The *Kosher Get*: A Halakhic Story of Divorce

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The *Kosher Get*:
A Halakhic Story of Divorce

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It seems inappropriate to dedicate a book on divorce to one's husband, and wrong, given that he has spent the last six years taking children to the park whilst I have been writing it, retrieving documents for me when they have been lost, watching relevant movies with me and teasing me about being his "chattel" to dedicate it to anyone else. So there is no dedication.

I should, however, mention that in his capacity both as thesis supervisor and book editor, Bernard Jackson has worked in a way that entirely redefines the adverb "tirelessly" – and that his unfailing instinct for when to push, when to take over and when to step back and wait for me to assert my own autonomy could fit him for a second career in midwifery! Rabbi Elisha Ancselovits has, metaphorically speaking, held my hand (when not sparring with me) ever since I turned up in a Halakha class he taught eleven years ago having never read a single mishna. And my father has been wanting to be able to talk about "my daughter the Dr." since I was three when he started talking philosophy and theology with me; I'm glad finally to be able to satisfy – and thank – him.

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Prologue

Jerusalem, 2012. Ilana wants a *get*. Her husband, Ze'ev, and she have been married for a decade and have several children. He has loved her, though she complains that he is not emotionally demonstrative, and he has been willing to turn a blind eye to the fact that she has had sexual relations throughout most of their marriage with quite a number of other men. This time, however, it is different. This time, Ilana has fallen head-over-heels in love with the man she has been seeing for the better part of the last year. She wants a *get* so she can marry him.

Naftali, Ilana's lover, is also married. However, he and his wife Avigail have not had sex for the past decade – an abstinence which has been her choice and not his. They have talked about divorce many times but for his part he has loved her deeply and always thought one day she would rediscover her passionate side. She, for her part, has enjoyed his company in a platonic sort of a way and has never had a taste for being a single mum. She has become used to fending off his intermittent sexual attentions and so their relationship might well have pottered along for ever. If Naftali hadn't met Ilana. Now Naftali has left "home" and is waiting to marry Ilana – if and when she becomes available.

In any divorce case, perhaps in any argument, it is hard not to take sides, not to view one party as a betrayer, a manipulator; the other as innocent. However, contemplating the halakhic problems raised by the sexual goings-on (and not-goings-on) of our four acquaintances one is forced into the realisation that none of the parties is innocent. That Ilana is guilty of serial adultery is obvious. Ze'ev too, though, has transgressed halakhic norms: it is forbidden for a husband to simply accept his wife's adultery; he is not permitted to continue to have a sexual relationship with a wife he knows to have had sex with another man.[1] Avigail, on the other hand, is in the category of *moredet* – a woman who refuses to have relations with her husband. Such a refusal is clearly frowned upon in the Talmud,[2] which records an argument over whether or not such a woman should lose her

[1] (BT) Yev. 11b, derived from Deuteronomy 24:4. See also the article by Elisha Ancselovits, "Men Divorce – Women are Divorced: Explaining this Halakha as An Aid to Solving the Problem of Marriage for Secular [Israeli] Jews", *Ma'agalim* 3 (5760/2000), 99-121 (Hebrew), discussed in greater detail in chapter 4. Ancselovits argues that such a prohibition serves to prevent the husband from engaging in wife-swapping.

[2] Although the actual obligation to pleasure one's spouse falls upon the husband (derived from Exodus 21:10, Shulḥan Arukh EH 76:1-3), the Halakha clearly takes for granted that the wife will provide sexual fulfilment for her husband in the same way that it expects her to serve his food and (in the absence of many servants) bake his bread. (One who refuses to do household work is also considered a *moredet* ("rebellious wife"), Mishna Ket. 5:5, though the Talmudic discussion on this mishna (Ket. 63b-64a) clearly uses *moredet* to denote the sex-refusing and not the work-refusing wife.)

ketubah little by little over a year and then be divorced or whether, following four weekly public warnings, she should be immediately divorced. The point being that if after some cooling off period the woman cannot be coaxed back into the marriage bed she should certainly be divorced (one reading of the *sugya* even suggests that the husband should be *forced* to divorce her).[3] But Naftali has consistently *not* sought to divorce Avigail. Rather, he has for years accepted her sexual refusal just as Ze'ev had accepted *his* wife's sexual infidelity. Until now: now, Naftali's long sexual abstinence has exploded in an adulterous union.

Avigail will not contest the divorce. Naftali will be free to marry Ilana. This despite the Halakha, which expressly forbids a man and woman to be married if they have previously had relations of an adulterous nature. But will Ilana be free to marry Naftali? Ze'ev is angry, and understandably so: though I have suggested that none of the protagonists of my story is entirely blameless (halakhically speaking, at least), Ze'ev seems the most "sinned against" rather than sinning, and a sudden divorce is surely not how he expected to be paid for his years of forbearance in the face of his wife's bed-hopping. Refusing his wife a *get* will not bring her back to him, still less will it make her fall out of love with Naftali, or curb her sexuality. But it *is* one way – probably the only way left to him – in which he can assert power in the face of a situation which has for years rendered him power*less*.

What of the *bet din*? If Ilana comes requesting a divorce, what will, or should, their reaction be? There seems little prospect of a reconciliation between Ilana and Ze'ev. Moreover, halakhically such a reconciliation would, as I have pointed out, be prohibited. But in this case there are no grounds on which at present they could coerce a divorce.[4] Imagine another scenario, though: imagine that at the outset of their marriage, at the time of *kiddushin*, Ze'ev had signed an agreement, the kind of agreement which is now being suggested in some parts of the Modern Orthodox world – the world to which Ilana and he belong – authorising the *bet din* to declare the marriage void, retrospectively or prospectively, through an act of annulment or the triggering of a condition if at some future date (now, in fact) he refused to give a *get* in the face of his wife's suit for divorce or the *bet din*'s recommendation to divorce? What might then be the reaction of the *bet din*? Would they, indeed, have a choice? The answer to the latter question would clearly depend upon the type of agreement: one which predicated the termination of the marriage upon the will of

[3] For a full discussion of this *sugya*, see Avishalom Westreich, "Compelling a Divorce? Early Talmudic Roots of Coercion in a Case of Moredet", Working Paper no.9 of the Agunah Research Unit, May 2008, available from http://www.manchesterjewishstudies.org/publications/, and the discussion in B.S. Jackson, *Agunah – The Manchester Analysis* (Liverpool: Deborah Charles Publications, 2011), 68 (n.283) and 152-153.

[4] There are few grounds on which coercion of the husband to give a *get* is halakhically permitted, and considerable debate as to whether the measures which *batei din* can nowadays use to pressure a husband to give a *get* may amount to coercion or not – for a fuller discussion, see ch.5.

the *bet din* would now give the *bet din* considerable scope to act. But it might well also put them in a bind. It may well be the case that it is in everyone's interests for Ilana and Ze'ev to be divorced. However, it is not at all clear that it helps Ze'ev to be relieved of (or denied) the obligation to effect by his own action the termination of his marriage; that obligation is one which the Halakha has explicitly placed on him – for good reason, one might assert. One might also suspect that a *bet din* could legitimately wish to pause before stepping in to "reward" Ilana for some quite serious transgressions of Halakha – and to enable a marriage upon which the Halakha frowns. A type of agreement which requires of the *bet din* to accede to the woman's unilateral request for a *get* on the other hand would allow the *bet din* no scope for exercising their discretion and would render them, in fact, as powerless as Ze'ev himself.

Powerlessness. There is a level on which, I would argue, the story of Ze'ev and Ilana's marriage, the story of Naftali and Avigail's long road to divorce, is a story all about power and powerlessness. I have used this particular story to open my investigation into the nature of the will required of the man to give a kosher *get,* not because of any prurient fascination with the sex lives of others but rather because I think it reveals something about shifts in power and the experience of powerlessness – specifically, a quite disturbing (im)balance of power between the sexes. On confronting the narrative I have reported (and here we should bear in mind that I was told it by a man – narratives change significantly according to the narrator), what struck me is how emasculated both of the men appear. One is (that figure of literary derision) a cuckold, the other rendered sexually inactive against his will – one might almost say "impotent". Neither man seeks of his own volition to leave his marriage; it is Ilana who triggers both divorce suits, thus effectively wielding considerable power. Ze'ev finds himself in a situation where the only weapon at his disposal is the *get* – and not using but rather withholding it at that. Clearly, choosing to do so may be regarded as an abuse of the power granted him by the halakhic system but in some ways it may be an understandable abuse. The system which accorded him power over the *get* does not, I will be arguing throughout this book, envision, still less intend, such an abuse. But nor does it envision or sanction the development of a situation in which the husband's *only* power or means of affecting his marital situation lies in withholding the *get* and thus preventing the formal end of the marriage and, crucially, his wife's remarriage. Nor does the halakhic system conceive of a context in which a woman can deny her husband sex indefinitely and get away with it – a situation to which Naftali responds in a manner (infidelity and triggering the final break-up of another marriage) which is ultimately as destructive as Ze'ev's.

Ze'ev and Naftali wield simultaneously both too little and too much power. Yet there is another male entity in my narrative which also finds itself, in my view,

bearing either too little or too much power, and that is the *bet din.* Agunah activists tend to ascribe to the *bet din* vast powers, laying at the feet of the rabbinic establishment almost the entire blame for the phenomenon of *get* recalcitrance. The *batei din* themselves, on the other hand, claim an entire lack of power: by their account, their hands are tied by the constrictions of the Halakha and its demand that a kosher *get* must be freely given. In so claiming, they place the onus of responsibility on the husbands. Those who argue for the halakhic viability of the various solutions to the *agunah* problem – whether wider scope for coercion, application of other measures which may be considered in the category of *harḥakot*,[5] the possibility of annulment or the introduction of terminative conditions into the marriage ceremony – attempt to place the ball back squarely in the rabbinic court (pun intended). Moreover, some of these suggestions (for example, the type of terminative clause I posited earlier, which predicates the end of the marriage on the will of the *bet din*) would give the *batei din* far greater scope for the exercise of discretion than the Halakha to date has ever conceived. However, these solutions and their proponents choose to ignore the fact that whilst the rabbinic establishment may be less powerless in the face of the Halakha than it claims, such claims may actually reflect a *feeling* of powerlessness that originates not in the halakhic system onto which it is projected but rather in the society which is demanding a change in the nature and functioning of marriage. This is a society in which not only is the balance of power between the sexes rapidly shifting but the dynamics of power between government (authority) and the governed is also changing. It is the governed – and mainly women – who are challenging the authority of the rabbinic establishment and *demanding* that it act to alleviate the plight of *agunot.* But the very basis of their demand is a frustrated acknowledgement that power rests in the hands of that establishment. In such a confrontation, and with women refusing to comply with rabbinic expectations of how women should behave – for better or for worse, society and the nature of marriage have shifted – it may well seem that, just as the only power left to Ze'ev is a destructive refusal to act, the only power that remains to the rabbinic establishment is likewise a refusal to act.

The purpose of the book which follows is to explore the developing story of "what a divorce [should] look(s) like" which informs rabbinic attitudes towards the appropriateness of various proposed solutions to the *agunah* problem. My premise is that the Halakha is not constructed or developed in a vacuum as an abstract legal exercise but rather reflects rabbinic conceptions of what the good should be – conceptions which have themselves been informed by the study of Halakha.[6] This

[5] Non-coercive social exclusion. See Rema EH 154:21.

[6] Cf. Elisha Ancselovits, "The *Prosbul* — A Legal Fiction?", *The Jewish Law Annual* XIX (2011), 3-16; "Embarrassment as a Means of Embracing Authorial Intent", in Tsemah Yoreh, Aubrey Glazer

understanding is, I believe, crucial to the pursuit of a *good* solution to the problem of *iggun*. It is not enough for a proposal to be legally possible, it must also be able to cohere with the rabbinic *story* of marriage and with rabbinic understanding(s) of gendered behaviour. It cannot be seen to wrest power from those to whom the Halakha has traditionally entrusted it and it cannot be seen to encourage behaviour which the Halakhic system deems immoral. That does not mean that a good solution cannot be found; it does, however, mean that such a solution must accept as good and authoritative the halakhic worldview into which it seeks to be absorbed.

NH, Pesach 5772

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and Justin Lewis and Miryam Segal (eds.): *Vixens Vanquishing Vineyards: The Embarrassment and Re-embracement of Scripture – A Festschrift Honoring of Harry Fox LeVeit Yoreh* (Brighton, MA: Academic Studies Press, 2010), 325-58.

Introduction

Not for nothing have I begun this book with a story. Papers enough have been written about the *halakhot* of marriage and divorce in general as well as the problem of *get* recalcitrance specifically. There have even been books – scholarly and rabbinic. However, whilst these have achieved much in clarifying, or at least arguing, what can and cannot be done on a purely legal level, none has yet led to a concrete solution to the problem. Indeed, many, it might be argued, have inadvertently led to a worsening of the situation. This is because a forceful assertion by individuals strongly associated with a "liberal", "Modern", "feminist" or "academic" camp of the halakhic viability of solutions which leading *poskim* feel to be inconsistent with the aims and *mores* of the Halakha as a whole tends merely to invite a knee-jerk dismissal not only of those particular solutions but of any contributions emanating from those camps. I would suggest, indeed, that the fact that I can use the word "camp" at all with regard to the various groups who have an interest in seeing a solution to the *agunah* problem (and its use not be considered merely idiosyncratic) illustrates a fundamental problem: namely, that many who work in this area have come to view themselves as being in confrontation with the rabbinic establishment. That establishment, in turn, has adopted a more and more intransigent position until in some quarters it now prides itself (just like the recalcitrant husband) on its refusal to give in to what it views as illegitimate pressure.

This book is in a sense intended to be a work of mediation. Its aim is first and foremost to explore the (in my view) misunderstanding which has led to one "side" making proposals in which they perceive no flaw and the other side's dismissing those proposals for no "good" (i.e. legal) reason. It is only after doing this work of exploration and explanation that I will begin, very tentatively, to make some suggestions of my own for a way forward.[7] But what is the misunderstanding of which I write – from where does it come? My argument is and will be that secular

[7] Those who have read the thesis out of which this work is drawn as it was published on the University of Manchester Agunah Research Unit website may be surprised to find the focus of this book significantly different. The thesis published on the Unit website was intended as my contribution to the work of that Unit and attempted to remain within its parameters and to accept as a given its stated goals. At a distance of two years, and having in the interim followed my intellectual and halakhic interests into other areas, I realise that much that was unclear in my original work was the result of my attempting to remain within the conventions of an academic discourse which accepts as a given a legalist conception of Halakha whilst working out of a set of premises which fundamentally challenge that conception. This book is no longer constrained by the requirements of the Unit, my contribution to the workings of which is amply reflected in its Final Report. Rather, it is a meditation in my own voice and in my own language on both the problem of *iggun* and the deeper questions which are raised by its continued existence.

lawyers, scholars of Mishpat Ivri[8] and those who have pursued a rabbinic training in Modern Orthodox *yeshivot* have learned to consider the Halakha as a (albeit very intricate) fixed set of rules and precedents – in fact, as a particularist example of a legal system (as traditionally conceived),[9] In the case of secular lawyers and Mishpat Ivri scholars this is hardly surprising – the entire Mishpat Ivri movement's project after all is to make "secular legal" use of halakhic norms, and to attempt to sever the civil law component of Halakha from its religious and criminal branches. The case of those who have received their training from Modern Orthodox *yeshivot*, however, may need more explanation.

Many *yeshivot*[10] – the overwhelming majority of those which serve the Modern Orthodox (or, in Israel, the Religious Zionist) population as well as an increasing number of Chareidi institutions – no longer train their students to learn Talmud in the way that was considered traditional until the 19th and early 20th Century[11] but rather train them to learn using the "Brisk" method. Brisk[12] is an analytical methodology which seeks to extrapolate from the concrete examples and decisions of Talmudic literature to discover abstract and generalisable principles which guide halakhic theory. This is a method of learning Halakha which is extremely appropriate to (and makes most sense viewed in the context of) a culture which tacitly accepts a Kantian, post-Enlightenment understanding of morality; one which privileges principles (which are by nature generalisable or universalisable) over context-dependent, particularist expressions of moral value. It is also a methodology which values what might be described as "academic" learning – that is, learning for its own sake rather than with a view to *paskening* halakha from the conclusions reached – over the more intellectually circumscribed activity of

8 Literal translation: "Jewish Law". The term is used to describe the non-ritual areas of Halakha – particularly where arguments are being made for the incorporation of features or parts of those areas into secular law (most notably in Israel). However, the fact that the term "Halakha" itself is also widely glossarised as "Jewish Law" may indicate a certain level of confusion, one which, I argue, stems at least as much from the prevalent misunderstanding of Halakha (that I seek to describe in this Introduction and the first Chapter) as it does from the challenges inherent in (or the impossibility of) making firm distinctions between the ritual and the non-ritual aspects of a body of moral thought which is religious in its entirety.

9 Following my teacher, Bernard Jackson, on whose work in legal theory I draw heavily, I will argue in the next chapter that in fact even secular legal systems are much more likely to incorporate narrative features – and to be much less straightforwardly rule-based – than has traditionally been assumed or is overtly acknowledged by lawyers.

10 I include in the umbrella term "*yeshivot*" also those few institutions which offer Talmudic learning to women.

11 Cf. Louis Jacobs: A *Tree of Life: Diversity, Flexibility, and Creativity in Jewish Law* (Oxford: Oxford University Press, 1984), 59-61, and Chaim N. Saiman, "Legal Theology: The Turn to Conceptualism in Nineteenth-Century Jewish Law", *Journal of Law and Religion* 21/1 (2006), 39-100.

12 The methodology is so called after the rabbinic dynasty credited with originating it, the rabbis Soloveitchik of Brisk.

deciding halakha (the *rosh yeshiva* is more respected than the *av beis din*). An exemplary anecdote (I am not concerned with whether or not it is *true* in the factual sense; its importance rather lies in the fact that it is widely recounted *as if* it were true and thus may be understood to reveal something that people wish to communicate about Brisk) relates that a student of Rav Aharon Soloveitchik submitted an article to the journal of *Yeshivat Gush Etsion* (of which Soloveitchik is the Head) demonstrating through close argumentation that eating a piece of flesh cut off from the leg of a *dead* creature could constitute a transgression of the prohibition of *ever min hachai* (a piece of flesh torn off a *living* creature). The student's reasoning was found to be unflawed though the article was nonetheless turned down because it too much resembled an (erroneous) *psak halakha.* My argument is that a training in Brisk methodology predisposes one to a very particular understanding of halakhic texts, their aim and the way they "work" – one which (a) bears heavy similarities to commonly held understandings about the way secular legal texts "work" and (b) is more suited to the activity of legal theorising in the abstract than to the rather less "pure" (in the academic sense) activity of making moral decisions in a real-life context.

I believe, however, that this "legal" conception of Halakha is at best partial and insofar as the *halakhot* of marriage and divorce are concerned actually becomes misleading. Just as something which is "clearly" (i.e. according to all intuitions and common sense) not *ever min haḥai* remains permitted for consumption no matter how well the halakhic sources are manipulated to show otherwise, so is it true that a woman who is "clearly" halakhically married and not yet halakhically divorced cannot be remarried notwithstanding ingenious halakhic devices that may operate to declare her *pnuya* (eligible for marriage). However, whereas it may be that we all share the same "story" about what *ever min haḥai* is (maybe a mental image of an injured deer no longer fleet enough to escape into the forest and a villainous looking man with an axe ripping a steak out of her haunches), what we may not have is a consensus on the "story" of marriage and divorce. Thus, the task on which I am engaged in this book is one of understanding what the traditional rabbinic understanding of divorce is, and rendering that story in modern, secular language so that it may more easily be compared to other contemporary understandings. Because one of the most central texts about the nature of a valid divorce[13] demands that such a divorce be granted *willingly* on the part of the husband, one of my main areas of focus will be the stories halakhic texts tell about the nature of the human will and what constitutes willing action. Because understandings of what divorce is rely so heavily on stories about what marriage is, a second area of focus will be the rabbinic description of marriage.

The insight that one must seek to understand the problem of *iggun* within the

[13] Mishna Yevamot 14:1.

context of rabbinic understandings of marriage and divorce rather than as a decontextualised, abstract legal problem is, of course, not mine alone. In attempting such an understanding, I can be considered to be engaged in a parallel undertaking to that of Michael Broyde in his book *Marriage, Divorce and the Abandoned Wife in Jewish Law*.[14] However, where he expresses rabbinic understandings through the language (and thus the *prism*) of legal philosophy, I seek to express the same understandings (or perhaps, rather, different understandings – the language in which one seeks to understand and relate a concept must necessarily inform and colour the understanding itself) through the language of story. Whilst his primary extra-halakhic tool for discussing moral (and therefore halakhic) behaviour is secular jurisprudence, mine is the novel or screenplay.

My preference for stories over legal concepts as a means for analysing and rendering accessible halakhic understandings has, I think, three roots. First, I have been deeply influenced by the writings of narrative ethicists working in a number of very different moral contexts and philosophical commitments, most notably the feminist and the Christian. It is "relational" feminism (as opposed to rights-based feminism, which is thoroughly legal in focus) which has increasingly laid an emphasis on story as an important component of making (and thus analysing) moral decisions. As a moral tradition, this strand of feminist thought can be said to begin with the work of Carol Gilligan, whose book *In a Different Voice*[15] argued against the dominant Piaget-Kohlberg exercise of seeking to measure moral maturity by quantifying the extent to which an individual was able to apply general principles to the solving of specific (but hypothetical) moral quandaries. Gilligan's argument was that an alternative mode of moral decision-making (which tends to predominate in women, but is by no means claimed to be exclusively female) is more likely to eschew abstract principles in favour of a commitment to preserving, fostering and balancing particular relationships. Whereas a moral rule or principle may, indeed (if a Kantian approach is accepted) should, apply in a given situation regardless of the character, emotional state and preferences of the moral agent and her relationship to those who stand to be affected by her action or decision, an ethic which prioritises what Gilligan terms "caring" – and what I would like to paraphrase "the sustenance of positive relationships" – would seek to take all these things into account. Because character, emotions and relationships are the stuff of stories, a relational ethics such as that developed in a feminist context out of Gilligan's work is one which is concerned with the story(ies) of the moral agent.

[14] Michael Broyde, *Marriage, Divorce and the Abandoned Wife in Jewish Law: a Conceptual Understanding of the Agunah Problems in America* (Hoboken NJ: KTAV Publishing House Inc., 2001).

[15] C. Gilligan, *In A Different Voice: Psychological Theory and Women's Development* (Cambridge, Mass. and London: Harvard University Press, 1982).

It is, perhaps, Stanley Hauerwas who has argued most persuasively for the importance of story in the context of understanding and developing a theological (Christian) ethics.[16] Once again, it is an exclusively rule/principle based ethics with its claim to universal applicability and the concomitant assumption that it is possible (let alone desirable) for the moral agent to be a de-contextualised, purely rational subject against which Hauerwas argues. His advance, in my view, on the feminist model of narrative ethics inheres in his seeking to account for and evaluate not only the life-story of the moral agent her/himself (and the stories of others as they are affected by her (in)action) but also the stories which shape her character and her decisions – and are in turn shaped by her character and decisions – the stories the community to which the agent belongs seeks to tell. Just as feminist ethicists have sought to emphasise the particularity of the contexts within which moral decisions are made,[17] so Hauerwas seeks to emphasise the particularity of specific communities. This becomes especially relevant, I shall argue, when we deal with the Halakha – an ethical system which, whilst it has universalist elements, quite consciously limits many of its moral prescriptions to a specific community.[18] One of Hauerwas' arguments is that the moral intuitions held by individuals in a community are shaped by the guiding stories the community relates, the stories it "owns" (in the Judeo-Christian tradition, he believes, the dominant story/ies should be the Biblical story/ies). The challenge of Christian life, he argues, is to live *as though* the Christian story is true. This may well entail particular actions having a moral valance in the specifically Christian life that they do not have in the non-religious life; one example he gives is the act of suicide, which he argues is transgressive only insofar as it contradicts a particular story – one in which life has intrinsic value; in which life does not ultimately "belong" to the person who lives it and in which suffering has ultimate meaning.[19] Thus, whilst one should continue to speak of *committing* suicide (one "commits" a crime or an atrocity) in the context of a Christian ethics, it is not necessary that a moral agent

[16] For a condensed statement of Hauerwas' position in this regard, see the Introduction to and first section of *Truthfulness and Tragedy: Further Investigations into Christian Ethics* (Indiana: University of Notre Dame Press, 1977).

[17] For a useful summary, see the section dealing with the Social-Relations approach to ethics in Martha Minow, *Making All the Difference: Inclusion, Exclusion and American Law* (New York: Cornell University Press, 1990), 110ff.

[18] Even going so far, in the case of the Sabbath laws, as to prescribe that those outside the community will be acting *immorally* if they attempt to carry out the same actions which it urges on those inside the community (see Sanhedrin 58b and Beitsah 16a.) Importantly, Sabbath observance and its limitation to the Jewish community is, explicitly here, described in terms of a particular *relationship* (with G-d) and is, of course, an act by which that community remembers and re-enacts two foundational stories: that of Creation on the one hand, and the redemption from Egypt on the other.

[19] See his "Memory, Community and the Reasons for Living: Reflections on Suicide and Euthanasia" (with Richard Bondi) in *Truthfulness and Tragedy*, *supra* n.16, at 101-115.

speaking in a secular context with no such story(ies) use such value-laden language.

Another feature of Hauerwas' ethic which I believe goes further than a feminist (or feminine) ethic has explicitly gone, and which is particularly relevant to the subject of this book, is his acceptance of the possibility – perhaps even the inevitability – of tragedy. Whereas both the Kantian model and the utilitarian model of ethics (their differences notwithstanding) appear to presuppose a "correct" answer to any moral problem, an answer that will necessarily be arrived at by a perfect (ideal) rationality (a rationality which is the same in every person with the result that two people of equal levels of rationality should presumably arrive at the same conclusion, just as two people with equal mathematical ability will arrive at the same solution to a problem in algebra), Hauerwas' theory acknowledges that in many situations it is not in anyone's power to arrive at a perfect, or perfectly moral solution. It is not, Hauerwas claims, our responsibility to eliminate suffering from the world; but rather to live well in the (inevitable) presence of suffering. From a Jewish theological perspective, it may be that the value Hauerwas places on suffering is problematic – as may be his emphasis on human finitude and the concomitant responsibility of G-d: Hauerwas comes from a Protestant tradition of Christianity one of the tenets of which (justification by faith alone) arises out of a rejection of the "overly Jewish" Catholic dependence on "works" (good deeds, *mitsvot* perhaps). However, when writing about divorce, it is worth bearing in mind that the context within which moral decisions must be made is one in which imperfect decisions have previously been made; whilst we may hesitate to use the word "tragedy", it is surely the case that a story about divorce is rarely one which naturally lends itself to a happy ending.

By way of a necessary digression, I should here note the difference between narrative *ethics* as I here describe it and the semio-narrative theory of *action* with which I deal in the next chapter. The latter theory is far more abstract in its definition of narrative: Algirdas Greimas, from whose writing the theory is developed, posits that a "narrative" consists in the subject's being charged to fulfil a goal; in his being helped/hindered in the achievement of the said goal; in his achieving or failing to achieve the goal and in a recognition of the outcome of his struggle. This narrative is not a "story" in the full sense of the word though it is clearly allied thereto. Compare John Truby[20] on the art of creating a story: his initial, one-line definition of a story is as follows: "A speaker tells a listener what someone did to get what he wanted and why."[21] He goes on to suggest that in a

[20] Hollywood screenwriter and celebrated scriptwriting teacher and author, whose book *The Anatomy of Story* (New York: Faber and Faber, Inc., 2007) offers 22 steps to becoming a "Master Storyteller"!

[21] *The Anatomy of Story*, 6.

successful story the main character has at least one ally and at least one opponent, whose function is to help or hinder him in his pursuit of his goal. However, from Truby's one-line definition, the "and why" stands out as different from Greimas' definition. It is the "and why" that, as it is developed in Truby's book, begins to define storytelling as a *moral* activity: "A great story is not simply a sequence of events or surprises designed to entertain an audience. It is a sequence of actions ... with moral implications and effects" (p.108). According to Truby's account, the main action of the story – the goal pursued by the main character – arises out of his/her "need" – in the best of stories, a moral weakness. The climax of the story involves a struggle, a self-revelation (as a result of which the character experiences moral growth, or else fails to grow) and a moral decision made by the main character – which reveals to the listener/audience whether that character has indeed grown.

The moral element can, in fact, be quite easily reintroduced into Greimas' semio-narrative theory: in applying his theory to the legal sphere, B.S. Jackson suggests that the "Recognition" element of the narrative carries a moral valance: in recognising the achievement of or failure to achieve the goal, both actor and spectators condemn or condone the action.[22] (Insofar as it is the agent himself who evaluates his own action, this could be said to be equivalent to Truby's self-revelation, the step which triggers moral growth if this is to occur, or confirms moral failure.) The fact that what was originally presented as a morally neutral theory of action can convincingly be interpreted as one in which implicit moral judgement is a necessary corollary of action will become important as, in the next chapter, I argue that an application of a narrative understanding of human behaviour to legal decision-making has the potential to transform our understanding of the legal system from one that is entirely based on rule and precedent to one which is, in essence, narrative based, thus blurring the distinction often drawn between law and ethics. This step is precisely the one I have taken vis-à-vis the Halakha – claiming that what is often understood to be a system of "law" is in fact a system of (narrative) ethics.

Christians and radical feminists (not to mention Orthodox Jews!) are not always easy or natural bed-fellows. However, one of the things the narrative ethicists I have cited do have in common is a refusal to accept as adequate dominant contemporary modes of discourse about morality. As an observant Jew, I think it is incumbent upon me similarly to call into question the hegemony of any one discipline of non-halakhic (secular legal or ethical) thought on moral issues and the

[22] On "recognition", involving the communication of "modalities", in the Greimassian account of the basic structures of meaning, and on the "tacit social evaluations" which accompany "narrative typifications of action" at the social level, see B.S. Jackson, *Making Sense in Law* (Liverpool: Deborah Charles Publications, 1995), 150-54.

manner in which they should be discussed. Moreover, as I indicated at the start of this Introduction, in dealing specifically with the *agunah* problem there is an additional reason for doubting the adequacy of hitherto accepted ways of discussing the problem: namely, that they have failed to solve it. Thus a second reason for my use of story as a means for both understanding and relaying halakhic concepts can be understood as linked to my first (the debt I have just described to existing thinkers in narrative ethics). This second reason is political and asserts that the language of legal concepts is an exclusive language; therefore, to use it as the primary language for the discussion of ethics or the explanation of an ethical system (the Halakha) is to perpetuate the assumption that the correct locus of moral decision-making or input into policy-making is the community of experts, of professionals. To use the language of (largely popular) literature and film is, by contrast, a democratic decision: its implicit assertion is that reflection upon moral issues is an activity in which not only *ought* we all to be engaged, we *are* all engaged, though without necessarily labelling our activity as such. One of the questions I will be pondering in later chapters is to what extent the Halakha assumes or demands that all adults (or, possibly, all *men*) are competent moral agents. My own commitment is to a belief that within certain spheres, namely, those in which we are educated to be capable of moral reflection, we are *all* moral agents. One of the primary ways in which we receive a moral education is through the hearing of, reflecting on and finally telling of the stories of our culture and community. That is of course why (if you are a reader who shares one facet of my cultural background) I was able to conjure in your mind the image of the wounded deer and the evil hunter – we share a knowledge of the Bambi narrative.

My third reason for favouring narrative over legal concepts might be thought a pure "accident" of personal biography – a coincidence which allows my own "story" to be coherent. Whilst, as I have claimed above, there is a preponderance of Modern Orthodox learning institutions teaching the Brisk method of Talmud study, I was fortunate enough to be trained in halakhic *psak* by a rabbi and thinker whose approach to the Halakha is consciously non-Brisk.[23] Whilst Elisha Ancselovits' theory of Halakha is different at crucial points from my own, several features of it make, and made, possible the narrative understanding, analysis and evaluation of halakhic texts in which I seek to engage. His central hypothesis, if accepted, also explains why there is such a tension between what might be technically possible assuming the halakhic corpus as a body of legal literature, and what is actually possible according to the educated intuitions of leading *poskim*: these *poskim* are

[23] Elisha Ancselovits, "What is a Pesak? An Emic Answer". Paper delivered in writing at the first conference of *Open Source: A Halakha Think Tank*, on the theme of "Halakhah as a Language of Applied Values: Theory and Practice" (2010) and "Using Formalist Language Appropriately for Halakhic Decision-Making", *Ma'agalim* 5 (2007), 157-184 (Hebrew).

understanding the Halakha as what I would term (he does not use this term but agrees that it is appropriate) a narrative moral system. He argues that throughout history, those who have decided Halakha have, far from understanding the halakhic system as a static given (the legal system as object), had a (largely unstated) understanding of specific *halakhot* as the embodiment of attempts to achieve consequences consonant with the overall aims of the Halakha as a consistent and coherent ethical system.[24] His emphasis on projected consequences (rather than on deductive reasoning) creates an insistence on a temporal connection between two events (crisis/*psak* and consequence), a connection which creates a narrative link – cause and effect. The effect, whilst it may be foreseen or unforeseen, willed or unwilled, is in this paradigm never unconnected to the first event.[25]

Ancselovits' emphasis on consequences means that a *psak* is always understood to be situated within the context of a particular, ongoing life (or lives – he expects the *posek* to consider the life of the community as much as that of the individual). In his view, halakhic decisions are thus contextualised value judgements, not deduced facts or abstract judgements, and this means that it is specific, concretised *halakhot* and not abstract halakhic themes which form the proper subject of analysis and which embody the individual *posek*'s attempt to achieve particular goods. Thus decisions about the good are always embedded in a particular context

[24] Ancselovits puts this much more simply, describing the *posek* as simply seeking to achieve "the good". However "the good" is an ambiguous term – we live in an age when it is accepted that there are many possible, conflicting conceptions of the good – and whilst Ancselovits would accept that *maḥloket* (disagreement as to what constitutes a good *psak* halakha in a given situation) stems precisely from disagreement as to what weight or value should be given to which of different and incompatible goods, one of his primary requirements of a responsible *posek* is that (s)he should recognize and acknowledge the goods achieved by alternative halakhic options and attempt so far as possible to account for and be accountable to those alternative goods in his/her own *psak*. This requires some consensus of outlook and of general moral vision – two *poskim* simply cannot speak languages as unintelligible to one another as, say, an epicurean philosopher and one of the Desert Fathers. The good envisioned by one *posek* must be recognised as a good by the second *posek*, albeit that the second *posek* may find another good to be of a higher value. The system (as Ancselovits envisions it) will not work (or does not work well) if the good aimed at by one *posek* is viewed as an ill by the second.

[25] I would note that the denotation of the Halakha as a "consistent and coherent" ethical system also introduces the notion that a narrative criterion may be applied not only to human action (which in order to be intelligible to others needs to demonstrate a high degree of consistency and coherence) but also to halakhic *psak* itself. This has been crucial to me in developing a narrative criterion for evaluating halakhic analysis, problems and proposals. The analogy which I am tempted to make is that of the reader of detective fiction. Like the exposition of a detective novel or short story, a halakhic problem presents the person who sits down to confront it with a plethora of details, all of which must be accounted for in the final analysis. But even more importantly, perhaps, a solution which relies on a legal presumption that a person is acting in a way which is humanly implausible is like a story in which the murderer is revealed to have murdered in a manner entirely out of character and with no motive at all. Whether the halakhic system is understood to be G-d given or human-made, it is a premise of both Ancselovits' and my theses that as a whole and in its details it should be assumed to make sense in human terms. ("The Torah speaks in the language of men" – Nedarim 3a.)

(narrative framework).[26] This, of course, brings us right back to the feminist concern for relationship, social context and concretised (not abstract) moral decision-making.

In many ways, the book which follows may seem to be distinctly un-feminist – certainly, one of my main arguments is that the halakhic institution of marriage cannot be manipulated in the way many Jewish feminists have wished, believed and argued that it could – it cannot become entirely egalitarian. Similarly, I do not believe that there is a solution to the *agunah* problem which will provide for the release of every woman who wishes to be divorced without violating the integrity of the halakhic system. And I remain (most days, at least) more committed to the halakhic system than to egalitarianism (whilst acknowledging that others will choose the opposite commitment).

And yet my methodology, my wish to understand the Halakha as a narrative ethical system, is deeply influenced by feminist ethical theory and my readings of Talmudic texts are conscious of my own female and feminist orientation. My style – the incorporation of personal anecdotal narratives, the use of an at times almost-intrusively personalised "I" – is born out of a feminist refusal to portray myself as "neutral" when in fact, as must be one of the central arguments of everyone who offers a "cultural reading",[27] the assumption of neutrality is only the ruling élite's claim to normativity.

It may be that this combination will only serve to alienate readers of all stripes – both conservative and radical. I hope not. As I have stated, this book is in part an attempt at mediation. I will present certain facets of the Halakha concerning marriage and divorce in a non-traditional, very modern style in order to attempt to

[26] I would point out that Ancselovits' emphases here are entirely consistent with the way in which the halakhic system is presented in the Talmud (where halakhic discussions are frequently seen to arise in the context of real-life problems or particular halakhic positions are illustrated – to use my preferred language: "embodied" – by stories of the actions of particular sages, their families, students or communities.

[27] The value of such a cultural reading as his – and, I hope, mine also – is well argued by Daniel Boyarin in the first chapter of *A Radical Jew: Paul and the Politics of Identity* (Berkeley, Los Angeles: University of California Press, 1994). He understands himself, as an observant Jew, to be giving a cultural reading of Paul in two senses: first, approaching and commenting on a text which has historically been used as a basis for anti-Semitism in itself creates a politicized reading – it cannot help but do so; second, hailing from a culture which accepts rabbinic culture of the era of Paul as normative and living, he offers insights into the context of the Pauline corpus that cannot easily be accessed by European Christian readers and scholars – insights which are necessarily bound up with who he (Boyarin) is. In the same way, for a woman to encounter and engage with rabbinic texts which discuss women, some of which have been and are still being used as a basis for the halakhic delegitimation (in some spheres) of women, is itself a political act – and one I do not wish to mask by assuming a gender-neutral (i.e. male) "voice". Secondly, insofar as women and, in particular, women's bodies and sexuality, are represented in the texts I analyse, I bring to my reading an intimate knowledge of at least one particular woman's body and sexuality – a knowledge which cannot be accessed by any traditional (i.e. male) commentary on those texts (cf. Boyarin, *A Radical Jew*, 40).

render them accessible and comprehensible: I wish my likely reader (probably modern, secularly educated and Jewishly educated – or at least interested – but not invested in the rabbinic status quo) to understand why it is that so many halakhic authorities have refused in the face of great pressure to act to relieve the suffering of women trapped in marriages that they find intolerable; I wish my reader to understand that there may well be nothing disingenuous about claims on the part of such authorities that they lack the power to act in the way they are being urged to do. But I also present my readings and insights in such a radical manner because the language of literature is that of a culture I inhabit at least as much as I inhabit a halakhic culture – the latter being a culture from which I am significantly excluded because of my gender. I am conscious, in writing this way, that my very ability to write about halakhic sources without accepting the dominant narrative of how to read and present such sources is in itself a challenge to halakhic discourse. I hope it may be a fruitful challenge. If there is more than one way of talking and writing intelligently about rabbinic sources, if there is a female and yet legitimate way of talking and writing about these sources, then it might be that female discourse in and of itself may be somewhat legitimated. And that would mean that when women speak, the men who rule them might have a greater ability to hear them.

One last note in furtherance of my attempt to "place" my work in an intelligible context. In seeking to reflect on the value and nature of autonomy in a specific halakhic context (that of divorce) I have been working in a general area which has been of some interest to scholars of Jewish philosophy. I should perhaps in particular mention the work of Kenneth Seeskin, whose *Autonomy in Jewish Philosophy* would seem to overlap at points with my own interests. My engagement with Seeskin's work (which came late in the day) has in fact, I believe, resulted in a more nuanced reading of Kant on my own part. However, the fact remains that Seeskin's focus is firmly on human/Jewish autonomy vis-à-vis G-d. His is at base a theological conception of autonomy. Thus, whilst aside from a substantial caveat regarding his acceptance of the Kantian understanding of autonomy[28] I concur with much of what Seeskin writes and also espouse the *theological* value of human autonomy as a premise - particularly in chapter 3, what he does not examine is the centrality or otherwise of *individual* autonomy vis-à-vis the rabbinic institution(s).

[28] Expressed, most succinctly, in his essay "Autonomy and Jewish Thought", in Daniel Frank (ed.), *Autonomy and Judaism: The Individual and the Community in Jewish Philosophical Thought* (Albany: State University of New York Press; 1992). On p.22, Seeskin writes: "... the sense of autonomy I wish to defend is the ... Kantian sense."

Chapter One

On Definitions and their Problems

Ilana wants to marry Naftali. In order to do so she must first be divorced from Ze'ev. In a secular jurisdiction this might be (depending on the particular laws of the specific country) relatively easy: she would "petition" or "sue" for divorce; sooner or later the Court would grant her that divorce and hey presto, she would be free. Were the divorce proceedings to be instigated by Ilana alone, Ze'ev might colloquially claim that *she* "divorced" *him*. This would be technically incorrect, however: in secular jurisdictions only the Court has the power to dissolve a marriage, to divorce; both marriage partners are the objects of that power, the objects of the Court action – they *are* (passive tense) divorced. In Halakha, by contrast, it is the husband who has the power to divorce, a power derived from Deuteronomy 24:1-2; the wife is (passive tense once more) divorced. In chapter 4, I will examine more closely the halakhic structure of marriage and divorce, asking what the implications of this one-sided power are and what it tells us about the conception of marriage it both arises out of and serves to reinforce. For now, it is sufficient to notice that the power is the husband's and not the Court's, notwithstanding the fact that a Jewish ritual divorce is now invariably enacted at the Jewish court.[29]

It may well be argued that the *bet din* does have some power in the matter – it has the power of persuasion, a power the exercise of which may be experienced (especially in Israel or any jurisdiction where there is an agreement that the secular legal system will enforce the decisions of the Jewish court) as more or less coercive. The Talmud itself goes so far as to legitimate actual physical coercion of the husband to divorce.[30] However, it also severely circumscribes the coercive power of the court, enumerating alongside instances in which a *get* can be coerced a number of instances in which, though divorce is recommended or mandated, it cannot.[31] And the conflict between the power of the *bet din* even in these few cases to coerce a divorce and the need for the husband to grant that divorce of his own volition is the cause of considerable consternation (as well as the impulse for considerable philosophical creativity) among the *poskim*. That conflict is first

[29] See chapter 5 for an analysis of the very few recorded instances of rabbinic annulment of marriage.

[30] In Chapter 6, I shall consider the extent to which measures short of physical torture may be considered truly to be coercive and shall offer one interpretation of the possible meaning for a halakhic culture of physical coercion.

[31] M. Ket. 5:5-6 and 7:1-5, 9-10.

remarked upon in mishna Arakhin 5:6. However, it is not there that I choose to begin my exploration of the meaning and nature of the husband's sole power of divorce but rather with the first mishna in Yevamot chapter 14, since it is here that the contrast between the Halakha's need for the husband to divorce willingly and its lack of concern with the volition of the wife is rendered explicit.

> A deaf mute who married a hearing woman and a hearing man who married a deaf-mute woman: if he wishes (אם רצה) he releases her and if he wishes (אם רצה) 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 (אם רצה) he releases her and if he wishes (אם רצה) 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 Yoḥanan 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 (לרצונה ושלא לרצונה) whereas a man does not release unless willingly (לרצונו).[32]

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. One might hope!

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,

[32] All translations of halakhic sources throughout this book are my own, except where occurring in the context of quotations from other authors or where explicitly acknowledged.

and the second part of the mishna explains, in response to Rabbi Yoḥanan 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 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 Yoḥanan 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. Assuming this mishna as both authoritative and central (i.e. assuming the requirement for רצון on the part of the husband to be inescapable and binding) I think it is important to engage in some exploration and analysis of this word of problematic definition: רצון.

רצון occurs some twenty two times in the Mishna (including the mishna under discussion here).[33] Six times[34] it refers to the "will" of G-d – as in the classic prayer formulation *yehi ratson milfanekha* ... ("May it be Your will ...") or in the exhortation to identify oneself and one's own will with the Divine Will. Four

[33] For an analysis of each occurrence, see the version of this book which appeared as a working paper on the website of the Manchester University Agunah Research Unit (working paper no. 17, available from http://www.manchesterjewishstudies.org/publications/). During the course of my work for the Unit, I also analysed every instance in which the word occurs in the Tosefta: with one exception (Ket. ch.3 halakha 6, which is analysed as it occurs in the form of a *baraita* at the start of chapter 2) the word occurs in similar contexts and seems to carry a similar valance in the Tosefta as in the Mishna.

[34] Ber. 9:3; Tamid 7:3; Avot 5:20; Avot 2:4; A.Zara 4:7 and Taanit 3:7. The latter is a more ambiguous example than the five preceding instances, as the will denoted by the word *ratson* is not the will of G-d so much as the will of Honi – to which G-d is prepared to accede. However, I have included it in this section because the context is (as in the others) one of prayer and relationship between the human and the Divine and because the will in question is the one according to which G-d chooses to act. (See my later summary of Frankfurt's definition of will as a wish according to which we choose to act.)

times[35] the word appears to connote the "wishes" or "approval" of the rabbinic hierarchy. In each of these four instances, the discussion is of whether the actions of the people are or are not in accordance with the rabbinic preference so, assuming that (as in some of the cases discussed in these *mishnayot*) the rabbis have the power to enforce compliance with their wishes and choose not to, we might say that the word "will" is inappropriate here[36] and that the word *ratson* is being used in the weaker sense of "preference" or "wish". Four *mishnayot* which deal with the area of ritual purity seem to use the word *ratson* to denote intention or something akin thereto.[37] רצון seems to be used in the sense of preference in Beitsah 3:2, Bava Metsia 2:10, Avot 6:9, Shevuot 7:8 and arguably Gittin 3:5 – though in the latter example it could also be argued to denote intention or "will".

Arakhin 5:6[38] presents us with a use of רצון which is at least as problematic as that with which we are concerned in Yev. 14:1 – and it is one major source of the many disputes over when and what kind of compulsion or coercion (*kefiyah)* invalidates a *get*, hence it is an important source to which I will return in the second half of this book. In Arakhin 5:6 there is a clear and palpable tension

[35] Shab. 5:4; Pes. 5:8; Men. 10:5; Men. 10:8.

[36] As noted above, I will argue at the end of this chapter (following Frankfurt) that "will" in its true sense is that desire by which we choose to shape our action; according to this definition, to claim that the rabbis "will" people to act in a particular way or to desist from particular actions but are not willing to use their power to enforce behaviour in accordance with that will makes little sense.

[37] Kelim 8:11; Makhshirin 1:1; Makhshirin 5:3; Tevul Yom 3:6. My translation of the word *ratson* as intention here has been criticised by, inter alia, Dr. Sacha Stern and Professor Alexander Samely. I contend that it is the translation which makes most sense in the context and would point out that my translation is by no means maverick: Neusner, for example, translates the relevant part of Kelim 8:11 as follows: "…For the liquid renders unclean both by intent and not by intent". Blackman also renders "*ratson*" and "*shelo l'ratson*" in Kelim 8:11 as "intentionally" and "unintentionally". Danby renders Makhshirin 6:8: "A woman's milk renders anything susceptible to uncleanness whether it is drawn purposely or not purposely. The milk of cattle renders anything susceptible to uncleanness only if it is drawn purposely…" (I will argue later in this chapter that "purpose" denotes a particular form of intention.) Similarly, Blackman's rendering of the relevant passage in Makhshirin 6:8 is: "A woman's milk renders [produce] *susceptible to uncleanness* whether [it is drawn] intentionally or [issues] unintentionally, but the milk of cattle does not render aught *susceptible to uncleanness* save [when it is milked] intentionally." Thus whilst no other translator consistently renders *l'ratson* and *shelo l'ratson "*intentionally" and "unintentionally" in every occurrence in Seder Tahorot, as I do, I would argue that it is in no way an idiosyncratic rendering. Moreover, the fact that many translators render the words differently in different contexts – as well as making different choices of English wording from one another – only supports my wider and more central contention that the meaning of רצון shifts according to context and cannot easily be pinned down.

[38] "[In the case of] those who owe value offerings – they take a pledge by force; [in the case of] those who owe sin offerings and guilt offerings – they do not take a pledge by force. [In the case of] those who owe *olot* and peace-offerings – they 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): They force him until he says: I will (*rotseh ani*)." This mishna and the Talmudic *sugyot* which discuss its implications for the will required in order to give a kosher *get* will be discussed at much greater length in chapters 3 and 6, where I discuss coercion.

between *ratson* and *kefiyah* but it is important to stress that the presence of the latter does not negate or render impossible the former – that is to say, the mishna presupposes that רצון (which I shall here translate as "will") can be compelled or coerced. The one remaining occurrence of רצון in the Mishna, on the other hand, Yevamot 6:1, contrasts רצון with אנוס, a word which, like *kefiyah*, is also frequently translated as "compulsion" or, in legal contexts, "duress". Unlike Arakhin 5:6; Yevamot 6:1 sets up a dichotomy which suggests that the two cannot coexist, thus the mishna is worth citing here in full because it may considerably advance our understanding of what רצון is by indicating what, in this particular context at least, it is not:

> 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*)[39] – 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.

In this mishna, "willing" intercourse is contrasted with compelled intercourse, and these two opposites exist on a different scale from that which extends from error (*shogeg*) to knowledge (*mezid*). Error suggests an inadequacy on the level of cognition – "I didn't *know*" what I was doing. Compulsion on the other hand suggests a deficiency on the level of volition: "I didn't really *want*" to do what I was doing.

That there is a distinction between cognition and volition might seem obvious; and, to someone with a basic knowledge of Hebrew, that רצון denotes the latter and, *by definition,* because it denotes the latter, does not denote the former, might seem equally obvious. However, I have argued that רצון bears a fluid meaning – one which does not allow for an easy translation; for example, I have argued above that in quite a few *mishnayot* רצון might be well translated as "intention", a word which, whilst not exactly describing the same type of lack of cognition implied by "error" has connotations more in the cognitive scale than, for example, "unwilling". Moreover, one of my central arguments throughout this book will be that a complete distinction between will, intention and knowing action is inappropriate when discussing a halakhic understanding of human action and what makes that action meaningful. It is, however, a distinction which appears to be drawn in English Law[40] and therefore, as a means of presenting a system of thought

[39] It might be worth noting that unlike other occurrences in the Mishna where it is predominantly לרצון which is used, Yev. 6:1 uses ברצון.

[40] The distinction is framed very concisely, for example, by James LJ in *Mohan* (1976). In his ruling, Judge Mohan asserts that intention is "a decision to bring about [the proscribed result], in so far as it

to which we might usefully compare or contrast the halakhic system, I think it useful to offer a brief exploration of intention as it features as a component of *mens rea* – the state of mind necessary in order for an agent to be convicted of a crime – in English criminal law. To critique certain aspects of that (legal) understanding of meaningful human action, I will then explore (as an alternative paradigm to which to compare the Halakha) a particular tradition of moral philosophy which views itself as a departure from rule-based (that is, quasi-legal) ethics – that represented by virtue ethicist Alasdair MacIntyre. Finally, to close this chapter, I shall summarise one philosopher's essay defining will and the freedom thereof in the belief that that definition is a useful one with which to go on to examine the notion of "will" in Halakha.

It is important to stress that I do not offer any of these understandings as "the definition" of the words "will" or "intention" in English; nor, of course, do I mean to suggest that they are the best or only understandings that may be found. Rather, I offer them in order to problematise our usage of these concepts, to highlight just how unstable they are – and how differently they are used by different communities and in different contexts. I have chosen these understandings (and not others) precisely because the very manner in which they conflict with one another – or are unstable in and of themselves – may reveal something about the tension and problems inherent in any demand for fully intentional, or willing action; about the problematic nature, in fact, of personal autonomy – but that, of course, is the subject of a later chapter.

Mens Rea

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.[41] 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

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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)." See A. Ashworth: *Principles of Criminal Law* (Oxford: Oxford University Press, 1995, 2nd ed.), 169. This is quite consistent with the fact that, as a constituent element of *mens rea*, intention to produce a particular consequence may be replaced by recklessness as to that same consequence (recklessness implying no particular desire whatsoever).

41 In this as in many other features, I suggest that the legal system differs from the Halakha, which is "maximalist" in the number and range of acts which fall within its purview.

actus reus that the criterion of *mens rea* 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[42] 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 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 why 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?"[43]

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 or rules. The Law's prohibitions, in order to be perceived as authoritative, must in most cases be blanket prohibitions, applying regardless of the

[42] 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. (See also pp.29-31 below, where I further distinguish purpose and motive.)

[43] Cf. P.H. Mussen, J. Kagan, A.C. Huston and J.J. Conger, *Child Development and Personality* (New York: Harper & Row, 1990), 236: "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." 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.

motive or purpose of the transgressor.[44] 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 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 ("narrative") theory,[45] 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.[46] 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.

[44] 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 Misérables*: 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.

[45] As described in the Introduction, I have been influenced by the "semio-narrative" theory of Algirdas Greimas, particularly its application to the legal context by B.S. Jackson in *Making Sense in Law supra* n.22, at section 5.1, pp.141-163, and in *Law, Fact and Narrative Coherence* (Merseyside: Deborah Charles Publications, 1988), particularly the first chapter. In my description of "typical" jury activity in the paragraphs which follow, I have relied on the sources quoted by Jackson – in particular the research of W.L. Bennett and M.S. Feldman, *Reconstructing Reality in the Courtroom* (New Brunswick: Rutgers University Press, 1981), discussed at pp.159-61 of *Making Sense of Law*, and W.A. Wagenaar et al., *Anchored Narratives*. *The Psychology of Criminal Evidence* (Hemel Hempstead: Harvester Wheatsheaf, 1993), whose theory of "Anchored Narratives" is described in section 5.3, pp.177-184, of *Making Sense of Law*). The latter is particularly revealing as it deals with (over)reliance on narrative typifications not by laypeople (English juries) but by professionals (judges).

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

"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, to want to know more. 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, 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 the 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.[47]

[47] 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

There is, then, a tension inherent in the legal system's definition of intention, or rather, between its formal definition[48] and what evidence may in practice be used 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.[49] 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.

Thus far, in dealing with criminal law and the English legal system, I have concentrated on the concept of "intentional" action and not of "willing" action. In

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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*, http://writ.news.findlaw.com/colb/20021023html, 23/10/2002).

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

[49] 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*, 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.

fact, criminal law accepts the notion of non-voluntary behaviour only in cases of mental illness or demonstrable coercion (by an external force).[50] It might thus be argued *either* that the Law is concerned only with the form of the action and not with the individual's disposition thereto (to put it simply: the Law simply does not care how I feel about what I do; it only cares that I am in my right mind, have the freedom to do or not do what I do and therefore can reasonably be assumed to intend the acts I commit) *or* that, Lord Justice James notwithstanding,[51] the Law assumes some link between intention and volition – it assumes that I want (not merely intend) to do what I do. The latter possibility is one which – in the context of the halakhic system – I will explore and develop in the next chapter. Before I do so, however, we should examine a somewhat different construction of intentional behaviour.

A View Drawn from Moral Philosophy

If the English system of criminal law provides one paradigm to which we can contrast the halakhic system, then the arguments of moral philosophers may provide an alternative, one which I believe may share more features in common with the Halakha – despite the latter's presentation in some ways as a set of norms, legal or quasi-legal rules. If Law starts with an act, the tradition of ethics with which I am concerned may be said to 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 continues to be influential). Nor is it possible to 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 they depict as consisting largely in the balancing of conflicting "rules".[52] However, the tradition of ethics on which I

[50] Ashworth, *Principles of Criminal Law*, *supra* n.40, section 4.2 (Involuntary Conduct), pp.95-103. In cases such as extreme drunkenness where actions performed 'under the influence' may not themselves be voluntary at the time of action, the Law nonetheless reserves the right to hold the actor responsible for his actions under the doctrine of prior fault.

[51] See above, n.40.

[52] As noted in the Introduction, this approach has been criticised from a feminist perspective by Carol Gilligan for failing to take into account the relational context of moral decision-making and is also subject to the criticism that such an approach to ethics seems to imply that there is always a (more) moral course of action which can be taken. It does not allow for a truly tragic moral quandary in which conflicting claims or obligations simply cannot be arranged in a moral hierarchy and there is

will be focussing in this section is one which consciously seeks to differentiate itself from such rule-based ethical systems. I draw on the work of such philosophers as Stanley Hauerwas (to whose work in developing a narrative ethics I made reference in the Introduction) and, primarily here, Alasdair MacIntyre,[53] who has sought to develop a "virtue ethics" which he sees as a direct descendant of an Aristotelian ethics of character.[54]

I choose these particular philosophers out of, inter alia, a conviction that it is at least as important for moral philosophy (or a theory of moral development) to give an account of ways in which an individual (or community) develops an inclination and ability to act on a moral decision once identified (that is to say, to formulate an account of the development of the will)[55] as it is for those areas of inquiry to suggest ways of arriving or teaching others to arrive at a moral decision. It is quite possible for a person to correctly identify the best course of action to take in a given circumstance, and to choose to take another, less good course. 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.[56]

MacIntyre, as I have suggested above, views his own virtue ethics as a continuation of a tradition originating in antiquity and, most particularly, with the thought of Aristotle. It is unsurprising, then, that his ethics is grounded in an

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no morally acceptable alternative (not even a lesser-of-two evils) which may be chosen – a *Sophie's Choice* type of dilemma.

53 See particularly MacIntyre's *After Virtue: A Study in Moral Theory* (Indiana: University of Notre Dame Press, 1984). 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 History of Ethics* (London: Routledge & Kegan Paul Ltd., 1967).

54 I define character here and elsewhere as a predisposition to act in a particular manner.

55 See my outline of Frankfurt's definition of the freedom of the will following.

56 Diana Baumrind in her essay "Leading an Examined Life: The Moral Dimension of Daily Conduct", in Kurtines, Azmitia and Gewirtz (eds.), *The Role of Values in Psychology and Human Development* (New Jersey: John Wiley & Sons Inc., 1992), 256-277, at 272 (cf. also at 258-262 and 265-272), draws a distinction between Judgments about Morality, Moral Judgments and Moral Conduct. She argues (emphasis in original) 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."

assumption of rationality – a fact which will become important as we go on in later chapters to consider the tension between the rational and the emotional self and the question to what extent the Halakha assumes rationality on the part of its subjects. 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).[57] However, assuming 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, only one of which I would describe as truly rational. The question "why?" may be answered retrospectively (with reference to the actor's motivation) or prospectively (with reference to his 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'[58] – is, I would argue, essentially a non-rational model – it 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. It is a model which provides the kind of answers to questions that a Freudian analyst (or a philosopher in the tradition of Hobbes) might approve.

From Socrates through Aristotle, Aquinas and a tradition which runs through contemporary thinkers such as MacIntyre and Frankfurt, on the other hand, the second model, a teleological one, is foregrounded. This is a predominantly 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*

[57] G.E.M. Anscombe, *Intention* (Oxford: Basil Blackwell, 1957), paras. 5-9 (pp.9-16).

[58] 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.

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 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).

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 (though Greimas' semio-narrative theory, in setting 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*, might seem to suggest the teleological model). 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, for instance, 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: "Men do not always act rationally, *but the standards by which men judge their own actions are those of reason*"[59] (emphasis mine). I would argue that these same standards (those by which men judge their own actions) are the ones by which men judge the actions of others *so long (and only so long) as they acknowledge the other as a similarly rational human being*. This latter point is important: Aristotle does not necessarily assume that slaves will act rationally, or purposefully.[60] Louis Sass points out that: "While "normal" behaviour is generally understood in teleological terms … "pathological" behaviour is generally understood in deterministic terms (that is,

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

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

caused by something)."[61] In this case, we have a clear privileging of purposeful behaviour over "motivated" behaviour.

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 who work in a jurisprudential context. 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*:

> "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.[62]

Unlike narrative theory in its legal context, then, Aristotle's demand is not for short-term coherence but rather for long-term, even life-long coherence. This will become a crucial factor when we are considering (in chs. 5 & 6) the validity of such mechanisms as a condition in marriage or an authority to give a *get* which presuppose that a man can make a provision at an early stage of his adult life for a situation which may arise many years later.

[61] L.A. Sass: *Madness and Modernism*: *Insanity in the light of Modern Art, Literature, and Thought* (New York, NY: BasicBooks, 1992), quoted in S. Giordano, *Understanding Eating Disorders: Conceptual and Ethical Issues in the Treatment of Anorexia and Bulimia Nervosa* (Oxford: Clarendon Press, 2005), 88.

[62] McIntyre, *A Short History of Ethics*, 63, quoting Aristotle. *Eudaimonia* is 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.

Will and Desire

The conception and definition of will, and the manner in which it is distinct from desire, with which I will be working in this book 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".[63] As part of his attempt to define will, Frankfurt offers an analysis of the structure of human desires.[64] That analysis may be paraphrased as follows:

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 in no way the same thing as intending to act in that way. I may, for example, want to do X (cook dinner), but 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

[63] In *Free Will*, ed. Gary Watson (Oxford: Oxford University Press, 2003, 2nd edition), 322-336.

[64] I have used 'desire' throughout this book in a way synonymous with 'wish' or 'want'.

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.

Frankfurt's care to strip his idea of "personhood" of any moral valance was at first glance puzzling to me – he gives no indication in his paper why he would wish to distinguish between being a "person" so defined and being a "moral agent" – or, at the very least, to acknowledge, as I have pointed out, that not caring about one's will seems a fair definition of amorality. Because his insistence in this regard was so perplexing, I found it necessary to posit an explanation. What follows therefore is mere conjecture – but even if it is does not offer a true account of Frankfurt's thought processes, it has the advantage of taking forward my own engagement with the one philosopher who, perhaps more than any other, was concerned with a concept which will become central over the course of the next two chapters: that of autonomy. It is possible, according to my hypothesis, that in his own project of seeking to delineate the relationship between desire and will, Frankfurt was reminded of Kant's distinction between Willkür and Wille – both sometimes translated by the English word "will". In Kant's thought, Willkür denotes what has sometimes been described as "freedom of choice"; the ability to choose what one does; Wille, by contrast, denotes the "rational will". The exercise of Wille, if Kant is correct, should invariably lead to morally good (in Kantian terms: rational, in accordance with right Law) actions. Against this background, we may make sense of Frankfurt's desire to escape the conflation of personhood with moral agency in the as follows.

In the context of a discussion of the difficulty of balancing paternalist concerns with respect for autonomy in the case of patients suffering from eating disorders, Simona Giordano outlines a distinction which may be drawn between substantive and formal conceptions of autonomy.[65] The substantive conception (which she explicitly links with Kant and legal positivists whose thought relies on Kantian assumptions, such as Rawls) accords rationality (and therefore the right to autonomy) to those who, in any given situation, make the decision or judgement that rational people would, in that situation make. Put very baldly: X is the rational choice for a person in situation P; *A* is in situation P; if *A* expresses a willingness to X then he is rational; if she declines to X, then she is irrational. This conception of autonomy of course relies on the anti-tragic conception of morality against which

[65] Giordano, *Understanding Eating Disorders*, *supra* n.61, at 46-50.

(drawing on Hauerwas) I argued in the Introduction – namely, that in any given situation there is a moral and rational choice to make and (contrary to the insights expressed by narrative ethicists and feminists) that there is only one most moral and rational choice which will be chosen by a moral and rational individual regardless of his/her personality or the particular relationships which are involved. It also, of course, assumes a clear and firm link between rationality and positive morality.

Thus my hypothesis is that perhaps Frankfurt in rejecting a moral element to personhood is baulking against the assumption that one who cares what his will shall be is one who necessarily cares that his will should be good – especially if that "good" is the "good" as defined by others. This may indeed be a fallacy: one could imagine a scenario in which a man who is squeamish might wish to develop the will to slaughter innocent villagers in a military coup in order to gain promotion in a corrupt and evil political régime. Such a man would care about his will, but his will could in no way be identified as the morally right course of action.

I would rather incline to a procedural definition of rationality according to which if one is able to give a plausible, intelligible account of the reasons one has chosen X, X is a rational choice regardless of whether or not it is a good choice – either in absolute moral terms or in terms of utility (objectively assessed) to the person choosing. A moral agent, in this conception, is a person capable of making moral choices whose actions may – nay, must – therefore be understood to reflect their moral choices. (As we have seen, we impute intentionality to the actions of others.) A moral agent is a person who can be held responsible.

The argument between substantive and formal conceptions of autonomy will become crucial as we move in later chapters to the discussion of whether a husband can be considered "truly" and rationally to choose what others are agreed he should not – most notably, to retain the shell of a marriage even in cases where the Halakha (in the person of the *bet din*) deems the couple should be divorced and where the continuation of the marriage in the view of all independent observers benefits no-one. The narrative related in the Preface is an attempt to show that such a choice is perfectly possible: both Ze'ev and Naftali are reasonable, intelligent, "good" men; both have, however, chosen to remain in marriages with women who are sexually not theirs – and as we shall see in chapter 4, sexual exclusivity is the *sine qua non* of halakhic marriage. Is their rationality or autonomy thereby compromised?

I have, in this last section, written of both rationality and autonomy – using the concepts almost interchangeably and neither defining nor defending my usage. I have needed to refer to these concepts because my focus was on Kant's understanding of Will, which might be described as almost synonymous with pure reason (rationality), the latter being the sole and necessary requirement for the

imputation of autonomy. However, as my own understanding of autonomy is significantly different from Kant's, a gap in my narrative thus far still exists. The focus of this chapter was the mishna in Yev. 14:1 – my attempt has been to define the concepts which are evoked by the English words with which we may translate the mishna's *ratson*; namely, intention, desire and will, or, rather, to illustrate how easily they elude definition. A conception of autonomy, however, lies necessarily behind any discussion of will. I believe the Halakha has such a conception and it is the purpose of the next two chapters (in a narrative, non-direct style) to address and explore that conception.

Chapter Two

Making Decisions – Desiring, Intending, Wanting and Willing: from רצון to דעת

Yevamot ch.6 mishnayot 1-2:

> A man who has intercourse with his *yevama*, whether he does so mistakenly or knowingly (בין בשוגג בין במזיד), whether he is compelled to do so or whether he does so willingly (בין באונס בין ברצון) – 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.
>
> 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 *ḥalitsah* to an ordinary priest, a *mamzeret* or a *netinah*[66] 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.

There is a telling semantic shift which occurs during the course of the first mishna: the first clause stipulates בין באונס בין ברצון – whether under compulsion or whether willingly – whereas the second stipulates הוא אנוס והיא לא אנוסה – exchanging the "willingly" of the first clause for "not under compulsion". This shift suggests an identification of that-which-is-not-compelled (if performed) with that-which-is-willed – an identification which may well have ramifications for our understanding of the divorce process: if a *get* is given in the absence of demonstrable coercion, we the community "read" (the evocation of story once more here is entirely deliberate) the husband's action as willing. But what is this "compulsion" which can override a man's will? The Gemara on this mishna (Yevamot 53b) asks precisely this question , the question to which this whole book is, in a wider sense, seeking an answer: אונס דמתניתין היכי דמי? – What type of compulsion is it with which our mishna deals? The immediate response is startling:

> 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

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

compulsion in forbidden relations, as there is no hardening [of the male member] without דעת?

The Gemara does not question or challenge this dictum of Rava here cited: "there is no erection without (as a working translation for דעת I will use) intention". Put quite simply, it claims: a man physically cannot have relations unless he has an erection, and he cannot sustain an erection unless he wants to have relations. My summary, however, would disguise a significant semantic shift made by Rava. Hitherto, אונס – compulsion – has been contrasted with רצון. It is not, however, רצון which, according to Rava, is necessary to sustain an erection; rather, it is דעת.

In order to comprehend the Gemara's understanding of רצון, then, we need to consider the connotations of the word with which it has been replaced. Unlike רצון, 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. The Mishna in Arakhin 1:1 gives perhaps the classic usage: "A deaf mute, an imbecile, and a minor are [subject to having their value] vowed and [being] valuation-pledged but do not vow [the value of others] nor make valuation-pledges because they do not possess *da'at*."[67] דעת is 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". "A deaf mute, an imbecile, and a minor... do not possess *da'at*"; two of these three types of male who are considered to be without mental capacity, however – the deaf-mute and the imbecile – are indisputably capable of sustaining an erection. It is impossible, then, to interpret the word דעת in Rava's statement as connoting merely mental capacity or knowledge. It is also, I would argue, 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 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

[67] See also Pes. 10:4; Bava Metsia 7:6; Para 12:10; Yadayim 4:7; Tahorot 3:6 as well as Arakhin 1:1.

[68] Tevul Yom 4:7.

[69] Avot 3:17: "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* (בינה) *there is no knowledge* (דעת), and if there is no knowledge (דעת) there is no understanding (בינה)…"

"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. Intention can exist without desire even if (as I argued in ch.1 against Judge Mohan) this is not the story we typically tell about our own intentions or read into the actions of others: 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 passion and arousal, in addition to being affective responses to stimuli, are also intentional states for which a man may be held responsible.

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 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 hop from the Gemara back 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.

[70] He could, of course, mean simply "desire" but that would be linguistically even more problematic. Why should he abandon the Mishnaic רצון which does at least sometimes denote 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 51b, in its discussion of a different statement also by Rava, uses the word יצר to denote sexual desire (see the discussion on p.40), 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.

Three curses, in the world inhabited by Harry Potter, together form the category of "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 villainess, 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 the qualities that the Halakha attributes to the adult and not to the child is דעת – a דעת that, as 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, in which Harry attempts 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 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

[71] J.K. Rowling, *Harry Potter and the Order of the Phoenix* (London: Bloomsbury, 2003), 715.

[72] J.K. Rowling, *Harry Potter and the Half Blood Prince* (London: Bloomsbury, 2005), 562.

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.

There is another possible reading of the Harry Potter development I have outlined here (and thus also the statement of Rava) which would suggest a slightly different emphasis: Harry, it is important, to note, never does use the *cruciatus* curse. Nor does he ever use *avada kedavra*, the killing curse. He successfully defeats Voldemort by simply disarming him and thus leaving him entirely vulnerable to his own rebounding curse. Killing and torturing simply are not part of who Harry is; they are too inconsistent with his story of himself. Thus, also, (to apply this reading to our discussion of Rava's statement) a man is asked to be consistent (consistency being, as I will argue later in this chapter, one of the requirements of דעת) in the story of his life – a story which Judaism insists should preclude murder, forbidden sexual relations and idol worship.

If consistency is such value as I am claiming, then I should immediately draw attention to another piece of Gemara (Ketubot 51b) which also quotes a statement by Rava – one which might at first glance appear to be *in*consistent:

> 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*] overwhelmed her…

Incidentally, the father of Shmuel also figures in a discussion of rape in Ket. 39a where he posits that the pain for which a 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 here in this *sugya* 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*.[73] 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 – involving his whole sense of self and 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.

I would suggest three possible explanations for the 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 *baraita* 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 likely to develop to a greater degree than a woman.

A few pages back, when stating that the Mishna never uses דעת to denote an

[73] Methodologically, I choose to 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.)

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 currently accepted, one might almost say unquestioned, understanding thereof. Tsvi Marx in his book *Disability in Jewish Law* writes that: "… minors, deaf-mutes and the mentally disabled are grouped together (*ḥeresh 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 da'at"*. Uncharacteristically, though, Marx cites no sources for this "rationale". That is, he does not justify (or 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 da'at*" 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 *ḥeresh* 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

[74] T. Marx, *Disability in Jewish Law* (Abingdon and New York: Routledge, 2002), 96. It has been suggested that Marx is not a good representative of the halakhic tradition as a whole. I entirely agree, which is why in the argument that follows I dispute his assumptions in this regards - precisely on the grounds of other rabbinic sources. However, I have cited him here because he is, in my view, representative of where a particular strand of the halakhic tradition now stands. Specifically, he comes, like Dayan Broyde and others who are active in seeking to understand the requirements for a kosher *get* out of concern for the problem of *iggun*, out of Yeshiva University which, together with Yeshivat Gush Etsion in Israel represents in many eyes the "pinnacle" of Religious Zionism/Modern Orthodoxy. These *yeshivot* have achieved distinction in teaching and perpetuating the Brisk school of halakhic scholarship – to which I have referred in the Introduction. It is this school of scholarship which is the milieu out of which many of the recent proposals for halakhic solutions to the problem of *mesurevot get* have emanated and it is those proposals – and the problems inherent in them – that are the ultimate focus of this thesis.

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 *ḥeresh* is one of cognitive functioning. The *ḥeresh* 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 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

[75] Linda K. Silverman, "Parenting Young Gifted Children", in J.R. Whitmore (ed.), *Intellectual Giftedness in Young Children: Recognition and Development* (New York: The Haworth Press, 1986), 74-75; M. Kitano, "Evaluating Program Options for Young Gifted Children", also in Whitmore (*ibid.*), 97-98. (The authors point out that not all intellectually gifted children are in fact quick to learn literacy skills).

[76] See R. Ellis, *Understanding Second Language Acquisition* (Oxford: Oxford University Press, 1985), 100-111.

[77] Most particularly, H.H. Gregory and C.B. Gregory, "Counseling Children Who Stutter and Their Parents", in Richard F. Curlee (ed.), *Stuttering and Related Disorders of Fluency* (New York: Thieme; 1999, 2nd ed), 43-64, write (at 52) 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." 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 (at 51) 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."

[78] O. Mowrer, *Learning Theory and Symbolic Processes* (New York: John Wiley & Sons, 1960), cited

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 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 part of a range of expressive options. Given the Talmud's characterisation of the *ḥeresh* as a person who is not *bar da'at*, 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

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by Ellis, *Understanding Second Language Acquisition*, *supra* n.76, at 117.

79 In describing social interaction theories of language development, Fleur Griffiths, *Communication Counts: Speech and Language Difficulties in the Early Years* (London: David Fulton Publishers Ltd, 2002), 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*, *supra* n.76, at 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.

82 Robert C. Gardner and Wallace E. Lambert, *Attitudes and Motivation in Second Language Learning* (Rowley Mass.: Newbury House Publishers, 1972), cited in Ellis, *supra* n.76, at 117-119.

83 Studies cited in M. Marschark, *Psychological Development of Deaf Children* (New York: Oxford University Press, 1993), 65.

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."[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]

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 the nation 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 me 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*

[84] *Ibid*., at 66.

[85] Elsewhere (at 52), in a discussion of the value of mixed (manual and oral) communication in the education of deaf children, Marschark quotes a study by G. Cornelius and D. Hornett, "The Play Behaviour of Hearing Impaired Kindergarten Children", *American Annals of the Deaf* 135/4 (1990), 316-21, 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]… exhibit[ed] more than eight times as many aggressive acts (e.g., pushing, hitting and pinching) as those in the manual + oral classroom. It should be noted, however. 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

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 - that is to say, the self is a narrative self, defined by its sense of its own story. Acquiring the language of a new country necessitates adopting the cultural assumptions of that country (eating ארוחת אשר[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) thus changing a part of one's story and so doing losing a part of one's identity. 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 part of one's self. 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.

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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.

H. Stern, *Fundamental Concepts of Language Teaching* (Oxford: OUP, 1983), 376-77, quoted in Ellis, *Understanding Second Language Acquisition*, *supra* n.76, at 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.

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 Jean Khalfa (ed.), *What is Intelligence*? (Cambridge: Cambridge University Press, 1994), 179-198, writes (on p.7 of the internet version) 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."

The person who does not speak the language of the community (and especially if he is not able to respond appropriately to 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 social boundaries) or 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 *Teḥumin*[90] (the article as a whole discusses the contemporary halakhic status of the חרש-מאיל (deaf-mute) 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 more concisely) than I can 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 da'at*" to include not merely intelligence but also the capacity to think and act responsibly…
>
> One can adduce several proofs for defining the expression "*bar da'at*" in this way: for example, in the very specific context of the laws of *yiḥud* [seclusion], the Gemara decides (Kiddushin 80b) that a woman (who is not by nature considered unintelligent,

[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, see H. Ginsburg and S. Opper, *Piaget's Theory of Intellectual Development: An Introduction* (New Jersey: Prentice Hall Inc., 1969), ch.3.

[90] Elisha Ancselovits, "Ma'amad ha-ḥeresh b'metsiut zmaneinu" ("The status of the deaf-mute in contemporary society"), *Teḥumin* 21 (2001), 141-52.

> and whose *da'at* is not questioned in other spheres of action) "shall not be secluded with two men, because women's intentions [*da'atan*] 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…
>
> … 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 da'at*, 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 da'at*"…
>
> … 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 da'at,*[92] notwithstanding that he also encounters problems in his communication with the wider world. However, the speaking deaf person referred to by *Ḥazal* 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 first chapter: the actions of a person "make sense" and may (not infallibly, but generally) be predicted insofar 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

[91] Cf. Nancy Weinberg and Judy Williams, "How the Physically Disabled Perceive their Disabilities", *Journal of Rehabilitation* 44/3 (1978), 31-33.

[92] According, at least, to the Rambam (Laws of Terumot 4, 4; Sheḥita 4:9; Ishut 2:26).

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 also worthwhile to stress in this context that, at least in a Jewish context, I consider socialisation and education to be, if not indistinguishable, then at least two facets of the same process – that which is still referred to in the Orthodox community today as *ḥinuch*.

It is time now to return to mishna Yevamot 14:1:

> 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 Yoḥanan 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 [his wife] unless willingly….

The Gemara's discussion (Yevamot 112b) opens with a question by Rami bar Hama:

> 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 *baraita*: a madman and a child who betrothed women and subsequently died – their widows are exempt from both *ḥalitsah* and *yibum*. A deaf-mute

[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.

> 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. Yoḥanan ben Nuri) and is implicitly rejected by the Gemara, which makes, once again, the linguistic shift from *ratson* to *da'at*: 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

[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 has 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.

(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, implicitly, 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 relevant to our discussion here; what is of interest is the Amoraic identification of (the Mishnaic) רצון with דעת. Without דעת, implies the Gemara, there can be no רצון. Either they are essentially the same thing (as I suggested might 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 is with דעת is at this point implicit from the question which aligns the deaf-mute with the minor and the madman. The word 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 *ḥullin* (i.e. that there is at least a possibility that his act of separating *teruma* has been effective). The relevance of this discussion (on 113a-b) 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 הוא קל ישתא דעתא חרש – the *da'at* of a deaf-mute is weak[95] – but it 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 *da'at* of the *ḥeresh* 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

[95] Evoking the description of woman's weakness of resolve, *supra,* at 40-41 and 47-48.

action at any given moment.

"...The man who divorces is not like the woman who is divorced, for the woman goes out whether willingly or unwillingly (לרצונה ושלא לרצונה) whereas a man does not release [his wife] unless willingly (לרצונו)." This mishnaic statement to us is fraught with difficulties and ambiguities, but it is worth noting that the discussion of it in the Gemara relates solely to identifying the underlying question which sparks it (is Rabbi Yoḥanan 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, to the Amoraim its reasoning must have seemed self-evident: divorce requires the will of the man and not the will of the woman.

In this chapter, I have only touched on any possible explanation for the gender imbalance inherent in the process of divorce. I have done so by exploring the relationship between *ratson* and *da'at*, arguing that the former depends upon the latter and that *da'at* is a product of a particular (moral) process of education and socialisation – an education and socialisation which, historically, might have been afforded to men and not to women. It is not until chapter 4 that we shall examine some possible reasons why it is crucial to the structure of halakhic marriage that the (firm, rational, educated, socialised) will of the man should be required for the dissolution of a marriage and the (less predictable because less educated) will of the woman should be (in the world of the Mishna) precluded from having any effect. In the meantime, in the chapter that follows, I wish to further explore the nature of the educated will as revealed in various key Talmudic sources and the commentaries of the Rishonim.

Chapter Three: Growing Up for Good: from דעת to radical autonomy

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 is 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 that trait as a combination of competence, independence[96] and self-control.[97] 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: 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.

[96] "… 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." L. Haworth, *Autonomy: An Essay in Philosophical Psychology and Ethics* (New Haven: Yale University Press, 1986), .43.

[97] "…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*.).

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 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,[98] 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[99] 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. Tolkien's vision is indelibly etched with the imprint of his experience of World War I.[100] 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[101] – and the only "heroism" possible on an individual level is friendship between soldiers.

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[98] Tolkien: *The Lord of the Rings,* 658-659 (The Passage of the Marshes).

[99] 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.

[100] For the best analysis, see John Garth, *Tolkien and the Great War: The Threshold of Middle-earth* (New York: Houghton-Mifflin Company, 2003).

[101] Including the officers. Garth points out that the death rate in Tolkien'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 élite 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[102] *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*.[103] 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."[104] 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.

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, I would suggest that their philosophies inhabit entirely different

[102] 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.

[103] A device for storing thoughts and memories externally to the brain and through which one person may enter another's memories.

[104] Rowling, *Harry Potter and the Deathly Hallows*, 557.

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 the 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*.[105]

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In Chapter 1, I presented various models of action, including the formal legal model, the narrative-motivational model and the teleological-narrative model. I further suggested that in considering the Halakhic corpus 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

[105] It has been suggested to me that these may also be argued to be the essential characteristics of a classical epic. It is not within the scope of this book to consider the epic as a genre, but the suggestion and its implications are interesting.

general, or a specific Rabbinic text in particular, subscribe to the "autonomy narrative" (a narrative in which a central value is the freedom of the will and its development) either as an ideal or as a realisable goal for most human behaviour.

One of the major questions I am attempting to explore in this book is how far the Halakha (in one particular area: that of divorce) expects, encourages, tolerates or 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 spheres in which the individual's will is potent, 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[106] 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 drawing a distinction between the areas of life in which individuals are afforded considerable freedom and those in which they are not, is to label those areas in which citizens have freedom of action "private".[107] It hardly needs to be pointed out, of 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

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

[107] This is precisely the line that Broyde takes in *Marriage, Divorce and the Abandoned Wife in Jewish Law* (*supra*, n.14), 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.

Oddly, however, Broyde *does* explicitly acknowledge the public consequences of laws governing the divorce of private individuals. He writes, for instance (p.61): "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." 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.

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; I am thus 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 the hero's autonomous action is seen to be beneficial both to others and to himself).[108]

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 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, students and communities. Thus (as I mentioned earlier), it is apt 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 opponents, 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, the monster of this epic quest. 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",[109] Mark McCullagh points out that the portion of the Nicomachean

[108] 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.

[109] In Richard Bosley, Roger A. Shiner and Janet D. Sisson (eds.), *Aristotle, Virtue and the Mean*, Special Issue of *APEIRON: a journal for ancient philosophy and science* (Edmonton, Canada) XXV

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 élite of the autonomous city-state) will need to be educated to have the right will, or to be able to arrive thereat. As McCullagh 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 behaviour.[110] 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 *mitsvot – talmud torah* (loosely translated: education) – might equally be directed to encourage autonomy or to encourage obedience. If the overriding aim of this mitsvah 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 mitsvah 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

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no.4 (December 1995), 155-174, especially at 156.

[110] 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.

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 splits into a further 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 perhaps 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 (in the absence of hard fault) 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.

Aside from Yevamot 14:1, one other mishna provides a central source for any discussion about the רצון in the context of the giving of a *get*, and this is the last mishna in chapter 5 of *Arakhin*. That mishna (5:6) reads as follows:

> [In the case of] those who owe value offerings – they take a pledge by force (ממשכנין); [in the case of] those who owe sin offerings and guilt offerings – they do not take a pledge by force. [In the case of] those who owe *olot* and peace-offerings – they 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: "לרצונו" (according to his will): They force him until he says: I will (רוצה אני)...

Because an analysis of the Rambam's understanding of the reasoning behind it must be so central to any discussion of this statement,[111] it seems fitting to begin with his commentary on this particular mishna. Let us take as a starting point his analysis not of the (controversial) end of the mishna, but of its beginning:

> *Rambam: Commentary on the Mishna, Arakhin ch.5 mishna 6*: The reason (טעם) that they 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 they take pledges in such cases by force (ממשכנין אותם)…

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

[111] 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 (S. Riskin: *Women and Jewish Divorce: The rebellious wife, the Agunah and the right of women to initiate divorce in Jewish law - A Halakhic solution* (New York: KTAV Publishing House, 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.

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 a 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. This expansion can be found in the Gemara's discussion of the mishna in Arakhin 21a:

> *Gemara:* R. Pappa said: From some people who owe sin offerings they take a pledge by force, and from some people who owe *olot* they do not take a pledge by force. "From [some] people who owe sin offerings they 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 ...

The Rambam's explanation makes sense in this context, 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 they 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 concerned with Torah laws] are lax regarding them; therefore they 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 end of the same mishna's requirement that the man consent verbally (*…ad sheye'amar rotseh 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. (I shall 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: 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". (היכא דבית דין ממשכנים אותו צריך שיאמר רוצה אני)

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.[112] This seems entirely consistent with his commentary on the mishna in Yevamot (14:1) where he explains "a deaf mute – just as he entered into the marriage by means of signals…" (חרש בשם שבונם ברמיזה) as being "about" the formal equivalence of betrothal and divorce: "that is to say: just as the betrothal, so too [must be] the divorce" (כלומר בקידושין כך גרושין).

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) *rotseh ani*; 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. "*Rotseh ani*" in this context means: I really mean this; not: I want it. (We have seen in the last chapter that the words *ratson* and *da'at* are deeply linked and even that "intention" is one possible translation of *ratson* in the Mishna – though I argued in the context of Yev. 14:1 that רצה (like *rotseh,* a verb form rather than the noun) should be read more straightforwardly as "want" or "desire".)

[112] My colleague Rabbi Dr. Abel has vigorously disputed this point. He argues that 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 that 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 *rotseh 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 *Aharonim*, 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.

A qualitatively different understanding is implied by Rashbam in his commentary on Bava Batra 47b-48a, where the subject of a forced utterance of *rotseh ani* is discussed in a context very different from that in Arakhin. We read in Bava Batra 47b:

> 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 he were not pressured (לאו דאנים), 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.[113] 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.[114] 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.

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.[115] 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

[113] 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.

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

[115] M. Killen & J. Smetana, *Handbook of Moral Development* (London: Routledge & Kegan Paul, Ltd., 2006), especially ch.4: Conscience and Internalisation.

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 Pharaoh (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 Pharaoh'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.[116]

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

[116] 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 *Aḥaronim* towards incentives to give a *get*). However, it is interesting to hypothesise, following B.S. Jackson ("The Fence-Breaker and the *Actio de Pastu Pecoris* in Early Jewish Law", *Journal of Jewish Studies* 25 (1974), 123-136), that exemption from punishment in the case of indirect causation might well arise from a perception that the animal or natural phenomenon which directly causes the damage is itself presumed to have 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 shaliaḥ ledavar 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 haZaken 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" (2 Sam. 12:9). 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 haZaken'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 *bet 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.

> …[a seemingly redundant saying:] he shall bring it: this teaches that they force him (מלמד שכופין אותו); but is it possible that [the sacrifice should be offered] against his will (בעל כרחו)? For that reason [in order to refute this possibility] we are taught "according to his will" (לרצונו). 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" (כופין אותו עד שיאמר רוצה אני).

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

> 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" (לרצונו); because he resolved in his heart (דגמר בלבו) 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[117] differs from my 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 "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 רוצה אני must always, or even often, indicate that the seller *desires* to sell. If "Will" might be defined as "a desire that a particular event or circumstance be effected through one's own actions or those of others"; 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*"[118] 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

[117] And Rashi in his analysis of the connected sugya in Kiddushin (50a) s.v. *ki mitsvah lishmoa ḫakhamim*. Rashi writes that there is a presumption that he is fulfilling the mitsvah and that he "determined in his heart" (*g'mar b'libo*) to fulfil the words (commands) of the *bet din*. Rashi in Arakhin is silent on this point.

[118] An undivided, or peaceful, or whole heart.

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 to accept that, given the context, it is best (either instrumentally or as an end in itself) 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 *shaḥarit*, 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*:

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

The expression I have here translated "they focussed their minds" is "*yihavu da'ateihu*", literally: they brought their "*da'at*" and the word I have translated "decided" is "*gamru*". Thus the decision-making process described by the Ramban appears to be: engaging the volitive faculty – imagined to be a rational faculty (*da'at*) – and then coming to a point of closure (*gamru* – finishing). This is what is referred to throughout the halakhic literature as *gemirat da'at*. It is this decision-making process which he deduces to have taken place from the words רוצה אני. Once again, then (as I attempted to demonstrate throughout chapter 2), *da'at* and *ratson* are shown to be inextricably linked in the formation of the adult and responsible (socially and morally educated) will.

Thus we have on the one hand Rabbi Ovadia from Bartenura who seems to understand 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 (whether the heart or the mind is emphasised in that process).

The Ritva's commentary on Bava Batra 48a recalls that of the Ra'av, emphasising the need for words rather than assuming from those words any volitive process:

> And thus [too] you say with women's *gets*: they beat him (בופין אותו) until he says "I am willing: [This refers to] those that they force to release [their wives], and this is the *get* which is justly coerced (*hame'useh 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 (מחמת אונסה), 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 me'useh*”[119] but in the case of those whom we force to release their wives, it is a *get me'useh k'din* – a *get* which is “justifiably” or “legally” coerced. It is worth noting as an important aside here that the Hebrew word *me'useh* is not actually a direct translation of the English word “coerced” or “compelled” though the phrase *get me'useh* is properly translated as a “coerced *get*”. In fact, *me'useh* is a passive form of the verb ע-ש-ה – to do. If doing is agency then he who does is agent and subject. We saw in the beginning of chapter 1 how important it is that in Halakha the husband, in both taking a wife and divorcing her, acts: he is the subject and she the object of his action. In the case of a *get me'useh*, by contrast, the *get* and not the husband is the focus of the phrase. The *get* (object) is enacted but with a problematic unclarity as to the subject of the action; the husband is seen to disappear, his status is diminished; he is no longer the sole agent (because he is no longer sole author, motivator) of his action.

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 into the category (outlined above) of thinkers who tend to view important decisions with a communal impact as more “public” in nature. 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.

[119] 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.

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 recalcitrant; he is expected to concede to the giving of the *get*). However, that view trusts the husband to be ultimately rational (and therefore amenable to persuasion, 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 chapter 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[120].)

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 question appears in Kiddushin 49b (as part of a chapter which is concerned with conditional acquisitions):

> Regarding a certain man who sold his possessions in the belief that he was to make aliyah to Erets 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" (דברים שבלב) are not "words" [to be taken into account when assessing the validity of an action].

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

[120] Possibly because we think that giving a *get* following non-halakhic coercion may actually constitute a wrong decision. As noted in ch.1 (pp.33-34), Giordano, *Understanding Eating Disorders*, *supra* n.61, 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 in that it 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 thus irrelevant to autonomy. (For a further discussion of substantive versus formal conceptions of autonomy in relation to pressure of the husband to divorce his wife, see *infra*, ch.6, at 125-128, and my conclusions in ch.7.) 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).

– 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.[121] 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.[122] 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.[123]

The discussion around the notion of דברים שבלב is a crucial one for any 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 on Kiddushin 49b:

> 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

[121] See also the commentary of the Ritva on Bava Batra 48a, a partial analysis of which I offered above (at 67-68). 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.

[122] Ginsburg and Opper, *Piaget's Theory of Intellectual Development*, *supra* n.89, at 90.

[123] Hence the requirement for prayer to be audible to oneself even when (as in the case of the silent *amidah*) not to others (Shulḥan 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 shebalev 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.

at the time of the sale that he is selling because he wishes to go to Erets 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 Erets 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 mitsvah 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 mitsvah; and if he does not return it, he has not fulfilled the mitsvah; 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 Erets Israel.

Ba'alei haTosafot in this commentary 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.[124] 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 *umdena* – 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.[125]

[124] 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.

[125] On *umdena*, see A. Westreich, "*Umdena* as a Ground for Marriage Annulment: Between Mistaken Transaction (*Kiddushei Ta'ut*) and Terminative Condition", in *The Manchester Conference Volume,*

Whilst this may be a useful set of categories into which we place actions, *Ba'alei haTosafot* 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 *umdena* and not classify his thoughts as *devarim shebalev* are those in which the context "proves" the intention of the actor. Thus, we read in Novellae of the Ran on Kiddushin 20b (pagination of the Rif):

> *Rava said: these were words that were in the heart* (דברים שבלב)*, 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 (**אומדנא**) 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 of the person acting; thus] 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 (הענין מוכיח בתוכו) is that there are actions for 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 book, 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 believe 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

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ed. L. Moscovitz (Liverpool: The Jewish Law Association, 2010, Jewish Law Association Studies XX), 330-52, and the earlier internet version in the Bibliography. See now also A. Westreich, *Talmud-Based Solutions to the Problem of the Agunah* (Liverpool: Deborah Charles Publications, 2012), ch.7.

unintentional).[126] However, in the case of an act 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 Erets Israel), the act itself is not particularly inexplicable without that condition; after all, as the Ran points out, many 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:

> …And Rabbeinu Tam objected on the basis of what we learn in the third chapter of Terumot, and also in Pesaḥim: "A person who means to say *ma'aser* 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 he said] is 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 (see the discussion in Chapter 2) 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."[127] About this situation Rabbeinu Tam (in line with the Tosafot explanation that we saw earlier) writes: ודילמה שאני התם שאונס הוה וכיון דמתוך אונס 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]."[128] That is, the fact of demonstrable external pressure or compulsion causes

[126] "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.

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

[128] 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.

us (the spectator/auditors) to examine the act or speech-act more closely and raises the question of its voluntary (or otherwise) status.[129] 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.[130]

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 person bringing the sacrifice is forced *ad sheye'amar rotseh 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 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 – שאני התם דאנן סהדי דניחה ליה בכפרה ודילמה – "perhaps that case is different because we assume that he is pleased with the atonement".

[129] 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 "*ḥerem*" and retrospectively insists that he was referring to the "*ḥerem"* (net) of fishermen and not the religiously significant *ḥerem*. (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.

[130] In the commentary of the Beit Yosef to the Tur EH 134:2 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 (*ḥefets*) 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-existent, 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 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).

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 sheye'amar rotseh ani*" as a possible source for Rava's dictum? This possibility also is rejected: ודילמה 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 – ניחא ליה – this second objection does not use the language of affect but rather the language of commandment – *mitsvah*. 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,[131] 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, that the Jewish person is in some sense pleased to do what he is commanded to do 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. Before we turn to his words on the subject, however, I would like to contextualise them by at least touching on the Rambam's notion of will, and in particular the education of the will, in general.

The opening of this chapter (the "digression" into the realm of Harry Potter) was about education as moulding of the will. In one of his most famous passages[132] The Rambam follows Aristotle (and an august line of thinkers) when he suggests that whilst one may not be "by nature" 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 Chapter 1, the complete absence of any desire or effort in this direction might correctly be considered a

[131] Along the lines argued by Kant, namely that the expression of rational autonomy (possibly, it could be argued, a man's true will) consists in acting according to Law – the ideal, universal moral standard which presumably may be identified with Divine command.

[132] *Hilkhot De'ot* ch.2.

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. The education philosopher John 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.[133] The essence of Frankfurt's argument[134] 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 haGer:[135]

> …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 (the love of G-d) 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). Close connection to the one G-d in this responsum (being His direct child) is conceived as emanating from the act 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 nature of Torah). Notwithstanding the fact that the Gemara teaches:[136] "Greater is the one who is commanded and does than the one who is not commanded and [nonetheless] does",

[133] J. White, *Education and the Good Life* (London: Kogan Page Ltd, 1990), 75.

[134] "Freedom of the Will and the Concept of a Person", *supra* n.63.

[135] Responsa of the Rambam no. 293. Rabbi Ovadya haGer 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.

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

the Rambam is powerfully drawn to the image of Torah as freely-chosen. It is no coincidence, I would argue, that in seeking to present a Judaism which is consistent with a Kantian regard for autonomy, Kenneth Seeskin[137] centres his analysis of Jewish philosophy on the writings of Maimonides. Certainly, until one arrives at the Modern era, no other Jewish thinker places such a high value on "thought" (what Seeskin terms "rationality" – though I wonder whether his use of this term is somewhat anachronistic, or at least coloured by his own Kantian orientation). Seeskin also makes a good case for understanding Maimonides to insist that correct beliefs (thoughts) should be arrived at through individual mental struggle – that is to say: autonomously – not because they are accepted on the authority of others. As Seeskin points out in dealing with the thought of Moses Mendelssohn, this creates a problem for any Jewish thinker who claims (as any Orthodox philosopher must) that Jews are bound to the ceremonial laws of the Torah when gentiles are not, simply because of the fact of their birth. If one accepts universality as a true requirement of a rational morality[138] then the only way that the Torah can be understood to represent ultimate morality is to posit that it should ultimately be universally accepted.

This being the case, the convert, then, can (in a much simpler way than the born Jew) embody for the Rambam the concept of radical autonomy:[139] demonstrating his *independence* of the cultural milieu in which he was raised, he asserts his *ability* to take on the yoke of mitsvot 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, I would urge, form a part of the background against which we read the

[137] K. Seeskin, *Autonomy in Jewish Philosophy* (Cambridge: Cambridge University Press, 2001).

[138] As I have explained in the Introduction, I do not accept universality as a requirement. It seems to me quite reasonable to posit "Jewishness" as a particular characteristic which makes observance of Torah law an ethical requirement of one individual and not another. It would even be possible to argue that being born into Jewishness and thus into a particular relationship with G-d entails particular obligations just as being born into a particular family (say, with a disabled sibling) would generate particular obligations from which those born into a different family or orphaned at birth would be exempt. This, however, is a topic in Jewish philosophy which is certainly beyond the remit of this book! I merely seek to point out that Seeskin's problem is not insoluble.

[139] 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 having 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 heroines likely to transform their own lives into autonomy narratives. Interesting in this context is the characterisation by Eilberg Schwartz's 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 – as radical choosers, many of them self-made men who attained everything they were through *talmud Torah*: see H. Eilberg-Schwartz: *The Human Will in Judaism: The Mishnah's Philosophy of Intention* (Atlanta, Georgia: Scholars Press, 1986, Brown Judaic Studies no. 103).

Rambam's analysis of the mechanics of *kefiyah* and *ratson* in Laws of Divorce ch.2 halakha 20:

> A person regarding whom the Law indicates that they should force him (כופין אותו) to divorce his wife and who does not want to divorce, a Jewish court in every place and at every time beats him (מכין) 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 (אנסוהו) until he wrote, in a case where the law indicates that he should write [the *get*], then the *get* is flawed (פסול). Why is this *get* not void, as he [the husband] was coerced (אנוס), whether by the non-Jews or by Jews? Because we do not talk of being coerced other than [in the case of] 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 (יצרו הרע) drives him to avoid doing a mitsvah 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 (בדעתו הרע).[140] 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 mitsvot and to keep from sinning and it is his [evil] inclination that is driving him and 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 they 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 (פסול): because it was Jews who coerced him [we can assume that] he did decide (יגמור)[141] and

[140] Once again, the proper translation of the term "*da'at*" is elusive. The *da'at 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 *da'at harah* refers to the assent (*gemirat da'at*) 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 *da'at 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. We might usefully compare the *"da'ato harah"* of this passage to the *de'ot ra'ot* to which the Rambam refers in his Laws of Repentance (cf. *Hilkhot Teshuva* 7:3): in the latter context, examples given of *de'ot ra'ot* (which are contrasted with specific sins of which one might seek to repent, such as stealing or promiscuity) include (propensity to) anger, jealousy, avarice and gluttony – that is to say, they are habits of bad (or immoderate) behaviour. The man who suffers *de'ot ra'ot* thus allows himself to exercise insufficient self-control – in the language of this and the last chapter: his *da'at* is "bad" in the sense of being insufficiently developed.

[141] This is the *gemirat da'at* 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)

> [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 possibility for connection to G-d. Rather, he must reconcile the necessity for 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 still leaves 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 autonomy – his determination that life is, or should be, the kind of autonomy narrative I delineated through the opening of 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.[142] 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

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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. The *get* remains flawed, however, because the decision to give it has been made in error. This is a classic example of a tension between substantive and formal conceptions of autonomy – the "objectively wrong" decision has been arrived at by a recognisably rational and reasonable process.

[142] 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.

that the Rambam (following the Talmud) not only allows but even encourages parents and teachers to beat their children as a means of education.[143] 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 (*da'at*) 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 *bet din* in the matter which faces him or, better still, to arrive at the same conclusion himself). He is still being driven by his irresponsible drive, the same *yetser* which a woman (who is generally less well educated) cannot resist.[144] The beating which is administered to the husband is primarily not punitive, but rather *educational*.[145]

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 that it is, after all, enlightening to look at the language which the Rambam uses to assert that a woman who claims *ma'is alai* should be given a *get* even if the husband must be coerced into giving it: לפי שאינה בשבויה 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.

And so we revert, perhaps, to one of the questions with which this book started, a question fundamental to any discussion of the *agunah* problem: what is the status of a woman – in society, in Halakha and in marriage? What level of education and autonomy is expected of her and, importantly, how does her autonomy enhance or detract from that of her husband? In order to even begin to explore this question, we must now take a closer look at the rabbinic construct of marriage – it is that which is the purpose of the next chapter.

[143] Hilkhot Talmud Torah 2:2.

[144] Ketubot 51b, my analysis above at 40. 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.

[145] 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).

Chapter Four

Kiddushin

The Biblical requirement for a *get* in order to terminate a marriage is derived from the same verses that the Gemara uses to defend the possibility of *kinyan kesef* to establish a marriage (Deuteronomy 24:1-2):

> When a man takes a woman and ?becomes her husband/?has relations with her/?acquires mastery (ובעלה) over her[146] and if it happens that she does not find favour in his eyes because he finds in her something reprehensible (ערות דבר) 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 …

What is evoked by these two verses is a "typical" (I hesitate for obvious reasons to use the word "ideal") story about marriage and divorce. We can easily give the bones of the terse, Biblical language some flesh and relate them to an extrapolation of the real life story we encountered in the Prologue. Ze'ev met Ilana, a blonde with a good figure. He liked her, proposed to her and married her under the *ḥuppah*. They did what married couples (should) do – as evidenced by their children. However, she was constantly looking around at other men ("something reprehensible"), a factor which (should have) led him to re-evaluate their marriage and to come to the conclusion that she was not a good wife. Therefore, he went with her to the *bet din*, where a *get* was written. With anger and recriminations he gave her the *get*, telling her never to darken his door again. She responded that she would never want to set foot in his lousy apartment again anyway, stormed off, called Naftali on his mobile phone and arranged a date for their marriage ...

The Biblical story told here is a circular one: it begins with a sexual union, has an intermediate stage of formal sexual separation – divorce – and ends, crucially, in the woman's new sexual union. Important to note is the fact that the basic *halakhot* dealing with the proper way to contract a marriage find their genesis in these very verses. That is to say, the rabbis choose not to identify one place where the Torah talks about marriage and another where it speaks of divorce but rather to identify the passage where it (additionally) speaks of divorce as *the* passage where it talks about getting married. 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

[146] 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.

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.

In making such an argument, I am following the line of Rabbi Elisha Ancselovits[147] and Gail Labowitz.[148] Both of these writers stress that the very essence of marriage as an institution codified in the halakhic sources is the forbidding (in Ancselovits' language: the "rendering taboo") of the wife [sexually] to all other men during the lifetime of the husband unless and until the husband should of his own free will release her (through divorce – the granting of the *get*). Labowitz, in "The Language of the Bible and the Language of the Rabbis" (the first of her two related articles), focuses closely on the property acquisition aspect of marriage initiation – *kinyan*. She argues thoroughly and, in my view, convincingly against the assumption or assertion that a linguistic shift occurred between early and late Mishnaic times reflecting a paradigmatic shift in the conception of marriage from acquisition (*kinyan*) to consecration (*kiddushin*). In fact, Labowitz demonstrates that *kiddushin* does not express a countermodel to *kinyan* (acquisition); that the terms are used interchangeably, indeed synonymously, and – most importantly from my point of view – that the root *k-d-sh* as much as the root *k-n-h* denotes a unilateral act on the part of the husband (the subject, voluntary actor) towards the wife (the object, non-active). Thus, Labowitz is concerned, at least in part, with the manner in which the mode of contracting a marriage both reflects and influences the (power) relations within the marital relationship.

Ancselovits, on the other hand, focuses on the public/communal implications of the specific *halakhot* relating to the contracting and ending of the marriage relationship. 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.[149] These witnesses are defined as *edei kiyum*,[150] meaning that they are

[147] Ancselovits' analysis of marriage and divorce is outlined in an article in "Men Divorce – Women are Divorced: Explaining this Halakha as An Aid to Solving the Problem of Marriage for Secular [Israeli] Jews", *Ma'agalim* 3 (5760/2000), 99-121 (Hebrew).

[148] Gail Labovitz' two-part paper "'The Language of the Bible and the Language of the Rabbis': A Linguistic Look at Kiddushin, Part 1", *Conservative Judaism* 63/1 (2011), 25-42, and "'He Forbids Her to All': A Linguistic Look at Kiddushin, Part 2," *Conservative Judaism* (forthcoming). See also her *Marriage and Metaphor: Constructions of Gender in Rabbinic Literature* (Lanham MD: Lexington Books, 2009).

[149] Cf. Rambam Hilkhot 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 Hilkhot 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.)

[150] Kidd. 65a-b; MT Ishut 4:6; EH 42:2.

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 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.[151] The very essence of the act of betrothal is its public (i.e., publicly witnessed) nature.

From this it would seem logical to suppose that the primary effect of marriage might be an effect (as Ancselovits indeed argues) not on the couple themselves but on the community. Thus it is that *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*)[152] serves to prohibit the woman sexually to all other men.

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 *yiḥus* – 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 its 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 warp 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*)[153] 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"[154] in the case of the *ben/bat haniddah*, no *social* handicap is suffered. It is clear that the absolute taboo against relations with a

[151] Kiddushin. 65a-b.

[152] Cf. Menachem Elon, *The Principles of Jewish Law* (Jerusalem: Keter Publishing House Ltd., 1974), 357-358.

[153] Lev. 18:19-20 and 18:29.

[154] Deut. 23:3.

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, a 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[155] society, and thus of the halakhic system, which is shaped by and serves to support patriarchal society. This is why it is from a halakhic point of view so deeply problematic that, in what I have presented as our *zeitgeist* story, Ze'ev tacitly accepts his wife's serial adultery. By being aware of but not attempting to assert a more rigid control over his wife's deviant sexual behaviour, Ze'ev is weakening the social taboo on adultery. And he is weakening, too, the perception (illusion?) of male control and power over women and particularly their sexuality, which is a *sine qua non* of patriarchal society.

The second logical consequence of the social nature of the religious prohibition against adultery is that there can be no room for acknowledgement of the married woman's "right" to leave her husband. In this particular system, "leaving" is understood to imply leaving *for another man*, it being inconceivable that a woman would prefer to remain unmarried.[156] As I have pointed out, the "other man" is written into the Biblical text (Deut. 2:20) as the ultimate purpose and end of divorce. Or, to take the contemporary story: Ilana doesn't want a *get* in a vacuum; she doesn't just want "her freedom"; she wants the *get* in order to marry Naftali. Indeed, it might well be argued that the ability to remarry under a *ḥuppah* and to bear untainted children (or, for the religiously observant, the freedom to have sexual relations without being in a sinful relationship) is the single and only benefit

[155] I use the term patriarchal in a purely descriptive and not a censorious sense.

[156] 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 communities be the case. However, Dvora Weisberg, *Levirate Marriage and the Family in Ancient Judaism* (Waltham, Mass: Brandeis University Press and London: University Press of New England, 2009), 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 might well be understood to be dissatisfying to the woman.

conferred by the *get.* Asserting a woman's "right to leave" her marriage at will is thus very close in the Halakhic imagination to asserting the "right" of another man to seduce her away from her husband. And enabling another person to relieve the husband of his property would of necessity diminish the perception of all concerned that his property is truly his property.

Finally, the converse must also be true: 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 that 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 analysis of whether and when there is a strong purpose served by *kinyan* in our communities today.

Halakhic marriage is understood to be, at its most basic level, "about" (guarding the husband's exclusive rights to) sexual relations. (Hence Avigail's status as *moredet* in our story leads to an obligation (weak or strong) on Naftali to divorce her, the Halakha acknowledging the dangerous situation which is created where sexual needs are not fulfilled within the marriage.) Thus it is that an argument may be made for assuming a publicly acknowledged sexual relationship to indicate marriage – an assumption which, whilst on the one hand it is not accepted as a basis for decision-making *l'halakha* is as a more general idea clearly expressed in the Talmudic dictum "*Ein adam oseh beilato beilat znut*".[157] It is, I would claim, a false understanding of the concept of *zenut* (influenced, perhaps, by Christian denunciations of all extra-marital sex as equally sinful, resulting, where there are children, in the stain of bastardy) which leads to the popular (mis)conception of this dictum as suggesting that a man wishes his intimate relations to be marital for religious reasons. I would understand it, rather, to relate to psychological/social reality rather than to religious aspiration. "*Ein adam oseh beilato beilat 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*[158] and is also, I would argue, implied by the Me'il

[157] Yev. 107a; Ket. 73a; Gitt. 81b. The maxim literally means that a man does not render his sexual activity promiscuous.

[158] *Perushei Ibra* 18. This view is not, as has been suggested, shared by Rav Moshe Feinstein, who rules that in the case of couples civilly married, where "*...ein lahem shum kinyan v'lo shum ma'aseh*…" "… they have no acquisition nor act [of taking]…" (Iggrot Moshe EH I:74; cf. also EH I:75 where he rules similarly).

Tsedakah, cited here by the Ḥatam Sofer:[159]

> … 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* (אין דעת שום אדם סובל זה)" (emphasis mine).

The Me'il's Tsedakah's understanding is entirely consistent with my own and Ancselovits' description of *kiddushin* and the marriage-taboo. He (the Me'il Tsedakah) 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, or be perceived as sexually available to, another man.

Thus far, in this chapter I have attempted to show that the structure and strength of what I shall henceforth refer to as the *kinyan*-type (i.e., traditional-halakhic)[160] 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'aḥer*)[161] but also prevents other men from viewing the married woman as approachable, or seducible.

However, 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

[159] Responsum Ḥatam Sofer, EH II 68.

[160] "*Kinyan*" drawing on Rav Moshe Feinstein's use of the term in the responsum cited in n.158 above; "halakhic" because, once again following Rav Moshe Feinstein as cited above (and the normative halakha which accepts his view) it is only the "*ma'aseh*" of *kinyan* that results in a union which must be dissolved by means of a *get* (i.e., a halakhically binding union) and "traditional" because this type of union is most consistent with a patriarchal society and understanding of gender relations (as argued by Labowitz).

[161] "So that a woman should not set her eyes upon another," M. Ned. 11:12. The use of this common rabbinic narrative, and also that of *tav l'meitav*, in halakhic literature, and especially the *piskei din* of modern Israeli rabbinical courts, is studied by my colleague in the Agunah Research Unit, Shoshana Knol, *Agunah and Ideology* (Liverpool: Deborah Charles Publications, 2011).

duress' constituting *kefiyah* and resulting in a *get me'useh*.[162] 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, with all their unwritten implications) 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 me'useh*. Rav Maimon Noar responds that the *get* is entirely valid because we do not consider a *get* to be *me'useh* except in the event that "they forced him against his will (*shelo mida'ato*) to do something he did not want to do (*b'davar sh'eino rotseh la'asot*) 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 (רצונו) 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 (it might be apt to describe archetypal "in-laws" as playing the kind of role in narratives of adult life that "stepmothers" do in a certain genre of fairytale) to divorce "Leah" his wife within a given time frame, again incurring a substantial financial penalty (1,000 dinarii) 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 *me'useh* and invalid. Regarding the question of whether this was not (like the 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.[163]

[162] See for example I.A. Breitowitz, *Between Civil and Religious Law: The Plight of the Agunah in American Society* (Westport CT: Greenwood Press, 1993). 21f., n.64.

[163] 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 leRabbeinu Tam*, as quoted by S. Riskin, *Women and Jewish Divorce*, *supra* n.111, at 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-

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 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.[164]

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.[165] 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 compel the *get* that *get* is invalid.[166]

In this chapter, I have outlined the 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

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rational) – cf. my Chapter 1. An act performed in order to achieve a goal (a financial incentive) can be interpreted as more highly rational (i.e. more consonant with *da'at*) than one performed in order to escape the (emotional/physical) fear or presence of economic loss and/or pain. See further chapter 6, in which I discuss the interplay between *kefiyah* and will.

[164] The concise opinion of Rabbi Joseph of Colon 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.

[165] Heikhal Yitsḥak, EH Part A no.2, s.v. "*harei lanu*".

[166] 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 discuss in ch.5.

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 book, I shall attempt to balance these answers when I put forward my own tentative proposal.

Chapter Five

On Contracting and Not Contracting a Binding, Halakhic Marriage

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 (following Ancselovits), 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 *bet din* to use this power in a particular case. As we saw at the end of 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 at least a measure of guarantee against female adultery.[167] 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.[168] This is very succinctly

[167] Ancselovits in his article (*supra* n.147) 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, that 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.

[168] It is extremely important to note that in writing of the "will" of the husband at the time of the break-up, I am including the notion of "coerced will". There is, as I argue in the next chapter, a huge difference between extorting the words "*rotseh 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

expressed in the course of a responsum by Rav Moshe Feinstein, in which he seeks 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):

> 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, I would argue, the halakhic term for what I described in the last chapter 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*".[169]

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. Moreover, to seek to deny the extent to which the introduction of a particular type of terminative condition or *harsha'ah* (advance directive or authority) for a *get*[170] (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.[171] The point at which we may wish to differ from the

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for his action or enunciation.

169 I do not claim, of course, that "*ervah*" as a term can always be translated as "taboo"; it is a word translated by a wide range of English words in different contexts. I claim only that it is a good and appropriate rendition here.

170 Such a *harsha'ah* is a written document signed by the husband at the inception of the marriage authorising a *bet din* to have a *get* written and delivered to the wife in stated circumstances. The kinds of *harsha'ah* with which I am concerned here are ones where the stated circumstances do not have to do with the husband's action or status but rather to do with the will of the wife or the judgement of the *bet din*.

171 Of course, I would vigorously deny that that right extends to extorting money from the wife or her

arguments of conservative opponents of *nisuin al-tenai* (conditional marriage) 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.[172]

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 benefited from the kind of Torah-centred education and socialisation that the sages of the Talmud and many of the 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* (physical coercion) or even the *harḥakot* 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 (broadly understood). If a

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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. Again, see the concluding chapter.

[172] 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.

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 recalcitrance. 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, since 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 *ḥilonim* in Israel but might equally be used of progressive, traditional-Western[173] and religious Zionist/Modern Orthodox communities. To take an extreme example, in 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.

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

This latter argument would, however, stand in direct contradiction to my reading of the maxim "*ein adam oseh beilato beilat 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 beilat 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 exists of another man's viewing her as available for seduction.

What may, however, be claimed is that women experience sexual jealousy as frequently and strongly as men. Moreover, it may be the case that in some circles couples who are civilly married or who consider themselves to be married or "as-if-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).

The latter, in as stark terms as I have expressed it above, is a hard argument to make in Ashkenaz communities and throughout any part of the Sephardi world where the decrees of Rabbeinu Gershom have been accepted. These decrees both prevent a man's taking a second wife (concurrently with an existing marriage; i.e., they forbid polygamy) and disallow him from divorcing his first wife without her consent (apart from instances of hard fault). Hence, defenders of the rabbinic status quo against women's rights pressure groups frequently draw attention to the "fact" that statistically there are as many men whose wives are refusing to receive a *get* as women whose husbands are refusing to give one. It is not my purpose in this chapter, or indeed this book, to offer any opinion on whether such statistics are a true reflection of the picture. Socially and halakhically, the ramifications of a husband's infidelity to a recalcitrant wife are less serious than those of a wife's adultery against a recalcitrant husband – so that greater suffering is likely to be caused by the withholding of a *get* from even (supposing the statistics to be accurate) an equal number of women than by the refusal to receive a *get* from the

same number of men. However, it is certainly false to claim that the man in contemporary Judaism (as opposed to the Talmud) has the right of unilateral divorce whereas the wife does not. Neither husband nor wife has the power of unilateral, no-fault divorce – and it is crucial to the narrative of halakhic development in this area that the most radical steps to be introduced (both the *ḥeramim* of Rabbeinu Gershom and the replacement of physical coercion by *harḥakot* by Rabbeinu Tam) were introduced to *reduce* and not to increase the possibility of non-consensual divorce. However, it is equally false to claim that the acceptance of the decrees of Rabbeinu Gershom has resulted in gender parity. There are cases in which a man may divorce his wife without her consent, while a woman may not be divorced without her husband's consent. Importantly, these are cases not of "no fault" but of "hard fault". Thus, for example, a man may leave a *get* for his wife even without her consent and be remarried by the *bet din* if his first wife is "proven" to have been unfaithful, whereas a woman whose husband has been – or is – unfaithful but desires to remain married to her has no halakhic recourse. My argument is and shall be that it is not the cases where a wife is irretrievably irritated by her husband's leaving the lid of the toothpaste tube that result in either actual or perceived halakhic injustice – though that (or simply positing a woman's desire for promiscuity) is the type of narrative which is conjured by the spectre of "no fault unilateral right to divorce" and which is, I suspect, the target of rabbinic fear and ire when confronted by demands for solutions to the problem of *mesurevot get*; rather, it is cases of domestic violence, abuse, desertion and serial or ongoing infidelity.

It is in the light of this definition of the problem – one which differs fundamentally from the classic liberal position which would consider divorce an inalienable "right" in any and all circumstances – that I shall move on to consider some of the proposed solutions. However, before doing so I should 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 – that is to say, a form of partnership in which there is no true *kinyan* – of the possible 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* (annulment) – 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* ("There is [can be] no condition in marriage"),[174] it is *meta-halakhic* issues which are foregrounded.[175] Berkovits,[176] Abel[177] and Broyde[178] 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.[179]

[174] Yehuda Lubetsky, (ed.), *Eyn Tenai b'Nisuin* (Vilna, 1930).

[175] I am grateful for this insight to a paper given by Melanie Landau at the Jewish Law Association Conference in Manchester, 2008, which demonstrated the extent to which emotive language and not legal argumentation was used in this pamphlet.

[176] Eliezer Berkovits, *Tnai beNissu'in uVeGet* (Jerusalem: Mossad Harav Kook, 1967).

[177] Yehudah Abel, *Confronting 'Iggun* (Liverpool: Deborah Charles Publications, 2011); earlier version available from the ARU web site: http://www.manchesterjewishstudies.org/publications/ (no.18, there).

[178] Michael J. Broyde, "A Proposed Tripartite Agreement to Solve Some of the Agunah Problems: A Solution Without Any Innovation", in *The Manchester Conference Volume,* ed. L. Moscovitz (Liverpool: The Jewish Law Association, 2010, Jewish Law Association Studies XX), 1-15.

[179] In this context, an exchange between Michael Broyde and Avishalom Westreich is illuminating. Westreich writes: "In correspondence with the Agunah Research Unit, Rabbi Broyde argues that R. Feinstein uses *umdena* regarding a future event only in order to cancel a levirate bond, as in the responsum discussed below, but not in order to release a married wife without a *get*. Although this 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* to a married woman is understandable, in light of concerns about bastardy

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.[180]

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 such an amalgam 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, on a communal not an individual level, that the introduction of the possibility of a non-binding (conditional) marriage which masquerades as a binding marriage can have only one of two fates. The first is that it be denounced and rejected by traditionalist halakhic authorities – no matter what

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(*mamzerut)* and adultery (*hʾumrat eshet ish*) which would apply in such a case." (A. Westreich, "*Umdena* ...", *supra* n.125, at 347 n.66). 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 (*hʾumrat 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 yibbum* 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*, *supra* n.156, at 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 upon marriage to become in any sense the property of her husband's extended family. *Yibbum* 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.

[180] 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.

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 advantages over forms of marriage dissimilar to the traditional *ḥuppah* and *kiddushin* are obvious – not least of them being the fact that couples in love, together with their friends and family, are emotionally and nostalgically attracted to traditional ceremonies. I believe romanticism and pragmatism are unhappy bedfellows. However, I would also wish to point out 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.[181] Because conditional marriage is the option most frequently put forward – alone or as a constituent factor in an amalgam of remedies – I shall now offer an evaluation of the different condition-triggers which have been advocated by different theoreticians. This analysis also holds true for any mechanism by which the marriage may be dissolved by one (or more) of these triggers.

[181] 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, however, 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. Y. Abel: "*Hafqa'ah, Kefiyyah, Tena'im*", Working Paper no.12 of the Agunah Research Unit, June 2008, available from http://www.manchesterjewishstudies.org/publications/, 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.

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 represented in the initiation of marriage by the critical presence of *edim*[182] – and for the effectuation of divorce by the involvement of the community's court – the *bet din*.

Logically, then, 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 (explicitly 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 alone (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, though contradicting the mishna 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[183]), that 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.

[182] As discussed in the previous chapter: see pp.82-83 and nn.149-50, *supra*.

[183] S. Aranoff, "Two views of Marriage – Two views of Women", *Nashim* 3 (Spring/Summer, 5760/2000), and available at http://www.agunahinternational.com/halakhic.htm, at section (b): *Marriage as a Partnership*.

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 and any who follow his lead[184] attempts to make the *bet din* the arbiter of whether or not the marriage should continue. Likewise the proposed condition of Rav Uzziel.[185] 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[186] – 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 *bet 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 (halakhic) marriage.

What is fascinating, then, is that it is precisely this (in my view) highly

[184] Cf. Y. Abel, "The Plight of the 'Agunah and Conditional Marriage", Working Paper no.4 of the Agunah Research Unit, June 2008, available from http://www.manchesterjewishstudies.org/publications/, 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 give 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*.

[185] *Mishpatei Uzziel* 45 & 46. See also *Agunah: The Manchester Analysis, supra* n.3, at 113-115 (§§3.43-45), and n.181, *supra*.

[186] *Marriage, Divorce and the Abandoned Wife* (*supra*, n.14), at 1-2, 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.

unhalakhic aspect which is emphasised as a positive feature in the writing of those who propose such a type of condition. One hypothesis for the reason for the tenacity of this idea in proposals spanning nearly a century is that it has great popularity amongst lawyers. Secular jurisdictions, as noted at the outset of chapter 1, tend to place the power to contract and dissolve marriages in the hands of the courts. Those who are trained in secular law or who understand Halakha as primarily a legal system (see my argument against this understanding in the Introduction) may be assumed to have an innate trust of the judicial system and an inclination to vest a greater amount of power over marital status in that system (whether it is a secular or a religious court system). A feminist of cynical bent might also point out that, whilst vesting power to effect the continuance or termination of a marriage in the hands of the court is in dissonance with the halakhic tradition insofar as it emasculates the husband within his own marriage and takes away from him the onus of responsible decision-making, it does have the advantage from a traditionalist's perspective of serving to perpetuate a patriarchal status quo in which control over a woman's marital status is firmly in the hands of men.

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

> A *get* which is coerced by Jews is valid (גט מעושה בישראל כשר), by gentiles invalid. One which is [coerced by] gentiles who beat him (חובטין אותו) 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 occurs when 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.

We could understand the reasoning behind this mishna in one or both of two ways: 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 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, unjust, or even perhaps clouded by improper motives.

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:

> Rav Naḥman 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.[187] 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 Naḥman 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:

> 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 [even] an invalid *get*.

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 only issue at stake

[187] 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.

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 – i.e., it is the legitimacy or otherwise of the coercing court which determines whether or not a *get* may be effective) then a *get* which ensues from their coercion (even if coercion was justified in all the circumstances) should have no effect whatsoever.

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 hador* 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 Gemara's next attempt to understand Shmuel's statement takes the form of a statement by Rav Mesharshei:

> 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 "*ma'is alai*" may be divorced)[188] 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 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 coerced *get* (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.[189] The coerced husband may be given very little "room for manoeuvre" but

[188] 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 *"ma'is 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*, see Avishalom Westreich, "Compelling a Divorce?", *supra* n.3. Cf. also Riskin, *Women and Jewish Divorce*, *supra* n.111, at 33-46.

[189] Even if the full extent of his action is 'merely' to declare "*rotseh ani*", this clearly constitutes a speech-act.

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 *bet din* itself to give a *get* as has been suggested to me,[190] 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 "*rotseh ani*" may in certain circumstances be coerced 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[191] which we analysed in a different context towards the end of chapter 3:

> A person regarding whom the Law indicates that they should force him (כופין אותו) to divorce his wife and who does not want to divorce, a Jewish court in every place and at every time beats him (מכין) 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 (אנסוהו) until he wrote, in a case where the law indicates that he should write [the *get*], then the *get* is flawed (פסול). Why is this *get* not void, as he [the husband] was coerced (אונס), whether by the non-Jews or by Jews? Because we do not talk of being coerced other than [in the case of] 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 (יצרו הרע) drives him to avoid doing a mitsvah 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 (בדעתו הרע).[192] 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 mitsvot and to keep from sinning and it is his [evil] inclination that is driving him and 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 they 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 (פסול): because

[190] B.S. Jackson, private conversation.

[191] *Hilkhot Gerushin* 2:20.

[192] See n.140, *supra*.

> it was Jews who coerced him [we can assume that] he did decide (יגמור)[193] 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 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,[194] 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.[195] This is a satisfactory explanation of the sentence outlining the process which occurs 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 (i.e., he does not have to view the *get*-giving as an intrinsic good); he does not have to be

[193] See n.141, *supra*

[194] 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.

[195] 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: "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…" (*Listening to Prozac* (London: Fourth Estate Ltd., 1994), 266, 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 *da'at* – the capacity for autonomy – of those who refuse *bet din* orders to perform a *mitsvah* 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.

persuaded that giving the *get* is the right, good and best thing for him to do; he simply has to want (or at least be assumed to want) to be a good Jew. The *get*-giving is thus viewed merely as a means and not as an end in and of itself, an understanding which is wholly consistent with a concept of the Jewish adult male as a rationally autonomous person, whose actions occur in a narrative context and are, by and large, purposive.

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. As we have seen, he writes:

> If non-Jews of themselves compelled him (אנסוהו) until he wrote, in a case where the law indicates that he should write [the *get*], then the *get* is flawed (פסול). Why is this *get* not void, as he [the husband] was coerced (אנוס), whether by the non-Jews or by Jews? Because we do not talk of being coerced other than [in the case of] 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 (יצרו הרע) drives him to avoid doing a mitsvah 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 (בדעתו הרע).

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 Ḥatam Sofer[196] to offer a somewhat different interpretation of the passage from that I have just outlined, even as it relates to a Jewish court:

> 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 Mordekhai] is that a *get* which is coerced, even [if it is coerced] according to the halakha and he says "I am willing" (רוצה אני), 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 mitsvah to heed the words of the Sages. However, here the husband will say "who says it is a mitsvah to heed the words of the Rosh? Perhaps it is a mitsvah to heed the words of the Mordekhai …"

In the Ḥatam Sofer's interpretation, the mitsvah *lishmoa b'divre ḥakhamim* 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

[196] *Responsa Ḥatam Sofer* III, EH I no.116.

commandment basically to obey the Halakha.[197] The husband is transformed from the *am ha'arets* 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.[198] 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" – Ḥatam Sofer).[199]

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 Ḥatam 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).[200] Hierarchical boundaries (between *bet din*

[197] This discussion might well influence our understanding of the *harḥakot* of Rabbeinu Tam, offered as an alternative to *kefiyah*. The *harḥakot* (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.

[198] 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 Mordekhai and share his qualms with the husband. It has also been suggested that whilst he is not explicitly aware of these conflicting views, the husband may be understood to have some latent, sub-conscious awareness of them. This suggestion, however, also relies on the husband's having been educated in such a way that he naturally, sub-consciously, mimics in his own thought patterns the understandings of the greatest *poskim*.

[199] This is of course entirely in keeping with a view of the Rambam (my own as outlined in chapter 3, and Seeskin's as mentioned there) as a philosopher who holds that personal autonomy is a necessary condition of moral agency.

[200] 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 *da'at*. I would add here the obvious point that Torah education also marks the husband as "one of us", and whereas it is (relatively) easy for a court (in any jurisdiction or social context) to reach a decision to override the

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 the *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 Ḥatam 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*, *harsha'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. Freimann[201] 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, 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.[202] Rav Uzziel's proposal for a condition which predicates the validity of the marriage upon ongoing *bet din* approval emanates from a similar period of, and attitude towards, Israeli history.

All this is to say that, until extremely recently, it was not, to my knowledge,

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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.

201 A.H. Freimann, *Seder Kiddushin v'Nisuin Aḥarei Ḥatimat haTalmud* (Jerusalem: Mossad HaRav Kook, 1964), 397, writes (translation of Rabbi Dr. Abel, *Confronting 'Iggun*, *supra* n.177, at 52-53): "… 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 centre 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."

202 M. Elon, *HaMishpat ha'Ivri* (Jerusalem: Magnes Press, 1978), I.712, 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."

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 Erets Israel, is the first to attempt to wrest such (putative) authority away from a central *bet din* and to confer it on "any Orthodox *beit din*".[203] 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 Broyde's 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.[204] We cannot assume that a couple

[203] Broyde: "A Proposed Tripartite Agreement ...", *supra* n.178, at 14: "I hereby grant jurisdiction to any Orthodox *beit din* selected by my wife to enforce any and all parts of this document."

[204] In fact, we might suspect that some degree of change in religious identity might in many cases

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,[205] 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.[206]

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 recent 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.

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 *bet din* to annul when in fact the *bet 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 *bet 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 Ḥatam Sofer can raise the spectre of a husband's not accepting the *bet*

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accompany a marital breakdown, either as a precipitating factor or as a natural response.

[205] 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!

[206] In *Agunah: The Manchester Analysis, supra* n.3, this phenomenon is termed "(upwards) religious mobility": see §§6.38, 54 for the strategy recommended in respect of it.

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 "any [and 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.[207]

Annulment

In the foregoing I have elided the concepts of (i) condition which makes the validity of a marriage dependent upon *bet din* approval; (ii) irrevocable *harsha'ah* for a *get* which a *bet 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 *bet din*'s actions specifically *against* the husband's will,[208] both the *harsha'ah* and the condition 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

[207] 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*.

[208] It is salutary to note that the only post-Talmudic instance of *hafka'ah* (leaving aside the medieval *takkanot* instituting new requirements for the *formation* of *kiddushin,* on pain of annulment) 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 (Darkhei Moshe EH 7). 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): see, e.g., E. Shoḥetman, "Hafka'at Kiddushin – Derekh efsharit lepitaron ba'ayyat meuqavot haget?", *Shenaton haMishpat ha'Ivri* 20 (1995-1997), 349-398, at 382-385). Neither group tends to point out that this emergency ruling and its 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. Cf. *Agunah – The Manchester Analysis*, *supra* n.3, at §5.47 (p.244): "Moreover, this emergency ruling and its defence are palatable only because the *bet din*'s act of *hafqa'ah* in this instance was not against the husband's will but rather supportive of 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 Austreich* 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.

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 in any social context apart, arguably, from that 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 ada'ata d'rabbanan mekadesh*[209] 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 Shoḥetman[210] 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*). Shoḥetman 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).[211] 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 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 *shliḥut* for a *get* contrary to an explicit *bet din* ruling – if the husband's cancellation should be effective in such a case, מה בוח 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*

[209] "Anyone who betroths [a woman] does so according to the will of [possibly: dependent upon the (some proposals require the addition of "ongoing") consent of] the sages": Ket. 3a; Gitt. 33a; Gitt. 73a.

[210] "Hafka'at Kiddushin ...", *supra* n.208.

[211] Cf. A. Westreich, "Annulment of Marriage (Hafka'at Kiddushin): Re-examination of an Old Debate", Working Paper no.11 of the Agunah Research Unit, June 2008, available from http://www.manchesterjewishstudies.org/publications; *Agunah: The Manchester Analysis, supra* n.3, at 217-21.

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 pretty much 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 mera*, the man prevented from breaching a condition or the man who attempts to cancel a *shliḥut*) 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.

The intelligent reader will, at this point, be demanding an explanation of how I reconcile such a conviction that the halakhic system and traditionalist *dayanim* are so loath to emasculate other men, so respectful of their autonomy, with the Mishnaic tradition which allows for *kefiyah* – physically coercive measures designed to override defiance on the part of the husband and procure his compliance with a *bet din* ruling. This explanation is long overdue, and forms the substance of the next chapter.

Chapter Six

On Coercion and Free Will

There is a scene in the spy thriller *The Good Shepherd* in which the CIA brutally tortures a man claiming to be a Russian spy attempting to defect to the West: Valentin Gregorovich Mironov. (CIA agents are loath to believe his claim because they have already invested emotionally in the trust of another Russian double agent who has claimed the same identity.) When torture fails to elicit from the man a different name, they administer a substance that they have found in the past to have some efficacy as a truth drug: LSD. Under the influence of "acid", the Russian prisoner is seen to hallucinate and sing songs from his childhood. Finally, he states, with conviction and seeming lucidity, "My name is Valentin Gregorovich Mironov and I am free!" before jumping through and out of the window to his death. Later developments prove his claim about his identity to have been truthful (the trusted double agent is in fact an imposter); he is – or was – in fact Valentin Gregorovich Mironov.

The scene is an interesting one for reasons which, I hope, will become apparent as we progress through this chapter. But in case its relevance is disturbingly opaque at this point, some thoughts on my "reading" of the scene's importance: first, we see that, in this case at least, torture fails to warp the determined man away from his fundamental identity – no amount of beating makes him lose sight of who he is – his name. Second, the introduction of LSD into the scene creates an ambiguity: LSD here both does and does not act as a producer of "truth". On the one hand, it induces the Russian to revert to what many nostalgically or rightly perceive to be the "truest", most undistorted identity a person can claim: that of one's childhood self. He reverts to his native language (see chapter 2 for the significance of this) and is clearly unaware of his immediate surroundings – thus he is not consciously or deliberately lying to his interrogators. But on the other hand, LSD produces distortion: delusion or hallucinations are not true; they are false. One might argue that LSD allows the spectator to perceive the "true self" of the drug-taker whilst preventing the taker from perceiving the "truth" of his surroundings and situation; this would be sustainable insofar as the "true self" is understood to be one which is un-self-conscious, that is, one which does not seek to mould itself for the viewer's (or hearer's) perception. But this argument relies on a strikingly non-social, non-relational conception of the self in positing that a "true" self is one with which another person can have no reciprocal relationship (because it does not in fact perceive the other).

Finally, we should note that the words Valentin (for he is indeed who he claims to be) utters as he prepares to jump are a declaration of his own freedom. However, it is unclear whether he claims freedom with "*da'at*" – the effects of the drug having worn off, he might have decided that the only way to exercise his freedom in the face of his torturers is to commit suicide – or under the influence of the drug (one of the common effects of which is to induce in a taker the delusion that (s)he can fly). In other words, it is ambiguous whether Valentin is at this point indeed free, or simply (temporarily) insane.

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Through the course of the last two chapters, I have been arguing that in traditional *kinyan*-marriage the husband's is of necessity the only will which can effect the termination of the marriage. I have also argued that, for a number of reasons, the nature of many of our Jewish communities today renders it no longer either halakhically necessary, no longer prudent or simply no longer preferable to insist that most marriages conform to this traditional *kinyan*. I suggested in the last chapter that whilst it is perfectly defensible to introduce a form of consecrated, monogamous union which the woman can leave at will, 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 and that whatever form of non-*kinyan* union we might introduce, it is of paramount importance that it should be clearly understood that it is in 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.[212]

[212] And therefore to cast doubt on a second marriage contracted in reliance on a *get* of questionable validity given in the context of such a union and thus also to call into the question the status of any children conceived in such a second marriage. There are those who believe I am paranoid on this point. There is considerable halakhic as well as social pressure on a *dayan* to do anything in his power to refrain from ruling that any person is a *mamzer(et)* and thus disqualified from marriage to any natural born Jew – thus at least two dayanim have scoffed at the notion that, confronted with the offspring of a marriage contracted by a woman after the dissolution of a first marriage governed by, for example, the Broyde Tripartite Agreement, any *bet din* would rule that that offspring was a *mamzer*. This is a good example of a situation in which we have a choice regarding whose personal experience we consider more likely to lead to an accurate prediction of a judge's behaviour – another judge or someone from a sector of society where legal convictions are more common – a black kid, perhaps, from a notorious housing estate, one who may have (unlike the fellow judge)

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 (absent "hard fault") leave her without her consent (under the *ḥerem 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.[213] 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

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experienced a view of the courtroom from the dock and not from the protected position of the judge's dais. I do not say that the *dayan will* return a verdict of *mamzerut* nor that most *dayanim* would consider doing such; I merely say that where there is a political point to be made and a lack of shared language and experience between the *dayan* and the young man or woman standing before him, the *dayan* may respond with less empathy and respect than he habitually does to his fellow *dayan.*

There is a passage early on in the fourth book of the Harry Potter series in which a senior Ministry of Magic official, Barty Crouch, dismisses from his employ a house elf (slave) named Winky, causing her intolerable shame, terror and grief. Whilst Harry and his friend Ron laugh at Hermione Grainger's harsh judgement of Crouch following the incident (Crouch is highly respected in the wizarding world) Professor Dumbledore chooses to uphold her, asserting that one should "never judge a person according to how they treat those they consider to be their equals …" In other words, the very qualities which gain a person respect and status within the ruling class of any community (typically, a good family background, a privileged education and a level of intelligence) make it exceedingly unlikely that he will be the most accurate judge of those people by whom he is regarded as an equal. As a female convert, and one who has gone through the experience of having my own conversion disputed by a *dayan* who had never met me and chose to dismiss others' testimony about my observance, I have, let us say, a different view of the range of possible *bet din* responses to a woman in a vulnerable situation and a state of distress than those who hold a more privileged position vis-à-vis the rabbinic establishment.

213 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.

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*.[214] This kind of interpretation depends upon the very Western, individualist philosophy it claims to reject – relying, for example, on the (secular) "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 context (the man's clear will to be divorced from his wife). It also 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![215] However, its driving force is clearly a horror of allowing the Halakha to "give in" to pressures of Modernity in general and, specifically, (Western liberal) 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.

My insistence that in a traditional, *kinyan*-type marriage the husband has, if not the freedom to end his marriage as and when he wills (that Mishnaic right was restricted by Rabbeinu Gershom), at least the right to remain married for as long as he wills, begs the question of the place in such a *kinyan* for *kefiyah* – physical coercion of the husband to end the marriage. Is not the halakhic discretion granted the *bet din* to coerce a *get* tantamount to allowing a third party to intervene in the marriage after all?

I believe that any answer to this question must engage with two separate issues: first, the question of the situations in which any given Jewish community accepted that it was legitimate for the *bet din* to intervene; second, the nature of *kefiyah* itself. It is the second issue, whose discussion begins historically with the

[214] David Bass, "Hatsavat tenaim al ydei ba'al hameḥuyav b'get", *Teḥumin* 25 (2005), 149-62, esp. at 158 and 163. See also Ram Rivlin, "Divorce Bargaining as Extortion: Beyond Gender and Divorce Law?", http://law.huji.ac.il/upload/GetthreatsRamRivlin.pdf, who offers a particularly interesting reading of the Maharashdam (see pages 34-37), whose actual ruling is that a man may impose a condition on the giving of the *get* if that condition is one with which it is easy for the wife to comply. Rivlin suggests that "with which it is easy for the wife to comply" is sometimes interpreted as implying a condition which is justified – one which will force the woman into "good" behaviour or address an imbalance that would otherwise exist in the divorce settlement and which cannot be righted by strictly legal means.

[215] In the next chapter, at 129-130, I analyse a parallel (in subject matter) responsum by Rav Moshe Feinstein in which he takes the contrary approach.

elucidation of the mishna in Arakhin 5:6,[216] with which I deal first in this chapter. This mishna reads:

> [In the case of] those who owe value offerings – they take a pledge by force (ממשכנין); [in the case of] those who owe sin offerings and guilt offerings – they do not take a pledge by force. [In the case of] those who owe *olot* and peace-offerings – they 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: "לרצונו" (according to his will): They fo him until he says: I will (רוצה אני)...

They force him (כופין אותו).The force in question is a physical force, a beating which aims to induce the husband to act in the appropriate way in order to avoid (further) physical pain.

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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 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

[216] Also discussed in ch.3, p.61 yo the end of the chapter.

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 may be defined[217] 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*,[218] and what the relationship of those people is to the *bet 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 semantic relation thereto). Clearly, the halakhic system cannot condone and does not, 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 …*they* (legitimate rabbinic authority) coerce him *until* (purpose) *he says* (speech act) "I am willing" (a statement which should be understood to be – in some sense – true).[219]

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.[220] 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.

[217] The following definition is loosely congruent with that offered (and argued) by Edward Peters in the Introduction to his *Torture* (Oxford and New York: Basil Blackwell, 1985), 1-4.

[218] 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 of laypeople coercing the *get.*

[219] I am throughout this chapter understanding "truth" in a manner which does not relate it exclusively to fact, though that aspect is clearly present, especially in the modern discussion of the extraction of information. In fact, I argue that it is not merely information which torture in a modern context seeks to elicit, rather "truth" can legitimately be conflated with or understood to relate to sincerity – the ability to "own" (with all its connotations of "owning up to", i.e. confession) one's speech and action.

[220] Page DuBois, *Torture and Truth* (New York and London: Routledge, 1991).

Torture, according to this understanding, is the attempt by force to access the truth which has been hidden inside the other's body.

DuBois' 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* (1376b-1377a) as follows:[221]

> 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 …

In other words, the value of torture is in the eye of the beholder (or the barrister). "They" 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. 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

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

to extort the confession illegal (administered by those who act as though they are "above the law"), but also that 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. DuBois 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.[222]

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 (Ket. 7:10) 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 "*harḥakot*" – 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

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

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 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 *shlihut* for the *get* – by means of an oath.[223] Such a proposal might suggest a halakhic view of the Jewish adult male as a correlate of the Greek freeman.[224] 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

[223] 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 Tsvi Hoffman in Shut Melamed LeHo'il 3:22.

[224] I do not mean to suggest that the Halakha relates to the halakhic category of either Israelite or Canaanite slave as in any way corresponding to that of slave in the ancient Greco-Roman world but rather that (as I have been arguing throughout this thesis) there are parallels between what is expected of an adult Jewish male (in terms of education and social standing) in certain communities and what is expected of the free man of classical civilisation in, at least, Aristotelian thought.

be distinguished from reasoned will (settled intention to act according to a particular disposition). I would stress here also that holding a strong and guiding awareness of the future in spite of the immediacy of the present experience is an indispensable facet of having a truly narrative sense of self. In the mature person, a sense of coherence and integrity of self thus extends from the past into the future.

Torture, in the 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 da'at*. This, of course, is precisely Rava's stance with regard to the man "coerced" into an act of forbidden intercourse 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 it*." (my emphasis).[225] In Halakha, the slave, *like the woman* (a point which is crucial to the argument of this book) inhabits a grey area between disqualification from *mitsvah*-observance and full obligation – a position of semi-responsibility reflecting partial, or limited, דעת.[226] (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 *da'at* 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.

[225] Quoted in *Torture and Truth*, *supra* n.219, at 40.

[226] I hope that there is no need here for me to stress that it is not my personal view that women in contemporary society have a lesser level of *da'at* than men; I argued in chapter 2 that the Halakha accords them less *da'at* because it expects from them a lesser level of education (that is socialisation into moral responsibility across a broad spectrum of areas of life). I further argued in chapter 5 that the fact that women can in most parts of the Jewish community today be expected to have an equally strong (or weak!) religious education and equal capacity for moral reflection with their male counterparts is one of the major factors in favour of introducing and condoning a form of sexually exclusive union which is not the halakhic model of *kinyan* (a model which assumes gender inequality).

What light does this discussion shed on the nature of *kefiyah*? In Chapter One, I outlined two conceptions of autonomy which may or may not command our respect: substantive and formal autonomy. A substantive conception of autonomy poses little problem if we wish somehow to override the will of the recalcitrant husband. It is upon such a conception of autonomy that advocates of the Rackman-Morgenstern procedure for retrospective annulment of marriages (including, notably, Susan Aranoff) rely, arguing that a man who denies his wife a *get* must be psychologically deficient.[227] That is to say: he has not arrived at the right judgement as to the correct action (that which is evidently rational and reasonable) and therefore cannot truly be rationally autonomous. Their argument is not inherently different from any argument which asserts that a man may be coerced against his will (rather than being coerced into changing his will) if he refuses to give his wife a *get* when she has halakhic grounds for demanding one. The only salient differences are: (a) that in order for the annulment to operate retrospectively, the court must find that the man had *always* been psychologically deficient (rather than, for example, reacting badly to marriage, to the breakdown of the marriage or to some external stressor which may have precipitated both the demise of the marriage and the husband's "insanity" and (b) in the grounds for divorce which are considered halakhic.

A formal conception of autonomy, on the other hand, poses much deeper problems and requires that we understand any form of coercion to alter (I have suggested the term, to "educate"; though this terminology has disturbing overtones as we consider the "re-education" programmes of totalitarian states both real and fictional) the husband's will. I would suggest that, even given a formal conception of autonomy, coercion may operate in the imagination (and let us remember that we have very little evidence to suggest that a husband was ever actually beaten until giving a *get* – it may well be that the mere threat sufficed to ensure compliance) as a kind of trial by fire. The husband who was entirely convinced that right was on his side would, if he had sufficient autonomy (if he were sufficiently

[227] S. Aranoff, "Halachic Principles and Procedures For Freeing Agunot", first published in the New York *Jewish Week*, 28.08.1997, available at http://www.agunahinternational.com/halakhic.htm#1, writes: "Building on this concept [Morgenstern's] of kiddushei ta'ut, a beit din may recognize other intolerable defects in the husband as grounds for a declaration of kiddushei ta'ut. These defects — which are in total discord with any reasonable concept of marriage — include: physical and psychological abuse, adultery (which more than ever endangers the life of the spouse), sexual molestation, abandonment, criminal activity, substance abuse, and sadism (the withholding of a get may be viewed as indicating a sadistic nature). A beit din, applying a psychologist's or psychoanalytic concept of human nature, may hold that the seeds of such deviant behavior are present in the groom at the inception of the marriage though they may not yet have expressed themselves in overt behavior." See further B.S. Jackson, "Agunah and the Problem of Authority: Directions for Future Research", Working Paper no.2 of the Agunah Research Unit, *Melilah* 2004/1, at §4.4.4 (pp.51-52), available at http://www.mucjs.org/MELILAH/2004/1.pdf and http://www.manchesterjewishstudies.org/publications/.

bar da'at) to have arrived at a rational and reasonable judgement in this regard, be able (like the classical free man) to resist *kefiyah*. Therefore, if he chose not to, if he chose ultimately to give the *get*, we may 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). He must have been convinced that the *bet din*'s judgement was, after all, the correct one.

The husband who was unable to resist *kefiyah*, on the other hand, must have been one who was "slave-like"; insufficiently master of himself. If he had not the self-mastery (or the belief in his own rightness) to endure *kefiyah* then it is likely that he lacked the self-control to be truly autonomous; once again, he must have been in thrall to his *yetser* (or *da'ato*) *hara* and there is thus no problem raised by the overriding of his (deficient) will.

It is the fact that this reading is possible that has led me leads me to refer to the product of *kefiyah* as "coerced *consent*" and to insist 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 phenomenon of martyrdom exists because a person may choose to die rather than be beaten into submission. (In the scene from *The Good Shepherd* with which I opened this chapter, the Russian would-be-defector cannot be beaten into rescinding his true claim of identity.)

The phenomenon of martyrdom is the example *par excellence* of autonomous resistance of or to *kefiyah* and it is a heroic one. Thus far, I have painted a rather glorious picture of the person who is able to resist coercion, who flouts authority. It is hard for the Romantic imagination to suppose that Right is sometimes on the side of those who wield power; that the rebel is, occasionally, a rebel without a (good) cause. On the other hand, we should not lose sight of the fact that in this particular context, I am dealing with the phenomenon of a man whose wife desperately wishes to be divorced from him in a situation where even the *bet din* (that most conservative of entities) has judged that she has good reason to wish to be free of him. I suggested in chapter 3 that what is typically achieved by the hero at the end of an autonomy narrative is something that can be described in terms of *eudaimonia* – a sense of the good life, a life satisfying in its well-livedness – and, typically, a better life too for others. Altruism, it may be claimed,[228] is a necessary part of *eudaimonia* and the well-formed (well-educated) character.

Harry Potter, Rabbi Akiva, Socrates, the man whose *da'ato hara* is educated out

[228] See the argument which runs throughout John White's book *Education and the Good Life* (on which I also draw in chapter 3, *supra* n.133).

of him by means of *kefiyah* in the Rambam's imagination in *Gerushin* 2:20 (pp.76-78, *supra*), in all these people the self who exercises his autonomy does so in the pursuit of moral goodness as acknowledged, ultimately, if not at the time, by the wider community. In the extract from *The Good Shepherd* described at the outset of this chapter, the final act of Valentin Mironov, whilst allied to a truth statement, is more ambiguous: it is not certain that jumping out of a window achieves *eudaimonia* for anyone involved. We also noted that Valentin's "true self" as revealed by LSD was associated with his childhood self – but as I argued in chapter two, a young child is hardly the epitome of autonomy, or *da'at*; on the contrary, the halakhic system assumes him to be one of the categories of person of whom *da'at* cannot be assumed.

Another "true self", then; this time tied to a story of marital breakdown and vengeance. Ted Hughes gives the following account of a very particular development of self in his Foreword to *The Journals of Sylvia Plath*:[229]

> Sylvia Plath was a person of many masks, both in her personal life and in her writings ... These were the visible faces of her lesser selves, her false or provisional selves, the minor roles of her inner drama. Though I spent every day with her for six years, and was rarely separated from her for more than two or three hours at a time, I never saw her show her real self to anybody – except, perhaps, in the last three months of her life.
>
> Her real self had showed itself in her writing, just for a moment, three years earlier, and when I heard it – the self I had married, after all, and lived with and knew well – in that brief moment, three lines recited as she went out through a doorway, I knew that what I had always felt must happen had now begun to happen, that her real self, being the real poet would now speak for itself, and would throw off all those lesser and artificial selves that had monopolized the words up to that point, it was as if a dumb person suddenly spoke.

It is this very remarkable and distinctive "real self" of course that blazes forth in Plath's late poetry. That self was, surely, brilliant, rational, shockingly lucid and sufficiently self-controlled to express itself at will in rhyming couplets or formal sonnets; it was also angry, vengeful and able, ultimately, to choose a suicide which it is doubtful that same "real self" would always have wanted to choose. It is precisely this kind of self whose will a condition in marriage or a *harsha'ah* for a *get* would seek to bind in advance. But can it? If the Halakha holds a formal conception of autonomy, the answer may well be "no" – after all, *da'at* is, as I argued in chapter 2, responsibility – and with it, the possibility of being held accountable for all one's decisions – including the worst. If we do not hold a Kantian view of rationality or a substantive conception of autonomy, then there is

[229] *The Journals of Sylvia Plath*, ed. Ted Hughes and Frances McCullough (New York: Dial Press, 1982), xiii-xv.

no reason to suppose that *da'at* should always produce morally good decisions. The implication of Hughes' very Romantic conception of self – one which may well be incompatible with a halakhic understanding but which is certainly resonant in a modern, non-Jewish context – would be that by means of most proposed solutions to the problem of *iggun*, the "lesser" or "false" self, the socially compliant mask, would be enabled to restrict the autonomy of the true self.

But what then? Have we reached a final impasse which finds any solution within *kinyan* marriage to be philosophically untenable? The time has come, finally, I think, to put this all together.

Chapter Seven

Tying it all together

Let me retell the story as I understand it and have tried to relate it so far.

The Halakha, beginning with a mishna in Yevamot (14:1), demands that whilst a woman may be divorced regardless of her will in the matter, a man can only release her "willingly" (לרצונו). I have suggested that "willingly" need not mean according to the spontaneous desire of the moment; it should mean "autonomously", i.e. with full intention and without undue coercion from either external or internal sources. "Without undue coercion" in this context means not without influence from factors external or internal (such a neutral decision would be impersonal to the extent of meaninglessness; devoid of social relationship, personality, physical and emotional drive there is no "I" who can claim to be the author of my own action); rather, it means being free from the type of level of force which would leave no scope for rational, independent decision-making.[230]

I argued, in chapter 1, for a narrative understanding of action. This entails the belief that an act does not exist and should not be judged or interpreted in a vacuum but rather extends from motivation through the act itself to the projected or likely consequences thereof. Allied to this, one of the requirements for autonomous behaviour is that it should be informed; therefore, the subject should be able to predict the likely consequences of his action. I argue, therefore, that it is not giving the *get* in and of itself, the transfer of a piece of parchment, which must be willed by the husband; rather, what must be willed is a formal relinquishing of and separation from his (ex) wife. This difference is expressed very succinctly in a responsum by Rav Moshe Feinstein. This responsum[231] 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 he has come to divorce his wife "of his own free will", he responds that it is not "of his own free will" (the words of the English expression are transliterated into the Hebrew of the responsum) 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 demand

[230] Jerome Hall, after summarising various judgments relating to the validity or otherwise of pleas of necessity, writes: "Justifiable action taken in states of necessity is not regarded as coerced" (quoted in Ashworth, *Principles of Criminal Law*, *supra* n.40, at 436). That is to say, opting for a "necessary" (illegal) action is considered to be an entirely rational decision, notwithstanding the forces that lead to the necessity.

[231] *Iggrot Moshe* EH Part 3, no.44.

more from his wife. Rav Moshe Feinstein writes:

> … he replied that he would have divorced her also of his own accord (גם בעצמו), 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 (נמצא שבעצם הגירושין הוא רוצה ממש בעצמו), [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 (בכפיה ממש), there was no coercion of the will to divorce (נמצא שאין הכפיה על רצון הגירושין), 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* … (שיש טעם גדול שאין דין אונס לפסול הגט).

Earlier on in the responsum, Rav Moshe Feinstein also writes:

> 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 (שאינו מצד רצון עצמו ממש), which would be called "free will" (transliterated), 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 (רצון) 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?

This acceptance of the legitimacy of influence by others on autonomous action and the insistence that it does not invalidate the autonomy of the subject is crucial. In the last chapter, I acknowledged (somewhat tongue in cheek) the temptation to view rebellious behaviour as necessarily autonomous and compliant, conformist behaviour as weak and lacking in moral fibre. That, of course, is a fallacy; in fact, autonomy can only be arrived at (as we saw in chs. 2 and 3) through a process of education and socialisation. As a poet, Sylvia Plath (and Ted Hughes as well!) would thoroughly concur with T.S. Eliot's position in "Tradition and the Individual Talent":[232] artistry, even genius, can only express itself through a given language, a particular discipline (what McIntyre terms a "practice"), a simultaneously accepted and (creatively) disputed tradition. So too moral autonomy and integrity: these qualities require an individual to be sufficiently embedded and invested within a particular tradition to be able to question and judge it.

In a sense, then, the dichotomy I set up in the last chapter between substantive and formal conceptions of autonomy is a false one. It is a false one because a purely formal conception of autonomy is impossible: if we do not share any conception as to what values and ideals should be cherished; if we do not share any notion of "the good"; if we can have no intelligible conversation about the

[232] T.S. Eliot, "Tradition and the Individual Talent", *The Egoist* vol. 6, nos. 4 & 5 (September & December 1919).

eudaimonia which might be achieved through the exercise of radical autonomy because your "good life" and mine are mutually exclusive opposites, then how can we judge one another to be reasonable or unreasonable?

The Halakha, I believe, like many of us perhaps, holds both a substantive and a formal conception of autonomy. It expects the rational, reasonable person (in our case, the husband) to allow his ideals and understandings to be informed by communal narratives about the life well-lived and thus (in the subject of our concern here) to know what a marriage looks like. If the community holds its narratives (including narratives about marriage) firmly enough and values them enough to communicate them clearly, then they will be internalised by the husband who lives and grows in the community. At any given point he can be expected to know, at heart, how well his life and marriage conform to the normative story. Though at times he may need a little persuading (hence the possibility of the threat of *kefiyah*), he ultimately realises, for instance, that a woman cannot be expected to remain married to a man whose profession makes him constantly odorous[233] or who is rendered through a grave physical defect or illness sexually repulsive.

Whilst, as is obvious from the whole thrust of this study, I believe firmly in the possibility and value of individual autonomy – and espouse the necessity of personal, individual responsibility and accountability for one's actions – when a problem such as *sarvanut get* becomes so widespread that it is a topic and focus of global debate and concern in the Jewish world, I suggest that we may view the problem less as a an unfortunate opportunity afforded by a loophole in the Halakha for unscrupulous *individuals* to behave unethically and more as a problem which is endemic in the Jewish community as a whole – a problem of the nature or the clarity of the narrative communicated about marriage (and thus divorce). It is not, I submit, the legal mechanics of the Halakha which need addressing but rather its philosophy and understanding of marriage – and the disjointure between that conception and the prevailing conception of marriage and divorce and their function in the modern secular world. I do not argue that the halakhic understanding needs to be altered; rather, that it needs to be clarified and honestly presented. The problem of *get* recalcitrance as I have described it emanates largely

[233] 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 their particular defects) 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 as "intolerable to live with" without having to prove that no woman would be willing to live with it.

(I do not claim entirely, see below) out of a mismatch between the traditional halakhic conception and legal edifice of marriage – that highly gendered construction known as *kinyan* which I outlined in chapter 4 and which requires the autonomous, therefore educated, will of the husband to dissolve it – and the modern secular conception which envisages an equal partnership to be disbanded at will by either party, accepting vicious and vindictive (but, in principle at least, "fair" and neutral) legal proceedings as an unfortunate but probably inescapable side-effect.

Autonomy – the kind of autonomy required of a man to end his marriage in a halakhically acceptable manner – is educated, as much as poetic creativity, within a particular tradition. Given a gun and placed in an Israeli army unit on the Lebanese border I could no more make an autonomous decision than could my 6 year old daughter edit this book for me. I understand Hebrew orders; she reads English; but education and socialisation into a practice requires much more. A young friend of ours (we shall call him Avi) recounted over dinner a decision that had landed him a punishment in the Israeli army (of which I am not an initiate). His commanding officer in a training exercise pointed out a Palestinian man on a bus at a border crossing and told Avi to treat him as though he had been tipped off that he was a terrorist suspect. That would have entailed hauling him out of the bus, roughly, at top speed, interrogating him at gunpoint and strip searching him. Avi refused the order. As a young man who spent his high school years in physical training in the hope of being selected for an élite army unit, who attended a strongly Zionist hesder yeshiva programme and who had been extensively trained, Avi has earned the right for his decision not to harass an innocent citizen to be considered autonomous – a moral and rational action for which he accepted punishment. In a similar situation, my own fusion of fear and moral revulsion might well lead to a similar decision, but that decision – right or wrong – would not be rationally autonomous.

On the other hand, my refusal to change my methodology and certain of the readings in the PhD thesis that became this book despite the threat of some of my examiners to fail the thesis if I refused to comply can, I believe, be judged autonomous: a long engagement with different disciplines within academia, and the mentorship of several supportive but critical professors, has given me, I hope, a capacity for autonomous scholarship – one which my very intelligent 6 year old as yet lacks – hence her inability to edit this book for me.

A man who contracts a halakhic marriage but has not been socialised and educated within the halakhic system cannot be considered autonomous within that system, however intelligent and thoughtful he may be in other spheres. He may perhaps be compared to a man raised on a still-communist kibbutz who, on getting his first temporary job offer, takes out a credit card with a £500,000 limit. Unless

alerted to the dangers, he may not even know he should read the small print. (How many men – or women – marrying under the *ḥuppah* are familiar with the contents of the Ketubah which is read out as part of their marriage ceremony?)

A couple who have no desire to enter into all the obligations of a Jewish marriage should not, I argue, and should not be encouraged to, contract a binding halakhic marriage. If a couple does not accept the non-parity of a traditionally gendered couplehood (let us say, by way of concretising the situation: if the couple does not intend the wife to cover her hair upon marriage as a visible marker of her – note: her, not his – change of status) there is no shame whatsoever in their entering into a communally acknowledged and religiously blessed alternative to *kinyan*.

Taking the step of removing non-halakhically observant couples from the purview of binding *kiddushin* and the halakhic authorities would mean that instead of attempting to find a solution within the bounds of *kinyan* which would avoid the problem of *get* recalcitrance for the entire spectrum of Jewish observance, the need would be only to find a solution for the observant community. That observant community should, logically, be those over whom the halakhic authorities hold most sway – not necessarily at the time of the breakdown of a marriage (a time when emotions run high, judgements are clouded by pain and anger and the likelihood of a person's being able to listen or be guided is at its lowest) but rather through the long period of character formation known in the orthodox world as *ḥinuch* – a process ideally begun at birth and continued through childhood and adolescence but which may also be begun, by the *ba'al(at) teshuva* for instance, at any time in adulthood. A particular conception of marriage is easier to inculcate than norms for behaviour upon the breakdown of that marriage. I wrote, a couple of pages back (p.131) that the Halakha "... expects the rational, reasonable person (in our case, the husband) to allow his ideals and understandings to be informed by communal narratives about the life well-lived and thus ... to know what a marriage looks like. If the community holds [such] narratives ... firmly enough ... and values them enough to communicate them clearly, then they will be internalised by the husband who lives and grows in the community." The crucial point is that the community must care enough about marriage to communicate its expectations of husband and wife in their married life as clearly as it communicates its expectations about Sabbath observance or standards of *kashrut*. The Mishna, in allowing for *kefiyah* of the husband to give a *get* under particular circumstances, delineates the acceptable boundaries of marriage. They do not include a husband's being physically repulsive (whether through his fault or not). I argue that in the 21st century – even, no *especially*, in the Orthodox world – domestic violence, deep psychological cruelty and serial or prolonged sexual infidelity are outside the acceptable boundaries of marriage. These actions, whether under the husband's

control or, because he is mentally ill and therefore non-autonomous, outside it, are as repulsive as a malodorous profession. If the community holds this to be true and cares enough about this truth to communicate it, teach it and inculcate it, then the husband who transgresses this communal narrative must, at heart, know he is acting outside the parameters of Jewish marriage. By such actions, then, he knowingly either chooses to destroy or is unable to prevent himself from destroying his marriage.

I argued in chapter 5 that, philosophically speaking, the major flaw in most hitherto proposed solutions to the problem of *iggun* lies in the fact that they place the locus of control over the continuance of dissolution of the marriage in hands other than those of the husband. This is, essentially, the argument of Rav Aharon Kotler[234] against a condition in marriage on the grounds of *bereira* – the trigger for the dissolution of the marriage to which the husband agrees can only be clarified in retrospect. Rav Kotler argues that 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 flaw is present in any condition or authority for a *get* (or any other mechanism) according to which the will of the wife or of the *bet din* is the deciding factor in the continuance or severance of the marriage partnership. A condition or *harsha'ah* for a *get*, however, which predicates the continuance or dissolution of the marriage on the behaviour of the husband is not subject to the same criticism. It is, I believe, congruent with the philosophy of halakhic marriage. Such a solution could surely be implemented without giving in to the pressures of the secular world, without allowing Torah to be compromised by the *mores* of liberalism and without departing from the traditional narratives of Jewish marriage. Such a step would, I argue, not only be one which could be taken without compromising the integrity of Torah; it is one which would increase the dignity of the daughters of Israel, demonstrate the compassion of the *poskim* within the bounds of the Halakha, and so reflect light on the Torah whose ways are ways of pleasantness and all of whose tributaries are peace.

[234] Rav Aharon Kotler, *Mishnat Rabbi Aharon* (Jerusalem: Makhon Yerushalayim, 1985), *siman* 60, pp.90-91. For a reply to this, see *The Manchester Analysis, supra* n.3, at §6.34 (p.275).

Epilogue

England, 2011. Ze'ev granted Ilana the divorce she requested – and fought a bloody battle for custody of their children, thus proving that there is more than one way to skin a cat and *get* recalcitrance is not, after all, the only way to seek revenge on one's estranged wife.

Naftali did not marry Ilana – as everyone knows, a married man never leaves his wife to marry his mistress, no matter what he says. Meanwhile, a few people on reading the conclusions of this book have asked me: if I were doing it all again, what form of marriage would I choose?

Flippantly, I respond that it all depends on the man I was marrying: if the husband-to-be were willing to enter into a union that wasn't *kinyan* then I would probably not need such an alternative but would be perfectly "safe" being bound to him with a traditional *ḥuppah* and *kiddushin*; if he insisted on full *kinyan* regardless of my concerns, then I should probably run a mile anyway. With hindsight, I think that for me the firm commitment of binding *kiddushin* has been important: I would not necessarily have felt secure having children with a man who I knew had reserved for himself the option to walk out whenever he felt like it. And an awareness that I am an *eshet ish* with all the religious resonances of that term has probably made me less likely to fall into temptation when the marital road has been (inevitably) rocky on occasion. But what I would advise somebody else with my own personality, my own convictions and my own vulnerability, without the benefit of the hindsight with which I can now look back over more than a decade of my own marriage – including, crucially, the bearing of children –, I do not know. All I do know is that I firmly hope that in the years between now and the marriages (iy'H) of my daughters our community(ies) can find the clarity and the courage to provide them with a form in which to express their complete commitment to another person, their firm intention to found with him a faithful house in the Jewish world and to do so secure in the knowledge that they can expect to be treated with the love and dignity that they – and all other Jewish women – deserve.

Aggada(ta)	"story" collected in rabbinic (frequently Talmudic) literature
Agunah (pl. *Agunot*)	lit. "chained woman": a woman who remains halakhically bound in marriage to a man with whom she is no longer living as man and wife. *Note: historically, most *agunot* were the victims of men who had disappeared, whose deaths could not be proven or had been rendered legally incapable (due to insanity) of providing a valid *get*. However, as the focus of the Agunah Research Unit was women whose husbands simply refuse to give a *get* (the particular type of *agunah* correctly termed a *mesorevet get*) the term is used predominantly in this book to indicate the latter.
Aḥaron (pl. *aḥaronim*)	lit. "last" – commentators on the Talmud/halakhic decisors who post-date the Shulḥan Arukh
Amora (pl. *amoraim*)	sage whose opinion(s) are collected in the Gemara
B.T.	Babylonian Talmud
Ba'alei haTosafot	the Tosafists
Bet din (pl. *Batei din*)	Jewish court of Law
Beit midrash	study hall
Baraita	Tannaitic tradition not collected in the Mishna but cited in the Gemara
Dayan (pl. *Dayanim*)	judge
D'oraita	According to (written) Torah law
E.H.	Tur/Shulḥan Arukh, Even HaEzer
Ed (pl. *edim*)	witness
Eshet ish	married woman
Get (pl. *Gittin*)	the bill of divorce given by a man to his wife which renders her eligible for marriage to another man
Hafka'ah	annulment
Ḥerem d'Rabbeinu Gershom	decree enacted in the Ashkenaz world in the Middle Ages (and accepted by force of *minhag* in most of

	the Sephardi world) to the effect that a man may neither take a second wife nor divorce his existing wife without her consent
Harsha'ah	authority (written document of)
Hatra'ah	warning halakhically required before an act is committed in order for it to incur corporal/capital punishment
Ḥevruta	study partner
Kefiyah	coercion (physical)
Kesef kiddushin	the money/article of value (traditionally a ring) used to effect *kiddushin*
Kiddushin	betrothal
Kinyan	(act of) acquisition/purchase; (piece of) property
M.T.	Mishneh Torah (Rambam)
Ma'is alai	(plea made by a woman that) "he [her husband] is repulsive to me"
Mamzer(ut)	bastardy resulting from a relation which is adulterous (i.e., involving a married woman) or incestuous. A *mamzer* is not permitted to marry a true born Jew; if (s)he does so, the children of that union will also be considered *mamzerim* as will any children resulting from the union of two *mamzerim*
Mishpat Ivri	lit. Jewish Law – the non-ritual portions of the Halakha which most closely correspond to the areas of Law covered by most secular legal systems
Mohel (pl. *Mohelim*)	a man qualified to perform ritual circumcision.
Moredet	a wife who refuses to perform her (most often understood to be) sexual obligations to her husband
Nisuin	marriage
Nisuin al tenai	conditional marriage
O.H.	Tur/Shulḥan Arukh, Orakh Ḥayyim
Posek (pl. *Poskim*)	halakhic decisor, generally a well-respected rabbi but not necessarily a *dayan* – *dayanim* often not being considered *poskim*, i.e., qualified to generate new halakhic decisions rather than to apply the existing halakha to particular cases

Psak	a particular halakhic decision (pl. *piskei halakha*) or the process of arriving thereat (also known as *paskening*)
Rishon (pl. *Rishonim*)	lit. "first" – commentators on the Talmud and halakhic authorities dating from the Medieval period
Sarvanut get	the refusal to give a *get*
Shaat hadoḥak	situation of pressing need
Shaḥarit	the morning prayer service
Shaila	question; request for a competent *halakhic* decision/clarification
Shalom bayit	marital harmony
Stamma	the anonymous (narratorial?) voice of any part of the Talmud
Sugya (pl. *sugyot*)	(relatively self-contained) passage of the Talmud
Takkana	enactment
Talmid Ḥakham	lit. "wise student" – a person of great Torah learning
Tenai	condition
Tosafot	see *Ba'alei haTosafot*
Umdena	(loosely) assumption
Yeshiva (pl. *Yeshivot*)	male-only institution of learning dedicated to the study of, predominantly, Talmud.
Yetser hara (*yetser*)	the evil inclination
Yevama	widow whose late husband died without surviving children and who is thus obligated to be married to her brother-in-law or engage with him in the ceremony of *ḥalitsah*.
Yiḥus	lineage (colloquially: prestige)

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