

**Woman as Moral Agent in Rabbinic Judaism:
Methods Toward
A Genealogy of Consent**

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Chapter One

Introduction

The women's movement has occasioned much debate about the status of women in Judaism, today and historically. A significant amount of the ensuing debate is around the status of women in during the rabbinic periods, as evidenced by rabbinic literature and law. Feminist scholars themselves have achieved no consensus on this issue. Among feminist scholars, the portrayal of women and their rights in rabbinic literature can range anywhere between a litany of abuse,¹ women as sexual chattel,² or relatively libraty in the social and historical context of the era.³

Though the research and debate has raged for decades, one crucial aspect for women's lives in the rabbinic era remains unrecognized and unexamined: the moral agency of the Jewish woman. By the phrase moral agency I mean a woman's opportunity to choose between options and the moral—ethical, religious, practical, interpersonal, political—factors which guide her decision making process.

Every day of our lives we make moral choices: To spread gossip or to not spread gossip; to run through a red light or to stop; to eat healthily or to eat donuts; to make the passage of time for those around us a pleasure or a torment; to be kind to animals or to leave them unfed; to do our own work or to cheat; to respond to those in need or to ignore them; to have quality time with our spouse and children or to watch TV. Although they

¹ Biale, Rachel. Women and Jewish Law. New York: Schocken Books, 1984.

² Wegner, Judith Romney. Chattel or Person? The Status of Women in the Mishneh. New York: Oxford University Press, 1988.

³ Hauptman, Judith. Rereading the Rabbis: A Women's Voice. Boulder: Westview Press, 1998.

generally go unrecognized and unexamined as such, daily opportunities for moral decision-making are boundless, encompassing each and every facet of our ordinary lives.

We are all moral decision makers. Often we respond to decision making opportunities through rote preconditioning trained into our conscious and subconscious minds through our upbringing, social conditioning, religious training, etc. Conscious or unconscious this preconditioning guides us to act and in-act or not act in a nexus of meanings and values. When an individual or group is part of the dominant social groups in a society, their values are often those which are articulated as representative of the society as a whole. In the United States, for example, many scholars and critics have identified the publicly articulated ethical/moral base to largely reflect the needs and values of Christian, whites, capitalists, and males.⁴ Values, ethics, experience, and foundational life stories of groups falling outside that profile are often obfuscated. Hence, for example, Jews strive to create alternative educational institutions through which distinctly Jewish values and learning may be perpetuated. Other minorities respond in a variety of ways: African American fight to make Black history a part of school curriculums, Eastern orthodox sects—Greek, Russian, etc.—build churches and seminaries in the States to preserve their particular social and religious heritage; and experiments with cooperative living and non-competitive play abound in a number of settings.

The values and moral/ethical decision making patterns evidenced by members of non-dominant groups may be veritably invisible from the standpoint of the dominant culture to the extent of a total lack of awareness that such decision making even exists.

⁴ Cannon, Katie G. Black Womanist Ethics. Atlanta: Scholars Press, 1988.

For example, what can we say about the moral decision-making patterning of Black women under slavery? Many respond to the very question with surprise. Even or especially those among us who pride ourselves in having some consciousness regarding the ravages of slavery respond, “Black women under slavery! They had no decisions to make! The master determined who they would marry, where they would work, whether or not they would raise their own children...!” Indeed it would appear there was in no way the empowerment of self-determination that moral decision-making requires.

The above response is entirely understandable. Partly it is due to the distance of time, space, and social standing between the viewer and the viewed. However, to a greater extent the very philosophic base which permeates Western society may also cause it. In America we place a great deal of emphasis upon our freedom, indeed, many would say freedom is the cornerstone of our democracy. Freedom and democracy go hand in hand. We are free to choose and sustain our democracy. Our empowerment to vote comes through our freedom. People who live in non-democratic countries are often thought of as lacking freedom. Thus decision making in the American mind goes with freedom and self-determination.

The equation of freedom and decision making capabilities has roots deep in our philosophic base. Kant’s famous illustration of the universality of ethics is based on a presumption of freedom: Soldiers hunt for a man. They enter another man’s home and ask if the man is hiding there. Indeed the man is hiding there. The householder is forced to choose between truth and lie. He chooses truth.

For Kant, telling the truth is a universal ethic. It transcends country, creed, and social status. There is no circumstance under which a lie is morally acceptable.

Feminists and philosophers of minority groups have sharply criticized Kant's notion of universal ethics and morality. They argue that truth telling under every circumstance may be an ethic that can only be afforded by dominant political groups in a society. Non-dominant groups may in fact support an ethical pattern which commands lying under certain conditions. For example, how should the householder have answered if the man hiding was a runaway slave on the Underground Railroad? How should he have answered if the man hiding was a Jew hunted by the Inquisition? How should he answer if the person in hiding is a woman fleeing an abusive husband? Let us take the scenario a step further to ethical decisions made by the person in hiding: The soldiers begin to beat the householder to make him talk. Does the runaway slave, the rabbi, or the abused woman come out of hiding to save him? And further, knowing that running and hiding will very likely put others in danger, does the slave, the Jew, the woman decide to run at all? What goes into their decision making process? What factors do they weigh? What values do they hold? What priorities do they set?

It is clear (and has been clear to minority thinkers for some time) that in his argument regarding the universality of morals, Kant considered only the decision making process of persons with relatively more power in a society. By not considering the decision-making process and capabilities of groups and persons with less or no power, he was lead into a tremendous philosophical error indicative of Western philosophical, religious, and political thought. The error was the universalization of ethics and morality based on full self-determination, i.e. so-called freedom. Those ethics appropriate for the dominant group appear then to be appropriate for all. Moreover, those individuals and

groups which do not display the prerequisite self-determination to enact the universal ethics appear to have no decision making power—therefore no moral agency—at all.

Did female slaves have and exercise moral agency? Black womanist scholars would reply in the affirmative. However, in order to investigate that moral agency new methods in historic research and text analysis must be developed.

Theoretical Traditions

Carl Marx⁵ and Sandra Harding⁶ have clearly established the necessity of the sociohistorical contextualization of experience. The Personal Narrative Group (PNG) has long worked to develop a practical application of these theories toward the apprehension of women's moral agency through biography and autobiography.⁷ If we are to consider a woman as moral agent in the context of her moral universe, we must understand that universe, its mechanics, its limitations, its options, as the PNG explains:

A paraphrase of the oft-cited phrase from Marx may illuminate this claim: Women make their own lives (and life histories), but they do so under conditions not of their own choosing.

Both individual agency and social structure must be considered.⁸

⁵ See, Marx, Carl. "Economic and Philosophic Manuscripts of 1844: Critique of Hegelian Dialectic and Philosophy as a Whole."

⁶ Harding, Sandra, Whose Science? Whose Knowledge? Thinking from Women's Lives. Ithaca: Cornell University Press, 1991.

⁷ Personal Narratives Group, Interpreting women's Lives: Feminist Theology and Personal Narratives, Indiana University Press, Bloomington, 1989.

⁸ Ibid., p. 5.

In each life exists this tension between personal volition and environment. Between individuals the balance and dynamics may be wildly divergent, but, for the WNR, the fact of the tension remains central to life interpretation.

Clearly identifying the standpoint here means also determining the weave and the boundaries of the social web, reconstructing the universe in which this woman stands -- *there*. It is only by understanding the relationship between a life and a life's context that the "logic" (including the theology) of that life emerges.

Moreover, because no life occurs in isolation, but rather in relationship, there is an aspect of power that the woman exercises within her particular place and time. Each life may be said to both shape and be shaped by its context in a dynamic and fluid process. A woman may not wholly choose her environment -- her life -- but she does to some extent shape it. We can, then, go to the shape of a woman's life -- the decisions she makes, the company she keeps -- in the matrix of its social/historical context -- to discover her values, her ethics, her sense of good and evil, right and wrong, earthly or heavenly redemption.

Katie Cannon, for example, in her groundbreaking book, Black Womanist Ethics,⁹ explains her unusual use of literature and biography for construction in the field of black womanist ethics:

The cherished assumptions of dominant ethical systems predicated upon both the existence of freedom and the wide range of choices have proven to be false in the real-lived texture of Black life. Thus, Black women have created and cultivated a set of ethical values that allow them to prevail against the odds, with moral integrity, in their ongoing participation in the white-male-capitalist value system.

⁹ Katie G. Cannon, Black Womanist Ethics, Scholars Press, Atlanta, 1988.

The best available literary repository for this underground treasury of values is the Black woman's literary tradition.¹⁰

After an in depth examination of the moral situation of the black woman historically in American, Cannon finds the dominant ethics of white male academia to be inapplicable to the “real-lived texture” of black women’s lives, with the viable options and choices therein. She then assumes not that ethics need to be constructed for the African American female but rather that they already exist, waiting to be discovered and articulated. She turns to what she considers an almost underground repository of black women’s value-ethics, the black woman’s literary tradition.

In this last point hers is a striking example, I think, of what JoAnne Terrell would call “naming”:

The very naming of things or persons calls them into existence, or brings them to light so they may be put into relationship with other things or persons. Accordingly, the rectification of names is essential because nomenclature reinforces reality.¹¹

Though Terrell's immediate concern here is the naming of sin, it is not inappropriate to suggest that the power of Cannon's work comes from the perception of moral/ethical qualities and calling them just that. Moreover (and this is major methodological point), Cannon names them not only as virtues applicable to Zora Neil Hurston, but also as indicative of the survival strategy of her entire community. Zora Neil, an African American woman, did not develop her ethical framework in a vacuum. For Canon, she is not singular. What makes her unique is her literary output, not her moral code. For this last observation we may consider the possibility that, in interpreting Jewish women’s

¹⁰ Ibid., 75.

¹¹ JoAnne M. Terrell, A Womanist Perspective on Sin and Redemption, Master's Thesis, Union Theological Seminary, 1990. p. 28.

materials, their significance, too, points beyond themselves. The insight gained from one woman's story may actually open a vista to an entire women's era, their shared values and survival strategies, their cosmic understanding and virtues developed to express it.

Fledgling efforts to recover the ethics and moral agency of Jewish women have occurred in the last decade targeting literature of various kinds from autobiography to prayers. Absent from those attempts thus far has been systematic inquiry into the moral agency of Jewish women during the rabbinic and subsequent periods. Two reasons stand out as major hindrances to this enterprise: For many, women in rabbinic periods appear to have had little or no power of self-determination and therefore no moral agency (as discussed above); and, There are virtually no texts by women or addressing women's life histories to analyze. If the primary method by which moral agency is discovered and analyzed is through texts by women, the whole enterprise of finding moral agency would appear to be doomed before it began. However, as will be demonstrated in this paper, this is not necessarily the case. There are texts which provide insight into these matters.

Flexibility in methodologies is obviously required. Black womanist scholars found no formal documents or ethical treatises explicating historic Black women's theology/philosophy of morality and ethics. They turned to the literature which was available and developed a method through which that literature could be read for the necessary information.

We too have abundant literature from the rabbinic periods. It is not by Jewish women, however a good deal of it pertains to women. In Mishneh, Talmud, responsa, and law codes male rabbis discussed women, legislated and related stories about them. Can this material at all be utilized to investigate Jewish women's moral agency?

Feminist Contributions

Feminist scholars have pioneered various means of interpreting rabbinic literature in order to yield various kinds of insight regarding rabbinic attitudes toward women as well as women's status under rabbinic Judaism. Here are some methodological processes designed to yield insights into Jewish women's moral agency through rabbinic literatures:¹²

- I. Consider the rabbis/authors of rabbinic texts as *interested* (as opposed to disinterested) witnesses.
- II. Using a *hermeneutic of suspicion*.¹³
- III. Listening to silence.
- IV. Willingness to use old texts in new ways.
- V. Presenting old/new information in a new way.
- VI. Asking expanded questions and expanding the canon of sources and resources.

¹² These processes are already integral to Jewish feminist work and will not be described in any more depth here. Please see, Plaskow, below, for definitions and application.

¹³ Plaskow, Judith. Standing Again at Sinai: Judaism from a Feminist Perspective. San Francisco: Harper, 1989. This and the following statements are introduced and discussed by Plaskow in her Introduction.

Chapter Two

Changing Lenses: Moving the Woman from Passive to Active Participant

A major problem with rabbinic literature *vis-à-vis* historic research on women is the third-personality of the female in Talmud, responsa, and codes. The rabbis talk about women a great deal. They tell stories about them and adjudicate concerning them. Through all this, the woman is usually not present. We do not hear her voice, her story, her opinion, at least not first hand. It could be said that the very *form* of these texts presents women as passive, people upon whom action is taken, as opposed to people initiating action.

In matters concerning sexual ethics, the form and purpose of rabbinic texts reiterates and reinforces a content which often portrays women as passive, or primarily passive. The presenting form of rabbinic texts, then, is a major stumbling block to the apprehension of women as active, women having and executing moral agency. This leads to a daring question: can the presentation of material be restructured to aid the reader's focus on the agency of women?

Let us take subject matter in which historically women have been considered passive objects acted-upon by their husbands to their own extreme detriment: wife beating.

Despite modern myths that wife beating does not occur in the Jewish community, there is ample evidence which suggest wife beating has been in fact an issue and a

problem in Jewish households for millennia. Most insidious in wife beating are the assumptions that the woman must remain a silent and passive victim. Restructuring texts to illustrate that this was not always the case might not only prove trace moral agency in historical response, but also contribute towards *tikkun olam* in the Jewish community today.

This has been the worthy purpose of two unusual scholars, Naomi Graetz and David Stein.

Graetz's scholarship aimed at uncovering a wide range of opinions and Halacha relating to cases of wife beating in Jewish communities from the beginning of the rabbinic era. Tracing law, attitudes, and metaphors back to the Torah, her greatest contribution is the revelation of a wide range of responses from the support of wife-beating for infractions against the husband and Israel, to the absolute condemnation of wife-beating under any circumstance.

While groundbreaking and extremely useful, the texts that Graetz chooses and her method of exposition quietly reinforce the overall impression that women are once again objects who are acted upon: men beat them, courts adjudicate regarding them. For example:

[The case of] the man whose wife is injured—whether *he* inflicted the injury or whether someone else injured her—the damage money is held for the woman [lit. taken from him] (the husband?) and real estate is purchased for her, and *he* has access to the usufruct.¹⁴

¹⁴ This is translated from Lieberman, S. (1988). *Tosefta Ki-Peshutah: A comprehensive Commentary on the Tosefta* (New York: JTSA), Baba Kama 9:14 (p. 45). Naomi Gratz, Silence is Deadly: Judaism Confronts Wifebeating. Northvale, NJ: Jason Aronson, 1998. p. 70.

The case above is not even directly about a woman but rather concerns a “man whose wife is injured.” We do not have enough of the story to know whether it was the husband himself or another man who injured this woman. We are told in fact that [*legally*] it does not matter. [That in itself is an important distinction. This is a legal dicta. It does not intend to tell the story of the woman, but rather to delineate the judgments necessary to the case.] The woman is entitled to monetary damages, however, that is not how the sentence is written. Rather the text indicates, “the damage money is held for the woman.” Even when she is entitled to and receiving money she is not active, for the money is held for her. In the next line we learn that the money is spent or invested for her also. We are not advised as to how much control she has in the decisions here. The snippet ends with the information which is really interesting to the husband—he may collect the usufruct. The overall impression offered by the text is that an injured wife (whether injured by her husband or another) initiates a legal case involving primarily the husband, with the injured wife a vastly removed third party.

That is the purpose of Graetz’s book, to teach about the response—we may indeed say the moral response—of Jewish male individuals and communities to the reality of wife beating. To investigate the woman’s story, to in fact delineate patterns of moral agency on the part of women, these texts must be read differently. In this vein, let us consider the following rather famous passage also discussed by Graetz:

A certain woman came before Rabbi [Yohanan] and she said. “Rabbi, I set him a table and he turned it over.” He answered that anything a man a man wishes to do to his wife he may do. “Meat which comes from a slaughter house, if he wishes, may be eaten with salt; it may be eaten roasted, it may be eaten boiled, it may be eaten cooked in a stew; and so it is with fish from the fisherman.” [In a continuation of this source, another rabbi answered the question] “Why are you different from a fish? You have no more right to

complain against your husband's treatment than the fish has the right to object to the manner in which it has been cooked."¹⁵

This unfortunate Talmudic passage has been much cited by scholars as indicative of at least some rabbis' attitudes toward husbands and wives.¹⁶ Indeed, at face value this is little more than a crude expression of wives' lack of control over their married life, in particular in the area of sex. Of course, the evidence is there to support that reading. At the same time, however, one crucial aspect of the text is thereby overlooked: The aggrieved wife *went* to a rabbi (or, it seems, a group of rabbis) and *complained*. A woman went out and spoke for herself, addressing an appropriate authority in the context of her community and her religion. However it turned out for her, this is clear evidence of a woman in what she perceived to be an abusive situation exercising her moral agency.

Now that we have identified an opening, evidence of an act of moral agency, however circumscribed, let us widen the view. In this marriage the woman feels her husband is using her [sexually] in ways that are inappropriate and/or abusive. She has a number of options regarding her response: She can refuse him sex; she could stop working for him; she could make his life miserable in innumerable ways; she could run away; she could get back at him by stealing from him; she can complain to the neighbors; she could petition a *beit din* for redress or even divorce. Some of these options entail the risk of becoming a *moredit*, a rebellious wife. Others may entail a loss of dignity and/or privacy. Having named these options (which she may have indeed explored and/or tried also) we are encouraged to ponder why she decided to approach this rabbi. What went

¹⁵ B. Nedarim 20a-b. NG, p. 74.

¹⁶ See, Boyarin, Daniel. Carnal Israel: Reading Sex in Talmudic Culture. Berkeley: University of California Press, 1989. Chapter 4.

into her decision? How brave did she have to be? Did she approach the rabbi because she was a community leader or because she truly wanted to appeal to the person closest to G-d [or to G-d G-d's Self] believing that G-d really couldn't intend even a lowly woman to be treated in such a fashion? Was this a gesture born of desperation or of faith?

We cannot answer any of these questions without creating midrash [which definitely has its place in this endeavor]. However, it is of central importance to note that merely shifting the lens to focus on actions by women opens a wide range of questions and possibilities regarding the investigation of women's moral agency in rabbinic literature. The woman in the passage above chose to take clear action in an effort to change her life for the better. That action may have been [indeed, must have been, considering the outcome] humiliating, and she chose it regardless. More, she made the moral choice to appeal to a rabbi (at least here). That is a statement in itself, although we cannot determine its exact nature.

The Work of David Stein

The matter of divorce is central to any discussion regarding Jewish women's moral agency.¹⁷ Seeking a divorce or other court intervention in an abusive marital situation is as profound and life-altering an act as consenting to marriage. If a woman seeks a divorce or appeals to a court for assistance she must weigh: impact on herself,

¹⁷ Although a woman's decision to respond, flee, or see judicial assistance in cases of domestic violence does not fit our modern concept of *consent* per se, it is a moral decision specific to women and their lives. Stein's work is brought here to illustrate how rabbinic literature may be reread and rewritten to highlight those decisions and their subsequent impact upon women's lives. Here is a direct example of a methodology being developed toward the illumination of Jewish women's decision-making processes.

her children (both their young life and their future prospects), her husband, her family of birth—specifically mother and father. She must consider to reaction of her friends and community, the role she is creating for herself, the example she sets. Moreover, she must reconcile her actions with what she and those around her believe regarding wives, husbands, marriage, social order, Jewish law, and even G-d.

Most even marginally knowledgeable Jews will likely respond: None of these moral considerations matter because in Judaism women are not able to initiate divorce! Historically speaking, they would be incorrect. Provision exists in the Talmud for the abrogation of a marriage at the wife's request, forcing the consent of the husband. [See Appendix III] A part of Stein's work has been to uncover and present historic cases in which husbands were forced to divorce their wives for reasons of battery or other abuses.

Moreover, Stein has painstakingly reconstructed two dozen vignettes "in which wives, their male relatives, and communal leaders sought to stop spousal violence." His examples come from a span of over 1500 years and from sources all over the Jewish world through those eras. Many of these cases end in court initiated divorce.

By "reconstruction of a vignette" here is meant that Stein reworks and retells stories from the vantage point of action taken by a woman or on behalf of a woman in an abusive marital situation. Many of the original texts are geniza fragments of court cases or responsa relating to cases. In each case, the original text matched a form similar to that reported above in which men adjudicate and respond to men who asked a question regarding what to do about/with a man who beats his wife. Stein rewrites these texts to tell a story about a woman who seeks help or redress for her abusive marital situation. In each case there is clear evidence from the original text that it was in fact the woman

herself or a family member who initiates the action. It must be noted that Stein's labor here is not just for the purpose of telling a story differently, but rather to gain teaching materials from the Jewish tradition to assist modern-day women in identifying and addressing abusive and perhaps dangerous situations in their own lives and communities. He feels it is a clear case of historic examples of active moral agency assisting contemporary Jewish women to come to grips with their own issues and possibilities for healing.¹⁸

The following are examples of such reconstructions.

[E] Roughly 1,000 years ago, a Jewish wife in the Levant sued for divorce in a local court of the Babylonian Jews, saying: "I do not want my husband, because he is hitting me repeatedly and tormenting me." The court examined the evidence and found her claim to be true—that this Jewish husband was (in the words of the presiding judge) "abusing her without provocation."¹⁹

Note here how the action is initiated by the woman. She has decided to act in order to end an abusive situation, and subsequently chose a local Jewish courts as the venue for such an action. She was able to clearly articulate why she wanted to be free of her husband. We may be able to conjecture from the this very sparse portrayal that she believed herself to be worthy of or entitled to better than an abusive marriage. We do know for sure that she chose to act within the normative religious/social/legal framework. Further, from the evidence of other such vignettes, it is likely that she successfully witnessed on her own behalf. That signals that, on the one side, she was able to identify and articulate regarding instances and/or patterns of abuse, and that, on the other side, she

¹⁸ This is, in great part, the reasoning behind this paper as a whole. DR

¹⁹ [E] Responsum of R. Joseph b. Isaac ibn Abitur of Egypt [c. 1000C.E.]; adduced by Solomon ibn Adret, vol. 7 #477; repr. In *Otsar ha-Ge'onim, Ketubbot* #476. Translation and summary by Stein.

was heard and ultimately believed. For her act [we might say, of moral courage] she was rewarded, and, of necessity, the rest of the community knew about it. Did her success impact other such marriages—either by convincing the husband to cease and desist, or the wife to seek legal aid? We don't know. We do know, however, this was not a singular occurrence. Take the following case:

[I] Approximately 850 years ago, a couple appeared before a Jewish court of law in Egypt's leading city. The Jewish wife had run away from her husband, who was a Jewish communal professional. She said that after falsely accusing her of stealing his money and utensils, he then beat and cursed her. She did not want this to happen again—and if it did, she insisted on an immediate divorce. (The court examined the evidence and found her claims of abuse to be true.) p. 5²⁰

Here we have a little more of the woman's story, which must have been embedded in the legal complaint that she filed. Apparently there was an incident (it is not reported as habitual but rather a one-time occurrence) which she does not want repeated. The wife was accused of stealing from her husband and beaten. After this beating she made a choice to never endure such an ordeal again. [How strong was her sense of self and entitlement that she could choose to not endure false accusations again?] She chose to act on that choice, and first dealt with it by running away. Was that a instinctual act of self-preservation, or a thought-out decision? Did she run to someone or somewhere, or merely run? Did she weigh values and consequences?

We simply don't know, however, *the fact that she ran* became entered into the court case which she later initiated. Between the running and the initiating, a pattern of

²⁰ [I] Cairo Geniza fragment (settlement agreement) [c. 1150 C.E.]: Bodleian Library (Oxford Univ.) MS Heb. C28 (Cat. 2876), f. 7; Goitein, 187-8; 466 n. 133.

response haltingly emerges: She would not be beaten; she would not be falsely accused.

This is the beginning of a pattern of moral agency.²¹

Of particular poignancy is the following:

[T] Roughly 700 years ago, a Jewish wife in Europe sued for divorce in a Jewish court of law, claiming, “My father was so poor that he was forced to marry me to this man—whom I agreed to accept. But I do not want to be married to him any longer, because he is unbalanced, and I fear that he may kill me in his rage.” (The judge’s description of the case noted: “The husband rampages daily.”) p. 8²²

Later in this paper we will examine similar cases in which the father and daughter are somehow coerced into marriage arrangements in which the agency of the daughter is vastly compromised by poverty and other factors. Here, the daughter/wife admits she accepted the betrothal of this man. However, we are also given a tiny insight into the nature of that acceptance. Her father was too poor to do otherwise. Her moral agency was limited to two terrible choices: accept the betrothal of this man, and perhaps a lifetime of pain and unhappiness; or refuse, causing her father more worry and anxiety, perhaps costing him additional money for her food and maintenance. Was the choice really a choice or was she forced into it. Did she accept out of love, filial devotion, or out of overall hopelessness? And now, how much did she endure before she was able to say ‘enough!’ Did she weigh her father’s response or no? Being the daughter of a poor man,

²¹ I do not want to be misunderstood here. Moral agency for women or men is not limited to action, and/or especially action taken to overthrow despots and/or end abuse. Moral agency can also be patterned by non-action, *in which case we would have no record here*. We can, in fact, argue that patterns of moral agency involving endurance and other forms of action lacking external evidence are evidenced here by their absence from the annals of court proceedings. Similarly, evidence of moral agency in which males and females live together without abuse and/or violence are likewise evidenced by their absence of court documentation.

²² [T] Responsum of Rabbenu Asher ben Yechiel (*Rosh*) #32 [c. 1300 C.E.]; as adduced in *Tur, Even ha-Ezer* 154, p. 73a [Stein’s translation and reconstruction.].

from where did she gain her sense of self worth. What factors did she weigh before bringing her case before the beit din?

After presenting his vignettes, Stein provides a discussion on court corroboration of the evidence of abuse. In 17 cases he finds the women entered the court settings themselves to accuse and testify against their husbands. It is historically documented then that these women's stands in court were effective. (Testimony is not the same as being a "witness" which women under Jewish law cannot do.) Next Stein offers a sweeping overview of the social and judicial structure concerning assault and battery. According to Jewish law, spousal battery is not a criminal act, but subject to civil law. The victim can sue either for damages or an injunction to desist. Obviously in the case of spousal abuse, a woman can request a court to help her obtain a divorce as well. The plaintiff could be the wife herself or a member of her family of birth. It is arguable that third party interference—as with a father or a brother—might also entail some complicity on the part of the battered woman herself. Next Stein walks through the actual court procedure and discusses ways of teaching this material in various settings. This is indicative of the focus of his scholarship: education and activism. He wants to get this material out into the community and present it in a particular way--with the woman as able agent of healing and change, and the Jewish community as knowledgeable and supportive of that movement.

Embedded in the words "moral agency," especially in the word "agency," is what we might call a cultural expectation of subject-initiated action. In fact, there are instances

and examples of Jewish women initiating various actions, particularly in regards to money and property. However, in the realm of sexual ethics which is the focus of this paper, we rarely think of women in rabbinic Judaism *initiating* but rather *consenting*. Again we are required to shift our model from a male oriented stance onto a female one. Consenting, or not consenting--even now--constitutes a major expression of moral agency for women. Interestingly, it is a primary category of rabbinic thought around issues involving sex, most particularly around the time of becoming betrothed and married.

Chapter Three

Consent to Marriage Under Jewish Law: Women's Moral Agency in Socio/Historical Context

To aid our discussions, we begin with some necessary definitions.²³

Definitions

A female child, from birth until she is a full twelve years old, is called a minor or a little girl [*ketanah*]. Even if she grows many hairs within this period they are considered the same as moles. If, however, she grows two hairs in the nether parts of the body [the pubic area], in places known for growth of hair, and is twelve years and one day old, she is called a maiden [*na'arah*].

The two hairs grown at that age are called the nether token. Once a girl produces the nether token, she is called a maiden, until the expiration of six full months. From the beginning of the day that completes the six months and onwards, she is called a mature woman [*bogeret*]. Thus the interval between a maiden and a mature woman is only six months.²⁴

Rambam, Hilkhhot Issut, Marriage 2:1-2²⁵

Establishing the Necessity of Consent

Biblical Evidence of Woman's Consent

Traditionally, the right of a woman to consent or decline a betrothal rested at least partially on the following:

[Abraham has instructed his servant to find a wife for his son Isaac. The servant's answer was]:

²³ Though codified at a later date, these definitions are derived from the Talmud. I have chosen to present them here and in this more straightforward form as the information itself is necessary to understand the following texts and commentary.

²⁴ Translation from Code of Maimonides, trans. Isaac Klein, New Haven: Yale University Press. 1972. Unless otherwise noted, all passages from Maimonides will be from this edition.

²⁵ Though codified at a later date, these definitions are derived from the Talmud. I have chosen to present them here and in this more straightforward form as the information itself is necessary to understand the following texts and commentary.

“What if the woman does not consent to follow me to this land...?”²⁶

Gen. 24:5

Mishnaic/Talmudic Evidence

The following constitutes the major statement regarding the acquisition of women for the purpose of marriage.

The woman is acquired by three means and she regains her freedom by two methods. She is acquired by money, or by document, or by sexual connection.... she recovers her freedom by a *letter of divorce* or on the death of the husband. The widowed sister-in-law is acquired by sexual intercourse and she obtains her release by *chalitzah* or on the death of the brother-in-law.²⁷

Mishnah Kiddushin 1:1

Note the woman here appears to be altogether passive, an object acted upon by a subject.

Can this really be the case? In the case of acquisition through intercourse, are we to interpret this as saying a woman passively and silently waits while a man has sex with her, establishing her as his wife? Methodologically it is incumbent upon us to inquire regarding what the Mishnah does not: what is the role of the woman?

Even as we linger with this very passage there is yet a slight indication of activity on the part of woman: Note the statement attached at the end regarding the release of the widowed sister-in-law through *chalitzah*. Who initiates this ritual? Can it be entirely the brother-in-law with the woman wholly passive? What about the actions during the ritual which are undertaken by the woman?

²⁶ Translation from Tanakh: A New Translation of the Holy Scriptures According to the Traditional Hebrew Text, Jewish Publication Society: Philadelphia. 1985. Unless otherwise noted, all Biblical passages will be from this edition.

²⁷ Translation from Mishnayot, trans. Philip Blackman, Judaica Press: Gateshead. 1983. Unless otherwise noted, all passages of Mishnah will be from this edition.

The Talmud, in its discussion of this mishnah, begins to articulate what at least part of the female participation could be:

[The Gemara discusses why the Mishnah says, "A woman is acquired," instead of "a man acquires a woman..."] Of if you prefer, say that the Mishnah chose this form of expression because if [the Tanna] had taught, "a man may acquire," I might have thought that the woman may be betrothed even against her will. Hence, [the Mishnah] taught: A woman may be acquired implying that willingly, yes; against her will, no.²⁸

Kid. 2a

Having reached the age of 12 ½, a woman may only be acquired willingly, not unwillingly. Stated differently, a woman, having been asked to become betrothed, is faced with a decision: whether or not to accept. This is an indication of necessary agency, with the manifest potential of being a significant moral/ethical quandary. Many of us today are not accustomed to the idea that accepting a proposal of marriage is a deeply moral/ethical/religious act. However, let us pause again and think: What factors do we weigh when we consider a mate? When we consider a mate for our children? Religion? Observance? Profession? Property? Personal characteristics such as: Generosity? Kindness? Honesty? Experience? Appearance? Friends? Social Standing? Outlook on Life? Sexual Attractiveness? Once considered part by part, we can see that choosing a mate and consenting to a betrothal is in fact an act of moral agency.²⁹

²⁸ Translation from Talmud Bavli: The Schottenstein Edition, Masorah Publications: Brooklyn, NY. 1990.

²⁹ See, Hauptman, Judith, Rereading the Rabbis: A Woman's Voice, p. 70-73. Hauptman provides an interesting discussion regarding the exact constitution of women's consent to marriage, i.e. does she have to respond to an offer of betrothal and what the nature of response must be in order to be actual betrothal. Judith Romney Wegner in Chattel or Person? The Status of Women in the Mishnah, p. 42-45, further describes the

We cannot know exactly what factors Jewish women weighed while choosing their mates in different historical periods. Because of the paucity of evidence from the female perspective, we can only begin to imagine the factors this decision could entail:

For example: What is desirable about this suitor: Piety? Money? Property? Maturity? Stability? Location? His attitudes: Toward children? Her family of birth? Tzedukkah? How much does her father approve/disapprove? Is her family in such a financial state that her acceptance will assist them?

There is evidence indicating that the rabbis themselves understood that accepting a marriage betrothal can be a highly moral/ethical/religious act. For example, the Talmud recounts stories of virtuous women. A primary way in which women are considered virtuous is through *whom they marry* and subsequently aid and support. The Rabbis obviously had a consciousness that in the woman's power of consent and refusal was an expression of ultimate values. For example, consider the story of Rabbi Akiba and his wife Rachel. He was a penniless student, she the daughter of a very rich man who opposed her marriage to the gifted pauper. In spite of this, and the outcome—which was years and years living away from her husband as he studied—Rachel not only marries Akiba but supports him financially as well. She is valorized throughout as a true *eshit heil*.³⁰ This story reflects the personal/religious interest the rabbis had in women and marriage. Outside the scope of their societal periscope, a range of moral/ethical considerations must have attended decisions regarding marriage to any person in Jewish society rabbi or no. At this stage we can only speculate regarding the range of them.

inefficacy and/or ultimate unimportance of women's initiation or response in the overall process of betrothal.

³⁰ Ned.50a, Ket. 62b.

And, we can only speculate what form refusal took. Was refusal simply lack of consent, or was consent simply lack of refusal? In the face of possible familial and community pressure to marry, what did a woman have to do to refuse and what was she thought of subsequent to that refusal? What factors--economic, political, societal, etc.--influenced woman's consent?

We do know some things. It is clear from the Torah that, while instances of women's consent are available, the obligation to marriage only with a woman's consent was not codified as law until later. It is not even codified at the time of the Mishneh. The rabbis instituted it during the Talmudic era. As we expand the range of our questioning, we are invited to ask: why? Was it a result of experience with women? Did they note that marriages in which women had had a voice regarding their husband were happier and lasted longer? Did they experience women as entities capable of decision-making? More light is shed on this line of questioning by the following important passage:

Father's Prerogative Circumscribed by Daughter's Right of Refusal -- A Legal Debate

Mishnah

A man may give his daughter in betrothal when a *na'arah* [either] himself or through an agent.

Gemara

A MAN MAY GIVE HIS DAUGHTER IN BETROTHAL WHEN A NA'ARAH. Only when a *na'arah*, but not when a minor: this supports Rab. For Rab Judah said in Rab's name, others state, R. Eleazer said: One may not give his daughter in betrothal when a minor, [but must wait] until she grows up and says, 'I want So-and-so'.

Rashi on the Above Gemara:

When she is a *na'arah*: All the more so [he can give her in betrothal] when she is a minor....³¹

Kid. 41a

³¹ Translation mine.

Here the issue of consent is both expanded and qualified. A father cannot give his daughter in marriage until she is at least a na'arah. Why? Medical reasons regarding childbearing are not mentioned, nor are questions of domestic training. Rather, according to Rabbi Eleazar a father should wait until the daughter is old enough to both have a preference and be able to articulate it. Moreover, it must be underscored that what is referenced here is preference, which is a substantial step beyond consent or refusal. In consent and refusal the woman remains the object with clearly delineated areas in which re-action is invited. Having a preference and voicing it is the action of a subject not an object. Interesting also is the fact that a set script, setting, and audience are delineated: she can say whom she wants to her father (probably in the privacy of their home). The whole discussion regarding to whom she is attracted for any range of reasons is to be with her father—not with the young man himself. Female preference is at once allowed and contained: it is recognized as in itself preferable (enough to be legislated) and potentially dangerous. What the rabbis understood as the inherent danger of a young woman's preference is expressed in the following quote, one of scores on the topic:

If a father does not find a daughter a husband around age 12 he is contributing to her becoming a harlot. *(Do not degrade your daughter and make her a harlot, lest the land fall into harlotry and the land be filled with depravity. Lev. 19:29)*
San. 76a

In contrasting the two Talmudic excerpts, there is a clear tension between the desire to allow young women the power of choice and a deep-seated fear that time and female volition will lead to tragedy. Looking back at the Rashi on Kid. 41A, we find evidence of a similar contradiction.

We have seen how Jewish women's moral agency in regards to consent, refusal, and statement of preference in marriage found recognition during the rabbinic era, and how that agency might be restricted due to societal conditions real or imagined. And we noted how rabbinic law waxed and waned accordingly.

Rashi on the Mishnah:

When she is a *na'arah*: Also [he can give her in betrothal] when she is a minor....³²

Kid. 41a

Rashi is here saying that a father cannot only give a daughter in betrothal when she is a *na'arah* (12 ½) but also when she is a minor. This could be a contradiction of the Mishneh. How are we to understand it? Luckily, the Tosafot intervene to reveal to us Rashi's intent:

"A man is forbidden to marry off his daughter when she is a minor"...
Nevertheless, it is our custom to betroth our daughters even if they are minors because day after day the Exile increases and if a man has the possibility of giving his daughter a dowry now [he betroths her], lest he not have it later on and she will remain an *agunah* forever.³³

Tosafot, Kiddushin 41a

Agunah here means, as it does, "chained woman," –in this case chained to her father's family having no possibility for marriage and thereby leaving. The vicissitudes and dangers of diasporic existence are cited as reasons why it is *simply too dangerous* to allow a young woman the time and space in which to choose her own mate. In order to keep this from happening, Rav's dicta, however authoritative, can be abrogated.

If we combine this insight with the one above from San. 75a, in which fathers are exhorted to marry their daughters off at an early age, a pattern emerges important to our

³² Translation mine.

³³ Translation from Biale, Rachel, Women & Jewish Law: An Exploration of Women's Issues in Halakhic Sources, Schocken Books: New York. 1983.

understanding of women's moral agency under Jewish law: the right of woman to consent or refuse is a positive and laudable rabbinic enactment which can be abrogated under specific circumstances, in the face of particular fears *which transcend her (or what others thought of her) as an individual woman*.³⁴ For example, what happens to the father and the rest of the family if the daughter cannot get married? Does she become a continuing strain on the already meager resources? Are the parents significantly depleted in resources for old age thereby? And what of the communal problem of young women who are unmarried with no prospect of marriage? Does their unclaimed and unsatisfied sexuality poise a threat to the community, to men both married and unmarried and the families that depend on them? Clearly, an unmarried and unmarriageable daughter poses (at least in some people's minds) economic, communal, and religious threats. It is important to understand that the range of women's moral agency in any society may be impacted by any or all of these external factors. Rabbinic knowledge regarding women's moral agency is only a part of the puzzle. Women's moral agency may lead to chaos in the rabbinic mind and experience, and so might the basic instability of Jewish life.

³⁴ This repatriation between the movement of halachah can be demonstrated....

Chapter Four

Rape in Jewish Law: Toward a Genealogy of Consent

I. The Legal Definition of the Crime and its Punishment

Torah

The Betrothed Virgin

In the case of a virgin who is engaged to a man--if a man comes upon her in town and lies with her, you shall take the two of them out to the gate of the town and stone them to death; the girl because she did not cry for help in the town, and the man because he violated another man's wife. But if the man comes upon the engaged girl in the open country, and the man lies with her by force, only the man who lay with her shall die, but you shall do nothing to the girl. The girl did not incur the death penalty, for this case is like that of a man attacking another and murdering him. He came upon her in the open; though the engaged girl cried for help, there was none to save her.³⁵

Deut. 22:23-27

This passage from Deut., problematic in so many ways, yields interesting information regarding the profile of sexual consent. First, although obvious it must be stated: these verses apply only to a virgin who is betrothed. Such a young woman's sexuality, her very virginity, is obligated to her future husband. Rape of this woman is a crime against the future husband, as is her willingly engaging in consensual sex. It is upon the criteria of consent that liability for lost virginity is decided, with possibility capital consequences. What then is the criterion? She is in a town and does not scream. Or she is in a field.

In today's courts, rape is often proven through evidence indicating that the victim struggled (greatly) with the rapist. Lack of bruises, etc. is often interpreted as lack of

³⁵ Translation from: Tanakh: A New Translation of the Holy Scriptures According to the Hebrew Text, The Jewish Publication Society: Philadelphia. 1985. Unless otherwise noted, all passages from the Bible will be from this edition.

conflict, ergo, and consent. The Torah has a similar criteria, with interesting differences and application. The Torah does not look for evidence of a physical struggle, rather for a scream for help. In both cases criteria external to the testimony of the woman may be decisive. In neither case does the court decide on the basis of whether or not the woman said yes or no. In the Torah, consent may be the absence of a scream. (In contemporary courts, consent may be the absence of a sustained struggle.)

On the other hand, in Deut. there is a certain presumption of innocence on the part of the woman insofar as she is considered to have been raped if the sexual advance occurred in a field (where she could have screamed and not been heard). This statement requires refinement, as do those above: the Deut. passage is attempting to determine liability. How do we know this? Because this law applied to only one category of woman, a vulnerable and valuable woman at that—a betrothed virgin. If this virgin is no longer a virgin she is not completely the woman her betrothed contracted to marry. Liability must be established to a degree not quite required of raped women of other categories. It should also be noted that consent per se is not the topic of discussion, but rather coercion and attempt to receive assistance. Consent here equals lack of moral and legal liability. It is signaled not by action, but rather the absence of certain actions. Expressions of lack of consent may include saying ‘no,’ saying ‘no’ insistently, pushing him away, attempting to cover herself, attempting to strike him, etc.—in short, any act up to but not including, for whatever reason, shouting for help. Moreover, field or city, scream or silence, all become legal determinants which may or may not express the dynamics of any particular situation. Consent in Deut. is not personal. To the degree it

exists, it is legal. Stated differently, we might say, then, moral agency for women in

Deuteronomic legislation has two categories:

Effective moral agency:

In which the internal decision of the woman is reflected in her outward circumstance, i.e. she decides to not have sex with this man and she does not have sex with this man; or, she decides to not have sex with this man and she has sex with his man albeit under coercion;³⁶ and,

Legal moral agency:

In which the exercise of moral agency by a woman is in categories of action not only recognizable by the court, but also interpretable by the court as corresponding to the intended action/nonaction by the woman.

Only one of these manifestations of moral agency seems to ‘matter’ in Deut., i.e. is in accordance with strictly legal definitions. Without downplaying the importance of these distinctions and their consequences, we can still ask: did what we have identified as effective moral agency exist contemporaneously with legal moral agency; and, if yes, of what importance was it—and to whom? Stated differently, the question is: did betrothed virgins understand and mold or express their “consent” or “lack of consent” to legal standards, or were the legal categories external to a set of more personal, possibility

³⁶ By use of the term ‘effective’ I mean an actualized response (or non-response, if that is the response) as opposed to a theoretical or potential response. This term in no way implies ‘efficacious,’ as having produced the desired effect. An effective response—that which expresses a decision (being moral agency) may in fact not be efficacious. As in the case of rape, she may not be efficacious in her attempt to stop the rapist when she pushes him away; however, she will have been effective in acting on her moral agency. Interestingly, the term ‘effective’ does include the Jewish notion of intent, i.e. *kavanah*. Intent as *kavanah* corresponds to the philosophic category of potentiality, that which is *en potends*. Effective moral agency, however, requires movement from the intended to the actual—in *potentia* to the *in actu*.

socially defined or suggested modes of moral agency? If the answer is the second proposition, then we must ask: what was the interface between effective and legal moral agency like? Where was effective moral agency learned? (Certainly not in yeshiva) Discussed? Important? (Certainly not in beit din) and among whom?

The Virgin Who is not Betrothed

If a man comes upon a virgin who is not engaged and he seizes her and lies with her, and they are discovered, the man who lay with her shall pay the girl's father fifty [shekels of] silver, and she shall be his wife. Because he has violated her, he can never divorce her.

Deut. 22:28-29

This passage closely follows the above verses about a betrothed virgin. Here, the woman is not betrothed. The rapist is liable toward the woman's father, who will never be able to marry this daughter off, and the woman herself. In some ways, this is a brilliant piece of social legislation. A host of religio-social problems might follow such a rape. The victim's family of birth might be saddled with her forever, causing a financial strain and deleting possible resources for the parent's old age. Or, the woman might end up without family, on the street—a single woman desperate to support herself any way she can. We have already seen how dangerous such a woman might appear to the rest of the community. And let us not overlook the possibility of her becoming pregnant. Indeed, forcing the rapist to marry her and pay the father is a neat way of solving all those problems at once.

There is not here a lengthy description of the external conditions which meet the criteria for rape. Unlike the betrothed virgin, this unbetrothed virgin does not face the

death sentence if caught engaging in legally consensual sex. She has not been made *hekdesh*³⁷ to a future husband.

Her consent or lack of it is bound up in a single word—*otfasah*, and he seizes her—which does not even describe her actions, rather, it describes actions of the rapist. In this verse there is mention of neither legal nor effective moral agency on the part of the woman. According to the plain meaning of the text, she could respond to the threat of rape in any number of ways, none of which impact the outcome: her father is paid and she marries the rapist.³⁸ The thinking of the legislator (Legislator?) in terms of seeking overall social good is so perceptive and insightful that the total lack of insight and mention of the virgin's response is striking. A universe of lived experience, of sexual attractiveness, of chase, capture, violation, fighting back or fearful acquiescence is entirely obfuscated. Similarly, the woman's response to the prospect of marrying her assailant is also absent. It is almost as if, in this case, consent of any kind is wholly irrelevant.³⁹

The Married Woman

If any man's wife has gone astray and broken faith with him in that a man has had carnal relations with her unbeknown to her husband, and she keeps secret the fact that she has defiled herself *without being forced*, and there is no witness against her [he may subject her to the Ordeal]⁴⁰

Numbers 5:12b-13

³⁷ From the same root as the Hebrew word *kadosh* (holy), *hekdesh* means to make separate, dedicated to a particular owner and purpose.

³⁸ In Talmud and later codes, we learn that the daughter and the father can prevent this marriage: "And regarding both the rapist and the seducer, both she and her father can prevent [the marriage]." ³⁸ It is interesting to note that the wording here is not active consent but rather prevention. Are those legally and/or effectively different and distinct? Another question: If the raped daughter does not marry the rapist, what are her options?

³⁹ This impression may be tempered by other related texts. Here, I am reading the verses on their own, as a single literary and/or legal unit.

⁴⁰ Italics mine.

Here is a case which parallels in some ways the case of the betrothed virgin, that of a married woman. Interestingly, we have more information about this woman, which in fact traces an issue of moral agency. The thrust of the verse addresses not the fact that she has committed adultery, but rather that she has kept her adultery a secret. In the words of the verse, “she has defiled herself without being forced.”

Here, a legal definition of “being forced” is absent. Legal moral agency regarding the sexual act itself is limited to these actual words “being forced.” Note the grammatical construction is passive. In order to commit adultery in this verse she does not need to do any action, she is acted upon and does not respond in such a way that it might be said, “she was forced.” Legal consent appears to be not fighting back.⁴¹

A few words later in this verse, we have the first instance of the woman actively doing something which certainly involves moral agency. She “keeps secret...”. Though the grammar connotes action: “keeps secret,” this action is basically the absence of action—reporting the incident. Interestingly, the next action the verse attributes to the woman is defiling herself “without being forced.” The implication is that she could have defiled herself even if she was forced. Legal moral agency, then, involves not sex *per se* but rather self defilement which doesn’t (according to the grammar) seem to be

⁴¹ The Hebrew word for seized, *nitpasa*, has the same root as the term in the above verse, Deut. 22:28, *ootpasa*, which is read there as forced or coerced. In the above case the man is punished but not the woman. Because both the punishment and the verb root were similar, Rashi interpreted this also as a case of coercion, of forced sex. However, there is no indication that this distinction between consent and coercion in the case of a married woman carried the force of law during the Biblical period. Moreover, there are other interpretations of the term *nitpasa*, (i.e. apprehended) which allow other interpretations.

something the seducer or rapist does to her. After-the-fact legal moral agency involves reporting the incident.

The verse is certainly, and, I would argue, intentionally provocative. The suggestion that a married woman had sex with another man and kept the matter a secret suggests to us volumes: that there was possibly a secret affair, that even as the woman keeps silent regarding the act perhaps she is weaving a whole web of lies. Or perhaps she was lonely, misunderstood, bored, and wanted to feel herself young and beautiful again. Really our minds can go wild from these few words. And in fact that is what the verse is about. Although the verse is written in such a way as to suggest that the woman is guilty, no one knows for sure and this is why there is the Ordeal—to help the husband establish her guilt. We might say it is because the moral agency of the woman/wife is so shrouded in mystery, so distant, so unknown, and so little articulated that the husband has to resort to ancient (and somewhat dangerous) divining methods to learn the truth.⁴²

Here, then, the effective moral agency of the woman is indeed referenced, if only noted that it is unknown and unexplored—at least we know it exists. Is it the close lived proximity between husband and wife which impresses upon the husband the presence of moral agency (even as it remains a mystery) in such a way that is not learned in relation to the betrothed and unbetrothed virgin in her father's house?

Talmud

By the time of the Mishneh and Talmud, the notion of legal moral agency in regards to consent is, unsurprisingly, far more sophisticated and developed. It seems clear

⁴² Sadly, according to contemporary media, little has changed in that regard.

that, in many cases, knowledge of women's effective moral agency has drastically increased (alongside of an overall rabbinic trend away from the enactment of the death penalty.) For example, insight has been gained regarding seduction of a minor female:

[Seduction of a] minor is deemed *ones* [forced] and [those girls who have been thus seduced] are permitted to Israelites⁴³ [to marry].⁴⁴

Yeb. 33b

While this law may be somewhat taken for granted in today's society, it was not known in Israelite days and in fact signals a new consciousness about girls' and women's moral agency: Up to a certain age, a girl's moral agency (effective or legal) is not developed enough to make her wholly responsible for her actions, especially in regards to sex. A young girl might not know the full consequences and/or appreciate the weightiness of the decision before her. She may know too little of life to understand what the loss of virginity entails. She may be feeling sexual urges for the first time, and not know how to appropriately respond. Or she may know nothing about sex at all and thus not even really know what is happening to her. That the rabbis learned this signals a marked growth in their understanding and appreciation of the overall issue of consent for girls and women.⁴⁵ Everything that a girl does not have which makes her not responsible for sexual encounter is exactly what older women do have—by which they do become responsible.

On the other hand, it is interesting to note that the rabbis do not actually absolve the girl from responsibility. They do not speak of actions committed by the girl at all. Rather, the legal rubric again concerns the action of the seducer. It is his act which is redefined not hers. His act becomes *ones* which means undue force and here implies

⁴³ Israelites and not Cohanim.

⁴⁴ Translation mine--DR.

⁴⁵ Of course it is arguable that this law was made in response to the needs of fathers, or a combination of all of the above.

rape. She is not capable of appropriate moral response. And so her response is not regarded at all. The remainder of the sentence continues the overall absence of agency on the part of the female: she is permitted to ordinary Jews to marry. It does not say, she is permitted to marry (implying action on her part) ordinary Jews. Whether or not the rabbis have come to expanded understanding of developmental female moral agency, they are here still legislating (at least ostensibly) regarding the actions of the male.

One important factor to point out from this quote is that, by specifying the span of years in which a child/girl does not have requisite moral agency to be made responsible for involvement in sexual acts, by the very fact of this articulated division, they are in fact underscoring the seriousness with which they regard women of an age to be responsible. Stated differently, by pointing to when women do not have moral agency, they underscore when it is that women do. Ability to consent is recognized as a part of the maturation process. Female moral agency is a product of maturity. Female moral agency is considered mature.

As the following text illustrates, female moral agency is also considered to be complex—influenced by both the mind and the body:

Rava said: Wherever [intercourse's] beginning was under duress but its end was with consent, even if she says: "Let him be," for if he had not attacked her, she would have hired him, she is permitted [to her husband to continue as his wife]. What is the reason? Passion overcame her.⁴⁶

Ket. 51b

According to the above, even though she is being raped, the act of sexual intercourse may cause the woman to desire what she earlier rejected. As she ceases to

⁴⁶ Translation from The Babylonian Talmud, Trans. Rabbi Dr. I. Epstein, The Soncino Press: London. 1935. Unless otherwise noted, all passages from the Talmud will be from this edition.

resist and even comes to enjoy it, the act is still one of rape, and act of *ones*. She was forced into actions she would not otherwise have taken. This interpretation of female sexuality and moral agency is reflected in later codes:

A woman who is subjected to duress at the beginning of intercourse, but finally acquiesces in it, is also entirely exempt, for once the man has begun sexual intercourse with her under duress, she cannot but acquiesce, seeing that human impulse and nature compel her to ultimate assent.⁴⁷

Rambam, *Misheh Torah*, Forbidden Intercourse 1:9b

We have seen how female consent became a function of age and maturity. Here, again, information about the rabbinic understanding of female moral agency can be discovered through analysis of its margins or borders under rabbinic law. Consent is subject to certain conditions, i.e., the woman in some state of physical and mental equilibrium from which she can make appropriate decisions (and be held responsible for the same). What can upset this balance? Sex, apparently, even if it is forced. Apparently if a woman comes into the sexual act, her physical body, with its natural desire for sex with men, can overcome or displace her mental (and emotional?) desire to resist.⁴⁸ However we may feel about this somewhat essentialist view of female sexuality, we can still learn much about the rabbis and their understanding of female moral agency. Let us map the movement from rejection to acceptance:

A man comes upon a woman, and he seizes her. She says “no, no” but he does not stop. She calls out for help, no one hears. She attempts to fight him off at the same time trying to keep her clothes close to her body. [At this time she is satisfying all criteria for both legal and effective moral agency. What she wants and what she is doing

⁴⁷ Translation from *The Code of Maimonides*, trans. by Rabinowitz and Grossman, Yale University Press: New Haven. 1965. Unless otherwise noted, all passages from Maimonides will be from this edition.

⁴⁸ If women were the only sex subject

are in agreement. How the rabbis would legally interpret her actions correspond her to desires.] The man succeeds in initiating the sexual act. At some point during sex, the woman ceases to fight him off. In fact, she becomes an accepting and willing participant.

We can say she became a willing participant due to *ones*, undue force. However, the source of that *ones* according to both Talmud and codes, is not the man who is raping her. Rather, it is her own body, her “passion,” in the words of the Talmud, her natural “impulse” and “nature” in the words of Maimonides. Rambam goes so far as to proclaim, “she cannot but acquiesce.” It is, it seems, a foregone conclusion that a woman who is being raped will at some point begin to desire the continuation of that act to the point of completion. Her moral agency has not merely been influenced. Saying yes to the rapist here is not an act of agency. Rather, her moral agency, both effective and legal, has been entirely displaced. She is in no way responsible. It might be said that any apparent consent or acts of consent is a sham. Here, *consent is not determined though outward appearance, word, or action. Consent or non-consent is according to the dynamics (outward appearance, words, and actions) during the initial portion of the encounter.*

Through the generations of rabbis, the view of consent evolved. In order to have legal consent, certain criteria must be met. These criteria are: age (maturity) and possession of mental faculties, i.e. not overwhelmed by the sexual act.

Conclusion

With the development of categories, effective and legal, we have at last framed and identified some of the acres and acres of silent and unknown moral decisions arrived at and [possibly somehow] expressed by our foremothers. Slowly, we may be able to fill in some of the blanks with careful rereading of existing rabbinic literature—now circumscribed more completely as fodder for and product of Jewish legal reasoning. Additional evidence from historic research of myriad kinds can inform us further.

At some near point, however, the trail will turn cold. Our foremothers call to us from too long ago for us to clearly discern their voices [their yeas and nays], decipher their gestures [expressing joy or horror], ultimately learn from their example, and grow from their teachings. It might appear that now we have conceptualized a space for their moral teaching and example we see how impoverished our inheritance truly is.

This would have been the case, at least, two centuries ago, before the advent of research methodologies generated by existentialism and then feminism. Existentialism as a philosophical inquiry into human existence, patterns of knowledge, and morality pioneered the use of the *self*—the human self as a whole—as research instrument: an epistemological tool to explore ontology, the nature of being. Feminist thinkers, incorporating work from various disciplines (foremost among which was psychology), built on this foundation a scaffolding toward the justification and use of the *embodied female self* as research instrument.⁴⁹

⁴⁹ A fine overview of this intellectual progression is offered by Josephine Donovan in, Feminist Theory: The Intellectual Traditions of American Feminism, New York: Continuum Press, 1991.

How do we know the range of possible effective responses to a moral dilemma?

By questioning with our bodies, our memories, our knowledges, and our imaginations.

This is in fact how we have come to know about the whole category of effective response altogether—gleaning from the evidence of our lives, thinking from memory and

imagination, responding from our stand-point as women ourselves. In this thesis we have considered in formal methodological terms that which has already been explored by

contemporary Jewish women in midrash, poetry, song, prayer and simple daily life. In

some quietly important ways, it seems that in order to learn from our Mothers we must be willing to learn from our own lives, to honor our Mothers we must learn to give honor to

one another.

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Appendices Related Rabbinic Texts

Appendix I. Rape

Definition of Rape in the Codes

Who is a seducer, and who a violator? A seducer acts with the victim's consent; a violator has intercourse with her against her will.

A woman subjected to intercourse in the open field is presumed to have been violated, and is subject to the rule governing violation, until witnesses testify that she had indeed submitted to intercourse of her own will.

A woman subjected to intercourse in the city is presumed to have been seduced, inasmuch as she did not cry out, until witnesses testify that she was indeed violated, as for instance, that the man had drawn his sword and said to her, "If you cry out, I will slay you."

Rambam, Mishneh Torah, Virgin Maiden 1:2

Explanation:

According to the Torah and Maimonides, in the case of a betrothed maiden rape is determined according to location. If committed in the city, it was not rape because she would have cried out and someone would have heard. According to this criterion, the only place a virgin could truly be raped was the countryside, where there was no one to hear. As we saw above, Rambam admits the possibility that a man might have threatened the woman's life thus buying her silence in the city. This could only be established with witnesses, however. Rambam reads the biblical verses more metaphorically, changing the criterion for rape changed from basic location to whether or not the woman could have been rescued:

About the betrothed maiden: When witnesses see from afar a man seize a maiden and lie with her in the town and they raise their voice and warn them, [then] according to our rabbis they shall both be stoned, since the woman too is considered to be transgressing intentionally because she did not cry out at all. For normally, any woman being raped [anusah] cries out in the town for help to be saved.

And if they see her in the field when he holds her and lays with her she is considered raped [anusah] and not liable. And the reason for "and she cried out" (Deut. 22:27) is [to indicate that] it is *possible* that she cried out...for even if they did not hear her cry out she is not liable because she had no rescuers there. And the general rule is that if she has rescuers there, whether in the town or in the

countryside, she is liable, and if she has no rescuers, whether in the town or the countryside, she is not liable.⁵⁰

Nachmanides on Deut. 22:23

Related Texts from Rambam. Mishneh Torah. Book of Holiness. Forbidden Intercourse

13. Concerning any of the forbidden women [forbidden through incest or betrothal/marriage to another man] referred to above, the rule is as follows: If she is three years and one day old, or older, and an adult male cohabits with her, he incurs the death penalty, or extinction, or flogging, while she is entirely exempt, so long as she has not come of age. If she is less than three years and one day old, both are exempt, since intercourse with her is not regarded as intercourse.

18. If one of them is awake and the other is asleep, the latter is exempt....

18:1 We have learned by tradition that the term “harlot” as designated in the Torah means any woman who is not a daughter of Israel, or a daughter of Israel who has had intercourse with a man whom she is forbidden to marry....

6. Any woman who has intercourse with a man who rendered her a harlot, whether by rape or by consent, whether willfully or by error, whether naturally or unnaturally--once he has initiated with her, she is invalidated for the priesthood, because she has become a harlot. The only condition is that she be at least three years and one day old, and that he be at least nine years and one day old.

7. Should the wife of a priest be raped, her husband must be flogged if he subsequently has intercourse with her,....

8. The raped wife of an Israelite, while permitted to her husband, is forbidden to the priesthood.

16. If she is mute, or deaf, or if she says, “I do not know with whom I have had intercourse,” or if she is a minor who cannot distinguish between a valid and an invalid man, she is deemed a harlot out of doubt.

⁵⁰ Translation from Biale, Rachel, Women & Jewish Law: An Exploration of Women's Issues in Halakhic Sources, Schocken Books: New York. 1983. pp. 246-7. I am indebted to the Author for this information.

Punishment for Rape
The Civil Case

Explanation:

In Jewish law, some types of rape are considered civil not criminal cases. Specifically, those cases of rape involving betrothed or unbetrothed virgins, for virginity was considered a valuable “commodity” which, once damaged, could never be repaired. In these cases, rape was punishable by monetary payments and, often, marriage of the raped woman.

Talmud

Mishnah

The seducer gives three things and the rapist four. The seducer gives [payments for] shame and blemish and the fine. A rapist adds to it in that he gives the [payment for] pain.

What is [the difference] between a rapist and a seducer? The rapist gives the [payment for] pain but the seducer does not give the [payment for] pain. The rapist gives immediately, but the seducer [gives] when he sends [her] away. The rapist drinks from his pot, but the seducer, if he wishes to send [her] away, he sends [her] away.

How does he drink from his pot? [He must marry her] even if she is lame, even if she is blind, and even if she is afflicted with boils. [If] a matter of adultery was found about her, or if she is not fit to enter [by marriage] into [the community of] Israel, he is not permitted to keep her, for it is said: “And she shall be his wife” -- a wife who is fit for him.⁵¹

Ket. 39a

Explanation:

This mishnah outlines the fines and payments that must be paid to the father of the raped or seduced maiden. A man who seduces must pay three fines relating to the issue of the amount of money in bride price her father has lost because she is no longer a virgin along with the social embarrassment caused. “Blemish” refers to the loss of the hymen, while “the fine” is the fifty shekel fine stipulated by the Torah. The payment for social embarrassment is figured according to the social status of the virgin’s father and

⁵¹ Translation from The Talmud: The Steinsaltz Edition, Random House: New York. 1994. Following in the Gemara is a rich discussion on what exactly the pain of rape might be.

that of the rapist (i.e. a seducer of high social standing who seduced a girl of lower standing would pay less than if the social tables were reversed.)

Over and above the three payments, the rapist pays an extra one for pain inflicted. This is entirely rabbinic. The gemara following discusses what that pain might be.

Codes

1. The fine of fifty shekels constitutes payment for the enjoyment of the intercourse alone. The seducer must also pay, in addition to this fine prescribed by the Torah, compensation for the humiliation and the blemish. The violator [rapist] must pay, in addition to all these, compensation for the pain, for a woman who submits to intercourse willingly suffers no pain, whereas if she is violated she does suffer pain. Hence it is said of the violated, *because he has pained her* (Deut. 22:29)

6. Compensation for the blemish is assessed according to the girl's beauty. The judges must therefore consider her as if she were bondswoman being sold in the market place, and must estimate her value as a nonvirgin as against her value as a virgin. For a man would ordinarily prefer to purchase a virgin bondswoman in order to give her to his slave whom he wishes to benefit and please. The judges must thus determine the amount of her deterioration in value, and the offender must pay accordingly.

Compensation for the pain depends upon the tender age of the girl and the structure of his body. The judges must thus estimate the amount the father would have paid to prevent his daughter from being hurt by this man, and the latter must pay this amount.

Rambam, Mishneh Torah, Virgin Maiden 2:1, 6

“And in the case of a raped virgin who suffers pain [he pays for] pain, indignity, and blemish. And these are not identical for all people, rather it all depends on the degree of indignity, according to the one who causes the shame and the one who is shamed. For the case of one who shames an important girl from an important family is not like the case of one who shames a lowly and poor one. And it is not the same for a father who is shamed by important man as for one shamed by a lowly and despised man. Therefore, the court considers his status and her status and such things as how much her father and her family would have given for this not to have been done to them by that man; and that is how much he shall pay.

And pain: they judge according to his smallness [size? age? importance?] and hers, and according to her health and how much she actually suffered. And that is how much he will pay in addition to the fifty [shekels] of the fine.⁵²

⁵² Translation from Biale. See ff 6.

A Virgin who was Raped Does Not Wish to Marry her Assailant

Talmud

And regarding both the rapist and the seducer, both she and her father can prevent [the marriage].⁵³

Ket. 39b

Codes

If a violated woman refuses to marry her violator, or if her father refuses to give her in marriage to him, they may do so, and the violator may pay his fine and go his way.

If she and her father consent to the marriage, but the violator does not, he must be compelled to do so; he must consummate the marriage, and pay the fine as well, for it is said, *and she shall be his wife* (Deut. 22:29), which is a positive commandment.

Even if she is lame, or blind, or leprous, he must be compelled to consummate the marriage, and may not dismiss her of his own free will forever after, as it is said, *he may not put her away all his days* (*ibid.*), which is a negative commandment.

Rambam, Mishneh Torah, Virgin Maiden 1:3

When a Rapist Can (and Must Be) Stopped
Even at the Cost of His Life

And these may be prevented at [the cost of] their lives; he who pursues after his fellow to slay him, or [he that pursues] after a male [for unnatural sexual intercourse], or [he that pursues] after a betrothed maiden [to violate her].....

Mishnah San. 8:7a

Explanation:

According to this mishnah, one may (and in fact must) save these categories individuals if at all possible, even if it means killing the attacker. The first proof text given in the gemara following [San. 73a] is Lev. 19:16b "Do not stand by the blood of your fellow, I am the Lord." This is taken as a positive commandment to save one that is about to be murdered--even if it means killing the attacker. Further down in the gemara, this verse is linked to Deut. 22:26-27, the case of the betrothed virgin who is attacked in the countryside:

⁵³ Translation from Steinsaltz. See ff 7.

But you shall do nothing to the girl. The girl did not incur the death penalty, for the case is like that of a man attacking another and murdering him. He came upon her in the open; the engaged girl cried for help, there was no one to save her.

The Torah already likens the girl to a man who might be murdered. The rabbis then took the phrase "there was no one to save her" to mean that if one had been there she should have been saved. If a man about to be murdered can be saved at the cost of his attacker's life, so can she. Legally, it became a positive commandment--In the case of an engaged virgin about to be raped, the would-be rapist can (should) be stopped even if it means killing him. This is further refined in the codes:

6b If one person is pursuing another with the intention of killing him, even if the pursuer is a minor, it is the duty of every Israelite to save the pursued, even at the cost of the pursuer's life.

7. Thus, if one has been warned but still pursues, he may be killed even if he does not accept the warning, seeing that he continues to pursue. If it is possible to rescue the pursued at the cost of one of the pursuer's limbs... this should be done. If, however, it is impossible to judge exactly and the pursued can be rescued only if the pursuer is killed, he may be killed even though he has not yet killed anyone, for the Scripture says, "Then thou shalt cut off her hand, thine eye shall have no pity (Deut. 25:12)

10. The rule is the same whether one is pursuing another to kill him, or whether he is pursuing a betrothed girl to ravish her.... "The betrothed damsel cried and there was none to save her (Deut. 22:27), intimating that if there is someone to save her, he should save her by any possible method, even by killing the pursuer.

[In the following verse, the circumference of women to be saved is widened a little to include married women (thus committing adultery) or close relatives (intercourse with whom would constitute incest).]

12. If one pursues a woman forbidden to him, seizes her, lies down with her, and commences coition, he may not be killed until after his trial, even though he has not completed the act.

13. ... the offense [of not saving by stopping/killing the pursuer] is most serious, for if one destroys the life of a single Israelite, it is regarded as though he destroyed the whole world, and if one preserves the life of a single Israelite, it is regarded as though he preserved the whole world.

Rambam, Mishneh Torah, Murder and Preservation of Life 1:6-16

Regarding the Consent of the Wife

Rami b. Hama citing R. Assi further ruled: A man is forbidden to compel his wife to the [marital] obligation, since it is said in Scripture, *And he that hasteth with his feet sinneth.* (Prov. 19:2)

R. Joshua b. Levi similarly stated: Whosoever compels his wife to the [marital] obligation will have unworthy children. Said R. Ika b. Hinena, What is the Scriptural proof? *Also without consent the soul is not good.* (Prov. 19:2)

Eruvin 100b

It is the duty of every man to warn his wife against infidelity, and the Sages have said, "A man should warn his wife only because the spirit of impurity has entered into him." Nevertheless, he should not carry his jealousy of her beyond reason, nor should he compel her to have intercourse with him against her will. rather, he should do it only with her consent, accompanied by pleasant discourse and enjoyment.

Rambam, Mishneh Torah, Marriage 15:17

Central Texts from Rambam. Mishneh Torah. Book of Holiness. Forbidden Intercourse

1:1 If one wantonly has connection with a woman within the forbidden unions enumerated in the Torah, he is liable to extinction (being cut off from the people Israel), as it is said, *For whosoever shall do any of these abominations, even the souls that do them shall be cut off from among their people* (Lev. 18:29), i.e. both of them, the man and the woman. If, however, they have committed the transgression in error, they are subject to a fixed sin offering.

2. Some of the forbidden unions are punishable by death imposed by the court, in addition to extinction, liability to which is common to them all. In the case of forbidden unions which are punishable by death imposed by the court, if witnesses were present and warning was given, and if the culprits did not desist from their act, the prescribed death penalty must be inflicted upon them.

6. The only forbidden union punishable by strangulation is the one involving intercourse with another man's wife, as it is said, *The adulterer and the adulteress shall surely be put to death* (Lev. 20:10); for wherever death is prescribed in the Torah without further specification it signifies strangulation.... If she is a betrothed maiden, both are punishable by stoning, as it is said, *If there be a damsel that is a virgin betrothed unto a man, and a man find her in the city, and lie with her; then ye shall bring them both out unto the gate of that city, and ye shall stone them with stones that they surely die* (Deut. 2:23-24).

9. The victim of duress is entirely exempt, both from flogging and from offering a sacrifice; needless to say, [s]he is also exempt from the death penalty, as it is said, *but unto the damsel thou shalt do nothing* (Deut. 22:26). This holds true

only when the victim is the woman, since duress cannot be applied to the man, for no erection is possible without his own intention. A woman who is subjected to duress at the beginning of intercourse, but finally acquiesces in it, is also entirely exempt, for once the man has begun sexual intercourse with her under duress, she cannot but acquiesce, seeing that human impulse and nature compel her to ultimate assent.

13. Concerning any of the forbidden women [forbidden through incest or betrothal/marriage to another man] referred to above, the rule is as follows: If she is three years and one day old, or older, and an adult male cohabits with her, he incurs the death penalty, or extinction, or flogging, while she is entirely exempt, so long as she has not come of age. If she is less than three years and one day old, both are exempt, since intercourse with her is not regarded as intercourse.

18. If one of them is awake and the other is asleep, the latter is exempt....

19. The witnesses to the deed are not bound to see the culprits initiate intercourse, like a painting stick being inserted in the paint tube. Once they see them in close embrace, in the manner of those engaged in the sexual act, the culprits are liable to be put to death on this evidence. It cannot be said that perchance the act of coition has nevertheless not been initiated, for this posture constitutes presumptive evidence to the effect that it has.

3:6 If ten men successively have intercourse with a virgin who is still under her father's control, the first one is punishable by stoning, while all the others are liable to strangulation. This applies only when they have normal intercourse with her, or they have abnormal intercourse with her, so that she remains a virgin, they are all liable to stoning.

18:1 We have learned by tradition that the term "harlot" as designated in the Torah means any woman who is not a daughter of Israel, or a daughter of Israel who has had intercourse with a man whom she is forbidden to marry....

6. Any woman who has intercourse with a man who rendered her a harlot, whether by rape or by consent, whether willfully or by error, whether naturally or unnaturally--once she has initiated with her, she is invalidated for the priesthood, because she has become a harlot. The only condition is that she be at least three years and one day old, and that he be at least nine years and one day old.

7. Should the wife of a priest be raped, her husband must be flogged if he subsequently has intercourse with her,....

8. The raped wife of an Israelite, while permitted to her husband, is forbidden to the priesthood.

16. If she is mute, or deaf, or if she says, "I do not know with whom I have had intercourse," or if she is a minor who cannot distinguish between a valid and an invalid man, she is deemed a harlot out of doubt.

29. [Speaking of Israelite women who live in a city captured in war: When are they believed that they were not raped by the occupying army--and therefore are not rendered harlots?] When the attacking army belongs to the same kingdom and settles down in that city, without fear of pursuit; therefore apprehension need be felt that they may have had intercourse with the women. If, however, an army from another kingdom raids the territory, overruns it, and passes on, the women are not rendered forbidden, since the invaders have no leisure for intercourse, for they forthwith busy themselves with pillage and then flee. If, however, they have taken women captive so that they come under their control, these women become forbidden, even if the Israelites pursue the raiders and rescue the women from their hands.

Whether a Woman Should be Given to a Man Who Flames with Passion in Order to Save His Life

no. Sanhedrine 75a (good story ending with)

Since the destruction of the Temple, sexual pleasure has been taken [from those who practice it lawfully] and given to sinners, as it is written, *Stolen waters are sweet, and bread eaten in secret is pleasant.*

Israel Today

Rape in Israel is punishable with up to 14 years' imprisonment. (Section 152, Criminal Code Ordinance, 1939, as amended in 1966). Constructive (statutory) rape (sexual intercourse with an infant girl) extends up to the girl's age of 17. A provision of the new law as amended has made the law that the man who rapes a *na'arah* must marry her unenforceable.

Appendix II: Limitations of Consent--The Question of Age

1. A father can betroth his daughter without her consent while she is a minor. When she becomes a *na'arah* she has the right [to consent or not] to any betrothals made by her father. However, in [matters concerning] lost objects that she finds, money that she earns, and her *ketubah*, if she is widowed or divorced [her father] is permitted [to this money] until she reaches the age of *bogeret*; therefore the father gives his daughter in marriage from the day she is born to the day she becomes a *bogeret*. And even if she is deaf and dumb and her father betroths her, she is that man's wife completely. If she is three years and one day old she can be betrothed through intercourse with the consent of her father. Younger than that if her father turns her over to be betrothed through intercourse she is not betrothed.

2. Once she reaches the age of *bogeret* the father no longer has the power to betroth her: she has become like all women who cannot be betrothed except on their own volition.

3. If the father gave her in marriage and she became a widow or was divorced while her father was still living, she is on her own recognizance [regarding the acceptance of betrothal] even if she is a minor; however, if she marries and is widowed or divorced many times before she reaches the age of *bagrut*, maturity, then she returns to the jurisdiction of her father.

4. If a girl becomes betrothed without her father's consent before she reaches the age of *bogeret* she is not engaged.

8. It is a mitzvah to refrain from betrothing one's daughter when she is a minor until she is grown and can say "I want So-and-so."⁵⁴

Shulkhan Arukh Even Haezer 37

42:1 A woman cannot become engaged without her consent, and if she is forced she is not engaged.

43:1 A minor who betroths or marries is neither [betrothed or married] for the rabbis do not permit the marriage of minors. It is thus forbidden to pledge a girl while she is a minor.

Shulkhan Arukh Even Haezer

Regarding the Male

⁵⁴ Translations mine. Unless otherwise noted, all further translations of the Shulkhan Arukh will be mine as well-DR.

A boy can become a *g'dolah* and proceed to marry on his own volition at the age of 13 years.⁵⁵

A woman may not be betrothed except with her consent, and if one betroths her against her will, she is not betrothed. On the other hand, if a man is coerced into betrothing a woman against his will, he is betrothed.

Rambam. Hilkhhot Issut, Marriage 4:1

And even though the father has the authority to betroth his daughter, while she is a minor or a maiden, to whomsoever he wishes, it is not proper to do so. Rather, the Sages have ordained that a man should not have his daughter betrothed while she is a minor--he should delay until she reaches adulthood and herself declares, "I desire to be wed to So-and-so." Similarly, it is improper for a man to betroth unto himself a minor female, nor should he betroth a woman until he has first seen her and found her acceptable in his eyes, lest she should find no favor in his eyes, with the result that he would have to divorce her, or else lie with her while he dislikes her.

Rambam Hilkhhot Issut 3:19b

⁵⁵ Translation from The Babylonian Talmud, trans. by Rabbi Dr. I. Epstein, The Soncino Press: London. 1935. Unless otherwise noted, all further talmudic passages will be from this edition .

Appendix III: Divorce Without the Husband's Consent: A Review of Basic Jewish Sources

Deuteronomy 24:1

The Establishment of the Husband's Prerogative in the Torah

A man takes a wife and possesses her. She fails to please him because he finds something obnoxious about her, and he writes her a bill of divorcement, hands it to her, and sends her away from his house.

Mishneh Yebamot 14:1

The Mishnaic Reiteration of the Husband's Prerogative

The man who divorces is not like the woman who is divorced, because the woman goes forth with her consent or against her will, whereas the man divorces her only with his own free will.

Mishneh Ketubot 7:10

Circumstances which may Override the Husband's Prerogative

And these are [the reasons] for which they force him to give divorce: one afflicted with skin disease, one who has polyps, or one that collects [excrement], or one who mines copper ore, or a tanner.

Talmud: Ketubot 3a

On the Rabbis' Refusal to Allow a Man to Cancel His Get in Uncertain Circumstances

Rava himself was of the opinion that it was on account of both virtuous and non-virtuous women. It was on account of virtuous women because if one ruled that this *get* was not valid, there will be times that there will be no accidental presentation but they will assume that there was, and they will thus remain in a state of *agunah*. And it was on account of the non-virtuous women because if this *get* were not valid, there will be times when he will be accidentally prevented from giving the *get* and they will say he was not

so prevented. And such a woman will remarry anyhow and the *get* will be invalid and her children will be illegitimate (*mamzerim*).⁵⁶

Talmud: Gittin 33a

The Power of the Rabbinic Court to Remove the Marital Status

-- Raban Shimon ben Gamliel says that the husband may not cancel the *get*... because if he could wherein would lie the power of the court?

-- Can it be? The cancellation of the *get* is a scriptural right. For the sake of the 'power of the court' do we permit a married woman to remarry?

-- Yes, because anyone who betroths does so with the implicit understanding that the act is in consonance with rabbinic standards, and the rabbis [can remove] the marital status from him.⁵⁷

Liturgy for Engagement

Evidence of the Power of the Rabbinic Court

The Betrothal Ritual (Erusin)

The blessing for betrothal is said over wine.

The man gives the ring (or some item worth at least a *perutah*) to the bride and recites:

"Behold, you are consecrated to me with this [giving of the ring] according to the Law of Moses and of Israel."

Cairo Geniza

Document Concerning a Demand for Divorce and Ketubah by the First Wife

When Her Husband Takes a Second Wife

-- If someone marries a second wife and the first one wants a divorce and says: "I refuse to accept a co-wife", does she receive her *ketubah* payment or not?

-- Thus says the sages: "If he said, 'Let me go and marry another wife', R. Ammi said: 'He must divorce and pay the *ketubah*.' (this is minority opinion)

-- Rava said, 'A man may marry several women besides his wife', as long as he is able to support them.'"

-- Consequently, if this man is seen to be able to support the two of them.... the first cannot say "I refuse to accept a co-wife." If she insists in her attitude, she is a *moredet* (recalcitrant wife).

⁵⁶ As translated by David Novak in "Annulment in Lieu of Divorce in Jewish Law," *The Jewish Law Annual*, Vol. 4. p 188-206. I am indebted to Rabbi Novak for this analysis and interpretation.

⁵⁷ *ibid.*

[She must return all that her husband has given her.]

-- And he writes for her a bill of divorce [without her *ketubah*] and divorces her immediately or after a few days, as the court sees fit to delay it and they accept the postponement. But if she will not accept the postponement, he divorces her immediately.

-- But if this man is incapable of providing the two of them with all which he should and deprives the first one [of anything including sex], he must divorce her and pay her *ketubah*.⁵⁸

⁵⁸ As translated by Mordechai A. Friedman in "Divorce Upon The Wife's Demand as Reflected in Manuscripts from the Cairo Geniza," *The Jewish Law Annual*, Vol. 4. p. 103-127.