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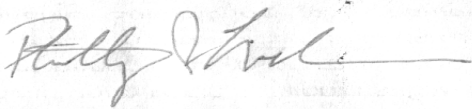
UNIVERSITY

Program in Jewish Studies

Dear Colleagues,

Thanks so much for taking the time to read my paper, "Legal Norms in the Jewish Courts of Medieval Egypt". The material in the paper is an expansion of some ideas whose germination came from the defense of my dissertation, which took place a couple of years ago. I've attached an abstract of the dissertation, in the hopes that it will help give some context for the paper. Feel free to get in touch with me before the group discussion, particularly if there are general matters related to the documents I discuss in the paper whose elucidation would make our discussion more fruitful. Otherwise, I look forward to seeing you on 25 November.

Best Regards,



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A PARTNERSHIP CULTURE
JEWISH ECONOMIC AND SOCIAL LIFE SEEN THROUGH
THE LEGAL DOCUMENTS OF THE CAIRO GENIZA

Volume 1

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A DISSERTATION
PRESENTED TO THE FACULTY
OF PRINCETON UNIVERSITY
IN CANDIDACY FOR THE DEGREE
OF DOCTOR OF PHILOSOPHY

RECOMMENDED FOR ACCEPTANCE
BY THE DEPARTMENT OF
NEAR EASTERN STUDIES

Adviser: Mark R. Cohen

November 2007

Abstract

This dissertation explores economic partnership relations in the Jewish community of medieval Egypt, primarily as described in the documents of the Cairo Geniza. It also contains a corpus of transcriptions, translations and brief commentaries on just over one hundred heretofore unpublished legal documents from the Geniza concerning such partnerships. The corpus is attached to the dissertation as volume two.

The first volume of the dissertation presents a synthesis which seeks to evaluate the possible connections between partnership relations as seen in the documentary corpus on the one hand; and classical Jewish and Islamic legal sources on the other. The conclusions of this synthesis are that partnership relations within the Jewish community held to Jewish legal norms to the exclusion of Islamic legal norms much more closely than previously believed; and that the Jewish community relied upon both formal and informal vehicles in establishing and maintaining economic relationships. The first of these conclusions questions the assumption common among scholars of the Geniza that the Jewish documents depict a universal reality extending to the Islamic community; and the second confronts the underpinnings of the scholarly debate concerning the extent to which economic institutions in medieval Islamic culture were formal or informal.

The first chapter compares the partnership relationships described in the documentary corpus to the models of partnership presented by the classical Jewish legal sources and responsa alike. Where the legal sources are not univocal, the chapter outlines the underpinnings of the dispute within these sources.

The second chapter compares the partnership relationships described in the documentary corpus to the models of partnership presented in the classical Islamic legal sources by the various

schools of Islamic law. Many of these sources have been synthesized by others, but the chapter includes a discussion of a number of legal schools heretofore unexplored in the literature.

The third chapter turns to the discipline of anthropology to evaluate partnership practice as practiced by the Jewish community, looking beyond the documentary corpus to other genres of Jewish literary and documentary production. Evaluating letters, Biblical commentary, *waqf*-agreements and the like allow for the description of a “partnership dynamic” rooted in concepts of trust and discretion and relying on formal and informal vehicles alike in forging and maintaining partnership relationships.

The fourth chapter relies upon the conclusions of the first two chapters to challenge a paradigm in the study of the Geniza documents which assumes Jewish and Islamic practice to be identical in the economic domain. In the light of this challenge, the chapter presents an alternative paradigm which relaxes this assumption. Presenting a more complex web of relations in the medieval Islamic world, this alternative retains a central role for the documents of the Geniza in the study of medieval Islamic social and economic history.

Having established in the previous chapter that at least a stratum of Jewish merchants employed partnership structures which echo the typology of partnership models seen in Maimonides' *Mishneh Torah* and which deviate from corresponding models seen in Islamic law; and, having shown continuities across medieval Egyptian Jewish culture that reveal the characteristics of those "Jewish" partnership models to be defining characteristics of the society as a whole which relied upon those partnership models, this chapter will examine the process of legal decision-making in the Jewish community of medieval Egypt in an attempt to show those characteristics to flow (in part) from classical Jewish legal norms. First recapitulating the approaches of other scholars—notably Abraham Udovitch and Avner Greif—to the economic relations of Jewish merchants in the medieval Islamic Mediterranean, both of whom hold that classical Jewish legal codes were not in fact determinative of commercial practice in the environment which produced the Cairo Geniza documents, this chapter will proceed to reveal a complex dialogue between canonized legal norms and commercial practice. The keystone of this dialogue will be shown to have been a legal process relying heavily on mediation rather than adjudication.

A summary of contemporary mediation theory will reveal a number of models for the relationship between canonical legal norms and actual mediated agreements; and the procedural details of court practice in Jewish medieval Egypt will be measured against these models. Revealing court practice to follow a "norm-educating" model, the documentary output of the Jewish court will be shown to be in dialogue with canonical Jewish legal norms. While much ink has been shed by other scholars revealing ways in which the *Mishneh Torah* and other classical Jewish legal works were influenced by forces emerging from their quotidian environment, causing their writers to incline towards one or another Talmudic ruling or even

to do violence to the Talmudic text itself in order to accommodate quotidian practice, this chapter will demonstrate positive law to have had a corresponding determinative influence on that quotidian environment, affecting the choices of Jewish economic actors as they opted to structure their relationships according to canonical Jewish norms.

As will be shown, the advantage of “norm-educating” models of mediation is that the legal agreements which they produce do not necessarily accord with all the canonical norms of the system which produced those agreements. Thus, Jewish legal norms may have influenced commercial practice without completely determining or defining that practice. This suggests that the choice of Jewish economic actors to structure their relationships generally according to those norms should be seen as a conscious decision. This chapter will assert, then, that this conscious decision represents an attempt on the part of these Jewish merchants to establish a connection with classical Jewish legal norms and, by extension, Jewish cultural identity. Economic life can and should therefore be seen as a forum for Jewish cultural self-expression, the attractions of the profit motive in an open commercial marketplace notwithstanding. The key role of the courts as well as the influential role of classical Jewish legal norms in shaping and implementing agreements should also suggest the importance of the *Gesellschaft* as opposed to the *Gemeinschaft* (to use the language of Fernand Töennies), challenging the “Lawlessness and Economics” literature as it has been applied to the 11th century Mediterranean, which argues that coalitions of merchants turned to local subgroup norms to define their own behavior, which was then monitored outside the formal legal system. In its place, the chapter will suggest an important role for classical Jewish legal norms as reflected in the *Mishneh Torah* in shaping Jewish economic relationships and Jewish identity generally.

Any analysis of partnership relations in the medieval Islamic Mediterranean and the connection between commercial law and practice must take as its starting point Abraham Udovitch's seminal 1970 work *Partnership and Profit in Medieval Islam*. In this book, Udovitch outlines the major strains of Islamic partnership law among three of the four primary Sunnī legal schools. Turning, then, to business letters from the Cairo Geniza concerning mercantile partnerships, Udovitch concludes that “[w]hen compared, a remarkable symmetry becomes evident between the legal formulations of the late eighth century on the one hand, and the documented commercial practice of the eleventh and twelfth century Geniza merchants on the other.”¹ This leads Udovitch to conclude that “the earliest Ḥanafī law treating partnership and *commenda* contracts is to be viewed, with minor qualifications, as a veritable Law Merchant.”² Udovitch's choice of terms here is deliberate: he wishes to argue that Islamic commercial codes of the medieval period do indeed describe economic life as practiced by medieval Islamic economic actors, parrying the challenges of the so-called “Skeptical School” of Islamic law, typified by the scholars Ignaz Goldziher and Christiaan Snouck Hurgronje, who denied a primary connection between *fiqh* and daily life. Udovitch's conclusions resonate with the work of Joseph Schacht and Gotthelf Bergsträsser, who claimed that points of continuity indeed existed between law and practice in certain domains, notably in ritual, family, and inheritance law.³ Udovitch's analysis of the parallels between commercial letters and

¹ Abraham L. Udovitch, *Partnership and profit in medieval Islam*, Princeton studies on the Near East (Princeton: Princeton University Press, 1970), 255-56.

² *Ibid.*, 259.

³ See Udovitch's characterization of the Schacht-Bergsträsser position in *Ibid.*, 7. Note that Bergsträsser seems to focus on the disjunction of Islamic law and practice following the influence of European powers: “Dann wurden mit dem Eindringen des europäischen Einflusses besondere staatliche Gerichtshöfe neben dem des Kadi geschaffen, zuerst Handelsgerichte.” (Gotthelf Bergsträsser and Joseph Schacht, *G. Bergsträsser's Grundzüge des islamischen Rechts* (Berlin: Walter de Gruyter, 1935), 121). However, Schacht describes this disjunction in much broader terms: “The law of contracts and obligations stands in the middle between the law of family, inheritance, and pious endowments (*waqf*) on one side, and criminal, fiscal, and constitutional law on the other. On the first branches, the *sharī'a* (notwithstanding the existence of some customs derogatory to it) had the firmest hold; on

commercial codes vindicated Schacht's reading of Islamic law as both reflecting and accommodating commercial practice;⁴ in the presence of both of these aspects, the application of the term "Law Merchant" is clearly apposite, particularly since Ḥanafī law, to which Udovitch applies this epithet, is most expansive among the four major Sunnī schools in granting a role to *urf* (Arabic, "custom") in determining positive law. Udovitch saw Ḥanafī law as accommodating customary practice, noting first the development of a rich formulary literature in the Islamic world (and particularly in the Ḥanafī school) despite an explicit ruling in the Qur'ān denying the validity of written documents,⁵ and then the development of the *ḥiyāl* (Arabic, "legal devices") literature, "in which the lawyers attempted to narrow down the area in which actions would be in violation of the law by making them conform to the law formally while in reality circumventing it."⁶ Thus, in the absence of any "religious or moral principle"⁷ governing commercial practice, the Ḥanafī lawyers were free to develop legal devices which accommodated—indeed, canonized—a local practice encountered by Islamic conquest over the course of the seventh century, despite the fact that this local practice diverged from the ideals of the early Islamic conquerors themselves. In this manner, Udovitch understands the principal forms of commercial cooperation seen in eighth-century Islamic

the last, it had very little, if any, influence." (Joseph Schacht, "The Schools of Law and Later Developments of Jurisprudence," in *Law in the Middle East*, ed. Majid Khadduri and Herbert J. Liebesny (Washington, D.C.: Middle East Institute, 1955), 77).

⁴ Thus, Schacht writes that "[t]he law of contracts and obligations, situated between those two extremes, was ruled by a customary law which respected the main principles and institutions of the sharī'a, but showed a greater flexibility and adaptability." (Schacht, "The Schools of Law and Later Developments of Jurisprudence," 77-78).

⁵ The development of formulary literature in the early Islamic world is discussed by Jeanette Wakin in Aḥmad ibn Muḥammad Ṭaḥāwī and Jeanette A. Wakin, *Jāmi' al-kabīr fī al-shurūṭ. The function of documents in Islamic law: the chapters on sales from Ṭaḥāwī's Kitāb al-shurūṭ al-kabīr. Edited with an introduction and notes by Jeanette A. Wakin* (Albany, N.Y.: State University of New York Press, 1972), particularly pp.1-10, noting that "[w]hile doctrine may have neglected the written instrument, in practice it was indispensable." (Ṭaḥāwī and Wakin, *Jāmi' al-kabīr fī al-shurūṭ. The function of documents in Islamic law: the chapters on sales from Ṭaḥāwī's Kitāb al-shurūṭ al-kabīr. Edited with an introduction and notes by Jeanette A. Wakin* 9)

⁶ Udovitch, *Partnership and profit in medieval Islam*, 11.

⁷ *Ibid.*, 7.

legal codes to reflect much earlier forms: “while the *commenda* was apparently a commercial form original with the Arabs, an institution like partnership was not an innovation of, or in any way peculiar to, Islamic law.”⁸ The development of a legal system which had the analytical flexibility to accommodate local norms worked in tandem with the absence of any particular “religious or moral” attachment to early Islamic norms as Ḥanafī law coalesced. Thus, Udovitch argued that Ḥanafī codes could be seen as a vital tool for illuminating commercial practice in the medieval Islamic world, the codes themselves being primarily a systematization and canonization of that practice. In the near-total absence of extensive documentary evidence from medieval Islamic merchants,⁹ the significance of the historian’s ability to rely on legal codes for insight into quotidian practice cannot be overstated.

Although he lacked commercial documents from medieval Islamic merchants, Udovitch *did* have a corpus of documentary evidence to which he could turn in order to bolster his claims concerning commercial practice: the Cairo Geniza. This treasure trove of documents, which began to enter the hands of scholars in the middle of the 19th century and had by Udovitch’s time begun to receive systematic treatment, particularly by the 20th century *doyen* of Geniza studies, S.D. Goitein, included fragments of a multitude of genres, from classical biblical and rabbinic texts to copies of children practicing the Hebrew script, to 11th century petitions to the Fāṭimid caliph written in Arabic. Yet, despite Goitein’s attestation that “[t]he largest and most valuable group of Geniza documents is made up of court depositions”,¹⁰ Goitein’s own attention, as well as that of Udovitch, was focused overwhelmingly on letters.

⁸ *Ibid.*, 8.

⁹ In 1952, Adolf Grohmann estimated the total number of Arabic documents of all genres from the first few centuries of Islam to be 50,000 (Adolf Grohmann, *From the world of Arabic papyri* (Cairo: Al-Maaref Press, 1952). While the total number of documents has undoubtedly increased, this figure is sufficiently miniscule to demonstrate a paucity of documentary evidence concerning commercial practice from the period.

¹⁰ S. D. Goitein, *A Mediterranean society: the Jewish communities of the Arab world as portrayed in the documents of the Cairo Geniza*, 6 vols. (Berkeley: University of California Press, 1967), I:10.

Although the first volume of Goitein's *A Mediterranean Society* did discuss a number of legal agreements concerning commercial cooperation,¹¹ Goitein and Udovitch both turned primarily to letters for their depictions of economic life. Thus, Goitein's 1971 article "Formal Friendship in the Medieval Near East"¹² and Udovitch's 1977 article "Formalism and Informalism in the Social and Economic Institutions of the Medieval Islamic World"¹³ describe the institutions and models of commercial cooperation exclusively through epistolary material. Unfortunately, however, much of the specific detail concerning commercial cooperation, such as the planned allocation of profit and loss between partners, is entirely absent from commercial letters, which typically include such vague phrases as "[f]or our joint business, too, make an effort and buy whatever you see fit of flax and spices."¹⁴ Indeed, it is only where Udovitch turns to Goitein's analysis of the small collection of legal documents which the latter did examine¹⁵ that he can conclude that "[m]ost arrangements...involved complex patterns of distribution of investments, work, risks, and profits among the parties to a partnership or *commenda*".¹⁶ Amidst a Judeo-Arabic corpus which alludes to partnerships, agency agreements, brokerage, and *commenda* often using the Arabic terms recognizable from *fiqh* compendia, Udovitch claims that "[t]hose aspects of commerce which loomed large for the Geniza merchants are exactly those to which the legal texts devote lengthy and detailed discussions,"¹⁷ leading to his

¹¹ See particularly Appendix C there, "Industrial Partnerships".

¹² S. D. Goitein, "Formal Friendship in the Medieval Near East," *Proceedings of the American Philosophical Society* 115, no. 6 (1971).

¹³ A.L. Udovitch, "Formalism and Informalism in the Social and Economic Institutions of the Medieval Islamic World," in *Individualism and Conformity in Classical Islam*, ed. A. Banani (Wiesbaden: Harrassowitz, 1977).

¹⁴ S. D. Goitein, *Letters of medieval Jewish traders* (Princeton, N.J.: Princeton University Press, 1974), 141.

¹⁵ Goitein explains that "[i]n our book, *A Mediterranean Society*, we have studied twenty-six contracts of industrial partnership, many of which are nothing but veiled forms of employment..." (———, "Commercial and Family Partnerships in the Countries of Medieval Islam," *Islamic Studies* 3 (1964): 317). By comparison, *Letters of Medieval Jewish Traders* contained translations of some 80 commercial letters, a small fraction of the epistolary corpus which was the primary basis for *A Mediterranean Society*.

¹⁶ Udovitch, *Partnership and profit in medieval Islam*, 257.

¹⁷ *Ibid.* .

conclusion that Islamic law represented nothing more (and nothing less) than a record of commercial practice.

Further developing his study of commercial cooperation in the medieval Islamic world, Udovitch moved on from attempting to describe the relationship between classical Islamic commercial codes and daily life in the Islamic world to discussing the specific forms of commercial cooperation which dominated that daily life. His aforementioned article “Formalism and Informalism in the Social and Economic Institutions of the Medieval Islamic World,” began to trace out the findings of his work by developing the epistolary corpus of the 11th century merchant, trader, banker, and community leader Nahray b. Nissim. In this article, Udovitch affirmed Goitein’s understanding that “the predominant form of commercial association” was what Goitein called “formal friendship”. This form of cooperation brought together distant associates in ties that “had no specific shape or content”¹⁸ but instead relied on *quid pro quo* transactions which were fulfilled by associates relying on mutual trust built over the course of longstanding relationships. Translating and analyzing one letter to Nahray from one Mūsā b. Abū al-Ḥayy, Udovitch adduces “[t]wenty discrete transactions or business-related operations...directly mentioned in the letter.”¹⁹ Examining these twenty transactions, Udovitch concludes that

“of these, *one only* concerns a formal business relationship, the others are all informal; they are requests that the recipient of the letter carry out a variety of business-connected tasks and favors for which there is no indication that he would derive any profit or gain whatsoever.”²⁰

This was a conclusion that corroborated Goitein’s earlier findings that so-called “formal friendship” was the dominant mode of economic cooperation within the Jewish community of

¹⁸ ———, “Formalism and Informalism in the Social and Economic Institutions of the Medieval Islamic World,” 64.

¹⁹ *Ibid.*, 72.

²⁰ *Ibid.* .

the medieval Islamic Mediterranean, and it also reflected a trend within studies of urban life in the medieval Islamic world away from the formal structures adduced by Orientalist scholars transporting the formal economic institutions seen in the study of medieval Europe onto their study of the Islamic world in favor of a more current view of the medieval Islamic city as operating outside the structure of such institutions. Thus, summarizing Udovitch's findings as a whole: where the Jewish community *did* rely on formalized partnership, the structures it employed were those seen in canonical Islamic legal codes, but, according to Udovitch, this only accounted for a tiny fraction of the transactions described in the Geniza letters. Rather, the vast majority of business cooperation was carried out on the basis of informal relationships for which associates received no direct compensation. The expectations of these relationships were not necessarily articulated explicitly, and they were managed through the instruments of personal guarantee and trust.

Udovitch's work on the role of informal cooperation was developed more fully by the economist Avner Greif. Greif's PhD dissertation, completed in the Department of Economics at Northwestern University in 1989, developed further Udovitch's theory that personal guarantee and trust controlled trade relations instead of formal contracts and the court mechanism. Greif revealed that traders' letters periodically described their dissatisfaction with a distant agent's performance, and that this dissatisfaction resulted in the distant agent being punished by being denied future opportunities to do business with his erstwhile fellow. Being denied future opportunities would mean not only being denied the opportunity to call in any *quid pro quo* favors to which that agent might have felt entitled, but also being denied the opportunity to perform any favors for that same partner again, therefore denying him the opportunity to engender any such favors in the future.

Where Greif managed to extend beyond Udovitch's conclusions was in reading the Geniza letters not only as communications between two individuals reflecting their opinions about one another, but also as communiqués passing on information about third parties unrelated to any particular transaction involving either the writer of the letter or its recipient. In this manner, Greif saw the social function of letters as resources disseminating information to an entire group about the individual members of that group. Udovitch saw traders as developing and maintaining bilateral relations, through which each individual could be seen as the focal point at the center of a number of relations, some of which overlapped. But Greif saw these relationships—or, at least, the punishment mechanism which governed these relationships—to be multilateral. That is, while a principal-agent relationship was maintained at the level of the node, between those two individuals, a principal would express his dissatisfaction with any particular agent in his letters to his other associates, and this dissatisfaction would thereby be communicated to the group as a whole. According to Greif, those associates would show common cause with their fellow by shunning the erstwhile agent, agreeing never to employ an agent who cheated while operating for any coalition member. In an environment in which the legal system was expensive, slow, or generally inaccessible, this multilateral punishment structure could provide a framework which made for an efficient wage and provided the agent with a disincentive to cheat.

As his model of agency relations understood that it was the multilateral punishment mechanism rather than the legal system which provided agents with the disincentive to cheat, Greif sought evidence of “implicit contracts” between principals and agents in the Geniza letters, as well as evidence of that multilateral punishment. A brief example will suffice: Greif writes that

“[a]round 1055 it became known in Fustat that Abun Ben Zedaka, an agent who lived in Jerusalem, embezzled the money of a Maghribi trader. The response of the Maghribi traders was to cease any commercial relations with him. His bitter letter indicates that merchants as far away as Sicily had ostracized him. Only after a compromise was achieved and he had compensated the offended merchant were commercial relations with him resumed.”²¹

With information in letters about agents’ behavior playing a central role in monitoring and controlling that behavior, Greif followed Udovitch in seeing trade in the medieval Islamic Mediterranean to be organized primarily around “informal” agency relations rather than around instruments of formal partnership. However, rather than Udovitch’s “personal guarantee”, centered around bilateral relations, Greif saw a somewhat tight-knit group of eleventh-century traders, whom (following Goitein) he calls the Maghribis, placing the center of their network in the Maghreb (that is, northwest Africa), though he seems unwilling to describe this as a subculture *per se* and he rejects Werner Sombart’s reliance on relationships within “natural groups”. On the other hand, Greif does argue that there was some sense of connection and *esprit de corps* among these traders, a sense prefigured by Udovitch’s allusion to “the network of informal business cooperation which is referred to with great frequency and the term is simply *aṣḥābunā*, our colleagues”²² Further supporting Greif’s analysis is his claim that evidence of cooperation with non-Maghribi traders by members of this group is rare, and that connections within the group were often sustained for multiple generations; while Udovitch described these connections as intensely personal and non-inheritable.

Greif’s doctoral dissertation did not stop with the 11th century Maghribis. Rather, by also examining social and legal organization in 12th century Genoa, Greif was able to show that increases in the population of Genoa in the mid-12th century, combined with the reliance on a

²¹ Avner Greif, "Contract Enforceability and Economic Institutions in Early Trade: the Maghribi Traders' Coalition," *American Economic Review* 83, no. 2 (1993): 530.

²² Udovitch, "Formalism and Informalism in the Social and Economic Institutions of the Medieval Islamic World," 75.

well-organized legal system which allowed for the adjudication of disputes centered on formal contracts,²³ fostered a trading community that was based on bilateral patron relationships and adjudicated in the court system rather than on the sort of multilateral relationships seen in the community of the Maghribi traders and managed through the multilateral punishment mechanism. Thus, Greif could claim that the organization and development of the legal system played a key role in economic development, facilitating trading structures in 12th century Genoa that would not have been possible in the 11th century Jewish community of North Africa.

Greif's research was an important contribution to the "Lawlessness and Economics" literature, which seeks to adduce alternative methods for the enforcement of property rights and the management of contracts in light of the ineffectiveness or absence of a structured legal enforcement mechanism. Greif's discussion of a sense of *esprit de corps* among traders suggests a "specific set of cultural beliefs"²⁴ through which traders would jointly punish an agent who had cheated any of their fellows, and also a local (that is, group-specific) definition of behavioral norms (defining, for instance, what exactly "cheating" is) which did not extend beyond that specific group. Thus, Greif writes that

"[b]y discouraging intercoalition agency relations, these factors make the expectations on which the coalition rests self-enforcing. Hence, once a coalition is formed through some historical process, agency relations will be established only among the traders for whom expectations were initially crystallized."²⁵

One consequence of this, according to Greif, is that the expectations of the coalition were transmitted intergenerationally, insuring that the coalition consisted only of Maghribis and their descendants. Presumably, one could only become acculturated to the norms of the group by growing up in that group. Thus, the source of those norms was the group itself, the small-

²³ Cf. Avner Greif, "The Organization of Long-Distance Trade" (Northwestern University, 1989), 219ff.

²⁴ Cf. ———, "Cultural Beliefs and the Organization of Society: a Historical and Theoretical Reflection on Collectivist and Individualist Societies," *Journal of Political Economy* 102, no. 5 (1994): 915.

²⁵ Greif, "Contract Enforceability and Economic Institutions in Early Trade: the Maghribi Traders' Coalition," 539.

scale *Gemeinschaft*, as opposed to the behavioral norms described by the classical legal literature of the Jewish community as a whole, representing the broader *Gesellschaft*. Thus, neither Udovitch nor Greif would have understood Jewish legal norms to have played a role in the practice of the community of Jewish economic actors in the medieval Islamic Mediterranean. Examining the epistolary corpus of the Geniza, both scholars turn to the dominance of custom in determining practice: in Udovitch's case, it is the custom of the broader (that is, the "Islamic") marketplace; in Greif's, it is the custom of the coalition itself.

However, another perspective on these relationships can be seen by shifting the focus away from traders' letters, which provide much detail as to the commodities in which merchants transacted as well as much information concerning merchants' satisfaction with their partners and agents, to legal documents, which provide specific detail concerning the structure of mercantile partnerships. Perhaps unsurprisingly, very few legal documents from the Geniza are concerned with agency relations. Whereas commercial letters often ask distant agents to buy or sell specific items as a *wikāla* (Arabic, "agency appointment"), Jewish law requires the writing of an agency appointment in but one case: when the agent is retained to collect on a deposit or a debt recorded in a document.²⁶ The act of *qinyan* (Hebrew, "act effecting acquisition") being required only in such cases, the court would not have been the usual or primary locus of agency appointment—except in this specific case. On the other hand, the Geniza does reveal many more legal documents concerning commercial partnerships than suggested by Goitein's list of 27²⁷ "industrial partnerships".²⁸ Indeed, a cursory survey of the *unpublished* documents from the Geniza corpus reveals at least twice that number of

²⁶ Cf. Maimonides, *Laws of Agents and Partners*, 3:1ff.

²⁷ Goitein's aforementioned article (cf. footnote 15 above) mentioning 26 partnerships preceded publication of the first volume of his *A Mediterranean Society*, in which he detailed 27 partnerships.

²⁸ Cf. Goitein, *A Mediterranean society: the Jewish communities of the Arab world as portrayed in the documents of the Cairo Geniza*, Appendix C of Volume I.

partnership agreements, as well as an equal number of legal documents dissolving partnerships or indemnifying erstwhile partners from any future obligations relating to their partnership. One might suggest that the very existence of these documents points to the importance of the courts as an important locus for the establishment and maintenance of commercial relations, challenging Greif's understanding that it was the coalition's management of behavioral expectations that controlled behavior rather than the threat of punishment through the court system. Yet there are two central strands to Greif's argument: first, that the multilateral punishment mechanism developed as an alternative to an ineffective and/or expensive legal system; and, second, that the norms of mercantile behavior were defined by the *Gemeinschaft*. Unearthing court records concerning partnership challenges no more than the first of these claims, which would simply support the subsequent rejoinders to Greif's work, particularly that of Ethan Bueno de Mesquita and Matthew Stephenson,²⁹ who have suggested the possibility of a court system operating *in parallel* to the multilateral punishment mechanism. According to the model proposed by Bueno de Mesquita and Stephenson, merchants could have had the choice of cooperating with other members of their coalition and relying on the multilateral punishment mechanism *or* cooperating with individuals outside the coalition and relying on the legal system to maintain that particular relationship. As one might expect, the comparative statics of their model suggest that where the legal system is inexpensive and efficient, the latter option becomes more attractive and at least a share of the initiation, maintenance, and enforcement of economic relationships is filtered through the legal system. Yet the very fact that legal documents were written concerning partnership says nothing about the norms which they embody, nor does it say

²⁹ See, for instance, Ethan Bueno de Mesquita and Matthew Stephenson, "Legal Institutions and Informal Networks," *Journal of Theoretical Politics* 18, no. 1 (2006).

anything about the relationship of classical Jewish or Islamic legal codes to the partnerships described by those documents. In fact, if the legal documents had reflected partnership models seen in Islamic law, this analysis would simply bolster and even extend Udovitch's claim that Ḥanafī law was a "medieval Islamic Law Merchant" to include Jewish economic actors—a conclusion which Udovitch himself seemed to support.³⁰ On the other hand, if the partnership models described by the legal documents were entirely eclectic, bearing no relationship to either Jewish or Islamic law, one could perhaps claim that the norms they reflected had actually emerged from the local norms of the guild-like coalition of merchants envisioned by Greif. However, as established in the previous chapter, the partnership structures described by the legal documents actually echo the models described by Maimonides in his *Laws of Agency and Partnership*, even where those models differ from Ḥanafī law. Yet while such a statement challenges Udovitch's claims, it need not challenge those of Greif: perhaps the norms of the *Gemeinschaft* happened to overlap significantly with those of the *Gesellschaft*.

It is for precisely this reason that a close examination of court practice in Jewish medieval Egypt is necessary, to adduce the respective roles of classical Jewish legal norms and local norms among sub-communities of merchants in commercial practice. That is, one cannot automatically ascribe any overlap between the *Mishneh Torah* and the legal documents of the Geniza to a fealty on the part of Jewish merchants to classical Jewish legal norms. Yet even if one could do so, the documentary evidence would not support such a conclusion. That is, although there are general affinities between the models of partnership seen in the legal documents and those seen in the *Mishneh Torah*, the documents themselves hardly map onto classical legal codes perfectly, nor do they perfectly reflect the language of the formularies of

³⁰ Thus, in his aforementioned article "Formalism and Informalism in the Social and Economic Institutions of the Medieval Islamic World", Udovitch does not mention the word "Jew" once, despite the fact that *all* of the documents underpinning his conclusions emerge exclusively from the hands of Jews.

the time.³¹ Indeed, even a cursory examination of legal documents concerning partnership from the Geniza reveals some surprising disjunctions with Jewish jurisprudence: the folio British Museum Oriental Collection 10126.6 reveals a *commenda*-style relationship between two Jews to have been renegotiated or restructured into a loan with a “fixed rate of profit” (Arabic, “*fā’ida muta’ayyina*”), an arrangement clearly proscribed by Jewish law. Any analysis of court practice must be able to account for such outcomes.

To this end, with an eye towards understanding the role that Jewish legal norms played in eleventh-century court practice, what follows is a précis of Goitein’s account of court procedures, which will then be examined in light of contemporary mediation theory. This précis will reveal judicial authorities in the Jewish court to have acted as mediators rather than adjudicators, and the role of rabbinic “judges” in educating “litigants” as to the bounds of Jewish law in the process of mediation to have influenced the outcomes of the court, though perhaps not to have defined those outcomes, and therefore to have had an important role in establishing commercial practice.

Goitein begins his discussion of court procedure as manifest in Geniza records by pointing out that “[f]ormal judgments, quoting the legal sources and detailing the reasons for the decision made, are almost entirely lacking.”³² Goitein points out that court records are instead generally either depositions germane to the matter at hand, or declarations by the

³¹ These formularies include the *Sefer ha-Sheṭarot* (“Book of Legal Documents”) of Sa’adya Gaon (Egypt and Babylonia, d.942, partially published as Simḥah Assaf, *Sefer ha-sheṭarot shel Rav Sa’adyah* (Jerusalem: Mosad ha-Rav Kōq, 1943) and Menahem Ben-Sasson, “Fragments from “The Book of Testimony and Documents” of Rabbi Saadiah Gaon,” *Shenaton ha-mishpaṭ ha-’ivri : shel ha-Makhon le-ḥeker ha-mishpaṭ ha-’ivri, ha-Universiṭah ha-’ivrit bi-Yerushalayim* 11-12 (1983-1985); and of Hai Gaon (Babylonia, d.1038, published as Hai ben Sherira and Simha Assaf, *Sefer ha-sheṭarot* (Jerusalem: Azriel Press, 1930)); and of Judah b. Barzillai (Spain, late 11th/early 12th century, published as Judah ben Barzillai and S. J. Halberstam, *Sefer ha-Sheṭarot* (Jerusalem, 1966)). The *Sefer ha-’Itṭur* of Isaac b. Abba Mari (Marseilles, d.after 1193, published as Isaac ben Abba Mari and Meir Jonah Glanovsky, *Sefer ha-’Itṭur* (Jerusalem,1969)).

³² Goitein, *A Mediterranean society: the Jewish communities of the Arab world as portrayed in the documents of the Cairo Geniza*, II:334.

parties. These declarations fall into two broad categories—“acquittals” or “acknowledgments”. In both cases, these documents suggest what we would call resolution of the matter at hand: an “acquittal” denotes the release—often effected bilaterally—from the litigants of any future possible obligation towards each other, at times subject to a final condition such as settlement of a debt; while the “acknowledgement” declares an outstanding obligation from one party to the other.

Although his dataset of legal documents consists primarily of records only alluding to the resolution of conflict, a dataset nearly devoid of formal judgments *per se*, Goitein clearly felt compelled to dispel his reader of the notion that statutory law played no role in dispute resolution. Rather, Goitein explains, the composition of myriad rabbinic responsa attests to the role of formal legal norms in the legal process. However, rabbinic concern with punishment for error in judgment—a concern reflected in Maimonides’ *Mishneh Torah* and its Talmudic sources which point out that “any judge who rules in a less than true manner causes the *shekhina*”—that is, the divine presence—“to depart from Israel”³³—led the court to set down its judgments in the form of declarations on the part of the parties rather than in the form of decisions *per se* written in the voice of the court. Indeed, Goitein mentions a tenth-century judge who accepted his appointment only on condition that he should never be obliged “to give formal judgments in cases which he would decide.”³⁴ Thus, Goitein suggests, the documentary form taken by “judgments”—to wit, acquittals and acknowledgments—should not mislead the researcher into thinking that they do not represent actual decisions made by the court. Goitein clearly believes that some settlements were made outside the court, although this may have been relatively infrequent; he writes that “[i]n the cases of real

³³ *Mishneh Torah*, Laws of the Sanhedrin (the “Great Court”) 23:9.

³⁴ Goitein, *A Mediterranean society: the Jewish communities of the Arab world as portrayed in the documents of the Cairo Geniza*, II:335.

settlements outside the court our documents would state that ‘upright elders,’ or ‘peace-loving persons’ or simply ‘those present’ intervened and brought about an agreement through arbitration or persuasion”.³⁵ However, he understood those documents that do not contain such attestations to be the result of judicial decisions proper, even though those documents may have taken the form of acquittals and acknowledgements rather than formal decisions of the court itself. Interestingly, Goitein states that “Muslim judges adopted a similar attitude”³⁶ towards giving formal judgments, though a famous *ḥadīth* teaches that “When a judge gives a decision, having tried his best to decide correctly and is right, there are two rewards for him; and if he gave a judgment after having tried his best (to arrive at a correct decision) but erred, there is one reward for him.”³⁷ In this vein, although the description of “Middle Eastern” court practice in Chibli Mallat’s 2007 *Introduction to Middle Eastern Law* parallels much of Goitein’s description, including an absence of professional counsel, the recourse to outside legal experts, and the centrality of “consensual decision-making, with the judge as the holder of the last say in the matter at hand”,³⁸ Mallat’s analysis of a court register from 17th century Tripoli in Lebanon reveals that such registers contain many such judicial decisions nonetheless. On the other hand, Mallat was unable to find any such adjudication recorded in documents from the Geniza.

According to Goitein, court process in medieval Jewish Egypt involved a preliminary review of the evidence, in both oral and documentary form, by the rabbinic court, almost without exception in the absence of legal advocates for either party. On the other hand, where the legal questions were complex, the initial presentation of evidence would be followed by

³⁵ Ibid. .

³⁶ Ibid. .

³⁷ *Saḥīḥ Muslim, Kitāb al-‘Aqdiya*, ch.4.

³⁸ Chibli Mallat, *An Introduction to Middle Eastern Law* (Oxford University Press, 2007), 83.

recourse to jurisconsults whose opinions served the advocacy function: Goitein writes that “the parties, and if he saw fit, also the presiding judge, would present the case, as it had been formulated in court, to one or more legal experts.”³⁹ This process mirrors the practice in Islamic law of *qāḍīs* (“judges”, perhaps) referring their legal questions to *muftīs* (“jurisconsults”) and could help reveal why both Islamic and Jewish responsa from the period remove detail from their legal opinions: the advocacy function could be served by these responsa even without all of the details of the specific case. As is well known from the responsa of the *geonim*, heads of the central academies in Babylonia or Palestine, which reveal multiple authorities responding to a single question or case, Jewish litigants would often send queries to multiple jurisconsults. Additionally, a single jurisconsult can even be seen periodically to respond to opposing litigants in a single case.⁴⁰ Jurisconsults were aware of this, and specified in their responsa that their “rulings”—that is to say, the conclusions drawn in their responsa—applied only if the details of the case were indeed as stated in the question.⁴¹

Goitein explains that receipt of these legal opinions would be followed by an attempt to settle the case extracurially, apparently by “arbitration” panels which often included judges. Thus, only after efforts at arbitration failed would the court hand down a judgment, and even then only after the court itself sent legal queries to its superiors either in Fustāṭ, old Cairo, or, when the chief judges in Fustāṭ were themselves involved in a case, to the authority figure—the gaon or nagid (that is, the local communal head)—who appointed them. At the same time, the litigants would also appeal to the higher court or the authority figure even before the

³⁹ Goitein, *A Mediterranean society: the Jewish communities of the Arab world as portrayed in the documents of the Cairo Geniza*, II:338.

⁴⁰ For instance, Mordechai A. Friedman points out that *Responsa Maimonides* 34 and 45 demonstrate a particularly clear example of this phenomenon.

⁴¹ This conclusion emerged out of a personal communication with Mordechai A. Friedman. Jurisconsults would often write their responsa at the bottom of the page on which a question had been submitted to them. Thus, the voice of the questioner distinct from that of the respondent in manuscripts and published editions of responsa alike.

lower court handed down a decision. Finally, just before the court handed down its decision, it would give the parties the opportunity to save face by satisfying one another—particularly where the presumed loser was an individual of high standing. The decision itself often demanded that one or more parties take an oath, a ritual that included removing a Torah scroll from the ark and placing it in the hands of the party required to take the oath.

Thus, examining the dispute resolution process in general, it is clear that rabbinic adjudication as such is not the norm but is instead the last resort when disputes have not been resolved successfully by other means—as Mallat mentions with respect to his 17th century Lebanese court register. On the other hand, a number of preliminary stages in the litigation involve something which Goitein calls “arbitration”. However, the process which Goitein describes as “arbitration” demands further examination, not only because it seems likely that this described the manner in which the court and its members actually resolved most disputes, which might give a clearer idea of the function of the court generally, but also because an examination of the primary characters involved in this process and the documents they produced may yield some insights into exactly which sets of possible social norms were implemented as a result of the activities of the court, which (in turn) may make for a reevaluation of Greif’s fundamental assumption that the community of traders held and implemented their own set of *Gemeinschaft* norms.

In attempting to adduce the role of classical Jewish legal norms in court practice as described by Goitein, it is important to examine what Goitein meant by “arbitration”. As opposed to a contemporary understanding of arbitration as a process involving the binding adjudication of third parties, Goitein describes a stage in the litigation following the presentation of evidence and the amassing of legal opinions in which a settlement is attempted

“outside court” by means of a “board of arbitration”,⁴² after which the case would return to the court itself if the so-called “arbitration” was unsuccessful and a settlement was not reached. Yet it would seem that the very essence of the process of arbitration—to wit, the binding aspect of third-party adjudication—is absent from Goitein’s description. That is, the “board of arbitration” to which Goitein alludes was clearly educated as to the details of the case and to the fine points of law as detailed in rabbinic responsa and precedent which had been brought to the court, but that board of arbitration seems to have lacked the power to hand down a binding decision—otherwise, it is unclear why this board would ever need to return the case to the court itself. It would seem, then, that the actual function of this board of legal experts was *mediation* rather than *arbitration*—that is, attempting to bring the parties together to arrive at a settlement rather than actually handing down a binding decision *per se*. Furthermore, although Goitein brings an example of this “arbitration board” from the town of Damīra on the Nile which seems to function outside the court system, a cursory search of legal documents from the Geniza reveals that the word “*peshara*” (Hebrew, “settlement”) is not uncommon in documents actually executed in the court. It would seem, then, that the court would begin with an attempt to resolve disputes through mediation, in the hopes that this would save the judges from the possibility of error. This may also have had the added benefit of avoiding the dissatisfaction of one or more parties with a judgment decreed by the court. In an environment in which enforcement of judgments and the coercive power of the court is unclear—indeed, Goitein writes that “[t]he handing down of a judgment did not always mark the end of a lawsuit. Its execution, even with the aid of the state authorities...sometimes

⁴² Goitein, *A Mediterranean society: the Jewish communities of the Arab world as portrayed in the documents of the Cairo Geniza*, II:339.

caused great trouble”⁴³—reducing the role of adjudication in favor of mediation in order to reduce litigants’ dissatisfaction might have saved the resources of the court for attempting to enforce particularly difficult situations. Given that any case could be taken to an Islamic court “on appeal”—that is, if one or more of the litigants was unhappy with the result in the rabbinic court, he or she could take the case to an Islamic court—the Jewish court would seem to have a vested interest in producing results which had the support of all concerned. Particularly in Fāṭimid Egypt (969-1171), when Shīʿī rulers recognized courts of all four major Sunnī schools, Jewish, Christian, and Muslim litigants had their pick of a large range of courts;⁴⁴ litigants’ choice of venue meant that the Jewish and Christian (Coptic) courts essentially competed to attract cases. Geniza documents often allude to “Arabic” documents (that is, presumably, documents whose origin was in the Islamic courts) making their way as “evidence”⁴⁵ in the Jewish court, and it is clear that scribes in the Jewish court composed legal documents in order to respond to legal concerns present in Islamic as well as Jewish law,⁴⁶ just as scribes in Islamic courts of any particular legal school turned to the practice of *iḥtiyāṭ* (Arabic, “precaution”) and composed their documents to respond to the legal concerns of the other Sunnī schools.⁴⁷

It may be that Goitein’s use of the term “arbitration” instead of “mediation” was purely an error in nomenclature, because in using the term “arbitration” Goitein is sensitive to the

⁴³ Ibid., II:342.

⁴⁴ This situation changed somewhat with the arrival of the Ayyūbids (1171-1250), who enforced a Sunnī doctrinal orthodoxy with greater fervor (see Michael Milton Chamberlain, “The Crusader Era and the Ayyūbid Dynasty,” in *The Cambridge History of Egypt, Volume 1*, ed. Carl F. Petry (Cambridge Cambridge University Press, 1998), 232, who points out that the Ayyūbids appointed *qāḍīs* from the Shāfiʿī school alone).

⁴⁵ As mentioned above, the Qurʾān rejects an evidentiary role for documents in general, but court practice clearly admitted such documents from the early period, as explained by Wakin (see footnote 5 above). Jewish law generally gives legal force to documents.

⁴⁶ For a further discussion of the role of legal phraseology in scribal practice, see Phillip I. Ackerman-Lieberman, “Legal Writing in Medieval Cairo,” in *Stefan Reif Festschrift*, ed. Siam Bhayro (Leiden and Boston: Brill, Forthcoming).

⁴⁷ See Wakin’s discussion of *iḥtiyāṭ* in Ṭaḥāwī and Wakin, *Jāmiʿ al-kabīr fī al-shurūṭ. The function of documents in Islamic law: the chapters on sales from Ṭaḥāwī’s Kitāb al-shurūṭ al-kabīr. Edited with an introduction and notes by Jeanette A. Wakin* 32ff.

understanding of legal scholars that “mediation” of disputes generally avoids recourse to social or legal norms in the service of a solution acceptable to the disputing parties. Thus, in his seminal article “Mediation—Its Forms and Functions”, published in 1971, the very same year that Goitein published the volume of *A Mediterranean Society* which discusses court procedure, the scholar of jurisprudence Lon Fuller wrote that “mediation is commonly directed, not toward achieving conformity to norms, but toward creation of the relevant norms themselves.”⁴⁸ Likewise, Goitein’s assumption that mediation (in his words, arbitration) creates norms rather than conforms to norms is palpable when he protests that “[i]t would be entirely wrong to assume that the courts acted merely as boards of arbitration, without having recourse to statutory law.”⁴⁹ While Goitein understood that the court was well-versed in the details of cases at hand and the relevant points of law, he would seem to admit Fuller’s point that mediation involves enabling the parties “to meet shared contingencies without the aid of formal prescriptions laid down in advance.”⁵⁰ Indeed, Fuller even sees “not in the making of legal rules, but in their enforcement and administration that a certain incompatibility may be perceived between mediative procedures and the ‘rule of law’.”⁵¹

The understanding, then, that mediation dominated the Jewish courts of medieval Egypt, and that mediation meant a certain detachment from the norms of the *Gesellschaft*, would seem to support clearly Greif’s model of a tight-knit coalition with the norms of its own *Gemeinschaft*, even though the court may have been the forum in which those norms were implemented. On the other hand, more recent study of mediation has sought to “separate out the variety of processes grouped together as mediation and distinguish them based on their

⁴⁸ Lon Fuller, "Mediation--Its Forms and Functions," *Southern California Law Review* 44 (1971): 308.

⁴⁹ Goitein, *A Mediterranean society: the Jewish communities of the Arab world as portrayed in the documents of the Cairo Geniza*, II:334.

⁵⁰ Fuller, "Mediation--Its Forms and Functions," 326.

⁵¹ *Ibid.*: 328.

treatment of social norms.”⁵² Thus, in her 1997 article “The Role of Social Norms in Mediation”, Ellen Waldman outlines three distinct models of mediation: “norm-generating”, “norm-educating”, and “norm-advocating”. The first of these models is prefigured by Fuller’s claim that mediation is directed “toward creation of the relevant norms themselves”. In this model, participants in the mediation process themselves articulate possible solutions, encouraged by the mediator to do so. Significantly, Waldman explains that in this model “the mediator does not remove identified options from consideration simply because those options conflict with existing social norms.”⁵³

On the other hand, Waldman’s other two models, “norm-educating” and “norm-advocating” both place the mediator in the role of informing the disputants as to relevant social and legal norms, which are then used as a “baseline framework for discussion of disputed issues.”⁵⁴ The main distinction to be drawn between these two models is that the “norm-educating” mediator does not insist that the parties implement the norms, while the “norm-advocating” mediator establishes the bounds for any possible settlement based on the range of options allowed by the norms which he or she advocates.

In her discussion of “norm-educating” mediation, Waldman points out that some American corporations have developed in-house mediation programs to resolve employee disputes that are not explicitly norm-educating yet are nonetheless informed by legal norms. Indeed, one corporation’s decision to utilize only mediators with an employment law background leads Waldman to conclude that in such cases “[t]he ‘objective perspective’ is, thus, informed by judicial norms and standards.”⁵⁵ Likewise, although Goitein does mention

⁵² Ellen Waldman, "The Role of Social Norms in Mediation," *Hastings Law Journal* 48, no. 4 (1997): 707.

⁵³ *Ibid.*: 718.

⁵⁴ *Ibid.*: 730.

⁵⁵ *Ibid.*: 736.

that “upright elders” or “peace-loving persons”⁵⁶ might play a role in extracurial settlement, the aforementioned example from Damīra nonetheless involved a mediation board which was headed by a circuit judge. Thus, members of the court may well have been norm-educators simply by virtue of their educational and professional background. The norm-educating aspect of mediation would have undoubtedly been facilitated by the introduction into the mediation dialogue of expert legal opinions; as mentioned, Goitein explains that these opinions were composed and received by the court prior to the attempt to resolve the matter via mediation.

On the other hand, the mediation system of the Jewish court can hardly be said to have been “norm-advocating” as described by Waldman, which she defines as one in which “the mediator not only educated the parties about the relevant legal and ethical norms, but also insisted on their incorporation into the agreement.”⁵⁷ The documentary evidence itself suggests that this model is inappropriate—the aforementioned agreement renegotiating a failed partnership into a loan at a fixed interest rate being the clearest example. In bringing to light that the conditions of this document violated classical Jewish legal prohibitions on interest-bearing loans, Udovitch is certainly correct that the court did not act in a “norm-advocating” role. However, Waldman herself points out that the mediation of agreements in a norm-educating context may periodically involve overriding a norm without destroying the system on which that norm is based. Thus, Waldman writes that

“a settlement in which one waitress trades her right to be free of admiring but objectifying comments at work for higher pay is less disturbing from a public policy viewpoint than a class action settlement in which thousands of women workers ‘agree’ to continue to work in an obscene, insulting, and intimidating environment. The norm-educating model is appropriate only in conflicts in which the relevant norms may be

⁵⁶ Goitein, *A Mediterranean society: the Jewish communities of the Arab world as portrayed in the documents of the Cairo Geniza*, II:335.

⁵⁷ Waldman, “The Role of Social Norms in Mediation,” 745.

disregarded without weakening the ideals upon which our government and legal structure are based.”⁵⁸

While it is clear that a loan at fixed interest transgresses classical Jewish legal prohibitions, it hardly seems likely that the single commercial relationship described in the British Museum’s collection BM Or 10126.6 would have weakened the ideals upon which medieval Jewish society was based. On the contrary, it would seem that this document, which Goitein described as unique among Geniza documents in stipulating a fixed interest rate, represented an exception proving the rule that traditional prohibitions on interest-bearing loans were indeed followed. However, the existence of the document *does* support the contention that the mediation practices of the court were norm-educating rather than norm-generating. Such a contention is further supported by the general adherence of partnership agreements as they appear in the court records of the Geniza to legal norms as canonized in classical Jewish legal codes.

It is also important to point out that although the legal experts who wrote opinions which came before the court serving in its role as mediator may have had personal experience as merchants, as perhaps did the members of the court themselves, these individuals did not explicitly self-identify in their role as merchants when they were serving in their capacity as jurisconsults or as mediators. Thus, merchants are certainly found as signatories notarizing court records, but it is not in this capacity in which they sign those records. It would seem likely that the norms to which jurisconsults made reference, and for which mediators found themselves in a norm-educating role, were not those of the merchant community *per se* but were rather of Jewish society as a whole which those jurisconsults were presumed to represent. In this, the Jewish court is to be distinguished from the “Piepowder” or “Law

⁵⁸ Ibid.: 739-40.

Merchant” courts found at the Champaign fairs of 12th-15th century Europe. In describing the Piepowder courts, Scott Belhorn writes that

“Over the course of these several centuries, commercial law developed at a distance from the powers of the state, regulated by mechanisms operating mainly within the market. The remarkable feature of this history is that the very merchants most affected by this law oversaw the arena in which it was administered...In effect, the laws of the fair were the merchants’ own evolving social norms.”⁵⁹

Jewish law as found in classical legal compendia did not generally suffer the problem faced by medieval European merchants that the variation of local standards from borough to borough would have made it difficult for merchants to discover, much less conform to, such standards, begging the formation of cross-jurisdictional courts. This may have indeed allowed Jewish law to serve as a cross-jurisdictional law. On the other hand, Menaḥem Ben-Sasson does note, citing a responsum of Sherira Gaon, that local practice in Fez was to indemnify agents serving principals in a *commenda* from liability for trading losses except in the case of malfeasance—a divergence from classical Jewish law that resonated with Islamic law. Jurisconsults were therefore clearly aware of some local norms in writing their opinions. A norm-educating model for mediation practice among the Jewish courts would allow for the possibility that local traders actually formed their agreements according to that custom even after having been educated as to the classical sources of Jewish law on the matter. This is once again to be contrasted with the Piepowder courts, for which Bellhorn points out that “lawyers—viewed with suspicion as purveyors of the tediously formal—were generally denied entrance to the piepowder courts.”⁶⁰

Sherira Gaon’s acknowledgement of local custom in Fez is important, because it points to an understanding that Jewish legal norms are neither promulgated nor perpetuated in a

⁵⁹ Scott Belhorn, "Settling Beyond the Shadow of the Law: How Mediation Can Make the Most of Social Norms," *Ohio State Journal on Dispute Resolution* 20 (2005): 1010-11.

⁶⁰ *Ibid.*: 1014.

vacuum, but respond to pressures from local custom and from realia generally. Thus, a gaonic responsum famously refers to “*ḥukm al-tujjār*” (Arabic, “the law of the merchants”),⁶¹ as the legal basis on which the practice of check-writing is permitted, despite an explicit Talmudic ruling to the contrary. Whether the ultimate source of Jewish legal norms was quotidian practice itself or Talmudic texts, it would seem clear that involving agents of the court in the mediation process could make the court the locus of a dialogue between standards canonized in legal compendia and, ultimately, *responsa* on the one hand, and customary practice and the pressures of the marketplace on the other. The “norm-educating” model allows, even makes for, this dialogue. This dialogue would have provided an important feedback loop as those agents of the court continued to be in dialogue with their own jurisconsults.

That Jewish partnership agreements generally seem to be in line with Talmudic norms may say something about economic practice, but it also says something about the role of the courts in which these agreements were notarized. While traders were undoubtedly acculturated to local practice in the marketplace itself, the court provided a vehicle for educating those traders to the norms of Jewish law both at the formation of and during the maintenance of those agreements. Unlike contemporary American law, which views the adversarial process of adjudication as putting pressure on a contractual relationship—Stewart Macaulay, one of the founders of the study of the sociology of law, describes litigation as damaging if not damning to a relationship—the court simply provided a forum for public acknowledgement of milestones in the life cycle of a partnership relationship, as agreements were initiated publicly and also terminated publicly with the execution of an acquittal or

⁶¹ Albert Harkavy et al., *Teshuvot ha-ge'onim: she'elot u-teshuvot / mi-kama ge'onim uve-yiḥud me-Rav Sherira ga'on, mi-beno Rav Hai ga'on umeha-Rav Yitshak Alfasi* (Jerusalem, 1965), 215, #423. A second gaonic responsum, published in Nissim Ḥayyim Moses Moda'i, *Sha'arei Sedeq: Teshuvot ha-ge'onim* (Jerusalem: Hoṣa'at sefarim "Kelal u-Feraṭ", 1966), 165, concerning the practice of keeping written accounts, refers to “*minhagei ha-soḥarim*” (Hebrew, “the customs of the traders”), though the latter custom hardly transgresses Talmudic norms.

release, with some court records also appending a document renewing a partnership to the bottom of a document releasing the very same partners from any former obligations. It would seem, then, that the social function of the release document was that of a regularly-scheduled cyclical audit of accounts, a milestone in a relationship rather than its terminus. As a forum for mediation rather than adjudication, the courts could focus on maintaining relations rather than on negotiating their termination. Greif is undoubtedly correct that the reputation mechanism played an important role in preserving an individual's future opportunities in the marketplace, and the information flow depicted in letters is clearly important for gauging agents' behavior. However, the courts seem also to have had a role in mediating conflict and managing relationships; and the norm-educating role of the courts meant that in tandem with *Gemeinschaft*-like norms of the trading community, the process of mediation also meant that economic actors were asked to measure their behavior up against the norms of the *Gesellschaft* found in the works of contemporary Jewish jurists.

Understanding the "norm-educating" model as one which creates an actual dialogue between the legal opinions of jurisconsults and the needs of individual litigants, as those litigants arrayed opinions in their favor and then presented them to the court or Jewish judges requested those opinions and then brought them to the court, the influence on the outcome of the norms as they are rendered by jurisconsults in responsa should be examined. As mentioned above, Waldman understands the selection of employment law practitioners as mediators by some American corporations to influence the range of outcomes, though obviously not to limit that range. The regular citation of Talmudic norms in responsa, even in the infrequent case in which they are presented to point out a divergence in customary practice from those norms, suggests that jurisprudents were aware of these norms and that

litigants had at least a rudimentary exposure to those norms. Indeed, Jewish litigants' presumed ability to intelligently choose a venue that would give their case a good hearing from among a number of different Sunnī courts as well as the Jewish courts suggests that they may indeed have been somewhat sophisticated as to the norms which would form what Waldman calls as the "objective perspective" of the various venues in which they could seek recourse. This suggestion is given support by the legislative innovation of the geonim of Babylonia following the Islamic conquest which permitted the court to grant a divorce from a "rebellious wife" immediately instead of after the talmudically-imposed delay of one year, as Robert Brody explains that "[t]his ordinance was apparently motivated by the fear that Jewish women...might seek the assistance of Islamic authorities and possibly even convert to Islam in order to dissolve their marriages without delay."⁶² It is clear, then, that the geonim themselves were aware of the competitive nature of venue selection and understood litigants to have at least an elementary knowledge of the various expected baseline outcomes in each venue.

It perhaps goes without saying that Jewish juriconsults themselves were aware of Talmudic norms, but the fact that responsa of the period avoid citation of Talmudic material as often as they cite it could suggest that juriconsults were themselves actually "norm-generating" and unconstrained by statutory law. Yet the public nature of the transmission of responsa within the community of juriconsults, which included the copying and distribution of responsa of the geonim of the academies throughout the Jewish community as a whole (and presumably a similar practice disseminating responsa of local authorities), as well as the ever-present possibility that a judge might return a particular juriconsult's ruling on appeal to a more senior authority, diminishing the status of the juriconsult whose ruling was appealed if

⁶² Robert Brody, *The geonim of Babylonia and the shaping of medieval Jewish culture* (New Haven: Yale University Press, 1998), 62-63.

his opinion were publicly overruled, would indicate a pressure on jurisconsults to rule in a manner that was recognizably in dialogue with precedent, consisting of Talmudic sources; geonic monographs and legal compendia; and the responsa of other jurisconsults, including both the geonim of the academies and other local jurisconsults. As the movement towards codification developed from the ninth century to the twelfth, legal compendia strove increasingly to reach a population which was perceived as being incapable of interpreting Talmudic precedent;⁶³ Maimonides' code is even composed to supplant recourse to the "Oral Law" as the way to discern the law.⁶⁴ Despite his attestation that "...I explicitly wrote that my sole purpose in composing it was to alleviate the burden of those students who because of their impatience of spirit were not able to descend to the depths of the Talmud...,"⁶⁵ the *Mishneh Torah* seems to have been disseminated quite quickly and with great popularity. This would have made it even more difficult for a local jurisconsult to incline away from classical Jewish legal norms as they were characterized in this compendium.

Under some pressure, then, for jurisconsults to toe the line of Talmudic and geonic precedent in their opinions, it seems likely that the litigants in the Jewish courts would have been exposed to classical Jewish norms through the mediation process. It is, of course, impossible to determine whether it is the exposure to these norms in the courts, in the marketplace as a whole, or in the familial clan-cum-coalition which Greif describes as the seat of *Gemeinschaft* norms, that leads to their adoption in agreements. However, that the legal agreements in the Geniza generally reflect those norms to which all litigants would have been

⁶³ See Menaḥem Elon's analysis of the statement of the eleventh-century Spanish authority Joseph Ibn Megas in Menachem Elon, *Jewish law : history, sources, principles = Ha-mishpat ha-Ivri*, A Philip and Muriel Berman ed. (Philadelphia: Jewish Publication Society, 1994), III:1183: "[r]ecourse to books of *halakhot* is superior to the research and analysis of the Talmud itself as a means of ascertaining the law..."

⁶⁴ See the Introduction to the *Mishneh Torah*, cited by Elon (Ibid., III:1185).

⁶⁵ From Maimonides' letter to the Alexandrian judge Pinḥas b. Meshullam, cited in Isadore Twersky, *Introduction to the Code of Maimonides (Mishneh Torah)* (New Haven: Yale University Press, 1980), 32.

exposed when initiating, maintaining (such as when rendering accounts), or terminating partnership relations, would seem to challenge the proposal that the norms reflected in those agreements actually reflected the distinctive *Gemeinschaft* norms of a subset of Jewish merchants. Rather, it would seem that these norms were implemented in part because of the influence of the *Gesellschaft*, personified by the official representatives of the mediation process.

On the other hand, it would seem that the Jewish community's court process was structured such that individuals *could have* chosen to structure their partnership relationships otherwise. Thus, in a broader, Islamic, environment which likely disseminated Islamic legal norms through a system of jurisconsults and judges similar to that sustained by the Jewish community, and in which participants in the marketplace were generally aware of Islamic legal norms, even if the majority of economic actors (to wit, Muslims) may not have been aware of *Jewish* legal norms, the choice of Jewish economic actors to make recourse to Jewish legal norms must be seen as deliberate. As discussed in the previous chapter, there may have been economic reasons for principals and agents to choose the models of cooperation offered by Jewish law over those offered by Islamic law,⁶⁶ although this might suggest that it was the *Mishneh Torah* and not Ḥanafī law that was a “medieval Islamic Law Merchant”—a proposition which seems difficult to accept given that most merchants (once again, Muslims) may well not have been aware of the norms of the *Mishneh Torah*. Rather, it would seem that the proximity of legal documents to canonical Jewish legal norms was a conscious decision on the part of

⁶⁶ Pace Udovitch, who argues that aspects of the *commenda* (as understood by Islamic law) point to its economic suitability for long-distance trade; for example, he writes that “[s]ince the *commenda* was presumably used primarily for long-distance trade, this type of flexibility for the agent was almost a *sine qua non* for a profitable venture.” (Udovitch, *Partnership and profit in medieval Islam*, 212). On the other hand, it is clear that the practice of indemnifying the agent from losses in a *commenda*, a practice accepted and codified by Islamic law and rejected by Jewish law, produces a serious adverse selection problem addressed in the contemporary economic literature; see, for example, Mark Grinblatt and Sheridan Titman, “Adverse Risk Incentives and the Design of Performance-Based Contracts,” *Management Science* 35, no. 7 (1989).

economic actors to express their loyalty to the broader Jewish legal and cultural system which produced those norms.

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