Introduction

If this thesis is to be concerned with the problem of what precisely the halakha requires when it stipulates that a man cannot divorce his wife except by his own free will (and therefore any mechanism which attempts to provide a *get* in the absence of his agreement, or otherwise to dissolve the marriage without his express consent, may be invalid), the natural place to start may be the first mishna in Yevamot chapter 14:

> חרש שנשא פקחת ופקח שנשא חרשת אם רצה יוציא ואם רצה יקיים כשם שהוא כונס ברמיזה כך הוא מוציא ברמיזה פקח שנשא פקחת ונתחרשה אם רצה יוציא ואם רצה יקיים נשתטית לא יוציא אמר רבי יוחנן בן נורי מפני מה האשה שנתחרשה יוצאה נתחרש הוא או נשתטה אינו מוציא עולמית תחרש אינו מוציא אמרו לו אינו דומה האיש המגרש לאשה מתגרשת שהאשה יוצאה והאיש שנ לרצונה ושלא לרצונה והאיש אינו מוציא אלא לרצונו
>
> A deaf mute who married a hearing woman and a hearing man who married a deaf-mute woman: if he wishes, he releases her and if he wishes, he keeps her. As he brought her into the marriage by signals, so he can release her by signals. A hearing man who married a hearing woman and she subsequently became a deaf-mute: if he wishes, he releases her and if he wishes, he keeps her. If she became mad, he may not release her. If he becomes a deaf-mute or mad, he cannot ever release her.
>
> Rabbi Yohanan ben Nuri asked: why can a woman who becomes a deaf-mute be released whilst a man who becomes a deaf-mute may not release? They replied: the man who divorces is not like the woman who is divorced, for the woman goes out whether willingly or unwillingly whereas a man does not release unless willingly.

Yisrael Campbell, probably the most famous English language comedian in Israel, relates a conversation with a Hebrew teacher who tries to convince him that Hebrew is a simple language to learn: it has (relatively) so few words. Campbell points out that English has so many more words because the different English words actually mean different things. Thus, to take his example, “to visit” and “to criticise” (one verb in Hebrew) are two entirely different activities.

A retort of the Hebrew speaker to Yisrael Campbell along the lines that it is easy, when presented with the verb לבקר in most contexts, to discern whether the speaker/writer is referring to visiting or criticising may well be justified (just as most adult English speakers could correctly transcribe a sentence containing the

word “toe” as opposed to “tow”). Two entirely different concepts which happen to be indicated by the same word are unlikely to be confused. It is much harder, however, to distinguish between different but *related* uses of the same Hebrew word root. A failure to make such a distinction introduces an inherent contradiction into the above mishna.

The mishna opens by listing three different situations (the deaf-mute married to a hearing woman; the hearing man married to a deaf-mute woman and the hearing man who married a woman and subsequently became a deaf-mute). In the first two situations the halakha stipulates that if the man wishes (אם רצה) he releases her, and if he wishes (אם רצה) he retains her. In the third case, he cannot release her, and the second part of the mishna explains, in response to Rabbi Yochanan ben Nuri’s objection/question (why should a deaf-mute male be different from a deaf-mute female) that: “a woman goes out whether willingly or unwillingly whereas the man only releases willingly (לרצונו)”.

If we understand the root רצה to have one consistent meaning in this mishna then it is hard to make sense of these two rules. If the deaf-mute married to a hearing woman (the first case) “wishes” to release her, his wish is effective. The implicit contrary ruling that follows (“If he became a deaf-mute … he may not ever release her [even if he wishes to]” also relates to the deaf-mute (the only difference being that he is one whose condition arose after his marriage). The fact that a person is a deaf-mute, clearly does not render him incapable of “wishing” to divorce his wife – as is acknowledged by the first mishna – “אם רצה”. However, the reason given for the deaf-mute of the third scenario’s inability to divorce his wife (the response to Rabbi Yochanan ben Nuri) is precisely that divorce on the man’s part must be “לרצונו” – “willing”. In order for the two halves of the mishna to make any sense side by side, we must understand the רצה of the first half and the רצון of the second half differently.

As the context gives no indication to the contrary, I assume that the “רצה” of the first part of the mishna can fairly accurately be translated as wish or want, as per most basic Hebrew text books. It is, therefore, the רצון of the second part of the mishna whose definition is problematic. In an attempt to arrive at a better understanding of what this word might connote, I have studied, provided my own translations of, and consulted some of the standard translations of and notes to,

every mishna in which the word occurs.[1]

One of the points which has emerged from this study is that two of the English words which might naturally translate the Hebrew רצון, "will" and "intention", are themselves problematic in that they are used by different communities of English-speakers in radically different ways. Specifically, and most relevant to our project, they are used differently by philosophers, lawyers and laypeople. As the halakha has been perceived, variously, as a legal system, an expression of Rabbinic philosophy,[2] and the record of discussions by people who might in some contexts be considered "lay" (being neither philosophers in the Greek sense, nor lawyers in the modern Western sense), before we can begin to analyse the concepts at hand, we must decide in what "language" we assume the Mishna and later halakhic literature to be speaking. Therefore, before presenting the results of my study of the Tannaitic literature (chapter 1), I offer in this introductory chapter a brief summary of some of the ways in which intention has been or might be understood, and an argument for which of these ways is the most appropriate to the halakhic, specifically early Rabbinic, literature. I have focussed here mainly on the concept of intention (though I have also outlined what will be my working definition of will) because I believe that through an exploration of different understandings of intention we may arrive at an

[1] I also studied the Tosefta. For the most part, usage in the Tosefta is similar to that in the Mishna (as would be expected). One instance in the Tosefta, however, uses *b'ratson* in a manner which explicitly incorporates the idea of a specific purpose. I have cited this tosefta in chapter 1 where it is most relevant. Other *halakhot* from the Tosefta, whilst not particularly interesting on a linguistic level (that is, their use of the word רצון does not go beyond that which we find in the Mishna) are extremely interesting from a content point of view. I have dealt with such *halakhot* in chapter 2, in the context of their citation as *beraitot*.

[2] Particularly illuminating in both these contexts is an essay by Saul Lieberman entitled "How much Greek in Jewish Palestine" in *Greek in Jewish Palestine*. Whilst his subject is not the nature of the halakhic system per se but rather the extent of its consideration of (and loans from) on the one hand Greek philosophy and on the other Oriental-Hellenistic law, the assertion that the latter exerted a much greater and more direct influence on rabbinic literature than the former constitutes an indirect argument for a consideration of the halakha as a legal system (what interested the rabbis in their surrounding culture was their jurisprudence, not their philosophy). On the other hand, the arguments of scholars who claim a connection between particular branches of Greek philosophy and Rabbinic literature (Lieberman (p.217) cites Joel, Bacher, Neumark and Kaminka) presumably mean to suggest that the rabbis were indeed engaged in philosophy. Also enlightening in this context, of course, is the work of Jacob Neusner who has increasingly argued for a primarily theological (i.e. philosophical) understanding of Rabbinic Judaism. In a relatively early book, *The Academic Study of Judaism,* he debates where in a university curriculum Jewish Studies might find its place. He suggests philosophy of religion; sociology of religion; psychology of religion and comparative literature of the ancient, medieval and modern periods (p.21). He goes on to suggest that: "Judaism cannot be reduced to a geometry, of course, but it needs to be reduced to a history, or more specifically, to a history-of-ideas or a history-of-literature or "philosophy" course. (p.22) Notable by its absence from this list is a law, or history of law (or even ethics!) course.

understanding of what, for the various different traditions, constitutes significant action. It is also the case that later chapters will be much more heavily dominated by discussions of what constitutes free will and voluntary action. The natural place for any broader discussion of competing understandings of will is therefore in those chapters.

Criminal law[3]

The legal definition of intention starts with an act. The act is the focus of the Law; and that Law concerns itself in fact with a very small selection of acts – those which it defines as criminal. It is, then, not surprising to find that the concept of intention is one that is applied (or not) retrospectively not to a person but to an act. To put this in legal terms: apart from the doctrine of prior fault (where for example a person commits a crime in a state of inebriation, for which he is then held responsible even though the crime was not simultaneous with the fault) it is to the *actus reus* that the criterion of *mens rea*[4] is applied. Legally, we may ask: "was the act intentional?" We can even ask: "was it committed with such-and-such an intention". We cannot, however, ask: "what was the intention[5] of the person who acted?" In order to better understand this difference, let us consider a questionable act of a child.

When Johnny (a boy of sufficient age to know that falling down hurts) pushes his little brother over in the sandbox, the inclination of the majority of parents when deciding whether or not to reprimand or punish him, is probably to ask: did he do

[3] I have chosen for the purposes of this thesis to focus on criminal law to the exclusion of other branches of law because I think it offers the sharpest contradiction to moral philosophy and – as I will argue – the halakha. Some of the distinctions and analyses I will make are valid for all branches of law but it is criminal law which tends to be (often wrongly) equated in the public mind with morality as it deals with those behaviours which tend by common consensus to be termed "immoral": murder, stealing, rape and so forth. It is also in criminal law that negligence plays the smallest part (though it is not entirely absent) and thus the act (as opposed to omission) is most heavily foregrounded. It is on this characteristic that the current section focuses.

Throughout this section, I have drawn upon the analysis in Ashworth: *Principles of Criminal Law*.

[4] The concept of *mens rea* encompasses more, of course, than mere intention. It also incorporates knowledge (of the relevant circumstances and, in the case of a result crime, the likely consequences) or recklessness.

[5] The very fact that I have used the noun 'intention' in this question to refer to what lawyers would term a 'purpose' brands me a non-lawyer! If a man opens a door (intentionally) then a lawyer, asked the question "what was his intention"? can only reply: "to open the door" (or maybe: "to make a squeaking noise"). A layman might well answer: "to go out for a walk". I am convinced that the latter answer is quite "correct" and its conflation of 'intention' and 'purpose' does not represent a misuse of the English language. However, for the sake of clarity (and in deference to any lawyer-readers) I will from here on attempt to observe a distinction between intent and purpose. (Cf. also pp. 14-16 where I futher distinguish purpose and motive.)

it intentionally? That is, they are relatively unlikely to ask "what was his intent or purpose in so doing? (Was it out of spite? Was it an experiment to test the force of gravity? Was he "helping" said little brother to join in a game of "Ring a ring o' roses"?")

I would posit three reasons we do not generally ask "what purpose?" but rather, simply, "was it on purpose?" The first is that small children find it difficult to comprehend "why?" questions. The same child who spends 90% of her waking day asking "why?" will be utterly perplexed if she herself is in turn asked "why?"[6]

The second possible reason we do not ask of a child's behaviour "what purpose?" is what I shall term the legalistic reason. According to this view, the role of the parent or caregiver is to prepare his child for life in the adult world – a world governed by a legal system or systems and by sets of social mores that operate more or less like laws. The Law's prohibitions, in order to be perceived as authoritative, must in most cases be blanket prohibitions, applying regardless of the motive or purpose of the transgressor.[7] The parent who is uninterested in "why" is thus quite correctly teaching his child that certain behaviours are simply unacceptable and will be treated as such regardless of motivation. It should be remembered that the questions: "Might the ends justify the means?" and "May we do evil so that good will come from it?" are moral philosophical ones, not legal

[6] Cf. Mussen, Conger, Kagan and Huston: *Child Development and Personality*: "Two-year-olds understand *yes* and *no* as well as *where*, *who* and *what* questions, and generally answer appropriately… At this age, *when*, *how* and *why* questions are answered as though they asked *what* or *where*. (Q: When are you having lunch? A: In the kitchen. Q: Why are you eating that? A: It's an apple.) However, at about age 3 children begin to respond to *why* questions appropriately (Ervin-Tripp. 1977). The frequency of correct answers to all types of *wh* questions increases between the ages 3 and 5." (p.236). I would add a distinction that the authors of this book do not draw: my own (not statistically significant, but fairly typical) 3+-year-old now answers both *when* and *why* questions appropriately (i.e. in a way that makes grammatical sense) but not accurately. (A *when* question to which the answer is in the recollectable past is always answered with *yesterday*; if the answer is in the future, with *tomorrow*. A *why* question about the behaviour of others draws the answer "I don't know", and about her own behaviour draws the answer: "I just want(ed) to".) That indicates that she has a limited notion of the progression of time (understanding past and future but not the difference between recent and distant past/future) and very little understanding of or ability to communicate the decision-making processes of either herself or others.

[7] There are of course exceptions, such as when an aggressive act is committed in the name of self-defence (justifiable conduct). However, the encouragement of law-abiding behaviour requires that private individuals be "discouraged" from "taking the law into their own hands". Victor Hugo's Javerre, as a cipher for the Law, is rather unjustly condemned by his novel, *Les Miserables*: the Law really cannot distinguish, or be expected to, between a man who steals out of avarice and one who steals to feed his starving relatives. Both are illegal acts and one might validly argue that it is not so much that the Law should refrain from punishing in the latter situation but rather that the ruling classes (who also happen to make the laws) have a moral responsibility to ensure that social conditions are such that no-one is driven to break the law out of necessity.

ones. Even the legal concept of justifiable action is not about the *future* ends that might be achieved through the action; rather, it is about the *present* circumstances in which the actor acts (thus self-defence, even when it covers a pre-emptive aggressive action, must be in response to an imminent attack).

The third possible explanation (of the parent's failure to ask "what purpose?") is based on the theory that the way in which most people judge other people and situations is the polar opposite of the legalistic model outlined above. According to this theory, which I shall henceforth term "narrative theory",[8] when judging we are neither oblivious of nor impervious to the motivations of the actors concerned; on the contrary, it is precisely the motivations that we are judging. This, after all, is why we ask "did you intend?" at all; if we *merely* judged the *act*, intention would not enter into it.[9] However, in the majority of circumstances, the motivations we judge are motivations that *we* attribute to the actors. We have an "innate" (whether genetic, or learned in early childhood) disposition to make sense of the world and those around us in story terms. Acts are neither interesting nor meaningful in a vacuum, but become meaningful in direct correlation to the amount of context with which we are provided or which we can infer. Thus, "J hit Q" is an uninteresting statement. "Abdul hit Jack" becomes a more meaningful/interesting statement, though unless we happen personally to know an Abdul and a Jack to whom we assume the statement to refer, our interest is generated entirely by the speculative narrative *we* impose on the statement. (In contrast to "J hit Q", "Abdul hit Jack" is likely to play into our pre-formed and ongoing stories about racial tensions.) If we then hear that Jack had been sleeping with Abdul's daughter, for whom Abdul was trying to arrange a marriage with his cousin, the act becomes even more meaningful – i.e. we are hard pushed *not* to be drawn into the story. Finally, we can imagine this scene (Abdul hits Jack) as the climax in a blockbuster movie, the scene "everybody talks about". Once again, however, it is not the act itself which has everybody talking,

[8] My approach here draws heavily on the "semio-narrative" theory of Algirdas Greimas as described by B.S. Jackson in *Making Sense of Law*, section 5.1 pp. 141-163, though I have been selective in the use I have made of this theory and do not claim that my use thereof is identical with Jackson's account (still less with the original). In my description of "typical" jury activity in the paragraphs which follow, I have relied on the sources quoted later in that chapter – in particular the research of Bennett and Feldman (Reconstructing Reality in the Courtroom*)* quoted by Jackson on p.159 ff. and Wagenaar et al. (whose theory of "Anchored Narratives" is described in section 5.3 pp.177-184). The latter is particularly revealing as it deals with (over)reliance on narrative typifications not by laypeople (English juries) but by professionals (judges).

[9] Criminal Law does not generally punish on the grounds of strict liability for, I would argue, this very reason.

but rather the meaning we attribute to the act in its context.

To return to the scenario in which Johnny has pushed his little brother in the sandpit: in post-Freudian Europe, we have all "learned" the narratives of sibling rivalry and toddler aggression. Thus, according to our model of comprehension, the parent does not ask why Johnny pushed baby brother because he already (assumes he) "knows" – i.e. it fits a pre-existing narrative.

I have called this version of narrative theory the polar opposite of the legalistic model. However, we should note that narrative thinking also creeps into legal process. Juries, however much they may be exhorted to decide only whether they believe the defendant to have committed crime X, may actually be inclined to base their verdict on whether or not they believe the defendant to be "guilty", i.e. to have done wrong in a situation where the majority of people could have chosen not to. In fact, the jury's verdict relates not to the act at all but to the person: "guilty" or "not guilty" as charged. Thus the legal process ends in a statement in moral rather than legal language. If it were not the case that the jury is expected to judge "guilt" (popularly understood) rather than simply whether relevant act was committed with the relevant mental state at the time, the Prosecution would not "waste time" arousing the Jury's passions by emphasising the gravity of the crime and its tragic consequences, nor would the Defence raise all the mitigating circumstances. Moreover, we should not underestimate the power of the pre-internalised narratives which the jurors bring to the courtroom – narratives which tell them what sort of people act in what sort of ways. Hence the near-impossibility, for example, of a prostitute bringing a successful claim of rape.[10]

There is, then, a tension inherent in the legal system's definition of intention, or rather, between its formal definition[11] and what evidence may in practice be used

[10] In the course of an article responding to the case of the prostitute Aileen Wuornos, executed in the U.S. having been found guilty of having killed at least six of her customers (Wuornos at one point claimed that she killed each of the men in self-defence when they assaulted or raped her), Sherry F. Colb draws the interesting comparison between the difficulty of a prostitute's bringing a rape case against a man (or using it as a grounds for a claim of self-defence) and the difficulty of a wife's bringing a rape claim against her husband: in each case the woman is popularly assumed (though not, now, technically-legally considered) to have rendered herself sexually available – either to one particular man (in the case of marriage) or to all men (in the case of the prostitute) at any and all times (Colb: *When a Prostitute Kills*, 23/10/2002).

[11] Intention = (one form of) *mens rea* to commit the act in question (*actus reus*) at the time of committing the act.

to move a jury to render a verdict of "intentional x" or not. Whilst it is, theoretically, quite possible for a person to perform an action for no reason at all, the way we narrate events – to ourselves and others – relies on the fact that rational people do things for (better or worse) reasons.[12] Think of a defendant who took an unusual route home one night and was found at the scene of a crime. If in Court (and even in his lawyer's office?) he says he was in this particular place because he wanted Haagen Daz chocolate ice cream and his regular corner shop had only strawberry in stock, he is more likely to be believed innocent (especially, but not only, if his story can be corroborated) than if he simply says: I just happened to walk that way for no reason at all. If he says the latter – that he had no motive or purpose at all – the jury may impute to him a purpose: he walked that way in order to commit the crime.

Having thus argued that even the English legal system only half-heartedly operates according to its own rules in terms of its definition of intention, we might ask, briefly, what is gained by persisting with the legal definition at all?

I would posit two possible answers. First, it may be argued that the question "what intention" enters the realm of pure subjectivity and therefore cannot be the object of reliable judgement (or Judgment). This is a fair argument except that in most cases we cannot really prove the existence of intent at all but can only

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[12] I am grateful to my husband for pointing out the following incident from a biography of playwright Samuel Beckett. The incident concerned was an unprovoked attack on Beckett – a man unknown to him stabbed him:

> By French law, Beckett was required to confront his assailant in the courtroom, and in mid-February 1938 he went dutifully to the Palais de Justice, where he found Prudent [the attacker] sitting forlornly on a narrow wooden bench. Beckett was directed to sit down next to him to wait until the case was called, and so found himself in the incongruous position of exchanging pleasantries with the man who had stabbed him. After some insignificant chitchat, Beckett asked Prudent what he had done to inspire such drastic behaviour. Prudent drew his shoulders up and with a Gallic shrug replied indifferently, "I don't know."
>
> Critics have often pointed to this incident as the basis for much of the futility, despair and meaninglessness they find in Beckett's writing. ***At the time, however, it amused Beckett enormously and became a story which he enjoyed telling his drinking companions for years to come.*** (emphasis mine)
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> Deirdre Bair: *Samuel Beckett, A Biography*, p.283.

Beckett is probably unusual in being able to find such unprovoked aggression amusing, and whilst I personally find much to value in Beckett's work, I would note that he is not considered the most accessible of playwrights(!) The kind of absurdist drama which some of his plays typify relies on an existential, post-religious denial of meaning. Actions in a Beckett drama may have no purpose only because Beckett and his audience can imagine a world which has no purpose, *and thus no meaning*. The fact that Beckett can in life appreciate and in drama portray actions which thwart our narrative sense does not suggest that we are wrong in construing meaning in such narrative terms; on the contrary, it demonstrates quite clearly that when we are completely denied narrative structure, we are unable to find (or produce) meaning.

consider it more or less likely that an act was intentional, a judgement which in itself is likely to hinge on whether the supposed intent was plausible or not.

Secondly, and this I believe is a central concern: to take too much account of the whys of human behaviour would be to contextualise and relativise the law. As I have written above, Law is not ethics. It is primarily concerned with means (actions) and not with ends (purposes). In order to be universal, it cannot posit that an act is lawful with one motivation and unlawful with another. Even a morally right act but illegal act must be punished (to a greater or lesser degree).[13]

I raise these points not primarily in order to speculate about the nature of the English legal system but because what is useful to that system qua legal system might be expected also be useful to the halakha qua legal system. It may be that I will argue for an understanding of the halakha which takes it far beyond its status as a legal system, but that at least some areas of halakha are intended to provide us with the means of establishing or perpetuating a Jewish legal system – i.e. that it is intended *inter alia* to be taken seriously as a legal system – is indisputable.[14]

Moral philosophy

I opened the last section by stating that the legal system and thus its definition of intention centres on acts and not persons. However, given the minimalistic nature of the law in most Western societies, it is unlikely that my moral character will, unless I am extremely unfortunate either in my genetic disposition[15] or my social position,[16] be reflected in my choice to engage or not to engage in criminal behaviour. Most people, most of the time, are not facing serious temptation to break the law. Rather, my moral character will largely be determined by the

[13] Thus marijuana consumption for medicinal purposes remains illegal and punishment is still meted out to those who possess and administer marijuana, regardless of the need. However, the extent of debate in this area (and the fact that a dozen or so U.S. states have now legalised the growing and taking of "medicinal" marijuana) demonstrates how difficult it is to retain a legal prohibition over something that is popularly perceived to be morally positive.

[14] Insofar as it may have been disputed, I would suspect that this is either in an effort to over-compensate for the many years in which halakha has been treated *solely* as a legal system or else a reaction against a particularly narrow understanding of what 'legal' might mean – i.e. a confusion of 'legal' with the pejoratively-used 'legalistic'.

[15] If I am, for instance, by nature a person who finds it extraordinarily difficult to control my violent impulses, so much so that I cannot find adequate expression for them in the boxing ring, on the rugby field, or in membership of the Territorial Army.

[16] If I was raised in such a way, for example, that I am unable to achieve a level of education which might open to me adequate employment opportunities and am therefore unable to achieve a basic level of economic stability.

choices I make in spheres over which the law attempts to exercise no control; for example, the choices I make about how to spend my own time and money.[17] These choices, in the Western secular tradition, fall into the realm of "morality" not law. The law does not express a view on whether I should spend my weekend watching television or should lend a hand in running the local youth club. It does not "care" whether I spend my profit share on a luxury cruise and the latest model of Jaguar or whether I use it to fund a soup kitchen. Any ethical system deserving of its name, however, should probably provide guidance in weighing up these alternatives.

It is worth emphasising at this point just how far apart Law and morality are perceived to be not only in the intellectual circles of Western, secular tradition, but also in the Christian tradition. One of the central, founding myths of Christianity is the essential and insurmountable inadequacy of all law – even Divine law – for achieving G-d's kingdom on earth. Whilst it would be easy to assume that as the Church(es) became institutionalised and developed their own laws, their attitude to law in general softened so that the perceived tension between law and morality reduced, it seems that this has not necessarily been the case. I was initially surprised, for example, by the following quote from a book entitled *Morals, Law and Authority*, which deals with the authority of the Pope and of Papal encyclicals both within and outside the Roman Catholic Church. In his Introduction the editor, J.P. Mackey, writes: "… solemn pronouncements, particularly papal encyclicals and addresses, would seem to have had real authority and the greatest effect on people where least claims were made to absolute legal status for their contents."(p.vii) I find this a quite astounding statement. Mackey seems to be suggesting that – even in the

[17] It has been suggested to me that a salient point of difference between a positivist legal system and a system of ethics (the latter to include both the halakha and Islamic law) is the range of modalities the system may employ. Whereas the law is concerned only to prohibit, permit or obligate; a moral system also encompasses encouraged and discouraged behaviours. This is indeed an interesting point of difference, which I think is closely related to the minimalism of secular law versus the maximalism of moral/ethical systems. (For a brief discussion of Jewish Law's use of the greater range of modalities, see Jackson, B.S.: *Judaism as a Religious Legal System*, pp.43-44.) I would, however, dissent from the view that such rabbinic concepts as *lifnim meshurat ha-din* and *midat hassidut* are necessarily identical with the modalities 'recommended' and 'discouraged' – certainly if one assumes that such modalities are not legally enforceable. The Rambam, for instance, rules that behaviours which he classes as "*midat Sodom*" (the negative equivalent of *midat hassidut*) are indeed the subject of rightful *kefiyah* in the Courts (cf. for example *Hilkhot Shekhenim* 7:8 and 12:1). There also exists a spectrum of halakhic attitudes which could be translated by the English "prohibited" (quite apart from the range of available punishments reflecting the severity of transgression which exists in any legal system). So, for instance, there is a category of prohibited but not punishable (*patur aval asur*) and one of

Roman Catholic church, which is at the "legalistic" end of the Christian spectrum – Law is not only *not* perceived to be morally binding; it is in fact, if we understand "real authority" in this context to mean "ability to elicit action in compliance", the least morally persuasive form of utterance. I raise this simply to invite the reader's awareness, throughout this section, that the status of law, even religious law in the thought of moral philosophers who espouse the religion providing and inspiring the law, is radically different from the status of Jewish law – halakha – in the thought of a Jewish moral philosopher. One simply could not intelligently claim that some other form of discourse – say *aggada*, or maybe wisdom literature – was more morally persuasive than the halakhic literature, whilst remaining within a normative Jewish tradition.[18]

If Law starts with an act, ethics, I will argue, start with a person. And if it is, theoretically at least, possible for an act to be committed at a given point in time and judged as though that were the only point in time to matter (intention as divorced from context), it is wholly impossible for a person to exist only at the time of action, and implausible to attempt to deny continuity from minute to minute and year to year. There are, of course, rule-based systems of ethics which, like law, focus on acts. Kant is no small name in moral philosophy, nor can we discount the fact that the most well-known and widely read of the psychologists who have studied moral development (Piaget, Kohlberg et al.) have actually studied a facet of cognitive development called "moral reasoning", which consists largely in balancing conflicting "rules". However, whilst it may be true that when we enter a classroom to judge a teenager's moral development, we may tend to do so by testing his ability in the sphere of moral reasoning, when we judge our neighbour's teenage son to be a moral or immoral person, we are more likely to focus on whether he exhibits (ongoing) kindness to the elderly lady across the street, or whether he is the sort of person we would trust to sit with our small children for an hour if we had to go into town on an emergency errand. That is, we would be likely to focus on our judgement of his character.[19] Unfortunately, Socrates was mistaken:[20] it is quite possible for a person to

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prohibited but not punishable by a human court (*hayyav b'dinei shamayim*).

[18] I am hesitant to use the word "Orthodox". In this context, I am using "normative Judaism" to refer to all strands of Judaism which accept the *halakhic* system (however interpreted) as the norm of Jewish behaviour. This would, for instance, certainly include elements of the Conservative movement in America, though not Reform, who have consciously (and in conscience) argued for Jewish ethics as independent from *halakha*.

[19] Where character is primarily a predisposition to act in a particular manner.

[20] Socrates, according to Aristotle: "believed that all the virtues were forms of knowledge; in such

correctly identify the right course of action to take in a given circumstance, and to choose to take the wrong course.[21] So whilst moral development may in part be about learning to solve difficult moral quandaries (we probably will sometimes find ourselves in difficult and perplexing situations and need to be equipped with the mental tools to enable us to decide how to act), to focus exclusively on the skills which will enable us to balance different rules one against the other and to ignore the fact that we must learn to be the sort of people who can choose to follow the right course of action once it is so identified is something of a mistake.[22] Moreover, as I have said, rules, like laws, centre on acts, and I have already dealt above with a philosophy of action that concerns itself primarily with acts. What will interest me for the rest of this section, then, is character-based ethics.

Character-based ethics views moral development as the cultivation of virtue, or "the virtues".[23] What virtues we should be desirous of cultivating will to some extent be dependent upon the type of society we inhabit and what we envision to be our place within that society. We might argue for a notion of "core virtues" – such as kindness and courage – that will be valued in just about all members of just about all societies, as against "specific virtues" – the heightened sensitivity that might, for example, be valued in the *shaman* for a tribal society, or the musician or artist in our own society, but not in a warrior or political journalist. Importantly, because virtue ethics derive from the Aristotelian tradition, it is hard to imagine a virtue ethicist who is not also a rationalist. And rationalism implies that human behaviour is reasoned, and reasonable.

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a way that when we knew what justice was, it followed that we would be just" (MacIntyre: *A Short History of Ethics*, p.21).

[21] Hence, *Oedipus Rex* – the tragedy about a man who does wrong because he does not know that it is wrong – is less powerful as a moral drama in our world than *Macbeth* – the tragedy of a man who does wrong knowing that it is wrong. *Oedipus Rex* is about man's ultimate lack of control over his own fate; *Macbeth* is about his lack of control over the events spawned by his own, freely chosen, actions: that is, the *consequences* of his decisions.

[22] Diana Baumrind in her essay "Leading an Examined Life" draws a distinction between Judgments about Morality, Moral Judgments and Moral Conduct. She argues that: "My worth as a moral agent rests on the moral adequacy of my judgments and actions. The moral adequacy of my judgments rests in part on, but is not defined by, their cognitive adequacy… [it] is based on… [inter alia] how willing and able I am (a) to realize my decision in action and (b) to cope effectively with the consequences I have produced by those actions. The moral adequacy of my *action* inheres in the extent to which I hold myself responsible for that action, and this in turn is based in part on the coherence, rationality and volitionality of my decision-making processes." (Kurtines, Azmita & Grewirtz (ed.): *The Role of Values in Psychology and Human Development*, ch. 12, p.272 (emphasis in original). Cf. also pp.258-262 and pp.265-272.

[23] I have been deeply influenced here by the work of Alasdair MacIntyre, particularly *After Virtue.* For an understanding of how other philosophers have (or have not) been a part of the Aristotelian tradition MacIntyre seeks to represent in our contemporary age, I have drawn on his *A Short*

It has been argued (I believe correctly) that an intentional act, in a rational framework, is one to which "a certain sense of the question 'why?' has application" (a sense of 'why' which elicits a reason for acting rather than a cause).[24] This distinguishes intentional acts from both accidents and those involuntary reactions about which one cannot sensibly ask "why?" At the risk of seeming to repeat myself, then, in an effort to explore what I believe to be the inherent difference between even the narrative understanding of behaviour when that behaviour is understood as act-based and an understanding which is character-based, let me revert to the centrality of that question "why?"

I noted earlier that the speech of young children is frequently characterised by the incessant asking of the question "why". I would like to suggest that the young child's use of 'why?' is not only continuous (or seemingly so!) but often, more importantly, inappropriate. Thus the young child asks the legitimate question: "Why is the table wet?" (Because I spilt a glass of water.) Her question can be understood as a question about cause, and not one seeking to discover motive or intention. However, she may well go on to ask "Why did you spill a glass of water?" a question which is grammatically appropriate but semantically nonsensical. The question "why?" in relation to a person's action implies that the action is deliberate, i.e. it is implicitly the particular sense of the question to which Anscombe refers as being a test of whether an action is or is not intentional; it cannot therefore sensibly be asked of an action which has already been described as accidental or involuntary.[25]

What is interesting to me is that the fact that the child fails to grasp the distinction between accidental and intentional, voluntary and involuntary behaviour suggests that (s)he assumes all adult behaviour to be voluntary and intentional. The young child thus assumes the adult to be always "in control", reflecting perhaps adults' own narratives about adult behaviour – or at least the narratives they proffer to children. This is a case of motivation-attribution taken to its extreme, but I will be

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History of Ethics.

[24] G.E.M. Anscombe: *Intention* paras. 5 – 9 (pp.9-16)

[25] One can, of course, ask the question "why did you have an accident?" in such a way that it is a sensible question (inviting, for example, the causal answer: "because I was tired," or "because you distracted me by asking silly questions"). However, one's intuition is that the child is not asking the question in such a way; just as one's intuition is that a child who has asked "why shouldn't I wear my summer shoes outside today?" and received the answer "because it is raining" and who then goes on to ask "why is it raining?" is not trying to elicit an answer in terms of the natural science of precipitation. There may be nothing tangibly "wrong" with such an answer – one may even be able to express it in such a way that it would be comprehensible by such a young child – but it "feels" inappropriate.

arguing that as adults too, unless we are given some indication to the contrary, we assume each others' behaviour to be intentional and voluntary.

Assuming, then, that a "why" question implying intentional action has been appropriately asked, I would suggest that there are two ways in which that question may be appropriately answered: retrospectively (referring to motivation) or prospectively (referring to purpose). "Why did you eat the doughnut?" – "Because I was hungry," falls into the former category. "Why did the chicken cross the road?" – "Because it wanted to get to the other side," falls into the latter. Both types of answer are legitimate and "sensible" (i.e. we can make sense of them). Both types of answer allow for human choice: one does not necessarily have to eat when one is hungry; still less does one have to eat x rather than y. But they are, nonetheless, different kinds of answer and presuppose different philosophical models of human behaviour. The first – that which I have termed 'motivation'[26] – is, I would argue, essentially a non-rational model. From the Epicureans through Hobbes to Freud, the "I was hungry" model of human action posits basic needs/drives/desires which the individual will strive to fulfil insofar as society (or the instinct for self-preservation that leads him to obey societal norms) allows him.

From Socrates through Aristotle, Aquinas and a tradition which runs through contemporary thinkers such as MacIntyre and Frankfurt, the second model, the teleological one, is foregrounded. This is a primarily rational model of human behaviour. Whereas an understanding of human nature in which emotion or biology is dominant will focus on actions as answering needs or desires (motivation) a rationalist model sees human actions as purpose-driven. One might also say that in the first model, acts are viewed as ends in and of themselves – the act in itself satisfies the desire or need which prompts it – whereas in the second all acts are viewed as instrumental. Thus Piaget and Kohlberg offer between them an interesting scheme of moral development which suggests a movement *from* affective/motivated behaviour *towards* rational/teleological behaviour. An individual (according to their understanding) moves out of the amorality of infancy (where all action may be interpreted as an

[26] Obviously, I am not using "motivation" here in anything like the sense in which "motive" might be used in legal discussions. A lawyer, judge or jury in a court case might speak of a man's "motive" for murder – for example: he murdered his grandmother in order to gain the inheritance. In my view, this is not a motivation but rather a purpose ('ulterior motive', perhaps, but that is quite different from "motivation"). 'He killed her because he had hated her all his life', or even, 'he killed her out of avarice' would be, more correctly, statements of motivation.

attempt to address pressing personal needs regardless of the moral value of the action or its consequences) into the conformity of childhood. Children learn in the conformist stage(s) to exercise some level of control over their impulses and to ask and answer "why?" questions, but will typically give to those questions either retrospective answers (I'm not eating my dinner because I'm not hungry) or "intrinsic value" answers (to another child, for example, "You are not allowed to draw on furniture because it's bad/forbidden to draw on furniture)." That conformity is then transcended when the mature individual reaches a teleological understanding of morality – so that actions are evaluated (rationally) in the light of general principles (an assessment of the good or evil which will result from a particular action).

I would further argue that it is regarding his teleological decisions that the agent is most open to (rational) persuasion. A person who wishes to engage in a particular action because he is so motivated by a powerful passion may be persuaded not to do so through the threat of punishment (If you beat your enemy over the head, you'll go to prison) or through the realisation that it conflicts with another desire (If you eat that chocolate bar, you won't be able to fit into that dress). The initial desire to act, however, whilst it may fade with time, is not altered. A person who wishes to achieve a particular aim, on the other hand, may be engaged in discussion about the best means of achieving that aim. If I wish to go running this evening because I wish to get fit, and you persuade me that joining a women's netball team is more likely to help me achieve that goal (citing, perhaps, statistics which demonstrate that it is easier to stick to an exercise regime if one is part of a group than if that regime is a solitary one) then the original desire can be entirely replaced by the new intention. Likewise, to take a much more controversial example, if it is my overriding desire to become close to a G-d in whom we both believe, it is possible that an educated and persuasive member of another faith may convince me that his religion is more likely than my own to enable me to achieve that aim – and I will form an intention to convert. However, if my affiliation to my birth or childhood religion is predominantly affective (I am a Jew because I "feel Jewish" or a Catholic because I enjoy the rituals of Catholicism in and for themselves) then my reaction to my proselytising friend is likely to be considerably less open.

The narrative theory I outlined above in the context of the legal system functions whether the supposed answer to the "why" of the action is motivational or teleological. It is worth noting that Greimas' semio-narrative theory sets up a

three-part narrative sequence of meaningful human action centring around the development, achievement/non-achievement and evaluation of the achievement/non-achievement of a *goal*, and this goal-orientation would seem to suggest the teleological model; I am happy to accept, however, that in 'real life' we are as likely to impute a retrospective motivation as a prospective purpose. It might even be argued that the answer we supply to explain the action of another person is highly dependent on the kind of reason for our own actions we most frequently give. If I am a person who answers most frequently to my own passions, I might assume that you have chosen to write a biography of P (a famous author) because you are fascinated by her work. If I am a person who attempts to fit my behaviour into a life-plan, I might assume that you have chosen to write the same biography because you think that there will be in the near future, a vacancy in a prestigious university department for a lecturer with such a specialism. A rationalist philosopher will of course be likely to impute a purpose (rather than a motivation) to your action. To quote MacIntyre on Aristotle once again: "Men do not always act rationally, *but the standards by which men judge their own actions are those of reason.*"[27] (emphasis mine).[28]

MacIntyre writes of the "standards by which men judge their own actions". I would argue that these same standards are those by which men judge the actions of others ***so long (and only so long) as they acknowledge the other as a rational human being***. This latter point is important: Aristotle does not necessarily assume that slaves will act rationally, or purposefully.[29] Louis Sass points out that: "While "normal" behaviour is generally understood in teleological terms … "pathological" behaviour is generally understood in deterministic terms (that is, caused by something)."[30] In this case, we have a clear privileging of purposeful behaviour over "motivated" behaviour.

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[27] MacIntyre: *A Short History of Ethics*, p.73

[28] My (precocious) two-and-a-half year old daughter, who has been extremely quick to grasp the concept of consequentialism, was last week (at the time of writing) riding a rocking-horse in the playroom and as she swung back, hit the handlebars into her sister's face. Sister cried. Father asked: "Juliet, did you mean to do that?" (referring to the injury to her sister). Juliet replied: "Yes, I did mean to" (referring, I suspect, to riding the horse). Father: "That wasn't nice. You shouldn't hurt your sister." Juliet: "I didn't mean to." Father and sister left the room. Juliet mumbled to herself: "I didn't mean to. I didn't do it. It's not true… [happier]: I didn't do it." Thus Juliet, a rationalist two-and-a-half year old, cannot conceive of having deliberately done something without having intended all of the consequences. If she cannot accept responsibility for the consequences ("I didn't mean to") then she disowns the action ("I didn't do it").

[29] Cf. his discussion of the efficacy of torture as a means of eliciting true information from slaves as opposed to freemen, quoted in chapter 6.

[30] L.A. Sass: *Madness and Modernism*, quoted in Giordano: *Understanding Eating Disorders*, p.88.

When we turn to deal with the halakhic system, then, we shall have to ask not only what the rabbis' assessment of their own reasons for behaviour was, but also how far they valued their 'subjects' – i.e. the Jewish laity – as human beings of equal rationality. Before we attempt to answer that question, however, let me point out one further difference between the model of purposive behaviour espoused by the philosophers with whose work I am engaging and that of the narrative theorists. If narrative theory acknowledges that we consider actions in context, and not merely in a vacuum, it implies that we as observers demand a certain level of coherence in order to make meaning. The coherence demanded, however, tends to be short-term: he was hungry; he went to the shop to buy some bread; he ate and was satisfied. The traditions of moral philosophy which interest me here, however, beg to differ. Once more, I will lean on Alasdair MacIntyre: here he is describing Aristotle's definition of the nature of *eudaimonia*:[31]

> The good of man is defined as the activity of the soul in accordance with virtue, or if there are a number of human excellences or virtues, in accordance with the best and most perfect of them. What is more, it is this activity throughout a whole life. One swallow does not make a summer, nor one fine day. So one good day or short period does not make a man blessed and happy."
>
> > *Happy*, that is, is a predicate to be used of a whole life. It is lives that we are judging when we call someone happy or unhappy and not particular states or actions.[32]

Unlike narrative theory, then, Aristotle's demand is not for short-term coherence but rather for long-term, even life-long coherence.

Halakha

Having outlined three philosophies of human action, one of which (theoretical legalism) would seek to apply intention to a given act at a given time; one of

[31] Translated here and in many other books as "happiness". In fact, I would suggest "well-being" as a better translation, both because it suggests a broader concept of what it might mean to be "happy" or "blessed" and because, for all its irregularity, the verb "to be" remains a verb. "Being" well is at least allied to the notion of "doing" well; and right action is as integral to the Greek concept of *eudaimonia* as is well-feeling.
[32] McIntyre: *A Short History of Ethics*, p.63

which (narrative theory) would seek to apply it to that act in a context (attributing either a motivation or a short-term purpose to the actor) and the last of which (character-ethics) would seek to apply intention to the person acting in the context of his life orientation, it remains for me to question which philosophy is closest to that embodied by the halakha.

Because halakha is apt to express itself in legal language, it is easy to assume that it is a "legal system like any other legal system" – different maybe in content, scope and origin (though many Western legal systems also owe a "content-debt" to the Judeo-Christian tradition and perceive some of their individual laws as deriving from Biblical law), but essentially similar in terms of its perception of the way in which humans observe or transgress laws, and what it means to attempt to regulate human action. I will here offer four major ways in which the halakha is radically different from English criminal law (our working example of a modern legal system) and suggest that those four differences are sufficiently fundamental to force us to re-evaluate the halakha and classify it as something other than a legal system, straightforwardly understood.

The first sense in which the halakha is clearly different from English criminal law is in its maximalism. Whereas criminal law attempts to "interfere" as little as possible with the day-to-day life of its citizens, halakha aims to regulate every sphere of life – ordinary and extraordinary. This alone takes halakha into the realm of what we might term "ethics" rather than law.

Whilst one might of course still argue that the halakha represents a rule-based rather than a character-based ethic, so that it would fall into the theoretical framework of a legal/rule system rather than the sort of system of moral (virtue) philosophy I have described above, I would argue against this assumption by pointing out a second way in which the halakha differs from any secular legal system: namely, that it represents a large part of the expression of a religion. Inherent in a religion is the notion of an ultimate *telos* – an end toward which all human life is, or should be, directed. In some religions, this *telos* may be a purely spiritual affair, independent of any "this-worldly" system of ethics the religion might (incidentally) espouse as an instrumental means of ensuring good order, peace and other necessary conditions for the flourishing of the spiritual life. This is true for example of most brands of Protestantism but is clearly not the case in Judaism. Not only is the *halakha* not "incidental" to the religion; it does not and

cannot exist separately from the religion – nor can the religion, in its traditional form at least, survive as divorced from the *halakha*. Rather, the *halakha* – the "going-way" – is the very "way" on which Jews are urged to travel in order to reach the *telos* both of their own lives and of the Jewish people as a whole. Notions of *halakha* and *telos* are so integrally related in Judaism as to demand that we view halakhic behaviour as end-oriented.[33] Thus to attempt to divorce acts from context and consequences (physical or spiritual) in the *halakhic* imagination would seem contrary, to say the least.

A third difference between the halakha and the English legal system centres on its oral versus literary nature. The English legal system is a highly literary-based system. Legal statutes are (extremely) carefully drafted so as to leave the smallest possible room for error in their interpretation. Student lawyers are trained in a university environment: lectures notwithstanding, it is assumed that they will obtain most of their information from books, and will be examined by means of essays and written examination questions. (Bar school advocacy exams are probably the only exception to this rule.) Compare this to the yeshiva student who will, in a day, read only a fraction of the text his opposite number in the university will digest,[34] who will clarify his ideas not through writing essays but through discussion with his *hevruta*, and who may never in his life sit a written examination.[35] Moreover, almost every step in the legal process generates documentation: not only the Pleadings themselves and, of course, the Judgment, the Instructions to Counsel and the correspondence between opposing solicitors; also the most seemingly banal conversations between lawyers and their own clients will be recorded – i.e. written down. These written records not only serve as proof (should such be needed) that the lawyers concerned have discharged

[33] It is worth noting here that Howard Eilberg-Schwartz also emphasises the importance of *telos* in the Rabbinic – or at least the Tannaitic – mind. One of his "axioms" – the conclusions his study reaches – concerns "the importance of teleological criteria in the Mishnah's system of classification" ". His claim is that "the sages define an object or action in terms of its end or *telos" (The Human Will in Judaism*, p.185). Moreover, he specifically underlines the connection between this concern with *telos* and the importance within the Mishnaic system of intention. (Cf. for example p.187: "It stands to reason, therefore, that had the Mishnah adopted non-teleological criteria by which to classify things, intention would play a relatively insignificant role in the system.")

[34] Even a student learning *bekiut* rather than *b'iyun* traditionally describes himself and is described as "learning" rather than "reading".

[35] Granted, the Israeli Rabbinate and some other, more "modern" *semicha*-granting bodies set a written examination for ordinands. I would only note that (anecdotally) I have heard that ordinands with a university background are frequently "appalled" at the level of cheating, the openness of discussion between examinees and, in general, the cultural difference between themselves and the purely yeshiva educated ordinands in their attitude toward such examinations.

their duty in a professional manner; they also serve as a means of clarification: the client will (often) be asked to read his lawyer's notes of a particular conversation in order to verify that the lawyer's understanding is indeed correct.

In contrast, it is striking but no accident that the central, most authoritative, body of halakhic literature is termed "*Torah shebe'al pe*" – the oral law.[36] In fact, it could be argued that even the written law, is "oral" in two respects. First, whether we accept the traditional account (Moses' ascent of Mount Sinai, the two tablets and so forth) or follow modern critical theory (the legal codes having their origin in an oral tribal mediation system)[37] the one point of consensus is that the laws were originally *spoken*. Moreover, they were spoken (whether by G-d to Moses or by the elders to one another) in a context of shared aims and a shared understanding of the society to which they related. Thus, it is abundantly clear that even the written law was neither intended nor understood as a full and thorough enunciation of all laws. The Torah itself makes reference to the role of the (orally-operative) judges in each generation[38] in deciding (i.e. creating) law; moreover, the traditional acceptance of an oral law alongside and complementary to the written demonstrates Rabbinic acknowledgement of glaring aporia in the latter.

What is the implication of this orality in halakha? It has been shown that an account of an event (or, I will be arguing, a legal norm) which is oral will tend to share features with an account intended as part of a private rather than a public discourse.[39] On a very practical level, this should be obvious: a written document

[36] In emphasising orality both as an integral feature of the halakha and as a feature of its own self-perception, I am following Martin Jaffee (*Torah in the Mouth)*. For a brief summary of his argument, see the very opening of the introduction to his *Torah in the Mouth* (pp. 3-7) which revolves around the account in Eruvin 54b of the oral transmission of the Torah.

[37] Cf. for example B.S. Jackson in *Wisdom-Laws*, particularly sections 1.4.2 (pp. 29-35) and 2.2, citing inter alia, Boecker: "…before being written down as literature, a 'literary' form was always oral." (p.45).

[38] Deuteronomy 17:8-11.

[39] Cf. the "restricted" and "elaborated" codes described by Basil Bernstein (quoted in Jackson, *Making Sense of Law*, pp. 93-94) and Ong's suggestion that these relate respectively to "oral-based" and "text-based" modes of communication (ibid. p.94). I find these terms useful, though I would question Bernstein's identification of restricted-code-using communities with particular socio-economic groups (those without a high level of education). My own contention is that even groups of people who are highly educated and at ease with processing information from "outside" (i.e. people who are "elaborated-code-literate") may quite deliberately use a restricted code when talking inside a closed group – particularly one which they would prefer remained closed. I would even suggest that, in the case of the sages and some later *halakhic* authorities, elaborated-code texts (such as Greek philosophy) are translated into restricted code (for example, Jewish jurisprudencial language in certain tractates of Mishna) in order that they should appear to be internally generated, and thus gain authority within a milieu which self-consciously values the

can be disseminated to a much larger public than I am able to address orally (leaving aside the phenomenon of modern media mass communication). Moreover, when speaking to a present audience, I "know" who I am speaking to. By contrast, I cannot normally predict in whose hands my written document will end up. Inside my own *beit midrash*, then, I might have reason to assume that my interlocutor and I share not only basic schema about the world, but even fairly detailed assumptions about how particular narratives function (the internalised narratives, or "why"s behind my sentences). This enables me to leave the majority of my communication unspoken, so that at times the actual transcript of my words might read more like a code, or short-hand, than a full dialogue.

Public discourse, on the other hand, especially in its written form (which assumes that the writer will not be available to clarify any areas of vagueness the reader finds) must "state the obvious", assuming that what is obvious to the writer may not be obvious to a reader who might very well come from a different social class, have a different educational background, and assume different basic "facts" about the subject at hand.[40]

The Mishna (and thus also the Talmud) opens with a question:

מאימתי קורין את שמע בער
בין?

From when do we read the Shema in the evening?

The wealth of assumed knowledge here is enormous: that there exists a requirement to read the Shema; that we know what the Shema is; that Shema must be read in the evening… That this is not how a code of law begins, even if we accept the content of "Jewish law" as a given, can be demonstrated by looking at later Jewish re-statements of the law – documents which have been more deeply influenced by non-Jewish legal systems. The openings of the Shulchan Arukh and Mishneh Torah, for example, are strikingly different from the

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restricted (internal) above the elaborated (external) code.

[40] It might be added that dictionaries are more useful as a tool in helping to de-code written documents than oral speech. To quote from Edith Harding and Philip Riley's book *The Bilingual Family*: "There are [many] kinds of meaning which occur in real-life interaction but not in dictionaries and grammars. The most important of these is meaning which is based on *common knowledge* of the way our world is organised… This is important from the point of view of the bilingual: he speaks the language but, because he has been living abroad, does not know many of the things which people who speak that language usually know." (p.17, emphasis mine) One might suggest that our position in picking up the Mishna might be compared to that of the bilingual in this passage: we may know what the words mean, but lack the common knowledge (or set of assumptions that the Sages held) to know what they mean in context.

opening of the Talmud, and resemble secular legislative literature in taking far less for granted and attempting to forestall the questions of a reader who does not necessarily share all the same background information and/or assumptions as the writer. If we were to restrict ourselves to the codes, we might more legitimately think we were dealing straightforwardly with "law". However, those later codes attempt to be at most a "translation" of the halakha into terms with which the layman can more easily become familiar.[41] They do not attempt to provide a different philosophical framework for the halakha from that of the Sages[42] and their authors would be appalled by the very suggestion that such an attempt might be made. The fact also remains that the *sine qua non* for a *talmid hacham* is familiarity not with the codes but with the Talmud. A rabbinic opinion or *psak* which made no reference to the relevant *sugyot* in the Gemara, even though it dealt with the *halakhah psukah* in the later literature would be unlikely to be highly regarded.

Finally, and deeply linked to the oral nature of the halakha, is the question of its essential aim. Put simply, legal statutes in the secular world exist for lawyers. The layman has a working knowledge of what is legally permitted and what is not (comparable, perhaps, to the level of halakhic knowledge traditionally required of a woman) but is not expected to show any knowledge of, nor interest in, technical legal literature. The opposite is the case in normative Judaism, which demands that every man every morning make a blessing over (i.e. accept) the command to learn Torah.[43] Study of halakha is presented as not only one of the pre-requisites for, but one of the major factors in, a life well-lived. It takes the exalted place of rational contemplation in the Aristotelian tradition. Thus the halakha is an "oral" tradition in an additional sense to that mentioned above: it is a tradition which demands to be "in our mouths and on our lips" in that it should be constantly debated, discussed and rehearsed.

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[41] Cf. the Rambam's explanation of his aims in the last paragraph of his introduction to the Mishneh Torah. He views his contribution as (1) ordering; (2) condensing and (3) translating into clear language the entire *Torah she-be-al pe*.

[42] The Rambam throughout his writing consciously identifies himself with the philosophy of the Sages. The existence of the Shulchan Arukh notwithstanding, the fact and form of Rabbi Yosef Caro's commentary on the Tur – the Beit Yosef – which is careful to record the arguments of the *rishonim* leading up to the decisions of the Tur, might suggest an ambivalence about the whole project of writing a 'guidebook' which gives only *psak* and not the *shakla vetarya* of rabbinic discussion. The Shulchan Arukh, of course, is not studied in *yeshivot* without the Beit Yosef and the commentaries of the *acharonim*.

[43] BT Shabbat 127a, incorporated in the Blessings of the Torah, Morning Service.

To emphasise the difference in world-view between the halakhic system and the secular that this implies, I wish, anecdotally, to quote from a recent issue of JOFA[44] magazine[45] carrying a letter from a congregational rabbi praising the contribution of a friend of mine working as an intern in his community. She had run a series of classes on the topic of *taharat ha-mishpacha* (the laws of family purity) and the rabbi lauded her as a teacher. He was particularly pleased to note that since her classes, the number of *shailas*[46] he had been asked relating to this area had increased dramatically. That is to say: the rabbi sees the acquisition of knowledge (which might have been expected to forestall questions and free him, the rabbi, up for other work) as only a step in a process whose aim is to lead to more questions. Those questions will lead to more learning, which will lead to more knowledge (and more questions) and that is the essence of the proliferation of Torah.

It is the halakhic weight attached to the responsa literature – the celebration (as per the rabbi's letter in JOFA magazine) of the *shaila* – which provides my final argument for an understanding of halakha as a legal system primarily oral in nature. We should of course remember that most *shailas* are in fact orally presented and orally decided. Traditionally, the only written responsa take the form of letters from acknowledged halakhic authorities to correspondents who live at too great a distance to bring their question in person. Even then, these written responsa are overwhelmingly addressed to correspondents known personally to the rabbi. That is, though they are written, they are essentially a form of private communication. Responsa are also recorded in the works of other *poskim* who will quote a decision, often reported by hearsay, from one of their contemporaries or recent forebears. In this case, as in the case of the *shaila* orally answered, the decision of the rabbi is generally reported without any account of the reasoning leading thereto. This, of course, draws us right back to the format of the Talmud – the archetypal "oral law" – a large proportion of which consists in statements attributed to various authorities very few of which are accompanied by any explicit account of that authority's reasoning.

Before we move on to our analysis of the Mishna, it is important to relate, very briefly, the narrative theories I have outlined above (both retrospective and

[44] Jewish Orthodox Feminist Alliance.
[45] *JOFA Journal*, Spring 2006.
[46] Questions brought to the rabbi on a particular halakhic issue, seeking his definitive decision.

prospective) not to the subject matter or content of the halakha, but to modes of interpreting halakhic literature. Let us return to the two reasons I posited for the parent's and secular legal system's failure to ask "what purpose?" when confronted with either the child's or the possible criminal's behaviour: the legalistic, which denies the need to ask about motivation or purpose at all; and the narrative, which tends to assume that the purpose is obvious and immediately accessible to the observer. I would argue that these mirror the two predominant models of reading both Talmud and any subsequent halakhic literature which makes undefended or unexplained statements of halakhic decision. The legalistic posits that so long as the statement was "intentional" (this concept could be translated in the context of understanding halakhic literature as: correctly attributed and correctly preserved, thus explaining the current academic concern with manuscript variants) we should not care what motivates the decision nor what purposes might have been served thereby; it simply enters our range of halakhic options. The second model assumes that what lies behind the decision – the values being weighed by the rabbis who chose this option over the others available – is wholly accessible. The reason there is no explicit explanation, according to this second model, is not that the motivation or purpose is unimportant, but rather that the speaker/writer assumed that he was speaking "amongst friends" (i.e. to other *talmidei hakhamim*) who would so share his world view and assumptions that explanation would be redundant. I suspect that in a less self-conscious milieu, one that simply assumed the continuity of the present with the traditions of the past, the latter would prevail: a later *posek* would automatically and unconsciously assume full understanding of and identification with the motivations and purposes (the worldview and the "why"'s) of the earlier decision-maker.

In our own, more self-conscious age, we are likelier (in Orthodox circles as well as academic ones) to adopt the legalistic approach, to stress our dis-location from the earlier authorities and insist that we have no access to their thought processes and thus can only deal with the recorded *psak*.

My contention is that a third alternative is not only possible but is in fact incumbent upon us. As we have seen above in my account of the secular legal system, however much we try to exclude considerations of purpose and motivation from our judgements, these will inevitably seep in. We are incapable of treating human decisions as motiveless and an attempt so to do will simply

result in our projecting our own assumptions as to motive upon the actor ***without being aware that we are doing so***. Likewise, we cannot revert to the assumption that we automatically share the unarticulated world view of earlier generations – that is an innocence we have lost. Rather, we must accept that, whilst we do not have complete or automatic access to the thought processes of the authorities before us, we can in many cases infer those processes from their decisions.[47] This is easiest in circumstances where we have a record of a number of decisions by the same person and can rely on the fact that one of the criteria for rational behaviour (as I will be arguing particularly in chapter 2) is consistency.

One feature of the methodology I use for interpreting halakhic sources (intentional statements about halakha) which in turn informs my understanding of intention in its wider sense is the emphasis it lays on the importance of consequences. One of my assumptions is that the responsible *posek* concerns himself with the reasonably foreseeable consequences of his *psak* and therefore it is legitimate to ask: what did he hope to achieve through *paskening* in the way he chose, i.e. to assume that he intended the consequences arising out of his *psak* (unless they were such that an intelligent man would be expected to be entirely surprised by them). Thus more widely the halakha, an expression (as I have argued) of a system of *ethical* governance rather than a strictly legal code and one which is based on a presumption of reasonable intelligence, reasonable self contol and a more than reasonable acquaintance with the law[48] infers ***intention to produce the significant and foreseeable consequences*** of an act from the performance of the act itself. This again strengthens my argument for an understanding of halakha as narrative legal system. Whilst a rule-based system such as English criminal law is concerned with consequences only in some circumstances, or in the context of some (result) crimes, it is inherent in the very notion of a narrative, and thus essential to the halakha as narrative legal

[47] For examples of such inference, cf. Ancselovits: "Embarrassment as a Means of Embracing Authorial Intent" in *Vixens Vanquishing Vineyards*, forthcoming.

[48] This is not in any way a controversial assertion. Insofar as the assumed reasonableness of the "halakhic man" is concerned, Eilberg-Schwarz, for example, writes: "… the sages picture the typical Israelite as a rational person …" (*Intention in the Mishna*, p.137). He goes on to state that "…In the Mishnah**…** the ideal Israelite is a rational, practical person whose behaviour is always **predictable**" (emphasis mine: I will return to this notion in late chapters: the emphasis on coherency of behaviour as a criterion of rationality.) Insofar as the assumption of reasonable acquaintance with the law is concerned, I would simply refer to the huge emphasis placed on the centrality of the act of learning in the Jewish tradition, as well as the encouragement, already noted, of the individual to ask specific questions of halakhic authorities.

system, to be concerned with consequences.[49] The reasonable, intelligent actor understands his act to have both a past and a future. This is borne out by two cognates of the word "intentionally": 'deliberately' on the one hand, and 'on purpose' on the other. The word 'deliberately' suggests 'deliberation', a process of reflection leading to a decision or action. That deliberation (decision-making process) is the past of the act.[50] 'On purpose', by contrast, would seem to imply 'with a purpose' i.e. in order to bring about a particular consequence or set of consequences. Thus the future of the act consists in the consequences thereof. Both past and future of the act are inalienable from the act itself; they provide its context and therefore its meaning.

Before moving on, it is worth noting one last characteristic of intention as I define it, and that is that it is entirely independent of desire. Uncharacteristically, I here follow a legal and not a philosophical precedent. James LJ in *Mohan* (1976), asserts that intention is "a decision to bring about [the proscribed result], in so far as it lies within the accused's power, no matter whether the accused *desired* that consequence of his act or not" (emphasis mine) and goes on to note that "This definition has the advantage of stating that desire is not essential to intention (one may act out of feelings of duty, for example, rather than desire)."[51] This is quite consistent with a consideration of intention as a constituent element of *mens rea* where intention to produce a particular consequence may be replaced by recklessness as to that same consequence (recklessness implying no particular desire whatsoever). I remain unconvinced on the other hand by G.E.M. Anscombe's opposing argument[52] that if one has foreknowledge that one's action will produce a particular consequence but does not actively desire to produce that consequence, one cannot be said to intend to produce that consequence. Here we might draw a distinction between intention and will – in this case, the person does not *will* the particular consequence; (s)he does nonetheless *intend* it.

Will

I have concentrated in this prolonged introduction on the concept of intention

[49] Cf. Greimas' understanding of narrative as being centred around the achievement or non-achievement of a goal – most goals can be understood as consequences the actor wishes to achieve though his action.
[50] If we choose to incorporate more of the affective/motivational understanding into what is now appearing a highly cognitive/rational understanding of action, we can of course replace "deliberation" in this narrative with "motivation".
[51] Ashworth: *Principles of Criminal Law*, p.169.
[52] Anscombe: *Intention*, para.25, pp.41-45

simply because of the striking gap between the meaning that lawyers attribute to the word, and that which some philosophers attribute to it. It has, therefore, been important to clarify and defend my own meaning in using the word. Moreover, much of what I have said in this introduction concerning intention forms the background to my conception of will: the two concepts are deeply connected – as indeed we might expect, given that the central problem of this thesis is a Hebrew word (רצון) which I have argued may be translated in different contexts by each of the two English words.

The nature of will is also a highly contested area, but it has proven easier to arrive at a working definition of will than of intention simply because serious debate about that definition has been carried out much more exclusively in the philosophical arena. Criminal law accepts the notion of non-voluntary behaviour only in cases of mental illness or demonstrable coercion (by an external force).[53] In other cases, such as extreme drunkenness, though it accepts that the actions performed 'under the influence' may not themselves be voluntary at the time of action, it nonetheless reserves the right to hold the actor responsible for his actions under the doctrine of prior fault. It thus seems that the Law equates, or at least approximates, voluntariness with responsibility and that its definition of free will equates, more or less, to freedom of action. It has been left to philosophers to argue that that understanding is in fact fallacious.

The conception of will with which I will be working in this thesis is strongly influenced by, but not absolutely identical with, that offered by Harry Frankfurt in an essay entitled "Freedom of the will and the concept of a person".

In his attempt to define will, Frankfurt offers the following analysis of the structure of human desires:[54]

A person experiences any number of first order desires. These may be as basic as the desire to eat or sleep, or as sophisticated as the desire for approval from society or from another person, or even the desire to be a 'good' person in our own eyes. The fact that a person wants or desires to do something is no indication that (s)he will (even barring any external interference) do that thing. That is to say, wanting to act in a particular way is no way the same thing as intending to act in that way. I may, for example, want to do X (cook dinner), but

[53] Ashworth: *Principles of Criminal Law*, Section 4.2 (Involuntary Conduct) pp. 95-103.
[54] I have used 'desire' throughout this thesis in a way synonymous with 'wish' or 'want'.

much prefer to do Y (go swimming). Or I may want to do X (for example, have a particular blood test) but simultaneously want very much not to do X (because I am squeamish about blood tests). On the other hand, I may want to do X and this desire may be the one moving me to act in the way I presently am acting, or may be my settled intention for future action. In this latter case, the statement "I want to do X" describes my will.

In addition to the many first order desires I have, I also have second order desires: these are desires to have or not have certain desires. If, for example, amongst my first order desires is the desire to obtain a good degree result, I might have a second order desire to want to study in the Library. On the other hand, I might have a second order desire to want to do something without having any desire to actually do it. The example that Frankfurt gives is that of a therapist who works with drug addicts who believes it would help his practice to have experienced the desire for a particular drug (therefore he wants to want to do X – in this case, take the drug) but would in no way actually want to become addicted to the drug (whilst he wants to want to do X, he has no desire of any order to actually do X). Thus, Frankfurt distinguishes between second order *volitions* (such as my desire to want to study in the Library), where not only do I want to want to do X, but I want X to be my will, and second order desires which are not volitions (such as the therapist's desire to want to take a drug) where I want to want to do X, but do not want X to be my will.

Frankfurt argues that a "person" is an individual who experiences second order volitions – i.e. one who cares about what his will should be. He further argues that it is only a "person" (according to this definition) who can experience freedom of the will and its lack. Though Frankfurt specifically rejects the notion that this is necessarily a moral stance, I would argue, against him, that his "person" is what I would wish to term a "moral agent". (There surely can be no better definition of amorality than not caring about one's will.) The person who is not a moral agent cares about how (s)he acts only insofar as his/her action satisfies or does not satisfy certain first order desires; (s)he does not care about how (s)he *chooses* to act – her will. The halakha, on the other hand, is addressed to moral agents (the people who entered into a covenant with a moral G-d). As such, we are expected to have first order desires, second order desires and second order volitions. As we progress through our analysis of the halakhic sources, and especially as we arrive at the chapters evaluating proposed solutions to the problem of *get* recalcitrance it will be important to keep in mind these fundamental aspects of the

halakhic system: (i) the halakha esteems voluntary action, without which man is not a moral agent; (ii) it draws a distinction between wish/desire and will; (iii) intention need by no means imply desire and (iv) both will and intention incorporate motivation and purpose, thus the consequences of an action must be assumed to be willed or intended as much as, if not more than, the action itself in order for that act to be considered voluntary.

Working definitions

Will: *a desire that a particular event or circumstance be effected through one's own actions or those of others.*

Intention: *the decision to act in a particular way and/or to bring about a particular consequence*

It will be noted that will and intention, so defined, are not merely closely related concepts; they overlap. Will, however, encompasses some level of volition whereas intention can exist entirely without any sense of wanting or desiring. On the other hand, intention assumes the power to act, whereas will might exist even in the acknowledged absence of the power to realise one's will. In many circumstances, however, one might equally be described to will a particular act and to intend it.

Chapter 1: The Mishna

What follows in this chapter is an enumeration of all occurrences of the word רצון in the Mishna. I have translated each mishna (or sometimes, in the case of longer *mishnayot*, the relevant sentence or sentences therefrom) and have made suggestions as to what kind of רצון (will, desire or intention, cognitive or affective, motivational or teleological) is denoted. I have tried to arrange the occurrences in clusters, influenced by the senses in which they appear to have used רצון – and happen to have found that often groups of *mishnayot* dealing with similar themes and concerns have used the word in a particular way and in similar contexts, as against other groups of *mishnayot* which use the word entirely differently.

I have not attempted to order the *mishnayot* in any other way, nor to observe differences between, for example, halakhic and *aggadic* contexts, or *halakhot* that have survived as *halakha l'ma'aseh* versus those which have been lost, altered or rendered obsolete. I have taken the view that such distinctions would not be helpful in what is essentially a search for the meaning of a word as it was used at the time of the discussions compiled in the Mishna.[55]

Ratson refers to the will of G-d.

The first occurrence of the word רצון is in Berachot ch.9 mishna 3, where it appears twice:

> רת ואמר יהי רצון שתלד אשתי זכר הרי זו הצועק לשעבר הרי זו תפלת שוא כיצד היתה אשתו מעוב תפלת שוא היה בא בדרך ושמע קול צוחה בעיר ואמר יהי רצון שלא יהיו אלו בני ביתי הרי זו תפלת שוא.

> When a person cries out [in prayer] about something that has [already] occurred, this is a vain prayer. What is an example of this? Someone whose wife is pregnant and who says: **may it be Your will** (*yehi ratson*) that my wife give birth to a son – this is a vain prayer. Someone who is travelling and hears voices of distress in his town and who says: **may it be Your will** that these are not members of my household – this is a vain prayer.

[55] I am working with the assumption that unless we have specific internal reasons to believe otherwise, we can understand words or phrases used in the Mishna to bear their "common" meanings. That is: where a word or phrase occurring in the Mishna does not refer to a specific and exclusively halakhic concept (for instance, "*teruma*" or "*shiva nekiim*") which would have no place in everyday language, that word denotes what it would denote in everyday, non-specifically-halakhic parlance.

This mishna is seeking to explain what kind of prayer is not permitted on the grounds that it is uttered in vain. Inherent in its understanding of "vain prayer" is the assumption that at least one of the purposes of prayer is to change the mind of G-d (otherwise, there is nothing that could be achieved by prayer under normal circumstances that cannot also be achieved through "vain prayer" – when it is too late to change). At the risk of being pedantic, however, we should note that in most petitionary prayer what the petitioner aims to change is not G-d's mind but rather his actions.[56] "May it be Your will that it is not my house burning down" (permissible or not) means not: "I wish that You would not want my house to burn down" but rather: "Please make it not my house burning down". The child who pleads with his father (in rather archaic language): "Please, papa, I beg you not to want to spank me!" cannot really claim to be satisfied if his father replies (in similarly outdated fashion): "Believe me, this hurts me more than it hurts you." – i.e. I don't *want* to, but I will anyway because I believe I should. Without wishing to deny that one of the true ends of religion may well be to seek to be in a "loving relationship" with G-d, to which end we must care very much how G-d "feels", the "יהי רצון", prayer formula suggests a far less sophisticated state of affairs: one in which we do not much "care" what G-d thinks or feels, but are concerned rather with what He does (to or for us).

רצון here, then, would seem to denote either will or intention in a way consistent with my definitions threof in the Introduction: it indicates a decision to bring about a particular state of affairs, which may well be understood to suggest a desire that that state of affairs be effected.

The formulaic יהי רצון of prayer is encountered twice more in the Mishna:

Tamid 7:3

זה הוא סדר התמיד לעבודת בית אלהינו יהי רצון שיבנה במהרה בימינו אמן…:

… This is the order of the Tamid offering for the service of the house of our G-d**, may it be [His] will** (*yehi ratson*) that it be rebuilt speedily in our days, amen.

Avot 5:20

יהודה בן תימא אומר הוי עז כנמר וקל כנשר ורץ כצבי וגבור כארי לעשות רצון אביך שבשמים בנה עירך במהרה בימינו ותן חלקנו בתורתך: יהי רצון מלפניך ה' אלהינו שת…

[56] There can be, of course, no external impediment to G-d's will becoming His action as there can to human will being translated into action. Thus in a sense the gap between these two possible prayers is minimal.

Judah ben Tema says: be bold as a leopard, and swift as an eagle, and fast as a deer, and strong as a lion to do the **will** (*ratson*) of your Father who is in heaven…

May it be Your will, (*yehi ratson milfaneicha*) O Lord our G-d, that Your city be rebuilt speedily in our days and give us our portion in Your Torah.

In this latter mishna, the word רצון occurs twice. The second occurrence is in the context we have just seen above; that of the prayer formulation. The ורצו of the first clause, however, is ambiguous. It could indicate any type or level of desire; alternatively, it might indicate intention,[57] or will in the sense of decision. The latter two options make the mishna harder to read but not impossible: we could understand it to be assumed that the addressee shall in fact do the will/intention of the heavenly Father, Judah ben Tema merely adjures him to "be bold as a leopard etc" in so doing ("be bold as a leopard… and strong as a lion to do that which your Father in heaven has ordained that you do"). However, a more natural reading is to identify רצון here with "that which is desired".

A similar ambiguity surrounds the use of רצון in another mishna from the same tractate:

Avot 2:4

הוא היה אומר עשה רצונו כרצונך כדי שיעשה רצונך כרצונו בטל רצונך מפני רצונו כדי שיבטל רצון אחרים מפני רצונך…

He used to say: make/do **His will** (*rtsono*) as your **own will**, so that He shall make/do **your will** as **His will**. Nullify **your own will** (*rtsonkha*) in the face of **His will** so that He shall nullify the **will** of others before **your will**…

The two sentences which make up the first part of this mishna are related, but by no means identical and I would suggest that the use of the word רצון in both sentences is deceptive. We have seen above (in the context of the prayer formulation יהי רצון and, probably, Avot 5:20) that רצון can be identified with "that [object] which is desired or decided upon" (notwithstanding that desire and decision are two separate concepts; here I am simply concerned with the fact that רצון can refer to the concrete thing desired/willed rather than the seat of the desire or will itself). The use of רצון in the first sentence of this mishna is probably consistent with that usage so that it may be translated (loosely): "Do what He

[57] It is of course quite possible to speak of one's intention that another should act in a particular way, assuming that one understands oneself to have the power to affect the actions of the other.

wants as you [would] do what you want so that He shall do what you want, like He does what He wants." This reading is supported by the use of the "*k*-" prefix denoting "as" or "like". The mishna does not say: make His will [identical to] your will, but rather: make His will *like* your own will – "like" in the sense that just as you act on your own will, so you should act on His. The fact that the verb *aseh* may mean either make or do also lends support to this reading: "make His will as your own will" could equally be translated "do His will as [you would do] your will."

However, the second sentence is subtly different, and whilst רצון in this sentence too could quite intelligently be understood to denote "that [specific, external thing] which is willed or desired" it could equally well be understood to denote an internal, non-specific, will-in-potential. According to this second understanding, in being told to "nullify" his will the reader/listener is being exhorted not merely not to implement what he wants but in fact not to want (or at least, not to will) what he wants – indeed not to want/will at all. To put this slightly differently: the first sentence of the mishna urges the listener to do those specific things which G-d wants. The second clause seems to urge us to sign a blank cheque[58] to will what G-d wants whatever that might be. We should note, here, that a person's *voluntarily* relinquishing their own will in favour of that of another may be entirely consistent with at least some conceptions of human free will and autonomy. The fact that it is my decision to do whatever you want me to do regardless of whether or not I will each of my individual actions renders my subsequent actions voluntary and thus my own responsibility.[59]

Two more *mishnayot* use רצון with reference to the will or desire of G-d: The first is from Avodah Zarah:

<u>Avodah Zarah 4:7</u>

אלו את הזקנים ברומי אם אין רצונו בע"ז למה אינו מבטלהש?

They asked the elders at Rome: if He does not **want** (*ein rtsono b'*) idol worship, why does He not destroy it?

[58] Rather as the midrash understood the acceptance of the Torah at Sinai. The Israelites promise to "do and to hear" in that order (Ex. 24:7), and it is their promise (as understood by the rabbis) to do before hearing precisely what it is that they are being commanded to do which wins the respect of the angels. (Cf. Shab. 78a and 79b.)

[59] Hence the possibility of prosecuting individuals for war crimes notwithstanding that the perpetrators were merely "obeying orders". Cf. also Haworth: *Autonomy* (p.20) who argues (in opposition to Dwokin) that a person who voluntarily relinquishes his procedural autonomy (control over his day-to-day choices) in favour of another, may be considered to retain his substantive autonomy.

Here, רצון can only imply wanting, and not willing. The very problem posed by the Romans is why a dichotomy exists between what G-d wants (in the sense of liking or desiring) and what is. Their challenge is premised on the logic that G-d's omnipotence dictates that what is is a true reflection of what G-d wills. The response of the sages (that the world needs the sun, moon, stars and constellations – all idols which are regularly worshipped) leaves that premise entirely unchallenged.

There are two other options for interpreting this mishna, however. The first is that the challenge of the Romans is understood to be disingenuous and to imply that lack of idol-worship is G-d's true will and that the implicit answer to the question of why He does not destroy it is that he is unable to do so. The second is that רצונו is in fact used entirely differently here – to denote a type of pleasure, approval or favour which has nothing to do with intention or otherwise to act. This last interpretation might find echoes when we consider our final instance of a mishna dealing with the will of G-d: the famous story of Honi ha-Ma'agal:

Taanit 3:8

מרוב גשמים מעשה שאמרו לו לחוני המעגל על כל צרה שלא תבא על הצבור מתריעין עליהן חוץ התפלל שירדו גשמים אמר להם צאו והכניסו תנורי פסחים בשביל שלא ימוקו התפלל ולא ירדו גשמים מה עשה עג עוגה ועמד בתוכה ואמר לפניו רבונו של עולם בניך שמו פניהם עלי שאני כבן בית על בניך התחילו גשמים מנטפין אמר לא כך לפניך נשבע אני בשמך הגדול שאיני זז מכאן עד שתרחם שאלתי אלא גשמי בורות שיחין ומערות התחילו לירד בזעף אמר לא כך שאלתי אלא גשמי רצון ברכה ונדבה ירדו כתיקנן עד שיצאו ישראל מירושלם להר הבית מפני הגשמים באו ואמרו לו כשם או אם נמחת אבן הטועים שלח לו שהתפללת עליהם שירדו כך התפלל שילכו להן אמר להן צאו ור שמעון בן שטח אלמלא חוני אתה גוזרני עליך נידוי אבל מה אעשה לך שאתה מתחטא לפני המקום ועושה לך רצונך כבן שהוא מתחטא על אביו ועושה לו רצונו ועליך הכתוב אומר)משלי כ"ג(ישמח אביך ואמך ותגל יולדתך.

The alarm is sounded on account of any trouble that comes upon the community except an overabundance of rain. It happened that the people said to Honi ha Ma'agal: pray for rain to fall. He replied: go and bring in the Pesach ovens so that they do not dissolve. He prayed and no rain fell. What did he do? He drew a circle and stood in it and said: Master of the Universe, Your children have turned to me because I am like a member of Your household. I swear by Your great Name I will not move from here until You have mercy on Your children. Rain then began to drip, and he said: this is not what I asked for, but [rather] rain [to fill] cisterns, ditches and caves. The rain then began to come down with great

force, and he said: this is not what I asked for but [rather] rain of **benevolence** (שמי רצונג) blessing and bounty. Rain then fell in the normal way until the Israelites in Jerusalem were compelled to go up [for shelter] to the Temple Mount because of the rain. They came and said to him: in the same way you have prayed for [rain] to fall, pray [now] for the rain to cease. He replied: go and see if the stone of claimants has been washed away. Shimon ben Shetah sent to him: were you not Honi I would exclude you under the ban of exclusion, but what can I do to you? You importune G-d and He does **your will** (*v'oseh lekha rtsonkha*) just as a son importunes his father and he does **his will** (*v'oseh lo rtsono*) Of you Scripture says: let thy father and thy mother be glad and let her that bore thee rejoice.

In this mishna the word רצון again occurs in two different places with two different meanings, and I would suggest that the mishna deliberately "plays with," or puns on, the meaning. The first use, in which it is actually a qualifying/adjectival noun – גשמי רצון (here translated, following the Soncino translation, "benevolence", despite the fact that there is little semantic justification for this translation) – associates רצון with ברכה and נדבה; blessing and willingness (Soncino translates "bounty"). I have suggested above the possible connotations of "approval" (a translation I will use for רצון in some of the other occurrences), pleasure or favour. Alternatively, one could translate "willing rain" as in, the opposite of "grudging". This would connect רצון with נדבה, used in the same clause, נדבה coming from a root meaning to volunteer/donate (for example to give a free-will offering to the Temple).

The mishna goes on to use the word again, however:

ושה לו מה אעשה לך שאתה מתחטא לפני המקום ועושה לך רצונך כבן שהוא מתחטא על אביו וע רצונו.

What can I do to you? You importune G-d and He does your will just as a son importunes his father and he does his will.

Here, the meaning is deceptively complicated. Shimon ben Shetah's characterisation of Honi as a בן (a son can be any age, of course, but here the image evoked is that of a child) echoes his own self-description as like a *ben bayit* – a member of the household (son, slave, offspring of a slave). The characteristic model, or perhaps stereotype, of a child's will is that it is unreflective, immature (by definition) and influenced by emotion rather than informed by reason. However, a closer look at the story subverts this first

impression. Honi in fact does not act like a child. First: it is not his own desire but that of the community in pursuit of which he petitions G-d. Thus any charge of "childish" egocentricity must fall flat. Second, his actions (prayer) are in no way carried out without proper reflection. His first response to the request for his intercession is to consider the likely consequences of its fulfilment and safeguard the items most at risk (the Pesach ovens). Nor does he pray for the cessation of rain before verifying that enough rain has indeed fallen (the question about the claimants' stone). It may suit all concerned to depict Honi as a child, but he rather acts as an elder – hence his ability to disquiet the official community elders as represented by Shimon ben Shetah.

The use of רצון in this context, then, should not necessarily threaten an understanding of רצון that would demand that it be responsible, rational and mature. Honi's prayers certainly reflect will (properly formed) and not merely desire. However, it must also be noted that the word רצון appears not in the narratorial voice of the mishna itself but in the reported speech of Shimon ben Shetah, who is using it to address a Honi he represents as a child and as a danger to the "system". We cannot then discount the possibility that its use is meant to denote a childish whim rather than an adult will.

With the meaning in this mishna left open for the moment, then, we should move on from our consideration of the *mishnayot* dealing with the influence of the will of men on the will of G-d and vice versa and turn to consider four *mishnayot* concerned with the will of the rabbis.

רצון as approval, assent and intention

Shabbat 5: 4

ואין העגל יוצא בגימון ולא פרה בעור הקופר ולא ברצועה שבין קרניה פרתו של רבי אלעזר בן ...
עזריה היתה יוצאה ברצועה שבין קרניה שלא ברצון חכמים:

...and a calf should not go out with its yoke nor a cow with its hedgehog skin, nor with a chain between its horns. Rabbi Elazar ben Azarya's cow used to go out with a chain between its horns, **which was not in accordance with the wishes** (*shelo b'rtson*) of the Rabbis.

Pessachim 5:8

כמעשהו בחול כך מעשהו בשבת אלא שהכהנים מדיחים את העזרה שלא כרצון חכמים ר' יהודה אומר כוס היה ממלא מדם התערובות זרקו זריקה אחת על גבי המזבח ולא הודו לו חכמים...

As their actions on a workday, so too their actions on Shabbat, except that the cohanim wash down the courtyard **which is not in accordance with the wishes** of the Rabbis…

Menachot 10:5

משקרב העומר יוצאין ומוצאין שוק ירושלים שהוא מלא קמח וקלי שלא ברצון חכמים דברי רבי מאיר רבי יהודה אומר ברצון חכמים היו עושים…

From the time that the *omer* offering was brought, [the people] went out and found the Jerusalem market full of flour and corn ears, **which is not according to the wishes** of the Rabbis – these are the words of Rabbi Meir. Rabbi Yehuda says they used to act in this way **in accordance with the wishes** (*b'rtson*) of the Rabbis…

Menachot 10:8

קוצרים בית השלחים שבעמקים אבל לא גודשין אנשי יריחו קוצרין ברצון חכמים וגודשין שלא ברצון חכמים ולא מיחו בידם חכמים…

They may reap the crops in irrigated fields in the valleys but may not make stacks of grain. The people of Jericho reap **in accordance with the wishes** of the Rabbis and stack not in accordance with the wishes of the Rabbis, but the Rabbis do not prevent them…

In all four of these mishnayot, רצון might be translated "approval", as in "without the **approval** of the Rabbis".

Close to the usage in these last *mishnayot* – approval, or assent[60] (there used to suggest an attitude towards the behaviour of others) – are a number of *mishnayot* which deal with the question of "assent" to one's own behaviour, that is, intentionality. The following three *mishnayot* from Seder Tahorot consider the question of whether a liquid's ability to render what it touches *tamei* is affected by the fact that it was produced *qua* drink – that is, they are concerned with intentionality in the sense described in the Introduction, where the word is used to refer to intent to both perform the act and produce the consequence(s)) thereof.

[60] Levin and Blackman both use the words "assent" and "consent" to translate רצון in various contexts in the Mishna.

Kelim 8:11

האשה שנטף חלב מדדיה ונפל לאויר התנור טמא שהמשקה מטמא לרצון ושלא לרצון…

If milk dripped from a[n impure] woman's breasts and fell into the airspace of an oven, the oven becomes *tamei* since a liquid renders *tamei* whether it is produced **intentionally or unintentionally** (*l'rtson oshelo l'rtson*)…

Machshirin 1:1

י זה כל משקה שתחלתו לרצון אע"פ שאין סופו לרצון או שסופו לרצון אע"פ שאין תחלתו לרצון הר בכי יותן משקין טמאים מטמאין לרצון ושלא לרצון:

Any liquid which was produced **intentionally** at first, even though in the end its production was **unintentional,** or which was produced **intentionally** in the end, even though at the beginning its production was **unintentional,** this is in the category of "if water be put" [i.e. it has the capacity to render something else capable of becoming *tamei*]. Liquids which are *tamei* render *tamei* whether they have been produced **intentionally** or **unintentionally**.

According to both *mishnayot* a liquid which is *tamei* renders that which it touches *tamei*, whether it was released intentionally or unintentionally. When liquid is not in itself *tamei*, however, but (by its liquid nature) renders others susceptible to *tumah* the sages allow for the possibility of the intentional quality of an act's changing mid-act. The intentional part of the act apparently overrides the unintentional so that the entire act becomes considered as if it were intentional (and, in our case, the resulting liquid may render *tamei*). This would be congruent with a worldview which ascribes intention to an act unless we have good reason to assume the contrary.

The uncertainty over how we should treat liquid produced unintentionally for the purposes of an assessment of *tumah* is the subject of another mishna later in the same tractate:

Makhshirin ch.6 mishna 8

חלב האשה מטמא לרצון ושלא לרצון וחלב הבהמה אינו מטמא אלא לרצון אמר ר"ע ק"ו הדברים מה ה שהוא מיוחד אם חלב האשה שאינו מיוחד אלא לקטנים מטמא לרצון ושלא לרצון חלב הבהמ לקטנים ולגדולים אינו דין שיטמא לרצון ושלא לרצון אמרו לו לא אם טמא חלב האשה שלא לרצון שדם מגפתה טמא יטמא חלב הבהמה שלא לרצון שדם מגפתה טהור אמר להם מחמיר אני בחלב מבדם היוצאין שהחולב לרפואה טמא והמקיז לרפואה טהור אמרו לו סלי זיתים וענבים יוכיחו שהמשקים מהן לרצון טמאים ושלא לרצון טהורים אמר להן לא לא אמרתם בסלי זיתים וענבים שתחלתן אוכל

וסופן משקה תאמרו בחלב שתחלתו וסופו משקה ע"כ היתה תשובה אמר ר"ש מכאן ואילך היינו משיבין לפניו מי גשמים יוכיחו שתחלתן וסופן משקה ואינן מטמאין אלא לרצון אמר לנו לא אם אמרתם במי גשמים שאינן רובן לאדם אלא לארצות ולאילנות ורוב החלב לאדם

A woman's milk renders *tamei* whether it is [extracted] **intentionally** or **unintentionally**, whereas cows' milk renders *tamei* only if is [extracted] **intentionally**. Rabbi Akiva said: if a woman's milk, which is only considered a drink for infants, can render *tamei* whether it is extracted **intentionally** or **unintentionally**, should it not be the case all the more so that cows' milk, which is considered a drink both for infants and adults, should render *tamei* both when it is extracted **intentionally** and when it flows **unintentionally**. They replied: no; a woman's milk renders *tamei* [even] when its flow is **unintentional** because blood from a wound on her body is *tamei*; but should cows' milk render *tamei* when its flow is **unintentional**, given that blood from a wound on the cow's body is *tahor*? He said to them: I am stricter about milk than about blood, because if one milks in order to heal, the milk is *tamei,* whereas if one lets blood in order to heal the blood is *tahor*. They said to him: baskets of olives and grapes should prove the case: liquids that exude [from the olives and grapes in baskets] are *tamei* when they are **intentionally** produced and *tahor* when they are **unintentionally** produced. He replied: no; baskets of olives and grapes are first of all a food and only afterwards a drink, whereas milk is a drink from beginning to end. His answer was so far. Rabbi Shimon said: from thenceforth we used to argue before him: rainwater should prove the case, for it remains a liquid from beginning to end, but does not render *tamei* unless [it is collected] **intentionally**. He replied: no; you can say this of rainwater because most of it is not for man but for the soil and for trees, whereas most milk is for man.

The major premise of the argument in this mishna is that a liquid which is primarily a drink automatically has the ability to render *tamei*, whether its production is intentional or unintentional, thus aligning it with the first part of Mach.1:1.

Similarly, in the following instance we find that anything intended to be food which then fell out of a person's mouth is impure (from the wetness of the saliva) whilst anything which is viewed as non-food remains insignificant (and does not render what it touches *tamei).*

Tevul Yom 3:6

היה אוכל זיתים פצועים ותמרים רטובות כל שהוא רוצה למוץ את גרעינתו ונפל על בגדיו ועל … ככר של תרומה טמא היה אוכל זיתים נגובין ותמרים יבשות כל שאינו רוצה למוץ את גרעינתו ונפל ו ר"מ אומר אלו ואלו טמאין על בגדיו ועל ככר של תרומה טהור אחד טהור ואחד טבול יום כאל בטבול יום שמשקין של טמא מכשירין לרצונו ושלא לרצונו וחכ"א אין טבול יום טמא

… If a [ritually clean] person was eating crushed olives and wet dates, inasmuch as he wanted to suck the stone [of an olive or date], and it fell on his garments and on a loaf of *terumah*, it becomes *tamei*. If he was eating olives or dried dates, inasmuch as he had no intention of sucking the stone, and the stone fell on his garments and on a loaf of *terumah*, it is *tahor*. This is the same whether the man eating was *tahor* or was a *tevul yom*. Rabbi Meir says: in both cases [the *terumah*] is *tamei* in the case of a *tevul yom*, as liquids issuing from people who are *tamei* render anything susceptible whether they are produced **deliberately or accidentally**. However, the Rabbis say that a *tevul yom* is not *tamei.*

Thus, in the sphere of *tumah* and *tahara*, intention does not necessarily play a central role. However, in judging susceptibility to *tumah*, the Tannaim attempt to resolve the question of the status of a particular possible food or liquid by reliance on narratives of typical behaviour – what most people perceive such produce to be.

רצון – cognitive intention or affective will?

The major distinction I drew in the Introduction between intention as I have chosen to define it and will is that intention can refer to a decision arrived at using only the cognitive/rational facility and need in no way incorporate desire, whereas will implies volition, one component of which is (what I will refer to for lack of a better term as) "affective".

Thus far, in our trawl of the Mishna, we have mostly seen רצון used to refer to decisions that have been arrived at more or less rationally. (The only exceptions to this usage have been the *mishnayot* in Taanit 3:8 and, possibly, Avodah Zara 4:7, which have used it to denote an attitudinal state and not a decision at all.) The following mishna from Seder Nashim confuses our issue by positing two different scales of assent. One scale runs from שוגג to מזיד and appears to imply precisely the kind of cognitive, non-intentional/intentional dichotomy[61] which in

[61] In this mishna, I have actually translated this dichotomy as "mistaken" vs. "knowingly", as it is

the *mishnoyot* analysed above was implied by לרצון and שלא לרצון.

When contrasted with this dichotomy, the רצון/אונס (willing/coerced) scale implies a status vis-a-vis volition:

Yevamot 6:1

הבא על יבמתו בין בשוגג בין במזיד בין באונס בין ברצון אפילו הוא שוגג והיא מזידה הוא מזיד והיא שוגגת הוא אנוס והיא לא אנוסה היא אנוסה והוא לא אנוס אחד המערה ואחד הגומר קנה ולא חלק בין ביאה לביאה.

A man who has intercourse with his *yevama*, whether he does so mistakenly or knowingly, whether he is compelled to do so or whether he does so **willingly** (*b'ratson*) – even if he does so in error and she knowingly; he knowingly and she in error, he because of compulsion and she not due to compulsion; she because of compulsion and he not because of compulsion; no matter whether intercourse is interrupted or comes to completion – she is acquired. And there is no distinction between one form of intercourse and another.

It might be worth noting that unlike the occurrences in *mishnayot* where we translated לרצון as intention, Yev. 6:1 denotes "willingly" as ברצון. ברצון does not occur anywhere else in the Mishna, but does also appear in a tosefta which might itself be deemed relevant to our problem:[62]

T.Gittin Ch. 5, halakha 6

ואמ' האב אי איפשי שתשמשני הואיל ולא נתקיים התנאי הרי זה גיטיך על מנת שתשמשי את אבא ... אינו גט רבן שמעון בן גמליאל אומ' אם ברצון אמר הרי זה גט…

[If a man says] "This is your get on condition that you serve my father... and the father says "I don't want her to serve me", then the condition has not been fulfilled and it is not a *get*. Rabban Shimon ben Gamliel says: if he [the father] says it **on purpose** (*b'rtson*) [so that the condition shall not be fulfilled] then it is a *get*…

Here again, "on purpose" cannot refer to intention rather than accident – in either case, the father speaks "intentionally". It also, importantly, cannot be that it

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hard to imagine what "accidentally" having intercourse with a woman would look like. "בשוגג" in this context means not knowing the true identity of the woman concerned, just as doing a forbidden *melakha* on Shabbat *beshogeg* denotes deliberately doing the *melakha* having forgotten (or being unaware) that it is Shabbat, or else not knowing that such a *melakha* is forbidden on Shabbat. It does not imply (as is often assumed to be the case) doing the *melakha* accidentally. Nonetheless, my point is that this is a failure of cognition, not will.

[62] It also occurs in the T Ket. 3:6, discussed in chapter 2.

simply refers to a case in which the father speaks "voluntarily" (i.e. is not coerced into speaking). Rather, it refers to the specific intention, i.e. purpose, with which the father speaks. If the father speaks "innocently" (for his own reasons he does not wish his possibly-ex-daughter-in-law to serve him), his speech nullifies the *get*. However, if his speech has the ulterior motive of nullifying the *get* (it is the "ulterior motive" which the tosefta denotes by "*b'rtson*") the *get* remains a *get.* In this tosefta, *ratson* would seem the polar opposite of the legal definition of intention I described in the Introduction – intent as relating only to the act, regardless of motivation or purpose – here, *ratson* refers to intent *only* as regards motive or purpose.

The question of motive and/or purpose as the defining issue in whether an act or declaration can be considered to be "*b"* or "*l'ratson*" is one which will assume considerable importance as we come to ponder the willingness or otherwise with which a man volunteers (or acquiesces) to give a *get*. The possibility that what the husband must consent to is not actually the *get*-giving itself but the *consequence* thereof (his divorce from his wife) is one which is implied by a responsum of Rav Moshe Feinstein which is central to my thesis.[63] For the moment, it must simply be noted that this seems to be the logical interpretation of the tosefta.

Ratson as desire

Thus far, I have made a case for *ratson*'s being used to denote will (both in the sense of that which is specifically willed – act, state of affairs or, in the last example, consequence – and in the sense of "seat of the human will"), intention and assent. What we have not seen, other than arguably in the case of the story of Honi ha'Maagal, is its use to denote something which explicitly merely a whim or preference. This rather lighter usage of the word can be found in number of *mishnayot* reporting the behaviour of famous or esteemed rabbis:

Beitzah 3:2

מצודות חיה ועוף ודגים שעשאן מערב יום טוב לא יטול מהן ביום טוב אלא אם כן יודע שניצודו מערב יום טוב ומעשה בנכרי אחד שהביא דגים לרבן גמליאל ואמר מותרין הן אלא שאין רצוני לקבל הימנו.

[63] Cf. ch.7, p.167.

If snares were set for game, poultry or fish on the eve of a festival, one should not take [snared animals] out on the festival unless one knows that they were caught on the eve of the festival. There was an incident in which a non-Jew brought fish to Rabban Gamliel and he (Rabban Gamliel) said: they are permitted, **but I don't want** (*ein rtsoni*) to accept them from him.

Here, Rabban Gamliel's refusal to take the fish is explicitly not a matter of strict halakha, but rather an expression of preference. A similar tone is struck in the following mishnaic extract, where an unnamed man attempts to persuade Rabbi Jose ben Kisma to live in his town:

Avot 6:9

אמר רבי יוסי בן קיסמא פעם אחת הייתי מהלך בדרך ופגע בי אדם אחד ונתן לי שלום והחזרתי לו
אמר לי רבי רצונך שתדור עמנו במקומנו ואני אתן לך אלף אלפים דינרי זהב ואבנים טובות …שלום
ת אמרתי לו בני אם אתה נותן לי כל כסף וזהב ואבנים טובות ומרגליות שבעולם איני דר אלא ומרגליו
במקום תורה

Rabbi Yosi ben Kisma said: once I was going along the road and a man met me and greeted me, and I returned his greeting… He said to me: Rabbi, **would you like** to live with us in our place, and I will give you a thousand thousand gold denarii and precious stones and pearls. I answered him: my son, if you were to give me all the silver and gold, precious stones and peals in the world, I would not live in anything other than a place of Torah.

The use of רצון in these contexts seems to suggest a polite mode of enquiring into the preference of another or a "high" form of expression for one's own preferences (Rabban Gamliel is throughout the Talmud portrayed as a person highly aware of his own honour). We should note at this point that the overwhelming majority of the instances in which רצון is used occur in discussions of the actions or preferences of those with both knowledge and power: out of twenty-two *mishnayot* in which the word is used, five refer to the will of G-d and seven refer either to the will of "the Rabbis" or to the preferences of named (authoritative, powerful) rabbis. If we leave aside for the moment the four instances we have seen in which רצון simply means "intentionally" as opposed to "unintentionally" then there remain (excluding the mishna in Yevamot which is the catalyst for our entire discussion) only five instances. One, as we have already

seen, discusses the status of the action of *yevam* vis-à-vis a *yevama* with whom he has relations, whether under compulsion or "willingly". Another is concerned with the obligations of a *shaliach* for a *get* to the husband:

Gittin 3:5

המביא גט בארץ ישראל וחלה הרי זה משלחו ביד אחר ואם אמר לו טול לי הימנה חפץ פלוני לא ישלחנו ביד אחר שאין רצונו שיהא פקדונו ביד אחר.

Someone who brings a get in the Land of Israel and falls ill, should send it via another; and if he (the husband) said to him (the first agent) take such and such an item from her for me, he should not send it via another person, **because it is not his (the husband's) wish** that he should entrust his possession to another.

I understand רצון here, as in the mishnayot we have just seen, to be the expression of a simple preference. We could posit very rational reasons, of course, for the husband's preferring an object of value not to be entrusted to a person he has not specifically appointed as his agent, and the context is indeed normative: as most people would not wish such an object to be entrusted to a stranger (or at least, an agent not specifically appointed) in the event that he is unable himself to fulfil his agency, the appointed agent should refrain from entrusting the object to another person in this way an agent. On the other hand, at first glance, a mishna from tractate Shevuot dealing with the entitlement of the heir to force (that is: wield power over) his late father's business associates and wife to swear an oath regarding their disposal of his property, implies that there may be no rational reason whatsoever for his desire (which is nonetheless to be honoured).

Shevuot 7:8

ואלו נשבעים שלא בטענה השותפין והאריסין והאפוטרופין והאשה הנושאת והנותנת בתוך הבית ובן הבית אמר לו מה את טועניני רצוני שתשבע לי חייב…

The following are made to swear an oath even if no claim is made: partners, tenants, the guardians of a minor, a wife who carries on business at home and a son of the household. If [one of the above] said to him "What is your claim against me?" [and the other replied] "**I want** you to swear an oath to me" he must swear…

In truth, however, this mishna from Shevuot does not show that רצון can be used to denote an entirely irrational preference since an heir may very quite

understandably wish to be assured that no money was taken even in the absence of concrete suspicions.

The last two occurrences in our list are both concerned with the performance or non performance of *mitzvot*

Bava Metzia 2:10

…הלך וישב לו ואמר הואיל ועליך מצוה אם רצונך לפרוק פרוק פטור שנאמר עמו

… If [the owner of an animal] went and sat down and said "Since you are commanded [to unload the animal] **if you wish** to unload it, unload!" he is exempt, for it is said "with him" [the owner]…

Importantly, here the רצון concerned (once again, presented as a simple preference) is the desire of the person concerned to perform a mitzvah. This is precisely the context, also, of the following occurrence:

Arakhin 5:6

חייבי ערכים ממשכנין אותן חייבי חטאות ואשמות אין ממשכנין אותן חייבי עולות ושלמים ממשכנין לרצונו כופין אותו עד שיאמר רוצה אני וכן אתה שאין מתכפר לו עד שיתרצה שנאמר אותן אף על פי אני אומר בגטי נשים כופין אותו עד שיאמר רוצה

[In the case of] those who owe value offerings – we take a pledge by force; [in the case of] those who owe sin offerings and guilt offerings – we do not take a pledge by force. [In the case of] those who owe *olot* and peace-offerings – we take a pledge by force even though [the sacrifice] does not effect atonement [for the person who owes them] until he becomes willing to offer it, as it is said: "*l'ratsono*" (according to his will): We force him until he says: I will.(*rotsei ani*)...

This last is, of course, together with our source from Yevamot, one of the two most central Tannaitic sources for any discussion about the necessity of רצון for the giving of the *get*. As such – and because the meaning in this context is at least as unclear and contested as its meaning in Yevamot 14:1 – I shall attempt no analysis here, but rather shall follow its development through the Gemara and Rishonim, seeking to come, in chapter 3, to an assessment of the Rambam's understanding thereof.

Conclusions

Thus far, we have seen the word רצון bearing a wide range of meanings. We have seen one group of *mishnayot*, those relating to the laws of purity, in which the word can be taken to mean 'intentionally' or 'deliberately'. However, this seems to be a sphere-specific meaning; there is no other context in which this is the most natural interpretation of the word. In the other contexts we have seen: prayer, social, sexual and economic relations or the performance of *mitzvot*, the word appears to denote a range of nuances on the scale from whim to will. It can be used of decisions appearing predominantly rational; on the other hand, it can be used of preferences which may be purely affective.

Other than in the (I have suggested, anomalous) context of the purity laws, we have never seen the word used of a woman's will, nor that of a slave or minor. Where a power imbalance has been indicated in a mishna, ורצו has usually been used of the person or entity with the greater power.[64] I would suggest, tentatively, that the Mishna's inclination to associate רצון with the holders of power, and particularly religious power (we have not seen the word used of secular authorities and it is infrequently used of ordinary householders, whereas it is used with a disproportionate frequency of the rabbis and of G-d), might in itself influence our understanding of the word. In particular, I would suggest that רצון is predominantly used with reference to the will of those who might be expected – by dint of their social standing and religious education – to form and use their will most responsibly – to be, in Frankfurt's words: "concerned with what [their] will should be". I hope that my reason for laying such an emphasis here on the power of those who described as exercising their *ratson* shall become clear as I move into a discussion of the importance of having an educated will. However, before I can do this, we must turn to the Gemara's analysis of the two *mishnayot* which, as I have indicated, are central to all future discussions about the giving of the *get*.

[64] Where (Avot 2:4) it is suggested that G-d will do the will of a human being, I would suggest that the point is precisely that the human, by aligning himself with the will of G-d, becomes uplifted, and thus worthy of honour.

Chapter 2 – Gemara with Rishonim (i)

In the Introduction, I argued for a narrative understanding of intention, specifically contrasting this with the legal definition thereof which relates only to the moment of the act. I also argued that one of the major differences between will and intention is that whereas intention need encompass no affective component whatsoever (that is, it can denote a decision which has been arrived at through cognitive processes alone), will necessarily has an affective component – it answers to and incorporates some level of desire. Wish or desire, of course, may be used to refer to a stance which is purely affective, where the subject has (as yet) engaged in no cognitive process whatsoever. My argument in chapter I has been that רצון is used at different times in the Mishna to refer to each of these attitudes – intention, will and desire. Most of the time, it is clear from the context which attitude is denoted in a particular mishna (though the meaning is so fluid that it might even shift between the opening of a mishna and its end). I have suggested, however, that both in the central mishna with which this thesis deals (Yevamot 14:1) and in Arakhin 5:6, the meaning of רצון is ambiguous. Thus far, we have assumed that it is *one* of the meanings we have outlined above (will, desire or intention) which is denoted by רצון in each of its occurrences – that is, I have assumed that the attitude it describes is predominantly *either* cognitive or affective. The Amoraic development of some of the Tannaitic material dealing with רצון, however, suggests that this may not necessarily be the case. It is the interplay between cognitive and affective, desire and intention, and how the rabbis understand it, that will be the focus of my attention in this chapter. I would stress at the outset, however, that I view both cognitive and affective processes as making sense only in a narrative framework (they are, I insist, "processes") – thus tension or synergy between cognitive and affective understandings of רצון in no way implies a tension between "legalist" and psychological-narrativist theories. In this chapter, the cognitive and the affective are viewed as rival "stories" – but both are stories.

One instance of the use of רצון in the Tosefta, however, would at first glance appear to contradict the narrative understanding I propose: in this example, רצון would appear to relate to the desire "of the moment", divorced from any long-term aim or process of reflection:

Tosefta Ketubot (Lieberman ed) ch.3 halakha 6

אחד האונס ואחד המפתה מה בין אונס למפתה אונס נותן את הצער מפתה אינו נותן את הצער ר' שמעון אומ' זה וזה אין נותנין את הצער מפני שסופן לכך אמרו לו אין דומה הנבעלת ברצון לנבעלת שלא ברצון…

[In general,] the man who has raped [a virgin] is considered the same as the man who seduces [a virgin]. What is the [only] difference between the rapist and the seducer? The rapist compensates her for pain, whereas the seducer does not compensate her for pain. Rabbi Shimon says: neither compensates her for pain, because the pain [of penetration] is ultimately the experience of all virgins. [The Sages] responded to [Rabbi Shimon]: it is not the same to be penetrated **willingly** and to be penetrated **unwillingly**…

The simplest reading of this text would understand the rabbis' response to Rabbi Shimon to state that the virgin who desires intercourse – whether because she has been effectively seduced (the seducer, according to all opinions, is not liable to compensate for pain), or because she has consented to be married – suffers less physical pain from that intercourse than the virgin who is raped. If this reading is accepted then it would suggest that the רצון of the tosefta refers quite simply to the girl's desiring the man enough to be physically aroused to a point where relations will cause her the lesser degree of pain. When we turn to the Gemara, however, we find a conspicuous lack of support for this reading:

Ket. 39a

ארבעה; המפתה נותן בושת ופגם וקנס, מוסיף עליו אונס -המפתה נותן שלשה דברים, והאונס נותן שנים. *מתני'*. שנותן את הצער. מה בין אונס למפתה? האונס נותן את הצער, והמפתה אינו נותן את הצער; האונס נותן מיד, והמפתה –לכשיוציא…

גמ'. צער שחבטה על גבי קרקע. מתקיף לה רבי זירא: אלא מעתה, צער דמאי? אמר אבוה דשמואל: חבטה על גבי שיראין, הכי נמי דפטור? וכי תימא הכי נמי, והתניא, ר' שמעון בן יהודה אומר משום רבי שמעון: אונס אינו משלם את הצער, מפני שסופה להצטער תחת בעלה, אמרו לו: אינו דומה נבעלת לנבעלת ברצון! אלא אמר רב נחמן אמר רבה בר אבוה: צער של פיסוק הרגלים, וכן הוא אומר: באונס רב נחמן אמר רבה בר אבוה: משל דמפותה, ותפשקי את רגליך לכל עובר. אי הכי, מפותה נמי! אמר רב נחמן אמר רבה בר אבוה: משל דמפותה, למה הדבר דומה? לאדם שאמר לחבירו קרע שיראין שלי והפטר. שלי? דאבוה נינהו! אלא אמר רב אבוה: פקחו עיניהן של בנות ישראל שאומרות מפותה אין לה צער. והא קא חזינן דאית לה! אמר נחמן אמר רבה בר אבוה: פקחו אביי, אמרה לי אם: כמיא חמימי על רישיה דקרחא. רבא אמר, אמרה לי בת רב חסדא: כי ריבדא דכוסילתא. רב פפא אמר, אמרה לי בת אבא סוראה: כי נהמא אקושא בחינכי.

Mishna: the seducer pays compensation on three accounts, and the rapist on four; the seducer pays for shame, damage, and a fine; the rapist adds to this that he compensates her for pain. What is the difference between the rapist and the seducer? The rapist compensates for pain and the seducer does not compensate for pain; the rapist pays immediately and the seducer when they separate…

Gemara: [the rapist compensates her for] the pain of what? The father of Shmuel says: the pain because he threw her on the ground. Rabbi Zeira objects: but if this were the case, if he threw her on silks would he be exempt? If you were to argue that, what about the *beraita* [parallel to our tosefta quoted above] which teaches: Rabbi Shimon ben Yehuda says in the name of Rabbi Shimon: the rapist does not compensate for pain because her [the virgin's] ultimate lot will be to suffer pain from her husband. [The sages] responded: it is not the same to be penetrated in rape and to be penetrated willingly.

Rather, Rav Nahman said in the name of Raba bar Avua: the pain of her having her legs pushed apart, and he quoted in this context: "and you shall open your legs to all who pass". If this were the case, then the one who is seduced also [suffers this]! Rav Nahman said in the name of Raba bar Avua: a comparison for the seduced – to what is she similar? To a man who says to his friend: tear up my silk garments and you will be exempt [from the payment of any damages]. [How can she say] "my"? They are her father's! Rather, Rav Nahman said in the name of Raba bar Avua: wise women say: the virgin who is seduced does not suffer pain. But how can this be – we have seen that she does? Abbaye says: my nurse told me it is like hot water on a bald head. Rava says: the daughter of Rav Hisda told me: like the prick of the blood-letting needle when the skin is punctured. Rav Papa says: the daughter of Aba Surya told me: like hard bread on the gums.

The *stamma* begins by asking a question to which the answer would appear to be obvious: what pain worthy of compensation is experienced by the girl who is raped? The response offered by the father of Shmuel is obviously inadequate and Rabbi Zeira's objection thereto quotes the retort of the Sages to Rabbi Shimon (just as it appears in our tosefta): it is not the same to be penetrated in rape as to be penetrated willingly. However, the Gemara fails at that point (or anywhere directly) to discuss this statement of the Sages from the tosefta. It does not ask why, or in what way, the experience of being raped is different (in terms of the degree of physical pain caused) from the experience of willingly submitting to penetration. It does not mention the physical effect of desire: arousal, and thus lubrication. Rather, the Gemara immediately presents an

alternative explanation, that of Rav Nahman (in the name of Raba bar Avua): the pain to which the mishna refers and for which the rapist must compensate is the pain of the girl's having her legs pulled apart – that is, a pain experienced in the legs or inner thighs and not in the vagina (which, as both Rabbi Shimon and the father of Shmuel are careful to remind us, is ultimately fated to be pained in this way).

This explanation of Rav Nahman/Raba bar Avua creatively solves the problem of distinguishing between the pain caused by a rapist and that caused by a seducer: a man who forces a woman's legs apart could be expected to cause pain where pain would not be experienced by the woman who of her own accord opened her legs. Once again, however, the Gemara does not appear to accept a seemingly logical solution. The *stamma*'s response is: but this should also be the case when a girl is seduced. Rav Nahman (again in the name of Raba bar Avua) does not offer the obvious retort that this would not be the case if she willingly opens her legs (which might suggest that the legs here are being used as a euphemism for that part of the body which *is* forcibly opened by both rapist and seducer and which the virgin has no power herself to open from inside). Rather, he offers a peculiar comparison to a man who allows his precious silks to be ripped up by his friend and explicitly exempts that friend from paying damages. Rashi's comment on this comparison is that in return for the pleasure of the intercourse, the seduced girl is understood (even though she does not state this explicitly) to waive her right to compensation – and this seems the most plausible way of understanding this piece of text.

Leaving aside the next comment of the *stamma* (which raises the interesting but to us irrelevant problem of who is considered to "own" the girl's honour – herself or her father), we return in a third statement of Rav Nahman/Raba bar Avua to a variation on the statement of the Sages from the tosefta which reflects my "simple" understanding of that statement: "wise women" say that a seduced virgin does not experience pain. I understand that statement comparatively; unlike the raped virgin, the arousal experienced by the seduced virgin leads her to a point where she does not experience overwhelming pain of the sort which demands compensation. However, refusing once again to accept this distinction between the relatively minor pain experienced by the virgin in her willing deflowering and the much more extensive pain suffered by the virgin rape victim, the Gemara insists that "we know that women do experience pain". The Gemara then goes

on to quote the voices of three women who, through the mouthpieces of their husbands/sons share their various experiences of the pain of being deflowered and this is the end of the discussion.

To summarise, we have seen that the Gemara ignores the Sages' dictum from the tosefta. We should, of course, bear in mind the very real possibility that the Gemara's refusal to deal with that dictum and the concomitant assertion that the רצון of the girl makes a physical difference constitutes not an oversight but rather a deliberate decision. Apparently, the Gemara wishes to deny the subjective desire of the girl any legal consequences, either because it is subjective and can only be inferred or because of an unwillingness to acknowledge physical arousal on the part of the virgin girl.

Wondering whether the Gemara and its lack of support is the halakhic last word on the statement which first attracted my attention in the Tosefta, I turned to the commentaries of some of the classic *rishonim* on the Mishna and Gemara

Rambam

The Rambam in his commentary on the Mishna (Ketubot ch.3 mishna 3) explains אונס נותן את הצער (The rapist pays compensation for pain) as follows:

> ה נבעלת באונס לנבעלת ברצון. וכלל הוא אצלם מפותה אין לה צער פירשו בתלמוד ואמרו אינה דומ
> וכן בפסוקי התורה נאמר באנוסה ענוי ולא נאמר במפותה
>
> They explained this in the Talmud and they said: it is not the same to be penetrated in rape as to be penetrated willingly. And this is a rule for them: the one who is seduced has no pain, and thus in verses from the Torah it is said with regard to a woman who is raped "torment" [sometimes translated "humiliation" (ענוי)] which is not said with regard to the woman who is seduced.

The Rambam cites the explanation of the sages in the tosefta (it is not the same…), and Rav Nahman/Raba bar Avua's third statement, quoting the wise women: "the one who is seduced has no pain". He thus supports my "simple" read, but in attributing this understanding to the Talmud seems to impose his own understanding on a text which can in no way be claimed to unambiguously support it.

The *Rif* excludes the whole problem of צער and begins his précis of the Gemara discussion with the issue of when the seducer pays the three counts for which he is liable.

The *Ran* offers the following comment on the mishna, stipulating the counts on which the seducer is liable: ...דמפותה אין לה צער אבל לא את הצער

…but not compensation for pain, for the seduced girl has no pain.

Thus both the Rambam and the Ran concur with the "common sense" response of the sages to Rabbi Shimon (tosefta) and the statement of the wise women reported by Rav Nahman/Raba bar Avua, whilst notable other Spanish commentators (the Rif, the Raavad and Ramban, for example) are silent on the matter.

Rashi and Tosafot, on the other hand, exhibit greater fidelity to the Gemara's own logic. Rashi's commentary on this sugya offers little in the way of evaluation, merely elucidating the text. *Baalei ha-Tosafot* offer comments on two points in the discussion under review here. First, on the Gemara's opening question: "the pain of what?"

Tosafot Ketubot 39a s.v. "Tsaar demai?"

קשה לר"י דמאי קא מיבעיא ליה וכי לא ידע הש"ס שיש צער גדול לבתולה בביאה - **צער דמאי** ראשונה וכמה קטנות חולות מזה וכ"ת דמאותו צער פשיטא ליה להש"ס דפטור שהרי סופה להצטער בכך תחת בעלה והא איכא כמה תנאי בהכונס דלא חיישי לכחש גופנא פירוש דבר שסופו להיות כן לר"י דצער בעילה משום תאות תשמיש אינו בא בשעת תשמיש אלא אחר כך וכל צער החבלה ונראה דמחייב היינו אותו צער הבא לו בשעת חבלה אבל מה שבא לו אחר כך מיפטר דגרמא בעלמא הוא הלכך בעי צער דמאי ורשב"א מפרש דפשיטא דצער של בתולים ליכא למימר דע"כ תנא דמתני' חייש פתה פטור.לכחש גופנא מדמ

"The pain of what?" – R' Yitzhak objected [to the Gemara's question] "of what", asking: did [the authors of] the Gemara not know that there is great pain for a virgin the first time she has intercourse, and some young girls become ill from this? You might answer that obviously the Gemara exempts [the rapist] from [compensating] this pain as ultimately the girl is fated to suffer this from her husband and there are several conditions for the [husband when he] penetrates in order not to run the risk of hurting her body, and the explanation is that ultimately it will be so [i.e. the girl will experience pain]. Rather, R' Yitzhak explained that the pain of intercourse when caused by careless entry does not come at the moment of penetration but rather afterwards and the pain of wounding for which a person is obligated to pay compensation is pain that comes at the moment of wounding, whereas that which comes later is categorized as "*gerama"* [indirect causation] and the person who wounds is exempt. Therefore [the Gemara asks] "the pain of what", and

[moreover] Rabbi Shimshon of Sans explains that it is obvious that we cannot say this is the pain of losing her virginity because against this our mishna teaches that the seducer is exempt [from compensation] despite [lit: for] the risk he might hurt her.

R' Yitzhak raises the obvious objection: how can the Gemara ask "what pain?" the rapist causes. It is common knowledge that a virgin experiences great pain the first time she is entered and "*kama ketanot holot mize*" – some young girls become ill from this. However, Tosafot acknowledge, following the Gemara, that given that "all" virgins experience pain on first entry, the rapist cannot possibly be penalised for causing her that pain. Tosafot go on to present R' Yitzhak's ingenious solution to the problem of the greater pain caused by the rapist: the pain caused by the man's clumsy entry is experienced *afterwards* and not at the time of penetration. It is thus considered to be *gerama* and as such is not something for which the victim is eligible to be compensated. Hence the Gemara's question: "what pain" the rapist is liable to compensate.

The *Ritva* offers a somewhat problematic summary of R' Yitzhak's position:

Novellae of the Ritva on Ketubot 39a

פירש ר"י ז"ל דלהכי לא משמע לן דליהוי צער של השרת בתולים משום דאילו צער **צער דמאי**. שבשעת השרה ממש הנאת התשמיש נוח לה מן הצער, ועוד דאם כן אפילו מפותה נמי, וכל שכן צער שלאחר גמר ביאה דליכא למימר, שאין אדם משלם צער אלא אותו שהוא בשעת חבלה ממש

The pain of what? R' Yitzhak z'l explained that this does not refer to the pain of taking her virginity, because if it were to refer to the pain at the time of the breaking the hymen, the pleasure of sex relieves this pain and, moreover, if it did refer to this, then the seducer would also [be liable]. All the more so, about the pain after complete penetration we cannot talk for a person does not pay [damages for] pain other than that which is [inflicted] at the time of the wounding itself.

We can observe here a shift from the Gemara's original objection to the difference in liability between the rapist and the seducer – that both (and indeed the girl's first husband in the more ideal scenario) cause the same pain – to an objection that the pain of entry (in every case) is ameliorated by the pleasure of sex; a presumption that even the virgin entered against her will can derive pleasure from intercourse.

Thus amongst the *rishonim* we find two starkly different approaches. One (the Rambam and the Ran) insists that "consent is everything" – with consent, the pain is negligible; without it, it reaches a level for which the aggressor should pay compensation. The other (Rashi, Tosafot, Ritva) effectively seeks to minimise or eliminate the importance of consent: all girls experience pain (but obviously, we cannot hold this pain to be of a level that would require compensation) and/or, at the most extreme, all girls experience both pain *and* pleasure – regardless of their emotional attitude towards sex.

I would simply note at this point that it is the second approach which seems most consistent with the stance of the Gemara itself (that of the *stamma*; not, of course, of Rav Nahman/Raba bar Avua). The first seems more closely to reflect the presumption of the mishna, and the view of the Sages (in opposition to Rabbi Shimon) in the tosefta.

If I am correct and the Gemara here seeks to minimise the importance of the girl's רצון for the physical experience of sex, maybe this is a good point at which to explore its attitude towards the importance of the רצון of the man – specifically in relation to the physical act of intercourse and, at the moment, in no wider sense. The discussion around one of the *mishnayot* we highlighted in ch. 1 furnishes us with an opportunity to do so:

Yevamot ch.6 mishna 1

הבא על יבמתו בין בשוגג בין במזיד בין באונס בין ברצון אפילו הוא שוגג והיא מזידה הוא מזיד סה והוא לא אנוס אחד המערה ואחד הגומר קנה ולא והיא שוגגת הוא אנוס והיא לא אנוסה היא אנו חלק בין ביאה לביאה:

A man who has intercourse with his *yevama*, whether he does so mistakenly or knowingly, whether he is compelled to do so or whether he does so **willingly** – even if he does so in error and she knowingly; he knowingly and she in error, he because of compulsion and she not because of compulsion; she because of compulsion and he not because of compulsion; no matter whether intercourse is interrupted or comes to completion – she is acquired. And there is no distinction between one form of intercourse and another.

Let us first simply note one leap that has already been made: the first clause stipulates "בין באונס בין ברצון" – whether under compulsion or whether willingly, whereas the second stipulates "הוא אנוס והיא לא אנוסה היא אנוסה והוא לא אנוס" –

exchanging the "willingly" of the first clause for "not under compulsion". This is an important, if subtle shift: the identification of that-which-is-not-compelled (if performed) with that-which-is-willed.

In order to understand the Gemara's discussion on this mishna, we must quote the following mishna which moves from a focus on *yibum* (representing encouraged, even prescribed sexual intercourse) to deal with forbidden intercourse:

Yevamot ch.6 mishna 1 (cont)

כן הבא על אחת מכל העריות שבתורה או פסולות כגון אלמנה לכהן גדול גרושה וחלוצה לכהן הדיוט ממזרת ונתינה לישראל בת ישראל לממזר ולנתין פסל ולא חלק בין ביאה לביאה

So also a man who has intercourse with one of the people with whom sex is absolutely prohibited to him [*arayot*] by the Torah, or with one who is disqualified from being married to him, for example a widow to the High Priest, a divorcee or one who has undergone *halitzah* to an ordinary priest, a *mamzeret* or a *netinah*[65] to a regular Israelite, or an Israelite woman to a *mamzer* or *natin* – [she is] disqualified [from marriage to a regular Israelite] and no distinction was made between different types of intercourse.

On this mishna the Gemara (Yevamot 53b) asks precisely the question which this thesis is, in a broader sense, asking: "...אנוס דמתניתין היכי דמי?" – What type of compulsion is it with which our mishna deals?

The immediate response is startling:

אילימא כשאנסוהו עובדי כוכבים ובא עליה, והאמר רבא: אין אונס לערוה, לפי שאין קישוי אלא לדעת!

If you were to say: for example that idol-worshippers compelled him and [because of that] he had relations with her, what about the statement of Rava that there is no compulsion in forbidden relations, as there is no hardening [of the male member] without דעת?

Here we have a direct, fairly unequivocal answer to the question with which we approached this part of the Gemara: if the Gemara itself in Ketubot (against the Mishna, the Sages as reported in the Tosefta and certain of the *Amoraim*) appears to minimise (or deny entirely) the importance of female will in her physical experience of first intercourse, what is the status of male desire? The

[65] A descendant of the Gibeonites who were converted to Judaism under false pretences and were subsequently prohibited from marrying into the congregation of Israel.

Gemara seems wholly to accept the dictum of Rava: "there is no erection without (as a working translation for דעת I will use) intention". Put quite simply: a man physically cannot have relations unless he has an erection, and he cannot sustain an erection unless he wants to have relations – here, desire is all-important. This summary, however, disguises an extraordinary leap made by Rava. Hitherto, אונס – compulsion – has been contrasted with רצון. In the context of the Mishna as a whole we have variously translated this word "desire", "will" and "intention" but in this mishna, where it is contrasted with *ones*, I have specifically suggested that it must be translated with its volitive/affective nuance, not merely its cognitive one. It is not, however, רצון which, according to Rava, is necessary to sustain an erection; rather, it is דעת.

At first glance, then, the Gemara's incorporation of Rava's statement would seem to throw the very notion of a distinction between cognitive and affective into complete disarray. In the Mishna, דעת is never used to describe what we would term an affective state. It is used overwhelmingly to refer to *mental* capacity.[66] Two of the three archetypal males who are considered to be without mental capacity, however, the deaf-mute and the imbecile,[67] are indisputably capable of sustaining an erection. דעתis also used on one occasion to refer to intention[68] and on another,[69] possibly, to refer to knowledge, though in this case too it would not be impossible to translate it as "mental capacity".

It is impossible, however, to interpret the word דעת in Rava's statement as connoting merely mental capacity or knowledge. It is impossible to understand him to be referring to a merely cognitive attitude on the part of the man towards his own erection. For whilst Rava's statement might be interpreted to mean: "there can be no erection without knowledge" (i.e. without the man's noticing his own arousal) and this would be a perfectly innocuous, if banal, statement, the context (that we do not recognise a defense of compulsion in the case of forbidden relations) renders it nonsensical. Being compelled is doing something

[66] Pessachim 10:4; Bava Metzia 7:6; Arakhin 1:1; Para 12:10; Yadaim 4:7; Tahorot 3:6.
[67] Cf. for example the mishna in Arakhin 1:1 cited above.
[68] Tevul Yom 4:7.
[69] Avot 3:17:
רבי אלעזר בן עזריה אומר אם אין תורה אין דרך ארץ אם אין דרך ארץ אין תורה אם אין חכמה אין יראה אם אין יראה אין חכמה אם אין בינה אין דעת אם אין דעת אין בינה
Rabbi Elazar ben Azarya says: if there is no Torah there is no worldly functioning; if there is no worldly functioning, there is no Torah; if there is no wisdom there is no awe; if there is no awe, there is no wisdom; **if there is no understanding there is no knowledge, and if there is no knowledge there is no understanding…**

one would not choose to do rather than doing something one does not know one is doing.

This leaves as a possible translation "intention" – the word with which I provisionally translated דעת in this context above. However, rendering the word as "intention" does not suggest any solution to the problem of Rava's not accepting that there may be compulsion in the case of forbidden relations. I have argued that intention can exist without desire: I can intend to drink and eat on Yom Kippur if the state of my health demands it without experiencing any first order desire to drink or eat. Moreover, for this very reason, I will be exempt from any punishment if, in such a circumstance, I do intentionally eat and drink. Why should not the consummation of a forbidden relationship be exactly the same? The answer can only be that (in Rava's view) a purely intellectual or instrumental intention does not (cannot) lead a man to have an erection. In order to make sense of his statement, we have to acknowledge that when Rava says דעת he does not mean intention; he means will.[70] He has used the word דעת to replace the mishna's רצון but intends to convey exactly the same meaning.

Why then, one might ask, does he use the word דעת? (And why have I gone to some lengths to draw attention to his substitution?) I would argue that it is not merely a slip of the tongue, nor an inaccurate use of Hebrew. Rather, Rava is refusing to accept a mind/passion dichotomy. Precisely in the sphere where men most frequently claim to have been acting without thinking, where it might be claimed that the body and not the mind is in control and where, in consequence, men might seek to avoid accountability, Rava insists that the man is entirely accountable. He insists that, in addition to being affective, passion and arousal are also intentional.

One might well respond that Rava's dictum aims not to introduce a new halakha (that there is no plea of compulsion in the case of forbidden relations) but rather

[70] He could, of course, mean simply "desire" but that would be linguistically even more problematic. Why should he abandon the Mishnaic which does at least sometimes denote רצון wish or desire in the "weak" sense and replace it with a word (דעת) which has never in the tradition been used to indicate desire? In fact, Ketubot 51a, in its discussion of a different statement also by Rava, uses the word יצר to denote sexual desire (cf. the discussion on pp.65-66ff.), whilst in a discussion of why women are not trusted – precisely in the sexual sphere – to act as a safeguard against impropriety, the Gemara (Kiddushin 80b) states that דעתן קלות – their "intentions", or perhaps "resolve" are weak. Clearly, the intention being denoted by דעת there is precisely the opposite of sexual desire; it refers to the ability to resist such desire.

to explain an existing one – that even when one's life is threatened, there are three categories of transgression one is not permitted to commit – murder, forbidden sexual union and idol-worship (Sanhedrin 72a). I am going here to make a short digression from the Gemara into the world of fiction to try to explain how it is that Rava's statement makes particular sense in the context of those three transgressions.

Three curses, in the world inhabited by Harry Potter, together form the category of the "Unforgivable Curses". They are illegal, and carry the strongest penalty for their use. Harry first attempts to use an unforgivable curse in the fifth book of the series. His curse (the *cruciatus* – torturing – curse) has some effect, and is certainly registered by his adversary, Bellatrix Lestrange. However, he does not achieve its full force: it does not cause her crippling pain. His attempt elicits from her a mature response (hitherto she has always addressed him in a mock baby voice) and, despite her status as villainness, I would claim that at this point of the novel, she represents the "teaching" voice of experience. "Never used an Unforgivable Curse before, have you?" she taunts: "You need to *mean* them… You need to really want to cause pain…".[71]

The Harry Potter series straddles many genres, but not least of them is the *bildungsroman.* It is an epic novel about growing up. I mention this here, in this context, because of course one of qualities that the halakha attributes to the adult and not to the child is דעת – a דעת that, it is becoming more and more apparent, does not simply mean "mental capacity" or "knowledge" – not in the way in which we might immediately suppose, at any rate. In a sense, what Bellatrix Lestrange tells Harry is one aspect of what Rava says about sex: you need to mean it. You need to really want it. What she accuses the not-yet-fully-mature Harry of lacking is דעת. What his spell has displayed a lack of is potency.

As Harry is in the process of growing up, we might expect to see some development between this exchange and the one towards the end of the next book in the series which sees Harry attempt the same curse, this time against his long-term adversary Snape. This time, there is no question of his "meaning it", his unambivalent emotional intensity. However, he is still unsuccessful – his curse is parried. Snape's first response is: "You haven't got the nerve or the

[71] *Harry Potter and the Order of the Phoenix*, p.715.

ability." His last word on the subject, however, is that Harry's curses will be "Blocked again and again until [he] learn[s] to keep [his] mouth shut and [his] mind closed."[72] Bellatrix (the female) identifies Harry's lack of power as a lack of emotional commitment to his spellwork – he doesn't mean it or want it enough. Snape (the male) identifies it as a lack of mastery over his mind – he doesn't have enough mental control.

Harry *is* a powerful wizard by this point in the series. He does have knowledge, skill, power of concentration and guts, and thus can perform many spells with considerable power. But not yet having reached adulthood, he cannot bring the cognitive and affective together with sufficient intensity and control successfully to perform one of the three unforgivable curses.

My argument is that a man may not make the most important decisions – such as decisions about marriage and divorce or the alienation of inherited land – until he is able to be fully accountable for all his decisions – even the worst ones. Conversely, once he *may* make those decisions, he is considered to be accountable for them in all cases: if he has mental control he *must* exercise it, even faced with a beautiful woman *and* a gun to his head. Potency requires intensity of desire *and* cognitive assent.

Before dealing with the rest of the discussion around the mishna in Yevamot 6:1, I wish to draw attention to another piece of Gemara which also quotes a statement by Rava:

Ketubot 51b

אסורה לבעלה, חיישינן שמא תחלתה באונס וסופה -שת ישראל שנאנסה אמר אבוה דשמואל: א ופליגא דרבא, דאמר רבא: כל שתחלתה באונס וסוף ברצון, אפי' היא אומרת, הניחו לו, ...ברצון מ"ט? יצר אלבשה. מותרת -שאלמלא)לא(נזקק לה היא שוכרתו

The father of Shmuel said: the wife of a regular Israelite who is raped becomes forbidden to her husband as we suspect the possibility that even though in the beginning she was compelled, in the end, she had relations voluntarily… and this was a dispute with Rava, for Rava said: in every case where relations were in the beginning compelled, and by the end voluntary, even if she says "Leave him be" [implying] that even if he had not raped her, she would have had relations with him; she is permitted. What is the reason for this? Her desire [*yetser*]

[72] *Harry Potter and the Half Blood Prince,* p.562.

overwhelmed her…

The father of Shmuel figured also in the discussion of rape which I cited at the beginning of this chapter: he understands that the pain for which the raped virgin should be compensated is the pain of being thrown on the ground (and not the pain of forced penetration). His view here is entirely consistent with that earlier statement, expressing an assumption that relations themselves are apt to be physically pleasurable for the woman no matter the context in which they were begun (according with the view of the Ritva in his commentary on Ket. 39a. Rava does not contradict this assumption, nor deny the possibility that the rape victim may physically end up responding positively, even (affectively) desiring intercourse. Nonetheless, he asserts that even when we know this to have been the case, her act should not be considered adultery: the rape victim remains permitted to her husband.

Thus we have two radically different statements from the same *amora*. In the case of the man, even if we know he was pressured by threat of death into having relations with a forbidden woman, the fact of his having sustained an erection is sufficient for us to ascribe will (in the true sense – fusing together the cognitive and the affective) to his action, and to hold him accountable for it. In the case of the woman, even if we know that in the end she desired and enjoyed the encounter, the fact that initially the relation was one of rape exempts her from punishment and responsibility. If we believe the Gemara's explanation, then we explicitly accept her plea of being overwhelmed not only by the "enemy outside", the physically stronger man but also by the "enemy within" – her own sexual inclination.

Assuming (which, methodologically, I am inclined to do) that there is not simply an irreconcilable contradiction between the two statements, a wrong attribution or an error in transmission,[73] we can suggest three possible explanations for the

[73] As suggested in the Introduction (Cf. p.25) I think it reasonable to assume consistency where we are dealing with a fully developed, rational intelligence and where there appears to be no overwhelming motive for inconsistency. I also assume that students of the Sages were extremely careful to correctly preserve their teachers' dicta so that, whilst errors are not inconceivable, it would be preferable to explore all other possible explanations before assuming that an error in either transmission or attribution has occurred. (I am aware, incidentally, that there is a particular problem in attributing two dicta to Rava, as his name is indistinguishable from that of Rabbah. In this case, I am assuming the identity of the author of these two dicta because they occur in similar contexts. I cannot of course prove this identity.)

difference between these statements. The first is that Rava is positing a purely physical difference between men and women, suggesting that the man as the active partner cannot be physically aroused without engaging his will whereas the woman as the passive "recipient" can enjoy what is "done to her" with no reference whatsoever to her will. The second, which might also be grounded in a putative physical difference between the genders, would suggest that a woman's sexual desire is simply stronger (or stronger under some circumstances) than a man's: this hypothesis might be supported by, for example, the *beraita* in Ketubot 65a which advocates limiting a woman's wine intake on the grounds that too much wine leads her to indiscriminate sexual licentiousness. Whilst the latter would, however, seem to be relatively good science (a woman's liability to be affected by alcohol being indeed greater than a man's for very simple reasons of blood volume), I find nothing (medical or anecdotal) to support the larger argument – for the innate irresistibility of a woman's sexual inclinations, as opposed to the man's. Moreover, even if a physical difference between the genders could be found to explain Rava's statement, it would not explain the *stamma*'s understanding that the woman is actually overwhelmed by desire.

The third possible explanation, the one which I will attempt to defend in the rest of this chapter and that following, is that there is something about דעת (as Rava understands it) that is not innate but is rather the product of social conditioning and education – something a man is more likely to develop to a greater degree than a woman.

A few pages earlier, in stating that the Mishna never uses דעת to denote an affective state, I suggested that by far the most frequent usage in the Mishna occurs in a context which would suggest it means "mental capacity". This is consistent with the accepted, one might almost say unquestioned, understanding thereof. Tzvi Marx in his book *Disability in Jewish Law* writes that: "… minors, deaf-mutes and the mentally disabled are grouped together (*heresh shote vekatan*) in many of the Rabbinic sources. Significantly diminished *mental functioning* is the Rabbinic rationale for this categorization."[74] (emphasis mine). What Marx is terming "significantly diminished mental functioning" is presumably the Rabbinic exclusion of these categories of person from being considered "*bar daat"*. Uncharacteristically, though, Marx cites no sources for this "rationale".

[74] Marx: *Disability in Jewish Law*, p.96.

That is, he does not justify (he does not feel he has to, as it seems to have been the assumption underlying several generations of halakhic discourse) his assertion that being a "*bar daat*" or not is determined simply by one's mental capacity or lack thereof. Nor does he hesitate in his translation here of "*shoteh*" into "*mentally* disabled". Granted, *shoteh* is the most difficult of the Rabbinic disqualifications from דעת to render confidently in a modern context; however, whilst I would accept that most severe forms of what doctors term "mental disability" would indeed fall into the Rabbinic category of "*shoteh*", I would wish to include in that category also some forms of mental illness that we would not term "disability". If, for example, we examine the Gemara in Yevamot 112b discussing why the Rabbis made a *takkana* allowing the *heresh* to be married but did not make a similar *takkana* for the *shoteh*, we come across the following sentence in explanation: דאין אדם דר עם נחש בכפיפה אחת – "because a person doesn't live in the same basket with a snake". The comparison here of the *shoteh* to a snake does not suggest that the Gemara had in mind the many forms of disability which might render a person mentally disabled but not dangerous (the renowned placidity of children with Down's Syndrome comes to mind). Rather, the comparison does strongly suggest some forms of mental illness which are not classed as mental *disability* at all – acute schizophrenia, a propensity towards psychotic episodes; even some cases of dementia which lead to uncharacteristic aggression. Snakes, especially in Jewish mythology, are not "stupid". They are unpredictable; they are morally ambivalent and they are dangerous.

Leaving aside for a moment the difficulties surrounding the Rabbinic understanding of the *shoteh*, and how congruent that is with modern psychological understandings of mental illness, it is easy to see why at first glance it might be assumed that the "problem" with the *katan* and the *heresh* is one of cognitive functioning. The *heresh* and the "most extreme" form of *katan* – the infant – are marked by their illingualism. Language development in children is most frequently understood to fall within the general classification of "cognitive development" with precocious language acquisition (as well as the early acquisition of language-related skills – reading and writing) popularly, though perhaps mistakenly, assumed to indicate above-average intelligence in children.[75] Likewise, though studies have shown the facility with which oral/aural

[75] Whitmore (ed.): *Intellectual Giftedness in Young Children*, pp.74-75 and 97-98. (The authors point out that not all intellectually gifted children are in fact quick to learn literacy skills).

ability in a second language is acquired to be unrelated to intelligence,[76] the popular imagination credits multi-lingual children and adults with superior intellect.

Much work has been done on the interplay between language and cognitive development, questioning whether the development of concepts precedes and precipitates the child's acquisition of the language with which to express those concepts, or whether language itself is prior to, and shapes thought. Less work has been done on the interplay between language and emotional development, though a number of factors would indicate that these are at least as linked as linguistic and cognitive development. Hugo and Carolyn Gregory,[77] for example, cite studies to show the significance of the development of the concept of self both for the acquisition of language and for the way in which (in the event of difficulty in appropriate acquisition) a child responds to speech and language therapy. More radical is the suggestion of Mowrer[78]: that the very "reason" a young child learns language is primarily in order to identify with his parents – the logical corollary being, of course, that in the absence of any desire or encouragement to so identify, (s)he would not learn language.[79] This thesis is at least partially consistent with Schumann's Acculturation Model of (second) language acquisition,[80] which posits that "native" use of a language is that in which the speaker uses language not merely for what Schumann describes as the communicative function[81] but also for the "integrative function" ("the use of language to mark the speaker as a member of a particular social group"). On this

[76]Ekstrand (1977), Chastain (1969) and Genesee (1976), all cited in Ellis: *Understanding Second Language Acquisition*, p.111.

[77] Gregory & Gregory: "Counseling Children who Stutter" (pp.43-64) in Curlee (ed.): *Stuttering and Related Disorders of Fluency*. Most particularly, they write that "when a small child is beginning to stutter… enhance[ing] the child's positive self-esteem [and] feelings of security and confidence… appears to be a significant factor contributing to the child's development of normal fluency." (p.52). What is true of the child who stutters is, of course, to a lesser degree true of any child, and many adults. Thus, Gregory and Gregory write that "Speech fluency can be a barometer of a child's language development, psychosocial stresses and other day-to-day environmental differences. There are variations in every child's fluency; thus, variations in fluency are normal." (p.51).

[78] 1980, Cited by Ellis: *Understanding Second Language Acquisition,* p.117.

[79] In describing social interaction theories of language development, Fleur Griffiths (*Speech and Language Difficulties in the Early Years*, p.136) writes that "… language is a socio-cultural tool which develops out of social encounters as a consequence of human motivation to interact with others and to develop a concept of self".

[80] Ellis: *Understanding Second Language Acquisition*, pp. 251-253.

[81] I am actually unhappy with this term, and would replace it with one such as "functional language use". Communication, of course, is much more than "the transmission of purely referential, denotative information" which is how Schumann characterises this "first stage" language use.

model, what Gardner and Lambert[82] (in analysing the development of second language skills) term "instrumental" motivation will never lead to native-like facility (though it may be perfectly effective as enabler of competent acquisition of first-level – i.e. functional – language ability). Only "integrative" (i.e. affective) motivation will lead to such an identification with a particular language *and its speakers*.

It also seems to be the case that, just as emotional development enables language acquisition, so linguistic development in turn helps to engender emotional maturity. It is no accident that the tantrums associated with the "terrible twos" have been remarked to decline in regularity and severity as a child acquires sufficient language to verbalise his desires and emotions, thus rendering physical expression (hitting, kicking, biting or rolling around on the floor) and non-linguistic vocal expression (shouting and screaming) if not unnecessary then at least only some of a range of expressive options. Given the Talmud's characterisation of the *heresh* as a person who is not *bar daat*, it is also interesting to note that a number of studies have suggested that deaf children from hearing families (i.e. children who have grown up with inadequate language skills) have a greater tendency towards impulsive behaviour than their hearing counterparts.[83] Marschark comments that "…several investigators have attributed deaf individual's [sic] "rash" behaviour to the lack of early language interaction with parents, who are generally unable to explain delays in gratification… Without sufficient communicative fluency to relate the present to the past and the future… parents unwittingly may be teaching their children that emotional and instrumental dependence is immediately rewarded. This attitude is then carried over into the school setting, where deaf children are three times more likely to demonstrate emotional difficulties than are their hearing peers (R.I. Harris, 1978).[84] (Marschark thus explicitly links the inability to delay gratification – caused by the failure at a crucial stage to comprehend time, a concept strongly dependent upon language – with later *emotional* difficulties.)[85]

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[82] Ibid. pp.117-119.
[83] Studies cited in Marschark: *The Psychological Development of Deaf Children*, p.65.
[84] Ibid. p.66.
[85] Elsewhere, in a discussion of the value of mixed (manual and oral) communication in the education of deaf children, he quotes a study by Cornelius and Hornett (1990) who "…reported that within a sample of kindergartners with congenital or early-onset deafness…the children in [a] classroom using manual + oral communication showed higher levels of social play and more frequent dramatic play. The children in the oral-only classroom [that is, those whose primary experience of language was that of a mode of expression from which they were largely excluded, rather than one in which they could attain mastery –of the language, and of their own selves]…

My contention would be that, even while we may think that we associate language deficiencies with lack of intelligence, we actually, albeit only on a sub-conscious level perhaps, recognise all too well the importance of affective factors in language acquisition and fluency. As I write this chapter, Britain is debating a very specific question within a more general context that has been preoccupying her since at least the 1950s – that of determining, and enforcing, the optimal level of immigration into her isles. The very particular form which this debate has most recently taken centres on the question of whether a certain level of proficiency in the English language should be required of any person seeking residency in Britain. My own analysis of this debate and the visceral emotions it arouses leads to the conclusion that not only is the degree to which a foreigner has mastered a host culture's language a strong indicator of his/her emotional reaction to the host culture itself,[86] it is, albeit often subconsciously, *perceived as such* by the native speakers who constitute the host culture.

For most adults (and herein lies the difference from children), a sense of self is intimately connected to a sense of one's past, and acquiring the language of a new country necessitates adopting the cultural assumptions of that country

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exhibit[ed] more than eight times as many aggressive acts (e.g., pushing, hitting and pinching) as those in the manual + oral classroom. (ibid. p.52, though it should be noted that Marschark goes on to question the reliability of this study).

[86] Think of Sylvia Plath's famous "relationship" with the German language, which she attempted time and again to acquire. Nobody would deny Plath's intelligence, and yet her attempts always ended in failure. In her Journals as well as in what is arguably her most famous poem, *Daddy*, she reflects on the inseparability in her mind of the German language and the German father with whom she has an entirely ambivalent relationship. In "Daddy", of course, the German language becomes fused with the Nazi oppression of the possibly-Jewish speaker, the language itself becoming a threatening entity. It is worth noting also that the fictionalised account of her own nervous breakdown in *The Bell Jar* includes a disturbing description of the narrator's losing the ability to read. (In actual fact, Plath was rehabilitated in part by her English teacher from Grade School who taught her to read and write again.) I admit that Plath is probably unrepresentative in the extent to which her identity was bound up with language, and to which language was an emotional and not a utilitarian issue for her. Quite possibly, if she had merely had to do her grocery shopping in German, she would have found her language skills quite adequate to the task. However, my point is that even those of us who do not become posthumously acclaimed poets use language at least as much for social-emotional purposes as we do for utilitarian ones. Ultimately, grunt and point will normally get us a kilo of potatoes. It will not enable us to form meaningful relationships.

Stern (1983), quoted in Ellis (ibid) pp. 117-118, divided various attitudes researched by Gardner and Lambert and found to have a significant effect on the acquisition of a second language into three groups: first, attitudes towards the community and people who speak the target language; second, attitudes towards the specific target language; and third, attitudes towards language-learning in general. In stressing the importance of affective factors for language acquisition (both of the primary language and of second languages) I am of course concentrating on the first as, if not the affective component most influential from the point of view of the learner, then that most likely to be identified by the host culture as the reason for success or failure to acquire the language.

(eating ארוחת עשר[87] means not eating elevenses. Singing נד-נד with one's child on the see-saw involves a choice not to sing "See-saw Marjorie Daw", with all its attendant, and inescapably English, consciousness of class divisions and economic struggle). Therefore, even when one is technically "able" to speak a non-native language, one still faces the problem that to choose to use that language involves relinquishing one's past, and the part of one's identity that is built upon that past. In this context, refusal to use a new language (most easily effected by refusing to acquire it) is a refusal to sacrifice one's old identity to the new. It is easy to see how such a determined expression of the centrality of the old identity may be perceived by a host culture as rejectionist or isolationist and thus to understand why non-ability to use a language generates not only disdain (an attitude towards perceived cognitive failure) and frustration on the part of the native speaker, but also anger and hostility far beyond that which might at first glance be deemed "appropriate" to the dysfunction.

It is my contention that because of a human tendency to perceive and/or react to the actions of other people as intentional even when they are entirely unintentional,[88] exactly the same anger, hostility and fear attaches to the child who does not acquire a primary language, or an adult who loses his linguistic capacity. The person who does not speak the language of the community marks himself, and is marked by others, as aberrant. The primary means that any civilised society has of controlling the behaviour and assessing the thoughts of (and thus the threat of) its members is language. The person who has no language is thus (short of being locked up in a playpen or a mental institution) uncontrollable and unpredictable. Even those who have some language but may use it inappropriately, in ways that demonstrate that they have not (or not yet) internalised the cultural mores the language is supposed to inculcate, are a source of some threat to the status quo. Hence the social discomfort engendered by the mentally ill, and, frequently, by the child, who may express inappropriate sentiments at inappropriate moments (he has not yet fully internalised a sense of

[87] A small mid-morning meal consisting often of bread and white or soft cheese, tuna and egg.

[88] Dan Sperber)"Understanding Verbal Understanding" in Khalfa (ed.): *What is Intelligence* writes that:

> "In general, behaviours can be conceptualised as bodily movements or as realising intentions. Conceptualising voluntary behaviours as realising intentions is far more economical, more explanatory, and of greater predictive value than merely conceptualising them as bodily movements… Humans can no more refrain from attributing intentions than they can from batting their eyelids. (pp.500-501).

social boundaries) or may be characterised by "irrationality" (we cannot control his desires through argument). [89] In almost all societies, the activities of these categories of people are closely bounded and it is these people whom the Talmud characterises as not being בר דעת.

Before turning back to examine the Gemara on our central mishna from Yevamot (14:1), I wish to quote a section from an article in *Tchumin*[90] (the article as a whole discusses the contemporary halakhic status of the חרש-סאיל who communicates through sign language) by R. Elisha Ancselovits, in which he discusses in what דעת consists. I have translated and edited this section and quote it here at some length because he articulates better (or at least differently) than I many of the assumptions which underlie my reading of the various passages from the Gemara in this chapter and in the next.

> … It appears that the Rambam understood the expression "*bar daat*" to include not merely intelligence but also the capacity to think and act responsibly…
>
> One can adduce several proofs for defining the expression "*bar daat*" in this way: for example, in the very specific context of the laws of *yihud* [seclusion], the Gemara decides (Kiddushin 80b) that a woman (who is not by nature considered unintelligent, and whose *daat* is not questioned in other spheres of action) "shall not be secluded with two men, because women's intentions [*daatan*] are weak [*kalot*]". The Rambam explains this as follows: "they give themselves over to intercourse" (*Laws of Prohibited Intercourse*, 22:9). In this case we are clearly not dealing with intelligence, but rather with responsibility…

[89] Such irrationality may arguably be a product of his not having yet reached the stage of using language as a thoroughly abstract phenomenon – Piaget's stage of formal operations. Piaget lays great emphasis on the development of symbolism and the capacity to deal with abstract concepts as a marker of cognitive development. He charts the child's ability to understand, create and use symbolism – the most prevalent form of which is language – in tandem with his development from egocentricity to understanding of other points of view. However, so far as I am aware, he does not draw a causal link between the two. I would be tempted to do so, and to hypothesise that the ability to understand "represents-but-is-not-x", the ability to separate between object/experience and the linguistic symbolisation thereof, and the ability to separate "I" and "not-I" develop together and rely one upon the other. (For a useful summary of Piaget's work in this area, cf. Ginsburg and Opper: *Piaget's theory of intellectual development: An Introduction*, ch. 3 (pp. 72ff).)

[90] *Techumin* vol. 21, 2001.

> …We define responsibility as behaviour which is determined, organised and predictable over time. A person can be intelligent without displaying a high degree of responsibility. That is the implication of the Darkhei Noam (EH para.3 s.v. "and even though….": "The deaf-mute, imbecile and minor and so forth who are not considered to be *bnei-daat*, are not consistent in correct thinking and in their intentions **from beginning to end, as their opinion/understanding changes from moment to moment"** [emphasis mine].
>
> Lack of responsibility in the case of the deaf-mute can arise from the lack of speech-communication between the deaf-mute and other people. Personal development depends to a large extent on the external world's dealing with the individual and his consequent self-perception.[91] It is this personal development, in conjunction with the signs of his physical development, which renders the person a "*bar daat*"…
>
> …We have thus posited that the deficiency in the deaf mute centres around his problems of communication. This would seem at first sight to be at odds with the case of the [speaking] deaf person who is considered to be entirely *bar daat,*[92] notwithstanding that he also encounters problems in his communication with the wider world. However, the speaking deaf person referred to by *Hazal* is one who grew up and developed as a hearing person. As he never lost his ability to speak, he never lost the capacity to communicate with the wider world and thus his דעת is unimpaired…

What I wish to stress in this extract is the emphasis on a halakhic understanding of דעת which is not at all "about" cognitive facility – one that is, in fact, more or less divorced from the notion of intelligence. Ancselovits sees דעת as a social construct, almost a social skill: that of behaving responsibly – by which we mean also intelligibly (that is, in conformance with some set of accepted values) and, importantly, predictably. This focus on the connection between predictability and intelligibility is of course wholly consistent with the narrative model of behaviour and of understanding intentionality presented in my Introduction: the actions of a person "make sense" and may (not infallibly, but generally) be predicted insofar

[91] Cf. Nancy Weinberg and Judy Williams: "How the Physically Disabled Perceive their Disabilities", *Journal of Rehabilitation* 44 (Aug.-Sept. 1978).
[92] According, at least, to the Rambam (Laws of Terumot 4, 4; Sehita 4:9; Ishut 2:26).

as they are consonant with his (consistent) goals. What is added to this analysis in Ancselovits' understanding is an appreciation that in order for a person's goals to be "accessible" to the wider society, and thus to gain acknowledgement or approval, they must in some sense have been shaped by, or in relation to, that society. Purely maverick goals are unlikely to enable other people to make sense of the behaviour those goals inspire, and thus such behaviour is unlikely to be perceived as consistent or responsible.

This understanding of דעת as socially constructed makes complete sense of the halakhic exclusion of those who have no or inadequate social ties to the general community: the minor (who, with prolonged exposure and education will grow into responsibility); the deaf-mute, who traditionally had no means of communicating with and accessing the communication (and thus socialisation) of the community,[93] and the insane, as defined (Talmud, Hagiga 3b-4a) by the kind of aberrant (and solitary) behaviour which would naturally lead to social suspicion and exclusion. I would add that for this, primarily social, understanding of דעת it is not important whether we foreground the cognitive element in the development of responsibility or whether we foreground the emotional component in social development, as I have in part argued that we should. It seems at least intuitively obvious that without some mental faculty, there is no possibility of learning any kind of social norms, whilst without any emotional investment in the wider community there will be no motivation so to do.

It is time now to return to the mishna in Yevamot with which we opened ch.1:

> חרש שנשא פקחת ופקח שנשא חרשת אם רצה יוציא ואם רצה יקיים כשם שהוא כונס ברמיזה כך הוא מוציא ברמיזה פקח שנשא פקחת ונתחרשה אם רצה יוציא ואם רצה יקיים נשתטית לא יוציא אמר רבי יוחנן בן נורי מפני מה האשה שנתחרשה יוצאה נתחרש הוא או נשתטה אינו מוציא עולמית תחרש אינו מוציא אמרו לו אינו דומה האיש המגרש לאשה מתגרשת שהאשה יוצאה והאיש שנ לרצונה ושלא לרצונה והאיש אינו מוציא אלא לרצונו
>
> A deaf mute who married a hearing woman and a hearing man who married a deaf-mute woman: if he wishes, he releases her and if he wishes, he keeps her. As he brought her into the marriage by signals, so he can release her by signals. A hearing man who married a hearing woman and she subsequently became a deaf-mute: if he wishes, he releases her and if he wishes, he keeps her. If she

[93] Ancselovits thus stresses the importance of the fact that sign language enables communication not only within the deaf community but also with "bilingual" signers who are also part of the speaking community.

became mad, he may not release her. If he becomes a deaf-mute or mad, he cannot ever release her.

Rabbi Yohanan ben Nuri asked: why can a woman who becomes a deaf-mute be released whilst a man who becomes a deaf-mute may not release? They replied: the man who divorces is not like the woman who is divorced, for the woman goes out whether willingly or unwillingly whereas a man does not release unless willingly….

The Gemara's discussion on our part of the mishna opens with a question by Rami bar Hama:

Yevamot 112b

אמר רמי בר חמא: מאי שנא חרש וחרשת דתקינו להו רבנן נשואין, ומ"ש דשוטה ושוטה דלא תקינו נשותיהן פטורות מן החליצה ומן היבום! -להו רבנן נשואין? דתניא: שוטה וקטן שנשאו נשים ומתו תקינו להו רבנן נשואין, שוטה ושוטה דלא קיימא תקנתא -חרש וחרשת דקיימא תקנתא דרבנן לא תקינו רבנן נשואין. ומאי שנא קטן דלא תקינו רבנן -בנן, דאין אדם דר עם נחש בכפיפה אחת דר תקינו רבנן נשואין, קטן דאתי -נשואין, וחרש תקינו ליה רבנן נשואין? חרש דלא אתי לכלל נשואין ואין! התם לא תקינו רבנן נשואין. והרי קטנה דאתיא לכלל נשואין, ותקינו רבנן נש-לכלל נשואין שלא ינהגו]בה[מנהג הפקר

Rami bar Hama asked: what is different about a deaf-mute man and woman that the Rabbis made a *takkana* enabling them to contract marriage, and about a madman and madwoman, that the Rabbis made no such *takkana* enabling them to contract marriage? For we learnt in a *beraita*: a madman and a child who betrothed women and subsequently died – their widows are exempt from both *halitzah* and *yibum*. A deaf-mute man and woman, that there exists for them a Rabbinic *takkana* – the Rabbis made a *takkana* to enable them to marry. A madman and a madwoman; for them no Rabbinic *takkana* exists because a person does not dwell together with a snake in one basket. And what is the difference between a child for whom no Rabbinic *takkana* exists to enable his marriage, and a deaf-mute for whom such a Rabbinic *takkana* does exist? For a deaf-mute who will not [in the future] grow into the possibility of a regular marriage, the Rabbis made such a *takkana*; for a child, who will grow into the possibility of a regular marriage, the Rabbis made no such *takkana.* But what about the girl [minor], who will grow into the possibility of a regular marriage, but the Rabbis [nonetheless] made a *takkana* that she could be married? In that case, it was so that she should not be treated in a licentious manner…

The opening of the mishna might have led us to believe that the "problem" posed by the person who becomes a deaf-mute after his marriage and who subsequently wishes to divorce his wife is one purely of communication: if direct speech, publicly witnessed, is the "gold standard" of clarity and the public has witnessed speech (i.e. it has been wholly sure of the man's will) at the time of a marriage, then if that same public cannot be quite as sure (in the absence of speech) of the same man's will to divorce, no divorce can be effected. This would make sense of the fact that the woman, who played no verbal part in the *kiddushin*, may be divorced even after losing her powers of hearing and speech: she does not need to speak in order for the public to infer a similar level of will on her part to receive the *get* as she evinced to receive the *kesef kiddushin*. This explanation of the mishna, however, which limits the ability of the deaf-mute to divorce his wife for purely pragmatic reasons, is at odds with the general rule given at the end of the mishna (the Rabbis' response to R. Yohanan ben Nuri) and is implicitly rejected by the Gemara, which makes a linguistic shift to which, by now, we should have become accustomed. The end of our Mishnaic extract explained that the reason the "newly"[94] deaf-mute man is disqualified from divorcing his wife whilst the newly deaf-mute woman is not disqualified from being divorced is that the man must willingly release his wife)לרצונו(whereas the wife may be divorced whether she is willing or not. The Gemara takes this notion of רצון and re-presents it as a problem of דעת, immediately questioning what the difference is between the deaf-mute and the other categories of male who are generally halakhically disqualified on the grounds of their not having דעת – the madman and the minor. The Gemara's answers are not particularly of interest to me here; what is of interest is the conversion, once again, of a Mishnaic concern with ורצו into an Amoraic concern with דעת. Without דעת, implies the Gemara, there can be no רצון. Either they are essentially the same thing (as I suggested

[94] The reader might well at this point object to my insistence that דעת does not merely denote mental capacity, but rather the cognitive/affective/social decision-making capacity that Ancselovits defines as "responsibility" – after all a person who suddenly becomes a deaf-mute does not lose his past, and in particular, the education and social relationships that have inculcated in him a sense of responsibility. To this objection, my answer is two-fold. First, a person who lost the ability to communicate intelligently and intelligibly with the wider society might well experience some degree of withdrawal from that society, causing him gradually to lose his sense of belonging to the community. Thus, his sense of responsibility and his sense of orientation (provided and nurtured by ongoing communication and relationship) might diminish over time so that, whilst the day after his hearing and speech loss he might be fully responsible, many years later, he might have lost much of that sense of responsibility. Secondly, I would emphasise that the Mishna is not dealing with gradual-onset deafness of the sort that might develop with old age. In order to lose both speech and hearing in a way that would be perceived as "total", a person would have to be subject to either a fairly major accident or illness or an extreme trauma. These kind of experiences might in and of themselves diminish mental capacity or stability.

seemed to be the view of Rava) or the one (דעת – the mental, emotional and socially developed capacity to make responsible decisions) is a necessary requirement of the other (רצון – will, one might almost say "free will").

That the concern of the Gemara at this point is with דעת is of course only implicit (from the question which aligns the deaf-mute with the minor and the madman). In fact, דעת is not explicitly mentioned until the very end of the next *amud* (113a, and continuing into 113b) where there is a discussion of Rabbi Eliezer's view (against the anonymous voice of a mishna in Terumot*)* that the *teruma* separated by a deaf-mute cannot be eaten as regular *hullin* (i.e. there is at least a possibility that his act of separating *teruma* has been effective). The relevance of this discussion here is an analogy which is being drawn between the deaf-mute's capacity to separate *teruma* and his capacity to enter into a marriage that is binding *d'oraita* and not merely on a rabbinic level. The Gemara states that Rabbi Eliezer accepts that חרש דעתא קלישתא הוא – the *daat* of a deaf-mute is weak[95] – but is unable to determine whether he (Rabbi Eliezer) believes in the possibility of the deaf-mute's actions' nonetheless being effective because, notwithstanding the general weakness of his decision-making capacity, there are areas in which he will "set his mind" on a particular object and fully intend to achieve it; or whether Rabbi Eliezer believes that the weakness of mind of the deaf-mute consists in his being sometimes lucid and sometimes not.

This is highly relevant to our own discussion of what constitutes דעת: the first option – that the *daat* of the *heresh* is generally weak, but that he may in some circumstances, having understood the position, come to form a firm intention – seems to support an understanding of דעת which leans towards its being "mental capacity". Thus Rashi glosses the statement as follows: "his ability to understand is less than that of other people, but once he has understood and sets his mind to do something, his intention is fully intentional". The second option, on the other hand, appears to support an understanding closer to Ancselovits': his propensity to be lucid at one time and not at another renders him unpredictable and thus his actions unreliable. However his very capacity for lucidity (which I understand to entail also responsibility), albeit transient, raises the question of how we should treat his action at any given moment.

[95] Evoking the description of woman's weakness of resolve, supra. p.67.

The last point I would make on this sugya is that the discussion of the rule from our mishna which provides the focus of this thesis – ש המגרש לאישה אינו דומה האי המגרשת שהאשה יוצאה לרצונה ושלא לרצונה והאיש אינו מוציא אלא לרצונו – relates solely to identifying the underlying question which sparks it (is Rabbi Yohanan ben Nuri surprised by the fact that the woman who becomes a deaf-mute may notwithstanding her changed status be divorced, or is he rather surprised by the fact that the man who becomes a deaf-mute may not?). It does not relate to the rule itself or what it might mean. Clearly, whilst to us the statement is fraught with difficulties and ambiguities, to the Amoraim it must have seemed self-evident. In any case, the discussion was considered closed and at this level of halakhic development, no questions were raised.

It has not been my intention in this chapter to offer a thorough, complete or exhaustive analysis of the concept of דעת as it appears in the Gemara. To do so would require a thesis or two in its own right, and is certainly beyond the scope of this chapter. What I have rather sought to do is show one way in which the concept is used – most particularly where the word דעת replaces or augments the word רצון in the Mishna. I have suggested that together the רצון-דעת composite comes to denote a very conscious and conscientious ("responsible" in Ancselovits' language) power of will – a will which supports and includes elements of desire and cognitive reasoning, but which must necessarily go much further than either of these elements alone. It is, I would argue, no accident that many of the sources I have quoted in this chapter deal with sexual will or volition: linguistically, the word דעת has its "genesis" in the Biblical story of the Fall, where it is used of that very intimate, experiential and sexual "knowing" of good and evil. Once again, given this, it should be no surprise that דעת is equated with maturity, a maturity which the halakha defines at least in part as sexual maturity (the emergence of pubic hair).[96] Thus it is sexual capacity which both denotes (physical) and demands (cognitive and emotional) maturity.

There is one problem. The Gemara seems to assume that we can expect maturity (in the sense of responsibility or conscientiousness) from one who is (physically) mature, unless we have good reason to believe that that expectation will be thwarted: that is, unless a person has severely limited capacity for enjoying the benefits of communication with his surroundings (the חרש) or has

[96] Mishna Niddah 5:7-8.

demonstrated either severely impaired mental functioning or dramatically irresponsible/incomprehensible behaviour. What the next chapter will deal with is the extent to which the Gemara's assumption is or remains well-founded as we move forward from the period of the sages to a period of arguably greater social and religious mobility in Medieval Spain, Europe and North Africa.

Chapter 3 – Rishonim and Gemara (ii)

War rages in Middle Earth, a war whose main purpose is to distract the evil Sauron's attention from two hobbits making their way towards the furnace of Mount Doom – the only place where the one Ring of Power may be destroyed. Frodo Baggins, the hobbit whose eccentric uncle Bilbo willed him that Ring of Power (in ignorance) is carried towards the climax of the final book in the *Lord of the Rings* trilogy by his companion and one-time servant, Sam Gamgee. They are led on their journey by Gollum (who kept ignorant of its purpose), a creature who was once a hobbit but who has been both morally and physically all-but-destroyed by his former possession of the Ring and his desire to re-possess it. When they reach Mount Doom, Frodo finds himself unable to resist the Ring's hold over him and unequal to the task of relinquishing it to its destruction. It is Gollum who manages inadvertently to bring their plan to fruition by seizing the Ring and, in his delight, losing his balance and toppling over, together with the Ring, into the fire. Peace is restored, Middle Earth redeemed.

Lawrence Haworth in his book *Autonomy* defines said trait as a combination of competence, independence[97] and self-control.[98] Frodo as hero, on the above account, scores low on autonomy: he is unable (incompetent) to reach Mount Doom (he is carried, on Sam's initiative, and guided by Gollum); he is not procedurally independent:[99] his possession of the Ring is due to someone else's will (both senses intended) and the plan to destroy it was also of someone else's making – though he did (some two books earlier) volunteer to be the one to carry out the plan. He also displays insufficient self-control: confronted by the searching *nazgul*, he repeatedly gives in to the temptation to put on the Ring and ultimately fails to destroy that golden, immortality-conferring embodiment of everyman's Will to Power.

If Frodo is less than a convincing embodiment of autonomy, Gollum is its very antithesis: under oath, at this point, to serve the "ringbearer", he is thus forced to aid Frodo and Sam in a journey that will lead to the destruction of the only value

[97] "…self-rule is not possible if the person's objectives are simply borrowed from others. In that case, it is not he who rules. Thus, the second trait necessary for autonomy is (procedural) independence." (Haworth: *Autonomy*, p.43*)*

[98] "…self-rule is not possible if the person's passions and impulses dictate his responses, so that he is led to do that which, had he reflected, he would have avoided doing. The third trait necessary for autonomy, therefore, is self-control." (ibid).

he recognises. He is deficient in knowledge (his actions are in ignorance of the fact that his masters' plan is to destroy the Ring) in independence from the will of others (he is the hobbits' slave) and in self-control – he is unable to answer to any desire or thought in himself other than his obsession with the Ring. The dialogue between his *yetser hara* and his better self[100] about whether or not he should kill Frodo, ends with his being persuaded by the scheming of the *yetser* rather than by the more genuine[101] voice of his own conscience.

And yet it is Gollum who destroys the Ring – or maybe it is more accurate to say that it is through Gollum that the Ring is destroyed. Whatever power directs lives (or at least novels) uses Sam's good-hearted loyalty, Frodo's dogged determination and sense of weary destiny and Gollum's enslavement to the Ring in equal measure and without reference to the moral value of each, to bring about the desired end.

It has been noted that J.R.R. Tolkein's vision is indelibly etched with the imprint of his experience of World War I.[102] Given his particular vision of that war, it is perhaps not surprising that his most major work seems to convey an anti-autonomic philosophy. War as typified by the trenches may in many ways demand that we accept the essential impossibility or valueless-ness of individual human decision-making, at least in that context. Victory is achieved, if at all, only through the mass manipulation of soldiers – decisions made on a level quite separate from the people who will carry out the resultant orders[103] – and the only "heroism" possible on an individual level is friendship between soldiers.

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[99] Cf. Intro. footnote 61.

[100] Tolkein: *The Lord of the Rings,* pp.658-659 (The Passage of the Marshes).

[101] It is the voice of the *yetser* (the "Gollum"-voice) which utilises faux child grammar and syntax, perhaps alluding to the fact that lack of self-control – propensity to give in to temptation – is a childish trait, control having to be learned on the route to adulthood. It is interesting to note that in the most recent film version, this dialogue is carried out with the *yetser* voice about an octave higher, (childishly un-broken) than the voice that seeks to retain, or regain, its moral compass.

[102] For the best analysis, see John Garth: *Tolkein and the Great War.*

[103] Including the officers. Garth points out that the death rate in Tolkein's generation of soldiers who were public-school and Oxbridge educated was significantly higher than that of soldiers who were not. That is to say: a staggering number of men carrying out orders and dying in so doing were actually part of the elite whose privilege in social, economic and educational terms would normally have led them to believe in their own autonomy and the importance of their own decisions. The dissonance between this belief and the actuality of the war is well reflected in the literature of disillusionment: see, of course, the poetry of Wilfred Owen, or the play *Journey's End* by R.C. Sherrif.

The wizarding world is finally at war. A last battle is being waged against Voldemort at Hogwarts in order to buy Harry Potter, Ron and Hermione time to search out the last hidden *horcruxes*[104] and destroy them. Only after the destruction of the last two *horcruxes* will it be possible for Harry to confront Voldemort and attempt to kill him, as Voldemort will then no longer be able to return to his body: he will be irrevocably dead.

As it happens, the *horcrux* in question is, like the One Ring, destroyed accidentally, by a "minor villain" who has no knowledge of what the *horcrux* is, no intention to destroy it, and who manages to start a fire of abnormal potency which burns him, like Gollum, to death. This unintentional destruction, however, is not the climax of the book but rather a minor plot point. The true climactic sequence begins a little later, at the end of a story told posthumously by Snape to Harry through a *pensieve*.[105] By means of this story Harry learns that he himself is – unbeknownst to Voldemort – a *horcrux.* Thus the only way for Voldemort to become mortal is for the *horcrux* that is Harry to be destroyed, meaning that ultimately Harry must allow Voldemort to kill him.

On the one hand, in walking towards his death, as he duly does, Harry is, like Frodo Baggins, carrying out Dumbledore's plan rather than one of his own making. On the other hand, he is aware at every moment that he still retains a choice: in his perception,"… the deathly stillness of the grounds felt as though they were holding their breath, waiting to see whether he could do what he must".[106] True, Harry perceives obligation ("must"). But at the same time, where there is no choice, there cannot be doubt (the "could" refers not, in Haworth's language, to competence but rather to self-control). Similarly, in his later conversation with Dumbledore whilst he exists in a liminal state between death and life, Harry says: "I meant to let him kill me!" That "meant to" is an expression, I would argue, of full intentionality and, indeed, will, as is acknowledged by Dumbledore's response: that that will of Harry's shall "… have made all the difference". Harry's will, unlike that of the soldiers in the first World War, or that of Gollum, has significance.

[104] A part of a person's soul split off from the whole and preserved in an artefact. The continued existence of the horcrux renders its maker immortal.
[105] A device for storing thoughts and memories externally to the brain and through which one person may enter another's memories.
[106] Rowling: *Harry Potter and the Deathly Hallows*, p.557

Whilst the Harry Potter series and *The Lord of the Rings* belong to the same genre of literature, and J.K. Rowling has been observed to borrow features from the earlier trilogy, my argument is that their philosophies inhabit entirely different worlds. The thematic plots (I hesitate to use the term "sub-plots" as they are intrinsic to the main narrative) of the *Harry Potter* series are concerned with freedom (freedom from genealogical determination; freedom from slavery) and with the development of moral identity – significantly, those who belong to the older generation (teachers, parents and ex-pupils) as much as the younger generation are offered the opportunity to change and grow (*pace:* Lupin, who returns at Harry's prompting to his wife and child, and has the good grace to acknowledge Harry's moral authority; also Snape, who is a wonderful fictional demonstration of how effective repentance may bring with it neither grace, nor recognition, nor the eradication of the character flaws which led in the first place to sin).

The ability to choose death is probably the highest form of self-control one can imagine; by this point in the epic, Harry's competence (his magical ability, mental clarity and clear leadership skills) is quite extraordinary and his procedural independence (he listens to the advice of others but, enabled by the death of Dumbledore at the end of Book VI, makes his own best decisions) is unquestionable. If we accept Haworth's criteria, Harry Potter scores so high on the autonomy scale that I would suggest that the series falls into a genre for which I would coin a new term: "autonomy narrative". This "autonomy narrative" is one in which a person is **enabled** by virtue of his/her character, skills, education, social class/position and any other relevant factors to make a **free choice**. His **free choice** results in an **action or series of actions** which are performed at some cost to the actor. The protagonist is **freely aided** in his actions by those he leads. His action/series of actions is seen to have been **effective** in improving the lives of others; and finally, the actor discovers that through his altruistic action he himself has benefited – to use the appropriate philosophical term: he has achieved, or come close to achieving ***eudaimonia***.

The time has come for me to defend the opening of this chapter, and state clearly its relevance to my thesis.

In the Introduction, I presented various philosophical models of action, including the formal legal model, the narrative-motivational model and the teleological-

narrative model. I further suggested that in considering at least the Mishna (and, presumably, if the Mishna is the starting point for Rabbinic literature, then some if not most subsequent halakhic literature) we should favour one or other of the narrative models. If we accept that argument, then it makes sense to probe what kind of *narratives* of human action might be available as models for the rabbinic construct of significant action. Given that my own focus is on the nature of will in halakhic thought, it is reasonable for me to ask how far Rabbinic texts in general, or a specific Rabbinic text in particular, subscribe to the "autonomy narrative" either as an ideal, or indeed as a realisable goal for most human behaviour.

One of the major questions this thesis is attempting to explore is how far the halakha (in one particular area: that of divorce) expects, encourages, tolerates or alternatively discourages and is willing to override, the autonomy of the individual. If the rabbis view individual autonomy as dangerous, threatening or merely illusory, then it can be assumed that the halakha will attempt to circumscribe the area in which the human will is powerful, so that ultimately we will have very limited power (or none at all) in the most important areas of our life. The more unimportant the individual's will is rendered, of course, the less important it becomes precisely what his will is: in any meaningful way, it does not matter whether you prefer chocolate chip ice cream or strawberry, and if this is the only level on which a person is permitted to make his own decisions, no-one need be overly concerned with the formation of his will. Very few societies, however, attempt to curtail individual liberty so extensively. Most allow their citizens[107] to make at least some decisions which do matter (whilst using legislation and sanctions to control behaviour in areas where the public weal is deemed to be most at risk).

One way of understanding how it is that individuals are afforded considerable freedom in some areas of life and not in others, is to label those areas in which citizens have freedom of action "private".[108] It hardly needs to be pointed out, of

[107] "Citizens" being, of course, a sub-group of any society – often, as is the case in halakhic Judaism, free, adult males.

[108] This is precisely the line that Broyde takes in *Marriage, Divorce and the Abandoned Wife in Jewish Law*, where he asserts that marriage (and therefore divorce) in Judaism constitutes a "private contract" with which the *bet din* not only is disinclined to meddle, but should also normally be discouraged from meddling. This point is central to his entire argument, and constitutes the major difference in his view between Jewish Law and American Law in the area of marriage and divorce. Whatever the merits of his argument, he vastly overstates his case, for example when he writes (pp.11-12) that "the community cannot enact legislation that restricts a person's ability to marry without… the presence of a larger quorum than required". This fails

course, that there is no such thing as a truly private decision. My neighbour's alcoholism (a personal affair which he is within his legal "rights" to indulge insofar as it does not cause him to become violent) not only puts a strain on the NHS but also results in my being loath to allow my children to call at his house with their sponsorship forms, thus being prevented from teaching them a positive lesson about good neighbourliness and co-existence in community. However, the categorisation of a particular decision as private appears to be an attempt to minimise the importance of the areas in which individuals are free to make their decisions unhindered by legislation or public policy, or at least to claim that although those areas are important to the deciding individual, they are of limited objective (public) importance.

The second alternative is not to underestimate the importance of these areas – both for the decision-making individual and those intimately associated with them, and for the wider community – but rather, whilst upholding the importance of making good decisions, to assert the equal importance of autonomy. This view would argue that precisely because these decisions are important, they should be made freely: those who act must (for reasons political or theological) be able truly to own their actions. It is this second alternative which forms the basis of the autonomy narrative (at the end of which, as I stated above, the hero's autonomous action is seen to be beneficial both to others and to himself).[109]

It is my hypothesis that when areas of liberty are viewed in this second way by the society in question and its lawmakers, the leaders of that society will typically

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entirely to acknowledge that it was legislation enacted by the community that created the requirement for the presence of a quorum at all.

In fact, Broyde *does* explicitly acknowledge the public consequences of laws governing the divorce of private individuals. He writes, for instance: "Just as unilateral no-fault, nonmutual divorce has not proven to be a significant stabilizing force in those states that have adopted it in the last 25 years, so too it will not prove a stable force in Jewish society for the dissolution of marriages…Just as it has not led to increased family stability in those states that have adopted it, so too it will not prove to be a stabilizing force in the Jewish family."(p.61). In other words, in his view the benefits which ensue from affording women the ability to exit marriages that are intolerable to them regardless of their husbands' wishes in the matter are outweighed by the benefits to the Jewish community of having a (relatively) stable family structure. This is an entirely reasonable position, but has nothing to do with marriage's being a "private", contractual affair; rather, it has everything to do with its public nature. Of course, Broyde's own proposal, notwithstanding his analysis here, of a solution which might provide for "unilateral, no-fault, nonmutual divorce" might be taken as evidence that in fact he does view the matter as a "private" one.

[109] It is because and only because Harry owns his decision to allow Voldemort to kill him that his act – like his mother's seventeen years previously – affords a magical protection to those in whose interests he has made this decision.

assume a significant moral responsibility not only to make good decisions in such spheres in their own personal lives but also for the education of their children and disciples. Thus (as I mentioned earlier), it is important that Harry Potter is a school narrative; it elaborates a philosophy of, amongst other things, education. It is important that whilst he is taught wand-work, and this stands him in good stead when he confronts death eaters, Harry is clearly taught a lot more, and it is the "more" (the extra-curricular education he has received, from Dumbledore and others) that enables him to confront and ultimately defeat Voldemort. In the course of his explanation of "the [partial] truth" to Snape, Dumbledore states: "We have protected [Harry] because *it has been essential to teach him, to raise him*, to let him try his strength." (p.551, my italics) Harry has been educated to the point where Dumbledore knows he will not (in Harry's language) "duck out". In other words, because it is his will which shall determine the course of wizarding history, it is his very will which has been educated.

In an essay on "Mediality and Rationality in Aristotle's Account of Excellence of Character",[110] Mark McCullogh points out that the portion of the Nicomachean Ethics which claims (famously) that virtue consists in the mean is conceived not as a philosophical or even ethical textbook per se but rather as a book of advice for the moral *trainer*. Let us not forget that it was Aristotle who coined the word *autonomia*. It is highly significant that the same Aristotle to whom that notion is central assumes as a matter of course that those who shall need to be autonomous (the ruling elite of the autonomous city-state) will need to be educated to have the right will, or to be able to arrive thereat. As McCullogh rightly notes, Aristotle's theory of the mean, if it merely advised one always to act in a way that represented the midpoint between two possible extremes of behaviour, would be vacuous. Rather, the theory encourages the moral actor to develop the ability to determine what the appropriate mean behaviour is in any given circumstance (that mean being entirely circumstance and person dependent). That is to say: the moral agent must acquire the skill to make the correct decision in any given circumstance, and the self-control to enact that decision. In other words, he is to be educated to be morally autonomous.

It goes without saying that an education aimed at inculcating moral autonomy is qualitatively different from an education directed at producing morally correct

[110] In Bosley (ed): *Aristotle, Virtue and the Mean*, pp.155-174, cf. especially p.156.

behaviour.[111] Compare (to take an example unconnected with morality) the headmistress of a ballet school; she must ask herself, consciously or unconsciously, whether her classes are aimed primarily at the child who will eventually take the lead role and will be expected to bring her own individuality to that role, or at the children who will aim to take their places in the *corps de ballet*. The same exercises may well be performed in either case, with an equal level of discipline expected from the students, but the corrections given and the language used to describe the end at which the students should aim will be significantly different.

Just as in the case of the ballet school, so in the case of halakhic Judaism, one of the central and defining *mitzvot* – *talmud torah* (loosely translated: education) – might equally be directed to encourage autonomy or to encourage obedience. If the overriding aim of this mitzvah is to acquaint the student of Torah with the halakha as decided elsewhere (whether at Sinai or in a back room in Salford) then it is a mitzvah concerned with procuring obedience to the Law through the very sensible route of publicising that Law. If, however, the overriding aim is to initiate the student into the decision-making process by developing his familiarity with the discussions and reasoning of the rabbis who have preceded him (from the *Tannaim* of the Mishna to contemporary *poskim*) then one could make an argument that what is being taught as halakha is less the "what" than the "how". Clearly, "how" can only be taught by means of "what" (knowledge is a significant part of the "competence" component of autonomy) conversely, there is no way that a bright student can be taught "what" without sooner or later gleaning an inkling of "how". Nonetheless, it is a reasonable hypothesis that an authority who speaks or writes about "*talmud torah*" has some notion of how he wishes to balance the aims of obedience and autonomy.

All this is relevant to our discussion of the רצון necessary for the giving of the valid *get* because there are three possibilities (a choice of two, the second of which

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[111] Kohlberg's theory of moral development (drawing on Piaget) posits that the individual comes *through* moral conformity to a stage of moral autonomy. However, he accepts that the highest stage of moral development he describes (complete autonomy) is rarely, if ever, attained. What his theory does not explore is whether the failure of many individuals to achieve a level of moral competence higher than conformity is due more to individual (cognitive) limitations or to educational failure or, indeed, policy. One would have to imagine a society rather differently structured from our own if one wanted seriously to advocate the education of the majority of people to a high level of moral autonomy.

splits into a futher two): we may say that the divorce of individuals is an issue which primarily affects the individuals concerned and not the wider society (i.e. it is a "private" matter) and that there is therefore no reason to be overly concerned with the choice to divorce or not. Alternatively, we may say that the divorce of individuals is indeed perceived by the halakha to be a matter of importance to society, whether because we are bound as Jews responsible for one another to care about the emotional and economic wellbeing of the couple or family in question or whether because the ramifications of each divorce or continued unhappy marriage on the community in which the couple lives may be considerable.

If the latter is the case, then there are two further options: either the halakha must mandate precisely under what circumstances the husband should effect a divorce and under what circumstances he should not – this is of course one route taken by the halakha at various points: the Mishna's advocacy of *kefiyah* in certain circumstances, or Rabbeinu Gershom's limitation of the husband's ability to divorce his wife to instances where she also is willing. Or else, if it is truly to respect the autonomy of the husband in this area even whilst acknowledging the importance of the decision he will make, it must be concerned with the correct development of his autonomous will. It would be this second view which, in my argument, would subscribe to a vision of the autonomy narrative's being not only possible but also desirable, even obligatory.

I have, I think, shown from my analysis of *The Lord of the Rings* versus *Harry Potter* that the autonomy narrative and the narrative of human insignificance may very well coexist within a particular culture, a particular genre, even a particular person (devotees of *Harry Potter* and devotees of *The Lord of the Rings* are not two mutually exclusive circles.) I do not therefore expect to find that "Rabbinic literature" as a totality swings one way or another in its estimation of autonomy. I will in what follows, however, try to trace pro-autonomic and anti-autonomic development and link this to the kind of רצון that the *Rishonim* understand to be indicated by the end of the mishna in Yevamot 14:1.

Before moving into those Rabbinic sources themselves, however, I wish to demonstrate (once again by means of a recent film) how the very same language may be used in different cultural contexts to advocate diametrically opposed understandings of autonomy. A famous Protestant hymn opens:

Amazing Grace, how sweet the sound
That saved a wretch like me
I once was lost, but now I'm found
Was blind, but now I see…

John Newton: *Amazing Grace*

For anyone who boasts only the slightest familiarity with Protestant evangelical theology, the resonance of the words is inescapable. Grace is the redeeming action of G-d which in some way operates to save the undeserving man or woman – classically (or maybe, popularly) from damnation. This is one of the central tenets of Protestantism against Catholicism.[112] Catholic theology also has, of course, a notion of grace – but in Catholic thought grace operates most powerfully through the sacraments, restoring human action (participation in these sacraments) to some place, if not a central one, in the redemptive process.

The recent film "*Amazing Grace*", however, which presents the biography of William Wilberforce (the MP who repeatedly petitioned Parliament for the abolition of the slave trade in Britain) offers a radically different understanding of grace. Appropriately for a film whose very raison d'ętre is an abhorrence of the institution of slavery (formal denial of human autonomy), *Amazing Grace* is another good example of the autonomy narrative. The abolition of slavery (benefiting the many) is achieved through the vision, determination and perseverance of one man (who comes from a position of privilege, including educational privilege), aided by a small number of loyal friends. He sacrifices to this greater end his own health and his inclination to a life of religious seclusion. However, through this self-sacrifice he arrives at a life which not only boasts renewed health and domestic happiness but also seems to offer the satisfaction of a life "well lived". The story as told through the film does not shy away from the religiosity suggested by its title, but the grace in question is transformed from its conception in the hymn as gift of God to the passive human recipient into a fusion of divine inspiration, divine support and the ability of humans through their lives to give something back to God.

The same conflict that pulls us between Protestantism and autonomism, between Lord of the Rings and Harry Potter can be read into the dispute attributed in the

[112] Justification by faith alone implies a rejection, at least for redemptive (i.e. existentially important) purposes, of "works". That is to say, human action has no central, ultimate importance.

Gemara in Arakhin 21a-b to the viewpoints of Ulla and of Shmuel:[113]

שאין מתכפר לו עד אמר שמואל: עולה צריכה דעת, שנאמר: לרצונו. מאי קמ"ל? תנינא: אף על פי ... מדידיה, אבל -שיתרצה, שנאמר: לרצונו. לא צריכא דפריש ליה חבריה, מהו דתימא: כי בעינן דעת מדחבריה לא, קמ"ל: זימנין דלא ניחא ליה דליכפר במידי דלא דידיה. מיתיבי: חטאתו ואשמו של פלוני יצא! -בין לדעת בין שלא לדעת לא יצא; עולתו ושלמיו של פלוני עלי,- יצא, שלא לדעת -לדעת עלי בשעת -אמר לך שמואל: כי תניא ההיא בשעת כפרה, דאירצי בשעת הפרשה, כי קאמינא אנא הפרשה. ופליגא דעולא, דאמר עולא: לא חילקו בין חטאת לעולה, אלא שחטאת צריכה דעת בשעת יצא, שלא לדעת -דעת הפרשה, ועולה אין צריכה דעת בשעת הפרשה; אבל בשעת כפרה, אידי ואידי ל לא יצא! - יצא, שלא לדעת - לא יצא. מיתיבי: חטאתו ואשמו עולתו ושלמיו של פלוני עלי, לדעת - שמואל מוקי לה בשעת הפרשה, עולא מוקי לה בשעת כפרה.

…Shmuel said: the *olah* offering requires intention (*daat*) as it is said "according to his will" (*lirtsono*).[114] What [extra thing] does this [statement of Shmuel's] teach us? Our mishna teaches: even though it does not effect atonement until he becomes willing [to offer it], for it is said "according to his will" [and therefore Shmuel's statement would appear redundant]. No, it is necessary [and refers to a case where] his friend separates [the offering] on his behalf. What might we have thought? – that we require intention on the part of [the person separating the offering] but not on the part of his friend [i.e. the person on whose behalf it is being offered]. This [that that is not the case] is what [Shmuel's statement] teaches us: sometimes it is not pleasing to him that he should be atoned for with something that is not his. They raised an objection [to Shmuel's statement] based on a *beraita*: [if a person says]: so-and-so's sin-offering and so-and-so's guilt offering are my responsibility, if [the person whose offering it should have been] knows about it[115] – the offering is effective, if he does not know about it – the offering is

[113] The Gemara records the respective traditions in the names of Shmuel and Ulla but then, under pressure of a seeming redundancy in Shmuel's statement – his requirement for דעת for an *olah* offering would seem merely to repeat the Mishna's acceptance of the requirement for רצון – extrapolates from their recorded positions to the arguments they might have made in response to challenges: it is for this reason that I write of the Gemara's "attributing" the dispute to these named *Amoraim*.

[114] Note the Gemara's identification of דעת with רצון here, as in many other instances, see ch.2.

[115] Elsewhere, I have translated "*daat*" as "intention". I have also, of course, spent the entire last chapter arguing that in some contexts it should be translated "will". However, *daat* can clearly also mean, simply, "knowledge", and for reasons that shall become clear in my analysis of this passage, in this context I believe "knowledge" is the preferable translation. I also fully intend my use of "intention" to translate the same term only a few lines further on, in the context of the response that might be made on Shmuel's behalf. As I will go on to suggest in my analysis of this *sugya*, Shmuel/proto-Shmuel is actually requiring a form of will regarding the sacrifice qualitatively different from that required by Ulla (and, arguably, the *beraita*); in other words, their disagreement regarding the time at which will is required is indicative of a deeper disagreement regarding the type of will required.

ineffective; [however, if a person says]: so-and-so's *olah* offering or his peace offering are my responsibility, whether [the former] knows or does not know – the offering is effective. Shmuel might respond to you: this *beraita* refers to *daat* [knowledge or intention] at the time of the atonement, that he should will [*d'yratsei*] at the time of the separation [of the offering] is what I am saying – [the important point is the] time of the separation. And in this [Shmuel] is in disagreement with Ulla, for Ulla said: there is no difference between the sin-offering and the *olah*-offering except that a sin-offering requires knowledge/intention at the time of separation and an *olah*-offering does not require knowledge/intention at the time of the separation; however, at the time of atonement, as regards both of them, if there is knowledge/intention – they are effective; if there is no knowledge/intention – they are not effective. Shmuel [limits the requirement for intention] to the time of the separation, Ulla limits it to the time of the atonement…

This dispute between proto-Shmuel and Ulla between (as a minimum) requiring דעת at the moment of the separation of the animal for sacrifice (Shmuel's view) and requiring it only for the moment of atonement (Ulla's view) is the same argument we have just seen in non-halakhic philosophies: between the centrality of human action and intention (intention as a necessary component of religiously efficacious action) and the centrality of G-d's grace or the machinations of the world directed by blind fate or chance. According to the position attributed to Shmuel, the crucial part of the sacrificial atoning procedure is that of the willing human designation of the animal. According to the position attributed to Ulla, it is the human acknowledgement of Divine redemptive action (there must be דעת at the time of the *kapparah* – at which moment the person whose sin is atoned for is inactive).[116]

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[116] Ulla's understanding of the sacrificial process, i.e. that it is functions entirely independent of the state of mind of the person being atoned for, is not particularly unusual. The Mishna in Yoma ch.8 (mishna 8) would seem also to indicate that sacrifice and repentance are two separate modes of atonement:

חטאת ואשם ודאי מכפרין מיתה ויום הכפורים מכפרין עם התשובה…

A sin offering and a certain guilt offering effect atonement. Death and Yom Kippur effect atonement together with repentance…

However, perhaps a more interesting sugya to which to compare Arakhin 21a-b is one which can be found in Yoma 36b:

דברים, או אינו אלא כפרת דמים? הרי אני בכפרת דברים הכתוב מדבר. אתה אומר בכפרת-תנו רבנן: וכפר – דברים, אף כפרה האמורה בפר -דן: נאמרה כאן כפרה, ונאמרה להלן כפרה. מה כפרה האמורה בשעיר דברים..

We learn [in a *beraita*]: "and it shall atone" – the verse is referring to the atonement of words. You claim [it is referring to] the atonement of words; but [perhaps it is] only the atonement of blood? I judge it [to be referring to the atonement of words on the grounds

My point in placing this sugya at the opening of the "halakhic" part of this chapter is not to suggest that either one of the two possibilities is "the Jewish view" or "the halakhic position" but to acknowledge that the halakhic literature even at its earliest stages is aware of both modes of relating to the world and to the divine.

The gemara in *Arakhin* where this dispute occurs is part of the discussion of the last mishna in chapter 5, the same mishna which ends with the problematic statement: וכן אתה אומר בגטי נשים כופין אותו עד שיאמר רוצה אני – and so it is with women's *gittin*: [they/we may] pressure him until he says "I am willing".

Because an analysis of the Rambam's understanding of the reasoning behind it must be so central to any discussion of this statement,[117] it seems fitting to begin with his commentary on this particular mishna. Let us take as a starting point his analysis not of the end of the mishna, but of its beginning. I will cite the first part of the mishna, a different section of the Talmudic passage thereon than that cited above and then the Rambam's commentary:

אין ממשכנין אותן, חייבי עולות ושלמים - ממשכנין אותן, חייבי חטאות ואשמות -חייבי ערכין מתני'. ממשכנין אותן, אע"פ שאין מתכפר לו עד שיתרצה, שנאמר: לרצונו, כופין אותו עד שיאמר רוצה - אתה אומר בגיטי נשים, כופין אותו עד שיאמר רוצה אני. אני. וכן

Mishna: [In the case of] those who owe value offerings – we take a pledge by

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that] "atonement" is said in this case and "atonement" is said in the further case [of the goat to be sent out]. Just as the "atonement" referred to in the case of the goat is the atonement of words, so too the atonement referred to in the case of the bullock is the atonement of words. …

The *sugya* goes on to offer a further proof (from the same passage in Leviticus) that the atonement referred to is effected by words and not by blood: the verse refers to the atonement after the verbal confession but before mention of the killing of the bullock. Thus, reasons the *sugya*, the atonement itself temporally precedes the killing, and can only have been brought about by means of the confession, which, I would argue, concurs with Shmuel's view of the mechanics of atonement. (I shall go on in this chapter to explore the very close connection between enunciated words (confession) and intention.) However, the fact that the *sugya* feels the need to bring two proofs from Scripture to support the primacy of words would suggest that the initial or natural assumption would be that the words alone are ineffective – that the real locus of the atonement is in the spilling of blood.

[117] I would like to stress that a discussion of his understanding of this statement (which appears in the Mishneh Torah in the context of Gittin and not in the context of his commentary on the Mishna which is the text with which we are dealing at this point) may be considered quite separately from any discussion of the circumstances in which the Rambam permits or urges *kefiyah*. At least since Riskin's work on the subject (Riskin: *Women and Jewish Divorce*, 1989) the latter has been the focus of extensive debate. I am not, in this chapter, concerned with the validity or otherwise of any particular reason for "forcing" a man's will. I am concerned only with the way in which various halakhic authorities have understood the structure of that will, and the extent to which they consider it inviolable. Thus I aim to evaluate the Rambam's position on the nature and importance of will alone.

force; [in the case of] those who owe sin offerings and guilt offerings – we do not take a pledge by force. [In the case of] those who owe *olot* and peace-offerings – we take a pledge by force even though [the sacrifice] does not effect atonement [for the person who owes them] until he becomes willing to offer it, as it is said "*lirtsono*" (according to his will): We force him until he says: I will (*rotsei ani*)....

גמ': אמר רב פפא: פעמים שחייבי חטאות ממשכנין אותן, חייבי עולות אין ממשכנין אותן; חייבי יצא, ואם נזרק עליו -חטאות ממשכנין אותן בחטאת נזיר, דכיון דאמר מר: אם גילח על אחד משלשתן ין הותר הנזיר לשתות יין וליטמא למתים, פשע בה ולא מייתי; חייבי עולות א-אחד מן הדמים ...בעולת מצורע; דתניא, רבי ישמעאל בנו של רבי יהודה בן ברוקה אומר: כשם -ממשכנין אותן שחטאתו ואשמו עיכבתו, כך עולתו עיכבתו.

Gemara: R. Pappa said: From some people who owe sin offerings we take a pledge by force, and from some people who owe *olot* we do not take a pledge by force. "From [some] people who owe sin offerings we take a pledge by force". This [was said] in [regard to] the sin offering of a Nazir since the master taught: "If he shaved after one of the three]offerings[he is acquitted, and [if he] had one [portion of the animal's] blood sprinkled on him then he may drink wine and become impure for the dead". Therefore, he will be negligent and not bring the sin offering. "From [some] people who owe *olot* we do not take a pledge by force."… This [was said] in [regard] the *olah* of a leper. For we learn [in a *beraita*]: R. Ishmael the son of R. Yehudah ben Beroka says: Just as his sin offering and guilt offering hold him back [from purity], so does his *olah* hold him back.

Rambam: Commentary on the Mishna, Arakhin ch.5 mishna 6

הטעם שאין ממשכנין חייבי חטאת ואשם מפני שהם עצמם מזדרזים להביאם, לפי שאין מתכפר להם עד שיקריבום, אבל העולות והשלמים כיון שאין בהם כפרה אפשר שיתרשלו בהן, ולפיכך ממשכנין אותם…

The reason that we do not take by force pledges to cover the debts of sin offerings or guilt offerings is that they themselves [i.e. the people who owe them] are solicitous to bring them, because they are not atoned for until they offer them; but [in the case of] *olah* offerings and peace offerings, because they do not effect atonement, it could be that [people] are lax regarding them; therefore we take pledges in such cases by force…

The Rambam's commentary produces what initially seems to be an entirely illogical argument. The relevant mishna emanates out of a concern with various cases of *rashlanut* – offerings or sacrifices which are owed but which the person

owing them is failing to bring – and it discusses how we may deal with that *rashlanut* by forcing or not forcing the person obligated, depending on the type of offering required. The Rambam's commentary, however, does not enquire into the nature of the different types of sacrifice. It does not, for instance, argue that the severity of the offering affects the level of consent required and thus perhaps explain why sin offerings are not forced but *olot* may be forced. Rather, he states that we do not take pledges for some particular types of offering by force [when the person who owes them fails to bring them] because people are in fact solicitous to bring them. That is, he would seem to imply that the case raised by the mishna is at best entirely theoretical – in fact, no one will (should) fail to bring these types of offering. Such an statement would seem nonsensical when offered as an explanation (טעם) of the mishna's law on how to act when a person does fail to bring the required offering. However, I would suggest that the Rambam's "explanation" in fact makes sense when taken in the context of Rav Pappa's expansion of the mishna (dealing with the case in which the *nazir* desires to be freed from his special status but may, having completed the part of that process which has practical implications, be negligent about bringing the offerings required to properly complete it). It does so, I would argue, only if we take the liberty of expanding his words somewhat. According to such a hypothetical expanded reading, the Rambam's commentary would run as follows:

> The reason that we do not take pledges by force for debts of sin offerings or guilt offerings is that [the people for whom the Torah law is intended, i.e. the *faithful* community of Israel] are solicitous to bring them, because they are not atoned for until they offer them [and the person who believes he can live without atonement is not a person over whom the *bet din* can be expected to take trouble]; however [in the case of] *olah* offerings and peace offerings, because they do not effect atonement, it could be that [even people who are generally Torah-observant] are lax regarding them; therefore we take such pledges by force [so that our inaction shall not lead them to remain in their sin].

Having seen that even the beginning of this particular mishna in Arakhin raises some interesting questions on the nature of the necessity of will in certain human actions, let us turn to some of the explanations offered for the mishna's requirement that the man consent verbally (…*ad sheyeamar rotsei ani*).

We should note at this point that, interestingly, the Rambam offers no explanation of this statement in the context of his commentary on the Mishna. (We shall, of course, consider at the end of this chapter the explanation he offers in the context of his summary of the laws of divorce in the Mishneh Torah). The first commentaries I wish to consider, then, are those of Rabbi Ovadia of Bartenura and the Rashbam.

Rabbi Ovadia of Bartenura (Ra'av) Commentary on the Mishna: Arakhin 5:6

היכא דבית דין ממשכנים אותו צריך שיאמר רוצה אני:

Even though the *bet din* takes a pledge by force [thus ensuring that the debtor bring the relevant sacrifice, in order to redeem his pledge] it is necessary that he say "I am willing".

The only requirement mentioned here is one of speech. The Ra'av does not claim that that speech must (either in the sense of moral obligation or in the sense of logical necessity) reflect or create an internal state of mind or heart. It is simply the case that there must be such a statement.[118] This seems entirely consistent with his commentary on the mishna in Yevamot (14:1) where he explains: …חרש.כשם שכונס ברמיזה – "a deaf mute – just as he entered into the marriage by means of signals…" as being "about" the formal equivalence of betrothal and divorce: כלומר–כקידושין כך גרושין – "that is to say: just as the betrothal, so too [must be] the divorce".

[118] My colleague Rabbi Dr Abel has vigorously disputed this point. He argues that as the Ra'av would have been familiar with the commentary of the Rashbam on Bava Batra 47b-48a (to which we will turn in a moment) and given the esteem in which the Rashbam was held, he (the Ra'av) would not have argued against the latter in his understanding of the mishna. He adduces a further proof for his argument from the fact that when the Gemara in Yevamot 106a quotes our mishna, Rashi in his commentary simply repeats the mishna: **וכן בגיטי נשים:** כופין אותו עד שיאמר רוצה אני without exploring what kind of assent or intention is implied (or not) by the statement *rotsei ani* whilst his commentary on Kiddushin 50a (a sugya we shall analyse further in this chapter) uses the same language as the Rashbam. (In fact, it seems reasonable to assume that the Rashbam, Rashi's grandson, whose commentary on Bava Batra is the continuation of the unfinished Rashi commentary thereon, simply lifted Rashi's explanation from the similar sugya in Kiddushin and incorporated it into the commentary on Bava Batra.) I do not accept these proofs. First, I do not believe that later *Rishonim*, or even *Acharonim*, were necessarily bound to follow the interpretations (especially ones which did not immediately generate specific halakhic rulings) of even the greatest of *Rishonim*. It remains possible to disagree with Rashi! Secondly, I would point out that the commentary of Rashi on the Gemara in Yevamot 106a simply completes the sentence from the mishna. It does not even purport to offer an interpretation (to either corroborate or contradict the interpretation in Kiddushin 50a). The Ra'av on the mishna itself, however, does offer an interpretation, albeit a terse one. Thus it is quite possible to argue that the Rashi interpretation (as offered in Kiddushin) is implicit in – or simply irrelevant to – what he writes in Yevamot. However, it is not so easy to argue that the Rashi interpretation is implicit in the Ra'av's commentary on the mishna, which goes beyond the wording of the mishna (i.e. offers an interpretation) but does not incorporate any of the analysis of Rashi/Rashbam.

I would identify this position of the Ra'av with the inclination to value correct action more highly than autonomous action. Ra'av allows the *beit din* to be relatively unconcerned with the actual feelings or intention of the person who says (is forced to say) רוצה אני; it suffices merely that the correct words are uttered so that the form of the action allows us as spectators/auditors to perceive the act as intentional – intentional as opposed to voluntary. "*Rotsei ani*" in this context means: I really mean this; not: I want it.

A qualitatively different understanding is implied by Rashbam in his commentary on Bava Batra 47b-48a. In order to make sense of this commentary, however, we need to understand the broader thrust of the sugya in Bava Batra, which in itself is highly relevant to our thesis here.

Bava Batra 47b

זביניה זביני; מ"ט? כל דמזבין איניש, אי לאו דאניס לא הוה מזבין-אמר רב הונא: תליוהו וזבין .

Rav Huna said: if they tortured him until he sold, his sale is considered a [valid] sale. What can be the reasoning behind this? Every time a person sells [an object of value] if it were not for pressure (*ones)*, he would not have sold.

The Gemara suggests that nobody actually, spontaneously *wants* to sell a valuable possession; all sales arise out of economic necessity or pressure.[119] In fact, we could extrapolate to a claim that (according to this opinion of the Gemara), most actions are in some part a response to some form of pressure, whether perceived or real, physical, social or emotional.[120] The only question is what measure and type of pressure is understood so strongly to distort the normal person's ability to make an autonomous choice that the resulting choice is considered not to be "his", or not to be a choice.

[119] In the text, I translated the Hebrew *ones* as, merely, "pressure". I believe the "legal" translation may be "duress" and here I have suggested that pressure may extend to incorporate (perceived) necessity. The Gemara here does *not* suggest any distinction between different modes or degrees of pressure – the torture (literally: "suspension" – *taliyuhu)* of Rav Huna's initial statement is equated with the economic pressure which in more normal circumstances precipitates a sale, and no reference is made to the fact that such pressure may be relatively light or entirely crushing. Distinctions between various types and degrees of pressure are, of course, drawn by commentators, and I shall explore some of their opinions in chapter 6.

[120] This is of course very similar to the argument I made in chapter one for a narrative understanding of intention. In order to consider an action to be intentional, we must normally be able to attribute to the actor a motive or purpose. Here, I am arguing (or claiming that the Gemara

The *sugya* continues:"ודילמא שאני אונסא דנפשיה מאונסא דאחריני" (perhaps self-imposed pressure is different from pressure exerted by others). This is an extremely important suggestion and assumes the possibility of making a clean distinction between internal and external pressure, a possibility that, when it comes to non-physical pressure at least, might be hotly disputed. Many schools of understanding moral development, from Freud to the neo-conservatives argue that moral standards (the individual conscience) are in the first place internalised from the external standards with which we are forced in our early years to comply.[121] I would argue that it is possible that even physical pressures may not necessarily or in all cases be neatly divisible into internal and external. Throttling a person until they agree to part with a family heirloom (whether for a fair price or not) quite clearly constitutes external pressure. The eventual decision to sell may or may not be defined as the seller's "will" but is clearly not one that has been arrived at in any sense "autonomously". At the other end of the spectrum, the decision to donate that same family heirloom to be sold at a charity auction appears to be entirely autonomous, even though the sentimental attachment to the object, or the regard for beautiful and valuable artefacts, might be the same in each case. However, there are many less clear-cut situations: when the Egyptians, for example, sell their cattle, their land and eventually their own selves in servitude to Pharoah (Exodus 47:13-20). Should this be classed as אונסא דנפשיה? It is, assuredly, the people's own hunger which prompts the sale. But their hunger (or at least their incapacity to satisfy it) has been created by external factors: the famine which is an act of G-d, and the Egyptian social and economic system which has enabled Yosef to tax the people during the seven years of abundance and to assert Pharoah's ownership of the food retained in the storehouses. In a reality in which food, clothing and heating are essentials for the sustaining of physical life, a person who is pressured into a particular action by another's refusal to share those commodities (unless they perform a suggested action) might arguably be understood to be subjected to external *ones* just as much as the person who is held at gun point. [122]

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is arguing) that it is possible to define all motives as "pressure" of some sort or another.

[121] Cf. Killen & Smetana: *Handbook of Moral Development*), especially ch. 4: Conscience and Internalisation, p.241ff.

[122] It is possible that the halakha in its identity as legal system rather than philosophy would wish to distance itself from my blurring of boundaries. Just as it recognises a distinction between action and indirect causation (*gerama*), in most instances holding the offender exempt from punishment for *gerama*, so too it recognises a legal distinction between direct and indirect coercion (as we will see when we analyse the attitudes of the various *acharonim* towards incentives to give a *get*). However, it is interesting to hypothesise, following Jackson ("The Fence Breaker and the Actio de Pastu Pecoris in Early Jewish Law") that exemption from punishment in the case of indirect

The Gemara (Bava Batra 48a) moves on from the distinction between internal and external pressure to quote the mishna with which this chapter is primarily concerned:

עד מלמד שכופין אותו, יכול בעל כרחו? תלמוד לומר: לרצונו, הא כיצד? כופין אותו -יקריב אותו שיאמר רוצה אני.

…[a seemingly redundant saying:] he shall bring it: this teaches that they force him; but is it possible that [the sacrifice should be offered] against his will? For that reason [in order to refute this possibility] we are taught "according to his will". How is this (that he may be forced to bring the sacrifice but the sacrifice must be "according to his will")? They force him until he says "I want to".

Rashbam, in his commentary on this citation explains as follows:

אלמא היכא דכופין אותו עד דאמר מתוך יסורין רוצה אני קרינא ביה לרצונו :**ניעד שיאמר רוצה א** דגמר בלבו להקריב והוא הדין לזביני אם אמר רוצה אני הוי זביני דגמר בלבו להקנות.

Until he says "I want to" – and just as when they force him until he says in the midst of [because of] his suffering "I want to" we call it "willing"; because he resolved in his heart to offer the sacrifice, so also is the ruling regarding sales: if he says "I want to", [his sale is considered] a sale because he resolved in his heart to sell.

Rashbam here[123] differs from our understanding of the Ra'av in his commentary on the Mishna. Whereas the Ra'av appears to regard the very fact that the words were spoken as the necessary requirement for his act to have been considered

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causation might well arise from a perception that the animal or natural phenomenon which directly causes the damage has itself some form of intentionality or free choice – to cause or not cause the damage. Thus the laws of indirect causation might seem allied to the laws of agency, in which case the general rule is that "*ein shaliach le-davar aveirah*" – there can be no agent to perform a transgression (because the agent himself has a free will and is, as a matter of morality, expected to resist the agency). This parallel between the laws of agency and those of *gerama* is actually made explicit in the discussion in Kiddushin 43a of liability for incitement or appointment of agency to murder. Here, Shammai ha-Zaken indeed argues that the person appointing the agent to kill bears full responsibility, inferring this from a Scriptural verse referring to King David's having had Uriah killed "with the sword of the Ammonites". The whole sugya here is a discussion about agency, but the responsibility of King David for Uriah's death is actually a case of indirect causation and not, strictly speaking, agency. (David does not instruct the Ammonites to kill Uriah; he merely ensures that he is placed in such a position that the warring Ammonites are extremely likely to do so of their own accord.)

The Gemara suggests a reinterpretation of Shammai ha-Zaken's view which would modify it to the effect that the appointer of an agent is accountable according to "*dinei shamayim*" (but not punishable by the earthly *beit din*). That is, as moral/ethical system the halakha does acknowledge his responsibility, even whilst accepting that as a pragmatic legal system it cannot punish a person for an act he has not himself committed.

[123] And Rashi in his analaysis of the connected sugya in Kiddushin (50a). Rashi in Arakhin is silent on this point.

"לרצונו", Rashbam's commentary implies that the words are valuable not in and of themselves but rather as evidence of an internal resolution.

It is important to stress that in order for us to accept Rashbam's stance here, it is not necessary to believe that the declaration אני רוצה must always, or even often, indicate that the seller *desires* to sell. I defined "will" at the end of my Introduction as "a desire that a particular event or circumstance be effected through one's own actions or those of others"; consonant with this understanding is the fact that it is the *consequence* which the subject attempts to bring about through his willing action; the act itself may be painful or even distasteful to him and yet be entirely willed (Harry Potter, we should remember, in no way desires death as an end in itself).

My understanding of the Rashbam's commentary on Bava Batra 47b is that it implies that whilst an *act* can be performed reflexively, especially in response to physical pressure, (if we merely coerce someone into performing an act, we cannot assume that that act was in any way autonomous; it may simply have been a reflex reaction to the pain of the coercion) the formation of *words* either engenders or else cannot be achieved without, some level of acceptance (ownership) of the decision to act. That understanding is supported by the next comment (Bava Batra 48a): כי אמר רוצה אני ודאי בלב שלם קאמר – "when (or "because") he says "I am willing, it is certain that with a "*lev shalem*" – an undivided, or peaceful, or whole heart – he says it." It is the assertion that his heart must be "*shalem*", whether that means here "peaceful" or simply "undivided" that takes us a step further than Rashbam's previous comment. It suggests that not merely is the actor forced into an internal acknowledgement of his decision to act: rather, that acknowledgement must at least resemble willingness, there must be an affective component; it comes from the complete "heart" that autonomously decides that it is best to sell under these circumstances. The heart has been convinced (this suggests a rational component) to accept, either instrumentally or as an end in itself) that, given the context, it is best to perform the required action.

We should note in this context that verbal repetition is a powerful means of education. Whether it is standing to pledge allegiance to the flag of the U.S.A. every morning in school or repeating the Rambam's thirteen Principles of Faith after *shacharit*, encouraging a person to speak in a certain way is part of

persuading them to think in a desired way – hence the use of positive affirmations as part of cognitive/behavioural therapy.

Rashi and Rashbam's viewpoint appears to be shared by the Ramban in his commentary on the same sugya:

והכא הכי קאמרינן משאמרו רוצים אנו יהבו דעתייהו וגמרו דתהוי להו כפרה מקיפיה.

…In this case [that of *olah* offerings] we can argue thus: **from the fact that they say "we are willing" [we deduce that] they focused their minds and decided on it** so that atonement is effected for them.

The expression I have here translated "they focussed their minds" is "*yihavu daateihu*", literally: they brought their "*daat*", and the word I have translated "decided", "*gamru*". Thus the decision-making process described by the Ramban appears to be: engaging the volitive faculty – imagined to be at least partially a cognitive faculty (*daat*) – and then coming to a point of closure (*gamru* – finishing). This is what is referred to throughout the halakhic literature as *gemirat daat*. It is this decision-making process which he deduces to have taken place from the words רוצה אני.

Thus we have on the one hand Rabbi Ovadia from Bartenura understanding the need for words to be a formal one, and on the other Rashi/Rashbam and Ramban taking the words to be evidence of a volitive process (Rashi emphasising the affective aspect – his *lev shalem* and Ramban emphasising its cognitive – *yihavu daateihu*).

The Ritva's commentary seems to recall that of the Ra'av, emphasising the need for words rather than assuming from those words any volitive process:

<u>Commentary of the Ritva on Bava Batra 48a</u>

פי' באותם שכופין להוציא וזהו גט .**וכן אתה אומר בגיטי נשים כופין אותו עד שיאמר רוצה אני** המעושה כדין שהוא כשר, ודייק בערכין)כ"א ב'(ליתני עד שיתן מאי עד שיאמר רוצה אני דמבטיל ה למודעא, דייק מינה דאי מסר מודעא ולא ביטלה אע"פ שיאמר רוצה אני הגט פסול, אבל אם ביטל אפילו מחמת האונס מהני בזה, ובזביני דעלמא אין ביטול מודעא מתוך האונס מועיל כלום,

And thus [too] you say with women's *gets*: we beat him until he says "I am willing: [This refers to] those that we force to release [their wives], and this is the *get* which is justly coerced (*ha-meuseh k'din*), which is valid. And in [the parallel sugya in] Arakhin it makes an inference from the precise words of the mishna: "it

could have taught: 'until he gives [the *get*]; why does it [instead] teach: 'until he says I am willing'? [To teach] that he cancels all declarations [that this *get* is not given of his own free will]." It can be inferred from this that if he made a declaration and did not cancel it, even though he says "I am willing", the *get* is invalid. However, if he cancels it, even as a direct result of the coercion, this is sufficient [to validate the *get*]. In the case of a sale, however, the cancellation of a declaration that is itself a product of coercion does not achieve anything…

According to the Ritva, the *get* which is achieved through *kefiyah* is always defined as a "*get meuseh*"[124] but in the case of those whom we force to release their wives, it is a *get meuseh k'din* – a get which is "justifiably" or "legally" coerced. Like Ra'av, the Ritva at the end of this paragraph focuses on the words which must be said (in this case, the words cancelling a previous declaration [that the *get* is unwillingly given]) and he accepts those words as sufficient *even if [we know that] that cancellation is itself the product of coercion*. The fact that he explicitly states that a cancellation of all declarations is invalid in the case of a sale (where there can never be a halakhic obligation to sell) and in the case of a *get* unless it is a *get* which is the result of halakhically justified coercion, clearly shows that it is not the internal state of mind of the divorcing husband which concerns the Ritva but rather an external factor – it is the halakhic attitude towards the particular reason for compelling the husband to give a *get* which determines whether a forced *get* is valid or invalid.

I would suggest that both the Ra'av and the Ritva fall in to the category (outlined above) of thinkers who view important decisions with a communal impact as "public". They do not necessarily trust the subject autonomously to come to a good decision and perceive a necessity to intervene, even to the extent of countering the husband's autonomy in cases of grave need.

The alternative view – which I have attributed here to Rashi/Rashbam/Ramban – by no means diminishes the social importance of correct decision-making on the part of the husband (in the scenario they envisage, the husband is not ultimately

[124] That is, it is acknowledged that this *get* is and remains "coerced": there is no suggestion that the coercion is simply a means by which the husband is persuaded of the error of his ways and comes to freely will the giving of the *get* (as, one might argue, is the understanding of the Rambam). We could say that the רצון of רוצה אני here according to the Ritva is "intention" and not "will". The husband through coercion forms the (possibly entirely rational) intention to give the *get*. This intention, however, is in direct contradiction to the affective disposition of the husband.

recalcitrant; he is expected to concede to the giving of the *get*). However, that view trusts the husband to be ultimately rational (and therefore persuadable, by means psychological or physical). When he makes the "right" decision, he is interpreted as having truly willed that decision – just as we saw (in chapter 2) that a man who sustains an erection long enough to have relations with a woman, even if his actions might have been attributable merely to the threat he is under, is assumed to have truly willed to have relations with that woman. We shall later examine (in chaper 6) the Greek view that a free man precisely because he is free (accorded autonomy) is expected to be autonomous in all his decisions, even those made under torture. The majority view of the rishonim that I have outlined here appears in many ways similar: the Jewish adult male is autonomous; therefore, we ascribe autonomy to all his (right) actions. (We do not, however, go so far as to ascribe autonomy to actions wrongly coerced.)[125]

I have argued that it is speech, and not action, that those *rishonim* who ascribe significant autonomy to the coerced husband view as proof of his will. If speech is assumed to reflect will, we might well ask what happens in the absence of the appropriate words. One of the *sugyot* to deal with this appears in Kiddushin 49b (as part of a chapter which is concerned with conditional acquisitions):

<u>Kiddushin 49b</u>

ההוא גברא דזבין לנכסיה אדעתא למיסק לארץ ישראל, ובעידנא דזבין לא אמר ולא מידי; אמר רבא:
הוי דברים שבלב, ודברים שבלב אינם דברים.

Regarding a certain man who sold his possessions in the belief that he was to make aliyah to Eretz Israel, but who at the moment of sale said nothing; Rava said: [his belief that he was making aliyah, as a reason and thus condition of sale] was "words that are in the heart {alone}" and "words that are in the heart" are not "words" [to be taken into account when assessing the validity of an action].

[125] Possibly because we think that giving a *get* following non-halakhic coercion may actually constitute a wrong decision. Giordano (*Understanding Eating Disorders*, pp.46-50) distinguishes between substantive and formal conceptions of autonomy. A substantive conception of autonomy judges "whether or not a person's action/choice is autonomous… on the basis of the outcome or of the content of the action/choice. The action/choice must be rational – that is, must promote some objectively valuable state." A formal conception, by contrast, will judge autonomy depending "on the process of deliberation that leads up to that action or choice. The outcome or the content of the action/choice is irrelevant to autonomy." (p.46). On my analysis, even those *rishonim* who support the autonomy of the husband have a substantive conception of autonomy: that is, they only support that autonomy insofar as they assume that the husband's autonomous choice will ultimately be substantively correct (i.e. concurring with the halakha).

Once again, we have a dictum in the name of Rava. As in Yevamot, so too here in Kiddushin, Rava appears to be claiming that action (including speech-as-action – the speech at the moment of sale which would render the sale conditional) is paramount and should be seized upon and believed regardless of what a person might later claim about his underlying feelings or intentions. The action of selling one's possessions without the requisite qualifying action of condition-making speech cannot be retrospectively viewed as having been without full voluntary status.

I should point out that speech throughout this chapter of Kiddushin is clearly considered to be effective as action.[126] We should also note that the Hebrew word used in this *sugya* for "words", *devarim*, serves in Hebrew also to denote "things". Piaget points out that in young children words and their referents (things) are so strongly associated that the child will sometimes find it difficult to relate to the thing without also enunciating its name and will provide a running commentary to his action, as if speech were a requisite part of that action.[127] More interestingly, Piaget also argues that the child's confusion between word and thing works in the opposite way: a second reason he posits for the child's tendency to monologous use of language is that the child attempts to use words to create a reality he cannot create through his actions. Thus, for example, if a box is too heavy for the child to transport, he may say to the box: "go over there", his ability to say being mistaken for the ability to effect. One possible reading of Rashi and Ramban on the sugya in Bava Batra is that they, like Piaget's child, advocate the power of words to effect a reality. However, the reality they claim the words to effect is an internal, not an external one. Words cannot, perhaps, affect the location of a heavy box; they can, however, affect the speaker's state of mind.[128]

The discussion around the notion of דברים שבלב is a crucial one for any

[126] See also the commentary of the Ritva on Bava Batra 48a, a partial analysis of which I offered above. The declaration (*moda-ah*) that a get is unwillingly given becomes a "thing" invalidating the *get* which can only be undone by another speech-act – the cancellation of all declarations.
[127] Cf. Ginsburg and Opper: *Piaget's theory of intellectual development*, p.90.
[128] Hence the requirement for prayer to be audible to oneself even when (as in the case of the silent *amidah*) not to others (Shulchan Arukh, OH, 101:2). A word which is not enunciated or articulated (with the lips) is not, for the purposes of the obligation to pray or make a blessing, considered to have been a word (*devarim she-ba-lev einam devarim*). We may assume that G-d does not require to hear the words (or lip-read the enunciation thereof) and by definition the congregation will not hear. Therefore we must assume the entity most intended to be affected by the (in this case silent) speech of prayer is the pray-er.

consideration of the rabbinic understanding of intention. I have therefore searched all of the most frequently cited Rishonim for their comments on this statement where it appears in the Gemara in Kiddushin. Rashi is here silent; therefore I have chosen to begin with the commentary of Tosafot:

Tosafot on Kiddushin 49b

משמע דוקא משום שלא פירש דבריו אבל אם פירש דבריו להדיא ואמר **דברים שבלב אינם דברים** בשעת המכר שהוא מוכרם לפי שהוא רוצה ללכת לארץ ישראל הוה המכר בטל וקשה אמאי הא בעינן גבי אתרוג על מנת להחזיר ילך לא יתקיים המקח ורשב"ם פירש תנאי כפול והרי לא התנה שאם לא רו יצא לא החזירו לא יצא ואע"ג דבעינן תנאי כפול הני מילי באיסור כגון התקדשי לי על מנת אם החזי שתתני לי מאתים זוז וכן בגט אתקין שמואל בגיטא דשכיב מרע אבל בממון לא בעינן תנאי כפול ולא ומר דיש נהירא דהא כל תנאי ילפינן מבני גד ובני ראובן והתם דבר שבממון ואומר ר"י דצריך לחלק ול דברים שאינם צריכין תנאי כפול אלא גלוי מילתא דאנן סהדי דאדעתא דהכי עביד וגם יש דברים דאפילו גילוי מילתא לא בעי כגון ההיא דהכותב כל נכסיו לאחרים ושמע שיש לו בן שהמתנה בטלה כמו כן אנן וכן הכותב כל נכסיו לאשתו לא עשאה אלא אפוטרופא לפי שאנו אומדין שלכך היה בדעתו ו סהדי דלא זבן אלא אדעתא למיסק לארעא דישראל.

Words in the heart are not words: the implication of this is that [we do not accept the condition] specifically in the case that he was not explicit in his words; but if he did say at the time of the sale that he is selling because he wishes to go to Eretz Israel then the sale would be void. This creates a contradiction with the fact that we need a double condition and [even if he said at the time of the sale that he is selling because he intends to go to Eretz Israel] he has not made the condition that if he did not go, then the transaction would not be deemed to have taken place. The Rashbam explained regarding an *etrog* [sold/given so the person who performs the mitzvah with it shall be deemed to be its owner] on condition that it will be returned; if he later returns it, he has fulfilled the mitzvah; and if he does not return it, he has not fulfilled the mitzvah; and this is notwithstanding that we need a double condition. These words [the need for a double condition] are in the case of a prohibition, for example: "you shall be betrothed to me on condition that you give me 200 *zuz*; and thus also in the case of a *get* [such as] the *get* Shmuel enacted of a terminally ill person; however in an economic matter, we do not need a double condition. This [explanation of the Rashbam] is unconvincing, because the whole issue of conditions is learnt from the case of the sons of Gad and the sons of Reuben and that case is an economic matter. The Ri thus says that we should make a [different] distinction and say that there are some matters which do not require a double condition but [merely] an expression of the fact so that it is clear to us that it is in a particular belief that he acts thus; and there are also some matters that do not

even require an expression of the reason; for example when a person transfers all his possessions to others and then hears that he has a son – [in this case] the gift is void; thus also if he transfers all his possessions to his wife [we assume that] he did not do so except as a guardian. [We do not require him to state this explicitly] because we act on an assumption that this was what his intention was. Likewise, we are convinced that [in this case] he did not sell except because of his intention to make aliyah to Eretz Israel.

Baalei ha-Tosafot thus reject the Rashbam's distinction between economic matters and Torah prohibitions as a sufficient reason for defining when a double condition is required and when not.[129] The Ri offers a different distinction, suggesting that there are three types of action which a person might wish to void on the grounds that he only intended them in a particular set of circumstances (i.e. with a particular implicit condition): there are the cases the Talmudic sages discussed, for which we require a double condition to have been made; those for which we do not require a double condition but for which we do require an explicit statement of the condition or grounds upon which the act is based (*gilui milta b'alma*) and those for which we accept an *umdinna* – that is, where we do not require him to have said anything at the time of the action but rather take it for granted that everyone will have understood that it was only on such a condition, or in such a belief, that the person in question acted.

Whilst this may be a useful set of categories into which we place actions, *Ba'alei ha-Tosafot* give no indication how we might distinguish between actions and assign them to the correct categories. Such a suggestion is offered by the Ran, who takes Tosafot's explanation further and clarifies it. The cases, claims the Ran, in which we can be sure enough of a person's intentions to act on an *umdinna* and not classify his thoughts as *devarim she-balev* are those in which the context "proves" the intention of the actor.

Novellae of the Ran on Kiddushin 20b (pagination of the Rif)

הוו להו דברים שבלב ודברים שבלב אינם דברים האע"ג דקייל בדוכתא טובא דעאזלינן בתר אמר רבא ת בנו וכתב כל נכסיו לאחר ... ואחר כך אומדנא דאמרינן בפ" משמת גבי מי שהלך למדינת הים ושמע שמ לא היה כותבן ובפרק מרובה נמי בא בנו שאינה מתנה דאזלינן בתר אומדנא שאילו היה יודע שבנו קים

[129] The Ramban in his commentary on this *sugya* (with which we shall deal below) rejects a similar distinction (between *gittin* and *kiddushin* on the one hand and economic matters on the other) which he attributes to the Ra'avad.

אמרינן מעשה באשה אחת שהיה בנה מיצר לה וקפצה ונשבה כל שיבא עלי איני מחזירתו וקפצו עליה ים אמרו לא נתכוונה זו אלא להגון לה. הני ודוכתייהו בני אדם שאינם מהוגנים וכשבא הדבר לקפני חכמ לא קשיאן דכל כה"ג כיון שהענין מוכיח בתוכו לאו דברים שבלב נינהו

***Rava said: these were words that were in the heart, and words that are in the heart are not words**:* And even though we were taught in another place that we should follow an assumption regarding intention (*umdinna*) as we said [in Bava Batra ch.9] regarding a person who went abroad and heard that his son had died and wrote [a document giving] all his possessions to someone else and after this, his son came – that [in this case his giving over] is not considered to be a valid gift as we follow the assumption that if he had known that his son was still alive he would not have written [the gift]… and in [chapter 7 of Bava Kamma] we also recounted the story of a woman whose son was tormenting her and she jumped up and swore "Anybody who comes to me [to propose marriage], I will not turn him away" and men who were not appropriate jumped upon her [words]; when the matter came before the Sages, they said that she did not mean this to apply except to men who were suitable for her. These sources are not in conflict, because in every situation like that {the examples given in the Bava Batra ch.9 and Bava Kamma ch.7} the situation itself proves [the intention] these are not cases of "words that are in the heart", rather it is as if they were spoken explicitly…

What I understand the Ran to mean when he says that the situation itself proves the intention (*ha-inyan mokhiah b'tokho*) is that there are actions in which, because they are so surprising, the intention is deemed to be intrinsic to the action itself. These are actions which draw attention to themselves and so demand some type of explanation. Throughout this thesis, I have been arguing that we should follow a "narrative" explanation of intentional action. This is a good example of some *rishonim* doing precisely this: Tosafot as explained by the Ran believes that actions should be "explicable"; thus if an action would appear to be rationally inexplicable, or would require us to believe that the actor was operating out of a very different moral, cultural or emotional framework from the rest of society (as in the case of the man willing all his worldly goods to another whilst he had a son living) we should not take the action at face value but should rather assume some very good reason for the act, in the negation of which the act is void (considered to have been unintentional).[130] However, in the case of an act

[130] "Unintentional", in this context, extending to include "mistaken". A mistake is an action which is not "fully intentional" in that the actor does not intend the consequences which a reasonable person who was not under a misapprehension could have predicted.

with a more normal and plausible explanation, such as selling land, notwithstanding that in one particular case it was done with an internal (to the person selling) condition (the intention to go to Eretz Israel) the act itself is not particularly inexplicable without that condition; after all, as the Ran points out, ימany people sell their land merely through economic necessity.

The Ran, continuing this tradition which would view speech as more or less crucial depending upon the context, cites the view of Rabbeinu Tam:

> והקשה ר"ת מדתנן בפרק ג" דתרומות ראיתא נמי בפסחם מתכוין לומר מעשר ואמר תרומה תרומה ולבו שוין אלמא ואמר מעשר שלמים ואמר עולה עולה ואמר שלמים לא אמר כלום עד שיהיו פיו דברים שבלב הוו דברים ותירוץ דכי אמרי" דברים שבלב אינם דברים ה"מ היכא שהוא מוציא מפיאומו מה שבלבו אבל כל שהו טועה בדברו כי התם לאו כלום הוא דבעינן פיו ולבו שוין להוציא מה שמוציא בשפתיו.
>
> …And Rabbeinu Tam objected on the basis of what we learn in the third chapter of Terumot, and also in Pessachim: "a person who means to say *maaser* and instead says *teruma*, or vice versa; [or a person who means to say] *shelamim* and instead says *olah* or vice versa – he has said nothing unless his mouth concurs with his heart" but [surely this would imply that] words that are in the heart are indeed words? He answered this problem thus: when they said, "words that are in the heart are not words," they were referring to situations in which he meant to say what he in fact said, even though what was in his heart was the opposite from what came out of his mouth; because he made no mistake in what actually came out of his mouth, what was in his heart is nothing. However, everyone who makes a mistake in his words as in that case [in Terumot] [what is in his heart] is not nothing because we do require that his mouth should accord with his heart insofar as the words that come out of his mouth are concerned.

In other words, so long as a person intended to say and effect what he indeed said (however literally we do or do not interpret those words in light of their context) no matter whether or not he actually *meant* it (a la Bellatrix Lestrange) we can disregard his emotional state of reluctance as he later represents it to us. The Ran goes on to cite Rabbeinu Tam's explanation of a story told in tractate Kallah about Rabbi Akiva who was known to "swear with his lips and cancel the oath in his heart."[131] About this situation Rabbeinu Tam (in line with the Tosafot explanation that we saw earlier) writes: ודילמה שאני התם שאונס הוה וכיון דמתוך אונס

[131] The story can be found in Kallah 1:16

...הוה הוה כאולו פירש – but perhaps this case is different because it was a situation of compulsion (*ones*) …and because it was out of compulsion [that he made the oath] it was as if he stated explicitly [that he did not mean what he said].[132] That is, the fact of demonstrable external pressure or compulsion causes us (the spectator/auditors) to examine the act or speech-act more closely and raises the question of its voluntary (or otherwise) status.[133] Just as a seemingly inexplicable act (such as a man's leaving all his possessions to someone unrelated to him) draws attention to itself, so too external pressure draws attention to the act.[134]

The *sugya* in the Gemara goes on to ask from where Rava took the notion that "*devarim shebalev einam devarim*", and first posits that he takes it from our mishna in Arakhin dealing with an offering where the husband is forced *ad sheyeamar rotsei ani* – because in this context the statement of willingness is the important factor, not the actual willingness (הא בלביה לא ניחא ליה – "and in this

[132] It is worth noting here that the *ones* to which Rabbeinu Tam refers is not physical compulsion, nor even serious threat to life and limb. Rather, the context of his oath is that he is challenged on a ruling he gives which contradicts that of his colleagues. He can prove the truth of his own ruling by exacting a confession out of the mother of a brazen child; however, in order to gain this confession, he swears that he will, in exchange, bring the mother to life in the world to come. It is this promise he cancels in his heart even whilst speaking it with his lips.

[133] However, the Ramban insists that when the Gemara says בלבו – in his heart – what it means to say is that he spoke inaudibly, arguing that (just as is the case with silent prayer or blessings) his lips must have moved. Otherwise, the words are not even "words that are in the heart"; they are merely non-words. Similarly, the Ran (at the end of this paragraph) and the Ramban both argue that words can be retroactively interpreted in a far-fetched manner – he cites an example from Nazir 20 where a person swears by a "*herem*" and retrospectively insists that he was referring to the "*herem"* (net) of fishermen and not the religiously significant *herem*. (This is comparable to the view of the Ritva: if the words can be "forced" to mean what it is halakhically preferable for them to mean then we should not strain too hard to hear the actual intention behind them.) However, the words need, in some minimal way at least, to exist..

[134] In the commentary of the Beit Yosef to the Tur EH134:2 the Ramban is cited as arguing that if a man makes a *moda'ah* on a *get*, but he is not in actual fact subject to any recognised form of duress, his words (of *moda'ah*) are nothing. The Ran on the other hand is cited as claiming that we accept his *moda'ah* even if we have no reason to believe that he has been subject to duress; and that if (on the other hand) we *do* know of duress, the *get* is invalid even in the absence of any *moda'ah*. The Ran thus seems to follow my logic above, stipulating that if attention is drawn in any way to the circumstances surrounding the giving of the *get*, that *get* must be treated with suspicion. In the Hagahot v'he'arot to the same *siman* (EH 134:2), the Rosh is cited as claiming that even when it is revealed that the duress which [the husband] claims is false, the *get* is no *get* because the very fact that the husband made such a claim reveals that he has no desire (*hefets*) to give a *get* (suggesting that the Rosh understands the importance of the *moda'ah* to be that it reflects a lack of inner resolve on the part of the husband to the giving of the *get.*) The Rashba explains his similar ruling by claiming that even if the duress which the husband claims is non-existant, the fact that he made such a claim indicates that he is indeed being coerced into the giving of the *get* (or selling of the article) – he has merely lied about the nature of the compulsion out of fear. What seems to be at stake in this discussion is the question of whether we care about the mere fact of a *moda'ah* (either because it inherently raises a question over the validity of the *get* causing some consternation in the community or because it indicates that for some reason – valid or invalid – the husband does not actually want to give the *get*) or whether we are only concerned

case in his heart it is not pleasing to him"). This would seem a clear proof for the Ra'av's understanding – the actor's actual state of mind/emotional disposition is irrelevant; what matters is what others hear him say. However, the Gemara goes on to suggest that this may not be a good source for Rava's dictum because – ודילמא שאני התם דאנן סהדי דניחה ליה בכפרה – "perhaps that case is different because we assume that he is pleased with the atonement". That is, in this case, Ramban is correct: we can justifiably assume that his words accurately reflect the person's state of mind. What then, asks the Gemara, of the end of our mishna: the model of a man coerced into giving his wife a *get* "*ad sheyeamar rotsei ani*" as a possible source for Rava's dictum? This possibility also is rejected: ודילמא שאני התם דמצוה לשמוע דברי חכמים – "perhaps that case [also] is different because it is a commandment to listen to/obey the words of the sages".

The logic of the last statement appears flawed, or at least raises significant questions. Whereas the Gemara's objection to the use of the example of an offering brought as a result of coercion had used the language of affect – *nicha lei* – this second objection does not use the language of affect but rather the language of commandment – *mitzvah*. There is no prima facie connection between my desire, or even will and the commandment of others or of Another. Moreover, if there were such a connection, then the mishna in Arakhin (and many others) would be redundant: a man would only need to be told that the halakha required him to bring an offering/divorce his wife/free his slave and he would align his actions with that halakhic requirement; there would be no need of *kefiyah.* There seem to be two assumptions at play here: first, a quasi-Socratic assumption translated into Jewish philosophy to the effect that the Jewish person is in some sense pleased to do what he is commanded to do[135] and second, that the *bet din*'s act of *kefiyah* serves to persuade the recalcitrant husband of what the halakha demands in a way that a simple statement of that halakha cannot. At this point, it would seem that we have no choice but to plunge into the Rambam's analysis of this statement.

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with problems that are raised regarding the validity of the *get* when they are raised for good reasons (that all concerned recognise as good reasons).

[135] Cf. Introduction, p.11, footnote 20.

אנכי יקוק אלהיך אשר הוצאתיך מארץ מצרים מבית עבדים

I am the LORD your G-d who brought you out of the land of Egypt, out of the house of slavery.

(Exodus 20:2)

Some commentators[136] have viewed this opening of the Ten Commandments as an introduction, a justification of G-d's demand that we keep His laws, the laws themselves beginning with the next sentence: "Thou shalt have no other gods before Me." (which takes us to the end of the *pasuk* – thus that second sentence might in fact be understood as the end of the first). The Rambam, however, forcefully argues that this is in itself the first commandment: the commandment to acknowledge G-d.[137] Thus he asserts the primacy of what we might term an "intellectual" mitzvah. "Intellectual" is of course an inadequate word here: I do not in any way mean to suggest an attitude which is dispassionate or emotionally void, but I do mean an "act" or activity in which no physical component, no "action" as it were, is involved.

To put this another way: most positive commandments can be expressed through verbs which can sensibly be conjugated in the present continuous tense: it makes good sense to say: "I am praying", or "I am taking the *lulav*" or even: "I am circumcising my son". This tense cannot properly be used, however, of a verb referring to a state of mind or of being: it makes no sense to say "I am believing". A strong philosophical case might be made for the argument that it is impossible (or unreasonable) to command one to do or be something which cannot be expressed in the present continuous. Such a command comes perilously close to demanding a disposition (rather than an action), and it is a frequent assumption that dispositions are given rather than chosen (what cannot be chosen cannot reasonably be commanded): I cannot choose to be "by nature" generous, forgiving or patient, any more than I can choose to be intelligent or artistically gifted.

This may, however, be a false (or only partially true) assumption. The opening of this chapter (the "digression" into the realm of Harry Potter) was about education as moulding of the will. The Rambam follows Aristotle (and an august line of thinkers) when he suggests in fact that whilst one may not be "by nature"

[136] Cf. for example Rashi on this verse.
[137] This is the commandment he lists first in his enumeration of the *mitzvot*.

generous, one can cultivate the characteristic of generosity until one acquires a generous disposition, that disposition becoming as much a part of one's "true" character as those dispositions with which one was blessed at birth. Character can be understood as the propensity to act in a particular manner given a particular circumstance or set of circumstances. Thus, the ability to acquire a disposition is closely allied with the ability to choose one's will. This ability is, of course, never complete, but as I noted in the Introduction, the complete absence of any desire or effort in this direction might correctly be considered a moral failing or, in Frankfurt's terms, a failure to achieve personhood.

I repeat: the ability to choose one's disposition, to mould one's character, to choose one's will is never complete. White points out that it is not in fact desirable, nor would it be a facet of achievable autonomy for the choosing self to be able to choose to be whatever it wanted to be. Such a self would be self-annihilating, as it would have no fixed characteristics other than a determination not to be limited by its own characteristics.[138] The essence of Frankfurt's argument[139] is similar: the very concept of personhood, according to him, entails *both* the ability to choose how to be (the possession of second order desires, desires which seek to shape the will) *and* the recognition of the limits of that ability. Moreover, Frankfurt claims that it is the case that some people have a greater degree of control over their will (I would say, a greater degree of autonomy) than others – that though all have "free will" the will of some people is more free than the will of others.

The Rambam expresses nothing similar to this latter claim of Frankfurt's, but his insistence on the importance of the ability to shape one's own will and create one's own dispositions proves illuminating as a background against which we might read one of the more striking lines from his *responsum* to Rabbi Ovadya ha-Ger:[140]

> אל יהא יחוסך קל בעיניך אם אנו מתיחסים לאברהם יצחק ויעקב אתה מתיחס למי שאמר והיה ... העולם.

[138] White: *Education and the Good Life*, p.75
[139] "Freedom of the will and the concept of a person", op.cit.
[140] Responsa of the Rambam no. 293. Rabbi Ovadya ha-Ger had written to inquire about the appropriateness of his referring to "our fathers" in the set prayers given that, as a convert, he is not directly descended from the patriarchs.

…and let not your lineage be light in your eyes: if we are descended from Abraham, Isaac and Jacob, you are descended from He who spoke and the world was created…

Perhaps most rabbis – and the Rambam among them – are occasionally given to hyperbole, but let us at least consider the possibility that his language here is not a mere attempt to shore up the spirits of his correspondent, but rather an intrinsic part of a philosophy in which the first and primary commandment is one which demands a disposition, and in which dispositions may be acquired by force of will through a process of education (whether self-education or education by parents and teachers). Connection to the one G-d in this responsum (being His direct child, perhaps exemplifying the state of being in His image) is conceived in terms of having freely chosen (in this case, against the odds) to acknowledge the truth of His existence (and all the other truths which emanate therefrom such as the binding truth of Torah). Notwithstanding that the Gemara teaches:[141] גדול המצוו ועושה יותר ממי שאינו מצווה ועושה (Greater is the one who is commanded and does than the one who is not commanded and [nonetheless] does), the Rambam is powerfully drawn to the image of Torah as freely-chosen. The convert embodies for the Rambam the concept of radical autonomy:[142] demonstrating his *independence* of the cultural milieu in which he was raised, he asserts his *ability* to take on the yoke of mitzvot and exercises considerable *self-control* in so doing (thus fulfilling in exemplary fashion all of Haworth's requirements for autonomy).

This exceedingly high estimation of the value of personal autonomy must form a part of the background against which we read the Rambam's analysis of the mechanics of *kefiyah* and *ratson*:

Rambam: the laws of divorce ch.2 halakha 20

מי שהדין נותן שכופין אותו לגרש את אשתו ולא רצה לגרש, בית דין של ישראל בכל מקום ובכל זמן מכין אותו עד שיאמר רוצה אני ויכתוב הגט והוא גט כשר, וכן אם הכוהו גוים ואמרו לו עשה מה כשר, ואם הגוים מעצמן אנסוהו שישראל אומרין לך ולחצו אותו ישראל ביד הגוים עד שיגרש הרי זה עד שכתב הואיל והדין נותן שיכתוב הרי זה גט פסול. ולמה לא בטל גט זה שהרי הוא אנוס בין ביד

[141] Bava Kamma 38a, 87a and Avodah Zara 3a

[142] I have taken the term from White. Haworth also draws a distinction between what he calls "normal autonomy" and the greater degree of autonomy which some individuals possess – these are perhaps the same individuals to whom Frankfurt refers as have a will "more free" than that of others, they might be identified as those most likely to reach Stage 6 of Kohlberg's stages of moral reasoning and they would be, in the terms of my own argument in this chapter, the heroes and

גוים בין ביד ישראל, שאין אומרין אנוס אלא למי שנלחץ ונדחק לעשות דבר שאינו מחוייב מן התורה רו הרע לבטל מצוה או לעשות עבירה לעשותו כגון מי שהוכה עד שמכר או נתן אבל מי שתקפו יצ והוכה עד שעשה דבר שחייב לעשותו או עד שנתרחק מדבר שאסור לעשותו אין זה אנוס ממנו אלא הוא אנס עצמו בדעתו הרעה. לפיכך זה שאינו רוצה לגרש מאחר שהוא רוצה להיות מישראל רוצה ן שהוכה עד שתשש יצרו ואמר הוא לעשות כל המצות ולהתרחק מן העבירות ויצרו הוא שתקפו וכיו רוצה אני כבר גרש לרצונו. לא היה הדין נותן שכופין אותו לגרש וטעו בית דין של ישראל או שהיו הדיוטות ואנסוהו עד שגירש הרי זה גט פסול, הואיל וישראל אנסוהו יגמור ויגרש, ואם הגוים אנסוהו מר לישראל כתבו וחתמו הואיל ואין הדין לגרש שלא כדין אינו גט, אע"פ שאמר בגוים רוצה אני וא מחייבו להוציא והגוים אנסוהו אינו גט.

A person regarding whom the Law indicates that we should force him to divorce his wife and who does not want to divorce, a Jewish court in every place and at every time beats him until he says "I am willing" and he writes a *get* and this *get* is valid. So also if non-Jews beat him and said to him: do what these Jews tell you to, and thus the Jewish [community? court?] pressured him by means of the non-Jews until he divorced, this is a valid *get*. If non-Jews of themselves compelled him until he wrote, in a case where the law indicates that he should write [the *get*] then the *get* is flawed {*pasul*}. Why is this *get* not void, as it was the product of compulsion, whether by the non-Jews or by Jews? Because we do not talk of compulsion apart from one who was pressured and forced to do a thing which he is not commanded by the Torah to do – for instance someone who was beaten until he made a sale or a gift; but in the case of one whose evil inclination drives him to avoid doing a mitzvah or to do a sin, and was beaten until he did the thing that he was obligated to do or to leave the thing that he was forbidden to do, this [later behaviour] is not compelled from him; rather [formerly] he compelled himself out of his bad judgement (*daato ha-rah*).[143] Therefore, someone who does not want to divorce [when the halakha is that he should divorce]; it follows from the fact that he wants to be part of the community of Israel that he wants to perform the mitzvot and to keep from sinning and it is his [evil] inclination that is driving him and

heroines likely to transform their own lives into autonomy narratives.

[143] Once again, the proper translation of the term "*daat*" is elusive. The *daat harah* seems here to be intimately connected with the *yetser hara* and it is difficult to deduce where the one may end and the other begin. Without making a philological study of the Rambam's entire corpus, I would not wish to make too confident a suggestion, but would hazard a guess that whereas the *yetser hara* refers to the temptation to act wrongly, the *daat harah* refers to the assent (*gemirat daat*) to the wrong action. The assent is of course in one sense an expression of the will, and it is hard to see how the will can be coerced by one's own decision. However, if we take account of the various traditions which teach that a person and his ability to make good decisions may be warped by the bad decisions he has previously made, then it becomes quite possible to argue that the *daat harah* – the decision to act wrongly – makes it more difficult to reverse that decision and act well. This putting of obstacles in the way of his own free choice may be what the Rambam here refers to as self-coercion.

> because they beat him until his inclination was subdued and he said "I am willing"; he has divorced willingly. If the Law were not to indicate that we should force him to divorce but rather the Jewish courts erred, or they were laypeople, and they coerced him to divorce, the *get* is flawed {*pasul*}: because it was Jews who coerced him [we can assume that] he did decide {*yigmur*}[144] and [following that decision] did divorce. However, if non-Jews coerced him to divorce in a case where such coercion was not halakhically permitted, the *get* is not a *get* at all, even if [to] the gentiles he said "I am willing" and said to Jews "write and witness [the *get*]" – the Law does not require him to release his wife and it is non-Jews who coerced him, is not a *get*.

The Rambam cannot bear to do as the Ritva does and assume that we simply override the husband's autonomy when we have halakhic justification for doing so (with merely the formal statement of willingness to fulfil the halakhic requirement for voluntary divorce). To rob the husband of his autonomy is to deny his essential humanity – his *tselem elokim*. Rather, he must reconcile the necessity of coercion of the husband with the necessity of asserting that the husband remains free. The way this passage has traditionally been understood is that the "true will" of the husband has hitherto found itself under attack from his evil inclination and that once the evil inclination is subdued by beating, it is the "true will" which emerges and submits itself to the dictates of the *bet din*. (This understanding, incidentally, is compatible with the statements of Rava we saw in the last chapter and particularly the statement that a man is liable for intercourse with a woman forbidden to him: his "true will" is always present, and could have been acted on.) However, that understanding leaves the husband as bereft of true personal autonomy as does the Ritva's, with the husband's willingness to divorce being at best instrumental. (He wishes to divorce in order to "be a good and obedient Jew" rather than because he has actually discovered in himself any desire to divorce.)

I wish to argue that there is another way to understand this passage, one more in keeping with what I have identified as the Rambam's passionate commitment to

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[144] This is the *gemirat daat* that Rashi and Ramban argue has taken place following the compulsion. The reasoning of the Rambam here would seem to be that his desire to do what the Jewish community expects of him (and is sufficiently concerned with to have used such force against him) has led the husband to (rationally) decide to divorce. Therefore, there has been *ratson* even though the grounds on which that *ratson* and, in fact, the entire decision-making process, has been based is erroneous. See my further analysis of this passage on pages 139-143).

autonomy – his determination that life is, or should be, the kind of autonomy narrative I delineated in the introduction to this chapter. Will, as we have seen, is in this type of narrative absolutely central. However, like the subject of most good stories, it is not a static thing but one which changes and develops.[145] It is the way in which it develops which provides the story with its tension, and its interest. In the modern world, we are accustomed to view beating, especially when administered on behalf of a court, as punishment. However, we should remember that the Rambam (following the Talmud) not only allows but even encourages parents and teachers to beat their children as a means of education.[146] When the divorce-refusing husband is beaten, then, he is in the position of the recalcitrant *child* – a child who has not yet learnt responsibility in the use of his own free will (as evidenced by the fact that he does not have the self-control or the good judgement to accept the authority of the *beit din* in the matter which faces him). He is still being driven by his irresponsible drive, the same *yetser* which a woman (who is generally less well educated) cannot resist.[147] The beating which is administered to the husband is primarily not punitive, but rather educational.[148]

I suggested earlier that we could consider the merits of the Rambam's rationalisation of this *sugya* quite separately from his analysis of the permissible grounds for that *kefiyah*. However, because of the way in which I have framed my own argument in this chapter, I believe it is, after all, enlightening to look at the language which the Rambam uses to assert that a woman who claims *mais*

[145] To use Aristotelian language, the will, like the human being, has a *telos* – we might say that the will "wants" to become free. Thus, my assertion here that the will may change and develop diminishes not one whit my earlier argument that a person's life must have coherence – that in order to be perceived as rational, his decisions must in some way be consistent with one another. On the contrary, it in fact supports that argument: a living thing must change: the oak tree forms one coherent narrative with the acorn in a way in which a fossilized acorn cannot.

[146] Hilkhot Talmud Torah 2:2

[147] Cf. Ketubot 51a, my analysis pp. 66-68. In both cases *yetser* is being used to denote a drive to act (or refuse to act) which is in contradiction to the responsible will which the halakha decides to attribute to the actor.

[148] Though punishment and rehabilitation may often be blurred, with the latter being the "acceptable front" for the former, a distinction should in theory be possible. Beating as a form of rehabilitation rather than punishment might become more accessible if we compare it to a more modern form of dealing with transgressive behaviour. Imprisonment is widely used as a state-sanctioned and enforced punishment. A form of imprisonment has been frequently used with children as punishment for several generations (probably for as many years as children have typically had individual rooms – with or without locks – to which to be sent without supper). However, time alone in an enclosed space ("time out" in contemporary parenting jargon) is to this day recommended as a means of allowing/encouraging a child to regain his or her self-control. In this case, the intention is not to punish but rather to provide a "cooling off" space which allows for the child's development of the self-control (necessary for the development of autonomy).

alai should be given a *get* even if the husband must be coerced into giving it: לפי שאינה כשבויה שתבעל לשנוי לה – "Because she is not a captive that she should submit to one she detests (Ishut, 14:8). The Rambam justifies the apparent limitation of the husband's autonomy not by attempting to downplay the importance of human autonomy but rather by appealing to the woman's own (possibly more limited, but nonetheless important) autonomy.

One endnote, in conclusion of this chapter.

It could be argued that the Mishna – the source in which we first encountered the necessity of רצון is a work of idealism. It represents in some ways the beginning of the Rabbinic "revolution", the wresting of power from the cohanim. Eilberg Shwartz's description of the men of the Mishna – those who moved from a legal system of strict liability to one which places a heavy emphasis on intention – shows them to be radical choosers, many of them self-made men who attained everything they were through *talmud Torah*. They demanded that education be available to every man, and thus expected it (to some degree) of every man. When the Mishna asserts the need for autonomy, it thoroughly expects and demands to educate all Jew(i)s(h men) towards that autonomy.

The dust having settled after that revolution, the rabbis having taken control and the masses not being engaged in a significant amount of *talmud Torah*, the trust in the "man in the street" (*am ha'arets*) to have a responsible will is significantly decreased. There are among the *Rishonim* those, still, who like the Rambam cherish autonomy above most else. Others, however, perceive (what they view as) the impossibility of educating all men to responsible autonomy, and they thus limit the scope of that autonomy.

In these first three chapters, I have cast my net over a fairly wide range of sources dealing with very different areas of halakha in order to gain a general appreciation of the many different halakhic approaches to the questions of intention and voluntary behaviour. Now it is time to ask how the concepts of intention, will and, in particular, responsible, educated will are understood specifically in the context of marriage and how these concepts may inform our decision as to the legitimacy or otherwise of the various solutions which have been proposed to the problem of women who wish to be divorced but whose husbands either refuse outright or else demand a price for the giving of the *get*.

Before we may analyse the requirement of free will for a *get*, however, we must turn our attention to the structure of marriage. It is only, I would argue, when and if we understand how marriage is structured, what its structure achieves and why that structure includes the requirement of the Mishna for a voluntarily (on the part of the husband) effected divorce that we can begin to understand what may be right, or wrong, in the various proposals to solve or circumvent the problem of *sarvanut get.*

Chapter 4 - Kiddushin[149]

The Biblical requirement for a *get* in order to terminate a marriage is derived from the same verse that the Gemara uses to defend the possibility of *kinyan kesef* to establish a marriage.

> כי יקח איש אשה ובעלה והיה אם לא תמצא חן בעיניו כי מצא בה ערות דבר וכתב לה ספר כריתת ונתן בידה ושלחה מביתו: ויצאה מביתו והלכה והיתה לאיש אחר:
>
> When a man takes a woman and ?becomes her husband/?has relations with her/?acquires mastery over her[150] and if it happens that she does not find favour in his eyes because he finds in her something reprehensible and he writes her a bill of divorcement and gives it into her hand and sends her from his house: and if she goes out from his house and goes and is with another man…
>
> (Deuteronomy 24:i-ii)

I would argue, then, that the particular form which divorce takes (the written document which is given from the husband to the wife, the receipt of which enables her to be [sexually] with another man) is an integral feature of the form of Jewish marriage itself, a marriage which is initiated, as well as ended, in a particular way. Thus the concepts of marriage and divorce are mutually dependent and mutually sustaining.

Marriage is initiated by an act of the man with the consent of the woman in front of witnesses. The presence of two eligible witnesses is indispensable.[151] These witnesses are defined as *edei kiyum*,[152] meaning that they are an essential component of the act of betrothal. Whilst it is theoretically necessary in order to prosecute a murder in halakha for witnesses to be present and to have warned the murderer that what he is about to do constitutes a capital offence, even in their absence, or in the absence of *hatra'ah*, empirically speaking the murderer, if

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[149] This chapter owes a substantial debt to the thought of Rav Elisha Ancselovits, whose own analysis of marriage and divorce is outlined in an article in *Ma'agalim*: האיש מגרש –האשה מתגרשת: הסבר הלכה זו כעזר לפתרון בעיית הנישואין למגזר החילוני (The Man Divorces - The Woman gets Divorced: Explaining the Halakhah in order to Problem of Marriage for the Secular Sector.)

[150] The ambiguity in the Hebrew is important, and to choose one translation would be to disguise how very interdependent the notions of sex, ownership and husbandry are in the text.

[151] Cf. Rambam Ishut 1:1: before the giving of the Torah there was no difference between the gentile manner of taking a wife and the Israelite manner and the taking was an entirely private matter; it was the Torah which instituted the requirement for witnesses (for Israelite marriage alone). Marriage is no longer entirely a private matter. (Cf. also in this regard Rambam Gerushin 1:13: if the husband gives the wife a *get* in the presence of only one valid witness, the *get* is not a get "at all". Here again, we see that the institutions of marriage and divorce are co-dependent.)

[152] Kidd. 65a-b; MT Ishut 4:6; EH42:2.

he murders, murders. Not so the husband: if a man betroths a wife in secret (i.e. without witnesses) then his betrothal is nothing, no matter what mode of *kiddushin* he employs. The very essence of the act of betrothal is its public nature.

From this it would seem logical to suppose that the primary effect of marriage might be an effect not on the couple themselves but on the community. This is, I would argue, precisely the case: *kiddushin*, before it creates a sexual bond between the marriage partners (this is what is created later by *nisuin*) and before it establishes the day-to-day economic and domestic responsibilities of the parties to one another (again, primary economic responsibility for the woman is retained by her father or by the woman herself until *nisuin*)[153] serves to prohibit the woman sexually to all other men.

The means by which *kiddushin* achieves this strong prohibition on intercourse with the betrothed (and, of course, married) woman is the act of *kinyan*, acquisition. Those of us who have been raised in a feminist or post-feminist society may of course bristle at the notion that a husband *acquires* a woman;[154] we do not like to think of his "property rights" in her, or his "ownership" of any part of her. However, palatable or unpalatable, this is precisely what happens through *kiddushin*; and I will argue that the stringency of the prohibition of *eshet ish* may only be understood if we do in fact understand the woman in question to become "Joe's woman".

We could posit a variety of reasons for demanding and enforcing the absolute sexual exclusivity of the woman who is married or otherwise "spoken for". Amongst those that have been suggested to me are arguments (i) that the very structure of patriarchal (and essentially patrilineal insofar as the transmission of

[153] Cf. Menachem Elon, *Principles of Jewish Law*, (section on Marriage, pp.357-358).

[154] Much ink has been spilt in the attempt to argue that *kinyan* is not, in this context, acquisition and I have been roundly criticised for my assertion that it is. Interestingly, HaLivny, whilst he asserts that we should by no means regard marriage as acquisition in the property acquiring sense does not suggest in what way we should regard it ("The Use of קנה in Connection with Marriage", *Harvard Theological Review* 57, pp.244-248.) Moscovits (*Talmudic Reasoning*, p.259) argues for its being presumably a form of consecration. The Beit Din of America (in contradiction to Susan Aranoff) and Riskin (as quoted below, footnote 159) appear to regard it as a class of *kinyan* which is *sui generis*. I would only note that I have yet to encounter a female scholar who denies that *kinyan* in the context of marriage, as in most other contexts, implies a power relation, specifically one of acquisition.

yichus – status – and property is concerned) society depends upon the *pater familias*' sense of security in his heirs' being in fact his own and (ii) that the strength of the prohibition against intercourse with a married woman as well as with the women in one's own family group serves essentially to protect the majority of women in a traditional society from sexual assault. Regardless of the purpose, what I would wish to argue is that it is clear that the taboo surrounding the *eshet ish* owes its peculiar force to the fact that adultery is not merely a religious prohibition or a moral injunction but rather a transgression which somehow threatens the fundamental warf and weave of the community. Compare the prohibition against intercourse with a *niddah*, a prohibition which on a purely religious level carries the same level of punishment (*issur karet*)[155] as adultery. To the child of such a liaison is imputed a spiritual blemish (*pagum*); however, unlike the case of the *mamzer*, who is defined as one who "may not come into [i.e. marry within] the congregation of Israel"[156] in the case of the *ben/bat ha-niddah*, no *social* handicap is suffered. It is clear that the absolute taboo against relations with a married woman is one which serves a *social* purpose, is socially respected and, when breached, is liable to be socially enforced.

From the foregoing, three consequences follow: first, the perception of the married woman as in some sense the "property" of her husband (to the extent that her "theft" is understood to be a transgression primarily against the *husband*, and punishable by the community as a whole because it threatens the perceived inviolability of "private property") is an essential element of patriarchal[157] society, and thus of the halakhic system, which is shaped by and serves to support patriarchal society. Second, there can be no room for acknowledgement of the married woman's "right" to leave her husband (which, in this particular system, is understood to imply leaving *for another man*, it being inconceivable that a woman would prefer to remain unmarried[158]) – the "right" of any other person to relieve

[155] Lev. 18:19-20 and 18:29.
[156] Deut. 23:3.
[157] I use the term patriarchal in a purely descriptive and not a censorious sense.
[158] Pace: *tav l'meitav tan du*...(Ket.75a, Yev.18b). This is not the place to question the meaning of the Gemara's *kol dehu* and thus the extent of Resh Lakish's dictum or the halakhic acceptance thereof. Clearly, the presence of Mishnaic grounds for a coerced divorce (Ket. 7:10) attests to the fact that there are limits. As an absolute minimum, the halakha must recognise that a man who is by objective standards physically repulsive is worse than no husband at all, or the woman's taking her chances on the marriage market once again with the economic wherewithal (the *ketubah* payment) to support herself whilst she remains single. It has also been suggested to me that a previously married woman might happily return to her father's house. This may indeed in some

the husband of his property necessarily diminishes the perception of all concerned that his property is truly his property. And finally, conversely, where there is no consensus regarding the patriarchal nature and structure of society, i.e. where there is no overwhelming perception of the woman as the property of the husband and thus no strong taboo against relations with the married woman (stronger, say, than against a single woman's having relations with a married man), there will necessarily be a tension between the notion and *halakhot* of *kinyan* on the one hand and societal norms on the other. This will become a major factor in our analaysis of whether and when there is a strong purpose served by *kinyan* in our communities today.

I make no apologies, therefore, for using the language of ownership to describe the husband's relationship (in the context of a traditional marriage) to his wife. I believe this to be the correct and appropriate language, notwithstanding the many apologists who would attempt to convince us otherwise.[159] The Gemara understands the "כי יקח" of the *pasuk* in an absolutely straightforward manner,

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communities be the case. However, Dvora Weisberg (*Levirate Marriage and the Family in Ancient Judaism*, ch.1) argues that in many societies of which levirate unions were a feature, a woman previously married – even a widow – is apt to be rejected by her birth family. The institution of levirate thus provides a protection for such a widow where her childlessness means that she is not yet considered a full part of her late husband's family. One might also point out that the determination of Tamar, despite the fact that she has returned to her father's house, to force Yehuda into honouring his obligation to give her in marriage to his youngest son (Gen.38:6-30) attests to the fact that a return to the birth family even where possible would characteristically be dissatisfying to the woman.

[159] My approach has been questioned by, inter alia, Rabbi Shlomo Riskin (private conversation), who was troubled by my emphasis on *kinyan* and drew my attention to the fact that the halakha uses (at points) a specific and unique term - "*kinyan issur*" - to denote the particular type of *kinyan* which marriage represents. He would wish to argue that that this term denotes an entirely different kind of acquisition from *kinyan hefetz* (the acquisition of an inanimate object). My own argument is that the term *kinyan issur* is the linguistic attempt to describe precisely what I have described above: the fact that the primary effect of the kinyan is not to change the status of the woman vis-à-vis her new husband but rather to change her status vis-à-vis all other men in the community. In order to effect such a change, however, *kiddushin* must render the woman un-seduceable – that is, it must render her unable to leave the union without her husband's consent.

An internet article in *Netu'im* by Rav Yehuda Shaviv (dealing with the sequence of the Mishna tractate Kiddushin) expresses very well the contemporary rabbinic tension between a desire to deny that the woman becomes the man's property and a desire to reinforce the efficacy of the mishnaic language:

> וודאי, שאין האשה קניינו של הבעל במובן שיש לאדם בעלות על קניינים שרכוש, ואין כאן אלא ביטוי מושאל.
> כן אסורה המקודשת -אולי גם במובן זה, שכדרך שקניינו של אדם נאסר על הזולת והמשתמש בו עובר על גזל עובר על 'לא תנאף' **והמשתמש בה** לאיש על שאר האנשים.
>
> Clearly, the wife is not the property of her husband in the sense that a man has ownership of acquisitions that are his property, and this [the language of acquisition] is nothing more than a comparative expression. Perhaps also [it could be used] in the sense that just as the acquisition of one man becomes forbidden to the next and someone who uses it transgresses the prohibition of theft, so a woman who has received *kiddushin* becomes forbidden to other men and one who 'uses' her transgresses the prohibition of adultery.

defending the use of money for this *kinyan* by comparing it to the purchase of a field or fields.[160] There are few people in mainstream legal philosophy who find ownership of fields problematic! In response to those who object that the husband cannot "own" his wife because he cannot do as he pleases with her; it is certainly true that he may not beat her, starve her or physically force her into actions she does not wish to perform – including the sexual act.[161] However, I believe that this objection itself stems from a misunderstanding of the concept of ownership. The halakha does not grant to any person a right to do absolutely as he pleases with his property: a man may not wantonly beat or starve his animals;[162] ownership of a field does not confer a right to its produce until the appropriate tithes have been taken, nor a right to use it any fashion the owner chooses[163]; ownership of an apple does not override the injunction against throwing it away uneaten.[164].

Even in modern secular society and law, ownership of an article need not be synonymous with the right to do exactly as I please with it. I can be described as

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[160] The Talmud (Kidd. 2b) offers two alternative Torah sources for the suitability of money to effect the *kinyan kiddushin*: the first is a *gezera shava* between the יקח of the verse dealing with a man's taking of a wife and the קח with which Avraham gives over to Efron the money with which he purchases the field in which he buries his wife. The second is a verse from Jeremiah which promises that "fields will be bought with money". Ebn Leider (Hebrew College, USA) teaches the opening sugya in Kiddushin as one which reveals a tension between two different understandings of marriage (one of the features betraying this tension being the unnecessary alternative *drashot* for each of the modes of *kinyan*). His argument is that whereas the verse in Jeremiah raises no problems with the notion that women, like fields can be "bought" with money; the decision of Gemara to use the purchase of the field of the Machpelah as its source for the *gezera shava* suggests that at least some of the Amoraim could not conceive of *kiddushin* as a "normal" acquisition at all; the only purchase they were willing to recall in the context was one which arose out of Avraham's great love for his wife Sarah. I appreciate Leider's reading but find it only partially persuasive. Moreover, I would note that the Jerusalem Talmud in its discussion on this point avails itself of only one of the *derashot* – the verse in Jeremiah which rendered the acquisition untroubling (YKidd.5)

It is not the aim either the foregoing part of this footnote, nor of this section as a whole, to ignore the fact that the first question of the Gemara when confronted by the first mishna in Kiddushin is the nature of the relationship between the *kinyan* of this mishna and the *kiddushin* of the mishna which opens the following chapter. I do not deny that the halakha envisions an ideal of marriage which has emotional and spiritual dimensions, one which is not merely an economic and sexual affair. However, I personally cannot find a means of reconciling that emotional and spiritual ideal with the messy, unspiritual, extremely material reality of marital breakdown and divorce which is the subject of this thesis.

[161] Cf. Pess.49b (opinion of Rabbi Meir): only a boor would have relations with a wife against her will; Ned. 20b (opinion of Rabbi Levi): blemished children would result from such an act and Eruv.100b (Rami bar Hama in the name of Rav Asi) which explicitly forbids the man to rape his wife.

[162] For the former, cf. B.M.33a-b, Rema EH5:14; for the latter, Gitt. 62a, Birkei Yosef OH157:4 and Nishmat Adam 1:5:11.

[163] Cf. Mishna Bava Batra, ch.2; HM155.

[164] *bal tashchit* – OH170:22.

owning a Grade II listed building, but that does not give me the legal right to paint it the colour I choose, extend it or change the structure in any significant way without permission. If a passing stranger were to wander in and attempt to eat his dinner in the front room, however, it would make complete sense for me to assert that "this is my property".

My argument is that a man's property rights in the woman he has designated his own through *kiddushin* operate in a similar manner to my property rights in the Grade II listed building: they are a "No Trespassing" sign to others rather than an indiscriminate document of planning permission. Thus there is no prima facie reason why *kinyan* as the necessary legal basis of marriage should in any way influence the internal dynamics of the marital relationship – marriage may still be experienced by the partners as an equal, loving relationship. Economically, the halakha affords the wife the right to be entirely independent of her husband (*eini nezonit v'eini osah*);[165] sexually and emotionally the halakha encourages the man to support and cherish his wife. We could compare the husband to a man who tills a field in order to assert his ownership of it (*hazakah*); he is not thereby doomed to become an exploitative farmer who leaches the soil of its natural fertility and attempts to overproduce on the land; he may equally be a certified organic farmer who sings to his trees morning and evening and plants hedgerows to provide a habitat for endangered wildlife. His act of tilling does not define his own relationship to the land. Rather, it defines the relationship of others to the land. Likewise, the man who gives a woman a ring, though he addresses *her*, might actually achieve the halakhic objective better if he were to address the public: "*harei **hi** mekudeshet li …*". Of course, he must address the woman in order for her acceptance of the ring to signify her consent; and of course as any feminist with even the slightest interest in semiotics will point out, it is entirely disingenuous for me to claim that the form of *kiddushin* has no influence over or is no reflection of the assumptions our society makes about the nature of marriage. There are limits as to what form of relationship can be expressed by an act which asserts ownership, just as the organic New Age farmer of my example above *cannot* halakhically assert his ownership of the field by leaving it fallow indefinitely. [166] However, the point I have attempted to make by my exaggerated

[165] Gitt. 77b, EH80:15

[166] If he does, his ownership of it is diminished, to the extent that a squatter who cultivates the field for a period of three years will be believed if he subsequently claims to have bought it (Cf. Elon: *Principles of Jewish Law*: Hazakah). The converse is, of course, one of the reasons given for the laws of *shemitta* – the Israelites must remember that final ownership of the Land belongs to

argument is that it is only a quite radical form of relationship which is excluded by the model of *kinyan* whereas the kind of relationship with which many people who express horror at the language of ownership would be perfectly happy as a paradigm of marriage is not only perfectly compatible with *kinyan*-acquisition; it is in fact supported by it.

The farmer cannot leave his field entirely fallow indefinitely whilst asserting his ownership over it because, once again, the halakha as narrative legal system understands ownership to have particular purposes. In the halakhic narrative, fields are for cultivation. The halakha understands marriage also to have a purpose, and that purpose is a sexual one. As noted above, the wife may withdraw from the economic benefits and liabilities of marriage; however, no matter how many servants the couple employs, she may not withdraw from those physical acts of service to her husband which are generally acknowledged to bring about intimacy: pouring his drink for him; washing his hands and feet and making his bed.[167] Likewise, according at least to the Babylonian tradition,[168] whilst a man entering marriage may stipulate that she shall have no financial claim upon him he cannot contract out of his "liability" for marital intimacy.

Just as marriage is understood to be, at its most basic level, "about" sexual relations, so publicly acknowledged sexual relations are largely assumed to result in a marriage, an assumption which I believe is clearly expressed in the Talmudic dictum "*Ein adam oseh beilato bi'at znut*".[169] It is, I would claim, a false understanding of the concept of *zenut* which leads to the popular (mis)conception of this dictum as suggesting that a man wishes his intimate relations to be marital "as the Torah wishes".[170] I would understand it, rather, to relate to psychological/social reality rather than to religious aspiration (rather as *tav l'meitav* is generally understood, regardless of whether one follows Bleich's argument that it refers to an ontological and unchangeable reality or Aranoff's

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the One who gave it to them – i.e. their act of not husbanding the land is an acknowledgement of incomplete ownership.

[167] That these acts are liable to bring about intimacy is acknowledged by the very same gemara which goes on to record that they are all acts which are prohibited whilst the woman is a *niddah* – tradition in the name of Rav Huna, Ket. 61a.

[168] For an analysis of the Yerushalmi tradition in this regard, cf. Margalit, Yehezkel: *On the Dispositive Foundations of the Obligation of Spousal Conjugal Relations in Jewish Law* in JLA Studies XVIII, pp. 161-186.

[169] Yev.107a; Ket.73a; Gitt.81b.

[170] Cf. Broyde: paper outlining the Tripartite Agreement, presented at the JLA conference, Manchester 2008.

that it refers to a historical social reality which we no longer inhabit).[171] "*Ein adam oseh beilato bi'at znut*" means simply that although it is considered that a man would be willing to retract from his contractual or monetary acquisition of a wife, he is not assumed to intend the retraction of the implication of his sexual act. Understanding this as a statement about the man's desire in general (his emotional need for his partner's sexual fidelity, and his desire that society respect the validity of his exclusive claim on her) makes sense of Rav Henkin's decision that the civil marriage or cohabitation of two Jews constitutes *kiddushin*[172] and is also, I would argue, implied by the Meil Tsedakah, cited here by the Hatam Sofer:[173]

> הכוונה אין אדם רוצה שתטחן אשתו לאחר בחייו ע"י ביטול הקידושין וגם בניו יהיו בני פנוי' אין ... דעת שום אדם סובל זה
>
> "… the meaning (of *ein tenai b'nisuin* because of the fear of *beilat znut*) is that a man does not want to fear losing this woman to *another* during his life-time (through the voiding of his marriage) and his children will be considered as the children of a woman not married as ***no man's will can bear that***)" (emphasis mine)

The Meil's Tsedakah's understanding is entirely consistent with my own description of *kiddushin* and the marriage-taboo. He argues that, given the choice, a man enters into an exclusive kind of relationship with "his" chosen woman – a kind which does not allow her to leave him for/be perceived as sexually available to another man.

It is this understanding of halakhic marriage which I believe should form the backdrop against which we should evaluate different proposed solutions to the problem of *get* recalcitrance.

One question which will arise time and time again through the chapters which follow is whether in fact this understanding is applicable or desirable in today's cultural context. Any simple answer to that question would be inadequate. Therefore, I shall simply raise it every time it is relevant, and seek different answers. At the end of the thesis, I shall attempt to balance these answers when I put forward my own tentative proposal.

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[171] Cf. Aranoff: *Two Views of Marriage –Two Views of Women.*
[172] Cf. *Perushei Ibra* 18.
[173] Responsum Hatam Sofer, EH II 68.

Post script to chapter 4

In this chapter I have attempted to show that the structure and strength of the traditional, *kinyan*-type, marital-bond depends on the perceived inability of the wife to leave at will. It is this inability, I have argued, that not only prevents the wife from spontaneously deciding that she would prefer life with another man (the concern which has been expressed as *shelo tihiye ishah notenet eineiha be'aher*)[174] but also prevents other men from viewing the married woman as approachable, or seduceable.

In this short concluding section, I wish to make the argument that though the central feature of the marital bond is *sexual* exclusivity, an external threat to the marriage need not necessarily be sexual in order to be unhalakhic. I wish to compare two responsa cited by the Beit Yosef in his commentary to the Tur EH 134:5(b), both of which deal with a situation in which a man has entered into a financial arrangement whereby he stands to lose a substantial amount of money if he fails to divorce his wife. In the first responsum, Rav Maimon Noar rules that a *get* given is valid notwithstanding the existence of such an arrangement. In the second, the Rashba rules that the *get* is invalidated by the arrangement. These two responsa have previously been understood in the context of discussions about self-imposed penalties, and the possibility of economic duress' constituting *kefiyah* and resulting in a *get meuseh*.[175] I would argue that the two responsa do not in fact necessarily have to be understood as contradicting one another and that the difference between the two final decisions can be accounted for if we consider the respective contexts (narratives) of the creation of the financial obligation.

The responsum of Rav Maimon Noar (Beit Yosef, EH 134:5 s.v. "*Katav…*") relates to a case in which a man had sworn 200 gold pieces to the town Mayor if he took back his wife and did not divorce her. The man then divorced his wife, including *bitul kol moda'i.* The question was raised whether the fact that the man would be substantially penalised economically if he failed to divorce rendered the *get* a *get meuseh*. Rav Maimon Noar responds that the *get* is entirely valid because we do not consider a *get* to be *meuseh* except in the event that "they

[174] Ned. 11:12.
[175] Cf. for example Breitowitz: *The Plight of the Agunah*, footnote 64 pp.21-22.

forced him against his will (*shelo midaato*) to do something he did not want to do (*b'davar sh'eino rotseh la'asot*)[176] or threatened him with loss. In this case, the husband obligated himself to do what he wanted to do (*ma shehu rotseh la'asot*) and even though ultimately he could not take his wife back without a financial penalty, this did not constitute duress (*ones*) because that (to divorce his wife) had been his will (*rtsono*) from the beginning.

The Rashba, in the "conflicting" responsum deals with the question of "Reuven" who has entered into an agreement with his in-laws to divorce "Leah" his wife within a given time frame, again incurring a substantial financial penalty (1,000 dinari) if he fails so to do. Reuven regrets the agreement, wishes and tries to find a way to resile from it, but fails. He authorises the divorce out of his fear of being pursued by the in-laws for the sum he owes. Moreover, he was not aware that he could issue a *moda'ah* to the effect that he was being coerced into this divorce. The response of the Rashba is that so long as others were aware of the coercive situation, the *get* is *meuseh* and invalid. Regarding the question of whether this was not (like that above) a situation in which the husband had obligated himself in the financial penalty so that he benefited economically from the divorce (rather than being penalised for withholding it, so the agreement could be interpreted as a "carrot" and not a "stick") the Rashba answers that this is clearly not a case of financial gain through divorce but rather fear of loss.[177]

What is striking about this responsum as against the first (quite apart from the fact that we have a clear statement of the fact that the husband at the time of giving the divorce did not want to do so and had been attempting to find means to avoid doing so) is that the story of his binding himself to give the *get* involves the active participation of others. Whereas the first husband, so far as we can glean, spontaneously pledged 200 gold pieces in an effort to strengthen his resolve to

[176] *Daat* in this context seems to be carry a meaning of both cognitive and affective will, similar to Rava's use of the word in the Gemara. *Rotseh* seems to carry the meaning I argued for it in the mishna in Yevamot 14:1 – want – as opposed to the stronger sense of "will" which I have suggested would be appropriate for its cognate, *ratson*, in the second part of that mishna.

[177] I would suggest, as a side point, that the distinction drawn by so many authorities (starting with Rabbeinu Tam who advocates bribery as a legitimate way of eliciting a divorce (*Sefer Hayashar leRabbenu Tam*, as quoted by S. Riskin, *Women and Jewish Divorce*, p.102) between promising a reward for the divorce and penalising the failure to divorce is linked to the preference for seeing behaviour as purposive (rationally teleological) rather than reactive (non-rational) – cf. my Introduction (p.16). An act performed in order to achieve a goal (a financial incentive) can be interpreted as more highly rational (i.e. more consonant with *daat*) than one performed in order to escape the (emotional/physical) fear or presence of economic loss and/or pain. See further chapter

divorce, Reuven of the second story entered into a "mutual agreement" – not with a disinterested bystander (we have no reason to suppose that the Mayor of the first story had a vested interest in seeing the couple divorce) but with his in-laws. That the in-laws had a strong personal interest in seeing their daughter divorced can be evidenced by their unwillingness to forego the agreement. The admixture of their will as well as Reuven's later regret for having entered into the agreement suggests that the agreement itself may not have been entirely spontaneous on Reuven's part (it was not, perhaps, truly *onsa d'nafshei*). Thus the two responsa are not, I would argue, dealing with the same kind of financial compulsion to divorce – and the salient point of difference between them is the involvement of a third party.[178]

That the involvement of a third party can make the difference between a halakhically valid form of compulsion and an invalid form is claimed explicitly in a much later responsum – that of Rav Herzog.[179] Rav Herzog defends the view of the Rambam that a *get* should be coerced on the wife's plea of *ma'is alai*. The merits or de-merits of that particular view are not my concern here. What is relevant to my argument is his insistence that the permissibility or obligation of coercion exists *only* in the case of a *moredet.* If the wife herself is not a *moredet*, Rav Herzog claims, but rather some other Jew external to the marriage forces or attempts to persuade the *bet din* to force the husband to give a *get* then even if it is the *bet din* who finally compell the *get* that *get* is invalid.[180]

6, in which I discuss the development of the *Rishonim* understanding of the interplay between *kefiyah* and will.

[178] The concise opinion of Rabbi Yitzhak Kolon cited further on in the same *siman* (s.v. *v'katav od*…) supports my understanding. In a case where a man deposits money with a third party and the third party does not then want to return the money until he divorces his wife, this does not constitute *ones* because "we do not call anything *ones* except what is brought upon a man by others; not when he brings the duress (*ones*) upon himself". In this case, the initial agreement was not entered into out of the third party's desire to see the husband (or his wife!) divorced.

[179] Heichal Yitzhak, EH Part A no.2, s.v. "*harei lanu*".

[180] This invalidity is the inverse corollary of the validity of the *get* coerced by gentiles at the behest of the Jewish *bet din* which I will discuss in ch.5.

Chapter 5 – Solutions to the problem of *get* recalcitrance (i): Solutions which render irrelevant or override the husband's will at the time of the marital breakdown

In the last section, I outlined an understanding of Jewish marriage when effected by the *kinyan gamur* which we call *kiddushin* whose central feature is that the woman is acquired by the husband in such a fashion that she is taboo and perceived as sexually unapproachable by all other men so long as the husband remains alive and does not indicate a desire to release her. Her absolute unapproachability, I have argued, depends in part upon the fact that the power to terminate the marriage rests in the husband and the husband alone. Granting the woman power to terminate her own marriage results in a situation in which another man may attempt to persuade her to do so. Moreover, granting any third party, including conceivably even the *bet din*, power to terminate the marriage could result in the possibility that a rich and influential individual with an interest in seeing the marriage end might offer incentives to or exert subtle pressure on the third party *bet din* to use this power in a particular case. As we saw in the post-script to the last chapter, the only situation in which we may directly pressure a divorce – even through economic means – in the absence of agreed grounds for *kefiyah* is in the event that the husband has spontaneously expressed the desire to be rid of his wife.

Of course, we may not wish to assume that wives are innately seducible, or *batei din* corruptible, but some men, at least, have been known to be insecure in this regard, and the halakhic status quo vis-à-vis marriage and divorce provides a measure of guarantee against female adultery.[181] Any proposed solution to the problem of *get* recalcitrance which would enable another party to end the marriage regardless of the will of the husband at the time of the break-up fails to offer this guarantee; it fails to provide a context in which other men and the wife herself view the woman as irrevocably prohibited and thus it fails to be Jewish marriage in the sense in which I have explained it.[182] This is very succinctly

[181] Ancselovits in his article points out that this is the case only in a religious (or, I would add, traditional patriarchal) society which takes seriously the *kinyan* aspect of marriage. A secular Jewish public which is undaunted by the religious injunction against adultery (as opposed to the moral claim that it is unethical to betray the trust of one's partner or seek to persuade another to do so) will be no more likely to refrain from adulterous liaisons than from liaisons which are merely unfaithful – for example of a married man with another woman, or of any person, male or female, who has a steady partner or common-law spouse with a third party.

[182] It is extremely important to note that in writing of the "will" of the husband at the time of the

expressed in the course of a responsum by Rav Moshe Feinstein. He is seeking in this responsum to explain the opinion of the Rambam which permits a woman who has received a conditional *get* and is fully able to comply with the condition but has lived with another man before actually fulfilling the condition, to remain with the second man after she has complied with the condition and thus effected the divorce (in contrast with the halakha that stipulates that a married woman who has adulterous relations with another man is forever prohibited both to her husband and to the second man):

> שלכן יש מקום לומר דהרמב"ם אמר זה דוקא בתנאי דתלוי בידה כהא דאם תתני מאתים זוז וכדומה אינה ככל א"א שאין בידה להתגרש ואינה בכלל איסור סתם א"א שנאמר בתורה, אלא שהיא כגרושה לענין זה מאחר שבידה להתגרש, וכמפורש בלשון הרמב"ם ואם ניסת לא תצא אא"כ לא נשאר בידה לקיימו,
>
> There is room to say that the Rambam states this specifically in the case of a condition that depends on the wife as in the example that [he makes the get conditional on her] giving me 200 zuz and suchlike, and therefore she is not like every married woman in whose power it isn't to be divorced, and she is not in the simple category of the married woman forbidden by Torah (to other men); rather, she is like a divorcee for this purpose because it is in her power to be divorced, and thus in the words of the Rambam: if she was married [to another man] she needn't go out from him unless it no longer remains in her power to fulfil the condition ….
>
> Iggrot Moshe EH 3:41

He goes on to explain that a woman who is at any moment able to dissolve her own marriage is not "*ervah*" – which is why the relationship with the second man was not in this case considered adulterous. *Ervah* is the halakhic term for what I in the last chapter described as "taboo" – the woman who is perceived as untouchable because she belongs to another man. If she is not *ervah* she is not perceived to be the acquisition of her husband. Or, perhaps, if she is not the acquisition of her husband, she is not "*ervah*".

There is thus some truth in the various alarmist responses to proposals for conditional marriage which claim that such proposals would bring an end to Jewish marriage as we know it: I have argued that this is indeed the case.

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break-up, I am including the notion of "coerced will". There is, as I will be arguing in the next chapter, a huge difference between extorting the words "*rotsei ani*" from the husband, even if he would not "freely" and without outside pressure have consented to utter them, and dispensing altogether with the need for his action or enunciation.

Moreover, to seek to deny the extent to which the introduction of a particular type of terminative condition or *harsha'ah* for a *get* (measures which render the husband's will at the time of the divorce irrelevant) do change the very nature of marriage is to leave one's arguments indefensible against criticism from traditionalists who insist that the Torah gives a husband the right to give or withhold a *get* at will.[183] The point at which we may wish to differ from the arguments of conservative opponents of *nisuin al-tenai* is not what the effects on the nature of marriage of such a *tenai* may be but rather whether these effects are overwhelmingly negative, as such opponents would claim.

First, we may choose to argue that the communal message sent by insisting on marriage as *kinyan*, however benevolent the original decision to instigate this form of marriage, is one demeaning to women, which enforces an outdated and inequitable perception of the wife as chattel of her husband and may lead to subtle or less subtle forms of abuse. We may then argue that attempting to preserve the "sanctity" or stability of marriage at such a price is either immoral or counter-productive: as women gain greater emancipation, they simply will not agree to such a form of marriage[184]

There is one serious drawback to this argument: namely, that it requires us to reject as intrinsically flawed the form of marriage which, according to my thesis, is explicitly accepted, if not mandated, by the written Torah. However morally problematic certain passages of Torah may be, it is not a promising premise for a ***halakhic*** argument to reject either the specifics or the values of the written Torah, especially where those Torah-values have been codified in the halakhic system through the decisions of the past two millennia.

An alternative argument for the circumvention of the husband's will at the time of marital breakdown might rest on the premise of the decline of the generations. Responsible *דעת*, as we saw in chapter two, is developed through education and social interaction. Many men in our own generation have not benefitted from the kind of Torah-centred education the sages of the Talmud and many of the

[183] Of course, I would vigorously deny that that right extends to exhorting money from the wife or her supporters in return for the *get*, or withholding the *get* out of spite (rather than because he actually wishes to pursue *shalom bayit*) in a situation in which he has not protested against the marriage's being (civilly or de facto) disbanded.

[184] Anecdotal evidence suggests that this may be the case now in Israel, and is even advocated from time to time in Modern Orthodox circles in the United States.

Rishonim envisaged. Nor do they belong to communities in which the halakhic obligations of the man in marriage, or the halakha's demand that he end the marriage in particular circumstances are either well-known or respected. Moreover, *batei din* are restricted both in their authority to issue and in their practical capacity to implement orders of *kefiyah* or even the *harhakot* of Rabbeinu Tam. This being the case, an insistence on the husband's retaining the sole power to give or not give the divorce when he may not typically have the same moral frame of reference, strength of character, communal support or sense of obligation to the Torah and her representatives as the husband envisioned by the sources which originally vested that power in him, might in fact constitute a transgression of the *lifne iver* prohibition. If a man is allowed, even encouraged, to enter into a situation (halakhic marriage) which may require him at a particularly stressful point of his life (the breakdown of that relationship) to make a courageous moral decision when he is unlikely to have the moral wherewithal or the social context to enable or encourage him to make that decision, then those who encourage him to enter into that situation in the first place might find themselves partially responsible for the sins he later commits both by causing unnecessary suffering to his wife (if he refuses to give her the *get* which would enable her to remarry or demands from her an unreasonable price) and in the event that he ignores a *bet din* recommendation or obligation to give the *get*.

To this second argument, I should add that the very publicity which surrounds the issue of *iggun* in our days leads to a situation in which men may be more likely to withhold a *get.* Few Jewish men can now be oblivious to their power in this respect, or the possibility of financial gain which might accrue to them from doing so. Moreover, women are more acutely aware of their halakhic disadvantage and their vulnerability in the case of marital breakdown. I would argue that this awareness on both sides is unlikely to foster *shalom bayit*, whereas it is possible that the trust that would be expressed (on the part of the husband) and acknowledged (on the part of the wife) by entering into a non-*kinyan* form of marriage might well foster a sense of security and mutuality which would have a positive effect on the relationship – an effect which could go a long way to counter any destabilising effect created by the loss of *kinyan.* That basis of trust might also strengthen the wider community's sense that non-*kinyan* marriages

are also real relationships that should not be violated by any third party.

Lastly, it is entirely possible to argue that in many Jewish communities today, *kinyan* simply does not achieve any benefit as the wife is never perceived as actually belonging to the husband (and the need for him to effect divorce is understood as a legal oddity and not as reflective of any interpersonal reality). This is Ancselovits' argument vis-à-vis the *hilonim* in Israel but might equally be used of progressive, traditional-Western[185] and religious Zionist/Modern Orthodox communities. In, for an extreme example, a politically correct American university setting where men are discouraged from referring to their wives as "my wife" or their secretaries as "my secretary" and urged instead to use non-possessive descriptions ("This is Jane: we are married,"; or "This is Prakash; he performs administrative duties in the office") it may be unlikely that the men of a particular couple's acquaintance will relate to the wife as "Joe's woman" in any meaningful sense. In such a context, *kiddushin* cannot provide a safeguard against adultery that is any stronger than the woman's and any potential third party's sense of religious obligation.

This latter argument, of course, would stand in direct contradiction to my reading of the maxim "*ein adam oseh beilato bi'at znut*" or would rely on the assertion of its having been socially/temporally contingent. Whilst it is certainly possible that perceptions of and aspirations regarding marriage have changed radically in the last century, I am unconvinced that sexual jealousy has become a thing of the past. It is this sexual jealousy which, I have argued, is the referent of the halakhic language describing the man's desire for his relations not to degenerate into *znut*. *Znut*, in my understanding is deliberately leaving open the possibility that another man can have relations with one's designated woman. "*Ein adam oseh beilato bi'at znut*" (as I read the Me'il Tsedakah in the last chapter) thus means that a man wishes his sexual acts to be carried out in a context in which the woman is exclusively and irrevocably his. A form of marriage in which there is no true *kinyan* is one in which the woman is never completely acquired and the husband's acts of intimacy might be defined as *znut* not because of any actual unfaithful activity or planned activity on the part of the woman but merely because the possibility of another man's viewing her as available for seduction exists.

[185] An example of which might be the United Synagogue in England, or Ashkenaz, non-Charedi Jews in France.

What may, however, be true is that women experience sexual jealousy as frequently and strongly as men; and that couples who are civilly married or who consider themselves to be married through some other non-*kiddushin* ceremony or no ceremony at all have expectations of sexual fidelity which are as high as those of the partners to a *kinyan* marriage. If this were in fact to be the case (which I believe remains to be proven) then once again, we could make an argument that traditional marriage disfavours the woman (barring her from unilaterally seeking divorce and remarriage whilst not protecting her against her husband's doing likewise). This would be a hard argument to make in Ashkenaz communities where the decrees of Rabbeinu Gershom are in force to prevent a man's taking a second wife and to disallow him from divorcing his first wife without her consent. The only cases in which a man may be divorced and a woman may not seem to be ones of "hard fault". That is, a man may leave a *get* for his wife even without her consent and be remarried by the *bet din* if, for example, his first wife is "proven" to have been unfaithful. I shall revert to the problem of "hard fault" on the part of the husband in the conclusion of this thesis. In the meantime, I shall make a brief summary of this chapter's arguments thus far:

(i) A relationship which is set up in such a way as to allow the woman to dictate when and how it shall end regardless of the will of her partner is not a traditional Jewish marriage.

(ii) We may nonetheless wish to enable or encourage such a form of relationship for one of three reasons: first, we may argue that a relationship in which a man acquires ownership of a woman's sexuality – however partial and well delineated that ownership is – is intrinsically demeaning and abusive to women; second, we may argue that the will of the husband is unlikely any longer to be a responsible will and the decline in the authority of the *bet din* has made it less likely that an intransigent husband will be persuaded to do the right thing in giving his wife a *get*; third, we may argue that in many communities, the *kinyan* form of marriage no longer serves the function of rendering the wife taboo. If this is correct, then more harm than good may arise from this form of marriage as it paves the way for adultery and the birth of children who may be tarnished with *mamzerut*.

The question which arises from this summary is thus as follows: if my argument

so far points to the guarded conclusion that it would be desirable to facilitate or legitimate a form of union which does not require an act of will on the part of the husband at the time of the break-up in order to dissolve it, of the forms of circumvention, which is the optimal?

The work of the Agunah Research Unit and of many other academics and rabbinic scholars suggests that a legal-halakhic defense could be constructed to support any or all of the following: conditional marriage; conditional *get*; conditional marriage together with a *harsha'ah* for a *get*; civil marriage and a form of concubinage or "Noachide marriage" or "*derekh kiddushin*". There are also those who insist on the power of the *bet din* to end a marriage by *hafka'ah* (whether in conjunction with another/other remedies or not). Each method has its exponents. Whilst I am not disinterested in the halakhic arguments surrounding the merits of each against the others, I am not convinced that the formal arguments are or will ever be conclusive. It is striking that in a collection of letters from some of the foremost *halakhic* authorities of the early 20th Century on the subject, *Eyn Tenai b'Nisuin*, it is *meta-halakhic* issues which are foregrounded.[186] Berkovits, Abel and Broyde amongst others have all agreed that conditional marriage is perfectly possible. It is striking, however, that all three of these thinkers have advocated reliance on an amalgam of solutions. Conditional marriage is, it seems, formally possible but pragmatically impossible.[187]

[186] Malka Landau's paper at the JLA conference 2008 demonstrated the extent to which emotive language and not legal argumentation was used in this pamphlet.

[187] In this context, an exchange between Michael Broyde and Avishalom Westreich is illuminating. Westreich writes: "In a correspondence which I had with Rabbi Prof. Broyde he argues that R.M. Feinstein's use of *umdena* regarding a future event is only for cancelling the levirate bond… but not for releasing a married wife without a *get*. Although it might be true in practice, from a theoretical point of view there is no difference between marriage and levirate: in both cases the marriage is retroactively annulled. Indeed, the practical hesitation in applying *umdena* for a married wife is intelligible due to the fear of *mamzerut* and *humrat eshet ish*." (Westreich: *Umdena as a ground for Marriage Annulment*, p.15 footnote 71) Having read the original correspondence, I would claim that Westreich and Broyde are in fact talking at cross purposes – that Broyde is using legal terminology (*humrat eshet ish*) as a shorthand or indeed a disguise for the non-formal concern which as *dayan* and not as professor he feels bound to honour – the apprehension that notwithstanding the fact that the legal mechanism by which a *yevama* may be released from *zikat yibum* and that by which a wife might be released from *kiddushin* could be the same, the real-life act of releasing the wife of a living husband is a quantum leap from the real-life act of releasing a *yevama* from the claims of her brother-in-law. In her study of levirate union, Dvora Weisberg lists the features of societies in which such unions are commonplace (*Levirate Marriage and the Family in Ancient Judaism*, ch.1). These features are not features of Western society. Thus whilst it seems likely that (at least in the past) "Western society" or some sub-groups thereof have related to married women as the property (in a limited sense) of their husbands and to the extent that married women are still so perceived, *kiddushin* does serve to render the woman taboo (which communal taboo is a value which stands to be lost in any arrangement to circumvent the husband's near-total control over the power to release his wife) it would be extremely hard to imagine an argument that in our society we still perceive a woman

My analysis of the form and function of *kiddushin* should have made it evident why conditional marriage presents such a problem. On the one hand, it attempts to be, to all observers, indistinguishable from traditional marriage – thus creating an absolute taboo around the married woman. On the other hand, in at least some of its variants, it asserts that the woman is free to leave at will – precisely what she is unable to do in a traditional marriage, which thus erases her status as taboo.[188]

I would argue that it is its surface resemblance to traditional marriage which has made conditional marriage the focus of such hostility from traditionalists. I would further argue that its inclusion in an amalgam of remedies which also includes a conditional *get* or *harsha'ah* for a *get* renders it more and not less open to criticism. There is an intrinsic contradiction between condition and *get*, the *get* being the signifier par excellence of the *kinyan*-ownership model of marriage and the condition being a statement of its antithesis. I have a fear that any coupling of condition and *get* may lead to a *bet din* decision that neither represents the true will of the husband, that a woman may not re-marry on the strength of either document and even, in the most extreme scenario, that the children of a second union entered into on the strength of the condition and *get* should be treated as *mamzerim*. I would also note that the introduction of a "non-binding marriage" which masquerades as a binding marriage (i.e. conditional marriage – without the admixture of provision for a *get*) can have only one of two fates. The first is that it be denounced and rejected by traditionalist halakhic authorities – no matter what its formal halakhic merits; the second (much more unlikely) is that it come to replace binding marriage altogether. The second option is, of course, precisely what traditionalists fear, and why their opposition is so intense.

Conditional marriage, notwithstanding its inherent problems, as the "kissing cousin" of traditional marriage is the option most frequently raised by those thinkers who wish to eliminate entirely the problem of *get* recalcitrance but who at the same time wish to alter as little as possible the form of halakhic marriage. Its

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upon marriage to become in any sense the property of her husband's extended family. *Yibum* therefore serves to reinforce no social value whatsoever and can be perceived as a counter-intuitive institution. It is no wonder, then, that Broyde as *dayan* dismisses Westreich's (legally watertight) argument that the same legal construct is at play for *eshet ish* and *yevama*. Both are entirely correct, but each perceives the nature and purpose of a legal construct in a different way.

[188] There are alternative proposals, of course, providing for a terminative condition activated not at the behest of the woman but at the sole discretion of a court. I deal with these proposals at the end of this chapter.

advantages over forms of marriage dissimilar to the traditional *chuppah* and *kiddushin* are obvious – not least of them being the fact that couples in love, their friends and family are emotionally and nostalgically attracted to traditional ceremonies. Romanticism and pragmatism are unhappy bedfellows.

It will be obvious from the foregoing that I personally would favour the legalisation (in Israel), halakhic defence (for all religious communities) and pressure for the social acceptability of less halakhically complicated solutions (unions which are not in any sense intended to be confused with halakhic marriage).[189] Personal preference, however, is neither academic argument nor halakhic *psak* and thus, acknowledging that it is halakhically possible for conditional marriage to be reiterated as an option, I shall now offer an evaluation of the different condition-triggers which have been advocated by different theoreticians.

Possible triggers – husband, wife and *bet din*

It would appear from my short analysis of the nature of *kiddushin* that there are three parties to any Jewish marriage: the husband, the wife and the community. The community is, as a minimal legal requirement, represented in both the initiation of marriage and the effectuation of divorce by the critical presence of *edim* (as discussed in the previous chapter) – and in some circumstances by the community's court – the *bet din*.

[189] It is important here to note that one of the advantages conditional marriage *does not* on my analysis boast over non-halakhic marriage is avoidance of the problem of *bi'at zenut*. On a conceptual level, this is because I understand *zenut* to refer to any arrangement by which a man's "wife" can leave him at any moment for another man.

It is interesting in this context to note that in the Broyde proposal, the insistence that there is no retrospective *zenut* actually relies on the fact that the condition is clearly subsidiary to the *get*. The condition exists, so far as I can deduce, solely to provide the threat of retrospective *zenut* in order that we do not claim that the husband revoked the *harsha'ah* either in defiance of his oath or without telling anybody. The claim that the husband will not revoke the *harsha'ah* because of the threat of the condition's being activated, or of annulment, is a deeply interesting one – one which is quite consistent with my own assumption that men generally would prefer the end of their marriage to be seen as "in their hands" rather than in those of their wife's or the *bet din*. This desire for control is in direct opposition to the only view according to which certain types of condition may be free from the problem of (potential) *bi'at zenut*. The argument of Rav Uzziel (*Mishpatei Uzziel, 45&46* – cf. Abel: *Hafqa'ah, Kefiyyah, Tena'im*, Section C: Conditional Marriage) is that so long as a condition makes the continuing validity of the marriage dependent upon the act or intention of a third party, when the marriage is retrospectively void there is no problem of *zenut* precisely because the husband had no control over the decision to void the marriage (and thus he had every intention of having fully marital relations). I will deal in the latter part of this chapter with the problems I view as inherent in Rav Uzziel's proposal; here I simply wish to acknowledge his view as the sole one which obviates the problem of potential *zenut* in conditional marriage.

Of course, one may also simply argue that if non-*kinyan* forms of marriage are accepted as normal modes of living in monogamous union with a partner, *zenut* in the pejorative sense, i.e. promiscuity, does not adhere to such a union.

Logically, it seems reasonable to imagine forms of marriage according to which the act of will of any one of these three parties, or any combination thereof, will be effective to terminate the union. This does not, however, necessitate the conclusion that it is halakhically desirable to implement every one of these forms of marriage.

The mishna which is the centre of this thesis, Yevamot 14:1, is unequivocal in its stipulation that it is the will of the husband alone which may be effective to end the marriage, and that the will of the wife is irrelevant. The decree of Rabbeinu Gershom (explicity against this mishna) to the effect that a man may not divorce his wife without her consent introduces a need for the will of the wife insofar as divorce is concerned. So far, these represent the (only) two "mainstream" halakhic options.

Conditions dependent upon the wife

When a proposed condition attempts to predicate the continuance of the marriage upon the will of the wife (regardless of the will of the husband) essentially what is being attempted is a revocation of the decree of Rabbeinu Gershom and thus a reversion to the ruling of the mishna that unilateral divorce should be a live option, contradicting the mishna, however, in rendering the wife's sole will as efficacious as that of her husband. Such a proposal depends upon the (quite reasonable) premise that in our culture women are as well educated, both generally and Jewishly, and as morally responsible as men and that moreover (as Aranoff et al argue[190]) there is no longer a pressing social or economic need for women to remain married so that the need to protect women against their own rash decisions is no greater than the need to protect men against theirs.

Conditions dependent upon the *bet din*

What is interesting is that the type of condition outlined in the previous paragraph is *not* the type of condition advocated by the majority of thinkers who have proposed conditional marriage. The condition advocated by Eliezer Berkovits

[190] Aranoff: Two views of Marriage – Two views of Women (section (b): *Marriage as a Partnership*).

and any who follow his lead[191] attempts to make the *beit din* the arbiter of whether or not the marriage should continue. Likewise the proposed condition of Rav Uzziel.[192] This is, in my view, a far more fundamental departure from any traditional halakhic form of marriage than placing the power to leave in the hands of the woman. Broyde may overstate the point when he argues that Jewish marriage is essentially and exclusively a private contract[193] – I have argued that the public element is an indispensable part of *kinyan*-marriage. However, just as I argued with relation to a form of marriage which the wife is able to exit at will that it may be a perfectly good form of relationship but it is not traditional-halakhic marriage, so, and even more so, I would argue with relation to a form of marriage which may be disbanded by the *bet din*: it may be defensible as a form of relationship but it is inconsistent with traditional-halakhic marriage. If it is in the power of any third party – including, I would argue, the *beit din* – to dissolve a marriage ***at their own discretion and not because of a breach on the part of the husband of a specific, previously stipulated term of the marriage*** then the woman is not the exclusive and inalienable *kinyan* of her husband. There is no taboo, and thus there is no marriage.

What is fascinating, then, is that it is precisely this (in my view) highly *unhalakhic* aspect which is emphasised as a positive feature in the writing of those who propose such a type of condition. It is the fact that power over the dissolution of marriage is in the hands of a Jewish court and not a gentile one which is highlighted as the salient point of difference between the rejected French proposal and those proposals (such as those of Berkovits and Rav Uzziel) which

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[191] Cf. Abel: *Plight of the Agunah*, VIII:5 and (esp.) IX:6. In section IX:32, Berkovits is quoted as claiming that the ending of a marriage governed by his proposed condition is actually in the hands of the husband. So far as I understand Berkovits' proposed condition, the husband, faced with a *bet din* recommendation or command to divorce his wife has the choice between executing that divorce himself by means of authorising a *get* or, if he is recalcitrant, having his marriage annulled (retroactively). This constitutes a choice over *how* the marriage ends. It does not constitute a choice as to *whether* the marriage ends. As I shall argue in chapter 7, the choice the Mishna expects the husband to make is ***whether or not to release his wife***. The Berkovits proposal does not given the husband control over that decision. I am not therefore necessarily rejecting the Berkovits proposal (and those similar to it). I am merely insisting that all who discuss it be entirely clear about the power and control it gives or does not give to the husband, the wife and the *bet din*.

[192] *Mishpatei Uzziel* 45&46.

[193] *Marriage, Divorce and the Abandoned Wife*, pp.1-2, p.7. His stated views here make it all the more interesting that his own proposal also includes a mechanism by which the *bet din* is given some measure of control over whether the marriage ends or not. Not only is the *harsha'ah* for a *get* constructed such that "any *bet din*" can authorise the writing of the *get* at the wife's legitimate request, the proposal also includes an acceptance on the part of the couple contracting the marriage that the *bet din* holds a power of annulment. I deal with annulment – the most extreme form of *bet din* power – later in this chapter.

predicate the continuance of the marriage on the ongoing will of the *bet din*.

The distinction between Jewish and gentile court in terms of the acceptability of its interference in "private" marital concerns has, of course, venerable roots; it originates at the end of a mishna in Gittin 9:8:

> גט מעושה בישראל כשר ובגוים פסול ובגוים חובטין אותו ואומרים לו עשה מה שישראל אומרים ... לך וכשר:
>
> A get which is coerced by Jews is valid, by gentiles invalid. One which is [coerced by] gentiles who beat him and say to him: "Do what the Jewish [court] has told you," is valid.

The mishna appears straightforward and sensible: what a man does following coercion by a gentile court we do not recognise; what he does following coercion by a Jewish court we do. The only exception to this rule is if the gentile court is merely implementing the dictates of the Jewish court – in which case we relate to the man's action as though it were coerced by the Jewish court and recognise it as effective.[194]

We could understand the reasoning behind this mishna two ways – these two not necessarily being mutually exclusive. First, it might simply represent the desire of the halakha to preserve the unilateral jurisdiction of the Jewish courts; according to this reading, non-recognition of acts performed under the duress of independently acting gentile courts serves politically to undermine the legitimacy of the courts which provoke these acts. Additionally or alternatively, however, we could hypothesise that the mishna is motivated by distrust of the *judgement* of gentile courts. According to such a reading, gentile courts are not essentially illegitimate (their judgments are not invalid simply by dint of having emanated from a non-Jewish court); rather, their judgements are to be viewed with suspicion insofar as they are assumed to be fallible or corruptible in judgement,

[194] This in itself sheds an interesting light on the question of what constitutes an action in the rabbinic mind, or rather what the crucial facet of an action is. In this scenario, the gentile court is not understood to act in any meaningful sense (the function of a court is to judge, so that if a particular court does not judge but merely implements the decision of another court, it is not viewed as acting). It is, in this sense, like the *shaliach* who fulfils his *shlichut* (as opposed to one who fails to fulfil the *shlichut* but rather acts upon his own initiative, or indeed the *shaliach l'davar aveirah* – the agent appointed to carry out a sin – in both of which cases the agent is responsible for his own actions and so "owns" the act.) In this context, it is illuminating to note the derivation of the Hebrew expression for a coerced get: *get meuseh*. "*Meuseh*" is a passive intensive (*pu'al*) form of the verb ע-ש-ה, to do – so that the term literally denotes a get which is made to act upon [the husband] rather than the product of his (willing) action.

to a degree the Jewish court is not. We do not recognise acts performed under their duress because there is a likelihood (or at least a significant possibility) that the judgement which led to the duress is mistaken, or unjust.

The Gemara, in the opening of its discussion of the Mishna just quoted (Gittin 88b) seems to foreground concerns regarding the substance of the judgement according to which duress is mandated, introducing both the possibility that gentile courts may judge correctly and that Jewish courts may in fact judge incorrectly:

> פסול ופוסל; ובעובדי כוכבים, - כשר, שלא כדין -מר ר"נ אמר שמואל: גט המעושה בישראל, כדין א אפי' ריח הגט אין בו. - פסול ופוסל, שלא כדין -כדין
>
> Rav Nachman said in the name of Shmuel: a *get* which is rightfully coerced by Jews is valid; one not rightfully coerced is invalid, and also invalidates.[195] Whilst [a *get* which is coerced] by gentiles rightfully is invalid and invalidates; not rightfully, there is not even a hint of a *get* about it.

Rav Nachman in the name of Shmuel rules that a *get* given following coercion by a wrongly-judging (Jewish) *bet din* is ineffective to release the wife from the marriage. Thus, I would argue, Shmuel implies that the *get* which is a product of Jewish coercion is only contingently valid – its validity is dependent upon its having been justly (or correctly) coerced. Moreover, whilst (as we might expect from the mishna) the product of a gentile court's coercion can never be a valid *get*, Shmuel also makes a distinction between a scenario in which the gentile court compels correctly (in which case the *get*, though invalid, is understood to be a *get* for the purposes of disqualifying the woman from eating *teruma* just like the wrongly-coerced *get* of a Jewish court) and the "nothing" that happens when gentiles coerce according to their own rules and not according to halakha. Thus, the substance of the Judgment is introduced as, if not the defining issue in deciding the status of the *get*, then at least *a* crucial issue.

The *stamma* responds to this tradition with an objection which takes the plain meaning of the mishna at face value:

> מה נפשך? אי עובדי כוכבי' בני עשויי נינהו, איתכשורי נמי ליתכשר! אי לאו בני עשויי נינהו, מיפסל לא ליפסל.

[195] That is to say, it prevents the wife from marrying or remarrying a *cohen* and, according to Rashi, from being permitted to eat *teruma* as the "wife" of the *cohen* from whom she is not yet properly divorced.

> What is the reasoning behind this? If gentiles are able to coerce, then their valid actions [in rightfully coercing a *get*] should produce a valid *get*; if they are not able to coerce then their invalid [i.e. ineffective] actions should not produce a *get* which invalidates.

If gentiles may legitimately coerce, then surely when they coerce for good halakhic reasons, the ensuing *get* should be fully valid – this corresponds to my second hypothesis regarding the reasoning of the mishna: if the issue at stake is the correctness of the Judgment then it should not matter who has formed it; if a man is halakhically obligated to divorce his wife and does so, even under duress, and even if that duress does not emanate from a *bona fide bet din*, then his wife should be considered divorced. If, on the other hand there is something inherently illegitimate about gentiles' coercion (in line with my first reading of the mishna), then a *get* which ensues from their coercion (even if coercion was justified in all the circumstances) should have no effect whatsoever. In other words, the second option is that it is the legitimacy or otherwise of the coercing court which determines whether or not a *get* may be effective.

It is the latter understanding, of course, which would allow us to take the step advocated by Rabbis Uzziel, Berkovits *et al*. of creating a condition which allows the (or a) *bet din* to disband the marriage. This is dependent upon their understanding that the central objection of the *gedolei ha-dor* collated in *Eyn Tenai b'Nisuin* to the proposed French condition was the particular construction of that condition such that **civil** divorce, i.e. the act of the gentile courts in France, would cause the retroactive dissolution of the Jewish marriage. But this is a large assumption. Even where objections specifically draw attention to the fact that it is a gentile court whose writ causes the dissolution of the marriage, it is a false logic to claim that it is necessarily the case that were it not a gentile court whose decision precipitated the dissolution there would be no objection. That is to say: even if the fact that it is a gentile court upon whose decision the marriage termination is dependent is especially grievous in the eyes of those who oppose such a condition, the very fact that it is a third party (which would include even the most distinguished and irreproachable of *batei din*) whose will can terminate the marriage might be ample cause for objection. Thus it is important to note that neither option (total acceptance or total disqualification of the gentile court's "correct" judgement) is seen to be consistent with the tradition in the name of Shmuel.

The next attempt to understand Shmuel's statement is the recording of a statement by Rav Mesharshei:

> אמר רב משרשיא: דבר תורה גט מעושה בעובדי כוכבי' כשר, ומה טעם אמרו: פסול? שלא תהא כל אחת ואחת הולכת ותולה עצמה בעובד כוכבי'.
>
> Rav Mesharshei said: according to pure Torah law, a *get* coerced by gentiles is valid, and the reason why they said that it was invalid was so that each and every woman should not go attaching herself to gentiles and releasing herself from her husband.

Rav Mesharshei offers a synthesis of the two options: essentially, the efficacy of a *get* depends upon its having been rightfully coerced (I am assuming for the purposes of this chapter that Rav Mesharshei here does refer to a *get* rightfully coerced, and that he does not have an entirely different understanding of coercion – one which would lead to his validating even a *get* wrongfully coerced.) Thus, according to this view, a *get* coerced by a gentile court for good halakhic reasons should be valid. However, for reasons of polity (the reason given – in order that "each and every" woman should not go thrusting herself on the gentiles and releasing herself from her husband – is one which will be echoed later in the literature of the Gaonim as a justification for their waiver of the twelve month waiting period before a wife claiming "*mais alai*" may be divorced)[196] we choose not to honour the *get* coerced by the gentile court.

This synthesis of the two options is rejected by the Gemara as mistaken, and the final explanation offered is that a *get* rightfully coerced but by gentiles could be confused with a *get* rightfully coerced by a Jewish *bet din*, whereas a *get* wrongfully coerced by gentiles is never confused with a *get* rightfully coerced by a Jewish *bet din*. No further reasoning is given and, importantly, there is no discussion whatsoever of the statement that a *get* ***wrongfully*** coerced by a Jewish *bet din* is invalid, a statement which would not seem prima facie to be evident from the mishna and which is inconsistent with an interpretation which understands the sole factor at stake in determining validity to be the halakhic

[196] The exact substance of the Gaonic *takkana* and where precisely it departs from Talmudic precedent is, of course a matter of fierce debate. I understand Talmudic law (Ket.63b) to dictate coercion of a *get* in the case of a *moredet* who claims *"mais alai*" (as per Rambam's view) and the various Gaonic *takkanot* to cancel: (i) the twelve month waiting period, and (ii) the Talmudic stipulation that such a woman shall lose her entire *ketubah*. For a thorough analysis of the views on this sugya, cf. Avishalom Westreich: *Compelling a Divorce.* Cf. also Riskin: *Women and Jewish Divorce.*

status of the coercing *bet din*.

Before continuing, I should interrupt my reading to make two important points. First, the assumption behind the position that it is possible to confuse a rightfully *get* coerced (in circumstances which would halakhically warrant coercion) by a gentile court with a *get* rightfully coerced by a *bet din* can only be that what "Joe public" is assessing when he considers the validity of the coerced divorce is not the process by which the husband is forced to release his wife but rather the gravity of the domestic situation which led to the coercion. This has important consequences when we consider in what "will to divorce" actually consists: I shall be arguing that will to divorce is in fact will to terminate the marital relationship; not will to perform the act of *get*-giving. This understanding is entirely consistent with the narrative understanding of intentionality I outlined in chapter 1: intention relates primarily not to the act itself but to the meaning and consequences the actor attributes to or foresees from the act.

Secondly, (and this is a very obvious point): the mishna in Gittin 9:8 relates to coercion of a *get*; this part of my thesis, on the other hand, is concerned with different models of conditional marriage. In the scenario envisaged by the mishna in Gittin, the husband's will is coerced; he does not have a *free* choice; nonetheless he acts.[197] The coerced husband may be given very little "room for manoeuvre" but the very necessity of coercion constitutes an acknowledgement that it is ultimately the *husband*'s will, his action, that matters. To put it crassly, if it were correct to assert that the ultimate form of coercion were for the *beit din* itself to give a *get* as has been suggested to me,[198] then surely there should never be or have been need for the bloody and time-consuming process of coercion. Thus it is necessary to note that whilst this mishna and the subsequent discussion of the relative merits of gentile versus Jewish court coercion may be a useful background for a discussion of the merits of a condition which depends upon the decision of a *bet din* as opposed to one which depends upon the decision of a secular or gentile court, it is not a perfect precedent.

Probably the most famous and influential, if not authoritative, attempt to reconcile the fact that the statement "*rotsei ani*" may in certain circumstances be coerced

[197] Even if the full extent of his action is 'merely' to declare "*rotsei ani*", this clearly constitutes a speech-act.
[198] B.S. Jackson, private conversation.

with the fact that such a statement is only effective to produce a valid *get* if it reflects the will of the husband, is that of the Rambam which we analysed in a different context towards the end of chapter 3:[199]

The simplest, most frequently voiced, reading of this passage is along the lines of my first explanation of Gittin 9:8: there is a commandment to obey the dictates of the rabbinical authorities,[200] thus when the husband fulfils the dictates of the *bet din*, even though he does not actively wish to perform the specific action they require of him, he is glad in his heart and is able to "frame" his action as the action of his true self (the one who desires to be a good Jew) even whilst his emotional self (the self which he may understand, or be persuaded, is not under his own control but rather under that of the *yetser hara*) would wish to carry on resisting.[201] This is a satisfactory explanation of the sentence outlining the process occurring when a Jewish court (or "*bet din*" of laypeople) errs and mistakenly coerces a *get*: "because it was Jews who coerced him he did decide and did divorce." The *bet din* in this analysis represents to the husband either Torah or the community to which he wishes to continue to belong, and it is this representation which is all important in generating a sense of the husband's ownership of his action. He does not ever have to want to do the action (the giving of the *get*) in and of itself; he does not have to be persuaded that giving the *get* is the right, good and best thing for him to do; he simply has to want (or at

[199] *Hilkhot Gerushin* 2:20. (I have not reproduced the text here as it appears in its entirety on pp.107-109.)

[200] Derived from Deuteronomy 17:9 – which specifically extends Mosaic authority to Moses' successors in all generations. Whilst there may be dispute surrounding the extent of rabbinic authority following the breach in the line of "true" *semikha*, the very next part of the Gemara in Gittin with which we have been dealing (88b) asserts the authority of the present "lay" rabbis to coerce a *get* on the grounds that these "lay" rabbis are operating as the agents of previous generations of "true" rabbis.

[201] Popular language attests to the fact that it is possible, even common, to experience one's "emotional self" as being outside of one's own control; we speak of "uncontrollable passion", or "uncontrollable rage". We also speak of other people as being "out of control", a language which is most frequently, however, used of children (it is probably the definition of a temper tantrum). Peter D Kramer writes (*Listening to Prozac*, p.266): "Inner drive can lead to great accomplishments. But often "being driven" indicates ***compromised autonomy*** (as indicated by our use of the passive participle, "driven," as if by an alien force…" (emphasis mine). Note, importantly, that out-of-control-ness is associated primarily with those who are immature or who are suffering some degree of mental illness (the latter quote is in the context of a discussion of psychiatric medication). Thus what the Rambam evokes in his reference to the *yetser hara*, though never explicitly, is the implication that the *daat* – the capacity for autonomy – of those who refuse *beit din* orders to perform a *mitzvah* or refrain from an *aveira* is impaired. If this is indeed the case, then (given the halakha's demand for the cultivation of responsible, educated autonomy) we should not be surprised to find that the halakha is less concerned in these circumstances with respecting the free will of the person being coerced than with achieving the justice and communal cohesion desired by ethical and rationally autonomous persons.

least be assumed to want) to be a good Jew. It is important at the outset to note, however, that this reading does not satisfactorily explain the Rambam's description of what happens when gentiles coerce correctly: "If non-Jews of themselves compelled him until he wrote, in a case where the Law indicates that he should write [the *get*] then the *get* is flawed. Why is this *get* not void, as it was the product of compulsion… ? Because we do not talk of compulsion apart from one who was pressured and forced to do a thing which he is not commanded by the Torah to do … but in the case of one whose evil inclination drives him to avoid doing a *mitzvah* or to do a sin, and was beaten until he did the thing that he was obligated to do or to leave the thing that he was forbidden to do, this [later behaviour] is not compelled from him; rather [formerly] he compelled himself out of his bad judgement." Here, the Rambam does not focus on husband's desire to conform with the local community but rather on the husband's desire to divorce his wife when such is the right thing to do

It is an appreciation of this reasoning which, I suspect, leads the Hatam Sofer[202] to offer a radically different interpretation of the passage, even as it relates to a Jewish court:

> וטעמא אני אומר שהרי גט מעושה אפי' כדין ואומר רוצה אני מ"מ אינינו כשר אלא מטעם דאחז"ל היינו …מסתמא ניחא לי' לקיים דברי חכמים שאמרו לכופו להוציא ועל דרך שהסבי' הרמב"ם יפה כשברור גם להמגרש שהעישוי כדין אליבא דכ"ע א"כ מצוה לשמוע דברי חכמים אבל הכא יאמר נא א"ש דלמא מצוה לשמוע דברי המרדכיש מאן לימא לן שמצוה לשמוע דברי הרהמגר…
>
> The reason I say [that even if it is clear in Heaven that the halakha is like the Rosh, one may not coerce a *get* due to the opposing opinion of the Mordechai] is that a *get* which is coerced, even [if it is coerced] according to the halakha and he says "I agree" is nevertheless only valid for the reason that the Sages gave: that it is presumably agreeable to him to fulfil the words of the Sages who said one should force him to divorce, as the Rambam beautifully explained… [but] this is only when it is clear to **the divorcing husband** (my emphasis) that the coercion is in accordance with the Law according to every authority [for] if so it is a mitzvah to heed the words of the Sages. However, here the husband will say "who says it is a mitzvah to heed the words of the Rosh? Perhaps it is a mitzvah to heed the words of the Mordechai…

[202] *Responsa Hatam Sofer* III, EH I no.116.

In the Hatam Sofer's interpretation, the mitzvah *lishmoa b'divre hachamim* is transformed from a commandment to obey the *bet din* by dint of the fact that they are the representatives of the Jewish, Torah-observant community into a commandment basically to obey the halakha.[203] The husband is transformed from the *am ha-aretz* most frequently envisioned by halakhic sources dealing with recalcitrant husbands into a Jew of considerable education – one who knows how to distinguish between the views of the Rosh and the Mordekhai.[204] He is not expected or asked blindly to trust the wisdom, greater halakhic education and communal authority of the *bet din*, but rather is assumed to judge and evaluate their decisions. If he dissents from their judgment, he is under no obligation to subjugate his own will to theirs and thus their coercion has no greater validity than that of a gentile court (his wife remains a "definitely married woman in Biblical Law and not a questionable one").

There are numerous problems with this reading, not least the fact that if the husband could be assumed to wish to comply with the "true" halakha regardless of the views or actions of the *bet din* in front of him, then surely he should never require physical *kefiyah* – the moment he becomes aware of a certain and indisputable halakhic obligation to divorce his wife, his will should be to do so, and if his true רצון is influenced only by knowledge, then the Mishna should advocate intellectual persuasion, not physical beating. However, what is in my mind most interesting about this passage is the particular relationship between husband and *bet din* which it implies; in the description of the Hatam Sofer, the *bet din* has no judicial function whatsoever; their function is purely educative. Thus a fairly conservative *posek* is actually espousing a highly modern view of autonomy (at least, the autonomy of the husband).[205] Hierarchical boundaries

[203] This discussion might well influence our understanding of the *harhakot* of Rabbeinu Tam, offered as an alternative to *kefiyah*. The *harhakot* (as their name might suggest) serve to distance the husband from the community, thus impressing on him the seriousness with which his conduct is being taken, without causing any direct, physical pain. I would note that not all thinkers (either in the halakhic system or in contemporary debate) draw a firm distinction between the pressure of physical torment and the pressure of psychological torment or the induction of fear; it seems, however, that Rabbeinu Tam *is* inclined to draw such a distinction, and to classify non-physical means of coercion as falling short of full *kefiyah*. However, he assumes that even non-physical means will ultimately be effective because the fundamental requirement is for *persuasion* of the husband.

[204] Or, at least, one who is part of a Torah-knowledgeable community, who may find himself discussing the circumstances of his divorce with someone else who may be troubled by the opposing opinion of the Mordechai and share his qualms with the husband.

[205] This should not be surprising, given his characterisation of the husband as one who is highly educated in halakha. I argued in chapter 2 that it is *education* which produces *daat.* I would add here the obvious point that Torah education also marks the husband as "one of us", and whereas it

(between *bet din* and husband) are softened; Judaism may still require the abrogation of the individual's will in favour of the halakhic commandment, but that halakhic commandment is evaluated not in absolute terms ("even if in Heaven it is clear that the halakha is like the Rosh…"), nor in terms of acceptance of the given power structure (the fact that *dayanim* have presumably been appointed to office in acknowledgement of their superior wisdom and learning) but rather in terms of what cannot but be acknowledged as truth by the husband.

It is no accident that, in sharp contrast with this reticence of the Hatam Sofer to coerce a *get* in circumstances where some, or even a majority, of *poskim* advocate coercion, proposals which advocate the abrogation of the husband's power in favour of the *bet din* (conditions predicated on the ongoing agreement of the *bet din*, *harsh'ah* for a get to be enacted at the *bet din*'s behest and *hafka'ah*) have arisen in the context of a radically different political situation. Specifically, they rely on a particular understanding of the emergence of the Jewish state. The crucial issue raised by such proposals is one of the relationship of different *batei din* to one another and in particular the relationship of the Chief Rabbinate in Jerusalem to the *batei din* of the diaspora. Freiman[206] in his argument for the restitution of *hafka'ah* as a remedy argues that the Chief Rabbinate should achieve pre-eminence through being the natural location for the wisest scholars of the age. Menachem Elon[207] who also argues for the power to reinstate *hafka'ah* suggests that, even if we cannot assume the innate superiority of the Jerusalem Chief Rabbinate in terms of sagacity, that court has such a *political* advantage that it may exercise authority through influence and more effective two-way communication. Rav Uzziel's proposal for a condition which predicates the validity of the marriage upon ongoing *bet din* approval emanates from a

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is (relatively) easy for a court to reach a decision to override the autonomy of someone who is dissimilar to the judges themselves, it is considerably more radical to expect them to coerce someone whom they perceive as similar.

[206] Cf. *Seder Kiddushin v'Nisuin*, p.397, Freiman writes: "… the establishment of the highest religious institution in the Land of Israel, the place of the Jewish People's vitality, has restored to the People of Israel an authoritative religious center with authority throughout the Jewish World… This position gives to the *batey din* of the chief Rabbinate of the Land of Israel from a halakhic perspective also, power and authority which no *bet din* of the people of Israel had during the latter generations."

[207] Cf: *Mishpat ha'Ivri* vol.1 ch.20. Elon writes: "Just as the cause of [reticence to legislate] was the fact of scattering and dispersal, of local communal legislation and of the lack of a central Jewish authority, so the cause of reactivating legislative authority must issue from the new situation of ingathering and unification, of the formation of a central authority, which will bring about legislation for all Jewry. The Halakhic center which is in the Land of Israel is fit to be – and in fact is – the main center and holder of the halakhic hegemony over all the Jewish Diaspora.

similar period of, and attitude towards, Israeli history.

All this is to say that, until the Broyde proposal (3rd part), it was not to my knowledge ever suggested that just *any bet din* might consider itself to have the authority to annul, or otherwise (for example, through the action of a condition) bring to an end a particular marriage. Though the language of "sanhedrin" is never explicitly used, it is clear that this is the kind of authority that leading figures in and around the Chief Rabbinate are assuming is or shall in the future be held by that Rabbinate. Thus I would argue that the contrast which is being established in the writings of Berkovits *et al*. is not between *a* gentile court and *a* Jewish court, but rather between a gentile court which is perceived as the executive arm of the (French) state and "the"Jewish court.

I suggest, then, that it is all but impossible to understand calls for *bet din* power to terminate marriage without or specifically against the will of the husband outside of the context of radical Religious Zionism. However, there is one advocate who (though also clearly Religious Zionist in personal orientation) departs from the mold somewhat. It should in many ways be no surprise that Broyde, the youngest of the writers to advocate *bet din* power to disband marriage and an established figure within the largest Orthodox rabbinical caucus of the largest Jewish population ***outside*** of Eretz Israel, is the first to attempt to wrest such (putative) authority away from a central *bet din* and to "any Orthodox *beit din*". This is entirely consistent with the argument he advances in *Marriage, Divorce and the Abandoned Wife in Judaism* that Judaism is not monolithic, that a number of Jewish halakhic meta-communities are distinct and equal; and that marriage is, or ought to be (it is not always clear whether he has derived ought from is, or indeed assumed is from ought) or shall we say "might be", governed by these individual meta-communities. It is also wholly appropriate in the context of the United States' decentralised rabbinical system.

I am wholeheartedly in sympathy with this post-modern approach, except for one substantial caveat. Whilst globalism is not new – the halakha has mechanisms in many of its different areas for deciding how to deal with the problems inevitably engendered when a person uproots himself from one community and identifies with another community – the number of people who will cross from one

community to another in the course of their life is exponentially higher now than at any time in the past. This is especially the case, or is the case in a very particular way, when we are dealing with Broyde's religious meta-communities, which are not geographical but rather ideological. We simply cannot assume that a woman or man who contracts a marriage identifying with a particular religious Jewish community will identify with that same community at the point at which that marriage breaks down.[208] We cannot assume that a couple getting married will necessarily perceive themselves as coming from or belonging to the same community as one another, or even that a given person will identify exclusively with one community (I might be, for example, both Sephardi and Religious Zionist; or I might pray and educate my children within the black hat community but work at a Modern Orthodox university.) In an age where identity is understood less as an objective given and more as a subjective choice, it is not even easy to decide who should decide to which religious community, if any, I belong. Moreover, even if we argue that both partners to the marriage can and do bind themselves irrevocably at the time of the marriage to the religious community in which that marriage takes place,[209] we surely cannot assume that the woman's children from a second marriage (the ones whose status most crucially depends upon the legitimacy of the agreement) can be bound into affiliation to that same community.

Even if we could demand such consistency from the marriage partners and their descendants, I do not believe we can assume that the identities of and positions espoused by the communities themselves and their representative *batei din* do not shift over time. If one had even been tempted to make such a claim, a brief glance at the history of the current conversion crisis in Israel should be enough to reveal it as perilously naïve. Thus, unless *every* religious community agrees that *every bet din* has the authority to annul marriage, it would be an extraordinary risk for any *bet din* to take to actually annul a marriage.

[208] In fact, we might suspect that some degree of change in religious identity might in many cases accompany a marital breakdown, either as a precipitating factor or as a natural response.

[209] We will deal in the last section with the question of how far a man can bind his will in advance, in the form of a *harsha'ah*. To me it seems somewhat odd to be expending so much energy to save a woman from binding herself irrevocably to the marriage by means of requiring her partner to bind himself irrevocably to release her when she wills; to do so, moreover, by means of both partners' binding themselves irrevocably to a particular form of Jewish identification takes the matter to an extreme!

Of course, Broyde's tripartite agreement rests on the assumption that no *bet din* ever does have to annul a marriage, as the marriage self-destructs or is terminated through some other mechanism before it should ever come to the point of annulment. But this being the case, what force is there in a declaration that the members of a particular community accept the power of the *beit din* to annul when in fact the *beit din* never does annul and we can assume it never would because it (rightly) does not believe it has the undisputed power of annulment? (To utilise a disputed power would be to jeopardise not only a *beit din'*s own good standing in the eyes of other *batei din* but the status of the wife, her second husband and any future children.)

If the Hatam Sofer can raise the spectre of a husband's not accepting the *bet din*'s decision because he believes in his heart that the halakha should follow a different *rishon*, how much more can we assume that he will not accept one *bet din*'s decision if he knows that a few streets down the road, another *bet din* would *pasken* differently? The Broyde proposal would give the authority to implement a *harsha'ah* for a *get* to "every orthodox *bet din*". Unfortunately, there are few in the Orthodox world who will accept the *kashrut* certification of just "any orthodox *bet din*" – a situation which is reflective of precisely the communal diffusion which Broyde himself describes.[210]

Annulment

I am aware that in the foregoing I have elided the concepts of (i) condition which makes the validity of a marriage dependent upon *beit din* approval; (ii) irrevocable *harsha'ah* for a *get* which a *beit din* can implement as they see fit and (iii) annulment. Although there are important distinctions to be drawn between these proposals, philosophically I believe that they operate along a continuum in one spectrum. It is true that, whereas annulment represents the *beit din*'s actions specifically ***against*** the husband's will,[211] both the *harsha'ah* and the condition

[210] One hardly need mention that, contrary to the hopes and expectations of the illustrious writers we have seen, the standing of the Israeli Chief Rabbinate is in this matter no different from that of any other *bet din.*

[211] It is salutary to note that the only post-Talmudic instance of *hafka'ah* was its use by the Great Rabbis of Austria to allow wives who had been held captive by gentiles to return to their *cohen* husbands (Cf. Darkhei Mosh EH7). Advocates of retroactive *hafka'ah* frequently cite this precedent whilst opponents are quick to point out the legal flaw in the Rema's defence of this action (namely that a woman who is assumed to have had relations with a gentile is not permitted to marry a *cohen* even if she has not previously been married) cf. Shochetman: *Hafka'at Kiddushin*, pp. 382-385). Neither group tends to point out that this emergency ruling and its

require the husband to articulate his consent to divorce in advance. However, in the case of any arrangement whereby the *bet din* is given scope for exercising its discretion, the husband's consent is meaningful only if we posit that, at the inception of the marriage at least, he actually believes that the (or any) *bet din* will be better able to judge when his marriage should end than he himself will. This would seem to me an extraordinary assumption apart, arguably, from the context of the ultra-orthodox community – precisely the community least likely to agree to the principle of annulment of marriage on other grounds.

Kiddushin, as I have analysed it, depends upon the inability of any third party to dissolve a marriage. Unless my analysis is severely flawed, the only argument which could possibly validate any solution leaving the power of dissolution in the hands of the *bet din* must be philosophically speaking a variant of the argument for *hafka'ah.* Such an argument rests on an understanding that the maxim *kol d'mekadesh adaata d'rabbanan mekadesh*[212] refers not only to the act of *kinyan* (which can thus be undone if "*rabbanan*" are not satisfied that it was properly performed) but also to the ongoing conduct of the marriage. Eliav Shochetman[213] has laid out what I think is a convincing argument that in the Talmudic cases of *hafka'ah* in situations where there was no irregularity in the institution of the marriage but the problem rather related to a problem with the validity of a *get*, "*kol d'mekadesh…*" did not actually form a basis for the *hafka'ah* (to retroactively annul the marriage); rather the *hafka'ah* served to validate the *get* (annulling the marriage from the point of the giving of the *get*). Shochetman adduces evidence for the phrase "*kol d'mekadesh…* " in such instances' having been transferred from its occurrence in Yev.110a (the case of *kiddushin* in which the woman's consent was coerced, i.e. the inception of the marriage was itself problematic). This accords with (to my mind) a common sense view of the function of a legal body: the power of the court *qua* court may extend, variously, to validation, invalidation, legislation and punishment. It is salutary to note that in the Talmudic

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defence are palatable because and only because the *bet din*'s act of *hafka'ah* in this instance was not against the husband's will but rather supportive of it. Far from destabilising the institution of marriage, this particular act of *hafka'ah* supported and bolstered it. We saw in chapter 2 the *sugya* (Ket. 51b) in which Rava sought to permit married women who had been raped to return to their husbands. The *hafka'ah* of the *Gedolei Austraich* is merely the logical extension of that *sugya*, erasing the distinction between the wives of regular Israelites and the wives of *cohanim*. Once again, a grave error is – in my opinion – committed when halakhicists attempt to lift a legal precedent out of its narrative context. *Hafka'ah* changes its timbre and thus, I would argue, its halakhic acceptability, depending on whether it is used to enable a marriage or to disband it.

[212] Ket.3a; Gitt.33a; Gitt.73a.

[213] Cf. *Hafka'at Kiddushin* in *Shanaton ha'Mishpat ha'Ivri*, vol.20

cases *hafka'ah* seems to have been used, in fact, as punishment. This is most explicit in the rationale given for the annulment of the marriage in the abduction case at Naresh: "he acted inappropriately, therefore they acted inappropriately towards him" and in Rabban Shimon ben Gamliel's response (advocating the possibility of *hafka'ah*) to the husband's attempt to cancel his *shlichut* for a *get* contrary to an explicit *bet din* ruling – if the husband's cancellation should be effective in such a case, מה כוח בית דין יפה? – what does that say about the (lack of) power of the Rabbis to legislate a corrective to such cancellations by forbidding them? ***Hafka'ah has thus never been about restoring justice in individual cases, nor has it been primarily about relieving the suffering of individual women; rather, in its Talmudic (and only) incarnation, it was about making a very clear public statement regarding the ways the bet din will or will not tolerate men behaving and setting limits to men's ability to flout bet din authority.***

Hafka'ah is thus a political act, taking the form of an act of aggression against the husband. Whether it acts to validate a *get* which he declares invalid (in the case of the *shekhiv me'ra*, the man prevented from breaching a condition or the man who attempts to cancel a *shlichut*) or whether it retroactively renders his act of *kiddushin* invalid (because he has coerced a woman into acceptance or because he has "stolen" the girl who should have become another man's wife), it renders the man's acts or speech-acts meaningless and thus the man himself powerless.

Importantly, such annulment expresses its disapproval of the individual by stripping him of his autonomy (rendering him "incompetent"). It is not or should not be, remotely surprising that most *dayanim* are loath to emasculate other men in this manner – after all, as I argued in the last chapter, the whole edifice of marriage depends upon men viewing married women as taboo precisely because they, as husbands themselves, have a horror of other men interfering with their own wives. Nor is it surprising that, on the other hand, it is *lawyers* (albeit some of them male, and married!) who are the strongest advocates of *hafka'ah* and other mechanisms through which *judges* acquire the discretion to uphold or terminate marriages as, ultimately, they see fit.

End note to chapter 5

In this chapter, possibly in this thesis as a whole, I have presented dichotomies: either marriage is primarily a private matter, or it is primarily public; either the recalcitrant husband is an *am ha'aretz* who must be educated by physical beating or he is a *talmid hacham* who is under no obligation to be convinced even by the *bet din*; either it is the provenance of the Judgment according to which a husband is coerced into giving a *get* which is of paramount importance, or it is the substance of the Judgment, and the likelihood of its conformity to halakha. Such dichotomies make for the easiest analysis of halakhic sources – many of which present themselves in dialectical form. However, they can be criticised for being simplistic. Life, and halakhic *psak* are not simplistic – they are not an "either…or"; rather they are a perpetual attempt to find a balance two extremes, both of which are valid, to attain a "both…and".

Marriage is a private contract *and* a matter for public concern in which courts may, finally, interfere. Human autonomy is extremely important, but it is the community's right and duty to shape that autonomy and, in the interests of others, to place firm limits on it.

The chapter which follows explores the boundaries of private and public; it explores the struggle for control at the very limit of human autonomy and it asks how we might understand that struggle in the context of the giving of the *get*, why *kefiyah* is not *hafka'ah* and what the interaction between the *bet din* and the coerced husband achieves that may not be achieved in some of the proposed solutions to the problem of *get* recalcitrance.

Chapter 6 – Solutions to the problem of *get* recalcitrance (ii): Solutions which attempt to mold or bind the husband's will at the time of the marital breakdown

In the last chapter, I argued that in traditional *kinyan*-marriage the husband's is of necessity the only will which can effect the termination of the marriage. I argued that for a number of reasons, the nature of many of our Jewish communities today renders it no longer either halakhically necessary or preferable to insist that most marriages conform to this traditional *kinyan*. I argued that it is perfectly defensible to introduce a form of consecrated, monogamous union which the woman can leave at will, that I am considerably less convinced of the wisdom of introducing a form of union the power of whose dissolution is in the hands of a third party but that whatever form of non-*kinyan* union we might introduce, it is of paramount importance that it should be clearly understood that it is no way identical with *kinyan*. I have argued the latter so strongly because I believe that there are Jewish communities for whom the preferable form of monogamous union remains *kinyan* and it is overwhelmingly the sons of these communities who are represented in the membership of *batei din* worldwide. Because *kinyan* is the form of union best suited, at least for the present, to their own communities, it is easy for many *dayanim* to assume that it is the best and most Torah-congruent form of union for every Jewish couple. Therefore, if there is an option to interpret a particular union as a *kinyan*, they may well choose to do so.

There is another reason, however, for my insistence that non-*kinyan* unions should be clearly labelled as such and this is that I believe that the possibility for *kinyan* should continue to exist. Morally, I believe that a couple wishing to make an irrevocable commitment to one another should be allowed to do so. If a woman believes that the emotional and material security she obtains for herself and for her children through marriage to a man who cannot leave her without her consent (under the *herem d'Rabbeinu Gershom*) outweighs the possible pain of not being able to leave and marry another man might she one day prefer to, she should, I believe, be able to enter into such a binding relationship. To insist that all marriage should be governed by new rules (such as a *takkana* that there should be a condition in all marriages which allows either party to leave at will, or which predicates the continuance of the marriage on the ongoing approval of a *bet din*) attempts to render such an option unavailable and, in my view rightly, earns the antagonism of more conservative thinkers who would wish to see

Jewish communities exemplifying more family stability than our gentile counterparts.[214] Moreover, antagonising such thinkers (and *poskim*) elicits from them the knee-jerk reaction of taking their interpretation of *kinyan* to an extreme. Contemporary Israeli Chief Rabbinate *dayan* Rav Isirer, for example, cites the Maharashdam as an authority for allowing the husband who is entirely willing, and halakhically obliged to separate from his wife to impose many types of condition on his giving her a *get*.[215] This kind of interpretation depends on the very Western, individualist philosophy it claims to reject – relying, for example, on the "legalist" definition of intention as relating only to the act (in this case, the specific act of giving the *get*) rather than to the narrative (the man's clear will to be divorced from his wife). It assumes a definition of רצון which includes desire of the moment formed in a vacuum, evidencing no form of critical self-reflection and influenced little by communal mores – a hedonistic definition if ever there was one![216] However, its driving force is clearly a horror of allowing halakha to "give in" to pressures of Modernity in general and, specifically, feminism. Making an argument that we should introduce what is essentially a different form of marriage masquerading as *kinyan* and attempting to thrust this solution on a community which is not ready to accept it is, then, not only morally dubious; it is also counter-productive. It leads, in unfortunate cases, to extreme (I would argue, unhalakhic) interpretations of the halakha – interpretations which truly do discriminate against women, allowing them to become victims of abuse at the hands of husbands and ex-husbands who abuse them in marriage, control them through restrictive conditions on *gittin*, or attempt to profit from divorce by extortion.

I have argued throughout the last two chapters that the halakha is very clear: according to the Mishna, a man has the freedom to end his marriage, if it is a *kinyan*-type marriage, as and when he wills. This right was restricted by

[214] I do not mean to suggest that family stability is dependent upon or exclusively fostered by the inability of either party to leave at will. Clearly, many other educational and social factors influence how strong and stable the institution of marriage is in a particular community. A positive correlation between the availability of "no-fault" divorce in a society and its rate of marital breakdown may imply causation either way round (i.e. that the easy availability of divorce causes more frequent divorces, or that the prevalence of marital breakdown has caused pressure to be brought to bear on the legal system of the society to offer easier divorce). It is equally a possibility that both may have been "caused" by an amalgam of external influences – for example a society structured in such a way that it perceives no strong need (and so offers little support) for marriage.

[215] Cf. David Bass: "*Hatsavat tenaim al ydei ba'al hamehuyav b'get*", in *Techumin* 25, esp. pp.158 and 163.

[216] I shall analyse a parallel (in subject matter) responsum by Rav Moshe Feinstein in which he takes the contrary approach in the next chapter.

Rabbeinu Gershom to the effect that he may not necessarily end the marriage when he wills, but he may remain married for as long as he wills. This is not an argument for the halakha's condoning or refusing to intervene in marriages where most reasonable women would be unable to stand marriage to such a husband. In cases where the entire community accepts that it would be well-nigh impossible for any reasonable woman to have a loving and intimate relationship with her husband (in the Mishna's examples, because he is rendered through grave physical defect, illness or occupation sexually repulsive) he may be forced to release his wife.[217] The Mishna's list of repulsive features reflected Tannaitic society's consensus on defects with which a woman could not be expected to live. If we are forced to adopt the view that that (outdated) list is closed, then it is possible that an alternative mechanism (i.e. one which does not fall into the category of *kefiyah* classically defined)[218] can be found to enable the termination of *kinyan*-marriage in specific cases which reflect our own communal "red lines".[219] First, however, we must ascertain that we have such red lines.

I sincerely hope that the whole Jewish community, from Moscow to Haifa, from Boston to Bnei Brak, can agree that domestic violence constitutes a breach in marital trust such that a Jewish woman should not have to live with such a husband. Abandonment and persistent sexual infidelity both render a man by definition emotionally less- or un-available to his wife, and thus in my view indicate an unacceptable lack of commitment to the marital relationship, a lack of commitment which should render him a husband to whom a Jewish woman cannot be expected to continue being married.[220] However, before we could decide the halakha to ensure that such behaviours brought about the termination

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[217] The fact that the question is raised vis-à-vis a woman who willingly agrees to a marriage to such a man but then finds herself bound to a *yavam* with the same defect and is unwilling to have relations with him (Mishna Ket.7:10: the Sages rule that this is an acceptable plea) demonstrates that *some* women will always be willing to accept a husband with a defect that would render him insufferable to most women; and also that the existence of those few women (or of men with sufficient charm or other personal qualities to outweigh that defect) does not allow us to claim (using as a basis the maxim *tav l'meitav*) that any woman would be happier to be married to such a defective man than to be single. The fact that the Mishna provides for coercion in the case of those defects (despite the fact that particular women find them tolerable in particular men) proves that it is possible to classify a defect "intolerable to live with" without having to prove that no woman would be willing to live with it.

[218] For an authoritative and persuasive delineation of the view that most methods of coercion available to Israeli *batei din* today do not constitute *kefiyah* classically defined, see Daichovsky: "*Kefiyat ha-get b'zman ha-ze*" in *Heqrei halakha*, pp. 273-277.

[219] This, of course, is something no-one will do if all those who care about finding such halakhic solutions are wholly engaged in promoting non-*kinyan* marriage.

[220] The husband being halakhically obligated in regular sexual availability to his wife (cf. MKet.5:6).

or dissolution of the marriage, we would have to verify that we indeed do have consensus on these issues.[221]

It is only once we draw up a list of characteristics or behaviours that are as unacceptable in today's husband as was leprosy in a husband some 1800 years ago that we can start to look for means by which, in the absence of a mandate for physical *kefiyah*, we can coerce the will of the husband into giving a *get*. Assuming that communal authorities will ultimately be able and willing to agree such a list and as a preface to the attempt to develop and evaluate such a potential means of quasi-coercion, it is necessary to analyse precisely what happens in traditional, physical *kefiyah*. That is the aim of this present chapter.

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Let us revert for a moment to Harry Potter and the three unforgivable curses. The *Imperius* curse seeks to control the mind, the will and therethrough the actions of the person cursed whilst the *Cruciatus* curse inflicts pure physical suffering on the victim – it is a torturing curse. They would seem to be different: one operates upon the mind; the other upon the body. However, the witch who has most truly mastered the art of the *cruciatus* curse – Bellatrix Lestrange – has used it most powerfully in the novels' pre-history against the parents of one of Harry's classmates, Neville Longbottom. The Longbottoms were tortured by Bellatrix into insanity. Thus the mind/body distinction is blurred: through the mind, we may without doubt control the body; through the body, it may be that we can control, break into, or simply break, the mind.

Or not. The premise of arguments for the efficacy of torture must be that a delicate balance may be struck between affecting and destroying the mind. Pain must be able to affect the decision-making capacity (influencing the victim to decide to reveal what in "truth" he does not want to reveal, or to assent to an action to which in "truth" he does not wish to assent) without rendering him

[221] That we can reach such a consensus is far from being a foregone conclusion. In his article "Hafka'ah, Kefiyah, Tenaim" (op.cit.) Yehuda Abel discusses at some length an article by Rabbi David Bass which analyses conflicting views of the Rishonim on precisely this issue. (Section B:III-VIII) The argument of this chapter will be that when we are dealing with measures which fall short of being full *kefiyah* we can also consider applying them to conditions and situations falling outside the Mishnaic list of grounds for coercion. Thus we can agree not to tolerate certain defined behaviours without fearing that such an agreement will be mistakenly understood as a lenient position regarding the expansion of an arguably closed list.

incredible or implausible, without affecting his memory or any other facet of his ability to give reliable information, without eradicating the possibility of his being viewed as "owning" his own actions, in other words without removing his *דעת.*

I ought to clarify at the outset of this chapter that I do not necessarily believe the *kefiyah* advocated in particular circumstances by the sages of the Talmud to be equivalent to torture, with all the connotations that word carries in contemporary English. What I do claim is that there is a discussion extending from the ancient world to our own regarding the relationship between physical coercion and the autonomy of the individual and that this discussion is in Western culture best articulated as a discussion about the nature, purpose, permissibility and effectiveness of torture.

Torture is defined[222] as torment inflicted legitimately by, or with the assent of, a public authority. Its definition does not include pain inflicted for the purpose of punishment nor the gratuitous causation of pain for the sadistic pleasure of the torturer(s). It refers to torment inflicted with a particular end, understanding that end to be in the public interest – most frequently the production of a truth statement.

Kefiyah as the rabbis discuss it has a remarkably similar definition. From the Mishna on, as we have seen, halakhic authorities debate the question of what class of people may legitimately employ *kefiyah*,[223] and what the relationship of those people is to the *beit din*. That is to say, *kefiyah* is classically carried out by or at the behest of the body which represents communal authority. כופין is not a word used for a beating intended to be punitive (for which the most usual Hebrew word is מלקות or a derivative thereof). Clearly, the halakhic system cannot condone or, in fact, imagine torment inflicted out of spite or sadism. Thus כפיה is an instrument of legal governance which is teleological. Insofar as our mishna in Arakhin is typical, the desired end of *kefiyah*, like that of torture, is a (true?) statement: "כופין אותו עד שיאמר רוצה אני…" …*we/they* (legitimate rabbinic authority) coerce him *until* (purpose) *he says* (speech act) "I am willing" (statement which should be understood to be – in some sense – true).

[222] The following definition is loosely congruent with that offered (and argued) by Edward Peters in the Introduction to his book *Torture* (pp. 1-4).
[223] Cf. the argument about Jewish versus gentile courts which derives from Gittin 9:8, discussed in the previous chapter. See also Rambam (Gerushin ch.2) on the validity laypeople coercing the *get.*

Peters' book *Torture* opens with a series of definitions of that activity taken from Roman jurists through to contemporary lawyers. The most succinct is that of Azo: "Torture is the inquiry after truth by means of torment". That paradoxical relationship between torture and truth is the subject of a book by Page duBois which has influenced my thinking in this chapter considerably. Her argument, put very briefly, is that a culture which believes in the efficacy of torture is one which has a particular understanding of truth, according to which truth is located *outside* the person who seeks after it but may be hidden *inside* the body of another. Torture, according to this understanding, is the attempt by force to access the truth which has been hidden inside the other's body.

Du Bois' book concentrates on torture in the classical world. But our modern world struggles equally with the nature and value of torture. The primary justification for using "enhanced interrogation techniques" when dealing with suspected terrorists, for example, is the reiteration of that classical understanding of the relationship between torture and truth. The information such suspects may reveal under coercion, so the argument runs, will lead to our apprehension of other terrorists and the aversion of terrorist attacks. Truth may be obtained through torture. This assertion, however, has been contested at least since torture was used in the legal system of Athens: DuBois quotes Aristotle's *Rhetoric* as follows:[224]

> Torture is a kind of evidence, which appears trustworthy, because a sort of compulsion is attached to it. Nor is it difficult to see what may be said concerning it and by what arguments, if it is in our favour, we may exaggerate its importance by asserting that it is the only true kind of evidence; but if it is against us and in favour of our opponent, we can destroy its value by telling *the truth* about all kinds of torture generally; for those under compulsion are as likely to give false evidence as true, some being ready to endure everything rather than tell the truth, while others are equally ready to make false charges against others, in the hope of being sooner released from torture…"
>
> *Rhetoric* 1376b-1377a

In other words, the value of torture is in the eye of the beholder (or the barrister). "We" know that tortured evidence may not be reliable evidence but it is our job to convince those who do not share our knowledge that it *is* reliable evidence. (Interesting in this context is the fact that according to most legal systems in the developed world, a confession elicited under torture is inadmissible as evidence.

[224] Quoted in *Torture and Truth*, p.67, emphasis mine.

It might be argued that its inadmissibility arises as much from a tacit acknowledgement of the fact that it is untrustworthy as from the desire to delegitimise and disincentivise torture as a procedure.)

In contemporary society (I do not know how it was in the time of Aristotle!) lawyers are not always able to convince the laity that torture does indeed produce the gold standard of truth. A *New Yorker* article by Jane Mayer, "The Black Sites" quotes the (unconvinced) widow of the victim of a terrorist murder, confronted by the confession of terrorist suspect K.S.M. under duress to her husband's killing: "You need a procedure that will get the truth… An intelligence agency is not supposed to be above the law."

What interests me in this statement is the perception (moreover, the perception by someone who might have been presumed to have a strong emotional motivation to accept the confession as "true") that not only are such procedures as were used to extort the confession illegal (administered by those who act as though they are "above the law"), but they are ineffective: by implication, they are not "procedure[s] that will get the truth". If public perception is that torture does not produce the truth, then even the obvious political advantage (Aristotle's advice to the advocate to exaggerate the reliability of evidence obtained under compulsion) is lost. If torture is not nice and if it does not either in fact or in public perception reveal "the truth" there must surely be some other explanation for its persistence.

I have argued that both torture and *kefiyah* should be understood as distinct from punishment. However, punishment itself serves many purposes. Amongst these (at least in theory) are deterrence and prospective social control: threat of punishment procures compliance with laws, and public witness of, or at least knowledge of, punishment serves to reinforce societal norms. The public nature of punishment serves to generate feelings of both fear and validation – fear insofar as the witness can imagine him/herself being found to transgress the same or similar norms; validation insofar as (s)he accepts the justice of those norms. Du Bois stresses that torture is only performed on those who are "other". Not only is it only on others that it is permitted, it is only on others that it is effective. She quotes Antiphon:

> You do not need to be reminded, gentlemen, that the one occasion when

> compulsion is as absolute and as effective as is humanly possible, and when the rights of a case are ascertained thereby most surely and most certainly, arises when there is an abundance of witnesses, both slave and free, and it is possible to put pressure upon the free men by exacting an oath or word of honour, the most solemn and the most awful form of compulsion known to free men, and upon the slaves by other devices which will force them to tell the truth even if their revelations are bound to cost them their lives, as the compulsion of the moment has a stronger influence over each than the fate which he will suffer by compulsion afterwards.[225]

There are many features of this quotation which are relevant to my thesis, and we shall return to it shortly. At present, what I wish to point out is that torture serves to promote and strengthen social cohesion by reinforcing communal boundaries (in this case, the boundary between slave and free). It is salutary to note in this context that the Mishna advocates *kefiyah* to divorce in the case of leprosy – a disease which excludes its bearers from society – and that when Rabbeinu Tam attempts to replace *kefiyah* by non-physical coercion, he reaches immediately for "*harhakot*" – measures which will distance the husband from the Jewish community, placing him "outside". (It hardly needs mentioning that in its most recent foray into public view, torture has been used on proponents of the West's collective religious-ethnic Other: Islam.)

Torture is thus a way of affirming a community's cohesion by means of articulating the nature of its Other. The Other is (s)he who is not granted legal immunity from torture. But it is important that her non-immune status is not a product of mere chance – the Other is non-immune *because (s)he does not deserve to be immune.* DuBois points out that the legal immunity from torture afforded to (Greek, and later Roman) citizens from torture was premised not only upon an instinct for self-preservation, free men wishing to ensure that they could never find themselves in a situation where they could be tortured (in fact, the frequent occurrence of war ensured that those born free could easily be captured by Greek enemies and enslaved) but on a belief that the condition or nature of a slave is such that he cannot resist torture whereas the condition of a free man is that he can and does. To return to the quotation from Antiphon:

> … it is possible to put pressure upon the free men by exacting an oath or

[225] Antiphon 6.25, quoted in *Torture and Truth*, p.61.

> word of honour… and upon the slaves by other devices which will force them to tell the truth even if their revelations are bound to cost them their lives, as the compulsion of the moment has a stronger influence over each than the fate which he will suffer by compulsion afterwards.

The free man is honourable: his "word is [quite literally] his bond" – he is *compelled* by his own truthfulness. (It is no accident that some of the proposals we have seen which try to provide at the time of *kiddushin* for a *get* to be given in the event of marital breakdown attempt to bind the husband to the giving of that *get* – or non-revocation of the *shlichut* for the *get* – by means of an oath.[226] Such a proposal is derived from the halakha's view of the Jewish adult male as a direct correlate of the Greek freeman. He is essentially autonomous, immune from physical coercion but bound by his own word.) The man who "gives in" to compulsion, on the other hand – the slave – is portrayed by Antiphon as a man for whom the present moment is a stronger force than the longer-term benefit which he might derive from not giving in (the preservation of his life). That is, the act of "giving in" is one of surrendering oneself to feeling, here located in the body. Whilst thought can encompass the passage of time, feeling is forever in the here and now. (I wrote in chapter two about the crucial importance of learning to delay gratification both for children's actual moral development, and for society's inclination to view them as rational agents.) Feeling, the desire of the moment, is to be distinguished from reasoned will (settled intention to act according to a particular disposition). Torture, in this quote from Antiphon, has power only over the body, the present, the *now*. Through the body it influences the mind insofar as, and only insofar as, the person being tortured has not reached the stage of full rationality – that is to say (in the language of the sources with which we are primarily concerned) insofar as he is not entirely *bar daat*. This, of course, is precisely Rava's stance in the *sugya* I analysed in depth in chapter 2.

Antiphon's thesis is even more baldly stated by Aristotle, who writes (*Politics* 1254b): "a slave… is capable of belonging to another (and that is why he does so belong) and… participates in reason *so far as to apprehend it but not to possess*

[226] Such, for example, is the case in the Broyde proposal, to which I devoted considerable attention in the last chapter. The first proposal according to which a man would obligate himself through a vow at the time of his wedding to divorce his wife if she receives a civil divorce was that of R. David Tzvi Hoffman in Shut Melamed Le-Ho'il 3:22.

it." (italics mine).[227] In halakha, the slave, like the woman, inhabits a grey area between disqualification from *mitzvah*-observance and full obligation – a position of semi-responsibility reflecting partial, or limited, *דעת*. (Once again, we need not of course accept Aristotle's metaphysical assertion that a slave is slavish by nature in order to concur that the limited scope for action and responsibility accorded to the slave stunts his development or sustenance as a fully rational agent.) This partial *daat* is characterised not by irrationality but by semi-rationality: the slave does "participate" in reason – he acknowledges it; however he does not "possess" it. This is a fascinating and revealing use of language: the slave does not "possess" reason, because he cannot "possess" himself; his lack of possession is intimately connected to his own state of being "possessed". In contemporary parlance we talk of self-control as "self-mastery". That mastery of self is, so it would seem from this excerpt from Aristotle, mastery of reason – but cannot be achieved without mastery of (freedom of) action. I am master of my own actions only if I am master of my own mind; but if I may not be master of my own actions, I cannot gain mastery of my own mind.

What light does this discussion shed on the nature of *kefiyah*? I would argue that the coerced husband, whilst he has the status of slave insofar as a serious flaw in his bodily integrity or situation has rendered him "other" to the main body of the Jewish community and thus liable to physical compulsion, still retains his metaphysical status of free man. This enables us to take his רוצה אני as a serious and truthful statement – because as a free and rational man he is sufficiently master of himself to have been able to resist *kefiyah* had he truly so willed (this is of course entirely consistent with the Rambam's understanding that he does not truly will his resistance – the *yester hara* folds under coercion; the autonomous man does not). This is why I have referred to the product of *kefiyah* throughout this thesis as "coerced *consent*" and have repeatedly insisted that such coerced consent is a form of consent. The choice between submitting to ongoing torture and assenting to an act which one does not will, I argue, whilst it may be a rather limited choice is nonetheless a choice. The availability of martyrdom rests on the fact that a person may choose to die rather than be beaten into submission.

The foregoing explains, I hope, my hesitation to embrace solutions to the problem of *get* recalcitrance which seek to do away altogether with the husband's consent

[227] Quoted in *Torture and Truth*, p.40.

to divorce on the grounds that in extreme situations (those which warrant *kefiyah*) the halakha "relieves" the husband of his obligation (ability) to make the decision whether or not to divorce his wife. My argument has been that the halakha even in those most extreme situations still requires the husband to make that decision, albeit that it permits the exertion of pressure to encourage him to decide in the affirmative. Useful here might be the distinction of the Helkat Yoav[228] between the level of will or intentionality required in, for example, a sale (where there are two parties to the transaction and the *gemirat daat* of both is required) and that required for the giving of a gift, or a *get* (where the will – *ratson* – of only one is required). In the latter case it is רצון גמור – full will – which is required[229] but in the case of legitimate *kefiyah*, the Helkat Yoav asserts, the will of the *bet din* supplies part of the necessary will. Note, however: the will of the *bet din* can only supply part of the necessary will; it cannot supply the totality.

The thrust of my argument in chapter two was that between the period of the *Tannaim* and that of the *Rishonim*, the status of the husband underwent a substantial change. Whilst there are Rishonim who still view the husband as a free man in the classical tradition and thus believe that his coerced רוצה אני must be indicative of a true internal will (I analysed Rambam, Rashbam and Ramban), there are also those who are less concerned to preserve his autonomy, who, we might say, view his coerced consent as more similar to the coerced evidence of the slave – produced by the act of will of the *bet din*, not that of the husband. It is no coincidence that this change is roughly contemporaneous with the tightening of the grounds for *kefiyah:* so long as the action of the (coerced) husband continues to be viewed as his autonomous action, one may find more extensive grounds for coercion to be legitimate; when the husband (who we now recognise does not necessarily have the Torah education or physical and spiritual resilience that might render him a truly "free" man in the classical sense) is viewed as having had no choice about assenting to the *get,* force must be kept at an absolute minimum. Coerced consent (understood as "highly pressured" consent rather than "forced" consent) is then re-introduced through actions that fall short of full kefiyah – namely *harhakot*. Even prior to Rabbeinu Tam's decisive overhaul of the halakha in this area, the *Rishonim* are simultaneously conducting discussions over whether the Mishnaic grounds for *kefiyah* can be broadened to

[228] Cited in Gertner: *Kefiyah b'Get* pp.465b-466a.
[229] Cf. also Tosafot Ket. 47b s.v. *shelo* where the distinction is drawn between רצון גדול and רצון פשוט.

include grounds "similar" to those listed in Ket.7:10 *and* over whether psychological coercion "counts" as *kefiyah*.[230] My contention is that these are not two separate discussions but rather two interrelated parts of one continuing discussion. We might note that not only is the discussion over the "grey" areas of coercion parallel to contemporary debate over the boundaries of the definition of torture, it also recalls the legal doctrine of necessity or duress: Jerome Hall[231]. after summarising various Judgments relating to the validity or otherwise of pleas of necessity writes: "The above decisions suggest the following essential conditions of the doctrine of teleological necessity: (1) the harm, to be justified, must have been committed under pressure of *physical* forces…" (p.426, my italics). He goes on to clarify that "Justifiable action taken in states of necessity is not regarded as coerced." (p.436). That is to say, opting for a "necessary" (and illegal) action is considered to be an entirely rational decision. Aristotle's free man, Judaism's Rabbi Akiva, the Crucible's Giles Cory[232] were men of (to revert to Haworth's term) "radical autonomy". If we accept that the man in the street is not now generally expected to be radically autonomous, we also may accept that he is not expected to be able to resist pain.[233] Thus it makes sense to draw precisely the distinction between physical and psychological coercion that some of the sources as well as the English legal system draws.[234]

We have seen, then, that parallel with the discussion of what grounds for *kefiyah* are legitimate there is a discussion of what forms of *kefiyah* may be legitimate for cases which fall somewhat outside the strictly defined grounds but which clearly call for action on the part of the community to encourage the husband to release his wife. In our contemporary situation, actual, physical *kefiyah* is almost never employed, the (narrowly defined) Mishnaic grounds for *kefiyah* almost never arise and so most practical discussion is confined on the one hand to coercive actions which fall short of physical beating (in Israel, economic penalties, social disabilities and imprisonment) and on the other to grounds which may be classed

[230] For the latter, see the discussion of the Bet Yosef on EH134 (and the summary of various positions in Breitowitz: *Between Civil and Religious Law*, pp.20-40.
[231] *General Principles of Criminal Law*, cf. the chapter on Necessity and Coercion.
[232] Cf. Arthur Miller: *The Crucible*, based on the narratives of the Salem witch trials.
[233] One might argue that a programme such as the SERE programme of the US military which aims to teach elite soldiers to resist torture is attempting precisely to produce the capacity for "radical autonomy". What such autonomy might mean in the context of an army would be a fascinating discussion, alas beyond the scope of this thesis.
[234] However, one should also note that fear (psychological torture) has the same physical effect on the brain as pain, raising levels of cortisol and thus arguably clouding rational judgement. Thus the difference is only one of degree.

as *amatla* or *amatla mevoreret* but not as classic grounds for *kefiyah*.

Before closing with a discussion of mechanisms which would provide for a pressured (not forced) *get* in the kind of situations I have raised at the beginning of this chapter – situations of domestic violence, rape within marriage, emotional abuse, infidelity and abandonment – let me just revise this argument briefly and concisely, as it is the foundation of the proposal which will follow:

The Mishna insofar as it views the husband as a free man believes that he has or should have the strength of character to resist *kefiyah* if his will to remain married is sufficiently strong. Whilst some *rishonim* persist in this characterisation of the husband, others understand his autonomy to be weaker. According to this second view, *kefiyah* does not merely pressure the man into making a particular choice; it essentially robs him of all choice. It is this second view which severely limits the situations in which *kefiyah* may legitimately be employed. At the same time, however, it introduces measures which fall short of physical coercion but which apply strong psychological (and economic) pressure on the husband. These measures may be used in a broader range of cases. Whilst some *poskim* continue to view measures less severe than physical beating as something other than *kefiyah*, others move to classify almost all methods of pressuring the husband as coercion, rendering the resultant get a *get meuseh*. Arguments in favour of a pre-nuptial agreement (PNA) garner wide (not ubiquitous) halakhic support because of a distinction (having its roots in the Gemara) between pressure applied by others and pressure applied by oneself to perform an action.[235] In my analysis of the opinions of the Rashba, R. Yitzhak Colon and Rav Maimon Noar at the end of chapter 4, I argued that such a distinction is indeed observed and the apparent disagreement between the Rashba and Rav Maimon Noar arises not from a fundamental disagreement as to whether self-coercion is indeed permissible but from the specifics of the case, in particular whether the self-coercion is perceived to have been generated by others. Illegitimate self-coercion, it turns out, is that which can be perceived as a form of indirect coercion by others.

Those who do not recognise the validity of PNAs (leaving aside the question of their efficacy, which does not concern me here) do so for two reasons: One is

that *rishonim* such as R. Yosef Kolon ruled that a husband may understandably change his mind regarding his commitment to divorce his wife. Accordingly, even monetary pressure on him to divorce her is a form of coercion. The other reason is that even if we accept that monetary self-coercion is valid, in this case it is invalid on the grounds of *asmakhta* – there is no *gemirat daat* on the part of the husband when he signs the document because there can be no serious intention to commit to an agreement which he does not believe in his heart will ever be required.[236] The *asmakhta* argument is similar to an argument raised against conditional marriage or *harsha'ah* for a get by Rav Kotler.[237] Rav Kotler argues that such a condition or harsha'ah is invalid on the grounds of *bereira*: the husband cannot seriously enter into an agreement which has no defined parameters, under which he may lose his "assets" (whether his money or his wife) in circumstances entirely unforeseeable and unpredictable. This is precisely my own argument against a condition or *harsha'ah* which predicates the continuance of the marriage on the ongoing will of the *bet din*: insofar as the *bet din* has discretion to declare his marriage null and void (through whatever mechanism), the husband cannot in any meaningful way "acquire" a wife. Imagine children at an old-fashioned, tyranically-run boarding school attempting to trade or sell coveted objects. Now imagine that every other week, new staff would be hired and fired and the school rules would change: one week marbles would be permitted, chocolates not; the next week both marbles and chocolates would be banned, ecstacy would be permitted; the next, all class A drugs would be off limits, but a roaring trade in cigarettes and nail varnish could be carried on. It would be, I suspect, hard for pupils to acquire a sense of stability, not to mention trust in the institution of private property. The market value of all goods not for immediate consumption would presumably drop (after all, any object might be confiscated at any moment) and students might react in a variety of unhealthy ways to intolerable *and unpredictable* levels of interference: perhaps sinking into apathy, or being doubly possessive in their hoarding of goods against other children.

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[235] Bava Batra 48a, cf. ch. 2, pp.91-92.

[236] For a thorough analysis of this problem, cf. Breitowitz, *Between Civil and Religoius Law*, pp.107-144.

There is a fly in the (probably contraband) ointment of my argument. The reader is no doubt baulking at my comparison of *batei din* to tyrannical schoolmasters subject to the vagaries of their passing desires. *Dayanim*, surely, are dependable, predictable, masters of their own responsible will; after all, they are the Torah-educated descendants of the Sages whose will was well-formed – the free-men of Judaism. This trust in both the institution and the post-holders of the Orthodox Rabbinate is the foundation upon which such solutions as I analysed in chapter 5 (ones which propose mechanisms by which the *bet din* is empowered to dissolve marriages at its discretion) are based. It is a trust which should be well-founded; as a Jewish community we are in deep trouble if we cannot respect and depend upon our rabbis and *dayanim*. We are in deep trouble if the "halakhic response" to such fundamental and devastating problems as under what circumstances *shalom bayit* should be fostered and under what circumstances a marriage is abusive and should be terminated is unpredictable, if it changes from moment to moment. After all, according to my reading in chapter 5, one of the bases upon which the validity of a *get* coerced by a Jewish *beit din* is upheld and the validity of one coerced by a gentile court questioned is that the Jewish *bet din* can be assumed to be wiser, more committed to the standards of *halakha* and less corruptible than its gentile counterpart.

If it is judged that the central institutions of Orthodoxy are essentially healthy and may be trusted to wisely, compassionately and disinterestedly make the most far-reaching decisions in the lives of couples in crisis *and*, moreover, if it may be assumed that most husbands entering into marriages (and not just the halakhic scholars who make such proposals) share this trust then mechanisms which give *bet din* total discretion to decide when a marriage should continue and when it should be dissolved are philosophically and halakhically sound.

However, feminists argue that not only cognitive theories but also emotional experiences validly enter our moral decision-making process.[238] In the earlier part of this thesis, I took just such a feminist stance, arguing against the exclusion of either rationality or emotionality from a firm and halakhically-grounded understanding of human will. I am a female convert. My own experience, lived through and reflected upon, prevents me from advocating the kind of solutions I described above. I cannot place or advocate that there be placed such far-

[237] Cf. Rav Aharon Kotler: *Mishnat Rabi Aharon*, *siman* 60, pp.90-91.

reaching trust in the institution of the rabbinate. My experience is that of the child in the playground: what is permitted today is prohibited tomorrow. What was mine yesterday is gone today.

[238] Cf. the argument of Gilligan in *In a Different Voice*.

Chapter 7 – Conclusion

A responsum of Rav Moshe Feinstein[239] gives a ruling in a case where a man has divorced his wife according to halakha, but a question is subsequently raised because, when asked whether "of his own free will" he has come to divorce his wife, he responds that it is not "of his own free will" but rather because he has been persuaded that there is no hope of her returning to live with him as his loving wife. Moreover, whilst he is reconciled to being divorced from his wife, he would have preferred to make conditions on the *get* and demanded more from his wife.

This responsum touches on two of the major points of my thesis: first, whether "of one's free will" must mean "in accordance with one's spontaneous desire" and second, whether a man who consents to divorce his wife must consent unconditionally to the *get*, or rather to the divorce. (This latter is a concretisation of the question that I analysed in the Introduction: whether the halakha should be understood as a legal system, in which case it might be valid to argue that it is the act in itself – in this case, the giving of the *get* – which must be defined as intentional or not; or whether it might be understood as a narrative ethical system, in which case it would be the "story of the *get*" – the story embedded in Deuteronomy 24i-ii – and the *consequences* of the husband's giving of the *get*, i.e. his final separation from his wife, which must be intended.)

Rav Feinstein's responsum answers both of these questions in a manner entirely consistent with the understanding I have outlined in this thesis. This assertion is not to claim that my understanding is "the correct" one, corroborated by Rav Feinstein's responsum. It is not, as I have tried to acknowledge, the only one. It is, however, one that hangs together; it makes sense. I claim that it is valid.

Rav Moshe Feinstein writes:

> עצמו רצון מצד שאינו רק מקיים היה נמי לעבור ירא היה שלא בעלמא הסכם שאף דבריו פירוש נוטה שזה הגט וליתן הסכמתו לקיים רוצה הוא שיסכים עליו שהשפיעו מפני אלא ,וויל פרי קורא שזה ,ממש אחרים השפעת מחמת או לה שנאתו מחמת מעצמו רוצה אם לנו דמה הגט לכשרות רצון נחשב

[239] EH Part 3, no.44.

> The explanation of his words is that even if there was any kind of an agreement at all which he would not be afraid to break, even then he would have upheld it; only that it was not precisely of his own accord (*ratson*), which would be called "free will", but rather because [others] influenced him to agree and that is why he wants to fulfil his agreement and give the *get* – and this is considered will (*ratson*) for the validation of a *get* - for what does it concern us if he wants [it] of his own accord out of his hatred for her or because of the influence of others?

In other words, as I argued in the previous chapter, a man remains free despite the efforts of others to influence his decision one way or another. Autonomy, as we saw in Haworth's definition thereof in chapter 3 (p.75), requires that a man be competent to act, free from being unduly influenced by others and free from being over-controlled by his unregulated emotional life. Moreover, if a man is capable of being autonomous, we assume that all his actions are autonomous (the argument of Rava, explored in ch.2). Thus the fact that the man's will to divorce has not been formed in a vacuum does not invalidate its being *his* will.

In answer to my next question – precisely what it is that the man must consent to do: give the *get* or divorce his wife – Rav Moshe Feinstein writes:

> השיב שהיה מגרשה גם בעצמו אבל יכול להיות שהיה דורש איזה סדורים בקשר לחינוך הילדים, … הרי נמצא שבעצם הגירושין הוא רוצה ממש בעצמו רק שהיה רוצה להשיג בעד הגירושין איזה דבר שבאופן זה אף אם הסעטעלמענט נימא שהוא אנוס ואף בכפיה ממש, נמצא שאין הכפיה על רצון … ין, אלא שהגירושין לא יהיו למשכון להשיג איזה דבר ממנה, שיש טעם גדול שאין לזה דין הגירוש אונס לפסול הגט…
>
> … he replied that he would have divorced her also of his own accord, but it might have been that he would have demanded some arrangements in connection with the education of the children. Thus it turns out that the divorce itself he really want[ed] of his own accord, [the problem is] merely that he wanted to obtain by means of the divorce some other thing… and in this case, even if we should say that the settlement constituted real coercion, there was no coercion of the will to divorce, rather [simply coercion that] the divorce would not be a tool with which to obtain something from [the wife], about which there is good reason [to argue[that this is not considered coercion to invalidate the *get*…

Thus he argues that if a husband is willing to divorce his wife, but wants to retain the *get* as a bargaining chip, then even if he is forced to give up what he wanted to achieve by means of the *get*, his willingness to ***divorce*** renders the *get* valid. That is to say: the choice which falls to the husband in *kinyan*-marriage to make is the choice whether or not to remain in a marital relationship with his wife. This

is entirely different from asserting that he has an absolute choice at any given moment whether or not to give her a *get*. It is, I would argue, the (mis)understanding of the halakhic system as a "purely" legal system which has reduced the *get*-giving to a formal, legal act and the husband's right of refusal to a "legal" power (the power to authorise or not the writing and giving of the *get* per se) rather than a social one (the power to remain married to his wife). Actions, however (as I argued in the Introduction), even legal actions, do not like a vacuum – which serves ultimately to render them devoid of all meaning and significance – and so tend to create their own contexts. The *get* has thus in recent years taken on a new significance in a story that is utterly other and alien to the halakhic story of divorce (rooted in Deut.24:1-ii). In this new story, the *get* is again a means to an end but instead of its end being a separation from a woman the husband has found fault with, it has become the extortion of privileges, behaviours and economic wealth from a wife from whom the husband is, often, already to all intents and purposes separated. Formally-legally, of course, we may argue (as I noted above in relation to the decision of Rav Isirer) that the husband is within his rights to use the *get* as a tool of extortion in this manner. When we understand that the story element of the halakha is as normative as the legislative element, however, it becomes clear that such a use of the *get* is illegitimate, as is expressed by this *responsum* of Rav Moshe Feinstein.

I repeat: I do not believe this thesis has offered the only way of reading and understanding the halakhic sources relating to the will of the husband to divorce his wife. Clearly, there are many sources I have not dealt with here and other valid interpretations of the sources I have dealt with. Moreover, there is no one halakhic understanding of either will or marriage. My purpose has been to try to reach a deeper understanding of what men, women, *poskim* and *dayanim* mean when they talk about the problems inherent in *kinyan* marriage and its dissolution, one which will hopefully prevent us from merely taking up entrenched positions which go no further towards alleviating the problems of *iggun.*

To summarise my thesis, then: I argued first for a particular understanding of halakha – the term I would finally use being a system of "teleological narrative ethics". I then argued that whilst רצון is used in a variety of ways in the Mishna, I believe the best translation of the word in its occurence in Yevamot 14:1 is "will" (the husband must release his wife "willingly"). I argued that "will" in the view of

the Sages consisted in an educated and autonomously arrived at balance of cognition and affect – that they did not observe the complete head/heart distinction we might be inclined to in a rationalist world. In chapter 4, I offered a brief analysis of the traditional form of halakhic marriage – what I term *kinyan* marriage. I suggested that the very essence and raison d'etre of this form of marriage was its inviolability by a third party (which necessitates the inability of the wife to leave at will). I went on in chapter 5 to offer some reasons why for many parts of the Jewish community today such a form of marriage is inappropriate and to suggest that it is entirely halakhically and morally valid to encourage the development of forms of marriage which are not *kinyan* for these sub-communities. I emphasised that these forms of marriage should be distinct from and not confusable with *kinyan*, an objective which I believe can most easily be achieved by making their dissolution free from the requirement for a *get*. I outlined the reasons for my belief that conditional marriage is the most dangerous of options for non-*kinyan* marriage and suggested that if, notwithstanding, a condition is believed to be the best mechanism for preventing *get* recalcitrance, it should be one which provides the means for either the husband or the wife to leave at will – not one which predicates the continuation of the marriage on the will of a *bet din*. I further suggested that, because the *get* has its roots so strongly in the concept of *kinyan* it confuses the issue still further for provision for a *get* to be included in a mechanism which is based upon a condition. [240]

In the last chapter, I acknowledged that for some parts of the Jewish community, *kinyan*-marriage retains advantages. In my brief analysis of the relationship between torture and truth-utterance, I laid out an understanding of the way in which the shifting relationship between *kefiyah* and the husband's free will in the divorce process enabled different *poskim* to balance the public good (including the welfare of the wife) with respect for the husband's autonomy. I argued that upholding *kinyan*-marriage and limiting the ability of either partner to leave at will in no way necessitates the attempt to sustain all marriages in all circumstances. Specifically, I argued that abuse, physical or emotional, should not be halakhically

[240] If, for reasons of consistency with the tradition, a condition is found to be the preferred option and if, moreover, it is deemed necessary to combine it with a provision for a *get* then I would suggest that the least problematic solution currently proposed is that of Rav Elisha Ancselovits in which the condition is made by the woman alone and the *harsha'ah* for a *get* comes into effect one month earlier than the condition so that the husband can be deemed to intend the *harsha'ah* alone rather than attempting to convince the witnesses and the community that he is entering into two different forms of marriage (*kinyan* and non-*kinyan*) simultaneously. (Ancselovits' proposal is held by the Centre for Women's Justice in Jerusalem but is unpublished.)

tolerated. Thus, whilst (as I have shown) advocating the power of annulment or another power which would terminate a marriage at the discretion of the *bet din* is unhalakhic (and, I would argue, unwise) I would strongly urge the development of a mechanism by which *kinyan* marriage may be dissolved *in particular circumstances, delineated by rabbinic authorities, agreed by the entire community and known in advance of the marriage by the husband.* A condition would, I believe serve this purpose – and would not raise the problem of *bereira* as the husband would know in advance precisely what he was agreeing to – moreover, the condition could be constructed in such a manner that its operation was entirely dependent upon the behaviour, actions or inaction of the husband ("If *I* am found by the court to have been abusive, if *I* am sexually unfaithful or desert you…").[241] However, as the community for which *kinyan* marriage is most appropriate is that which historically has rejected all proposals for a condition of any type in marriage, I would suggest instead a *harsha'ah* for a *get* which the husband agrees be given in the stipulated circumstances.

I have suggested that such a *harsha'ah* does not raise the same problems of *bereira* as would be raised by a *harsha'ah* or condition which would identify the necessary will to dissolve the marriage as that either of the wife or of the *bet din*. According to my suggested model, the husband would retain absolute control over whether or not his marriage continued. Indeed, if a wife-batterer or serial philanderer has no control over these actions, then as a community I would suggest we have no obligation to recognise his autonomy (autonomy, as we have seen is, in the Jewish context, a product of a Torah education and demands self-control as much as resilience to control by others). On the other hand, a person who wilfully (i.e. with full control of himself) engages in actions decried by the halakha and the halakhically observant community, puts himself outside the boundaries of that community and thus renders himself liable to their coercion (torture, the denial of autonomy, is carried out on one who is, or has made himself, Other). Thus if we have communal agreement to behaviours which will not be tolerated in marriage and which are uncontestable grounds for divorce; if these "red lines" are communally acknowledged and no-one who marries can claim ignorance of them; if the husband signs in advance a *harsha'ah* for a *get* to be given in such circumstances then there is little room for argument that the

[241] Of course, the *bet din* still retains a power in this type of condition – but its power is limited to that of ascertaining *facts*: deciding whether or not the husband has been abusive, for instance (with

husband can in halakha and truth oppose his will to the giving of the get at such time as he himself performs such actions as will trigger that giving.

Will, as I have argued throughout this thesis, is not synonymous with desire. The רצון of the Misha in Yev.14:1 was understood in the Gemara and in the commentaries of the Rishonim, correctly in my opinion, to denote will. Desire may be the fleeting impulse of the moment; will combines affective, volitive and cognitive in a conscious and conscientious decision to act. Will is the product of a person's self-development and his education. It is a dynamic process, not a static state. Autonomy requires us to be as free from our own unreflected-upon desires as from outside coercion. Conversely, it requires us to be open to the guidance of others as much as to our own "still small voice". To suggest that the halakha demands that we honour the whims and desires of a man who is a slave to his own passion is to do a disservice to the halakha and its ideal of autonomy. To seek to pander to his immature and irresponsible desire to retain possession of a wife with whom he has no true will to remain in a marital relationship makes a mockery of halakha. To seek to override a man's will when he truly wishes to remain married to the "wife of his youth", however, is unhalakhic.

The halakhot of *kinyan* marriage vest enormous power in the husband on the understanding that he is mature, mentally stable and a part of the halakhic community. Where the men of a particular society can no longer be expected to conform to those ideals, *kinyan* marriage is not the best, nor the most halakhic option. Where the men of a particular community do in general conform to those ideals but a small percentage do not, it would be irresponsible not to make provision for the dissolution of marriage in those cases where the man does not. It is such a provision I have suggested in the form of a *harsha'ah* for a get in the circumstances (and only in the circumstances) that a man proves himself unworthy of continuing to be married.

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the specific definitions of abuse having been stipulated in advance). It does not have far-reaching discretion.

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Declaration

I hereby declare that no portion of the work referred to in this thesis has been submitted in support of an application for another degree or qualification of this or any other university, or any other institute of learning. I further declare that this thesis represents my own original work, and that all sources for and influences on my argument have been acknowledged and attributed.