Rabbi Riskin, founding rabbi of Lincoln Square Synagogue, New York, NY, is chancellor of the Ohr Torah Stone institutions and chief rabbi of Efrat, Israel.

# HAFKA'AT KIDDUSHIN: TOWARDS SOLVING THE AGUNA PROBLEM IN OUR TIME

## I. MARRIAGE AS AN INSTITUTION

There are two fundamental ways to understand the legal underpinnings of the institution of marriage:

1. Marriage as a legal institution is a contractual arrangement created by the two partners to the marriage. Just as the two parties create the marriage contract, it is only they who can terminate it.
2. Marriage is indeed a contractual arrangement between the two parties, but it requires the formal ratification or validation of the city or state in which those two parties live, or the local judicial authorities. From this perspective, therefore, since a marriage is only effectuated, or rendered legal, by such an extrinsic authority, it can only be terminated by the decision of some similar authority. This is the situation in most of the western world.

The Jewish tradition adopts the first path: "If a man takes a woman" (*Deuteronomy* 24:1)—the husband "takes" his partner as his wife by way of betrothal and marriage. And therefore "he shall write her a bill of divorce, and give it in her hand"—in order to break the marital bond, the husband must give his wife a *get*. A court's decision on the matter does not suffice.

## II.

At the time of betrothal and marriage, both the bride and the groom perform mutual transactions and they assume mutual obliga-



*TRADITION* 36:4 / © 2002 Rabbinical Council of America

tions. Hatam Sofer describes the transaction that is performed as *kinyan halifin*, the transaction in which each of two parties gives something and receives something else in return:

> In the case of betrothal, there is no buyer or seller, but rather *halifin*. [The groom] 'sells' himself, giving over his person to his betrothed by assuming specified obligations, namely, sustenance, clothing, and cohabitation. In return, [the bride] 'sells' herself, giving over her person by assuming the obligation of cohabitation by Torah law, and handing over her handiwork by rabbinic law. This is *halifin*.[1]

This mutuality notwithstanding, the active partner in the acts of betrothal and marriage, as well as in the act of divorce, is the husband. In betrothal, the rabbis specify that "*he* must give [the betrothal gift] and *he* must recite [the betrothal formula]" (see *Kiddushin* 5b); in marriage, it is the groom who brings the bride into *huppa*, or *his* house (*Shulhan Arukh, Even ha-Ezer* 61:1); and in divorce, it is the husband who writes his wife a bill of divorce, and gives it into her hand. The husband's active role in these areas might stem from the fact that it is he who is regarded as the active partner in the sexual act, which is truly the exclusive and therefore defining aspect of marriage, or else from the fact that it is he alone who is obligated to have children.[2]

Nevertheless, Jewish law attempted as much as possible to reach a greater degree of mutuality between husband and wife even with regard to these ritual ceremonies. Thus, betrothal requires the woman's approval: "with her consent, yes [the betrothal is valid]; without her consent, no" (*Kiddushin* 2b). And furthermore, *Hazal* enacted that the husband must write his wife a *ketuba* at the time of marriage. That document, which obligates the husband to pay his wife a considerable sum of money should he choose to divorce her, was instituted in order to prevent rash and hasty divorces (*Ketubot* 10a).[3] And while by Torah law a woman may be divorced against her will, a millennium ago Rabbenu Gershom, "Light of the Exile," enacted that a woman can only be divorced if she accepts her *get* voluntarily, just as the Torah requires that the husband grant the divorce of his own free will (cited in Rema's strictures to *Even ha-Ezer* 119:6).[4]

## III.

All this having been said, the halakhic principle that the husband cannot be forced to divorce his wife against his will (*Yevamot* 113b, *Gittin* 49b)

opens the door to the *aguna* problem should a woman seek a divorce and her husband refuse to grant her a *get*.[5] This problem is especially exacerbated when recalcitrant husbands acquire civil divorces—which enable them to remarry with state sanction—and then "hold up" their wives for a great deal of money in exchange for the religious divorce. There are two aspects to this *aguna* problem: first, there is the tragic predicament and ordeal of the *aguna* herself (and indeed the entire community); second, there is a challenge to halakha as a reflection of "righteous laws." Leaving an *aguna* inextricably tied to a husband with whom she cannot live contradicts the Torah's imperative, "And you shall do that which is right and good" (*Deuteronomy* 6:18). So too it stands in conflict with the obligation to walk in the ways of God (see *Sota* 14a; Rambam, *Sefer ha-Mitsvot, asin* 8), Who is "merciful and gracious" (*Exodus* 34:6); moreover, the halakha itself declares that "its ways are ways of pleasantness" (*Sukka* 32b; *Yevamot* 87b). Clearly, it must be possible to find a solution to this complicated problem within the framework of halakha. And indeed, our talmudic authorities already viewed the *aguna* problem as one that requires non-conventional solutions and leniencies—"on behalf of the *aguna*, the Sages ruled leniently" (*Yevamot* 88a). In dealing with this problem, *Hazal*, the *Geonim*, and the *Rishonim* suggested solutions and enacted legislation that reflect their concern for the honor of a woman who seeks a divorce from her husband.

## IV.

The *mishna* in *Ketubot* (77a) states that in certain cases the Jewish court may indeed compel the husband to divorce his wife: "The following are forced to divorce: one afflicted with boils, one stricken with a polypus [whose nose or mouth is ill-smelling], a scraper [of canine excrement], one who smelts copper, and a tanner." In the first two cases mentioned in the *mishna*, the husband is forced to divorce his wife because of a medical condition from which he suffers and which makes it impossible for his wife to live with him. In the last three cases, divorce is coerced upon the husband because of the foul odors that he bears on account of his profession, preventing intimacy. So too a man suffering from impotence may be compelled to divorce his wife.[6] In these cases, the court may apply pressure upon the husband to divorce his wife until he says that he agrees to the divorce (*Arakhin* 21a). In that way the husband is viewed as though divorcing of his free will,[7] and the problem of an imposed divorce does not arise.

The Jerusalem Talmud cites two examples of prenuptial conditions that were customarily attached to the *ketuba* at the time of marriage in order to protect the woman's interests:

> Rabbi Yosa said: Those who write,[8] 'If he comes to hate [his wife]', or 'if she comes to hate' [then the woman receives a divorce as well as financial compensation], it is considered a monetary stipulation, and the stipulation is valid (*Ketubot* 5:8).[9]

> It once happened . . . Rabbi Mana said to them [the woman's relatives]: 'Bring her *ketuba*, so that we may read it.' They brought her *ketuba*, and found written in it: 'If this woman marries this man, and does not wish the partnership[10] [i.e., if she seeks a divorce], she shall [receive a *get* and] collect half of her *ketuba*' (*Ketubot* 7:6).

In our day as well, various prenuptial agreements have been formulated in which the husband obligates himself to pay his wife a large sum of money for her maintenance in the event that he delays giving her a bill of divorce. Such agreements are intended to protect the woman, and force the husband to grant her a divorce. The Rabbinical Council of America endorses the use of prenuptial agreements of this sort in the United States.[11] But this arrangement does not solve the *aguna* problem in all cases—e.g. where a wealthy husband is ready to pay for his wife's maintenance, but refuses to divorce her, or where the two parties never signed such an agreement.

## V.

The *mishna* (*Ketubot* 63a) teaches the law pertaining to the rebellious wife—a woman who refuses to lie with her husband, as the *Gemara* concludes—according to which a specified sum is deducted from the woman's *ketuba* each week she persists in her rebellion, or as the law was later emended, a four-week warning period is followed by immediate forfeiture of her entire *ketuba*. In the course of its discussion, the *Gemara* asks: "What is the case of a rebellious wife?" The *Amoraim* disagree about this point. Amemar: "Where she says, 'I wish to remain married to him, but I wish to cause him distress [by refusing].'" In other words, the woman wishes to use the sexual relationship as a bargaining chip. "But if she says, 'I find him repulsive,' we do not force her [nor do we reduce her *ketuba*]. Mar Zutra said: We do force her." Even if the woman says that she cannot bring herself to have sexual relations with her

husband because she finds him repulsive, she is forced to do so by way of the weekly deductions from her *ketuba*, or by way of the public announcements and immediate forfeiture of her *ketuba*. The law is in accordance with Amemar that a woman is not forced to live with her husband when she claims that she finds him repulsive. She is only considered a rebellious wife if she uses sex as a weapon, but not if she finds her husband repelling. The *Gemara* concludes that when a woman claims that she finds her husband repulsive, "she is made to wait twelve months for her bill of divorce."

Amemar asserts that if a woman claims that she finds her husband repulsive, we do not force her to cohabit with him. But the question whether or not we force him to give her a *get* remains open. Rashbam[12] understands that according to the *Gemara*'s conclusion, the husband is required to divorce his wife immediately, even against his will. The words, "we do not force *her*" imply that we do not force the woman to return to her husband, but we do indeed force the husband to grant his wife a divorce. This is also the position of Rambam (*Hilkhot Ishut* 14:8):

> A woman who refuses to cohabit with her husband is called a rebellious wife. We ask her why she refuses. If she says, 'I am repelled by him, and cannot willingly engage in sexual relations with him,' we force him to divorce her immediately, for she is not like a captive who must surrender to someone whom she hates. She is divorced without receiving any part of her *ketuba*, but she takes the worn clothing that is still extant.[13]

The *Geonim* in general[14] and Rav Sherira Gaon in particular[15] understood from what is stated at the end of the talmudic passage, "and she is made to wait twelve months for her bill of divorce," that according to halakha the woman is made to wait twelve months, and only then do we force her husband to grant her a divorce. However, their assumption is that the rabbis did sanction compelling the husband to grant a divorce to a wife who claims she finds him repulsive. In a later generation, the *Geonim* went one step further than the Talmud and enacted that the court force the husband to divorce his wife immediately. This seems to be the position of R. Yitshak Alfasi (Rif) as well.[16]

Most of the *Geonim* and early *Rishonim* maintain that when a woman claims that she finds her husband repulsive, we compel the husband to grant an immediate divorce—either by talmudic law or Geonic enactment. Some authorities, however, disagree. The chief proponent of the position rejecting the possibility of compulsion was Rabbenu Tam (1100-1171). Rabbenu Tam[17] understood the *Gemara* as follows:

If a woman claims that she is repelled by her husband, and that she is ready to waive her *ketuba* in order to leave him, we do not force her, that is to say, we do *not* say that her waiver is regarded as having been given in error, and so she must remain with her husband until she changes her mind. Rather, we say that if her husband is willing to divorce her without paying out her *ketuba*, he may do so. But under no circumstances do we force him to grant her a divorce. Rabbenu Tam was aware of the Geonic enactments on the matter, but for various reasons rejected the possibility of enforcing those enactments beyond the period of the Geonim.

Even though the majority of Rabbenu Tam's predecessors maintained that when a woman finds her husband repulsive we compel the immediate divorce, once Rabbenu Tam expressed emphatic opposition to this policy few arose later to disagree with him. Here is the *Shulhan Arukh* (*Even ha-Ezer* 77:2):

> If a woman refuses to cohabit with her husband, she is called a rebellious wife. We ask her why she refuses to cohabit with him. If she says, 'I am repelled by him, and cannot willingly cohabit with him'—then if the husband wishes to divorce her, she does not have any part of her *ketuba*, but she takes the worn clothing that is still extant.

There were, however, a number of *Aharonim* who were ready to rely on Rambam and the *Geonim* and force the "repulsive" husband to divorce (if not with actual physical force then at least with milder forms of coercion). Here are a number of examples.

R. Hayyim Palaggi (*ha-Hayim ve-ha-Shalom* II, 35):

> It would therefore appear that once a year or two have passed following their separation, we force the husband to divorce his wife, for two reasons: The man cannot live without a wife, and the woman too cannot live without a husband. And all the more so, if she is young, for we are concerned that it will lead to her ruin, her being chained to her husband [against her will]. Go and see how the halakhic authorities ruled leniently regarding an *aguna*, especially when she is young. They went as far as to say that we may rely on the opinion of a single authority. And all the more so, the obligation rests upon the judges of Israel to rule leniently on this matter, lest they come to mishap.

R. Eliezer Waldenberg (*Tsits Eliezer* IV, 21; V, 26):

> Nevertheless, there is ample room to discuss compelling a divorce when

> the claim, 'He is repulsive to me,' is supported by genuine reasons, and the court sees a pressing need to force the husband to divorce his wife so that she not fall into bad ways.

At the end of his piece, R. Waldenberg suggests that the court force the issue by offering the husband the choice to grant his wife a divorce or pay for her maintenance.

## VI.

As will be explained below, the Talmud recognizes the possibility of *hafka'at kiddushin,* the annulment by a *bet din* of a marriage hitherto considered legally valid. This contrasts with those marriages created in error or under false pretenses. If, say, one party was kept from knowing an essential piece of information regarding the other, the marriage may be declared as having *never* been legally valid, and therefore not, legally, having ever taken effect. In such a case, a *get* is not necessary. The question arises as to just when it may be argued that a marriage was founded upon an error. It would appear from the responsa of Rabbi Moshe Feinstein[18] that four conditions must be met in order to declare a marriage invalid for having arisen in error.

> 1. The heretofore-unknown blemish must have existed already at the time of marriage.
> 2. The unknown factor only came to the other party's attention after the marriage had already taken place.
> 3. The previously unknown factor affects the essence of the marital bond (such as impotence), or is a major defect that makes it impossible to live with the affected partner (such as mental deficiency).
> 4. The unknown factor is a matter that would seriously vex most people[19] and deter them from marrying the affected partner had they known about the matter from the outset.

It was recently suggested that the criteria for error be expanded, so that the discovery of a negative personality trait, such as anger or miserliness, be recognized as a valid basis for a claim of a marriage made in error.[20] According to this suggestion, if a woman claims that she would never have married her husband had she known earlier of his rage or miserliness, her marriage can be cancelled on the grounds that it had been based on false pretenses. It would seem to me that the criteria

established by Rabbi Feinstein cannot be expanded. Indeed, were it true that personality traits can serve as grounds for arguing that a marriage had been created in error, the need for a *get* would never arise, for everyone appearing before a divorce court would maintain that, had he or she been previously "aware," the marriage would never have taken place.

## VII.

With all the good intentions we have seen reflected in the rabbis' concern for the *aguna's* plight, the very fact that a woman seeking divorce must receive a *get* from her husband places her at a disadvantage. Cases do arise, we well know, where husbands refuse to grant their wives *gittin*, and women remain *agunot* for years. This problem became particularly acute following the period of the Emancipation, when civil marriage and divorce became available. In Western countries, even if a man marries a woman in a religious ceremony and in accordance with Jewish law, he may divorce her in a civil court and delay granting a *get* in order to "punish" or extort money from her, and rabbinical courts are largely helpless to do anything about it. Even in Israel, where rabbinical courts have authority in matrimonial law, the judges are not always able to deal effectively with a husband who absolutely refuses to grant his wife a divorce. It is true that the situation has been greatly alleviated of late, since the secular courts now impose sanctions on recalcitrant husbands (who refuse to give their wives *gittin* after being ordered to do so by a religious court). These include removal of his professional and driver's licenses and even incarceration, but still, there are some husbands who prefer lengthy jail sentences to granting their wives a divorce, and in that event, women have no recourse.

It would appear, however, that a halakhic solution based on talmudic texts is available to us. It merely awaits our initiative to make full use of the latent possibilities. Surely the Torah promises us "righteous laws," and if a legal solution exists it is our responsibility to find the judge to put it into practice within the framework of an eternal halakha that displays compassion to the *aguna*. The solution I am suggesting is that of *hafka'at kiddushin*, the cancellation of a marriage. Even though betrothal and marriage are regarded as contracts created by the two parties and thus terminated by them, a number of talmudic passages prove that in certain circumstances the rabbis are authorized to cancel a marriage without the husband's consent and even against his will.

## VIII.

Five different talmudic passages bring up *hafka'at kiddushin*. Two of the passages deal with *hafka'a* taking place already at the time of betrothal, whereas the other three address *hafka'a* at the time of divorce. Obviously, the latter group is most relevant to our problem, but all of the selections require consideration to get at the principles underlying this legal mechanism.

*Gittin* 33a contains a discussion of the case of a husband who cancels a *get* that he had sent with an agent without notifying the agent or his wife. The *mishna* at the beginning of the chapter states: "If someone sends a *get* to his wife . . . at first he was permitted to convene a court somewhere else and cancel it. Rabban Gamliel the Elder enacted that they not do this for the sake of the social order (*tikkun olam*) [so as not to increase *mamzerim* or *agunot*]." A *Beraita* cited by the *Gemara* discusses a man who violates Rabban Gamliel's enactment, and cancels a *get* outside the presence of his wife: "Our rabbis taught: 'If he cancels it, it is cancelled; these are the words of Rabbi [Yehuda ha-Nasi]. Rabban Shimon Ben Gamliel says: He cannot cancel it, nor can he add a condition [to the *get*], for if [he were able to do] so, how would we affirm the authority of [Rabban Gamliel's] court, [if his enactment carries no consequences]?'"

The *Gemara* raises a question about Rabban Shimon ben Gamliel's reasoning: "Is there a case where by Torah law a *get* would be void, and because of the argument, 'how would we affirm the court's authority,' we permit a married woman to [marry anyone else in] the world?" The *Gemara* answers that indeed it is possible for the rabbis to validate a *get* that is invalid by Torah law,

> for whoever betroths [a woman] betroths [her] with the understanding that his act has rabbinic approval. Hence the rabbis have the authority to cancel his betrothal. Ravina said to Rav Ashi: Granted in the case where he betrothed her with money. But what is there to say if he betrothed her with sexual intercourse? [Even so] the rabbis have the authority to declare his intercourse an act of prostitution.

This passage appears once again in *Yevamot* 90b, in the context of a discussion regarding the Sages' authority to abrogate a Torah law. *Rishonim* rule in accordance with the view of R. Yehuda ha-Nasi (Rambam, *Hilkhot Gerushin* 6:16).

*Gittin* 73a visits the man who on his deathbed gives his wife a *get*

and then recovers. Halakha prescribes that if a dying person instructs that a gift be given to a certain individual, the gift is valid at the time of his death, and no formal act of acquisition is required. But if the dying man recovers, he may retract the gift (Rambam, *Hilkhot Zekhiya* 8:14). The *Amoraim* disagree about a *get* given by a dying man. Rav Huna maintains that his *get* is like his gift, so that if he recovers, the *get* is no longer valid, for we presume that he granted the divorce assuming that he would die, which is no longer the reality. But Rabba and Rava maintain that the *get* is valid, not because of some basic legal principle, but "lest people say that a *get* is valid [even if it is given] after [the husband's] death."[21] The *Gemara* raises a question about the position of Rabba and Rava: "Is there a case where by Torah law a *get* is void, and because of a decree we permit a married woman to the world?" The *Gemara* answers in the affirmative, arguing that "whoever betroths [a woman] betroths [her] with the understanding that his act has rabbinic approval, and the rabbis cancelled his betrothal." The law is in accordance with Rabba and Rava (Rambam, *Hilkhot Gerushin* 9:16,18).

Finally, *Ketubot* 3a deals with the case of a husband who gives his wife a conditional *get* and the condition goes unfulfilled due to circumstances beyond his control. For example, a husband sets out on a trip, and, for his wife's protection, gives her a *get* in the event he does not return home within a specified time. As it happens, he plans to return in time, but is kept from his doorstep by a dividing stream. According to the first and accepted version of Rava's position, there is no claim of "unavoidable interference" ("*ones*") regarding a *get*, so it is valid. The *Gemara* explains that even though Torah law recognizes the validity of the claim of unavoidable interference ("*ones rahamana patrei*"), the rabbis declared that in our case there is no such claim "because of virtuous women and because of licentious women." Simply explained, no virtuous woman would ever remarry on the basis of such a conditional *get*, because she would always fear that an unavoidable interference had prevented her husband's return. The *Gemara* asks: "And because of virtuous women and licentious women we permit a woman who is [still] married [by Torah law] to [marry anyone else in] the world?" The *Gemara* answers yes, for "whoever betroths [a woman] betroths [her] with the understanding that his act has rabbinic approval, and the rabbis have the authority to cancel his betrothal." The law is in accordance with the view that there is no claim of unavoidable interference regarding a *get* (*Tosafot, ad loc., s.v. ikka,* in the name of Rabbenu Hananel; Rambam, *Hilkhot Gerushin* 9:8, and *Mishne le-Melekh*).

Of the two passages dealing with *hafka'a* at the time of betrothal, the first is *Bava Batra* 48b. There we meet the man who unfairly uses his authority or power to coerce a woman into accepting his betrothal. Says Amemar: "If a man coerced [a woman] into accepting his betrothal, his betrothal is valid." Mar bar Rav Ashi: "In the case of a woman [who was so coerced], the betrothal is certainly not valid." Why? Even though by Torah law the betrothal in such a case would be valid, "he acted improperly, and so they acted improperly toward him, and the rabbis cancelled his betrothal." The law follows this last opinion (Rambam, *Hilkhot Ishut* 4:1).

Finally, for the *Bavli*, *Yevamot* 110a deals with the case in which a man betrothed a minor—such a betrothal being valid only by rabbinic law—and intended to bring her under a bridal canopy upon her reaching the age of twelve. But before he could do so, another man snatched her away and betrothed her. Even though by Torah law the second husband's betrothal is valid, for she accepted his betrothal, "Rav Bruna and Rav Hananel, disciples of Rav, were there, and did not require [the woman to receive] a get from the second one. . . . Rav Ashi said: He acted improperly, and so they acted improperly toward him, and the Rabbis cancelled his betrothal." This case, though not explicitly codified by Rambam or the *Shulhan Arukh*, is cited by a number of *Rishonim* (see, for example Rashba, *Responsa*, I, 1206) as a legitimate precedent.

The Jerusalem Talmud cites only one case of *hafka'at kiddushin* in connection with a husband who cancelled a *get* after sending it to his wife via an agent (*Gittin* 4:2). It would appear from that discussion that *hafka'a* is based on the authority invested in the rabbis to uproot a Torah law. It would also appear that the Jerusalem Talmud rules that the rabbis have the authority to uproot a Torah law, even in an active manner, unlike the conclusion of the Babylonian Talmud (*Yevamot* 90b).

## IX.

The following points must be clarified when analyzing the views of the legal authorities to be cited below:

1. What is *hafka'at kiddushin*? What is the mechanism through which a marriage may be cancelled?
2. What is the result of *hafka'at kiddushin*? Is the marriage cancelled retroactively, or only from the time of cancellation?
3. Who is invested with the authority to cancel a marriage? Did

this authority come to an end at the close of the talmudic period?
4. In which instances may a marriage be cancelled? Only in the cases mentioned explicitly in the Talmud, or in other cases as well?
5. Is there a distinction between *hafka'a* at the time of betrothal and *hafka'a* at some later point—e.g., at the time of divorce?

Of the five instances of *hafka'at kiddushin* in the *Talmud Bavli,* the three involving *hafka'a* at the time of divorce invoke the principle that a man betroths his wife with the sanction of the rabbis. The two passages dealing with *hafka'a* at the time of betrothal make no mention of this principle. In its place we find the notion that "he acted improperly, and so they act improperly toward him." It is clear that when the *hafka'a* takes effect at the time of betrothal, a *get* is not required. As we shall see regarding those cases where the *hafka'a* takes place at some later point, the *Rishonim* disagree as to the requirement of a *get,* and whether that *get* must be valid by Torah law or mere rabbinic decree. The question arises: What is the relation between the two types of *hafka'a,* or in other words, is *hafka'a* at the time of betrothal also based on the principle that a man betroths a woman with the understanding that his act has rabbinic approval? The answer to this question has profound halakhic ramifications, for if the two types of *hafka'a* share the same basis, we may infer or extrapolate certain laws from one to the other. For example, were we to conclude that the authority to cancel a marriage at the time of betrothal remains in force even after the close of the talmudic period, then it might follow that the same may be said about *hafka'a* at a later point in the marriage. Similarly, it might be argued that in the same way that a *get* is not required for *hafka'a* at the time of betrothal, so may enactments allowing for the cancellation of a marriage at a later date, and perhaps without a *get,* be instituted.

In order to understand the halakhic foundation of *hafka'at kiddushin,* let us carefully analyze the words of Rashi (1040-1105) in his commentary to the various passages dealing with the topic. At first glance, his position appears to be rather consistent, and based upon the principle that the marital formula makes every betrothal dependent upon rabbinic approval. Nevertheless, alternate explanations of his view have been suggested.

We will cite here a section of Rashi's commentary to *Ketubot* 3a:

*Whoever betroths*—whoever betroths a woman betroths her according to the understandings instituted by the sages of Israel in Israel that the

betrothal take effect and remain in effect in accordance with the words of the sages and that the betrothal be invalidated in accordance with the words of the sages by means of a *get* validated by the sages.

*And the Rabbis cancelled his betrothal*—when it is followed by a *get* like this.

*Granted*—that you can say the betrothal is cancelled when he betrothed her with money, for you can say that this *get* nullifies the betrothal and transforms the money retroactively into a gift.

*If he betrothed her with sexual intercourse, what*—retroactive cancellation is there? Granted when there is a valid *get*, even though the betrothal was in effect until now, the Torah declares that the *get* severs [the marital bond] and permits that which had been forbidden from now on. But this which is not a *get* by Torah law, and you validate it because of his understanding that he betrothed her with the assumption that his act has rabbinic approval, and therefore it may be cancelled by those very rabbis—you must say that it was not a betrothal from the very beginning. And if he had betrothed her with sexual intercourse, and you nullify his betrothal retroactively, what happens to his act of sexual intercourse?

*The Rabbis declared his intercourse*—an act of prostitution retroactively because of a *get* that is valid by rabbinic decree. And they have the authority to do this, for he relied upon them.

Rashi clearly maintains that the *hafka'a* works retroactively, but what is the halakhic basis for canceling a betrothal? The usual interpretation of the super-commentaries is that according to Rashi, *hafka'at kiddushin* is based on a set condition always and automatically attached to the betrothal.[22] Whenever a man betroths a woman he conditions his betrothal on rabbinic approval. The rabbis as a whole act as silent partners in his betrothal, and the validity of the betrothal depends upon their consent. Even though Rashi doesn't mention the term "*tenai*" (condition) explicitly, this seems to be how he interprets the established betrothal formula, "You are hereby betrothed to me in accordance with the laws of Moses and Israel." Hence, Rashi's words under the heading "*Whoever betroths*" above; hence his commentary to *Gittin* 33a: "He betroths her with the understanding that his act has Rabbinic approval—that his betrothal should take effect in accordance with the law of Moses and Israel instituted by the sages of Israel, and surely they said that any betrothal in Israel should be cancelled with such a *get*. Therefore the

betrothal is nullified, for he betrothed her with that understanding"; and hence his commentary to *Yevamot* 110a: "And they cancelled his betrothal—for whoever betroths [a woman] relies on the approval of the sages, for we say 'in accordance with the laws of Moses and Israel.'"[23]

According to this understanding of Rashi's position that *hafka'at kiddushin* is based on our conditional betrothal formula, the *get* is not needed to implement the *hafka'a*. Similarly, according to this view that *hafka'a* is based on the conditional betrothal formula, there is no need to say that the authority to cancel a marriage ended with the close of the talmudic period. So too there is room to say that new enactments and practices may be instituted regarding marriage and divorce, and that *hafka'at kiddushin* is not limited to the cases mentioned in the *Gemara*. And furthermore it may be argued that Rashi does not distinguish between *hafka'a* implemented at the time of betrothal and *hafka'a* implemented at some later point. After all, in the *Yevamot* (110a) passage dealing with *hafka'a* at the time of betrothal, the *Gemara* does not mention the principle that a man betroths a woman with the understanding that his act has rabbinic approval. Nonetheless, Rashi in his commentary to that passage does cite that principle to explain the application.[24] Thus, it may be argued that just as there is no need for a *get* when the *hafka'a* is implemented at the time of betrothal, so too it may be possible to cancel a marriage at some later point without a *get*.[25]

*Shita Mekubbetset* (R. Betzalel Ashkenazi) on *Ketubot* 3a understands Rashi's position in a completely different manner, insisting that without a *get*, there is no room for *hafka'a* after the time of the betrothal itself. According to the *Shita*, when the *Gemara* says that a man betroths a woman with the understanding that he has rabbinic approval, it does not mean that the husband conditions his betrothal on that approval, akin to a person who betroths a woman on condition that his father approves. If that were the case, then when the rabbis deny their approval, there would not be any need for a *get*. Rather, Rashi maintains that a person wants his betrothal to be absolute and unconditional, but that betrothal may be cancelled by a *get* that is declared valid by the rabbis. According to this, a distinction must be made between *hafka'a* at the time of betrothal and later *hafka'a*. If the husband acts improperly at the time of betrothal, his betrothal is not valid, for the rabbis declare his property ownerless (invalidating the betrothal money), and his sexual intercourse an act of prostitution. When the *hafka'a* is implemented at some later point, the marriage can only be cancelled by a *get* that is valid at the very least by rabbinic decree.[26]

## X.

While there may be a certain ambiguity in Rashi's position, because he does not use the term "*tenai*" outright, other *Rishonim* state clearly that *hafka'at kiddushin* is based on a condition. We will cite here just a few of them.

R. Aharon ha-Levi (*Ketubot* 3a):

> It may be asked: since we say 'whoever betroths a woman betroths her with the understanding that he has Rabbinic approval,' why mention money or intercourse? Surely he is like [someone who says] 'on condition that Father approves,' and he didn't approve.
>
> Since he betrothed her with the understanding of their approval, it is as if he said, 'on condition that Father approves.'

Ritva (*Ketubot* 3a):[27]

> [Therefore] he says, 'in accordance with the law of Moses and Israel.' Thus it is as if he stipulated 'on condition that the Sages approve.'[28]
>
> He is like someone who said, 'You are betrothed to me on condition that Father approves.'

R. Avraham ben ha-Rambam (*She'elot u-Teshuvot Birkat Avraham* no. 44):

> You can apply here the principle that whoever betroths a woman betroths her with the understanding that he has rabbinic approval, and it is like a condition attached to the betrothal.

Maharam of Rothenburg (in *Mordekhai, Kiddushin* 3: 522, regarding a case where a man betrothed a woman in a valid manner):

> At the time of betrothal he did nothing wrong, and we judge him according to that time, and say that he betrothed her on condition that if he later violates a rabbinic regulation . . . his betrothal will not be valid.

### *Get*

On the other hand, there are *Rishonim* who raise objections against the principle of *hafka'at kiddushin* in general, and against Rashi's understanding that the *hafka'a* takes effect retroactively in particular.

After all, if a marriage can be cancelled retroactively because of unavoidable interference or cancellation of a *get*, then whenever a woman commits adultery—so that the woman is forbidden to her husband and lover, the adulterers are liable for the death penalty, and any child born from their relationship is a *mamzer*—all the husband has to do is send a *get* to his wife through an agent and then cancel the *get*, or attach to the *get* a condition that is likely to lead to unavoidable interference. Once this is done, the marriage will retroactively be cancelled, his wife will retroactively be considered a single woman, and she and her children will be saved from all the penalties of her adultery. This objection leads a number of *Rishonim* to a different understanding of *hafka'at kiddushin*.

Rashbam argues that the *Gemara* does not mean to say that a valid betrothal that has already been in effect can be cancelled retroactively. Rather, a marriage is terminated going forward by way of the *get*. A person does not want the rabbis to declare his relations acts of prostitution, so when divorcing his wife he gives her a *get* in such a way that the rabbis will not cancel his marriage. In other words, from the outset he waives all claims of unavoidable interference, and "cancels" all future cancellations of the *get*. In those cases where the rabbis cancelled a betrothal even without a *get* (*Yevamot* and *Bava Batra*), the husband acted improperly at the time of betrothal. Since a man betroths a woman with the understanding that he has rabbinic approval, if he betroths her in an improper manner against the Rabbis' wishes, the betrothal never takes effect, and the woman is free to leave even without a *get*. But if a man betroths a woman in the proper manner, the betrothal can be terminated only with a *get* that is valid by Torah law.

Ri ha-Lavan adds that just as we say that a man betroths a woman with the understanding that he has rabbinic approval, so does he divorce her with the same understanding. Thus, whenever a man divorces his wife, he is considered as if he had stipulated at the time of the divorce that unavoidable interference and even retraction do not invalidate a *get*. Ri ha-Lavan agrees with Rashbam that once a marriage has begun—that is, the betrothal has taken effect—the marriage can only be terminated with a *get* that is valid by Torah law. Thus, the positions of Rashbam and Ri ha-Lavan do not advance the possibility of canceling a marriage when the husband refuses to give his wife a *get*.

Rabbenu Tam and Ri propose alternate solutions to the difficulties raised above. While they do not actually get into the details of how *hafka'a* works, it would appear that they feel its effect is retroactive.

They explain that for various different reasons we are not concerned that the husband will take advantage of *hafka'at kiddushin* in order to protect his adulterous wife or to legitimize *mamzerim*. According to Ri, *hafka'at kiddushin* is applied in accordance with clearly formulated criteria set by the rabbis, without considering the circumstances of a particular case. Rabbenu Tam argues that the implementation of *hafka'a* requires the decision of a court, and if the court sees that the husband is trying to protect his adulterous wife or permit *mamzerim*, it will not cancel his marriage. In any case, Rabbenu Tam and Ri reject Rashbam's conclusion that once a man betroths a woman in the proper manner, the betrothal can only be terminated with a *get* that is valid by Torah law.

Other *Rishonim* agree with Rashbam that after a betrothal takes effect with rabbinic sanction, it cannot be cancelled without a *get*, but they argue that the *get* need not be valid by Torah law. They too distinguish between *hafka'a* at the time of betrothal and *hafka'a* at some later point. For example, Ri mi-Gash to *Ketubot* 3a states explicitly that a distinction must be made between the two types of *hafka'a*. When the husband betroths his wife in an improper manner, the woman leaves even without a *get*. But whenever he betroths her in a proper manner, and the marriage is later cancelled, the woman requires some sort of *get* (*get kol dehu*).[29] A similar distinction is put forward by Ramban, Re'ah, and Rashba.

Rashba was asked about the case where a man was seen drowning in "water having no end," but nobody witnessed his actual death. Why didn't the rabbis cancel the man's marriage in such a case, and thus permit his wife to remarry? He explains that "the Rabbis did not cancel marriages with nothing at all, but only in cases like this where there is some sort of *get*. Or else where a single witness testifies that the husband died." But this only applies to *hafka'a* implemented at some later point. When, however, a marriage is cancelled at the time of betrothal, a *get* is not required, "because the betrothal itself lacked rabbinic approval, for the husband acted in an improper manner."

It may be noted that the case of a man who had been seen drowning in "water having no end" does not pose any real difficulty to those who maintain that *hafka'at kiddushin* may be implemented even without any *get* whatsoever. In that case, the rabbis did not want to cancel the marriage, for the husband was perhaps still alive and would one day return, expecting to find his wife waiting for him. But in those cases where the rabbis did in fact cancel a marriage, a *get* may not be necessary.

R. Menahem ha-Me'iri (*Ketubot* 3a) states explicitly that *hafka'at*

*kiddushin* does not require a *get*: "That which [the rabbis] said that they cancelled a betrothal—not only in a case like this where there is a *get*, but by right it is not valid, but rather even in a case where there is no *get* at all." Me'iri explains why in *Ketubot* and *Gittin* a *get* is required, whereas in *Yevamot* and *Bava Batra*, a *get* is not required: "Here [in *Ketubot*] the *hafka'a* stems from the doubt which arose regarding the *get*." The implication is that there is no essential difference between *hafka'a* implemented at the time of betrothal and *hafka'a* implemented at some later point, *hafka'a* without a *get* being possible in both cases. Me'iri's comment in *Yevamot* (89b) is particularly relevant to our discussion:

> We already explained in our commentary to the mishna that a court can only abrogate a Torah law in one of three ways: by declaring that the Torah law be abrogated in a passive manner; by declaring a person's property ownerless; or by proclaiming a temporary abrogation, thus constructing a fence safeguarding the Torah law. Any instance involving matrimonial law is not regarded as an abrogation, for a man betroths a woman with the understanding that he has rabbinic approval, and they have the authority to cancel a marriage.

Me'iri implies that *hafka'at kiddushin* is not based on declaring the husband's property ownerless. Rather, it is based on a specific authority given to the rabbis in matters of marriage and divorce, and there is no reason to say that this authority does not obtain today. Me'iri's position may be based on the Jerusalem Talmud cited earlier.

It should be noted that Rambam does not make a single reference to the principle of *hafka'at kiddushin* in his *Mishne Torah*. But he codifies all the rulings that the *Gemara* associates with that principle except for one (that of *Yevamot* 110a). R. Nahum Rabinowitz[30] concludes from the silence that Rambam agrees with Rashbam and Ri ha-Lavan, thus obviating the need to invoke *hafka'a*.[31] But it would seem to me that this argument is inconclusive—Rambam does, after all, codify the relevant rulings based on the deployment of *hafka'at kiddushin*. Further, *Yad Malakhi* cites the following principle (*Kelalei ha-Rambam* no. 2): "It is well known that Rambam . . . mostly copies the *Gemara*. A matter that is cited in the *Gemara* as an objection, or 'by the way'—it is not his way to copy . . . for Rambam only includes in his work that which is explained frontally in the *Gemara*." Regarding *hafka'at kiddushin*, both conditions are present. The principle is cited in the *Gemara* "by the way," as part of an answer to an objection. Moreover,

the principle is not explained in the *Gemara* (*only by the Rishonim*). Rambam's teacher, Ri mi-Gash, for what it's worth, cites the principle and explains it in a manner inconsistent with the view of Rashbam. And finally, Rambam's son explains his father's position at the beginning of *Hilkhot Ishut* as based on *hafka'at kiddushin*.[32]

## XI.

Over the generations there have been many attempts to apply the principle of *hafka'at kiddushin* to cases that were not mentioned explicitly in the *Gemara*. Most of the discussions relate to cases that became known as "secret marriages" or "deceptive marriages." By law, when a man gives a woman a ring or some other object of value in the presence of two witnesses, and says to her, "You are betrothed to me in accordance with the law of Moses and Israel," they are man and wife. No additional ceremony is required. But in order to avert disputes between the parties and prevent any doubts as to the validity of the marriage, enactments were instituted in many communities that introduced formality and publicity into the marriage ceremony. Among other things, these enactments required that the betrothal take place in the presence of ten people or before the community's rabbi or communal heads, that the betrothal have the parents' blessings, that a *ketuba* be written, and that the betrothal take place at the time of the *huppa*. The question arose as to the validity of a marriage that took place in defiance of these enactments, "secretly" or "in a deceptive manner." Some argued that even after the close of the talmudic period, the authority to cancel marriages remained in the hands of the rabbinic authorities of each generation, while others denied them that privilege. Some restricted the possibility of canceling a marriage to those cases in which the sanction of *hafka'at kiddushin* was mentioned explicitly in the enactment. Others argued that while the authority to cancel marriages still exists in theory, for various reasons it should not be exercised in practice. Over the course of time, the willingness to utilize the authority to cancel a marriage has thus generally declined. Nevertheless, there have been significant instances after the talmudic period where rabbis in various communities have invoked *hafka'at kiddushin* to resolve problems arising in their day.

Already in the days of the *Geonim*, there was a difference of opinion as to whether the rabbis retained their authority to cancel a marriage after the close of the talmudic period. In a responsum dealing with the marriage ceremony (cited in *Otsar Geonim, Ketubot,* p. 18, no. 60), Rav

Hai Gaon records: "And our grandfather, our master and rabbi, Yehuda Gaon, enacted for them that betrothals only take place in accordance with the Babylonian practice, with a *ketuba*, and the signature of witnesses, and the betrothal blessings. As for a betrothal that does not follow this practice, he enacted that we do not concern ourselves with it, as they said: 'Whoever betroths a woman betroths her with the understanding that he has rabbinic approval, and the rabbis cancelled his betrothal.' So too it is fitting that you put this into practice." Rav Hai Gaon and Rav Yehuda Gaon are clearly of the opinion that the authority to cancel a marriage did not end with the close of the Talmud, and that the possibility of canceling a marriage is not limited to the cases mentioned in the *Gemara*. It is difficult to infer what they maintain about the other points raised earlier.

In contrast, R. Yosef Karo writes in a responsum (*She'elot u-Teshuvot Bet Yosef* no. 10) that he saw a responsum of one of the *Geonim* who argued "that we only say that the rabbis cancelled a marriage where they [actually] said so."[33] It is obvious that according to that opinion, the authority to cancel a marriage terminated with the closing of the talmudic period.

We have seen that Rav Hai Gaon and Rav Yehuda Gaon accept the possibility of canceling a marriage on the basis of an explicit enactment, although there may have been other *Geonim* who disagreed. At the end of the twelfth century, a disagreement arose between the rabbis of Worms and Speyer on the one hand, and the rabbis of Mainz on the other, as to whether *hafka'at kiddushin* could be implemented in a case where there was no prior enactment governing the matter. Ra'avan (*Sefer Ra'avan* p. 283) cites an incident that occurred in Cologne, where

> a young man was trying to arrange a marriage with the parents of his prospective bride. In the meantime another man of means arranged the match and [the parents] agreed to the marriage, the father agreeing to accept the betrothal of the second suitor. They called for the community [to assemble] in accordance with the custom. When the second suitor stood up to go and betroth her, the relatives of the first suitor went ahead in a guile manner, and betrothed her in the presence of witnesses that they had prepared. When the [bride's] parents realized [what had happened], they said to her: 'Throw away the betrothal [ring] in your hand,' and she did so, and the second suitor betrothed her on that same occasion.

Rabbi Ya'akov ha-Levi of Worms and Rabbi Yitshak ha-Levi of Speyer wished to cancel the first marriage without a *get*, on the basis of

the *Yevamot* passage dealing with the snatching incident: "So too did the first suitor (act improperly when he) snatched her from the second suitor to whom she had been designated, and betrothed her. Let us cancel the betrothal." But the Sages of Mainz, R. Elyakim, R. Ya'akov ha-Levi, and Ra'avan himself all rejected their arguments: "[Even] if the [talmudic] rabbis had the authority to cancel a marriage, we do not have the authority to do so." Ra'avan seems to imply that he would not implement *hafka'at kiddushin* in his time even to cases identical to those of the *Gemara*.[34]

Rashba in a *teshuva* (no. 1185) raises the matter of a betrothal conducted in the presence of witnesses who by rabbinic decree are disqualified to testify: does such a betrothal require a *get*? He rejects Rif's argument that in such a case we should cancel the marriage on the basis of the principle that a man betroths a woman with the understanding that his act has rabbinic approval. For Rashba argues that

> this principle does not apply to all cases regarding which the sages said not to act in a certain manner, so that if he acts in that manner, his act has no validity. In all these matters, you only have what the Rabbis permitted explicitly.

It would, however, be wrong to infer from what Rashba says that the rabbis lack the authority to *institute* new enactments that would allow for the cancellation of a marriage. Rashba was in fact asked in another responsum (no. 1206) about a community that enacted a decree forbidding a man to betroth a woman in the presence of less than ten people (if he should do so, his betrothal is invalid). He writes:

> By right, it is clear to me that the townspeople are permitted to act in that manner, provided that the residents agree. But if there is a Torah scholar who disagrees with them, they may not do so. The reason is that the community may declare the husband's money ownerless, and so it turns out that he betrothed his wife with money that was not his. As they said in the Talmud, 'The rabbis cancelled his betrothal.'

At the end of the responsum, he concludes: "There was such an incident in our city, and I discussed the matter before our rabbis, and my master, Rabbi Moshe bar Nahman agreed with me." He concludes here that "the matter still requires further consideration," but in another responsum (no. 551), he writes:

> If the communities as a whole or each community individually wish to

> institute an enactment to protect against such mishaps, they should make an enactment in the presence of all, and declare as absolutely ownerless any money given to any woman in the community, unless she received it with her consent and her father's consent, or in the presence of a certain person as they wish. And I found that Rav Sherira Gaon and his ancestors acted in this way, and told the community to act in this way.

Here the hesitation is absent.

Rashba's position as outlined above seems to be contradicted by what he himself writes in yet another responsum (no. 550) regarding a city in which an enactment was passed that a man may only betroth a woman in the presence of ten people and the congregational leader, and that someone who violates the enactment is liable to excommunication and a monetary fine. Rashba rules that even if a woman was betrothed in a manner inconsistent with the enactment, she still needs a *get*, for we do not cancel her betrothal on account of the enactment. However, it may be suggested that the difference lies in the formulation of the enactment.[35] In the first two enactments (1206, 551), it was stipulated explicitly in the text of the enactment that if someone betroths a woman not in accordance with the terms of the enactment, his betrothal will not be valid. If such a stipulation was included in the enactment, the betrothal is not valid, but if no such stipulation was made, the betrothal is indeed valid.

Rabbenu Asher (Rosh) in a *teshuva* (35: 1) was asked whether or not a court can legislate that if a man betroths a woman without her parents' consent, the betrothal money is declared "ownerless" and the betrothal thus invalid. Rosh writes that in addition to this argument, the court has the fact that "in every generation a man betroths a woman with the understanding that he has the approval of the sages of the generation who make enactments to serve as safeguards, and with the understanding that his betrothal will only be valid if it is conducted in accordance with their enactments." Thus, Rosh too allows for *hafka'at kiddushin* in accordance with contemporary rabbinic enactments.

The first sign of a change in attitude regarding *hafka'at kiddushin*—in which the theoretical principle is accepted, but the practical implementation is questioned— may be found in a responsum of Rivash (no. 799). Rivash was asked about a community that enacted a rule that a man may only betroth a woman with the knowledge of the community's trustees, in their presence, and in the presence of ten people. Betrothals conducted in any other manner were declared invalid, with

the money or equivalent given for betrothal declared ownerless. Rivash finds this acceptable, without invoking the need for rabbinic approval of marriage, for the community's control over the money is enough to empower it over marriage. If, however, a man betroths a woman without money—say, by way of sexual intercourse—the principle that betrothals are conducted with rabbinic approval is necessary. At the end of the responsum, Rivash writes that in theory, "if a man betroths a woman in violation of the community's enactment, his betrothal is invalid, and she does not require a *get*." However: "In practice I would lean towards stringency, and not rely on my opinion in the matter— on account of the severity of the issue of releasing a woman without a *get*—without the approval of all the sages of the different regions." Rivash does not reject the possibility of canceling a marriage that was conducted in violation of a communal enactment. But he hesitates to use the authority granted to the Torah scholars of every generation, as well as to the community, and requires the agreement of all the sages in the area in order to utilize that authority.

R. Shimon ben Tsemah Duran (*Tashbets* 2:5) was asked about "a community that enacted that if someone betroths a woman without the knowledge of the city council and the communal elders, his betrothal is invalid." He rules that according to the letter of the law every court and every community in every generation is authorized to cancel a marriage.

> This is what appears from the law itself. But because of the severity of matrimonial law, we should be concerned that perhaps we require a court like the court of R. Ami and R. Asi . . . even so in matters of marriage we should be stringent . . . and moreover it was not explicitly stated in the enactment that they would declare the money ownerless. And so we have heard that the ruling was never put into actual practice.

A similar ruling is issued in another responsum (1:133): "Whatever I say on this matter is merely theoretical. For authorities have already been asked about this matter many times, and we do not find that they put this ruling into practice." And Tashbets's grandson, R. Shimon ben R. Shelomo Duran (*Yakhin u-Boaz* 2:46), after distinguishing between *hafka'a* at the time of betrothal and *hafka'a* at some later point, and between the various different formulations of the communal enactments, adds:

> Even if the enactment would be formulated in this manner, it should not be acted upon. The great authorities have already testified as fol-

> lows: 'And so we have heard that the ruling was never put into actual practice.' Now if the early authorities testify about the even earlier authorities that they never acted upon such an enactment . . . then how is it possible that we should do so.

R. Joseph Colon (*Maharik*) in the fifteenth century received information (later proved to be false) that the rabbi of Constantinople, R. Moshe Kapsali, released without a *get* a woman who had been betrothed with a fig in the presence of two witnesses. (R. Kapsali had banned betrothals conducted without the presence of ten people.) R. Colon (no. 84) issued a forceful response to this ruling, arguing that a marriage cannot be cancelled on the basis of a ban or enactment—even a communal enactment, and certainly not that of a single rabbi. *Shiltei Gibborim* (*Bava Batra,* 45a in *Rif*) suggests that there is no contradiction between the position of Maharik that a betrothal is valid, even if conducted in such a manner that violates an enactment, and the position of Rashba that in such a case the betrothal is not valid (we have already noted that this apparent contradiction exists between the various responsa of Rashba himself). It all depends upon the formulation of the enactment. If it was stated that a man who betroths a woman in the presence of less than ten people, or the like, would be subject to a ban, his betrothal is valid (and his violation is dealt with separately). If the enactment states that a betrothal in the presence of less than ten people is actually invalid, it is so.

Maharam Alashkar (no. 48) discussed a communal enactment declaring that a man may not betroth a woman in the presence of less than ten people or in the absence of the community's sage, and that any betrothal conducted in violation of this enactment will not be valid. He argued that according to Rav Hai, Rashba, Rosh, and Rivash, a community is permitted such legislation. But he concluded that his personal support depended upon the agreement of the entire region and all or most of its rabbinical authorities. For a man does not betroth a woman with the understanding that he has the approval of a particular community, but rather with the understanding that he has the approval of all the communities in the region. Though in the case at hand Maharam Alashkar required the issuance of a *get*, he agrees that in theory the rabbis of every generation have the authority to pass legislation allowing for a betrothal to be cancelled.

Rabbi Yosef Karo in his *Bet Yosef* (*Even Ha-Ezer* 28) cites the three responsa of Rashba, as well as the responsa of Rivash, Rashbatz, and

Maharik cited above, without commentary. As we have seen, these allow for the possibility of *hafka'a* when there is agreement on the part of the regional rabbinical authorities. The spirit of these responsa is to view *hafka'a* as a theoretical possibility that would best not be applied practically. In the *Shulhan Arukh,* R. Karo makes no mention of any of the issues raised in those responsa.

The matter is also treated in two of R. Karo's own responsa. In one place (*She'elot u-Teshuvot Bet Yosef* no. 6), he sharply attacks a ruling invalidating the betrothal of an individual who violated a communal enactment by acting without the presence of a court. R. Karo accepts the view of Rivash that even if the enactment stipulated that the betrothal money would be declared ownerless, the woman may not be released without a *get.* This is all the more true when the communal enactment itself does not mention the consequence of invalidation of the betrothal. Elsewhere (no. 10), R. Karo repeats his position and explains that "where they said [that the marriage is cancelled] they said so, and where they did not say [that the marriage is cancelled] they did not say so." In other words, *hafka'at kiddushin* is only implemented in those cases that are mentioned explicitly in the *Gemara.* Moreover, even if it is agreed that it is possible to cancel a marriage in other cases as well, "that only applies to them, and to the early generations who understood the reasons of things. But in these generations, who says that we have the authority to cancel marriages that are valid by Torah law."

R. Moses Isserles writes in his gloss to the *Shulhan Arukh* (*Even Ha-Ezer,* 28:21):

> If a community enacted among themselves that anybody who betroths a woman in the presence of less than ten people, or the like, and someone went ahead and betrothed a woman in that manner, we are concerned about the betrothal and the woman needs a get. Even if the community expressly stipulated that the betrothal will not be valid, and declared his money ownerless—even so, one should be stringent in practice.

Rema's position seems to be quite clear: A *get* is required, even if the enactment stipulates that the betrothal is invalid when done improperly. But there is still room for a certain doubt. The editor who notes Rema's sources traces Rema's ruling to Maharik. But Maharik's ruling related to an enactment that did not explicitly mention *hafka'at kiddushin.* Thus, it is difficult to understand how his words can serve as a source for Rema's ruling. The editor might have made a mistake, and the true source for Rema's ruling may be Rivash. If so, just as Rivash said that he would join

with other rabbinic authorities if they would agree to release the woman without a *get*, so too Rema might agree to such a proposition.[36]

## XII.

Particularly interesting and important in the context of our discussion is Rema's view in his *Darkhei Moshe* (7:13). Rema deals there with the lenient ruling (as cited by *Terumot Hadeshen* no. 241) issued on behalf of the Jewish women taken captive during a period of persecution in Austria, which allowed them to return to their husbands. (The operative law is that such women are generally assumed to have been violated during their captivity, and are therefore prohibited to return to their husbands; *Even ha-Ezer* 7:4). Rema writes:

> It seems to me that the rabbinic authorities may have issued their lenient ruling not on the basis of the strict law, but because of the needs of the hour. For they saw that there was reason to be concerned about what women might do in the future. For if they knew that they would not be permitted to the husbands of their youth, they might sin, and so [the rabbis] were lenient. And don't say from where do we know that we might be lenient in a case that involves a possible Torah prohibition. It seems to me that they relied on that which they said that whoever betroths a woman betroths her with the understanding that he has rabbinic approval, and the court is authorized to cancel his marriage, so they were like unmarried women, and even if they sinned, they are permitted to their husbands.

Obviously, according to no less an authority than Rema, today's Rabbinic authorities (that is to say, those living after the close of the talmudic era) retain the authority to cancel a marriage that had once been valid—even without a *get*, and even without an explicit enactment empowering them to do so.

Even though the tendency among the halakhic authorities seems to discourage the practical possibility of *hafka'at kiddushin*, enactments that included the provision of *hafka'at kiddushin* for those who violate those enactments continued to be passed into law until the beginning of the twentieth century. In a period of a little more than a hundred years (1804-1921), for example, no fewer than seven enactments allowing for the cancellation of marriages were instituted in various different countries—Italy, France, Algeria and Egypt.[37] Take Egypt. An acute

form of the problem of "deceptive marriages" arose in Egypt, because the Jewish community included foreign nationals who enjoyed the protection of the major foreign powers. The rabbis had once been able to force those who violated their enactments to give their wives a *get*, but this became impossible. In 1901, R. Eliyahu Hazan, Chief Rabbi of Alexandria, headed a court that established rules for the public character of the marriage ceremony. If one defies the rules—"his betrothal will be invalid, like a broken shard."[38]

Rav Kook (*Ezrat Kohen* no. 70) discusses the possibility of appending *hafka'a* to other arguments, in order to release a married woman without a get. He concludes that it is possible to include *hafka'at kiddushin* among other reasons for leniency, but one may not rely solely on that argument. This is also the position of R. Ovadia Yosef in a number of his responsa (*Yabi'a Omer* VII, no. 18, 7; IV, no. 5, 11).

Additionally, in the course of the last century, a number of attempts were made to resolve the *aguna* problem by attaching a condition to the betrothal and invoking the principle of *hafka'at kiddushin*. These attempts were based on the fifteenth century enactment of Ri Berin, according to which a man with a heretic brother may betroth a woman, stipulating that if he dies and she falls before her late husband's brother for levirate marriage, the betrothal will not be valid (cited Rema, *Even ha-Ezer* 157:4). In 1924 the court in Constantinople published a work entitled, "Conditional Marriage." The members of that court wished to attach a condition to all betrothals and marriages stating that if the husband leaves his wife for an extended period of time without her permission, or if he refuses to accept a court ruling, or if he takes ill with a mental or contagious disease—in all such cases the marriage is retroactively cancelled, and the woman does not need a *get*. Besides attaching a condition to the betrothal, the Constantinople court suggested invoking the principle of *hafka'at kiddushin*. Most of the leading halakhic authorities rejected these proposals, and the Constantinople enactments were never put into actual practice.[39]

In order to overcome some of the halakhic difficulties with the Constantinople proposals, R. Ben Tsiyon Meir Hai Uziel (*She'elot u-Teshuvot Mishpetei Uziel, Even ha-Ezer* no. 46) suggests another solution, according to which the husband should betroth his wife using the following formula: "You shall be betrothed to me with this ring for as long as no objections are raised during my lifetime and after my death by the court in this city, with the agreement of the district court or the state, and the decision of the court of the chief rabbinate of Israel in Jerusalem,

and on account of a persuasive claim of causing my wife to be an *aguna*." But this proposal was also rejected by most of his generation's rabbinic authorities. In addition to the specific halakhic objections, it was argued that it is wrong to make every marriage conditional, for that would inevitably lead to a degradation of the sanctity of marriage.

In a theoretical discussion relating to present-day enactments concerning marriage, R. Yitshak Herzog writes as follows: [40]

> And this might have halakhic ramifications even in our day when the sages of the generation see that couples marry in civil courts . . . and according to some opinions, as long as they live together afterwards openly as man and wife, she becomes his wife by Torah law, the sages of the generation should decree to uproot the marriage with the Torah authority invested in them. . . . Indeed it could be where the husband is obligated by Torah law to grant his wife a divorce, but he refuses to comply with the law, and the woman may have received a civil divorce in a non-Jewish court, but that does not help according to Torah law, and she remains an *aguna* forever. In such a case the court has the authority to uproot the betrothal, or to rule according to the principle that a man betroths a woman with the understanding that he has rabbinic approval. Even though *Hazal* did not cancel the marriage in such a case, that was because they were authorized to use physical force, or at least to impose a ban or excommunication, which is not the case in our day when these are forbidden.[41]

## XIII.

We have seen that many *Rishonim* maintain that *hafka'at kiddushin*, even when implemented many years after the marriage, is based on an implied condition attached to the betrothal. According to this opinion, even when the talmudic case-in-point involved a *get*, it was not the *get* that brought about the cancellation of the marriage, for in each instance the *get* was invalid by Torah law. Hence, there is reason to allow *hafka'a* many years after the betrothal even without a *get*. According to this opinion there is no reason to say that the authority to cancel a marriage ends with the close of the Talmud, for the mechanism of the *hafka'a* is built into the marriage formula that is still in practice to this very day.

We have also seen that throughout the ages—during the days of the *Geonim*, the *Rishonim*, and the *Aharonim*—the sages of every generation have used their authority to cancel marriages. To be sure, over time

the rabbinic authorities have hesitated more and more to invoke that authority, but they never gave it up altogether or doubted the possibility of executing it with a specific enactment of a regional *bet din*. *Hafka'at kiddushin* has always remained a legitimate solution to pressing halakhic problems. In times of need, and when no other halakhic solution was available to them, the rabbis have invoked their authority to cancel marriages even without a *get*. Enactments allowing for the cancellation of a marriage never stopped, as we have seen in the enactments passed in Egypt less than a hundred years ago.

The authority to cancel a marriage was usually invoked to cancel betrothals that had been conducted in an improper manner in violation of explicit communal enactments that had been instituted to prevent "secret" or "deceptive" marriages. But the option of canceling a marriage even after a valid betrothal, and even without an explicit enactment, was never completely ruled out either in cases of extreme necessity, as we have seen in Rema's explanation of the lenient ruling issued regarding women who had been taken captive during a period of persecution. According to Rema, the lenient ruling allowing such women to return to their husbands is based on the assumption that even today's rabbis have the authority to cancel a marriage even without a *get*, and even though the couple had been living together as man and wife for many years. Rema justifies the ruling, emphasizing that it was issued because of "the needs of the hour." The rabbinic authorities ruled leniently because they were concerned that a more stringent approach would lead to sinful behavior in the future. These considerations are no less valid today than they were in the time of Rema.

## XIV.

It is my opinion that in difficult times like today, when many women are forced to live as *agunot* chained to their husbands, and recalcitrant husbands are taking advantage of their wives as well as abusing the halakha to hold up their wives for ransom and/or prevent them from marrying, there are certainly grounds to make use of the option of *hafka'at kiddushin* even without a *get*, but with an explicit enactment; this would release those women from their chains and from an almost certain life of sin. This is especially so when the problem of *agunot* causes such great human suffering and degradation of halakha. But this can only be done by a large gathering of the rabbis of Israel who must decide on the matter, so that many authorities share the burden of the

decision, and the Torah not become like two Torahs. Much thought is needed in order to carefully define the circumstances in which *hafka'a* would be implemented, as well as to formulate the stipulation that would have to be added at the time of betrothal. My suggestion would be that the Chief Rabbinate in Jerusalem adopt an enactment stipulating that if a religious court orders a husband to divorce his wife, and he refuses to do so even after sanctions have been imposed upon him, then a special court should be established with the authority to cancel his marriage and free his wife to remarry.

There is little need to worry that allowing for the dissolution of a marriage without a *get* would lead to a devaluation of the sanctity of the institution of marriage. The proposed enactment would only apply in the most extreme cases of a recalcitrant husband. Moreover, it is likely that the actual implementation of *hafka'at kiddushin* will be rare. The mere threat of *hafka'at kiddushin*—and with it the release of the woman from her marital chains—would deprive the husband of the strangling hold that he has over his wife, and should suffice to convince him to free her from the marriage with a valid *get*.[42]

Tractate *Yevamot* closes with a statement of Rabbi Elazar in the name of Rabbi Hanina:

> Torah scholars increase peace in the world, as the verse states: 'And all of your children shall be taught of the Lord, and great shall be the peace of your children'— read not *banayikh* [your children], but rather *bonayikh* [your builders—Torah scholars are the true builders of peace].

Maharsha explains that Tractate *Yevamot* ends with this passage, because it contains many strange laws that appear to contradict and uproot that which is stated explicitly in the Torah. Rabbi Elazar teaches that these laws were not taught in order to uproot the Torah, but rather to increase peace in the world, the peace that is engendered by healthy family life. The parallel *Gemara* in *Berakhot* then cites the verse, "Abundant peace have they who love Your Torah"—these laws bring abundant peace to the world, allowing a woman to free herself from her husband so that she not remain forever tied to him, as the verse states: "Her ways are ways of pleasantness, and her pathways peace," and a woman without a husband cannot live in peace. The *Gemara* ends with the verse, "The Lord will give strength to His people." May God give the leaders of His people, the Torah scholars of every generation, the courage and strength to be lenient in these matters, and then surely "The Lord will bless His people with peace."

## NOTES

1. R. Moshe Sofer, *Hiddushei ha-Hatam Sofer* to *Bava Batra* 47b. But see *Seridei Esh al ha-Shas*, no. 11, who disagrees with Hatam Sofer, arguing that betrothal cannot be likened to *kinyan halifin*: "The very fact that one can acquire a wife with a *peruta* proves that the [betrothal] money merely symbolizes the acquisition. . . . And for this reason a wife cannot be acquired by way of *halifin*, for a woman is not an object that can be bartered for another. Betrothal is a matter of prohibition and consecration, and the money symbolizes the acquisition. But *halifin* is an act of trade, exchanging one thing for another. This would be a disgrace for a woman, as mentioned by Rashi."
2. *Yevamot* 65b, following the anonymous first Tanna of the mishna: "A man is obligated to have children, but not a woman," against R. Yohanan ben Beroka; *Shulhan Arukh, Even ha-Ezer* 1:13.
3. According to an alternative opinion cited there, the *ketuba* obligation is by Torah law, being instructed by the word *mohar* in *Exodus* 22:15; see also Rashi, *ad loc.* As for the normative halakha, whether the *ketuba* is a Torah law or only a rabbinic enactment, see *Rema, Even ha-Ezer*, 66:6, and *Bet Shemuel,* note 14.
4. This is derived from what is stated in the verse (*Deuteronomy* 24:1), "And he shall write her a bill of divorce, and give it in her hand" (Rashbam, *Bava Batra* 48a, s.v. *vekhen ata omer*); or else from the beginning of that very verse, "that she find no favor in his eyes" (Rambam, *Hilkhot Gerushin* 1:2).
5. As was mentioned above, following Rabbenu Gershom's enactment requiring the woman's free-will acceptance of her *get,* a man cannot divorce his wife against her will. But should a man seek a divorce and his wife refuse to accept her *get,* he has the option of obtaining a *heter me'a rabbanim,* an allowance from a hundred rabbis permitting him to take a second wife.
6. See *Nedarim* 90a: "Originally [the sages] said: Three women are to be divorced [even against their husband's will] and are to receive their *ketuba*. . . . [One who says] 'Heaven is between you and me' [Rashi: the husband is impotent]. . . . The Sages then revised [their views] and said that a woman must not be [so easily given the opportunity] to look at another man and destroy her relationship with her husband." See also *Yevamot* 65a, and *Tosafot,* s.v. *shebeno le-vena hi ne'emenet*; *Shulhan Arukh, Even ha-Ezer* 154:7.
7. See Rambam, *Hilkhot Gerushin* 2:20, who explains that the pressure applied to the husband uncovers his true desire to be a part of the Jewish people and do as he is commanded, and it is merely his evil inclination that overtakes him and prevents him from doing the right thing. See also R. Yitshak Herzog, *Heikhal Yitskhak* (pt. I, no. 1, note 32), who explains that wherever the Mishna or Talmud says that we force a divorce, it means that the sages legislated a coerced divorce for the benefit of Jewish women, relying on the assumption that if the rabbis order the husband to divorce his wife, the husband will agree to do so of his own free-will, for there is a mitsva to obey the rabbis.
8. *Korban ha-Eda* understands that this stipulation was written in a separate contract drawn up prior to the *huppa,* whereas *Penei Moshe* explains that it

was written into the ketuba itself.

9. See also Me'iri, *Ketubot*, p. 269, no. 4, who argues that the Geonic decrees allowing for a forced divorce in the case of a woman who claims that she finds her husband repulsive, were based on the normative practice of inserting such a stipulation into the marriage contract.
10. For the correct reading of this text, see my book, *Women and Jewish Divorce: the Rebellious Wife, the Aguna and the Right of Women to Initiate Divorce in Jewish Law. A Halakhic Solution* (Hoboken, 1989), p. 31, and p. 166, note 16.
11. See *Women and Jewish Divorce*, pp. 143-156, where I cite a responsum of Rabbi Ya'akov Zolti, the former chief rabbi of Jerusalem, in which he accepts the idea of such a prenuptial agreement. See also Susan Metzger Weiss, "Sign at Your Own Risk: The RCA Prenuptial May Prejudice the Fairness of Your Future Divorce Settlement," *Cardozo Women's Law Journal* 6 (1999): 49-102, who surveys the various prenuptial agreements that have been proposed in recent years, and discourages the use of the RCA prenuptial in favor of other agreements (e.g., the one proposed by Rabbi J. D. Bleich) that she claims better protect the interests of Jewish women.
12. Cited by Rosh, *Ketubot*, chapter 5, no. 34. According to *Shiltei Gibborim* (*Ketubot* 27a in *Rif*) in the name of *Semag*, and *Shita Mekubbetset*, this is also the view of Rashi.
13. *Bah* (*Even ha-Ezer* 77, s.v. *od*) understands that Rambam inferred as follows: "Since the *Gemara* says: 'But if she says, "I find him repulsive," we do not force her,' this implies that it is only the woman whom we do not force, but the man we force. For if not, the *Gemara* should have said: 'But if she says, "I find him repulsive," we do not deduct from her *ketuba*.' Why mention forcing, if not for this inference?" See also R. Yitzhak ha-Levi Herzog, *Heikhal Yitshak* (pt. 1, no. 2, note 1), who understands that according to Rambam, the husband is forced to divorce his wife by talmudic law, and not only by Geonic enactment. He proves this argument by pointing out that Rambam does not cite the reason offered by the *Geonim*, that the husband is forced to divorce his wife, lest the woman come to a bad end, which is indeed a reason for an enactment. Rather, Rambam states that a woman is not like a captive who must surrender to someone whom she hates, an argument that is not connected to any particular enactment or time period.
14. See *Women and Jewish Divorce*, pp. 47-68, where numerous Geonic responsa dealing with the issue are cited.
15. *Ibid*, pp. 56-57. Rav Sherira Gaon's responsum is cited in *Otsar ha-Geonim* to *Ketubot*, pp. 191-192.
16. Rif on *Ketubot* 63a (p. 27a in *Rif*). But see *Ramban* (*Milhamot, ad loc.*), who understands that according to Alfasi, prior to the Gaonic enactment, a husband whose wife claimed that she finds him repulsive would never be forced to give her a *get*, not even after twelve months.
17. *Tosafot, Ketubot* 63b, s.v. *aval amra ma'is*; *Sefer ha-Yashar, Responsa*, no. 24.
18. R. Moshe Feinstein, *Iggerot Moshe, Even ha-Ezer*, pt. 1, no. 69, regarding an impotent husband; no. 80, regarding a husband with limited mental faculties; pt. 4, no. 113, regarding a husband who was discovered to be a homo-

sexual. It should be noted that according to R. Feinstein, efforts must first be made to convince the husband to divorce his wife, and only if those efforts fail may the marriage be declared as having been based on an error.

19. R. Feinstein mentions this condition in a different responsum (*Even ha-Ezer*, pt. 1, no. 179), regarding a retroactive stipulation attached to *halitsa*.
20. This annulment procedure has been put into practice by the Beit Din LeBa'ayot Agunot, or Court for the Problems of Chained Women, a special court established in the United States by Rabbi Emanuel Rackman and Rabbi Moshe Morgenstern to solve difficult cases involving *agunot*. Though fiercely criticized by most of the Orthodox establishment, this court has to date dissolved the marriages of hundreds of Jewish couples.
21. And this will lead to the validation of a *get* in a case where the husband said, "This will be your *get* after I die," even though such a *get* is in fact invalid (see *Gittin* 13a and 72a), because a *get* cannot take effect after the husband's death. Were we to invalidate the *get* of a dying man after he recovers, people would say that the *get* is only valid if he dies, and come to validate a *get* that was only supposed to take effect after the husband's death (following Rashi).
22. See *Hafla'a, Ketubot* 3a; *Tiferet Ya'akov, Gittin* 33a. Rabbi Tsevi Hirsch Chajes (*Gittin* 33a) discusses the requirement of a "double condition" (*tenai kaful*), and concludes that a "double-condition" is not needed here, because the condition is not attached to a physical act, but rather to a mere verbal statement. Following this line of reasoning, he explains that here the betrothal money must be declared ownerless, or his sexual intercourse must be declared an act of prostitution, in order to nullify the act of betrothal.
23. According to this understanding of Rashi, two questions may indeed be raised: First, if we are dealing here with an ordinary condition, like "You are betrothed to me on condition that Father approves," why does the cancellation of the betrothal depend upon set rules "instituted by the sages of Israel"? And second, if the betrothal is cancelled because of a condition that had been attached to it, why does Rashi repeatedly say that the betrothal is terminated by way of a *get* that was validated by the rabbis? As for the first question, it might be suggested that when Rashi writes, "that his betrothal should take effect in accordance with the law of Moses and Israel instituted by the sages of Israel," he means to explain the formula recited at the time of betrothal, "in accordance with the law of Moses and Israel." He understands that this refers to the practices put into effect by the sages of Israel. The condition that allows for the cancellation of a marriage is, in fact, not equivalent to the condition, "on condition that Father approves." A marriage cannot be cancelled unless the husband violated a clear and well-known regulation that had been put into practice by the sages. As for the second question, it might be suggested that in each of the cases discussed by the *Gemara*, there is a specific reason why a *get* that is valid at least by rabbinic decree is required. In *Gittin* 33a, a *get* is needed, because if before the woman receives the *get*, she learns that her husband had cancelled it, the cancellation is indeed valid. In *Gittin* 73a, a valid *get* is necessary, for if the *get* would not be valid, the concern that people might think that a *get* is valid even if it is given after the husband's death would

still remain. And in *Ketubot* 3a, the entire discussion assumes that a woman received a *get* to which a condition had been attached and that condition was fulfilled through circumstances beyond the husband's control. In none of the cases, however, is the *get* needed to implement the *hafka'a*.

24. So, too, Rashbam (*Bava Batra* 48b) explains like Rashi in *Yevamot* that *hafka'a* at the time of betrothal is based on the principle that a man betroths a woman with the understanding that his act has rabbinic approval.
25. We already explained above (note 23) why, regarding the cases mentioned in the *Gemara*, Rashi requires that there be a *get* that is valid at least by rabbinic decree. But it may still be possible to institute enactments that allow for the cancellation of a marriage even at some later date, and even without a *get*.
26. R. Eliezer Berkovits (*Tenai be-Nissuin u-ve-Get* (Jerusalem, 1967), pp. 134-136, suggests yet another interpretation of Rashi. Like *Shita Mekubbetzet*, he too argues that Rashi does not base *hafka'ah* on a condition, for it would not be right to say that every betrothal is conditional. But he disagrees with *Shita* about the role played by the *get*. While *Shita* understands that the *get* which is invalid by Torah law was declared valid by the Rabbis, R. Berkovits argues that the invalid *get* remains a mere piece of paper. The notion that a man betroths a woman with the understanding that his betrothal has rabbinic approval implies that a man betroths a woman according to the laws and practices put into effect by the sages of Israel. The rabbis cancelled the marriage in the case where the husband cancelled the *get* in his wife's absence and in the case where the condition attached to the *get* was fulfilled by way of some unavoidable interference—that is to say, they enacted that if a man gave his wife such a *get*, the marriage is cancelled. R. Berkovits concludes that a *get* is not indispensable for the cancellation of a marriage, for the *get* in these cases is in fact a mere piece of paper.
27. The standard texts read: "*Even though* he says, 'in accordance with the law of Moses and Israel,' it is as if he stipulated 'on condition that the Sages approve.'" The editor of the critical edition of Ritva suggests the reading: "*Therefore* he says." R. Berkovits infers from the standard text that according to Ritva, Rashi does not base *hafka'at kiddushin* on a condition, for according to Ritva, the plain meaning of the words "in accordance with the law of Moses and Israel" does not imply a condition. But according to R. Goldstein's reading, Ritva agrees with Rashi. This is supported by what Ritva says in his commentary to *Bava Batra* 48b, s.v. *man*: "Rashi already explained this in various places"—that is to say he (Ritva) and Rashi are in agreement.
28. *Hafla'a* (*Ketubot* 3a) also understands that *hafka'at kiddushin* is based on a condition, similar to the condition, "You are betrothed to me on condition that Father approves." *Hafla'a* adds that when a person makes his betrothal conditional on rabbinic approval, there is no concern that he will waive that condition, for the rabbis said that if someone betroths a woman without attaching such a condition, his sexual intercourse will be considered an act of prostitution. According to *Hafla'a*, two principles are involved in *hafka'at kiddushin*: If the husband betrothed his wife on condition that the betrothal has rabbinic approval, the rabbis cancel the betrothal by withholding their approval; if he betrothed her without attaching such a condition,

they cancel the betrothal by declaring the betrothal money ownerless (invoking the court's authority to declare property ownerless).

29. R. Berkovits (*op. cit.*, p. 133) tries to identify the "great authorities" (*gedolei olam*) cited by Me'iri as saying that some sort of *get* (*get kol dehu*) is needed. The novellae of Ri mi-Gash to *Ketubot* have now been published in which that position is stated clearly.
30. *Yad Peshuta, Hilkhot Ishut* 4:1; *Hilkhot Gerushin* 3:8.
31. See *Tsits Eliezer* (vol. 15, no. 58): "It is noteworthy that Rambam does not appear to mention anywhere in his book this law of *hafka'a*. I have already suggested to explain this on the basis of what I saw in *Sefer Ra'avan* (*Gittin*), regarding this law of cancelling a *get*, that according to Rabbi [Yehudah ha-Nasi] if the husband cancelled the *get*, it is cancelled, and we rule in accordance with his opinion. He does not accept the argument, how do we affirm the authority of the court. [According to him], the court does not have the authority to cancel a marriage. Wherever the Talmud speaks about *hafka'a*, it is according to R. Shimon ben Gamliel, but Rabbi disagrees, and the law is in accordance with Rabbi." But this explanation requires further examination, for Rambam codifies all the cases of *hafka'a* mentioned in the *Gemara*, even though he does not mention the principle of *hafka'a*.
32. R. Rabinowitz notes further that Rif to *Bava Batra* 48b omits what is stated in the *Gemara* from the word *afke'inhu* until *be'ilat zenut*. He suggests that perhaps Rif as well rejects the principle of *hafka'at kiddushin*. Two counter-arguments may be proposed: first, in the Mosad ha-Rav Kook edition of *Rif*, R. Sachs notes that the better versions of *Rif* do in fact contain the missing words; second, Rashba (*Responsa*, pt. 1, no. 1185) cites Rif's responsum regarding witnesses who are disqualified by rabbinic law, in which he bases his ruling on the principle of *hafka'a*.
33. But see Menahem Elon, *ha-Mishpat ha-Ivri*, p. 541, note 62, who questions whether R. Yosef Karo is in fact referring to a sage from the Geonic period, and not to one of the *Rishonim*.
34. As was already noted by *Seridei Eish*, pt. 3, no. 114. R. Berkovits (*op. cit.* p. 152), on the other hand, tries to compare Ra'avan to *Tosafot*, arguing that even according to Ra'avan it would be possible to cancel a marriage at some later point after the time of betrothal, even without a *get*.
35. *Shiltei Gibborim* (*Bava Batra* 45a in *Rif*) raises the same question and offers the same solution, except that he focuses on the contradiction between Rashba and Maharik. But the same contradiction exists internally between the two responsa of Rashba.
36. *Pithei Teshuva* (*ad loc.*, note 30) refers to the responsum of Maharam Alashkar (cited above), who distinguishes between an enactment passed by a single community and an enactment passed by all the communities in the region. He seems to be suggesting that this distinction was accepted by Rema who wrote: "If *a community* enacted."
37. A. H. Freiman, *Seder Kiddushin ve-Nissu'in* (Jerusalem, 1945), p. 345.
38. *Ibid.*, p.337.
39. *Ibid.*, p. 391.
40. Rabbi Yitshak ha-Levi Herzog, *Tehuka le-Yisrael Al Pi ha-Torah*, vol. 1,

p.73. It should be noted that R. Herzog emphasizes that whatever he writes should be understood as a theoretical discussion, and not be taken as a practical guideline. On p. 74, he writes: "But we have never heard, G-d forbid, that anybody ever acted on this matter. And when certain people rose up to act, wishing to establish a new practice, the great authorities of the generation fiercely objected and the matter was forgotten and never mentioned." In note 18 on that same page there is a reference to Rav Herzog's approbation to R. Uziel's work: "But I must declare that I do not agree at all with the proposal in no. 45 regarding a conditional betrothal . . . and while the author himself stresses that it is merely a proposal, nevertheless I find it necessary to make this declaration."

41. Elsewhere (pp. 82-83) Rabbi Herzog writes with greater caution: "As for *hafka'at kiddushin*, with attention paid to the words of Rashba, and the silence of the other authorities on this issue except for that which is stated explicitly in the *Gemara*, it would appear that we do not have that authority, even for a limited time. But in the future, if ordination is restored, and the Torah's authority is concentrated in Jerusalem with all or most of the fit communities and all the Rabbis of Israel accepting her authority, the matter will require a decision. . . . And even so we have found an exception to the rule in our master Rema's *Darkhei Moshe, Even ha-Ezer* 7:13, where Rema cites in the name of *Terumat ha-Deshen,* no. 241, with regard to women during the persecutions in Austria who were permitted [to return to their husbands] by the great Halakhic authorities. . . . It seems to me that they relied on that which they said that whoever betroths a woman betroths her with the understanding that he has Rabbinic approval, and the court has the authority to cancel a marriage . . . I was later told that according to a responsum of an early Gaon they wanted to cancel a marriage, or they actually did so in a particular case. I must look for it, and if it happened like that, it is a great precedent, and we have the grounds to say that this authority was not removed from the sages of the generation even after the closing of the Talmud." In the next section he adds: "But this does not mean that we, orphans of orphans, should God forbid use this authority. Rather, when we merit the arrangement that I mentioned—the restoration of ordination, or even without that restoration, the establishment of a High Court in Jerusalem with the agreement and acceptance of its authority on the part of a majority of the Torah-abiding residents in the land of Israel, and a majority of the rabbis and fit communities in all the corners of the world—then it will be possible to consider such matters, a fixed order that will stand until the days of the Messiah."

42. In general, there are many more references to enactments allowing for the cancellation of marriage than to cases in which *hafka'at kiddushin* was actually implemented. See also Freiman, *Seder Kiddushin ve-Nissu'in,* p. 343, where he cites testimony that in the seven years following the enactment passed in Egypt, nobody even attempted to betroth a woman not in accordance with the enactment, for everybody knew that the betrothal would be cancelled.