The second volume of Rabbi Bleich's Hebrew-language work, *Be-Netivot ha-Halakhah*, has recently been published.

Survey of Recent Halakhic Periodical Literature

KIDDUSHEI TA'UT: ANNULMENT AS A SOLUTION TO THE *AGUNAH* PROBLEM

The first news reports concerning the establishment of a *bet din* devoted exclusively to freeing *agunot* from the shackles of a dead marriage by means of nullifying their marriages *ab initio* were received by the community of rabbinic scholars with much puzzlement. Annulment of marriage has long been recognized in Jewish law. Annulment, after all, is nothing other than a determination that, by operation of law, the marriage was invalid in the first instance. However, annulment was seldom available as a remedy for the plight of an *agunah* for the simple reason that the grounds for annulment are extremely narrow and, by definition, limited to factors already present at the time the marriage was celebrated. When grounds for annulment do exist, it is far from clear why the parties should turn to a *bet din* whose roster is composed, with a single exception, of individuals who are unknown to the rabbinic community and from which names of authorities recognized as experts in this highly complex area of Jewish law are conspicuously absent.

As reports of the prowess of the new *bet din* proliferated and the number of cases purportedly resolved in this court grew, puzzlement turned to skepticism and finally to incredulity. Calls were heard for full and complete disclosure of the factors that have been accepted as grounds for annulment and of sources and precedents for such decisions. For many months nothing was published nor, to the best of this writer's knowledge, was any written material circulated privately. The sources disseminated by word of mouth fell far short of demonstrating the validity of the procedure and, in some cases, actually demonstrated the opposite.

Now, at long last, the basic considerations governing the action of this group have been published in *Jewish Week*, August 27, 1997. Curi-

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ously, this material, bearing the title "Halachic Principles and Procedures for Freeing Agunot" has been published in the form of an advertisement.

The halakhic principles underlying the concept of *kiddushei ta'ut* and their ramifications in terms of concrete application merit careful and comprehensive elucidation. That task is beyond the scope of this initial undertaking. The present discussion will be limited to an analysis of the purported forms of *kiddushei ta'ut* outlined in the advertisement published in *Jewish Week*. Three separate grounds are advanced in support of a determination that the marriages of (apparently all) *agunot* were defective from inception and hence are subject to annulment without need of a *get*. Those grounds will be examined *seriatim*.

KIDDUSHEI TA'UT I

The first consideration for nullifying marriages of *agunot* is captioned "*Kiddushei Ta'ut I: A Latent Defect.*" The authors declare that existence of an undisclosed defect of a severity such that it may be presumed that, had the other party been aware of the defect, he or she would not have entered into the marriage renders the marriage voidable. Failure to disclose a defect of such nature need not be accompanied by fraudulent intent nor need it even have been willful.[1] Indeed, the party who failed to disclose need not even have been aware of the defect. In support of this unexceptionable assertion the authors cite a responsum of Rabbenu Simchah of Speyer published by R. Yitzchak ben Mosheh in the latter's *Or Zaru'a*, I, no. 761.

The authors contend that "psychological abuse, adultery (which more than ever endangers the life of the spouse), sexual molestation, abandonment, criminal activity, substance abuse, and sadism (the withholding of a get may be viewed as indicating a sadistic nature)" are among the "intolerable defects" that render a marriage voidable. Assuming, *arguendo*, that at least some of the enumerated forms of conduct constitute incontrovertible evidence of a character flaw constituting a salient defect that serves to invalidate a marriage, the application of that putative principle in the *agunah* cases under discussion is unwarranted. Undisclosed physical conditions that are regarded as salient defects render the marriage voidable only if they are present at the time the marriage is celebrated; defects that arise subsequently cannot retroactively nullify a marriage. Assuming, as at least some authorities do, that blindness qualifies as such a defect, that condition serves to invalidate the marriage only if it is present at the time of the marriage, but not if the onset of the

blindness occurs at a later time during the course of the marriage. Yet, at times, blindness is the gradual result of a degenerative disease. Blindness may result from diabetes or glaucoma but the person may suffer from the illness for many years before losing eyesight. However, when blindness does come, its cause can be traced to the illness from which the person has suffered over a period of time. Nevertheless, when loss of sight occurs subsequent to marriage, no rabbinic authority has suggested that the marriage is void because blindness is a result of a condition that preexisted the marriage. On the contrary, the marriage would remain valid because, although the cause of the defect preexisted the marriage, the defect itself did not.[2] Thus, it is blindness, rather than the cause of blindness, that may invalidate the marriage. To put the matter in somewhat different terms, only the clinical state itself constitutes a salient defect; unexpressed future effects of that state do not constitute a salient defect.

Similarly, it can at most be argued that an existing undisclosed, but recognizable, character defect may serve to invalidate a marriage. A character defect that has not found expression in overt conduct is, at best, analogous to a subclinical defect having no impact upon the validity of the marriage.

Moreover, the analogy between an even already existing character defect and a physical defect is fundamentally flawed, both theologically and halakhically. Absent the intervention of providence, an incipient disease will run its natural course. Thus, untreated glaucoma will lead to blindness, a certain concentration of malignant cells will result in carcinoma and Huntington's disease will culminate in premature death. In each case there is a causal nexus between that which exists in the present and that which will come into being in the future. In effect, the argument propounded on behalf of the *agunot* is that when there exists a necessary causal connection between two phenomena the effect is already present in the cause. The argument is based on the assumption that, because of the predictable outcome, an unexpressed defect is the functional equivalent of a perceivable defect with the result that even an unexpressed salient defect constitutes grounds for annulment. That premise is assumed rather than stated and no authority for its validity is cited by the authors.

1. Character Defects

Be that as it may, character defects are viewed by Judaism in a completely different light. Determinists have long argued that freedom of the will is an illusion because moral choices are not made spontaneously. The determinist argument is that there exists a causal continuity be-

tween a person's character and his or her conduct. Character is formed either by physiological predisposition or by antecedent events or by a combination of the two. Accordingly, if one were to possess exhaustive knowledge concerning all antecedent causes affecting the disposition of any human being, one would have full knowledge of that person's desires, inclinations and predilections and hence one would be able to predict with perfect accuracy what a person would choose in any given situation. According to this view, a person is, in effect, programmed by already existing factors and antecedent events either to commit an act of theft in a given set of circumstances or not to do so; he is already programmed to respond to a plea for alms presented in a particular manner or he is programmed to spurn such a plea. In effect, the will itself is predetermined and hence the will is not free in any meaningful sense.

Judaism does not deny that character is molded by forces various and sundry. But it does insist that the will remains free even though it may be predisposed to choose in a particular manner. Freedom of the will exists even when the choice is made difficult by the presence of preexisting forces, whether physical or psychological. Indeed, man is called upon to exercise freedom of the will in making moral decisions only because of an already present inclination to act in a contrary manner. When a sense of duty does not conflict with desire there is no need for the will to assert itself. It is precisely because character is antecedently determined that an autonomous will is a necessity in order for moral choice to be possible in any situation in which desire as determined by character conflicts with duty. And it is precisely because man is endowed with free will that the presence of already determined character traits is not an absolute predictor of future conduct. Character serves only to establish the context within which the act of moral decision takes place.[3]

Thus, although an absolute causal connection may exist between a particular physiological state and the future emergence of a recognized salient defect, no such absolute causal connection exists between a particular psychological or moral state and future volitional acts. The argument advanced as *Kiddushei Ta'ut I* purports to nullify marriages on the basis of conduct that does not become manifest until after the marriage has taken place. In affirming the doctrine of free will, Judaism denies that such conduct is determined and hence the character flaw of which such conduct is born cannot be regarded as a salient defect existing at the time of the marriage.[4]

Of course, it might be argued that a person possessing evil intentions is afflicted with a salient defect simply by virtue of the presence of that disposition and that subsequent untoward conduct is necessary

only to supply evidence of the prior condition. Acceptance of that thesis would lead to the inevitable conclusion that a person who is hot-headed and brutal by nature and who must consciously struggle to contain violent rage but does not disclose such negative impulses may have his marriage annulled even if he successfully controls himself and behaves as an exemplary husband throughout his married life. Similarly, not only would undisclosed glaucoma that subsequently results in blindness render a marriage void, but the marriage might be retroactively annulled even in the unfortunate case of a husband afflicted with glaucoma who dies of other causes while still enjoying unimpaired sight.

The basic point is rather dramatically illustrated by the well known report concerning the moral character of Moses cited by *Tiferet Yisra'el*, *Kiddushin* 4:11. According to this account, Moses acknowledged himself to be capricious, greedy, arrogant and evil but to have overcome those traits by sustained self-discipline and sheer determination. Putting aside the provenance and questionable authenticity of that report,[5] its point is quite remarkable. Let us assume that Moses was indeed a person who, by character and temperament, was inclined to wickedness but led a life of exemplary holiness, not by breaking and remolding his character, but by thwarting his inclinations. Presumably, since he was a consummate master of self-control, Moses had no reason to disclose those wicked propensities to his future wife. Are we really to assume that the marriage of Moses and Zipporah was voidable on the basis of *Kiddushei Ta'ut I*?

Such a conclusion is bizarre not because the example is inapt but because only salient defects whose presence are concrete and demonstrable serve as grounds for nullifying a marriage. A sub-clinical phenomenon does not constitute a salient defect; a psychological propensity, particularly when its negative effects can be avoided by an act of will, is assuredly not a salient defect.

Moreover, even if it were to be granted that the character defects or the behavior patterns described by the authors rise to the level of salient defects that constitute grounds for annulling a marriage, that fact would not solve the *agunah* problems in the cases addressed. Both *Helkat Mehokek*, *Even ha-Ezer* 29:9, and *Bet Shmu'el, Even ha-Ezer* 39:15, declare that salient defects serve to void a marriage only if the aggrieved party moves to annul the marriage immediately. Acquiescence at the time of the marriage as signified by failure to lodge a complaint, even if followed by later protest, negates the possibility of annulment. Failure to protest fraud or mistake is indicative of forgiveness of the defect, i.e., it is indicative of a desire for an enduring marital relation-

ship despite the presence of the defect. *Ozar ha-Poskim* 39:32, sec. 3, cites a number of authorities who dispute the ruling of *Helkat Mehokek* and *Bet Shmu'el.* However, even those disputants concede that when silence is accompanied by a confirmatory act, e.g., proffering of funds for support and maintenance of the wife, an assumption of forgiveness of the condition does arise.

Moreover, a conjugal relationship continued after the discovery of the defect serves to establish a recognized marital relationship requiring a *get* for its termination. This is so because even if the marriage was void at the time of inception because of fraud or mistake, nevertheless, since cohabitation for purposes of creating a marital union can itself create a valid marriage, cohabitation subsequent to discovery of the defect serves to ratify the marriage. If the marital relationship continues without protest after the defect becomes known, a presumption arises to the effect that a marital relationship has been established by means of cohabitation[6]. The marital relationship arising from cohabitation is not subject to annulment because of the presence of a salient defect since the defect became known before the new relationship was established.

The situations in which the salient defect argument has the greatest *prima facie* cogency are situations involving wife-beating. It is not unreasonable to assume that men who engage in such conduct are afflicted with serious character defects. It is now well known that, typically, for a variety of reasons, battered women do not immediately seek to end the marital relationship. They frequently return to their husbands even after leaving the marital abode. Although such a wife may continue the relationship only in the hope that the husband's unacceptable conduct will cease, she can no longer allege either fraud or mistake. The defect was known and accepted at the time of resumption of the relationship. Correction of the defect is not expressly stipulated as a condition subsequent. Accordingly, there is no need to enter the halakhic labyrinth engulfing the theoretical possibility of invalidating such a conditional marriage The net result is a valid marriage requiring a *get* for its dissolution. The identical considerations apply to any other character flaw that might potentially serve as a salient defect for purposes of annulling the marriage in situations in which the wife has knowingly remained in the marital relationship.

It certainly cannot be argued that mere refusal to execute a *get* in favor of the wife constitutes existence of a salient defect, *viz.*, sadism, already present at the time of the marriage. It is quite true that in such cases there is generally no resumption of the marital relationship after persistent refusal of the husband to execute a *get.* Nevertheless, the

claim that this reflects a salient defect already present at the time of marriage, apart from its patent error, is impliedly contradicted by each and every responsum dealing with the problem of a recalcitrant husband. More fundamentally, the argument cannot be entertained for two reasons: (1) Recalcitrance, indefensible as it may be, is usually the product of acrimony surrounding the breakdown of a marriage. Even if recalcitrance constitutes a manifestation of a grievous character flaw, there is no reason to assume that such a flaw existed at the time of marriage. (2) Moreover, in the absence of a formal ruling by a qualified *bet din* directing the husband to cooperate in the execution of a *get,* the husband's refusal to do so can hardly be categorized as evidence of a salient defect. Whatever the wife's complaint may be, the husband is entitled to present his case before a *bet din.* Even if the husband has refused to heed the summons of a *bet din,* he is nevertheless entitled to due process of law in declining to accede to his estranged wife's demands until explicitly ordered to do so by a competent *bet din.*

The most serious objection, by far, is that the argument advanced relies upon a postulate that is both empirically incorrect and halakhicly untenable. The underlying premise is that human character does not undergo radical transformation and that negative patterns of conduct are universally the products of a character formed long before the appearance of overt behavioral symptoms.

This contention cannot but evoke recollection of a classic comment of *Taz, Yoreh De'ah* 1:5, well known to every rabbinic student. It is forbidden to eat the meat of an animal slaughtered by a person who is not proficient in the laws of ritual slaughter. Rema, *Yoreh De'ah* 1:1, rules that, if a person has at one time been tested and found to be expert but on reexamination is found to have forgotten matters pertinent to slaughter, the meat of animals slaughtered by him prior to the reexamination is permissible. In effect, the halakhic presumption is that his prior knowledge stood the ritual slaughterer in good stead during that entire period and that forgetfulness is not presumed to have occurred until there is actual evidence of its manifestation. *Taz* takes strong exception to Rema's ruling in arguing, *inter alia*:

> . . . forgetting laws also comes bit by bit for it is impossible to say that a person knows everything, and that in one moment he forgets everything. [The] perception of [our] intellect contradicts this for our eyes see that a person who forgets his learning forgets bit by bit, today a bit and tomorrow a bit. This is how we explicitly interpret the verse "And it shall be, if you shall forget (*shokoah tishkah)* the Lord your God"

(Deuteronomy. 8:19), [i.e.,] if you begin to forget, in the end you will forget everything, as Rashi has explained."

The authors' contention that obnoxious conduct does not occur spontaneously but is always the product of an existing incipient flaw is but the transposition of Taz' comment regarding knowledge and information to flaws of character.

The argument is inapt for a number of reasons: (1) Rema, as explained by *Shakh*, *Yoreh De'ah* 1:8, certainly does mantain that the halakhic presumption is that forgetfulness may well be spontaneous rather than incremental. That such presumptions are the rule with regard to other matters is incontrovertible. The sole matter of dispute is whether loss of memory is an exception to that general halakhic principle. Thus *Shakh* declares that apostasy, unlike loss of memory, does not result in a ruling that animals slaughtered by the apostate are retroactively declared to be non-kosher. Even loss of faith is not presumed to be a gradual process.

The underlying principle is the concept of *hazakah*, i.e., any known state or status, whether physical or a halakhic construct, is deemed to persist unless and until there is tangible evidence that a change has occurred. This principle is the halakhic counterpart to the phenomenon the physicist describes as inertia. As a halakhic principle, not only is change deemed not to have occurred unless there is evidence thereof but, when the occurrence of change is incontrovertible, such change is deemed to have occurred at the latest possible moment.

Taz' comments regarding forgetfulness do not really represent an exception to this principle. *Taz* simply asserts that loss of memory of an entire corpus of material is a process rather than a discrete event and hence the process of change that is known to have occurred must have begun at a more remote time.

Taz does not make any such claim with regard to beliefs or ideological commitments and certainly does not do so with regard to either behavior or character traits. Human character *does* change. To paraphrase Aristotle,[7] the difference between a virtuous person and a person who merely performs virtuous acts is identical to the difference between a musician and a person who simply plays music. A novice may laboriously press the keys of an instrument and play them in proper sequence; the musician does so effortlessly because the music has become part of his very being. Both Aristotle and Rambam[8] assert that a person of wicked character may consistently conduct himself in a virtuous manner, but every act of virtue demands conquest of his natural inclination.

Although he may win every battle, he must continuously strive against natural inclinations in making moral decisions. A virtuous person behaves in an identical manner, but his actions require no effort. For him, virtue is integrated into the psyche and is virtually a spontaneous reflex. Rambam takes pains to spell out in detail how virtuous character traits may be cultivated. Even a wicked person, if he adheres to the prescribed regimen, can become virtuous.

It goes without saying that, unfortunately, the reverse is equally true. A virtuous person may become wicked; a person of exemplary character may develop negative character traits. Practice and habituation are the keys to acquisition of both virtue and vice. Many a man has mellowed in the course of a marriage. Marital happiness combined with spousal guidance and encouragement evoke virtuous acts which, in turn, lead to development of a virtuous character. Marital misery and an acrimonious spousal relationship are highly corrosive to the human character. Marital discord evokes mean-spirited conduct; that conduct, in turn, poses a serious danger to moral health. Repeated acts of nastiness, meanness and cruelty result in the integration of nastiness, meanness, cruelty, and even sadism, as character traits. There may or may not be reason to categorize such character traits as salient defects. There is, however, no way of determining that such a defect was latent, but present, even before marriage. Quite to the contrary, the defect may well have developed only after marriage. In any event, absent conclusive proof to the contrary, the principle of *hazakah* serves to establish a halakhic presumption that manifestation of such character flaws does not reflect the presence of a pre-existing condition.

2. Identification of Salient Defects

These considerations are quite sufficient in themselves to render inapplicable the grounds for annulment presented as *Kiddushei Ta'ut I.* But, quite apart from the foregoing, the defects described, even if present before marriage, simply do not render the marriage voidable.

"Go and examine the Talmud, *Rambam* and *Tur Shulhan Arukh.* In no place will you find actual annulment of a marriage because of a defect." Thus writes R. Yosef Eliyahu Henkin, of blessed memory, in his *Peirushei Ivra,* no.1, sec. 44. Indeed, as recorded in *Shulhan Arukh, Even ha-Ezer* 39:5, unless made the subject of an express stipulation, presence of a serious physical defect in the bride renders the validity of the marriage doubtful but does not render the marriage voidable as a matter of halakhic certainty. The specific physical defects that give rise to a state of uncertainty with regard to the existence of valid marriage

are spelled out in detail. The effect of the ruling codified by *Shulhan Arukh* declaring the marriage to be of doubtful validity is that if the woman in question wishes to enter into a marital relationship with another man she must first secure a *get* but, should the woman attempt to contract a marriage with a second man without benefit of a previously executed *get,* a *get* from the second man would be required as well.

As recorded by the Gemara, *Ketubot* 13b, Rava explains that the marriage of a woman afflicted with such an undisclosed defect is of doubtful validity because we do not know whether or not people are "insistent" that their wives be free from such defects. In their respective commentaries to *Ketubot* 73b, Rashi and Ramah explain that the doubt arises from an inability to assess the mindset of the generality of people (*stam bnei adam*) entering into a marital relationship. The issue is whether the generality of men would refuse to enter into a marital relationship with a woman afflicted with such a defect, in which case the marriage is void for reason of fraud or mistake, or whether there is no reason to assume that the generality of people would refuse to enter into a marital relationship because of the presence such a defect, in which case there are no grounds to void the marriage. As explained at length by R. Yosef Dov Soloveitchik, *Bet ha-Levi*, III, no. 4, and by Rabbi Henkin, *Peirushei Ivra*, no. 1, sec. 35, a mental reservation by one of the contracting parties cannot serve to void a contract. Only an assumption recognized by the public at large as an implied condition can be deemed to rise to the level of an express condition upon which it may be presumed that the contract is predicated. Rabbenu Nissim, *ad locum,* explains the doubt with regard to the validity of such marriages in a somewhat different manner. According to Rabbenu Nissim, the absence of a defect may indeed be an implied condition of entry into the marital covenant but there is nevertheless doubt with regard to whether or not fulfillment of that condition is forgiven upon consummation of the marriage.

However, *Tosefot*, *Yevamot* 2b, *Ketubot* 72b and *Gittin* 46b, demonstrate that there is at least one defect that, as a matter of certainty, serves to defeat the marriage, *viz.*, a physical defect that renders the woman an *eilonit,* a woman who manifests certain physical criteria indicating that she is incapable of bearing children. Regarding the contingency of an *eilonit,* argue *Tosafot*, there is no doubt as to the state of mind of the parties. Unless there is explicit evidence to the contrary, there is a general presumption that a man would not knowingly enter into a marriage with a woman incapable of bearing children. *Tosafot*'s ruling with regard to an *eilonit* is confirmed by *Bet Shmu'el*, *Even ha-*

Ezer 35:19. Although this ruling reflects the consensus of most early-day authorities, it is not a position that is held unanimously. Although Me'iri himself agrees with *Tosafot*, nevertheless, in his commentary on *Yevamot* 2b, s.v. *ve-nimze'u eilonit*, and *Kiddushin* 50a, s.v. *ve-ha-Mishnah ha-shishit*, Me'iri cites an earlier authority who maintains that physical symptoms demonstrating that the woman is an *eilonit* do not constitute a salient defect serving to invalidate a marriage. Moreover, in his commentary to *Kiddushin* 50a, Me'iri cites this authority as maintaining, that symptoms of *eilonut* do not invalidate a marriage even if the groom expressly stipulates that the marriage is predicated upon the absence of a "defect." The position that an undisclosed condition of *eilonut* is not a defect serving to defeat the validity of a marriage is attributed to Rabbenu Tam by Ramban and Rashba in their respective commentaries to *Yevamot* 2b. That view is indeed presented by Rabbenu Tam in his *Sefer ha-Yashar*[8a] (Jerusalem, 5719), no. 175.[9] This position is also espoused by *Maggid Mishneh, Hilkhot Ishut* 4:10, and attributed by him to Rambam as well.[10]

The condition of *eilonut* is the only defect for which *Tosafot* adduce talmudic proof establishing that the defect serves as grounds for nullifying a marriage as a matter of certainty rather than merely rendering the marriage a marriage of questionable or doubtful validity. Whether there are additional defects of a like nature is a matter of considerable question and controversy. The enumerated defects that result in a marriage that is doubtfully or possibly voidable are the defects that disqualify a priest from participating in the sacrificial service as well as other defects related to feminine pulchritude and attractiveness. None of those defects seriously impairs functionality. Hence it is quite conceivable that, even if the defect had been disclosed, the groom would have accepted the woman as a marriage partner. In contradistinction, physical incapacity to bear children goes to the crux of the marital relationship and, accordingly, it is presumed that everyone recognizes that the generality of men would not knowingly enter into marriage with an *eilonit*.[11] There are many other defects that render a person dysfunctional to a greater or lesser degree and hence fall between these extremes. Whether the generality of men would accept such defects, and hence whether their undisclosed presence renders the marriage voidable, is a matter of considerable dispute.[12] Even if it is accepted that the class of defects that render a marriage voidable as a matter of certainty is not limited to *eilonut*, identification of other members of the class of such defects is fraught with difficulty. Thus, for example, Rabbenu Shimshon and *Or Zaru'a* differ with regard to whether blindness is to be equated with *eilonut* as constituting such a

defect. Similarly, *Bet ha-Levi*, II, no. 4, sec. 2, expresses uncertainty with regard to whether epilepsy is a defect comparable to *eilonut*.

Among latter-day decisors, R. Chaim Ozer Grodzinski, *Teshuvot Ahi'ezer*, I, no. 27, sec. 3, rules that, in the presence of an undisclosed "grave defect," no *get* is required. This is also the position of R. Moshe Feinstein, *Iggerot Mosheh*, I, nos. 79 and 80; *Even ha-Ezer*, III, nos. 45, 46, 48 and 49; and *Even ha-Ezer*, IV, nos. 13, sec. 4, 83 and 113.[13] *Ahi'ezer* infers from terminology employed by Rambam, *Hilkhot Ishut* 7:8, that this was Rambam's view as well. Rambam speaks of "doubtful marriage" in cases in which the defect is one which "disqualifies" a woman, i.e., a defect that significantly detracts from feminine attractiveness. The inference to be drawn is that more serious defects affecting functionality result in unequivocal grounds for annulment of the marriage. Rivash and Maharit, cited by *Shitah Mekubezet*, *Ketubot* 72b, maintain that a marriage in which the bride has not disclosed a salient defect is of questionable validity only if the defect is "minor," i.e., essentially aesthetic in nature, but that the marriage is unquestionably voidable if there exists an undisclosed "major" defect, e.g., epilepsy or mental illness, unless the marriage has been consummated after the groom becomes aware of the defect. In the latter case there is a presumption that, in order to avoid the transgression associated with fornication, the sexual act is performed with the intent thereby to contract a marriage. The position of Rivash and Maharit is accepted, *inter alia*, by *Teshuvot Malbushei Yom Tov*, no. 4, and *Avnei Nezer*, *Even ha-Ezer*, II, no. 176. Similarly, *Bet ha-Levi*, III, no. 4, states that he is "inclined to rule" that no *get* is necessary in the presence of "a grave defect" in the bride. On the other hand, R. Jacob Reischer, *Teshuvot Shevut Ya'akov*, I, no. 101, rules that even in the presence of "grave defects" the validity of the marriage remains doubtful and a *get* is required.[14] Rabbi Henkin, *Peirushei Ivra*, no. 1, sec. 47, comments that "since from the days of the Talmud [until the present] we have not heard and we have not known of annulment of a marriage, particularly after *nisu'in* [i.e., consummation], because of a defect, we therefore know that all [defects] are included in [the] doubt [regarding the validity of a marriage]."

Even if the permissive opinion regarding annulment of marriage in the case of an undisclosed serious defect is accepted as normative, that determination would not, in itself, provide a basis for resolution of the *agunah* problem. The various talmudic discussions concerning a marriage expressly conditioned upon the absence of defects as well as those concerning fraud or mistake based on failure to disclose an existing defect address themselves to defects present in the bride. There is no

mention in those discussions of defects present in the groom as grounds for annulment, nor is there any mention of defects of the groom either by Rambam or *Shulhan Arukh*.[15] Nevertheless, *Bet Shmu'el*, *Even ha-Ezer* 154:2, does assert that the two situations are comparable with the result that "if [the bride] did not know [of the defect] the transaction is erroneous and we compel [the husband] to divorce her."[16] A number of scholars, including *Hazon Ish*, *Even ha-Ezer* 69:23, comment that *Bet Shmu'el*'s ruling reflects the notion that the marriage must be regarded to be of doubtful validity and hence a *get* is required. Thus *Bet Shmu'el*'s ruling with regard to the failure of the groom to disclose a salient defect is analagous to the ruling of *Shulhan Arukh* with regard to the bride's failure to disclose the existence of a salient defect.

Bet Shmu'el's ruling is however disputed by *Bet Me'ir*, *Even ha-Ezer* 154:1. Indeed, *Bet Shmu'el* himself cites a conflicting view in the name of *Bah*. *Bet Me'ir* contends that, as recorded in *Ketubot* 75b, the talmudic presumption is that a male does not readily accept physical defects in a bride, whereas a woman is much more willing to overlook the physical defects of a prospective husband. The latter principle is reflected in the comments of the Gemara, *Ketubot* 75a, and, even more strikingly, *Bava Kamma* 110b. A similar objection to *Bet Shmu'el*'s position is expressed by *Hazon Ish*. Indeed, *Bet Shmu'el*, *Even ha-Ezer* 154:9, himself recognizes this distinction in stating that not every defect in a female is similarly categorized as a defect in a male. Thus, for some authorities, epilepsy is deemed to be a salient defect in a female but not in a male.

3. Tav le-Meitav Tan Du

To a significant extent this controversy centers upon an analysis of the frequently quoted, but often misunderstood, statement of the Gemara, *Bava Kamma* 110b: "*Tav le-meitav tan du mi-le-meitav armelu*—Better to dwell as two than to dwell alone." The import of that aphorism can be understood only from the context in which it is formulated. The Gemara queries why it is that a woman whose husband dies without issue and whose brother-in-law is a *mukeh shehin*, i.e., afflicted with a dermatological condition that renders cohabitation repulsive, cannot avoid the need for *halizah* on the plea that she had no intention of entering into a marriage that would result in a levirate relationship with a male who is physically repulsive.[17] The Gemara responds: "We are witnesses that she is satisfied with a minimum (*kol dehu*) as Resh Lakish has said 'Better to dwell as two than to dwell alone.'" Taken literally, the Gemara would be understood as stating that women have such a compelling desire for marriage that they will accept any defect in a marriage

partner and will even acquiesce to a marital relationship with a man who is physically repulsive. However, Rashi, *Ketubot* 111a, understands the Gemara as stating something quite different. Rashi adds the comment that it is because a woman is satisfied "with a minimum" that she is willing "to marry the first [husband]" despite the possibility that he may die without issue and as a result she may find herself subject to a levirate relationship with a *mukeh shehin*.

Rashi's comment readily lends itself to the inference that a woman is willing to accept the possibility of such a contingency only as part of the bargain of a normal marriage. The thrust of Rashi's statement is that a woman is willing to assume the risk of a future levirate relationship with a *mukeh shehin* as the price that must be paid in return for a normal first marriage, but she would not initially enter into such a relationship. Hence it should be concluded that if, unknown to the bride, the groom is himself a *mukeh shehin*, the marriage may be abrogated without a *get*. If Rashi's comment is understood as explaining that a woman entering into a marriage is concerned only with regard to her relationship with her present husband and that she is willing to ignore a situation that she may face upon his death, it is arguable that the marriage is valid not only if the brother-in-law is a *mukeh shehin* with whom a relationship is physically possible, albeit repugnant, but also with a brother-in-law incapable of any type of relationship, e.g., a person in a vegetative state or, to take an example repeatedly discussed in the responsa literature, a person who is impotent.[18]

An analogous case is described by *Mordekhai*, *Yevamot*, sec. 29. *Mordekhai* cites a statement of *Teshuvot ha-Ge'onim* declaring that the marriage of a childless widow confronted by a brother-in-law who is an apostate is to be regarded as retroactively null and void and, accordingly, the widow does not require *halizah*.[19] That position, *Mordekhai* explains, is based on the assumption that, since a woman cannot maintain any type of relationship with an apostate,[20] had she known that such a situation would arise, she would, *ab initio*, have refused to enter into the marriage. *Mordekhai* further cites a conflicting statement found in Rashi's responsa in which Rashi disagrees with the *Teshuvot ha-Ge'onim* and requires *halizah*. *Bet ha-Levi*, III, no. 3, explains that Rashi's ruling as recorded in this quoted responsum is consistent with his explanatory remark in his talmudic commentary, i.e., women will accept an adverse future contingency in order to obtain the benefits of a normal marriage. According to Rashi, the "*kol dehu*" to which reference is made by the Gemara refers to the initial marriage and connotes acceptance of whatever the future may have in store.

However, Rashi's understanding of the *kol dehu* that a woman is willing to accept is not universally acknowledged. As explained by *Mordekhai* in the name of Maharam, *Teshuvot ha-Ge'onim* understands the phrase as referring to the marital qualifications of the brother-in-law. Hence the term is understood as reflecting the woman's acquiescence to marriage if even minimal satisfaction is possible in a future levirate relationship, but not if there can be no satisfaction at all.[21] It is significant to note that *Bet ha-Levi* cites an earlier scholar, *Teshuvot Radakh*, who asserts that, even according to Rashi, the marriage is valid only if there is at least some minimum benefit to the wife in the levirate relationship. On this analysis, the opinion expressed by Rashi in his responsum indicating that *halizah* is required in the case of a brother-in-law who is an apostate is predicated upon the notion that there may be some benefit to the woman even in marriage to an apostate.[22]

The sole ambiguity and the only matter of dispute with regard to interpretation of Rashi's view is in a case in which the brother-in-law is totally dysfunctional. It is however clear from Rashi's comment that if, unknown to the bride, the groom is himself a *mukeh shehin*, no *get* is required. Nevertheless, *Bet ha-Levi* notes that even "grave defects" in a female result only in doubtful nullification of a marriage and for that reason he maintains that even in the case of a "grave defect" in the husband a *get* is necessary to dissolve the marriage. However, consistent with the position that a "grave defect" in a woman may lead to annulment of a marriage with certainty, *Teshuvot Helkat Yo'av*, no. 24, rules that the same is true with regard to an undisclosed "grave defect" in the groom. R. Moshe Yonah Zweig, *Ohel Mosheh*, II, no. 123, expresses a similar view and remarks that determination of whether a specific defect constitutes a "grave defect" is to be determined by the judgment of the *bet din*.

As has been pointed out earlier, since women are more likely than men to compromise on such matters, the particular undisclosed defects that may invalidate a marriage are not identical in both males and females. Some authorities maintain that in males such defects are limited to those defects that render intercourse repulsive; others maintain that a marriage may be annulled on the basis of any defect in the male which, when it develops after marriage, constitutes grounds for compelling a divorce. The parameters of the latter category are themselves a matter of controversy, as evidenced, for example, by the dispute among early authorities with regard to whether or not epilepsy constitutes such grounds.[23]

In formulating their grounds for annulment in the form of "*Kiddushei Ta'ut I*" the authors write:

> . . . a beit din may recognize other intolerable defects in the husband as grounds for a declaration of kiddushei ta'ut. These defects—which are in total discord with any reasonable concept of marriage—include physical and psychological abuse, adultery (which more than ever endangers the life of the spouse), sexual molestation, abandonment, criminal activity, substance abuse, and sadism (the withholding of a get may be viewed as indicating a sadistic nature). . . .
>
> The method of freeing a woman based on a finding of kiddushei ta'ut I is buttressed by the insight of Rav Yitzchok Elchanan Spektor who wrote a century ago that when a defect in the husband justifies coercion of the get, the Talmudic presumption of tav l'metav tan du mil'metav armelu—a woman is better off married to anyone than being alone—is not applicable. (Ein Yitzchok Vol. I 24:41.)[24] Once this presumption is suspended, a woman can credibly testify that had she known of salient defects in her husband she would have chosen not to marry, the marriage was a mistake, she would be better off alone.

Not only do the authors assert that a defect arising after solemnization of the marriage constitutes grounds for annulment but that any defect that may serve as grounds to compel the husband to sever the marital relationship by means of a *get*, *mutatis mutandis*, constitutes grounds for annulment.[24a] The position that the presumption of *tav le-meitav tan du me-le-meitav armelu* does not apply to any defect that justifies coercion of a *get* is hardly unique to R. Issac Elchanan Spektor.[25] The identical thesis was formulated by R. David Friedman of Karlin in his *Piskei Halakhot*, *Yad David*, *Hilkhot Ishut*, sec. 10; R. Zevi Hirsh Orenstein, *Teshuvot Birkat Rezeh*, no. 107; R. Chaim Ozer Grodzinski, *Teshuvot Ahi'ezer*, no. 27, sec. 4; R. Moshe Feinstein, *Iggerot Mosheh*, *Even ha-Ezer*, I, no. 79[26]; as well as by others.[27]

Invoking this position in annulling the marriage of a husband who withholds a *get* is inapt for two reasons: (1) In order to serve as grounds for annulment the defect must have existed prior to the marriage. (2) The defect must be one that, had it developed subsequent to marriage, would warrant coercion in order to compel granting of the *get*. The authors provide a long list of "defects" in the husband which they allege constitute grounds for a declaration of *kiddushei ta'ut*, some of which may indeed be grounds for coercion of a *get*, some of which are the subject of considerable dispute with regard to whether or not they constitute grounds for compelling a *get*, and some of which do not constitute grounds for coercion of a *get* by any stretch of the imagination.

The most egregious example of the latter is "withholding a *get.*" "Withholding a *get*" is categorized by the authors "as indicating a sadistic nature." It is superfluous to debate whether the withholding of a *get* is *ipso facto* evidence of sadism or even whether sadism constitutes grounds for annulment. Suffice it to say that the authors' sweeping assertion is contradicted by a two thousand-year corpus of Jewish divorce law. The authors categorically declare that: (1) every woman is entitled to demand a *get* upon breakdown of the marriage; (2) failure of the husband to comply is indicative of sadism; and (3) sadism is grounds for compelling a divorce. Accordingly, they assert that, since any defect constituting grounds for compelling a *get* is *ipso facto* also grounds for an annulment, there is really no reason to go to the trouble of executing a *get*, much less of forcing the husband to do so! Hence, it follows that, if a woman desires a divorce and the husband does not acquiesce, a *get* is never necessary. Talmudic discussions regarding specific and particular grounds for compelling a *get* are irrelevant; the codification of such provisions are superfluous; and perusal of the learned responsa honing the application of such criteria is a waste of time! It must be emphasized that, in the very limited instances in which the principle *tav le-meitav tan du* is set aside, the wife must present credible evidence that (1) the defect existed at the time of the marriage and (2) she was unaware of the defect at the time of the marriage.

The authors further inform us:

> The argument that women prefer to remain single rather than endure a miserable marriage is even more persuasive today given the increased economic and social autonomy women have achieved in our times . . . [and hence] [t]he concept of tav l'metav is outmoded and no longer an impediment to declaring kiddushei ta'ut.[28]

That statement betrays a fundamental misunderstanding of the technical halakhic application of the principle encapsulated in the aphorism "*tav le-meitav tan du.*" As cited in the relevant talmudic discussion, the aphorism is neither reflective of a psychological truism descriptive of all women nor of a sociological generalization regarding the reactions of the majority of women. Hence, any consideration of the possibility of *nishtaneh ha-teva*, i.e., that sociological, psychological, economic and attitudinal facts or values may have changed, is irrelevant.[29]

R. Moshe Feinstein, *Iggerot Mosheh, Even ha-Ezer*, I, no. 79, *anaf* 1, adduces comments of the Gemara and of *Tosafot* indicating that women of the talmudic period relished the prospect of marriage to a

mukeh shehin no more so than do their progeny in our day. In his earlier cited discussion, *Bet ha-Levi* notes a certain discrepancy between the notion that women are satisfied with a *mukeh shehin* and the rule that provides that a husband who develops such a condition may be compelled to divorce his wife.[30] *Bet ha-Levi* remarks that the problem is dispelled upon recognition that the Gemara is not making a universal statement applicable to all women but simply acknowledges the possibility that some small number of women might prefer the consort and companionship of a *mukeh shehin* to a life of spinsterhood. In formulating the query regarding the validity of a marriage in which *tav le-meitav tan du* is cited as a response, the Gemara seeks retroactively to invalidate a marriage when, with the passage of time, the wife is confronted with the prospect of a levirate marriage to a *mukeh shehin*. In posing the question, the Gemara assumes that the original marriage was conditioned upon the non-occurrence of such an event. This is assumed by the Gemara despite the fact that no express condition to that effect was formulated by the parties. Accordingly, if such is a condition of the marriage, it must be an implied condition; but an implied condition can invalidate an act only if it is commonly assumed to be a condition of the act. In formulating the question, asserts *Bet ha-Levi*, the Gemara assumed that (1) every marriage is conditioned upon the brother-in-law not being a *mukeh shehin* and (2) it is not necessary expressly to formulate that condition since it is commonly assumed that a marriage is predicated upon the acceptance of that condition. As with all conditions of marriage, if the condition subsequent is violated or unfulfilled the marriage is retroactively and automatically null and void. To this the Gemara responds that, since there *are* women who will accept a *mukeh shehin* as a husband, no such condition may be imputed. The existence of some women who deign to marry a *mukeh shehin*, although they may be few in number, serves to defeat the presumption of what would otherwise be an implied condition of the marriage.

Bet ha-Levi then proceeds to distinguish between retroactive nullification of a marriage that is a possibility only when the marriage is conditional in nature and voidance of a marriage on grounds of mistake.[31] An undisclosed defect in merchandise invalidates a sale even if some people may be found who are willing to pay full price for the merchandise despite the defect. A sale of that nature is voidable because of lack of intent on the part of the purchaser to consummate the purchase of defective merchandise; the sale is not void *ab initio* because of violation of a condition precedent. Hence, there is no need to stipulate that the merchandise is warrantied to be free from defects; lack of intent to

effect a purchase of defective merchandise is sufficient to rescind the sale.[32] It is for that reason, argues *Bet ha-Levi,* that if the husband is himself a *mukeh shehin* a *get* is not necessary. Such a marriage is annulled, not because its validity has been defeated by a future occurrence, but because it was rooted in mistake *ab initio.*[33] This distinction serves to explain the basis of the inference to be drawn from Rashi's comment to the effect that if the husband is himself found to be a *mukeh shehin* the marriage is invalid.

Be that as it may, it is certain that the Gemara's employment of the concept of *tav le-meitav tan du* establishes only that *some* women are willing to accept such a relationship and hence that, if a brother-in law is in a position to exercise the prerogative of levirate marriage as a *mukeh shehin*, the marriage cannot be nullified retroactively. This is precisely the point made by Rabbi Henkin in his earlier cited comment. Since men afflicted by the various character flaws categorized by the authors as salient defects frequently do find mates even upon due disclosure of such defects, it is quite evident that, even in our era, at least some women find males of flawed character to be acceptable marriage partners.

KIDDUSHEI TA'UT II

The second ground for annulling marriages advanced by the authors is applicable, they contend, in all cases in which Jewish law provides for compelling a divorce but in which the *get* cannot be compelled by virtue of the fact that rabbinic courts in the diaspora lack police power to enforce their judgments. Accordingly they argue:

> Today the unavailability of kefiyah is the firm halachic basis for liberating agunot on the grounds of KIDDUSHEI TA'UT II, a lack of informed consent by the bride. For had these women known at the time of marriage that they were agreeing to a union in which they could be virtually imprisoned by an unscrupulous husband, they never would have consented—kiddushei ta'ut. When rabbis tell these women that they are shackled forever to vicious husbands, these women can rightfully say, "Had I known that this was the nature of the marriage relationship, I never would have wed. I did not enter this marriage surrendering control of my life to my husband no matter how abusive he might be."

The argument is that, had women known that *kefiyah* is unavailable, they would not have entered into the marital relationship in the first instance.

As a psycho-social assertion, the argument is simply contrafactual. Virtually all Jewish women acquainted with the term "*get*" are aware of the fact that a husband can withhold a *get*. It is this writer's impression that a significant number, and probably the vast majority, of such women are unaware of even the theoretical possibility of *kefiyah*. Assuredly, no woman presumes that it is within the province of rabbinical courts in this country actually to compel a *get*. At present, these facts are certainly well known to any woman who reads the Anglo-Jewish press. Despite the wide and even sensationalized publicity given to the plight of modern-day *agunot*, women continue to enter into marital relationships, albeit in some cases with a marked lack of enthusiasm for the potentially onerous consequences that may result. Where then is there *kiddushei ta'ut*?

As authority for their basic argument the authors cite a comment of Rashba:

> As early as the 13th century, the Rashba must have discerned that brides would not wed if they did not trust that rabbis could free them from bad marriages by coercing a get. (See Hiddushei HaRashba Gittin 88B). It is very relevant here, even if parenthetical, to describe fully the rationale of the Rashba and his reason for justifying the exercise of physical coercion against recalcitrant husbands despite the incontestable Talmudic affirmation that rabbis have only limited power to decree corporal punishment since the conferral of Biblical Semicha (ordination) came to an end a thousand years earlier. Yet the Rashba approved of physical coercion of the husbands of "chained" women using the same reasoning that prompted the rabbis to exercise their rabbinic power to force debtors to pay their creditors what is due them, because otherwise the poor would not be able to borrow money. "The doors of creditors would be closed to them." In a similar way, the Rashba said that women would not marry if they had no exit from marriage to a man who has become their tormentor.

Unfortunately, those comments reflect a gross misreading of Rashba. The talmudic statement to which Rashba appends his comment addresses the qualifications that must be possessed by persons sitting as members of a *bet din*. According to biblical law, a judge serving on a *bet din* must be the recipient of *semikhah* or ordination conferred by persons who were themselves ordained in a like manner. Valid ordination represents an unbroken chain of succession beginning with the ordination of judges by Moses in the wilderness. As part of their attempt to

destroy Judaism as a religion, the Romans endeavored to sever the chain of succession in order to make it impossible for *batei din* to function. The Gemara, *Sanhedrin* 14a, reports that the Roman persecutors made both the conferral and receiving of ordination a capital offense and further decreed the entire city in which ordination was conferred to be guilty by association. Despite the valiant and sacrificial efforts of some prominent rabbinic leaders of the day, the Romans eventually succeeded in suppressing *semikhah.*

During the period of the later Amora'im there were no longer any surviving ordainees. Yet, the *batei din* continued to function in at least a limited manner. The Gemara justifies that practice by declaring that rabbinic judges continue to serve because in their performance of judicial functions they merely "perform the agency of the earlier ones." Thus, the members of the *bet din* do not enforce their own personal authority upon litigants who appear before them but act simply as agents of the fully qualified judges of earlier generations.[34]

The Gemara, however, declares that the doctrine of agency can be invoked only with regard to adjudication of matters that occur with frequency, e.g., matters pertaining to acknowledged undertakings and debts. Robbery and assault are explicitly excluded from the jurisdiction of contemporary courts whose members lack the original form of ordination.

Rashba proceeds to question the authority of a *bet din* to engage in duress for the purpose of effecting a *get* in those limited cases in which *kefiyah* is justified. Such occurrences are certainly not usual and frequent (*shekhihi*) as are matters pertaining to repayment of debts and the like. Since the authority of the *bet din* is apparently limited to matters that are customary and usual, the *bet din* should be powerless to compel a *get* under any circumstances. Rashba does not raise this question directly but obviates the unasked question with an extremely brief comment:

> And [with regard to] divorce also, the fundamental reason that we act as their agents is in order not to shut the door in the face of borrowers as it is stated in *Sanhedrin* 3a. *Gittin* are similar to acknowledgment of debts for, if they cannot marry men, daughters of Israel will be *agunot.*

Rashba does no more than state the consequences of failure to apply duress, *viz.*, the affected women will not be able to enter into new marital relationships. He does not declare that women will refuse to marry in the first instance, just as future creditors might withhold credit. Rashba states simply that *we* do not wish women to be *agunot* just as

we do not want would-be borrowers to be denied credit. Public policy requires that a woman be enabled to become free from the bonds of a dead marriage just as public policy requires us to promote ready availability of credit. That policy consideration, asserts Rashba, is sufficient to generate agency in present-day rabbinic courts even if situations requiring compelling a *get* are few and infrequent.[35]

The authors have apparently read the words "for if they cannot marry men" as referring, not to the present unhappy state of the woman who is not free to remarry by reason of inability to obtain a *get*, but to an unmarried woman surveying the possibility that her contemplated marriage will break down under circumstances in which, at least in theory, a *get* may be compelled. The authors understand Rashba as declaring that, were the *bet din* not authorized to enforce a *get* in such circumstances, women would not enter into a marriage in the first instance.

Were this interpretation logically tenable, it would be a possible, albeit strained, reading of the text. However, the concern putatively ascribed to women by Rashba is misplaced. Why is the prospective bride who is concerned that the *bet din* is not competent to compel a *get* when grounds for duress do exist not equally concerned that there may be a breakdown of the marriage but that the *bet din* will not find grounds for *kefiyah*? After all, grounds for compelling a *get* exist in only a small proportion of divorce cases. Acknowledgment that an unordained *bet din* is authorized to compel a *get* in rare cases in which grounds for *kefiyah* exist should hardly assuage the qualms of a bride reluctant to enter into a marital relationship because of a fear that she may become an *agunah*. Women enter into marriage either with the firm conviction that there will not be an irreparable breakdown of the relationship followed by the witholding of a *get* or with the determination that acceptance of such a remote contingency is a prudent risk. The lack of power on the part of a *bet din* to compel a *get* in the rare cases in which there might exist valid grounds to do so would hardly be a material factor in any such decision.

Moreover, for a woman to reject marriage because of fear of becoming an *agunah* is totally irrational. The tragedy of an *agunah* is that she is not free to establish a second, viable marital relationship. Denying oneself *any* marital relationship is naught but rejection of a possible, but doubtful, state of *igun* for a definite life-long unmarried state that is tantamount to *igun*.

More fundamentally, even accepting the authors' reading of Rashba, there is no hint in the words of Rashba that failure to disclose the *bet din*'s inability to compel a *get* constitutes grounds for annulment. At

most, Rashba is saying that *some* women would not marry under such circumstances and hence their concern must be addressed by vesting the *bet din* with authority to coerce the husband. Rashba does not say that all women, or even most women, would refuse to enter into marriage under such circumstances. Indeed, even with regard to the extension of credit cited by Rashba by way of analogy, there is no talmudic statement to the effect that, absent a functioning judiciary, no person will extend credit. At most, Rashba's comment may be construed as an assertion that *some* women, if informed, will spurn marriage because of the *bet din*'s inability to compel a *get*. As has been stated earlier, considerations of a like nature may be entertained as possible grounds for annulment only if it is universally known that women in general will not enter into marriage under such circumstances. Accordingly, there is no basis whatsoever for attributing to Rashba the position that inability to compel a *get*, in and of itself, entails *kiddushei ta'ut*.

KIDDUSHEI TA'UT III

The final ground for invalidating a marriage on the basis of error or mistake is based upon a rather curious argument advanced by Professor Meir Simchah Feldblum in a recent article titled "Ba'ayot Agunot u-Mamzerim—Haza'at Pitaron Makifah ve-Kollelet" that appears in *Dine Yisra'el*, XIX (5757-5758). In essence, Professor Feldblum contends that (1) women are unaware of the true nature of halakhic marriage and (2) there exists "an *umdena*, even an *umdena de-mukhah*" that, were women actually aware of the technical nature of marriage, they would not consent to enter into a halakhically valid marital relationship. That contention is presented almost as an aside in the context of a far more elaborate argument in the form of a proposal that halakhic marriage be replaced, at least in some circles, by an entirely different type of relationship. The nature of that relationship and the halakhic considerations precluding its advocacy are beyond the scope of this discussion and will be addressed, God willing, in a future contribution. Apparently in an endeavor to show that his proposal does not call for instituting a novel type of relationship, Professor Feldblum argues that such relationships already exist *de facto* since, in at least some circles, all marriages are void for lack of consent to marriage as postulated by Halakhah.

Wherein lies the ignorance ascribed to modern-day brides? Precisely what it is that women do not know about the nature of halakhic matrimony? Here, at least to this reader, Professor Feldblum's brief

comments are less than clear. Although he conflates the two factors, he seems to focus upon two separate aspects of the matrimonial relationship: (1) that it is within the power of the husband to withhold a *get* and thereby prevent dissolution of the marriage ; and (2) that there is an "aspect of *kinyan*" associated with marriage.[36]

Neither argument is well-taken. The first argument must be dismissed for at least three reasons:

1. It is quite easy to find brides who do not envision that their grooms would withhold a *get* in the (to them) remote contingency of a breakdown of the marital relationship. But it is inordinately difficult to identify a bride entering into marriage with *huppah ve-kiddushin* who does not recognize both that a *get* is necessary to terminate the relationship and that cooperation of the husband is *a sine qua non* of the execution of a *get*. It is even more unlikely that in Israel, where civil divorce does not exist, and *agunah* cases are frequently the subject of coverage by the national press, such ignorance could be widespread. It may be noted that Professor Feldblum's proposal and the arguments supporting it are apparently directed to the Israeli Chief Rabbinate as evidenced by his insistence that the proposal is preferable to introduction of civil marriage.

2. Consummated acts and transactions can be rendered nugatory only on the basis of demonstrable error. In the absence of objective evidence of error there must be an *umdena de-mukhah*,. i.e., a general presumption so widespread that the halakhic system can take "judicial notice" that the information or intention is known by all or, as in the case under discussion, that no one possesses the item of information in question and, furthermore, there must be an *umdena de-mukhah* that no one possessing such information would have acted in a like manner. Assuredly, ignorance of the need for the husband's cooperation in the execution of a *get* cannot be so widespread that it rises to a presumption with regard to all brides.

3. Assuming, for the sake of the argument, that the factual allegations made by Professor Feldblum are accurate, i.e., that no woman who is a member of the circles described by Professor Feldblum is aware of the requirement that a *get* can be executed other than as a voluntary act on the part of the husband, there is nevertheless no basis for the conclusion that the marriage is void or voidable on grounds of error. In commercial transactions, for example, a seller's erroneous (but demonstrable) presumption that he enjoys the prerogative, under certain circumstances, of repurchasing the merchandise he has conveyed to the purchaser does not, when his assumption proves to be incorrect,

constitute grounds for voiding the sale. To be sure, in order to enter into a valid marriage, a woman must understand the nature of marriage, but any misimpression she may have with regard to the method, mode or manner of terminating the marriage does not serve to render the marriage *kiddushei ta'ut*. To take another example, many otherwise fairly knowledgeable women are uninformed with regard to levirate obligations that impede the remarriage of a widow. Yet, no one has been heard to argue that failure to realize that death of the husband does not always sever the marital bond totally and completely constitutes grounds for annulment.

The second ground that Professor Feldblum advances for invalidating a marriage requires further scrutiny because it goes to the nature of the marital relationship itself rather than to its termination. Professor Feldblum accurately reports that many women are unaware of the "*kinyan* aspect" of marriage. Professor Feldblum then argues that in an age of gender equality women do not want to be treated as a chattel to be "acquired" by their husbands. Hence, he argues, with regard to at least a certain class of women, there is an *umdena de-mukhah* that they did not agree to enter into the only type of relationship that Halakhah recognizes as matrimony.

The technical aspects of halakhic marriage are even more extreme than portrayed by Professor Feldblum. The legalistic essence of marriage is, in effect, an exclusive conjugal servitude conveyed by the bride to the groom.[37] All other rights, responsibilities, duties and perquisites are secondary and flow therefrom. The three methods of solemnizing a marriage, i.e., *kesef, shetar* and *bi'ah*, parallel the conveyances prescribed for the transfer of real property. Title to real estate is transferred by payment of the purchase price; marriage is effected by *kesef*, delivery of an object of value, usually specie in the form of a ring, by the groom (the "purchaser") to the bride. Transfer of real property can be effected by delivery of a deed; a man can acquire a woman as a wife by delivery to her of a *shetar kiddushin*. Real property can be transferred by *hazakah*, i.e., the recipient performing an overt act demonstrating proprietorship, e.g., plowing a furrow (a mode of transfer that is the precursor of livery of siesen in common law). *Bi'ah*, or cohabitation for purposes of marriage, is the counterpart of *hazakah*; it is an overt demonstration of the exercise of the servitude that is being acquired. Understanding that the essence of marriage lies in a conveyance of a "property" interest by the bride to the groom serves to explain why it is that only the husband can dissolve the marriage. As the beneficiary of the servitude, divestiture requires the husband's voluntary surrender of the right that he has acquired.

Some women may well find this legalistic categorization demeaning. It is not inconceivable that some women, upon being informed of the halakhic nature of marriage, may refuse to enter into such a relationship. Nevertheless, there is certainly no *umdena de-mukhah* that a woman who does enter into such a relationship would not do so if fully informed. Halakhah does not demand that a bride be conversant with the technical nature of the relationship.[38] She must be aware only of the restrictions arising from marriage, not of the legal niceties describing those restrictions. A perceptive woman will quickly recognize that legalistic descriptions of the relationship are far less significant than the actual interpersonal and emotional nature of a marital relationship. Despite the technical nature of the conjugal rights vested in the husband which effectively serves to erect a legal barrier to any adulterous relationship, Jewish law does not treat women as chattels that can be sold, bartered, exchanged or used at the discretion and whim of the proprietor. The sole right of which the bride is divested is the capacity to contract a marriage with any other male. Nor can she be compelled to allow her husband to exercise the conjugal right that she has conveyed to him, although if she refuses to do so she may justifiably be divorced with forfeiture of the monetary settlement to which she is otherwise entitled under the terms of the *ketubah*.

One further point must be noted. Professor Feldblum fails to address the principle of *tav le-meitav tan du me-le-meitav armelu*. Particularly in Israel where there is no option of civil marriage, and even in the diaspora when the groom insists upon a religious marriage, a woman may accept halakhic marriage even if she finds the nature of halakhic marriage distasteful because of an overriding desire not to remain single. At the very minimum, that desire serves as a countervailing motive with the result that there is certainly no evidence of automatic rejection of halakhic marriage.

Professor Feldblum postulates an *undema* for annulment of marriage only with regard to marriages involving women who are religiously unobservant. He apparently believes that egalitarianism is strong only among the non-observant whereas the observant would not reject halakhic marriage despite its alleged offensive nature. However, the authors of the advertisement in the *Jewish Week* tell us:

> Our actual experience with agunot exceeds that of Professor Feldblum and has led us to conclude that *no* [emphasis added] woman views marriage as a transaction in which her husband "acquires" her. No one can credibly maintain today that brides are consenting to the concept of

> "gufah kanui," that marriage is a kinyan in which the husband acquires title to the wife's body . . . Thus there is no informed consent by women to kinyan at the time of marriage and the marriage is void ab initio . . .

With one fell swoop *all* marriages have been nullified! Surely no rabbi who has ever officiated at a wedding ceremony subscribes to that misguided view.

In point of fact, this description of halakhic marriage is grossly overstated. The husband does not acquire "title to the wife's body." A wife is not a slave. The husband acquires a servitude rather than title to her body—an extremely important legal distinction.[39] Nor is there reason to believe that religiously committed women of yesteryear would have reacted any differently from religiously committed women of today. If our marriages are invalid, so were those of our parents and grandparents.

An autobiographical comment may be in order. For many years I have taught a survey course in Jewish law at the Benjamin N. Cardozo School of Law. The students are of diverse backgrounds and many are non-observant. It has been my unfailing practice to describe the technical halakhic nature of marriage in the manner outlined above. I have heard no report of any student, male or female, declining *huppah ve-kiddushin* as a result of this newly acquired information.[40]

"META"-PRINCIPLES

The authors append a series of declarative statements, set off in a boxed and bulleted list, in an attempt to substantiate their assertion that "We are proposing [a solution] that is not only justified by the halachic authorities but mandated by them." The statements offered in support of that bald assertion range from the irrelevant though the misleading to the patently incorrect. Let us examine them *seriatim*.

1. "• To liberate an Agunah one must even rely on minority views. (Taz Even Haezer 17:15, Taz Yoreh Deah 193:4)"

A statement to that effect does appear in *Taz*, *Even ha-Ezer* 17:15. However, of at least equal significance is the completely contradictory ruling of Rema, *Even-ha-Ezer* 17:15: "In all of these matters we rule in accordance with the stringent opinion." In that ruling, which reflects the principle that stringency is required with regard to any matter of doubt pertaining to biblical law, Rema follows a series of early-day authorities. Rema's ruling is confirmed by *Bi'ur ha-Gra*, *Even ha-Ezer*

17:61; *Helkat Mehokek*, *Even ha-Ezer* 17:31 and 17:47; *Mahazit ha-Shekel*, *Even ha-Ezer* 17:56; and *Hazon Ish*, *Even ha-Ezer* 31:12.[40]

A similar statement is recorded by *Taz*, *Yoreh De'ah* 293:4 (not 193:4). *Taz*' latter comment is not made in the context of an *agunah* question but with regard to the controversy concerning the permissibility of *hadash*, i.e., eating freshly harvested grain before Passover, in the diaspora. *Taz* remarks that the permissive minority opinion may be relied upon since "a man's life depends upon drinking barley beer and oat beer." (Apparently, the water supply was recognized, at least by Jews, to be a source of dangerous illness.) *Shakh*, in his glosses on *Taz*, *Nekudet ha-Kesef*, *ad locum*, takes sharp issue with *Taz*.

Much more significant is the point that, before entering into the question of applicable canons of halakhic decision making in instances of controversy, a controversy must exist. The authors fail to cite a single source that may accurately be claimed as authority or precedent for their innovation.

2. "• To prevent aginut, testimony does not have to meet standards of Biblical drishah and hakirah. A single witness, circumstantial evidence, and hearsay are all admissible.(Rambam, Hilchot Gerushin, 13:29.)"

The two-witness rule is suspended only with regard to testimony establishing the death of the husband. For all other matters, the two-witnesses rule remains in effect. The point has no bearing upon the issues under discussion.

3. "• Fear of mamzerut is an illusion. (See the Responsa of the Maharsham 9.)"

There are nine published volumes of *Teshuvot Maharsham*. *Teshuvot Maharsham*, I, no. 9, offers a theoretical (*le-halakhah ve-lo le-ma'aseh*) device for retroactively curing a state of *mamzerut*. That proposal as well as the reasons why even *Maharsham* was not willing to implement his scheme in practice are discussed in detail in this writer's *Contemporary Halakhic Problems,* I (New York, 1977), 162-167. Be that as it may, the solution requires the active cooperation of the husband. He must designate an agent to effect a divorce and then nullify the agency outside of the presence of the agent. The agent must then proceed to execute the *get*. Is one to assume that a recalcitrant husband who has steadfastly refused to cooperate in execution of a *get* will, upon the birth of a child to his estranged wife, designate an agent for that very purpose?

4. "• The pursuit of a more stringent post-Shulchan Aruch view of Jewish law. . . ."

Rejection of annulment in the guise advocated by the authors is by no stretch of the imagination a "pursuit of a more stringent post-Shulchan Aruch view of Jewish law." The proposal has been rejected precisely because it has no basis whatsoever in *Shulhan Arukh*.

Moreover, the contention that such rejection is a reflection of a "stringent post-Shulchan Aruch view" represents fundamental ignorance of the operation of Halakhah in this area. As Rabbi Henkin has observed, there is no mention in *Shulhan Arukh* of annulment as a vehicle for dispensing with the need for a *get*. The notion that an undisclosed "grave defect" in a female constitutes grounds for nullification of a marriage as a matter of certainty, while based upon early-day authorities who adopted such a position with regard to an *eilonit*, is not to be found in *Shulhan Arukh*. Extension of the principle in the course of the last century to include "grave defects" in the male can only be described as a post-*Shulhan Arukh* leniency. To denigrate the unexceptionable position of contemporary rabbinic scholars by accusing them of post-*Shulhan Arukh* stringency is simply a canard.[41]

A RESPONSIBLE SOLUTION: AN IMPERATIVE

Rejection of annulment as a valid means of ameliorating the plight of the *agunah* is in no way born of failure to appreciate the gravity of the problem. Rather, it reflects the simple truism that a faulty solution merely exacerbates and compounds the problem. Resolution of the *agunah* problem in a manner that taints future issue with the stigma of bastardy is a disservice both to the *agunah* and to the Jewish people.

This writer has long maintained that responsible solutions to the *agunah* dilemma are within the realm of possibility.[42] But to be viable and non-schismatic, any proposed solution must be advanced with the approbation of respected rabbinic decisors and accepted by all sectors of our community.

The need for such concerted action on the part of acknowledged *poskim* has become ever more exigent. With the escalating divorce rate, the *agunah* problem has worsened. Although there are no accurate statistics and it is more than likely that the numbers cited in the media are exaggerated, it would be specious to claim that the imperative for addressing this problem is diminished because of such hyperbole. Insofar as the tragic plight of the *agunah* is concerned, even one is too many.

NOTES

1. See *Bet Shmu'el, Even ha-Ezer* 116:3 and R. Yitzchak Elchanan Spektor, *Be'er Yizhak*, no. 3, sec. 1.
2. This writer is not aware of any authority who maintains that either diabetes or glaucoma constitutes a salient defect. These conditions are readily distinguishable from salient defects in the husband that do serve to invalidate the marriage in that the condition itself, absent complications such as blindness, does not render the individual dysfunctional.

   With regard to nullification of the sale of *shekhar* that turns to vinegar within three days, *Sema, Hoshen Mishpat* 230:14, writes that, even if at the time of the sale both the taste and smell were those of *shekhar*, it must be assumed that, "he certainly did not taste it properly." *Sema* clearly assumes that an undetectable change in chemical composition that will inevitably cause the *shekhar* to become vinegar is not a defect that invalidates a sale.
3. For an excellent analysis of the function of the will in contravening the inclination of an already determined character see C. Arthur Campbell, *In Defense of Free Will: An Inaugural Lecture* (Glasgow, 1938) and *idem*, "Is 'Free Will' a Pseudo-Problem?" *Mind,* vol. LX, no. 240 October 1951), pp. 441-465.
4. This argument for annulling marriages will strike a responsive cord in American canonists. It has been speculated that between 1980 and 1994 the Catholic Church in the United States has annulled more marriages than the Catholic Church has annulled throughout its history. See Robert H. Vasoli, *What God Has Joined Together: The Annulment Crisis in American Catholicism* (New York, 1998), p. 6. The lion's share of those annulments has been based upon a finding of "defective consent." That concept, to be sure, is not an expression of constructive lack of consent on the part of the spouse whose marital expectations have not been fulfilled, but upon the lack of intent, or "consent," of the nonperforming spouse to satisfy essential matrimonial rights and obligations. Although it is the state of mind that is crucial, the conclusion that such consent or intent was lacking is typically made on the basis of subsequent conduct during the course of the marriage.

   The elasticity of this approach has resulted in a situation that has been described as one in which it is possible to secure an annulment "at the drop of a petition." See Vasoli, p. 76. Little wonder then that an official of the Curia, the head of the Pontifical Council for the Interpretation of Legislative Texts, has described the volume of annulments issued in the United States as a "grave scandal." See *Catholic News Service*, June 3, 1993.

   There is certainly no intention on the part of this writer to suggest that those who have taken upon themselves to nullify Jewish marriages on the basis of *kiddushei ta'ut* have been consciously influenced by developments in the application of canon law. Yet, the observation "*Wie es Christelt sich, so Jüdelt es sich*" seems entirely apt. The cogency for purposes of canon law of retroactive determination of a psychological state on the basis of later conduct is a matter for canon law scholars to debate and determine. In Jewish law it is without precedent or foundation.
5. For a discussion of the sources and reliability of the narrative presented by

Tiferet Yisra'el see Shnayer Z. Leiman, "R. Israel Lipschutz: The Portrait of Moses," *Tradition*, vol. 24, no. 4 (Summer, 1989), pp. 91-98.

6. Whether consummation serves to ratify the marriage unconditionally only when previous unconditional assent was lacking on the part of the male or whether the same is true when it is the woman whose assent at the time of *eirusin* is not assumed to be unqualified is a matter of controversy. The major issue is whether the woman's concern lest she be retroactively guilty of fornication serves to make the wife amenable to marriage under all circumstances. See *Teshuvot Hatam Sofer*, *Even ha-Ezer*, II, no. 74, s.v. *ve-amnan*. Cf., however, *Mishnah le-Melekh*, *Hilkhot Geirushin* 10:18, who asserts that this consideration does not serve to motivate the female, who is passive in the sexual act, to accept marriage under all circumstances. See also *Be'er Yizhak*, no. 4, *anaf* 3 and *Iggerot Mosheh*, *Even ha-Ezer*, I, no. 79, *anaf* 3, s.v. *aval*.

   See also *Teshuvot Noda bi-Yehudah, Even ha-Ezer, Mahadura Kamma,* no. 54, s.v. *u-befrat* and *Piskei Din Rabbaniyim,* XV, 7-10, for other considerations suporting a distinction between the husband and the wife with regard to unconditional ratification of the marriage occasioned by subsequent cohabitation.

7. See Aristotle, *Nicomachean Ethics*, Book II, chap. 1.
8. See Rambam, *Eight Chapters*, chap. 4.

8a. Cf., however, the analysis and reconstruction of the text of *Sefer ha-Yashar* advanced by R. Yechiel Ya'akov Weinberg, *No'am*, V (5722), 19-32, reprinted in *idem, Seridei Esh,* III, no. 33, secs. 4-10.

9. Many latter-day authorities maintain that an undisclosed defect that renders intercourse impossible, e.g., an obstructive tumor in the genital tract, renders the marriage void even according to Rabbenu Tam. Some authorities maintain that such a defect is not condoned even if the marriage is consummated. See *Ozar ha-Poskim*, *Even ha-Ezer* 39:32, sec. 9. See also *ibid.*, sec. 11.
10. Rambam is also cited in this vein by *Tur Shulhan Arukh*, *Even ha-Ezer* 44. This position is also ascribed to Rambam by many latter-day authorities. See, for example, *Teshuvot Havot Ya'ir*, no. 101, who asserts that *eilonut* is not a defect that may serve to invalidate a marriage, but that an injury or anomaly in the male sexual organ that makes intercourse impossible does constitute such a defect. On the other hand, despite some equivocation in a later paragraph, *Teshuvot Noda bi-Yehudah*, *Even ha-Ezer*, *Mahadura Tinyana*, no. 80, s.v. *ve-amnam*, asserts that Rambam is in agreement with *Tosafot* in regarding *eilonut* as a defect that serves to nullify marriage as a matter of certainty. See also *Teshuvot Noda bi-Yehudah*, *Even ha-Ezer*, *Mahadura Kamma*, no. 78. For a further discussion of Rambam's position see R. Yechiel Ya'akov Weinberg *No'am*, V, 17-43, reprinted in *idem*, *Seridei Esh*, III, no. 33.

    See also *Peirushei Ivra*, no. 1, sec. 40, who asserts that, for Rambam, *eilonut* is to be regarded as any other salient defect with the result that if the wife proves to be an *eilonit* the marriage is of doubtful validity. However, if consummated, it should follow that the marriage is valid as a matter of certainty.

11. Nor, assert *Tosafot*, does a man in consummating the marriage intend that

the coital act serve to establish a marriage even if his wife proves to be an *eilonit*. Since *eilonut* is so rare, argue *Tosafot*, it does not occur to the husband that, in order to avoid the onus of fornication should his wife be an *eilonit*, it is necessary for him to perform the sexual act for the express purpose of establishing a marital relationship even if such a defect exists.

12. Identification of a defect for purposes of annulling a marriage and identification of a defect for purposes of compelling a divorce are two entirely separate matters. Defects affecting functionality within the marital or familial relationship may be grounds for compelling a divorce upon petition of the complaining spouse even if the defect develops after marriage.
13. For a comprehensive review of the responsa of the numerous authorities who have adopted positions both pro and con as well as identification of specific defects that are to be considered "grave" see *Ozar ha-Poskim*, *Even ha-Ezer* 39:32, secs. 6-29.
14. For additional sources see *Ozar ha-Poskim*, *Even ha-Ezer* 39:32, sec. 6
15. This point is emphasized by *Yeri'ot Shelomoh*, I, no. 8 and by *Pe'rushei Ivra*, no. 1, sec. 42.
16. See, however, *Yeri'ot Shelomoh,* I, no. 8, who understands *Bet Shmu'el*'s comments in a different manner.
17. See *Tosafot* who explain that the query is raised only with regard to the case of an *arusah*, i.e., a "betrothed" woman who is entitled to none of the benefits of marriage but that the point is not at all cogent in the case of a widowed *nesu'ah* who has received the benefits of the marital bargain. Also, after *nesu'in* the woman's concern lest she be retroactively guilty of fornication serves to make the wife amenable to marriage under all circumstances. See *Teshuvot Hatam Sofer*, *Even ha-Ezer*, II, no. 74, s.v. *ve-amnan*. Cf., *supra*, note 6.

    See also *Iggerot Mosheh*, *Even ha-Ezer*, III, no. 79, *anaf* 3, who asserts that *Tosafot*'s distinction between *eirusin* and *nesu'in* does not pertain to "grave defects."
18. Cf., however, R. Jacob Reischer, *Teshuvot Shevut Ya'akov*, I, no. 101, who states that the *kol dehu* that a woman will accept connotes even sexual activity that does not include intercourse and also Rashi's comment that the *kol dehu* to which reference is made connotes "companionship" (*zavut).*

    There is considerable controversy among latter-day authorities with regard to whether or not impotence constitutes grounds for annulment. For a discussion of the relevant responsa see *Ozar ha-Poskim*, *Even ha-Ezer* 39:32, sec. 17 as well as R. Yechiel Ya'akov Weinberg, *No'am*, V, 43-51, reprinted in *idem*, *Seridei Esh*, III, no. 33, secs. 17-23. See also *infra*, notes 24, 25 and 27.
19. There is a separate body of opinion that maintains that there is no levirate obligation when the sole surviving brother is an apostate. See *Shulhan Arukh*, *Even ha-Ezer* 154:4 and commentaries thereto.
20. Some authorities maintain that an apostate has the status of a gentile with whom sexual intercourse is forbidden. See *Encyclopedia Talmudit*, XII, 163-164. The position of *Teshuvot ha-Ge'onim* is predicated either upon the prohibited nature of the relationship or upon the more general consideration of fundamental incompatibility of marriage to an apostate. See *Teshuvot Noda bi-Yehudah*, *Even ha-Ezer*, *Mahadura Kamma*, no. 88, s.v. *u-me-ata.*

Whether or not concealment of a status that gives rise to a prohibition against intercourse constitutes concealment of a salient defect is a matter of considerable controversy. See in particular *Terumat ha-Deshen*, no. 223, and *Teshuvot Noda bi-Yehudah*, *loc. cit.* For a discussion of relevant responsa see *Ozar ha-Poskim*, *Even ha-Ezer* 39:32, sec. 12.

See also *Teshuvot Noda bi-Yehudah*, *Even ha-Ezer*, *Mahadura Tinyana*, no. 80, who refused to annul a marriage on grounds of undisclosed apostacy of the husband. Cf., however, R. Yechiel Ya'akov Weinberg, *No'am*, I (5719), 1-5, reprinted in *idem*, *Seridei Esh*, III, no. 25, secs. 1-2 and *No'am*, V, 9-17; R. Moshe Yonah Zweig, *Ohel Mosheh*, II, no. 123; as well as *Iggerot Mosheh*, *Even ha-Ezer*, IV, no. 83, who, at least in theory, were willing to consider annulment in such situations. For additional discussions of that question see *Ozar ha-Poskim*, *Even ha-Ezer* 39:32, sec. 23.

21. *Bet ha-Levi* assumes that, for *Teshuvot ha-Ge'onim*, a woman insists upon at least the minimal relationship possible with a *mukeh shehin* only with regard to the brother-in-law. *Iggerot Mosheh*, *Even ha-Ezer*, I, no. 79, *anaf* 1, asserts that if a woman is concerned with having at least a minimal sexual relationship in a future levirate marriage, *a fortiori*, she must be concerned with the opportunity for sexual gratification in the original marriage.
22. *Bet ha-Levi* adduces support for the view that there may be an advantage even in marriage to an apostate from a ruling of Maharam of Rothenberg cited by *Bet Yosef*, *Even ha-Ezer* 140, disallowing acceptance of a *get* granted by an apostate without knowledge of the wife.
23. For a further discussion of the various sources discussing this issue see *Ozar ha-Poskim*, *Even ha-Ezer* 39:32, sec. 16.
24. The case brought to the attention of R. Yitzchak Elchanan Spektor involved a man who was twice divorced because of inability to consummate the marriage. The third wife, who at the time of marriage was unaware of his impotence, sought a *get*, but to no avail. The husband died without issue somewhat less than six years after the marriage. The husband was survived by a brother who had been deported to Siberia some twenty-five years earlier and had not been heard from since. The existence of the brother was also not disclosed to the wife prior to the marriage.

    The husband's sexual organs were not properly developed; he possessed at least some secondary sexual characteristics of a female; and allegedly he also manifested talmudic criteria associated with a congenital eunuch (*saris hamah*). Marriage to a *saris hamah* does not give rise to levirate obligations. For a discussion of the relevant sources see *Encyclopedia Talmudit*, XXI, 418-422.

    Rabbi Spektor, *Ein Yizhak*, no. 24, sec. 44, permitted the woman to remarry without requiring *halizah* only on the basis of the configuration of these grounds, each of which, standing alone, is described as "doubtful:" 1)There are no levirate obligations associated with a *saris* and the status of the man in question was that of a possible or "doubtful" *saris*. 2) In the opinion of some authorities, as noted in the text, the principle of *tan du* does not apply in the case of a brother-in-law who is an apostate. For a similar reason, argues *Ein Yizhak*, it does not apply in the case of a brother-in-law of a woman whose deceased husband had the status of a "doubtful" *saris*. Other than when required by levirate obligation a man is forbidden to

marry his brother's wife. Since the brother of a *saris* would not only be free of the levirate obligation but would be forbidden to marry his widowed sister-in-law, a brother of a "doubtful" *saris* would be precluded from entering into a levirate marriage because of the fact that, if the deceased brother was a *saris*, the union is prohibited. Thus, since the sister-in-law is effectively denied consortium, *tav le-meitav* is not applicable, just as it is not applicable in the case of an apostate. 3) Impotence may constitute a salient defect. R. Yitzchak Elchanan expressly predicates his permissive ruling upon the presence of triple doubt. See also the similar analysis of a comparable case by R. Eliyahu Klatzkin, *Dvar Eliyahu*, no. 48. *Dvar Eliyahu*, however, maintains that, in cases of undisclosed impotence, a *get* is required by virtue of rabbinic decree.

It must be emphasized that R. Yitzchak Elchanan was willing to consider only *undisclosed* impotence as a defect constituting grounds for annulment. Moreover, it is patently clear that R. Yitzchak Elchanan was not prepared to annul a marriage solely on that basis. Despite his readiness, in this responsum, to accept this line of reasoning intellectually, he was aware both of counterarguments and of the body of opinion that rejected that thesis and, accordingly, was unwilling to accept such a defect in and of itself as sufficient grounds for annulment. Cf., *idem*, *Be'er Yizhak*, no. 4, *anaf* 3, in which R. Yitzchak Elchanan himself adopts the position that impotence does not constitute a salient defect.

24a. The argument is based on the premise that the *get* is valid only if the woman genuinely seeks a divorce because she cannot abide a continuing relationship with a husband who suffers from the salient defect. If, however, that claim is false but is advanced by a wife who desires a divorce because of an entirely different motive, the *get* is invalid. Hence, it is argued, we cannot presume that *tav le-meitav tan du* applies to such defects for, if so, the woman's claim to compel a *get* because of the presence of such defect should be rejected as specious. But, concludes the argument, if *tav le-meitav tan du* does not extend to such defects, it should follow that the same defects, when present before marriage, should also serve to nullify the marriage.

The position of those who, despite the cogency of the foregoing argument, do not accept the notion that any defect that serves as a basis for compelling a *get* also serves to invalidate a marriage is analyzed in *Piskei Din Rabbaniyim*, XV, 8. The explanation offered in that source is that a woman might well accept such a relationship precisely because of the option offered her to compel a *get* if she cannot endure the marriage. A woman may well accept a *kol dehu* relationship because of her awareness that it is within her power to terminate that relationship. Accordingly, when she does seek to compel a *get*, there is no reason to suspect her motive. Employing that analysis, the *bet din* concludes that, if the defect is one that the wife cannot avoid by compelling a *get*, i.e., mental incapacity of the *yavam*, there can be no question of the wife's willingness to accept such a relationship on the basis of *tav le-meitav tan du*. Since the wife cannot compel termination of the marriage if it proves to be untenable to her, she would refuse to accept it in the first instance.

25. Nor is R. Issac Elchanan unequivocal in asserting that view. See *Be'er Yizhak*, no. 4, *anaf* 3.

26. *Iggerot Mosheh*, both in this responsum as well as in *Even ha-Ezer*, III, nos. 48 and 49, regards impotence as grounds for annulment.
27. This position, however, is contradicted by an early-day authority. *Teshuvot ha-Rosh*, *klal* 42, no. 5, accepted a woman's contention that, unknown to her at the time of the marriage, her husband was impotent and ruled that he might be compelled to execute a *get*. Rosh did not rule that a *get* was necessary on the grounds that, since impotence is a defect of a nature such that it constitutes grounds for compelling a divorce, it also serves as grounds for *kiddushei ta'ut* when concealed at the time of the marriage.
28. In an address delivered at a convention of the Rabbinical Council of America, Rabbi Joseph B. Soloveitchik asserted that *hazakot* posited by the Gemara do not represent "transient psychological behavioral patterns, but are permanent ontological principles rooted in the very depths of metaphysical human personality." [This categorization applies to *hazakot* in the nature of halakhic presumptions regarding behavior and comportment. It may be presumed that it is this criterion that also serves to distinguish a *hazakah* of this nature from a halakhic presumption categorized as a *rov*. Thus the halakhic principle that a debtor does not discharge a loan before the date on which it is due is a legal presumption described as a *hazakah* despite the undeniable fact that some people have certainly been known to prepay their debts and hence the principle is descriptive of only the majority of people. In contradistinction, the principle that "The majority of those who engage in ritual slaughter are proficient" is described as a *rov* or "majority," not as a *hazakah* concerning persons who engage in the slaughtering of animals. The first presumption is described as a *hazakah* because it reflects a deeply-rooted psychological propensity; the latter is simply a socio-religious phenomenon. (Cf., however, *Bet ha-Levi*, II, no. 4, who maintains that for many authorities, this *rov* is really a *hezkat kashrut*. Cf. also his comments, *ibid*, no. 4, sec. 4, to the effect that for other authorities, this *rov* "is comparable to other *hazakot*" posited by the Gemara.) In any particular instance, application of a *hazakah*, no less so than of *rov*, is subject to rebuttal on the basis of incontrovertible evidence. But the principle of *hazakah* and the principle of *rov* must be understood as qualified by a *ceteris paribus* clause, i.e., as applicable to the matter described "all things being equal." For example, it is a psychological truism that people do not pay debts unless and until they are under obligation to do so. Indeed, what would prompt a person to act contrary to his own interests in the absence of either a legal or moral obligation? If, however the agreement between the parties provides for a discount for early payment, it is obvious that prepayment may be in the self-interest of the debtor and hence no longer psychologically disdained.]

With regard to the principle *tav le-meitav tan du me-le-meitav armelu* in particular, Rabbi Soleveitchik declared:

> Let us take for instance the *hazakah* . . . *tav le-meitav tan du me-le-meitav armelu*. This has absolutely nothing to do with the social and political status of the woman in antiquity. The *hazakah* is not based upon sociological factors. It is a *pasuk* in *Bereishit*, "And thy desire shall be to thy husband."(Genesis 3:16). It is a metaphysical curse rooted in the feminine personality. She suffers incomparably more than the male while in solitude. Solitude to a male is not as horrifying an experience

as solitude to a woman. And this will never change. . . . It is not a psychological fact; it is an existential fact. It is not due to the inferior status of the woman, but is due to the basic distinction between the female personality and the male personality.

An old spinster's life is much more miserable and tragic than the life of an old bachelor. This was true in antiquity; it is still true; it will be true a thousand years from now. To say that *tav le-meitav tan du me-le-meitav armelu* was due to the inferior political or social status of women at that time is simply misinterpreting the *hazakah*. No legislation can alleviate the pain of a single woman; no legislation can change this role. She was burdened with it by the Almighty after she committed the first sin.

Citing Rambam's statement in *Hilkhot Teshuvah* 3:8 to the effect that one denial of the "authority of scholars of the *mesorah*" constitutes denial of the Torah, Rabbi Soleveitchik declared that denial of the applicability of *tav le-meitav tan du* "borders. . . . on the heretical." A condensed version of those remarks prepared by Dr. Issac Hersch was published in *Light*, 17 Kislev 5736, pp. 11-15 and 18, and has been recently reprinted in the *Jewish Press*, October 16, 1998, pp. 32 and 34.

Although not stated explicitly, it is readily apparent that Rabbi Soloveitchik intended to describe not only rejection of the principle *tav le-meitav tan du* as a universal, timeless and irrebutable presumption as bordering on the heretical but also to include in the same category denial of a woman's readiness to accept a *kol dehu* relationship in marriage as postulated by the Gemara, *Bava Kamma* 110b. It is clear that Rabbi Soloveitchik understood *tav le-meitav tan du* as reflective of a universal condition rooted in the curse "thy desire shall be to thy husband."

As explained in the text, the notion that women today are less willing than women of antiquity to accept a *kol dehu* relationship is irrelevant to a proper understanding of the halakhic ramification of that concept. In formulating the halakhic principle enumerated in *Bava Kamma* 110b, the Gemara asserts only that some women are willing to accept a *mukeh shehin* as a husband. That fact is demonstrably true even today. *Tav le-meitav tan du* is cited by the Gemara to explain why some women consent to marry a *mukeh shehin* and the like. That this is actually true of *some* women is empirically demonstrable without need for reliance upon dogmatic faith.

29. It is by no means the case that provisions of Halakhah that are ostensibly predicated upon facts of nature necessarily change because of changes that may have occurred with regard to such realia. For a discussion of that issue see this writer's "On the Immutability of Torah," *Viewpoints on Science and Judaism*, ed. Tina Levitan (New York, 1978), pp. 20-22.
30. *Bet ha-Levi* further notes that the Gemara, *Ketubot* 75a, states that a woman is satisfied with any marriage because it enables her to be promiscuous without fear of resultant pregnancy since, unlike an unmarried woman, she can attribute paternity to her husband. *Bet ha-Levi* does not make the argument that in a modern, morally degenerate society pregnancy out of wedlock has lost its stigma. Instead, he argues that the vast majority of women are chaste and pious; the Gemara merely takes into account the fact that only a minuscule percentage of all women seek a husband as a cloak for promiscuity.

31. Upon careful reading of the much earlier responsum of *Teshuvot Havot Ya'ir*, no. 221, it is apparent that this distinction was already noted by the author of that responsum.
32. For this reason, asserts *Bet ha-Levi*, a serious defect in the husband renders the marriage nugatory even in the case of a *nesu'ah* whose marriage has been consummated. Cohabitation may establish a marriage that is not subject to extraneous conditions, but fraud and mistake serve to invalidate any marriage including a marriage entered into by virtue of cohabitation.

    Cf., however, *Teshuvot R. Akiva Eger*, *Mahadura Tinyana*, no. 106, who seems to assert that fraud and mistake invalidate a transaction only because of an implied condition to that effect. Nevertheless, it seems to this writer that R. Akiva Eger does not contradict *Bet ha-Levi*'s thesis and that R. Akiva Eger's comments indicate only that, absent a provision of law allowing for conditional transactions, all overt acts would be absolute and, for that reason, acts which cannot be made conditional, e.g., *huppah*, are absolute and not voidable because of mistake regarding an assumed, but unexpressed, detail.
33. Cf., however, *Peirushei Ivra*, no. 1, sec. 37.
34. For a discussion of the notion of agency reflected in this doctrine see *Teshuvot Hatam Sofer*, *Orah Hayyim*, no. 84.
35. It must be stressed that Rashba does not expressly formulate the problem he seeks to resolve. He merely notes that *gittin* are executed in our day despite the absence of ordained judges and seeks to justify the practice by showing that for this purpose *gittin* are comparable to debts. Rashba, however, does not inform us why *gittin* should require ordained judges, or for that matter, any judges at all. The authors assume that Rashba is questioning only the validity of a compelled divorce on the assumption that only a qualified *bet din* may legitimately apply duress in enforcing its judgement. I have allowed that presumption for the purpose of this discussion because of the many authorities who do indeed adhere to that view. *Kezot ha-Hoshen* 3:1 develops the thesis that only a qualified *bet din* may exercise duress in compelling a person to fulfill a religious obligation. His view is, however, vigorously disputed by *Netivot ha-Mishpat* 3:1. See also *Minhat Hinnukh* no. 8 and no. 558. This also appears to be the position of Ramban, *Commentary on the Bible*, Leviticus 20:8, and of *Sefer Yere'im*, I, no. 164, as noted by *Teshuvot Hatam Sofer*, *Hoshen Mishpat*, no. 177. R. Shimon Shkop, *Sha'arei Yosher*, *sha'ar* 7, chap. 5, adopts a position similar to that of *Netivot ha-Mishpat* with regard to compelling performance of *mizvot* but agrees that a qualified *bet din* is required to enforce a matter of family law. See also R. Naphtali Zevi Judah Berlin, *Meromei Sadeh*, *Bava Kamma* 28a, and *idem*, *He'emek She'elah*, *Parashat Va-Yeshev*, *She'ilta* 27, sec. 6. *Or Sameah*, *Hilkhot Mamrim* 4:3, limits the requirement for an ordained *bet din* for purposes of coercion to matters that require a volitional act such as divorce and sacrificial offerings. Thus, Rashba can readily be understood as maintaining that duress, at least for compelling a *get*, is reserved only to an ordained *bet din* and, accordingly, as developing the thesis that, in our day, other courts are empowered to do so only on the basis of agency.

    It is, however, conceivable that Rashba's concern is much more general. *Teshuvot Noda bi-Yehudah*, *Mahadura Tinyana*, *Even ha-Ezer*, no. 114,

maintains that a *bet din* must be present at the delivery of every bill of divorce. For that reason, since a *bet din* does not sit at night, a *get* should not be executed after nightfall. Cf., *Teshuvot Hatam Sofer*, *Even ha-Ezer*, II, no. 66. If Rashba was also of that view, he may be understood as questioning the validity of all *gittin* and nothing at all can be inferred with regard to whether a woman would insist upon the possibility of enforcing a *get* in at least some cases. Since the view expressed by *Noda bi-Yehudah* was actually also advanced by a number of early-day Spanish authorities, including *Teshuvot Rivash*, nos.388 and 389, as well as by Rabbenu Nissim whose responsum appears in *Teshuvot Rivash*, no. 390, it is not at all implausible to ascribe this position to Rashba as well. Rashba, on this analysis, is concerned that no remedy would be available to any women trapped in a failed marriage. According to the authors' understanding of the text, Rashba would then be asserting only that women would not marry if divorce, even upon the desire of both parties, were a complete impossibility. See, however, *Or Zaru'a*, no. 745, as well as the numerous latter-day authorities who reject *Noda bi-Yehudah*'s position. For a full discussion of this issue see R. Joshua Wolhendler, *Seder ha-Get Me'ir Einei Hakhamim* (Brooklyn, 5751), pp. 261-264.

36. *Dine Yisra'el*, XIX (5757-5758), 209. Professor Feldblum may not have meant to imply that the second factor, if disclosed, would in and of itself dissuade women from marriage but rather that it is the "aspect of *kinyan*" associated with marriage that allows a husband to withhold a *get* and that it is solely the latter consideration that would prompt a woman to refuse an offer of marriage. I have treated the two as separate and independent considerations since I can envision Feldblum or someone else raising the second consideration as an independent argument.
37. Cf., *Tosafot*, *Ketubot* 2b, s.v. *mazi*, as well as the concluding section of *Teshuvot Hatam Sofer*, *Even ha-Ezer*, II, no. 74.
38. Ran, *Nedarim* 30a, declares, ". . . a woman does not have the power to convey herself to the husband. . . . Rather, once she agrees to the man's [act of] *kiddushin* she abnegates her intent (*da'atah*) and will and makes herself as *res nullius* vis-a-vis the husband and the husband takes her into his domain." For the halakhic ramifications of that analysis of the nature of the matrimonial act see *Avnei Milu'im* 26:6. It is probably fair to state that most marriage performers are unaware of Ran's exposition and of its ramifications, even fewer grooms understand that marriage consists of acquiring something that is ownerless and few brides, if any, understand that they are making themselves *hefker* so that they may be acquired by the groom. Ran himself must have been well aware of this pervasive ignorance. The point is obvious: Neither the bride nor the groom need concern themselves with the theoretical manner in which the marital relationship is established or how it is described. All that is required is that the partners comprehend the essence of the relationship. Error with regard to the theory or characterization of the relationship does not invalidate the marriage.
39. Thus Rashba, *Kiddushin* 6b, explains that marriage in return for the enjoyment of a loan (*hana'at milveh*) does not constitute prohibited usury because in receiving a wife in marriage the bride divests herself of nothing and the groom acquires no tangible property interest. See also Rabbi Shimon Shkop,

Hiddushei Rabbi Shimon Yehuda ha-Kohen, Kiddushin, no. 9.

40. For a discussion of additional sources see *Pithei Teshuvah, Even ha-Ezer* 17:72 and *Ozar ha-Poskim* 17:123. A number of latter-day scholars assert that even the permissive view cited by *Taz* is limited to particular types of controversy. See also *Hazon Ish, Even ha-Ezer* 31:12, who declares that a minority view can be relied upon only by "a scholar whose knowledge is vast and who is capable of making a determination, but one who has not reached that level must rule in accordance with the stringent view."
41. And finally, a caveat: With very rare exceptions, material cited in these columns represents scholarly deliberations reflecting the application of halakhic dialectic to sources and precedents in the corpus of Jewish law. Although, at times, this writer has expressed strong disagreement with opinions cited, such disagreement has been within the parameters of "These and those are the words of the living God." Even when there have been allegations of error, the error has not been entirely without foundation. Articles and books that do not reflect those standards of scholarship have been studiously ignored both because such material does not merit consideration or rebuttal and because of concern that even critical mention would leave the impression that the opinions cited, even if criticized, are within the ambit of Halakhah. The material upon which this column focuses does not meet the standard for review. But for the attention the issue has received in the media, the *Jewish Week* advertisement would have been ignored by this department. Accordingly, the discussion presented in these pages should not be construed as indicating that the material cited represents a tenable halakhic perspective.
42. For discussions by this writer of ramifications of the *agunah* problem and analyses of proposed solutions see *Contemporary Halakhic Problems*, I (New York, 1977), 150-154 and III (New York, 1989), 329-343; "Modern Day *Agunot*: A Proposed Remedy," *Jewish Law Annual*, IV (1981), 167-187; "The Attitude of American Civil Courts Towards Jewish Divorce," *Dine Israel*, X-XI (1981-1983), 365-384; "*Avitzur*: A Victory for the *Agunah*," *Jewish Week*, February 25, 1983; "Jewish Divorce: Judicial Misconceptions and Possible Means of Civil Enforcement," *Connecticut Law Review*, vol. 16, no. 2 (Winter, 1984), pp. 201-298; "A Suggested Antenuptial Agreement: A Proposal in Wake of *Avitzur*," *Journal of Halacha and Contemporary Society*, Spring, 1984, no. 7, pp. 25-41;"Haza'ah le-Pitaron Ba'al ha-Mesarev le-Garesh," *Or ha-Mizrah* (Sept., 1989), pp. 57-78 "Haza'ah le-Pitaron Ba'al ha-Mesarev le-Garesh," (reprint) *Torah she-be-al Peh*, XXXI (1990), 124-139; "Heskem Mamon le-Meni'at Siruv le-Garesh," *Or ha-Mizrah* (May, 1993), pp.272-280; "Ba'ayat ha-Geirushin be-Ikvot ha-Hakikah ha-Ezrahit (Get Law) be-Medinat New York," *Or ha-Mizrah* (April-July, 1994), pp. 230-258. The Hebrew articles have been reprinted with additions and revisions in this writer's *Be-Netivot ha-Halakhah*, I (New York, 1996), 3-55.