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How Jewish is Jewish Family Law? *

BERNARD S. JACKSON
University of Manchester

1.0 *Introduction: The Paradox*

I wish to consider a paradox. Family law is often regarded as particularly resistant to change. In Judaism, as elsewhere, family values are considered as at the very core of the culture's ethics. In technical terms, the *halakhah* views family law not as part of civil law, along with contract and tort, but as a category apart, much of it classified as *issur veheter* rather than *mamona*.

Yet despite that, the history of Jewish family law has been one of recurrent, and often radical, change. Moreover, that change has often, as I shall argue in this paper, been influenced by the non-Jewish cultural environment. Indeed, in a recent book, Michael Satlow claimed:[1]

> It is, indeed, a central assertion of this book that in antiquity there was no single concept of 'Jewish marriage': Jews understood marriage, and married, much like their non-Jewish neighbours. On a local level, Jews did attempt to 'Judaise' their marriages, flavouring their local understandings and customs in order to make them seem Jewish.

Without serious attention to the internal qualifications of this statement, it might appear to go too far. Nevertheless, we do need to ask not only how much of Jewish family law is historically Jewish, but also in what sense it is Jewish: how much is it like Yom Kippur, and how much like Kletzmer music or hasidic dress?

2.0 *The Biblical Period*

2.1 *The Laws*

The Hebrew Bible provides no systematic account of the law of marriage or divorce. There are, moreover, grounds for doubt regarding the 'religious' character of the basic institutions of marriage and divorce in the Hebrew Bible, *without* necessarily impugning their 'Jewish' character. The sometimes elaborate rule formulations which we find in the Pentateuch very frequently relate to special situations which have some element within them of interest from a religious point view; it does *not* follow from this that the basic institutions which are presupposed in these passages were also conceived, at that time, as 'religious'.

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[1] Michael L. Satlow, *Jewish Marriage in Antiquity* (Princeton and Oxford: Princeton University Press, 2001), xiii.

What are the concerns of Biblical family law? Any doubt regarding the 'religious' character of the basic institution of marriage might immediately be opposed by the inclusion in the Decalogue of the prohibition of adultery, and its capital sanction in Deut. 22:22, which itself concludes with a religious motivation: **ובערת הרע מישראל**. However, such sanctioning of the breach of the institution does not make the institution itself religious. The Decalogue also prohibits theft: does that mean that private property was conceived as a sacred institution? Again, the fact that Lev. 18:6–23 provides an elaborate list of forbidden marriages does not entail the view that permitted marriage was regarded as a religious institution.

Elsewhere, the concerns of biblical law are primarily with the financial consequences of irregular marriage. Exod. 22:15–16 (MT) is concerned to protect the father of an unbetrothed virgin against loss of the brideprice, the *mohar*, if she is seduced; Deut. 22:28–29 makes it mandatory for the rapist of a virgin to pay the father 50 shekels *and* marry the girl (without any possibility of future divorce).

The Biblical law of divorce also deals not with the basic institution, but rather with its misuse. Deut. 24:1–4 is notoriously difficult: its concern is with what has been called 'palingamy'. It *mentions* the possibility of divorce either because of *ervat davar*[2] or, in the case of the second marriage, simply because the husband 'hates'[3] his wife. The law tells us that a divorced wife may not return to her original husband if she has had an intermediate marriage.[4] Much scholarly ink has been spilled in the search for an explanation.

Westbrook[5] argues that it is primarily concerned with economics, rather than with the 'sanctity' of marriage: the original husband divorces his wife on an allegation of *ervat davar*, and thus without a financial settlement; the second marriage terminates, however, without any such allegation, either by the death of the second husband or by unilateral divorce on his part—in either case (he argues) with a settlement for the wife. The first husband cannot remarry his wife and thus, in effect, take the financial advantage of the second marriage, when he himself had terminated the first marriage for free, and on an allegation of *ervat davar*. This is probably the most attractive of the explanations given so far of this difficult law.[6]

It does not, however, explain the religious motivations provided by the au-

[2] Here undefined: the early Rabbis differed over its interpretation: *M. Gitt*. 9:10.

[3] Sometimes used as a technical term for unilateral divorce. Y. Zakovitch, 'The Woman's Rights in the Biblical Law of Divorce', *The Jewish Law Annual* 4 (1981), 28–46, at 34f., views *senu'ah* in the Hebrew Bible as referring to a woman not yet a divorcée but whom the husband would like to divorce, and suggests that the technical meaning is first found at Elephantine.

[4] Islamic law, incidentally, has the converse rule: a divorced wife may return to her original husband *only* if she has had an intermediate marriage: 'If he divorces her, she is not lawful for him afterwards, until she marries another husband' (*Qur'an*, 2:229).

[5] R. Westbrook, 'The Prohibition on Restoration of Marriage in Deuteronomy 24:1–4', *Scripta Hierosolymitana* 31 (1986), 387–405.

[6] An example occurs in Roman literature: J. Carcopino, *Daily Life in Ancient Rome*, ed. H. T. Rowell, trld. E. O. Lorimer (Harmondsworth: Penguin Books, 1962), 110f., notes that the 'virtuous Cato of Utica, after being divorced from Marcia, felt no shame in taking her back when her private fortune was augmented by that of Hortensius, whom she had married and lost in the interval' (citing Plutarch, *Cato Minor* 36; 52).

thor/editor of the final text, who explains the ban on the woman returning to her first husband on the grounds that the woman is 'defiled' and taking her back is an 'abomination' which brings guilt upon the land.

אחרי אשר הטמאה כי־תועבה הוא לפני יהוה ולא תחטיא
את־הארץ אשר יהוה אלהיך נתן לך נחלה׃

But why is the woman 'defiled' and what is the 'abomination' (תועבה), and why? David Instone-Brewer suggests that the 'abomination' consists in the moral hypocrisy of the man, in that such a 'remarriage would involve abrogating a sacred vow'.[7] However, the evidence of any such 'sacred vow' taken in constituting marriage is very thin.[8] Another possibility is that the תועבת is the hypocrisy of the *woman*, who was initially divorced because of adultery (so interpreting *ervat davar*), then entered into a second marriage (impliedly, with the lover with whom she committed adultery), and now wishes to return to her former husband, perhaps having for this purpose engineered the 'hatred' of the second husband. Rabbinic law, we may recall, later made divorce of an adulterous wife *mandatory*.[9] Should we perhaps argue for a similar motivation for the biblical law: the wife cannot go back to her original husband, to whom she has been unfaithful, simply by the device of contracting an intermediate marriage, particularly one with the lover with whom she had had adulterous relations? Even this would not entail our accepting a sacral conception of marriage at this stage: the ban on remarriage may be viewed simply as reinforcing the traditional authority of the husband: the wife must realise that any infidelity will permanently sever her economic claims on her first husband. Thus, the concerns of Deut. 24, like the other laws already mentioned, are either adultery or economic abuse of marriage. The motive clause of Deut. 24:4, moreover, may well represent an editorial addition; it is not needed for the substance of the rule. The terminology echoes that of Malachi, which, I shall presently suggest, belongs to a later stage of biblical development, when the law of marriage did assume a more central place in religious thought and practice.

A similar argument may be advanced for the law of inheritance: we have two texts concerning intestate succession, but both, on examination, do not appear motivated by a sense of the religious character of family law *as such*, but rather by more particular considerations. The law stated in the case of

[7] D. I. Brewer, 'Deuteronomy 24:1–4 and the Origin of the Jewish Divorce Certificate', *JJS* XLIV/2 (1998), 230–43, at 234.

[8] Brewer offers none. The only text suggestive of such is Ezek. 16:8: 'And when I passed by you, and looked upon you, behold, your time was the time of love; and I spread my skirt over you, and covered your nakedness; yes, I swore to you (ואשבע לך), and entered into a covenant with you, says the Lord God, and you became mine.' Z. W. Falk, *Hebrew Law in Biblical Times* (Jerusalem: Wahrmann Books, 1964), 148, however, suggest that it reflects general custom. He cites in support Mal. 2:14, discussed below (which mentions a covenant, but no oath), and Prov. 2:17, where the ברית אלהיה which the woman forgets does not appear to be a covenant of marriage.

[9] Indeed, it is plausibly argued that this is the background to Matthew's allowing divorce in case of *porneia*: E. Lövestam, 'Divorce and Remarriage in the New Testament', *The Jewish Law Annual* 4 (1981), 47–65, at 59f., on Matt. 5:31–32, 19:9.

the daughters of Zelophehad (*Num*. 27) occurs in the context of the imminent entry to and division of the promised land.[10] It is not be assumed, then, that there was originally any religious understanding that the whole of the estate of a deceased should be distributed amongst the sons alone, to the exclusion of the daughters. Recall the conclusion to the book of Job (42:15): 'And in all the land there were no women so fair as Job's daughters; and their father gave them inheritance among their brothers.'

The law of primogeniture (Deut. 21:15–17) does not state, straightforwardly, that the oldest son receives a double portion; rather it says that he is not to be excluded from that double portion (in favour of a younger son), merely because he is the son of a wife who is in (relative) disfavour with the husband. In short, we have here a contest between the sons of different co-wives. The situation described by the law fits like a glove that of the succession to Jacob, who passed over his firstborn son (Reuven, son of Leah), in favour of Joseph (son of Rachel), by adopting the latter's two sons, Ephraim and Menasseh, and giving each a portion equal to that of their uncles.[11] Ephraim and Menasseh, of course, figure as two of the twelve tribes. It may well be, therefore, that this law, like that of the daughters of Zelophehad, is concerned primarily with the allocation of the promised land, rather than with the institution of succession in general.

2.2 *The Narratives*

Biblical narratives supplement our information regarding *practice* in biblical times, if not normative Jewish practice. Indeed, some aspects are decidedly non-normative, compared to later (rabbinic) understandings. Let me mention three aspects, relevant to my general theme.

First, there is the widespread phenomenon of Hebrew males unproblematically marrying non-Hebrew females: e.g. Moses, Joseph, Ahab.[12] Indeed, questions may even be asked regarding the religious status of the matriarchs themselves. We read that Rachel stole her father's *teraphim* (Gen. 31:19). Rabbinic interpretation insists that they were not for her own use (she, of course, is taken to have converted) but rather that the 'theft' was designed to deprive her father of their use, and thus wean him away from idolatry.[13]

Second, while the *laws* provide no indication of any right of the woman to divorce her husband, Zakovitch has argued that various narratives (notably, the matrimonial histories of Moses, Samson and the marriage of David and Michal) suggest that where the wife feared that she had been deserted by her husband, either she or her father might unilaterally terminate the marriage by returning to her original home.[14]

[10] Indeed, the Rabbis themselves conceded that the marital restriction (within the tribe) imposed in Num. 36 related only to that generation (*B.B.* 120a; *Rashbam ad loc.*).

[11] Gen. 48:3–19, 49:3–4; 1 Chron. 5:1–2. Cf. C. M. Carmichael, *Law and Narrative in the Bible* (Ithaca and London: Cornell University Press, 1985), 142–45.

[12] We may note that the converse, out-marriage by Hebrew females, is *not* unproblematic, as witness the story of Dinah; this, of course, is reflective of an original patrilineal principle.

[13] E.g. *Rashi, ad loc*.

[14] Zakovitch, *supra* n. 3, at 36–38.

Third, while the laws mention only *mohar*, bride-price, the narratives provide evidence also of the provision of property to the bride by her father.[15] Illustrations may be found in several narratives of the 'handmaids' possessed by the matriarchs, and notably the relationship between Sarah, Abraham and Hagar. Given the apparent lack of rights inherently enjoyed in this property by the husband,[16] it is doubtful whether we should describe it as 'dowry'. It certainly served the function, however, of providing financial independence for the wife, should she decide that she required it.[17]

We may note that the narratives involving all three of these 'deviant' practices have a common factor: some in each group involve 'intermarriage' and indeed, at some stage, negotiations with families belonging to other cultures. In this way, the Bible itself attests to knowledge of foreign marital practices. And the archaeological record of Ancient Near Eastern law provides a wealth of corroboration for the view that family law (both the formation and dissolution of marriage) was conceived primarily in economic terms.[18]

2.3 *The Prophets*

Yet despite this, we do find a certain form of sacralisation of the notion of marriage in relatively early sources. Already in the eighth century, Hosea depicts the relationship between God and Israel in terms of a marriage where the wife has been unfaithful (but ultimately is forgiven and taken back). It is understandable that an image of human unfaithfulness is used as a metaphor for unfaithfulness to God. But though God's relationship with Israel is here (re-)established through a *berit* (2:18)—and Hosea (4:2) appears to invoke the Decalogue prohibition of adultery—human marriage is not yet itself con-

[15] Sometimes called *shilluhim* (1 Kings 9:16), over which she exercised full control.

[16] See esp. Abram's reply to Sarai's complaint about Hagar's behaviour after the latter had conceived: 'Behold, your maid is in your power (*beyadeykh*); do to her as you please': Gen. 16:6.

[17] Moreover, the narratives indicate some flexibility even in the modalities of *mohar*: Jacob, it may be recalled, did not have the wherewithal for a cash *mohar*: he therefore paid by labour—in advance for (what turned out to be) Leah, on credit for Rachel. But Jacob's marriage was matrilocal: he was bound to provide services for Laban in respect of the support he himself received from the household, quite apart from any 'brideprice'.

[18] Indeed, Louis Epstein, in his classic 1927 book, *The Jewish Marriage Contract: A Study in the Status of the Woman in Jewish Law* (New York: Jewish Theological Seminary of America, 1927), 53, already argued that certain clauses are common to all ancient oriental peoples, including a declaration that the *mohar* was paid and received and enumeration of the dowry received by the husband. As for the latter, interpreters have viewed both the Old-Babylonian *seriktum* (B. Porten, *Archives from Elephantine: The Life of an Ancient Jewish Military Colony* (Berkeley and Los Angeles: University of California Press, 1968), 229 n. 85) and the Egyptian demotic deeds of gift to daughters (G. R. Driver and J. C. Miles, *The Babylonian Laws* (Oxford: Clarendon Press, 1952–1955), I.272ff., 336) as designed as the daughter's share in the inheritance, devolving on her death upon her children—like the later *benin dikhrin* clause found, as we shall see, in both the documentary papyri from the Dead Sea caves (P. Mur. 21:12–14, P. Mur. 116:4–7, P. Mur. 115:12–14, P. Yad 10:12–13 (err.: see *infra*, n. 90), P. *XHev/Se* 2:11–13) and the Mishnah (*Ketubot* 4:10). Similarly, for the neo-Babylonian period, M. T. Roth, *Babylonian Marriage Agreements 7th–3rd Centuries B.C.* (Neukirchen-Vluyn: Neukirchener Verlag, 1989), concludes her analysis of the purpose of the agreements (24–28) by stressing (at 28) 'the primacy of the dowry in the marriage agreements': more generally, 'the transmission of wealth is the most frequent and probably the most important consideration in the documents we call marriage agreements.'

ceived in terms of a *berit*,[19] and certainly not one with sacral connotations.

Hosea's use of the marriage metaphor may well reflect some aspects of contemporary practice: the woman appears to have the freedom to leave her husband (whether she actually divorces him in this text is less clear), and the procedure is undoubtedly *not* that of the *sefer keritut of* Deut. 24:1–3, Isa. 50:1, and Jer. 3.8 (which follows Hosea's conception/metaphor of God's relationship to Israel as a marriage). In *Hosea* 2:4, divorce is accomplished by an oral formula: 'Plead with your mother, plead; for *she is not my wife, nor am I her husband*; let her therefore put away her harlotry away from of her sight, and her adulteries from between her breasts.'

Deut. 24 does however appear to presuppose the delivery of a *sefer keritut* by the husband as the normal procedure. The oral formula of rejection (Hos. 2:4) may well have given way to this documentary form, not least to avoid the kind of marital complications attributed to both Moses and Samson.[20] Yet the fact that such procedures are presupposed in a text of religious law, and even the fact that the oral formula is used in the marriage analogy describing the relationship between Israel and God, does not in itself entail the view that the basic procedures of marriage and divorce were themselves already regarded at this stage as matters of religious law.[21]

Ultimately, of course, they came to be so regarded. But when, and for what reasons? A case may be made that it was the religious reform of

[19] A salutary warning against premature conceptualisation of the relationship was sounded by A. van Selms, *Marriage and Family Life in Ugaritic Literature* (London: Luzac, 1954), 13, in the context of Ugaritic literature: 'No proper word for "Marriage" is found in Ugaritic literature. The same remark applies to Biblical Hebrew and probably also to Babylonian. There is no theorising about the institution of marriage in general; only concrete cases wherein this man takes that woman as his spouse are visualised. In such concrete pictures the abstract idea of "marriage" cannot be expected: the actual taking in marriage is described, and this is done by making use of verbs. Therefore it is impossible to say what Ugaritic word could be considered the equivalent of our word "marriage".' Cf. my observation regarding anachronistic 'juridification' of matrimonial property from different sources (*mohar* v. dowry) in the context of the Dead Sea papyri, in 'Problems in the Development of the *Ketubah* Payment: The Shimon ben Shetah Tradition', in *Rabbinic Law in its Roman and Near Eastern Context*, ed. C. Hezser (Tübingen: Mohr-Siebeck, 2003), 199–225, at 212.

[20] Exod. 18:2–5 suggests that Jethro's motivation in visiting Moses with Zipporah and her sons is to resolve any ambiguity as to the status of the marriage created by Moses having earlier sent his wife 'home'. Samson's father-in-law, by contrast, drew his own conclusions from Samson's desertion: Judg. 14:19–20, 15:1–2.

[21] In the Ugaritic context, van Selms, *supra* n. 19, at 39–41, comments on the use of blessings during the wedding ceremony, which he interprets as designed to ensure the fertility of the marriage. Since procreation is, in his view, the prime objective of the marital relationship, this runs counter to neither his warning against the premature conceptualisation of marriage (*supra*, n. 19) nor its sacralisation. The Genesis 1 creation narrative similarly confers on the primal couple (and indeed on the fish and birds) a blessing for procreation, without any suggestion of a marital relationship, while the conclusion (the meaning of which is disputed) which Gen. 2:24 derives for later generations: 'Therefore a man leaves his father and his mother and cleaves to his wife, and they become one flesh', is in the voice of the narrator, addressed to post-diluvian society, rather than that of one of the participants in the creation itself. Cf. *Dig*. 1.1.1.3 (Ulpian): *Ius naturale est, quod natura omnia animalia docuit . . . hinc descendit maris atque feminae coniunctio, quam nos matrimonium appellamus, hinc liberorum procreatio, hinc educatio . . .* (Natural law is that which nature has taught all animals . . . thence derives the union of male and female, which we call marriage, thence the procreation of children, thence their rearing . . .).

Ezra, prompted by inter-marriage and the religious problems seen to accompany it, which brought marriage and divorce *as a whole* into the religious sphere.[22] Moreover, the *later* prophetic use of the marriage metaphor, as we find it in Ezek. 16:8[23] and Malachi (probably dating from just the period of Ezra/Nehemiah), is significantly different from that of Hosea: here, *the marriage itself* is a covenant and God is a witness to it (2:14):

> Because the LORD was witness to the covenant between you and the wife of your youth, to whom you have been faithless, though she is your companion and your wife by covenant.
>
> על כי־יהוה העיד בינך ובין אשת נעוריך אשר אתה בגדתה בה והיא חברתך ואשת בריתך׃

3.0 *Elephantine, Egypt and the Shimon b. Shetah Tradition*

It is against this background, I suggest, that we should re-assess the significance of the 'deviant' practices found in the fifth-century BCE Aramaic marriage contracts at Elephantine—a Jewish military colony located on an island in the Nile,[24] which had a 'Temple' of its own.[25] Here, it is quite clear that the wife has a right to stand up in the assembly and to pronounce a divorce formula against her husband. In Brooklyn 7:24–25, for example, we read:

> And if Yehoyishma divorces her husband Ananiah and says to him [in an/the assembly], 'I divorce [thee], I will not be to thee a wife' . . . the divorce money is on her head, his (or her?) *mohar* is lost: כסף שנאה בראשה, מהרה יאבד

Both the terminology of these Elephantine contracts,[26] and the fact that divorce is performed by an oral declaration,[27] is evocative of Hosea, and thus

[22] Ezra 9–10, cf. Neh. 10:31; some, e.g. D. Piattelli, 'The Marriage Contract and Bill of Divorce in Ancient Hebrew Law', *The Jewish Law Annual* 4 (1981), 66–78, at 68f., have viewed the story of Ruth as a polemic opposed to this view of mixed marriages. For a more detailed analysis of these and related problems in the biblical period, see my 'The 'Institutions' of Marriage and Divorce in the Hebrew Bible', forthcoming.

[23] See n. 8 *supra*.

[24] See further Porten, *supra* n. 18, at 8–27; J. M. Mélèze-Modrzejewski, *Les Juifs d'Egypte* (Paris: Armand Colin, 1991), 21–25. The colony may have been established originally in the late seventh century BCE, working as mercenaries for Psammetichus I or II guarding against the Nubians, but in the period of our documents was serving the interests of the new Persian rulers.

[25] See further Porten, *supra* n. 18, at 109–14.

[26] As has been noted by M. J. Geller, 'The Elephantine Papyri and Hosea 2, 3', *JSJ* VIII (1977), 139–48; see also G. P. Hugenberger, *Marriage as a Covenant: A Study of Biblical Law and Ethics Governing Marriage, Developed from the Perspective of Malachi* (Leiden: Brill, 1994), 231–36. On C15, in the context of the archive of Mivtahiah, see R. Yaron, *Introduction to the Law of the Aramaic Papyri* (Oxford: Clarendon, 1961), 4f.; Mélèze-Modrzejewski, *supra* n. 24, at 26–34. See also B. S. Jackson, 'Some Reflections on Family Law in the Papyri', in *Jewish Law Association Studies* XIV (2004), 141–77, at 149–51.

[27] Cf. D. Daube, *The New Testament and Rabbinic Judaism* (London: Athlone Press, 1956, reprinted New York: Arno, 1973), 366, rejecting the early attempt of Epstein, *supra* n. 18, at 202, to harmonise the procedure with rabbinic law, by claiming that the wife here compels her husband to divorce her.

linked to a form of practice in Palestine distinct from and perhaps anterior to that in Deuteronomy. Yet even this does not entail the view that they were regarded as religious institutions: religious law appears not yet to have been conceived to include such basic marital matters.

The emphasis in these texts—as also in many other Second Commonwealth sources[28]—is upon dowry rather than *mohar*.[29] Yet we may note that the outline of the future rabbinic development is already present at Elephantine, in the fact that the husband himself adds a further sum to the dowry, whose overall value is enumerated in the contract:[30] the *mohar* has thus become an indirect dowry in that its value is calculated as part of the dowry which has to be returned on divorce.

This conflation of the *mohar* with the dowry is known already in Egyptian practice. By the third century BCE, however, *non-Jewish* practice in Egypt had itself adopted *deferment* of the *mohar*.[31] Pestman dates this change from about 230 BCE:[32] before then, the wife received this payment (the Egyptian *šp*) when entering into the marriage, later, at its dissolution.

To do this, the husband added a fictitious piece of property to the dowry. Now this deferment of the *mohar*, its conversion from an up-front bride-price to a debt payable by the husband only on termination of the marriage (especially, on divorce), is precisely the reform in the *ketubah* which rabbinic sources attribute to Shimon b. Shetah, around 100 BCE.[33] Moreover, the security clause over the husband's estate, itself attributed by the tradition to Shimon b. Shetah, is also found earlier in Egypt. Rabinowitz in 1956 quoted a demotic marriage contract of 176 BCE, in which the husband declares to the wife:[34]

> Hath said X to Y 'Thou hast given me 50 silver (pieces) of the Treasury of P'tah refined ... it is thou who shalt be entitled to the security (?) of thy bread and clothing, and it shall be at my charge, and I will give it thee without being able to say to thee "Receive thy endowment." On the day when thou preferrest to receive it, I would give it to thee on it. Everything that I have or shall acquire

[28] E.g. Tobit 8:19–21. E. Bickerman, 'Two Legal Interpretations of the Septuagint', *Revue internationale des droits de l'Antiquité* III (1956), 81–104, at 91f., reprinted in his *Studies in Jewish and Christian History* (Leiden: Brill, 1976), I. 201–24, at 210f., noted that the LXX even translates *mohar* as dowry (*pherne*).

[29] And sometimes even on *wholly separate* (sometimes immovable) property given to the bride by her father, in which the groom may be given very limited and specified rights (Cowley 8). See further Jackson, *supra* n. 26, at n. 28.

[30] See further Jackson, *supra* n. 19, at n. 31.

[31] In fact, there are some documents where the marriage contracts explicitly say that the bride-price has *not* been paid: M. J. Geller, 'New Sources for the Origin of the Rabbinic Ketubah', *Hebrew Union College Annual* 49 (1978), 227–45, at 236.

[32] P. W. Pestman, *Marriage and Matrimonial Property in Ancient Egypt* (Leiden: Brill, 1961; Papyrologica Lugdono-Batava, IX), 155.

[33] Jackson, *supra* n. 19.

[34] J. J. Rabinowitz, *Jewish Law: Its Influence of the Development of Legal Institutions* (New York: Bloch, 1956), 41, quoting it from H. Thompson, *A Family Archive from Siut* (Oxford: Oxford University Press, 1934), 25. R. Yaron, 'The Murabba'at Documents', *JJS* 11 (1960), 157–71, at 169, too, has maintained: 'The lien on the property of the husband, and its subsidiary provisions, are in all probability derived from national Egyptian law.'

(is) the pledge of thy endowment.'

Rabinowitz himself drew attention, in this context, to the possibility that Shimon took refuge in Egypt to avoid the persecution of the Pharisees by Alexander Jannaeus.[35] But even if we do take the view that some of the practices reflected in the Elephantine papyri derive from the Egyptian (particularly, demotic) environment (while others reflect earlier Palestinian practice and terminology), that does not entail the conclusion that they should not be regarded as 'Jewish'.[36] We may recall that the Pentateuch itself is happy to ascribe to foreign influence (in the form of the advice of Jethro) the reform of the judicial structure introduced by Moses in Exod. 18:13–27.

If there was a movement from *mohar* to dowry, we might ask why. Some have seen it in terms simply of assimilation to the external cultural environment. However, there are also good internal reasons for it. Once the rule in the case of the daughters of Zelophehad (*Num*. 27:1–11) became a general norm of the Jewish law of succession, so that daughters would not inherit from their father along with their brothers, the father would desire all the more to provide for his daughters during his lifetime, and not rely on the goodwill of his sons after his death to maintain them. The obvious way to do this was via a marriage settlement. The daughter's dowry should thus be seen not simply as a contribution to the expenses of the marriage, but as a form of transmission of family property to daughters and ultimately to their own heirs. But if the daughter's share of her father's estate was, in effect, to be advanced in the form of a dowry, it was especially important that it be properly secured.

[35] *Supra* n. 34, at 43: 'It may well be, however, that Simeon b. Shetah, who, according to a Talmudic tradition (PT, Nazir, 5: 3), fled from the wrath of Alexander Jannaeus, spent some time in exile in Egypt, where he became acquainted with the pledging clause in the marriage document which had been in use for a long time, and that upon his return to Palestine he introduced this clause into the marriage document of Palestinian Jewry.' Note that Rabinowitz does not assert that the Palestinian Talmud itself claims that Shimon spent time in Egypt. It claims only that he fled from the king's anger, and was later recalled. For the passage and its parallel in *Y. Ber*. 7:2, see J. Neusner, *The Rabbinic Traditions about the Pharisees Before 70, Part One* (Leiden: Brill, 1971), 96–99. Other sources, however, attest both Yannai's persecution of the Pharisees and the exile of some to Egypt: see esp. *Sot*. 47b = *Sanh*. 107b: 'When Yannai the King killed the rabbis, Simeon b. Shetah was hidden by his sister, while Joshua b. Perahiah [and Jesus] fled to Egyptian Alexandria': Neusner, *ibid*., at 83–86, 114; cf. Geller, *supra* n. 31, at 245, noting that 'Pharisees fled to Egypt to escape the persecutions of Alexander Jannaeus'; *Y. Hag*. 2:2 = Y. Sanh. 6:6: 'The men of Jerusalem wanted to appoint Judah b. Tabbai as *nasi* in Jerusalem. He fled and went to Alexandria': Neusner, *ibid*., at 99, 128. On Shimon's survival of Yannai's massacre of the 'rabbis', see also *Ber*. 48a; Neusner, *ibid*., at 112. For a discussion of the relationship of these rabbinic traditions to the accounts of Josephus of the reign of Yannai (noting that Shimon is not there mentioned), see Neusner, *ibid*., 137–41. See further Y. Efron, 'Simeon ben Shetah and King Yannai', *In Memory of Gedaliahu Alon—Essays in Jewish History and Philology* (1970), 69–132 (in Hebrew). On relations between the king and the Pharisees, see also C. Rabin, 'Alexander Jannaeus and the Pharisees', *JJS* 7 (1956), 3–11; E. Schürer, G. Vermes and F. Millar, *The History of the Jewish People in the Age of Jesus Christ (175 B.C.–A.D. 135)* (Edinburgh: T. & T. Clark, 1973), I.221–24.

[36] A. Wasserstein, 'A Marriage Contract from the Province of Arabia Nova: Notes on Papyrus Yadin 18', *JQR* 80 (1989), 93–130, at 111 n. 54, comments: 'The partners to the transactions recorded are Jews and they presumably act in accordance with Jewish law and custom within the framework of Persian law; "Jewish" law or custom here is, of course, in no way to be confused with rabbinic law.'

4.0 *The Judaean Desert Documents*

Let us move now to the first two centuries of the Common Era, the formative period of Jewish law, culminating in the Mishnah. Jews in Palestine are now subject to Roman rule (though, being for the most part non-citizens, not to Roman private law); there are Greek cities, and the wider cultural environment is Hellenistic. There is a thriving Jewish community in the centre of Hellenistic civilisation, Alexandria. Of this period, Satlow maintains, the 'vast majority of Hellenistic Jews did not have a distinctive 'law of marriage,' and even the rabbis had trouble convincing other Jews to adopt their own legal forms until relatively late.' [37]

This claim is based not only on long-known Hellenistic-Jewish sources, but also the more recent discovery of a number of collections of documentary papyri, largely dating from the Bar-Kochba period, in caves around the Dead Sea, particularly at Murabba'at and Nahal Hever/Seiyal. These include a dozen or so concerned with marriage and divorce, in various degrees of preservation. Some are in Aramaic, others in Greek (of varying quality), though sometimes with Aramaic subscriptions and signatures.

This library has provoked some notable differences of view amongst scholars. Some, like Satlow, see the Greek as primary, as representing the dominant cultural influence, and seek to interpret the Aramaic in their light. From this viewpoint, the Aramaic scribal practice, as here evidenced, provides a channel of transmission of foreign influence which is ultimately reflected also in the 'classical' Jewish sources, such as the Mishnah. Others see the Aramaic documents as part of an organic Jewish development, and seek to interpret the Greek in that light. It is common ground, however, that there may well have been pragmatic reasons for the choice of Greek—either for registration/archiving in non-Jewish institutions, or indeed to facilitate recourse to gentile jurisdictions (of which there is direct evidence).

I shall review briefly, in this context, two of the central issues: that of the wife's right to divorce and that of the matrimonial property régime reflected in the marriage contracts.

4.1 *Unilateral Divorce by Wife?*

We have seen that unilateral divorce by the wife of the husband was practiced by the Jewish community in Elephantine, and that the procedure there was by public, oral declaration, rather than by delivery of a *get*. Moreover, those practices do not appear to have been entirely without biblical precedent. However, by the time of the Mishnah, divorce is fully part of Jewish religious law—'Nashim' constituting one of the six Orders of the Mishnah—and Deut. 24:1–4, which contemplates only divorce by the husband, by means of the delivery of a *sefer keritut*— is taken as the institution's biblical base. The Hellenistic environment, on the other hand, is one in which wives largely have equal freedom of divorce with their husbands[38] (save for the aristocratic Ro-

[37] *Supra* n. 1, at xixf.

[38] It had not always been so. Daube, *supra* n. 27, at 363f., while acknowledging that 'in the

man marriage *cum manu*[39]), and where the procedural requirements are much more flexible.

A number of reflections of this are found in Jewish sources. Philo's version of Deut. 24:1–4 contemplates termination of the first marriage by the wife rather than the husband.[40] The New Testament controversy with the Pharisees regarding divorce concludes with Jesus telling his disciples (but not the Pharisees): 'Whoever divorces his wife and marries another, commits adultery against her; and if she divorces her husband and marries another, she commits adultery' (*Mark* 10:11–12).[41] And Paul counsels the Corinthians that 'the wife should not separate from her husband' (*I Cor*. 7:10–11).[42]

Such sources have prompted the view that there existed a Hellenistic-Jewish tradition of unilateral divorce by the wife. Two of the Dead Sea documentary papyri have been taken to support this. The first is the much-discussed (Aramaic) P. Hever 13, lines 3–10 of which Cotton and Qimron translate:[43]

Greek law of the papyri . . . as a rule either party might dissolve the union', notes that 'under the old Attic law a husband could divorce his wife, but a wife could dissolve the marriage only with the help of the Archon—a system not unlike the Jewish.'

[39] On Roman divorce *mores* in the late Republic, see A. M. Rabello, 'Divorce of Jews in the Roman Empire', *The Jewish Law Annual* IV (1981), 79–102, at 82, quoting Seneca, *De beneficiis* 3.16.2, who complains that there are women who do not number the years by consuls but by husbands, and Martial, *Epigrammata* 6.7, on a woman who in thirty days had married and divorced ten husbands. Rabello comments: 'As always, dissolute morality was typical of the nobles and the rich.'

[40] 'Another commandment is that if a woman after parting from her husband for any cause whatever marries another . . . ' (*DSL* iii.30).

[41] On the terminology here, which not only (alone amongst the synoptic passages concerning divorce) envisages termination at the initiative of the wife but also uses the transitive ἀπολύειν, 'to dismiss', see Daube, *supra* n. 27, at 365–68, who compares the divorces of Salome (text at n. 48, *infra*, though noting, at 365, that the (middle, ἀπολύεσθαι) form of the verb—ἀπολυομένη τὸν γάμον—is not quite so strong as the Markan 'to dismiss the husband'), Herodias (with reservations: see n. 51, *infra*) and the Elephantine papyri, but tends towards the argument, supported by text-critical considerations, that ἀπολύειν is not here original.

[42] Daube, *supra* n. 27, at 362f., observes that here, 'with reference to a marriage where both parts are believers, Paul uses the intransitive χωρίζεσθαι of the wife who "separates", but the transitive ἀφιέναι of the husband who "dismisses" his wife. This is in perfect agreement with the Jewish ideas on the subject. In the next two verses, with reference to a marriage where only one party is a believer, he uses the transitive ἀφιέναι both of the dissolution of the marriage by the husband and of its dissolution by the wife. The latter application of ἀφιέναι is justified since the procedure he has in mind is a non-Jewish one, Roman or Greek . . . In confirmation of this analysis it may be pointed out that, in Rabbinic literature, the transitive *gerash*, "to expel", is used once and once only of the wife divorcing her husband, and that it is in a discussion of gentile divorce.' In the Jewish context, he notes, 'to separate' 'may denote the same as "to go away", i.e. actual departure from the common domicile, or merely avoidance of intercourse', and may also be used of a wife who is entitled to 'institute proceedings culminating in his being compelled to divorce her. But even then it is the husband who dissolves the bond, though against his will. Of her, it would still be said that she "separates", "goes away" or "is let go away".' The reference here is to the sources discussed *infra*, at n. 56.

[43] H. M. Cotton and E. Qimron, 'XHev/Se ar 13 of 134 or 135 C.E.: A Wife's Renunciation of Claims', *JJS* XLIV/1 (1998), 108–18, at 115. This approves in substance the rendering of Yardeni in H. M. Cotton and A. Yardeni, *Aramaic, Hebrew and Greek Documentary Texts from Nahal Hever and Other Sites* (Oxford: Clarendon Press, 1997, DJD XXVII), 67 (quoted also by Cotton and Qimron, *ibid*., at 109) while resolving some ambiguities left open by Yardeni.

3 [ ] – – – – [– –] ו/י – – – – ן [– –] לא איתי [לי]
4 אנה שלמצין ברת יהוסף קבשן
5 מן עינגדה עמך אנת אלעזר בר חנני[ה]
6 די הוית בעלה מן קדמת דנן ד[ין]
7 הוא לך מנה גט שבקין ותרכ[ין]
8 [מ]לת מדעה ל[א] איתי לי עמך א[נת]
9 אלעזר על צבת כל מדעם וקים עלה
10 אנה שלמצין כול די על [ ]בע

I, Shlamzion daughter of Yehosef *Qbsn* from Ein-Gedi, have no claim against you, Eleazar son of Hananiah, who previously were my husband and who had (have) a deed of abandoning and expulsion from me. You, Eleazar, owe me nothing concerning anything whatsoever. And I accept as binding on me, I, Shlamzion daughter of Yehosef, all (the obligations) written above.

It is generally now agreed that this is not itself a *get*, but rather an acknowledgement by the wife that the divorce settlement has been paid. Nevertheless, it is the husband who is said to have received the 'deed of abandoning and expulsion' from the wife. I have argued elsewhere that this is the correct interpretation, though it has been disputed on linguistic grounds and is not entirely unproblematic.[44]

A second probable reflection of the wife's right to unilateral divorce occurs in one of the Greek papyri, P. Yad 18, lines 57–60:

> Judah called Cimber shall redeem this contract for his wife Shelamzion, whenever she may demand it of him, in silver secured in due form, at his own expense interposing no objection.

Later rabbinic law forbade a married couple to live together without a *ketubah*:[45] if some such rule is read back here, the wife's right to demand that the husband redeem the contract would entail her divorcing her husband. But again, this is not unproblematic.[46]

[44] Jackson, *supra* n. 26.

[45] Katzoff himself elsewhere describes an opinion of Rav Hai Gaon, that the woman could collect even during the course of the marriage, as an eccentric position, which is credible only if limited to the dowry and additions, but excludes the basic *ketubah* debt of 200 zuz, since by the time of Rav Hai it was settled law that a couple may not live together without this basic obligation: see R. Katzoff, '*Donatio ante nuptias* and Jewish Dowry Additions', in Naphtali Lewis, ed., *Papyrology* (Cambridge: Cambridge University Press, 1985, Yale Classical Studies 28), 231–44, at 240.

[46] Katzoff in particular has offered alternative explanations: 'I suggest that this particular phrasing was chosen to provide that the husband will not have to pay out the dowry when it becomes due, unless the document is surrendered, and, in other words, that he will not have to make do with a receipt. The practice recorded in Greek papyri was that receipts for payment of private debts were issued only in special circumstances, such as the death of the principal creditor or debtor, loss of the debt document, or partial or early payment. Otherwise the normal practice was to return and tear the document recording the obligation.' See N. Lewis, R. Katzoff and J. C. Greenfield, 'Papyrus Yadin 18. I. Text, Translation and Notes (NL), II. Legal Commentary (RK), III. The Aramaic Subscription (JCG)', *IEJ* 37 (1987), 229–50, at 243. However, this clause of P. Yad. 18 speaks of redemption of the contract (*συγγραφὴν*) as a whole, not simply the dowry, so that it is difficult for Katzoff to limit it in accordance with the opinion of Rav Hai Gaon, *supra* n. 45.

What cannot be denied is that a practice of unilateral divorce by the wife was known, particularly amongst the partially assimilated members of the Herodian royal family. Josephus comments on several such instances, stating explicitly that this practice was contrary to traditional Jewish law. Thus, Salome:[47]

> Some time afterwards Salome had occasion to quarrel with Costobarus and soon sent him a document (*πέμπει ... αὐτῶ γραμματεῖον*) dissolving their marriage, which was not in accordance with Jewish law (*κατὰ τοὺς Ἰουδαίων νόμους*) ... For it is (only) the man who is permitted by us to do this, and not even a divorced woman may marry again on her own initiative unless her former husband consents.[48]

Cicero, we may note, is aware of the possibility that a woman, *si viri culpa factum est divortium, etsi mulier nuntium remisit*.[49] There is no real suggestion in Josephus that Salome claimed *viri culpa*, but it is noticeable that the terminology of *πέμπει ... αὐτῶ γραμματεῖον* is closer to the Roman *nuntium remittere* than to Deut. 24:1, 3, where the husband 'puts' the *sefer keritut* in her hand (**ונתן בידה**) rather than simply 'sends' it (though rabbinic law did

[47] This is Salome the sister of Herod the Great, whom Herod gave in marriage to the Idumaean Costobarus, whom he also made governor of Idumaea. Costobarus, however, offered to transfer his loyalty (and the territory) to Cleopatra. Salome interceded with Herod to save his life, but shortly afterwards divorced him: *Ant*. 15.7.9–10.253–59.

[48] *Ant*. 15.7.10.259 (Marcus translation, in the Loeb edition). D. I. Brewer, '1 Corinthians 7 in the light of the Jewish Greek and Aramaic Marriage and Divorce Papyri', *Tyndale Bulletin* 52 (2001), 225–43, at 232 (online versions (without full footnotes) at http://www.instone-brewer.com/ and http://www.tyndale.cam.ac.uk/Brewer/MarriagePapyri/1Cor_7a.ht m) accepts that in theory only men could write a divorce certificate, while women had to demand a certificate through a rabbinic court, but suggests that in practice women may have taken the law into their own hands and asked a scribe or a male guardian to write it out (taking P.Hev. 13 as an example). Daube, *supra* n. 27, at 371f., comments thus on the terminology: 'Salome went as far as *πέμπειν γραμμάτιον ἀπολυομένη τὸν γάμον*, "to send a document, by which she dissolved the marriage", and *προαπαγορεύειν τὴν συμβίωσιν*, "to renounce the union". Such a measure, Josephus remarks, would be recognised only if taken by the husband. From the point of view of the law, her action was no more than a *διαχωρίζεσθαι* (passive) *καθ' αὑτὴν*, a "separating by her own decision", a walking out. It is noteworthy that, according to Josephus, when she explained her step to Herod, she used the expression *ἀποστῆναι* (aorist 2 of *ἀφιστάναι*), "to part from the husband". Maybe Josephus thought it unlikely that she herself would draw attention to the gross illegality of her procedure. "To part from a husband", being intransitive, does not necessarily imply a dissolution of marriage by a bill of divorce; it may just signify a wife's running away.' On this argument, we may note, Salome did conceive of her divorce as operating under Jewish, rather than Roman law. *Aliter*, Rabello, *supra* n. 39, at 93: 'here [referring specifically to the case of Herodias], as in other cases connected with Herod and his family, one is not dealing with Jewish, but rather with Hellenistic and Roman customs, given the marked assimilation of this family.' At 100, Rabello stresses that Salome and Herodias, as Roman citizens, could have divorced their husbands under Roman law even against the will of their husbands.

[49] *Top*. 4.19. The first use of *repudium* rather than *nuntium*, in this context, appears to be by Justin Martyr, writing in the mid-second century CE, where he refers to a Christian woman who 'gave [her husband] what you call a bill of divorce (*τὸ λεγόμενον παρ' ὑμῖν ῥεποῦδιον δούσα ἐχωρίσθη*), and was separated from him' (*Apol*. II.2.6). In fact, it is far from clear that *repudium*, as here used in Roman law, originally referred exclusively to a written message, as opposed to information delivered orally by a messenger (*nuntius*). See further, on the accounts of Josephus, the New Testament sources and the issues raised by the *lex Julia de adulteriis*, B. S. Jackson, 'Jewish and Roman Divorce in Josephus and the New Testament', forthcoming.

early come to recognise delivery by an agent).

In four other cases, Josephus writes of Herodian princesses terminating their existing marriage at their own initiative,[50] in order to marry someone else, but without here mentioning any bill of divorce: he notes that Herodias (a daughter of Herod the Great) 'parted from a living husband' (*διαστᾶσα ζῶντος*);[51] that Drusilla's marriage to Azizus was dissolved (*Διαλύονται οἱ γάμοι*) when she was persuaded to leave (*καταλιποῦσαν*) him in order to marry the procurator Felix;[52] that Berenice, having married Polemo king of Cilicia (who was circumcised in order to convert) subsequently deserted him (*καταλείπει τὸν Πολέμωνα*), so that 'he was relieved simultaneously of his marriage and of further adherence to the Jewish way of life';[53] and that Mariamme[54] took leave of (*παραιτησαμένη*) Archelaus and married Demetrius, an Alexandrian Jew. In neither case are we informed of any formal notification, whether oral or written, of the husband, and it appears that even this was not legally required in Roman law, at least in the late Republic.[55]

[50] Of course, Josephus had particular reason to be sensitive to such matters: he tells us that his own first wife left him: *Vita* 75.415. Daube, *supra* n. 27, at 371, comments: 'Of his own first wife, Josephus tells us that "she did not remain long with me but left me", *ἀπηλλάγη*. It is clear that it was she who wanted and effected the separation; in fact she stayed behind in Palestine when he followed Vespasian to Egypt. Whether he put a formal end to the marriage by giving her a bill of divorce remains uncertain, but no doubt he did.' See further Rabello, *supra* n. 39, at 93–95, commenting also on Josephus' account of his dissolution of a subsequent marriage (*Vita* 76.426), where he indicates his disapproval of his wife's conduct: 'At this period I divorced my wife, being displeased at her behaviour . . . ', leading some to view this as reflecting the approach of the School of Shammai.

[51] *Ant*.18.5.4.136. Daube, *supra* n. 27, at 365f., comments: 'Moreover, such criticism as has come down to us seems directed against her marrying her husband's brother rather than against her remarrying as such. It is, of course, possible that the crime of incest was considered so monstrous that little mention was made of other weak points about her second marriage; or again, her first husband may have divorced her when she left him. But it remains a remarkable affair.'

[52] *Ant*. 20.7.2.141–43: 'Not long afterwards Drusilla's marriage to Azizus was dissolved (*Διαλύονται οἱ γάμοι*) under the impact of the following circumstances. At the time when Felix was procurator of Judaea, he beheld her; and, inasmuch as she surpassed all other women in beauty, he conceived a passion for the lady. He sent to her one of his friends, a Cyprian Jew named Atomus, who pretended to be a magician, in an effort to persuade her to leave (*καταλιποῦσαν*) her husband and to marry Felix. Felix promised to make her supremely happy if she did not disdain him . . . She . . . was persuaded to transgress the ancestral laws and to marry Felix.' Though the dissolution of the marriage is probably by virtue simply of Drusilla's desertion of Azizus, the comment here by Josephus of breach of the laws probably refers to Drusilla's choice of a Roman as her next husband.

[53] *Ant*. 20.7.3.145–46: 'After the death of Herod [of Chalcis], who had been her uncle and husband, Berenice [II] lived for a long time as a widow. But when a report gained currency that she had a liaison with her brother, she induced Polemo king of Cilicia, to be circumcised and to take her in marriage; for she thought that she would demonstrate in this way that the reports were false. Polemo was prevailed upon chiefly on account of her wealth. The marriage did not, however, last long, for Berenice, out of licentiousness, according to report, deserted Polemo (*δι' ἀκολασίαν ... καταλείπει τὸν Πολέμωνα*). And he was relieved simultaneously of his marriage and of further adherence to the Jewish way of life.'

[54] *Ant*. 20.7.3.147. Drusilla, Berenice and Mariamme were all great-granddaughters of Herod: *Ant*. 18.5.4.130–32.

[55] Cicero, *de orat*. 1.40.183, comments on the case of a Roman who abandoned his pregnant wife in Spain without informing her that he was divorcing her (*neque nuntium priori remisisset*), brought another wife with him to Rome and died there intestate. Similar is Tacitus' account,

The Mishnah did, of course, accept that wives could demand divorces in specified circumstances (even though the procedure of delivery of the *get* by the husband was still required).[56] In my view, the significance of the case histories recounted by Josephus resides in the reaction which it appears to have provoked in rabbinic circles, who made the operation of divorce at the demand of the wife more difficult. *Mishnah Nedarim* 11:12 describes the following historical sequence:

> Originally [the Sages] said: Three women are to be divorced [even against their husband's will] and are to receive their alimony … The Sages then revised [their views] and said that a woman must not be [so easily given the opportunity] to look at another man and destroy her relationship with her husband. [Therefore] …
>
> בראשונה היו אומרים, שלש נשים יוצאות ונוטלות כתובה . . .
> חזרו לומר, שלא תהא אשה נותנת עיניה באחר ומקלקלת על בעלה

We need not here concern ourselves with the details of the three cases in which the Rabbis tightened the law, in order to guard against possible misuse by wives who really sought unilateral divorce simply because they fancied someone else more. In each case, the change makes the wife's unilateral claim of cause for divorce insufficient.[57] What is significant for present purposes is the likely correlation of the Rabbis' moral panic with the behaviour described by Josephus on the part of the Herodian princesses. If so, we have here an example of negative influence, influence by way of reaction. And if I am correct, this moral panic has blighted Jewish law to this very day, for it is precisely the same fear which informs the negative attitude of many rabbinic authorities to possible solutions of the problem of the *agunah*—an issue on which I shall have more to say presently.

That foreign influence in this aspect of family law—the wife's status in divorce—was largely negative in the formative era of rabbinic law[58] appears to be supported by the following fact regarding the incidence of Greek and Aramaic documents: we do not (as yet) have any bills of divorce from Jews written in Greek, even though the Mishnah (*Gittin* 9:8) accepts that they may be writ-

Ann. 11.26–27, of a notorious later incident involving the imperial family: Messalina's desertion of Claudius in 48 CE, in favour of her lover Silius, with whom she then celebrated a marriage, is described without any mention of Messalina's having sent notification to Claudius of termination of their marriage. Indeed, at 11.30, Claudius is asked whether he knows that he has been divorced. S. A. Treggiari, *Roman Marriage: Iusti Coniuges from the Time of Cicero to the Time of Ulpian* (Oxford: Clarendon Press, 1991), 458, suggests that the story must presuppose that some outward sign of the divorce had been given, such as Messalina's leaving the palace and removing her personal belongings, or even leaving a written notice on Claudius' desk while he was at Ostia. *Aliter*, J. F. Gardner, *Women in Roman Law and Society* (London: Routledge, 1990), 63 n.53, 85, arguing that Tacitus (supported by Suetonius and Dio) does not appear to assume the validity of either the 'divorce' or the 'remarriage'. See also R. Yaron, '*Divortium inter absentes*', *Tijdschrift voor Rechtsgeschiedenis* 32 (1964), 54–68.

[56] *M. Ket*. 7:9–10, *Tos. Ket*. 7:10–11.

[57] For example, if she is the wife of a priest and claims she has been raped (and thus becomes a forbidden partner to a priest), she must produce independent corroboration.

[58] For rabbinic knowledge of the wife's right unilaterally to divorce her husband in some gentile legal systems, see Daube, *supra* n. 27, at 363, citing *Gen. Rabb*. on 2.24, *Y. Kidd*. 58c.

ten in Greek. So far, (only) one bill of divorce in Aramaic has been found,[59] plus the Aramaic quittance (P.Sel. 13) referred to above. Hannah Cotton[60] explains this (if I may paraphrase her) on the grounds that a bill of divorce is a constitutive document, itself effecting the divorce, whereas a *ketubah* is not constitutive of the marriage, but rather is declarative of transactions and obligations, many of which would exist anyway.

4.2 *The Marriage Contract in the Papyri*

A very different picture emerges when we consider the terms of the rabbinic *ketubah*, and its relationship to foreign practice. Here, I believe, we do have evidence of significant foreign influence, as already seen from the immediately preceding history in Egypt. But Satlow's account of this, in my view, goes too far. He views Palestinian Jewish practice as almost entirely Hellenistic in character, and attributes to the *Babylonian* Amoraim the re-invention of a 'Jewish' marriage reconstructed from biblical sources.[61] I have argued, by contrast, that Jewish practice in Palestine at this period continued in the tradition of the Jewish community of Egypt, where the *mohar* had come to be integrated with the dowry in a 'single (combined) pot'.[62] Moreover, even the marriage contracts in Greek, though predominantly Hellenistic in language and concept, do sometimes manifest Jewish adaptations.[63] It is, moreover, this Hellenistic-Jewish mix which informs the classic Jewish statement of the standard terms of the *ketubah*, which we find in the Mishnah.

I shall illustrate this argument largely be reference to two *ketubot*, one Aramaic, the other Greek. The first is the famous Aramaic *ketubah* of (the second marriage of) Babatha,[64] whose archive of family papers from the Bar Kochba period is one of our principal sources for the period. In lines 5–6, the husband undertakes:[65]

> [that you will be] my wife [according to the la]w of Moses and the 'Judaeans' and I will [feed you] and [clothe] you and I will bring you (into my house) by means of your *ketubba* and I owe you the sum of four hundred denarii (*zuzin*) . . .

[59] DJD II, no. 19.

[60] H. M. Cotton, 'A Cancelled Marriage Contract from the Judaean Desert (*XHev/Se* Gr. 2)', *Journal of Roman Studies* LXXXIV (1994), 62–86, at 84 n. 204.

[61] Specifically, he thinks that the *mohar* is replaced entirely by the dowry in Palestinian practice, and that the *ketubah* payment is a largely Babylonian attempt to reinterpret this practice in biblical terms: 'In not a single papyrus from the Judaean Desert do we find a *mohar*, or a reference to a *mohar* payment, even by another name' (*supra* n. 1, at 201).

[62] Jackson, articles cited *supra*, nn. 19, 26.

[63] Thus the Greek P. Mur. 116:4, like the Aramaic P. Mur. 21.11–12 (but unlike the Greek P. Mur 115:9–10), has separate clauses for the maintenance of male and female children, reflecting the different Jewish law provisions for male and female heirs (*M.B.B.* 9:1: 'If a man died and left sons and daughters, and the property was great, the sons inherit and the daughters receive maintenance; but if the property was small the daughters receive maintenance and the sons go a-begging').

[64] For the full text, see Y. Yadin, J. C. Greenfield and A. Yardeni, 'Babatha's *Ketubba*', *IEJ* 44 (1994), 75–101, at 79.

[65] *Ibid.*, at 79.

5 לאנת[וֹ{הֹ} כדי]ן משה ויה[ו]דאי ו[זאנ]נה לך ומ[כס]ך
ובכֹתֻבתֻך אעֹלֹך
6 וקים >ע< לך עֹלי כסף זוזין ארבע מאֹה

It seems that the *ketubah* here is distinct from the debt of 400 zuz and refers, as in another Aramaic marriage contract (P. Mur. 21) as well as a host of rabbinic sources,[66] to the dowry. It is the 'debt' which is the now-deferred *mohar*.[67]

Let us turn next to the best-preserved of the marriage contracts in Greek, P. Yadin 18, of 128 CE.[68] The formal aspects of the document—its dating (exclusively) according to the Roman calendar (lines 29–33) and its 'execution' in the question and answer form of the Roman *stipulatio* (lines 66–67)—are noticeable, and may reflect the fact that the bridegroom appears, from the name Cimber, to have had Roman citizenship. Again, we find in lines 39–49 the 'dual settlement' consisting of the dowry plus the husband's promise to supplement it, here by 300 denarii, 'all accounted toward her dowry'.[69] The settlement is here expressed as designed to secure the maintenance of the wife and the children of the marriage, apparently during the subsistence of the marriage,[70] and is followed by a security clause[71] which, again in line with earlier Egyptian practice, includes the husband's after-acquired property.[72]

The greatest debate regarding this document, however, has focused upon the statement that the maintenance obligation is 'in accordance with Greek custom' (*ἑλληνικῷ νόμῳ*).[73] This, argues Katzoff, does not indicate that the marriage contract *as a whole* is drawn up in accordance with Greek law;[74]

[66] See further Jackson, *supra* n. 26, at n. 39; Jackson, *supra* n. 19, at n. 24.

[67] Indeed earlier in line 5 an alternative restoration of line 5 replaces ו[זאנ]נה לך ומ[כס]ך with ו[יהב]נה לך ומ[הר]ך.

[68] The translation is that of the editors, *supra* n. 46, at 233.

[69] '… she bringing to him on account of bridal gift (*εἰς λόγον προσφορᾶς*) feminine adornment in silver and gold and clothing appraised by mutual agreement, as they both say, to be worth two hundred denarii of silver which appraised value the bridegroom Judah called Cimber acknowledged that he has received from her by hand forthwith from Judah her father and owes to the said Shelamzion his wife together with another three hundred denarii which he promised to give her in addition to the sum of her aforestated bridal gift, all accounted toward her dowry (*πρὸς τὰ {τα} τῆς προγεγραμμένης προσφορᾶς* [*α*]*ὐτ*[*ῆς*] *πάντα εἰς λόγον προικὸς αὐτῆς*) …'

[70] '… pursuant to his undertaking of feeding and clothing both her and the children to come in accordance with Greek custom (*ἑλληνικῷ νόμῳ*)': lines 49–51. However, the fact that it is the (combined) dowry which is secured must also provide a guarantee on death or divorce.

[71] '… upon the said Judah Cimber's good faith and peril (*πίστεως καὶ κινδύνου*) and [the security of] all his possessions, both those which he now possesses in his said home village and here and all those which he may in addition validly acquire everywhere, in whatever manner his wife Shelamzion may choose, or whoever acts through her or for her may choose, to pursue the execution': lines 51–56; see further, on the nature of the security, Jackson, *supra* n. 26, at s.IV.

[72] After-acquired property is not mentioned in the rabbinic formulations of the Shimon b. Shetah tradition, but is found in Amoraic sources and later *ketubot*. Such a clause is found also in some of the Aramaic papyri: P. Mur. 20:12, and in a general loan document, P. Mur. 18. Its origin, however, again goes back to Egypt: the demotic contract of 176 BCE quoted above (text at n. 34) gave the wife security over everything the husband had 'or shall acquire'. See further Jackson, *supra* n. 19, at 221 f.

[73] *Supra*, n. 70.

[74] Katzoff, *supra* n. 46, at 239f.

nor, indeed, was it the Hellenic custom to say in the marriage document that the husband would support the wife 'in accordance with Greek custom'.[75] But Jewish marriage documents, he argues, do mention law in this context. The phrase in the Jewish *ketubah* to this very day is: 'I will support you according to the law (or rather custom and practice) of Jewish men'—a phrase which, Katzoff claims,[76] can be traced back to tannaitic literature, nearly contemporary with our document.[77] Similarly, Katzoff suggests, the phrase *κατὰ τοὺς νόμους* in the declaration of marriage[78] could reflect the Jewish practice of stating that the wife was taken 'according to the laws of Moses and Israel'.[79] In short, Katzoff offers us an *interpretatio hebraica* of P. Yad. 18—despite its Roman diplomatics, the absence of any explicit reference to Jewish sources, and in the face of *ἑλληνικῷ νόμῳ*. He later capped his argument with the following observation: 'The essence of a *ketubah* is the obligation of the husband to pay the wife a sum of at least two hundred zuz (= denar) secured by all the property of the husband. This obligation is clearly set out in P. Yadin 18.'[80] But neither this obligation, nor the securing of it—as I argued above—is in origin Jewish.

To others, Katzoff has appeared to protest too much. Wasserstein maintains that *ἑλληνικῷ νόμῳ* refers either to the laws of Greek *cities* in that region or to the ordinary custom of Greeks resident in the area.[81] He cites examples from many Greek marriage contracts of provisions for support and proper treatment of the wife and suggests that the draftsman's concern here may have been to invoke Greek rather than Jewish practices in respect of the age until which children were to be supported. As for *κατὰ τοὺς νόμους*, and the absence of the traditional Jewish formula 'according to the law of Moses and of Israel/the Jews', Wasserstein rejects Katzoff's suggestion[82] that *κατὰ τοὺς νόμους* is evidence of the *Jewish* character of the document in that it supplies the reference to the law anticipated in Jewish *ketubot* at this point, though not specifying which laws. *κατὰ τοὺς νόμους*, Wasserstein points out, is an

[75] Moreover, he observes, we have no knowledge of any particular custom on this matter. Rather, he notes, the usual phrase used in Greek contracts to denote the standard of support was 'according to his means': Katzoff, *supra* n. 46, at 240.

[76] Based on *kera'ui* in *Tosefta Yeb*. 2.1; Katzoff, *supra* n. 46, at 241.

[77] This argument has now attracted support from Instone-Brewer, *supra* n. 48, who adds that the reference to the bridegroom's 'good faith' (*πίστις*), though normal in Greek contracts of loan or sale, is not found in any Graeco-Roman marriage certificates except in those of Jews.

[78] 'Judah son of Eleazar, also known as Khthousion, has given over Shelamzion, his very own daughter, a virgin, to Judah, surnamed Cimber, son of Ananias son of Somalas, both of the village of 'En Gedi in Judaea residing here, for Shelamzion to be a wedded wife to Judah Cimber for the partnership of marriage according to the laws (*κατὰ τοὺς νόμους*) . . . ': lines 34–39.

[79] Rather than referring to the Greek *ekdosis*, despite *ἐξέδοτο* in line 3: Katzoff, *supra* n. 46, at 241.

[80] R. Katzoff, 'Papyrus Yadin 18 again: A Rejoinder', *JQR* 82 (1991), 171–76, at 176.

[81] Wasserstein, *supra* n. 36, at 122f., arguing that the real question is not whether Greek law was mentioned in Greek marriage contracts but rather whether this contract intended that Greek law or custom was to be observed.

[82] *Supra*, at n. 79.

ordinary Greek phrase, and should be read in the context of the more explicit *ἑλληνικῷ νόμῳ*.[83]

In this debate, there seems ultimately to have been a realisation[84] that the issue was more definitional than historical.[85] The following definitional possibilities have been canvassed or assumed:

(i) a document is Jewish or Greek in accordance with the historical source of the institutions used in it (Wasserstein[86]);

(ii) a document is Jewish if the (historically) Greek sources are given a Jewish 'spin' (Katzoff);

(iii) a document is Jewish if acceptable to *later* Jewish (halakhic) authorities (Cotton[87]);

(iv) a document is Jewish if so conceived by the parties *at the time*.

This last (iv) is the definition I personally would most favour, and Katzoff

[83] *Supra* n. 36, at 113.

[84] Reflected particularly in Katzoff's reply to Wasserstein, *supra* n. 80.

[85] Katzoff, *supra* n. 46, at 237f., himself described P. Yad. 18 as being '… as a whole … part of the Greek tradition of marriage documents. Indeed, nearly every phrase in our document appears so frequently in papyri of this type that it would be superfluous to list all parallels.' Conversely, Wasserstein, *supra* n. 36, at 117f., 123, acknowledges that there may indeed be Jewish elements in the marriage contract: 'That some of the provisions in our document look like similar provisions in Jewish rabbinic law need not either surprise us or make us think of this as a 'Jewish document'. That the parties to the contract were Jews might quite naturally make them choose from the possibilities at their disposal such provisions as were both familiar and acceptable to them because of their Jewish background.' Nevertheless: 'As a whole, it is simply a document relating to a not untypical local situation which contains, absorbs, and reflects a great variety of Western (i.e. Greek and Roman) and Eastern (Jewish, Nabataean and other oriental) elements, some of which have their common origin in very remote antiquity, in some cases as early as the Code of Hammurabi.'

[86] Though he qualifies this where he writes, *supra* n. 36, at 129: 'It is clear that by the second century CE the Jews living in Palestine and Babylonia—i.e., those Jews who were to remain in the historic tradition of Israel, in rabbinic Judaism—had long been forming their own system of law, which only two or three generations later was to be codified in the Mishnah. This, though containing "foreign" elements was "Jewish" law.'

[87] H. M. Cotton, 'The Rabbis and the Documents', in M. Goodman, ed., *Jews in a Graeco-Roman World* (Oxford, New York: Clarendon Press 1998), 167–79, at 171f.: 'What makes a contract Jewish is not its language, content, or particular ingredients. Jewish civil law, as we have it in the tannaitic and later sources (as well as in the Pentateuch), was not created in vacuo, but absorbed very many local, or, better, regional traditions which are reflected in its rules. But unless we wish to describe everything used by Jews as Jewish, we need to find some criteria which will distinguish what is Jewish from what is not. I have not found a better definition for what is Jewish than that such material eventually received halachic sanction, and is present in the halachic sources. Conversely, what is not there, or explicitly forbidden, I would designate non-Jewish.' Earlier, however, she had argued (*supra* n. 60, at 85) that it is methodologically unsound to claim that because the documents reflect halakhic rules, familiar to us from tannaitic literature, these rules should necessarily be described as Jewish. 'The fact that there are many points of resemblance between Greek marriage contracts from Judaea and Arabia and contemporary contracts from Egypt suggest that the traditions which came to be crystallised in the final redaction of the *Mishnah* by the end of the second century were not uniquely Jewish. It is not so much that our documents reflect the Halakhah, but rather that the Halakhah was not created *in vacuo*: it reflects mixed local traditions which were later absorbed into Judaism.'

more recently comes close to it.[88] The trouble with such a definition is methodological: how can we know how the users of the documents conceived of them? Part of the answer may reside in the archival and jurisdictional uses they may have had in mind for the document. But even this is less than straightforward. The very closeness of the Jewish matrimonial property arrangements to those of the Hellenistic world might well have prompted a feeling that recourse to non-Jewish courts, with the practical benefits that entailed, was not in fact recourse to 'foreign law'. As I suggested in an article twenty years ago,[89] the versions of the *baraita* in *Gittin* 88b which have R. Tarfon prohibit recourse to gentile courts even if they judge *kedine yisrael* may have been directed against just such an argument.

5.0 *The Marriage Contract in the Mishnah*

I turn now to the presentation of the Jewish marriage contract in the Mishnah, and ask, even in this context, the seemingly bizarre question: how Jewish is it?

The Mishnah provides a set of 'standard terms' for the *ketubah*—clauses which, if not explicit, will be implied. They are termed *tena'in bet din*, conditions of (imposed by) the court. We find them in *Mishnah Ketubot* 4:7–12. They cover the following matters:

(a) the minimum *ketubah* (deferred *mohar*) obligation (M7a);

(b) security over the husband's entire estate in order to secure it (M7b);

(c) the obligation to redeem the wife if captured (M8) and to do so without prejudice to her marital status or rights in her *ketubah* (M9);

(d) the exclusive right of the male children of the marriage to inherit the wife's *ketubah*, without prejudice to their rights in the estate of their father (M10: the *benin dikhrin* clause);

(e) residence and maintenance rights of female children of the marriage until their own marriage (M11: the *benan nukban* clause);

(f) residence and maintenance rights of the wife when widowed, but noting regional variations (M12): in Jerusalem and Galilee, the choice between such residence and maintenance and departure on payment of the *ketubah* is that of the widow; in 'Judaea', it is that of the husband's heirs—who thus have the option to pay off the widow (who, in a polygamous family, may well not be their own mother) and send her away.

[88] 'One would want to ask in the case of an institution with lines of continuity to both Jewish and gentile traditions what the institution would have meant to the particular Jew using it': review of H. M. Cotton and A. Yardeni, *Aramaic, Hebrew and Greek Documents from Nahal Hever* (Oxford: Clarendon Press, 1997, DJD XXVII), in *Scripta Classica Israelica* 19 (2000), 316–27, at 326f. Satlow, too, has maintained recently (*supra* n. 1, at 89) that the important question is: how did Jewish communities understand their marriages as Jewish?

[89] B. S. Jackson, 'On the Problem of Roman Influence on the Halakah and Normative Self-Definition in Judaism', in *Jewish and Christian Self-Definition*, ed. E. P. Sanders (London: SCM Press, 1981), vol.II, 157–203 (text), 352–79 (notes), at 169.

When we compare this formulation with the (Aramaic) *ketubah* of Babatha, we see that the latter contains every one of the above clauses,[90] except the security clause—and the editors seek to restore the latter in a gap in the papyrus.[91] The clause relating to the rights of the widow follows the Judaean local variation noted in the Mishnah.

What is the significance of this close correspondence? Some[92] have seen this as demonstrating the normativity of the Mishnaic scheme already in the first half of the second century. But though, as Hannah Cotton has argued,[93] the three Aramaic marriage contracts from the Judaean Desert show that the rabbinic marriage contract had indeed by then developed its own special form, not one of the five marriage contracts written in Greek can be said to be a translation of an Aramaic *ketubah*. Apart from using much phraseology from contemporary Greek marriage contracts in Egypt, the crucial formula 'that you will be my wife according to the law of Moses and the Jews' is absent from all of them. There was thus, at this time, 'no normative, authoritative and uniform marriage contract which Jews knew that they had to use.' A better conclusion would therefore seem to be that the Mishnaic scheme is itself based upon (a version of) actual notarial practice[94]—as indeed its own recognition of regional variations as regards widow's rights would appear to confirm. But where did this notarial practice itself come from? From the fifth century BCE, we encounter a conflation of indigenous with local environmental cultural influences, with the biblical *mohar* integrated with the dowry in a 'single (combined) pot'. Of the standard clauses of the Mishnah, only the distinction between male and female heirs is distinctive of Jewish family law,[95] but that too is now found in one of the Greek papyri from the Judaean desert.[96] Thus the Greek marriage contracts from the Dead Sea may have contributed, along with the Aramaic exemplars if less directly, to the Mishnaic scheme.

But though the Mishnaic scheme may well have 'mixed' historical origins, its very incorporation within the Mishnah marks it as 'Jewish' in the religious sense. There are, however, different modalities within this notion of 'Jewish in the religious sense'. Two questions arise: first, did this affect the conception

[90] There is an apparent error in the formulation of the *benin dikhrin* clause in P. Yad 10:12–13: it should be formulated in terms of the wife predeceasing the husband, rather than vice-versa.

[91] See now Y. Yadin, J. C. Greenfield, A. Yardeni and B. A. Levine, eds., *The Documents from the Bar Kokhba Period in the Cave of Letters: Hebrew, Aramaic and Nabatean-Aramaic Papyri* (Jerusalem: Israel Exploration Society, 2002), 126f., 140; see further Jackson, *supra* n. 26, at 169 f. In the 1994 edition, *supra* n. 64, there was no 'pledging clause', although the editors assumed that there had been one: they indicated for line 17 'lacunae and fragments of letters containing the warranty clause'.

[92] E.g. L. J. Archer, *Her Price is Beyond Rubies: The Jewish Woman in Graeco-Roman Palestine* (Sheffield: JSOT Press, 1990), 177.

[93] *Supra* n. 87, at 174, 177.

[94] Sometimes justified from Scripture: Satlow, *supra* n. 1, at 87.

[95] The desire to have dowry property devolve to the wife's heirs is a concern common to Jewish and non-Jewish society (though in the latter the clause is more likely to be gender-neutral: see further Cotton, *supra* n. 60, at 84; *idem, supra* n. 80, at 175). As we have seen, even the security interest over the husband's estate is known from Egypt already in the second century BCE.

[96] *Supra* n. 65.

of marriage itself; second, did it affect the normative status of the rules of marriage?

The conception of marriage does appear to have undergone a process of sacralisation. Even though the opening of *Mishnah Kiddushin* expresses the rules of creation of *kiddushin* in terms of *kinyan*, acquisition of property—and the particular modes chosen are identical to those for the acquisition of non-movable property (including land and slaves), with *biyah* manifesting *hazakah*[97]—we cannot ignore the connotations of the use of the term *kiddushin* for betrothal,[98] nor the fact that *Tosefta Kiddushin* 1:1 describes the woman's status, once the groom's declaration has been made to her, as *mekudeshet* and not merely *niknit*—and this despite the fact that the formula (still used today: *harey at mekudeshet li*) is only one of three possibilities recognised by the Tosefta.

The Tosefta uses the terminology of *erusin* as well as *kiddushin*, perhaps reflecting the influence of Hosea 2:21, וארשתיך לי לעולם. My second question, that of the normative status of the rules of marriage, also takes us back to an issue raised in the analysis of the biblical material: are the rules of marriage *as a whole* given the same normative status, or is there some distinction between economic and other concerns? After all, there is a rabbinic distinction between the status of rules which are *de'orayta* and those which are *derabbanan*, with matters of *issur ve-heter* (prohibition and permission) tending to be classified as the former, and matters of *mamona* as the latter.[99] The former are in principle incapable of either change or voluntary opt-out (a Jew cannot halachically opt out of Yom Kippur), while a more flexible attitude is often encountered in relation to the latter.

Where, in this, did the law of marriage stand? And did it stand or fall together, or might one say that adultery was a matter of *issur ve-heter* (no opt-out) while most of the terms of the *ketubah* were *mamona* and therefore *derabbanan*? The issue arose already in tannaitic times: while the minimum 200 zuz as the *ketubah* of a virgin was apparently viewed by some as (or at least as having the force of) *de'orayta*,[100] some marital obligations were regarded as *mamona*. According to *Tosefta Kiddushin* 3:7–8, while one could not opt out of the Levirate obligations incidental to marriage, the husband could, by means of a pre-marital condition, opt out of his marital obligations of food,

[97] Indeed, *Mishnah Kiddushin* continues with the theme of *kinyan* in general, rather than the particular context of *kiddushin*. With *M. Kidd.* 1:1, compare in particular *M. Kidd.* 1:5.

[98] Notwithstanding Satlow's (tongue-in-cheek?) suggestion (*supra* n. 1, at 76) that it may be a loan word from the Greek *ekdosis*! Daube, *supra* n. 27, at 368f., goes further, in noting that 'the Shekhinah's presence throughout married life is assumed by many Rabbis' (citing *Sot*. 17a), and the converse: the departure of the *shekhinah* where there is uncleanness (citing *Sifre ad Deut*. 23.15, '… the LORD your God walks in the midst of your camp, to save you and to give up your enemies before you, therefore your camp must be holy, that he may not see anything indecent among you, and turn away from you', where the same term, *ervat davar*, is used as in Deut. 24:1).

[99] See M. Elon, *Jewish Law, History, Sources, Principles* (Philadelphia: Jewish Publication Society, 1994), I.207–23.

[100] Apparently, R. Meir, as against R. Judah: *M. Ket*. 5:1; *Ket*. 56a; see further Epstein, *supra* n. 18, at 66–69; Elon, *supra* n. 99, at I.215f.; M. A. Friedman, 'Marriage and the Family in the Talmud', in *Yad la-Talmud*, ed. E. E. Urbach (Ramat Gan: Yad la-Talmud, 1984), 31-36, 99–100, at 34.

clothing, or conjugal rights, since they (even the last) were classified as *mamona*.

What, then, about divorce rights? The following tannaitic view, of R. Jose, is recorded in the Palestinian Talmud (*Y. Ket*. 5:9 (30b)):

> R. Yose said: For those who write [a stipulation in the marriage contract] that if he grow to hate her or she grow to hate him [a divorce will ensue, with the prescribed monetary gain or loss, and] it is considered a condition of monetary payments, and such conditions are valid and binding.

אמר רבי יוסה אילין דכתבין אין שנא אין שנאת תניי ממון ותניין קיים

This appears to say that a clause providing for unilateral divorce by either husband or wife is valid, since it is classified as *mamona*. That appears to be the implication of the term 'hate', which appears in the divorce context already in Deut. 24:3, and is also attested in Babylonian[101] and Egyptian documents,[102] the Elephantine Papyri[103] and elsewhere.[104] Unfortunately, the *ketubah* clause here being debated is not fully reproduced in the text (an indication, perhaps, that it was well-known): we have the protasis: 'if he grow to hate her or she grow to hate him', but the apodosis is left unstated. The English translation I have here quoted (that of Shlomo Riskin[105]) represents the dominant view,[106] namely that there is here an entitlement to divorce (even against the objection of the other party, and without proof of any further 'cause'); by contrast, Katzoff takes the implied apodosis to affirm only spe-

[101] See Yaron, *supra* n. 26, at 32 n. 6, 55, viewing 'to hate' as a technical term for divorce occurring already as early as the *ana ittišu* series; S. Greengus, 'The Old-Babylonian Marriage Contract', *JAOS* 89 (1969), 505–32, at 518 n.61; Z. W. Falk, *Introduction to Jewish Law of the Second Commonwealth*, part II (Leiden: Brill, 1972–1978, 2 vols), 312 n. 4 (comparing the expression 'he disgusts me' (*ma'us alay*) in *Ket*. 63b).

[102] Pestman, *supra* n. 32, at 63f., notes that the term is commonly found in deeds between ca. 500 and 116 BCE, as in 'If (I) repudiate you (as) a husband, be it that (I) hate you, be it that (I) wish another for me than you' (text no. 9 lines 3–4, 492 BCE; cf. at 156, a text of 169 BCE), and views it as stating motivation rather than the repudiation itself. Note, however, the fourth century BCE Rylands papyrus quoted by A. Verger, *Ricerche Giuridiche sui Papiri Aramaici di Elefantina* (Roma: UniversitL di Roma, 1965; Studi Semitici 16), 118 n.42: 'If I abandon thee as a wife, and hate thee, and love (?) another woman more (?) than thee, I will give (thee) 10 (pieces of) silver . . . ', where 'hate' may well be constitutive. Pestman also discusses (at 64) the relationship between the terminology in Egypt and in the Aramaic marriage contracts, for the possibility here of foreign influence on the Egyptian system, which he is reluctant to accept.

[103] Yaron, *supra* n. 26, at 55, finds evidence at Elephantine of both of its original usage as a motivation and its later technical (constitutive) function; see further R. Yaron, 'Aramaic Marriage Contracts from Elephantine', *JSS* 3 (1958), 1–39, at 32–34; Daube, *supra* n. 27, at 366; Verger, *supra* n. 102, at 118; *aliter*, M. A. Friedman, *Jewish Marriage in Palestine: A Cairo Geniza Study* (Tel Aviv: University of Tel Aviv, 1981), I.314f. n.10. E. G. Kraeling, *The Brooklyn Museum Aramaic Papyri* (New Haven: Yale University Press, 1955), 148, took the expression in Brooklyn 2 as 'evidently fixed phraseology that must be used to make the thing legal'.

[104] Might we regard Mal. 2:16: 'For I hate him who puts away his wife, said the Eternal God of Israel' as a form of divine talionic justice?

[105] S. Riskin, *Women and Jewish Divorce: The Rebellious Wife, the Agunah and the Right of Women to Initiate Divorce in Jewish Law. A Halakhic Solution* (Hoboken, NJ: Ktav, 1989), 29f.

[106] E.g. Epstein, *supra* n. 18, at 198 n. 19; Friedman, *supra* n. 103, at I.316–22; D. I. Brewer, 'Jewish Women Divorcing Their Husbands in Early Judaism: The Background to Papyrus Se'elim 13', *HTR* 92:3 (1999), 349–57, at 353f., 356.

cial terms regarding the *financial consequences* of the divorce.[107] However this may be, even if the clause does validate unilateral divorce by the wife, it does not tell us *how* precisely the divorce is effected in this situation, and in particular what is the position if the husband refuses.[108] In short, we are now entering the domain of *agunah*—in which this text of the Palestinian Talmud has assumed great importance. The rest of my remarks will address the 'Jewish' character of *this* vexing problem.

6.0 *The Middle Ages*

6.1 *The Genizah Ketubot*

A clause very similar to that on which R. Jose ruled is in fact found in a number of *ketubot* preserved in the Cairo Genizah. TS 24.68 [109] is a contract which in structure and content is in other respects very similar to that of Babatha nearly a millennium earlier. However, it includes a clause (lines 5–7) which reads:

> And if this Maliha *hates* this Sa'id, her husband, and desires to leave his home, she shall lose her *ketubba* money, and she shall not take anything except that which she brought in from the house of her fathers alone; and she shall go out by the authorisation of the court (**על פם בית דינה**) and with the consent of our masters, the sages.

Here, the apodosis missing in the R. Jose text is supplied. But what precisely does it mean? We are not told that the husband has an obligation to give a *get*, or even that the court will coerce him. Rather, 'she shall go out by the authorisation of the court'. In another *ketubah* we are told that the wife goes out in such circumstances [**דינא**] **על פי בית**.[110] Katzoff[111] takes the expression as indicating no greater powers on the part of the court (or the wife) than in traditional *halakhah:* the court 'will first order the husband to give her a *get*' and may seek to coerce him if he refuses. But why in that case use an unusual expression, and one which appears to imply a court power to effect the divorce even without the participation of the husband? I side with the view of Mordecai Friedman, who sees this as a continuation of the Palestinian (or, perhaps better, Palestinian-Egyptian) tradition.[112] For this particular clause

[107] *Supra* n. 46, at 245f., comparing *Y. Ket* 7.31c, in which it is provided that if in the course of the marriage the wife hates her husband and does not wish the marital union, she will receive only half the dowry.

[108] Unless we ascribe to the verb 'hate' here in the protasis the technical (constitutive) meaning, which it does appear to bear in some of the earlier sources: see further nn. 101–103, *supra*.

[109] Friedman no. 3, *supra* n. 103, at II.55–56.

[110] JNUL Heb.4 577/4 no. 98, lines 33–34: Friedman no. 2, *supra* n. 103, at II.41, 44–45.

[111] *Supra* n. 46, at 246.

[112] *Supra* n. 103, at I.328–46, concluding (at 246): 'We have traced the development of a rare *ketubba* clause over a 1500 year period. Jewish law certainly never empowered a wife to issue a bill of divorce unilaterally and thus dissolve her marriage. However, it was stipulated in *ketubbot*, which, from talmudic times, followed the Palestinian tradition, and the rabbis eventually recognised this as binding law that through the wife's initiative, if she found life with her husband unbearable, the court would take action to terminate the marriage, even against the husband's will.'

is not only clearly of the type which R. Jose validated, but also evokes the clause in favour of the wife in the Elephantine papyri. But this is now done in a period when the sacral nature of marriage has been established, and as an *exception* to the general rules of procedure for divorce.

6.2 *Islamic Law and the Babylonian Tradition: the takanta demetivta*

Some have seen the clause in the Genizah *ketubot* as reflecting, rather, a development which occurred in the Geonic academies in Babylonia. Rav Sherira Gaon[113] provides a history of the matter, telling us that the Geonim ultimately decreed that the husband of a woman demanding 'Divorce me; I do not wish to live with you' (a *moredet*, in the talmudic terminology), was indeed to be compelled to grant her a divorce immediately, with return of the dowry and payment of the basic *ketubah* obligation. This was enacted, he tells us, three hundred years ago, (soon) after the period of the Savoraim, in order to address a particular problem:

> After the time of the savoraim, Jewish women attached themselves to non-Jews to obtain a divorce through the use of force against their husbands; and some husbands, as a result of force and duress, did grant a divorce that might be considered coerced and therefore not in compliance with the requirements of the law [as under the law one may not use duress to force the giving of a divorce].[114]

What was this 'attachment' to non-Jews? An anonymous thirteenth-century responsum[115] explains it on the grounds that the daughters of Israel 'went out to "bad ends", either prostitution or apostasy (בין בזנות בין בשמד)'. The allusion may well be to a rule of Islamic law, which al-Maliki expresses as follows:

> If two unbelievers become Muslim, they are confirmed in their marriage, but if only one becomes a Muslim, then this is annulment without divorce.[116]

Thus, Jewish women in the Islamic environment could escape from an unwanted marriage by converting to Islam.[117] Their Jewish marriage was thereby considered (by the Islamic authorities) as annulled. Of course, that would not affect its status in Jewish law. Nevertheless, the Jewish authorities sought to avoid this outcome by facilitating the Jewish divorce. But how could they be sure to facilitate it, if the husband resisted coercion? Later formulations of the decree go beyond Sherira's formulation, כופין אותו וכותב לה גט לאלתר—which by its use of the singular in וכותב implies the traditional position, that it is the husband, not the court, who must ultimately 'write' (or authorise) the *get*, albeit after coercion. Rav Shmuel ben Ali and

[113] He held office as Gaon of Pumbeditha between 968 and 998.

[114] *Per* Elon, *supra* n. 99, at II.659f. Cf. Riskin, *supra* n. 105, at 56–59 for full Hebrew text and an alternative translation.

[115] Riskin, *supra* n. 105, at 52f.

[116] As quoted in J. Neusner, T. Sonn and J. E. Brockopp, *Judaism and Islam in Practice: A Sourcebook* (London and New York: Routledge, 2000), 118.

[117] Cf. Riskin, *supra* n. 105, at 4.

the *Halakhot Gedolot* both use plural verbs,[118] which suggests that the court would ultimately assume the power to authorise the writing of the *get* (this may well also be the implication of the formulation in the Cairo Genizah *ketubot*[119]), while the *Rosh* formulates the matter explicitly in the language of annulment.[120]

We have here another example of the development of Jewish law in reaction against elements in the contemporary non-Jewish environment. But whereas the reaction in tannaitic times had been to make divorce more difficult, here its effect was to liberalise the law, and in so doing to create something closer to equality between husband and wife: just as the husband had traditionally had the right to divorce his wife without cause (as in the second divorce in Deut. 24, and the Hillelite view—and especially that of R. Akiva—in the Mishnah[121]), so too now the wife had the right to divorce her husband without cause.

6.3 *Christianity and the Ashkenazi Tradition: the takkanah of Rabbenu Gershom*

Such considerations were foreign to Rabbenu Tam, living in a 12th cent. Christian environment where the *moredet* had no possibility of seeking gentile help in order to obtain a divorce, and where, indeed, there was external moral pressure to restrict divorce itself.[122] It was, indeed, precisely this Christian environment which, as Ze'ev Falk argued many years ago,[123] appears to have led to the adoption by Rabbenu Gershom of the requirement that (absent specific cause) divorce required the consent of the wife, and could no longer be effected by the husband almost unilaterally.[124] Polygamy and easy divorce constituted a *hillul hashem* in the eyes of the gentiles. Thus, a measure of equality between husband and wife was achieved also in Ashkenaz, but by a quite different route to that of the Babylonian Geonim: the latter had lib-

[118] See further B. S. Jackson, '*Moredet*: Problems of History and Authority', in *The Zutphen Conference Volume*, ed. H. Gamoran (Binghamton: Global Publications, 2001; *JLAS* XII), 103–23, at 117f.

[119] Cf. Friedman, as quoted *supra*, n. 112.

[120] *Resp*. 43:8, p.40b. See Jackson, *supra* n. 118, at 117f.

[121] *M. Gitt*. 9:10: 'The School of Shammai say: A man may not divorce his wife unless he has found unchastity (*devar ervah)* in her, for it is written, *because he has found some indecency* (*ervat davar*) *in her*. And the School of Hillel say: [He may divorce her] even if she spoiled a dish for him, for it is written, *because he has found some indecency in her*. R. Akiba says: Even if he found another fairer than she, for it is written, *if then she finds no favour in his eyes*.'

[122] Cf. Riskin, *supra* n. 105, at 110f.; E. Westreich, 'The Rise and Decline of the Law of the Rebellious Wife in Medieval Jewish Law', in *The Zutphen Conference Volume*, ed. H. Gamoran (Binghamton: Global Publications, 2001; *JLAS* XII), 207–18, at 218.

[123] Z. W. Falk, *Jewish Matrimonial Law in the Middle Ages* (Oxford: Clarendon Press, 1966), ch. IV.

[124] 'A Takkanah: not to divorce a woman against her will. Such a Writ of Divorce is void. If he gave her the writ originally with her consent, and then it was found to be unfit, he may give her a second writ against her will, provided we know that she did not realise that the first writ was void': L. Finkelstein, *Jewish Self-Government in the Middle Ages* (Westport, Connecticut: Greenwood Press, 1972, reprinted from New York: Jewish Theological Seminary of America, 1924 edition), 198.

eralised divorce in favour of the wife; in Ashkenaz, unilateral divorce on the part of the husband was restricted. In the absence of consent of both parties, divorce could now be achieved only if either husband or wife proved to the *bet din* one of those (quite severe) 'causes' which the law recognised as entitling that spouse to a divorce.

7.0 *Modern Issues*

The modern analysis of the *agunah* problem is also not immune from the kind of questions regarding the Jewish character of family law which I have posed in this paper.

In an important recent analysis of the problem,[125] Rabbi Michael Broyde argues that the basic problem of *agunah* is not one of mechanisms designed to overcome the husband's recalcitrance, but rather the very model of marriage itself—since different models of marriage entail different conceptions of marital termination. He distinguishes five models of exit from marriage, which have been normative in different communities at different times. Of these, one may distinguish particularly between (i) that of the Geonim which gave both parties to the marriage a unilateral right to terminate it (without proof of fault) and (ii) that of Rabbenu Gershom, which, as we have seen, equalised the position between the spouses, by allowing *neither* party to the marriage a unilateral right to terminate it (without proof of fault). Rabbi Broyde maintains that it is the latter conception which is currently 'normative' in most Orthodox (and certainly US) communities. Nevertheless, he takes the view[126] that any individual couple may 'opt in' to whichever model they like, even if that is not the model normative in their community, by the use of an appropriate clause in the *ketubah*.

Rabbi Broyde, as I noted, distinguishes five such models: in addition to the above two, there are those of the Bible and the Talmud. But he also identifies a fifth model, which he calls 'marital abode as the norm'[127] but which sounds to me rather like the modern secular 'irretrievable breakdown', where the woman seeking a divorce separates from the husband and the Rabbinic court concludes that there is no prospect of their getting together again; in such a case, he argues, it is permissible to coerce the giving or receiving of a *get*.

On this analysis, there is certainly no *single* Jewish conception of marriage. Rather, Jewish history has furnished a number of different models, which many would say reflect in part (whether by assimilation or reaction) the different cultural environments of Jewish life. On Rabbi Broyde's analysis, all are in principle authentically Jewish, and one may opt into whichever one is preferred.

[125] M. Broyde, *Divorce and the Abandoned Wife in Jewish Law* (Hoboken NJ: Ktav, 2001).

[126] A logical development, one might argue, of R. Jose's stance in the Palestinian Talmud and its manifestation in the *ketubot* found in the Cairo Genizah.

[127] *Supra* n. 125, at 23, citing the *Or Zaru'a* and (at 142 nn. 14 and 15) *responsa* of Rav Henkin and Rav Feinstein.

Suppose, then, that one does opt into a model of marriage with a liberal divorce regime, one which gives the wife a right to terminate the marriage virtually at will. How is such a right to be enforced? There is, in fact, an argument that a suitable condition in the marriage contract could be made self-enforcing, but that is an issue for a different occasion. Most Orthodox rabbinic authorities nowadays prefer to seek the assistance of the civil authorities, in one of two ways: either by enforcement of a pre-nuptial agreement which imposes (in effect) financial sanctions for non-compliance, or by measures like the recently enacted Divorce (Religious Marriages) Act 2002, which gives the civil court in England a discretion to withhold a secular divorce until such time as any impediments to a religious remarriage are removed. Such a strategy might be thought to be rather un-Jewish in character. Technically, it is not. As early as (probably) the third century CE, the *Mekhilta ad Exod*. 21:1 ruled:

> A bill of divorce given by force, if by Israelitish authority, is valid, but if by gentile authority, it is not valid. It is, however, valid if the Gentiles merely bind the husband over and say to him: 'Do as the Israelites tell thee'.

The power conferred by the Divorce (Religious Marriages) Act 2002, one might argue, does precisely this: the court tells the husband: 'Do as the Israelites tell thee'. But though this may not be, in technical terms, an incursion upon the Jewish character of halakhic divorce, we may prefer to view it in the historical context of those interactions between Jewish and gentile law which I have sketched in this paper. Such interactions are apt to have internal effects on the halakhic system. Indeed, there is a form of halakhic justification for such interaction: if *hillul hashem* was a motive for reform in the Middle Ages (in different ways, in both the Geonic decrees and that of Rabbenu Gershom), perhaps it ought seriously to be considered as a motive for reform today.

8.0 *Conclusion*

It seems to me that it is possible to sketch the following history of our topic. There existed a variety of practices amongst Jews in biblical times, in relation to both divorce and matrimonial property. It is doubtful that any of them were regarded as part of religious law before the exilic period. This is not to say, however, that they were not regarded as Jewish customs. In the Second Commonwealth period, perhaps prompted particularly by the normative status accorded to the discrimination against daughters in the law of succession (*Num*. 27), dowry came to dominate over brideprice, the latter being incorporated within the former. The security interest attached to matrimonial property, probably of Egyptian origin, was originally designed to secure the wife against misuse of the dowry in the hands of the husband. Many of the elements of the traditional Jewish *ketubah* are not exclusively Jewish in origin. Conversely, there are elements in the Greek papyri written by Jews, which make sense only in a Jewish legal-cultural environment. Unilateral divorce by the wife continued to be practised, at least in some circles. Indeed, the practice, evidenced at the Jewish colony at Elephantine, of divorce on the part of

the wife, irrespective of the husband's consent, continued, reinforced perhaps by the gentile environment. There was, however, a rabbinic reaction against the possible misuse of divorce even for cause on the part of the wife, which may have been prompted by a moral panic at the behaviour of the more assimilated Jewish aristocracy, succeeded by a fear that the Romans might allow even non-citizens to take advantage of their own more liberal divorce rules. But the practice continued, validated by contractual clauses (R. Jose), as may be seen in the *ketubot* of the Cairo Genizah.

We have had occasion to note also the increasing sacralisation of Jewish marriage, through the imagery used by the biblical prophets to describe Israel's relationship with God, to Ezra's reforms, the incorporation of family law as a major element in the Mishnah and the adoption of the concept of *kiddushin*. Yet this increasing sacralisation did not entail immunity to outside cultural influences, positive and negative. Broadly, the Sephardim remained within an Islamic cultural framework, including polygamy and relative ease of divorce, while the Ashkenazim accommodated to a Christian framework, banning polygamy and rejecting unilateral divorce by either spouse.

We are not immune in the modern era to these processes. Increasing sacralisation continues apace, in the implicit rejection by some of the notion that there is *any* '*mamona*' aspect of Jewish marriage which remains subject to change or opt-out.

Michael Satlow[128] refers to an exhibit on Afghanistanian Jewish marriage at the Israel Museum in Jerusalem: the marriage customs of these Jews, he observes, resembled those of their Moslem neighbours to a far greater degree than they resembled the marriage customs of European and American Jews. Yet both groups understood what they were doing as 'essentially' Jewish! I am not sure what some of the critics of the Chief Rabbi's recent book would make of this. But my answer to the question: 'how Jewish is Jewish Family Law?' has to be: it's as Jewish as we choose to make it.

[128] *Supra* n. 1, at xviii.