Two Models of Medieval Jewish Marriage: 
A Preliminary Study

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Introduction
The contemporary plight of the agunah, the Jewish woman ‘anchored’ or ‘chained’ to a dead marriage, has led to increased interest in the details of Jewish divorce. As was to be expected, the laws and practices of Jewish divorce differed over time and place, especially as the Jewish diaspora widened in the early medieval period. The central aim of this article is to argue that this variety is rooted in differing conceptions of marriage. Issues such as the role and obligations of each spouse, the ends which the marital state served, and when the marriage could rightly be deemed ‘over’ emerge as constellations of law and lore which appear to revolve around varying views as to the nature of marriage and how it is formed. In a word, law or other practices are the phenotype of an underlying ‘genotypical’ conception of marriage, whether in the mind of the jurists or prevailing in the society as a whole. How communities and scholars dealt with specific problems, indeed whether they saw a situation as a problem at all, is ineluctably a consequence of thinking within such models.

In this paper, I will examine two medieval examples that serve as rather integrated conceptions of marriage: one that emerges from the Near East (Persia, Palestine, Egypt) and the other from northern Europe. Ideally, one would cast a relatively wide net to explore a variety of sources, both legal and non-legal, to ensure that the particular conception truly reflects the model of marriage prevailing in a specific society. However, given the limits of space, we will focus this preliminary study on the legal texts available to us, as these too (and perhaps especially) develop along paths of increasing coherence. Moreover, the particular medieval Jewish view must be located within the broader cultural and historical context, be it Muslim or Christian, in which it was articulated. At the most basic level, the different social and political reali-

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1 The author would like to thank Michael Broyde of Emory University’s School of Law for his careful review of earlier drafts of this article. The responsibility for the final form, of course, lies completely with the author.


3 For the purposes of this paper, I will be using the terms ‘conception’, ‘notion’, and ‘view’ somewhat interchangeably.

4 I intend to develop the other manifestations of each conception in an upcoming book.
ties created for Jews by their hosts had a profound impact on Jewish marriage practices. But even in merely cultural terms, the 'competitive' nature of Judaism's relationship with these religious traditions renders it highly probable that the reality outside the Jewish community had some impact on internal views. In the course of this article, these will be raised primarily as suggestions for further enquiry.5

Given medieval Jewry's reliance on the Talmud as its primary (if not exclusive) source of Jewish law and practice, it is necessary to begin by outlining in some detail some of the rules and grounds for marriage and divorce that are contained in the rabbinic corpus. After the talmudic period, we witness an emerging diversity, owing to both the increasingly wide geographic range of Jewish settlement, and the absence of a broad centralized authority or institutional network which might unify the various and discrete communities and their norms.6 For the purposes of this article, the 13th–14th centuries, with their growing instability for Jewish life, will serve as our terminus ad quem.

I. Talmudic Law and Principles

The Babylonian Talmud, redacted in the 6th–7th centuries C.E., served as the basis for all subsequent legal discussion in Judaism until the modern period. Given the unique nature of this text that intermingles generations of rabbis in academic discourse and freely edits its transmitted sources, the issue of reliably dating these statements is hotly debated. We will therefore not concern ourselves with the otherwise important questions of the historical development or actual normativity of these laws. For our purposes—describing the base upon which medieval Jewish law evolved—it will suffice to offer a summary of the most salient features of marriage and divorce law as they are represented in the final product of the Babylonian Talmud and related texts.

A. Betrothal and marriage

With respect to marriage, Jewish law in talmudic times concerned itself primarily with two facets: (1) the proper procedures which would effect a valid union, and (2) the financial arrangements of the marriage.7

5 See previous note.
6 Several regions were able to erect organizational structures which achieved varying degrees of uniformity, but no such institution governed the entire Jewish world for the last thousand years. Abraham Hayyim Freimann offers the most comprehensive and detailed summary of local variation in marriage customs and legislation after the talmudic period in Seder qiddushin ve-nisu’im ha-karim ha-Talmud: Mehqar histori-dogmati be-dine Yisrael (Jerusalem: Mossad Harav Kook, 1944). Similarly, each chapter in An Introduction to the History and Sources of Jewish Law, ed. N. S. Hecht et al. (Oxford: Clarendon Press, 1996), which summarizes the development of halakhah in a particular period, devotes a special section to the developments in family law during that time.
7 For an elaborate discussion of the legal dimensions of betrothal in rabbinic law, with specific comparison to Roman conceptions of this institution, see Boaz Cohen, 'Betrothal in Jewish and Roman Law', PAAJR 18 (1949): 67–135; repr. in Jewish and Roman Law: A Comparative Study (New York: Jewish Theological Seminary of America, 1966), vol. 1, pp. 279–347 (subsequent citations will be from the latter volume). More recently, see Shmuel Safrai, 'Home and
1. Procedures. Once no bars existed to the marriage of two individuals (e.g. degree of consanguinity, certain women forbidden to a male priest, etc.), betrothal (qiddushin) was effected through a man’s declaration of intent to a woman in the presence of two valid witnesses, accompanied by some observable act between the man and the woman. Most common was the transmission of an article of known worth from him to her, intended to symbolize a form of transfer. Consent of both parties was required, although the woman’s consent could be, and often was, tacit.

The betrothal had legal significance in that it conferred the status of a ‘married woman’ (eishet ish) on the bride. This meant that only her husband had conjugal rights to her (although he could not yet exercise them); if another man had sexual intercourse with her, it constituted adultery. Dissolving the union at this point would require a full divorce. Betrothal was thus a form of ‘inchoate marriage’ in terms of establishing a relationship. The couple were finally allowed to live together only after a second ceremony known as nisu in (nuptials), which normally entailed a large celebration and the formal entry of the bride into the husband’s house or symbolic canopy (huppah).

As is evident from the above, talmudic marriage was essentially of a legal, not sacral, nature; in this respect, rabbinic law was consonant with contractual conceptions of marriage in many ancient Near Eastern societies. Marriage entailed financial as well as religious status consequences for the parties, and the rabbis referred to betrothal as qiddushin: ‘you are prohibited unto the entire world as a sacrosanct object’, since sanctified property partook of both ritual and civil dimensions. See Babylonian Talmud (henceforth, BT) Qiddushin 3b; Cohen, ‘Betrothal in Jewish and Roman Law’, pp. 289ff.; Gafni, ‘The Institution of Marriage in Rabbinic Times’, pp. 13–14.

Other acceptable acts were the presentation of a document to the woman, or cohabitation (Mishnah Qiddushin 1), although the Sages early on seem to have opposed the latter method as ‘licentious’. See BT Qiddushin 12b; Tosafot, ad loc., offers varying interpretations of this licentiousness.

Silence was not always taken as proof of tacit consent; her actions could also be construed as a rejection. See BT Qiddushin 8b–9a. The validity of consent achieved through fear or intimidation was a matter of dispute among later talmudic authorities; see BT Bava Batra 48a. In the case of a minor girl, her father’s consent was all that was required, although rabbinic sources in BT discouraged this practice and recommended waiting until the daughter reached the age of majority (BT Qiddushin 41a).

This was similar to the Greek engue; see Boaz Cohen, p. 293; Cynthia B. Patterson, ‘Marriage and the Married Woman in Athenian Law’, in Women’s History and Ancient History, ed. S. B. Pomeroy (University of North Carolina Press, 1991), pp. 48–72.

Again, possibly parallel to the Greek gumos (celebration) and sunoikein (cohabitation within a common household). See Patterson, Women’s History (as in n. 11), p. 56.

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John J. Collins, ‘Marriage, Divorce, and Family in Second Temple Judaism’, in Families in Ancient Israel, by Leo G. Perdue et al. (Louisville, Kentucky: Westminster John Knox Press, 1997), p. 109. Gafni (op. cit., pp. 16ff.) suggests that the religious dimension of marriage derived from it being the only legitimate avenue for fulfilling the religious obligation to procreate; otherwise, the institution of marriage would have remained exclusively a civil contract. The centrality of procreation to the Jewish view of marriage had hellenistic Jewish champions, such as Philo...
clerical presence was required to validate any part of the betrothal or wedding, although the recitation of specified blessings at both may have required the presence of someone with this competence, either a rabbi or cantor. Furthermore, motives for marriage were of little concern and consequence to the Talmud. A man and a woman with two witnesses and an object of some value had all the necessary ingredients to be married legitimately in the eyes of rabbinic law.

2. Financial arrangements. The legal, contractual nature of Jewish marriage was most evident in the requirement of a marriage document, known as the ketubbah. It contains the amount the woman is to receive from the husband or his estate in the event of the dissolution of the marriage, either through death or divorce. The Talmud states that this obligation was instituted in order to protect the woman, so that the husband ‘will not regard it as easy to divorce her’. Through legislation and local custom, the ketubbah was granted greater deterrent force, e.g. through the addition of other sums and the voiding of any possible waiver by the wife.

B. Monogyny vs. polygyny

Talmudic law saw no legal hindrance to marrying more than one woman, provided the husband could fulfill all his obligations to each. Even so, a talmudic view attributed to a Palestinian scholar of the 4th century recommends that a man should ideally divorce his first wife and pay her ketubbah before marrying another. This disagreement might reflect different sensibilities in late antiquity between Babylonia, where Persians practised polygyny widely, and the land of Israel, where Roman and then Byzantine law deemed polygamy a crime.

(On Joseph 43) and Josephus (Against Apion 2:199), and can even be found in the medieval discussion surrounding the betrothal blessing (see Beit Yosef, Even ha-‘ezar 34:2). It appears to me, however, that his case might be slightly overstated; the integration of civil and religious aspects in most areas of life was natural in the rabbinic world-view, and need not derive from a specific commandment. Such a basic institution as marriage was seen as part of a religious world order harking back to Adam and Eve and the creation story; the liturgy connected with both qiddushin and nisu’ in refers to the primordial story (especially Gen. 2) and not to the intention of procreation.


\[15 \text{ Michael L. Satlow argues that basic physical attraction of the man for the woman was the only concern in the talmudic sources, attested in such laws as forbidding marrying a woman sight unseen (BTQiddushin 41a) and permitting the use of cosmetics for women on the Sabbath ‘lest they become repulsive to their husbands’ (titganeh ‘al ba’aleihen). Attraction, not love, according to Satlow, was the ‘glue’ of marriage. See his ‘“One Who Loves His Wife Like Himself”: Love in Rabbinic Marriage’, Journal of Jewish Studies 49 (1998): 67–86.} \]

\[16 \text{ For an overview, see Louis M. Epstein, The Jewish Marriage Contract (New York: Jewish Theological Seminary of America, 1927). Indeed, the minimum to which she is entitled does not strictly necessitate the writing of a document, since he would have to pay it regardless; nevertheless, writing out the obligation was always preferable. See Mishnah Ketubbot 4:7.} \]

\[17 \text{ BT Yevamot 89a, Ketubbot 11a.} \]

\[18 \text{ BT Yevamot 65a.} \]

\[19 \text{ Ibid., as the view of R. Ammi.} \]

\[20 \text{ See Salo W. Baron, A Social and Religious History of the Jews (New York: Columbia Uni-} \]
thus emerged.\textsuperscript{21} In the end, however, economics coupled with the traditionally monogamous character of Jewish society makes it reasonable to assume that few Babylonian Jews took advantage of the law’s permission.\textsuperscript{22}

C. Dissolution of marriage

According to talmudic law, the marital state could be terminated only by two means: death of the husband, or divorce.\textsuperscript{23}

1. Death of the husband. The Roman and Greek ideal of the perpetually mourning wife (the \textit{univira}: ‘woman prevented from re-marrying’\textsuperscript{24}) finds no echo in talmudic law.\textsuperscript{25} Once a man with children died,\textsuperscript{26} his wife had no connection to him; she was allowed to re-marry after a brief waiting period to ensure she was not pregnant from him. As noted above, the widow was entitled to her \textit{ketubbah} from her husband’s estate. Talmudic law tightly governed how the \textit{ketubbah} would be paid off to ensure that she had some means of support. Some widows returned to their parental households while others chose to stay in their husband’s house to be supported by the heirs.\textsuperscript{27}

2. Divorce. As it was with betrothal, the main focus of rabbinic discussion of divorce is on proper procedure for writing and delivering the \textit{get} (divorce document). In the nine chapters of Tractate Gittin (=Divorce), only one mishnah—the very last (9:10)—addresses the reasons for divorce. Three views are represented, each expounding the frustratingly brief reference in Deut. 24:1:

\begin{quote}
\textit{מַהֲרֵי בֵּית שָׁמַאי אֲדֹנָי לְאַרְשׁ אֲרָבָא אִשָּׁה אֲלָא אֶתְהַ אֶת קִבֵּל אִשָּׁה אֶת קַטְבִּיבָה.}
\end{quote}

\begin{quote}
בֵּית דֵּרֶבֶּר עִרְוָה שְׁנֵאִמָּר (דְּבֵרֵי כּ’ד’כ) כּ’מַא בֶּהוֹדֶרֶבֶּר וְזַח עִרְוָה אַמְּרֵי אֶת קִבֵּל אֶת קַטְבִּיבָה
\end{quote}

\begin{quote}
דְּבֵרֵי ר’ עִקְרִיבֵא אַמְּרֵי אפּ’כּ’מַא אַדָּחֵר נַאֵה חֲדָנִים שְׁנֵאִמָּר (דְּבֵרֵי כ’ד’כ) הֶוֹדֶר אֶת קִבֵּל אֶת בּוּטִינֵי.
\end{quote}

The School of Shammai says: A man may not divorce his wife unless he has found unchastity in her for it is written (Deut. 24:1), \textit{Because he hath found in her indecency in anything}. And the School of Hillel says: [He may divorce her] even if she spoiled a dish for him, for it is written, \textit{Because he hath found in her indecency in anything}. R. Akiba says: Even if he found another fairer than she,
for it is written, And it shall be if she find no favour in his eyes . . . (ibid.).

While this mishnah may highlight the wide discretion unilaterally granted the husband, Judith Hauptman has persuasively argued that literary considerations suggest that what we have here is not a legal message, but a homiletic one, exhorting the man that even as he held the exclusive right to divorce his wife, it was in fact a process which would be arduous and expensive. Elsewhere in tannaitic literature we do find several situations where the husband is obligated to divorce his wife, and these are more telling for our subject. Tractate Ketubbot (= ‘marriage contracts’) deals quite naturally and more extensively with grounds for divorce, since one of the aims of instituting the marriage contract and its financial obligations was precisely to discourage capricious divorce.

The first cluster of laws in the 7th chapter of Ketubbot involves vows, taken by either party, that seriously impact upon the material aspects of the couple’s relationship and their obligations one to the other. Many are related to the husband’s basic marital obligations of food and clothing, but others deal with the wife’s normal routines of day-to-day life, from performance of chores to visiting neighbours and family. In the rabbinic view, the problem with such vows is that they seriously affect her integration and reputation within the community. Men making such vows were required (in most cases after the passage of some interval to allow him to retract) to divorce their wives and pay the marriage settlement as stipulated in the ketubbah. While biblical law granted the husband the right to control his wife’s behaviour through specific vows, talmudic law does make him suffer consequences if he abuses that privilege.

28 Judith Hauptman, Rereading the Rabbis: A Woman’s Voice (Boulder, Colorado: Westview Press, 1998), pp. 103–4. The talmudic discussion of that mishnah (BT Gittin 90a–b) confirms the exhortatory nature of this passage, employing harsh language regarding the divorce of one’s first wife (‘even the altar [in the Temple] sheds tears over the divorce of one’s first wife’).

29 Particularly in the seventh chapter, but also in the fifth and last chapters.

30 The gemara struggles with the actual formula of this vow, since a person may not vacate a biblical obligation through taking a vow. This is somewhat at odds with Y. D. Gilat’s claim that maintenance evolved from a biblical obligation for the tannaim to a rabbinic one for the amoraim. See his ‘Mi-de-oraita le-de-rabanan’, Benjamin De Vries Memorial Volume, ed. E. Z. Melamed (Jerusalem: Tel Aviv University, 1969), pp. 84–88. The Talmud (BT Ketubbot 70b) understands the laws involving the husband’s vows restricting maintenance as a ‘degradation (bizayyon) to her’, thus explaining why a vow restricting maintenance for thirty days is tolerated, since people will likely not become aware of it. However, see ibid. 71a (=PT Ketubbot 7:1) where the amora Rav (in PT, Samuel) suggests that if the vow came without a time limit of 30 days, then the husband must divorce her immediately—a position inconsistent with the above explanation that it is degrading to her. For a discussion of the various versions and interpretations of this sugya (talmudic passage) see Saul Lieberman, Tosefta kifshufah, vol. 6 (New York: Jewish Theological Seminary of America, 1967), pp. 284–86.

31 See below, n. 36.

32 Thus, the Talmud uses such phrases as ‘the matter would be degrading to her’, ‘if so, she will be called “the ugly woman”’, ‘tomorrow she might die and no creature would mourn for her’, ‘she would appear like an imbecile’, ‘he would give her a bad name among her neighbours’, ‘because he locks her up’, etc. See BT Ketubbot 70b–72a, passim.

33 Indeed, even if the vow restricting her consumption pertained to a food she did not eat, Samuel insists that he must still divorce her and pay the ketubbah. See Ketubbot 71a; Mai-
The issue of vows was raised earlier in the tractate, in the fifth chapter, in connection with the conjugal dimensions of the marriage. The Mishnah discusses the case of a man who vowed not to have intercourse with his wife who would, after a debated time interval, be forced to divorce her. Similarly, the woman might ‘rebell’ against her husband in refusing to have intercourse with him. The Talmud discusses her motives, whether malicious or simply aesthetic (ma’is alai, ‘he is repugnant to me’). According to the Mishnah, such a woman, labeled a morede’t (‘rebell’), suffers financial sanctions of incremental loss of her ketubbah. The Tosefta, however, allows for repeated warnings followed by complete loss of her ketubbah if the behaviour does not change. The Babylonian Talmud, after a lengthy discussion of the issue, adds a curious 12-month limbo period whereby the morede’t is neither divorced nor supported by her husband—a situation which presumably would itself pressure her to desist from her rebellion. Regrettably, what happens at the end of the twelve months is not explicated in the talmudic passage, although that the marriage remained in limbo, with the attendant dangers of adultery and bastardy, seems unlikely.

Divorce is similarly required or recommended in situations involving the wife’s malfeasance, whether in areas of strict religious law, such as proper food preparation or sexual purity, or in the area of social indiscretions (e.g. going out without a head covering, or talking to men indiscriminately). In the former, divorce is clearly required; in the latter, the text is ambiguous whether the husband is obligated to divorce his wife, or just that the major hurdle to divorce—the payment of the settlement—has been forfeited, and so he is free to divorce her whenever he pleases.

Mishnah Ketubbot then turns to the subject of physical blemishes. If the husband discovers deformities in his wife that were deliberately concealed (a fact he must prove), then he is entitled to divorce her without payment of the settlement. Reciprocally, if the husband’s physical attributes are repulsive monides, Mishneh Torah, Hilkhot Ishut 12:24. But cf. Tosefta Ketubbot, 7:2, where R. Judah claims: ‘Jewish women prefer to deny themselves a particular food their whole lives than to leave their husbands even for a day.’ It would seem that he disagrees with the law in its entirety; see Lieberman, Tosefta Kifshutah, vol. 6, p. 287f. His ‘liability’ for the settlement largely depends on whether he could have remedied the situation. Thus, her vows, by being endorsed through the husband’s silence, render him liable if he cannot tolerate the conditions created by the vow. According to Palestinian Talmud (henceforth, PT) Ketubbot 7:2 (31b), even those who release him from paying the ketubbah in cases where she initiated the vow agree that he is in fact liable if he provoked her; see Hilkhot Yerushalmi, ed. Saul Lieberman (New York: Jewish Theological Seminary of America, 1948), p. 48.

34 Mishnah Ketubbot 5:5–6.
35 The consequence of being coerced to divorce her is implied in the Mishnah, but rendered explicit in the Tosefta. See Tosefta Ketubbot 5:6; Lieberman, op. cit., pp. 264–65.
36 The Talmud discusses whether ‘rebelliousness’ applied to a wife’s other duties. See PT Ketubbot 5:9 (30b); BT Ketubbot 63a. The woman’s home obligations are stipulated in Mishnah Ketubbot 5:5; the frequency of intercourse in the context of a biblical conjugal right is discussed in 5:6.
37 Tosefta Ketubbot 5:7. The Babylonian Talmud sees this as a public condemnation, while the Palestinian Talmud apparently sees it as a private warning.
38 See Shlomo Riskin’s discussion, Women and Jewish Divorce, pp. 33–46.
to the wife, or he engages in a craft that makes him foul-smelling, then she is allowed to ask the court to force her husband to divorce her (kofin oto le-hosi). It should be noted that these cases are in contrast to the earlier treatment of the moredet who refuses to have relations with her husband without citing cause.

The tractate Ketubbot ends with a curious mishnah about moving to the Land of Israel, which another tannaitic source elaborates to mean that either spouse may coerce the other to move to Israel, or suffer the financial consequences: he would have to pay the marriage settlement, and she forfeits hers. The reverse is true regarding leaving the holy land: the spouse who wants to stay receives the favourable treatment under the law.

We cannot leave the subject of rabbinic views of marriage and its relationship to one’s religious obligations without addressing the subject of procreation and its role in marriage. Mishnah Yevamot (6:6) requires a man whose wife has not conceived and borne children for ten years to take measures to fulfill his commandment to have children, presumably by marrying another. The Mishnah does not require him to divorce his first wife, but he must be able to afford his obligations to her. The Talmud, however, cites a baraita paralleled in the Tosefta that states rather unequivocally that he should divorce her and pay her marriage settlement (yosi ve-yiten ketubbah), for ‘perhaps he was not destined to procreate through her’. The toseftan preference for divorce in this case may reflect the emerging Palestinian norm that preferred monogyny over polygyny. This law, even in its ‘soft’ form, should not be read as a case of the rabbis adopting the Stoic view that procreation was the essence of marriage. Marriage was independently desirable in rabbinic Judaism, but it could not displace standing obligations of either party.

40 It would appear that in rabbinic parlance, the expression kofin oto le-hosi is the equivalent of yosi ve-yiten ketubbah; in the Palestinian tradition, a man who married a second wife was coerced to divorce his first wife if she so requested it, even though the talmudic expression is yosi ve-yiten ketubbah. Many medieval commentators sought a practical distinction between the two, whether between forms of coercion (verbal persuasion vs. physical means) or between levels of commandment (desirable vs. enforceable). From the sources themselves, a distinction that suggests itself is that kofin oto le-hosi is used only when the divorce is entirely her initiative and does not involve his willful action or inaction. Thus, unavoidable physical blemishes require the coercion of the court, since he did nothing to bring the conflict on. The other cases all involve some behaviour on his part that leads to the conflict (taking vows or allowing her vows to stand, etc.). That his ability to correct the situation is pivotal in many of these cases is expressed by the talmudic term ‘he put his finger between her teeth’ (e.g. BT Ketubbot 71a), i.e. he caused the problem himself.

41 Interestingly, even if she was aware of these before the marriage, one opinion in the mishnah still permits her to lodge a complaint with the court, for ‘she assumed she would be able to tolerate it’ and only discovered subsequently that she could not.

42 BT Ketubbot 110b. But cf. PT ad loc., which cites a contrary tannaitic source allowing the husband to stay even if his wife wants to go to the land of Israel. See Lieberman, op. cit., pp. 385ff.


44 BT Ketubbot 77a. Minimally, some form of verbal persuasion is used to convince the husband to divorce his wife and marry another. But cf. Tosafot (ad loc.), s.v. litnei, who refuses to see in this prescription the full weight of the law (i.e. coercion).

45 Jeremy Cohen, op. cit. (n. 43), pp. 139ff; cf. above, n. 13. Marriage could, however, modify
These sundry divorce laws afford us a window into the rabbinic understanding of the nature of marriage:

1. Marriage has a strong sexual component, both in terms of regular intercourse, and the presence of basic physical attraction. Failure to engage in intercourse in the presence of the partner’s desire for it (the ‘rebellious wife’) or the existence of plausible impediments to it (blemishes, odour, vows) allow, or in some cases, require, the dissolution of the marriage.

2. Marriage is also a contractual arrangement whereby the husband must provide his wife with food and shelter, unless she foregoes this right. His vows to the contrary essentially negate the marriage, and divorce is required.

3. The marital unit is fundamentally a private (i.e. non-public) entity, with the two parties responsible to one another with no need for outside assistance (excepting the court, which at times acts as her agent in requiring divorce). This privacy is most observable in the area of ritual law, whereby the couple is expected to create an environment loyal to Jewish law, and even aspiring to its ideals. Behaviour that breaks down the mutual trust and cooperation required means the marriage must (or ought to) end. The option of bringing in more public forms of verification to ensure proper observance of the law, a method available to employers wary of their employees’ commitments, does not exist.

4. The cultivation of this mutual trust extends to behaviour that affects each spouse’s reputation in the community, as well (e.g. he excessively controls her comings and goings through vows, or she fraternizes when out in public). Lastly, if one member wants to live a more religiously ideal life in the Land of Israel, the resisting spouse has the inferior position.
under the law.\textsuperscript{50}

From the perspective of the divorce laws, then, it is reasonable to characterize the rabbinic notion of marriage as a ‘partnership’ in that it shares many of the indicia of that form of union in Western society. (I use the term ‘partnership’ primarily for its heuristic value; the full-blown legal notion, in all its dimensions and facets, is not necessarily implied.) It is created by the consent of each party without recourse to any outside entity, and it is dissolved with the unilateral withdrawal of one of its members (either through the husband’s initiative, or the court acting as the wife’s agent) or the death of either. Observance of the law and pursuit of religious goals are paramount; dereliction in, or impediments to, the fulfillment of responsibilities—both marital and non-marital (such as procreation)—constitute the end of the partnership and legitimate divorce. In the Land of Israel, this notion also had the dimension of being pro-monogyny, adding bigamy as a situation that permitted the wife to sue for divorce. But this feature should be subsumed under the more general category of the union facilitating the performance of its members’ obligations.

It is therefore not surprising that in the Palestinian tradition, the word that would be used for marriage is shutafut—partnership.

II. The Early Middle Ages: the Middle East

The Muslim conquest of the 7th–8th centuries allowed Jewish settlement, originally centered in Babylonia and Palestine, to expand into Egypt, North Africa, and even into Spain. Given the Palestinian and Babylonian origins of these communities, it is not surprising that we find among them several continuities with the view of marriage articulated in the earlier section. But the changing social, political, and economic realities would also produce significant innovations in this period.

A. Babylonian geonim (heads of academies)

The period of rapid Muslim expansion was accompanied by widespread conversion to the new faith, either willfully or by coercion. While officially ‘peoples of the book’ (\textit{ahl al-kitāb}) were allowed to remain loyal to their own traditions, it is not surprising that many Jews did choose to adopt the religion of the conquerors, although the precise extent is impossible to determine.\textsuperscript{51} It is in this context that we hear about a major development in Jewish marriage law: \textit{dina de-metivta}, or the ‘enactment of the academy’.'\textsuperscript{52}

\textsuperscript{50} This may, however, reflect more on the rabbinic view of living in Eretz Israel than on the relative importance of personal religious aspiration as compared to being married. See W. D. Davies, \textit{The Territorial Dimension of Judaism} (Berkeley: University of California Press, 1982), pp. 34–45.


\textsuperscript{52} Mordechai Akiva Friedman, \textit{Jewish Marriage in Palestine: A Cairo Geniza Study} (Tel Aviv and New York: Tel Aviv University and The Jewish Theological Seminary of America, 1980), 1:312–46; Shlomo Riskin, \textit{Women and Jewish Divorce}, pp. 47–78. Moshe Shapira charts the tal-
The background of this enactment is the law of the moredet, the woman who refuses to have intercourse with her husband. As noted above, the Babylonian Talmud concluded that she would be treated in phases: first, the woman would be warned twice weekly for 4–5 weeks while receiving maintenance; then she would lose her entire marriage settlement all at once (rather than incrementally); finally, a year-long limbo period ensued during which she would receive neither maintenance nor a divorce. Sherira Gaon understood the talmudic passage to mean that a divorce was to be granted, even by coercion, at the end of the twelve-month period, although this interpretation was not universally accepted.

The length and effectiveness of this limbo period are addressed in geonic responsa during the early middle ages. What motivated the geonim to act is unclear; some sources imply that the 12-month limbo period led women into prostitution (and hence adultery, as they were still legally married) or to convert to Islam, where Islamic courts ‘legally’ dissolved their marriages, while other sources maintain that some women had Islamic authorities coerce the Jewish husbands to give their wives a divorce, a situation which would render the divorce invalid. Whatever the actual circumstances, the leaders (geonim) of the Babylonian academies addressed the situation by introducing a new ordinance with two parts to it: one concerning the giving of the get, and one concerning the financial settlement.

First, the geonim decided that instead of the long waiting period which was talmudically instituted to deter women from exiting marriages unilaterally, now ‘the rebellious wife’ would be able to get her divorce immediately. The Jewish courts, if necessary, would coerce the husbands to write the get in return for his keeping all the property, even what she brought into the marriage. Bases and medieval applications of the Babylonian ordinance in ‘Geirushin be-gin me’isah’, Dine Israel 2 (1970): 117–53.

\[\text{53 Osar ha-Geonim, ed. B. M. Lewin (Jerusalem: Mossad Harav Kuk, 1939), Ketubbot, pp. 191–92.}\]


\[\text{55 Sherira Gaon, in Osar ha-Geonim, ad loc.}\]

\[\text{56 See Shapira, op. cit., who finds all the historical accounts difficult, given the early date of the ordinance and the lack of developed Islamic law during this period. Instead, he follows Meiri’s understanding of the situation (ad loc.) that women were stipulating in their marriage contracts terms which caused all economic sanctions against her to evaporate in the event she claimed ‘he is repulsive to me’ (ma’is alai). This stipulation apparently became widespread at this time, propelling the geonim to dispense with the 12-month waiting period and grant her an immediate divorce. Interestingly, such stipulations were used in Palestinian ketubbot; see M. A. Friedman, Jewish Marriage in Palestine, I:325–27, who discusses this interpretation yet raises some doubts about it in the Babylonian context.}\]

\[\text{57 On the two-part nature of the ordinance, see Meiri, ad loc., and She’elot u-teshuvot Maharat Habah of Levi ben Jacob ibn Habib (d. 1541), no. 36.}\]

\[\text{58 The precise scope of this ordinance is debated. The 12th-century Isaac bar Mari of Marseilles (Sefer ha-’Ittar, s.v. merey) insisted that the geonim were not prepared to extend this leniency to the spiteful wife, but limited it to the woman genuinely repulsed by her husband, granting her immediate relief. Others claim both women were accorded the same consideration; see Samuel ben Ali, cited in She’elot u-teshuvot Maharam ni-Rutenburg, Lemberg ed. no. 443; Berlin ed. p. 64, no. 494; cf. Maimonides (Mishneh Torah, Hilkhot Ishut 14:14) and Rashba in his responsa (I:1192).}\]
riage. Any benefits of the intervening sanctions were apparently outweighed or offset by the dangers the limbo period posed to the woman's sexual integrity and her commitment to her faith.

In addition, the geonim modified the financial dimensions of the settlement. While the Talmud exempted the husband from paying the ketubbah settlements to the moredet, over the course of the geonic period we see a gradual but steady increase in the woman's entitlement first to her own property, and then even to some alimony settlement. Apparently, the existence of any serious financial penalty she may suffer elicited some of the same fears as to the woman's reaction. The acceptance of this ordinance in lands under geonic authority (and beyond) seems to have been widespread, and continued for several centuries.

The dina de-metivta itself and its successful career (in certain locales) may be explained by the fact that it flowed naturally from the general view about marriage that we discerned in the rabbinic period. Marriage was essentially a 'partnership' (shutfuta in Aramaic); the amelioration of the status of the moredet follows the trend in allowing the woman who found life with her husband unbearable to initiate divorce proceedings with (ultimately) fewer adverse consequences. The talmudically prescribed penalties were effective only as long as the woman had no recourse; now that she had—presumably, by turning to the Muslim authorities, or simply ignoring her status and seeking the company of other men—the sanctions lost much of their sting. It was thus better to have the husband divorce her immediately.

The dina de-metivta does not seem to have constituted a radical departure from the prevailing view of marriage as partnership. First, the financial consequences of the man's decision to leave were never commensurately ame-

59 If the Talmud intended the divorce to be given at the end of the twelve-month period, then the effect of this ordinance is merely to move that end-point up. Nachmanides, however, claimed that all geonim agreed that according to talmudic law, a divorce was not coerced at the end of the 12 months, in which case the ordinance is a more radical departure from the then current law. See his novellae to tractate Ketubbot (in some editions attributed to Rashba, R. Solomon ben Abraham Adret), ad loc.


63 See Shapira, op. cit., on the variety of locations that applied this ordinance. It should be noted that some communities originally embraced it and subsequently rejected it (and in one case, possibly re-accepted it) on the force of particular rabbinic leaders.

64 This consistency is particularly true if the ordinance was limited to women who claimed ma'is alai, since her repulsion made conjugal life with this man unbearable. See above, n. 58.

65 The loss of faith that sanctions would repair the relationship did not mean that no hope was held out that the couple might reconcile. Thus, the Pumbeditan gaon, R. Aharon Kohen (10th c.) cites the laws of R. Yehudai Gaon that even under the new ordinance, the divorce is delayed a week or two in order to see if reconciliation can be achieved (keday le-mitba' shelama bein ha-ish le-ishto madh. inan lah shabta ve-tartin). See Teshuvot ha-Geonim, ed. Assaf (1927), p. 66; Schepansky, p. 341. Sherira Gaon deemed the term to be four weeks, although he does not give the reason explicitly; it might have been a fallback to the toseftan position, minus the public sanctions. See Schepansky, p. 346.
liorated; men are consistently required to pay the marriage settlement, thus preserving the disincentive to divorce one's wife unilaterally. Second, there is no evidence that the geonim sought to modify, reduce, or outlaw polygyny; the Babylonian Talmud's insistence that the husband be able to maintain all his wives properly is the norm. Of course, the prevalence of multiple wives in the Muslim milieu cannot be ignored, but it is important to note that the notion of marriage as partnership did not evince a concomitant requirement of exclusivity, either in talmudic Babylonia or in Muslim lands.

Third, while motives for legal changes are always hard to interpret, all the geonic references which mention the underlying reason for this ordinance consistently mention the concern about either promiscuity or apostasy. The language never crosses over into discussions of the value of being in the married state willingly or wholeheartedly. Indeed, other cases (e.g. spousal abuse), that to us today would be grounds for divorce or at least intervention by the state, did not drive the geonim to extend the scope of their dina de-metivta. It is therefore reasonable to conclude that what we have is a continuation of the basic view of the (Babylonian) Talmud: marriage as a partnership of two consenting adults who commit to fulfill obligations vis-à-vis one another, and who do not impede each other's discharge of those obligations. The relaxation of the laws of moredet in geonic times was simply a (reluctant?) modification of talmudic law (as they interpreted it) for the specific circumstances that the community of the geonim faced regarding the readily available option of conversion or other unacceptable avenues. The talmudic sanctions had lost their teeth, and so it was not necessary, and even counterproductive, to maintain them. The solution the geonim found to their particular dilemma is consistent with the view of marriage as partnership.

66 Thus, a poor man who wants to divorce a barren wife to be able to procreate with another must still raise the money for the ketubbah; see Abraham Harkavy, Teshuvot ha-Geonim (Berlin, 1887), no. 211; H. Z. Hirschberg, A History of the Jews in North Africa (Leiden: E. J. Brill, 1974), 1:186. A similar case involved a man who took an oath that his wife would not be his wife, but could not afford the marriage settlement; rather than uphold the oath, the man is instructed to continue to maintain his wife until such time as he can afford the ketubbah; see Harkavy, no. 345. See also Teshuvot ha-Geonim, Sha’arei Shèdeq (Jerusalem, 1966), p. 153, no. 74, where a man who wanted to divorce his wife on the condition that she relieve him of the marriage settlement is beaten until he divorces her and pays it.

67 The talmudic limit of four wives is curiously identical with the Islamic practice; see Schacht, pp. 41, 62; Friedman, ‘Polygyny’, p. 36. But see S. Assaf, ‘Teshuvot ha-Geonim’, Mada el-ha-yahadut 2 (Jerusalem, 1927), p. 21, which cites a responsum of Sherira Gaon that ‘heaven allows him’ a limitless number of wives, provided he can provide maintenance and conjugal relations for all of them.

68 See e.g. Teshuvot ha-Geonim, Sha’arei Shèdeq, p. 153, no. 76.


70 Several Ashkenazic presentations of the geonim's ordinance portray it as a sorekh sha'ah, a contemporary emergency to which they were compelled to respond. See e.g. She’elot u-Teshuvot ha-Rosh, 43:8.

71 This would be true even under Meiri's explanation, that the widespread nature of the custom to preclude the law of moredet rendered the talmudic law obsolete. Worse, according to Shapira (n. 56), the women could get the Muslim authorities to re-impose maintenance, thus giving the divorce a 'quasi-coerced' character, and making it thus possibly invalid.
At this point it might be more helpful to note in which directions medieval Jewish law in this region did not develop. First, the essentially private nature of marriage did not change. One radical solution to the problem of ‘rebellious wives’ might have been to arrogate to the court the ability to dissolve a marriage, a prerogative held by Muslim courts in the form of tafrik or li’an. Jewish marriage law in the geonic period, however, did not go down this path. It retained its talmudic character: a deeply private, contractual relationship between two individuals, undertaken in the presence of two valid witnesses. To be sure, to insist on the private nature of marriage is not to say that the institution had no public face to it at all; in the early 10th-century Yehudai Gaon instituted in Chorosan an arrangement that all betrothals follow a prescribed public ceremonial procedure (later modified to the presence of ten males). However, this ordinance confirms the private nature of marriage for it was intended to prevent the doubts which arise from such crucial, status-changing events occurring outside the public’s view. The possibility of invalidating or voiding such a private agreement was not entertained. Marriage and divorce therefore remained, fundamentally, a private matter between a man and a woman.

Second, the geonim did not think inaction was acceptable. The hemorrhage of apostasy, especially for a minority, was to be prevented wherever possible. In addition, the precise Jewish status of one who converted out of Judaism was being worked out at the time with respect to inheritance, divorce, etc. While retention of Jewish status emerged as the norm, allowing rash or even coerced conversions to be easily reversed, the social reality of those who had no wish to return was rendered even more incongruous with the legal status. Thus, measures that could be taken which would either prevent apostasy or sever the marital links of those who did convert were certainly desirable.

72 At one point in his responsa, Asher ben Yehiel (Rosh, d. 1328) refers to the ordinance as the dissolution of the marriage by the court (טבוק שלycles פליאורא רבען פלחיו תבב). However, in the rest of that responsa, as well as in others, Rosh mentions that the husband is being forced to give the get. Therefore, the reference to dissolution seems to be in the realm of legal theory, in that coercion in this case does not invalidate the divorce since all marriages are contingent upon the consent of the court, and so the mechanism here might be dissolution rather than the husband’s willful divorce. See She’eilot uteshuvot ha-Rosh (Jerusalem: Machon Yerushalayim, 1995), 43:8. But see Maimonides’ Mishneh Torah, Hilchot Geturshun 2:20 for another solution to this problem of legal validity.

73 Talmudic discussions do refer, on six occasions, to the possibility that a rabbinic prerogative indeed existed to dissolve marriage, but this argument was used to validate the authority of the rabbis to institute legislation which voided seemingly legitimate marriages. It was not invoked to solve specific cases which may require dissolution. I hope to address this point more in the book.

74 See Freimann, op. cit., pp. 19–22. Later reports of this ordinance, however, give it far-reaching power to invalidate betrothals not conducted in the prescribed manner; see Freimann, p. 21. This ordinance would then constitute a serious step in the re-conception of marriage as public and corporate. Why I do not think this to be the case in this instance will be taken up in my forthcoming book on this subject.

75 For an extensive catalogue of the many strategies that were employed historically by city or region to counter clandestine or fraudulent marriage, see A. H. Freimann, Seder Qidushin ve-nisu’in, pp. 2–220, passim.

Furthermore, allowing the intervention of Islamic courts into the sensitive realm of Jewish divorce law was problematic enough; if their involvement could be shown to be in accord with Jewish law, that is acting where a Jewish court would have coerced a divorce, this at least prevented conferring the biblical status of mamzer on the subsequent progeny.77 Lastly, I would maintain that rejecting inaction was in itself related to the geonic view of marriage as a genuine partnership, and not a mere ‘status’. Whatever the concerns—apostasy, promiscuity, or the validity of coerced divorce—letting her remain a Jewish ‘married woman’ even as she lived apart from her husband with no serious prospect of reconciliation made little sense. Maintaining a legal reality so incongruous with the facts on the ground was pointless in the geonic view, especially where there might be truly adverse consequences down the road. The call to action, even radical action, was rooted in the view that being married meant more than a legal relationship. While not prepared to validate any excuse for separating a couple, the geonim nevertheless inspected the reality of the situation. If there was no basis for seeing this man and woman as a viable couple, then divorce was indicated.

B. The view from the Cairo Geniza

The notion that marriage was a genuine partnership is similarly evident in many of the documents of the Cairo Geniza, the storehouse of ancient papers which have shed light on over three medieval centuries of Jewish life in the Middle East. This treasure trove of medieval realia affords us a window on the day-to-day Jewish life of Egypt, Palestine, and neighbouring countries that legal works and even responsa do not grant us. The routine and the uneventful with respect to marriage and divorce are similarly critical to our depiction.78 The numerous marriage contracts and divorce documents which have been preserved in the Geniza attest to what is perhaps the distinguishing feature of Middle Eastern Jewish marriage: the individually tailored stipulations which were inserted into the marriage contract. In these documents79 we see real negotiation between partners: men who wanted to marry women from wealthy or prestigious families often agreed to limitations, such as not marrying another woman without this wife’s consent, agreeing not to take a concubine, or allowing the woman to conduct her own business affairs without her husband’s consent. Inversely, women from the lower classes often agreed to limit their comings and goings or agreed to let their husbands have more than one wife so that a middle-class man might marry them. While we might be inclined to compare this cynically to a ‘meat market’, where those with capital or goods always come out ahead, in reality it seems to have been the logical extension of the theory of marriage with which we have been operating: a pri-

77 BT Gittin 88b, Bava Batra 48a; Maimonides, Mishneh Torah, Hilkhot Geirushin 2:20. Cf. Isaiah di-Trani’s Teshuvot ha-Rid, no. 59, which bears a similar implication.

78 This portion of the article is informed by the comprehensive treatments of S. D. Goitein generally (A Mediterranean Society, vol. III: The Family, Berkeley: University of California Press, 1978) and of Mordechai Akiva Friedman more particularly (above, n. 52).

79 Friedman catalogues the available evidence, both by chronology and by country of origin, in Jewish Marriage in Palestine (as in n. 52), I:30–33.
vate contract between two consenting adults, where each party has something to offer the other, and may agree to other ‘optional’ conditions in order to secure the union. Perhaps the greatest testament to this mutuality is the provision among some Palestinian documents that entitled either the husband or the wife to initiate divorce proceedings. Such tailored agreements embody the concept of marriage as a voluntary partnership governed by terms of a private contract. The role of the court is portrayed as primarily a procedural one, ensuring that the technical details of betrothal and divorce be properly performed.

To be sure, some stipulations began as the express conditions of a few marriages, which ultimately spread and became common practice. This meant that phrases such as ‘the customs of the holy community of Aleppo’ could suffice in a legal document to refer to a whole host of conditions, and in some cases, the existence of such terms was assumed without their express inclusion in the marriage document. But legislation was relatively rare; enactments usually confirmed widespread practices. Marriage, at its core, was a shutfuta.

It is interesting that many of the formal enactments initiated by scholars in Egypt regarding marriage and divorce date from Maimonides and his court. Having been born in Spain and trained in the school of Isaac al-Fasi and his students, Maimonides probably brought with him to Egypt sensibilities and interpretations hailing from that western region. Maimonides’ interpretation of the relevant talmudic passages and the circumstances of ma’is alai as well as his ordinances conform well to the prevalent Middle Eastern view of marriage as partnership.

III. Ashkenazi Jewry in Christian Europe: The 11th–12th centuries

The last community addressed in this essay is that of Franco-German Jewry in the 11th–12th centuries. Our primary foci will be three: the ordinances attributed to the principal authority in pre-Crusade Germany, Gershom ben Judah of Mayence (ca. 950–1028), known as ‘the light of the Exile’, the

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80 See Friedman’s detailed discussion in Jewish Marriage in Palestine, I:316–33.
81 The extent of geonic legislation is debated; see Brody (n. 60), op. cit. We here follow Brody’s conclusion that there were only two such ordinances, both in the realm of family law.
82 Some medieval authorities insisted that by definition, commonly accepted practices must have enjoyed formal ratification at some earlier date, which has since been forgotten. See She’elot u-teshuvot Alfasi, ed. Leiter, no. 13. Nachmanides echoes this view; see Menachem Elon, Hamishpat ha-’ivri (Jerusalem: Magnes Press, 1973), II:716, and notes. This view, however, likely emerged out of jurisprudential concerns.
83 I intend to treat Maimonides in my upcoming book.
84 On this subject, see Zeev W. Falk, Jewish Matrimonial Law in the Middle Ages (above, n. 14), and Avraham Grossman, Hakhmei Ashkenaz ha-rishonim (Jerusalem: Magnes Press, 1981). The fate of these ordinances beyond German borders is discussed in Shelomo Z. Havlin, Taqqanot Rabbeinu Gershom me’or ha-Golah be-’imanei ishat bi-tehunei sefarad u-provans., Shenaton ha-mishpat ha-’ivri 2 (1975): 200–257. From a strictly historical standpoint, it is unclear whether R. Gershom himself actually promulgated these bans; indeed, apparently he once ruled contrary to his own ban. See Falk, pp. 13–18. S. Eidelberg, in Teshuvot Rabbenu Gershom Me’or ha-golah (New York: Yeshiva University Press, 1956), reconciles this responsum with the ban by dating
12th-century Jacob Tam’s interpretation of the talmudic passage regarding *moredet*, and the fate of the geonic ordinance in Europe.

A. The ordinances of Rabbeinu Gershom

While most of what we know about Rabbeinu Gershom, including his talmudic interpretations and legislative enactments, comes to us from the words of disciples and their students, and even from later generations, it is clear that he had a profound impact on Franco-German Jewry for several centuries. Two *taqkanot* (ordinances) attributed to R. Gershom in the area of marriage law—the ban (*herem*) against bigamy, and the ban against divorcing one’s wife against her will—helped establish, or possibly concretize, an Ashkenazic conception of marriage.

Unlike the medieval discussions of the geonic ordinance that in almost all cases included some reference to its underlying cause, the socio-historical circumstances surrounding R. Gershom’s bans remain unclear. Some suggest that R. Gershom’s *herem* on polygyny might merely have been the legal formalization of the common practice, although it is still fair to ask what triggered such a move in the 11th century. Some see the influence of a strictly monogamous Christian society that saw polygamy as a form of depraved behaviour; R. Gershom’s ban was thus consistent with Jewish self-perception as being stricter than, or at least as strict as, Gentiles. But external influences are always hard to prove, leading other scholars to seek internal reasons, such as the preservation of the ancient monogamous Palestinian tradition from the mishnaic and talmudic period. This is especially likely when seen in the

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85 See S. Eidelberg, *Teshuvot Rabbeinu Gershom* (as in n. 84), introduction. All the ‘responsa’ are collected from later sources quoting R. Gershom (sometimes referred to as R. Gershon).


87 Finkelstein, ibid., pp. 23–30, 143–147; A. Grossman collects the various opinions as to the provenance of these ordinances, ibid., pp. 132–49.

88 Zechariah Frankel was the first to propose this, given not a single instance of bigamy in the communal records of the Rhineland at the time; see Falk’s discussion, *Jewish Matrimonial Law*, p. 1.

89 This was Leopold Low’s basic argument against Frankel (previous note) that polygamy must still have been practised, and that the only means of abolishing it was a formal ban. See Falk, ibid.

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91 This is especially likely when seen in the

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more general context of the greater links between Ashkenazi practices and Palestinian norms.\footnote{See Y. Ta-Shma's comprehensive article 'Halakhah, minhag u-masoret be-yahadut Ashkenaz be-me῾ot ha-11–12', Sidra 3 (1987): 85–161; repr. in his Minhag ashkenaz ha-qadmon—heqer ve῾iyun (Jerusalem: Magnes Press, 1992).}

A third opinion looks to economic history for a context.\footnote{Grossman, ibid., pp. 317–19.} With the expansion of Jewish trade around this time, many European Jewish merchants found themselves in foreign ports for months at a time. They therefore took additional wives in those cities, either divorcing them before departure, or just leaving them until returning on a later trip. Neither wife benefited from such an arrangement, as both households were not fully stable, particularly the one abroad. R. Gershom, in an effort to solidify the primary household at home, therefore sought to impose a ban on such travelling merchants. The advantage of this approach is that it also explains the other ban attributed to R. Gershom—that of not allowing a woman to be divorced against her will. For some merchants would be tempted to divorce their wives from afar (via a messenger) in order to remain married in their new home—a practice which Maimonides explicitly recommends before a foreign trader could marry a local woman.\footnote{Responsa of Maimonides, ed. Blau, vol. 2, p. 624.} By requiring the wife's consent, R. Gershom helped stabilize the family structure in Germany which was so much at the core of Jewish life in the Ashkenazic communities, and which must have suffered significant stress with some husbands being away for such long periods of time.

Of course, these enactments must also be seen against the backdrop of other socio-economic conditions of the time, viz. that rich merchants were crucial to the survival and maintenance of the Jewish community, and that women in general enjoyed a higher status than in the regions under Muslim rule.\footnote{Grossman, op. cit.}

This rise in the status of middle-class women in Central Europe may be the independent and more likely source for the second, and more radical, enactment attributed to R. Gershom—that of requiring the woman's consent to be divorced.\footnote{Grossman, Ha῾akhmei Ashkenaz ha-rishonim (as in n. 84), p. 148. On Christian society, see Suzanne Fonay Wemple, ‘Women from the Fifth to the Tenth Century’, and Georges Duby, ‘The Courtly Model’, in A History of Women in the West, vol. II: Silences of the Middle Ages, ed. Christiane Klapisch-Zuber (Cambridge: Harvard University Press, 1992), pp. 169–201, 250–66.} This would naturally prevent frivolous divorce, a phenomenon to be avoided if only for its destabilizing effects. On this reading, the ban against polygamy might have been intended to prevent men from bypassing the ban against coercive divorce, closing off an option of supporting two women. In any event, developments in the surrounding Christian society cannot be ignored: marriage was increasingly seen in Church doctrine as based on consent of the couple, and divorce grew increasingly scarce as the Church's doctrine on the dissolubility of marriage was enforced around this time. Moreover, Christians viewed marrying a divorced woman as a form of adultery. In understanding this significant departure from talmudic law, it is hard to imagine that these did not, in some way, affect the Jewish mores of divorce, especially among a populace that insisted on seeing itself as equally, if not more, pious
than its hosts. In the end, the motives for each ban, and their interrelatedness, if any, remains highly speculative.

The scope of the bans seems to have expanded over time. It is reasonable to assume that, originally, R. Gershom did not insist on monogyny at the expense of fulfilling a commandment, such as procreation. A childless man could thus seek another wife after the requisite time had passed, either by divorcing his current wife or taking another—practices prescribed in the Mishnah. Nevertheless, as the generations passed, even reasonable exceptions were not always granted. Thus, in late 12th-century Germany, a childless man whose wife was deranged requested a dispensation from the ban against polygamy. The request was rejected on the grounds: ‘better one soul be lost than cause damage (la’asot qilqul) for future generations’. This indicates the ban’s general acceptance and authority.

Taken together, these bans and their ensuing application in Ashkenaz constitute steps towards a different conception of marriage from that of the Jewish communities under Islam, discussed above. In contrast to the relative ease with which a Jewish husband or wife in the Oriental countries could exit the marriage (either he unilaterally, or she, by claiming ma’is alai), in Europe, each spouse had to secure the consent of the other in order to end the union. I would argue that these moves reflect a trend in Ashkenaz to see marriage as possessing more ‘corporate’ dimensions, whereby consent must be secured before changes in status can be effected. In other words, each party was not allowed to act unilaterally, but had to do the things which would persuade the other party to agree. This obviously renders the entity more stable, even if not with the completely willing cooperation of its members. The contrast with the other medieval model is again instructive: both conceptions achieve a semblance of parity, but very differently. If the Babylonian geonim found it acceptable to afford the wife more opportunities to get out of the marriage unilaterally, just as the husband had, then early Ashkenaz sought to equalize the couple by requiring him to get her consent to divorce—in essence shackling him much as Jewish law shackled her. If either the husband or wife refused the divorce, the two remained married; apparently, the Ashkenazic model did not find the notion of a ‘dead’ marriage inherently intolerable. An entity existed even without the ongoing consent of its members.

In a 15th-century customary, Jacob Moelin notes that ‘the rabbis of earlier days’ required that all divorces within the communities of Speyer, Worms, and Mayence receive the approval of the leaders of all three communi-

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98 See above, n. 91.
99 See Eidelberg (above, n. 84), no. 42, 44, and Eidelberg’s note 1 at 113 (citing other medieval sources which seek to reconcile R. Gershom’s position with ‘his’ ordinance).
101 An appendix to the Munich manuscript of the Babylonian Talmud includes the ordinance, stating: ‘If he divorced his wife against her will and she remarried, he is innocent of all blame.’ The responsa of Meir of Rothenburg (Prague), no. 1022, does indeed void the coercive divorce, but no other source corroborates that version (see Louis Finkelstein, Jewish Self-Government, p. 182). See the Kol Bo’s version as cited by Moses Isserles, Shulhan Arukh, Even ha-’ezer 119:6.
ties. This is confirmed in an earlier responsum of the famed R. Meir ben Barukh of Rothenburg (d. 1293), and in other recensions found in various manuscripts. The agreement of the communities was not only essential; the divorce ceremony itself was highly public, conducted in the synagogue courtyard with the entire community assembled. We find similar moves, although somewhat later in Ashkenaz and certainly not limited to it, to make the marriage ceremony public, requiring the presence of ten adults rather than the talmudically mandated two witnesses. Some communities even issued ordinances requiring the consent of adults or rabbinic supervision before any union could be established between two people wishing to marry. An ordinance attributed to Jacob Tam (admittedly, by a much later source) insisted that only an officially authorized rabbi could conduct a betrothal between two people. All these appear to be indicia of what we have termed a ‘corporate’ view of marriage. Much as even the unanimous consent of all shareholders to either create or dissolve a corporation is ineffective in some jurisdictions without the license of the state, so too does early Ashkenaz insist on the approval of the community (through the representation of the qehillah or its representatives) before a marriage or divorce can be effected. This development must be seen as part of the general trend in Ashkenaz to articulate the powers and authority of the formal communal body known as the qehillah.

Marriage, therefore, was not merely a private affair, requiring only the consent of the parties for both entry and exit, but was a matter for the society as a whole. To be sure, this view did not reach the general normative position that rendered a totally private marriage (with witnesses) invalid, although the theory was certainly in place to allow that. The position of Yom Tov of Joigny (d. 1190) that we force a divorce on anyone who violates the ordinances of the community with regard to marriage is perhaps the strongest sanction to be found.

102 Falk, <i>Jewish Matrimonial Law</i> (as in n. 84), p. 119, dates this to a conciliar session in the 13th century.
103 Finkelstein, <i>Jewish Self-Government</i> (as in n. 86), pp. 218–56.
104 See Freimann, <i>Seder Qiddushin ve-Nisuin</i> (above, n. 6), pp. 24–82, passim.
105 <i>Responsa Keneset Yechezkel of Ezekiel Katzenellenbogen</i> (1670–1749), no. 72. See Freimann’s discussion, ibid., p. 40.
107 To be sure, due to the gravity of marital status and its implications for adultery, bastardy, etc., many Jewish societies moved to public marriages. This helped prevent clandestine marriages, fraudulent claims of engagement, and other ills which stem from the originally private character of marriage and divorce. See Freimann, op. cit. Nevertheless, taken together with the bans, we may say that this requirement to publicize divorce is more closely associated with the notion that marriage was within the province of society, not just of the individuals concerned.
108 See <i>Sheʾelot u-teshuvot Mahariq</i>, no. 84.
109 Freimann, ibid.
We cannot ignore the social and cultural context of this evolution. First, marriage’s well-documented shift from ‘the secular courts of emperors and kings into the church courts of archdeacons, bishops, and popes’\textsuperscript{110} might have its rabbinic parallel in Ashkenaz.\textsuperscript{111} Moreover, European society, Gentile and Jewish, was increasingly inclined in its very structure towards standardization and control of its practices. Ordinances and bans were instruments routinely employed in these communities, in an extremely wide range of areas.\textsuperscript{112} Often citing the potential dangers of diverse and discrepant customs regarding marriage and divorce, Ashkenazic scholars composed works that provided the correct text and instructions for the proper execution of both the ketubbah and the get.\textsuperscript{113} Of course, other communities outside Ashkenaz also sought to govern the activities of their members. But beyond that basic structural observation lies the more fundamental Ashkenazic conviction that the marital entity, the family, was a microcosm of the society, the basic unit of its structural stability and the means of its perpetuation, and thus was of great interest to the entire community, not just the immediate members of the union.\textsuperscript{114}

Thus in Ashkenaz, the text of the ketubbah was standardized rather early, in contrast to the private nature of individual contracts and stipulations which we encountered in the Middle Eastern countries, where marriage was and largely remained a matter between the two parties.\textsuperscript{115} In contrast to Babylonia, where enactments dealt with the grounds for divorce, R. Gershom’s ordinances focused on the procedures for a smooth and orderly divorce, a feature we find within the high aristocracy of northern France at this time.\textsuperscript{116} In Ashkenaz, marriage and divorce became genuine community events; a couple joining in matrimony was another link in society’s ongoing effort to perpetuate the Jewish people and their way of life. It therefore cannot be left to the couple alone; their break-up affects the society at large, and as such, they require the community’s consent. The Jewish customs and laws evolving in medieval Europe were thus primarily concerned to safeguard the institution


\textsuperscript{111} Ze’ev Falk, \textit{Jewish Matrimonial Law}, compares Jewish matrimonial law with primarily Christian developments, but his interest is focused on the rituals and ceremonies, rather than the theory of marriage.

\textsuperscript{112} See Louis Finkelstein, \textit{Jewish Self-Government}.


\textsuperscript{115} One exception may be the well-known 1187 ordinance in Egypt that people living in more rural areas were required to marry and divorce under the supervision of authorized scholars. But the fact that this was limited to non-urban Jews suggests that this was a measure intended to ensure proper procedure, not to bring marriage and divorce into the communal domain. The very fact that the text of the ketubbah was merely supervised but not standardized attests to this basic difference.

\textsuperscript{116} Duby, p. 7.
of marriage per se as the keystone of society, not necessarily the interests of
the individual parties to the marriage.117

B. R. Jacob Tam’s interpretation of moredet

One of the most significant developments in marriage law within the
Franco-German orbit was the interpretation of the talmudic passage regard-
ing moredet. This was spearheaded by Jacob b. Meir Tam of Ramerupt (d.
1171), a leading French tosafist. Owing to his authority, R. Tam’s under-
standing of the sources and their normative implications quickly became the pre-
dominant Ashkenazic view—largely due to its resonance with the emerging
‘corporate’ model.

R. Gershom’s ban against polygamy had one unforeseen consequence. The
Babylonian Talmud, it will be recalled, insisted on a 12-month probation-
ary period during which a rebellious wife would be neither supported nor
divorced. In Ashkenaz, however, this in effect also penalized the husband,
since he could not marry another woman during that time and he could not
divorce her unless she agreed. While some sought to modify the ban against
polygyny,118 R. Tam interpreted the whole passage differently. First, he felt the
Talmud never reached a conclusion regarding whether the man must divorce
his wife at the end of the twelve-month period; the decision to divorce was left
entirely up to the husband. Second, as he saw it, the motives of the woman
in resisting intercourse with her husband were almost immaterial; both the
spiteful wife and the wife who found her husband repulsive were treated more
or less identically. Third, R. Tam claimed that during the 12-month limbo pe-
riod, ‘if the husband wishes to divorce her without alimony he may divorce
her, and he has no alimony obligation, for she has forfeited [it] to him; it is a
valid forfeiture.’119

R. Tam’s motives in a more restrictive interpretation of the Talmud are
cited by R. Asher (Rosh) over a century later. Apparently, R. Asher saw little
merit in accommodating the rebellious wife, as the geonim and others had
done. As far as he was concerned, ‘let her not have sexual relations with her
husband and let her remain chained all of her days.’120 Any leniency would
only give license to greater temerity on the part of women,121 and threaten the

117 R. Asher b. Yehiel (early 14th century) refused to release a man from his vow that he would
never re-marry, if he knew at the time of betrothal that his future wife was unable to have children.
The case involved a man who had married an older, wealthy widow, and then learned that he
would not receive a penny of her fortune. He had sought absolution of his oath on the grounds
that he needed to fulfill the commandment to procreate; nevertheless, R. Asher denied him the
absolution of his oath, reasoning that if he were to receive the money, he would not be concerned
with procreation. See his Responsa, 8:8.
118 Thus, an older contemporary of R. Tam, R. Eliezer b. Natan (Ra’avan), ruled that either she
is granted a divorce immediately, or if penalizing her will have societal benefits, then the husband
is permitted to circumvent the ban and marry another woman, even as the first wife remains
119 Sefer ha-yashar, Hiddushim, ed. Schlessinger (Jerusalem: 1965), n. 4.
120 Teshuvot ha-Rosh 43:8. The translation is by Breitowitz (supra, n. 2), at pp. 47–48.
121 ‘Because she followed the dictates of her heart and cast her eyes upon another and desired
him more than the husband of her youth, do we then fulfill her lust and force the man who loves
institution of marriage itself.

R. Tam’s understanding of the law of moredet is further evidence of the underlying Ashkenazic conception of marriage as a ‘corporation’ which requires the agreement of all members (and outside authorities) to dissolve it. He understood that a broad interpretation of the law would run counter to the conception of marriage established in Ashkenaz. R. Gershom’s ban made it difficult for the man to exit unilaterally; R. Tam ensured that the woman was subject to similar constraints. Each side would negotiate honestly in divorce because both parties knew they had no other way out of the marriage. And both partners had to face the possibility that if consent were not reached, they would remain married to each other—a prospect which essentially ensured that the negotiations would be conducted in earnest.

R. Tam was similarly concerned with the communal dimension of marriage and divorce. We mentioned earlier that according to later sources, he required that betrothals be conducted by officially authorized rabbis. R. Tam acted in a similar vein with respect to divorce. In response to doubts raised regarding a get finally delivered by an apostate to his wife, R. Tam convened a synod of French rabbis who issued a ban that no Jew was allowed to question a divorce once it has been issued. In other words, casting aspersions on the validity of a get was equivalent to undermining the authority of the court or community that oversaw it. Were a court’s role merely procedural, it was legitimate at times to question whether the divorce was properly executed. In fact, in a certain sense challenges to a divorce are a societal expression of discomfort with the very idea of a couple divorcing, even if it involves an apostate who will not be returning to the community. But in Ashkenaz, the court or the communities became the arbiter of divorces themselves, deciding whether a couple’s wish to be divorced was legitimate or not. Challenging their divorces was tantamount to undermining the society that was based on their authority. Even as R. Tam sought to reduce the number of divorces by restrictive interpretation of moredet, he also had to shore up the authority of the community and its representatives to legitimate the divorces that were carried out.

As we noted, these restrictions in Ashkenaz were not total: if the husband chose to violate the bans and divorce his wife either against her will or without communal authorization, the divorce was valid. Nevertheless, we refer to the wife of his youth to divorce her? Heaven forbid, that any judge would judge in such a manner’ (ibid.).

Text at n. 105.

Thus, we find homiletic sources discouraging all divorce: ‘The law permits divorce even when a wife spoils her husband’s cooking, or he finds a woman more pleasing in his eyes—but one day that man will come to judgement, since permission was only given [to divorce] lest perchance he would sin with the wife of his neighbour, had the divorce not been permitted.’ See Sefer Hasidim, ed. Freimann (Frankfurt, 1924), no. 281. See also Sefer Hasidim, attributed to the 12th-century German pietist R. Judah ha-Ha’adid and his disciples, exhorts communities to investigate whether there are legitimate grounds for a divorce, and calls upon all respectable persons not to serve as witnesses or messengers for divorces that are deemed utterly baseless. See Sefer Hasidim, op. cit., pp. 288, 457 (no. 1110, 1886–7); see also Falk, op. cit., pp. 131ff.
conception of marriage more as a sort of ‘domestic corporation’ than as a partnership, for the members are not free to act unilaterally to dissolve the marriage, but must gain the other’s consent, and in some cases secure a license from an authorizing body to break up the union.

C. The fate of the dina de-metivta in Europe

According to the testimony of some later scholars, R. Gershom himself applied the geonic ordinance regarding the moredet,125 as did others. Prima facie, this would seem to be at odds with the conception of marriage in Ashkenaz: how could a society which deemed the close monitoring of its members’ marriages to be its responsibility permit such a potentially destabilizing force as a woman’s unilateral appeal for divorce?

First, the evidence regarding the acceptance of the dina de-metivta in Ashkenaz is far from unambiguous.126 Scholars were genuinely divided as to its validity and viability in Ashkenaz. Behind the question regarding the woman who is repulsed by her husband always lurked the concern that other women would abuse this option to achieve more deceitful ends, a concern even R. Gershom voiced in the responsum attributed to him.127 On the other hand, a medieval European woman left in the unenviable position of officially being married but not living with her husband was also an intolerable position, particularly in a society that we noted saw a rise in the status of women. By the early 13th century, this double bind led to a preference to let the matter be determined on a case-by-case basis, allowing the local authority familiar with the specific circumstances before him to render the decision.128

Second, it is not the geonic ordinance that is in and of itself inconsistent with the Ashkenazic view of marriage we are portraying. To the contrary, forcing a woman to remain with a man she found repulsive did not sit comfortably within the Franco-German emphasis on consent, both in marriage and now in divorce as well. It was only the danger of allowing her to be divorced upon request—that the prerogative might be abused by women who desire another man—which was so threatening to the institution of marriage. While some scholars therefore chose to reject the ordinance, others sought simply to control it, advocating application of dina de-metivta only if there was some objective criterion to back up her claim (amatla mevureret). In this case, a narrow interpretation of the ordinance would still protect marriage even as it granted the woman some power to initiate divorce. In the end, however, it is usually social controls rather than stricter laws that prevent legal mechanisms from being abused.

It is not surprising that the trajectory of subsequent decisions was, for the most part, in favour of restricting the wife’s use of the claim ma’is ʿalai. Generally speaking, juristic interpretation often favours maintaining a person’s ju-

125 She’elot u-Teshuvot Maharani, ed. M. Bloch (Berlin, 1891), p. 285. The Prague edition of the responsa (1608) cites the same in part, at no. 250. See also Shapira (supra, n. 52), pp. 137ff. These are collected in Eidelberg, op. cit., no. 40–41.
126 Shapira, op. cit., pp. 135–53.
127 Eidelberg, no. 40.
ridical status rather than altering it, just as we find in medieval canon law. But more importantly, we would insist that the regnant conception of marriage did not tolerate the expansive interpretation of the talmudic passage in question, nor the application of the geonic ordinance. For instance, we notice that in Ashkenaz, a distinction is increasingly drawn between two talmudic terms: *yosi ve-yiten ketubbah* (‘he should divorce [her] and give a *ketubbah*) and *kofin oto le-hosi* (‘we coerce him to divorce [her]’). While early interpretations, in both Spain and Ashkenaz, tended to collapse these two notions, we find a difference emerging over the course of this period, moving in the direction of a more restrictive interpretation which empowered the local court to use force only in those cases in which the Talmud actually uses the word *kofin.* *Yosi ve-yiten ketubbah* thus comes to mean only that it is religiously incumbent upon the husband to divorce his wife; while we are allowed to cajole him with words, physical force is not permitted. Thus, the Franco-German approach saw precious few cases which the Talmud specified coercion. In the vast majority of the cases where conflict erupted within a marriage, Ashkenazic practice was either to seek reconciliation or to persuade the husband to give the divorce willingly.

Another factor in this development was R. Gershom’s own ordinance insisting on the wife’s consent to the divorce. An ordinance that places consent at the centre of divorce would be at pains to allow her to sue for divorce unilaterally. That Ashkenaz moved in the direction of limiting the number of cases of forcing the husband to divorce his wife in general and in the application of the geonic ordinance in particular was thus a natural outgrowth of a conception of marriage which centered on the two parties’ consent. The Ashkenazic community continued to develop its theory of marriage for several more centuries with respect to both its corporate dimensions and its connection to society. But by the end of the 12th century, serious bans as well as talmudic interpretations established Jewish marriage in Ashkenaz as a different sort of entity than in the Middle East.

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129 See James A. Brundage, *Medieval Canon Law* (London: Longman, 1995), p. 169: ‘One key principle held that broad interpretation was appropriate in situations that would maintain a person’s juridical status, while strict interpretation was in order for actions that would alter it . . . . In marriage cases, likewise, doubtful issues ought to be resolved in favour of the marriage . . . .’

130 Alfasi on BT Yevamot 65b, with respect to the woman who has lived with her husband fourteen years and not given birth. Rashi, s.v. *hu*, is of the same opinion. Joseph Karo (*Beit Yosef, Even ha-‘ezer* 154:21) raises some doubts whether the position of Alfasi could indeed be generalized. He amends it to be the position of the Ri of Dampierre, cited in Tosafot, Ketubbah 70a, s.v. *yosi*.

131 See Tosafot, ibid. The distinction is attributed by Asher b. Yehiel to R. Hananel ben Hushiel (d. 1053) of North Africa, a slightly dubious attribution given the fact that no earlier source quotes him as the author of this distinction. Even his student, Isaac al-Fasi, who in other contexts cites Hananel’s view, makes no mention of this position. See the lengthy analysis of Joshua Falk, Derishah to Arba’ah Turim, *Even ha-‘ezer* 154:21, which casts considerable doubt on this attribution.

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IV. Conclusion

This paper represents an initial stage in a work aimed at inspecting the ideas of Jewish marriage, particularly from the perspective of divorce. On the assumption that divorce laws are often accurate indicators of conceptions of marriage, I set out to show that indeed a coherent view of marriage underlies the laws and customs of different Jewish communities, and that this diversity can be constructively and helpfully classified into ‘families’ which share basic assumptions even if there are some minor differences.

Needless to say, much more work needs to be done. There are many other resources which must be consulted even for the periods examined here, and some attention must be paid to the complex relationship of the ‘ideal’ as portrayed in works of law and the reality which existed ‘on the ground’. Moreover, the methodological assumption (particularly in a legal tradition such as Judaism) that a coherent theory of marriage underlies the laws must be clarified and defended. Lastly, more thorough comparisons with the non-Jewish environment in which Jews found themselves—Roman, Christian, and Muslim—must be undertaken.