The Hated Wife in Deuteronomic Law

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Abstract
In Deut 21:15-17, a father is required to grant the birthright to his biologically oldest son, when he has both a loved wife and a hated wife, and when the oldest son is the son of the hated wife. A common interpretation of this text is that it seeks to prevent fathers in general from demoting an eldest son and granting the birthright to a younger son. By contrast, this article argues that the text assumes that fathers had the right to demote their eldest and that they would continue to have this right. It suggests that the hated wife is one who has been arbitrarily demoted by her husband to a lower status within the household. Because of this action on the part of the husband, the text requires him to forfeit his right also to demote this woman’s son arbitrarily, a right he would otherwise have retained.

Keywords
Biblical law, inheritance, firstborn, birthright, demotion of wife

Introduction
Much biblical scholarship assumes that the purpose of Deut 21:15-17 was to oppose a longstanding custom: namely, the right of a father to designate any of his sons as his firstborn. The son so designated would then be entitled to the birthright, a set of privileges that came due at the time of inheritance.

1) The author expresses his thanks to the Alexander von Humboldt Foundation in Bonn, Germany, whose grant of a one-year research fellowship at the Ludwig-Maximilians-Universität in Munich helped to support the work for this article.
2) The biblical term for firstborn is bekôr and for birthright, bekōrâ. The principal Akkadian term for firstborn (or “heir [in preferential position], eldest son”) [CAD A/2, p. 174]) is aplu. Other Akkadian terms that can identify a firstborn include māru rabû (“elder/eldest son”) and aḧu rabû (“elder/eldest brother”). In Old Babylonian adoption texts, for instance, the adoptee is often called the aplum (ARM 8 1) or the ahûm rabûm (BE 6/2 24) of the adopter’s family. These two terms can even be combined (BE 6/2 48). There are also terms to designate younger sons or secondary heirs: māru ahû yēbru (“younger son/brother”) and tardennu (“younger sibling,”
The Deuteronomic authors of this text were, according to this view, insisting that the oldest son consistently be recognized as the firstborn and always be the one to receive the birthright. The oldest son would thus acquire an additional share of the estate at the time of inheritance, most likely giving him twice as much of the estate as the portion granted to any other son. The birthright may also have included other privileges, such as the right to administer the division of the estate and to perform cultic rituals reserved for the paterfamilias. The text, though, seems primarily concerned with the size of each son’s inheritance share. It reads as follows:

If a man has two wives, one loved and the other hated, and the loved one and the hated one both bear him sons, with the firstborn son belonging to the hated one, then on the day he bequeaths his possessions to his sons, he shall not be able to designate the son of the loved one as the firstborn rather than the son of the hated one, the (real) firstborn. Instead, he shall acknowledge the son of the hated one as the firstborn in order to give him a double portion of all he possesses. For he is the first of his potency (i.e., virility); the right of the firstborn belongs to him.

In most ancient Near Eastern societies, it was customary for the biologically oldest son to receive the birthright. There is ample evidence, though, for a father’s right to divide his estate among his heirs however he liked. In order to deviate from custom, the father had to create a testament: a set of oral instructions, declared before witnesses and typically recorded in writing. In summarizing the shared features that can be observed across ancient Near Eastern legal systems, R. Westbrook lists five powers that a father could exercise by means of a testament. Among these is the power “to transfer the extra

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3) Regarding the disagreement over the meaning of pî šenayim in v. 17—whether it means a double portion or two thirds of the estate—see E. W. Davies, “The Meaning of PÎ ŠENAYIM in Deuteronomy xxi 17”, *VT* 36 (1986), pp. 341-345.
4) Unless otherwise stated, all translations of biblical and other ancient Near Eastern texts in this article are those of the author.
5) For general discussion and bibliography, see A. C. Hagedorn, *Between Moses and Plato: Individual and Society in Deuteronomy and Ancient Greek Law* (Göttingen, 2004), pp. 201-211.
share from the first-born to another sibling”.\footnote{Ibid., p. 59. The other four are: “to assign specific property to individual heirs”; “to give his daughters an inheritance share alongside their brothers”; “to give his wife an inheritance share”; and “to disinherit a natural heir, for cause” (ibid., pp. 59-60).} This was done by naming a younger son as the “firstborn” or “primary heir”.\footnote{See the discussion of terminology in n. 2. To call a younger son the “firstborn” may seem unusual. The legal systems of the ancient Near East, however, had their fair share of legal fictions. There are the notorious sale-adoptions at Nuzi: outright sales of family property disguised as adoptions. See C. Zaccagnini, “Land Tenure and Transfer of Land at Nuzi (XV-XIV Century B.C.)”, in T. Khalidi (ed.), \textit{Land Tenure and Social Transformation in the Middle East} (Beirut, 1984), pp. 79-94. At Emar, very young children are said to be sold into debt-slavery of their own free will. See the documents published as nos. 83, 205, and 217 in vol. 3 of D. Arnaud, \textit{Recherches au pays d’Aštata: Emar VI} (Synthèse 18; Paris, 1985-87). Another and perhaps more relevant fiction occurs when fathers, in their testamentary declarations, legally transform their daughters into sons and their wives into fathers. This allowed a daughter to inherit and the mother to manage the estate after the father’s death. See, for example, the documents published as \textit{Sumér} 32 133-34 (no. 2) and \textit{RA} 77 16; see also Z. Ben-Barak, \textit{Inheritance by Daughters in Israel and the Ancient Near East} (Jaffa, 2006), pp. 13-108. The legal fiction of naming a younger son as firstborn is no different and no less valid.} In a marriage agreement from Nuzi (HSS 9 24), for example, the groom, who already has sons from another marriage, agrees that, when his new wife bears a son, it is that son who will count as his firstborn (\textit{māru rabû}) and primary heir.\footnote{See J. S. Paradise, “Nuzi Inheritance Practice” (Ph.D. diss., University of Pennsylvania, 1972), pp. 260-261.} An Ugaritic text (RS 94.2168), that records a grant of houses and fields that a certain ‘Abdimilku received from the king of Ugarit, presents a somewhat different identification. The text describes the one who will be ‘Abdimilku’s primary heir and the one to receive much of the granted property as “the one among his sons whom ‘Abdimilku loves” (lines 11-12: \textit{d . hb . ‘bdmlk / b . bnh}).\footnote{See P. Bordreuil and D. Pardee, \textit{Manuel d’Ougaritique} (Paris, 2004), vol. 2, pp. 105-106.} The only clear prohibition on a father’s testamentary powers comes in Laws of Hammurabi §168, which prevents a father from completely disinheriting a son unless he has justifiable reasons to do so.

Because the father possessed these powers, there were times when contractual agreements attempted to limit them. A number of Old Babylonian adoption texts contain a line that, with some emphasis, removes the adoptive father’s right to promote a younger son to the status of firstborn: “Even if PN (adoptive father) has ten more sons, PN\textsubscript{2} (adoptee) will still be his firstborn (\textit{aplu})”.\footnote{See, for example, several of the texts cited in \textit{CAD} A/2, p. 174.} These sorts of contractual limitations confirm that fathers ordinarily had the choice to exercise their testamentary powers if they so desired.
Thus, the father’s right freely to designate the firstborn and to assign shares of different sizes to his sons was a well-entrenched custom throughout the ancient Near East by the time of this Deuteronomic text.\textsuperscript{12}

It is this right that the authors of Deuteronomy are said to be attacking. In fact, there is general consensus among scholars about the interpretation of this text. They state their positions in slightly different ways but essentially arrive at the same conclusion: Deuteronomy forbids fathers from favoring younger sons over the eldest when it comes to the birthright and inheritance shares. I. Mendelsohn wrote that “the innovation in this law is the abrogation of the arbitrary power of the father to choose a firstborn”.\textsuperscript{13} For E. W. Davies, “the basic meaning of the Deuteronomic law is clear and undisputed”. It prevents the father from having “an arbitrary allocation of birthright”.\textsuperscript{14} Many others come to similar conclusions.\textsuperscript{15}

J. Tigay, on the other hand, offers a somewhat different interpretation. He concludes that “from here it appears that the father could divide his property among his sons as he wished, so long as he did not violate the following prescription [in v. 17]”.\textsuperscript{16} I agree with this particular conclusion of Tigay’s but perhaps for reasons different from what he would have anticipated. I argue

\textsuperscript{12}) For further examples and analysis that support this conclusion, see C. Zaccagnini, “Nuzi”, in R. Westbrook (ed.), \textit{A History of Ancient Near Eastern Law} (HdO 72; Leiden, 2003), vol. 1, pp. 600-603; and I. Márquez Rowe, “Ugarit”, in R. Westbrook (ed.), \textit{A History of Ancient Near Eastern Law} (HdO 72; Leiden, 2003), vol. 1, pp. 729-730.


\textsuperscript{16}) J. H. Tigay, \textit{Deuteronomy} (JPS Torah Commentary; Philadelphia, 1996), p. 195. Hagedorn seems to follow Tigay’s point of view: “It seems possible that the father can divide the property as he wishes, as long as he observes the rules of Deut 21:15-17” (\textit{Between Moses and Plato} [n. 4], p. 205). He later concedes, though, that the majority view may be right in its assertion that the text seeks “to fix the right of the first-born biologically” (ibid., p. 207).
that the authors of Deuteronomy do indeed seek to prevent the father from exercising his whims in a particular situation but that the way in which they do so reinforces the father’s basic right to elevate a younger son and grant to him the birthright.

A Different Theory

The text speaks of a “loved” wife and a “hated” wife. Modern versions vary in their translation of these terms, but I will maintain a literal rendering. The text is quite clear in its stipulation that the husband must assign the birthright to the son of the hated wife, should he indeed be the older of the two sons. Even on the face of the text, however, the regulation here is to take effect only in a particular situation: when a husband has both a loved and a hated wife. What I propose here is that Deut 21:15-17 does not abrogate the right of a father to assign the birthright to whomever he wishes but that the passage assumes the ongoing legitimacy of this right. The reasoning I follow in order to reach this conclusion is as follows. Supporting argumentation for these points comes further below.

1. The concept of “hated” refers to a definite, clearly identifiable action on the part of the husband.
2. A hated wife is one who either has been demoted within the household to a lower status than what she previously held or has been divorced and sent away from the husband’s household.
3. Because the text specifies no other action to accompany the “hate”, the hated wife is one who has been demoted rather than one who has been divorced.
4. In Deuteronomic law, the concept of hate (šn’) refers not only to an identifiable action but also to an action that is done arbitrarily, i.e., without reasonable justification in the eyes of the law.
5. When individuals perform such actions, they are required to forfeit certain rights, to which they would ordinarily have been entitled.
6. With its use of the word “hated”, the text is telling the reader that the husband has performed an arbitrary action—in this case, demoting his wife.
7. Because of this arbitrary action toward the woman, the husband must now forfeit a right that he would otherwise have retained. The text’s prohibition points to the idea that what is now forfeit is his right to demote her son and to transfer the status of firstborn to another.
8. It is reasonable to conclude that, if the husband had not treated his wife in this particular way, his right to exercise all his testamentary powers would still be in place and thus, too, his right to give the birthright to a younger son without the need for any legal justification.

Although modern readers tend to interpret the passage in terms of a subjective fondness that the husband feels toward the one wife and not toward the other, such a reading does not suit this text. The terms “to love” (Hebrew ʿāhab; Akkadian rāmu) and “to hate” (Hebrew śānē; Akkadian zēru), when used in legal contexts in the ancient Near East, function as technical legal terms.17 This is especially true for “to hate”. H. Z. Szubin and B. Porten have recently examined the Aramaic term šn’ (“to hate”) in the documents from Elephantine.18 They include in their study a review of the Akkadian term zēru (“to hate”) as it is found in cuneiform legal, diplomatic, and narrative texts.19 They also consider a number of Egyptian demotic marriage contracts that use the verb “to hate”, as well as a range of biblical texts containing forms of šn’.20 Their conclusion is that, in legal texts, “hate” is a technical term that consistently “signifies repudiation or rejection, the effect of which is tantamount to a breach of contract due to demotion of status within an existing relationship”.21 In other words, “hate” stands for an action, taken within the context of a legally defined relationship, that possesses legal substance and is legally demonstrable just as an action that constitutes a breach of contract.

Prior to Szubin and Porten’s article, a number of scholars interpreted “hate” in a somewhat similar way and associated it with the action of divorce.22 It has been claimed, for example, that the standard divorce formula

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19) Ibid., pp. 55-57.
20) Ibid., pp. 57-60.
21) Ibid., p. 56. This runs contrary to some of the arguments of J. E. Lapsley, “Feeling Our Way: Love for God in Deuteronomy”, *CBQ* 65 (2003), pp. 350-369. Lapsley wishes to attribute more emotive aspects to these terms rather than interpreting them in a strictly legal sense, but she does not seem to take the non-biblical evidence sufficiently into account.
in the Aramaic papyri from Elephantine is “I hate PN, my wife” or “I hate PN, my husband”. Szubin and Porten take exception to this and argue that nowhere in ancient Near Eastern legal texts does “hate” in and of itself mean divorce. When used in texts dealing with marriage, they say, the term rather “conveys the meaning of demotion, reduction of status”. Their thesis has merit. In order for the term “hate” to be used in the context of a divorce, it is typically coupled with another verb, such as Akkadian ezēbu (“to leave, abandon, divorce”), to mean that the one spouse—almost always the husband—both repudiates and sends away his wife. Szubin and Porten argue that the same type of verbal coupling (“hate” plus “divorce”) also occurs in the Egyptian marriage contracts that they studied.

Deuteronomy’s family laws that use the term šn’ follow a similar pattern. When Deuteronomy clearly refers to the dissolution of a marriage, it combines šn’ with other actions to denote a husband’s effort to end the relationship. In Deut 22:13-14, the verb šn’ is combined with the phrase “and brings charges against her”. In Deut 24:3, it is combined with the husband’s writing out (ktb) a divorce document (kēritut) and sending her away from his house. The combination of šn’ with another action indicates not only the end of the marriage but also a change in the woman’s external status, that is, her status vis-à-vis those outside the household. It seems unlikely, then, that the authors of Deuteronomy would use the term šn’ entirely by itself to indicate divorce. Szubin and Porten make only a few brief references to Deut 21:15-17 but suggest that the hated wife is one who has been demoted from the position of first-ranking wife, while the loved wife has been promoted thereto. This explanation allows the external status of the hated wife to remain unchanged; she is still married. On the other hand, it indicates that her status within the household has been significantly altered.

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24) “Status of a Repudiated Spouse” (n. 17), 59.
25) Whether they are correct in all the details of their analysis, especially with respect to the Elephantine papyri, requires a great deal more discussion that lies outside the scope of this article.
26) See, for example, lines 17-19 of the Alalakh tablet AT 94 (published as JCS 8 7 [no. 94]): šum-ma [“?a]-u-[×] i-bi-it-ta-ma-al-ki [i]-z[e]-er-šu ù i-zi-bu-šu “if PN (husband) hates and divorces PN2 (wife)”. See also lines 49-50 of the Neo-Assyrian document Iraq 16 37-39, 55 (ND 2307): šum-ma =mīl-ki-ra-[u] . . . e-zī-ri a-e-zib-ši “if PN (husband) […] hates (and) divorces her”.
28) Ibid., p. 59.
Demotion of the Wife

Szubin and Porten have provided the best interpretation to date for understanding what the law in Deut 21:15-17 means by a “hated” wife: one who has been demoted to a secondary rank by her husband.\(^{29}\) What the husband has done is a definite action that takes place within a legally defined relationship. It is also an action—should the sons, following the death of the father, contest how the estate is to be divided—that the older son can use to demonstrate to a court (comprised, perhaps, of local elders) that his mother was “hated” and that he is, therefore, entitled to the birthright despite any attempts, before or after the father’s death, to give it to the younger. But further explanation of how this idea can influence our understanding of this text is necessary.

Explicit references to a husband’s demotion of his wife occur in a relatively small number of ancient Near Eastern legal texts and usually take the form of prohibitions—statements that prohibit a husband from reducing his wife’s status from that of first rank to secondary rank. A number of texts from Nuzi forbid a husband from taking a second wife and thereby demoting the first, should the first be able to bear children.\(^{30}\) In a marriage contract from Alalakh (AT 92), a similar prohibition occurs. The groom is allowed to take a second wife if the first, Naidu, appears to be childless. But then the text states that, if Naidu eventually bears a son, even after the second wife has borne one or more sons, “Naidu is the great one” (lines 19-20: na-i-du-ma gal bu-\(\text{a}^a\)). In other words, she will retain or, perhaps better, regain the status of first-ranking wife upon her bearing a son. From the biblical period comes a recently published Neo-Babylonian marriage contract, involving a woman named Nabê-hinni, that contains another similar prohibition.\(^{31}\) Lines 2-4 of the reverse read: ina u₄₄₄₄ mu d[AM šā-n]i-ti i-taḥ-zu ṣ₄₄₄₄ na-bê-e-hi-in-i ṣ₄₄₄₄-d₄₄₄₄-ta=gal\(\text{a}^a\) “on the day when he (the husband) takes another wife, Nabê-hinni is the great wife”.

\(^{29}\) Cf. E. Nielsen, Deuteronomium (Handbuch zum Alten Testament I/6; Tübingen, 1995), p. 207. With his translations of “vorziehen” and “zurücksetzen” for the terms “loved” and “hated”, Nielsen seems to suggest, at least in part, a similar line of reasoning. He elaborates very little, however, on the function of these terms.


\(^{31}\) The text is BA 2 5. It is housed in the British Museum (BM 33795) and has been published in C. Wunsch, Urkunden zum Ehe-, Vermögens- und Erbrecht aus verschiedenen neubabylonischen Archiven (Babylonische Archive 2; Dresden, 2003), no. 5, pp. 21-24.
This Neo-Babylonian contract indicates that, within the household, there will be one wife who holds the first or highest rank—one who is the *aššatu rabītu.* Moreover, the contract specifies that Nabê-hinni will retain that status, even if her husband decides to take on a second wife. That the contract seeks to prevent the husband from demoting his wife is clear indication that husbands, during this period as well, generally possessed the right to carry out this action. Contracts have no need to specify conditions that are already binding by virtue of law. Contracts typically create rights and duties where none existed before. In addition, one of the most important functions of contracts is to place limits on an individual’s existing rights and to require at times that an individual completely forego certain rights. In this marriage, then, the husband forgoes his right to demote or reduce the status of Nabê-hinni.

Demotion of a wife may also be referred to in other Neo-Babylonian texts, specifically some of those that employ the line, “She is not a wife”. They refer to the possibility that, at some point in the future, the husband will utter this statement concerning his wife. In commenting on two texts in particular, K. Abraham states that “perhaps the husbands in these two documents did not intend to dissolve the marriage, but only wanted to reduce their wife in rank when declaring ‘She is not a wife’. In such a case the phrase would mean ‘She is not a first-ranking wife’.” Her reasoning is based on the fact that these two documents do not include a statement about the husband releasing (*wuššuru*) his wife, a statement that refers to divorce and that occurs in a number of other Neo-Babylonian marriage documents. This may fit the pattern where a sending-away action, such as that denoted by Hebrew *šlh* or Akkadian *ezēbu*, has to accompany an expression of “hate” in order for actual divorce to be indicated. In the absence of such an action, this statement—“she is not a wife”—may well refer to demotion.

The story of Jacob and his two wives is relevant here. Gen 29:30 states that, after consummating his marriage with Rachel, Jacob “loved Rachel more than Leah”. Verse 31 then states that “YHWH saw that Leah was hated (*šenû’â*)”. If we apply the legal connotations of the terms “to love” and “to

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32 For other references to *aššatu rabītu*, see *CAD* R, p. 31, under “c) of first rank”.
34 Szubin and Porten examine a statement from the Elephantine texts that they translate as “she shall not be to me a wife.” They conclude that this statement does indeed mean demotion and not divorce ("Status of a Repudiated Spouse" [n. 17], pp. 60-62).
hate” to this text, Jacob has promoted Rachel to first rank and demoted Leah. Then Leah gives birth to Reuben, and she believes “that now my husband will love (‘hb) me” (v. 32). This expectation is understandable, for, as the Nuzi and Alalakh texts discussed above suggest, it would have seemed natural to families in the ancient Near East for the fertile woman to achieve first rank and for the barren one to be demoted. Leah implies this again when, after birthing her second son, she says (v. 33), “YHWH has heard that I am hated (šnûâ)”. How this story of the two women plays out, especially with respect to their sons and the identity of Jacob’s primary heir, will become important further below.

Hate in Deuteronomy

If demotion of the wife is indeed what the authors of Deuteronomy had in mind, they specified a particular type of demotion with their use of the term śn’. In ancient Near Eastern legal texts, the term “hate” identifies not only a definite legal action but also an action that the law deems to carry a particular kind of motivation. That is, the law judges such actions to be arbitrary, to be without sufficient legal grounds.35 The actions are not considered criminal or illegal, but they lack legal justification.

Consider the situation, raised both in the Laws of Eshnunna (LE §30) and the Laws of Hammurabi (LH §136), where a man “hates” (zêru) and leaves his city. There were certainly times when a man had ample justification for leaving his city, such as in the case of military duty. In the latter instance, or if he is captured and deported in a raid on his own town, the man has the right to reclaim his wife, if necessary, upon his return (LE §29, LH §135). If he leaves out of “hate”, however, both codes say he must forfeit the right to reclaim his wife. The codes do not prohibit his leaving in this instance, nor do they criminalize such behavior. They require instead that he forfeit a particular right that he would otherwise have still been allowed to exercise. This connection between “hate” and forfeiture of rights becomes more clear in laws regarding marriage and divorce.

There were two types of divorce with different sets of consequences in the ancient Near East: divorce with grounds and arbitrary divorce or divorce without grounds. The husband who initiated a divorce with grounds suffered

no financial penalty and typically retained his wife’s dowry, while the husband who initiated a divorce without grounds lost the dowry and often had to pay an additional amount to his wife. The law codes and other relevant texts have no terminology that corresponds precisely to the phrases “with grounds” and “without grounds”. They do make clear, however, that some divorces resulted in penalties for the divorcer and some did not. The penalties required the divorcer to forfeit certain rights, such as a husband’s right to his wife’s dowry. The key distinction that these texts consistently bring forward is whether or not the divorcer can point to misconduct on the part of the spouse as the reason for the divorce. If so—that is, if there are grounds—then there is no penalty for the divorcer and even the possibility for a bit of profit. If not, then the divorce is, in the eyes of the law, arbitrary: rights must be forfeited, and financial penalties ensue. The type of divorce with which the term “hate” is associated is the arbitrary type where the divorcer can cite no such misconduct. The term identifies what we might call a no-fault divorce. Neither party has committed an action that provides the other spouse with grounds for divorce. Still, one of the spouses—again, usually the

36) See Westbrook, “Character of Ancient Near Eastern Law” (n. 5), pp. 48-49: “Since a wife was entitled to restoration of her dowry on termination of the marriage, the consequences of her husband divorcing her would be the loss of that property together with his spouse. Typically, the contract provided for a further financial penalty upon the husband. In the absence of contractual provisions, some systems imposed financial penalties by operation of law…. Penalties for divorce could be avoided if the divorcing spouse could show sufficient grounds. A husband who divorced his wife for adultery, for example, did not have to pay her compensation and could probably keep her dowry”.

37) For further detailed discussion of this point, see R. Westbrook, Old Babylonian Marriage Law (AFO Beiheft 23; Vienna, 1988), pp. 71-78.

38) Again, see Westbrook, “Prohibition on Restoration of Marriage” (n. 34), pp. 401-404. A few scholars have criticized Westbrook on this particular point, but see the response to these criticisms in B. Wells, “Sex, Lies, and Virginal Rape: The Slandered Bride and False Accusation in Deuteronomy”, JBL 124 (2005), pp. 41-72 (esp. pp. 59-60, n. 58).

39) It should be noted, with respect to this point, that some marriage documents from Elephantine indicate that certain types of misconduct on the part of a spouse may count as “hated”. In TAD B3.8, for example, if the wife acquires another husband, “it is hatred” (line 34). The result and the financial consequences are exactly the same, though, as if the wife had “hated” her husband by means of a formal declaration. (Szubin and Porten, “Status of a Repudiated Spouse” [n. 17], pp. 68-70). In a sense, then, this still functions as a no-fault repudiation. Neither spouse was guilty of any misconduct at the moment when the wife decided to repudiate (“hate”) her husband. The difference is between a repudiation in word and a repudiation in deed. Whether the Aramaic text at this point is specifically referring to divorce or to a different type of repudiation is a separate question that cannot be answered here.
man—may initiate a divorce. It was not illegal to do so. But if he did, he did so in the knowledge that it would cost him certain rights and financial assets to go through with ending the marriage.

This same line of reasoning can be applied to the Deuteronomic texts that refer to “hate” for a wife: Deut 21:15-17; Deut 22:13-19; and Deut 24:1-4. Deut 22:13-19 refers to a wife who is hated because her new husband wishes to be rid of her but has no grounds for sending her back to her father. The text says that the man pretends to have sufficient grounds and thus brings false charges. Because the man is lying, however, and never had good reasons for his attempt to end the marriage, the text can use the term “hate” to describe his actions. Deut 24:1-4 describes a woman whose first husband divorced her due to her own misconduct. That much is clear from the line in v. 1, “she did not find favor in his eyes because he found the nakedness of a thing in her”, although the details of what the husband is said to find have perplexed scholars for centuries. The text then says that her second husband “hates (šn’) her… and sends (šlh) her from his house or… dies” (v. 3). This second divorce, in contrast to the first, is paired with the possibility of the second husband’s death. That the latter event would not have been due to the wife’s misconduct makes it unlikely that the divorce would be different in this regard. This second divorce is thus a divorce without grounds. How the term “hate” is used in the context of divorce in other ancient Near Eastern texts supports this conclusion. All of this points to the idea that, for the main text under discussion (Deut 21:15-17), the term “hated” carries a similar connotation and signals that the action on the part of the husband was carried out without sufficient legal grounds—that it was done arbitrarily, as far as the law is concerned. As argued previously, the hated wife in this text is one who remains within the household of her husband but who has been demoted by her husband. It is this demotion—demotion that cannot be blamed on the wife’s misconduct—that constitutes the arbitrary action on the part of the husband.

41) See, for example, the discussion in S. Lafont, Femmes, Droit et Justice dans l’Antiquité orientale: Contribution à l’étude du droit pénal au Proche-Orient ancien (OBO 165; Göttingen, 1999), pp. 87-88.
42) Just as with divorce, there is evidence in ancient Near Eastern legal texts that demotion could take place with grounds or without grounds. The contracts cited above from Alalakh and from the Neo-Babylonian period that prohibit a husband from demoting his wife confirm the husband’s right, albeit blocked in these contracts, to demote without grounds. A provision in the Laws of Hammurabi (LH §141) indicates that a man could demote his wife with...
As with other uses of “hate” terminology, one now expects that the husband in our text will be required to forfeit certain rights. The man in LE and LH who “hates” and leaves his city forfeits the right to reclaim his wife. The man who “hates and divorces” his wife forfeits his right to retain her dowry. The forfeited right in our text can be found in another element common to the three Deuteronomic texts involving a hated wife. Each imposes a prohibition on one of the men mentioned in their respective scenarios, and each begins its injunction with the words lō’ yûkal. Deut 21:16 states that “he (the father) shall not be able (lō’ yûkal) to designate the son of the loved one as the firstborn rather than the son of the hated one” (v. 16). Deut 22:19, when referring to a man who has falsely claimed that his new bride was not a virgin at the time of their wedding, states that “he shall not be able (lō’ yûkal) to divorce her for the rest of his days”. And, Deut 24:4 states that the first husband, who divorced his wife for cause, “shall not be able (lō’ yûkal) to marry her again”, after the woman’s second husband has either died or divorced her for “hate” and not for cause.43

In each instance, a man is required to give up a certain right due to some action that, for the authors of Deuteronomy, counted as “hate”. One possibility is that these authors were attempting to thwart what they saw as unjust profiteering that could result from such actions. In Deut 24:1-4, the text about the twice-divorced woman, the first husband would have initially profited from her misconduct: he would have retained her dowry upon divorcing her and been free from paying her any divorce money. Her second husband then divorces her without grounds, or passes away. In either case, she would have retained whatever dowry she brought into the marriage with her.44 In the case of divorce, she also would likely have received an additional payment. Were the first husband to marry her again, these items—the dowry and the divorce money—would become part of his total assets. He might

43) The only other verse in Deuteronomy to contain a third-person form of the verb ykl is Deut 22:29, and it contains a formulation very similar to the three described here. It does not, however, refer to a hated wife.

44) Her parents could certainly have provided her with a second dowry, without which the prospects for a second marriage would have been extremely dim.
more than double the profit he realized from his first marriage with the woman. The context of Deut 22:19 is more complicated. Suffice it to say that the man is prevented from ever divorcing his wife because he hated her, i.e., tried to rid himself of her without justifiable grounds, and lied about it. If he had not combined deception with his “hate”, the consequences for him would have been decidedly less severe. He now loses, however, any chance of profiting from his dismissal of her in the future. He cannot divorce her for misconduct and retain her dowry, nor can he divorce her even without grounds and thereby free himself of providing for her.

In our text, the husband has hated, i.e., demoted, one of his wives without grounds. He must now give up the right to remove from her son the status of firstborn without grounds. For him to demote this son would allow his other son (the son of the loved, i.e., promoted, wife) to profit thereby. It seems likely that this latter son and his mother would already have profited by virtue of the husband’s demotion of the one wife and his simultaneous promotion of the other. At the very least, the text appears to grant the husband the right to only one arbitrary (“arbitrary” according to Deuteronomistic law) mistreatment of the wife and her offspring. If he chooses to exercise this right by demoting the wife, he forfeits the right arbitrarily to demote her son—a right to which he would otherwise have been entitled. In light of this understanding, it becomes evident that Deuteronomy’s authors assumed that fathers had the right to demote their firstborn sons and would continue to have this right in the future. They tried to insist, however, that fathers must relinquish this right in the particular situation described in the text.

The story of Jacob and his wives and sons becomes relevant once again. According to the logic outlined above, Jacob found himself in the very position described by this Deuteronomic text. He possessed two wives, one loved/promoted and one hated/demoted, and his eldest son, Reuben, was the son of the latter. Based on the rule in this text, he should have felt constrained to grant the birthright to Reuben and not to reserve it for Rachel’s son, Joseph. Yet, he appears to violate this rule in Gen 48:21-22 by declaring that he gives to Joseph “one portion more than to your brothers” (v. 22). If we accept, however, the statements of Gen 35:22 and 1 Chr 5:1-2 (cf. Gen 49:3-4) as

45 For this interpretation, I am following the argument of Westbrook, “Prohibition on Restoration of Marriage” (n. 34), pp. 387-405. While this is not the only possible reading of Deut 24:1-4, it is the one that I find the most convincing. For a recent and thorough substantiation of Westbrook’s interpretation, see D. L. Ellens, Women in the Sex Texts of Leviticus and Deuteronomy: A Comparative Conceptual Analysis (Library of Hebrew Bible/Old Testament Studies 458; London, 2008), pp. 235-248.
referring to genuine parts of the story, we find a solution. Gen 35:22 tells of Reuben’s sexual relations with Bilhah, Jacob’s concubine, and of his father’s discovery thereof. 1 Chr. 5:1-2 then states the following (in the New JPS translation): “The sons of Reuben the first-born of Israel. (He was the first-born; but when he defiled his father’s bed, his birthright was given to the sons of Joseph son of Israel, so he is not reckoned as first-born in the genealogy; though Judah became more powerful than his brothers and a leader came from him, yet the birthright belonged to Joseph.)”46 A rule like the Deuteronomic one would not have permitted Jacob to demote Reuben without grounds. But because Reuben became guilty of misconduct, when he slept with Bilhah, the way became clear, legally, for Jacob to demote Reuben and to promote a younger son of his choosing—namely, Joseph—and to grant to him the birthright. It is not necessary, then, to posit a contradiction between Jacob’s actions and the principle contained in this text.47

**Conclusion**

The provision in Deut 21:15-17 is not an attempt to forbid fathers from assigning the birthright to whomever they please. Thus, it is not an attempt to override the custom, widespread throughout the ancient Near East, of allowing fathers the right to dispose of their property among their heirs arbitrarily, as they saw fit. Rather, it is an attempt to forbid heads of household from combining two arbitrary decisions, both of which would result in negative consequences for the same wife and her son. One such decision is to demote the wife by reducing her status or rank within the household. A husband could reduce his wife’s rank with grounds, due to some misconduct on the part of the wife that would justify his action. On the other hand, he could also reduce her rank arbitrarily, without grounds. By their use of the term *śn’*, the authors of Deuteronomy indicate that the husband within this particular scenario has demoted his wife arbitrarily.

This then raises the question of whether or not the husband can make the second arbitrary decision: the decision to take the birthright from the

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46) It is true that in a number of biblical texts, Reuben continues to be referred to as the “first-born of Israel”. In terms of inheritance, however, he is not treated as the one holding the rights and privileges accorded to that position. See G. Brin, *Studies in Biblical Law: From the Hebrew Bible to the Dead Sea Scrolls* (JSOTSup 176; Sheffield, 1994), pp. 257-261.

demoted ("hated") wife’s son—the husband’s biologically oldest son—and reassign it to a younger son. The authors of Deut 21:15-17 answer that question in the negative. The husband’s right to reassign the birthright without grounds in this particular situation is revoked. Nevertheless, this is a right that the husband would have retained if the events leading to this situation had not occurred. If the text were not assuming that fathers did indeed have the right arbitrarily to demote their firstborn sons, it would have no need to speak to the issue. Moreover, the text implies, fairly clearly it seems, that if the man has not “hated” one of his wives, he is free to give the birthright to any of his sons, even if his reason for doing so lacks legal justification and even if it is a matter of mere favoritism toward a wife or toward a son. In the event that he establishes no direct instructions in this regard, however, the biologically oldest son would inherit the birthright according to well-known, longstanding, and widely practiced custom. It was a custom that had likely endured for millennia because, for the societies of the ancient Near East as for the authors of Deuteronomy, the oldest son was “the first of his [the father’s] potency; the right of the firstborn belongs to him”.