Shoshannat Yaakov

Jewish and Iranian Studies in Honor of Yaakov Elman

Edited by
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SORTING OUT THE WAGES OF ADULTERY: EXECUTION, ORDEAL OR DIVORCE*

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The first part of this study centers on two passages from Sifre Bemidbar which address the adulteress and the range of her possible fates according to the halakha: execution, ordeal or divorce. The second part integrates the conclusions within the broader picture, with elucidation of some of the other basic texts.

Sifre 7 seems to assign an adulteress who should be subject to the death penalty to mandatory divorce instead. She indeed may be relieved, but traditional scholars dealing with this passage have been perplexed. Some solve the crux through emendation, and others through ingenious reinterpretation. Academic scholars have also tried their hand. Here we review the proposals of Chanoch Albeck, Jacob Neusner, Yehuda Youngster, Ishay Rosen-Zvi, and that of Vered Noam, whose study on the issue at hand is the most extensive. Noam postulates that the position under discussion conforms to the opinion of Bet Shammai versus Bet Hillel, and that this clause is a remnant of Bet Shammai’s teachings.

The problematic textual issue involves the lack of the negative particle לא. Even though current talmudic philology rightfully distains emendation, there are situations where it is justified, such as in a text for which only one exemplar has survived, and contains a suspected corruption whose occurrence can be explained through the usual canons of textual criticism, such as homoioteleuton or others. The very universality of the problematic reading among the surviving texts suggests that all witnesses of Sifre Bemidbar are descendent from a single exemplar, itself already removed from the original text. Menahem Kahana, investigator par example of Sifre

* It is a privilege and a pleasure to participate in this festschrift honoring my esteemed colleague, Professor Yaakov Elman. Aspects of this study are supplemented in my edition of bGit 9, to appear in the series Talmud Ha-Igud, by the Society for the Interpretation of the Talmud.
Bemidbar, has determined that this indeed is the nature of all surviving witnesses to this work, lending much strength to our reconstruction, which, when taken into consideration, enables us to sort out the wages of adultery.

We open our study with a short review of the laws from the ancient Near East regarding adultery, the “great sin.”

* * *

The social reality in the ancient Near East and its reflection in legal tradition present a polygamous society in which the prohibition of a wife’s sexual contact with any male other than her husband was a basic norm. This situation engenders a wide range of suspicions or accusations that may befall a married woman’s lot. This can be documented from the ancient Near Eastern law codes.

If a man’s wife is surprised (in flagrante delicto) with another man, both shall be tied and thrown into the water, but the husband may pardon his wife and the king his slaves. (Hammurabi §129)

If the “finger is pointed” at a man’s wife about another man, but she is not caught sleeping with the other man, she shall jump into the river for her husband. (Hammurabi, §132)

If a woman quarrels with her husband, and says: “You are not congenial to me,” the reasons for her prejudice must be presented. . . . If she is not innocent, but leaves her husband, and ruins her house, neglecting her husband, this woman shall be cast into the water. (Hammurabi, §142–43)

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2 “The guilty pair are caught in flagrante delicto together, and it appears that in Babylonia and Assyria as elsewhere in the East adultery can be proved only by ocular testimony of the commission of the offence” G.R. Driver and J.C. Miles, The Babylonian Laws 1 (Oxford: Claredon Press, 1952), 281. For the range of the Talmudic requirement of ocular testimony cf. bMak 7a (“Both Abaye and Raba said that the witnesses are to be asked whether they had seen the actual penetration as a painting stick is inserted in the tube . . . Samuel said that being caught in the posture of adulterers is sufficient”).

3 The binding together, “It would have been in keeping with the doctrine of talion if they were sent to their death in a last compulsory embrace” Driver and Miles, The Babylonian Laws, 1:281. In a Sumerian document: “To the body of the man on the bed he tied her (and) carried her to the assembly” S. Greengus, “A Textbook Case of Adultery in Ancient Mesopotamia”, HUCA 40–41 (1969–70): 35. See also Num. 25:8, Sifre Bemidbar 131 relates that Phinehas hoisted them in flagrante delicto on his lance and thus presented them to the assembly.

4 “… the permansive ‘he’ or ‘she is (given to) going out’ (Bab. waṣi or waṣiat) in §§ 142–3, which implies that the parties are in the habit of going out from their house for improper
If a man bring a charge against one’s wife, but she is not surprised with another man, she must take an oath and then may return to her house. (Hammurabi, §131)

If a man’s wife, who lives in his house, sets her face to go out,\(^5\) plunges into debt, tries to ruin her house, neglects her husband, and is judicially convicted: if her husband offers her release, she may go on her way, and he gives her nothing as a gift of release.\(^6\) If her husband does not wish to release her, and if he take another wife, she shall remain as servant in her husband’s house. (Hammurabi, §141)

If a man should seize another man upon his wife and they prove the charges against him and find him guilty, they shall kill both of them; there is no liability for him (i.e., the husband). If he should seize him and bring him either before the king or the judges, and they prove the charges against him and find him guilty—if the woman’s husband kills his wife, then he shall also kill the man; if he cuts off his wife’s nose, he shall turn the man into a eunuch and they shall lacerate his entire face; but if [he wishes to release] his wife, he shall [release] the man. (Middle Assyrian Laws, A §15)\(^7\)

If a man should say to another man, “Everyone has sex with your wife,” but there are no witnesses, they shall draw up a binding agreement, they shall undergo the divine River Ordeal. (Middle Assyrian Laws, A §17)

Documentary sources, in addition to the law codes, round out the meaning of adultery in the ancient Near Eastern and add picturesque rhetoric. “A number of Neo-Babylonian marriage agreements include a clause which deals with the possibility of the wife committing adultery: ‘Should PN (wife) be discovered with another man, she will \textit{die by the iron dagger}’”\(^8\) This rhetoric should in no way be taken as simply rhetorical.

Much light can be shed upon biblical and rabbinic law when viewed against the Near Eastern backdrop, whether by way of comparison or

\(^{5}\) “Sets” etc. G.R. Driver and J.C. Miles, \textit{The Babylonian Laws}, 1:300.

\(^{6}\) This phrase refers to divorce, see below.

\(^{7}\) Shalom Paul has already mentioned the category of adultery among Middle Assyrian Laws widely compared to biblical law see S. Paul, “Biblical Analogues to Middle Assyrian Law” in \textit{Religion and Law: Biblical-Judaic and Islamic Perspectives} (ed. Edwin B. Firmage, Bernard G. Weiss, John W. Welch; Winona Lake: Eisenbrauns, 1990), 333. On this passage see specifically pp. 345–6 (with reference to Ez. 23).

\(^{8}\) My emphasis. See M.T. Roth, “‘She will Die by the Iron Dagger’, Adultery and Neo-Babylonian Marriage,” \textit{Journal of the Economic and Social History of the Orient}, 31 (1988): 186–7. See the entire article for a study of adultery in the ancient Near East, with literature.
contrast. Furthermore, similarity of categories is often instructive even when rulings are opposite.9

If found wanting or under suspicion, the (perceived) wayward wife may meet one of three fates: death penalty (with her paramour), ordeal (“cast into the water” on a sink or swim basis), or divorce. In sharp contrast to biblical law and its rabbinic interpretation, Hammurabi allows pardon of the death penalty (for his wife) by the husband (which automatically produces a pardon for the paramour by the king).10 Interestingly, there is no mention here of divorce inflicted upon the wife suspected of adultery, even though it was used for the relief of other complaints bordering on adultery (§141). It may quite well have been an option, but the legislator mirrors popular psychology: if he loves her, he will keep her; if he hates her, he will have her killed one way or another.

The issue of pardon raises a sharp contrast with biblical/rabbinic law, where adultery is not a pardonable civil case, but a violation of religious law not pardonable on High without the death penalty.11 Equally, in rabbinic law the husband is proscribed from continuing to cohabit with his adulterous wife, even if procedurally the death penalty cannot be inflicted, and the ordeal cannot be imposed. He may not simply forgive and forget. She is “prohibited to him”, and he must divorce her.


10 Driver and Miles, The Babylonian Laws, 281.

1. The Three Fates

This title does not refer to the three Morae, but to (something even more moiredik), the three possible wages of adultery in rabbinic halakha: execution, ordeal or divorce. These three are spelled out precisely, within two very similar passages in Sifre Bemidbar:


<table>
<thead>
<tr>
<th>Sifre Bemidbar, 7 (p. 10)</th>
<th>Sifre Bemidbar, 19 (p. 23)</th>
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<tbody>
<tr>
<td>‘Speak unto the children of Israel, and say unto them: If any man’s wife go aside.….’ (Num. 5:12)</td>
<td>‘and if the woman be not defiled, but be clean.’ (Num. 5:28)</td>
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<td>Why was this passage written in Scripture?</td>
<td>Why was this written in Scripture?</td>
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<td>Since it is said, ‘When a man taketh a wife and marrieth her [then it commeth to pass, if she find no favour in his eyes because he hath found some unseemly thing in her, that he writeth her a bill of divorcement, and giveth in her hand and sendeth her out of his house]’ (Deut. 24:1)</td>
<td>Since it is said, ‘And the man that committeth adultery with another man’s wife both the adulterer and the adulteress shall surely be put to death.’ (Leviticus 20:10)</td>
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<td>we derive the rule [that divorce is the required recourse for a husband who has found his wife to be adulterous] only in a case in which there are witnesses [who establish the fact of adultery], but they did &lt;not&gt; give prior warning [to the wife, as to the ban and the punishment].</td>
<td>we hear from this that the wife is to be put to death only when there are witnesses who establish the fact of adultery, who have given prior warning (to the wife, [as to the ban and the punishment]).</td>
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<tr>
<td>But if there is a matter of doubt whether or not the woman has actually had sexual relations, we do not know the rule of what the man has to do to her.</td>
<td>But if there are witnesses who did not warn her, she is exempt from the death penalty. Since she is exempt from the death penalty, is she permitted to resume sexual relations with her husband?</td>
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<td>Accordingly, Scripture states: ‘[And the Lord spoke unto Moses, saying] Speak unto the children of Israel, and say unto them: If any man’s wife go aside….’ (Num. 5:11–12)</td>
<td>You must say, when it is in doubt whether she has had sexual intercourse with another man she is prohibited to her husband, a fortiori is the woman prohibited when it is certain that she had such intercourse.</td>
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The question dealt with here is “what should he do with her” (מה יעשה לה). What are the husband’s options (better: obligations) according to the laws governing the range of cases of adultery? Three answers are delineated, depending upon circumstances: death penalty, ordeal or divorce.

Full adultery punished by death occurs when the strict procedures are present: two witnesses and warning (התראה). The warning consists of a statement by the witnesses to the woman before the act: “Do you know that adultery is forbidden, and if you commit this act you will be executed by strangulation?” She can be executed only if she acknowledges the warning: “Yes I know, and indeed it is upon this condition [that I will be executed] that I am doing this.” If there is no acknowledgement, execution is impossible. In this way the sages introduced a procedure making the death penalty virtually impossible in terms of any practicality, even if one should claim that the institution was not yet terminated in their time. However, on the theoretical side, in all rabbinic literature and halakhic writings, the laws of death penalty are still fully maintained and analyzed rigorously, as indeed were laws of sacrifices, and all other areas which historical circumstances had removed them from practical reality.

We have seen then that in cases witnessed and with warning administered the death penalty always applies. When the act was witnessed, but there was no warning, and the adulterous wife cannot be put to death, she is still forbidden to her husband, and it is incumbent upon him to divorce her, because the witnesses’ testimony still determines with certainty that the act was committed. However, when the very occurrence of the act is in doubt, the ordeal is mandatory (in compliance with the detailed rabbinic definition of the laws of sotah).\(^\text{12}\)

\(^{12}\) And again, the discussion of these laws pervades the rabbinic corpus, despite the early termination of these procedures recorded in mSot 9:9, tSot 14:2.
Before we proceed to a more detailed analysis, a crucial textual question must be dealt with. This question regards this part of the above-quoted passage from Sifre Bemidbar, 7:

he writeth her a bill of divorcement, and giveth in her hand and sendeth her out of his house’ (Deut. 24:1), we derive the rule [that divorce is the required recourse for a husband who has found his wife to be adulterous] only in a case in which there are witnesses [who establish the fact of adultery], but they did <not> give prior warning [to the wife, as to the ban and the punishment].

The word “not” is absent from all the textual witness!13 Without the word “not” the text would be translated:

witnesses who establish the fact of adultery, and have given prior warning.

In this form, the text flies in the face of all rabbinic legal thinking. In such a case the death penalty would apply, certainly not simply dismissing the adulterous wife by divorce!14 It also violates the stylistic and substantive symmetry with the twin passage at Sifre Bemidbar 19. The word “not” has been supplied by many authorities, or at the least they have registered the extreme difficulty of the present text.16

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13 (Gen. Frag) * לא שמענו אלא בוכן שיש לו עדים והתרו בו שintégrא ממונת בכס (Lond. 341)
(Lond. 341)

14 Neither could one make much of a case for divorce and then execution as the meaning of this passage.


16 R. Eliezer Nahum, *Commentary on Sifre* (Jerusalem 1993), 30: “This Tanna follows Bet Shammai” etc. (cf. below); R. David Pardo to Sifre loc. cit.: “Regarding ‘and they warned her’, I don’t know what that means”; R. Avraham Gedalia, *Berit Avraham on Sefer HaYalkut*: “This is difficult, for if they warned her she is to be executed by strangulation”; R. Avraham Gumbiner, *Zayit Raanan* on *Yalkut Simoni* (Venice 1743): “Delete בה הרהרה, or it refers to a case where a court to rule execution was not approachable and teaches that she is prohibited to her husband immediately”; R. Abraham Lichtstein, *Zera Avraham*: “She would be deserving death and not divorce”; R. Haim Palagi, *Sifre Haim*: “Warning (התרהרה) applies only to the death penalty”; R. Elijah Gaon of Vilna emended: בה לא בה הרהרה (but they did not warn her); N.Z.Y. Berlin *Emeq HaNetziv* on Sifre: “The purpose of this warning requires explanation”; M. Friedmann, *Meir Ayin* on the Sifre: “Perhaps the text read originally ‘and they did not warn her’”; R.Z.H. Volk, *Keter Kehuna* (Jerusalem 1954) ad. loc. p. 35: “This warning is incomprehensible and unexplainable.” Rosen-Zvi equates this
Stepping back and taking a broader view of both passages synoptically is necessary for a full assessment of this textual *crux criticorum*.

The two passages are similar in structure and use the same terminology, both the technical terms of midrash dialectics, but also the substantive terminology (ספק ובשלו ספוק לא נבעלה: בום שיש ולעדמה ההורים מבית), of the technical terms of midrash dialectics, but also the substantive terminology (ספק נבעלה ספוק לא נבעלה: בום שיש ולעדמה ההורים מבית). The specific aim of these two passages is to clarify what happens to the adulterous wife over the range suspicion-conviction (מה יעשה לה), and, concomitantly, at which stages is she permitted or prohibited to her husband.

Lev. 20:10, which legislates the death penalty, is defined in Sifre 19 as the situation “where she was warned by the witnesses” (ויהי ליהו Deus ידוהי ההורים מבית). If she was not warned, and therefore she cannot be put to death, may her husband continue to cohabit with her, even though it is known with certainty (ודאי) that she committed adultery? The answer is that he may not, and therefore he is constrained to divorce her! This is derived *a fortiori* from the law that even a woman not proven an adulteress but simply suspected of such and already within the process of the sotah ordeal is prohibited to her husband.

Sifre 7, couched in the same language and nearly a perfect mirror image, also contrasts the procedure of divorce required for the certain (= ודאי of Sifre 19) adulterous to the suspected (ספוק) adulterous, who must undergo the sotah ordeal. It is indeed incomprehensible that the certain adulteress who must be divorced be labeled in one passage as not being warned by her witnesses, and therefore not executed but divorced, and in another, exhibiting the same stylistic terms, as warned, but still, strangely, not executed, but divorced.

Despite our deep-seated hesitation of emending a text against all witnesses, here we have no choice but to read “not warned” (ולא להו ההורים מבית) in the divorce context in Sifre 7 as we find it in Sifre 19. Not only the immediate context, but the inner logic of the extended passage and its parallel which uses the identical rhetoric stand behind this decision.

Leaving the text the way it has been received exacts, as we have seen, a price too great to bear, in the form of forced and improbable explanations. However, emendation against all textual witnesses also exacts a

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with the ‘warning’ (קנין) which the husband administers to his wife as part of the sotah procedure (as in mSot 11), apparently assuming that the witnesses recite this warning, thus construing this text as an absolute anomaly, and leaving the passage with serious stylistic problems (174). See below, note 36.

most undesirable price. Are there any mitigating circumstances for taking the route of emendation?

First let us address the unanimity of all textual witnesses as to the reading of this phrase in this passage. Is it conceivable that the identical erroneous reading pervades all attestations? This possibility could suggest itself only if all witnesses to the Sifre Bemidbar derive from a single exemplar. It is therefore interesting to note, that Menahem Kahana’s exhaustive research on the textual traditions of Sifre Bemidbar arrived exactly at this conclusion regarding the text tradition of Sifre Bemidbar, based on common errors and the identical appearance of “foreign bodies”: late glosses, additions based on the Babylonian Talmud, etc. appearing in all surviving witnesses. Sifre Bemidbar, in all attestations, is indeed derivable from a single exemplar, and a problematic reading common to all witnesses must be treated as if it were occurring in a work which survived only in a single exemplar.

Now we must address the particular mechanisms that may have led to this early error. Two of the most common causes of manuscript error are homoioateleuton and corruption through confusion with a similar passage. The master copy we are positing was most probably executed by a scribe quite familiar with the text of the entire Sifre Bemidbar, perhaps knowing if in part or in full by heart. The identical phraseology of Sifre 7 and 19 could mistakenly lead to writing והתרו בה in 7, as this language appears in 19 along witholah痕迹 in.20

Homoioateleuton will be more speculative to reconstruct, but definitely possible.

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18 M. Kahana, *Prolegomena to a New Edition of the Sifre on Numbers*, dissertation, (Jerusalem 1982), 265 (Hebrew): מוצאם של כל עדת הנוסח הנ”ל מאב טכסט קדום שเหนימו הנ”ל שלוב בגרסאותיו! Cf. p. 217. P. II: “Some common marginal annotations and common errors which are found in all the versions lead to the conclusion, that all the known western witnesses (and perhaps the oriental versions as well) were descended from one parent Sifre text. A further conclusion alludes to the closeness of Ms. Vatican to this parent text.”


20 For corruption in Sifre Bemidbar due to confusion with similar passages in proximity, see Kahana, *Prolegomena to a New Edition of the Sifre on Numbers*, 268–71.
The words in bold type are a repeated text of a size that causes homoioio-
teleuton in manuscripts on an extremely frequent basis. If the copyist's
eye skipped from the first occurrence of this text to the second, all the
underlined words would be eliminated, yielding exactly the received text
(whose witnesses emanate from the one common source). An advantage
of this conjectural reconstruction\footnote{Presented here in order to explore various possibilities that may have caused the textual corruption. For our immediate purpose, the first suggestion is simpler and more probable.} is that according to this model, both passages (Sifre 7 and 19) mention all three possible fates of the suspected adulteress: divorce, ordeal, or death, and correspond to the same line of legal thinking.\footnote{In any case, this is presented here simply as one example of how there error occurred, and is not intended as a certain reconstruction, which would have to deal with several issues. Let it be said, however, that some of these must be viewed in light of the strangely close connection that some tannaic sources see between the divorce and sotah Pentateuchal passages. See especially mSot 6:3 and my comments in the above-mentioned commentary. Compare Malbim, who also felt that the Sifre text requires conceptual expansion in order to complete all possibilities of what may be done to the adulterous wife; this he does however, \textit{without} addressing the main problem!}

The rare occasion of an extremely difficult and incomprehensible text, and the fact that all Sifre Bemidbar witnesses derive from one exemplar, are not coincidences. This situation indicates that we must treat the problem as if we were dealing with an ancient text of which only one copy survived. In such a case, it is necessary to surmise that an unexplainable text is the result of some type of corruption. We have supplied possible examples of such a corruption, and therefore, on the simplest level, it is necessary to supply “not” (לא). Emendation is the best recourse in certain cases when only one exemplar of a given work has survived. Sifre Bemidbar is a work that belongs to this category regarding corruptions common to all witness, since they all derive from one exemplar, itself already quite removed from the original text.

The above mentioned traditional commentators on the Sifre, all ‘latter-day’ scholars,\footnote{אחרונים.} admirably attempted to make some sense of the existing text, each going his own way and in his own direction in veering from the simple (and unacceptable) meaning of the given text, through stilted though often ingenious interpretations. We have indicated their approaches briefly above. Here we will present the track taken by the sole surviving commentary by a scholar of the earlier period,\footnote{ראשונים.} R. Hillel b. Elyaqim.
... meaning, we have heard that he expels him with a writ of divorce as it is written “[he finds an unseemly thing (=adultery) in her] and he writes a writ of divorcement” only in cases where he had witnesses to her adultery and they warned her—in this passage scripture says “he finds an unseemly thing (=adultery) in her”, and elsewhere scripture says “the thing will stand on the testimony of two witnesses”,

But if it is uncertain whether she committed adultery or not, we have not heard what should be done to her, therefore scripture says (Numbers 5, 12) Speak to the children of Israel etc. (the sotah ordeal).

We will register two points here. R. Hillel expands the original language of the Sifre לא שמענו שביצעה בעבשה במכה. Were this the intent of the Sifre the subtle redundancy would be exceptional to the Sifre’s regular style.

We have heard that he expels her with a writ of divorce only in cases where there are witnesses who warned her, for then she is expelled with a writ of divorce

The correct explanatory expansion that we have proposed above is לא שמענו שמהיצעה במכה אלא בмонтажנה שיש לו עדים והתרו בה שרובעא מצונה, based upon the language towards the end of the section. This wording renders the expanded passage clear and not redundant:

We have heard what he should do with her only in cases where there are witnesses who warned her, for then she is expelled with a writ of divorce
This I feel is more in keeping with the standard style of the R. Yishmael school of midrashim.

Following on his expansion, R. Hillel explicates the text as meaning: the only possible grounds for divorce we know of is when the husband has two witnesses who testify that his wife committed adultery!! (לא שמענו שמוציאה בנו... אלא באומותшивי ערימת שיתנה), a position arguably held by Bet Shammai, but definitely not by this commentator's more authoritative namesake, Bet Hillel. Indeed R.M.D. Ashkenazi, in his commentary on the Sifre ad loc states: “...a further difficulty is that this baraita appears to be presenting the opinion of Bet Shammai”!

This leads us directly to our second point, intimately related to the first, which (the second point) flows from the long explanatory derivation that R. Hillel's interjects within the language of the Sifre:

There is no doubt about the fact that this comment derives from bGit 90a, where it is associated by the BT to Bet Shammai's position in mGit 9:10 (this will be explicated in further detail below). It serves R. Hillel's contention, then, that this paragraph of the Sifre, which sees the husband divorcing his wife on the basis of the testimony of two witnesses to her adultery, as being in accordance with the opinion of Bet Shammai, and veers from the standard authoritative position of Bet Hillel.

This position is more fully spelled out by R. Eliezer Nahum:

25 But see below that even Bet Shammai would not take this position according to tannaitic sources.
26 mGit 9:10.
27 Sifre with Toldot Adam (Jerusalem 1972), 20.
28 18th century.
We have heard only for cases in which he has witnesses who have warned her.

It would appear that this tanna holds to the opinion of Bet Shammai, as we have learned at the end of tractate Gittin, Bet Shammai say a man should not divorce his wife unless he finds in her a matter of unchastity (= adultery), as it is written, and he found in her a matter of unchastity.

And the gemara asks, “What do Bet Shammai do with the word ‘thing’?” and it answers, It says here ‘thing’, and it says elsewhere ‘thing’, just as there two witnesses are required, so here two witnesses are required.

Therefore our Sifre passage says that we have heard only when there are witnesses.

Thus the solution of assigning the passage to Bet Shammai is implicit in R. Hillel’s commentary, alluded to briefly by R.M.D. Ashkenazi, and spelled out fully by R. Nahum Eliezer.

Academic scholarship has also addressed the difficulty of Sifre 7 where an adulterous wife, warned by two witnesses, is simply dismissed by divorce. H. Albeck explains the passage on the basis of a baraita in ySot 1:1 (16b), which broadens Bet Shammai’s permission to divorce to include not only adultery but also lighter immodest behavior. The PT (Palestinian Talmud) also knows of a different source which denies such an extension by Bet Shammai; the contradiction is resolved by R. Mana: the denial of such an extension of the law refers to a case where there were no witnesses to the immodesty, and the acceptance of immodesty as cause for divorce refers to a case where two witnesses testified to this impropriety. Albeck claims that Sifre 7 addresses a women warned by two witnesses against immodest behavior. The death penalty is not an issue here, but she may be divorced according to Bet Shammai by cause of her immodesty.29

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There are severe problems with this solution. Clearly the Sifre is addressing adultery, in that it applies the *sotah* ordeal for doubtful situations of the case under discussion. However, the *sotah* ordeal applies only to suspected adultery, but not to suspected lighter immodesty. Furthermore, the source in the PT suggesting that Bet Shammai permit divorce even for immodesty is certainly a late baraita, and its unique opinion cannot be expected to underlie the Sifre's general language. R. Mana supplied a standard talmudic resolution to conflicting sources, by assigning each to different circumstances, whereas critically they are better arranged on a chronological continuum.

J. Neusner translates our passage:

Since it is said... (Deut. 24:1), we derive the rule that a woman leaves her husband with a writ of divorce only in a case in which the husband has witnesses who have given an admonition [as to what is required should he consummate the marriage and then wish to end it].

This explanation assumes that warning under discussion is one presented as a prior admonition at the time of marriage explaining that the marriage could be terminated through divorce, although such an admonition is unknown elsewhere. This ingenuity of this solution underscores the difficulty of our passage.

A different attempt to reinterpret the “witness” clause in Sifre 7 has been presented by Y. Youngster:

In light of these difficulties we should conclude that the witnesses mentioned here are not witnesses to adultery, but witnesses to ‘warning’ (*עדי התראה*), witnesses to [the declaration of] ‘jealousy’ (*עדי קנייה*), and thus is the text to be interpreted: the biblical divorce passage allows the husband to divorce his wife only if he found ‘something unseemly’ (*ערה דבר*) in her. Were ‘something unseemly’ clear testimony regarding fornication, divorce is out of the question, for the woman is subject to the death penalty. Therefore the author of this passage assumes that ‘something unseemly’ (*ערה דבר*) is a situation close to certain [adultery], even though this virtual certainty does not rely on direct testimony. This situation can occur if the woman went into ‘seclusion’ (*נסתרה*) after two witnesses administered a warning to her, for then a reasonable assumption that she had sex in seclusion is created.

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30 See my Gittin commentary op. cit.
31 J. Neusner, *A Theological Commentary to the Midrash*, v. 8, Sifré to Numbers and Sifré to Deuteronomy, (Lanham, 2001), 30.
This proposal, equally ingenious, takes the witnesses as the witnesses mentioned in mSot 13: “He must warn her before two witnesses,” a stilted interpretation of our passage in context. Furthermore, at a certain point, Youngster makes the witnesses themselves responsible for sounding the warning instead of the husband, a procedure unknown elsewhere.33 This then is also a position of desperation, underscoring once more the profound difficulty of our passage when it lacks the word “not”!

I. Rosen-Zvi34 proposes in essence the same solution raised by Youngster, and it is open to the same objections. Indeed, the fact that this solution requires reconstruction of basic definitions,35 yielding a system unknown elsewhere, is openly acknowledged by Rosen-Zvi.36

The most extensive study pertaining to the issue at hand is by Vered Noam. It offers a valiant attempt to explicate the text as it stands, certainly a great desideratum for academic scholarship, often raised to the status of a categorical imperative.

Noam’s solution to the crux in this Sifre passage37 corresponds exactly to the position presented by R. Nahum Eliezer, offered briefly by

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33 Even though the term התראה has been used to explain the term קינון in bSot 3a (אמר רב נחמ בר ACTIVE; see Rashi to Numbers 5, 14), in an operative sense the two are never mixed.

34 Ibid., 174.

35 קינון (ץחר חחר) והשיה (יש לעיר).

36 Rosen-Zvi credits Menahem Kahana’s yet unpublished commentary on Sifre Bemidbar, and part of his language seems to be quoted directly from Kahana’s work, although the commentary does not appear in Rosen-Zvi’s bibliography. See also Rosen-Zvi’s reference to Youngster in I. Rosen-Zvi, The Rite that Was Not: Midrash and Gender in Tractate Sotah (Jerusalem 2008), 38, n. 69 (Hebrew). [At proof-reading: Kahana’s commentary has now appeared. See M.I. Kahana, Sifre on Numbers: An Annotated Edition, II (Jerusalem: Magnes 2011), 79-82 (Hebrew)].

37 Whose difficulty she acknowledges: “In a most matter-of-fact and nonchalant manner, they introduce a unique and exceptional ruling, which contradicts everything we have learned from other sources, eliciting great surprise among commentators and researchers alike” See V. Noam, “Divorce in Qumran in Light of Early Halakha,” IJS 66 (2005): 212.
R.M.D. Ashkenazi, and implicit in the commentary of R. Hillel, as I have suggested above.\textsuperscript{38} Noam writes:\textsuperscript{39}

According to this midrash, in order for a husband to divorce his wife, the wife must be accused of adultery. There must be witnesses to the act who issued a prior warning, and there must also be an organized judicial procedure—as is customary in capital offences! The midrash explains that since a man could not divorce a wife suspected of adultery if these strict conditions were not met, it was necessary to enact the \textit{sotah} procedure—a—mystical, extra-judicial, transcendental procedure for determining a woman’s guilt. This explanation is surprising. It is a reflection of the strict ruling of Bet Shammai, which demands proof of a woman’s adultery in order to allow the divorce. The mGit 9:10 states…

Noam opens her analysis by stating: “According to this midrash, in order for a husband to divorce his wife, the wife must be accused of adultery.” The nub of my criticism challenges this statement. The midrash is not addressing the question as to what are the legal grounds for divorce, but what must be done to the adulterous wife according to the various conditions of suspicion or proof! Contrast our expanded translations:

<table>
<thead>
<tr>
<th>Noam</th>
<th>Friedman</th>
</tr>
</thead>
<tbody>
<tr>
<td>we derive the rule [that a woman leaves her husband with a writ of divorce]</td>
<td>we derive the rule [that divorce is the required recourse for a husband who has found his wife to be adulterous]</td>
</tr>
<tr>
<td>only in a case in which the husband has witnesses who have given prior warning [to the wife, as to the ban and the punishment].</td>
<td>only in a case in which there are witnesses [who establish the fact of adultery], but they did \textless not\textgreater give prior warning [to the wife, as to the ban and the punishment].</td>
</tr>
<tr>
<td>But if there is a matter of doubt whether or not the woman has actually had sexual relations, \textbf{we do not know the rule of what the man has to do to her.}</td>
<td>But if there is a matter of doubt whether or not the woman has actually had sexual relations, \textbf{we do not know the rule of what the man has to do to her.}</td>
</tr>
</tbody>
</table>

\textsuperscript{38} The close correspondence in not noted in Noam’s study, although two of these are referred to obliquely. She introduces literature of the commentators by stating: “Various commentators have attempted to go beyond the plain meaning of these midrashic interpretations” \textit{ibid.}, 214). In note 31 ad. loc. Nahum’s commentary is listed. She further remarks: “It should be noted that Rabbenu Hillel appears to adhere to the plain meaning of the midrash.” I hope I have demonstrated above that the opposite is true.

\textsuperscript{39} \textit{Ibid.}, 212.
We are searching for “the rule of what the man has to do to her,” not for the rule of under what circumstances “a woman leaves her husband with a writ of divorce.” She can be dismissed with a writ of divorce for any reason the husband sees fit, according to standard halakha (Bet Hillel). However, the only “rule of what the man has to do” with his wife whose adultery has been established by witnesses, but they did not warn her of the death penalty, is to divorce her. If, as the Sifre goes on to say, her adultery was in doubt, “scripture obliges her to drink the bitter water.” Since Noam takes the question to be under what circumstances a woman leaves her husband with a writ of divorce, she is led to the conclusion that “[t]his explanation is surprising. It is a reflection of the strict ruling of Bet Shammai, which demands proof of a woman’s adultery in order to allow the divorce.”

Furthermore, the assigning of this Mishnah to Bet Shammai does not assuage the basic problem of the missing negative. If the witnesses warned her, how could Bet Shammai absolve her from the death penalty? If they did not, why divorce her first, and why make no mention of the death penalty (which Sifre knows exactly how to do, as in § 19)?

Succor comes, according to Noam, from bGit 90a. In the midrashic duel between Bet Shammai and Bet Hillel over the words “unseemly thing” (ערות דבר), the tannaitic discussion in Sifre Devarim falls short of assigning Bet Shammai an explanation of “thing” (דבר). Such an explanation was available to the PT in the form of a baraita not known to the BT. In order to fill this void (“What do Bet Shammai do with the word ‘thing’?—ובית שמאי האי ‘דבר’ מאי עבדי ליה”), the following answer is given:

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40 My italics.

41 Noam is quite aware of this. “Adultery backed up by witnesses who issued a prior warning was punishable by death, and a woman who was sentenced to death, does not need a divorce!” Ibid., 213; this is of course correct for biblical and certainly rabbinic law despite the prophetic imagery in Hosea 2:4–5, cf. Jeremiah 3:8; on this issue see Westbrook, “Adultery in Ancient Near Eastern Law,” 577–580. Despite this fact, she hopes to make her case based upon Sifre 19: “Nevertheless, there is another passage in Sifre (ibid.), which proves the authenticity of this extraordinary ruling […] The midrash does admit that a woman found guilty of adultery according to two witnesses who have issued a prior warning to her is subject to capital punishment. On the other hand, the midrash begins its discussion with the assumption that a woman is forbidden to her husband (and consequently, a candidate for divorce), first of all, precisely in such a case.” See Noam, “Divorce in Qumran in Light of Early Halakha,” 213–14. This reading, I fear, is not upheld by the simple meaning of that passage.

42 Brought here in the succinct form found in the manuscripts, versus the expansion in the printed editions.
It says here ‘thing’, and elsewhere it says ‘thing’; just as there two witnesses are required, so here are two witnesses required.

“The Talmud surmises that Bet Shammai would have dealt with the word דבר by extrapolating from the laws of witnesses to the laws of divorce, thus requiring witnesses to an adulterous act in order to permit divorce”; thus Noam’s conclusion, which she wishes to trace to an authentic tannaitic position.⁴³ We will attempt to demonstrate that this passage is not only unique to the BT, but was composed by the BT through a process which we can reconstruct, and thus can shed no light on the historical Bet Shammai.

The process begins with mSot 6:2–3:

If one witness said, ‘I saw her that she was defiled’, she does not need to drink…

For the inference might be: Since the first testimony (which does not render her forbidden for all time) cannot be sustained by less than two witnesses, should we not, therefore, infer that the last testimony (which renders her forbidden for all time) cannot be sustained by less than two witnesses! But Scripture says, And there be no witness against her [meaning] any manner of evidence against her.

⁴³ Noam, “Divorce in Qumran in Light of Early Halakha,” 215. See the rest of her discussion there, where she uses mSot 1:1 to support the conjecture that this “anonymous text of the Talmud” is indeed an ancient tannaitic position of Bet Shammai. See below.
From this to the first testimony is an argument from the less to the greater: If the last testimony (which renders her forbidden for all time) can be sustained by one witness, should we not therefore infer that the first testimony (which does not render her forbidden for all time) can also be sustained by one witness! But Scripture says, Because he hath found some unseemly matter in her (Deut. 24:1), and elsewhere it says, At the mouth of two witnesses...shall a matter be established (Deut. 19:15). As the matter there spoken of must be at the mouth of two witnesses, so, here, it must be at the mouth of two witnesses.

In order to prove that two witnesses are required to establish the fact of the wife’s “seclusion” with another man in regard to the laws of sotah, strange recourse is made to the divorce passage of Deut. 24, viewing part of its language as referring to sotah! The Talmud’s anonymous voice finds this preposterous and impossible. It offers another derivation for the witnesses of “seclusion” which it reads into the Mishnah, and it reroutes the Mishna’s derasha to a different halakhic context! The new context is “an ordinary charge of infidelity”, namely, not in the context of the sotah ordeal:

Whence however, have we it that one witness is not believed in an ordinary charge of infidelity where there was neither warning nor seclusion? Here [in connection with infidelity] the word ‘thing’ occurs and it also occurs [in the law of evidence]; as with the latter [a charge is established] by two witnesses, so [is the former established] by two witnesses.45

44 ySot 11 (16b) (re. R. Eliezer) "עוה וסתייה, דבר הוא קרוי, סתייה בלא סתירה, דבר הוא קרוי! Despite the strange-ness, this is of course the correct meaning of the Mishnah. See the explanation of this phenomenon below.

45 bSot 3b (cf. 3b): "ונמאנה בעלה באין בפני ברל סתייה, דלא מתיימן玨 ראש; ביד נאמר בלא מהלך, דבל דרמר על פנים עדים, אöm לא ב amat על פי עדים."
An ordinary charge of infidelity is established only through the testimony of two witnesses! The Talmud is not dealing here with Bet Shammai’s rulings at all, nor with those of any other ancient sect. This is standard halakha, and certainly according to Bet Hillel. What is the function then of the required testimony of two witnesses? This is laid down here not in regard to execution, but in context (mSot 6:2) it is similar to the function of one witness to adultery of a woman after jealousy warning and seclusion: the testimony of one witness forbids her to her husband! However, in “ordinary” charges of adultery, outside of the context of the sotah ordeal, testimony that a woman committed adultery will make her prohibited to her husband only when it is given by two witnesses. Compare:

R. Hanan said: Witnesses against a betrothed damsel who were proved false are not executed, since they may plead, We came forward [to testify] only to render her ineligible for her husband. But they must surely have warned her!—This treats of a case where they did not warn her. (bSan 41a)

We see that the legal brunt of testimony by two witnesses of adultery who did not deliver a warning is to render the adulterous woman prohibited to her husband, and this is what is meant in bSot 31b.

The language in bGit 90a is identical with that quoted from bSot 31b. In order to answer the question “What do Bet Shammai do with the word ‘thing’?”, the Talmud transfers a passage from bSot 31b whose essential content is not at all unique to Bet Shammai. Indeed according to the sugya of bGit 90a and Rashi ad. loc. it is a ruling held in common by both Bet Shammai and Bet Hillel which requires “clear” testimony by two witnesses of the adulterous act in order to make her prohibited to her husband. “Clear,” but without having delivered the warning. This is corroborated by the use of the exact same language that was originally formulated at bSot 31a. The law is not unique to Bet Shammai, it just gets them off the hook as to what they could do with the word “thing,” namely, use it for one of the two laws which Bet Hillel derive from this word.

Certainly there is no basis to take the explanation of “thing” ascribed to Bet Shammai in bGit 90a as an ancient tradition, and there is nothing to be found there to support the interpretation that Sifre 7 (without “not”) represents a position of Bet Shammai. Furthermore, the same

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46 See Maimonides, Mishne Torah, Sotah 1:15.
47 אמר רב חנן: עדין עתרה המאורסה שזוהמה—אין נחרצה. מועתק שלוליס תלמר לאוסרה על בעלת באומר—הוא אטור בה!—ולא אטור בה.
48 This concept is dealt with in my commentary to Gittin IX, sugya 21.
problems met above the Sifre also plague this interpretation of bGit 90a. Noam claims on the basis of this passage, combined with even less explicit passages that “over the course of time, tannaitic halakha interpreted ‘the clarification of the matter/thing’. [...] as a judicial procedure for divorce involv[ing...] witness and prior warning.”49 But here the original question returns (הדרה קושיא לודבותה): such a background surely must require execution and not divorce, even for Bet Shammai (or: how much more so for Bet Shammai)?50

Methodologically therefore, we must balance our unwillingness or reluctance to emend with the canons of textual criticism when warranted; our devotion to the lectio difficilior with the fact, as Saul Lieberman has taught us, that a corrupt text is also a lectio difficilior.

2. The Wages of Adultery

We are now in a position to sort out the wages of adultery, and sort out the relevant texts:

Deut. 24:1
mGit 9:10
mSot 6:3
Sifre Bemidbar 7

Deut. 24:1

This verse presents a general description of what might lead to divorce; it does not lay down legal cause for divorce.51 The phrase ערה דבר can signify any negative orientation of the husband towards his wife, from suspicion of adultery52 to the slightest defect.53 The range of translations is telling on this point:

50 In mGit 9:10 Bet Shammai are referring to unchastity of a lesser degree than proven adultery with warning by witnesses. See mKet 3:4–5, mss reading, and see Friedman, Gittin IX, Talmud Ha-Igud, in press, Mishnah 10.
52 Certainly not testimonial proof of adultery.
53 A detailed discussion is found in my Gittin IX, to Mishna 10, par. 2. Also, compare Exod. 21:8. Moshe Weinfeld writes: "ערה דבר means an ‘indecent’ or ‘immodest’
When a man hath taken a wife, and married her, and it come to pass that she find no favour in his eyes, because he hath found some uncleanness in her: then let him write her a bill of divorcement, and give it in her hand, and send her out of his house.

When the Torah refers to full-fledged adultery, clear-cut language is used for the act itself and its consequences:

<table>
<thead>
<tr>
<th>Lev 20:10</th>
<th>Lev 20:10</th>
</tr>
</thead>
<tbody>
<tr>
<td>If a man commits adultery with a married woman, committing adultery with his neighbor’s wife, the adulterer and the adulteress shall be put to death.</td>
<td>ואיש אֲשֶׁר יִנְאַף אֶת אֵשֶׁת אִישׁ אֲשֶׁר יִנְאַף אֶת אֵשֶׁת רֵעֵהוּ מוֹת יוּמַת הַנֹּאֵף וְהַנֹּאָפֶת:</td>
</tr>
<tr>
<td>Deut. 22:22</td>
<td>Deut. 22:22</td>
</tr>
<tr>
<td>If a man is found lying with another man’s wife, both of them—the man and the woman with whom he lay—shall die.</td>
<td>כִּי יִמָּצֵא אִישׁ שֹׁכֵב עִם אִשָּׁה בְעֻלַת בַּעַל וּמֵתוּ גַּם שְׁנֵיהֶם הָאִישׁ הַשֹּׁכֵב עִם הָאִשָּׁה וְהָאִשָּׁה וּבִעַרְתָּ הָרָע מִיִּשְׂרָאֵל:</td>
</tr>
</tbody>
</table>

The meaning of these statements is precision-honed to perfection. They are as sharp and pointed as an iron dagger, in contrast to the vague and general עַרְוָת דָּבָר that can be applied to a range of situations, including poor civic sanitary conditions (Deut. 23:15). Similarly, Second Temple authors, when discussing adultery, use clear and unequivocal language, eg. Josephus:

—or improper act […] and here suggests an act of infidelity or of sexual aberration” etc. M. Weinfeld, *Deuteronomy and the Deuteronomic School*, (Oxford; Clarendon Press, 1972) 269, n. 4. In Anan’s Book of Precepts: “He found in her something despicable” A. Harkavy, *Studien und Mitteilungen* VIII; (St. Petersburg, 1903) 118–9: "היה אָם אֶלְּהָמוֹת וּבַעֲטִינָיו יֵכָּב אֶל-שֶׁכִּי יָרְאָה אִשָּׁה וְאִישׁ בִּכְלָלָה, כִּי יִמָּצֵא בְּעִין וְאָשָּׁר אִישׁ שֹּׁכֵב עִם אִשָּׁה בְּעֻלַת וּמֵתוּ מִיִּשְׂרָאֵל, וְאֶל-שֶׁכִּי אֶל-שֶׁכִּי יָרְאָה אִשָּׁה וְאִישׁ בִּכְלָלָה גַּם שְׁנֵיהֶם הָאִישׁ הַשֹּׁכֵב עִם הָאִשָּׁה וְהָאִשָּׁה וּבִעַרְתָּ הָרָע מִיִּשְׂרָאֵל:"

54 New American Standard Bible: “he has found some indecency in her”; New Century Version: “he has found something bad about her”; Young’s Literal Translation: “he hath found in her nakedness of anything.”
A husband, therefore, is to lie only with his wife whom he hath married; but to have to do with another man’s wife is a wicked thing, which, if any one ventures upon, death is inevitably his punishment: no more can he avoid the same who forces a virgin betrothed to another man, or entices another man’s wife. (Contra Apion, 2.15)\textsuperscript{55}

New Testament:

And the scribes and Pharisees brought unto him a woman taken in adultery; and when they had set her in the midst, they say unto him, Master, this woman was taken in adultery, in the very act. Now Moses in the law commanded us, that such should be stoned… (John 8:1–3)

Philo:

The law has pronounced all acts of adultery, if detected in the fact, or if proved by undeniable evidence, liable to the punishment of death. (On Special Laws 3.10,52)

Philo, through the mouth of Joseph, cross-culturally:

I, therefore, having kept myself pure to this day, will not begin now to transgress the law by adultery which is the greatest of all sins, when I ought rather, even if in past time I had lived in an irregular manner, and had been led away by the impulses of youth, and had imitated the licentiousness of the natives, still not to seek to pollute the marriage of another man, an offence which who is there would not avenge with blood? For though different nations differ in other points, still all agree in this alone, that all men think him worthy of ten thousand deaths who does so, and give up the man who is detected in adultery without trial to the husband who has detected him. (Of Joseph, 44)\textsuperscript{56}

\textit{mGit} 9:10

“Bet Shammai say, a man should not divorce his wife unless he has found unchastity (ערוה) in her, for it is written, because he hath found in her indecency in anything (עררה בדבר).”\textsuperscript{57} This falls far short of a

\textsuperscript{55} Cf. Book of Susana.

\textsuperscript{56} Nir, Noah’s brother, considered divorce for his wife whose adultery was not uncovered by witnesses, but discovered through pregnancy, until she was struck down from heaven (2 Enoch 71: 1–9).

\textsuperscript{57} Cf. H. Danby’s translation, p. 321, the main difference of mine from his being: may not/should not.
formal charge of adultery, in which case she is subject to execution. It is, however, serious unchastity that is a proper cause for divorce. “Serious unchastity” is promiscuity equivalent to suspicion of adultery, or adultery lacking formal testimony; Hebrew: זימה. A man who raped a virgin must marry her, “he can never have the right to divorce her” (Deut. 22:29). But still, “if she was found unchaste … he may not continue [his union] with her, for it is written ‘And she shall be to him for a wife’ (Deut. 22:29)—a wife that is fit for him” (mKet 3:5). An “unchaste” wife is fit neither for a rapist nor for any Israelite. He must divorce her! This is the case for both Bet Shammai and Bet Hillel. Were this talking about a case of full formal testimony of adultery, the apodosis of this mishnah would be a terrible understatement.

The Hebrew of the above-quoted phrase from mKet 3:5 “if she was found unchaste” is נמצאת בה דבר ערותה in the printed editions, but in the exact manuscripts: נמצאת בה דבר זימה. Bet Shammai at mGit 910 attempt to limit divorce to דבר זימה, in which case divorce is mandatory (and only mandatory divorce is sanctioned). This is certainly at least a peg below “the adulterer and the adulteress shall be put to death” (Lev. 20:10). However, instead of using the phrase זימה as in mKet 3:5 they use the language of their prooftext Deut. 24:1: ערותה.

Many scholars have suggested that Bet Shammai’s ruling on divorce is similar to the one found in Matthew, containing the famous “exception clause.”

The fact that πορνεία here is not automatically equivalent to μοιχεία is clearly spelled out in this very passage, as they are indeed listed side by side in Matthew 15:19 = Mark 7:21.
Scholars have argued, based upon LXX translations, that πορνεία is equivalent to Hebrew זנות (compare זימה in the above-mentioned mishna), or “means unlawful sexual conduct, or in unlawful conduct general.” The use of the word μοιχᾶται suggests moral equivalency to prosecutable adultery in its full formal legal sense (in flagrante delicto, ocular testimony, death penalty liability), whereas the use of πορνεία here covers the full range of the husband’s reasonably convincing evidence of “fornication”, falling short, however, of full-blown μοιχᾶται. The Matthew passage itself

Matthew 5:32

ἐγὼ δὲ λέγω υμῖν ὅτι πᾶς ὁ ἀπολύων τὴν γυναῖκα αὐτοῦ παρεκτός λόγου πορνείας ποιεῖ αὐτὴν μοιχευθῆναι, καὶ οὗ ἐὰν ἀπολελυμένην γαμήσῃ, μοιχάται.

Matthew 5:32 (King James Version)

But I say unto you, That whosoever shall put away his wife, saving for the cause of fornication, causeth her to commit adultery: and whosoever shall marry her that is divorced committeth adultery.

Matthew 19:9

λέγω δὲ υμῖν ὅτι δὲς ἂν ἀπόλυση τὴν γυναῖκα αὐτοῦ μὴ ἐπὶ πορνεία καὶ γαμήσῃ ἄλλην μοιχάται.

Matthew 19:9

And I say unto you, Whosoever shall put away his wife, except it be for fornication, and shall marry another, committeth adultery: and whoso marrieth her which is put away doth commit adultery.


67 The fact that πορνεία is not equivalent to μοιχεία took Meier (pp. 147–50) far astray in equating πορνεία with incest. πορνεία includes the act of adultery, but it does not pinpoint the exact legal status for adultery as πορνεία does. Guenther, in his syntactic study of the exception clauses in these Matthew passages, senses a quantitative difference between πορνεία and μοιχεία. “Both the exception introducer (παρεκτός) and the exclusion introducer (μὴ ἐπὶ) represent the minor portion of the whole. In both our Matthean texts, the scope of πορνεία must be narrower than that of μοιχεία (adultery)” (p. 96), which would present no small difficulty from a legal consideration, where adultery must be more narrowly defined than fornication. In light of our conclusions above, it would be
uses πορνεία as a reflex of דבר עורה in Deut., as Bet Shammai’s statement is also a reflex of that verse.68

With the clarification of meaning on both sides, we can maintain the equivalence of these two texts.

Unchastity was exactly the background and justified legal cause for subjecting a married woman to the sotah ordeal, and not demonstrated adultery which requires the death penalty, and must be associated with an absolute degree of certainty not commensurate with the gnawing doubt which leads to the sotah ordeal. Shlomo Naeh, basing himself on a reading in the PT in the edition of the Academy of the Hebrew language, has recently demonstrated that “דבר של זימה” is cause, and the only legal cause, for the ordeal.69 With the sotah ordeal not operative, the mandatory recourse for such unchastity is divorce.

According to the opinion of Bet Shammai in mGit 9:10, divorce should not be resorted to other than for unchastity. The PT knows of a broader opinion ascribed by some tannaitic reciters to Bet Shammai, according to which a wife may even be divorced for “ugly behavior” (דברים כאורים),70 explained as immodest dress. The two opinions are contrasted by the PT: according to one (Mishnah) a wife may be divorced for עורות only, and any lesser unchastity or promiscuity is “ugly behavior.” It has usually been assumed in the past that עורות in the Mishnah’s report of Bet Shammai does not refer to adultery only, and any lesser unchastity or promiscuity is “ugly behavior.”71 We have tried to demonstrate that עורות in the Mishnah’s report of Bet Shammai does not refer to adultery only, and any lesser unchastity or promiscuity is “ugly behavior.” According to the way we have defined these terms, a clear distinction must be made among these three categories: “adultery,” “unchastity” and “immodesty”. For adultery—death; for

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70 ySot 11 (16b) = yGit 9:11 (50d).
71 I. Rosen-Zvi, אפילה מכא אורות גוזה חנה—מכס ניסך על עליות הצורה וה/license, 2, n. 5.
unchastity—mandatory divorce; for immodesty—elective divorce\(^{72}\) on the part of the husband, without the penalty of paying the *ketubba*.\(^{73}\)

*mSot* 6:3

This text has been a cause of confusion and consternation, in that it appears to present a strange combination of *sotah* and divorce terminology. Together with the context in its present setting (that is, following Mishnah 2a)\(^{74}\) it reads:

If one witness said, ‘I saw her that she was defiled’, she does not need to drink…

For the inference might be: Since the first testimony (which does not render her forbidden for all time) cannot be sustained by less than two witnesses, should we not, therefore, infer that the last testimony (which renders her forbidden for all time) cannot be sustained by less than two witnesses! But Scripture says, *And there be no witness against her* [meaning] any manner of evidence against her.

From this to the first testimony is an argument from the less to the greater: If the last testimony (which renders her forbidden for all time) can be sustained by one witness, should we not therefore infer that the first testimony (which does not render her forbidden for all time) can also be sustained by one witness! But Scripture says, *Because he hath found some unseemly matter in her* (Deut. 24:1), and elsewhere it says, *At the mouth of two witnesses… shall a matter be established* (Deut. 19:15). As the matter there spoken of must be at the mouth of two witnesses, so, here, it must be at the mouth of two witnesses.

A woman who has gone through the two preparatory stages of the *sotah* ordeal (“warning” and “seclusion”),\(^{75}\) and then a witness testifies to the fact that she has been “defiled” by (= had intercourse with) a man other than her husband does not proceed with the ordeal (“she does not drink the water”). The process is terminated, and she is permanently prohibited to her husband, who must divorce her.\(^{76}\)

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\(^{72}\) There were tannaim who ruled that divorce is mandatory even for immodesty. The interlocutor objects that were this opinion to be accepted, no daughter of our father Abraham will remain married to her husband (Sifre Zuta Devarim 24, 1 [p. 346] and parallels; see my *Gittin IX* at sugya 21).

\(^{73}\) This penalty is regularly associated with elective divorce, but exempted here; see mKet 7:6.

\(^{74}\) See my *Gittin IX*, appendix to sugya 23.

\(^{75}\) קֶנֶּיִי יִסְחָרִי

\(^{76}\) See also mSot 1:3; 4:2; 6:2 etc.
In this whole situation there are three possible situations requiring testimony of witnesses (according to the position of R. Yehoshua in mSot 1:1): “warning” (קוני), “seclusion” (סתירה), and “defilement” (טומאה). MSot 6:3 refers to the testimony of seclusion as “the first testimony”, and the testimony of defilement as “the second testimony,”\(^\text{77}\) since “warning” is not part of that discussion. The last paragraph of the mishna (in its entirety certainly an ancient derasha) deals with the following question: in that the testimony of one witness is sufficient to establish “defilement, a situation which prohibits her to her husband forever, should we not infer that regarding “seclusion”, which prohibits he to her husband only conditionally,\(^\text{78}\) the testimony of one witness would also be sufficient?

The Mishnah rebuffs this challenge with a scriptural derivation proving that “seclusion” requires two witnesses: Scripture says, Because he hath found some unseemly matter in her (Deut. 24:1), and elsewhere it says, At the mouth of two witnesses... shall a matter be established (Deut. 19:15). As the matter there spoken of must be at the mouth of two witnesses, so here, it must be at the mouth of two witnesses. “Here” (“some unseemly matter” [عبرות דבר] of our divorce passage in Deut. 24:1) is used as a derivation for the laws of “seclusion” in the sotah passage!\(^\text{79}\) What does divorce have to do with sotah? This surely requires sorting out.

We will attempt to prove that “seclusion” applies equally well to both passages, and this early derasha had no compunction about combining divorcee with sotah. Let us start with Numbers 5:12–13.

If any man’s wife has gone astray and broken faith with him in that a man has had carnal relations with her unknown to her husband, and she keeps secret the fact\(^\text{80}\) that she has defiled herself without being forced, and there is no witness against her—

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\(^\text{77}\) See tSot 1:2 (p. 151).
\(^\text{78}\) If the ordeal is negative she returns to her husband (Numbers 5:28).
\(^\text{79}\) “Surprisingly, this law is based on the word davar = ‘thing/matter’ in the verses relating to divorce, and not those relating to the sotah.” See Noam, “Divorce in Qumran in Light of Early Halakha,” 215.
\(^\text{80}\) Cf. Ibn Ezra.
Milgrom writes: “Heb. ve-nisterah. The Nifal is taken as a reflexive, literally ‘she keeps herself secret’ (Ehrlich).” 81 The Septuagint records: καὶ κοιμηθῇ τίς μετ’ αὐτῆς κτιτήν στερμάτος καὶ λάθη εξ ὀφθαλμών τοῦ ἀνρὸς αὐτῆς καὶ κρύψῃ αὐτή δε ἢ μεμιαμμένη καὶ μάρτυς μή ἢ μετ’ αὐτῆς καὶ αὐτή μη ἢδ συνειλημμένη = “And if anyone sleeps with her in a union of seed and escapes the notice of her husband’s eyes and she conceals it—although she is defiled—and there is no witness with her and she has not been caught.” In light of Job 28:2182 the meaning could be close to: and the matter was unknown to her husband and hidden [from him].83

The simple meaning of נסתרה may be less than opaque to some readers. The Sages built homiletical explanations around these verses which yielded the developed rabbinic concept of the sotah ordeal, according to which נסתרה is not a description of lack of certainty regarding an event before “warning” (קינוי), anterior to and independent of the ordeal procedure, as is the simple biblical meaning, but rather “seclusion” (סתרה)84 with another man after the warning.85

“Seclusion” with a man, coming after “warning”, is a preliminary to the ordeal. It is valid as such when its duration is sufficient for presumed intercourse (“seclusion long enough for defilement”)86 and is witnessed by two witnesses (according to R. Yehoshua’s position in mSot 1:1).

Thus “seclusion” and “defilement” are closely related. “Seclusion” with a man being an unchaste act is suspected defilement, and legally treated as presumed defilement. If seclusion takes place within the sotah procedure, denial on the part of the woman87 leads to the full implementation of the ordeal (“drinking the water”), which will determine if she is defiled and must be divorced, or exonerated and may return. Admission on the part

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81 Jacob Milgrom, The JPS Torah Commentary: Numbers, 302, n. 33.
82 וְנֶעֶלְמָה מֵעֵינֵי כָּל חָי וּמֵעוֹף הַשָּׁمַיִם נִסְתָּרָה cf. reading in Numbers 5:13 in the Samaritan Pentateuch (Ta, p. 137; Kittel, p. 199) in place of ונעלת.
83 M. Halbertal, Interpretative Revolutions in the Making, (Jerusalem: Magnes Press, 1997), 96 (Hebrew), considers the simple meaning, but does not present this form.
84 See mSot 1:2 (בִּגְמָה וְדְרָכָה; The Temple Scroll (ed. Y. Yadin, Jerusalem, 1972), 209, l. 4 (בָּנָכֶהוּ וְדְרָכָה בְּסַדְרָה).)
86 ספר במדבר 7, 12 (סתריה כֶּרֶם טוֹמָא). See tSot 1:2 (p. 151), where “what is the duration of defilement” refers to the possible defilement during seclusion (and not “defilement” of the previous phrase = “testimony of defilement”), the Tosefta deriving from a text similar to the Sifre passage. Cf. bSot 4a and other parallels.
87 Of defilement before and after warning.
of the woman of defilement\textsuperscript{88} or testimony to that effect by one witness\textsuperscript{89} terminates the ordeal and she must be divorced.

If “seclusion” with a man takes place external to, and independent of, the ordeal procedure, there not having been any “warning” by the husband, it is still an unchaste act raising suspicions of defilement, and when established through the testimony of two witnesses, obligates the husband to divorce his wife.\textsuperscript{90} Even though this is not the opinion of most post-talmudic codified law, it was certainly represented among positions voiced by the Talmudic sages.\textsuperscript{91} The standard post-talmudic codification is exemplified here in the following passage from Maimonides’ \textit{Mishne Torah}:

\begin{quote}
How is a woman to be dismissed on the ground of ill repute? For example, if witnesses testify that she has done something exceedingly unseemly, indicating that a transgression has been committed, even though there is no clear evidence of harlotry.

How so? If, for example, she is alone in the courtyard, and people seeing a spice-peddler come out, immediately at the moment of his exit enter and find her rising from the couch and putting on her trousers or tying her belt, or find moist saliva above the canopy; or if both of them come out of a dark place, or help one another to ascend from a pit, or the like; or if they see him kiss her at the opening of her chemise, or see them kiss or hug each other, or if the two of them enter a place one after the other and shut the doors, or act in a similar manner. In any case such as these, if the husband wishes to dismiss her, \textit{she may be dismissed} without her ketubbah, and no warning is required.

If a man sees his wife play the harlot, or if one of his or her relatives, in whom he places credence and reliance, tells him that she has played the harlot—whether the informant is a man or a woman—once his mind is firm in the belief that the information is true, \textit{he is obligated to dismiss her}, and is forbidden to have intercourse with her; he must, however, pay her ketubbah.
\end{quote}

\textsuperscript{88} mSot 1:5; 4:2.

\textsuperscript{89} mSot 6:2, or significant rumor, mSot 6:1 (Meiri; Albeck, \textit{Shishah Sidre Mishnah: Seder Nashim}, 385; the word \textit{ונסתרה} in that mishna is also absent in Cod. Kaufmann etc. [cf. Hershler, 67 and n. 67; J.N. Epstein, \textit{Introduction to the Mishnaic Text} [Jerusalem, 2000] 84 [Hebrew] and is clearly a gloss).

\textsuperscript{90} This suggestion should be compared to the Talmud’s ruling (see above at n. 45) that two witnesses are required to prohibit the husband to continue cohabitation with his wife.

\textsuperscript{91} Some of whom required divorce even for immodesty. See below.
If a woman tells her husband that she has, while under him, played the harlot of her own free will, no attention need be paid to her statement, since she may have cast her eyes upon another man…

But if he believes her, and places reliance in her words, he is obligated to divorce her. The court, however, may not compel a man to divorce his wife for any of these causes, unless two witnesses come forth to testify that his wife has indeed played the harlot in their presence, and of her own free will. Only thereafter may they compel him to divorce her.  

However, as indicated above, there are Talmudic authorities that required divorce for suspicious seclusion, and this opinion, for such seclusion based upon the testimony of two witnesses, was still held by some geonim. It would certainly be reasonable to assume that the ancient derasha preserved in mSot 6:3 would agree.

Therefore, the tanna of this Mishnah could easily and legitimately make use of the term “seclusion” (סתרה) in the context of mandatory divorce, and transfer an aspect of its legal definition, namely, the requirement of testimony by two witnesses, to the “seclusion” of the sotah ordeal. The shock or strangeness of this usage has now been removed, and there is no need to force it into yielding far-reaching and undocumented tannaitic positions.

According to our analysis, the clear legal distinction between adultery proceedings and divorce proceedings is maintained. When the witnesses present full testimony to adultery, including warning of the death penalty, execution is necessary, in the eyes of both Bet Hillel and Bet Shammai; lesser testimony, such as lack of warning, is equivalent to suspicious seclusion, and divorce must follow.

Thus our decision to add the negative to the Sifre Bemidbar text (התרו בה לא ו) is justified not only by the canons of textual criticism, but also by the clear and indisputable requirements of all surviving authentic tannaitic law. Mandatory divorce for witnessed, certain, adultery is possible according to both Bet Shammai and Bet Hillel only if no warning was administered. Were warning administered, the death penalty is required. Consequently we must read: “they did not warn her.”

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92 Ishut 24: 15, 17–18.
93 See yKet 7:6 (31c); bYev 24b. See my IX Gittin at sugya 21.
94 Sh’iltot, Balak 134 (Mirsy, Bemidbar, 78).
95 Such as ascribing the Mishnah to Bet Shammai only, and assuming that for divorce they would require full adultery testimony with warning by the witnesses. See Noam, “Divorce in Qumran in Light of Early Halakha,” 215.
96 A Hebrew summary of this study with some expansion of its conclusions appears at https://dl.dropbox.com/u/50708793/adultery%20site%20heb.doc.