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ORIGINAL ARTICLE

Rabbinic Evidence for the Spread of Roman Legal Education in the Provinces

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Abstract

A long tradition of comparative scholarship has succeeded to establish the impact of Roman legal environment on rabbinic law making during the first two centuries CE, particularly in the field of family and status. Yet, the specific channels for acquiring this knowledge have hitherto remained a matter of conjecture. This paper argues that the rabbis were exposed to the contents of the current legal handbooks. Tractate Qiddushin (on betrothal) of the Mishnah includes two peculiar units: the first (1.1–5) regarding forms of acquisition and the second (3.12) on the status of newborns. Both units appear in key points in the tractate and exhibit striking structural and conceptual similarities to extended portions of the Roman school tradition regarding the laws of status, as handed down in Gaius' *Institutes* and Pseudo-Ulpian's *liber singularis regularum*. It is therefore suggested that these units provide the earliest literary attestation already around the turn of the third century CE for the dissemination of Roman legal education among non-Roman provincials in the East, who sought to adjust their local practices into Roman-like legal structures.

Early rabbinic literature of the first two centuries CE provides an exceptional view into the nature of the encounter with Roman law in the provinces. Despite the rabbis' resistant stance toward Roman imperialism and their effort to develop a separate system of law, this group of highly qualified local legal experts were clearly aware of Roman legal administration and practices. A long tradition of comparative scholarship has succeeded to identify sporadic points of contact between rabbinic and Roman law,[1] but careful textual

[1] Following are some select examples of this scholarship (which has re-emerged recently). See below (n. 73) for additional cases of comparative scholarship regarding laws of status. Boaz Cohen, *Jewish and Roman Law: A Comparative Study*, 2 vols. (New York: Jewish Theological Seminary, 1966), 1–14 surveys the earliest stages of this scholarly endeavor. See also Jay Harris,

analyses of some rabbinic units allow us to move beyond this general image and recover the specific channels through which this knowledge disseminated. Thus, rather than sidestepping rabbinic literature as a peculiar case of local law making, it is suggested that we view it as a rich source for studying the nature of local encounter with the manifestations of Roman law in the provinces.

Tractate Qiddushin (on betrothal) in the Mishnah[2] is divided into two main sections. Its first part is dedicated to the betrothal ceremony, its formal features, participants, and conditions. The second part, beginning with m. 3.12, deals with issues of status: who may marry whom and what is the status of the offspring. Both sections open with a unique set of principles, which—as we shall argue—bear striking resemblance to sections within Roman legal handbooks. The tractate commences with the principles regarding forms of acquisition (1.1–5), including women, slaves, property, and livestock. The second part of the tractate begins with a set of principles determining the status of newborns (3.12). Although some have claimed that these irregular units are rooted in early pre-rabbinic law,[3] I will argue rather that they belong to the latest stage of the Mishnah's redaction during the late second/early third centuries CE. I further argue that this case provides an unprecedented testimony to the acquaintance of (non-Roman) provincials with legal handbooks such as Gaius' *Institutes* already during this period.

We shall first discuss mishnah 3.12 on status, whose affinity to Roman law has been widely acknowledged. Indeed, this parallel can hardly be overlooked; at the same time, I will offer a new approach to assess its literary and historical significance, and a new model for describing the impact of Roman legal

"Fitting in or Sticking out: Constructs of the Relationship of Jewish and Roman Law in the Nineteenth Century," in *Jews, Antiquity and the Nineteenth Century Imagination*, eds. Hayim Lapin and Dale B. Martin (Bethesda: University Press of Maryland, 2003), 53–63, and Catherine Hezser, ed., *Rabbinic Law in its Roman and Near Eastern Context*, TSAJ 97 (Tübingen: Mohr Siebeck, 2003), 1–15 (introductory survey); David Daube, "The Civil Law of the Mishnah: The Arrangement of the Three Gates," *Tulane Law Review* 18 (1944): 352–407; Reuven Yaron, *Gifts in Contemplation of Death in Jewish and Roman Law* (Oxford: Clarendon Press, 1960); Daniel Sperber, *A Dictionary of Greek and Latin Legal Terms in Rabbinic Literature* (Ramat Gan: Bar Ilan University Press, 1984); Amram Tropper, "Roman Contexts in Jewish Texts: On Diatagma, and Prostagma in Rabbinic Literature," *Jewish Quarterly Review* 95 (2005): 207–27; Tzvi Novick, "The Borer Court: New Interpretations of mSan. 3," *Zutot: Perspectives on Jewish Culture* 5 (2008): 1–8; Natalie B. Dohrmann, "Law and Imperial Idioms: Rabbinic Legalism in a Roman World," in *Jews, Christians and the Roman Empire: The Poetics of Power in Late Antiquity*, eds. Natalie B. Dohrmann and Annette Yoshiko Reed (Philadelphia: University of Pennsylvania Press, 2012), 63–78; Orit Malka, "Disqualified Witnesses between Tannitic Halakha and Roman Law: The Archaeology of a Legal Institution," *Law and History Review* 37 (2019): 903–36. For a recent survey of this field see Katell Berthelot, *Jews and their Roman Rivals: Pagan Rome's Challenge to Israel* (Princeton and Oxford: Princeton University Press, 2021), 257–315.

[2] Note, Mishnah (upper case) is the name of the earliest composition of the rabbis dated to the turn of the third century, whereas mishnah (lower case) denotes the basic unit of legal rulings within a tractate of the Mishnah.

[3] In his survey of so-called "ancient tractates," Jacob N. Epstein includes the first chapter of Qiddushin, which he terms "tractate acquisition," and the section on genealogy (3.12–4.14) due to its Aramaic terminology. See Jacob N. Epstein, *Prolegomena ad Litteras Tannaiticas: Mishna, Tosephta et Interpretationes Halachicas* (Tel Aviv: Dvir, 1957), 54, 414–15 (in Hebrew).

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environment on the formulation of this section. Then we shall return to the opening unit of the tractate, which betrays a similar form of dependence on Roman legal literature. Together, these two key units reveal what provincials knew about the Roman principles of personal status, which they adjusted to their own forms of self-determination.

Status of Newborns

Mishnah Qiddushin 3.12 defines the status of children in various cases of regular and irregular marriages. Scholars have noticed early on that this mishnah presents us with one of the clearest cases of affinity between rabbinic and Roman law. This striking parallel has received various interpretations; however, as I will argue in this section, previous scholars have misjudged the historical significance of this similarity. A careful textual examination of the mishnah in comparison to other rabbinic sources will reveal the exact nature of the correspondence between these laws in the Mishnah and Roman legal sources and policy.

The mishnah consists of four sections, each of which includes a rule followed by examples:

> **(1) Any case where there is betrothal and no transgression—the offspring follows the male.**
>
> And which is this? This is a priestly woman, Levite woman, or Israelite woman who was married to a priest, a Levite man, or an Israelite man.
>
> **(2) And any case where there is betrothal but there is transgression—the offspring follows the inferior.**
>
> And which is this? This is a widow to the high priest, a divorcee, or released levirate widow to an ordinary priest, a female *mamzer* or *natin* to an Israelite man, the daughter of an Israelite to a *mamzer* or *natin*.
>
> **(3) And anyone who cannot have betrothal with him, but she can have betrothal with others—the offspring is a *mamzer*.**
>
> And which is this? This is one who has intercourse with any of the forbidden relations that are in the Torah.
>
> **(4) And anyone who cannot have betrothal, not with him and not with others—the offspring is like her.**
>
> And which is this? This is the offspring of a slave woman or a non-Jewish woman.[4]

The mishnah determines the status of a newborn according to two parameters: the legality of the marriage (=betrothal), and the participants' capacity to contract a legal marriage. In the first two cases the marriage is valid, but they differ with respect to their legality. In case of a legal marriage (1), the offspring follows the status of its father. According to section (2) since the marriage is prohibited, as in the case of a priest marrying a divorcee, the child follows the status of the inferior parent. The last two sections in the mishnah address cases where the couple lacks the legal capacity to perform a legal marriage.

[4] Translation following *Oxford Annotated Mishnah*, 2.322–23 (translation by Gail Labovitz).

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Here the mishnah distinguishes between a couple who basically has the capacity for legal marriage, but not with each other, such as relatives, in which case the child is a *mamzer* (3), who may not marry other Jews, and someone who completely lacks this capacity, such as non-Jewish woman or slave. In this case the child follows the status of the mother (4).

Scholars have pointed out the close affinity between the rabbinic principles of personal status neatly laid out in this mishnah, and the fifth title of Pseudo-Ulpian's *liber singularis regularum*.[5] This title rules that a father has *potestas* only over his children born of a legal marriage, and that the legality of the marriage is contingent upon the partners' capacity to contract such a marriage. This legal power, as a general capacity or with respect to particular partners, is termed *conubium*. The structure and context of this section in Pseudo-Ulpian is basically identical to the much more elaborate unit on *patria potestas* in Gaius' *Institutes* (1.55–96), which adds references to additional laws and *senatus consulta* that offer solutions to particular cases. Despite the difference in scope, the two texts are evidently based on a shared study or school tradition, whose contours are clearly apparent in the following sections of Pseudo-Ulpian:[6]

> (1) Children born of a legal marriage (*iustum matrimonium*) are in their *potestas*.[7] (2) A marriage is legal when there is *conubium* between the contracting parties [...] (3) *conubium* is the capacity to legally marry a wife.[8]
>
> (4) Roman citizens have *conubium* with Roman citizens, as well as with Latins and aliens who have been specifically granted this right.[9]
>
> (5) With slaves there is no *conubium*. (6) Nor is there *conubium* between ascendants and descendants, however distant the degree of relationship [...][10]

[5] This "Rules in One Book" which has been initially attributed to Ulpian, is also referred to as *Tituli ex corpore Ulpiani*, or *Regulae*.

[6] Scholars have debated how to describe the relationship between the two works. Fritz Schultz, *History of Roman Legal Science* (Oxford: Clarendon Press, 1953), 180–82 argued that the *liber singularis* was a later revision of Gaius. For a similar view, see Tony Honoré, *Ulpian: Pioneer of Human Rights*, 2nd ed. (Oxford: Oxford University Press, 2002), 207–12. In contrast, Hein L. W. Nelson, *Überlieferung, Aufbau und Stil von Gai Institutiones* (Leiden: Brill, 1981), 92–96 limited the similarities to general structural features. Following this approach, according to Martin Avenarius, *Der Pseudo-Ulpianische liber singularis regularum: Entstehung, Eigenart und Überlieferung einer hochklassischen juristenschrift* (Göttingen: Wallstein Verlag, 2005), 124–39, the work is contemporary to Gaius' *Institutes*. Both works drew from a shared study tradition, while each of the authors adjusted it to its own legal school. As Schultz points out, the basic contours of the isagogic literature from the mid-second century and onward, drew from the work of Sabinus, and derive from the basic systematic work of Mucius on the *ius civile*. At the same time, the extent to which Gaius innovated the "Institutional" tradition in accordance with his organizational scheme is underlined by David Johnston, "Gaius and the *Liber singularis regularum* Attributed to Ulpian," in *Le Istituzioni di Gaio: avventure di un bestseller*, *Trasmissione, uso e trasformazione del testo*, eds. Ulrike Babusiaux and Dario Mantovani (Pavia: Pavia University Press, 2020), 303–18.

[7] Compare Gaius, *Institutes* 1.55.

[8] Compare Gaius 1.56.

[9] Compare Gaius 1.56–57, 76–77 (cases of foreigners with *conubium*).

[10] Compare Gaius, 1.58–63.

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(7) If anyone marries a woman whom it is not lawful for him to marry, he contracts an incestuous marriage; and hence his children are not subject to his *potestas*, but are illegitimate (*spurii*), as if conceived in promiscuous intercourse.[11]

(8) When there is *conubium*, the children always follow the father. In the absence of *conubium*, they follow the status of the mother,[12] except where the child is born of an alien father, and a mother who is a Roman citizen, as the *Lex Minicia* directs that where a child is born of parents one of whom is an alien, it shall follow the condition of the inferior (*deterior*) parent.[13]

(9) A child born of a Roman citizen father and a Latin mother, is a Latin; one born of a freeman and a female slave, is a slave; since the child follows the mother as in cases where there is no *conubium*.[14]

As in the above mishnah, the capacity to perform legal marriage becomes the sole criterion, and it took over all other considerations, including illegal marriage among citizens, incest and marriage with non-citizens. All cases are subjected to the question of the partners' legal capacity, *conubium*.[15]

According to paragraph 8, when there is *conubium*, the children follow the status of the father (in addition to being under his *potestas*, §1). This is equivalent to the first section in the mishnah. In the absence of *conubium*, in case the mother is a peregrine or a slave, the children follow the status of the mother (§9). These two cases appear as well in the last section of the mishnah. Notably, with Pseudo-Ulpian, as in the mishnah, the status of the parents as citizens is only a secondary consideration, subject to the criterion of legal recognition. Thus, although the parents' citizenship is normally a precondition for achieving *conubium*, it is not necessarily so (§4). On the contrary, blood relations are another factor in determining legal capacity (§6). Incest is thus defined as taking a wife without legal right (§7), as is the case in the third section of the mishnah. In a particularly convoluted formulation the mishnah defines a *mamzer* as someone whose parents lacked the capacity to marry each other, in line with the Roman concept of *conubium*.

The principle in the second section of the mishnah according to which a child of an unlawful marriage acquires the inferior status fits as well to the same legal framework. In this case, the child does not automatically follow the mother's status, since the marriage is acknowledged; however, the partners are penalized for their offense and the child acquires the lower status. This is in fact the foundation upon which the *Lex Minicia*, mentioned in section 8, is

[11] Compare Gaius 1.64.

[12] Compare Gaius 1.67. Gaius adds that in case the husband proves that he was ignorant of the fact that the woman was not a Roman, the child is brought under his control. He thereby adds other cases of mistakes.

[13] Gaius 1.78. For the dating of the Minician Law under the Republic see David Cherry, "The Minician Law: Marriage and the Roman Citizenship," *Phoenix* 44 (1990): 244–66 (248–50).

[14] Gaius 1.79–82.

[15] See Susan Treggiari, *Roman Marriage: Iusti Coniuges from the Time of Cicero to the Time of Ulpian* (Oxford: Clarendon Press, 1991), 43–51, for a survey of the principles of *conubium* and *matrimonia iusta*.

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based. Instead of ignoring the relationship, and determining the child's status according to his mother, as if he was fatherless, the legal impact of this relationship is acknowledged, only in order to degrade the child to the status of the inferior parent (*deterior*).[16] Evidently then the principles of the Roman system explain all the cases in the mishnah as well as the taxonomy it offers. There are obvious and fundamental differences, to which we will turn next, but the shared rules deriving from the governing principles of legal capacity and legal marriage are substantial and cannot be ignored.

Are the two systems related?

How are we to explain the striking resemblance between the two texts? After all, the multiple points of convergence between the rabbinic and Roman systems evidently stretch beyond the general preference of the mother's "natural" status (*mater semper certa est*), that is directly relevant only to the last section of the mishnah. A range of scholarly suggestions reflect the changing approaches toward the relationship between rabbinic and Roman law. Boaz Cohen was not the first one to mention this parallel,[17] but he discussed it in some detail.[18] In accordance with his comparative approach his work focuses on the parallel principles of the two developed systems, while generally side-stepping the question of historical relationship.[19] This approach somewhat lost its appeal once the scope of rabbinic legal innovation under Rome was properly acknowledged.[20] Considering rabbinic involvement in reshaping Jewish law during the first two centuries CE it stands to reason that they would absorb or take into account current trends, even in the fields of family law.[21] In this vein, in an influential article Shaye Cohen has argued that the so-called "matrilineal principle," according to which the child follows the status of the mother in cases of

[16] Even when the parents lacked *conubium* and the marriage was deemed unlawful, it was not legally void, and the couple was granted some of the legal rights. See Cherry, "The Minician Law," 247. Furthermore, according to Ulpian (Dig. 48.5.14.1), a man could charge his wife with adultery even if they were not lawfully married (*iniusta uxor*), since the *Lex Iulia de adulteriis* encompassed all marriages (*omnia matrimonia*).

[17] Louis M. Epstein, *Marriage Laws in the Bible and in the Talmud* (Cambridge, MA: Harvard University Press, 1942), 174, 194–97 has argued that the notion of invalidated marriage is foreign to Jewish law and was introduced by the tannaim from Roman law.

[18] Boaz Cohen, "Some Remarks on the Law of Persons in Jewish and Roman Jurisprudence," *Proceedings of the American Academy for Jewish Research* 16 (1946–1947): 1–37 [=ibid., *Jewish and Roman Law*, 1.122–58] (12–15).

[19] See however his comment on p. 36.

[20] On the extent of rabbinic innovation particularly in the field of private law, see Yair Furstenberg, "The Rabbinic Movement from Pharisees to Provincial Jurists," *Journal for the Study of Judaism* 55 (2024): 1–43. Compare the position of Ranon Katzoff, "[on] Daniel Sperber: 'A Dictionary of Greek and Latin Legal Terms in Rabbinic Literature,'" *Journal for the Study of Judaism* 20 (1989): 195–206, who claims that in contrast to the influence of Hellenistic legal institutions, "Roman law arrived after Jewish law became less inclined to absorb foreign influence from Greek and Roman sources alike" (206).

[21] See Yair Furstenberg, "Provincial Rabbis: Shaping Rabbinic Divorce Procedure in a Roman Legal Environment," *Jewish Quarterly Review* 109 (2019): 471–99.

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mixed marriages,[22] makes its first appearance in this mishnah.[23] Cohen provides a few possible explanations for this innovation, but makes the strongest case in favor of Roman influence. He admits that his description portrays the rabbis as overlooking the accepted Jewish norms in favor of a foreign system, and therefore concludes: "In their statement of the matrilineal principle, however, the rabbis were philosophers, and like most philosophers, they did not always live in the real world."[24]

Scholars have challenged this line of interpretation from different directions. Joseph Mélèze Modrzejewski agrees that the change of policy took place in the second century CE, but he attributes it to the demographic catastrophe following the Second Revolt. Since Rome prohibited circumcision and conversion, the rabbis decided to consider children of Jewish mothers as Jews.[25] Consequently, they applied the principle of matrilineal decent in all cases of intermarriage (including when the mother is a non-Jew, as in the mishnah), in line with Roman image of *ius gentium*, and received Roman approval for this policy.[26]

From a different direction, Ranon Katzoff has challenged the similarities between the legal systems.[27] First, following the legislation of the *Lex Minicia* Roman citizenship was granted in practice only when both parents were

[22] Notably, the mishnah itself deals only with one side of matrilineality, where the mother is a non-Jew and the father is Jewish (see below n. 25 for the opposite case). Notably, in these cases, the actual legal status of the newborn is practically inconsequential. After all, within a patriarchal context, the child is born into his Jewish father's family. Thus, even if he is formally a non-Jew, once he is circumcised in the eighth day and raised as a Jewish child, he would be considered a Jew anyhow. Thus, as the Talmudic story of Jacob of Naburayya and R. Haggai demonstrates (PT Qiddushin 3:14, 64d) in cases of a non-Jewish mother, the principle of matrilineal decent is relevant in practice only to determine whether the newborn may be circumcised on the Sabbath (as a Jew) or not (if the circumcision is considered for the sake of conversion).

[23] Shaye J. D. Cohen, "The Origins of the Matrilineal Principle in Rabbinic Law," *AJS Review* 10 (1985): 19–53; Shaye J. D. Cohen, *The Beginnings of Jewishness: Boundaries, Varieties, Uncertainties* (Berkeley: University of California Press, 1999), 263–307.

[24] Cohen, "The Origins of the Matrilineal Principle," 53; Cohen, *The Beginnings of Jewishness*, 307.

[25] Joseph Mélèze Modrzejewski, "'Filios Suos Tantum' Roman Law and Jewish Identity," in *Jews and Gentiles in the Holy Land in the Days of the Second Temple, the Mishnah and the Talmud: A Collection of Articles*, ed. Menachem Mor (Jerusalem: Yad Ben Zvi Press, 2003), 108–36. See also David Daube, *Ancient Jewish Law: Three Inaugural Lectures* (Leiden: Brill, 1981), 28. However, as Daube himself acknowledges, this explanation is problematic since at first children of Jewish mothers and non-Jewish fathers were considered *mamzerim*, who are not allowed to marry other Jews. Christine Hayes, "Genealogy, Illegitimacy and Personal Status: The Yerushalmi in Comparative Perspective," in *The Talmud Yerushalmi and Graeco Roman Culture III*, ed. Peter Schäfer (Tübingen: Mohr Siebeck, 2002), 73–90, traces the later validation of these children as Jews in light of comparable Roman trends.

[26] Ulpian in his commentary on the Praetor's Edict (D. 50.1.1.2) lists cases of communities which received the privilege to confer the citizenship of the mother in case of marriage of citizens of different cities. Mélèze Modrzejewski thus concludes that this was the cases with the Jews as well. Notably, however, this privilege was necessary only in cases where the civic status of the mother was preferred upon that of the father. In cases of a fatherless child, he would automatically gain the status of the mother, according to the *ius gentium*, even without such privilege.

[27] Ranon Katzoff, "Children of Intermarriage: Roman and Jewish Conceptions," in *Rabbinic Law in Its Roman and Near Eastern Context*, ed. Christine Hezser (Tübingen: Mohr Siebeck, 2003), 277–86.

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Roman, in contrast to rabbinic law.[28] Furthermore, on the jurisprudential level, although Roman law recognizes paternity (and subsequent potestas) only if there was in fact a valid marriage, the situation in rabbinic law is exactly the opposite. Even in an incestuous relationship, the newborn is considered his father's child in every respect; he inherits him and must honor him as his father. Thus, Katzoff argues, "the lines of jurisprudential thought of Roman and Jewish law on these matters go in completely different directions."[29] He therefore concludes that the laws in the mishnah go back to the reform of Ezra (sometime during the Persian period) who expelled the foreign women and their children (Ez. 9).

The substantial differences Katzoff points out are undeniable, and he is correct to reject Shaye Cohen's image of a transplant of legal practices. After all, rabbinic law has its own independent inner logic, and the similarities are superficial. At the same time, Katzoff's position does not account for the striking correspondence in the taxonomy of rules, which govern the principles of rabbinic law. What then would be the most plausible way to explain the complex legal and conceptual relationship between the two systems? In what follows I will suggest a new approach which adds to our analysis two additional dimensions. First, a close examination of the mishnah reveals internal tensions, through which we may isolate the specific stage of legal development corresponding to Roman formulations. Second, we suggest considering the actual function of the rabbinic adaptation of Roman legal categories within the provincial context.

Jewish law, Roman taxonomy

Despite the systematic appearance of m. Qiddushin 3.12, which seems to lay out the major principles governing the status of the newborn, in fact there are clear difficulties in each of the four sections, and these reveal the discrepancy between the actual details of law and their underlying principles. As we will see, there is a marked tension between the detailed laws and the conceptual framework into which they were incorporated. This tension, I would claim, provides the key for understanding the role of the Romanized guise of this mishnah. The mishnah did not introduce new laws concerning personal status; rather it sought to artificially adjust traditional rules (some of which are reflected in earlier sources) into a ready-made legal configuration, set according to Roman standards. This analysis has far-reaching implications for our understanding of the role of Roman law in the formation of this mishnah and the channels of its reception.

As both Talmuds already noticed, the first principle is partial and inaccurate,[30] and in some cases of legal marriages the child does not follow the father. For example, in case of a permitted marriage between a male proselyte and a woman *mamzer*, the child still follows the inferior status and is considered a

[28] See also Daube, *Ancient Jewish Law*, 27.
[29] Katzoff, "Children of Intermarriage," 286.
[30] PT Qiddushin 3:14, 64c; BT Qiddushin 66b.

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mamzer. The first principle then is insufficient. With respect to the second principle, not only is it inaccurate,[31] it does not fit the examples the mishnah itself provides. Thus, in a case of a high priest who marries a widow the child is considered a *halal* (profaned), following the verse in Leviticus 21.14–15: "A widow, or a divorced woman, or a woman who has been defiled, or a prostitute, these he (the high priest) shall not marry. But he shall take as his wife a virgin of his own people, *that he may not profane his offspring* among his people, for I am the Lord who sanctifies him." It is misleading to claim that the child follows his mother's inferior status.[32] Rather, according to Scripture, the child is disqualified since his father desecrated his own seed. Arguably, the mishnah at this point artificially adjusts biblical notions of priestly holiness to categories concerning parental status. This tendency becomes even more apparent in the second half of the mishnah.

The discrepancy between principles and ensuing legal details is most striking in the third section. Here we learn that if a woman has a capacity to contract legal marriage in general, but not with this particular man, the child is a *mamzer*. The mishnah adds that this refers to cases of incestuous relationships, including with relatives or married women, as specified in Leviticus 18. The mishnaic formulation gives the impression that the child's unfortunate status derives from his mother's inability to contract legal marriage with her partner, but this is quite a twisted way to define the *mamzer* and it explicitly contradicts the ways the tannaim themselves defined him. Mishnah Yevamot 4.13 presents the views of early rabbis (first half of second century), concerning the definition of the *mamzer*:

> Who is a *mamzer*?
>
> Every blood relative who is included in *He may not enter*—the words of R. Aqiva;
>
> Simeon the Timnite says: Every [offspring of a union] for which one is liable to *karet* (extirpation), and the *halakhah* is according to his words.
>
> R. Joshua says: Every [offspring of a union] for which one is liable to the death penalty administered by a court.
>
> R. Simeon b. Azzai said: I found a scroll of genealogies in Jerusalem and it was written therein: A certain man is a *mamzer* from a married woman, upholding the words of R. Joshua.[33]

As this mishnah makes clear, the mother's lack of capacity for legal marriage is irrelevant for the definition of *mamzer*. Rather, the issue at stake is the severity of the sexual transgression. Leviticus 18 and 20, which deal with such transgressions, present a variety of punishments ranging from no punishment to

[31] Thus the Palestinian Talmud points out that in a case of a priest who remarried his divorcee, the marriage is not legal but the child is a valid priest.

[32] Evidently, the widow and divorcee cannot pass their status to their children. This closed list was supposedly transferred as is from m. Yevamot 2:4, which list prohibited marriages "because of Holiness," although the principle does not fit all cases.

[33] Translation following *Oxford Annotated Mishnah*, 2:27.

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death penalty or extirpation at the hands of God. Therefore, the rabbis dispute what degree of severity entails the status of *mamzer* mentioned in Deutronomy 23:3. The reference in Mishnah Qiddushin to the woman's "lack of legal capacity with respect to her partner" is admittedly a cumbersome and confusing way to denote the weight of the prohibition. There is no way to bridge between the definitions in the two mishnahs, and the criterion of "legal capacity" does not correspond to the categories the rabbis supply in mishnah Yevamot. We thus arrive at the unavoidable conclusion that the mishnah sought to define the *mamzer* solely on the basis of validity of betrothal and the parents' legal capacity, and consequently offered a complicated definition that could somehow fit the more straightforward rules provided by earlier rabbis.[34]

The lack of legal capacity also determines the status of the newborn in the last principle in the mishnah. When the woman has no legal capacity whatsoever the child follows her status. For evident reasons, this section generated the most scholarly interest, and in contrast to previous sections, it seems to be rather coherent and undisputed. However, a closer examination indicates that here too the governing principle of legal capacity is not necessarily the original one, and that the mishnah's ruling can be explained within a pre-Romanized legal environment. Let us compare the mishnah to its parallel source in the tannaitic legal Midrash, the *Mekhilta according to R. Ishmael*, where presumably the mid-second century rabbi, R. Ishmael, is already aware of the mishnaic principle. His interpretation relates to Ex. 21:4 which rules that the wife given to a Hebrew slave remains with her children at the owner rather than joining the freed slave.

> *The Wife and Her Children (belong to her owner).* What purpose is there in saying this? To declare that her children have her status. I thus know only about the bondwoman, that her children have her status. How about the case of a foreign woman?
>
> R. Ishmael used to say: It could be argued by using the method of *kal vahomer* (argumentum a-fortiori):
>
> Just as in the case of the Canaanite slave, where marriage with an Israelite cannot take place, the children have the status of the mother, so also in any other case where marriage with an Israelite cannot take place the children have the status of the mother. And which are cases like this? The children of any bondwoman or of any foreign woman.[35]

[34] Furthermore, the definition of *mamzer* in the third section presents us with a bewildering anomaly, since it includes two very different groups. On the one hand, the severe cases of incest, and on the other, gentiles and slaves, who also lack capacity for legal marriage. Consequently, even relations that were not prohibited in biblical law and from the rabbinic perspective are considered a light prohibition entail the status of *mamzer*. Although the inclusion of the slave and gentile is not made explicit in the mishnah, which in fact seems to emphasize that its definition includes only severe biblically sanctioned prohibitions, this conclusion is made explicit in other sources. See the dispute in t. Qiddushin 4.16.

[35] Mekhilta de R. Ishmael, Neziqin 2 (Lauterbach ed., 2.362).

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The conclusion and the reasoning attributed to R. Ishmael are identical to the mishnah. Yet, a sensitive reader may notice the discrepancy of terminology and logic he applies. R. Ishmael begins with an argument a-fortiori (*kal va-homer*), which assumes that it is more reasonable to follow the status of the mother in a case of a non-Jewish woman rather than if the mother is a slave. However, the detailed explanation that follows provides a different reasoning: as in the mishnah, the child acquires the status of the mother whenever she has no capacity for legal marriage. According to this explanation there are no apparent grounds for distinguishing between the two cases, a gentile and a slave woman. But if this is the case, why did R. Ishmael claim to apply an argumentum a-fortiori? In other words, this unit is inconsistent in its midrashic terminology and seems to conflate different forms of argument. Although the latter part reflects the logic of the mishnah, the first part of R. Ishmael's statement should presumably be explained on different grounds.[36]

In attempt to reconstruct the *kal va-homer* argument, that was interrupted by the Mishnah's logic, we must ask in what respect is a child of a slave woman more prone to be considered a Jew than a child of gentile mother? Although these two women are similar with respect to their incapacity to perform legal marriage, they are clearly distinct with respect to the degree of association with the Jewish people. After all, slaves are considered partially Jewish, according to rabbinic law. They are obligated to perform some of the laws, have undergone some form of conversion and become fully Jewish following their manumission.[37] It would thus be reasonable to assume that a child of a slave woman, who was disassociated from any previous ethnicity and has joined the Jewish people to some degree, would follow the Jewish status of his father. However, if the Torah rules that the slave woman's children follow the status of their mother, all the more so in a case of a non-Jewish woman, who belongs to a different citizen body.

Admittedly, this reconstruction of the original argument of R. Ishmael is a mere conjecture,[38] but it comes to show that it is possible to understand the ruling in the last section of the mishnah based on a principle other than the legal capacity for marriage. Indeed, this is also the prevalent approach in the citizenship laws in the Hellenistic world. Although in Roman law

[36] Note the different solutions each of the two editors of the Mekhilta applied to solve the discrepancy in R. Ishmeal's statement. The Horowitz-Rabin edition (Frankfurt 1931, p. 251) omitted the term *kal va-homer* (although it appears in all manuscripts), while Lauterbach maintained the wording but added a note (n. 2), suggesting that R. Ishmael's own statement only included the reference to *kal va-homer*, without the following argument from analogy, which was added by redactor. Here we followed Lauterbach's plausible solution.

[37] See t. Avodah Zara 3.11, b. Yevamot 46a regarding the immersion of slaves. Even according to the Damascus Document 12.10–11 both one's slave and maidservant have "entered with him into the covenant of Abraham" (Fraade ed., 107). Catherine Hezser, *Jewish Slavery in Antiquity* (Oxford: Oxford University Press, 2005), 35–41 discusses the denationalization of the slave in rabbinic sources.

[38] Another possible explanation for the *kal va-homer* argument is that the Torah permits (at least in some cases) to take a slave woman for a wife. So, if in this case it rules that the child follows his mother all the more so in a case of the prohibited marriage with a gentile.

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considerations of civic association were subjected primarily to the principles of legal marriage, Greek sources exhibit the opposite tendency, deriving from an alternative view of civic identity.[39] Here, the status of a child was determined primarily according to his parents' citizenship.[40] The policy varied among the Greek cities, but many if not most of them ruled that the children of *metroxenoi*, foreign women, were considered *nothoi* ("bastards") and were not granted citizenship.[41] The Athenian law of Pericles is a famous example of this policy: "anyone who was not born from two *astoi* should not share in the polis."[42] These children were barred from their fathers' phratry and consequently deprived of citizenship.[43] Following this legislation, the basic meaning of *nothos* shifted from a child born out of wedlock, as in the case of slave women, to mainly denote the child of foreign women.[44] Thus, in Hellenistic inscriptions *nothos* developed into a civic category: a child of a mother who did not belong to the community of the father.[45]

Evidently then, even without relying on the language and ideology of Ezra and other Judean separatist groups,[46] the Hellenistic world of Second Temple

[39] Regarding the apparent contrast between the so-called Roman generosity and Greek reluctance, see Phillipe Gauthier, "'Générosité' romaine et 'avarice' grècque: sur l'octroi du droit de cité," in *Mélanges d'histoire ancienne offerts à William Seston*, Publications de la Sorbonne, série Etudes 9 (Paris: E. de Boccard, 1974), 207–15. Gauthier underscores the lack of Roman interest in political unity and cohesion of its citizens, in contrast to the Greek political ideal of the polis. Roman citizenship was therefore permeable, although not necessarily generous, and it served to sustain an imperial framework while maintaining inter-communal differences. Greek political thought, in contrast, did not extend beyond the narrow interests of the polis.

[40] Nonetheless, some stages and sources of early Athenian law refer to the legality of the marriage, such as the definition of the legitimate child attributed to Solon by Demosthenes and Hyperides. See *Laws of Solon* (eds. Delfim Leão and P.J. Rhodes), fr. 48b, according to which the children of a woman who is betrothed for a lawful marriage are *gnesioi*.

[41] See survey in Daniel Ogden, *Greek Bastardy: In the Classical and Hellenistic Periods* (Oxford: Clarendon Press), 275–317. Ogden describes a general relaxation of these citizenship laws during the Hellenistic period, including in Athens itself where children of *metroxenoi* were granted citizenship since 229 BCE (81–82).

[42] *Ath. Pol.* 26.4; Plutarch, *Pericles* 37.3; see also Aristophanes, *Birds* 1649–70 where Pisthetaerus applies Pericles' citizenship law to Heracles, whose mortal mother was considered alien. On the political background of this legislation, see Cynthia Patterson, "Athenian Citizenship Law," *The Cambridge Companion to Ancient Greek Law*, eds. Michael Gagarin and David Cohen (Cambridge: Cambridge University Press, 2005), 267–89 (278–83).

[43] Deborah Kamen, *Status in Classical Athens* (Princeton and Oxford: Princeton University Press, 2013), 66–67; Daniel Ogden, "Bastardy and Fatherlessness in Ancient Greece," *Growing Up Fatherless in Antiquity*, eds. Sabine Hübner and David M. Ratzan (Cambridge: Cambridge University Press, 2009), 105–19 (110).

[44] Thus, in his Onomasticon Pollux of the second century CE defined *nothos* as a child born either to a foreign woman or to a *pallake* [slave concubine] (3.21).

[45] Maria Nowak, *Bastards in Egypt: Social and Legal Illegitimacy in the Roman Era*, *Journal of Juristic Papyrology Supplement 37* (Leuven, Paris, Bristol: Peeters, 2020), 182.

[46] There are strong indications (although not conclusive) that some groups, such as the Qumran sectarians, prohibited marriage with converts. See Menahem Kister, "Studies in 4QMiqsat Ma'ase Ha-Torah and Related Texts: Theology, Language and Calendar," *Tarbiz* 67 (1999): 317–72 (343–47) (in Hebrew); Christine E. Hayes, *Gentile Impurities and Jewish Identities: Intermarriage and Conversion from the Bible to the Talmud* (Oxford, New York: Oxford University, 2002), 68–91. Of

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Jews supplied the civic foundations for the policy expressed by R. Ishmael, barring children of *metroxenoi*, even without applying Roman principles. For the child to be considered Jewish, the mother would have had to be Jewish as well, either by birth or through some form of naturalization and joining the Jewish way of life.[47] Only later, and due to Roman influence was this practice conceptualized in Mishnah Qiddushin 3.12 through the notion of legal capacity. Here again, the innovation of the mishnah lies not in the ruling itself, which goes uncontested in rabbinic literature, but in the choice to explain it according to the principles for recognition of legal marriage.

Romanization of local status

According to our analysis, Mishnah Qiddushin 3.12 offers a Roman-like version of the local laws of persons. Regarding the field of personal status, monitored both by the local community and the imperial government, communication and cooperation between these administrative realms would depend on the possibility to adapt the legal language to imperial principles. In this respect our mishnah is comparable to the contemporary *Gnomon of the Idios Logos* from Egypt, although it exhibits a different pattern of adaptation. This imperial document consists of rules for governing imperial estates in Egypt including those confiscated for offences against the rules of inheritance or marriage. It thus frequently addresses the validity of various mixed marriages, the status of the children and their inheritance rights. As Nowak has recently demonstrated in detail,[48] the *Gnomon* as well as other current documents adjust the rulings concerning fatherless children and mixed marriages among local communities to a set of Roman standards regarding non-Roman citizens.

Thus, as in the Mishnah, these sources include cases where the child follows the status of the mother as well as the principle of following the inferior parent. In cases of fatherless children (e.g., a slave father), the Romans imposed on the local metropolitan citizens what they viewed as binding to everyone, the *ius gentium*, by which the child acquires the status of the mother, regardless of the actual local practice.[49] At the same time, with respect to mixed marriages the *Gnomon* applies recurrently the distinctively Roman *ius civile* principle of following the inferior parent (deterior). For example: "Any individuals born to an *aste* (woman citizen of the Greek poleis) and an Egyptian will remain Egyptian but can inherit from both parents."[50] Rather than following the *ius*

particular interest is *The Testament of Levi* 14:6 "take to wives the daughters of the Gentiles, purifying them with an unlawful purification" (*Tesaments of the Twelve Patriarchs,* Hollander and de Jonge ed., 168).

[47] The exact procedure of conversion for women during the Second Temple is unclear. Immersion for women converts is known only in later rabbinic texts. Perhaps, the acceptance of the Jewish way of life was enough. See Cohen, *The Beginnings of Jewishness*, 169–70.

[48] Nowak, *Bastards in Egypt*, chs. 3–4.

[49] Nowak, *Bastards in Egypt*, 142–80.

[50] BGU V 1210 ii. 109–10; paragraph 38. Nowak, *Bastards in Egypt*, 198–202. Note also paragraph 46 which applies the same rule concerning a union contracted by mistake with respect both to Romans and to *astoi*.

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gentium, the Gnomon applies with respect to peregrines the same principles that would apply to Roman citizens in cases of mixed marriages, corresponding to the rule of the *Lex Minicia*, thereby creating a clear hierarchy among the different communities in the province.[51]

Notably, although Rome in general did not impose its own system of private law on the non-Roman inhabitants of the Empire, they sought to consolidate the field of status acquisition by formulating a Roman-like law for the nations, informed by Roman principles. Although the Mishnah, in contrast to the *Gnomon*, is not an imperial document, does not represent Roman policy, and it seeks to maintain separate laws pertaining to the foundations of Jewish identity, it provides a way to present Jewish traditional law of status through the very same Roman principles.

A similar case where the Mishnah applies a Roman taxonomy with respect to local peregrine law informed by the knowledge of Roman legal handbooks (i.e., Gaius, Pseudo-Ulpian) appears in the opening section of the tractate.

"Acquisition Tractate"

As in the case of m. 3.12, scholars have noted the incongruity between the opening unit of tractate Qiddushin and other mishnaic sources. Although it is regularly assumed that this unit represents pre-rabbinic law, we will argue that here too the unique features of this unit are best understood as an adaptation of Roman principles as these appear in Roman legal handbooks, and Gaius in particular. Remarkably, the section in Gaius' *Institutes* which corresponds to this mishnaic unit is right by the sections related to m. 3.12 surveyed above. Thus, the opening sections of both parts of the mishnaic tractate reflect knowledge of the same textual framework within Roman legal handbooks, and they exhibit a similar form of imposition of Roman legal principles upon local legal practices.

The first section of tractate Qiddushin reads as follows[52]:

> [1] **A woman** is acquired in three ways and acquires herself in two ways. She is acquired by money, by document, or by sexual intercourse.
>
> By money—the House of Shammai say: By a dinar, or by the equivalent of a dinar; but the House of Hillel say: By a *perutah* (copper coin), or by the equivalent of a perutah. And how much is a *perutah*? One eighth of an Italian issar.
>
> And she acquires herself by a divorce document or by death of the husband.
>
> **The levirate widow** is acquired by sexual intercourse.

[51] See Roger Bagnall, "Egypt and the Lex Minicia," *Journal of Juristic Papyrology* 33 (1993): 252–58.

[52] The structure and redaction of the chapter, the relationship between its parts and its ideological underpinnings has generated much scholarship. See Noam Zohar, "Women, Men and Religious Status: Deciphering a Chapter in the Mishnah," *Approaches to Ancient Judaism* 5 (1993): 33–54; Avraham Walfish, "The Study of the Redaction of Mishnah Qiddushin, Chapter 1: From Whence and to Where?" *Netuim* 15 (2008): 43–77 (in Hebrew).

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And she acquires herself by *halitsah*, or by death of the levir.

[2] **An Israelite slave** is acquired by money or by document.

And he acquires himself by years, or by the Jubilee year, or by reduction of money.

The Israelite female slave exceeds him in that she acquires herself by puberty.

The one with a bored ear is acquired by boring the ear.

And he acquires himself by the Jubilee year, or by death of the master.

[3] **A Canaanite slave** is acquired by money, or by document, or by taking possession.

And he acquires himself by money by the hand of others or by a document by his own hand—the words of R. Meir; but the Sages say: By money by his own hand, or by a document by the hand of others; but only provided the money shall belong to others.

[4] **Large cattle** is acquired by delivery, and **small cattle** animal by lifting—

the words of R. Meir and R. Eleazar; but the Sages say: Small cattle is acquired by drawing.

[5] **Properties that can serve as surety** are acquired by money, or by a document, or by taking possession; and those that cannot serve as surety are acquired only by drawing.

Properties that cannot serve as surety are acquired together with properties that can serve as surety, by money, or by a document, or by taking possession.

And properties that cannot serve as surety bind properties that can serve as surety so as to take an oath regarding them.[53]

Evidently, the most striking feature of this unit is the inclusion of women, alongside other acquired objects, and applying the verb *qanah* (buy) in contrast to the standard rabbinic verb *qidesh* ("sanctify") to denote betrothal. Jacob Nahum Epstein and others have concluded that the application of the notion of acquisition with respect to women reflects biblical perceptions of marriage, and therefore this unit must be considered ancient.[54] To this consideration, scholars added other indications for the biblical orientation of this chapter, such as the notion that the observance of the commandments ensures the inheritance of the land (m. Qid. 1.10). In fact, however, the evidence for the antiquity of the chapter is quite slim and the assumption that the language of acquisition with respect to betrothal predates the rabbis is overtly apologetic.[55] After all, in the parallel mishnah which includes the dispute between the Houses of Hillel and Shammai concerning betrothal money in tractate

[53] Translation following the *Oxford Annotated Mishnah*, 2.306-8.

[54] Epstein, *Prolegomena ad Litteras Tannaiticas*, 53; Avraham Weiss, "The Presentation of Material in Tractate Qiddushin, Mishnah and Tosefta, and Examination of the Problems relating to the Chapter on Acquisition," *Horev* 12 (1917): 70–148 (81) (in Hebrew).

[55] In fact, with respect to the first part of the chapter, the only argument for its antiquity is the use of the language of acquisition with respect to women. Regarding Epstein's method of deducing from a few indications the antiquity of larger units, see Yair Furstenberg, "The Literary Evolution of

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Eduyot 4.7, belonging to the earliest stratum of the Mishnah, they speak of *qiddushin* (sanctification) rather than acquisition.[56] Thus, before attempting to "date" a mishnaic unit through sporadic elements, which is always a precarious endeavor, we must consider what accounts for the features of the unit 1.1–5 as a whole.

Notably, the tractates covering the laws of sale, Bava Metzia and Bava Batra, do not give an account of the formal means of acquisition in any systematic manner. They just generally assume that merchandise is acquired through physical possession, and that documents are used for the transfer of property.[57] However, as we examine our unit as a whole, it becomes clear why it was set in its current context and not in a tractate dealing with property. It begins with women, continues with the different grades of slaves and then the different kinds of cattle. The last section distinguishes between two kinds of property. The first part of the unit (1.1–3) then is concerned with the personal status of those who gain their freedom through a process of acquisition. Therefore, the first sections list both how they are acquired and how they acquire themselves. In contrast, in the last cases of non-human property, the direction of transfer is inconsequential. At the same time, turning to the details of the acquisition procedure, it is notable that women, slaves and land (that serves as surety) are all acquired through the same three methods: money, document, and physical holding (*hazaqah*).[58] In the case of a woman the last method is substituted by sexual relationship. Other objects are acquired by moving them.

This unit bears striking resemblance to sections 108–123 in Gaius' first book of the *Institutes*, dedicated to the laws of persons.[59] The most noticeable point of similarity which has been pointed out by scholars appears in the opening statement of both units.[60] Similarly to the Mishnah's "a woman is acquired

the Mishnah," in *What is the Mishnah? The State of the Question*, ed. Shaye J. D. Cohen (Cambridge, MA: Harvard University Press, 2022), 98–125.

[56] The presumed antiquity of the chapter was already questioned by Shmuel Safrai, *In the Times of the Temple and the Mishnah: Studies in Jewish History* (Jerusalem: Magnes Press, 1996), 628–29 (in Hebrew).

[57] M. Bava Metsia 4.1 rules that in case of movables the sale is sealed only by pulling the merchandise and not by payment. The use of documents in the sale of property is implied in m. Bava Batra 4.2. In other cases, however, the Mishnah assumes oral exchange between the parties (e.g., 7.1; this ambiguity between written and oral expressions is characteristic of the Mishnah. Compare: m. B.M. 9.2–3; m. B.B. 8.5).

[58] Examples for specific acts that are considered *hazaqah* appear in the parallel tosefta 1.5. Land is acquired by locking or opening the gate or setting up a fence. A slave is acquired through an act of service to his master, such as tying his shoes and carrying his clothes to the bathhouse.

[59] Notably, Yaakov Elman, "Order, Sequence and Selection: The Mishnah's Anthological Choices," in *The Anthology in Jewish Literature*, ed. David Stern (Oxford: Oxford University Press, 2004), 53–80 (66) compares this unit in Gaius to Qiddushin ch. 1 only with respect to some of their literary features, including the choice of material including obsolete practices; the level of knowledge each text assumes and the inclusion of disputes.

[60] For a comparison of the opening statement in Gaius and the Mishnah see Cohen, *Jewish and Roman Law*, 290–91; Ishay Rosen-Zvi, "Is the Mishnah a Roman Composition?" in *The Faces of Torah. Studies in the Texts and Contexts of Ancient Judaism in Honor of Steven Fraade*, eds. Christine Hayes, Zvi Novick, and Michal Bar-Asher Segal (Göttingen: Vandenhoeck & Ruprecht, 2017), 487–508 (n. 6).

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in three ways…" Gaius states "Of Old, women passed into manus (of their husbands) in three ways, by usus, confarreatio, and coemptio" (1.110), and he goes on to explain the three methods (1.111–113).[61] However this similar formulation is only the tip of the iceberg of deeper rhetorical, structural, and thematic overlaps between the two units. Both texts exhibit a tendency toward classification and division as an organizing principle, characteristic of the manual tradition.[62] On the structural level, both texts list the forms of acquisition of the same group of objects. Both begin with women, who serve as a stepping stone to the following cases of slaves, animals, and land. In the Mishnah the three methods in the case of women recur in all major acquisitions. Similarly, Gaius describes in detail the three procedures that bring women under the hand (in manu) of their husband, but he gives special attention to the third method of coemptio as a variation of mancipatio (1.113), which is the standard Roman form for acquiring property and for transferring people in and out of the authority and ownership of others, including slaves and children. Thus, Gaius goes on to explicate how mancipatio can also emancipate a woman from the household of her husband (1.114–118). Here again as in the mishnah both directions are presented.

Next, we learn that the mancipatio form of sale applies to property as well.[63] Gaius then describes the apparatus of the mancipatio procedure (1.119) and lists the range of objects it can apply to: free persons (such as women and children), slaves, as well as specific animals that are considered *res mancipi*, such as oxen, horses, mules, and asses (1.120). The last group is Italic land, which can be transferred only through this unique form of acquisition, restricted to Roman citizens (1.121). In contrast, as we learn from the complementary discussion of methods of acquisition in Gaius' *Institutes* book 2, property that is not considered *res mancipi*, such as land outside of Italy or other movables, does not require this formal procedure and is alienated through mere delivery (2.19).

Having discussed how slaves and woman are freed Gaius turns in the next section to present the ways children are released from the power of their father (1.124). It is thus worth noting that within the shared framework of the laws of personal status both Gaius and the mishnah juxtapose the unit on acquisition with the issue of patria potestas.[64] As a result, the following section in the

[61] On the history of these early forms of marriage see Treggiari, *Roman Marriage*, 16–36. In practice, the prominent form of marriage was "sine manum," and women were not subjected to their husbands' authority. The couple could add this feature at any stage.

[62] See Elisa Romano, "Le Institutiones di Gaio e la tradizione manualistica antica," in *Le Istituzioni di Gaio: avventure di un bestseller, Trasmissione, uso e trasformazione del testo,* eds. Ulrike Babusiaux and Dario Mantovani (Pavia: Pavia University Press, 2020), 167–204 (192). With respect to the Mishnah, although the enumeration at the head of the unit is not surprising, since many tractates open with a number, the overall classificatory structure (in contrast to mere lists) is quite unique. For a similar rhetorical mechanism in the redactional layer of the Mishnah (relevant also to our discussion of m. Qidd. 3.12 above) see Merav Tubul-Kahana, "The Mishna Tosefta Relationship in light of Tetralemma and Trilemma Parallels," *Sidra* 26 (2011): 61–80 (in Hebrew).

[63] See Pseudo-Ulpian, title 19.2, Gaius, 2.14–17, for a list of things acquired through *mancipatio* (*res mancipi*).

[64] In contrast to the previous section, the location and structure of this unit in Gaius is not identical to the Rules of Pseudo-Ulpian, yet they share some significant structural features. The general

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mishnah opens with laws regarding the responsibility and authority of parents over their children (1.7).

As we dig in deeper into the legal details, we learn that the two texts exhibit parallel conceptions despite the obvious differences in practice. It is thus difficult to assume that these points of similarity are merely coincidental. As in the Mishnah, Roman civil law (*ius civile*) acknowledges one of three forms of acquisition for important things, in contrast to mere delivery acceptable only with respect to other objects. In both systems, the three methods in the case of women are a variation of the standard procedures. As noted above *coemptio* is a form of *mancipatio*, which is a payment of a symbolic price, using a scale and a minimal bronze ingot, in front of witnesses.[65] This reminds us of the rabbinic form of acquisition with a symbolic sum of money as presented in the Mishnah.[66]

The first of the two additional forms of transfer according to Gaius is *in iure cessio*, where a magistrate declares the property renounced by the previous owner as belonging to the person claiming it (Inst. 2.24). The parallel procedure in the case of a woman is *confarreatio*, which is a kind of sacrificial rite undertaken by priestly officials. The third form is called *usus* in the case of women and *usucapio* in other cases. In this procedure, the formal one-time act of acquisition is substituted by a long and uninterrupted period of possession. Gaius explicitly associates the *usus* with respect to women to the *usucapio* of property: "If she cohabited with her husband for a year without interruption, being as it were acquired by a usucaption of one year and so passing into her husband's family as a daughter" (1.111).[67]

This form of continued possession is required to complement incomplete or invalid acts of property transfer, so as to prevent uncertainty of property ownership for a long period of time. Rabbinic law does not generally acknowledge this form of acquisition, and long possession can only serve as a probative tool for assessing the holder's claim of ownership.[68] Yet, it is significant that the same term that the rabbis use for this kind of proof through long possession

flow of Pseudo-Ulpian is comparable to the first two books of Gaius *Institutes*, beginning with the laws of persons and then the law of things. Although Gaius includes the basic principles of acquisition within the laws of persons, as these are used for bringing people under the authority of others, in Pseudo-Ulpian, the redactor has omitted much of the section on women who are under their husbands' manus (title 9), due to its inapplicability (Avenarius, *Der Pseudo-Ulpianische liber singularis regularum*, 291). The sequences re-converge in the following section (title 10). Yet in Pseudo-Ulpian too the overarching framework of family law is evident, and the principles of acquisition (title 19), parallel to the beginning of Gaius, book 2, are embedded within the laws of wills and inheritance.

[65] The difference between *coemptio* and *mancipatio* is only in the language used since the woman does not become the property of her husband, but rather she is under his authority.

[66] Notably, both the mishnah and Gaius discuss the minimal size of the bronze coin. The *perutah* is the smallest bronze coin, an eighth of a Roman assarius (cf. Mark 12:41–44). Gaius (1.122) also defines the bronze ingot as a portion of an asses, which was weighed on the scale.

[67] Elsewhere Gaius quotes the law of the Twelve Tables, according to which "usucapio of movable property is completed within a year, that of land and houses within two years" (Inst. 2.42).

[68] See mishnah Bava Batra 3.1–3. At the same time, there are indications for a shift in the meaning of the term *hazaqah* in later stages of the tannaitic law, reflecting rabbinic exposure to Roman usucapio. See Yair Furstenberg, "Acquisition and Possession ('Hazaqah'): Tannaitic Law between Changing Legal Contexts," *Shnaton Ha-Mishpat Ha-Ivri* (forthcoming; in Hebrew).

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(*hazaqah*) is also the term they apply with respect to the third form of acquisition through physical use, thus aligning it with the third form of acquisition in Roman law through long possession, *usucapio*. Consequently, both systems acknowledge alongside the two formal acts of acquisition a third manner through use (usus, hazaqah).

Finally, another point of convergence relates also to terminology, this time with respect to the acquisition of animals. The mishnah distinguished between large cattle that is acquired by delivery (*mesirah*), and small cattle acquired by lifting or drawing, as in other movables. Presumably, at this point rabbinic law differs from Roman law, according to which large cattle require a formal act of *mancipatio*, rather than mere physical control. However, when describing the procedure of *mancipatio* Gaius comments: "The mancipation of lands differs from that of other things in this point only, that persons, servile and free, and animals that are *res mancipi* cannot be mancipated unless they are present, indeed the taker by the mancipation must grasp the thing which is being mancipated to him, which is why the ceremony is called *mancipatio*: the thing being taken with the hand" (1.121). Possibly this notion also explains why in the case of large cattle the mishnah does not require to draw them near as in small cattle and other objects but merely holding them, as the tosefta makes clear.[69] This resonates with the notion of *mancipatio* of *res mancipi* animals as defined by Gaius.

Arguably then, the opening unit of tractate Qiddushin should not be viewed as a straightforward display of the actual methods of acquisition in Judea. It clearly relies on some practical forms for transferring property, but it incorporates these actions within a Roman-like taxonomy, familiar from legal handbooks such as Gaius' *Institutes*. The rabbis were not attempting in any way to import the distinctly Roman practices, limited to Roman citizens.[70] On the contrary, they displayed non-Roman methods in a Roman guise. Property was regularly acquired through the writing of sale documents, as evident in the Egyptian papyri and other rabbinic sources. Payment was also considered in the Greek legal tradition as a form of acquisition, in contrast to Roman principles.[71] Presumably, then the creator of this unit intended to present these local practices as they would be understood from a Roman perspective within a Roman-like structure. Thus, alongside the comparable formal forms of acquisition, he added immediate possession, which the Romans themselves considered

[69] T. Qidd. 1:8: "What is considered delivery? Handing over the halter or reins."

[70] Only later, after Caracalla granted universal citizenship to the inhabitants of the Empire, we find a talmudic discussion regarding the validity of the Roman form of manumission through *in iure cessio*. See PT Gittin 4:4 (45d): "From Scripture I learn that a slave is set free if his owner dismembers his eye or tooth, whence do we know that he is manumitted through a *pilleus* (hat), a *ouindiktiontos* (manumissio vindicta), or a liberation of Kings? Scripture says: 'He will set him free,' in any way."

[71] On the role of payment and documents in Greek legal traditions see Fritz Pringsheim, *The Greek Law of Sale* (Weimar: Hermann Böhlaus Nachfolger, 1950), 90–92; James G. Keenan, Joseph G. Manning, and Uri Yiftach-Firanko, *Law and Legal Practice in Egypt from Alexander to the Arab Conquest: A Selection of Papyrological Sources in Translation with Introduction and Commentary* (Cambridge: Cambridge University Press, 2014), 276–79, 295.

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to be satisfactory for non-Romans (according to the *ius gentium*). A long period of possession was required only for Romans to achieve a unique status of dominium, full ownership. Despite these differences the parallel structure is unmistakable.[72]

Conclusion

Recent scholarship has made significant progress in uncovering the scope of rabbinic exposure to Roman legal environment and its impact upon the rabbis' own law making, particularly in the field of family and status.[73] Yet, the specific channels for acquiring this Roman legal knowledge have hitherto remained on the whole a matter of conjecture.[74] Our analysis of Mishnah Qiddushin in this paper points to the role of Roman legal handbooks in the disseminating of this legal knowledge beyond the boundaries of Roman legal practitioners to local populations, including the rabbis. In key points in the tractate, the redactor added units that drew from the same literary context within Roman legal handbooks, and reflect a similar pattern for adapting local practice to Roman legal structures.

This case thus contributes not merely to the study of the evolution of rabbinic law, but to our understanding of the legal environment in the provinces more broadly. Although scholars have traced the expanding role of local legal experts and their growing involvement in Roman legal administration during the second century,[75] our knowledge of the actual ways these local agents

[72] This perspective may help us interpret the notion of acquisition with respect to women more accurately. Gaius explicitly refers to the acts of acquisition as an imaginary form of sale (Gaius, 1.113: "*id est* per quandam imaginariam uenditionem"), which is intended to change her legal status. Thus, in the Mishnah as well the language of acquisition has a range of functions, including the determination of personal legal status, as depicted by Gaius.

[73] Following are some recent examples relating specifically to issues of status and citizenship: Yair Furstenberg, "The Rabbis and the Roman Citizenship Model: The Case of the Samaritans," in *In the Crucible of Empire: The Impact of Roman Citizenship upon Greeks, Jews and Christians*, eds. Katell Berthelot and Jonathan Price (Leuven: Peeters, 2019), 181–216; Orit Malka and Yakir Paz, "*Ab hostibus captus et a latronibus captus*: The Impact of the Roman Model of Citizenship on Rabbinic Law," *Jewish Quarterly Review* 109 (2019): 141–72; Yifat Monnickendam, "The Exposed Child: Transplanting Roman Law into Late Antique Jewish and Christian Legal Discourse," *American Journal of Legal History* 59 (2019): 1–30; Yael Wilfand, "Roman Concepts of Citizenship and Rabbinic Approaches to the Lineage of Converts and the Integration of their Descendants into Israel," *Journal of Ancient Judaism* 11 (2020): 45–75. See also Berthelot, *Jews and their Roman Rivals*, 280–82.

[74] For a theoretical mapping of this question see Bernard Jackson, "On the Problem of Roman Influence on the Halakha and Normative Self-Definition in Judaism," in *Jewish and Christian Self Definition, Vol. 2: Aspects of Judaism in the Greco Roman Period*, eds. Ed P. Sanders and Albert I. Baumgarten (London: SCM Press, 1981), 157–203. This issue has been readdressed recently by Catherine Hezser, "Did Palestinians Rabbis Know Roman Law? Methodological Considerations and Case Studies," in *Legal Engagement: The Reception of Roman Law and Tribunals by Jews and Other Inhabitants of the Empire*, eds. Katell Berthelot, Natalie B. Dohrmann, and Capucine Nemo-Pekelman (Rome: Ecole française de Rome, 2021), 303–22.

[75] See Wolfgang Kunkel, *Herkunft und Soziale Stellung der römischen Juristen* (Weimar: H. Bohlaus Nachforger, 1952), 354–65; Christopher P. Jones, "Juristes romains dans l'Orient grec," *Comptes rendus des séances de l'Académie des Inscriptions et Belles-Lettres* 151 (2007): 1331–59; Anna Dolganov,

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acquired their legal education in the provinces during this period has been quite meager. Due to the nature of the documentary evidence, scholars have hitherto mainly focused on the exposure to Roman administration of justice and adduced evidence for the use of imperial decrees, precedents, court proceedings, and edicts by local litigants.[76] Only later sources pertaining to the third and fourth centuries testify to the activity of schools of law in the Roman East,[77] and to the later reception of handbooks.[78] According to our analysis, the redaction of the Mishnah around the turn of the third century[79] provides the earliest attestation to the systematic study of the principles of Roman law (or at least parts of it) among non-Roman provincials in the East, who were exposed to the Roman study tradition, most noticeably represented by Gaius' *Institutes*.[80]

"*Nutricula Causidicorum*: Legal Practitioners in Roman North Africa," in *Law in the Roman Provinces*, eds. Kimberly Czajkowski and Benedikt Eckhardt (Oxford: Oxford University Press, 2020), 358–416; Furstenberg, "The Rabbinic Movement from Pharisees," 26–32.

[76] We have substantial evidence that local legal practitioners would compile collections of precedents from Roman archives in the service of their cases. See John A. Crook, *Legal Advocacy in the Roman World* (London: Duckworth, 1995), 69; Georgy Kantor, "Knowledge of Law in Roman Asia Minor," in *Selbstdarstellung und Kommunikation: Die Veröffentlichung staatlicher Urkunden auf Stein und Bronze in der römischen Welt*, ed. Rudolf Haensch (Munich: Beck, 2009), 249–65 (262–64); Ari Z. Bryen, "Judging Empire: Courts and Culture in Rome's Eastern Provinces," *Law and History Review* 30 (2012): 771–811. However, only rarely it is possible to establish that these compilations served didactic intentions. See, for example, Ranon Katzoff, "Precedents in the Courts of Roman Egypt," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung* 89 (1972): 256–92 (286–88). Notably, this collection gathers cases regarding personal status, as in the case of our mishnah. Other relevant sources are the documents found in Babatha's archive including Greek translations of the Latin formula necessary to execute an *actio tutelae* (action on guardianship). Kimberly Czajkowski, *Localized Law: The Babatha and the Salome Komaise Archives* (Oxford: Oxford University Press, 2017), 93–98, suggests that the local legal advisor who assisted Babatha would have had access to this formula either through a forensic handbook including such formula or directly from the provincial edict.

[77] We begin hearing of the law school in Berytus from the first third of the third century and later. See Fergus Millar, "The Greek East and Roman Law: The Dossier of M. Cn. Licinius Rufinus," *The Journal of Roman Studies* 89 (1999): 90–108 (106–8); Linda Hall, *Roman Berytus: Beirut in Late Antiquity* (London and New York: Routledge, 2004), 192–217.

[78] As we have seen above (n. 6), according to most scholars, Pseudo-Ulpian's, *liber singularis regularum*, does not belong to Gaius' reception history but is rather a concurrent product of the "Institutional" tradition. Commentaries on and revisions of Gaius' *Institutes* are traceable beginning from the end of the third century in the Western provinces, such as the Fragments of Autun (fragmenta Augustodunencia), the Collatio and the Epitome Gaii. See, Schultz, *History of Roman Legal Science*, 301–4; Nelson, *Überlieferung, Aufbau und Stil von Gai Institutiones*, 96–139; Rolando Ferri, "Teaching Roman Law in an Ancient Western School," in *Le Istituzioni di Gaio: avventure di un bestseller, Trasmissione, uso e trasformazione del testo*, eds. Ulrike Babusiaux and Dario Mantovani (Pavia: Pavia University Press, 2020), 565–76. Regarding the eastern provinces, see below n. 81.

[79] Unfortunately, we lack direct evidence for the precise dating of the Mishnah. The Epistle of Rav Sherira Gaon (tenth century) dates the migration of Rav, R. Judah the Patriarch's great disciple, to 219 CE, and it generally assumed that R. Judah died around that time. Other scholars date his death to an earlier stage of the Severan dynasty (with whom R. Judah maintained close contact, according to rabbinic traditions).

[80] Following Mommsen, Jones, "Juristes romains," 1333–37 suggested that Gaius' textbook of Roman law was in fact composed in the Greek East, and therefore was careful to address differences between Roman and peregrine law.

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Admittedly, in the current state of scholarship we cannot say in what exact form (written or oral) the rabbis were exposed to this tradition. The rabbis would not have known Latin, and we are not aware of translations of Gaius or similar writings into Greek or another local language.[81] Yet, the textual evidence compels us to assume that this sort of legal knowledge circulated in one form or another among local legal experts, such as the rabbis.

Undoubtedly, the rabbis expressed strong resistance toward Roman judicial institutions, and worked to develop a distinctly Jewish legal system. Yet, they are our most documented case of local legal experts in the Roman Empire, who were deeply committed to the knowledge and development of law, in accordance with current standards. It therefore does not come as a surprise that rabbinic writings provide one of the earliest attestations for the dissemination of Roman legal education among non-Romans.

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[81] P. Oxy. 17.2103, dated to the beginning of the third century CE, is our earliest manuscript of Gaius' *Institutes*, and it testifies to the quick dissemination of this text in Egypt in Latin. From the sixth century Latin–Greek glossary of Pseudo-Philoxenus we learn that Gaius was taught in Greek. Around this period, a copy of the first edition was produced in Egypt (PSI 1182) and provided with marginal glosses by a Greek-speaking user. See Ulrich Manthe, "Das Fortleben das Gaius im Oströmischen Reich," in *Administration, Prosopography and Appointment Policies in the Roman Empire*, ed. Lucas de Blois (Amsterdam: J.C. Gieben, 2001), 180–201.

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