

Section 18

Marriage

The Torah presents marriage as a consequence of Eve's creation: "therefore a man leaves his father and his mother and clings to his wife and they become one flesh" (Genesis 2:24). Not surprisingly then, the Karaite Sages held that matrimony's legal foundations long predated the Torah and are as a result not elaborated upon by Scripture. Instead, these foundations are known through *sevel hayerusha* and confirmed by Scriptural references.

The topics I will cover in this section are:

1. Engagement (*erusin*) and Marriage (*nisuin*)
2. Requirements For Engagement
3. The Marriage Ceremony
4. Invalid Engagements
5. Obligations Of A Man To His Wife
6. Obligations Of A Woman To Her Husband
7. Divorce
8. Yibbum
9. Forbidden Sexual Acts

"The central purpose of [marriage] is the protection of the human race. This is [accomplished through] giving [man] a special woman sanctified to him from among all other people, permitted to him but forbidden to all others, in order to identify and make known his children to him so that he will show compassion to them and care for them in all their needs until they grow, as it is written 'as a man shows compassion to his children'¹ " -Adderet Eliyahu's Introduction to Seder Nashim

§18.1 Engagement (*Erusin*) vs. Marriage (*Nisuin*)

Halakha recognizes engagement (*erusin*) and marriage (*nisuin*) as separate acts. An engaged woman may not perform sexual acts with or become engaged to any man other than her fiancé. *Erusin* thus forbids a woman to everyone but her fiancé. *Nisuin*, for its part, permits a woman to have relations with her husband. *Nisuin* is performed after *erusin*.

For legal purposes, *erusin* is similar to *nisuin*. Dissolving engagement requires the same divorce procedure as used in dissolving marriage. Performing sexual acts with a woman who is engaged to someone else is considered adultery. Furthermore, despite the fact that only *nisuin* may permit a woman to her fiancé, a man is not liable for seducing a woman with whom he has only performed *erusin*. This is contrary to the liability a man faces for seducing an unengaged virgin (Exodus 22:15-16). That being said, the implications of *erusin* are not identical to *nisuin* in all respects. For example, the laws governing how a man should act towards his wife and vice versa apply only after *nisuin*.

¹ Psalms 103:13

The fundamentals of *erusin* and *nisuin* were established in pre-Sinaitic times; thus, the Torah does not elaborate on these laws. Rather, they are known to us through *sevel hayerusha*. Nevertheless, and as described below, the Sages drew on Scriptural references to confirm the accuracy of this tradition. The references in the Torah also serve to demonstrate that the pre-Sinaitic definitions of *erusin* and *nisuin* and the laws regarding said concepts are considered authoritative and binding by the Torah.

Notes on §18.1:

Nisuin (i.e., marriage) was once commonly performed days, months, or years after *erusin* (i.e., engagement). Today, however, one almost always performs *nisuin* immediately after *erusin*. Both acts are generally performed during what is colloquially referred to as the “wedding ceremony.”

§18.2 Requirements for Engagement

§18.2a The Three Requirements

Three acts must be performed in order for a woman to become engaged to a valid partner². In the Sages’ parlance, the three acts necessary for engagement are referred to as:

1. *Mohar*: the payment of the bride price.
2. *Ketav*: the signing of the engagement contract.
3. *Bi’a*: consent.

These three acts must be performed in front of ten honorable men as is evidenced by Boaz gathering “ten men from the elders of the city” (Ruth 4:2) to marry Ruth. These men serve as witnesses to the engagement. At this gathering, the man-to-be-engaged swears an oath declaring his engagement. Although the oath is not strictly necessary, it is used to emphasize the gravitas of the engagement. Both the man and the woman may appoint emissaries to represent them at the ceremony, although it is preferable for both to be present.

The performance of all three of these acts between valid partners in front of ten honorable men is necessary and sufficient for engagement. The Rabbanites use the same three terms but require that only one of these acts must be performed. Furthermore, *bi’a* in Rabbanite parlance refers to intercourse - not to consent (although Rabbanites still require consent). Despite using identical terminology, the Rabbanites differed from the Karaites with regards to the details of the bride price and engagement contract.

Notes on §18.2a:

Adderet Eliyahu stresses the importance of gathering ten honorable men. According to *Adderet Eliyahu*, these men also function as witnesses. In general, however, only two proper witnesses are required. *Adderet Eliyahu* is therefore unclear as to whether gathering ten men is strictly necessary for engagement or simply preferred. *Adderet Eliyahu*’s wording also leaves unclear the status of women as valid witnesses of engagement. According to the Sages (including Rav Bashyatzi), women are generally considered valid witnesses (§2.6b). Whether Rav

² The invalidity of certain partners is discussed in §18.4

Bashyatzi holds them to be valid witnesses for the purpose of engagement, however, is unclear given *Adderet Eliyahu's* emphasis on gathering “ten honorable men”.

Rav Aharon's *Gan Eden* rules more clearly on these issues. Rav Aharon states that the criteria governing who may serve as witnesses for engagement are the same as the criteria that generally govern witnesses³. (See §2.6b) According to *Gan Eden*, Boaz's gathering of ten men is merely one possible application of the general laws of witnesses - as is evidenced by Boaz's statement to these men: “...you are witnesses this day” (Ruth 4:9)⁴.

At Karaite weddings today, ten witnesses generally sign the engagement and marriage documents. Furthermore, the community today affirms that both men and women may be valid witnesses, as long as they are Jewish. This affirmation is not merely theoretical; in practice, female witnesses frequently sign engagement and marriage documents.

§18.2b The Mohar

There are two kinds of *moharim*: (i) the early *mohar*, and (ii) the late *mohar*.

The early *mohar* is necessary for *erusin*; and the late *mohar*, for *nisuin*. The early *mohar* functions as a bride price, validating the contract of *erusin*. By contrast, the late *mohar* functions as a “security” for the bride. A bride receives access to her late *mohar* upon divorce or her husband's death. As a result, if she had been financially reliant on her husband, she could use the late *mohar* to relieve financial burdens once widowed or divorced. Additionally, the late *mohar* discourages a woman's husband from casually seeking divorce. Even though a woman receives her late *mohar* upon the divorce or death of her spouse, the late *mohar* is affirmed during *nisuin*.

Although both the early and late *mohar* are known to us through *sevel hayerusha*, references in Scripture confirm their validity. The early *mohar* is referred to in the verse: “...he shall pay an amount equal to the *mohar* of virgins” (Exodus 22:16)⁵. By contrast, the late *mohar* is mentioned in the case of a man taking his maidservant and then divorcing her. The maidservant is to leave her former husband's (*i.e.*, master's) house “without payment; there is no money” (Exodus 21:11). The “payment” and “money” refer to the late *mohar*. In other words, the verse informs us that in the case of a divorced maidservant, no late *mohar* is given - implying that late *mohar* was known to ancient Israel and was generally given.

The early *mohar* is paid by the groom directly to the engaged woman if she is of age. If she is a minor, however, the early *mohar* is paid to her father. Upon *nisuin*, which may only occur once the woman is of age, the woman's father must then gift his daughter with goods or cash equivalent to her early *mohar*.

The late *mohar* is always directly given to the divorced woman or widow. This is because the late *mohar* is established at *nisuin* and only adults undergo *nisuin*.

³ *Gan Eden* Seder Nashim Ch. 5 Daf 144B Col 2

⁴ *Gan Eden* Seder Nashim Ch. 5 Daf 144B Col 2

⁵ That is to say: Scripture assumes the existence of a concept called the “*mohar* of virgins”. This concept was known to ancient Israelites, and, for that reason, it was not expounded upon within Scripture itself.

The Sages disagreed regarding the proper monetary value of the early *mohar* and the late *mohar*. I do not discuss these details here.

§18.2c *Ketav*

The *ketav* (“writ”) refers to the document confirming *erusin*. This document is to be signed by ten respected men as is evidenced by Boaz gathering ten men to marry Ruth (Ruth 4:2). Some communities include a record of the early *mohar* in the *ketav*.

Another *ketav* is signed by ten men upon *nisuin*. This second *ketav* is required only for *nisuin* and confirms the marriage of two parties as opposed to their engagement. It is this second *ketav* that is often called the “*ketubah*.”

Notes on §18.2c:

The *Notes on §18.2a* discuss whether at a minimum “ten respected men” or “two witnesses” are required. This discussion is also applicable here. In any case, the Karaite practice is to use ten witnesses whenever possible.

Karaite marriage documents found in the Cairo Geniza reveal that Karaite *ketubot* (*i.e.*, marriage contracts) generally included several witness signatories.⁶

§18.2d *Bi'a*

In the parlance of the Sages, *bi'a* refers to consent⁷. The groom must give consent to any engagement. In order for him to do so, he must be an adult. When the potential bride is an adult, the Sages disagreed, however, as to who else must give consent other than the groom. Some Sages held that only the bride’s father must give consent. Others held that both the father and his daughter must give consent.⁸ The Rabbanite Sages, meanwhile, held that only the daughter must give consent.

Adderet Eliyahu concludes that both the bride and her father must give consent. To prove this point, the *Adderet* first disproves the Rabbanite position that only the daughter’s consent is required. In support of this disproof, Rav Bashyatzi notes that Rachel and Jacob waited to obtain the consent of Lavan’s (Rachel’s father), even though Rachel and Jacob each wished to marry the other. Additionally, in the case of a seduced woman who willingly sleeps with a man, the Torah explicitly requires her father’s consent before marriage (Exodus 22:16). Finally, the Torah provides that a man may annul his daughter’s vows (Numbers 30:6); therefore, he may similarly veto his daughter’s choice of fiancé. Although one might respond by saying that only the daughter’s consent is required because Rebecca was asked if she wanted to go to Canaan to marry Jacob (Genesis 24:57-58), Rebecca’s father, Bethuel, had previously given his consent to the engagement (Genesis 24:52).

⁶ See *Karaite Marriage Documents from the Cairo Geniza*, Dr. Judith Olszowy-Schlanger, p. 261.

⁷ The Rabbanites use the term *bi'a* to refer to intercourse (although Rabbanites still require consent).

⁸ According to Dr. Olszowy-Schlanger, the 10th Century Karaite Sage Rav Ya’akov al-Kirkisani believed that the consent of the bride’s father and of her mother were necessary to contract the marriage. See *Karaite Marriage Documents from the Cairo Geniza*, Dr. Judith Olszowy-Schlanger, p. 207 (citing *Kitab al-Anwar*, VI 69: 5).

Adderet Eliyahu also refutes the position that only the bride's father must consent to the engagement. Just as a woman must speak a vow in order for her vow to hold (although her father may annul it), so too must a woman consent to an engagement (even though her father's consent is also required). One might argue that a woman's consent is not necessary because no mention is made of Caleb's daughter's consent when Caleb offers her as a wife: "...he that strikes *Kiriat-Sefer* and takes it, to him I will give my daughter, Achsah, as a wife" (Joshua 15:16). Yet, it is conceivable that Achsah had agreed to this arrangement.

There are exceptions to the rule that both a woman and her father must consent to an engagement. First, if an adult woman has no living or known father she may give consent on her own. Second, if an adult woman is a divorcee or a widow, she may consent on her own. This is just as a father is powerless to annul his daughter's vows if she is divorced or widowed (Numbers 30:10). Third, engagement to a minor with a known living father requires only the father's consent. As much is clear because a man may sell his daughter as a maidservant (Exodus 21:7). Finally, engagement to a minor without a known living father is infeasible until said minor reaches adulthood.

Notes on §18.2d:

In order to define "adult consent", a definition of adulthood is necessary. *Adderet Eliyahu* holds that both sexes reach adulthood upon showing physical signs of puberty⁹. *Gan Eden*, however, holds that both sexes reach adulthood at age 12. *Gan Eden* argues that at this age, people generally show both physical signs of maturity and the mental capacity needed to understand the *mitzvot*¹⁰.

Although an individual past the *halakhic* age of adulthood can give consent to any engagement, *Adderet Eliyahu* cautions against marriage between people of different ages¹¹.

§18.3 The Marriage Ceremony

Nisuin (marriage) signals the beginning of married life and permits a man to have sexual relations with his fiancée. The Torah references *nisuin* when it mentions every man "who has engaged a woman but not taken her" (Deuteronomy 20:7).

A *ketav* documenting the *nisuin* and the late *mohar* is necessary for a valid *nisuin*. *Nisuin* also includes the gathering of ten honorable men as witnesses, the entrance to the *chupah*, and the *Sheva Brachot*. I am unsure which, if any, of these last three acts *Adderet Eliyahu* holds to be necessary to *nisuin*.

§18.4 Forbidden Engagements

§18.4a Introduction

There are two classes of forbidden engagements. The legal effect of entering into a forbidden engagement depends on why the engagement was forbidden.

⁹ *Adderet Eliyahu* Seder Nashim Ch 1 Daf 150A Col. 2

¹⁰ *Gan Eden* Dinei Nedarim Daf 172A Col. 2

¹¹ *Adderet Eliyahu* Seder Nashim Ch 2 Daf 151A Col. 2

Some engagements are forbidden to the extent that they are impossible. Any such engagement is legally null and void. For example, an attempted engagement to a woman engaged or married to someone else does not alter the marital or engagement status of any party involved. This engagement is considered legally impossible and has no legal effect.

Other engagements are forbidden, but are legally binding. Although the engagement holds, the engaged parties immediately become obligated to divorce.

§18.4b Forbidden Engagements that Are Null and Void

An attempted engagement to any of five different classes of women is null and void:

1. a woman who is already engaged or married;
2. a woman with whom relations would be incestuous;
3. in the case of a polygamous engagement, a woman who would become a rival to one's present wife/wives;
4. a gentile woman who has not undergone conversion; or
5. another person's maidservant.

The Sages determined that it is impossible to become engaged to a woman with whom relations would be incestuous or who would rival one's first wife (items 2 and 3, respectively). They reasoned that these engagements are forbidden, because they are discussed together with the prohibitions on relations with a woman already engaged or married (Leviticus 18). Engagement to a woman who is already engaged or married is clearly null and void; thus, the Sages argued that the same holds for engagement to a woman with whom relations would be incestuous and to a woman who would rival one's first wife.

Leviticus 18 also includes a prohibition on relations with a menstruating woman; however, the Sages held that it is still possible to become engaged to a menstruating woman. This is because the primary context of the prohibition on relations with a menstruating woman relates to relations between a man and his wife.

One may not become engaged to a gentile woman (item 4) because the Torah states regarding the seven nations that inhabited Israel before Joshua's conquest: "you shall not marry them" (Deuteronomy 7:3). Although contextually this prohibition mentions only these seven nations, the prohibition applies to all gentile nations. The seven nations were singled out only because they were the ones with whom the Israelites would be most likely to marry. Furthermore, it is clear that engagement to a non-Jew is not only forbidden but is also null and void, because it entails the same punishment (an "asham" sin offering, see Ezra 10:19) as another case, *i.e.*, the engagement to another's maidservant (see below), where engagement is null and void.

One may not become engaged to another person's maidservant (item 5) because she is under someone else's dominion; thus, she cannot become exclusively sanctified to another. This is known from the case where one sleeps with another's maidservant (Leviticus 19:20-22). A man who sleeps with another's

maidservant, must make a sin offering (Leviticus 19:21). This is distinct from the case in which a man and a free virgin have sexual relations; in these instances, the Torah commands the pair to wed unless the woman's father refuses (Exodus 22:16). This suggests that it is impossible for a man to marry another's maidservant. A manservant may likewise not become engaged to a free woman. In certain cases, however, a manservant may become engaged to a maidservant. This is clear from the verse "if his master give [his manservant] a wife" (Exodus 21:4).

§18.4c Rival Women

A man may not become engaged to a woman who would become a rival to his first wife (item 3 in §18.4b). A "rival woman" is any woman who would cause a man to reduce his first wife's basic necessities or cause the man to favor one woman's conjugal rights over another's. This is clear from the verse, "if he takes another woman he shall not reduce her food, her clothing, or her conjugal rights" (Exodus 21:10). The term "rival woman" does not refer to any woman who would engender feelings of jealousy in one's first wife. Were this the case, polygamous marriage would be all but forbidden. Furthermore, the law does not require a husband to continue lying with his first wife with the same frequency he did before wedding his second wife. A husband is required to lie with each wife with equal frequency as the other. This is because a man's vigor limits how often he may lie with women.

Notes on §18.4c:

Today, many Karaites read the prohibition on engagement to a rival woman to include women who would engender feelings of jealousy in one's first wife. This serves as a way of requiring the consent of a man's first wife to any further marriages. Given modern expectations of married women, this view renders almost all cases of polygamy *halakhically* forbidden.

§18.4d Forbidden Engagements that Require Divorce

If one performs the acts required for engagement in the context of forbidden relations other than those listed in §18.4b, one becomes legally engaged. However, one is then immediately required to divorce from the person with whom engagement is forbidden.¹²

This class of forbidden relationships includes, but is not limited to, relations forbidden to a *Kohen* (§13.4c), one's own ex-wife (Deuteronomy 24:4), men and women of certain nations (§18.4e), and *mamzerim* (§18.4f).

§18.4e Forbidden Nations

The Torah forbids engagement to anyone with Moabite or Ammonite ancestry. Furthermore, the Torah forbids engagement to 1st or 2nd generation Egyptians or Edomites (Deuteronomy 23:4-9). Scripture forbids engagement to these nations by prohibiting them entry into "the congregation of *HaShem*", an

¹² This is in contrast to the engagements listed in §18.4b, which are null and void. Because those engagements have no legal effect, they do not require any divorce procedures (because there is nothing to undo).

expression that refers to engagement and marriage. The Rabbanite Sages argued that this prohibition did not apply to females from these nations or to those with female ancestors from these nations. By contrast, the Karaite Sages held that the prohibition applies equally to both genders.

Because engagement between someone of the Israelite faith and a gentile is legally impossible (§18.4b), the prohibitions on these specific nations (as opposed to all gentiles) must refer to members of those nations who converted to the Israelite faith. Although a gentile may normally convert to marry someone of the Israelite faith, in the case of these nations, the resulting engagement would be forbidden and require divorce. If, however, any member of these nations converts purely for love of God, not for the sake of marriage, then the prohibition on becoming engaged to them does not apply. For example, Ruth married an Israelite, even though she was a Moabite, which are not allowed to “enter the congregation of *Hashem*; even to the 10th generation . . .” (Deuteronomy 23:4). It is clear that Ruth converted for love of God because she stayed with Naomi the Israelite,¹³ even when she knew she did not stand to gain from this choice (Ruth 1:11).

§18.4f The Mamzer

A *mamzer* is a child born out of an adulterous relation or out of an incestuous relation. A male or female *mamzer* may not wed a male or female Israelite (Deuteronomy 23:3). Furthermore, a *mamzer*'s descendants are *mamzerim* because the Torah states “even until the tenth generation [a *mamzer*] shall not enter the congregation of *HaShem*” (Deuteronomy 23:3). The phrase “even until the tenth generation” includes all generations even past the tenth. Any child for whom both biological parents are unknown is considered suspect of being a *mamzer* and is treated as such by the law. Furthermore, any child who is the product of a “potentially adulterous relationship” is treated as a *mamzer*. A “potentially” (as opposed to “definitively”) adulterous relationship can occur when it is unclear whether a woman was legally engaged to someone else or whether a woman's divorce from someone else was legally valid. In these cases, it would be unclear whether any subsequent relations are adulterous.¹⁴

The term *mamzer* comes from the word “*zar*” meaning strange. This is because the *mamzer* is estranged from the rest of Israel.

Notes on §18.4:

The Phrase ‘Shall Not Enter the Congregation of Hashem’

Many of the Karaite Sages have understood the phrase he “shall not enter the congregation of *Hashem*” as a prohibition on marriage between Israelites and the types of persons mentioned in those passages.

According to Rav Shmuel al-Maghrebi, however, some of the Sages held that that the phrase did not refer to marriage at all: “*all about whom it is said - ‘he shall not enter’ – the intent is not marriage but the intent is that*

¹³ Upon explaining her decision to stay with Naomi, Ruth declares to Naomi “your people is my people; your god, my god” (Ruth 1:16).

¹⁴ A child born out of wedlock is not a *mamzer*; but one born of adultery is

*[he should not join Israel] at the times of the sacrifices, and at the festive occasions of the chupah of the groom and the circumcisions, and at the national gatherings .*¹⁵

The Karaite Sage Rav Ya'akov ben Reuven also records this view that the prohibition relates to certain communal and national gatherings¹⁶. Furthermore, Rav Aharon the Elder attributes it to Rav Sahl ben Matzliah¹⁷.

Rav Shmuel explains that those who held this position brought proof from the case of Sheshan. The Israelite Sheshan allowed his daughter to marry an Egyptian (1 Chronicles 2:35), despite the Torah's statement that only a 3rd generation descendant of an Egyptian may "enter into the congregation of *Hashem*" (Deuteronomy 23:9). One potential response to this example is that a "3rd generation Egyptian", might still be called an "Egyptian." And since there is no prohibition related to a 3rd generation Egyptian, the verse does not pose a problem.

Those Sages permitting marriage but prohibiting participation at social gatherings also brought proof from the usage of the expression "he shall not enter" in Lamentations: "She (Jerusalem) has seen gentiles entering her sanctuary – concerning whom You commanded that they should not enter into Your congregation" (Lamentations 1:10). This verse suggests that the denial of entry into "the congregation of *Hashem*" was not a prohibition against marriage; rather it prohibited entry into sanctuary. This is consistent with the position that the phrase serves to prohibit participation in sacrifices or national gatherings (which occurred during the *chagim*).

More on Whom a Mamzer May Marry

According to *Adderet Eliyahu*, a *mamzer* or a member of the forbidden nations may not marry an "Israelite". Similar statements appear in other Sages' works. It is often unclear, however, what these Sages mean by "Israelite". Sometimes "Israelite" is used to denote any person of the Israelite faith and sometimes it is used to exclude converts. The context of the discussion of these laws in Rav Shmuel al-Maghrebi's *Sefer Mitzvoth* suggests that, in this case, the prohibition on Israelites marrying *mamzerim* and members of the forbidden nations does not apply to converts.

Another question is whether a *mamzer* may marry another *mamzer* although both of are of Israelite descent. It seems to me that this is permitted because both *mamzerim* have been barred from entering "the congregation of *HaShem*". Thus, each *mamzer* is outside "the congregation of *hashem*" and their marriage does not violate the prohibition on *mamzerim* "entering the congregation of *HaShem*".

Rav Ya'akov ben Reuven's List of Mamzerut:

According to Professor Zvi Ankori's *Karaites in Byzantium* (pp. 72-76), Rav Ya'akov's *Sefer HaOsher* considered seven possibilities for the definition of a *Mamzer*:

1. Heretical converts;
2. One whose mother is known but whose father is unknown;
3. One who is the offspring of forbidden sexual relations (*i.e.*, the relations listed in Leviticus 18:6-18);
4. One who is conceived during *nidah* (relations with a woman on *nidah* is forbidden by Leviticus 18:19);
5. The name of a specific foreign nation;
6. All converts; and

¹⁵ See *The Karaite Halakah and Its Relation to Sadducean, Samaritan and Philonian Halakah, Part One* (1913), Bernard Revel, Kessinger Legacy Reprints, p. 67.

¹⁶ See *Karaites in Byzantium*, Dr. Zvi Ankori, p. 72 n. 40 (citing *Sefer Ha-Osher* 93a-b).

¹⁷ See *The Karaite Halakah and Its Relation to Sadducean, Samaritan and Philonian Halakah, Part One* (1913), Bernard Revel, Kessinger Legacy Reprints, p. 67.

7. "They who are not from the seed of Abraham."

Of these positions Rav Ya'akov rejects numbers 4) and 5). Because I do not have his work, I am unsure if Rav Ya'akov rejected more positions than just 4) and 5). I likewise cannot state whether he held one or, depending on context, more than one of these definitions to be correct. Furthermore, I cannot fully assess what proofs, if any, he provides in support or refutation of these potential definitions. However, I do discuss in detail possibility number five in the next subsection.

"Mamzer" as a Nation

In addition to Rav Ya'akov, both Rav Aharon the Younger (author of *Gan Eden*) and Rav Aharon the Elder record the opinion (presumably held by at least some Karaite Sages) that the term "*mamzer*" refers to a nation. This view is supported by the fact that the only two uses of the term *mamzer* in Tanakh appear in the context of other nations. In Deuteronomy, Ammonites and Moabites are mentioned in a similar prohibition (Deuteronomy 23:4). In Zechariah, several other nations or city-states are mentioned along with the term *mamzer*, including Ashdod, Ashkelon, Philistine, Ekron, Tyre and Damascus (Zechariah 9:1-6).

Although Rav Aharon the Younger records the position that the term *mamzer* refers to a nation, he clearly rejects this opinion in *Gan Eden*: "there is no sense to the words of he who says that [*mamzer*] is a name of a nation"¹⁸. However, he appears to have reevaluated the position in *Keter Torah* (a later work), offering it as an alternative to the definition later adopted by *Adderet Eliyahu*: "it is also possible that *mamzer* is the name of a clan like *Amon* and *Moav*, as it is written '*mamzer* shall dwell in *Ashdod* (Zechariah 9:6)"¹⁹. His predecessor, Rav Aharon the Elder makes a similar statement in his *Sefer HaMivchar*: "it is also possible that *mamzer* is the name of a specific nation and the proof is [the verse] '*mamzer* shall dwell in *Ashdod*' (Zechariah 9:6)"²⁰. In his commentary on the prophets, however, Rav Aharon the Elder records several interpretations regarding the verse "*mamzer* shall dwell in *Ashdod*" that do not interpret the term *mamzer* as a literal nation. First he notes that '*mamzer*' may actually be a reference to Israel, second that it may be a reference to Ishmael and third that it may be a term for a strange ("*zar*") nation; in other words, a nation not descended from *Ever* (the progenitor of many of the nations dwelling near Israel at the time)²¹. In summary, neither Rav Aharon the Elder nor Rav Aharon the Younger definitively adopt the position that *mamzer* refers to an actual nation although both hold it to be plausible. Rather, both appear to accept the opinion later adopted by *Adderet Eliyahu* as their preferred interpretation²².

In my opinion, it is implausible that *mamzer*, as it appears in the context of the prohibition on entry into the "congregation of *Hashem*" in Deuteronomy 23:3, refers to a nationality. Although *mamzer* appears in the context of other nationalities, it is also appears in the context of non-nationalities: "he that is crushed or maimed in his member shall not come into the congregation of *HaShem*" (Deuteronomy 23:2). Furthermore, *Amon* and *Moav*, the nations with which it does appear in the prohibition in question (Deuteronomy 23), are themselves products of incest (Genesis 19:36-38). This supports the contention that the term *mamzer* includes any children of incest.

¹⁸ *Gan Eden Seder Nashim* Ch 14 (Pg. 149B Col. 2)

¹⁹ *Keter Torah* on Deuteronomy 23:3

²⁰ *Sefer Hamivchar* on Deuteronomy 23:3

²¹ *Mivchar Yesharim* on Zechariah 9:6

²² Rav Aharon the Elder even introduces the opinion with the phrase "and the correct [interpretation] is" and Rav Aharon the Younger with the phrase "and the truth is that".

Finally, when referring to a member of a nation or hereditary clan in Biblical Hebrew, one always adds the Hebrew suffix “*yod*” to the name of that nation or clan²³. For example, one who is a member of the nation “Moav” is called a “*Moavi*” (Deuteronomy 23:4). One who is a member of the Amon, is called an “*Amoni*” (Deuteronomy 23:4). However, when discussing the prohibition on marrying a *mamzer*, the Torah does not include the suffix “*yod*” (*i.e.*, the verse reads “*mamzer*” not “*mamzer*”). Thus, I believe it unlikely that the term *mamzer* in Deuteronomy 23:3 refers to a nationality.

In response to my argument, one might contend that the term “*Kohen*” does not include the suffix “*yod*”, despite the fact that a *Kohen* is a member of a hereditary clan. I argue, however, that “*Kohen*” primarily means “priest”, a non-hereditary status. Even gentile priests may be referred to as *Kohanim* (*e.g.*, Exodus 2:16, Genesis 14:18).

§18.5 Obligations of a Man to his Wife

A man is required to provide his wife with basic necessities (food, clothing, housing, etc.) and sexual intimacy. The requirement to provide these benefits is derived from the laws of the maidservant. The Torah states that if a man marries a maidservant and then takes a second wife, “her [*i.e.*, the maidservant’s] food, her clothing, and her conjugal rights he shall not diminish, and if he does not do these three for her she shall leave [his house]” (Exodus 21:11). Because even a maidservant-wife is promised these benefits, any wife must be guaranteed these benefits. In accordance with the verse, failure to provide these benefits is grounds for divorce (“she shall leave [his house]”).

A man is also required to heal his wife should she become sick. Extended illness may be grounds for divorce, however. Furthermore, a man must pay ransom for his wife should she fall captive. In general, a man may not divorce a captive wife to avoid redeeming her. If he wishes to divorce her, he must first redeem her then divorce her. Finally, a man is required to give his wife a proper burial.

Halakha also governs how a man interacts with his wife in daily life. A man must love his wife as he does himself. He must greatly honor her. He must joyfully converse with her. He should not grow excessively angry with her even should she err in some respect. He should always speak gently to her. In most cases, he may not seek to distance her from her family.

§18.6 Obligations of a Woman to her Husband

A man has a right to benefit from the fruits of his wife’s labor. He only has this right, however, if he uses his finances wisely. It is forbidden for his wife to provide for her husband if he is wasteful. A woman is required to be sexually intimate with her husband.

A woman should make *aliyah* if her husband chooses to do so. If she chooses not to settle in Israel, she may divorce him without receiving her late *mohar*.

Halakha governs how a woman must treat her husband in day to day life. A woman should heed her husband. She should also respect him. Finally, she should behave modestly.

²³ Technically one may also use the term “children of” to refer to a nationality. As in “children of Israel”, but this is irrelevant to the argument at hand.

§18.7 Divorce*§18.7a Introduction*

The Torah explicitly discusses divorce:

“When a man takes a wife and marries her and then it comes to pass that she does not find favour in his eyes because he has found some unseemly thing (“ervat davar”) in her, he shall write her a writ of divorce (“sefer keritut”) and give it to her and send her out of his house” - (Deuteronomy 24:1)

A divorce proceeding must be overseen by a *beit din*. Furthermore, divorce requires the presence of an *“ervat davar”* (unseemly thing) in either spouse and a *“sefer keritut”* (writ of divorce). Both men and women may initiate divorce, although the Torah discusses only the case where a man initiates divorce. The right of a wife to initiate divorce proceedings is learned through *hekeish*.

§18.7b The Writ of Divorce

A writ of divorce is called a *“sefer keritut”*²⁴. Whether man or wife initiates the divorce, the woman is the one to receive the *sefer keritut*. The purpose of the *sefer keritut* is to free a woman from her husband and certify that she may marry another man²⁵.

It is preferable for the husband to willingly grant his wife a writ of divorce. The Sages differed, however, regarding cases in which the husband refuses to provide the writ. Some Sages held that the *beit din* may grant a woman a divorce even without a *sefer keritut* from her (ex-)husband. Other Sages, however, argued that the *beit din* should coerce the man into writing a bill of divorce. This coercion may be done through gentile authorities.

In some cases, it may be uncertain whether a woman’s husband has died. This makes it uncertain whether such a woman may remarry. In these cases, the *beit din* is allowed to use the method of approximation (§2.5) to come to a best guess as to whether the husband has died. The *beit din*’s guess determines the woman’s marital status.

Notes on §18.7b:

Today, Karaite *batei-din* may grant women divorces even should the husband refuse to provide a writ. But this has occurred very rarely. As discussed, Rav Bashyatzi notes that some of the classical Sages also held this to be permissible. One such Sage is Rav Levi²⁶. Another is the 19th century Sage Rav Yitzchak Ben Shlomo²⁷.

²⁴ In the Rabbinic tradition, this document is referred to by its *Aramaic* name “get”.

²⁵ This is likely why the woman always receives the writ of divorce. According to Halakha, a man could marry more than one woman but a woman could not have more than one husband.

²⁶ Rav Levi’s *Sefer Mitzvot* P. 1187 in the Publication by Rav El-Gamil. This is my understanding of Rav Levi’s text although it is somewhat ambiguous how he rules.

²⁷ See Pg. 65 in: Ilana Sasson (2013). Gender Equality in Yefet Ben ‘Eli’s Commentary and Karaite Halakhah. *AJS Review*, 37, pp 51-74.

Furthermore, Rav Aharon the Younger permits the *beit din* to issue a divorce without the husband's providing a *sefer keritut*, only if it is impossible to coerce the husband into giving a writ of divorce²⁸.

Adderet Eliyahu, by contrast, does not express an opinion on the case where it is impossible to coerce the husband. It does, however, clearly support the coercion of the husband when necessary, and prohibits a *beit-din* granted divorce without a writ, at least in such cases where it is possible to coerce the husband²⁹. According to Prof. Illana Sasson, Rav Binyamin Al-Nahawandi similarly held that a *beit-din* should physically coerce a husband who refuses divorce but makes no mention of a *beit-din* granted divorce³⁰.

§18.7c The Writ of Divorce

Whether man or wife sues for divorce, the suing party must have found an “*ervat davar*” (“unseemly thing”) in the other party. In other words, they must have a good reason for requesting divorce. The Sages explain that an “*ervat davar*” is a major flaw whether in one’s conduct or one’s physical body that the party initiating the divorce cannot stand to tolerate. Any divorce suit is ultimately decided by a *beit din* to prevent the initiating party from greatly exaggerating the severity of an alleged “*ervat davar*.”

An example of an *ervat davar* pertaining to conduct is a spouse who does not heed the laws of permitted foods. A husband not providing for his wife has likewise demonstrated an *ervat davar* pertaining to conduct. A physical *ervat davar* might be the development of a severe disease without cure. Alternatively, it might be chronic bad breath.

If the *ervat davar* is found in the wife, there are some cases where she is not eligible to redeem her late *mohar* upon divorce. If she has a physical *ervat davar* that she hid before the wedding then she is not eligible to receive her late *mohar*. If her physical *ervat davar* develops after the wedding, however, she is eligible to receive her late *mohar*. If she develops an *ervat davar* relating to personal conduct, she is not eligible to receive her late *mohar*. If, however, this *ervat davar* was already known to her husband before the wedding, she is eligible to receive her late *mohar*.

Should a woman initiate divorce and her husband wish to grant her one, then there is no need for a *beit din* to look into the presence of any *ervat davar*.³¹

§18.8 Yibbum

§18.8a Yibbum

Should a man die without a son, the Torah states that his “brother” must marry his wife and sire a son. The first born son of that union would then “uphold the name” of the deceased so “that his name not be blotted out from Israel” (Deuteronomy 25:5-6). This procedure is known as *yibbum* (“levirate marriage”).

²⁸ *Gan Eden Seder Nashim* Ch. 14 Daf 155A Col B

²⁹ *Adderet Eliyahu Seder Nashim* Ch. 12 Daf 160B Col 2

³⁰ See Ilana Sasson (2013). *Gender Equality in Yefet Ben ‘Eli’s Commentary and Karaite Halakhah*. *AJS Review*, 37, pp 51-74, n. 42.

³¹ Although not discussed by *Adderet Eliyahu*, there similarly is no need for a *beit din* investigate the presence of any *ervat davar* if a woman does not contest a divorce sought by the husband. The parties may still need a *beit din*’s involvement in the event a dispute arises over the payment of the late *mohar*.

Most of the Sages held that *yibbum* applies to the deceased's kinsman - not the deceased's literal "brother" for several reasons. First, they noted that the term "brother" frequently means "fellow" or "kinsman" (e.g., Deuteronomy 16:12, Deuteronomy 22:4) in addition to "literal brother". Second, because marriage to one's brother's wife is forbidden through the laws of incest (Leviticus 18:16), one's closest living non-literal brother should fulfill the *mitzvah* of levirate marriage. For example, Ruth's nearest kinsman was meant to perform *yibbum* with Ruth (Ruth 3:12) before he passed his duty to Boaz, the next nearest kinsman (Ruth 4:6). Third, these Sages noted that although Yehudah's son, Onan, was required to perform *yibbum* for his literal brother (Genesis 38:8), this matter occurred pre-Sinai - before the prohibition on marrying one's brother's wife had been given.

§18.8b Chalitzah

One required to perform *yibbum* for his kinsman may opt out of his requirement through a public ceremony known as *chalitza* (Deuteronomy 25:7-10).

§18.8c The Reason for Yibbum and Present day Applicability

The purpose of *yibbum* is so that the name of the deceased will "not be blotted out from Israel" (Deuteronomy 25:5-6). More specifically, *yibbum* allows the deceased to continue to associate his name with his land inheritance in Israel. This is clear from the story of Boaz performing *yibbum* for Ruth's deceased husband, Machlon. Boaz states that the purpose of his *yibbum* would be "to raise up the name of the dead upon his inheritance" (Ruth 4:5, 4:10). The term "inheritance" here refers to "land inheritance", because in context Boaz is discussing both marriage with Ruth and the acquisition of Machlon's field (Ruth 4:5). Furthermore, although Machlon had a closer kinsman who wished to acquire the field (Ruth 4:5), that kinsman gave up his right to the field when he chose not to perform *yibbum* for Machlon (Ruth 4:6). It is clear that Boaz then received the field because he states "I have bought all that was Elimelech's and all that was Chilion's and Machlon's" (Ruth 4:9). Thus, Boaz receives the field because the purpose of *yibbum* is to sire a son who will uphold the deceased's name on his tribal land inheritance. When Machlon's closest kinsman passed the duty of *yibbum* to Boaz, he was also forced to pass Machlon's field to Boaz.

Neither *yibbum* nor *halitzah* are required today. This is because in the absence of a system of tribal land inheritance, the purpose for *yibbum* is no longer applicable.

Notes on §18.8c:

The story of Onan challenges the contention that *yibbum* is inapplicable in the absence of tribal land inheritance. Indeed, Onan was obligated to perform *yibbum* (Genesis 38:8) despite the fact that the land had not yet been granted as tribal inheritance. Perhaps God promising the land to Jacob (Genesis 28:15) was sufficient to cause *yibbum* to become required for Onan (Jacob's grandson). Or perhaps *yibbum* and *halitza* still apply today. This matter requires more research.

§18.9 Forbidden Sexual Acts

The exclusive purpose of sex is the proliferation of the species. Homosexual intercourse is thus prohibited (Leviticus 18:20, 20:13). Heterosexual sodomy (anal sex) is also forbidden. Evidence for the latter's prohibited status is found in the commands against incestuous intercourse: "you shall not uncover her nakedness" (e.g, Leviticus 18:7). In these prohibitions, "nakedness" appears in the singular. If sodomy were permitted in the general case, however, the prohibition on incest would have been stated in the plural ("you shall not uncover her **nakednesses**") in order to forbid both vaginal incest and incestuous sodomy. Otherwise, one could hold that incestuous sodomy is permitted. However, because sodomy is generally prohibited, it is not necessary to single out the incestuous case. While the plural phrase "lyings of a woman" is found in the verse: "you shall not lie with a male, the lyings of a woman" (Leviticus 18:22), it does not imply that multiple forms of intercourse are permitted with a woman. "Lyings of a woman" refers to a single act, just as the phrase "the lords of the land" (Genesis 42:30) refers to a single person (Josef). Some Sages said the phrase does refer to a plurality of acts, but refers to acts of intimacy ("*ma'asei chiddudin*") other than sodomy.

Notes on §18.9:

Rav Bashiatzki's view on Non-Vaginal Forms of Intercourse

Rav Bashiatzki clearly holds sodomy to be prohibited. It is somewhat unclear, however, whether Rav Bashiatzki holds prohibited other non-vaginal forms of intercourse. While prohibiting such acts would be consistent with his reasoning that sex is exclusively for the proliferation of the species, he discusses only sodomy explicitly. Furthermore, he appears to accept the possibility that the term "lyings of a woman" refers to acts of intimacy ("*ma'asei chiddudin*") other than sodomy. I believe the term "acts of intimacy" can include any type of sexual act that does not include regular intercourse or sodomy, although I am not an expert on the usage of this term.

The ambiguity regarding Rav Bashiatzki's position on other forms of non-vaginal intercourse also leaves unclear Rav Bashiatzki's view on birth control. If all forms of sex that replace "fruitful" vaginal sex are forbidden, then it would seem that in most cases birth control would also be forbidden. If, however, only sodomy is prohibited, then it would seem birth control is permitted.

The Purpose of Sex

I disagree with Rav Bashiatzki's contention that sex is exclusively for the proliferation of the species. Under this view, a woman would be forbidden to sleep with her husband post-menopause, when she is already pregnant, or if she is barren. This contradicts a woman's guarantee to conjugal rights: "if he takes another woman, he shall not reduce ... her conjugal rights" (Exodus 21:10). If, as Adderet Eliyahu claims, only fertile sex is permissible, why would the Torah explicitly protect a woman's "conjugal rights"? In response to this question, one might argue that the term "conjugal rights" refers to a wife's right to bear children if she so chooses. However, one must then explain why a man taking a second wife puts at risk the first wife's conjugal rights. As soon as the second wife's pregnancy became known, she would be forbidden to her husband (under Adderet Eliyahu's "proliferation of the species" view). At this time, the situation with respect to the first wife would revert back to the status prior to the man's taking the second wife. Alternatively, if the second wife were clearly barren, then the husband would only be permitted to sleep with the first wife and her rights to bear children would be safe.

Under Adderet Eliyahu's "proliferation of the species" view, the only situation putting at risk the rights of the first wife occurs when the second wife can become pregnant, but only with much greater difficulty than the first. Then, for as long as the second wife were not pregnant, she could be seen as the cause for the husband no longer paying attention to his first wife.

In fact, Adderet Eliyahu itself makes no claim that the term "conjugal rights" refers exclusively to the right to bear children. In contradiction to its statements regarding the purpose of sex, *Adderet Eliyahu* itself assumes regular intimacy with one's wife to be owed to her or at least expected. Adderet Eliyahu quotes and affirms Rav Aharon the Younger's statement regarding the meaning of the prohibition on taking a rival wife. When discussing the rival wife prohibition, Rav Bashyatzi and Rav Aharon do not consider the amount of children each wife bears. Instead, they focus on the intimacy each wife receives, insisting that each wife receive equal intimacy relative to the other:

"the meaning is not that if [the husband] was accustomed to lying with her [i.e., the first wife] once a week and he takes another [wife] in addition to her he should not reduce this frequency, because it would not make sense that he could have enough [vigor] for both of them and all the more so if he should have more wives, but the meaning is that he should not lie more with the second one than with the first"³².

Now one might argue that these Sages believed each wife should receive equal intimacy only because intimacy leads to conception. However, exclusively upholding the right to conception and forbidding all other sex would entail a man preferring (by default) the wife who is less frequently pregnant; in contradiction to the Sages' statement that each wife should receive equal intimacy. Finally, Rav Bashyatzi and Rav Aharon assume that it is reasonable for a man to lie with his wife once a week ("if [the husband] was accustomed to lying with her once a week..."). This frequency would not be expected if sex were forbidden whenever a woman were pregnant.

Because the Torah upholds a wife's right to intimacy, not just reproduction, the purpose of sex cannot exclusively be the proliferation of the species. It is inconsistent on the one hand to legitimize a woman's right to physical intimacy with her spouse, while simultaneously holding illegitimate any form of sex that could not produce conception. Although, proliferation of the species is not the exclusive purpose of sex, it is undoubtedly an important purpose of sex. For example, God tells His creations "be fruitful and multiply" (Genesis 1:28). Furthermore, many laws are designed to prevent infertility of both man and beast. (God willing these laws will be discussed in the section on Forbidden Mixtures.) Thus, while proliferation of the species is not the exclusive purpose of physical intimacy between man and wife, it is held in high regard by the Torah.

³² *Adderet Eliyahu* Seder Nashim Ch 8 DAF 158A Col 1.