# THE AGUNAH CRISIS: AN ANALYSIS OF SOME PROPOSED SYSTEMIC SOLUTIONS

(from a series in progress)

**I**

I was honored to be a participant in the Tikvah/JOFA Agunah Summit. The experience caused me much and ongoing rethinking. That rethinking was certainly a goal of the summit, and much has been written optimistically about other outcomes.

But I also felt that much of what was said and happened at the Summit evidenced deep confusion about the nature of the challenge and about the ways in which proposed solutions would work in practice, and that this confusion often made it difficult even to have serious conversations, let alone to agree on action steps. I am accordingly starting a series of articles intended to describe the agunah issue as clearly as possible, in the hope that this will enable new collaborations and creativity.

**I. Who is an Agunah?**

A) The "Classic" Agunah: Definition and History of Four Categories

a.

Definition:

In popular discourse, the classic agunah is a woman whose husband has disappeared and may or may not be dead. The Rabbis relaxed their usual evidentiary standards and allowed her to remarry on the basis of normally invalid testimony or circumstantial evidence of death. However, fearing fraud, they also imposed severe penalties if the husband eventually turned up alive.

History:

Thousands and thousands of responsa through the centuries address cases of disappeared husbands. These responsa generally reflect the commonsense understanding of the Talmud, namely that formal rules of evidence should not prevent a widow from remarrying, but that remarriage should be permitted only when the husband's death can genuinely be seen as proven.

Rabbi Yoel Sirkes was among the most eloquent about the religious obligation to allow such women to remarry. He applied to them a midrashic reading of a verse from Kohelet "And I have seen the tears of the oppressed . . . and power flows from the hands of their oppressors – these are the Sanhedrin", which originally was said regarding mamzerim, and he gave the taskof freeing agunot Redemptive significance. But his responsum addresses a case, as he acknowledges in a coda, where the husband turned up alive, happily before the putative widow remarried.

The modern rabbinate has generally been admirably successful and humane in dealing with such cases. Under the leadership of Rav Ovadiah Yosef, the Israeli rabbinate has resolved all cases associated with the 1973 war, and more recently, the RCA Beit Din led a consortium of rabbis in resolving all cases associated with the 9/11 attacks. These decisions included bold and innovative consideration of forms of evidence that had not previously been accepted by rabbinic courts, such as DNA tests.

*It is important to realize that popular discourse leaves out several other Talmudic cases that may have great contemporary significance.*

b.

Definition:

The Talmud uses the term *igguna* to refer to a woman whose husband lives apart from her but is unable to obtain an effective divorce from him. In that case as well, the Rabbis relaxed evidentiary standards to make long-distance delivery of an effective get practical.

History:

The Talmudic method for enabling long-distance divorce has been effective ever since.

c.

Definition:

Without using the term "*igguna*", the Talmud records several cases in which the Rabbis used extraordinary legal means to ensure that husbands could never deliberately place wives in doubt of whether they had been divorced.

History:

Divorce in Talmudic times seems to have occurred fairly often without formal court oversight, with the husband privately hiring a scribe and delivering the document in person or by agent. In post-Talmudic halakhah, however, the husband almost invariably uses a court scribe and court agents, and delivery as well takes place in the presence of a court. Court practice is constructed so as to ensure that the divorce is proof against any subsequent attack or allegation.

The cases mentioned by the Talmud therefore occur nowadays only when they are deliberately constructed by courts. For example, one such case was used to allow a remarried woman to remain with her second husband, when, to everyone's shock, her first husband turned up alive many years after the Holocaust and despite eyewitness testimony of his certain death.

d.

Definition:

Again without specifically using the term "igguna", the Talmud records several cases in which the Rabbis uses extraordinary legal means to release women from marriages they had entered into with defective consent, for example if their genuine consent was obtained in circumstances of coercion.

History:

I am not currently aware of any post-Talmudic cases in which this precedent has been applied.

B) The Contemporary Agunah

Popular discourse identifies the contemporary agunah as the "mesurevet get", the woman who wants a Jewish divorce but whose husband refuses to grant her one. This definition is simultaneously too broad and too narrow. It is too broad because it fails to account for the differing circumstances and

motivations for a husband's refusal, and it is too narrow because it excludes circumstances in which everyone agrees the divorce is still legitimately in process.

I therefore distinguish and define at least four separate categories of 'contemporary agunot".

Definition:

a) Women (in America) whose civil divorce is complete, or (in Israel) where a court agrees that good-faith negotiations over issues other than the get have ended.
b) Women who remain in marriages because they fear that seeking divorce will not free them from an undesirable marriage, but rather lock them into a dead marriage.
c) Women who are in the midst of divorce negotiations and are explicitly told that they must make concessions in order to receive the get.
d) Women who are in the midst of divorce negotiations and worry that the husband may use get-refusal to demand concessions, even though he has never threatened this.

Values Approaches:

a) Halakhic marriage is formally a contractual relationship that presumes, or at least makes considerable room for, a significantly integrated financial life and a joint endeavor to properly raise children. These aspects of marriage, perhaps even more so than the intimate emotional and physical elements of the relationship, necessitate the formalization of its ending.
   It is reasonable to argue that each spouse has a principled right to hold the other spouse in the relationship until a good faith effort has been made to resolve financial and custody issues.
   It is also reasonable to argue that neither party should have a right to hold the other's future hostage even if negotiations in good faith do not lead to what he or she thinks is a reasonable outcome.
b) A prominent *dayyan* once argued to me – and I suspect that his position was not idiosyncratic among his colleagues – that diminishing the risk of get-refusal would generate an unfortunate rise in divorces, as women would then choose to exit marriages that could, with work, be salvaged. In my humble opinion, this is a perversion of Jewish values that needs to be named and fought vigorously. What kind of marriage can be sustained by the fear that one's spouse would rather hold you prisoner than allow you to leave? Is it not likely that many of the marriages thus sustained will be heavily abusive? The legitimate goal of improving marriage stability and lowering the divorce rate can and must be met without making marriage a prison and turning daughters of Israel into slaves and blackmail victims.
c) Here significant subtlety is necessary. A reasonable person might hold the opinion that the secular divorce laws in a particular jurisdiction are biased against husbands, whether in the

realm of custody or of property of division. (One way to reach this conclusion is by assuming that wives halakhically are presumptively entitled to no more than the amount of their ketubah; those who properly wish to use beit din for the financial aspects of divorce should investigate the rulings of particular batei din in this regard.)

Furthermore, even in the most theoretically just system there will be cases where injustice seems the likely outcome, as for example when one side is financially desperate and therefore under extreme pressure to settle.

Under each of these circumstances, there is a strong temptation to see get-refusal as a legitimate means of obtaining justice. It is therefore critically important to understand that this argument is dangerously wrongheaded, and why. Here's why.

It is obviously wrong to use the get to extort money unjustly. But where the divorce is being litigated in civil court (and in the United States the courts will not recognize the decisions of arbitration panels with regard to custody, so all custody disputes must be litigated in civil court), the beit din will not have the capacity to determine whether the get is being used to obtain rather than to pervert justice. A beit din has no subpoena power, and no access to court records, and therefore cannot adequately investigate claims of hidden bank accounts, abuse, and the like. Every get-refusing husband will therefore claim that he only seeking to prevent an unjust court ruling, and the beit din will be powerless to distinguish the extortionists from the genuine among them. So we must use the classic rabbinic mechanism of "lo plug" – we do not make exceptions when doing so will undermine the rule.

d) No negotiations should take place in the shadow of one party's capacity to torture the other with impunity and for any reason. This seems to me self-evident.

One special case is if the husband claims that he is withholding the get solely as a means of compelling the wife to litigate their financial issues in a beit din. Under such circumstances the bit din should compel the husband to demonstrate his sincerity by immediately signing a binding arbitration agreement naming a specific beit din as divorce arbiter, and to have a get written but not delivered. If the husband signs the agreement and orders the get written, and the wife refuses to sign the arbitration agreement as well, or to sign such an agreement naming an alternate reputable beit din, and the beit din feels that it would have access to sufficient information and expertise if the case came before it

C) The Meaning of "Systemic Solution"

One theme of the Agunah Summit was the need for a "systemic solution". However, different speakers used the term to mean and exclude different things, and this led to frequent and unfortunate misunderstandings and failures of communication. I will therefore try here to develop a rigorous analysis of the term.

Systemic can mean

1. Comprehensive (antonym "ad hoc")
2. Internal (antonym "external")
3. Automatic (antonym "dependent")

These three translations generate five specific uses:

a) internal to the Halakhic system, rather than reliant on external forces, such as the secular courts
b) capable of resolving all cases
c) capable of resolving all cases without requiring any rabbi to exercise any form of halakhic discretion
d) capable of resolving all cases without requiring specific men or women to exercise any form of discretion
e) capable of resolving all cases without requiring any human being, rabbi or otherwise, to exercise any form of discretion

Each of these definitions likely represents a distinct values position. For example:

a) the desire for an "internal solution" may stem from a concern for the moral reputation of Halakhah, and lead someone to prefer such a solution even if it is less effective than a solution that involves extrahalakhic forces or agencies;
b) the desire for a comprehensive solution may reflect a belief that ad hoc solutions cannot be relied upon in advance, and so reliance on such solutions will leave women vulnerable to get-refusal blackmail or anxiety.
c) the desire for a solution not dependent on rabbinic discretion may reflect a lack of trust that the rabbinic court system will properly use any new powers it might be given, or a general aversion to increasing rabbinic power;
d) the desire for a solution not dependent on the discretion of non-rabbis may reflect a lack of trust that couples will take proper prudential measures before marriage, or a sense that accepting such a solution in principle will in practice enable rabbis to avoid their responsibility to fix the matter.

e) The desire for a solution independent of any human discretion may reflect either a combination of c) and d) or else a sense that vulnerable people should not, if possible, be required to put their trust in others.

Furthermore, the contemporary agunah issue (see also the four manifestations discussed last post) affects three distinct groups of women:

1) Women who are currently in the midst of or have completed civil divorce proceedings
2) Women who are currently married but not considering divorce
3) Women who are not currently married.

A solution may be comprehensive for one or two but not all three of these groups. For example:
prenuptial agreements only help group 3;
postnuptial agreements might extend a similar solution to group 2;
but any solution requiring the husband to voluntarily accept new obligations cannot help group 1.

Furthermore, some solutions may work comprehensively, internally, or automatically in Israel but not in the United States, or vice versa. More on that below.

D) Comparing the American and Israeli Situations

One challenge to implementing any systemic solution for agunot is that the issue manifests differently in Israel and the United States, among other places.

Israel

Israel has no civil divorce. All marriages between two Jews must be ended by a get before either partner can remarry.

As a result, many Israelis without deep halakhic loyalty are subject to a system that binds them against their will.

Israeli agunot therefore **may** be women who would happily remarry without a get if they had a choice. They **may** happily accept any solution which frees them, regardless of their own evaluation of the halakhic or intellectual integrity of that solution.

For example, they would be effectively freed by a governmental decision to permit civil divorce even for parties who were married via valid *kiddushin.* They would also almost certainly be effectively freed by a governmental decision to recognize the marriage-ending declarations and rituals of nonOrthodox Judaism, or to recognize divorces issued by a highly idiosyncratic Orthodox beit din.

On the other hand – most **Israeli agunot would not be freed by any method that the government refused to recognize, no matter how solidly grounded that method is in Halakhah, or how broad a consensus of universally respected Orthodox poskim approved it.** As of now, the Israeli government allows the Chief Rabbinate to set its Jewish divorce standards.

United States

The US has secular divorce, and does not grant religious divorce any legal force. American Jewish women have the legal option to remarry without an Orthodox-recognized get if they so choose, either under secular or under nonOrthodox auspices.

**A woman who self-identifies as an agunah in America is consciously rejecting these options.**

She may reject them because they conflict with her personal commitments or ideology; or,
she may reject them because they conflict with the commitments or ideology of the community or communities she identifies with and would seek a remarriage partner in.

**American agunot therefore will not accept a solution that fails to satisfy their own and or their communities' standards of intellectual integrity and/or halakhic integrity and/or halakhic authority.**

If they were willing to accept such solutions, they would already be free.

On the other hand – **American agunot and/or their communities have the autonomy to choose their own halakhic authorities and to evaluate halakhic arguments on their own.** Therefore a solution for

American agunot does not in principle require either rabbinic consensus or the approval of a particular rabbi or set of rabbis.

Note: Some Israeli women, and therefore likely some Israeli agunot, are like Americans in that they autonomously accept the authority of halakhah, or live in communities that do, and so can only accept solutions that meet their own religious standards.

Note: Some Israeli women would be willing to remarry illegally so long as they have a valid halakhic divorce.

Note: Canada is fundamentally the same as the US with regard to this section, but with secular legal differences we will discuss elsewhere. I do not have enough knowledge of other countries to discuss them individually.

E) Previosuly Proposed Systemic Solutions

The systemic solutions thus far proposed fall into the following categories, which I will discuss seriatim:

1) Preventing *kiddushin*
2) Retrospectively invalidating *kiddushin*
3) Constructing *kiddushin* that dissolve automatically in reaction to get-refusal
4) Creating a consent-independent mechanism for get-delivery
5) Creating a disincentive for get-refusal
6) Coercing get-delivery
7) Dissolving *kiddushin* by means other than a get

<u>Preventing Kiddushin</u>

One advocate at the Agunah Summit argued that the best way to prevent get-refusal is to prevent get-necessity. She accordingly suggested that woman be encouraged to find ways of formalizing relationships that do not count halakhically as kiddushin.

Rabbi Meir Simchah Feldblum z"l suggested – I have never been quite sure how seriously – that this had already happened in practice, on the ground that no contemporary woman actually intends to accept the terms of kiddushin, specifically the vulnerability to get-refusal.

This proposed solution, especially when proposed systemically and for both Israel and the United States, raises many, many halakhic and moral difficulties, and in any case would be ineffective. Here's why:

1) It likely actively suborns sin. Halakhah forbids both men and women to engage in non-exclusive sexual relationships, (although the ground of the prohibition is different for men and women). Rabbi Feldblum and others noted that some or many medieval authorities permitted *pilagshut* = concubinage, which they understood to be a relationship that limited the woman to one partner but did not require her to receive a get for it to be dissolved. However, most commentators believe that Maimonides believed that *pilagshut* is Biblically forbidden to everyone but the monarch, and other authorities believe that it is rabbinically forbidden. It is therefore profoundly unlikely that this suggestion would be adopted by a significant percentage of the halakhically committed population.

2) It leaves women without the protection of marriage. Kiddushin provides women with the ketubah, which provided for her in the case of divorce or widowhood. While the ketubah is of little practical value today, this is because secular law has adopted the ketubah model – but again, only for married couples. Israeli law would not, so far as I know, recognize concubines as married. Woman would therefore run the risk of being left without any claim if the relationship ended. *Pilagshim* could still

obtain marriage licenses in the United States and marry secularly, so this objection does not apply in the United States.

3) Some authorities require a get to sever a *pilagshut* relationship. I suspect that many batei din, especially in Israel, would not permit a woman who had been formally designated a *pilegesh* to remarry without a get.

4) Those authorities who do not require a get to sever a *pilagshut* relationship might nonetheless require the male to actively and willingly sever the relationship. (I have been unable to find a satisfying discussion of this question and welcome references).

The purported lack of need for a get therefore does not enhance the woman's legal position in any way, but rather harms it, because –

a) she has none of the protections of marriage

b) the male has none of the obligations of marriage

c) there are no precedents for compelling or even pressuring the male to end the relationship, even if the female wishes to.

d) Even if the male consents, the woman may be left with no proof that the relationship has ended.

In other words – it seems to me likely that woman who enter into such relationships will become agunot at the same or greater rate than present, and gain no other practical advantages. The proposal could only be effective if batei din accepted that such relationships could be contracted and sustained without requiring a get, or the husband's consent, to dissolve them, and batei din are not intellectually compelled or religiously desirous of accepting such proposals.

An alternative version of the proposal is for woman to eschew any and all relationships that have halakhic significance, on the grounds that either

a) It is worth committing the sin of sex-outside-exclusive-relationship to avoid the risk of agunah, or
b) Kiddushin is hopelessly sexist and should therefore be abandoned. The risk of agunah is symptomatic and emblematic of the fundamental problem that kiddushin involves a *kinyan* of the woman by the man.

This is sometimes described as "reverting to *kiddushei bnei Noach"* and/or solemnized with creative rituals and texts such as brit ahuvim.

With regard to b), my custom in premarital counseling is to mention Rabbi Shlomo Riskin's very plausible claim that substance of the *kinyan* of *kiddushin* is not that the man acquires the woman, but

rather that the man acquires his obligations *toward* the woman. The prima facie evidence for this claim is that *kiddushin* effected by document happen when the man transfers the *shtar* to the woman, and in commerce it is the seller who transfers the *shtar* to the buyer. A secondary supporting framework is that wives have no Biblical obligations toward husbands in marriage, whereas husbands are obligated to provide for their wives' food, clothing, and sexuality. Wives do have a one-way Biblical prohibition against sexual nonexclusivity, but that is an obligation to G-d rather than to the husband.

With regard to a), I think this approach runs the risk of blaming the victim. As I noted last week, agunot in America are always in a sense volitional – no one forces them to keep halakhah. Proposing "solutions" that require women to violate either the letter of the spirit of Halakhah as understood by their home communities will not diminish the incidence of agunah in America; it will only diminish sympathy for them.

Nor is it clear that this solution works in Israel for those not halakhically committed. Just as secular law in the United States recognizes "common-law marriage", meaning that a couple who acts married for some period of time is treated legally as having married, so too batei din, via mechanisms we will discuss in the future in the context of conditional marriage.

However – and this is a big however – I think that it is intrinsically problematic for a halakhic system to have compulsory jurisdiction over people who fundamentally reject its assumptions, especially when that combination accidentally but inevitably generates severe human suffering. In Israel the absence of civil marriage creates this situation; in America having a valid kiddushin necessitates a valid get.

I have wondered for years whether Orthodox rabbis should officiate at weddings for the non-Orthodox in a culture where divorce is common and gittin rare. I have heard several stories about American rabbis deliberately making errors when officiating at weddings to forestall issues of mamzerut; perhaps the same kind of thing occurs in Israel to forestall agunah. Nowadays I tend to think that insisting on the prenup (which will of course be the subject of a later post) should allow a rabbi to educate such couples so that the risk that they will choose not to obtain a get should they divorce is minimal.

F) Retrospectively invalidating *kiddushin*

In Section E) I discussed various proposed methods for allowing a couple to deliberately live together in a formal and religiously recognized relationship without necessitating a get should they separate. I argued that such methods would generally be ineffective and even counterproductive.

That discussion was almost entirely lekhatchilah (beforehand), however. Faced by a modern agunah situation (and often in cases of *mamzerut* as well), any beit din will look to see if bediavad (after the fact) it is possible to declare that the relationship never constituted *kiddushin*, and therefore no get is necessary. (This technique must be sharply distinguished from *afk'inhu*, or annulment, which may involve retroactively *causing* the relationship to never have constituted *kiddushin*. That will be discussed below). One can accomplish this inter alia by questioning

A) whether the parties intended to enact *kiddushin*
B) whether the parties entered into the relationship willingly
C) whether the parties entered into the relationship adequately informed about each other
D) whether the object of value (ring) belonged to the groom before being transferred to the bride
E) whether the bride acquired something of value without giving equal value for it other than agreement to marry
F) whether the bride and groom understood that the transfer of the object of value effected marriage
G) whether the ceremony took place in the presence of valid witnesses.

In this post we'll discuss A).

Here we need to distinguish two kinds of cases: those in which no attempt was made to conform to the halakhic norms of kiddushin, and those in which such an attempt was made.

The most common case of the first kind is where the couple had a civil rather than a religious ceremony.

It might be thought obvious that in such cases no get is necessary. However, halakhic marriage can be effected via sexual relations as well as through ceremony, and the Talmud in various places established the principle *ein adam oseh beilato beilat znut* = "a man does not make his sexual act one of promiscuity". Now this obviously is not a claim that all male sexual acts are intended to accomplish marriage. Rather, it is a claim that in a marital context, a man will stipulate that he has whatever intentions are necessary to make his sexual acts marital. The halakhic tradition has sometimes taken this as a presumption that in a committed monogamous relationship, the first sexual act was intended to effect *kiddushin*. The great 20th century halakhic decisor Rabbi Yosef Eliyahu Henkin famously held this about couples who publicly identified as husband and wife in the presence of a Jewish community.

Rabbi Moshe Feinstein famously disagreed, and there is testimony that Rav Henkin did not hold to his position in cases of mamzerut. It is also possible to distinguish (either way) between

a) situations in which there is a readily available option for ceremonial kiddushin (such as the United States) and opting for purely civil marriage likely expresses indifference to religion, and
b) situations in which there is a readily available option for ceremonial kiddushin (such as Israel) and opting for purely civil marriage requires a trip to Cyprus and may express hostility to religion (although we should distinguish hostility to a particular rabbinic bureaucracy from hostility to Halakhah generally), and
c) situations in which there is no readily available option for ceremonial kiddushin (such as under Communism in the USSR)

In cases of *agunah* I believe that most batei din would rely on Rabbi Feinstein in cases of purely civil marriage, or at the least refer the case to another beit din that relies on Rabbi Feinstein.

Another case of the first kind is where there was a religious ceremony that deliberately disassociated itself from halakhic *kiddushin*. For example, a Reform colleague and I years ago considered proposing that the Reform ceremony include the words "*shelo kedat Mosheh v'Yisroel" ="* not in accordance with the laws of Moses and Israel" to make explicit its rejection of kiddushin, from his perspective to avoid association with what he understood as a patriarchal institution (but see the discussion of *kinyan acharayut* last post), and from mine to prevent any risk that remarriage without a get would produce *mamzerut*. If it can be established that the couple was making the choice to avoid *kiddushin* consciously while committing to the relationship, i.e. that they did not consider themselves to be engaged in promiscuity, there should be no presumption that a later sexual act was intended to effect *kiddushin*, even according to Rav Henkin.

But this is not obvious. If one holds that intent-for-*kiddushin* requires specific religious content, the argument is compelling. Some argue, however, that intent for any relationship which both parties agree imposes a religious obligation of sexual fidelity on the woman constitutes *daat kiddushin*. If the parties reject other aspects of *kiddushin*, such as the husband's physical obligations toward the wife, they are considered *matneh al mah shekatuv baTorah* = stipulating against Scripture. In such cases the rule is *maaseh kayam utenai batel* = the action takes legal effect but the stipulation is a nullity.

I think that this is too broad a definition of *kiddushin.* My preferred alternative is that we define *daat kiddushin* as intent for a relationship that imposes a religious obligation of sexual fidelity on the woman *that can be dissolved only via a get*. If the groom does not intend to impose such an obligation on the bride, as would be the case in all such ceremonies, then in fact no *kiddushin* can have happened and no

*get* is necessary, even though halakhically this means that all sexual acts during the relationship are considered *znut*.

I cannot say at this point whether/when batei din would accept my preferred formulation lehalakhah. However, my sense is that in cases of agunah, most batei din would adopt some formulation of *daat-kiddushin* that would allow the woman to remarry, or or at the least refer the case to another beit din that adopted a formulation sufficiently narrow to allow the woman to remarry.

Many Reform and most Conservative wedding ceremonies, however, do adopt or adapt halakhic language and ritual to an extent that make it very hard to argue that the couple explicitly intends to avoid *kiddushin*. Reasonably, most couples emerge from such ceremonies feeling that they have entered into whatever Judaism considers marriage. Factors other than lack of *daat kiddushin* are therefore necessary to free *agunot* who were married in such ceremonies.

H) Defining Willingness

Halakhic marriage is a contract between two parties, and accordingly the marriage is effective only if both parties intended to marry. However, how does the law know what the parties intend? Mindreading cannot be a requirement for legal decisionmaking, so it follows that the law must use external behavior and commonsense reasoning to create presumptive intent.

The burden of proof must always be on the party who wishes to void an apparently valid contract, or put differently, the demonstration that X has signed or orally entered into a contract makes the contract presumptively binding on X. The halakhic phrase which enshrines this principle is דברים שבלב אינם דברים = "words in the heart are not words" when opposed to words from the lips or the pen, meaning that your present claim of past intent has no legal force against your past speech or signature.

> (In most Orthodox wedding ceremonies, the bride indicates her willingness to marry by implication, rather than by speech.[1] To my knowledge, however, all halakhic decisors have interpreted her acceptance of the ring as an act of entering into the marriage contract, so that the "words in the heart" principle applies.)

How can someone wishing to void a contract meet the burden of proof? The simplest way to accomplish this is *mesirat moda'a,* an advance statement before valid witnesses that one's word or signature will not be sincere. This is not a device that can be employed retrospectively or conditionally, however, and therefore is not useful with regard to agunah.

A second way to satisfy the burden of proof is to demonstrate coercion, for example by producing witnesses to a threat. However, postfacto claims of coercion face two halakhic obstacles:

a) סברה וקבלה = savrah vekiblah – if the contract was not a one-time affair, but rather involved a long-term relationship, halakhah considers the possibility that the coerced party eventually came to terms with the result and entered willingly into the contract.[2] An agunah would likely have to prove the existence of an ongoing threat throughout the marriage in order to avoid needing a get.

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[1] When I am mesader kiddushin, I sometimes ask the bride explicitly whether she consents before the groom places the ring on her finger, and she replies "הרי אני מוכנה לקבל טבעת זו לשם קידושין כדת משה וישראל". This seems to me preferable both halakhically and pastorally to silent acceptance, but obviously it should be done only if the couple wishes it.

[2] From an analytic perspective, this is confusing, as it seems that the parties are entering into the contract at different times, and that party A is not aware of the moment that party B actually enters into the contract and therefore makes it binding on B. I have not seen an adequate treatment of this issue and would welcome references.

b) תליוה וזבין – if the end result of coercion is agreement to a fair contract, i.e. a contract that falls within the norms of the current marketplace, halakhah validates the contract even as it condemns the coercive behavior. This principle is applied to marriage on Bava Batra 48b.

Note: the Talmud there records Mar bar Rav Ashi's statement that in such circumstances we resort to *afk'inhu*, which we will discuss many posts hence, but I can say here that afk'inhu is rarely a reliable tactic for freeing Orthodox agunot.

Asserting that her marriage was coerced is therefore rarely if ever an independently successful rationale for freeing an agunah, at least one whose marriage endured past the first night.

However – coercion can play an important ancillary role. Next post we will discuss C), the claim that the marriage was entered into as the result of misinformation or missing information = מקח טעות = *mekach ta'ut*. A standard basis for such a claim is that a mental health condition was not disclosed prior to the wedding. However, unless made immediately after the wedding, such claims often run into a variation of סברה וקבלה – if the condition made marriage a nonstarter for the woman, why didn't she leave immediately after discovering it? She must have made her peace with it! One possible response is that she felt coerced to stay, and many abused woman correctly feel that leaving would be actively and physically dangerous.

We explained above that a claim that one's marriage was coerced requires evidence of coercion to succeed, because the action of accepting the ring creates a presumption of willingness. In this case, however, the action whose meaning we are seeking to interpret is not her acceptance of the ring, but rather her remaining with a man with whom she stood under a chuppah years ago.

A woman's acceptance of a ring in the context of a man's statement of marriage can reasonably be constructed as "silent speech", so that we can presumptively reject a claim that her consent was subject to unstated conditions. But I don't think we must or should apply this construction to her failure to leave immediately after finding out that her husband was mentally ill. We should instead treat that as an action whose meaning is indeterminate, and therefore her present claim that she remained because of coercion or fear would not be defeated by the "words in the heart" principle.

As an analogy –
an employer cannot renege on a signed contract by claiming that he or she signed it under threat, because of "words in the heart".
What if the employer seeks to void the contract on the ground that the potential employee seriously inflated his or her credentials?
If the employer can establish that the fraud was discovered after the hiring, the contract might well be voided.

> What if the employer did not fire the employee immediately after discovering the fraud? If the employer has a reasonable explanation for the delay – for example, fear that the employee would sabotage an ongoing project – the delay would not prevent the employer from terminating the contract (although the employee would be due appropriate wages for services rendered).

Therefore a plausible claim that coercion or fear of retaliation prevented a woman's immediate departure from the marital home should be sufficient to keep the focus on whether the original agreement to marry was validly consented to, and allow a claim of *mekach ta'ut* to proceed even if the woman remained in the marital home after discovering her error.