

Premarital Cohabitation in Ancient Judea: The Evidence of the Babatha Archive and the Mishnah (*Ketubbot* 1.4)*

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This article discusses one aspect of matrimonial practice in second-century CE Judea: whether a man and a woman could or would cohabit before they were officially married. I shall examine a marriage contract from the Babatha archive discovered in the Judean desert; this contract contains a clause that specifies that a couple had lived together for some time before the marriage contract was drawn up. This statement may be perceived as contradicting the picture of matrimonial practices derived from Jewish legal sources. In dealing with such contradictions it is possible to adopt either an apologetic or a provocative approach. This article professes to apply a **provocative approach to** the problem by accepting the content of this clause at face value and suggesting a fresh interpretation to a passage

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from the Mishnah. This mishnah attests different matrimonial practices in Galilee and Judea and suggests that premarital cohabitation was sometimes practiced in Judea, but certainly not in Galilee. The Palestinian Talmud interprets the mishnah, obviously apologetically, by assigning the Judean practice of premarital cohabitation to the aftermath of the Bar Kokhbah revolt, as a result of the imposition of the *jus primae noctis* (“the right of the first night”). The contract from the Babatha archive predates the Bar Kokhbah revolt, however, and thus attests a Judean practice of premarital cohabitation that is not connected to the Roman decree. In the article I shall suggest two possible interpretations for this practice. I shall conclude by arguing that the *jus primae noctis* in Jewish sources belongs, as has been shown for all other instances of the motif, to folklore and not to history.

■ The Marriage Contract of Salome Komais

Recently, a new Greek document from the Cave of Letters has been published, together with the now famous Babatha archive.¹ This archive and other documents that were discovered by Yigael Yadin in the Judean desert in the early 1960s² date from the aftermath of the Bar Kokhbah revolt (135 CE). Jewish survivors from nearby Ein Gedi fled to the caves in the desert, taking their documents with them. Apparently they all died in the cave.

The document I shall discuss here was designated “Papyrus Yadin 37—Marriage Contract” and had belonged to a certain Salome Komais³ of Maoza,

¹Naphtali Lewis, *The Documents from the Bar Kokhba Period in the Cave of the Letters*, vol. 2: *Greek Papyri* (Jerusalem: Israel Exploration Society, 1989) 130–33.

²Yigael Yadin, *Bar-Kokhba: The Rediscovery of the Legendary Hero of the Last Jewish Revolt Against Imperial Rome* (London: Weidenfeld & Nicolson, 1971).

³The name of this woman is interesting. This is one of the rare instances of a woman with both a Greek and a Hebrew name. She is mentioned once in the document with both names and henceforth only as Komais. Whether Komais is a name or a nickname is of some interest as well. As a name, only the masculine Komaios is recorded (see Gustav E. Benseler and Wilhelm Pape, *Wörterbuch der griechischen Eigennamen* [2 vols.; Braunschweig: Vieweg, 1863] 1. 690; and Peter M. Fraser and Elaine Matthews, *A Lexicon of Greek Personal Names*, vol. 1: *The Aegean Islands, Cyprus, Cyrenaica* [Oxford: Oxford University Press, 1987] 269). The marriage contract that I am discussing states that Salome is also called Komais (καλουμένην), which may indicate that this is not a real name. The Greek word κομάω means “let the hair grow long,” or, idiomatically, “plume oneself, give oneself airs” (LSJ, s.v. κομάω, 975). Each of these meanings can explain the use of the word for a nickname. According to a relatively old rabbinic halakhah, a man who divorces his wife should state in the divorce bill all names and nicknames his wife had: “Rabban Gamaliel the elder decreed (התקין) that [he] should write. . . woman so-and-so (אשה פלוניה) and all names she possesses” (*m. Git.* 4.2). Perhaps the practice of the divorce bill has been here (and elsewhere) carried over to the marriage contract.

who married Jesus son of Menahem. The document includes various interesting aspects, such as a clause in which the husband assumes responsibility for the support of his wife “in accordance with Greek custom” (νομῶ Ἑλληνικῶ);⁴ the presence of a guardian (ἐπίτροπος) who represents the bride, as is customary in Greek and Roman legal systems;⁵ and the size of the bridal settlement (ninety-six denarii) which does not agree with the Jewish legal tradition of two hundred *zuz* for a virgin and one hundred for a widow or divorcee (*m. Ketub. 1.2*).⁶

One clause in the document states that “Jesus son of Menahem. . . has taken Salome. . . to live with her as also before this time” (συμβιῶσαι τ[ὸν Ἰησοῦν μετ'] αὐτῆς ὥ[ς κ]αὶ πρὸ τούτου τοῦ χρόνου). This statement raises several questions with relation to the nearly universal world view of Jewish society and Jewish matrimonial practices during the Roman period as reflected in Jewish sources. This view maintains that girls were kept segregated in their homes before they were married so as to insure that they entered matrimony as virgins; their husbands were selected by their fathers, and seldom did the bride get a chance to meet her prospective husband, much less to live with him, before nuptials took place.⁷ When describing the mishnaic system of women, Neusner made the following statement:

It is beyond the Mishnah's imagination for a man and a woman to live together without the benefit of a betrothal, a marriage contract and a consummation of marriage. I cannot think of a single rule which takes account of the possibility of cohabitation other than under normal, legal procedures.⁸

Neusner's statement summarized the legal situation of the issue that we are discussing, as it is found in the Mishnah. Even if this rigid view is actually our impression from these subjective, tendentious, and strongly motivated bodies of data, the Mishnah⁹ and the Talmud, and even if people

⁴On this clause, see Ranon Katzoff, “Papyrus Yadin 18—Legal Commentary,” *IEJ* 37 (1987) 239–42; Abraham Wasserstein, “A Marriage Contract from the Province of Arabia Nova: Notes on Papyrus Yadin 18,” *JQR* 80 (1989) 105–30.

⁵See, for example, Rafal Taubenschalg, *The Law of Greco-Roman Egypt in Light of the Papyri* (New York: Herald Square, 1944) 123–26.

⁶For further examples of contemporaneous monetary settlements, see Pierre Benoit, Josef T. Milik, and Roland de Vaux, *Discoveries in the Judaean Desert*, vol. 2: *Les grottes des Murabba'at* (Oxford: Clarendon, 1961) 248, 255.

⁷For a very conservative description, see, for example, Leonard Swidler, *Women in Judaism: The Status of Women in Formative Judaism* (Metuchen, NJ: Scarecrow, 1976) 141.

⁸Jacob Neusner, *A History of the Mishnaic Law of Women* (5 vols.; Leiden: Brill, 1980) 5. 266.

⁹On the Mishnah and the regulation of women's lives, see Judith R. Wegner, *Chattel or Person? The Status of Women in the Mishnah* (Oxford: Oxford University Press, 1988).

did not exactly act out the restricted realities prescribed by these sources, it seems remarkable nevertheless that information about an earlier, highly informal relationship between a man and a woman would actually be delineated in a marriage contract signed by two Jews.

Thus in this second-century CE marriage contract drawn by Jews, we encounter the highly unusual statement that the couple had cohabited before they were formally married. The following discussion is an attempt to place this unusual clause within a historical perspective. In order to do so, however, I must first ascertain that linguistically and legally this is the correct reading of the Greek sentence.

■ σύμβιος

What exactly does *συμβιώω*, the verb used in the document to signify the act of living together, mean? In various documents this verb and *σύμβιος*, the noun derived from it, signify married life. This verb is also employed in another Jewish-Greek marriage document discovered in the Judean desert and published some years ago: a remarriage contract, that is, a second marriage contracted by the same couple (Elai son of Simon and Salome daughter of Yohanan Galagoula) after a formal divorce.¹⁰ Sources indicate that remarriage was not an uncommon phenomenon in Jewish society.¹¹ The document states that Elai had previously been married to Salome (*προγενομέ[νην]. . . σύμβιον*), divorced her, and now wished to take her again as his wife “out of a need for communal life” (*σ[υ]νβιώσεος χάριν*).

On the other hand, *γαμέω*, which is the more common term for the act of marriage, is absent from Salome Komais’ marriage contract, but appears both in the Wadi Muraba‘at document of Elai and Salome (*εἰ[ς] γυναῖκα γαμετήν*)¹² and in another Jewish-Greek marriage contract, that of Salamzion, Babatha’s stepdaughter (*γυναῖκαν γαμετήν πρὸς γάμου*),¹³ where the term *σύμβιος* is absent.

What then is the linguistic difference between the two terms? The lexicons indicate that while the verb *συμβιώω* describes the ongoing activity of married life, the verb *γαμέω* denotes the single action of taking a wife

¹⁰Benoit, *Les grottes des Muraba‘at*, 243–54.

¹¹For example, Herod remarried his first wife, Doris, after the execution of his second wife, Mariamme the Hasmonean (Josephus *Bell.* 1.451; *Ant.* 16.85). See also *m. Git.* 4.7; *t. Yebamot* 13.5.

¹²Benoit, *Les grottes des Muraba‘at*, 248.

¹³Lewis, *Greek Papyri*, 78.

in marriage.¹⁴ It is therefore not at all surprising that the Muraba‘at remarriage document of Elai and Salome would employ the term *συμβιόω* to describe the previous marriage of the couple. Similarly, the use of *γαμέω* in the marriage contract of the virgin Salamzion, Babatha’s stepdaughter, is also easily understood; Salamzion is simply taken as a wife. Even the *γαμέω* in the Elai and Salome document describes the actual renewed act of taking Salome as a wife.

We may thus summarize the evidence and connect it with the Salome Komais document. The use of the verb *συμβιόω* indicates an ongoing cohabitation of the couple, which is interrupted in order to make it official in marriage. *γαμέω* is absent because it is unnecessary, since Jesus does not perform a single act of taking a wife. We have indeed understood the text correctly. Salome Komais and Jesus son of Menahem had been living together as a married couple without actually contracting an official marriage. How then should we understand this information against the historical background of Jewish society in second-century Judea?

■ Modes of Interpretation

Ancient texts such as Salome’s marriage contract seem to suggest a picture of ancient society quite divergent from the conservative impression given by other texts—such as the Mishnah—that many consider normative. Recent and not so recent research of these texts gives rise to two diametrically opposite attitudes: the “apologetic” and the “provocative.” Obviously the promoters of the provocative interpretation are the ones who describe the counterinterpretation as apologetic, while the champions of the apologetic view designate the view of their opponents provocative. I therefore do not use these two terms in a derogatory sense here, although I shall eventually situate myself within the latter.

The Apologetic Approach: In the study of texts dealing with women, the apologetic attitude is promoted by conservative scholars who set out to demonstrate that the document in question does not really contradict their perception of the ancient world, ancient Christianity, or, as in this case, ancient Judaism. All that needs to be done is a reading of the document in light of what we “know.”¹⁵

¹⁴LSJ, s.v. *γαμέω*, 337; *συμβιόω*, 1657; Friedrich Preisigke, *Wörterbuch der griechischen Papyrusurkunden* (2 vols.; Berlin: Weidmann, 1925) 1. 282; 2. 508.

¹⁵For an interesting example of this sort of apologetic attitude one may review the literature on a text from Qumran that suggests that wives could bear witness in the sect’s tribunal against their husbands (1QSa 1.10–11). This text, which seemed in its present form incon-

This sort of apologetic has already appeared in relation to the Salome Komais contract. Here are some examples.

(1) *Orphaned Minor*: In his minimal commentary on the document, the editor, Naphtali Lewis, stated,

Jewish custom is reflected in all probability in the statement that the bridal pair are to live henceforth. . . “as also before this time.” In Greek papyri from Egypt there are instances of couples living together as man and wife in what is termed as “unwritten marriage” (ἄγραφος γάμος), which was sometimes later converted by a written contract into ἔγγραφος γάμος. Close as that parallel may be, however, in [Papyrus Yadin] 37 the expression “as also before this time” implies that the bride and groom had been living together since the day of their betrothal, in keeping with a Jewish practice of the time when the bride was both an orphan and a minor.¹⁶

Lewis’s statement betrays a tension between the two interpretations that occurred to him. Since he was a scholar of Egyptian legal documents,¹⁷ he was inclined to identify this clause with similar legal situations familiar to him from Egyptian papyri. In his legal commentary on the Babatha archive, however, Lewis collaborated with Jewish scholars, who were assigned the task of producing a legal commentary on the documents in light of Jewish legal traditions. The commentary has not yet been published, but this remark is undoubtedly an indication of how the scholars involved in this project intend to approach the documents. In a lecture on the legal contents of the Babatha archive and their relevance to Jewish law, Ranon Katzoff defended the position taken by Lewis in the above passage by stating that according to halakhah a man could only live with a woman without being officially married to her if she was a minor whose father was dead and who was married off by her mother or brothers.¹⁸ Such a marriage would only become valid when the minor girl assumed adulthood and consented to the marriage (*m. Yebamot* 13.2). Katzoff, it appears, inferred from this halakhah that only after this consent would a marriage contract be officially written. This interpretation seems to me a typical talmudic “pilpul,” designed to explain away a contradiction between a legal case and the law by dismiss-

ceivable to scholars, was emended by Joseph M. Baumgarten (*Studies in Qumran Law* [Leiden: Brill, 1977] 183–86), and his emendation was accepted by Lawrence H. Schiffman (*Sectarian Law in the Dead Sea Scrolls—Courts, Testimony and the Penal Code* [BJS 33; Chico, CA: Scholars Press, 1983] 62–63).

¹⁶Lewis, *Greek Papyri*, 130.

¹⁷See, for example, Naphtali Lewis, *Life in Egypt under Roman Rule* (Oxford: Clarendon, 1983).

¹⁸Ranon Katzoff, In the Faculty Seminary of the Classics Department in the Hebrew University, Jerusalem, 1990.

ing the case as reflecting a very specific and rare legal situation. This sort of argument is found often in the talmudic text and a specific terminology was developed for it by the talmudic rabbis (אִשְׁקָלָהּ; “It is not difficult”).

(2) *Marriage Contract and “Ketubbah”*: From a very different quarter and with a very different agenda comes the claim that this document should not be studied in the light of Jewish law at all, since it is really not a *ketubbah* but rather a typical Greek marriage contract.¹⁹ This argument, intended to wrest this and similar documents from the hands of the talmudists and place them in those of the classicists, suggests that in a confused world where many legal systems operated side by side and where some proved much more efficient than others, prudent people armed themselves with two documents, each suitable for a different legal system—the *ketubbah* for the Jewish courts and a contract in Greek for its Roman equivalent. Such an argument could easily be employed by the apologists: surely Jesus had written a proper *ketubbah* for Salome Komais at their actual nuptials, but later, just to be on the safe side, he also composed a Greek marriage contract which stated that the couple had already been married for some time. Komais took this document with her to the cave but carelessly left behind her Hebrew (or more likely Aramaic) *ketubbah*.

This explanation sounds very logical. At this point, however, it cannot be corroborated at all, and there is circumstantial evidence that appears to negate it. In the Judean desert both Greek marriage contracts and Aramaic *ketubbot* have indeed been discovered.²⁰ The Babatha archive, however, seems to me to be the typical place for a double document situation to appear. Babatha was a very tidy person who treasured her paperwork and preserved it in full. Indeed, the Aramaic *ketubbah* from her second marriage has been preserved.²¹ She has no corresponding Greek marriage contract, however. This, of course, could be coincidence, and perhaps Babatha never did receive a Greek document from her husband. One may even claim that Babatha’s family did not believe in supplementing the Aramaic document with a Greek one. Babatha, however, also preserved the marriage contract of her stepdaughter—this one in Greek. The stepdaughter also had only one document, strangely not of the same variety as Babatha’s.

It seems to me that there exists a much better explanation for the bilingual document situation: the time factor. Of the three Aramaic documents extant from the Judean desert, the two with dates that have been preserved

¹⁹This is the case put forward by Wasserstein, “Marriage Contract,” 121.

²⁰Benoit, *Les grottes des Murab‘at*, 109–17, 243–56; Lewis, *Greek Papyri*, 76–82, 130–33.

²¹Yadin, *Bar-Kokhba*, 237–38.

chronologically precede²² the three dated Greek documents.²³ With the destruction of the temple, the power of Jewish courts was much curtailed, and they became institutions of arbitration rather than effective law-enforcement instruments. It soon became obvious to the holders of the documents that for enforcement of all laws, including marriage settlements, the pagan courts should be approached, and these unfortunately did not usually read Aramaic. The Jews thus resorted to writing Greek marriage documents.

I shall now briefly enumerate other possible apologetic explanations that may be given for the *σύμβιος* passage in Salome Komais' marriage contract and then attempt to discard them as well.

(3) "*Ketubbah*" *Written after Marriage*: It may be suggested that Jesus and Salome were married according to Jewish law, but only at a later stage wrote down their marriage contract. This notion, however, certainly negates the main gist of Jewish *ketubbah* legislation:

Said Rabbi Meir: A man may not keep (ישדא) his wife even one hour without a *ketubbah*. (*b. B. Qam.* 89a)

Further, aggadah, the literary-poetic composition produced by rabbinic circles, bears out this approach:

A betrothed man and woman (ארוס וארוסה) who were captured by gentiles were married off one to the other. She said to him: "Please, do not touch me, since I have no *ketubbah* from you." And he did not touch her until the day he died. (*b. Git.* 57a)

(4) *Concubinage*: It may be suggested that until the time when Jesus handed Salome her marriage contract, she was only his concubine (פלגש) since the rabbinic sources make the distinction:

Which is a wife and which is a concubine (פלגש)? Rabbi Meir says: A wife has a *ketubbah*, a concubine does not have a *ketubbah*. (*y. Ketub.* 5.20, 29d)

Most scholars are of the opinion, however, that concubinage as a legal institution was dead by the Second Temple period.²⁴

²²Benoit, *Les grottes des Muraba'at*, 110–11 (117 CE); Yadin, *Bar-Kokhba*, 239–46 (124–127 CE).

²³Benoit, *Les grottes des Muraba'at*, 248–50 (124 CE); Lewis, *Greek Papyri*, 77 (128 CE); 131 (131 CE). Lewis himself (p. 130) has noted this chronological development, but has assigned it to fashion.

²⁴See, for example, Louis M. Epstein, *Marriage Laws in the Bible and the Talmud* (Cambridge, MA: Harvard University Press, 1942) 62–76.

(5) *The Minimal “Ketubbah”*: According to the Mishnah, if a man does not actually write a *ketubbah*, he is nevertheless obligated to provide for his wife according to a standard set of rules. For example,

If he did not write her a *ketubbah*, a virgin collects two hundred and a widow one hundred. (*m. Ketub.* 4.7)

It may be suggested that at first Jesus had thought he need not write a *ketubbah* because, in event of divorce or death, he would comply with the norms set out by the rabbis, but eventually he came to the conclusion that these were too heavy and he therefore formulated his own marriage contract. While the amounts cited in rabbinic sources are, as mentioned above, either two hundred denarii for a virgin or one hundred for a widow, Salome Komais’ contract guarantees the wife only ninety-six denarii. The sums stipulated in rabbinic halakhah, however, are minimum amounts, and a husband is only allowed to pay his widow or divorcee more but certainly not less. The sum in Salome’s *ketubbah* is thus also not in accordance with rabbinic dictums.

The apologetic approach has thus produced two interpretations, and I have suggested three others, all of which harmonize the $\sigma\upsilon\mu\beta\iota\omicron\varsigma$ clause in the Salome Komais document with the laws preserved in rabbinic literature. I suppose other explanations of this sort could also be suggested, but I believe that I have demonstrated the extent to which these are devised more to preserve the writers’ worldview than to reveal the meaning of the new source. The victim of this attitude is history. Thus, a new approach is required if we are to produce a more credible historical account. This approach can appropriately be named “provocative.”

The Provocative Approach: The provocative interpretation of passages about women is championed these days by feminist scholars. In her groundbreaking work on women leaders in the ancient synagogue, Bernadette Brooten, after tracing all the apologetic explanations of functional titles found for women in synagogue inscriptions from the Greek and Roman world, concluded,

Rather than trying to fit these inscriptions into our preconceived notions of what women were (or are) and of what Judaism was, would it not be more reasonable to take these inscriptions as a challenge to our pre-conceptions, as traces of Judaism of which we know very little?²⁵

²⁵Bernadette J. Brooten, *Women Leaders in the Ancient Synagogue* (BJS 36; Chico, CA: Scholars Press, 1982) 32.

Brooten's book, which suggested the possibility that titles for Jewish women such as ἀρχισυναγωγή ("head of synagogue"), should be taken at face value, was very provocative when it appeared. Today, after ten years, Brooten's book has nearly become a classic, extensively quoted and greatly acclaimed.

The interpretation I wish to suggest for this text, along the same lines, is of a provocative nature. I propose that the text should be taken to mean exactly what it claims. Some men and women in Jewish society of second-century Palestine did indeed live together out of wedlock. Moreover, this claim can actually be verified from rabbinic sources themselves.

■ Rabbinic Sources

Rabbinic sources, primarily the body of laws that evolved into the Mishnah and other tannaitic corpora, set out to describe the way Judaism should ideally function. These conceptions can hardly be taken as historical descriptions. Legal tannaitic rulings, however, were not created in a vacuum, but composed within a society that functioned according to ancient ancestral customs, various foreign influences, and a confusing legal system. Try as they would, the rabbis could not ignore these elements. They could, however, bend and mold them to fit into their system. When confronted with a custom or norm that had taken hold in society, they explained it either as an outlandish streak of their halakhah or as a transgression of it. Nevertheless, it is exactly these glimpses into practices opposed to the general ethos of the rabbis that should be considered reliable historical matter. Pericopes in rabbinic literature that describe a reality similar to the one emerging from the σύμβιος clause in the marriage contract of Salome Komais are of this nature. They are garbled and apologetic, indicating that the tendency to explain away did not begin in modern times. Once the apologetics are stripped off, however, we are left with viable information on Jewish social history in the second century CE.

First, the rabbinic legal system recognizes a form of marriage that is instituted through sexual intercourse:

In three ways is a woman acquired. . . through money, writ or intercourse. (*m. Qidd.* 1.1)

This text posits intercourse as a valid marriage form—equivalent in all aspects to the writ—which may be interpreted as the wedding contract. Rabbinic literature is elsewhere critical of this marriage form (*b. Qidd.* 12b), but in the relatively old mishnaic tradition, it is presented as fully legitimate.

Further, rabbinic literature suggests that there were regional differences in the expected relationships between groom and bride prior to nuptials. The Mishnah contains the following statement:

He who eats at his father-in-law's in Judea not in the presence of witnesses does not have a virginity claim, because he is intimate (מתיחד) with her. (*m. Ketub. 1.5*)²⁶

The issue under discussion here is the virginity charge that a husband may level against his wife following the wedding night. It is the husband's privilege to divorce his wife without compensation if she was found not to be a virgin. This tradition maintains that this privilege was reserved only for Galileans, since Judean grooms were callous toward unmarried maidens. The tradition here is anonymous, but since it voices criticism of the lax customs of Judea, it was probably formulated by someone from Galilee. Thus, as an outsider who wishes to disassociate himself from this practice, the formulator may not even be attempting to provide a fair picture of the custom, much less alert us to all its social implications.

The Tosefta also enumerates a number of differences in the matrimonial practices of Judeans and Galileans:

Rabbi Judah said: In Judea, to begin with, they would bring the bride and bridegroom together for one hour before they entered the bridal chamber (חופה),²⁷ so that he will get accustomed to her (יהא לברו גס בה), and in Galilee they did not do so. In Judea they would feel the bodies (מפשפשין) of the groom and bride one hour before they entered the bridal chamber, and in Galilee they did not do so. In Judea they would produce two companions (שושבינין), one from the house of the groom and one from the house of the bride, and in spite of this they only produced them for marriage (נישואין), and in Galilee they did not do so. In Judea the two companions would sleep where the bride and groom slept, and in Galilee they did not do so. Whoever does not act according to this custom does not have a virginity claim. (*t. Ketub. 1.4*)²⁸

²⁶An interesting interpretation of this mishnah is found in Zeev Falk, *Introduction to Jewish Law of the Second Commonwealth* (2 vols.; Leiden: Brill, 1978) 2. 284. In his opinion, this mishnah refers to a poor groom, who works for his prospective father-in-law in order to earn the bride price.

²⁷On the regional differentiation between this concept and that of the hometaking of the wife (לכנוס), see Adolf Büchler, "The Induction of the Bride and Bridegroom into the חופה in the First and Second Centuries in Palestine," *Livre d'hommage à la memoire de Dr. Samuel Poznanski* (Warsaw: n.p., 1927) 82–132.

²⁸For a discussion of this source and its parallels in the Talmuds, see A. S. Hershberg,

This tradition tells of several customs followed by Judeans on their wedding night, but not by Galileans. It is recounted by Rabbi Judah bar Elai, whose Galilean-Ushan origin is well attested. Taken by itself, it may appear to describe stricter measures in Judea than in Galilee, ultimately making Galileans ineligible to file virginity suits. It should, however, be taken as related to and commenting on the previously discussed mishnah, as its position in the Tosefta indicates. Since Judeans were notorious in their premarital sexual license, when a Judean husband wished to file a virginity suit he had to make sure that several precautions designed to guard his wife's virginity on entering wedlock had been followed. In Galilee, where the unmarried couple was never suspected of any misconduct, no such precautions were necessary.

The Babylonian Talmud, however, understands Rabbi Judah's statement as contradicting the mishnah. Its discussion of his statement begins by positing it against the mishnah, as an indication that the bride and bridegroom were not intimate before the nuptials in all cases. At a second stage Judah's statement itself poses exactly the problem I have delineated here: taken on its own, it suggests a stricter practice in Judea than in Galilee. To counter this difficulty Abbaye suggests emending the text:

Said Abbaye: (The text should) always. . . (be) transmitted: "whoever acts" [instead of "whoever does not act"]. (*b. Ketub. 12a*)

This emendation suggests that Abbaye understood the actions taken by the Judeans prior to the nuptials and described in this statement as the same as the actions described in the mishnah (that is, eating at the father-in-law's house). Rava, Abbaye's traditional adversary, stood behind the integrity of the text and suggested an extended version in order to solve the difficulty:

Said Rava to him: But it is transmitted "whoever does not act," hence said Rava, this is what is intended: "Whoever does not act according to Galilean custom in Galilee but acts according to Judean custom in Galilee does not have a virginity claim." (*b. Ketub. 12a*)

Rava also took this statement as describing the same situation as the mishnah. Both rabbis took it for granted that in Judea the premarital restrictions were less severe than in Galilee.²⁹

Thus far we have been able to establish that Galilean rabbis and their followers viewed Judean matrimonial practices as faulty because the hus-

"The Betrothal and Nuptial Practices in the Talmudic Period," *Ha-'Atid* 5 (1923) 95–97 [Hebrew].

²⁹One scholar who has tried to use the sources discussed here for a very different purpose is J. Tabori, "Two Wedding Ceremonies: Alcestis and some Jewish Parallels," *Scripta Classica Israelica* 6 (1981–82) 16–22.

band and wife were suspected of premarital intimacy. In light of these sources, I shall ultimately claim a Judean provenance for Salome Komais' marriage contract. First, however, I wish to discard another possible apologetic solution, which could employ these very same sources in order to weave Salome's marriage back into the Jewish halakhic fabric. This solution would suggest that Salome and Jesus were abiding by the well-documented Jewish custom of a prolonged betrothal, according to the custom of Judea.

■ The Jewish Betrothal Practice

Halakhah maintains that there were two stages in the Jewish marriage:³⁰ the *קידושין* (literally “consecration”) which is followed by a betrothal period (*אירוסין*) and then the nuptials, in which the husband brings his bride home or under the canopy (*חופה*). This period, in which the daughter is neither totally under the authority of her father, nor yet controlled by her husband, is one of the most complex from the halakhic point of view.³¹ Nevertheless, the rabbis recommended a long betrothal period:

A virgin is given twelve months from [the moment] when her husband demanded her (*חבעה בעלה*), so that she may maintain (*לפרנס*) herself. And just as they let the woman they also let the man maintain himself. (*m. Ketub. 5.2*)

This period differed from the period that followed the nuptials only in that the betrothed couple were not permitted to have sexual intercourse; in order to insure this, the bride remained under the roof of her father. The benediction that is recited even today in a Jewish wedding refers to this situation:

. . . and He has forbidden (*אסר*) us the betrothed (*אירוסות*) but has permitted (*החיר*) us the married women (*נשואות*). (*b. Ketub. 7b*)

This custom also explains Joseph's dilemma when, according to the Gospel of Matthew, he discovered that Mary, his betrothed, was pregnant, even though he had not yet married her (Matt 1:18; compare Luke 1:27).

From the context of *m. Ketub. 1.4* we may infer that the editors of the Mishnah may have understood the situation of the bridegroom at his father-in-law's house as pertaining to that of the betrothed, but as yet unmarried

³⁰This is the view of most commentators, but some suggest a tripartite process: *שידוכין* (“matchmaking”), *אירוסין* (“betrothal”), and *נישואין* (“marriage”); see Hershberg, “Betrothal and Nuptial Practices,” 75–102.

³¹Jacob Neusner, “From Scripture to Mishnah: The Origin of the Mishnah's Division of Women,” *JJS* 30 (1979) 140; Wegner, *Chattel or Person*, 17–18.

couple. The bride may be suspected of associating with her future husband while the latter either visits or actually resides at the house of his father-in-law. Into this halakhic setting an apologist may wish to insert the situation of the Judean desert marriage contract.

This very solution, however, creates another halakhic difficulty. The question whether the *ketubbah* was handed to the bride at the betrothal or at the nuptials is by no means a minor one. Although this issue is still debated, all agree that there can be no doubt about the case of the abducted Alexandrian women.

Hillel the Elder expounded secular texts (דרש לשון הדיוט). When the Alexandrians would betroth women, someone else would come from the market and abduct her. This case was brought before the rabbis and they suggested (בקש) declaring their sons bastards (ממזרים). Hillel the Elder said to them: Produce before me your mothers' *ketubbot*. These were brought to him. And it was written in it: "When you enter my house you shall be my wife according to the law of Moses and Israel." (*t. Ketub. 4.9*)³²

This case is dated to the time of Hillel the Elder (ca. 10 BCE). It tells of women who were betrothed to one man but ultimately married another. Their sons were not declared bastards on the strength of a clause found in the marriage contract the women possessed, which had been given to them at their betrothal. To what extent this tradition is telling a true story is questionable. Even if it is wholly fictitious, however, its formulators assumed that women already possessed marriage contracts during their betrothal period; they may thus be applying to Hillel's time a practice prevalent in their own day. The earliest attestation of the story of the Alexandrian brides is tannaitic, and it can thus be viewed as a late contemporary of the Babatha archive. Even if, therefore, the handing of the marriage contract was conceived by the tannaim as taking place at the betrothal, the Salome Komias contract, although it presupposes a long betrothal, still contradicts tannaitic halakhic rulings, because it was handed to the bride at the end rather than the beginning of this period.³³ Therefore, the Judean desert document does not fit into this model.

■ The Palestinian Talmud

Let us now return to the mishnaic text of *Ketub. 4.1*. The Judean practice described in it may not actually assume a situation of betrothal. In fact,

³²Compare *y. Ketub. 4.8, 28d*; *y. Yebamot 15.3, 14d*; *b. B. Me. 104a*.

³³See also Adolf Büchler, *Studies in Jewish History* (Jews College Publications 1; London: Oxford University Press, 1956) 126–59; Asher Gulak, "Betrothal Contract and Possessions Acquired Orally According to Talmudic Law," *Tarbiš* 3 (1942) 361–76 [Hebrew].

it is unknown whether the standard betrothal period promoted by the rabbis was actually practiced by all or by any. I assume that the Mishnah refers to a period prior to wedlock, at which some contact between a prospective but as yet unmarried couple takes place. This description resembles that deduced from the Judean desert contract of Salome Komais, but is not yet close enough. While the Mishnah voices a suspicion about premarital sexual misconduct, it does not make an outright accusation that Judeans cohabit prior to marriage. Salome Komias and Jesus, however, attest to having actually lived together prior to wedlock.

The commentary of the Palestinian Talmud on this particular mishnah, however, suggests that premarital arrangements in Judea were more permanent than the Mishnah cares to make explicit. Just as an apologetic tendency discerned in the Mishnah pointed to Judea as the place where such practices were prevalent—whereas in Galilee, the seat of the editors of the Mishnah, these practices were not followed—a new apologetic tendency is now found in the Palestinian Talmud, which sets out to excuse the circumstances that compelled the Judeans to resort to sex out of wedlock. **The excuse here is the horrors of the aftermath of the Bar Kokhbah revolt.**

Some sources suggest that after the Bar Kokhbah revolt the Romans introduced in Palestine the *jus primae noctis*, namely, the right of the local governor to deflower all maidens entering wedlock.³⁴ The Palestinian Talmud refers to this “event” when it deals with the mishnah on the husband’s residing at his father-in-law’s house:

In the beginning they decreed a destruction (שמד) in Judea. . . and they decreed that a soldier (איסטרטיוס) penetrates (בועל) first. It was (then) enacted that her husband would come into her (בא עליה) while she was still in her father’s house. (y. Ketub. 1.5, 25c)³⁵

Although Louis M. Epstein (*The Jewish Marriage Contract* [New York: Jewish Theological Seminary, 1927] 9–15) agreed that, at the beginning, this was indeed the practice, he maintained that later the custom was changed, and the handing over of the *ketubbah* was performed together with the nuptials. My interpretation may actually suggest the opposite.

³⁴**The date of the alleged event is subject to some controversy.** For example, Samuel Krauss (“La fête de Hanoucca,” *REJ* 30 [1895] 37–43) dated it to the aftermath of the Jewish revolt in the days of the emperor Trajan (115–117 CE). On the other hand, Samuel Belkin (*Philo and the Oral Law* [Cambridge, MA: Harvard University Press, 1940] 246) saw in it one of the Antiochean decrees (168 BCE). The Bar Kokhban date, championed, among others, by Raphel Patai (“Jus Primae Noctis,” *Studies of the Center for Folklore Research* 4 [1974] 177–80), seems to me, on account of the word שמד usually associated with the Bar Kokhban revolt, to be the correct interpretation.

³⁵Compare also *b. Ketub. 3b*. The context and contents of the Babylonian discourse on the subject are so blurred that they need hardly concern us here.

This tradition connects the imposition of the *jus primae noctis* with the שמד decrees, which are usually associated with the aftermath of the Bar Kokhbah revolt. As a result, the rabbis enacted an emergency measure (תקנה), which was intended to avert the danger of Jewish maidens' losing their virginity to Roman soldiers and possibly even conceiving by them. In such a case, the prospective couple was actually encouraged to practice sexual intercourse and cohabit out of wedlock in the very house of the bride's father. The quasi-historical justification for this Judean custom, the *jus primae noctis*, belongs, however, in my opinion, to the apologetics of the Galilean rabbis, because in the next sentence the talmudic commentators go on to claim that

although the destruction (שמד) was discontinued, the custom was not.
(y. Ketub. 1.5, 25c)

This claim means that in Judea men and women continued to practice some sort of premarital cohabitation before the nuptials. The Talmud then goes on to state that even

the daughter-in-law of Rabbi Oshaiah entered (the bridal chamber) pregnant. (y. Ketub. 1.5, 25c)

This indicates that these matrimonial practices were followed in families of the Judean rabbis themselves.

The admission of the talmudic sources that the custom of cohabitation prior to marriage was not easy to uproot even when the conditions that had brought it about, namely, the *jus primae noctis* of the aftermath of the Bar Kokhbah revolt, ceased to exist, also proves, in my opinion, that the custom did not arise from these conditions. Salome Komais' marriage contract, which is dated to August 131 CE and suggests a similar reality of premarital cohabitation, predates the Hadrianic decrees by four years and severs all previously assumed connections between the two.

We have now surveyed another form of rabbinic apologetics, one which argues that premarital cohabitation was only practiced in Judea under the extremely hazardous conditions brought about by the *jus primae noctis* imposed by the Romans in the aftermath of the Bar Kokhbah revolt. The Judean marriage contract of Salome Komais, however, also describes premarital cohabitation and predates the Bar Kokhbah revolt. This means that premarital cohabitation was a local practice particular to and common in Judea. What was its significance for the men and women who followed it?

■ The Social Implications of Premarital Cohabitation

The social and personal implications of premarital cohabitation in second-century Judea can also be viewed with either a conservative or a radical approach.

The Radical Approach: It may be suggested that premarital cohabitation was a device that allowed the prospective couple to test the ground before actually deciding to pursue a common life together. Such a reconstruction suggests not only a radical departure from the common view of the traditional Jewish matrimonial customs but suggests in addition a society that puts much less value on both virginity and paternity. Premarital cohabitation that did not result in marriage certainly entailed loss of virginity, and in many cases it may also have resulted in conception and birth. The insistence on a virgin bride and stress on fatherhood are the pillars of patriarchal society, and in this respect ancient Judaism does not seem to have differed from other patriarchal societies. Some evidence for a lenient approach to these issues, however, can be found in rabbinic literature. The virginity charge is played down in a series of stories in the Babylonian Talmud (*b. Ketub.* 10a). It would be helpful to this argument if one could show that these stories are of Judean provenance, but unfortunately it is impossible to make such a claim. More promising is the issue of paternity. In a story that describes a case of *מִיִּזוֹן*—the right of the orphan daughter to reject a husband chosen for her in her minority by her mother or brothers—the Palestinian Talmud tells of a woman who came before the sages with a son on her shoulders and rejected her husband. Despite the fact that the woman had borne a child, the rabbis ruled that the marriage had been invalid and released her from it (*y. Yebamot* 1.2, 2d; 13.1, 13c). This story apparently reflects Judean custom because the woman was the daughter-in-law of Rabbi Ishmael—a well-known Judean sage.

The Conservative Approach: One can explain premarital cohabitation as a relic of matrimonial customs practiced by an illiterate society; only later was the marriage contract artificially added. This proposal comes close to the Egyptian *ἄγραφος γάμος*³⁶ described above in a quotation from Lewis. Thus, although such a marriage was mocked by the rabbis for its leniency, it was in reality just as strict and binding as that promoted by the rabbis themselves. Perhaps *m. Qidd.* 1.1, which describes marriage by intercourse, alludes to these older matrimonial practices, which were later discarded. Although for methodological reasons I chose the provocative approach in the interpretation of the sources, with regard to the social implications I lean toward this latter, conservative interpretation.

■ Jus Primae Noctis

In conclusion, I wish to address the general historical plausibility of the *jus primae noctis* in Judea in the aftermath of the Bar Kokhbeh revolt. This

³⁶See Hans J. Wolff, *Written and Unwritten Marriage* (Haverford, PA: American Philological Association, 1939).

question has been tackled by Raphel Patai,³⁷ who formulated a remarkable theory. He was well aware of the fact that all medieval literature that evokes the custom of *jus primae noctis* has been proven to be folkloristic and has no historical basis.³⁸ On the whole, Patai abided by these conclusions. He argued, however, that a special case should be made for the talmudic sources describing the same sort of custom. He claimed that since all the sources that are now considered legend and depict the practice in Christian medieval Europe were composed much later than the period they propose to describe, it is acceptable to discard them. In Judea, on the contrary, in the aftermath of the Bar Kokhbah revolt, the Romans actually put into practice such a law, as the “reliable” rabbinic sources claim.

Patai, as a folklorist, should have known better. If a motif of this sort could have appeared in a sixteenth-century document and upset the entire history of medieval Europe for the next two centuries, the same motif likewise could have cropped up in the fourth- or fifth-century Palestinian Talmud, falsely describing events of the second century.³⁹ In my opinion, the conclusions of the present article, which make the *jus primae noctis* narrative of the Palestinian Talmud nothing more than an apology for an inconvenient Judaic custom that is described cryptically in the Mishnah, undermine Patai’s claim.⁴⁰ From a large repository of folkloristic material circulating worldwide, the *jus primae noctis* was conveniently drawn in order to explain and justify a custom that seemed to the rabbis to undermine their view of proper conduct in Jewish society.

³⁷Patai, “Jus Primae Noctis.”

³⁸The myth was first rejected by Carl Schmidt, *Jus primae noctis: eine geschichtliche Untersuchung* (Freiburg: n.p., 1881). For more recent works upholding this view, see William D. Howarth, “Droit du Seigneur: Fact or Fantasy,” *Journal of European Studies* 1 (1971) 291–312; and Hermann F. W. Schmidt-Bleibtreu, *Jus Primae Noctis—Herrenrecht der ersten Nacht* (Bonn: Rohrscheid, 1988).

³⁹The *jus primae noctis* is now an accepted literary motif in folklore dictionaries. See, for example, Dov Noy [Neuman], *Motif Index of Talmudic-Midrashic Literature* (Ph.D. diss.; Ann Arbor Dissertation Series Microfilms, 1954) 725.

⁴⁰In this view I join several previous scholars, who reached the same conclusion based on different evidence. See Israel Levi, “Hanoucca et les jus primae noctis,” *REJ* 30 (1898) 220–31, esp. 231; and more recently Moshe D. Herr, “Persecution and Martyrdom in Hadrian’s Days,” in David Asheri and Israel Schatzman, eds., *Studies in History* (Scripta Hierosolymitana 23; Jerusalem: Magnes, 1972) 101 n. 56.