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Bearing Knowledge: Law, Reproduction and the
Female Body in Modern Morocco, 1912-Present

By

Satyel K. Larson

A dissertation submitted in partial satisfaction of the

requirements for the degree of

Doctor of Philosophy

in

Rhetoric

in the

Graduate Division

of the

University of California, Berkeley

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Professor David Cohen

Fall 2012

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Abstract

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Law, Reproduction and the Female Body in Modern Morocco, 1912-Present

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Satyel K. Larson

Doctor of Philosophy in Rhetoric

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Combining historical, juridical and ethnographic analysis, my dissertation traces a history of evidence of reproductive bodies and the not-yet born in the Maghrib over the course of the last century through a case study of a regional phenomenon known as the “sleeping baby in the mother’s womb” (*al-rāqid; l-raged; bū mergūd*). Women with sleeping babies experience pregnancies that can last for years beyond the standard nine months accepted in Western law and medicine. According to the belief in the sleeping baby, a sudden traumatic experience or the return of menstrual blood can arrest the development of a fetus in the womb. The fetus will then “sleep” in the womb—“neither living nor dead”—for an indefinite period of time until it is awoken by another traumatic shock, sexual intercourse, or spiritual and herbal treatments.

As a legal doctrine in Islamic law, the sleeping baby admitted protracted pregnancies lasting up to five, and in some cases seven, years after conception. Prior to the codification of Islamic family law between 1957-9, which banished the sleeping baby from official law, the sleeping baby phenomenon and discourse addressed the intersection of the psycho-biological and socio-legal aspects of human reproduction. The biological aspects include false or "hysterical" pregnancies (i.e., pseudocyesis), abortion induced by the mother, ectopic pregnancies, and various kinds of miscarriages--both those that are expelled from the mother's uterus and those that are retained--as well as viable, full-term pregnancies in which women give birth to a living baby. The socio-legal aspects include claims to paternity, contestations of paternity, inheritance disputes, spousal and child maintenance claims, adultery, and the status of the children of slave mothers (*um walad*), and free mothers based on their marital situation. The discourse of the sleeping baby enabled women to express *any* of the various contingent combinations that could arise from these biological and social contingencies.

The dissertation knits together detailed archival analysis of selected published and unpublished family and criminal law cases in French and Arabic from the colonial and postcolonial periods, with ethnographic data gathered from participant observation and extensive interviewing in courts and a public maternity hospital in urban Morocco. In my analysis, I track and examine the diverse forms of evidence in colonial Islamic law (1912-1959) and post-colonial state family law (1959-present) that have taken reproductive bodies and the not-yet born as objects of legal knowledge—a process I term

“legal embodiment.” By legal embodiment, I mean how human reproductive bodies and their bodily materials emerge in and from historical forms of law, as viable evidentiary objects carrying signifying force. Legal embodiments indicate how reproductive bodies interact with, emerge from and are given value by particular geo-historically circumscribed knowledge, authority and technologies. From women’s testimony about their own bodies and midwives’ sensory expertise in colonial Islamic courts, to visualizing biomedical technology and DNA testing in postcolonial state family law courts—the diverse set of bodily evidence reveals how diverse legalities that regulate women’s reproduction intersect with knowledge, technologies and authority under colonial and post-colonial political-economic power. By tracing legal embodiments, I show how evidence and expertise in Moroccan law have transformed women with sleeping babies from legally-viable reproductive bodies to extra-legal unproductive bodies. Extra-legal embodiment indexes historically minor discourses and practices that law does not value as evidence, and which are deemed irrelevant in law’s bodily valuations.

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INTRODUCTION

This dissertation is a study of law and women's rights discourse in modern Morocco, focusing on the period between 1912-2012. It analyzes the trajectories and various historical manifestations of several different discourses about gendered bodies and reproduction (i.e., birth, pregnancy, menstruation, maternity, and so forth) in law. While it would be easiest to say that this is a comparative study between women's rights discourse and the sleeping baby discourse, this would be inaccurate. Instead, the dissertation shows how my account of the changes in law makes a comparison between the sleeping baby discourse and rights discourse incommensurable.

The dissertation closely reads and thickly describes how the sleeping baby appears and disappears in pre-colonial Islamic doctrine and jurisprudence; evidence and testimony in colonial and post-colonial court cases; expert colonial medical, judicial and administrative writings; extended interviews with women and midwives; and postcolonial art and literature. By analyzing the trajectory of the sleeping baby, the dissertation traces a rupture in the relationship between official law and gendered forms of knowledge about the body. It shows how this rupture between law and bodies marks not only a shift in the dominant discourse of reproduction that changes how official law and medicine regulate reproduction, but indexes a different way of thinking about gendered identities and contingency before the law.

Insofar as the phenomena and discourse of the sleeping baby (*al-rāqid; l-raged*) is not easy to explain, the task of each chapter of the dissertation is to explore the different iterations, instances and deployments of the sleeping baby within and outside of the law, in order to bring it into focus as an object of analysis. Briefly, women with sleeping babies experience pregnancies that can last for years beyond the standard nine months accepted in Western law and medicine. According to the belief in the sleeping baby, a sudden traumatic experience or the return of menstrual blood can arrest the development of a fetus in the womb. The fetus will then "sleep" in the womb—"neither living nor dead"—for an indefinite period of time, and in some cases infinitely, until it is awoken by another traumatic shock, sexual intercourse, or spiritual and herbal treatments.

As a legal doctrine in Islamic law, the sleeping baby admitted protracted pregnancies lasting up to five, and in some cases seven (or more), years after conception. Prior to the codification of Islamic law between 1957-9, which banished the sleeping baby from official law, the sleeping baby phenomenon and discourse addressed the intersection of the psycho-biological and socio-legal aspects of human reproduction. The biological aspects include false or "hysterical" pregnancies (i.e., pseudocyesis), abortion induced by the mother, ectopic pregnancies, and various kinds of miscarriages--both those that are expelled from the mother's uterus and those that are retained--as well as viable, full-term pregnancies in which women give birth to a living baby. The socio-legal aspects include claims to paternity, contestations of paternity, inheritance disputes, spousal and child maintenance claims, adultery, and the status of the children of slave mothers (*um walad*), and free mothers based on their marital situation. The discourse of the sleeping baby enabled women to express *any* of the various contingent combinations that could arise from these biological and social contingencies.

This dissertation, consisting of six chapters, is based on twelve months of fieldwork conducted in a family law court, a maternity hospital, and colonial archives in

Rabat, Casablanca and Fez between July 2009 and July 2011. The first three chapters provide the historical backdrop, covering the sleeping baby in pre-colonial Islamic legal literature, court cases in the colonial period, and in the ‘expert’ writings of colonial jurists, doctors and administrators. The first two chapters show how, prior to the formation of the state in Morocco, reproduction, pregnancy and birth were not conceived of in terms of a secular body in biomedical time. Rather, they were conceived of in the discourse of the sleeping baby (*rāqid*). Chapters One and Two show how Islamic law allowed women gendered uses of Time and different forms of power to undergo reproductive experiences. By gendering Time, and treating the body, as well as the spirit (*ruh*) or soul (*nafs*) as an object of the law that was dependent on women’s collective knowledge, Islamic law incorporated different forms of knowledge and truth into itself. Chapter Two examines how not all women had access to this luxury of gendered Time, since slave women could not automatically claim sleeping babies in court. Chapter Three analyzes colonial expert writing, focusing on how colonial legal reform, and medical and public health discourses about pathological reproduction traveled to Morocco in the practices of colonial medical, judicial and administrative experts.

The second part of the dissertation covers the immediate post-Independence period to the present, during processes of intensified urbanization, de-agrarianization and industrialization, and the commodification of labor. It contextualizes how the new forms of family law and women’s rights discourse affects women in a society governed by radicalized market-driven values and unregulated drive for profit making; prodigious growth of a new administrative elite, and an increased volume of urban unemployment due to rapid rates of urbanization accompanied by slow rates of progress in the economic sector. In this context, the standardization of reproductive time is highly gendered, political and disciplines reproductive bodies in different ways. The second part also explores how changing cultural understandings of reproduction, and migrating concepts between reproduction and the economy influence how the law regulates reproductive time. Through an examination of the persistence of the sleeping baby discourse outside official law and medicine, the second part explores how State-Islamic law provides normative frameworks for how women experience reproduction by limiting and standardizing gendered uses of Time. While Time *per se* is not the focus of the dissertation, it is one of its minor preoccupations. The last three chapters are framed by the overarching question of how State law and rights discourse contribute to the regulation of a new reproductive time. This time is assimilated to the time of work under capitalism, where speediness, efficiency and productivity are the highest values.

Chapter Four questions the work of legal reform in relation to women in Moroccan society after the formation of the postcolonial state. It offers an account of the absence of the sleeping baby in official law and medicine after it was banished after Independence with the first codification of the *Mudawwana* (i.e., shari’a based Code of family law). To offer an account of the absence, Chapter Five analyzes the new forms of genetic and technoscientific evidence used in paternity, inheritance and maintenance cases. It explores how the new forms of evidence are being absorbed into Islamic family law’s logic of paternity and how the impact of these forms of new evidence on women’s right is ambiguous and highly uncertain. Chapter Six listens to the persisting discourse of the sleeping baby in spaces outside official law and medicine: in literature, film, women’s narratives and the practices of midwives (*l-qblat*).

The dissertation explores the sleeping baby as a discourse and practice that structures and positions women's embodied reproductive experiences. In pre-colonial Morocco, in its discursive form—it offers a different way of thinking identity and rights before the law. In colonial Morocco, in practice, it enables married women, or women who were once married to benefit from the logic of paternity that dominates the family and reproduction in Islamic law. Like any discourse, it is both productive and repressive--producing exclusions and reproducing gendered forms of power even as it can be born and repeated in ways that might resist it. In postcolonial Morocco, the sleeping baby becomes an alternative discourse to the dominant medical concept of human reproduction as labor that must be completed on time, and surveilled prophylactically. In the postcolonial period, the sleeping baby discourse suggests an embodied contestation of time and a counter-claim to a gendered reproductive experience outside the colonizing reach of reproductive economies and patriarchal power—local and global.

The dissertation explores how the sleeping baby as a discourse is born, internalized, and materialized by women in Moroccan society. Pregnancy or the lack thereof becomes a situation that exposes the logic of the repressive mechanisms of the gendered work of reproduction and the gendering reproduction of work, the ambiguous status—neither commodity nor non-commodity, a price without a value—of female bodies in the reproduction of life, how this reproductive experience is constituted in particular historical contexts in relation to a gendered logic of paternity, and a culturally defined dependency on the testimony of the father. And yet, the discourse of the sleeping baby also shows the possibility of being embodied otherwise, a contestation of the gendered politics of time, of oppressive uses of time, a refusal to make one's body available for reproduction (a refusal that was tolerated under other modes of production and economy); an understanding of the burden of reproductive biological work in relation to the economy of the family; a cultural tolerance of abortion; an acceptance of melancholy; and a fantasy of omnipotent epigenesis, and strength. The dissertation highlights how Islamic law before state law made space for this discourse as an authoritative source of knowledge to ask why State law can no longer incorporate non-normative reproductive experiences within its regulation of reproduction. It asks whether this effectively constitutes tightening the noose around who constitutes a family member and who will be responsible for parenting.

The dissertation is in many ways a critique of rights discourse. Yet, it consciously focuses its chapters on the discourse of the sleeping baby, holding aside the will to compare until the conclusion. There, I show that the two discourses are incommensurable insofar as a comparison between the two discourses is not possible even after having fully attempted to understand the various historical manifestations of the sleeping baby discourse, which is counter-intuitive, very unknown and foreign to most readers. I approach the sleeping baby in a way that, to the best of my ability, does not exoticize or idealize it. I attempt to commit as little violence or orientaling as possible in the process of analysis and translation, even as I know I write from within and have been funded by the American Academy.

The dissertation attempts to write towards an anthropology of law in postcolonial African contexts in ways that reveal the problems that have arisen when embodied corporealities and prior historical hegemonies are absorbed into liberal discourses of rights and equality. In the course of modern struggles over various forms of self-

determination, civil rights discourse has been most manifest in relation to questions of gender and race. Despite scholarly attempts in the last several decades to go beyond debates about nature vs. culture, gender in most popular domains and academic disciplines remains marked by the question of sexual difference. Sexual difference itself is, in many circles, often reduced to the question of biological reproduction, and for women this amounts to biological maternity, and the potential or capability to bear a child.

From the perspective of modern biopolitics and positive law, the discourse of the sleeping baby unsettles both the “biopolitics of abstraction,” and the dominant discourses of reproduction (biomedical, techno-scientific, etc).¹ At the same time, this unsettling disrupts the idea of modernity as progress, offering a critique of the role of State law and rights, and the gendered forms of knowledge that positive law under the State depends on. The dissertation explores how, insofar as the discourse of the sleeping baby disrupts the dominant discourse of biological reproduction, it represents important anomalous aspects of the question of gender for women in society. By exploring the various historical and discursive manifestations of the sleeping baby, it attempts to open up new ways to think about, through and beyond rights discourse and their current biopolitical functions.

Throughout the dissertation, there is a latent tension between the sleeping baby and gender rights, a tension which I can only really address as the incommensurability of two discourses, after having explored precisely what the sleeping baby discourse is and does. In thinking about rights discourse through the sleeping baby, the dissertation remains wary of idealizing the sleeping baby or any pre-colonial relations of domination. The discussion in chapter two of the existence of slavery and the role of the female slave show the potentially excluding, degrading and limited aspects of the sleeping baby as a reproductive discourse in law. The chapters that focus on the socio-legal and religious aspects of the sleeping baby discourse should not be read as an utopian moment, or as a pre-history of the present. Consciously, then, the work attempts not to idealize or champion the sleeping baby as an alternative for the future. Rather it aims to show that, insofar as the particular force of the sleeping baby has come to an end, we can now only ever understand or approach the sleeping baby politically—and the problems of gender, bodies and reproduction it represents—as a rights question, which it is not. What might be read as a curious sort of lament of historical and legal change is intended rather to mark the problematic tensions and absences within law and rights discourse about gender and gendered bodies. The dissertation marks the absence of the sleeping baby from the law and medicine in postcolonial Morocco by showing how it has become something else, a discourse that no longer has the social or legal force it once did. Yet, it attempts to mark this absence without lamenting it sorrowfully or championing it as a thing for whose return we should wait or work towards.

The dissertation aims to emphasize the discursive possibilities of the sleeping baby *as a discourse*. By insisting on the discursive aspects of reproduction, it suggests two things: first, a new critique of the ways that rights discourse has erased corporeal

¹ I borrow the term “biopolitics of abstraction” from the title of an essay by the art historian Jaleh Mansoor. Mansoor’s essay takes up questions about abstraction and universality in ways similar to my own, but in relation to art practice. See Mansoor, Jaleh. 2010. “A Spectral Universality: Mona Hatoum’s Biopolitics of Abstraction.” *October* - (July 1): 49–74.

contingencies from law; and second, that the language and knowledge of legal and medical institutions have material effects on the body that have been internalized by historical subjects. The sleeping baby is not my Benjaminian Aura.² At the risk of repetition, I am not championing the sleeping baby as a way out of an oppressive economic system and gender relations for Moroccan women, nor for ‘women’ in general. The dissertation emphasizes that the sleeping baby has been culturally, ideologically and juridically produced as an historical phenomena and discourse in the Maghribi context. Yet, at the same time, precisely because the sleeping baby in law points to the very possibility of understanding contingency and identity otherwise, it leads to the idea that the reproductive experience in general is just as much a culturally and legally produced phenomena as it is a biological one, and questions the oppressive role of official law, medicine and rights discourse in maintaining the particular historical understanding we have of it today. The disappearance of the sleeping baby allows us to see how law regulates reproductive experiences by positing the subject of rights as an *acorporeal* secularized body to be regulated through Work-time. By helping to clarify the ambiguous status of biological reproduction in contemporary society, and by showing how reproduction has been historically experienced and born in different temporalities, this analysis of the sleeping baby reveals another ethics and politics of human reproduction, and shows the limits of conceiving of reproduction in terms of the soulless categories of manufactured work, products and labor.

² Benjamin, Walter. 2008. *The Work of Art in the Age of Mechanical Reproduction*. Penguin Books Limited.

Chapter One. Genealogies of Sleeping Babies in Pre-Colonial Maghrib Between Women’s Embodied Knowledge, Legal Doctrine and Social Praxis

What is the record of the sleeping baby in the mother’s womb (*al-rāqid*) in the Maghrib? As an historical object, the sleeping baby’s genealogy is constructed out of major compendiums of Sunni Islamic jurisprudence (*fiqh*), Maghribi court records and juridical opinions (sing: *fatwa*; pl. *fatāwas*; *nawazil*; ‘*amal*), Maghribi personal and family oral histories, the oral histories of Maghribi midwives (sing: *qabla*; pl. *qablet*), and in a different register (i.e., one of outsider disbelief and criticism), in the writings of colonial jurists, doctors and public health administrators. In each of these modes of understanding, remembering, and speaking/writing, the sleeping baby is said to dwell for different periods of time in the mother’s womb—varying from two, four, five and seven years in Islamic legal literature to the death of the mother in popular belief and the practice of midwives. Each of these modes also has a unique method of knowing and interpreting the signs that indicate the existence of a sleeping baby.

This chapter traces a genealogy of the first appearance of the sleeping baby (*raqada janīn*) in pre-colonial Maghrib, focusing on pre-colonial Islamic jurisprudence, the sources of knowledge of the sleeping baby in legal doctrine, and the methods of legal reasoning through which the sleeping baby was incorporated into doctrine.¹ The chapter argues that Islamic law was impregnated by the speech of women, desire and feminine representations of procreation. The first part examines the legal doctrine developed by the four major schools of Sunni jurisprudence outside the Maghrib (i.e., Hanafi, Maliki, Hanbali, and Shafi’i)² focusing particularly on early Maliki doctrine in Medina.³ The second part examines further doctrinal elaboration in pre-colonial Maghribi *responsa (fatwa)* literature. Due to the form of Islamic jurisprudence practiced uniquely in the Maghrib, in which jurisprudence gives priority to local customary practices and the decisions of judges (‘*amal*), as opposed to primarily referring back to classical doctrine (*fiqh*), this *fatwa* literature is an historical gem.⁴ Fatwa collections are important both as

¹ “*Raqada janīn*,” literally means the not-yet born life inside the mother’s womb (*janīn*) that was sleeping or resting (*raqada*).

² On the development of the major legal schools in orthodox Sunni Jurisprudence, see: Hallaq, Wael B. 2005. *The origins and evolution of Islamic law*. Cambridge, UK; New York: Cambridge University Press. Chapter 7, 150-177; and Bearman, P. J, Rudolph Peters, Frank E Vogel, and International Conference on Islamic Legal Studies. 2005. *The Islamic school of law: evolution, devolution, and progress*. In Cambridge, Mass.: Islamic Legal Studies Program, Harvard Law School: Distributed by Harvard University Press.

³ The Maghrib is a geographical region, literally meaning “[the place of] the West” in Arabic, and comprising roughly modern-day Northwest Africa west of Egypt—i.e., Libya, Algeria, Tunisia, Morocco, Western Sahara and Mauritania. This geographic positioning “of the West” refers to a geopolitical historical moment in the seventh century in which, for the Muslim world, the center was to be found in the Arabian peninsula. The Maghrib comprised the westernmost territories of the Islamic conquest. During the al-Andalus era of Moorish Iberia/Muslim Spain, the latter area was also included in the Maghrib.

⁴ From a socio-legal perspective, a *fatwa* can be considered at once a record of “law in action” and “law on the books.” From the perspective of record of law in action, it demonstrates the kinds of issues and problems in social life that entered the legal domain, and how religious jurists resolved these problems. In socio-legal terms, one could thus argue for the development a kind of “realist” jurisprudence or pragmatist hue in the practice of Maghrebi Islamic jurisprudence. For further discussion on this Maghrebi jurisprudential practice, see Ould Bah, Mohamed El Mokhtar. 1981. *La littérature juridique et l'évolution*

records of authoritative sources of legal reasoning in post-classical (after 12th century) legal texts and as historical records of the kinds of issues that were brought before the law in a particular culture and society.⁵

This chapter traces the various iterations of sleeping babies in the doctrinal literature of classical, and pre-colonial Islamic jurisprudence. It focuses particularly on Maliki doctrine, which of the four schools of Sunni jurisprudence, permitted the longest legal pregnancies. The chapter aims to show how in this literature, sleeping babies offer an account of legal embodiment based on three things: first, women's embodied knowledge, tied to a theologico-biosociality and the ritual elements (*ibādāt*) of the law; second, a correspondence between this knowledge and the knowledge of a social class of women experts: midwives; and third, a flexible doctrine and casuistical method that incorporated judicial precedent and customary norms into the law. I argue that this account of legal embodiment treats individual reproductive bodies as categories of radical contingency in which women's experiences of time take on a distinct quality separate from the time of the biological cycles of nature. In Islamic legal doctrine, evidence of the female body about this particular kind of time is manifested through the individual and deeply subjective testimony of women and female expert witnesses.

The chapter touches in many aspects on the relationship between kinship and law. It is important from the start to acknowledge that there are many ways to talk about the sleeping baby. There is the approach taken by Islamic law and jurisprudence, accompanied by the discourses of creation in Islamic theology, and of the care of bodies in Moroccan midwifery. There is also the approach taken by colonial and postcolonial state law accompanied by scientific and social scientific discourses. My inquiry stresses that there are other ways of talking about the sleeping baby than the one adopted by colonial and postcolonial state law. In this way, my work departs from the predominant socio-legal, functionalist and instrumentalist approaches to the sleeping baby. My inquiry shows that such approaches do not answer many important questions raised by the phenomenon of prolonged pregnancies in Islamic law and culture.

I begin by bringing up the sociological, functionalist and instrumentalist approaches to the sleeping baby, not because this inquiry focuses on refuting such explanations, but because these approaches form a legacy of academic and policy-oriented scholarship about the sleeping baby and reproduction in law that constitute “doxic knowledge.” This inquiry departs from the legacy of sleeping baby scholarship that began in nineteenth century ‘expert’ French colonial medical, juridical, public health

du malikisme en Mauritanie. [Tunis]: Université de Tunis; Jacques Berques, *Les Nawazil el-Mu'azara du Mi'yār al-Wazzani*, Rabat, Moncho, 1940; Louis Milliot, “Les Institutions Kabyles” *Revue des Etudes Islamiques*, Paris, P. Guethner, 1932; N.J., Coulson, *History of Islamic Law*, J. Schacht, *Introduction to Islamic Law*. Chapter Two will continue to examine records of “law in action”—focusing on how women claim sleeping babies in court cases during the colonial period. While this chapter touches briefly on the sleeping baby in oral histories, it does so only insofar as such histories were written, and incorporated into Islamic jurisprudence as sources of evidence for determining legal lengths of gestational periods in doctrine. I will address the sleeping baby in personal oral histories, beyond their legal importance, more in depth in the final chapter.

⁵ Johansen, Baber. 1995. “Casuistry: Between Legal Concept and Social Praxis.” *Islamic Law and Society* 2 (2) (January 1): 135–156. Quoted from page 139.

and anthropological writings about the Maghrib, and that continues in various modes of postcolonial scholarship in the twenty-first century.⁶

According to the instrumentalist view, women only used sleeping babies in court to avoid punishment, and for social and economic gain. While it is true that the sleeping baby helped women gain further social and economic power in a patriarchal culture, this view does not adequately explain the sleeping baby's place in the law or in women's lives, while demonizing poor women and representing them as less than human. Or, from a socio-legal perspective, the sleeping baby was considered to be a legal fiction that showed the humanitarianism of Islamic jurists and judges. While it is important that Islamic law and the practice of the jurists enabled women to escape the inequities and harms that exist in certain readings of the laws related to women's sexuality and bodies in Muslim societies, the legal fiction approach forecloses inquiries that would take seriously the relationship that the sleeping baby reveals about law and its sources of knowledge.

While socio-legal, functionalist and instrumentalist inquiries teach us something about the reasons behind the sleeping baby doctrine in Islamic jurisprudence, they foreclose other inquiries about custom and women's experiences as the sources of legal knowledge. The latter are the concern of this chapter. By taking seriously, as Islamic law once did, women's corporeal experiences and custom as historical sources of legal knowledge, this chapter departs from the colonial legacy of understanding the sleeping baby. Rather than immediately discrediting non-Enlightenment epistemologies and singular experiences of gendered corporeality as sources of legal knowledge, my inquiry, by taking such sources seriously and listening to what is actually being articulated, begins the work of decolonizing the colonial legacy of the sleeping baby. The colonial legacy of the sleeping baby is not only about the codification of law and juridification of birth and pregnancy in Morocco. It is also about the colonizing work of modern law in women's lives and over their bodies.

I. Islamic Jurisprudence, Time and Women's Bodies

For centuries until codification, Islamic law remained plastic to contingencies of particular situations of reproductive female bodies through its evidentiary and witnessing procedures. In cases of the sleeping baby and prolonged pregnancy, women's embodied experience of time and their reproductive bodies became testimonial evidence and were incorporated into the law in ways permitted by Islamic legal theory (*uṣūl al-fiqh*). Unlike colonial state law, Islamic law in many instances was able to affirm singular experiences of corporeality in women's lives. Three things made this possible: Islamic law's casuistical methods, its dependence on theological premises, and its acceptance of customary practices as legitimate as long as they did not explicitly contravene the norms of the *Sharī'a*. By analyzing each of these three things, one can better answer the question: when and to what extent has Islamic law operated as a decolonizing force in women's lives?

⁶ See: Jansen, Willy. 2000. "Sleeping in the Womb: Protracted Pregnancies in the Maghreb." *The Muslim World* 90 (1-2): 218–237. Colin, Joel. 2003. "Au maghreb un contre-pouvoir du côté des femmes: L'enfant endormi dans le ventre de sa mère." *L'Année sociologique* (1940/1948-). Troisième série, Vol. 53, No. 1, Le droit au féminin. 109-122. Both Jansen and Colin endeavor to understand the sleeping baby from a perspective that, while informative, limits our understanding the phenomena of the sleeping baby to one that remains within a dialectic of oppression and resistance by asking how the sleeping baby is a 'counter-power (*contre-pouvoir*) in the lives of women oppressed by patriarchal culture.

Against the dominant view in Western scholarship on Islamic law that Islamic law's casuistical method resulted in unnecessary abstractions and jurisprudential rhetoric, Baber Johansen argues that "casuistry pertains to a process of social differentiation that renders the universal validity of norms socially implausible." Changing social practices produce "practical problems" which the law must answer. In light of these changes, existing norms are no longer universally valid and new norms are produced.⁷ One historical narrative is that Islamic law develops as a collection of cases in the pre-classical period (prior to 10th century), coalesces into a set of general norms in classical period (10-12th century) and then "degenerates into an infinite number of causes and effects" in the post-classical period (after 12th century) preparing the way for casuistry as the dominant legal method. Against this narrative, Johansen argues that casuistry as a legal method already defined Islamic law in the classical period (10-12th century) and that "there are important practical reasons for the development of casuistry at the expense of universal principles and norms." Islamic law was flexible, historically and geographically, with respect to social practices and changing knowledge of professional groups. Through this flexibility, it evolved and was able to deal with contingency and unpredictability in changing social, political and economic contexts. While some later jurists considered the result of this method to be "an anarchy of law," the production of norms remained limited by the framework and guiding principles of the *Sharī'a*.

Thus the production of norms and normative pluralism in Islamic law largely had to do with its method of casuistry, which offered a positive critique of rule-based reasoning. Rather than claiming that legal concepts have universal and uniform consequence, in the casuistical method a particular case produce particular effects and outcome depending on the context. This method depends largely on the juristic importance of several things to Islamic law: social practice (*'urf*), normative custom (*'ada*), material culture, and the weight that jurists give to the judgment of experts (social groups whose practice constitutes the authoritative interpretation of certain classes of cases), human convention and knowledge by experience (*marifa al-tajriba*). Johansen writes:

In different regions and historical periods, different forms of power were characteristic of different social and professional groups, and their differing practices have to be taken into account. The concepts of social practice (*'urf*) and normative custom (*'ada*), therefore, play an important role in casuistic discussion of the legal validity of contracts and the meaning of legal terms. In many fields, casuistry refers to defined social groups as the arbiters and interpreters of the legality of practice and the meaning of terminology. It is in keeping with this practical orientation that the jurists constantly refer to the judgment of experts, to human convention (*iṣṭilāh*), to "knowledge by experience" (*ma'rifa bi-l-tajriba*), that is, to practical sources of knowledge in everybody's reach, in order to justify a casuistic approach to law and social practice.⁸

What will be particularly important for the discussion of the sleeping baby or pregnancy as a legal concept constructed historically in doctrine, is precisely the role of incorporating social practice, custom, material culture and the judgment of

⁷ Johansen. "Casuistry." 142-52.

⁸ Johansen. "Casuistry." 152

knowledgeable women as experts into law. At another level, the different approach to the production of norms through casuistry, implies a unique approach to legal knowledge, and a different way of thinking identity through contingency, what I will call radical contingency. Radical contingency has a theological, a medical and a legal basis. In this chapter I will focus on the legal aspect, briefly touching on the other two when necessary.

What is the evidence and proof of the sleeping baby in classical Islamic law and pre-colonial Maghribi jurisprudence? The actual science/practice and theoretical methodology of the law (*fiqh*, and *usul-al-fiqh*, respectively), were very much human endeavors.⁹ In the schema of Islamic legal theory/methodology (*uṣūl al-fiqh*), evidence is interpreted in light of sources of authority. The four main sources of authority, in descending order are the Quran, Sunna (--i.e., the sayings/*ḥadīth* and deeds of the Prophet Muhammad), consensus of the scholars (*ijmā'*) and analogy (*qiyas*). *Ḥadīth* literally means, “saying,” and is both a formal narrative, and the science of recording and classifying narrative transmissions of the saying and deeds of the Prophet as authentic or inauthentic. Other secondary sources include reasoning that departs from the revealed texts (*istiḥsān*), reasoning on the principle of public interest (*maṣlaḥa*). Customary norms and social practice often made their way into the law vis-à-vis the latter.

While theological discussions are not the focus of this chapter, it is important to note that in the legal contexts of the literature being discussed, time, fecundity and sterility are not solely the result of physiological, biological or physical laws, but are also subjected to divine will. While jurisprudence was very much a human endeavor separate from theological discussions (*kalām*), “[d]uring the fourth/tenth century, law was already seen as an integral part of a universal scheme. Theology established the existence, unity and attributes of God, as well as the “proof” of prophecies, revelation, and all the fundamentals of religion. Law presupposed the theological conclusions and went on to build on them.”¹⁰

Thus, it can be assumed that certain theological premises were built upon in the law. Time, for example, in the Quran has been separated from cycle of reproduction of nature.¹¹ Time is under the command of God, not under the command of nature. It has a direction, history has an end, and it is not cyclical. This becomes important in the lives of Muslim legal subjects insofar as the law of ritual (*‘ibādāt*) reinforces and underscores God’s command of time, and serves to underline the distinct quality of God’s time as compared to the idea of time in natural reproduction. The ritual assigns religious functions to bodily functions and makes visible the religious-juridical functions of bodily fluids. Implied in ritual is the end of time and the future of the individual. The difference between divine time and natural time is important for the woman’s body in its procreative activities, both in menstruation and gestation. A woman’s body in these capacities partakes in both of these times. There is already an ambiguity as to the status of the woman’s body—that is, whether, when and how it is a natural and a divine thing.

Furthermore, in the Quran, for example, there are virgin births and births to parents one of whom is sterile or infertile.¹² Those who hate God will be sterile, whereas the decrepit sexually impotent man and the barren woman can conceive when God wills

⁹ Hallaq. *The Origins and Evolution of Islamic Law*. 129

¹⁰ Hallaq. *Origins and Evolution*. 129

¹¹ Quran 9.36-7

¹² Quran 19.8-9; 19-21.

it. While these verses are never called upon as a source of authority for a ruling or opinion on a prolonged pregnancy *per se* a verse such as the following one is drawn upon by a Maghribi jurist when explaining a prolonged pregnancy: “*God knows that which every female beareth, that which the wombs absorb and that which they grow*” (Quran, 13.8). As we will see, in the doctrinal literature, life once created in women’s wombs has the possibility of “falling asleep (*raqada*),” “shriveling (*inqabaḍa*),” “becoming dry (*hashsha*),” and then waking up (*ifāqa*), reanimating/reviving (*inta^casha*), moving (*taḥarraka*) and growing again (*kabira, kabura*). This aspect of creation or embryology is linked not only to time in an Islamic cosmology (see for example, hadith in Sahih of Bukhari, or Quran 23: 12-16), but also to women’s embodiment of this time and the ability to order and communicate this experience as knowledge for themselves, or for others, as experts (--i.e., midwives or other “knowledgeable women”). Does Woman, in this way, have access to divine time, which she can embody, experience and communicate? If so, is she merely the passive recipient of divine will? Or is she a communicative agency? Both? Or neither? Again, an ambiguity inheres since she is, in her reproductive capacities, both passive and active.

For example, in the chapter that tells the story of the Virgin Mary in the Qur’an, *Surah Maryam*, Maryam—unlike her counterpart in the New Testament¹³—bears her burden of pregnancy and childbirth in much pain and suffering. Upon hearing the news that she will be “gifted” a son... a matter which has *already* been decreed, she says: “How can I have a son when no mortal hath touched me, neither have I been unchaste!” Since the pregnancy is a divine decree, taking part of divine time, “she conceives him (*fa-ḥamalathu*).” The conjunction “thus (*fa*)” indicates that the conception is result of the decree that preceded it, indicating that the conception is a passive submission to the decree. Yet, the verb *hamala*—to conceive, bear, carry—is in the active form. She conceives him actively and directly—that is, she conceives him—*hu* being the direct object and result of her conception. And in the beautiful line that follows, she is shown to be a sentient and communicative being, who suffers the pain and anguish of childbirth in speech, expressing a death wish upon herself: “Oh! Would that I had died before this! Would that I had been a thing forgotten and out of sight! (...*ya-laytanī mittu qabla hadhā wa kuntu nasī-an mansī-an*, 19.23).”¹⁴ The ambiguity in these verses, between maternity as passive (i.e., he has already been conceived) or active (i.e., she conceives him and in so doing wishes death upon herself), is one this chapter and the next will continue to explore. The next chapter will show that there is no Woman as such situated along this ambiguity of activity/passivity, but only specific women who access this ambiguity of passivity/activity in different ways. Free women, for example, have greater access to activity than slave women. This ambiguity also expresses the question, which I will return to in the next chapter, of whether the sleeping baby is good for the Father (paternal and patrilineal power) or the mother (maternal agency).

In cases of the sleeping baby and prolonged pregnancy, women’s embodied experience of time and their reproductive bodies become testimonial evidence and must be incorporated into the law in ways permitted by legal theory. Only in part do

¹³ In the New Testament, Mary says: "Here am I, the servant of the Lord; let it be with me according to your word." Luke 1.38

¹⁴ 19. 16-23, Yusuf Ali translation

theological premises of the law construct an imaginary domain where such thinking becomes possible. However, Islamic law is only partially dependent on theological premises, since it also grounds itself on practical premises, including the importance of Medinan custom in Maliki *fiqh*, and customary practices in Maghribi Maliki *fiqh*.¹⁵

II. Prolonged Pregnancies in Classical Doctrine

The duration of the gestation is at once the subject-matter of legal, medical and theological knowledge. This knowledge permits us to define the moment or period during which a child was conceived and to attribute authorship, human or divine, to the conception. In classical Islamic jurisprudence, marriage in the only licit form of sexual relations, and an entire set of laws establishing relations between legality, sexuality and kinship develops around the legally defined moment of conception: legal parentage of the child, rights of inheritance (a child and his father mutually inherit from one another), mutual but not reciprocal rights and obligations of parent and child, legitimacy of birth and indirectly, the legitimacy of sexual acts resulting in the creation of life.

Between the moment of conception and birth, the law stipulates minimum and maximum periods of time during which a child can be legitimately born. Legitimacy correlates with the presumption of paternity afforded by marriage. The legal presumption of paternity in Islam, “the child belongs to the marriage bed (*al-walād l’il firāsh*),” is the corollary of institutional matrimony, which makes reproduction legal within certain timeframes. Pregnancy, gestation, birth and kinship in classical Islamic law are thus tied to the legal presumption of paternity that only marriage offers.

The legal minimum period of pregnancy is six months, definitively, based on Quranic exegesis. The jurists (*fuqahā*) have deduced this number from three Quranic verses in three different chapters (sing. *sūrah*, pl. *sūwar*). *The Winding Sand-Hills* Chapter (*Sūrah Al Aḥqāf*) states that the gestation of the child, together with his or her weaning, is thirty months total: “We have enjoined on man kindness to his parents: In pain did his mother bear him, and in pain did she give him birth. The carrying of the (child) to his weaning is (a period of) thirty months.”¹⁶ It is written in *The Cow* Chapter, (*Sūrah Al Baqarah*) that, when so desired, mothers breastfeed their children for two years: “Mothers shall suckle their children for two whole years; (that is) for those who wish to complete the suckling.”¹⁷ And the *Luqman* Chapter (*Sūrah Luqman*) repeats that the child breastfeeds for two years: “And We have enjoined upon man concerning his partners. His mother beareth him in weakness upon weakness, and his weaning is in two years.”¹⁸

According to the Hanafi jurist, Sarakhsi, in *Al-Mabsūṭ*, the shortest duration of legal pregnancy is six months. The various Quranic verses stipulate that the mother bears and breastfeeds the child for thirty months, and that weaning takes place at 2 years. Thus the remaining six months must refer to the minimum length of pregnancy. Sarakhsi gives

¹⁵ In Medinan custom, local usage and practice were the final arbiter in determining the content of Prophetic sunna. Prophetic sunna is itself divided into sub-types, the third type is tacit approval—a situation in which the Prophet witnessed or saw an act and said nothing. His silence in Islamic jurisprudence has weighty authority. See Hallaq, *The Origins and Evolution of Islamic Law*.

¹⁶ Quran 46.15, Abdullah Yusuf Ali translation

¹⁷ Quran 2.223, M. Pickthall translation

¹⁸ Quran 31.14, M. Pickthall translation

the example of a woman who gave birth at six months under the reign of the Caliph ‘Uthman. The woman was not punished for adultery and the child was affiliated to the husband.¹⁹ Ibn ‘Abbas, paternal cousin and companion of the Prophet, was ostensibly the first to undertake this interpretation, and the caliph, Uthman ibn atham or ali abi talib gave it an official endorsement.²⁰

All the schools of Islamic law have adopted the position that any child born to a married woman six months after the conclusion of a marriage is presumed to have been conceived during the marriage. The presumption of legal paternity only takes effect when the child is conceived at least six months after the marriage has been concluded.

Unlike the doctrine of minimum gestation, the doctrine of maximum gestation period is not based on Quranic exegesis.²¹ There is disagreement between the four Sunni schools of Islamic law (sing. *madhhab*, pl. *madhāhib*) about the length of time. The phenomenon of legal schools is, as Wael Hallaq puts it, “one of the most defining characteristics of Islamic law.”²² There are several meanings of the concept *madhhab* in the history of Islamic law, from the legal doctrine of a school concerning a group of cases, a “personal school”—or the collective doctrine of an individual jurist (*mujtahid*), a widely-acknowledged opinion that becomes associated with a school, or a highly

¹⁹ Sarakhsi, Muhammad ibn Ahmad, Muhammad Hasan Muhammad Hasan Isma`il Shafi`i, and Kamal `Abd al-`Azim `Inani. 2009. *Kitab al-Mabsut fi al-fiqh al-Hanafi*. Bayrut: Dar al-Kutub al-`Ilmiyah. Vol VI, 44

²⁰ This amount of time, i.e., six months, corresponds to the embryogenesis presented in a hadith of Ibn Masud in the compilation of Bukhari (Book of the Beginning of Creation). “Narrated Abdullah Ibn Masud: Allah’s messenger, may peace be upon him, the true and truly inspired one said (the matter of the creation of) a human being is put together in the womb of the mother in forty days, and then he becomes a clot of thick blood for a similar period, and then a piece of flesh for a similar period. Then Allah sends an angel who is ordered to write four things. He is ordered to write down his (i.e. the new creature’s) deeds, his livelihood, his date of death, and whether he will be blessed or wretched in the hereafter. Then the soul is breathed into him.” (The Book of the Beginning of Creation, Bukhari, II, LIX, 6 3208). See: Az-Zubaidi, Al-Imam Zain-ud-Din Ahmad bin Abdul-Lateef. Trans. Dr. Muhammad Muhsin Khan. 1994. *The Translation of the Meanings of Summarized Sahih Al-Bukhari. Arabic-English*. Riyadh: Maktaba Dar-us-Salam. 643. Sarakhsi adds: “Then after the soul is breathed into him, God finishes making the creature in two months, and at the end of six months, perfection is created.” *Al-Mabsūṭ*. VI, 44

²¹ It seems that one exception to this rule is the minority jurisprudence of the Egyptian *fāqih*, Ahmad al-Azdi Al-Tahawī (d. 321/933). First a Shafi`i, and then later a Hanafi scholar, Al-Tahawī, like the Hanafis admitted pregnancies for two years. However, he arrived at this conclusion by way of Quranic exegesis. In his *Mukhtaṣar Mushkil al-āthār*, he infers from The Winding Sand-Hills Surah (46, *Al-Aḥqaf*), Verse 15, that “together, breastfeeding and suckling last 30 months, and it is not permitted that either one—pregnancy or breastfeeding--exceeds this time period.” From this, al-Tahawi infers that pregnancy lasts for two years and breastfeeding for six months. To support this view al-Tawahi also cites his own version of a Prophetic *ḥadīth* in which the Prophet Mohammed comes into contact with the mother of a son, Ibn Sayyad, who was being accused of being the Antichrist. The Prophet instructs one of his companions, Abu Ḍarr, to ask the mother the duration of her pregnancy and the occasion of the birth. The mother responds that she carried Ibn Sayyad for twelve months and that when he was born he cried like a child who was two months old. Al-Tahawi says that the Prophet made no pronouncements about this situation. It is to be inferred that, as elsewhere in the *ḥadīth* tradition, the Prophet’s silence about a subject matter that he comes into contact with can be considered as his tacit approval and sufficiently eloquent to make it exemplary for the future. Al-Tahawi states that if the Prophet had disagreed about the possibility of Ibn Sayyad’s mother bearing him for twelve months, he would have said so. The Zahari (a school that fell out of usage in the first centuries of Islam) jurist Ibn Hazm al-Andalusi (d. 456/1064) rigorously refutes this *ḥadīth* in his work *Al-Muḥallā*.

²² Wael Hallaq. 2005. *The Origins and Evolution of Islamic Law*. Cambridge: Cambridge University Press, 150

developed doctrinal school in which a group of jurists is loyal to the collective, cumulative and “accretive” body of legal doctrine and positive law constructed by generations of distinguished jurists who associate themselves with the name of a founding imam-jurist. The idea of the *madhhab* is important for the present discussion insofar as each doctrinal school was as much a “methodological entity as a positive, doctrinal one,” and insofar as Medinese custom and social practice are considered important sources of law in the Maliki school. Once the schools had formed, they also came to be regarded in terms of a place and kind of education. Thus it is said of Ibn Battuta, the fourteenth-century Moroccan scholar, that he studied at a Sunni Maliki *madhhab*, which was the dominant form of education in North Africa at the time.

Each school bases its pregnancy doctrine on different sources, including custom and two separate non-prophetic *hadiths*. In chronological order of each school’s founding, the Hanafis recognize pregnancies lasting up to two years, the Malikis five years the Shafi’is four years, the Hanbalis in some texts two years, and in others four years. While the present discussion of sleeping babies in pre-colonial law and society focuses on the elaboration of Maliki doctrine and practice, a brief discussion of the other schools’ positions clarifies the development of the legal concept of a sleeping baby in Islamic legal doctrine, and the debates between the schools on this subject.

Hanafi doctrine recognizes pregnancies for two years based on a *hadith* (saying) of Aisha, favorite spouse of the Prophet Mohammed and daughter of the Caliph Abu Bakr al-Siddiq. This hadith is not found in either of the two major authoritative hadith collections of Muslim and al-Bukhari. Two major works of Hanafi doctrine, *Al-Mabsūṭ* and *Badā’i’ al-ṣanā’i’*, report this hadith, in which Aisha says to a woman called Jamila bint Sa’d: “The baby does not rest in the womb of its mother for more than two years; only the time necessary to take a ride.”²³ Since this is not a prophetic hadith, it is considered to have a certain jurisprudential ‘weakness’ insofar as it is relied upon by jurists a source of authority. According to al-Kasani, the only explanation for the hadith, whose subject matter cannot be determined by personal opinion (*ra’i*), nor by the intellectual efforts of interpretation (*ijtihād*), is that it must be something that Aisha overheard from the Prophet.

Shafi’i doctrine permits pregnancies lasting up to four years. The Shafi’i doctrine is also based on a non-prophetic *ḥadīth* recounted by the Caliph ‘Umar ibn al-Khattāb.²⁴ In the *ḥadīth* recounted by the Caliph ‘Umar ibn al-Khattāb, a man was absent from his wife for two years. Upon his return, he found her pregnant. The Caliph was on the verge of stoning her when Mu’ad ibn Jabal, a companion of the Prophet Muhammad who because of this had a prestigious social status, said to the Caliph: “You may have authority over

²³ quoted in Sarakhsi. *Al-Mabsūṭ*. VI, 45 and al-Kasani, Abu Bakr ibn Mas’ud, and Ahmad Mukhtar ‘Uthman. 1968. *Badā’i’ al-ṣanā’i’ fi tartīb al-sharā’i’*. al-Qahirah: Zakariya ‘Ali Yusuf. III, 211

²⁴ Shafi’i doctrine, while not directly relying on normative custom (*‘adā*) for points of doctrine, may have still been influenced indirectly by the historical account of famous cases in which the community of Magi women bore their children for four years. Sarakhsi, when discussing the Shafi’i position, mentions, after this hadith upon which the Shafi’i doctrine is based that “There is also the case of ‘Abdelaziz al-Magishuni, whose mother gave birth to him after carrying him for four years. This is a recognized custom (*wa-ḥādḥahī ‘adā ma’rūfa*) of the Magishun women. They give birth after four years.” Sarakhsi critiques the Shafi’i position of permitting four year pregnancies, saying that the Caliph ‘Umar never gives proof that al-Dahhak was carried for four years, since he established paternity either based on the validity of the marriage or on the declaration of paternity by the husband. Ibid, 45

her [i.e., the mother], but you do not have authority over that which is in her belly.”²⁵ The Caliph spared her punishment until she gave birth to a son. The *ḥadīth* recounts that at when the mother gave birth to the child, he laughed, revealing his two teeth that had already formed, and that furthermore, in all aspects, the child resembled the absent husband who the mother claimed was the father. This man, when he saw the child exclaimed, “By God. That is my son!” The Caliph ‘Umar did not punish the mother and attributed paternity to the husband of the mother who was thereafter said to have carried the child for four years. The child was called “*al-Daḥḥak*,” which is to say “The Laughing One.” The story is recounted to highlight the physiological and psychological maturity of a child carried for years by his mother. This *ḥadīth*, like the hadith of Aisha relied upon by the Hanafis, is also considered “weak” by the jurists, since its origin can only be traced back to the Caliph ‘Umar (as opposed to a prophetic hadith whose reliable narrative chain of ascriptive transmission [*isnād*] can be traced back to the Prophet Mohammed). This *ḥadīth* also does not appear in either of the two main authoritative collections of hadith (i.e., Muslim and Bukhari).

Hanbali doctrine is of two minds. Some jurists say two years, and others say four years. In *Al-Mughni*, one of the widest known works of Hanbali fiqh, the jurist Ibn Qudama al-Makdisi²⁶ states: “If a widow or a repudiated woman brings into the world a child during the four year period after the repudiation or the death of her husband, the child will be attached to the husband, and with [the child’s] birth, the mother’s waiting period (*‘idda*) ends.”²⁷ This formulation is taken from another Hanbali doctrinal work, the *Mukhtasar* of al-Hiraqi, of which *al-Mughni* is a long commentary: “If a repudiated woman or widow of four years or more gives birth to a child, the child is attached to the husband. This is so because the child could have been conceived by him, and because there does not exist another person who is as well placed as him, or his equal, to endorse paternity. The child should thus be related to the husband as if his birth were a consequence of the marriage.”²⁸ Other Hanbalis however would agree with the Hanafis and say two years. According to Ibn Qudama, Ibn Hanbal himself had two different opinions. In one instance, relying on the hadith reported by ‘Aisha, he said that pregnancies can last for two years. In another instance, he recognized the historical cases of the Banu Aglan people whose women were famous for carrying their babies for four years, and of Muhammad Ibn Abdullah, a fifth-generation descendent of the Prophet Mohammed, who was known to have stayed in his mother’s womb for four years. Ibn Qudama’s discussion of protracted pregnancies, historically written after the other three schools had formulated their doctrine, presents an inventory of the various opinions related to this subject matter, which he says is a difficult one since it results neither from divine decree, nor from simple custom/convention between men.²⁹ Amongst this

²⁵ quoted in Sarakhsi, *Al-Mabsut*, VI, 45

²⁶ Muwaffaq al-Dīn Abū Muḥammad ‘Abd Allāh b. Aḥmad b. Muḥammad, Ḥanbalī ascetic, jurisconsult and traditionalist theologian. He was born in D̲jammā’īl, near Jerusalem (Bayt al-Maḳdis, whence his ethnic name) in Sha’bān 541/Jan.-Feb. 1147, and died in Damascus on 5 or 6 D̲jumāda II 620/6 or 7 July 1223. *Encyclopedia of Islam*, 2nd Edition

²⁷ Ibn Qudamah, Muwaffaq al-Din ‘Abd Allah ibn Ahmad, ‘Abd Allah ibn ‘Abd al-Muhsin Turki, ‘Abd al-Fattah Muhammad Hulw, and ‘Umar ibn-Husayn Khiraqi. 1986. *al-Mughni*. Imbabah, al-Qahirah: Hajr. Vol XI, 232

²⁸ Ibn Qudamah. *Al-Mughni*. XI, 235.

²⁹ Ibn Qudamah. *Al-Mughni*. XI, 232

inventory are the opinions of famous early jurists including, al-Shafi’I, Malik ibn Anas, Abu Hanifa, Thawrī, and al-Zuhri.³⁰ He also mentions al-Laythi,³¹ (d. 234/849; a 9th century Maliki Cordovan scholar), who admitted pregnancies for three years; ibn al-Awwam³², a 9th century specialist of hadith with Shi’i proclivities, who spoke of pregnancies lasting five years; a jurist named Abu ‘Ubayd who did adhere to a single school, choosing an eclectic jurisprudence, and who did not at all limit the length of pregnancies³³; and Abu al-Hattab, a Hanbali jurist who cites the case of Ibrahim ibn Nujih al-Uqayli, who stayed in his mother’s womb for four years.

Amongst the four Sunni schools of Islamic law, Maliki doctrine admits the longest legal durations of pregnancy. The Maliki opinion is that a child can rest in the womb for five years. This opinion is based on a conversation in the *al-Mudawwana al-Kubra* between Ibn al-Qāsim (d. 191/807), a disciple of Malik ibn Anas, and Sahnun (d. 240/855), a Kairouani jurist, in which the former attributes this opinion to Malik ibn Anas. The conversation about the legal duration of pregnancy occurs in a dialogue between the two jurists about what position should be taken on a divorced woman who has completed her waiting period (*idda*), and who afterwards, within a period of five years, gives birth to a child, saying that the child is from her husband. *Idda* is the legally prescribed period of waiting during which a woman may not remarry after she has been divorced, widowed or abandoned. During this time her former husband must support her. If a woman is pregnant, the *idda* is prolonged until she gives birth.

Sahnūn: (I said) When a man divorces his wife by three (*thalāthan*)[i.e., irrevocably] or by way of revocable repudiation (*talaqan yamlak al-ruju’a*), and

³⁰ “Hārūn b. ‘Abd Allāh, judge in Egypt, considered the greatest Mālikī scholar there, d. 232/846. A native of Mecca, he came to Baghdād, but nothing is known of his activities there until al-Ma’ mūn nominated him *qāḍī* of Egypt on 14 Ramaḍān 217/13 October 832 (al-Kindī) or a few days later (Ibn ‘Abd al-Ḥakam), where he remained in post till 13 Ṣafar 226/12 December 840. As a judge, his career was marked by innovations. He moved his seat as judge, and sat in front of the mosque in winter and in the middle of it in summer, whilst keeping a distance between himself and the faithful at prayer, as also from his own scribes and his enemies. Regarding the judicial system, on his arrival in Egypt he took personal charge of all contentious cases, visiting the scenes in question with the parties involved, e.g. in the case of ḥubus or pious endowments, keeping track of the income from them, and paid close attention to other things, such as the financial situation and care of orphans, etc.” See Encyclopedia of Islam, 2nd ed.

³¹ Yaḥyā b. Yaḥyā al-Laythī (d. 234/848), Cordovan faḳīh, descendant of a Berber (Maṣmūda) soldier who entered the Peninsula at the time of the conquest. His family, known as the Banū Abī ‘Īsā, was always closely connected to the Umayyad family whom they served with the pen and the sword. See Encyclopedia of Islam, 2nd ed.

³² "Ibn al-‘Awwām." *Encyclopaedia of Islam*, Second Edition. Brill Online, 2012.

³³ See, Gottschalk, H.L. "Abū ‘Ubayd al-Ḳāsim b. Sallām." *Encyclopaedia of Islam*, Second Edition. Brill Online, 2012: “Abū ‘Ubayd al-Ḳāsim b. Sallām: (the nisba varies between al-Baghdādī, al-Ḳhurāsāni and al-Anṣārī), grammarian, Kur’ānic scholar and lawyer, was born at Harāt about 154/770, his father, of Byzantine descent, being a mawlā of the tribe of Azd. He studied first in his native town, and in his early twenties (about 179/795) went to Kūfa, Baṣra and Baghdād where he completed his studies in grammar, *ḳirā’āt*, ḥadīth and fiḳh. In none of these fields did he adhere to one school or group, but chose a middle position in an eclectic way. Returning home he became tutor in two influential families in Ḳhurāsān, and in the year 192/807 was appointed *qāḍī* of Ṭarsūs in Cilicia by its governor Thābit b. Naṣr b. Mālik. Abū ‘Ubayd remained in office until 210/825 and after some travelling settled for the next ten years in Baghdād, where ‘Abd Allāh b. Ṭāhir became his generous patron. In the year 219/834 he performed the pilgrimage and afterwards stayed on at Mecca to die there in 224/838 and to be buried in the house of Dja’far b. Abī Ṭālib.”

she [the wife] gives birth more than two years after, must the husband be the father of the child or not?

(*Ibn al-Qāsim* said): According to Malik, he must be the father if the child was born in the three, four or five years [after the repudiation]. And this is [also] my opinion, that the period of time is five years. Malik said: ‘We will attach to the husband the child that a woman gave birth to in similar periods of time [i.e., five years] to those to whom the women could have given birth as a result of their husband.’

Sahnūn (I said): When the husband repudiates her, and she has menstruated three menstruations, and she has said: ‘My *’idda* has been completed.’ And after [having completed] this, she gives birth within four years from the date of the repudiation. And then, the woman says: ‘He repudiated me. And then I had three menstruations while I was pregnant (*wa-’ānā ḥāmīl*), without knowing that I was pregnant.’ Thus it had already happened that the woman had spilt blood on the fetus. [And then she said] ‘This is what happened to me,’ [to which] the husband responds: ‘Your *’idda* has already ended. And this fetus is a new fetus that is not from me.’ Must we attach the child to the father or not?

Ibn al-Qāsim: It is attached to him, as long as he does not disavow the child by the procedure of disavowal (*li’ān*).

Sahnūn (I said): What if, after the repudiation, she comes to him [i.e., the husband] more than four years after [the repudiation], and gives birth within six years, while the repudiation was a revocable one. Must the child be attached to the father?

Ibn al-Qāsim: In this case, the child is not attached to the father, in any event, because we know that the *’idda* is well expired and that the fetus is a new fetus.

Sahnūn: Why consider it a new fetus? What about if there are doubts about the duration of her waiting period (*’idda*)?

Ibn al-Qāsim: Malik had said: “Her *’idda* will be for nine months, then she will complete an *’idda* for three months, then she will be freed unless after this time she [still] has doubts on the subject. In this case, she will wait until her uncertainty disappears.

Sahnūn: What about if she has doubts after one year’s time, and she waits and her uncertainty does not disappear?

Ibn al-Qāsim: She waits until the time, as we have said, that women give birth, but no more, unless her doubts about this subject were not dispelled before this.³⁴

In this text, which essentially has three authors—Ibn al-Qāsim, Sahnūn and Mālik ibn Anas—the source of authority is almost intangible. Ibn al-Qasim formulates the doctrine in the following way: The question of the longest legally admissible duration of pregnancy arises from the case of an anonymous woman which must be decided upon. The opinion that pregnancies can last for “two, four or five years,”—periods of time in which women “could have given birth by their husbands,” is attributed by Ibn al-Qasim

³⁴ Mālik ibn Anas, ‘Abd al-Raḥmān ibn Muḥammad Ibn Qāsim, Abū al-Sa’īd ‘Abd al-Salām ibn Sa’īd Sahnūn, Ḥamdī al-Damardāsh Muḥammad, and Muḥammad ibn Aḥmad Ibn Rushd. 1999. *al-Mudawwanah al-kubrā*. Bayrūt: Dār Ṣādir. Vol III, 735-7.

to Malik ibn Anas, who is presented in the text as having already articulated his position. The discussion does not question or reference the context in which Malik allegedly formulated this opinion. However, Ibn al-Qasim states that it is also his opinion that five years is the maximum duration of pregnancy. It is the particular case at hand that enables him to elaborate what is at that moment not-yet the Maliki doctrinal position, which is uttered as a repetition of Malik's opinion, but this time in reference to the particular case of prolonged pregnancy that has been affirmed by the speech of the anonymous woman in the dialogue: "He repudiated me. And then I had three menstruations while I was pregnant, without knowing that I was pregnant...This is what happened to me." The dialogue does not present the woman as coming to consult a jurist about a question of doctrine that she has ignored. Rather, Sahnūn places the woman in a situation where she herself utters a custom that at the time does not yet appear to be canonized as the Maliki doctrinal position on the duration of pregnancy. Neither the woman, nor her husband, are represented in any way as if they should already know the answer. In fact, they are not represented as depicting their situation in terms of a question that needs a response. Rather, the woman's speech is presented as a narrative that she recounts without the aim of persuading a judgment or needing a response in any direction: "This is what happened to me." She explains a subject about which she must ask the jurist, who plays the role of legislator: will he or won't he canonize a customary practice. The question remains: Who or what is the source of authority here for the customary practice and concomitant knowledge that is not-yet the law that it will become?

It is only in the context of this anonymous woman's case being discussed by Sahnun and Ibn al-Qasim, that the Maliki doctrine is clearly formulated. Unlike the minimum lengths of gestation, neither the Qur'an nor Sunna, nor the Prophet and his companions are solicited for authority as material sources of law. Unlike the other schools of law, *ḥadīths* of the companions (Aisha and Umar ibn al-Khattab) are not solicited as sources. While in other cities such as Kufa, Basra, and Damascus where migrant scholars, including Companions of the Prophet Muhammad imported an embodied Prophetic example, in Medina, the abode of the Prophet and the home of Maliki *fiqh*, the Medinese were certain of their ways, declaring the Medinese example as expressed by consensus of the scholars and consensual practice as the standard norm. Wael Hallaq notes that while other jurists such as Shaybani began invoking *ḥadīths* as competitors for authority with consensual sunnaic practice, "Malik...did not feel the need to invoke *ḥadīths* as an integral part of his reasoning, for the sunnaic, consensual practice of his city was in itself evidence of the authoritative character of consensus."³⁵ The doctrine related to the prolonged pregnancy, in part, comes from the knowledge of the anonymous woman in the dialogue. What is thus solicited (and which is also officially a low-ranking source in the hierarchy of sources in legal theory-*usūl al-fiqh*) is customary practice and knowledge by experience: 'urf—coming from root 'a-r-f, meaning knowledge or know-how. 'Urf is that which is known in a community, or that which is recognized as being valid, good. Thus, custom, tradition, admitted usage, social practice and so forth. The material source of the law in the dialogue appears to be custom, insofar as the enunciation about the prolonged pregnancy is referred back to the anonymous woman. The woman's anonymity itself is significant. It lends credibility and universality

³⁵ Hallaq. *The Origins and Evolution of Islamic Law*. 112

to the custom while depriving the enunciation of any personal character. The woman is at once no single woman and every woman. Custom, when it is enunciated in this way, constitutes the material source that the jurists reformulate.

Maliki *fiqh*, which is most known for emphasizing the approved customs and social practice in Medina as a source of legal authority thus created a juridical norm out of this customary practice, making the limit 5 years. And yet, the dialogue is still confusing. To Malik is attributed the saying: “We will attach to the husband the child that the woman has given birth to in similar periods of time in which women can give birth because of their husband.” This is a rather cryptic saying, unless we know Malik’s attachment to Medinan custom and its content—and the personal convictions of the Imam Malik that Ibn al-Qasim had just revealed: “The child which the woman has given birth to during the three, four or five years (after the repudiation) is attached to the repudiating husband/spouse.” In what historical context could Malik have pronounced such an opinion? What kind of custom and what kind of knowledge is this? It is difficult to answer either of these questions with any certainty. However, the following historical examples in existing literature about Medinan custom and the practice of prolonged pregnancies generate a productive line of response.

The birth of Mālik ibn Anas (d.179/796) is itself controversial and has become something of a legend. Historical sources give dates varying between 90/708 and 97/716. The earliest record is found in the Baghdadi biographer Ibn Sa’d’s (d.230/845) account, which itself was based on the historical chronicles of the Medinan historian al-Waqīdī (d.207/822). The part of Ibn Sa’d’s manuscript that related the biography of Malik ibn Anas has gone missing. However, it has been reconstructed in other works by the scholars al-Ṭabari and al-Suyūfī. In these texts, according to Ibn Sa’d’s account, Malik ibn Anas spent three years in his mother’s womb. Al-Waqīdī is said to have reported: “I heard Malik ibn Anas say: Pregnancy can last for 3 years and certain people were in the womb for three years, making reference to his own case.” Another early scholar, Ibn Qutayba, says that Malik spent over two years in his mother’s womb.

It is possible that the case of Malik was not unique in Medina at the time, and that before the elaboration of Islamic jurisprudence, long pregnancies were known there. Another recorded case of a long pregnancy, perhaps one of the oldest, is that of Manzur ibn Zabban ibn Sayyār al-Fazarī, author of gallant poetry, who lived at the time of the Prophet. The document that contains the story of Manzur is not quite as old, coming from the pages of a 31 volume book *Kitāb al-Aghānī* (The Book of Songs) by the Iranian scholar said to be of Arab-Quraysh origin, Abū al-Faraj al-Isbahani (d. 967). Born in Esfahan in 897, al-Isbahani eventually took up residence in Baghdad. The part of Al-Isbahani’s text that is of interest here tells the history (*akhbār*) of Manzur ibn Zabban’s life, including: the context of his birth; his marriage to his father’s ex-wife Mulayka, for which he was shortly imprisoned by the Caliph ‘Umar bin al-Khattab, and only released after swearing forty times that he didn’t know it was forbidden; and the marriage of his daughter.³⁶ The events of the story situate Manzur as an adult living during the Caliphate of ‘Umar between 12/634 and 22/644, in Medina.³⁷ The text appears in the form of a

³⁶ Abū al-Faraj al-Isbahānī, and Ibrāhīm Ibyārī. 1969. *Kitāb al-aghānī*. al-Qāhirah: ṭab‘at khāṣṣah taṣṣduruḥā Dār al-Sha‘b. Vol XII, 189-94.

³⁷ In this story Manzur Ibn Zabban fell in love with and married the ex-wife of his father, Mulayka bint Sinan, with whom he had three children. Manzur loved Mulayka, and he also equally loved wine. His

narrative poem, one “song” among others in *The Book of Songs*. What is most important about this story here, historically and geographically situated as it is, is that it reports that the mother of Manzur, Qihtam bint Hashim, was pregnant with him for four years. Al-Isbahani reports that when Manzur was born, he did not cry. It was said that the reason for his silence was the prolonged length of time during which his mother carried him. Because of this, his father called him *Manzur*. Al-Isbahani reports that according to another contemporary Muhammad ibn Talha, the son of a companion of the Prophet, the father composed in honor of his son, the following verses:

You did not come into the world, so much so that
it was finally said, he will not come.
That is why you were called *Manzur*, and
you came by divine will.
I wish that you be as Hashim.
And equally, I wish that you be the leader
of the Banū Badr.³⁸

In Arabic, *Manzur* is the passive participle form of the trilateral root *n-z-r*, which can mean to see, to have in mind, and also to expect. In this instance, *manzur* seems to connote expectation or waiting. Thus, *Manzur* is the anticipated one, the expected one, the one who his parents were waiting for. Al-Asbahani’s text reports: “[Manzur] is one of those whose mother had carried him for a long time during her pregnancy.” “One of those” implies that Manzur’s case in which his mother was pregnant with him for years, was not an isolated case, but rather perhaps a phenomenon that was known to Medinans at the time.

There are several other examples in the Medinan domain where prolonged pregnancies are affirmed in the literature. There is the example of Muhammad ibn Muslim ibn ‘Ubayd-Allah ibn Shihab al-Zuhri (d.124/742)—one of Malik’s teachers, to whom he taught the traditions (of the companions of the Prophet).³⁹ In *Al-Mughni*, the Hanbali jurist Ibn Qudama, writes that “al-Zuhri said that it was possible that a woman carries a child for six or even seven years.”⁴⁰ There is also the case of Abd al-Aziz al Mājishūn (d. 164/781)—a celebrated jurist-teacher of Medina and contemporary of Malik, who was the author of a treatise on juristic consensus of the scholars of Medina

inclinations for both were reported to the Caliph ‘Umar ibn al-Khattab, who summoned Manzur before him, marriage to a stepmother being categorically forbidden by verses in *The Woman* chapter in the Quran (4.22-23). When Manzur appears before the Caliph, he says, “I didn’t know that Mulaika was forbidden to me.” Manzur was taken as a prisoner and held until the evening, during which time he swore 40 times that he didn’t know that it was not permitted to marry the ex-wife of his father. ‘Umar separated him from the ex-wife of his father and said that if he had not sworn, he would have decapitated him.

³⁸ Abū al-Faraj al-Isbahānī, Ibrāhīm. 1969. *Kitāb Al-aghanī*. al-Qāhirah: ṭab’at khāṣṣah taṣduruhā Dār al-Sha’b. Vol XII, 192.

³⁹ See " Mālik b. Anas." Encyclopaedia of Islam, Second Edition. Brill Online , 2012. Reference. University of California Berkeley. http://referenceworks.brillonline.com/entries/encyclopaedia-of-islam-2/malik-b-anas-COM_0649. And Lecker, M.. " al-Zuhrī." Encyclopaedia of Islam, Second Edition. Brill Online , 2012. Reference. University of California Berkeley. http://referenceworks.brillonline.com/entries/encyclopaedia-of-islam-2/al-zuhri-SIM_8204

⁴⁰ Ibn Qudama. *Al-Mughni*. IX, 116

(*ijmā'*)—a treatise has been lost, except for small fragments, today.⁴¹ Sarakhsi writes: “There is also the case of ‘Abdelaziz al-Magishuni, whose mother gave birth to him after carrying him for four years. This is a recognized custom (*wa-hādhahi ‘adā ma’rūfa*) of the Mājishūn women. They give birth after four years.”

There is also the case of Fatima bint al-Walīd ibn ‘Utba ibn Rabī’a, wife of Muhammad ibn ‘Aglān, and records of the customs of the Banū ‘Aglān, a large Medinese community from the Khazrag (modern day Iraq). In *al-Ma’ārif* (The Cultural Affairs), the historian Ibn Qutayba (d. 276/889) writes: “Fatima bint al-Walīd ibn ‘Utba ibn Rabī’a gave birth [to a child fathered] by a freed slave (*mawlā*), Muhammad ibn ‘Aglān, after a pregnancy lasting more than three years. The child to whom she gave birth already had its teeth at the time of its birth.”⁴² In *Ṣaḥīḥ Muslim*, the celebrated reporter of hadiths, Muslim ibn al-Hajjāj al-Qurayshi, reports a discussion that he had with Malik ibn Anas: “I recounted to Malik the hadith that Jamila bint Sa’d took from Aisha and according to which the pregnancy of the woman does not exceed two years, and Malik then exclaimed: ‘Praise God! Who could have said that? Go see our neighbor, the wife of Muhammad ibn ‘Aglān. She carried her child for four years before giving birth.’”⁴³ A companion of Malik, and Maliki jurist, Ibn Wahb (d. 197/813) comments: “According to al-Layth ibn Sa’d, the wife of Ibn ‘Aglan gave birth after four years, and she gave birth a second time after a pregnancy of seven years.”⁴⁴ And Ibn Qudama writes: “With the people of the Banu Aglan, the women bear their children for four years...the wife of ‘Aglan had, three different times, been pregnant for four years.”⁴⁵

Thus, one could construct an archive of historical examples in Medinan custom that points to a larger phenomena that would establish the customary character of prolonged pregnancies--i.e., the case of Manzur ibn Zabbān reported by al-Asbahani, the case of Malik himself as transmitted by al-Waqidi to Ibn Sa’d; Abdalaziz Mājishān and the women of the Mājishān, Fatima al-Rabia of the Banū ‘Aglan, and what was said by Malik and Ibn al-Qāsim as related by Sahnūn. Yet, even if prolonged pregnancies can be established as a custom, the custom itself remains unexplained by the jurists. By now, it is clear that the jurists (*fuqahā'*) developed the doctrine of maximum pregnancy in the context of two situations: one in which paternity had to be attributed to an absent, missing or dead husband of a widow or abandoned wife, and/or one in which the paternity of a child was in dispute in the case of remarriage. The cases involve the legitimation of the child and his or her rights to paternity (and the majority of names in patrilineal genealogy—that is, *Ibn* so and so, literally meaning the son of so and so, grammatically rendered in the genitive), as well as retroactive judgments on the status of the woman’s sexual act when it leads to pregnancy. Adultery (*zina*) is considered both a crime and a sin. It may also be useful to keep in mind that in Maliki doctrine, unlike in the other schools, pregnancy is considered direct, as opposed to circumstantial, evidence of adultery. Yet, as helpful as these sociological explanations are in filling in the possible

⁴¹ See Jonathan Brockopp. “Authority in Early Maliki Texts” in Bernard Weiss. *Studies in Islamic Legal Theory*. P.9

⁴² Ibn Qutaybah, ‘Abd Allāh ibn Muslim. 1960. *al-Ma’ārif*. p.595

⁴³ Muslim ibn al-Ḥajjāj al-Qushayrī, Nawawī, and Khalīl Ma’mūn Shīḥā. 1994. *Ṣaḥīḥ Muslim*. Bayrūt, Lubnān: Dār al-Ma’rifah. 18 volumes. Vol 10 pp 36-40

⁴⁴ See the partial translation of the Mudawwana in the appendix of “L’enfant endormi, notes juridiques, ethnographiques et obstétricales” by G.H. Bosquet et Henri Jahier. 17-36

⁴⁵ Ibn Qudama, *al-Mughni* attributes this report to Ibn Hanbal. Vol 9 116

contexts in which pregnancy, gestation and birth became legal concepts, they do not reveal the source(s) of knowledge of a prolonged pregnancy--the possibility of which seems almost assumed.

As we saw above in the case of Fatima al-Rabia of the Banū ‘Aglān as reported by Muslim ibn al-Hajjāj al-Qurayshi, Malik ibn Anas tells the latter that for knowledge of the duration of pregnancy, he must directly rely on the knowledge of women who have had such an experience: “Praise God! Who could have said that? Go see our neighbor, the wife of Muhammad ibn ‘Aglān. She carried her child for four years before giving birth.” One further example in early Maliki doctrine may begin to clarify this problem. The chapter on “Judgements” in *al-Muwatta*, (the Well-Trodden Path), one of the earliest surviving law books, by Malik Ibn Anas, indicates women’s knowledge by experience (*ma’rifa al-tajriba*), and a social class of expert women, as one possible source of evidence, or legal knowledge:

Malik related to me from Yazid ibn 'Abdullah ibn al-Hadi from Muhammad ibn Ibrahim ibn al-Harith at-Taymi from Sulayman ibn Yasar from 'Abdullah ibn Abi Umayya that a woman's husband died and she observed the *'idda* of four months and ten days. Then she married when she was free to marry. She stayed with her husband for four and a half months and then gave birth to a fully-developed child. Her husband went to 'Umar ibn al-Khattab and mentioned that to him, so 'Umar called some of the older [knowledgeable] women of the *Jahiliyya* and asked them about that. One of the women said, ‘I will tell you what happened with this woman. When her husband died, she was pregnant by him but then the blood flowed from her because of his death and the child became dry in her womb (*fa-ḥashsha waladuha fi-baṭniha*). When her new husband had intercourse with her and the water reached the child, the child moved in the womb and grew (*taḥarraka al-waladu fi-baṭniha wa-kabira*).’ 'Umar ibn al-Khattab believed her and separated them [the wife and the second husband] (until she had completed her *'idda*). 'Umar said, ‘Only good has reached me about you two,’ and he connected the child to the first husband.⁴⁶

There are two important and connected aspects of this text: first, it conceptualizes a sleeping baby, and second it gives an example of knowledgeable women as a class of experts. I will focus on the second aspect first. Both the example of Fatima al-Rabia and the example of the older woman in the *Muwatta* point to women practicing prolonged pregnancies, which are incorporated into the law through their knowledge by experience, and through their expertise on women’s bodily experiences. It is useful here to recall Johansen’s claim: the concepts of social practice (*urf*) and normative custom (*ada*) play an important role such that, in many fields, casuistry refers to “defined social groups as the arbiters and interpreters of the legality of practice and the meaning of terminology. It is in keeping with this practical orientation that the jurists constantly refer to the judgment of experts, to human convention (*iṣṭilāh*), to ‘knowledge by experience’ (*ma’rifa bi’l-tajriba*), that is, to practical sources of knowledge in everybody’s reach, in order to justify a casuistic approach to law and social practice.”

The role of experience and impossible experience in relation to limits of knowledge

⁴⁶ Mālik ibn Anas, and Muḥammad Fu’ād ‘Abd al-Bāqī. 1951. *al-Muwaṭṭā’*. [Cairo]: Dār Iḥyā’ al-Kutub al-‘Arabīyah. Book of Judgments (*Kitāb al-āqḍīyya*) Chapter 36, §21, pp 377-8.

in issues of women's bodies (menstruation in particular) is a problem Islamic law has always faced. This problem is relatively wide recognized by later jurists, who have discussions that explain why they rely on women for knowledge of these matters and why the standards of evidence for witnessing women's bodies are different from other witnessing standards. Unlike in all other areas of the law, one woman by herself is an adequate witness of the female body.⁴⁷ The jurists must rely on individual women and knowledgeable women as experts as it relates to matters of women's bodies, for which there must be knowledge by experience. Women come to comprise a social group who are the arbiters and interpreters of the legality of protracted pregnancies, and who define the meaning of pregnancy. The jurists' discussions must take into account the ritual status of the Muslim woman in relation to menstruation, reproduction and socio-religious construction of purity, which ties into the Islamic cosmology discussed earlier insofar as it structures times and creation. In another passage in Sahnun's *Mudawwana*, Sahnun asks Ibn Al-Qasim what in the doctrine has come from malik and what from later authorities. The role of experience and impossible experience is discussed. In the chapter on menstruation (Beb al-Ha'id) in *Al-Mughni*, Ibn Qudama, the 12/13th century Hanbali jurist uses the same reasoning: there is no standard definition for the reproductive functions of women's bodies because women are too different from one another. The response is that the jurist must go and ask the woman.⁴⁸

Women's practice of self-knowledge of the body through experience is incorporated into the law. This juridical self-knowledge of the body is at the same time God's knowledge of time and creation in the theological sphere. It must be kept in mind that women in classical Islamic law are both subjects of positive law (*mu'āmalāt*) and subject of the ritual laws (*ibādāt*). The latter are a set of rules and guidelines that determine the status of the ritual subject in her devotional practices such as purity, praying and fasting. While from the perspective of modern positive state law, ritual practices do not constitute law as such, for classical Islamic law, these practices were the pillars of the law for the Muslim subject. The *ibādāt* form the first part, and statistically, sometimes a little less than half of any Islamic jurisprudential text. Classical jurists integrate ethical debates about the Muslim ritual into the law.⁴⁹ In this way, ritual and ethics are part of, and in no way considered separate from, the sphere of the law

⁴⁷ See Shaham, Ron. 2010. *The expert witness in Islamic courts medicine and crafts in the service of law*. Chicago, Ill.: University of Chicago Press.

⁴⁸ I thank to Baber Johansen for first pointing this out in his course on the "Female Body in Islam," at Harvard Divinity School in the Fall of 2008. The same word is used to conceal testimony in a case and for a woman's womb.

⁴⁹ Whereas the classical jurists integrate ethical debates about the Muslim ritual into the law, in the process of the codification and translation of the shari'a by nation-states, or national law, all that was included in this part of the shari'a became part of the realm of private religious expression, marking judiciary decisions as a realm separate from religious ethics. A whole dimension of the law thus disappeared in the process of translation. From the perspective of modern positive state law in the United States, excluding the ritual or cult from the legal domain is necessary because the law is primarily a guide for the state judge, who has no business intruding on personal or private freedom as expressed by the First Amendment. Approaching the law from the modern common or civil law judge's perspective, the ritual part of the shari'a can only bring up religious or ethical, and not legal, concerns, and thus cannot even be thought of as part of the law. That the cult formed part of Islamic law can be difficult for American law students to grasp, since ritual as part of law makes the law appear to be without a lawgiver.

(*Sharī'a*). The law was thus not divorced from ethics or morality. While modern commentators have construed this interdependence of law and ethics as a deficiency of Islamic law, I would agree with Wael Hallaq's claim that it was precisely this relationship that made the law a "grass-roots law" and "equipped it with efficient, communal based, socially embedded, bottom-top methods of control that rendered it remarkably efficient in commanding willing obedience and—as one consequence—less coercive than any imperial law Europe had known since the fall of the Roman Empire."⁵⁰

While there is not enough room here to fully explore this issue without taking the discussion off track, it is important to remember that a reproductive woman is a legal subject/concept both in terms of her ritual status and in terms of her social status through kinship and marriage. Through her reproductive capacity, both of these statuses are linked, and can have consequences in terms of punishment and classical penal law regarding adultery. The identity of the Muslim woman in the ritual is very much linked to menstruation and her reproductive capacity which gives her a social function. During menstruation, the woman is temporarily excluded from the ritual. While the human being as such is always considered pure (*tahara*), a variety of bodily states, including menstruation and post-natal bleeding, can cause major or minor impurities, which temporarily exclude one from performing the rituals. These rituals link the gendered body to the Islamic cosmology of creation (—i.e., the separation of categories such as male/female) and time—and for women, can only be known through personal bodily experiences and practices.⁵¹ Ritual is part of the embodied social institution of gender that intersects with religion and the sacred in ways that have cosmological value. That is ritual maintains a culture by a particular set of assumptions of external boundaries played out on a gendered human body.⁵²

An example from the literature will help to clarify this issue. In the "Book of (Ritual) Purification (*Tahara*)," in *The Distinguished Jurist's Primer (Bidayat al-*

⁵⁰ Hallaq, *Sharia: Theory, Practice, Transformation*, 2-3

⁵¹ There are huge public debates in the Islamic University in Egypt Al-Azhar and in the medical and legal profession around discussions of sex change in the 20th century, and whether sex change is a danger to the separation of categories. See Skovgaard-Peterson, Jakob. 1995. "Sex Change in Cairo: Gender and Islamic Law." *Journal of the International Institute* 2 (3).

⁵² Relatively recent scholarship on Islamic law—in contrast to a secularized juristic perspective—has emphasized the importance of ritual and purity law in the comprehensiveness of the structure of the *Shari'a*, insofar as it forms and grounds legal subjectivity and consciousness in an embodied way, and paves the path of submission to the law. See: Gauvain, Richard. 2005. "Ritual Rewards: A Consideration of Three Recent Approaches to Sunni Purity Law." *Islamic Law and Society* 12 (3) (January 1): 333–393; Katz, Marion Holmes. 2002. *Body of Text: The Emergence of the Sunnī Law of Ritual Purity*. SUNY Press. Introduction (1-27) and Ch 4 (145-206); Maghen, Ze'ev. 1999. "Close Encounters: Some Preliminary Observations on the Transmission of Impurity in Early Sunnī Jurisprudence." *Islamic Law and Society* 6 (3) (January 1): 348–392 (Expanding on Kevin Rheinart's critique, see below); Maghen, Ze'ev. 2004. "First Blood: Purity, Edibility and the Independence of Islamic Jurisprudence." *Der Islam* :81; and Rheinart, A. Kevin. 1990. "Impurity/No Danger." *History of Religions* 30 (1): 1–24 (A critique of Mary Douglas' of argument about dirt, purity and contagion based on an analysis of the Muslim purity states and rituals—i.e. through a reading of the structure of rituals of purity and impurity: *hadath, janaba, tahara, najasa*).

Mujtahid), Ibn Rushd/Averroes discusses the different kinds of blood that can flow from the uterus as understood by the law: Hayd v. Istihada. This discussion focuses on how the different types of menstrual blood have different effects on the ritual status of the woman, and how it is difficult to establish with certainty a norm that would universally subsume the experience of women. Ibn Rushd writes:

All these opinions given by the *fuqahā'* about the minimum period of menstruation, its maximum, and the minimum period for purity have no revelatory basis. The basis is experience and what each believed to be the usual occurrence. Each one of them said what he thought the common experience of women to be. It is difficult, however, to fix by experience limits for such things, because of the differences among women. The differences that arose about such things are those that we have mentioned.⁵³

He continues:

The reason for disagreement is the difficulty in relying upon experience, due to differences in women, and because there is no authoritative source that can be acted upon, as is the case in their disagreement about the days of menses and purity.⁵⁴

This discussion not only relates to menstruation, but also to pregnancy:

Disagreement between the jurists as to whether blood seen by a pregnant woman constitutes menstruation. The reason for their disagreement on this issue stems from the difficulty of relying on experience and the obscurity of the subject. Sometimes the blood that a pregnant woman sees is the blood of menstruation, which is the case of an exceptionally strong woman and where the foetus is small, and it could be a double pregnancy as it is related from Hippocrates and Galen, and the rest of the physicians. Sometimes the blood that she witnesses could be due to the weakness of the fetus, and its illness generally depends upon her frailty and illness, in which case it is the blood of a defect and illness, and it is the blood from a defect.⁵⁵

The ritual assigns religious functions to bodily functions and makes visible how bodily fluids function in a religious-judicial way. These bodily functions are experiential knowledge that the law must rely on and incorporate in its production of norms. This dependence on contingent bodily experiences creates a law attuned to listening to singularity and exceptions.

III. Sleeping Babies in Pre-colonial Maghribi Jurisprudence

The discussion has thus far focused on protracted pregnancies and the status of the reproductive woman in classical Islamic doctrine as a way of approaching the sleeping baby in pre-colonial Maghribi legal literature. As mentioned earlier, scholars of Islamic

⁵³ Ibn Rushd, *Distinguished Jurist's Primer* 52

⁵⁴ Ibn Rushd, *Distinguished Jurist's Primer*, 54

⁵⁵ Ibn Rushd, *Distinguished Jurist's Primer*, 55

law, Western and Maghribi, widely recognize the Maghribization of Islamic law.⁵⁶ For many, this means a unique relationship between law, custom and judicial practice, and a departure in substance and method from classical Maliki norms on some legal issues, including length of pregnancy, ritual norms involving saint worship, legal validity of the transactions of a person considered to be mentally incompetent, and contracts on land tenure.⁵⁷

Unique to the Maghrib (and in the ancient school of Medina), Maliki jurists would give the practice of the courts, as opposed to classical doctrine, the supreme criterion of legal authority.⁵⁸ In the *'Amal al-Fassi* (The Judicial Practice of Fez), the seventeenth-century author writes: "In principle the judgements of the *qadis* of our time which are based upon an isolated opinion ought to be rescinded immediately. The *'amal*, however, must prevail over the 'preferable opinion'. It cannot be neglected." After the initial elaboration of Islamic law and the development of legal theory in the tenth century, there was widespread divergence of opinion even within one single school on particular issues of law, both in terms of substance and method. "Within each school, doctrine graded the relative authority of conflicting views on the basis of the support they commanded among its representative scholars, and opinions were accordingly broadly classified as either 'dominant' (*mashhūr*), preferable in a certain circumstance (*rajīh*) or 'weak' (*ḍa'īf*)." In theory, in cases of conflict, the judge would apply the dominant opinion. In practice, however, judges would often apply 'weak' or 'preferable' opinions in the interest of justice. Moroccan jurists went even further, recognizing customary norms and social praxis by placing stress on the idea of public interest (*maṣlaḥa*). In this, actual social practices and institutions that strict legal doctrine would not permit would be incorporated into Maliki fiqh and judged in judicial practice. Judicial practice itself would then become a source of legal authority. "This Western Maliki *'amal* is not customary law; it is an alternative doctrine valid as long as it is felt advisable to bring custom within the orbit of the *Sharī'a*, and it mirrors, on a different plane, its predecessor, the 'amal of medina."⁵⁹ Hence the maxim that "judicial practice prevails over the best attested opinion."

Let me elaborate briefly on the examples mentioned above. The agricultural contract of the *khammesa* (from *kh-m-s*, meaning five), is a Maghribi customary practice in which the tenant of agricultural land retains four fifths of the product of the land that he rents and works on. All the supplies for agricultural production including animals and tools are generally provided by the land-owner. Rent is paid to the land-owner in the form of the remaining fifth of the product yielded by the rented land. Undoubtedly, this is an illicit practice under classical doctrine, contravening the principles that the exact value of a rental contract should be determined and known in advance (i.e., that land should not be rented on the basis of what a yield produces), and that rent should not consist in food

⁵⁶ See David Powers *Law and Society in the Maghreb*, Lawrence Rosen *Custom and Law in North Africa*, Joseph Schacht, *Introduction to Islamic Law*, Noel Coulsen, *History of Islamic Law*, *Amal al-Fassi*, Book on Maliki Fiqh in Mauritania;

⁵⁷ Of course since the North African region is the major geographical region (except for Muslim Spain) that practiced and developed Maliki *fiqh* after it developed in Medina, one must question the distinction between something like Maliki *fiqh*, as such, and its development in the Maghreb, as if the former ever existed in some pure, independent realm outside of socio-legal practices.

⁵⁸ Schacht, *Introduction to Islamic Jurisprudence*, 61

⁵⁹ Schacht, *Intro to Islamic Jurisprudence*, 62

products.⁶⁰ Maghribi jurists, such as the eighteenth century Fassi *faqih* Abu ‘Ali bin Rahal, however, defended the *khammesa* on the basis of necessity (according to the Maliki adage, “Necessities make permissible the forbidden things”: “*al-ḍarūrat tubīḥu-l-maḥzūrāt*”), and on the basis of local consensus (*ijmā*) with regards to the practice in the region.⁶¹

There is also the issue of the validity of transactions undertaken by persons deemed to be mentally incompetent. According to Malik, the validity of such a transaction depended on whether or not the mentally incompetent person had been formally placed under limitations that would restrict his or her capacity to engage in transactions. Historically, Moroccan courts had applied this principle. However, beginning in the 19th century, the courts generally began to apply the principle that the validity of the transaction did not depend on this formal restriction, which contravenes the opinion of Ibn Al-Qasim in the *Mudawwana*.⁶²

Another well-known Maghribi (and West African) singularity, is the practice of saint worship (also known as maraboutism), that touches on many aspects of Islamic ritual practices. As previously mentioned, such practices are included within the purview of Maliki *fiqh*. Saint worship has been the subject not only of many modern anthropological studies of Moroccan society, but of juristic debate in the Muslim Mediterranean world. In the *Miyar al-jadīd* (1908), a reknown scholar from Fes, al-Wazzani (d. 1923), defends saint worship as an Islamic practice on the grounds that “social practice is a norm among the norms of Islamic law, so long as it does not contradict the *Sunna* (*Inna l-‘āda ḥukm min aḥkam al-sharī‘a mā lam tukhālif al-Sunna*”).⁶³

IV. Three Maghribi Fatwas

Finally, we return to the main subject at hand—namely, legal maximum periods of pregnancy. Within the Maliki school, there are differences of opinion with regard to the maximum period of pregnancy. As we have seen, the orthodox Maliki opinion in the *Mudawwana* is five years. While some Maliki jurists admit only four, pre-colonial legal records in the Maghrib show judges and muftis admitting pregnancies lasting up to seven years. In pre-colonial Maghrib, several fatwas show a distinctly Maghribi possibility of legal pregnancies lasting seven years, as well as the first written mention of a prolonged pregnancy using the language of a sleeping baby (*raqada janīn*)—an idiom that is specific to the Maghribi prolonged pregnancy.

This section begins with “a perplexing case”—that is, perplexing insofar as it openly perplexed the judge and jurist who worked on it. In the 14th/8th century, a non-binding religious-legal decision (*fatwā*) from Fez, recorded by al-Wansharisi in his *al-Miyar*, a voluminous compilation of Maghribi *fatwas*, depicts a judge (*Qāḍī*) who must decide what to do about a woman who has given birth more than seven years after her

⁶⁰ See for example, “The Book of Cultivation,” (*Kitāb mā jā‘a fi-l-ḥarth wa-l-muzāra‘a*), Bukhari. *Sahih al-Bukhari*, 9.1084

⁶¹ Quoted in J. Berque, *Les Nawazil el-muzāra‘a*, 37

⁶² See N.J. Coulson, *A History of Islamic Law*, 145-6

⁶³ Al-Wazzani defended this opinion in a polemical debate with the Egyptian scholar, Muhammad Abduh. Al-Wazzani is quoted in J. Berques, *Les Nawazil*, 78

husband has disappeared. The woman claims that the infant to whom she has given birth is the child of her disappeared husband. In the fatwa, the judge appears to be preoccupied with harmonizing the particularities of the case with the norms and limits of the maximum permissible length of pregnancy imposed by the *Mudawwana*, the major doctrinal Maliki text. The decision before the judge is whether or not to punish the woman for adultery (*zina*), when, according to the *Mudawwana*, the maximum permissible length of pregnancy is five years. Having knowledge of a Tunisian jurist who found this position in the *Mudawwana* juristically weak, the judge addresses himself to a religious jurist (*faqih*) of Fez, who also held the office of *Mufti* (a professional religious-legal adviser).

The fatwa represents the case through the Mufti's written record of the judge's narrative. According to this record, "The wife of a man from Fez, who was reported missing during the battle of Tarif gave birth to a child *born of her husband* more than five years after the disappearance of the latter."⁶⁴ This statement marks the beginning of the fatwa. It functions in the way of a title, and an indication of the mufti's understanding of the substantive content that can be found in the *fatwā*. What then follows is the mufti's recording of the judge's declaration as he seeks legal counsel from the mufti:

The event concerns a woman from Fez; during the month of Ramadan in the year 748 of the Hijra, she gave birth to a child and claimed that he was born of her husband who disappeared during the battle of Tarif.⁶⁵ When this situation arose, I remained perplexed because the juridical school (*madhhab*) that refers to the *Mudawwana* [i.e., Malikism] condemns to God's punishment the woman who brings into this world a child after more than five years and one month have passed since the disappearance of her husband. However, al-Qabisi [a Tunisian jurist, author of the *Mulakhas*] found that *this opinion* [of five years] was weak from a juridical point of view. [Let us not forget what] the Prophet said: 'The sacred punishments (*ḥudūd*) are not applied when there are doubts.' I ordered the woman be arrested, and I personally consulted with the religious jurists (*fuqahā'*) Misbah, Ibn Abd-al Salam, Abu al-Rabi' al-Wansharisi, ibn 'Abdun and Ibrahim ibn Musa ibn Ruqīyya, all of whom have issued fatwas based on the *Mudawwana*. I told them that which I knew about this issue [of maximum periods of pregnancy], but they still maintained their position in conformance with the *Mudawwana*. I said [to them]: 'Illicit sexual relations are prohibited by consensus (*ijmā'*); only another consensus (*ijmā'*) can remove the prohibition.' The assembly then separated.

The mufti briefly interjects: "In Fez, a widow gave birth to a child *born of her husband*,

⁶⁴ Wansharīsī, Aḥmad ibn Yaḥyá, and Muḥammad Ḥajjī. 1981. *al-Mi'yār al-mu'rib wa-al-jāmi' al-mughrib 'an fatāwá ahl Ifrīqīyah wa-al-Andalus wa-al-Maghrib*. al-Rabāt: Wizārat al-Awqāf wa-al-Shu'ūn al-Islāmīyah lil-Mamlakah al-Maghribīyah. Vol IV, 492-3, emphasis added.

⁶⁵ Tarif, or Tarifa is a port city in the southernmost coast of Andalusia, Spain. In the late thirteenth century, the city was conquered by Sancho IV of Castile, and resisted siege by North African Islamic troops in 1294. In 1340, it again resisted siege from Moroccan troops, leading to the Battle of Rio Salado. The woman in the fatwa gave birth during the month of Ramadan in the year 748. In the Gregorian calendar, this means December, 1347. If the husband disappeared seven years prior, this would place him with the Moroccan troupes that besieged Tarifa in 1340.

seven years after the latter had died,” before resuming his record of the judge’s case.

Then I met with the religious jurist (*fāqih*) Abd al’Aziz al-Qarwi (a jurist from Fez). I spoke with him about this situation and we shared the same opinion. He [al-Qarwi] said, ‘The case is perplexing and your opinion is identical to that which Sheikh abu al-Hasan held after he examined the saying of the religious scholars (*‘ulamā’*) on this subject.’ Then he [i.e., al-Hasan] said: ‘A widow arrived in Fez. She had stated that she was pregnant. Then after seven years, she gave birth to a child who people say resembled in all aspects the deceased husband who had left other children, who recognized the newborn as heir when they saw his resemblance with their deceased father. They decided to give him his share [of the inheritance] and did not hold any suspicions about him.’

I asked al-Qarwi to put into writing the opinion of Sheikh Abu al-Hasan and, with his own hand, he [i.e., al-Qarwi] wrote down everything concerning this issue. I kept this document. I excused the woman from the sacred punishment (*ḥadd*) and I affiliated the child to the husband under the condition that he [i.e., the husband] would not present himself and disavow the child through a disavowal of paternity (*li ‘ān*). May God grant us success.

This opinion of a maximum seven year pregnancy given by al-Hasan, adopted by the judge and tacitly approved by the Fassi mufti and al-Qarwi does not seem to be an isolated case. Another *fatwā* in the *Miyar* of al-Wansharisi reflects the opinion of another jurist who states that the maximum length of pregnancy can be seven years. We read the following:

A woman declares (*taza‘um*) that she has been pregnant for four years.

We asked Ibn Lubāba about the woman who declares that she has been pregnant for four years.

And he responded: A woman can remain pregnant for five or seven years when she has not had sexual intercourse, and God knows best. In effect, the child shrivels in the womb, just like something that is to be chewed shrivels, until [the woman] has sexual intercourse [again], and then the child is reanimated (revived) and begins to grow (*al-waladu yanqabiḍu fi’l-raḥim kamā tanqabiḍu al mudḡha ḥatta idhā waḥi‘at [wa] inta‘asha al-waladu wa-kabura*).⁶⁶ Glory to God, the Creator, the Omniscient. [Ibn Lubāba] then said: this (*dhalika*) may also be the result of menstruation. When the woman is pregnant and she has her period, this [i.e., menstruation] too can shrivel the child in the womb. When she stops menstruating on her fetus, the child then begins to grow and the woman gives birth [literally, the womb narrows, as it narrows after childbirth]. And this is the saying of the exalted one: “Allah knows that which every female beareth, and that which the wombs absorb and that which they grow.”⁶⁷

⁶⁶ The expression “*ḥatta idhā waḥi‘at*” could also be translated as, “or until someone has had sexual intercourse with the woman again.”

⁶⁷ Wansharisi. 1981. *Al-Miyar*. Vol III, 224-5. The translation of the Quranic verse XIII, 8 (The Thunder) is from Mohammad Pickthall. Other translations of that verse: Abdullah Yusuf Ali: “Allah doth know what/Every female (womb) doth bear, by how much the wombs/ Fall short (of their time/Or number) or do

What enables pregnancy for seven years for these jurists? In the first *fatwa* we have a record of two different women declaring pregnancies that lasted seven years: the woman in the case at hand, and the woman whose case was decided by Sheikh Abu al-Hasan, the Fassi (i.e., from Fez) jurist, and which became the precedent in the *fatwa*. Consensus (ijmā‘) is raised as a possible ground for a new ruling, and is among the judge’s major preoccupations. The five other jurists (*fuqahā’*) with whom he consults had issued already *fatwas* in accordance with the orthodox Maliki doctrinal position of five years articulated in the *Mudawwana*. It appears that the judge gathers the jurists together in an assembly and, after hearing his concerns that the opinion in the *Mudawwana* is ‘weak’ from a juridical point of view, they remained ever committed to their position. The written proof of that had issued an opinion in which a seven-year pregnancy was admitted becomes the basis for the judge’s ruling. Here, we have something like the principle of judicial precedent mentioned earlier in relation to the Moroccan judicial practice of ‘*amal*. However, in the text of the *fatwa*, we do not learn why al-Qabisi, the Tunisian jurist, considers the five-year position a weak one. Furthermore, from this text, we can only speculate what constituted proof of a seven year pregnancy for the Fassi jurist, Abu al-Hasan, upon whose opinion the judge bases his own. This opinion is given tacit approval in the *fatwa* not only by the judge, but also by the mufti who records the *fatwa* and the other jurist from Fez, al-Qarwi, who writes down the opinion of al-Hasan.

However, in the second *fatwa* that documents the opinion of Ibn Lubāba, the idea of a prolonged pregnancy is constructed independently of a specific legal precedent or reference to legal doctrine. Here, the juristic discourse departs from the strictly technical reasoning of *fiqh* (jurisprudence), embarking on an amazing embryogenetic discourse that recalls the speech of the knowledgeable woman in Medina in Malik’s *Muwatta*. Ibn Lubāba’s reasoning for prolonged pregnancies connects biology to theology within the context of women’s precarious position in social relations produced through marriage and kinship through heterosexuality. His reasoning also closely resembles modern Maghribi ideas of the sleeping baby. The baby “shrivels” in the womb, suspended between life and death. This shriveling can occur in two contexts: when menstrual blood touches the baby in the womb, or when the woman has not had sexual intercourse. The shriveled baby remains shriveled, a suspended potentiality, until the menstrual blood stops flowing or until the woman resumes sexual intercourse. Either of these two things have the power to revive the shriveled baby. This is similar to the logic of the knowledgeable woman in the *Muwatta*, upon whose expertise ‘Umar ibn al-Khattab bases his judgment to assign paternity to a first husband and to spare both the woman and the second husband punishment: “One of the women said, ‘I will tell you what happened with this woman. When her husband died, she was pregnant by him but then the blood flowed from her because of his death and the child became dry in her womb. When her new husband had intercourse with her and the water reached the child, the child moved in the womb and grew.’” Here, we have a combination of menstrual blood that causes the baby to “become dry” and sexual intercourse, or more specifically the “water” of the new husband that reanimates or “moves” the baby. The woman’s testimony clarifies the situation further.

exceed.” This verse is said to exemplify how the “most hidden and apparently unknowable things are clear to Allah’s knowledge.” This includes the sex of the child and for how long it will be carried by its mother.

Blood begins to flow from the pregnant woman because of loss. Yet, this does not cause her to lose the child; it remains, but in a dried up form. What does this mean? How do we make sense of the trajectory of pregnancy in these narratives?⁶⁸

It may be tempting to cast these questions away, to colonize the narrative, as the colonial jurists and doctors will do, by translating it into a variety of socio-juridical, biological, psychological or psycho-biological logics, by only being able to think of the sleeping baby in terms of a myth, a legal fiction, an anti-feminist feminine ruse, or a juridical humanitarianism for vulnerable social subjects. If we do not translate it into one of these logics, are we left in the disturbing realm of parapsychological discourse?

Before answering these questions, I would like to introduce a third fatwa. Here, we do not encounter the idea of a prolonged pregnancy (“*ḥaml; jāʿat bi’l-walad fi thalāth sinīn aw ārbʿa aw khams sinīn*”) but that of the sleeping baby proper (*raqada janīn*). In addition, in this fatwa, we find the language of the sleeping baby in a context in which expert midwives are called upon to provide testimony. Other *fatwās* in the *Miyar* show that calling on midwives (*qawābil; qablat*) for expert testimony in matters related to pregnancy and the female body was a common practice in pre-colonial Maghrib.⁶⁹ The fatwā records the opinion of Abu al-Fadl Qasim al-‘Uqbani (Al-Tilimsani) (d. 851/1450). Al-‘Uqbani was the chief qadi from Tlemcen, a province and town in what today is Northwest Algeria, not very far from the most eastern towns in modern Morocco, such as Oujda. Al-‘Uqbani was considered “one of only a handful of jurists in the Maghrib at this time who were regarded as having attained the level of *ijtihād*.”⁷⁰ He was also a *sufī*, and known for transcending the boundaries of Maliki *fiqh* to solve legal problems. Al-‘Uqbani delivered this fatwa in the ninth/fifteenth century (830/1427). It was recorded in the *Miyar* of Wansharīsī, who was a disciple of al-‘Uqbani. The fatwā reads:

Regarding a woman whose fetus was sleeping for a long period (*raqada janīnuhā mudat ṭawīla*) and then (re)marries and gives birth.

And it was asked about a woman whose husband had died and then said, “I am pregnant,” and then began to say, “my fetus was sleeping (*raqada janīnī*),” and then became engaged and remarried. She maintained her declaration that her fetus was sleeping until the day of her marriage contract. The second husband thus undertook [to obtain] evidence/ testimony from expert women that she [i.e., the mother of the sleeping baby] had gotten her period before the marriage was contracted.

What is your opinion about her self-diagnoses of pregnancy [considering] what is known about women who carry a sleeping baby and continue to menstruate and that under these conditions the first husband is the father? Or rather, do you think that proving that she had her period invalidates her declaration that she is pregnant with a sleeping baby, and so the father is the second husband?

⁶⁸ It is tempting to cast it away, to colonize the narrative, as the colonial jurists and doctors will do, by translating it into a variety of socio-juridical, biological, psychological or psycho-biological logics, by only being able to think of it in terms of a myth, a legal fiction, an anti-feminist feminine ruse, or a juridical humanitarianism for vulnerable social subjects. If we do not translate it into one of these logics, are we left in the disturbing realm of parapsychological discourse?

⁶⁹ Wansharīsī. *Al-Miyar*, Vol IV, 54-55, The title of a fatwa, for example: “If the midwives testify to a pregnancy, and then return and testify against it. (*idhā shahadat al-qawabil bi’l-haml thumma tarājʿan wa shahadna bʿadmihi*)”

⁷⁰ David Stephan Powers. 2002. *Law, Society and Culture in the Maghrib. 1300-1500*. Cambridge Studies in Islamic Civilization. 169

And [knowing that] her childbirth after the second marriage contract was like the childbirth of [most] women.

[Qasim al-Uqbani] responds: If the woman continues to declare pregnancy even until [the time when] the marriage contract is upon her, there is no marriage for the second husband, nor paternity (*fa'lā nikāh li'l-thānī wa-lā firāsh*). The child can only be attached to the first husband. But if at the time of the marriage contract she says, “My doubts are gone” and she permits herself to get engaged, after which she says, “I only allowed myself [to accept the engagement] when the suspicions were gone... and god is in agreement...”⁷¹

The idiom of the sleeping baby is expressed here in its verbal form: my fetus was sleeping (*raqada janīnī*), her fetus was sleeping (*raqada janīnuhā*), and so on. It seems it has yet to appear in the nominal form (*al-rāqed*) that is prevalent in modern Moroccan legal documents and in popular discourse “the sleeping baby in the mother’s womb (*l’raqed f’batn umhi*). Nevertheless, all of these ideas about a fetus or baby falling asleep and being revived by sexual intercourse, the sperm of the man, or menstruation are crystallized here in the language of sleep or resting expressed by *raqada*. What is described in the previous fatwas, and in the Maliki doctrine and hadiths discussed earlier, expresses itself here in an idiom specific to the Maghrib. The title of the fatwa and the presentation of the sleeping fetus indicate a general familiarity with the idiom and the concept that it implies. In other words, the fatwa is linguistically at the level that resonates with modern Maghribi beliefs about the sleeping baby. Whereas the second fatwa of Ibn Lubabu conceptualizes and explains a sleeping baby, Al-‘Uqbani’s assumes such a concept and names it.

The language of the sleeping baby, of a fetus falling asleep and waking up, becomes a way of understanding and incorporating the earlier doctrinal formulations of a prolonged pregnancy in a Maghribi translation. For example, in *Au dela de tout pudeur*, Moroccan sociologist Souymaya Naamane Guessous, says that in the hadith in the *Muwatta*, when the woman says “the child became dry in her womb (*fa-ḥashsha waladuha fi-baṭniha*)” it means that the child went to sleep (“*l’enfant s’est endormi*”); and when the woman says “the child moved in the womb and grew (*taḥarraka al-waladu fi-baṭniha wa-kabira*)” it means the child woke up (“*l’enfant s’est reveillé*”).⁷² The language of the sleeping baby poses as many questions as it answers. The fatwa does not give a philological genealogy of the origins of *raqada janīni* in the Maghrib dialect. It does not explain, whether, for example, sleeping or resting is a translation from a Berber language into Arabic, implying a practice that pre- and/or co-existed with the Maliki doctrine. It is important that the sleeping baby itself appears in a fatwa in connection with a knowledgeable woman, or midwife, as an expert. There is still not sufficient evidence to explain how and why seven year pregnancies were permitted in Maliki doctrine and practice. However, from this analysis of the three fatwās, it can be inferred that permitting seven-year pregnancies comes from existing doctrine, customary practices, and the knowledge of expert midwives. “It is in keeping with this practical orientation that the jurists constantly refer to the judgment of experts, to human convention (*iṣṭilāh*),

⁷¹ Wansharīṣī. *Al-Miyar*, Vol IV, 524-5.

⁷² See Soumaya Naamane Guessous. *Au dela de tout pudeur*. P. 291

to “knowledge by experience” (*maʿrifa biʿl-tajriba*), that is, to practical sources of knowledge in everybody’s reach, in order to justify a casuistic approach to law and social practice.” Further on in the sleeping baby fatwa (i.e., that of al-ʿUqbani), women as a social class of experts are called upon:

And it was asked about a woman whose husband had died and who was suspected of being pregnant. The [expert] women felt her belly and some said that there was a fetus inside because her navel palpitated and her belly was full. Other women abstained from testifying to the pregnancy (*shahada biʿl-ḥaml*). And she remained [in this state for] almost a year and a half. Then she remarried and remained so for five months. The husband then consummated the marriage with her (literally--he penetrated her *dakhala biha*) and approximately five months later she gave birth to a child...⁷³

It is difficult today to fully understand the practice of midwifery and women’s care of the body in the pre-colonial Maghrib, or to say whether the practices of the *qabilas* in Morocco today can be traced back to the fifteenth century. This historical practice belongs to an unwritten, oral tradition of midwives that began to be marginalized in the colonial period, and outlawed in the post-colonial period. Nevertheless, midwives practicing in Morocco today recall being taught by grandmothers, and grandmothers of grandmother. They, as well as other Moroccan women, operate according to the idea of indefinite pregnancy—that is, that the baby can fall asleep in the mother’s womb and remain indefinitely with the mother until her death. Sometimes the fetus wakes up, and sometimes it doesn’t. These ideas will be further explored in the last chapter.

In the *Mudawanna*, as well as other Maliki sources, women’s embodied knowledge, both the experience of a female reproductive body, and the practices of ‘knowledgeable women’ as custom are the source of the law. Remembering al-Wazzani’s statement from above that what is not un-Islamic, or explicitly forbidden, is Islamic: “Custom is a norm among norms of the *Shariʿa* as long as it does not contradict the Sunna.” The law cannot incorporate that which is strictly unIslamic, that for which there has been clear consensus, or a clear textual ruling. However this leaves the law open to many possibilities, to a becoming within limits. “With respect to cases and legal problems for which there are no authoritative texts or consensus and about which learned opinions differ, the qadi follows and upholds his own judgment even if he finds some of its reasoning faulty. Also, for the Malikis, the legitimacy of *ijtihad* depends on the existence of differences of opinion (*ikhtilāf*) among jurists.”⁷⁴ Through these methods, the law retains within it the possibility of being ever other than what it is—at once responsive, adaptive, flexible to contingency and unthought possibilities, *and* foreclosed, limited.

⁷³ Wansharisi, IV 524-5

⁷⁴ see Ahmad ibn Idris al-Qarafi al-Misri. 1967. *al-Ihkam fi tamyiz al-fatawiʿ ani ʿl-ahkam wa-tasarrufat al-qadi wa-ʿl-imam ed Abd al-Fattah abu al-Ghudda*. Halab: al-Farafira. 20-22, 121-22, 188-90, 219-26.

Chapter Two.

Free and Slave Women in Sleeping Baby Cases in Colonial Morocco, 1912-1956

I.

The sleeping baby is an umbrella term, or discourse, that can express any of the various combinations that arise from psycho-biological and socio-economic contingencies. As we saw in the last chapter, because sleeping baby is no single thing, the sleeping baby is an embodiment of contingency. In this sense the sleeping baby is a discourse that accounts for different kinds of contingencies. Without defining those contingencies in advance, sleeping babies are the embodiment of contingent nature and explaining the nature of contingency. In this chapter, I will show how the discourse of the sleeping baby in legal practice in colonial Morocco is a regulatory reproductive discourse. As a claim in court, the sleeping baby is treated as a pregnancy in which a woman has given or will give birth to a living baby. The meaning of pregnancy itself, as well as the parameters of the regulation are culturally defined, such that procreation or reproduction means something other than what it means for the colonial biomedical discourse of reproduction, and obstetric jurisprudence—which Chapter Three analyzes. The different meanings and bodily practices of procreation will be explored in this chapter and subsequent ones.

In Chapter One, I examined how sleeping babies existed in the doctrinal literature of classical Islamic jurisprudence. I focused particularly on Maliki doctrine, which of the four schools of Sunni jurisprudence, permitted the longest legal pregnancies. In this literature, sleeping babies offer an account of legal embodiment based on the ritual elements (*ʿibādāt*) of the law. I argue that this account treats individual reproductive bodies as categories of radical contingency in which time takes on a distinct quality separate from the time of the biological cycles of nature. Evidence of the female body is the individual and deeply subjective testimony about this time that is witnessed by women, midwives (*al-qablat*), or other women whose knowledge of female bodies was relied upon as authoritative (*al-arifat*).

Drawing on this account of *embodiment*, this chapter examines sleeping baby cases in Morocco in the documentary practices of trials (s. *muḥakkama*; pl. *muḥakkamāt*) in Islamic courts, judicial councils (*majlis*) and people's councils (*jam'a*) during the colonial period (1912-1956), until the codification of the family law (1957-9).¹ In these cases, sleeping babies are invoked in courts by claimants, and in the rulings of Qadis (Islamic judges) to validate claims to paternity, inheritance and matrimonial maintenance (*nafaqa*), and to attach children legitimately to the patriline (*nasab*) of divorced, widowed or remarried women. Evidence for the existence of a sleeping baby is tied to the sensory expertise of Moroccan midwives (*al-qāblat*), and to women's testimony about the reproductive aspects of their own bodies. In this chapter, I compare the evidentiary value of free and slave women's testimony in sleeping baby cases to show how, in theory and in practice, the reproductive female body in Islamic law is further rendered ambiguous as

¹ My archival research and interviews uncover how the sleeping baby had been invoked in courts by claimants, in formal legal opinions by Islamic religious-legal scholars, and in the rulings of Islamic judges to validate claims to inheritance and matrimonial maintenance, to circumvent accusations of and punishments for adultery (*zina*), and to attach children legitimately to the patriline (*nasab*) of divorced, widowed or remarried women.

a biological category. That is, the female body before the law is concomitantly a social, political and economic category that distinguishes free women from slave women, and married women from unmarried women. Unlike the free woman, the slave woman's testimony about her reproductive body is viable only under certain conditions. The ambivalence of the slave woman's testimony as evidence in law expands the notion of legal embodiment elaborated in Chapter One to incorporate social, political and economic status as factors that give the body value and signifying force.

Judgments from court cases in Morocco during the colonial period—as well as in colonial Algeria—indicate a general acceptance of pregnancies and thus waiting periods after divorce (*idda*) lasting five years based on Maliki doctrine. In Berber speaking areas (the so-called customary tribunals) pregnancies of an infinite duration were incorporated into law.² Medical and legal discourses about the female body intersected in the acceptance of prolonged pregnancies revealing a cultural context in which the two disciplines shared an image or ideology of the female body. Classical Islamic legal doctrine constructs the sleeping baby and prolonged pregnancies as a form of women's embodied knowledge intimately tied to a gendered experience of time. In Morocco, by the colonial period (1912-1956) judicial practice assumes expert and ordinary women's authoritative knowledge and experience about female bodies and gendered time. Compared to other testimonial evidence from women not related to the body, the testimony of midwives' acquired an unusual power.

In Islamic legal practice in Moroccan and Algerian courts and judicial councils, sleeping babies are incorporated within women's property rights over the body. In Islamic jurisprudence, the physical functions related to reproduction were subject to property rights that gave free married women control over the rhythm of pregnancies and compensated them financially for fulfilling different reproductive and caregiving roles. Wives could not be required to nurse their children, and were guaranteed wages for breastfeeding and childrearing when divorced. Repudiated wives who were pregnant had rights to financial compensation in the form of clothing, food and shelter during the period of pregnancy. As the historian Maya Schatzmiller has shown in the context of medieval Islamic Spain: "Rights over the body were an additional dimension of the larger corpus of women's property rights, which were created and acquired through marriage and motherhood."³

However, not all women had equal rights to their bodies, as these rights did not exist outside of concubinage or marriage. Although reproduction and motherhood could occur outside of marriage, the biological functioning of the female body alone did not impart property rights of the body to every woman. Even within marriage and concubinage, the rights over the body were not universally upheld as women's rights, but were exclusively the rights of the free wife.

By examining the kinds of claims the sleeping baby enabled free married women and concubines to make in courts and tribunals, this chapter aims to clarify how the

² "The period of time during which a baby can remain sleeping in the womb of its mother has never been determined amongst the Zayans."

³ See Schatzmiller, Maya, Joint International Law Program, and Harvard Law School. Islamic Legal Studies Program. 2007. *Her day in court: women's property rights in fifteenth-century Granada*. Cambridge, Mass.: Islamic Legal Studies Program, Harvard Law School: Distributed by Harvard University Press. 116. Also, Tucker, Judith E. 2008. *Women, family, and gender in Islamic law*. Cambridge, UK; New York: Cambridge University Press.

sleeping baby functioned with respect to women's property rights in legal practice during the colonial period (1912-1956)⁴. As mentioned above, the sleeping baby is a discourse of reproduction, a regulatory reproductive discourse. Beyond providing a typology of sleeping baby claims, the chapter analyzes *two important juridical aspects of the sleeping baby as a regulatory reproductive discourse of legal embodiment*.

First, the cases expose how the sleeping baby at law is nestled within a gendered logic of legal paternity through marriage or concubinage. Beyond conferring the important symbolic gift of socio-cultural legitimacy and origin, legal paternity through marriage or concubinage engenders a number of important property rights to women: inheritance, maintenance for the spouse during pregnancy, wages for breastfeeding, and maintenance of a child after s/he is born. Because of the methods of legal record keeping in the juridical domain, where the claim or dispute and its resolution are highlighted, the cases tend to foreground the socio-economic aspects of the sleeping baby with respect to women's property rights.

Sleeping babies are discursively produced in court in relation to claims to paternity, contestations of paternity, inheritance disputes, spousal and child maintenance claims, and adultery. The status of the mother with regards to freedom (free/slave) and marriage (unmarried/married, divorced, abandoned or widowed) determines whether the law will hear a sleeping baby claim. This is because inheritance (*mīrāth*) and spousal maintenance (*nafaqa*) claims rest on the establishment or disestablishment of paternity (*al-nasab*), which is the first term in the juridical logic of the family. A Qadi's decision regarding an inheritance or maintenance claim rests on establishing or disestablishing paternity within marriage or concubinage. This means that even though many cases are not brought in as paternity cases or paternity disputes, the question of paternity must first be answered before moving on to the claim at hand. In this way, the logic of paternity within marriage or concubinage grounds the economic and symbolic order of juridical modes of kinship and relationality.

Second, within this logic of legal paternity, women are differentiated as subjects of property rights according to whether they are free or slave women, and then according to whether they are married, divorced, abandoned, remarried, or single. In colonial Morocco, along this axis of difference, only free women who were or had been married, or concubines whose masters had recognized the paternity of a child had the right to make claims based on a sleeping baby. Thus in judicial practice, where the actuality and possibility of a woman having a sleeping baby is legally and medically assumed, a woman's social status becomes an important factor in determining whether she can claim a sleeping baby and concomitantly, the extent to which her testimony about her body will be given legal value. The possibility of the law recognizing a woman's testimony about the rights of her body is limited in practice according to hierarchies of social and political status that are connected to ethno-racializations or caste-based identifications of reproductive female bodies in slavery. In this way, the sleeping baby maps out a typology of reproductive women in the colonial period as subjects of different reproductive vulnerabilities.

⁴ The technical term for French colonial exploits in Morocco is "Protectorate." Since this term is misleading, insofar as it depoliticizes the violence and oppression of the French activities in Morocco, and adopts the French perspective, I use "colonial" instead. For further elaboration on this topic, see my "Introduction."

The two most evident legal distinctions in sleeping baby cases are the ones made between the free woman and the slave woman, and between the married and the unmarried woman. There is a spectrum of categories between the married and the unmarried woman that includes the widow, the abandoned wife, the repudiated wife and the single or never married woman. The voice of the latter is absent from the legal documents. This corresponds to the principle that women acquired property rights over their bodies through marriage and motherhood. Interestingly, married women with sleeping babies are also absent from court documents. This corresponds to the idea that the belief in the sleeping baby was so profound that there would not have been any reason for a married couple with a sleeping baby to be in court unless the husband wanted to accuse his wife of adultery. Recalling the *fatwa* from Fez discussed in the previous chapter, adultery claims that involve the sleeping baby are not cases of husbands accusing wives of adultery and denying paternity, but of pregnancies that occur after a husband has disappeared. Thus, it is the absence of or separation with the husband or father that sleeping babies appeared in courts.

This chapter is divided into three sections. The first section situates sleeping baby claims in early-to-mid twentieth century reproductive culture in the Maghreb. It highlights the reproductive cultural context as one in which intersecting legal and medical discourses constitute female bodies as the subjects of intrinsic property rights. The second and third sections delve further into specific cases of sleeping babies. The second section explores the dialectics of knowledge production between free women and the law. The third section compares free and slave women's rights to make sleeping baby claims.

II. Judicial and Medical Discourses of Sleeping Babies in Reproductive Culture, the Family and Property Rights.

How and in what circumstances did sleeping babies appear in court? And what was the cultural context in which sleeping babies were an accepted part of a public discourse about reproduction? A number of sleeping baby cases from different regions in Morocco and Algeria indicate that sleeping babies were an entrenched aspect of medical and legal discourses in *Sharī'a* courts and Berber judicial councils during the colonial period. The use of the sleeping baby (*al-rāqid*) in court by men and women of diverse social groups, urban and rural, indicates that it was part of a public discourse about reproduction and women's roles as reproducers within the family.

Insofar as the physical functions related to the reproductive body were the subject of intrinsic property rights, the sleeping baby brings together medical and legal discourses, care practices and knowledge of women's reproductive bodies by midwives, desire and cultural witnessing practices of women's bodies.

The state of being pregnant (*ḥāmīl*) is uniquely described in one case as “a fetus that is found in her womb or her thoughts (...*al-janīn aladhī mawjūd fī baṭniha aw fī ḡanniha y'atabr wuld zoujuha*...).”⁵ This means that the ontological status of pregnancy is not simply or only determined by a biological state, but must also take into account the mind, or the psychological or spiritual state, which by the conjunction “or (*aw*)” is

⁵ *Al-majalla Al-maghribiyya: li-l-qawanīn wa-l-mathāhib wa li-l-ahkām al-ahliyya, al mathhab al-mālikī wa-l'urf al-barbarī wa-l-qānūn al-isrā'īlī*, 1935-6, 57

rendered equally relevant. The dual importance of the physical and spiritual aspects of pregnancy in Islamic medicine and Moroccan midwifery will be discussed further below and in Chapter Six.

For women, sleeping babies in legal doctrine and practice were engendered by the prolonged absence of or separation with a husband. The absence can be temporary—such as in the case of a husband who is absent for work, or one who goes missing and then returns—or permanent—such as in the case of death, or when the marriage bond has been irrevocably broken between a couple by divorce. Thus, the male workers of the Sahara, as husbands who had to be absent for long periods of time for work, would return to find children conceived and born during their absence. Because of this, they would say: “Praise to God! We are blessed! Present, we engender. Absent, we also engender! (*al-hamdulillah aladhi baraka finā ḥatta wulidnā ḥādirin wa ghā’ibin*).”⁶ In the masculine imaginary, the sleeping baby represents a phallogocentric or “phallogocentric” symbol of masculine omnipotence. In relation to sleeping babies, men from the Sahara would say: “All that is caused by irrigating (the fields) belongs to the owner of the fields (*kulumā tetī bihi al-sāqiya yuṣim fī milk mālik al-faddān*).”⁷ Sleeping babies in law always have fathers—they are considered to be the work of the father. Witnesses called upon to testify in one case from Khenifra in the 1930s (which I will discuss further below) use a prepositional language connoting origins and causes to represent the relationship between the sleeping baby and its father: “I did not want to take an oath because my cousin Itto had admitted to me that the child who was sleeping (in her womb) was from the loins of Haddou (*min sulb Haddou*);” or, “When I married Itto Qasso, she did not inform me of her pregnancy and the sleeping baby (*al-janīn al-rāqid*) from Haddou (*min Haddou*).”⁸ In legal practice, sleeping babies are always about legal kinship and the rights and obligations that it engenders. They are not related to concepts of virgin births, immaculate conception, or epigenetic ovism.

In the sleeping baby cases I’ve found, the medical aspects or signs of the sleeping baby emerge as evidence through the testimony of women and midwives. Where questions or contestations arise about a woman’s sleeping baby, midwives or other knowledgeable women (a mother or a sister) testify about the age and existence of a sleeping baby. Medical and legal discourses about female bodies intersected, insofar as the body was subject to property rights, and the body of the free wife and its reproductive qualities were considered to be her property from the legal standpoint.⁹ Islamic medical writings to a large extent reveal a positive image of the female body, an image that is very different than the negative and demeaning one favored by the Greek physicians.¹⁰

⁶ *Al-majalla Al-maghribiyya*, 58

⁷ *Al-majalla Al-maghribiyya*, 58

⁸ *Al-majalla Al-maghribiyya*, 56, 55

⁹ Schatzmiller, *Her Day in Court* 102

¹⁰ On negative images of female bodies in Greek medicine see: Dean-Jones, Lesley. 1994. *Women’s Bodies in Classical Greek Science*. Oxford: New York: Clarendon Press; Oxford University Press. Von Staden, Heinrich discusses the female body’s corporeal solicitation of negative interpretation in 1992. “Women and Dirt.” *Helios* 19: 72-92; King, Helen. 1998. Also: *Hippocrates’ Woman: Reading the Female Body in Ancient Greece*. London; New York: Routledge. Of course, as Schatzmiller points out with respect to female bodies in Islam, there are exceptions and examples in the Islamic hadith tradition of misogynous ideas about female sexuality and the body, which contemporary scholarship has been keen to excavate. For example, in “Some Isnād-Analytical Methods Illustrated on the Basis of Several Woman-Demeaning

Female bodies were assumed to have both a physical and spiritual nature. A 10th century Tunisian physician Ibn al-Jazzār (*aka* Algizar, d. ca. 979), author of *The Book of Medicine for the Poor and Dispossessed* (*Kitāb ṭibb al-fuqarā' wa-l-masākīn*) describes the necessary conditions of health for a woman while the baby develops inside her womb: “Two things are required from the woman during the formation of the child. One is physical (*min al-badan*) and the other is spiritual, of the soul (*min al-nafs*). This is the basis upon which the foetus is fashioned, meaning that the mother should be healthy and well built, good natured, and mentally and emotionally strong.”¹¹

In law, the sleeping baby is considered by the courts to be a birth that will be or has been viable, in which a woman will give birth to a living baby. In order to inherit, the life of the sleeping baby must be ascertained as certain and alive. During the time that it takes for the sleeping baby to develop and be born, it is thought of in terms of alternating suspension and animation, a preservation of life that does not entail death. Midwives detect growing life through movements of the fetus and specific physiological changes to female bodies.

In Islamic medicine, male physicians also discussed women and midwives’s skills as medical practitioners, and judged them to be proficient, intelligent and perspicacious. In the *Muqadimmah*, Ibn Khaldun writes that the continuation of the human species depends on the knowledge of midwives. Male physicians devoted themselves to teaching midwives, depended on their assistance and deferred to their expertise and opinions. In his 30 volume encyclopedia of medical practice, *The Book of Concessions* (*Kitab al-Tasrif*), the 10th century Andalusian scholar Al-Zahrāwī (*aka* *Abulcasis*, d. 1013)—a pioneer in the field of surgical procedures—consecrated a chapter to training midwives. There he explains to the midwife various medical procedures involving the use of surgical tools, and the insertion of the hand into the mother’s abdominal region. He also explains how to treat the rupture of women’s genitalia, how to remove a dead fetus from the womb, how to treat a live fetus when it is not born in a normal way, how to extract the afterbirth and other medical-surgical techniques. Al-Zahrāwī writes that the midwife must be a person with wisdom and dexterity, who is proficient in all kinds of cases, and

Sayings from the Hadith Literature (*Studies in the Origins and Uses of Islamic Hadith*, 1996) G. H.A. Junybol argues that Ibn Habib’s ninth century collection of hadith represent a negative and demeaning ideology of the female body. Or, in *Le Harem Politique: Le prophète et les femmes* (1987) Fatima Mernissi connects the revival of contemporary Islamic fundamentalist misogyny to the ideas found in the *fatwas* of the medieval Hanbali jurist Ibn Taymiyya (d. 1255). I agree with Schatzmiller’s conclusion that, while misogynistic examples exist in some legal discourse about the female body, legal and medical discourses generally, or at least equally, respected women’s bodies. See Bos, Gerrit. 1993. “Ibn al-Jazzār on Women’s Diseases and Their Treatment.” *Medical History* 37. 296-312; or two of the most well-known treatises on Islamic medicine: Ibn Sina’s *The Canon of Medicine* (*Al-Qanūn fi-l-ṭibb*) and Al-Zahrāwī’s *The Book of Concessions* (*Kitāb al-tasrif*). Also, on the anti-reductionist aspects of the female body in Islamic medicine, see: Bakar, Osman. 1999. *The History and Philosophy of Islamic Science*. Cambridge, UK: Islamic Texts Society. Ch. 6 103-130; and Rahman, Fazlur. 1987. *Health and Medicine in the Islamic Tradition: Change and Identity*. Health/medicine and the Faith Traditions. New York: Crossroad.

¹¹ See Ibn al-Jazzār. 2008. *Siyāsāt Al-ṣibyān Wa-tadbīruhum* (*Policies for Treating and Managing Boys*). al-Ṭab‘ah 3. Qarṭāj: al-Majma‘ al-Tūnisī lil-‘Ulūm wa-al-Ādāb wa-al-Funūn, Bayt al-Ḥikmah. Quoted in Schatzmiller, *Her Day in Court*, 108

who is aware of possible failures and mistakes.¹²

A positive medical discourse on women as patients and practitioners is also found in the writing of jurists—and in particular, the notaries, who were especially concerned with legal practice and the witnessing of midwives. The historian Maya Schatzmiller writes “Ibn Mughīth had complete confidence in the midwife’s ability to discern the importance of her account in legal matters when she was required to give evidence in cases involving the property rights of infants and their families. The testimony of midwives in legal procedures concerning women’s conditions even acquired a unique power compared to other testimonial evidence from women. They alone, and not the male physician, had the legal power to give evidence in cases involving the female biological functions.”¹³

The biological aspects of the sleeping baby that are introduced by French biomedical colonial thought, and that I will discuss in the next chapter, are not present in precolonial medical discourse and practice. That is, the sleeping baby is not translated in court into a pathological biomedical phenomenon such as false or "hysterical" pregnancy (i.e., pseudocyesis), abortion induced by the mother, ectopic pregnancy, or various kinds of miscarriages--both those that are expelled from the mother's uterus and those that are retained. Rather, the sleeping baby is an umbrella term, or discourse, that can express any of the various combinations that arise from these psycho-biological and social contingencies. As a claim in court, the sleeping baby is treated as a pregnancy in which a woman has given or will give birth to a living baby.

¹² See Abulcasis, and Gustave E. von Grunebaum Center for Near Eastern Studies. 1973. *On Surgery and Instruments; a Definitive Edition of the Arabic Text with English Translation and Commentary*. Berkeley, CA: University of California Press.

¹³ See Schatzmiller, *Her Day in Court*, 109. This is not an uncontested issue. On the status of female witnesses in Islamic law see Shaham, Ron. 2010. *The expert witness in Islamic courts medicine and crafts in the service of law*. Chicago, Ill.: University of Chicago Press. Ch 3.. “[T]he testimony of women relating to the privileged parts of the female body has enjoyed a privileged status. This is the only field in which fiqh, on the grounds of necessity (darura) permits women to testify alone and not alongside a male. The necessity is created, as in Jewish law, by males being prohibited from viewing the intimate parts of the female body.” While Shaham presents a helpful overview of the Sunni school’s opinions on female witnessing in general, and of the female body in particular (i.e., in virginity, puberty, pregnancy, birth, first cry of an infant, suckling, physical defects in female slaves, and in forensic evidence when a female body was part of a crime), the argument I present here (together with Schatzmiller’s) explicitly aims to complicate and counter the thesis of his third chapter. There he argues that midwives, insofar as they were expert witnesses of female bodies, were, as the title of the chapter neatly sums up: “Agents of patriarchy in a secluded world of women.” While it cannot be denied, as many of the cases I present in this chapter show, that midwives provided counter-testimony that was not in the interest of the particular woman in the case, they also equally provided testimony for women. In Morocco, Shaham’s conclusion that midwives primarily “safeguarded the moral code set by men” does not hold. For further literature on female witnessing also see: Messick, Brinkley. 2002. “Evidence: From Memory to Archive.” *Islamic Law and Society* 9 (2) (January 1): 231–270; ; Fadel, Mohammad. 1997. “Two Women, One Man: Knowledge, Power, and Gender in Medieval Sunni Legal Thought.” *International Journal of Middle East Studies* 29 (2) (May 1): 185–204; Rosen, Lawrence. 1995. “Law and Custom in the Popular Legal Culture of North Africa.” *Islamic Law and Society* 2 (2) (January 1): 194–208; In Arabic: ‘Asarī, ‘Abd al-Salām. 2007. *Shahādat Al-shuhūd Fī Al-qaḍā’ al-Islāmī: Dirāsah Tārīkhīyah Fiqhīyah Muqāranah, Ma’a Bayān Mā Jarā Bih Al-‘amal Ladā Al-shuhūd Al-‘udūl Al-muwaththaqīn, wa-quḍāt Al-tawthīq bi-al-Maghrib*. al-Ṭab‘ah 1. al-Rabāt: Dār al-Qalam. Vol 2

A woman's sleeping baby was considered to be public knowledge by members of her community. In several cases of contested paternity in the region of Khenifra from the mid 1930s, men of local notoriety and power claim sleeping babies to support paternity claims. In one case, Haddou Ou Assou, the first ex-husband of Fatima Itto Qasso, a woman with a sleeping baby who had remarried three times since the first divorce, claims paternity of a child, Mohammed, born by Fatima years after the divorce. This interesting vacillation in *who* claims a sleeping baby in court is part of the ambiguity I mentioned in the previous chapter—namely that the question remains as to whether the sleeping baby is good for the Father (paternal and patrilineal power) or the mother (maternal agency).

During the trial, Fatima's father, Itto Qasso, tells the judicial council (*jama'a*) that he did not think it was necessary to tell the present husband of his daughter that she had a sleeping baby because it was public knowledge to all members of the community: "As for the present husband, I confess that I never said anything to him about matter of [my daughter's] sleeping baby. I thought I could do without it because everyone in the tribe knew about the existence of [her] sleeping baby (...*wa āmā zoujuha al-ḥālī, aqrr bi-anī lam aqul lahu fi sha'in al-janīn wa ṭanantu innahu la ihammiyya fi thalik haithu y'alam jamī'a anās al-qabīla wujūd janīn al-rāqid*)."¹⁴ In this case a number of witnesses are called upon to verify whether the mother had told them that the sleeping baby belonged to Haddou Ou Assou or to one of the later husbands.¹⁵

Thus, from socio-legal perspective, a primary legal function of the *rāqid* was to legitimize children born out of wedlock. A second function of the *rāqid* in law was to safeguard the reputation, lives and corporeal integrity of mothers from the violence of law and society. A third function was to acquire inheritance rights and a pension for an unborn child, and to acquire maintenance (clothing, food, shelter) for pregnant and or/breastfeeding women. In order to inherit, the life of the fetus must be ascertained as certain; in this sense we can say that in legal discourse the "sleeping" of the sleeping baby is associated with life.¹⁶ The following cases exemplify these three aspects of the *rāqid*.

In 1948, a woman in Rabat claimed a pension from the man who had repudiated her. While she claimed she was pregnant by him, he said that the child was not his because the wife had lived in another town during her waiting period. The court awarded the pension to the wife.¹⁷

In an inheritance case from Meknes, a city in Northern Morocco in 1939, a widow with a sleeping baby, represented by its assigned guardian ... In another inheritance case recorded in Judgment no 1.680 of January 9, 1939 from Meknes, the president of the *Habous*, an Islamic charitable institution of inalienable property,¹⁸ brings a man, "M ben D" to court to demand that he evacuate the house which he had occupied for at least over

¹⁴ *Al-majalla Al-maghribiyya*, 55

¹⁵ *Al-majalla Al-maghribiyya*, 56.

¹⁶ Some jurists, such as (find reference) also claim that the woman is entitled to maintenance even if the fetus in her womb has died, until it is expelled—as long as the womb is occupied, the woman has financial compensation due to her. See Coulson. 1971 *Succession in the Muslim Family*. Cambridge: Cambridge University Press: "The child must be born alive... The child must have been conceived before the death of the *praepositus*." 207-9

¹⁷ J. Lappanne-Joinville under the direction of and with a preface by Louis Milliot. *Recueil de jurisprudence chérifienne*. Tribunal d'appel de Chra', Vol 4 Paris: Recueil Sirey. 92-96

¹⁸ (also known as *waqf/awqaf*),

a year and a half, and that he pay back rent for the time which he had lived there.¹⁹ The house in question was adjoined to the Grand Mosque of Meknes, and was constituted as an *habous* of the family of El Hadj M. In his testament, El Hadj M had left the house to his family. In case of the extinction of the family, the testament names the Imam of the mosque (“*mua’ddin*”—i.e., he who calls the faithful to prayer five times a day) as the next assignee of the house.

In the court records, the president of the *Habous* claims that the family was extinguished in the person of its last representative, M ben T el L, and that following the death of the latter, another man, M ben D, had occupied the house in question. “I demand the evacuation of the house and the payment of rent as determined by experts beginning from the day of the death of the last heir until the day when the house was evacuated by the defendant.”

In response to these allegations, M ben D responded: “M ben T el L, represented in the hearing as the last heir died leaving a widow, K bint D el M, [who was] pregnant by him. I was assigned as representative of the sale by M ben T el L. I add that the family of the El Hadj M ben el Hadj was thus not completely extinguished. In addition to the widow, M ben T el L also left a brother and a cousin, living in Meknes.” In support of this response, M ben D provided a testimonial act in which he was designated as guardian of the sleeping baby to be born by the widow. He also produced two midwives who provided testimony stating that the widow K was one year pregnant with a sleeping baby, and that that movements of the fetus were perceptible.

In response to these proofs, the President of the *habous* provided written testimony of two other midwives that the widow K was not pregnant. The judge ordered a new examination of the widow, the results of which “did not permit the determination in a clear way of the existence or inexistence of pregnancy.”

After considering the case, the qadi of Meknes wrote:

Considering that the defendant has not brought proof regarding the alleged heir.....But seeing that current jurisprudence admits as a maximum period of pregnancy a period of up to five years...Seeing that the presumption of pregnancy puts the widow in the position of a woman in her period of waiting until the birth or the expiration of the period of 5 years representing the maximum period of pregnancy; and that by this law the widow has the right to lodging in the house left by her husband.²⁰

The qadi decided that until the widow K gave birth, the house (*habous*) would pass to the Imam, “with the reservation that the widow has lodging there for the duration of her waiting period.” The Imam also had a right to back rent fixed by experts, with the exception made to the lodging destined for the widow. In the event that the sleeping baby were to be born to the widow K, the case could be reopened.

The discourse of sleeping babies was also brought into court independently by judges in their decisions, even when the parties to the case had made no mention of one.

The man seeks the inheritance of once privately owned land that was left to the Public Treasury since there was no living heir at the time of the death. In the case the man

¹⁹ *Al-majalla Al-maghribiyya*

²⁰

and denied it, is told by the judge that he would have won had he claimed he was a sleeping baby—i.e., that he in fact alive at the time of the testator's death.

In 1946, a judge in the Southern town of Tiznit denied Arbi ben Ahmed ben Belaid, the petitioner's, request which sought an inheritance of land that had been sold off while he was a minor. The land had been left to Ahmed Ben Belaid, the petitioner's father, who, having murdered the decedent, his cousin, el Arbi ben Moussa, could no longer to inherit from him. Without an heir, the land defaults to the Public Treasury (Bayt al Mal), which had then sold part of the land to another party as private property. The petitioner however claims that since his father was excluded from the inheritance, he legally became the next kin to inherit. The records of the case are very long. What is important here is that the petitioner was a minor at the time the inheritance was divided. Witnesses depositions state that at the time of the decedent's death (journada 1355/ august 1936), the petitioner was between 14 and 16 years old. One of the conditions for inheritance is that the heir must be alive at the time of the decedent's death. Thus, the date of birth of the petitioner determines whether or not he was alive at the time of the death of the testator, and therefore a living heir. According to el Arbi ben Ahmed ben Belaid's proclaimed date of birth, he was born three years after the decedent died. Thus, the qadi of Tiznit ruled that he could not inherit. Mr. ben Belaid appealed the decision to the *Sharī'a* Court of Appeals in Rabat. After reviewing the evidence presented to the Qadi of Tiznit, and new evidence from both sides, the Court issued a very long decision, calling attention to the "flagrant contradiction" in Mr. ben Belaid's testimony.²¹ In its decision, it independently invoked the *rāqid*, stating that for not a "single moment" in either trial did the petitioner claim that at the time of the decedent's death, he was "sleeping in his mother's womb." The judge states that because he did not claim this, because did not claim to have remained sleeping in his mother's womb until his birth in 1340, "that is to say, after a duration of three years after conception, a period of time less than the maximum legal amount of time [of five years], and which would have permitted him to inherit" he could not have been alive at the time of the decedent's death. The date of birth that Mr. ben Belaid gave to the court showed them that "he adopted the thesis that his duration of gestation in the womb of his mother was *only* the habitual kind of nine months."

The Court of Appeals upheld the Qadi of Tiznit's decision. In Islamic jurisprudence, in order to inherit, the life of the heir at the time of the death of a decedent

²¹ The Court held : "Seeing that the petitioner himself brought a denial to this testimony, saying that he was born in 1337 and at the time of the decedent's death he had already been in his mother's womb for four months, while relying on the other hand on the testimony number 2583 that explicitly states that in 1355, he was the age of 14 or 15 or 16 Seeing that with the best hypothesis he was thus born in 1340 and thus did not exist in 1337 when the decedent died...*Seeing that not for a single moment in either the Court of the First Instance nor in the Court of Appeals did the petitioner claim that at the moment of the decedent's death he was sleeping in his mother's womb, and continued to rest there until his birth occurred in 1340, that is to say, after a duration of three years after conception, a period of time less than the maximum legal amount of time [of five years], and which would have permitted him to inherit...*Seeing that he only claimed that he was born on Chawwal 1337, five months after the death [of the decedent], showing that he adopted the thesis that his duration of gestation in the womb of his mother was only the habitual kind of nine months—or we see that his birth must have happened in 1340. Seeing that in law, in order to inherit, the heir must exist at the moment of the death of the decedent, which is not the case of this petitioner.

must be ascertained as “certain,” a matter for the expertise of midwives and the testimony of the mother, when she is still alive. The inheritance is suspended until the birth of the child, who inherits if he is born alive. Another inheritance case from 1919 applies this same principle, calling of the sleeping baby to determine whether an heir existed at the time of the death of a decedent. “A son dies, leaving his mother as an heir, and she then remarries. If at the moment of the son’s death, it is established by the witnessing of women that the mother is pregnant, the child to be born will inherit from the deceased even if his birth does not happen for four years or more.”²² In matters of pregnancy, proof must be reported in the manner required, which is to say by the testimony of two women who have been recognized by the court as honorable (*ta’dīl*) or by two elderly women who have been approved.

Sleeping babies were also claimed in court in Algeria. In 1861, the following case was heard by the Court of Appeal of Algiers.²³ In January 1860 Ben Aoufi Ben Bou Dissa divorces his wife Anaya Bent bel Gassen, who at the time declares herself pregnant and requests a pension (*nafaqa*). Ben Aoufi denies that the child is his. In February of 1860, the Qadi of Aumale orders that two women consult with Anaya to confirm her declaration of pregnancy. Based on their testimony, the Qadi decides that Ben Aoufi must pay Anaya 4 duros and 1 franc at the end of each month, and that at the end of the sixth month he must give her several garments, including one made out of cotton. Anaya gave birth to a child between February 12 and March 12, 1861. Ben Aoufi appealed this decision first to the Midjles d’Aumale stating that it was impossible that the child was his, since it could not have been conceived before January 1860 and born thirteen to fourteen months later. That court having upheld the decision, Ben Aoufi brings it to the Court of Appeal of Algiers, run by the French who had already encountered and outlawed the sleeping baby. The court states that the ‘disposition of the majority of the current and ancient European laws, based on the facts of physiological science, do not admit more than a ten month period of pregnancy.’ They go on to say that there is no single precise ruling in Islamic law about the duration of pregnancy, that there is a plurality of opinions and dissidence about the subject, and that therefore it cannot be proven that Anaya was in fact pregnant by Ben Aoufi in January 1860. Based on this, in a judgment signed by MM de Vaultx, President of the Court, and Robinet de Clery, Av. Gen, they overturn the ruling of the Qadi of Aumale, and deny Anaya’s request for a pregnancy pension.

In another case in Algeria in 1866, Halima bint Si Mohamed, widow of Mohammed el Kabir ben Kaddour, wanting to remarry after his death, goes to the Qadi to let him know that she believes she is pregnant. The Qadi has her visited by two elderly women who confirm that she is pregnant. Based on the declarations of these women, the judge says that she must wait to be married until she gives birth, or until the expiration of the longest legal period of pregnancy. Two years later Halima returns to the same Qadi and says that she is not pregnant. The Qadi gives her permission to marry Ali ben al Hadj Bouroubi el Boutami and one year later she gives birth to a baby boy. Ammar ben Kaddour, the brother of the first deceased husband, then brings her and her new husband to court, claiming that the child is the son of her brother. The Qadi relies on Maliki

²² p 190, quoting At-Tsuli, Bahja, II p. 423 (photo 6253)

²³ Algeria, and Robert Estoublon. 1890. *Jurisprudence Algérienne De 1830 à 1876*. Alger,: A. Jourdan,. 26-28

doctrine of the Sheikh Abdel Baki Zerkani, a commentator on the work of the Mukhtasar of Khalil. In the work of the latter, Khalil states: “The widow or divorced woman who is in her waiting period [*‘idda*] and doubts whether she is pregnant or not, must wait [to remarry] until the maximum term of gestation. [Maliki] doctrine hesitates over the delay: four or five years.”²⁴ Sheikh Abdel Baki Zerkani commenting upon this, writes: “The widow or divorced woman, who after sensing what she feels, suspects that she is pregnant, must wait, before even thinking about another matrimonial alliance, and prolong this waiting until the extreme possible limits of gestation. This extreme limit, is it five or four years? This questions has been discussed by the jurists. Nevertheless, if, even after this period [of waiting], her suspicions about being pregnant are strengthened, the waiting must continue. This would be the case even if the child dies and remains the womb of the mother...A term of four years is the most generally accepted. Still even if the said term of four or five years passes and without the suspicion [of pregnancy] being further illuminated, the woman must abstain from remarrying anew, and she must abstain until all doubt has vanished.” The judge refers to many other Maliki jurists and commentators on Khalil--including Brahim Sheberakhiti ([insert other names]... ---who all repeat same opinion: that whenever a widow or divorced woman is in doubt about whether or not she is pregnant, she must wait the longest waiting period of four or five years. In the event she does remarry and gives birth, the child is attached to the first husband, and the second marriage is annulled. The Qadi thus affiliates the child to the first husband Mohammed el Kebir. In 1866, the French Court of Appeals of Algiers reverses this decision and affiliates the child to the second husband.

In a third case from Algeria, a woman from Aflou is repudiated in January 1913. She returns to live in the town next to Laghouat, where she makes known that she is pregnant. Towards the end of 1916, four months after remarrying, she gives birth. When her first husband dies in 1929, she brings a claim to court requesting that paternity of her son to her first husband be recognized.

Finally, it should be noted that the records of some judicial councils show that while in Maliki jurisprudence, pregnancy can last for five year, in some geographical regions, the sleeping baby can sleep indefinitely. In a judgment (*ḥukm*) from the records of these cases we read that “[T]he belief in the sleeping baby is admitted in Zayan territory (*naṭaran ila l’atiqād Zayān bi-l-janīn al-rāqid*),” and that “[T]he period of time during which a sleeping baby can remain sleeping in the womb of its mother has never been determined for the Zayan people (*wa naṭaran ila ān muda ruqūdihi ghair maḥduda ‘aindhum*).”²⁵ Fetuses can sleep for the entirety of the mother’s lives: “As for the belief in the sleeping baby, there is no period of time for which it is no longer possible. There are women who, for the duration of their life, have a sleeping baby in the womb.”²⁶ The woman can still remain pregnant as long as she has even a doubt.²⁷ It is the woman’s oath, supported by the oath of her mother or sister to which the judicial council defers.

In the next section I will discuss the oath and testimony of free women in a number of cases from the region of Khenifra.

²⁴ Khalil, Mukhtasar

²⁵ *Majalla*, 56

²⁶ *Majalla*, 57

²⁷ *Majalla*, 57

III. The Oath of Free Women : Sleeping babies in the Middle Atlas Mountains²⁸

A number of cases of contested paternity from the courts of the people of Zayan in the Middle Atlas Mountains from the mid-1930s show how for free women, evidence for the existence of the sleeping baby is tied to their testimonial oath about the reproductive functions of their own bodies, and to the sensory expertise of Moroccan midwives (*al-qāblat*). According to custom in this region of Khenifra, in cases involving pregnancy, sleeping babies and contested paternity, the law defers to two oaths taken by the mother. In the case where a woman remarries and gives birth to a child six months after the remarriage, and the paternity is contested, the woman's testimony is what counts (*faqawl qawl al-mar'a*).²⁹ "It is thus she herself who designates the father of the child, supporting her contentions by an oath accompanied by the oath of her mother, or if [the mother] is no longer living, her sister. (*Fatadhkaru hiya man huwa ābūhu wa tushid qawlaha biyamīniha wa yamīn ummiha aw yamīn ukhtiha in mātāt ummuha.*)"³⁰ In practice, this generally meant that the woman diagnosed herself as being in a state of pregnancy and designated the father.³¹

Midwives are also used in the customary tribunals to determine whether there was a pregnancy or the presence of a sleeping baby. In one case, a husband who had divorced his wife and suspected that she was pregnant called upon two midwives to examine her. To the judicial council (*jamā'a*), the husband says : "About eleven months ago, I divorced Aziza Bint Mohh, the defendant. At the time of the divorce, I had her visited by two midwives to determine whether she was pregnant by my doing. The answer was affirmative...About a year and two months later, she gave birth to a child of masculine sex. I asked that the child be attached to me..." In response, the wife, Aziza, declared to the court that her ex-husband was lying by claiming to be the father of the child. According to her, the child was not a sleeping baby and was conceived in the bed of another man, Abbas ben Brahim.³² In its judgment the judicial council wrote: "Since the woman has not recognized the petitioner as the father of the child Mohammad; since the petitioner has not proven his good faith; the council decides to follow custom in deferring the oath to the mother and her mother."³³ In a second case of contested paternity after divorce, another judicial council of the same region defers to the oath of the mother and her mother, granting paternity to the man designated by the mother of the sleeping baby.³⁴ And in yet a third case of contested paternity with a sleeping baby claim, the judicial council confirms this custom: "In total absence of proof, the Council decides that the woman will take an oath with her mother who is still living, to confirm her claims...Once the oaths have been taken, the child will be attributed to Omar, actual husband of the defendant [--i.e., the mother of the child]."³⁵

²⁸ These cases are partially recorded in the Majalla, Chapter Four, On Judgments, pp. 54-61

²⁹ Majalla, 57

³⁰ Majalla, 57

³¹ Majalla, 57; *Remembering that the state of being pregnant (hāmīl) here is described as "a fetus that is found in her womb or her thoughts." (...al-janīn aladhī mawjūd fī baṭniha aw fī ḡanniha y'atabr wuld zoujuha...)*

³² Majalla French 59

³³ Majalla French 60

³⁴ Majalla French 60

³⁵ Majalla French 60

In another case of contested paternity briefly discussed above in a previous section, the mother, Fatima Itto Qasso, who had been married four times, wants to attribute paternity to her fourth husband, the man to whom she was married at the time of the dispute. Her first husband brings her to court claiming paternity of the child. In this case, Fatima's mother had passed away, and the second oath fell to her sister. However, her sister and a female cousin both refused to take the oath, saying that Fatima had already told them that the child belonged to the petitioner, the first husband, Haddou. In this case, Fatima claims to the Council that there was a sleeping baby at the time of her divorce with Haddou. She states that the sleeping baby (*al-janīn al-rāqid*) was from the loins of Haddou (*min ṣulb ḥaddou*), her first husband, but that “the sleeping baby died as a result of an accident (*al-janīn [al-rāqid] saqata bissabab 'āriḍ*).” The baby that was to be born, she said, came “from the loins of her present husband.” She adds that she never informed him about the sleeping baby at the time of the marriage because it was no longer in existence.³⁶ She states: : “The seed-being that I was bearing in my womb fell accidentally during my last visit with Haddou. The child who was just born can only belong to my current husband, who was never told about the existence in my womb of a sleeping baby.”

The judicial council acknowledges her testimony, but in its judgment states that without a second oath of a sister, mother or even another female relative, or without proof from a midwife, Fatima Itto Qasso cannot prove that the sleeping baby ever fell by an accident, or that the child Mohammed to whom she gave birth is not that sleeping baby.³⁷

In the case above, the sleeping baby that “fell by accident” shows how the discourse of the sleeping baby may have covered abortion and a variety of scenarios of miscarriages, including those caused by the mother or a third person. Abortion in Islamic law before the formation of the postcolonial state technically belonged to the realm of penal law—however, it functioned more like a tort. In Islamic jurisprudence, the accidental or purposeful death of an unborn fetus is an instance where a person other than the mother causes a woman to have an accident and miscarry. In this event, the family of the person who caused the miscarriage would be liable to pay a certain amount of money to the father for the death of the fetus. I did not come across any cases of abortion per se, where a party came to the law seeking blood-money for the death of a fetus in the womb.

The ability to legally diagnose oneself as pregnant (“in womb or in thought”) and to designate the father under the conditions mentioned above gave free women a counter-power over pregnancy and paternity. The law accommodated different temporalities. Here in the judicial councils of the Middle Atlas Mountains, women were given infinite time until their death. In other regions, as we saw in the previous section, women were given five years. Yet, while the law accommodated different temporalities, it did not give it to all women. In the next section I will discuss how Islamic law and society in Morocco did not always give time to slave women.³⁸

³⁶ p 55

³⁷ Judgements of the Shariatic jurisdiction declare that “testimony taken in customary berber form is valid in front of the Shariatic jurisdictions” (9-26-53) le revue marocaine de droit;

³⁸ majalla 57, yr photo 6551: *idha qālat al-mar'a innaha ḥāmal fī-l-janīn aladhī moujoud fī baṭaniha ou fī tanniha y'atabr wuld zoujuha al-muṭlaq*

IV. “The Name of the Father” –Sleeping Babies and Slave Mothers in Morocco³⁹

It was not only in the mountains of the Middle Atlas that women invoked rights to paternity for their living or unborn children, to inheritance, and to maintenance. The final sleeping baby case I will discuss involves a freed slave woman with a sleeping baby who seeks an inheritance for herself and her son... based on paternity through concubinage from the heirs of her deceased master’s estate. These heirs include the master’s other two daughters, and the Public Treasury (*Beit al-Māl*).⁴⁰

In 1334/1919, in the *Sharī‘a* Court of Appeals of Rabat (*Majlis al-isti’nāf al-sharī‘ al-A‘lā*), Ms. Mabarka, a freed slave mother who had been manumitted through child-bearing by her master al-Haj S’aid al-Azzemouri (*al-sayyida mabāraka mustawalida al-haj sa’id al-azemmourī*)⁴¹ claimed her right to an inheritance for herself and her son from the estate of Mr. al-Azzemour based on a sleeping baby claim. In its judgment the Court of Appeals states that the declarations of the freed slave mother (*al-um al-mustawalida*) regarding paternity of the child and her pregnancy are to be accepted in cases where she gives birth after the death of her master (*al-qawl qawl al-um al-mustawalida idha ātat bi-l-wuld b’ad mawt s’ayyidiha*). The jurisprudence from the case compares the speech of slave mothers and the “best quality” concubines to ordinary female slaves who are purchased “solely for the purpose of cohabitation.” In its discussion of the issue, the speech and testimony of the latter group of female slaves are given no legal value, since they do not have the same rights of the body as free women. However, slave mothers, through giving birth to their master’s children, acquire rights over their bodies such that speech about the reproductive aspects of their body and pregnancy is productive of legal knowledge.

While space does not permit for a robust discussion of slavery and gender in Islamic law in general, or in Morocco in particular, a relatively brief elaboration on slavery, women and the law in Morocco during the colonial period will help to

³⁹ When studying gender in the Islamic world, women in a specific geographic local and historic time should not be constructed through the lens of an unhelpful essentialized and fetishized category such as “Muslim women” or “Moroccan Women.” Not only is this group an incredibly heterogeneous one, such that other equally important (historical, social, political and economic) distinctions such as free woman and slave woman disappear, but it erases the existence and identities of other women. For example, migrant domestic workers from South East Asia in contemporary Lebanon, Jordan and Saudi Arabia are equally “Women in the Islamic world.”

⁴⁰ A welfare and pension institution in Islamic society, the Public Treasury (literally the “House of Money” *Beit al Māl*) was considered to be owned by the entire Muslim community. It responsible for administration of taxes in early Islamic states, and for administering charity (*zakah*) and other public tax (*jizya*) revenues for public works including income to the needy and care for the poor, orphans, elderly, disabled and sick. See Patricia Crone. 2005. *Medieval Islamic Political Thought*. Edinburgh University Press.

⁴¹ Records for this case can be found in: “Judgment 45.” Morocco. 2009. *al-Aḥkām al-ṣādirah ‘an Majlis al-Isti’nāf al-Sharī‘ al-A‘lā (1914/1332-1919/1336)*. Rabat: al-Mamlakah al-Maghribīyah, al-Majlis al-A‘lā. Original Arabic manuscript of judgment from lower tribunal, with French translation/commentary are in Milliot, Louis, Medjlès Al-Istinâf, and Maroc. Tribunal du ministre chérifien de la justice. 1920. *Recueil de jurisprudence chérifienne*. II, Tribunal du ministre chérifien de la justice et Conseil supérieur d’Ouléma (*Medjlès Al-Istinâf*). Paris: Ernest Leroux. Manuscript in Arabic nos: 228-230, p. 273-9.

contextualize the case, which centers around the claims and testimony of a woman who is a slave.

Paternity cases in Islamic history often dealt with slave women who bore children by their masters. Jurists frequently discussed various aspects of the legal and ritual status of slave women in general, and the slave mother—the *um walad*, in particular. Disputes about the rights of paternity “are said to have been common in Arabia since pre-Islamic times.”⁴² Many of the early paternity disputes in the Islamic context involved the children of slave women, who were sometimes also prostitutes, or who were married to other slaves while simultaneously performing as the concubines of their masters. Since the children of slave women who weren’t fathered by a free man could be considered property/commodities, opportunities for conflicts related to paternity proliferated.

Legal scholars of Islamic law argue that the legal position of slaves generally reflects the actual conditions of slavery.⁴³ The nineteenth and twentieth trans-Saharan trade in slaves has been questioned by Moroccan intellectuals, such as Ahmad ibn Khalid Al-Nasiri, who criticized the practice of enslaving Muslims from the Western Sahara, questioning the doubtful legality of concubinage, as well as the integrity of the slave traders.⁴⁴ Yet, even if the Islamic laws on slavery were not always upheld in practice, Islamic jurisprudence helps to depict the normative atmosphere in which slavery took place. As discussed in the first chapter, insofar as many aspects of Islamic law and legal scholarship were separated from the political power of government, but not from ethics, this normative atmosphere induced greater conformity of its subjects with less violence.⁴⁵

From the point of view of Islamic jurisprudence, the slave is a legal person with diminished rights and obligations. Slavery originates through birth or through captivity in war. Only non-Muslims who are not protected by a treaty or safe-conduct can be slaves, or captured as slaves. Owners must fulfill their religious duties towards slaves, meaning that they cannot overwork them, and must give them sufficient rest. If slaves are abused, they can lodge a complaint against their master, and be resold if the owner persistently violates his duties. Slaves could buy their freedom by signing a legal contract obligating them to pay off their price in installments (after which he or she would be known as *mukātab/a.*) Manumission (*’itk*) in Islam was considered meritorious. After being freed, a slave could reach high social status.⁴⁶ Slaves could own property and marry with the permission of their owner, but were legally regarded as inferior and their testimony not given value in court. Though the master had a legal and religious obligation not to ill-treat his slave, this did not imply that slaves had the rights and obligations of free women and men. For example, male slaves were not obligated to pay taxes or serve in the military, and were not punished as harshly, nor protected equally against their owner, under penal law; women did not live under the same restrictions of modesty and were able to move about more freely than free women.⁴⁷

⁴² Rubin. *Al Walad*. 7

⁴³ See Schacht, Schroeter, coulson

⁴⁴ Salāwī, Aḥmad ibn Khālīd, Ja’far al-Nāṣirī, and Muḥammad al-Nāṣirī. 1954. *Kitāb al-istiḳṣā li-akḥbār duwal al-Maghrib al-Aqṣā*. al-Dār al-Bayḍā’: Dār al-Kuttāb. Vol 5.

⁴⁵ See Wael Hallaq: *Sharia: Theory, Practice, Transformation*

⁴⁶ Schacht 129; Schroeter, 201

⁴⁷ *expand on this: rules of dress, fitna etc as this is important for distinguishing kinds of women*

In addition to the doctrinal image of slavery, historical sources on slavery and slave markets in Morocco paint a different portrait of slavery in an Afro-Mediterranean Islamic context, than the one of slavery in the United States, where, for example, agricultural work on plantations for industrial enterprise accounted for the largest percentage of exploited and stolen labor, and where children could be separated from their parents and near relatives in sale.⁴⁸ In Morocco, Jewish and Muslim communities practiced slavery, with the latter acquiring them for the former since slavery is forbidden in Judaism. In major urban areas, slaves were sold in the market (*suq*), typically a square surrounded by stalls where commercial activities took place. In the market, they were sold in a special area reserved for that purpose, such as the *suq al-raqīq* or *suq al-abīd* in Marrakesh, generally held two to four days a week—or in the yarn and thread market (*suq al-ghazl*), such as those in, Rabat, Fez, Ksar el-Kebir and Tetuan. In other towns like Casablanca a caravanserai was constructed specifically for the purpose of slave trade, and in Southern Morocco, slaves were traded at seasonal fairs/sites of pilgrimage (*mawsim*). “In all towns in the interior, slaves were still being sold in the early twentieth century.” Still despite the trade, an American historian of Morocco argues, it was not primarily the revenue from taxing the slave markets that kept the market alive into the twentieth century, but the importance of domestic slavery as a social institution to the Moroccan elite and the Sultan. The public slave markets were closed in 1912 at the beginning of the French Protectorate, and a formal ban on slavery was effected in 1922. While the slave trade came to an end by 1937, slavery continued to exist as a social institution through forms of clientship even though manumitted slaves were legally free to leave their masters.⁴⁹

In Moroccan Urban society during the colonial period, domestic slavery was an important social institution in the households of wealthy elites and the Sultan. “All sources concur that females represented the large majority of slaves imported to Morocco.”⁵⁰ While there are other recorded instances of using slave labor for the construction of buildings or as standing armies, “[m]ost of the slaves sold in the urban markets were purchased by wealthy merchants, notables, and officials or their middlemen. These slaves—female, male, concubines, and eunuchs—were destined to become servants to these wealthy masters...[T]hose who actually possessed slaves represented a small minority and usually maintained no more than a single slave; even fewer would own more than five or six. Female slaves were in the majority, perhaps representing two-thirds of the slaves imported and in the cities they generally served as domestic servants, while in the country they lived lives little different from free

⁴⁸ Of course, domestic and sexual slavery constituted part of the economy of the slave trade, and was equally, if differently, insidious, intolerable, inhumane, and unjust. See MH Camp, Stephanie. 2004. *Closer to Freedom: Enslaved Women and Everyday Resistance in the Plantation South*. Chapel Hill and London: The University of North Carolina Press; and Baptist, Edward. "Cuffy," "Fancy Maids," and "One-Eyed Men": Rape, Commodification, and the Domestic Slave Trade in the United States. *American Historical Review*. 106, 5. Dec, 2001, 1619-1650

⁴⁹ Jacques-Meunié, J. 1947. Les Oasis des Lektaoua et des Mehamid: Institutions traditionnelles des Draoua. 397-429

⁵⁰ Schroeter, Daniel J. 1992. "Slave markets and slavery in Moroccan urban society". *The Human Commodity: Perspectives on the Trans-Saharan Slave Trade* / Ed. by Elizabeth Savage. - London : Cass. 185-213.

women....”⁵¹ This type of slavery made Joseph Schacht, a modern scholar of Orientalist studies of Islamic law, remark that the “Islamic law of slavery is patriarchal and belongs more to the law of family than to the law of property.”⁵² While this understanding of domestic housework and the work of reproduction would benefit from being placed under the lens of feminist critique, the remark is helpful insofar as it confirms the predominance of a domestic form of slavery in which slaves were often incorporated into kinship networks as members of the family.

Slavery, and the rights and obligations of masters and slaves, male and female, was thus a subject of considerable discourse in Islamic law. Slavery and concubinage was accepted by Islam, and slaves were supposed to be well-fed and clothed.” 201. A late nineteenth century illustrated travel narrative written by an Italian novelist and poet, Edmondo Amicis, “*Morocco: Its People and Places*” represents through an erotic and colonizing gaze, two slave women in Fez wearing intricate clothing and adorned with jewelry in the house of a man, the “Moor Schellal” who invited him in for tea:

On the opposite side of the court there was a black slave girl of about fifteen, having on only a sort of chemise, which was open at the side as far up as the hip, and confined around the waist with a girdle, the slenderest, the most elegant, the most beautiful female creature (I attest it on the head of Ussi) that I had seen in all Morocco. She was leaning against a pilaster with her arms crossed on her bosom, looking at us with an air of supreme indifference. Presently there came out of a small door another black woman, of about thirty years of age, tall in stature, of an austere countenance and robust figure straight as a palm tree; who, as it seemed, must have been a favourite with her master, for she advanced familiarly, whispered some words in his ear, pulled out a small bit of straw that was stuck in his beard, and pressed her hand upon his lips with an action at once listless and caressing that made the Moor smile. Looking up, we saw the gallery on the first floor and the parapet of the terrace fringed with women’s heads, which instantly disappeared. It was impossible for them all to belong to that house. Just as we were gazing upwards, three ghost-like forms passed us by, their heads entirely concealed and vanished through the small door.”⁵³

There is an illustration on this page entitled, “Negro Slave of Fez,” showing the face and bust of one of the two women he describes. The woman wears chandelier earrings and a beaded necklace, her neck and décolleté are visible.

The various labors that female slaves performed include various forms of housework and service, child and adult care, and sex labor. This work, with the exception of sex labor, was not necessarily different from work performed by non-slave servants.⁵⁴ Through biological-reproductive labor, or sexual slavery resulting in the birth of living children, women who were female slaves could buy freedom for themselves and their

⁵¹ Schroeter, *Slave Markets and Slavery in Moroccan Urban Society*

⁵² Schacht, Joseph. 1982. *An Introduction to Islamic Law*. Oxford: Clarendon. 130

⁵³ De Amicis, Edmondo, and C. Rollin-Tilton. 1882. *Morocco; its people and places*. New York: G.P. Putnam's Sons. 298-300.

⁵⁴ Tawfīq, Aḥmad. 2008. *Les voisines d'Abou Moussa*. Paris: Éditions Le Fennec. Or in English: Tawfīq, Aḥmad, and Roger M. A. Allen. 2006. *Abu Musa's women neighbors: a historical novel from Morocco*. Sausalito, Calif: Post-Apollo Press.

children. Concubinage was one function served by slaves in the homes of the wealthy, or in the harem of the Moroccan Sultan. It was common for men to have concubines or marry slave women. The offspring of concubines were regarded as free at birth and would subsequently receive an equal share of the father's inheritance. The female slave who bore her master a son was also considered free, and the master was not allowed to sell her; she in turn was obligated to serve him. Those female slaves without children could be sold or inherited if the master died, but often female slaves were manumitted at the death of the master.⁵⁵

V. Judgement # 45

I am now in a position to fully explore the jurisprudence of Ms. Mbarka's case, which comes from the records of the *Shari'a* Court of Appeals in Rabat, and was heard there on the 6th of Ramadan 1334/ 7th of July 1916.

The case had arrived at the Court of Appeals after having being heard between 1913-14 by the Court of the First Instance of Azzemour, a city about 55 miles Southwest of Casablanca. The case was brought to court by Mr. Hamaleny Ibn 'Allal, the "*Bou Mawarith of Mazagan*"—that is, the functionary and representative of the Public Treasury (*Bayt al-Māl al-Muslimīn*) of Mazagan, a port city 20 miles south of Azzemour. As a representative of the Bou Mawarith of Mazagan, Mr. Hamaleny Ibn 'Allal brought a case against Mrs. Mbarka, one of the heirs of the estate of a recently deceased man, Al-Haj Said Al-Azemmouri.

Said Al-Azemmouri died some time in the latter half of 1330-1/1912. Following his death, Mrs. Mbaraka, "a female slave of the deceased" had declared herself pregnant with a sleeping baby by her master Al-Azemmouri. Pregnancy in Islamic law suspends the division of an inheritance. Nonetheless, the division of the inheritance took place. Al-Azemmouri's two daughters, Fatima and Zohra, and the Bou Mawarith divided the inheritance, after common agreement and the necessary legal procedures.⁵⁶ A representative of Mbarka made a complaint to the *Sherifiën Makhzen*, through the "Minister of Justice (Vizir)", and made it known that the child with which she was pregnant was the *'asab* (agnatic blood heir) of his father, and that the division of the inheritance must be suspended by the existence of a pregnancy.⁵⁷ The Minister ordered that the child be given his hereditary share upon being born. Approximately one year after the death of the Said, Mbarka gave birth to a son she called Said, after his father. When she asked for the inheritance from the Public Treasury, it refused to give it to her.

⁵⁵ Schroeter, *Slaves and Slave Markets*, 200-201

⁵⁶ The inheritance is listed as 11, 959 riyals

⁵⁷ The Makhzen is a royal, monarchical institution dating from pre-colonial Morocco that was kept in tact during the colonial period and has survived into the postcolonial period. The Makhzen is pre-colonial Morocco was a unique form of limited statehood, associated with the notion of a ruling elite, deriving its power in part from a claim to authority based on religion and God tied to noble family lineage, and in part from belonging to the Islamic community of believers. The Sultan was the head of the Makhzen and some towns and other collectivities paid taxes to the Sultan, while others refused. Temporal State power was based on a system of personal loyalty to the Sultan that was exchanged for protection and partial autonomy. There was thus only partial, fragmented power and statehood, since there was also great resistance to and fighting against the Sultan, his taxes and his army.

This was the occasion for the Bou Mawarith to lodge a complaint in court, to keep the share of the Public Treasury's inheritance from being re-allocated due to the addition of a new heir. In his argument, the Bou Mawarith, does not call into question the existence of sleeping babies, or whether Mrs. Mbarka was pregnant with one, but rather questions whether Mbarka's child deserves the legal paternity given her status as a slave.

In court, Mbarka declares that she was already pregnant by Al-Azzemouri, and that she gave birth to a child one year after his death. In support of this allegation, she produced the attestation of twelve witnesses (*shahāda lafif*—a customary form of witnessing specific to Morocco), whose depositions were verified by the Court.⁵⁸ In their depositions, the witnesses all declared that Mbarka was the “mother of a child who was conceived by way of the deceased and who survived the latter's death.”

In addition to this *lafif*, a number of people came before the court to testify. Two midwives declared to the court they assisted Mbarka on the afternoon of *Eid al-Fitr*, at the birth of a male child whom they called Said, after his father.⁵⁹ The midwives testified that the child was alive when born and still living at the moment of their testimony.⁶⁰

Another document, corroborating the midwives testimony, showed the non-verified depositions of another twelve witnesses (*shahāda lafif*). According to these witnesses, Mbarka, “pregnant at the moment of the death of Said, gave birth on the day of *Eid al-Fitr*, after the afternoon prayer (al-asr),⁶¹ to a living child, who was named after his father, and who still lives.⁶²

Two other midwives testified that they had examined Mbarka after the death of Al-Azzemouri, and did not find a sleeping baby. Rather, they “found the presence of a fetus, malformed and without life.” However, the expression “malformed and without life” was scratched out on the document that certified their testimony.

Additionally, a public “just witness” attached to the court (*adoul*), established that the deceased died leaving the two daughters Fatima, and Zohra, as well as a female slave who was pregnant by him, and who gave birth to a male child posthumously, the latter receiving the name of his father.⁶³

After gathering and hearing the evidence from the two parties, the Qadi of the Court of the First Instance issued the following judgment on 12 Ramadan 1333, 24 July 1915:

The deceased died, survived by his two daughters, and leaving a slave who declared herself pregnant by her master, and who gave birth to a male child after the master's death. The child received the name of his father. These facts are established by the testimony of the adoul and the testimonial *lafif* produced in evidence. The Bou Mawarith contested these

⁵⁸ *Recolée* is the process of reading to witnesses in a proceeding the evidence that they have given to see if they persist. This happened on 8 qa'da 1331/ Thursday October 9, 1913.

⁵⁹ *Eid al-Fitr*, means “A celebration to break the fasting”--and is the Muslim holiday marking the end of Ramadan, the holy month of fasting.

⁶⁰ Their testimony was given on 17 Shawwal 1332/8 September 1914.

⁶¹ *Salah* or *Salat* is the practice of ritual formal worship in Islam. Sunni Muslims pray five times a day, measured according to the movement of the sun: near dawn (*fajr*), after midday has passed and the sun starts to tilt downwards / Noon (*dhuhr* or *ẓuhr*), in the afternoon (*asr*), just after sunset (*maghrib*) and around nightfall (*'isha'*). See Fazlur Rahman, *Islam*

⁶² The document was dated 10 chawal 1332/1 September 1914.

⁶³ dated 24 rabi' II 1332

facts by declaring the evidence inoperative, since, the proof of a positive fact outweighs that of a negative one. The hadith says: “Al walad l’il firash” The child belongs to the conjugal bed.

After reviewing the matter, the qadi judged that the ruling of the *Makhzen*, that Mrs. Mbarka’s son is an agnatic heir (*‘asab*) is in conformance with the law, given that the genealogy of the child is established and that the law is rigorous in that which concerns paternal disavowal (li‘ān):

According to a *hadith*, a man wanted to disavow his son due to his dark skin. The Prophet prohibited him from doing so, giving the reason that the color of the child’s skin could be a return of hidden heredity (*Naza’ahu ‘arq*).

Furthermore, in Maliki doctrine, pregnancy can be prolonged for five years when there is a sleeping baby. The Qadi of Azzemour then quotes the Mi’yar of al-Wansharishi:

A number of authors are of the opinion that if a man has had licit relations with a woman and if, six months after, the woman has a child, he must be declared the father if he was able to be with the woman and if he is one who can accomplish the sexual act.’ This would be the case even if this [slave] woman declared herself pregnant and had a child, one, two or three years after the death of her master. The latter is the reputed husband and the filiation is certain... These are the principles of the *Sharī‘a*.

The Bou Mawarith then appealed the Qadi’s decision to the Court of Appeals.⁶⁴ During the appeal, he tried to prove that “the slave was never actually pregnant” by producing a number of testimonial declarations of midwives who put Mbarka’s pregnancy into question.

A declaration dated 7 hijja 1331 of two midwives who attested that it was a malformed and aged “already old” fetus. However, one of the two midwives retracted her declaration nine days later, saying that she herself was not actually capable of discerning a sleeping baby. Two other midwives testified on 7 hijja 1331 that Mbarka was not pregnant at all.

A declaration of two other midwives, dated 4 hijja 1331, which is the double original of the testimony already above and in which the expression “malformed” was crossed out. The retraction dated 18 hijja 1331 by one of the midwives of the declarations of 7 hijja 1331, that she made, she said, was encouraged by her cousin Bou Cha’ib al-Mekki who gave her 10 riyals (currency in Morocco); the slave was never actually pregnant.

The testimony of a court witness (*shahada adoul*) on 18 rabii II 133, announcing that the deceased had died, leaving as heirs his two daughter and the Beit Al-Mal (Public

⁶⁴ In the two sets of records, there are conflicting accounts of who appealed the case. In one set of records it says that Mrs. Mabarka was the appellant. In the other set, it names the Bou Mawarith as appellant. It appears that either the Public Treasury would not pay back the inheritance, which caused Mrs. Mbarka to ask for the case to be reviewed again at a higher level.

treasury). He also called upon a functionary of the Protectorate Service des Domaines to give testimony, who said:

There is no certain evidence/witnessing/testimony of the fact that the slave was pregnant at the moment of the death of her master. Two of the declarations bear the statement of four midwives that the slave gave birth to a fetus, malformed and without life. However, these declarations are contradicted by two other declarations. Islamic law does order us to give the child of the slave mother his hereditary portion, but only on the condition that the deceased had recognized, while he was alive, having had relations with the mother, and that she was pregnant by him. Since no proof of this recognition has been reported, there is no space to include the child as an heir of the deceased.

After reviewing the new evidence, the Court of Appeals issued the following judgment:

The testimonies of men and women, *lafif* and *adoul*, upon which the judgment [of the Qadi of Azzemour] is made, are valid. They agree, on the whole, to declare that the slave Mbarka, pregnant by her master, gave birth to a child a year after his death. These positive proofs are preferable, before the law, to those produced by the Bou Mawarith, which are negative proofs. However, the judge did not cite in the decision the text under which the deceased must be declared father of the child.

We say: and that which we will say replies to the objections presented by the *Service des Domaines*. The solution is implicit in the contention of the *Service des Domaines*, to know that the attribution of paternity to the master supposes that the latter had recognized having relations with the slave. Here, [in the argument brought forth by the Service of the Domaines] it is a question of the slave whose master had not already made her a mother. Ibn 'Achir explains, in conformity with the text of Khalil: 'As the Moudawwana and other works show...If the master has avowed...that when the slave is pregnant...if the master has neither recognized nor disavowed the child due to a quick or sudden death, paternity is not attributed to the child. It is for you to decide in the cases where the mother is of the best quality of slaves, from those who we only buy in order to cohabitate with.' Whereupon a fatwa of Al-Zarqani, adopted by Bannani and which al-Rahouni did not refute, declared that he had also made an exception in favor of the slave whose pregnancy was apparent even before the death of her master; this was a solution which Dasuqi was in favor of.

Seeing that the master had already made a mother of this slave, as is shown in exhibit #1, dated 8 qa'da 1331, the saying of this slave that the child born one year after the master's death is the fruit of said master must be accepted, by reason of the presumption resulting from the fact that she had cohabited with him; owing largely, to the consistent evidence

formerly referred to that she produced. Citing the Moudawwana, Ibn ‘Arafa says: ‘A concubine-mother has accomplished her legal waiting period. Later on, she has a child who is assumed to have been conceived by the master, as she affirms. This latter will be declared the father, while he is living, as well as after his death, as long as he did not, before dying, declare to have not ‘approached’ the slave (for sex) after the death of her husband.’ It is said in the Chapter on Li‘ān: It is clear that this solution is particular to the concubine-mother. This quote was reproduced in the Fath-Al-Rabbani.

From what proceeds, it follows that any ambiguity regarding the judgment is cleared. The filiation of the child [to the father], his death, and the number of his heirs being established, there is place: to annul the first division that occurred without regard for the eventual birth of the child; to give to the child his inheritance, or half of the succession of his father; of this half to give a third to the concubine mother, and the (other half) to his sister Fatima and the other sister being predeceased, and the rest to the Beit Al-Mal which is an ‘*asab*, as long as there does not exist any apparent heir of a closer rank.

In the end, Mbarka ends up with her share of the inheritance according to the rules of succession in the Muslim family.⁶⁵ Her son is granted paternity and thus, as the only son, his share of the inheritance. So, what is the difference, then, between the free woman and the concubine mother if they both end up being able to claim sleeping babies in court? The difference is that for the free woman it is a right given to her through marriage, while for the slave, it depends on the recognition of the father/master. In the jurisprudential discussions in Mbarka’s case, paternity is granted to her child based on the fact that she had already born another child by al-Azzemouri, a child that he had already recognized. This made her according to the words of the Court, drawing on previous Maliki jurisprudence, a slave of the “highest quality,” one whose speech about the reproductive aspects of her must be accepted.

For the free woman, the property right’s respecting her body ensured that she had rights to children and that her husband could not practice birth control without her consent. This was not the case for the slave woman, as all the schools of law permitted slave owners to practice birth control with slaves without their consent. Insofar as the slave woman was “owned” by her master, her body did not entitle her to the same property rights as the free woman. The historian Basim Musallam summarizes the three different trajectories of the law’s treatment of *coitus interruptus* in the following way: ‘(1) with a wife who is a free woman; (2) with a wife who is a slave of another party, man or woman; and (3) with a man’s own female slave, or concubine.’⁶⁶ In the latter two cases, the woman did not need to give her consent.

⁶⁵ See Coulson, *Succession*

⁶⁶ Musallam, Basim. 1983. *Sex and Society in Islam: Birth Control Before the Nineteenth Century*. Cambridge Studies in Islamic Civilization. Cambridge [Cambridgeshire]; New York: Cambridge University Press.

The ambivalent status of the concubine mother embodies the ambivalence between active and passive maternity. They also show that patrilineal uses of sleeping baby are not *de jure* opposed to maternal agency. Comparing the free woman and the concubine mother underscores that the slave woman does not *ipso facto* have the right to claim a sleeping baby in court because of her maternity or biological body.

Indeed, the slave mother occupies an important and ambivalent space in a social category between free women and slave women. Giving birth to a child that her master recognizes as his child means manumission for the slave woman, and freedom for the child.⁶⁷ In this sense, the concubine mother buys her freedom through child bearing, *and* prevents the perpetuation of the system of slavery for her children. The situation of the slave mother in Islamic law is not like that of the slave mother on the plantation, or in US law, as described by Dorothy Roberts in *Killing the Black Body*.⁶⁸ A slave owner could not procreate or rape a female slave with the intent, or effect, of creating children as property or commodities. As Roberts notes: “By bearing children, female slaves perpetuated the very system that enslaved them and their offspring.”⁶⁹

In the cases presented in this chapter, the phenomenon of the sleeping baby encompasses a wide array of issues related to the intersection of the psycho-biological and socio-legal aspects of human reproduction. The sleeping baby is a discourse. At law, it enables certain categories of women, and in some cases men, to be able to make claims that will enhance or maintain their social and economic status. At law, it is also discourse that regulates reproduction. Insofar as it does not overcome gender, class and ethnic politics within the family and society, it may tacitly reproduce them. The sleeping baby in law thus at once reproduces the masculine gender politics of paternity, ruled by the logic of the testimony of the father and social hierarchies, *and* is a possible moment of maternal agency that certain women can use in court to advance or maintain their property rights and socio-economic standing.

While this chapter emphasizes the juridical aspect of the discourse of the sleeping baby, the juridical aspect does not exhaust the discourse of the sleeping baby. Rather, it is but one possible instance of its iteration that is produced within the institutional context of the law. Again, it bears repeating: the sleeping baby also has a life outside the law, its juridical aspect being but one, though certainly important, aspect. The other lives of the sleeping baby discourse in colonial and postcolonial Morocco will be explored in the following chapters.

⁶⁷ Also see Johansen, Baber. “Valorization of Female Body in Sunni Law.”

⁶⁸ Roberts convincingly shows how slave women in the US became machines for the production of commodities. “Legislation giving the children of Black women and white men the status of slaves left female slaves vulnerable to sexual violation as a means of financial gain. Children born to slave women were slaves, regardless of the father’s race or status. This meant, in short, that whenever a white man impregnated one of his slaves, the child produced by his assault was his property” 29 “Wills frequently devised slave women’s children before the children were born—or even conceived.” 34

⁶⁹ Roberts, *Killing the Black Body*, 48.

Chapter Three.

Under the Colonial Gaze: Ethical Forensics, Obstetric Jurisprudence and the Legal Death of the Sleeping Baby in the Mother's Womb

Abstract

Prior to the codification of personal status law in postcolonial Morocco (1957-1959), the veridical discourses of the female body, which constituted the field of Islamic socio-legal discursivity vis-à-vis reproduction, guaranteed the free reproductive woman access to the production of truth about the sexual functions of her body.¹ In the colonial period, access to this veridical discursivity--which until then had been materialized by the knowledge and techniques of Moroccan midwives (*al-qablat*), and conditioned by a regime of evidence and expert witnessing--is wrested from the reproductive woman by a new set of medico-legal discourses that arise in relation to the sleeping baby in the mother's womb (*al-rāqid/l-raged*). Through close readings of expert colonial medical and juridical representations of the sleeping baby in North Africa, this chapter demonstrates how instituting the expertise of the gynecologist in court involved the dismantling of the expertise and techniques of Moroccan midwives, and of the truth value of free women's testimony about the sexual functions of their bodies.² These documents reveal how the colonial jurisprudential argument condemns the sleeping baby only on the grounds that evidence of its existence is anchored to the testimony of women about their bodies. 'Obstetric jurisprudence' emerges in the colonial literature on the sleeping baby as a paradigm for understanding how colonial ideology repeats a gendered logic of imperial domination. The gynecological exam operates as a biopolitical technique of population surveillance that renders "the female body" visible to the public gaze and legible to state law and medicine. The exam, furthermore, functions as a technique that sustains, and is sustained by, gendered and ideological representations of nature. Colonial jurists frame the gynecological expertise that makes the sleeping baby draw its last breath in court as an issue of maintaining public order. Through this analysis of the colonial scientific medico-legal interest in the sleeping baby and the practice of the midwife, this chapter animates a question that is central to my dissertation, namely: Is the free reproductive woman's speech silenced by colonial medico-legal discourse and replaced with a substitutable discourse, or is the entire field of Islamic socio-legal discursivity vis-à-vis reproductive health overlaid with new conditions of normativity and truth telling about the reproductive functions of the female body?

¹ As I discuss in Chapter Two of this dissertation, the reproductive woman constructed in and by Islamic law is ambiguous as a biological category since she is simultaneously a social, political category: the free woman. The slave woman's testimony about her body, unlike that of the free woman, is viable as truth only under restricted conditions. The rules for free women in public and private differed from those of slave women. The status of the female slave's speech is consistent with her status in ritual practices (*'ibadat*). The ritual status of the female slave differed from that of the free woman insofar as ideas of *fitna* and the covering up of the shame zones (*'awra*) were not equally applied or practiced.

² In the postcolonial period, the expertise of the gynecologist is increasingly supplemented by technoscientific, visualizing forms of evidence. See Chapters Four and Five of this dissertation, which discuss how ultra-sounds and DNA testing supplant classical Islamic forms of testimony, oath-taking and physiognomic expertise.

Introduction

Has the constitution of a normal and pathological reproductive female body become a necessary element of modern state power? Have positive, codified law and medical expertise performed the function of the state's midwives? Did the surveillance of reproduction, pregnancy and fertility as the medico-legal control of life emerge as a characteristically modern, colonial form of population management? To begin to answer these questions, this chapter analyzes the French colonial legal and medical preoccupations with the female body and knowledge of its reproductive capacities--that is, with pregnancy, fertility and the phenomena of the sleeping baby (*al-raqīd*, *l-raged*, *bū mergūd*) in North Africa. The chapter studies the specialized writings of French colonial jurists and physicians during the European occupation of the Maghreb region, focusing particularly on Morocco. By investigating how bio-medical and gynecological expertise in courts became a necessary condition for colonial biopolitical management of the reproductive activities of the female body, it suggests the extent to which this management is integral to the colonial apparatus itself.

The chapter follows the itineraries of the colonial medical and legal experts who, in order to speak, wrest truth-making away from the Moroccan female subject and the Moroccan midwife. In so doing, they also take away from her the conditions of possibility of speaking her own body to official law or medicine. This chapter traces the institutionalization of a process of subjectified speaking and listening, and maps the expert discourses that have crafted the only forms of speech, speaker and body that are audible to modern law and medicine.

Much of the chapter focuses on the discourse of obstetric jurisprudence. I demonstrate how it is both a paradigm for understanding the colonial ideology tied to a gendered logic of domination (based on gendered visions of science and medicine in Europe), and a biopolitical technique of population surveillance that sustains such an ideology. This ideology was particular to European gendered politics of nature and the biomedical understanding of the female body as part of nature that could only be objectively interpreted by biomedicine and gynecology. In the colonial writings, the law isolates gynecology as the only form of knowledge (and the gynecologist as the only expert) that could speak truthfully about the female body. This reproductive knowledge and expertise displaced the knowledge, testimony and witnessing of Moroccan women and midwives, and rendered them inaudible to the law and state apparatuses.

The chapter questions the operative force of colonial knowledge and the performance of expertise, first by marking the coincidence between the colonial prognostications of the disappearance of the sleeping baby in the official juridical and medical spheres and its actual postcolonial disappearance. Second, it analyzes how prognostications of the death of the sleeping baby enact a coloniality that assumes epistemological hierarchies and incommensurabilities concerning nature. In particular they represent a gendered politics of nature about the possibilities, and ways of knowing and bearing the reproductive female body.

Colonial juridical and medical expertise conceived of the sleeping baby as a threat to the public order. Medical and legal experts assumed the law's task to be the governing of female sexuality and the reproductive body. By exploring the intertwined roles of

colonial law and medicine in managing this threat, I trace the emergence of a world where law that retains plasticity towards possible contingencies of the female body is replaced by law that disciplines the female body and its reproductive capacities by pathologizing corporeal contingencies. This is a world where women are no longer assumed to be able to speak their own bodies to law or medicine, and where attempts to do so are considered to be ‘false,’ ‘hysterical, and *un-* as opposed to *re-*productive,’

I. The Legal Death of the Sleeping Baby

On November 18, 1955, Morocco proclaimed political independence from the French Protectorate. One of the first legal projects the new state undertook in 1957 was the reform and codification of personal status law, which had until then remained uncoded.³ A ministerial decree created a commission composed of ten men to undertake the project of “collecting,” “reviving” and putting in order the “anarchy” of juridical rules and dispositions of Islamic jurisprudence (*ahkām al-fiqh al-islāmī*) in matters of family and succession.⁴ Drawing on the interpretive traditions of the orthodox Maliki *madhhab* (doctrine, rite, school), the *Mudawwana al-Ahwal al-Shakhsiyya* or Code of Personal Status was promulgated serially in six books between 1957 and 1958. The codification attempted to create a technical object that would secure a normative viewpoint from which the Moroccan Muslim legal subject and judge could understand practices related to the family and succession. “Effectively, for the first time in the history of this country,” insisted Abd al-Karim BenJelloun, Minister of Justice

[w]e have achieved a codification of Islamic jurisprudence in the form of a law (*qanūn*) that responds to all exigencies of modern times while safeguarding the foundations of the religion and spirit of Islam. The profound reform that this law brings to the regime of the family and the promotion that it assures to the feminine condition permits, as a guarantee to this nation, social progress in the context of Islam and in that of the dignity and pride that it has always assured to the woman.⁵

Woman, the family, codified law, progress, Islam: this constellation constitutes an important nexus of power whose itineraries as postcolonial preoccupations will be traced in this and subsequent chapters. The six codified law books covered marriage and its dissolution, birth and its effects, legal capacity and representation, testament, and succession. The codification remained loyal to Maliki jurisprudential norms (too much, or not enough so, according to its critics.)

In addition to translating the *Shari‘atic* and *fiqhic* legal norms into codified form,

³ The French attempted a proto-codification in the last years of the Protectorate. See Borrmans, Maurice. 1977. *Statut Personnel Et Famille Au Maghreb de 1940 a Nos Jours*. Paris. 190-196.

⁴ See Borrmans, *Statut Personnel*, 193-94. The commission included: Muhammad Ben Arbi l-Alawi and Mukhtar al-Susi, ministers attached to the King’s counsel, Allal al-Fasi, who became the Commission’s rapporteur; Muhammad Dawud, member of the Consultative Assembly; Ahmad al-Badrawi and Abd al-Rahman al-Safsawani, respectively President and Vice-president of the High Shari’a Court of Appeal; Mahdi al-Alawi, Advisor to the High Court of Appeal; Abd al-Rahman al-Alawi, President of the Regional Appeal of *Qadi’s* Judgements for Casablanca; al-Hasan ibn bel Bashir, President of the Regional Appeal in Fez, and Hammad al-Iraqi, advisor of the Sherifi High Tribunal.

⁵ Borrmans, *Statut Personnel*, 232.

the commission modified the substance of several pre-existing juristic norms.⁶ Among them was the famous doctrine of the sleeping baby (*al-rāqid/l-raged*). In Morocco and elsewhere in the Maghreb, the belief that a child can fall asleep in the mother's womb (*al-rāqid; l-raged*) is popular.⁷ According to this belief, a sudden traumatic experience or the return of menstrual blood can arrest the development of a fetus in the womb. The fetus will then sleep in the womb for an indefinite period of time until it is awoken by another traumatic shock, sexual intercourse, or spiritual and herbal treatments. As a legal doctrine in Islamic jurisprudence, the sleeping baby admitted protracted pregnancies lasting up to five, and in some cases seven, years after conception. For thirteen centuries until the codification of the *Shari'a* between 1957-59, it had been invoked to validate claims to inheritance and maintenance, circumvent accusations of adultery (*zina*), and legitimately attach children to the patriline (*nasab*) of divorced, widowed or remarried women.

The new *Mudawwana* ended the juridical acceptance of the sleeping baby, going against the majority opinion of Maliki jurisprudence as well as local customs and belief by fixing the maximum legal term of pregnancy at one year. Article 76 of the *Mudawwana* states that if at the end of the year there exists a doubt as to whether the woman is still pregnant, "the judge will have recourse to gynecologists who will help with their science to find a reasonable solution."⁸

Two decades earlier under French colonialism, Maghrebi legal and medical scholars questioned the pertinence of European law, gynecology and obstetrics to Muslim reproductive practices. Muhammad al-Hagwi, an illustrious legal scholar (*faqih*) and Moroccan Minister of Education under the French Protectorate, was invited to hold a conference in Tunisia which was broadcast on Tunisian radio, later published in his book *Three Letters; Renewing the Sciences of Religion (Talat Rasa'il; Tajdīd 'ulum al-din)* and reprinted in the Tunisian journal *Al-Nahda*. During this conference, Al-Hagwi adamantly defended the sleeping baby, which he recognized as a "juridical, social and medical" phenomenon.⁹

Drawing on the Islamic jurisprudential repertoire, al-Hagwi embarks on a comparative study of law, medicine and pregnancy, comparing the periods of gestation in historical *fiqh* literature to those found in ancient Roman and modern French law. Without denying the significance of modern French law and medicine for French women, his argument questions their applicability for Muslim women. He asks modern law and medicine not simply to negate the possibility of a prolonged gestation when studying the female body and its reproductive capacity, but to account holistically for reproductive

⁶ *Shari'a* refers to the divine law whose primary sources are the Qur'an and the Sunna (sayings and deeds of the Prophet Muhammad) and whose secondary sources are communal consensus (*ijma*) and analogy (*qiyas*). *Fiqh* or Islamic jurisprudence refers to the human interpretive practice, the science of the law and interpretive methodology that derives a spectrum of norms from the primary and secondary sources.

⁷ See Joel Colin. 2003/1. Au Maghreb un contre-pouvoir du côté des femmes: l'enfant endormi dans le ventre de sa mère. *L'Année sociologique*, Vol. 51, p. 109-122; Willy Jansen. 2000. "Sleeping in the Womb. Protracted Pregnancies in the Maghreb. *The Muslim World*. 90: 218-37. Camille Lacoste-Dujardin. 2008. *La vaillance des femmes. Les relations entre hommes et femmes berbères de Kabylie*. La Découverte "Recherches." Paris. 69-98

⁸ Borrmans, *Statut Personnel*, 234; Mudawanna al-Ahwal al-Shakhsiyya, Art 76.

⁹ See Al-Hagwi, Abū 'Abdallah Mohammad. 1938. *Three Letters; Reviving the Sciences of Religion (Thalāt Rasā'il; Tajdīd 'ulūm al-dīn)*, 85-90.

practices in particular milieus by remembering the influence of cultural beliefs and customs as well as climatological, natural and material phenomena.

Al-Hagwi's discussion of the jurisprudential aspects of the sleeping baby reveals an understanding of Islamic law's relation to the female body and reproduction as a flexible production of norms that is capable of enveloping empirical contingencies within its purview. The law related to the longest duration of gestation is based on juristic interpretation (*ijtihad*), which according to al-Hagwi, offers eight different opinions on the longest gestation period in Sunni jurisprudence.

With the exception of the minority Zaharite school, Islamic jurisprudence not only provides legal opinions based on norms according to statistical majorities, but also allows for the rare, the particular and the exceptional singularity: "Al-Qarafi and others have made exceptions in twenty cases in which that which is rare outweighs the dominant phenomenon."¹⁰ And with the sole exception of the Zaharite school, which sets the period of gestation at nine months according to the principle of statistical majority, all the other schools of law acknowledge the possibility of prolonged periods of gestation, minority phenomena and rare exceptions. Al-Hagwi accuses the Zahirites of weak reasoning and of ignoring one of the fundamental aims of the law, which is to protect the honor of women and preserve the rights of the child to paternal filiation.

When he turns to address the medical aspect of the sleeping baby, he argues that European medicine cannot bring a single tangible argument on behalf on its position against the existence of the sleeping baby. Following a principle in Islamic law that claims that negation has no value in itself, legal or otherwise, he proposes that since the European medical position can only deny the existence of the sleeping baby, it cannot constitute real evidence against the sleeping baby's existence and is only a refutation of knowledge that is without value. Furthermore, he argues, the argument against the existence of the sleeping baby is based on logical induction, which again cannot account for exceptions, or singular and rare phenomena.

By positing that variation in the individual can only be understood in terms of cultural specificity, and by demanding that law and obstetrics be practices of local knowledge that take care to understand the particularities of specific lived experiences in particular environments, and to understand the role of the individual in her milieu, Al-Hagwi argues for a kind of cultural relativism in law and medicine. He clarifies:

European doctors have concerned themselves with women who live in cold countries, countries where magic is not known and where physicians ignore its existence and what it signifies. In underdeveloped countries—as they say—we find women who are quite skilled when it comes to 'sleeping' the fetus, and are experts of an undeniable efficaciousness in the preparation of medicinal plants...The physicians are struck dumb when they see what is engendered by the jealousy resulting from polygamy, etc. (...[A]nd remembering that monogamous society is not exempt of such problems). The [European] physicians claim that the fetus is an organism in the process of growing that, like a fruit, when the time arrives for its fall, drops from its tree. We respond to them that disease and vulnerability can create obstacles to growth and that the comparison that they make between the fetus

¹⁰ Al-Hagwi, *Three Letters*, 85-90.

and the fruit is imprecise. Why not compare the fetus to plants and trees whose growth stops if disease or weakness arises?¹¹

According to al-Hagwi, legal and medical practices should approach human reproductive practices—sexuality, fertility, sterility, conception, pregnancy and birth—with an understanding of particular cultural dynamics and individual vulnerabilities. Furthermore, he adds, when it comes to the domain of creation, the imposition of French law and medicine upon the North African colonies constitutes an injustice to North African women. They will be dishonored or accused of lying, and the expertise and practices of knowledgeable women will be questioned.

Al-Hagwi's thoughts echo those of other North African scholars in an 1880 conference in Algeria who argue that with respect to reproduction, the rules of secular science "cannot constitute an immutable rule...[T]here is no space to reckon with the divine will, and with the phenomena of nature."¹² To admit French law and medicine would be to cause women's speech to be falsely accused, and to suggest that they are dishonest. The woman would suffer and be dishonored. In addition, when it is remembered that fornication is a crime under Islamic law, she may even be punished for a crime that she did not commit. In the manuscript from the conference, an Algerian interpreter Monsieur Brihmat, fleshes out the contours of this perspective:

These contestations of the state of Muslim legislation that literally contradict French legislation have not left the Arab scholars indifferent. Also, it is with eagerness that I always seize the occasions that are offered to me to know the state of the soul of my co-religionists on analogous questions. Generally speaking, the Arab scholars make a supreme tribute to the princes of medical science: the hygienists, the psychiatrists, in one word, all that is done in service of humanity is the object of their admiration. But they have become intractable ever since science has made its incursion into the domain of the Creator. They deny science any kind of competence in these matters and multiply to infinity the examples of error that have been committed because of it. When we point it out to them that science did not decide on such delicate subjects until it had many times repeated its observations, they would respond uniformly that the observations, in such a case, however precious they may be, cannot constitute an immutable rule, and that *there is space to reckon with the divine will, and with the phenomena of nature*. And from this point, they immediately foresaw the consequences of such a rule of law: admitting this limit, that of French law, is to throw trouble and dishonor to families, to bring the gravest accusations against the wife, to expose her to a punishment for a crime that she may not have committed. I have not met a single Muslim scholar who diverged from this tone. I confess to you, gentlemen, that without sharing with the same intransigence the opinion of my coreligionists on this delicate point, I do not

¹¹ Al Hagwi, *Three Letters*, 91.

¹² See M. Brihmat, "Manuscript from Conference in Algiers," 16-17, quoted in Bosquet, G.H, and Jahier, H. 1946. "L'enfant endormi. Notes juridiques, ethnographiques et obstétricales." *Cahiers médicaux de l'union française: Revue medico-chirurgicale de la France d'outre-mer*. Vol. 1, 9-27.

think they are all wrong. Convinced and tolerant believers, they support their arguments insofar as it is owed to the divinity not to scrutinize secrets that can vary. I respect this manner of seeing without sharing it.¹³

Brihmat ventriloquizes a particular perspective of the ‘Arab scholars’ that is consistent with the logic of al-Hagwi with respect to a normative understanding of law and science’s relation to the production of norms based on understandings of nature. The production of legal and scientific norms, in other words, must be able to account for singularity, rarity and the exception that may occur in nature or through divinity. Law and science need to remain open and flexible to the empirical. This includes the domain of the creation of life, which does not “constitute an immutable rule,” and is not entirely in human hands, whether or not those hands are trained in medical knowledge. The space that permits the reckoning with nature and the divine will is a space that permits law and science to remain open to the possibility of individual singularity—a space in which anomaly is not necessarily abnormality, but the occasion that produces a new norm.

For thirteen centuries until the codification of the *Sharī‘a*, the sleeping baby had been invoked to validate claims to inheritance and maintenance, circumvent accusations of adultery (*zina*), and legitimately attach children to the patriline (*nasab*) of divorced, widowed, abandoned or remarried women.¹⁴ While the 1957-8 Mudawwana maintained a certain respect for the classical Maliki doctrine by setting the limit of gestation at one year, as opposed to nine months, it nonetheless heralded the legal death of the sleeping baby, seeing to its eventual obsolescence from domain of the law. For thirteen centuries until the codification of the personal status law, the sleeping baby had dwelt safely in Moroccan courtrooms and in the writings of Islamic jurists and scholars.

Towards the end of this time, namely during the period of European colonialism from the late-nineteenth to the early-to-mid twentieth century, the sleeping baby was besieged by colonial medical and juridical apparatuses. Where circumstances permitted the practice of colonial judicial oversight of the religious tribunals, as was the case in Libya, Italian colonial judges overturned judgments that ruled in accordance with the belief in the sleeping baby, calling the *rāqid* a threat to the public order. Such direct intervention into personal status matters was exceptional, in Libya and Morocco as elsewhere in the Maghreb. While the French Protectorate in Morocco created personal status jurisdictions by instituting higher and lower *Sharī‘a* courts in the sixteen major geographical departments, and managed the appointment of *Sharī‘a* judges and the courts’s budgets, intervention did not generally occur at the level of colonial judicial review.¹⁵

While the sleeping baby remained in Moroccan courtrooms until independence in 1956, the North African legal and scientific production of knowledge about and practices related to the sexual and reproductive functions of female body was consistently assailed by colonial obstetricians and jurists. When judicial review did not overturn the judgments of the personal status courts which ruled according to the doctrine of the sleeping baby,

¹³ Brihmat, *Manuscript*, 16-17.

¹⁴ See Chapter One of this dissertation.

¹⁵ Robin Bidwell. 1973. *Morocco Under Colonial Rule. French Administration of Tribal Areas 1912-1956*. London: Frank Cass, 156-61. (*corroborate number of departments*)

French colonial medical and legal experts attempted to explain away the sleeping baby discursively as a problem of theoretical, practical and technical knowledge. The scholarly investigations were accompanied by the actual gynecological examinations of corporeally 'pathological' Moroccan women, a practice which colonial power prescribed as the final solution to the problem of the sleeping baby. This practice was part of an infrastructure of reproductive knowledge, and associated biopolitical medico-legal discipline and surveillance techniques called obstetric jurisprudence. Obstetric jurisprudence sustained processes of colonial subject-formation through a scientific ideology of nature as feminine, and as a dark mirror of the self. This ideology represented one side of a particular European ethical relationship to nature as the site of sin, chaos and corruption.

Obstetric jurisprudence as a field developed in the eighteenth and nineteenth centuries in Europe and in the US as the interface between gynecology and law. In France the policing by the state of female sexuality and reproduction began in the eighteenth century.¹⁶ And by the late nineteenth century in Britain, in a discussion of medico-legal issues in gynecology, the obstetrician Henry McNaughton Jones asked: "Is it not true that the gravest issues, even those of life and death, liberty, loss of character and reputation...frequently hang upon the evidence of the gynecologist?"¹⁷ Jones further complained about "that confident self-assurance which occasionally in the witness-box asserts itself in matters that require considerable and special pathological experience to decide."¹⁸ As historian of gynecology Ornella Moscucci explains in *Science of Woman*, obstetric jurisprudence attempted to "construct a science that could explain woman's nature in its various physiological, moral and social aspects...it was where knowledge about women's physiology and pathology was applied to the regulation of social life."¹⁹ European gynecologists' claims to expertise about medico-legal questions regarding the female body in matters such as illegitimacy of birth, marriage and divorce, rape, abortion and infanticide were new forms of medico-legal authority that had emerged by the nineteenth century. These new claims "implied that the maintenance of the public order depended on the medical surveillance of women's sexual functions. Thus from the medico-legal point of view it was necessary to recognize, for example, the disorders of the sexual apparatus that mimicked the signs of parturition, the abnormalities of the hymen which might be mistaken for rape, the malformations of the female sexual organs that constituted a bar to marriage, the length of gestation and the development of the fetus."²⁰

Obstetric jurisprudence is both a paradigm for understanding the colonial ideology tied to a gendered logic of domination (based on gendered visions of science and medicine in Europe), and a biopolitical technique of population surveillance that sustains such an ideology. This ideology was particular to the European gynecological understanding of nature and/as the female body. The law's relation to gynecology as the only expert knowledge that could speak truthfully about the female body captured other

¹⁶ Ludmilla Jordanova. 1981. "Policing Public Health in France 1780-1815." In T. Ogawa, ed., *Public Health*, Saikon, 12-32.

¹⁷ Henry McNaughton Jones. 1894-5. "A gynaecological question of importance in forensic medicine relating to the hymen." *British Gynaecological Journal*, 10, 38-48.

¹⁸ Henry McNaughton Jones. "A gynaecological question," *British Gynaecological Journal*, 38-9.

¹⁹ Ornella Moscucci. 1990. *The Science of Woman. Gynaecology and Gender in England, 1800-1929*. Cambridge: Cambridge University Press, 10.

²⁰ Moscucci. *Science of Woman*, 107.

forms of knowledge, speech and testimony, and rendered them inaudible to the law and state apparatuses.

The specific techniques of the gynecological examination as legally legible evidence rendered the female body and reproduction publicly visible to the colonial gaze (and palpable to its touch.) Obstetric jurisprudence institutes a public gaze on the female body as the mainstay of legal and medical institutions—the doctor’s office and the court, while the colonial gynecologist claims unique expertise in all matters related to women’s sexual functions. This technique, I would argue, is emblematic of colonial biopolitical operations of population surveillance over birth, contraception and the reproductive labor of the female body.

After thirteen centuries of Islamic jurisprudence, doctrine, custom and belief, what happened to the reproductive woman’s ability to speak truthfully? How as it wrested from her? What happened so that she could be said to be speaking falsely, hysterically, or to be lying or misrecognizing herself? By analyzing the colonial medical and juridical sleeping baby literature, this chapter reveals how the sleeping baby became thinkable in modern positive law and medical science through the categories of fraudulent/impossible female speech, on the one hand, and the sexually or reproductively pathological female body and imagination, on the other. Colonial obstetric jurisprudence introduces a new bifurcation of truth and falsehood corresponding to a European dichotomy of social order/disorder. Under the colonial gaze, the institution of the legally legible gynecological examination emerges as a corrective that operates as a biopolitical technique. This technique functions in two ways. It enables government to surveil and record births to manage the population, and it provides a form of ethical forensics of the female body that can speak to and for the law.

In what sense, then, is the European model of knowledge (obstetric jurisprudence) and associated technique (the gynecological exam) efficacious as a way of controlling and producing a particular kind of female body? What are the effects of colonial juridical and medical predictions about the destiny of the sleeping baby in Moroccan courtrooms? Beyond drawing out the possible connections between the French colonial encounter with the sleeping baby and its expulsion from the local law and science, this chapter investigates the colonial panic in relation to sleeping babies. It examines how colonial knowledge conceived of the sleeping baby as a threat to public order, and the particular rationalities and forms of knowledge it invoked to argue for the sleeping baby’s abolition from law, religious science and local medical practice. Through the systematic critique of Islamic legal and medical practices as an expression of local knowledge and beliefs as they relate to nature and the female body’s reproductive capacity, colonial jurists and medical doctors surrounded the sleeping baby with death, predictions of its extinction and directives on how to extinguish it.

I began with the arguments of Maghrebi Muslim religious and legal scholars, al-Hagwi and Brihmat, in the colonial period. Their overburdened responses, addressed directly to the colonial anxieties over the sleeping baby, reflect how the question of knowledge and expertise—that is, what counts as knowledge and who produces it—emerges in the late-colonial era as a politics of nature—a politico-ethical dilemma in relation to how the law can know the female body.

Al-Hagwi and Brihmat’s arguments stand in stark relief to those of the Moroccan judiciary at the dawn of the postcolonial period, just two decades later. In 1959, Abd al-

Karim BenJelloun, the new Moroccan Minister of Justice, rationalizes changing the laws related to pregnancy and gestation periods after independence. BenJelloun in part adopts the same language and discursive strategy of French colonial jurists in relation to prolonged gestation periods. He complains that in Morocco, the prolonged gestation periods which the jurists (*fuqaha*) have ‘made to last’ for up to seven years are a “problem,” and a “source of misery and suffering” for Moroccan society. He contends, “[F]iliation became an issue of ‘ruses’ that made up the defect of our Moroccan society, since the woman could continue to receive maintenance for as long as long as it was suspected that she was pregnant.”²¹ Although the reasoning here is to protect the husband or relatives of the deceased husband from being taken advantage of, the sleeping baby is understood through the opportunity it may present for fraudulent feminine ruses. In the case of doubt related to any pregnancy, the judge will have recourse to the expert knowledge of the ‘science of woman’--gynecology and obstetrics.

While these issues begin to gesture towards dilemmas of authority in the postcolonial period, the historical focus of the rest of this chapter is the colonial period, when competing authorities (European and Moroccan; medical, legal and religious) lay claim to expertise about the reproductive female body. The rest of this chapter focuses on colonial enactments of expertise and authority. In particular, I examine how Euro-American reproductive-biological knowledge and associated techniques pathologized local experts, as well as their forms of knowledge, techniques and expertise when they did not conform to Enlightenment understandings of nature and the body.

II. Enactments of Expertise Under the Colonial Gaze

In the late-colonial era, the French Medical Union published an article, “The Sleeping Baby: Juridical, Ethnographic and Obstetrical Notes” in a France D’outre-mer (colonial) medical-surgical review journal. In the last pages of this article, the authors, G.H. Bosquet, a law professor specializing in the comparative laws and customs of Islam and H. Jahier, a medical professor specializing in obstetrics, articulate the reason for their interest in the subject matter of the article—namely, the protracted pregnancies known throughout the Maghreb as *al-rāqid/l-raged*, or the sleeping baby in the mother’s womb. According to the authors, the sleeping baby is a threat to the public order. Concurring with a contemporaneous decision of Italian colonial judges in Libya, Bosquet and Jahier tie together an exceptional jurisprudential decision by the Libyan court with the prognostication of the legal death of the sleeping baby. A day will come, they prophesize, when the sleeping baby will be “no more than a memory.” They firmly anchor the prophecy to the European occupation of the Muslim regions in general, and to recent colonial jurisprudence, in particular. Citing the Libyan judges, Bosquet and Jahier explain that only once in a period of a decade of colonial juridical rule in Libya did Italian colonial judges refuse to grant the visa that rendered enforceable the judgments of the Muslim personal status tribunals. The occasion of the refusal was a judgment that admitted the legal doctrine of the sleeping baby, which the court found to be “a threat to public order.”

To better understand the operative force of the colonial epistemologies that inhere in Bosquet and Jahier’s writing, and other extant colonial legal and medical studies on the sleeping baby, it may be helpful to ask: How did colonial Enlightenment

²¹ Quoted in Borrmans, *Statut Personnel*, 234, footnote 158

knowledge constitute itself in relation to the sleeping baby and its complex nexus of custom, religious science, law and belief concerning the reproductive female body and nature's possibilities? How was this nexus constructed as a threat to the maintenance of public order? And what is implicated historically for Europe in the relationship between knowledge of the reproductive female body and the maintenance of public order?

II.1 Colonial Regulation of Law, Justice and Truth about The Female Body and Sexuality

With these preliminary questions in mind, the following sections analyze the connections between imperial power and reproductive practices of the female body; the role of colonial science in the formulation/recapitulation of ideas/practices of sexual difference; and the reframing of the reproductive female body as a natural object in colonial discourse. How does colonial knowledge bears the gendered marks of its imperial circumstances, produced at the intersection of different forms of knowledge and rationality?

II.2 Gynecology as Anthropology: Is Biological Surrealism Midwife to Modern Law?

Bosquet and Jahier's article begins and ends in the future, making prognostications about the imminent death of the sleeping baby. These prognostications perform various historical leaps that *misdiagnose* the present as a means of predicting a future in which the sleeping baby "will be no more than a memory." The prognosis repeats several times in various forms throughout the article and is announced at the outset, on the first page: "The present study aims to review some provisions of this theory (of the sleeping baby) and to refute the ancient explanations so as to finally show how today they are in the process of being abolished."²² And again, to close the article, the very last sentence repeats the prognosis, ending not with a descriptive diagnosis of the contemporaneous state of affairs with respect to the sleeping baby, but with the wish fulfillment of infanticide in the name of the colonial Father, an exercise of the colonial imagination that fantastically conjures up the disappearance of the sleeping baby: "Definitively, we have shown how a legend is born, what juridical consequences it can have, and how, finally, in our days, this curious remnant (*vestige*) of Muslim juridical folklore disappears."²³

What can be the status of this disappearance and these prognoses, particularly from the standpoint of the present moment when, for many North Africans, the sleeping baby remains solidly anchored to the female somatic imaginary and to customs that mediate sexual relationships between men and women?²⁴ This discussion will demonstrate how the normative force of these colonial predictions reflect more the gendered logic of the colonial imaginary and its philosophy of history, more a colonial fantasy of law and medicine as the ventriloquizers and stringent co-surveillants of reproductive labor, the female body and sexuality—and less an accurate description of the legal and medical milieus in North Africa in the 1940s. Legal and medical records (including, quite paradoxically the transcripts of medical examinations performed by Bosquet and Jahier themselves) indicate that the sleeping baby remained strong and healthy both in popular belief, and in Moroccan courtrooms, doctors' offices and midwives' practices at least

²² Bosquet and Jahier, *L'enfant endormi*, 9

²³ Bosquet and Jahier, *L'enfant endormi*, 27

²⁴ See Colin, "Au Maghreb." *L'Année sociologique*, 115-20 and Jansen, "Sleeping in the Womb," *The Muslim World*, 220-25.

until the codification of personal status law in 1957-8.²⁵ The “past explanations” (*les anciennes explications*) of the sleeping baby—whether *anciennes* is translated to mean “former” or “ancient”—were in fact neither “former” in the sense of something surpassed, nor ancient in the sense of something belonging to a previous time. The explanations remained credible both in popular belief and in intellectual discourse, and were still being enacted and relied upon at the time of Bosquet and Jahier’s writing.²⁶ The strength of the belief and the persistence of its enactment were in fact one of the main reasons for their intervention. The sleeping baby was not, therefore, a “remnant,” trace or relic (*vestige*) of something belonging to the past. Rather, it was a practice, belief, custom and law that revealed a particular worldview contemporaneous to the time of their writing—which they understood as incompatible with their own worldview. As the first part of this chapter has shown, the explanations and theories about the *rāqid* were not absolutely “in the process of being abolished,” or “disappearing”—but rather were being repeatedly confirmed and defended by Maghrebi judges, jurists, medical doctors, midwives, pregnant women and theologians—both in the context of everyday life and in response to the attacks that were being launched against the sleeping baby in colonial jurisprudential and medical writing.²⁷ By positing the actual and latent death of the sleeping baby in their present moment—a latency, I would add, that pieces of their very own article belie—Bosquet and Jahier’s juridical, ethnographic and obstetrical analysis attempts to perform the collapse of a belief and its ties to the law and religious science that gave it institutional and rational expression.

What, then, is the operative force of these predictions? And how do they reflect a gendered logic of the colonial imaginary and its philosophy of history? What is the imagined threat that the sleeping baby poses to the colonial imaginary such that it must repeatedly predict and enact its historical end? As we know from the work of Reinhart Koselleck, prognoses about historical time are the “other side” of the philosophy of history.²⁸ It is difficult simply to read the colonial intervention into the sleeping baby as an instance of what Gayatri Spivak calls “white man saving brown women from brown men”—that is, as an instance of constructing the woman as an object of protection from bad patriarchy as a mode of justifying colonial intervention and the civilizing mission.²⁹ It is difficult because even without considering the possibility of the sleeping baby as a

²⁵ Family law cases in the colonial era until codification (1957-9) show that judges not only accepted cases based on sleeping baby claims, but that they also suggested to those seeking relief that they “should have used the sleeping baby” to make a stronger claim for inheritance or property. See J. Lapan-Joinville, 1956. “Les conflits de paternité en droit musulman (rite malékite).” *La Revue Marocaine de Droit*. Casablanca, s.n., Vol. 8, 352-363.

²⁶ Contemporaneous studies represent this situation. See Roger Maneville and Mathieu, Jean. 1952. *Les accoucheuses musulmanes traditionnelles de Casablanca*. Publications de L’Institut des Hautes Etudes Marocaines. Tome LIII. Paris: Imprimerie Administrative Centrale, Editions J. Peyronnet; J. Dujardin. 1952. “Une erreur de diagnostic. Histoire Vraie.” *Maroc Medical*. Casablanca, Vol. 31, 854; and P. Lalu (Ksiri). 1954. “Le mythe de l’enfant endormi, occasion d’examen gynécologique.” *Maroc Medical*. Casablanca, Vol. 33 (349), 642-5

²⁷ Bosquet and Jahier, *L’enfant endormi*, 22-25; Camille Lacoste-Dujardin, *La Vaillance des Femmes*, 85-89; Maneville and Mathieu, *Les accoucheuses musulmanes*, 6-15.

²⁸ Reinhart Koselleck, 1988. “The Philosophy of Progress and its Prognosis of Revolution.” *Critique and Crisis. Enlightenment and the Pathogenesis of Modern Society*. Cambridge, Mass. MIT Press. 9:127

²⁹ Gayatri Spivak. 1988. “Can the Subaltern Speak?” in Cary Nelson, *Marxism and the Interpretation of Culture*, Urbana: University of Illinois Press, 271-315.

feminist practice, what the French colonial ideology and biopolitical techniques served to protect was not the woman as an object of oppression or as a subject of rights and the law. What was consciously at stake for French colonial expertise was the maintenance of a public order that depended on the institutionalization of gendered performances of reproductive labor *through medico-legal practices that surveilled and managed female sexuality and reproductive practices*.

Thus, before analyzing how the sleeping baby is made to disappear in French colonial writings including Bosquet and Jahier's, as well as the meaning of the disappearance, the itinerary of their article is worth mentioning, briefly, insofar as it maps a particular relationship between law and medicine. Both at the level of the logic of the colonial arguments for the legal death of the sleeping baby based on the facts of gynecology, and at the level of how such arguments make Islamic law, religious science and popular medicine mutually indict one another as inept and incompetent practices that lack the reason found in European law, science and medicine, the condition of possibility of birth and pregnancy becomes the intertwining of the medico-biological and the juridical through the ethical forensic of expert testimony. Though the present discussion focuses on the use of the gynecological examination and a surrealist biological discourse to explain away the sleeping baby, replacing it with the teratological and pathological Enlightenment medical discourses of the reproductive female body, the subsequent section of this chapter will later return to take up the more specifically juridical moments of the colonial analyses of the sleeping baby—focusing on the devaluation of female speech and the practice of midwifery.

Briefly, then, the article begins as an analysis of the comparative “principals of Muslim law related to filiation, and those admitted by French law in the matter,” focusing on the most “surprising” disposition in the “Muslim familial system,” one that cannot be simply legitimated by the “patriarchal conception of the family,” or solved by the formula: “The juridical link of filiation on the paternal side can only be legitimate; on the maternal side, it is always natural.” This most surprising disposition is the theory of the sleeping infant, in light of which “exorbitant” maximum legal periods of gestation wholly surpass natural ones, including the extreme ones, with the result that children are attached to a marriage from which they certainly did not issue.³⁰

The article canvasses the juridical norms related to gestation periods given by the various schools of Islamic doctrine (sing: *madhhab*; pl. *madhahib*)—orthodox, heterodox, and Shi'ite—and notes that the belief also has independent origins in North African customs. But, they ask, what explanation can really be given for this phenomenon such that it persists so strongly in the juridical sphere? The juridical explanation for the sleeping baby that had been given since the eighteenth century, namely, that of a legal fiction permitted for humanitarian reasons, is precisely the one that the authors are “fighting against.” Since the 18th century, it had been argued that it was not because of “ignorance of the laws of nature,” nor because “Muslim jurists really believed that pregnancy could be protracted for such a period of time,” that the sleeping baby continued to exist in Islamic law. Rather, the jurists' support for the *rāqid* was dictated by “sentiments of humanity,” to save women from punishment for adultery, and to “temper the abuse of repudiation and the disavowal of children.”

³⁰ Bosquet and Jahier, *L'enfant endormi*, 9.

Bosquet and Jahier completely distance themselves from this idea of a legal fiction for humanitarian reasons as the cause of the persistence of the *rāqid* in their “North African populations.” According to them, “the sleeping baby is not a fiction that deceives anyone.” What is key here is that it is precisely because the sleeping baby is *not* a fiction that it is a real threat and danger to the public order for the colonial imaginary. It is precisely because the *rāqid* is grounded in belief that it comes to be a serious source of fear for colonial knowledge and that the intervention imagined to bring about its end becomes necessary. Referring to the case of North Africa, they write: “Here it cannot be a question of a legal fiction; the sleeping child is certainly a reality in the spirit of the populations...Gynecological practice clearly proves that the belief in the sleeping child is still widespread in many indigenous environments.”³¹

A contemptuous alarm over the wide-spread belief of the sleeping baby among the experts and elite is apparent in extant colonial writings on the sleeping baby.³² What inspires further fear for the colonial experts is not only that women believe in the *rāqid*—both those considered to be particularly vulnerable (the poor, “widows, divorcées, abandoned women”) and who may therefore be more prone to lack reason and/or morals, and those of “absolute good faith” including “knowledgeable women” such as midwives—but also, alarmingly, the male “experts,” whose competence in such matters is called upon to maintain public order: husbands, scholars, intellectuals, jurists, judges and theologians who are trained, educated and in positions of power. The sleeping baby is not just a popular belief, write Bosquet and Jahier, since “the scholars (*fuqaha*) themselves perfectly admit the possibility of such pregnancies.”³³ In a late nineteenth-century colonial study of Islamic Law in Algeria, the French jurists A. Hanoteau and A. Letourneux write in reference to the sleeping baby: “Muslims who are otherwise very distinguished for their intelligence have filed a complaint with the Court of Algiers for having refused to honor with its judgments such a monstrous jurisprudence.”³⁴ In an article published under the French Protectorate in *Maroc Medical* in 1954 entitled “The Myth of the Sleeping Infant, Opportunity for a Gynecological Examination,” the medical doctor P. Lalu writes, “This dogma of the sleeping baby encounters absolute credence amongst Moroccan Muslim women of every status, from the bourgeois to the peasant. They all consider it as one of the fundamental aspects of marriage, *reinforced in their opinions by the views of judges, midwives...and neighbors.*”³⁵ And in a colonial study of Moroccan Muslim midwives that I analyze in the following section, the infant and maternal health experts Mathieu and Maneville write, “This belief is general and is found amongst people, the most seemingly evolved and educated.”³⁶

What inspires fear here is that the sleeping baby cannot be made to fit simply into “a patriarchal conception of the Muslim family,” or be explained away as a popular belief of the poor and uneducated. The sleeping baby also does conform to the rational of a legal fiction or a feminine ruse. The colonial writing belabors the point that the sleeping

³¹ Bosquet and Jahier, *L'enfant endormi*, 15.

³² Bosquet and Jahier; P. Lalu; Dujardin; Lapanne-Joinville; Mathieu and Maneville; Hanoteau and Letourneux

³³ Bosquet and Jahier, *L'enfant endormi*, 17.

³⁴ Quoted in Bosquet and Jahier, *L'enfant endormi*, 18.

³⁵ Lalu, *Le mythe de l'enfant endormi*, 642, emphasis added.

³⁶ Maneville and Mathieu, *Les accoucheuses musulmanes*, 45.

baby is anchored not only in the popular imagination, but in the otherwise rational and intelligent writings and practices of the most respected judges and jurists. This is always the moment in the colonial studies where the text temporarily abandons law and the juridical domain of this “monstrous jurisprudence” for a curious journey into another “monstrous” world—that of the reproductive female body via the gynecological examination, romantic evolutionary biology and natural science. Bosquet and Jahier—as well as the Dr. P. Lalu and the colonial public health researchers, Jean Mathieu and Roger Maneville—contend that while the origin of the false belief of the *rāqid* may escape the law, it cannot escape biology, gynecology and medical science.

According to colonial knowledge, the real origin of the sleeping infant is the “erroneous interpretation of medical facts” based on incompetent local gynecology and obstetrics. The only solution to the “problem” of the sleeping baby, therefore, is to confront it from the position of modern obstetrical science. Keeping in mind that the uterine journeys that are the subject of the next few pages of my discussion are but a detour in Bosquet and Jahier’s article that enable a curious return to the question of law and knowledge of female sexual functions for the maintenance of public order, it must be asked how the article is structured as an argument for the institutionalization of “obstetric jurisprudence” in the Maghreb. “Obstetric jurisprudence,” a field interfacing law and gynecology that was developed in late-eighteenth and nineteenth century France and Britain, implies that the maintenance of public order depends on the medical surveillance of female sexual functions. It is a form of surveillance that must be capable of articulating itself as expert evidence qua ethical forensics in court in medico-legal questions related to marriage, divorce, pregnancy, filiation, rape, infanticide and abortion.³⁷ It is only once, and immediately after, the “competent” gynecological examinations, clinical studies and biological explanations have intervened to explain away the sleeping baby that the question of the law returns, and with it the repetition of the prognosis of the “old” sleeping baby’s last breath.

In an homage to eighteenth to early-twentieth century developments in the “science of woman,”—gynecology, comparative (human and veterinary) obstetrics and embryology—Bosquet and Jahier together with other colonial medical doctors including P. Lalu and J. Dujardin—embark on a study that remains consistently loyal to the medical trends in late nineteenth and early twentieth century France and Britain that studied and classified the varieties of the abnormal uteruses and ovaries, relying on and borrowing language from early-nineteenth century gothic novels, and offering the female body as a virtual proto-science fiction nightmare.³⁸ The aim of the obstetrical discourse is to show how “in the absence of any *competent* examination, the illusion [of the sleeping child] is possible.”³⁹ The illusion is thus caused by errors of the diagnosis of pregnancy connected to the “incompetence” of local gynecological experts—i.e., Muslim midwives—and the imagination of the “pseudo-pregnant” woman.

³⁷ See Moscucci, “Woman and Her Diseases” in *The Science of Woman*; Jordanova, Ludmilla. 1989. *Sexual Visions. Images of Gender in Science and Medicine between the Eighteenth and Twentieth Centuries*. Madison: University of Wisconsin Press, and “Policing Public Health in France 1780-1815.” In T. Ogawa, ed., *Public Health*, Saikon, 1981, pp12-32; and Edwards, Susan. 1981. *Female Sexuality and the Law*. Oxford, Martin Robertson & Company.

³⁸ See Moscucci, *The Science of Woman*; Jordanova, *Sexual Visions* and Edwards, *Female Sexuality*.

³⁹ Bosquet and Jahier, *L’enfant endormi*, 7, emphasis added

The obstetrical inquiry begins by with the question: “What is the duration of the normal pregnancy in the woman?” The “sleeping” of the sleeping baby is substituted for various interpretations of the causes of generation and variation in organic phenomena, a surrealist and teratological discourse filled with deceptions, betrayal, monsters, mummies and tricksters. The French medical and juridical experts diagnose the sleeping baby as the North African inability to recognize the *rāqid* for what it is: an epistemic category of error. Their evaluation says: ‘You who believe in the sleeping baby are mistaken. Your belief deafens your ears to the ‘logical and scientific explanation’ and makes you incapable of seeing, understanding and knowing the sleeping baby for what it really is: expressions of natural error— biological anomaly, reproductive deviance and psycho-physiological pathology.’ In attempting to establish the sleeping baby as a category of error, the French colonial diagnosis relies on concepts of the normal that shifts the diagnosis from the statistical to the ideological level, with the latter ultimately overdetermining any framing of the former. Error it seems, as opposed to variation or anomaly, becomes possible in the face of the law. At the ideological level, nature becomes monstrous, fetishized and feared, and the female reproductive body as part of such a nature is separate from its human milieu—from culture, economics, politics and society—and negatively associated with unproductive chaos, disorder, animality and monstrosity.

In an essay entitled “The Normal and the Pathological,” the French historian of science George Canguilhem contends that the term normal vis-à-vis the living being “has no properly absolute or essential meaning.”⁴⁰ Its meaning is always ambiguous since it can carry both archetypal and prototypical content, and equivocates between descriptive and normative content, meaning both a statistical average and an ideal. Both meanings of normal, however, have to account for individual singularity, exceptions to the rule and variation. For Canguilhem, it is in scientists’ attempts in human biology and medicine to make the normal account for individual singularity that both of the former become integral aspects of an anthropology that “presupposes a morality.” As such, the normal can ultimately never escape the ideological, since the normal “always remains a normative concept of the properly philosophical scope.”⁴¹

From the perspective of scientists that hold “the laws of nature to be invariant,” and science to be a question of universals, for example, “the singular—that is, the divergence, the variation—appears to be a failure, a defect, an impurity.” This implies that error consists in singularities that diverge from an ideal type, and that there is truth in nature’s types that may or may not be realized in reality. Canguilhem writes:

After all, to affirm that truth is in the type but reality outside of it, that nature has types but that they are not realized—is this not to render knowledge powerless to grasp the real? Doesn’t it justify Aristotle’s objection to Plato—namely that if one separates Ideas from Things, one cannot account for the existence of things or for the science of Ideas?...Only within a hypothesis that conceives the laws of nature to be generic, eternal essences is the individual a provisional and regrettable irrationality. That hypothesis presents divergence as an ‘aberration’ that human calculation cannot reduce to the strict identity of a simple formula; its explanation

⁴⁰ Canguilhem. “The Normal and the Pathological,” *Knowledge of Life*, 124.

⁴¹ Canguilhem. “The Normal and the Pathological,” *Knowledge of Life*, 133.

makes of divergence the error, failure or prodigality of a nature considered at once intelligent enough to proceed in simple ways and too rich to resolve to conform to its own economy.”⁴²

On the other hand, for scientists who do not seek a law of nature in the organizational “attempts” of the living organism, individual singularity is rather an “adventure” of nature. From this perspective, there is no comparison between living beings and a “real, pre-established type.” The organism’s validity is determined in relation to the eventual success of its life. While this perspective would still leave room for the view of nature as a hierarchy of possible forms, no negative judgment can be attributed to the living organism as such, at least as long as it lives. Anomaly here means difference and inequality without attributing a pejorative meaning to difference—that is, without a determination of value. “Nothing can be lacking to a living being once we accept that there a thousand and one different ways of living...What decides the value of the form is what becomes of it.”⁴³

Whether from the perspective of a science that views individual variation in biological life as error, or from one that sees it as an organizational adventure, difference without a determination of value is ultimately impossible. For Canguilhem, the normal is conditioned by its slip into the prototypical, the normative, and the ideal, attributing values to the living being that far exceed the domains of human biology and medicine. “If, then, it is true that anomaly, an individual variation on a specific theme, becomes pathological only in relation to a milieu of life and a kind of life, then the problem of the pathological in man cannot remain strictly biological, for human activity, work, and culture have the immediate effect of constantly altering the milieu of human life.”⁴⁴ It is in this excess that science is best understood from a critical perspective that understands it as an integral part of an anthropology that presupposes a particular morality, culture, economy and human order.

In the specifically human milieu, organic norms—even those that assume anomaly and variation, can never get away from the question of law insofar as the norm always turns into lawfulness so that pathology is not seen as simply unsuccessful vitality (as it would be in an organic context) but as aberrancy and error. It is precisely through the concepts of anomaly and variation that the French colonial juridical and medical writings represent the sleeping baby through an ideology of the pathologically reproductive female body in which little, if any, value is attributed to such a body. Relying on a variety of reports from 18th to early-20th century European and Australian gynecology, embryology and obstetrics—both human and veterinary, the colonial analysis slips between statistical and ideological content. “To begin with,” Bosquet and Jahier ask, “what is the duration of a normal pregnancy in women?” The answer, they say, will differ slightly depending on whether it is based on the date of the last sexual intercourse (265-270 days) or the date of the last menstrual period (280 days). In either case, the normal pregnancy here is a statistical mean gathered from a number of European and Australian clinical obstetrical studies. They report that in a study of 7,200 births an eminent French gynecologist, Dr. Nancy, found 80 in which the birth occurred after more than nine solar

⁴² Canguilhem. “The Normal and the Pathological,” *Knowledge of Life*, 124-5.

⁴³ Canguilhem. “The Normal and the Pathological,” *Knowledge of Life*, 126.

⁴⁴ Canguilhem. “The Normal and the Pathological,” *Knowledge of Life*, 124-5.

months from the date the birthing woman claimed to have had her last menstrual period. In view of studying these anomalies, Dr. Nancy advises other physicians to retain only those cases in which a woman is “elsewhere intelligent enough and precise in her responses.” Already, the statistical norm begins to blur with the ideological one insofar as the quantitative evaluation made in relation to the statistical average of pregnancies lasting for nine months is framed by the exclusion of the kinds of women who the gynecologist has judged capable of speaking reasonably. This particular blurring, I would suggest, is not accidental to that case study, but integral to the performance of expertise in colonial medicine and law where what is ultimately at stake in both the juridical and the medical domains is the expropriation of truth-value (of veridical discursivity) from the female subject—the witness and the patient—as a subject who can speak authoritatively about her body. This last point will be elaborated upon shortly.

In the colonial discourse, sleep is “simulated” by five clinical anomalies that lead to variations of the duration of pregnancy in excess of the normal gestation period. In addition to the four most common possibilities that the article discusses at greater length, there are other excessive variations. These include the cases “...in which [the pregnancy] leads to the birth of a monster (*ce sont les cas où elle aboutit à la naissance d'un monstre.*)⁴⁵ “A. Martel has reported the observation of a téréatencéphale. Last period: December 1924; birth: November 10, 1925 of *said monster* weighing 5 kilograms; Houssay reported two cases of anencephalic fetuses, one born 333 days after the last menstrual period [weight 5 kilos 500], the other 330 days [weight: 4 kilos 600].”⁴⁶

Canguilhem may be helpful here. Based on a principle of biological repetition with finite difference according to which the same engenders the same, “the existence of monsters calls into question the capacity of life to teach us order,” writes Canguilhem. Divergence is understood as a breach in confidence in life that inspires “radical fear.” This radical fear of living morphological divergence that issues from the human being is a double fear because “such a failure could touch us or could come from us.”⁴⁷ And yet, it seems that such divergence does not issue from the human being *per se*, but from the female body, the site *par excellence* of the creation of living monstrosity in both the colonial writings, as well as in Canguilhem’s text. Teratological discourse, I would argue, is one that issues from and inspires radical fear in a pathologically reproductive female body. While Bosquet and Jahier’s study does not dwell for very long on the birth of the monster *per se*, the female body as the site of the monstrous and monstrosity persist in the analyses of the four other possible anomalies of gestation.

In addition to the cases in which the woman gives birth to a “monster,” the four other possible prenatal errors are discussed in order of their possible occurrence. From the least to the most frequent, they are: the extra-uterine or ectopic pregnancy, the prolonged aseptic retention pregnancy, the pregnancy after amenorrhea, and finally the so-called imaginary/false/illusory/hysterical pregnancy.

The ectopic pregnancy occurs when the egg is implanted outside the uterus in the fallopian tube, the cervix, or in the peritoneal or abdominal cavity. While etymologically the word ‘ectopic’ comes from the Greek meaning out of place (*ek-topos*) or displacement, the term was first used by the English obstetrician Robert Barnes for whom

⁴⁵ Bosquet and Jahier, *L’enfant endormi*, 20.

⁴⁶ Bosquet and Jahier, *L’enfant endormi*, 20, emphasis added.

⁴⁷ Canguilhem, “Monstrosity and the Monstrous,” *Knowledge of Life*, 134.

woman was by definition pathology, a deviation from the standard of health represented by the male, and for whom gynecology was necessarily the study of pathology.⁴⁸ Bosquet and Jahier explain that at the beginning, an ectopic pregnancy is accompanied “by all the usual signs of a normal gestation,” and that “at four and a half months, the woman perceives the active movements of her fetus.” At term, however, she “produces a false labor (*[elle] se produit un faux travail*)” and the infant dies. Sometimes, it “can be retained in the maternal organism for a long or short period of time,” for 56 or 57 years according to two European obstetrical studies that they cite. “These accidents only appear in a certain number of cases; certainly not in them all.” The “stone child (*lithopedion*)” retained by the female body passes through various stages of “calcification,” or “mummification”. During this retention, the woman who appears pregnant can actually become pregnant anew. Bosquet and Jahier’s narrative of this possibility of the sleeping baby focuses on the deceptive appearance of the female body that appears one way but is actually another. It appears to be reproductive and to harbor life when it is actually unproductive and harbors stone, death or nothingness. This deceptive body can lead both the “pseudo-pregnant” woman and others to genuinely perceive a real (i.e., productive) pregnancy where there is none.

Likewise, in the second clinical possibility, the prolonged aseptic retention, the female body deceives by appearing reproductive when it is not. “After a beginning of normal pregnancy, accompanied by all its symptoms, the egg dies at a precocious stage...And this egg can be retained for months, years even, during which it mummifies. Then it is eliminated in a form that is not always recognizable.”

In both clinical cases—ectopic and aseptic—the sleeping baby simulates life, labor and reproduction in the female body, when there is actually death in unrecognizable forms. In both cases, the female body is taken out of the cycle of reproduction on false pretenses. In the ectopic pregnancy, the uterus is actually “empty (*vide*)” and there remains the possibility of “fecundation” during the time that the woman is carrying the stone child. Bosquet and Jahier compare the woman to a female cow. They explain, “amongst animals, if the fetus is retained in a uterine horn, it can there be newly fertilized, although rarely...‘The cow that carries the shriveled calf in its veliere no longer asks for the bull.’” While the cow’s uterus is still available for reproduction, the cow, shunning the bull, behaves as if it is not because it is still carrying the dead calf. This comparison of the woman with the sleeping baby to the cow who is no longer interested in reproducing because she retains the dead fetus reflects the colonial anxiety over the possibility of women’s control over reproduction and rising life. Throughout this section of the article, the reproductive human female body is compared more often than not to the female animal bodies of dogs, cats, birds, cows and horses. While the comparison may be a common gesture in comparative reproductive biology, this science

⁴⁸ The first person to have used the term ectopic pregnancy was the English obstetrician Robert Barnes (1817-1907), for whom woman was, by definition, pathological, a deviation of the standard of health represented by the male. For Barnes, gynecology was “the most instructive testimony to the law which declares that there is no proper boundary between physiology and pathology; that pathology is but a chapter in the history of physiology.” Gynecology was the study of the “whole woman,” which defined femininity according to an organicist conception of bodily functioning in which the physical, psychological and moral were indissolubly fused. Barnes explained that it was “impossible to draw an arbitrary line that shall clearly separate what are commonly regarded as the special diseases of women from the domain of general pathology.” See Moscucci, “Woman and Her Diseases,” *Science of Woman*. 125

serves to justify the argument for rendering lawful obstetric jurisprudence as surveillance over female bodies in their sexual functions and reproductive capacities.

The third clinical cause of error is the pregnancy that arrives after a period of prolonged amenorrhea (inactive ovary). Again the appearance of the female body betrays life. The beginning of amenorrhea can be accompanied by signs which are not unlike the signs of pregnancy: “[T]here is fattening (*engraissement*), digestive trouble and even milk can appear in mammals.”⁴⁹ Finally, the fourth and most frequent cause of error which Bosquet and Jahier have “purposefully saved for last” is what is alternately called a pregnancy by pure illusion, a false, imaginary or hysterical pregnancy (*grossesse nerveuse*). These clinical cases, “the pathogenesis of which are far from being elucidated,” present themselves in the following manner: The woman does not have her period and, “since the beginning of her amenorrhoea, crazed with maternity (*affolée de maternité*),” she interprets all the symptoms as signs of pregnancy. She grows bigger, she vomits, and she sees her breasts grow in volume. Her breasts take the appearance of a pregnant breast in which a colostrum secretion appears.⁵⁰ She believes to feel the active movements of the fetus and thus arrives at term or, more exactly, at that time which she believes to be the term. At this moment, she produces a “false labor,” loses bloody mucus and has labor pains. They explain that, “All the obstetricians have seen or will see such similar cases where, called to terminate a birth with forceps, they only find an empty uterus.” Unlike the obstetricians in such cases who “recognize right away” that the woman is not in labor, the midwives in such cases are “always persuaded and persuading” about the fact of pregnancy. After any of these varieties of ‘false labor,’ “*everything returns to order. For the Muslims, the infant sleeps.*”

These anomalies form part of a surrealist biological discourse about the horrifying possibility of things created by the reproductively deviant female body—monsters, mummies, stone babies, ghosts, simulacrum—things that blur the line between life and death, between the human and the non-human. Bosquet and Jahier’s study suggests that the female human body that does not reproduce mechanically is at risk of reproducing the radically non-human and fundamentally other. In another study published in 1954, the gynecologist P. Lalu writes that it is only after a competent gynecological examination that the sleeping baby can be replaced by “a long series of *monstrous* ovarian cysts, fibroids and pelvic inflammatory diseases (salpingitis)...which make themselves known to the woman and her entourage as an abnormally prolonged pregnancy. We also do not forget the infants who died *in utero*, the stone babies (*lythopedions*) carefully conserved in the hope of a possible revival.”⁵¹

While there are several ways to read this surrealist biological discourse, it would be helpful to remember that such knowledge is enacting colonial scientific expertise in the service of maintaining lawfulness with respect to ‘legitimate’ births in order to

⁴⁹ *Engraissement*, is a term primarily used for animals, namely cows and birds before you slaughter them to eat them. See *Dictionnaire de L’Académie Française* (6th and 8th Edition) and *Émile Littré: Dictionnaire de la langue française (1872-77)*. <http://artflx.uchicago.edu/cgi-bin/dicos/pubdico1look.pl?strippedhw=Engraissement>

⁵⁰ Colostrum also known as foremilk refers to the first milk secreted during pregnancy and for the first days after the delivery before lactation begins. It contains a large amount of antibodies and differs from breast milk. See Harry J. Lipner, 2008, "Lactation," in AccessScience, ©McGraw-Hill Companies, <http://www.accessscience.com>

⁵¹ Lalu, *Le mythe de l’enfant endormi*, 643.

institutionalize particular forms of gendered performances of the reproductive body for the maintenance of the public order. I would like to focus, then, for a moment on how the ideas of the deceptive female body and its production of false labor are made to relate to one another in Bosquet and Jahier's text, as well as some of the possible reasons for the relation. When the female body is taken as the object of colonial medico-legal knowledge, the slip from the statistical to the ideological serves to reinforce the gendered logic of the colonial imaginary. According to this logic, there is a universally normative reproductive female body that biologically reproduces 'on time,' like a machine; when it is not reproducing, it is empty (*vide*), uninhabited, *terra nullius* that can be occupied.

Bosquet and Jahier argue that in humans, the statistical majority of the cases that falsely give the illusion of pregnancy are what they call imaginary pregnancies or "pregnancy by pure illusion." "The woman does not have her period and from the beginning of her amenorrhea, terror-stricken with maternity, will interpret all the symptoms accordingly." She is visited by all the usual signs of pregnancy--her breasts swell, she grows bigger, and she even feels the movements of the fetus. At the moment she believes it to be the right time to be in labor, she experiences labor pains (*des douleurs*) and loses blood. But the labor is false. The entire pregnancy has been an illusion and the only one who can recognize this for what it really is, is the colonial expert.

As for the cause of an imaginary/false/nervous/illusory pregnancy, Bosquet and Jahier admit that "the pathogenesis is far from being elucidated." Yet, it is precisely in these cases that the colonial legal and medical discourse develop an ideology of something like a preternatural ovism, of bad nature and negative responsibility linked to femininity, in which through a circular logic of causation the feminine mind, with its desires and fears, is linked to the hysterical uterus, which is simultaneously isolated in the female sex of all animals including women as the genesis of the false pregnancy.

Throughout the article, the woman is compared to female animals of other species that also experience false pregnancies. They write: "We have said: pregnancy by pure illusion, and yet this extraordinary anomaly may occur in all animals, *removed by definition from the influences of the mind, desire or fear of pregnancy*. Buffon has described its occurrence amongst dogs. We have seen it in the rabbit (Harvey), the cow, the cat (Girard), the mare (Chauveau, Iselli), and analogous facts have even been seen amongst birds by Larcher." In other words, while false pregnancies also occur in other female animal species, its cause or origin cannot be located in the mind that it does not have. It should be noted that medical opinion was not unanimous on the last point. The Director of the Royal Academy of Science, Johann Theodor Eller published a dissertation in the mid-18th century arguing quite the opposite. For Eller--who had observed a dog, whose mother when pregnant was chased by a turkey and was subsequently born with the head of a turkey cock--female animals of other species also had the power to engender with their imaginations. Eller thus wrote: "Women should not boast of being the only ones to possess the prerogative of producing monsters by the force of their imagination; we are convinced by the preceding story that beasts can do so just as well."⁵² While Eller is not writing about the power of the imagination to produce a 'false' pregnancy per se, both the female human and the non-human animal imagination is "credited with the

⁵² Quoted in Canguilhem, "Monstrosity and the Monstrous," *Knowledge of Life*, 138-9.

power of imprinting upon living beings in gestation the traits of a perceived object, an effigy, a simulacrum; the inconsistent contours of a desire—that is to say, of a dream.”⁵³

However, for the purposes of constructing the normatively reproductive woman in colonial medical and juridical knowledge, the woman must be *unlike* other female animals who experience false pregnancies only insofar as the site of the ‘pathogenesis’ of the sleeping baby in the colonial discourse is the pathological feminine psyche—the influence of the female imagination, ‘mind, desire, or fear,’ on the body. For Bosquet and Jahier, the cause of the illusory pregnancy in the human takes place at the level of the psychology of Woman. In this way, an essentialized, universal woman as such (irrespective of her origin of birth, European, Moroccan, Algerian and so forth) becomes responsible, if only indirectly, for the appearance of her body. The influence of the feminine mind (*l’esprit*) on the uterus causes it to seem full when it is actually “empty” (*vide*), causes the female body to be absolutely unproductive, making itself unavailable for further reproduction under false pretenses. It is even negatively productive, giving birth not even to death or monstrosity, but to a phantasm of nothingness.⁵⁴ This concept of responsibility operates in the colonial literature to reinforce the need for a particular form of expert surveillance over the female body, reproductive labor, fertility and pregnancy, and in part explains why the colonial apparatus is intent on capturing women’s speech about their bodies.

Thus there is a particular ideology of bad nature in need of governance that is enacted in the biological discourse which takes the form of assuming a fundamental homology between the female body and ‘nature’—between the female body as a natural resource and the communal land, resources and labor that were being exploited by colonialism. The empty uterus is like the “uninhabited and masterless land” that the colonial occupation lays claims to in order to accumulate resources. Both the unpregnant female body and uncultivated land are considered *a priori* “empty” nature, *terra nullius*.

Terra nullius meaning “land without an owner” or “no man’s land,” refers to a legal idea and fiction, originating in Roman law to justify the occupation of sterile land. More recently, the early modern founders of international law and supporters of colonial exploits in the 17th and 18th centuries elaborated the doctrine to say that unused, or barren land belongs to no one. During the 18th century the doctrine was used to give legal force for the settlement of lands occupied by indigenous people, where no system of laws or ownership of property was held to exist. The Swiss natural law philosopher and international legal theorist Emmerich de Vattel, drawing on Leibniz, Grotius, Wolff and Locke, argued that *terra nullius* also applied when the land was not being cultivated well by an indigenous people.⁵⁵ If the land was not being cultivated to the fullest, those who

⁵³ Canguilhem, “Monstrosity and the Monstrous,” *Knowledge of Life*, 139.

⁵⁴ Bosquet and Jahier explain, “amongst animals, if the fetus is retained in a uterine horn, it can there be newly fertilized, although rarely...The cow that carries the shriveled calf in its veliere no longer asks for the bull.” This comparison of the woman to the female cow that is no longer interested in reproducing because she retains the dead fetus. The cow’s uterus is still available, although it behaves otherwise because it is still carrying the dead calf. The female body is represented as being close to the “natural” world and the animal body. *L’enfant endormi*, 17.

⁵⁵ See Emerich de Vattel. 2007. *The Law of Nations, and the Duties of Citizens, or Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns* (1758). Indianapolis: Liberty Fund, and Richard Tuck. 1999. *The Rights of War and Peace: political thought and the international order from Grotius to Kant*. Oxford/New York, Oxford UP.

could cultivate it had the right to do so.

The French colonialists referred to the desert space that is now Morocco/Mauritania/the Western Sahara as “la vide,” describing its occupation as “pénétration” and resistance to the latter as “pacification”⁵⁶--all highly gendered terms for the colonial territory. Not unlike the surveillance and governance of the empty uterus that the colonial occupation lays scientific claim to, the French colonial administration of empty land was called “the administration of emptiness (*l’administration de la vide.*”) As Achille Mbembe writes in relation to indigenous land in general: “This land is deemed to belong to that category of things that never belonged to anybody.”⁵⁷ These associations of emptiness perpetuate a dualism in which women’s reproductive bodies and the lands occupied by colonialism are negatively associated with the dark materiality of a bad nature--of lack, chaos, inherent dependency, vulnerability and irrational embodiment that serve to justify colonial occupation.

The female body, furthermore, presented by Bosquet and Jahier is a trickster body that shifts shapes. Like the colonized space that inspires fear and terror in the heart of the colonizer—and described so well by Fanon as the place in which nothing is what it appears to be, and in which deception and betrayal dwell⁵⁸—the female body tricks those not trained by European medical practice to properly uncover its phenomenal duplicities. Not only does its appearance deceive, but its very dark materiality and bodily productions—its milk and blood—betray life itself, appearing to harbor life or signs of life where there is not even death (i.e., where nothing ever even lived to begin with), appearing occupied when it is actually “empty.” In face of this emptiness, the colony, like the female body, become worlds of limitless appropriation, assimilation and subjectivity. As Achille Mbembe puts it, “From the standpoint of the conqueror, the colony is a world of limitless subjectivity. In this, the act of colonizing resembles a miracle.”⁵⁹ From the colonial standpoint, the female body as potential fertility and a source of free reproductive labor also seemed like a miracle. Associated with nature, it thus becomes a standing reserve of life in need of surveillance, control and governance.

The landscapes of nature and the female body when viewed as natural resources trouble and frighten the colonialist when they appear one way but are another because change and instability interfere with the tasks of administering the emptiness. Both the potential lack of fertility and the production of false labor stand in the way of techniques of governance and the miracles of accumulation. While this is not the place to fully draw out the implications of Bosquet and Jahier’s language of ‘the production of false labor,’ caused by the pathological feminine psyche-soma, it should be noted very briefly that one of the most important contributions of feminist theory and struggle has been the redefinition of work, and the recognition of women’s unpaid reproductive labor as a key source of capitalist accumulation. From the perspective of ecofeminism—which draws on the radical ecology movement and varieties of feminist thought—the miracle of

⁵⁶ See Garba Diallo. 1993. “Mauritania: The Other Apartheid” *Nordiska Afrikainstitutet*, Sweden, 32. During the administration of French West Africa, the term Mauritania only applied to the Arab-inhabited northern part of the country, which the French termed ‘la vide’ or emptiness. The French termed the administration of this territory « the administration of the void » (« *L’administration de la vide* »).

⁵⁷ Achille Mbembe, *On the Postcolony*, 183.

⁵⁸ Frantz Fanon, *Wretched of the Earth*, 112.

⁵⁹ Mbembe, *On the Postcolony*, 183-4.

colonialism is really part of a process of primitive accumulation of colonial and imperial economies.⁶⁰ One of the central claims of ecofeminism is that the domination of ‘nature’ and ‘woman’ have shared roots in the logic of science and capitalism.⁶¹ Within this logic and through the process of primitive accumulation, nature and gendered reproductive labor are considered to be un-owned usable natural resources that cost capital nothing. In perhaps *the* foundational text of ecofeminism, *The Death of Nature* (1980), Carolyn Merchant argues that the ideological scaffolding for processes of accumulation is located in the paradigm shift of the scientific revolution and the rise of Cartesian mechanistic philosophy, which replaced an organic worldview that had understood nature and woman one that transformed them into “standing resources,” thus removing any ethical constraints to their exploitation and domination. Evelyn Fox Keller in *Reflections on Gender and Science* (1996) locates this shift in the 17th century as a struggle between competing hermetic and mechanical philosophies that understood matter differently. While the former “saw matter infused with spirit, the latter saw it divorced from it.”⁶² The mechanical philosophy that gained ground enabled a particular domination of woman and nature:

The founding fathers of modern science rejected some elements of Bacon’s thought and often retained at least a covert interest in alchemy (Newton is a notable example.), but their break with their hermetic forebears was quite sharp in one respect: they embraced the patriarchal imagery of Baconian science and rejected the more participatory and erotic language of the alchemists...The goal of the new science is not metaphysical intercourse but domination, not the union of mind and matter but the establishment of the “Empire of Man over Nature.’ The triumph of those who have been generally grouped together as ‘mechanical philosophers’

⁶⁰ For histories and theories of ecofeminism see: Irene Diamond and Gloria Orenstein, eds., 1990. *Reweaving the World: The Emergence of Ecofeminism*. San Francisco: Sierra Club; Maria Mies and Vandana Shiva. 1993. *Ecofeminism*. London/Atlantic Highlands, N.J.: Zed; Karen Warren, ed. 1997. *Ecofeminism: Women, Culture, Nature*. Bloomington/Indianapolis: Indiana Univ. Press.; Noël Sturgeon. 1997 *Ecofeminist Natures: Race, Gender, Feminist Theory, and Political Action*. New York: Routledge, 1997; and Mary Mellor. 1997. *Feminism and Ecology* New York: New York Univ. Press, 1997. Ecofeminist ideas have been taken up in feminist religious studies. See, e.g., Rosemary Radford Ruether, ed., 1996. *Women Healing Earth: Third World Women on Ecology, Feminism, and Religion*. Maryknoll, N.Y.: Orbis, 1996; and Heather Eaton and Lois Ann Lorentzen, eds. 2003, *Ecofeminism and Globalization: Exploring Culture, Context, and Religion*. Lanham, Md.: Rowman & Littlefield.

⁶¹ Charis Thompson. 2006. “Back to Nature? Resurrecting Ecofeminism after Poststructuralist and Third-Wave Feminisms.” *Isis*, University of Chicago Press. 97:3; 505-512. Thompson deftly argues that there is value in retaining a ‘reevaluated’ ecofeminist perspective that incorporates critiques from third-wave feminism. While some feminists have critiqued ecofeminism for ethnocentrism and essentialism, Thompson develops the argument that Merchant’s historical and empirical work “argues precisely against the errors and dangers of reifying the identification” between nature and woman. It further argues “against the idea that there is a universal female behavior and against depictions that universally cast woman as a nurturer.” Instead of reifying ‘woman,’ Merchant’s work develops “an archival methodology that grounds the universalizing claims of modern science in time and place, text and ideology.” Ultimately, “[t]he idea that the rise of modern science, technology, and capitalism produced and relied on the death, domination, and exploitation of a nature gendered female, and that this reinforced and reflected the cultural subordination and exploitation of women, is the kind of large and provocative thesis of which academia has too few.”

⁶² Evelyn Fox Keller, 1985. *Reflections on Gender and Science*, 55

represented a decisive defeat of the view of nature and woman and God, and of a science which would accordingly have guaranteed to both at least a modicum of respect.⁶³

Keller and Merchant, as well as Ehrenreich and English, draw a connection between the rise of modern science, the formation of the bourgeoisie, the subordination of nature and the simultaneous persecution of witches and midwives in Europe.⁶⁴

Through enactments of medical, juridical and professional expertise, French colonialism in the Maghreb attempted to import this mechanical worldview of nature and women to its colonies—the colony itself being one form of nature *par excellence*—to demolish and eradicate at an accelerated speed and with different outcomes the patrimony of empirical knowledge that had taken Europe itself centuries to destroy. The following section discusses the processes of enacting medical and juridical expertise in the colonial Maghreb. It focuses on how this expertise constituted itself in relation to Moroccan midwifery and female testimony and wrested the possibility of veridical speech and practice from both.

II. 3 The Female Patient and the Gynecological Exam

Thus the question of colonial or imperial population surveillance is tied to the historical gendering and disciplining of reproductive labor through the institution of the medico-legal norm. In Morocco, the specific biopolitical technique for the legalization and control over the reproductive body is the displacement and appropriation of midwifery which removes the socio-legal guarantee and condition that the reproductive woman can speak truthfully about herself. A final excursion into gynecology and midwifery is necessary, then, before returning to the juridical question of the legal death of the sleeping baby. This excursus will demonstrate how the colonial literature ties the idea of real or good law surrounding female sexuality and reproduction to the practice of gynecology and the colonial expert who claims to be uniquely knowledgeable about the sexual and reproductive aspects of the female body.⁶⁵

⁶³ Keller, *Reflections on Gender and Science*, 55.

⁶⁴ See Maria Mies, 1986, *Patriarchy and Accumulation on a World Scale. Women in the International Division of Labour*. 77: “Hence, the historical emergence of European science and technology, and its mastery over nature have to be linked to the persecution of European witches. And both the persecution of the witches and the rise of modern science have to be linked to the slave trade and the destruction of subsistence economies in the colonies.” She writes: “Carolyn Merchant has shown that the destruction of nature as a living organism—and the rise of modern science and technology, together with the rise of male scientists as the new high priests—had its close parallel in the violent attack on women during the witch hunt which raged through Europe for some four centuries....Merchant does not extend her analysis to the relation of the New Men to their colonies. Yet an understanding of this relation is absolutely necessary...unless we include all those who were ‘defined into nature’ by modern capitalist patriarchs: Mother Earth, Women and Colonies.” 75. Other works that take up the connection between the persecution of witches in Europe, the rise of the new bourgeoisie and modern science, and the subordination of nature include Carolyn Merchant, 1983, *The Death of Nature*; Ehrenreich & English, 1973 *Witches, midwives and nurses: a history of women healers*; and Keller, *Reflections on Gender and Science*.

⁶⁵ Ornella Moscucci’s *The Science of Woman* offers a well researched feminist social history of gynecology. It focuses largely on England and France in the late eighteenth and nineteenth centuries, and documents how the rise in medical professionalism in Europe (and the United States) in the nineteenth

The colonial legal and medical literature excises the expertise of midwives and their accrued empirical knowledge of the female body and natural medicine that takes a holistic approach to the health of an individual in her milieu, replacing it with the expertise of the gynecologist and the gynecological exam. The immediate argument here is not about the modern practice of midwifery in Morocco *per se*, but rather about what kinds of knowledge positive law and the authority of the modern state will listen to, and whom they permit to speak. As a matter of Colonial public health and safety in Morocco, gynecology and obstetrics attempt to capture other techniques of knowing and caring for the sexual and reproductive functions of the female body, the most prominent of which would have been the practice of midwifery. In the process of the colonial administration of public health, Moroccan midwives were demonized by colonial scientific expertise and lost the ability to speak the truth to the law about the female body.

The first project undertaken by the colonial Management of Public Health in its creation of a Medical-Social Services department focused on maternal and infant protection of the “urban Moroccan Muslim neo-proletariat.”⁶⁶ Maternal and infant protection is framed as a general problem of population management, and more particularly as a problem of natality, or as a way of managing the cost of elevated birth rates and a surplus population on the process of the proletarianization of urban labor.

A late-Protectorate era study funded and published by the colonial Public Health department entitled “The Traditional Muslim Midwives of Casablanca, (1952)” inscribes the practice of midwives within its management of public health, which is framed within the problem of rapid processes of industrialization accompanied by social infrastructure projects. The authors write: “Understanding that these efforts would be taken in vain if they did not find their echo amongst the female population, the department proposed to undertake the education of mothers and to create a virtual army of Moroccan midwives possessing modern knowledge of hygiene and pediatrics.”⁶⁷ It is towards this education that the colonial study assesses and diagnoses the knowledge of the ‘traditional Muslim midwife,’ the *qabla*, and her techniques of care and power over the Moroccan woman. The aim of the study is to determine “whether the midwife is “recuperable,” and whether after being trained she will be able to “serve as the bridge between the past that she represents and the future liberated from custom and the irrational.”

The study was published towards the end of the Protectorate period as a book by the Institute for Advanced Moroccan Studies, one of the three “scientific organs of the Protectorate.” “[I]ntended to provoke and encourage scientific research relating to Morocco, and to coordinate and centralize the results,” the Institute, established in 1920, operated as an ideological arm of the colonial apparatus, serving as a kind of colonial storehouse for Orientalist knowledge accumulated in Morocco for the purposes of colonial administration.⁶⁸

century was accompanied by the increasing medicalization and policing of the reproductive situations of the female body—namely, pregnancy, menstruation, lactation. It is at this historical time that the pathological female body appears as the object *par excellence* of gynecology.

⁶⁶ Maneville and Mathieu, *Les accoucheuses musulmanes*, 5-10.

⁶⁷ Maneville and Mathieu, *Les accoucheuses musulmanes*, 9

⁶⁸ The fields of research covered by the institute included: geodesy and cartography, geology and morphology, meteorology, biogeography, hydrology, linguistics, history and archeology, pre-Islamic, the history, art and ethnography, sociology, customary law and procedure, the mountain economy and hygiene

The study opens with a black-and-white photograph of a woman, seated over a cradle, smiling quietly. Her hair is neatly pulled back and partially covered with a white cloth. She is seated, watching over a newborn infant who seemingly stares out at some object outside the frame of the picture. The woman's hand rests on the infant's large wooden cradle-box towards which she directs her gaze. The infant and the woman are both swathed in white garments and seem equally uninterested in acknowledging the camera. The photograph itself probably tells many different stories than the epigraph that is printed underneath it. The quote, attributed to the French historian Michelet (d. 1874) is supposed to provide a title and give meaning to the photograph. The epigraph reads:

The only physician of the people during the last thousand years has been the Witch (*la Sorcière*). Emperors, kings, popes, and the richest barons have had doctors from Salerno, and Moors and Jews. But the mass of any state, and it might be said, the world, only consult the *Saga* or the midwife. If she does not heal, she is insulted and called a witch. But generally, in respect mixed with fear, she is called Good woman, or Beautiful woman (*bella donna*) from the same name that is given to the Fairies.⁶⁹

Here, the Moroccan Muslim midwife is immediately, before the study even begins, connected in the colonial imaginary to a backwards past, to witchcraft, to strange femininity, to disorder, the people, fear and the world of the irrational: spirits and magic.

Sage-femme. Midwife by definition, procuress, abortionist, sorceress, adviser, witch for the occasion (literally, thrower of spells/ *jeteuse de sorts*), gossip when desired, and for us a precious informer who permitted us, beyond the apparent evolution of morals, *to seize the immutability, we can almost say, of the Moroccan mentality*.⁷⁰

To understand better the construction of the midwife in the colonial imaginary as an immutable and dangerous relic of the past, it may be helpful to turn very briefly to the history of the midwife in Europe. While there is no space here to expand on the history of midwifery in France and Europe, a very condensed introduction is necessary to contextualize the ideological framework within which the public health administrators researched and wrote.

Scholarship on midwives in France and elsewhere in early modern Europe tie the midwife to the scientific revolution, the witch and folk healing practices. The witch was historically the local midwife who practiced her art as a way of making a living.⁷¹ During

More information on the scientific hands of the French colonial body can be found at:

http://www.diplomatie.gouv.fr/fr/ministere_817/archives-patrimoine_3512/expositions_11556/etudes_14146/les-tribus-marocaines-pendant-protectorat_14156/les-organes-scientifiques-du-protectorat_33888.html#sommaire_3

⁶⁹ Maneville and Mathieu, *Les accoucheuses musulmanes*, epigraph.

⁷⁰ Maneville and Mathieu, *Les accoucheuses musulmanes*, 10.

⁷¹ For detailed discussions of the witchhunts in England and Italy, see Alan Macfarlane, 1970. *Witchcraft in Tudor and Stuart England; a regional and comparative study*. New York: Harper & Row; and Jacob

the time of the witch-hunts in the 17th century, healing was part of women's domestic activities, and every housewife was expected to understand the treatment of the minor ailments of her own household, and to prepare her own drugs. Midwifery was initially not considered to be a medical responsibility but a lay craft. During the witch hunts in Europe, the midwife was most often identified with the witch. As the midwife-witch was persecuted, "women were expropriated from a patrimony of empirical knowledge, regarding herbs and healing remedies that they had accumulated and transmitted from generation to generation, its loss paving the way for a new form of enclosure."⁷² As Ornella Moscucci writes in her well-researched history of the "science of woman" in Europe, this expropriation coincided with the rise of professional medicine: "From about 1730 onwards, medical men rapidly encroached upon the territory of the midwife, extending the scope of their intervention in childbirth from the attendance of complications to the routine management of all births." Discrediting the midwife went hand in hand with the institutionalization of gynecology. The last decades of 18th century saw the medical practitioner's responsibility extend from the management of normal births to the treatment of the diseases of women and infants.⁷³ The rise in medical professionalism in the Europe and the United States in the nineteenth century was accompanied by the increasing medicalization of reproductive issues.¹ It is at this time in history that the female body as pathology appears as the object *par excellence* of gynecology and obstetrics. By the early twentieth century, such transformations had been consolidated and institutionalized in medical practices in most of Western Europe and the United States.

It is within this historical and epistemological milieu that medical knowledge, technology and techniques traveled to the French colonies. According to the colonial administrators of public health and the authors of the study, Roger Maneville and Jean Mathieu, by the early twentieth century, the Moroccan Muslim midwife is a relic of a past when the reproductive issues and female sexuality were largely the domain of women. The midwife is dangerous because her expertise intervenes with non-European forms of knowledge and practices in the production and management of life, and as Maneville and Mathieu write, with "the problem of sexuality in general." They explain:

We are interested in this research, not only for that which touches medicine and hygiene, but also at the social, folkloric and linguistic levels of the question. To study the "qabla" is also to study the milieu that brings her to life, keeps her alive. We will also render precise the behavior of Muslims of the poor neighborhoods of Casablanca, that form the majority of the inhabitants of the city, for all that concerns birth itself as well as the problem of sexuality in general. We will see that the "qabla" does not limit her activity to the practice of births, but intervenes equally in everything that concerns the relations between the sexes. It is she who

Burckhardt. 1958. *The civilization of the Renaissance in Italy*. New York: Harper. For a provocative Marxist-Foucaultian Feminist analysis of the figure of the witch and the function of the witchhunts in the emergence of modern European capitalist society, see: Silvia Federici. 2004. *Caliban and the witch*. New York: Autonomedia. Federici argues that the language of the witch-hunt produced a gendered subject of sexuality who was perverted and carnal by 'nature.' She writes that the production of the female pervert was "a step in the transformation of female sexuality into work."¹⁹²

⁷² Federici, *Caliban and the Witch*, 201.

⁷³ Moscucci, *Science of Woman*, 17.

teaches abandoned women the magical formula to keep lovers, she who mixes aphrodisiacs, who gives indispensable advice to voluntarily conceive a male infant; it is she who equally makes the poison that causes abortion, the tea that wakes up the sleeping child in the womb of his mother or the talisman that enters the needles.⁷⁴

The problem for the colonial administration is whether and how to “recuperate” her so that she may help them with their job of administering health and hygiene to their “North African populations.” By associating the midwife’s expertise with practices that belong to the ‘customary’ and ‘irrational’ world of the past and not the “liberated future,” the study collects the knowledge held by the Moroccan Muslim midwife as a means of discrediting its value in the modern world. For the purposes of this discussion, I will focus primarily on the study’s construction of the irrational practices of the midwife as they relate to the sleeping baby.

The study devotes a chapter to the sleeping baby. Under the rubric of “The Role of the Midwife in Obstetric Matters,” it discusses the techniques the midwives use to diagnose pregnancy and how they determine the age of pregnancy. The chapter begins by noting that the duration of pregnancy is both a scientific and a legal question, and gives a comparative account of the legal lengths of gestation in Roman, Jewish, British and French civil law. The comparison highlights the apparent uniqueness of the prolonged gestation period in Islamic law, which admits that a woman can give birth to a living infant several years after the commencement of her pregnancy. The study reports that the belief is widespread, even among scholars and the educated, and is based not just in popular belief but in legal texts. Every midwife interviewed confirmed the generality of the belief in the sleeping baby. Mathieu and Maneville elaborate:

This belief is general and is found amongst people, the most seemingly evolved and educated. There was not one of our graduate midwives or students of schools of Muslim nursing who was not absolutely persuaded. If we attempted to convince them of the contrary, which we did do on several occasions, we always obtained the same response: “Your scholars, who are eminent scholars, believe that pregnancy cannot be prolonged for longer than nine months and some days. But they are wrong since the companions of the Prophet have affirmed the opposite; beside, God knows better than anyone.” And the discussion would close, definitively. This unanimous opinion of the Muslims is based on the texts.⁷⁵

Thus, for the colonial expert, the midwife’s belief in the sleeping baby is buttressed by her irrational religiosity which further discredits her in the eyes of the colonial experts from properly or competently speaking about her knowledge of the reproductive functions of the female body. The rehearsal of the repertoire of Maliki jurisprudence on the sleeping baby enacts a further discrediting of the expertise and rationality of the midwives who, according to the study, go beyond the jurisprudential opinions that are cited, “insofar as they accept as possible the existence of a “raged” who does not wake up for ten or twenty years, or even longer.”

⁷⁴ Maneville and Mathieu, *Les accoucheuses musulmanes*, 10.

⁷⁵ Maneville and Mathieu, *Les accoucheuses musulmanes*, 42.

The prenatal care techniques of the midwives, including the diagnosis of pregnancy and the determination of its age, are further discredited since they do not look at or touch the vagina, and in large part rely on the utterances of the women who come to see them.

As with the case of protracted pregnancies, the regularity of menstrual periods will not cause a disturbance, *because it is the woman herself who declares that she is pregnant. Everyone around her accepts her utterances (ses dires) without discussion.* The apparent prolonged gestations can be explained, either by simulated pregnancies, pathological/false pregnancies...etc., but *all rational explanations are inaccessible to the Moroccans.*⁷⁶

The expertise of midwife is the very legal and socio-religious reason why the pregnant woman can speak the truth about herself. The colonial performance of expertise wrests that veridical ability from the woman and the midwife. The verdict of the study is that the midwife is pleasant but irrational, and generally incapable of reason. It is she who is responsible for waking up the sleeping baby and to whom women would come for medical advice and care. Her techniques of listening to and accepting the utterances of her patients makes her practices “irrecoverable” and her expertise incompetent. The only way she can be saved is if she becomes trained to stop believing the words of women and to start practicing particular Euro-American forms of the gynecological exam through specific modes of vaginal touching and investigation.

Only one midwife told us that she based her knowledge on a practice of vaginal touching that, towards the end of the first month, gives the very characteristic feeling of cervical softness. In reality, it is probably that this woman, particularly intelligent and having learned from a European that the palpation of the cervix is an important sign of pregnancy, wanted to show us that she too perfectly knows her craft. Because it is important to note that we have never, outside of this case, found the usage of vaginal touching--considered by the traditional ‘qablat’ (midwives) as a particularly indecent gesture and even illicit in front of the religious law, in one word “taboo” (*haram*).”

We see later on that it is forbidden to look at the genital organs of a woman... Thus, from the beginning of this study we see that the knowledge (*les connaissances*) of the Moroccan woman concerning pregnancy is scant and uncertain and that her spirit of observation is hardly developed. We will show, moreover, that they hold certain ineradicable beliefs despite their irrational character. It is thus with that which is called in Arabic, “*raged fi btan ummuh*,” the child sleeping in the belly of its mother, more simply the “*raged*.”⁷⁷

The colonial study of the Moroccan Muslim midwife by the Department of Public Health is not an isolated incidence of colonial medical and health practices insisting on the lack of credibility of the utterances of the female patient, the gullibility and lack of

⁷⁶ Maneville and Mathieu, *Les accoucheuses musulmanes*, 45.

⁷⁷ Maneville and Mathieu, *Les accoucheuses musulmanes*, 41.

expertise of the incompetent midwife, and the need to institute a particular form of the gynecological examination in which the female patient is not listened to, but rather her vagina is gazed upon and into, displayed and made accessible to the touch of the male colonial doctor. In an article published by *Maroc Medical* "An Error of Diagnosis: A True Story (*Une Erreur de diagnostic: histoire vraie*)" a French medical doctor humorously and contemptuously argues that doctors should never actually listen to what the Moroccan patient, and especially the female patient, says about the experiences of her body in pain.

The reader of *Maroc Medical* is presumed to be a skeptic and is assured that the anecdote is "rigorously authentic." The author, J. Dujardin, assuming the royal 'we,' announces that he himself participated in the events being recounted, "as actor and as witness" and can therefore account for the truth of its content. What we begin to witness, both above with the discrediting of the midwife and in the following accounts of gynecological examinations is the substitution of the doctor's ability to witness and speak about the female body for that of the woman's, as well as the wresting of veridical speech from the reproductive woman.

The doctor Dujardin is called one day to examine a Moroccan female patient, Madame X, who claims to be suffering from pain in her liver (*souffrir du foie*). When he examines her, "other signs, accompanied by very localized pain, orient us lower." He inquires into her menstruation and she responds that she has a "curious delay of three weeks." Then he inquires into the possibility of pregnancy to which she replies that pregnancy is not a possibility for her. In seventeen years of marriage, she responds, she has never had a child. The skeptical doctor sends her away with ingestible medicine and prescribes laboratory tests. There Dujardin writes, ends "Act One," and his active role in the matter. "Act Two" begins eight days later when the medicine has produced no effect for the woman who continues to suffer in pain. Before visiting a second doctor, ostensibly by the name of Dr. Pangloss, she promises the first doctor not to mention a word about her amenorrhea so that the second doctor will not "so stupidly embark...down this grotesque history of pregnancy."⁷⁸ According to the author, Dr. Pangloss is a doctor well deserving of being called a doctor, whose office is always filled with patients. The price he pays for this success is that he must see his patients quickly, and that "at the end of the day, he believes at their word *these incorrigible mythomaniacs that are the sick patients*. It is thus with great confidence that he listens to the explanations of Madame X...he admits that she suffers from her liver and prescribes a beautiful arrangement comprising a masterly formula and three specialties." Madame X, delighted, returns home and begins to "religiously ingest" her medications at the prescribed hours, swearing to never again return to the office of Dr. Dujardin. Madame X's husband, "an impenitent boozier," also suffers from pain in his liver. At the advice of his wife, he also goes to consult Dr. Pangloss who tells him: "Dear sir, you have exactly the same thing as your wife. The same arrangement will do for you too, so take exactly the same medication as her." "Act Three" begins and ends six days later when Madame X has a miscarriage. The "epilogue" serves to tell the moral of the story. Monsieur X thinking that he has the "exact same thing" as his wife, anxiously waits everyday for his miscarriage (*l'avortement*) at the local bar where, recounting his story, he has become the

principal attraction. The owner of the bar is more inclined to believe that he as a sleeping child.

The author, J. Dujardin asks, What moral should be taken from this story? The response is that “The patient always lies (*le malade ment toujours*).” This axiom, he cedes, is not always absolutely true, “but we must admit that [the patient] often lies, and often with ingenious charm...” The doctor concludes: “How medicine would be an inspiring thing (*une chose passionnante*), if only there were no sick patients (*les malades*).”

In this article, Dr. Dujardin’s puts his patients on trial, accuses them of lying and making false allegations about their symptoms. The role of the doctor, “supported by reason and good sense” is to “objectively” interpret their symptoms by ignoring what the patients say. In this particular instance, the man actually did speak truthfully about his stomachache. Madame X, however, thinking herself incapable of bearing of child ‘lies’ about her symptoms. The humorous and playful tone of the article does very little to soften its message. This article’s sarcasm towards the pain of the Moroccan patients is meant formally to enact the particular distance that the doctor himself should take from the patient when listening to him—or rather, especially when listening to her. In this story, the Moroccan husband ‘accurately’ recounts his pain, whereas the woman “lies” about a “capital matter (*une chose capital*)”—the absence of her menstrual period.

The moral of the story is that only the colonizer and not the Moroccan subject has the expertise and ability to speak for and about the female body in pain. The doctor listens contemptuously to the patient, “an incorrigible mytho-maniac.” The doctor should not really listen to the Moroccan woman when she tells you about her pain and suffering—and he especially should not listen her in things related to her sexual functions. The second doctor in this story serves as the foil insofar as he causes this tragic comedy of errors. His mistake was that he listened to the account of suffering of the Moroccan woman and believed her at her word. The lesson to be learned is that a good doctor will not listen to the Moroccan female patient who not only does not understand her own pain, but can be said to lie about and misrecognize the sexual functions of her body. In either case, her speech is not to be trusted.

Bosquet and Jahier, in their article, recount in a similarly sarcastic tone two cases of a sleeping baby seen by a French gynecologist. In the first case a married woman who menstruates irregularly comes to see the doctor after having “insignificant” periods for seven months, during which time she saw her belly grow and felt the active movements of her infant. “Upon examination, her uterus was manifestly empty (*manifestement vide*). In front of this statement of the doctor, the young woman remained incredulous: ‘I feel the movements of the infant.’” The doctor responds by telling her that this is impossible since her womb is quite little and certainly empty (*vide*).

The second case of the sleeping baby examined by the same French obstetrician reveals a colonial fear of the effects of female speech on the community. A woman “who appears to be of menopausal age” visits the doctor to find out why she has not yet given birth since she has not had her period for one year. Already having had three children, she is convinced that she is pregnant and has felt the movements of her infant for some time already. Upon examination, the doctor confirms that the woman is without a doubt pregnant and will give birth in approximately four months. “Well, the infant must have been asleep” the woman responds. The authors of the article comment on the dangerous

effects of this last statement: “And no power on earth will make this woman of absolutely good faith and crazed with maternity, understand that she did not become pregnant until after an amenorrhea of seven months, due to her age. And this woman who will give birth one day, as well as her family and her entire village, will all be ready to testify: Z. bint O. carried her living child for 12 months.”

Bosquet and Jahier conclude that the “one victim” of the women’s utterances about the sleeping baby is French obstetrics because the woman, before finally agreeing with the obstetrician, will go to all of her friends and tell them that the doctor was not able to find the sleeping infant that she will one day give birth to. When she actually becomes pregnant “ a month or a year later, this story will only add fuel to feminine gossip.” The woman will do nothing but “persuade young and even younger suggestible women” of the fact that she carried a sleeping child for a long period of time. Here it is not only the belief in the sleeping baby that is presented as the danger, but “feminine gossip” and the power of women to persuade and influence other women regarding the sexual functioning of their bodies, a power that should be reserved primarily for the medical expert. The woman’s speech is transformed into mendacity, gossip, and kind of empty and negatively persuasive speech; from a logos to an injurious rhetoric.

Another article published in *Maroc Medical*, “The myth of the sleeping infant, occasion for a gynecological examination” argues, as the title would suggest, that the cure for the sleeping baby is the expertise of the gynecologist together with the technique of the gynecological examination. The Doctor P. Lalu offers a brief sociological account of the sleeping baby as an essential element that holds together Moroccan marriages insofar as it helps to sustain the “tranquility and sustainability of this matriarchy that confers to the Moroccan woman a sovereign authority in her home.” The basis of this domestic sovereignty is the power of the woman to bear children for her spouse, for whom the concept of marriage is inconceivable without children. “Prolonged pregnancies are an undeniable factor of familial calm and stability.” This is because of the importance of women bearing children to a marriage. If the marriage is without children, and the visits to the various healers, doctors and spiritual guides do not result in pregnancy, the woman is at risk of repudiation, which for her is a terrible, dramatic event. The myth of the sleeping baby affords the woman the opportunity to avoid being repudiated and to keep her marriage intact for as long as she remains pregnant. Lalu claims that while the sleeping baby is an indispensable social corrective for marital problems, it is not for the doctors to decide whether in a particular instance the woman is deploying it as an artful feminine ruse or whether she sincerely believes in her sleeping baby. Rather, it is on the basis of the sleeping baby, he argues that doctors “ have the unique occasion to take gynecological stock of women who for no other reason would have decided to undergo such an examination.” Lalu rehearses the surrealist biological discourses found in Bosquet and Jahier’s article, wherein the female body becomes the site of the production of unproductive reproductive labor, monstrosity, horror and death. In this case the relationship between the biological discourse and the need for the gynecological examination is explicit. The woman cannot be trusted to manage her reproductive functions, nor to speak about them truthfully. Both cases justify the need for “a precise interrogation followed by a gynecological examination for any Moroccan woman coming

for a consultation for a ‘ragged’.”⁷⁹

The last two sections have explored how expertise was constituted in the medical and legal domains. New forms of Euro-American reproductive expertise consolidated obstetric jurisprudence in the colonial territory by forging new relationships between the reproductive female body, law, biomedicine, and gynecology. I demonstrated how colonial expertise attempted to transform the sleeping baby from a bio-social occasion for the production of new norms into a psycho-bio-social pathology. This transformation repeats the French historical medico-legal practice of turning the reproductive female body into a laboratory that provides the conditions for a particular performance of science and gendered theorization of nature. The sleeping baby became the site for the continued study of evolutionary romantic biology and the concomitant pursuit of the surveillance/policing of the female body in the legal domain.⁸⁰ The discussion examined how colonial reproductive-biomedical discourse read the sleeping baby as the objective “error” of medical diagnosis and the subjective disorder of a pathological female body and feminine imagination. In the colonial mind, both error of interpretation and the pathological imagination lead to the “incompetent” misrecognition by local law, custom and medicine of the workings of the abnormal, pathologically unproductive female body, which in turn poses a threat to the regulation of public order.

While in the medico-scientific domain the sleeping baby was explained away through the creation of a topology of the varieties of the reproductive female body focused on its possible anomalies, the remainder of the chapter analyzes how the French colonial jurists and doctors transformed the sleeping baby into a medico-legal problem whose only solution in the legal domain was its absolute negation and exile from the courtroom and written law.

II.4 Colonial Law, Immodest Speech and The Female Witness.

The point of the above discussion was neither to impugn the colonial doctors, jurists and public health administrators for their arrogance, nor to attribute ill will to them and their practices, nor to make an argument for or against Western medical, technological or gynecological practices. Furthermore, the point was neither to ascribe to Moroccan women an authentic or genuine voice or consciousness that would imply unmediated poetic access to truth or to the phenomenal experiences of the body. Rather, the point has been to draw attention to the institutionalization of a process of subjectified speaking and listening, and the discourse of obstetric jurisprudence that has crafted a particular form of expertise and expert that became audible to healthcare and the law through a process of displacement. The speech of the French experts wrested public truth-making away from the Moroccan female subject, and with it, the very conditions of possibility of speaking about her own body to state law or medicine other than as failure or pathology. It is precisely here where the discussion can return to the question of the sleeping baby as a legal problem for modern colonial law and its ‘administration of

⁷⁹ Lalu, *Le mythe de l'enfant endormi*, 643.

⁸⁰ See Ornella Moscucci, *Science of Woman*, Canguilhem, *Knowledge of Life*; Susan Edwards, *Female Sexuality and the Law*; Evelyn Fox Keller, *Reflections of Gender and Science*; Carolyn Merchant, *Death of Nature*; Hilary Marland, 1993. *The Art of midwifery: early modern midwives in Europe*. London: Routledge.

justice.’

To arrive at the truth related to knowledge of the female reproductive body in pre-codified Islamic law, women were the only ones who could speak to the law as witnesses and expert witnesses about the contingencies of the sexual functions of their bodies (see for example the writings of jurists such as Ibn Asim, al-Bahja, Al-Zurqani on Khalil, al-Hawari, the fatwas of al-Wansharishi etc). The Maliki jurisprudential evidentiary principle concerning the sexual functioning of the female body supported the view that a woman was to be believed in any matter related to the sexual functioning of her own body as long as it was conceivably ‘plausible.’ According to this principle, the speech of women was to be considered truthful as evidence in all matters concerning the reproductive aspects of their bodies. For the jurists of the French North African colonies, this evidentiary principle rendered the administration of law impossible.⁸¹

In a colonial study on the conflicts of paternity in Maliki jurisprudence published in French and Arabic in the Protectorate-era law review journal, the Moroccan Review of Law, H. Lapanne-Joinville condemns the legal practice of sanctioning prolonged gestation periods by relying on the utterances of women about their bodies. Such a practice, he claims, multiplies the possibilities for fraud and does not protect the interests of the father. There are two reasons for this. On the one hand, it is difficult to apply a norm to the sexual functions of the female body—the only norm for which is difference. In other words, the reproductive functions of a woman’s body such as menstruation, lactation, gestation and menopause differ both from other women’s bodies as well as from itself. The body of reproductive subject, Lapanne-Joinville suggests, does not operate mechanically, but fluctuates and changes with time. On the other hand, the utterance of the woman is accepted as true in evidence even if it contradicts earlier utterances that she made.

Lapanne-Joinville’s writing presents a typology of the possible combinations and resolutions of conflicts that may arise from the Islamic laws of paternity in cases where the woman divorces, remarries, or is abandoned by her husband. The problem, according to Lapanne-Joinville, is that when a divorced or abandoned woman remarries and becomes or is already pregnant, there is the possibility for fraud in conflicts of paternity and the possibility of rendering legitimate an ‘illegitimate’ birth. This possibility is due to the Maliki principle of evidence that posits that a woman’s speech about the sexual functioning of her body—i.e., experiences of menstruation, pregnancy, lactation, observations of her genitalia—is considered legally valid and true, and cannot be used against her in court even if she makes opposable claims at a later point in time. Furthermore, those claims can only be contested at the risk of being taxed for defamation.⁸² Lapanne-Joinville’s jurisprudential argument condemns the sleeping baby solely on the grounds that the evidence of its existence is anchored to the speech of

⁸¹ J. Lapan – Joinville, 1956. “Les conflits de paternité en droit musulman (rite malékite).” *La Revue Marocaine de Droit*. Casablanca, s.n., Vol. 8, 352-363.

⁸² Lapan-Joinville, “Les conflits de paternité,” *La Revue Marocaine*, 363. *Qadhif* is a slanderous accusation of fornication or of illegitimate descent. In the latter case, it amounts to accusing the mother of fornication. The Quran considers slanderous accusation a crime (*hadd*) and fixes a penalty of 40-80 lashes for anyone found guilty of falsely accusing an innocent person. See: Linant de Bellefonds, Y. “*Kadhif*.” *Encyclopaedia of Islam*, Second Edition. Edited by: P. Bearman; , Th. Bianquis; , C.E. Bosworth; , E. van Donzel; and W.P. Heinrichs. Brill, 2011. Brill Online. University of California Berkeley.
<http://www.brillonline.nl/subscriber/entry?entry=islam_SIM-3755>

women about the sexual functions of their bodies. Not unlike other colonial medico-legal texts from the period, Lapanne-Joinville's article reveals a general anxiety about and distrust of the changes that may occur to a female body, which does not operate mechanically but is often constantly changing, in flux. It is difficult for the law to institute a universal model of normativity when it comes the sexual functioning of the female body where difference, contingency and singularity (of phenomenon such as menstruation, lactation and pregnancy) is the rule.

In discussing the waiting period that women must observe in Islamic law after the dissolution of a marriage (*idda*), Lapanne-Joinville reproaches Islamic law for not regulating the sexual functioning of the female body according to a universal model but for treating the female body as a category of contingency in which every body may be different, such that difference or contingency itself becomes the site of the authority of female witnessing and speech.

In Islamic law, to avoid the "confusion of blood ([what the Roman's called] *turbatio sanguinis*)" that could arise when a woman remarries, the waiting period for the widow and the divorcée depends on the accomplishment of several menstrual cycles. If the woman does not menstruate regularly, it depends on a set period of time, three months for the divorced woman if the marriage was consummated, four months and ten days for the widow regardless of whether the marriage was consummated or not. However, in order for the woman to remarry, she must have observed at least one menstruation during this period of time. If the woman is pregnant, the waiting period is prolonged, either until she either gives birth or the fetus is released.

Lapan-Joinville first takes issue with the juridico-religious practice of waiting only insofar as it is founded on a body that cannot be normalized or abstracted. He condemns the fluctuating female body as a body unfit for the administration of law.⁸³ He writes, "But what complicates things is that women do not always menstruate regularly. Some do not see the appearance of their period for several months at a time. Others have it every fifteen or twenty days. And still others (young girls, women who have attained menopause) do not have their period at all." Here again, he emphasizes that the reproductive functioning of a woman's body diverges not only from another woman's body but also from itself over time. And it is on the basis of the knowledge of this sexual functioning that society and governance depend for knowledge of paternity and the management of 'legitimate' birth.

According to Lapanne-Joinville, the constant contingencies of the female body and its divergence from itself, complicates the administration of law in its determinations of paternity and the 'legitimacy' of birth. 'Complication' for Lapanne-Joinville would be a value antithetical to the desired telos of modern state law as a form of rational bureaucracy (such as that described by Max Weber and other legal positivists) which serves as colonialism's assumed evolutionary paradigm of law, whose essential validity the colonial writing never places in question. The changing female body as a

⁸³ In order to understand the regulatory power of this judgment, it is important to keep in mind here the previous discussion of the cultural construction of the normal in Canguilhem, and a particular viewpoint that the scientist—and perhaps, as Lapanne-Joinville's text suggests, the legislator—adopts. This viewpoint begins from the assumption that deviation and singularity in nature is error or failure. For Canguilhem, the fluctuation of the female body would be the basis of an individualized norm, but not a biological law; for the French jurist, biological law and juridical law are made synonymous.

complicating factor for the law might suggest that the ideal subject of modern positive law is a disembodied subject, or a body that operates like a machine—but certainly not the fluctuating female body.⁸⁴ Lapanne-Joinville’s frustration with the female body suggests that the contingent body—its differences from itself in time and divergences from other bodies in space—complicates the administration of law whose main task with regards to sexuality and reproductive practices is the regulation and production of a normatively universal, female body.

What further complicates matters and ultimately makes Islamic law redundant as real law in the colonial reading, is that knowledge of the contingencies of a particular female body belongs not to the medical expert—who in the figure of the midwife is contemporaneously being displaced by the gynecologist and discredited in other colonial writings—but to she who experiences that body. In the colonial juridical reading, phenomenological experience of the female body does not count as knowledge for the law. Not only because the body is ‘complicated’ and in flux, but also because she who experiences that body is the only person who can testify to the law on behalf of its changes over time. Lapanne-Joinville writes

“On the simple allegation of the woman that she perceives herself to be pregnant, the waiting period (*‘idda*) resumes its course, until the delivery of the child, without the possibility of opposing her former declaration against her... The evidence for one or another situation, as we conceive it, makes administrating the law impossible since the [Maliki] doctrine also admits that in this matter, one must rely on the statements of the woman. It is indeed a principle that the woman is believed according to her word (*sur parole*) for that which concerns her genital organs, the absence of menstruation, and the performance of the waiting period (*‘idda*) by the accomplishment of regular menstruation or a miscarriage, when her allegations are plausible.”⁸⁵

Lapanne-Joinville cites two fatwas to support his understanding of the principle of female testimony about the sexual functions of the female body, which I will quote in full.⁸⁶ The first is a fatwa of the Maliki jurist ‘Isa al-Sijistani:

Question: One [woman] observing the waiting period (*idda*) recognizes that she is pregnant before witnesses. Then she remarries with a second and then a third husband and gives birth while under the power of the latter. The first husband produces the evidence of the former testimony.

⁸⁴ See Michael J. Sandel. “The Procedural Republic and the Unencumbered Self.” *Political Theory*. Vol 12, No.1 Feb 1984.

⁸⁵ Lapan-Joinville, “Les conflits de paternité,” *La Revue Marocaine*, 363.

⁸⁶ A fatwa is a legal opinion that takes the form of a question posed by and a response. Fatwa literature is considered to a helpful source of understanding the actual functionings of Islamic law in practice, the kinds of problems and questions that arose in social life, which social actors were involved, harmonies and divergences in practice from doctrine, etc. See Masud, Muhammad Khalid, Brinkley Morris Messick, and David Stephan Powers. 1996. *Islamic legal interpretation: muftis and their fatwas*. Cambridge, Mass: Harvard University Press. In the Maghreb there are voluminous collections of published fatwas, including the famous ones of al-Wansharishi, as well as many other collections that are unpublished and kept in private libraries.

Response: The woman is believed in that which relates to her genital organs. If she claims to have completed the waiting period (*idda*) and declares that the child is from the third marriage, so shall it be. Her first testimony cannot be used against her.

The second fatwa responds to a question about when a woman can remarry. Abu Hasan As-Sughyir finds: “If the woman claims to be pregnant and remains thus for a certain time and then declares not to have an infant in her womb and wants to get married, her word will be admitted if her declaration is plausible.” Lapanne-Joinville considers this principle of admitting female testimony about the sexual functions of the body incompatible with the administration of modern state law.

The impossibility of relying on female testimony in Lapanne-Joinville’s text corresponds at a practical level to the bio-medical arguments of physicians who insist on the need for expert control and surveillance of the female body, and on the necessary insertion of an institutionalized male gaze and touch to corroborate the bodily experiences of the woman, so to render it publicly meaningful and true. Surprisingly, Lapan-Joinville’s reading of the admissibility of a woman’s testimony about the sexual functions of her body completely excludes any mention of the midwife, ‘the knowledgeable female expert (*arifa*)’ who would have been called upon to provide evidence in the case of a dispute. Given Lapan-Joinville’s expertise and encyclopedic knowledge of Islamic legal practices and doctrine in the Maghreb, the absence may suggest the desire to emphasize a fundamental distrust and lack of credibility and expertise—technical and/or moral—of an individual woman’s testimony and knowledge about the sexual functions and reproductive aspects of her body.

From the juridical perspective, the ultimately pathological nature of the female mind that causes the body to appear other than it actually is, and the fluctuations of the female body that complicate the administration of law, lend weight to the arguments against believing the word of the female witness or patient about her own body. The attempts to find the real errors are the attempts to discredit ordinary female speech about the female body in the medical and legal arenas, to surround it with an air of chaos, madness, disorders of the imagination and body—and to instead institute the gynecologist as expert of a universal female body. The judge or legislator should no longer listen to women when deciding upon matters related to the reproductive female body, but to the gynecologist. “This is what must grab our attention...we have the unique occasion to take gynecological stock of women who for no other reason would not decide to submit to such an examination...All the reasons that I have just elaborated appear to me amply sufficient to justify a precise interrogation, followed by a detailed gynecological examination of any woman coming for a consultation for a ‘ragged.’” The cure for the sleeping baby as a social, legal and medical problem is the competent gynecological examination that refuses to listen to the female speech, to mark it as unreasonable, hysterical, false and disillusioned before it is ever spoken. “For heaven’s sake, do not look to give a logical and scientific explanation, that far from convincing your female interlocutor (*interlocutrice*), will make you into a dangerous imposter, or worse yet, into an enemy of the ‘real’ faith...It would be very bad to go to war against established

principles, even in the name the most dependably established science.”⁸⁷

Conclusion

In Bosquet and Jahier’s article, the return to the question of the sleeping baby as a matter of law depends on the constitutive process of enacting expertise that institutionalizes, naturalizes and pathologizes the reproductive female body as an object of psycho-biology and gynecology, a process that wrests away women’s access to other ways of knowing, speaking and performing the reproductive body while banishing those ways of knowing to the past.

If the pathological nature of women’s bodies’ necessitated the development of “a science that could explain woman’s nature in its various psychological, moral and social aspects,” it would only be this science which could speak the truth about this nature to the law, reducing all other voices to forms of silence. It is through these enactments of knowledge that colonial expertise explains away the sleeping baby as a phenomenon that belongs only to the domain of legal history as a memory in the courtroom, a “curious trace of Muslim juridical folklore.”

“It was already a while ago,” they explain in reference to mid-nineteenth century courts in French-occupied Algeria, “that our tribunals refused to admit the juridical existence of the sleeping baby.” The law that admits such a phenomenon is not law insofar as it is contrary to the maintenance of public order. In late-eighteenth and nineteenth century France, England and North America, the medically defined, normatively pathological reproductive female body that had posed problems for law resulted in the gynecological and obstetrical policing of the reproductive female body. The development of obstetric jurisprudence—the interface of law and gynecology—had effectively solved the problem for law of the ‘normally deviant’ reproductive female body by instituting an expertise that could speak to and for the law. For the colonial expert in the Maghreb, judgments about reproductive knowledge insisted that the colonial eye was the only eye that could see the difference between the normally reproductive and the pathologically unproductive female human body, between the healthy body as an abstract universal mechanical object and the unhealthy one as a site of chaos, disease, monstrosity and failure.

Thus, the final enactment of expertise—a kind of meta-expertise, a decision that constitutes the truth value of the expert performance itself—occurs at the juridical level. For the law, testimony and expertise that admits the sleeping baby, according to Bosquet and Jahier, is not really law, testimony or expertise at all. In this way, colonialism reveals the limits and extent of legal positivism. It no longer suffices to simply identify the law—the command of the sovereign, the basic norm, or the ultimate rule of recognition. In the case of the sleeping baby, the act that identifies the law simultaneously negates its existence as law, positing a hierarchy between norms, commands and rules, and expertise about what can constitute law, banishing all other laws and norms to the realm of history.

What has been key here are the two reasons that colonial law and science give for local incompetence: first, the irrationality of the techno-science of Moroccan midwifery and, second, the “dangerous” practice of accepting as true the speech of the female

⁸⁷ Lalu, *Le mythe de l’enfant endormi*, 642

witness and the female patient concerning the sexual functioning of her own body. Islamic law and local medicine were such that they allowed contingencies and anomalies in the production of norms. In the Islamic and Maghrebi discourses, time takes on a distinct quality separate from the cycles of nature (*tabī'a*), permitting sleep/rest (*raqd*) and birth (*wilāda*) to conjure up a different set of possibilities, values and practices related to the reproductive female body.⁸⁸ Concomitant to the performance of expert knowledge in the colonial medico-legal pursuits was the systematic enactment of a techno-epistemological hierarchy. This hierarchy negated the value of theories concerning nature's possibilities in the creation of human life that did not conform to Enlightenment concepts of the body. Both Moroccan midwives' knowledge of reproduction, conception and contraception, and the truth value of female speech in court about the reproductive functions of the female body depended on Islamic epistemologies and local understandings of nature, creation, health and life.

In the colonial discourse about the sleeping baby, the abnormally reproductive female body is one that reproduces, or believes itself to reproduce, outside the mechanical time of natural biological reproduction. *Colonial knowledge* posits such a body outside the realm of human history, where it is read alternately as a sign of evolutionary deviance, the chaos of the animal world, the danger of the pathological, the excess of the monstrous, and the deception and betrayal of the false appearance.

For the French colonial jurist and obstetrician, the sleeping baby represented the lack of medico-legal surveillance of the female body, value in female speech, and birth outside the time of natural reproduction, all of which medical doctors and jurists must be able to surveil and control. Births outside the time of the cycle of reproduction of nature become part of a teratological discourse which turn the female human body that did not reproduce like clockwork into a body capable of producing the radically non-human and fundamentally other—the monster—, death or a simulacra of life (of falsely appearing reproductive). The knowledge and techniques of Moroccan midwives are deemed incompetent insofar as they are incapable of accurately recognizing signs of death from signs of life, and cannot thus reliably surveil or manage the reproductive aspects of the female body.

I have shown how colonial medical and juridical literature misdiagnoses the present to justify prophecies of the death of the sleeping baby; insists on the lack of value of midwives' knowledge and female speech about reproductive female bodies; constructs a female subject under the influence of a pathological imagination whose body errs, deceives and lies and cannot speak the 'truth'; demands for the institutionalization of the gynecologist who comes to speak for the Moroccan woman; and introduces the colonial touch and gaze on the reproductive female body. All of this needs to be understood as a discourse that marks a shift in the relationship between law and medicine concerning the reproductive female body in modern Morocco. Again, the point here, of course, is not to create an argument against Anglo-European medicine or technology. Rather, I have shown how the colonial epistemology and expertise that could not incorporate or assimilate the sleeping baby could only demand of law and medicine that it tear down the scaffolding and obliterate the matrix in which the sleeping baby dwelt.

I conclude by noting that while Islamic law had for centuries remained plastic to

⁸⁸ See Chapter One of this dissertation

contingencies of particular situations of the reproductive female body through its evidentiary and witnessing procedures, the functioning of modern colonial law seems to depend on the institutionalization and assumption of an abstract universal reproductive female body. Since for the French colonial jurists, it was precisely Islamic law's contingent production of bodily norms based on women's experiences which they related through acts of witnessing and testimony that caused it to fail as "real" law, the question arises: what must the female reproductive body become for it to be an object of colonial or modern state law? What must the reproductive body become for modern law when all acts of reproductive bodily witnessing must be translated into the language of obstetrics? The contingent, fluctuating female body as a complicating factor for modern law might suggest that the ideal subject of modern positive law is an essential or abstract universal body, a disembodied subject, or a body that operates like a machine. And if modern law must both assume and produce this abstract universal female body, the question remains as to how and whether it accounts for the particularities of the socio-biological experiences of women's lives. Will the functioning of modern state law in the postcolony depend on the institutionalization of a normal-reproductive and pathologically-unproductive female body?

Chapter Four. In the Postcolony: Law and Gender in Fragments

I. Fragment 1

1956, the seminal year in Moroccan history that ended the formal protectorate relationship with France. This chapter, together with the next two chapters, examines the disappearance of the sleeping baby from the juridical and medical spheres in the post-colonial period, beginning with the first codification of the family law (*Mudawwana al-aḥwāl al-shakhsīyyah*), also known as *Mudawwana al-'usra*).

Since Morocco gained independence from France in 1956, incredible energy and intellectual labor has been devoted to the reform and codification of the *Sharī'a* (Islamic law) into the Code of Personal Status (*Mudawwana al-aḥwāl al-shakhsīyyah*). Scholarly studies of modern family law reform shows that most Muslim majority countries embarked on reforming the family law as early as the second decade of the twentieth century.¹ However, the project of reengineering family law did not begin in earnest until the colonies gained independence. In 1956, the new Moroccan national government began work on the codification of family law, a reform the French had been considering since 1953. At the beginning of that decade, nationalists like al-Fasi had already begun to debate the place of the Islamic legal tradition in the modern nation-state, focusing primarily on the substance of Islamic law contained in the *Sharī'a* regarding matters of personal status.² While scholarship concurs that in most Muslim majority countries, Islamic law came to represent what was taken to be the last stronghold of the *Sharī'a* to survive 'modernization,' the effects of modern state power, insofar as they concern the state's encounter with the *Sharī'a*, are under-researched by many legal scholars in the field of Islamic studies. Very few studies have questioned the new methods of redesigning the law that divorced the *Sharī'a* from its native legal environment. Perhaps following the silence by the reformists themselves, studies of the legal reform of family law have rendered neutral the new legal tools of the nation-state (i.e., codification and reform) and have not posed the question of the shift from the pre-colonial culture of legality to one that revolved around the political practices of the nation-state.³

In this context, it is important to further examine the disappearances of sleeping babies from legal and medical spaces, as well as its appearance in popular healing practices and art. During the process of codification, the sleeping baby is written out of and exiled from the law. This change was one of the few very substantive (i.e., content

¹ See Herbert J. Liebesny, *The Law of the Near and the Middle East*. Albany: State University of New York Press, 1975: chs. 3-4; Norman Anderson. *Law Reform in the Muslim World*. University of London: The Athlone Press, 1976: 1-33; Joseph Schacht. *An Introduction to Islamic Law*. Oxford: Clarendon, 1964: ch.15; and Knut S. Vikør. *Between God and Sultan*. New York: Oxford University Press, 2005: 222-53.

² See Dawoud S. al-Alami. *The Marriage Contract in Islamic Law in the Sharī'a and Personal Status Laws of Egypt and Morocco*. London Dordrecht: Graham & Trotman, 1992; and Dawoud S. al-Alami and Doreen Hinchcliffe. *Islamic Marriage and Divorce Laws of the Arab World*. London: Kluwer Law International, 1996.

³ See for example, Buskens, *idem*, "Recent Debates on Family Law Reform in Morocco.": p.77, where he writes : " The textual form was modeled on French legal tradition, in accordance with the aim of creating a modern nation-state: The millennial tradition of fiqh, with its glosses and commentaries, was replaced by Cartesian style texts arranged in books, chapters, articles, and paragraphs."

based) changes made to the norms of Maliki fiqh as codified by the Moroccan judicial elites after independence.

Morocco is, and is not, not unique in this regard. In general, modern laws in countries previously governed by Islamic law no longer allow for the *rāqid*. In 1929, Egypt reduced the maximum length of pregnancy from two years to one year, followed by Syria in 1953, Tunisia in 1956 and Morocco in 1957. Yet, protracted pregnancies are not completely excluded, as a year is still more than modern medical science, or American or European codes would allow. According to the Code Napoleon, a woman can only be pregnant for 300 days, and in Swiss and German law, 302 days. Article 57 of the *Mudawwana* states that after one year, it is up to a judge to decide, with the help of medical experts, whether or not the woman is pregnant. Algeria established the maximum terms at 10 months under French colonization. Though the French had effectively outlawed prolonged pregnancies in the nineteenth century, Algerian Qadis continued to admit claims based on sleeping babies, judgments which the French judges attempted to overturn. Why were prolonged pregnancies something codified state law and judicial elites could not continue to tolerate, particularly when many other practices considered intolerable to many were codified? ⁴ Why is science so sacred to modern law?

In *Just Silences*, Marianne Constable offers a critique of modern law, whose possibilities have been restricted to “sociolegal positivism.” Constable wants to recuperate law’s “nonpositivist possibilities” in the silences of the law. These silences do not represent the lack of justice, but rather its unscriptability in sociological and positivist discourse. As Constable puts it:

[J]ust silences listens to what is not positivist in law, to what is not clearly articulated and articulable at law, and to what is just. Its claims about justice are not normative or prescriptive. It refuses to relegate the justice of law to empirically contingent social realities. It reveals a multiplicity of legal silences and of possible implications for justice at precisely the limits of positive law, where the language of power and the power of language run out.⁵

Drawing on the idea of just silences, the second part of the dissertation analyzes the silence of the sleeping baby in the hospitals and courtrooms of postcolonial Morocco. It is in these silences of these spaces that the former legality of the sleeping baby can be found. In the field of critical legal geographies, the spatiality of social life is analyzed as a problematic of the law. Legal spaces cease to exist when physical spaces cease to exist, just as new physical spaces are productive of new legal spaces.⁶ The destruction of land and property, or the re-appropriation of space is accompanied by new law and new legalities, symbolizing new forms of legal ownership such as titles and deeds, and new forms of regulation, such as policing and surveillance. The new legalities render

⁴ (i.e., forced marriage, polygamy, unilateral divorce by the husband without judicial oversight, the marriage of minors, in particular girls, and so forth)?

⁵ Constable, 13

⁶ Critical legal geographies Reader

invisible and silent the fullness of the space, attempting to saturate the former legalities that linger there, but whose histories and presence can no longer be seen or heard.⁷

I would extend, by analogy, the idea of space, of *topos*, to the human body. Bodies are not just regulated in space and time, but are themselves spaces with temporalities. For my purposes here, for this chapter, the gendered human body of the woman with a sleeping baby will be seen as a space, or an “environment (*milieu*)”—as Levi Strauss puts it—of persisting legal temporality.

In discourses of modernity, modernity is associated with the rule of law (based on secular-scientific claims to truth), gender equality, and the amelioration of the status of women in society. The source of inequality is often perceived to be “tradition”—perceived as Mediterranean, Middle Eastern or Muslim.⁸ In this image of modernity, “Moroccan Women,” along with their Algerian and Tunisian sisters, access work, mobility, freedom and rights with the advent of modernity, which is situated historically with the first prolonged contacts with Europeans (read: colonialism). Colonialism as modernity is perceived as the rupture with the “traditional” order—an order perceived to be temporally separate from the temporalities of the “civilizations” at the alleged centers of modernity.⁹ Moroccan women, once liberated from “traditional society” would be equally free as men to “go out to work.” Against wide-spread ideas about the recent, exceptional and devalorization quality of women’s work, in Morocco, popular classes of “women have always worked,” and held property rights over the body, including over birth control and reproduction.¹⁰ Against these “civilizing” postcolonial discourses, this work suggests that biomedical and secular-scientific claims to truth and knowledge may have in fact colonized women’s reproductive bodies in new and inimical ways.

As chapter Six shows, these official medical and legal discourses have not saturated the language of reproduction outside their won domains. The appearance of sleeping babies on the stages of the postcolonial state apparatuses is restricted to silences. They are outlawed, not in the sense that they become illegal (though the practice of midwifery vis-à-vis abortion and contraception is officially criminalized), but rather

⁷ The emphasis on spatiality in critical legal geography--on maps, grids, cities and states neglects to account for a constitutive dimension of legal spatiality, namely time and temporality. The question of the relationship between time and law is a messy one. In distinction to the volumes written about space and the law in academia—as well as more indirectly in more popular works of urban geography such as *City of Quartz* or *Planet of the Slums*, little ink has been spilled over the question of time and law. This neglect is not, I think, because of the lack of importance of the question, but because of the difficulty in approaching the topic. In perhaps the only work devoted entirely to this topic, *Time and Law: Is it in the nature of law to persist*, the editor introduces the book, which is a publication of papers from a conference, by saying that the conference has not resolved any confusion about the subject matter, but has only managed to bring the confusion to a higher level. Ost, François, Mark Van Hoecke, *Facultés universitaires Saint-Louis (1974-.... : Bruxelles)*, and Katholieke universiteit Brussel. 1998. *Temps et droit: le droit a-t-il pour vocation de durer?* Bruxelles: E. Bruylant; also see Fitzpatrick, Peter. 2001. *Modernism and the grounds of law*. Cambridge, UK; New York: Cambridge University Press.

⁸ Hatem. 1993. 120-2

⁹ Fabian, *Time and the Other*

¹⁰ See Chapter Two of this dissertation and Schweitzer, S. 2002. *Les femmes ont toujours travaillé. Une histoire de leurs métiers, xix et xx siècle*. Paris, Odile Jacob, quoted in Rodary, Meriem. 2007. “Le travail des femmes dans le Maroc précolonial, entre oppression et résistance.” Ed. Catherine Coquery-Vidrovitch. *Cahiers d'études africaines* 47 (187-188) (December 15): 753–780. I thank Claire Nichols for telling me about the latter article.

extralegal, in the sense that reproductive bodies are only legible or audible to law and medicine in ways that make the sleeping baby unthinkable.

Since the codification in Morocco, *rāqid* has come to signify something new in official legal and medical discourse—namely, a dead fetus, or one that is without movement or life. In my survey of cases during the postcolonial period, I came across only one case that mentioned the term *rāqid*. The case, which first appears in the District Court of Casablanca in 1970, and ends up in the Civil Division of the Supreme Court in 1971, takes up the issue about how to legally determine a date of birth.¹¹ It presents the question of whether the witnessing of two midwives (*qābilatīn tushāhidān*) who have diagnosed a sleeping baby pregnancy of four months can be considered as evidence when, according to the Supreme Court, the only Islamically legitimate form of witnessing (*al-shahāda al-mu'tabbira shar'an*) is one that witnesses “the movements and life” of the fetus, which can only be detected after “four months and ten days according to the saying of al-Tuhfa.” The Supreme Court overrules the lower court’s judgment, based on the fact that it had accepted the midwives’ testimony about the sleeping baby, which “cannot be considered.” In an indirect way, the judgment shows that pregnancy and reproduction have taken on a new meaning, and that only “movement and life” will be admitted as evidence.

The biomedical concept of the *rāqid* has also spread in popular culture, thanks to television programs focusing on the life of Zahra Abu Talib, a seventy-five-year-old widow. Sometime circa 2001, she became a media sensation when doctors discovered that she had a forty-six-year-old fetus in her womb. The doctors said: “After nine months of pregnancy had passed, the fetus died in the week or two [following the due date] due to a number of health-related complications of the pregnant woman. This is exactly what happened with this woman who says that she is pregnant with a sleeping baby. This is in fact a case of a dead fetus (*janīn mutawafā*), which was never discovered at that time (1956) because of medical errors and the lack of medical care at the necessary time.”¹² Some young urban Moroccans I spoke with only associate the *rāqid* with the idea of the dead fetus of Madame Abu Talib.

With some notable exceptions (which will be pursued further in Chapter Six), the discourse of the sleeping baby can no longer be understood by the consciousness of most Westernized Moroccan elites, by judges and doctors trained in French medicine, in postcolonial state hospitals, courthouses and feminist organizations. Certain elites want to distance themselves from popular beliefs, such as the *raged*, which they believe make their country appear to be “backwards” or “out of time.” On several occasions, feminists (of a liberal strand—i.e., those working for political change for women in Morocco vis-à-vis state-based reforms to the family code drawing on liberal Enlightenment values, sensibilities, rhetoric and funding from international organizations such as the World Bank and European Union)—declared: “The sleeping baby is a manipulation of the law, a

¹¹ Decision Number 7 of the Civil File Docket, number 35087. *Journal of Judgments of the Supreme Court (majalla qaḍa al-majlis al-'ala)*. Vol 25. December 2000. Rabat: Council for the Preservation of Rights' Center of Publishing and Judiciary Documentation. 105-6

¹² Quoted in Sharfaddin, Fatima al-Zahra, No Title Health section, “*Jouhar*.” March 15, 2010.

feminine strategy or tactic, a ruse.”¹³ Or as a scholar known for his liberal-feminist sympathies at the state-based religious university, the *Dar al-Hadith al-Hassaniya*, told me: “The *rāqid* is not a proper subject for feminism. Feminism requires deliberate political strategies. You cannot prove that these poor women with sleeping babies from the countryside have acted in concert or with any direct political aims.”¹⁴ “A celebrated contemporary jurist of al-Azhar, Sheikh Muhammad Abu Zahra explains Arab historiographers’ attachment to the story of Malik as a sleeping baby in the following way: “While Malik has a juridical opinion that [has been] inspired by the knowledge transmitted by mothers or from the ideas of certain elderly women known for their honorability, we, we are not able to hold the same opinion.”¹⁵ Some feminists and religious elites adopting liberal and biomedical thought see only negative connotation for women with “feminine arts,” (*al-mu’ataqadāt al-sā’ida*) aspiring instead to situations in which women do not need to rely any form of accommodation to patriarchal power. While this position is admirable, if utopian, for some—it is also why some other groups of feminists in Morocco charge this brand of feminist politics as ‘elitist’ and ‘out of touch’ with the daily lives of most Moroccan women.¹⁶

The *raged* is not always met with scorn. Sometimes, it is met with laughter. A master’s student at the *Dar al-Hadith al-Hassaniya* smiled: “We all laughed in class when we learned about the *rāqid*. No, no one believes in that anymore.” Others, neither laughing nor scoffing, adopt a sociological approach: “The *raged* is a way of protecting women,” said Said A. a young bachelor from the “*bled*” (countryside) now living in Casablanca. “Everyone in Morocco, everyone in the family, everyone in the community knows what is really going on. The *raged* is attached to a story of incest or rape. But no one says it. It’s a way of protecting the woman, keeping the honor of the family.”¹⁷ Another young man, Afer L. associated the sleeping baby with problems of male fertility and impotence. “Who knows if this is true? I don’t not believe in it. But now they have artificial insemination. You go to the doctor, they can...Now, they have Viagra. (Laughter).”¹⁸ Doctors also approach the *raqid* from sociological and medical perspectives, drawing from biomedical languages of infertility, sterility and nervous disorders to describe women with sleeping babies.

II. Fragment 2

The Chimeras of Others? What do you know about this? In these matters, who can boast to clearly distinguish the truth from falsehood, fact from fiction? Is there anything more real for man than the creations of the human spirit? Don’t you understand that this research of yours is a bou

¹³ Interview on file with author, June 21, 2011.

¹⁴ Interview on file with author, June 9, 2011.

¹⁵ Abu Zahra, Muhammad. *Malik*, quoted in Joel Colin, “Au Maghreb un contre-pouvoir du côté des femmes: l’enfant endormi dans le ventre de sa mère.” *L’Annee Sociologique* 2003/1, Vol 51, p. 116

¹⁶ Jansen, Willy. 2000. “Sleeping in the Womb: Protracted Pregnancies in the Maghreb.” *The Muslim World* 90 (1-2): 218–237..

¹⁷ Interview on file with author, May 19, 2011.

¹⁸ Interview on file with author, May 26, 2011.

*mergoud, a sleeping baby, a son of the Tunisian soil. It is immaterial whether he ever sees the light of day long after you have left. What matters is that you have carried him in your heart for almost ten years.*¹⁹

Much postcolonial thought about the sleeping baby follows in the footsteps of colonial writings, which preponderantly adopt a “positivist sociolegal” or biomedical approach to the phenomena. This positivist approach is one of modern law and science, which only understands the truth of the subject, and the relationship between law and justice in sociological, bioscientific and policy-oriented terms.²⁰

One exception to these approaches in colonial writings about the sleeping baby is found in the work of Marie-Louise Doubouloz-Laffin, whose work *Le Bou Mergoud. Tunisian Folklore, Popular Beliefs and Customs of Sfax and its Region* (1946),²¹ situates the sleeping baby more broadly in the context of jinn possession, and professional healing and witchcraft. While the title of the book indicates that the work is about the sleeping baby in Tunisian folklore, the book only devotes one paragraph to the *bou mergoud*, addressing instead jinns, diverse states of possession, illnesses due to jinns, magic and witchcraft to deal with jinns, and saint worship.²² The paragraph devoted to the sleeping baby explains the phenomena in a partially familiar way: the Maghreb is a region where men, nomadic and sedentary, are frequently “displaced.” When they leave their tents or walls of stone to search for work elsewhere, they must leave their wives behind. One or two years after the husband’s departure, the woman gives birth to a child, a *bou mergoud*—a sleeping baby. When the baby is born, it is considered legitimate and the proof of its legitimacy is its resemblance to the absent father. While some other colonial authors believe that the sleeping baby is a method to protect the child and the mother from a horrifying punishment, according to Doubouloz-Laffin, the real reason for the belief in the sleeping baby is the *resemblance* of the child once born to the absent or dead husband. Indeed, thus far in the sleeping baby cases I have come across, people who were skeptical about a claim to a sleeping baby were persuaded otherwise upon viewing the resemblance of the child to his or her father at birth. Doubouloz-Laffin notes that even when a widow remarries, the child’s resemblance to the absent or dead spouse is the reason why the child is attributed to the first rather than the second husband. Amongst the Jews in Tunisia, she adds, who also believe in the sleeping baby, the *bou mergoud* is a “*dibbouk*” a rebirth, an incarnation of the soul of the deceased in the body of the child.²³

One of the most interesting aspects of Doubouloz-Laffin’s writing is the refusal to pathologize the sleeping baby and the insistence on thinking through the sleeping baby with those who believe in it. From the perspective of postcolonial State law and biomedicine, the sleeping baby is *unthinkable* or *unknowable*. In the postcolonial period, the sleeping baby becomes an extra-legal discourse, which does not coincide with the uses of Time of the State, regulated by the law. The sleeping baby in modern Morocco is

¹⁹ Dubouloz-Laffin, Marie Louise. 1946. *Le bou-mergoud, folklore tunisien, croyances et coutumes populaires de Sfax et de sa région*. Paris: G.P. Maisonneuve.

²⁰ See Constable, Marianne. *Just Silences. The Limits and Possibilities of Modern Law*

²¹ Dubouloz-Laffin, Marie Louise. 1946. *Le bou-mergoud, folklore tunisien, croyances et coutumes populaires de Sfax et de sa région*, Paris: G.P. Maisonneuve.

²² See Dubouloz-Laffin, *Le bou-mergoud*, Introduction.

²³ Dubouloz-Laffin, *Le bou-mergoud*, 274

a persisting ‘tradition’ or state of underdevelopment—both of which imply that it is a way of being in the world that stands in need of correction.²⁴

III. Fragment 3

Modern Law expresses the capitalist relationship between power and knowledge, as it is condensed in capitalist intellectual labour: outside the law, individual-subjects contain no knowledge or truth. As law becomes an incarnation of Reason, the struggle against Religion is pursued in the forms of law and juridical ideology, and Enlightenment physical science is conceptualized in juridical categories. Abstract, formal, universal law is the truth of subjects: it is knowledge (in the service of capital) which constitutes juridical-political subjects and which establishes the difference between public and private. Capitalist law thus gives expression to the process whereby the agents of production are entirely dispossessed of their ‘intellectual powers’ to the benefit of the dominant classes and of their State.²⁵

The above quote asks, in a different tenor, the Foucaultian question: Who speaks the truth of the subject? This question does not imply truth or poetics beyond language or outside of ideology. In postcolonial Morocco, as the next two chapters will show, the law-science or law-biomedicine juncture, as apparatuses of the State, are the official discourses of knowledge. They do not saturate knowledge, but dispossess the subject of the ability to witness or speak in these spaces. The witness is no longer turned back towards herself and her own language, but to the silent witnesses of biomedicine and technoscience, the forms of knowledge of the apparatuses of the state.

In official legal and medical discourse, the sleeping baby becomes unthinkable. Instead of a law impregnated by feminine representations, desire and women’s speech, instead of a law open to contingencies, a new kind of law appears, one whose foundations were laid during the colonial period. This is a law tied to state apparatuses and its technocratic spaces. Wael Hallaq, argues that in this newness, and in its confrontation with the state and the power of the state, Islamic law is no longer, ontologically speaking.²⁶ This question, “what remains Islamic about Islamic law?” is an important one, and will be pursued in Chapter Five.

Sleeping babies were never just a socio-legal phenomenon—one to be understood from the perspective of law as positive law. From the positivist perspective, there is a cynical, almost proto anti-welfarist response to sleeping babies. Yet, sleeping babies probably appeared before midwives and husbands more than they did before judges and muftis. I say this because of the women I spoke to in Morocco who either had sleeping

²⁴ I would also not say this is a matter of resistance, as one would understand it in the tradition of liberal thought. Histories of sleeping babies do elaborate women’s position in society, in economic, social and political structures, in a way that does not erase identities (ethnicity, class, and so forth) but also does not make ‘woman’ identical with these structures and identities. This is of course also not to say that women are defined by their reproductive capacities, but rather it shows what happens when they are...

²⁵ Nicos Poulantzas. 2000. *State, Power, Socialism*. 89

²⁶ Hallaq. 2009. *Shari‘a: Theory, Practice, Transformation*

babies or still had sleeping babies, or a man I met who was a sleeping baby, not a single case involved the law. While sleeping babies are created within very real economic conditions, these conditions do not fully explain them. After sleeping babies are banned from law, women, both in the Maghreb and in the diaspora in Europe, continue to experience them. How do we understand the sleeping baby outside of the perspective of sociolegal positivist law? We must ask what law was prior to the law of the state, such that that it made the speech and knowledge of women, based on customary practices of care of the self and reproductive body, part of law. This is an image of law attuned to a different idea of justice, and a different care of the self. As the first part of this dissertation has shown, a variety of women could turn to the law and the courts for this justice and protection.

IV. Fragment 4

At law, a primary function of the *rāqid* was to legitimize children born out of wedlock. The problem of abandoned babies and children in the streets in urban areas is a devastating issue for Morocco today.²⁷ It was in relation to a discussion about sleeping babies that Amina, a woman in her 50s, a resident of Temara, mother of two and domestic servant to foreign diplomats and technocrats working in Rabat, told me about her dream of the night before, in which two lovely children (*zwaineen*) were abandoned in the streets by their mother. She said she woke up, choking on her tears. She knew other women who in their youth had abandoned their children, but “they don’t like to talk about it.” The day before, Amina had seen a news program on television about women who throw their children in the garbage. Having endured great hardship in her life, including difficulties supporting Rabia, her daughter of her first marriage, she identified with the women on the program. She herself had trouble conceiving a second child with her second husband. He was much younger than she was, and worked as a day laborer, though he often had difficulty finding work.

A second function of the *rāqid* in law was to safeguard the reputation, lives and corporeal integrity of mothers from the violence of patriarchal culture and society. As we remember from the medieval judgment from Fes, several judges and muftis extended the length of the *raqid* within Maliki doctrine to seven years, knowing that this extension would save women from corporeal punishment. At the crossroads of a law impregnated with feminine representations and the speech of women, religious and legal scholars from Fes and Tunis obviated the law’s use of violence. Another discussion with Amina about the *raqid* solicited a tragic story about a husband who chased his pregnant wife down in the medina of Marakesh and violently stabbed her to death. The husband had been in jail for a long period of time. When he was released, he found his wife pregnant. He flew into a jealous rage, and murdered her and the child she was carrying in her womb. The wife had claimed that the baby she was carrying was a *raqid* who had been sleeping since he was incarcerated, but the husband didn’t believe in the *raqid* and was sure of her infidelity.

A third function is to acquire inheritance rights and a pension for an unborn child.

²⁷ See: Bargach, Jamila. 2002. Orphans of Islam: Family, Abandonment, and Secret Adoption in Morocco. Rowman & Littlefield. Also REPORT from NGO

This has largely been passed onto the realm of technoscience: As Amina told me “Now they have tests and analyses (*tahlīlāt*). When they become pregnant outside of marriage, they may not know who the father is; then they have to go to the judge and they take tests. Lab tests and analyses play a large part in determining paternity now. For abortions one can go to the *fqih* and *qabla*, but these practices of contraception are forbidden (*haram*).”²⁸

Amina’s Story

I spent all day every Friday with Amina when she would come to clean the house of the woman I was living with. I lived with her for a few short period of time in Temara, and would visit with her and her family on the weekends. Amina made me promise to tell you her story, about the hardships she has suffered and how she managed to endure them nobly.

Amina grew up as a peasant in a village near Fez. She was married when she was 17 years old, “when I was very young.” She used to visit the Saint’s tombs, and the *Shuwaffa* and *fqih* a lot, but that was “a long time ago.” “I go occasionally, but mostly I am a good Muslim now. I pray, I am married to God...This is sufficient. I used to go to unlock what had been locked so that I couldn’t find a husband, or when someone was envious of me. Or to make him stay when I did. But I don’t go anymore. They just cause problems. How does he know when there will be a natural disaster like an earthquake or a tsunami. How can he predict anything?”

Her first marriage only lasted two years. She was seventeen and her husband was not very nice.

He was always out at cafes. He drank. He didn’t pay the rent or take care of his household responsibilities. I became pregnant with my daughter Rabia and he didn’t take care of anything. I asked for a divorce, three times, which I finally obtained when my daughter was 14 months old. I paid the notary (*adoul*) and left my home and all of the furniture. I just took my clothes and my daughter.

She went to live with various members of her family. First she went back to her parent’s house, where her three brothers did not treat her well. One would hit her when she returned home, asking her where she had been, and why she went out. She moved around with her daughter, staying with various members of her family, none of whom treated her well. She ended up with one of her sisters in Rabat who would make nice food and clothing for her own children but exclude Rabia, which would make Amina extremely upset.

She began to cry as she had told me this, saying she doesn’t think back on this very often. Things were too difficult for her then. I consoled her and felt responsible for having solicited these painful memories from her. But later she told me that she felt much better after having cried, that it was a relief and that her health was better than it had in a while. She suffers from chronic pain, neck problems, headaches and difficulties with her appetite. Because of her neck problems, she often has trouble sleeping. I told her that I was uncomfortable with this aspect of my research, of bringing up things that might cause her to recall painful things. But she kept telling me to “write it all down, every

²⁸ Interview on file with author. May 13, 2011.

word,” and to focus all of my research on her story. Quite sincerely, she urged me to “write an entire book about her life and her story.” Since she cannot read, I became her access to history and writing.

While staying with one of her sisters, she kept looking for work and finally managed to meet her current husband. “It wasn’t any easy marriage to begin with because I am eight years older than him and people don’t like that. There are problems now between him and my daughter and I always having to arbitrate.” But, she reminds me, there could be many worse problems. “He is good, he doesn’t drink, smoke or go to cafes. Unlike many husbands, he does not stay away from the house. He treats me well. I had some trouble getting pregnant.”

Amina talked about her struggles finding work and expressed her pride about never having to beg for money on the streets. “You see women outside the mosque begging for money and it breaks your heart. This is the main problem with divorce. Sometimes there are 3, 4, 5, 6 children and the mother has no work and can’t afford to pay the rent. The landlord will have to take her to prison and then the children are on the streets, sniffing glue” She would always try to find work she said, even if she only made 20 dirhams (\$2.50) a day. Working for foreigners pays well, though employment is not secure. Amina now owns her own apartment, of which she is very proud. She explained that she was living in the slums outside of Rabat and that it made her health worse. Often, she would show me the papers from the bank. The apartment, she told me before I visited, “is properly furnished with a bathroom and a kitchen and costs 1600 dirhams (\$200) a month.” She purchased it through a line of credit with the Bank Al-Maghrib, and will be paying it off for thirty years. She worries every month about paying the bank. “I work as much as possible. But there is very little work for my husband and my daughter.” In addition to her housework for foreigners, she also sells make-up and linens to her neighbors and outside local markets.

V. Fragment 5

The next two chapters examine traveling models of law, rights, technoscience and biomedicine in postcolonial Morocco, and explore a rupture between pre-colonial and post-colonial legalities. The rupture marks three things. First, it marks the introduction of the absence of a certain mode of protection of *some* though not all of the most vulnerable women.²⁹ These were the primary and secondary functions of the sleeping baby at law referred to above. The formal equality of the law and the truth of biomedicine and technoscience in law effectively punish poverty and socialized gendered vulnerabilities.

Second, while the discourse of sleeping babies continues, it is now heard from the perspective of Westernized elites, as an atavistic discourse that is silenced in official spaces. This rupture marks a shift in the dominant discourse of reproduction. This means not only a change in the forms of regulation of the reproductive body, but indexes a different way of thinking about rights, contingency and identity in law. The continuation of the sleeping baby disrupts and unsettles dominant discourses of reproduction.

Third, the relationship between law and time is ruptured by the State. The disappearance of the sleeping baby from law marks the end of a particular

²⁹ While the law excluded the slave non-mother from the realm of its protection, this does not diminish the fact that it did protect some women.

relationship between law and time. Not only did this power over time augment women's control over their reproductive experiences (--i.e., the regime of women's collective knowledge about birth and reproduction), and over determinations of paternity, but it made the law flexible, dynamic, not stuck in regulating the time of creation. The cultural and religious aspects of reproduction are seen in the shift of embodied temporalities differently allowed to women in the pre-colonial and post-colonial legal regulations of pregnancy. This prompts the question, what is it that she being asked to reproduce?

Chapter Five examines how Enlightenment physical science in the form of biomedicine and genetics—DNA in particular--is conceptualized in juridical categories by new forms of evidence, even as they remain within and absorbed into the Islamic logic of paternity. Here we see that individual subjects contain less and less knowledge and truth outside the law. Chapter Six examines the persistence of sleeping babies outside of state law, in popular healing practices, and oral histories of Moroccan women, and art. It analyzes the discourse of the sleeping baby as a persisting temporality that disrupts the dominant discourse of reproduction.

Chapter Five.

Translating Paternity: DNA, the Marriage Bed [al-firāsh] and technologies of gender and kinship in Modern Moroccan Law (2004-present)

INTRODUCTION

My archival research and interviews have uncovered how for centuries until the codification of the family law in Morocco (1957-59), the sleeping baby (*l-raged; al-rāqid*) had been invoked in courts by claimants, in formal legal opinions by Islamic religious-legal scholars, and in the rulings of Islamic judges. In these contexts, sleeping babies were called upon to validate claims to inheritance and matrimonial maintenance (*nafāqa*); to circumvent accusations of and punishments for adultery (*zina*); and to legitimately attach children to the patriline (*nasab*) of divorced, widowed or remarried women. In these cases, evidence for the existence of the sleeping baby is tied to the expertise of Moroccan midwives (*qabla; qblet—qābila; qawābil*) and to women's testimony about the sexual functions of their own bodies.

In the course of my fieldwork in the Maternity Hospital in Rabat I encountered women who said that they had sleeping babies, or knew of another woman who had one. Yet, during the four months I spent in the Family Law and Supreme Court in the same city (2011), I did not observe a single instance where a woman brought a sleeping baby claim into the courthouse. In speaking with judges, clerks and other court personnel, I was not informed of any recent sleeping baby cases. And in my survey of published and unpublished court records of paternity, maintenance and inheritances cases from 2004 to present, I found no trace of a sleeping baby.

There are many possible reasons for this. As I suggest in Chapter three, one of the main reasons for the sleeping baby's absence in contemporary state courts is the postcolonial codification and subsequent reforms of the family law that abolished the Sunni Maliki doctrine of protracted pregnancies, which had admitted pregnancies lasting up to five, and in some cases seven, years after conception.¹ Marking a departure from classical Islamic jurisprudential norms, Articles 75 and 76 of the first Mudawwana (Moroccan Code of Personal Status, 1957-9) set the maximum gestation period at one year. The latter article required the judge to resort to medical specialists and experts in the event of any suspicion of pregnancy beyond the maximum legal period. In the two reforms (1993, 2004) that have been undertaken since the first codification (1957-9), these rules regarding pregnancy terms have not changed.

This chapter analyzes the forms of evidence used in contemporary family law cases in which the sleeping baby would have appeared before the codification. In particular, it examines contested paternity cases in which paternal genealogical kinship (*nasab*) is established and disestablished (*thabūt wa nafī al-nasab*) either for its own sake, or to determine maintenance (*nafāqa*), and inheritance claims. The chapter presents seven family law cases that were heard in Moroccan courts from 2004 to the present. All of these cases were first heard in Courts of the First Instance, and subsequently appealed through the Moroccan judiciary, where they were eventually decided by the Supreme Court.

¹ The first codification of the family law set the maximum and minimum legal terms of pregnancy. The minimum remained the classical Islamic standard of six months based on Qur'anic verses.

In my analysis of these cases, I compare new appropriations and rejections of ‘biological facts’ in judicially ordered DNA testing (*al-khibra al-j̄nniyya*) with classical Islamic forms of legal evidence of a paternal genealogical kinship (*nasab*) including the marital presumption (*al-walad li-l-firāsh*), testimony of acknowledgement to establish paternity (*iqrār*), and testimony to disavow and disestablish paternity (*li’ān*).

The analysis focuses on the relationship between Moroccan-Islamic modes of establishing paternal genealogical kinship (*nasab*) and the introduction of DNA testing and “biological facts” as evidence in modern Moroccan law. While the truth of genetics is supported by the status of science as rational, objective, disinterested and authoritative, its communication and use beyond the laboratory makes use of narrative, analogy, metaphor and imagination. I will examine some of the cultural work of making genetic meaning in a Muslim legal context.

I. DNA as a Traveling Model of Identity and Biological Paternity, and DNA in Morocco

In February 2004, after decades of intense political entanglements between Islamist and feminist social movements in Morocco, King Muhammad VI substantively reformed the Moroccan Code of Family Law (*mudawwana al-usra*). Among the reforms were changes that could potentially affect the meaning and practice of genealogy and kinship in Morocco. As the preamble expressed a renewed commitment to protect the right of the child to genealogy (*nasab*), Book Three, Section One, Chapter Two (III.1.2), “On Birth and its Effects: On Filiation and Kinship: Kinship and Its Modes of Proof” amended the methods for establishing *nasab*. Article 153 was reformed to permit the judge to rely on decisive expertise to establish paternity. What this has come to mean in legal practice is the selective judicial use of DNA testing to resolve paternal kinship (*nasab*) disputes.

As indicated by its subtitle “Kinship and its Modes of Proof,” III.1.2 elaborates the legally ordained modes of proof for determining legitimate paternal filiation (*al-nasab*), which for centuries had been established either by the marital presumption of paternity (referred to metonymically as *al-firāsh*—the marriage bed) or by testimony of acknowledgment (*iqrār*) of paternity. The law considers *al-firāsh*—the marriage bed irrefutable proof (*ḥujja qāṭi’āyya*) of paternity, which until the 2004 reform could only be denied through *li’ān*—the testimony of disavowal of paternity and an act of imprecation in which paternity is denied but the honor, status and sexual legality of the mother is safeguarded. Article 153 of III.1.2, by giving new forms of technoscientific expertise probative value, opened the path for a new mode of proof to establish genealogical kinship, namely, genetic analysis (*taḥlīl al-hāmiḍ al-nawawī, al-khibra al-j̄nniyya*).

Article 153 stipulates a number of conditions that have to be met for a DNA test to be conducted. The judge must first decide that one of the parties has presented “sufficient reason” for a performance of the DNA test. The judge must then issue an order for the analysis, and the test must be conducted by the state genetic laboratory (*al-darak al-malikī*), which operates under the aegis of the Royal Moroccan Police. Since 2004, DNA testing for paternity using blood and saliva samples has been conducted in the Moroccan National Defense’s Royal Military’s Genetic Laboratory using Life Technologies | Applied Biosystems AmpFℓSTR® Identifiler® Plus PCR Amplification

Kit. In contested paternity cases (as well as in adultery and rape cases emerging out of paternity cases—and in inheritance and child maintenance cases that require the establishment of paternity as a precondition) judges have appropriated as well as rejected the results of the DNA test, both to establish and deny paternity. The DNA test has sparked debates amongst Islamists, feminists, and religious and judicial elites as to the proper place of ‘biological facts’ in Moroccan law and society.

But what is a biological fact? Recent feminist scholarship and science studies, as well as law and science scholarship, have revived interest in kinship theory, gender and the “new biologics” (Franklin 2001, Hayden 2004). What this scholarship shares is a view of nature having become artifice (Haraway 1997, Rabinow 1996, Strathern 1992, Thompson 2005), a view that questions the historical and ethnographic work that the biological has been made to do (Franklin 2001). Familiar anthropological questions such as the meaning of genealogy or blood ties have taken on new significance and broadened theoretical concern, tied in part to recent developments in reproductive technologies. The attempts to denaturalize kinship and the “implosion of nature and culture” have reconfigured the question of biological facts—of gender and kinship—as a culturally and historically contingent one that indexes the historical specificity of Euro-American knowledge systems. This approach to ‘biological facts’ has revealed how bodies and knowledge—ways of being, knowing and doing—are linked in the post-Enlightenment secular West through forms of possessive individualism linked to new capital markets and technological innovation (Strathern 2005, 1992).

The rest of this chapter focuses on how DNA testing to establish *nasab* is being incorporated into the legal production of kinship in contemporary Morocco, where religious and judicial postcolonial elites maintain authority over a local Islamic and customary model of patrilinear genealogy through the administration of citizenship and national identity. The chapter attempts to highlight how DNA as a model of legal evidence of kinship, and as a presumed origin and telos of relatedness, is translated in the postcolonial contemporary Moroccan context. I will demonstrate how genetic evidence, in its Moroccan Islamic and positive legal articulation, is constrained and shaped by cultural and religious elements that resist naturalizing a bio-logics of affinity in order to affirm the value of the testimony and name of the father.

The chapter asks, and preliminarily tries to answer, two sets of related questions in order to disentangle the various threads that have been braided together by the entrance of DNA testing in Moroccan family law.

First, what qualifies as paternity in the Moroccan legal context and for what purposes? What other modes of proving paternity is DNA testing replacing in Morocco? What models of paternity are at work in Morocco and what does the DNA test become within this model? If we understand DNA testing to establish paternity as a circulating model of a particular form of secular biological paternity, the ‘genetic family’ and a particular “culture of nature” —with its attendant concepts of authorship, copyright and Lockean property relations—what does DNA become in a religious context where paternity is a strictly legal, as opposed to a biological, or even a social, concept? How, in other words, is DNA testing for establishing paternity familiarized, appropriated and resisted in Moroccan legal culture, where the marital presumption of paternity only allows for legally constructed modes of affinity between men and children? How is DNA testing replacing other modes of witnessing and expert witnessing? How are cultural

appropriations of new technology shaping reproductive bodies, reconceiving kinship and negotiating and relocating networks of care and intimacy?

And second, how is paternity gendered in law? What kind of genders are being constructed by biological and legal models of paternity? Are paternity and masculinity made commensurate in the same way that maternity and femininity are?

To begin to answer these questions, the following analysis examines seven family law court cases from 2004 to the present. In my time spent in the family law court, the paternity cases I witnessed were established through testimony of acknowledgment (*iqrār*). In the same court's archives, the majority of paternity cases are *iqrār* cases.² The following cases involving genetic analysis to determine paternity are thus pieced together from court records, and discussions with judges and court clerks. They were heard before the Court of the First Instance, Family Law Division throughout Morocco, and were then appealed at both the Court of Appeals and the Supreme Court level.

II. The Cases: Seven Paternity Disputes

Prior to 2004, paternity could be established by the marital presumption (*al-walad li-il-firāsh*), by the same means used to establish marriage (*thubūt al-zawāj*), or by an oath of acknowledgement (*iqrār*). Paternity could be denied by an oath of disavowal (*li'ān*) or by physiognomic expertise (*'ilm al-firāsa*), an art that died out of use in urban areas after the codification of the law. A case from 2000, "Leila v. Jamal,"³ opens up the legal world in which these terms, forms of evidence and procedures occur.

Case 1. *Leila v. Jamal*, Tangiers, 2000

Leila, wanting her daughter, Khadija, to be registered in the civil status booklet (*carte d'état civil; ḥal al-madaniyya*), takes the presumed father, Jamal—from whom she was already divorced—to court in Casablanca to order him to register Khadija in his booklet. Jamal submits a counterclaim stating that Jamila is not his daughter since he had been working in France when Leila became pregnant and thus could not have fathered Khadija. He requests that the court order an expert blood-type test of Khadija to disestablish his tie (*nasab*) to her. The Court of the First Instance in Casablanca dismisses Jamal's claim, denies the request for the blood test, and orders him to register Khadija in his Family Booklet. Jamal appeals this decision to the Court of Appeals, protesting that, at the time Leila became pregnant, he had not had sexual relations with her for four

² In a sample set of 50 paternity cases in a very affluent major urban area, 42 were *iqrar* cases, 6 were simple *li'ān* cases and 2 were DNA cases. Since I was looking specifically for DNA cases (of which there were perhaps 2 in 50), the court clerks and employees, a room of women with whom I often sat during my time in the Family Law Court, were eager to tell me about cases in which poor women, without lawyers, had used DNA testing to establish paternity in cases against powerful men in parliament and the Ministries. These stories (which I will elaborate on in Chapter 6) have a certain mythic, feminist quality, and are not unlike some of the cases I discuss below--cases in which powerful men, sometimes already married, promised women (of lower social standing) that they would marry them--or in fact did marry them through the customary *fatiha* marriage which does not produce a written marriage contract. For now, I will bracket the telling of these cases.

³Arret n. 38 20/1/2000; 571/96

months, and that sexual relations would have been impossible since he was working in France. Furthermore, he claimed, at the time Khadija was conceived he had no knowledge of Leila's pregnancy. The Court of Appeal ruled to uphold the judgment of the lower court on the grounds of "*al-walad l-il-firāsh*," or what in US and common law is called the marital presumption of paternity: Khadija had been born to the conjugal bed three months prior to the divorce; that Jamal already had another daughter with Leila; and that irrespective of his claim of ignorance as to Leila's pregnancy, the denial of paternity (*li'ān*) came too late, insofar as it did not follow the proper procedures. Jamal, exasperated, appealed this decision to the Supreme Court, requesting that the Supreme Court order an expert blood-type test of Khadija. The Supreme Court also refused his request. Upholding the lower courts' decisions, the judges stated:

Seeing that the act of ordering expertise or making an inquiry falls within the [first] jurisdiction [of the lower court], which has the right to decide whether such an expertise is justified; and seeing that the court did not in this case decide to accept the father's request, the court exercised its power insofar as *this medical analysis is not one of the methods of proving or denying paternity. Whatever the results of such a test, they are not founded and have no evidentiary value.*⁴

Four key issues in this case set the stage for the analysis of DNA testing in the six subsequent post-2004 family law cases.

The first historical point to underscore is that before 2004, medical analysis, and more specifically here, analysis of blood (HLA-type or DNA testing) was not a legal method of proving or denying paternity in Moroccan family law. Starting in the twentieth century with the ABO blood-group theory, followed by the Major Histocompatibility Complex (MHC), HLA-type, and finally DNA—genetic experts have supplied legal systems with scientific authority to deny—and to a lesser extent—to establish paternity (See Kaplan, Brautbar and Nelken, 1979; and Golan 2004).⁵

Different Euro-American cultures have taken DNA tests to be evidence and exercised judicial discretion with respect to them in various ways. In the 21st century American context, we are familiar with consumer genetic tests including "at home legal paternity tests that provide court admissible evidence." These tests have been made popular by television shows featuring disputes of contested paternity and by public fascination with individual private lives. Daytime television talk shows bring people's private affairs into public, devoting entire shows to finding absent fathers, or asking some version of the question "Who's the father?" In such shows, the results of paternity tests are aired in a dramatic fashion, often with the putative fathers jumping for joy and saying glib things like "Yeah! I told you so!" or depending on the results, looking somber. Women like Jenny often appear on these shows.

Jenny, [is] a 24 year old single mother...[who] said she had two children and wanted to know which of two former boyfriends was the father of the youngest.

¹⁰Arret n. 38 20/1/2000; 571/96; emphasis added.

⁵ In the early twentieth century, Carl Landsteiner developed the ABO blood-group theory which was adopted by the Scandinavian conference of genetic experts in Copenhagen in 1952. See Kaplan, Brautbar and Nelken, 1979; and Golan 2004

Unemployed, evicted from her apartment, she said she had no place else to turn. ‘I have nothing to hide,’ she said when asked if she had any qualms about appearing on national television. ‘But I wouldn’t want people to look down on me as some kind of slut. I was just too trusting and lonely.’⁶

In France and the Netherlands, where consumer paternity tests are not available, a mother must make a request to the Court to have the putative father tested. The public’s fascination with similar kinds of stories is reflected in the sensational stories of a newspaper like *Gazette des Tribunaux* that reported daily on contested paternity in civil proceedings, and in more popular journals such as *Le Matin*. In the Euro-American context, the law recognizes various forms of consensual unions as family forms resembling marriage.

Both the sexual culture and legal culture regarding marriage and family are more restrictive in Morocco. Outside of Europe and America, genetic expertise as a model of biological identity began traveling globally very quickly, appearing as early as 1937 in an Egyptian physician’s guide for the qadi in how to use blood-group tests to determine matters of personal status (‘Amara 1937, al-Tuni, 1960). As we have seen in Leila’s case, however, unlike in Egypt, blood-type testing or DNA testing was not permitted as a form of evidence in Morocco until quite recently. DNA testing was introduced as a legal means of proving paternity following the feminist family law reform movements that resulted in the 2004 reform of the Code of Family Law. This part of the reform aimed at to ameliorate the situation of children born out of wedlock to unwed mothers, as well as the related and very serious problems of abandoned babies, children living in the streets and clandestine abortions.

Dr. Ahmed Khamlichi is a well-known jurist (*‘ālim*) and law professor in Rabat. Currently he is the director the *Dar Al-Hadith Al-Hassaniya*, the state run Islamic seminary. He was an advocate of and contributor to the family law reform of 2004, and is considered to be a friend by many Moroccan feminists. Dr. Khamlichi ventriloquizes one position of the Moroccan feminists who argued in favor of introducing DNA tests as a method of establishing paternity. In an interview conducted prior to the reform, Dr. Khamlichi suggests that the way to solve the problem of abandoned children is to legalize paternity tests. Mothers, he says, should have:

[r]ecourse to genetic and blood tests so that fathers can no longer deny their paternity and therefore their responsibility. Husbands walk off on women who are left with the burden of these children. How can the women cope? It is almost inevitable and a very sad reality that these children will end up in the streets sniffing glue, being a danger to themselves and to others. Legally if this woman goes to court, she needs to bring witnesses that she was indeed married...this is ridiculous...*in an era of scientific miracles, we still need witnesses...*We are making the children pay dearly for the errors of their parents...This is a legacy of a past and a set of judicial traditions that are anachronic, if not obsolete...One walks into the hospital for abandoned children, and even the one-year-old babies have a

⁶ Quoted in Fuchs, Rachel G. 2010. *Contested Paternity: Constructing Families in Modern France*. JHU Press.

look of guilt, their eyes have already absorbed all the hate around them, they are guilty for everything.⁷

This is not a perspective that is shared uniformly among Moroccan jurists and judges. After the DNA test was introduced in 2004 as knowledge with evidentiary value and after it began to be used by claimants and judges, the use of the test has been contested, restricted and viewed as a threat to the Moroccan model of the family and family values. In an unpublished decision of the Moroccan Supreme Court, a judge reverses a decision from the Court of Appeals, which had established paternity based on a DNA test in the context of sexual relations outside of marriage. Referring to previous decisions issued by his chamber over DNA testing, the judge states:

These judgments—all of them— have already demonstrated the reasons to attach legitimate genealogical kinship (*al-nasab al-sharī'a*). They have clarified that the adultery...that produces pregnancy cannot be attached to the author [of the pregnancy] even when it is one hundred percent biologically proven (*thabat bi'olujānn*). This is because shari'atic kinship has its sources, which are not the sources of biological kinship. Shari'atic kinship is conditioned upon religion and faith. This is because from it [i.e., Shari'atic kinship] follows inheritance and respect. This is in distinction from natural biological kinship (*al-nasab al-ṭabī'ī*).⁸

This distinction between biological and Shari'atic *nasab* raises the second key issue in the case between Leila and Jamal. In subsequent cases, DNA testing is being called on to perform evidentiary work in determining *nasab*. In Moroccan family law, the Maliki rite recognizes paternal genealogical relationship (*nasab*) as the primary mode of filiation. “Birth and its Effects” (*al-walada wa nata'ijuha*), Book 3 of the Moroccan Code of Family Law outlines this position in three chapters that indicate two sets of rules that regulate a child's relationship to its parents. The first two chapters define legal filiation (*al-nasab w-al-bunuwa*) and the rules for its establishment (*al-nasab wa-wasa'il ithbātīhi*). The third chapter defines the care of the child through custody (*al-haḍana*).

How do we translate *nasab*? I have hesitated to use “paternity.” While it is an efficient translation, it erases much of the legal and idiomatic specificity of *nasab* in the Moroccan and Islamic contexts. Classical Islamic legal notions of kinship and filiation are crystallized in the notion of *nasab*, which translates not only as relationship, consanguinity, family and parentage—but also as race, lineage, genealogy and origin. *Nasab* is “the most fundamental organizing principle of Arab society...”⁹ By definition, *nasab* may refer to genealogy with respect to a father and a mother. However, in all the schools of Islamic law, the primary significance of *nasab* is lineage with respect to fathers only. It is through *nasab* that a man establishes paternity, and a child gains ‘legitimacy,’ legal identity and religion. *Nasab* might best be defined as a genealogical relation to, or a general relation as, a father. *Nasab* is Islamic law's official philosophy of history—a chain of material and symbolic implications that give an individual identity

⁷ Interview with Ahmed Khamlichi, quoted in Jamila Bargach. 2002. *Orphans of Islam. Family, Abandonment and Secret Adoption in Morocco*. Lanham: Rowman & Littlefield. 5

⁸ Judicial Decision/Judgment Issued December 21, 2010; File 2009/1/2/680, on file with author

⁹ Encyclopedia of Islam, 2nd edition

meaning within a collective history. *Nasab* as a form of identity, legitimacy and collective belonging existed before the nation-state and nationality. Muslim jurists, past and present, give *nasab* as the main reason why a Muslim woman cannot marry a non-Muslim man.¹⁰ But, is *nasab*—or patrilineal genealogy—a biological concept in Moroccan law? At this point, it would be difficult to affirm such a statement given the judge’s distinction between “legitimate” *nasab* and “biological” *nasab* when the latter on its own has no legal effects. What happens then when *nasab* encounters the genetic model of kinship that the DNA test conjures up?

This question is particularly important in women’s lives insofar as determinations of *nasab* affect the administration of birth and citizenship. This is the third key issue that the first case raises. Determinations of *nasab* in the era of birth certificates and citizenship may have the added effect of disciplining and punishing the sexual behavior of unwed women. Leila’s case, in which she is seeking to have her daughter registered in the Family Booklet, is not unique, and may be one of the most common kinds of paternity cases in the postcolonial period.¹¹

Registration in the Family booklet—which also records birth, marriages, divorces and death—confers to the Moroccan child civil status and a legal identity as a Moroccan citizen. This booklet is the main official document proving one’s legal identity and is one of the most essential documents in the life of the urban postcolonial Moroccan citizen. It is required to obtain a National Identity Card, a passport, a driver’s license, free medical care and other social services, legal aid assistance in courts, and a vaccination booklet. It must be presented to request an official birth, marriage or residence certificate. It is necessary as proof of identity to obtain employment, register for government literacy classes, be admitted to the hospital, start a business, purchase a home or other property based on credit, get married, open a bank account, receive money transfers, claim inheritance from one’s parents, and enroll in school. Without a Family Booklet, a person does not legally exist.¹²

The laws and practices of establishing a legal identity, however, are quite confusing—both to the civil status officers in charge of granting such status, and to lawyers trying to help their clients establish a legal identity. For a newborn child to legally exist, his or her birth must first be registered at the Civil Status Office where s/he was born. In 2002, reforms (different from, though not unrelated to the Family Law Reform in 2004) were made to the Civil Status Law, which were intended to enable mothers of children born out of wedlock to give their children a name and legal identity. Prior to this law, there were no specific provisions that enabled the registration of children born out of wedlock to their mothers. The 2002 reform introduced explicit provisions allowing an unwed mother to register her child’s birth. However, while these children may have their births registered—i.e., they may obtain a birth certificate—it is

¹⁰ In a recent fatwa, Dr. Khaled Abou al Fadl, responds to a query about this “weighty and serious problem” of the Islamic prohibition on Muslim women marrying non-Muslims, which according to Dr. Fadl is an issue about which the Muslim jurists had “very strong positions” and upon which they never disagreed. The first justification for this rule is that in Islam, “children are given the religion of their father. . .”

¹¹ See interview with Judge Talal Abdullah, on record with author. Also see Mir Hosseini (2000), Bargach (2002) and Bordat & Kouzzi (2010).

¹² Moroccan law requires every citizen to carry official identity papers on one’s person. *De jure*, people can be stopped by the police and asked to produce such papers, questioned and imprisoned if they are not carrying identity papers.

unclear whether unwed mothers have the right to obtain a Family Booklet, and in many case they are denied the booklet. Some lawyers and Civil Status Officers claim the unwed mother may not obtain it. Others say yes she may, and still others do not issue unwed mothers Family Booklets because they say that the law is confusing and not explicit as to whether or not she may have one and what the correct procedure for giving her one would be.¹³ Adding to the confusion is the fact that under the pre-2002 Civil Status Law, any adult person, woman or man, could obtain his or her own Family Booklet.

Before 2002, however, children could not be registered with a name in the Family Booklet without the birth certificate, which paradoxically required proof of the parent's marriage certificate. This essentially made it impossible for an unwed mother to register her children and give them a legal identity. Under the 2002 law, the marriage certificate is not needed, but it still requires a birth attestation written by a doctor or other official medical professional. To be considered valid, local state authorities must legalize the attestation. Births must be registered within 30 days, after which time the court must be petitioned in order to obtain a judicial declaration of birth. Failure to register a birth is punishable by a 300-1,200 dirham fine.¹⁴ Before the 2002 Civil Status Law reforms, children of unwed mother were not given a family name, and were registered as the child of "father unknown" or "xxx." Under the current Civil Status Law, unwed mothers may register their child's birth, but must choose a name for the child's fictional biological father that begins with "*Abd.*" Yet while the unwed mother may now obtain a birth certificate, the Family Booklet now (after 2002), can only be issued to a married man, in his name. There are a few exceptions where a wife, divorced woman, widow or legal tutor may request a legalized copy of this booklet, but no provision is specifically made for the unwed mother. The unwed or divorced mother in postcolonial paternity cases often seeks to establish the paternal filiation of her child only once that child reaches school age and finds that she needs to present proof of the child's legal identity in the form of the Family Booklet to enroll her child in school. And until 2006, when the National Identity Law was reformed, nationality was only granted based on *nasab*, the paternal origin line.¹⁵

This labyrinth of Kafkaesque postcolonial ritualized bureaucracy is the context in which paternity cases and DNA testing gain part of their meaning. Paternity cases in the postcolonial period reveal how the administration of citizenship through civil status, family and criminal laws have become a new means of disciplining unwed mothers, and punishing children born out of wedlock by excluding them from citizenship and a legal identity based on their so-called "illegitimate" origins. In a country where "biological" paternity is not recognized, and adoption and abortion are officially illegal practices, the paternity suit is a deeply fraught ritual in which mothers try to establish a legal identity and future for their children.

¹³ Bordat & Kouzzi (2010): A civil status officer claims, "The mother of illegitimate children have no right to have a Family Booklet, because the pre-requisite for obtaining a Family Booklet is the marriage license. In the past, the mother of illegitimate children could obtain a Family Booklet so that she could have registration references and or for guardianship purposes. Now she cannot have a Family Booklet because, as I have just explained, the essential condition for obtaining one is the marriage license."

¹⁴ Approximately \$36-145 as of November 2011. The legal, though not enforced, monthly minimum wage in Morocco is approximately \$250.

¹⁵ See Fatima Sadiqi. 2008 "Facing Challenges and Pioneering Feminist and Gender Studies." African and Asian Studies.

The fourth key issue that Leila and Jamal’s case raises is that in the Moroccan family law context, judges tightly control access to expertise and evidence, together with the forms of knowledge produced by it. While this kind of judicial control is common in civil law contexts such as in France and the Netherlands, the Moroccan family law context in which sex outside of marriage is illegal and shameful adds additional constraints for the family law judge. Thus, while the 2004 Family Code establishes medical analysis by way of DNA testing to prove or deny parentage, as the following cases show, not everyone has a right to this test, and there are several conditions that must be met that are unique to the Moroccan Islamic context. Namely—the child needs to have been conceived during a legal marriage or “engagement period.” Secondly, even when this condition is met, the judge has to be persuaded that there is “sufficient proof” and reason to order the test.¹⁶ DNA testing, expertise or any investigation, falls within the judicial discretion of the judges. In the following cases (2, 3, and 4), the person seeking the DNA test first has to persuade the court to conduct the test. Acting as gatekeepers before the test, judges exercise their right to judicial discretion in permitting or denying expertise or investigation. One’s genetic identity, or the genetic identity of one’s children, does not always have the right to be revealed. Cases 2, 3 and 4 further explore how the courts exercise judicial discretion in the matter of DNA testing.

Case 2. *Nadia v. Ismael*, Casablanca, 2004¹⁷

On July 29, 2002, before the Court of the First Instance in Casablanca, Nadia claimed that approximately six months earlier, on February 2, 2002, her then husband of a little less than two years, Ismael, threw her and her one and a half year old son, Badr, out of the marital home.¹⁸ Ismael had refused to give her and Badr their maintenance (*nafaqa*), and had requested a judicial order to discharge him of his duty to pay spousal and child maintenance, doctors’ expenses, holidays, and other necessities, beginning from the date of the refusal up until the date of the judgment. He had also demanded that Nadia return the dowry, specified as 500 dirhams, which he gave to her on November 2, 2000.¹⁹

Ismael responded to Nadia’s claim with a counterclaim, in which he clarified that according to the marriage contract, exhibit 8 of the documents on file with the court, the marriage had happened on June 20, 2000. He further explained that Badr was born on December 16, 2000, which according to his calculations was five months and twenty-five days after the marriage took place. He called upon the minimum term of a pregnancy (six months) needed to legally attach the child to the marriage bed to support his claim. He added that Islamic jurisprudence does not allow a woman to be pregnant at the time of the marriage contract. Based on this, he sought the cancellation of the marriage contract and the annulment of the marriage (*faskh ‘aqd al-zwāj*). In his statement, he also requested back the maintenance that he had given to Nadia until July 2001.

After hearing the case, the Court of the First Instance agreed to Ismael’s request,

¹⁶ The “engagement period” is also an innovation introduced by the 2004 reform, and is considered by members of the judiciary to be a progressive measure. “We are getting there, little by little.” Interview on file with author

¹⁷ Case #213, Moroccan Supreme Court, February 24, 2004

¹⁸ Exhibit #8, the marriage of November 3, 2000

¹⁹ Approximately \$58

and rejected Nadia's claim. Nadia then appealed to Court of Appeal, which upheld the lower court's decision based on the "decisive proof" of the marriage contract, and on Badr's birth certificate which stated that Badr's birth did not happen within the minimum legal time of pregnancy. When the minimum legal time of pregnancy is not met, the child is not legally attached to the father. Nadia then appealed to the Supreme Court requesting a DNA test of Ismael and Badr. She thought it would lend weight to her case if the test established Ismael as the biological father of Badr. At the time of her appeal, genetic testing had just been approved as a means of establishing paternity. Nadia claimed that the lower court's decision violated articles 155 and 154 of the Code of Family Law (Mudawwana Al-Osra).²⁰

The Supreme Court rejected Nadia's request for DNA testing, and upheld the lower courts' decisions. In its ruling it stated:

Seeing that the evidence of the amount of time between the date of the marriage contract and the date of the birth of the child, the claim to establish paternity does not meet the legal minimum of six months. As long as the marriage contract shows that the baby was not born within the minimum time for pregnancy, *there is no necessity to conduct a medical or genetic analysis in this matter.*²¹

In this case, the Supreme Court finds that conducting a DNA test would be legally redundant. Even if the test established genetic paternity, it would not establish legal paternity since one of the necessary conditions for legal paternity—namely, the baby being born six months after a marriage contract has been concluded—was absent. The Court relies on the birth certificate and marriage contract as evidence to establish the lack of grounds for conducting the DNA test.

The father in this case does not want to be attached to the child and disestablishes his paternity by appealing to Islamic jurisprudential principles that have been codified in the Moroccan Code of Personal Status. He gives the marriage contract and Badr's birth certificate as evidence that the birth did not happen within the legally required period. Nadia, it seems, does not argue with these principles, or with the reported date of birth of her son. We must wonder what she hopes to achieve by requesting the DNA test that would prove that Badr is Ismael's biological child when the law is clear about the minimum time for pregnancy.

Case 3. Ahmad v. Zahra, Zagora, 2008²²

After a brief courtship, Ahmad and Zahra were married in 1982 and took up

²⁰ Article 154 states that the paternity of a child is proven by the conjugal bed (al walad l-il firash) under two conditions: First, if the child is born six months after the marriage contract was concluded and the opportunity for sexual intercourse has existed, whether the marriage contract is valid or defective. Second, when the child is born during the year that follows the date of separation. Article 155 states that "[i]f a pregnancy results from sexual relations by error and the woman delivers within the minimum and maximum statutory pregnancy period, the child's paternity shall be attributed to the author of the sexual intercourse." Paternity due to sexual relations by error is established by all legal means. See Moroccan Code of Personal Status, 2004

²¹ *ibid*, emphasis added

²² Supreme Court decision #26

residence in Zagora—a town of 35,000 or so people in the Draa river valley located in the Southeastern region of Morocco. Lacking stable employment in Zagora, Ahmad would leave Zahra for sustained periods of time to find work elsewhere in Morocco. During their marriage, Ahmad and Zahra had two children: the first child, a boy they named Kareem, was born on November 10, 1993; their second child, a girl called Meryem, was born four years later on April 27, 1997.

In February 2007, after twenty-five years of marriage, Ahmad petitioned the Court of the First Instance in Zagora to have both children be genetically tested to disprove his paternity. In his claim, he states that he came to court to petition the judges to have genetic analysis (*al-khibra al-jinniyya*) conducted upon the children so to deny them his *nasab*, and all the rights and obligations that *nasab* entails. He stated that had been married to Zahra since 1982, and that during the time of their marriage two children, Kareem and Meryem, had been born. However, Ahmad continued, by 2007, he had reasons to doubt that the two children were his. His reasons for doubt included his observance of the “(im)moral behavior” (*taṣarrufet akhlaqiyya*) of his wife; marital problems that had led Zahra to begin taking birth control pills (*habūb mna‘ al-ḥaml*); and finally, his repeated absences from the conjugal home for long periods of time due to work. Based on these three reasons, he stated that he had inferred that he had reason to doubt that Kareem and Meryem, children with whom he had lived for 14 and 10 years, respectively, were children of his “*nasab*.”

In her counterclaim, Zahra repeated the date of their marriage in 1982 and pointed to evidence of the marriage date in the marriage contract. She claimed that since the date of their marriage contract, she had remained Ahmad’s faithful wife. She also stated that she had “bore two children by him,” her son Kareem on November 10, 1993, and her daughter Meryem on April 27, 1997. She pointed to the Civil Status Booklet as definitive evidence of the children’s birth dates. She added that both children were “born to the conjugal bed” (*‘ala firāsh*), and that their father did not doubt the two children’s filiation to him (*nasab*), except after more than 10 years had passed since the birth of Meryem, the youngest child. She claimed that Ahmad’s belated order to deny paternity made his claim unjustifiable. Finally, she drew upon the Moroccan Family Code, which states that denying paternity in the context of a correct marriage can only be done by way of an oath of disavowal and sworn allegation of adultery committed by a spouse (*li ‘ān*). According to Islamic jurisprudence, the disavowal must occur in a timely fashion, and Ahmad did not until now deny his paternity of either child. Zahra asked the court to refuse his claim.

After the hearing (*al-munāqasha*), the Court of the First Instance of Zagora decided to refuse Ahmad’s demand for the DNA paternity test. When Ahmad appealed this decision (*ḥukm*), the regional Court of Appeals of Ouarzazate upheld the first court’s judgment. Ahmad then appealed to the Supreme Court. In his appeal, he protests that the Court of Appeals decision “lack’s support at the foundation” and “violates the law.” He claims that based on article 153 of the Mudawwana, he has the right to conduct genetic analysis on the two children to deny his paternity (*nasab*) to them.²³ The Supreme Court

²³ Article 153 states: The conjugal bed is proven by the same means used to prove the marital relationship. The conjugal bed that meets the required conditions is irrefutable proof of paternity, only subject to disavowal by the husband through a sworn allegation of adultery committed by his spouse, or by means of an irrefutable expertise, upon two conditions: 1) The husband must present solid proof of his allegations; and 2) Issuance of a judicial decision ordering the expertise. MCOPS, 2004

refused Ahmad's appeal stating that:

...[N]asab is presumed by the conjugal bed (*al-firāsh*), which cannot be challenged by the husband except by way of an oath of disavowal (*li'ān*), or by way of genetic analysis that benefits the definitiveness of proof. However, this is subject to two conditions, one of which is that the husband must present solid proof of his allegations against his wife. *The evaluation of the solidity of this proof is entrusted to the authority of the court. There is no supervision (raqāba) over this authority or over that which the court deduces from the proof.* The Court of Appeals, when it considered what the husband has claimed as to the reasons for his doubt, in terms of the behavior of his wife, her taking birth control pills, and his repeated absences from the house—even if [all of these reasons] are certain and proven—they do not constitute strong reasons (*dalā'il quwwiyya*) to challenge the nasab of the two children who were born to the conjugal bed (*'ala firāsh*). *The court thus has no need to depend on the authority of the genetic analysis and justifies the correct and justified application of article 153. The reason for the appeal has no ground. The Supreme Court therefore rejects the husband's demand.*²⁴

In this case, the knowledge of a biological relationship that the DNA paternity test would produce has no authority on its own where legal paternity is concerned. For this court, "*al walad li-l firāsh*" (on the marital presumption), is given as the reason for rejecting the DNA test. After presenting the next case, I will explore the significance of "*al walad li-l firāsh*."

Case #4. Hicham v. Murad (son of Imane and Hassan), Agadir 2007²⁵

On December 4, 2007, Hicham, in a recorded hearing before the Court of the First Instance in Agadir, a city in Southern Morocco, claimed that his brother Hassan died on

²⁴ *ibid*, emphasis added. Nasab (filiality, genealogy) is determined by the conjugal bed (*firāsh*) and cannot be appealed or challenged by the husband except by way of *li'ān* (oath of disavowal) or by way of genetic expertise that benefits the irrefutability of the evidence. Such expertise can only be conducted on the condition that the husband presents solid proof of the reasons for his allegations. The Court, when it considers that which has led the husband to doubt—namely, the behavior of his wife, her taking of contraceptives and his repeated absences from the house—and even if these are certain—they do not form strong proof to challenge the *nasab* of the two children who were born *to the husband's conjugal bed (ala firāshihi)*, and born under such conditions, there is no need for the evaluative authority of genetic analysis. *Legal Principles*: The conjugal bed is proven by the same means used to prove the marital relationship. The conjugal bed that meets the required conditions is irrefutable proof of paternity, only subject to disavowal by the husband through a sworn allegation of adultery committed by his spouse, or by means of an irrefutable expertise, upon two conditions: - The husband must present solid proof of his allegations; - Issuance of a judicial decision ordering the expertise.

²⁵ Supreme Court case #40; Articles 152, 158, 160 of the Mudawwana: *Article 152* Paternity is established by: 1- the conjugal bed; 2- acknowledgement; 3- sexual relations by error; *Article 158* Paternity is proven by the conjugal bed, the father's acknowledgement, the testimony of two public notaries (adouls), oral testimony, and by all other legal means, including judicial expertise; *Article 160*: Paternity is proven by the father's acknowledgement of his paternity of the child in question, even in a "deathbed declaration", according to the following conditions: 1- That the acknowledging father be of sound mind; 2- That the child's paternity be unknown; 3- That the declarations of the author of the acknowledgement not be contradicted by the truth or plausibility; 4- That the child accepts the acknowledgement if she or he has reached the age of legal majority, and if not, she or he has the right to petition to contest the paternity upon coming of age.

February 15, 2006. Hicham stated that, according to the inheritance rules, Hassan's only Shari'atic inheritors were his brothers, including himself. He was thus surprised to find that an inheritance had been completed by "one called Murad," who claimed to be the only son of Hassan--and thus, the only inheritor. Hicham petitioned the court to have genetic analysis conducted on Murad to disestablish paternity, protesting that Murad is not Hassan's son. Murad's birth certificate shows that he was born on September 29, 1974 in Souissi—and that Hassan was not in Souissi during this time. In his statement, Hicham added that there were additional problems with Murad's *nasab* because the marriage contract between his deceased brother and the woman whom he had married was not completed and settled until December 19, 1974. Also, he added, the Family Book, which Hassan had kept throughout his life, did not declare any children born to him. Given all of these reasons, Murad was not legitimately (*shar'i*) affiliated to Hassan and none of the effects of legitimacy could be bestowed upon him. Murad, even if he was Hassan's [biological] son, was born outside the conjugal bed (*khārij al-firāsh*) and before the marriage contract was effected. Hassan thus petitioned the court to conduct genetic analysis on Murad and to deny Murad Hassan's *nasab*.

Murad, in his response to the court, states that his father died on February 15, 2006. Before his death, his father had produced a will that confirmed Murad to be of his *nasab*. Murad calls upon article 158 of the Mudawwana, which says that: "Paternity is proven by the conjugal bed, the father's acknowledgement, the testimony of two public notaries (adouls), oral testimony, and by all other legal means, including judicial expertise." His father, he claims, acknowledged him at the time of the divorce of his mother, Imane, on April 18, 1989. He then pointed to a certificate of testimony by witnesses, dated June 27, 1977 that establishes his *nasab* to his father. In his defense to the court, he also brought forth a copy of his passport, which showed "his entire identity and the name of his father." Finally he presents a belated copy of a birth certificate, dated June 27, 2000. Based on this evidence, he requested that the Court reject Hicham's request, find it "without basis" and refuse to have the case heard.

The Court of the First Instance did just that, refusing Hicham's request to disestablish paternity and to conduct a genetic analysis. Hicham appealed this decision to the Court of Appeals. In his appeal, he argued that the foundation of Shar'atic kinship is the conjugal bed (*al-walad l-il firāsh*). He drew upon the Islamic conditions that render a birth legal: The child must be born after the marriage contract has been established by the two spouses, and must be born to the marriage bed at the earliest within six months after the contract, regardless of whether the contract is good or in error—or, in the case of divorce, within one year after the separation. The judgment of the Court of the First Instance, he declared, goes against established Shari'atic principles and opposes juridical rules.

The Court of Appeals ruled against Hicham, stating that the call to deny paternal kinship and conduct genetic analysis, can only be heard from "the direct source" (*al-asl al-mubāshir*). As for any others, "such as brothers and the general collateral kin or anyone else," they have no right to make claims to establish or deny *nasab*, in accordance with articles 150 and 160 of the Code of Family Law. The Court of Appeals upheld the decision of the Court of the First instance.

Hicham then appealed to the Supreme Court. In that appeal, Hicham claimed again that the law was not applied correctly and that the court's decision was without Shari'atic

justification and legal basis. In its ruling, the Supreme Court stated:

It is clear from the court records that the father, Hassan, acknowledged as his son, Murad, who was born on September 29, 1974—and that this acknowledgement remained in tact for 32 years until the father’s death on February 15, 2006. Even if the marriage contract was drawn up on December 16, 1974, after the birth of Murad...there are the administrative certificates dated August 16 and 17, 1974 in the marriage file that indicate that both spouses were in Souissi...[I]t is thus clear that there had already existed consent to be married before the marriage contract was established by the fact of their cohabitation. Furthermore, the divorce certificate of May 3, 1984, shows that Hassan had acknowledged Murad as his son. The acknowledgment (*iqrār*) is decisive since it was made as an official testimony before two just witnesses, and gave Murad all the rights of paternal filiation (*nasab*) to his father. In accordance with article 152, acknowledgment is a reason among reasons to establish *nasab*. *Acknowledgment by the father remains standing throughout the life of the son until the father’s death, in accordance with the last paragraph of article 160. As for after his death, it is not permitted to raise any claims, or conduct genetic expertise in relation to this[...]*

According to article 154 which establishes paternity of a child born to the marriage bed if that child is born within six months of the marriage contract—the contract may be correct or in error...In the case at hand, the child was born after two months approximately from the date of the contract; thus his birth falls outside the requirements stated in the article...the pregnancy appeared before the marriage contract, but this was a time of the engagement period, so he cannot be attached except by acknowledgment (*iqrār*) as according to article 156[...]

*Acknowledgement establishes nasab regardless of whether the birth happened during the period of time allowed for pregnancies. This is due to the consideration that acknowledgement (*al-iqrār*) is a reason amongst the reasons to attach *nasab*, unless it is contradicted Islamically. If the father acknowledges the paternity of the child, paternity cannot be denied by DNA testing. Even if the mother comes to him before the minimum length of pregnancy (six months), the acknowledgment stands and the child is attached to him[...].²⁶*

For these reasons, the Supreme Court denies the request of the claimant.²⁷

²⁶ The judge continued: If the marriage contract is signed after the birth of a child, but was preceded by measures that benefit the contractors (husband and wife) who were cohabitating in the same place when they undertook preparations to conclude their marriage contract, and this benefits their intent to marry by way of offer and acceptance, it (the contract) was available before the writing of the contract...

²⁷ A later Supreme Court opinion found that court may have reached the right decision, but that it was not properly based on the requirements of the law—that the *nasab* should have been established based on engagement, or sexual relations by error. Based on Maliki fiqh, if the husband acknowledges the child and the wife comes to him before the shari’atically/Islamically accepted minimum length of pregnancy, the child is attached to the husband, and this is because the intent to marry exists before the contract is written, because writing is not the basic element in the contract, but rather, is a way of confirming the intent. The juristic interpretation of the Supreme Court on this particular point is guided by Maliki fiqh, and where

In the three previous cases, the Courts at all three levels (Court of First Instance, Court of Appeals, Supreme Court) denied various petitioners access to DNA testing based on hierarchies of evidence within codified and reformed forms of Islamic family law. In these cases, the judges did not permit DNA testing to erode older forms of proof of kinship, such as the marital presumption (*al-walad li-l-firāsh*), testimony of acknowledgment (*al-iqrār*) and disavowal.

The person seeking DNA analysis has to persuade the court to permit the test, to gain access to genetic knowledge. The modern Moroccan judge sits like Kafka's gatekeeper before biological pedigrees, protecting what he deems to be more important forms of knowledge of relationality. In the above cases, genetic identity was considered irrelevant in relation to other forms of evidence—namely the marital presumption (*al-walad li-l-firāsh*) and the father's testimony of acknowledgment (*iqrār*). It is interesting to note that questions of bodily integrity or privacy, which might be debated in American or European courtrooms, do not enter the judicial sphere in these cases.

Al-walād li-l-firāsh is a maxim that might be translated as “the child belongs to the (conjugal) bed.”²⁸ Some scholars of Islam contend that it is an abbreviated version of one of the legal utterances attributed to the Prophet Mohammed (*hadith*): “*Al-walād li-ṣāhib al-firāsh*” —“the child/progeny belongs to the owner of the bed.”²⁹ The bed (*firāsh*) functions metonymically as a representation of the socio-legal legitimacy of sexual acts occurring within a marriage. It expresses the Islamic legal principle of legitimate birth which holds that a child born in a marriage has the right to claim legitimate kinship and descent status (*nasab*) from the husband, unless he explicitly denies paternity. The utterance “*al-walād li-l-firāsh*” is sometimes followed by “*wa-li-l-āhir al-ḥajar*” —and for the adulterer, the stone.³⁰ There is some debate amongst scholars of classical Islamic law as to whether the *firāsh* saying has possible Roman or Jewish origins.³¹ There is also debate as to whether the saying is actually a Prophetic utterance, since “it may have been known in Arabia since pre-Islamic times.”³² And there are also claims that the utterance is a lost portion of divine revelation that was not included in the Uthmanic canonical edition of the Qur'an.³³

Historically, the most frequent legal issue around the *firāsh* dictum are disputes of contested paternity. Disputes about the rights of paternity “are said to have been common

Article 156 of the Code of Personal Status is connected to attaching the pregnancy of the fiancée to the fiancé when they meet the proper conditions, and this does not oppose the rules of *istalḥaq*, and which does not force the man to testify to the reasons for the *istalḥaq* as long as the conditions are met. In another Supreme Court decision, decided on June 8, 2005, the following was decided: “Acknowledgement (*al-iqrār*) establishes paternity without requiring evidence/explanation of the reasons from the couple or connecting it to “marriage by resemblance,” on the condition that he makes clear/explicit that the child is of his *nasab* as it is established jurisprudentially (*fiqhan*).

²⁸ In a functionalist way, it corresponds to the marital presumption in Euro-American family law, civil and common.

²⁹ See the tradition of Abu Hurayra, Bukhari, Ṣaḥīḥ, VIII, 191 (85:18); quoted in Uri Ruben. “*Al-walād li-l-firāsh*. On the Islamic Campaign Against *Zina*.”

³⁰ Bukhari, Ṣaḥīḥ, 191

³¹ See Uri Ruben, *Al-Walad*; Joseph Schacht, *Origins*, 181; Goldziher, *Muslim Studies* I. 174 n.2; Patricia Crone, *Roman*, 11

³² Ruben. *Al Walad*. 7

³³ See Burton, *Sources*, 49f, and Ruben. *Al Walad*. 18-9.

in Arabia since pre-Islamic times.”³⁴ Many of the early disputes in the Islamic context involved the children of slave women who were sometimes also prostitutes, or who were married to other slaves while simultaneously performing as the concubines of their masters. Since the children of slave women could be considered property, opportunities for conflicts proliferated. The *firāsh* maxim became a way of solving disputes. “Whenever *firāsh* was pleaded, the relationship by blood (*nutfa*—sperm) with the real progenitor was invalidated.”³⁵ This is borne out by a tradition in which ‘Umar consults an Arab physiognomist concerning the position of someone born in the Jahaliyya (--i.e., Arabia in period prior to Islam). The expert finds that the *nutfa* belongs to “*fulān*” (--i.e., John Doe), but the *firāsh* belongs to another. ‘Umar says: “True, but the messenger of God decided in favor of the *firāsh*.”³⁶

A man can deny paternity through the procedure of *li ‘ān* (imprecation) in which he takes an oath accusing his wife of adultery. This oath, based on Qur’anic verses (XXIV, 6-10), is exceptional insofar as, unlike any other accusations of adultery, it permits the husband to make the claim without punishment (*hadd*) befalling either him or the wife. *Li ‘ān* must be made before a judge. It results in the termination of marriage and creates a permanent ban on marriage between the two parties.

Muslim jurists have defined *iqrār* as an “acknowledgment” or “confession” or “recognition,” in this case, of paternity (*iqrār al-nasab*). A judge cannot ignore such a recognition as long as the author of the recognition has reached the age of legal majority and is of sound mind. In theory, an act of recognition is unilateral, imposing obligations on its author alone. In the case of establishing paternity, such an act also imposes obligations on its object.³⁷ As we saw in Case 4, the acknowledgment of the father persists even after his death. Highly gendered, both acknowledgment (*iqrār*) and disavowal (*li ‘ān*) are performative speech acts (J.L. Austin 1976) *par excellence* that instantiate and materialize the intentions of a man’s testimony. The uttering of the statement is at once the doing, or undoing, of paternity. I will return to this last point shortly.

³⁴ Rubin. *Al Walad*. 7

³⁵ Rubin. *Al Walad*. 11

³⁶ Rubin. *Al Walad*. 8: “In the context of the story of ‘Abdallah b. Hudhāfa, the legal implication of the *firāsh* maxim is clear: the son of an ‘unchaste’ woman always retains the genealogical relationship (*nasab*) with his legal father, in spite of the possibility that he is another man’s offspring. This prevents him from becoming a “bastard,” child of fornication: “*walad al-zina*”

³⁷ See, *Encyclopedia of Islam*, 2nd ed., “*Ikrār*”: In all the schools, three conditions are necessary for its validity: the child who is recognized (or who recognizes) must not be the son of someone else; there must be a sufficient difference in age between the author and the beneficiary to make the recognition likely; finally the person recognized must agree to it, unless it is a question of a very young child or of an insane person. To these three conditions the Mālikīs add a fourth: they require that the circumstances of the birth were such as to make such a relationship plausible, in other words they consider that a child born in Morocco may not be “recognized” by a father who is definitely known never to have left Syria; but the other schools do not demand this condition nor (agreeing in this with the Mālikīs) do they demand that proof be shown of the marriage of which the child is the issue. The recognition of direct relationship puts the beneficiary in exactly the same juridical situation as if the relationship resulted from the rule *al-walad li-l-firāsh*, “the child belongs to the marriage-bed”, or from the proof by *bayyina*, by witnesses; this applying in all the branches of law, whether concerning succession, impediments to marriage, incapacity to bear witness, or else in penal law.

These forms of evidence and procedure will recur in the next set of cases. I will return to discuss the hierarchies amongst them after presenting three more cases, instances in which the courts admits DNA testing as a method of settling disputes over *nasab*.

Case # 5. *Zakaria v. Fatima*, 2008, Casablanca³⁸

On June 8, 2004, in Casablanca, Zakaria presented a statement to the Court of the First Instance in which he stated that he had been married to Fatima for many years. The marriage, he complained, lacked intimacy, which made continuing relations with her impossible. He had previously requested permission from the court to divorce her. During the legal mandatory period of reconciliation, he came unexpectedly to her and she was four months pregnant. He had already known for some time that he was sterile, and thus knew with certainty that the pregnancy was not from him. He sought a judgment to deny the pregnancy by way of an oath of disavowal (*li'ān*.) Soon after, he conducted research and learned that DNA testing had become a legal method of disestablishing paternity. Zakaria then presented an additional statement on March 3, 2005, requesting a judge's order to conduct a DNA test on Kaoutar, Fatima's daughter. Fatima had told Zakaria that Kaoutar was Zakaria's genetic offspring, who came from his loins (*sulb*). She claimed that she knew through DNA analysis. Zakaria supported his request to conduct his own DNA analysis with doctors' testimony and laboratory analyses that demonstrated his sterility.

Fatima, in her response responded that Zakaria was not sterile since he already had a daughter with another wife. To try to establish Zakaria as a man who always acts according to a particular pattern with respect to women, she related how Zakaria acted when he learned of the other wife's pregnancy. He had accompanied that wife to her family's house and abandoned her there. After he left, he proceeded immediately to request a divorce from that wife and sought a claim not to raise her maintenance for child support.

The judge after hearing Zakaria and Fatima, issued an order for genetic expertise. The DNA test was conducted. The results stated that Zakaria was not the biological father of Kaoutar. After the investigation was concluded, the Casablanca Court denied the paternity of Kaoutar to Zakaria based on DNA test, and refused Fatima's remaining demands.

Fatima appealed this decision to the Court of Appeals in Casablanca, requesting a second DNA test. The Court issued an order to conduct the test, which was returned showing the same results. Zakaria was not the father. Based on this evidence, the Court of Appeals upheld the lower court's decision, relying on DNA evidence of non-paternity. Fatima, by way of her lawyer appealed this decision. On behalf of Fatima, her lawyer argued that she sought to overturn the ruling based on a violation of the general Islamic legal groundwork (*qā'ida shar'iyya 'amma*), and a violation of the necessities of articles 153 and 154 of the Family Code. The "Shari'atic principle" of "*al-walad l-il-firāsh*," she maintained, is the basis of establishing paternal kinship—which the husband cannot discredit except by presenting strong and convincing proof for conducting corroborative expertise. Furthermore, Zakaria had knowledge that she was pregnant and did not raise a

³⁸ Supreme Court, #41

claim to deny paternity until 6 months had passed from the time she had given birth. The lawyer drew on the principles of Islamic jurisprudence, stating that the classical Islamic jurists (*fuqahā'*, expert of *fiqh*) determined that the deadline for raising a claim for denying paternity was between one or two days.³⁹ The lawyer claimed that the Court of Appeals had therefore erred. First, it admitted a claim to deny paternity, even though a long period of time had passed since the birth of the daughter, Kaoutar. Second, it resorted to genetic analysis without the acceptance of the Shari'atic, jurisprudential (*fiqh*) rule that says that the child belongs to the conjugal bed (*al-walad l-il-firāsh*), and without Zakaria delivering "strong and convincing proof" for the reasons for the test. Thus, the lawyer stated, Zakaria's claim has violated the well-known Shari'atic rules and requirements of articles 153 and 154 from the Moroccan Code of Family Law. The lawyer concluded that the Court's decision to conduct the first test lacked the justification that would make the findings of the test valuable as evidence.

The Supreme Court, after hearing Fatima's argument decided to deny her claim and uphold the ruling of the lower court. In its decision it stated:

If, as according to Article 153, the marriage bed with its conditions is a conclusive proof of establishing *nasab* [kinship/filiation], the law [*qanun*] still permits the husband to challenge the marital presumption by way of disavowal (*li'ān*) or by way of expertise that benefits the conclusiveness of paternal kinship, according to two conditions: the husband must present strong proof of the claim, and the court must issue a judicial order for the expertise. The law is not in any way bound in its decision as to what constitutes strong proof...Article 153 has not defined a determined deadline for presenting this challenge. This lower court considered that the claimant presented medical testimony and laboratory analyses that confirm his sterility, and decided that these are strong proofs that corroborate his claim. The court, insofar as it considered the medical testimony and analyses strong proofs, issued an order for genetic analysis at both the lower and appeal court levels. Both of these DNA tests proved in a definitive way (*bisiffa qat'aiyya*) that the girl Kaoutar is not from the loins (*ṣalb*) of Zakaria. The rulings based on these DNA tests not to establish the *nasab* of the girl to him were correct applications of the law that met the law's necessary requirements. The requirements of Article 153 of the Code of Personal Status have been applied in a correct and diligent way. The rulings are entirely justified and the rest [of Fatima's claims] appear to be without a basis.⁴⁰

Case #6 *Mohammed v. Farida*, Casablanca, 2005⁴¹

³⁹ These rules from classical Islamic jurisprudence regarding a statute of limitations to deny paternity do not seem to have been codified in the Moroccan Code of Personal Status.

⁴⁰ The Supreme Court in discussing this case points to several other similar decisions where strong proof was found to conduct DNA testing. In one decision, the husband returns home after being taken hostage by the Polisario to find his wife pregnant. The certificate and testimony that he was taken hostage were the reason to conduct genetic analysis. In another decision, the husband left Morocco for nearly one year and returned to find his wife 5 months pregnant. He only learned of the pregnancy 2 months after returning and requested genetic analysis which was given to him based on the proof of his absence.

⁴¹ Supreme Court Ruling, April 2005

Mohammed, after divorcing Farida on January 20, 2000, petitions the court to disestablish paternity so that he does not have to continue paying maintenance (*nafaqa*). He requests that the Court issue an order to conduct genetic analysis on Bouchra, the daughter. Bouchra was born to his ex-wife in the year following the divorce. Mohammed claims that Bouchra is not his daughter, but the daughter of another man called Abdullah. Mohammed produces the divorce certificate as evidence. He states that the divorce certificate, which requires a woman to state if she is pregnant at the time of divorce, does not even mention that Farida was pregnant. Mohammed also produces as evidence the certificate of a gynecologist dated December 09, 1999, which states that when he undertook an examination of Farida, she was not pregnant at that time.

Farida, in her response, claims that Bouchra was born on July 10, 2000 by an (unofficial) midwife (*'ala yad qābila*). Farida presents administrative testimony, dated August 14, 2000, of Bouchra's date of birth. At the time of her divorce, she claims, she was in her third month of pregnancy. She claims that she was always faithful to her husband and did not "separate from him until the day of the divorce."

The Court of the First Instance accepted Mohammed's request and issued an order to conduct genetic analysis on Mohammed, Farida and Bouchra. The test returned showing a 99.999 percent probability that Bouchra was not Mohammed's daughter. Based on these results, the judge granted Mohammed's request to stop paying maintenance and to disestablish paternity. Bouchra appealed the decision to the Court of Appeals, which reached the same conclusions as the lower court. She then appealed that decision to the Supreme Court, which decided the following:

The plaintiff/petitioner seeks a judgment that will break the bonds of paternal kinship (*nasab*) to the little girl. He seeks to conduct medical expertise by way of genetic analysis of the respondent [Farida] and the girl to confirm the correctness of the *nasab*. According to Article 153 of the Code of Family Law, the marital presumption of paternal filiation (*al-firash*) with its conditions is considered definitive proof that establishes paternal kinship, which cannot be challenged by the husband except by way of *li'ān* or expertise[...]

The respondent [Farida] did not indicate any legally necessary proof to establish the exact date of birth of the child. The representation of the date of birth in the birth certificate ...is not based on specialized competence [i.e., since it came from an unofficial midwife]. The administrative testimony that relates the girl's date of birth is dated approximately four weeks after the supposed birth. The date of the birth of the girl is not exact (*ghair maḍbūṭ*) in a convincing, positive, certain way—and in accordance with what the law is in this context. It must be a Muslim birth certificate issued by a competent authority who has been entrusted by law[...]

The marital presumption (*firāsh*) is certain proof to establish paternal kinship (*nasab*), as we have heard in the respondent's response. However this is only on the condition that the date of birth is established in an undebatable way. Where the petitioner denies the *nasab* of the girl who was born after the divorce as concluded from the proofs presented, including those from the respondent herself, there remains (out)standing the element of the first condition of the requirements of Article 153.

As to the second element of the Article 153, the court issued an order to conduct genetic analysis on all three [i.e., Mohammed, Farida and Bouchra]. Entrusted to conduct such analysis is the state laboratory in Casablanca. This laboratory released its report that has been approved by the President of the Biological Administration, and the President of the Investigative Police, and which has all the official stamps of approval. The results of the genetic analysis inform us of the lack of proof to establish the filiation of the girl [to Mohammed]...As the results of this test are clear, highly detailed and free from any confusion or ambiguity—there is little room for appeal. It is known that what arrives from modern science and the results of genetic analysis to define biological bonds between individuals and their origins through the scientific analysis of what is called DNA, is considered correct (*ṣaḥiḥa*) and certain, to a degree which does not permit doubt and does not carry error except in a very weak and insignificant way...This test points to disestablishing the paternal filiation (*nasab*) of the girl to the petitioner. *Nasab* remains the Shari'atic glue (*al-luḥma al-shar'iyya*) between the father and his child that is transmitted from predecessor to successor, from back to front (*min al-salf il-al-khulf*). By means of this test, *nasab* has been disproven between the petitioner and the child. The petitioner's request is legally supported, insofar as he ought to deny the *nasab* of the child who was born on July 1, 2000.

Thus the original request by Mohammed not to have to pay maintenance was upheld by the Supreme Court based on the following reasoning:

The girl is not of the *nasab* of Mohammed. The obligations of the father must only be met when there is 'Shari'atic glue' (*luḥma shar'iyya*) between them... The call for maintenance must be considered secondary to the claim to establish *nasab*, the latter determining whether the former is claimable; Claims for maintenance are the consequence of establishing the bond of filiation (*ṣilat al-bunūwa bain al-ab w-al-ibn*), which must first be established before establishing maintenance. The controversy is about these bonds, which must be decided before the court can make a decision about maintenance. Without Shari'atic filiation (*nasab*), there are no responsibilities between them. The court finds no legal tie between the claimant and the girl; *nasab* must be established in order to receive maintenance (*nafaqa*); the rest becomes incumbent on the public treasury.

Case #7. *Boutaina v. Samir*, Rabat, 2007⁴²

Boutaina petitioned the court to establish the paternity of her child, Youssef, to Samir, her ex-fiancé. She stated that Samir proposed engagement to her, and that during the engagement period, their son Youssef was conceived. She presented witnesses who testified to an engagement on June 18, 2004. She added that maintenance was due to her for her period of pregnancy, as well as to her child since the day he was born. Samir, for his part, presented his case, claiming that he had withdrawn the engagement. He alleged that Boutaina had knowledge of his retraction after a notary he had hired informed her of his withdrawal. He disavowed the pregnancy and denied his association with it.

⁴² Supreme Court decision, March 7, 2007

According to the court, hiring a notary to inform one's fiancée that an engagement has ended does not constitute knowledge that can be relied upon according to the law. As long as Samir did not settle the effects of the annulment and retraction himself, he did not produce any legal effects that would have ended the engagement. Such effects would have been achieved if he had informed her himself of the end of the engagement. Thus, the engagement persisted, both according to Boutaina's knowledge, as well as legally. Boutaina established to the court that the pregnancy occurred during the engagement, and applying article 156 of the Moroccan Code of Family Law, the engagement period is a reason to "affiliate the child to the engaged man on the grounds of sexual relations by error."⁴³

Where Samir disowned the pregnancy of Boutaina and denied his association with it, the court issued an order to conduct genetic expertise by way of DNA testing. The Court repeated that it considers the DNA test "a Shari'atic method of establishing paternity." This particular test was entrusted to the State military genetic laboratory of Rabat. This laboratory—one of three state laboratories in Morocco—concluded in its report of April 19, 2006, that the defendant is considered by the law to be the biological father of the child by a percentage of 99.999%. Samir appealed the results of the test both to the Court of Appeals and the Supreme Court, arguing that the test was not a legitimate mode of establishing paternity, nor were the results of the test itself correct. In its judgment the Supreme Court responded:

It is self-evident that the laboratory in question is a state apparatus (*jihāz*) amongst state apparatuses that has permitted members of the state to correctly accomplish their tasks... Deducing from the reasoning set out above, the child in question is fathered from the liquids and loins of the defendant. The court must therefore attribute his *nasab* to the child, with all the legitimate effects that ensue from such a relation. Amongst these effects is maintenance. Maintenance must be given [to the petitioner] since the birth of the child on February 6, 2005. As per Article 198 of the Moroccan Code of Family Law, the father must pay maintenance for the child.⁴⁴

And as for the maintenance during pregnancy, the claimant remains within her right to demand the maintenance that is due to a mother during the period of pregnancy,

⁴³ Article 156 (CFL): If an engagement takes place by an offer and acceptance but for reasons of force majeure the marriage contract was not officially concluded, and during the engagement period the engaged woman shows signs of pregnancy, the child is affiliated to the engaged man on the grounds of sexual relations by error when the following conditions are met: a- If the two engaged person's families are aware of the engagement, and if the woman's legal tutor, if required, has approved the engagement; b- If it appears that the engaged woman became pregnant during the engagement period; c- If the two engaged persons mutually acknowledge that they are responsible for the pregnancy. These conditions are established by a judicial decision not open to appeal. If the engaged man denies responsibility for the pregnancy, all legal means may be used to prove paternity.

⁴⁴ Article 198 (CFL): Maintenance paid by the father to his children shall continue until they come of legal age, or until those who have pursued their education reach the age of twenty-five. In any case, maintenance paid to the daughter shall not cease until she can earn a living on her own or until her maintenance becomes incumbent upon her husband. The father shall continue to pay maintenance to children suffering from a handicap and unable to earn a living.

which must therefore be decided, as according to article 189 and 190.⁴⁵ The court will use all of its power to implement the judgment.

III. Analysis of the Cases

In the last four decades in “Euro-America,” social and technological developments have complicated the traditional idea of the family. New kinships and forms of relationality between desiring parents and children have emerged from new life-creating practices of reproductive technologies and new life-classifying practices of genetic testing. It is now possible for a child to have five parents including a sperm “donor,” an egg “donor,” a “surrogate” mother, and two “intending” parents. These new creations of life and classifications of relatedness (kinship) have regenerated interest in identity politics. Legal, anthropological and biomedical scholarship have approached new kinships from humanistic, social and policy-oriented perspectives (Franklin and McKinnon 2002, Glennon 2000, 2009, Rothstein et al, 2005, Strathern). What emerges from this scholarship is a complicated picture of 1) the role biology and genetics play—or ought to play—in creating and maintaining kinships and family ties—and 2) the practices of knowledge that are produced as a result of such ties.

The biological and the technological, like law and rights discourses, claim universality and veridicality, yet are always given meaning in particular cultural and historical contexts (Kay 1999, Rabinow 1996)⁴⁶. Yet, the discursive force of DNA claims transcendence over culture, and in particular, language.⁴⁷ A dominant scientific understanding take DNA as a natural, eternal, universal, unmediated prediscursive code—a nonmaterial writing that existed before humans’ entry into the world, a transparent signification of an exact correspondence between signifier and signified that sits, waiting to be decoded. This logocentric view of nature as already-written writing is not new. As Lily Kay (1999) has shown, nature, “from ancient times to recent years has always been textualized.” While the metaphor of the transcendent writing of Nature can be traced to antiquity, new discourses of information have revived and revitalized this metaphor, imbuing it with “scientifically legitimate meanings” that are taken as ontologies. The metaphor of transcendent writing has been historicized anew in particular technological contexts, cultures of writing, and ideas of the “book.”⁴⁸ Perceptions of the

⁴⁵ *Article 189 (CFL)* Maintenance shall include food, clothing, medical care, and all that is deemed indispensable, as well as children's education, taking into consideration the provisions of preceding Article 168. A number of elements shall be taken into account to fix maintenance: a pondered average, the income of the maintenance provider, the status of the maintenance recipient, the cost of living, as well as the customs and traditions prevailing in the locality where maintenance is awarded. Article 190 (CFL) In assessing maintenance, the court shall rely on the declarations made by the two parties and the evidence they present, taking into account the provisions of preceding Articles 85 and 189, and may resort to expert assistance. All cases pertaining to maintenance shall be decided within a maximum of one month.

⁴⁶ Rabinow (1996, 99) proposes the term “biosociality” to mark a set of shifts whereby nature and the biological have become “modeled on culture understood as practice.”

⁴⁷ Even as the offbeat subspecialty of DNA linguistics gained currency in the 1980s outside of mainstream molecular biology, and theoretical biologists turn to generative grammar as a framework for understanding genomic organization (Kay 1999, 225).

⁴⁸ *Ibid.*, “When *episteme* and *techne* are seen as intertwined (thus rejecting the Greek logocentric legacy), the time honored dichotomy between theory and practice, discovery and invention, observer and

transcendent authority of DNA and the agency of writing nature in the secular context of molecular biology is no longer God. But what happens to this perception of transcendent authority in a socio-religious context? What is the proper place of applied genetics in Moroccan culture?

There are many views of what it means to be close or to have ties in Moroccan culture beyond legal productions of kinship and social constraints on sexual behavior. Social anthropologists of Morocco offer diverging views of the ways that *nasab* is configured in Moroccan culture, suggesting *nasab* alternately as a lineage ideology, a genealogical idiom that deconstructs such an ideology, or a pragmatic mode of constructing social relations. (Eickelman 1976, Geertz and Rosen, 1979, Gellner, 1969, Rosen 1984, Pandolfo 1997). In my reading, these views are not antithetical to one another, nor do they exclude a space for thinking about the effects of the legal dimensions of lineage on the postcolonial urban Moroccan subject of law.

Conflicting models of paternity?

The Human Genome Project has accelerated the development of techniques for inexpensive, efficient analysis of regions of DNA and comparison of genetic profiles. Scientists and engineers are constantly refining those techniques so that testing is becoming ever faster, cheaper and more widely available. Beyond this, the emphasis on genetic identity proposed by DNA analysis has reinforced the view that biological relationship and parental status are tightly linked. Given the growing influence of genetic thinking and “genetic essentialism,” it is easy to slide into the view that genetic contribution is the essence of family and parenthood (Nelkin and Lindee 2004). Notwithstanding important differences in various countries, DNA testing in law has been used in Euro-American contexts to establish the identity of perpetrators in criminal cases and fathers in paternity suits. As feminist legal scholar Martha Fineman notes, the paternity case in the Euro-American context has been modeled historically on the criminal case.⁴⁹ “The paternity proceeding is typically classified as civil in nature, yet it is viewed by many public-interest advocates as akin to a criminal trial. The imposition of a child-support award is considered to be the equivalent of an eighteen-year sentence...”⁵⁰ The analogy between paternity and criminality places responsible reproduction in the context of the traditional nuclear family and the rule of law—a context in which the legal consequences of kinship and relationality are clear, and “decisions will be considered and controlled.”

Paternity, it seems, is a highly gendered, precarious enterprise. Unlike traditional forms of maternity, biological paternity could not, until very recently be so sure of

phenomenon are blurred. Technology and theory generate each other; epistemic things become technical things and vice versa, as Hans-Jorg Rheinberger has shown” (231).

⁴⁹ In US and Common Law, “Theoretically, through the paternity proceeding, irresponsible reproducers are burdened with the same economic and legal consequences that men within traditional marriage relationships have. The reasoning is that the unmarried men will then have the same incentive to be responsible...A punitive model is consistent with history. At common law, disincentives for irresponsible reproduction included bastardy proceedings and criminal sanctions for fornication or nonmarital cohabitation. Such starkly punitive responses seem out of date in our more sexually permissive era.” 211

⁵⁰ Fineman (1995, 213).

itself.⁵¹ The biological understanding of exclusive paternity posits that, because men have historically been unable to bear children, they are structurally in a position of uncertainty as to whether a child brought into this world, or a child in the womb, actually belongs to them. From a Euro-American legal perspective, in the context of a traditional heterosexual family, paternity has made men particularly vulnerable to victimization by “scheming” reproductive women and adulterous wives who “dupe” men into creating ties with children whom they did not beget. This uncertainty and vulnerability has been translated in family law—ancient and modern—into a need for balancing interests between “social interests” in reproductive practices, serving the best interests of the child, and protecting men from fraud. While historically, courts have employed physiognomists as experts, the probative value of physiognomical evidence has been rather weak and considered, at best highly circumstantial.⁵² The DNA paternity test, with its probability of 99.9999% accuracy, biologically changes this position of the historical uncertainty of fatherhood. The DNA prenatal paternity test means that fathers no longer even have to wait to see the faces of their children in whom they look for signs of resemblance, but can test the not-yet born while it is still in the mother’s womb. The erosion of the marital presumption of paternity in family law context has made the DNA test increasingly visible in Euro-American courts (Rothstein 2005).

Echoing Donna Haraway (1997), Sarah Franklin (2001) poses the question, why are new forms of biological reproduction the places to look for new kinship? Family law scholars and anthropologists, for example, have unearthed other options to the model of exclusive paternity. In a U.S. Supreme Court case, *Michael H. v. Gerald D.* (1989), a model of dual paternity was put forth. The plurality opinion ultimately rejected such a model and invoked “nature itself” as a reason for the rejection of dual paternity, but nonetheless offered it as a possible model.⁵³ In disputes involving reproductive technology, paternity has come to be redefined in extra-genetic terms of “intention” to become a father. And anthropologists of South America have identified sixteen societies marked by a belief in “partible paternity...the conviction that it is possible, even necessary, for a child to have more than one biological father.”⁵⁴ The question of paternity thus remains open and this chapter deliberately attempts not to reinforce or re-naturalize biology as a foundational form of relationality.

As we have seen, to ask what is Shari’atic paternity (*nasab*) in contemporary practices of state based Islamic law is fundamentally to ask: what is permitted as evidence of legal paternity?

Questions about DNA testing and paternity are very alive throughout Morocco. There are different ways of understanding DNA in terms of relationships, families, and the law. In the six cases, fathers, putative fathers, mothers and collateral relatives call upon DNA testing for different, personal reasons to help prove their case. Some, like Boutaina (case 7) use it or request to use it to inculcate putative fathers and compel them

⁵¹ In the last three decades, debates about maternity and motherhood introduced by ART and surrogacy have analogized the new maternity to the old paternity (Laura Woliver, *Women, Science and Technology*)...

⁵² Rothstein 2005; The paternity conundrum has been popularized in a rather sad way by television shows in the U.S. In popular media “You are NOT the father.” You ARE the father. Men who do not want the child are “accused” of being the father. “J’accuse!”

⁵³ *Michael H. v. Gerald D.* 1989. 491 U.S. 110, 118, 148

⁵⁴ *Economist*, 1999. Science and Technology: Paternity Test. 350:74

to bear responsibility for their sexual behavior. It also historicizes her sexual behavior, making it acceptable and her “respectable” to herself, her family and conservative elements of Moroccan society. Others, fathers like Ismael (case 2), Ahmad (case 3), Zakaria (case 5), Mohammed (case 6) doubt that children born in their marriage are theirs and attempt to use the test to prove a biological relation that would sever the tie that they have with the children. Others, like Hicham (case 4), request the test to Fatherhood as a social or emotional bond—reasons for establishing paternity in Euro-American contexts—does actually not appear to have evidentiary relevance in any of these cases.

There is both insistence upon, as well as resistance to admitting DNA as evidence amongst religious and juridical elites. As we heard earlier from Dr. Khamlichi, the DNA test is seen both as a means for helping single mothers discipline men and to try to make them financially responsible for their sexual behavior. This is a view held by many family law lawyers and women’s rights activists in Rabat.⁵⁵ Fatima Sadiqi, a feminist activist and Professor of Linguistics and Women’s Studies in Fez, Morocco argues that DNA tests are “a potentially potent aid for single mothers because once a father is identified, he faces legal obligations to recognize the child and provide financial support. And when a man recognizes a child after a DNA paternity test, a woman stands a better chance of being accepted back into her family, even if she doesn’t get married. But various problems in establishing a formal engagement, such as poverty, mean that judges have applied the law only rarely. Despite these obstacles, Morocco is the only country in the Arab-Islamic world to address single mothers and allow DNA paternity tests to protect them.”⁵⁶ Although Morocco is not actually the only country in the Arab-Islamic world to allow DNA paternity tests for single mothers, Sadiqi imagines the DNA test as a means of furthering her activism, as a technology that is almost heroic, existing to help and protect women and single mothers. Both Khamlichi and Sadiqi attribute supportive and protective qualities to the DNA test, imagining it almost as an unlimited and absolutely loyal friend in their struggles in gender politics, and thereby erasing the very real “obstacles” that the DNA test in practice presents.

There are also those who are of the opinion that the DNA test is a technology that could erode traditional forms of family. Scholarly as well as informal debates as to whether DNA constitutes an Islamically viable mode of proof (*wasīla shar‘iyya*) are very present in urban society.⁵⁷ The problem with DNA testing according to those who oppose it is that biological facts as evidence may be used to erode Moroccan forms of paternity. The process of translating the DNA test into the Moroccan legal context such that it expresses Moroccan values is a complicated issue. By “translating,” I mean how judges and litigants make DNA testing make sense in the Moroccan legal context. A Moroccan family law judge in Rabat says that DNA tests and technological innovations cannot be rushed into Moroccan courtrooms. “Little by little, we are making progress in this area (*kantqddmu fi had l-mjal, schwiya schwiya*). Genetic expertise may be used elsewhere, but we are in Morocco.”⁵⁸ “Progress,” here means ameliorating the situation of unwed mothers, single women and their children who may become social outcasts when abandoned by their husbands or the men who have promised to marry them. Another

⁵⁵ See interview with Ahmed Khamlichi and Latifa al-Bouhsini on file with author

⁵⁶ Sadiqi, 2008. *African and Asian Studies*. 7, 461

⁵⁷ Interview with Supreme Court Judge, interview of author with file, May 26, 2011.

⁵⁸ Interview on file with author. June 16, 2011.

judge said that there are debates amongst jurists and theologians about genetic expertise (*khibra jinniyya*) and whether it can be considered Islamic. “Many religious scholars are against the DNA test and consider it un-Islamic since it implies permitting sexual relations outside of marriage. This will lead to chaos.”⁵⁹

A related concern amongst judges and legal scholars, is that the DNA test is being used to erode marriages and *al-walad li-l-firāsh*—the marital presumption of the conjugal bed. According to this view, the major concern about the DNA test is not that it is being used to approve of sexual relations outside of marriage, but that it is being requested more and more by husbands trying to accuse their wives of infidelity. Without other logics available to mothers, lawyers and judges for making arguments about what constitutes legal paternity other than “*al-walad li-l-firāsh*,” men may be using the DNA test to legally erode bonds—financial, emotional and social—that they have created with children. For these judges and legal scholars, the DNA test is imagined as a danger and risk, a potentially hostile force that threatens to undo an imagined sense of order and harmony.

These debates around the use of DNA tests, and the looseness with which courts grant to men the status of fathers when they acknowledge children (i.e., the majority of paternity cases are actually testimonies of acknowledgment--*iqrār*) invokes the dimension of wanting to bring legality into the huge phenomenon of “illegitimate” births in Moroccan society.⁶⁰ In a society where legal adoption is impossible (i.e., criminalized), abortion illegal, and where it is *so* important to have a name, “Shari‘atic paternity” (*nasab*) has been the only way to achieve this.⁶¹ But what representation of Shari‘atic paternity emerges from these cases?

Paternity is not biological or social in Moroccan law, but is based on a father testifying to a relation to a child. His legal acknowledgment of this recognition in the form of testimony constitutes legal paternity. The testimony of acknowledgment carries heavy symbolic weight since it simultaneously confers legality—both Islamically and administratively—not only to the child’s birth, but to the sexual act in which he or she was conceived. This legality will mark a person’s social status throughout his or her life. A non-biological father can easily recognize a child who becomes his son or daughter, as long as there has been a marriage or engagement to the mother. This recognition is at issue directly and indirectly in both colonial sleeping baby cases and in modern paternity cases.

⁵⁹ Interview on file with author. June 16, 2011.

⁶⁰ The majority of *nasab* cases in Rabat’s family law court are cases of *Iqrar*. A conservative estimate says that in Casablanca and Rabat, there are 1000 abandoned babies every year. In discussing medically assisted reproduction with court personnel, there was deep sadness as to this point, and it was pointed to as a reason why medically assisted reproduction is bad and morally wrong in Moroccan society. I was told that there are 27,000 abandoned babies in Casablanca every year. Whether or not this is true is unimportant. What is important is that people understand this to be a major social problem.

⁶¹ The prohibition against adoption is based on Qur’anic injunctions: “God has not assigned to any man two hearts within his breast; nor has He made your wives, when you divorce, saying, ‘Be as my mother’s back,’ truly your mothers, neither has He made your adopted sons your sons in fact. That is your own saying, the words of your mouths; but God speaks the truth, and guides on the way. Call them after their true fathers; that is more equitable in the sight of God. If you know not who their fathers were, then they are your brothers in religion, and your clients. There is no fault in you if you make mistakes, but only in what your hearts premeditate. God is All-forgiving, All-compassionate.” Sura 33:4-5, A.J. Arberry. For a sociological and ethnographic account of adoption in Morocco, see Jamila Bargach (2002).

In principle, then, it seems that the regime of paternity in Moroccan family law is a regime that is ruled by the logic of testimony (i.e., "I am the father") rather than by biological proof. It is an implicit argument in Islamic law for the necessity of contingency.⁶² It is the principle of the father's testimony of acknowledgment, or its lack, which makes the child genealogically "true" or "false,"—that marks the social and legal distinction between a child of the bed (*wuld l-frash*)—and a "bastard" "born out of wedlock" (*wuld l-hram; walad al-zina*).

The court does not value genetic materials or any other evidence over the testimony acknowledgment of a father.⁶³ Fatherhood or paternity is not grounded by biology or genetic kinship in Moroccan law. Even as the concept of *nasab* implies a transmission of origins "from back to front (*min al-salf il-al-khulf*)," the origins that are transmitted do not necessarily imply genetic kinship. Genetics do not determine the paternal "glue" (*luḥma*) that bonds the child and the father together. Paternal glue is not created by the act of impregnating a woman, of contributing genetic substance in sperm.

If genetics do not determine paternity, neither does practiced fatherhood (i.e., caring and providing for a child emotionally and financially) outside the confines of the marriage bed. If paternity is not viewed as a biological event, or as a social practice, what kind of event or practice is it? The cases under review suggest that it is a testimonial act of acknowledgment, the performance of the gift of a name, and a recognition of rights, obligations and responsibility that glues or ties two or more people together. Do the cases at hand then resign us to reaffirming the problematic axiom that maternity is a natural, and paternity a social institution?

Several observations that begin to map the hierarchies of evidence in these cases.

1. First, when a father acknowledges paternity, biological proof cannot deny it unless another man also acknowledges paternity.⁶⁴ In the cases I reviewed from 2004 to present, I did not find an instance of two men claiming paternity. Historically, in such a case, *nasab* would be attributed to the man married to the mother of the child. *Nasab* depends on the testimony and acknowledgement of the father, as the husband of the mother. His recognition is a gift—the gift to/of a name, and a pledge of material support to both the mother and child according to his means and ability. We might understand the family name in Morocco to be something of a legal fiction. In the eyes of the law, this gift of a name is not ultimately dependent on genetic kinship, even as Moroccan law strictly prohibits adoption and giving non-blood children the father's name. As I have mentioned, the majority of paternity cases that I came upon in the Family Law Court archives were cases of acknowledgment (*iqrār*). Yousra, the young court clerk who was helping me to navigate my way through the piles of paternity case files since 2004, looking for cases involving genetic testing, expressed sympathy to me that unfortunately for me, the majority of paternity cases were "*iqrār*" cases, in which the father simply acknowledges his paternity. As we have seen in the case of Murad and Hicham, the testimony of the

⁶² There is also the theological argument, which comes in when the DNA test wants to substitute for a never really certain proof to the ontological uncertainty of god's knowledge (*Allah y'alem*) that deeply marks reproductive practices in Morocco.

⁶³ I did not come across any cases where two fathers were disputing over paternity. Since the fathers in the cases under review are not arguing for their legal right to paternity, the question remains open as to whether the courts have opinions on paternity as practiced fatherhood.

⁶⁴ Again it would be interesting to find a case where two fathers were disputing over paternity, with both of them claiming paternity.

father, once it is given persists even after his absence or death. This is to say that in most cases, when a father wants to be a father, it is not difficult to establish. In addition to Yousra, I met a number of couples who had sexual relations before the marriage contract was drawn up, and the judge turned a blind eye to the pregnant woman during the conclusion of the marriage contract.

2. Second, when genetic DNA analysis is used, it is certain, recalling the unpublished Supreme Court decision, that biological *nasab* does not on its own establish filiation or paternal rights. DNA does not create the legal effect of kinship and does not bestow any parental rights or obligations on a father. What first establishes filiation is the speech act that acknowledges to another, not the creation of life or a genetic tie, but the recognition of two other human beings.

DNA testing, as a techno-scientific form of evidence, is neither the friend of the “secular” feminist activists nor the enemy of conservative judges. It is incorporated into the Islamic evidentiary repertoire by finding its place amongst an established set of evidentiary rules. In the last three cases above (5,6,7), it becomes a Shari’atic method both to establish and disestablish Shari’atic filiation. For example, in *Boutaina v. Samir* the court uses genetic analysis as proof, which it considers an “Islamic method of defining filiation.” Even in the act of denying a petitioner access to a DNA test, the judge’s denial is justified on the basis of evidentiary hierarchies pertaining to Shari’atic principles and positive juridical rules.

In other words, when the judge permits the test to be administered and it establishes paternity, it can only do so as long as there is marriage, engagement or “sexual relations by error”—which imply a man’s implicit acknowledgment at some historical moment to recognize any children born during the marriage (or engagement,) as long as the child is born at least six months after the marriage contract or an engagement was concluded.

When the presumed father denies paternity as in all of the cases except Case 4, the hierarchy of evidence depends very much on the contingencies of the case at hand. The one stable condition is that the party requesting the DNA test has to convince the judge to conduct the analysis. There are many contingent elements involved in this act of persuading the judge. In cases 2, 3, and 4, judges at every court level refused the petitioners access to the test, giving more weight to the testimony of acknowledgment (case 4), the marital presumption (i.e., the conjugal bed, case 3) and the strict observance of the minimum duration of pregnancy after the completion of the marriage contract (case 2).

Where the evidentiary weight of the marital presumption—“*Al walad li-l-firāsh*”—is concerned, it is interesting to compare Case 5 to Case 3. In the latter case, the father requests a DNA test of his children and the judge denies it based on “*Al walad li-l-firāsh*”—“the child belongs to the marriage bed.” In the former case, the father requests the test and his reasons for requesting it, namely knowledge of his sterility, are deemed sufficient. Given the similarities of the two cases—i.e., married couples in which the father is requesting the test—it is possible to state that a man’s knowledge of his sterility is a stronger reason for conducting the test than absence from one’s partner, birth control, or observance of “immoral” behavior. In Case 6, the *firāsh* is only certain proof of paternal filiation on the condition that the date of birth can be established with certainty. Here, the DNA test has no evidentiary value since the date of birth, which would render the birth legitimate, cannot be established. This last condition—i.e., the date of birth—is

certainly a novelty of the postcolonial state, since birth certificates did not exist prior to the state. In case 7, the meaning of *al walad l-il-firāsh* has been expanded to include the engagement period, and the DNA test corroborates the mother's claims.

Socially, when the man denies paternity (as in all the cases, except Case 4), and the DNA test is used as evidence (cases 5, 6, 7,) the results of the test become a sign of the wife's fidelity or infidelity. In the eyes of the law, the DNA test marks the lawfulness or criminality of a woman's extra- or premarital sexuality, which simultaneously marks the child's social identity as legitimate/illegitimate, true/ false.

Thus, as evidence of genealogy and kinship in Moroccan law, DNA has not, as some religious and judicial elites have worried, become a universal, transcendental signifier of origin, identity or family. It has not, *ipso facto*, indicated kinship, genealogy or heredity. Rather cultural and Islamic understandings of genealogy, heredity and identity (*nasab*)—and permissible sexual behavior—have defined the limits of what DNA may be made to indicate in the legal domain. DNA in the Moroccan context only gains value under the sign of a masculine recognition of the other, the gift of the family name to a child that conjures up an origin. And while we know that “the original is a priori indebted with translation,” (Derrida 1982, 201) there cannot even be the fiction of such an origin here—of an apex ancestor to whom genetic kinship can be traced through DNA—without the repetition of a father's testimony of acknowledgment and recognition.⁶⁵ The father's acknowledgement of a child in an act of testimony performs the gift of the origin. Testimony not genetics or biology is the basis of paternity in Moroccan law, even as paternity must occur within the context of a marriage. Historically, in the first centuries of Islam (7-9th centuries), before *nasab* became anchored in the collective Islamic legal and social imagination, it competed with other claims to kinship (namely the *di'wa*). *Nasab* at this time was considered a legal fiction—an act that was once met with criticism by religious and legal scholars, and ridiculed as fictitious by poets.⁶⁶ This gives pause to wonder: has the introduction of DNA testing has revived some of these early concerns over *nasab* ?

Marcel Mauss (2000) notes, “the pact that is the gift is at once a present and a poison.” Can this be said of *nasab*? The question of *nasab* as a father's testimony of acknowledgment, a performance of masculinity, points to an assumption that fatherhood as masculinity is somehow always already there, waiting to be symbolically performed, given, withheld or taken away. But what if the father is himself fatherless--without a name, or property? In what does paternity consist besides radical loss? What if there is no “there there”? This is both a philosophical, and yet extremely practical question, given the labyrinth of confusing techniques administering birth in postcolonial Morocco. What if the father's identity is itself lack, the sign of loss or absence? What does a father do who, nameless and fatherless himself, has no paternity to give? What does or can he pass on when he himself is child of “father unknown,” or “xxx”? While, since 2002, this nameless father's children can now obtain a birth certificate, it is not clear—to lawyers,

⁶⁵ “L'original n'est pas un plein qui en viendrait par accident à être traduit. La situation de l'original est la situation d'une demande, c'est-à-dire d'un manque, d'un exil, et l'original est à priori endetté de la traduction. Sa survie est une demande de traduction, un désir de traduction, un peu comme Babel demande: traduisez moi. Babel est un homme, enfin est un Dieu male.” *L'oreille de l'autre: Otobiographies, transferts, traductions* (Montreal, VLB 1982).

⁶⁶ See Goldziher, *Muslim Studies*, I. 127f; and Ṭabari, *Tārīkh*, II, 191f

civil servants and feminist NGOs—whether the single mother of these children can obtain the necessary family booklet that would give the children a legal identity. Does this imply the possibility of a deadly chain of being condemned to life without a legal identity, so that the conditions of a child’s birth implicates him or her, as in the consequences of a crime? Is this the meaning, often repeated in Morocco, that “Your wealth and your children are a *fitna* for you”? (Quran 64:15). The word *fitna* has many meanings including trial, temptation, and chaos. Stefania Pandolfo (1997) writes that the meaning of *fitna* here is, “a flirtation with the unknown, with the insecurity of novel paths, that taste for dissent, dispute and hazardous games.” In the context of these cases, this second meaning—the “insecurity of novel paths”—of *fitna* emerges: the anxiety of identity (legal, national) of the father whose birth was itself marked by stigma and chaos.

In *Mohammed v. Farida* (case #6), the testimony of the midwife, or an unofficial birth attendant—i.e., anyone not official approved by the state to administer health care—no longer counts as expertise. Yet, in many rural areas, such health care is not attainable. This creates an impossible situation of liminal legal identity for many Moroccans. In the state, to have an acceptable birth and a meaningful social and legal identity, to give birth or have been given birth to meaningfully, the birth has to be recorded and written down, and witnessed by the state’s medical-administrative apparatus.

In classical as well as contemporary Islamic law in the Maghreb, the marriage bond has to some extent protected the woman and given to her speech about her reproductive body social and legal value. Under the power of the postcolonial State, in cases where there is no marriage bond, where the man is absent or turned against her, the woman’s testimony as to the reproductive functions of her body, including but most especially birth, must be corroborated by state apparatuses of record keeping and documentation. In the past fifty years, the unlicensed midwife has been deemed an “incompetent” witness by the court. A woman’s testimony about giving birth and becoming pregnant is now constantly surveilled and documented by public record. Witnessing the female body of the unmarried or divorced woman—one not accounted for by male testimony—becomes the realm of the gynecologist and other licensed professionals whose expertise is authorized by state authority to help in the administration of national identity.

In conclusion, it is important to stress that sleeping babies existed in the legal domain prior to the medical, legal and administrative apparatuses of the postcolonial state in part because birth and pregnancy were not surveilled by the bureaucratic accounting of populations through the production of certified birth certificates issued by official state organs, and in the last several years, DNA tests. This is not to say, of course, that there were not other methods of discipline and surveillance over women’s reproductive functions or other ritualized methods of socially marking birth and pregnancy. The new administrative productions of identity in the context of postcolonial Moroccan Islamic family law has become a new policing and surveillance apparatus of sexuality and identity by state institutions. In the Moroccan context, with its inheritance of Islamic family law norms, the policing and surveillance of sexuality has very specific social consequences, primarily for girls engaged in premarital sex, single and divorced women, and children born to unwed mothers. Administrative techniques of surveillance such as DNA testing, birth certificates and the creation of an elite cadre of expert witnesses have reconfigured practices of *nasab*—of birth and kinship—in Moroccan Islamic family law.

Ziba Mir-Hosseini's study of the 1957 Moroccan Code of Personal Status and Succession law shows that the first legal reforms in Morocco have produced a consolidated patriarchal hold within a reinterpreted field of the *Sharī'a*, while simultaneously undermining the elaborate guarantees and forms of security that the *Sharī'a* had provided in practice before the emergence of the postcolonial nation-state.⁶⁷ I would suggest that the discourse and practices of obstetric jurisprudence in contemporary Morocco—the security and surveillance of birth and reproduction—reveal some of the real effects of the male-dominated ideologies of the nation-state on the lives of women and the reproduction of citizens.

⁶⁷ Ziba Mir Hosseini, *Marriage on Trial: A Study of Islamic Family Law* (London: I.B Tauris, 2000).

Chapter Six. Thinking the Sleeping Baby: The Ethics and Politics of Human Reproduction at the Margins

The first and most natural technical object of Man, which is at the same time a technical means, is his body. Marcel Mauss

Looking to define the biological nature of Man in terms of anatomy or physiology does not change the fact that this corporeal nature itself constitutes an environment/case (milieu) upon which Man exercises his faculties. Claude Levi-Strauss.

This final chapter presents an ethnography of sleeping babies, pregnancy and birth. It draws on fieldwork in a Moroccan Maternity Hospital in Rabat, interviews with the staff and some patients there, as well as with gynecologists and neonatologists working in neighboring cities of Salé and Casablanca. I explore how sleeping babies enable extra-legal embodiments in Moroccan artistic narratives, psychoanalysis and popular healing practices. The analysis focuses on extra-legal narratives of reproductive embodiment—that is the language women and unofficial midwives use to describe sleeping babies, menstruation, quickening, labor, delivery and birth. I argue that while medical metaphors of pregnancy and birth as a realm of efficient production and speed—and menstruation as “failed production”—are widespread in the official medical domain where French is widely used, Moroccan women express relationships to their reproductive functions in Arabic and Berber through languages of divinely influenced time and predestination (*kutib alayha ddem; l-qdr*), physical pain (“*jaha l’wji*,” hot and cold), spaces of mobility and immobility (imprisonment--*masjoun*, openness--*mahlul*, obstruction—*tqaf*, confined—*mutakaff*) and friend/enemy distinctions (*sādiq*--friend, protection, harm, *makyouss*, invasion/occupation “the being stays and lies down.”).

The discourse of the *rāqid*, absent from the spaces of state law as well as official medicine, persists in women’s narratives about birth and reproduction. These narratives are institutionally homeless, silences in the bustling corridors of the postcolonial state, its hospitals and courts. Yet, even when they are spoken, they cannot be listened to, even by those who want to listen. The spaces themselves determine in large measure the parameters of discourse, what can be said and what can be heard. In the public hospital of Casablanca, Dr. H an obstetrician and neonatologist, saw in her almost two decades of practice “a lot, maybe dozens of women with sleeping babies every year.” Usually, they came from the countryside (*bled*), traveling to Casablanca just to obtain medical care. Especially interested in women’s health issues in Morocco, and “the convergence of femininity across a mother/woman (*mere/femme*) identity,” Dr. H wanted to listen to her patients with sleeping babies, and to better understand them. But in her role as a physician, her resources were already very limited, making the performance of her duties already difficult. She would listen to women describe their sleeping babies, but felt that she couldn’t really listen to them there in the hospital, even as she believed that what they were describing would enable her to provide better healthcare for them. It was in part her desire to understand the sleeping baby and its relationship to a “feminine unconscious,” and in part the difficulties of practicing in a public hospital lacking the basic services and technology that would allow her to do her job, that led her to give up her practice at the

hospital to begin a psychoanalytic practice. Yet, her patients in her private practice in Casablanca are not the same genre of patients (*elles ne sont pas du meme genre*) that she would see in the hospital. The psychoanalytic treatment of women with sleeping babies is just not possible. She was convinced that these "bodies at the margins" were bearing the weight of different forms of gendered violence and desire, together with crushing economic deprivation and dispossession. Drawing mostly on French schools of psychoanalysis, she told me "As Freud says, every time you engage in intercourse, you unconsciously think of your parents. Unconsciously, you think of your creation, your birth, your past and how you might repeat this all in the future. A woman unconsciously internalizes, or is occupied by, many forms of domination. I am sure this materializes in the appearance of sleeping babies, in becoming- or not-becoming Mother."¹

In *The Woman in the Body*, the anthropologist Emily Martin argues that medical knowledge about reproduction is constituted by cultural forces, the most powerful of which are language and metaphor.² By reading medical language for what it *does*, Martin reveals the at times violent, and always gendering methods of the scientific interpretation of physiological bodies. Scientific descriptions attribute specific teleologies to the reproductive system. For example, menstruation becomes an activity that is singularly oriented towards the production and implantation of a fertilized egg, as opposed to simply being about "flow," and negative values are attributed to women's bodies when they fail to "efficiently produce a product"—i.e., babies. Martin suggests that the cultural overdetermination of reproductive bodies in medical knowledge is historically contingent, and that there might be other ways to describe biological phenomena.

This particular culture of reproduction and production of scientific knowledge—the one regulated by obstetric jurisprudence—has been generated in the context of industrial capitalism geared toward the production of commodities, a context in which workers have been severed from the means of production. Martin shows how economic concepts and language have migrated from the economy to reproduction, such that "analogies taken from the realm of production in factories are being applied to birth," and such that processes occurring in the factory, with its forms of power and control, "might be said to occur in the realm of reproduction."

For example, menstruation and menopause that do not produce pregnancies are described as "forms of failed productions." Medical metaphors and imagery juxtapose images of "the uterus as a machine that produces the baby, and the woman as laborer who produces the baby"³; Uteruses are said to "produce efficient or inefficient contractions;" The distinction is made between good and poor labor in terms of timeliness and the amount of progress a "reasonable" uterus makes at certain pace and "in certain periods of time." While the doctor is described like a manager or 'factory supervisor' of the woman, the woman in labor is herself conceived of as "a 'laborer' whose 'machine' (uterus) produces the 'product,' babies." Martin asks: "If the doctor is managing the uterus as a machine and the woman as laborer, is the baby seen as a 'product'?" Certainly, language in medical texts say that Caesarians "produce the best products,"⁴ and describe the effect

¹ Interview on file with author, May 31, 2011.

² Martin, Emily. 1987. *The woman in the body: a cultural analysis of reproduction*. Boston: Beacon Press.

³ Martin, *Woman in Body*, 63

⁴ Martin, *Woman in Body*, 64

of medical interventions as an increase in productivity: "Amniotomy (breaking the amniotic sac) results in an increase in 'work performed by the uterus.'"⁵ Martin concludes that it is because the woman is thought of as performing work that must be controlled that "scientific management strategies are thought to be important."⁶

Martin's ethnography of reproduction shows how these heavily charged medical metaphors do not just exist in books, but are "applied" to women's bodies in menstruation, birth and menopause. "The dominant medical metaphors applied to women's bodies in menstruation, birth and menopause involve a hierarchical system of centralized control organized for the purpose of efficient production and speed. Medical attention usually is given when this system undergoes breakdown, decay, failure or inefficiency."⁷

Martin's work argues that women's narratives of a fragmented self are mediated by implicit, or unconscious, embodiments of dominant medical metaphors--which are themselves the product of a relationship between economy and society. Beyond psychosomatics, biomedical discourse produces very real, material effects in how maternity is thinkable, sayable and embodied by women. These metaphors "assume that women's bodies are engaged in 'production' with the separation this entails (given our concept of production) between laborer and laborer, laborer and product, laborer and labor, and manager and laborer." While this model of reproduction does not fully saturate the reproductive subject, it has become the dominant model for thinking about reproduction in the context of contemporary biomedicine.

Martin's discussion of the modern reproductive self points to the subject's ambivalent relationship to something like a "Protestant ethic" or masculinized "work-discipline" in the realm of human sexuality. Not only do ideas of duty to work, and a spirit of hard work, become socially important in the realm of biological reproduction (as the rationalized social organization of the "free-est" labor of all), but an ethos of progress and success defined by one's relationship to an inherently *apolitical* Time is equally important. According to this ethos, then, we must be hostile to failure, to abortion, and to unproductive activities that waste social time. According to this ethos, birth control only involves the regulation of social time. According to this ethos, there is no time for the soul, the human, the unconscious--the "woman in the body."

In the first two chapters, pregnancy, procreation and reproduction in Islamic medicine link the soul (*al-nafs*) as well as the body to reproduction and pregnancy. Nowhere in modern biomedicine is the unconscious, desire or the soul represented as important in reproduction, except as pathology or problem needing medical intervention. Bourdieu reminds us that, in the realm of sexuality and reproduction, the encounter with another tradition is:

[i]ndispensable in order to break the relationship of deceptive familiarity that binds us to our own tradition. The biological appearances and the very real effects that have been produced in bodies and minds by a long collective labour of socialization of the biological and biologicization of the social combine to reverse the relationship between causes and effects and to make a naturalized social

⁵ Martin, *Woman in Body*, 59

⁶ Martin, *Woman in Body*,

⁷ Martin, *Woman in Body*,

construction ('genders' as sexually characterized habitus) appear as the grounding in nature of the arbitrary division which underlies both reality and the representation of reality and which sometimes imposes itself even on scientific research.⁸

While a represented naturalization of the socialized biological may be true of much scientific research, feminist cultural and science studies have been wrestling for several decades now with these questions as they concern research, scholarship and approaches to knowledge.

For example, in *Bodies that matter*, Judith Butler argues that bodies are produced through performances or repetitions of culturally inscribed forms of knowledge that appear in the regulatory norms and symbolic force of sex. These performances produce a "sedimented effect" on bodies, which were never already there to begin with. "[T]here is no reference to a pure body which is not at the same time a further formation of that body. In philosophical terms, the constative claim is always to some degree performative."⁹ While Butler posits an opposition between 'radical constructivist' and scientific theories of the body, from the perspective of feminist science studies, this is a false opposition.

Beginning in the 1970s, a number of critical feminist scientists began to dissect sociobiological arguments that hold sway in popular genetics, biology and evolutionary psychology.¹⁰ Feminist technoscience scholars trained as natural scientists or biologists (such as Ruth Hubbard, Ruth Bleier, Linda Birke, Evelyn Hammonds, Anne Fausto-Sterling, Evelyn Fox Keller and Donna Haraway) have since engaged with biology as a politico-ontological matter in ways that reach beyond the comfort zones of the humanities and "soft" social sciences. In this scholarship, ontology is politics by other means.

The so-called "material" and "ontological" turns in feminist technoscience studies have happened largely through engagements with the biological body as *both* a physical and a cultural entity.¹¹ This has happened through in several ways, including through the figure of the cyborg, the queer child of super power militarism and neo-colonial science. A particularly compelling iteration of this engagement is found in Anne Fausto-Sterling's work. In "The Bare Bones of Sex: Sex and Gender" she writes: "In thinking about both gender and race, feminists must accept the body as *simultaneously* composed of genes, hormones, cells and organs—all of which influence health and behavior—and of culture and history."¹² In the study of bones, for example, certain populations and women have been considered to have biologically or "naturally" weaker, frailer or less dense bones. While researchers often draw conclusions about biology by reading bones as if they are

⁸ Bourdieu, Pierre. 2001. *Masculine domination*. Stanford, Calif.: Stanford University Press.

⁹ Butler, Judith. 1993. *Bodies that matter*

¹⁰ Rose, Hilary. 1971. *Science and Society*,. Penguin Books; also see, Rose. 1994. *Love, Power and Knowledge: Towards a Feminist Transformation of the Sciences*. Indiana University Press.

¹¹ Donna Haraways take on biological knowledge, for example, cannot be said to fit either a social constructivist or a naturalist take on biology.

¹² Anne Fausto Sterling. "The Bare Bones of Sex: Sex and Gender. *Signs: Journal of Women in Culture and Society* 30 no. 2 2005, emphasis added; also see Fausto-Sterling, Anne. 1992. *Myths of Gender: Biological Theories about Women and Men*. New York: Basic Books

archeological facts to be discovered and read, Fausto-Sterling suggests that bones are artifacts, and that various modes of interpretation are used to produce knowledge about bones, which develop in the cultural contexts that materialize them. As she puts it:

As a biologist, I focus on what it might mean to claim that our bodies physically imbibe culture. How does experience shape the very bones that support us? Can we find a way to talk about the body without ceding it to those who would fix it as a naturally determined object existing outside of politics, culture, and social change? This is a project already well under way, not only in feminist theoretical circles but in epidemiology, medical sociology and anthropology as well... The sex-gender or nature-nurture accounts of difference fail to appreciate the degree to which culture is a partner in producing body systems commonly referred to as biology—something apart from the social. I introduce an alternative—a life-course systems approach to the analysis of sex/gender... We need to ask old questions in new ways so that we can think systematically about the interweaving of bodies and culture.¹³

Fausto-Sterling's "life-systems" approach shows how cultural practices shapes the very bones in our bodies and how disease states are socially produced by rhetoric and measurement.

The rest of this chapter remains in dialogue with feminist theories of embodiment that questions the cultural processes of body-making. In the realm of reproduction, to paraphrase Butler, the question becomes: How do bodies that "fail to materialize" a viable reproduction in the proper way, according to efficient speeds and a productive use of time, "provide the necessary "outside," for the bodies which, in materializing the norm, qualify as bodies that matter?"¹⁴ How in other words, have women with sleeping babies in Morocco become abject or failed reproductive bodies?

In the postcolonial period in Morocco, law and medicine's relation to reproductive knowledge constitute a change in the regulation of time. These changes reflect not only a new form of regulation, but changes in the relationship between "biological facts" and cultural values that have altered the very meaning of reproduction in official medical and legal domains. Reproduction or procreation before the meaning imposed on it by state law and biomedicine meant something else and was correlated to an ethics and politics of human life that was attuned to different values, such as nobility and generosity. *Al-injāb* is the Arabic word for procreation and reproduction. In its various forms, it means to beget children (often specifically sons), to be nobly born, generous or excellent. This term has begun to disappear in the realm of the postcolonial bureaucratic apparatuses of law and medicine, as languages of production take over. For example, in medically assisted reproduction in Morocco, as well as in other Arabic-speaking countries, the language of begetting nobility (*injāb*) is replaced by the language of manufacture (*ṣ-n-a^c*). With *ṣ-n-a^c* the language of "manufacture" and "production" (as in commodity production) enters the Arabic language in the realm of human reproduction. Thus, for example, artificial insemination is translated into Arabic as *al-talqīh al-ṣanā^ci*—literally "the manufactured insemination." The trilateral root *ṣ-n-a^c* in its various forms mean "to

¹³ Fausto Sterling, *Bare Bones of Sex*

¹⁴ Butler, Judith. 1993. *Bodies That Matter: On the Discursive Limits of "Sex."* 1st ed. Routledge. 16

make, to work, to manufacture, to prepare or be artificial.” It connotes “to create,” but primarily in the sense associated with manufacture. And it is in the realm of industrial manufacture that the regulation of time and the surveillance of work is paramount. The shift from procreation as creating noble birth to reproduction as manufacture means that birth, pregnancy, gestation, menstruation and menopause in Moroccan law and biomedicine are activities that are discursively folded into a new model of administrated factory work and ideas of “free” labor.

With this in mind, Martin, together with Bourdieu and feminist science studies scholars, invite us to think the *rāqid* and reproduction in a different way—paying particular attention to the language of the women who bear them and the midwives who take care of them. To think the reproduction of life, even or especially when it does not thrive, outside of the “failed product” model, where bodies, or their parts, become machines, women unpaid laborers, and physicians managers requires stepping outside of the biomedical demographic framework and *doxa* that permeates discourse about reproduction. This analysis of the discourse of sleeping babies—of the languages of birth and menstruation—begins to think reproduction and culture otherwise—that is, as a process that questions the work of reproduction, work that is just as intimately tied to the past, to death, loss and failure as it is to the future, life, attachment and success. It is a way of thinking reproduction attuned to the complicated social and psychological dimensions of *what* is being repeated, and what is being reproduced. It also a way of thinking how reproduction occurs in contexts of multiple forms of domination—intersections of class, gender, race, disability—that differently affect women as subjects of diverse reproductive vulnerabilities, but without imposing the ontological subject position of victimhood on women. In the obstetric jurisprudential discourses of reproduction, focused on bodily forensics, women do not have a discourse to say what seems to be unsayable about these intersections of the gendered divisions of biological labor, and socialization of sexual difference. Where obstetric jurisprudence (biomedicine, law and social policy) erases the “woman in the body,” displacing gendered humanities from birth and reproduction, the discourse of the *rāqid* keeps her in-tact, opening up onto other ways of thinking birth, procreation and embryogenesis.

Other Languages of Reproduction

This section briefly discusses the language of reproduction women use in postcolonial Morocco. The language used by women to describe labor and contractions is not associated linguistically to efficient production and speed as they are in English or French. Instead, labor and contractions are referred to as “*wjī*,” or “*al wja*” literally meaning to feel pain or to hurt: “Her pain has begun (*bdaha l-wjī*),” “The pain came to her (*jaha l-wjī*),” “The pain visited her (*zarha l-wja*),” or “the pain is with me! (“*fiyya l-wja*!”) These expressions are used to indicate that “labor” has started (as well as to talk about pain during menstruation.)

“Pains” (—i.e., contractions) at the time of birth are not measured according to speeds and time connected to ideas of efficiency, but according to ideas of openness (*mahlul*) and Galenic notions of temporal humors—specifically, of hot and cold. When a woman has difficulty with contractions, or rather “the pains,” she describes them, not as speeding up or slowing down, but as becoming “cold” (*brd*). As Bouchra Al F., a young

mother of three, living in a shantytown outside of Temara, the last stop of a several hour bus ride from Rabat, told me:

I had my first daughter at home with the midwife (*'ala yad qbla*). She heated the room a little with fumigations (*bakhur*) and my daughter moved forward. That was in the village, you know, where they make Argan, between Essouira and Marrakesh. With my second daughter, the contractions started normally, and then they became cold. I was in Mers el-Kheir, and had to go to the hospital in Rabat. They have no patience (*ma kayiṣbrush*) there. That time, I could not give birth in my own time, as I wished (*'ala khatiri*). They rush to try a cesarean section (*ftih*) or episiotomy (*ghuraz*). They tried to rush me, and were so rude. It's shameful. They caused me so much pain (*azzabuni bizzaf*). I tried to be strong, to endure... By God, they have no patience (*ma kayiṣbrush, wallah*).¹⁵

The pregnant woman who has “gone into labor” is called “*nfissa*” or “*nafsa*”—meaning the one in childbed, from the Arabic root *n-f-s*, which in its active verbal form can mean both priceless and envy. Unlike languages of production to describe reproduction in the biomedical domain, the body of the woman giving birth is associated with something whose value cannot be measured or determined, and even in her pain, a possible object of envy.¹⁶ As a noun, the same root, *n-f-s*, refers to the soul, psyche, spirit and mind.¹⁷

“*Nfas*” also from the same root, refers to the postpartum period. During this period, typically lasting from 7 to 40 days, it is particularly important that the new mother be taken care of by someone she trusts who will protect her from the envy—usually, the *qabla*, who washes the mother and her clothes. The blood (*d-dem*) of postpartum bleeding is considered to be very powerful. If it falls into envious hands, it can potentially cause the mother much harm. If there is no *qabla*, hospital employees are preferable to family members whose resentment may cause envy that harms the mother.

Qabla (classical Arabic: sing. *qābila*; *qawābil*) is the feminine form of the active participle from the root *q-b-l*, meaning to welcome, meet, accept and receive; she who welcomes, receives, and is subject to the object received as in the expression “He is mortal—i.e., subject to death (*'huwwa qābil li-l-mawt*)”. Thus understood, the midwife does not “deliver” the baby, implying management and control of the object to be delivered. Rather, she waits for it, accepts and receives it, and assists the mother in welcoming it into the world. In other verbal forms, the root *q-b-l* means to come forward, to encounter, to become intelligent to, to bring anyone into the presence of something, and to hear the prayer of God.

The fetus or embryo is often called the “son of Man (*bnadam*—i.e., literally, “the son of Adam,” the latter standing in metonymically for Man as such).” This is reflected in the language women use to describe miscarriages or induced abortions: “*tiyeh bnadam*” or “*khesser bnadam*”. The latter, meaning “the loss of the son of Man” refers more to miscarriages proper, while the first, meaning “the wandering of the son of man” is more

¹⁵ Interview on file with author

¹⁶ Interview with midwife, on file with author

¹⁷ Hans-Wehr English-Arabic dictionary

ambiguous, referring both to a miscarriage and an induced abortion.¹⁸ The sleeping baby has various names in different parts of Morocco, and across the Maghrib. In some iterations, it is also referred to as “*bnadam*”--as in “*bnadam yatsan idist*.”

This brief discussion of the language of reproduction used in postcolonial Morocco shows that it is a practice heavily charged with anthropological and cosmological determinations. Value, envy, soul and humanity are important *embodied* aspects of the gendered “socialized body” in practices of procreation and birth. It is in *this* discursive context, and not that of biomedicine, psychopathology or obstetric jurisprudence, that the discourse of sleeping babies is best understood.

Listening for Sleeping Babies: Between Desire and Envy, Mourning and Melancholy, Attachment and Loss, Hope and Despair

During my fieldwork in Rabat in 2011, I visited the homes of several women who had sleeping babies. Only rarely in the Maternité, and in another gynecologist’s office in Salé, would a woman come in, convinced she has a raged (*‘aında raged fi batn*). In one such instance, Assia, a woman in her thirties, was convinced, even after seeing a sonogram that did not detect life in her womb, that she was pregnant, that she had been pregnant “since her wedding night.” “It is not imaginary. I feel the sleeping baby in my womb and one day it will come into existence.” Her husband who came with her to the doctor’s office said he believed her, and that he didn’t really care if she couldn’t have children, that he was most concerned about her health. Assia told me that a couple of her husband’s envious relatives had put the baby to sleep because they didn’t want her to have any children with her husband. “Believe me, nothing good can come with the relatives of your husband.” This was in Dr A.’s office in Salé. The doctor, a woman in her 60s, later told me that she was accustomed to hearing such things from time to time, but that she couldn’t “do anything about it. Perhaps its true, I certainly cannot prove that it isn’t!” To her patients, Dr. A would sensitively and discreetly try to translate the *raged* into biomedical terms, primarily treating the *raged* as a problem of sterility or infertility (*hatta wa in kānat ‘āqiran*), for which she would refer the patient to another doctor who specialized in treating infertility, as well as to an herbalist.

More often, however, during the course of my research, when patients at the hospital, employees in the court, or neighbors would hear about my research, they would offer to introduce me to a relative or friend with a sleeping baby—or offer me a story of a sleeping baby, or a friend or relative with a story. I was also told to spend time at the saints tombs in Casablanca, Meknes or Salé. In these ways, I met a number of women who had--or, once had--a sleeping baby.

'Asma, an elderly woman who lived in a popular neighborhood in Rabat had been carrying her sleeping baby for 27 years. She said that it made her ill and had always been the source of suffering, but that she couldn’t lose it, and was scared to go to the doctor for fear they would take it away. But it would not leave. “Yes, he makes me suffer, but I do not want the doctors to take it away.” She had put it to sleep when her husband was sent to war in the Sahara, and was planning to wake the baby up when he returned. But he never returned. She had taken medications and done “writings” (*kitba*) to try to make the baby leave or fall, but it stayed in her womb.

¹⁸ I thank Dr. Imane Khachani, medical intern at the Maternité for discussing these ideas and terms with me.

Zineb, a widow living in Oulmes, a town two hours southeast of Morocco, had carried her son (whom I also met) for four years before giving birth to him. The family was proud that they had a sleeping baby amongst them. She said he had fallen asleep on the day her husband was in a car accident. She knew the baby remained alive in her womb because she felt it moving inside. She went to the qabla in the town who verified that there was a raged, and who helped her take care of him.

In order to make sense of stories like these, I met with a Hakima, a midwife (*qabla*) from a village outside of Fez, who visited her younger sister Amina (who I wrote about in Chapter Four) in Temara from time to time. In Amina's two-bedroom apartment on the 10th floor of a recently built concrete high-rise, I asked Hakima: "What does it mean that the sleeping baby is 'sleeping'?" And what does it mean for it to wake up? Why and for how long does the baby sleep? Please, tell me everything!"

Hakima knew exactly what I was asking. I learned from her sister that she was a celebrated midwife, and had been practicing for over thirty years. Hakima told me that she had delivered "hundreds of babies," and was very familiar with the techniques of caring for the mother and the sleeping baby. She, like Amina before her, informed me that one of her mother's children had been a raged. In visits spread over several months, she shared knowledge of her practice with me.¹⁹ The first thing she told me was:

Hakima: My mother had seven children. The last one was a raged. After three months, it went to sleep and it stayed asleep for the rest of her life. She had it for forty years and died with it.

Amina: It's probably still in there! [*The sisters laugh deeply for a while. Then silence.*]
As I told you, it was never born. It was imprisoned (*masjoun*)--you know a hostage (*un otage*). It lies down in the mother's womb, without spirit (*ruh*), and won't leave. It would not die, and could no longer live. As we say, touched by the jinns (*makyouss*). Do you understand? It was a being that had no spirit (*ruh*), and could not be born. My mother, she tried to make it leave, but it stayed. Do you know what I mean when I say imprisoned (*masjoun*)? I mean that he will not die, and he can no longer live. He cannot be born in 15 or 18 years. A masjoun, that's the jinns (*l'ariah*) and he just stays. Sometimes, he makes the uterus shrink and exerts pressure on the mother that makes her suffer; this being he has no spirit (*ruh*). It was an enemy, not destined for this world.

Hakima: True. That one, it was not destined for this world, but some are destined for this world. There are good ones, and there are bad ones, and the good one is a friend to the mother (*huwwa sādiq li-umhu*). It is destined for this world and in this case the pregnancy thrives. The other one, the bad one, he is an enemy. He is destined for the other world (*l-akhra*). Do you understand? They both can enter the woman's womb when she is predisposed. There are those who sleep because of a shock, trauma, or an accident that befalls the mother. There are those who sleep because someone wants to harm the mother. There are those who sleep because the mother wants to keep the baby inside her, and those who sleep because the mother does not want the baby. Do you understand?

¹⁹ Interviews and notes on file with author

Me: Yes, There are those who fall sleep and those who are sleeped by the mother or someone else. Please tell me about the ones who fall asleep.

Hakima: Initially, the being is a drop of blood, the smallest bubble in a drop of water, gazing down. It is so small, infinitesimally small. It rests like this, *suspended*, until it receives the order to be (*yakoun*); this is the being of three months (*moula tlata*). The being of three months is there just barely, three more months and it is flesh, three months more and it is heavy with weight (*tlata twahem, tlata tchehhem, tlata teqqel.*) This is the pregnancy that arrives in nine months, when the being has become a friend and the pregnancy thrives. But sometimes the being sleeps when the mother experiences a trauma, a fright, a shock, is upset, disoriented or scared (*sdm kabir, jaja, khala, tfaqsat, takhlit, khouf*). The one who sleeps because of a shock, or if the mother falls, he sinks to the bottom of the womb and becomes implanted. The shock or trauma causes the baby to fall asleep. Do you understand?

Amina: (clarifying for me): After a traumatic shock, (*sdm kabir*), when you become scared, the being can go to sleep.

Hakima: It dries up and rests there, quietly, idly, without spirit (*ruh*), it does not move. This dried up one, it is a friend (*sadiq*), and the spirit (*ruh*) returns to it after it has slept, usually for three months, but sometimes for years. In this case, the child gazes down, suspended there, resting until God wishes it to move. Then God says “Be” (*Koun*). Gently and very slowly, it begins to resuscitate and move because the soul (*nafs*) that was absent until that moment makes its return by the power of God.

Amina: So the spirit is gone, and the sleeping baby stays in the mother's womb without spirit. When the spirit is absent, it sleeps.

Me: And this one, this is the friend?

Hakima: Yes, exactly. The friend can sleep for months. Or 2 years, 3 years, 4 years, or the mother's entire life. In this last case when the mother dies, he dies. In the meantime, without spirit (*ruh*), he rests in the womb of the mother as a piece of flesh, neither living nor dead, somewhere between the two; either he fades every month by the blood that flows every month until he becomes infinitely small, or he remains for many years. The one who remains...this being is neither dead nor alive, he is flesh imprisoned (*masjoun*), arrested and confined (*mutakaff*) in the mother. If someone wanted to harm the mother, he can make the being sleep. It stays suspended in her womb. It cannot develop or regress until the mother dies, unless there is another shock (*sdma, jaja*). The other one, the one who is not friendly, the *makyouss* (touched by the djinns), he lies down and remains there; this one, we make it leave with herbs (*dwa laarabe*) which the mother drinks. The being then returns and it falls and leaves. In both cases, the soul (*nafs*) or spirit (*ruh*) is departed or absent. With the friend, when it returns, the being slowly wakes up. Do you understand? If the woman's health is okay, he stays alive with the woman until she herself dies. He can sleep in the mother's womb for eternity. If there is another shock, he may die or wake up. We know a woman in Fez, a cousin of our uncle, who had a sleeping

baby for fourteen years, and then he woke up. We will take you to see her, if you'd like! She will talk to you.

Amina: As I told you, you have to go the countryside (*bled*) where there are no doctors if you want to meet women who have *rageds*. There are some in Temara or Casablanca now, but they are a lot more in the countryside.

Me: Okay, thank you, I would like to speak to this woman. Tell me, how do you know for how long the raged will sleep before waking up? How do you know when to wake it up? How do you know that it will be born or whether it will stay?

Hakima: We don't know this. We do not torture a woman to make it happen. It is impossible to make the being be born before it has completed its time. It has its own time. A birth occurs when the being has completed its time, and before then, it is not possible. When it is late, they "induce" labor and make it come; but I don't think this is good. They come to me to wake the raged up with medications, arab medications. Do you know them? Amina, explain it to her. And, sometimes I do massages to open up the womb, '*la maison du bébé.*' A woman may also go to the *fqih* for a writing (*kitba*). Do you understand? Amina, do you remember, you couldn't conceive for two years after your miscarriage?

Amina had already told me the story, which Hakima repeated:

Hakima: There was no drinkable water and she [i.e, Amina] ended up drinking from a bucket of water that was mixed with bleach and the baby died. Then she couldn't conceive for many years. She was frustrated since she wanted a child with her new husband. She went to see a *qabla* and the doctor (*ṭabib*) on the same day. Remember (*to Amina*)? The *qabla* massaged her stomach and gave her three days worth of medication and then she became pregnant with her son. Praise God! Now everyone goes to see the doctor--everyone except the very old and the people in rural areas. The massage of the *qabla* opens up the *walda*, which has dropped. Amina's *walda* is dropped now and the *qabla* will do massages to open it up. But she doesn't want any more children.

Amina: Yes, that's it (*ça-fî*), two is enough!

Hakima: There basically aren't midwives anymore. Only in the *bled*. Even there, there are laws to put them in prison. There was one in the news recently. Have you heard about her?

Amina : The raged is like the *baum zwain*, the doctors don't really know anything about it.

Hakima: True, sometimes the raged is like "*baum zwain.*" Some women come to me and say that they have a sleeping baby, but when I consult with them, it is only that the intestines are hard. They insist that they feel the baby moving, but when I check again, it is only the intestines. For five years now, Amina has had trouble in her stomach. She has no appetite. She had gone to see several doctors and they all say they have no idea what

she was talking about. So she went to *l-sherif*. He touched different parts of her body with fire (*l-hadid*), massaged her stomach and now she feels a little better. The *baum kwais* is tied to her heart and her blood which has become cold. It makes her extremely tired and she has no appetite.

Amina: The doctors do not understand and cannot really help, even though they try. It can last for eternity and the French speaking doctors I have consulted, God bless them, they have no idea how to treat it.

Hakima: A few years ago, Fatema—*turning to Amina*, you know, the wife of Abdelkadir—she was pregnant at the time her husband migrated to find work in Europe. France or maybe the Netherlands. She was crazy about that man and was distressed because she thought he might not return. She came to me and said she felt a deep sadness in her womb. She told me it was where the baby was, and that something had fallen from her. She was bewildered, she couldn't sit still, was very cold, and in despair (*l-qanf*). I warmed her up and checked her. I told her the being was still there. It was ever so small, resting. She was in great despair, especially at the time of her periods she would come to me. I checked again and the being was still there. I gave her Arab medications (*l'-achoub*). She heated them in water or milk and drank it. Her daughter slept there for three years. Then one day she fell asleep, and on the same day she woke up. Fatima told me she felt her womb swell again. She was ashamed in front of her other children and her relatives, and was worried because everyone would say it was the child of adultery (“*wld zina*”). You see, that one was not a *masjoun*. It was the effect of a traumatic shock. The Arab medications in time nourished the being, and it woke up. I attended to the birth of her daughter who had moved forward and we welcomed her into this world. I remember her first cry. The baby in the womb memorizes the heartbeats of the mother. When she cries in this world, it is because she misses the music of her mother, and then she stops crying when you give her to her mother. That one, she will die in this world as God wills.

Amina: Yes, Fatema wanted her daughter to live, despite all of her troubles. There are others I know who don't want their babies to live, but God wants to save the baby and wills him to live despite the mother's desire to make it fall. Some mothers who do not want a child take Arab medications (*dwa laarabe*) every year to prevent the baby from being born.

Hakima: Look at Meriem, your neighbor. She is five months pregnant, and she takes all kinds of things, medications from the pharmacy, Arab medications, herbs. She will take anything at all to make the being fall. She came to me yesterday and said that she did not want to be pregnant. I told her to wait and see. I told her to let it out in this world, whether it lives or dies. The being may stay in the womb. Or it will come out in this world or the other. If he stays, he will always cause her to suffer. I think the birth is still far away.

Situations like Fatema's and Meriem's are also represented in narratives in contemporary postcolonial Moroccan film and literature. Fatema's situation is not unlike that of the wife in the tale of *Zrerek* in Tahar Ben Jelloun's novel *The Prayer of the*

Absent (*La prière de L'absent*, 1981)²⁰, or of Zineb in the film, *The Sleeping Baby* (*L'enfant endormi*, 2004), by Yasmine Kessari.²¹ Meriem's situation, on the other hand, mirrors that of the protagonist Yezza in the novel *The Sleeping Baby* (*L'enfant endormi* 1987) by Noufissa Sbai.²² Before analyzing the above conversation, I will briefly discuss how the sleeping baby appears in literature and film.

In a story within a story within a story, Zrerek, a fleeting character in *The Prayer of the Absent* returns home after working in France for three years to find his wife pregnant. Zrerek was given his name because of the extreme blueness of his eyes (*Z-r-q* in Arabic means to be blue; and also to become blind). He had married his wife, a "very beautiful girl...with eyes so beautiful and full of mischief that they make birds fall out of the sky," one week before his immigration to France. The week after the wedding, he leaves his beautiful wife behind to live with and be looked after by his parents. For three years, she does not hear a word from him. Not a single letter, not a single dirham. Upon his return from France, Zrerek inquires after his wife with his mother, who tells him that he has returned just in time. "I have good news to tell you. You will soon be a father. We all hope it will be a boy." Zrerek flies into a rage upon hearing this news and begins to shout: "How is this possible? It has been three years since I've left and my wife has just become pregnant. But this is madness. I am going to break everything. I am going to kill her..." His mother calms him down, and reassures him that his wife is indeed pregnant by him. She asks: "Have you not yet heard of the 'sleeping baby'... This child was conceived three years ago, and the angels put it to sleep in the womb of its mother to wait for the return of the father. Now you have returned. The angels have liberated the child. You will see, he will have your eyes. They will be as blue as yours!" Zrerek's mother's words made him feel better as he waited for the birth of the child. We learn: "It was a boy and he had blue eyes!"

In a different vein, the film *L'enfant endormi* focuses on the daily lives of a group of women in a village in the Atlas mountains. The village is almost entirely populated by women whose husbands, sons and fathers have migrated clandestinely for an indefinite period of time to find work in France. The men's absence fills the spaces in the village, and marks the time as the women wait for news and worry about the men's fate. Upon learning of her pregnancy, Zineb's mother-in-law insists that she put the baby to sleep so that it will wake up and be born when the husband returns. They consult a local healer (*fqih*) who after some persuasion agrees to prepare an amulet (*kitba*) that will put the baby to sleep. In order to wake the baby up, the amulet needs to be opened. After Zineb is ignored by her husband who shuns her letters, and she realizes that he is not returning, she puts the amulet in the river and watches it float away. This moment marks the end of the film. It remains unclear whether Zineb's destruction of the amulet that represents her baby's life means that she has decided to wake the baby up to be born in the absence of the husband, or whether she has destroyed the possibility of it ever waking up "in this world."

Bourdieu writes that women unconsciously interiorize masculine domination in all social strata and especially in the body, while affirming that structures of domination are

²⁰ Jelloun, Tahar Ben. 1997. *La Prière De L'absent*. Seuil. 123-6

²¹ Kessari, Yasmine. 2004 *L'enfant endormi*

²² Sbai, Noufissa. 1987. *L'enfant endormi*. Rabat: Edino.

the product of the incessant historical work of reproduction to which singular agents and institutions contribute.²³ In this light, the discourse of sleeping babies appears at the crossroads of the social and biological, but beyond biomedical and obstetric jurisprudential discourses of human reproduction.

The ambiguity between maternal agency and patriarchal power, activity and passivity, natural time and divine time reemerges in this literature and art, and in my conversations with Hakima and Amina. Here, there are many elements to tease apart. To begin with, the representations of the fluids of the body—blood (*d-dem*) and sperm (*al-mā'*)—are ways of thinking about the relationship of possible equality between the sexes in relation to cosmologies and the supernatural world. The stress between the respect for human life, women's rights over their bodies, and God's will to let live or die is always considered within singular historical contingencies. The sleeping baby, as presented by Hakima, bears the knowledge of Qur'anic embryogenesis and cosmologies tied to the ensoulment of the fetus—and the knowledge of the socio-economic conditions of globalization in which men illegally migrate to Europe never to return. An anthropologist working on sleeping babies in the Maghribi diaspora in the Netherlands found the phenomena of sleeping babies to be “common.” Migration and illegal migration to Europe has revitalized, or added a new dimensions to the discourse of the sleeping baby in an era of massive unemployment, absent men and ‘surplus’ populations.

In Zineb's case in the film, the sleeping baby can be thought of as an object that keeps a marital bond in tact in the absence of the husband/father. When she realizes that he will not return, she breaks the bond. In this sense, the waking up of the sleeping baby offers a model of reproduction or repetition as a possible dynamic of rupture—as a way of avoiding madness, a mode of detachment or the end to a cycle of intergenerational trauma. The *raged* that is put to sleep by its mother can also be woken up by the mother through specific therapies, whence it resumes its development. Women may call upon a *fqih* or a *qabla* to put the babies to sleep (*raqada al-janeen*)—in instances where the present is unbearable, but the future remains hopeful, with the belief that the situation will become one in which the baby can be woken up, and the woman will be liberated from waiting.

The return of the soul or spirit marks the “waking up” of the sleeping baby, which is considered to be in a suspended state of animation, between life and death, waiting for time to pass or for a decision to be made. It rests as/in a liminal place, as the “not-yet,” an object not yet to be grieved, a bond not yet to be broken, a waiting between life and death, a deferment and postponement of a decision. In the Sous, in berber, one speaks of the *amexsour*, which is a passive noun meaning abyss, deterioration or illness. The cycle of reproduction is frozen and paralyzed as women wait for the return of a husband or the will of God. Natural time, from this perspective, is not important. Pregnancy can last for “eternity,” and the sleeping baby can die with the mother since God ultimately decides these things.

Conclusion

This chapter has aimed to show how the biomedical concept of reproduction that has become dominant in legal, biomedical and political institutions that 'manage' birth

²³ Bourdieu. Masculine Domination.

and reproduction has not saturated women's politico-theological imagination, as it is represented through their reproductive language and unofficial practices of care.

The biomedical concept of reproduction has become normalized as an international *doxa* traveling through projects of population planning, demographics, and human development.²⁴ In Morocco, reforms to family planning and family law have instituted aspects of this model of reproduction. It is important to repeat the questions posed by the Islamic feminist movement against the family law reform 2000: why are the two mega-centers for global financial capital—the IMF and World Bank which funded the latest reform of the family law code (*Mudawwana*)--interested in women and the structure of the family in North Africa?²⁵ Why is the World Bank the second entity since the French Colonial Government to undertake a comprehensive study of the reproductive health of mothers in the region—a study which complains about rising birthrates and the “excessive” fertility rates of Moroccan women?²⁶

If liberal economic concepts are guiding models of reproductive health and family law reform, it is not implausible to think, along with Marxist feminist scholar activists like Maria Mies and Silvia Federici, that during periods of historical transitions into the world market, “the conquest of the female body is still a precondition for the accumulation of labor and wealth.”²⁷ How in the context of an international gendered division of labor, then, do colonial and neo-colonial medicine and law operate as institutions that regulate women's reproductive bodies to reproduce—or to keep from reproducing—an existing work force, or to manage a population? While this explanation may be a simplistic, heavy-handed and in some ways totalizing explanation, it does provide a way to understand the deep hostility of capitalist French colonial and Moroccan neo-colonial elites to the sleeping baby, which to them, represents a mode of reproduction not oriented towards ‘production’—an ethic of feminine laziness towards work, and work-discipline. The French colonial study of midwifery discussed in Chapter Three was quite explicit in denouncing Moroccan midwifery as a practice unable to ‘competently’ manage ‘its’ new Moroccan urban proletariat.²⁸

The dominant concept of reproduction envelops the management of conception, as well as of contraception. In national and international politics of poverty, contraception is emphasized. For example, In *Reproducing Inequities. Poverty and the Politics of Population in Haiti* (2006)—Catherine Maternowska, a professor in obstetrics, gynecology and reproductive sciences, as well as an in anthropology, observes the collapse of a disastrous family planning program supported by USAID in Cité Soleil, a vast slum in Port-au-Prince, Haiti.²⁹ In its blind quest to increase the number of pharmaceutical contraceptive users so as to decrease the population of the slum, the program failed to acknowledge the economic conditions and gendered international

²⁴ Connelly, Matthew. 2008. *Fatal Misconception: The Struggle to Control World Population*. 1st ed. Belknap Press.

²⁵ Freeman, Amy (2004). "Re-locating Moroccan Women's Identities in a Transnational World: The "Woman Question" in Question". *Gender, Place and Culture* 11

²⁶ Aoyama, Atsuko. *Reproductive health in the middle east and north africa*

²⁷ Silvia Federici. *Caliban and the Witch.*; Mies, Maria. 1986. *Patriarchy and Accumulation on a World Scale: Women in the International Division of Labour*. Atlantic Highlands N.J.: Zed Books.

²⁸ Maneville etc

²⁹ Maternowska, M. Catherine. 2006. *Reproducing Inequities: Poverty and the Politics of Population in Haiti*. Rutgers University Press.

division of labor in Cité Soleil. There, Maternowska argues, due to lack of employment, women's primary access to economic wealth was mediated through men, and particularly through childbearing which women believed would enable them to "keep a man." Childbearing was the main way for women to survive. Because of this, women would keep having children, more than ten or twelve, to "keep a man." The relatively elite staff at the family planning clinic was in the unhappy position of having to mediate between women's 'desire' for children, and the American funded clinic's desire to increase contraceptive use. Maternowska found that the health-care staff had no time or inclination to understand or listen to their clients' problems. The long-acting hormonal contraceptives they promoted would often cause frightening and dangerous side effects, including excessive bleeding, bloating and dizziness. This only added to the considerable hardship in a slum where sanitary pads were nonexistent and where even cloth rags came at a premium. When women expressed fears or complained, the doctors and nurses were often rude and dismissive. One woman who wanted to have her Norplant removed was called an animal by her doctor.

As Maternowska and Dorothy Roberts in a different historical and geographical context have shown, the emphasis on individual liberty and rights in law and family planning (in both national and international contexts) is a harmful displacement that obscures the important political and economic conditions in which reproductive 'choices' are made. The reproductive experiences of these women "highlight the poverty of current notions of reproductive freedom" or rights.³⁰ Scholars like Maternowska and Roberts, together with feminist historians of medicine, show that practical deployments in law and medicine of the dominant biomedical concept of reproduction may in fact be inimical to women's health, enabling exploitative economic and political conditions to persist, or be reproduced. In politics, conception and contraception are presented as abstract events, decisions made by an abstract subject of rights who is decontextualized from gender politics and the economy.

For women in postcolonial Morocco, the sleeping baby is a discourse that provides a language, epistemology, and temporality within which traumatic ruptures are given social and bodily significance. It is a discourse that highlights how corporeal vulnerability and women's role as reproducers of life engenders forms of embodiment. The sleeping baby is a discourse of contingency constituted by several factors including: material situations and religious beliefs, both of which are consciously and unconsciously interiorized; the place of women in gendered divisions of labor and reproductive biological labor; the embodied effects of poverty and race/caste/ethnicity on the reproductive body; the desire for children as an effect of social and economic conditions; the ambiguities and ambivalences of gender equality in creating human life; changes in the social and economic condition of pregnant women, for better or for worse, depending on their marital status; unwanted pregnancies and the problem of abortion and abandoned babies. Sleeping baby is a discourse that encompasses the intersection of psychological, biological, socio-cultural, legal and gendered aspects of reproduction. It encompasses sterility, illness, miscarriage, infertility; pregnancy and abortion. It does not treat any of these states as purely biological ones. Each instance of a sleeping baby articulates a

³⁰ Roberts, Dorothy E. 1997. *Killing the Black Body: Race, Reproduction, and the Meaning of Liberty*. 1st ed. New York: Pantheon Books.

contingency that would be difficult, if not impossible, to translate into the discourse of rights. The conclusion will address the remaining question of rights discourse and the sleeping baby.

CONCLUSION

I conclude with a set of questions: What would it mean to say that one has the right to a sleeping baby? Does it make sense to say this? Are rights the best way to understand the sleeping baby? If not, which other analytic concepts suit it best? How do we, or can we, understand the discourse of the sleeping baby with the legal and political concepts available today? If positive law and rights discourse have saturated feminist politics, is it from the perspective of law and rights that the question of the sleeping baby must be posed?

I return to law and rights discourse since this is where the project began. I initially encountered women with sleeping babies and sleeping baby court cases in 2009 in my efforts to understand the importance of women's rights and family law reform to feminist politics in Morocco after the major reform to the code of family law (*Mudawanna*) in 2004. While the sleeping baby led me to focus on reproduction and biopolitics in the context of uneven development, the sleeping baby raised the issue of the changing relationship between law and knowledge in modernity, and the material effects this has on the gendered subject.³¹ With the crucial and important changes to the code of family law and improvement in women's status, the persistence of women with sleeping babies and their inability to be heard, cared for, or protected by the law provokes not only the question of who the new legal reforms in Morocco are intended for, but whether law and rights are the best modes of affecting social change or addressing social problems.

Rule of law and gender equality administered through State institutions are eminent hallmarks of modernity. This has different meanings depending on whether modernity is assumed to mean progress and success, or decline and failure. From the perspective of the former, the 'woman's question' in Morocco—of gender equality and equal rights—becomes a means of emancipation; for the latter, a tool of abstraction that is compounded by the repetition of historical hegemonies. Just as for Foucault, modern biopolitics compounds old regimes of sovereignty and governmentality to more thoroughly pervade everyday life, the cultural theorist Ariella Azoulay argues that other than the vote, modernity did little to alter women's positions in relation to discourse, social institutions and civil rights.³² From the perspective of gender, modern biopolitics and positive law, the discourse of the sleeping baby unsettles both the "biopolitics of abstraction" and the dominant discourses of reproduction (biomedical, techno-scientific, etc).³³ This unsettling disrupts the idea of modernity as progress, offering a critique of the

³¹ Biopolitics describes the way state power uses the body as the first site of inscription to organize populations through institutions. It is "the acquisition of man insofar as man is a living being," leading to "State control of the biological." Michel Foucault first elaborated the idea of biopolitics in *The History of Sexuality* and later expanded upon it in his lectures at the Collège de France, *Society Must Be Defended* and *Security, Territory, Population*. See Foucault, Michel. 1990. *The History of Sexuality, Volume 1: An Introduction*. New Ed. Penguin Books Ltd. Part Five: "Right of Death and Power over Life"; 2003. "*Society Must Be Defended*": *Lectures at the Collège De France, 1975-1976*. Picador. "March 17 1976"; and 2009. *Security, Territory, Population: Lectures at the Collège De France 1977--1978*. First ed. Picador. 1-25.

³² Azoulay, Ariella. 2008. *The Civil Contract of Photography*. Zone Books.

³³ I borrow the term "biopolitics of abstraction" from the title of an essay by the art historian Jaleh Mansoor. Mansoor's essay takes up questions about abstraction and universality in ways similar to my own, but in relation to art practice. See Mansoor, Jaleh. 2010. "A Spectral Universality: Mona Hatoum's Biopolitics of Abstraction." *October* - (July 1): 49-74.

role of law and of the gendered forms of knowledge on which positive law under the State depends.

Before answering the questions above, it will be helpful to discuss the trajectory of women's rights in postcolonial Morocco. Polemical debates about women's rights crystallized around the reform of the family law (*Mudawwana*) and the agonistic rallies in 2000 between "Islamist" and "secular" feminist movements.³⁴ Two decades before the rallies, "secular" feminist movements and international organizations began pressing for legal reforms to the family law—which would be a reformed code of law based on particular interpretations of shari'a norms, mostly drawn from the Maliki school (*madhhab*). The result of the collaboration was the National Plan of Action for Integrating Women into Development (NPA, 1999)³⁵, which included ratifying CEDAW and broadly reforming the Code of Personal Status (*Mudawwana*, i.e., the shari'a based family law). The Plan, intensely opposed by Islamists and others, including many on the Left, polarized Moroccan society and led to two massive marches for and against the Plan that took place in Rabat and Casablanca, respectively, on March 12, 2000.³⁶

In Casablanca, large networks of women active within the two major Islamist organizations--Justice and Spirituality (*Jamā'at al-'adl wa-l-ihsāne*) and the Movement of Unification and Reform (*Harakat al-tawhīd wa-l-islāh*)—spectacularly mobilized up to one million people, who participated in the march against the Plan. Meanwhile, forty miles away, in Rabat, up to half a million people participated in the march for the Plan, organized by a network of sixty women's organizations, and women's sections of political parties and labor unions.

The juridification of the "woman question" through rights discourse and issues in family law in postcolonial Morocco was not something that suddenly appeared after independence from French rule and continued to the present. Rather the juridification continues a tradition of nationalist struggle in which women became symbols of modernity and cultural authenticity.³⁷ During the colonial period, the emancipation of women was discursively tied to the emancipation of Morocco from French colonial

³⁴ The categories "Islamist" and "secular" do not fully capture the two strands of feminist movements in Morocco, insofar as both draw on religious and liberal rights inspired discourse, and insofar as both have been influenced and affected by the other. This is also not to conflate the two movements, or the considerable differences in their politics and ethics. Rather it is to draw attention to the problems that inhere in such categorizations, especially when adding the adjective 'Islamist' to anything in today's geopolitical post 9/11 climate invokes paranoia, ideas of danger and fear of radical otherness to many people. For a good sociological account of these two movements, see: Salime, Zakia. 2011. *Between Feminism and Islam: Human Rights and Sharia Law in Morocco*. Social Movements, Protest, and Contention v. 36. Minneapolis: University of Minnesota Press.

³⁵ The National Plan of Action was the result of years of collaborations between 'secular' feminist organizations, and the 'socialist' government elected in 1998. "It drew heavily upon the United Nation's convention on human rights, notably the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and the Beijing Platform for Action, all the while ignoring the Islamic sharia as a source of inspiration." Salime, Zakia. *Between Feminism and Islam*: xii

³⁶ Freeman, Amy. 2004. "Re-locating Moroccan Women's Identities in a Transnational World: 'The Woman Question' in Question." *Gender, Place & Culture*. Vol 11, Iss. 1.

³⁷ The nationalist movement headed by the party Al-Istiqlal was a predominantly bourgeois movement emanating out of important urban centers like Fez, Casablanca and Tanger. Of course, the nationalist struggles were led both at the level of internal politics, and were oriented against the French.

rule.³⁸ Emancipation itself became an allegory for the material and symbolic dreams of two things: the social and economic development that decolonization would ostensibly achieve, and the political power that decolonization would confer to those who successfully led the struggles.

Early in the nationalist struggle during the colonial period, legal reform, independence and the emancipation of ‘the Moroccan woman’ became an important political constellation on the nationalist agenda, an agenda which did not go uncontested. While the famous Fassi-salafi legal scholar (*fāqih*) Belarbi Aloui supported reform-based legal and political changes for the emancipation of women, other members of the community of scholars (*fuqaha*) strongly contested it. Among those who supported it were the Sisters of Purity (*Akhawāt al-ṣafā*). *Akhawāt al-ṣafā* was the first feminist association in colonial Morocco,³⁹ founded in the mid-1940s by a group of women at the heart of the nationalist party, *Al-Istiqlal* (Independence Party—“the army of Salafism”). During their second congress held in Fes in 1948, the Sisters drew on the authority of Islamic history and the example of the wives of the Prophet to articulate a plan of reform to improve the status of women. This status, they claimed, had not been deformed by religion, but rather by cultural elements in Moroccan society which were ‘backwards,’ ‘ignorant,’ ‘primitive,’ and ‘superstitious.’ In a written critique, the Sisters attacked the Shari’a courts as the prime example of the “superstitious” and declining culture in Moroccan society, and accused the courts of badly treating the women who came to them for consultation and assistance.⁴⁰

While the nationalist feminist discourse treated Moroccan women as a unified social group, irrespective of class, language or ethnicity, ‘the Moroccan woman’ was represented in this discourse by the elite figure of Lalla Aisha, King Mohamed V’s daughter. Lalla Aisha’s elite education became the nationalist symbol of Morocco’s future. This kind of elite feminism, as a form of (Islamic) ethics and political power, was contested by other groups and community of scholars, who articulated viewpoints against the elite education of women, also in defense of Islamic values.⁴¹ The contestations were not articulated directly against the power of elites, but subsumed into the question of the status of ‘the Moroccan woman.’

During the colonial period, then, the question of the status of the woman began to express a politics of Moroccan culture that highlighted the importance of *who* gets to interpret the meaning of Islam and family values in modern Moroccan society. In this light, certain religious resistance to legal and educational reforms for women can be read as resistance to the imposition of an elite, centralized, and top-to-bottom based power in the form of legal and educational reforms. Assuming that feminist politics in postcolonial Morocco continues a trajectory that began during the colonial period and nationalist struggles, this reading would be supported by the discourse of the early twenty-first century Islamic feminist movement in response to the National Plan of Action for

³⁸ Daoud, Zakyia. 1996. *Féminisme Et Politique Au Maghreb: Sept Décennies De Lutte*. Casablanca, Maroc: Eddif. In particular pages 240-273.

³⁹ First feminist association insofar as feminism is defined in terms of political struggles articulated in liberal rights discourse

⁴⁰ Daoud, Zakyia. *Féminisme Et Politique Au Maghreb*. 250; also see in Arabic, Al-Dafali, Mohammed Marouf. 1998. “*Akhawāt al-ṣafā: tanzīm nisā’i rā’id fi tārikh al-ḥaraka al-waṭaniyya*.” “*Majalla Amal*” Casablanca, Volume 13/14, 178-89.

⁴¹ Daoud, Zakyia. *Féminisme Et Politique Au Maghreb*. 247

Integrating Women into Development (NPA, 1999)⁴², which, as mentioned above included ratifying CEDAW and a major reform to the Code of Personal Status (*Mudawwana*, i.e., the sharī'a based family law).

The nationalist discourse aspired to a universalism in which “woman” as a category would subsume all differences. Yet class, language and ethnic differences were already important social markers for women during the colonial period. Though not necessarily integrated into the formal economy, some women had longed worked in Morocco during the pre-colonial period. They had worked as artisans, midwives, seamstresses, expert witnesses in courts (*arifas*), masseuses in the public baths, agents of the ‘feminine police’ attached to the judge of a court in issues of personal status, cooks, embroiderers, ordainers of weddings (*neggafat*), agricultural laborers, embalmers for funerals, domestic servants, child caregivers, waged breastfeeders, carpet weavers, counselors and healers (*shuwafat*).⁴³ During colonization, the need for new labor emerged with introduction of industry and manufacture. In the 1950s, Morocco experienced a rural exodus, one effect of which was that poor, single, divorced and widowed women from the countryside began to work in large numbers in major urban areas in textile and food factories, canneries, as ‘*sardinières* (i.e., standing in the water for ten hours a day catching sardines,)’ and as domestics in the homes of wealthy urban foreigners and Moroccans. While the politics of legal and educational reform formed the basis of the nationalist feminist discourse, “the politics of bread” or “politics of the street” formed the basis of another feminism concentrated on Islam and the potential social consequences of familial instability, particularly for poor women.⁴⁴ This latter feminism, latent during the nationalist struggles, would be consciously expressed several decades later in the discourse of Islamic feminism.

Thus, for example, women who marched in Casablanca articulated nuanced and sophisticated perspectives about their opposition to the Plan and legal reform. Nadia Yassine, the President of the women’s section of Justice and Spirituality (*al-‘Adl wa-l-ihṣān*), daughter of Sheikh Abdelsalam Yassine, and a self-styled “feminist Islamist” armed with “gender-sensitive” readings of the Qur’an, said that she marched in Casablanca with her “heart turned to women marching in Rabat.” For her, marching meant mobilizing against the violent way the Plan was dictated as “an up-down reform” that excluded enormous segments of Moroccan society and many women’s voices.⁴⁵

Other ‘Islamist’ women expressed similar sympathies for the women in Rabat, saying that they were not marching *against* them, but *for* another form of politics in Morocco. For another participant in the Casablanca march, Zineb, the imposition of the Plan on Moroccan society by international organizations and secular women’s movements mapped onto a larger problem of global forms of hegemony, development

⁴² The National Plan of Action was the result of years of collaborations between ‘secular’ feminist organizations, and the ‘socialist’ government elected in 1998. “It drew heavily upon the United Nation’s convention on human rights, notably the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and the Beijing Platform for Action, all the while ignoring the Islamic sharia as a source of inspiration.” Salime, Zakia. *Between Feminism and Islam*: xii

⁴³ See Rodary, Meriem. 2007. “Le travail des femmes dans le Maroc précolonial, entre oppression et résistance.” Ed. Catherine Coquery-Vidrovitch. *Cahiers d’études africaines* 47 (187-188) (December 15): 753–780; also Messick, Brinkley. *American Anthropologist*

⁴⁴ “Politics of Bread” is used by Zakya Daoud to describe

⁴⁵ Quoted in Salime, Zakia. 18-19

projects, unequal power relations and “North-South domination.” The Plan, according to her was “a cultural attack, a lie.” She added: “But when I say that we don't accept the Plan, it doesn't mean there shouldn't be changes. There have to be changes, but changes that come from inside [Morocco], not something that is imposed in the context of a North-South domination.”⁴⁶ Nouhza, one of Zaineb’s colleagues expressed her discontent in this way:

There were technical points that all women can and even must agree on: literacy, participation of women in positions of power, these are points we agree on. But there were points that caused conflict and which were fundamental. Firstly, the link that exists between this Plan and the World Bank... This same Bank that brought structural adjustment, that made access to education no longer free... and now this same Bank has come and imposed a development plan on us? It's suspicious... a bank doesn't do social work... We saw the same Plan emerge in Yemen, India, Tunisia, Egypt, so it's not a national plan, unless we have a transnational ministry! Our actions were not against the Plan itself, but we refuse this cultural aggression. Moroccan women know very well what they want... We demand the right to cultural difference, it's our right. It's true there's globalization, but all the same, globalization is meant for us to accept one another as different people, but we're not going to meld together and give one unique model. Which model would it be? Is it an American model, or a Japanese model, or French or European? It's not possible! There's the history of people, and you can't just turn the page like that.⁴⁷

It was not only feminist Islamists, or Islamist feminists, who opposed the Plan in this way. Members of the left-leaning political parties did so too. In opposition to the Plan (NPA), Mohamed Lahbib al-Forqani, a member of the Socialist Union of Popular Forces (USFP, *al-ittihād al-ishtirākī li-l-qūwwāt*) said:

The National Plan to Integrate Women into Development is neither national, nor Islamic. It's the expression of an imperial and Zionist aggression against our society's last lines of defense. The proponents of this Plan only address Islam through a Western prism.⁴⁸

These points of views, especially the more nuanced ones, positively influenced some of the “secular” feminist association supporters of the Plan. After the Islamist march in 2000, a women’s rights activist of the Ligue démocratique des droits des femmes, Bouchra Abdou, said that secular feminist groups needed to transform their “elitist and legalistic” approach to social change as legal reform into a “politics of the street.”⁴⁹ It is not hard to see how the critique of the family law reform and secular women’s rights discourse by the “Islamist” feminist movement in a way continues the

⁴⁶ Quoted in Freeman, Amy. *Re-locating Moroccan Women’s Identities*. 30

⁴⁷ Quoted in Freeman, Amy. *Re-locating Moroccan Women’s Identities*. 30

⁴⁸ *La Vie Economique*, 17 March 2000, p. 7, cited in Freeman, Amy. “Re-locating Moroccan Women’s Identities

⁴⁹ Salime, Zakia. *Between Feminism and Islam*. xxiii

counter-nationalist “politics of bread” as opposed to a nationalist politics of law, which involves the effort to have, as Nadia Yassine puts it, a “balanced interest by women in their bodies, sexual life, and beauty besides the soul.”⁵⁰

It was under nationalist, and nationalist feminist discourse, that legal reform in particular became a method of solving political and economic problems. The French, who had already colonized all other areas of the law in Morocco, replacing the Shariatic norms, ethics and procedures with French codes, had attempted a proto-codification of the family law in the early 1950s. So while the Sisters of Purity focused on attacking the courts and associated the violence and mistreatment of women with the rulings of the judges and family law, legal reform as an instrument for social change was borrowing from colonial modes of governance. Thus, talong with other scholarship from the last two decades about gender and Islamic law in Morocco, North Africa, Islamic Spain and other parts of the Arab world, I have written against a trend in contemporary and classical orientalist academic scholarship and popular discourse that focus predominantly on the evils of Islamic law—on Islamic law as the radical other of Law (read: that which is good, rational, progressive, reasonable, etc)—by showing that gender justice may have, in the realm of reproduction, been better served through the norms of the shari’a.

Only in the context of the previous discussion, can I offer a brief analysis of women’s rights discourse in postcolonial Morocco. Here, legal reforms and law-based efforts for social change have been articulated through the juridification of ‘the woman question’ and women’s rights discourse, drawing on liberal Enlightenment thought. As the analysis in the preceding chapters on the sleeping baby discourse has shown, it is no longer possible (insofar as it literally no longer makes sense) in official legal discourse to speak of a sleeping baby, let alone a right to bear a sleeping baby. Without the sleeping baby discourse, what other discourses remain for women and gendered bodies in law?

Under the law of the State, rights discourse has become the only way of knowing particular experiences, or of articulating contingency and identity. Women’s rights discourse—and rights discourse in general—is supposed to be a discourse that deals with individual historical cases (that is, with identity and contingency). Yet, the dilemma of rights is well-known: rights must presume an ahistorical abstract subject that exists outside of time and place, and a unique, singular individual. The tensions that inhere between these two poles of rights have not been overcome. The hegemonic concept of rights prescribes civil and political equality between individuals conceived as constitutive, autonomous agents endowed with reflective faculties. The ahistorical abstract universal subject is also one with a universal abstract body. Feminist scholarship has addressed how the body of rights is a masculine body (without yet fully addressing the particularities of corporeality of a feminine body, a topic taken up more in feminist science studies and anthropology).⁵¹ Nonetheless critiques of rights discourse show that it has been inadequate for dealing with difference, singularity, experience, bodies, identities, embodiments and contingencies. The recent concept that appears in critical feminist scholarship about rights is “paradox.”

⁵⁰ Salime, Zakia. *Between Feminism and Human Rights*. 18

⁵¹ Grosz, Elizabeth. 1994. *Volatile Bodies: Toward a Corporeal Feminism*. Indiana University Press.
Scott, Joan W. 1997. *Only Paradoxes to Offer: French Feminists and the Rights of Man*. Harvard University Press;
Brown, Wendy. 1995. *States of Injury*. Princeton University Press. 96-134

In “Suffering the Paradoxes of Rights,” Wendy Brown eloquently describes the two central paradoxes of rights: the first relates to the problems of encoding identities, and the second to the problem of abstraction.⁵² The first paradox corresponds to a Foucaultian formulation of the “powers of identity and rights based on identity.” That is, how are women’s rights “formulated in such a way as to enable the escape of the subordinated from the site of that violation,” and how do they “build a fence around us at that site, regulating rather than challenging the conditions within.”⁵³ Because rights exist in language and as part of political discourse, every repetition of a historical category of identity holds within it the possibility of negatively reinforcing and reinscribing the very identity and subjection that initially caused the harm. As Brown puts it, “the more highly specified rights are as rights for women, the more likely they are to build that fence insofar as they are more likely to encode a definition of women premised on our subordination in the transhistorical discourse of liberal jurisprudence.”⁵⁴ Even as they offer the possibility of redress, rights can never be mobilized ahistorically, outside of the discourse and historical context that give the category of “woman” meaning.

The second paradox Brown elaborates corresponds to Marxist and neo-Marxist critiques of liberalism. This critique centers around the problem of abstraction: the more abstract, and race-, disability-, gender- and sexuality-blind a right is, “the more likely it is to enhance the privilege of men [and others in positions of power] and eclipse the needs of women as subordinates.”⁵⁵

The first paradox shows that the more content rights have, the more likely it is that they will essentialize and reinscribe the very identities that initially caused the harm. The second paradox shows that the less content they have, the more likely it is that they will reproduce the privileges and inequities of broken social systems, and “augment the power of the already powerful.” Brown points to other paradoxes and problems of rights, including problems of intersectional identities, essentialism, and the reinscription of heterosexual normativity. In sum, Brown argues, while rights have no doubt been effectively and necessarily deployed by subordinated peoples, they cannot be the horizon of gender (or race, disability and so forth) politics in law.

The paradoxes in rights discourse are thus tied to problems inherent in any feminist or identity politics project. In *Only Paradoxes to Offer*, Joan Scott also argues that paradox itself is constitutive of rights discourse in the history of Western feminism, also largely due to its discursive nature.⁵⁶ Since it is politically necessary for feminism to speak and act for ‘women,’ it (re)produces in new historical articulations the “‘sexual difference’ it sought to eliminate.”⁵⁷ Further problems emerge in the struggles that arise when competing normativities ascribe different descriptive contents to women as a

⁵² Brown, Wendy. “Suffering the Paradoxes of Rights.” In Brown, Wendy, and Janet Halley, eds. 2002. *Left Legalism/Left Critique*. Duke University Press Books. 420-34 This essay revises some of Brown’s earlier more oppositional and critical positions on rights. See Brown, Wendy. 1995. *States of Injury*. Princeton University Press. 96-134

⁵³ Brown, Wendy. “Suffering the Paradoxes of Rights.” 422

⁵⁴ Brown, Wendy. “Suffering the Paradoxes of Rights.” 422

⁵⁵ Brown, Wendy. “Suffering the Paradoxes of Rights.” 422

⁵⁶ Scott, Joan W. 1997. *Only Paradoxes to Offer: French Feminists and the Rights of Man*. Harvard University Press.

⁵⁷ Scott, Joan W. 1997. *Only Paradoxes to Offer: French Feminists and the Rights of Man*. Harvard University Press. 5

category to claim that category, both within and without feminism. Because feminist agency (or any other agency) is inherently paradoxical—its subject is presumed to be both abstractly universal and individually singular—rights articulated on behalf of that agency will also be paradoxical.

And yet, paradoxes and problems notwithstanding, Brown and Scott reach the conclusion that rights, like most of liberalism’s “sunny formulations of freedom and equality” that mask unequal power relations, are something one ultimately “cannot not want” in contemporary society: “there was (is still) no alternative.”⁵⁸ Without articulating in advance what a feminist politics might be that moves beyond the tensions that inhere in the paradoxes of rights, both agree such a politics is possible and within reach.

There is no space here to fully deal with Scott and Brown’s arguments. What is important is that their arguments represent one possible critical theoretical approach to rights. This approach has not been completely adopted by feminist jurisprudence, which has generally been more reluctant to consider abandoning or critiquing rights discourse as such in law and politics. Gender justice remains largely approached as a problem for law that can be addressed through legislation, and grasped and attained by women by deploying rights’ claims. In diverse issues of gender equality--from race and essentialism, workplace discrimination, reproduction and the body, educational opportunities, sexual violence, marriage, family, homosexuality, uneven development and globalization—rights discourse retain incredible practical and scholarly purchase.

Within liberal feminist jurisprudence, the most compelling way of thinking within rights discourse is found in arguments made by black feminist legal and political scholarship. Black feminists like Angela Harris, Patricia Williams and Kimberle Crenshaw, while remaining critical of rights, defend their absolute necessity in historical struggles and continuing relevance for marginalized populations, accusing scholars like Brown and Scott of writing from the privilege of a race-blind perspective.⁵⁹ For the former who are more policy-oriented, the latter’s theoretical approach is seen as dangerous, elitist and white. Yet despite their disagreements as to how to go about affecting change (through academic theory or policy-oriented legal practice), they agree that committed feminist scholarship as praxis involves the development of another language in which rights can be articulated.

For this discussion, both approaches are helpful for thinking through the discourse of the sleeping baby, and whether it can be articulated as a right in modern legal discourse. According to Scott and Brown’s paradoxes of rights, the mother of the sleeping baby would be trapped, frozen by an encoded identity that would potentially reproduce further gender violence and discrimination. While they offer the possibility for her escape within rights discourse, this is a dangerous endeavor that is inherently inimical to her future self. The question remains about whether and when the black feminist approach would also contribute to harmful encodings of identity.

In “Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics,” Kimberle Crenshaw’s graspable, and by-now very popular, “intersectional” approach offers

⁵⁸ Brown borrows the idea of rights as something “one cannot not want” from the Marxist-Derridean cultural critic Gayatri Spivak. 420; About there being no alternative, see Scott

⁵⁹ Angela Harris insists that feminist legal scholarship operate with the idea of “multiple consciousness”

perhaps the closest thing to a rights discourse that can deal with bodies, contingencies and the singularity of experiences.⁶⁰ Crenshaw argues that Black women are

[...]excluded from feminist theory and antiracist policy discourse because both are predicated on a discrete set of experiences that often does not accurately reflect the interaction of race and gender. These problems of exclusion cannot be solved simply by including Black women within an already established analytical structure....[T]he intersectional experience *is greater than the sum of racism and sexism*.⁶¹

Through readings of how courts frame and interpret the stories of black women in several discrimination cases, Crenshaw shows how singular categories of identity (i.e., “black” or “woman”) in rights and law pose very real and analytical problems for intersectional identities insofar as one can only choose one category of identity upon which to rest a discrimination claim. One must choose one and cannot say both: “[C]ategorical analyses completely obscure” the “compoundedness” of the experience of intersectionality, an experience of being “multiply burdened,” humiliated, subjected and excluded in both analytic and practical ways. Such experiences can receive protection only to the extent that their experiences are “recognizably similar” to a single category of identity, a putatively purer and single category of struggle. This categorical structure of thinking about identity “imports a descriptive and normative view of society that reinforces the status quo.”

In relation to the sleeping baby, the idea of intersectionality is appealing less for its formulation of multiplicity, in which identities map on to a grid of possible injuries, victimizations and social inequities that a disadvantaged subject can check off to find herself, and more for how it thinks rights in relation to contingency, language and the sheer conceptual inadequacy of rights discourse for the modern subject. Williams repeats that there is something beyond, something “much broader” and “greater than the sum” of the compounded parts of the intersectional identity, something that cannot be articulated in the categories of identity that are legible to modern state law. Intersectionality points to a discourse about gender justice that brings into focus an identity that could never be fully defined in advance of its contingent articulation. Crenshaw, a policy-oriented legal scholar and professor, concludes the essay by arguing that the way out is to develop a new discourse, language and regime of representation for rights.⁶² But who will hear this new discourse or recognize the representation? Will it fall on the deaf ears of modern positive law?

Rights discourses have long traveled internationally as part of the technology transfers of uneven development in what some disciplines call late modern capitalism. In new locations, rights are instantiated, internalized, rejected and reiterated. They become something new, and perhaps in a reverse anthropological perspective, reveal new

⁶⁰ In 1989 Crenshaw published her seminal article in which she advanced the idea of intersectionality. A little over two decades later, in October 2011, Columbia Law School opened the Center for Intersectionality and Social Policy Studies, directed by Kimberle Crenshaw. See Crenshaw, Kimberle. 1989. “Demarginalizing the Intersection of Race and Sex. A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics.” *U. Chi. Legal F.* 139.

⁶¹ Crenshaw, Kimberle. “Demarginalizing the Intersection of Race and Sex.” 140

⁶² 167

potentialities and dangers. In this sense, it can be said that women's rights in Morocco have become Moroccan, part of the political scene, deployed in public and private institutions, showing up in unexpected places and in unexpected ways, in conversations in cafés, homes, schools, as well as in feminist organizations and courts of law.⁶³ Over the last several decades, a veritable cottage industry of policy-oriented writing, local and international, has burgeoned around the question of “woman and the law” (*la femme et la loi*), focusing on women's rights in the family and society.⁶⁴ In this literature, law as state law and justice as rights ultimately consolidate and affirm the new postcolonial regime of representation—the new mode of biopolitical-abstract beings before the law.

Prior to the formation of the state in Morocco, when Islamic law was still as much a scholar's theologico-intellectual endeavor as it was a practical one, could we have spoken of something like, yet not at all like, a *right to bear a sleeping baby*? Is rights discourse in any way commensurable to the sleeping baby discourse? If they are not commensurable, what does a comparison do?

Both at law and beyond, the sleeping baby was a discourse, language and mode of representation (both external and internal) that did not fall under the liberal model of the constitutive subject—a model that proceeds according to a subsumptive logic in which particulars fall under the given generalities that represent them. The forced disappearance of the sleeping baby doctrine from the law, then, marks not only a shift in the discursive mode of regulating reproduction, but the disappearance of the law's affirmation/recognition of a different mode of identity, together with its contingent, particular (gendered, racialized, aged) body.

Under the Universal Rights of Man, the particular contingent body was never incorporated into the discourse of citizenship (or of civil and human rights.) As Lacan reminds us in “Kant with Sade,” sexuality and embodiment are a blind spot in Enlightenment thinking.⁶⁵ Based on a set of Enlightenment Universalist claims ostensibly

⁶³ The deployments of rights in the context of great social inequities and injustices, crushing poverty and corruption has a very performative quality for those who know that rights require recognition. In this way the performance is an appeal to other ideas of law and justice beyond the oppression and injustice of social institutions.

⁶⁴ In addition to the voluminous literature and pamphlets published by feminist associations such as the, the Union of Feminine Action (UAF), the Democratic Association for Moroccan Women (ADFM) and the Moroccan Association for Women's Rights (AMDF) or . In French, see, for example, Mounir, Omar. 2005. *La Moudawana, le nouveau droit de la famille au Maroc: présentation et analyse: texte intégral en français*. Marsam Editions; Combe, Julie. 2001. *La Condition De La Femme Marocaine*. L'Harmattan; M'Chichi, Houria Alami. 2002 *Genre Et Politique Au Maroc: Les Enjeux De L'égalité Hommes-femmes Entre Islamisme Et Modernisme*. Editions L'Harmattan; Mouaqit, Mohammed. 2009. *L'idéal Égalitaire Féminin à L'oeuvre Au Maroc: Féminisme, Islam(isme), Sécularisme*. L'Harmattan; Moulay R'chid, Abderrazak. 1991. *La femme et la loi au Maroc*. Casablanca: Le Fennec, and 1985. *La Condition De La Femme Au Maroc*. Collection De La Faculté Des Sciences Juridiques, Économiques Et Sociales. Série De Langue Française 33. Rabat: Editions de la Faculté des sciences juridiques économiques et sociales de Rabat; Banānī, Farīdah. 1992. In Arabic and French, see: *Prologues: revue maghrébine du livre = Muqaddimat: Nasrat al Kitab hawla al-magrib al-arabi*. Hors série 2 and 4. There is also a vast literature in Arabic. See for example, *Taqsim Al-'amal Bayna Al-zawjayn Fi Daw' Al-qānūn al-Maghribi Wa-al-fiqh al-Islāmi: Al-jins Mi'yāran. al-Ṭab'ah 1. Silsilat Manshūrāt Kulliyat al-'Ulūm al-Qānūniyah wa-al-Iqtisādīyah wa-al-Ijtimā'iyah raqm 9. Marrākush: Kulliyah al-'Ulūm al-Qānūniyah wa-al-Iqtisādīyah wa-al-Ijtimā'iyah*.

⁶⁵ Lacan, Jacques, and James B. Swenson. 1989. “Kant with Sade.” *October 51* (December 1): 55–75.

blind to the particularities of corporeality, modern law and rights discourse fails to account for the particularities of women's lives. In modern struggles over reproductive rights, "the body itself underwent a process of secularization." This secular body, writes Ariella Azoulay, "came into the world without any of the normative defenses of citizenship to regulate it." In this process of secularization—i.e., the abstraction, subsumption into secular work-time and the disappearance of the soul or human from the law—the body is abandoned to a "renaturalized precariousness."⁶⁶ While women continue to be seen in society as bodies--commodified, fetishized, and regulated within disciplinary, and often violent, parameters—bodies themselves and the processes of biological labor slip the grasp of discourse, and, with it, rights, law and policy.

Rights discourse cannot deal with the particularities of women's lives and bodies, insofar as it relies on knowledge of an abstract, naturalized and secular body, and encoded categories of identity. The disappearance of the sleeping baby doctrine marks the disappearance of the gendered and contingent body from law, a doctrine that together with social knowledge and practices, and legal methodologies, accounted for the contingencies of corporeality, for pain, suffering and the social cost of having a reproductive body in a patriarchal society. Particular bodies are written out of modern positive law, and replaced with rights and categories of identity that cannot articulate the politics of reproduction, of maternity, of the impoverished, dispossessed, racialized and single woman.

Thus it no longer makes sense to speak of *the right* to bear a sleeping baby. Rights discourse, even in its intersectional moment, could never address, understand or hear the sleeping baby. Islamic jurisprudence and practice in relation to women's bodies had been penetrated by women's speech and other forms of collective knowledge of care for gendered selves to the extent that women did have a social right to claim sleeping babies. While historically produced in a situation of patriarchy, the sleeping baby reflects an attitude to the future and the not-yet born in which there is time to consider whether that future is worth reproducing, and to care for the self while doing so. Claiming a sleeping baby in courthouses today would thus involve a massive architecture of interrelated intersectional rights related to the contingencies of bodies materialized by power effects within culture, economy and society—bodies that for the law do not exist except as "bare life";⁶⁷ a social justice vision of reproductive rights, maternity and paternity not centered on individual choice; disability rights in which disability takes on new meanings; worker's rights in which the work of biological labor is no longer ethically or politically ambiguous; child care not centered around the nuclear family; and the practical ability to accept the various combinations of these components through the experience of an institutionalized body and identity that is "greater than the sum of its parts," which could never be said in advance.

Even as feminist politics came into existence through law and rights discourse,

⁶⁶ On the precariousness of gendered bodies, see Silvia Federici's feminist critique of the Italian Autonomist's view of precarious labor in: 2008. "Precarious Labor: A Feminist Viewpoint." *In the Middle of a Whirlwind*. <http://inthemiddleofthewhirlwind.wordpress.com/precarious-labor-a-feminist-viewpoint/>. This idea in part develops out her earlier engagements with the role of the female body in colonialist primitive accumulation. See Federici. *The Caliban and the Witch*.

⁶⁷ Agamben, Giorgio, and Daniel Heller-Roazen. 1998. *Homo sacer. Sovereign power and bare life*. Stanford, Calif.: Stanford University Press.

the latter have saturated feminist politics in some unfortunate ways. The body of rights is but as an abstract universal thing in the empty secular time of modernity: disciplined work-time. Perhaps the sleeping baby can help us think *past* and *before* (discursively and historically) women's rights discourse, by making legible how socio-cultural elements render the experience of some female bodies more precarious than others, while simultaneously exposing the to-date historical precarity of them all.⁶⁸

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