Abstract:

This article examines the legal and economic incentives created by the Islamic Marriage and Divorce System (“IMDS”) to develop an empirical model regarding the relative prevalence and severity of clitoridectomy practices in different Muslim societies and considers how those practices may be eliminated from an economic perspective.

Part I of the article establishes the economic link between the IMDS and clitoridectomy and compares the IMDS and the American Marriage & Divorce System (“AMDS”) in terms of their relative efficiency. Part II operationalizes and refines the basic theory outlined in Part I by creating a falsifiable model regarding the relative prevalence and severity of clitoridectomy practices in a given Muslim society. Part II then tests this model against empirical data regarding the clitoridectomy practices of approximately 20 tribes in Islamic Northeastern Africa and the Arabian Peninsula. Based on the model in Part II, Part III then proposes and examines several potential methods for eradicating clitoridectomy through the use of Islamic law.

PART I: Terms and Basic Theory

The Terms and Classification System Used by this Article

As many scholars have pointed out, even though they are frequently used interchangeably, the terms “clitoridectomy,” “female circumcision,” “Female Genital Mutilation” (FGM), or “Female Genital Cutting” (FGC) can refer to a wide variety of practices.1 Sometimes the practice involves removal only of the clitoral hood, or poking the clitoris with a needle. Other times, the practice involves removal of the labia minora, labia majora, and the stitching together of the roughened (partially amputated) remnants of the labia majora.

1 Esther K. Hicks, INFIBULATION at 15 (1996)
Unfortunately, much of the literature on the topic does very little to separate the different forms of these practices in terms of their relative severity and instead has attempted to create categories based on regional custom and medical typologies. Unfortunately, as noted by a number of scholars, this has led to widespread confusion over terms.  

However, in the context of this article, “clitoridectomy” will refer to all practices that substantially reduce the degree of, or ease by which, female pleasure may be derived from sexual activity by removing or irreparably damaging the clitoris along with other sexual organs. Practices that may be reasonably intended to increase clitoral stimulation during sex, such as piercing with jewelry, are not included. Similarly, practices that do not involve permanent harm to the clitoris, such as poking with a needle, are also excluded from this definition.

“Excision” refers to removal of the clitoris along with the labia minora. Specifically, in the context of this article, excision will be used to differentiate those societies that practice clitoridectomy through removal of the clitoris, but do not practice infibulation.

“Infibulation” refers to the stitching together or narrowing of the vaginal opening in order to make intercourse painful for the woman. While infibulation does not necessarily include excision, in practice, infibulation almost always accompanies removal of the clitoris as well. Consequently, when a tribe or society is referred to as practicing infibulation, the practice also includes excision. Thus, in the context of this article, the practice of infibulation represents the most severe form of clitoridectomy.

Therefore, in terms of their relative severity, the clitoridectomy practices of the societies presented within this article should be understood as falling under a 3-tiered classification system. The highest tier being infibulation, the next highest tier being excision, and the third tier representing no clitoridectomy practices whatsoever.

Law & Economics and Rational Choice Theory

Previous attempts to analyze the causes of clitoridectomy have nearly exclusively focused on the nature of the beliefs and cultural tastes of those individuals who engage in the practice. Opponents of clitoridectomy tend to view these beliefs as inherently irrational or emblematic of a patriarchal society.

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2 This confusion in terminology and difficulty in creating typologies is partially attributable to the high-degree of intra-regional variance and private nature of these procedures, which makes garnering reliable data to create specific medical typologies almost impossible. Additionally, the politically charged atmosphere dominating much of the literature on the subject has also significantly contributed to the difficulty in developing consistent and specific terms and typologies for describing the practice. See Id.
and power structure. Defenders of the practice tend to argue that clitoridectomy is either required by their religious teachings, or is a matter of personal tastes and cultural aesthetics akin to breast enlargement surgeries in the West, and consider attempts to eliminate the practice to constitute a type of cultural imperialism.  

While analyzing the nature of the beliefs surrounding clitoridectomy has represented a central focus for much of the previous literature, in the realm of law and economics, the personal beliefs of individuals regarding the causes of their behavior are mostly considered irrelevant. The primary concern of economics is to predict how individuals will respond when presented with a given choice or how their behavior will change when their incentives are altered - not how they choose to personally explain or rationalize their behavior ex post.

To the extent that economics does consider the internal workings of individuals, the sole assumption that traditional economics makes into the causes of human behavior is that individuals are rational maximizers in that they will not make choices that maximize their costs and minimize their benefits. Consequently, traditional economic theory suggests that an otherwise costly custom will not be adopted on a widespread basis in a society unless the custom provides some set of individuals in that society a benefit. Put differently, one of the laws of economics is that demand shapes supply and, unless an individual or group is being supplied some type of benefit from an otherwise costly practice, there can be no demand for that practice.

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3 See FEMALE CIRCUMCISION (Rogaia Mustafa Abusharaf ed., 2006)
4 A frequent misconception about economic theory is that because individuals are “rational” maximizers they must be conscious or aware of the motivations behind their behavior. This is inaccurate. Rational choice theory, which provides the theoretical basis for traditional economics, simply states that individuals will make choices that maximize their benefits and minimize their costs given the environmental constraints facing them. “Rationality” is simply in reference to the idea that individuals will not make choices that maximize their costs and minimize their benefits. The process by which these choices are made does not have to be conscious. The behavior of a cockroach following the scent of food in a kitchen, while avoiding lighted areas where it can be seen and killed, can be said to be acting rationally. However, the cockroach is unlikely to have any “beliefs” regarding its behavior or the nature of the incentives controlling it. Similarly, individuals do not have to be aware of the incentives controlling their behavior in order to behave rationally. Refraining from incest is a good example.

Individuals who choose not to engage in sexual relations with immediate family members are less likely to have mentally or physically impaired offspring. Consequently, the choice found across a wide variety of societies throughout history to avoid incest due to religious reasons is, in effect, rational – regardless of the multiplicity of beliefs regarding why that prohibition exists. In other words, it does not matter if an individual believes that incest is banned because the gods cursed Oedipus, or because Amnon was killed by Absalom, or because God finds the act abhorrent – from the perspective of rational choice theory, the specific nature or veracity of the belief is unimportant. What is important is that the belief that one should not engage in incest with immediate family members is passed on because the belief produces a material benefit to its adherents in the form of reducing the some of the risks and costs of reproduction.
The majority of the benefits from a practice do not have to run to the same group of individuals who incur the majority of that practice’s cost (for example, in the case of slavery, one group benefits at another’s cost) but in order for a custom to exist on any significant level there must first be some individuals within that society who benefit from it. In short, where there is smoke, there is fire - and where there is high cost being actively incurred, there is likely to be a corresponding benefit.

Given that one of the laws of economics is that demand shapes supply, an analysis of 1) the costs of clitoridectomy, and 2) the relative prevalence of the custom, should provide a good starting point for investigating the root of the demand for the practice. If clitoridectomy is both very costly and prevalent in a given society, economic theory suggests that the market demand for that custom is also likely to be extremely high.

The demand for clitoridectomy can be understood as a function of the size of the group and the strength of the “preferences” of the individuals within the group based on the benefits those individuals receive from the practice. The greater the benefits and group-size - the greater the aggregate demand for the practice will be. Consequently, if clitoridectomy is both very costly and highly prevalent in a given societies, then economic theory suggests that the demand for the custom is likely to originate with a substantially sized group of individuals in that society who are also likely to receive a significant benefit from the practice.

Understanding how the relative prevalence of clitoridectomy is, like the supply of any good, a function of cost and demand is important since the costs and prevalence of clitoridectomy in Muslim society suggest a level of demand far beyond what any previous theories that attribute the custom solely to “religious beliefs” or “cultural aesthetics” can account for. More importantly, as will be demonstrated, the costs and prevalence of the custom also heavily indicate an economic cause behind the practice.

The Market Demand for Clitoridectomy:

In both medical and financial terms, clitoridectomy is a costly procedure. Families who choose to have their daughters excised or infibulated frequently pay a professional to perform the procedure.
Moreover, even when performed by a doctor, the procedure includes the immediate risk of death, sterilization, and - particularly in regards to women who subsequently go through childbirth - frequently causes severe long-term medical problems.\(^5\) The costs of clitoridectomy also increase with the severity of the practice. For instance, the risk of death of the baby at childbirth is approximately 30% higher amongst excised women, and 55% higher amongst infibulated women, than it is amongst women who have not had a clitoridectomy.\(^6\)

Clitoridectomy is primarily practiced in Islamic Northeastern Africa, though it is also found in scattered pockets of the Middle East.\(^7\) While it is not an Islamic custom per se, clitoridectomy is found mostly in Muslim societies, where the practice is often highly-prevalent. For instance, according to the US State Department, in Egypt and the Sudan, clitoridectomy rates are over 90%.\(^8\) However, it is important to note that clitoridectomy is not just an exclusively regional or Muslim custom. In Libya, which neighbors Egypt and uses a legal system based on Islamic law, clitoridectomy is not practiced at all. Similarly within Egypt and Ethiopia, both Coptic Christians and Ethiopian Jews (the Falasha) are known to practice clitoridectomy as do a number of Pagan/Animist tribes throughout Africa.\(^9\)

The high costs and prevalence of clitoridectomy in the societies where it is practiced suggest that demand for the custom is likely to originate with a substantially large group of individuals with a strong preference for the practice. According to the observations of many scholars and doctors within these societies, demand for the practice appears to originate with the marital choices of men.\(^10\)

In terms of shaping demand, and assuming their preferences for excised or infibulated brides is strong enough, men represent a sufficiently large enough group to account for the high rates of clitoridectomy frequently found in the societies where it is practiced. However, because economics is an empirical science, self-reported data and anecdotal reports alone are insufficient to prove that clitoridectomy originates with the marital choices of men. Specifically, before the nature of the benefits

\(^5\) Wikipedia, article on Female Circumcision, available at: wikipedia.com
\(^7\) Nicholas Birch, “Female circumcision surfaces in Iraq”, CHRISTIAN SCIENCE MONITOR (August 10, 2005).
\(^8\) Office of the Senior Coordinator for International Women’s Issues, Female Genital Mutilation: Country Reports, U.S. DEPARTMENT OF STATE REPORT (June 1, 2001). Available at: http://www.state.gov/g/wi/rls/rep/crfgm/
\(^9\) Id.
\(^10\) “What is quite sure is the fact that very few men would marry a girl who has not been excised and infibulated.” Hicks, INFIBULATION at 17 (2006). See also, “Whatever is decided in terms of legislation, the pressure for female circumcision to continue remains strong. As one prominent Egyptian doctor was reported as saying, ‘If my daughter is not circumcised no man is going to marry her.’” Peter Kandela, Egypt Sees U-Turn on Female Circumcision, BMJ 310, 312 (January 7, 1995)
that the men in these societies receive from the practice can be determined, empirical data must first demonstrate whether, and to what extent, these men have a revealed preference for excised or infibulated brides. As will be demonstrated, empirical evidence suggests that not only does such a preference appear to exist amongst the men in these societies, but that it can also be quite high.

In Egypt, approximately 78% of women between the ages of 11 and 19 years of age have had a clitoridectomy. However, 97% of married women have undergone the procedure. Taken alone, these facts are unlikely to indicate a strong male-preference for excised or infibulated brides - except that most women in Egypt who receive a clitoridectomy have the procedure performed between 7 and 11 years of age. In other words, women who undergo clitoridectomy marry at a far higher rate than women who have not. Specifically, women who have had a clitoridectomy are a little under 10 times likelier to get married than women who have not. This fact indicates a strong preference amongst Egyptian men for brides who have undergone some type of clitoridectomy.

Further, as many scholars have noted, legislative attempts to directly outlaw clitoridectomy have had little effect in reducing the practice other than simply moving it underground. Thus, demand for clitoridectomy appears to be relatively inelastic, which also tends to indicate an extremely high level of demand for excised and infibulated brides amongst the men of the countries where it is practiced.

From an economic perspective, this high and relatively inelastic level of demand raises significant questions about why the men in these societies appear to have such a strong preference for excised or infibulated brides. To wit, is there something particularly unique about these men that would so narrowly constrict their choices in marital partners or makes infibulated or excised women so much more attractive to them than women who have not undergone these procedures? Beyond the medical risks facing their wives and dangers of losing a higher proportion of their children during childbirth, why would these men choose to enter into marriages with potentially high sexual costs? Or, as a female friend of mine once put it, from a western perspective, “Don’t the men in these societies know that they’ll have more - and better - sex if their wives are likelier to enjoy it as well?”

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12 Id.
13 Id.
Previous Explanations of Male Demand

When it comes to the root causes of the male preference for excised or infibulated brides, much of the previous literature on clitoridectomy has regarded the practice as a product of religious belief or cultural aesthetics. For instance, in terms of the latter, as one scholar has argued:

[Clitoridectomy] can appropriately be compared with breast enlargement in America. In the American context, cultural analysts maintain, this practice of surgical bodily alteration is promoted primarily through popular culture, which socializes women to feel good about themselves and increase their value by displaying their breasts as objects for male viewing.\(^\text{15}\)

While cultural concepts of beauty may, in part, explain some of the demand for excised or infibulated brides amongst men, when prevalence rates are considered, such an explanation becomes highly unsatisfactory. To the extent there may be a purely aesthetic motivation behind the preferences of men for excised or infibulated brides, it seems unlikely that rates of over 90% would occur unless there were more concrete, or economic, motivations at play. Consequently, the preference for excised or infibulated brides amongst the men in the societies where clitoridectomy is practiced cannot simply be dismissed as question of personal taste, or cultural aesthetics, to the same extent that the preference of American men for large-breasted women can in producing breast-enlargement. Moreover, considering the frequent, and often intentional, effect that clitoridectomy has in reducing the sexual pleasure of women – clitoridectomy practices would appear to be more than just a question of cultural concepts of beauty.

In addition to cultural aesthetics, because the practice is primarily found in Muslim societies, the male demand for excised or infibulated brides is also frequently attributed to religious belief. Individuals who espouse this view tend to assert that Islam teaches Muslim men that the sole purpose of women and marriage is procreation. Specifically, that female sexual satisfaction is somehow sinful and, so, men should only marry women who have been excised or infibulated in some way.\(^\text{16}\) In short, the religious teachings of Islam are supposedly highly anti-sex and the men in these societies are so

\(^{15}\) See Rogaia Mustafa Abusharaf ed., FEMALE CIRCUMCISION (2006).

\(^{16}\) A common sentiment amongst proponents of the practice who assert that the custom is a product of religious belief is that “[C]ircumcision of females releases them from their bondage to sex, and enables them to fulfill their real destiny, as mothers.” See Hicks, INFIBULATION at 17 (1996).
controlled by their religion that the normal rates of variance found in measuring other areas of marital choice (e.g. age, education, body type, etc.) are nearly eliminated.

Regardless of whether one believes that religion, any religion for that matter, would have the ability to so control marital choice to the degree at which over 90% of a given society’s women would have a clitoridectomy - neither the Quran nor the Hadith (sayings of the Prophet) nor Islamic law is anti-sex, treats the sexual satisfaction of women as inherently sinful, or perceives the role of women or marriage to be purely procreational.\textsuperscript{17} Unlike the American Marriage and Divorce System (AMDS), where procreation historically represented the basis of the marital contract, the historical basis of the Islamic marital contract is recreational sex.\textsuperscript{18} In fact, during the Classical period of Islamic law, and in many Muslim countries now, either marriage partner can sue for dissolution of the marriage, based on a lack of sexual satisfaction from their partner. Thus, from the perspective of Islamic law, wives have a right to maximize the sexual satisfaction they receive from marriage.\textsuperscript{19} Moreover, the nature of Islamic inheritance law provides women a distinct incentive NOT to reproduce. Specifically, according to the Quran, a wife is entitled to inherit a fourth of her husband’s estate, unless the husband left behind children, in which case the wife’s inheritance is cut in half.\textsuperscript{20}

Moreover, even assuming, arguendo, that there were possible religious reasons for why the men in these countries have a higher demand for excised or infibulated brides, that explanation would do relatively little in explaining the high degree of variance found across the Muslim world in terms of prevalence or why it is found in non-Muslim societies as well. Consequently, simply attributing clitoridectomy to the vague category of “religious belief” is unlikely to provide much of an explanation with any degree of depth or specificity as to why the custom exists and is unlikely to serve much of a purpose other than to reinforce ethnocentric stereotypes of Muslims.

\textsuperscript{18} See generally, Laurence Drew Borten, \textit{Sex, Procreation, and the State Interest in Marriage}, 102 COLUMBIA LAW REVIEW 1089, 1128 (May, 2002).
\textsuperscript{19} It may be confusing that wives under Islamic law have a right to maximize their sexual satisfaction in a society where clitoridectomy also occurs. Such confusion is likely to arise out of a legal realist conception of the law as being contemporaneously based upon the values and norms of the society where those laws are found. In regards to Islamic law, this is highly inaccurate. Islamic jurisprudence and the rules found in Islamic law reach back over a thousand years. Consequently, the fact that clitoridectomy exists in Muslim society today has little to do with Islamic doctrine or the formal rules found within Islamic law. As will be discussed, the practice of clitoridectomy is a reaction to the economic incentives created by Islamic law – it is not a part of Islamic law or Islam itself. In fact, given the general stance of Islamic law regarding sex during the Classical period, clitoridectomy is a highly un-Islamic practice.
\textsuperscript{20} Surah 4:12.
Given that neither the formal religious teachings, nor cultural aesthetics, of Islam seem to explain the relative prevalence or severity of clitoridectomy practices in the Muslim world, previous attempts to study clitoridectomy on an empirical level have produced relatively few or meaningful correlations. The only correlation appears to be that the practice appears more frequently in rural than cosmopolitan districts. As a result, it is easy to dismiss the practice as emerging out of backward, less educated areas. However, numerous studies have repeatedly confirmed that neither education nor literacy levels have any significant effect on clitoridectomy rates. Moreover, the only three Muslim tribes in the Sudan known not to practice any type of clitoridectomy are all from the rural and less developed Darfur region, where one of those tribes, the Masalit, is one of the poorest ethnic groups in the country. Additionally, attempts by activists and governments to eliminate clitoridectomy through advertising campaigns and grassroots activism have also produced few tangible results. In countries such as Sudan and Egypt, where these campaigns have existed for decades, clitoridectomy rates still exceed 90%. In short, clitoridectomy appears to be more than a product of individual religious beliefs or “uneducated” superstitions, since attempts to re-educate and alter the beliefs of those engaging in the practice have overwhelmingly failed.

The fact that attempts to reduce clitoridectomy by altering the beliefs of individuals in these societies have mostly failed tends to suggest that the primary cause of clitoridectomy is economic. Specifically, if the cause of clitoridectomy is economic, then attempts to re-educate individuals towards a particular way of thinking are unlikely to have much of an effect. When individuals have a sizeable economic interest in maintaining and continuing a set of beliefs, those beliefs will be highly resistant to change. Assuming that individuals are rational maximizers, when given a sufficient incentive, they will

22 “The incidence of these procedures among the women varies very little by age, religion or level of education.” Office of the Senior Coordinator for International Women’s Issues, Female Genital Mutilation: Country Reports, Mali, U.S. DEPARTMENT OF STATE REPORT (June 1, 2001). Available at: http://www.state.gov/g/wi/rls/rep/crfgm/
23 Granted, while the Masalit, FUR and Tungur are all primarily from the Darfur and Northern Darfur regions of Sudan, this does suggest that the non-practice of any type of clitoridectomy is a “regional” custom that has simply been passed on from one tribe to another. The same region is also home the Zagahawa, Mahamid, Baggara, Berti, Danagala, Bisharin, Rubatab, Mahas, and Sukkot tribes – all of whom practice infibulation. Insofar as regional differences may explain why all three non-clitoridectomy practicing tribes exist there, Darfur has the lowest marrying age for women of any of the regions of the Sudan due to the high rate of early marriage practices for women (i.e. child-brides) found there. As will be discussed in more detail later in this paper, lowering the marrying age for women by increasing the prevalence of child-brides in a society increases the quantity of available women relative to the demand for them. Therefore, dowers will tend to be far lower in this region of the Sudan than anywhere else. Consequently, there will be less of a demand for excised or infibulated brides amongst the men in those societies. See Lindy Williams and Teresa Sobieszczyk, Attitudes Surrounding the Continuation of Female Circumcision in the Sudan, 59 JOURNAL OF MARRIAGE AND THE FAMILY 975 (1997).
continue to follow whatever set of beliefs that will allow them to benefit themselves at the lowest possible cost. In other words, they will adopt whatever set of beliefs that allow them to continue their behavior with the least amount of guilt or regret.

As this article will demonstrate, previous attempts to eliminate clitoridectomy have failed because the relative prevalence and severity of clitoridectomy practices is a function of the sizeable economic incentives facing the parents and men in the societies where it is practiced. Specifically, the relative prevalence and severity of clitoridectomy practices is a function of 1) the degree of economic risk facing men under the IMDS, and 2) the legal ability of parents to materially profit from the performance of clitoridectomy on their daughters.

However, before these incentives can be adequately discussed, it is necessary to first explain the operation of the IMDS from a comparative perspective to gain a better understanding of the nature of the IMDS’s legal rules and why those rules exist from an economic perspective.

The Problem With Marriage

Like any partnership, marriage can be understood from an economic perspective as producing efficiency gains through the specialization and division of labor between partners. By allowing one person to specialize in market production (i.e. work in the formal marketplace) while the other specializes in domestic production (household work, child rearing, etc.), both parties stand to produce more utility (i.e. satisfaction or happiness) for themselves than they would if they worked independently. In other words, an individual who is forced to split her time working between the home and the office is unlikely to earn as much as an individual who can simply focus on his job. However, as noted by a number of economists, while marriage produces gains in efficiency, most of those gains are typically absorbed by men.\textsuperscript{24}

To illustrate this point, imagine that Sally and Bob get married and decide to have children. However, due to the lower salary that Sally is likely to make in the formal market, she stays at home and raises the children while Bob works in the formal marketplace for the next 20 years. Because he no longer has to divide his time between home and work, Bob is able to work more, and so he acquires more job skills, experience, and so forth, and his earning potential increases at, say, a real rate of 2% per year. On the other hand, Sally's earning potential in the formal market does not increase, regardless of how good a mother or housewife she is. Even assuming that Bob and Sally started off with relatively similar earning potentials, after 20 years, Bob can still be expected to earn approximately 48% more than Sally in the formal market. Thus, if Bob divorces Sally, Bob's economic quality of life will increase immensely while Sally's will plummet. In short, Bob will have a strong economic incentive to seek termination of the marriage, much to the disadvantage of Sally, who will now be faced with the prospect of having to find a job after being out of the formal workforce for two decades.

Given these issues, marriage and divorce law has traditionally been seen as a method by which societies transfer capital and income from husbands to wives or, as some scholars have put it, the means by which societies convince women to engage in child-rearing and domestic production against their long-term economic interests.

For instance, under California state law, the “married woman's special presumption” which considered any property given to a wife as a gift to be her separate property, but any property given to a husband to be community property to be divided equally amongst the spouses, existed until the 1970’s as a means of redistributing wealth towards wives.

Similarly, also until the mid-70’s, the prohibition on no-fault divorce in many U.S. states (and many European and Latin American countries currently) existed as a means by which wives could protect themselves from the financial implications of divorce by providing them a type of property right in the marriage. Proving “fault” in a court of law is a long, arduous, and expensive process.

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25 From an economic perspective, women are less likely to earn as much as men because women bear children and typically must take at least some time off work to do so. Employers take that fact into account and, subsequently, discount the value of female workers by offering to pay them less than their male counterparts. In turn, when the choice between a couple emerges as who will be the spouse to stay at home and engage in domestic production while the other one stays in the formal workforce, women typically opt to be the ones to stay at home. In response, the market discounts the value of married women as workers even further, since now it is even more likely that if an employer is to hire a married woman, she’ll quit if she decides to have a child. Thus, more women choose to stay at home and the average earning potential of married women spirals down further. Consequently, one of the few methods women have to signal to an employer that they will not leave work and rear children is to refuse to get married.

26 For empirical evidence that this occurs, see Lenore J. Weitzman, The Divorce Revolution (1985).


Consequently, if one party wants out of the marriage, in order to avoid this process they will have to provide the other party an incentive to accept fault. For instance, if Bob reacts to his incentive to divorce his wife after 20 years of marriage, he would typically have to “buy out” his wife in order to obtain such a divorce. Otherwise, Sally could conceivably hold out almost indefinitely. In short, the fault-system prevented husbands from garnering the majority of the economic windfall from marriage by, essentially, placing the power of divorce into the hands of their wives.

Additionally, legal obligations such as alimony, which requires the economically advantaged spouse, such as Bob, to provide payment to the former spouse, i.e. Sally, while the latter seeks work, is another means by which marriage and divorce regimes throughout the world frequently attempt to mitigate the uneven distribution of wealth across genders that marriage and child rearing tend to create.

From an economic perspective, most of the aforementioned rules, which were symptomatic of the traditional approaches of U.S., Latin American and European marriage and divorce systems, are highly inefficient. Because alimony rules frequently create an incentive on both spouses to hide income and work less, recurrent law suits by both parties regarding the size of these payments well after the divorce has been concluded were a frequent result. Consequently, the more a particular divorce regime relies on the granting of alimony as a means of distributing wealth from marriage, the greater the level of inefficiency is likely to be. Similarly, because fault regimes also provided an incentive to and, to a certain extent, require both parties to drag the other through court airing their proverbial “dirty laundry” for an extended period of time, fault-divorce frequently produces a “long-term crisis,” resulting in, as noted by psychologist Judith S. Wallerstein, the infliction of permanent psychological damage on the children of divorcing couples. Additionally, as noted by a number of scholars some 50 years prior to its eventual repeal in the 1970’s, in addition to a myriad of other problems, the Married Woman’s Special Presumption increased the likelihood of fraud and, consequently, the fact-finding and settlement costs facing the courts.

Given the problems with these rules, in the view of a number of scholars, the modern AMDS has been heavily shaped by Rational Choice Theory (RCT) and an economic view of marriage where both parties have either “equal” or “equitable” rights in the gains created by the marriage. Thus, the

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30 W. P. Marks, Effect of Married Women’s Acts upon the Presumption against the Bona Fides of a Conveyance by a Third Person to the Wife of a Debtor, 2 The Virginia Law Register 690-692 (Jan., 1917).
relative prevalence of most of the above rules has been substantially reduced. For instance, most states have adopted no-fault divorce and the Married Woman’s Special Presumption was discarded by the California legislature in the 1970’s.

In turn, the modern AMDS has primarily attempted to mitigate the unequal consequences that marriage and child-rearing tend to impose on women through the increased use of legal presumptions that either 1) divide the economic gains created by the marriage to the spouses equally as community property or 2) provide for “an equitable distribution” of the economic gains created by the marriage based on a judicial finding concerning the relative contribution and needs of each spouse.32

Regardless of which regime is used, as I have written about more extensively in other articles, the modern AMDS is still not particularly efficient from a traditional, or neoclassical, economic perspective.33 Negotiations regarding the division of property primarily occur at the end of the marriage - after the couple is likely to have spent a considerable amount of time intermingling property and when the incentives for both parties to engage in cooperative bargaining and reduce transaction and information costs are lower. Thus, the nature of divorce under the AMDS is such that it produces inefficient results due to its relatively high transaction and information costs.

Put differently, because bargaining occurs at the end of marriage, divorce in America typically entails heavy involvement by third-party paid professionals such as lawyers, mediators, arbitrators, courts, psychiatrists, counselors, or all of the above before settlements can be reached. Additionally, as pointed out by noted economist Lloyd Cohen, because women have fewer opportunities for remarriage than men following a divorce, they tend to lose more from divorce than their husbands beyond what any court can be expected to reasonably calculate on a case-by-case basis or any equitable or community property division of the marital property can provide compensation for.34 Thus, women must personally engage in or, more specifically, hire lawyers to engage in, what negotiation theorists refer to as “hard bargaining” to avoid being systematically disadvantaged by the AMDS. Accordingly, states operating under the modern AMDS are likely to face high transaction costs unless the state takes steps to somehow reduce the use of hard bargaining tactics or the use of lawyers in divorce settlements.

34 See Lloyd Cohen, I Gave Him the Best Years of My Life, 16 J. LEGAL STUD. 267, 278 (1987).
Consequently, some states have attempted to reduce transaction costs associated with hard bargains under the AMDS by attempting to encourage arbitration and mediation between divorcing spouses without the use of lawyers to protect their interests. In these states, divorcing spouses are encouraged to represent themselves. However, as pointed out by other scholars, these attempts to lower transaction costs tend to produce settlement results that disadvantage women. Because men tend to have more experience in the market and with formal negotiation, women are therefore far better off when they have professional representation than they would if they were to simply attempt to negotiate their divorce settlements alone.

Depending on the state’s positions towards protecting what Lloyd Cohen refers to as “appropriation of the wife’s quasi-rents” by the husband late in the marriage, the AMDS is likely to result in increased reliance on third-party professionals in divorce settlements or is likely to provide women inadequate incentives to marry. By placing negotiation over the value of divorce at the end of the marriage, the AMDS inherently produces results where either 1) high transaction costs are incurred through the increased use of third-parties and hard bargaining in negotiating settlements, or 2) the rate of marriage is likely to be reduced and, thus, so are the efficiency gains that marriage brings.

Either way, by leaving bargaining over divorce to occur at the end of the marriage - the result produced by the AMDS is inherently inefficient.

Unlike the AMDS, in the IMDS, bargaining over the value of divorce occurs at the beginning of the marriage. Under the IMDS, in order for a marriage to be valid, a dower must be paid by the husband to the wife as part of the terms of the marital contract. The amount of the dower is stipulated as part of the contract and is negotiated between the wife’s wali, or “guardian” (typically the father or an elder male relative), and the husband. Under most schools of Islamic Jurisprudence, or Schools of Fiqh (“SOF”), the dower is the wife’s separate property, which vests into her exclusive managerial control upon the occurrence of a divorce by her husband.

Unlike the AMDS, where divisions of property must occur at the end of the marriage amidst fact-based inquiries, vague standards regarding equity, and considerable uncertainty regarding the value of divorce - all a judge must do under IMDS is simply look at the marital contract to determine what the wife is entitled to. Ostensibly then, from a traditional economic perspective, the IMDS is likely to produce more efficient results than the AMDS due to the higher degree of certainty regarding the

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value of divorce and its lower transaction and information costs. Thus, the IMDS should produce more efficient results, since the expected value of a divorce is considered at a point in time before the spouses have intermingled their property and when both have an incentive to behave cooperatively. In other words, in the IMDS, one would expect more efficient results since bargaining over divorce occurs before the spouses have forgotten who owned what and the love of newlyweds has been replaced by spite and the bitterness of divorcees.

However, from an economic perspective, a significant problem of uncertainty within the IMDS still exists. Specifically, even though the nature of the dower system increases the degree of certainty regarding the division of the marital property following a divorce, it does not increase the degree of certainty regarding the period of time the marriage will last. Marriages have been known to last anywhere from a few minutes to 85 years. Given the degree of variance involved, and the fact that no one appears to have yet determined what makes for a successful marriage, averages are unlikely to be particularly useful in predicting how long a given marriage will last. Consequently, predicting how long a marriage will last is effectively impossible for anyone to calculate and, thus, a high degree of uncertainty still exists in regards to the marital contract.

As a result, the nature of the dower system produces contrary incentives between husbands and wives regarding the length of the marriage. Specifically, all other things being equal, the effect of the dower system will be that men will have a preference for longer marriages and women will have a preference for shorter ones. As will be discussed further, especially when placed in the context of additional legal rules found within the IMDS, the effect of these contrary incentives can help to substantially predict and explain the relative prevalence and severity of clitoridectomy practices in the Muslim world.

The IMDS and the Dower System:

In the 1985 landmark California case of The Marriage of Noghrey, an Iranian couple formed a marriage contract whereby the husband gave his wife a $500,000 house in Sunnyvale, California as a dower - only to have his wife file for a no-fault divorce seven months later. As the judge stated in his
ruling; “[the wife] for her part is encouraged by the very terms of the agreement to seek a dissolution, and with all deliberate speed, lest the husband suffer an untimely demise, nullifying the contract, and the wife’s right to the money and property.” Consequently, the judge granted the divorce, but invalidated the dower contract.

Regardless of whether one believes that the wife in Noghrey entered the marriage with the sole intent of simply receiving her dower and leaving, as the case clearly illustrates, the dower system produces contrary incentives for husbands and wives regarding the length of the marriage due to the fact that, over time, most dowers will decrease in value. Consequently, during the early stages of the marriage, the wife has an incentive to end the marriage as quickly as possible, while her opportunities for remarriage, and the size of the dowers she is likely to receive from those future marriages, remain relatively high. In comparison, men have an incentive to extend the duration of the marriage until its later stages when the dower has fallen in value.

As a personal example, my girlfriend is half-Palestinian and half-Lebanese. Her parents were married in Lebanon in 1980. The dower stipulated in their marriage contract was approximately 20,000 Lire, which, in 1980 Lebanon, was a considerable amount of money. However, in today’s terms and converted into U.S. dollars, that exact same dower would be worth approximately $12. Granted, this is an extreme example of devaluation, which can be partially attributed to the destruction of the country’s infrastructure from Lebanon’s civil war and the subsequent Israeli invasions of the country. However, the point here is still valid. As inflation and the average husband’s earning power increases, the relative value of the wife’s dower will decrease over time.

Given that men profit from longer marriages, whereas women profit from early dissolution, men therefore have an incentive to deter women from seeking a divorce early in the marriage. The size of this incentive increases depending on the present value of the dower to the husband. In short, the larger the dower is, the greater the husband’s incentive to prolong the marriage and the wife’s incentive to shorten it.

Unfortunately for men, under the formal legal rules of the IMDS itself, there are few ways in which men can protect themselves from the type of behavior exemplified by the wife in Noghrey. Moreover, the IMDS provides numerous advantages for women when it comes to formation of the initial
marital contract. Consequently, as will be discussed in greater detail, the result is a legal system that produces a high degree of economic risk for men.

**Economic Risk and Formal Protections Facing Men under the IMDS**

As I have discussed more extensively in previous articles, because the IMDS allows men to have up to four wives, the number of available women will always be lower than that of men. In other words, polygamy increases the scarcity of women relative to men. Consequently, women occupy a superior bargaining position when it comes to negotiating the initial marital contract.

Additionally, the Wali-system, which assigns a guardian to negotiate on behalf of the wife, but assigns none to husbands, places women in a better position to take full advantage of their superior bargaining position than men. Thus, the initial marriage contract will typically heavily advantage wives, an advantage that usually expresses itself in the form of high dowers.

Moreover, despite the fact that men are, ostensibly, given the sole legal authority to initiate a divorce under the IMDS and cause a wife’s right to the dower to vest, in fact, women have a considerable number of options that, essentially, allow them to end the marriage without their husbands consent. For instance, under most SOF, all that is required to effectuate a divorce is a simple oral utterance regardless of the husband’s intent. Consequently, under these SOF, all a wife needs to do in order to elicit a divorce from her husband is cajole him into stating “I divorce you” in front of one or two witness. Additionally, the wife may simply have the unrestricted right to divorce her husband at will, if the right was negotiated into her initial marital contract - which is a fairly common occurrence given

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40 I use “initial marriage contract” because, as I have argued in other papers, the IMDS can be seen as offering 3 potential opportunities for formal renegotiation of the marital contract during the marriage. See Ryan Riegg, *Behavioral Economic Issues in Marriage & Divorce Law*, (UCLA Law, Working Paper, 2006).

41 Id.

42 I use the term “initial” marriage contract because, as I have discussed in other papers, through its system of revocable divorce (*talaq*) classical IMDS creates three separate opportunities for a formal renegotiation of the marital contract during the course of the marriage. See Ryan Riegg, *An Economic Analysis of the Islamic Marriage and Divorce System: Extra-Legal Gender and Marriage Customs in the Muslim World*, (UCLA Law, Working Paper, 2006).

43 Under a number of SOF, a simple, or even vague, oral utterance could effectuate a divorce, regardless of intent. See Ibn Rushd, *DISTINGUISHED JURIST’S PRIMER VOLUME II 89* (Imran Ahsan Khan Nyazee trans., 1996).
that, as previously discussed, most initial marriage contracts will tend to heavily advantage wives over husbands.

Moreover, under most SOF, divorce can be effectuated by wives through the process of mutual imprecation. In this circumstance, the wife commits adultery, the husband accuses her of being unfaithful in front of a judge, and the wife responds by swearing that she has not. The court then divorces the couple and provides the wife her dower, unless the husband can prove his claim. However, to prove his claim, the husband must meet the standard of evidence for proving adultery under Islamic law - which, quite frankly, is a nearly impossible standard to meet. Specifically, under some SOF, in order to prove adultery, the accuser must produce four eyewitnesses of good character who, quite literally, watched the act of penetration as it occurred.

As the distinguished scholar of Law and Economics Ronald Coase once pointed out: One cannot determine the effect of a group of laws by simply looking at the conduct those laws require, instead, one must determine how people will respond to those laws in the real world and outside the law itself. Given that men under the IMDS have an interest in deterring their wives from seeking divorce - but minimal formal means of deterring wives from doing so - it seems likely that they will develop extra-legal means of protecting their interests. In other words, the men in these societies can be expected to develop some set or level of precautions in response to their perceived level of risk. As will be demonstrated, these precautions frequently translate themselves into specific customs found in many parts of the Muslim world including clitoridectomy.

Customs as Precautions

Considering that the degree of economic risk facing men under the IMDS is, in large part, attributable to dower size, men could attempt to reduce their risks by taking precautions to lower


45 Moreover, under some SOF during the Classical Period, the witnesses were required to see the actual act of penetration (simply seeing a couple naked together would be insufficient). Additionally, failure to prove the claim of adultery would subject all testifying witnesses to a punishment of 80 lashes for slander. Consequently, in these SOF, proving adultery was practically impossible. See Abou El Fadl, RELIGION AND THE DEATH PENALTY at 102 (2004).
dowers. However, as previously discussed, dower size is primarily a function of scarcity. The greater the quantity of available men relative to the quantity of available women, the more men will have to pay women in order to marry them. Consequently, as has been demonstrated in a number of empirical studies, polygamy tends to exert a considerable effect on increasing dower size. Put differently, the greater the rate of polygamy, the greater dowers tend to be.\textsuperscript{46}

In order to reduce dower sizes under the IMDS in societies where polygamy is allowed or commonly practiced, such as in Africa where polygamy rates frequently reach up to and beyond 50%, the number of available women relative to available men must be increased.\textsuperscript{47} One method of achieving this result is to develop early marriage practices for women. In short, increase marriage rates between older men and child-brides. The higher the quantity of child-brides in a society, the lower dowers will tend to be, and the lower the economic risk facing men from marriage.

In addition to adopting customs that lower dowers, men can also attempt to establish customs that increase the costs facing women of leaving their marriages and finding new mates. This second group of customs is the primary focus of this article. These customs include practices such as extensive veiling, seclusion practices, consanguineous marriage (i.e. marriage between cousins) and, more importantly, clitoridectomy.

From an economic perspective, most of the customs in this second category operate to increase the costs of divorce on women by decreasing their ability and incentives to seek out new potential mates during marriage. For instance, so long as a woman is veiled extensively in public, or can be permanently secluded indoors at will by her husband, it is less likely she will be able to attract new potential mates. Consequently, the costs of divorce on such a woman will be higher as, if she leaves the marriage, she will face a greater risk regarding whether or not she will be able to find a new mate at all. In short, when wives are extensively veiled and secluded, it is less likely the woman will be able to leave her husband for another man, as finding another man during marriage is relatively difficult.

\textsuperscript{46} For example, see Walter Goldschmidt, The Economics of Brideprice among the Sebei in East Africa, 13 ETHNOLOGY, 311, 331 (1974).

\textsuperscript{47} For instance, among the ethnic groups of Senegal, 55% of Wolof, 54% of Mandingo, 42% of Serer, and 41% of Poular women are polygamous. See S. Ndiaye, NUPTIALITE ET FECONDITE AU SENEGAL 59-72 (compiled by Yves Charbit, Lamine Gueye, Salif Ndiaye, 1985).
Much like customs such as extensive veiling or seclusion, clitoridectomy can be also be understood as increasing the costs of divorce on women from two separate, though similar, economic perspectives. The first perspective is most applicable in cases where the maximum degree of sexual satisfaction that may be attained by a woman has been permanently and substantially reduced by the practice. In these situations, clitoridectomy can be understood as discouraging divorce by permanently and substantially reducing the non-pecuniary incentives amongst women to seek out new potential mates. Put simply, if sex is unlikely to be any better with a new potential mate than it is with your current husband because the maximum value of sex for you has been virtually reduced to zero, then it is less likely you will attempt to pursue new potential mates and seek divorce. Similarly, the likelihood that a given wife will seek a divorce through mutual imprecation - which is likely to involve an act of infidelity - is less likely to occur if sex is literally painful or difficult for the wife.

The second perspective is most applicable in cases where clitoridectomy has not permanently and substantially reduced the degree of sexual satisfaction a woman may attain, but has only temporarily decreased the ease by which women may attain sexual satisfaction from a given mate. From this second perspective, clitoridectomy produces a relationship-specific investment amongst wives in their husbands and marriages which, in turn, provides a significant disincentive for divorce amongst women.

Specifically, according to many women who have had a clitoridectomy, learning how to achieve orgasm and have pleasurable sex with their mates is an extremely time-consuming process. Particularly amongst infibulated women, learning how to have sex with a particular mate without causing severe vaginal damage takes a relatively long period of time and learning how to achieve orgasm takes even longer. However, once these women have been engaged in sexual activity with a particular mate for a long enough period of time, according to several studies on the topic, the degree of sexual satisfaction reported by many excised and infibulated women and women who have never received a clitoridectomy becomes relatively equal.48

Consequently, under this second perspective, clitoridectomy only temporarily decreases the ease by which women may attain sexual satisfaction from a sexual partner. Thus, the practice may be perceived as producing relationship-specific investments by wives in the marriage in the form of time and the acquisition of unique sexual knowledge by the spouses. The investment is relationship-specific because, outside the context of that particular marriage, the time spent and the knowledge acquired has only minimal, if any, use (i.e. the investment cannot be easily transferred to other, future, relationships). The investments made are non-recoverable because time, unlike most pecuniary investments, cannot be refunded. Consequently, wives who are excised or infibulated, but still retain the ability to substantially enjoy sex and achieve orgasm, possess a distinct disincentive in regards to divorce.49

To illustrate this point, imagine that you are an infibulated woman and it took you and your husband several months to learn how to have sex without causing severe vaginal tearing and pain, which, according to some infibulated women, is not an abnormal period of time for this process to occur.50 Imagine further that, after finally learning how to have sex without causing you vaginal tearing, it took you and your spouse several more months to learn how to bring you to orgasm, which, again, is not abnormal period of time according to some infibulated women.51 It has therefore taken you, say, a year to begin to be able to fully enjoy sex to its, generally speaking, maximum potential. Consequently, if you choose to find another mate and leave your husband, there is a substantial risk that it may be another year before you are able to fully enjoy sex again with your new mate. Under these circumstances, it will probably be far less likely that you will want to obtain a divorce as doing so may require you to spend another year without an orgasm. Consequently, clitoridectomy can be perceived with female genital mutilation/cutting (FGM/C), INTACT CONFERENCE ON ADVANCING KNOWLEDGE ON PSYCHOSEXUAL EFFECTS OF FGM/C: ASSESSING THE EVIDENCE, ALEXANDRIA, EGYPT (October 10–12, 2004); Nwajei SD, Oyono AI. Female genital mutilation, 26 WOMEN'S STUDIES INT FORUM 575–80 (2003); Hanny Lightfoot-Klein, The Sexual Experience and Marital Adjustment of Genitally Circumcised and Infibulated Females in The Sudan, 26 JOURNAL OF SEX RESEARCH 375-379, No.3 (August, 1989); 49 Put simply, and hopefully without being crude, not all men or women are built the same or enjoy the same types of activity in the bedroom and learning what “works” sexually for both parties can be a time-consuming process - there are angles to consider, speed, depth, positions, foreplay etc. - and this process takes even longer when several of the major organs designed for enjoyment of sexual activity are permanently damaged. Consequently, assuming the self-reported data of the women in the cited reports above to be accurate, clitoridectomy does not eliminate or reduce the degree of pleasure women receive from sex, it merely increases the amount of time it takes for a woman to achieve a given level of sexual satisfaction each time she finds a new mate. Thus, in economic terms, clitoridectomy produces a relationship-specific investment amongst wives in their marriages and mates in the form of time spent by the couple learning how maximize their sexual utility, which, in turn, increases the non-pecuniary costs of divorce on women. 50 Hanny Lightfoot-Klein, The Sexual Experience and Marital Adjustment of Genitally Circumcised and Infibulated Females in The Sudan, 26 JOURNAL OF SEX RESEARCH 375-379, No.3 (August, 1989). 51 Id.
as also producing a disincentive for divorce amongst women by increasing one of the non-pecuniary costs of leaving their marriages.\textsuperscript{52}

In addition to the two purely economic perspectives presented above, clitoridectomy may also be perceived as further reducing the likelihood that wives will attempt to leave their marriages through the use of power. According to negotiation theory, power can be defined as the ability to make credible threats.\textsuperscript{53} As will be discussed in more detail later, by demonstrating their ability and willingness to purchase the agreement of parents to maim their daughters, the ability of husbands to make credible threats to prevent their wives from seeking termination of the marriage is significantly increased.\textsuperscript{54} Thus, part of the effect of clitoridectomy is that it also reduces the likelihood that women will seek divorce through the use of power.

Amongst the men who promote the practice, one of the most frequently purported rationales for clitoridectomy is that it decreases the likelihood that their wives will be unfaithful and, as a result, helps to guarantee longer marriages:

\textsuperscript{52} The question of which of the two perspectives discussed above is a more accurate depiction of the practice is a question of the effect a given practice will have on female sexual functioning. In rural areas, or in areas where the practice has been illegalized and forced underground, clitoridectomy is frequently conducted with non-sterilized instruments such as sharp rocks or jagged pieces of glass. In these areas, many women can be safely presumed have had their sexual functioning permanently and substantially reduced as a result of the extreme physical trauma and the medical complications that frequently accompany the procedure (e.g. infection, blood loss, etc.). Consequently, in these areas, the first perspective may provide a more accurate picture of the type of disincentive created by the practice. In situations where the ease by which sexual satisfaction may be achieved has only been temporarily reduced by the practice, the second perspective may be more appropriate. Nonetheless, regardless of which of the two economic perspectives is a more accurate depiction of the practice, the basic result caused by clitoridectomy is the same – a substantial increase in the costs facing women of leaving their marriages and finding new mates.


\textsuperscript{54} That part of clitoridectomy’s value to men includes an element of psychological intimidation against women can reasonably be inferred from the following three facts:

1) Unlike male circumcision, where age varies greatly depending on the tribe, most clitoridectomies and/or infibulations are performed on girls when they are between the ages of 8 and 16 – when they are old enough to remember the pain and trauma of the procedure.

2) In many of the societies where both men and women undergo “circumcision” later in life and in public, women are encouraged to scream out in pain as much as possible during the procedure, while boys are encouraged to stay silent and pretend that the procedure does not hurt. Presumably, the effect of such a practice sends a strong signal of intimidation to the female onlookers, which also socializes women into believing that they are less physically and mentally powerful than men, and thus must be obedient.

3) Even in those societies where actual excision is no longer or only occasionally practiced, symbolic gestures such as placing and holding a knife between the girl’s legs, or pricking the clitoris with a sharp object, remain. Presumably, the psychological value of brandishing a weapon is to demonstrate an ability or intent to use it. In other words, to provide a credible threat to ensure future obedience from the girl.

The clitoris is the basis for female masturbation... the spiritual basis of masturbation is fantasy; in fantasy a female broods on sexual images; such brooding inevitably leads a female to spiritual infidelity, since she commits adultery in her heart, and this is the first step to physical infidelity, which is the breaker of homes.\(^{55}\)

Considering that both economic and negotiation theory predict that women who undergo a clitoridectomy will be less likely to seek divorce or engage in infidelity – and that men who marry them frequently attach this value to the practice – clitoridectomy can also be understood as providing men a means of protecting themselves from the economic risks posed to them by the IMDS and the dower system. Thus, as will be discussed in Part II, the greater the potential economic risk facing men in these societies, the more prevalent and severe clitoridectomy practices are likely to be. However, before that discussion can occur, it is important to first explain how alternative-customs – such as consanguineous marriage, child-brides and extensive veiling and seclusion practices – operate within the legal systems of a number of Muslim countries to create what can be best understood as “market substitutes” to the practice of clitoridectomy and may have an effect on the relative prevalence of the practice in individual societies.

**Clitoridectomy and Market Substitutes:**

Even though all of the customs previously discussed (i.e. consanguineous marriage, clitoridectomy, child-brides extensive veiling and seclusion practices) arise frequently in the Muslim world, it is important to pause here and explain that none of these customs should be considered “Islamic” or a part of the IMDS per se since, 1) historical evidence indicates that nearly all of these practices predated or originated outside of the Muslim societies they are now practiced in, 2) these practices have scant support in either the Quran or Hadith and 3) none of the Classical Jurists considered any of these customs to be required by Islamic law.\(^{56}\)

However, even though these customs are clearly outside the scope of the IMDS, in the contemporary period, these customs are often given the force of law in a variety of Muslim countries where they are also encouraged and reinforced by additional legislative and judicially-created legal

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\(^{55}\) Esther K. Hicks, Infibulation 17 (1996)

rules. Specifically, in countries such as Saudi Arabia and Iran, seclusion practices by husbands seeking to keep their wives indoors are given the force of law and female veiling is legally mandatory.

Similarly, consanguineous marriage practices are reinforced in a number of countries by allowing the minimum or “proper” dower to be waived or significantly reduced if the marriage is between cousins. Under a number of SOF, a minimum or proper dower must be paid in order for a marriage to be valid. If the dower is not stipulated, the judge will assign one based on the market rates for a similar union based on age, class, geographic region etc. However, in a number of Muslim countries – particularly in Egypt – determining an accurate market rate for assigning a dower is nearly impossible. Most couples will frequently register a high dower amount in the official marriage contract, called the mahr al-sum’a, “dower of reputation,” or mahr al-alaniyya, “public dower,” while the actual dower, which is far lower, is kept secret.

Given that the information regarding dower sizes for an exogamous marriage (i.e. a marriage between unrelated spouses) in a number of Muslim countries is frequently, if not always, inflated and unreliable, a considerable incentive is generated for individuals to engage in consanguineous marriage in countries where the law allows the dower to be waived or drastically reduced when the union is between cousins. By reducing the amount of capital and uncertainty involved in the exchange in consanguineous marriages, negotiations over the marriage contract are likely to move faster and more efficiently than they are in exogamous marriages. Specifically, while a prospective husband seeking an exogamous marriage will need to engage in extensive pre-marital negotiation with his prospective wife’s wali to protect himself against the risk of having a judge assign an inflated dower based on the public dowers in the area, he will not need to take the same level of precaution when it comes to a consanguineous marriage. Thus, the rule creates a strong incentive for husbands to seek consanguineous marriages over exogamous marriages due to the former’s lower transaction and dower costs. Moreover, legal rules and customs encouraging consanguineous marriage also provide a degree of protection for husbands by preventing money and property from leaking out of the overall family unit. In other words, even after the occurrence of a divorce, a husband who marries his cousin

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57 See generally, Abou Fadl, SPEAKING IN GOD’S NAME (2005).
58 Id.
59 Ron Shaham, FAMILY AND THE COURTS IN MODERN EGYPT 29-42 (1997)
60 Id. See also, David Pearl and Werner Menski, MUSLIM FAMILY LAW (1998)
61 Id.
will continue to have some degree of access to the dower he paid to his former wife, further strengthening the incentive for men under the IMDS to seek consanguineous unions.

By increasing the costs associated with exogamous marriages, and consequently strengthening the incentive for men to seek consanguineous marriages, the ability of women to find mates outside of their family unit is reduced. In addition to lowering the risks facing men by lowering their dower and transaction costs, legal rules that encourage consanguineous marriage can also be understood as increasing the reputational constraints on the ability of wives to divorce and remarry and, thus, their ability to profit from the dower system. Hence, an additional economic value to men from legal rules encouraging first cousin marriage is that reputational deterrents to the type of opportunistic behavior exemplified by the wife in Noghrey become more effective.63

These customs are important to note as, when they are given the force of law, or are directly encouraged by formal legal rules, these customs provide strong market substitutes to clitoridectomy. Thus, a high presence of these substitutes in a given Muslim society can be expected to subsequently lower the relative prevalence and/or level of severity of clitoridectomy.

Put differently, in a country where men have legal authority, backed by the force of the State, to seclude and veil their wives extensively, their need to reduce their wives' potential incentives for divorce through extra-legal customs such as clitoridectomy is diminished. Similarly, when consanguineous marriage is encouraged by legal rules developed by a country's individual legal system to the point at which remarriage for wives is made increasingly difficult, men will, again, have less of a need to seek excised or infibulated brides. Consequently, in countries such as Saudi Arabia, where veiling and seclusion practices are supported and strictly enforced by the state - and consanguineous marriage rates are among the highest in the Middle East – clitoridectomy is less likely to be practiced.64

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63 To wit, news travels much faster between members of a family unit than it does between strangers. If a woman behaves opportunistically in a consanguineous marriage, the information is likely to become readily available to the family fairly quickly. Therefore, in a legal environment where the mandatory dower is waived or substantially reduced in a consanguineous marriage over an exogamous one, the shunning of that woman by the family unit will become that much more effective as the ability of the woman to marry a new husband will be significantly reduced. Because such a woman will likely be unable to marry another member of her family, she will need to find a new, exogamous, mate who does not know of her reputation. However, because men have a strong economic incentive to seek consanguineous marriages over exogamous ones due to the former’s lower costs, the woman will find her opportunities for remarriage greatly diminished. In short, because the transaction costs associated with exogamous marriages are higher when this type of legal rule is in effect, the incentive for women to seek early termination of the marriage is reduced.

Given these considerations, it is now possible to create a preliminary predictive hypothesis regarding the relative prevalence and severity of clitoridectomy in a given Muslim society. Specifically, under the IMDS, when dower size and the divorce rate is high, and remarriage for women following a divorce is easy or frequent, men will perceive themselves as facing a high degree of risk and will take a correspondingly high level of precaution.

Conversely, when dowers and the divorce rate are low, and/or remarriage for women following a divorce is difficult, men will perceive themselves as facing relatively little risk and will take a lower level of precaution. As will be demonstrated, in the absence of market substitutes (i.e. legally enforced or encouraged veiling, seclusion, child-brides, or consanguineous marriage practices) the level of precaution taken translates itself into the relative prevalence and severity of clitoridectomy practices found in a given society. In short, the higher the level of risk, the likelier it is that members of a Muslim society or tribe will practice clitoridectomy in its most severe form (infibulation), while the lower the risk, the more likely it is the tribe will not perform any type of clitoridectomy at all.

PART II: Empirical Analysis

Empirical Hypothesis

For the reasons outlined in Part I, depending on the relative absence of market substitutes, the prevalence and severity of clitoridectomy practices found in a given Muslim society will correlate heavily with dower size, and the divorce and remarriage rate amongst divorced women in that society.

Methodology:

With the exception of the authoritative study on infibulation amongst the tribes of Islamic Northeastern Africa by Esther K. Hicks (“Hicks’”), most empirical studies on clitoridectomy only measure clitoridectomy on the national level in terms of the practice’s relative prevalence, and not in terms of severity or type, and do not provide any data regarding dower size, or divorce and remarriage rates.
Therefore, empirical research has been limited exclusively to the tribes in Hicks' study due to practical constraints and in order to ensure methodological consistency in data-gathering.65

Based on Hicks' study, a list of 20 different tribes from the Middle East and Africa were compiled for which relevant data existed. The criteria for inclusion on the list was 1) each tribe had to be Islamic, 2) data existed about whether the tribe had high dowers or not, and 3) whether the vast majority of the tribe was known to engage in either the practice of infibulation or excision, or, conversely, was known not to practice any form of clitoridectomy whatsoever. Entries where data was omitted or listed as “variable” by Hicks, and could not be further clarified through additional sources, were considered unreliable and were not used.

Based on the above criteria, the following graph (see Appendix) illustrates the relationship between dower size, and divorce and remarriage rates amongst women (represented by the X-axis and collectively labeled as “Risk”) and the clitoridectomy (represented by the Y-axis and collectively labeled as “Response”).

The line traversing the graph represents the hypothesized trend line linking the level of risk facing the men in a given society tribe under the IMDS with the severity of that tribe’s clitoridectomy practices. As risk facing men under the IMDS tends to increase as a function of dower size and divorce & remarriage rates amongst divorced women, so does the severity of a tribe’s clitoridectomy practices.

Selection Criteria and Additional Considerations

Research was limited to Islamic tribes despite the facts that 1) a number of Pagan, Christian and Jewish tribes in Africa are known to practice clitoridectomy to varying extents, and 2) the relative prevalence and severity of clitoridectomy practices amongst these tribes also appear to increase with dower size. Nonetheless, because the specific nature of dower payments and property rights are relatively unknown or are highly variable among these non-Islamic tribes, they have been excluded from this study. For instance, amongst the pagan Nuba, who practice excision, the dower does not vest until the couple has children.66 Developing a model that takes this type of partial-vesting issue into account would be an extremely arduous task. Therefore, in the interests of preserving concision and clarity, Pagan, Christian and Jewish tribes have been omitted from this study, even though inclusion of

65 Hicks, INFIBULATION 133-138 (1996)
these tribes appears to support the model proposed by this article that dower size and divorce rates heavily contribute to whether or not a tribe practices clitoridectomy.

In addition to excluding non-Islamic tribes, the following graph does not formally measure or include clitoridectomy prevalence-rates in measuring Response. At first glance, this may seem to be a significant flaw. Just as Risk is a measurement of magnitude (i.e. the potential size of the loss) and frequency (i.e. the likelihood of that loss occurring), so is Response. Specifically, Response is a measurement of magnitude (i.e. the severity of clitoridectomy practiced) and frequency (i.e. the relative prevalence of that practice).

Put differently, just because 50% of Society A practices infibulation and 50% practices no type of clitoridectomy whatsoever, while 80% of Society B practices excision while 20% practices no type of clitoridectomy, that does not mean that Society A’s Response is any higher than Society B’s. (In this case, they may very well be considered equal despite the fact that both societies engage in different types of clitoridectomy practices.)

That said, while differences in prevalence-rates are important to consider on the national level due to the high degree of variance between countries – for instance, Egypt’s rate of clitoridectomy is over 90%, while Libya, which is immediately adjacent to Egypt, does not practice clitoridectomy at all – at the tribal level, clitoridectomy practices are likely to be nearly universal. Generally speaking, all of a tribe’s members either engage in one type of clitoridectomy practice (i.e. either infibulation or excision) or will not practice any type of clitoridectomy whatsoever. In other words, prevalence rates are only marginally important on the tribal level because the practices are likely to be universal across all members of the tribe. Consequently, prevalence rates will only be considered later in this article’s discussion of clitoridectomy on the national level.

Findings:

As the graph illustrates, all 12 infibulating tribes of the 20 tribes studied have high dowers, high rates of divorce and easy remarriage for women. At the other end of the trend line, of the seven tribes that practice no type of clitoridectomy whatsoever, three have low dowers and low rates of divorce or, as in the case of the Masalit, have extremely low remarriage rates for divorced women.67 In between these two extremes lie the Meidob, who have low dowers but a high rate of divorce and, consequently, only practice excision.

67 Id., See also, Dennis Tully, CULTURE AND CONTEXT IN SUDAN (1988).
Nonetheless, even though these findings heavily support the model presented in this article, there are four tribes that do not fall on the trend line: the Rwala and AlMurrah of Saudi Arabia, the Fulani of Nigeria, and the Somali/Ogaden. Consequently, these four tribes require a more extensive discussion.

The Rwala and AlMurrah

Under the model presented here, the Rwala and AlMurrah both have sufficiently high levels of Risk that should result in the tribe practicing infibulation. Specifically, in both tribes, dowers are high, divorce is frequent, and no known bars to remarriage by divorced women appear to exist. However, what makes both tribes unique is their location. Both tribes are located in Saudi Arabia, which as previously discussed, gives the force of law to a number of customs designed to reduce the ability of women to find new potential mates. Specifically, veiling is mandatory in Saudi Arabia, and the ability of husbands to seclude their wives is strictly enforced. Additionally, Saudi Arabia is also home to one of the highest rates of consanguineous marriage in the Middle East.

Consequently, neither tribe engages in clitoridectomy, because neither tribe needs to – the men of these tribes have sufficient protection as is and do not have a market demand for excised or infibulated wives.

The Fulani

According to Hicks, the Fulani have low dowers and a high rate of divorce. Consequently, under the proposed model of this article, they should practice excision. However, they do not practice any form of clitoridectomy at all. Part of this result is likely to have to do with the fact that most Fulani women are first married when they are children, prior to menstruation. Consequently, dowers amongst the Fulani are not just likely to be low – they are likely to be extremely low. Thus, the relatively high rate of divorce in Fulani society is unlikely to produce a perceivable risk to most Fulani men and, therefore, they are unlikely to have a significant market demand for excised or infibulated wives.

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68 Hicks, INFIBULATION 133-138 (1996).
70 Hicks, INFIBULATION 266 (1996).
71 Id.
In other words, when dowers are extremely low, clitoridectomy as a precaution is unnecessary since the total degree of Risk facing men is relatively low.

**The Somali/Ogaden:**

Considering that the Somali/Ogaden appear to have both a high rate of divorce, high dowers, and no source on the tribe mentions any type of bar to remarriage by divorced women, the tribe represents the one outlier in this study. Under my model, the tribe should practice infibulation, but according to Hicks the tribe only practices excision.\(^\text{72}\) On one hand, while it is tempting to simply assert that the Somali/Ogaden are the sole exception that proves the rule, Hicks’ categorization of the tribe may, in fact, be an error.

Specifically, the Somali/Ogaden primarily reside in the Somaliland portion of Northern Somalia and the Somali region of Ethiopia. According to the U.S. State Department, a statistical survey performed by CARE international in Somaliland found that 91 percent of Somali women undergo infibulation.\(^\text{73}\) Additionally, also according to the State Department, infibulation is considered common amongst all Somali groups within Ethiopia, with the Somali region of Ethiopia having a clitoridectomy prevalence-rate of 70%.\(^\text{74}\) Taken together, these facts highly suggest that the Somali/Ogaden are extremely likely to practice infibulations and not, as Hicks asserts, just excision.

Nonetheless, while I have corrected Hicks’ data in regards to other tribes,\(^\text{75}\) I have left the Somali/Ogaden as an excision-only tribe as I was unable to find any specific research or data relating that particular tribe’s clitoridectomy practices. Consequently, they remain this study’s sole outlier, even though my personal feeling is that primary empirical research will likely reveal the Somali/Ogaden as an infibulating tribe and further confirm the model presented in this article.

**What Makes North Africa Different: Expanding the Model to the National Level**

Considering that the clitoridectomy procedures are mostly performed on women while they are still children, the presence of these practices in a given society requires more than a male demand for

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\(^\text{72}\) Id. at 133-138

\(^\text{73}\) Office of the Senior Coordinator for International Women’s Issues, *Female Genital Mutilation: Country Reports*, U.S. DEPARTMENT OF STATE REPORT (June 1, 2001). Available at: http://www.state.gov/g/wi/rls/rep/crfgm/

\(^\text{74}\) Id.

\(^\text{75}\) For instance, the Berti are listed by Hicks as non-clitoridectomy practicing tribe, even though the tribe is clearly known to practice infibulation. See Abdullahi Osman El-Tom, *Female circumcision and ethnic identification in Sudan with special reference to the Berti of Darfur*, 46 GEOJOURNAL 163, 170 (1998).
excised or infibulated brides. It also requires parental consent. That clitoridectomy fundamentally involves the participation of parents is important to note since an examination of their incentives may provide several useful insights into the practice. Specifically, an analysis of parental incentives may explain the relative prevalence of clitoridectomy at the national and regional level and, more importantly, may be the root to eliminating the existence of the custom in the Muslim world.

As mentioned in the introduction, clitoridectomy practices are most prevalent in Africa, where they are also practiced in their most severe form (infibulation). What makes Africa different is that, unlike the majority of the rest of the Muslim world and contrary to the legal rules established by the majority of the Classical jurists, parents in most African societies are able to receive, or are directly entitled to, a proportion of their daughter’s dower.

However, unlike the daughter who must wait until the occurrence of a divorce to receive her portion of the dower, the parents receive their payment once the marriage contract is executed. Consequently, the parents have a strong incentive to increase the size of dower as much as possible in order to enrich themselves. Amongst the majority of tribes practicing clitoridectomy, a proportion of the dower is simply given directly to the parents upon the daughter’s marriage. However, on the national level, the proportion and means by which parents receive their share of the dower differs from society to society.

For instance, in Egypt, the parent’s payment frequently occurs by means of a triangular transaction: The husband pays the wife’s guardian (usually her father or male relative) the dower, from which the parents then purchase their daughter’s jihaz, or “trousseau,” such as silverware, clothing, and personal items. By passing the dower through the guardian instead of directly to the wife herself, the parents are given the opportunity to extract a portion of their daughter’s dower for themselves by simply purchasing a jihaz of a lesser value than the dower given to them. This type of embezzlement is easily concealable, since detection by the court would involve having to value every item of the jihaz purchased by the parents. Further, the common, legally permitted, practice of establishing “secret” and “public” dowers in Egypt makes the judicial detection of embezzlement by guardians and parents even more difficult as, in addition to ascertaining the value of the jihaz, the parents and guardian of the wife could also dispute the size of the actual dower. Moreover, considering that the wife’s claim to the dower occurs at divorce – when the husband is unlikely to have much of an incentive to act cooperatively with her – proving embezzlement by parents and guardians by the wife is likely to be costly and difficult.
As noted by the scholar Ron Shaham’s excellent study of decisions made by the Egyptian court system between 1900 and 1955, this type of embezzlement from wives by their guardians was fairly common:

Even when a dower was specified, usually in exogamous marriages, a wife often did not receive it because her guardian did not bother to involve her in the marriage arrangements and took possession of her dower. Few women consequently rebelled against this patriarchal state of affairs by demanding in court that their husbands or their guardians pay them arrears of prompt dower...[However,] few guardians admitted in court their receipt of a wife’s dower; others categorically denied it and were found by the court to be hiding the truth. Consequently, a guardian usually explained that according to prevailing custom he had used the dower, supplemented by an additional sum from his own resources, to purchase his ward’s jihaz.76

Similar to Egypt, in Somalia, the dower is legally the possession of the wife. However, amongst Somalia’s nomadic population, which represents 70% of the country, the husband provides the father of the bride 10 to 20 camels on average upon execution of the marriage.77 From an economic perspective, the de facto result of this type of payment is the same as if the father of the bride was legally entitled to a proportion of his daughter’s dower. Simply put, the husband has a total amount he is willing to pay to obtain the daughter’s hand in marriage. The more he pays to the father, the less he will have to give to the daughter as a dower. Thus, the father can still be seen as receiving a proportion of his daughter’s potential dower. The majority of the Classical Jurists understood that allowing a side-payment from the groom to the bride’s parents would have the same economic effect as allowing the parents to merely take a proportion of their daughter’s dower and discussed this issue at length.78 Consequently, in most of the Muslim world outside of Northern Africa and under most SOF the parents of the bride are strictly prohibited from receiving any payment or gift from the husband for the marriage. However, in those countries where clitoridectomy is practiced, fathers frequently receive a proportion of their daughter’s dower through a side-payment from the groom.

Regardless of the precise means of how their payment is received, in every society I have studied where parents are given a proportion of their daughter’s dower, clitoridectomy is found as well. From an economic perspective, by being allowed to receive a proportion of their daughter’s dower, parents could ensure that their daughter would have enough to perform the necessary preparations for marriage.

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76 Ron Shaham, FAM LI AND THE COURTS IN MODERN EGYPT 29 (1997)
these parents are provided an incentive to increase the size of that dower as much as possible. In turn, these parents react to that incentive by excising and infibulating their daughters. However, depending on the society, the total proportion or amount parents are able to receive from their daughters dower can be subject to a wide degree of variance. These differences are therefore important to note since, in examining clitoridectomy rates on the national or regional level, the size of the parental incentive to engage in this practice is likely to be dependant on the size of the sum, or proportion of the dower, these parents can expect to receive in exchange for excising or infibulating their daughters. The higher dowers are likely to be and/or the larger the potential proportion of that dower the parents are able to receive, the more likely it is that they will infibulate or excise their daughters. So, for example, in rural Egypt, where dowers tend to be higher than in cosmopolitan areas, clitoridectomy occurs at a higher rate. Meanwhile, in Libya, where the dower is the property of the wife and the wife alone, clitoridectomy does not occur at all.

Behavioral & Neuroeconomics and Clitoridectomy Rates

Even though I have written more extensively on the behavioral and neuroeconomics of the IMDS and the AMDS in previous work, this article has been based upon a traditional, neoclassical economic assumption that clitoridectomy is the result of the choices made by rational economic actors and occurs independently of the beliefs of those actors. However, that premise can only take us so far. Thus, a comment on how the relative degree of trust in different Muslim societies may explain some of the variance in clitoridectomy practices among them is necessary.

As numerous neuroscience and neuroeconomic studies have demonstrated, affiliative bonding between humans involves the exchange of trust. Most relationships – marriage in particular - are built on trust. As neuroeconomists such Paul J. Zak have demonstrated, trust can be understood as a type of social currency where, the greater the level of trust between the members of a society, the lower the transaction costs of exchanging goods and services in that society and the greater its level of development is likely to be. Simply put, transactions and economies operate a lot more efficiently if

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79 Ron Shaham, FAMILY AND THE COURTS IN MODERN EGYPT 29 (1997)
80 See Abdullahi A. An-Na’im, ISLAMIC FAMILY LAW IN A CHANGING WORLD (1992).
individuals do not feel the need to constantly take precautions to prevent themselves from being taken advantage of.

The widespread refusal amongst the men of a given society to marry women who have not had a clitoridectomy is a comment upon the degree of trust men have in women and their beliefs regarding female trustworthiness. Interpersonal trust levels may then help to partially explain the relative prevalence and severity of clitoridectomy practices in different Muslim societies. The less men and women trust each other, the likelier it is that both will engage in taking a high level of precaution to protect their interests regardless of their actual level of risk. Therefore, the likelier it is men will have a strong preference for excised or infibulated brides.

In addition to interpersonal trust levels, the relative levels of trust found in a society towards its civil institutions may also help to partially explain the relative prevalence and severity of clitoridectomy in different Muslim societies. The likelier it is that individuals believe they will receive justice and protection from their legal systems, the less they will need to take extra-legal precautions to protect themselves.

Even though these factors are slightly outside the scope of this article, they represent a valuable area of potential research. Based on preliminary comparison of rankings from Transparency International’s Perception of Corruption Index and clitoridectomy prevalence rates in Islamic Northeastern Africa, a moderate correlation appears to exist between the two. In short, when individuals do not trust their civil institutions because they are perceived as corrupt, then it is likelier that the men in those countries will take precautions to protect their interests outside the law by seeking excised or infibulated brides.

Additional Considerations and Common Contentions

While I do not presume to be able to predict every possible critique of this article’s findings, in discussing this article with individuals who are unacquainted with the IMDS, a common contention has been that, based on popular perception and media representations of Muslim society, it would appear

that women in Muslim society are frequently divorced against their will and do not seek divorce as often as men. Consequently, some readers may believe that the IMDS does not appear to create an incentive for divorce amongst women. In regards to this potential concern, I have two arguments.

My first argument is that, by the time a formal divorce actually occurs, it is exceptionally difficult to tell who caused a marriage to fail. At the end of every marriage, there is normally plenty of blame, accusations of marital malfeasance, and recriminations to go around for both spouses. Moreover, there are fairly sizeable economic incentives for a wife who has been divorced to always proclaim that the divorce was against her will. Specifically, if the divorce was by mutual agreement (or “Khul”) then, in most SOF, the wife will be required to disgorge the value of her dower to her husband. In short, if the wife does not claim the divorce was against her will – she risks losing her dower.

My second argument is that, even assuming that men do in fact seek divorce more frequently than women in Muslim societies, such a fact does not tend to disprove that the IMDS produces economic incentives for divorce amongst women. Instead, such a fact simply demonstrates the high-degree of efficacy of the extra-legal customs written about in this article (i.e. clitoridectomy, consanguineous marriage, extensive veiling and seclusion, etc.) in deterring women from seeking divorce. In short, the fact that women do not seek divorce as frequently as men simply demonstrates that customs such as clitoridectomy do, in fact, work. If the opposite were true – if these customs did not work – then women would be likely to seek divorce as frequently or, as is now the case in America, more frequently than men. In other words, the fact that the women in these societies file for divorce less frequently than men tends to prove the model presented in this article.

PART III: Eliminating Clitoridectomy

As a number of scholars have pointed out, many excised and infibulated women believe themselves to be better off as a result of having a clitoridectomy. Subsequently, these scholars argue that arguments by western activists against the practice are weak and are rooted in an ethnocentric

belief that those engaging in the practice are inherently immoral simply because they engage in a practice that defies the West’s cultural and sexual norms. According to these scholars, arguments against the practice are, therefore, often little more than propaganda to be used by the West to justify its continued imperialism over the East.

As someone who is of mixed Chinese and European ancestry, and has lived and worked in both the East and the West, I am sympathetic to the arguments of these scholars to a certain extent. I too am highly skeptical of western activists who argue that the West has a right to interfere with other cultures based purely on subjective moral judgments of those cultures’ practices. Body modification is nothing new in the West – people voluntarily get parts of their body tattooed, pierced, enlarged, reduced, bleached, darkened, inlaid with gold/platinum/diamonds, and/or have their genders reassigned all the time – but rarely is the type of vociferous language used against clitoridectomy ever applied to these types of practices. Rarely does one hear tattooing or the choice to pierce one’s penis referred to as “oppressive” or “evil”. Consequently, I also agree that, when discussing the practices of other cultures, all scholars – including myself – need to be cognizant of potentially engaging in ethnocentrism and that arguments against clitoridectomy based on “moral” reasoning and purely subjective valuations of the practice are especially prone to this type of bias.

However, simply because I do not wish to automatically condemn clitoridectomy as inherently immoral does not mean that clitoridectomy should not be eliminated. In fact, the position of this article is that it should – but the reasons clitoridectomy should be eliminated can be understood on efficiency grounds, and not due to any type of moral judgment regarding those who engage in the practice. Specifically, when it comes to clitoridectomy, there are two major indicators that the practice is likely to be highly inefficient and, thus, should be eliminated.

First, the major costs of clitoridectomy are primarily borne by the women upon whom it is practiced and not by those who receive its benefits. It is these women who experience the pain of the procedure and face the danger of death, sterilization, and long-term medical issues – not their parents or their future husbands who ultimately benefit from the practice. From an economic perspective, this suggests that the true cost of clitoridectomy is not being fully represented by the market and so the supply (prevalence) of the custom is likely to be inefficiently high.

85 See generally, Pamela Abbott, Claire Wallace, Melissa Tyler, AN INTRODUCTION TO SOCIOLOGY: FEMINIST PERSPECTIVES 47-51 (2005) (discussing Post-Colonial and “Black” feminist critiques of the assumption by white feminists that clitoridectomy is necessarily oppressive towards women).

86 Id.
Second, clitoridectomy is not a product of voluntary choice. Clitoridectomy is practiced on women when they are still children and are dependant on their parents for survival. These children cannot simply choose to leave home if they do not wish to be excised or infibulated. In most of the societies where clitoridectomy is found, the choice of a child to leave home includes a substantial risk of starvation. Clitoridectomy is therefore a product of coercion. The fact that adult women, who no longer depend on their parents for support, generally do not engage in the practice (unless they are married, have children and are, therefore, dependant on their husbands for survival) demonstrates that clitoridectomy is not a product of voluntary choice. If it were a product of voluntary choice, then the rates of clitoridectomy amongst adult women would likely be as high as that of children.

Against the fact that women in these societies do not choose to pursue clitoridectomy for themselves when they are adults, it means little that women who have already received a clitoridectomy may believe that they are better off for having received one. Rational choice theory predicts such a response. Individuals will always make choices that maximize their benefits and minimize their costs – including generally adopting whatever set of beliefs is likely to lower their non-pecuniary and emotional costs. Since there is no way to reattach their missing clitoris, many of these women are better off by adopting beliefs that minimize the emotional costs of that loss. Therefore, regardless of the self-reported beliefs of these women, because the choice of these women regarding clitoridectomy is a product of coercion and not voluntary choice, rational choice theory states that the practice will likely be inefficient.

Arguing that clitoridectomy should be eliminated because it is inefficient may not have the same romantic allure as a rallying cry to eliminate the practice because it is immoral or violates human rights. However, it is necessary to avoid the dangers of ethnocentrism and demonizing those who engage in the practice. The people who engage in the practice are not evil. They are people, like any group of people, who are trying to do their best to survive with the choices they have available to them. The fact that they react to economic incentives does not necessarily make them any less moral. In places of extreme scarcity, which includes many countries within Africa, the choice to excise or infibulate one’s daughter in order to increase your future dower payments may frequently be an act of necessity and not due to any type of moral deficiency.
To illustrate this last point, imagine a man needs a crucial loan to feed his family or provide his children urgent medical care. If a lender can be more assured that the man’s daughter will receive a relatively high dower, and that the man will receive a portion of that dower, the lender will be likelier to provide the needed loan. Consequently, if the man chooses to excise his daughter under these circumstances, is his act immoral? I do not mean to suggest that clitoridectomy is always a product of this degree of scarcity or that the choice to engage in the practice is always this stark, but only that passing sweeping, moral judgments on large groups of individuals without attempting to understand their underlying motivations does more harm than good.

Previous Attempts to Eliminate the Practice:

For the last several years, various African states have attempted to eliminate clitoridectomy by outlawing the practice. As noted by a number of academics and researchers, the effect of the vast majority of these laws is that it has simply pushed the practice underground, where the practice carries much greater risks. Similarly, attempts by activists and governments to eliminate the practice through advertising campaigns and grassroots activism have been largely unsuccessful. Based on the model outlined in Parts I & II, this result is predictable. As previously stated, the “beliefs” of individuals in a given society about clitoridectomy have little to do with whether it is practiced. Consequently, attempts to re-educate individuals about the practice and towards a particular way of thinking are unlikely to have much of an effect. The root cause of clitoridectomy is not merely “cultural.” It is not akin to the Chinese practice of publicly spitting to release bad “energy,” or the American use of fireworks to celebrate their independence, which can be significantly controlled and reduced through direct legislation and education. Rather, the demand for clitoridectomy practices is deeply rooted in the relative economic incentives and degree of protection the IMDS creates for men and women.

Considering that clitoridectomy significantly correlates with dower size, one potential method to reduce clitoridectomy is to eliminate the dower system completely. Without the payment of dowers by husbands to wives, the incentives for wives to seek early termination of the marriage will be reduced
and, thus, so will the male need for customs such as clitoridectomy as a protection against the risks facing them under the IMDS.

While at first glance this solution may appear like a good idea, practical constraints restrict its potential utility as a goal for those interested in eliminating clitoridectomy. The dower system is a central piece of the IMDS. Eliminating it would be akin to eliminating the entire system. Consequently, it is unlikely that the type of popular support in the Muslim world required to so fundamentally change the marriage and divorce system will be appearing any time soon.

Moreover, even assuming, arguendo, that such an elimination were possible, what would remain in its place would be a system where property divisions and divorce settlement negotiations occur at the end of marriage amidst the extensive involvement of third-parties, high transaction costs and/or a lowered marriage rate. Therefore, eliminating the dower system would involve the de facto imposition of an American or European system in its stead, which from an economic perspective – and beyond the disturbing ethnocentric implications of promoting such a notion – has plenty of problems of its own. Therefore, the remainder of this article will only consider various means of eliminating clitoridectomy based on the use of legal rules already found in different portions of the Muslim world and within the Islamic legal system itself.

**Outlaw Polygamy**

One method of reducing clitoridectomy without attempting a complete overhaul of the IMDS would be to simply reduce dower size by outlawing polygamy – which many Muslim states have done to varying extents. However, the practical consequences of such a move are, at best, unlikely to work or, at worst, could produce equally problematic externalities.

Put frankly, polygamy is found mostly in impoverished, agrarian areas of the developing world for a reason. In these societies, female labor in the formal market is frequently less valuable than male’s. Women cannot carry as much, work as long in the field and cannot be put into fulltime work as early boys. Unlike the technologically advanced West, where a wide variety of jobs exist in which
physical strength is relatively unimportant, the women in these societies do not have the same set of options in whether to specialize in domestic or market production. Receiving property and capital through marriage and childrearing represents one of the few options these women have to survive and accumulate wealth. Lowering the degree to which these women can profit or receive economic protection from the marriage and divorce system by lowering their dowers is unlikely to improve the situations of these women very much. More importantly, there is also a substantial question about whether or not women under the IMDS will even be willing to have polygamy outlawed in the societies where it is practiced.

As it is in the AMDS, marriage in the IMDS is a contract voluntarily entered into by both spouses. Under both systems, women cannot be legally “forced” to marry someone they do not wish to. Moreover, under most SOF, women can choose to have the ability of their husbands to take additional wives restricted through the marriage contract. Thus, laws outlawing polygamous unions are a restriction on the contractual autonomy of both men and women. From an economic perspective, restricting the contractual autonomy of individuals is likely to produce inefficient results. Because individuals are rational maximizers, social utility is maximized when these individuals are given the freedom to pursue their preferences. Laws that prohibit marital choice are therefore likely to be inefficient.

For instance, if a woman in a given African village has the choice of either being 1) the second wife to a wealthy, pleasant, and otherwise attractive, merchant or clan chief, or 2) the only wife of a poor, physically unattractive farmer with an anger problem, she may very well prefer choice number one. Such a woman may not be particularly eager to have her marital opportunities limited to the angry farmer through a law outlawing polygamy. Therefore, it seems likely that, much like laws prohibiting clitoridectomy itself, the women in societies where polygamy is frequent, may simply choose to ignore such a prohibition and move the practice underground where their rights to property may receive less protection from courts.
Additionally, as I have discussed more extensively in other work, from a Malthusian perspective, laws outlawing polygamy can be highly problematic in the developing world – particularly in Africa.\textsuperscript{87}

**Increase Market Substitutes**

Another alternative is to develop the use of market substitutes to clitoridectomy by giving veiling and seclusion practices the force of law, or by encouraging consanguineous marriage and/or the marriage of child-brides to older men.

The obvious problem with these approaches is that all these customs come with their own social-costs or, in the case of veiling, are unlikely to produce much of an effect on their own. Seclusion practices deprive the market of female labor and limit the ability of women to increase their human

\textsuperscript{87} As noted by distinguished legal scholar, Judge Richard Posner, laws outlawing polygamy are primarily intended to benefit poorer, younger men who cannot afford to support as many wives. (See Richard Posner, ECONOMIC ANALYSIS OF LAW 159, 1992.) Therefore, the effect of outlawing polygamy is that it transfers the quantity of wives and reproductive opportunities from wealthier men to poorer men. When it comes to the developing world, reducing the ability of women to marry wealthier men is therefore likely to create significant problems by increasing both population density and the relative degree of poverty amongst the lower classes. This result occurs because, as has been noted by a number of economists, the poorer a couple is, the greater their incentive to reproduce in order to obtain additional labor from their children and support in their old age. Consequently, outlawing polygamy will increase the number of reproductive opportunities poorer men are likely to have, thereby increasing the number of individuals in that group. That this occurs can be demonstrated by the fact that, as many scholars have noted, polygamous societies tend to reproduce at a significantly lower rate than non-polygamous societies. (See H.V. Muhsam, Fertility of Polygamous Marriages, POPULATION STUDIES, July 16, 1956.)

Increasing the reproductive opportunities of poorer men is problematic as, even though these poorer men are likely to personally benefit from having additional children, their present children are unlikely to receive much, if any, benefit from their parents’ decision to have additional children. Whatever long-term gains the children stand to inherit from their parents’ choice to have additional children is also divided amongst a larger group of people. To those with a background in law and economics, the problem can be seen as a type of “tragedy of the commons.” By reproducing heavily, individuals of one generation stand to garner increases in their personal wealth and support in their old age, even though the costs of their activity will be borne by the next generation who, in the case of the family farm (where this phenomenon has been studied the most and where its consequences are most devastating), must now divide smaller and smaller plots of land.

As noted by many scholars such as Jared Diamond, in the context of Africa in particular, these problems frequently lead to issues of genocide. (See COLLAPSE, Chapters on Rwanda, 2005). Specifically, prior to the genocide, Rwanda and Burundi had the two highest population densities in Africa, which, as demonstrated by Professor Diamond, played a significant role in leading to the outbreak of civil war. As I have argued here and in previous work, this result is unsurprising considering that both Rwanda and Burundi are primarily Christian nations where polygamy is highly uncommon. Consequently, population growth in both countries is amongst the highest in the world (see CIA, WORLD FACT BOOK, 2007). See Ryan Riegg, The Economics of Islamic Marriage and Divorce Law, (UCLA Law, Working Paper, 2006).
capital. Consanguineous marriage can have severe genetic costs over time. Sex with premenstrual
girls can cause physical damage to these women that may be, in some cases, as bad as clitoridectomy.
Consequently, increasing existing market substitutes for clitoridectomy is unlikely to have much of a
positive effect.

**Increase Wives’ Incentives to Stay Married Through Islamic Inheritance Law**

The passages on inheritance begin with the following Surah: “From what is left by parents and
those nearest related there is a share for men and a share for women, whether the property be small or
large, a determinate share.” After several Surahs on orphans warning those disposing of their estates
not to leave behind children without taking care of them, and discussing compensation for the trustees
of orphans (as well as warning those trustees that they will burn in hell if they commit embezzlement)
Surah 4.11 then reads:

Allah enjoins you concerning your children: The male shall have the equal of the portion of two
females; then if they are more than two females, they shall have two-thirds of what the
deceased has left, and if there is one, she shall have the half; and as for his parents, each of
them shall have the sixth of what he has left if he has a child, but if he has no child and (only)
his two parents inherit him, then his mother shall have the third; but if he has brothers, then his
mother shall have the sixth after (the payment of) a bequest he may have bequeathed or a
debt; your parents and your children, you know not which of them is the nearer to you in
usefulness; this is an ordinance from Allah: Surely Allah is Knowing, Wise.

Surah 4.12 subsequently reads:

And you shall have half of what your wives leave if they have no child, but if they have a child,
then you shall have a fourth of what they leave after (payment of) any bequest they may have
bequeathed or a debt; and they shall have the fourth of what you leave if you have no child,
but if you have a child then they shall have the eighth of what you leave after a bequest you
may have bequeathed or a debt; and if a man or a woman leaves property to be inherited by
neither parents nor offspring, and he has a brother or a sister, then each of them two shall
have the sixth, but if they are more than that, they shall be sharers in the third after any
bequest that may have been bequeathed or a debt that does not harm (others); this is an
ordinance from Allah: and Allah is Knowing, Forbearing.

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88 See Howard Schneider, *Saudi Intermarriages Have Genetic Costs*, WASHINGTON POST FOREIGN SERVICE
(Sunday, January 16, 2000): http://www.library.cornell.edu/colldev/mideast/saudmarr.htm
Given that the placement of Surah 4.11 directly follows a discussion of orphans, and the conspicuous absence of any mention of spouses in Surah 4.12, it would seem to be a reasonable assumption that Surah 4.11 is only applicable in cases where a decedent does not leave behind any spouse. (Especially since Surah 2.182 provides that Muslims should leave their parents some type of bequest when they fear death, suggesting that the parents otherwise may not always be provided for under Surah 4.11.)

This assumption is especially strong considering that Surah 4.12, which directly follows Surah 4.11, then immediately begins with a direct discussion of spousal inheritance rights. Consequently, one could argue that the Surahs provide what can be understood as two different schemes for the distribution of property depending upon a decedent's marital status at the time of death. Surah 4.11 applies when there are no surviving spouses and Surah 4.12 applies when there is a surviving spouse. Lawyers from every legal system should recognize this type of basic statutory organization. When dealing with complex areas of law, especially in the area of wills and estates – where there are often wide variations in factual circumstances and parties to a disposition of property – most legal statutes are written in this manner. Specifically, they are separated according to some type of basic or broad factual condition – i.e. whether a decedent left behind any spouses – and then broken down even further based on additional factual circumstances.

Assuming that Surah 4.11 and Surah 4.12 can be understood as two separate distributional schemes – and given that under the IMDS men are allowed up to four wives and that Surah 4.12 provides that a wife is entitled to a quarter of her husband’s estate – the easiest and seemingly most logical reading of Surah 4.12 would be to simply assume that each surviving wife should therefore be entitled to a quarter share of her husband’s estate with any residue or remainder divided according to the husband’s testamentary wishes. (Or, in cases of intestacy, the latter half of Surah 4.12.)

In other words, based on this proposed interpretation of Surahs 4.11 and 4.12, if a husband died with four wives and no children, his wives would completely divide his estate equally between them. If the husband died with one wife and no children, one quarter would belong to the wife and three-quarters would be divided according to the husband’s testamentary wishes or, in cases of intestacy, according to the latter half of Surah 4.12 (i.e. it would pass to the decedent’s siblings). Unfortunately, the Surahs 4.11 and 4.12 have never been read in this manner.
Despite the fact that Quran dedicates lengthy passages to the subject of inheritance and how estates are to be divided, most Muslims treat these passages as if they are merely advisory rather than mandatory. Consequently, in much of the Muslim world, estates are often distributed entirely by intervivos and testamentary instruments similar to those found in the West, or by negotiated premarital agreements where inheritance rights are considered part of the wife’s dower.  

Additionally, even when some SOF have attempted to interpret Surahs 4.11 and 4.12 as mandating compulsory distributions, despite the fact that the beginning of the Quran’s entire discussion of inheritance appears to strongly imply that the Islamic inheritance regime is intended to be one of children inheriting from parents – and not the other way around – parents are generally provided a substantial proportion of their decedent-child’s estate regardless of whether or not the deceased left behind a spouse.  

Further, traditionally under a number of Sunni SOF, the presence of a male agnatic heir often limits the maximum proportion of the estate a wife is entitled to receive. As some scholars have theorized, these traditional interpretations of the inheritance Surahs are largely a consequence of extensive efforts by men in Muslim societies who wished to have the Quran’s inheritance regulations read as flexibly as possible in order to protect their economic interests. Specifically, by developing legal rules that prevented fragmentation of the family’s economic unit and preserved tribal inheritance rules through a flexible reading of the Quran, men and male agnates were given a substantial economic benefit over wives and women in the realm of inheritance law.

From an economic perspective, these traditional interpretations of Surah 4.11 and 4.12 operate to transfer of wealth from a decedent-husband’s wives to the husband’s parents and male agnates. As will be discussed in greater detail, one effect of this wealth-transfer is that the incentive for women to enrich themselves through the dower system is significantly increased and, thus, so is the need for men to engage in practices such as clitoridectomy in order to protect themselves.

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However, in addition to increasing the likelihood that women will have an increased incentive to enrich themselves through the dower system, these traditional interpretations of the inheritance Surahs also increase the incentives for many Muslim women to reproduce as frequently as possible. As many scholars have noted, since many women in a number of Muslim societies may often have fewer profitable job opportunities available to them due to social constraints and a lack of economic development, the effect of such a wealth transfer through inheritance law tends to increase the incentive amongst poorer women to reproduce as frequently as possible as a means of saving. Specifically, for these women from poorer families, the traditional interpretations of Surahs 4.11 and 4.12 create a substantial incentive to reproduce as frequently as possible once married in order to have sons from whom they will be able to receive financial support if widowed. From an economic perspective, increasing the incentive amongst poorer women as a means of obtaining financial security to reproduce produces significant externalities. Excessive population growth in many Muslim countries is extremely problematic and providing women an increased incentive to engage in reproduction as a means of achieving financial security is likely to inhibit economic growth by, effectively, keeping half of a society’s population (i.e. women) out of the formal workforce.

However, if the traditional interpretations of the inheritance Surahs were abandoned, and Surahs 4.11 and 4.12 were instead read to create a strong legal presumption that each surviving wife is entitled to a minimum of one quarter of their husband’s estate regardless of the presence of a male agnate – and that the husband’s parents are presumed to be entitled to none of the estate – wives would, on average, stand to inherit a far greater proportion of their decedent-husbands’ wealth and would be less likely to rely on reproduction as a means of obtaining financial security.

In terms of eliminating clitoridectomy, to the extent that men would wish to increase the amount of property over which they would be able to assert testamentary power, men would, ostensibly, react to this change in inheritance rules by taking fewer wives and lowering dowers. In turn, as discussed previously, lower dowers will tend to lower the incentive of wives to seek divorce and, consequently, the incentive for men to protect themselves against this risk through customs such as clitoridectomy.

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93 Annelies Moors, **WOMEN, PROPERTY AND ISLAM** 60-62 (1995).
More importantly, regardless of whether or not men would reduce dowers in reaction to an increase in the proportion of their estate their wives would be entitled to under Islamic law, the proposed change in the interpretation of Islamic inheritance rules would still have an effect of lowering the incentive amongst men to seek excised or infibulated brides. So long as women stand to inherit a significant portion of their husband’s estate, their incentive to seek divorce as quickly as possible will be reduced. Simply put, all other factors being equal, if a wife stands to gain a relatively small dower from a divorce, but would lose out on receiving a sizable inheritance from her husband as a result, she is likelier to choose to stay married. Consequently, by reinterpreting these rules in the proposed manner, wives would have an increased incentive to ensure that their marriages will last until death and men will have less of a need to protect themselves through the use of customs such as clitoridectomy.

Unfortunately, even though a reinterpretation of the Surahs 4.11 and 4.12 would be useful in eliminating clitoridectomy, it seems unlikely that such a reinterpretation is likely to take place. While wide variations on issues of inheritance do exist amongst the various SOF, no SOF has embraced the type of interpretation proposed here. Consequently, since no legal precedent for this type of proposed interpretation currently exists, the entrenched economic interests of men and parents who ultimately benefit from the traditional interpretations of the inheritance Surahs will likely to be too strong to overcome.

**Eliminate the Parental Incentive**

Given the problems with the potential solutions above, the most efficient and pragmatic method for eliminating clitoridectomy would be to bar parents from receiving any proportion of their daughters’ dowers through the adoption of legal rules that specifically consider the dower solely to be the wife’s property and prohibits any side-payments by a groom to the wife’s parents.

The advantage of this approach is that it replaces the current legal rule in those countries practicing clitoridectomy with the more common, and Classical, Islamic legal rule preventing parents from receiving any portion of the dower. Consequently, Muslims in countries with a high clitoridectomy rate are unlikely to consider the switch to such a rule to be particularly offensive or objectionable. In short, such a rule is likely to meet less resistance and will be far easier to enforce.
Nonetheless, even though this approach lacks many of the issues and externalities of the other proposed solutions, there are some potential problems. Specifically, one of the benefits of allowing parents to receive a portion of the dower in agrarian societies is that it creates an incentive for the parents not to kill their female infants. Unlike China and India where there is no such incentive, and where millions of female infants have been killed over the last few decades, female infanticide in the Muslim world is far lower, if not absent entirely. By reducing the ability of parents to materially profit from the marriage of their daughters, families in agrarian societies of the Muslim world will therefore have an incentive to kill their female infants.

However, even though reducing the ability of parents to materially profit from the marriage of the daughters may increase the pecuniary incentive for parents to kill their female infants, there is a question of how much time it would take female infanticide to emerge in the Muslim world, or whether it would emerge at all. A significant portion of Muslim identity is based on the idea that Islam greatly improved the position of women by, most significantly, eliminating the practice of female infanticide. This belief is firmly held and rooted in religious tradition and is a point of pride for many Muslims. It therefore seems unlikely that the practice of female infanticide would appear quickly in Muslim society, even if the economic incentive for parents to keep their female children were reduced by a law outlawing their ability to receive a portion of their daughter’s dower. Therefore, my hope in recommending this shift is that, in the time it would take for female infanticide to begin to take root in a given Muslim society, the economy of that society will have developed sufficiently to the point at which female infanticide is unlikely to occur.

Conclusion:

I do not necessarily see a conflict between those who wish to study the Islamic Law as Muslims and those who wish to study Islamic Law as economists. Both start with a basic belief that the rules within a system of law will tend to be rational – that, underneath the surface, there is an underlying logic to why certain laws exist and how they operate together. Both reject Orientalist and

ethnocentric notions that Islamic legal rules, such as those creating property rights for women, were created by accident or that millions of people must be irrational for failing to adopt Western legal systems.

Moreover, I believe strongly that many of the early and Classical Jurists had an economic view of the law. If there has been one historical constant in the Middle East it is the presence of the Souk - giant markets, often built out stone or carved out of the sides of mountains, most of which have been in constant use for thousands of years. Almost every major city in the Middle East has its own ancient Souk since – as the geographic nexus of trade routes from Africa, Asia and Europe – the Middle East has been a hub of international trade for generations. By the time the Islam began to emerge, the type of free trade that gave birth to a dominant merchant class in Europe – and, subsequently, classical economic theory – had already been present in the Middle East for millennia. Consequently, I believe that it to be ethnocentric to assume that the type of conditions that created the birth of economic theory in the West would not have had the same effect in the Middle East during the birth of Islamic jurisprudence. Especially since, during the Early and Classical periods of Islamic law, the affluent class, from which many of the earliest and classical Jurists of Islamic law emerged, was the merchant class and even the Prophet himself was from a merchant family. Consequently, my hope is that, by re-adopting a law and economics approach to Islamic Jurisprudence in the present, Muslims may be able to unlock some of the Islamic legal system’s vast potential and recapture some of the original intent and understanding of its rules.

As an American and recent law school graduate, my other hope is that American legal-scholars and policy-makers who read this article will gain some insight in regards to the AMDS and some of the potential long-term effects relatively recent changes to that system may bring.

From a legal perspective, marriage is a contract and when it comes to negotiating and forming any contract, issues of uncertainty must be dealt with to prevent opportunism before otherwise efficient exchanges may take place.95 Most of the time, uncertainty can be reduced through the use of formal contracting mechanisms, which typically enable otherwise efficient exchanges to take place by reducing the cost of obtaining vital information. For instance, contingent contracts enable parties to engage in otherwise efficient exchanges by delaying the exchange of consideration until the cost of vital

information has dropped (e.g. delaying payment until it has become clear how many widgets have been or will be sold). Similarly, vertical integration contracts reduce the cost of obtaining information by removing the barriers between firms.

However, when dealing with a relationship like marriage – where how long the relationship will last is highly uncertain, the parties' needs and wants may shift dramatically over time, where ownership of property becomes increasingly less clear the longer the relationship lasts, and where the expectations and value each party places on continuing or terminating the marital relationship can vary immensely – uncertainty cannot be reduced by formal contracting mechanisms. Abstracted to their most essential forms, the major task of any marriage system then is where, in the course of the contractual relationship, uncertainty is placed.

As discussed previously, the AMDS generally places uncertainty at the end of the relationship, while the IMDS places bargaining at the beginning of the relationship. Specifically, the emphasis in the IMDS is on the prenuptial agreement. Under the IMDS, entering into marriage frequently begins with a formal negotiation, which is then reduced to writing, and then signed by the parties to the marriage. Even as a matter of tradition, in most Muslim countries there are typically two major family celebrations in regards to marriage: the engagement, which involves the signing of the prenuptial agreement between the potential spouses, and the marriage itself.

In contrast, in the AMDS, most spouses enter marriage without any type of formal prenuptial agreement whatsoever and the relative value of marriage and divorce to each spouse is only considered at dissolution. However, as a matter of law – that trend has started to change. The modern trend in the AMDS has been to vest greater legal authority in prenuptial agreements. Couples may now bargain into their prenuptial agreement far more than they were allowed to 20 years ago. For instance, in many states previously, couples could not write prenuptial agreements nullifying a spouse’s right to alimony following a divorce. However, today, eliminating the right to alimony between spouses has become highly commonplace in most prenuptial agreements. Additionally, in most states, the presumptions created by a signed, prenuptial agreement are extremely difficult to rebut. Consequently, by increasing the legal emphasis placed on prenuptial agreements, the AMDS has started to shift towards the IMDS in regards to where uncertainty in the contractual relationship is placed. From a traditional economic perspective, it is unclear what the long-term effects of this shift may be and
economists have debated the issue widely. Consequently, the IMDS provides a good case-study for considering what those effects are likely to be by providing scholars studying the AMDS a point of comparison.

On a final note, this article is dedicated to the memory of my grandmother. My great-grandfather converted to Islam in 1901 and, by the age of 25, had taught himself Arabic and translated the Quran. His passion for learning about other cultures, and belief that religion should expand minds rather than limit them, was passed on to my grandmother who, during a time when women rarely went to college, obtained a Masters from Berkley and spent much of her life studying the different religions of the world and finding value in them all. Theirs is a tradition that I hope to emulate and is the spirit this article is written in.
Appendix

Clitoridectomy and the Economics of Islamic Marriage & Divorce Law

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Risk

- Low Dower X Low Divorce & Remarriage Rate
- Low Divorce & Remarriage Rate X High Dower OR
- Low Dower X High Divorce & Remarriage Rate

No Clitoridectomy

- Infibulation (Includes Excision)
- Excision Only

Low Dower X Low Divorce & Remarriage Rate

- Esa SOMALI
- Afar
- Berti
- Ruka’a
- Baggara
- Shaqiyya
- Hadendoa
- Bisharin
- Beni Amer
- Ababda
- Beja

Somali/Ogaden

- Meidob

Fulani (Nigeria)

- Tungur Masalit
- FUR

Rwala Saudi A.

AlMurrah (Saudi A.)