

TWO VIEWS OF MARRIAGE – TWO VIEWS
OF WOMEN: RECONSIDERING
TAV LEMETAV TAN DU MILEMETAV ARMELU

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INTRODUCTION

For almost two decades, the struggle to free *agunot*, “chained women” whose husbands refuse to divorce them,¹ has been intensifying in the Orthodox Jewish community. Under Jewish law, only the husband has the power to sever a marriage, and that power cannot be exercised on his behalf by a *beit din* (rabbinical court, pl. *batei din*), even in cases where the marital relationship has become attenuated or abusive. As a result, women locked into intolerable marriages may wait for years or even decades to be freed and able to start new lives.

In the last few years, a new *beit din*, established in 1996 by Rabbi Emanuel Rackman and Rabbi Moshe Morgenstern in association with AGUNAH, Inc., an organization dedicated to this cause, has been at the center of the struggle for freedom for *agunot*. This new *beit din* began freeing *agunot* by making rulings of *kiddushei ta'ut*, a finding that an error took place at the time of the wedding that voids the marriage agreement and thus releases the *agunah* without her husband's consent. The Orthodox rabbinate in the United States² has strongly criticized the new *beit din*. Its representatives contend that the Talmudic phrase *tav lemetav tan du milemetav armelu*, “better to dwell two together than to dwell alone,” is a binding halakhic principle that negates the new *beit din*'s approach to freeing *agunot* from their intolerable marriages. After a brief summary of the earlier phases of the struggle to free *agunot*, this paper focuses on a reconsideration of the *tav lemetav* principle in the Talmud. It makes the case that, contrary to the objections of critics, the Rackman *beit din*'s approach is consistent with the talmudic text, not at odds with it.

The Struggle to Free Agunot

I have been an *agunah* activist for more than a decade as part of AGUNAH, Inc.³ The struggle to free *agunot* in the Orthodox community is far from over. Nevertheless, *agunah* advocates can take heart from the fact that, over the years, we have succeeded in putting the plight of *agunot* high on the Orthodox community's agenda and in educating Orthodox rabbis and laypersons regarding three major aspects of the *agunah* problem: (1) the existence of *agunot*; (2) the procedural corruption and mismanagement of Orthodox *batei din*; and (3) the extortion and prejudicial position of women in halakhah as interpreted by rabbis in the Orthodox *batei din*.⁴

At first, early in the struggle, *agunah* advocates had to overcome the opinions of rabbis⁵ who insisted that there were hardly any *agunot* at all.⁶ But gradually, after years of media coverage and demonstrations, and as *agunot* gained the courage to identify themselves publicly, it became clear that there were significant numbers.⁷ Regrettably, many rabbis still slip into the word game of insisting on calling these suffering women *mesuravot get*, women refused a Jewish bill of divorce, rather than *agunot*, as if a different appellation in some way vindicates the rabbis' earlier denial of the *agunah* problem or diminishes the injustices perpetrated against these women.

Second, *agunah* advocates had to expose the fact that the *beit din* system was mismanaged and corrupt, so that justice was almost never done for *agunot*. Rabbis heaped criticism on AGUNAH, Inc., for publicizing accounts of *beit din* misconduct.⁸ But soon the public at large recognized the *hefkerut*, the blatant impropriety that reigned in *batei din*, and rabbis were forced to acknowledge that AGUNAH, Inc., was right: the *beit din* system was dysfunctional and, yes, corrupt.

Third, *agunah* advocates had to make clear to the Orthodox halakhic community that their *dayanim* (rabbinic judges) were operating with a view of marriage and women that was inherently prejudicial to women. Thus, even if *beit din* administrative procedures were reformed and corruption rooted out, women would still be gravely disadvantaged and abused in the *beit din* system, because of the inferior status assigned to wives by *batei din* and the resulting imbalance of power in favor of the husband. Once again, the rabbinate attacked AGUNAH, Inc., but eventually they conceded this point as well. The rabbis acknowledged that because of the husband's

extortion. When people expressed revulsion over innocent women being forced to purchase their freedom from wicked men, rabbis shook their heads or shrugged their shoulders and answered, "You're right. It's not fair. It's immoral. But it's halakhic. Halakhah gives men the power to deny their wives freedom, and there is little rabbis can do in most cases."

Refuting this defeatist and morally disturbing view of halakhah and women's status within marriage is the fourth and ultimate challenge in the struggle of AGUNAH, Inc., to free *agunot*. AGUNAH, Inc., has long insisted that there are halakhic ways for *batei din* to free *agunot* from unfit, recalcitrant husbands. But our rabbinical critics in the U.S. and elsewhere continue to maintain that the potential for husbands to commit *get* abuse is intrinsic to halakhic marriage. As Rabbi Mordechai Willig put it in an April 1999 lecture,⁹ "As long as there is Jewish halakhic marriage, there are going to be cases of *agunah*. It is a byproduct of halakhic Jewish marriage." Women's freedom is at the mercy of their husbands.

This one-sided view of marriage was dramatically upset late in 1996, when Rabbi Emanuel Rackman and Rabbi Moshe Morgenstern, in association with AGUNAH, Inc., established their new *Beit din live'ayot agunot*¹⁰ and began to free women who had been left in chains by other *batei din*. This new *beit din* applied the halakhic concept of *kiddushei ta'ut* to dissolve intolerable marriages. A finding of *kiddushei ta'ut* is a *beit din* determination that a fundamental mistake or misunderstanding occurred when the couple wed. This makes the marriage void *ab initio*, from the very beginning, because one side or the other never gave informed consent to the union, as required by halakhah. Such a determination obviates the need for a *get*. It allows the *beit din* to issue a *petor* (release), which frees the woman without her recalcitrant husband's consent.

Freedom for *agunot* was becoming a reality. The organized Orthodox rabbinate reacted swiftly, denying that there was any known halakhic way for freeing these women and calling upon the new *beit din* to publish the halakhic sources and responsa on which the new *beit din* based its decisions to free *agunot*.

MAKING THE CASE FOR KIDDUSHEI TA'UT

In August 1998, in response to this call for the halakhic sources, I wrote a document entitled "Halachic Principles and Procedures for Freeing

Agunot,¹¹ which set forth halakhic arguments in support of the Rackman/Morgenstern *beit din*. Relying on well-known halakhic sources, I outlined three forms of *kiddushei ta'ut* that may be used by contemporary *batei din* to free *agunot*. The basic halakhic premise of all three forms of *kiddushei ta'ut* is this: if critical information about the groom or the terms of the marriage was not disclosed to one party, in our cases the bride, informed consent was lacking, making the marriage void *ab initio*.

Kiddushei ta'ut I involves the voiding of the marriage because a salient defect in the groom which existed at the time of the wedding was not disclosed to the bride. When the salient defect becomes known, the wife has the right to declare to a *beit din*, "The marriage transaction took place under false pretenses. Had I known of this defect, I never would have consented to marry him."

Kiddushei ta'ut on the grounds of a salient defect in the groom is an established concept in halakhic literature. More than 700 years ago, Rabbi Isaac ben Moses of Vienna, the *Or Zarua* (c. 1180–1250) recorded a case in which his contemporary, Rabbeinu Simcha of Speyer, ruled that a wife should be released without a *get* in the event that an unknown defect in the groom is revealed, on the grounds of *kiddushei ta'ut*.¹² Rabbi Yitzchok Elchanan Spektor, a noted nineteenth-century European rabbi, also paved the way for rulings of *kiddushei ta'ut I*. He wrote that if a discovered defect in the groom is serious enough to warrant compelling him, by means of physical coercion (*kefiyah*), to give a *get*, there is no presumption that the woman would have consented to marry the man despite his defect.¹³ Thus, in cases of grave pre-existing defects, an *agunah's* plea of *kiddushei ta'ut* can be accepted, and the oppressive marriage can be voided.

The failure to disclose a defect may not necessarily involve fraudulent intent on the part of the groom. It may be that he himself was not aware of his problem. For example, as set out in a responsum of Rabbi Moshe Feinstein, the groom may be unaware at the time of the marriage that he is impotent. When this condition becomes apparent, the marriage is voidable even though the groom did not willfully conceal the information.¹⁴ *A fortiori*, of course, the marriage is voidable in the case of willful concealment of a serious defect.

In case after case that came before AGUNAH, Inc., and the Rackman *beit din*, the recalcitrant husbands had manifested deep-seated personality disorders and abusive behavior (physical and psychological abuse,

adultery, sexual molestation, abandonment, criminal activity, substance abuse, sadism¹⁵). These justified freeing the *agunah* on the grounds that she would never knowingly have consented to marry a man with such a defective nature.¹⁶

Kiddushei ta'ut II involves voiding the marriage *ab initio* because the bride was not informed of, and therefore did not give the requisite informed consent to, marriage terms that imprison her in a marriage no matter how intolerable it becomes. She would never knowingly have agreed to being locked into an impossible marriage.

Kiddushei ta'ut II finds support in the writings of Maimonides, who, in the twelfth century, laid down the principle that *batei din* should release women from intolerable marriages by coercing the husband to give a *get* when his wife declares that he is repugnant (*ma'us*) to her (*Hilkhot ishut* 14:8). He declared: "Our women are not slaves, that they should be forced to co-habit with someone they despise." In the thirteenth century, Rabbi Solomon ben Adret wrote that the daughters of Israel would not wed if they thought that they could not rely on rabbis to free them from bad marriages, by ordering the coercion of a *get* (*Hiddushei haRashba, Gittin* 88b).

In case after case, *agunot* reported to AGUNAH, Inc., and the Rackman *beit din* that they had no idea when they married that rabbis have no power to sever oppressive marriage bonds that chain them to cruel and violent men. Neither their congregational rabbis, nor the rabbis who taught them at school, nor the rabbis who officiated at their weddings had informed them that marriage could be a trap with no exit.

Kiddushei ta'ut III is based on the proposition that when women marry, they are not aware of and therefore are not knowingly consenting to the halakhic terms of marriage as the acquisition (*kiyuan*) of title to their bodies by their husbands (*gufah kanui*).¹⁷ Consequently, again, their marriages are void *ab initio*, with the result that they do not need a *get* to exit them.¹⁸

These arguments and halakhic sources concerning *kiddushei ta'ut* stirred interest in the Orthodox community. Though our critics at first faulted the publication of our document in a newspaper rather than in a halakhic journal,¹⁹ they eventually responded. Some rabbinic organizations, like Agudath Israel of America, issued terse general condemnations of the "Principles and Procedures." But on October 27, 1998, Rabbis Michael Broyde, Yona Reiss, Gedalia Dov Schwartz and Mordechai Willig of the Beth Din of America (BDA), a major modern Orthodox *beit din* in New

York City, issued a detailed critique of the document. It was mailed to the membership of the Rabbinical Council of America (RCA), a national association of modern Orthodox rabbis in the United States.

Both Rabbi Rackman and I responded to the BDA critique; my response came to be known as “Principles and Procedures II”²⁰ Rabbi J. David Bleich of Yeshiva University followed with a far lengthier critique of the first “Principles and Procedures” in the RCA’s *Tradition* magazine.²¹ BDA rabbis also began to lecture more frequently in the New York area about *agunot*, and we of AGUNAH, Inc., who were not offered a platform, took every available opportunity to question them from the floor at these lectures. What was developing was a dialogue in print and in lecture halls between, on the one side, the Rackman *beit din* and AGUNAH, Inc., and, on the other, the BDA/RCA. Out of this dialogue emerged two contrasting views of marriage and women, with dramatically different consequences for the status of wives *vis-à-vis* their husbands and women’s ability to exit intolerable marriages.

TWO VIEWS OF MARRIAGE - TWO VIEWS OF WOMEN

(a) *Marriage as shi’abud or kinyan*

The organizing concepts that our opponents use to characterize marriage are *shi’abud*, or servitude, for Rabbi Bleich, and *kinyan*, or acquisition, for the BDA. For Rabbi Bleich, “The legalistic essence of marriage is, in effect, an exclusive conjugal servitude conveyed by the bride to the groom.”²² The bride is divested of the capacity to marry any other male. The BDA rabbis’ *kinyan* formula of marriage is similar, stating that the *kinyan* of marriage “only forbids relations with (and marriage to) anyone other than her husband.”²³ Note that neither formulation contains any parallel restriction for the husband, binding him to practice sexual fidelity to his wife. Only the wife is forbidden to have extramarital sex, and the wife can only reacquire her sexual freedom if her husband voluntarily surrenders his exclusive rights.²⁴ According to Bleich and the BDA, the husband’s right as the sole beneficiary of his wife’s sexuality survives even if he beats and abandons her, has relations with other women or torments her emotionally and psychologically.

Women have an overriding desire to marry

Our opponents do not dispute the fact that their *kinyan/shi’abud* marriage exposes women to abuse and empowers men to keep their wives prisoner. But in their view, women are presumed to have such an overriding desire to marry that they willingly marry seriously defective men and accept the risk of being trapped in a marriage controlled by an abusive husband’s ability to give or withhold a *get*. In making this presumption, our opponents rely on the talmudic statement attributed to Resh Lakish, *tav lemetav tan du milemetav armelu*, which, roughly translated, means “Better to dwell two together than to dwell alone.”

Bleich applies the *tav lemetav* concept as follows: There are women, anxious to marry, who would knowingly marry men with the grave defects listed above under *Kiddushei ta’ut I*. Consequently, there can be no presumption that women marry on the condition that their grooms be free of such defects. A *beit din* therefore cannot void a particular woman’s marriage when she testifies that she would never knowingly have married a defective man, for the truthfulness of the woman’s testimony is in doubt. Perhaps marriage was so much more desirable than remaining single that she would have consented even with the knowledge of his grave defects. Bleich writes:

Since men afflicted by the various character flaws categorized by the authors as salient defects frequently do find mates even upon due disclosure of such defects, it is quite evident that, even in our era, as least some women find males of flawed character to be acceptable marriage partners.²⁷

Bleich provides no evidence of women frequently consenting to marry men who disclose the salient defects of *Kiddushei ta’ut I*. Nevertheless, he maintains that his postulated existence of women willing to marry such misfits bars voiding the marriage in cases of seriously defective husbands. In Bleich’s own words, “The defects described [in *Kiddushei ta’ut I*], even if present before the marriage, simply do not render the marriage voidable.”²⁸ After his rejection of a salient defect as grounds for *Kiddushei ta’ut I*, Bleich states that *tav lemetav* undermines *Kiddushei ta’ut III* for similar reasons: as a result of an overriding desire not to remain single, a woman

may knowingly accept her “distasteful,” subordinate status of servitude in halakhic marriage.²⁹ Thus, a woman’s claim that her marriage is void because she did not consent to sexual servitude to an abusive husband cannot be credited by the *bei din*.

The concept of *tav lemetav*, Bleich says, is an immutable halakhic principle applicable to women. In support of this approach, he quotes Rabbi J.B. Soloveitchik:

Let us take for instance the *hazakah ... tav le-meitav tan du me-le-meitav armelu*. This has absolutely nothing to do with the social and political status of the woman in antiquity. The *hazakah* is not based upon sociological factors. It is a *pasuk in Bereishit*, “And thy desire shall be to thy husband” (Genesis 3:16). It is a metaphysical curse rooted in the feminine personality. ... And this will never change. It is not a psychological fact; it is an existential fact. ... An old spinster’s life is much more tragic than the life of an old bachelor. This was true in antiquity; it is still true. ... To say that *tav le-meitav tan du me-le-meitav armelu* was due to the inferior political or social status of women at the time is simply misinterpreting the *hazakah*. ... She was burdened with it by the Almighty after she committed the first sin.³⁰

This, then, is what Bleich and the BDA present as the halakhic paradigm of women, presumptively desperate to marry and willing to accept gravely defective grooms who acquire unilateral control over their wives.³¹ As a consequence of this paradigm, every *agunah’s* veracity is under suspicion when she testifies that she would not knowingly have consented to marry an abusive man. Each might be one of those whom Bleich and the BDA say would knowingly consent to marry repugnant men rather than remain single. The upshot of this interpretation of *tav lemetav* and of women’s attitude toward marriage is almost totally to foreclose a woman’s ability to exit a marriage on the grounds of *kiddushei ta’ut*.³²

(b) Marriage as a Partnership

By contrast, I argue that marriage is a sanctified partnership, a contract between equals.²⁵ Some partnerships will be more successful than others

with regard to mutual love, respect and support. But neither party may abuse the other and retain the right to bind the spouse in a dead marriage. I reject the idea that brides beneath the *huppah* (marriage canopy) knowingly agree to a one-sided *shi’abud* or *kinyan*, under whose terms the husband obtains a non-reciprocal authority over his wife’s sexual freedom.²⁶

My *Principles and Procedures* publications took the view that *tav lemetav* is an outmoded view of today’s women, who choose marriage when it is an attractive option, not because of a compulsive desire to marry. Contemporary women do not prefer marriage to minimally qualified men to remaining single. They can support themselves economically; they can travel fairly safely alone; and they can have intimate relationships with men outside of marriage without fearing the birth of a child out of wedlock.³³ While society at large is still uneasy about women who bear children without benefit of marriage, even this phenomenon is far from unheard of.³⁴ The large number of never-married or divorced women indicates that marriage to minimally qualified males, for them, is not preferable to being single. The many *agunot*, often women with large families, who struggle alone rather than tolerate abusive husbands is dramatic evidence that *tav lemetav* is an inaccurate concept of the nature of women in 1999. When a man turns out to be an abusive husband, the wife can credibly claim *kiddushei ta’ut*. She never would have consented to a marriage had she known how defective her groom was or that exiting the marriage is impossible.

Post-talmudic sources buttress the argument that *tav lemetav* is not a barrier to *kiddushei ta’ut* when women find themselves chained to defective husbands. The statements of Maimonides and Solomon ben Adret legitimize a woman’s claim that her consent to marriage was conditioned by her reliance on the rabbi’s ability to free her from a repugnant husband. The rulings of the *Or Zarua*, Rabbi Yitzchok Elchanan Spektor and Rabbi Moshe Feinstein set the precedent that *tav lemetav* may be overruled when a salient defect makes the marriage intolerable.³⁵

TAV LEMETAV IN THE TALMUD

This section sets forth a more fundamental challenge to our opponents’ harsh interpretation of *tav lemetav*. Not only is it outmoded today, but even

in the Talmud itself, reconsidered without later, more patriarchal accretions, *tav lemetav* was not an unyielding legal presumption, and thus it need not present an insuperable halakhic barrier to rulings of *kiddushei ta'ut*. Rather, *tav lemetav*, in the five talmudic contexts in which it appears, was cited as a familiar maxim that reflected on, but did not determine, the Talmud's decisions in various cases.

Bava kamma

The most widely cited passage in which *tav lemetav* is invoked begins on *Bava kamma* 110b.

A childless widow who is bound to one afflicted with a repulsive skin disease [*shehin*]: shouldn't she be released without *halitzah*?³⁶ For surely she would not have betrothed herself with this understanding. There [i.e., in this case], we can bear witness [*hatam anan sahadei*] that she was satisfied [*demenah niha lah*] with a minimum [*kol dehu*, a minimally acceptable man]. As Resh Lakish said, *tav lemetav tan du milemetav armelu*.

The question at hand is whether a childless widow (*yevamah*) might avoid the need for *halitzah*, release from marriage to her brother-in-law, in a case where he was a *mukeh shehin*, a sufferer of a repulsive skin disease. She surely had had no expectation or intention, when she married, of being forced into levirate marriage with one so afflicted, and so her original marriage, she claimed, was a mistake and void. The Talmud rejects this claim, declaring: "There, we can bear witness that she was satisfied with a minimum." What, according to the Talmud, is the minimum that would suffice for her to agree to the marriage? And what is the import of the saying *tav lemetav*, which immediately follows?

Rashi, in his comment on the words *menah niha lah*, explains:

"She was satisfied" to be betrothed to the first, who was healthy [*shalem*], with the risk that if he should die [childless from her], she would end up in a levirate relationship with his [afflicted] brother.

Thus, according to Rashi, the court is claiming to bear witness (or to presume) that the woman wholeheartedly accepted marriage to her healthy husband, despite the encumbrance of an indirect flaw: his diseased brother. In this case, a healthy husband was her minimum requirement, and since she got what she bargained for, she was not deceived. The marriage was binding, and *halitzah* would be necessary to release her from marrying her brother-in-law. If, however, the groom himself, unbeknownst to the bride, had been a *mukeh shehin*, the marriage would be voidable, since a diseased groom would not qualify as minimally acceptable. According to Rashi, he would be less than the *kol dehu* that the woman would presumably have demanded before she agreed to marriage.³⁷

Rashi's approach significantly restricts the type of defect the *beit din* is presuming to be acceptable to the woman.³⁸ According to Rashi, the minimum a *beit din* can presume to be acceptable to a bride is that the groom himself must be healthy, *shalem*. If the groom has a serious hidden defect, a *beit din* cannot presume that the bride would have agreed to wed had she been aware of his defect. Thus, when such a defect comes to light, the wife can claim "*Kiddushei ta'ut*. I would not have agreed to this marriage had I known of my husband's defect. I thought he was *shalem*, healthy."

Of the places where *tav lemetav* appears in the Babylonian Talmud, this *Bava kamma* passage is the most widely cited in halakhic literature, probably because it is the only one of the five passages in which the talmudic concept *anan sahadei* (we bear witness, we presume) appears. The use of *anan sahadei* here is an example of the talmudic view that when "words in the heart,"³⁹ a person's unspoken intentions, are relevant to deciding a legal matter, the court has the authority to make presumptions about those intentions and decide the case accordingly. In our case, the court is presuming that the woman did intend to commit herself to the marriage with her healthy husband, despite the liability of a diseased brother. Thus, her claim that her marriage is void because she did not at the outset accept the risk of requiring *halitzah* from her brother-in-law is rejected by the court.

It is important to note how narrow is the scope of this *anan sahadei*, how limited is the claim with regard to the *beit din*'s power to presume a woman's thoughts in approaching marriage. *Bava kamma* states: *Hatam anan sahadei – there*, in this particular case of a healthy husband with a sickly brother, we, the court, bear witness; we may surmise that the woman intended to marry even with the levirate risk.

It is also noteworthy that the judgment is phrased in the singular: *menah niha lah*, “she is satisfied.” This singular form is consistent with my argument that the Talmud in *Bava kamma* is not making a broad generalization about women’s attitudes toward all loathsome marriages, but rather a judgment about a woman in this specific set of circumstances.

It is only after the Talmud makes a determination that the woman willingly married her healthy groom that the Talmud rounds off the text by quoting Resh Lakish’s aphorism, *tav lemetav*. First the facts of the case are weighed, the healthy groom being a crucial element of the case, and then a decision is reached, relying on the *anan sahadei* legal principle to make authoritative presumptions about the woman’s attitude at the time of her wedding. Facts and a limited presumption about intent decide this case, not *tav lemetav*, which is no more than an adage that reflects on but does not determine the court’s decision.

It should further be noted that the risk the court presumes the woman to have accepted is quite limited. In order for her to be faced with *halitzah*, both her diseased brother-in-law and she herself must outlive her healthy husband, and she must be childless when her husband predeceases her. Note also that the Talmud is only contemplating the need for *halitzah*, not forcing her to marry this man who, unfortunately, is repulsively ill.⁴⁰ Thus, her principal risk is that after *halitzah*, she will be disqualified from marrying a *kohen*, a descendant of the Jewish priestly families, whose men are forbidden to marry women who have been divorced or released from levirate marriage. We can also speculate that if the widow in question had been more self-sufficient (as many contemporary women are) and formidable when she first married, even the slim risk regarding the brother-in-law might have led her to reject the prospective healthy groom. It is certainly a long stretch from a woman accepting this narrow risk in marriage to the broad operating presumption of Rabbi Bleich and the BDA that all women would willingly accept grooms who are defective rather than remain single.

Yevamot

The second occurrence of *tav lemetav* is in *Yevamot* 118b. The passage raises the question of whether a *get zikui*, a *get* that is transferred to the

wife through a receiving agent appointed by the court,⁴¹ can take effect immediately, before actual delivery to the wife, in cases where there is discord, *ketatah*, between husband and wife.

One who issues a *get zikui* when there is discord [*ketatah*] between them. What is it? Since there is discord, is it a benefit to her, or perhaps physical comforts are preferable to her [*niha lah*]? Come and learn [*ta shema*]: Resh Lakish said, *tav lemetav tan du milemetav armela*.

Like *Bava kamma*, *Yevamot* discusses the woman in the singular. Which is preferable to her: to exit this bad marriage via an “instant” *get* or to retain the physical comforts (*niha gufa*) of marriage?⁴² But unlike *Bava Kamma*, the Talmud in *Yevamot* makes no *anan sahadei* presumption about whether the woman would rather exit the troubled marriage or stay. The court is unable reliably to “read” the words or intent in the woman’s heart with regard to enduring or exiting the troubled marriage.

Why is *Bava kamma* able to make a ruling about the woman’s intentions regarding the marriage, while *Yevamot* is not? I suggest that it is because enough key facts are available for a ruling in the *Bava kamma* case, whereas in *Yevamot* they are not. In *Bava kamma*, the widow herself enters a plea, and the extent of the undesirable aspect of the marriage is known and can be evaluated. In *Yevamot*’s *get zikui* case, on the other hand, the woman is obviously absent, since the Talmud is considering the activation of a *get* without her being available to receive it. Since the court cannot determine how insufferable the marriage is in her absence, it cannot make a presumption about whether this woman would prefer staying in her troubled marriage to exiting it,⁴³ and the case is left unresolved. No *anan sahadei* statement, no decisive, legally binding determination, is recorded in *Yevamot*.⁴⁴ *Tav lemetav* is cited, but, in the absence of information about how badly troubled the marriage is and of the woman’s individual perspective, it cannot produce a decision. This stands in direct contradiction to a broad, unqualified interpretation of *tav lemetav* as a binding presumption that women prefer a miserable marriage to being single!

In these two talmudic contexts, then, *tav lemetav* is not a controlling, deterministic legal rule which, without reference to the particulars of a case, prejudges against almost every woman seeking to exit an intolerable marriage. In *Bava Kamma*, *tav lemetav* is merely a familiar adage quoted

after the case is decided, while in *Yevamot* it is insufficient to yield a decision about a woman's preference regarding her marriage.

The next few lines of *Yevamot* provide further information about the limits of what *tav lemetailav* may imply about women. Immediately after *tav lemetailav* is cited, Abaye is quoted as saying that a woman feels her social status is improved even with a husband who is as small as an ant.⁴⁵ Rav Papa says that a woman will be proud even of a groom who has a low profession or is just a simple man. Rav Ashi says that a woman accepts a husband even if his family is not the best or she gets practically no economic sustenance from him. An anonymous *tanna* (mishnaic sage) adds that "they" are all promiscuous and cast the responsibility on their husbands (for any pregnancy, Rashi explains⁴⁶). These sayings can be read as commentary on the phrase *tav lemetailav*, suggesting what shortcomings a woman will accept rather than remain single: a small man, meaning that he is of low social status or perhaps that he is physically small; a man who has a menial job or is lowborn; or a man who barely provides financially. As to the question of why women consent to marrying such minimal specimens, the anonymous *tanna*, as explained by Rashi, supplies the answer: to camouflage pregnancies that might result from sexual relations with other men.

In none of the contexts discussed above, nor in those discussed below, does the Talmud associate *tav lemetailav* with a presumption that a woman would knowingly consent to marry or prefer to remain with a man whose defects are as grave as beating, tormenting or abandoning his wife and children.⁴⁷ There is therefore no clear precedent in the Talmud⁴⁸ that obliges or, we may say, empowers contemporary *batei din* to presume that today's *agunot* would knowingly have consented to marry or be bound to dangerously defective men. Furthermore, we have seen that the Talmud presumes a woman's intentions only in a very specific set of circumstances and speaks in the singular about the woman. On this basis, we may argue that contemporary *batei din* should not make sweeping generalizations about women, but should take into account specific factors that influence women's attitude toward marriage. In today's world, for example, factors such as a woman's economic and social status in the community and the existence of modern birth control reduce the likelihood that a woman would knowingly marry a minimally acceptable man, let alone a seriously deficient man.

Kiddushin and Ketubbot

The three remaining places in which *tav lemetailav* appears in the Talmud are *Kiddushin* 7a and 41a and *Ketubbot* 75a. None of these cases even remotely suggests that women willingly accept marriage to odious men.⁴⁹ As in *Bava kamma* and *Yevamot*, *tav lemetailav* appears in these passages as an aphorism, and the three cases in point involve grooms with defects that are limited or hardly worthy of being called defects at all. They certainly do not involve cruel and abusive treatment of their wives.

Kiddushin 7a deals with the validity of a marriage that is established by means of the wife giving the husband a gift, where the accepted practice would be the reverse.

Rava asked, What if [a woman said]: Here is a *maneh*, and I will be betrothed to you. Mar Zutra said in the name of Rav, she is betrothed. ... Here we are dealing with an important man [*adam hashuv*] ... a woman is satisfied [*niha lah*] with a minimum. As Resh Lakish [said], *tav lemetailav tan du milemetav armelu*.

This case of *tav lemetailav* involves a ruling upholding the validity of a marriage where the "defect" is that the bride was not insistent about receiving the customary symbolic⁵⁰ material token, *shaveh perutah*, in return for agreeing to the marriage – hardly a precedent for holding that women will knowingly consent to marrying gravely defective men. In addition, the Talmud explains why it is acceptable to her to forego the token in this case. The reason is that the groom is a particularly distinguished man, an *adam hashuv*. Given a groom of unusually high social stature, a woman is satisfied to be wed even without receiving the symbolic token.

Note again that there is no *anan sahadei* statement in this case, which, had it appeared, might have added some further element to what *batei din* are competent to presume about a woman's attitude toward marriage. In this case there is no need for the *beit din* to speculate or presume about whether the bride was consenting to a marriage with the "defect" that she was deprived of the *perutah*, for there is hard evidence about her attitude at the time of the wedding. It is the bride's own voluntary, overt action and explicit words, in offering to give the man money and be married to him,

that create the “defect” of her not receiving the *perutah*, incontrovertibly demonstrating her consent.

Thus, it is the bride’s express willingness and the additional explanation about the groom’s stature that justify the Talmud’s decision that it is satisfactory to her to marry despite the *perutah* “defect.” Only after this information is weighed and a decision upholding the marriage recorded does the Talmud invoke *tav lemetav*, seemingly as an afterthought. It seems unreasonable to suggest that this instance of *tav lemetav* represents a generalized, binding halakhic presumption. Furthermore, it seems unreasonable to rely on this case, where the bride explicitly waives the *perutah*, as a precedent for today’s rabbis to be empowered to presume women’s informed consent to self-destructive marriages, when these unfortunate women neither said nor did anything to indicate such consent.

Kiddushin 41a allows that a woman, in contrast to a man, may accept betrothal by agency:

A man may not betroth a woman before he sees her, lest he [subsequently] see something repulsive in her and she become loathsome to him. ... But there is no prohibition in this case [of a woman accepting betrothal by agency], as Resh Lakish said, *tav lemetav tan du milemetav armelu*.

What the Talmud is saying is that a woman, unlike a man, is not likely to end up despising her husband because of some cosmetic imperfection that she might have seen upon meeting him in person. Again, this application of *tav lemetav* poses no difficulties for limiting its scope as a presumption. It suggests only that women are less likely to reject men based on visual impressions than vice versa – a far cry from presuming that women will knowingly marry men who are dangerously abusive. Interestingly, Rashi characterizes *tav lemetav* in this context and in *Ketubbot* 75a as a colloquial saying of women, not as a controlling halakhic presumption.⁵¹

Furthermore, the woman who accepts betrothal by agency, like the woman in *Kiddushin* who forges the *perutah*, is overtly communicating her acceptance of this “defect” at the time of the creation of the marriage. She is willing to take the risk of being married without first seeing her husband. The Talmud is not speculating or making an *anan sahadai* presumption about whether this woman or women in general would accept

some intolerable concealed risk. Rather, it is saying that if a woman explicitly accepts betrothal by agency, it is binding. This case in no way presents *tav lemetav* as implying that *batei din* must presume that women prefer a lifetime of pain with an abusive husband to being single. All the woman is accepting here is the possibility that her husband’s appearance will not be aesthetically pleasing.

The final mention of *tav lemetav* occurs in *Ketubbot* 75a,⁵² which deals with a case where a husband nullifies a vow he had taken of which the bride was unaware at the time of the marriage. This case of *tav lemetav* also in no way suggests a broad presumption that women will knowingly marry brutal husbands. It concerns the validity of a woman’s consent to a marriage when her husband, who may have a predilection for taking vows, had been bound at the time by some vow that disturbs her and which he has agreed to nullify. As in the other cases, the Talmud speaks in the singular about the woman. *She (ih)* is satisfied with a minimum, the minimum being marriage to a man who was once encumbered with a vow and may be a “vowing type.”⁵³

The Outer Limits

Four kinds of defects that a bride might overlook and still consent to marriage are associated with the maxim *tav lemetav* in the talmudic texts we have reviewed: (1) the slim risk of levirate ties requiring *halitza* from a brother-in-law with a repulsive physical condition; (2) unimpressive physical, social or economic status; (3) failure to give the bride the token *perutah*; and (4) a nullified vow and, perhaps, a propensity to make vows. Grave pre-existing personality disorders, however, go beyond these outer limits of *tav lemetav*.⁵⁴ When a wife discovers them in her husband, *tav lemetav* should not be regarded as a barrier preventing her from claiming that she would have withheld her consent to the marriage had she known of these defects.

Text must be read in context. *Tav lemetav* read in its original talmudic contexts is not a comprehensive, immutable halakhic presumption (*hazakah*) that defeats almost all claims of *kiddushei ta’ut*; it is, rather, no more than a maxim, perhaps a colloquialism used by women. Furthermore, this maxim is associated with women accepting relatively limited or benign

defects in their grooms,⁵⁵ the most serious being the slim possibility that the woman may have to undergo the *halitza*h ceremony in order to be free.

This limiting interpretation of the talmudic texts and contexts is reflected in the later halakhic sources discussed above. It is precisely the position espoused by Rabbi Yitzchok Elchanan Spektor, who ruled that *tav lemetav* does not bar a claim of *kiddushei ta'ut* in cases of pre-existing defects in the groom that are serious enough to warrant *kefiyah*, physical coercion of the *get*. Rabbi Moshe Feinstein's reliance on *kiddushei ta'ut* to free *agunot* put into practice Rabbi Spektor's general rule limiting the applicability of *tav lemetav*. Moreover, Solomon ben Adret's statement that women would not consent to marriages that may turn out to be traps with no exit is presaged in the *get zikui* case, where the Talmud leaves open the possibility that a woman may prefer exiting a bad marriage to staying in it.

I have argued that when women discover that their husbands are sexual molesters, wife beaters and the like, these women can claim *kiddushei ta'ut*: they would never knowingly have consented to be bound in marriage to such defective husbands. Contrary to our critics, *tav lemetav* does not discredit such pleadings by women in the *beit din*. It was never meant to be a sweeping presumption that forces or empowers *batei din* to assume that all women are willing to accept intolerable faults in men rather than remain single. If the husband's flaw, whether pre-existing or post-dating the marriage, is intolerable, so grave as to warrant physical coercion, *tav lemetav* is inapplicable. The *beit din* can credit a woman's testimony that the minimum she required for her consent to marrying her groom was that he be normal and mentally healthy and that she have a way out should he torment her. We do not presume, as Rabbi Bleich and the BDA do, that at the time that a disastrous marriage was created, the bride was so desperate to be wed that she would knowingly have consented to a marriage of endless torment. *Kiddushei ta'ut* occurred under the *huppah*, and the marriage is void *ab initio*.

Further Support in the Talmud for Restricting Tav lemetav

The preceding discussion makes the case that *tav lemetav* was applied narrowly even in the Talmud and does not, therefore, constitute a barrier to a

woman's claim that her marriage was based on a mistake and should be voided. A careful reading of Mishnah *Ketubbot* 7:1-5, which lists numerous grounds for physical coercion of the husband to give a *get*, demonstrates the wide range of circumstances in which Rabbi Yitzchok Elchanan Spektor's suspension of *tav lemetav* in such cases would apply, making rulings of *kiddushei ta'ut* possible.

The Mishnah lists a series of cruel and unreasonable restrictions or humiliations that a husband might impose on his wife⁵⁶ but which then oblige him to free her with a *get* if he does not cease mistreating her. These include barring the wife from deriving benefit from him,⁵⁷ from tasting certain foods, from using certain beauty adornments, from visiting her father, or from visiting others to pay condolence calls or to socialize; or demanding that she behave in a humiliating fashion either publicly or privately. In cases such as these, the Mishnah declares: *yotzi veyiten ketubah*, the husband should release his wife with a *get* and pay her the value of her *ketubah*.

Rashi⁵⁸ interprets this declaration of *yotzi veyiten ketubah* as an authorization of *kefiyah*, the use of physical coercion to secure a *get* from the husband. The medieval commentators known as the Tosafists, discussing Rashi's interpretation, raise the question of why these cases involving cruelty are not grouped with the cases of repulsive physical maladies listed in *Ketubbot* 7:10, which, should they befall the husband, warrant coercing him to give a *get*. The Tosafists point out that a husband who suffers from a repulsive disease is an innocent victim of circumstance, while one who imposes intolerable restrictions on his wife is personally responsible for his wife's suffering. It follows, *a fortiori*, that if a husband who unfortunately falls victim to a repulsive disease is coerced to give a *get*, a husband who deliberately torments his wife with cruel restrictions must do the same.

These mishnahs and the comments on them by Rashi and the Tosafists are remarkable, because they describe behaviors that secular courts and mental health professionals have only recently recognized as classic forms of psychological wife abuse. Abusive husbands typically attempt to dominate and debilitate their wives by isolating them from friends and family, humiliating them in public and in private, and controlling household funds.⁵⁹ All such behaviors warrant coercing a *get* from the husband, declare Rashi and the Tosafists.

The view taken by Rashi and the Tosafists provides major support for the

liberation of *agunot*. As we have seen, Rabbi Yitzchok Elchanan Spektor declares that the presumption *tav lemetav* is inapplicable in cases where coercion of the *get* is in order. This allows a claim of *kiddushei ta'ut* when defects of the kind described in the preceding paragraph come to light. The finding would unfold as follows. It is demonstrated to the *beit din* that the husband has psychologically or physically abused or abandoned his wife, indicating that he has a serious personality disorder that was undetected at the time of the marriage. The *agunah* pleads *kiddushei ta'ut*, I never would have consented to marry him had I known of his grave psychological defects. Applying the standard that there is no presumption of *tav lemetav* in cases where a defect in the husband warrants coercion of the *get*, the *beit din* accepts her plea: there was no informed consent at the time of the wedding. The marriage is void, and the *agunah* is released.

CONCLUSION

In this article, I have set forth three forms of *kiddushei ta'ut*, a woman's claim that she would have preferred to remain single had she known of her groom's defects or the impossibility of exiting an intolerable marriage. I have also described various halakhic sources which, over the centuries, narrowed the scope of the talmudic presumption *tav lemetav tan du mi lemetav armelu*, invoked by rabbinic judges as a barrier to the claim of *kiddushei ta'ut*. This paper argues further that even in the Talmud itself, *tav lemetav* was not a rigid legal rule used to defeat almost any claim of *kiddushei ta'ut*. Rather, from the beginning it was a much narrower maxim and did not have the status of an immutable presumption that women would knowingly consent to marry cruel and violent men rather than remain single.

I have outlined the rather benign outer limits of what types of defects the Talmud suggests that a woman might overlook and still marry. That a conclusive statement prefaced by *anan sahadei* appears only in the *halitzah* case, where a healthy husband is essential to a binding marriage, sets a precedent for *batei din* to presume that the minimum women accept in marriage is a healthy (*shalem*) husband. The importance of specific information about the woman in question – for example, her economic and social status – is reflected in the *Yevamot* case, where the absence of

the woman forestalled a judgement. *Tav lemetav* is not halakhically strong enough in the Talmud to predetermine the woman's preference with regard to exiting or remaining in a marriage.

Contemporary *batei din* should consider that neither the Talmud nor contemporary reality justifies a presumption that women accept marriage to misfits rather than remain single. This will allow them to stop operating with presumptions that view women as compulsively driven to marry even severely defective men and willing to accept marriages in which men acquire unilateral, indissoluble control over their wives. Once this happens, the way will have been cleared for equitable and compassionate *beit din* rulings that free *agunot* and restore dignity to Orthodox Jewish family law.

Notes:

1. An *agunah* (pl. *agunot*), in Jewish law, is a woman unable to remarry because she is locked into a dead marriage from which her husband cannot release her or refuses to do so. In earlier periods, most *agunot* were women whose husbands had disappeared in circumstances under which they could not officially be declared dead – for example, at sea or in a war. Today, most of them are women whose husbands are holding them prisoner by stubbornly refusing to issue a *get*, a bill of divorce, which, in Jewish law, is the sole prerogative of the husband.
2. Much of the debate about the Rackman/Morgenstern *beit din* has taken place in the United States, where the *beit din* has been operating. However, two conferences on the subject have been held in Israel, both of them focusing on the halakhic validity of the new *beit din*. The first was convened in July 1998 by Sharon Shenhav under the auspices of the International Council of Jewish Women and the Jewish Women's Human Rights Watch in Jerusalem. The second, entitled "Can Marriage, Freedom and Equality Co-Exist?" was held on June 21–22, 1999, at Bar Ilan University. The debate has also spread to England, in the wake of a case of a woman who, after being freed by the Rackman/Morgenstern *beit din* in New York, remarried in England. In reaction to this case, Chief Rabbi Jonathan Sacks and other Orthodox rabbis in England declared that Rabbi Morgenstern's annulments would not be recognized by other *batei din*.
3. AGUNAH, Inc., was founded approximately twelve years ago. The organization's mission was twofold: first, to counsel and advocate for individual *agunot* caught in the *beit din* system, and second, to urge systemic change through the reform of *batei din* and the adoption of all available halakhic remedies for the relief

of *agunot*. Over the years, AGUNAH, Inc., has advised hundreds of *agunot* in the United States and around the world. Through writing, speaking and public demonstrations, AGUNAH, Inc., roused the conscience of the Orthodox Jewish community. The three founding directors of AGUNAH, Inc., were Rivka Haut, Susan Alter and me. Today, my co-directors and comrades-in-arms at AGUNAH, Inc., are Honey Rackman, Henni Goldstein, Estelle Freilich and Elona Lazaroff..

4. Throughout the 1990s, Jewish and secular media in the United States carried articles too numerous to mention documenting these aspects of the *agunah* situation. Jewish media like the *Jewish Press*, the *New York Jewish Week* and the *Forward* covered the issue frequently. Secular media like the *New York Times*, *New York Magazine*, and *ABC News* also picked up the issue from time to time.

5. Throughout this paper, the rabbis to whom I refer are exclusively Orthodox, as are the *batei din*. This is because rabbis in the other denominations have solved the *agunah* problem within their communities. Most of AGUNAH, Inc.'s work involves American rabbis and *batei din*, but Israeli rabbis have been equally resistant to acknowledging the dimensions and gravity of the *agunah* problem. European women have also turned to AGUNAH, Inc., because of the failure of Orthodox rabbis in their countries to face up to the injustices being done to *agunot*.

6. Outside of Israel, there are *agunot* only in the Orthodox community, because, as indicated in the previous note, the Conservative movement has developed halakhic solutions to the *agunah* problem, while the Reform movement regards civil divorce as the termination of the marriage. In Israel, however, because of the exclusive jurisdiction of the Orthodox rabbinate and its *batei din* over Jewish marriage and divorce, all Jewish women, including Conservative, Reform and unaffiliated, are at risk of becoming *agunot*.

7. At the Second International Conference on Feminism and Orthodoxy held in New York in February 1998, Rabbi Saul Berman asked the members of an audience of about 2,000 people to raise their hands if they knew an *agunah*. Somewhere between a third and a half of the people in the audience raised their hands. At the July 1998 seminar in Jerusalem (see note 2), Rabbi Eli Ben-Dahan of the Jerusalem *beit din* stated that about 5% of the 8,500 new divorce cases per year in Israel become long-term *ger* problems. This figure, which represents 425 new *agunot* per year in Israel, ignored the large number of women who give in to their husbands' extortionate demands for payment in order to receive a *get* in a reasonable amount of time. Thus, 425 new problem cases per year understates the dimensions of the *agunah* problem in Israel.

8. Some of the irregularities we reported were: *dayanim* protecting husbands who were child molesters, even giving them unsupervised overnight visitation with their children; *dayanim* sitting on cases involving their relatives and financial supporters; *batei din* failing to issue summonses and contempt citations in situations that

called for them; wealthy people influencing *beit din* deliberations; and the loss of documents and records by *batei din*.

9. Public lecture on April 25, 1999, at the Young Israel synagogue of Flatbush in Brooklyn, N.Y. Rabbi Willig is a senior member of the Beth Din of America.

10. Rabbi Rackman is a well-known and widely respected Orthodox rabbi and scholar. He has had a distinguished career as chancellor and president of Bar Ilan University, president of the Rabbinical Council of America, founder of the Beth Din of America and rabbi of the Fifth Avenue Synagogue in New York City. Rabbi Morgenstern is an accountant by profession. Ordained by Rabbi Moshe Feinstein, Morgenstern has far-ranging knowledge of the rabbinical sources dealing with *aginur*. In April 1999, Rabbi Rackman set up a new *Beit din le inyenei agunot*. Rabbi Morgenstern continued to operate the *Beit din live'ayot aginut*.

11. "Halachic Principles and Procedures for Freeing Agunot" (henceforth: "Principles and Procedures") was published by AGUNAH, Inc., in cooperation with Rabbi Emanuel Rackman in the *Jewish Week*, August 28, 1998, pp. 26-27.

12. Rabbi Isaac ben Moses of Vienna, *Or Zarua* (Jitomir 5662/1862; lithograph copy New York: M.P. Press, n.d.), I, § 761.

13. Rabbi Yitchock Elchanan Spektor, *Ein Yitchock* (Vilna 1889-1895; photo offset edition New York: Haim u'Vrachah, 1964-1965), I, 24:41.

14. See Rabbi Moshe Feinstein, *Sefer Igrot Mosheh* (New York: Noble Press Corp., 1961), *Even Ha'Ezer*, I:79.

15. Without exception, the *agunot* we deal with have described these types of disorders in their recalcitrant husbands.

16. Critics of *Kiddushei ia'ut I* have argued that the personality disorder may have set in only after the marriage, in which case the bride was not deceived and the marriage is not void. But virtually all the *agunot* we deal with say their husband's abusive and aberrant behavior began within days of the wedding. Furthermore, documentation by mental health professionals indicates that these kinds of personality disorders and behavior patterns are traceable to earlier formative years, but they are undetectable by brides and others at the time of the wedding.

17. See BT *Bava batra* 48b, *Tsafot* beginning "Kaddish bevi'ah ..." for a discussion of the concept *gufah kanui*. The essence of this *kinyan* type of marriage is that the husband acquires exclusive rights to his wife's sexuality, although he is not pledged to be sexually faithful to her. See below for further discussion of *kinyan marriage*. In *Dinei Israel* (Tel Aviv University Law School, 1998), Professor Meir Feldblum writes that "in light of women's efforts in our days to achieve equality in all spheres of life, there is a presumption, even a categorical presumption (*umdena demukhah*), that many women if informed would in no way agree to the *kinyan*/acquisition nature of *kiddushin*/marriage." Feldblum also outlines *derekh kiddushin*, an alternative to *kinyan* marriage.

18. The parallels between *kinyan* (acquisition) of a slave and of a wife are instructive. A master obtains title to a slave by *kinyan*, and the slave requires a *get* when freed from slavery. If a woman understands and knowingly accepts that her marriage is a transaction in which she is being acquired by her husband, there is a *kinyan* at marriage, and she requires a *get* to obtain her freedom. But if she rejects the idea that she is being acquired at marriage, there is no *kinyan*, and no *get* should be required to free the woman.
19. The rabbis' initial preoccupation with the technicality of where "Principles and Procedures" was published, rather than with the substance of the article, was reminiscent of their preoccupation with the technicality of whether suffering women are *agunot* or *mesuravot get*, rather than with the injustices being perpetrated against them.
20. Rabbi Rackman's response was mailed to the RCA membership. My response, initially entitled "AGUNAH, Inc., Replies to the Beth Din of America," was sent to Rabbi Michael Brojde and circulated throughout the New York Jewish community. Retitled as "Halachic Principles and Procedures for Freeing Agunot, II: A Response to the Beth Din of America" (henceforth: "Principles and Procedures II"), it was also distributed at the conference held in June 1999 at Bar Ilan University (see above, note 2).
21. J.D. Bleich, "Kiddushei ta'ut: Annulment as a Solution to the *Aguna* Problem," *Tradition*, 33/1 (Fall 1998) (henceforth: Bleich).
22. *Ibid.*, p. 114.
23. Page 1 of the BDA letter of October 27, 1998 (henceforth: BDA letter).
24. Bleich, p. 114.
25. "Principles and Procedures II," p. 10. Note that the Babylonian Talmud, Tractate *Kiddushin*, makes the transition from referring to marriage as *kinyan*, in the early mishnahs, to using the term *kiddushin*, sanctification. The shift in language is welcome, though the distribution of power remains unbalanced in favor of the husband. For further discussion of this transition see Judith Hauptman, *Rereading the Rabbis: A Woman's Voice* (Colorado: Westview Press, 1998), p. 69.
26. To be sure, many brides know that the halakhah views extramarital sex by a wife, but not by a husband, as adultery, and that biblical law allows a man to have more than one wife. What I have argued is that, notwithstanding this traditional double standard, brides today would not knowingly consent to such one-sided sexual fidelity in marriage, and therefore they are not giving informed consent to the Bleich/BDA *shi'abud/kinyan* form of marriage. Women today, especially in light of potentially fatal sexually transmitted diseases, demand sexual fidelity from their husbands as an essential element of the marriage. The BDA's letter does not require sexual fidelity by the husband as part of *kinyan* marriage. I questioned Rabbi Michael Brojde about this at the February 1999 EDAH conference in New

York City, and he confirmed that the BDA was "very careful" not to include the husband's sexual fidelity as essential to their concept of *kinyan* marriage.

27. The BDA letter (page 3) formulates this idea as follows: "Many persons marry even though they are well aware of their spouse's emotional and psychological problems; and many women remain in marriages even after aberrant behavior of their husbands becomes manifest. Therefore, even if a woman really did not know about her husband's psychological problem (assuming that one can be demonstrated) before the marriage, there is no categorical assumption that she would not have married him had she been aware of the problem."

28. Bleich, pp. 98, 101 and 108. Bleich repeatedly cites Rabbi Y.E. Henkin in support of this rejection of salient defects as grounds for voiding a marriage. While embracing Henkin's position, Bleich disregards the view of Rashi, which lends support to the position that salient pre-existing defects in the groom are grounds for a declaration of *kiddushei ta'ut*. See note 38 for further comment on Bleich's preference for interpretations that imprison rather than liberate *agunot*.

29. *Ibid.*, p. 115.

30. See *ibid.*, note 28, for a fuller quote.

31. *Ibid.*, p. 115. The BDA's formulation of women's willingness to accept the risk of entrapment is found on page 2 of its letter: "Women continue to marry, fully aware that a woman may on occasion be trapped in a bad marriage. ... Were Jewish women not interested in strong Jewish marriages – which despite the plight of *agunah* continue to happen with considerable frequency – they would categorically refuse to be married in a Jewish ceremony.

32. Page 2 of the BDA letter notes that Rabbi Moshe Feinstein applied the concept of *kiddushei ta'ut* in cases of homosexuality, insanity and impotence and considered doing so in cases of hidden apostasy. AGUNAH, Inc., referred to the BDA an *agunah* whose husband was a self-favored homosexual and who had been convicted and jailed for 32 years for sexually abusing the couple's children. The BDA first suggested that in return for the *get*, either the *agunah* or the BDA write a letter to help the husband get early parole. After the *agunah* rejected this proposal and AGUNAH, Inc., registered its shock, the BDA refocused on the possibility of *kiddushei ta'ut* and demanded that the *agunah* produce evidence that the husband was a homosexual before they married. The BDA suggested that she try to get signed affidavits from her husband's former male lovers. Finally, the BDA asked for an affidavit that the woman had left her husband immediately upon discovering that he was homosexual. Had she stayed in the marital home to prepare and plan where to go with her traumatized children, that, according to the BDA's interpretation of halakhah, would represent her acceptance of her husband's homosexuality and vitiate her claim of *kiddushei ta'ut*. Fortunately, this *agunah* had a brother who had taken her in, allowing her to leave the marital residence

immediately. This case resulted in what Rabbi Yona Reiss, current administrator of the BDA, has said is perhaps the only ruling of *kiddushei ta'ut* in the history of the BDA, which was founded almost 50 years ago. The *ogunah* returned to Israel, where Israeli government officials refused to recognize the BDA's ruling of *kiddushei ta'ut* and her status as a single woman. Through persistence on the part of AGUNAH, Inc., and expert representation by Sharon Shenhav, Israel's Chief Rabbinate finally upheld the BDA's voiding of the marriage. This is one success story for *kiddushei ta'ut*, but it is a very narrowly drawn case, and it remains to be seen if this is the beginning of some hope for broader rulings of *kiddushei ta'ut* for *agunot*.

33. Bleich, on p. 106, discounts economic, sociological and demographic data that contradict this image of women. The BDA's abstention from citing Rabbi J.B. Soloveitchik's statement categorizing *tav lemetailav* as a timeless *hazakah* leaves open the possibility that the BDA might eventually agree that social, economic and political changes rebut *tav lemetailav*. This would open the way for rebutting the presumption that modern women knowingly marry gravely defective men. But for now the BDA stands with Bleich: In a speech delivered on November 16, 1999, at Manhattan's Fifth Avenue Synagogue, BDA administrator Rabbi Yona Reiss endorsed Bleich's article. And to date no one affiliated with the BDA has published any comments that take exception to any aspect of Bleich's article.

34. *The Jewish Week*, on June 25, 1999 (p. 23), reviewed a film entitled "And Baby Makes Two," by Judy Katz and Oren Rudavsky. The film chronicles the experiences of members of a support group called "Single Mothers by Choice," who have chosen to have children without marrying. The majority of the women in the film are Jewish.

35. Fuller presentation of my discussion of post-Talmudic sources can be found in the two "Principles and Procedures" pieces. A valuable, detailed discussion of these sources can be found in Ruth Halperin Kaddari, "*Tav lemetailav tan du milemetav armelu*: Women's Perpetual Marital Preference and Their Construction as Other in Jewish Law," forthcoming in the series *Jewish Legal Writings by Women*.

36. Biblical law requires a childless widow to marry her deceased husband's brother, in what is known as levirate marriage. *Halitzah* is the ceremony required to release the two from this obligation.

37. Rashi's contention that a *mukeh shehin* is not an acceptable groom is supported by Mishnah *Ketubbot* 7:10, which states that if a man is *mukeh shehin*, the court may compel him by means of physical coercion to release his wife with a *get*. That is to say, a *mukeh shehin* is not presumed to be an acceptable husband.

38. There are interpretations of this passage which conclude that the *kol dehu*, the minimum the woman was willing to accept, was the brother-in-law. Thus, the woman and all women are presumed to be willing to marry even such a pitifully

defective man as a *mukeh shehin*, and women today cannot claim that they would never have married a man who turns out to be gravely defective. Bleich presents this line of reasoning at length (pp. 102-108). But the direction one takes in halakhic development is often a matter of choice. Rabbis Feinstein and Spektor, as cited above, are outstanding examples of halakhists who accepted Rashi's liberating interpretation of *kol dehu*. Why not, therefore, choose Rashi's interpretation, as Rabbis Feinstein and Spektor did? It accomplishes the goal of freeing innocent women from pain and suffering, restores justice and compassion to Jewish family law and fulfills the Jewish values embodied in the biblical phrases "justice, justice you shall pursue"; "and you shall do what is right and good"; "all the paths of the Torah are peace"; and "you shall live by them."

39. *Devarim shebalev*, literally "words in the heart." See the *Entziklopediah talmudit*, pp. 70-71, for a discussion of *anan sahadei*.

40. We may assume that the rabbis would have compelled the diseased brother-in-law to cooperate with the *halitzah* ceremony, since, as we saw in note 37, *mukeh shehin* is one of the conditions regarding which the Mishnah declares unequivocally that a *get* may be coerced.

41. The question is whether the *get* takes effect immediately upon delivery to the court-appointed receiving agent, even though a *get* ordinarily must be handed to the wife or an agent designated by her. In this case, where there is discord between the marriage partners, the Talmud is asking whether a presumption can be made that the wife wants out of the marriage and that, therefore, receipt by the court-appointed agent constitutes effective delivery of the *get*.

42. Later commentaries discuss whether this denotes sexual satisfaction or physical sustenance.

43. For extensive citations concerning the difficulty of determining a woman's preferences about exiting a marriage, see the notes in *Hiddushei haRitba al haShas* (Jerusalem: Mosad Harav Kook, 1992), *Yevamot* 118b.

44. It is interesting that *tav lemetailav* is introduced in *Yevamot* with the phrase *ta shema*, which denotes the introduction of some information that may either help resolve or raise further questions about the issue being discussed. When this information does resolve the question at hand, the section often ends with the phrase *shema mina*, which means that a conclusion can indeed be drawn on the basis of the material that was introduced. In our *get zikui* case, the section does not close with *shema mina*, and it would thus appear that although *tav lemetailav* was cited, it did not resolve the issue. For a discussion of the Talmud's use of the phrases *ta shema* and *shema mina*, see Adin Steinsaltz, *The Talmud: A Reference Guide* (New York: Random House, 1989); and Yitzhak Frank, *The Practical Talmud Dictionary* (Jerusalem: Ariel United Israel Institutes, 1994).

45. Rashi here and on *Ketubbot* 75a provides various explanations of the unusual

words in these quotations from the sages. The Steinsaltz edition provides some other variations, all in a similar vein.

46. This explanation by Rashi appears in *Ketubbot* 75a, where the same text appears.

47. I use these defects as examples because Orthodox *batei din* have refused to release *agunot* from such men. The BDA's Rabbi Mordechai Willig, in the speech cited in note 9, and the BDA letter have made the point that women go back to or remain with husbands who beat them. The rabbis contend that *batei din* must, therefore, presume that women will knowingly consent to marry wife beaters.

48. There is no parallel to *tav lemetav* in the Jerusalem Talmud.

49. Rabbi Spektor (above, note 13) points out that the two cases of *tav lemetav* in *Kiddushin* are not concerned with a defect in the husband at all. As for the passage in *Ketubbot*, he notes that the defect is not serious enough to warrant physical coercion of the *get*.

50. Note that the *perutah* is purely a means of signifying the completion of the marriage transaction. It is of no economic significance in the financial terms of the marriage. Thus, waiving the *perutah* can hardly be seen as a defect in the groom.

51. For an interesting discussion of women's voices regarding *tav lemetav*, see the paper by Ruth Halperin Kaddari cited in note 35 above.

52. The presentation of this text in *Ketubbot* is too fragmented for it to be quoted in full.

53. Certain vows, such as one abjuring conjugal relations for a prolonged period, are grounds for divorce: see the Mishnah *Ketubbot* 5:6. See also the section below on mental cruelty, which discusses other vows as grounds for coercing a *get*, thus permitting a woman to exit a marriage that may have become intolerable because of vows that create hardship for her.

54. Interestingly, commentators in the Artscroll edition of the Talmud paraphrase *tav lemetav* as "better to be married to a 'husband of mediocre stature' or an 'unexceptional suitor.'" This paraphrasing matches my suggested interpretation of the limits of *tav lemetav* in the Talmud. It was better, perhaps, in those days, for a woman to be married to an unimpressive man, but not to a cruel abuser. See the Artscroll edition of *Kiddushin*, pp. 7a3, note 18, and 41a3, note 10.

55. Given these limits, *tav lemetav* does not support a presumption that a woman would knowingly consent to the risk of being locked into Bleich's *shi'abud* or the BDA's *kinyan* to an abusive, dangerous man. But Bleich and the BDA take the position that a bride's consent to *shi'abud* or *kinyan*, even to gravely defective men, is the essence of Jewish marriage, and that without such shackling of women, Jewish marriage is, in effect, eradicated. If Bleich and the BDA truly believe that women would freely and knowingly consent to such dangerous terms of marriage and that such consent is the essence of Jewish marriage, I believe they have an

and that such consent is the essence of Jewish marriage, I believe they have an obligation to do the following: (1) fully inform all prospective brides of an abusive husband's power to hold his wife prisoner; and then (2) get explicit consent from them to these terms of marriage. Their consent should be witnessed at the wedding, just as the *ketubah* is. Silent and presumed consent by the bride, based on *tav lemetav*, is insufficient in light of the arguments set forth in this paper and indefensible in light of the injury it causes to women. Some may protest that bringing up such shocking details at the wedding is disturbing, but a bride cannot be kept ignorant of the risks to which she is exposed and then be assumed to have consented to them. Those who characterize the essence of Jewish marriage as a *shi'abud* or *kinyan* that empowers cruel men to torment innocent women should own up to this in public, and should not shy away from educating brides about their concept of Jewish family law. Until Bleich and the BDA do this, brides can claim that they never consented to imprisonment in impossible marriages.

56. It is a matter of dispute whether the husband himself made these problematic vows or whether he became responsible for them by failing to nullify them when they were uttered by his wife. In any case, a husband who plays a role in the creation of such vows may be coerced to give a *get*.

57. There is extensive discussion in the Babylonian Talmud, *Ketubbot* 70a-b, on the question of what benefit the husband might be restricting, since he has an obligation to provide his wife with conjugal relations and financial support.

58. BT *Ketubbot* 70a, *ad loc.* Further on in *Ketubbot* (77a), the first-generation *amora* Shmuel interprets *yotzi veyiten ketubah* to mean *kefayah*, coercion of the *get*.

59. On this point of wife abuse through financial control, it is interesting to note the discussion in the Talmud (BT *Ketubbot* 77a) of Rav's view that a *get* should be given if a man refuses to support his wife. Shmuel questions Rav's position and suggests that the husband be coerced to support his wife rather than to issue a *get*. The Talmud explains Rav's call for a *get* by quoting the saying *ein adam gar im nahash bikhefifah ahat* – one cannot live in the same basket with a snake. That is to say, a woman cannot be expected to live with a husband who must be coerced to support her.