

Critique of the David Instone-Brewer Divorce and Remarriage Theory

By David Hillary

In this interesting paper, David Hillary concurs with the Catholic position that marriage can only end by death and divorce is forbidden by Jesus for everything, even for adultery, abuse or abandonment. He defines the term 'porneia' (in Jesus' exception) as 'premarital unchastity' which is one of the grounds for Catholic annulment, though they also have many others that he lists.

This conclusion relies on a rather strange interpretation of the rabbinic debate between Hillelites and Shammites. His interpretation doesn't just disagree with me but with (I think) every previous scholar who has looked at it. Every academic commentary on Matthew written since 1850 has pointed out that this Hillel-Shammai debate was behind the Pharisees' question to Jesus about divorce, and they have all interpreted that debate in the same way as rabbinic scholars like myself.

That doesn't mean, of course, that David Hilary is wrong, but he would have to present his reasoning in a much firmer way than he has done here. He doesn't give any arguments to explain how he has come to his alternate interpretation - he just states his conclusions (see p.13-14). He also seems to think that the Hillelites have the better arguments without realising that he is reading a Hillelite document - so they are bound to 'win'!

He concludes that they are discussing whether remarriage is allowed after any type of divorce, whereas other scholars conclude they are discussing the grounds on which a valid divorce can occur - i.e. one that allows remarriage. One problem is that he only really discusses this one version of the debate and doesn't put it in the context of the mass of other rabbinic material on the matter, which is perhaps why he comes he is able to read it in this rather idiosyncratic way. I look forward to seeing him grapple properly with the rabbinic material.

He complains occasionally about lack of "verbally exact" phrases, and inexact translations of words like 'porneia'. He appears to want NT and rabbinic citations of the OT to be 'exact', and wants to have a single English translation for Hebrew and Greek words. He says, for example, that "any matter" and "any cause" are not the same. Unfortunately he doesn't take into account the small vocabulary of ancient Hebrew (which has about 8000 words) compared to English (which now has about a million). The word used for "matter/cause" in Deut.24.1 (davar) is translated by just over 80 different English words even in the KJV (which tries to match each Hebrew word to an English equivalent as much as possible). Asking for an exact match between phrases in Hebrew, Aramaic and Greek is impossible, especially when they are discussed (as he does) only in English.

He points to one weakness that I'm very conscious of: that the early church apparently did not understand Jesus' teaching. This is a weakness because I would like to think that the Holy Spirit would guide those leaders and our present day leaders to interpret scripture correctly.

Unfortunately it appears that they soon forgot the meaning of the Jewish legal terminology that the Pharisees introduced into the debate, and with which Jesus responded.

I was surprised to see Hilary also thinks that the Early Church Fathers have misunderstood Jesus, because they thought 'porneia' in this context referred to adultery (which I would agree with) whereas Hilary thinks it referred only to pre-marital sex in this context.

Hilary has grappled with complex and wide-ranging issues in a competent way. There are some serious gaps (some of which I have pointed out with postit note in this document) but perhaps he can deal with them. However, I can't help thinking that when he does come to a better understanding of the material, he will also come to a different conclusion.

David Instone-Brewer, May 2019.

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Synopsis

Divorce and Remarriage in the Bible, The Social and Literary context, by Dr. David Instone-Brewer is an extensive and controversial book on this important topic (2002, 355 pages).

I explain why I wrote this paper: Instone-Brewer's theory, while initially plausible, didn't fit with the innocently divorced wife in Mat. 5:32 being guilty of adultery in remarrying. I wrote this paper to address this conflict and to provide certainty as to the Christian teaching on the topic.

Instone-Brewer's position is that Jesus' teachings on divorce and remarriage in Mat. 19:3-12 are dependent upon the Hillelite-Shammaite debate, that Jesus was tested on the legality of the Hillelite 'Any Matter' divorce procedure, and that he ultimately replies in agreement with the Shammaite position that Deut. 24:1 only refers to divorce for adultery. This reverses what would otherwise be the plain meaning of the text.

In critiquing Instone-Brewer's position, we address the historical speculations involved in his reconstruction of the Hillelite-Shammaite debate on Deut. 24:1-4, and the proposed links with that debate in Mat. 19:3-12.

First and most importantly, we assess the positions and meaning of the Hillelite-Shammaite debate on Deut. 24:1-4 to show that the debate was not about permissive vs. restrictive positions on grounds for divorce. We show the debate was instead about the exegetical basis for permitting a divorced woman to remarry after divorce for any cause whatsoever.

Second we address Instone-Brewer's claim that the Hillelites introduced a specific and permissive ground for divorce that was identified by the legal-technical phrase 'Any Matter.' We note that there is no support whatsoever that such a ground for divorce existed, nor that there ever was a divorce procedure identified by that phrase. We also note that the alleged invocation of that legal-technical phrase in Mat. 19:3 fails: 'every cause' is not a reasonable match for 'Any Matter,' and for this kind of reference the match should be verbally exact.

Third, and in like manner, we address Instone-Brewer's claim that the Shammaite position was ever summarised or abbreviated down to the phrase 'except indecency.' Again we note that there is no support whatsoever for this as a distinctive phrase. And again we also note that the alleged invocation of that distinctive phrase in Mat. 19:9 fails: 'not for fornication' is not a reasonable match for 'except indecency,' and for this kind of reference the match should be verbally exact.

Fourth, we assess the dating of the Hillelite-Shammaite debate to show that Instone-Brewer fails to provide sufficient evidence that the debate was contemporary with Jesus' test question from the Pharisees. There is a significant possibility that the debate post-dated Jesus' test question from the Pharisees, which would destroy the proposed link.

Next we address Instone-Brewer's attempts to recover the social and literary context of the legal debate, specifically the legal and political context and content of the gospel. Whilst Instone-Brewer's scholarship in this book and in his other papers is to be credited with developing important aspects of the legal and political context, he has failed to recognise and develop its significance in some important areas, and these limitations build up to a fundamental error in his analysis of Christian wedding vows and what they mean for divorce and remarriage.

We assess Instone-Brewer's paper *Choosing a Legal System in Early Judaism* to develop the legal and judicial context of the legal debates, showing Jesus' general approach in favour of non-coercive legal administration and a competitive judiciary, as opposed to the coercive legal administration and monolithic hierarchical state judiciaries, and emphasise the political meaning of this.

We also emphasise the propriety of political assessment of the social and literary context and content of Jesus' teaching by showing an example of Instone-Brewer doing this in his paper *18 Benedictions and the Minim before 70 CE*. Instone-Brewer develops that the Pharisees were the drivers of the wording, and argues they used it to attack the Sadducees and the Roman empire. We show that Dan. 9 is the background of the 18. We also show that the paper also proves the national and political nature of the resurrection, a point not developed by Instone-Brewer, intrinsically connecting what would otherwise be disparate points.

We then show that Instone-Brewer fails to apply this legal and political approach to Mat. 5:21-26, and how this approach opens up this text completely differently, showing the barb against the Romans and the well-connected Jewish hangers on who handed him over to the Romans to be executed, and their civil litigation system and coercive civil remedies.

We address Instone-Brewer's claim that when Jesus ruled that a man who divorces his wife and marries another commits adultery, he didn't literally mean adultery with all the legal and financial consequences of that being applicable. We show that Instone-Brewer himself documents and develops the social and literary context where 'technical' adultery was a real form of adultery, and carried all the legal and financial consequences of real adultery and we show why this is applicable here.

We finish this legal issues part by addressing the fundamental error Instone-Brewer makes in assessing Christian wedding vows as showing a continuity of the marital obligations, and thereby allegedly a continuity of the remedy of cancellation for breach. We criticise Instone-Brewer's flagrant disregard for the legal meaning of the wedding vows in church government, policy and pastoral practice, and his support for the church's abdication of its judicial functions in marriage, divorce and remarriage. We particularly criticise the practice of not expecting or requiring those who vowed 'for better, for worse ... till death do us part' to be held to those legally binding vows and not recognising this as a legal impediment to subsequent marriages before the original contract is discharged by death.

Then we address the substance of the exegesis of Mat. 19:3-12. We also address Mat. 5:32; Ex. 21:10-11; 1 Cor. 7 and Eph. 5:22-33.

We show that the question is best read in a plain and normal sense: is it lawful for a man to divorce his wife for every cause? We refute Instone-Brewer's claim that Jesus digressed rather than answered the question. We show that Paul interpreted the answer to mean 'a man must not divorce his wife.' We exegete the answer to show how Jesus skilfully and powerfully makes his case that a man's obligations to his wife are unconditional and irrevocable and show how this answers the question of the legality of divorce on the grounds of breach in the negative. We develop the eschatological and apocalyptic implications of Jesus' appeal to the restoration of the Garden of Eden and the replacement of the hard hearts with hearts of flesh in regathered Israel under the Messianic Kingdom.

We show that Jesus did not back down at the end of the debate and that he instead upped the stakes as high as they could go by ruling remarriage after divorce to be adultery.

We address the exception clause 'not for fornication' with a study on the word adultery before making a study on the word *porneia* based largely on the usage of *zanah* in the Old Testament, but also considering New Testament usage of *porneia*. We identify the root meaning as prostitution, and study how the word was used in specifically extended senses. We identify that, at that particular time and place, the terms adultery and *porneia* were defined and used in distinction based on the marital status of the woman involved, and we address various exceptions to this general rule.

We discuss how the early Christian writers approached the questions of divorce and remarriage and how they dealt with Mat. 19:9 and other relevant passages.

We make the case that *porneia* in Mat. 19:9 refers to premarital unchastity of the bride, and we welcome Instone-Brewer's generally favourable assessment of this interpretation and address the reasons why he nevertheless rejected it.

We address the disciples' difficulties with Jesus' teaching on divorce, and we examine the supposed optional marriage and optional procreation position of Jesus, as maintained by Instone-Brewer. We suggest instead Jesus' ruling about being made eunuchs for the Kingdom of Heaven was a rabbinic joke at the disciples' expense rather than as a serious commendation of celibacy.

We illustrate how differently Mat. 19:3-12 might have been recorded if Jesus' test question from the Pharisees happened and meant as Instone-Brewer proposes.

We then move to Mat. 5:32 in the Sermon on the Mount and discuss its structure and meaning, showing that it suggests a very strict position against divorce and remarriage indeed.

We then move back to the Old Testament to Ex. 21:10-11 and show that the woman involved was a female servant, and not a slave-wife, and how the text is about financial remedies rather than the permissibility of divorce or remarriage.

We then move back into the New Testament to Paul's teaching in 1 Cor. 6-7. We develop the structure and logic of the passage and show how it addresses the question of the validity of marriages between believers and unbelievers and how the divorce prohibition applies to these difficult cases. Paul's argument is that marriages are valid whether they are or were between believers or unbelievers, and whether before or after conversion, and so none of these scenarios overrides the prohibition of divorce. We show that Paul deals with the issue of a spouse involuntarily divorced, exculpating them from the guilt of the divorce without validating the divorce itself.

We finish off the biblical material by showing how Eph. 5:22-33 teaches that a man's duties to his wife are to the extent of pouring out his life unto death, that those duties are unconditional and irrevocable, and last until the death of the man or his wife.

We finish the paper with some practical notes then appendices address various other matters.

Appendix 1 provides an alternative argument that if *porneia* refers to adultery rather than premarital unchastity, that the exception clauses in Mat. 5:32 and 19:9 could be explained as addressing the question of causation and as a rhetorical emphasis respectively, how the exception clauses do not logically require permission for divorce or remarriage in such cases, and showing that the sayings without the exception clauses independently prohibit divorce and remarriage even for adultery.

Appendix 2 highlights another questionable historical speculation of Instone-Brewer that the Christian church abruptly changed its doctrine and practice on divorce and remarriage after 70 A.D. without leaving a trace.

Appendix 3 documents the traditional Christian wedding service and vows from the Book of Common Prayer, showing its exegetical basis and legal meaning. It also introduces material showing how seriously and literally the doctrine of one flesh was treated in English common law.

Appendix 4 sets out a contractual remedies analysis of marriage and divorce. This also looks at various legal issues that could result in relief such as illegal contract and mistake.

Appendix 5 looks at the meaning of the term 'nakedness of a thing' in Deut 24:1, showing that it means that the man uncovered something objectionable and that it does not refer to or imply adultery in particular, and shows the difficulties occasioned by attempting to link it with 'not for *porneia*' in Mat. 19:9.

Why I wrote this paper

When I first heard Instone-Brewer's position nearly 20 years ago, I immediately found it plausible, and I liked its contextual explanation. Some years later when I studied commercial law at a basic level for an accountancy degree I saw fairly immediate application and fit with contractual remedies law. The whole approach seemed not only plausible, but practical and feasible. Marriage was supposed to be lifelong and monogamous, but contractual remedies law provided some necessary and practical relief in the hard cases.

Some years later, however, when I studied the Sermon on the Mount I was struck that this analysis didn't seem to fit. The woman suffered the husband's divorce, without grounds and against her wishes, and yet she was condemned as an adulteress for remarrying. This woman had every right, it would seem, under contractual remedies law, to cancel the contract.¹ And she had done enough to give notice that she intended to cancel the contract, in remarrying.² This should be a text-book case of cancellation, but Jesus ruled the opposite.

¹ The husband both repudiated the contract and breached it resulting in substantial detriment to the wife, which are both grounds for cancellation under [sections 36](#) and [37](#) of the Contract and Commercial Law Act 2017 (NZ).

² [Section 41](#) of the Contract and Commercial Law Act 2017 (NZ) states that intention to cancel may be made known by words or by conduct and that it may be possible that 'the other party cannot reasonably expect to receive notice of the cancellation because of that other party's conduct in relation to the contract.'

For a long period of time I was uncomfortable with the tension and uncertainty with the material and what it was supposed to mean. Different passages seemed to say different things. Most of the passages seemed to be capable of being reasonably interpreted either way. This should be an area of clarity and certainty for the Christian church, for pastors and elders, and for individual believers grappling with marriage difficulties.

This paper, then, seeks to provide that certainty. It refutes Instone-Brewer's thesis and establishes, biblically and exegetically, that valid and lawful marriage and its obligations end only on the death of one or both of the spouses. Should the spouses separate, so long as they both live the duty to forsake all others continues and remarriage is unlawful and adulterous.

Instone-Brewer's theory

Instone-Brewer's theory is that the Jewish background, in particular the debate between the Hillelite Pharisees and the Shammaite Pharisees, and their respective catch-phrases allegedly quoted by Matthew, are absolutely essential to understand Jesus' teaching on divorce and remarriage. Instone-Brewer insists that this context was lost to the Christian church almost instantly in 70 A.D. and thereafter Jesus teaching became 'utterly incomprehensible to Christians' (p. 239). In particular, the catch-phrases, supposedly abbreviated out by Mark, resulted in a gospel that after 70 A.D. 'could not be understood at all.' (p. 239).

Instone-Brewer's theory itself is fairly easy to understand. It is that in Matthew's account (19:3-12):

1. Jesus was solely questioned about the new Hillelite 'any matter' divorce.
2. Jesus responded with a digression in favour of monogamy.
3. The Pharisees dragged the debate back to the legality of the Hillelite 'any matter' divorce by appealing to Moses and demanding a straight answer.
4. Jesus finally responds quoting the Shammaite catch-phrase 'only indecency' was the ground that should be accepted based on Deut. 24:1, and thereby affirming the Shammaite position.

As a result of this proposed exegesis of the debate in Mat. 19:3-12, Instone-Brewer develops the following implications:

1. The Hellelite-Shammaite debate and catch-phrases reverse the plain meaning of the teaching. Divorce is available for every cause, just not 'Any Matter' (i.e. no cause or any

trivial cause) of the Hillelites. The recognised causes of indecency and neglect of marriage obligations are adequate, sufficient and available grounds for divorce.

2. Mark's account abbreviated out both the Hillelite and the Shammaite catch-phrases. We have to unabbreviate them back into the account to recover the 'social and literary context' necessary to reverse the plain meaning of Mark's version, i.e. the apparent absolute prohibition of divorce, and remarriage after divorce, does not stand, it is reversed. Likewise for Luke's record of Jesus' saying on the matter.

The theory seems so perfect, it seems to fit the data down to T. And it seems so scholarly, who could argue against interpreting a debate account according to the issues and vernacular of the time it happened?

Except it isn't so perfect. The problems with the theory are often not obvious, so we will have to identify and present them for the reader's review and assessment.

Historical Speculations



Instone-Brewer's historical speculations are fairly transparent. He frankly admits various points he makes are uncertain and speculative. Normally this is on issues and points he encounters along with way as he develops his book, but of little weight for his conclusions. However, surprisingly, on his monumental conclusion that Jesus taught 'Divorce is allowable – if there is a stubborn refusal to stop committing adultery' he states, point blank: 'It is not certain that Jesus was teaching this.' (p. 181)

Other than this stunning back down at the very climax of his book, Instone-Brewer offers a great contrast between some items he admits are highly speculative, and others that he concludes are firmly established. Without any disrespect to Instone-Brewer's scholarship, his entire case rests of historical speculations that are not as good or as firm as he concludes.

As speculations, they could be gradually or not so gradually reinforced by later scholarship and literary discoveries. Or they could be destined for the academic scrapheap by later discoveries or better analysis of the existing material. Even if we like his historical speculations, they do not provide sufficient certainty to base legal decisions, church policy and pastoral practice.

Our approach in this paper is primarily to offer an alternative (better) analysis of the historical material in this part and then to provide robust exegesis of the biblical material providing sufficient certainty to address difficult issues with confidence in later parts.

Let's have a look at these historical speculations which Instone-Brewer's theory requires.



Hillelite School - Shammaite School Debate Positions

The first historical speculation is the analysis of the debate itself between the Hillelite school and the Shammaite school. Instone-Brewer's theory is that the Hillelites had a permissive view on divorce, while the Shammaite school held a restrictive view. Instone-Brewer then interprets Jesus' ruling as quoting a Shammaite school catch-phrase, and thereby being in favour of the Shammaite restrictive position on the grounds for divorce.

The trouble with this approach is that Instone-Brewer's own technique, and the example he gives in support of it, destroys his analysis of the debate, and thereby destroys his entire thesis.

Instone-Brewer's analysis of the Shammaite school – Hillelite school debate texts are found on pages 161-165 of his book, which he gives primarily to support his abbreviation thesis.

The thrust of his argument is as follows. When the text says:

The School of Shammai says: A man should not divorce his wife except if he found indecency in her. (y Sota 1.2, 16b)

We cannot interpret this in a straightforward manner because it is an extremely abbreviated version of the debate. Other material shows that the School of Shammai also allowed divorce on the grounds of neglect of marital obligations based on Ex. 21:10-11, so he says that the abbreviated text has omitted that point. To prove his point, he quotes the Mishnah, which he says is not as highly



abbreviated, and the **Safre** which he says is the least abbreviated.



So, if we follow Instone-Brewer's technique, we should use the least abbreviated account to tell us what the debate was about and the arguments of each side. So let's have a look at that account:

The School of Shammai says: A man should not divorce his wife except if he found indecency in her, since it says: *for he found in her an indecent matter*.

The School of Hillel said: Even if she spoiled the dish, since it says [Any] *matter*.

The School of Hillel said to the School of Shammai, Since it said *matter*, why did it [also] say *indecency*, and since it said *indecency*, why did it also say *matter*? Because if it said *matter* and it did not also say *indecency*, I would say: She who is discharged for a *matter* is permitted to remarry, but she who is discharged for *indecency* should not be permitted to remarry.

And do not be surprised [that she should be forbidden to remarry]. If she is forbidden [to marry] him [her first husband] who had been permitted to her, [why should she] not be forbidden to him who had been forbidden to her?

As scripture teaches: *Indecency ... and she leaves his house and goes and becomes the wife of another.*

And if it said *indecency* and it did not [also] say *matter*, I would say she may go because of *indecency* [but] she may not go because of a *matter*.

As scripture teaches: *a matter ... and she leaves his house.* (*Sifre Deut.* 269, ed Finkelstein 288)



So, according to this account, ***the dispute is on whether Deut 24:1 provides a legal basis for remarriage after divorce, depending on the cause of the divorce.*** Since this is the most detailed and comprehensive account of the debate, we need to accept it as definitive, and as explaining and qualifying the abbreviated versions.

Now let's look at the arguments advanced and how they work and what they mean and imply. The Shammaite school doesn't give an argument, it only gives its position. The Hillelite school gives two arguments:

1. The word 'matter' is superfluous in the Shammaite interpretation. The fact that it was not omitted is intentional, and it shows that the case included a) divorce for indecency and b) divorce for matter.
2. The Shammaite school holds that women divorced for a matter from Ex. 21:10-11, namely neglect of marital duties, could remarry. But if Deut. 24:1 does not include a matter from Ex. 21:10-11, but does include indecency, then the Shammaite school has no legal basis for remarriage of women divorced for a matter from Ex. 21:10-11 (or for any other ground, or for no grounds at all).



The Shammaite school gives no reply, most likely because it could not find some other text providing a legal basis for remarriage of women divorced for neglect of marital duties under Ex. 21:10-11. That text does not say they can remarry, nor does it say they get a divorce certificate (which would imply they can), and there is no other text or argument available. The Hillelite school seems to win.



We can support this interpretation that matter refers to Ex. 21:10-11 because the example the Hillelite school gives is 'even if she spoils the dish.' Ex. 21:10-11 was interpreted to mean that the husband was obliged to provide the ingredients and the wife was obliged to prepare and cook them

for him. To spoil the dish is to neglect this marital duty and can – presumably if malicious or persistent – meet the grounds for divorce under Ex. 21:10-11, as they were applied and practiced it in their day.

A later Hillelite provided a further argument that also incorporates divorce for no grounds at all:

R. Aqiba says, Even if she found someone else prettier than she, since it says *And it shall be if she find no favour in his eyes.* (m. Git. 9.10)

As with spoiling the dish, this argument is often wrongly dismissed as flippant. Rabbi Aqiba is providing a further contextual argument: the way the divorce is introduced suggests divorce generally: she simply finds no favour in his eyes, so he argues that it means divorce for any cause whatsoever. The divorce of Deut. 24:3, for hate, he implies, is also included, because it sets up the context with the explanation: ‘she finds no favour in his eyes.’ Rabbi Aqiba’s argument is not necessarily in favour of allowing divorce for the ground he mentioned, his point is that if a woman was divorced for that ground, it would be included and the woman could remarry on the strength of Deut. 24:1.

Josephus explains the law with an emphasis on freedom to remarry regardless of the cause of the divorce:



He that **desires to be divorced from his wife for any cause whatsoever**, (and many such causes happen among men,) let him in writing give assurance that he will never use her as his wife any more; **for by this means she may be at liberty to marry another husband, although before this bill of divorce be given, she is not to be permitted so to do:** but if she be misused by him also, or if, when he is dead, her first husband would marry her again, it shall not be lawful for her to return to him. (Emphasis added, Antiquities, book 4, Chapter 8, verse 23)

Josephus said that this freedom to remarry applied if she was divorced for any cause whatsoever, and many such causes happen among men. Josephus states the Hillelite position exactly, although he does not give the exegesis or argument for it.

Philo’s discussion on the same text says basically the same thing:



But if, proceeds the lawgiver, a woman having been **divorced from her husband under any pretence whatever, and having married another**, has again become a widow, whether her second husband is alive or dead, still she must not return to her former husband, but may be united to any man in the world rather than to him, having violated her former ties which she

forgot, and having chosen new allurements in the place of the old ones. (Emphasis added, Philo, Special Laws III, 30)

In summary, we have nothing conclusive that the Hillelites held permissive views on divorce, or that the Shammaites held less permissive views. The debate we do have is a narrow exegetical controversy concerning how to prove scripturally what it seemed both the Shammaites and the Hillelites agreed on: that a woman divorced for any cause whatsoever could remarry.

If Jesus refuted the Hillelite position he did so without addressing any of their arguments, and if he endorsed the Shammaite position on the grounds for divorce it is not clear how they differed from the Hillelite ones. The practice of marrying each other's daughters, proffered by Instone-Brewer as evidence of a policy of mutual recognition notwithstanding different standards on divorce grounds (p. 130-132), is better explained as an accommodation of other differences (he mentions *six* other differences and mysteriously omits grounds for divorce!) and a procedural rule of respecting judicial decisions (which he does mention), rather than any difference on grounds for divorce.

'Any Matter' as Legal Jargon

The second historical speculation is the existence of the Hillelite 'Any Matter' divorce as a distinctive cause of action in divorce proceedings. Instone-Brewer's interpretation of Mat. 19:3f relies on the 'every cause' being an explicit reference to the Hillelite 'Any Matter' divorce procedure, denied by the Shammaites.

However there is no evidence whatsoever that there ever was a distinctive legal cause for divorce invented by the Hillelites, nor that 'Any Matter' was identifying a particular type of divorce under the technical name, which Jesus or the gospel writer could then use as legal jargon to refer to it. Instone-Brewer seeks to find references to 'Any Matter' divorces, as legal jargon, and he proposes two authors, Philo and Josephus, as proof. However we have already examined these texts and shown that they merely repeat the Hillelite position that a woman divorced for any cause whatsoever can remarry on the strength of Deut. 24:1. They are not referring to a distinctive divorce ground or procedure, they are referring to any and all divorce grounds and procedures. (Although these sources do support the idea that the Hillelites held a permissive view on the grounds for divorce, that does nothing to carry Instone-Brewer's argument here, nor does it prove that the Shammaites held less permissive views.)

The historical speculation here also runs into an exegetical issue on Mat. 19:3, for the text does not refer to 'Any Matter' it refers to 'every cause': neither word is a good match:

- 'every' means all, but 'any' means one of possibly several

- ‘cause’ means a legal charge (as in Mat 27:37; Mark 15:26; John 18:38; 19:4,6; Acts 13:28; 23:28; 25:18,27; 28:18), but ‘matter’ means simply a thing or a deed.



And yes, of course the Greek could have referred to ‘Any Matter’ if that was really a thing to refer to specifically. If ‘Any Matter’ was legal jargon, such as Instone-Brewer speculates existed, a reference to it must be **verbally exact**. When someone wants to plead the Fifth Amendment, to exercise their right not to be made to make self-incriminating statements in the USA, they ‘plead the fifth’ they don’t ‘ask for five’, ‘ask five times’, ‘ask for a number five’, say ‘fifth please’ or ‘gimme five’.

‘Except indecency’ as Legal Jargon

The third historical speculation is like the second: the claim that the Shammaite position was summarised by the catch-phrase ‘except indecency’, again as a technical term. The Shammaite school exegetical position was expressed in the words ‘unless he found in her a matter of indecency’ and not ‘except indecency’. There is no evidence of their position being encapsulated in the shortened phrase ‘except indecency’, this is pure historical speculation by Instone-Brewer.



And again, it runs into an exegetical issue: the text of Mat. 19:9 does not say ‘except indecency’ it says ‘not for prostitution’ (or ‘not for fornication’³.) As with the supposed term ‘Any Matter’ the verbal match should be exact, which would in Greek be the Septuagint translation’s *‘aschémon’* (shapeless, meaning unseemly or improper, and not adultery). Instone-Brewer’s claim that *porneia*



(which literally means ‘prostitution’) is used in Mat. 19:9 *because it is the most accurate translation* of ‘nakedness of a thing’ in Deut. 24:1 (p. 158) is frankly laughable. That translation is not only poor, it is unprecedented, and this being so, it very unlikely to be the invocation of the alleged Shammaite catch-phrase (that probably didn’t exist).

Hillelite-Shammaite School Debate Contemporary with Jesus

The fourth historical speculation is that the Hillelite-Shammaite debate was contemporary with Jesus and his debate. Although Hillel and Shammai as individuals pre-dated Jesus’s ministry, whether the debates between the house of Hillel and the house of Shammai were contemporary with Jesus is historical speculation based on the Mishnah that was written up **two hundred years** after Jesus

³ The Greek *porneia* comes from the term to sell, and thereby refers to selling sexual services to strangers for cash, i.e. prostitution. The English ‘fornication’ comes from the Latin *fornix* meaning arched, which refers to the brothel. So, both terms equally mean prostitution, at their root, as does the Hebrew word *zanah*. Other forms of sexual immorality may be included **by extension**. The manner of the extension we discuss later in the paper.

spoke.⁴ Can we have enough confidence that the debate was contemporary with Jesus to base not only our exegesis of the account passages on it, but also our doctrine, jurisprudence and practice?

Instone-Brewer assumes we can, he never discusses the possibility that the debate post-dated Jesus' teaching and the establishment of the Christian church. However, when we look at some of his comments on dating, we have to wonder how much confidence we can have in his conclusions.

 Instone-Brewer states in his book: 'Rabbinic chronologies are very difficult to reconstruct because the only biographical information we have about them is usually late.' (p. 174) If this is the case for the Rabbis, how much more for the debates between the schools themselves, which must have spanned many decades more than the careers of the founding Rabbis, who only gained their authority to make new rulings in their advanced years, and whose teaching must therefore be dated up to and including only a few years before they died?⁵

The dating techniques of Instone-Brewer sometimes are not confidence inspiring. For example, he argues that a debate was early because the Shammaites appear to win, and: 'They have the last word, even though the structure of the debate suggests the Hillelites should be the last, and they win by showing the absurdity of the Hillelite position.' (p. 116). Whilst it is fascinating historical speculation on Instone-Brewer's part, I wonder if he means the Hillelites win by showing the absurdity of the Shammaite position? And I am a bit lost as to why a debate showing differences of requirements for the parties and the courts shows one position in this debate was absurd: understandably we might assess the Shammaite school as being more onerous, perhaps producing greater offsetting benefits, perhaps not, but does that make the Hillelite (or is it the Shammaite?) position *absurd*? What it boils down to is that ***Instone-Brewer is dating exchanges between the***

 ***Shammaite school and the Hillelite school based on what he feels is absurd*** (that in this case I can't even follow!). To me this dating procedure betrays an enormous amount of uncertainty and his stated conclusions engender little confidence.

Another case of this is on page 91 where Instone-Brewer insists that 'This interpretation of Gen 1:28 must be dated very early, because the schools of Hillel and Shammai had two debates on this

⁴ Instone-Brewer states that the final editing of the Mishnah was about 300 C.E. in his footnote on page 158, which would make it about **270 years after Jesus spoke**. However on page 162 he writes: 'None of the rabbinic literature that has survived is contemporary with the NT, and even the Mishnah was edited in the late second or early third century.'

⁵ Rabbis with authority did not get their authority until they were over 60 years old (Aqiba), with Hillel at 70 and Shammai at 85, according to David B Curtis [here](#). So, Shammai's teaching career when he had authority to make new rulings must have been very short. John the Baptist was different in two respects: a) obtaining his authority from heaven, and b) while in his 30s. Jesus claimed his authority was both from heaven and from John the Baptist, see Mat 21:23-27, and he also obtained it in his 30s.

matter.’ This is an extremely strong conclusion from a single fact that could equally be explained by a single period of debate in which two debates were had addressing the same matter, or two rounds in quick succession.

Instone-Brewer explains his dating of the Shammaite-Hillelite school debates as follows:

School debates can usually be assumed to be pre-70 C.E. because the Shammaites were all but wiped out by 70 C.E. Although an occasional Shammaite is referred to after this date, they do not pose the kind of threat to the dominance of the Hillelites, who effectively form normative Judaism from that time onward. (p. 106, footnote)

So, even on Instone-Brewer’s dating of the debates between the schools, they are only *usually* pre 70 A.D.! And all this is expressed as *assumption*.

Notwithstanding this great uncertainty, it appears we can date the Hillelite-Shammaite debate over Deut 24:1 with moderate confidence between 30 and 38 A.D.:



- We can suggest that since the debate was between the school of Shammai and the School of Hillel, that both Hillel and Shammai are dead. As Shammai died in 30 A.D. we don’t think it was before then.
- Philo’s summary of Deut. 24:1 can be dated around 38 A.D. and it does seem to reflect the Hillelite position.

If we take an early date on Jesus’s crucifixion of 30 A.D., that doesn’t leave room for the debate to develop before Jesus’s test question from the Pharisees. So we have to either suppose the debate started before Shammai died and/or opine for a late date for Jesus’ crucifixion to provide room for the debate to pre-date the test question from the Pharisees, and both of these options seem reasonably possible. But it is also reasonably possible that the debate emerged after Jesus’ test question from the Pharisees which would preclude Instone-Brewer’s theory.

If Instone-Brewer’s theory is wrong if the necessary context may not have yet happened, and if this is a realistic possibility, isn’t it more prudent not to practice or allow divorce and remarriage before the death of the original spouse?

Legal Issues

Instone-Brewer's work traverses a significant amount of legal territory. Contract law and contractual remedies law is at the heart of our subject matter, and a robust approach to legal texts, contract documentation, case laws and so on is required to analyse the data, draw out the legal principles and give us Christian instruction and practice good enough for people to commit their lives to, to institutionalise, and to defend against dangers and challenges.

Instone-Brewer's primary thesis is that the Christian church almost instantly lost its Jewish roots after 70 A.D., and that it is his job as a scholar to restore to us that Jewish background necessary to correctly interpret and apply the sayings of Jesus.

I have to credit Instone-Brewer's paper on *Choosing a Legal System in Early Judaism* for its helpful discussion on legal matters and the institutional structure that provides a powerful context for Jesus' institution of his own decentralised judicial system in Mat. 18:15-20. If you have ever wondered why a church with only 3 people in it was imbued with ultimate authority on earth in the Messianic Kingdom – doesn't that seem an awfully small church? – Instone-Brewer's explanation of the court of the three sages, where each side chooses one sage and together they choose a third explains what is going on! (Also as discussed briefly on pages 115-116 of his book.) Jesus really gave and instituted the most wonderful legal system and judiciary for reconciliation of adversaries, for restoration of the wayward, for litigating civil suits, for judicial proceedings, for rendering verdicts and for exercise of non-coercive kingdom authority in this foundational Christian legal text.

It is often noted that the Jews in general and the Pharisees in particular were legalistic. We might therefore be justifiably surprised to learn that the Jews had an 'eclectic approach to legal matters' and operated in a legal environment in which 'a plethora of competing legal systems co-existed' according to Instone-Brewer's paper. To recover the social and literary context we have to recognise the legal and institutional style is quite different from modern near-comprehensive legal codes backed by a hierarchical judicial system ultimately backed by a powerful state and an apparatus of police and well-resourced and efficiently structured regulatory law enforcement agencies. Instead, most of the law was customary, almost all legal matters required one to pursue remedies for oneself or by lawyers you had to pay for, most disputes were resolved by negotiation and financial settlement, most of the judiciary was ad-hoc and competitive, and the most fearful consequence

was loss of honour.⁶ In this context, Mat. 18:15-20 makes a whole lot more sense – eventually when we disabuse ourselves of enough of our modern myth of the rule of law.⁷

The social and literary context of the gospels is also its political context. Jesus' teachings and his legal and political system were sufficiently threatening to the power and legal system of Chief priests and the Torah teachers and the dominant faction of the Pharisees to make him a political enemy and ultimately get him handed over to the lawless Romans to be crucified as an enemy of the state. Jesus was not only against the state in its particular form that later killed him, he was against the whole concept and practice of statehood with his alternative competitive judiciary and non-coercive remedies that he taught would grow into the Kingdom of God. Recovery of the social and literary context includes the legal and political content of Jesus' ministry and his rulings. We need to recover Jesus' social and legal philosophy, style and stance, in its Jewish jurisprudential context, as against the other competing political factions (Sadducees and the Herodians, Chief Priests, establishment lawyers and Torah teachers, austere and militant Shammaite Pharisees, and revolutionary Zealots), to understand the legal system he instituted.⁸

Instone-Brewer develops the political context and content of Second Temple literature very well in his paper the *18 Benedictions and the Minim before 70 CE*. The 18 are fundamentally a national prayer of confession and repentance, as in Daniel 9:3-19 and the prayer for and invocation of the promised national deliverance of Daniel 9:20-27.⁹ His analysis of the 18 Benedictions picked up on both anti-Roman and anti-Sadducee political aspects, in the resurrection references that he credits to the Pharisees. Although he doesn't develop this, [his paper](#) also proves that the resurrection, denied by the Sadducees and taught by the Pharisees, was the national and political resurrection of Israel.¹⁰ In the 18 the resurrection is equal to the judgement of the violent, the arrival of salvation for Israel, the forgiveness of Israel's sin, the redemption of Israel, the healing of sick Israel, the final year

⁶ That is, the most fearful consequence under the style of legal system Jesus drew from, developed, affirmed and instituted here. Jesus' rejection of and barb against the ministry of death under the alternative state legal system we discuss in the following section.

⁷ See John Hasnas' [Myth of the Rule of Law](#).

⁸ Jesus' teaching and position is actually closest to the Hillelite school, with an added heavy emphasis on the prophetic consciousness of the Old Testament prophets, and the emphatic claim that the fulfilment of Israel's hope was at hand and in Him personally. Jesus's stinging rebukes of 'the Pharisees' seems to be targeted against the emergent Shammaites as the dominant faction after Hillel died about 20 A.D. and Shammai succeeded him as president of the Sanhedrin.

⁹ How Instone-Brewer doesn't mention the background of Daniel 9 in this paper I don't know: to me the connection seems both obvious and important.

¹⁰ That Instone-Brewer misses this is unsurprising: Christian theology has taken the resurrection concept and made it mean something very different – a personal afterlife and a personal physical body via reconstitution and revitalisation of individual corpses. This development disguises the national and political character of the resurrection in traditional Christian theology. However, the Pharisees never taught the physical resurrection of corpses, see William Bell's (lengthy and slow, sorry!) youtube series on the resurrection doctrine of the Pharisees [here](#).

of redemption, blowing the trumpet for freedom, the regathering of the exiles, the restoration of the judges, the uprooting of the kingdom of the arrogant (which Instone-Brewer plausibly claims was referring to the Roman empire), and God's compassion on Israel, Jerusalem, Zion, the temple and the Messiah. This national resurrection and regathering concept is exactly what we have in Is. 25:6-8, the source of Paul's resurrection doctrine in 1 Cor. 15 and 2 Cor. 5, and what Paul describes as the hope of Israel in Acts 26:5-8; 28:20 (compare Rom. 11:15). It is also what we see in Ez. 37. We see this concept, and the Christian application of it, peppered through the gospels (e.g. Mat. 19:28; Luke 2:25; 24:21; Acts 1:6; 3:19).

Why is the national and political nature of the resurrection important? It connects the political positions of the Sadducees and the Pharisees to their resurrection doctrine: The Sadducees were in bed with the Romans, so of course they didn't believe Israel would or should rise up to freedom as a national body, so they didn't believe in 'resurrection' (Acts 23:8). And conversely, the Pharisees did believe Israel would and should rise up to freedom from the Roman yoke, so they affirmed it as *the promise made by God to the fathers, to which our twelve tribes* [i.e. regathered Israel] *hope to obtain'* (Acts 26:5-8). This hope of Israel was the Pharisees' doctrine of the resurrection: 'I worship the God of our fathers, believing everything laid down by the Law and written in the Prophets, having a hope in God, *which these men* [i.e. Pharisees] *themselves accept*, that there is about to be a resurrection of both the just and the unjust' (Acts 24:15).¹¹ This example proves the propriety and the importance of reading documents such as this, including the gospels, legally and politically.

If Instone-Brewer is successful in his quest for the recovery of the social and literary context of Jesus and his debate for us, we need to be comfortable with Jesus and his gospel being heavily and properly legal and political. We have to expect a sophisticated legal system and a high standard of legal argumentation from both sides in debate accounts.

Unfortunately, Instone-Brewer's work falls short of his goals and falls short of what we need to recover. We will address an example just to highlight how much work remains to do justice to Instone-Brewer's project, before returning to the topic of divorce and remarriage where we address two fundamental errors.

¹¹ The resurrection of the just is the resurrection of Israel under Messiah, as in Ez. 37; Is. 25:6-8; 26:16-21. But this resurrection would be in and through the gathering of the nations ('Gog and Magog') to rise up at the war against Israel in the tribulation, which is the resurrection of the unjust, as in Ez. 38-39 (cf. Rev. 19-20). Hence, the resurrection of 'the just *and the unjust*.'

A legal and political interpretation of Mat 5:21-26

An example of the failure of Instone-Brewer to recover the appropriate legal and political content and meaning is his paraphrase of Mat 5:21-26

“You think that you are innocent of murder, because you only did it in your heart? You are guilty of murder.” (p. 160)

An analysis of the text shows how completely distorted this is as a paraphrase by failing to read the passage properly legally and politically. The passage says *nothing* about ‘doing it in your heart’ and it says *nothing* about doing something other than killing someone that amounts to the guilt of murder. This approach to the text *assumes* that it is not a text about legal, political and imperial matters. That approach also creates the obvious problem that Jesus breached his own law by being angry and calling the Pharisees bad names (as noted by Instone-Brewer on page 153.) If we reverse that assumption and take the text as legal and political commentary we not only solve that minor problem but we can paraphrase the passage much more powerfully, for example:

You have been taught by the Torah teachers: ‘you shall not murder’ and ‘the murderer will be judged and put to death’

But I say to you that you: observe! You only need to be angry with your Jewish brother to be sued, and if you say to your Jewish brother ‘Raca’ [an Aramaic-language insult] you will be dragged before the Sanhedrin [Jewish Supreme Court].

And if you say to the wrong person: Wicked Fool! [a Greek-language insult] You know that you are in danger of being crucified by the Romans and then your body will be in danger of being thrown in the valley of fire outside the city.

Therefore: if you are bringing your offering in the temple and remember that your Jewish brother has something against you, leave it there and go and settle it first. Compromise and settle out of court because you know the coercive institutions of the court: dragging you there, arresting you, judging you, breaking you with a huge verdict and throwing you in the clink until you pay off the enormous judgement debt!¹²

(The Jews didn’t want to practice the death penalty for murder as set out in the law of Moses so they jacked up the burden of proof to impossible levels to ensure that the law would not take the life of a man. The murderer’s life would be spared. But the insulter ... well that was a different story, depending on who you insulted. The Romans sure didn’t have any compunctions about using the death penalty against not just insurrectionists but also those who insulted Rome’s officials or those like Jesus who insulted the well-connected hangers-on. The passage is fairly obviously a dramatic irony of Jesus’ life: the thing he warned about happened to him!)

¹² See my paper *Typological Fulfillment of the Civil Law of Moses*.

When we put this passage in the correct legal, political and historical context, the barb becomes clear: Jesus is making an argument from the clemency shown to murderers to clemency for those guilty of lesser offences, while also criticising the coercive legal institutions of civil liability enforcement (compare Luke 12:54-59), and the coercive imperial system of the lawless Romans (compare Mat. 20:25).

Real or 'technical' adultery?

When we return to the issue of marriage and divorce we find the same kinds of issue affecting Instone-Brewer's scholarship. For example, Instone-Brewer competently documents that 'technical' adultery was treated as real adultery: **all** the legal consequences from adultery were applicable even if the adultery was because of a scribal error or a mistake, and were spelled out in comprehensive lists in the literature (pages 125-132). Patently the adultery was more unintentional or accidental than 'technical.' And yet, he just assumes that when Jesus ruled that remarriage after divorce was adultery, he didn't mean to suggest that it would be treated as real adultery in terms of its consequences or the remedial actions that should be taken:

Jesus pointed out that virtually every remarried divorcee was committing technical adultery because divorce based on "any matter" was invalid. Yet there is no expectation that Jesus expected them all to leave their partners and declare their children to be "illegitimate." (p. 309)



This is anachronistically reading modern anti-legalistic Christian gloss into Jesus and his teachings, in violation of the hermeneutic that Instone-Brewer set out:

1. Scripture should be read through the filters of the language and culture to which it was first addressed. (p. 294).
2. Silence on a subject may indicate agreement with the prevailing culture (p. 295)
3. The primary meaning of scripture is the plain sense, as it would be understood by an ordinary person in the culture for which it was written (p. 295).

Instone-Brewer just set out extensively that adultery from a remarriage after an invalid divorce, in that culture, was treated as real adultery and came with all the legal and financial consequences of that ruling and status. Jesus never said that he meant something else about remarriage after divorce being adulterous, so, according to Instone-Brewer's hermeneutic this indicates he didn't mean anything different from what the prevailing culture meant by it. And in ruling a remarriage adulterous, Jesus should be understood in the plain sense of that: commits adultery really means commits adultery.

(We may distinguish this case from the case in Mat. 5:28 where the adultery is inchoate and the point of the saying is to proscribe things that proceed to complete adultery. The focus on causation of adultery, in Matthew, including via divorce, we discuss later in the paper. Instone-Brewer also gives the appropriate social and literary context for this distinction on page 98 for looking and touching as compared with pages 125-132 for accidental adultery.)

What this boils down to is that Instone-Brewer's approach is to treat Jesus and his legal rulings as something less than legally real and as not fully applicable to the real world in compliance requirements, administration and adjudication of actual cases. Instone-Brewer has failed to apply the social and literary context he has reasonably well recovered here.

If that seems a bit harsh on Instone-Brewer, it is confirmed by our next case where the facts and the decisions are at a point of less delicacy when a man and a woman wish to join together but have not yet done so.

Fundamental Error on Christian Wedding Vows

The deficiencies of the contractual remedies analysis really come home when Instone-Brewer tries to analyse Christian wedding vows as providing a set of terms that, if broken, provide the remedy of cancellation of contract.

However, before this major legal error is apparently committed, we have a pattern of conflation between the *terms* of the contract, and the *remedies* for breach (cancellation in particular). Instone-Brewer doesn't seem to have any concept that a breach of a contract is not coextensive with the remedy of cancellation. This is surprising because clearly Instone-Brewer does maintain that breach of contract must be serious and persistent (his interpretation of 'hard-hearted') to allow cancellation, and further, he spends a considerable effort explaining that failure to provide conjugal relations was breach of contract, with an incremental damages remedy he wrongly calls 'fines', but was not grounds for divorce (p 107).

For example, Instone-Brewer says bluntly:

Marriage vows were the basis of Jewish divorce. If a marriage vow was broken, it became a ground for divorce by the injured party. (p. 213)

The earliest English language Christian marriage vows Instone-Brewer presents are from 1085 A.D. and the relevant part for us is:

I N take the N to my wedded wyf to have and to holde fro this day forwarde tor better: for wors: for richere: for poorer: in syknesse and in hele: tyl dethe us departe. (p. 231)

These vows are of course the traditional English wedding vows, virtually identical today other than the archaic spelling. The current [Book of Common Prayer](#) still has the same legal terms, and we provide a detailed analysis of those in Appendix 3.

The contractual remedies analysis is very straightforward: the couple agree that their marriage and their duties under it are unconditional, and that the marriage contract is irrevocable and cannot be cancelled for breach. Even if the breaches are of essential terms, and even if the effect of the breach is substantially for the worse.¹³ The wedding vows absolutely mean that divorce and remarriage are not permitted and are not lawful as long as they both shall live: the contract and the obligation to forsake all others continues till death, notwithstanding the seriousness of breaches.

Instone-Brewer completely fails to give any contractual remedies analysis of what the vows say, and what they mean for divorce law, and remarriage. Although he does not state it, the subtext seems to be this:

1. The Jews at the time of Moses and the Christians after them would have no idea about the content of marriage vows, other than it was set out in providing divorce for the breach of some of them in Deut. 24:1-4 and Ex. 21.
2. The wedding vows, then, were derived and adapted from these divorce-based texts.
3. The continuity of the marriage vows reflects a continuity of divorce availability and basis.

The problems with these ideas are fairly obvious: of course terms logically and historically precede remedies, and remedy law or clauses can change independently of regulations or clauses for the terms. The continuity of terms doesn't imply continuity of remedies at all.

In view of the deficiency of Instone-Brewer's analysis, we have covered them in setting out the traditional Christian position as Appendix 3, and in Appendix 4.

We can confirm how completely Instone-Brewer has missed this super-important legal point when he comes to applying his theory pastorally: his counsel and practice for cases of marital difficulty and blessing remarriages has ***absolutely no regard for the wedding vows made*** and which may be (almost invariably will be) absolutely legally binding on them, and deny the availability of divorce and remarriage (p. 312). In effect, Instone-Brewer is totally hypocritical in recommending Christian pastoral officiation of weddings as follows:

¹³ Contractual remedies law provides that a contract can be cancelled for breach of a term only if the term is essential or the effect of the breach is substantially detrimental to the other party (see [section 37](#), Contract and Commercial Law Act 2017 (NZ)). However, the remedy of cancellation is subject to the contract itself (see [section 34](#))

The couple should understand that the wedding vows are the most important part of the wedding service. ... I go through it carefully [with them], making sure they agree with every part. The vows are especially important ... (p. 311)

Instone-Brewer wants the church to take a complete pass on assessing the legality of marriages, and a complete abdication of its governing and judicial role. Even if the parties to the marriage promised for better or for worse, till death, expressly and formally, in front of many witnesses, with the blessing of the church and invoking the law and witness of God himself, well **they can't really be expected to honour those terms can they?** And the church can't really be expected to analyse and apply contractual terms and contractual remedies law, can it? If the husband later thinks that his wife's grumpiness and bad habits (or equally, her unfaithfulness) makes their marriage for the worse for him, and if he decides he can't stand her anymore, and if he repudiates the marriage, deserts his wife, goes to the unjust to get a divorce paper, and comes back to the church with a new 'bonny and buxom in bed and at board'¹⁴ lass, he can go through motions again, with the blessing of Dr Instone-Brewer's policy of deliberate church ignorance (p. 312), and general disregard of applicable contractual obligations.

Moses insisted that vows be kept (Num. 30:2; Deut. 23:21-23). Vows were taken **extremely** seriously, even those that should never have been made, such as Jephthah's vow that cost his daughter her life (Judges 11:29-40). Jesus prohibited swearing oaths and insisted that our yes be yes and our no be no, even without the oath (Mat. 5:33-37). Jesus taught that oaths were binding regardless of their legal form (Mat. 23:16-22). Now, when a man makes his wedding vows to pour out his life unto death, as Christ did for his church, he is making a solemn vow, unconditionally unto death, to keep her as his wife and to be her husband, come hell or high water, in the most legally serious and unambiguous terms possible.

Instone-Brewer is upholding the contemporary political philosophy and legal practice that the one contract that you can violate with virtual impunity and can always get relief from honouring is the marriage contract. Instone-Brewer argues that marriage is a contract, but his practice treats it as even less than that: it is a charade.

At its heart this is a failure to recover the literary and social context of Jesus and his legal debate and his rulings: the formality, the seriousness, the legal character and judicial functions of the church and judicial applications have all been lost. Instone-Brewer has completely failed to recover them,

¹⁴ A term in the earlier English wedding vows from about 1085, later removed, that Instone-Brewer found wonderfully alliterative, pages 230-231.

demonstrated by ignorance of contractual remedies law, inappropriate use of legal terminology,¹⁵ inconsistent hermeneutic, and when push comes to shove, unwillingness to apply plainly and contextually formal law and express contractual terms according to their tenor.

Exegetical issues

Even if we grant most or all of Instone-Brewer's historical speculations in favour of his theory, the exegesis does not work and must be rejected.

The question: can a man divorce his wife for every cause? (Mat. 19:3)

We have already noted the historical speculation that interprets 'every cause' in Mat. 19:3 as a reference to the alleged Hillelite school 'Any Matter' divorce procedure, and the exegetical issue that 'every cause' is not the same as 'Any Matter'.

The question Jesus was asked is important because Instone-Brewer's historical speculation and his attempt to link 'every cause' to the alleged Hillelite 'Any Matter' divorce procedure determines whether Jesus answer means 'no divorce' at all, or merely no to a particular ground for and proceeding for divorce, with the other causes left intact.

The issue is important enough for Instone-Brewer to introduce it with a mistranslation of Mat. 19:3:

"Is it lawful for a man to divorce his wife for **any matter**?" (bold in original, p. 134)

As we noted earlier, the text says 'every cause' and 'every' is not the same as 'any' and 'cause' is not the same as 'matter.'

Without Instone-Brewer's claimed link to the Hillelite school alleged position and 'Any Matter' divorce procedure, he thinks the question would mean:

The question "Is it lawful for a man to divorce his wife" could only be answered "Yes, it says so in the Law." This question would make any sense only if there was a portion of the Jewish world that did not allow divorce under any circumstances, so that the question would mean "Are you one of those who does not allow divorce?" However, as far as we know, there was no such group. (p. 135)

The errors this comment betrays are quite incredible!

¹⁵ Instone-Brewer uses 'stipulations' instead of 'terms,' and 'fines' 'penalties' and 'sanctions' instead of 'damages', and 'legislators' instead of 'adjudicators' inappropriately in his book.



His principle of interpretation is: Jesus and his teaching were limited to the positions of the Jewish world of his time. This is patently not the case, as the gospels repeatedly note that Jesus taught not as the Torah teachers but as one who had authority, i.e. authority to make unprecedented rulings and interpretations and applications of the law (e.g. Mat. 7:29).

Instone-Brewer overlooks that the context is the final days of Jesus personal earthly ministry. Whatever Jesus has been teaching about divorce would have been repeated in different settings and would have become known to his disciples and his enemies alike. These Pharisees were asking Jesus a question for which the only answer they could accept was “Yes, it says so in the Law.” **They already knew Jesus was not going to give that answer.** When they had his answer, giving an absolute prohibition of divorce, they replied with as much: “Why then did Moses command one to give a certificate of divorce and to send her away?” Doesn’t this confirm their original question meant exactly what Instone-Brewer just dismissed? We do not agree that ‘In this debate, the Pharisees’ point of view is very poorly represented’ (p. 173). They always intended to pit Jesus against Moses, and they do it skilfully here. (Likewise, the disciples already knew Jesus’ teaching and position, and their objections do not express shock, rather, they are well-framed legal arguments and objections from the Torah for the master to dismiss, as we develop below.)

Even granting Instone-Brewer’s point here, just think about what it means. Suppose, some new ancient documents are discovered, revealing a Jewish sect of the early First Century that prohibited divorce entirely. Would not that mean that Instone-Brewer’s exegesis would need to be thrown on the academic scrapheap? What are we supposed to do in the meantime?

Jesus and his ‘digression’ (Mat. 19:4-6)

Instone-Brewer claims that Jesus responds to the question of the validity of the ‘Any Matter’ divorce by going into a digression about marriage rather than by giving a supported and reasoned answer (p. 136). However this characterisation of the response just does not work. The answer he gives is not just ‘the answer’, **it is the proof of the answer from the Law of Moses.** That is how rabbinic debates worked. You can’t just teach your preferred conclusion, or some other digression, you have to address the question using authoritative sources by quotation, allusion, deduction or the like. If you don’t do this you lose the debate and lose status.



The conclusion of the texts appealed to and the argument made is the answer given at the end: ‘what therefore God has joined together, let not man separate.’ The ‘no separation’ conclusion is most naturally and reasonably the answer: there are no valid reasons for divorce. Or alternatively, in respect of Mark’s account, it is not lawful to divorce your wife.

Paul begs to differ

Paul gives an equally unqualified and absolute prohibition on divorce: ‘a husband must not divorce his wife.’ **And he says it is from ‘not I but the Lord’.** (1 Cor. 7:10-11) There is no other teaching from the gospels that amount to ‘a husband must not divorce his wife’ other than the conclusion of Jesus’s answer in Mat. 19:6 (and the parallel in Mark 10:9). (Remember that the other Gospel divorce teachings do not condemn divorce on its own, but divorce *in conjunction with remarriage*.) Paul interprets the answer as an answer to the question asked: is it lawful for a man to divorce his wife / for every cause – answer – a husband must not divorce his wife. ***This is the take-home message from the debate and the Jesus tradition according to Paul.***

In 1 CORINTHIANS 7 IN THE LIGHT OF THE JEWISH GREEK AND ARAMAIC MARRIAGE AND DIVORCE PAPYRI, Instone-Brewer seems to be reluctant to identify any particular ruling found in the gospels but agrees that Paul is teaching from a ‘gospel tradition.’ In effect, Instone-Brewer seemed to be asking us to suppose that there is some other ‘gospel tradition,’ taught to the believers at Corinth but lost to us, that ‘a husband must not divorce his wife.’ This lost tradition therefore may have nothing to do with the other gospel tradition that we do have in Mark and Matthew: ‘what God has joined together let no man separate.’ On page 199, Instone-Brewer treats the source even more briefly as ‘presumably based on what the Corinthians knew of the gospel traditions.’

However, in 2017 Instone-Brewer wrote an article *Mishnah and Mark 10:1-12: Marriage and Divorce* in which he now identifies 1 Cor. 7:10 as a direct reference to Mark’s account:

Jesus also points out that God is a witness at all marriages, so “let no one separate” them (Mark 10:9). ... It is also the only specific ethical teaching of Jesus directly referred to in the Epistles (cf. 1 Cor 7:10).

Although this would seem to be fatal concession to his position permitting divorce, he explains it as follows:

Jesus also points out that God is a witness at all marriages, so “let no one separate” them (Mark 10:9). The use of this imperative does not mean that it is impossible for divorce to occur, but it indicates that no human *should* cause a marriage breakup. This coheres with Jesus’ rejection of the Hillelite no-fault divorce, which makes broken marriage vows the only grounds for divorce. In Jesus’ teaching, a wronged partner may decide to divorce, but only after he or she suffers hard-hearted breaking of vows, which *should* never happen. (*Mishnah and Mark 10:1-12: Marriage and Divorce*, p. 5)



Instone-Brewer qualifies ‘let no one separate’ = ‘a man must not divorce his wife’ to mean: ‘a man may divorce his wife if she breaks her marriage vows too badly.’ On its face, it would appear he is drawing the opposite conclusion from those made by Jesus and Paul. As we proceed through the

analysis, we will show in more detail how Instone-Brewer's qualification cannot be sustained to reverse the face value meaning of the ruling of Jesus and the restatement by Paul.

Rabbinic debate presentation: no digression

Instone-Brewer does not accept that Jesus directly and forcefully addressed the question of divorce itself with an answer in the negative, instead he argues that Jesus digressed:

Before Jesus gave an answer to their question, he digressed into other matters concerning monogamy and lifelong marriage which he felt were more important. (from Jesus' Old Testament basis for monogamy, see also p 136f)

But this very argument he, the Rabbinic debate expert, shoots down in discussing this response:

This is not a typical form for recording Rabbinic debates. Normally a question would be followed by an answer, and then a further question from the original questioner, or a counter question from the person who was questioned. (from Jesus' Old Testament basis for monogamy & p 173)

Note that this is exactly what we have here: question-answer-further question (Mat. 19:3-7). Instone-Brewer seems to be avoiding the natural and expected pattern of the debate by characterising the response to the question as a digression rather than an answer.

But we *should* try to find the answer to the question via the reasoning presented, the passages quoted, alluded and hinted at, and of course the words given as the summary or conclusion. Even if we are not sure we can follow the reasoning we should expect that the answer is stated or suggested by the response (especially if it is not a counter-question). So we need to seriously work through the response to identify the answer and to link the answer logically and properly to the sources quoted as authority for the answer. This we attempt below, starting with Instone-Brewer's own work:

From the beginning of creation, '*He made them male and female*' [Gen 1:27], and those who entered (Noah's) ark '*went in two by two ... into the ark, male and female*' [Gen 7:9]. When taken together, these texts, show that God created human males and females in pairs. Scripture also says, '*For this reason a man shall leave his father and mother and be joined to his wife and they shall become one flesh, and the two were naked, the man and the woman*' [Gen 2:24f]. This shows that they have been joined by God. So they are no longer two but one flesh. What therefore God has joined together, let not man separate. (p 140)

Remember that Instone-Brewer claims that the above argument was made in favour of 'monogamy and lifelong marriage.' So the problem is: ***how do we get from a monogamy proof to a no divorce ruling?*** If we can't make a valid logical link and argument that flows from no polygamy to no divorce, we must have somehow missed the teaching and the argument. Or we have to accuse Jesus of *non*

sequitur arguments. Or take the path of Instone-Brewer in suggesting Jesus dodged the question with a digression.

In order get from a monogamy proof to a no divorce ruling, ***we need to get from divorce to polygamy***. And polygamy obviously requires a second wife. In the divorce context the second wife must be the one he marries after divorcing the first. But for taking a second wife after divorcing the first to amount to polygamy ***the divorce itself must be ineffective***. Thus we have gone from a ‘monogamous and lifelong’ marriage teaching (per Instone-Brewer) to a divorce effectiveness implication. Not only is the divorce ruled ineffective, he has answered the questions posed to him: it is ***not lawful*** for a man to divorce his wife, there are ***no valid grounds*** for divorce, and man’s divorces are ineffective and result in polygamy when the man takes wife number two after dismissing wife number one. Thus the answer is both a prohibition on divorce, and a ruling that man’s divorce action is ineffective.

Is this not the most satisfactory and fitting answer in the context of a rabbinic debate? Is this not how rabbinic debates are supposed to be argued and won? By contrast, Instone-Brewer’s digression interpretation belittles the exegesis, the argument structure and the answer of our Lord.¹⁶

A closer examination of the exegesis of Jesus and the way he makes his case helps us to develop and nuance the teaching and its implications. Let’s work through his source texts and how he uses them:

Male and female

The first text Jesus quotes is Gen. 1:27, ‘From the beginning of creation, *‘He made them male and female.’* I submit that these quotes should be interpreted as alluding to and incorporating the context within which they come from:

Then God said, ‘Let us make mankind in our image, in our likeness, so that they may rule over the fish in the sea and the birds in the sky, over the livestock and all the wild animals, and over all the creatures that move along the ground.’

So God created mankind in his own image,
in the image of God he created them;
male and female he created them.

¹⁶ As we noted above, Instone-Brewer also treats the Pharisees as making weak arguments, but this only weakens his own analysis. An interpretation that has both sides giving powerful and defensible arguments is the better way to understand a debate like this: these people are not rookies, they are experts on the law and seasoned scholars and debaters. Likewise, when we look at the disciples’ objection, it is better to find its strength, as we do below.

God blessed them and said to them, 'Be fruitful and increase in number; fill the earth and subdue it. Rule over the fish in the sea and the birds in the sky and over every living creature that moves on the ground.' (Gen 1:26-28)

The context is therefore that the male and female created were created as rulers, as royalty. This is significant in two ways:

1. Royalty was held to a higher standard in a number of areas than the rest of Israel. Thus, the suggestion is that Jesus is teaching a higher standard than Moses. This is particularly relevant to the use of Deut. 17:17, restricting the king from having many wives, as a support for monogamy, as documented by Instone-Brewer (p 61f, also Nomological Exegesis in Qumran 'Divorce' Texts).
2. The coming of the New Covenant involved the Christ as King, and his people as a kingdom of priests (1 Pet. 2:9), seated with Christ in heavenly places (Eph. 2:6), i.e. ruling and reigning with him (Mat. 19:28; Rev. 5:10; 20:4,6). Thus the allusion to the royalty of the male and female in the garden has messianic and eschatological implications. The higher royal standard of the New Covenant was now necessary to bring Israel back to the fellowship with God lost in the Garden of Eden. Thus the higher standard is suggested in a context of the institution of the New Covenant, rather than as a timeless teaching or a correction of the understanding of the Old Covenant regulations.

The second contextual implication of the quote is the command to be fruitful and increase in number. This is the first command of the Torah and by alluding to it Jesus suggests that his teaching is about ***marriage in compliance with this command, and the other commandments and regulations of the law for contracting and consummating marriages***. Jesus is affirming the procedural and legal requirements of the law for contracting valid marriages.

The third implication is that God created only one male and only one female, i.e. a pair, to become spouses. This is a monogamy proof that Instone-Brewer links to the male and female and two by two of Gen. 7:9. (p. 136f and also Jesus' Old Testament basis for monogamy.)

Putting this together, the teaching and the exegesis is that Jesus had come to institute the New Covenant restoration of the creation ordinance of marriage as one male and one female, for the re-enthronement of man as royalty, and to fill the earth and subdue it with holy seed from legitimate marriages in compliance with God's law (cf. Mal. 2:13-16; 1 Cor. 7:14).

One flesh

The next quote is from Gen. 2:24, again we will examine it in its context:

Then the Lord God said, "It is not good that the man should be alone; I will make him a helper fit for him." ... But for Adam there was not found a helper fit for him. So the Lord God caused a deep sleep to fall upon the man, and while he slept took one of his ribs and closed

up its place with flesh. And the rib that the Lord God had taken from the man he made into a woman and brought her to the man. Then the man said,

“This at last is bone of my bones
and flesh of my flesh;
she shall be called Woman,
because she was taken out of Man.”

Therefore a man shall leave his father and his mother and hold fast to his wife, and they shall become one flesh. (Gen. 2:18-24)

God said: it is not good for the man should be alone. This was understood as a requirement for men to marry; it was treated as command.

The rest of the context teaches the good of the man not being alone, i.e. the blessings of marriage and the honour to be accorded to the wife as the flesh of the man’s flesh and bone of his bones. It also teaches the marriage prerequisites and the marriage process.

Let’s look at the exact text quoted and appealed to:

Therefore a man shall leave his father and his mother and hold fast to his wife, and they shall become one flesh.

For this reason a man will leave

Jesus was asked whether a **man** could **divorce** his wife for every **cause**. It is fitting that Jesus responds by providing the **cause**, the reason, for a **man** to **divorce**: a man should divorce **his parents** to make a new generation of the family unit, to fulfil the command to be fruitful and increase in number.

Jesus turns their question around and answers it from Moses’ creation account: God’s divorce law is not for the man to divorce his wife, but for the man to divorce his parents in order to marry his wife.

Leave his father and mother

The term ‘leave’ is the Hebrew word *azav*, which means leave, but also means to **forsake**, to neglect a duty or to breach a covenant or a duty of loyalty. For example, God promised the people of Israel the curses of the covenant ‘because they have **forsaken** me’ (Deut. 28:20), i.e. broken a covenant duty of fidelity and loyalty.

and hold fast to his wife

The term ‘hold fast’ is the Hebrew word *davaq*, suggests not just holding fast so as not to let go or escape, such as the land that must not transfer from tribe to tribe (Num. 36:7), it is more importantly used for a duty of covenant loyalty, as Israel owed to YHWH (Deut. 10:20; 11:22; 13:5; 30:20; Josh. 22:5 etc.).

The use of these terms is obviously comparative and relative: the man is taking on a new duty of loyalty to his wife that is *so much stronger* than the man's duty of fidelity and loyalty to his parents, that he forsakes his parents by contrast. The terms are not just contrastive, they are an extreme contrast, even to the point of hyperbole.¹⁷

Thus *the marriage process is an exchanging of primary family loyalty and identity from one generation to the next.*

The prerequisites of a valid marriage are therefore:

1. Eligible spouses – one man and one woman only. Although not stated in Genesis or by Jesus here, additional eligibility criteria are implied: each must be not already married, and the marriage itself must not be otherwise prohibited by any of God's laws.
2. Valid process of entering the contract, involving the necessary exchange of loyalties, mutual commitment and the consummation of the marriage.

Nothing more than this is suggested, implied or stated in the passage.

Jesus shifts the critical time from the time of the woman's misconduct (after the marriage is contracted), to the time of the marriage itself. By implication, Jesus has in focus the validity and the process of getting married as the test for divorce, rather than the category or seriousness of sin, or evidence threshold necessary, to justify or grant divorce.

But let us look at the result:

one flesh

If the right process is followed, Jesus said the two shall become one flesh, quoting Gen. 2:24. Other than the word 'two' Jesus is not adding anything that is not there in Genesis. This suggests that Jesus is not actually relying on the word 'two' for the validity or force of his argument (Instone-Brewer points out that the exegetical technique of the day was not in favour of using or making variants of the biblical texts to make such points (see Jesus' Old Testament basis for Monogamy)). **IF** a man will obey God and his command to be fruitful and increase in number by agreeing with God that it is not good for him to be alone, and if he leaves his father and mother, and holds fast to his legitimate and lawful wife, **THEN** the two will become one flesh. Taken in its context, and in the way Jesus quoted it, the first parts are conditions precedent, and the last part is the legal result. Any union that is formed in compliance with the commands and conditions is valid and complete.

¹⁷ Jesus affirms the man's lifelong duty of loyalty and financial support to his parents in Mat. 15:3-6, showing that the man's divorce of his father and mother is relative, not absolute.

The meaning of one flesh is easy to establish from Hebrew idiom: the usage shows that it means **one family**.¹⁸ Although formed by contract, and in compliance with God's law and creation mandate, the result of marriage is a new family unit. Instone-Brewer agrees (p. 22).

The blood relation of the spouses with their parents is surpassed by with the one-flesh family relation with each other.

The nature of the family blood relationship is that it is not severed by the misconduct of the family members. For example, the lost son, said 'I am no longer worthy to be called your son' because of his misdeeds, and yet he knew that he **was still** a family member and that this alone entitled him to be accepted and afforded some protection and support from his family upon his return (Luke 15:19). What are the grounds, the causes, for making one's own flesh and blood no longer one's flesh and blood? Jesus taught that the son remains in the family forever (John 8:35). Now the marriage relationship is, per creation ordinance, **stronger than the blood relationship with the parents**. It is so much stronger that it is said that a man must **forsake** his father and mother! So if children cannot by wrongdoing lose their status as children, how can a wife lose her status by her wrongdoing? Is this not the very essence of Jesus' argument in quoting the creation ordinance of the one flesh? Does it not answer the question of the grounds for and lawfulness of divorce? If not, why not?

No longer two but one flesh

Jesus underscores the point of his argument: 'So they are no longer two but one flesh.' (Mat. 19:6).

Note that Jesus emphasizes that the **process** has produced the result. Before the process they were two. After the process they are one flesh. We have already covered this, but the repetition by Jesus confirms that this is his focus and the way that his argument and his exegesis works.

The implication is that the legal question must be answered by looking to the facts and evidence of the marriage process in any particular case. There are two possible legal answers:

1. There is a valid and lawful marriage. One flesh is the result.
2. There was no valid and lawful marriage. The process was critically defective and there is not one flesh but two.

Thus to answer the question of the validity and effectiveness of divorce of a 'wife' we have to determine whether the marriage was lawful and effective in the first place. If so, she is a lawful wife and there is one family and there are no grounds for divorce. But if the marriage process was defective, whatever relevant procedures and remedies are available, including declaring the contract

¹⁸ E.g. Gen. 15:4, 29:14, 37:27, Jud. 9:2, 2 Sam. 5:1, 16:11, 19:12-13, 1 Kings 8:19, 2 Kings 20:18, 1 Chron. 11:1 etc.

void ab initio (void from the beginning) or voidable at the option of the party induced to enter the contract by fraud within certain parameters (as we later discuss for the case of pre-marital unchastity by the wife). See also our contractual remedies analysis in Appendix 4 where we look at a range of legal theories that could get one out of a 'marriage.'

What therefore God has joined together, let not man separate

Instone-Brewer agrees that 'separate' here 'is a standard term meaning "to divorce"' (p.140). He paraphrases the saying as: 'Therefore, if God has joined them together, neither of them should divorce the other' (p. 176). Although we agree with what he says here, he obviously qualifies it to mean something else that we don't agree with.

The final answer and conclusion is emphatic. Again, Jesus emphasises the process, if and as lawfully completed, as final and conclusive: what **God has joined together**. How has God joined them together? By creating man and woman, and by commanding them to be fruitful and increase in number, by teaching that it is not good for the man to be alone and by ordaining the marriage process of leaving father and mother and holding fast to his wife. God commanded, God taught, and God instituted the marriage process as an exchange of primary family loyalty and identity from one generation to the next. When the man complies with these commandments and follows the lawful process, God joins the two as one flesh.

The final argument Jesus makes in his answer is the contrast between the authority and status of the marriage process as compared to the divorce process. It is important for us to realise just how powerful this argument really is: Jesus is appealing to God's creation example as out-ranking and trumping the status and authority of Moses and his accommodation of divorce. Instone-Brewer explains the technique as follows:

A further argument may be based on the fact that God's choice is an ethical example which must be followed. God chose to make one man and woman, and chose to send animals into the Ark in pairs.¹⁹ (footnote his, *Nomological Exegesis in Qumran 'Divorce' Texts*, as also p. 139)

So, in effect, Jesus is depreciating Moses and his accommodation of divorce by appealing to a higher authority than Moses. By way of analogy, Jesus is appealing to a Supreme Court binding precedent authority to dismiss an *obiter dictum* in a District Court judgement.

¹⁹ This same kind of argument from God's example is used by the Hillelites in mYeb.6:6 and parallels, to counter the Shammaites who argued from the example set by Moses. The debate concerned how many children and of what sex had to be born before a man had fulfilled the command to increase and multiply. Shammaites said two sons (from the example of Moses) but the Hillelites said a son and daughter (from the example of God at creation). See my *Techniques and Assumptions* pp. 142-143.

To develop the contrast more forcefully and exegetically: we see Jesus requiring that things be done on earth as in heaven (Mat. 6:10; John 3:31; Eph. 1:10). When Jesus established his new body, his church, he had all authority on heaven and earth (Mat. 28:18), and he gave this heavenly authority of the New Covenant to his church, so that what they would bind on earth would be bound in heaven and what they loosed on earth would be loosed in heaven (Mat. 16:17-19; 18:18). This heavenly authority would be present on earth wherever two or three judges would judicially assemble in the name (authority) of Jesus Christ (Mat. 18:19-20).²⁰

By contrast, the husband's divorce certificate and the Old Covenant Jewish courts who would order him to write out the certificate do not have this heavenly authority and have no power to separate what God has joined together. Heaven will not concur with such a judgement of man on earth, and such ruling is not under the name (authority) of Jesus Christ, and is *ultra vires* and void. The authorities, the powers, the rulers, the judges of Israel functioning under the Old Covenant economy have been disestablished by the institution of the New Covenant, and their power will be totally shattered (Dan. 12:7), when Christ would destroy all dominion, authority and power of his enemies (1 Cor. 15:24-25), when the power of sin that was The Law was to be removed (1 Cor. 15:56) at the end of the age of Moses. But the age of Messiah and the New Covenant has no end (Luke 1:32-33; Mat. 24:35).

The answer is therefore that there is no valid divorce law to separate what God has joined together and thus no post-valid-marriage grounds for divorce. And if a man divorces his wife and marries another, he becomes a polygamist.

We thus have a framework of teaching and exegesis that gives some nuance to the teaching and indirectly addresses a significant number of issues. It provides the essential requirements to contract a valid marriage and it tells us the result, and it excludes and invalidates human divorce as a remedy, whether for breach or hatred, in terminating the duties of loyalty contracted in marriage.

From an exegetical perspective Jesus has provided not only a definitive answer to the question of the lawfulness and ground for divorce, he has provided a robust Old Testament scriptural basis for it. He has decisively refuted and dismissed the Pharisees' position (or both sides of the debate he was asked to weigh in on – if that was what was going on).

At this point it should be clear that the answer given does not fit the alleged Shammaite position. The texts he quoted do not mention any grounds for divorce matching the alleged Shammaite

²⁰ refer Instone-Brewer's *Choosing a Legal System in Early Judaism* and its discussion of the Court of the Sages and the process of each side choosing one judge and together they chose a third.

position. *The idea that breach of marriage obligations provides grounds for divorce is not mentioned at all in any of the texts.* The point of the quotes was just the opposite: the obligation of the man to his lawful wife was more permanent, exclusive, irrevocable and unconditional than those between parents and children, that is to say, they are absolutely permanent, exclusive, irrevocable and unconditional.

God-with-us trumps Moses (Mat. 19:7-8)

The Pharisees, for the sake of argument, accepted Jesus' monogamy teaching but countered his argument for the invalidity of divorce with an objection: "Why then did Moses command one to give a certificate of divorce and to send her away?" The objection implies that they recognised that Jesus taught the categorical invalidity of human divorce as the end of a valid marriage. The objection may be paraphrased as follows:

You are teaching monogamy and that human divorce is unauthorised, invalid and ineffective. But Moses commanded it and provided regulations for it, so by implication there *are* valid divorces and therefore either there are grounds for divorce, or no grounds are required for divorce. But regardless, **any valid divorce** escapes the implication that divorce and remarriage necessarily amounts to polygamy. Obviously, you have overreached in your argument because your conclusion is inconsistent with the law of Moses!

There is no suggestion that the Pharisees understood Jesus' arguments as a qualified acceptance of divorce. Their objection does not suggest that he had dodged the question, either. It appears they took his argument as on-topic and as a broad denial of the legality and effectiveness of divorce in ending a lawful marriage. Mark's presentation of the issue makes perfect sense: is it lawful for a man to divorce his wife?

It is also noteworthy that they did not attempt a rebuttal; the response is a form of counter-attack. And it is a good one: Deut. 24:1-4 suggests that Moses accepted and implied the validity and legality of both for-cause divorce in Deut. 24:1 and for-no-cause divorce in Deut. 24:3. Divorce appears to be groundless in Deut. 22:19 and 28-29: a man's inability to divorce his wife at will seems to be an unusual restriction applied only to husbands under great dishonour and mistrust. Even if only for-cause divorce is accepted from Deut. 24:1-4, the counter-attack is a good one. Again: We do not agree that 'In this debate, the Pharisees' point of view is very poorly represented' (p. 173).

Jesus was denying them divorce, so they had him against Moses who commanded the man to write her a certificate of divorce and send her away. Doubtless the Pharisees thought that their trap had worked! Jesus had prohibited what Moses had commanded. Jesus had played right into their hands and the battle had moved onto their home turf – they knew exactly what Moses said about divorce.

Jesus replied, 'Moses permitted you to divorce your wives because your hearts were hard. But it was not this way from the beginning. (Mat 19:8)

We will look at the last part first before looking at the hard-heartedness of the Jews.

Back to the beginning

The Pharisees are unknowingly getting further ensnared in Jesus' trap. They tried to contrast what Jesus taught with what Moses wrote as the law for the children of Israel. **Jesus accepts and embraces the contrast** as evidence that the age of Moses and the law was careening to a cataclysmic end and that the age and the Kingdom of Messiah was then and there breaking into their world and that they had better get with the new programme right away.

In appealing to the Garden of Eden and the creation order and mandates, Jesus is teaching the restoration of the life lost in Adam, the restoration of the creation order, through the restoration of Israel under her Messiah and his Kingdom. Let's look at the prophecy being alluded to here:

For I will take you out of the nations; I will gather you from all the countries and bring you back into your own land. I will sprinkle clean water on you, and you will be clean; I will cleanse you from all your impurities and from all your idols. I will give you a new heart and put a new spirit in you; I will remove from you your heart of stone and give you a heart of flesh. And I will put my Spirit in you and move you to follow my decrees and be careful to keep my laws. Then you will live in the land I gave your ancestors; you will be my people, and I will be your God. I will save you from all your uncleanness. I will call for the corn and make it plentiful and will not bring famine upon you. I will increase the fruit of the trees and the crops of the field, so that you will no longer suffer disgrace among the nations because of famine. Then you will remember your evil ways and wicked deeds, and you will loathe yourselves for your sins and detestable practices. I want you to know that I am not doing this for your sake, declares the Sovereign Lord. Be ashamed and disgraced for your conduct, people of Israel!

This is what the Sovereign Lord says: on the day I cleanse you from all your sins, I will resettle your towns, and the ruins will be rebuilt. The desolate land will be cultivated instead of lying desolate in the sight of all who pass through it. They will say, 'This land that was laid waste has become like the garden of Eden; the cities that were lying in ruins, desolate and destroyed, are now fortified and inhabited.' (Ez. 36:24-35)

We can see here not just the promise of restoration but the equivalence of three promises:

1. The restoration of Israel under Messiah (regathering, reunification, resettlement cf. Ez. 37)
2. The replacement of the hearts of stone with the tender hearts of flesh (repentance, forgiveness, cleansing), and
3. The restoration of man to the Garden of Eden (renewed fellowship with God, full re-institution of the creation mandates, and of God's blessings for man).

Now in the context of the repeated appeal to the creation order and its mandates, does he not imply that he has come to institute the New Covenant and bring his people into the Messianic Kingdom, and that ***this is the reason why there is a difference between his teaching and the law of Moses?***

He is pressing his disciples and his debating opponents to choose their loyalty: to Moses and the Old Covenant, or to him as the fulfilment of the Messiah it promised. This debate tactic and this editorial presentation by Mark and Matthew are loaded with eschatological and messianic significance. Purporting to institute a post-Mosaic system, in fulfilment of prophecy, was to claim to be the Messiah, but Instone-Brewer seems to see none of this in the passage.²¹

Hardheartedness

If we are to make a study of the biblical teaching on hard hearts and what it means in the bible and in the gospel of Matthew we will quickly find that hard-heartedness is very much associated with Pharaoh and the Egyptians who made themselves the enemies of God and his people. This is the traditional application: the gentile enemies of God are hard-hearted and incur the wrath of God. But there is a secondary application and identification: Moses predicted that the people of Israel, in their last days, would become God's enemies, breaking the Old Covenant and incurring the plagues of Egypt (Deut. 28:15-68, 32:5-43). Israel herself would become spiritually Egypt: the hard-hearted enemy of God (cf. Gal. 4:21-31; Rev. 11:8).

This can be seen in a very straightforward way in Matthew 13:

In them is fulfilled the prophecy of Isaiah:

“You will be ever hearing but never understanding;
you will be ever seeing but never perceiving.
For this people's heart has become calloused;
they hardly hear with their ears,
and they have closed their eyes.
Otherwise they might see with their eyes,
hear with their ears,
understand with their hearts
and turn, and I would heal them.”

But blessed are your eyes because they see, and your ears because they hear. For truly I tell you, many prophets and righteous people longed to see what you see but did not see it, and to hear what you hear but did not hear it. (14-17)

²¹ Instone-Brewer does deal with this material very briefly in *Three Weddings and a Divorce*, but he does not apply it to human marriages in the New Covenant age or to this passage (there at least or anywhere else I have been able to find).

Jesus came to divide the people of Israel into those who followed him as the Messiah, and those who rejected him, had him put to death by the hands of lawless men, and who persecuted his followers (Mat. 10:16-39). Notice the temporal context and teaching: the time for the fulfilment of prophecy had come in that generation: some would be enlightened, healed and saved, and some were hard-hearted and would be destroyed. Jesus is placing his contemporaries in the final utterly corrupt generation of Deut. 32:5 and 20, upon whom God would avenge the blood of his servants to atone for his land and his people (Deut. 32:39-43 cf. Mat. 12:38-45; 16:4; 17:17; 23:29-38). Part and parcel of this ominous time is the auspicious time of atonement, redemption, forgiveness and the institution of the New Covenant, with different laws from those instituted by Moses (Jer. 31:31-34). It is at this time God would fulfil his promise:

I will sprinkle clean water on you, and you will be clean; I will cleanse you from all your impurities and from all your idols. I will give you a new heart and put a new spirit in you; I will remove from you your heart of stone and give you a heart of flesh. (Ez. 36:25-26)

In rejecting the Jewish divorce practices and law tolerated under the Old Covenant, and linking it with hard-heartedness, Jesus is depreciating it, and teaching them the significance of the creation ordinance he taught: this was the New Covenant, live by it, the appointed time has come!

Jesus is not talking about the hard-heartedness of the unrepentant wife, nor the hardheartedness of the unforgiving husband nor of the treacherous one. The point is to contrast the age of Moses and its laws with the age to come, whose King was already instituting its laws in their midst, obedience to which was now required to avoid being swept away with the old system and temple. That old law and system was always intended to be temporary and provisional until the time of reformation (Deut. 18:15-19; Mat. 5:17-20, 24:1-35, Heb. 9:8-10). The emphasis is on discontinuity and fulfilment, not on maintenance and excuse to continue the functioning or validity of the old law into the then-dawning age to come.

Instone-Brewer seeks to link the hard heartedness Jesus referred to back to Jer. 3-4 (p. 144-146). There are a few problems with this proposal:

1. It is not contextual. The closest context is the use of the term in the gospel of Matthew (and Mark) as we developed above. The connection Instone-Brewer seeks to develop is topical rather than contextual.
2. It has the wrong target. The target of Jesus' depreciatory remark is the husbands wanting a law permitting them to divorce their wives. Whereas Instone-Brewer tries to transfer the target to make it the stubborn wife who won't repent. The sinful wife in Jer. 3-4 is not literally a sinful wife, she is a sinful nation. The particular sin in this context is the sin of men,

in divorcing their wives, not the sin of women in being persistently unfaithful to their husbands.

3. The divine marriage image is that God might or God had divorced them for their hard-hearted rebellion against God's purpose, as expressed in their use of the Law of Moses to divorce their wives. So the point of the barb is not to justify their resort to divorce, as permitted by Moses, rather it is to warn them about what Moses was really doing in giving them some temporary regulations for divorce: he gave them enough rope to hang themselves! The law was given so that trespass would increase (Rom. 5:20).

The precedent for this is God giving Israel a human king. Patently the monarchy they asked for and received was not the institution of righteousness. Rather it was the judgement of God:

Where now is your king, to save you in all your cities?

Where are all your rulers—
those of whom you said,
“Give me a king and princes”?

I gave you a king in my anger,
and I took him away in my wrath. (Hos. 13:10-11)

In the same way the giving of hard-hearted Israel the divorce law they wanted, that they may divorce their wives, was God's judgement.

Remarriage as Adultery (Mat. 19:9)

Jesus continues to develop and intensify his position and its implications:

And I say to you: whoever divorces his wife, except for sexual immorality (*porneia*), and marries another, commits adultery [against her. Mark 10:11] (Mat. 19:9)

If human divorce is unauthorised, invalid and ineffective, not only does divorce and remarriage imply polygamy it also implies adultery.

Instone-Brewer explains why this is a much more serious charge and implication, and we shall use his work on analysing the Qumran community and documents to show why this statement is an intensification rather than a retreat by Jesus.

The key Qumran document reads:

They are caught by two (snares). By sexual sin, (namely) taking two wives in their lives, while the foundation of creation is “male and female he created them.” [Gen.1:27]. And those who entered (Noah's) ark went in two by two into the ark [Gen.7:9]. And of the prince it is

written, “Let him not multiply wives for himself.” [Deut. 17:17] (Nomological Exegesis in Qumran 'Divorce' Texts & p. 138)

This text invites obvious comparisons with our text in Mat. 19:4-6. We can set out the comparison in a table:

Source	Proof for	Quoted or alluded by Jesus in Mat. 19:4-6	Quoted in Qumran Damascus Document
Gen. 1:27	Monogamy	Yes	Yes
Gen. 7:9	Monogamy	Yes (per Instone-Brewer) ²²	Yes
Gen. 2:24f	Monogamy (and lifelong marriage, per Instone-Brewer)	Yes	No
Deut. 17:17	Monogamy	No	Yes

Now a reading of the Qumran document quoted above would seem to suggest that the ruling was for not only monogamous marriage but also *lifelong* marriage, for ‘taking two wives in their lives’ sounds like a criticism of taking:

1. Two wives at the same time (i.e. taking a second wife before the first wife was divorced or had died), and/or
2. Two wives, the second while the first was still living, even after she had been divorced by him (two wives in the first wife’s life), and/or
3. Two wives, the second after the first died (two wives in the man’s life)

Instone-Brewer develops and presents an extensive and complex argument for rejecting the second two and reducing the meaning of the text to the first option only (Nomological Exegesis in Qumran 'Divorce' Texts). I don’t think the argument is conclusive, but for the purpose of this paper, let’s accept it.

So, the Qumran community / documents were in favour of monogamy, **but were not against divorce and remarriage before the death of the previous spouse**. This leads Instone-Brewer to argue:

²² Instone-Brewer’s inclusion of this is debatable. Instone-Brewer says the text was ‘normally’ (p. 139) included with Gen. 1:27 as a monogamy proof text, but this seems to be based on a single example. He says it was ‘a little sloppy’ in being omitted (p. 177), and the omission was most likely in the mistaken belief it was not necessary for the argument (p. 139). But when he gives his final paraphrase the text seems quite powerful without it: “Have you not read that in the beginning of creation men could marry only one woman? Scripture says, ‘He made them (one) male and (one) female’ (Gen 1:27) and ‘For this reason, a man shall leave his father and mother and be joined to his wife, and the two shall become one flesh’ (Gen. 2:24). Again, we suggest instead that Instone-Brewer is wrongly interpreting the arguments of both sides as being weaker than they really are.

If they believed that remarriage before the death of a former wife was invalid, they could have charged their opponents with committing and condoning adultery, which was a far greater offence than polygamy. (from Nomological Exegesis in Qumran 'Divorce' Texts)

Thus Instone-Brewer himself links charging opponents with committing and condoning adultery, by way of divorce and remarriage, with the position that remarriage before the death of the former wife was invalid. But isn't this exactly what Jesus is doing here?

To introduce the adultery implication is to ratchet up the stakes as high as they could go. This is no back-down or qualification to his teaching, rather it is an escalation.

Instone-Brewer agrees that what Jesus is doing here is teaching that the divorce is invalid and ineffective (p. 149-152). He also notes that this approach is shared by 'almost all commentators' (p. 149). (He obviously claims, however, that what is being referred to was only the alleged Hillelite 'Any Matter' divorce rather than divorce *per se*.)

Exception for *porneia*

The so called exception clause in Mat. 19:9 is the most difficult part of our study on this passage. The difficulties include:

1. For us, it seems to undermine the argument Jesus presented, as we have developed it. On most interpretations Jesus destroyed his own argument by introducing an exception to an argument that valid marriage must not be ended by divorce.
2. That the exception clause only appears in Matthew's gospel, and is never even hinted at elsewhere.
3. That the term *porneia* is used rather than adultery, and why, and what *porneia* means here or in general.
4. The logical structure of the ruling that includes the reference to *porneia* is also difficult and disputed.

Instone-Brewer says the exception for *porneia* means 'adultery' but that 'adultery' in turn means and includes 'suspected adultery,' flirting, inchoate adultery and possibly other wrongdoing too (see p. 277-278). In effect, Instone-Brewer makes the exception large enough to drive a bus through, and it effectively collapses the argument Jesus developed to this point, at least so far as we have developed it. He also says that this exception is not exhaustive, and that neglect of marital obligations is also a valid ground for divorce, not mentioned here.

An exception that permits **any** valid marriage to be ended with a valid divorce will destroy the argument, again, so far as we have developed it. Either:

1. Jesus is rhetorically emphasising a particular category of case by excluding other scenarios he felt were not critical to address at that time, or
2. Jesus is referring to a recognisable defect in the marriage process (which is our approach), or
3. Jesus is not arguing that the question of divorce is addressed solely by identifying whether the marriage is validly contracted (Instone-Brewer's approach), or
4. Jesus just destroyed his own argument, or
5. The exception is the work of a later hand introducing something Jesus did not introduce and wouldn't have accepted.

We are going to go with the second option in seeking to explain the clause: we will argue that there is a specific and recognisable form of *porneia*, applicable to the case of a married woman, where the sin results in a defect in the marriage process whereby a divorce and remarriage might be permitted. This specific and recognisable form of *porneia* is pre-marital unchastity with another man, as set out in Deut. 22:13-21.

Option 3 will not be entertained because we submit that the exegesis and the argument presented by Jesus sufficiently clear that it is what his argument is and how it works.

Option 4 is not entertained because it makes Jesus look bad as a debater and as a lawgiver (or it makes Matthew a bad writer).

Option 5 is not entertained because it undermines the doctrine of inspiration of the scriptures.

Options 3 to 5 also need not be entertained seriously because option 2 is reasonably supportable and adequate to address the issue.

Option 1 is something of a backup, if *porneia* is held to mean 'adultery' rather than 'fornication.' See Appendix 1 for our alternative case showing if *porneia* means adultery, that Jesus' absolute prohibition on divorce remains intact, as He and Paul both elsewhere provide absolute prohibitions on divorce and remarriage before the death of the divorced spouse.

It is appropriate to start with the lexical meaning of *porneia*. Much of the debate revolves around what this word means in general, and in this particular context. And much of the debate about the exception clause and this word is less than helpful, so we will try to address that question – and it is a relatively difficult question – upfront. We don't really want to be accused of or presumed to define the word solely or primarily by what we wished that it meant, so as to minimise the adverse impact to the position we are committed to for other reasons (notwithstanding how good those other reasons might be).

Definition of adultery

Before addressing the relatively difficult question of the meaning of *porneia* in this context, we will address the easier question of the meaning of adultery. Although adultery is relatively easy to define and has a lot less room for debate, for our purpose it is important to define and distinguish its root meaning from its extended meanings.

Our position on adultery is this: its root meaning is defined by sexual misconduct of and with a married woman, in ***breach of her marital obligation of fidelity to her husband***. Instone-Brewer states: 'in one text the term is helpfully defined for us:

Rom 7:3: Accordingly, she will be shown to be an adulteress if she lives with another man while her husband is alive.' (p. 149)

According to this root definition, the sexual sin of or with the unmarried woman cannot be adultery. The reason for this definition and result is the legality of polygamy but not polyandry:

Cohabiting with an unmarried woman was not, strictly speaking, adultery, because adultery was a crime against the husband of a woman. It was regarded as immoral, but it did not fall within the definition of the legal term "adultery." When a man married, he could not vow exclusive faithfulness because he was allowed to have more than one wife.²³ This meant one could not commit adultery against a wife, only a husband. (p. 151)

What Jesus did in Mark 10:11, Mat. 19:9 and Luke 16:18, in ruling in favour of monogamy, and in referring to invalid and ineffective divorce, is to ***extend the definition of adultery*** to the man taking another woman after dismissing his first wife. This is unambiguously what is happening as Mark 10:11 says the husband commits adultery ***against his wife***. Instone-Brewer concurs and makes this point on page 151. (Of course it also applies if he takes a second wife without divorcing the first, too, based on the monogamy teaching alone.)

But the woman's transgression, presented as grounds for divorce in Mat. 19:9, is not listed as adultery, but *porneia* and the above discussion is on the result of the divorce and remarriage, not the grounds for the divorce being referred to and excluded.

Word study on *porneia*

We now turn our attention to the term *porneia*, as the woman's transgression in Mat. 19:9.

²³ This is of course obviously wrong, and Instone-Brewer documents cases when men did promise exactly this. But his point still holds for the case where he does not make this vow, and even if he does it is still debatable whether breach of that vow would be adultery or non-adulterous breach of contract.

Lexicons not helpful here

The lexicons are not helpful because they take something of a scatter-gun approach, and include every meaning they think they can find. In doing this they can lose the predominant or proper meaning of the term by dilution and misinterpretation.

An example of this is Mounce Concise Greek-English Dictionary:

πορνεία (porneia)

Strong: G4202

GK: G4518

fornication, whoredom, [Mt. 15:19](#); [Mk. 7:21](#); [Acts 15:20, 29](#); concubinage, [Jn. 8:41](#); adultery, [Mt. 5:32](#); [19:9](#); incest, [1 Cor. 5:1](#); lewdness, uncleanness, genr., [Rom. 1:29](#); from the Hebrew, put symbolically for idolatry, [Rev. 2:21](#); [14:8](#)

The way this dictionary defines the word is by taking what the author thinks the word means in each of the cases where it is used. The problem with this is that it does not look at the root meaning or etymology, nor does it define the main or predominant meaning or connotation, and it does not distinguish between the root or predominant meaning and the extended meanings (although he does put 'symbolically' for idolatry). And for the cases where it relates to grounds for divorce, he lists both cases as his proof that it means adultery. For us, this is too close to assuming what Instone-Brewer needs to prove.

Root meaning: prostitution

A more helpful start is the following encyclopaedia article:

The Greek word *porneia* refers to prostitution, with the related terms *porne* and *pornos* referring to female and male prostitutes, respectively. In ancient Athens prostitution was legal and was taxed, although it was considered both illegal and shameful for freeborn citizens. Thus, in seeking to discredit a rival, the Athenian orator and politician Apollodorus charged his enemy's partner Neaira with being a *porne* (c. 340s bce; Demosthenes, Against Neaira). In another famous case Aeschines prosecuted his opponent Timarchus for prostitution, arguing that a man who sold his body for profit could never be trusted with the affairs of the city (c. 346–345 bce; Aeschines, Against Timarchus).

Porneia thus had a decidedly negative connotation, and expressions such as *pornes huios* ("son of a whore") were used as pointed slurs. In the moralizing literature of the first and second centuries c.e., men were warned not to squander their inheritance on *pornai* and were condemned as licentious (*akolasia*) if they overindulged in trips to the brothel. Tax receipts, legal documents, and historical writings from the Roman period show that prostitution continued to be regulated and taxed despite the fact that *porneia*—with an expanded sense indicating any illicit sex—was condemned by Greco-Roman moralists. A double meaning of *porneia* prevailed: *porneia* as a recognized profession **forced upon slaves**

or taken up by impoverished persons of low status and *porne* or *pornos* as a sharp insult that could be directed at "honorable" men or women.

The rhetorical potential of the category *porneia* was used effectively by early Christian authors to target outsiders accused of visiting prostitutes, engaging in **incest** at brothels, and confusing former prostitutes with inspired prophetesses (1 Corinthians 5-6; Revelation 2:20-22; Hermas, Similitudes, 9.13.9; Justin, 1 Apology, 36; Irenaeus, Against the Heresies, 1.6.3, 1.23.3, 1.25.3). Those authors built upon a tradition they had inherited from the Septuagint (the Greek translation of the Hebrew Bible), in which idolatry—worshiping gods other than the god of Israel—was associated with **improper sexual acts, including incest, male homoerotic sexual intercourse, and bestiality**. Thus, Israelites were warned not to "play the whore" (*porne*) by going after other gods (Hosea 4:15-19, Septuagint) and Canaanites were said to "prostitute themselves" (*ekporneuo*) to their gods (Exodus 34:15-16, Septuagint). Equating false religiosity with sexual acts, authors such as John of Patmos called their enemies "whores" (*pornai*; Revelation 2:21-22, 17-18). (source: <http://www.encyclopedia.com/social-sciences/encyclopedias-almanacs-transcripts-and-maps/porneia>)



So the word means **prostitution**. Any other meaning must therefore be an extended, secondary, or figurative meaning. For now we will agree with the sentiment that '*porneia*—with an expanded sense indicating any illicit sex—was condemned by Greco-Roman moralists' but will not agree that the Greco-Roman manner of extension is the same as for Hebrew writers at this time and that we see in our passage.

Let's look at the elements of prostitution, as it is most commonly practiced in history and even today:

Prostitution is when:

1. A woman
2. engages in sexual relations with strangers
3. for cash.

So, prostitution is an activity carried on by a woman whose profession is a prostitute. She is doing it as an occupation and as a means of livelihood (or she is a sex-slave). The customers are men, and they pay cash to the prostitute (or pimp or sex-slave owner).

The woman who is the prostitute is unmarried, for if she had a husband her husband would divorce her – immediately! For the prostitute, prostitution is fundamentally incompatible with the institution of marriage.

Now, I don't think anyone could disagree with this characterisation of what prostitution is and how it is carried on. No one is going to disagree even though everyone accepts that exceptions to this characterisation are possible (e.g. male prostitutes).

The contrast with the adulterous wife at this point is strong. The adulterous woman is the woman who engages in sexual relations, generally not with many strangers but with one lover, and generally to satisfy her lust or loneliness rather than for cash. The temptation of the adulterous wife is portrayed in most detail in Pr. 6:20-7:27 does not have any cash change hands, and it is specifically said that the husband's jealousy will be so strong he will not accept financial settlement. This passage even contrasts the low price of the prostitute as against the apparently free but ultimately catastrophic price of the adulteress (6:26). The adulteress in this passage is lonely because her husband went away on a long journey, and is overcome by her own sexual appetites.

Contextual meaning is an extended meaning: premarital unchastity

This creates an obvious problem for us: how can a man accuse his wife of 'prostitution' as grounds for divorce? The sin of the wife is extremely unlikely to be actual prostitution! Hosea had to go and find a woman who **already was** a prostitute to marry so that he could have a wife turn to prostitution (Hos. 1:2). But the language in Mat. 19:9 is mundane terse legal language, it is extraordinarily unlikely to refer to a case as extreme as prostitution as a legal standard, especially in a culture with a restrained view and practice of sexuality, as was the Jewish people this ruling was originally addressed to. So this practically requires that the term in Mat. 19:9 is being used for some extended or secondary meaning. I am not aware of any writer who has proposed that the word means actual prostitution in this context.

But how should we understand the extensions? I think we have to use some common sense, and also consider the usage. We should be able to explain the justification of the extensions, and we should be able to point to reasonably unambiguous use cases to support those extensions.

The extension here is not from women to men. The context of Mat. 19:9 is explicitly referring to the misconduct of the wife, not the husband. But generally it is a valid extension: like the female prostitute the male prostitute engages with sexual relations with strangers for cash. We can safely both recognise the validity of this extension and exclude it in the context of Mat. 19:9. The cultural difference between the Jews and the Greeks/Romans is also pertinent here. For Romans, *porneia* could refer to both male and female prostitution as root meanings rather than extended meanings

(as in the encyclopaedia article quoted above). For Jews, male prostitution is an extended (and rare, possibly unprecedented) meaning.²⁴

The most natural extension is from the female prostitute (unmarried woman prostitute) to the promiscuous female (unmarried woman slut). Interestingly, the word slut is by extension a prostitute (see <https://en.wiktionary.org/wiki/slut>). In the same way the 'prostitute' in Greek is by extension a slut. This extension is common to both Jewish writers, in Greek and Hebrew, and Greeks/Romans, in Greek. The missing element of this extension is the receipt of cash for the conduct. But the conduct is close enough to merit the extension of the term to include it.

The extension continues to capture the case of the unmarried woman who has (or who is presumed to have had) any sexual relations, generally with an unknown man. The willingness to attribute guilt and blame to the female sexual transgressor is / was strong enough to relax the requirement for promiscuity as well: even one forbidden lover or encounter was sufficient. The most conspicuous case of this would be the pregnancy of Mary during her betrothal to Joseph (Mat. 1:18-25). Mary was presumed to have had sexual relations with another man, an unknown man, because she was pregnant before her marriage to Joseph was consummated. In John 8:41, Jesus' birth is alluded to be allegedly of *porneia*.

We have two similar cases in the Old Testament where the Hebrew word *zannah* is used where an unmarried woman was found unexpectedly pregnant or unexpectedly not a virgin.

In Gen. 38:13-34 Tamar the widow is unexpectedly found to be pregnant to an unknown man. She is accused of being pregnant from *zannah*. The Septuagint translation translates it as being pregnant from *porneia*. The force of the context is simply that she, an unmarried woman, is pregnant to an unknown man. Whether she was having sexual relations with men for cash or promiscuously is irrelevant, it is enough that she is pregnant when she should not have been having sexual relations with anyone (her brothers-in-law then having been denied to her).

In Deut. 22:13-21 we have the case law for the woman who should have been a virgin but was found not to be on her wedding night. The non-virginity of the bride was sufficient to prove her guilty of *zannah* (in the Septuagint *ekporneuō*, an intensified form of *porneia*). Again, whether she was having sexual relations with men for cash, or promiscuously, is irrelevant, it is enough that she had lost her virginity when she should not have.

²⁴ The First Century Jewish writers still refer to male prostitutes as dogs rather than *pornos*, e.g. Rev 22:15, or possibly effeminate e.g. 1 Cor 6:9.

Another unexpected example of the extended meaning of *zanah* / *porneia* is Lev. 19:29 which states: Do not profane your daughter by making her a prostitute. Instone-Brewer quotes Rabbi Aqiba as saying this referred to “him who delays marrying off his daughter who has already passed through puberty” (p. 117-118). This supports the focus of the term for sexual immorality by or with an unmarried woman, even if she is not strictly a prostitute.

It is often insisted that *porneia* refers to sexual immorality in general. Instone-Brewer is not alone in claiming ‘It has a wider range of connotations throughout the area of sexual sin and impropriety, including the act of adultery.’ (p. 156). The lexicons and translations bear this out: with the loss of the word fornication (which originated as a reference to prostitution) as archaic, modern translators generally go for the ‘safe’ translation ‘sexual immorality.’ In contrast we are arguing that *porneia*, at least in a Second Temple Jewish context, refers primarily to prostitution, and by extension to sexual relations by or with an unmarried woman, and therefore would generally exclude adultery and male homosexual conduct. The translators have employed a loose phrase ‘sexual immorality’ that covers too much, we submit, and loses the force and meaning of the term it translates.

One way to address this claim is to show how the terms are used in distinction, and to examine the usage to see the nature of the distinction. Here are some examples.

I will not punish your daughters when they play the whore,
nor your brides when they commit adultery; (Hos. 4:14)

In this usage, we see two female sexual sins in a parallelism, but they are not presented as entirely equal. The sin of the ‘daughter’ is *zanah* but the sin of the ‘bride’ is adultery. The bride is the married woman, so her sin is adultery, but the daughter is apparently unmarried, so her sin is *zanah* (‘prostitution’).

for the price of a prostitute (*zanah*) is only a loaf of bread,
but a married woman hunts down a precious life. (Pr 6:26)

Here we have an explicit contrast between adultery and prostitution, with the point that adultery is so much more costly and dangerous than prostitution.

The New Testament likewise uses the terms in apparent distinction (Mat. 5:32; 15:19; 19:9; Mark 7:21; 1 Cor. 6:9). Likewise Justin Martyr (Second Apology, Chapter 2).

On the same basis we can also draw a distinction between *porneia* and homosexual conduct. Consider this example:

be not led astray; neither whoremongers, nor idolaters, nor adulterers, nor effeminate, nor sodomites (1 Cor. 6:9)

Here we see that whoremongers (*pornos*) are in distinction with both adulterers and effeminate and sodomites. *Pornos* does **not** seem to be a summarising term for sexual immorality here, because idolatry, a non-sexual sin, is included in the following items of the list.

Here is another example:

thou dost not bring a gift of a whore, or a price of a dog, into the house of Jehovah thy God (Deut. 23:18)

Here the earnings of the female prostitute and the male prostitute are spoken of in contrast and in different terms. Rev. 22:15 is similar, listing dogs separately from *pornos* .²⁵

Our examination of the different meanings of *porneia* and adultery is not intended to be strict, and providing absolute proof, rather we are looking at the general and normal meaning and usage. In some cases it is difficult to prove how much words are being used in contrast, and how much they are being used as synonyms. For example, sin lists can include related and overlapping terms, and so the use of two terms does not always prove a strict distinction between terms in the list. This needs to be kept in mind when we look at some counter-examples, where illicit sexual relations with a married woman is held to be *porneia* or *zannah* instead of or as well as adultery.

We have a curious case in Judges 19, where a concubine committed *zannah* . For our thesis we will suggest that the woman's status as a concubine rather than a wife is why her conduct is referred to as *zannah* rather than adultery. Whether she was 'unfaithful' or had turned to actual prostitution is unclear, so this could be a case where the word is being used in its root meaning of prostitution rather than in an extended sense.

The most frequent counter-example to our thesis is the case of Israel's and Judah's prostitution with the other nations and their gods, while Israel and Judah were married to YHWH. This is the most frequent use of the term *zannah* in the entire Old Testament. Israel and Judah were held guilty of both adultery and *zannah* .

Firstly we must note that the term *zannah* is not used here in an extended sense, i.e. extended from prostitution to adultery. Rather, it is used in its primary sense: prostitution itself (albeit with some

²⁵ We presume dogs here refers to male prostitutes, however it is possible the term was being used to describe (spiritual) gentiles (compare Mat. 7:6; 15:26-27 / Mark 7:27-28; Luke 16:21; Phil 3:2; 2 Pet. 2:22, also compare the use of 'fox' in Luke 13:32 to describe Herod as a petty tyrant)

unusual features). So, we are not discussing a possible extension of the term from prostitution at all. (And yes, the use is metaphorical here).

Notwithstanding that this is the most frequent use of the term *zanah*, we will attempt to show that this usage is still extremely unusual, for the equally unusual reason that, unlike a normal husband, YHWH did not immediately divorce Judah and Israel notwithstanding their repeated unfaithfulness and prostitution. Judah's and Israel's sin is shockingly and extraordinarily extreme for a married woman who was so well provided for by her husband YHWH and likewise YHWH was shockingly and extraordinarily forgiving and tolerant not to immediately divorce Israel and Judah. Israel was eventually divorced, but not Judah.

Let's look more specifically at the use of the two terms in this case:

“Then I said of her who was worn out by adultery, Now they will continue to use her for a whore, even her! For they have gone in to her, as men go in to a prostitute. Thus they went in to Oholah and to Oholibah, lewd women! But righteous men shall pass judgement on them with the sentence of adulteresses, and with the sentence of women who shed blood, because they are adulteresses, and blood is on their hands. (Ez. 23:43-45)

Here we see that *zanah* (whore) is something that is further than, and therefore in some distinction with, adultery. What Israel and Judah did was shocking conduct for any woman, let alone a woman in marriage covenant with YHWH.

The difference between Judah's conduct and the more common cases of such sins are specifically highlighted by Ezekiel:

“And after all your wickedness (woe, woe to you! declares the Lord God), you built yourself a vaulted chamber and made yourself a lofty place in every square. At the head of every street you built your lofty place and made your beauty an abomination, offering yourself to any passer-by and multiplying your whoring. You also played the whore with the Egyptians, your lustful neighbours, multiplying your whoring, to provoke me to anger. Behold, therefore, I stretched out my hand against you and diminished your allotted portion and delivered you to the greed of your enemies, the daughters of the Philistines, who were ashamed of your lewd behaviour. You played the whore also with the Assyrians, because you were not satisfied; yes, you played the whore with them, and still you were not satisfied. You multiplied your whoring also with the trading land of Chaldea, and even with this you were not satisfied.

“How sick is your heart, declares the Lord God, because you did all these things, the deeds of a brazen prostitute, building your vaulted chamber at the head of every street, and making your lofty place in every square. Yet you were not like a prostitute, because you scorned payment. Adulterous wife, who receives strangers instead of her husband! Men give gifts to all prostitutes, but you gave your gifts to all your lovers, bribing them to come to you from

every side with your whorings. So you were different from other women in your whorings. No one solicited you to play the whore, and you gave payment, while no payment was given to you; therefore you were different. (Ez. 16:23-34)

So, from this passage we can see what *zanah* normally is, and what adultery normally is, how Judah's case differed, and how extreme this case was. Adultery is normally the sin of the married woman, in having some other man, with no cash expected to change hands to procure it. The adulteress is presumed to be neglected and lonely, and weak under temptation by a man who will give her a kind word to have his way with her. Judah is not like that, her husband is available to her, provides for her and is kind to her, yet ***she is unusual to receive strangers instead of her own husband***. And likewise, *zanah* is normally sexual relations with strangers for cash by an unmarried woman. Judah is not like that, ***she is unusual not only in that she has a husband, but also that she doesn't even need the cash and yet she seeks out and pays many lovers***.

Just as extreme and shocking is that YHWH would not immediately divorce her.

The situation that gives us the woman who commits adultery and prostitution at the same time is extremely unusual. We cannot use this extremely unusual case to prove that *zanah* / *porneia* to Hebrew speakers and writers normally includes adultery, notwithstanding the frequency of use in this case.

We also submit that YHWH's divorce of Israel was like his strange deed and his alien work of Is. 28:21. Not everything God does reflects the normal course of events, nor does metaphorical activity necessarily provide an example for us to follow. The idea of a metaphor is to communicate *some* parallel between one thing and another. When Jesus said he would come as a thief against Jerusalem, he is not suggesting we become thieves on the strength of his metaphorical example.

This same distinction is shown when a married woman is forced into prostitution:

Therefore thus says the Lord:

“Your wife shall be a prostitute in the city,
and your sons and your daughters shall fall by the sword,
and your land shall be divided up with a measuring line;
you yourself shall die in an unclean land,
and Israel shall surely go into exile away from its land.” (Amos 7:17)

Normally a married woman would not be guilty of prostitution, but in this case it is a fate forced upon her, notwithstanding her marital status. Again this is not an extension from prostitution to adultery; this is prostitution in its normal significance, brought about by extreme and tragic conditions.



We turn back to the New Testament to cover some other examples that are sometimes used to support the idea that *porneia* included adultery.

1 Cor 5:1 is sometimes used to show *porneia* includes adultery. This case is relatively easy to dismiss. The problem is that ‘a man has his father’s wife.’ The problem is the woman’s connection with the man’s father. The law being violated is the law that prohibits a man to have sexual relations with or marry his father’s wife. Obviously, the effect of this law is to address what happens after the father dies. Even today, ‘a person may not marry the person’s ... parent’s spouse’ and ‘spouse’ here ‘includes ... a former spouse ... whether the marriage ... was terminated by death, dissolution or otherwise’.²⁶ If the father was alive, there would be no need for the law, since it would already be prohibited as adultery. Since the mother is a widow, she is unmarried, and her relations with her husband’s son are not a marriage, so even if they purport to marry the marriage is not valid and she is still legally unmarried. The traditional Jewish legal interpretation of the prohibition on the father’s wife was that it was applicable after the father died or divorced his wife – as today. *Porneia* in this case, then, is sexual relations with an unmarried woman, as we have argued.

The other case is in 1 Cor 7:2 where sexual relations within marriage were required to be given because of the temptation to *porneia*. There are two aspects of the interpretation here that are relevant:

1. The prescription of sexual relations in marriage is sometimes presented as the solution to pre-marital sexual relations, i.e. it is a recommendation for those tempted to engage in premarital sexual relations to marry. Although this would support our contention about the meaning of *porneia*, we do not take this approach. In contrast we argue, when we address this passage later in this paper, that the problem is withholding sexual relations within marriage. So the prescription is for sexual relations within existing marriages, rather than to get married.
2. The temptation being addressed is often construed as ‘adultery’ described broadly as any sexual relations by a married person with a person who is not his or her spouse. In contrast we argue, when we address this passage later in the paper, that the context is the problem of Christians using pagan temple prostitutes, and so the sense of the term here is ‘prostitution’ proper, rather than ‘sexual immorality that is also adultery considered broadly.’

²⁶ Marriage Act 1955 (NZ), [schedule 2](#).

When we interpret Mat. 19:9 we have to take it in a more mundane and legal sense: in this Second Temple Jewish context what does *porneia* properly mean? Extreme cases do not govern here: hard cases make bad law.

This development of the root and extended meaning of *zanah* and *porneia* has a fairly specific temporal and cultural context, and it is based on, as we have discussed, acceptance of polygamy but not polyandry, and it is connected with ancient Israel and the law of Moses. As the time changes, this sense and meaning of *porneia* becomes clouded by:

1. The Christian teaching (and Greco-Roman position) in favour of monogamy, and
2. The Christian extension of the term adultery to cover unfaithfulness of a husband against his wife, regardless of the marital status of the woman he has in addition to her, and regardless of any divorce procedure used against the wife, and
3. The fall of Jerusalem in 70 A.D., some loss of understanding of Hebrew terminology and thinking and the influx of gentiles into the church who thought of *porneia* as equally meaning male and female prostitution, and thought of adultery as the unfaithfulness of either a husband or a wife, and who extended *porneia* to cover sexual immorality more generally.

We have shown how well *porneia* identified the sin of the unmarried woman and how neatly this links to Deut. 22:13-21 and John 8:41. However, some writers have suggested *porneia* refers to or includes incest or unlawful marriages (as mentioned by Instone-Brewer, p. 275). We submit that this is something of a misunderstanding. If a man has sexual relations with an unmarried woman, who he is not entitled to marry, or who purports to marry him, generally this will mean that the woman is technically / legally unmarried. Then, having sexual relations with her is to have unlawful sexual relations with an unmarried woman; hence it fits within the Jewish extended meaning of *porneia*. Instone-Brewer argues that this could not be, in particular, what Mat. 19:9 refers to, because such would not be addressed by divorce proceedings (p. 276). This point is valid, and is well supported by the rabbinic source Instone-Brewer quotes.

Instone-Brewer does discuss the for the pre-marital unchastity interpretation we favour, and he says:

A more convincing case was made by **Abel Isaksson** who said that *porneia* refers to **premarital sex**. Evidence of premarital unfaithfulness was an OT ground for divorce. This evidence would normally be found on the wedding night, but one could also bring a charge before the wedding if the betrothed was found alone with someone. Even if the marriage

did not take place, the separation would be regarded as divorce and would require a divorce certificate because the betrothed couple were considered to be legally married. Jesus might have regarded them as not yet joined by God, so that a divorce was still possible.

This is a very plausible explanation, especially when Isaksson presents it as part of a larger picture. Isaksson argued Jesus wanted his disciples to have the same purity as OT priests, who were not allowed to marry a divorcee nor a non-virgin. Jesus used *porneia* to exclude the nonvirgin and also forbade the married or a divorcee. Isaksson pointed out that Joseph planned to divorce Mary for premarital unfaithfulness. (p. 276)

Instone-Brewer only seems to reject the interpretation on the basis of:

1. finding that *porneia* has a wide meaning, generally, and includes adultery
2. not finding evidence Jesus intended to limit the meaning of *porneia* in this way in this context, and
3. not accepting a valid distinction between adultery (which Instone-Brewer thinks is what must have been meant by Jesus in this context) and *porneia*. He bases this on several cases where the two seem to be used in parallel or in reference to the same conduct, and he doesn't find Isaksson's attempt to explain them as different aspects of the same conduct plausible.

We can definitely understand Instone-Brewer's position here.

In response to difficulty 1., we have sought to show that the meaning of *porneia* for Hebrew people using Greek language at this time, was not as wide as Instone-Brewer suggested, and that it does properly link with and refer to the sexual misconduct by or with an unmarried woman, even if not actual prostitution.

In response to difficulty 2., there are significant and good reasons for thinking that Jesus (or Matthew as his translator) did not refer adultery as the grounds and that the distinction between the term he used and the later use of the term adultery is intended to identify different conduct.

Firstly, it is most unnatural not to use the term adultery if it refers to post-valid-marriage sexual unfaithfulness of a wife against her husband. To not use the term adultery is virtually incomprehensible, if this was what was meant. The nature of this text as a formal legal ruling suggests it is not a stylistic variation; rather it is a terse legal statement. Instone-Brewer's claim that it is like using 'divorce' and 'dissolution' in the same document to mean the same thing is not persuasive here because 'divorce' and 'dissolution' mean the same thing, whereas *porneia* and

adultery do not. Instone-Brewer's position that 'adultery' was meant not plausible, linguistically and contextually, on this point.

Secondly, the argument structure developed by Jesus up to this point strongly requires that no post-valid-marriage sin of the wife justifies or allows valid divorce. This points us back to pre-marital sin that creates a defect in the joining together process quite properly and strongly. This is not us trying to assume what we set out to prove, this is from the detailed and thorough examination of the argument Jesus actually made leading up to this point in the debate.

Thirdly, having established the general link between the marital status of the woman guilty of or involved in *porneia* being unmarried, there is every reason to think Jesus is limiting *porneia* to the recognised case of the non-virgin bride claiming to be a virgin, and being later discovered not to be, resulting in a divorce case. There is no other case in this area that could plausibly have been meant:

- Actual prostitution is inherently implausible as a legal standard of misconduct for divorce.
- Unlawful marriage and incest do not require divorce to annul.²⁷

In response to difficulty 3. we have examined the extremely unusual characteristics of the case Instone-Brewer relies, that of Israel and Judah, on to conclude as he has. A closer examination of the material does establish the difficulty of relying on that extreme case, and does provide good support for maintaining a distinction between the terms in more mundane legal settings.

Further support for the pre-marital unchastity interpretation can be gleaned from some of the early Christian writers, for example:

a person should either remain as he was born, or be content with one marriage; for a second marriage is only a specious adultery. "For whosoever puts away his wife," says He, "and marries another, commits adultery;" not permitting a man to send her away **whose virginity he has brought to an end**, nor to marry again. (Athenagoras, a plea for the Christians, written around 176 A.D.)

Note that Athenagoras considers the prohibition on divorce as having something to do with the groom ending the virginity of the bride, after having just quoted Matthew 19:9 / Mark 10:11 / Luke 16:18. Or he considers the sending away of the woman whose virginity he ended to be the mischief

²⁷ The essence of a divorce certificate is that *this woman was my wife, but now she isn't, and so she is free to marry any man* (see p. 119-122). If the marriage is invalid then the woman is in no need of this man's permission to be free to marry someone else. However, in the case of a man who entered into a marriage contract based on a misrepresentation that the woman was a virgin, if this entitles the man, within certain parameters, to cancel the contract, she *does* require his divorce certificate to so cancel the contract and free her to remarry, and may require the court's ruling recognising the validity of the same or ordering him to so certify should he separate on this basis without providing her with this certificate.

the prohibition was particularly targeted at and applicable to, even if it might have had a wider application than that. This mischief (conveniently for us) does not exist if *porneia* refers to premarital unchastity in this law.

Difficulties with the Exception Clause

Instone-Brewer documents significant difficulties and differences about how to interpret the principal legal ruling:

And I say to you: whoever divorces his wife, except for *porneia*, and marries another, commits adultery. (Mat. 19:9)

Instone-Brewer documents two problems with this ruling:

1. The meaning of *porneia* in this context, and
2. The logic of the ruling.

The difficulty can be seen in the significant manuscript variations, some add ‘and whoever marries a divorced woman commits adultery’ or change the conclusion to ‘makes her commit adultery, and whoever marries a divorced woman commits adultery.’ (See ESV text notes). Both of these variations seem to be imported from Mat. 5:32. But the real difficulties come after the form of the text has settled, but the fit with and justification for the church’s teaching needed to be addressed – a development we suggest happened a bit later. The difficulty with that fit continues to cause much discussion and differences even today.

The early church, from Hermas, developed the following position:

1. An adulterous wife may (even *must*) be divorced if she refuses to repent, or is persistent, but
2. Following divorce or separation, whether lawful or not, neither party may remarry while the other still lives.²⁸

The earliest writers do not attempt to demonstrate that this is the correct exegesis of Mat. 19:9, which requires:

1. *Porneia* means adultery, and
2. The logic is: whoever does divorce his wife (which is not permitted except for *porneia*), and marries another, is guilty of adultery.

²⁸ See page 240 for the quote and Instone-Brewer’s comments. Instone-Brewer dates Hermas’ writings between 100 and 150 A.D., which is the earliest of those he quotes and dates.

Rather, what we have is a mix of quotations, and general teaching and arguments. In **three cases only** (so far as I have found) is the word *porneia* (or its Latin equivalent fornication) used to refer to adultery:

1. Hermas, Command 4.5 refers to a wife's continuing adultery as her continuing in her *porneia*.
2. Clement, Stromata II.23 refers to remarriage as fornication rather than adultery.
3. Ambrosiaster, Commentary on 1 Corinthians, refers to a woman sending away her husband for fornication, when referring to his adultery (see p 251)

Other writers quote the reference to *porneia* in Mat. 19:9 or Mat. 5:32, but do not explain what it refers to, or quote parts of those texts without the reference to *porneia*, or only refer to adultery:

1. Justin Martyr, Apol. 1.15.1-4 quotes Mat. 5:32 but omits the reference to *porneia*.
2. Justin Martyr, Apol. 2.2.1-8 tells the story of a woman who converted to Christianity but was married to an evil non-Christian husband, who wanted to divorce her but was advised against it by her friends, but later did divorce him. The result was an outbreak of persecution. I recount the story here as to what it might imply. Instone-Brewer makes this conclusion: 'When she became a Christian, she was taught that she should divorce her adulterous husband.' (p. 242). (Actually the text doesn't say he was adulterous, but it could reasonably be implied from the descriptions.) However, Justin Martyr doesn't say whether she ought to have or was permitted to divorce him. It is not stated that these are Christian friends, but making the steadfast opponents of divorce non-Christian is an awkward position to take. More likely these were Christian friends who interpreted 1 Cor 7:10 and 13-16 as prohibiting her from divorcing him, and requiring her to hope for his amendment. The point of telling the story may be partly just telling what happened, but perhaps also to show that divorce leads to further evil – a very Christian theme, largely ignored, sadly.
3. Athenagoras, as we quoted above, quotes the sayings of Jesus to the effect that divorce and remarriage is adulterous, without any mention of causes for divorce.
4. Theophilus, To Autolycus, III.13, quotes Mat. 19:9 in writing against adultery by remarriage without discussing what the exception clause means.
5. Tertullian, Marcion IV.34, said fairly specifically that 'the reason a wife may not be dismissed, [is] that another wife may be obtained' as his explanation of Luke 16:18, and the contrast with the exception clause is fairly strong here. This is in keeping with his absolute stance against remarriage (even after death of a spouse!).

Origen's discussion on the relative seriousness of adultery compared to other crimes a woman might commit (see p 248) is suggestive of the trouble with the early church position against divorce, except for adultery, and against remarriage regardless of the cause of the divorce. In allowing divorce for adultery, and then extending *porneia* to include adultery to create an exegetical basis for it, the question of other evils, apparently more serious than adultery, naturally arises. How this is to be answered is unclear: Origen didn't offer any solution.

We offer an explanation for this data: the early Christian writers were influenced by both Jewish and Roman laws and traditions that required or encouraged divorce for adultery. Instone-Brewer explains the Jewish traditions encouraging or requiring divorce for adultery on pages 180-181. Instone-Brewer refers to the Roman law of Augustus, the *Lex Julia*, in 1 CORINTHIANS 7 IN THE LIGHT OF THE GRAECO-ROMAN MARRIAGE AND DIVORCE PAPARI, which *inter alia*, made divorce mandatory for adultery.

But they insisted on no remarriage until the death of the spouse or former spouse, under the sayings of Jesus that they accepted as teaching: divorce + remarriage = adultery.

Then, Mat. 5:32 and Mat. 19:9 were then made to fit by making *porneia* extend to adultery, and interpreting the logic of Mat. 19:9 to mean that adultery was an exception for divorce but not remarriage. We submit this is an understandable but uncomfortable fit on both points.



We can resort to the same arguments Instone-Brewer makes for his speculation of radical loss of Jewish roots after 70 A.D. (although we don't need to make the loss as radical as he does). The fairly subtle distinction between *porneia* and adultery comes from a polygamous background that focused on the woman's status and guilt for sexual sins that may have been a bit lost on gentile believers where monogamy was standard and adultery went both ways and male prostitutes were common, as well as female prostitutes. We have already mentioned that it does appear that *porneia* has a different base meaning and a more general extension to sexual immorality than it did in the Jewish Second Temple context.

It is generally accepted by scholars that the construction and logic of Mat. 19:9 has the exception apply to both the divorce and the remarriage (see p. 155-156). This makes the early Christian writers' implied approach to the text's logic awkward and is suggestive of some force being applied to try to make the text fit some other semantic adjustment – the extension of *porneia* to adultery, we suggest – while preserving other elements of the ruling – the restriction on remarriage after divorce.

There is also the awkward concept that one can have a valid divorce, for adultery, and then not remarry. As Instone-Brewer states on page 148, 'it [the saying of Jesus] appears to be illogical because it charges a person who remarries with the very specific crime of "adultery," which a remarried person is not guilty of in any known legal system.' The solution to the general saying is that the divorce is ruled invalid, a solution it seems that everyone accepts. But to say divorce for adultery is valid, but remarriage following valid divorce for adultery is adulterous destroys the solution and strains credulity. It is not surprising that in later church history this position was not maintained, either all divorce was invalid (as the end of valid marriages), or divorce for adultery was valid and permitted remarriage.

We therefore present premarital unchastity as the conduct referred to in Mat. 19:9. The conduct

results in a defect in the joining together process and therefore does not undermine the one flesh argument developed against divorce of a wife for post-valid-marriage transgressions. This meaning of the term *zannah / porneia*, is the only reasonable and plausible one for this context and audience and time. The term is naturally distinct from adultery, it has a clear Old Testament legal basis, and it fits the legal practice of the time. It fits the context of the Gospel of Matthew which alone states that Joseph planned to divorce Mary and had evidence of grounds to do so. The exception is narrow and technical enough for Mark, Luke and Paul to ignore. The remaining objections of Instone-Brewer to this meaning have been adequately addressed.

In the event that this interpretation fails, and adultery is meant, see Appendix 1 which shows that the clause does not necessarily provide an exception permitting either divorce or remarriage.

Better not to marry? (Mat. 19:10-15)

The disciples raise a clever objection to Jesus' 'from the beginning' lifelong monogamous marriage and no divorce teaching: this makes marriage so onerous that it is better for a man not to marry. The objection is clever because, 'from the beginning' God created woman and marriage because 'it is not good that the man should be alone' (Gen. 2:18). The disciples are expressing an objection from the same source as the teaching itself.

But the role of the disciples in the gospels is not to outwit and outshine the Teacher; rather, it is to express misunderstanding for the teacher to correct and to raise objections for the teacher to dismiss. It is awkward to present Jesus turning around to accept the objection and teach optional marriage here.

At this point we should note the pattern of the passage, and how the pattern itself does not support the idea of Jesus backing down or offering concessions to either his debating opponents or his disciples. This point is made by Wenham:

Before looking at Jesus' argument about divorce, we should point out that the pattern of the debate here is typical of many in the gospels.

Someone asks a question.

Jesus attacks the very foundations of his opponents' position.

Then they counterattack raising objections from Scripture to his views.

Jesus dismisses these objections.

Then the disciples interject their difficulties about Jesus' teaching.

Finally Jesus reaffirms his own position and challenges his disciples to have faith and accept it.

This is the pattern in 19: 16 – 30

Question of Rich Man: What good deed must I do to have eternal life? (v.16)

Jesus' Fundamental Challenge: Why do you ask me about what is good? Keep the commandments. (v. 17)

Rich Man's Counter: Which ones? (v. 18) What do I still lack? (v. 20)

Jesus' Dismissal: Go sell what you possess. (v. 21) It is easier for a camel to go through the eye of a needle than for a rich person to enter the kingdom of God. (v. 24)

Disciples' Objection: Who then can be saved?(v. 25)

Jesus' Reaffirmation: With man this is impossible, but with God all things are possible.(v.26)

The divorce debate just a few verses earlier follows the same pattern.²⁹

So, we should expect Jesus to dismiss his disciples' objection and uphold both 'from the beginning' teachings. Marriage should be lifelong, monogamous, AND good and necessary.

What we have here is a progression from difficult to shocking to scandalous:

1. From 'no divorce' to
2. 'no marriage' to
3. 'no genitals.'

²⁹Wenham, Divorce in First-Century Judaism and the New Testament, sourced from https://www.wisereaction.org/ebooks/wenham_divorce_first.pdf

The final scandal is to refute the second shock and to argue that the first difficult teaching is nonetheless correct.

This is also a humorous response to the disciples' objection, a joke at their expense. In effect, Jesus is addressing the objection by inviting his disciples to line up and have him cut off their genitals 'for the kingdom of heaven'! Any takers? Who's first?!

We can easily see that the idea of forgoing marriage and children for the kingdom of heaven is unlikely to be a serious commendation: Having children was the blessing promised for keeping the covenant (Deut. 28:4,11), and in the promised New Heaven and New Earth, which is the kingdom of God, they shall have children then too (Is. 65:20-23). In the Messianic Kingdom, they would not only have children, but children's children (Ez. 37:24-25).

Jesus dismisses the objection: those claiming exemption from marriage because of the rule of monogamous and lifelong marriage and no divorce would then be required those to join the second category of eunuchs, those made that way by men, by having themselves made eunuchs also, 'for the kingdom of heaven.' As Instone-Brewer points out, making oneself a eunuch is the sin of marring the image of God (p. 170). He also acknowledges that it is shocking enough that Jesus was commending (so he thinks) a life without marriage and children, and he says Jesus is not commending castration – that is too shocking evening for Instone-Brewer!

This is confirmed by the following material about the children inheriting the kingdom of heaven (Mat. 19:13-15). The disciples are suggesting to forgo marriage and children 'for the kingdom of heaven' and Jesus responds by pointing out that the kingdom of heaven was near in time (Mat. 4:17) and that therefore those who were then children would be the generation that would live long enough to see the kingdom come and would inherit that kingdom of heaven, nationally as a generation. The disciples were promised that some of them would not die before they saw the Son of Man coming in his Kingdom (Mat. 16:27-28). For those who were then children and not grown men, they would expect to live well into the age to come, the Messianic kingdom age, inheriting the kingdom some of their fathers lived to see arrive.

In 1 Tim. 3:2-4 Paul required elders to be married men who had children, and in 1 Tim. 4:3 Paul condemned those who forbade marriage.³⁰

³⁰ Instone-Brewer, however, disputes that Paul's rule that to be appointed an overseer one 'must be ... one woman man' requires that he must presently have any woman at all (p. 226-228). The plain meaning and sense of the text is that to be appointed overseer, one must be a man who currently has exactly one wife. The alleged parallel of the widow being a 'woman of one man' is qualified and explained by a) that she is a widow

Our main reason for suggesting that Jesus did not commend a life without marriage and children is the context and structure of the debate and the account in Matthew. But there are other teachings that can be argued support the idea Jesus was teaching optional marriage, which we briefly mention for the sake of balance.

Isaiah prophesied that there would come a time when the eunuch would no longer be counted a dry tree, he would have children (or something better than sons and daughters), and an enduring name (Is. 56:1-8, see Acts 8:26-39 for fulfilment). Jesus taught that in the age to come, at the resurrection, there would be neither marriage nor giving in marriage (Mat. 22:23-33). The 'marrying and giving in marriage' during the close of that Old Covenant temple age would be proven inauspicious when judgement arrived (Mat. 24:37-39). Those who were pregnant and nursing babies at that time would suffer and probably die in the great tribulation (Mat. 24:19-22). In the Kingdom of God, spirit gives birth to spirit (John 3:6), and the need for the levirate marriage law to 'raise up' seed would no longer be critical. Paul's comments in 1 Cor. 7:26-31 permit (even commend) at least temporarily remaining unmarried at the short time before the passing away of the old world. Whether these fairly specific teachings on the birth pains of the Messiah at the end of the Old Covenant age imply a general teaching of optional marriage for us following the consummation of the Messianic Kingdom is questionable, however. We prefer, then, to understand the 'neither marry nor given in marriage' teaching as contextually focused on a) the manner of entry into the kingdom of heaven by spiritual rather than physical birth and b) the manner of 'raising up seed' to eternal life as resurrection by participation in the spiritual body of Christ rather than by producing further generations of the flesh and blood of Israel (1 Cor 15:44-50). Raising up natural children, by marrying and giving in marriage, remain creation mandates in the Messianic age and blessings in the new heaven and earth.

Imagine if Jesus taught Instone-Brewer's theory in Mat. 19:3-12

Before leaving this passage, we should make some quick observations about how different the debate would probably have been carried on and presented by Matthew if Jesus actually taught the Instone-Brewer theory.

now and b) that her being a woman of one man must be proven by her **past** good deeds: if she raised children, if she showed hospitality, if she washed the feet of the saints, if she helped the afflicted, if she earnestly pursued every good work. These works are necessarily past works, whereas the overseer's qualifications are for his present condition, circumstance and character.

The list of texts where Instone-Brewer provides justifications and interpretations that do not require them to be followed according to the plain grammatical meaning of the text is significant and concerning: Instone-Brewer seems to prefer the interpretation that allows modern practices, assumptions and norms to be upheld, while biblical injunctions are to be qualified and contextualised so that they don't apply to us, certainly not as worded.



1. The test would have been introduced by naming the two different schools of the Pharisees and briefly recounting their positions. If Jesus is going to agree with the Shammaites, it should be the Hillelites who he engages and refutes in the debate.³¹
2. The opening question would have been test on the lawfulness of a verbally exact reference to the 'Any Matter' divorce.³²
3. He would not have quoted creation ordinances, since this was not the passage the debate centred around, and it does not provide any causes for divorce of a wife to clear up the Deut. 24:1-4 dispute. (He would only introduce these texts to prove monogamy after first addressing the key exegetical question about the validity of the 'Any Cause' divorce procedure.)
4. He would have initially responded as in Mark, but he would have put the question back to them more specifically: What did Moses write to you **concerning the cause that she found no favour in his eyes?** (i.e. the natural and proper reference to the cause for the first divorce in verse 1, the answer for which is verbally the 'uncovered matter' or in Greek the 'aschémon pragma' (shapeless matter), which might be subject to some attempted interpretation or gloss).
5. His questioners would have replied 'As scripture teaches: *Indecency ... and she leaves his house* and As scripture teaches: *matter ... and she leaves his house*' i.e. the Hillelite argument that the two words referred to any cause whatsoever.
6. Jesus would have to make a linguistic or contextual argument why 'indecent matter' refers to a single ground for divorce, and ideally some explanation or definition of what this single ground was.
7. Jesus would then use the Hillelite argument against them: they held that if it meant 'indecent matter' then the woman divorced for the indecent matter could remarry, showing she had a valid divorce, but the one divorced for some other matter could not, showing her procedure was only a separation. Presumably this would be done by arguing that Ex. 21:10-11 did not permit remarriage because there was no permission for remarriage in the text and there was no divorce certificate either. But that doesn't match Instone-Brewer's theory, so Jesus has to argue the opposite, that Ex. 21:10-11 proves she can remarry because she is validly divorced, but that the supposed 'Any Matter' divorce procedure invented by the Hillelites, does not include permission to remarry because it is not valid. It is hard to see how Jesus would develop and present the necessary argument here.
8. A monogamy argument would be required before Jesus could rule invalid 'Any Matter' divorce makes the remarrying husband commit adultery.
9. The ruling should have been: 'Anyone who divorces his wife for 'Any Matter' and marries another, commits adultery and anyone who marries a woman divorced for 'Any Matter' commits adultery.' This form of ruling would not affect any other valid grounds for divorce, and would do what Instone-Brewer claims he intended to do: specifically rule the 'Any Matter' divorces invalid, while preserving the divorces based on Ex. 21:10-11 as both valid and as permitting remarriage. And it would be the most natural way to state the ruling: it is

³¹ The precedent for this is Jesus refuting the Sadducees on the resurrection: they are introduced by name, their position is stated, they get to pose the objection, and Jesus refutes them and affirms the Pharisees' position.

³² The precedent for this is Mat 17:10 where the view being addressed (and the source) is clearly stated.

exactly what we have in Luke 16:18, but in reference to ‘Any Matter’ divorce in particular (as Instone-Brewer claims was meant by Luke’s generic divorce reference).

10. The Shammaites would have said: “Well said, Rabbi” and the Hillelites would have been reported to have been confounded, amazed or no longer daring to ask him any more questions.
11. The teaching about optional divorce and optional marriage would have been left to the later discussion in private between Jesus and his disciples – and it would have some scriptural basis and argument presented in its favour.

The absence of any of these features undermines the plausibility of Instone-Brewer’s interpretation. Instone-Brewer’s interpretation is not ‘unpacked’ (p. 133f) from the real account but ‘in-packed’ putting in words and concepts that are not there.

Against Adultery in the Sermon on the Mount

The other place we have the ‘exception clause’ is also in Matthew’s gospel, in the Sermon on the Mount. As we have already covered the exception clause, we will not address the passage at length.

The structure of the passage is a section of the sermon on the topic of adultery. As is fairly well known, the sermon increases the standard of conduct from the standard of Moses to the standard of perfection or maturity (Mat 5:48). The easy yoke and the eschewing of coercive remedies for breach of the law are not suggestive of low standards, but rather higher!³³ As we discussed above, the implications of depreciating the law of Moses and instituting a new standard are the passing of heaven and earth and the arrival of the new heaven and earth (Mat 5:17-20), that is to say the Messianic kingdom was arriving quickly and even before the consummation arrived they were to live ‘as in the day time’ of consummation and resurrection life (Rom 13:13). Even while the night continued a little longer, they must stay awake, as in the day time (Luke 12:35-40).

Jesus puts the responsibility for adultery on men, rather than on women as was commonly done in his day, and goes through a progression of seriousness, directness and completion of action:

1. Looking (v 28-29)
2. Touching (v 30)
3. By proxy, by divorcing his wife, causing her to commit adultery (v 32)
4. By himself literally and bodily, by marrying a divorced woman (v 32)

Unlike Mat. 19:3-12, there is no argument for or from monogamy, creation mandates or the ‘one flesh’ teaching. This passage is a development of the idea of adultery, and the *causes* of the sin of

³³ The connection between remedies and legal standards is often missed but it is clear: when the law is about defining and applying coercive remedies, the misconduct needs to be more serious and the burden of proof higher. This is why the Jews put the burden of proof for capital offences to impossibly high levels, lest they have the law take the life of a man. Jesus specifically addresses the objection that his law of clemency implies lax standards in Mat 5:17-20. As does Paul in Romans 6.

adultery. The teaching is that we must not only refrain from *committing adultery*, we must also refrain from *inchoate adultery* and *causing adultery* and this last one is where divorce and remarriage come in.

The path from illicit looking and touching to adultery is fairly self-explanatory. But the divorce and remarriage channels are not, especially if we work solely within the framework of the law of Moses. Jesus is instituting a new framework called the New Covenant, which surpasses the law of Moses. So if we are to understand the teaching we have to understand it as a new law instituted by the King of the Kingdom of Heaven.

Let's have a look at the text:

“It was also said, ‘Whoever divorces his wife, let him give her a certificate of divorce.’ But I say to you that everyone who divorces his wife, except on the ground of sexual immorality, makes her commit adultery, and whoever marries a divorced woman commits adultery. (Mat 5:31-32)

We notice that here, unlike Mat. 19:9, the adultery is committed by the divorced woman not the divorced man and is caused by the husband who divorced her, not on the ground of *porneia* (as with Mat. 19:9 *porneia* which we have suggested refers to unchastity with another man before the marriage).

How she commits adultery is suggested in the last saying: whoever marries a divorced woman commits adultery (32b). By divorcing his wife, a man makes a divorced woman. If anyone marries a divorced woman, he commits adultery, and that is how she commits adultery: by remarriage. Instone-Brewer argues correctly that the woman's remarriage here is not necessarily going to happen, and that is enough that, if she does remarry, the man's responsibility (and the woman's guilt) is established and the point is carried (p. 150-151).

The woman is made guilty of adultery but the man is responsible. But why the divorce fails to legitimise the subsequent marriage is not explained here – the implication here is that the divorce is invalid and ineffective.

The final case is that whoever marries a divorced woman commits adultery. This is the man directly, personally and physically committing adultery, rather the causing it or doing it by proxy. This is the completed act of adultery.

Looking at the passage as a whole, the climax of sin and strictness is the last part of verse 32: here is where the man actually commits adultery, and the strictness is extreme: the only condition for the

ruling is that he marries a divorced woman. This helps confirm that the exception does not provide any significant laxity or leeway for justifying divorce and remarriage, which also explains why it can be omitted by Mark, Luke, John and Paul. But if it meant *adultery*, and if it meant that adultery absolved the man of guilt for both divorce and remarriage, it would open up a significant and dangerous way of justifying divorce and remarriage. For example if the husband provoked his wife into adultery through neglect of conjugal duty, temptation, opportunity or distress, he would then have a good chance to justify divorce and then remarriage. But this goes against the whole concern for making men responsible for not causing sin and the climax of strictness of the passage.

The meaning of *porneia* as pre-marital unchastity with another man fits as well here as in Mat. 19:9. All the arguments for and against each meaning of *porneia* are about equally applicable to both passages so we will not repeat them here.

Another aspect of Matthew's concern with causing adultery is the role of those with judicial authority and those who solemnise marriages: the responsibility not to cause adultery surely does rest on all those involved in divorce and remarriage. Yet Instone-Brewer advocates an ask-no-questions and non-judgemental approach, i.e. he discourages those solemnising marriages from asking about marital history, and discourages those counselling those with troubled marriages teaching them that they may not divorce or that they have done wrong in divorcing or remarrying, or that their present marriages are ongoing adultery (p. 311-312). The contrast is as concerning as it is striking.

Ex. 21:10-11 More grounds for divorce?

Instone-Brewer claims Exodus 21:10-11 provides three additional grounds for divorce in the Old Testament. An examination of Deut. 24:3 shows that in the Old Testament no grounds were required for divorce at all, and the only difference between the divorce on sufficient grounds, properly pled and established, and divorce on no grounds was financial.³⁴ Other Old Testament passages also suggest that divorce was available at the will of the husband, and its unavailability was reserved for special situations of mistrust (e.g. Deut. 22:19). By implication, discussion of grounds for divorce is a discussion about the financial obligations associated with divorce rather than the validity of divorce itself. Acknowledging and admitting in this passage material supporting 'rights of spouses' and

³⁴ Instone-Brewer's book presents and agrees with Westbrook's analysis that the first divorce is for cause, and the woman forfeits her marriage contract pay-out, but that following the death of her second husband, or his divorce of her for no cause, she has her marriage contract paid out, and this is what lies behind him being prohibited from going back on his earlier stance that she was unacceptable to him because of her conduct, in order to get her back with her newly acquired property. However, Instone-Brewer recently told me by personal email he no longer favours this view. However, I still find Westbrook's work persuasive.

'grounds for pay out of marriage contract' under the Old Testament does nothing to undermine the higher standard in the New Testament documented above.

Ex. 21 gives us a number of difficulties. We will attempt to address them here together with the question of the going out of the female servant in verse 11.

The difficulties are:

1. Why do the male servants serve for six years, but the female servants for life?
2. Why does the male servant, given a wife by his master, who he has children with, appear to have such a terrible choice: divorce his wife and leave his children as servants and go free, or serve the master for life? Suggesting, even apparently mandating, the separation of a family like this seems cruel, unjust and a poor model of family life and a poor model of slavery.
3. Does the passage really presuppose and deal with a female servant who is married to the master's son, then he gives his son another wife, his son then neglects his first wife, and then resolve that neglect through divorce in which the woman goes out penniless?

We suggest a closer look at the passage shows that these difficulties are more apparent than real. On the contrary we will show that the passage:

1. Presupposes, suggests and supports temporary slavery for both male and female servants, but lifelong marriage for male and female servants and free men and free women alike.
2. Respects the dignity, marital rights and marriages of those going into slavery married, those married while servants and those whose slavery ends while married, for both female servants and male servants.
3. Presupposes that the male servant, given a wife by his master, neither divorces nor leaves his wife and children, nor agrees to serve the master for life.
4. Shows that the female servant who is not provided with her food, cover and habitation is never married, and goes out unmarried and free, without any suggestion of divorce. It is reasonably implied that male servants also have these rights to food, cover and habitation, and that failure to provide this would give them a remedy of immediate freedom also.

Ex. 21:2-11 has only one topic of focus: the rights and interests of servants in households. And Ex. 21 as a whole is united by a common theme of household laws, even including injuries and killing of household members: servants (21:20) and parents (21:15) and the pregnant woman and her unborn child within the household (21:22-25). It even extends somewhat and is applicable beyond the household to the neighbour and to injuries caused by animals (21:28-36).

But our focus is on the verses dealing with servants within households. When a person was sold as a slave they join not the master's family, but his **household**.

Now 'a slave has no permanent place in in a family but a son belongs to it forever' (John 8:35). And yet, 'A servant who deals wisely will rule over a son who acts shamefully, and will share the inheritance as one of the brothers' (Pr. 17:2). These are the dynamics we meet in this chapter: the [male] servant serves for six years, and then he goes free (21:2). But if the master – the patriarch, the head of the household – gives a female servant to his son as a wife, he shall deal with her as a daughter (21:9). The female servant must be given a major wedding present as he would give to his daughter for her to take into the marriage as her own estate, which she gets to keep when he, the son of the master, dies. She goes from being a servant to sharing an inheritance as one of the brothers. (If he betroths her not to his son but to one of his male servants, she does not (necessarily) get that level of financial benefit, however.)

Now this is where we meet Instone-Brewer's supposed three additional grounds for divorce:

'If another [woman] he take for him, her food, her covering, and her habitation, he doth not withdraw; and if these three he do not to her, then she hath gone out for nought, without money. (Ex. 21:10-11, Young's Literal Translation)

I have used Young's Literal Translation to avoid having the translators interpret our text too much for us. Instone-Brewer says this passage refers to a female servant, purchased by the patriarch, given to his son as a wife, and then the son takes another – on Instone-Brewer's interpretation another **wife** – but then fails to provide the first wife with these three things. She is free to go, as a divorcee, and is free to remarry someone else (p 99-101).



The problem with this interpretation is that it does not fit the context and it is not what the passage is about. It also does not fit the structure of the law. Let's look at the entire law with some added structuring and gloss:

'And when a man selleth his daughter for a handmaid, she doth not go out according to the going out of the men-servants; [INSTEAD the master has these **three** options]:

1. IF evil in the eyes of her lord, so that he hath not betrothed her, then he hath let her be ransomed; to a strange people he hath not power to sell her, in his dealing treacherously with her. [OR]
2. IF to his son he betroth her, according to the right of daughters he doth to her. [OR]
3. IF another [woman] he take [instead] for him [his son], her food, her covering, and her habitation, he doth not withdraw;

IF these **three** he do not to her,

THEN she hath gone out for nought, without money. (Ex. 21:7-11, Young's Literal Translation)

With this structuring and presentation we can see who the law is directed at (the master, not the master's son), and the mischief the law was directed at: failure to betroth her. The law does not say he has to betroth her to his son, and 21:4 refers to the master giving a male servant a wife, so he could betroth her to either one of his male servants, or to one of his sons. Or perhaps some other man, for example if he owed a debt to another man who was single, and he desired the female servant as a wife.

The worst of the mischief is in the first clause: sell her to foreigners should he decide not to betroth her to anyone because he doesn't like her. Instead she is to be redeemed by her family. So the provision of the daughter is either a temporary aid to the selling family, or a permanent joining of the daughter to the master's family as a free woman wife, or to one of his male servants or to some other man. The foreigners would be presumed not to adequately recognise and protect her rights, particularly her right to be properly betrothed, whether to a son or to a male servant in the household.³⁵

Another element at work here is the redemption price. The law does not specify the redemption price, and probably for good reason: the market price might be too variable. Another reason likely is that the redemption price depends on the girl's length of service, reducing for time served. So, in the event the master fails to betroth her, the redemption price becomes progressively more affordable until it perhaps reaches zero or a nominal amount.

But until he betroths her and unless she is redeemed by her family, he still has duties to the female servant: to provide her food, clothing and habitation. The neglect of these provisions is linked to him not giving her as a wife to his son, but choosing someone else instead, and the remedy is she goes free without payment of money. However, we suggest this applies regardless of the circumstances or the reason: every servant, male and female, has the right to food, clothing and habitation, and every servant may go free, without payment of money, if these are not provided by the master, regardless of the reason. (If the master does betroth her to his son (or another man) presumably it is

³⁵ Alternatively, the 'foreign people' he can't sell her to might be a reference to another household, so that the female servant must either stay securely with the master chosen by her father, or return to her family – this interpretation gives the female servant maximum protection of her rights and interests and makes the relationship based more on trust and honour between two families. Although there does not seem to be any reference to secondary markets for such female servants, still this alternative interpretation is fairly unlikely, as 'foreign' normally means non-Israelite, and 'people' normally means nation.

her husband who would have the responsibility for her provisions instead, and if her husband was a servant, her husband would be the one to claim the provisions and the remedy of freedom (along with his wife) for failure to provide provisions.)

So, according to this law, the woman who leaves does not leave the son as a wife, but the master as a female servant who could have been betrothed to his son but was not, and was not provided her necessities.

There are two other missing elements that also suggest that the female servant never married the master's son:

1. There is no mention in this part of the law for any reason for failure to provide her necessities nor why the son took another woman. This is in contrast to the situation when she is not betrothed because the master dislikes her in 21:8. If she *was* the son's wife, then it would be expected that he would take another wife only if he hated the first one or that he didn't love her, and this in turn could be for some misconduct of the first wife, or for no reason. Any misconduct of the wife would affect the financial settlement element addressed by the law but it is missing. These missing elements of motive / background and misconduct (or lack of misconduct) suggest that there is no marriage of the female servant to the master's son that is being affected in this clause.
2. The law does include provisions for the male servant's children, when the master gives him a wife (21:4), but there is no mention of what happens to the female servant's children when she goes out. This suggests that there are no children and further than the female servant is not a slave wife.

At this point we will have a brief look at the way the children of two wives are addressed in Deut. 21:15-17. The contrast with Ex. 21:7-11 is quite striking on the above point, and the context includes a similar scenario to the female servant who is given to the son as a wife:

“When you go out to war against your enemies, and the Lord your God gives them into your hand and you take them captive, and you see among the captives a beautiful woman, and you desire to take her to be your wife, and you bring her home to your house, she shall shave her head and pare her nails. And she shall take off the clothes in which she was captured and shall remain in your house and lament her father and her mother for a full month. After that you may go in to her and be her husband, and she shall be your wife. But if you no longer delight in her, you shall let her go where she wants. But you shall not sell her for money, nor shall you treat her as a slave, since you have humiliated her.

“If a man has two wives, one loved and the other unloved, and both the loved and the unloved have borne him children, and if the firstborn son belongs to the unloved, then on

the day when he assigns his possessions as an inheritance to his sons, he may not treat the son of the loved as the firstborn in preference to the son of the unloved, who is the firstborn, but he shall acknowledge the firstborn, the son of the unloved, by giving him a double portion of all that he has, for he is the firstfruits of his strength. The right of the firstborn is his. (Deut. 21:10-17)

The parallel with Ex. 21 is fairly obvious: both cases deal with a female servant who may be taken or given as a wife, and in both cases the concern of the law is to protect the rights of such women, and in both cases those rights are ultimately protected by a remedy of being given freedom.

In both cases the references to marriage are explicit: in Ex. 21 they are consistently referred to as betrothal, and in Deut. 21 it refers both going into her and being her husband and having her as a wife. This consistency of referring to marriage, betrothal and/or sexual relations helps show that the female servant in Ex. 21 who went out was not married to the master's son, since there is no mention of her being betrothed to him, him going into her, him being her husband or her being his wife.

In both cases the woman's sale to foreigners is prohibited.

However, in Deut. 21 the breakdown of the relationship between the husband and the wife are clearly referred to, as is expected in such laws: he doesn't like her anymore. By contrast, Ex. 21 doesn't mention any breakdown in the marriage relationship, nor any reason, as we noted above.

The next law is exactly as expected: a man has two wives. Since he no longer liked the war captive, he hated her and divorced her and sent her out of his house. Then he took another wife that he loves. But now he has sons from both wives. The problem of inheritance disputes between the sons of the two wives naturally arises and the law addresses it immediately after a case of divorce and presumed remarriage. This is missing from Ex. 21 because the first woman was never his wife and so they had no children.

It appears that Deut. 21:15-17 is normally construed as dealing with a man who has two wives at the same time. This is surprising because the term 'hate', as used in this text, is virtually synonymous with divorce, and it follows what is basically a divorce case.

Back to Ex. 21. The going free without payment of money has nothing to do with divorce or remarriage. It is the remedy for the servant whose eye or tooth is destroyed by the master (21:26-27). So also, the female servant whose master fails to provide food, clothing and habitation (or either of the other two options) goes free, without payment of money.

We can further confirm what it means to 'go out' in this context and prove that it does not imply divorce by analysis of the position for the male servant. Not only could the female servant 'go out', the male servant could 'go out' with his wife and children (if they came in with him), showing 'go out' does not mean or imply divorce, rather it means go out of slavery and become free.

But what about the man servant who 'goes out' without his wife and children: 'he shall go out alone' (21:4). Doesn't this mean he divorces his wife? The unmarried male slave has a choice: to get married, if the master offers him a wife, or to stay single. The consequence of accepting a wife provided by the master is a further choice: service for life, or go free alone, with the wife and children remaining the master's (21:4-6). The text states that 'the wife and children are her lord's'. This is obviously not meaning the wife and children are the wife of the master and the children of the master, and it has to mean that the master owns the labour of the wife and children. So the 'going out' alone of the male servant after 6 years means he is free and can earn wages, either from his former master or from a new employer, but the wife and children still have to serve his former master without pay, since that is the meaning of being a slave. The choice to serve the master for life is specifically said to happen only if the servant plainly asks for it and evidences his election by permanently marking his ear with a large hole. Think about what this means: suppose the servant's 6 years finishes, and he makes no election and continues to work for the master: it means he can later claim for unpaid wages, and/or negotiate for the freedom of his wife in lieu of wages – this latter result would presumably be the expected course of events. We can further speculate that this expectation would be recognised by the law, since the law is based on custom, and so a further length of service to redeem the rest of the family as of right. What the law is doing here is providing a presumption for this to take place and limiting how this presumption can be rebutted: the formal election and the evidence of the large hole in the ear.

So, we can address the difficulties a superficial reading of the law raises:

1. the married man who becomes a servant, stays with his wife and children, they all serve 6 years then they all go free. This is temporary slavery and lifelong marriage.
2. The unmarried man who becomes a servant and is given a wife by his master, also serves for six years and goes free, with no divorce suggested on account of him becoming free. Following his freedom, if he only continues his service, his wife and children also go free after a further period of service, as of right. This is temporary slavery and lifelong marriage.
3. The unmarried man who becomes a servant and is given a wife by his master, also serves for six years, and he could also then choose to serve for the rest of his life. By this point he will know what kind of man the master is to work for as a servant, which is some protection for

him. He might want this because: he loves his master, as the text says, and perhaps also he thinks he will never earn much in his freedom because he is already old and frail, and he presumably hopes to gain some security and benefits for himself and his family by continuing to work for the rest of his life. This is permanent marriage and a financial decision to continue service for life as an informed, express choice. Presumably his children will enjoy freedom when they are of age or marry, and / or they will get freedom at the next Jubilee year (Lev. 25:54).³⁶

4. The unmarried woman who is sold as a slave by her father we presume is old enough to be useful as a servant, so probably 10 years old or more. As girls were married at 12 years old, such a daughter would be ready to be betrothed, or would soon be ready. The value of a young woman was in her domestic services as a wife, so the implied obligation on the master is to betroth the girl to his son or to one of his male servants. Since marriage is for life, she does not go free after 6 years. So, either she is to be given as a wife – which is for life – or she is to be redeemed by her family. This redemption is probably progressively cheaper the longer she has served, so that her service, if she isn't married is also (we speculate), effectively temporary. And if the master fails to give her provisions during her service, she also goes free, without payment of money. This is temporary slavery and lifelong marriage.



We also briefly comment on the meaning of the term translated 'habitation' by Youngs Literal Translation, that Instone-Brewer thinks means conjugal love. The term probably does mean a little more than habitation or quarters, and it probably does extend to something like 'rights' or even 'marital rights.' But in this context the marital rights of the female servant are not conjugal love, they are betrothal. Failure of the master to provide *this* right is what triggers her ultimate release, whereas failure to provide more fundamental necessities food, cover and habitation triggers an immediate release.

In this text there is no suggestion of temporary marriage or separation of spouses or remarriage or polygamy, and only limited allowance for lifelong slavery.

And what of Instone-Brewer's discussion of the application of the passage to marriage and divorce law? Is the husband required to provide the wife with food, clothing and habitation? And can she sue for divorce if these things are not met?

³⁶ Later rabbis said that a man could not sell his daughter as a servant if the Jubilee years were not being practiced, because it would result in perpetual slavery, see <http://www.jewishencyclopedia.com/articles/4920-daughter-in-jewish-law>

Of course the husband must provide for the wife, and of course failure to do so is a breach of contract. Of course the rights of the wife are not less than those of a servant, surely she also has the rights to intercourse and to bear children also, and more besides!

But whether breach of contract, and how serious a breach of contract, allows a right or remedy of cancellation is precisely the point at issue in our paper. We have already addressed that question in the negative based on Jesus' teachings, and since he didn't say anything else about this text in particular we have to go with what he said when he addressed the topic dismissing the idea of divorce for breach of contract, notwithstanding this being opposite to the position of the Pharisees he addressed.

Pauline privilege of divorce and remarriage? (1 Cor. 7)

1 Cor. 7 supposedly provides another ground for divorce and permission for remarriage: when a believing spouse to be deserted by an unbelieving one. To address this claim we will look through the passage from 1 Cor. 6:12.

The first section of the passage deals with *porneia*. We note that as in Matthew, *porneia* is not the same as adultery, and the two are listed separately in 1 Cor. 6:9. The main meaning of *porneia* is prostitution as we noted previously but it also is used to designate unlawful sexual relations with unmarried women, as for example in 1 Cor. 5:1 – a man has his father's wife.³⁷ The *porneia* in 1 Cor. 6:12-20 seems to be related to eating meat sacrificed to idols, and therefore should be understood as participation in pagan idolatry at pagan temples where ritual prostitution occurred.

But Paul quotes Gen. 2:27 and the one flesh teaching against the practice of pagan temple prostitution by Christians (1 Cor. 6:16). Some people have wrongly taken this to imply that all sexual relations result in a one flesh union, and that therefore whatever the one flesh union is, it is not particularly unique or durable.³⁸ This of course is the opposite of Paul's point: he is contrasting the proper context of sexual relations where one leaves father and mother and hold fast to his wife, and the two become one family with the case of sexual relations with a prostitute. Does one become one family unit with a prostitute? Obviously not. Hence Paul is juxtaposing two very different concepts to make his point against having sexual relations with a pagan temple prostitute.

The next section of the letter Paul teaches that each man should have his wife and each wife should have her husband because of the problem of *porneia*. As we noted above, in this context this is

³⁷ See above for an analysis of this case. Also, we note that *porneia* and its Hebrew version *zanah* are not used to describe such forbidden relationships in the bible, instead they are described using alternative words such as depravity, perversion and abomination (e.g. Lev. 18)

³⁸ As Instone-Brewer may do summarising R H Charles's position on page 270, with apparent approval.

pagan temple prostitution. He was written by some at Corinth that 'it is not good for a man to touch a woman,' that is to say some were rejecting sexual relations altogether, even in marriage. Paul's teaching is about the need for sexual relations in marriage and the wrong of withholding it from one's spouse. The withholding of such was causing a problem: the denied spouse, presumably the husband, was resorting to temple prostitution. He is not talking about the problem of sexual immorality by unmarried people and prescribing marriage as the remedy. Nor is he dealing with adultery in the original sense of the word (having sexual relations with someone else's wife).

Next Paul moves on to the unmarried and widows (1 Cor. 7:7-9). It seems that he is here addressing widows and widowers, and that Paul himself was a widower. He recommends singleness but says they can marry rather than burn with passion. As those who are virgins and who are engaged or betrothed persons are addressed later, these seem to be excluded from the target of this section. In the same way there is nothing to suggest divorced persons are included in this group.

To the married, however, he gives more than a recommendation, he gives a command that he says is directly from the Lord:

the wife should not separate from her husband (but if she does, she should remain unmarried or else be reconciled to her husband), and the husband should not divorce his wife.

As we noted above, this sets out Paul's interpretation of the teachings and tradition of Jesus, we presume primarily from Mat. 19:1-6 / Mark 10:6-9. If the gospel of Matthew / Mark was not yet finished at this point, which should not in any way be conceded, we presume Paul had access to the same material in earlier written form as well as in oral tradition. Paul feels no need to add any qualifications or exceptions or explanations. Divorce is prohibited, and if the prohibition is broken, remarriage is prohibited also but reconciliation is not. The divorced are addressed with the married: they must reconcile or remain unmarried. This shows that they are not addressed with the other categories:

- widows / widowers (vs 9-8)
- virgins / betrothed / those who broke off a betrothal (vs 25-38).

The next introduction, verse 12, indicates that the absolute prohibition of divorce and remarriage has been applied to cases where both husband and wife are believers. So, he introduces an application for the rest, for those where one has an unbelieving spouse. Do the absolute prohibitions still apply in such cases?

Before commenting on the answer, and the argument Paul uses to support his answer, let's understand the nature of the problem here. This is a problem of **a conflict of laws**. On the one hand the law of Christ prohibits divorce. But on the other hand the law of Christ prohibits getting married to an unbeliever (e.g. 1 Cor. 7:39). So, if a believer sins by marrying an unbeliever, do they have to repent of this sin by divorcing the unbeliever? Does it mean that the one sin of marrying an unbeliever makes the marriage invalid and the children illegitimate? And if a married person becomes a Christian but their spouse is not, should that marriage be ended as unholy and because it is a breach of the law of Christ? In summary, the problem is **which law prevails**, the law of no divorce or the law of marriage only to a believer?³⁹ And in summary the problem is *not* whether a believer can remarry after divorcing or getting divorced by an unbeliever. The prohibition against remarriage after divorce is a separate prohibition and law that is not in conflict with any other law because there is no law requiring that a believer must be married to a believer: it is perfectly acceptable for a divorced person to remain unmarried as mentioned in verse 11.

Paul's answer is that the believer is still required to maintain the marriage provided the unbeliever is willing to maintain it. I.e. **the no divorce rule prevails**.

Paul then has to address some arguments for divorce applicable to such cases: He has just been teaching that the members of the body of Christ should be kept pure from prostitution (1 Cor. 6:15-20), so doesn't this mean that marriages with unbelievers are unholy and must be broken? This seems to be very similar to the issue addressed in 1 Cor. 5:9-12 where Paul had to clarify that the disassociation with the immoral was particularly targeted at those who claim to be believers rather than unbelievers. Paul teaches that the believer sanctifies and purifies the unbeliever, resulting in a legitimate marriage and legitimate children (1 Cor. 7:14). This, then, resolves the question: marriages with unbelievers, although they should not be contracted by believers, if they are or have been contracted, they are still legitimate, and therefore the ruling against divorce – let not man separate – is still applicable. In doing this Paul confirms that the spiritual status of the spouse has no bearing on the validity of the marriage contract, **and therefore provides no legal basis for divorce**.⁴⁰ This also means that the ruling of verse 11 – if you divorce you must remain single or else be reconciled to your spouse is just as applicable even if your spouse was an unbeliever. Instone-Brewer concurs:

³⁹ The conflict of laws type issues were commonly addressed in the First Century, with conflicts being resolved by assessment of the hierarchy of the commandments (see Mat 22:34-40 for an example of this type of thinking).

⁴⁰ Ambrosiaster, the only early Christian writer to support remarriage after divorce, primarily based his argument on the position that marriages with unbelievers were *not* valid, and this surprisingly comes from his commentary on 1 Cor 7! See pages 250-251 for the quote.

‘Although the latter section speaks about mixed marriages, there is nothing in the first section to indicate it only applied to nonmixed marriages.’ (p. 200)

This leaves one case that still requires a ruling that Jesus did not address. Instone-Brewer summarises the problem being addressed:

In verse 15 Paul has to face the fact that a believer married to a pagan may not be *able* to hold the marriage together. Their partner may simply walk out. (emphasis his, 1 CORINTHIANS 7 IN THE LIGHT OF THE JEWISH GREEK AND ARAMAIC MARRIAGE AND DIVORCE PAPYRI)

And

he is concerned, at this point, with a marriage where one partner has been *forced* into a situation they do not want. (emphasis mine, 1 CORINTHIANS 7 IN THE LIGHT OF THE JEWISH GREEK AND ARAMAIC MARRIAGE AND DIVORCE PAPYRI)

Instone-Brewer further sets out the question of interpretation of this part as follows:

Does it mean that they are no longer bound to live with the partner, or no longer bound by the marriage?⁴¹ And if it means the latter, does this give them freedom to remarry? The language is particularly strange, because ‘bound’ (δουλώω) is a word normally reserved for situations of slavery. (footnote his, 1 CORINTHIANS 7 IN THE LIGHT OF THE JEWISH GREEK AND ARAMAIC MARRIAGE AND DIVORCE PAPYRI)

Although Instone-Brewer does look at a few options (including his footnote), the most obvious option he does not consider at all: the obligation is the divorce prohibition, and the not being bound is the not being bound to the rule against divorce. That is, after all, the subject of the discussion: how does the ruling of Jesus against divorce apply to marriages with unbelievers, a situation Jesus did not apply it to?

As Instone-Brewer points out the believer could be in a bind here. But what exactly is the bind? On the one hand divorce is prohibited, but on the other hand the believer may be forced into a situation where they are not able to stop the divorce from taking place. The specific issue being addressed is therefore whether the believer is guilty simply because he or she becomes a divorced person beyond their control and against their will. Paul exculpates the believer from any such charge by stating that the believer is not bound in such cases (1 Cor. 7:15).

⁴¹ Some other possibilities have been suggested, e.g. ‘not under bondage to deny his or her faith in order to avoid a broken home’—Theodore H. Epp, *Marriage, Divorce & Remarriage* (Good News Broadcasting Assoc., Bawtry, Doncaster. 1954–91), 25–26; not bound to keep marriage vows, but still bound to remain married—Andrew Cornes, *Divorce and Remarriage: Biblical Principles and Pastoral Practice* (London: Hodder & Stoughton, 1993), 251; not subject to imprisonment, which would happen if they tried to prevent their spouse leaving—R.L. Roberts, ‘The Meaning of *Chorizo* and *Douloo* in I Corinthians 7:10–17’, *Restoration Quarterly* 8 (1965) 179–84, p. 183.

But Instone-Brewer insists that the 'not bound' Paul is referring to is not the divorce prohibition ruling but to the marriage itself, with a right to remarry therefore implied. He argues that the terminology of 'not bound' is suggestive of a divorce certificate and the right of remarriage.

Let's look at the concept of slavery which Instone-Brewer finds 'particularly strange' as a reference to marriage. Instone-Brewer does not seem to want to think of marriage as a form of slavery. And he is right, **the term 'bound' (doulōō) is never used for the marriage bond in the New Testament.** Neither is any other slavery term or word applied to marriage anywhere in the whole bible! Does this not suggest that the freedom from the slavery Paul is talking about is not freedom from marriage?!

 But the slavery word '**bound' (doulōō) is used for legal obligation** 'to the elementary principles of the world' (Gal. 4:3) where the context shows that it means to the Old Covenant law. Even in our passage here we can see the connotation and use of the term slave:

For he who was called in the Lord as a slave is a freedman of the Lord. Likewise he who was free when called is a **slave of Christ.** (1 Cor. 7:22)

In what sense is the free man the slave of Christ? **In the sense of his legal obligation to obey the law of Christ!**

In fact there are frequent references to legal obligations as slavery, and to the obligations of the believer to the law of Christ as slavery too (e.g. Rom. 6:18, 19, 22; 2 Cor. 11:20; Gal. 2:4; 4:24, 25; 5:1; Col. 4:1; Heb. 2:15). Even in the Old Testament, the duty to comply with the law of the monarchy was expressed as slavery: 1 Sam. 8:17.

Paul says that his exculpation is given because God has called us to peace. Instone-Brewer helps illuminate the significance of the appeal to peace:

Paul's answer is pragmatic, as implied by the words 'God has called us to peace'. This is similar to the early rabbinic technical phrase 'for the sake of peace' which indicated a pragmatic solution to a difficult legal decision.⁴² (footnote his, 1 CORINTHIANS 7 IN THE LIGHT OF THE JEWISH GREEK AND ARAMAIC MARRIAGE AND DIVORCE PAPYRI)

Let's look at his summary: it relates to a difficult **legal decision**. Looking at the examples he gives we have some kind of breach of law but because of other factors **the remedy should not be sought nor**

⁴² For example the non-Jewish poor were not strictly allowed to take the gleanings, but they were allowed 'for the sake of peace', and mentally defective people were not punished for minor theft 'for the sake of peace' (mGit. 5:8). Fee regarded it as meaning 'in order to make a good impression on Gentiles' (*First Epistle to the Corinthians*, ad loc.), but I have shown elsewhere that it was rabbinic legal terminology for what we might now call 'pragmatism' (Instone-Brewer, *Techniques*, 21, 37, 82, 144–45).



granted nor applied because the person is not culpable. So, when an appeal to peace is made, it is an argument that the law has been breached but that no legal action should be taken. Contra Instone-Brewer, it is not primarily an argument for pragmatism (although its application probably will be pragmatic), rather it is an argument for exculpation. In this case we have the breach of the law – the divorce in breach of the law of Christ – and we have the situation that no remedy should be sought against the believer for getting divorced.⁴³ The reason for the no action is that the believer is exculpated from guilt because of extenuating circumstances: they did not consent to the divorce and were not able to stop it happening. This is not the same as a ruling that the divorce itself was right, or that the divorce is effective and that the believer can remarry. No, the divorce is wrong, invalid, prohibited, and ineffective, but the believer is not liable or guilty for it having happened in such cases. This is the perfect opposite to Mat. 5:32 where the husband’s responsibility and guilt are confirmed because he did cause the divorce that lead to the adulterous remarriage.

Although Instone-Brewer’s general position might be arguable in other contexts, this context makes his suggestion impossible:



- Paul prohibits divorce absolutely in verses 10 and 11
- In the event that a divorce takes place notwithstanding the prohibition, Paul makes a further prohibition of remarriage by limiting the options to remaining single or reconciling in verse 11. Thus the assumption that divorce always implies a right of remarriage is explicitly excluded up front by Paul.
- The most immediate context is not about the marriage but about the divorce prohibition being violated against the will of the believer by the unbeliever. This is the *only* issue being addressed in this part of the passage.
- Immediately after exculpating the believer divorced by the unbeliever against their will, Paul continues the discussion about the believer saving the unbeliever. He has not moved on to the question of remarriage because it does not arise, it is outside the scope of what he is offering exculpation for.
- Paul does not restrict the divorcee from remarrying ‘only in the Lord’ as he does for widows in verse 39, suggesting this parallel scenario is not in view. Instead what is suggested by the absence of any such comment is that the situation is the same as for the believer: if divorced the options are to remain single or reconcile.

Thus there is **nothing** in the context to suggest Paul is talking about the believer divorced by the unbeliever being allowed to subsequently remarry, and **everything to exclude this suggestion**. The whole discussion is focused on the prohibition of divorce, with no discussion of adequate causes or grounds for divorce, **even when the spouse is an unbeliever**. The question of remarriage is not

⁴³ This is yet another example where Instone-Brewer confounds breach and remedy. He finds an argument not to apply a remedy to be an argument no breach has occurred and that the action in question is lawful. A closer look shows that this is not the case; the issue is a breach of the law for which no remedy is to be sought or given because of extenuating circumstances, as in the other ‘for the sake of peace’ examples.

addressed in this part of the passage at all, having already been prohibited following divorce in verse 11.

The reason for the lack of discussion on remarriage is fairly obvious: one can be divorced against one's will by a spouse disobeying the Lord, but one cannot be remarried against one's will. ***The remarrying spouse has no grounds for exculpation*** unless the first spouse has died, and so Paul offers no such exculpation here.⁴⁴

Paul then presents another argument for his teaching (1 Cor. 7:16-17):

for what, do you know, O wife, whether the husband you shall save? or what, do you know, O husband, whether the wife you shall save? If not, as God did distribute to each.

The wife is called to sanctify and save her unbelieving husband, and the husband is called to sanctify and save his unbelieving wife by following the Lord's teaching and rulings. But God did not predestine individual choices, so you do not know whether you can save either your marriage or your unbelieving spouse. Some will fail and some will succeed. But the calling to follow the teaching and rulings of the Lord still apply. This is Paul's call to follow the teaching and rulings of the Lord whatever the outcome. These teachings and rulings are applicable in all churches and regardless of what the unbeliever chooses to do. The believer was never enslaved to the unbelieving spouse, he or she is the slave of Christ! But Paul releases the believer from the guilt of divorce put upon them without their consent by the unbeliever. The guilt of adultery of the innocently divorced spouse who remarries Paul did not exculpate, and Jesus confirmed with his ruling in Mat. 5:32.

The next part of the passage discusses the rule about maintaining one's status when he was called (1 Cor. 7:17-24). The method of argument here is to provide some examples of status that do not ***require*** change when one converts or afterwards. But the reason for providing these is to prove that an adverse or unwanted status that one inherits from his days before his conversion does not ***necessarily*** require change because of conversion. If it is not necessary, then it provides no basis for setting up a conflict with other laws. This provides an analogical argument showing that ***divorce cannot be justified by the fact that the marriage was contracted before conversion*** and that the spouse is an unbeliever. This means that the life-time marital history of a person cannot be erased by repentance, conversion or forgiveness.

⁴⁴ Forced remarriage is also theoretically possible, as is forced polygamy. None of us would condemn or subject such a person to disciplinary measures, meaning we would offer the same exculpation Paul did for divorce to such cases, without any implication that the resulting relationships are valid marriages. However, these forced remarriages and forced polygamy cases we are discussing are extremely hypothetical now and would also have been then. Paul offers his exculpation for the case that is quite realistic and of concern to his original audience: divorce initiated and completed by an unbeliever without the consent of the believer.

The first example is circumcision and uncircumcision, about which Paul wrote elsewhere, and where change of status was not permitted (Rom. 4:11, Gal. 5:2-3). The second example is slavery status and is a little more qualified, with the suggestion that while change of status was not required and not even expected, manumission is positively encouraged⁴⁵ where available whereas enslavement of the free man is prohibited.⁴⁶ Thus this teaching is not setting out an absolute rule for change of status, rather it is teaching that continuation of one's valid married status at conversion is not a barrier to living the Christian life in those circumstances, and therefore provides no exculpation for breaching the law of Christ to change them – including the law against divorce and against remarriage while the former spouse still lives. To see the conditional nature of the rule against status change, it is easy to see the converse, where change of status *was* required, for example if someone's employment was a brothel keeper or sorcerer.⁴⁷

(In the same way that valid marriages do not become invalid by conversion, invalid or adulterous 'marriages' do not become valid by conversion. The implication is that such relationships should not continue for two reasons:

1. In Christ we are called to sin no more. An invalid or adulterous marriage inherited from pre-conversion times is not a valid excuse to continue sinning.
2. The rule against divorce is applicable to valid marriages and not invalid or adulterous ones, meaning there is no conflict of laws analysis required in invoking divorce (or annulment) in such cases.

These cases have to be the most difficult cases on this topic, e.g. a man marries woman A, but then she abandons him and marries someone else and starts a family with him (2.4 children and white picket fence etc.), and he then marries woman B, a divorced woman, and starts a family with her, then he becomes a Christian. In such a case the man will have an adulterous relationship he must end, but he will have financial and family obligations likely remaining while he can't marry anyone new because his first wife still lives, and she seems quite unlikely to become available to return to him, and even if she does, he might not want her back (or she might not want him back). This kind of

⁴⁵ Our analysis here allows us to resolve the issue that a significant number of scholars have concluded that Paul discouraged rather than encouraged manumission in this passage. See 12 Reasons to Understand 1 Cor 7:21-23 as a Call to Gain Freedom here https://www.pbpayne.com/wp-admin/1_Cor_7-21_escape_slavery.pdf

⁴⁶ The situation of the free man becoming a slave also implies the same exculpation for the believer enslaved against his will. Typically, slavery was the result of insolvency, but it was also common from being captured in war or for being convicted for a crime, and so this would most likely happen involuntarily.

⁴⁷ E.g. Act 19:19. The early church had an extensive list of occupations one was required to quit to be accepted for baptism, including magistrates, commanding army officers, and those with the power of the sword, although rank and file soldiers were allowed to remain in the army so long as they vowed not to kill even if commanded to do so. See Hippolytus, Church Order in the Apostolic Tradition.

case is hard for all involved, and it is why the church needs to be more active in teaching Christian marriage law and regulating marriage solemnisation so that invalid and adulterous marriages avoided, at least inasmuch as can be through teaching and practice. Sadly Christians today are not only divorcing, they are marrying divorced people and are remarrying with church blessing or toleration, meaning that we now need to deal with these very difficult cases that happened *while the parties purported to be Christians and to be under the pastoral care and teaching of the church elders!*)

Before leaving this section, we note another contradiction of Instone-Brewer’s theory. He says that Jesus ruled the ‘any matter’ divorce void, invalid an ineffective, meaning that both divorced persons were then still married to each other and both commit adultery if they remarry. But then he says that Paul teaches that an unbeliever can divorce a believer for no cause or any cause, and **then the divorce itself is adequate cause to end the marriage** and to free both parties to remarry. Thus Instone-Brewer has Paul contradict Jesus in ruling that the believer is ‘not bound’ to the marriage ended by the supposedly invalid divorce that both Jesus and Paul allegedly condemned and ruled ineffective. Instone-Brewer has Paul teach that marriage is terminable by simple repudiation without cause – repudiation itself is cause for divorce and gives freedom to remarry. (The only catch is that the person invalidly divorced by their spouse must accept its finality, then it becomes valid? In remarrying is not the invalidly divorced wife accepting the divorce and thus clear of the charge of adultery?) Thus all divorces are valid and effective, and there are no restrictions on divorce at all, and all divorces entitle both parties to remarry. Even the divorce certificate required by Moses seems to be redundant (as on page 202)!

The next section of the passage addresses the question of virgins. The issues covered include whether to get married or not, making and breaking engagements or betrothals, and devotion to the Lord. The background of the passage seems to be the same issues as we have noted before: some were rejecting sexual relations and marriage, and so Paul should be seen as acknowledging and addressing some of the arguments against marriage applicable to virgins and the betrothed.

Paul warns that there is an emerging distress. We can identify this distress by comparing the common elements from the Olivet Discourse:

Element or term	In Olivet Discourse	In 1 Cor 7:26-35
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Element or term	In Olivet Discourse	In 1 Cor 7:26-35
Distress	'for there will be great distress (Greek: <i>ananke</i>) on the land and wrath against this people' (Luke 21:23)	'the emerging distress (Greek: <i>ananke</i>) (7:26)
Pressure	'then there will be great suffering' (Greek: <i>thlipsis</i>) (Mat 24:21)	Worldly trouble (Greek: <i>thlipsis</i>) (7:28)
Appointed time shortened	'Unless those days were shortened, no flesh would survive' (Mat 24:22)	'the appointed time has grown short' (7:29)
Sparing flesh	'Unless those days were shortened, no flesh (Greek: <i>sarx</i>) would survive' (Mat 24:22)	Worldly (Greek: <i>sarx</i>) trouble, and I am trying to spare you (7:28)
The passing of the age / world ⁴⁸ / heaven and earth	when will these things be, and what will be the sign of your coming and of the close of the age? (Mat 24:3) 'Heaven and earth will pass away, but my words will not pass away.' (Mat 24:35)	For the present form of this world is passing away (7:31)
Marriage inauspicious	For as in those days before the flood they were eating and drinking, marrying and giving in marriage, until the day when Noah entered the ark, and they were unaware until the flood came and swept them all away, so will be the coming of the Son of Man. (Mat 24:38-39) And And alas for women who are pregnant and for those who are nursing infants in those days! (Mat 24:19)	Yet those who marry will have worldly troubles, and I would spare you that. (7:28)

⁴⁸ Note that the age, as in Jesus' 'this age', is sometimes referred to as the 'world' (Greek: *kosmos*), e.g. in Eph. 2:2 'according to the age of this world.'

Element or term	In Olivet Discourse	In 1 Cor 7:26-35
Time context	Truly, I say to you, this generation will not pass away until all these things take place. (Mat 24:34) i.e. approx. 40 years from 33 A.D. to 73 A.D.	Written in about 57 A.D. and warning of immanent distress that affects decisions to marry and start a family at that time.

Jesus had a special concern for the children of his generation:

And there followed him a great multitude of the people and of women who were mourning and lamenting for him. But turning to them Jesus said, “Daughters of Jerusalem, do not weep for me, but weep for yourselves and for your children. For behold, the days are coming when they will say, ‘Blessed are the barren and the wombs that never bore and the breasts that never nursed!’ Then they will begin to say to the mountains, ‘Fall on us’, and to the hills, ‘Cover us.’ For if they do these things when the wood is green, what will happen when it is dry?” (Luke 23:27-31)

Jesus told those women that their children would suffer the Last Days judgement on Israel predicted in Isaiah 2-4, when they would hide in the caves and holes in the ground (Is. 2:19-21). At this time:

And seven women shall take hold of one man in that day, saying, “We will eat our own bread and wear our own clothes, only let us be called by your name; take away our reproach.” (Is. 4:1)

This analysis and prophetic background shows that the emerging distress is the end of the Old Covenant system and the destruction of the Temple at the siege and fall of Jerusalem that Jesus predicted would happen in the First Century generation was basis for Paul’s teaching about the emerging distress that would make marrying and giving in marriage temporarily inauspicious. The intensified persecution coming could end marriages by death or could tear couples apart by force, and the persecution could leave many Christian brothers and sisters injured or unable to support themselves, so there are valid reasons for deciding not to get married, at least at that time leading up to the rebellion and the tribulation and the fall of Jerusalem.

In this context it is argued that the one ‘free from a wife’ (1 Cor. 7:27) still refers only to virgins, i.e. the one who has divorced during the betrothal period or who has broken off an engagement. The idiom used by Paul seems to be alternative ways to refer to betrothed (or engaged) and not betrothed (single) virgins. This also seems to be one interpretation of Instone-Brewer, although he wishes to add an additional interpretation to take the context to include those divorced which of

course is outside the scope of the term 'virgins' and that we cannot accept (1 CORINTHIANS 7 IN THE LIGHT OF THE GRAECO-ROMAN MARRIAGE AND DIVORCE PAPYRI).

Finally, Paul concludes with instructions on widows. He teaches that a woman is bound to her husband as long as he lives, but after she is free to marry again, only in the Lord. Somehow Instone-Brewer sees this as an argument from the right of the divorcee to remarry anyone she wants, to the equal right of the widow. As we have already worked through the passage and shown that it teaches the opposite concerning the legality and validity of divorce and the freedom of divorcees to remarry, we have already refuted this claim. And the fact that Paul teaches in the passage that a divorcee must remain single or be reconciled to their spouse, and that a woman is bound to her husband as long as he lives obviously contradicts Instone-Brewer's interpretation.

Both this last teaching and Romans 7:1-3 teach positively that a woman is bound to her husband as long as he lives and negatively that she is not bound and is free to remarry when he is dead. As elsewhere, Instone-Brewer wishes to accept the second part but qualify the first with exceptions that Paul never spells out or even suggests in his writings. By this point in our critique we can see why both are perfectly suitable summaries of his teaching.

Marriage as an Irrevocable Covenant (Eph. 5:22-33)

We will finish this exegetical part with one last teaching where Paul links the marriage of Christ with the church with the one-flesh teaching from Gen. 2:24. Paul makes an express parallel between Christ's commitment to his church, and a man's commitment and duty to his wife. A husband must love his wife as his own body, and he who loves his wife loves himself. Paul is teaching and affirming the 'one flesh' teaching of Gen. 2:24 that Jesus quoted to refute divorce, by quoting it also and applying it prove the extent of a man's duty to his wife.

What this means is that the teaching on Christ's duties of love for his church are applicable to a man's duties of love for his wife. So, when Paul teaches that Christ is faithful to his faithless church, it is applicable to a man's duties to his wife:

if we are faithless, he remains faithful—

for he cannot deny himself. (2 Tim 2:13)

Note that Paul's quote rests on the identity of Christ with his church, the church is his body, his flesh. Christ is one flesh with his church, and so even if she is faithless, he is faithful. This is exactly the same argument Paul uses in Eph. 5:22-33.

What this boils down to is that the covenant of a man with a wife is **irrevocable**. There is no going back, even in the case of breach. Paul expressly states that God's gift and call are irrevocable (Rom. 11:29). Israel was called to the wedding feast (Is. 25:6), she was called to be betrothed (Hos. 2:16-20) and to be remarried in the New Covenant (Jer. 31:31). Paul said that **that** calling was irrevocable. Jesus said that the wedding would go ahead notwithstanding the invited guests refused to come, and it would happen at the time that the undeserving guests were judged, when the king was angry, and sent his troops and destroyed those murderers and burned their city (Mat. 22:1-14.) He said it was being fulfilled by Israel in the First Century Christian Church (Rom. 11:1-5; 2 Cor. 11:2). Paul taught that Jesus came to confirm the promises made to the patriarchs (Rom. 15:8).

So, when Paul teaches that God's love for Israel is irrevocable and was in the process of fulfilment notwithstanding Israel's unfaithfulness, and that Christ's love for the church is the standard for a man's love for his wife, based on the one-flesh teaching, he affirms that marriage obligations are irrevocable too.

Practice Notes

In writing this paper we have addressed the exegetical and legal issue of divorce and remarriage but we have not addressed the practical and pastoral challenges and change required to move lifelong marriage from a crapshoot to a confident expectation and a Christian practice.

In New Zealand about one third of marriages are ended by divorce. With around half of all births to mothers not *de jure* married to the father of their child, marriage formalities are commonly avoided and sexual activity before making a marriage commitment is normal (reservation for and waiting until marriage formalities is now rare). Our practice is most commonly for people to have a number of sexual relationships before deciding who is for keeps, and then (maybe), making a formal marriage commitment, which still has a one third chance of not lasting as long as they both live. In 2012, the median age at first marriage was 30.0 years for men and 28.5 years for women.⁴⁹ Relationships that do not reach this point have even greater chance of not lasting as long as they both shall live. Children may and frequently do arrive at any stage in this process.

The consequence of this approach is an unstable family structure, with single parent households and blended families very common and even traditional married family structures suffering high rates of

⁴⁹ Statistics New Zealand, see http://www.stats.govt.nz/browse_for_stats/people_and_communities/marriages-civil-unions-and-divorces/MarriagesCivilUnionsandDivorces_HOTPYeDec12/Commentary.aspx

separation and divorce. We have gotten out of marriage about as little as we have put in, which is absolutely minimal levels of attention to risk and commitment to the contract and maximum options and rights to terminate the contract to be free to try the whole process (or parts of the process) again. And again. (In other countries the failures in continence and marriage are sometimes even worse than in New Zealand with extremely high divorce rates (and very low fertility rates) in most of Europe and very high rates of non-marriage and births out of wedlock in South America.)

The decisions we make about sexual activity and contracting marriages are the most serious personal and financial decisions we will ever make, and the present approach is utter folly. If we are to enjoy the abundant life of the New Covenant age in Christ we need to take a whole lot more serious approach. We can't leave these things to chance, follow our feelings and desires and hope it all works out in the end. We will not address this issue in full here and now, but I hope to write another paper that does that later. For now we will look at a few areas where we might be doing things wrong and some alternatives that might improve our results and chances.

Before marriage

Before a person gets married, they should not be engaging in sexual relations with anyone. In recent times past when this was more commonly believed and practiced, there were a number of practices and rules followed to help unmarried people avoid temptation. Such as:

1. Parental control and management of times, places, company and situations where there was an undue risk of sexual temptation (including requirements for chaperones, restrictions of going out alone, limitations on access to alcohol etc.)
2. Similar controls and management by schools and others responsible for activities or care for young people
3. Rules of modesty in dress and personal presentation
4. Rules of avoiding tempting situations such as times and places
5. Rules segregating sexes for some activities
6. Avoidance of media portraying sexual immorality.
7. Teaching about the rules of Christian conduct and marriage.

Further, one concern we see in modern times and culture is late age of marriage, meaning that the before marriage period is elongated. As noted above, In New Zealand in 2012, the median age at first marriage was 30.0 years for men and 28.5 years for women. In part this reflects the practice of having sexual relationships and cohabiting before marriage frequently and for longer periods of time than in the immediately preceding generations. This is radically different from the ancient practice of the Jews of arranging marriages from or soon after puberty, reflecting a pro-marriage policy and an alternative or antidote to unmarried sexual activity by young people.

Contracting marriages

The process and practices for contracting marriages have a significant impact on selection of a spouse, negotiation of terms, and the expectations for conduct in marriage.

1. Finding a potential spouse:
 - a. In many cultures potential spouses are sought out by the parents of the spouses to be. This allows for vetting prospective spouses for their family background, character, credit history, financial status and so on. Willingness to enter into a marriage contract in accordance with the New Covenant laws on marriage and divorce and remarriage would of course be part of the qualifications required.
 - b. Alternative institutions such as a Christian dating / vetting service or intermediaries could also be of assistance if it helped validate material data on qualifications for marriage and suitability for and willingness to contract marriage on Christian terms.
2. Dating and getting to know each other before contracting and consummating marriages is an especially tricky and sensitive area. Tactics and the whole approach to this by Christians concerned about compliance with the New Covenant laws on marriage and sexuality needs to be significantly different from the customs and practices of our wider contemporary Western culture.
3. Negotiation of terms. In many cultures with arranged marriage traditions, the negotiations are done between the families and include financial terms for payment of a dowry as well as elaborate and expensive marriage ceremonies/celebrations. Financial arrangements and terms and wider family and community involvement and expectations can greatly stabilise marriages. They work by significantly increasing the buy-in and commitment levels of the couple, increasing support from and expectations of the families and community on the couple and by making separation or divorce or remarriage more expensive and less socially acceptable. Suitable Christian legal advice and financial, security and transaction structuring are another avenue for promoting more buy-in and lower risk levels.
4. Solemnising marriages. Traditionally Christian churches have wanted to regulate and solemnise marriages to ensure that the couple are eligible (not having been married to a spouse still living, have been baptised and are professing the Christian faith etc.) and that the marriage terms are expressly till death do us part and without the option of divorce whether on grounds or not. Background checking and pre-marriage counselling or courses might also be encouraged or required at this point by churches.

Exception Handling

When sexual behaviour or conduct in marriage is outside the standards of the laws of Christ and the New Covenant, appropriate responses can mitigate the breaches and foster healing and restoration of people and communities to the Garden of Eden and the presence of God (1 Cor. 6:9-11). We have, here in this world, the sanctuary, the Holy City, our refuge from the sin and sickness of the world from where we can get the leaves of the tree of life for the healing of the nations (Rev. 21-22). Our ministry is to reconcile the world to God by not counting men's sins against them (2 Cor. 5:11-21). Here are some areas where we can respond to breaches of law in a Christian manner that can help heal the world.

1. Where a couple have started having sexual relations before entering into an official contracted marriage, they can be encouraged to make their relationship committed and official through contracting express written marriage terms and having a wedding ceremony (cf. Ex 22:16-17; Deut. 22:28-29). But this should not occur if either party has previously contracted a marriage and their spouse is still alive. Both parties should be required to be baptised and to commit to living the Christian faith before the church should be willing to solemnise or bless their marriage.
2. Where a couple are officially married but their marriage contract has not included Christian terms for 'for better or for worse, ... till death do us part' can opt in and upgrade their marriage contracts by formally renouncing divorce and committing unconditionally till death do they part, and entering into appropriate financial arrangements to protect the marriage estate and the interests of the parties in maintaining it.
3. When a couple are having discord and difficulties, support and assistance to them can help restore peace and harmony and a recommitment to lifelong marriage. Reconciliation can be assisted and supported where feasible. Warnings should be given against divorce and remarriage when appropriate.
4. Within the church membership community, standards of compliance with the laws of Christ for marriage should be upheld. This should include at and for baptism, at and for joining membership of a particular congregation, for distribution of communion, as well as for pastor, elder and deacon and deaconess roles in the church organisation. Sins such as adultery should be identified and responded to with corrective and restorative action, and if that fails the result must be suspension from membership and communion (1 Cor. 5; 1 Tim. 3:1-5).
5. For baptisms and new memberships, a church can require a marriage upgrade and formal commitment to renounce divorce and a till death do us part duration term, but not before checking that both parties have not contracted previous marriage where the spouse still lives.
6. For those living in an adulterous relationship (has been married to someone else who is still living but is having a sexual relationship with a third person, or is in a sexual relationship with such a person), baptism, membership and communion should not be available until such a relationship ends, and a period of penance is completed.

Appendix 1: The exception clause fallacy

This appendix provides a backup argument addressing the case if *porneia* in the exception clause does refer to adultery rather than premarital unchastity.

The absence of the exception in Mark and Luke raises the question of whether the exception is implied nevertheless, as Instone-Brewer claims. There are a range of possible explanations for the absence in Luke and Mark, and the presence in Matthew:

1. It could be implied where absent (per Instone-Brewer)
2. It could be a technicality of such limited application that didn't need to be brought up for those to whom it would not apply or who would not be interested in having an exhaustive technically correct pronouncement. (i.e. it would be implied but it would not be necessary or applicable to every audience)
3. It could be **legally redundant**, but included for rhetorical purposes or other valid reasons in Matthew. This would mean **it might not be implied in Mark and Luke**.

If the exception is not a technicality, and is not redundant, the argument for it being implied has to be strong and it should not undermine the substance of the argument or the way the argument works. But the thrust of the argument leading up to that point is that valid marriages aren't lawful to terminate for breach. If there is a material exception allowing valid marriages to be terminated for breach, the argument itself collapses. The implication is not that there is a material exception, the implication is the opposite: any exception must be something else such as a flaw invalidating the marriage process, so that the exception does not undermine the argument itself. Any post-valid-marriage breaches that are grounds for divorce change the whole argument from a debate about the lawfulness and effectiveness of divorce to a debate about the types of breaches, the sufficient seriousness, the necessary rules of evidence, procedures to be followed, and consequences for innocent and guilty parties and so on. But the argument never goes there here or anywhere else in the New Testament. There is, in the New Testament:

1. No list of substantial breaches that give adequate grounds for cancellation of the marriage contract⁵⁰
2. No list of breaches that are held to be insufficient to entitle the other party to cancel the contract
3. No procedural law on the method of pleading or the evidence required to prove adequacy of grounds for cancellation for breach⁵¹
4. No regulations set out as applicable to remarriage following divorce by the innocent or guilty parties.

Thus we cannot say that any material exception can be just implied into Mark and Luke when the context suggests the opposite.

⁵⁰ It is a fallacy to argue that a list of contractual obligations is the same as a list of breaches for which the contract can be cancelled. I have not seen anything from Instone-Brewer discussing this distinction, and he seems to equate contractual obligations with cancellation rights for any breach. We provide a contractual remedies analysis of marriage and divorce as Appendix 4.

⁵¹ There are procedural laws in the New Testament but nothing connecting them to cancellation of marriage for breach.

This leaves us with two alternatives:

1. It could be a technicality of such limited application that didn't need to be brought up for those to whom it would not apply or who would not be interested in having an exhaustive technically correct pronouncement. (i.e. it would be implied but it would not be necessary or applicable to every audience)
2. It could be legally *redundant*, but included for rhetorical purposes or other valid reasons in Matthew. This would mean *it might not be implied in Mark and Luke*, contra Instone-Brewer.

We will return to the first alternative later, but for now we can consider the last.

In Mat. 19:9, the context is that the Hillelites, supposedly, argued for valid divorce without requiring the cause of sexual immorality (here characterised as adultery) on the part of the wife. So here it is natural to expect some castigation of their position as turning a case with no sexual immorality into a licence and a means to commit adultery in getting rid of the first wife and taking another and in causing her to take another man. Thus the ruling of Jesus could be modified to highlight this specific scenario and implication.⁵² But to take from this that in the case of sexual immorality (adultery) on the part of the wife after the marriage is validly contracted, that the man in divorcing his wife and taking another, does not commit adultery, is the *logical fallacy of denying the antecedent*.

This is obvious if we change the cause to something more trivial, for example:

If a man divorces his wife, not for burning his food, and marries another, God will burn him.

This obviously does not imply:

If a man divorces his wife because she burned the food, and marries another, God will not burn him.

The case of the man who divorces his wife for this cause is not discussed, it is excluded. Whether God will burn him (whether for divorce or some other reason) in this case is simply not stated.

And thus the ruling is perfectly consistent with:

If a man divorces his wife and marries another, God will burn him.

⁵² Note that in Matthew there is a particular focus on causation and responsibility for sin one permits, causes or fails to stop. For example, in Mat. 5:32, the focus is on the man causing his wife to commit adultery, and the exception clause there could be to highlight the case where the woman was innocent of sexual immorality but as a result of the divorce becomes guilty of adultery. In this case also, therefore, we should not be surprised at the narrow focus on causation of the adultery when Mark and Luke simply record a ruling that: divorce + remarriage = adultery, applicable equally to all parties (husband, husband's new wife, wife, wife's new husband) and with no particular cause, blame or mitigating factors highlighted.

That is, the exception clause could be *redundant*. I have not seen anything from Instone-Brewer (or anyone else for that matter) addressing this obviously possible interpretation.⁵³

Jesus in Mat. 19:9 does not make any ruling whatsoever on the case where a man divorces his wife for *porneia*, whatever *porneia* is or means in this context. It might amount to adultery or it might not, he doesn't say, as he excluded that scenario from his ruling.

Here is another example of the same logic and rhetoric applied hypothetically to capital punishment. Suppose that the 'Hillelites' argued for the death penalty for 'any [serious] crime' basis while the 'Shammaites' said that the death penalty was only for murder alone.

Section	Account 1	Account 2
Question	Is it lawful to put a man to death?	Is it lawful to put a man to death <i>for any crime</i> ?
Answer	Have you not read that in the beginning he created man and gave him life to live in peace? Whom therefore God has given life, let not man take away.	Have you not read that in the beginning he created man and gave him life to live in peace? Whom therefore God has given life, let not man take away.
Counter	Why then did Moses command that every matter be established by the testimony of two witnesses, who will throw the first stones?	Why then did Moses command that every matter be established by the testimony of two witnesses, who will throw the first stones?
Dismissal and ruling	Because of the hardness of your hearts Moses allowed you to put a man to death, but from the beginning it was not so. And I say to you: whoever charges a man with a crime and executes the death penalty commits murder.	Because of the hardness of your hearts Moses allowed you to put a man to death, but from the beginning it was not so. And I say to you: whoever charges a man with a crime, <i>except killing</i> , and executes the death penalty commits murder.

Now in the above example, Account 2 seems to suggest (but does not require) the advocate being questioned accepts the death penalty for murder only. But when compared with Account 1, and the background of the debate about the death penalty, we can see that Account 2 is doing something different. The exception is put there *to contrast between killing as the crime and killing as the remedy*. By killing the one who did not kill, one has started the killing process and has introduced killing where there was no killing. In highlighting this case Account 2 is entering the fray with an argument of particular importance against the 'Hillelites' and picking up on a particular concern for the 'Shammaites'. The suggestion is that the 'Hillelites' are wrong to accept killing as a remedy for

⁵³ As far as I can figure out the so called 'preteritive view' might possibly amount to the same thing, but the material I could find on it (from William A. Heth and Gordon J. Wehham's *Jesus and Divorce*) is so badly argued for that I'm loath to identify with it with the straightforward redundancy concept I present here.

non-killing offences – it devalues killing as a crime by putting other offences on par with it – while the ‘Shammaites’ are being somehow inconsistent in being against killing (the crime) but not against killing (as punishment) – if they really cared about life they would be against all killing. However, it is also evident that the original answer is against the death penalty entirely. It is not an argument against taking away life by murder, the debate is not about murder it is about the death penalty so the answer provided addresses *that* issue. The murder issue is being used as a wedge. The advocate is against both murder and the death penalty and the killing exception clause does not disturb that result when taken in the context. If *porneia* means post-valid-marriage sexual immorality, i.e. adultery, why should the divorce teaching be interpreted any differently?

Appendix 2: Early Christian Reversal

Instone-Brewer has a major historical speculation of the complete loss, without a trace, of the alleged original universal Christian teaching and practice, in common with the non-Christian Torah teachers of the time of Jesus, of acceptance of both divorce and remarriage for every cause, other than two causes Christians distinctively rejected: infertility and the ‘Any Matter’ Hillelite divorce. This loss of teaching, tradition and practice was without any trace of controversy or debate, and was replaced with a diametrically opposite position: a virtually absolute prohibition on divorce, and an actually absolute prohibition on remarriage while a former spouse still lived.

And it came after:

1. a three year teaching ministry from Jesus,
2. an entire generation of Christian evangelism,
3. the leadership and pastoral care of the Apostles and the spread of the gospel to the uttermost parts of the Roman world by A.D. 70.
4. The completion of the New Testament canon by A.D. 70.

Divorce and remarriage is an issue of enormous and universal significance, and it affects every church, even potentially every family. Such traditions and practices one would expect to be quite stable, more so than ideas and theories and teachings. Yet Instone-Brewer’s theory requires an abrupt and absolute change swept the church in short order, leaving not a trace. Although Instone-Brewer gives some possible reasons for the change, in the possible change in legal terminology and

loss of Jewish heritage and influx of gentiles, the difficulties with this historical speculation are not really addressed by Instone-Brewer. The difficulties with this are not hard appreciate or notice, and should give us pause to revisit the theory that requires it.

Appendix 3: Christian Tradition

This topic is one of the unusual cases where I get to defend Christian tradition. The position I defend in this paper unusually has the weight not only of my biblical exegesis, but also the witness of the earliest Christian writers, the Roman Catholic Church, the Church of England, and English Common Law. I get to invoke still-current authority in our English language as ancient as the Book of Common Prayer of 1662, to as recent as the Contract and Commercial Law Act 2017 (NZ).

Traditional Christian position defined

Let's begin with an outline of that traditional Christian position. It's simple: lawful marriage joins an eligible man and an eligible woman into a new family, and these family obligations are for life. Under this position there is no need to discuss the grounds for divorce or the permissibility of the remarriage of divorcees.

Instone-Brewer's position defined

Instone-Brewer's theory starts the same but ends differently: these family obligations can be terminated while both spouses still live by divorce. Divorce is effective in ending marriage obligations, meaning both spouses are free to remarry. Under this position, there is a need to discuss the grounds for divorce and the permissibility of remarriage. Instone-Brewer's position is that there are four grounds for a valid divorce (adultery, neglect of provision of food, neglect of provision of cover or clothing, and neglect of conjugal love), plus an additional condition that the neglect or adultery be persistent and unrepentant. He holds that remarriage is always permitted to both parties of a valid divorce.

Book of Common Prayer

Let's document the traditional Christian position with the aid of the most beautiful use of the English language ever developed: the traditional English Christian marriage service, as found in the Book of Common Prayer authorised in 1662 and still current.⁵⁴

Christ's model of Marriage – unto death

DEARLY beloved, we are gathered together here in the sight of God, and in the face of this Congregation, to join together this man and this woman in holy Matrimony; which is an honourable estate, instituted of God in the time of man's innocency, signifying unto us the mystical union that is betwixt Christ and his Church

Note the allusion to Eph. 5:25-33 where a man's duty of loyalty to his wife is required to be modelled on Christ's expression of that duty in pouring out his life unto death for the forgiveness, healing, cleansing and perfection of the bride, his church. This is a powerful exegetical basis for the position that the man's obligations under the marriage are unconditional, irrevocable and until death. Instone-Brewer's book does not address this exegesis at all.⁵⁵

Impediments to Lawful Marriage – already married

Therefore if any man can shew any just cause, why they may not lawfully be joined together, let him now speak, or else hereafter for ever hold his peace.

And also, speaking unto the persons that shall be married, he shall say,

I REQUIRE and charge you both, as ye will answer at the dreadful day of judgement, when the secrets of all hearts shall be disclosed, that if either of you know any impediment, why ye may not be lawfully joined together in Matrimony, ye do now confess it. For be ye well assured, that so many as are coupled together otherwise than God's Word doth allow are not joined together by God; neither is their Matrimony lawful.

⁵⁴ The 39 Articles of Religion do not have any articles on marriage, divorce or remarriage, but they do refer to and authorise the Book of Common Prayer which contains the Form of the Solemnization of Matrimony, and a Homily on Matrimony notable for its extensive discussion of spousal abuse and neglect without any hint of either permissible separation or divorce.

⁵⁵ On pages 253-254 Instone-Brewer discusses St. Augustine's position and quotes him to the effect that Eph. 5:25-33 taught that 'the nuptial bond has a permanent obligation, and can be cancelled neither by separation nor union with another.' The indissoluble nature of marriage is equivalent to and is the result of the irrevocability of the contract, and the exclusion of the remedy of cancellation for breach of the contract. In the same way a person who converted and was baptised, and then apostatised and then repented would not need to be baptised again, showing that the validity of baptism was permanent, he argued that the obligations and status of the marriage was permanent notwithstanding breaches, separation and union with someone else. Instone-Brewer says the logic seemed impeccable to Augustine's contemporaries, but never attacked either the logic or the exegesis itself. We addressed this powerful passage earlier in the paper.

At which day of Marriage, if any man do allege and declare any impediment, why they may not be coupled together in Matrimony, by God's law, or the laws of this Realm; and will be bound, and sufficient sureties with him, to the parties; or else put in a caution (to the full value of such charges as the persons to be married do thereby sustain) to prove his allegation: then the solemnization must be deferred, until such time as the truth be tried.

The English law requires the reading of the Banns, public announcements in three Sunday church services before the wedding, of the intended marriage ceremony, and inviting any objections. This practice reflects the importance the Christian church traditionally places upon avoiding invalid marriages, and the care she takes to supervise and ensure, to the best of her ability, that invalid marriages are not contracted, and that marriages contracted are valid. This is done by checking for impediments. The main impediment to valid marriage is that the would-be spouses have already been validly married and that marriage has not been ended by the death of the other spouse. Instone-Brewer's book discusses practice for solemnising marriages and remarriages without any discussion whatsoever about the need for any procedures to identify impediments to lawful marriage.

Note also the exegesis of Mat. 19:6 making the action of God in joining the two co-extensive with the lawfulness and validity of the marriage itself, under God's law. Divorce is invalid and prohibited to the extent that the marriage was validly contracted, and invalid marriages are the only ones man may separate. Instone-Brewer never addresses this exegesis in his book.

And the permission to separate invalid marriages is also shown by the warning that the marriage is only effective if the parties are eligible.

Unconditional Lifelong Obligations Expressly Affirmed

If no impediment be alleged, then shall the Curate say unto the Man,

N. WILT thou have this woman to thy wedded wife, to live together after God's ordinance in the holy estate of Matrimony? Wilt thou love her, comfort her, honour, and keep her, in sickness and in health; and, forsaking all other, keep thee only unto her, so long as ye both shall live?

The Man shall answer,

I will.

Then shall the Priest say unto the Woman,

N. WILT thou have this man to thy wedded husband, to live together after God's ordinance in the holy estate of Matrimony? Wilt thou obey him, and serve him, love, honour, and keep him, in sickness and in health; and, forsaking all other, keep thee only unto him, so long as ye both shall live?

The Woman shall answer,

I will.

Here is the part where we have the first express mention about the unconditional duration of the obligations created under the marriage. The parties expressly and formally vow that their obligations under the contract are irrevocable and unconditional, as long as they both shall live and until the contract is ended by death. This is formal legal language, wherein ***the parties replace the normal rules permitting cancellation of contracts for substantial breach with the special terms for marriage, excluding cancellation for breach or repudiation entirely.***⁵⁶

Then shall they give their troth [pledge of loyalty] to each other in this manner.

The Minister, receiving the Woman at her father's or friend's hands, shall cause the Man with his right hand to take the Woman by her right hand, and to say after him as followeth.

I N. take thee N. to my wedded wife, to have and to hold from this day forward, for better for worse, for richer for poorer, in sickness and in health, to love and to cherish, till death us do part, according to God's holy ordinance; and thereto I plight thee my troth.

Then shall they loose their hands; and the Woman, with her right hand taking the Man by his right hand, shall likewise say after the Minister,

I N. take thee N. to my wedded husband, to have and to hold from this day forward, for better for worse, for richer for poorer, in sickness and in health, to love, cherish, and to obey, till death us do part, according to God's holy ordinance; and thereto I give thee my troth.

Again, the meaning is unmistakable: regardless of how badly the vows might be broken, no matter how grievous the consequences for either of them, the special status created and the duties under the contract are for life and are ended only on the death of one of the parties. Instone-Brewer never addresses this contractual language in his analysis of the wedding vows, nor does he address their

⁵⁶ See section 34, Contract and Commercial Law Act 2017 (NZ), see <http://www.legislation.govt.nz/act/public/2017/0005/latest/DLM6844096.html>

fairly obvious meaning excluding the remedy of cancellation (p. 230-232). Rather, he quotes and discusses them as if they betray, in their continuation of the obligations in marriage recognised in the Old Testament, the like continuation of the availability of the remedy of cancellation for breach.

About the Money

Then shall they again loose their hands; and the Man shall give unto the Woman a Ring, laying the same upon the book with the accustomed duty to the Priest and Clerk. And the Priest, taking the Ring, shall deliver it unto the Man, to put it upon the fourth finger of the Woman's left hand. And the Man holding the Ring there, and taught by the Priest, shall say,

WITH this ring I thee wed, with my body I thee worship [i.e. serve], and with all my worldly goods I thee endow: In the Name of the Father, and of the Son, and of the Holy Ghost. Amen.

The man, in compliance with the injunction of the Apostle to sacrifice himself for his wife, and to pour out his life unto death for his wife, pledges to serve his wife and to endow all his worldly goods into the union, holding nothing back for himself alone. This is of course in contrast to the Jewish and non-Christian marriage contracts Instone-Brewer documents and analyses in his book which include detailed lists of which property remains separate and/or the quantum of damages and/or separate estate the parties (generally the wife) must receive on divorce or death. Instone-Brewer never addresses this major financial and contractual difference even though he quotes an even earlier English version of the same wording (p. 232), as well as numerous other non-Christian marriage contracts that have detailed financial provisions for divorce and liquidated damages, separate property and so on.

No Divorce

Then shall the Priest join their right hands together, and say,

Those whom God hath joined together let no man put asunder.

The traditional exegesis of Mat. 19:3-12 summarised in one sentence: Those married in compliance with the law of God must not divorce. There are no grounds for divorce to discuss, and no exceptions to the rule against divorce, and no lawful remarriage of those joined in that state as long as they both shall live.

Instone-Brewer omits this part of the English wedding service.

English Common Law – legally one person

When a maiden marries Mr. John Smith, she becomes Mrs. John Smith.

The oneness in marriage has been taken very seriously and literally, at law:

By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and cover, she performs every thing. ... Upon this principle, of a union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquire by the marriage. I speak not at present of the rights of property, but of such as are merely personal. For this reason, a man cannot grant anything to his wife, or enter into covenant with her: for the grant would be to suppose her separate existence; and to covenant with her, would be only to covenant with himself: and therefore it is also generally true, that all compacts made between husband and wife, when single, are voided by the intermarriage. ... If the wife be indebted before marriage, the husband is bound afterwards to pay the debt; for he has adopted her and her circumstances together. If the wife be injured in her person or her property, she can bring no action for redress without her husband's concurrence, and in his name, as well as her own: neither can she be sued without making the husband a defendant. (William Blackstone, *Commentaries on the Laws of England*, Vol, 1 (1765), pages 442-445)

This legal concept is similar to the law on the capacity of women to make vows in Numbers 30, which focused on contractual capacity of women. As with Jewish law, this rule of one flesh means that there is a single marital estate in the name of the husband.⁵⁷

Whilst we may admit to some difficulties in how these matters were historically practiced in English law, we cannot fault the law for not treating the oneness of the married couple seriously – at least until legislative innovation reversed the position and treated married women as they would later become in large numbers: divorced women.

Ancient Christian Tradition

The traditional English Christian law and practice and teaching on lifelong marriage are not a strange Anglican innovation, rather it is the ancient Christian tradition inherited from and still maintained to this day by the Roman Catholic Church.⁵⁸

⁵⁷ The Jewish legal concept, after some stages of development detailed by Instone-Brewer, was that the single marital estate in the name of the husband, against which was charged the financial obligations to the wife, payable on the divorce of the wife or the death of the husband. Whether the wife could have separate property is not particularly clear, but it seems she could have this, if so provided in the marriage contract.

Although some earlier Christian writers permitted (even required) divorce of the unrepentant adulterous wife while disallowing remarriage, the almost universal witness of the Christian writers has been against divorce (absolutely or almost absolutely) and remarriage while the former spouses still lives (absolutely). Instone-Brewer recognises this in his book, and proposes an absolute reversal of position soon after 70 A.D. that we addressed in Appendix 2.

Appendix 4: Contractual Remedies Analysis of Marriage and Divorce

For the purpose of this discussion we will analyse marriage and divorce and rights to remarriage using contemporary New Zealand contractual law, as set out in the [Contract and Commercial Law Act 2017 \(Part 2 Contracts Legislation, Subpart 3 Contractual Remedies\)](#). But first some introductory matters explaining the terminology and concepts:

The parties enter a contract and may make **representations** to make a deal. A false representation is called a **misrepresentation**, which may be innocent or fraudulent.

The contract is the exchange of promises called **terms**. Breaking a term of the contract is called **breach**.

A party to a contract may also reject the contract or 'walk away' from the contract and refuse to perform its obligations and refuse to complete the contract. This is called **repudiation** of the contract.

Contractual remedies law covers the actions that a party can take in the case of misrepresentation, breach and/or repudiation of the contract by the other party. There are a number of remedies available, but the one we are interested in is the rescission of the contract. In New Zealand law this is called **cancellation**.

⁵⁸ Although the polish of the language and the design of the ceremony, and the institutional set up are very well developed, compared to earlier marriage practices which were less formal and less detailed and less well regulated.

Let's look at the law and what is required to provide a right of cancellation to one party if the other party breaches a term of the contract:

Cancellation

36 Party may cancel contract if another party repudiates it

A party to a contract may cancel the contract if, by words or conduct, another party (**B**) repudiates the contract by making it clear that B does not intend to—

- (a) perform B's obligations under the contract; or
- (b) complete the performance of B's obligations under the contract.

This section is subject to the rest of this subpart.

37 Party may cancel contract if induced to enter into it by misrepresentation or if term is or will be breached

(1) A party to a contract may cancel it if—

- (a) the party has been induced to enter into it by a misrepresentation, whether innocent or fraudulent, made by or on behalf of another party to the contract; or
- (b) a term in the contract is breached by another party to the contract; or
- (c) it is clear that a term in the contract will be breached by another party to the contract.

(2) If subsection (1)(a), (b), or (c) applies, a party may exercise the right to cancel the contract if, and only if,—

- (a) the parties have expressly or impliedly agreed that the truth of the representation or, as the case may require, the performance of the term is essential to the cancelling party; or
- (b) the effect of the misrepresentation or breach of the contract is, or, in the case of an anticipated breach, will be,—
 - (i) substantially to reduce the benefit of the contract to the cancelling party; or
 - (ii) substantially to increase the burden of the cancelling party under the contract; or

(iii) in relation to the cancelling party, to make the benefit or burden of the contract substantially different from that represented or contracted for.

Subsection (1) is subject to the rest of this subpart, but does not limit [section 36](#)

38 No cancellation if contract is affirmed

A party is not entitled to cancel the contract if, with full knowledge of the repudiation, misrepresentation, or breach, the party has affirmed the contract.

So, not only a breach of the contract is required, the performance of the term must be essential or ***the effect of the breach must be to substantially reduce the benefit or increase the burden on the other party.***

So now let's apply this to a case of marriage, for the purpose of illustration we will look at the marriage of John and Mary contracted on the below terms:

JOHN

I John, take you Mary, to be my lawfully wedded wife, forsaking all others, to have and to hold, from this day forward, for better, for worse, for richer, for poorer, in sickness or in health, to love and to cherish, till death do us part.

MARY

I, Mary, take you John, to be my lawfully wedded husband, forsaking all others, to have and to hold, from this day forward, for better, for worse, for richer, for poorer, in sickness and in health, to love and to cherish, till death do us part.

Now the complaint heard is that the wife has subsequently breached the terms of the contract by having another man.

The first level of analysis is very straightforward. In the husband is obviously entitled to cancel the contract under section 37 (1) (b) for breach of a term, and the term breached is obviously essential to him under section 37 (2) (a) and/or substantially reduces the benefit on the husband under the contract and/or increases his burden under section 37 (2) (b), and we presume for the sake of argument he has not known about the breach and affirmed the contract under section 38. Thus the case for him being entitled to cancel the contract is obviously made out.

The trouble with this analysis is that it has ignored another legal rule as set out in section 34 of the Act:

34 Remedy provided in contract

If a contract expressly provides for a remedy for misrepresentation, repudiation, or breach of contract, or makes express provision for any of the other matters to which [sections 35 to 49](#) relate, those sections have effect subject to that provision.

What this means is that the parties can provide for their own remedies. Thus they can, *inter alia*, define which terms are essential, the level of change to benefit and burden, and ***the availability or application of the remedy of cancellation.***

And if you look at the terms of the contract this is exactly what they have done: they agreed that the contract and their promises under it would be for better or for worse and would last till the death of one of the parties. Thus they agreed, in substitution of the rules of section 36 and 37 (1) (b) and (c), that the contract could not be cancelled even though the contract was repudiated or breached by the other party (or would be), and even though the effect of the breach (or anticipated breach) of the other party was substantially for the worse.⁵⁹

The particular significance of cancellation as a contractual remedy for a marriage contract is the term of exclusivity. The marriage contract has a term restricting each spouse from having sexual relations with any other person: they must 'forsake all others.' If cancellation is permitted, the effect includes (Sec 42):

(a) to the extent that the contract remains unperformed at the time of the cancellation, no party is obliged or entitled to perform it further:

⁵⁹In this case we can know this for sure about this because the origin of the wording employed by the parties was from a time when the law and the doctrine about divorce meant exactly this. The alternative wording 'so long as we both shall live' has the same legal meaning but I used the 'till death do us part' wording because it does not sound like a condition subsequent, it sounds more like it is: a clause excluding cancellation as a remedy for breach.

The marriage contracts of antiquity analysed by Instone-Brewer are typically written more like business contracts because they *were* more like business contracts: cancellation rights for breach or repudiation were assumed and the parties regulated the quantum of damages payable and the terms that would be regarded as 'essential' to handle those scenarios of cancellation in advance (they set out amounts of liquidated damages). The wording in the case of Mary and John does not discuss any remedies for breach because cancellation as a remedy is excluded, making it unlike a business contract.

The cancellation of the contract implies the freedom to remarry, whereas the exclusion of cancellation as a remedy makes remarriage unlawful until the contract is discharged by death.

However, note that the remedies for repudiation and breach are not necessarily the same as remedies for misrepresentation. It is perfectly possible to have the contract cancellable by a party for misrepresentation, as in the case of the pre-marital unchastity exception we looked at in this paper, but not for repudiation or breach.

But is the marriage contract created and regulated solely by the parties, and is it not instead also subject to the laws and regulations given to us by our Lord? The context of marriage, divorce and remarriage law is not entirely the same as a general commercial context.

Our Lord has instituted and taught us particular essential requirements to contract valid marriages, and particular mandatory requirements for the contract terms and limitations for the remedies in the case of misrepresentation, breach and repudiation. These laws are implemented and applied through the mandatory Form for Solemnizing Matrimony in the Book of Common Prayer, for example.

Living in his kingdom and under his government in this New Covenant age requires us to maintain his standards and comply with his laws and regulations concerning marriage, divorce and remarriage and the result – the one flesh doctrine – puts cancellation of the contract for breach, repudiation or by mutual consent, out of bounds. (As we noted above, it may allow cancellation for misrepresentation, such as of the virginity of the bride under the pre-marital unchastity understanding of the exception clause).

When a party to a marriage adopts the Christian faith and joins the body of Christ, they opt into his jurisdiction and law, and they enter into the marriage contract of the New Covenant. In doing this, we should understand that they renounce divorce and modify their marriage contract, if and to the extent necessary, to be on for better or worse till death do us part terms. Or alternatively, that they vow off divorce, and are thereby subsequently estopped from any divorce action for breach or repudiation.

List of ways to get out of a marriage

Finally we discuss the law and the circumstances in which a person could get out of a marriage, other than on the grounds of breach of a validly entered marriage contract.

The list is surprisingly long! Contract law has a large number of circumstances when relief might be available, and so many of these are potentially applicable to the marriage contract. In providing this

list we are not necessarily saying that they should be applicable or available, rather we are considering the scope of situations where marriage obligations might not continue to be applicable.

Death

This always ends the marriage obligations and generally frees the survivor to remarry (Rom 7:1-2; 1 Cor 7:39). This end of the contract is also in the terms of the traditional English wedding vows. This end of the contract and the obligations under it is so obvious it goes without saying, it would be an implied term if it were not an express term.

It might be possible to agree that the obligation to forsake all others continues after the contract ends by death, and there could be good reasons for so-doing, but these do not concern us here.

Married to Someone Else

This has to be the most common and obvious ground for annulment. This is a capacity issue: a person who is already married does not have the capacity to marry a third person. This is obviously implied by stating that if a man divorces his wife and marries another, he commits adultery: the original marriage is still valid and binding, and the new marriage is adulterous and void. This is an impediment to the validity and lawfulness of the purported marriage.

Marriage induced by misrepresentation

This one is also reasonably common. For example a woman tells a man she is two months pregnant, and he is the father. She knows, however, that she is three months pregnant and that he is not the father. He consents to marry her on this basis, and two months later they marry. Four months later she gives birth and he suspects the child isn't his. He gets a paternity test done and confirms he is not the father. He separates from her and insists he was defrauded and seeks a divorce.

In this case it is not an annulment, rather it is a cancellation of contract for fraudulent misrepresentation.

(If she thought he was the father, but later it turned out he wasn't, this would be an innocent misrepresentation, and would still entitle him to cancel the contract under [section 37](#) of the Contract and Commercial Law Act 2017 (NZ))

Another example of this is the woman who claimed to be a virgin, but was proven not to be on the wedding night, per Deut. 22.

In these cases it is reasonable to consider not just the circumstances and equities of each case, but also rules to ensure that such cases are genuinely cases of misrepresentation of facts that were

essential to the other party, and that actually induced the person to enter the contract. Time limits for exercise of such rights are also appropriate.

In these cases we do not say the marriage is and was void, we say it is voidable or cancellable.

Marriage entered by mistake

This case is where one party enters the contract because of a mistake, and the other party is aware of the mistake. For example, a woman tells her boyfriend she is pregnant and the boyfriend assumes he is the father. The woman knows he is not the father. They agree to get married but then later he finds out he is not the father and claims she took advantage of his mistake, he separates from her and seeks a divorce.

He might succeed under [section 24](#) of the Contract and Commercial Law Act 2017 (NZ). Unlike cancellation for misrepresentation, this remedy is granted by the court rather than by notice to the other party (within a marriage context it is probably appropriate to have recognised church witnesses (investigators) and adjudicators (three judges) for all cases of declaration of nullity and cancellation, rather than leave the parties to decide their own cases, as if by mutual consent.)

The case of the woman who was not a virgin in Deut. 22 could also come under this heading if she did not claim to be a virgin, but her husband believed she was, and would not have married her if he knew.

Illegal Contract

A marriage can be void because it is illegal. For example, a marriage between a man and his father's wife. As we noted earlier in the paper, the restriction on marrying one's father's wife is applicable after the father has died.

This area of law can be a little too productive of illegal contracts and thereby open up elective annulment by finding an illegal relationship with one's wife. The biblical limitations are not particularly narrow, for example they do not prohibit marriages between first cousins (and in many cultures marriage to first cousins is common). However, the Roman Catholic Church at one point increased the restricted degrees from four to seven, making annulment on the grounds of consanguinity more common.

Lack of Capacity

A party may lack capacity to marry for a number of reasons.

This one seems to open a can of worms. Some cases are unambiguous, such as a man purporting to marry another man. Others are more difficult: at what age can a young woman give valid consent to a marriage, or can the necessary consent be validly given by her parents? Although today we have

fairly firm ideas about such matters, they differ significantly from what was taught and practiced at the time and in the culture Jesus ministered to.

It is now a concern in the Philippines to that serious neglect of marital obligations is being construed as 'psychological incapacity' in order to annul marriages. The concern is that one is construing present neglect of marital obligations as an incapacity to be married that extended back to the wedding date and that is incurable, whereas normally the situation is that the party has the capacity but simply chooses not to perform.

Discharge for Frustration

This doctrine is not cancellation for breach and in New Zealand law it is called discharge. This may be available if a contract has become impossible to perform (see Section 60 of the Contract and Commercial Law Act 2017 (NZ)). This might possibly be available when a marriage has been contracted, but it cannot be consummated. This brings us to our next point.

Unconsummated Marriage

A contract is created by offer and acceptance. Generally this will be at betrothal or engagement when the parties offer and accept terms of the marriage. In cultures with arranged marriage and dowry traditions, these terms are negotiated and agreed at this point. The wedding ceremony itself does not signify the making of the contract, but the beginning of its performance. The performance is by the beginning of cohabitation and by the physical union of the parties on the wedding night.

The contractual remedies analysis allows some debate about the point during the process when the marriage becomes irrevocable.

One analysis is that the parties agree to agree, in a non-binding manner, at the engagement or betrothal. The engagement or betrothal can be broken off without damages being payable. This is probably the position for most modern Western engagements. In these cases, the wedding ceremony itself is when the binding agreement is made.

In other cultures, the betrothal or engagement is more binding, and damages will be payable for breaking off the engagement or divorcing one's betrothed. However, as the contract's performance has not really started, generally it would not be considered a valid and complete marriage, which must not be broken off. In 1 Cor. 7:25-38 there is no suggestion breaking an engagement or betrothal is absolutely forbidden.

We suggest that the marriage only become irrevocable and complete and valid when it has been consummated physically. Legal and financial consequences can happen earlier, however the finality

and irrevocability start when all the essential elements have been completed: they have vowed to be husband and wife, and they have become husband and wife physically.

This means that unconsummated marriages can always be dissolved. A marriage might not be consummated because of physical incapacity or for change of mind or because of frustration or because of discovery of fraud or mistake. The financial and legal consequences will vary, but from a policy point of view, we can permit divorce of these unconsummated marriages and remarriage of the parties without significant concern.

Other reasons

Over the centuries, creative minds have developed a significant number of other doctrines and justifications for annulment or cancellation, other than for breach. However, other than those we discussed above with some approval, the remaining reasons proffered are probably not acceptable in Christian law.

The Roman Catholic Church has developed a significant list of defects that can produce an annulment. For example, if one of the parties got married believing that marriage was not necessarily permanent, and could be terminated by divorce.⁶⁰ Another one is 'You and your spouse married believing that marriage is not a religious or sacred relationship but merely a civil contract or arrangement.'⁶¹

Some issues here are quite complex. For example, what if the parties enter the contract by conduct rather than by words? Normally this is a perfectly valid method of entering a binding contract, albeit more difficult to prove. However, just because two people have a sexual relationship and/or cohabit or have children together doesn't necessarily mean that they have agreed to enter into a marriage with all the obligations and rights and benefits involved. But on the other hand, we don't want to make valid marriage a special status available only through the magic words and ritual actions performed by those claiming to represent God who themselves reject marriage!

Part of the legal and cultural developments in Christian law and practice (and Jewish law and practice before that) has been to encourage valid marriages, discourage invalid marriages, and to

⁶⁰ Ironically, this is exactly the scenario that Jesus addressed when he condemned marriages contracted on this understanding being terminated by divorce!

⁶¹ The Roman Catholic idea that marriage is a sacrament isn't too concerning on its face: yes, we do have God's grace come to us through marriage and there is nothing wrong with representing and celebrating it as such. But the grace of God, like the rain, falls on the just and the unjust, and so it provides no special benefits to believers. The trouble is that the doctrine evolved into is something of a parallel world of spiritual status, independent from civil and legal status, and thereby having no legal or civil significance. This relegates the church and its teachings to an irrelevant otherworldly system with no financial or legal incentives or benefits. It reduces the church to a superstition.

discourage sexual activity outside of marriage. This includes encouraging institutional and formal processes around entering marriage. These processes can filter out invalid marriages, and provide more legal certainty and family and financial security.

We also note that many of the causes for annulment are from sexual relationships outside of formal and socially accepted marriage relationships, e.g. lies about paternity.

Appendix 5: ‘nakedness of a thing’ of Deut 24:1

There is a problem with making Jesus agree with the Shammaite school on Deut 24:1-4 – they may have been right that verse 1 referred to divorce for cause, but if Instone-Brewer is right about what they believed, they were wrong to ignore the groundless divorce in verse 3 that seems to be as good as the death of the second husband at ending the second marriage. Deut 22:19, 28-29 also provide two further case laws that seem to imply the practice of divorce without cause normally being available at the husband’s option.

Despite the difficulties he creates for himself, Instone-Brewer wishes to link the ‘nakedness of a thing’ of Deut 24:1 to *porneia* in Mat 19:9. Although on the surface it seems to fit, when examined more closely the ‘nakedness of a thing’ does not mean ‘adultery’ which Instone-Brewer thinks *porneia* means in Mat 19:9.

So why does the ‘nakedness of a thing’ not refer to sexual immorality committed by the wife post-valid-marriage?

The meaning of a word depends on its context. The most immediate context is called idiom. Idiom means: ‘a group of words established by usage as having a meaning not deducible from those individual words’.⁶² This means that we have to look to usage to determine meaning, and that the meaning of the group is particular and narrow.

There is an established idiom for sexual relations in biblical Hebrew, and it is to ‘**uncover the nakedness of.**’ This can be established by numerous examples in Lev. 18 and 20. This would be the natural idiom to employ if Deut 24:1 was referring to unlawful sexual relations. That it does not use this idiom is significant: it means that unlawful sexual relations is probably not intended and we

⁶² From Oxford Dictionaries see <https://en.oxforddictionaries.com/definition/idiom>

need to look instead for the idiomatic meaning of the phrase that is actually used in the passage: the 'nakedness of a thing'.

Notice that the words used in the 'uncovering the nakedness of his ____' is suggestive of the specific acts involved, there is some degree of euphemism, but the removal of clothing covering the private parts is suggestive of going all the way to have sexual relations, one with another, especially when the parties are named. As in 'You shall not uncover the nakedness of your father's wife' (Lev 18:8). In the same way, the 'nakedness of a thing' is suggestive of the meaning.

Nakedness can mean uncovered or exposed. For example, nakedness of land is its vulnerability and lack of protective covering:

And Joseph remembered the dreams that he had dreamed of them. And he said to them, "You are spies; you have come to see the nakedness of the land." (Gen 42:9)

When the nakedness is of the human body, it can be combined with 'flesh' (Hebrew: *basar*), as in Ex 28:42, to make it something like clothing to 'cover their flesh nakedness'.



But what of the 'nakedness of a thing'? The only other use of the exact term is in reference to human dung left uncovered, used just before this case in Deut 23:9-14.

If this is the meaning, it could refer to the uncovering of a repulsive thing, a repulsive or shameful deed. The husband uncovered something repulsive that his wife did, and insisted on divorce on the grounds of it. Whilst Deut 23:14 refers to the physical uncovering or failure to cover human dung, which God found repulsive, Deut 24:1 refers to the metaphorical uncovering or discovery of some deed that the husband found repulsive.

Let's have a look at a few modern English paraphrases of the text that illustrate the meaning of the 'nakedness of a thing' idiom here:

he found something disgraceful about her. (Contemporary English Version)

he's discovered something inappropriate about her. (Common English Bible)

he found out something indecent about her (GOD'S WORD translation)

he finds something about her that he doesn't like. (Footnote: or that she is guilty of some shameful conduct.) (Good News Translation)

He has found something bad about her. (International Children's Bible)

he has found something wrong with her (The Message)

When Instone-Brewer analysed the case in his book he relied heavily upon and agreed with the analysis of Westbrook. This analysis is persuasive, notwithstanding Instone-Brewer's recent rejection of it (private email). Accordingly we should also defer to his scholarship on the meaning of the 'nakedness of a thing' based primarily upon analysis of the legal context of Ancient Near East marriage and divorce laws and practices as well as analysis of the laws of Moses specifically:

In our text in Deuteronomy the first divorce comes about because the husband found "some indecency" [nakedness of a thing] in his wife. The term has been the subject of much debate, beginning with the famous dispute between the schools of Hillel and Shammai in *m. Git.* 9:10. Of the modern scholars, only A. Toeg argued that the term means actual adultery, on the ground that in most occurrences in the Bible [nakedness] is employed as a euphemism for sexual relations (e.g. Lev 18:6). But there can be no question of sexual connotation in Deut 23:15. the only other instance of the identical phrase [nakedness of a thing] where the physical cleanliness of an army camp is involved.

Driver noted that it must be less than actual adultery, since this is punished not by divorce but by death (Deut 22:22), and suggested "some improper or indecent behavior". This seems to us the correct interpretation in light of the comparative material discussed above. In our view [it] is the type of misconduct referred to in CH 141-142 and in 111. Kelub. 7:6. [i.e. misconduct short of adultery] and therefore justifies the husband in divorcing his wife without a financial settlement.⁶³

The modern 'mischief rule' of legal interpretation also suggests that the law is not to define the misconduct of the wife but the mischief of her first husband that it seeks to restrain. The misconduct of the wife is simply an element of the law that does not require a definition. The meaning and the practice and the standard of misconduct necessary to resist payment of financial compensation on divorce is assumed rather than provided for in this law.

At the risk of anachronism we can get some idea from a list of offences that in the First Century supposedly justified forfeiture of the divorce payment:

These are they that are put away without their ketubbah [divorce payment]; a wife that transgresses the Law of Moses and Jewish custom. What conduct is such that transgresses the law of Moses? If she gives her husband untithed food or has connexion with him in her uncleanness, or does not set apart the dough-offering....And what conduct is such that

⁶³ Westbrook, p 398 (page 12 of the pdf), see <https://www.wisereaction.org/ebooks/westbrook.pdf>

transgresses Jewish custom? If she goes out with her hair unbound, or spins in the street, or speaks with any man....Also if she is a scolding woman. And who is deemed a scolding woman? Whosoever speaks inside her house so that her neighbours hear her voice.’
(*Ketuboth* 7: 6.)

 Although these offences seem to be fairly minor, and according to Gordon Wenham (where I sourced the quote from) less serious than those that would have been required at the time Deut 24:1-4 was originally given, what is important for us to note that the purpose of Deut 24:1 is not to enumerate or define what they were. When the purpose of the law, ruling or opinion is to define what they were, they are defined in the manner you see above. The absence of the list of offences or a defined single offence is intentional: that is not what the case is about! And, did you notice that is that actual adultery is never even mentioned?

So, upon what basis can we see Jesus getting dragged into an exegetical debate (that probably post-dated his time, if it even existed as Instone-Brewer speculates) about a subject that the source text only refers to and does not even attempt to define, and in supplying an answer that Instone-Brewer does not even accept as the complete list? Supposedly Jesus just collapsed his own argument, and for what: an incomplete answer to an inappropriate exegetical question on a text that does not even attempt to provide the answer? And by appealing to other texts that do not provide any grounds for divorce either? Really?! This suggestion by Instone-Brewer makes Jesus an exegetical fool as well as a lousy rabbinical debater.

Furthermore, as we noted earlier in the paper, the supposed lexical match between Deut 24:1, and the Shammaite school’s expression of its position (using the same word), is a poor one. Instone-Brewer seeks to gloss over the differences by translating both words as ‘indecenty’ making them identical in the English, to create the impression that the two sources are properly linked and identical (ps. 134 & 152).

As if all this was not enough, even Instone-Brewer puts the last nail in the coffin by taking the position that the ‘thing of nakedness’ is not adultery:

 It is difficult to determine what this “indecenty” was, though it was almost certainly not adultery. (*Deuteronomy 24:1-4 and the origin of the Jewish divorce certificate*)

Instone-Brewer maintains the inconsistency on the basis that Jesus addressed a Rabbinic debate that itself had drifted into positions and exegesis that was not tied up with the original context and meaning of the law of Moses. Jesus cannot be expected to address an exegetical dispute by correctly

discerning the original meanings of the law and its rulings, apparently. This seems to be a somewhat unexpected and awkward position to maintain.