4

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

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Preamble

This chapter explores the Jewish legal tradition's development of marriage law, and it does so in a way that highlights two important facets of Jewish law, both of which have import to those who ponder abandonment of marriage. First, classical Jewish law had an expansive, complex set of sexual relationship doctrines that for more than two thousand years abandoned monogamy as the central model of marriage—indeed, it was prepared to contemplate sexuality outside of marriage as licit. Although marriage was never abandoned as *an* institution of licit sexuality and reproduction, it was abandoned as *the* institution of licit sexuality and reproduction. Equally importantly, in the past five hundred years the Jewish tradition forsook these diverse models of marriage and sexuality, but reverted to that which was unprecedented in the Jewish tradition—the ho-hum model of monogamy with mutual consent or fault-based exit rights—and enacted strong decrees

with weak foundations in technical Jewish law to mandate them. The lengthy experiment with abandoning marriage is over in the Jewish tradition. It did not work. This chapter describes the Jewish legal history of that experiment.

Much has been written of the Jewish contribution to civilization, and the consensus answer is that monotheism—the belief in one and only one God—is the central contribution.[1] The other major "mono" in our society—monogamy, the belief in one and only one marriage partner—is hardly ever listed as a significant Jewish contribution to our society. Indeed, as this chapter will show, the Jewish tradition had for many years a quite robust, diverse, and complex set of marital and nonmarital models of sexual interactions.

This chapter seeks to explain why the Jewish tradition is not thought to be the father and mother of monogamy, even as the significant religious and cultural source of monogamy—the creation story of Adam and Eve—is the biblical text in the Jewish tradition. Among the many basic lessons that would seem to be taught by the creation story is, after all, that God took but one rib from Adam and created Eve, who then partners with Adam to create all humans. (The story would, to put it mildly, have a very different theme had God taken a rib from each side of Adam and created two female companions for Adam instead of one wife.) Indeed, the basic marriage doctrine can be found in Genesis 2:24 (immediately following Eve's creation), and is as clear a theological endorsement of monogamy as one can find. After God creates Eve, the narrator/God states: "Thus, man leaves his father and mother, and clings to his wife, and they become one flesh."

This verse is not speaking to Adam or Eve, but to the biblical reader to give them a sense of the Divine nature of the marital—monogamous—union.[2] People should, this verse tells us, leave their parents and marry a single spouse. While polygamy plays a role in the rest of the Genesis stories, a clear theme remains that monogamy ought to be the biblical ideal. Thus Abraham is only polygamous as his wife, Sarah, appears barren—she suggests polygamy as a solution to her infertility.[3] Jacob is tricked into a polygamous relationship, and threatened that he cannot marry his true love, Rachel, unless he keeps Leah.[4] The biblical Hebrew word used to denote a cowife in a polygamous relationship[5] means "trouble," a stinging indictment of the family dynamics in polygamous relationships. Indeed, there is no case of nonmonarchical polygamy in the biblical tradition other than in cases of infertility or fraud in creation.[6]

Why then is monogamy not part of the Jewish tradition's contribution to modern marriage? Why is there no talmudic exegesis noting that the verses in Genesis seem to mandate monogamy?[7] The answer to that question is

found in Jewish law.[8] The Bible itself, in the law code section of Exodus and Leviticus, mandates that polygamy is permitted, and these explicit legal texts supersede any inference from the stories found in Genesis. Consider the verses in Deuteronomy:

> When a man has two wives, one beloved and one hated, and both the loved and the hated wives bear him children; however, the first born child is from the hated wife . . .[9]

or

> A king may not have too many wives, lest they lead his heart astray.[10]

and the verses in Leviticus:

> Do not marry a woman and then her sister to torment her as her rival.[11]

and the verses in Exodus:

> If a man takes another wife, he may not diminish [this wife's] allowance, clothing or conjugal rights.[12]

Each of these biblical verses sharpened the rabbinic tradition's sense that polygamy was permitted by Jewish law. There is no questioning of this in the talmudic tradition at all.[13] Thus the Jewish tradition was polygamous, and the matter was never really subject to serious reexamination as a matter of normative Jewish law.[14]

However, even as the Jewish tradition was polygamous, it is important to make clear what was thought not to be possible as a sexual relationship in the Jewish tradition. Three categories of relationships were never considered permitted in the Jewish tradition.

1. *Homosexual relationships.* Based on a set of clear verses in Leviticus,[15] the Jewish tradition deemed same-sex relationships (be they marital or not) as violations of Jewish law.[16]
2. *Polyandrous relationships.* Although Jewish law was in its original form polygamous, polyandry (a woman married to two husbands) was never deemed possible.[17] The very nature of marriage denoted sexual exclusivity by the woman.[18]

3. *Sexual promiscuity.* Random coupling without any relationships violated, according to most authorities, the biblical injunction against harlotry.[19] Other authorities limited this precise biblical violation to cases of sexual slavery and agreed that promiscuity was prohibited by an ancient rabbinic decree governing prostitution.[20]

However, as the next two sections will show, beyond these three limitations, there was a robust discussion about marital and sexual norms. Even as the Jewish tradition is now monogamous in practice, such is not its basic origin in terms of sexual relationships. Three basic models of sexuality form an intrinsic foundation for the Jewish tradition: monogamous marriage, polygamous marriage, and sexual companionship. The next section of this chapter explores the relationship between monogamy and polygamy in models of marriage, and demonstrates that the Jewish tradition had quite diverse and robust models of marriage with many different varieties and nuances. The section after that discusses licit alternatives to marriage in the Jewish tradition.

JEWISH MARRIAGE LAWS

In general, marriage requires the mutual consent of both parties. Not only must this consent be unconditionally given, but as a matter of legal and religious theory one is under no ethical or religious duty to give that consent merely because one person wishes to marry him or her, even if he or she wishes to marry that person very much. One can, fully consistent with Jewish law and ethics, decline to marry a person because the person lacks financial resources, the person will not commit to a larger dowry, or one simply does not love the person or loves another more. Marriage is a discretionary act in almost all cases,[21] and consent to marry, freely given and freely withheld, is required for almost all marriages.[22]

However, one cannot really judge the stability and attractiveness of the marriage doctrines in any system except by looking at the exit rules. Exit rules from marriage are, in fact, a more concrete way of examining the weight a legal system assigns to a marital relationship.[23] How law and society expect people to behave in less than perfect marriages better evaluates the models of marriage than anything else.[24]

While the Torah has a number of stories and incidents concerning marriage, in terms of divorce law little is known other than the talmudic description of biblical law and the brief verses that incidentally mention divorce in the course of describing the remarriage of a divorcée.[25] Deuteronomy states:

given a unilateral divorce. Polygamy was permitted, and the husband still had his right to unilateral divorce even without fault, although he would be required to pay the amount agreed on by the parties in the *ketubah*. In this view, marriage was a contractually regulated partnership, albeit one whose exit costs were contractually delineated and perhaps even restricted.[41]

One sees from this brief historical summary of three thousand years of Jewish marriage and divorce law a number of basic doctrinal points that cause one to grasp why the Jewish tradition can be fairly described as having only weak doctrines of marriage and marriage doctrines open to divorce.

1. Marriage was never centrally constructed as monogamous and monogamy was never constructed in its hard (Catholic) form of one husband with one wife in one life.
2. Divorce was always recognized as normative and permitted; it was free of governmental or religious restrictions. Mutual consent divorces were always permitted.
3. Parties could construct the fiscal basis of their own marriage as they wished, and provide clear financial incentives to encourage divorce if they so wished.
4. Diverse models of marriage coexisted for centuries. Whether it is unilateral automatic no-fault, judicially regulated no-fault, soft fault, abandonment, hard fault, mutual consent, or contractual marriage, each has a basis and an authority advocating it in the Jewish tradition. One is hard-pressed to see a single view of Jewish marriage.

The breadth and depth of the models of marriage presented show that these models have so little in common with one another that they hardly fall into any common categorization of "marriage" at all. The breadth includes polygamous unilateral no-fault marriages on one hand, and monogamous hard-fault marriages on the other—everything in between is present also. One borders on promiscuity[42] and the other on no divorce.[43] Jewish law was diverse in its legal models of marriage in a way unique to legal systems generally.

However, such diversity no longer exists. Israeli Orthodox Jewry, at a national rabbinic conference called in 1950 by the chief rabbis of Israel, passed an enactment generally making monogamy and mutual consent divorce (with fault-based divorce possible) binding on all Jews irrespective of their communal affiliations as the normative model.[44] This decree reflected communal practices throughout Jewry, with only very minor dissent from very small Iranian and Iraqi Jewish communities. For the past fifty

years, only one model really is present. The diversity of models and practices in marriage remains in theory, but has ended in practice.[45]

SEXUAL COMPANIONSHIP AND JEWISH LAW

Just as there were diverse models of marriage, there were also diverse attitudes to extramarital sexuality in Jewish law. Although the current community of adherents of Jewish law clings to just one model—no sex outside of marriage—in fact, the legal traditions incorporated into Jewish law are quite diverse and robust in the area of nonpromiscuous extramarital sexuality. Consider the opening discussion in the classical code of Jewish law in the section dealing with marriage law. Rabbi Joseph Karo writes in *Shulḥan `Arukh*, Even ha-`Ezer 26:1 (which is the first paragraph addressing marriage law) that

> A woman is not considered married until she has a valid wedding ceremony properly done; but if a man and a woman have a sexual relationship in a promiscuous way not for the sake of marriage, it is nothing. Even if they had a sexual relationship for the sake of marriage in secret, she is not his wife, even if she agreed to have sexual relations with no other, but rather we use judicial coercion to remove her from his house.

However, Rabbi Moses Isserles, writing the glosses that form the other half of this main code, writes:

> [She must be removed from the house because] she will be embarrassed to immerse in a ritual bath as directed by Jewish law and instead they will have sexual relations when such are prohibited.[46] *But, if a man has a steady faithful sexual relationship with a woman outside of marriage, and she immerses when mandated by Jewish law, there are those who say that this conduct is proper*, and this is the *pilegesh* [faithful sexual companion[47]] mentioned in the Bible. There are those who say that such conduct is prohibited, and one violates the biblical commandment of not bringing a prostitute into the community through such conduct and flogging is proper.[48]

Thus the classical Jewish law code of the middle of the sixteenth century has no substantial agreement on the nature of extramarital sexuality. One view considers all extramarital sexuality as illicit, and the other permits nonmar-

ital sexuality so long as it is not furtive or embarrassing. Normative Jewish law, were it to just examine this text alone, would conclude that the first view of Rabbi Isserles may be followed, as the general rule in Rabbi Isserles's law code is that the first view is more definitive than the second.[49]

Indeed, a close review of the classical literature on Jewish views of extramarital sexuality shows that just as the Jewish tradition never placed enormous stock in (hard or soft) monogamy as the sole model of marriage, so too there are many Jewish law decisors who did not view marriage as the sole model of licit sexual relationships. Indeed, one school of thought viewed all nonpromiscuous sexual relationships as proper. Understanding the nature of the dispute with regard to faithful sexual companions thus becomes crucial to understand general attitudes toward extramarital sexuality.

The Bible is replete with sexual relationships that are classified as one of sexual companionship, from Abraham[50] to Jacob,[51] the judge Gideon,[52] King Saul,[53] King David,[54] King Solomon,[55] and many others. Indeed, the Talmud is replete with discussions of sexual companionship devoid of any clear indication that such conduct is wrong.[56] Four basic attitudes are recorded in Jewish law with regard to sexual companionship without marriage.

The first view is that of Maimonides. Based on a linguistic insight in Maimonides's codification found in his Laws of Marriage 1:4, it is commonly claimed that Maimonides was of the view that all nonmarital sexual relationships were prohibited by the Jewish law prohibition against harlotry, and this is codified in the fourteenth-century work *Arba`ah Turim* (Tur), Even ha-`Ezer 26 in his name. Indeed, despite Maimonides' codification of the right of a king to sexual companionship outside of marriage,[57] one can quite clearly see a limitation on the conduct of others. A similar view is taken by Rabbi Solomon Adret, who posits that the sexual companionship really is permitted by natural law, and was practiced in prebiblical times, but was prohibited by operation of normative Jewish law, once the Torah was given.[58] This view is adopted as well by Rabbi Karo in his classical Jewish law code, which is quoted above.[59]

Another view is that native Jewish law permitted sexual companionship relationships and later rabbinical decrees prohibited them. This is explicitly noted by Rabbi Meir Abulafia, who posits that sexual companionship outside of marriage is genuinely permitted by Torah law so long as the relationship is not promiscuous in nature.[60] Marriage was then merely an institution that allowed and enforced certain values of financial support, long-term sexual fidelity, the prohibitions of consanguinity and the like—however, one could opt for a sexual relationship without these values in natural Jewish law. However, the rabbis of the Talmud sensed that this model

of faithful companionship was deeply unstable and prohibited it as it seemed to them to devolve into simple promiscuity—twenty minutes of companionship was enough.[61] In this view, faithful sexual companionship was prohibited as a prophylactic rule against promiscuity by rabbinic decree.

However, such are not the only two views found in the rabbinic tradition. There is a third view. Naḥmanides, writing in his response, adopts the view that there is no obligation—either according to Torah law or rabbinic decree—to be married before one engages in a sexual relationship.[62] He explicitly states that so long as the parties are engaged in a relationship where both paternity and maternity are known, Jewish law imposes no restrictions, and such relationships are found in faithful sexual companionship. Naḥmanides recognizes the difficulty with these relationships—they lead down the slippery slope to promiscuity—yet all he is prepared to do is warn of the dangers, but not prohibit the activity. Such is also the view taken by Rabbi Solomon Luria of the sixteenth century, who refuses to prohibit relationships of sexual companionship, even as he posits that such relationships are unwise.[63] Rabbeinu Asher, in his responsa, seems to adopt a similar view, and prohibits faithful sexual companionship in situations and cases where the woman is embarrassed by her conduct and role because such embarrassment leads to violations of Jewish law.[64] However, as can be inferred from this view, those who are comfortable with their role, as it is stable and accepted, would not be in violation.

Even this view is not the most permissive in the Jewish tradition. There is a clear tradition of authorities who saw no problem with faithful sexual relationships outside of marriage. Consider, for example, a simple response of the Ran, Rabbi Nissim Gerona, a foremost authority of the fourteenth century. The question was whether a woman who had been in a relationship of sexual companionship with one man and who now wished to marry another man had to wait the 90 days mandated by Jewish law for divorcées, so as to allow paternity to be clearly known, or was she exempted from this requirement as women who engaged in promiscuous sexual relationships are. Rabbeinu Nissim responds:

> The view of Judah, that she has to wait 90 days, is correct. Since she was known to be his sexual companion, this is not called promiscuity at all, since the sexual companion is faithful to a particular man, and thus not considered sexually promiscuous. The Jewish forefathers engaged in similar conduct, as it notes in the Talmud's discussion of wives and sexual companions, which is that wives had betrothal and financial rights, and sexual companions had neither . . . Thus, in this case, since

> she resided with him in a manner permitted by Jewish law, raised their son and he treated her like a sexual companion, she is not called promiscuous, and thus not exempt from the rules of waiting to establish paternity.[65]

Similar observations, and even proposals to welcome sexual companionship, are a clear part of the rabbinic tradition and are discussed in the rabbinic literature as part of the patterns of marriage. Among the early authorities, such is clearly stated by Rabbi Abraham ben David of Posquières,[66] Rabbi Ḥasdai ben Sholom,[67] Rabbi David Qimḥi,[68] and many others.[69]

Indeed, a classical responsa written by Rabbi Jacob Emden (1697–1776) discusses the role of sexual companionship in a clearly laudatory way, discussing the advantages of sexual companionship from both his and her perspective,[70] as well as the many disadvantages that flow from tight monogamy.[71] He seriously contemplates—and indeed comes close to advocating—the return to sexual companionship as a norm within the Jewish tradition.

Nor is this an isolated event or a mere footnote to rabbinic history. Consider the modern responsa *Ateret Paz*, whose author is Rabbi Pinchas Zvichi, a well-known modern decisor of Jewish law born in 1960. In the course of the responsa—written in 1983—addressing the question of whether marriage is a religious duty at all, he seriously contemplates the possibility that marriage is not a religious obligation according to Jewish law because one can properly fulfill the obligation to procreate without marriage by having a sexual companion, and having children with that person.[72] He concludes in the end that whether there is a religious duty to marry or not is in profound dispute among the early medieval decisors, with Maimonides mandating marriage, and others not.[73]

Indeed, nearly every classical recounting of Jewish views toward sexual companionship posits that there are these four views, and weighs them with seriousness. Consider, for example, the modern encyclopedia of Jewish family law entitled *Otsar ha-Posqim*, a still incomplete recapping of Jewish family law started in 1950 and currently in its twentieth volume. In its introduction to the issue of extramarital sexuality, this work states as follows:

> BUT IF ONE HAS A FAITHFUL SEXUAL COMPANION:
> *A. Summary of the views with regard to this matter.* In this matter, Rabbi Isserles (Rama) recounts two views when one designates a faithful sexual companion, there are those who say such conduct is permitted and those who state such conduct is prohibited and liable for flogging as a violation of Jewish law. However, besides these two views, there are

> other views among the decisors, there are those who argue that this conduct is not a violation of the prohibition against promiscuity, but a violation of the positive obligation to marry; there are others who say that the prohibition is rabbinic and there are others who say that such conduct is permitted but it is improper to do so.[74]

Indeed, the subheadings speak as much about the theoretical views of Jewish law as anything else. The bold subheadings of this section are as follows:

> B. Those who rule that a faithful sexual companion violates the prohibition against promiscuity
> C. Those who say that a faithful sexual companion violates the positive obligation to marry
> D. Those who say that a faithful sexual companion violates only a rabbinic prohibition
> E. Those who say that a faithful sexual companion does not violate any prohibition, but such conduct is improper
> F. Those who say that a faithful sexual companion is completely permitted. [75]

Rabbi Isserles (the normative codifier of Jewish law for European Jewry) endorses view F, permitting faithful sexual companions, since he quotes it first—since he quotes that view first in his law code, the normative rules of interpretation argue that such is his favored view.

Of course, those familiar with the sociology of the modern Jewish community will respond by noting that in the community of those who adhere to Jewish law now, there is absolutely no sexual companionship practiced publicly, and anyone who engaged in such conduct would be treated as one who violates Jewish law. That too is a completely accurate recounting of Jewish practice. As Rabbi Abraham Bornstein recounts, "Nowadays our custom is not at all to have sexual companions."[76] Others note that same social proposition and even provide support in Jewish law for this social practice.[77]

Indeed, in response to a technical problem in Jewish divorce law, there have been proposals to simply forsake marriage completely and only have relationships of faithful sexual companionship, with no requirement of divorce. The responses to these forms of proposals have been uniformly negative, and all focusing on the social harms caused. Consider, for example, the comments of Irving Breitowitz. He states:

> It would be inconceivable for a religious system to set up the *concubine* as a viable and equal or even preferable mode of relationship. Such a proposal, it was said, degrades the sanctity of marriages and family life, promotes promiscuity, denigrates women and would be a "cure" considerably worse than the illness it seeks to alleviate.[78]

What Breitowitz does not say is that such proposals categorically violate normative Jewish law—as it is unclear that they do. Rather they violate normative Jewish custom and tradition, as noted by Rabbi Bornstein.[79]

Indeed, a close read of the literature with regard to the concept of sexual companionship for cases where marriage is precluded due to technical failings confirms the basic theses that faithful sexual companionship has a normative role. Consider the basic doctrinal problems of marriages with mentally disabled people. The talmudic sages felt that such people ought to be able to enter into marriages, as they presented a number of socially valuable benefits to people in need of protection and care. However, basic Jewish law marriage doctrine requires consent to marry, and such a person cannot consent, apparently precluding them from entry into marriage as a possibility. Yet the talmudic rabbis created a pseudo-marriage for such people, with some but not all of the marriage rituals and rights. Why are such arrangements not a violation of the rules against promiscuity? Rabbeinu Asher, in a famous discussion of a similar case, provides a framework for a basic answer.[80] He states:

> Nevertheless, she cannot be forbidden [to enter] such a relationship and thereby be considered an unmarried woman who engages in promiscuous sexuality [which is prohibited], because in this case she is living with a man in the manner of marriage and it is not promiscuous [and not prohibited].[81]

Indeed, this line of reasoning supports the general proposition that the Jewish tradition has only weak sanctions against nonmarital but stable sexual companionship outside of marriage.[82]

Yet another view as to what is a faithful sexual companion is worth noting, as it resonates with a contractarian view of marriage.[83] The Jerusalem Talmud contemplates the possibility that a faithful sexual companion is actually fully and completely married, but without any of the financial obligations or rights associated with a normal marriage.[84] This view is also taken by Rabbi Elijah of Vilna (Gr"a) in his commentary on the code of Jewish

law.[85] If this view is correct, then yet another model of marriage is present: the minimal marriage. All that is pledged in this marriage is sexual fidelity by the woman and nothing else. No obligation to mutual support, to conjugal relations, to nurture, to clothe, or any other normal marital obligation is presented.[86]

Just as Jewish law had diverse and weak doctrines of marriage, so too it had diverse doctrines of extramarital sexuality. All agreed that promiscuity and prostitution are prohibited, but throughout the Jewish tradition there has been a significant legal opinion positing that sexual companionship outside of the framework of marriage is permissible. Such views effect and affect Jewish law's sense of marriage—it would seem to bolster those who favor weak marriage.

FINAL THOUGHTS ON THE DEVELOPMENT OF JEWISH MARRIAGE

This chapter has demonstrated two ideas in the name of the Jewish tradition that are rarely stated with such vigor in the name of conservative religious traditions. The first is that rigorous hard monogamy is by no means the only model found even in the biblical tradition. Jewish law put forward only weak and relatively modern prohibitions against polygamy, and none against divorce or serial monogamy.[87] Historically, many diverse models of marriage had a place around the table in the traditions of Jewish marriage and sexuality. Indeed, given the breadth of the models of marriage noted in this chapter, one is hard-pressed to define any real historical model of Jewish "marriage"—the term is used in the Jewish tradition to cover a range of relationships from marriages that nearly automatically ended when one party wished to marriages that only ended through mutual consent, with many models in between.[88] Equally importantly, while the Jewish tradition could not contemplate a society with promiscuous sexuality, it could and did imagine a society with doctrines of faithful sexual companionship outside of marriage. Such relationships were not at all beyond the pale of the Jewish tradition—even as prostitution and its close cousin in Jewish law, promiscuity, were simply unimaginable.

Yet neither polygamy nor sexual companionship nor unilateral no-fault divorce took hold in the Jewish community. Rather, even as the set of legally permitted options of marriage grew, the set of practiced marital conduct shrunk, so that in the year 2005, all licit Jewish law marriages occupy the narrow space of monogamy, with mutual consent exit rights (or faulted exit). This has been the sole normative model in the European-derived

Jewish communities for more than two hundred years. I would like to consider why there has been this practical narrowing of options by examining a set of elemental texts in Jewish marriage and divorce law from *Shulḥan `Arukh*, Even ha-`Ezer, the basic code of Jewish family law. The answer that I posit is that the Jewish peoples found monogamous marriage with only mutual consent exit rights (or faulted exit) to be a successful system that provides a stable platform for marital happiness, social growth, child development, and economic enhancement.[89] Jewish law did not mandate this result at all.

As background for this examination, one needs to know that the *Shulḥan `Arukh* is a law code with two authors. The first is Rabbi Joseph Karo (1488–1575), who lived in Safed, Israel, and was an Arabic Jewish law scholar, a follower of Maimonidean tradition. The second is Rabbi Moses Isserles (1530–1572), who lived in Krakow, and was a European Jewish law scholar, a follower of the Tosafot tradition. They did not jointly write this work. Rather, Rabbi Karo wrote the code, and Rabbi Isserles wrote extensive glosses on it, citing opinions and traditions left out by Rabbi Karo. Their combined publication remains to this day the normative compilation of Jewish law.

The first source to consider is the opening discussion of marriage, found in *Shulḥan `Arukh*, Even ha-`Ezer 1:1, which states:

> Karo: Every man is obligated to marry a woman in order to reproduce. Anyone who is not involved in reproduction is considered as if he or she is a killer, a reducer of the place of people on this earth, and causes God's presence to leave the Jewish people. *Isserles: 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" (Prov. 18:22).*

Rabbi Karo, because he has no Jewish law doctrine permitting licit sexual conduct outside of marriage, notes simply that marriage is mandatory, as such is needed and necessary to have children, which is an obligation according to Jewish law. Rabbi Isserles, who has the doctrine of faithful sexual companionship as a rival to marriage, has to persuade people to marry. Thus, the virtues of marriage are noted, even in a law book where such notations are normally kept to the absolute minimum.

A similar such exchange takes place two short paragraphs later in Even ha-`Ezer 1:3, which states:

> Karo: There is a duty upon every man to marry a woman when he reaches 18; one who wants to marry early may do it at 13, and has done a good deed, but one may not marry before 13, because that is promiscuous. Under no circumstances should a person wait past the age of 20 to marry. One who passes the age of 20 and does not want to marry, a Jewish court will force him to marry in order to fulfill the obligation to reproduce . . . *Isserles: Nowadays, our custom is not to compel people on this matter. So too, one who has not fulfilled the obligation to reproduce and wishes to marry a woman unable to have children, such as a sterile or elderly woman or a minor, because he is enamored of her or her money; even if, according to Jewish law, we should have protested this marriage, we have a custom going back for many generations, not to be exacting in the matter of choosing one's partner. Even if a man marries a woman and lives with her for ten years without children, our custom is not to divorce, even though they did not fulfill the obligation to procreate. The same is true for all other matters of choosing one's mate, except that one may not marry a person with whom it is forbidden to have a sexual relationship [such as incest].*

Again, Rabbi Karo not only posits marriage as the only model, but posits that these marriages can be compelled—one who waits to marry beyond the prescribed age is beaten by a rabbinical court as an inducement to find a spouse.[90] Rabbi Isserles, as a proponent of the legal possibility of faithful sexual companionship outside of marriage, posits that marriages have to have more to them than a lawful way to have children. Indeed, he is prepared to contemplate as proper and permissible marital relationships that are non-procreative in nature or for love or money. These marriages satisfy needs and urges that are beyond those to reproduce—marriage as an institution has value outside of reproduction according to this view.[91] By engaging in a lengthy defense of the value of marriage outside of the technical framework of Jewish law, Rabbi Isserles strengthened the institution of marriage and highlighted its benefits.

This can be summarized as a basic model of marriage in the European Jewish tradition. Monogamous marriage became the only option sanctioned by the Jewish people, even as other options were permitted by Jewish law—as monogamous marriage has social strengths that seem attractive to the Jewish law community, and its congregants.[92]

The same can be said with regard to divergent views of polygamy. Consider the basic exchange in the *Shulḥan `Arukh* with regard to polygamy. Even ha-`Ezer 1:9–10 states:

> Karo: 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. *Isserles: Only in a place where you know that it was not accepted, does it not apply, but ordinarily, it applies everywhere . . .*

If marriage is about reproduction, then polygamy is a normative option; indeed, in certain cases, it is even efficient, as is faithful sexual companionship. If, on the other hand, marriage is about love and companionship or other values that come from a relationship, polygamy is far from the ideal—even as the Jewish tradition permitted polygamy, it did not treat such relationships as the ideal interpersonal relationship, in that the word used to denote the cowife relationship was the same as the Hebrew word for "trouble."

Indeed, the same form of an exchange occurs in the context of divorce in Even ha-`Ezer 119:3–6.

> Karo: A man should not divorce his first wife, unless he finds improper conduct on her part . . . *Isserles: Except in cases of improper conduct, anyone who divorces his first wife, the heavenly altar cries tears. However, that was only in talmudic times when divorce was against the will of the woman; but if divorce is with her consent, it is permitted. . . .* Karo: A man may divorce his wife without her consent. *Isserles: . . . All of this is according to technical Jewish law, but Rabbeinu Gershom decreed that one may not divorce his wife without her consent, unless she has engaged in fault-based activity . . .*

Rabbi Karo contemplates marriage as a legal relationship where, at best, the only protections he can find for the wife that are beyond her contractual rights is that one's first wife should not be divorced—against her will—except for a good reason. Other than that, marriage holds little value other than facilitating sex and reproduction. Rabbi Isserles contemplates the central mutuality of marriage making the parties happy, and when they are both unhappy, divorce is proper and normal; just as there is a defense of marriage, there is a defense of divorce in situations where the marriage does not make both parties happy. In order for marriage to be a valuable social institution, rather than a religious obligation, exit doctrines have to protect both parties, and provide security to both parties as well.

What is happening in the Jewish tradition, I suspect, is a policy defense of marriage by Rabbi Isserles, and the Ashkenazic tradition that followed him. Since the Ashkenazic Jewish tradition had a variety of options available

to it—as a matter of theoretical discussion, this included both polygamy and faithful sexual companionship—Rabbi Isserles needs to defend the institution of monogamous marriage so that its adherents are benefiting from marriage. That exact defense need not be engaged in by Rabbi Karo, who for technical reasons cannot see any problem in polygamy, but yet denies the legal validity of the faithful sexual companion as a model, leaving marriage as the only licit way to have a sexual relationship.

The Jewish community voted with its feet by adopting a model of practice that validated monogamy with mutual consent or fault-based exit rights, and that functionally prohibits all forms of sexual activity outside the confines of monogamous marriage. Such an outcome is not dictated by either the view of Rabbi Karo or Rabbi Isserles, but by, I suspect, Rabbi Isserles's robust defense of the virtues and privileges of marriage. The life of law is experience, and the Jewish experience has concluded that monogamy with mutual consent or fault-based exit rights works. Jewish law did not reach (and still has not really reached) that conclusion. Jewish life did.

CONCLUDING LESSONS FOR AMERICAN LAW

What is most interesting to us—modern Americans reviewing the Jewish developments to see what we can learn—is how the Jewish tradition eventually settles on monogamy as the only model of marriage actually functioning in the community. Notwithstanding the possibility of many diverse models of marriage, from polygamy to faithful sexual companionship[93] to neomarriages with no financial rights of one on the other, the Jewish tradition chose the ho-hum model of monogamy with mutual consent or fault-based exit rights, and enacted strong decrees with weak foundations in technical Jewish law to mandate them. At present, one suspects that within the community of those who adhere to Jewish law, there are no polygamous marriages, no faithful companions, and no marriages without financial strings. All marriages are in this one model. The 2,500-year Jewish law experiment with diverse models of marriage has ended, and reached its zenith, in a boring conclusion—which returns to the model of Adam and Eve together in the garden with just the two of them building a family.

The lesson this long experiment has to teach American law seems clear. American law started at a point very different from Jewish law: it began with mandatory monogamy, which it derived from the canon law.[94] Even divorce has a weak foundation in the common law.[95] Over the last century, American law has moved to a sexually freer society, prepared to contemplate diverse models of marriage, from sexual companionship to polygamy

and beyond.[96] Indeed, Martha Albertson Fineman argues for an even bolder proposition—that it is marriage itself as a privileged legal institution that ought to be dissolved, and marriage ought to be an institution invisible to the law.[97] Such, she claims, will create robust, disparate models of marriage, crafted by the people in the marriages themselves and better serving the needs of the diverse community, which will order their marital relationships through their own contracts. The Jewish communities and the Jewish tradition, as this chapter has shown, had for many years exactly such diverse, robust models of marriage and nonmarital companionship. What the Jewish experiment with robust marriage models is implicitly saying about such proposals is maybe they are not such a wise idea, even if legally plausible.

NOTES

1. See, for example, Norman Lamm, *The Shema* (Philadelphia, 1998).

2. Lemech (Gen. 4:19–23), the first recorded polygamist, is the subject of a great deal of speculation. See note 6 for more on this.

3. Gen. 16:1–15.

4. Gen. 29:15–30. Laban's comment in Genesis 26:16 that the younger daughter cannot marry before the older one is to be understood as a threat. If Jacob refuses to stay married to Leah, he will not be able to marry Rachel. For more on this, see M. Broyde, *Marriage, Divorce, and the Abandoned Wife in Jewish Law: A Conceptual Approach to the Agunah Problems in America* (Hoboken, N.J., 2001). Appendix B deals with fraud and error in the creation of marriage.

5. In Hebrew, *tsarah*.

6. For an elaboration of the Lemech story and an explanation of it in rabbinics, see Genesis Rabbah 23 and Menaḥem Mendel Kasher, *Torah Shelemah* 1:334 (commenting on Gen. 4:19). From the verse itself, it appears that his first wife was infertile and only gave birth after the second wife. (The situation of Moshe's marital status [whether he was polygamous or not] is unclear; although Josephus insists that the Ethiopian woman is not Zipporah, his first wife, most Jewish commentators identify her as such.)

7. A small number of medieval commentators derive the monogamous ideal from the verse in Genesis 2:24; see *Ba`al ha-Turim* and *Ḥizquni* and the notes in *Torah Shelemah* Genesis 2:24. However, there is only one talmudic homily on the joys of monogamy; see note 13.

8. Jewish law, or halakhah, as used in this discussion, denotes the entire Jewish legal system, including public, private, and ritual law.

9. Deut. 21:15. The verses continue and direct that the inheritance may not be diverted from the child of the hated wife.

10. Deut. 17:17.

11. Lev. 18:18.

12. Exod. 21:11. This particular verse deals with a slave who is married by her master.

13. But see *Avot de-Rabbi Natan* (Proverbs of Rabbi Nathan) version 2, chap. 2:1 (page 5a in the standard pagination), which states, "Rabbi Judah ben Betera states: Job would observe to himself that . . . If it had been proper for the first Adam to be given ten wives, it would have been done. But it was proper to give him only one wife, and I too need but one wife." This is the sole rabbinic homily about the theological basis for monogamy.

14. See, for example, Abraham Naphtali Tzvi Roth, "The History of Polygamy among the Jews" *Meḥqarim be-ḥakhmat yisrael le-zichrono shel Prof. Y. M. Gutman* (Budapest, 1946), 114–36 (in Hebrew); and Aaron Pinchek, "Polygamy in the Sources," *Shanah be-shanah* (1973): 220–25.

15. Lev. 19:13.

16. Lesbian relationships, although less violative of Jewish law than homosexual ones, were prohibited. Maimonides maintained that such relationships were biblically prohibited (see his *Commentary to the Mishnah*, Sanhedrin 7:4), whereas others thought the prohibition to be rabbinic; see R. Joshua Falk Cohen, commenting on Tur, Even ha-`Ezer 20:2. For more on this, see Angela Riccetti, "A Break in the Path: Lesbian Relationships and Jewish Law" (M.A. thesis, Emory University, 2003), a version of which appears in this volume.

17. It represented a basic violation of the adultery commandment found in Exod. 20:13.

18. See J. David Bleich, "*Kiddushei Ta'ut*: Annulment as a Solution to the *Agunah* Problem," *Tradition: A Journal of Orthodox Jewish Thought*, Fall 1998, 90–128, text accompanying note 37ff. for more on this.

19. Denoted by the Hebrew word *qedeshah* or *zonah*. See Deut. 23:18 and Lev. 19:29.

20. For more on this dispute, see Getsel Ellinson, *Nisu'in she-lo ke-dat Mosheh ve-Yisrael* (Tel Aviv, 1975), 25–28. (In addition, Jewish law contained elaborate prohibitions against intermarriage, incest, and bestiality.)

21. The few exceptions to this include rape and levirate marriage (the marriage of a widow to her husband's brother when the first marriage produced no children; see Deut. 22:28–29, 25:5–9). In each case, the man has an obligation to marry, and only the woman may choose not to. In the second case, the woman who refuses must participate in a ceremony of refusal before judges known as *ḥalitsah* (levirate separation).

22. Suppose, for example, someone owns a painting that another likes. The fair market value of this painting is $100. For how much must this owner of the painting sell the painting to the one who wishes to buy it? The answer is that Jewish law does not provide a price. The seller need sell it only at a price at which he or she is comfortable selling it, and the buyer need buy it only at a price at which the buyer is comfortable buying it (so long as they are both aware of the fact that the fair market value is $100). The same is true for a marriage; neither party needs to consent to marriage unless he or she genuinely wishes to do so.

23. To elaborate on this: nearly every legal system posits that marriage, when leading to happiness by both parties, creates a strong marriage as a social fact. However,

the legal strength of marriage is best measured by looking at what happens when one party seeks to leave. Consider by analogy the fact that the common law essentially never allowed the parent–child relationship to be severed as a matter of law. That is our way of saying that this is a powerful legal relationship.

24. This proposition is spelled out and defended at some length in Broyde, *Marriage, Divorce.*

25. See text accompanying notes 2–14.

26. Deut. 24:1–4. Incidental mention of divorce is also found in Gen. 21:10, Lev. 21:7, 22:13.

27. There was a three-sided dispute as to when divorce was proper. The School of Shammai recounted divorce was only proper in cases of fault. The School of Hillel recounted that divorce was proper for any displeasing conduct, and Rabbi Akiba recounted that a man could divorce his wife simply because he wished to marry another and could not support both wives. See *Babylonian Talmud*, Gittin 90a–b. As always in Jewish law, the School of Shammai is rejected as incorrect.

28. The exception is the case that proves the rule. There are a small number of cases where marriage is not discretionary but ethically mandatory; see Deut. 22:19. These cases involve either fault or detrimental reliance by the other. In the case of seduction, the Bible mandates that the seducer is under a religious duty to marry the seduced, should she wish to marry him. That marriage does not require the same type of free will consent to marry, in that the religious and ethical component to the Jewish tradition directs the man to marry this woman; indeed, in certain circumstances he can be punished if he does not marry her. No divorce is permitted in such cases.

29. Irving Breitowitz, *Between Civil and Religious Law: The Plight of the Agunah in American Society* (Westport, Conn., 1993), 9.

30. This point is implicitly addressed in *Shulḥan `Arukh*, Even ha-`Ezer 117:11.

31. For a discussion of the various issues raised by this document in modern Jewish law, see Michael Broyde and Jonathan Reiss, "The Value and Significance of the *Ketubah*," *Journal of Halacha and Contemporary Society*, Spring 2004, 101–24.

32. *Ta`anat ba`inah ḥutra le-yadah;* see Yevamot 65b, *Shulḥan `Arukh*, Even ha-`Ezer 154:6–7; and Rabbi Yeḥiel Mikhel Epstein, *Arukh ha-Shulḥan*, Even ha-`Ezer 154:52–53.

33. Yevamot 65a; but see view of Rav Ammi.

34. Through a mechanism called *taqanta de-metivta*, whose exact workings are unclear. See Breitowitz, *Between Civil and Religious Law*, 50–53.

35. See Breitowitz, *Between Civil and Religious Law*, 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 *get*, based on the concept that "all Jews who marry do so with the consent of the Sages, and the Sages nullified the marriage." These situations all revolve around marriages under duress or other cases where one of the parties acted improperly.

36. There is considerable evidence that the era of the *geonim* was the only one in which the annulment process (mentioned in only a few cases in the Talmud, and always either preconsummation or involving bad faith marriages or divorces) was actually used with any consistency and scale by rabbinic authorities. Based on the

responsa literature (response to a question on a specific matter by a Jewish legal scholar), it appears that in cases where a divorce needed to be given by a husband who would not provide one, the *geonim* of that era annulled these marriages (under the *dina de-metivta* decree).

It cannot be emphasized enough that whether the *geonim* used this power or not, regardless of rubric, such annulments remain a dead letter in modern Jewish law. See Eliav Schochetman, "Annulment of Marriages," *Jewish Law Annual* 20 (5757): 349–97, for an extensive review of this issue. The broadest recasting of Jewish law favoring annulments can be found in Menachem Elon, *Jewish Law: History, Sources, and Principles* (Philadelphia, 1994), 641–42 and 856–77. Even Justice Elon concedes that in order even to contemplate the use of annulment, one needs a unified rabbinate, something that is far beyond the current contours of our community.

37. Maimonides disagreed with the *geonim* only as to a mechanism: he, and all the authorities who preceded him, ruled that annulments were not possible. Maimonides (Rambam) ruled that Jewish law did not possess any annulment power, but that the obligation on a husband to divorce his wife for fault included her assertion (even if unproven) that "he was repugnant to her." In such a circumstance, the husband must divorce his wife, and a Jewish law court should compel such a divorce under the threat of court sanction, including physical coercion, if the husband would not give the *get* of his own free will. Thus according to Maimonides, both husband and wife had a unilateral right to divorce, with no dower paid when the woman initiated divorce absent cause, and dower paid when the husband initiated divorce without cause. Marriages could still be polygamous. This is a no-fault divorce system and remains to this day the normative rule of law in only small portions of the Jewish community (such as Yemen). This model, like the model of the *geonim*, achieved equality between the husband and the wife by granting the woman the same right that the man had: the right to seek unilateral no-fault divorce.

38. This insight is generally ascribed to Rabbeinu Tam in his view of *ma'is `alai*. It flows logically from the view of Rabbeinu Gershom, who had to prohibit polygamy and coerced divorce, as well as divorce for easy fault, as Rambam's concept of repugnancy as a form of fault is the functional equivalent of no fault, identical in result to the *geonim*'s annulment procedure.

39. Absent the prohibition on polygamy, the decree restricting the right to divorce would not work, as the husband who could not divorce would simply remarry and abandon his first wife. This prevented such conduct.

40. R. Ḥayyim ben Isaac, *Responsa Maharaḥ Or Zaru`a* 126. In modern times this ruling resonates in the writings of Rabbi Joseph Elijah Henkin and Rabbi Moses Feinstein. Rabbi Henkin writes:

> If a husband and wife separate and he no longer desires to remain married to her and she desires to be divorced from him, in such a case divorce is a mitzvah [obligation] and commanded by Jewish law . . . One who withholds a Jewish divorce because he desires money for no just cause is a thief. Indeed, he is worse than a thief as his conduct violates a subprohibition *(abizrayu)* related to taking a human life.

Rabbi Joseph Elijah Henkin, *`Edut le-Yisrael* 143–44, reprinted in *Kol kitvei ha-Rav Henkin* 1:115a–b.

Rabbi Feinstein writes:

> In the matter of a man and a woman who, for these past years, have not had peace in the house . . . Since the *beit din* (Jewish law court) sees that it is impossible to make peace between them . . . it is compelling that they should be divorced, and it is prohibited for either side to withhold a *get*, not the man to chain the woman to the marriage or the woman to chain the man to the marriage, and certainly not over financial matters.

Rabbi Moses Feinstein, *Igrot Mosheh*, Yoreh De`ah 4:15.

41. *Shulḥan `Arukh*, Even ha-`Ezer 1:3–5 and 119:1–4.

42. One could switch spouses with some frequency.

43. Absent fault, there would be no divorce, as one spouse would refuse consent.

44. This rabbinic decree, however, does not render a second marriage invalid according to biblical law, and therefore if such a marriage does take place, it can be dissolved only by divorce. The criminal law of the state, however, renders it an offense on pain of imprisonment for a married person to contract another marriage without permission of a rabbinical court (Penal Law Amendment [Bigamy] Law, 5719/1959). Nevertheless, for Jewish citizens no offense is committed if permission to marry a second wife was given by a final judgment of a rabbinical court and approved by the two chief rabbis of Israel. The latter's approval is accepted as conclusive proof that the permission was given according to the law. Special provisions relating to the grant of this permission are laid down in the *Taqqanot ha-diyyun be-vattei ha-din ha-rabbaniyyim be-Yisrael*, 5720/1960. For more on this, see Elimelech Westreich, *Temurot be-ma`amad ha-ishah ba-mishpat ha-`ivri* (Exchanges on the [Jewish] Woman's Status in Israeli Law) (Jerusalem, 2002), which notes that there are some Sephardic (Oriental) decisors who do not accept this *taqqanah* in a small number of cases.

45. Why this is so will be discussed below.

46. Jewish law dictates that even in a marital relationship there be periods of abstinence followed by ritual immersion in a bath, called a *mikvah*. For more on this, see Norman Lamm, *A Hedge of Roses* (New York, 1974).

47. The Hebrew term *pilegesh* is generally translated as concubine, a term I decline to use, as in modern English it denotes some element of compulsion or slavery, which is completely lacking from the Jewish law use of the term. Instead, I use the term "sexual companion" or "faithful sexual companion," which is descriptive of what Jewish law mandated. The modern term "mistress" seems lacking; "lover" denotes too emotional a relationship. Perhaps "paramour" is a better term, although its modern connotation is illicit. The modern IRS acronym—POSSLQ, commonly pronounced poselqu, for people of the opposite sex sharing living quarters—might be close.

48. *Shulḥan `Arukh*, Even ha-`Ezer 26:1.

49. See *Sdei Ḥemed, Klalei Ha-Posqim: Rama*, 13.

50. See Gen. 25:1–6.

51. Gen. 35:22.

52. Judg. 8:31.

53. 2 Sam. 3:7.

54. 2 Sam. 15:16.

55. 1 Kings 11:3.

56. There are no cases of sexual companionship recorded in the Talmud involving talmudic sages.

57. *Mishneh Torah*, Laws of Kings 4:4. For an explanation of why the king is permitted to do something generally prohibited (in Jewish law, royalty was not generally exempt), see the view of Rabbi Meir Simḥah of Dvinsk, in note 82.

58. Rabbi Solomon ben Adret (Rashba), *Responsa of Rashba* 4:314.

59. This is so, even as Rabbi Karo incessantly emphasizes the procreative basis of marriage, to the exclusion of any other model. For more on this, see the conclusion.

60. Rabbi Meir Abulafia (Ramah), *Yad Ramah*, Sanhedrin 21a.

61. This criticism might parallel the Sunni/Shiite debate over temporary marriages, which perhaps Abulafia had encountered. For an example of this social phenomenon in modern times, see "Love Finds a Way in Iran: 'Temporary Marriage,'" *New York Times*, October 4, 2000, A3.

62. *Responsa ha-meyuḥeset le-Ramban* 284.

63. Rabbi Solomon Luria, *Yam Shel Shlomo*, Yevamot 2:11.

64. Rabbi Asher ben Yehiel (Rosh), *Responsa of Rosh* 32:13.

65. Rabbi Nissim Gerona (Ran), *Responsa of the Ran* 68.

66. *Rabad*, commenting on Ishut 1:4.

67. Quoted in *Rivash* 395 and 398.

68. *Radaq*, commenting on 2 Sam. 12:11.

69. See *Otsar ha-Posqim* commenting on 26:1.

70. Such as the lack of a need for divorce, the absence of financial connections, and the ability to marry one's companion's relatives after this relationship ends. Rabbi Jacob Emden, *Responsa She'elat Ya`avets* 2:15.

71. This refers to prostitution and intermarriage, as well as illicit sexuality within the marriage.

72. Some substantive Jewish law background might be needed to grasp the importance of this issue. All agree that a man is obligated to procreate, and (as explained earlier) promiscuous sexuality is prohibited. However, the question is whether marriage is the only manner of licit reproduction. If it is, then it must by definition become obligatory also and a mitzvah. If, on the other hand, there are alternative lawful ways to achieve the direction of Jewish law, then there is a much reduced claim that marriage is a religious obligation.

73. Another example of this is the view of *Mishpatim Yesharim* 2:170, who notes at the end of a responsa that "there is no prohibition at all" for sexual companionship.

74. *Otsar ha-Posqim* 26:1(5).

75. These are organized somewhat like Westlaw key headings.

76. Rabbi Abraham Bornstein (d. 1910), *Avnei Nezer*, Even ha-`Ezer 121, s.v. "36."

77. See, for example, J. David Bleich, "Can There Be a Marriage without Marriage?" *Tradition* 33, for example, no. 2 (1999): 39–49, commenting on a proposal such as noted in text accompanying note 80.

78. Breitowitz, *Between Civil and Religious Law*, 70.

79. In response to one such proposal I wrote the following:

> Consider the possibility. To solve a problem affecting a small number of marriages that end with very difficult divorces, one would propose that the very institution of marriage be abandoned. This type of parochial ethical microscope, focusing on just one aspect of a complex legal status (marriage) and evaluating every aspect of every proposal that affects marriage by the litmus test of what it does to *agunot* (end of marriage problem), is the type of thinking that has to be abandoned if there is to be any hope of significant progress in the area of Jewish end-of-marriage problems.

What I did not say is that such proposals clearly violate Jewish law. See Broyde, *Marriage, Divorce*, 63.

80. A minor girl who is betrothed by her mother, when her father is alive but not available.

81. Commentary of Rabbeinu Asher ben Yehiel (Rosh) to Kiddushin 2:8.

82. This is cited as one of two options in *Shulḥan `Arukh*, Even ha-`Ezer 37:14. Those who prohibit sexual companionship argue, in essence, that the prohibition of sexual companionship only applies when it is used as an affirmative rejection of the marriage doctrine—it is employed by a person who could get married but chooses not to. However, when it is employed by one who cannot marry, then the doctrine does not apply. Even that understanding notes that this is a weak doctrine.

This stands in sharp contrast to the approach taken by Rabbi Meir Simḥah of Dvinsk, who posits that sexual companionship is simply a form of promiscuity (as perhaps is the view of Maimonides). He posits that the only time sexual companionship is permitted is in situations where the sexual companionship cannot be ended. Thus the king may have a sexual companion, he posits in the name of Maimonides, precisely because the king's sexual companion may not be taken by another (except maybe the next king) and thus the fear of promiscuity is eliminated. See *Responsa Or Sameaḥ, Liqqutim* 10.

83. See text accompanying note 41.

84. *Jerusalem Talmud*, Sanhedrin 21:1. For more on this matter, see Ellinson, *Nisu'in she-lo ke-dat Mosheh ve-Yisrael*, 40–47.

85. Commenting on Even ha-`Ezer 26:1.

86. Normative Jewish law posits that fourteen different duties are regulated in the course of marriage. This stripped-down version has none—even the obligation of sexual fidelity imposes no positive obligation but only a negative one.

87. Indeed, polygamy as a marriage model creates a divorce model as well. Although our secular society is deeply uncomfortable noting this, divorce produces an enormous amount of societal turbulence for children and for the spouse (typically the wife) who did not seek divorce. Ultimately, granting the right to end a marriage whenever *either* spouse wishes to do so destabilized marriages. Polygamy was clearly patterned on an alternative solution to that problem.

88. Again, part of the thrust of this chapter is that the term "marriage" is too broad to be fairly used to describe all state-authorized coupling. Indeed, comparing

the weak private marriage and divorce of the Soviet Union in the 1920s, which allowed for postcard marriages and divorces, with the classical marriage theory of canon law, suggests that law ought to have two distinctly different terms for these institutions. (In the Soviet system, sending a postcard to the marriage bureau was enough to register a marriage, and one spouse mailing a postcard secured a divorce; see Michael J. Bazyler, "The Rights of Women in the Soviet Union," *Whittier Law Review* 9 (1987): 423–24. This stands in sharp contrast with the marriage theory advanced by Augustine: "the theory of the sacrament in marriage springs from the belief that marriage is an indissoluble compact. Once it has been formed, no one can dissolve it." Philip Lyndon Reynolds, *Marriage in the Western Church* (Leiden, N.Y., 2001), 308.

89. Or, to put it in a more modern form, Linda Waite and Maggie Gallagher are correct. Monogamy with mutual consent exit rights or faulted exit produces better results. See Linda Waite and Maggie Gallagher, *The Case for Marriage: Why Married People Are Happier, Healthier, and Better Off Financially* (New York, 2000).

90. There is no romantic notion of marriage in this less-than-ideal way to court!

91. A similar such dialogue appears in Even ha-`Ezer 1:8 about limiting the number of children born into a marriage:

> Karo: Even though one has fulfilled the obligation to procreate, one is prohibited to reside without a wife, and one must marry a woman of child rearing years, if one can afford to do so, even if one has several children already. . . . *Isserles: If one recognizes that one cannot have any more children, one should marry a woman who cannot have children. So too, one who has many children and is fearful that marrying a woman capable of having more children will lead to disputes between the children and his [new] wife, is permitted to marry a woman incapable of having more children, but it is prohibited to live without a wife because of this concern.*

Karo cannot contemplate the willful desire to cease having children. Isserles cannot contemplate being unmarried.

92. I would posit that the same basic motif is present with regard to sexual ethics within a marriage. Compare the views of Rabbi Karo with the views of Rabbi Isserles found in *Shulḥan `Arukh*, Even ha-`Ezer 25:2 and Oraḥ Ḥayyim 240:1.

Rabbi Karo states:

> Karo: One who is married should not spend more time [sexually] than proper with one's wife; rather one should have sexual relations in the frequency prescribed by Jewish law. . . . Everyone is obligated to have a sexual relationship with his wife returning from a ritual bath, and upon the husband's going on a journey, other than one obligated by Jewish law. So too, if one's wife is desirous of sexual relations, and dresses to indicate desire, one must live with her. Even when he is with her, he should not seek his own pleasure, but rather should act like one repaying a debt, since he is obligated to live with her, and to fulfill the obligations of the Creator to have children. . . . If he intends to have a sexual relationship so that he not be inclined to sin—*Isserles: That too is a proper activity*—it would be better if he conquered his desires. . . .

In Even ha-`Ezer 25:2 Rabbi Isserles responds:

> *A person may have sexual relations with his wife as they wish, live together when they wish, kiss wherever they wish, have sexual relations naturally or unnaturally, even mutual masturbation, so long as the man does not ejaculate other than during intercourse. There are those who are lenient even about this matter, and rule that unnatural intercourse is permitted even if the man ejaculates, and one engages in this conduct occasionally, and one does not grow used to it. Even though all of this is permitted, one who sanctifies himself with that which is permitted to him, is blessed.*

Again, Rabbi Isserles is advancing a model of marriage that provides value and benefit that is not grounded in reproduction, but rather pleasure and intimacy. Rabbi Karo sees no value in such; rather, sexuality is a marital obligation.

93. Not so faithful, of course, in that one could switch lovers every hundred days without a problem.

94. See Reynolds, *Marriage in the Western Church*, for more on this.

95. See John Witte, *From Sacrament to Contract: Marriage, Religion, and Law in the Western Tradition* (Louisville, Ky., 1997).

96. Indeed, the recent American Law Institute recommendation seeks to move American law precisely in the direction of Jewish law 1,300 years ago—with weak marriage doctrines, ready notions of faithful sexual companionship, easy divorce, and a diverse body of normative sexual relationships outside of the standard model of monogamy; see www.ali.org.

97. Martha Albertson Fineman, "Marriage and Meaning," in *For and Against Marriage: Strategies to Critique, Defend, Reform, and Appraise a Venerable Legal Category*, ed. Anita Bernstein (New York, 2005).