

**WASTED SEED AND SINS OF INTENT: SEXUAL ETHICS IN *DE SPECIALIBUS LEGIBUS*
3.34-36 IN THE CASE OF INFERTILE MARRIAGE**

(for SBL only; not for distribution)

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1. Introduction

It would be difficult to label Philo of Alexandria a latitudinarian in sexual matters. On any assessment, a contrast between Philo's position and the less inhibited perspective most characteristic of rabbinic Judaism is evident in some significant respects.¹ Chief among the differences between Philonic and rabbinic perspectives is the question of the legitimacy of nonprocreative sex. The rabbis sanction various acts of marital intercourse even when consciously nonprocreative. Philo, in contrast, apparently finds no legitimate place for nonprocreative sex.²

De specialibus legibus 3.34-36 is one of the more interesting passages in which Philo deals, in one way or another, with sexual conduct. In this part of the Exposition of the Law, Philo considers the case of infertile marriage or, more specifically, the case of marriage to a sterile wife. The passage is of particular interest for two reasons. First, unlike the surrounding material, Philo appears to have no scriptural basis for his exposition in this section. Second, Philo distinguishes between two particular situations, and offers a contrasting assessment of each: in the one, the wife's barrenness is known before

¹ See especially Daniel Boyarin, *Carnal Israel: Reading Sex in Talmudic Culture* (Berkeley: University of California Press, 1993), who offers a maximalist assessment of the contrast, and David Winston, "Philo and the Rabbis on Sex and the Body" (pages 199-219 in *The Ancestral Philosophy: Hellenistic Philosophy in Second Temple Judaism—Essays of David Winston* [SPhM 4 / BJS 331; Atlanta: SBL, 2001]), who challenges Boyarin's dichotomous analysis at various points. On the presence of an underestimated degree of ambivalence in Palestinian rabbinic thought concerning sex, see David Biale, *Eros and the Jews: From Biblical Israel to Contemporary America* (New York: Basic Books, 1992.).

² This assessment is widely supported in the literature on Philo. See now especially William Loader, *Philo, Josephus, and the Testaments on Sexuality: Attitudes towards Sexuality in the Writings of Philo and Josephus and in the Testaments on Sexuality* (Grand Rapids: Eerdmans, 2011). Both the severity and, in its own way, coherence of Philo's perspective on sex has been underscored by Kathy L. Gaca's analysis of Pythagorean sexual mores in *The Making of Fornication: Eros, Ethics, and Political Reform in Greek Philosophy and Early Christianity* (Berkeley: University of California Press, 2003), and, more briefly, "Philo's Principles of Sexual Conduct and their Influence on Christian Platonist Sexual Principles," *SPhA* 8 (1996): 21-39. Gaca points, across a range of sources, to a strict "procreationist principle" she identifies as a Pythagorean (or Neopythagorean) teaching, and draws attention to the similarities with Philo's position.

the marriage is formed; in the other, her condition is discerned only by extended experience of childlessness once the marriage has begun. In the former case, Philo is outspoken in his reproach of the male partner and condemnation of the sexual conduct that characterizes the union. In the latter, Philo offers what appears to be qualified approval of the childless marriage as a going concern, and, intriguingly, does not specify sexual abstinence for partners who, on the face of it, cannot engage in procreative intercourse. This silence is particularly pointed when viewed against the preceding section. In *Spec. 3.32-33*, Philo unambiguously prohibits sexual activity for the duration of another situation not conducive to procreation, the time of a woman's monthly period. Is Philo's position on sex in the subsequent section at odds with the more austere perspective that characterizes his thought elsewhere? If Philo implicitly approves of ongoing sexual activity in some marriages long since proved to be infertile, why or on what basis might he do this?

My goals in this paper are threefold. First, I will locate and consider *Spec. 3.34-36* alongside certain related sections of the surrounding material with which it shares a conspicuous characteristic: the rationalization of certain prohibitions in the conceptualization of illicit sexual activity as a condemnable wasting of seed. Second, I will consider the phenomenon of the inclusion of this passage in Philo's presentation of biblical law. Third, I will address the particular puzzle identified above. What should we make of Philo's failure to specify sexual abstinence in *Spec. 3.35*, and what might this entail for our understanding of his sexual ethics more widely? If *Spec. 3.35* does indeed provide implicit sanction for ongoing sexual activity in certain cases of infertile marriage, on what basis might Philo (or his interpreters on his behalf) justify the permission? The paper concludes with some brief reflections on the challenges involved in offering a summary assessment of Philo's perspective on marriage and sexual conduct.

2. Philo and the Procreationist Principle

A seemingly conventional perspective concerning sexual intercourse emerges in several texts

written by Diaspora Jews in the Second Temple period.³ Such intimacy is considered appropriate only as engaged in by a man and his wife, and that only as part of a procreative agenda. The perspective itself does not represent a thoroughgoing contrast with the outlook of the Hebrew Bible.⁴ Nevertheless, insofar as the emerging Diaspora perspective reconceptualizes the blessing of procreation as reproductive duty and spells out the procreative agenda as necessary condition for intercourse, so it represents a distinct development in the Jewish ethical tradition.⁵

Repeatedly, then, Philo makes clear that there is one acceptable purpose for entering into marriage: procreation. Philo's position on marriage reflects his understanding of why created humankind was divided into two sexes. The division of created humanity into man and woman (Gen 1:27) was to serve the purpose of reproduction (*Her.* 164; cf. *Opif.* 152). Consequently, those seeking marriage must be guided by the creational goal (*Ios.* 43). Philo's insistence on the procreative purpose of marriage emerges most clearly in connection with Abraham—as well it might, given the patriarch's profile in Philo's beloved Genesis and yet, embarrassingly, Abraham's experience as married yet childless man. It is important that Sarah should clarify the situation as she explains her suggestion that Hagar should act in her stead (*Abr.* 247-249; on Gen 16). Sarah knows that Abraham would

³ Josephus, *C. Ap.* 2.199; *B.J.* 2.161. Among the many Philonic passages that might be cited, see e.g. *Det.* 102; *Congr.* 12; *Ios.* 43 *Spec.* 3.9-10, 3.113; *Virt.* 207; *Mos.* 1.28; *QG* 4.86, 4.154. It may be that the same concern with procreation stands behind one of the maxims found in the *Sentences of Pseudo-Phocylides*: μηδ' ὕβριζε γυναῖκα ἐπ' αἰσχυντοῖς λεχέεσσιν (189). Further afield (as it were), it is also just possible that a similar concern is found in the *Damascus Document* (4Q270 7 i.12-13; 4Q267 9 vi.4-5); in review of the relevant passages, however, William Loader, argues against this reading (*The Dead Sea Scrolls on Sexuality: Attitudes Towards Sexuality in Sectarian and Related Literature at Qumran* [Grand Rapids: Eerdmans, 2009], 172-173). On the existence of a common ethical tradition among Diaspora Jews in the Second Temple period, see Gregory E. Sterling, "Was there a Common Ethic in Second Temple Judaism?" (171-94 in *Sapiential Perspectives: Wisdom Literature in Light of the Dead Sea Scrolls. Proceedings of the Sixth International Symposium of the Orion Center for the Study of the Dead Sea Scrolls and Related Literature, 20-22 May 2001* [eds. John J. Collins et al.; Leiden: Brill 2004]).

⁴ Where, I take it, the general goal of procreation in marriage is presupposed throughout. On marriage in the Hebrew Bible, see Joseph Blenkinsopp, "The Family in First Temple Israel," and John J. Collins, "Marriage, Divorce, and Family in Second Temple Judaism," in *Families in Ancient Israel* (ed. Leo G. Perdue et al.; Louisville: WJK, 1997).

⁵ In speaking of the transformation of blessing into duty, I follow Michael Satlow, *Jewish Marriage in Antiquity* (Princeton: Princeton University Press, 2001), 17-18. Satlow offers an important discussion of roughly similar developments in Palestinian rabbinic sources (17-21). On the interpretive history of Gen 1:28, see Jeremy Cohen, *"Be Fertile and Increase, Fill the Earth and Master It": The Ancient and Medieval Career of a Biblical Text* (Ithaca: Cornell University Press, 1989).

countenance sex with her maid only to fulfill the necessary law of nature—a requirement that Moses, naturally, affirms (*Praem.* 108-109, on Exod 23:26; cf. e.g. *Spec.* 3.112-113; *QG* 4.154; *Congr.* 12; *Virt.* 207).⁶

The Philonic (and Josephan) position undoubtedly reflects the influence of certain Greco-Roman ideals and perspectives. In the Roman world, the decisive transformation of moral disapproval for those single or married but childless into legal penalty occurs with the Augustan marriage laws, the *Lex Iulia de maritandis ordinibus* in 18 B.C.E.⁷ Much earlier, however, from the time of the Persian Wars onwards, legal and ethical norms appear in Greek sources promoting the priority of marriage and a citizen's responsibility to reproduce.⁸ The duty of procreation is intrinsic to the formation of the *oikos*, and thus establishes the priority of marital reproductive intercourse. Plato, concerned with the havoc wrought by uncontrolled sexual passions to individuals and their communities, insists on the duty to marry. Men single from the age of thirty-five onwards should be assessed an annual fine (*Leg.* 721 B, 774 A). Legislation that would limit sexual activity to the purpose of reproduction represents an attractive ideal (*Leg.* 838 E). Not only would such be a natural law, it would control the sexual instinct and promote in men affection for their wives rather than desire for the wives of others (*Leg.* 839 A-B).

While Plato does not, ultimately, push the ideal as a uniform prescription to regulate sexual conduct in all cases—so long as a citizen's reproductive duty is fulfilled, other avenues and thus purposes for sexual intercourse can be accommodated insofar as they are kept in their place—certain subsequent moralists do not balk in a similar way.⁹ The clearest case of such exacting procreationism is

⁶ Cf. *Abr.* 253, where Abraham is said to abstain from sex with Hagar once she is pregnant. Note also Abraham's concerns on sending his servant to find a wife for Isaac (*QG* 4.86, on Gen 24:2). The oath-taking ritual Abraham demands signifies his concern to arrange a marriage that has as its goal the procreation of legitimate children.

⁷ Revised shortly thereafter in 9 C.E. by the *Lex Papia Poppea*.

⁸ On the emergence of these ideas see Daube, "The Duty of Procreation," pages 951-970 in *Biblical Law and Literature. Collected Works of David Daube, Vol. 3* (Berkeley: Robbins Collection, 2003).

⁹ On the importance of distinguishing between perspectives in which procreative marital intercourse is the sole sexual activity permitted, and those in which it is merely the most important kind, see Gaca, *Making of Fornication*, 97-99. In the *Laws*, Plato's primary concerns in sanctioning nonprocreative intercourse are to ensure that it (a) does not impinge on the fulfillment of the reproductive duty (*Leg.* 784 E), and (b) remains a private matter (*Leg.* 841). In the *Republic*, Plato allows those who have passed the age for children to engage in

found in a discourse by the first-century Stoic, Musonius Rufus:

χρὴ δὲ τοὺς μὴ τρυφῶντας ἢ μὴ κακοὺς μόνον ἀφροδίσει νομίζειν δίκαια τὰ ἐν γάμῳ καὶ ἐπὶ γενέσει παιδῶν συντελούμενα, ὅτι καὶ νόμιμά ἐστιν· τὰ δὲ γε ἡδονὴν θηρώμενα ψιλὴν ἄδικα καὶ παράνομα, κἂν ἐν γάμῳ ᾖ.

Men who are not wantons or immoral are bound to consider sexual intercourse justified only when it occurs in marriage and is indulged in for the purpose of begetting children, since that is lawful, but unjust and unlawful when it is seeking bare pleasure, even in marriage.¹⁰

For Musonius and others of a similar persuasion, marital sex for the purpose of procreation is not simply a nonnegotiable sexual duty; it is the only legitimate kind of sexual intercourse at all.¹¹ On the face of it, there would seem to be similarities between Philo's perspective and that advocated by Musonius.¹² Philo appears not to limit the reproductive duty to the marital relationship taken as a whole. Rather, there are signs that he holds that the procreative mandate should pertain to all sexual intercourse engaged in by man and wife.¹³ Isaac's marriage at the age of forty confirms that sexual intimacy with Rebekah will be for the sake of begetting children rather than sensual pleasure (*QG* 4.154). The appropriate use of the reproductive organs is defined by that which lawfully begets and propagates the human race (*Det.* 102). Those who commit infanticide (*Spec.* 3.113)—who engage in sex with their wives but not for the sake of procreation—not only break the laws of nature, they are condemned as pleasure-lovers who pursue sex like animals.¹⁴ Similarly, those who indulge in intercourse without appropriate limits include those who act lustfully with their own wives (*Spec.* 3.9). It would seem that neither the connubial context nor a track record of reproductive success is sufficient

intercourse with whomever they wish, with certain consanguineous exceptions (*Rep.* 461 B-E). On higher and lower standards of conduct in Plato's vision for Magnesia, see *Leg.* 841 A-842 A, and the discussion in Trevor J. Saunders, "Plato on Women in the *Laws*" in *The Greek World* (ed. Anton Powell; Routledge: London, 1995), 591-609 (at 602-604).

¹⁰ Text and translation (adjusted) from Cora E. Lutz, *Musonius Rufus, "The Roman Socrates"* (YCS 10; New York: Yale University Press, 1947). Though the identification of this perspective as Neopythagorean rather than Stoic is an important part of her wider thesis, Gaca accepts the identification of Musonius as a Stoic philosopher.

¹¹ The Pythagorean treatises under the pseudonyms Charondas and Ocellus appear to share this position. See Hölger Thesleff, *The Pythagorean Texts of the Hellenistic Period* (Åbo: Akademi, 1965).

¹² As noted by A. C. van Geytenbeek, *Musonius Rufus and Greek Diatribe* (Assen: VanGorcum, 1962), 73, and followed by Gaca in "Philo's Principles," and *Making of Fornication*.

¹³ A stringency also evident in the particular claim of Josephus in *C. Ap.* 2.199 (cited above).

¹⁴ See Adele Reinhartz, "Philo on Infanticide," *SPhA* 4 (1992): 42-58. Cf. Josephus, *C. Ap.* 2.202.

to establish the validity of sexual intimacy.

3. The Problem with Non-procreative Sex

This procreationist perspective is evident in the Exposition of the Law as Philo addresses the Mosaic legislation concerned with sexual sin. First of all, it is reflected in Philo's treatment of adultery. Whatever else is at stake in breaking the Sixth Commandment, the forfeiture of the opportunity for production of legitimate offspring as marital ties are compromised is constitutive of the tragedy suffered by the betrayed (*Spec.* 3.11).¹⁵ The same perspective emerges in a particular guise as Philo treats, under the heading of the Sixth Commandment, other laws dealing with sexual misconduct.¹⁶ Philo interprets Lev 18:22 as a directive against pederasty (*Spec.* 3.37-42),¹⁷ conduct that merits death for both partners. The wrongdoing of the dominant partner is explained with reference to the illegitimate use of his reproductive resources (*Spec.* 3.39):

ὁ δὲ παιδεραστής . . . τὴν παρὰ φύσιν ἡδονὴν διώκει καὶ τὰς πόλεις τό γε ἐπ' αὐτὸν ἦκον μέρος ἐρήμους καὶ κενὰς ἀποδείκνυσιν οἰκητόρων διαφθείρων τὰς γονὰς

And the lover of boys . . . pursues an unnatural pleasure, and, insofar as it depends on him, renders the cities desolate and empty of all inhabitants by spoiling the seed.¹⁸

Not only does the lover of boys pursue an unnatural pleasure, he works against the ongoing viability of society by wasting the procreative seed.¹⁹ While the male seed should be sown in a place equipped to

¹⁵ Similarly, *Decal.* 126; *Spec.* 4.203. Cf. also Musonius Rufus XII.

¹⁶ In order of occurrence in *Spec.* 3, the cases concern (a) sex during menstruation (*Spec.* 3.32-33); (b) the case of a barren wife (*Spec.* 3.34-36); (c) pederasty (*Spec.* 3.37-42). We will consider (c) first, as the selection of parallel passages in which Philo addresses this subject (or, at least, same-sex intercourse) allows the greatest confidence in staking out Philo's position. For the parallel passages, see n. 24 below.

¹⁷ Note also Lev 20:13. Homosexual behavior among Greeks males primarily took the form of encounters between man and youth; so K. J. Dover, *Greek Homosexuality* (2d ed.; Cambridge: Harvard University Press, 1989); and David M. Halperin, *One Hundred Years of Homosexuality and Other Essays on Greek Love* (New York: Routledge, 1990).

¹⁸ All translations of Philo in this paper are my own.

¹⁹ See e.g. Plato, *Leg.* 836 C; Musonius Rufus XII; Josephus, *C. Ap.* 2.273 on the common trope of homosexual relations as contrary to nature. Most of Philo's treatments of same-sex intercourse concern pederasty. Philo's assessment of sex between adult men does not differ much, however. See Holger Szesnat, " 'Pretty Boys' in Philo's *De Vita Contemplativa*," *SPhA* 10 (1998): 87-107; and Loader, *Philo, Josephus, and the Testaments*, 204-216. For Philo, homosexual intercourse subverts the reproductive mandate incumbent upon humanity in two related ways: (a) such actions compromise possession of the raw materials of reproduction, as

facilitate its germination, instead it is left for dead in a place where growth is impossible. In *Spec.* 3.39, Philo expands on the imagery.

καὶ τελευταῖον ὅτι κακοῦ τρόπον γεωργοῦ τὰς μὲν βαθυγείους καὶ εὐκάρπους ἀρούρας χερσεύειν ἔῃ μηχανώμενος ἐπ' αὐταῖς ἀγονίαν, ἐξ ὧν δ' οὐδὲν βλάστημα προσδοκᾶται τὸ παράπαν, εἰς ταῦτα πονεῖται μεθ' ἡμέραν τε καὶ νύκτωρ.

And finally, in the manner of a bad farmer, he lets the deep-soiled and fruitful fields lie barren, contriving to keep them fruitless, while he labors in things night and day from which no offshoot whatsoever is expected.

Such criticism is clearly shaped by the procreationist concerns considered above. Each man is an agriculturalist with an inviolable responsibility to disperse his seed wisely. Choosing boys rather than women as the objects of his sexual exploits, he fails in this duty. Philo defends the biblical prohibition by appeal to the intrinsically nonprocreative character of same-sex intercourse.²⁰

The image of woman as field to be ploughed or sown is ubiquitous in classical sources.²¹

Correspondingly, the conceptualization of illicit heterosexual sexual activity from a procreationist perspective as a matter of irresponsible husbandry—insofar as it does not consist of vaginal intercourse with a suitable female candidate—is not difficult to appreciate. It is already found in Plato, in the section of the *Laws* considered above in which the Athenian acknowledges the attractiveness of the ideal that would restrict all sexual activity to its natural, reproductive purpose (*Leg.* 838 E).²² Similarly, the Athenian continues (*Leg.* 841 D), it would benefit every state if men refrained from sowing illegitimate

sterility ensues for those who engage in homosexual acts (*Abr.* 135; *Contempl.* 62); (b) alternatively, the problem with same-sex intercourse is that it represents a chronic mishandling of the reproductive materials. It is hard to tell which sense of "spoiling the seed" is in view in *Spec.* 3.39.

²⁰ Philo's procreative concerns do not constitute the only grounds for his criticism of homosexual activity. Philo is also concerned with the sexual entailments of the hierarchy he discerns between the categories of male and female (on which see Richard A. Baer, Jr., *Philo's Use of the Categories of Male and Female* [Leiden: Brill, 1970]). Note, e.g., *Spec.* 3.37 on boys who are sick with νόσον θήλειαν.

²¹ See Helen King, "Sowing the field: Greek and Roman sexology" in *Sexual Knowledge, Sexual Science: The History of Attitudes to Sexuality* (ed. Roy Porter; Cambridge: Cambridge University Press, 1994); and Page duBois, *Sowing the Body: Psychoanalysis and Ancient Representations of Women* (Chicago: University of Chicago Press). Note the Greek betrothal formula, spoken by the father of the bride, παίδων ἐπ' ἀρότω γνησίων (e.g. Menander fr. 720 [Kock], cited in King, "Making a Man: Becoming Human in Early Greek Medicine" in *The Human Embryo: Aristotle and the Arabic and European Traditions* [ed. G. R. Dunstan; Exeter: University of Exeter Press, 1990], 10-19, at 17).

²² I have not searched for earlier examples.

seed in young girls, and sterile seed, against nature, in men. Both parties are unqualified to act as suitable receptacles for the procreative seed.²³

Likewise for Philo this typology of sexual misconduct is not limited to his assessment of homosexual activity.²⁴ He also applies it in his interpretation of Lev 18:19, the Mosaic prohibition of intercourse with a woman during the time of her monthly period (*Spec.* 3.32-33). Where the original concern of the legislation is with the treatment of menstrual impurity, Philo explains the Mosaic interdiction by way of appeal to procreationist principles. Once more, the biblical prohibition accords with the law of nature. More to the point, it directs the husband towards an appropriate use of his reproductive powers (*Spec.* 3.32).

φορὰ τῶν μηνιαίων ὅποτε γένοιτο, μὴ ψαυέτω γυναικὸς ἀνὴρ, ἀλλὰ τὸν χρόνον ἐκεῖνον ὀμιλίας ἀνεχέτω νόμον φύσεως αἰδούμενος καὶ ἅμα προδιδασκόμενος μὴ ἀτελεῖς γονὰς ἀκαίρου καὶ ἀμούσου χάριν ἡδονῆς προῖεσθαι·

Whenever the monthly issue should come about, a man must not touch a woman but must during that time cease from intercourse, respecting the law of nature, and also being taught ahead of time not to bring forth ineffectual seed for the sake of an ill-timed and gross pleasure.

The problem with intercourse during menstruation is that the seed deposited in the womb does not achieve its proper reproductive purpose.²⁵ Philo illustrates the problem with the example of a farmer who, on account of drunkenness or madness, sows grain in pools and streams rather than fertile plains. Such seed will inevitably be wasted; such profligacy is to be avoided. Similarly, a man should refrain from intercourse with a woman when her womb is inundated each month with the menstrual fluids. When the uterine field has drained, however, he may resume intercourse and sow his seed confidently, no longer fearing that what he lays will perish (*Spec.* 3.33). Once more, the biblical prohibition is justified by appeal to the singular purpose of the raw material of reproduction at stake in the act of intercourse. As in the case of homosexual behavior, the agricultural typology of sexual misconduct

²³ The supply of children—a supply of optimum size and quality—for Magnesia motivates the regulations concerning marriage and divorce. See Saunders, "Plato on women," 599-600.

²⁴ Among other Philonic texts, see especially *Contempl.* 62; *Anim.* 49.

²⁵ On the optimal timing for procreative intercourse in ancient Greek medical texts, see e.g. Soranus, *Gynecology*, 1.35-38 (again, the conceptualization of woman as land to be sown is to the fore).

provides a rationalization for the Mosaic legislation.²⁶

4. The Case of the Barren Wife

A similar logic informs Philo's explanation of the Mosaic legislation concerned with sexual misconduct in one more case treated in *Spec.* 3.12-82. In *Spec.* 3.34-36, Philo addresses the case of men who marry and thus have sexual relations with sterile women. To introduce this passage in this way is misleading, however. While, self-evidently, *Spec.* 3.34-36 is presented as part of Philo's exposition of scripture, Philo neither cites nor alludes to any biblical law or precedent as warrant for this section. Nevertheless, Philo pronounces that such men should be reproached, and for a reason similar to that offered in the preceding case. If sex with a menstruating woman constitutes a blameworthy wasting of seed on flooded ground where it is inevitably swept away, sex with a barren woman is a matter of spoiling the seed by ploughing hard and stony land. In addressing this kind of irresponsible husbandry, Philo has a particular case in view: the case of intercourse with women known to be barren at the point of entry into marriage.

θήρα γὰρ αὐτὸ μόνον ἡδονῆς ἀκράτορος ὡς οἱ λαγνίστατοι τὰς γονὰς ἐκουσίῳ γνώμῃ διαφθείρουσιν· ἐπεὶ τίνοσ' ἄλλου χάριν ἐγγυῶνται τὰς τοιαύτας; οὐ μὴν δι' ἐλπίδα τέκνων, ἦν ἴσασι ἐξ ἀνάγκης ἀτελεῖ γενησομένην, ἀλλὰ δι' ὑπερβάλλοντα οἴστρον καὶ ἀκρᾶσίαν ἀνίατον. . . ὅσοι δὲ προδεδοκιμασμένας ἐτέροις ἀνδράσι ὡς εἰσὶν ἄγονοι μνῶνται συῶν τρόπον ἢ τράγων ὀχεύοντες αὐτὸ μόνον, ἐν ἀσεβῶν στήλαις ἐγγραφέσθωσαν ὡς ἀντίπαλοι θεοῦ· τῷ μὲν γὰρ ἅτε φιλοζῶω καὶ φιλανθρώπῳ δι' ἐπιμελείας τῆς πάσης ἐστὶ σωτηρίαν καὶ μονὴν τοῖς γένεσιν ἅπασιν ἐργάζεσθαι, οἱ δ' ἅμα τῇ καταβολῇ σβέσιν τοῖς σπέρμασι τεχνάζοντες ἐχθροὶ τῆς φύσεως ὁμολογουμένως εἰσὶν (*Spec.* 3.34, 36).

For in the quest for only immoderate pleasure, like the most lustful of men, they spoil the seed by voluntary inclination. For on account of what other factor would they pledge themselves to such women? It cannot be on account of the hope of children, which they know will fail, of necessity, to be accomplished; but it is on account of a surpassing madness, and incurable lack

²⁶ I note that my analysis of Philonic texts concerned with wasted seed coheres with the wider history of the idea in Jewish texts sketched by Michael Satlow ("Wasted Seed," *The History of a Rabbinic Idea*, *HUCA* 65 [1994]: 137-175, with brief treatment of Philo on 163-164). Satlow shows that the idea that the non-procreative emission of semen per se is condemnable is found no earlier than the redactional strata of the Bavli; in earlier texts, the actual concern of the authors is not with the waste of the reproductive material itself. I have tried to capture this in my analysis by referring to the idea of wasted seed, as it appears at various points in Philo, as a typology of sexual misconduct.

of self-control. . . . But those who copulate in only this way, with those proved beforehand with other husbands to be childless, they call to mind the manner of pigs or goats, and they should be inscribed in the records of the ungodly as enemies of God. For while he (God), in his love of animals and humankind, through his care of all that is, works for the preservation and continuance of everything that comes into being, those who contrive towards the extinction of the seed at the time of its sowing are, by common consent, enemies of nature.

Such women are known to be sterile on account of a previous childless marital union. And, so the logic goes, if they could not conceive before, their infertility is set in stone.²⁷ Those who desire marriage with such women cannot do so on account of the singular appropriate reason for seeking marital union, procreation. Rather, there is another rationale for their designs. Their pursuit of marriage is none other than a quest for immoderate pleasure, the scheme of those afflicted with madness and a chronic lack of self-control. The core of Philo's concern is with the agenda of the male partner who enters into marriage with a woman experientially certified as barren. These are men who spoil the seed voluntarily,²⁸ whose conduct confirms them as enemies of God and nature. While the philanthropic deity works to sustain the life of everything that comes into being, these men contrive towards the extinction of the seed of life at the point of its sowing.

The concern with the dishonorable purpose of the male suitor furnishes a point of contrast for Philo as he turns to address a second scenario. In an additional section, Philo contrasts the case of one who elects to marry an evidently infertile woman with the case of another who enters marriage ignorant of his young partner's compromised fecundity.²⁹

ὅσοι μὲν οὖν ἄγονται κόρας ἀγνοίᾳ τοῦ πῶς ἔχουσιν εὐθὺς εὐτοκίας ἢ τοῦναντίον, ὁπότεν χρόνῳ μακρῶ ὕστερον ἐκ τῆς ἀγονίας αἰσθανόμενοι στείρας αὐτὰς μὴ ἀποπέμπωνται, συγγνώμης εἰσὶν ἐπάξιοι συνηθείας, βιαστικωτάτου πράγματος, ἡττώμενοι καὶ φίλτρα ἀρχαῖα συμβιώσει μακρᾶ ταῖς ψυχαῖς ἐνεσφραγισμένα λύειν ἀδυνατοῦντες. (*Spec.* 3.35)

²⁷ Philo's discussion in *Spec.* 1.10-11 shows he is aware of the phenomenon of male infertility, but it does not figure as a factor in *Spec.* 3.34-36. For this reference I am indebted to Adele Reinhartz, "Parents and Children: A Philonic Perspective" in *The Jewish Family in Antiquity* (ed. Shaye J. D. Cohen; BJS 289; Atlanta: Scholars Press, 1993), 61-88 (at 70).

²⁸ Note Plato, *Leg.* 838 E, on participants in homosexual sex as murderers ἐκ προνοίας.

²⁹ I take it that the use of κόρη indicates the bride's virginity. This contrasts with the women considered in the first situation, whose infertility has been proved beforehand. Cf. n. 58 below.

Those who take young wives in ignorance of whether at that time they are fertile or not, and when following a long time of childlessness they should perceive that they are sterile and do not send them away, they are worthy of pardon as they yield to intimacy, a most forceful thing, and they are unable to loosen the long-held affection impressed on their souls by long companionship.

As with the previous scenario, the situation Philo addresses is specific. This is not just the case of one who deduces that his spouse is infertile after entering the union in good procreative faith. It is the case of one who on finding himself in this situation following a long period of childlessness does not send his partner away in divorce. Again, Philo diagnoses the internal forces that drive the external behavior. These men are constrained by the force of intimacy,³⁰ captivated by the affection impressed on their souls by long companionship.³¹ For such there is pardon.³²

5. Situating *De specialibus legibus* 3.34-36

What should we make of *Spec.* 3.34-36? First, let us consider the inclusion of this material here in Philo's presentation of the law. Most obviously, *Spec.* 3.34-36 is an example of an exegetical move observable at various points in Philo's interpretation of the pentateuchal legislation in this commentary series: the expansion of biblical law to cover cases unaddressed by the scriptural legislation itself.³³ Closest to hand, the rape of a widow or woman separated from her husband is addressed by Philo in his treatment of the laws concerned with sexual assault (*Spec.* 3.64; cf. Exod 22:16-17; Deut 22:22-29). The treatment of infanticide in *Spec.* 3.110-119 is similar. The exposure of children is not addressed specifically in the biblical material, but Philo deals with the subject immediately following his treatment of foeticide (*Spec.* 3.108-109, on Exod 21:22) as part of his treatment of the Seventh Commandment. Whether or not the Exposition is usefully identified as an example of "rewritten scripture," the kind of

³⁰ I assume *συνήθεια* has a non-sexual meaning here (LSJ: "habitual intercourse, acquaintance"). Note Philo's similar usages in *Spec.* 4.161; *Praem.* 18.

³¹ Cf. Musonius Rufus XIII A, cited below, on the necessity of *συμβίωσις* in marriage.

³² On the meaning of *συγγνώμη*, see n. 48 below.

³³ Similarly, Adele Reinhartz, "Philo's *Exposition of the Law* and Social History: Methodological Considerations," *SBL 1993 Seminar Papers* (SBLSP 32; Atlanta: Scholars Press, 1993), 6-21.

revision of the biblical material by way of legal expansion observable in *Spec.* 3.34-36 is a common enough feature in Philo's paraphrastic handling of the Mosaic code. We can see readily why Philo introduces the additional material exactly here. Following immediately on the treatment of the scriptural prohibition of sex with a menstruating woman, it deals with another kind of non-reproductive heterosexual (in fact, marital) sex.

Of course, the formal analysis begs a follow-up question. Why does Philo expand the legislation in this particular way? The parallels identified above between *Spec.* 3.32-33, 3.34-36, and 3.37-42 point in an obvious direction. The same procreationist discourse and value judgments inform Philo's treatment of sexual misconduct in each case. For one who repeatedly interprets the relevant biblical legislation through a procreationist lens, we might suppose that the case of infertile marriage might also be a point of particular—and, thus, scriptural—interest. To put it another way, Philo's procreationist focus is not merely a rationalization that buttresses his presentation of biblical law. Rather, it is a sufficiently consequential concern that it induces expansion of the Mosaic legislation in this particular way.³⁴

We can press this point much further, however. There is solid evidence that a woman's fertility and its matrimonial significance, ethically or politically considered, was a matter of some concern in the Greco-Roman context in which Philo interpreted scripture. Within the Philonic corpus, there is evidence elsewhere that the question of marriage to a woman ill-equipped to bear children was a live one for Philo—and, perhaps, was live within the Alexandrian tradition of biblical interpretation of which Philo was part. In *QG* 1.27 (on Gen 2:21), Philo scolds those who take wives who have passed their prime as those who destroy the laws of nature. The scenario and assessment Philo proposes closely resemble his concern in *Spec.* 3.34, 36: the decision to wed a woman who cannot (*Spec.* 3.34, 36) or can no longer (*QG* 1.27) conceive is made by those who oppose nature (*Spec.* 3.36) and its laws (*QG* 1.27).

³⁴ This coheres with the observation that Philo's procreationist concerns sometimes emerge in relation to texts that do not, on the face of it, address issues pertaining to marriage or sex at all.

Beyond Philo's works, in the wider context sketched above and within which Philo's own sexual ethics emerge, we observe a concern with the issue of spousal fertility in a variety of settings. In the program of Plato's *Laws*, the cardinal principle for one seeking a wife is to select a partner suitable for the procreation of children (*Leg.* 778 D). In the case of Musonius (XIII A), if the value attached to companionship and love within marriage is striking, it would appear not to dilute the reproductive imperative incumbent on those considering marital union. If the chief end of marriage is community of life, it is so with a view to the procreation of children.³⁵ The reproductive purpose of marriage shapes the advice Musonius offers on the selection of a partner:

ἀλλὰ σώματα μὲν πρὸς γάμον ἀποχρῶντα τὰ ὑγιῆ καὶ τὴν ιδέαν μέσα καὶ αὐτουργεῖν ἱκανά, ἃ δὴ καὶ ἐπιβουλεύοιτ' ἂν ὑπὸ τῶν ἀκολάστων ἦττον, καὶ ἐργάζοιτο μᾶλλον ὅσα σώματος ἔργα, καὶ παιδοποιῶτο μὴ ἐνδεῶς.

But as for the body it is enough for marriage that it be healthy, of normal appearance, and capable of hard work, such as would be less exposed to the snares of tempters, better adapted to perform physical labor, and not wanting in strength to beget or bear children. (Lutz)³⁶

The more specific issue of the ongoing validity of a childless marriage, and the question of what the constituent husband should do about it, was a matter of particular interest in this wider context—and unsurprisingly so for those concerned with the procreative duty, given the opportunity for divorce.³⁷ Indeed, the conciliatory position Philo adopts in *Spec.* 3.35 towards those who do not send their barren wives away most likely betrays Philo's familiarity with—and in some sense, recognition of the legitimacy of—an alternative course of action on the part of men who find themselves in this situation. If there are those who learn by experience that their wives are infertile who choose to remain

³⁵ Gretchen Reydams-Schils notes that for Musonius procreation is not a sufficient condition for marriage (*The Roman Stoics: Self, Responsibility, and Affection* [Chicago: University of Chicago Press], 151). I note that it remains a necessary condition, however.

³⁶ On fertility as qualification for marriage, see Susan Treggiari, *Roman Marriage: Iusti Coniuges From the Time of Cicero to the Time of Ulpian* (Oxford: Clarendon Press, 1991), 100-103. In relation to *QG* 1.27, note Treggiari's observation that it was considered discreditable for a man to marry a woman much older than himself (103).

³⁷ On the provision for divorce in ancient Greece, see Douglas M. MacDowell, *The Law in Classical Athens* (Ithaca: Cornell University Press, 1978). On divorce under Roman law, see Suzanne Dixon, *The Roman Family* (Baltimore: Johns Hopkins University Press, 1992); and Treggiari, *Roman Marriage*. There is clear evidence of divorce in a Roman context as early as the fifth century B.C.E.

in marriage, there are others who proceed to terminate the union. In the society envisaged in Plato's *Laws*, a couple childless throughout the ten-year period designated for procreation is obligated to separate so that the reproductive duty might be fulfilled with a more suitable partner (*Leg.* 784 B, 930 A).³⁸ In Roman law, by tradition following precedent in the case of the senator Carvilius Ruga, from the late third century B.C.E. onwards a husband enjoys the right to divorce his infertile wife (e.g. Plutarch, *Comp. Thes. Rom.* 6.3; *Comp. Lyc. Num.* 3.6).³⁹ In some sources, the assessment of her condition is established over the course of a five-year failure to conceive.⁴⁰ With the addition of the Augustan incentives for reproductively fruitful marriages, it is not difficult to see why men whose marriages have proved childless might look to cut ties with their existing wives and start over.

Perhaps most interesting for comparison with Philo are two Roman examples in which the integrity and motivation of a husband who would elect *not* to divorce his wife in such circumstances is evident, the appeal of the alternative course of action notwithstanding. A first-century B.C.E. funerary inscription (by convention, *Laudatio Turiae*) records the memory of a barren woman who had herself proposed divorce out of respect for the procreative needs of her husband—an offer nevertheless declined by a partner who could not contemplate the severing of the marital bond.⁴¹ Elsewhere, it is alleged that certain contemporaries of Carvilius Ruga himself disapproved of his divorce precisely because they saw marital loyalty as something not to be compromised even by the desire for children.⁴²

In treating the case of infertile marriage in his exposition of biblical law, Philo offers a kind of contemporizing exegesis. The Mosaic legislation expands to encompass an issue addressed in both Greek and Roman sources, and on which, in some important respects, there was disagreement

³⁸ Plato does not address remarriage in *Leg.* 784 B. The procreational condition for remarriage is found in 930 A in connection with those previously divorced on account of temperamental incompatibility.

³⁹ For additional references see Daube, "Duty of Procreation," 959-960; also Alan Watson, "The Divorce of Carvilius Ruga," *TvR* 33 (1965): 38-50.

⁴⁰ Seneca the Elder, *Contr.* 2.5; Quintilian, *Decl. min.* 251. Treggiari, *Roman Marriage*, 462, considers the five-year requirement a legal fiction.

⁴¹ Column 2, lines 31-44; for translation, see Mary R. Lefkowitz and Maureen B. Fant, *Women's Life in Greece and Rome* (3rd ed.; Baltimore: Johns Hopkins University Press, 2005).

⁴² Valerius Maximus 2.1.4; see Dixon, *Roman Family*, 68-69.

concerning the most appropriate course of action. Can we specify the impetus for Philo's inclusion of *Spec.* 3.34-36 within the Exposition more precisely? This is a complex question, and turns in part on several larger issues in the study of Philo.

First, any answer depends in part on the audience and aims proposed for the Exposition of the Law. On the assumption of a Jewish audience, and Philo's corresponding concern with the realia of Jewish family life, Adele Reinhartz suggests that the tone and scale of the discussion in *Spec.* 3.34-36 convey Philo's disapproval of a situation known to him from the Alexandrian Jewish community.⁴³ Alternatively, if Philo's audience in the Exposition is, at least materially, composed of non-Jews, the inclusion of *Spec.* 3.34-36 represents a particular gambit in Philo's overall concern either to explain and promote the law to the uninitiated, or defend it against external attack—a stratagem that proceeds by bringing an issue of wider contemporary concern within the purview of biblical law.⁴⁴

Second, the answer also turns on the relationship presupposed between Philo and other roughly contemporaneous interpreters of scripture. There is no direct evidence in either Josephus or the *Sentences of Pseudo-Phocylides* of a shared exegetical tradition concerning infertile marriage among Diaspora Jews. This does not prove that no such tradition existed, and does not eliminate the possibility that the issue was addressed by other Alexandrian interpreters known to Philo in their treatment of biblical law. It does, however, at least allow that this particular exegetical move—the application of a scriptural-procreationist ethic to the case of infertile marriage—is undertaken by Philo without recourse to other Jewish exegetes or traditions within his most immediate interpretive milieu.

⁴³ "Law and Social History," 17.

⁴⁴ Ellen Birnbaum, *The Place of Judaism in Philo's Thought: Israel, Jews, and Proselytes* (SPhM 2 / BJS 290; Atlanta: Scholars Press, 1996), 20, argues that the Exposition is addressed to both Jews and non-Jews. In *Jewish Identity*, Niehoff builds a strong case for the significance of the Roman context for Philo's exegesis. In her subsequent *Jewish Exegesis and Homeric Scholarship in Alexandria* (Cambridge: Cambridge University Press, 2011), Niehoff suggests that the Exposition may have been written specifically for Roman readers (170). Note also Mary Rose D'Angelo's sophisticated discussion, "Gender and Geopolitics in the Work of Philo of Alexandria: Jewish Piety and Imperial Family Values," pages 63-88 in *Mapping Gender in Ancient Religious Discourses* (ed. Todd Penner and Caroline Vander Stichele; Leiden: Brill, 2007). D'Angelo argues persuasively for the footprint imperial family values in Philo's works, "recast in the interest of the claims he makes for Judaism" (87).

This suggestion requires immediate qualification, however, on account of a factor notoriously difficult to weigh in the study of Philo: evidence of the presence of similar concerns in early rabbinic texts, in other words, among other Jews also, in their own way, concerned with the explanation of biblical law. In a ruling contained in the Mishnah, strikingly similar to the position proposed by Plato in the *Laws*, it is stipulated that a couple childless for ten years should divorce unless the husband has already, by other means, fulfilled what is taken to be the scriptural reproductive mandate (*m. Yebam. 6:6*).⁴⁵ Correspondingly, the general permission afforded in tannaitic sources towards marriage to an infertile partner appears always to be qualified by the condition that the procreative duty is not thereby compromised.⁴⁶ Now, it is immediately evident that in *Spec. 3.34-36* Philo does *not* offer the same ruling as the rabbinic texts; in some cases, Philo allows precisely what the tannaitic rabbis do not, or at least he fails to spell out the condition on which the Mishnaic ruling turns. Both the Philonic and rabbinic texts, nevertheless, address the subject of infertile marriage and the participants' standing with reference to their procreative duty. It is at least possible that Philo is familiar with a pre-Mishnaic halakhic tradition that provides precedent for subjecting the case of infertile marriage to the authority of Moses in some way.⁴⁷

These larger questions notwithstanding, I suggest that the details of the two cases Philo addresses, considered against the wider background sketched above, present the best clues concerning the motivation for and dimensions of Philo's discussion in *Spec. 3.34-36*. Once again, it is vital to

⁴⁵ נשא אשה ושהא עימה עשר שנים ולא ילדה אינו רשוי ליבטל ("if he married a woman and lived with her for ten years and she bore no child, he may not abstain [i.e. from the duty of procreation]"). Cf. also e.g. *b. Yebam. 64a*.

⁴⁶ Following Michael L. Satlow, *Tasting the Dish: Rabbinic Rhetorics of Sexuality* (BJS 303; Atlanta: Scholars Press, 1995), 224-231, 262-264. On the tension between monogamous and polygynous ideals and concessions in Palestinian rabbinic law, see Satlow, *Jewish Marriage*, 189-192. We encounter the prioritization of loyalty over procreative duty in a famous later story (*Song Rab. 1.31*; on which see Boyarin, *Carnal Israel*, 53-56).

⁴⁷ Jewish and non-Jewish influences on Philo's position in *Spec. 3.34-36* are not mutually exclusive. Note, correspondingly, the similarity of assumptions concerning marriage and sexual ethics in Palestinian rabbinic sources with relevant Greek and Roman ideas; so Michael Satlow, "Rabbinic Views on Marriage, Sexuality, and the Family," pp 612-626 in *The Cambridge History of Judaism Vol. 4* (ed. Steven T. Katz; Cambridge: Cambridge University Press, 2006).

observe that Philo does not treat the subject of infertile marriage in either a comprehensive or a generic way. Rather, his treatment of the subject consists of two very specific cases, the first concerned with the inception of certain marriages, the second with the failure of other marriages to be brought to an end.

In the first case, Philo adopts a position on which we observe a significant degree of agreement among ancient moralists and legislators: the identification of those who choose to marry without due regard for their reproductive duty as those worthy of censure. In the second case, Philo takes what amounts to a mediating position in regard to an issue on which we find greater evidence of disagreement among other ancient authors and sources. In the circumstance of marriage that unexpectedly proves to be childless, while some insist on divorce, and others urge the parties to stay together, Philo presents a sympathetic perspective towards childless couples who married in good procreative faith. It goes beyond the evidence of *Spec. 3.35* itself to conclude that it reveals Philo's conviction either that such a marriage really ought to be ongoing or, alternatively, brought to an end.⁴⁸ Rather, Philo offers what amounts to a halakhic permission for the marriage as a going concern.⁴⁹ If non-Jewish readers constitute (at least) a significant part of Philo's target audience in the Exposition—and I believe they do—I suggest that it is most likely that in *Spec. 3.34-36* we find Philo, perhaps independently of his nearest interpretive cousins, crafting a legislative hook to capture the interest and sympathies of his non-Jewish readers. Not only does the pentateuchal law speak to an area of contemporary concern, it does so in a specific, principled, and yet balanced way. The stringency of the law of Moses cannot be doubted, at least where such strictness is appropriate, as in the shameful

⁴⁸ On the one side, Niehoff, *Jewish Identity*, 101, maintains that Philo actually encourages the couple considered in *Spec. 3.35* to stay together. On the other, David Daube, "Duty of Procreation," 966, and Samuel Belkin, *Philo and the Oral Law: The Philonic Interpretation of Biblical Law in Relation to the Palestinian Halakah* (Cambridge: Harvard University Press, 1940), 221, conclude that Philo holds that the husband of a barren woman ought to divorce her. I suggest that the recognition of *συγγνώμη* in this case, presumably for failure to comply with the reproductive mandate of nature, in and of itself allows that Philo considers the failure to divorce in this situation either no real wrongdoing at all or a genuine wrong for which, yet, there is pardon. I discuss the meaning of *συγγνώμη* for Philo in my forthcoming University of Notre Dame dissertation.

⁴⁹ I concur with Niehoff's assessment elsewhere: "Philo determined that it is halakhically acceptable for a married couple to stay together even though a problem of infertility has arisen" ("Mother and Maiden, Sister and Spouse: Sarah in Philonic midrash," *HTR* 97 (2004): 413-444, at 422).

behavior of those who marry for discreditable reasons. Yet, concurrently, the law is suitably magnanimous towards those who find themselves in a double bind, as in the case of those who wed rightly but then find themselves constrained by both procreative duty and the force of their relational ties.⁵⁰

6. *De specialibus legibus* 3.35 and the Focus of Philo's Sexual Ethics

Might Philo's failure to specify abstinence in *Spec. 3.35* suggest that he approves of ongoing sexual activity in such cases? First of all, we should be clear: Philo does not explicitly authorize or prohibit further sexual intercourse in *Spec. 3.35*.⁵¹ To answer to this question, then, requires some speculation. Nevertheless, the degree of consistency usually attributed to Philo's perspective on sex—confirmed at various points so far in this paper—encourages further speculation, suitably qualified, in the case of *Spec. 3.35*, and points towards the principle factor that such conjecture ought to address. If Philo offers tacit approval for sexual activity in the case of certain infertile marriages, we might assume that the procreative character of such activity is preserved in some way, the challenging circumstances notwithstanding.

Maren Niehoff suggests that the couple in view in *Spec. 3.35* is free to continue to engage in sexual intercourse. Such activity is not out of step with Philo's position on sex elsewhere because the marriage itself provides the procreative context that furnishes the partners' sexual activities with reproductive legitimacy.⁵² Thus, while Philo condemns sexual intercourse with a wife previously known

⁵⁰ The presentation (or defense) of Jewish law as both appropriately strict and yet characteristically magnanimous is an important concern of Philo's elsewhere (e.g. *Hypoth.* 8.7.1, 8.7.9) and among other Diaspora authors of the time (note also the presentation of God in *Spec. 3.36* as φιλόζωος and φιλόανθρωπος). See the summary by John M. G. Barclay, *Flavius Josephus: Translation and Commentary*, vol. 10, *Against Apion* (Brill Josephus Project; ed. Steve Mason; Leiden: Brill, 2007), 358. In addition, I note that the discussion of texts above might be taken to support Maren Niehoff's suggestion that Philo wrote the Exposition of the Law with Roman readers in mind (*Jewish Exegesis*, 170). Arguably, the sources most salient for comparison with Philo's position, at least in the case of *Spec. 3.35*, are Roman.

⁵¹ The combined force of συνήθεια, φίλτρα and συμβίωσις resulting from married life is not presented as warrant for sexual activity (cf. above on Musonius XIII A). What these attributes prompt Philo to recognize, rather, is that entering and exiting marriage are not symmetrical concerns.

⁵² *Jewish Identity*, 100-101. Strictly speaking, Niehoff does not spell out her conclusion that ongoing

to be sterile because such relations cannot lead to procreation (*Spec.* 3.34, 36), in the situation addressed in *Spec.* 3.35 ongoing sexual activity is sanctioned as Philo encourages the partners to stay together as the procreative purpose of the relationship remains in a "theoretical" way.⁵³ Niehoff's interpretation of *Spec.* 3.34-36 is part of her discussion of Philo's sexual ethics in general. Niehoff contends that the locus of Philo's procreationist concern has been misidentified in discussions of Philo's ethics.⁵⁴ For Niehoff, Philo's focus is never on the sexual act itself. Rather, Philo's concern—the axis on which his procreationist perspective turns—is with the wider context or general framework within which sex occurs.⁵⁵ In his important recent study, Loader endorses Niehoff's assessment of *Spec.* 3.34-36.⁵⁶

I suggest that there is a problem with Niehoff's reading of *Spec.* 3.34-36—that is to say, as it stands, it is not sufficient to explain the details of the passage.⁵⁷ It is very difficult to distinguish between the two cases addressed by Philo simply by way of appeal to a difference in the procreational context in each situation. As is implicit in the discussion above, Philo gives no indication of a difference in the native reproductive capacities of the woman concerned in each case.⁵⁸ To use Niehoff's terms, I do not see how the procreative purpose of the relationship might be maintained *theoretically* in one case of infertile marriage but not the other, at least merely by appeal to the wider context in which sex occurs.

sexual relations are permitted in this case, but I cannot see any other way to interpret her comments given her emphases and arguments in the surrounding material.

⁵³ *Jewish Identity*, 101.

⁵⁴ Niehoff criticizes van Geytenbeek (*Musonius Rufus*) for overplaying the similarities between Musonius and Philo. I would add that this criticism might apply equally if not more so to Gaca, for whom the parallels between Philo and Musonius are even more tightly drawn.

⁵⁵ Note Niehoff's comments in relation to *Spec.* 3.32-33: "It would thus appear that the married couple was left in peace by Philo during all the days of the month that the woman was not directly bleeding" (*Jewish Identity*, 100-101).

⁵⁶ *Philo, Josephus, and the Testaments*, 203-204, 254.

⁵⁷ In Section Seven below I discuss briefly my agreement with certain aspects of Niehoff's important discussion in this section of *Jewish Identity*.

⁵⁸ I note above (n. 29) that a difference in age is presupposed for the *brides* in each of the two cases Philo considers in *Spec.* 3.34-36. In the first case, the women are old enough to have been married and proved infertile before; in the second case, the women are young virgins. Crucially, however, this difference pertains to the point of marriage only. The scenario Philo addressed in *Spec.* 3.35 occurs after a long time of childlessness. In other words, there are no grounds to conclude that the women in the one case are younger, that is, closer to their fertile prime, than the other.

To the extent that the cases can be differentiated concerning the legitimacy of sexual activity, it is not at the level of a general framework for sexuality established by circumstance. Any difference between the cases in terms of procreative agenda—considered theoretically or otherwise—exists at a level or in relation to a factor not yet specified. If Philo simply prohibits sexual activity wherever and whenever pregnancy is impossible—with a male, with a menstruating woman, or with a woman previously known to be barren—he likely prohibits it also if a woman's infertility has more recently come to light.⁵⁹

Can we posit an alternative or additional factor that might allow Philo to sanction ongoing sexual activity in one kind of infertile marriage but not the other? Kathy Gaca observes in passing that Philo might allow a childless couple to remain sexually active if such activity represents their perseverance in attempting to reproduce.⁶⁰ In other words, the legitimacy of sexual activity would be grounded in the couple's ongoing procreative intent. Gaca notes that Philo might appeal to an impeccable biblical precedent for the legitimacy of further sexual activity in this situation: the example of Abraham and the birth of Isaac to Sarah after decades of barrenness.⁶¹ Gaca's brief suggestion has much to commend it; in the following paragraphs I will attempt to strengthen it.

First of all, the appeal to the partners' intentions in the act of sex itself as the differentiating factor in the two cases of infertile marriage considered by Philo cuts with the grain of *Spec.* 3.34-36. As we have seen, the formal contrast Philo establishes is between two different approaches to the pursuit and maintenance of the marital union. In the first instance, Philo addresses the situation of one who enters marriage for an illegitimate reason. In the second, Philo deals with the case of another who refuses to terminate a marriage for a reason with which Philo has sympathy. The pivotal factor in the comparison is the intention or motivating concern of the male partner. Both cases deal with a reproductively deficient marriage. What is at stake in the difference between the two is the relationship

⁵⁹ I suggest that *Spec.* 3.9 also poses a challenge to Niehoff's assessment of the locus of Philo's procreationist concerns. Surely, the wider procreative context remains in the case of those who are, yet, condemned for their approach to sex with their very own wives.

⁶⁰ "Philo's Principles," 23. Niehoff does not interact with Gaca's suggestion.

⁶¹ Alas, Philo is silent concerning the act of intercourse responsible for Isaac's conception.

between this deficiency and the aims of the husband. In the one case, Philo insists, one who knows what he is getting into in marrying a sterile woman only does so on account of his insatiable hunger for pleasure. In the other, two motivating concerns are evident. First, we can assume that the marriage was originally pursued out of a proper respect for the procreational duty. Second, the union continues once the wife's barrenness has come to light on account of the bonds of friendship that knit the partners together.⁶² Thus while in the one case, the pursuit of pleasure is the lodestar of the relationship, in the other, it is at no point the defining concern. The fundamental contrast between the two husbands pertains to their intentions towards their partners. The priority of this factor is reflected in the language Philo employs in describing the actions of the husband in the first case: such men spoil the seed by voluntary inclination (ἐκουσίῳ γνώμη), and contrive (τεχνάζω) towards its extinction.

Second, this reading of *Spec.* 3.34-36 is illustrative of an important feature of Philo's treatment of marriage and sexual activity more widely. Time and again, the focus of Philo's procreationist concern is with the goal of sexual activity, or the motivation of the parties to sex. This focus emerges most clearly in Philo's comments concerning pleasure as it relates to intercourse.⁶³ The centrality of the issue of pleasure to the discussion in *Spec.* 3.34-36 typifies Philo's position elsewhere. Repeatedly across the Philonic passages considered briefly earlier in this paper, we observe Philo distinguish between two kinds of approach to marriage or sexual activity: on the one hand, for the sake of procreation, on the other, for the sake of pleasure (e.g. *Ios.* 43; *Virt.* 207; *QG* 4.86, 4.154). The latter would appear to be the sole and blameworthy alternative to properly reproductive sex. Philo does have a place for the legitimate expression of sexual desire, and, perhaps, even, the experience of pleasure as it accompanies sexual activity.⁶⁴ What Philo will not allow as legitimate is the striving for pleasure as the goal of sex,

⁶² The contrasting scenarios Philo describes thus feature a contrast between powerful and different forces: overwhelming desire for pleasure, on the one hand, and the force of relational ties, on the other.

⁶³ Philo's comments on pleasure are almost invariably negative; for the bodily, earth-bound human, the lure of pleasure is a persistent and serious danger. The Epicurean *oikeiosis*, with pleasure as the goal of life, is resolutely opposed by Philo; the pleasure-seeker (ἡδονικός) or pleasure-lover (φιλήδονος) are among his favorite targets.

⁶⁴ On the legitimate expression of desire for sex, see especially *Opif.* 151-152 and the discussion by Winston in "Philo and the Rabbis." Philo grants the legitimacy of desire for sexual intercourse as it serves the

which is inevitably the case when sex is undertaken on account of desire rather than for an appropriate, rational reason. The single motivation Philo acknowledges as legitimate for engaging in sexual intercourse is the propagation of the human race. Insofar as sexual activity is guided by this rational control, it qualifies as acceptable conduct; where this is not the case, it stands condemned as an uncontrolled expression of irrational desire (e.g. *Abr.* 249).⁶⁵ Accordingly, the appeal to the husband's procreative intent as the factor legitimizing further sexual activity in the case addressed in *Spec.* 3.35 is supported by recognition of Philo's pronounced concern with the issue of pleasure in *Spec.* 3.34-36 and in his treatment of sexual ethics elsewhere.

Third, the appeal to the husband's procreative intention in engaging in sex with his barren wife as providing legitimation for ongoing sexual activity within the marriage might be taken as a specific example of a general principle Philo defends elsewhere. It is a human agent's intention by which the character of the agent's actions are to be judged. Just as it is possible for formally correct actions to be undermined by the motive of the doer, so it is possible for apparently condemnable actions to be undertaken for laudable reasons and to be assessed positively as a result—as in the case of a doctor who causes pain to the benefit of the patient (*Cher.* 14-17; *Deus* 64-68). On the one hand, then, Balaam is an evil diviner of evil things, his benedictory words notwithstanding, on account of his motivation for speaking (*Migrat.* 113-114). On the other, in several passages Philo commends the Levites whose slaughter of their kinsmen at Sinai was praiseworthy rather than blameworthy since it occurred for the very best of reasons (e.g. *Ebr.* 65-68).

Accordingly, I suggest that if, indeed, Philo's failure to specify abstinence in *Spec.* 3.35 amounts to implicit permission for ongoing sexual activity in some cases of infertile marriage, the

reproductive goal. Here, however, Philo's assessment of bodily pleasure as it pertains to sex is thoroughly negative: it is the starting point of wicked and law-breaking deeds. In general, Philo concedes that certain pleasures, in and of themselves (not as goals), are necessary and useful. On occasion, at least, he allows that sexual pleasure might also be assessed in this way (e.g. *Leg.* 3.157).

⁶⁵ Here I follow Hans Svebakken's analysis of Philo's theory of desire and the self-control that ought to attend it, in *Philo of Alexandria's Exposition of the Tenth Commandment* (SPhM 6; Atlanta: SBL, 2012). Svebakken applies his general analysis to the issue of sex briefly on p. 94.

outstanding candidate for satisfaction of the procreative requirement is the procreative intention or goal of the husband (and to extend Philo's focus, wife). No similar permission in the other case of infertile marriage is possible due to the husband's fixation on pleasure. This suggestion is able to account for the other cases of sexual misconduct in the surrounding material in which Philo employs the typology of wasted seed. In the case of pederasty, no procreative motivation for intercourse is ever possible. In the case of sex during menstruation, we might suppose that the close proximity of the fertile portion of the monthly cycle to the term of menstruation suggests that one seeking sex during the brief period of infertility cannot be motivated by the procreative goal.⁶⁶

Correspondingly, if permission for continued sexual activity is implicit in *Spec. 3.35*, I suggest that we do not find in *Spec. 3.34-36* consistent support for Niehoff's reappraisal of the register of Philo's procreationist concern. I agree with Niehoff that Philo does not attend to the mechanics of the sexual act in conveying his procreative perspective. From this observation Niehoff deduces that Philo's concern is with the context in which such activity occurs—that is, we might say, it is *external* to the act itself. The evidence of *Spec. 3.34-36* points, I suggest, in another direction. Philo's greatest concern in this passage is *internal* to the action itself, with the intention of the agent(s) concerned. To the degree that Philo reasons consistently in his twofold treatment of infertile marriage, I do not see how he might permit sexual activity in one case but not the other without recourse to a relevant subjective distinction between the parties involved.

7. Concluding Reflections

As noted already, the discussion in the preceding section offers only a hypothesis to account for one explanation of Philo's silence in *Spec. 3.35* regarding the legitimacy of ongoing sexual activity. It is certainly possible that Philo's failure to authorize further sexual activity in *Spec. 3.35* implies that he

⁶⁶ I suggest that it is able to account for Philo's perspective in *Spec. 3:9* too (on which see the comments in Section Two and at n. 59 above).

does expect couples in this situation to refrain from sex.⁶⁷ Which is the likelier interpretation of *Spec.*

3.35? It is impossible to be sure. More constructively, I suggest that the preceding discussion directs attention towards the challenge of framing Philo's overall perspective on marriage and sexual conduct as accurately as possible. I do not believe that the discussion in the present paper serves to call into question the essential accuracy of the consensus assessment of Philo's perspective on sex. Philo brings a strict procreationist perspective to the interpretation of scripture, and this perspective is presupposed in the expansion of scripture in *Spec.* 3.34-36. Neither in this passage nor elsewhere in passing have we uncovered Philonic approval for sexual activity that does not satisfy, at least somehow, the procreative requirement.

I suggest, nevertheless, that the interpreter of Philo does face a secondary but important challenge in accounting for what Philo does *not* say on certain related issues and, correspondingly, what he appears *almost* to allow here and there. Philo's failure to specify the requirement of celibacy in *Spec.* 3.35 while simultaneously drawing attention approvingly to the marital phenomena of affection and companionship is a tantalizing combination. Elsewhere, Philo nowhere specifies a requirement of celibacy for older couples formerly fertile but rendered infertile by age.⁶⁸ Neither does Philo unambiguously prohibit intercourse during pregnancy, an omission all the more surprising given the presence of legislation to this effect in contemporary Jewish sources (*C. Ap.* 2.202; *Ps.-Phoc.* 186).⁶⁹ In one additional passage, Philo creeps perhaps even closer towards expressing approval for sexual intimacy on non-procreative grounds. In *Virt.* 112, dealing with the Mosaic legislation concerning the appropriate treatment of female captives taken in war (Deut 21:10-14), Philo allows two grounds according to which a captive might marry her captor: either on account of love of her partner or for the

⁶⁷ Similarly, Gaca, "Philo's Principles," 23. In addition, I note that in another context, Philo encourages those who fail in pursuit of their goals (unless the goal is genuine virtue itself) to desist. Also-ran athletes would do well to call a halt to their failures, while travelers prone to repeated disasters should find a new way to spend their time (*Sacr.* 115-116).

⁶⁸ Recall *QG* 1.27, however, discussed above in Section Five, on those who choose wives who are past their prime.

⁶⁹ Note *Abr.* 253, and Loader's comments in *Philo, Josephus, and the Testaments*, 203-204.

sake of the birth of children (ἢ δι' ἔρωτα τοῦ συνιόντος ἢ διὰ τέκνων γένεσιν). Yet, again, Philo does not follow through and confirm that the woman's love for her husband will constitute legitimate grounds for spousal intercourse.

What is the best way to account for these silences or, we might say, loose ends within Philo's perspective on marriage and sexual conduct as a whole? As discussed above, Niehoff (followed by Loader) takes them as evidence that the severity of Philo's sexual ethic has been exaggerated, and concludes that in heterosexual marriage the procreative requirement for sexual activity is largely satisfied by the formal arrangement itself. I acknowledge that this proposal makes good sense of some of the data (especially, silences), and I believe it is both important and successful in drawing attention to the observation that Philo does not, in fact, say everything that we might expect one possessed of particularly strict procreationist convictions to say. I have argued, however, that Niehoff's assessment, short of adjustment or supplementation, does not account for the details of *Spec. 3.34-36* (or *Spec. 3.9*). Correspondingly, my own reading of *Spec. 3.34-36* leaves me suspicious of the deduction that Philo's silence concerning certain sexual specifics bespeaks his approval of marital intercourse per se.

My consideration of *Spec. 3.34-36* prompts me to ask whether the issue might not be explored in an alternative way. Rather than being indicative of a measure of moderation in principle in Philo's core commitments, it may be that Philo's silence on some issues, his failure to spell out certain implications that would appear to follow inevitably from other statements he makes, is attributable to the negotiation between procreationist convictions, scripture, and literary goal undertaken by Philo at various points in his exegetical works. It may be that Philo is consistent in his actual convictions in his adherence to a strict procreationist perspective on sex. All intercourse, marital, of course, ought to be procreative, that is, pursued only for the purpose of reproduction and that, perhaps, in a context in which there is at least some kind of defensible warrant for the aspiration of reproductive success. However, Philo does not always find it expedient to spell this out, and is not prompted uniformly by the biblical text to do so. In the case of *Spec. 3.35*, Philo's failure either to spell out the requirement of

celibacy or specify the procreative goal that must be maintained if sexual intercourse is to continue might be taken as a strategic silence. In the Exposition of the Law at this point, it does Philo no good to press home the strict procreationist position willy-nilly if, as argued above, in *Spec.* 3.34-36 we find Philo reshaping biblical law to capture the interest and approval of his non-Jewish readers. In the preceding case of sex during menstruation, there is a biblical prohibition to defend. In the case of infertile marriage, however, Philo is not similarly constrained. It may be that he quite intentionally frames a legal provision such that it glosses over the implications of his procreationist convictions in regard to a situation sure to evoke the sympathies of his readers. I note with interest that in the other passage identified above in which Philo seemingly comes closest to giving approval for intercourse on non-procreative grounds (*Virt.* 112), he is concerned to demonstrate the φιλανθρωπία of the law of Moses in regard to the legislation of Deuteronomy 20 and the issue of the plight of women conquered in wartime.⁷⁰ In both passages, we might say, there is a kind of humanitarian and apologetic agenda that prompts Philo to skate over certain aspects or entailments of his procreationist convictions. Do these passages mark a degree of moderation in these convictions? I am not persuaded that they do, at least in principle. They give clearer evidence, I suggest, of the way these procreationist commitments are regulated by the exegetical situation at hand.

⁷⁰ See the discussion of *Virt.* 109-115 provided by Walter T. Wilson in *Philo of Alexandria, On the Virtues* (Leiden: Brill, 2011), 265-266.