

THE STORY OF JEWISH POLYGAMY

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Abstract

This Article examines the intersection of law, religion, and culture in the evolution of polygamy in the Jewish tradition. It traces the development of Jewish thought on polygamy over time by assembling and analyzing relevant discussions, arguments, decisions, and biblical interpretations from the time of the Hebrew Bible passages, when plural marriage was an accepted part of Jewish society, to the early Middle Ages when the practice was formally and conclusively rejected. In doing so, the Article attempts to untangle the various influences—both practical and doctrinal, internal and external—on the evolution of marriage law in Jewish communities. These findings highlight the mutable nature of marriage norms within a religious community, the adaptability of religious doctrine to the practical needs of the community, and the potentially progressive force of religious morality in advancing women's rights.

INTRODUCTION: POLYGAMY AND RELIGION IN PUBLIC DISCOURSE

Judaism's relationship with polygamy has always been fraught with tension and perhaps can best be summed up by the fact that the word for co-wife in Hebrew is *tzarah*, literally "trouble." As many know, the practice of polygamy was once considered part and parcel of Jewish culture, at least in theory, but nowadays that is no longer the case. The story of Jewish polygamy has no clear-cut ending; there was no one defining moment or document that shifted the Jewish societies in Western Europe away from polygamy and into monogamy. But over time, these norms *did* shift for reasons we examine in this Article.

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For the past several years, the issue of marriage and of marital forms in particular has been a prominent feature on both the national¹ and international stage.² Efforts to lift prohibitions on same-sex marriage in this country and abroad have inspired people on all sides of the political spectrum to speak about the virtues of monogamy's core institution and to express views on who should be included within it.³ While public discourse over marriage in the United States and around the world has focused primarily on gay marriage, the issue of legalizing plural marriage has been gaining considerable attention in recent years.⁴ In the United States, TV shows such as TLC's *Sister Wives*, HBO's *Big Love* and

1 See Carl E. Schneider, *Moral Discourse and The Transformation of American Family Law*, 83 MICH. L. REV. 1803 (1985).

2 See MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE* (1989).

3 In addition to the option of religious marriage available to same-sex couples in various religions and denominations, civil marriage has recently become open to same-sex couples in the state of Massachusetts as of May 2004. See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003). Since that time, and as of March 2014, seventeen states—California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New Mexico, New York, Rhode Island, Vermont, and Washington, as well as the District of Columbia and two Native American tribes—have legalized same-sex marriage, representing 38% of the U.S. population. *Where State Laws Stand*, FREEDOM TO MARRY (Dec. 20, 2013), <http://www.freedomtomarry.org/pages/where-state-laws-stand>; see also In re Opinions of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004); *Tying the Knot*, GLOBE & MAIL (July 15, 2003), at A9 (discussing two Canadian provinces, Ontario and British Columbia, since summer 2003). The Netherlands has recognized same-sex marriage since April 2001; Belgium has recognized it since 2003. See *Wet van 21 december 2000 tot wijziging van Boek 1 van het Burgerlijk Wetboek in verband met de openstelling van het huwelijk voor personen van hetzelfde geslacht (Wet openstelling huwelijk)* [Text of Dutch Law on the Opening Up of Marriage for Same-Sex Partners (Plus Explanatory Memorandum)], Stb. 2001, nr. 9 (Neth.), translated in Kees Waaldijk, *Text of Dutch Act on the Opening Up of Marriage for Same-Sex Partners*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS 455, 455–56 (Robert Wintemute & Mads Andenaes eds., 2001); Note, Inching Down the Aisle: Differing Paths Toward the Legalization of Same-Sex Marriage in the United States and Europe, 116 HARV. L. REV. 2004, 2004 (2003); see also Elizabeth F. Emens, *Monogamy's Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. REV. L. & SOC. CHANGE 277, 376 (2004). When the Supreme Court struck down the federal Defense of Marriage Act (DOMA) in *United States v. Windsor* in June 2013, the ruling opened the door to federal recognition of same-sex marriage. It may also have some unintended side-effects, easing the path to plural marriage—better known as polygamy—both legally and in the court of public opinion. DOMA defined marriage as “a legal union between one man and one woman as husband and wife.” While DOMA obviously prohibited gay marriage (by requiring that a marital unit consist of a man and a woman), it also enshrined the prohibition against polygamy, by requiring that such a union be between only one man and one woman.

4 See Adrien Katherine Wing, *Polygamy from Southern Africa to Black Britannia to Black America: Global Critical Race Feminism as Legal Reform for the Twenty-First Century*, 11 J. CONTEMP. LEGAL ISSUES 811, 812 (2001); The Marriage Act, No. 77 (2012), KENYA GAZETTE SUPPLEMENT No. 179, available at <http://www.kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2012/TheMarriageBill2012.PDF> (a recent bill in the Kenyan

Showtime's *Polyamory: Married and Dating* have brought the concept of plural marriage into the nation's collective living room. Polyamory, the practice of having more than one intimate relationship at a time with the knowledge and consent of everyone involved, has even been called "the next civil rights movement."⁵

The discussion of polygamy presents valuable angles for reconsidering the contemporary marriage debate. First, plural marriage raises novel questions beyond those presented by gay marriage because it turns not on the idea of *who* can be in a marriage, but rather on the very institution of marriage itself as consisting of a two-and-only-two part unit. Second, plural marriage, unlike gay marriage, represents an alternative bundling of marital principles that may be described as "traditional" within a broad range of cultures and religious communities.⁶ In this context, an examination of what a religious tradition has had to say about marriage over time can inform our understanding of what religion is capable of saying about the topic today.

This Article will focus on the history of polygamy in the Jewish tradition and will examine why, after millennia of experimentation, a religion walked away from a practice it had once legitimized. We will follow this history through the various streams of Jewish law and tradition, and watch as the debate slowly shifts from a question of legality to morality, from "could" to "should." We will focus on three historical realities over time that make

Parliament that would legalize polygamy). In August of 2012 the first polygamous civil union was granted in Brazil. See Kate Beioley, *First Polygamous Civil Union Granted in Brazil*, ARG. INDEP. (Aug. 29, 2012), available at <http://www.argentinaindependent.com/currentaffairs/brazil-first-polygamous-civil-union-granted-in-brazil/>.

⁵ See Kirsten Andersen, *Polyamory: The Next Civil Rights Movement?*, LIFESITENEWS.COM (Oct. 29, 2012), <http://www.lifesitenews.com/news/polyamory-the-next-civil-rights-movement>; Stanley Kurtz, *Beyond Gay Marriage*, WKLY. STANDARD, Aug. 4, 2003, at 26; see also Jaime M. Gher, *Polygamy and Same-Sex Marriage—Allies or Adversaries Within the Same-Sex Marriage Movement*, 14 WM. & MARY J. WOMEN & L. 559 (2008).

⁶ Plural marriage has existed since recorded history, across cultures, and across the world. Many of the major world religions, including those in the Western tradition, have supported, condoned, or at least acknowledged the practice of polygamy. See J. Patrick Gray, *Ethnographic Atlas Codebook*, 10 WORLD CULTURES 86, 86–136 (1998); *Polygamy*, NEW WORLD ENCYCLOPEDIA (Feb. 27, 2011), <http://www.newworldencyclopedia.org/p/index.php?title=Polygamy&oldid=950022>; Campaign Against Polygamy And Women Oppression International (CAPWOI), *History of Polygamy*, POLYGAMY STOP, <http://www.polygamystop.org/history.html> (last visited Apr. 5, 2013); Paul Vallely, *The Big Question: What's The History of Polygamy And How Serious A Problem Is It In Africa?*, INDEP. (Jan. 6, 2010), <http://www.independent.co.uk/news/world/africa/the-big-question-whats-the-history-of-polygamy-and-how-serious-a-problem-is-it-in-africa-1858858.html> (citing a University of Wisconsin study that surveyed more than a thousand societies and found that of these just 186 were monogamous). Cf. Blaine M.A. Robinson, *Polygamy*, BLAINE ROBISON.COM (Feb. 17, 2013), <http://www.blainerobison.com/concerns/polygamy.htm> (listing 40 men in the Bible with multiple wives).

sense of this evolution:

First, all of Jewish law is, at its core, an act of holding multiple values in a dialectic tension. The rabbi, before he rules on the permissibility of the chicken, for example, is first supposed to inquire about the finances of the individual asking and take into account the time of day on the Sabbath Eve.⁷ The law has areas that shift, contextually, when multiple legitimate values are at play. And so just because a particular action may be legal in one generation or time period, does not mean that other arguments do not exist that would militate against its continued legality, nor does it mean that additional factors might not very well come into play in the future that would shift that sometimes precarious balance in the opposite direction.

Second, for centuries, despite the fact that Jewish communities tended to be almost entirely monogamous, the rabbis made sure that polygamy was still legal on the books, if only to demonstrate the superiority of the rabbinic versus sectarian or Christian exegesis. At this point in history, the moral value of monogamy outweighed the advantages of polygamy enough, but only enough so that it was not practiced popularly on the practical side, but the law still recognized the important polemical advantages the theoretical aspect that its legality provided—especially if, on the ground, it was not costing the community anything since no one was taking advantage of this particular allowance.

Third, the time eventually came when this calculus forever shifted. The outside pressure of an increasingly monogamous, secular and Christian legal world gradually grew, and at just the right moment it combined with multiple Jewish developments and concerns, including at the forefront an internal pressure that had been building in the Jewish world to fix the perceived gender inequalities of Jewish family law. Taken all together, the benefits of officially outlawing polygamy now outweighed the benefits of even keeping it legal just on the books, and so the above-mentioned factors led to the promulgation of two decrees, commonly known as two of the bans of Rabbeinu Gershom.⁸ One dealt with unilateral divorce, and one dealt with polygamy. Both served as an attempt to legitimize Jewish family law both internally and to the outside world.

In tracing these strands of Jewish law's historical development, this Article sheds light on the ways in which marriage norms within a religious community are mutable across

7 See, e.g., SHULHAN ARUKH, *Yoreh Deah* 69:6, 11.

8 There was a third such ban that dealt with not opening other people's mail, but that is not relevant for our purposes.

time and place, religious doctrine can adapt to the practical needs of the community, and religious morality can ultimately serve as a progressive force in advancing women's rights.

Part I of the Article provides some initial background on the basic assumptions about polygamy in Jewish society as well as a primer for navigating the basic sources and authorities of Jewish law. Part II outlines the prevailing patterns, themes, and concerns about polygamy in the Old Testament. Parts III, IV, V, and VI analyze the evolving legal and scholarly commentary and interpretations of the Old Testament text as well as changing marriage practices in the Second Temple, Tannaitic, Amoraic, and Gaonic periods respectively. Part VII, VIII, and IX discuss the formal ban against polygamy in the Rishonim period and its relationship to Judaism's evolving conception of marriage generally. Finally, Parts X and XI discuss the geographic and temporal scope of the ban and their connection to the internal and external factors that motivated it.

I. The Background Information

It is important at the outset to make one thing clear: the issue of polyandry was never a discussion. The Seventh Commandment proclaims, "Thou shalt not commit adultery,"⁹ and adultery is defined as sexual intercourse between a married woman and a man other than her husband.¹⁰ Polyandry under Jewish law is by definition adultery, since it involves a married woman having more than one sexual partner.¹¹ The Talmud in *Kiddushin* unequivocally states that: "A woman cannot be the wife of two [men]."¹² Our discussion of polygamy, then, is really all about polygyny, and while polygyny may have always been uncommon

9 Exodus 20:13; Deuteronomy 5:17.

10 See Numbers 5:11–31; BABYLONIAN TALMUD, *Sanhedrin* 51b; 84b; Maimonides, *Mishneh Torah*, *Laws of Marriage*, Ch. 24.

11 The Babylonian Talmud in *Kiddushin* 7a records this distinction as a matter of social fact:

Rava said "[if a man said], 'Be betrothed to half of me,' [the woman] is betrothed. [If he said], 'Half of you is betrothed to me,' then she is not betrothed." Abaye said to him, "How does 'Half of you is betrothed to me,' differ so that she is not betrothed? [Is it because] the Merciful One said '[When a man takes] a wife . . .', and not 'half a wife'? Here too, the Merciful One said 'a man', and not 'half of a man.'" [Rava] said to him, "Now, a woman for a pair [of husbands] is not fit. But a man, is he not fit for two [wives]? And this is what he is saying to her; 'If I wish to marry another, I will marry [her].'"

BABYLONIAN TALMUD, *Kiddushin* 7a (translation by author) (citing Deuteronomy 24:1).

12 Rashi, commenting on the BABYLONIAN TALMUD, *Kiddushin* 7a.

de facto, in the rabbinic tradition it was certainly recognized de jure.

A survey of the sources reveals several underlying reasons for the practice of polygamy. Perhaps most importantly in a society that valued children, having many wives increased the man's chances of having many children. Wives were often seen as providing spiritual protection in that they kept their husbands from straying sexually; some have suggested that the practice of polygamy resulted from the chastity enforced on a husband while his wife was pregnant or nursing.¹³ In addition, while it was prestigious and a sign of prosperity to be able to afford many wives, it also provided an economic advantage: having many wives and children provided a ready labor supply. Historically, plural marriage served political purposes through the forming of alliances. Occasionally, it was also used to provide support for the helpless in times of surplus women.

A. A Jewish Law Primer

In order to better understand the flow of tradition this Article will summarize, a brief introduction to the history of Jewish law is necessary. Jewish law, or *halakha*, denotes the entire corpus of the Jewish legal system from its earliest sources in the Bible to contemporary responsa. It includes public, private, ritual, and civil law. It legislates not only that which is legal (things that law can compel or prohibit) but also the ethical and moral dimensions of daily life, and it includes obligations both interpersonal and between Man and his Maker.¹⁴ The term *halakha* was first employed by the early Rabbis (called Tannaim, approximately 10–220 C.E.) to refer to an oral ruling handed down by the religious authorities (as in the phrase *halakha leMoshe miSinai*, a law given to Moses at Sinai). It later took on a broader scope, meaning the accepted or authorized opinion when a ruling was in dispute. Eventually, *halakha* became the general term for the whole legal system of Judaism. *Halakha* is traditionally thought to consist of two primary sources: the Written Torah, which is comprised of the Hebrew Bible, and the Oral Torah, which, according to traditional belief, was given alongside the written Torah and is represented in the works of the Talmud and accompanying rabbinic literature.¹⁵

13 See generally, JEWISH MARRIAGE 25 (Peter Elman ed., 1975).

14 *Halakha* encompasses practically all aspects of human behavior and experience: lifecycle events, joy and grief, agriculture, commerce, personal, social, national and international concerns, etc. Reflecting this comprehensive understanding of the function of law, the Hebrew word *halakha* is derived from the word *halach* (literally, "to go"), following the statement, "Enjoin upon them the laws and the teachings, and make known to them the way they are to go and the practices they are to follow." *Exodus* 18:20. It is the legal system that outlines the way for properly living every aspect of one's life.

15 See Mark Goldfeder & Ira Bedzow, *Early Modern Period: Jewish Law*, in THE OXFORD ENCYCLOPEDIA

The Pentateuch, or Torah, is said to contain 613 commandments, 248 positive and 365 negative prescriptions.¹⁶ Part of *halakha* is the enumeration of these commandments, the formal declaration of the manner in which they are performed, and the penalty for transgression. The Biblical books contained in the Prophets and Writings, which together with the Torah represent the Hebrew Bible, were written during the 700 years following composition of the Pentateuch. The Jewish biblical canon appears to have been completed no later than the year 150 C.E. While the Prophets and Writings are traditionally understood to have been written with divine inspiration, and certainly had considerable impact on both the discourse and the homiletical material that appear in the primary documents of Jewish law, they are of far less significance than the Torah for establishing either normative legal or ethical norms.¹⁷

The Torah is the touchstone of Jewish law, and according to religious tradition and derived legal theory, it is the manifestation of the Divine word, as revealed to Moses at Sinai. Torah means “instruction” or “teaching,” and like all teaching it requires interpretation and application. According to traditional belief, alongside God’s revelation of the written Torah, represented in the text was a collection of material originally handed down orally from generation to generation. No legal system can exist on just a written text without explanatory notes and clarifications, and so this material was made up of a variety of additional laws, rules, explanations, and interpretive guidelines and tools. Although it was later written down, it remains known as the Oral Law.¹⁸ The divine and therefore binding nature of these two intertwined Torahs is the predicate belief of normative Jewish law. The existence of the dual system accounts for two basic features of Jewish life: the chain of tradition linking generations and the emphasis on Torah study.

The legal debates between the schools of Hillel and Shammai set in motion new debating processes among the rabbinic teachers of first- and second-century Palestine, the Tannaim (literally, teachers). The Tannaim were the first redactors of Jewish law, whose period is closely associated with the editing of the Mishna, traditionally ascribed to Judah the

OF THE BIBLE AND LAW (Pamela Barmash et al. eds., 2013) [hereinafter Goldfeder & Bedzow, *Early Modern Period: Jewish Law*].

16 See BABYLONIAN TALMUD, *Makkot* 23b.

17 See generally Emmanuel Rackman et al., *Halakhah, Law in Judaism*, in *ENCYCLOPAEDIA OF JUDAISM* (Jacob Neusner et al. eds., 2d ed. 2005) [hereinafter Rackman et al., *Halakhah*].

18 For example, the Written Law prescribes: “You shall not do any work on the Sabbath”; the Oral Law defines exactly which acts of labor constitute a violation of this injunction. See BABYLONIAN TALMUD, *Shabbat* 73a.

Patriarch (commonly referred to by the simple honorific “Rabbi”). The Mishna, a redaction of nearly all the main areas of Jewish law then extant, became the basis of subsequent Jewish legal development and literature. It is composed of material thematically arranged in six structural “orders.” They deal with agricultural law, family law, civil and criminal law, laws of Festivals, laws of the Temple, and laws relating to ritual purity.¹⁹

The Tannaitic period saw the transformation of Jewish law in three crucial ways. First, religious leadership was transferred from the triumvirate of king/priest/prophet to the rabbis, who assumed the mantle of expositors of Jewish oral and written law, thereby becoming the architects of authoritative rabbinic decrees and customs.²⁰ Second, during this period the oral law gradually came to be set in writing, a pivotal process that culminated in Rabbi’s decision to allow the creation of an authoritative writing down of the oral law, fixed in the text of the Mishna. Finally, by the end of this period, after the Destruction of the Second Temple, Judaism was firmly rooted in the Diaspora and no longer geographically confined to the land of Israel. These three transitions caused profound changes in Jewish law.²¹

The next five or six centuries saw the writings of the Babylonian and Jerusalem Talmuds, two running commentaries on most sections of the Mishna with elaboration and explanation of the rules and cases therein. They were written and edited by scholars called Amoraim (those who recount the law) and to a lesser extent, towards the end of the period, by the Savoraim (those who ponder the law) and the Geonim (geniuses of the Law). Once the Mishnah had been compiled, it became a sacred text second only to the Bible. It became axiomatic, for instance, that no Amora had the right to disagree with a Tanna in matters of law unless he was able to adduce Tannaitic support for his view.²²

The Jerusalem Talmud, compiling the interpretive traditions of the Rabbis in the Land of Israel, appeared around the year 425 C.E. The Babylonian Talmud, which developed in the Diaspora, underwent a much heavier editing process; it did not become fixed until about a hundred years after its Jerusalem counterpart. As such, it is a more refined work, and as a result, and for a variety of other reasons (the Babylonian Talmud is later than the Jerusalem and hence able to override the decisions of the latter; the textual condition of

19 See generally MOSES MAIMONIDES, MAIMONIDES’ INTRODUCTION TO HIS COMMENTARY ON THE MISHNA (Fred Rosner trans., 1994) [hereinafter MAIMONIDES, INTRODUCTION TO COMMENTARY].

20 See Rackman et al., *Halakhah*, *supra* note 17, at 789.

21 See *id.*

22 See Goldfeder & Bedzow, *Early Modern Period: Jewish Law*, *supra* note 15, at 787.

the Babylonian Talmud is in a more satisfactory state; the Babylonian Geonim at Sura and Pumbedita were in direct succession to the Babylonian Amoraim, so that the Babylonian Talmud became 'our Talmud,' etc.) the authority of the Babylonian Talmud ultimately eclipsed that of the Jerusalem Talmud, giving it far greater significance throughout most of Jewish history.²³

Developing alongside the two Talmuds, and really also part of the Talmudic corpus, were the *Midrashei Halakha*, compilations of rabbinic teachings so called because the sages interpreted Scripture using a method called Midrash. There were two schools of Midrashic thought, the schools of Rabbi Yishmael and Rabbi Akiva. The *Midrashei Halakha* record the verse-by-verse expounding of the Scripture to substantiate *halakhic* rulings. Many early *halakhic* rulings are therefore called *Divrei Sofrim* (the words of the scribes), although later that term also shifted to mean rulings of rabbinic rather than scriptural origin. Much of the Midrashic material makes its way into the two Talmuds as traditions or laws (known as *baraitot*), recognizable because they usually begin with a scriptural quote.

The fundamental significance of the Talmudic literature to Jewish law cannot be overstated. Jewish authorities accept that Talmudic law provides the base for all discussion of Jewish law, and its authority is beyond dispute, such that the denial of said authority effectively excludes one from the community of adherents. While the Talmud might in certain circumstances be unclear, or accept more than one view as acceptable or even normative, or at the very least cite several different views without explicit resolution of the matter under discussion, it nonetheless sets the framework of analysis for all that is Jewish within Jewish law. As Maimonides put it in the introduction to his Code, "All Israel is obliged to follow all the statements in the Babylonian Talmud. Every city and every province is compelled to conduct itself in accordance with the customs, decrees and regulations instituted by the sages of the Talmud, since all Israel agreed to accept them."²⁴

The general assumption in the classical Jewish sources is that the *halakhah* in its entirety goes back to Moses, except for various later elaborations, extensions, applications, and innovations in accordance with new circumstances. Thus Maimonides in the introduction to his Code counts forty generations backward from Rav Ashi, the traditional editor of the Babylonian Talmud, all the way to Moses, and concludes: "In the two Talmuds and the Tosefta, the Sifra and the Sifrei (names of Midrashic compilations), in all these are

23 See generally Gerald J. Blidstein, *Halakhah: History of Halakhah*, in 6 ENCYCLOPEDIA OF RELIGION 3742–47 (Lindsay Jones ed., 2d ed. 2005).

24 See MAIMONIDES, INTRODUCTION TO COMMENTARY, *supra* note 19, at 791.

explained the permitted and the forbidden, the clean and the unclean, the liabilities and lack of liability, the unfit and the fit, as handed down from person to person from the mouth of Moses our teacher at Sinai To it [the Talmud] one must not add and from it one must not subtract."²⁵

Internal Jewish law consists of a hierarchy of authority. Those laws that are derived directly from the scriptural text are referred to as Torah obligations. Laws whose source is in statements of rabbinic scholars throughout the generations, from Moses to the present, are called rabbinic decrees. The difference between the two lies not only in the type of penalty that each demands if transgressed, but also in the type of consideration each must be given in doubtful circumstances. In the case of doubt with regard to a Torah commandment, one must lean towards stringency, while in the case of rabbinic decrees, on the other hand, one may be lenient.²⁶ Rabbinic decrees are often meant to make a protective fence around the Torah²⁷ so as to hinder possible violations of the Torah commandments through carelessness. Other types of rabbinic decrees are called *gezerot* (singular, *gezerah*) which differ from other rabbinic rules in their source of authority. They need not be explicitly exegetical nor directly related to Torah obligations, although they are often designed to protect some Biblical ethic or ideal.²⁸ However, once a *gezerah* is decreed and has been accepted by Jewry at large, it cannot easily be rescinded by later authorities.²⁹ Similarly, *takanot* (singular, *takkanah*) are rabbinic decrees that typically relate to social and economic situations that may arise. Another component of rabbinic law is *minhag* (custom), which can affect Jewish law depending on its strength of normativity.³⁰

In the post-Talmudic era codification of the various strands of Jewish law became a popular endeavor. Based on available manuscripts from such leaders as Rav Shereira ben Hanina Gaon (900–940 C.E.) and Rav Hai Gaon (939–1038 C.E.), it appears that the Geonic era was an active period of codification. In the medieval era, different approaches arose with respect to codification. One genre that developed was responsa literature, in

25 *Id.*

26 See BABYLONIAN TALMUD, *Beitzah* 3b; JERUSALEM TALMUD, *Erakhin* 3:4.

27 See MISHNA, *Avot* 1:1.

28 See Michael J. Broyde & Mark Goldfeder, *Contemporary Jewish Religious Movements: Orthodox*, in THE OXFORD ENCYCLOPEDIA OF THE BIBLE AND LAW (Pamela Barmash et al. eds., forthcoming 2014) [hereinafter Broyde & Goldfeder, *Orthodox*].

29 MAIMONIDES, INTRODUCTION TO COMMENTARY, *supra* note 19.

30 *Id.*

which individuals or communities addressed questions to major deciders of Jewish law. These responsa were collected, and sometimes organized by topic. Another genre was the systematic organization of Jewish law into codes. The greatest example of such a code is Maimonides' *Mishneh Torah*, a fourteen-volume codex covering all aspects of Jewish law. Another example is the *Shulhan Arukh*, written by Rabbi Joseph Karo, which covers all aspects of daily living, but is not as comprehensive as Maimonides' code.³¹ The *Shulhan Arukh*, together with the glosses of the Rabbi Moshe Isserless, became the most authoritative code in the history of the *halakha*, and it marked a turning point in the history of codification in that even when later authorities departed from its rulings, they did so with extreme reluctance. Adherence to the *halakha* as represented by the *Shulhan Arukh* became the test of Jewish fidelity and attachment to Orthodoxy, especially in the modern period when denominational divergence began. Its rulings are still authoritative, even if not the final authority, for *halakhic* Jews everywhere.

In looking at polygamy through the lens of Jewish tradition and specifically through Jewish law—the primary vehicle for the transmission of Jewish values throughout the ages—this Article will not attempt to quote every statement, law, or saying about polygamy, or co-wives—just the ones that have in some way or another left a mark or made an impact on the tradition. Nor will it quote every responsa, even by major rabbis; there are hundreds that touch upon the idea and practice of polygamy, many of them similar, and so instead of providing string citations I have sifted through them for the ones that, in my opinion, best make the relevant points. The viewpoint for this work is that of an internal Jewish law scholar, and so references to the Old Testament, Talmud, and Midrashic lore will see those texts, and Jewish law in general, as comprising a unified code for a coherent and continuous set of norms for a community (albeit one that has dynamically developed over time), which is the way that it is and has been seen by its traditional practitioners.³² It will include a discussion of the development of divorce law in *halakha*, particularly as it explains the changes in the Jewish marital structure.³³

31 Primarily in that it does not deal with laws seen only as relevant to a Temple-based society.

32 The Article focuses on historic and legal sources, and so, for the most part, will not discuss aggadaic (homiletic or non-legal) or kabbalistic references to polygamy and proto-polygamy, unless and insofar as they do come to bear on the authoritative understanding of the Jewish position.

33 Ability to divorce freely and polygamy are frequently linked. Condemnation of divorce, both historical and even extant in the current pushback against the so-called American divorce revolution, along with popular romantic terms like “soulmate” and “one and only” point towards an even stricter ideal model of monogamy, an idea that Elizabeth Emens has called the fantasy of “supermonogamy.” See Elizabeth F. Emens, *Monogamy's Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. REV. L. & SOC. CHANGE 277, 376 (2004).

II. The Old Testament

For Judaism and Jewish practice, everything eventually comes back to the Bible, and so there is no better place to begin. In both the narrative and genealogical sections of the Old Testament, there are numerous references to polygynous marriages, and there are quite a few Biblical laws and passages that presuppose the existence of polygamy.

The very first commandment in the Bible is *pru u'rvu* (be fruitful, and multiply).³⁴ This commandment is repeated to Noah and his sons when they exit the Ark after the flood,³⁵ and is echoed again several times throughout the Biblical literature.³⁶

This commandment does three things. First, it sets the stage for the primary purpose of polygamy: the increase of viable children.³⁷ Second, the stage is also set immediately for tension because the prototypical biblical marriage is, of course, that of Adam and Eve, the first (and at that point the only) man and woman.³⁸ Their relationship is patently monogamous, as no one else even exists.³⁹ In addition, the Bible notes that a man

34 *Genesis* 1:28.

35 *Genesis* 9:1.

36 While marriages were clearly often contracted for the creation of progeny or for political alliance, Claire Gottlieb notes: "The element of romance is also not entirely lacking in the Biblical saga, especially from the Patriarchal narratives to the end of the United Monarchy." Claire Gottlieb, *Varieties of Marriage in the Bible and Their Analogues in the Ancient World*, at ix (1989) (unpublished Ph.D. dissertation, New York University) (on file with New York University). The Babylonian Talmud develops the parameters of this commandment to procreate in *Yevamot* 61b–64a (translation by author), *quoted in* Robyn Weiss Frisch, Haray Aten Mekudashot Li: A Study of Polygamy in Judaism from Biblical Through Rishonic Times, at 19 (2000) (unpublished Ph.D. dissertation, Hebrew Union College—Jewish Institute of Religion, Brookdale Center) (on file with author); *see also Shulchan Aruch, Even HaEzer* 1.

37 *See Psalms* 127:3–5 ("Children are a heritage from the Lord, offspring a reward from Him. Like arrows in the hands of a warrior are children born in one's youth. Blessed is the man whose quiver is full of them. They will not be put to shame when they contend with their opponents in court.") (translation by author).

38 It is interesting to note, however, that the Torah never speaks of their union as a "marriage" per se, unless one translates the words *ish* and *isha* in *Genesis* 2:23 as "husband" and "wife" (a valid translation although not the common one) as opposed to "man" and "woman," as they are usually translated. The verse would then read: "Then the man said, 'This one at last is the bone of my bones and the flesh of my flesh. This one shall be called "Wife" (*Isha*) for from "Husband" (*Ish*) was she taken.'"

39 While it is true that late Jewish mysticism believed in a demon woman named Lilith who is said to have been the first wife of Adam, such an understanding has never been used in a historical or legal normative context for family law. *See* ISRAEL ABRAHAMS, *JEWISH LIFE IN THE MIDDLE AGES* 114 (1932).

clings to his wife and the two “become one flesh,”⁴⁰ leading to the assumption by many scholars that the Bible introduced monogamy as an ideal before accepting polygamy as a compromise, the difficulties of which were then laid out in detail in the telling of the lives of the patriarchs.⁴¹ Nevertheless, in the Rabbis’ view even an example set by God in ordering the world essentially belonged to the domain of *aggadah* (homiletics), and does not supply an adequate foundation for a specific *halakha*.⁴² The Rabbis might appeal to God’s example when enunciating general rules of religious, moral, or prudent conduct,⁴³ or would reference it when elucidating a *halakhic* principle already established on other, proper legal grounds, but would go no further. (This is in direct contrast to a verse like *Genesis* 5:2, “male and female he created them,” which the Rabbis do cite in a legal context pertaining to how many children a man must have. Here, the primary duty of procreation, i.e., the commandment of “*pru u’rvu*,” has already been established by an actual precept, “Be fruitful and multiply.” The second verse is brought merely to give a more exact understanding of what that meant.⁴⁴)

40 *Genesis* 2:24.

41 See LAWRENCE H. SCHIFFMAN, *FROM TEXT TO TRADITION: A HISTORY OF SECOND TEMPLE AND RABBINIC JUDAISM* 257 (1991). From a Christian point of view, see also William B. Kessel, Address at the Ariz. District Pastoral Conference First Lutheran Church, Prescott, Ariz. (May 5–6, 1998) (citing *LUTHERAN CYCLOPEDIA* 626 (Erwin L. Lueker ed., 1975)):

The fact that polygamy was (e.g., in the Old Testament) and is practiced does not justify it. Scripture does not present it as God’s intent, or as God-pleasing, or as an example to follow. Is it possible, however, that God permitted polygamy to stand among the patriarchs to serve as a bad example or warning? Consider the plight of Abram and Sarai. Their polygamous household was anything but tranquil (*Genesis* 16:4–6). Problems between the co-wives translated into difficulties with their children (*Genesis* 21:9–11). Later Jacob loved his wife Rachel more than her co-wife and sister Leah (*Genesis* 29:32). This led to jealousy between the two (*Genesis* 30:1, 8). Then again, there was bitter strife between Elkanah’s two wives Hannah and Peninnah (1 *Samuel* 1:2). However, if God permitted polygamy to stand as an example not to be followed, then one wonders why conflict among David’s wives—Michal, Abigail, Ahinoam, Maacah, Haggith, Abital, Eglah, and Bathsheba—is not mentioned. Likewise familial disputes between Solomon and his 700 wives and Rehoboam and his dozen-and-a-half brides escape the lasting censor of Scripture.

42 See DAVID DAUBE, *THE NEW TESTAMENT AND RABBINIC JUDAISM* 76 (1956).

43 See *infra* Part V.A. for Rabbi Yehuda ben Beteira’s statement that Job’s rationale was: “If Adam was intended to have ten wives, they would have been given to him. But he was intended to marry only one wife. So too my wife is enough for me. My portion is enough.” He does not even cite to a specific verse, a clear sign that he is speaking aggadaically, and not with legal precision. DAUBE, *supra* note 42, at 76–77.

44 DAUBE, *supra* note 42, at 78; see *infra* Part V.B. (discussion of the Zadokite fragments, and accompanying notes).

Finally, the commandment of *pru u'rvu* actually sets the stage for the idea of a biblically prescribed polygamy.

A. Polygamy as Religious Obligation

The Rabbis of the Mishna in *Yevamot* 6:6 teach us:

No man may abstain from keeping the law "Be fruitful and multiply," *Genesis* 1:28, unless he already has children: according to the School of Shammai, two sons; according to the School of Hillel, a son and a daughter, for it is written, "Male and female He created them." *Genesis* 5:2. If he married a woman and lived with her ten years and she bore no child, it is not permitted him to abstain [from fulfilling this legal obligation]. If he divorced her she may be married to another and the second husband may live with her for ten years. If she had a miscarriage the space [of ten years] is measured from the time of the miscarriage. The duty to be fruitful and multiply falls on the man but not on the woman. R. Johanan b. Baroka [dissents from this view and] says: Of them both it is written, "God blessed them and God said to them, Be fruitful and multiply." *Genesis* 1:28.⁴⁵

The husband of the barren wife who is required to fulfill his obligations is therefore left with only one of two choices: divorce his wife or marry a second one. The latter option is explicitly spelled out in the Mishna in *Sotah*, 4:3: ". . . Rabbi Eliezer says, 'He can marry another woman to procreate through her.'"

The Tosefta in *Yevamot* 8:6 deals with the problem of what happens to the infertile wife once it is confirmed that she is the problem: "And to how many husbands is she permitted to be married [until we are sure that she is the infertile one]? Three. Beyond that she should only be married to someone who has a wife and children."⁴⁶ The Talmud in *Ketubot* sees Abram's taking of Hagar in addition to Sarai after ten years of living in Israel as a Biblical reference to this practice.⁴⁷

45 See also TOSEFTA, *Yevamot* 8:5.

46 The man, however, seems to have no similar limitation, but must continue to try and have children with other women. In fact, the famous statements of Rava and Rav Ammi discussed at length below come up in the context of a discussion of a man who wants to marry another woman in order to test his virility. See *infra* note 193 and accompanying text; BABYLONIAN TALMUD, *Yevamot* 65a.

47 See BABYLONIAN TALMUD, *Ketubot* 77. The relationship between divorce and polygamy is also highlighted here, and will come up again in the discussion of remedies for gender-based inequalities built into the structure

The idea of monogamy as an ideal is reinforced by the oft-repeated biblical metaphor of Israel as God's unfaithful but still beloved, and ultimately *only* wife, as well as by several verses that seem to indicate a definite monogamous preference, such as Ecclesiastes 9:9 ("Enjoy happiness with a woman you love all the fleeting days of your life that have been granted to you under the sun. . . .") and Psalms 128:3 ("Your wife shall be like a fruitful vine within your house; your sons like olive saplings around your table.").⁴⁸

Still, while there are no biblical passages that seem to indicate an actual *preference* for polygamy, there are plenty of legal passages that acknowledge its existence and even approve of it.⁴⁹ Aside from the many tales of multiple wives, the Bible assumes that female slaves will marry either their owner or his son,⁵⁰ regardless of whether or not they are already married. Elsewhere, the text is explicit that "[i]f a man (who is already married) marries another woman, he must not withhold (from his first wife) her food, her clothing, or her conjugal rights."⁵¹ The Torah also discusses what to do when bequeathing property to sons born from multiple wives in a situation where one wife is loved more than the other.⁵²

The rules of levirate marriage⁵³ compel a man (in certain circumstances) to marry his childless brother's widow, regardless of whether or not the man is already married to his own wife. This is important because it is one of the only times (aside from the case of barrenness, above) that the taking of a second wife could be construed as actually fulfilling a commandment.⁵⁴ The Children of Israel are warned that their king should not

of Jewish marriage laws.

48 See also Isaiah 50:1; Jeremiah 2:2; Ezekiel 16:8; Proverbs 12:4, 18:22, 19:14, 31:10–31.

49 See Frisch, *supra* note 36, at 22–23.

50 Exodus 21:7–9.

51 Exodus 21:10 (translation by author).

52 Deuteronomy 21:15–17.

53 Deuteronomy 25:5–10; see *infra* Part IV (discussing Levirate Marriage).

54 Indeed, while the text of the Bible itself does not specifically state that a married brother can perform levirate marriage, and so one might have thought this was ambiguous, the Rabbis in the MISHNA, *Yevamot* 4:11 state unequivocally that: "Four brothers married four women and died. If the oldest of them [i.e., the remaining brothers] wants to take them all in levirate marriage, the authority is in his hand." Note that there were several other options available here: the younger brothers could each have taken a wife, or the oldest brother could have done *chalitzah*, the un-shoeing ceremony, an alternative to levirate marriage, on all but one. Clearly, avoiding polygyny was not a priority here.

have *too* many wives,⁵⁵ while *Deuteronomy's* discussion of the "beautiful captive"⁵⁶ seems to be given in a polygamous context, as it too does not differentiate between married and unmarried soldiers.

B. Polygamy's Benefits

In biblical times, the benefits to a man of having multiple wives were obvious and many. Aside from increasing a man's chances of having more offspring, multiple wives and concubines served as a sign of wealth and power.⁵⁷ They also supplied a man with enough people to work the fields and tend the flocks.⁵⁸ A woman, meanwhile, may have preferred the status of a wife, even a secondary wife, to that of spinsterhood, or to living under the jurisdiction of a father or a brother.⁵⁹ Isaiah 4:1 points out that especially in times of national turmoil, multiple women would be content to take the name of one husband: "In that day, seven women shall take hold of one man, saying, 'We will eat our own food, and wear our own clothes, only let us be called by your name; take away our disgrace.'" Polygamous marriages were also entered into for political reasons; Solomon, for example, used his marriage alliances with foreign women to establish cordial relations with the nations around him.⁶⁰ Aside from the reference to the king noted above, the Torah places no limit on how many wives a man can have.

55 *Deuteronomy* 17:17. This verse actually reflects the exact opposite ambiguity of the verse in *Genesis*; the word here is *nashim* (plural of *isha*) and although it usually is not in this context, could also be translated as "women," which would presumably include concubines as well as full-fledged wives. Note that the Damascus document of the Dead Sea Scrolls sees this not as a prohibition on the king alone, but as an indication that the king should be an example to his people, who should all refrain from having multiple wives.

56 *Deuteronomy* 21:10–14.

57 See Frisch, *supra* note 36, at 26. "Note that throughout the biblical and Talmudic literature, the only references we find to actual polygamists are among the rich and powerful. This is not to necessarily say that the common man could not be or was not also polygamous, just that we lack any evidence that this was in fact the case." *Id.* at 9 (quoting RACHEL BIALE, *WOMEN AND JEWISH LAW: THE ESSENTIAL TEXTS, THEIR HISTORY, & THEIR RELEVANCE FOR TODAY* 50 (1984)).

58 *Id.*; see, e.g., *Genesis* 34:7 (Jacob and his children).

59 See Frisch, *supra* note 36, at 26 (quoting Gottlieb, *supra* note 36, at 86).

60 See Chaim Pearl, *Marriage Forms*, in *JEWISH MARRIAGE*, *supra* note 13, at 24–25.

C. Polygamy as a Tolerated Practice

The first example of polygamy in the Bible is that of Lamech and his two wives, Addah and Zillah.⁶¹ Although the influential commentator Rashi⁶² states that having two wives was the custom of the generation of the flood, Lamech's bigamy is the only recorded case of polygamy in the antediluvian period.⁶³ Other famous polygamous men from the *Genesis* narrative include Abraham (married to Sarah, and later, Hagar the concubine⁶⁴), Abraham's brother Nahor (married to Milcah and his concubine Reumah⁶⁵), Jacob (married to Leah and Rachel, along with the concubines Bilhah and Zilpah), Esau (married to Judith, Basemath, Mahalath, Adah, and Oholibamah), and Esau's son Eliphaz.⁶⁶

Throughout the Prophets and Writings we encounter Gideon (who had "many wives"⁶⁷), King Saul (who had multiple wives, although no exact number is given⁶⁸), King David (who had seven wives before he reigned in Jerusalem,⁶⁹ and then took additional wives and concubines when he left Hebron⁷⁰), King Solomon (seven hundred royal wives and three hundred concubines⁷¹), King Mennasseh (at least one concubine⁷²), Shaharaim (three

61 *Genesis* 4:19; see also *Midrash Genesis Rabbah* 23:3 (seeming to find Lamech's polygamy distasteful, as he kept one wife for pleasure and one for children).

62 Rabbi Shlomo Yitzchaki of France, (1040–1105); see Rabbi Shlomo Yitzchaki, commenting on *Genesis* 4:19.

63 Frisch, *supra* note 36, at 28.

64 By the time that Abraham married his second wife, Keturah, Sarah had already died. See *Genesis* 25:1.

65 *Genesis* 22:20–24.

66 The text to *Genesis* 36:11 does not mention his wife's name, only his sons' names, but *Genesis* 36:12 tells us that Timna was his concubine and bore him an additional son, Amalek. *Genesis* 46:10 implies that Jacob's son Simon had a second wife, a Canaanite woman, although it is not clear if those wives were, in fact, concurrent. The text to *Genesis* 36:11 does not mention his wife's name, only his sons' names, but *Genesis* 36:12 tells us that Timna was his concubine and bore him an additional son, Amalek.

67 *Judges* 8:30 (Gideon had seventy sons of his own issue, for he had many wives).

68 2 *Samuel* 12:8.

69 2 *Samuel* 3:2–5, 14.

70 2 *Samuel* 5:13.

71 1 *Kings* 11:3.

72 1 *Chronicles* 7:14.

wives, unclear how many concurrent⁷³), King Rehoboam of Judah (eighteen wives and sixty concubines, and who sired twenty eight sons for whom he sought many wives⁷⁴), Abia (fourteen wives and an unknown number of concubines⁷⁵), and King Jehoash (two wives⁷⁶). In Samuel I and II, the only recorded polygamist aside from the royal monarchs is Samuel's father Elkanah (married to Hanna and Penina⁷⁷).⁷⁸

In terms of the way the Bible thought about polygamy, none of these polygamous men are ever criticized for having multiple wives. Even King Solomon, whose many wives famously led him astray, was criticized not for marrying too many women, but for marrying women who were unsuitable because they were from among the nations with which God had prohibited the Israelites from intermarrying.⁷⁹ Still, others claim that the Bible is written in a way which already presupposes that monogamy was the general rule, pointing to verses such as *Deuteronomy* 20:7 ("And who is the man who has betrothed a wife") and 24:5 ("when a man takes a new wife"), which, although they don't proscribe polygamy, seem to indicate that it might not have been favored or the norm.⁸⁰ They also note that great men such as Moses and Aaron lived monogamous lives.⁸¹ Others cite to the thirty-first chapter of *Proverbs*, as well as several of the *Psalms*, which seem to speak of and praise a monogamous union.⁸²

73 1 *Chronicles* 8:8–9.

74 2 *Chronicles* 11:21, 23.

75 2 *Chronicles* 13:21.

76 2 *Chronicles* 24:3.

77 Gottlieb, *supra* note 36, at 86 (citing ROLAND DE VAUX, *ANCIENT ISRAEL VOL. 1, SOCIAL INSTITUTIONS* 25 (1965)) (noting that Elkanah traced his lineage back to Kohath, the son of Levi, so in reality he was not an ordinary commoner). In general, Samuel, like all the Biblical books, records the activities of the elite. *But see Yalkut Shimoni*, 1 *Samuel* 1:2; *Midrash Shmuel*, 1 *Samuel* 1:2; *Pesikta Rabasi*, ch. 43 (seeming to justify Elkanah's polygamy due to Penina's barrenness).

78 See 1 *Chronicles* 7:4 (implying that polygamy may have been common at that time amongst the tribe of Issachar).

79 1 *Kings* 11:4–5; see Frisch, *supra* note 36, at 30.

80 See MOSES MIELZINER, *THE JEWISH LAW OF MARRIAGE AND DIVORCE* 28 (1884) [hereinafter MIELZINER, *JEWISH LAW* 1884]. Mielziner also sees such commandments as the prohibition to neglect one's conjugal duties toward one's wife on account of another (Exodus 21:9) as designed to make polygamy practically difficult.

81 *Id.*

82 See Pearl, *supra* note 60, at 27.

It was possible, as in the cases of Esau and Jacob, for a man to have multiple wives of equal position and rank.⁸³ Oftentimes in ancient Israel, as in other polygamous societies, polygamy resulted in antagonism between the wives, whether because one was more favored (Rachel and Leah⁸⁴) or because one was barren and the other bore children (also Rachel and Leah, as well as Hannah and Peninnah⁸⁵). As noted above, Deuteronomy recognized the potential for this problem, stating that “if a man has two wives, one loved and the other unloved”⁸⁶

The practice of a barren woman giving her husband her handmaid to bear children “on her (the wife’s) knees”—i.e., a form of surrogate motherhood—was common in the Bible, and indeed in the Ancient Near East generally⁸⁷; Rachel⁸⁸ and Leah,⁸⁹ for example, both gave Jacob their handmaids, Leah even despite the fact that she had already borne some children.⁹⁰

It is debatable whether or not the practice of concubinage falls under the rubric of traditional polygamy—the concubine was not “married” to the master, and while her status was higher than that of a slave, it was lower than that of a wife and oftentimes (as in the cases of Sarah and Hagar, Leah and Zilpah, and Rachel and Bilhah) she even belonged to the primary wife. Still, there was a committed sexual relationship between two people in addition to any other wives a man might have, which was exclusive on the part of the woman. In many ways this looks like polygamy, as opposed to just an open sexual

83 See Frisch, *supra* note 36, at 38.

84 Genesis 29:30.

85 1 Samuel 1:1–6.

86 Deuteronomy 21:15–17. In *De Vertutibus* 115, Philo of Alexandria echoes the Rabbinic sentiment that if one takes a “beautiful captive” as a wife, jealousy will ensure when the older wife is superseded by a newer wife. PHILO OF ALEXANDRIA, ON VIRTUES: INTRODUCTION TRANSLATION, AND COMMENTARY (trans. Walter Wilson, 2011).

87 See VICTOR HAROLD MATTHEWS & DON C. BENJAMIN, OLD TESTAMENT PARALLELS: LAWS AND STORIES FROM THE ANCIENT NEAR EAST 47 (1997); see also John C. Jeske, *Genesis*, in THE PEOPLE’S BIBLE 145 (Roland Cap Ehlke & John C. Jeske eds., 1991); Stuart A. West, *The Nuzi Tablets: Reflections on the Patriarchal Narratives*, 10 Bible and Spade 68 (1981).

88 Genesis 30:3.

89 Genesis 30:9–13.

90 For our purposes, the terms *amah* (handmaid), *shifchah* (maid or female slave), and *pilegish* (concubine) all refer to the concubine.

relationship. In addition, the reasons for having a concubine are the same as the reasons for having multiple wives: not only was it prestigious, having many concubines also increased the man's chances of having many children and a steady stream of helpers (while at the same time being somewhat less expensive, and avoiding some of the pitfalls of rivalry that co-wives might engender⁹¹). For some parts of this discussion then, we will equate the practices of polygamy and concubinage, noting here at the outset that this was not the case in all societies and at all times.⁹²

Louis Epstein makes the argument that the tradition of polygamy among the Hebrews was from time immemorial directly related to the outside culture of which they were a part.⁹³ It is true that polygamy did prevail among most ancient oriental nations,⁹⁴ but not all; thus we find Abraham maintaining a matriarch in Sarah, as per Babylonian restrictions, while Esau, who, unlike Jacob remained in Canaan, participated fully in the Canaanite pattern of full and equal polygamy.⁹⁵ That might explain why Jacob's father-in-law, Laban, seeking to preserve his daughters' dignity, made Jacob swear before he returned to Canaan that he would take no other wives to rival them.⁹⁶ Epstein argues that if the majority of the Hebrews in Canaan and later in Egypt did not practice polygamy, it was mostly due to practical considerations; only the chieftains could afford it even though the law did not forbid it.⁹⁷

91 Although not always; after Hagar conceives from Abraham when Sarah could not, Sarah is lowered in her eyes, and responds by treating Hagar harshly. *See Genesis* 16:4–6.

92 Classical Roman law, for instance, allowed members of the Senatorial order to take as concubines women who they would otherwise not be permitted to marry. Since the relationship was devoid of legal basis, it did not stand in the way of another, legal relationship. *See* F. SCHULZ, *CLASSICAL ROMAN LAW* 137 (1951). In the year 325 C.E., however, an edict was issued forbidding a man to take a concubine in addition to his wife, while a later version expressly prohibited the taking of a second wife while the first was alive. These decrees received further confirmation at the Councils of Toledo (400 C.E.) and of Rome (402 C.E.). *See* ZE'EV W. FALK, *JEWISH MATRIMONIAL LAW IN THE MIDDLE AGES* 22 (1966) [hereinafter FALK, *JEWISH MATRIMONIAL LAW*].

93 LOUIS M. EPSTEIN, *MARRIAGE LAWS IN THE BIBLE AND THE TALMUD* 8–9 (1942) [hereinafter EPSTEIN, *MARRIAGE LAWS*].

94 MOSES MIELZINER, *JEWISH LAW OF MARRIAGE AND DIVORCE* 28 (2d ed. 1901) [hereinafter MIELZINER, *JEWISH LAW* 1901].

95 *See* Frisch, *supra* note 36, at 38 (citing Gottlieb, *supra* note 36, at 87).

96 *Genesis* 31:50.

97 Epstein offers an interesting conjecture that perhaps Egyptian culture affected Jewish monogamy in one very particular way, i.e., outlawing polygamy amongst the priests. EPSTEIN, *MARRIAGE LAWS*, *supra* note 93, at 10. The Mishna assumes that the High Priest had only one wife (MISHNA, *Yoma* 2a), and we see a later reflection of this in the New Testament (1 *Timothy* 3:2 and *Titus* 1:6), which prohibits polygamy to bishops.

Most assume that even though polygamy was clearly sanctioned, it was not extensively practiced even in Biblical times except by the leaders and the wealthy.⁹⁸ Polygamy was a privilege of the rich, and while a poor Israelite might desire having a number of wives (along with their attendant slaves and children) to help him in his household, his financial standing would probably make this arrangement highly impracticable.⁹⁹ Also note that in almost every situation, polygamy in the Biblical era already leads to strife, pain, and discord.

III. Second Temple Period

After the Old Testament, the next references we get to Jewish stances on polygamy come from extant marriage contracts written during the time of the Second Temple period.¹⁰⁰ One such document was found in Elephantine, a Jewish military colony in Egypt located at the Southern end of a small island in the Nile.¹⁰¹ The agreement, written in Aramaic and dated to around the year 441 B.C.E., makes it clear that some men in this period did not take a second wife because of an explicit agreement they had made with their first wives. The relevant provision, written by the husband (Ashor) to the wife (Miphtahiah) reads as follows:

And I shall have no right to say I have another wife besides Miphtahiah and other children than the children whom Miphtahiah shall bear to me. If I say I have children and wife other than Miphtahiah and her children, I will pay to Miphtahiah the sum of 20 kerashin, royal weight, and I shall have no right to take away my goods and chattels from Miphtahiah; and if I remove them from her (erasure) I will pay to Miphtahiah the sum of 20 kerashin, royal weight.¹⁰²

98 Russell K. Ryan, *And Then There Was One: An Analysis and Comparison of Polygamy Among Jews and Mormons*, in 9 THE JEWISH LAW ANNUAL 209 (Institute of Jewish Law ed., 1991).

99 EPHRAIM NEUFELD, ANCIENT HEBREW MARRIAGE LAWS 118 (1944). He does, however, think that bigamy alone might have been somewhat common, although many do disagree.

100 After the destruction of the First Temple in 586 B.C.E., the Jewish people went into exile in Babylonia. When the Persian King Cyrus defeated Babylonia in 539 B.C.E., he offered the Jews living under his rule the chance to return to their homeland and rebuild the Temple. While some did return, many remained in Babylonia and other areas in which they had settled during the Diaspora. See DAVID J. GOLDBERG & JOHN D. RAYNER, THE JEWISH PEOPLE: THEIR HISTORY AND THEIR RELIGION 51–53 (1992).

101 *Elephantine*, in 6 ENCYCLOPAEDIA JUDAICA 311, 312 (2007).

102 Frisch, *supra* note 36, at 52 (citing ARAMAIC PAPYRI OF THE FIFTH CENTURY, B.C. 45–46 (A. Cowley ed.,

As noted above, this provision has possible Biblical precedent; when Laban encounters Jacob in *Genesis* 31:50, he adjures him not to take any additional wives other than his daughters, Rachel and Leah: "If you ill-treat my daughters, *or take other wives besides my daughters*, though no one else be about, remember, God Himself will be witness between you and me." (emphasis added).¹⁰³ According to Ze'ev Falk, however, the clause in the Elephantine marriage contract prohibiting polygyny was drawn less from the Bible and more from the influences of the community's non-Jewish neighbors.¹⁰⁴ Falk is careful to point out though that just because the format of inserting a specific clause in a marriage contract to restrict polygyny may have been borrowed by Jews from their gentile neighbors, "[i]t does not necessarily follow that the tendency to monogamy was also a result of foreign influences."¹⁰⁵ The tendency toward monogamy could have come from within the Jewish community, which then borrowed a formal medium from surrounding non-Jewish culture.

Texts found among the Dead Sea Scrolls at Qumran, from the library of the sectarian Jews that lived there, condemn marriage to one's niece,¹⁰⁶ divorce, and polygamy, calling all of them *zenut* (fornication).¹⁰⁷ One scroll, commonly referred to as the "Damascus Document," has been dated to the late first century B.C.E. It states¹⁰⁸:

[They] are caught by two (snares). By unchastity, (namely), taking two wives in their lives, while the foundation of creation is "male and female

1967)) (citations omitted). Other such examples of agreements wherein the husband writes that he will refrain from taking a second wife because of an agreement with the first one have been preserved in similarly written Babylonian and Assyrian documents. See *Monogamy*, in 14 *ENCYCLOPAEDIA JUDAICA* 447, 447–48; FALK, *JEWISH MATRIMONIAL LAW*, *supra* note 92, at 5.

103 See also LOUIS M. EPSTEIN, *THE JEWISH MARRIAGE CONTRACT: A STUDY IN THE STATUS OF THE WOMAN IN JEWISH LAW* 125 (2005) [hereinafter EPSTEIN, *THE JEWISH MARRIAGE CONTRACT*] (noting that while the clause prohibits polygamy it does permit concubinage).

104 FALK, *JEWISH MATRIMONIAL LAW*, *supra* note 92, at 4–5, *quoted in* Frisch, *supra* note 36, at 53.

105 *Id.* at 5.

106 Not forbidden in the Torah. See *BABYLONIAN TALMUD*, *Yevamot* 62b.

107 See ROBERT EISENMAN, *JAMES THE BROTHER OF JESUS: THE KEY TO UNLOCKING THE SECRETS OF EARLY CHRISTIANITY AND THE DEAD SEA SCROLLS* 40, 81, 104 (1997), *cited in* Frisch, *supra* note 36, at 58; see also LENA CANSDALE, *QUMRAN AND THE ESSENES: A RE-EVALUATION OF THE EVIDENCE* 53 (1997).

108 FLORENTINO GARCIA MARTINEZ, *THE DEAD SEA SCROLLS TRANSLATED: THE QUMRAN TEXTS IN ENGLISH* (Wilfred G.E. Watson trans., 1994). To have two wives at once is, for the author of the Damascus Document, a breach of the ordinance of creation. *Book of Covenant of Damascus*, in 5 *ENCYCLOPAEDIA JUDAICA* 397, 398 (2007).

he created them.”¹⁰⁹ And those who entered (Noah’s) ark went two by two into the ark. And of the prince¹¹⁰ it is written “Let him not multiply wives for himself”¹¹¹ And David did not read the sealed book of the Torah which was in the Ark (of the Covenant), for it was not opened in Israel since the day of the death of Eleazar and Joshua and the elders. For (their successors) worshipped Ashtoreth, and that which had been revealed was hidden until Zadok arose, so David’s works were accepted, with the exception of Uriah’s blood¹¹²

While this text is somewhat ambiguous—most importantly, it is not clear from the context which person exactly is the subject of “in their lives,” the husband (in which case a man would be guilty of fornication for taking a second wife even if his first wife had already died) or the wife (in which case it was only forbidden to take a second wife if the first wife was still alive)—most scholars have understood it as a reference to polygamy.¹¹³ If so, the apparent claim that polygamy is actually biblically forbidden seems to be a complete

109 *Genesis* 1:27 (translation by author).

110 *Deuteronomy* 17:17 (translation by author). The word “prince” (*nasi*) here is a clear reference to the king. See 2 THE DEAD SEA SCROLLS: HEBREW, ARAMAIC, AND GREEK TEXTS WITH ENGLISH TRANSLATIONS: DAMASCUS DOCUMENT, WAR SCROLL, AND RELATED DOCUMENTS 21 n.41 (James H. Charlesworth ed., 1995).

111 As mentioned above, Rabbinic exposition, apparently even sectarian exegesis, required an explicit commandment as an anchor before it would use a homiletic verse to fill in the gaps. Thus the Zadokite’s turn to the Deuteronomic verse concerning kings as their base text, probably relying on a similar tradition to that which the Rabbis quote in the Babylonian Talmud in the name of Rabbi Shimon ben Yochai; “all Israelites are considered sons of kings.” See DAUBE, *supra* note 42, at 85–96.

112 Damascus Document 4:20–5:5, translated in 2 THE DEAD SEA SCROLLS: HEBREW, ARAMAIC, AND GREEK TEXTS WITH ENGLISH TRANSLATIONS: DAMASCUS DOCUMENT, WAR SCROLL, AND RELATED DOCUMENTS 19, 21 (James H. Charlesworth ed., 1995). The author of the scroll here wishes to preempt the argument from history that David, God’s beloved servant, was polygamous and never criticized for it, noting that it was not David’s fault since in David’s day the Torah was inaccessible; it had been sealed and hidden until Zadok (most likely Zadok the High Priest in Solomon’s time) arose. The author does note, however, that David was still punished for having Bathsheba’s husband Uriah killed.

113 See CHARLOTTE HEMPEL, DAMASCUS TEXTS (2000); see also SIDNEY WHITE CRAWFORD, THE TEMPLE SCROLL AND RELATED TEXTS, COMPANION TO THE QUMRAN SCROLLS 81 (2000) (“CD 4.205.5 prohibits polygamy (‘taking two wives’) and, evidently, divorce (‘in their lives’).”); JOHAN MAIER, THE TEMPLE SCROLL: AN INTRODUCTION, TRANSLATION & COMMENTARY 16 (1985); LAWRENCE H. SCHIFFMAN, RECLAIMING THE DEAD SEA SCROLLS 82–83 (2000); BEN ZION WACHOLDER, THE NEW DAMASCUS DOCUMENT: THE MIDRASH ON THE ESCHATOLOGICAL TORAH OF THE DEAD SEA SCROLLS: RECONSTRUCTION, TRANSLATION AND COMMENTARY 196 (2007); Joseph M. Baumgarten, *The Laws of the Damascus Document in Current Research*, in THE DAMASCUS DOCUMENT RECONSIDERED. JERUSALEM, ISRAEL MUSEUM, SHRINE OF THE BOOK 51–62 (1992).

innovation,¹¹⁴ although there are those who claim that at least some members of the Karaite sect also believed that it was biblically prohibited (they read the verse in Leviticus 18:18, "Do not take your wife's sister as a rival wife," broadly, with sister meaning something more akin to "neighbor").¹¹⁵

It is interesting that while in the Torah the prohibition of the king having too many wives is meant only for the king¹¹⁶ (and the same is true in the Temple Scroll found in Qumran¹¹⁷), when it is referenced in the Damascus Document, it is used for a different purpose, i.e., to show that the king serves as an example to his subjects. "Just as [the king] is not permitted to have more than one wife, so others are not."¹¹⁸ Perhaps the intent was to benefit women, or to promote stable marriages, or was simply in keeping with general Second Temple community attitudes.¹¹⁹ It is also noteworthy that the Damascus Document seems to have been written during the reign of King Herod,¹²⁰ and could have been written as a critique of his and his supporters' polygamous ways as described in Josephus' *Wars and Antiquities*.¹²¹

114 *Monogamy*, in 14 *ENCYCLOPAEDIA JUDAICA*, 447, 447–48 (1973).

115 LOUIS FINKELSTEIN, *JEWISH SELF-GOVERNMENT IN THE MIDDLE AGES* 23 (1972); *see also* ADOLF NEUBAUER, *GESCHICHTE DES KARAERTUMS* 46 (1866), *quoted in* *MARRIAGE AND ITS OBSTACLES IN JEWISH LAW: ESSAYS AND RESPONSE* 62 (Walter Jacob & Moshe Zemer eds., 2001) [*hereinafter* *MARRIAGE AND ITS OBSTACLES*].

116 *Id.*

117 Temple Scroll Column LVI, Verse 18, *translated in* FLORENTINO GARCIA MARTINEZ, *THE DEAD SEA SCROLLS TRANSLATED: THE QUMRAN TEXTS IN ENGLISH* (Wilfred G.E. Watson trans., 1994).

118 SCHIFFMAN, *supra* note 113, at 130, *quoted in* Frisch, *supra* note 36, at 62–63.

119 *See* LENA CANSDALE, *QUMRAN AND THE ESSENES: A RE-EVALUATION OF THE EVIDENCE* 53 (1997), *quoted in* Frisch, *supra* note 36, at 63.

120 King Herod had nine wives according to Josephus. FLAVIUS JOSEPHUS, *ANTIQUITIES OF THE JEWS*, Bk. XVII 1.3 (Allen Wikgren ed., Ralph Marcus trans., 1963).

121 CANSDALE, *supra* note 107, at 53 (discussing the rules of relationships). Though Josephus wrote in *Antiquities of the Jews*, Bk. XVII 1.2, that it is "an ancestral custom of [the Jews] to have several wives at the same time," Josephus himself, who was married to three different women, was never married to more than one woman at a time. Isaiah M. Gafni suggests that Josephus needed to include these explanatory notes in his text because of the monogamy of the Roman Empire. Isaiah M. Gafni, *The Institution of Marriage in Rabbinic Times*, in *THE JEWISH FAMILY: METAPHOR AND MEMORY* 21 (David Kraemer ed., 1989); *see also* LOUIS GINZBERG, *AN UNKNOWN JEWISH SECT* 19 (Jewish Theological Seminary Am. trans., 1970). Ginzberg cites another Zadokite document which took the Levitical law (18:18) against marrying a woman and her sister to refer to simply "a wife together with another one," a definite linguistic possibility but also definitely not part of the mainstream Jewish tradition. The Karaites would later use a similar exegesis.

The apocryphic literature does not deal with polygamy that often. 1 *Esdras* 4:29, for instance, simply mentions that Apame was a concubine of the king. The clearest statements we get come from the book *The Wisdom of Ben Sirah*, otherwise known as Ecclesiasticus. In regard to having multiple wives, Ecclesiasticus¹²² writes: "It is a heartache and sorrow when one wife is the rival of another." Later, he advises his audience, "Do not consult with a woman about her co-wife."¹²³ The author, however, was not against marriage, per se, and seemed to praise the monogamous lifestyle:

In three things I show my beauty and stand up in beauty
before the Lord and men;
Harmony among brothers, and friendship among neighbors,
And wife and husband suited to each other.¹²⁴

And also:

Happy is the man who has a good wife!
The number of his days is doubled.
A noble wife gladdens her husband,
And he lives out his years in peace.
A good wife is good fortune;
She falls to the lot of those who fear the Lord,
Whether rich or poor, he has a stout heart;
And always a cheerful face.¹²⁵

Overall, the materials available from the Second Temple period, both legal and homiletic, seem to reflect a growing attitude in favor of monogamy. Despite the fact that the majority of Jewish texts (with the exception of the Damascus Document¹²⁶) had not

¹²² JOSHUA BEN SIRACH, ECCLESIASTICUS 26:6, *translated in* THE APOCRYPHA (Edgar J. Goodspeed trans., 1989) (c. 200–175 B.C.E.).

¹²³ *Id.* at 37:11.

¹²⁴ *Id.* at 25:1; *see also id.* at 26:19–24, 37:11.

¹²⁵ *Id.* at 26:1–4.

¹²⁶ In general, it is important not to overestimate the value of these scrolls even to the Dead Sea Sect living in Qumran. While it is possible and even likely that these scrolls did represent their philosophy, it is also possible that they were part of a larger collection or library, or that they reflected the views of one small group or even one individual.

outlawed the practice of polygamy at this time, it is likely that it was not common.¹²⁷ This concept, of polygamy being legally valid but socially frowned upon, continued as a trend in the Jewish communities throughout the Talmudic period.¹²⁸

IV. The Tannaitic Period

The period of the Tannaim (“those who taught the Law”) extends from the period of Hillel the Elder at the end of the first century B.C.E. until the compilation of the Mishna by Rabbi Judah HaNasi at the end of the second century C.E.¹²⁹ The primary sources of Jewish law passed down from the Tannaitic period are the Mishna (designed to preserve, clarify, and systematize the rabbinic teachings surrounding the commandments in the Torah) and the Tosefta (literally additional material; made up of material attributed to the Tannaim that did not make the final cut in the redaction of the Mishna, but serves as a supplement to it).¹³⁰

While the majority of the material cited in these works is attributed to sages from this era, it also contains some material attributed to sages dating back as early as 300 B.C.E.¹³¹ Material from the Tannaitic period can also be found throughout the discussions in the Babylonian and Jerusalem Talmuds, which, although they were compiled and redacted later in the Amoraic period, preserve numerous stories, references, statements, and rulings

127 See Michael L. Satlow, *Family, Jewish*, in *ENCYCLOPEDIA OF ANCIENT HISTORY* 2629, 2629–30 (2013); see also MICHAEL L. SATLOW, *JEWISH MARRIAGE IN ANTIQUITY* 325 (2001) [hereinafter SATLOW, *JEWISH MARRIAGE IN ANTIQUITY*].

128 See Jack N. Lightstone, *Roman Diaspora Judaism*, in *A COMPANION TO ROMAN RELIGION* 345, 362 (2007); see also Michael L. Satlow, *Marriage and Divorce*, in *OXFORD HANDBOOK OF JEWISH DAILY LIFE IN ROMAN TIMES* 15 (Catherine Heszer ed., 2008).

129 As the last of the “pairs” mentioned in the Mishna in *Avot* who were responsible for maintaining the chain of tradition of the Oral Law, and the author of the “seven rules of *Hillel*,” the first compilation of the technical exegetical that are to be used when expounding on the Biblical text, *Hillel* is generally credited as changing the way that Torah was taught and laying the foundations of a new era. See Stephen G. Wald, *Hillel*, in 9 *ENCYCLOPAEDIA JUDAICA* 108–10 (2007).

130 HERMAN L. STRACK & GUNTER STEMBERGER, *INTRODUCTION TO THE TALMUD AND MIDRASH* 149–50 (2d ed. 1996), cited in Frisch, *supra* note 36, at 75. According to Rabbinic tradition it was redacted by Rabbi Chiyah bar Abba (an Amora, one of the rabbinic sages from the second through the fifth century living in Israel, active from 290–320 C.E., and the last prominent scholar to be mentioned in the Tosefta), a relative and student of Rabbi Judah HaNasi, in the late third or fourth century C.E. in Israel. See *Tosefta*, in 20 *ENCYCLOPAEDIA JUDAICA* 70–72 (2007).

131 LAWRENCE H. SCHIFFMAN, *FROM TEXT TO TRADITION: A HISTORY OF SECOND TEMPLE AND RABBINIC JUDAISM* 183 (1991).

of the various Tannaim.

The Talmudic tractate *Yevamot* (literally “levirate marriages”) deals with the legal rules that arise from the description of levirate marriage contained in *Deuteronomy* 25:5–10:

If brethren dwell together, and one of them die, and have no child, the wife of the dead shall not be married abroad unto one not of his kin; her husband's brother shall go in unto her, and take her to him to wife, and perform the duty of a husband's brother unto her. And it shall be, that the first-born that she bears shall succeed in the name of his brother that is dead, that his name be not blotted out of Israel. And if the man like not to take his brother's wife, then his brother's wife shall go up to the gate unto the elders, and say: “My husband's brother refuses to raise up unto his brother a name in Israel; he will not perform the duty of a husband's brother unto me.” Then the elders of his city shall call him, and speak unto him; and if he stand, and say: “I like not to take her”; then shall his brother's wife draw nigh unto him in the presence of the elders, and loose his shoe from off his foot, and spit in his face; and she shall answer and say: “So shall it be done unto the man that doth not build up his brother's house.” And his name shall be called in Israel the house of him that had his shoe loosed.

In addition to the polygyny that could occur when a married brother is biblically required to perform levirate marriage, several other passages presuppose the existence of polygyny.¹³² The teachings at the very beginning of the tractate, for example, *Mishnayot Yevamot* 1:1–4, all make mention of co-wives in their discussions of the family, as do many other *Mishnayot* and *toseftas* throughout the tractate.¹³³ Perhaps the most important statement about polygamy and levirate marriage, however, comes from outside of *Yevamot*, from the Mishna in *Bechorot* 1:7:

The duty of levirate marriage takes precedence over the duty of *chalitzah* [i.e., the un-shoeing ceremony, in which the brother-in-law tells the court that he will not perform his levirate duty] in the early days, when their

132 See Frisch, *supra* note 36 at 86.

133 See, e.g., *Yevamot* 15:4, where a co-wife is disqualified from testifying on behalf of a woman that her husband is dead, since, as the commentators explain, there is a fear that due to the dislike co-wives have for each other one will testify about the other falsely, so that she will marry someone else and then be prohibited to the original husband. See also *Yevamot* 4:11, 6:5, 6:6, 13:8.

intent was to perform a mitzvah, but now when their intent is not to perform a mitzvah, the duty of *chalitzah* takes precedence over the duty of levirate marriage.

Leviticus 18:16¹³⁴ and 20:21¹³⁵ make it clear that in general one is forbidden from marrying his brother's wife, even widowed or divorced. Levirate marriage was the exception to this rule, *provided* that it was done for the right reasons, i.e., to fulfill a religious obligation and not for personal or financial reasons. According to the commentators, if a man performs levirate marriage with ulterior motives, he is considered to be simply indulging in a forbidden union.¹³⁶ When it became clear that people were no longer acting with only pure motives, the rabbis ruled that performing *chalitzah* was the preferable option. According to Ze'ev Falk, when this changed, "naturally the main effect concerned those already married, who were now at liberty to remain monogamous. An internal factor encouraging bigamy among Palestinian Jewry was thus neutralized while there remained the external opposition to polygamy on the part of the administration."¹³⁷

Aside from Tractate *Yevamot* and the Mishna in *Bechorot*, many other passages throughout the *Mishna* also make mention of polygamy in various levels of detail. Chapter 10 in *Ketubot*, for instance, deals with laws relating to cases where the deceased leaves two or more wives.¹³⁸ The numerous matter-of-fact references to polygamy throughout the literature support the image of a world in which polygamy must have existed, at least to some extent. There are, however, only a few specific examples that are recorded in the Talmud. One, cited in both the Tosefta *Ketubot* 5:1 and Jerusalem Talmud *Yevamot* 4:12, involves Rabbi Tarfon, a prominent Tanna who was active in the years 80–110 C.E. The passage reports that during a year of drought Rabbi Tarfon, who was a priest, betrothed three hundred women, so that they would, as wives of a priest, be able to eat from the *Terumah* portion (the heave offering given to the priestly tribe) during this time of hardship. The Jerusalem text, however, makes it clear that the marriages were only nominal. Rabbi Tarfon makes another appearance in the canon in regard to polygamy, in a Tosefta in *Yevamot* 1:10; having been asked about the status of the children of rival wives,¹³⁹ Rabbi Joshua replied:

134 "Do not uncover the nakedness of your brother's wife."

135 "If a man marries the wife of his brother, it is indecency."

136 Frisch, *supra* note 36, at 88.

137 FALK, JEWISH MATRIMONIAL LAW, *supra* note 92, at 9.

138 For more examples, see MISHNA, *Gittin* 3:1, 8:7, *Kiddushin*, 2:6–7, *Sotah* 4:3, *Sanhedrin* 2:4.

139 A disagreement between the Houses of Shammai and Hillel recorded in the MISHNA, *Yevamot* 1:4.

"Why do you put my head between two great mountains, between the House of Shammai and the House of Hillel? They will destroy my head! However I testify that the family of the House of Alubai from Beit Sevaïm and the family of the House of Kufai from Beit Mekoshish are the descendants of rival wives. And high priests have come from them that have presided over sacrifices at the temple." Rabbi Tarfon said, "I want a daughter of a rival-wife to come before me so that I can marry her into the priesthood."¹⁴⁰

Jerusalem Talmud *Yevamot* 4:12 contains another story about polygyny, this one involving thirteen brothers, twelve of whom died without leaving children, making their wives eligible for levirate marriage. The widows of the deceased brothers came before Rabbi Judah HaNasi, who told the surviving brother that he should enter into levirate marriage with all of them, apparently unconcerned about the resulting polygamous union.¹⁴¹ Interestingly, in Babylonian Talmud *Ketubot* 62a, when the same Rabbi Judah's daughter-in-law became too old to have children after his son finally came back from his studies, he was hesitant to tell his son to marry another woman polygamously, lest "it would be said: The latter is his wife and the other his mistress." Perhaps this is an early reflection of a trend that we will see again later in history, wherein polygamy is allowed when there is a *mitzvah* (positive commandment) to do so (because technically the law allows it and the rabbis' moral compunction was not enough to override a commandment), despite the fact that it was otherwise frowned upon as somewhat immoral or something to be socially ashamed of.¹⁴² This balancing system is in fact not uncommon in Talmudic literature generally. Out of respect for the biblical commandments, the rabbis used much

140 In demonstration of the fact that the law is in accordance with the view of the House of Hillel.

141 See JERUSALEM TALMUD, *Yevamot* 4:12:

Four of the brothers: A story: there were thirteen brothers, and twelve died without children. They came before Rabbi [Judah] requesting to be taken in levirate marriage. Rabbi said to [the brother-in-law], "Go initiate levirate marriage." He said to him, "I can't." Each one of the wives said, "I will pay maintenance for my month." The brother-in-law said, "Who will pay maintenance for the intercalated month?" Rabbi said, "I will pay maintenance for the intercalated month." And he prayed for them, and they left him. Three years later, they came carrying thirty-six children. They came and stood themselves before Rabbi's courtyard. [Some people] went up and told him, "There is a crowd of children below that want to greet you." Rabbi looked out from the window and saw them. He said to them, "What is your business?" They said to him, "We want you to pay the intercalated month." And he paid the intercalated month.

142 BABYLONIAN TALMUD, *Sukkah* 27a:

more discretion in mandating the non-fulfillment of biblical norms (here the practice of polygamy) in a passive way rather than permitting active violations of commandments, something that they felt that they could not do.¹⁴³

Other specific instances of polygamy in the Babylonian Talmud include one involving the major domo of King Agrippas who, in the process of ascertaining his obligations regarding the holiday of Sukkot, mentions that he has two wives,¹⁴⁴ and one involving Rabbi Gamliel II of Yavneh (a leading Tanna who was active from 80–110 C.E.). Babylonian Talmud *Yevamot* 15a tells us that Rabban Gamliel performed levirate marriage with one of his brother's wives when his brother Abba died childless. In regard to other Jewish sources from the time period, Josephus tells us that two of King Herod's sons, Archelaus and Herod Antipas, had more than one marriage at a time.¹⁴⁵

Another source of Jewish material discussing polygamy from the Tannaitic period is the Aramaic *Targum* ("translation") of *Ruth*.¹⁴⁶ Chapter 4 of the *Book of Ruth* reads as

R Judah went and busied himself for his son's [marriage] into the household of Rabbi Yose ben Zimrah. They agreed for him to go to the Great House [the Academy] for twelve years. They promenaded her in front of him, he said to them, "Let them be six years." They promenaded her in front of him, he said to them, "I will consummate [the marriage] and then go." He felt shame before his father, [Rabbi Judah] said to him, "You have the mind of your Creator. Originally it is written, you will bring them and you will plant them in the mountain of your inheritance." *Exodus* 15:17 (referring to the Temple Mount), but in the end it is written, "Make me a sanctuary, so that I may dwell among them . . ." *Exodus* 25:8 (referring to the Tabernacle). He went and sat for twelve years. When he returned, his wife had become barren. Rabbi said, "What will we do? If we divorce her, they will say, 'This poor woman waited in vain.' If we marry [him to] another woman, they will say, 'This one is his wife and this one is his prostitute.'" He prayed for mercy on her behalf, and she recovered.

143 See, e.g., BABYLONIAN TALMUD, *Berakhot* 19b–20a, where the Rabbis weigh meta-principles against non-fulfillment of specific norms. "The value of human dignity is so great that it supersedes a negative commandment of the Torah"; or, in the Jerusalem Talmud's version; "The dignity of the public (literally 'the many') is so great that it supersedes a negative commandment of the Torah for one hour (i.e., temporarily)." JERUSALEM TALMUD, *Berakhot* 3:1.

144 See BABYLONIAN TALMUD, *Sukkah* 27a.

145 JOSEPHUS, *supra* note 120.

146 There has been some scholarly debate over the dating of *Targum of Ruth*. Many believe it to be Talmudic. See MIELZINER, JEWISH LAW 1901, *supra* note 94, at 29 n.2. Others consider it to be post-Talmudic, and others claim it originated much earlier among the Sadducees or some other non-Pharisaic sect. See D.R.G. Beattie, *The Textual Tradition of Targum of Ruth*, in THE ARAMAIC BIBLE: TARGUMS IN THEIR HISTORICAL CONTEXT 340 (D.R.G. Beattie & M.J. McNamara eds., 1992).

follows:

Boaz continued [speaking to the redeemer, saying]: "When you acquire the property from Naomi and from Ruth the Moabite, you must also acquire the wife of the deceased, so as to perpetuate the name of the deceased upon his estate." The redeemer replied, "Then I cannot redeem it for myself, lest I impair my own estate. You take over my right of redemption, for I am unable to exercise it."¹⁴⁷

In the Biblical account, the only reason that the redeemer gives for not redeeming is that doing so would "impair his own estate." A simple reading of these verses might imply that this is so because by marrying Ruth he would be required to expend capital for property that would go to Ruth's firstborn son, who would be legally regarded not as his own son, but as the son of Ruth's deceased husband Machlon, as per the rules of levirate marriage.

The *Targum*, however, tells a slightly different story:

Boaz said: "On that day that you buy the field from the hand of Naomi and from the hand of Ruth the Moabite, wife of the deceased, you are obliged to redeem and required to act as her brother-in-law and to marry her in order to raise up the name of the deceased upon his inheritance." The redeemer said, "In such circumstances I am not able to redeem myself. Because I have a wife I have no right to marry another in addition to her, lest there be contention in my house and I destroy my inheritance. You, redeem my inheritance for yourself, for you have no wife, for I am not able to redeem."¹⁴⁸

Interestingly, the redeemer does not say that he is not *allowed* to marry a second wife, just that it may result in contention in his house, reflecting the already established Biblical view that polygamy, while not illegal, is at the very least inadvisable from a practical household standpoint.

Other Midrashic sources, perhaps of later composition but representing much earlier teachings, include *Pesikta Rabbati* (circa 845 C.E.). In this midrashic collection, the pious Elkanah's polygamous behavior needs to be justified, and so the rabbis explain that it was

147 *Ruth* 4:5–6.

148 TARGUM, *Ruth* 4:5–6.

because his wife was barren.¹⁴⁹ A parable given in *Midrash Canticles Rabbah* (which is assumed to be very early) takes it for granted that if a man is marrying a second wife he must have already divorced the first.¹⁵⁰

The Tannaitic period of rabbinic Judaism corresponds to the time of early Christianity and the writing of much of the New Testament, and so when exploring early rabbinic views of marriage and polygamy one must also consider the views of early Christianity.¹⁵¹ The Gospels are relatively silent on the marriage front, although some scholars¹⁵² have argued that certain passages seem to set monogamy as the ideal. *Matthew* 19:9 for example, states: "if a man divorces his wife for any cause other than unchastity, and marries another, he commits adultery."¹⁵³ The lack of explicit condemnation is probably due to the fact that on the ground it was taken for granted; indeed, at least for the original sectarian Jewish Christian population, there is evidence that they were completely monogamous.¹⁵⁴

One of the Church Fathers, however, Tertullian, took the above-quoted passage quite far, in that he opposed not only what we can call regular or simultaneous polygamy, or even what this verse seems to describe on its face, i.e., second marriages after divorce; he also went so far as to proscribe a person's remarriage after the *death* of a spouse.¹⁵⁵

Still, there are very few explicit references to polygyny in the New Testament, and it is never banned in the text for the general population.¹⁵⁶ It was not until the Council of Trent

149 *Pesikta Rabbati* 43, cited in S. Lowy, *The Extent of Jewish Polygamy in Talmudic Times*, 9 J. JEWISH STUD. 115, 117 (1958); see also *Yalkut Shimoni*, 1 *Samuel* 1:2; *Midrash Shmuel*, 1 *Samuel* 1:2.

150 *Canticles Rabbah* 1:6, cited in Lowy, *supra* note 149, at 118.

151 See Frisch, *supra* note 36, at 93.

152 See DAVID DAUBE, *THE NEW TESTAMENT AND RABBINIC JUDAISM* 75 (1956).

153 SACRED WRITINGS—CHRISTIANITY: THE APOCRYPHA AND THE NEW TESTAMENT FROM THE REVISED ENGLISH BIBLE 18 (Jaroslav Pelikan ed., 1992). If polygamy were permitted, why would taking a second wife be a problem? See Lowy, *supra* note 149, at 132.

154 See H. J. Schoeps, *Ehebewertung und Sexualmoral der späteren Judenchristen* [*Evaluating Marriage and Sexual Mores of Later Jewish Christians*], 2 *STUDIA THEOLOGICA* 99, 99–101 (1948), quoted in Lowy, *supra* note 149, at 132.

155 See Lowy, *supra* note 149, at 134.

156 While it can be argued that the New Testament prohibited polygamy in 1 *Corinthians* 7:2, which reads, "let each man have his own wife and let each woman have her own husband," that reading is no more conclusive than the "therefore shall a man leave" teaching in the Old Testament. See EPSTEIN, *MARRIAGE LAWS*, *supra* note

in 1563 that the Church issued an unequivocal prohibition on the practice of polygamy. Passages written in the Tannaitic period do, however, mandate that an elder, bishop, or deacon, respectively, may each have only one wife.¹⁵⁷ It is possible, if not likely, that in forbidding their leaders and role models from a certain behavior, the authors of the New Testament were demonstrating their views of the practice in general.¹⁵⁸ It seems that, much like in the case of the Tannaim,¹⁵⁹ for the early Christians there was a grudging legal acceptance but a strong disinclination towards polygamy. Seeing as they were coming from the same traditions and operating in the same locale of the Holy Land, if one group did not directly influence the other, they must have at the very least been exposed to similar ideas and societal values regarding issues of marriage and family.¹⁶⁰

Proceeding to the world of non-canonical Christian literature, Justin Martyr, one of the Church fathers of the second century, was an important Christian apologist. His *Dialogue with Trypho* was the first anti-Jewish polemic written in Greek,¹⁶¹ and is an adaptation of a debate between Justin and a Jewish philosopher.¹⁶² In Chapter 134, Justin writes that Jewish sages in all the lands, even in his own day, permit marriage to four or five wives. Justin condemns the rabbis who, he claims, permit their followers to practice polygyny rather than obey God, and mistakenly cite to the Patriarchs as precedent.¹⁶³ Elsewhere, Justin reiterates that the purpose of the Patriarchs' polygamy was "not to commit adultery,

93, at 14. The Gospels of *Matthew* 19:9 and *Mark* 10:11 declare that "whosoever shall put away his wife . . . and shall marry another commiteth adultery," but there is reason to believe that the word adultery here just means sexual sin. *Id.* at 14–15.

157 See *Titus* 1:6; *1 Timothy* 3:2; *2 Timothy* 3:12.

158 Similar to the Damascus exegetical material. Note, though, that at least in the minds of the Tannaim, the Bible was *not* doing so when it proscribed multiple wives for the king. In regard to the limitations contained in *Deuteronomy* 17:17, TOSEFTA, *Sanhedrin* 4:5 states: "He shall not multiply for himself if the wives are like Jezebel. But if the wives are like Abigail, multiplying wives is permitted. These are the words of Rabbi Judah But a common person is permitted to do all of these things."

159 At least in a case where there was no good reason, such as bareness, levirate duty, or drought.

160 Indeed in the early centuries, the Christian teachings clearly assume that polygamy is contrary to Christian morals. See, e.g., CORPUS JURIS CANONICI, described in EPSTEIN, THE JEWISH MARRIAGE CONTRACT, *supra* note 103, at 15–16 n.49.

161 *Church Fathers*, in 4 ENCYCLOPAEDIA JUDAICA 719, 719 (2007).

162 Who, ironically, some scholars claim may have actually been the Tanna Rabbi Tarfon, the very same Tanna who himself, when the need arose, married three hundred women. See generally J. D. GEREBOFF, RABBI TARFON: THE TRADITION, THE MAN, AND EARLY JUDAISM (1979), cited in Frisch, *supra* note 36, at 101.

163 See Frisch, *supra* note 36, at 97.

but that certain mysteries might thus be indicated by them.”¹⁶⁴ As Falk notes, despite the fact that Justin Martyr clearly wrote for polemical reasons, criticizing Judaism to elevate Christianity, one can still infer from his work that the rabbis of his generation did not discount polygamy, at least in principle.¹⁶⁵ On the other hand, one must be cautious when using his writings as a historical source, since although he claims to be reporting on Jewish sages in “all lands,” it is possible that he is in fact only describing some anomaly with which he was personally familiar.¹⁶⁶

If polygamy was not de facto common in Tannaitic times, it was certainly accepted rabbinically de jure. From the Talmudic legal contexts in which it was discussed, polygamous unions per se were most likely to arise in a case where there was a biblical commandment or, as in the case of Rabbi Tarfon in the Jerusalem Talmud, a moral imperative mitigating the discomfort that the rabbis felt towards the practice.

The split between Jewish and Christian views of polygamy is probably rooted in their differing views on marriage as an institution. In Christian minds, at least at the time, marriage was merely tolerated, barely good; Paul famously proclaimed:

it is good for a man not to touch a woman. Nevertheless, to avoid fornication, let every man have his own wife, and let every woman have her own husband. . . . I say this by way of concession, not of command . . . for it is better to marry than to burn.¹⁶⁷

In rabbinic thought, however, marriage was considered to be “very good.”¹⁶⁸ According to one fragment found in the Cairo Geniza, which has been referred to as the “sermon in praise of a wife,”¹⁶⁹ there are in fact twelve good measures in the world, and any man who

164 SUSANNA DRAKE, *SLANDERING THE JEW: SEXUALITY AND DIFFERENCE IN EARLY CHRISTIAN TEXTS* 34 (2013) (quoting Justin Martyr, *Dialogue with Trypho* 141:4).

165 FALK, *JEWISH MATRIMONIAL LAW*, *supra* note 92, at 6, *quoted in* Frisch, *supra* note 36, at 98.

166 Frisch, *supra* note 36, at 98.

167 1 *Corinthians* 7:1–9, *quoted in* Gafni, *supra* note 121, at 17; *see also* TERTULLIAN, *TO HIS WIFE* (207 A.D.), *reprinted in* 4 *ANTI-NICENE FATHERS* 86 (Philip Schaff ed., 1885), *available at* <http://www.ccel.org/ccel/schaff/anf04.pdf>; ST. AUGUSTINE, *ON MARRIAGE AND CONCUPISCENCE*, BOOK 1 (419 C.E.), *reprinted in* 5 *NICENE AND POST-NICENE FATHERS: SERIES I* 764 (Philip Schaff ed., 1887), *available at* <http://www.ccel.org/ccel/schaff/npnf105.pdf>.

168 MIDRASH, *Genesis Rabbah* 9:7.

169 S. D. Goitein, *Preface* to JACOB MANN, *THE JEWS IN EGYPT AND IN PALESTINE UNDER THE FATMID CALIPHS*

does not have a wife in his house who is good in her deeds is prevented from enjoying all of them. These good measures are: good, happiness, blessing, peace, help, atonement, a (protective) wall, Torah, life, satisfaction, wealth, and a crown. Based on the discussion of marriage in Babylonian Talmud *Yevamot* 61b–64a, the anonymous preacher's list of goods might imply in simple mathematical terms that more wives would just equal more goods.

V. The Amoraic Period

The composition of the Mishna by Rabbi Judah HaNasi in the beginning of the third century, and its dissemination and acceptance in the Jewish legal academies both in Israel and elsewhere, led to a clear break in the way scholars worked to pass on the tradition.¹⁷⁰ The generations that followed the Tannaim were called Amoraim (“those who recount the law”) because they worked to interpret and deliver the authoritative Mishnayot. Memorization and constant recitation were the cultural ideal.¹⁷¹ Polygamy continued to be legal according to Jewish law during this period, which lasted until the codification of the Babylonian Talmud around 500 C.E. From what we know, however, it continued to be rare in practice, probably even more so than before.¹⁷² Talmudic debate and legislation regarding multiple wives is frequent, but seems to have been mostly academic.¹⁷³ While the two Talmuds contain a great deal of biographical information about many sages over the centuries, there is not a single *undisputed* reference to any of the Amoraim actually having more than one wife.

While Jews had been living outside of Israel in Babylonia since the Destruction of the Temple in 70 C.E., the traditions until this point had been quite fluid and connected, with Israel as the accepted source of authority. In the Amoraic period, as demonstrated by the emergence of the two Talmuds, two distinct communities began to take shape. While the Amoraic period is said to have lasted until 500 C.E., in truth the Amoraim in the land of Israel were only active until approximately 370 C.E. The earlier close of the Jerusalem

(1970), *quoted in* SATLOW, JEWISH MARRIAGE IN ANTIQUITY, *supra* note 127, at 1.

170 See *Amoraim*, in 2 ENCYCLOPAEDIA JUDAICA 89 (2007).

171 *Id.*

172 The Talmudic term for a spouse, *zivug*, literally means “pairing,” further postulating monogamy. Lowy, *supra* note 149, at 130; *see, e.g.*, BABYLONIAN TALMUD, *Sotah* 2a; *Gittin* 90b; *Sanhedrin* 22a.

173 The debates tend to center around precise legal theoretical questions in regard to formation and dissolution of marriage, but ignore such mundane issues as how the laws of family purity would be affected, a topic which, if polygamy was actually happening, would definitely have needed to be addressed. *See generally* BABYLONIAN TALMUD, *Yevamot*.

Talmud was probably due to the political reality in Israel: in 351 the Roman commander Ursicinus wreaked vengeance on the Jews of Tiberias, Sepphoris, and Lydda, the seats of the three academies, because of their revolts against the army.¹⁷⁴

There is much discussion in rabbinic literature about how to account for some of the differences between the Babylonian and Jerusalem Talmuds. Some assume that they represent the difference between two contemporary but different traditions, perhaps based on geographical and political influence. The Jews who remained in Israel during this period were under Roman rule, and were thus exposed to Roman views (and subject to Roman laws) about monogamy. The Jews in the Babylonian exile, however, were in close proximity to the polygamous Zoroastrian religious culture of Persia. Others, however, downplay these differences, noting that if you align the different Tannaitic and Amoraic layers of the two Talmuds, the corresponding strata are remarkably similar. They thus assume that what the two Talmuds really preserve is the difference between two stages of the development of a single shared tradition.¹⁷⁵ Regardless, though, of whether the differences were due to time and/or place, to some extent the material that we have preserved from the Jewish communities of Israel and Babylonia must be examined separately, with Israel coming first.¹⁷⁶

In 212 C.E., all Jews living in the Roman Empire became Roman citizens, and were therefore subject to severe penalties for the practice of polygamy. In 285 C.E. Diocletian specifically extended the prohibition against polygamy to all the inhabitants of the Roman Empire, and in 324 C.E. Constantine the Great became ruler and Christianity became the official religion of the Roman Empire.¹⁷⁷

On December 30, 393, Emperor Theodosius (with Arcadius and Honorius) prohibited Jews from practicing polygyny, stating: "None of the Jews shall keep his custom (*morem*) in marriage unions, neither shall he contract nuptials according to his law, nor enter into several matrimonies at the same time."¹⁷⁸ The imperial legislation was apparently not

174 See *Talmud, Jerusalem*, in 19 *ENCYCLOPAEDIA JUDAICA* 483, 483–87 (2007).

175 *Id.*

176 FALK, *JEWISH MATRIMONIAL LAW*, *supra* note 92, at 7. The truth is, though, that it is not entirely convincing to say that Roman legislation deterred polygamy; uncle-niece marriages were considered incest by the Romans but permissible according to the rabbis. There must have been something else, i.e., some more universal underlying cultural aversion. See SALO BARON, *A SOCIAL AND RELIGIOUS HISTORY OF THE JEWS* 2:26 (2d ed. 1983).

177 See Frisch, *supra* note 36, at 101.

178 SATLOW, *JEWISH MARRIAGE IN ANTIQUITY*, *supra* note 127, at 189. It should be noted, though, that the

entirely successful, however, even outside of Israel, because in 537 Justinian issued a novel ruling that granted an exemption from laws against polygyny to the Jews of Tyre; in 535 he had prohibited 'abominable marriages,' and two years later, upon tearful supplication from the Jews, he somewhat relaxed his position.¹⁷⁹

While some scholars, such as Lowy,¹⁸⁰ contend that Roman legislation (such as the aforementioned laws) did not serve as a deterrent for Jewish polygamy,¹⁸¹ most assume that it played a fairly large role. As Salo Baron puts it, "[n]o matter how little Jews were inclined to obey Roman legislation when it differed from their own, public violation of imperial criminal law throughout a lifetime, open to denunciation from any quarter, necessarily became unusual."¹⁸²

Others point out that the law bears on *all* those marriage customs that were peculiar to Jewish law, such as the degrees of permitted kinship, and legal age for marriage, in addition to any mention of polygamy. In fact, its formulation even permitted a more general interpretation; one could read it as condemning even the Jewish marriage ceremony itself.¹⁸³ They observe that clearly Imperial authorities never effectively implemented the law, because it was precisely this *halakhic* corpus that remained a constant throughout Jewish history. In fact, we have a textual witness to the already monogamous character of the Jewish family in the first half of the fifth century on the one hand, and to the enforcement (or lack thereof) of the Imperial legislation against polygamy on the other. In Theodoret's Commentary to Paul's First Epistle to Timotheus, we find the following: "Formerly, both Greeks and Jews used to contract simultaneously marriages with two, three, or even more wives. Even now some copulate with concubines and prostitutes, although the Imperial laws forbid to marry two women at the same time."¹⁸⁴

decree only covered legal wives, not concubines. See FALK, JEWISH MATRIMONIAL LAW, *supra* note 92, at 20 n.1.

179 Justinian included Theodosius' edict in his *Codex* in order to stress the ban again, and the *Basilica*, compiled by the Byzantine Emperor Leo the Philosopher as a digest of Justinian's laws at the beginning of the tenth century, also contains similar language. See *Codex Justinianus* 1:97; see also AMNON LINDER, THE JEWS IN ROMAN IMPERIAL LEGISLATION 192-93 (1987). Leo the Philosopher (886-912) would try again to ban polygamy later, also with only limited success. See JOSHUA STARR, THE JEWS IN THE BYZANTINE EMPIRE 144 (1939).

180 Lowy, *supra* note 149, at 116, quoted in Frisch, *supra* note 36, at 106.

181 See MIELZINER, JEWISH LAW 1901, *supra* note 94.

182 BARON, *supra* note 176, at 2:226, in Frisch, *supra* note 36, at 102.

183 LINDER, *supra* note 179, at 192.

184 See R. C. Hill, *Theodoret of Cyrus, Commentary on the Letters of St Paul*, quoted in LINDER, *supra* note

A. The Jerusalem Tradition

Discussing the various cases of the Mishna, the Jerusalem Talmud contains some legal rules about polygamy,¹⁸⁵ but the most important traditions about polygamy in the land of Israel during this time were actually preserved in the Babylonian Talmud. During the Amoraic period there was constant contact as well as correspondence between the centers of Jewish learning in Israel and in Babylonia, and so both Talmuds contain views from Amoraim who lived far away. In fact, for the most part the two rabbinic centers are not portrayed as being equal in authority or in prestige; in general, the Babylonian scholars considered themselves subordinate to the Israeli sages, who had a more direct connection to the tradition. Thus we find the fourth generation Babylonian Amoraic Sage Abaye, in Babylonian Talmud *Pesachim* 51a, remarking: “since we are subordinate to them, we do as they do.”¹⁸⁶ Therefore, it is not surprising that the Israeli traditions are quoted frequently and respectfully.

Babylonian Talmud *Yevamot* 65a quotes Rav Ammi, an Amora from Israel who was active from 290–320 C.E. He holds that if a husband whose wife has not borne him children wants to take another wife:

He must in this case pay her [his present wife] the amount of her *ketubah*. For I hold that whoever marries a wife in addition to his [present] wife must pay [the present wife] the amount of her *ketubah* (the price stipulated in the marriage agreement for the husband to pay in the event of the termination of their marriage, either by his death or by their divorce).¹⁸⁷

Falk maintains that Rav Ammi’s ruling “expresses a fundamental change of outlook . . . a new precept, based on his own personal conclusions . . . [his ruling] for the first time,

179, at 192.

185 For examples of polygamy discussed in a legal setting, see JERUSALEM TALMUD, *Yevamot* 1:1, 1:6, 2:1, 3:3, 3:5, 3:10, 4:1, and 5:3, and *Kiddushin* 2:6.

186 *Amoraim*, in 2 ENCYCLOPAEDIA JUDAICA 89 (2007). The Babylonian Talmud also describes Babylonian judges as being the “agents” of the scholars of the Land of Israel who are only empowered to adjudicate certain types of cases that do not require expert, ordained judges only found in the Land. See BABYLONIAN TALMUD, *Bava Kamma* 84b; see also BABYLONIAN TALMUD, *Sanhedrin* 14a. The *Shulchan Aruch* (*Hoshen Mishpat* 1) applies the same agency rule to Jewish law courts nowadays, noting that only scholars ordained in the Land can really judge, and that judges today are simply fulfilling the historical agency mandate.

187 And, the implication is, divorce her.

reflects a belief in monogamy on principle, as expressed by a rabbinical teacher, without any support from the law or from tradition."¹⁸⁸

Falk claims that this ruling must have been "inspired by beliefs and customs common in the Roman world of that time, which were also propagated by the provincial administration."¹⁸⁹ He notes that the Mishna had already laid down a number of cases in which the court obliged the husband to grant his wife a divorce and pay her *ketubah*. The common denominator in those cases is that relations between the couple have become strained, "either because the husband treats his wife in an oppressive manner, or as the result of a grave infirmity on his part."¹⁹⁰ Falk therefore deduces that, for Rav Ammi at least, and probably reflecting the beliefs and customs common in the Roman world, bigamy was an injustice. Rav Ammi's statement is expressed without any support from a law or tradition; it is simply a sentiment.¹⁹¹ It is particularly poignant when contrasted with the very next line in the Talmud, a quote from the Babylonian Amora Rava:¹⁹² "Rava said: A man may marry wives in addition to his first wife, provided only that he possess the means to maintain them."¹⁹³

Outside of a legal context, the Babylonian Talmud records that both Rabbi Ammi and Rabbi Assi (both of whom were sages who lived in Israel and were active between 290–

188 FALK, JEWISH MATRIMONIAL LAW, *supra* note 92, at 8.

189 *Id.*

190 *Id.*

191 *Id.* But see Lowy, *supra* note 149, at 120–23, who claims that Rabbi Ammi's statement has been grossly misunderstood when taken out of its original context, i.e., as part two of a three part statement regarding when a wife is entitled to a *ketubah* payment. All three are cases where the husband wants to stay married after ten years of childlessness. In the first and third cases (husband wants a divorce due to barrenness, wife claims he is the impotent one; husband claims there was a miscarriage to avoid divorce due to barrenness and wife disagrees) the wife is believed and can get remarried, but is not entitled to a *ketubah*, since she is not commanded to have children and therefore could have stayed and kept trying. In the middle case, where he takes a second wife, since the husband is no longer depending on her to fulfill *his* obligation, she is entitled to the payment. The innovation here has nothing to do with polygamy then, but rather with the payment of the *ketubah*.

192 See ADIN STEINSALTZ, THE TALMUD, THE STEINSALTZ EDITION: A REFERENCE GUIDE 34–36 (1989).

193 BABYLONIAN TALMUD, *Yevamot* 65a. Interestingly, the first part of the statement is written in Hebrew, and the second part in Aramaic. See Gafni, *supra* note 121, at 23 (believing that the qualification "so long as . . ." was an additional gloss added by a later hand). But see FALK, JEWISH MATRIMONIAL LAW, *supra* note 92, at 7 (believing it more likely that Rava himself, who spoke Aramaic, added the gloss to the preexisting rule regarding polygyny). Regardless, the statement preserved and attributed to Rava reflects the view that if he can afford it, a man may marry many wives. See Frisch, *supra* note 36, at 107–08.

320 C.E.) were sitting before Rabbi Isaac, who told them a parable about a man who had two wives, one young and one old: "The young one used to pluck out his white hair, and the old one used to pluck out his black hair. Finally, he was bald on both sides."¹⁹⁴

Again, despite the fact that polygamy was still discussed and approved of at least in legislative contexts in Israel during the Amoraic period, comments like these reflect a progressively more negative attitude toward polygamy and a moral leaning towards monogamy on the part of the Talmudic rabbis.¹⁹⁵ In the Babylonian Talmud's *Avot D'Rabbi Nathan* (one of the minor tractates), Rabbi Yehuda ben Beteira, an Amora from Israel, also comments negatively on polygamy:

Rabbi Yehuda ben Beteira says, "Job thought to himself, *for what would be my portion from God above, and my heritage from the Almighty on high?*"¹⁹⁶ If Adam was intended to have ten wives, they would have been given to him. But he was intended to marry only one wife. So too my wife is enough for me. My portion is enough."¹⁹⁷

And in the Midrash *Genesis Rabbah*, redacted in Israel,¹⁹⁸ the rabbis describe the bigamy of Lamech in quite an unflattering manner. It says that Lamech, like other men of the antediluvian period, took two wives so that one could be used for procreation and the other for sexual pleasure. The Midrash says that Addah (the wife for procreation) was "like a widow," and Zilla "like a harlot."¹⁹⁹

Regardless of the law, it was difficult for men in Israel in those days to marry more than one wife at a time, due to a combination of factors, including: difficult economic conditions, Roman influence over Jewish communities, and, in some places, contracts actually stipulating monogamy.

194 BABYLONIAN TALMUD, *Bava Kamma* 60b (translation by author).

195 See Frisch, *supra* note 36, at 104–06.

196 *Job* 31:2.

197 AVOT D'RABBI NATHAN Version B, Ch. 2, 9 (Solomon Schechter ed., 1887).

198 The Midrashic text was probably redacted sometime in the fifth century, although the traditions that it quotes are related in the names of much earlier Israeli Amoraim. See *Genesis Rabbah*, in 7 *ENCYCLOPAEDIA JUDAICA* 448, 448–49 (2007). *Genesis Rabbah* also reads like the Jerusalem Talmud, in that it is written in mostly Mishnaic Hebrew with some Galilean Aramaic.

199 *Genesis Rabbah* 23:2; see also JERUSALEM TALMUD, *Yevamot* 7d.

B. The Babylonian Tradition

The Jewish community in Babylonia presents an interesting foil. Unlike in Roman society where monogamy was the norm, in Persia, polygamy, “continued down to the Sassanian period, at least among the aristocracy that could afford a plurality of wives.”²⁰⁰ The statement of Rava quoted above, to the effect that a man may marry wives (no number is given) in addition to his [first] wife, so long as he has the means to maintain them, seems to typify this different attitude.²⁰¹

Some assume that Rava and Rav Ammi represent two different traditions, one in and one out of Israel.²⁰² Lowy, however, rejects the idea that Rava is disagreeing with Rav Ammi. He points out that while Rav Ammi was head of the Academy at Tiberias in Israel, he was also greatly influential in Babylonia.²⁰³ According to Lowy:

It is impossible to presume that Rava contradicts Rav Ammi. While the Talmud opposes them to each other for the purpose of analyzing the *sugya* (discussion), it is almost certain that their original sayings were not meant in this sense, and that only for the final literary reflection were their sayings made into a controversy. Not only do we never find elsewhere in the Talmud a controversy between them, but Rava always accepts the authority of Rav Ammi.²⁰⁴ Rava’s words, “a man may marry as many wives simultaneously as he can afford to maintain” are merely his own

200 Gafni, *supra* note 121, at 21 (quoting Mansour Shaki, *The Sassanian Matrimonial Relations*, in ARCHIV ORIENTALNI 39, at 338 (1971)).

201 Note though that to assume that this is typical of the Babylonia/Israel split may be an oversimplification. There may in fact be differences of opinion regarding this matter even within the Babylonian Talmud itself. As mentioned above, the Mishna in *Bekhorot* 1:7 says that *chalitza* is preferable to levirate marriage, despite the fact that in Babylonian Talmud *Yevamot* 39b the Tanna Abba Saul holds that intent is relevant, as discussed above, and despite the fact that Babylonian Amoraim disagreed and said one should always do levirate marriage, since it is a Biblical commandment.

202 See RUTH LAMDAN, A SEPARATE PEOPLE: JEWISH WOMEN IN PALESTINE, SYRIA, AND EGYPT IN THE SIXTEENTH CENTURY 139, 139 n.3 (2000).

203 He also notes that while many of Rav Ammi’s statements are found in identical form in both the Babylonian and Jerusalem Talmuds, there is no Jerusalem Talmud parallel to his statement in Babylonian Talmud *Yevamot* 65a, a parallel that would be expected if this were an exclusive Israel tradition. Frisch, *supra* note 36, at 109.

204 Here, Lowy, *supra* note 149, cites, for example, BABYLONIAN TALMUD, *Gittin* 63b.

way of repeating the ancient tradition about this legal freedom.²⁰⁵

It is also possible that Rava's words contain the wry secret of polygamy in Talmudic times; a legally acceptable but, practically speaking, near-impossible option. The insertion of the difficult law that the husband must secure for each wife both adequate maintenance²⁰⁶ and full conjugal rights tended to make polygamy even more obscure than it had been in the past, while keeping it legal on the books.²⁰⁷

Indeed, while polygamy remained legal in the legal-theoretical sense, in the Amoraic period even in Babylonia it was becoming clear that people did not like the practice, and that the way people really felt about polygamy already touched upon the legal system in practical ways. The law, for instance, is that a judge or witness who is instrumental in allowing a woman to remarry may not thereafter marry that woman himself, lest we have reason to suspect that his original testimony or opinion was tainted by some level of personal interest. But if at the time of the trial the judge or witness was married, and then his wife died at some later point, he *can* marry the woman, because the idea of polygamy, and therefore the idea of scheming towards polygamy, was viewed as farfetched.²⁰⁸

Elsewhere in the Babylonian Talmud we come across the idea that the High Priest, at least, should only have one wife at any given time.²⁰⁹ In regard to everybody else, the Mishna in *Yevamot* 4:11 states that if a man has four married brothers that have all died, he may perform levirate marriage with all four widows. An anonymous opinion in the ensuing Talmudic discussion adds on a disclaimer, however, stating that this is so provided that he can in fact support them.²¹⁰ The source then states that regardless of financial means, a

205 Lowy, *supra* note 149, at 124, *quoted in* Frisch, *supra* note 36, at 113. Another possibility is that there were a few, like Rava, who supported the idea. See also BABYLONIAN TALMUD, *Kiddushin* 7a, in which Rava also seems to very matter-of-factly support the idea of polygamous marriage; BABYLONIAN TALMUD, *Kiddushin* 80b, where he implicitly approves it; and BABYLONIAN TALMUD, *Yevamot* 63a–b, where he advises one with a bad wife who has a large *ketubah* to marry a rival.

206 As we will see later, this came to mean even separate quarters.

207 See DAVID WERNER AMRAM, *THE JEWISH LAW OF DIVORCE* 76 n.3 (1897); MIELZINER, *JEWISH LAW* 1884, *supra* note 80, *quoted in* George J. Webber, *The Recognition of Polygamous Marriage in Mosaic Law*, 49 *LAW Q. REV.* 19–20 (1933).

208 See EPSTEIN, *THE JEWISH MARRIAGE CONTRACT*, *supra* note 103, at 20 (quoting BABYLONIAN TALMUD, *Yevamot* 25b–26a).

209 See BABYLONIAN TALMUD, *Yoma* 13a.

210 This is consistent with Rava's statement cited above. See *supra* note 193 and accompanying text.

man should not take more than four wives so that each wife can receive at least one marital visit a month. It is interesting to note that earlier in that same discussion, the Talmud states that a young man should not marry an old woman, or vice versa. The implication here is that in order to avoid discord in the home, a man should marry someone who is close to him in age. The whole discussion then is framed upon ensuring the *quality* of the marital relationship, with *quantity* of marital partners as only one factor to be considered.²¹¹

Babylonian Talmud *Pesachim* 113a records a conversation between Rav (an Amora from Babylonia, active from 220–250 C.E.²¹²) and Rav Assi (from Israel, active from 290–320 C.E.²¹³) wherein one of them gave the other some practical advice: Rav said, “Do not marry two women. But if you do marry two, then marry a third.”²¹⁴

Perhaps Rav was speaking from experience; the only actual reference to any Talmudic sage being a polygamist comes from a cryptic passage in Babylonian Talmud Tractate Yoma, which is again repeated in Babylonian Talmud Yevamot 37b, and it also involves him.

Babylonian Talmud *Yoma* 18b contains the following story about the two great Babylonian Amoraim, Rav and Rav Nachman (another Babylonian Amora, active from 250–290 C.E.)²¹⁵: “Whenever Rav came to Ardashir he would announce: ‘Who will be [my wife] for a day?’”²¹⁶

Since Rav and Rav Nachman were both married,²¹⁷ taking additional wives would make them polygamists. However, many commentators and modern scholars have focused on this passage, offering several other explanations for Rav and Rav Nachman’s unusual practice. The mere fact that scholars resist taking it literally testifies to the general assumption that even in Babylonia, during this time, such things were just not done. Moreover, these were

211 See glosses of Rema to *Shulchan Aruch, Even HaEzer* 1, where Rema hammers home this point.

212 See STEINSALTZ, *supra* note 192, at 32.

213 *Id.*

214 Rashi there explains that this is because two wives may conspire against the husband, but if there are three, then the third will check the first two and provide insurance for her husband.

215 STEINSALTZ, *supra* note 192, at 33.

216 BABYLONIAN TALMUD, *Yoma* 18b.

217 See BABYLONIAN TALMUD, *Yevamot* 63a; *Berachot* 51b.

two of the absolute greatest sages of their generation; even if polygamy happened it is strange to think that such saintly people would engage in such a seemingly strange form of it. Aside from the general stories told about both of them and their piousness,²¹⁸ Rav's court is actually famous for having flogged people for contracting marriages without previous arrangements.²¹⁹

Some scholars suggest that they only took their "wives for a day" to escape the Persian royal "gift" of a concubine when they visited a city, since some Persian princes are known to have taken the refusal of their "gift" as a serious affront.²²⁰ In order to avoid complications, they went so far as to marry a local "wife for a day," despite the fact that they did not generally approve of the practice of bigamy.²²¹ Others suggest that when Rav and Rav Nachman had trouble with their primary wives, they would take a secondary "wife for a day" to threaten them.²²² Still others propose that they did this when their primary wives had their menstrual periods,²²³ or that they were really just "issuing proclamations stressing the importance of arranged marriages."²²⁴ Lowy points out that both of these cities were well within the limits of the Jewish settlement, and so it was not likely that Rav and Rav Nachman considered them "hiding places" where they could behave differently than they otherwise would.²²⁵

The other possibility is that these stories are true. The Talmud itself did not have a problem with the retelling on its face, and in keeping with the notion of influence by surrounding culture, marriage for a definite period of time was definitely part of the widespread practice

218 Regarding Rava, see, e.g., BABYLONIAN TALMUD, *Taanit* 21b; regarding Rav Nachman, see BABYLONIAN TALMUD, *Megillah* 28b.

219 BABYLONIAN TALMUD, *Yevamot* 52a; *Kiddushin* 12b.

220 See Frisch, *supra* note 36, at 114.

221 See R. Margoliot & S. Krauss, *Maan Hav'ya L'Yoma [Who Will be My Wife?]*, SINAI, XI 176–79, quoted in Frisch, *supra* note 36, at 114.

222 See Gafni, *supra* note 121, at 24; Lowy, *supra* note 149, at 126–29. The Talmud in Babylonian Talmud *Yevamot* 63a and *Berachot* 51b makes it clear that they both had difficult wives. Lowy writes: "Not only do their personalities make the contraction of such temporary marriages impossible to credit in them, but the sources themselves indicate that their so-called advertisement for a temporary mate never resulted in a consummated marriage" Lowy, *supra* note 149, at 127–28, cited in Frisch, *supra* note 36, at 115 n.360.

223 See Gafni, *supra* note 121, at 24.

224 *Id.*

225 Lowy, *supra* note 149, at 128.

in Sassanian Persia.²²⁶ In both Yoma and Yevamot, the story is immediately compared and contrasted with the ruling of Rabbi Eliezer ben Yaakov (a Tanna who was active from 80–110 C.E.):

But surely it has been taught [in a baraisa]:²²⁷ Rabbi Eliezer ben Yaakov says: “A man should not marry a woman in one county and then go and marry a woman in another country, lest [the children from the two marriages one day] meet each other and [unknowingly] a brother will marry his sister (or a father marry his daughter) [and thus the brother and his sister (or the father and his daughter) would produce illegitimate children] . . . ?” They say: The Rabbis were famous.²²⁸

The anonymous Amora thus distinguishes between Rabbi Eliezer Ben Yaakov’s ruling, which *would* normally prohibit a man from marrying two women in different countries, and the cases of Rav and Rav Nachman, who were famous enough that their offspring would be well known as their children.

The key to the Talmudic passage however, seems to lie in the continuation of the Talmudic discourse. After the above-cited interjection, the Talmud then goes on to ask how it was possible for these women to become engaged and married on the same day, when Rava had said that an engaged woman must wait seven clean days in her menstrual cycle before she can consummate the marriage? The Talmud answers and gives two possibilities:

The Rabbis would send their agents in order to inform [the prospective brides seven days in advance]. And if you prefer, I could say that the private meetings of three Rabbis were only for the purpose of being closeted up with [the women]. As a master said, “One who has bread in his basket is not like one who does not have bread in his basket.”²²⁹

The answer is right there in the text: the Rabbis did this to curb their own desires, but never to really marry these women long term. In the Yevamot version of this piece, the unit ends with one more statement attributed to Rabbi Eliezer ben Jacob which really seals this

226 *Id.* at 24–25.

227 BABYLONIAN TALMUD, *Yevamot* 37b.

228 BABYLONIAN TALMUD, *Yoma* 18b.

229 *Id.*

interpretation: "A Tanna [taught]: Rabbi Eliezer ben Jacob says, 'A man shall not marry his wife with the knowledge that he will divorce her, as it is said 'Do not devise evil against your neighbor, for he resides in security with you.'"²³⁰

The Rabbis then must never have intended these to be real marriages.

The above-mentioned discussion, with its various questions, quotations, and concerns, expresses the general feeling toward polygamy, concubinage,²³¹ and nominal polygamy (i.e., towards having second wives at all, of any status or for any period of time) at this point in history. Simply put, it is one of an uncomfortable legal acceptance, but a growing social concern.²³²

Monogamy, on the other hand, seems to be generally and genuinely praised. Sayings phrased in the singular form about the goodness of a wife abound throughout the Talmud, and, while indirect, do paint the picture of a more companionate and singular union. In regard to his wife, a proper husband "loves her as himself, but honors her more than himself."²³³ We are told that in a home where the wife is the daughter of a God fearing man, the husband has God for a father-in-law. The Talmud asks: who is rich? He whose wife's actions are comely.²³⁴ Who is happy? He whose wife is modest and gentle.²³⁵ We are told that when a man's wife dies, it is as if he has seen the destruction of the Temple; his world is darkened, his step is slow and his mind is heavy. She dies in him and he in her.²³⁶ We

230 *Proverbs* 3:29..

231 *Genesis Rabbah* 53:5; *Leviticus Rabbah* 1:13. Both recount the same parable, about a king who has both a wife and a concubine. The king goes openly to his wife, but when he goes to the concubine, he does it in a secretive fashion, "as if it were a shameful and illegal act." While concubinage is discussed on at least the academic level in both Talmuds, see, e.g., BABYLONIAN TALMUD, *Sanhedrin* 21a; JERUSALEM TALMUD, *Ketubot* 5:2, there is no hard evidence that it was actually practiced, and parables like the Midrashic one above most likely reflect the negative attitude towards the practice that was pervasive in that period.

232 Note, however, that other readings are possible. For instance, Rabbi Eliezer ben Jacob's calling into question of certain types of polygamy, i.e., long distance relationships, might be read to implicitly grant legitimacy to other types.

233 BABYLONIAN TALMUD, *Sanhedrin* 76b, quoted in ISRAEL ABRAMS, *JEWISH LIFE IN THE MIDDLE AGES* 114 (1993).

234 BABYLONIAN TALMUD, *Shabbat* 25.

235 AVOT D'RABBI NATHAN 7 (Solomon Schechter ed., 1887).

236 BABYLONIAN TALMUD, *Sanhedrin* 22a.

are told that marriages are made in heaven,²³⁷ that a man's happiness is in all of his wife's creations,²³⁸ and that God's presence dwells in a pure and loving home.²³⁹ Indeed, the word often used in marital contexts to describe a couple is *zivug* ("a pair"), which only makes sense if it is describing a monogamous marital home.²⁴⁰

If it is true then that most of the Talmudic and Midrashic material suggests a clear preference for monogamy, and if, as the evidence suggests, most Jews were in fact living monogamously, why *do* the Talmuds contain so much legal material about polygamy?

Baron suggests that the sages insisted on the continued validity of the positive principle, however unrealistic, in conscious opposition to Greco-Roman ideas of monogamy and in an effort to maintain an ancestral heritage against the influx of foreign ideas and institutions.²⁴¹ Lowy agrees in part, recognizing that if the Rabbis favored monogamy and yet did not explicitly advocate it, and if, moreover, they tried to keep it alive, at least academically, it must have been a conscious effort. He contends, however, that the sources do not really indicate *that* much of a difference in attitude towards polygamy between the Jewish communities in Palestine and in Babylonia.²⁴² He therefore thinks that the stubborn clinging to legalized polygamy was not so much a reaction to Greco-Roman influence, which was only a problem in Israel,²⁴³ as it was a response to Jewish sectarians. Whether it was the Zadokite or Damascus Document with its focus on *Genesis* 1:27 ("[I]n the image of God he created them, male and female he created them."²⁴⁴) and 7:9 ("[M]ale and female, came to Noah and entered the ark, as God had commanded Noah."²⁴⁵), or the Samaritans' and Karaites' focus on *Leviticus* 18:18 ("Do not take your wife's sister as a rival wife and

237 BABYLONIAN TALMUD, *Shabbat* 22a–b.

238 BABYLONIAN TALMUD, *Bava Metzia* 59a.

239 BABYLONIAN TALMUD, *Sotah* 17a.

240 See BABYLONIAN TALMUD, *Sotah* 2a; *Gittin* 90b; *Sanhedrin* 22a, cited in Lowy, *supra* note 149, at 117 n.27.

241 BARON, *supra* note 176, at 2:227–28.

242 Lowy, *supra* note 149, at 115.

243 As we noted, it also should have engendered a similar approach in regard to other laws as well.

244 *Genesis* 1:27.

245 *Genesis* 7:9; see Lowy, *supra* note 149, at 132 (quoting LOUIS GINSBERG, *EINE UNBEKANTE JUDISCHE SEKTE*, MGWJ, LV, at 689–91 (1911)).

have sexual relations with her while your wife is living.”²⁴⁶) the heretical influence might have been the real polygamic spur in the Rabbinic side.

It is safe to assume that Christian monogamy is based on the same inheritance of heterodox exegesis. According to Lowy, this might account for Jesus’ silence on the issue of polygamy; he didn’t feel the need to explicitly advocate for monogamy because that is what was taken for granted in his sect. He did, however, say that, “Whoever shall put away his wife, and marry another, commits adultery,”²⁴⁷ and the implications are quite clear: if polygamy were permitted, the marriage of a second wife after divorce would certainly not be considered adultery. As it were, the Jewish Christians at least, were known to be completely monogamous.²⁴⁸ Also in common with the other sects, Jesus himself in *Matthew* 19:4–5 (“And he answered and said, ‘Have you not read that He who created them from the beginning made them male and female, and said, for this reason a man shall leave his father and mother and be joined to his wife and the two shall become one flesh.’”) and *Mark* 10:6 (“But at the beginning of creation God ‘made them male and female.’”) quotes *Genesis* 2:24 (“Therefore shall a man leave his father and his mother, and shall cleave unto his wife, and they shall become one flesh.”) and 1:27 (“[I]n the image of God he created them, male and female he created them.”), and seems to make the exact same exegetical moves based on the Creation story that the other sectarian Jews did. In fact, he even strengthens it, by using more specific terminology; in his version the unambiguous “two” shall be one flesh, as opposed to the slightly more ambiguous “and they” in the original verse. Later, Tertullian would pick up on and use *Genesis* 1:27 and also 7:9 to strengthen his arguments. Such Biblical exegesis certainly ran counter to traditional Jewish teachings, and the manner in which the Rabbis understood the meaning of these texts. However, since their own moral convictions prevented their giving expression to any outright opposition to monogamy, the Rabbis were in somewhat of a quandary. The least they could do then to oppose such heretical interpretation was to at any rate try and uphold the *theoretical* feasibility of polygamous freedom in the academic setting.²⁴⁹ Lowy writes:

[In order] to counterbalance [the Jewish sectarians who claimed to recognize a Biblical commandment in monogamy], the Rabbis clung rigidly to an ancient legal freedom as expressed in the law, even if it was

246 *Leviticus* 18:18, with the word “sister” being understood in its broadest application, i.e., another woman. See Lowy, *supra* note 149, at 132 (quoting Elijah Basyatchi, *Aderet Eliyahu*).

247 *Mark* 10:11.

248 Cf. Lowy, *supra* note 149, at 132.

249 *Id.* at 130–31, quoted in Frisch, *supra* note 36, at 118.

out of keeping with their own ethical feeling. It seems that, although they were opposed to polygamy on grounds principally moral, because the sectarians had proscribed polygamy on the basis of an alleged Biblical injunction, they could not themselves openly and explicitly condemn it. Social conditions did not warrant such radical preaching, since in reality the Jewish family life was, as a rule, monogamous. They were thus in the happy position of being able to afford to retain in their legal doctrine the traditional right of polygamy, and this academic tendency was emphasized, so as "to lend no support to the words of them that say that monogamy was a biblical commandment."²⁵⁰

Such an idea of a polemic legal stamp was certainly not unheard of or unattested to; just in the area of family law, for instance, both the sectarians and the early Christians sought to place severe limits on divorce,²⁵¹ and so the Rabbis, despite the fact that they also did not like divorce,²⁵² went out of their way to record the fact that even if a husband simply found someone that he liked better than his current wife, that alone was grounds enough to legally divorce her.²⁵³ Similarly, the Rabbis promoted uncle-niece marriage, considered incest by all sectarians, quite possibly simply to assert the orthodox position against what they considered the sectarians' faulty exegesis, and to defend the traditional system against the possibility of heretical schism.²⁵⁴

Conversely, the factors that led the Rabbis to push for polygamy in the academy might also explain why there was no polygamy in practice. Outside of the ivory tower, Romans and sectarian Jews were both preaching against the practice, which led to a culture that frowned upon the taking of a second wife. Satlow²⁵⁵ however notes that even this does not tell the whole story. According to Satlow, the lack of polygamy was not just a reaction to

250 *Id.*

251 See *Matthew* 5:32, 19:9; *Mark* 7:21–22; *Luke* 18:20; see also SOLOMON SCHECHTER, DOCUMENTS OF JEWISH SECTARIES 71–72 (Joseph A. Fitzmyer trans., Ktav Pub. House 1970).

252 See, e.g., BABYLONIAN TALMUD, *Gittin* 90b ("If a man divorces his first wife, even the Altar cries . . .").

253 MISHNA, *Gittin* 10:10. Lowy notes that the strength of the position is made even more clear by the fact that the speaker here is Rabbi Akiva, whose marriage was famously happy and ideal. See MISHNA, *Gittin* 9:10; BABYLONIAN TALMUD, *Nedarim* 50a.

254 The Zadokites, for instance, derived their prohibition from *Leviticus* 18:3 and an analogy between men and women. For more, and for a similar discussion regarding intermarriage, see Lowy, *supra* note 149, at 136–38.

255 SATLOW, JEWISH MARRIAGE IN ANTIQUITY, *supra* note 127, at 19.

Romans or to “other” Jews, it was even closer to home. The Rabbinic Jews living in the land of Israel had been exposed to the same Biblical stories as their sectarian brethren, and had also increasingly developed a view of marriage as “natural” and rooted in creation, i.e. in the same primordial and paradigmatic coupling of Adam and Eve that the other sects had focused on. Despite their ideological justifications for it, and the precise legal readings that exegetically allowed for it, their own internal intellectual environment had also clearly led them to adopt a practically monogamous outlook. These positions were therefore, at least partially, outgrowths of an internal theological development based on a *shared* canon with others, not just of influence by completely external factors.

VI. Gaonic Period and the Early Rishonim

The title “Gaon” was given to the heads of the two Babylonian academies, in Sura and Pumbedita. While the positions existed in the Amoraic era, the title began to be consistently used towards the close of the sixth century, at the end of the Persian rule, when Mar Rab Hanan was appointed Gaon of Pumbedita, and it was used until the death of Hai, the last Gaon of Pumbedita, in the year 1038.²⁵⁶ The primary sources regarding polygamy in both the Geonic and Rishonic (early commentators) eras are from early responsa literature (records of legal questions posed to rabbis, and their answers), and eventually, as they developed, the early legal codes.

Before we shift to Babylonia, however, it is important to remember that there was still an independent Jewish community in Israel even during this period. A number of sources preserve testimony about polygamy in Israel during the post-Talmudic period,²⁵⁷ but generally speaking, the *halakhic* tradition recognized the woman’s right to insist on monogamy, as per Rabbi Ammi’s ruling. According to Mordechai Akiva Friedman, this explains why in the dozens of *ketubot* we have found in Israel from the period of the Geonim, no commitment is made by the husband not to engage in polygamy, and no consequences are discussed if he does. Presumably, this was because the recognized *halakha* stated that if she wanted to demand a divorce in such a case she had that right, there was no need to stipulate this in writing.²⁵⁸

256 See *Gaon*, in JEWISH ENCYCLOPEDIA (1906), available at <http://www.jewishencyclopedia.com/articles/6511-gaon>.

257 See, e.g., SEFER HAMAASIM LIVNEI ERETZ YISRAEL: MEKOROT UMEHKARIM, quoted in 8 MARRIAGE AND ITS OBSTACLES, *supra* note 115, at 69.

258 *Id.* Contrast this with the dozens of *ketubot* in the Cairo Genizah reflecting the practice of Egyptian Jewry. Here there were conditions and penalties, and in fact there is evidence that people violated these conditions notwithstanding the hefty price. See *id.* at 69–70.

Sherira ben Hanina Gaon (906–1006 C.E.) was the head of the academy of Pumbedita from 968–1006 C.E.²⁵⁹ In one of his responsa, Sherira Gaon held that if a man was married for ten years and his wife remained barren, but the man could not afford to divorce her (i.e. pay her *ketubah*), and he could also not afford to take and support a second wife, he must remain with the first wife and not take a second.²⁶⁰ The implication is that if he *could* afford a second wife, he *could* take one, which is consistent with the view of the Amora Rava, the historic head of Pumbedita.²⁶¹ A second responsa makes this point explicitly:

We have seen it thus: every man according to his means, without there being any set rule. As the Merciful One wrote (*Deuteronomy* 17:17): “Nor shall he multiply wives to himself” and we learned (Mishna *Sanhedrin* 2:4): “But only eighteen”—this reference is to the king . . . but an ordinary man . . . need not restrict himself, as long as he can support each one in food and clothing.²⁶²

Sherira’s views were also accepted in practice in Spain and North Africa.²⁶³ Another responsum from the Pumbedita academy, written by Rav Hai Gaon (939–1038), explicitly holds that the *halakha* follows Rava, and that a man can have more than one wife.²⁶⁴

While still not disallowing the practice of polygamy completely, the tradition at Sura did seem to track closer to the ruling of Rav Ammi. Historically, this makes a lot of sense; although he left to Israel at an early age, Rav Ammi was born and raised in Babylonia, and began his studies under Rav, in Sura.²⁶⁵ Hilai Gaon, a ninth century Gaon of Sura, wrote that if a man’s first wife is not agreeable to his taking a second wife, she can force him to pay her *ketubah*, even against his will.²⁶⁶ Similarly, although the Sura tradition favored

259 Sherira ben Hanina Gaon, in 14 *ENCYCLOPAEDIA JUDAICA* 1381 (2007). Gaon means “genius” or “honorable sage.”

260 Frisch, *supra* note 36, at 121 (quoting BENJAMIN M. LEWIN, OTSAR HAGEONIM YEVAMOT 143 (1928)).

261 EPSTEIN, THE JEWISH MARRIAGE CONTRACT, *supra* note 103, at 21.

262 FALK, JEWISH MATRIMONIAL LAW, *supra* note 92, at 11 (quoting BENJAMIN M. LEWIN, OTSAR HAGEONIM YEVAMOT 134 (1928)).

263 *Id.*

264 *Teshuvot HaGeonim Shaarei Tzedek* 4:30 (Joseph HaCohen Ardit ed., 1972); see also Ch. M. Horowitz, *Toratan shel Rishonim, Halakhische Schriften der Geonim* 2 (1881).

265 See BABYLONIAN TALMUD, *Nedarim* 40b–41a; Ammi Bar Nathan, in 2 *ENCYCLOPAEDIA JUDAICA* 82 (2007).

266 *Shaarei Tzedek*, *supra* note 264, at 4:60, quoted in Frisch, *supra* note 36, at 122.

levirate marriage to *chalitza*, Hilai ruled that if a widow did not want levirate marriage since the brother-in-law was already married, the brother-in-law could be compelled to perform *chalitza* instead.²⁶⁷

Notwithstanding the continued legal tolerance for polygamy, what we do find in the Geonic period is the continued seeming disapproval of the practice by the general populace. Epstein, for instance, points to the extant ketubot from wealthy families that were found in the Cairo Geniza, ketubot that contained clauses such as the following:

[H]e may not marry or take during the bride's lifetime and while she is with him another wife, slave-wife, or concubine, except with her consent, and if he does . . . he shall from this moment be under obligation to pay her the *ketubah* in full, and release her by a bill of divorce by which she shall be free to remarry.²⁶⁸

Towards the end of the Geonic era, rabbinic authorities began to move to the satellite communities in other parts of the world.²⁶⁹ While there are some references to cases of polygyny found in the responsa of the North African and Spanish rabbis, such as Rabbi Isaac Ben Jacob Alfasi (1013–1103, considered by many to be the last of the Gaonim, by others the first of the Rishonim),²⁷⁰ it seems that they were in a similar position to their Gaonic forebears. While it was legally permissible to have multiple wives, it was not widely practiced, even in Sephardic (Jewish communities of Spanish, Portuguese, or North African descent) enclaves.²⁷¹ Some Jews in Spain and other areas regulated bigamy by inserting clauses in the marriage contract protecting the wife against the husband's decision to take another.²⁷² In one responsum, Rabbi Alfasi deals with a case in which a woman whose husband had married a second wife insisted that he pay her a fine of two hundred

267 *Id.* at 1:52.

268 EPSTEIN, THE JEWISH MARRIAGE CONTRACT, *supra* note 103, at 272, quoted in 8 MARRIAGE AND ITS OBSTACLES, *supra* note 115, at 63; see also JACOB MANN, 2 TEXTS AND STUDIES 177 (1931–38); SHELOMO DOV GOITEIN, 3 A MEDITERRANEAN SOCIETY 147 (1991) [hereinafter GOITEIN, MEDITERRANEAN].

269 See RABBI ABRAHAM IBN DAUD, SEFER HA'KABALAH for the legend of how exactly this happened.

270 See, e.g., RABBI ISAAC ALFASI, SHE'ELOT U'TESHUVOT HARIF 282 (1825), where Rabbi Alfasi discusses a question regarding a man who had two wives; see also AVRAHAM GROSSMAN, PIOUS AND REBELLIOUS: JEWISH WOMEN IN MEDIEVAL EUROPE 79–81 (Jonathan Chipman trans., 2004) [hereinafter GROSSMAN, PIOUS AND REBELLIOUS].

271 Frisch, *supra* note 36, at 123.

272 FALK, JEWISH MATRIMONIAL LAW, *supra* note 92, at 12.

dinars. Rabbi Alfasi reports that this was in fact the custom in Spain from early times,²⁷³ perhaps reflecting a compromise position between Rava and Rav Ammi: the husband did not have to divorce her, but was communally sanctioned.²⁷⁴ His student, Rabbi Joseph ben Meir HaLevi ibn Migash (1077–1141 C.E.) mentions a woman whose husband undertook that in the event that he married another wife, he would be obliged to pay the first wife her *ketubah*.²⁷⁵ Falk claims that these clauses, called “Kairouan clauses” after the city in which they originated, are “characteristic of a society where polygamy is the rule, yet which nevertheless evince trends towards monogamy.”²⁷⁶

In the Ashkenazic communities, primarily in Germany and Northern France, no mention is found of stipulations in Jewish marriage contracts to protect the first wife in case the husband decided to take another wife.²⁷⁷ It is quite possible that this was a reflection of the difference in surrounding society; the Sephardic Jews lived amongst the Muslims, who also had these prenuptial agreements, and the Ashkenazic Jews amongst the Christians, who did not.²⁷⁸ In the eleventh or twelfth century, however, something drastic occurred: polygamy was officially prohibited by rabbinic decree for the Jews of Germany and Northern France.

VII. The Ban of Rabbeinu Gershom

The decree to end polygamy is famously attributed to Rabbeinu Gershom ben Judah of Mayence (960–1040 C.E.), and is commonly referred to as the *Cherem DiRabbeinu Gershom* (the ban of our teacher, Gershom) because the decree was fortified by a device that put a

273 ALFASI, *supra* note 270, at 120.

274 See GROSSMAN, *PIOUS AND REBELLIOUS*, *supra* note 270, at 81, who notes that this can be thought of as a similar approach to the later Germanic ban, just using economics instead of excommunication in the communal edict trying to limit the practice of polygamy. The edict here would have been accepted no later than the beginning of the eleventh century, making it one of the earliest communal edicts known to us from Spain. *Id.* (quoting A.H. Freiman and Z. Leiter). However, Grossman himself thinks from the continuation and context of the responsa that the edict in question was about husbands not leaving town without their wives for long periods of time (similar to Rabbeinu Tam's edict, *infra* note 341 and accompanying text), and not about polygamy at all.

275 RABBI JOSEPH IBN MIGASH, *TESHUVOT YOSEF IBN MIGASH* 129 (1870).

276 FALK, *JEWISH MATRIMONIAL LAW*, *supra* note 92, at 12 (citing *TESHUVOT GEONE MIZRACH U-MA'ARAV* 175–76 (Mueller ed., 1888), a responsa from Hanoch (about a case of polygamy)).

277 *Id.* at 13.

278 See FALK, *JEWISH MATRIMONIAL LAW*, *supra* note 92, at 12.

ban on anyone who transgressed it.²⁷⁹ With a genius not only for scholarly pursuits but also for practical communal organization, Rabbi Gershom achieved not only the establishment of Jewish learning in his country but also the uniting of the scattered Jewish communities into a unified federation.²⁸⁰ He established *takkanot* (decrees) regulating the relations of the communities to one another and to their members, and other edicts in civil law,²⁸¹ and while the communal ordinances were quite significant and innovative in his day, what Rabbi Gershom is most famous for are his decrees in the religious arena, particularly in the area of family law.²⁸² The delivering of the edict banning polygamy probably happened sometime around the year 1030 C.E., at a synod of scholars under the presidency of Rabbi Gershom, at one of their meetings in connection with one of the customary large fairs (although, as we will see, some scholars do question whether Rabbi Gershom was truly the originator of the ban).²⁸³ As compared to the *ketubah* clauses, this ban prohibited polygamy even with

279 Because the Talmud clearly allows the existence of polygamy, the prohibition was introduced in the form of a *takkanah*, or rabbinic ordinance. The leading rabbis had the power to order that a person who breaks the rules of the community be excommunicated from the community, and to forbid any contact with him. Thus while there is no biblical or Talmudic punishment for practicing polygamy, the violator is threatened with being banned from the community whose *takkanah* he has broken.

280 FINKELSTEIN, *supra* note 115, at 20.

281 Including ordinances protecting Jewish tenants, the privacy of letters, and the jurisdiction of the local courts. *See id.* at 30–35.

282 *Id.* at 22–23.

283 Rabbeinu Gershom ben Judah was one of the first great German Talmudic scholars. His name is connected to numerous *takkanot* (rabbinic ordinances), of which the ban against polygamy is the most famous. No text of the ban has been preserved, and no reference is made to it until more than a century after its purported promulgation. A responsum written by the famous French commentator Rashi (1040–1105 C.E.) regarding the case of a man who married a second wife because his first wife had borne him no children in their ten-year marriage makes no mention of the problem of the ban or of the need to lift it. *See* JOEL HAKOHEN MUELLER, TESHUVOT CHAKHMEI TSAFAT U-LOIR 14, 28 (1881). Additionally, the ban was said to have been imposed on the Jewish communities of Speyer, Worms, and Mainz. However, the Jewish community of Speyer was not founded until 1084 C.E., more than fifty years after Rabbeinu Gershom's death. FALK, JEWISH MATRIMONIAL LAW, *supra* note 92, at 13–14. If, in fact, it was originally connected with the community of Speyer, it must have been promulgated sometime after Rabbeinu Gershom had died. According to Louis Finkelstein, even if Rabbeinu Gershom was a prime mover behind it, the ordinance must have been established "by a synod [that met under the direction of Rabbeinu Gershom] representing the various communities for whom it was intended." *See* FINKELSTEIN, *supra* note 115, at 25. The oldest extant source linking the ban to Rabbeinu Gershom is from circa 1160 C.E. by Rabbi Eliezer ben Joel HaLevi of Bonn (1140–1225) in regard to the question of whether or not the decree nullified the Biblical commandment of levirate marriage in favor of *chalitza*. In that particular case, the judges did not address that issue but ruled that levirate marriage was inappropriate since the woman was too old to bear children. Later, Rabbi Meir ben Baruch of Rothenburg (1215–1293), among others, attributed the ban to Rabbeinu Gershom. *See, e.g.,* IRVING A. AGUS, RABBI MEIR OF

the wife's consent, presumably because such practice was contrary to public conceptions of morality at that time.²⁸⁴ Eventually, the ban was extended to all of Ashkenazic Jewry, though the Sephardic communities never officially adopted it. The ban was revolutionary in that it prohibited something expressly permitted by the Old Testament, a bold move in rabbinic interpretation and innovation.

It is important here to stop and place this ban in its proper historical context. First, as we have seen, for a long time, the Jewish community in Christian lands had been, practically speaking, an almost completely monogamous one.²⁸⁵ One consequence of this reality was that when a man wanted to marry someone other than his wife, his only option was to get divorced, whether his wife agreed to it or not. This led to the often-overlooked *second* part of Rabbeinu Gershom's legislation: the ban on polygamy was in fact accompanied by a related ban on unilateral divorce.

VIII. Judaism's Approach to Marriage, Generally

In order to fully appreciate this development, we will briefly address the history and structure of the Jewish marriage laws that led to this historic moment.²⁸⁶ The two different viewpoints that developed over the course of Jewish history saw marriage as either a

ROTHENBURG 282–83, 301 (1970) (Responsa 245 and 273). Elsewhere though, Rabbi Meir cites a judgment of Rabbeinu Gershom himself, in which he allowed polygamy consistent with Rava's ruling from BABYLONIAN TALMUD, *Yevamot* 6a. See TESHUVOT, *Maharam* 865. Falk argues that this proves that he was not the author of this decree, although it is also possible that this case came before him in his early years. See FALK, *JEWISH MATRIMONIAL LAW*, *supra* note 92, at 14–15. Many scholars believe that the ban was not actually issued until the twelfth century, and was then retroactively attributed to the highly respected and authoritative Rabbeinu Gershom. Another possibility is that Rabbeinu Gershom made informal pronouncements against polygyny but never himself actually issued a formal ban against plural marriages, and that such a ban was later introduced in his name by his students. Regardless of whether it originated with him, his students, or later in his name, the validity of the ban was never questioned. See *Gershom Ben Judah Me'or Ha-Golah*, in 7 *ENCYCLOPAEDIA JUDAICA* 551, 552 (2007). For the purposes of this Article, we will take Jewish law's understanding of the ban, with Rabbi Gershom's weight behind it.

284 Russell K. Ryan, *And Then There Was One: An Analysis and Comparison of Polygamy Among Jews and Mormons*, 9 *JEWISH L. ANN.* 205, 215 (1991).

285 In all of the *halakhic* rulings, commentaries, custom books, liturgical poems, and chronicles, including the memorial books containing the names of those killed during the First Crusade in 1096, there is no mention of anyone marrying a second wife, save a few isolated instances of doing so in "a case of a *mitzvah*," i.e., barrenness or levirate marriage. See GROSSMAN, *PIOUS AND REBELLIOUS*, *supra* note 270, at 73.

286 See MICHAEL J. BROYDE, *MARRIAGE, DIVORCE, AND THE ABANDONED WIFE IN JEWISH LAW: A CONCEPTUAL UNDERSTANDING OF THE AGUNAH PROBLEMS IN AMERICA* (2001) [hereinafter BROYDE, *THE ABANDONED WIFE*].

partnership model, wherein either side has an unfettered right to exit, or as a corporate model, in which one party cannot exit merely by deciding that they want to leave. Divorce law therefore developed as a reflection of marriage; in fact, the Biblical verses describing divorce appear almost incidentally in the context of describing the remarriage of one's divorcee.

In general, marriage in Judaism is a contractual agreement requiring the mutual consent of both parties, unconditionally given. In regard to divorce, however, *Deuteronomy* 24 states:

When a man takes a wife, and marries her, then it comes to pass, if she finds no favor in his eyes, because he has found some unseemly thing in her, that he writes her a bill of divorce, and gives it in her hand, and sends her out of his house, and she departs out of his house, and goes and becomes another man's wife, and the latter husband hates her, and writes her a bill of divorcement, and gives it in her hand, and sends her out of his house; or if the latter husband die, who took her to be his wife; her former husband, who sent her away, may not take her again to be his wife.²⁸⁷

Talmudic authorities took these verses to mean that the husband has a unilateral right to divorce his wife without fault, while the wife has no reciprocal right to divorce her husband except in cases of hard fault. The majority opinion in Jewish law maintains that there was no right to dower (*ketubah*) under biblical law, although there is an opinion which states that there *was* a limited right to dower, restricted to first marriages of virgin brides, in the amount of two hundred *zuz*.²⁸⁸ Biblical family law appeared imbalanced in other ways as well; as we have been discussing, a man could be married to more than one wife, any of whom he could divorce at will, whereas a woman could be married to only one man at a time, and had no clearly defined right of exit aside from perhaps hard fault.²⁸⁹ If the husband and wife no longer wished to live together, the husband could just marry another woman as long as he continued to support his first spouse.

287 *Deuteronomy* 24:1–4

288 See Michael J. Broyde & Mark Goldfeder, *Divorce in Judaism*, in *CULTURAL SOCIOLOGY OF DIVORCE: AN ENCYCLOPEDIA* 622–26 (Robert E. Emery & J. Geoffrey Golson eds., 2013) [hereinafter Broyde & Goldfeder, *Divorce in Judaism*].

289 IRVING A. BREITOWITZ, *BETWEEN CIVIL AND RELIGIOUS LAW: THE PLIGHT OF THE AGUNAH IN AMERICAN SOCIETY* 9 (1993).

The biblical rules of divorce could thus be summarized as follows: The husband had a unilateral right to divorce (and have had to pay dower absent fault in some marriages).

The Talmud attempted to mitigate the disparities between men and women by creating a minimum dower for *all* brides, which became, by rabbinic decree, a precondition to any marriage. Thus, while the right to divorce remained unilateral only for the husband, it was now at least somewhat restricted by a clear financial obligation to compensate his wife if he so exercised this unilateral provision, absent any judicially declared fault on her part. The Talmud even recorded views that if the husband cannot pay the financial obligation he is *prohibited* from divorcing his wife.²⁹⁰ In order to protect herself from a frivolous divorce, the woman could also insist on a dower higher than the minimum amount promulgated by the rabbis. In addition, the Talmud clearly enunciated the right of the wife to sue in cases of fault, including such grounds as provable repugnancy and impotence. In such a case, the husband was required to divorce his wife (and in most cases pay the dower as well). Finally, divorce could be by mutual consent, subject to whatever financial agreement the parties wished to follow.²⁹¹

Nonetheless, a significant imbalance in exit rights remained because marriages could still be polygamous but not polyandrous, and if the husband and wife no longer wished to live together, the husband had the legal right to simply marry another woman, so long as he continued to support his first wife. As a general rule, she could not, under such circumstances, sue him for divorce, although she could perhaps restrict his right to remarry with a special *ketubah* provision.²⁹² As it was under biblical law, marriage remained fundamentally a partnership for the husband and a corporate structure for the wife. The Talmudic rules could therefore be summarized as follows:

- 1) The husband had a unilateral right to divorce and had to pay dower absent fault.
- 2) There was divorce by mutual consent with dower to be determined by the parties. There was a right to divorce through a judicial declaration of "hard" fault: if by the woman, with no dower; if by the man, with dower.²⁹³

290 See *Shulchan Aruch, Even HaEzer* 117:11.

291 See Broyde & Goldfeder, *Divorce in Judaism*, *supra* note 288, at 623.

292 See BABYLONIAN TALMUD, *Yevamot* 65a (translation by author). But see the view of Rav Ammi, *supra* note 187 and accompanying text.

293 Broyde & Goldfeder, *Orthodox*, *supra* note 28, at 624.

Shortly after the close of the Talmud, during the Gaonic times, the rabbis of that period changed or reinterpreted²⁹⁴ the substantive understanding of Jewish law to vastly increase the right of a woman to sue for divorce. All a woman had to do was leave the household for a certain period of time and she had an automatic right to divorce, according to most opinions, with a full or partial right to dower. In addition, it appears from the responsa literature that when a marriage needed to end and a divorce from the husband was not forthcoming, the rabbis of that era felt that they had the power to step in and annul it.²⁹⁵ The husband still had a unilateral right to divorce, and had to pay dower absent fault. Thus, during the Gaonic period, Jewish divorce law worked as follows:

- 1) The husband had a unilateral right to divorce and had to pay dower absent fault.
- 2) The woman had a unilateral right to divorce, and if she exercised it, she received dower.
- 3) There was divorce by mutual consent with dower to be determined by the parties.
- 4) There was divorce through a judicial declaration: if by the woman, with no dower; if by the man, with dower.²⁹⁶

Within a hundred years of the Jewish expulsion from Babylonia, however, there was full abandonment of the rules used by the *geonim* in favor of a number of different alternatives.

The great Sephardic authority Rabbi Moshe ben Maimon (Maimonides, 1135–1204), like all of the authorities after him, ruled that Jewish law did not possess any annulment power, but liked the Gaonic idea of making marriage a partnership for everyone involved.

294 Through the use of a mechanism called *takanta de-mitivta* (lit. “Decree of the Academy”). How exactly it worked is unclear. See BREITOWITZ, *supra* note 289, at 50–53.

295 There is considerable evidence that the era of the *geonim* was the only one in which the annulment process (mentioned in only a very few cases in the Talmud, and always either pre-consummation or involving bad faith marriages or divorces) was actually used with any consistency or frequency by rabbinic authorities. See BREITOWITZ, *supra* note 289, at 62–65 for a discussion of the circumstances under which annulments were performed. There are five places in the Talmud where a marriage is declared terminated without the need for a divorce document, based on the concept that “all Jewish people who marry do so with the consent of the Sages, and the Sages nullified the marriage.” *Id.* See, for instance, BABYLONIAN TALMUD, *Gittin* 33a, *Bava Batra* 48b. These situations all revolve around marriages under duress or other cases where one of the parties acted improperly.

296 Broyde & Goldfeder, *Orthodox*, *supra* note 28, at 624.

He therefore greatly increased the woman's rights, expanding the obligation upon a husband to divorce his wife for fault to include even the case of her simply asserting (without any proof) that "he was repugnant to her."²⁹⁷ In such a circumstance, a Jewish court could compel the divorce under threat of court sanction, including physical coercion. This gave both men and women the unilateral right to divorce, with no dower paid when the woman initiated the divorce absent cause, and dower paid when the husband initiated divorce without cause. This no-fault divorce system remains the normative law in only small portions of the Sephardic Jewish community today (such as Yemen). Again, it was based on a partnership understanding of marriage; when either side wants out, Jewish law allows him or her to leave.²⁹⁸ European Jewry also ruled that Jewish law did not possess any annulment power, but took a divergent approach, which becomes important again for our discussion of what exactly happened to Jewish polygamy. Rabbeinu Gershom felt that rather than expanding the rights of the woman, in order to equalize the rights of the husband and wife it was necessary to restrict the rights of the husband, and prohibit unilateral no-fault divorce by *either* husband or wife. Divorce was limited to cases of provable fault or mutual consent; fault itself was vastly redefined to exclude cases of soft fault, such as repugnancy, and in only a few cases of serious fault could the husband actually be forced to divorce his wife or the reverse.²⁹⁹

Although no extant copy of the original document remains, according to tradition this edict was in fact part of the very *same* decree that prohibited polygamy, placing considerable pressure on the man in a marriage that was ending to actually divorce his wife, since without a proper divorce procedure neither could remarry. According to this approach, Jewish law permitted divorce through only mutual consent or very significant fault; when there was no finding of fault, little (perhaps other than imposition of a support obligation) could be done to encourage the couple to actually get divorced. Absent hard fault, this view saw marriage as entirely corporate in nature; it took the consent of both parties to enter and the consent of both parties to exit.³⁰⁰

297 MISHNEH TORAH, *Hilkhot Ishut* 14:8–9, 14:14.

298 Broyde & Goldfeder, *Orthodox*, *supra* note 28, at 624.

299 This insight is generally ascribed to Rabbeinu Tam in his view of *meus alay* (an assertion of repugnancy). In fact, it flows logically from the view of Rabbeinu Gershom, who not only had to prohibit polygamy and coerced divorce, but divorce for easy fault, as Maimonides' concept of repugnancy is the functional equivalent of no fault, identical in outcome to the Gaonic annulment. See BROYDE, *THE ABANDONED WIFE*, *supra* note 286, at 142 n.12.

300 See Goldfeder & Broyde, *Orthodox*, *supra* note 28, at 625. See also BROYDE, *THE ABANDONED WIFE*, *supra* note 286, at 142–43. A second view within European Jewry agreed that there was no annulment power and that it was necessary to restrict the rights of the husband by banning polygamy and by prohibiting unilateral no-

And so, as we have seen, not one but many factors favored the establishment of a strong form of marriage at this moment in history; externally, the influence of the Christian tradition,³⁰¹ and internally both the Ashkenazi aspiration to maintain the Palestinian monogamous model, which accorded well with their own worldview, along with the growing desire of the community to grant increased stability to marriage and certainty to a woman.³⁰² One could say that these moves shifted the model of marriage away from one of male dominance to one of companionship; men could no longer marry new wives in addition to their older ones or get rid of older ones for newer models, and so young people looking to get married would be even more selective for compatibility, and married couples would continue living together into old age.³⁰³

IX. Rabbeinu Gershom's Inspirations and Influence

Scholars such as Zacharias Frankel insist that even before the famous ban on polygamy, monogamy

had been accepted previously as a general custom, and was merely reinforced by the imposition of the ban . . . polygamy had in any event begun to disappear from medieval Jewish society, since public opinion had come to disfavor it, and Gershom *Meor HaGolah* (the Light of the Exile) merely summarized this attitude.³⁰⁴

fault divorce by either husband or wife. This was true under all circumstances except where the marital estate had ceased to exist and the couple had de facto ended all marital relations. What this did was to include the failure of the marriage as itself grounds for either to coerce a divorce. According to this approach, Jewish law permitted divorce only through mutual consent; failure of the marriage through the end of a marital residence; or very significant fault. This view of marriage had some corporate aspects; while the corporation was running neither had the right to end it; once the corporation ended de facto it could be made to end de jure. Finally, Oriental Jewry agreed that Jewish law did not possess annulment power, and that fault was limited to hard fault; however, they rejected the European decrees prohibiting unilateral divorce by the husband and polygamy. They thus effectively returned to the classical Talmudic rules of regulation and restriction of the husbands' right to divorce by dower contract stipulations. Most decisors ruled that absent fault it was prohibited to divorce one's wife unilaterally if he could not afford to pay the contract. A woman could only sue for divorce in cases of hard fault, such as leprosy. In modern times, nearly all *halachically* observant Jewish people (those in America, Israel, and Europe) follow one or the other of the European models of Jewish law divorce.

301 Which was moving towards a model founded on consent, and a strict condemnation of polygamy.

302 See Michael S. Berger, *Two Models of Medieval Jewish Marriage: A Preliminary Study*, in MARRIAGE, SEX, AND FAMILY IN JUDAISM 128–31 (Michael J. Broyde & Michael Ausubel eds., 2005).

303 See WOMEN AND JUDAISM: NEW INSIGHTS AND SCHOLARSHIP (Frederick E. Greenspahn ed., 2009).

304 *Id.* at 1. Other scholars, such as Leopold Loew, insist that “polygamy existed both before and after the

Truth be told, eleventh century Ashkenaz is fairly well documented, with extant *halakhic* rulings, commentaries, custom books, liturgical poems, and even historical chronicles memorializing and archiving medieval Jewish life, and none of them makes mention of anyone marrying a second wife, with the rare exception of a case of *mitzvah*, i.e., barrenness or levirate marriage.³⁰⁵

In regard to the question of precise authorship, Rabbi Meir Katzenellenbogen of Padova wrote that Shimshon of Sanz was actually the originator of the ban,³⁰⁶ and that the reason behind it was “for since we are in exile, we should not take many wives, nor beget many children, since we would not be able to rear them nor fend for them properly.”³⁰⁷ Others assume that it was done by later rabbis, who then pinned responsibility on Rabbeinu Gershom, a figure whose shoulders were broad enough that the legislation would stick.³⁰⁸

Regardless of whether or not the ban was actually Rabbeinu Gershom’s work, two responsa of Rabbi Eliezer ben Nathan illustrate that: a) monogamy was the general practice in the beginning of the twelfth century, and b) that there had been some kind of community-wide proclamation made on the subject. In one, he notes that there has been a fundamental change, writing that: “[T]his was the rule in former generations, when a man married a second wife But in our generation, when one cannot marry a second wife.”³⁰⁹

And in another, he explains the reason for the change and seems to cite to the famous edict: “Today, however, when a communal ordinance prohibits polygamy and [compulsory] divorce, we do not act according to this rule.”³¹⁰

There are three possibilities then: that the ban happened just as tradition would have it and forbade a real practice; or, alternatively, that it was merely a codification of already

issuing of the ban.” *Id.*; see also Frisch, *supra* note 36, at 128.

305 See GROSSMAN, PIOUS AND REBELLIOUS, *supra* note 270, at 73.

306 Rabbi Meir Katzenellenbogen, *Responsa XIII*.

307 Rabbi Meir Katzenellenbogen, *Responsa XIV*.

308 For detailed discussions, see works by Avraham Grossman, S. Lowy, and Elimelech Westreich, among others.

309 Eliezer ben Nathan, *Even Ha'Ezer, Ketubot*, quoted in FALK, JEWISH MATRIMONIAL LAW, *supra* note 92, at 16 n.2.

310 *Id.* at 16 n.4.

present feelings and existing social praxis;³¹¹ or it is also possible that it was something somewhat aspirational, an ideal that was announced in a channeling sort of way and that gained more and more acceptance over time as traditional and social values coalesced around an understanding of the family norm until it finally took hold.³¹² No matter its origins, within a couple of centuries the ban was known by Rabbeinu Gershom's name, and his students were encouraged to enforce it strictly, as though it were a biblical commandment.³¹³

A twelfth-century responsa from Eliezer ben Joel HaLevi makes it clear just how seriously the ban was enforced: a husband whose wife was demented came before the Communal Council and asked for an exemption from the ban in order to be able to marry a second wife. The Council at first refused to even hear his case, and when they finally did, they refused to grant the exception, holding that it be "preferable that one soul should be lost than that an enormity be carried out as precedent for generations to come."³¹⁴ This was so even though it was suspected that he was living with another woman in secrecy; the rabbis wanted to do nothing that would even on its face upset the validity of Rabbeinu Gershom's ban.

Once monogamy became the rule, it often took precedence even over man's highest duty of procreation; thus, in the view of some leading authorities,³¹⁵ it was better for a man to remain childless than to violate Rabbeinu Gershom's ban.³¹⁶ Still, it is interesting to note that the ban "never assumed such extensive authority as would enable it to annul the validity of any marriage carried out in defiance of it."³¹⁷

311 See Pearl, *supra* note 60, at 28.

312 A survey of responsa points toward a somewhat slow shift from legalized to forbidden polygamy; what starts with wives complaining to courts about husbands taking second wives but ultimately losing the cases moves towards polygamy becoming the exception in rare cases (such as levirate marriage or barrenness) and finally illegal altogether.

313 Asher ben Yehiel, *Responsa HaRosh* 43:8. Rosh compares it to the takkanot of the *geonim*, and notes that the ban is of an even higher status.

314 Eliezer ben Joel HaLevi, *Mavo*, quoted in FALK, JEWISH MATRIMONIAL LAW, *supra* note 92, at 17 n.1; Solomon Luria, *Responsa* 65, quoted in FALK, JEWISH MATRIMONIAL LAW, *supra* note 92, at 18 n.1.

315 See *infra* note 370 and accompanying text for more on this discussion.

316 EPSTEIN, THE JEWISH MARRIAGE CONTRACT, *supra* note 103, at 27 n.3.

317 FALK, JEWISH MATRIMONIAL LAW, *supra* note 92, at 33 n.49. Canon law, however, did make that move. Interestingly enough though, Jewish people seem not to have taken advantage of this "weakness" in the ban; we find no mention of cases of marriage in defiance of the ban lending further credence to the theory that this

We established above that the rarity of polygamy was probably due in part at least to the influence of the Christian environment (and perhaps the greatest proof of this relationship is the simple fact that in the French and German communities in which the ban was accepted, the predominant culture was Christian and monogamous, while in the Muslim neighborhoods, where polygamy was upheld, the ban was never really established), and indeed Rabbi Jacob Emden's responsa, in which he describes the ban as a result of Christian pressure, is probably the most well known source for the reason behind its promulgation.³¹⁸ We must stress, however, that the ban also reflects a continuation of the internal *Jewish* trend and moral development towards monogamy. Moritz Gudemann points out that the Christians of the Rhineland at that time, and even centuries later, were not always above polygamy,³¹⁹ and that even in the Orient, where polygamy was acceptable to the host population, and where the ban had less authority, the Jewish people for centuries had already been developing formal working tools and devices to maintain monogamous standards, such as the insertion of clauses into the marital agreement.³²⁰ The divide between Christian and Muslim lands cannot, therefore, be the only factor.

Among the reasons given for Rabbeinu Gershom's ban (other than Christian influence), and for arguing against polygamy in general both in the Eastern European context and worldwide amongst the Sephardim, are the following: strict monogamy was instituted to prevent people from taking advantage of their wives;³²¹ it was intended to avoid potential infighting between rival wives;³²² Rabbeinu Gershom was concerned lest the husband be unable to provide properly for all his wives (especially during the difficult times of Exile);³²³ there was a concern that a man might marry two wives in different locations who would not

ban was only cementing the reality on the ground. *Id.* at 34.

318 Rabbi Jacob Emden, II *Responsa* 15.

319 Louis Epstein notes that "the moral level of family life among the Christians of the Rhineland at that time, and even centuries later, was not above polygamy." ESPSTEIN, *THE JEWISH MARRIAGE CONTRACT*, *supra* note 103, at 25 (citing 3 MORITZ GUDEMANN, *GESCHICHTE DES ERZIEHUNGSWESENS* 115–19 (1888)); *see also* ABRAHAMS, *supra* note 39, at 117–18. Abrahams has an interesting theory that accounts for the split in a different way; he assumes that the Jews *around the world* had developed a practical code of monogamy, but that in Muslim lands, where it was not the standard, they relapsed into polygamy. *Id.* at 118–19.

320 3 MORITZ GUDEMANN, *GESCHICHTE DES ERZIEHUNGSWESENS* 115–19 (1888), *quoted in* EPSTEIN, *THE JEWISH MARRIAGE CONTRACT*, *supra* note 103, at 25–26.

321 Maharik, quoting the Rashba, *cited in* Darkei Moshe, *Even HaEzer* 1 n.10.

322 Mordechai, *Ketuvot* 291, *cited in* Darkei Moshe, *Even HaEzer* 1 n.12.

323 Rabbi Meir Katzenellenbogen 14; Rabbi Yehoshua Yaakov Halperin, *Sefer Mishkenot Yaakov* 1.

know about each other,³²⁴ which could lead to forbidden relationships between offspring;³²⁵ the ban was intended to avoid the inherent rivalry and hatred between rival wives, which could also lead to the transgression of a number of biblical violations;³²⁶ and, in a reversal of the argument from a moral religious consensus across Judeo-Christian thought, it has been suggested that the ban was adopted from Christian practice and laws not because the Jews agreed with it in principle, but simply to avoid Christian attacks against Jews who, if left alone, might otherwise have acted differently.³²⁷ Avraham Grossman, however, notes that drawing too many conclusions from Christian practice and influence one way *or* the other is hard; based on the evidence, if, in practice, the communities were already behaving in an almost identical fashion, and if the idea was one of conformity for better or for worse, then the edict would be practically superfluous.³²⁸ Mordechai Akiva Friedman suggests that maybe this *was* merely a declarative act, affirming the fact that the ancient tradition of Rav Ammi had in fact been preserved and passed over to Ashkenaz (and, perhaps, either showing solidarity with or at least openly conforming to the Christian community).³²⁹ Still, edicts were usually introduced to meet a real need, not just as declarative statements, and so this does not seem like it would have been reason enough for the ban on its own.

Along this line of thinking, however, some scholars, such as Simon Eppenstein, have suggested that around the beginning of the eleventh century there was a migration of Jews from Oriental countries to Germany, and that when these Jews arrived with two wives Rabbeinu Gershom was afraid that they would end up having undue influence on the nature

324 See BABYLONIAN TALMUD, *Yoma 18b*; *supra* note 288 and accompanying text.

325 *Id.*

326 Rabbi Moshe Shick, *Even HaEzer* 4; see also MISHNAH, *Yevamot* 15:4 (assumes that co-wives are liable to give false testimony about the death of a husband in order to get rid of an unwanted rival); MISHNAH, *Ketubot* 10:5 (concerned that they may deal fraudulently with each other in regard to their husband's inheritance).

327 Rabbi Jacob Emden, II *Responsa Sheilat Yaavetz* 15.

328 See GROSSMAN, *PIOUS AND REBELLIOUS*, *supra* note 270, at 74. Also important to note is the fact that there are no extant Christian sources accusing the Jews of polygamy anymore at this time.

329 MORDECHAI A. FRIEDMAN, *JEWISH POLYGyny IN THE MIDDLE AGES* (1986), *quoted in* GROSSMAN, *PIOUS AND REBELLIOUS*, *supra* note 270, at 73.

of his monogamous community, leading to the official ban.³³⁰ Salo Wittmayer Baron³³¹ conjectures that perhaps it was the literary sources, especially those responsa from the well-respected *geonim*, that arrived from Oriental lands at that time containing documentation of official permission to marry more than one wife, that led Rabbeinu Gershom to feel he had to take a stand. The influence was not limited to books, however; some heads of Ashkenaz communities in Rabbeinu Gershom's time actually traveled to Babylonia, particularly the academy of Pumbeditha in order to study under the tutelage of Rabbi Hai Goan. One example of an Ashkenaz scholar studying in Babylonia is Rabbi Elijah, who established the Torah center in Northern France, having studied extensively under Rabbi Hai in Babylon and having made several pilgrimages to the Holy Land.³³² The *geonim* were greatly respected in Germany and the rest of Christian Europe, and as their views, which were radically different than those of the European community in practice, became better known, had Rabbeinu Gershom not clarified the matter once and for all, their opinions might otherwise have caused quite a stir. A few scholars, like A.N.Z. Roth,³³³ note that for any of the above mentioned reasons, or simply just because, there may even already have been German Jews who themselves actually became bigamists, and whose viewpoint Rabbeinu Gershom now felt he practically needed to stand up to and protest against. As mentioned above, however, there is no internal (Ashkenazic) evidence for this type of practice in the quite considerable extant literature from the Jewish community of that time period.³³⁴ Falk notes that the position of women in Jewry had changed for the better. They were now accorded more respect, as evidenced by the higher dowries they brought their husbands; the higher level of compensation those husbands agreed to in their marriage

330 SIMON EPPENSTEIN, ABRAHAM MAIMUNI, SEIN LEBEN UND SEINE SCHRIFTEN (1914), *quoted in* GROSSMAN, PIOUS AND REBELLIOUS, *supra* note 270, at 73; *see also* Avraham Grossman, *The Historical Background to the Ordinances on Family Affairs Attributed to Rabbeinu Gershom Me'or ha-Golah* ("The Light of the Exile"), in JEWISH HISTORY: ESSAYS IN HONOUR OF CHIMEN ABRAMSKY 3, 7–8 (Ada Rapoport-Albert & Steven J. Zipperstein eds., 1988). Roth relies on a shaky foundation to support his claims. Roth, however, points out that it is difficult to imagine that Rabbeinu Gershom instituted the ban on polygamy in order to break apart already existing polygamous marriages of Sephardic migrants to Germany, or to prevent the daughters of Germany's monogamous society from become second wives to Sephardic Jews, or to prevent polygamous marriages amongst Sephardic immigrants.

331 BARON, *supra* note 176, *quoted in* GROSSMAN, PIOUS AND REBELLIOUS, *supra* note 270, at 73.

332 *See* AVRAHAM GROSSMAN, CHACHMEI ASHKENAZ HARISHONIM 56 (1988) [hereinafter GROSSMAN, CHACHMEI].

333 A.N.Z. Roth, in MEKHARIM BE-HOKMAT YISRAEL LE-ZIKHRO SHE' Y.M. GUTTMAN 110–25 (1946), *quoted in* GROSSMAN, PIOUS AND REBELLIOUS, *supra* note 270, at 73.

334 The evidence Roth points to is an inference from an external Sephardic responsa from Maimonides, (*infra* note 344 and accompanying text), discussing a polygamous element from the French and Germanic lands.

contracts to secure against the event of death or divorce; and the fact that they tended to run all domestic and business affairs in their husbands' often long absences.³³⁵ We even have evidence of women conducting negotiations with other Jewish and Gentile merchants, as well as feudal princes.³³⁶ Given their status in society, people now thought it unjust that the "mainstay of the house"³³⁷ should have to share her privileges with a co-wife.³³⁸ Rabbi Nissim of Gerona (the Ran) suggests that Rabbeinu Gershom's concern in imposing the ban may not have been only the welfare of the women, but also that of the men, and of overall domestic harmony: "[P]erhaps this ban was intended, not only for the benefit of the women, but also for that of the men, so that they will not bring conflict into their homes."³³⁹

Grossman himself believes that the main motivation and impetus for the decree was the economic activity of German Jews during Rabbeinu Gershom's lifetime. Many were engaged in international trade and stayed for lengthy periods of time in remote lands, including predominantly Muslim countries.³⁴⁰ They are mentioned frequently in the responsa of Rabbi Gershom and of his student, Judah HaCohen.³⁴¹ Explicit testimony of the hardships and burden this placed on the Ashkenazic Jewish family at that time can be seen in the edict of Rabbenu Tam (Rabbi Jacob ben Meir) from the mid-twelfth century, prohibiting Jewish traders from being away from home for more than a year and a half, and requiring them to remain at home for at least half a year upon returning from a journey.³⁴² The reality that husbands did not always hurry back can be seen in (among other sources) the responsa of the Spanish sages and the Geniza sources; it is hardly surprising then that some men chose to marry second wives while they were away.³⁴³ They would then return home after either divorcing or abandoning their new wives. Maimonides' edict, issued in

335 See GROSSMAN, PIOUS AND REBELLIOUS, *supra* note 270, at 14.

336 *Id.*

337 See BABYLONIAN TALMUD, *Sanhedrin* 22a-b.

338 FALK, JEWISH MATRIMONIAL LAW, *supra* note 92, at 25-26.

339 *Teshuvot HaRan* 48, *quoted in* GROSSMAN, PIOUS AND REBELLIOUS, *supra* note 270, at 90.

340 See IRVING A. AGUS, THE HEROIC AGE OF FRANCO-GERMAN JEWRY 23-77 (1969); 1-2. IRVING A. AGUS, URBAN CIVILIZATION IN PRE-CRUSADE EUROPE (1965).

341 See GROSSMAN, CHACHMEI, *supra* note 332, at 151-58, 195-210 (discussing Rabbi Judah HaCohen's response); Rabbeinu Gershom, *Teshuvot RaGmah* 46-52.

342 Edict of Rabbenu Tam Concerning Absentee Husbands, *translated in* ELLIOT N. DORFF & ARTHUR IRWIN ROSETT, A LIVING TREE: THE ROOTS AND GROWTH OF JEWISH LAW 418-19 (1988); *see also* FINKELSTEIN, *supra* note 115, at 140-41.

343 See Rabbi Isaac Alfasi, *Responsa of Rif* 28, 67, 185.

Egypt during the twelfth century, bears directly on this point:

That Maimonides enacted edicts on behalf of the welfare of Jewish women; namely: that no woman be married to a foreign Jew, who is not from the community of Egypt, unless he brings proof that he is not married, or takes an oath to this effect on a Pentateuch. And any foreign man who married a woman here and wished to go out to another country is not allowed to leave, even if his wife agrees to this, until he writes her a (conditional) divorce and gives it to her³⁴⁴

The historical reality of shifty businessmen, combined with the wealth and power of the Jewish community at large and the desire of fathers to protect both their daughters and their dowries, along with the rising social status of Jewish women in this society, all contributed to the coming of this tipping point in Jewish family law.³⁴⁵

Another interesting point to consider in relation to the Jewish development of formal legislation against polygamous practice is the development of the Canon law itself. As early as 326 C.E., the Catholic Church banned both polygamy and concubinage.³⁴⁶ In Germany in the ninth century, however, it became common practice for Christian men to take a concubine. Church authorities warned men to put an end to this practice, but not by divorcing their wives. Falk claims that even though Jews were no longer practicing polygamy, they were witnesses to these debates about concubines, and these developments were yet another prompt for women to demand equality,³⁴⁷ and then for Rabbeinu Gershom to issue his ban.³⁴⁸ At a church synod held in Rome in 826, the ban on polygamy was once more promulgated, and the prohibition soon made its way into the legislation of Emperor

344 Maimonides, *Teshuvot HaRambam* 2:347. Responsa from Alfasi indicate a similar milieu.

345 The fact that we find this phenomenon mentioned in the Sephardic responsa and not the Ashkenazi literature is to be expected; obviously the problem that needed to be solved was in the country where the Ashkenazi men had married and left the second wife. See GROSSMAN, PIOUS AND REBELLIOUS, *supra* note 270, at 13–14.

346 See ZE'EV W. FALK, *NISU'IN VE-GERUSHIN: TI KUNIM BE-FINE HA-MISHPAHAH BE-YAHADUT* [MARRIAGE AND DIVORCE: REFORMS IN THE FAMILY LIFE OF GERMAN-FRENCH JEWRY] (1961) [hereinafter FALK, MARRIAGE AND DIVORCE].

347 Or, more likely, for wealthy fathers to do so on behalf of their daughters.

348 See Asher ben Yehiel, *Responsa HaRosh* 42:1 (indicating that the basic purpose of the ban of Rabbeinu Gershom was to create a better balance of rights between the husband and the wife).

Lothair.³⁴⁹ Shortly thereafter, Pope Nicholas I used Tertullian's exhortations in his own writings to warn against bigamy. In the tenth century, Regino of Prum complained not only of bigamy but of general licentiousness, including the practice of men divorcing their first wives without justification in order to wed another (more echoes of Rabbeinu Gershom's first decree).³⁵⁰ In his book, compiled around the year 1020, Buchard of Worms enumerates all the laws of the Church enacted up to that date, including regulations against bigamy and licentiousness in general.³⁵¹

Despite the fact that ancient authorities had already flatly forbidden it, in 1274 the medieval canonists adopted and repeated the ban against polygamy, including it in the long list of forbidden sexual unions; polygamy in this sense was a mortal sin and a serious crime, and, if done with knowledge and intent, once convicted by a church court, such a polygamist faced a temporary ban from the Eucharist, and, interestingly enough, a ban or excommunication in serious cases. England passed a parallel statute in 1276, as did many other nations within a few years, including, perhaps, in reality, the Jewish nation.³⁵² On November 11, 1563, the Council of Trent *still* felt the need to condemn anyone who claimed: "It is lawful for Christians to have several wives at the same time, and that it is not forbidden by any divine law,"³⁵³ perhaps reflecting the slow and gradual acceptance over time of the Jewish ban against polygamy. Tremors of all these movements were undoubtedly felt by the Christians' Jewish neighbors, and surely factored into the subtle calculus of the shift away from polygamy towards monogamy.

X. The Limits of the Ban

The various sources that refer to Rabbeinu Gershom's decree differ in regard to its intended duration. Many authorities held that the ban was heavily restricted, and was

349 FALK, MARRIAGE AND DIVORCE, *supra* note 346, at 23.

350 *Id.* at 24.

351 While there is no direct evidence that even a little "fringe" Christian polygamy was actually being practiced at the time that Rabbeinu Gershom's edict is said to have been enacted, the arrival of the eleventh century did bring about a movement for religious reforms in general, which included the Reformist Popes such as Gregory VII removing priests who did not uphold their vows of abstinence, along with reforms against concubinage, a practice that was still somewhat popular. No doubt tremors of these movements were felt across religious boundaries. *Id.* at 25.

352 See EXPERT REPORT PREPARED FOR THE ATTORNEY GENERAL OF CANADA, IN THE MATTER OF THE *CONSTITUTIONAL QUESTION ACT*, R.S.B.C. 1986, c. 68, 67-68 (1986).

353 William B. Kessel, Address at the Ariz. Dist. Pastoral Conference First Lutheran Church (May 5-6, 1998).

set to expire at the end of the fifth millennium, in the year 5000 of the Jewish calendar, corresponding to 1240 C.E.³⁵⁴ Others held that the ban was not at all limited in duration.³⁵⁵ Regardless of whether it was originally set to expire in 1240 C.E. or any other time, it remained in force after such time (likely due to its overall acceptance and reflection of society), and later generations have continued to accept it as absolutely binding.³⁵⁶ Thus, wherever the ban was accepted, it now appears to have the force and status of law for all time.³⁵⁷ This seems to be based, if not entirely on then at least in accordance with, a responsa of the Maharshah, a leading authority in Poland in the thirteenth century. In 1240, he wrote a responsum in which he noted:

Most of the decrees of Rabbenu Gershom Me'or Hagolah were formulated with no mention of time; moreover, with respect to the decree on bigamy, he wrote that this can only be permitted with the consent of one hundred sages . . . and even then, they shall not permit it unless they see good reason for doing so. How can there be good reason, changing for the better, when, on the contrary, due to our many sins each succeeding generation is more

354 Solomon ibn Aderet (1235–1310), a Spanish sage, who claimed to have heard this from the French scholars. The statement is not found in his written responsa, but is quoted by Rabbi Joseph Colon. Rashba did say that the reason behind the decree was because of licentious men who abused their wives. Shlomo Zavlin Havlin, *The Takanot of Rabbenu Gershom Me'or Hagolah in Matters of Family Law in Spain and Provence*, in 2 SHENATON HA-MISHPAT HA'IVRI 230–31 (1975); see also FINKELSTEIN, *supra* note 115, at 29, 142–43 (contending that because in all of the French and German discussions of this ordinance there is no such reference, it must be mistaken). Epstein, on the other hand, points out that even though “we have not even the testimony of R. Solomon himself, but of a later scholar quoting him . . . legally, because of the great weight of Aderet in Jewish law, even such uncertain testimony given in his name is granted full authority, and the herem is regarded as having lesser binding force in law since the end of the fifth millennium.” See EPSTEIN, *MARRIAGE LAWS*, *supra* note 93, at 26, *quoted in* Frisch, *supra* note 36, at 134 n.409. In response to the question of how a tradition of a limited time could have been preserved only amongst the Sephardi rabbis and not the Ashkenazi ones, Rabbi Caro suggests that perhaps they knew about it, but deliberately concealed it because of their wish to continue the ban. See GROSSMAN, *PIOUS AND REBELLIOUS*, *supra* note 270, at 78.

355 Asher ben Yehiel (1250–1327), a leader of German Jewry who settled in Spain in 1303, said that the *takkanot* of Rabbeinu Gershom were “permanent and deeply rooted, as if they had been given on Sinai.” See BARON, *supra* note 176, at 6:136–137.

356 Ben-Zion Schereschewsky & Menachem Elon, *Bigamy and Polygamy*, in 3 ENCYCLOPAEDIA JUDAICA 691–94 (Michael Berenbaum & Fred Skolnik eds., 2d ed., 2008); see *Responsa Rosh* 43:8; *Shulchan Aruch, Even HaEzer* 1:10; *Arukh ha-Shulhan, Even HaEzer* 1:23; *Ozar ha-Posekim, Even HaEzer* 1:76.

357 See Joseph Caro, *Shulchan Aruch, Even HaEzer* 1:10. There is a debate among scholars as to whether the original ban contained a clause allowing for its suspension in exceptional cases, or whether that clause was attached to the ban at a later time. See FINKELSTEIN, *supra* note 280, at 142–43.

lowly and worsens from day to day?³⁵⁸

Maharshah also noted that the conditions which gave rise to the ban in the first place in the fifth millennium still applied equally in his day in the sixth, and that eminent Ashkenazi rabbis had upheld the full validity and legal weight of the ban even after its supposed expiration date.³⁵⁹

An interesting in-between opinion is given by the prominent sixteenth-century Polish Ashkenazic authority Rabbi Moses Isserles in his *Darkhei Moshe*: he claims that the edict had lapsed but the prohibition was still valid, as a matter of *minhag*, or prevailing custom.³⁶⁰ As noted above, the ban against polygyny does not include a clause that annuls the second marriage of a man who breaks the law by disregarding it. Such a marriage would still be legally valid,³⁶¹ although since it is a prohibited marriage, the first wife could either require the court to compel her husband to divorce the second wife or ask the court to order the husband to give her a divorce.³⁶²

In regard to the conflict between positive commandments and the *cherem*, there were two main issues. First, in terms of what to do with a levirate marriage requirement that would involve a married brother taking on a second wife (i.e., his brother's widow), this was not really a problem in France, where *chalitza* was already the preferred method even in cases that did not involve polygyny.³⁶³ In Germany, however, where levirate marriage was still practiced,³⁶⁴ authorities were split on this issue and remained so for quite some time.³⁶⁵ Rabbi Jacob ben Moses Moelin (1360–1427) allowed a man to take a second wife

358 Solomon Luria, *Responsa Maharshah* 14, quoted in Elimelech Westreich, *The Ban on Polygamy in Polish Rabbinic Thought*, 10 *POLIN* 69 (1997).

359 *Id.*

360 Moses Isserles, *Darkhei Moshe*, *Tur*, *Even HaEzer* 1:10. The Ritva (Rabbi Yom Tov Asevilli), cited in Rabbi Joseph Caro, *Beit Yosef* 1:8 (1559) (a commentary on *Tur*) considers the prohibition to have shifted from public to private law, which would again allow polygamy based upon the wife's consent.

361 Moses Isserles, *Darkhei Moshe*, *Tur*, *Even HaEzer* 44.

362 Abraham Tzvi Hirsch ben Jacob, *Pitchei Teshuva* 5 (on Joseph Caro, *Shulchan Aruch*, *Even HaEzer* 154). This sounds a lot like Rav Ammi's ancient ruling. See also Solomon Luria, *Responsa Maharshah* 14.

363 See FINKELSTEIN, *supra* note 280, at 27.

364 Rabbi Judah HaCohen, a disciple of Rabbeinu Gershom himself, ruled that levirate marriage is permitted but is not to be enforced against the woman's will. GROSSMAN, *PIOUS AND REBELLIOUS*, *supra* note 270, at 93.

365 See EPSTEIN, *MARRIAGE LAWS*, *supra* note 93, at 26–27.

in such a case.³⁶⁶ This was also the practice in the Spanish communities that did not accept the ban for themselves, but did enforce it on German Jewish immigrants.³⁶⁷ In contrast, the sixteenth century Italian authority Rabbi Judah Minz held that the *cherem* overrides the commandment of levirate marriage.³⁶⁸ Similarly, authorities were divided on the question of whether or not the ban against polygyny should be suspended in order to fulfill the duty of procreation in the case of a barren wife, with some approving,³⁶⁹ and others, including Rabbi Minz, holding that the ban should still apply even if the result was that the husband would remain childless.³⁷⁰ Two German authorities even quote responsa of Rabbeinu Gershom himself permitting a second marriage under these circumstances, although others are quick to respond that those may have been from before the ban.³⁷¹ The Maharshal writes that conduct unbefitting a wife, such as licentiousness or immodest behavior, constituted just cause for waiving the ban,³⁷² but for divorce suits based on anything but the wife's behavior (including, but not limited to, levirate marriage, barrenness, or madness), the ban was upheld.³⁷³ Even in those cases where cause was found for waiving the ban, however, the preference was to waive the enactment forbidding a man to divorce his wife unilaterally, as opposed to the enactment against polygamy.³⁷⁴

366 Yaakov Moelin, *Sefer Maharil HaHadashot, Hilchot Chalitza* 4 (Shklov ed. 1796); Rabbi Eliezer ben Joel haLevi, *quoted in* Solomon Luria, *Responsa* 188; *Isaac Or Zarua* 1:638, 739; Meir ben Baruch, *Responsa* 866. As attested to in the *Bayit Chadash* of Rabbi Joel Sirkis, (commentary on Tur, *Even HaEzer* 119), this position was accepted in actual practice by the rabbis of Frankfurt, Ashkenaz, and Russia. In regard to a woman who could not give birth, however, Rabbi Moelin ruled differently in practice. *See Responsa Maharil HaHadashot* 202; *see also* Westreich, *supra* note 358, at 74–75.

367 According to Isaac Halevi Herzog, *Otzar HaPoskim, Even HaEzer* 1:75, if a man goes from a place where the *cherem* of Rabbeinu Gershom is in effect to a place where it is not in effect, the *cherem* “goes on the head” of the individual. *See* Frisch, *supra* note 36, at 138.

368 RABBI JUDAH MINZ, *SEFER SHE'ELOT U'TESHUVOT* 10 (Krakow ed. 1882). According to Rabbi Minz, the *cherem* has the force of a Talmudic *takkanah*. *See* Frisch, *supra* note 36, at 135 n.430.

369 *See* EPSTEIN, *MARRIAGE LAWS*, *supra* note 93, at 27. Responsa of Rabbi Meir of Rothenburg quote this in the name of Rabbi Gershom himself. *See also* Westreich, *supra* note 358, at 73.

370 MINZ, *supra* note 368, at 10; *see also* Joseph Caro, *Beit Yosef* (1559); Rabbi Ishtori Haparchi, *Kaftor VaFerach* 178 (1322); Joseph Ibn Habib, *Nimmuke Yosef*.

371 *See* Rabbi Simon ben Tzemach Duran, *Responsa Tasbez* 470; Rabbi Ishtori Haparchi, *Kaftor VaFerach* 178, 782 (1322), *quoted in* Finkelstein, *supra* note 280, at 28.

372 Presumably since it has been put in place for her protection. *See* Westreich, *supra* note 358, at 67.

373 FINKELSTEIN, *supra* note 115, at 26,

374 Rabbi Meir of Rothenburg, *Responsa of Maharam* 946, *quoted in* Westreich, *supra* note 358, at 67; *see also* *Responsa Maharam, Even HaEzer* 245, 272, 273.

One situation in which it was quickly decided that the ban did not apply was where a wife accepted baptism and left the husband's home. It was assumed without question that the ordinance protecting the Jewish home against polygamy had never been intended for this purpose, and after it could be established that this was really a voluntary abandonment (as opposed to an involuntary captivity), the husband would be allowed to marry a second wife.³⁷⁵ Later, the custom became for the man to divorce his wife unilaterally though a court-appointed agent,³⁷⁶ again reflecting the preference to suspend the ban against coerced divorce before that of polygamy.³⁷⁷

Recognizing that sometimes even the suspension of the other enactment would not help,³⁷⁸ and that these and other emergency cases might be at odds with the ban, the early authorities provided for the possibility of suspending it in special cases, by joint decree of a hundred rabbis from at least three territorial divisions.³⁷⁹ When utilizing this mechanism, the husband must also leave the wife a valid bill of divorce and her full *ketubah* payment in escrow with the court.³⁸⁰ Scholars are unsure if this dispensation was so early as to actually be part of the original ban itself³⁸¹ or was simply a later addition made by either Rabbeinu Gershom or others.³⁸² Regardless, Rema's conception of the ban, as still binding but now based on custom and not law, leads to the following statement in his commentary: "In any event, it seems to me that at the present time one does not need the approval of a

375 FINKELSTEIN, *supra* note 115, at 26 (quoting *Responsa Teshuvot Hakme Zarfat ve-Lotir* 11b).

376 This is almost never allowed; the agent normally needs to be appointed by the woman herself. Here though, the rabbis relied on another Talmudic principle: one is rightfully allowed to assume that every rational person is a self-interested actor, and that what they would want if they were here, or if they had the capacity to consent, would be anything that is to their benefit. Since in this atypical case getting divorced would save her from the terrible sin of adultery, it was considered to be solely in the wife's benefit.

377 FINKELSTEIN, *supra* note 115, at 26 (quoting Israel Isserlein, *Pesakim U-Khetavim* 246).

378 E.g., when the woman did not have the requisite capacity to accept a divorce.

379 The circumstances are usually those in which a woman is obligated to take a get but cannot or will not for some reason. See Joseph Caro, *Shulchan Aruch, Even HaEzer* 1:10, 115, 119:6. The enactment is usually attributed to Rabbeinu Tam (1100–1171) although some, like Finkelstein, believe that it is earlier, perhaps part of or a product of the generation immediately following the original ban. See FINKELSTEIN, *supra* note 115, at 28.

380 See JOEL SIRKIS, BAYIT CHADASH, TUR, *Even HaEzer* 1; Westreich, *supra* note 358, at 80–83; see also FALK, MARRIAGE AND DIVORCE, *supra* note 346, at 28. "The Frankish Church also permitted bigamy when one of the partners had been abroad for an extended period," or under other extenuating circumstances. See, e.g., the decision of the Synod of Compiègne, from the year 757. *Id.* at 28 n.1.

381 See BARON, *supra* note 176, at 6:394.

382 See FALK, MARRIAGE AND DIVORCE, *supra* note 346, at 29 n.2, for a discussion of the matter.

hundred rabbis to waive it, since the period of the edict has already elapsed and no waiver is necessary at all."³⁸³ In respect to the *Shulchan Aruch's* ruling, that the ban on polygamy did not apply in the case of levirate marriage, Rema adds: "The same rule applies in every case where fulfillment of a precept is held in abeyance, as in the case of a man who has lived with his wife for ten years, and she has not given birth . . . but there are some who disagree and hold that the ban of Rabbeinu Gershom is to be enforced even in the case of a precept and even in the case of levirate marriage."³⁸⁴ In regard to a case that did not directly involve a commandment, such as insanity or unwillingness on the part of the wife to accept a valid divorce, Rema writes that, "in those cases . . . one should rule leniently and permit the husband to marry another woman."³⁸⁵

Despite the fact that certain kinks needed to be worked out, over time Ashkenazic Jewry accepted the Jewish ban against polygamy as binding for all time, at least in those communities where polygyny was forbidden by the dominant religion, Christianity, and was therefore forbidden by government law.³⁸⁶ According to Epstein, by the thirteenth century, although the ban had still not been fully accepted, its existence was already enough to create a legal presumption that the average marriage was a contract for monogamy.³⁸⁷ While it is true that we do have testimony from France that in that same time period (the thirteenth century) polygamy was still being practiced on the fringes,³⁸⁸ and the same is true of Italy in the first part of the thirteenth century³⁸⁹ (even until the sixteenth century, Italian rabbis permitted a childless husband to marry a second wife without formally suspending the ban, even though it had already been accepted,³⁹⁰ without feeling the need to make use of the formal procedures for getting around it. Interestingly enough though, the permission

383 Moses Isserles, *Darkhei Moshe, Tur, Even HaEzer* 1:10. In practice though the courts do try to obtain the *Heter Meah Rabbanim* (permit of 100 rabbis).

384 Moses Isserles, *HaMapah, Shulchan Aruch, Even HaEzer* 1:10.

385 *Id.* This was the recorded opinion of Rema's teacher, Rabbi Shalom Shakhna. See Westreich, *supra* note 358, at 75–76.

386 *Bigamy and Polygamy*, in 3 *ENCYCLOPAEDIA JUDAICA* 691–94.

387 EPSTEIN, *MARRIAGE LAWS*, *supra* note 93, at 30 (citing *Shilte HaGiborim* ad *Alfasi* to *Yevamot* Ch. 6; *Or Zarua* I, 181a).

388 *Id.* (citing Joseph Caro, *Beit Yosef* (1559)).

389 *Id.* (citing JACOB ANATOLI, *MALMAD HA TALMIDIM* 101b (Lyck ed. 1866)).

390 *Id.* (citing Rabbi Meir Padua *Responsa* 141 and *The Takkanot of the Ferrara* (1554), quoted in ISRAEL ABRAHAMS, *JEWISH LIFE IN THE MIDDLE AGES* 71 (1896)).

of the rabbis was not enough; the Pope had to grant it as well³⁹¹), still, for the most part, soon after the decree of Rabbeinu Gershom had caught on, in that part of the Jewish world polygamy was gone for good.

In those countries where polygamy was permitted by the dominant religion of Islam, the ban was not officially adopted.³⁹² Maimonides never even mentions the *cherem* of Rabbeinu Gershom, although his legal code, the *Mishneh Torah*, contains numerous references to polygyny.³⁹³ In *Hilchot Ishut*, 14:3, Maimonides states:

A man may marry several wives, even one hundred, either at the same time or one after the other, and his wife may not prevent him, provided he can supply each one with the food, clothing, and conjugal rights that are due to her. But he may not compel them to dwell in one courtyard, but rather each one [must be allowed to reside] by herself.

Practically speaking, these requirements mean that it would only have been possible for men who were extremely affluent to practice polygamy and afford to have more than one wife. In addition, following his discussion of conjugal rights in the very next paragraph, Maimonides offers a further limitation on the practice of polygamy: "Therefore the sages have commanded [in Babylonian Talmud *Yevamot* 44a] that a man shall not marry more than four wives, even if he has a lot of money, so that he can provide them [each wife] with conjugal relations once a month."³⁹⁴ It is interesting of course to note that Islam also allows a man to marry up to four wives simultaneously, provided that he can support them. Each is entitled to a separate dwelling and an equal portion of the husband's time and companionship.³⁹⁵

Although the ban never took hold in Spain and Provence, from the late thirteenth century and on, beginning with Rabbi Shlomo ben Aderet (Rashba), the rabbis there acknowledged

391 EPSTEIN, *THE JEWISH MARRIAGE CONTRACT*, *supra* note 103, at 30 (citing LEOPOLD LÖW, *GESAMMELTE SCHRIFTEN* 74 (1893)).

392 Schereschewsky & Menachem Elon, *supra* note 356. Islam allows polygamy, with Koranic sura 4:3 providing that a man may have up to four wives, assuming that he can deal justly with the co-wives. See M. Hashim Kamali, *Islamic Law: Personal Law*, in 7 *THE ENCYCLOPEDIA OF RELIGION* 4705, 4705–12 (Lindsay Jones ed., 2d ed., 2007).

393 See, e.g., Maimonides, *Mishneh Torah*, *Hilchot Ishut* 6:14, 6:15, 17:1.

394 *Id.* at 14:4.

395 See M. Hashim Kamali, *supra* note 392.

that it was in fact binding for the Ashkenazi Jews who had moved into the region.³⁹⁶ He did, however, view the ban as much less radical in its restructuring of family law, as just a temporary attempt to address a problem of the day, and make sure that husbands did not arbitrarily hurt their wives. As such, not only did he maintain that the ban was of limited duration,³⁹⁷ in any case where the husband had legitimate *halakhic* grounds on which to contemplate marrying a second wife, whether it was her fault or not, Rashba maintained that the ban did not apply.³⁹⁸ When Spanish Jewry first began arriving in Ashkenazi lands in large numbers (after the expulsion from Spain in 1492), Rashba's view was introduced to Ashkenazic Jewry by Rabbi Joseph Colon (Maharik).³⁹⁹

As we discussed however, despite the fact that Jewish communities in Islamic countries did not ever formally adopt the *cherem*, it was still probably never very common to have more than one wife.⁴⁰⁰ As we have seen, in some communities women included explicit stipulations in their marriage contracts prohibiting the husband from taking a second wife without the first wife's consent or the permission of a rabbinic court.⁴⁰¹ The Cairo Geniza does contain some legal documents and letters reporting or referencing cases of bigamy, although in general the reasons given were the same as cases in which such marriages may even have been allowed under the Ashkenazic exceptions to the rule, i.e., in cases where the first wife was barren for ten years, or of levirate marriage, or where the first wife was insane and could not legally accept a divorce.⁴⁰² There is, however, evidence of some

396 Westreich, *supra* note 358, at 67 (quoting Havlin, *supra* note 354, at 231).

397 *Id.*

398 *Id.*

399 Rabbi Joseph Colon, *Responsa Maharik* 101. Rabbi Joseph Caro, the Sephardic author of the *Shulchan Aruch*, enthusiastically adopted it, ruling that the ban had expired, and that even an Ashkenazi Jew could marry multiple women, except in Ashkenazi lands where the restriction still held on the strength of custom. In response to the question of how a tradition of a limited time could have been preserved only amongst the Sephardi rabbis and not the Ashkenazi ones, Rabbi Caro suggests that perhaps they knew about it, but deliberately concealed it because of their wish to continue the ban. See GROSSMAN, *PIOUS AND REBELLIOUS*, *supra* note 270, at 78.

400 See RACHEL BIALE, *WOMEN AND JEWISH LAW: AN EXPLORATION OF WOMEN'S ISSUES IN HALAKHIC SOURCES* 51, 205 (1984); see also 12 *ENCYCLOPAEDIA JUDAICA* 259–60 (2d ed. 2007); EPSTEIN, *supra* note 103, at 31.

401 Two such documents were found in the Cairo Geniza. See GOITEIN, *MEDITERRANEAN*, *supra* note 268, at 143–44. A similar contract is referenced in a responsum by the Sephardic authority Rabbi David Ben Solomon ibn Abi Zimra (1479–1573). In that case, in addition to signing the document the husband took an oath to the effect that he would not take a second wife at the time of the signing of the *ketubah*. See RABBI DAVID BEN SOLOMON IBN ABI ZIMRA SHE'ELOT U'TESHUVOT RADBAZ 221 (1967).

402 GOITEIN, *MEDITERRANEAN*, *supra* note 268, at 206, cited in Frisch, *supra* note 36, at 141.

local ordinances prohibiting the taking of a second wife, not as strict or as comprehensive as Rabbeinu Gershom's ban, but still perhaps influenced by it.⁴⁰³ Thus, while polygamy was not officially outlawed, it seems that it was only practiced rarely, perhaps due to an internal moral aversion that had been growing throughout the entire Jewish world in prior centuries, even in Talmudic times when and in places where polygamy was still widely permitted.⁴⁰⁴ The main difference between Jewish communities in Christian versus Islamic lands seems to have been the objective versus subjective nature of the disapproval of polygamy, manifested in whether or not there was a choice for the first wife to consent to the husband taking a second wife in communities in which the ban was not accepted.

It is interesting to note that despite the fact that polygamy was more accepted in Islamic lands, this did not make for a more pleasant polygamous household. A document written by a young son of a polygamous man who had immigrated from Spain to Egypt talks about how happy he was when his half-siblings (the children of the second wife, his own mother's co-wife) died, and in it he also prays that the second wife herself should die as soon as possible.⁴⁰⁵ The Rashba in one responsa notes that although people do have second wives, he has never heard of a single family in which such a marriage was successful.⁴⁰⁶ A generation later, interlocutors writing questions to the Rosh described polygamous families as "filled with arguments, resentment, and divorce,"⁴⁰⁷ and a generation after that the Rivash noted that, "there is no one who brings dispute into his home like one who takes another wife into his home."⁴⁰⁸

We should take a step back here and revisit the issue of concubinage in the Jewish world. The Talmud made a concerted effort to regulate the concubine; she was seen as possessing an intermediate status that did not have all the rights of a wife but was not to

403 See GROSSMAN, *PIOUS AND REBELLIOUS*, *supra* note 270, at 87–88.

404 Havlin and Assis do present evidence of several cases of bigamy even in Christian Spain, despite its official illegality. They note that these cases tend to be from wealthy upper class families, because in addition to the expensive practice of polygamy itself, one first had to pay for permission from the crown. See GROSSMAN, *PIOUS AND REBELLIOUS*, *supra* note 270, at 84–87 (quoting Havlin and Assis).

405 From the Cairo Genizah, *quoted in* GROSSMAN, *PIOUS AND REBELLIOUS*, *supra* note 270, at 89. The boy also hinted at the fact that the second wife taunted his mother, and the general tone points to an atmosphere of intense animosity and tension. The harsh picture of biblical polygamy, in the homes of the patriarchs, and of Elkanah and David, returns here in full force. *Id.*

406 *Id.* at 85, 90.

407 *Id.* at 90.

408 *Id.*

be considered like a prostitute.⁴⁰⁹ Already in Talmudic times, the manner of discussion as well as the divergence of opinions and traditions indicate that concubinage was no longer in practice.⁴¹⁰ Maimonides protested vigorously against concubinage, and sought to eliminate it by claiming that it was a right limited to the kings of Israel, not the common man.⁴¹¹ While some authorities disagreed but prohibited it anyway,⁴¹² other authorities permitted it,⁴¹³ some noting that it was legal but warned against the moral evils involved.⁴¹⁴ There is little evidence of any actual Jewish concubinage in the Middle Ages,⁴¹⁵ and the understanding was that even the rabbinic authorities who permitted it did not consider it ideal.⁴¹⁶ Eventually it came to be universally prohibited, and is thought of as connected to if not part of the ban.⁴¹⁷ What we see in the slow erasure of the practice of concubinage is just another small step on the march toward companionate monogamy in the Jewish marriage tradition.⁴¹⁸

409 In the Babylonian tradition she was seen as having neither *kiddushin* (official marriage status) nor a *ketubah*. See BABYLONIAN TALMUD, *Sanhedrin* 21a. In the Jerusalem tradition she was of slightly higher status, possessing a *ketubah* but without *kiddushin*. See JERUSALEM TALMUD, *Ketubot* 5:2, 29b.

410 See Lowy, *supra* note 149, at 117. He also quoted the Midrashic story of the king furtively visiting his concubine to make the point that it was considered shameful to have such an arrangement. *Id.*

411 Maimonides, *Mishneh Torah*, *Hilchot Melachim* 4:4.

412 See *Tur* and *Shulchan Aruch*, *Even HaEzer* 26:1.

413 Raavad, *Mishneh Torah Hilchot Ishut* 1:4; *Responsa of Rashba* 284 (traditionally attributed to Nahmanides); Meiri, *Beis Habechira*, BABYLONIAN TALMUD, *Sanhedrin* 21a (seeming to agree with the definition of the *Ravaad*); see MARRIAGE AND ITS OBSTACLES, *supra* note 115, at 62.

414 *Responsa of Rashba* 284 (traditionally attributed to Nahmanides); Commentary to *Genesis* 25:6, cited in MARRIAGE AND ITS OBSTACLES, *supra* note 115, at 62.

415 Anson Rainey et al., *Concubine*, in 5 *ENCYCLOPAEDIA JUDAICA* 133–36 (Michael Berenbaum & Fred Skolnik eds., 2d ed. 2007).

416 MARRIAGE AND ITS OBSTACLES, *supra* note 115, at 62.

417 See Rabbi David Ben Solomon ibn Abi Zimra, *Responsa Radbaz* 4:22, 7:33. “At the present time a woman is permitted to no man except through *kiddushin*, *huppah*, *sheva berakhot*, and *ketubah*. This applies even more in the case of a married man . . . both for the protection of his wife and because his taking a concubine—since he is aware that he must not take an additional wife—can only be for the purpose of prostituting, and this is forbidden in the opinion of all the posekim.” *Responsa of Rashba* 4:314; *Otzar HaPoskim*, *Even HaEzer* 1 n. 4; 26, n. 5 (quoted in Rainey et al., *supra* note 415).

418 Some assume that Maimonides’ opinion and rejection of the practice might have been influenced by the fact that in day the Sunni Muslims prohibited the practice of *mut’ah*, or temporary marriage. In this view, his opinion, like perhaps that of Rabbeinu Gershom, was also one affected by and effecting public policy.

XI. The Story Behind the Story

A careful reading of the *Shulchan Aruch* finds that, even if it was only in the background of the discussions when the ban against polygamy was being contemplated, the real reason why the ban has stayed and stuck on, first amongst the Ashkenazim and then over the centuries across all of Jewry, so that by the year 2013 anything but monogamy in Judaism is unheard of, is simply because anything but monogamy does not produce the kind of loving, intimate, companionate marriage that the Rabbis wanted to promote in order to inspire marital happiness, social growth, child development, and economic enhancement.⁴¹⁹ This development can be seen in the conversational subtext between the author of the *Shulchan Aruch*, Rabbi Joseph Caro, a Sephardic Jew living at a time before the ban became really normative in Sephardic lands, and the commentary of Rabbi Moshe Isserles of Ashkenazic descent and leadership.

The Laws of Marriage open up with the following discussion: the *Shulchaun Aruch* writes, “Every man is obligated to marry a woman in order to reproduce . . . ”⁴²⁰ (Note the focus on the *legal* imperative), to which the Rema responds with an exposition on the *virtues* of the marital relationship: “Anyone who is without a wife lives without blessing, and without Torah, and is not called a person. Once one marries a woman, all of one’s sins are forgiven, as the verse states, ‘one who finds a wife finds goodness, and obtains the favor of God.’”⁴²¹

The same subtext plays out just two paragraphs later: Rabbi Caro describes how the court will force someone who has waited past the age of twenty to get married,⁴²² and Rabbi Isserles writes that this is not our custom anymore. Rather, even if one doesn’t get married at an age when they should, because they have not found the right person, or even if they found someone they want to marry but the woman is sterile or too old to have children, despite the fact that traditional Jewish law would compel the court to force him to marry someone capable of reproduction so that he could fulfill the Divine command to be fruitful and multiple, the custom is not to do so.⁴²³

419 See Michael J. Broyde, *Jewish Law and the Abandonment of Marriage: Diverse Models of Sexuality and Reproduction in the Jewish View, and the Return to Monogamy in the Modern Era*, in MARRIAGE, SEX, AND FAMILY IN JUDAISM, *supra* note 302, 88, 103 [hereinafter Broyde, *Diverse Models of Sexuality*].

420 *Shulchan Aruch, Even HaEzer* 1:1.

421 Rema, *supra* note 211 (quoting *Proverbs* 18:22).

422 *Shulchan Aruch, Even HaEzer* 1:3.

423 Rema, *supra* note 211.

Having defended the policy option of companionate marriage based on love and bringing blessing, as opposed to the more functional marriage Rabbi Caro describes, based on law and having children, the attempt to codify the monogamous custom is made once again in the discussion of polygamy. The *Shulchan Aruch* states, “[a] man may marry many women, so long as he can support them all . . . Rabbi Gershom decreed that one may only marry one wife at a time . . . but the decree was not accepted in all lands.”⁴²⁴ To which Rabbi Isserles adds, “[o]nly in a place where you know that it was not accepted does it not apply. But ordinarily, it applies everywhere.”⁴²⁵

Notwithstanding the possibility of polygamy as an option in Jewish law, the Jewish tradition settled on monogamy as the only option that could really bring those blessings that Rabbi Isserles described, going so far as to enact strong decrees with weak foundations against even biblical precepts to enforce this new ideal.⁴²⁶

CONCLUSION

There really is nothing new under the sun.⁴²⁷ Whosoever thinks that society today has a monopoly on the questions surrounding the complex family structure and marital definition has never studied the Jews of antiquity.

Jewish law, from the perspective of a Jewish law practitioner, is a sometimes-shifting scale that allows for adaptive modality in changing circumstances. Values are held in dialectic tension, and there is always enough leeway and flexibility to provide an answer for literally every situation on this earth.⁴²⁸ Why was polygamy allowed? Because in some situations, having it available as a tool or as an option was useful, whether to increase the number of viable children being born, to feed the needy, for political stability, or for any other of a number of conceivable reasons.

At some point though, the reality began to change, and society moved away from this model of male-centric marriage.

424 *Even HaEzer* 1:9–10.

425 Rema, *supra* note 211.

426 See Broyde, *Diverse Models of Sexuality*, *supra* note 419, at 105.

427 *Ecclesiastes* 1:9.

428 See MISHNA, *Avot* 5:22 (“Ben Bag Bag used to say, ‘Turn it over, and turn it over, for everything is in it . . .’”).

For a while, due to circumstances both internal and external to the Jewish community at large, polygamy remained legal on the books if not in practice. As time went on, however, more and more factors came to bear on the question of polygamy, most of them centering around the quite compatible desires to both fit in with European society for better or for worse, and to create a more equitable and stable Jewish family life, whether by cutting off the possibility and stemming the flow of unilateral divorces by men, or by making sure that angry or even just uninterested husbands could not simply marry other women and abandon their original families, or in general by making sure that people chose their partners for the right reasons. There was a feeling, stemming from the Babylonian tradition and demonstrated in the capstone commentary of Rabbi Moshe Isserles, that only monogamy could really bring the kind of close companionship that a marriage really needs to be called blessed.

Change this big was slow to come, however. Especially as time passed, and the rabbis of the Talmud became legends, the idea of drastically rethinking anything in family law must have seemed more and more daunting and unlikely. To do so would require an authority figure with tremendously broad shoulders.

A man of such stature arose in the persona of Rabbeinu Gershom, “the Light of the Exile,” and whether it was actually him, or whether he was just the authority figure on which the ban was eventually hung, the medieval decree against polygamy came to be known forever by his name.

Once the tipping point was reached, polygamy never really made a comeback. In contrast to the rabbis of earlier eras, the rabbis of the Middle Ages no longer felt the need to even nominally cling to their heritage of polygamy, at least in Ashkenazic lands. Perhaps once the Jews were no longer living under the rule of the Roman Empire, the fear that national and cultural Jewish identity would be overtaken subsided.⁴²⁹ The Church, with its divergent and anti-polygamous exegesis, was no longer recognizable as another branch of Judaism, and sectarian influence in general had also largely died out. Eventually, the ban of Rabbeinu Gershom made legal what was for most people already likely the practical reality of the day, except in exceptional cases such as levirate unions and barren wives. Despite the fact that certain details needed to be worked on and thought about, questions about how it played out on the fringes should not overshadow the overwhelming success of the enactment.⁴³⁰ For the most part, and now forever, polygamy is gone.

429 Frisch, *supra* note 36, at 148.

430 Especially because, as in all legal material and responsa, it is the fringe cases that tend to get discussed.

Interestingly, despite the fact that polygamy was very consciously removed (one step at a time) from the realm of practice, it was never removed from the theoretical discussions in the study hall, nor was its practice ever retroactively whitewashed or hidden like some shameful thing in the tradition, even after it was banned. Ashkenazic Jewish polygamy was simply mounted in its rightful place as a museum piece in the hall of Jewish history, and life carried on.

A Midrashic teaching, dated roughly from around Rabbeinu Gershom's time, shows how comfortable Jews were talking about their polygamous ancestral heritage (perhaps this openness is a vestige of the fierce sectarian pride which led them to keep it so alive for so long in the academy, or, alternatively, maybe it is a nod to the fact that by the time it finally happened the ban was really just declaratory; it just goes to show that polygamy was not a hot-button issue and so was easy to talk about and reference without causing any stir). The Midrash here has God himself asserting that, at least historically speaking, polygamy was a good and viable option for Jewish marriage. *Exodus Rabbah* 1:14, speaking about Pharaoh's decree to kill all the male Hebrew infants, stated:⁴³¹

If it is a son, you will kill him . . . The Holy One Blessed be He said, "Whoever gave you [Pharaoh] this counsel is a fool. You should have killed the females. If there are no females, from where will the men marry wives? A woman cannot marry two men, but one man can take ten wives, or a hundred. So, 'the princes of Zoan are idiots, the wisest of Pharaoh's counselors is a poor counsel,'⁴³² because they gave him this counsel."

In *Exodus Rabbah* then, polygamy is comfortably right back where it had been for the last several centuries in practice, and where it has been ever since; occupying a prominent place on the shelf of history in the study hall/ivory tower, important both for the values it once held and in reference to the values that led to its decline.

Unlike the arguments in contemporary debates either lauding⁴³³ or castigating⁴³⁴ polygamy the Jewish tradition over time has refused to categorize polygamy, as inherently

431 *Exodus* 1:16.

432 *Isaiah* 19:11.

433 Emily J. Duncan, *The Positive Effects of Legalizing Polygamy: "Love is a Many Splendored Thing"*, 15 *DUKE J. GENDER L. & POL'Y* 315 (2008).

434 See, e.g., Maura I. Strassberg, *Distinctions of Form or Substance: Monogamy, Polygamy and Same-Sex Marriage*, 75 *N.C. L. REV.* 1501, 1504–06 (1997).

either evil or good, but has instead recognized the institution as another tool that has a time and a place, the abuse of which is wrong and the support of which is sometimes a good idea. Over time, Jewish law developed a recognition that polygamy fundamentally changes the nature of the marital relationship and might not be a good idea unless exigent circumstances, such as war or famine, call for it.

In particular, Judaism's growing concern about the practically unworkability of polygamy with a companionate form of marriage presents an example of the way in which religious morality can serve as a progressive force in reshaping legal and social institutions to improve conditions for women over time.⁴³⁵ This same potential is reflected in other advances in family law promoted by the Jewish legal system, including divorce, the forbidding of marital rape, the idea that women could own property, and mandatory prenuptial agreements specifying a large alimony in the event of divorce. Yet, despite the historical attentiveness of Jewish law to women's interests,⁴³⁶ modern scholars and policy advocates have failed to recognize the ways in which religious discourse has informed and can continue to shape contemporary debates over women's human rights. While it is true that religious thought cannot currently be considered at the forefront of the academic and advocacy/policy discussions of women's rights, without the tremendous groundwork that religion laid, it is very possible that these debates would not exist at all. This Article would argue then that we should approach perceived conflicts between religious practice and women's human rights with a sense of humility and a nuanced, contextual understanding, recognizing the potentially progressive nature of religious morality instead of immediately labeling particular practices discriminatory or chauvinistic. In the conversations between law, religion, and culture, an issue like polygamy can demonstrate how religious doctrine may well serve as a guide for how to balance and protect the practical rights and wellbeing of members of society, taking into account what people in a particular culture, time, place, and setting might want and need.

435 See BABYLONIAN TALMUD, *Kesubot* 47a (giving married women additional rights).

436 See RACHEL BIALE, *WOMEN & JEWISH LAW: AN EXPLORATION OF WOMEN'S ISSUES IN HALAKHIC SOURCES* (1984).