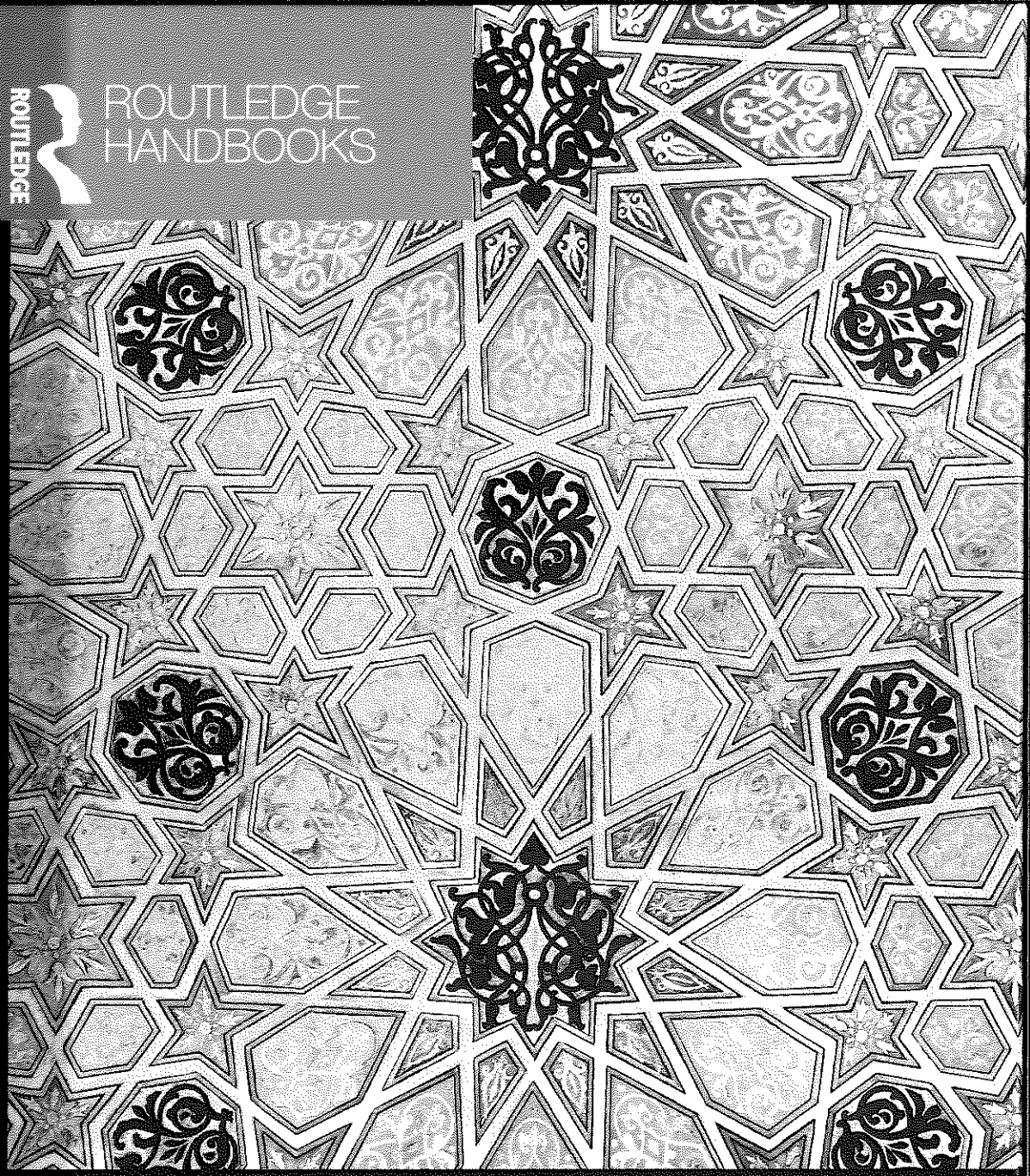
ROUTLEDGE HANDBOOKS



Routledge Handbook of Jewish Ritual and Practice

Edited by Oliver Leaman

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ACKNOWLEDGMENTS

Oliver Leaman

In the past when I have edited books such as this I have sought to establish a common system of transliteration and style. I have not done so with this book, since it seems to me that there are a variety of styles to be found in the literature, and readers might be better off seeing something of that variety here. I have of course sought to correct errors and done my best to produce a readable text, but readers will find varieties of spelling of Hebrew and other terms here. Readers will also find a wide variety of views and approaches, and that is all to the good in a book like this. The study of ritual and practice is often controversial and different authors have taken different approaches. Some are writing from a social scientific perspective, others more theologically or philosophically. Some have been rather combative in the presentation of their views, others more descriptive. This reproduces something of the variety of approaches and techniques that those writing in the field pursue. No author should be assumed to agree with what any other author has written, and there has been no attempt here at producing a party line.

I have encouraged authors to produce useful bibliographical information so that readers can follow up the accounts provided here with further study and inquiry. There are many issues in Islamic ritual and practice which have not been covered, to discuss everything is more a task for an encyclopedia than a handbook, but we have here what is, I hope, a reasonable survey of the area. Readers will find a variety of arguments, facts and assessments that present the topic in much of its richness and complexity.

I am grateful to the authors and the rest of my colleagues during the publishing process for their hard work on the project. 2020 was not the easiest year to work on such a project although, given the ways that religious ritual, like everything else, had to adapt and change, it did serve to focus minds on the topic rather more than is sometimes the case.

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INTRODUCTION

Oliver Leaman

One of the first concepts one thinks of when religion is mentioned is ritual. Religions not only use ritual as part of their activity but they often spend a good deal of time and space talking about it, insisting on it, defining it and challenging other rituals. Many religious spaces are based on ritual and would not exist in the form they do without it, or were it to be different. Differences between religious practitioners on the subject of ritual frequently result in violence, so important is the topic taken to be. The opposite is also true, people come together through ritual and it obviously plays a significant role in producing and cementing solidarity within what it comes to define as a community. This point should not be over-emphasized since societies can also welcome a variety of rituals, and this may occur within a religious group itself, where the concept of community is widened to take account of difference. Some believers may find this difficult to do, although they feel it is something they ought to make an effort to accomplish, and others impossible. This brings out something very important about ritual in religion, it is what philosophers sometimes call an essentially contested concept. How it is carried out within the religion is often a subject of debate and controversy, and whether it should be carried out at all is also an issue.

There has been a long and exciting debate in social science and religious studies about what ritual is and how it operates in religion and there is no intention here of establishing a party line for the volume and obliging all our authors to obey it. That would, in itself, be to try to establish a ritual and require practitioners to accept it. Readers should be aware that individual authors have their own views of the role of ritual in religion and they will discuss their particular topic on the basis of those views. That is entirely as it ought to be and in this way the variety of views on the topic are accurately reflected in the book. It is worth emphasizing here though that much more is involved when it comes to ritual than just description. Rituals are described but within that description values also appear. Rituals themselves embody values, and we all have opinions of how significant they are and where they should be taking us. Within religions themselves there are controversies about what the point of the ritual itself is, where it comes from and how rigorously it has to be stuck to. There are also personal reactions to ritual, and these of course are highly subjective and individual. We all have our own responses and attitudes to ritual in religion; there is a wide continuum of those who are intent on following every jot and tittle of the law, at one end, to those who do everything they can to break the law. Along the continuum there are those who are intent on adapting the religion to local conditions in a variety of ways,

while others are equally intent on avoiding all such suggestions. This is being written during the COVID-19 pandemic in 2020, and in the run up to Passover some advocated the use of modern technology such as computers and Zoom to broadcast the seder, so that those who would otherwise attend can still at least virtually participate. Yet this involves the use of electricity on a holiday when such a use is something that many Jews regard as legally unacceptable. It is worth mentioning here that were it not for the pandemic, those who are prepared to use electricity would not in many cases have tolerated its use. In exceptional conditions though, exceptional changes in ritual can be contemplated for some, not at all by others.

One can only imagine the flood of books and articles that will appear after the pandemic, if the pandemic actually ever ends or largely dissipates, on how ritual and practice has changed during its height. It is difficult to think of anything very new arising from these studies. There will be religious groups who adapt, some who do not, and some who do a little but less than other groups. There will be speculation on why these different reactions took place, and no doubt controversies will arise about different explanatory frameworks, and many of the studies will go into exhaustive detail on precisely what people did and why they said they did it. Even if the pandemic does not really end, the reactions of the religious communities will be studied and we will be told that they changed in particular ways during this period, or that they resisted change but nonetheless could not ignore it completely. Religion often portrays itself as being based on eternal truths, and will be shown to respond to transient emergencies, as though this is a novel finding and totally unexpected.

It is worth pointing out that there are, indeed, personal reactions to ritual, but there are also arguments that lead to different practitioners taking up different positions. Cynics might say that the use of arguments is no more objective than anything else since we can choose which arguments (and authorities) to accept and which to reject. For example, the *haredim* (often labelled Ultra-Orthodox) tend to be organized in different groups, each headed by a rabbi or groups of rabbis, and they tell their followers who is an authority on ritual. So the arguments they get to study are part of a circle of approved authorities, and although the details of each argument may exhibit some variety, the principles on which they rest will not. They will define the particular group and support that definition by the arguments that are studied within the group. This should not be pushed too far, since it often happens that someone in a group becomes aware of the deficiencies in the rational underpinning of the group and comes to challenge the group, or leave it. They may also stay within it and do what they are expected to do without having any real emotional or rational commitment to it, perhaps a description of the majority of people in such groups. They just do what they are expected to do or what they have been brought up to do and do not stand aside and consider whether they ought to carry on in that way. It is like speaking the language you were brought up in, it is just there and you operate with it. Those critical of religious ritual often point to how elaborate it can be and what a commitment of time and effort is involved. Of course, that provides a plausible motive for those carrying out those rituals to avoid seeing them critically. They are so busy acting they have little time to think about what they are doing and why.

It is the aim of these essays to describe, analyze and evaluate Jewish ritual and practice from a wide variety of often competing and contrasting points of view. The treatment is very far from exhaustive but indicates a range of intriguing ways of understanding religious life, along with those who live on the periphery of such a life. Both kinds of people are marked by their proximity or distance from religious ritual and practice, and they are given a voice in this volume.

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MODELS OF SEXUALITY (AND MARRIAGE) IN THE JEWISH TRADITION

Michael J. Broyde

Introduction

The Jewish tradition looks at its sexual law much like any standard religious or legal system does historically. Five common features are readily present within the classical Jewish legal tradition:

1. It prohibits incest.
2. It prohibits adultery.
3. It prohibits rape, and it prohibits marital rape – it does so much earlier than many other legal systems.
4. It recognizes that marriage serves both the purpose of companionship and reproduction.
5. Like other religious legal systems – and the common law – it prohibits bestiality, masturbation, and all other deviant sexual acts.

This chapter seeks to explain why the Jewish tradition until (relatively) recently did not mandate monogamy and comfortably endorsed non-marital sexuality. My argument will be counter-intuitive to some. After all, Jews, like Christians, start with the creation story of Adam and Eve as set out in Genesis 2. Among the many basic lessons taught by the creation story is that God took but one rib from Adam and created but one Eve, who then partnered with Adam to create all humans.

The text in Genesis 2:24 seems to be as clear a theological endorsement of monogamy as one can find: "Thus, a man leaves his father and mother, and clings to his wife, and the two become one flesh." This verse is not speaking to Adam or Eve but to biblical readers generally to give them a sense of the divine imprimatur of monogamous marriage.[1] God could have taken two ribs from Adam – one from each side – and created Eve and Vivian, and the biblical story would have a different flavor (and would be harder to teach to children!). People should, this verse tells us, leave their parents and marry a single spouse to whom they must cling.

While incidents of polygamy – marriage by one man to two or more women – do recur in later stories within Genesis, a clear theme remains in the first book of the Torah that monogamy ought to be the biblical ideal. Abraham becomes a polygamist only after his wife Sarah appears to be barren, and this brings trouble to his household.[2] Jacob is tricked into polygamy and told that he cannot marry his true love Rachel unless he keeps Leah as a wife also.[3] There is no case

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of non-monarchical polygamy in the biblical tradition other than in cases of infertility or fraud in the creation of the marriage. The biblical Hebrew word for a co-wife in a polygamous relationship, *tzrah*, means literally "trouble." This is certainly a stinging indictment of polygamy.

Why then is exclusive 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?[4] The answer is found in Jewish Law. The Bible itself – in the laws set out Exodus, Leviticus, and Deuteronomy – permits polygamy. And for the Jewish legal tradition, these explicit legal texts permitting polygamy supersede any inferences against polygamy that can be drawn from the stories found in Genesis. Consider the following verses from the biblical law:

> When a man has two wives, one beloved and one hated and both the loved and the hated wives both bear him children; however, the first born child is from the hated wife.[5]
>
> A king may not have too many wives, lest they lead his heart astray.[6]
>
> Do not marry a woman and then her sister to torment her as her rival.[7]
>
> If a man takes another wife, he may not diminish [this wife's] allowance, clothing or conjugal rights.[8]

Biblical Jewish Law permits polygamy, and Jewish Law thus permitted polygamy as well with little questioning.[9] There is almost nothing in the Talmudic literature that would cause one to question this.

While biblical law permits polygamy, it also prohibits various other sexual relationships and these prohibitions, too, entered Jewish Law. First, Jewish Law prohibits homosexual relationships based on a set of clear verses in Leviticus.[10] Second, Jewish Law prohibits polyandry –the marriage of one woman to multiple men – as a violation of the very nature of marriage which requires sexual exclusivity by the woman.[11] Third, Jewish Law prohibits sexual promiscuity. To most rabbis, random coupling without any ongoing relationship violated the biblical injunction against harlotry.[12] 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.[13] Three types of licit sexual association were left intact in the Hebrew Bible and in the Jewish legal tradition: (1) monogamous marriage; (2) polygamous marriage; and (3) non-marital but regular (rather than random) sexual companionship. These I shall take up in turn.

Sex and Marriage Laws

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, a person is under no ethical or religious duty to give that consent. Jewish Law allows a person to decline consent to marry for a number of reasons – for example, because the prospective spouse lacks financial resources or will not commit to a larger dowry or because the man or woman in question does not love the suitor, or loves someone else more. Marriage is a discretionary act in almost all cases. The more salient rules of marriage at Jewish Law are not the entrance rules, however, but the exit rules.[14] The Torah has only a few brief verses that incidentally mention divorce in the course of describing the remarriage of one's divorcee. Deuteronomy 24 states:

> When a man marries a woman and lives with her, and she does not find favor in his eyes, as he finds a sexual blemish on her part, and he gives her a bill of divorce, which he puts in her hand and sends her from the house. She leaves his house and goes to

> the house of another. However, if the second husband hates her and writes her a bill of divorce, gives it to her and sends her from the house, or the second husband dies, the first husband, who sent her out, cannot remarry her.[15]

Talmudic authorities took these verses to mean that the husband has a unilateral right to divorce his wife without fault, but the wife has no reciprocal right to divorce her husband except in cases of hard fault.[16] Exit from marriage was thus drastically different from entry into marriage. It did not require the consent of both parties. The marriage could end when the husband alone wished to end it. Marriage was imbalanced in other ways as well. 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 she had no clearly defined right of exit except on proof of her husband's serious fault.[17] Where the husband and wife no longer wished to live together, the husband could marry another and continue to support his first wife.

The Talmud mitigated these disparities between men and women by creating a minimum dower (*ketubah*) for all brides which was payable by the husband upon divorce. Payment of a minimum dower became, by rabbinic decree, a precondition to any marriage. A wife could, as a precondition to enter into marriage, insist on a dower higher than the minimum promulgated by the rabbis.[18] Thus, while the right to divorce remained unilateral with the husband with no right of consent by the wife, it was now restricted by a clear financial obligation imposed on the husband to compensate his wife if he exercised his right to engage in unilateral divorce absent judicially declared fault on her part. The Talmud even records views that if one cannot pay the financial obligation, then one is prohibited from being divorced.[19]

The Talmud also granted the wife the right to sue for divorce on proof of the husband's repugnancy, impotence, cruelty, and other grounds. In such a case, the husband was required to divorce his wife and often pay the dower too. The wife could divorce her husband who refused to have children by her,[20] and restrict his rights to divorce through a *ketubah* provision.[21] Soon after the close of the Talmudic period, the rabbis of that time (called *geonim*) greatly expanded the wife's right to sue for divorce. According to most opinions of the *geonim*, all the wife had to do was leave the household for a period of time, and she had an automatic right to divorce and claim at least a part of her dower.

These two changes in Talmudic law by the *geonim* were profound. These rabbis argued that marriage, like all partnerships, requires the perpetual consent of both parties to function properly. Thus, when either partner chooses to leave, the marriage should end. The *geonim* devised a mechanism to ensure that it did end – a form of annulment,[22] or coerced divorce that would be enforced even in the absence of proof of fault by the other party.[23] By the end of the *geonim* era (900 CE), the Jewish tradition had embraced a model of weak marriage which included few legal bonds that united the couple when love and friendship ended and gave either party a unilateral right to divorce.

Within two hundred years of the Jewish expulsion from Babylonia, the Jewish legal tradition largely spurned the *geonim*'s model of weak marriage in favor of three alternative models which came to exist concurrently.[24] The first was a model of strong marriage with limited and equal rights to divorce and no polygamy. This model came to prevail among European Jews led by Rabbenu Gershom. In Gershom's view, Jewish Law did not authorize the annulment of marriages. A better way to equalize the rights of the husband and wife to divorce was 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 of either party or mutual consent by both parties. Fault was vastly redefined to exclude cases of soft fault such as repugnancy and, in only a

few cases, could one spouse be forced to divorce the other.[25] And, as polygamy was prohibited, considerable pressure encouraged the man and woman in a troubled marriage to stay married. Absent fault, neither party could seek divorce without the consent of the other; unless divorce was in the best interest of both of them they would remain married.[26] Under this model, divorce became exceedingly rare.

A second model of slightly weaker marriage developed among other European Jews. Proponents of this model agreed that Jewish Law did not authorize the sweeping annulment power that the Babylonian rabbis had countenanced. They also agreed with Rabbenu Gershom that the best way to equalize the rights of husband and wife to divorce was to restrict the rights of the husband and prohibit unilateral no-fault divorce by either party. But these rabbis argued that desertion or abandonment was a proper ground for divorce. Thus, when the marital union had ceased to exist and the couple had de facto ended all marital relations, divorce could be compelled. Rabbenu Chaim Or Zarua was the authority who clearly elaborated on this approach.[27] Marriages, he said, could not be easily broken, but long-term abandonment was serious fault which entitled the abandoned party to sue for divorce.

A third model of weaker marriage emerged among Sefardi Jewry. This model effectively revived most of the Talmudic rules of divorce and polygamy. Proponents of this model, too, argued that Jewish Law did not authorize annulment. They also limited divorce to cases of hard fault – but only if the wife sued for divorce. Husbands could sue for divorce unilaterally and without proof of fault, provided they paid their dower. Under this model, a woman was expected to protect herself by insisting on her rights at the time of entry into marriage. If she wished to restrict her husband's entry and exit rights, she could do so by imposing a high dower payment. If she wished to curtail his right to take a second wife, she could insist on that right in the *ketubah*. She could use the waiver of her rights under the dower contract as an inducement to be given a unilateral divorce. In this model, marriage was a contractually regulated partnership, albeit one whose exit costs were contractually delineated but could be restricted.[28]

Even this brief historical summary of three thousand years of Jewish marriage and sex law underscores a few doctrines that are quite different from those that prevailed in the Christian West. First, in the Jewish tradition, marriage was never centrally constructed as monogamous, and monogamy was never constructed in its hard Catholic form of one husband with one wife for one lifetime. Second, divorce was always recognized as normative and permitted, albeit sometimes restricted, and mutual consent divorces were always permitted throughout Jewish history. Third, parties were free to construct the economic basis of their own marriage and could provide financial incentives to discourage or encourage divorce if they so wished. Fourth, Jewish Law maintained diverse models of divorce with no deep stigma associated with divorce.

Of course, this sexual diversity no longer exists. For the past two centuries, Jewish communities have slowly abandoned these early models. At a national rabbinic conference called in 1950 by the chief rabbis of Israel, Israeli Orthodox Jewry passed an enactment generally making monogamy and mutual consent divorce (with fault-based divorce possible) binding upon all Jews irrespective of their communal affiliations.[29] This decree reflected communal practices throughout Jewry with only very minor dissent from small Iranian Jewish communities. For the last fifty years, only one model of marriage is practiced among Jews, though a diversity of models and practices in marriage remains available in theory.[30]

Sexual Companionship and Jewish Law

Just as there were diverse models of marriage, there were diverse norms governing extramarital sexuality within the Jewish tradition. Consider the opening discussion in the classical sixteenth-century code of Jewish Law, *Shulchan Arukh*, in the section dealing with marriage law. Here, Rabbi Joseph Karo writes:

> 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 Jewish Law 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.[31] *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 *pelegesh* [faithful sexual companion][32] mentioned in the Bible. There are those who say that such conduct is prohibited, and one violated the biblical commandment of not bringing a prostitute into the community through such conduct and flogging is proper.[33]

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; the other permits non-marital sexuality so long as it is not furtive or embarrassing.

This diversity of opinion is reflected in other classical literature on Jewish views of extramarital sexuality. The Bible is replete with stories of extramarital sexual activity by Abraham,[34] Jacob,[35] Judge Gideon,[36] King Saul,[37] King David,[38] King Solomon,[39] and many others. The Talmud, too, is replete with discussions of sexual companionship devoid of any clear indication that such conduct is wrong.[40]

Four main views of extramarital sexual activity have emerged in Jewish Law based, in part, on these biblical and classical sources. One view is that of Maimonides: this view reads the Jewish Law prohibition against harlotry to prohibit virtually all non-marital sexual relationships. Maimonides does recognize the single right of a king to sexual companionship outside of marriage,[41] but this exception has also been read as a limitation on the conduct of others. A comparable view is taken by Rabbi Solomon Aderet and Rabbi Joseph Karo. They posit that open sexual companionship was permitted by the natural law and was practiced in pre-biblical times but was prohibited by operation of normative Jewish Law once the Torah was given.[42]

A second view is that earlier Jewish Law permitted sexual companionship relationships, but later rabbinical decrees prohibited them. This view is explicitly noted by Rabbi Meir Abulafiya who posits that sexual companionship outside of marriage is generally permitted by the Torah, so long as it is does not lead to promiscuity.[43] At the time of the Torah, marriage was an institution that allowed and enforced certain values of financial support, long-term sexual fidelity, and the like. The Torah, however, in Abulafiya's view, allowed one to opt for a sexual relationship without these values and guarantees. The rabbis of the Talmud sensed that this model of faithful

companionship was deeply unstable and easily led to promiscuity.[44] They thus prohibited even faithful sexual companionship as a necessary prophylactic rule against promiscuity.

A third view was adopted by Nachmanides, who saw no obligation either in the Torah nor the Talmud for parties to be married before entering a faithful sexual relationship. What was important was that the maternity and paternity of any children of such relationships be clearly established.[45] Nachmanides recognized the danger that such relationships might devolve into promiscuity. However, all he was prepared to do was to warn of the dangers but not prohibit the activity of extramarital sex. This was also the view of Rabbi Shlomo Luria, who refused to prohibit relationships of sexual companionship, although he thought them unwise.[46]

A fourth view was even more permissive. There is a clear tradition of authorities in the Jewish tradition who saw no problem with faithful sexual relationships outside of marriage. Consider, for example, a simple response of the Ran, Rabbi Nissim Gerona, who was a foremost authority of the fourteenth century. This question was before him: Does a woman who had been in a relationship of sexual companionship with one man, who now wished to marry another man, have to wait the 90 days mandated by Jewish Law for divorcees 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? Rabbenu Nissim responded:

> 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 matter 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.[47]

Similar such observations and even proposals to welcome sexual companionship are clearly stated by Rabbi Abraham ben David of Posquires,[48] Rabbi Chasdai ben Sholom,[49] Rabbi David Kimchi,[50] and many others.[51] A classical responsa written by Rabbi Jacob Emdem (1697–1776) lauded the advantages of sexual companionship for both men and women,[52] compared to the many disadvantages that flow from tight monogamy.[53] He seriously contemplated – and indeed came very close to advocating for – the return to sexual companionship as a norm within the Jewish tradition.

Nearly every classical recounting of Jewish views to sexual companionship notes these four views and weighs them with seriousness. Consider, for example, the modern encyclopedia of Jewish family law, entitled *Otzar Haposkim*. *Otzar Haposkim* is an incomplete recapping of Jewish family law started in 1950 and is currently still less than half-way done. 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.[54]

The subheadings of this section underscore this diversity of views:

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.

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.[55] This view is also taken by Rabbi Elijah of Vilna (Gra) in his commentary on the code of Jewish Law.[56] If this view is correct, it presents yet another model of marriage: the minimal marriage. All that is pledged in such a marriage is sexual fidelity by the woman and nothing else. There is no obligation to supply mutual support, conjugal relations, nurture, clothing, or any other normal marital obligation.[57]

Just as Jewish Law had diverse and weak doctrines of marriage, so too, it had diverse doctrines of extramarital sexuality. All authorities agreed that prostitution is prohibited. But a number of authorities posit that various types of sexual companionship outside of the framework of marriage are permissible.

Final Thoughts on the Development of Jewish Marital Ethics and Jewish Sexual Ethics

This chapter has documented two features of the Jewish tradition that are rarely discussed today among conservative religious commentators. First, monogamy is by no means the only model of marriage 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.[58] Several other models of marriage and divorce found a place in the Jewish tradition – ranging from polygamous, unilateral no-fault marriages to monogamous, hard-fault marriages with many types in between. Indeed, given their diversity, one is hard pressed to define any real historical model of Jewish "marriage and sexuality" as normative. Second, while the Jewish tradition did not countenance promiscuity or prostitution, it did countenance and protect faithful sexual companionship outside and alongside of marriage – ranging from simple companionate cohabitation without contemplation of marriage to a type of "minimal marriage" that demanded sexual fidelity of the couple to each other but little else.

Today, neither polygamy nor sexual companionship nor unilateral, no-fault divorce are permitted within the Jewish community. Monogamous marriage is now the norm, sexual companionship outside of marriage is prohibited, and divorce is allowed only on grounds of mutual consent or provable hard fault. This has become the norm everywhere.

I would like to consider why there has been this practical narrowing of options by examining a set of basic texts in Jewish marriage and divorce law from *Shulchan Arukh, Even Haezer*,

which is the basic code of Jewish family law. The answer that I posit is that Jews found monogamous marriage with only mutual consent exit rights (or faulted exit) to be a very successful system that provides a stable platform for marital happiness, social growth, child development, and economic enhancement.[59] Jewish Law did not mandate this result; Jewish experience did.

As background for this examination, one needs to know that the *Shulchan Arukh* is a law code with two authors. The first is Rabbi Josef Karo (1488–1575) who lived in Tzefat, Israel and was a Sefardi Jewish Law scholar, a follower of the Maimonidean tradition. The second was Rabbi Moses Isserles (1530–1572) who lived in Cracow 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 while citing opinions and traditions left out by Rabbi Karo. It remains to this day the normative work of Jewish Law.

The first source is the opening discussion of marriage, found in *Shulchan Arukh, Even Haezer* 1:1, which states:

KARO: Every man must marry a woman in order to reproduce. Anyone who is not having children is, as if, they are killers, reducers of the place of people on this earth, and causing God 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 it states "one who finds a wife finds goodness, and seeks the will of God." Proverbs 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, it is needed and necessary to have children, which is an obligation according to Jewish Law. Rabbi Isserles, who has the doctrine of faithful sexual companion 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 exchange takes place two short paragraphs later, in *Even Haezer* 1:3, which states:

KARO: There is a duty upon every person to marry a woman when he is 18; one who marries earlier until the age of 13, has done a good deed, and before the age of 13, it is like promiscuity. Under no circumstances should a person wait past the age of 20 to marry. One who passes 20 years 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 have children, and comes to marry a woman who cannot have children, such as a sterile, or an elderly woman or a minor, since he loves her, or because she is wealthy; even if, according to Jewish law we should have protested this marriage, we have a custom going back for many generations, not to examine matters of marriage. 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 marriage, except that one may not marry one who is forbidden to have a sexual relationship with [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. Rabbi Isserles, as a proponent of the legal

possibility of faithful sexual companionship outside of marriage, posits that marriages must 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 those for love or money. Marriage has values beyond reproduction that need to be considered according to this view. 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.

The same can be said with regard to divergent views of polygamy. Consider the basic exchange in the *Shulchan Arukh* with regard to polygamy. *Shulchan Arukh* 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 normally, 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 the relationship, polygamy is far from the ideal. Even as the Jewish tradition permitted polygamy, it did not treat such relationships as ideal; recall that the Hebrew word used to denote the co-wife was literally "trouble."

The same form of exchange occurs in the context of divorce in the *Shulchan Aruch* 1:8–10:

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, all is permitted.

KARO: A man may divorce his wife without her consent.

ISSERLES: All of this is according to technical Jewish law, but Rabbenu 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, 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 has little value other than its reproductive value. Rabbi Isserles contemplates the central mutuality of marriage to make the parties happy, and when they are both unhappy, divorce is proper and normal. Just as he defends marriage as a source of happiness, Rabbi Isserles defends 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 also.

Unsurprisingly, this dispute becomes central to the question of marital sexuality as well. In *Shulchan Arukh, Even Haezer* 25:2, Rabbis Karo and Isserles have an important colloquy on sexuality within a marriage. This discussion focuses on how people should conduct themselves during marital sexuality:

KARO: One should not act in a light-headed manner with one's wife nor degrade one's speech with words of vanity, even privately. For scripture says, "[God] declares unto a person what is his [conversation]" (Amos 4:13). The sages of blessed memory taught: Even for the light conversation between husband and wife one will ultimately be held accountable. One should not converse with his wife during intercourse nor prior to it, in order that one's mind not wander to another woman, and if one conversed then immediately had marital relations, about this it is said, "[God] declares unto a person what is his [conversation]." But matters of marital relations one may discuss, in order to increase one's desire, or in order to calm and appease one's spouse if they had been quarreling. One should not be engaged in marital relations with such frequency that they are involved constantly, as this is degenerate, vulgar behavior. Rather, one should minimize intercourse as much as possible, so long as one does not neglect the conjugal obligations entirely without the consent of one's wife. Even when copulating to fulfill the conjugal obligations one should intend not for one's own pleasure, but as one repaying an obligation, as one is obligated in regular conjugal rights, and [with the intent] to fulfill the obligation from one's Creator to procreate, and that one have children who are involved in Torah and fulfill mitzvot among the Jewish people. One should only engage in intercourse with the consent of one's wife; if she is unwilling, one must sooth her until she is willing. One should behave very modestly during intercourse and not engage in relations in front of any type of person, even a minor, except for a baby who is unable to speak.

Rabbi Isserles writes a note between the sentence ending with the word "quarreling" and beginning with the word "One":

RAMA: *Couples may do privately as they please: have relations whenever they please, kiss any part of the body they please, and have ordinary and non-ordinary intercourse, even manual stimulation – only that they may not release semen in a non-procreative manner. Some are lenient and allow non-ordinary intercourse even if it leads to the release of semen in a non-procreative manner, provided that it not be done regularly [as a manner of birth-control]. And even though all these manners are permissible, anyone who sanctifies oneself with that which is absolutely permissible is considered holy.*

A close read of the note is clear: recreational – and not reproductive – sexuality is being defended within the Jewish rabbinic tradition. "The life of the law is not logic, but experience," Oliver Wendell Holmes, Jr. reminds us.[60] Jewish experience has concluded that monogamy with mutual consent or fault-based exit rights works and so does robust sexuality within a marriage. Jewish Law did not (and still has not) really reached that conclusion. Jewish life did.

Concluding Lessons

Jewish Law on sexuality is broader than traditional Jewish life in the year 2021. The faithful who obey Jewish Law see only monogamy and sexuality within marriage even as the texts aver to a variety of additional possibilities. It should be interesting to the modern mind to see that the Jewish tradition eventually settled on monogamy as the only model of sexuality or marriage that worked. The Jewish tradition has experimented with multiple models of sexuality and

marriage – from polygamy, to faithful sexual companionship, to minimal marriages with no financial rights of one to the other, and to hard monogamy. Yet, the Jewish tradition ultimately chose the ho-hum model of monogamous sexuality.

Notes

1 Lemech is the first-recorded polygamist and is the subject of a great deal of speculation. Genesis 4:19–23.
2 Genesis 16:1–15.
3 Genesis 29:15–30. See more in my book, *Marriage, Divorce and the Abandoned Wife in Jewish Law: A Conceptual Approach to the Agunah Problems in America* (New York: Ktav, 2001), Appendix A on fraud in the creation of marriage.
4 A small number of medieval commentators derive the monogamous ideal from the verse in Genesis 2:24; see *Bal haTurim* and *Chizkuni* on it, and the notes in *Torah Shelama*, Genesis 2:24. However, there is only one Talmudic homily on the joys of monogamy; see note 9.
5 Deuteronomy 21:15. The verses continue and direct that the inheritance may not be diverted from the child of the hated wife.
6 Deuteronomy 17:17.
7 Leviticus 18:18.
8 Exodus 21:11. This particular verse deals with a slave who is then married by her master.
9 But see Avot Derabbai *Natan* (Proverbs of Rabbi Nathan) version 2, Chapter 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. See, for example, Abraham Naphtali Tzvi Roth, *The History of Polygamy Among the Jews* (Hebrew) *Mechakrim Bechachmat Yisrael Kezichrono shel Y.M Gutman*, 114–36 (Budapest: JTS, 1946) and Aaron Pinchek, *Polygamy in the Sources, Shanah Beshanah*, 320–358 (Jerusalem: Keren Kayamet Leyisrael, 1973).
10 Leviticus 19:13. Lesbian relationships were less violative of Jewish Law than male male homosexual ones, but were still prohibited. Maimonides maintained that such relationships were biblically prohibited. See *Commentary to Mishna Sanhedrin* 7:4. Whereas others thought the prohibition to be rabbinic. See R. Joshua Falk Cohen, commenting on *Tur, Even Haezer* 20:2. For more on this, see Angela Riccetti, "Lesbians and Jewish Law" (unpublished MA dissertation, Emory University).
11 See J. David Bleich, "*Annulment*," *Tradition* 33:1 (Fall 1998).
12 Denoted by the Hebrew word *kedasha* or the Hebrew word *zona*. See Deuteronomy 23:18 and Leviticus 19:29.
13 For more on this dispute, see Getsel Ellinson, *Nesuin Shelo Kedat Moshe Ve'Yisrael* (Jerusalem: Mossad Harav, 1973), 25–8. In addition, Jewish Law contained elaborate prohibitions against intermarriage, but these are different in type from our chapter, and thus are not discussed.
14 This proposition is spelled out and defended in some length in my book, *Marriage, Divorce and the Abandoned Wife in Jewish Law*.
15 Deuteronomy 24:1–4. Incidental mention of divorce is also found in Genesis 21:10, Leviticus 21:7, and Leviticus 22:13.
16 There was a three-sided dispute as to when divorce was proper. The School of *Shamai* recounted divorce was only proper in cases of fault. The school of *Hillel* recounted that divorce was proper for any displeasing conduct. Rabbi Akiva recounted that a man could divorce his wife simply because he wished to marry another and could not support both wives. See Talmud, Gitten 90a–b. As is always the rule in Jewish Law, the school of *Shamai* is rejected as incorrect.
17 Irving Breitowitz, *Between Civil and Religious Law: The Plight of the Agunah in American Society* (New York: Greenwood Press, 1993), 9.
18 For a discussion of the various issues raised by this document in modern Jewish Law, see Michael Broyde and Jonathan Reiss, "The Ketubah in America: Its Value in Dollars, its Significance in *Halacha* and its Enforceability in Secular Law," *Journal of Halacha and Contemporary Society* 47 (2004), 101–24.
19 This point is implicitly addressed in *Shulchan Aruch, Even Haezer* 117:11.
20 *Ta'anat b'eyna hutra l'yada*, see Yevamot 64a, *Shulchan Aruch, Even Haezer* 154:6–7, and *Aruch HaShulchan, Even Haezer* 154:52–53.

21 Yevamot 65a, but see also the view of Rav Ammi.

22 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.

23 There is considerable evidence that the era of the *geonim* was the only one in which the annulment process (mentioned in very few cases in the Talmud and always either pre-consummation or involving bad faith marriages or divorces) was actually used with any consistency and scale by rabbinic authorities. Based on considerable evidence from the responsa literature, 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: 349–97 (5757), 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: Jewish Publication Society, 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.

24 Only Maimonides maintained a form of this model, though even he denied any element of involuntary annulment. To Maimonides, marriage was a partnership; when either party wanted out, Jewish Law should allow him or her to leave. Maimonides disagreed with the *geonim* only as to the 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 upon 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 to the woman the same right that the man had: the right to seek unilateral no-fault divorce.

25 This insight is generally ascribed to Rabbenu Tam in his view of *meus alay*. In fact, it flows logically from the view of Rabbenu Gershom, who not only had to prohibit polygamy and coerced divorce, but 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.

26 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 that conduct.

27 Rabbi Chaim Or Zarua, *Teshuva* 126. In modern times, this ruling resonates in the writings of Rabbi Yosef Eliyahu Henkin. 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 sub-prohibition (*abizrayu*) related to taking a human life.
>
> *Rabbi Joseph Elijah Henkin*, Adut le-Yisrael *143–44, reprinted in* Kol Kitvei ha-Rav Henkin *1:115a–b and Rabbi Moshe Feinstein*

Rabbi Feinstein writes:

> In the matter of a man and a woman who, for these past years, has not had peace in the house ... Since the *beit din* 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 Moshe Feinstein*, Iggrot Moshe, *YD 4:15*

28 *Shulchan Aruch* 1:3–5 and 119:1–4.
29 This rabbinic decree, however, does not render a second marriage invalid according to biblical law; 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 *Takkanot ha-Diyyun be-Vattei ha-Din ha-Rabbaniyyim be-Yisrael*, 5720–1960. For the full text of this law, see Menachem Elon *Ha-Mishpat Ha-Ivri*, 1: 554–55 (Jerusalem: Magnes Press, 1988).
30 *Even Haezer* 26:1 (which is the first paragraph addressing marriage law). Why this is so will be discussed in the final sections.
31 Jewish Law dictates that, even in a marital relationship, there be periods of abstinence followed by ritual immersion in a bath, called a *mikva*. For more on this, see Norman Lamm, *A Hedge of Roses* (New York, 1974).
32 The Hebrew term *pelegesh* is generally translated as concubine, a term that I have declined to use, as the word "concubine" in modern English denotes some element of compulsion or slavery, and such elements are 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 and "lover" denotes too emotional a relationship. Perhaps "paramour" is a better term, although its modern connotation is illicit. The modern IRS acronym, which is POSSLQ, – for "People of the Opposite Sex Sharing Living Quarters," – might be close also.
33 *Shulchan Aruch* EH 26:1 (emphasis added).
34 Genesis 25:1–6.
35 Genesis 35:22.
36 Judges 8:31.
37 2 Samuel 3:7.
38 2 Samuel 15:16.
39 1 Kings 11:3.
40 Although there are no cases of sexual companionship recorded in the Talmud involving Talmudic sages.
41 Laws of Kings 4:4.
42 *Rashba* 4:314. This is so, even as Rabbi Karo incessantly emphasizes the procreative basis of marriage, to the exclusion of any other model.
43 *Yad Ramah*, Sanhedrin 21a.
44 This criticism might parallel the Sunni/Shiite debate over temporary marriages which, perhaps, Abulafiya had encountered. For an example of this social phenomenon in modern times, see "Love Finds a Way in Iran: 'Temporary Marriage'," *The New York Times* (October 4, 2000), A3.
45 *Responsa Hameyucheset leRamban* 284.
46 *Yam Shel Shlomo Yevamot* 2:11.
47 *Responsa of the Ran* 68.
48 *RaVaD*, Commenting on *Ishut* 1:4
49 Quoted in *Rivash* 395 and 398.
50 Radak Samuel 2:12:11.
51 *See Otzar Haposkim* commentary on 26:1.
52 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 the current relationship ends.
53 Prostitution and intermarriage as well as illicit sexuality within the marriage.
54 *Otzar Hapsokim* 26:1(5).
55 Jerusalem Talmud, *Sanhedren* 21:1. For more on this matter, *see* Getsel Ellinson, *Nisuin shel kedat Moshe Veysirael*, 40–47.
56 Commenting on *Even Haezer* 26:1.
57 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.
58 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 social and societal

turbulence for children and for the spouse (typically the wife) who did not seek divorce. Granting the right to end a marriage whenever either spouse wishes de-stabilized marriages. Polygamy was patterned on an alternative solution to that problem.

59 Or, to put it in a more modern form, Linda Waite and Maggie Gallagher are correct. Linda Waite and Maggie Gallagher *The Case for Marriage: Why Married People Are Happier, Healthier and Better Off Financially* (New York: Doubleday, 2000).

60 Holmes, Oliver Wendell Jr. *The Common Law*. Vol. I. (Boston, MA: Little, Brown and Company, 1881).

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