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Intention Deficit:  
שומט וקטן in the Mishnah and Later Rabbinic Texts

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ברוך אתה ה' אלהינו מלך העולם  
חונן הדעת

ברוך אתה ה' אלהינו מלך העולם  
משנה הבריות

# TABLE OF CONTENTS

Introduction.....	1
Chapter 1- The Mitzvah of ראיה.....	12
Mishnah Hagigah.....	12
Tosefta Hagigah.....	14
Bavli Hagigah .....	15
Yerushalmi Hagigah.....	23
Mishneh Torah on Offerings.....	29
Chapter 2- Terumot.....	33
Tosefta Terumot .....	37
Talmud Yerushalmi on Terumot.....	39
Mishneh Torah Terumot.....	51
Chapter 3-Damages (Nezikin: Baba Kamma).....	52
Mishnah Baba Kamma .....	52
Tosefta Baba Kamma.....	54
Mekilta de Rabbi Ishmael .....	61
Mekhilta de R. Shimon Bar Yochai .....	64
Bavli Baba Kamma.....	65
Yerushalmi Baba Kamma.....	73
Mishneh Torah Nezikin.....	77
Chapter 4- Marriage and Divorce of חרש, שומט וקטן .....	80
Mishnah Gittin .....	80
Mishnah Yevamot.....	84
Tosefta on Gittin, Ketubot and Yevamot.....	99
Talmud Bavli on Marriage and Divorce of חרש, שומט וקטן .....	109
Yerushalmi Gittin and Yerushalmi Yevamot.....	132
Mishneh Torah on Marriage and Divorce of חרש, שומט וקטן .....	153
Chapter 5- Observations and Conclusions .....	172
Implications for Schools and Congregations .....	182
BIBLIOGRAPHY: SECONDARY SOURCES: .....	204
PRIMARY SOURCES.....	206

## DIGEST

This thesis reviews the status of the חרש, שוטה וקטן, that is the deaf-mute, mentally handicapped and minor, in the Mishnah, Tosefta, the two Talmuds and Maimonides' Mishneh Torah. Four areas of law have been selected for this review: the obligation to appear at the Temple with the festival offering (Hagigah); the obligation to separate heave-offering from produce (Terumot); responsibility for damages (Nezikin- Baba Kamma); and eligibility for marriage, including levirate marriage, and divorce (Gittin and Yevamot).

These four legal areas and the labeling of individuals as חרש, שוטה וקטן seem at first alien to the concerns of Reform Judaism. Yet they are a window into how Judaism has traditionally viewed and treated those in our community who lack intelligence, דעת, the population we now acknowledge as having "special needs." A more relevant Jewish diagnosis for these people might be "intention deficit" since Judaism from the time of the rabbis till our own day has been a religious system which requires the formation of intention--termed in Hebrew מחשבה, כוונה or דעת, for the performance of the mitzvot which are the coin of our religious realm.

The four legal areas we will review represent two areas of ritual concern and two of practical concern. Hagigah and Terumot are not mitzvot followed in a diaspora community without a בית הקדש. However the halachic texts concerned with these mitzvot discuss the most basic definitions of who is suitable to appear before God and who is capable of forming an intention to perform a mitzvah. Nezikin Baba Kamma, Gittin and Yevamot illustrate the rabbinic treatment of those lacking דעת in everyday life. As we look at each area we will examine the tensions between protection, exemption and exclusion of these individuals. In a chapter of "Observations and Conclusions" we will look for generalizations and idiosyncrasies which characterize the tradition in each area.

This is not an exhaustive survey of the halachic literature on disability. Two such complete surveys are now available, doctoral dissertations by Judith Abrams, a Reform rabbi of the Maqom Center in Houston Texas and by Tzvi Marx of the Shalom Hartman Institute in Jerusalem. A third doctoral dissertation is underway by Martin Schloss of the Special Education Center of the New York Board of Jewish Education.

The ultimate concern of this thesis is to examine the responses of the Reform movement in education and congregational life in terms of this halachic background. In the final chapter on "Implications for Schools and Congregations" we will analyze the documents which the Reform movement has produced on this subject and will look at Tzvi Marx's reinterpretation of halacha in a way which fosters inclusion of those with "intention deficit".

We see in this survey an evolution from exemption to exclusion, then in modern times to permission and finally most recently to the development of a theory of obligation on the part of the community to include those with mental disabilities. It is clear that inclusion of those with "intention deficit" in our religious community will require efforts which cross movement and sometimes faith group lines. In order to work with members of other Jewish movements we need to speak the language of halachic obligation; and in order to work with other faith groups we need to know the halachic history that defines us as Jewish and not just a spiritual support group. We can also use this knowledge to build our awareness of the origins in our communal past of some of our difficulties in inclusion.

The Lehiyot Project of the Reform Movement is currently struggling for revitalization. I hope that this review of the halachic history of those with "intention deficit" will be useful in this revitalization.



## APPENDIX:

### *Lehiyot* Project Goals

- 1) To make Judaism and Jewish education accessible to all Jewish learners
- 2) To stimulate and inspire learners with special needs to develop their identities as enlightened, involved, and committed Jews
- 3) To establish a supportive environment in our synagogues so that people with special needs can take increased responsibility for their participation
- 4) To establish a national network focused on the special needs of differently-able people and their families as related to issues of Jewish identity--so as to reduce feelings of loneliness and isolation.
- 5) To encourage feelings of adequacy and enthusiasm for people with special needs--related to Jewish life activities--by establishing realistic educational and programming expectations.

## Introduction

The Reform movement today, while still committed to personal choice and individual autonomy regarding religious practice, is also looking increasingly to Jewish tradition, including the long halachic tradition, for guidance to Jews in making these choices. One such choice is how and to what degree to include Jews with disabilities in our communal life.

Since the early 1980's, through its *Lehiyot* ("Becoming") program, the Union of American Hebrew Congregations has asserted its ethical, moral and practical commitment to including Jews with disabilities in congregational life at every level from preschool to worship. The UAHC openly acknowledges that the *Lehiyot* initiative was inspired primarily by the impact of Federal law PL 94-142 and its consciousness raising effect on parents of children with disabilities and disabled persons. The *Lehiyot* principles statement acknowledges Jewish sources only in vague reference to *mitzvah*, *tikkun olam*, and *v'ahavta l'reiachah k'mochah*.

Jewish tradition from the Bible through rabbinic literature and modern responsa has accumulated a considerable body of halachic literature dealing with disabilities, not all of it immediately palatable to the Reform mind set of the 1990's. Yet Reform Jews are defined as Jews, as part of *K'lal Yisrael*, because we begin our discussion of any question by confronting the same sources as more traditional Jews, the texts of our people. The conclusions we reach after reading and grappling with these texts may not be the same as the conclusions drawn by Orthodox and Conservative Jews. But for our answers to be Jewish, it seems incumbent upon Reform Jews to

become familiar with this literature, and to see what guidance we might obtain from it as we make our decisions about how to include the disabled in our congregations.

This task has become much easier in recent years. Two major works on the subject have been created : Halakha and Handicap : Jewish Law and Ethics on Disability by Rabbi Tzvi Marx of the Shalom Hartman Institute in Jerusalem, published in 1992, was written as a doctoral dissertation for the Katholieke Theologische Universiteit te Utrecht in the Netherlands. Disabled Persons and Disabilities in Jewish Sources from the Tanach through the Bavli is the 1993 doctoral dissertation for Baltimore Hebrew University by Rabbi Judith Abrams of the Maqom Center in Houston, Texas. Rabbi Abrams' book will be published soon by the Gallaudet University Press. On a popular level, Rabbi Carl Astor's book for United Synagogue Youth, Who Makes People Different, is a concise summary of the major texts and issues relating to handicaps in general in Jewish law.

These works look at every type of disability and/or handicap in an encyclopedic fashion. This thesis will look only at the category of שוטה וקטן, חרש in rabbinic texts from the Mishnah through the Mishneh Torah. This category deals with the segment of the Jewish population which is lacking or limited or immature in mental capacity, or דעת--what I have chosen to characterize as "intention deficit".

Rabbinic Judaism is a religion which requires intention. How do those with limited ability to form an intention participate in a system of which the essence is intention?

Why should this topic be reexamined for a rabbinic thesis in a Reform seminary? In the past when Reform Jews have encountered halachic roadblocks to perceived ethical imperatives, the solution has been simply to toss the halacha aside or drive right through it. Yet when we Reform Jews attempt to be inclusive, we too find ourselves making exceptions and exemptions and creating special categories.

The Winter 1996 issue of Reform Judaism reports on the Keshet program at Camp Kutz, a special ten-day, free of charge program for autistic children. This program brings children into Reform Jewish camping who, we assume, would not otherwise be able to participate in a Jewish experience. But there is no question that this program treats these children differently and separately from other children.

When we look closely at our Reform communities, camps, schools, and congregations, we find that despite our commitment to inclusiveness and equality, we may treat those with what I have called "intention deficit," a lack of *דעת* as exceptional, as different, as "other." We may do this even as we try our best to be inclusive and to create ways for those lacking in the ability to be intentional to participate in our Jewish community.

Jacob Neusner describes the great concern of the Mishnah as an "obsession with the liminal or marginal." He says,

The one thing which the Mishnah's framers predictably want to know concerns what falls between two established categories or rules, the gray area of the law<sup>1</sup>.

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<sup>1</sup>Jacob Neusner, Judaism Without Christianity: An Introduction to the System of the Mishnah, Ktav, Hoboken, NJ, 1991, p. 117.



The חרש, שוטה, וקטן are people who do not fit into the established categories of rabbinic culture. Neusner describes a person in this category as

one who has the power to act, but not power to form an effective intention.... These sorts of people are deemed able, when properly supervised, to do a suitable deed. But they cannot impart to that deed the status lent by appropriate intention, because they are assumed to be unable either to express or even to formulate it.<sup>2</sup>

The Mishnah is addressed to the (male Israelite) householder.<sup>3</sup> Neusner sees the Mishnah's revolutionary emphasis on intention as a response to the chaos and destruction in Eretz Yisrael in the wake of the destruction of the Temple in 70 C.E., a radical affirmation that despite the apparent helplessness and defeat of the Jewish people, that Israel's will and intention could create holiness.

The Mishnah's Judaism is a system built to celebrate that power of man to form intention, willfully to make the world with full deliberation, in entire awareness, through decision and articulated intent.<sup>4</sup>

Neusner's student Howard Eilberg-Schwartz agrees that intention is an all important concept for the Mishnah, but sees this emphasis in less triumphant terms. For Eilberg-Schwartz, the Mishnah's emphasis on intention is simply a reflection of the concerns of the social group which produced it, that is, the sages, an aristocracy of intellect which replaced the former aristocracy of birth, the

<sup>2</sup>Neusner, Judaism: The Evidence of the Mishnah, University of Chicago, 1981, p. 260.

<sup>3</sup>Op. cit., p. 235.

<sup>4</sup>Op. cit., p. 283.

priests, as the dominant force in Israelite/Jewish society.<sup>5</sup>

Whatever the reason, whether it was an attempt to take control of an out of control world, or simply the reflection of the rise to power of a new elite, the world of the Mishnah and the rabbinic world that was to develop out of the Mishnah was a world which valued intelligence, awareness, and intention, דעת, מחשבה, בוונה. And in the Jewish world of Babylonia intellectual endeavor was elevated to an even higher status: David Kraemer claims:

Only in the Bavli is *talmud*—that is the study of study-thought to be a *mitzvah* of essentially divine status and therefore requiring a blessing.<sup>6</sup>

We read in Bavli Berachot 33a:

R. Ammi said: Great is דעה, so it comes between two names of God in

I Samuel 2:3: A God of דעה is Adonai. If one has no דעה there is no mercy for him: Isaiah 27:11: כי לא עם ביטות הוא על כן לא ירחסנו עושהו

But R. Eleazar said, Great is מקדש which also is placed between two names of God: Exodus 15:17: פעלת ה' מקדש ה'

Put the two together: R. Eliezer said, when there is דעה in a man, it is as if the מקדש was built in his day

Where did this leave the חרש, שוטה וקטן, human beings, members of the covenant, who lacked דעת?

<sup>5</sup>Howard Eilberg-Schwartz, The Human Will in Judaism: the Mishnah's Philosophy of Intention, Scholars Press, Atlanta, Georgia, 1986, pp. 194-198.

<sup>6</sup>David Kraemer, The Mind of the Talmud, Oxford University Press, 1990, p. 160.

Judith Abrams and Eric Polokoff, two Reform scholars who have looked at this question already, have come up with different answers to this question. Polokoff, who deals only with the שוטה in the Tannaitic sources, concludes that these sources

present the שוטה as an individual within a specific legal category who requires protection from liability and being taken advantage of by others. So too, the Tannaitic סתם offered remedies that facilitated the שוטה's inclusion in communal activities and protected the שוטה's economic rights.<sup>7</sup>

Polokoff regards the Amoraim as amplifying this protective stance, and quotes R. Yohanan in Baba Batra 12b<sup>8</sup>:

Since the Temple was destroyed, prophecy has been taken from prophets and given to שוטים and children.

Polokoff maintains that the סתם takes R. Yohanan's pronouncement literally and seriously, and says it reflects a view that

The שוטה for all his problems and anguish, may still possess insight and information we may need.<sup>9</sup>

Polokoff contends

However unfortunate or demeaning the שוטה's situation he is still endowed with human dignity.<sup>10</sup>

<sup>7</sup>Eric Polokoff, "The Shotah in Formative Rabbinic Literature," HUC-JIR NY, 1990, p. 49.

<sup>8</sup>Op. cit., p. 83.

<sup>9</sup>ibid.

<sup>10</sup>Op. cit., p. 94.

Abrams takes a different view of the overall position of חרש, שומה and וקטן. Her basic thesis is

that persons who were deemed to lack da'at (cognition and purposeful action) were not seen as liminal, but rather, as stigmatized.<sup>11</sup>

Abrams explains the concept of "liminal" as belonging to transitional or "interstructural" situation, by reference to the work of anthropologist Victor Turner. She believes that disabled persons in our society are basically liminal, whereas in rabbinic society persons with physical disabilities including blindness were wholly accepted with only their physical limitations preventing complete participation in the culture.<sup>12</sup> However, Abrams says that those who were regarded as lacking דעת, i.e. חרש, שומה and וקטן, were stigmatized.

Stigma is a concept she borrows from sociologists Erving Goffman and Paul Higgins. A stigma in Greek culture, Goffman explains<sup>13</sup>, was a visible mark (like Hester Prynne's "A" for adultery in Hawthorne's The Scarlet Letter) which advertised that the person bearing it was to be avoided. From Paul Higgins Abrams takes the notion that the stigma of, for example, deafness, is a "master status." That is, the stigma of deafness overrides any individual differences among such persons and determines the behavior of others towards that person.<sup>14</sup>

<sup>11</sup>Abrams, "Disabled Persons and Disabilities in Jewish Sources From the Tanach Through the Bavli," Baltimore Hebrew University Ph. D. dissertation, 1993, p. 8.

<sup>12</sup>Ibid.

<sup>13</sup>Erving Goffman, Stigma: Notes on the Management of Spoiled Identity, Simon & Schuster, NY, 1963, p. 1, quoted in Abrams, op. cit., pp. 6-7.

<sup>14</sup>Paul Higgins, Outsiders in a Hearing World, Sage Publications, Beverly Hills, CA, 1980, p. 131 quoted in Abrams, op. cit., p. 7.



In contrast to Polokoff's assertion that the rabbinic treatment of the שוטה did not undermine his basic human dignity, Abrams quotes Higgins on stigmatized persons:

Once stigmatized, they may be avoided, ridiculed, reacted to or punished in numerous ways which indicate they are less than fully human.<sup>15</sup>

Tzvi Marx has written an encyclopedic treatment of the issues pertaining to a broad variety of handicaps in relation to ritual halacha. His comments on mental handicap are relevant to our discussion. He raises the postmodern question: is labelling certain people as mentally handicapped a political act<sup>16</sup>, as explicated by Michel Foucault in Madness and Civilization<sup>17</sup>, R.D. Laing in The Politics of Experience and Thomas Szasz in "The Myth of Mental Illness"<sup>18</sup>. Marx points out that one ingenious rabbinical solution to this problem is to provide such a narrow definition of mental handicap that almost no one fits the description:

Theoretically, the category of "shoteh," mentally handicapped, is pervasive in the rabbinical literature, but its practical assignment to real cases is not easy.<sup>19</sup>

On the other hand, Marx notes that mental incompetence "borders on

<sup>15</sup>Higgins, op. cit., p. 123, quoted in Abrams, ibid.

<sup>16</sup> Tzvi Marx, Halacha and Handicap, Jerusalem-Amsterdam, 1992-93, p. 398.

<sup>17</sup>Foucault, Michel, Madness and Civilization: A history of Insanity in the Age of Reason, Richard Howard, transl. Vintage Books, New York, 1965.

<sup>18</sup>Thomas Szasz, "The Myth of Mental Illness," in Leroy Walters and Tom L. Beauchamp, Contemporary Issues in Bioethics, Wadworth Publishing, Belmont, CA. 1989, pp.110-114.

<sup>19</sup>Marx, op. cit., p. 399.

the antithesis of what the halachic culture admires."<sup>20</sup> Marx states, contrary to Polokoff, that R. Yohanan's comment about prophecy being given to שוטים and children "was intended as a derogatory remark".<sup>21</sup> He points out that membership in the covenant involves "taking responsibility for the content of the Halakha and its implementation."<sup>22</sup> Nevertheless, Marx points out that our sources distinguish between "one who is not in the covenant at all and one who is merely exempt from all its precepts (yet still considered in the covenant)."<sup>23</sup>

Marx ultimately sides with Polokoff in viewing the exemptions of the disabled as a form of protection:

The main motivation is compassion, consideration for the existential limits of the mentally handicapped themselves, not to place unfair demands upon those who have not the capacity to respond responsibly.<sup>24</sup>

These two apparently opposite ways of looking at the exceptional treatment of שוטים, חרש, שומע וקטן in the rabbinic sources--as protected on the one hand and as stigmatized on the other-- may be closer than first appears. In order to protect someone, they may be stigmatized. The mark of Cain is perhaps the best example of this. God placed a special mark on Cain so that those who encountered him would not kill him; yet this mark amounted to a stigma.

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<sup>20</sup>Op. cit., p. 398.

<sup>21</sup>Ibid.

<sup>22</sup>Ibid.

<sup>23</sup>Op. cit., p. 399.

<sup>24</sup>Op. cit., p. 401.

In today's society, especially in public education, there is much discussion about the benefits of special education, often separate education, for those with mental disabilities, as opposed to "mainstreaming," the inclusion of such people in the general group. The relative costs of each approach, both to those with disabilities and to the rest of the population have not been fully resolved. The same dilemmas apply to religious schools and congregations. Can those with mental handicaps be fully included in religious schools and congregations? To what extent must they be protected? Does such protection entail separation and/or exclusion?

We propose to look once more at some of the rabbinic texts which treat the *שומה וקטן*, *חרש*, beginning with the Mishnah, where the category first appears, and continuing through the Tosefta, Bavli, Yerushalmi and the Mishneh Torah of Maimonides. We shall look at four categories of these texts, two which involve purely ritual acts, the presentation of the festival offering in Hagigah and the separating of the heave offering in Terumah, and two which involve practical aspects of everyday life, Damages (Baba Kamma) and marriage and divorce (Gittin and Yevamot).

As we look at these texts, we shall ask if the determinations of the rabbis involve stigma or protection, separation or mainstreaming. Do the policies of the rabbis offer us any guidance as to how we should treat those who lack *da'at*?

We shall also ask, how have these policies influenced, consciously or unconsciously, the way in which we think about those within our communities with "intention deficit." It is our heritage of texts which makes us Jews. These rabbinic texts are part of that heritage which we as Reform Jews need to address more fully than we have done.



## Chapter 1- The Mitzvah of ראייה

### Mishnah Hagigah

We shall begin our analysis of the texts with Mishnah Hagigah 1:1, in part because the talmudic discussion includes definitions of חרש, שוטה וקטן.

הכל חייבין בראיה, חוץ מחרש, שוטה, וקטן. וטומטום. ואנדרוגינוס. ונשים. ועבדים שאינם משוחררים. החיגר והסומא והחולה והזקן. ומי שאינו יכול לעלות ברגליו. איזהו קטן. כל שאינו יכול לרכוב על כתפיו של אביו. לעלות מירושלים להר הבית. דברי ב'ש. ובה'א כל שאינו יכול לאחוז בידו של אביו. ולעלות מירושלים להר הבית. שנאמ' שלש רגלים.

All are obligated to appear, except the deaf, the mentally impaired, and the child, the one of doubtful sex or both sexes, and women, slaves who have not been freed, the lame, the blind, the sick and the old, and whoever cannot walk on his feet. Who is a child? The one who cannot ride on his father's shoulders from Jerusalem to the Temple Mount--these are the words of Beit Shammai. And Beit Hillel say: the one who cannot hold his father's hand and go up (on foot) from Jerusalem to the Temple Mount, because it says "three foot pilgrimages."

We notice that חרש, שוטה, וקטן are the first in the list of those exempted from the mitzvah of ראייה, appearing at the Temple Mount at the three pilgrimage holidays of Sukkot, Pesach and Shavuot. The Mishnah gives only one reason for exemption from the mitzvah, the inability to walk on one's feet. This follows the listing of the lame, the blind, the sick and the old. We assume that חרש, שוטה, וקטן are not necessarily disabled in their ability to walk.

However the Mishnah asks, how do we define a קטן. Beit Hillel says a קטן is exempted unless he can actually walk holding his father's hand. Beit Shammai says a קטן is only a baby who cannot sit on his father's shoulders. The Mishnah itself does not seek to define חרש or שוטה. The requirement to be able to physically walk is derived midrashically from שְׁלֹשׁ רִגְלִים תַּחֲגֵ לָךְ, in Exodus 23:14. The meaning of רִגְלִים here is "pilgrimage festival" but the root רגל is used to make the requirement of walking on one's feet.

The issue of the קטן is discussed here without reference to the child's mental ability or maturity, but only with reference to his ability to walk with help or to ride on his father's shoulders, his father walking for him.

We are not told clearly here whether those listed as חוץ are exempt from the requirement to appear or whether they are excluded. Can those on the list appear voluntarily at the Temple Mount even if they are not included in חוץ? Does the word חוץ in and of itself serve to exclude, not merely to exempt? Does the midrashic reference to שְׁלֹשׁ רִגְלִים imply that one who cannot or does not walk on his own feet is not merely exempted but excluded? On the other hand, does Beit Shammai's argument that a קטן may ride on his father's shoulders imply that another disabled person may be carried along? Does Beit Hillel's argument that a קטן may be taken by his father's hand imply that another disabled person may be taken by the hand to appear at the Temple Mount?

## Tosefta Hagigah

The Tosefta, a somewhat later redaction of teachings from the Tannaitic circles, gives us some insight into this question of exemption versus exclusion. The Tosefta Hagigah 1:1 adds the טמא, the ritually unclean person, to the list of those exempted. It says יצא טמא שאינו ראוי ליכנס לעזרה. The ritually unclean shall go out from the Temple are because he is not fit to enter. Does this imply that the others listed in the Mishnah, among them חרש, שוטה וקטן, are also not fit to enter? Or, does each exemption stand on its own, some implying exclusion, others not?

Tosefta Hagigah 1:1 suggests that a child who is weaned may be obligated for ראיה. It quotes Samuel I:1:22 וחנה לא עלתה כי-אמרה. Hannah refused to bring Samuel before the Lord until he was weaned because then (she had promised) he must stay at the Temple. Despite the context of Hannah's promise, the conjunction of "appearing" and Hannah waiting until Samuel was weaned suggests this as a definition of קטן for the purpose of this particular mitzvah.

The Tosefta like the Mishnah sees the קטן as a term that requires further definition. Tosefta Hagigah 1:2 discusses at length the issue of the קטן. The eruv, or Sabbath-boundary of a קטן is determined by his mother. He is obligated to sit in the Sukkah; if he knows how to shake it, he is obligated for the lulav;; if he can put them on he is obligated for tsitsit; if he can care properly for his father's tefillin, he should put on tefillin; if he can speak, his father must teach him the Shema, the Torah and Hebrew (לשון קודש): "otherwise it is better he never came into this world," לאו ראוי לו

באיילו לא בא לעולם.

Thus Tosefta acknowledges that there is no one קטן. Children are ready for different tasks at different ages. Tosefta does not even specify an age for each task; rather it suggests that the child is obligated according to his developmental stage. If he is able to do the mitzvah, then he is obligated.

Tosefta Hagigah 1:3 says that the girl who has grown two pubic hairs may perform *halitzah* *oryibum* (See Chapter 4) and the boy who has grown two (pubic) hairs is obligated for all the mitzvot-i.e. he is bar mitzvah. When his pubic hair is fully grown, then he may act as *shaliach tsibur*, may go before the ark and may lift up his hands in blessing. Rabbi (Judah) disagrees with this developmental approach. He says rather (for being *shaliach tsibur*) one must be twenty years old, since according to the Torah the Levites served in the Temple from the age of twenty.

### Bavli Hagigah

Bavli Hagigah includes a number of baraitot, teachings which are attributed to Tannaitic sources. How do these affect our picture of the Tannaitic concept of חרש, שומע וקטן? And how do the Babylonian Amoraim change this picture?

Bavli Hagigah 2b asks for clarification of the definition of the חרש. The first observation is that חרש in the Mishnah is generally classified with שומע and קטן:

דלאו בני דעה אף חרש דלאו בר דעה.



The reason these three categories are grouped together, says the Bavli is that they all lack understanding.

The next point about חרש made in Bavli Hagigah 2b is that the חרש which is classed with שוטה and קטן, the חרש which lacks mental capacity or דעת, is the חרש who can neither hear nor speak. This definition is taken from Mishnah Terumah 1:2:

חרש שדברו בו חכמים בכל מקום שאינו לא שומע ולא מדבר.

The חרש of which the Sages speak is always the one who cannot hear and cannot speak.

The Gemara for Bavli Hagigah 2b goes on to quote a baraita: תנינו ליהא דתנו רבנן, We have learned what our rabbis taught:

המדבר ואינו שומע זהו חרש שומע ואינו מדבר זהו אלם זה וזה הרי הן כפקחין

The one who speaks but does not hear is called חרש

The one who hears but does not speak is called אלם

Both are considered as having understanding.

These definitions are in turn derived midrashically from Psalm 38:14

ואני כחרש לא אשמע וכאלם לא יפתח פיו

I am like a חרש, I do not hear

Like an אלם who does not open his mouth.

Another explanation for the term אָלֵם is offered: It is an abbreviation for אִישְׁתִּקֵּל מִלּוּלֵיהּ:

Aramaic for, "his words have been taken away."

The Gemara again asserts, based on the Mishnah:

מְדַבֵּר וְאִינוּ שׁוֹמֵעַ, שׁוֹמֵעַ וְאִינוּ מְדַבֵּר חַיִּיב

The one who speaks but cannot hear, hears but cannot speak is obligated

But another baraita is then quoted which contradicts this:

וְהַתְּנִיחַ מְדַבֵּר וְאִינוּ שׁוֹמֵעַ שׁוֹמֵעַ וְאִינוּ מְדַבֵּר פֶּטוּר

Is it not taught that the one who speaks but cannot hear, hears but cannot speak is exempt?

How can this contradiction be resolved? Rabina and/or Raba, Amoraim, try to resolve the contradiction between two Tannaitic texts. They say מִיַּחְסָרָא חֲסוּרִי, the text is lacking. It should say :

הַכֹּל חַיִּיבִין בְּרֵאִיָּה וּבִשְׂמִיחָה

The חֲרֹשׁ who can speak but not hear or hear but not speak is exempt from רֵאִיָּה, from appearing at the Temple. But (Bavli Hagigah 3a) he is obligated to rejoice. The חֲרֹשׁ who can neither hear nor speak, along with שׁוֹמֵעַ וְקָטָן, is exempt from both appearing and rejoicing (eating from the שְׁלָמִים or peace offerings).

This חֲרֹשׁ (who cannot hear or speak) along with שׁוֹמֵעַ וְקָטָן

פֶּטוּר אִף מִן הַשְׂמִיחָה הוֹאִיל וּפְטוּרִים מִכָּל מִצְוֹת הָאֲמֻרִים בְּתוֹרָה

The complete heresh, shoteh, vekatan are exempt even from rejoicing since they are exempt from all the mitzvot in the Torah.

The exemption of the complete heresh from ראייה, appearing, is then explained midrashically from Deuteronomy 31:11-12

When all Israel comes to appear before the Lord Your God in the place that he will choose, you shall read this Teaching aloud (in the ears of) in the presence of all Israel. Gather the people--men, women, children and the strangers in your communities--that they may hear and so learn (יִלְמְדוּ) to revere the Lord your God and to observe faithfully every word of this teaching.

A baraita is then quoted which says:

וְתִנִּיחַ לְמַעַן יִשְׁמְעוּ פֶּרֶם לְמַדְבַּר וְאִינוּ שׁוֹמְעִים וְלְמַעַן יִלְמְדוּ פֶּרֶם לְשׁוֹמְעִים וְאִינוּ מְדַבְּרִים

So they will hear excludes the one who speaks but does not hear;

so they will learn -yilmdu-- excludes the one who hears but does not speak.

The stam then asks in Aramaic: Does this mean the one who does not talk cannot learn?

There were two mute men in the neighborhood of Rabbi, sons of Yochanan ben Gudgada, and according to others, sons of the sister of R. Yochanan, who, whenever Rabbi entered, went in and sat down and nodded and moved their lips. And Rabbi prayed for them and they were cured, and it was found that they were versed in Halacha, Sifra, Sifre and the whole Talmud! (Hagigah 3a)

But, say the Amoraim, Mar Zutra and Rav Ashi, יִלְמְדוּ is to be read yelamdu, that they may teach, which requires speaking. This entire argument serves to support the view that the one who is only deaf or only mute, although able to walk and capable of דַּעַת, is exempt from

the obligation of ראייה, appearing at the Temple on the three pilgrimage holidays. However such a person- unlike the the complete heresh, deaf mute, the שומה and the קטן, is obligated to partake of the שלמים that is, to rejoice.

Another exemption is added by the Amora R. Tanhum (Hagigah 3a) who says that a person deaf in one ear only is exempt from ראייה. He derives this also from Deuteronomy 31:11,

תקרא את התורה הזאת נגד כל-ישראל באזניהם

You shall read this Torah to all Israel in their ears (aloud)

R. Tanhum says "in their ears" exempts the one who hears in only one ear. According to R. Tanhum, this phrase is superfluous if the text means only that they must be present, since that much is required by נגד כל ישראל. They must actually hear with both ears, he says, since the text says ישמעו.

The connection of appearing with הקהל, Deuteronomy 31, 10-13 is brought up again in Bavli Hagigah 3a in a baraita pertaining to the קטן. R. Yochanan ben Beroka and R. Eleazar Hisma went to R. Joshua at Pekiin. R. Joshua asked his visitors what new thing they had learned in the Beit Midrash. They answered that they had heard from R. Eleazar ben Azariah a drash based on הקהל:

"הקהל את העם האנשים והנשים והטף"

אם אנשים באים ללמוד נשים באות לשמוע,

טף למה?

באין כדי ליתן שכר למביאיהן



If the men came to learn and the women came to listen, why did the children come? To bring reward to those who brought them. (Hagigah 3a)

This poignant aggadah regarding the value of "shlepping along" the little child who is not obligated raises a question for Tzvi Marx: Can "shlepping along" others who are halachically disabled also bring reward? Marx asks why the Talmud uses midrashic argument to exclude the deaf and mentally handicapped when it could easily use the sources to argue the other way:

This question is especially persuasive when one recalls R. Eleazar b. Azariah's reply (in Hagigah 3a) to the question as to what purpose the 'little ones' -טַף- are required to attend: "In order to grant reward to those that bring them." Could not the same or something similar have been answered on behalf of the hearing or speaking disabled and even of other disabled whom it would not be difficult to transport there? <sup>25</sup>

We might ask, if there is a reward for "shlepping" the טַף, is there such a reward for "shlepping" the חרש or the שוטה?

So far the Mishnah and Tosefta have sought to define קטן, for the purpose of the mitzvah of ראייה and the Bavli has discussed the parameters of חרש for the same purpose. Now who is the שוטה which is exempted from ראייה? Eric Polokoff notes that שוטה is often used in the Bible in a homiletical sense, to mean a fool, someone who is acting foolishly. But the Talmud is trying to develop a legal definition of שוטה. Since a שוטה is exempt from all the commandments, this is a very disabling status, one that must be carefully defined. Polokoff argues convincingly that the rabbinic

<sup>25</sup>Marx, *op. cit.*, p. 601.

is a mentally ill individual rather than one who is intellectually limited.<sup>26</sup> Bavli Hagigah 3b quotes a baraita:

איזהו שוטה היוצא יחידי בלילה והלך בבית הקברות והמקרע את כסותו

Our rabbis taught: Who is a שוטה? He that goes out alone at night, that spends the night in a cemetery, and tears his garments

R. Huna says all three symptoms must be present in order to label someone a שוטה; R. Yochanan says only one of these activities makes a שוטה. The stam says, these activities must be done in an insane manner, דרך שטות. Any of these actions could be done with a sane even if unusual intention. Perhaps he wanted to become ritually impure; perhaps he was suffering from גנדרופוס, lycanthropy, which Jastrow<sup>27</sup> defines as a form of melancholy in which a person believes himself to be a wolf or a dog, a syndrome which was apparently not seen as general insanity; or perhaps was lost in thought. But (Hagigah 4a) if all of these symptoms are present, he is מועד, forewarned, like an ox who has gored a donkey and a camel and is thus known to be dangerous.

R. Papa then proposes another definition of שוטה, from another baraita of R. Huna

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<sup>26</sup> Polokoff, *op. cit.*, p. 97:

Both the late Tannaim and the Amoraim considered the שוטה emotionally disabled, not mentally retarded. Indeed, there is no record in the formative rabbinic period of a single rabbinic attempt to curb the rights of one of limited intellectual aptitude. The Rabbis did not offer standards for curbing the intellectually limited individual's rights. They did not seek a foothold on the slippery slope of determining who was— and was not— intellectually qualified to participate fully in communal life.

<sup>27</sup> Marcus Jastrow Dictionary of the Targumim, Talmud Bavli and Yerushalmi and the Midrashic Literature, Pardes, New York, 1950, Vol. I, p. 257.

Who is a shoteh? He who destroys everything that is given to him. (Hagigah 4a)

We have a contradiction since both opinions are attributed to R. Huna. When R. Papa was about to retract this definition (in favor of the earlier, three part definition), the scholars asked him-- are you retracting it just in the case of tearing his clothes (part of the earlier definition) or in regard to the entire definition? The question remains undecided.

Thus the Bavli Hagigah leaves us with at least two possible definitions of שומה:

1) One who goes out at night alone, who sleeps in a graveyard, and tears his clothes- all done together, according to R. Huna

2) Any one of the above, done in an insane manner-R. Yochanan

and

3) One who destroys everything which is given to him-R. Huna according to R. Papa

All of these definitions seem to involve emotional disturbance rather than mental deficiency, making the Soncino edition's translation of "imbecile" inappropriate<sup>28</sup>.

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<sup>28</sup>See Polokoff comment, previous note.

The Talmud Yerushalmi has a rather different discussion of the same Mishnah Hagigah. The קטן, according to the Yerushalmi Hagigah 1:1, is obligated to appear

אפילו קטן חייב

to come up to the Temple Mount. He is not however obligated to bring an offering. Yerushalmi takes this requirement of appearing from Deuteronomy 31:12, where טף the little ones, are specifically mentioned.

ואין קטן גדול מסף

And is the קטן not bigger than the טף?

The Yerushalmi then cites the same aggadic teaching of R. Eleazar ben Azariah: The children come along to bring reward to the people who brought them. Unlike the Bavli, the Yerushalmi seems to interpret this aggadah as supporting the view that children are actually obligated to appear. According to Marx, the Yerushalmi generally takes a dim view of those who perform mitzvot without obligation: He quotes Hezekiah in Yerushalmi Berachot 2:9:

כל הפטור מדור ועושה נקרא הדיוט which he translates, "whosoever is exempt from something and nonetheless does it is a fool."<sup>29</sup>

<sup>29</sup>Marx, *op. cit.*, p. 185.

If this is true it might make sense for the Yerushalmi to include more people among the obligated. We shall see if this is true for the חרש and the שוטה.

Yerushalmi Hagigah 1:1 repeats the statement from Mishnah Terumah that the true חרש, the one exempted from the mitzvot, is he who can neither speak nor hear. The case of someone who is deaf in one ear is left in dispute between R. Yose and the Rabbis. The rabbis argue from Deut. 31:11 that באוזניהם means in two ears, but R. Yose says, even one ear for each. Apparently the Yerushalmi includes fewer in the definition of חרש, leaving open the possibility the one who can hear or speak, or the one who is deaf in one ear, is, in fact חייב.

Next the Yerushalmi Hagigah makes short shrift of the שוטה which it does not define:

שוטה: אמר רבי לעזר אתה הראת לדעת

Yerushalmi quotes Rabbi Elazar to exempt the שוטה from ראיה on the basis of Deuteronomy 4:35:

It has been clearly demonstrated (הראתה לדעת) to you that the Lord alone is God.

To know that the Lord is God one must have דעת; hence the שוטה, which Yerushalmi implies is one without דעת, is not obligated for appearing before the Lord.



Having discussed חרש and שומע the text comes back to קטן which was discussed at the beginning of the sugya in an aggadic way but is addressed more directly here, in a discussion between two Amoraim, R. Jeremiah and R. Aibu bar Nigri. Referring back to Beit Shammai's more restrictive definition of קטן in the Mishnah, one who cannot ride on his father's shoulders---in other words a baby---they ask: וקטן שומע וקטן מדבר?

Can Beit Shammai's קטן, riding on his father's shoulders, listen and speak?

In other words, is not such a קטן like a חרש and thus excluded?

They then bring up another possibility:

כל זכר לרבות את הקטן

Perhaps the passage "all your males" (Deut. 16:16) includes the minor--then speaking and hearing doesn't matter!

But then one can make the same argument for a male deaf-mute:

ויימר כל זכר לרבות את החרש

No--because למען ישמעון (Deut. 31:12) excludes the deaf and למען ילמדון excludes the mute.

But these same two verses (למען ילמדון and למען ישמעון) could be used to exclude the minor?

R. Yose comes in to solve the impasse:

Since one verse of Scripture serves to include and another verse serves to exclude, I shall include the minor, who will be liable to make a personal appearance in time to come, and I shall exclude the deaf-mute, who never will be liable to participate in time to come<sup>30</sup>.

This passage adds a new element to the question of why a person may be disqualified from a mitzvah. Even though a minor may be lacking in דעת, and may not have control of his speaking and listening faculties, he is qualified because these conditions are temporary, and will be remedied in time to come.

Although we are examining here only the cases of חרש, שוטה וקטן, the Yerushalmi makes a comment in its discussion of slaves, who are also exempted, that seems significant to the deaf, the mentally incapacitated and the child, at least from a modern point of view:

Said R. Joshua b. Levi, How do we know that whoever carries out the religious duty of making an appearance is as if he receives the presence of the Indwelling Presence of God?<sup>31</sup>

א"ר יהושע בן לוי מניין שכל המקיים מצות ראייה באילו מקביל פני שכינה?

This surely implies that those who are exempted or excluded from this mitzvah do not receive God's Presence. There is no suggestion that those who carry out the mitzvah bring the Presence to the community as a whole.

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<sup>30</sup>The Talmud of the Land of Israel, Vol. 20, Hagigah and Moed Qatan, Jacob Neusner, transl. University of Chicago Press, 1986, p. 10.

<sup>31</sup>Op. cit., p. 13.

On the other hand, just a few lines further down the page, R. Yose says in reference to the exemption of the sick and the old:

תריהן לקולא

They both come to make a lighter (more lenient) ruling

It is possible to interpret R. Yose's remark as applying specifically to the sick and the old, and not to חרש, שוטה וקטן. Perhaps the sick and the old are exempted out of pity and concern, while other exemptions are for other reasons. Judith Abrams cites this comment as evidence that the entire list of exclusions are an effort at leniency:

An alternative explanation may be that the underlying goal of this mishnah was to relieve as many persons as possible from the obligation to perform *ra'ayon*. The journey to the Temple was surely onerous, and it may have been deemed a boon to many persons not to be obligated to make it.<sup>32</sup>

Yerushalmi Hagigah 1:1 returns yet a third time to the problem of the minor, the קטן. The rabbis - R. Yohanan in the name of R. Yannai- are intrigued by the dispute in the Mishnah over who is a קטן. Yerushalmi is interested in the minor as defined by Beit Shammai- one who can ride on his father's shoulder--being חייב. This case is of interest as a בינתים, an "intermediate category" in Neusner's translation, something neither here nor there.

The Yerushalmi does not like this definition, and seeks to reinterpret it:

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<sup>32</sup>Abrams, *op. cit.*, p. 124.



אלא את שהוא רואה את כת'פו של אביו ומפסיע

Rather (this חייב) is one who can see his father's shoulder and follows after

Now Beit Shammai's definition of קטן who is חייב is, in the Yerushalmi's reinterpretation, narrower than Beit Hillel's- it is a child who can walk on his own following after his father.

Then Yerushalmi looks again at the other בינתים case, Beit Hillel's קטן who can hold his father's hand. Yerushalmi distinguishes between one who can hold his father's hand, the child taking the initiative, and compares this to Mishnah Tohorot 3:6 applied to a person of sound senses, פקח.

חרש שוטה וקטן שנמצאו במבוי שיש בו טומאה. הרי אלו בחזקת טוהרה. וכל הפיקח בחזקת טומאה. וכל שאין בו דאת להשאל ספיקו טהור.

If a deaf-mute, an imbecile or a minor was found in an alley-way wherein was uncleanness, he can be assumed to be clean, but one of sound senses must be assumed to be unclean. If anyone lacks understanding to be inquired of, a condition of doubt affecting him must be deemed clean.<sup>33</sup>

This person is clean and therefore חייב.

But referring to Mishnah Tohorot 3:6 again, the child whose hand is taken by his father -which implies he himself lacks the intention to make the journey to the Temple Mount--is regarded as חרש and is therefore not חייב.

<sup>33</sup>Herbert Danby, trans. The Mishnah, Oxford University Press, London, 1933, p. 719.

The two Talmuds leave open disputes about who falls into the categories of חרש, שוטה וקטן and therefore is a) not obligated and b) excluded from the mitzvah of appearing. Although the Bavli discusses related mitzvot it is Maimonides in the preface to Mishneh Torah on Hagigah (The "Festal Offering") who clearly delineates four separate positive commandments related to ראייה. These are assembling (ויקהל) derived from Deuteronomy 31:12; keeping the feast at the שולש רגלים, based on Ex. 23:14; appearing at the Temple, from Deuteronomy 16:16; and rejoicing at the pilgrimage seasons, from Deuteronomy 16:14.

Maimonides deals with the exemptions to ראייה in chapter 2:1 of the Mishneh Torah, הלכות חגיגה, the laws of the festal offering.

Women and bondmen are exempt from the law *to appear before the Lord*, but it is incumbent upon all men excepting him who is deaf (חרש), dumb (אבלם) or imbecile (שוטה), or a minor (קטן) or blind or lame, or unclean or uncircumcised. So too the aged and the sick and the tender and very delicate, who cannot go up to the Temple on their own feet—all of these eleven are exempt<sup>34</sup>.

The deaf, even though he can speak or even though he is deaf in but one ear is exempt... And it is said *That they may hear* (Deut. 31:12), thus excluding (להוציא) him whose hearing is not complete; and *that they may learn*, thus excluding (להוציא) him who cannot speak, for everyone commanded to learn is also commanded to teach<sup>35</sup>.

<sup>34</sup>The Code of Maimonides (Mishneh Torah), Book 9, The Book of Offerings, Chapter II, Halacha 1; Herbert Danby trans., Yale University Press, New Haven, Oxford University Press, London, 1950, p. 52.

<sup>35</sup>Op. cit., II:1, p. 53.

Maimonides follows the Bavli in his exclusion of the partially deaf or the one who can speak but not hear or hear but not speak.

However, where the Bavli includes the rabbis' doubts and hesitations about this exclusion, and even an aggadah affirming the capacity of the mute sons of R. Yohanan ben Gudgada to attain great learning, Maimonides simply states the exclusion categorically, giving only the midrashic derivation-לחמטן ישמעו- and using the word להוציא which is even stronger than the Bavli's פטור.

Maimonides goes on to clarify the status of the קטן:

If a child can hold his father's hand and go up from Jerusalem to the Temple Mount, it is incumbent upon his father to take him up and to appear before the Lord with him to initiate him in the commandments, for it is said *All thy males shall appear* (Ex. 23:17). And if the child was lame or blind or deaf, even if in but one of his legs or eyes or ears, it is not incumbent upon his father to initiate him even though he was likely to be cured, since if he had been of age and in like case he would have been exempt, as we have stated<sup>36</sup>.

Maimonides follows Beit Hillel's definition of the קטן as the one who can hold his father's hand and walk (rather than be carried on his shoulders).<sup>37</sup> Like the Yerushalmi, Maimonides holds as חייב the child who can hold his father's hand, not the other way round (one whose father holds his hand.)

Maimonides states clearly, all who are חייב for ראיה, appearing, are also חייב for חגיגה, bringing the festival offering<sup>38</sup>. On the other

<sup>36</sup>Op. cit., II:3, p. 53.

<sup>37</sup>Ibid.

<sup>38</sup>Ibid., II:4.

hand, many of those who are not חייב for ראיה are still חייב for שמחה, the "peace offering of rejoicing." Only the שומט וקטן and also the uncircumcised (ערל) and the ritually unclean (טמא) are exempt from שמחה. In the Mishneh Torah, therefore, women and slaves, the old and sick, the blind and lame are obligated for שמחה.

This categorical ruling seems to ignore the argument of compassion which is offered by the Yerushalmi. The שומט, שומט, וקטן are, as Judith Abrams contends, in a special category of stigma. Maimonides explains that the uncircumcised and unclean are exempt because they may not enter the Temple<sup>39</sup>. An uncircumcised man who was circumcised or an unclean man who was purified are capable therefore of inclusion. But as for the שומט, שומט, וקטן: following the Bavli he says הרי הן פטורין מכל מצוות האמורות בתורה. They are outside the pale.

We can summarize the stated reasons for exemption of the שומט, שומט, וקטן in each of the rabbinic texts we have studied as follows:

- a) Mishnah- exemption of minor is based on inability to walk
- b) Tosefta- exemption of minor is based on maturity, ability to perform the task
- c) Talmud Bavli- Exemption of שומט, שומט, וקטן based on perceived lack of דעת, understanding; exemption of שומט based on inability to hear (learn) and speak (teach); inability to hear in both ears; questionable obligation of minor to bring reward to parents; exemption of שומט based on activity in performed in insane manner

<sup>39</sup>Op. cit., II:4, pp. 53-54.

d) Talmud Yerushalmi- Exemption of שומה, due to lack of דעת understanding; exemption of sick and old from compassion (leniency)-this reasoning is not extended to חרש, שומה וקטן; exemption of minor due to lack of intentionality (grasping father's hand)

e) Mishneh Torah- Exemption of minor due to inability to walk; exemption of חרש, שומה, וקטן due to inability to hear, learn, teach



The next text topic to be examined is that of תרומה or "heave offering." This was the first portion -the amount was specified as one fiftieth-of the crop, to be "heaved" or "lifted off" the top and called holy, to be given to the priests as their portion. We read in Exodus 25:2:

דבר אל בני ישראל ויקחו לי תרומה מאת כל איש אשר ידבנו לבו

Tell the Israelite people to bring me gifts; you shall accept gifts for Me from every person whose heart so moves him.

The phrase אשר ידבנו לבו was taken by the rabbis to mean that the intention of the person giving תרומה was crucial. Because the separation of תרומה required intention, the subject engendered considerable discussion concerning the role played by perceived lack of intention in excluding the חרש, שומה וקטן from participation in Jewish communal life. Alan Avery-Peck observes in the introduction to his translation of Yerushalmi Terumot that the main concern of the tractate is

how things become holy, what happens to them once they are holy, and how they ultimately cease to be holy... how the heave-offering becomes holy in the first place... depends upon certain thoughts and deeds of the Israelite householder.. The common Israelite.... has the power to cause the produce to be deemed holy. He does this first by formulating the intention to consecrate produce as priestly due. Then he pronounces a formula by which he orally designates a portion of his produce to be heave-offering. Finally, he effects his intention by physically separating that portion of the produce from the rest of the batch.<sup>40</sup>

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<sup>40</sup>The Talmud of the Land of Israel, Chicago Studies in the History of Judaism, Vol. 6, Terumot, translated by Alan J. Avery-Peck, University of Chicago, 1988, p. 3.

How can someone whose intentions are not clear perform step 1 of this process? How can someone who cannot recite a blessing perform step 2? Is step 3 alone, the physical separation of *terumah*, sufficient to make it holy?

Avery-Peck argues that this emphasis on intention is not an elitist one, although it may seem so from the viewpoint of חרש, שומה וקטן. Rather it is a revolutionary response to the destruction of the Temple and its cult. He asserts:

The single message of Tractate Terumah is that the presence of holiness in this world depends on the thoughts and deeds of common, non priestly, Israelites<sup>41</sup>.

With these comments in mind, let us look at Mishnah Terumot.

Mishnah 1 reads:

חמשה לא יתרמו: ואם תרמו, אין תרומתן תרומה: החרש, והשומה, והקטן, והורם את שאינו שלו. נכרי שתרום את של ישראל אפילו ברשות. אין תרומתו תרומה.

Five may not separate *terumah*, and if they separated, their *terumah* is not *terumah*. The deaf-mute, the imbecile, and the minor, and he who separates what is not his. If a non-Jew separated from what belongs to a Jew, even with permission, his *terumah* is not *terumah*.<sup>42</sup>

Bartinura (following R. Samuel bar Nachman in the Yerushalmi) tells us that the exclusions listed here come from our Exodus text.

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<sup>41</sup>Op. cit., p. 4.

<sup>42</sup>The Mishnah, Seder Zeraim, Vol. 3, Terumot-Maasrot, Department for Torah Education and Culture in the Diaspora, Jerusalem, 1993, R. Pinhas Kehati, commentator, Rafael Fisch, transl., p. 3.

The phrase אשר ידבנו לבו according to Bartinura, excludes the

חרש, שומע וקטן שאין בהם דעת להיות נודבין

Pinhas Kehati, following R. Samuel and others in the Yerushalmi, cites Numbers 18:27: ונחשב לכם תרומתכם:

"And your gift shall be considered" as a source for the requirement for דעת in separating תרומה. Kehati states:

This mishnah teaches us that *terumah* must be separated with due thought and understanding.. any *terumah* whose donor has no thought or understanding is not valid<sup>43</sup>.

Mishnah Terumot 1: 2 gives a definition of חרש (which we referred to in our discussion of Hagigah):

חרש המדבר ואינו שומע לא יתרם; ואם תרם, תרומתו תרומה. חרש שדברו בו חכמים בכל מקום-שאינו לא שומע ולא מדבר.

A deaf person who can speak but does not hear may not separate *terumah*; but if he separated, his *terumah* is *terumah*. The *heresh* spoken of by the Sages is always one who can neither hear nor speak<sup>44</sup>.

The Mishnah says that the partial heresh is forbidden לכתהילה from separating *terumah*, but if he did so his *terumah* is valid בדיעבד. The separation of *terumah* requires a blessing--וצונו להפריש תרומות-- which the deaf person cannot hear and the mute person cannot say, but since *terumah* without the blessing is still *terumah*, the separation stands. In other words step 2, the blessing, is not essential to the process of creating holiness, as long as step 1,

<sup>43</sup>Op. cit., p. 3

<sup>44</sup>Op. cit., p. 4.

forming the intention, has occurred. Bavli Berachot 15a says specifically in regard to separating תרומה that the requirement for the blessing is only a rabbinic requirement:

ברכה דרבנן ולא בברכה תליא מילתא

The blessing is a rabbinic requirement and the (validity of) the thing does not depend on the blessing.

Mishnah Terumot 1:3 defines the status of the קטן in regard to תרומה:

קטן שלא הביא שתי שערות-רבי יהודה אומר: תרומתו תרומה. רבי יוסי אומר: אם עד שלא בא לעונת נדרים, אין תרומתו תרומה; ומבא לעונת נדרים, תרומתו תרומה.

A minor who has not produced two hairs—R. Yehudah says, his *terumah* is *terumah*. R. Yose says, if he has not reached the age of vows, his *terumah* is not *terumah*, but after he has reached the age of vows, his *terumah* is *terumah*<sup>45</sup>.

The age when vows are examined is twelve years and one day for a boy, eleven years and one day for a girl<sup>46</sup>. Kehati and Bartinura note that it is R. Yose's view which is followed by the Rambam. The age of vows- not physical development-is the standard for ability to form a valid intention for separation of תרומה.

Mishnah Terumot 1: 6 also addresses the issue of דעת or intention:

חמשה לא יתרמו; ואם תרמו, תרומתן תרומה: האלם, והשכור, והערם, והסומא, ובעל קרי לא יתרמו; ואם תרמו, תרומתן תרומה.

Five may not separate *terumah*, but if they did separate, their *terumah* is *terumah*. he who is mute, or drunk, or naked or blind or a *baal kerim* may not separate

<sup>45</sup>Op. cit., p. 5

<sup>46</sup>See below Rambam in Marriage and Divorce section



*terumah*; but if they separated *terumah*, their *terumah* is *terumah*.<sup>47</sup>

Although this mishnah does not deal strictly with חרש, שומה וקטן, we note that the אדם is counted in the intermediate category of those who may not separate *terumah* לבתחילה but whose *terumah* is valid בדיעבד. The drunk person is similar to חרש, שומה וקטן in that he is temporarily unable to say the blessing and may not even know what he is doing. Bartenura says that a drunk person may not say the blessing, because he is not "fit to speak with king." The blind person cannot see to select the best produce. The naked person and the *baal ker*i are not supposed to recite the blessing until they get dressed or washed.

### Tosefta Terumot

Tosefta Terumot elaborates on the issues raised in Mishnah Terumot. R. Judah says, if a חרש separates תרומה, it is תרומה. We note that this is the same R. Judah who in Mishnah Terumot 1:3 says the תרומה of a minor, בדיעבד, is תרומה.

Tosefta Terumot 1:1 goes on to give an example:

אומ' ר' יהודה מעשה בבניו של ר' יוחנן בן גוגדה שהיו חרשים, והיו כל מהרות בירושלם נעשין על גבן

Said R. Judah: The sons of R. Yohanan ben Gudgada were deaf-mutes, and in Jerusalem all of the foods requiring preparation in purity were prepared under their supervision<sup>48</sup>.

But R. Judah's colleagues dispute his proof that a חרש may separate

<sup>47</sup> Kehati, *op. cit.* p.11.

<sup>48</sup> The Tosefta, Zeraim, edited by Jacob Neusner and Richard Sarason, Ktav Publishing House, Hoboken, New Jersey, 1986, Terumot, Alan Avery-Peck, transl., p. 129;

The Tosefta, Zeraim, with commentary by Saul Lieberman, Jewish Theological Seminary, New York, 1955, p. 107 (1:1)



But R. Judah's colleagues dispute his proof that a חרש may separate תרומה:

הטהרות אין צריכיות מחשבה, ונעשה על גבי חרש שוטה וקטן  
תרומה ומעשרות צריכות מחשבה

Foods requiring preparation in purity do not require intention and may be prepared under the supervision of a שוטה וקטן, חרש, But תרומה and מעשר require intention<sup>49</sup>.

R. Isaac in the name of R. Eleazar says that the תרומה of חרש does not revert to חולין because it is a matter of doubt whether or not the חרש has understanding. The correct procedure for a חרש is for the court to appoint a supervisor for him. The חרש separates his own תרומה and the supervisor validates it for him.

R. Simeon ben Gamaliel says the חרש whose תרומה is not תרומה is the one who is חרש from birth. If he was born with hearing and became a חרש he may write his intention and someone else validates it for him. In both cases, the חרש is considered solely responsible for his own תרומה.

Tosefta Terumot 1:2 gives some definitions: one who hears but does not speak is a mute (אילם); one who speaks but does not hear is called חרש but both of these are considered of sound mind in every respect.

Tosefta Terumot 1:3 goes on to ask: Who is a שוטה? The definition given compresses that in Bavli Hagigah: One who goes out alone at night, sleeps in a graveyard, rips his clothing and loses (or destroys) מאבד what is given to him.

What about one who is at times שוטה and at times lucid? The rule is this: when he is שוטה he is considered שוטה in every respect; when he is lucid he is considered of sound mind in every respect.

<sup>49</sup>Ibid.

This last statement calls into question at least for Tosefta Terumot the view that שוטה is a stigmatized "master status".<sup>50</sup> Abrams acknowledges this<sup>51</sup>; nevertheless to call someone stigmatized if he is accepted when acting rational seems incorrect.

Finally Tosefta Terumot 1:4 sets up a situation for the קטן similar to that of the חרש:

R. Judah speaks of the קטן whose father put him to work in a cucumber field and who separates תרומה. R. Judah, consistent with his views in Mishnah Terumot, says his תרומה is valid. But "they say" it is valid because his father validates it. There is no discussion of the minor's age or mental ability.

### Talmud Yerushalmi on Terumot

Talmud Yerushalmi has an extensive exegesis of Mishnah Terumot. As we noted above, we read in the Yerushalmi Terumot 1:1 40a on חמישה לא יתרמו that R. Samuel bar Nachman derives this from Exodus 25:1-2:

דבר אל בני ישראל ויקחו לי תרומה  
מאת כל איש אשר ידבנו לבו תקחו את תרומתי  
וזאת התרומה אשר תקחו מאתם

The five excluded by the Mishnah, explains R. Samuel are:  
the non-Jew (because of בני ישראל)  
the minor (because of כל איש)  
the חרש and שוטה (because of ידבנו לבו—that is, willingness

<sup>50</sup>Abrams, *op. cit.*, p. 87.

<sup>51</sup>*Op. cit.*, p. 134.

requires intention)

one who separates *terumah* from produce not belonging to him (because of *מאתם*, "from them", ie belonging to them)

Then Yerushalmi Terumot 1:1A (40a) raises the question: What if the manner in which a *חרש*, *שוטה* or *קטן* actually effected a separation of *terumah* shows that there was proper intention? For example, what if we use an example from Mishnah Machshirin, he brought the produce up to the roof to keep it from becoming infested with maggots?

Mishnah Machshirin is quoted:

שיש להן מעשה, ואין להן מחשבה

These individuals have the power of deed, but not the power of intention. (Mishnah Machshirin 6: 1 and 3:8)<sup>52</sup>

Even if in this particular case it appears that the *חרש* or *שוטה* is acting with intention, the intention is not considered as valid. This principle more than any seems to validate Judith Abrams' point that the *חרש* and *שוטה* are actually stigmatized individuals.

R. Huna comes up with a case in regard to Machshirin where the action of a *חרש* or *שוטה* seems to have an uncontestably clear intention. The Yerushalmi wants to make an analogy with *terumah*: if a *חרש* or *שוטה* actually separated *terumah* correctly, that would imply a clear intention and the *terumah* should be acceptable *בדיעבד*.

<sup>52</sup>The Talmud of the Land of Israel, Vol. 6, Terumot, Alan J. Avery-Peck, transl., p. 47, translation of quote from Mishnah Makhshirin 3:8.

But R. Samuel and R. Abbahu in the name of R. Yohanan and R. Zeira in the name of our rabbis all concur that this is not the case:

They refer us to Numbers 18:27

ונחשב לכם תרומתכם

And your offering shall be reckoned, considered, thought about to you

R. Samuel continues:

In the case of matters concerning which intention (מחשבה) is specifically mentioned in תורה, one's deed (מעשה) is not enough to prove an intention; but in a case in which intention is not specifically mentioned, one's deed is sufficient to indicate the intention. Since intention is specifically mentioned in Numbers 18:27, נחשב, the deed alone is not enough in the case of תרומה.

R. Yose then points out a contradiction to this rule in the case of a writ of divorce. Although according to Mishnah Gittin 2:5A even a חרש, שומם וקטן can write a get, R. Huna has said that any of these must be supervised by an adult of sound mind--in other words, the deed alone is insufficient (since the get needs to be written for a specific woman) . Yet, says R. Yose, this is a case where Scripture does not mention intention.

R. Yohanan asks, so why is the supervision necessary? Maybe it isn't?

R. Yose responded that although this one-- חרש, שומם וקטן --writes the get, the intentional act, the divorce, is performed by the other, of sound mind. In Terumot, the whole act of separating תרומה is done by the one lacking דעת.

R. Jacob bar Aha argued that the case of the writ of divorce is different from the case of *terumah*--one requires intention, the



other does not. He disagreed with the need for a supervisor for a get in the case of שוטה וקטן, חרש, while arguing that these individuals may validly separate *terumah* if supervised. He says that *terumah* is comparable to the teaching of R. Yohanan b. Beroqah regarding mixing the ash of the red heifer with water.

But R. Yohanan says that writing a get is like the teaching of our rabbis regarding mixing the ashes of the red heifer with water.

Our rabbis teach (in Talmud Parah 5:7a) that regardless of supervision, the שוטה, חרש, וקטן may not mix the ashes of the red heifer with water. R. Yohanan similarly teaches that שוטה וקטן, חרש may not write a get regardless of supervision.

But R. Ishmael son of R. Yohanan ben Baroqah taught that they may mix the ashes of the red heifer if they are supervised.

The conflict between the rules of תרומה, or separating the heave-offering, and the rules of divorce in regard to שוטה וקטן, חרש is explored further in the next discussion. R. Simeon ben Gamaliel (Yerushalmi Terumot 1:1 40b) taught that one who was of sound mind and later became חרש can write his intention to separate תרומה.

But R. Jacob bar Aha and R. Hiyya in the name of R. Yohanan disagree because of a parallel with divorce. In Mishnah Yebamot 14:1 we learn that a man who was of sound mind who becomes שוטה or חרש cannot divorce his wife. Why not? Shouldn't he be able also to write a document signifying his intention? Perhaps he may, unless he is unable to write. But R. Ba bar Mamel said that written instruction to a scribe is not sufficient. R. Yosa added that the husband must say to the scribe, "Write" and to the witnesses, "Sign." But Mishnah Gittin (7:1) says in the special case of a mute he may just nod his head.



So why not allow the special case of a חרש to write his intention to divorce his wife? R. Mana says no, even a חרש may not write his intention to divorce. Only a mute may signify his intention by nodding; anyone else must raise his voice. R. Ezra has a counter argument-if raising one's voice is equivalent to nodding, then a man should have to raise his voice three times, just as a mute must nod three times. Mana answers no-speaking once is sufficient, even though nodding requires three times. Nevertheless, writing one's intention to divorce is not permissible.

R. Yudan has another idea. Perhaps the case of חרש, שוטה, וקטן separating תרומה is not comparable to that of writing a get. In the case of תרומה the individual merely has to say what he has done. In the case of the get, he has to say what he plans to do, instructing someone else to do it. (See below Yerushalmi Gittin 39a and following on Mishnah Gittin 7:1) But R. Benjamin bar Levy disagrees. He says that if a person has דעת concerning the past, he also has דעת concerning the future. If he does not have דעת concerning the past, neither does he have דעת concerning the future.

R. Abudimi counters that the difference between תרומה and get is that in the case of a get, the חרש is not allowed to appoint an agent. R. Yose bar Bun says that the חרש who can respond by nodding his head three times is one who was healthy and then became mute. The three nods are required to make sure that the חרש is referring to the divorce when he nods (in case he was working on another document when he became mute.) There is also a baraita which says the three nods are required only in the case of a man who became mute when he was pushed into a cistern (did this happen frequently?). If a person became mute through illness (i.e. not all of a sudden) he only needs to nod once.

Rabbi Judah disagrees with the rule that if a חרש separates תרומה it is not valid. He cites the fact that the sons of R. Yohanan ben

Gudgada were deaf-mutes and that all foods requiring preparation in purity were prepared under their supervision in Jerusalem.

But the rabbis argued that preparing foods in purity does not require intention and therefore may be done by שוטה וקטן, חרש, whereas separating תרומה does require intention (מחשבה). R. Yose says that in the case of preparing foods in purity (טהרה) intention (מחשבה) is not required; rather שמירה, supervision, is required. Alan Avery-Peck explains that the relevant verse for טהרה is Lev. 22:9: ושמרו את משמרתו (whereas the relevant verse for תרומה, as noted above, is Numbers 18:27: ונחשב לכם תרומתכם, hence מחשבה).

Yerushalmi Terumot then goes on to quote R. Huna's definition of שוטה, using the same criteria discussed in Bavli Hagigah 3b (cited as a baraita): a שוטה is one who 1) goes out alone at night 2) sleeps in a graveyard 3) rips his clothing and 4) loses (or destroys-מאבד) everything that is given to him. [Note: In Bavli Hagigah (4) is originally cited as an alternative to (1) (2) and (3).] Yerushalmi reiterates the arguments found in Bavli Hagigah. According to Yerushalmi, R. Huna says all four traits are required to label someone שוטה, because each alone might be explained. According to Bavli Hagigah, R. Huna offers only (4) as a definition of שוטה, and as an alternative to (1-3).

Here an interesting series of Greek-sounding words are given as the rationalizations:

One who goes out at night might be קיניטרוקים<sup>53</sup>; , suffering from lycanthropy, believing himself to be a wolf-which apparently was not considered to fall under the category of שוטה!

One who sleeps in a graveyard might be מקטיר לשדים, offering incense to the spirits (Bavli Hagigah 3b says is כדי שתשרה עליו רוח טומאה

<sup>53</sup>Bavli Hagigah 3b says גנדיפוס; Jastrow, *op. cit.*, p. 257, gives קנדרופוס as an alternative.

intentionally bring a spirit of uncleanness upon oneself).

One who tears his clothes might be סוליקוס; the word according to Avery Peck is כוליקוס which Jastrow defines as "melancholy"<sup>54</sup>.

One who loses or destroys everything might be קורדייקוס. Jastrow translates קורדייקוס as "delirious," noting that in Yerushalmi Gittin the sages define this term as one who is at times sane and at times insane<sup>55</sup>.

Yerushalmi Terumot 1:1 40b continues: R. Yohanan says a שוטה is one with only one of these traits. R. Bun agrees but says that to be deemed שוטה, a person who loses what is given to him must lose everything that is given to him (this seems similar to the Bavli Hagigah's concept that each one of these activities must be done דרך שטות in an insane manner).

What is a "delirious" person (קורדייקוס)? R. Yose says חסום, "confused in mind." An example is a man from Tarsus who came before R. Yose. When given red meat (סימוק) after dark wine (אבים) he would calm down (לעי, get tired) and also when given dark wine after red meat he would calm down.

Regarding this person, the sages said: if he is at times שוטה and at times lucid (חלים-put together); when he is שוטה he is regarded as שוטה in all respects (הרי הוא בשוטה בכל דבריו); when he is lucid, he is regarded as sane (פקח) in all respects.

An example of this is a case of such a person (sometimes שוטה, sometimes sane) who came before R. Samuel to divorce his wife. R. Samuel ruled that he could give his wife a writ of divorce when he

<sup>54</sup>Ibid. p. 55; see also Jastrow, op. cit., p. 620. The Bavli Hagigah version (3b) says בעל מחשבות, "lost in thought."

<sup>55</sup>Jastrow, op. cit., Vol. II, p. 1341.

was lucid (חלים). Similarly Resh Lakish ruled that such a person can divorce his wife when he is quiet (בשישתפה).

But Samuel's rule is stricter because חלים is really sane, cured (as opposed to ישתפה (quieted down, pacified). The prooftext for this interpretation of חלים is Isaiah 38:16: "ותחלימני וחייני: Restore me to health and make me live."

We have now reviewed the Yerushalmi Terumot on the ability/disability of חרש and שומה to separate תרומה. What about our third term, קטן, the minor?

Yerushalmi Terumot 1:1 40b says, it is not R. Judah who is the source of the Mishnah's exclusion of the minor. There is a baraita which quotes R. Judah: the minor whose father puts him in a cucumber field, and who separates תרומה while his father sells (מוכר) it at his side (Avery Peck quotes a version which says, "His father speaks (מדבר) at his side)-that is valid.

But the rabbis said: it was not the minor who separated but the father who confirmed (אימן) the תרומה. So if this is true, when did the separated produce become תרומה-- when the son separated it or when the father confirmed it?

The answer is, when the father confirmed it. R. Shimi teaches this from the analogy of one who separates תרומה from produce which is not his. Such produce is not תרומה unless the owner agrees, even after the fact.

Thus in Yerushalmi Terumot the minor is not regarded as capable of valid intention for separating תרומה. Yet he is allowed to do so with his father's confirmation.

There follows a discussion of those who separate תרומה which does not belong to them. This discussion relates to our concerns in that it



includes cases where someone is acting as guardian or executor (אפוטרופוס) for a minor orphan. Even in the case of a minor who is an orphan, his תרומה is apparently not valid unless confirmed by an adult guardian. Another discussion follows regarding the validity of appointing an agent to separate תרומה.

Having completed its discussion of the five who may not separate תרומה, the text then turns to a discussion of Mishnah 1:2 : the חרש who speaks but does not hear, who is not to separate תרומה but if he does so his תרומה is valid בדיעבד. Thus, the mishnah concludes, the חרש referred to by the sages is one who neither hears nor speaks. The Yerushalmi's discussion questions whether this is consistently true, that the חרש is one who neither hears nor speaks. For this purpose the text raises the issue of the reading of the Shema.

R. Yose, we are reminded, taught (in Mishnah Berachot 2:3) , one who reads the Shema but is not heard has not fulfilled his obligation-- but the sages say he has. Avery-Peck indicates that the actual point of the passage is that R. Yose by his silence on the topic agrees that the Tefila (unlike the Shema) need not be audible. The text goes on : R. Matena said it was R. Yose who ruled .<sup>56</sup>

Another R. Yose, an Amora said in a חידוש : Why did R. Yose (the Tanna) disagree with the sages regarding the Shema? Because in Deuteronomy 6 it says: שמע , "Hear." But for the other commandments (we would assume) they do not disagree (because "Hear" relates only to the Shema.) But, since R. Matena cites R. Yose specifically in regard to the Megillah. we assume that the disagreement extends to all commandments. R. Yose's reason is Exodus 15:26: וְהָאָזְנוֹת לְמִצְוֹתַי : (This means) your ears must hear what your mouth speaks.

R. Hisda says that the חרש is listed by mistake in Mishnah Megillah 2:4 (because it is normally included with שוטה וקטן). Therefore Hisda

<sup>56</sup>That חרש may not read the Megillah; see Mishnah Megillah 2:4: חביל כשרין לקרות המגילה חוץ מחרש שוטה וקטן; also see Bavli Megillah 19b-20a.



thinks that R. Yose the Tanna's disagreement with the sages is only in regard to the Shema and does not extend to the other commandments<sup>57</sup>. Therefore the חרש is disabled only with respect to the Shema. The implication then, according to R. Yose the Amora is that R. Hisda and the other sages would not exclude the חרש from separating תרומה because he cannot hear the blessing. Also R. Yose ben R. Bun says this rule (the exclusion of the חרש) is the opinion only of R. Yose the Tanna. The net result is, according to the sages, the חרש may separate תרומה.

Yerushalmi Terumot 1:2 (40c) then quotes Mishnah Hagigah 1:1 on the subject of the חרש, reminding us that the text of ויקהל continues למען ילמדו, which excludes the חרש who cannot hear and למען ישמעו, interpreted as "they will teach," to exclude the חרש who hears but does not speak.<sup>58</sup> Mishnah Hagigah is quoted because of the general statement in Mishnah Terumot, that a חרש is always someone who neither hears nor speaks. Similarly Mishnah Yebamot (12:4) is cited to show that a חרש who is only mute is also called a חרש if he is unable to recite the passage from Deut. 25:9<sup>59</sup> required for the ceremony of חליצה.

Therefore R. Jonah says: rules which Rabbi stated as general principles are not general principles: חדא אמרה דלית כללין דר' כללין.

Finally we will look at in Yerushalmi Terumot 1:3 (40c), returning to the topic of the קטן. The Mishnah Terumot 1:3 involves a dispute as to whether a minor separate תרומה - R. Judah says yes, despite the discussion above dealing with the minor in a cucumber field. If no, the question remains whether majority for תרומה is determined by age alone (12 years and one day for a girl, 13 years and one day for a boy), physical development (הביא שתי שערות). In the Mishnah R. Yose

<sup>57</sup>See discussion by Alan Avery-Peck, Yerushalmi Terumot, p. 68.

<sup>58</sup>See discussion in Chapter 1 of this thesis of the same text.

<sup>59</sup>ככה יעשה לאיש אשר לא-יבנה את-בית אביו:

says it is determined by age alone.

But the Yerushalmi quotes R. Meir: אין תרומתו תרומה עד שיביא שתי שערות. His תרומה is not valid unless he is physically developed (whether or not he is of the proper age.) R. Abin bar Kahana in the name of R. Hila says the reason for Meir's view is Numbers 18:32: ולא תשא עליו חטא בהרימכם את חלבו.

One who is not physically developed does not bear sin and is therefore not subject to the laws of תרומה.

R. Yose in the name of R. Hila says the reason for Meir's view is Number's 18:27 which we have referred to frequently. This is the verse which requires intention: ונחשב לכם תרומתכם, and מחשבה is not mentioned in connection with a minor.

R. Aha and R. Hinena in the name of R. Kahana add that a minor who cannot separate תרומה may also not מקדיש, dedicate produce to the Temple. You would think therefore, that if a minor may separate תרומה he may also dedicate produce, but the same R. Judah who said the minor may separate תרומה says he may not dedicate produce.

On the other hand, R. Yohanan said that even one who thinks a minor may not separate תרומה says that a minor may dedicate produce to the Temple. Specifically, a minor may bring a burnt offering (עולה) or a peace offering (שלמים). A minor may not bring a sin offering of fat or blood (because he is not culpable of sin). A minor who has a flux (זיבה) or leprosy (צורעת) may bring the offerings required of such a person. However, he may not act as agent for someone else who is required to bring such an offering. This is similar to the fact that although produce owned by a minor is subject to tithes, he may not himself separate תרומה.

May a minor bring ביכורים, first fruits? If one agrees with R. Judah who says first fruits are like holy things of the provinces, which a

minor may not bring (Mishnah Bikkurim 3:12 and Mishnah Hallah. 4:9) then a minor may not bring ביכורים. If one agrees with the rabbis in the above mishnayot, that ביכורים are like holy things of the sanctuary, then a minor may bring them.

May a minor bring חגיגה? Possibly no, because he is not obligated to bring it. Or possibly yes, since he could designate it as a peace offering which a minor may bring.

May a minor bring the פסח offering? The reasoning is similar to the חגיגה. Maybe not, because he is not obligated. Maybe so, because he can designate it as a peace offering.

May a minor set aside the tithe of cattle (מעשר בהמה)? If one agrees with R. Meir, no. It is the same as separating תרומה. May a minor designate a substitute animal? No, for the same reason. May a minor designate a substitute for any other holy thing? No.

Are priests who sacrifice a a holy thing designated by a minor outside of the altar culpable? No, according to Kahana. But R. Yohanan and Resh Lakish say they are culpable, since a holy thing separated by a minor is a holy thing. R. Judah agrees.

There is thus in the Yerushalmi considerable disagreement as to the status of a minor in regard to separating תרומה. There is also some disagreement as to the status of a חרש in separating תרומה. There is consensus that a שוטה may not separate תרומה but it is not easy to define שוטה, and there are those who are sometimes שוטה and sometimes not. We find also discussion of the concept of the חרש or אפסודוס (פיקח עומד על גביו) performing the mitzvah under supervision (אביו הוא שאימן על ידו or אביו מוכר על ידו). This concept is to be distinguished from the concept we will see in Baba Kamma of circumventing lack of דעת in a legal situation by appointing a guardian or אפסודוס.

## Mishneh Torah

How are these mishnaic and talmudic discussions codified by the Rambam?

In Treatise III, Chapter IV, of Zeraim, Rambam basically reiterates the mishnayot on Terumot:

Halacha 2:

Five persons may not set aside heave offering, and if they do so their offering is invalid: a deaf-mute, and imbecile, a minor, a gentile, and one who sets aside produce that is not his own...

Halacha 4:

Five persons may not set aside heave offering, but if they do so nevertheless, their offering is valid: the deaf who can speak but cannot hear, the mute who can hear but cannot speak, the naked, because he may not recite the benediction, the drunk and the blind, because they cannot set aside the choice produce...

Halacha 5:

A minor who has reached the age of vows but has not produced two hairs and has separated heave offering, his offering is valid, since his vows and dedication to the Temple are valid, as has been explained in the Laws concerning vows<sup>60</sup>.

Rambam here makes an important observation. The laws for תרומה are analogous to the laws for vows, since both require intention. He also clarifies for us the reasons why the naked, drunk and blind are not to separate לתרומה לבתחילה.

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<sup>60</sup>The Code of Maimonides, Book Seven, The Book of Agriculture, Isaac Klein, transl., Yale University Press, New Haven, 1979, pp. 117-118.



### Chapter 3-Damages (Baba Kamma)

The first two topics we reviewed involved ritual matters -- ראייה, that is appearing at the Temple on the festivals, and separating תרומה, from which the שוטה וקטן, חרש, are disqualified or exempt. Next we will examine civil matters: the status of שוטה וקטן, חרש in regard to damages, or Nezikin. What damages, caused to them or by them, are they liable for?

The relevant mishnayot for the case of שוטה וקטן, חרש are Baba Kamma 4:4, 5:6, 6:2, 6:4 and 8:4.

Kehati translates Mishnah Baba Kamma 4:4 thus:

If the ox of a normal person gored the ox of a deaf-mute, mental defective or a minor, he is liable. And (if the ox ) of a deaf-mute, mental defective or minor gored the ox of a normal person, he is exempt. If the ox of a deaf-mute, a mental defective or a minor gored, the court appoints for the an administrator (אפוטרופוס), and testimony concerning them is given before the administrator. If the deaf-mute regained his faculties (נתפח), the mental defective regained his sanity (נשתפה), or the minor became of age (הגדיל) it (the ox) returns to the status of חם; this is the opinion of R. Meir. R. Yose says, it retains its status<sup>61</sup>.

(We need not deal here with the last sentence of the mishnah, which says the stadium ox, trained to gore, is not liable.)

The important point here is that the Mishnah protects the interests of the שוטה וקטן, חרש. They are treated as a group here, and protected by not being liable and by having an administrator appointed to act on their behalf. Moreover, the Mishnah recognizes that the status of each individual may change over time. The Mishnah not only

<sup>61</sup> Seder Nezikin Vol. I, Bava Kamma, translated by Edward Levin, commentary by Rabbi Pinhas Kehati, Department for Torah Education and Culture in the Diaspora of the World Zionist Organization, Jerusalem, 1987, p. 59.



recognizes that the קטן will grow up but also that the condition of the חרש or שוטה may change. It would be difficult to characterize their status here as stigmatized.

Mishnah Baba Kamma 5:6 is fascinating because it seems to speak of an animal--an ox-- being שוטה וקטן, חרש. If such a handicapped animal falls into an open pit, the owner of the pit is liable for damages, even though he is not liable for damages to a normal animal, which knows how to take care.<sup>62</sup> He is also exempt if a child falls into the pit. However, as we see below, we can also translate this Mishnah as referring to the ox owned by חש"ו.

Mishnah Baba Kamma 6:2 speaks of a sheep left in the care of חרש, שוטה וקטן which then caused damage. The owner of the sheep, who gave it to the חש"ו to watch, is liable for the damage. This mishnah seems connected to 4:4, since the חש"ו is normally not liable for damages by an animal under its care.

Mishnah Baba Kamma 6:4 says that if a person "sends fire" by a deaf-mute, mental deficient or minor, he is exempt by the laws of man and liable by the laws of heaven (פטור בדיני אדם וחייב בדיני שמים). If he sent by a normal person, the normal person is liable.

Kehati<sup>63</sup> notes that the laws of agency do not apply to חש"ו, as we saw above in תרומות.

We must look at the Hebrew text of Mishnah Baba Kamma 8:4 since it can be translated in diverse ways.

חרש, שוטה וקטן פגיעתן רעה: החבל בהן, חיב; והם שחבלו באחרים, פטורין.

Edward Levin in the Kehati Mishnah translates:

<sup>62</sup>Kehati commentary, op. cit., p. 81.

<sup>63</sup>Op. cit., p. 90.

Coming into contact with a deaf-mute, mentally defective person or minor is a bad thing; whoever wounds them is liable, but if they wound others they are exempt.<sup>64</sup>

Danby renders this:

It is an ill thing to knock against a deaf-mute, an imbecile or a minor; he that wounds them is culpable, but if they wound others they are not culpable<sup>65</sup>.

Soncino in translating this passage in Bavli Baba Kamma 88a renders רעה as "awkward." This seems like an odd translation but perhaps it is appropriate in the context of the Gemara which follows (see below).

Levin's translation emphasizes the bad luck of the person who happens to run into a handicapped person.

Jastrow<sup>66</sup> gives "strike, come into contact with, meet (in a hostile sense), attack, strike" as definitions for פגע.

Levin's translation notwithstanding, Mishnah Baba Kamma expresses a consistently protective attitude towards חרש, שוטה וקטן. In the relevant mishnayot they are treated as one group. The exceptional nature of their status seems to redound entirely to their benefit.

### Tosefta Baba Kamma

The Tosefta Baba Kamma gives a different treatment to חרש, שוטה וקטן than the Mishnah in regard to damages.

Tosefta Baba Kamma begins with the text of Mishnah Baba Kamma 4:4 :

<sup>64</sup>Op. cit., p.117.

<sup>65</sup>Danby Mishnah, pp. 342-343.

<sup>66</sup>Jastrow, op. cit., p. 1135.

The ox of a deaf-mute, an idiot or a minor which gored the ox of a person of sound senses, the owner is exempt<sup>67</sup>.

Neusner translates Baba Kamma Tosefta thus:

R. Jacob says, he pays half-damages<sup>68</sup>.

The Lieberman text adds an attribution to Akiba:

ר' עקיבא ור' יעקב אומר' משלם חצי נזק

R. Akiba and R. Jacob say he pays half-damages<sup>69</sup>.

The Zuckerman edition attributes this opinion to Akiba alone:

ר' עקיבא אומר חצי נזק<sup>70</sup>

We can refer back to Mishnah 4:1 and see that half damages (חצי נזק) is the normal penalty for damage done by a תם ox, one that had not previously gored.

We read further in Neusner's version:

An ox, the owner of which became a deaf-mute, lost his senses or went overseas-R. Judah b. Neqosa says, "Under all circumstances it remains in the status of being deemed harmless, unless they give testimony against the beast in the presence of the owner" <sup>71</sup>.

<sup>67</sup>The Tosefta, Neziqin, Jacob Neusner, transl., Ktav Publishing, New York, 1981, p. 20 (based on Zuckerman edition of Vienna ms.)

<sup>68</sup>Ibid.

<sup>69</sup>The Tosefta according to Codex Vienna, Order of Nezikin, Saul Lieberman ed. and commentary, Jewish Theological Seminary, New York, 1988, p. 15.

<sup>70</sup>תוספתא על פי כתבי ערפורט ווינה, חרב משה שמואל צוקרמאנדל, הוצאות בומברגר את וואהרמן, ירושלים תפרח"י, עם תשלום תוספתא מאת הרב שאול ליברמן, ע' 352

<sup>71</sup>Neusner, Tosefta Neziqin, ibid.

Here R. Judah b. Neqosa puts an absentee owner (went overseas) in the same status as חרש or שוטה. Also, his loophole, "Unless they give testimony against the beast in the presence of the owner " is a large one. This condition seems to ignore the owner's lack of דעת, which was presumably the reason for exempting these people from paying damages.

Tosefta Baba Kamma 4:4 continues:

R. Yose says, "They appoint a guardian for it, and they give evidence against it in presence of the guardian."<sup>72</sup>

This is similar to the Mishnah, but in the Mishnah the appointing of the guardian is anonymous. Also, in the Mishnah it is clear that the guardian is for the handicapped owners (להן). The guardian in Tosefta is for the ox, as Neusner's translation implies, and the testimony is against the ox (in the Mishnah it is לעידן להן, testimony concerning them, ie חרש, שוטה וקטן).

Tosefta Baba Kamma 4:4 continues (Neusner, p. 20):

(If) the deaf-mute gained capacity to hear, the idiot regained his sense, or the minor reached maturity, or the owner came back from overseas, R. Judah b. Neqosa says, "Sumakhos says, 'Under all circumstances it remains in its original status of being harmless, unless they give testimony against the beast in the presence of the owner yet a second time.' R. Yose says, 'Lo it remains in its established status.'"<sup>73</sup>

The opinion here attributed to R. Judah b. Neqosa is similar to the opinion attributed in the Mishnah to R. Meir, although again R. Judah b. Neqosa adds his loophole.

Tosefta Baba Kamma 4:4 then continues immediately with:

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<sup>72</sup>bid.

<sup>73</sup>bid.



This is the governing principle: Any beast against which evidence is received, and against which its owner is warned in that same matter against which evidence is received for the beast, in a regard in which evidence is received against the beast (the owner) pays full damages from the choicest real property.

But any beast against which evidence is not received, and against which its owner is not warned in that same matter against which evidence is received for the beast, in regard which evidence is not received against the beast, (the owner) pays half damages, with liability limited to the value of the carcass of the animal itself.<sup>74</sup>

It appears as if this "general principle" following immediately the discussion of חש'ו is meant to apply to them as well, especially since R. Judah b. Neqosa twice is quoted as saying "unless they give testimony against the beast in the presence of the owner." Also in Tosefta, the owner who absents himself is in the same category as חש'ו. May we suggest that these people in Tosefta are those who are not responsible rather than those in need of protection?

Tosefta Baba Kamma 6:6-7 equate giving a pit over to the supervision of חש'ו to not covering it properly; this is contrasted to giving a properly covered pit over to the supervision of a sick or old person who has דעת:

חפר כראוי, וכסה כראוי, עשה לו חוליא גבוהה עשרה טפחים, מסר לחולה, ולזקן  
 שיש בהן דעת, פטור;  
 חפר שלא כראוי, וכסה שלא כראוי, עשה לו חוליא פחותה מעשרה טפחים, מסרו  
 לאחר שומה וקטן שאין בהן דעת, חייב

If one has dug a hole in the proper way and covered it up in the proper way, and made a fence around it in the proper way, ten handbreadths high, and handed it over to a sick person or to an old person who is intelligent, he is exempt (having done his duty for the protection of the well).

(If) he has dug (a hole) not in the proper way, and covered it up not in the proper way,

<sup>74</sup>ibid.



or if he handed it over to a deaf-mute, idiot or minor, who lack intelligence, he is liable<sup>75</sup>.

This topic of the pit is dealt with in Mishnah Baba Kamma 5:6. There there is no discussion about the pit being under the control of חש'ו, or for that matter, of anyone else. This is the Mishnah which discusses the possibility of an ox which is itself שיטה or חרש, קטן or falling into it.

Tosefta Baba Kamma 6:14 has a different Hebrew text. Lieberman<sup>76</sup> gives us:

נפל לתוכו חרש שוטה וקטן, שור סומא, המהלך בלילה, חייב, בן או בת, עבד או שפחה, פטור

Zuckerman<sup>77</sup> has:

נפל לתוכו שור חרש שוטה וקטן שור סומא המהלך בלילה חייב בן או בת עבד או אמה פטור

Neusner translates:

If an ox belonging to a deaf-mute, an idiot or a minor fell into it, or the ox of a blind person or of one who is walking about at night, the owner of the pit is liable<sup>78</sup>.

We shall see below that the question of whether the ox or the owner is handicapped becomes a topic of discussion in the Bavli Baba Kamma 54a. These Tosefta texts would suggest that the Bavli Gemara interpretation of this text as referring to a handicapped animal is possibly a misreading of the Mishnah; but since the weight of the tradition in fact came to interpret it in this way, it became

<sup>75</sup>Op. cit., pp. 28-29.

<sup>76</sup>Lieberman, *op. cit.*, p. 23.

<sup>77</sup>Zuckerman, *op. cit.*, p. 355.

<sup>78</sup>Neusner, *Tosefta Nezikin*, pp., 29-30.

the correct reading. In this context Neusner's translation becomes interesting and controversial.

Tosefta Baba Kamma 6:31 contrasts the case of the pit with the case of fire:

חומר בבור שאין באש, ובאש שאין בבור. חומר בבור, שהבור מסרו לחרש שוטה וקטן חייב, מה שאין כן באש. חומר באש שהאש מועדת לילך ולהזיק, ומועדת לזבל דבר הראוי לה ודבר שאין ראוי לה, מה שאין כן בבור

A strict rule applies to the pit which does not apply to fire, and to fire which does not apply to a pit. For in the case of a pit if one has handed it over to the (guardianship of) a deaf-mute, idiot or minor, he remains liable, which is not the case with fire<sup>79</sup>.

Mishnah Baba Kamma 6:4, we recall, says that if one sends fire by חש'ו, one is exempt by the laws of man and liable by the laws of heaven. Tosefta BK 6:31 implies that one who sends fire by חש'ו is not liable. Nevertheless, Tosefta BK 6:31 acknowledges that fire, unlike the pit, "is assumed to go along and do damage."

Tosefta Baba Kamma 9:8 gives a father absolute power over his minor children:

החובל בבנו ובתו (גדולים) חייב בכל. בעבדו ושפחתו העברים של אחרים, מוציאין מידו. ושל בתו, נותנים לו מיד, ושל בנו עושה לו בהן סגולה מיד. בבניו ובנותיו קטנים של עצמו, פטור מן הכל

If he injured his minor sons or daughters, he is exempt on all counts.<sup>80</sup>

"All counts" refers to the five elements referred to in Mishnah Baba Kamma 8:1:

<sup>79</sup>Op. cit., p. 35.

<sup>80</sup>Neusner, op. cit., p. 52.

Whoever wounds his fellow is liable for five things: for damage, for pain, for healing, for loss of time, and for shame.<sup>81</sup>

We may ask: is the father exempt from responsibility for injuring his child because the child lacks דעת, like the חרש and the שוטה? Or is it rather because the child is his property, part of his רשות, like נשים ועבדים? The קטנים of Tosefta Baba Kamma 9:8 seems to be different than the חרש, שוטה וקטן of קטן.

Tosefta Baba Kamma 9:8 no sooner states the father's claim to absolute power than it immediately contradicts this claim:

He who injures his minor daughter-the compensation for her injury "belongs to her, and for all other forms of compensation, lo he is exempt<sup>82</sup>

Further (9:9) If others injured her (the minor daughter) compensation for her injury belongs to her, and as to the rest of the compensation, he sets it aside in trust, and if she dies, he inherits her estate.

9:8 is also contradicted by 9:10:

He who injures his minor son is liable on all counts.<sup>83</sup>

Another contradiction occurs in Tosefta Baba Kamma 9:13:

He who inflicts injury on a deaf-mute, an idiot or minor is liable on four counts, but exempt on the count of indignity (בושת) because they are not subject to indignity. Rabbi says: "I maintain concerning a deaf-mute that he most certainly is subject to indignity. As to an idiot he is most certainly not subject to indignity. As to a minor, sometimes he is subject to indignity, and sometimes he is not subject to indignity."<sup>84</sup>

<sup>81</sup>Edward Levin, transl., Kehati Mishnah Seder Nezikin, Bava Kamma, p. 111.

<sup>82</sup>Neusner, *ibid.*

<sup>83</sup>*Ibid.*

<sup>84</sup>*Op. cit.*, p. 53.

Rabbi's comments are transmitted as objections to the basic statement that חש'ו are not subject to indignity. But the text of Tosefta seems oblivious to the previous statements about a minor son or a minor daughter. Indeed it appears that the minor which here is part of the group "חרש, שוטה וקטן" is something other than the minor referred to as the minor son or minor daughter. It may be that this distinction of two kinds of minor helps to explain the contradictions within the Tosefta Baba Kamma texts dealing with the minor.

## Mekilta

On the subject of damages, we have another Tannaitic source besides the Mishnah and Tosefta in the Mekilta de Rabbi Ishmael. The tannaim felt it was important to connect these laws directly to the Torah, which they did through the halachic midrash. In the Mekilta rabbinic laws are related to the laws of Exodus.

מכה איש ומת מות ימות

Mekilta asks: מכה איש. From this I know only about one who smites a man. How about one who smites a woman or a minor? Scripture says (Lev. 24:17) "And if a man smiteth anybody (כל נפש) he shall surely be put to death." This includes even one who smites a woman or a minor. How about a woman that kills a minor or another woman? Scripture (Numbers 35:16) says "He is a murderer" which comes to include this.<sup>85</sup>

מכה איש: This could mean also a minor who smites. But Scripture (Lev. 24:17) says "And if a man smite anybody." This excludes a minor (להוציא את הקטן).<sup>86</sup>

<sup>85</sup> Mekilta de-Rabbi Ishmael, Jacob Lauterbach ed. and transl., Vol. 3, Tractate Nezikin, Chapter IV, Ex. 21:12-14, Jewish Publication Society, Philadelphia, 1935, p. 32.

<sup>86</sup> Op. cit., p. 33.



Thus we see that in Mekilta one who kills a minor is guilty of murder, but a minor is not culpable of murder. This echoes Mishnah 8:4 (see above) where we learned that whoever wounds *חרש שומה וקטן* is liable, but if they wound others they are exempt.

Further on in chapter IV of Nezikin Mekilta discusses the issue of premeditated murder:

וכי יזיד: Why is this said? Because it says (Lev. 24:17) "And he that killeth any man (מזיד) which might be taken as one who acts intentionally (ואיש כי יכה כל נפש) and one who acts inadvertently (שוגג), it says here: "And if there come presumptuously," to exclude the one acting inadvertently.... "a man," to exclude the minor, "a man" to include outsiders (in those held liable for murder); "his neighbor," (ביתן מוס בעמיתך) to include the minor (as victim); "his neighbor" to exclude the outsiders (as victim).... "To slay him with guile (בחרגו בערמה) to exclude the deaf and dumb, the insane and the minor, who cannot practice guile..."<sup>87</sup>

Those who lack *דעת* are regarded in Mekilta as incapable of premeditation or guile as perpetrator of an injury or murder. The words *מזיד* and *ערמה* do not apply to them.

Later the Mekilta has a long discussion of the minor as a victim :

And how do we know the law is the same when minors are killed as when grownups are killed? You must reason thus: A *muad* is subject to death by stoning and a *tam* is likewise subject to death by stoning. Now inasmuch as you have learned that in the case of the *muad* no distinction is made between minors and grownups, it follows that in the case of the *tam* likewise no distinction should be made between minors and grownups.

No! If you cite the case of the *muad* that is different, for there the owner has even to pay ransom. therefore the law regards the case of minors like the case of grownups. But will you argue the same about the *tam*? There the owner does not have to pay ransom and

<sup>87</sup>Op. cit., pp. 36-37.

therefore the case of minors should not be regarded like the case of grownups. But there would have been no purpose in saying "Whether it have gored a son or daughter" (Ex. 21:31) except to furnish an expression free to be used in formulating the following *gezerah shavah*: Here the expression "gore" is used and there the expression "gore" is used. Just as there the case of minors is regarded like the case of grownups, so there the case of minors is regarded like the case of grownups. R. Simon b. Yohai says: Why is this said? Even if it had not been said I could have reasoned thus: If in the case where with respect to those who kill, the law does not regard minors like grownups, nevertheless with respect to those who are killed, it does regard minors like grownups, is it not logical that here where with respect to those who kill, the law regards minors like grownups, we should with respect to those who are killed, surely regard minors like grownups?

No! If you cite that case—that is a different matter, for there the law regards the one acting unintentionally like the one acting intentionally as regards liability for damages. Therefore the law also regards minors like grownups with respect to those who are killed. But will you argue the same about this case? here the one acting unintentionally is not regarded like the one acting intentionally as regards liability for damages. Therefore minors are not to be regarded like grownups with respect to those who are killed. But there would have been no purpose in saying: "Whether it have gored a son or a daughter" except to furnish an expression free to be used in formulating the following *gezerah shavah*: Here the expression "gore" is used and there the expression "gore" is used. Just as there the law regards the case of minors like the case of grownups with respect to those who are killed, so here also it is but logical that we should regard the case of minors like the case of grownups with respect to those who are killed.<sup>88</sup>

Although the question of intention is raised, the issue of the חרש who are generally also thought to be lacking intention does not arise. Again, the קטן here contrasted with גדול appears to be a separate category from קטן which completes the group, חרש, שומה, וקטן.

<sup>88</sup>Op. cit., pp. 76-77.

Chapter 21: 29<sup>89</sup> comments on the verses from Exodus (21:28ff) which give the Toraitic basis for the laws in Baba Kamma regarding the goring ox. This passage reiterates the Mishnaic principle that שוטה וקטן, חרש, are exempt because they lack דעת, but adds R. Akiba's opinion that they owe half damages:

ת"ל ולא ישמרנו בעליו לא ישמרנו ולא ישמרנו שיש בו דעת לשמר יצאו חרש שוטה וקטן שאין בהן דעת דעת לשמר שור חרש שוטה וקטן שנגחו הרי אלו פטורין. ר' עקיבה אומר משלם חצי נזק

The Scripture says "If (an ox is muad) and its master does not guard it"--"if his master does not guard it" means that the master must have intelligence; this excludes the deaf-mute, the mentally handicapped and the minor who have not the intelligence to guard it. If the ox of חשו' gores, they are exempt. Rabbi Akiba says they pay half-damages

Mekhilta de R. Shimon ben Yochai, Chapter 21:36 <sup>90</sup> adds:

שור של חרש שוטה וקטן שנגח בית דין מעידין להן אפוסטרופוס ומעידין להן בפני אפוסטרופוס ואם הזיקו יהו חייבין לשלם

If an ox belonging to a deaf-mute, mentally handicapped person or a minor gores, the court appoints a guardian (for the owner) and witnesses testify before the guardian; and if the ox (then) hurts someone, the owner (through the guardian) is obligated to pay.

In other words, once an animal belonging to חשו' has gored, a

<sup>89</sup>Mekhilta d'Rabbi Shimon ben Yochai, J.N. Epstein ed., Mekitzei Nirdamim, Jerusalem, 1955, p. 180; translation is mine.

<sup>90</sup>Op. cit., p. 36; translation mine.

guardian must be appointed and the appropriate warnings made before the guardian. Henceforth if the ox gores, full damages are owed. The passage does not deal with the issue of whether the damages are paid directly from the minor's property or whether the guardian has to pay up front and is then later repaid.

### Bavli Baba Kamma

The Bavli discussion of Mishnah Baba Kamma 4:4 begins on page 39a with a discussion of damage done by an ox belonging to a minor orphan. The Gemara begins with a קשיא against Mishnah 4:4: First the Mishnah says that if the ox belonging to חש"ו gores somebody there is no liability. Then the Mishnah goes on to say that a guardian should be appointed to hear testimony. If a guardian is to be appointed, then are not the damages for an ox owned by a חש"ו the same as for anyone else?

Raba said no, the guardian is appointed only once the ox gores; then the ox may be declared *muad*, and in case of a future goring, damages must be paid from the best of the estate. But from whose estate? R. Yohanan says, from the orphan's (we are here talking about a minor). R. Yose bar Hanina says, from the guardian's estate.

But did R. Yohanan really say so? Didn't R. Judah say in the name of R. Assi, that orphan's property was to be sold only for special cases—to prevent interest payments from eating up the estate? Or, R. Yohanan said, to pay a woman her *ketubah*. So then reverse the attributions to: R. Yohanan said, from the guardian's property; R. Yose bar Hanina said, from the orphan's.



Raba objected: Just because there is a contradiction between two sayings of R. Yohanan is no reason to assign an erroneous judgment to R. Yose bar Hanina, a judge who penetrated the innermost depths of the law. So don't reverse the attributions. We can say that a case of damages is different-the damages must be paid immediately. R. Yohanan says, from the orphans' estate, because otherwise people will refuse to act as guardians. R. Yose bar Hanina says, from the guardians, because the guardian will be reimbursed when the orphan comes of age<sup>91</sup>.

Page 39b begins a new discussion which incorporates some of the Tannaitic material we saw in Tosefta Baba Kamma.

היא דתניא שור שנתחרשו בעליו ושנתשטו בעליו ושהלכו בעליו למדינת הים  
What about an ox whose owner became deaf, became insane or went abroad?

We notice here that the third term of חשו' has changed. The minor is dealt with separately in the first sugya. שומה and חרש are now grouped with the one who has left the country.

R. Judah b. Neqosa said that Symmachos said, "It reverts to the status of Tam until witnesses give evidence in the presence of the owner." But the sages (חכמים) say that a guardian is appointed

<sup>91</sup>This summary paraphrases the translations of Bavli Baba Kamma 39a by E.W. Kirzner in the Soncino Hebrew-English edition, London, 1964 and by Jacob Neusner in *The Talmud of Babylonia: An American Translation*, XXB, Tractate Baba Qamma, Chapters 4-7, Scholars Press, Atlanta, Georgia, 1992, pp. 25-26.

before whom the evidence is given. If the חרש regained his hearing, the שוטה his senses, the minor came of age, or the absentee owner returned from abroad, R. Judah b. Neqosa said on behalf of Symmachos, the ox would revert to *Tam* (בתמותו). (We notice here that "minor" is once more included in the list of the handicapped, along with the ox whose owner went abroad, giving us four terms in the category of handicapped owners.) R. Yose says the ox remains in its established status (בחזקתו).

The position of Symmachos presents a problem: If the ox reverts to *tam*, then we are saying that Symmachos believes no guardian should be appointed because nothing can be done to reduce the value of the ox. This is because when a guardian is appointed, damages may be collected.<sup>92</sup> Symmachos believes that a change in control (רשות) creates a change in the status of the ox. R. Yose says a change of control does not create a change in the status of the ox.

Bavli Baba Kamma 39b then quotes another Tannaitic teaching: If the ox of a חרש, שוטה וקטן gores, R. Jacob pays half damages (חצי נזק) - (This means Rabbi Jacob orders the *owner* to pay half-damages.) What case are we dealing with? If the animal is *tam* then it is פשיטא that half-damages are appropriate (this is the case regardless of who the owner is); if the animal is *muad* then if proper precautions were taken, no damages are owed. And if proper precautions were not taken, then full damages are owed.

Raba said, we must be dealing with a *muad*. The case must be one where inferior precautions were taken (שמירה פחותה) that is, a

<sup>92</sup>Note by Dr. Mark Washofsky.

minimal fence was set up which did not hold back the ox, rather than adequate precautions (שחירה מעולה). R. Judah and R. Jacob agree that half-damages are a compromise in the case of a *muad* ox where some but not adequate precautions have been taken and also in the case of a *tam* ox which has been assigned to a guardian.

But Abbaye said- Don't R. Judah and R. Jacob differ on the damages owe for an ox owned by a חש'ו which gored? R. Judah says the owner is liable (חש'ו); R. Jacob says he pays half-damages.

Rabbah b. Ulla tries to resolve the differences between Judah and Jacob by arguing that R. Jacob is merely defining the amount of liability as asserted by R. Judah. But Abaye said they did differ, and that they were speaking of an unguarded *muad* ox. R. Judah is claiming that the half damages were due anyway for a *tam* ox, and that a guardian should be appointed to determine responsibility for the other half of the damages. R. Jacob says no guardian can be appointed, so only half-damages are owed.

Raba<sup>93</sup> says that Judah and Jacob do not differ. In this case why can't Jacob's statement refer to *tam* as well as *muad*? R. Eliezer b. Jacob says there is no liability in the case of *tam* or *muad* if even minimal precautions have been taken to control the animal. R. Jacob adds that guardians should be appointed even in the case of *tam* to make payments from the value of the carcass.

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<sup>93</sup>Bavli Baba Kamma 40a

Rabina suggested that maybe the point of disagreement between Judah and Jacob was whether a change of control effects a change of status of the ox: if the ox is declared *muad*, and then the deaf-mute recovered, the שוטה became sane, or the minor came of age, R. Judah said the ox retains its (*muad*) status but R. Jacob says the change in the owner's status causes the status of the ox to change (back to *tam*.)

These מחלוקות are not really important to our concern of personal status of חש'ו unless we presume that payment of half-damages indicates some legal responsibility on the part of these persons. Although we have a wide range of disagreement on the particulars, the picture in the Bavli in general is much less clear than in the Mishnah. חרש, שוטה וקטן are not free of legal responsibility and are not fully protected. However we also note that as in the Mishnah, the status of חש'ו is subject to change. The rabbis are careful to discuss thoroughly the cases in which they recover their דעת.

Bavli Baba Kamma 54a treats the cryptic Mishnah Baba Kamma 5:6 on the liability for damage for an uncovered pit:

נפל בתוכו שור חרש ושוטה וקטן חייב בן או בת עבד או אמה פטור

The Gemara immediately states the problem: does the text refer to an ox which itself is שוטה וקטן, חרש, or an ox belonging to an owner who is חש'ו? The Gemara says, it must be the first, because otherwise it implies that if an ox belonging to a normal owner fell into the pit, there would be no liability. R. Yohanan said it refers to



an ox which was itself חש'ו (54b) But, then wouldn't that imply that the owner of the pit would not be liable if a normal ox fell in? R.

Jeremiah explains: we assume the owner would be liable if a normal ox fell in, but some might argue that the owner would not be liable if an ox with special problems fell in, since the cause of the injury is the deafness, "insanity", or lack of דעה of the ox, and not the pit-owner's negligence. But the text says no, even here the owner is liable. R. Aha said to Rabina: There is a baraita which says: If a creature which is בר דעה, has understanding, falls into the pit, the owner is פטור. Does this mean an ox with understanding? Rabina said, No it means a man. R. Aha then asked: But wouldn't that mean that in the case of a man who has no understanding the owner is חייב? Why then is it written here "ox" and not "man." The meaning of בר דעה must be one of the species (נוין) which possesses understanding. He (R. Aha) again said-Hasn't it been taught, "If an ox which is בן דעה fell into a pit, the owner is exempt." Raba taught rather: This mishnah refers precisely to an ox which was deaf, שוטה, or small, or blind or walking at night; but if an ox of sound senses walking in the day falls in, the owner is liable.

The Talmud is unusual in applying the terms בן דעה and פקח to an animal. The use of such terminology seems strange. If an animal is בר דעה for the purpose of damages, is it then subject to the mitzvot? Can we use this sugya to influence our general understanding of the concept and status of חש'ו? Or is חש'ו simply a linguistic formula which means, "a person or an animal not blessed with full mental powers"?

Bavli Baba Kamma 59b comments on Mishnah 6:4:

השולח את הבערה ביד חרש שומע וקטן פטור בדיני אדם וחייב בדיני שמיים

Resh Lakish in the name of Hezekiah said: The Mishnah refers only to one who hands over a hot coal; if the normal person actually hands over something flaming to חש' then the normal person is liable, since he directly caused the fire. But R. Yohanan said, even if the source of fire was already in flame, the person who handed it over is still exempt, because it was the חרש who actually caused the damage. The original person is not liable unless he actually hands over tinder, shavings and a light, in which case he clearly caused the fire (since these are all the requirements for a fire. ) On the other hand (to return to the Mishnah) if he hands it to a normal person who then starts a fire, the second person is clearly liable.

Bavli Baba Kamma 86b comments on Mishnah Baba Kamma 8:1:

One who insults a naked person, a blind person or one who is asleep is liable for degradation or humiliation (בושת, one of the five types of damages). Although the Mishnah does not itself deal with חש' the topic arises out of a question by R. Abba b. Memel: is בושת owed to a person who was humiliated while asleep but died before waking? In other words, he never knew he was humiliated. The rabbis ask: what is the principle involved here?

Come and hear: R. Meir says that the deaf mute and the minor are subject to בושת but the שומע is not.

A discussion ensues: if בושת is a question of disgrace (זילותא) then it applies to a minor but if בושת is a question of insult (ביסופא) does it apply to a minor? But if you say it is disgrace, shouldn't that

apply also to a שוטה? But it may be said that the שוטה is a disgrace himself. (אמרי שוטה אין לך בושת גדולה מזה מכל מקום) R. Papa then makes a crucial point in regard to the קטן: if the minor feels embarrassed when he is reminded of the disgrace, then he is subject to insult.

What about insult to the family of the חש'ו? If בושת is insult to the family, shouldn't that apply to שוטה as well? Again, having a שוטה in the family is an insult second to none. Rabbi says: a חרש is subject to בושת, but a שוטה is not subject to בושת, whereas a minor is sometimes subject to be paid and sometimes not subject to be paid. He is subject to be paid where if the insult were mentioned to him he would be embarrassed.

This passage may be the clearest example of Judith Abrams' thesis that the שוטה is stigmatized. On the other hand, the קטן here as we have seen elsewhere is recognized as one who can be very different depending on his stage of development.

Bavli Baba Kamma 88a begins with commentary on Mishnah Baba Kamma 8:3, which does not deal strictly with our topic of שוטה, חרש, וקטן:

החובל בעבד כנעני של אחרים חייב בכלן. ר' יהודה אומר: אין לעבדים בושת  
One who wounds a Canaanite slave is liable for all (five counts: damage, pain, healing, shame and loss of time.) R. Yehuda says there is no shame for slaves.

The subject of testimony arises in connection with this Mishnah: The Gemara for Bavli Baba Kamma 88a tells us a slave and a woman

may not give testimony; we are reminded that a minor male although unlike a woman he is circumcised may not give testimony because he is not subject to any of the commandments

The Gemara on Mishnah 8:4, חרש, שומט וקטן פגיעתן רעה, deals only with a very complicated case of a minor heir, and appears to have almost nothing to do with the Mishnah. There is no comment at all on חרש ושומט. The idea that dealing with a minor is a bad thing is illustrated by the case of a minor who expects to inherit his father's property and sells it. There remains a question as to whether the purchaser will actually own the property.

### Yerushalmi Baba Kamma

Yerushalmi Baba Kamma on Mishnah 4:4<sup>94</sup> points out the contradiction in the Mishnah: on the one hand, an owner of an ox which gores who is חש' is exempt; on the other hand a guardian is appointed for him so he is חייב.

מעמידין להן אפיטרופוס ומעידין להן אפטרופוס עד כדון כשהועדו לפני  
אפטרופוס ומסרום לבעלים

This is a case when a warning was given before a guardian and then the ox is handed over to the owner--  
But what happens if they gave testimony before the owner and then handed the ox over to a guardian?

הועדו לפני הבעלים ומסרו' לאפטרופין מהו?

<sup>94</sup>Neusner notes that in the *editio princeps* this is 4:5; see his translation in *The Talmud of the Land of Israel*, Vol. 28, Baba Qamma, University of Chicago, 1984, pp. 96-97.



We derive the rule from the following:

If one borrowed the ox on the assumption it was *tam* and it turned out to be *muad*, the owner pays half damages and the borrower is exempt.

If a warning was made in the presence of the borrower and the borrower afterward gave it back to the owner, the owner pays half damages and the borrower pays half damages.<sup>95</sup>

R. Eleazar said: This goes along with what R. Yose said: The ox remains in its status (of *tam* or *muad*) regardless of change of owner or whether it was borrowed.

But if this follows R. Yose, then the borrower should pay all the damages.

We must be dealing with the case of a ox deemed *tam*.  
In that case the borrower should not have to pay anything.

We must be dealing with a case where the animal was not officially declared *muad* but the borrower knew it might gore.

If the ox ( here it seems to refer only to one belonging to a קטן ) killed a man while borrowed by another person, the borrower is exempt if he gave the animal back to its owner before the court process was complete (עד שלא נגמר דינו) ; if he gave it back after the

<sup>95</sup>Op. cit., pp. 97-98.

court process, he is liable. R. Jacob says if he gave it back after the court process but before the animal is stoned he is exempt.

This argument leads us to an important consideration not dealt with in the Bavli: what is the purpose of the guardian?

R. Yohanan said: They appoint a guardian not to incur liability but to gain advantage for them (על מנת לחוב להן אלא לזכות להן). But if liability is incurred, it is valid (ואם חבו חבו).

R. Yose b. Hanina said, "Either beforehand or after they do not appoint guardians for orphans either to gain advantage or liability."

But mishnah 4:4 (see above) differs from R. Yose b. Hanina's view: The court appoints a guardian and they bring testimony against the animal before the guardian (this is to incur liability.)

They said: "The case of the ox is different (שאני) because it must be prevented from injuring people (שלא יצא ויזיק).

What is the law when an ox belonging to orphans but which is in possession of a guardian does damage?

R. Yohanan said, the compensation comes from the orphans' property-otherwise no one would ever agree to be a guardian.

R. Yose b. Hanina said, it is paid by the guardian. (These opinions are reported similarly in the Bavli.)

If the father of orphans (before his death) appointed the guardian, this guardian is not subject to an oath. If a court appointed him, he is subject to an oath. No, he is not, since the court chooses him carefully.

Matters are reversed says Abba Saul: the guardian appointed by the father of orphans need not take an oath since the father asked him to do a favor, but a court appointed guardian must take an oath, for people will give a lot (בעי חיתן) in order to be publicly regarded as reliable (הימן).

Yerushalmi Baba Kamma 5:7 discusses the ox which fell into a pit-- does it refer to an ox which is שוטה וקטן or an owner? The Yerushalmi agrees with the Bavli- it is the abnormal ox which is discussed here. The owner of the pit is חייב if the ox is abnormal but פטור if the ox is normal<sup>96</sup>.

On Mishnah 6:4, the case of giving fire to חש'ו, Yerushalmi adds: Hezekiah said, the mishnah's exemption holds only in the case of one who gives a coal to the חש'ו. If he gave him a flame, he is liable.

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<sup>96</sup>Op. cit., p. 128.

Maimonides in Sefer Nezikin of the Mishneh Torah<sup>97</sup> summarizes the halachot derived from the Talmud Baba Kamma.

Most of the laws which we have reviewed appear under the heading of הלכות נזיקי ממון:

Chapter 4, Halacha 6: If an owner hands over his animal to the care of שוטה וקטן, חרש, the owner is liable even if the animal is tied up because it is normal for an animal to work its way loose.

Chapter 6, Halacha 3: If an ox which belongs to חש' or to an owner who goes abroad gores, the owner is exempt, but the court must appoint a guardian and then forewarning may take place before the guardian.

Chapter 6, Halacha 4: If after this warning the ox gores, payment from the animal (carcass) is made. Half damages are due if the animal is still *tam*; if after evidence is given on three days it gores, then payment must be made from the finest land of the guardian for full damages. When an orphan minor comes of age, they must repay the guardian.

Chapter 6, Halacha 6: If an ox is declared *muad* before a guardian, and then the owner recovers if deaf or insane or if the minor comes of age, the ox is still *muad*. "For these oxen are under their owner's

<sup>97</sup>The Code of Maimonides, Book Eleven, The Book of Torts, Hyman Klein, transl., Yale University Press, New Haven, 1954; Mishneh Torah, Sefer Nezikin, Mosad Harav Kook, Jerusalem, 1919.



authority." (Note: a *muad* ox which changes its behavior may change its status.) 78

Chapter 6, Halacha 7: The ox is assumed to be *tam* again if children can handle it without its goring.

Chapter 10, Halacha 10: an ox which kills a human being accidentally is exempt from punitive stoning. An ox must have the intention to kill in order to be stoned. Again as with Mishnah Baba Kamma 5:6 we note that the notions of intention and of דעת are applied to an animal as well as to a human being for legal purposes.

Chapter 12, Halacha 16 also reflects Mishnah Baba Kamma 5:6. One is not liable for the death of an animal in a pit unless the animal is חשו' or blind or it falls in at night.

Chapter 14, Halacha 5: If one spreads a fire through the agency of חשו' he is legally exempt but morally liable unless it is already ablaze in which case he is liable.

Chapter 3 of Laws of Wounding and Damaging ( הלכות חובל ומזיק ) deals with בושח. Chapter 3, Halacha 4 says one is exempt who humiliates a חרש but חייב if he humiliates a שומע. The rule for a minor is: If the minor feels shamed when insulted, the offender is liable; if not he is exempt. Finally Rambam states: There is no comparison between one who humiliates a minor and one who humiliates an adult, or between one who humiliates a slave and one who humiliates a freeman, or between one who humiliates a חרש and one who humiliates a normal person.

Thus the halacha that ultimately derives from the Mishnah Baba Kamma has made a long journey, from a position of primarily protecting the חשו"ס to a position of primarily asserting the rights of the normal person.

We will examine this subject by looking first at the references to חש' in tractates Gittin and Yebamot of the Mishnah.

Mishnah Gittin 2:5 reads:

הכל כשרין לכתב את הגט אפילו חרש שומה וקטן

All are qualified to write a get, even a deaf mute, a mentally defective person, and a minor...

Kehati notes that later the Gemara modifies this. The get has two parts: the *toref* and the *tofes*. The *tofes* is a standardized conclusion which can be written by חש' under supervision. The competent adult who is supervising must instruct the one writing, "Write in her name, לשמה, since a get must be written for a specific woman."<sup>98</sup> The *toref* should not be written by חש' but if it is may be considered valid בדיעבד.<sup>99</sup>

הכל כשרין להביא את הגט, חוץ מחרש שומה וקטן וסומא ונכרי

All are qualified to bring a get, except a deaf mute, a mentally defective person, and a minor, and a blind person and a non Jew.

<sup>98</sup> See Mishnah Gittin 3:1: כל גט שנכתב שלא לשום אישה פסול.  
 See also Deut. 24:1: וכתב לה ספר כריתות

<sup>99</sup> The Mishnah, Seder Nashim Vol. 3, Gittin, translated by Edward Levin with commentary by R. Pinhas Kehati, Department for Torah Education and Culture in the Diaspora of the World Zionist Organization, Jerusalem, 1989, p. 25.

"Bring" a get according to Kehati<sup>100</sup> means act as an agent. חרש שוטה  
קטן may not act as agents for others<sup>101</sup>.

Mishnah Gittin 2:6 continues the discussion of the חש'ו acting as an agent in a divorce:

קבל הקטן והגדיל, חרש ונתפקח, סומא ונתפתח, שוטה ונשתפה, נכרי ונתגיר, פסול.

The handicapped person may not receive a get as an agent even if he recovers his faculties.

אבל פקח ונתחרש וחרש ונתפקח ונסתמא וחרש ונתפקח, שפוי ונתשטה וחרש  
ונשתפה--כשר

But if a normal person becomes deaf and recovers, or becomes blind and recovers, or becomes insane and recovers, he is competent to receive a get. The general rule is: כשר בדעת--כשר  
Whoever has דעת at the beginning and the end of the process is qualified<sup>102</sup>.

Mishnah Gittin 5:5 distinguishes the חרש from the שוטה וקטן:

העיד רבי יוחנן בן גדגדה על החרשת שהשיאה אבית, שהיא יוצאה בגם  
ועל קטנה בת ישראל שנשיאת לכהן שאכלת בתרומה; ואם מתה בעלה יורשת

<sup>100</sup>Op. cit., p. 26.

<sup>101</sup>See Mishnah Rosh Hashanah 3:8. חש'ו אין מוציאין את הרבים ידי חובתן.

זה הכלל כל שאינו מחויב בדבר אינו מוציא את הרבים ידי חובתן

<sup>102</sup>Kehati Gittin, p. 27.



R. Yohanan ben Gudgada testified that a חרש given in marriage by her father goes out with a get; and a minor daughter of an Israelite who married a priest eats *terumah* and if she dies, her husband inherits her<sup>103</sup>.

This mishnah breaks up the category of חרש שומע וקטן. It is attributed to R. Yohanan ben Gudgada, the father of deaf-mutes who were learned in Torah and who supervised the preparation of pure foods.<sup>104</sup> Kehati<sup>105</sup> explains that the reason the חרש is allowed to accept her own get is that women can be divorced against their will anyway. The minor daughter of an Israelite who marries a priest is similar in that she is regarded for purposes of eating *terumah* and inheritance like an adult.

This same mishnah is repeated in Mishnah Eduyot 7:9 but there R. Yohanan ben Gudgada is referred to as R. Nechuniah ben Gudgada.

Mishnah Gittin 5:7 acknowledges the efficacy of signing by gestures in certain situations:

#### חרש רימז ונרמז

A deaf-mute may communicate and be communicated with by gestures; Ben Bateira says, with lip movements (קופקונקפן) for movable property (מטלטלין); Children's (הפעוטות) purchase is valid and their sale is valid for movable property.

Again as in the previous mishnah, two of the three in or category of חרש שומע וקטן are being accounted competent for certain transactions. Kehati notes that the halacha does not follow Ben

<sup>103</sup>Kehati Gittin, p. 71 (Edward Levin, transl.).

<sup>104</sup>See Bavli Hagigah 3a and Tosefta Terumot 1:1.

<sup>105</sup>Kehati Gittin, p. 72.

Bateira and that the "children" referred to must be nine or ten years old, and if intelligent seven or eight. This is yet another example of Y. Gilat's theory of the fluid definition of קטן.

### Mishnah Gittin 5:8

אלו דברים אמרו מפני דרכי שלום

These are the things decreed in the interests of peace....Taking an object found by a חרש חרש is treated as theft, in the interests of peace. R. Yose says, גזול גמור, actual theft.

Kehati<sup>106</sup> explains that this means an object that such a person found, rather than acquired legally, may not be taken from him, in the interests of peace. However<sup>107</sup> if someone does take it, the court will not order it restored. But R. Yose disagrees and says it should be restored.

Mishnah Gittin 6:3 deals with divorce of a קטנה, according to Kehati, whose father has died and who is capable of guarding her get.<sup>108</sup>

If a minor girl says "Receive my get on my behalf," it is not a valid get until it comes into her hand. Therefore if the husband wants to retract, he may retract, for a minor cannot appoint an agent. But if her father said to him, "Go and receive my daughter's get on her behalf, and he wanted to retract, he cannot retract.

Once again the principle that a minor may not appoint an agent is reiterated.

<sup>106</sup>Op. cit., p. 79.

<sup>107</sup>Note from Dr. Mark Washofsky.

<sup>108</sup>Kehati Gittin, p. 86.

Mishnah Gittin 7:1 asks about the case of a man who is not שוטה but is suffering from a temporary mental imbalance and asks for a divorce.

If a man was seized with *kordiakos* (temporary insanity-perhaps epilepsy) and said, "Write a get for my wife" he did not say anything. If he said, "Write a get for my wife," and he was seized with *kordiakos*, and he retracted and said, "Do not write," his last words are nothing. If a man became mute and they said to him, "Shall we write a get for your wife?" and he nodded his head, they test him three times. If he said for no "No" and for yes "Yes" then they write and give.

This mishnah affirms that the husband must be mentally competent when he writes a get, elaborating on Mishnah Gittin 2:5.

### Mishnah Yevamot

A number of issues related to marriage and divorce of חרש, שוטה וקטן are dealt with in Mishnah Yevamot.

*Halitzah* is the ceremony commanded in Deut. 25:5-10, by which a woman is freed from the obligation to marry her yavam, that is, the brother of her dead husband by whom she has borne no children. If the yavam refuses to marry his sister in law, she takes off his shoe (חולצת) and spits before him and says "So shall be done to the man who refuses to build up his brother's house."<sup>109</sup>

<sup>109</sup> See Introduction to *The Mishnah*, Seder Nashim, Vol. I, Tractate Yevamot, Edward Levin, transl., R. Pinhas Kehati, commentary, Department for Torah Education and Culture in the Diaspora, Jerusalem, 1992, p. 3.

Mishnah Yevamot 7:4 deals with an Israelite woman married to a priest, a marriage which gives her the right to eat *terumah*. But her right to *terumah* is terminated under the following conditions:

העובר והיבם והארוסין והחרש ובן תשע שנים ויום אחד פוסלין ולא אוכלין. ספק שהוא בן תשע שנים ויום אחד ספק שאינו. ספק הביא שתי שערות. ספק לא הביא.

Pregnancy by someone else, betrothal to someone else, intercourse with a *חרש* or with a boy age nine years and one day terminate her right to eat *terumah*. In other words, intercourse with a *חרש* can effect a valid marriage (by rabbinic *תקנה*) as can intercourse with a boy nine years and one day regardless of his sexual development. The *שוטה* is omitted from this list.

Mishnah Yevamot 7:5 gives another list which does include the *שוטה*:

האונס והמפתח והשוטה לא פוסלין ולא מאכלין

These people- the rapist, the seducer, and the *שוטה* do not disqualify an Israelite woman who was qualified to eat *terumah* from eating. The action of the *שוטה* has no effect, to qualify or as in the above list, to disqualify.

Mishnah Yevamot 10:6 states that intercourse with a boy nine years and one day renders his deceased brother's wife ineligible for levirate marriage with his brothers. Once again, we see that for purposes of marriage this boy is not really a *קטן*.



86

Mishnah Yevamot 10:9 sheds light on the variability of ages which determine the status of קטן:

If a boy nine years and one day old had intercourse with his yevamah, and after he came of age he married another woman, and died; if he did not know the first one after he came of age--the first one performs *halitzah* and may not marry by *yibum*, and the second one either performs *halitzah* or is married by *yibum*. R. Shimon says, he marries by *yibum* whichever he wishes, and submits to *halitzah* from the other. It is all one whether he is nine years and one day or he is a twenty year old who has not produced two hairs.<sup>110</sup>

Kehati comments that this liminal status, of a minor whose intercourse has nonetheless some validity, holds until age 35 and one day, at which point if he shows no signs of puberty he is declared a "sun-eunuch."<sup>111</sup>

Mishnah Yebamot 12:4 reads in Kehati's translation:

If a male deaf mute was subject to halitza or a female deaf mute performed *halitzah*, or a woman performed *halitzah* on a minor--their *halitzah* is invalid (פסולה). If a girl who is a minor performed *halitzah*, she must perform *halitzah* when she is of age; and if she did perform *halitzah*, her *halitzah* is invalid<sup>112</sup>.

Kehati notes that according to another version, the last statement should be "her *halitzah* is valid."<sup>113</sup>

This mishnah states generally that the *halitzah* of חרש וקטן are invalid. נשואה is not mentioned here, perhaps because no marriage is

<sup>110</sup>Kehati Yevamot p. 148, Edward Levin, transl.

<sup>111</sup>Kehati Yevamot, p. 149; see Mishnah Yevamot 8:4 on the sun-eunuch (סריס חסה), one who was born a eunuch (vs. the man-eunuch, one who was castrated (סריס אדם)).

<sup>112</sup>Kehati Yevamot, p. 170.

<sup>113</sup>Op. cit., p. 171.

Mishnah Yevamot 13:2 deals with the right of the מיאון to קטנה, refusal of a marriage. Steinsaltz<sup>114</sup> explains that the girl who is eligible for מיאון is the girl under twelve whose father is no longer living, and who is to be married off by her mother or brothers--but only with her consent. Her consent is not required for her to be given in marriage by her father.

איזו היא קטנה שצריכה למאן?

Kehati explains that the minor who needs to refuse is the one who has the דעת to understand her situation. The one who need not refuse is one whose marriage is not valid even by rabbinic law<sup>115</sup>. Those who need to refuse are:

Whoever was given in marriage by her mother or her brothers with her knowledge; if they gave her in marriage without her knowledge--she does not need to refuse. R. Hanina ben Antigonus says, Any girl who is unable to guard her kiddushin does not need to refuse. Rabbi Eliezer says, the act of a minor is nothing (אין מעשה קטנה כלום) she is like one who is seduced<sup>116</sup>.

Kehati quotes Rambam, Hilchot Gerushin 11:7 to explain that the *kiddushin* referred to here means the money or the document.

Mishnah Yevamot 13:6-12 deals with a number of cases of marriage and divorce involving minors and deaf-mutes. There is no mention

<sup>114</sup>The Talmud, The Steinsaltz Edition, A Reference Guide, Rabbi Adin Steinsaltz, Rabbi Israel V. Berman, translator and editor, Random House, New York, 1989, p. 215.

<sup>115</sup>Kehati Yevamot, p. 178.

<sup>116</sup>Ibid.

# Mishnah Yevamot 13:6

A minor who was given in marriage by her father and she was divorced is as an orphan in her father's lifetime.

Kehati explains the concept of an "orphan in her father's lifetime": she has the legal status of an orphan since her father no longer has authority over her.<sup>117</sup>

Mishnah Yevamot 13:7 begins a complex analysis of what happens in cases of various permutations and combinations of marriages to deaf-mutes, minors and orphans:

If two brothers were married to two sisters that were minors and orphans, and the husband of one of them died, she is exempt (וצא) on account of being the wife's sister. So too two female deaf-mutes. One an adult woman and one a minor, and the husband of the minor died—the minor is exempt on account of being the wife's sister; if the husband of the adult died—R. Eliezer says, they teach the minor to refuse him (כלמדין את הקטנה) (שומטאן בו) R. Gamaliel says, if she refused she refused, and if not—she waits until she comes of age, and then the other is exempt on account of being the wife's sister. R. Yehoshua says, Woe to him because of his wife, woe to him because of his brother's wife—he sends away his wife with a *get*, and his brother's wife with *halitzah*.<sup>118</sup>

Both the קטנה and the חרשת are presumably incapable of intelligent refusal. But R. Eliezer says, "They teach the minor to refuse him." This last statement again emphasizes the fluid status of the minor, especially the older minor.

<sup>117</sup>Op. cit., p. 186.

<sup>118</sup>Op. cit., p. 187.

Mishnah Yevamot 13:8 continues the analysis:

If a man was married to two orphans who were minors and he died-intercourse with or *halitzah* from one of them exempts her rival (פוטרת צרתה)-so too two female deaf-mutes. A minor and a deaf-mute-intercourse with or *halitzah* from one of them does not exempt her rival. A woman of sound senses and a deaf-mute-intercourse with the woman of sound senses (פקחת) exempts the deaf-mute, but intercourse with the deaf-mute does not exempt the woman of sound senses. An adult woman and a minor-intercourse with the adult woman exempts the minor, but intercourse with the minor does not exempt the adult woman<sup>119</sup>.

This mishnah begs the question-what is the reason that intercourse with the פקחת exempts the חרשת but not vice versa? Is this a question of דעת or a question of status, or some other quality? We may ask the same question with the regard to the גדולה and the קטנה<sup>120</sup>.

### Mishnah Yevamot 13:9

If a man was married to two orphans who were minors and he died; if the *yavam* had intercourse with the first one and then had intercourse with the second, or his brother had intercourse with the second—he has not disqualified the first; so too two female deaf-mutes. A minor and a deaf-mute: if the *yavam* had intercourse with the minor and then he had intercourse with the deaf-mute, or his brother had intercourse with the deaf-mute, he has not disqualified the minor. If the *yavam* had intercourse with the deaf-mute and then he had intercourse with the minor—he has disqualified the deaf-mute<sup>121</sup>.

<sup>119</sup>Op. cit., p. 189.

<sup>120</sup>See Tosefta Yevamot 9:3.

<sup>121</sup>Op. cit., p. 191.



Again we ask: what is this mishnah teaching us about the relative status of the קטנה and the חרושה or about their comparative ability to make an intelligent refusal or consent to levirate marriage? The mishnah states the law without giving us the reason. Kehati in his commentary quotes Maimonides' Hilchot Yibum veHalitzah 5:27.<sup>122</sup> The Rambam says that intercourse with the minor takes precedence over that with the deaf-mute because it can eventually develop into a real marriage whereas marriage to a deaf-mute is a partial contract, *kinyan meshuyar*, and is דרבנן rather than דאורייתא.

Mishnah Yevamot 13:10 tests the parameters of another combination:

A woman of sound senses and a deaf-mute woman: if the yavam had intercourse with the woman of sound senses and then with the deaf-mute woman, or his brother had intercourse with the חרושה, he has not disqualified the פקחת. If the yavam had intercourse with the deaf-mute woman, and then with the woman of sound senses, or his brother had intercourse with the woman of sound senses—he has disqualified the deaf-mute woman<sup>123</sup>.

ביאה is one of the three valid means of acquiring a wife; thus the yavam's intercourse with the פקחת constitutes a marriage and the subsequent intercourse with the חרושה is, according to Kehati, "merely a licentious act." But ביאה in the case of the חרושה does not create a fully valid marriage, so the act of intercourse is invalidated by the subsequent intercourse with the פקחת.

<sup>122</sup>Op. cit. p. 192.

<sup>123</sup>Op. cit., p. 193.

Mishnah Yevamot 13:11 looks at still another situation:

An adult woman and a minor: if a *yavam* had intercourse with the adult woman and then with the minor, or his brother had intercourse with the minor--he has not disqualified the adult woman; if a *yavam* had intercourse with the minor and then with the adult woman, or his brother had intercourse with the adult woman--he has disqualified the minor girl. R. Eliezer says, they teach the minor girl to refuse him<sup>124</sup>.

Since the act of בִּיאָה with the adult woman has the immediate status of marriage, the intercourse with the minor is again, "only a licentious act"<sup>125</sup>. Kehati says that this R. Elazar is a different R. Elazar than the one who says the same thing in 13:7; here it is R. Elazar b. Shamua, a pupil of R. Akiva; there it is R. Elazar b. Hyrkanus, a pupil of R. Yohanan ben Zakkai. "They teach her to refuse him" Kehati explains, applies where the minor's refusal will enable the *yavam* to fulfill the mitzvah of *yibum* with a fully qualified adult female<sup>126</sup>.

Mishnah Yevamot 13:12 states:

If a *yavam* who is a minor had intercourse with a *yevamah* who is a minor--they shall grow up together. If he had intercourse with an adult *yevamah*- she must wait until he is grown up<sup>127</sup>.

Kehati<sup>128</sup> quotes the Meiri on this mishnah as explaining that it applies to an act of intercourse which is legally valid, which means

<sup>124</sup>Op. cit., p. 194.

<sup>125</sup>Ibid.

<sup>126</sup>Op. cit., p. 195.

<sup>127</sup>Op. cit., p. 196.

<sup>128</sup>Op. cit., p. 197.

that the *yavam* is at least nine years old and the *yevamah* is at least three years old (!). Once again we have an illustration of the great variety of definitions of "minor" throughout Jewish law. Kehati explains "they shall grow up together": he may not divorce her until he comes of age, since a *get* given by a minor is not valid, and she may not receive a *get* until she is "knows how to guard it". What is "of age" in this case? Does it mean 13 years and one day for the *yavam* and twelve years and one day for the *yevamah*? Or does it mean in each case sexual maturity (הביא שת' שארוות) Or does it mean for the *yevamah* an age such as eight or nine when, if she is intelligent, "she knows how to guard "the *get*? ?

Mishnah Yevamot 14 is important to our discussion and therefore despite its length we need to look at it in its entirety.

#### Mishnah Yevamot 14:1

A deaf mute who married a woman of sound senses and a man of sound senses who married a deaf-mute woman: if he wants, he sends her away and if he wants-he keeps; just as he weds by signs, so does he send her away by signs<sup>129</sup>.

We note here (as well as in Mishnah Gittin 5.7) that the text assumes that the חרש can communicate by way of signs which suggests an awareness of some type of דעת.

If a man of sound senses married a woman of sound senses and she became a deaf-mute: if he wants, he sends her away and if he wants: he keeps<sup>130</sup>.

Again here the text is treating the חרשת like a normal woman.

<sup>129</sup>Op. cit., p. 199.

<sup>130</sup>Ibid.

If she became deranged (נשטתית) he may not send her away<sup>131</sup>.

This seems like a protection for the אישה שוטת.

If he became a deaf-mute or deranged (נשטתה) he may not send her away forever (אינו מוציא עולםית)<sup>132</sup>.

This statement acknowledges that the actions of a husband who is temporarily unable to communicate or deranged should not be regarded as permanent.

R. Yohanan ben Nuri said, Why does a woman who became a deaf-mute go out, and the man who became a deaf-mute does not send away? They said to him, the man who divorces is not like the woman who is divorced, for the woman goes out with her consent or without her consent (לרצונה ושללא רצונה) but the man sends away only with his consent (לרצונו)<sup>133</sup>.

Despite the first statement in the mishnah that a deaf-mute may send away with signs, this last statement seems to assume that a deaf-mute cannot give a valid consent to a divorce. Kehati also points out that the marriage of a חרש who was חרש at the time of marriage is valid only זרובן, whereas the marriage of one who became חרש after the marriage is valid דאורייתא and therefore needs to be dissolved by one who is fully competent.

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<sup>131</sup>bid.

<sup>132</sup>bid.

<sup>133</sup>bid.



R. Yohanan ben Gudgada testified about a *חרוש* whose father gave her in marriage, that she goes out with a *get*. They said to him, This one too is like her<sup>134</sup>.

R. Yohanan ben Gudgada appears often in our sources as a sort of champion for the *חרוש*, since apparently his sons were *חרשים* yet capable of functioning in Mishnaic society. If she is divorced by her husband, she herself may receive the *get*, like one who is fully competent. Here Kehati says he is countering the opinion of R. Yohanan ben Nuri in 14:1; I assume this means R. Yohanan ben Nuri's statement that the woman who becomes *חרוש* automatically goes out, is divorced. "This one too is like her" refers to the marriage of a *חרוש* whose father gave her in marriage being valid *דאורייתא*, like the marriage of a woman who became *חרוש* only after marriage.

### Mishnah Yevamot 14:3

If two deaf-mute brothers are married to two deaf-mute sisters or to two sisters of sound senses, or to two sisters, one a deaf-mute and one of sound senses; or two deaf-mute sisters are married to two brothers of sound senses or to two deaf-mute brothers or to two brothers, one a deaf-mute and one of sound senses—then these women are exempt from *halitzah* and *yibum*. And if they are unrelated—they wed, and if they want to send away—they send away<sup>135</sup>.

This mishnah is further delineating the differences between a fully valid marriage *דאורייתא* which involves a *get* and obligations of *halitzah* and *yibum*, and a marriage where one or both of the parties is not considered fully mentally competent. Yet the rabbis

<sup>134</sup>Op. cit., p. 201.

<sup>135</sup>Op. cit., p. 202.

apparently validated marriages between חרשים and/or חשרות by תקנה. This rabbinic validation of marriage suggests ambivalence in the rabbinic mind over the mental status of the חרש.

Mishnah Yevamot 14:4-9 is considered by many to be one mishnah but Kehati divides it into six mishnayot.

If two brothers, one a deaf-mute and one of sound senses, are married to two sisters of sound senses, and the deaf-mute husband of the woman of sound senses died, what shall the man of sound senses, husband of the woman of sound senses do? She is exempt on account of being his wife's sister. If the man of sound senses, husband of the woman of sound senses, died, what shall the deaf-mute husband of the woman of sound senses do? He sends away his wife with a get and his brother's wife is prohibited forever<sup>136</sup>.

This mishnah seems to put the deaf-mute married to the פקחת in an unfair situation. He must divorce his wife to free his sister in law from levirate obligation to him.

Mishnah Yevamot 14:5 takes the next option in this scenario:

If two brothers of sound senses are married to two sisters, one a deaf-mute and one of sound senses; if the man of sound senses, husband of the deaf-mute woman died, what shall the man of sound senses, husband of the woman of sound senses do? She goes away on account of being his wife's sister<sup>137</sup>.

Apparently here the חרשת is treated in the same way as a פקחת would be.

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<sup>136</sup>Op. cit., p. 203.

<sup>137</sup>Op. cit., p. 204.

If the man of sound senses, husband of the woman of sound senses died, what shall the man of sound senses, husband of the deaf-mute woman do? He sends away his wife with a *get*, and his brother's wife by *halitzah*.<sup>138</sup>

The married to the חרשת is obligated to divorce his wife, because their marriage is only דרבנן whereas his obligation to his brother's wife is דאורייתא. So apparently he must lose both women.

Mishnah Yevamot 14:6 now turns to the possibility of the husband being handicapped:

If two brothers, one a deaf-mute and one of sound senses are married to two sisters, one a deaf-mute and one of sound senses, and the deaf-mute, husband of the deaf-mute (חרשת) died, what shall the man of sound senses, husband of the woman of sound senses do? She is exempt on account of being his wife's sister<sup>139</sup>.

The marriage of the surviving couple is binding דאורייתא, and the husband does not have to marry his wife's sister.

If the man of sound senses, husband of the woman of sound senses, died, what shall the deaf-mute, husband of the deaf-mute, do? He sends away his wife by a *get* and his brother's wife is prohibited forever<sup>140</sup>.

The marriage of the survivors is only valid דרבנן, but the levirate obligation is דאורייתא. He cannot release her by *halitzah*, because he is a deaf-mute, and he cannot marry her because she is his wife's sister. So he must lose both women.

<sup>138</sup>Op. cit., p. 205.

<sup>139</sup>Op. cit., p. 206.

<sup>140</sup>Ibid.

Mishnah Yevamot 14:7 eliminates the issue of the wife's sister:

If two brothers, one a deaf-mute and one of sound senses, are married to two unrelated women of sound senses; and the male deaf-mute, husband of the woman of sound senses died, what should the man of sound senses, husband of the woman of sound senses, do? Either he submits to *halitzah* or he marries by *yibum*.

This case is unaffected by the fact that the deceased wife was a חרשת.

If the man of sound senses, husband of the woman of sound senses, died, what shall the male deaf-mute, husband of the woman of sound senses, do? He weds, and may never send her away<sup>141</sup>.

The חרש in this case has no choice but to end up with two wives. He cannot submit to *halitzah* because he is a deaf-mute, and his Toraitic obligation to *yibum* is stronger than his first marriage which is דרבן.

Mishnah Yevamot 14:8 is also a case where the *yavam* ends up, at least temporarily, with two wives:

If two brothers of sound senses are married to two unrelated women, one of sound senses and one a deaf-mute; and the man of sound senses, husband of the female deaf-mute died, what shall the man of sound senses, husband of the woman of sound senses, do? He weds, and if he wants to send her away-he sends her<sup>142</sup>.

The surviving brother must wed his *yevamah* because she is a חרשת and cannot therefore submit to *halitzah*. But he may divorce her since her consent is not required for divorce.

<sup>141</sup>Op. cit., p. 207.

<sup>142</sup>Op. cit., p. 208.



If the man of sound senses, husband of the woman of sound senses died, what shall the man of sound senses, husband of the female deaf-mute, do? Either he submits to *halitzah* or he marries by *yibum*.<sup>143</sup>

Since the *yavam* and the *yebamah* are both of sound senses, the choice is the *yavam*'s.

Mishnah Yevamot 14:9 is the last of this series:

If two brothers, one a deaf-mute and one of sound senses, are married to two unrelated women, one a deaf-mute and one of sound senses; and the male deaf-mute, husband of the female deaf-mute, died, what shall the man of sound senses, husband of the woman of sound senses, do? He weds, and if he wants to send her away, he sends her away<sup>144</sup>.

This case is similar to that in 14:8. The levirate tie is binding regardless of the mental status of the *yebamah*. The *yavam* must marry her, but is also free to divorce her. He cannot submit to *halitzah* because she is a *חרשת*.

If the man of sound senses, husband of the woman of sound senses, died, what shall the male deaf-mute, husband of the female deaf-mute, do? He weds and may never send her away.<sup>145</sup>

The male *חרש* cannot be subject to *halitzah*. Though he has a right to divorce *דרבנן*, his obligation to *yibum* is *דאורייתא*, so he is bound to two wives.

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<sup>143</sup>Ibid.

<sup>144</sup>Op. cit., p. 209.

<sup>145</sup>Ibid.

To summarize: the rabbis affirmed the right of the חרש to marry, but this right can be overridden by the Toraitic obligation to levirate marriage. Nevertheless the fact that the rabbis did affirm the right of marriage for חרשים suggests that even in Mishnaic times they understood that the status of חרש did not imply a complete lack of דעת.

### Tosefta on Gittin, Ketubot and Yevamot

Tosefta adds very little to the Mishnayot on Gittin. Tosefta Gittin 2:5 adds to the Mishnah which says even a חש'ו may write a get: "All are qualified to receive a get except for חרש, שוטה וקטן." This is similar to Mishnah Gittin 2:6, which, as we recall, reminds us that חש'ו may not act as an agent.

Tosefta on Ketubot has an interesting passage on חש'ו absent from the Mishnah. Tosefta Ketubot 1:3 seems to indicate the possibility of marriage to a female שוטה :

פקח שנשא חרשת או שוטה, כתובתן מאתיים מפני שרוצה להחזיק להם את הנכסים.  
חרש ושוטה שנשא פקחת אע"פ שחזר חרש ונתפקח שוטה ונשתפה, אין להן כתובה

A female deaf mute or שוטה married to פקח receives a כתובה of 200 zuz "for he wants to get a hold on their possessions"<sup>146</sup>.

This passage almost seems to justify marriage to a female deaf mute or שוטה for the sake of gaining property (although the husband cannot get his wife's property unless he pledges a כתובה in return

<sup>146</sup> The Tosefta, Nashim, Jacob Neusner, transl., Ktav, New York, 1979, p. 60.

since this is not a Toraitically valid marriage<sup>147</sup>.) On the other hand, a female of sound senses married to a חרש or a שוטה receives no כתובה. If the male spouse recovers, the wife then receives a כתובה of one *maneh*.

### Tosefta Yevamot

Tosefta adds comments regarding חש'ו to Mishnah Yevamot 9 dealing with cases of levirate marriage involving an Israelite girl married to a Kohen. Tosefta Yevamot 9:2 deals with the question of an Israelite girl married to a priest, who then dies childless--neither she nor her slaves eat *terumah*.

חרש שוטה וקטן שקנו עבדים אין אוכלין בתרומה אבל אם קנו להן בית דין או שמנו להן אפוטרופין, או שנפלו להם בירושה ממקום אחר, הרי אלו אוכלין בתרומה.

If the priest was a חרש, שוטה וקטן and he purchased slaves (then he died), these slaves also do not eat . But if a court acted on their behalf, or if a court appointed guardians for their estates, or if the slaves were inherited from someone else (than the father) these slaves do eat *terumah*.<sup>148</sup>

This Tosefta extends the limitations on the חרש שוטה וקטן generally to those in the priestly category and extends the same principle of guardianship to their legal activities.

Tosefta Yevamot 9:3 is a repetition of Mishnah 7:4 , the list of conditions which end the privilege of eating *terumah* for an Israelite girl married to a priest who dies. The Mishnah states פוסלין ולא פוסלין which Neusner translates "invalidates (from eating) but does not invalidate" which Neusner translates "invalidates (from eating) but does not invalidate".

<sup>147</sup>Note from Dr. Mark Washofsky.

<sup>148</sup>Neusner, Tosefta Yevamot, op. cit., p. 30.

Tosefta Yevamot 9.3 quotes R. Simeon:

בזה מדת הדין לוקה, שאם מעשה לפסול יש מעשה להאכיל

Justice is beaten here-for if a situation invalidates, it should validate also.

Among the cases in the list was חרש. Tosefta adds in this regard:

If his daughter of sound senses is married to his brother who is a deaf-mute, her co-wife (צרתה) is exempt from halitzah and from levirate marriage on the strength of an argument a fortiori (קל וחומר): if the marriage of her daughter is valid, the marriage of her co-wife should be valid. If the marriage of her daughter is not valid, then the marriage of her co-wife should not be valid. If his daughter who was a deaf-mute was married to his brother who was of sound senses, her co-wife should perform a rite of halitzah but not enter into levirate marriage<sup>150</sup>.

This situation appears to be an example of the principle, "that which serves to invalidate also should serve to validate." We recall the apparent lack of reciprocity in Mishnah 13. 8 which dealt with two co wives, one פקחת and one חרשת.

The passage ends by noting,

A deaf-mute whose father marries her off, lo she is deemed equivalent to a woman of sound senses for all purposes<sup>151</sup>.

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<sup>149</sup> Op. cit., p. 31.

<sup>150</sup> ibid.

<sup>151</sup> ibid.



As we have seen above, the fact that her father effected the marriage makes it valid by all standards, and therefore all the attendant obligations of marriage such as *yibum* are valid also.

Tosefta Yevamot 9:4 says:

An Israelite girl who was a deaf-mute who was married to a priest of sound senses does not eat *terumah*. If she became pregnant, she (still) does not eat *terumah*. But if she gave birth (to a sound fetus) she then does eat *terumah*.<sup>152</sup>

[שומעיה תאכל] seems to mean, "If the fetus within her is well formed she eats (*terumah*)"]

We recall that marriage of the *חרש* or *חרשת* is valid *דרבנן*. On the other hand, the marriage of the *שומע* is not valid:

A priestly girl of sound senses who married an Israelite *שומע*, immerses out of the embrace of her husband (*מחיק בעלה*) and then eats *terumah* in the evening. If she became pregnant, she no longer eats *terumah*. If she gave birth she does not eat heave offering<sup>153</sup>.

This rule sounds as if designed to maintain the quality of the priestly stock, although it could perhaps be governed by concern over the *דאורייתא* validity of the marriage.. A deaf-mute girl who produces a sound child is then accepted as a valid wife and eats *terumah*, but neither the marriage nor the offspring of a *כהנת* and a *שומע*, regardless of the condition of the child, is accepted.

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<sup>152</sup>ibid.

<sup>153</sup>ibid.

Tosefta Yevamot 10:1 continues the discussion of the חרש regarding marriage to a בִּתּוּן or a בְּהֵנָה.

An Israelite girl of sound senses who was betrothed to a priest of sound senses, but he did not suffice to marry her before he was made a deaf-mute, she does not eat terumah. If he died and left her before his levir (yavam) even though he (the levir) was a deaf-mute, she eats terumah. Greater is the power of the levir to permit her to eat terumah than the power of the husband to do so<sup>154</sup>: יִפֶּה כַּח הַיָּבָם לְהַאכִיֵּל וְכַח הַבַּעַל.

On the other hand

An Israelite girl of sound senses who was betrothed to a priest of sound senses, but he did not suffice to marry her before she was made a deaf-mute, she does not eat terumah. If he died and left her before his levir, even though he (the levir) was a deaf-mute, she eats terumah. Greater is the power of the levir to permit her to eat terumah than the power of the husband to do so<sup>155</sup>.

A third case:

An Israelite girl of sound senses who was married to a priest who was a deaf-mute does not eat terumah. If he died and left her before a levir, if he was of sound senses, she eats terumah, if he was a deaf-mute, she does not eat terumah<sup>156</sup>.

The status of the *yavam* regarding דִּמְיוֹ here controls whether the *yevamah* eats *terumah*.

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<sup>154</sup>Op. cit., p. 32.

<sup>155</sup>Ibid.

<sup>156</sup>Ibid.

A fourth case:

An Israelite girl who was a deaf mute who was married to a priest of sound senses does not eat *terumah*. If he died and left her before a levir, even if the levir is of sound senses, she does not eat *terumah*.

This is the Israelite girl who could not eat *terumah* until she actually gave birth to a sound child.

Tosefta Yevamot 11:9 is puzzling:

A deaf-mute with whom rite of halitzah was performed, a deaf-mute who performed the rite of halitzah, she who performs the rite of halitzah with a נשואה, a female נשואה who performs the rite of halitzah, and she who performed the rite of halitzah with a minor goes forth and thirteen rules apply to her--the words of R. Meir, in the name of R. Akiba<sup>157</sup>.

This Tosefta provokes two major questions:

Why is halitzah being applied to חרש שוטה וקטן in this Tosefta?

What are the thirteen rules? These are the penalties in Mishnah Yevamot 10 which apply to the hapless woman whose husband has disappeared and been declared dead; she has gone to court to get permission to remarry but her husband reappears. Jacob Neusner, following Mishnah Yevamot 10:1 lists these penalties in his commentary on Yerushalmi Yevamot 10:1:<sup>158</sup>

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<sup>157</sup>Op. cit., p. 39.

<sup>158</sup>The Talmud of the Land of Israel, Vol. 21, Tractate Yebamot 10:1, Jacob Neusner, transl., University of Chicago Press, 1987, pp. 313-314.

- 1) She is prohibited sexually to both husbands.
- 2) She must be divorced by both.
- 3) She can make no material claim on either husband, including her *ketubah*, and
- 4) the use of her *melog* property
- 5) Neither man must support her with alimony or
- 6) compensate her for wear and tear on her property.
- 7) she must give these back if she has received them.
- 8) Her children by the second husband and by the first husband after she has gone back to him are *mamzerim*.
- 9) Neither is her husband as regards burial (neither may contract *tumaah* on her behalf).
- 10) Neither is her husband for any aspect of marriage: neither may claim what she has found, her handwork, or may nullify her vows.
- 11) If she was a *בת ישראל* she may not marry a priest; if she was a *בת לוי* she may not eat *מעשר*; if she was a *בת כהן* she may not eat *תרומה*
- 12) No heirs may inherit her *ketubah*.
- 13) Surviving brothers of the second husband must perform *halitzah*.

Interestingly, Neusner explains<sup>159</sup> if she did not go to court but just assumed her husband was dead, remarried, and he came back, she would just go back to the first husband, since in this case her second marriage was never valid. (Moral: Don't ask, don't tell!)

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<sup>159</sup>Op. cit., p. 317.



Tosefta Yebamot 11:10 deals with technicalities of levirate marriage involving the boy who is nine years and one day. If he dies after intercourse with his deceased brother's wife, she must perform *halitzah*

but does not enter into levirate marriage.<sup>160</sup>

for the act of intercourse by boy age nine years and one day is equivalent to the act of bespeaking (נשא) by an adult.

Tosefta Yevamot 11:11 elaborates on this situation; what if such a boy has sexual relations with his childless brother's widow and then with her co-wife? In response to the point that perhaps neither act is valid because of the boy's age, Tosefta says:

אבל חרש שוטה וקטן שבעלו קנו ופטרו את הצרות

A deaf-mute, a שוטה and a minor who have had sexual relations have effected an act of acquisition, and they have freed the co-wives from the obligation of levirate marriage<sup>161</sup>.

On the other hand, the same passage continues:

שוטה וקטן שנשא נשים ומתו, נשיהם פטורות מן החליצה

זה הכלל-כל ביאה שצריכה דעת אינה ביאה, שאין צריכה דעת הרי זה ביאה

This Tosefta expresses the interesting concept of sexual intercourse which requires intelligence-- Neusner translates "articulated consciousness"<sup>162</sup>--cannot be performed by שוטה or קטן. However חרש is not included in the list of those whose death does

<sup>160</sup>Neusner Tosefta Yevamot, ibid.

<sup>161</sup>Op. cit., p. 41.

<sup>162</sup>Ibid.

not require halitzah by the widow. Apparently the intercourse which frees the co-wives from the obligation of יבום does not require דעת.

Tosefta Yevamot Chapter 13 discusses various issues related to the marriage, betrothal and refusal of minors. Tosefta 13:4 indicates some of the problems we encounter in reviewing these texts:

Said R. Ishmael, "I have reviewed all the rulings of the sages, and I have found not a single one but R. Eliezer whose rulings are consistent with respect to minor girls (שמדתו שוה בקטנות) and therefore I prefer the ruling of R. Eliezer to that of R. Joshua, for R. Eliezer rules consistently and R. Joshua is inconsistent."<sup>163</sup>

Tosefta Yevamot 13:6 begins a discussion of the kind of issue reviewed in Mishnah Yevamot 13- two brothers married to two sisters, one a minor, one a deaf-mute, etc. The cases are treated in a similar manner to that in the Mishnah.

Tosefta Yevamot 13:7 adds some new material, apparently referring to divorce by a חרש:

How does he put her away with a sign language? כיצד מוציא ברמיה  
He makes a sign and then gives her a writ of divorce<sup>164</sup>. רומז ונותן לה גט

This is followed by a long list in Tosefta Yevamot 13:7 of combinations of marriages between those of sound senses and deaf mutes. The general rule seems to be that marriage to a deaf-mute is valid (especially here where כהנים are involved, However some of the statements are difficult to reconcile with others. For example,

<sup>163</sup>Op. cit., p. 48.

<sup>164</sup>Op. cit., p. 51.

108

if a woman of sound senses is married to a man of sound senses who has a brother who is a deaf-mute, and the husband dies, the deaf mute brother must marry her and may not put her away<sup>165</sup>. Yet we just learned that a deaf-mute may divorce by means of signs.

In Tosefta Yevamot 13:8 we see a parallel to Mishnah Yevamot 14:3:

Two brothers, one of sound senses and one a deaf-mute, married to two sisters, one a deaf-mute and one of sound senses--a deaf mute married to a woman of sound senses and woman of sound senses married to a deaf-mute, neither *halitzah* nor *yibum* apply here.<sup>166</sup>

In general laws of marriage and divorce in Tosefta Yevamot and Gittin as applied to שוטה וקטן, חרש seem inconsistent and confusing. The חרש is regarded as capable of valid marriage although there are limitations on the process of *halitzah* and *yibum* for the חרש because of the question of whether the חרש can give valid consent. In general, the שוטה seems incapable of valid marriage. Although there are several passages in the Tosefta which speak of the marriage of the שוטה, there are no legal backups for this marriage--בתובה סו, no right of תרומה in the family of a priest. In the case of the קטן, the idea seems to be that eventually the marriage will become valid, and the age for validity is nine years for a boy and three years for a girl.

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<sup>165</sup>Ibid.

<sup>166</sup>Op. cit., p. 52.

## Talmud Bavli on Marriage and Divorce of **חרש, שומע וקטן**

It is important to note that since marriage and divorce are economic transactions in Jewish law, the discussions of **חרש שומע וקטן** in Gittin especially include comments on the ability of **חש'ו** to conduct business. We shall include these as they come up in the text rather than attempting to separate categories that we would consider more economic than marriage and divorce perse.

Bavli Gittin 22b comments briefly on the Mishnah **הכל כשרין לכתוב את** **והא לאו בני דיעה נינהו : הגם אפילו חרש שומע וקטן**

How can these people who are not capable of understanding able to write a get? R. Huna said: **א-והוא שהיה גדול עומד על גביו:** A (capable) adult must stand by their side. R. Nahman said; then an idolater should be able to write a get while a Jew stands by his side!! Yet hasn't it been taught that an idolater is disqualified from writing a get?

A discussion follows: R. Nahman said R. Meir said: **אפילו מצאו באשפה:** Even if the get was found in the trash, if it was signed and delivered it was valid. But Raba says it is written in the Torah (Deut. 24:1) "**לשמה**," in her name. Does this refer to the writing of the get? No, to the **חתימה**, the signatures. The passage concludes that the formal text (**טופס**) of the get need not be written expressly for the specific case, only the signatures. Or you can follow R. Eliezer who says the get is made effective only by the witnesses to the delivery **עדי מסירה ברתי**.



R. Judah said in the name of R. Samuel: והוא ששייר מקום התורף  
 The who writes a get should leave (blank) the *toref*, ie  
 the part of the document relating to the particulars of this case. So  
 also said R. Haga in the name of Ulla. מתני מני ר'א היא: The Mishnah  
 follows R. Eliezer (i.e. the important part is the witnesses to the  
 delivery)

R. Zerika in the name of R. Yohanan said, "This is not Torah"

What does he mean, באן הודיעין שאין כח לשמה? R. Abba said, אינה תורה  
 Here we are informed that there is no force to the idea that the get  
 must be written particularly for her. It follows R. Meir who  
 agreed: עדי מסירה כרתיה

This is the same idea as R. Eliezer's above; it is the witnessing of  
 the delivery that is important. These are essentially two different  
 reports of the view of R. Yohanan.

The point here for חש' is that in fact there is no need for a great  
 deal of דעת to write a get, merely the ability to sign in front of  
 witnesses. The Gemara is concerned as to whether the Torah  
 requires the writer of a get to formulate the wording "for her, " for  
 a particular woman. The rabbis appear to conclude that this is not  
 the case.

Bavli Gittin 23a continues the discussion of the Mishnah which  
 excludes חש' from delivering a get.

The Gemara begins בשלמא חרש שוטה וקטן דלאו בני דעה נינהו  
 Certainly the חרש, שוטה וקטן are excluded because they have no understanding-but why not a blind person?

The rabbis do not question that חשו' cannot deliver a get, but since blindness does not disqualify from many other mitzvot ( and since some great rabbis were blind) they want to clarify the situation of the blind person. It is interesting that here the discussion is between two blind Amoraim, R. Sheshet and R. Joseph. R. Joseph points out that in the case of the delivery of a get, it often comes from abroad. The agent must be able to testify בפני נכתב ובפני נחתם it was signed and sealed in my presence. A blind person cannot do this and so is disqualified.

Just as issues involving the blind in the Talmud often seem to quote R. Sheshet and R. Joseph, so do issues involving the חרש often quote R. Yohanan ben Gudgada, the father of חרשים. Bavli Gittin 55a comments on the Mishnah attributed to him (see Mishnah Gittin 5.5 above) :

חרשת שהשיאה אביה שהיא יוצאה בגט  
 ועל קטנה בת ישראל שנשאת לכהן שאוכלת בתרומה

The Gemara quotes Raba: the testimony of R. Yohanan ben Gudgada tells us, a man (wishing to divorce a deaf-mute wife) says to the witnesses:

See this get which I give her. Then he says to his wife: -Take this bond. Thus she is divorced.  
 -ראו גט זה שאני נותן לה  
 -בנסי שטר חוב זה: wife

R. Yohanan ben Gudgada said her consent is not needed (לא בענין דעתה). He uses this euphemistic language (שמך חוב) because he is ashamed (משום ביסופא) that he is divorcing her.<sup>167</sup>

Further in the testimony of R. Yohanan ben Gudgada, it states that a minor orphan daughter of an Israelite married to a priest may eat *terumah*. The gemara interprets this to mean that a חרשת married to a priest cannot eat *terumah*, since Yohanan ben Gudgada would surely have said so if she could.

Rashi explains, this is a חרשת married to a priest on her own as an adult, whose marriage is valid only דרבנן--because elsewhere we learn that the marriage of a minor חרשת given in marriage by her father is completely valid. The Gemara says, this is to prevent a deaf-mute priest giving a deaf-mute woman *terumah*. But wouldn't this be only a minor problem, like a child eating carrion (נבלה)? It is rather to prevent a deaf-mute priest giving *terumah* to a פקחת. But even this would be acceptable if it was *terumah* דרבנן. Well then, it is to prevent a חרש from feeding תרומה דאורייתא to an Israelite פקחת.

We note here the assumption that if there were a tradition which redounds to the benefit of the חרש it would be reported by Yohanan ben Gudgada. Further, there is a concern to distinguish between marriage which is דאורייתא and marriage which is דרבנן. The case of a minor married off by her father is an interesting case where marriage to the חרשת becomes marriage דאורייתא because of the merging of three disabled categories: אישה, חרשת, and קטנה.

<sup>167</sup> Bavli Gittin 113b, Note 6, Maurice Simon, transl. and notes, Soncino, London, 1963 (and so also Rashi).

113

because the marriage is an agreement between the father פקח and the husband פקח

Bavli Gittin 59a

Mishnah Gittin 5:7 says that a חרש can converse by gestures; Ben Bateira says also by lip motions. The gemara says, lip motions are not acceptable for a get-only gestures. Lip motions are acceptable only for מטלטלין, purchase and sale of movable goods. The gemara says this does not mean also movable goods but only movable goods. An alternative view is presented: תנן אימא אף מטלטלין - Some say also movable goods. Simon<sup>168</sup> notes that a חרש may effect a betrothal by lip motions- why not a get?

Mishnah Gittin 5:7 says young children (פעוטות) may buy or sell movable goods. Jastrow<sup>169</sup> defines פעוטות as "talkers", children of six or seven years of age. Actually Jastrow's definition may be derived from this Gemara, which asks: What is the youngest age for buying and selling? R. Judah said to his son R. Yitzhak, about six or seven. R. Kahana said, about seven or eight. It was taught in a baraita: about nine or ten. There is no contradiction: כל חד וחד לפי חורפיה -Each child according his acuity (sharpness). Why is this (allowed?) R. Abba bar Jacob said in the name of R. Yohanan, כדי חייו, so they may live (buy necessary things).

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<sup>168</sup>Op. cit., 59a, Note 10.

<sup>169</sup>Jastrow, op. cit., p. 1201.



The gemara goes on- if children are buying and selling, to what extent may the purchaser take advantage of the child's mistakes? (ומטותן עד כמה) R. Jonah said in the name of R. Zera, up to one sixth, as with an adult (see Baba Metzia 49b-if the item was sold for more or less than one sixth of its value, the transaction can be voided ). Abaye asked, what about the gift (of a child)? R. Yemar said, his gift is no gift. But Mar son of Ashi said, his gift is a valid gift. This saying was communicated to R. Mordecai with the name reversed. He said go tell the son of the master (Ashi) that this is not the case. We asked the master when he was standing with one foot on the steps, what is (the minor's) gift? He replied it is a valid gift, whether he is sick or well, whether it is a large gift or a small one.

This gemara gives us yet another limit for קטן, the age of six or seven for buying and selling, but it states clearly that the age is different for every child according to his intelligence. We know already from the mishnah that the deaf-mute may also buy and sell movable goods by means of gestures or lip motions. The שוטה is once again not included as one who may buy, sell or make a gift.

#### Bavli Gittin 61a

briefly comments on the mishnah, that to take away something found by חרש שוטה וקטן is considered robbery. R. Hisda emends this: it is robbery by rabbinic law, גזול גמור מדבריהם, not by Torah law. What is the result of the Mishnah? That the article can be recovered through a court procedure. This apparently protects the חרש שוטה וקטן from being taken advantage of by bullies, while enabling someone whose

115

property is more or less innocently expropriated by חש'ו to recover it.

The discussion of variable maturity in a child is continued in Bavli Gittin 64b on the mishnah: כל שאינה יודעת לשמור את הגט

It was taught in a baraita: קטנות who know how to keep a get may be divorced, but if she does not know how to keep a get she cannot be divorced. Who is a child who know how to keep a get? One who keeps her get and something else. R. Yohanan said: it means one who keeps something else in place of her get. R. Huna bar Manoah objected: הא שוטה היא Is she some kind of fool? (Note: the word שוטה here is clearly used in a homiletical sense, not as a legal category<sup>170</sup>).

Huna bar Manoah quoted R. Aha the son of R. Ika: it means one who can distinguish between her get and another object.

R. Judah in the name of R. Assi offers another definition of the child who can keep her get: if offered a stone she throws it away but if offered a nut she keeps it- she may receive the get for herself but not for another. If she is given something and then will return it when asked, she can keep it for herself or for others. R. Hisda said, no in both cases the child may take something for herself but not for others.<sup>171</sup>

R. Hinnena Vardan brought up the case of partnership in an alleyway which can be effected through a minor maidservant, who has not yet

<sup>170</sup>See Polokoff, *op. cit.*, p. 16.

<sup>171</sup>This discussion is in the masculine but I am assuming the relevance is for the minor girl who can keep her get.

passed through puberty, yet can take possession on behalf of others. But this case is merely דרבנן. He was silenced by R. Hisda, even though he could have said that any תקנה of the rabbis is though it is ordained in the Torah (כל דתקן רבנן כעין דאורייתא) - unless this is a matter without basis in the Torah. R. Avia brought up another case of possession effected by a minor, the second tithe effected by a Hebrew maidservant, but his has problems also.

Raba summed up the discussion: There are three stages of minor (א' מדות בקטן) the first is: if given a stone he throws it away but if given a nut he takes it. At this stage he can take possession for himself but not others. A girl at this stage may be betrothed so as to be released only by exercising her official right of refusal at twelve. פעוטות can buy and sell movable goods and a girl of this age can be divorced from a betrothal arranged by her father. A third stage is the stage at which their vows are tested (twelve and one day for a boy, eleven and one day for a girl). A girl of this age performs *halitzah*. But a young man may not sell the property of his deceased father until the age of twenty.

These very vivid tests for maturity of a child once more prove the flexibility of the status of קטן.

Bavli Gittin 67b deals with the man who suffers from *kordiakos*, temporary insanity. The get of a man seized with *kordiakos* is of no effect. The question, what is *kordiakos*, produces a long and very amusing gemara on various forms of incapacity produced by drinking, eating and demons, and various cures for these difficulties. *Kordiakos* is not equated with שטות, despite the fact that we have

learned that even someone called שוטה may recover and then be considered fully cognizant<sup>172</sup>. The gemara on Bavli Gittin 70b makes an interesting comparison of *kordiakos* and שטות. This is a comment on:

אמר כתבו גם לאשתי ואחזו קורדיקוס וחזר ואמר אל תכתבו אין דבריו האחרונים כלום

Resh Lakish interprets this as: the get may be written immediately. R. Yohanan says: it should not be written until he comes to himself (לכשישתפה). This appears to be the same verb used for recovery from שטות--see for example Mishnah Gittin 2.6, שוטה ונשתפה. What is the reason of Resh Lakish? Because it says, his last words are nothing. R. Yohanan says, we interpret אין דבריו אחרונים כלום to mean that when he recovers<sup>173</sup> the scribe does not need to consult him again-but should not write the get until he recovers (לכשישתפה). The gemara asks: On what basis do they differ? (במאי קמפלגי) Resh Lakish compares the *kordiakos* to one who is asleep; R. Yohanan compares him to a שוטה because a sleeper does not need any treatment; a שוטה needs treatment (ישן לא מחוסר מעשה, האי מחסר מעשה).

Why doesn't Resh Lakish compare the *kordiakos* to a שוטה? For a שוטה there is no cure (לא סמיה בידן) but for *kordiakos* there is a cure:<sup>174</sup> red meat cooked on coals and diluted wine.

This last comment makes one wonder if the discovery of antipsychotic drugs in the last twenty years might affect the

<sup>172</sup>See Yerushalmi Terumot 1:1 (40b).

<sup>173</sup>to be clear, rational Jastrow, p. 1276. לכשישתפני

<sup>174</sup>See again Yerushalmi Terumot 1:1 (40b).



R. Judah is then quoted against R. Yohanan- if a man had his throat cut or was crucified and gestured that they should write a get for his wife, they should write it and deliver it! But that is a case only of physical weakness and his mind was clear (דעתה צינותרא); in this case his mind is cloudy (דעתה שגישתא) which Rashi explains as (מבולבל).

Bavli Gittin 70b comments further on the passage from Mishnah Gittin 7:1, נשתתק ואמרו לו נכתב גם לאשתך:

The Mishnah says to test this man (who has been struck dumb) three times before writing a get for him. But the gemara asks, what if he was seized with an involuntary nodding of the head? R. Yosef bar Manyumi said in the name of R. Nahman: we question him at intervals. What if the nodding seized him at intervals? We ask him two questions which require a "no" and two which require a "yes." The school of R. Ishmael taught, they ask him about the summer in the rainy season and the rainy season in the summer. What if he was shivering or perspiring, and answered in the opposite way? The proper thing is to ask him about fruit (if he wants a certain fruit which is out of season).

Bavli Gittin 71a

R. Kahana said in the name of Rab:

חרש שיכול לדבר מתוך הכתב כותבין ונותנין גם

The Hebrew phraseology is worth noting: the חרש who can speak by means of writing--for him they write and deliver a get.

R. Yosef asks- what does this tell us? R. Zera replied- You have quoted a statement about an אלם, which is different from חרש: it was taught in a baraita:<sup>175</sup>

מדבר ואינו שומע זהו חרש שומע ואינו מדבר זהו אלם וזה הרי הן כפקחין לכל דבריהם

R. Zera said: If the אלם can signify by writing, what about Leviticus 5:1:

אלם שאינו יכול: אם לא יגיד ונשא עונו If he does not tell it (ie out loud) he shall bear his iniquity (speaking of witnessing) This excludes the אלם שאינו יכול. להגיד.

So how can he signify by writing? Abaye said: Testimony may not be in writing: as it says in Deuteronomy 19:15 על פי שני עדים או על פי אחד--At the mouth of two or three witnesses the matter shall be established.

An objection was raised: Just as he is tested with a get, so he is tested with business transactions, with testimony and with bequests.(Tosefta Gittin 5:1) R. Yosef bar Manyumi said in the name of R. Sheshet: This applies only to testimony on the status of a woman, about which the rabbis were lenient (דאקילו בה רבנן). But it also says ירושות-R. Abbahu says, it applies only to the inheritance of the eldest son. What about business transactions (משאות ומתנות)? Can

<sup>175</sup>See also the same baraita in Bavli Hagigah 2b and similar in Mishnah Terumot 1:2.

Another objection was raised: the use of gestures and lip movements by a חרש are followed only with regard to movable goods, but not with regard to a get, despite what R. Kahana says. Actually the Tannaim are divided on this: R. Shimon ben Gamliel says: the gestures of one who was a חרש from the birth may not be followed in regard to a get, but one who was פקח and became חרש after marriage can write a get for himself which others can sign.

But isn't it true that one born חרש can give a get? As he married her by gesture he can divorce by gesture- this is true for his wife by not for his *yevamah*--who came to him from his פקח brother. A *yevamah* from his חרש brother may be divorced by gestures--unless we say we shouldn't allow this because it may be seen as a precedent for *yevamah* of the פקח brother. Well then--maybe he shouldn't be allowed to divorce his wife by gestures either? No- a sister in law might be confused with a sister in law but not with a wife.

Bavli Gittin 71b

But we have learned the rules in this kind of case:<sup>176</sup>

שני אחין חרשין נשאוין שתי אחיות פיקחות או שתי אחיות חרשות או שתי אחיות אחת פקחת ואחת חרשת או שתי אחיות חרשות נשאוין לשני אחין פיקחין או לשני אחין חרשין או לשני אחין אחד פיקח ואחד חרש--הרי אלו פטורות מן מן החליצה ומן הייבום

<sup>176</sup>See Mishnah Yevamot 14

If the women were not related they must go through with the levirate marriage, and if the second husband wants to send her away, he may.

R. Yohanan said R. Shimon ben Gamaliel's colleagues differed from him. Abaye said: We have also learned, if his wife became insane (נשתתה) he can never put her away, and if he became חרש or שוטה he can never put her away. (Mishnah Yevamot 14.1) What is never? Even though he can show his intention in writing? Or, R. Papa said, even though we see that he is intelligent (דחזינא ליה חריף). R. Isaac said: a שוטה woman can be divorced the same as a פקח woman, since her consent is not required. But the Rabbis said she should not be divorced שלא ינהגו בה מנהג הפקר, so that people will not treat her like a piece of ownerless property.

This appears to be a place where the שוטה is treated in an exceptional manner for her protection alone. Thus, although someone who is שוטה to begin with may not marry, one who becomes שוטה after marriage may not be divorced.

### Bavli Yevamot

Yevamot, we recall, is greatly concerned with maintaining the distinction between marriage which is Toraitically valid and marriage involving the חרש which is valid only דרבנן. Bavli Yevamot 68a comments on the Mishnah which lists the חרש and a boy of nine years and one day as among those intercourse with whom deprive a previously eligible woman of the right to eat *terumah*.



He (the חרש) deprives her (the בת בהן) of the privilege, since he acquired her by virtue of a rabbinical enactment (בתקנתא דרבנן). Rashi here refers us to Bavli Yevamot 112b (see below for discussion).

What about the boy? The gemara tells us, this refers to a *yevamah* awaiting the decision of a *yavam* who is nine years and one day. If he has intercourse with her, סדאורייתא קניא ליה, he acquires her by Torah law. However since he can disqualify her from eating *terumah* but cannot qualify her to eat *terumah*, his action is not complete *kinyan* but only equivalent to מאמר. Steinsaltz<sup>177</sup> explains מאמר as a verbal declaration of betrothal which the Sages decreed should accompany either שטר or כסף before the levirate marriage is confirmed by ביאה.

Bavli Yevamot 69b merely reviews the Mishnah on the same rule for the שוטה:

Here we learn what the rabbis taught: if a שוטה or a minor married and died, their wives are exempt from *halitzah* and *yibum*. Rashi notes; אלתא אין קניין לשוטה. Our review of these materials leads us to ask: How old is the קטן whose wife is exempt? 13? 12? or nine?

Bavli Yevamot 107b specifies the language to be used by the קטנה who is exercising the right of refusal (מיראון). The gemara is concerned that the refusal not be confused with the language of divorce. However, we should note that the right of refusal gives one

<sup>177</sup>Steinsaltz Talmud Reference volume, p. 210.

123

who is both a female and a minor a certain amount of autonomy that we might not expect. On the other hand, the gemara goes on to quote R. Eliezer as we have read in Mishnah Yev amot 13 : אין מעשה קטנה : כלום, the action of a minor girl is nothing. The rabbis argue over whether the minor girl who is betrothed is actually a wife, in which case she needs a get (not her doing) or whether she is not his wife- in which case why does she need to do anything at all (ie למאן). The rabbis seem to be unhappy with the idea that the right of refusal has any legal force. For our purposes, we see the minor girl's right of refusal as yet another example of the ambiguous status of the minor, in this case the minor female who has even less status than the קטן. We recall from the Mishnah that the girl who exercises the right of refusal is one who was married by her mother and brothers לדעתה with her knowledge and presumably consent. If she was married without her knowledge she can just leave the man without saying or doing anything.

Bavli Yevamot 110a discusses Mishnah Yevamot 13:8:

מי שהיה נשוי לשתי יתומות קטנות ומת ביאה וחליצה של אחת פוטרת צרתה וכן שתי חרשות

The Gemara questions the last phrase: may a deaf-mute woman perform halitzah? This Mishnah implies that she may. But can she? Raba explained: If she was always deaf, she "leaves as she entered" by gestures but if she became deaf, she cannot recite the words. The treatment of the חרש on the topic of levirate marriage in the Mishnah seems to involve many contradictions, leaving the Gemara 110b to conclude: *הא כדאיתא והא כדאיתא*: each case is as it is, and they cannot

be compared. The sugya concludes by denying Raba's argument, maintaining that despite the implication of the Mishnah, the חרש may not perform *halitzah*. The correct solution for the חרש who is a *yevamah* is for the *yavam* to marry and then divorce her. R. Hisda says (110b) it may be inferred that Rab thinks that a deaf wife is only partially acquired while the *kinyan* of a minor is doubtful (חרש קנויה ומשיירת קטנה קנויה ואינו קנויה).

The most important discussion for our purposes in Bavli Yevamot is 112b which discusses in theoretical terms the marriage of חרש, שוטה וקטן.

Rami bar Hama said: What is the difference between a male or female deaf-mute and a male or female שוטה that the rabbis established a validating marriage for the חרש but not for the שוטה? For it was taught: if a שוטה or a קטן married and died, their wives are exempt from *halitzah* and *yibum*. In the case of the חרש where this *takkanah* could be actually carried into practice (דקיימת תקנתא דרבנן) they legalized marriage; but in the case of the שוטה where the *takkanah* could not be carried into practice because no one could live with a serpent in the same basket (דאין אדם דר עם נחש בכפיפה אחת) they did not legalize marriage.

In other words the basis for the distinction between marriage of the חרש and the שוטה was not theoretical but practical.

Next, the Gemara asks: What is the difference between the marriage of a קטן and a חרש that the rabbis legalized marriage for the חרש and not for the קטן? The rabbis made a תקנה for the deaf person because according to Torah law he would never have been able to marry, whereas the קטן in due course would be able to marry. But in the case of the קטנה the rabbis did legalize marriage in order that people (שלא ינהגו בה מנהג הפקר) might not treat her as ownerless property.

We note above the same argument used for legalizing the marriage of the קטנה as was used for forbidding divorce of a wife who became שוטה (see Bavli Gittin 71a). We might ask: what is the source of the Torah law which does not permit marriage for the חרש? Is the difficulty in קנין, or in the inability to pronounce words, in either the marriage ceremony or in חליצה?

Finally the gemara asks, what is the difference between the קטנה and the חרשת that the קטנה has the right of refusal (מיואן) but the חרשת does not?

--Because if the חרשת had the right of refusal, no one would marry her (דאם כן מימנעי ולא נסבי לה). Rashi explains that the right of the חרשת to refuse ends when she is of age (גבול יש לה) whereas the קטנה could walk out of the marriage at any time.

Bavli Yevamot 113a continues with a discussion which we looked at previously in Bavli Gittin 55a. What is the difference between a קטנה and a חרשת such that the קטנה may eat *terumah* and the חרשת may not? The gemara refers us back to the testimony of R. Yohanan ben Gudgada which we read in Mishnah Yevamot 14: 2:

קטנה בת The קטנה given in marriage by her father may be dismissed with a get. The חרשת married to a priest may eat *terumah* (while the חרשת may not eat).



We recall that the last conclusion is an argument from silence: surely R. Yohanan ben Gudgada would have said if the חרשת married to a priest could eat *terumah*! As Rashi notes, her marriage to a priest is not really marriage- it is only rabbinically valid, so her right to eat *terumah* is not a right by Torah law. Once again we read, this is a preventive measure lest the חרש priest feed a deaf woman *terumah*. But this isn't so bad - it is like a נבלה eating קטן. Neither is responsible nor is either subject to punishment (Rashi: לאו בני פקח חרש). Rather it is to prevent a חרש priest from feeding his wife with *terumah* דאורייתא.

Why does the קטנה receive a כתובה but the חרשת does not? Because if the חרשת were entitled to כתובה no one would marry her. From where do we know that a קטנה is entitled to a כתובה? We have learned:

המסאנה, השנייה והאילוניתאין להן כתובה:

The minor who refuses, the second-degree forbidden relative, and the barren woman do not receive a *ketubah*.<sup>178</sup>

It follows that the minor who goes out with a get (ie her husband's consent) receives her כתובה.

From where do we know that a חרשת does not receive a כתובה? From what was taught:

חרש ושוטה ש נשאו פקחות אע"פ שנתפקח החרש ונשתפה השוטה אין להם עליהם כלום

<sup>178</sup>See Bavli Yebamot 85b.

Rashi explains: since neither man has דעת even though the Rabbis ordained the validity of the marriage of the חרש they did not establish כתובה for them; just that the two of them wish to be married.

If either man recovers and wants to keep his wife, she then receives a כתובה of one *maneh* ( and then they are truly married, if the marriage has been consummated.)

If a man of sound senses married a woman who was deaf or שוטה, her כתובה is valid even if he wanted to write her a ketubah of one maneh, because he has agreed to take the loss. But if he did not consent she would receive no ketubah-otherwise no one would marry her.

If this is the reason (the חרש receives no ketubah) then there should be no ketubah for a woman of sound senses who marries a deaf man--otherwise women would not marry deaf men. But the woman desires to be taken in marriage more than the man desires to marry!:

יותר משהאיש ריחה לישא אישה רוצה להנשא

There follows a story:

There was a deaf man in the neighborhood of R. Malkio. The rabbi allowed him to marry a woman and write her a ketubah of four hundred zuz. Raba said, How wise was R. Malkio. Had the deaf man wished to hire a maid we would have allowed it. How much more this where two needs are fulfilled (marriage and housekeeping).

Apparently the deaf man was allowed to offer an especially large settlement to a woman for marrying him, since he needed both a maid and a wife. It is interesting that the previous decision--that there is no ketubah for a deaf woman--ignores the value of this woman as a housecleaner and bedmate.

Further- R. Hiyya bar Ashi said in the name of Samuel: there is no *אשם תלוי* (guilt offering) for intercourse with the wife of a deaf man (since this is a Toraitic requirement and the marriage of this man is not valid *דאורייתא*). This view is supported by the Mishnah, *חמישה לא יתרומו*. (There we assume the *terumah* of the *חרש* is invalid because we cannot know his intention) An argument ensues: is the *אשם תלוי* required because there is some doubt as to the validity of the deaf man's marriage? Or is it not required because, as we have stated above, the marriage is invalid *דאורייתא*?

Bavli Yevamot 113b:

R. Ashi asked: What is the reason of R. Eleazar (who said that the *terumah* of a deaf man could not be treated as profane because its validity is a matter of doubt)? Perhaps R. Eleazar regarded the mind of a deaf man as weak (*דעתא קלישתא*) but he was in doubt as to whether his mind was clear (*ציננותא*) or unclear-- or whether the deaf man's mind is always in the same weak condition or whether his mental state varies from normalcy to *שטות*. What difference does this make (*מאי נפקא מינה*)? Well, it would make a difference as to whether he could release his wife by a *get*. If his mind is consistent (*חדא דעתא*) he would be the same for *קידושין* as for *גרושין*. But if he is sometimes normal (*חלים*) and sometimes *שטות*, then he would be

capable of קדושין but not of divorce. Let it stand undecided! (חאי תיקו).

What about a woman who becomes שוטה? R. Yitzhak said: strictly according to the Torah, a woman who is שוטה can be divorced, because her consent is not required. Why then is it stated that she may not be divorced? שלא ינהגו בה מנהג הפקר, so that she will not be treated like a piece of ownerless property.

What kind of שוטה does this refer to? If it is someone who could take care of her get and take care of herself, who would treat her as ownerless property? If she is incapable of taking care of her get or of herself, how can it be said, דבר תורה שוטה מתגרשת, that according to the Torah she can be divorced? R. Yannai's school taught, ונתן בידה (Deut. 24:1) that is to her who is capable of accepting the get; which excludes the שוטה who is incapable of accepting the get. R. Ishmael's school taught: ושלחה מביתו which excludes the שוטה who will when sent out return anyway. The rabbis understood there might be a שוטה who was capable of guarding her get but incapable of taking care of herself--this one can be divorced by Torah law but the rabbis ordained that she should not be sent away because she would become a piece of ownerless property.

Abaye argued also that divorcing the שוטה is permitted דאורייתא but forbidden by the rabbis. He quoted the Mishnah:

לא יוציא עולמית: שוטה If she became a שוטה he may not divorce her -נשתמית לא יוציא  
But regarding the male שוטה: שוטה לא יוציא עולמית



The word עולמית is use only of the male; this teaches that the prohibition against the male divorcing is דאורייתא. The omission of the word עולמית in the first mishnah teaches that the prohibition against the female being divorced is דרבנן.

We have just discussed the case of the שוטה--what about the חרש?  
We recall Mishnah Yevamot 14.1:

R. Yohanan ben Nuri asked: Why can a woman who became חרש be sent out but a man who became חרש does not divorce his wife? the man who divorces his wife is not like a woman who is divorced. A woman goes willingly or unwillingly, but a man divorces his wife only willingly.

Bavli Yevamot 113b goes on to ask: was R. Yohanan ben Nuri clear about the status of the man, so his question really concerned the woman, or was he clear about the status of the woman, so his question really concerned the man? From the answer we infer that his question was really about the man. But, in Mishnah Yevamot 14:2 the rabbis said: הלא נמי, comparing the example of a deaf-mute woman given by Yohanan ben Gudgada to the example given by Yohanan ben Nuri, suggesting that Yohanan ben Nuri was talking about a woman. But Yohanan ben Nuri was just responding to the previous statement .

The testimony of R. Yohanan ben Gudgada in the Mishnah, emphasizes that the woman's consent is not needed for divorce; hence a חרשת may be divorced.

Bavli Yevamot 113b-114a now turns to the third category, that of the קטן. The subject of marriage and divorce is temporarily sidestepped in favor of the general question of whether the child may be held accountable for violating rules of Shabbat and kashrut.

Once on the Sabbath, R. Isaac bar Bisna lost the keys of the schoolhouse in the public domain [where he should not have been carrying them.] He came before R. Pedat who said to him, go bring out some boys and girls to the place and let them walk around there; if they find the keys they will bring them back<sup>179</sup>.

This story teaches that if the children were not actually instructed to look for the keys, they could find them; this falls under the category of "the minor may eat carrion." The passage goes on:

An adult may not say to the child, 'Bring me the key, bring me the seal,' but he may permit him to pick or throw such objects on his own accord.

The situation of the child is then compared to that of the gentile. A child may be allowed to put out a fire on the Sabbath, and if a child eats slightly unkosher (ie not properly tithed) food in his grandparents' house, the father does not worry about it. A Jewish child may breast feed from a gentile or an unclean beast, but may not be actively fed carrion by an adult.

To summarize the status of the חשו regarding marriage and divorce in the Bavli: The חוש may be married by rabbinical *takkanah*, but the male חוש may not divorce his wife and the female חוש may be sent

<sup>179</sup>The Talmud of Babylonia: An American Translation, Vol. XIID, Yevamot, Jacob Neusner, transl., Scholars Press, Atlanta, Georgia, 1992, p. 147.

away with a get. The כתובה has no חרש.

The marriage of the שוטה has no legal status; there is no *halitzah* or levirate marriage resulting from a marriage to a שוטה. If a married female becomes שוטה she may never be divorced, for her protection. If a male becomes שוטה he may not divorce his wife.

The marriage of the קטן is valid but a קטנה may exercise the right of refusal in a marriage arranged by her mother or brothers. If her father is living and arranges her marriage, she may not refuse. After she comes of age, her marriage is ended only by her husband's decision to send her away with a get.

#### Yerushalmi Gittin and Yerushalmi Yevamot

הכל בשרין לכתוב את הגט comments on Yerushalmi Gittin 2:5 (11a)<sup>180</sup> Where the Bavli seems to address the issue of the קטן writing the get and quotes R. Huna as saying, גדול עומד על גביו, Yerushalmi seems to address the issue of the חרש, quoting R. Huna as saying : והוא שחיה : פיקח עומד על גביו.

R. Yohanan quotes Deut. 24: וכתב לה לשמה; it must be written for a particular woman (which requires דעת). Shmuel said, "He must leave the תורף (the personalized section of the get) with him, i.e. leave it for the פקח to write. Resh Lakish adds: the get is nullified if he ( the חרש, שוטה וקטן) writes the תורף (the part of the get which is particularized and requires דעת) together with the טופס.

<sup>180</sup>The Talmud of the Land of Israel, Vol. 25, Gittin, Jacob Neusner, transl., University of Chicago, 1985, pp. 56-57.

Yerushalmi Gittin 11b<sup>181</sup> comments on Gittin 2:6, prohibiting חרש acting as agents to receive a get. The comment is about a slave who also may not act as an agent, but as Neusner points out the gemara really has nothing to do with the Mishnah since the slave is unlike חרש שוטה וקטן except that both may not act as agents<sup>182</sup>.

Yerushalmi Gittin 29a comments briefly on Gittin 5:6, the testimony of Yohanan ben Gudgada regarding the חרשת whose father gives her in marriage, goes out with a get etc. R. Hananiah questions Yohanan ben Gudgada<sup>183</sup>:

R. Hananiah asked before R. Immi (Neusner says R. Hila):

דבריו בפיקח שיש לה דעת - These words should be for a woman of sound mind.

שהיא יוצאת בין לדעת בין שלא לדעת - She goes out whether she consents or not

דעת - As for a deaf mute woman, who has no דעת

לדעת - She should go out only לדעת

Obviously there is a difficulty here with the meaning of דעת - How can a woman who has no דעת go out only with דעת? Should we translate (as Neusner) the first with "will" and the second with "consent"? Judith Abrams<sup>184</sup> points out the wide variety in possible meanings for דעת in Tannaitic literature. Abrams lists them as moral and cognitive insight and excellence; purposeful action; consent; opinion; temperament; and the ability to ask and answer questions. Is there a difference between דעת and לדעת? Is R. Hananiah attempting to ameliorate the situation of the חרשת? But

<sup>181</sup>Op. cit., p. 58.

<sup>182</sup>Op. cit., p. 59.

<sup>183</sup>Op. cit., pp. 138-139.

<sup>184</sup>Abrams, op. cit., pp. 88-96.



isn't being divorced with a get, as we suggested above, an amelioration in itself?

Yerushalmi continues: עדות היא - This is a matter of testimony,, not logical argument.

R. Hananiah suggested the testimony was regarding a woman of sound senses who was married off by her father and became a חרשת.

R. Yose thought it referred to a קטנה whose father married her off, and was divorced.

R. Yohanan asked, Why did they say, a minor Israelite girl married to a priest eats heave offering? מפני הכל קופצין עליה לישא מבני חינה

This passage also seems to make no sense: So that everyone will jump on her to marry her because of her charm!? But she WAS married (to a priest-that's why she eats *terumah*!)

R. Shimi said: זהוהא שתהא יודעת לשמר קידושין This rule (the minor who eats *terumah*) is for the girl who knows how to take care of her kiddushin. R. Immi says: the Mishnah says the same thing. R. Hamnuna in the name of R. Assi says: a minor קטנה אין לה חופה שתאכל בתרומה cannot have sexual relations, which is what entitles her to *terumah* (Neusner's interpretation). R. Immi says, the Mishnah agrees. R. Abin asked: if the minor entered the marriage canopy but did not have sexual relations (נכנסה לחופה ולא נבעלה) and then was sent back to her father's house, does she eat *terumah*? Yes, because she entered the נשבעינה מן הדא על גב חופת הראשונה. חופה.

בן בתירה אומר קופץ ונקפץ במטלטלין

The gemara adds: in order to hire workers or be hired as a worker  
הפועות מקח ומכר במטלטלין is explained as "little children" in Greek.<sup>185</sup>

Yerushalmi Gittin 5:8<sup>186</sup> comments regarding the purchase and sale  
of movable goods by children:

הפועות מקח ומכר במטלטלין

R. Yohanan said, (This is ) so they can live (support themselves):

מפני חייהן

R. Mana quotes Yerushalmi Baba Batra I: R. Yose says לא גבי עיצומין

מודה באילין

An עיצום, according to Jastrow,<sup>187</sup> is a (financial) promise made with  
a condition of forfeit in case of failure to fulfill it; the exception is  
those who indenture their sons to a trade . These, אילין, presumably  
are the פועות whose purchase is valid and whose sale is valid.

Yerushalmi Gittin 32a on Mishnah Gittin 5:9 enumerates criteria for  
determining the maturity of a קטן :

מציאת חרש שוטה וקטן יש בהן גזל מפני דרכי שלום

<sup>185</sup> פני משה as in the notes by פריי as in the Yerushalmi text should be read פריי (pedagogy, pediatrician, pedophile, etc.)  
I believe since the Greek word for children is paidea

<sup>186</sup> Neusner Yerushalmi Gittin, p, 146.

<sup>187</sup> Jastrow, op. cit., pp. 1073-1074.

They say in the name of R. Nahman bar Yakov: Anyone who, given a nut, throws it out and given a pebble, keeps it--if you take something from him it is like taking it out of the trash.

If they gave him a nut and he takes it, pebble and he throws it out, someone who takes his property is committing theft, at least for the purposes of peace.

If he takes both a nut and a pebble, puts them away and takes them out later, taking from him is גזל גמור, complete theft.

Such a person (as in the last case) can acquire for himself but not on behalf of others (זוכה לעצמו אבל לא לאחרים)

R. Huna said, Just as he acquires for himself, so he can acquire on behalf of someone else<sup>188</sup>.

This is yet another angle for definition of the קטן: his behavior with regard to acquiring property.

All agree that his gift is not valid: see Exodus 22:7 כִּי יִתֵּן אִישׁ; when a man gives, not when a child gives--the words of the sages.

R. Judah ben Pazi said in the name of R. Yohanan: It is not clearly theft from a קטן until he produces two pubic hairs.

R. Abbahu said in the name of R. Yohanan: Calling it theft applies to the matter of restitution of the property by means of the court. But everyone agrees it is not complete theft, which also incurs bringing an offering or taking an oath, until the minor has produced two pubic hairs.

But against the rabbis here (the ones as Neusner explains, who believe the

<sup>188</sup>Neusner Yerushalmi Gittin, p. 149.

minor cannot effect an acquisition) R. Yose asked: If that is so, the minor should not be able to acquire for himself. It says in Exodus 22:7 **בִּי יִתֵּן אִישׁ אֶל רֵעֵהוּ**. This means, he cannot give until he is (grownup) like his neighbor.

On the other hand: R. Yose bar R. Bun in the name of R. Samuel bar R. Isaac said: It has come down to us **(וַיִּדְדוּ לָהּ בְּשִׁמְתָהּ)** concerning children: "As to children, their purchase is valid and their sale is valid concerning movables."

But there is another Mishnah (Maaser Sheni 4:4) which says:

**אָבֵל אֵינוֹ מִזְכָּה לָהֶן לֹא עַל יְדֵי בְנוֹ וּבְתוֹ הַקְּטָנִים וְלֹא עַל יְדֵי עֲבָדוֹ וּשְׁפַחְתּוֹ הַכְּנַעֲנִי  
מִפְּנֵי שִׁידוֹן כִּידוֹ**

He cannot effect possession for them by means of his son or his daughter, his Canaanite slave or maid, because their hand is like his hand.

Yerushalmi Gittin continues:

Rabbis of Caesarea say: Here we are speaking of a child with **דַּעַת**; there we are speaking of a child who has no **דַּעַת**.<sup>189</sup>

To sum up, Yerushalmi recognizes that the child's ability to do business, to make sales and purchases is dependent on his age and acuity.

Yerushalmi Gittin 38a deals with Mishnah Gittin 7:1, **מִי שֶׁאֲחָזוּ** which we read **קוֹרְדִּיקוֹס**. The passage reviews the definition of **שׁוֹמֵה** which we read first in Bavli Hagigah, with the comments which we read on **kordiakos** in Yerushalmi Terumot 1:1:<sup>190</sup>

**סִימָן שׁוֹמֵה הַיּוֹצִיא בְּלִילָה וְהָלַךְ בְּבֵית הַקְּבֵרוֹת וּמִקְרַע אֶת כִּסּוּתוֹ וְהִמָּאֵבֵד מִה שְׁנוֹתָן  
לוֹ**

<sup>189</sup>Paraphrase of Neusner, Yerushalmi Gittin, pp. 149-150.

<sup>190</sup>Neusner, Yerushalmi Gittin, pp. 178-179.



The שוטה is one who sleeps in a cemetery, tears his clothing and loses what is given to him.

The argument between R. Huna and R. Yohanan is presented: are all of these traits necessary to define a שוטה or only one?

The point of this review is,

קורדייכוס אין בו אחד מכל אלו

In *kordiakos* none of these symptoms is present.

What is *kordiakos*? R. Yose said, confused (המים). He gave an example of a weaver from Tarsus (טרסי) who got confused. They gave him red meat and dark wine and he calmed down (לעי).

This is the *kordiakos* of which the sages spoke: the individual is sometimes שוטה and sometimes חלום, healthy. When he is שוטה he is שוטה for all purposes. When he is חלום he is like a פקח for all purposes.

Now we get to the relevance of this passage for Gittin<sup>191</sup>:

A case came before Samuel (apparently of a *kordiakos* who wanted a divorce), he said:

דהא חלים יתן גט: when he is healthy let him hand over a get.

Does Samuel agree with Resh Lakish who said: לבשישתה ?

When he is temporarily lucid (he can give her a get).

No, Samuel is more stringent than Resh Lakish: רובא דשמואל מריש לקיש

Samuel said, דהא חלים, when he is completely healthy: this is proven from Isaiah

38:16 : ותחלימני ותחייני (See Yerushalmi Terumot 1:1)

<sup>191</sup> ibid.

R. Yakov bar Aha said: There is a dispute between R. Yohanan and Resh Lakish. R. Yohanan said: even while he is suffering from *kordiakos* (עודהו קורדיינקוס), they write him a get and give it to his wife. Resh Lakish said, When he is lucid (לכשישתפה).

But this last teaching of Resh Lakish conflicts with another of his opinions (מחליפה שיטתיה) on the teaching:

נתחרש או נשתטה או נשתמד או שהורו בית דין לאכל חלב ר' יוחנן אמר נדחית  
חטאתו ריש לקיש אמר לא נדחית חטאתו

Resh Lakish there teaches that even if one went insane, was struck dumb, etc., he still must offer his חטאה.

R. Yose bar R. Bun and R. Aha said: the traditions are reversed (מחליף)  
: it was Resh Lakish who said the offering was no longer  
necessary.

On the other hand the position of Resh Lakish is opposite to Mishnah  
Gittin 7:1:

אמר כתבו גם לאשתו ואחזו קורדיינקוס וחזר ואמר אל תכתבו אין דברים האחרונים  
כלום

Interpret the statement to mean, when he regains lucidity, his second statement is  
nullified.

If he requests a divorce to be in effect tomorrow, or separates  
*terumah* to be valid tomorrow, and then is seized with *kordiakos*,

A relevant precedent may be Tosefta Terumot 1:1 which states that someone who was פקח and then became חרש may write out his instructions for *terumah*.

But R. Yakov bar Aha and R. Hiyya in the name of R. Yohanan brought up another Mishnah which makes the opposite point: Mishnah Yevamot 14:1--if a man became a deaf-mute or שוטה, he may never divorce his wife.

One solution, suggests Yerushalmi Gittin 7:1, is to say that the above Mishnah applies only to someone unable to write.

R. Ba Mamel brought up Tosefta Gittin 2:8 which invalidates written instructions.

R. Yose said: the end of the same Tosefta says, it is valid only if they hear the husband's voice. And even if he nodded his head it would be valid.

R. Mana agreed: Hearing the voice is the same as nodding the head.

R. Zera added: But doesn't he have to nod three times? So similarly, don't they have to hear his voice three times?

He answered: No- one time is enough for the voice, but nodding the

<sup>192</sup>Op. cit., pp. 180-181.

R. Yudan noted: There (in Terumot) we are dealing with past action; here in the case of a get, we deal with future action<sup>193</sup>.

R. Benjamin bar Levi asked: How should we interpret this? If a man has sound senses about the past, he should have sound senses about the future--if he has sound senses about the future, he should have sound senses about the past!

R. Abba Mari said: We are dealing in the Mishnah with a חרוש who cannot appoint an agent.

R. Yose bar R. Bun said: No-we are dealing with a healthy person (who was struck dumb).<sup>194</sup>

Yerushalmi Gittin 7:1 (39b)

Perhaps in this case they need to keep asking him alternating questions: Shall we write a get for your wife? He says yes. For your mother? He says no. For your wife? he says yes. For your daughter? He says no. For your wife? He says yes. For your sister? He says no.

R. Abbahu says, it is the same for giving testimony. A man may give his testimony sitting down. It is the same for vows.

R. Sheshet taught in Tosefta Gittin 5:1: Just as they examine (someone who is struck dumb) three times for a get, so too they

<sup>193</sup>Op. cit., p. 182.

<sup>194</sup>Op. cit., p. 183.



examine him three times as to inheritance, purchases, sales and donations (בירושות, ובמקח וממכר ובמתנות)

Much of Yerushalmi Gittin on חש' is familiar to us from other מסכתות which we have looked at. What if any of the material is new or unique to this source? We might consider the discussion of what enables the קטנה to eat *terumah* to be in this category. More significant are the passages on the right of the minor to buying and selling, as well as the idea that someone who is temporarily incompetent (ie *kordiakos*) may buy and sell if he is examined three times, as in the case of a get

Yerushalmi Yevamot 7:4 (33ab) asks:

Does a חרש invalidate? (ie does intercourse with a חרש by a widowed woman who was married to a priest terminate her right to eat *terumah*?)

Has not R. Hiyya taught:

אישתו של חרש ושל שומע טובלת מחיק בעלה ואוכלת

Neusner comments: "Consequently marriage to the deaf mute does not invalidate the woman's right to eat such food."<sup>195</sup>

R. Abba Mari and R. Mattena were talking; one said, we are talking about a חרש who can פוסל, who has the power of invalidation. The other said, this is a חרש who is a *yavam*.

<sup>195</sup> The Talmud of the Land of Israel, Vol. 21 Yebamot, Jacob Neusner, transl., University of Chicago Press, 1987, p. 239.

143

As we have noted, although marriage to a חרש is in general valid only דרבנן, in the case of a yavam the obligation to marry is דאורייתא.

Mishnah Yevamot 7:4 continues: "If there is doubt that he is nine years and one day" Yerushalmi Yevamot says, he invalidates her (פוסט); (in the case of a boy who is a בֶּהֱן) even if there is doubt whether or not he has produced two hairs, he gives her the right to eat *terumah* (לְהַאכִּיל).

Yerushalmi Yevamot 49b speculates about whether the nine year old is truly mature in its discussion of Mishnah Yevamot 10:7<sup>196</sup>:

: בן תשע ויום אחד הוא פוסט על ידי אחים

R. Abin quoted R. Yose ben R. Judah:

בן תשע ויום אחד עד שתיים עשרה ויום אחד ושהויה שתי שערות הרי זה שומא

Between nine and twelve, if two hairs appear, it might be only a mole

The boy who is nine years and one day who produces two hairs may be only retroactively declared an adult if he continues to develop.

Further on we read in Yerushalmi Yevamot 50a:

R. Samuel ben Abodema said: "Since the tanna wished to phrase the entire set of statements to concern a nine year old, he treated this particular case in terms of a nine year old."<sup>197</sup>

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<sup>196</sup>Op. cit., p. 335.

<sup>197</sup>Op. cit., p. 336.

R. Judah bar Pazzi in the name of R. Joshua ben Levi said: R. Yose ben R. Judah derived the facts from Ahaz, for it is taught: Ahaz fathered a child at the age of nine; Haran at the age of six; Caleb at the age of ten."<sup>198</sup>

Apparently the rabbis decided that nine was a happy medium at which to set the possible onset of puberty for a boy.

The upper limit of boyhood is discussed in an ensuing passage of Yerushalmi Yevamot 50a, commenting on the Mishnah Yevamot 10:8

אחד שהוא בן שנים ויום אחד ואחד שהוא בן עשרים שנה שלא הביא שתי שערות

A boy between nine years and one day who has not produced two pubic hairs is in the same category as a youth up to age twenty who has not produced two pubic hairs.

Yerushalmi adds: In the case of a man more than twenty years old who finally produced two pubic hairs, from that point onward he is treated as a man.<sup>199</sup> The question here is--is he perhaps a eunuch by nature?

The text goes on:

A eunuch is not subject to the law of בן סורר ומורד because he does not have a pubic זקן)

<sup>198</sup> ibid.

<sup>199</sup> Op. cit., p. 340.

But no--a man twenty years old and onward even if he has not produced two pubic hairs is treated as a man.<sup>200</sup>

145

Yerushalmi Yevamot 63a on Mishnah 13:2 (איזה קטנה שהיא צריכה לסאן) discusses the similar question of how one judges a girl's maturity in regard to marriage<sup>201</sup>.

Who is a minor who receives a get? Any who, if you give her a get and something else can produce the get later on.

R. Eliezer says in the Mishnah אין מעשה קטנה כלום. The husband of a minor (who was married off by her mother or brothers?) has no right to keep the things she finds, to the results of her handwork, nor may he nullify her vows. (We recall these points from the thirteen penalties above.) She is not his wife for any purpose, except that she has to exercise the right of refusal.

R. Joshua says no: he does have the right to keep what she finds, to the fruit of her labor and to nullify her vows. She is his wife for all purposes except that she has the right of refusal.

R. Ishmael said: Usually R. Eliezer is consistent with regard to a minor, but here he says she has to exercise the right of refusal (where he also said, the deed of a minor is nothing.)

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<sup>200</sup>Elsewhere (Mishnah Niddah 5:9) we read that a man who has not produced two hairs at age 20 is regarded as a eunuch.

<sup>201</sup> Neusner, Yerushalmi Yevamot, p. 404.



R. Abbahu told a story about R. Eliezer: His mother was nudging him to marry his sister's daughter (a minor). He kept saying "My daughter, go get married (to someone else) until she came to him and said "I am your slave to wash my lord's feet." He then married her but waited to have sexual relations until she had produced two pubic hairs<sup>202</sup>.

Yerushalmi Yevamot 13:2 (63b)<sup>203</sup> records a number of rabbinic speculations as to what the girl's status is if she then exercises the right of refusal after sexual relations) if she was a *mamzeret*, if she may return to her father's estate after a marriage as a minor. If her husband died, even though she was a minor, she is supported by her husband's estate.

Yerushalmi Yevamot 13:2 <sup>204</sup>pursues the discussion of what constitutes majority. We are reminded, as we noted above in our discussion of Yerushalmi Terumot, that a minor may not separate terumah until he produces two hairs, even if he has reached the age of vows mentioned in Mishnah Terumot 1:3. R. Abin Kahana says, because Numbers 18:32 says בִּלְאֵ תִשָּׂא עֲלֵיךָ חֲטָא.

Yerushalmi Yevamot then discusses whether a minor may dedicate produce to the Temple if he may not separate terumah. Yes, a minor may bring an עֹלָה or שְׁלָמִים but not a sin-offering because a minor is not subject to sin. He may bring an offering for a זֶבֶח if this befalls

<sup>202</sup>Op. cit., p. 405.

<sup>203</sup>Op. cit., pp.405-406.

<sup>204</sup>Op. cit., p. 406..

him, He may not be an agent for another in bringing this offering. R. Yudan then notes that even though produce owned by a minor is subject to tithes and heave offerings, a minor may not himself separate these offerings.

Neusner states an important point for our discussion:

Yudan's point is that the simple fact that a minor is subject to some obligations does not signify that he may carry out all responsibilities related to that obligation<sup>205</sup>.

May the minor bring *bikkurim* (first fruits)? R. Judah says no: *bikkurim* are like Holy Things of the provinces (קדשי הגבול). The rabbis however say yes; *bikkurim* are like Holy Things of the sanctuary (קדשי המקדש)

May a minor bring חגיגה, the festival offering? We reviewed this matter above in Chapter 1. However Yerushalmi Yevamot 13:2 (64b) asks: מאחר שהוא חובה אינו מביא?

Is it the case that since חגיגה is obligatory, the minor may not bring it? Or may the minor change the designation to a peace offering (או מאחד שהוא משנה לשם שלמים מביא) and thus be allowed to bring it?<sup>206</sup>

May a minor bring the paschal lamb? or since this like the חגיגה is an obligatory offering, is he excluded? But Resh Lakish in the name of R. Hoshiaia said: anyone can bring a paschal lamb the rest of the year and change its designation to a שלמים--perhaps a minor may bring a paschal lamb in this way.

<sup>205</sup>Op. cit., p. 409.

<sup>206</sup>Op. cit., p. 408, Alan J. Peck, transl.

May a minor set aside tithe of cattle (מעשר בהמה)? R. Meir says no-if a minor cannot set aside grain for *terumah*, he may not set aside tithe of cattle. Nor may he designate a substitute animal as offering, or a substitute for any Holy Thing.

Are priests culpable for sacrificing a Holy Thing dedicated by a minor outside the Temple? Kahana says no; R. Yohanan and Resh Lakish say yes. Kahana's view is contrary to R. Judah who says a minor may separate *terumah* and tithes. If that is so, then how can you say the priest is not culpable!<sup>207</sup>

These issues touch on the question: if חשו' is exempted from a ritual obligation, is he thereby excluded? Or may he participate in a voluntary or a כי לאחר יד (unusual) manner?

The text points out: מאיליהן קיבלו עליהן את המעשרות: They (the minors) took the tithes upon themselves. But R. Yohanan presents a קשיא to R. Joshua, (who said the husband of a קטנה does have the right to cancel her vows.) R. Zera says we must say that her vows cannot be canceled.

The question is resolved in Yerushalmi 13:2 (65a) by reference to Mishnah Niddah 5:6: Before this time (the age of vows: eleven for a girl, twelve for a boy; see P'nai Moshe) even if they say, "We know before Whom we have vowed, for Whose sanctity we have sanctified" their vows are not vows. After this age, even if they, "We do not know before Whom we have vowed, for whose sanctity we have

<sup>207</sup>Op.cit., p. 411.

Yerushalmi Yevamot 66b begins a review of Mishnayot Yevamot 13:8-14 dealing with the variety of cases of levirate marriage where a man was married to two minors, or a minor and a deaf-mute, or two deaf-mutes.

The gemara here is operating like a mathematical algorithm attempting to balance out an equation of *yevamot* whose marriages are not equally valid. It explains the question we asked about the mishnah: why does intercourse with the פקחת exempt the חרושת but not vice versa.

Speaking of two minors or two deaf-mutes, the gemara says: *בקניינה של זו כן קניינה של זו*: the *kinyan* of one is like the *kinyan* of the other

But if the two are not equivalent, eg the minor and the deaf-mute, R. Hiyya bar Ashi in the name of Rab says: He marries the deaf-mute and divorces her with a *get*, and the minor waits until she is of age and performs *halitzah*. The minor cannot perform *halitzah* right away, according to R. Meir, lest she be barren (איילונית): not, as we might expect, because she is a minor.

If he had sexual relations with the minor he divorces her, and the deaf-mute is prohibited (from marrying). If he had sex with the deaf-mute he divorces her and she is permitted to marry.

<sup>208</sup>Op. cit., p. 412.



R. Hela said, מפני תקנתה "This is to regularize her position."<sup>209</sup>

Hela's statement emphasizes one goal of the gemara, to make sure that the rules are consistent and in balance, that these irregular females, the minor and the deaf-mute, fit consistently into the system. We recall in Yerushalmi 63a R. Ishmael's praise of R. Eliezer because of his accomplishment of developing consistent rules vis a vis the minor.

Yerushalmi Yevamot 68b expands on Mishnah Yevamot 14:1: חרש who marries with signs may divorce with signs.

How does he put her away with signs? He signs and gives her a get. Just as he makes a sign, he receives a sign. This, Yerushalmi says, applies only where he betrothed her by כסף, a money payment (which, as we have noted above, is not required in the case of a חרשת. If he betrothed her by בעילה, sexual intercourse for the purpose of betrothal, which is a מעשה, then the divorce by דמות—which is not a מעשה—is insufficient. Here again we have the search for an equation.

Yerushalmi Yevamot 14:1 (68b) reports:

R. Eliezer asked R. Yohanan: What about the wife of a חרש or a שומה? (Are they really married? If another man sleeps with this wife, is it punishable?)

<sup>209</sup>Op. cit., p. 425.

R. Yohanan said, no guilt offering is required; R. Jacob bar Aha said the same. If another man should betroth her, it is effective. If he divorced her, she can marry the first man<sup>210</sup>.

The unusual aspect of this passage is its grouping of marriage of חרש and שוטה together as equally and totally invalid. This passage of the Yerushalmi seems ignorant of the rabbinic תקנה discussed in Bavli Yevamot 112b which validates marriage for the חרש. The exception is the case of the woman whose deaf-mute husband went abroad, and was reported dead. She remarried, either a deaf-mute or a פקח. When the deaf-mute husband came home--"she must go forth from this one and from that one"--suggesting some validity to the first marriage.

Yerushalmi Yevamot 14:1(69a ) then cites another case--a woman of sound senses, married to a פקח. He goes abroad and is reported dead. She remarries a חרש, but then the first husband returns. Yerushalmi wants to solve the situation (הוינן סוברין מימר) by having her divorce the חרש and return to the first husband. This is consistent with the attempt to weight the validity of the various marriages. But no- she is subject to the established (13) penalties (עוד היא באילין קסיה).

Yerushalmi Yevamot then asks: Why is it that if a wife becomes שוטה she may not be divorced?

a)The House of Yannai says: because of her passionate loose behavior

<sup>210</sup>Op. cit., p. 437.

b) R. Zeira and R. Ila said: because she cannot keep her get.<sup>211</sup>

R. Nehemiah bar Mar Uqban son of R. Yose said: There are three differences (between these arguments):

If her husband gave her a get in any case, the House of Yannai

(a) would regard her as validly divorced.

R. Zeira and R. Ila (b) would regard her as prohibited.

(c) If she had a son, a father and a brother, the one who says ספני גרירה would regard her as prohibited.

R. Zeira and R. Ila would say, if she has a father, she can keep her get. If she is sometimes שוטה and sometimes חלום the House of Yannai--who said ספני גרירה will say she is prohibited, but R. Zeira and R. Ila--who said she cannot keep her get--will say that when she is sane she can keep her get.

Yerushalmi Yevamot 69b continues with a discussion of Mishnah Yevamot 14:2 which is identical to Yerushalmi Gittin 29b on Mishnah Gittin 5.6, which referred to Mishnah Yevamot. We recall the ambiguous use of the word דעת in this passage. Here the rabbi before whom R. Hanina speaks is Hila; in Gittin it is R. Immi

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<sup>211</sup>This does not come under Deut. 24:1, according to Neusner, *op. cit.*, p. 438.

To sum up, Yerushalmi Yevamot explores quite fully the question of what constitutes a קטן and a קטנה for the purpose of levirate marriage and or divorce. The discussion brings our attention once again to the great flexibility of this definition. Yerushalmi Yevamot recognizes different ages for adulthood in terms of vows, of sexual maturity, and ritual obligations.

### חרש שומה וקטן Mishneh Torah on Marriage and Divorce of

Hilchot Ishut (Marriage) Chapter II contains Maimonides' summary of the definition of who is a קטן and a קטנה. Most of these laws are based on tractate Niddah of the Mishnah, 5:3-6:<sup>212</sup>

1) A girl is called a קטנה until she has two pubic hairs AND is twelve years and one day old. At this point she is a נערה.

2) At twelve years and one day if she has two pubic hairs (known as טימן התחתון, the "nether tokens") she is a נערה for six months. After six months she is a בוגרת.

3) She is still a קטנה if she reaches twelve years and one day without producing two hairs. She may remain a קטנה until age twenty if she has not grown two hairs. At that point when she grows two hairs she is a נערה for six months, as above, then a בוגרת.

4) If she is six months less than twenty, has not developed, and shows the signs of an איילוניית, a barren woman, she is so defined. If

<sup>212</sup> These summaries are adapted from The Code of Maimonides, Book Four, The Book of Women, Isaac Klein, transl., Yale University Press, New Haven, 1972, and from Mishneh Torah, Mosad Rav Kook, R. Shmuel Tanhum Rubinstein, ed., Jerusalem, 1946.



she simply does not develop, she is called an איילונית at age 35 and one day.

5) A woman who reaches 35 and one day without developing is called an איילונית which is a kind of בוגרת, without going through an intermediate period (נערה)

6) An איילונית, a בוגרת and a נערה are all גדולות, adult women. Signs of an איילונית are no breasts, difficulty in intercourse, no pubic mound, and a deep voice.

7) Development of breasts is called the upper tokens.

8) If a girl less than twelve has developed she is still a קטנה. If she has developed the nether tokens the development of her breasts does not determine her status.

9) Even if a girl shows no tokens of maturity, giving birth defines her as an adult (גדולה) after age twelve.

Hilchot Ishut II, 10-15 define the signs of maturity for a boy.

10) A boy is a קטן or a תינוק from birth until age 13 (Rambam does not say when this division occurs. Mishnah Niddah 5:6 defines 13 as the age when a boy's vows need not be examined to be valid.

11) If a boy reaches 13 without developing two hairs, he is still a קטן until he is twenty years less thirty days even if he shows signs of being a eunuch (סרים).

12) If he has either two pubic hairs or two facial beard hairs by the time he is thirty days less than twenty years he is not regarded as a eunuch until he is 35 years and one day old.

13) A eunuch has no beard, soft hair, a thin voice, watery semen, weak urine, etc.

14) A boy whose penis or testicles are damaged is a "man-made eunuch" (סריס אדם). He is regarded as a גדול at age 13 and one day since he will never go through puberty. A born eunuch is a סריס חמה a "sun-made eunuch."

15) A boy of thirteen and one day who has the upper tokens (i.e. a beard) but no pubic hair is ספק בין גדול וקטן in a state of doubt as to whether is a גדול or קטן. If he has not been examined he is assumed to be an adult if he exhibits the upper tokens.

16) The pubic hairs for a boy or girl must be long enough for the tip to be bent over to the root for them to count as the tokens. When the hairs not quite long enough the boy or girl may be treated either as a minor or an adult.

17) The two hairs must be on or near the genitals.

18) If a girl has two hairs before age 12 or a boy before age 13, these are considered the same as a mole (שומא) and do not constitute tokens of puberty.

19) As long as the boy or girl is examined after age 13 or 12 respectively, if two pubic hairs are found, they count as tokens of puberty--it cannot be argued that the two hairs appeared earlier.

20) A girl must be examined by pious and trustworthy (בשרות ונאמנות) women.

21) The years must be reckoned according to the Jewish calendar as fixed by the courts.

22) Two qualified male witnesses (שנים אנשים בשרים להעיד) must testify as to the girl or boy's age, not women or relatives.

23) The father's testimony as to whether a boy is nine or a girl is three (the ages when sexual intercourse is valid for kinyan) may be trusted regarding sacrifice but not regarding flogging or other penalties (מכות או עונשים). His testimony may be trusted regarding vows (for a 12 or 13 year old) but not for מכות or עונשים.

26) Wherever חרש or חרשת is mentioned, it refers to persons who can neither hear nor speak. A person able to speak but not to hear, or hear but not to speak, has the same status as any other person. A man or woman שכלמים בדעתם, with a perfect mind, neither a חרש nor חרשת is called פקח or פקחה.

In Hilchot Ishut, Chapter II, Halacha 27 Rambam gives a long list of special categories of people who are defined: eg נערה, קטנה, חרש, סריס. It is of interest to us that שוטה is not on this list.

7) If a minor betroths a woman, his betrothal is not valid  
(קטן שקדש--אין קדושיו קדושיו) An adult male may betroth a קטנה who is an orphan or no longer under her father's authority as follows:

a) If she is less than six years old, no matter how intelligent (נבונה), it is not a valid betrothal, and she need not refuse.

b) If she is ten years or more, no matter how slow (טבלה, a fool ) her betrothal is valid and requires refusal ( this means if she does not wish to go through with it-see Halacha 8) since she was betrothed לדעתה with her consent.

c) If she is between six and ten, she must be examined. If she can make distinctions in matters of marriage and betrothal, she must refuse. otherwise her betrothal is invalid and does not require refusal.

8) This is how refusal works. If after being betrothed a girl does not wish to stay with her husband, she must say "I do not wish to live with him" in front of two witnesses and then may leave without a get. This is because her betrothal is not valid מן התורה אלא מדברי סופרים. If she stays with her husband until she comes of age, she is then fully married and needs a get to leave.

9) If a חרש marries a פקח or a פקח marries a חרש, their betrothal is not valid מן התורה but only מדברי סופרים. If a פקח betroths a חרש afterwards, this betrothal is stronger and he must give her a get.



a get before she may return to the deaf mute husband. But if a male שוטה betroths a normal woman, or a normal man betroths a female שוטה, there is no betrothal at all, either מִדְּבַרֵי הַסּוּפְרִים or מִן הַתּוֹרָה. The source for this, according to the commentary of R. Shmuel Tanhum Rubinstein is Bavli Yevamot 112:

בִּי אֵין אָדָם דֵּר עִם נַחֲשׁ בְּכַפִּיפָה אַחַת

It may be relevant here to note Hilchot Ishut, Chapter IV, Halacha 18) If an intoxicated man betroths a woman, the betrothal is valid, even though he is exceedingly drunken. If, however, he has reached the drunkenness of Lot, his betrothal is invalid. This matter requires thorough deliberation<sup>213</sup>.

Chapter 12: 14 states that a man must maintain his wife and his minor children less than six years old. After that, there is a rabbinical *takkanah* that he must feed them until they are grown. But he may not be compelled to maintain them after age six.

Chapter 12: 17 states: If a man becomes שוטה the court may seize his property and sell it in order to provide for the maintenance of his wife and his children less than six years of age. This is held to be analogous to a man who goes overseas and abandons his family. (Ketubot 48)

<sup>213</sup>Klein, *op. cit.*, p. 27.

13) If a man of sound mind says, write a get, and it is delivered, and then he jumps off the roof, the get is still valid.<sup>214</sup> If he falls off the roof by accident or is blown off, it is not valid.

14) A man seized by an evil spirit (רוח רעה) may not write a valid get for his wife מפני שאין דעתו נכונה ומישובת: his mind is not sound and settled. (We are referred to Bavli Gittin 67) The same for a man who is as drunk as Lot. If he is less drunk, the get is in doubt.

16) A man who has lost his speech (נשתתק) but his mind is sound (והרי דעתו נכונה) must be tested three times at intervals. he must be tested carefully, since his mind may have been deranged (שמא נטרפה דעתו). If he writes a get it is valid; the rule for נשתתק is not the same as the rule for חרש.<sup>215</sup>

17) If a man is married in sound health and becomes a שוטה or חרש --Rambam says אין צריך לומר נשתתק--he cannot divorce his wife until he recovers (עד שיבריא). One may not rely on gestures with a חרש אף על פי שדעתו נכונה ומישובת--even if his mind is sound and settled.

If he marries while he is a deaf-mute he may divorce with gestures as he married by gesture, and his marriage is valid only by rabbinic law and not by Torah law.

18) If a man betroths a minor through her father and divorces her

<sup>214</sup>Op. cit., p. 175.

<sup>215</sup>Op. cit., p. 177.

19) If a קטנה is betrothed by her father and then he dies, she is divorced when she receives her get if she can distinguish her get from another object. If not, she is not divorced until she is able to do so.

Mishneh Torah, Hilchot Gerushin Book IV Chapter III

15) Anyone may write a get except for these five: גוי, ועבד וחרש ושומט וקטן

16) Why are these five not qualified? Because he who writes the get must write it expressly for the man who divorces and the woman who is divorced<sup>216</sup>. The heathen might follow his own idea, and the אינם בני דעת do not have normal understanding. If one of these five does write a get it is no get.

17) If one of these five writes the formal part of the get (טופס) and leaves blank the particularized section (תורף): the names, date and the formula:

פקח גדול) and an adult Israelite of sound mind (הרי את מותרת לכל אדם (ישראל) writes these in, it is valid.

18) טופס if an adult Israelite of sound mind supervises even נכתחילה; but a heathen or a slave may not. This rule is only a תקנת סופר, for the convenience of the scribe.

<sup>216</sup>Op. cit., p. 182.

6) All are qualified to act as an agent for a get except for גוי, עבד, חרש שוטה וקטן. If one of these receives or brings the get it is not valid.

8) If the agent had been a minor when given the get, and came of age when he brought it; was a deaf-mute and became sound, a שוטה and became sane, a heathen and was converted, or a slave and was freed, the get is not valid.

However, if the agent was sound at the beginning and end of the process, the get is valid (i.e. if he was sound, became שוטה and then recovered).

9) A minor girl may not appoint a receiving agent.. no testimony may be given for the act of a minor, שאינו בן דעה גמורה, because his mind is not completely formed.<sup>217</sup>

Chapter X: 23) A wife who becomes חרשת may be divorced by means of a get. But a wife who becomes שוטה may not be divorced until she recovers. This rule was enacted by the Sages to prevent licentious men from being free to have their way with her (שלא תהא הפקר) since she cannot take care of herself. He can marry someone else in the meantime but should make sure she has food and drink from her own money. He does not have to provide her with food and clothes or conjugal rights for it is unbearable for a sane person to live with an insane person

(שאיין כח לבן דעת לדור עם השוטים בבית אחד)

<sup>217</sup>Op. cit., p. 197.



162

Nor is he liable for her medical treatment [See Marriage Laws 14: 17: If a wife becomes ill, the husband is obligated to treat her until she recovers (Bavli Ketubot 51) . If however, the illness is a long one, and he will have to spend a great deal of money for her treatment, he says to her "Here is your ketubah-defray your expenses out of your ketubah or I will divorce you. He gives her her ketubah and departs, and his wish must be honored. It is not proper to do this however because it is contrary to decency <sup>218</sup>] or her ransom. Moreover if he divorces her anyway the divorce is valid. <sup>219</sup> He may send her away from his house and does not have to take care of her<sup>220</sup>.

Mishneh Torah Sefer Nashim, Hilchot Gerushin, Chapter XI: Refusal

1) A man should not marry a קטנה. If she is an orphan, she may declare her refusal and leave him without a get. This is because her betrothal is not completely valid. (אין קדושין קטנה קדושין גמורין) This is explained in Chapter IV:8 of Marriage Laws, ( listed above). Even if she is given in marriage by her father, if she is widowed or divorced while still a minor, she is then an orphan in her father's lifetime, and when she remarries may exercise the right of refusal<sup>221</sup>.

2) A חרש does not have the right of refusal, even though her marriage is actually equivalent to that of a קטנה (both are דרבנן). (כדי שלא יסנע מלנשא) This is so men will not refuse to marry her

<sup>218</sup>Op. cit., p. 91.

<sup>219</sup>According to Ravad, if she is able to keep her get the divorce is valid see דאורייתא - notes p. שח in Rubinstein edition of Mishneh Torah.

<sup>220</sup>But he must give her her ketubah-see Chapter 25:4 in Marriage Laws.

<sup>221</sup>Note: the earlier sources do not advise in this way against marrying the קטנה .

3) A קטנה may exercise the right of refusal בין מן הארוסין בין מן whether after espousal or marriage; in her husband's presence or in his absence. She may also exercise refusal against her yavam, and against a second or third husband, as long as she is a קטנה. If a קטנה becomes betrothed to a second man after being betrothed to one man, the second betrothal counts as refusal.

4) A קטנה may exercise refusal as long as she is a קטנה--that is until she is a נערה or is known as an אילונית. If her husband had intercourse with her after she is twelve years and one day she may not refuse, since ביעולה is a means of marriage.

6) Even if after twelve years and one day if he has not had intercourse with her and if there is a question as to whether she has reached puberty, she should have a get. However she may also simply become betrothed to another man and is then forbidden to the first man.

7) Who is the קטנה who must refuse? We recall from Gittin: if she is between six and ten she must be examined as to her mental development: if she knows enough to take care of her קדושין, she may refuse. If she does not know enough to do this, she can go back to her mother's house באלו לא נתקדשה בעולם.

If she is less than six, she need not refuse, no matter how intelligent. If she is more than ten, she must refuse, no matter how dull.

164  
If she was given in marriage by her mother or brothers or other relatives without her consent (שלא בדעתה) she need not refuse.

15) If a חרש divorces his wife by gestures (ברמיזה) and she becomes betrothed to another חרש or to a פקח she is forbidden to return to her first husband. But if the divorced wife of a normal man marries a חרש who then divorces her, she may return to her first husband.

### Chapter XIII

8) Hearsay testimony is valid for a woman's marital status, if the person testifying is בן דעת even a male or female slave; but not if he heard it from a שוטה or a קטן.

9) But a woman may remarry if someone heard children innocently talking about details of her husband's funeral.

### Treatise III Levirate Marriage

Chapter I:6) A brother by the same father of any age, as long as he was born (his head had emerged) before the husband died, makes the widow subject to *yibum*.

16) If a *yavam* who is nine years and one day has intercourse with his *yevamah*, they are married. However it is not a complete marriage until he is of age. At that point he must again have intercourse with her or submit to *halitzah*. He may not submit to *halitzah* until he is of age because Deut. 25:7 says "the man".

17) A minor *yevamah* may marry her *yavam* but she may not perform *halitzah* until she is of age and is found to have the tokens of puberty.

18) If a minor *yavam* has intercourse with his minor *yevamah*, they must be kept together until they grow up.

## Chapter V

18) The act of intercourse of a קטן who is nine years and one day is equivalent to נאמר by an adult *yavam*. The נאמר of a *yavam* who is nine years and one day is effective לבתחילה but not בדיעבד. The get or *halitzah* of a minor is invalid whether לבתחילה or בדיעבד.

19) Thus: if a minor *yavam* has intercourse with his sister in law or makes a verbal declaration לבתחילה she becomes ineligible to the other brothers.

If an adult *yavam* makes a verbal declaration, and then the minor *yavam* does the same, the minor has done nothing.

If the minor *yavam* has intercourse with his sister-in-law after his adult brother has bespoken her, the minor has the stronger claim, because it is like two adults who have spoken for the same woman in sequence.

20) But if the minor has intercourse with her, and then the adult



21) If a *yavam* nine years and one day has intercourse with his sister-in-law but does not after he comes of age she requires a get and *halitzah*; if he has intercourse with her after he comes of age she requires only a get.

22) A male of nine years and one day who has not developed is the same as a male of twenty who has not developed.

23) The betrothal of a קטנה who is entitled to refuse and the betrothal of a חרשת are both valid דרבנן but are still two different categories. A קטנה is subject to betrothal so that people will not take liberties with her--and it is held until she comes of age. A חרשת is allowed to be betrothed so she will not stay single forever--תקנו לה נשואין שלא תשאר פנויה לעולם

If all the sisters-in-law in one house are minors or deaf mutes, intercourse with one exempts the others.

24) If one is a deaf mute and one is a minor, the minor is instructed to refuse; he marries the deaf mute and then may divorce her if he wishes.

25) If one is normal and one is a deaf-mute, intercourse or *halitzah* with the normal one exempts the deaf-mute but intercourse with the deaf mute--whose קדושין is only דרבנן--does not exempt the normal one.

Similarly if one sister is a minor and one is of age, intercourse with the adult exempts the minor but not vice versa.

26) If both are minors, then intercourse with one does not exempt the other. So the other should refuse, and then the *yavam* may keep the first.

27) Similarly if one sister-in-law is a minor and one a deaf mute. If the *yavam* has intercourse with the minor, and then the deaf mute, the minor does not become ineligible because her tie is stronger since eventually she will be completely eligible. So he should give the deaf mute a get and marry the minor.

28) If one is a minor and one a deaf mute, and he has intercourse with the deaf mute first and then the minor, the deaf mute becomes ineligible. The minor should be instructed to refuse and the deaf mute given a get.

29) If one sister-in-law is normal and one a deaf mute, if he has intercourse with the normal one and then the deaf mute, the deaf mute should be given a get, and he may go back to the normal one. If he has intercourse with the normal one and then the deaf mute, the deaf mute is disqualified and must be given a get, while the normal one needs a get and halitzah.

30) If one sister-in-law is of age and one is a minor, if the *yavam* has intercourse with the one who is of age, and then the minor, the one who is of age is not disqualified and the minor should declare

her refusal. If he has intercourse with the minor and then with the one who is of age, the minor should also refuse and he should marry the one who is of age.

## Chapter VI

3) The following are eligible for *yibum* but not for *halitzah*: חרש, שוטה וקטן because they do not have the intelligence required for *halitzah*. If a חרש marries his *yevamah*, he may not divorce her, since his intercourse effects a complete marriage but his get is valid only דרבנן. A minor nine years and one day who marries his *yevamah* may not divorce her until he comes of age.

6) The following may contract levirate marriage but not perform *halitzah*: a female deaf mute, a female קטנה or שוטה because אין בהן דעת לקרות ולהבין, they lack intelligence to recite and understand. The *yavam* may divorce the חרשה later with a get after having intercourse.

8) The wife of a שוטה or קטן is exempt from both *halitzah* and *yibum*, because Deut. 25:5 "the wife of the dead shall not be married abroad" because the שוטה and the קטן are incapable of marriage.

Chapter VII deals with similar cases of levirate marriage where one of the levirate partners dies. The same basic points are reiterated: דרבנן marriage דאורייתא outweighs marriage.

# Treatise IV Virgin Maiden: נערה בתולה

8) A girl is not liable for a fine for seduction before the age of three.

9) The following women are not entitled to a fine: a בוגרת (of age); one who has refused; an איכלונית; a שוטת; a חרשת; and a girl known to have a bad reputation since her childhood.

## Treatise V Sotah

Chapter II, 2: Fifteen kinds of women are not eligible to drink of the water, even if they are willing and their husbands desire it, but instead they are dismissed without their ketubah (if secluded with another man): they include a קטנה married to an adult man, an adult woman married to a קטן, the wife of a man who is lame, mute or deaf or has lost a hand, or a woman who is lame, mute or blind has lost a hand or is deaf.

3) These prohibitions are derived from Numbers 5:29 which says that the wife (excluding a קטנה) who undergoes the Sotah ordeal is under her husband (which excludes the קטן); Numbers 5:22 "the woman shall say" excludes the mute and Numbers 5:19 "he shall say to the woman" excludes a deaf woman.

4) A קטנה given in marriage by her father who has been unfaithful does not drink the waters but is forbidden to her husband and warned. A קטנה who has no father is free to refuse.



We should also look at the Mishneh Torah on Mechirah, "Sales," chapter 29, since the laws of buying and selling for חרש, שוטה וקטן are related to marriage and divorce which involves *kinyan*, acquisition.

We learn there that although the purchase and sale of the חרש, שוטה וקטן as a group are not valid, the rabbis have decreed that the חרש and קטן may buy and sell movable goods בחייו, so they can make a living. The חרש may use gestures in his transactions, and he may be tested to make sure he understands what he is doing. But as in marriage, the purchase and sale of a שוטה is not valid: אין מקחה מקדח. How then can he live? An administrator, אפוטרופוס, should be appointed for him.

The purchase and sale of one who is sometimes sane and sometimes insane (עת שוטה ועת שפוי) is dependent on his condition: "during his periods of sanity all his acts are valid." (Mechira 29: 5) Again, witnesses must make sure that he was indeed sane at the time of the transaction.

Minors under the age of six may under no circumstances transact business. However, as we have seen in Bavli Gittin 59, a minor over the age of six, אם יודע במיב משא ומתן, if he understands business, may buy and sell movable goods--whether a large or small amount is involved. (Mechira 29: 6) He may not buy and sell real estate until he is of age. And if he has a guardian, he may not transact business without the guardian's knowledge.

Mechira 29: 8 illustrates the variable nature of the קטן;

בודקין את הקטן אם יודע בטיב משא ומתן או אינו יודע לפי שיש קטן חכם ונבון  
שהוא יודע והוא בן שבע: ויש אחר שאפילו בן שלוש עשרה אונן יודע ביטב משא  
ומתן

There are some children of seven who understand business and others who even at thirteen do not understand.

Thus the validity of a 13 year old's sale of real estate depends on whether he understands business (Halacha 12). However, the purchase of real estate even by a minor is valid because of the rule זכין לאדם שלא בפניו, a privilege may be bestowed on an individual in his absence (Bavli Kiddushin 42)--the same rule which allows for conversion of a minor by his father or by a court.

In the matter of inherited land (קרקע אביו) the term "of age" means when he is twenty years old, and then only if he shows signs of either puberty (הביא שתי שמורות) or impotency (סימני סדים). If not, then "of age" means age 35 and one day (עד שיגדיל לרב שניתיו). Isaac Klein translates "age 36" but the commentary in the Hebrew by R. Simchah Bunam Urbach refers us to Hilchot Ishut 11 for 35 years and one day.<sup>222</sup>

<sup>222</sup> Mishneh Torah, Sefer Kinyan, note קפה Rav Kook ed.

## Chapter 5- Observations and Conclusions

Having looked at a sample of the rabbinic treatment of חרש, שוטה וקטן in both ritual and practical matters, what can we observe and conclude?

We must first acknowledge that our discussion is by no means exhaustive. חרש are treated in tractates Tohorot and Yadayim and there are scattered but significant references in Rosh Hashanah, Megillah, Shabbat, and Hullin. In Rosh Hashanah we learn that חרש not being obligated cannot perform a ritual obligation, such as blowing the shofar or reading the Megillah, on behalf of those who are obligated.<sup>223</sup> However, we learn in Bavli Megillah 19b that according to Rabbi Judah a minor (though not חרש or שוטה) may read the Megillah for the congregation.

In Bavli Shabbat 153b we deduce the hierarchy of חרש, שוטה וקטן from the situation of who should carry a purse if darkness falls on erev Shabbat while one is traveling. The conclusion is that the שוטה has the lowest degree of obligation; then the קטן and then the חרש although there is disagreement regarding the relative status of חרש and קטן. Bavli Hullin 2a maintains the right of חרש to accomplish שחיטה if there is a competent adult supervising.

The first point that becomes clear is that חרש, שוטה וקטן is not a uniform category. Although the rabbis placed these three individuals

<sup>223</sup>Bavli Rosh Hashanah 29a and Mishnah Megillah 2:4.

173  
in one category because of lack of דעת, no sooner do the rabbis establish this category than they begin to break it down. The most fragmented category is the קטן. Already in Mishnah Hagigah there is a recognition that the קטן is not easy to define, and may be different in different situations. Yitzhak Gilat, in his 1990 article, בן שלוש? עשרה למצוות?<sup>224</sup>

Gilat points out that there is, as we have observed, a wide variety of different ages of "majority" for different life tasks. If we look at the four rubrics we have explored--Hagigah, Terumot, Baba Kamma and Gittin/Yevamot--we find many illustrations of this variety. In Tosefta ראיה we have the classic passage which says, a child should do each mitzvah when he can. In Hagigah we have the exemption of a child who cannot walk up to the Temple Mount. In Bavli Hagigah we see that a child who is not yet חייב for a mitzvah should be encouraged to do it anyway for educational purposes.

In Bavli Terumot we meet the concept that a minor may perform a mitzvah (separate *terumah*) with his father supervising. Baba Kamma introduces the idea that although the minor is not legally responsible for damages, he may become so through the appointment of a guardian. In the same tractate we learn that a minor may receive damages for shame, בושת, when he is mentally capable of expressing shame. In Gittin we learn that a minor may not effect a betrothal but we learn in Yevamot that a boy who is nine years and one day may effectively acquire his sister in law through intercourse, and a minor girl who is betrothed by her mother or brothers may refuse. An intelligent child of six may buy and sell but

<sup>224</sup> מחקרי תלמוד, האוניברסיטה העברית, ירושלים, תש"ן, 53-39



in the case of family land, certain individuals may not be considered "of age" until 36.

We have observed that although שוטה may indeed be what Judith Abrams calls a "stigmatized" category, the rabbis, as Tzvi Marx noted, defined שוטה so narrowly that few people with mental handicaps would actually be classified in this way; also anyone who was so classified would be deemed fit if he no longer displayed the traits of a שוטה. Bavli Hagigah 3b offers the narrow definition of שוטה: someone who goes out alone at night, spends the night in a cemetery and tears his garments. The Rambam in Hilchot Edut 9:9 rejects this narrow definition of שוטה in favor of one which defines as שוטה:

כל מי שנטרפה דעתו ונמצאת דעתו משבשת תמיד בדבר מן הדברים  
 "Anyone who is sufficiently confused so that his mind is always irrational in one area."

Rambam adds:

Discretionary power is vested in the judge in this matter, as it is impossible to lay down detailed written rules on this subject.

However Joseph Karo<sup>225</sup> following the Tur reverts to the narrower talmudic definition, insisting on the three specific symptoms of Hagigah 3b. Tzvi Marx notes that Karo's position has

one very benevolent effect. The possibility to deprive someone of his halachic status, on the basis of mental aberrance, is much more limited<sup>226</sup>.

<sup>225</sup>Bet Yosef, Eben Haezer 119, according to Tzvi Marx.

<sup>226</sup>Marx, *op. cit.*, p. 407.

Since separating תרומה is an area where סחשבה, intention, is crucial, there is no question that someone who is truly שוטה could not do this properly. However in Yerushalmi Terumot, not only do we review the narrow rabbinic definition of שוטה from Hagigah, but we also look at the קורדיקוס, someone who is temporarily mentally imbalanced or lacking דעת, perhaps due to epilepsy or another condition. A person who is קורדיקוס is not stigmatized, only temporarily indisposed.

In Baba Kamma the שוטה is generally treated in a similar manner to חרש and שוטה, except in the matter of בושח, payments for humiliation, shame or embarrassment. Bavli Baba Kamma 86b tells us that the שוטה is himself the greatest embarrassment possible, so he is not eligible for such a payment. On the other hand the שוטה along with קטן and חרש is protected against legal liability for the consequences of his lack of judgment.

In Bavli Yevamot 112b we learn that the marriage of the שוטה is not valid, because "no one can live with a snake in a basket." If the שוטה dies, no halitzah or yibum is required. On the other hand, if a man became שוטה after marrying, he may not divorce his wife, and if a woman became שוטה after marrying, her husband may not divorce her, lest she become הפקר, ownerless property, vulnerable to predators. Hence, although the שוטה is perhaps the most stigmatized category of the three we are considering, it is also highly protected. This protected status is emphasized by Eric Polokoff's rabbinic thesis.

Even though Mishnah Terumot 1:2 defines the חרש as one who can neither hear nor speak, Bavli Hagigah wants to exempt from the

mitzvah of ראייה also the one who can hear but not speak or speak but not hear. However, the חרש who can hear but not speak or speak but hear although forbidden to separate terumah לכתחילה may do so בדיעבד. The complete חרש may not separate terumah because of an inability to determine his intention, מחשבה. In Baba Kamma 86b we see that the חרש, even the complete חרש, is regarded as subject to insult and embarrassment and therefore may be paid בושת--unlike the שומע, and unlike even the קטן who is only able to receive בושת if it is determined by examination that he feels shame. Even the complete חרש could marry and divorce according to rabbinic takkanah, although such a marriage did not have the binding nature of the marriage of a normal person and could hence be dissolved by a conflicting marital claim by someone with undisputed דעת.

Thus despite the rabbinic clustering of חרש, שומע וקטן we see that in the four legal areas we have studied they are treated differently from each other. Moreover, a great variety of קטנים are distinguished from each other as well as various חרשים. Even the שומע is distinguished from the קורדיקוס and the definition of a true שומע is the subject of much controversy.

Having acknowledged the subtleties in the rabbinic treatment of חרש, שומע וקטן we must also acknowledge the broad outlines.

Judith Abrams describes the origin of the category of חש"ו in the Mishnah:

The sages developed an intellectual and spiritual system of Judaism which was transmitted with a great deal of orality. Thus, anyone who could not communicate verbally was more disabled in this system than any other individual. Mental, hearing and speaking disabilities compromised one's ability to participate in the system in general. These sorts of disabilities are most often designated by the category, *heres, soteh v'qatan*, the deaf-mute person, the mentally ill or mentally disabled person and minor. Such individuals are stigmatized. Their disabilities serve a "master status": no differentiation is made between, for example, a schizophrenic person and one with an IQ of 40. All such persons are placed into a discredited group. Their performance of mitzvot is questioned and often discredited. However, as we shall see, one may move from this discredited category into a valid one, if it can be proved that an individual has *da'at*, i.e. has been impressed with the seal of his culture's *gnosis*.<sup>227</sup>

This generalization sounds too sweeping until we remember it refers only to the Mishnah which was redacted for easy memorization rather than the subtle differentiation of the Talmud, especially the Bavli.

The Encyclopedia Talmudit<sup>228</sup>, in its article on שומה וקטן, sums up the category thus:

אף על פי שנדריהם חלוקים ואין דיני שוים בכל מקום, הוזכרו ביחד בתלמוד ובפוסקים, ראשונים ואחרונים, בתורה דוגמא ומשל לשאינם בני דעת וחיוב--במצוות ובמסוך-- לענין דברים התלויים בדעת או במחשבה וכוונה.

<sup>227</sup> Abrams, *Op. cit.*, p. 87.

<sup>228</sup> אנציקלופדיה תלמודית, כרך 17, דף תקלה



Deaf-mutes and mentally disabled are joined in being judged incompetent as if they were similarly mentally incapacitated, though the Talmud knows there are real differences.<sup>229</sup>

What observations can we make from the material we have reviewed the common determinants of the category, חש"ו?

In Hagigah we see that חש"ו are exempt from all aspects of ראייה, both from "appearing" with the חגיגה offering and "rejoicing" with the שולחים offering. We also note that in their company are numerous others with physical disabilities. This particular exemption seems reminiscent of the exclusion in Leviticus 21:17-21 of any כהן with a physical defect from serving as priest. Similarly any blemished animal could not be offered as a sacrifice. Judith Abrams suggests that to the priestly author,

The priest's physical perfection (and the sacrificial animal's) mirror God's perfection.<sup>230</sup>

It seems not surprising that in the ritual of appearing before God only the perfect are summoned. Even though Hagigah suggests a variety of reasons for the various exclusions (the קטן cannot walk; the חרש cannot hear or speak), the commonality of the listed of those exempted in Hagigah seems to be "not perfect," meaning not an intelligent able bodied male Israelite householder. (refer to Neusner) Bavli Hagigah 2b says the commonality is that all three are not

בני דעה.

<sup>229</sup>Tzvi Marx, Halakha and Handicap, pp. 398-399.

<sup>230</sup>Abrams, op. cit., p. 49.

Exactly what is *בר דעת* in this context? We refer once more to Judith Abrams' helpful discussion of the various meanings of *דעת*. She suggests that when *דעת* is a "cognitive, moral and psychological quality, associated with those who embrace wisdom, i.e. Torah," it requires both speech and hearing.<sup>231</sup> *דעת* also could here mean a form of intention, to exclude the *שומה*.

The exclusion of *חש"ו* from the mitzvah of separating Terumot has a much clearer common basis. The mitzvah of Terumah is derived from Exodus 25:1 :

Tell the Israelite people to bring me gifts; you shall accept gifts for Me from every person whose heart so moves him, *אשר ידבנו לבו*

and from Numbers 18:27: *ונחשב לכם תרומתכם*

Those who separate *תרומה* must exhibit *מחשבה*, intention, and a free will, *נדב לב*. This is not exactly the same as *דעת*. Presumably a child under his father's control does not have *מחשבה* and *נדב לב*, though he may be intelligent, *בר דעה*. A *חש"ו* who cannot recite the *ברכה* which is the clear expression of the appropriate *מחשבה* is not eligible at least *לכתחילה* to perform this mitzvah. And a *שומה* lacks both *מחשבה* and free will. As Tzvi Marx puts it:

<sup>231</sup> *Op. cit.*, p. 40.

Moral agents are responsible for their actions, but for this to be meaningful, they need to be free, not compelled outside of their volitional control. Mentally handicapped people cannot be said to be free in this way. They seem driven or compelled by constraints within themselves, their conduct like that of a man in the grip of an irresistible force.<sup>232</sup>

How are חש"ו alike in responsibility for damages? In Bavli Baba Kamma 39a we learn that all three are exempt from liability for damages, but the community can be protected by having a guardian, אפוטרופוס, appointed for them. If חש"ו own a goring ox, the injured party can be compensated from the property of the owner through the agency of the guardian. The exemption from liability comes from the lack of דעה; since חש"ו cannot be said to be fully aware of the danger, nor can they be credited with intention to do damage, they are exempt. For this reason they are "difficult to deal with" as Mishnah Baba Kamma 8:4 reminds us. The warning against dealing with these people serves as a deterrent against taking advantage of their vulnerability.

With regard to marriage and divorce, although there are great differences, as we have noted, in the treatment of חש"ו in this area, there is the commonality that most of these individuals may not contract a completely binding marriage by Torah law. The exception is the קטנה or חרש who is given in marriage by her father to a normal man who is of age. Here we have a case where the category of חש"ו intersects with another Talmudic category, that of נשים, עבדים וקטנים, women, slaves and children. these are individuals who, although possessing דעה, belong to the domain of another person and thus do not have control of their own lives.

<sup>232</sup>Marx, *op. cit.*, p. 401.

Judith Abrams has suggested that this intersection is one which produces anomalous cases in Jewish law.<sup>233</sup> In this case the חרש or קטנה is not expected to have דעת, which in this instance means consent. So, ironically, she becomes "normal."

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<sup>233</sup>Private conversation, 1995-96.



## Implications for Schools and Congregations

How do we as Reform Jews respond to the message of our texts regarding the שומע וקטן, שומע וקטן? Do we need to maintain protective exemptions from normal religious obligations for these people? If so, how do we do so without stigmatizing them?

The Reform Movement has produced several documents affirming its commitment to the disabled. In his 1963 collection of Responsa, Solomon Freehof included a responsum on Bar Mitzvah of a mentally retarded boy which touches on many of the traditions we have described. The Lehiyot Guidelines, produced under the direction of Rabbi Howard Bogot, list activities and resources for congregations wishing to become more sensitive and accessible to the needs of those with disabilities. The UAHC Press has published A Question in Search of an Answer: Understanding Learning Disability in Jewish Education, by Roberta M. Greene and Elaine Heavenrich. The Responsum on the Disabled, authored by Judith Abrams, which will appear in the next collection of Reform Responsa, seeks to make this commitment into an obligation.

In addition to looking at our movement's policies in the light of halacha, it seems useful also to look at our treatment of the disabled in the context of the values of American secular society, as represented by the Americans with Disabilities Act of 1990 and the recent publications of the National Organization on Disability.<sup>234</sup>

<sup>234</sup>That All May Worship: An Interfaith Welcome to People with Disabilities, National Organization on Disability, Washington, D.C. 1994; Loving Justice: The Americans with Disabilities Act and the Religious Community, NOD, Washington, D.C., 1996; From Barriers to Bridges: A Community Action Guide for Congregations and People with

The earliest modern Reform document on inclusion of the mentally disabled which I have found is Solomon Freehof's responsum to the question, may a mentally retarded child celebrate a Bar Mitzvah by reciting the Torah blessings while his father recites the Haftarah?

Freehof notes the inherent problem in the situation, the problem we have struggled with in looking at the status of חרש, שוטה וקטן in the early rabbinic literature.

Since Bar Mitzvah means the formal acceptance of responsibility for the commandments and since clearly, such a child can hardly be responsible, then whether Bar Mitzvah is permissible is surely a question which must have often been asked before<sup>235</sup>.

Freehof's responsum refers back to our category of שוטה as included in חרש, שוטה וקטן. He assumes that the mentally retarded boy in the question, who is described as "to some small degree educable," is the talmudic שוטה, though he acknowledges

Of course mental ailments are so varied that one can hardly expect the Talmud to have a precise definition.<sup>236</sup>

Freehof interchanges the terms "feeble-minded," "mentally retarded," and "insane" in the responsum. He quotes the definition of שוטה in Hagigah 3b and notes that the שוטה is normally grouped with חרש וקטן. However he notes that the status of the שוטה is different: as we have noted, whereas the חרש may enter into a valid marriage the שוטה

Disabilities, NOD, Washington, D.C., 1996.

<sup>235</sup>Solomon Freehof, "Mentally Retarded Child and Bar Mitzvah," Recent Reform Responsa, HUC Press, Cincinnati, 1963, p. 23.

<sup>236</sup>Op. cit., p. 24.

Freehof adds that the שומה is also not entitled to buy or sell either movable property or real estate, nor can he transfer property to another or have property transferred to him.<sup>237</sup> Freehof cites Rashi to Hagigah 3b, that the שומה is "free from all the commandments and from all punishment." As a result of this, says Freehof, the שומה is not counted in the minyan.<sup>238</sup>

Freehof quotes Avot 5:12 as the source for the Bar Mitzvah becoming responsible for the mitzvot, and notes that "the father recites the blessing--generally interpreted to mean that from now on this boy will bear the responsibility for his own sin."<sup>239</sup> Presumably he refers to "ברוך שפטרני מעונשו של זה". The logical conclusion, notes Freehof would be, that "Bar Mitzvah has no meaning in (the שומה's) case and should not be carried out."<sup>240</sup>

But Freehof chooses not to accept this conclusion. His loophole is that the Bar Mitzvah ceremony "is only a custom, a minhag." There is no direct reference in the halacha, he says, as to whether a שומה may recite the blessings. But, he argues, since the שומה is normally grouped with חרש וקטן, we may argue from the case of the minor. According to Shulchan Aruch Orah Hayyim 282:3, based on Bavli Megillah 23a, a minor may be among the seven called to the Torah on Shabbat morning, with the proviso based on Bavli Berachot 48a, that

<sup>237</sup>Maimonides, Mishneh Torah "Mechira" 29:4 and Shulchan Aruch Choshen Mishpat 235:20 and 243:16, cited by Freehof, ibid.

<sup>238</sup>Shulchan Aruch Orah Hayyim 55:8, cited in Freehof, ibid.

<sup>239</sup>Op. cit., p. 25.

<sup>240</sup>Ibid.

he must know to Whom the blessings are addressed:

קטן היודע למי מברכין מזמנין עליו.

Freehof concludes:

If, then this unfortunate child has enough intelligence, not merely to learn the blessings, but to understand that the blessings are addressed to God, then he may be called up to the Torah at any time. If that is the case, why not also on the Sabbath after his thirteenth birthday?<sup>241</sup>

He adds that in a Reform setting the Bar Mitzvah ceremony does not in any case have a "strict formal and legal meaning" but is a ceremony which should be judged on its "spiritual and ethical side."

If it does the child good, if it will stir the child to a little extra effort, which he may need, if it will bring joy to his parents who have had so much sorrow, then certainly the child should be allowed to recite the blessings and the father to read the prophetic reading.<sup>242</sup>

Freehof's responsum permits the Bar Mitzvah of a mentally retarded child, but it nowhere suggests that the congregation or the rabbi is obligated to promote such a Bar Mitzvah or to seek actively to include this child in congregational activities. This attitude is stated even more clearly in a later responsum of Freehof on the question of what are the religious obligations of mentally retarded and insane Jews in institutions. Citing Moses Sofer<sup>243</sup> he concludes that although the שומט, is not obligated for kashrut, etc. we should try to avoid putting him in a situation where he must eat tref.

<sup>241</sup>Op. cit., p. 26.

<sup>242</sup>Op. cit., p. 27.

<sup>243</sup>Responsa Orah Hayyim 33



There are varying degrees of mental deficiency and whatever degree of religious observance they can grasp may be of help to them and should be provided. But it must be borne in mind that if these religious observances cannot be provided for, then no sin has been incurred by the patient<sup>244</sup>.

The same Freehof responsa collection includes a responsum on "Jewish Law and the Insane." Again his conclusion is that we should do as much as we can for the insane: "We must protect and help them in any way we can." On the other hand, if they are unable to participate in public occasions such as worship, "they are not always necessarily responsible to do so."

Hence on such occasions when certain ones of them can be safely included, for their own benefit, and yet not destroying the benefits of the assembly for others, they may of course be included. Each must be judged individually<sup>245</sup>.

It was not until disability activists passed laws requiring inclusion of the disabled child in public education that the Reform movement began to publicly view this inclusion as obligatory.

The Lehiyot Guidelines are not dated but refer to their inspiration as Rabbi Alexander Schindler's report to the UAHC Board on November 30, 1984. In this speech Schindler acknowledged neglect by the Reform Movement's educational programs of the disabled, citing the "forgotten children, the mentally retarded, the disabled, the autistic, the deaf, the sightless.... whose laughter is not heard in our

<sup>244</sup>Solomon Freehof, Today's Reform Responsa, HUC Press, 1990, "The Mentally Retarded and the Law," p.11.

<sup>245</sup>Freehof, op. cit., p. 12.

However, the Lehiyot Project apparently predated this speech, since the Guidelines attest that the Lehiyot program concept was introduced in 1983 by the UAHC Department for Religious Education, then under the direction of Rabbi Howard Bogot. Though general religious concepts: "caring for others," "rachmanut" and "tikkun olam" are cited as justification for the concern<sup>247</sup> the Guidelines admit the practical effect of Public Law 94-142 of 1978 which mandated "appropriate educational opportunities in the least restrictive environment" for children with special needs.<sup>248</sup>

This law did not apply to religious institutions, but under its influence Jewish parents of children with special needs learned to advocate for their children's education, and quickly extended this advocacy to religious education.<sup>249</sup>

The Lehiyot Guidelines are largely directed at the education of children. They take their language from that of special education in public schools, outlining various models of "service delivery": self-contained classrooms, resource rooms, mainstreaming, and for gifted students, independent study and acceleration into more advanced classes<sup>250</sup>. From PL-94 Lehiyot also borrows the idea of designing an individual educational plan (IEP) in conjunction with

<sup>246</sup> Quoted in Lehiyot Guidelines, p. iii.

<sup>247</sup> Ibid.

<sup>248</sup> Op. cit., p. 3.

<sup>249</sup> Conversation with Becca Hornstein, founding parent of Lehiyot and now director of the Council for Jews with Special Needs, Inc. in Phoenix, Arizona.

<sup>250</sup> Op. cit., pp. 4-5.

188

the parents for each student with special needs. Sample forms are given as well as advice on language and terminology to use for disabilities. Sensitivity training workshops for those without disabilities are described. Texts from Sefer Aggadah on "Honoring Other People," "Good Manners," "Righteous Giving," "Lifesaving," and "Visiting the Sick" are included for study in these workshops.<sup>251</sup>

There are descriptions of language and learning disabilities, mental retardation, physical disabilities, hearing impairment, visual impairment, gifted, and the "aged infirm," and autism, with detailed lists of learning objectives and adaptations or additions to the Schuster Curriculum Guidelines ("To See the World Through Jewish Eyes") for each category, as well as lists of parent and professional organizations for each category of disability. There is a glossary of terms related to disability along with lists in the introduction of politically correct and incorrect terminology (e.g. "mentally impaired," not "dummy" or "retard.")

The Lehiyot Guidelines use the term *mitzvah* only in the general sense of "obligation," that is, the obligation of Reform Jews to "care" for the disabled and not to exclude them. The only sense of legal obligation expressed in the Lehiyot Guidelines is that derived from the federal law, not from Jewish law. Yet we see from this well intentioned document that just as the rabbis, in their efforts to protect or exempt those with disabilities were forced to make definitions of שוטה וקטן, חרש, and in so doing "label" these individuals, so too the writers of the Lehiyot guidelines found themselves categorizing and labeling individuals, and in some cases

<sup>251</sup>Op. cit., pp. 26-27.

A Question in Search of An Answer was published in 1981. It is directed at educators and religious school teachers, and, similar to the Lehiyot Guidelines, draws its justification more from Federal Law PL-94 than from halacha. Its purpose is to educate teachers in Reform educational settings about the needs of children with learning disabilities. It gives very specific instructions as to how to adapt lesson plans to for such children. It encourages group work (known as "cooperative learning") so that children with reading or writing difficulties can be included in the class community without having to be the reader or the writer. It discusses how to help children who have difficulty with directionality approach Hebrew. It encourages and directs communication with parents of children with special needs.

This book is a useful tool for teachers with little or no training in working with children with learning disabilities. The Preface acknowledges the dilemma which we have discussed:

Jewish tradition has long stressed the importance of educating children, with a life of Torah and study prized above all.<sup>252</sup>

How do we include those who lack תורה in a culture which prizes תורה above all other values? A Question in Search of An Answer deals strictly with children with learning disabilities.

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<sup>252</sup>Roberta M. Greene and Elaine Heavenrich, A Question in Search of An Answer, UAHC Press, 1981, p. x.



This group is not necessarily congruent with the group we have studied, חרש, שוטה וקטן. Perhaps the "peti" is a closer approximation to the learning disabled child discussed in this book.<sup>253</sup>

This distinction is raised by Judith Abrams in her Responsum on Disabled Persons 5752.5 (1992). The question, attributed to the CCAR Committee on Justice and Peace, is:

What are the obligations of the community, and specifically of congregations, towards physically and mentally disabled persons?

We note that the question is phrased as obligations of the community, not as what are the rights, responsibilities, obligations and/or exemptions of the disabled person.

Abrams first discusses the blind person. Although this is not part of the category of חרש, שוטה וקטן her discussion is relevant to our topic because she raises the issue of voluntary performance of mitzvot which one is not obligated to do. She cites Leviticus 19:14:

לא תקלל חרש ולפני עור לא תתן מכשול

She then cites Bavli Baba Kamma 86b, where R. Sheshet observes that though R. Judah exempts the blind from the mitzvot he still performs them. However she notes that the halacha ultimately came out in favor of the obligation of the blind to the mitzvot, and we

<sup>253</sup>See R. Moshe Feinstein, "The Difference Between 'Shoteh' and 'Peti' and the Obligation of Keeping Commandments and Learning Torah in Relation to a 'Peti'," Behavioral Sciences and Mental Health, Paul Kahn, editor, Sepher Hermon Press, New York, 1984, p. 229, cited by Judith Abrams in Responsa on the Disabled, p. 31.

191

have learned in Bavli Pesach that the blind rabbis, R. Sheshet and R. Joseph, recited the Haggadah on behalf of others as well as themselves.

We note two points relevant to חרש, שומע וקטן from this discussion:

- 1) There is a precedent for voluntary performance of mitzvot by those not obligated to do them
- 2) The fact that there were rabbis with a given disability (blindness) may be related to the halachic conclusion that this disability does not exempt one from the mitzvot

The responsum continues with a discussion of the חרש. Abrams quotes Mishnah Terumot 1:2, a חרש is one who can neither hear nor speak; and then points out the contradictory passage in Bavli Hagigah 2a, that the חרש who can speak but not hear or hear but not speak is exempt from ראיה. Moreover, חרש שומע וקטן are exempt from all the mitzvot. Abrams points out that R. Eliezer Waldenberg rules that today anyone who can hear or speak is considered פקח and is obligated to all the mitzvot except those which specifically require hearing.<sup>254</sup> She also cites R. David Bleich as a contemporary Orthodox authority who regards a deaf person who can speak at all as fully obligated.<sup>255</sup> Thus the only people who would be considered חרש by the leading Orthodox authorities today would be those with no hearing at all, even with a hearing aid, and no powers of speech.

Abrams concludes:

<sup>254</sup> Responsa Tsitsit Eliezer, 15 #46, cited by Abrams, ibid.

<sup>255</sup> Abrams, op. cit., p. 27.

Under this very limited definition of *cheresh*, most people with hearing and speaking disabilities will be considered as having no handicap.<sup>256</sup>

We should acknowledge here that Laurence Malinge came to a similar conclusion in his 1993 HUC rabbinic thesis. He says:

In conclusion, those who possess even minimal hearing or who have acquired intelligible speech are certainly not subject to any of the halakhic restrictions which apply to deaf-mutes. Furthermore, there is a highly significant body of rabbinic thought which deems even one who has acquired barely intelligible speech to be beyond the category of the rabbinic deaf-mute. Moreover, in the light of the degree of education attained even by the true deaf-mutes in contemporary society, it is doubtful that they are to be considered examples of the *heresh* described in rabbinic references. Hence, they should be encouraged, and indeed required, to participate fully in Jewish religious life, including performance of all ritual obligations as well as in Torah study.<sup>257</sup>

Abrams notes that physical disabilities were not regarded as halachic handicaps:

The Sages generally attempted to include handicapped or disfigured individuals in public ceremonies, except when their participation would cause people to gawk at them rather than concentrate on worship.<sup>258</sup>

Abrams next discusses the שוטה. She asserts that the literature makes "little distinction.. between mentally ill and retarded."<sup>259</sup>

<sup>256</sup> Abrams, *ibid.*

<sup>257</sup> Laurence P. Malinge, "An Analysis of Modern Responsa on the Status of the Deaf-Mute (Heresh) in Jewish Law as a Response to Modernity," HUC-JIR Cincinnati, 1993, p. 105.

<sup>258</sup> Abrams, *op. cit.*, p. 28.

<sup>259</sup> *Ibid.*

She distinguishes one type of שוטה, the mentally ill and retarded, from another, the "morally deficient." Presumably this refers to what Polokoff calls the "homiletical" use of the term שוטה. She acknowledges that the talmudic definition of שוטה as one who goes out alone at night, spends the night in a cemetery, and tears his clothes, refers to someone who is mentally ill rather than retarded.<sup>260</sup> As noted above, she cites R. Moshe Feinstein's responsum on the *peti*, a mentally retarded individual who can be included in the minyan if he has the understanding of a six year old.

On the other hand he would not include a *shoteh* who might be diagnosed as severely mentally ill and truly unaware of, or unable to relate to a worship service. even so, such persons should be encouraged to join as much as possible in the life of the community, to the degree that they can do so without being disruptive to others or are themselves unhappy.<sup>261</sup>

It is worth noting that unlike the Lehiyot Guidelines and the UAHC's book on learning disabilities, both written in the 1980's, Abrams' responsum is aware of the problem, prevalent throughout the 1990's, of limited resources. Rabbi Daniel Syme wrote excitedly in his introduction to A Question In Search of An Answer:

Our eyes have been opened to a whole new frontier in Jewish education.<sup>262</sup>

Abrams soberly quotes Feinstein 's warning that the welcome to the shoteh even in a worship service is limited to the degree which he is

<sup>260</sup>ibid.

<sup>261</sup>ibid. See also Marx, op. cit., p. 851, notes 190 and 191 citing Goldberg, Am Hatorah Mahberet 2, Hovevet 2, 1982 and Iggeret Moshe, Helek 2, Orah Hayim 88 as sources for responsa by Feinstein on differential obligation of inclusion of *peti* and of *shoteh* in minyan.

<sup>262</sup>Syme in Greene and Heavenrich, op. cit., p. ix.



not disruptive. She also adds that the community's obligation to the disabled is limited by that community's resources: 194

We cannot obligate any rabbi or congregation to provide special services to all disabled persons who come within their purview, but the obligation to be of whatever service possible has the status of a mitzvah.<sup>263</sup>

Within the limitations, then, of finances and what might be termed טַרְחָא דְצִיּוּר, the responsum affirms:

We should aim for the maximum inclusion of the disabled in the life of our communities<sup>264</sup>.

Abrams uses an aggadic image rather than a halachic imperative to justify the mandate for inclusion, quoting Numbers Rabbah, Bamidbar 4:20:

"The tablets and the broken pieces of the tablets were deposited in the Ark." There was no separate ark for the broken tablets; they were kept together with the whole ones<sup>265</sup>.

In this she is underscoring an observation made by Tzvi Marx, that for liberal Jews the responsum is a "literary form of argumentation." He adds

There are other ways of being influenced by halakhic literature than by being legally directed.<sup>266</sup>

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<sup>263</sup>Abrams, op. cit., p. 29.

<sup>264</sup>Op. cit., p. 30.

<sup>265</sup>Ibid.

<sup>266</sup>Tzvi Marx, op. cit., p. 866, note 171.

In the introductory portions of his Halakha and Handicap, Marx makes a broad ethical argument based on Judaic sources for extending responsibility and concern for disabled persons into obligation by the community to include such persons. His basic arguments are that man is made in צלם אלהים and that human dignity, כבוד הבריות, is a value so high it may override other values; that not to be obligated to the mitzvot is automatically degrading and devaluing to a human being in halakhic culture; and that the concept of ערכות, responsibility for one another especially within the covenant becomes "a standard against which to assess the way halakha directs itself in its relationship to the handicapped."<sup>267</sup> Marx's references in his argument for the importance of man's creation in God's image are drawn from the Midrash. He quotes Bavli Berachot 19b: גדול כבוד הבריות שדוחה לא תעשה בתורה.<sup>268</sup> In other words, considerations of human dignity may be used as arguments to override negative commandments of the Torah. He uses this discussion as a basis for a discussion of performance of mitzvot as a source of human dignity as well as of joy. "Being called to the mitzvot confers status and pride;" thus exemption from the mitzvot leads to lower status.

Whatever the reason for the exemption from mitzvot, a person with less obligations enjoys a lower status in comparison with one who has more obligation, since obligation to perform mitzvot generally confers high esteem.<sup>269</sup>

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<sup>267</sup> Marx, Op. cit., p. 110.

<sup>268</sup> Also in Menahot 37b, Shabbat 81a, Eruvin 41b, and Megillah 3b.

<sup>269</sup> Marx, op.cit., p. 180.

196

Marx explores the attitudes of the tradition towards one who, though not obligated, voluntarily takes on mitzvot. He notes that R. Hanina in Bavli Kiddushin 31a asserts that one who is commanded to do mitzvot is greater than one who is not commanded and yet does them. Yet, he sees in Hanina's teaching a basically positive valuation of voluntary performance of the mitzvot. This is the same passage which goes on to cite the joy that the blind R. Joseph says he would feel if he were commanded, cited by Judith Abrams in the CCAR Responsum on Disabled persons.

On the other hand, Marx notes the attitude of the Yerushalmi, exemplified by R. Hezekia, that "whosoever is exempt from something and does it is considered a fool," כל הפסור מדבר ועושה נקרא (Yerushalmi Berachot 2:9 cited in Marx, p. 185.) There is in the tradition, Marx notes, an approach that says what is not commanded is forbidden. The sin of Nadav and Abihu in bringing "alien fire" was simply that this fire was not commanded. Marx notes that this attitude is prevalent not only in midrashic interpretation but also in the Kuzari of Judah Halevi.<sup>270</sup>

Marx helps us to understand the positive side of favoring commandedness. As Yeshaia Leibowitz shows, the mitzvah system is designed to encourage consistent religious behavior on the part of the "ordinary uninspired person."<sup>271</sup> Marx however acknowledges an "ontological" philosophy of mitzvah in Jewish tradition which in fact acknowledges and encourages voluntary performance of mitzvot.

<sup>270</sup>Op. cit., p. 186.

<sup>271</sup>See op. cit., p. 187 ff.

Marx cites Ramban and Rabbenu Nissim of Gerona<sup>272</sup> as exponents of this school. He says that Rabbenu Tam allowed the recitation of a ברכה by one such as a woman who voluntarily performs a time-bound mitzvah, and that Rabbenu Nissim allows women to perform סמיכה, the laying of hands on a sacrifice.<sup>273</sup> Marx has consciously cited the texts used in the halachic arguments for inclusion of women in the mitzvot to include the disabled as well:

The process of acceptance of women's voluntary actions may offer some insights on halakhic process relevant to the needs of the disabled, another halakhically disenfranchised group.<sup>274</sup>

This attitude is opposed by what Marx terms the "deontological" view, the view that the only value of performance of a mitzvah is its commandedness. The Ritba, one of those who permits and even praises voluntary performance of mitzvot, nonetheless says that the reward for such voluntary action is for the good intention, but "from the perspective of the mitzva he has achieved nothing as Liebowitz claims."<sup>275</sup> The clearest examples of this view, according to Marx, come from the Yerushalmi Berachot 2:3 and 4:3, where the rabbis object strongly to the voluntary participation of Jonah's wife in the pilgrimage of ראיה and to the wearing of tefillin by Mikhal bat Kushi. Marx also points out that in Bavli Eruvin 96b we are told that women are to be prevented from blowing the shofar; and that both

<sup>272</sup>Hiddushei HaRamban Bavli Kiddushin 31a and Hiddushei HaRan on Bavli Kiddushin 31a

<sup>273</sup> Hiddushei HaRitba on Bavli Sukkot 20b (סמיכה) and on Hilchot Berachot, Birchot Hanehinin 5:2 on blessings, cited in Marx, pp. 190-191.

<sup>274</sup>Marx, *op. cit.*, p. 191.

<sup>275</sup>*Op. cit.*, p. 192.



198

Rambam<sup>276</sup> and the Vilna Gaon<sup>277</sup> prohibit one who is not commanded from reciting the blessing.

Marx explains that other authorities have attempted to resolve these two conflicting views. Ramban says that Hezekia in the Yerushalmi was only talking about mitzvot that were not commanded to anyone, and the Meiri says that Hezekia's objections do not apply to "reasonable, ethical or edifying observances that a person will want to take upon himself."<sup>278</sup> Another view filtered through the lens of Maimonides is that Hezekia was only objecting to taking on extra mitzvot out of exaggerated piety<sup>279</sup>.

Marx concludes that

except for those who insist on taking Hezekia categorically, the tradition is inviting even for those not initially addressed (by its imperatives) but who are exempted for various reasons<sup>280</sup>.

There is still a gap between an invitation by the tradition to the disabled to participate, and an obligation by the community to include. Marx, like Judith Abrams, cites R. Moshe Feinstein as distinguishing between the שומע and the פתי. The פתי is to be considered obligated at age 13 and the parents are obligated to educate him. However, Feinstein does not expect the community to

<sup>276</sup> Mishneh Torah Hilchot Tsitsit 3:9.

<sup>277</sup> Comment by the GRA on Shulchan Aruch Orach Hayyim 17:5 cited by Marx in note 210, p. 786.

<sup>278</sup> Marx, pp. 193-194, citing Hiddushei HaRamban and Hiddushei HaRitba to Kiddushin 31a and HaMeiri on Bavli Baba Kamma 87a.

<sup>279</sup> Marx, p. 194 citing MaHari Cohen Zedek on Rambam, Commentary to the Mishnah, Sotah 3:3.

<sup>280</sup> Ibid.

199

bear the full burden of the extra costs involved in special education. Although Federal Law PL 94-142 did not mandate special educational opportunities for Jewish schools, Jewish parents were quick to avail themselves of this mandate and to make for themselves the deduction that if children with impaired דעת had a right to secular education, קל וחומר they are entitled to religious education. The impetus for Lehiyot cannot be separated from this secular legal event.

More recently, the Americans with Disabilities Act (ADA) of 1990 has extended the rights of disabled persons beyond education to employment and accessibility to public places. Like PL-94, the law is not enforceable in religious institutions. However, it easy to argue that in fact religious institutions, more than secular ones ought to be compliant with the law. A 1996 publication by the National Organization on Disability, Loving Justice: The ADA and the Religious Community explains the law's provisions. On the inside cover is a quote from Jim Brady which paraphrases the old Hebrew National hot dog ad:

Are religious organizations subject to the ADA? Yes, and to a higher authority as well.

Becca Hornstein, the Reform parent of a 23 year old autistic son who along with Howard Bogot seems to have been the driving force behind the Lehiyot project, says that when she speaks to clergy about inclusion "I am not making a request; I am reminding them of their obligation."

However even the ADA includes the concepts of "reasonable accommodation," "undue burden," and "undue hardship." These concepts mean that even in the secular context, employers and institutions are not compelled to accommodate to needs of disabled persons which impose an undue financial burden, impinge on safety requirements, or impact on the operation of the facility or institution<sup>281</sup>.

Although this paper is not attempting to deal with the kinds of physical disabilities which involve expensive accommodations to wheelchairs, for example, in fact inclusion of the hearing impaired and the mentally or emotionally handicapped in a congregation can be expensive as well.

Installation of assistive listening devices (ALDs) and telecommunications devices (TDDs) which enable hearing impaired people to call the congregation by telephone, hiring of signers and of teacher aides in a school all involve money. Inclusion of those with emotional or neurological handicaps in a worship service may cause

מרחא דציבור.

That All May Worship: An Interfaith Welcome to Disabilities is another publication of the NOD which specifies ways to include those with various disabilities including hearing impairment, mental illness, or developmental disabilities.

The third NOD publication, From Barriers to Bridges: A Community Action Guide for Congregations and People with Disabilities (1996),

<sup>281</sup>Loving Justice, pp. 23-24.

records the eight interfaith "That All May Worship" conferences which were held in 1993 and 1994 in Santa Rosa, California; Manchester, Connecticut; Harleysville, Pennsylvania; Columbia, South Carolina; Pittsburgh, Pennsylvania; Lehigh Valley, Pennsylvania; Atlanta, Georgia; and Tulsa, Oklahoma. This handbook explains how to organize such a conference in order to raise consciousness and implement welcoming programs in other regions. From Barriers to Bridges also outlines ongoing programs which congregations might establish: a speakers' bureau on disabilities; a forum on mental illness; the purchase of a van by an interfaith coalition for transportation to services; support groups for people with disabilities and their families; partnerships with secular agencies which provide housing or group homes for those with disabilities; "adoptive families" for those with mental retardation living in the community in group homes; an interfaith coalition for providing respite care for families with a disabled member; a Circle of Support, a kind of intentional friendship circle for a disabled person; job coaching; media contacts about those with disabilities<sup>282</sup>.

In response to legal movement from the secular society, the written statements of the Reform movement have progressed from a willingness to accept those with lack of *תּוֹרָה* to a sense of positive obligation to include these people. As we try to connect more and more with our tradition, we can be appreciative of Tzvi Marx's struggle to find this obligation within halacha. Yet we maintain our autonomy from the strict bounds of halacha, and can choose to take on this obligation to inclusion out of a more general sense of justice, so that we can make our temples, in Isaiah's words, "a house

<sup>282</sup>From Barriers to Bridges, pp. 43-50.



Two anecdotes illustrate the rewards and the limitations that may arise in this struggle for inclusion.

The first was related by Rabbi Kenneth White on the HUCALUM forum of December 21, 1996. Rabbi White conducts services for developmentally disabled people as part of his responsibilities as New York State Chaplain:

One profoundly retarded woman has come to every service at one site since my arrival here. She could say two syllables, Mama and Baba...Several months ago I walked into my chapel and, preoccupied, had not greeted anyone as I reached for my guitar. This woman said quite clearly, "Bim Bam." The staff froze; I was outright astounded since that was the very song I was about to play. After the service had concluded I asked the staff if they, too had heard her speak. They all agreed that they heard it. I wanted to test if this was a nonsense vocalization on her part or was it deliberate. I went to her and prompted her twice. She responded clearly "Bim Bam" with a gleam in her eye. Her psychologist told me he was relatively certain that she had put together the time, the place, the person, the guitar, and the name of the song. No one had any idea she could do all of that. It had taken her years but she came through with the words.

I am relating this story because I want to encourage everyone to invite and welcome the developmentally disabled to their worship experiences. Because a person is developmentally disabled does not mean they cannot understand all or part of what is happening to them. Some respond very much. It is not up to us to determine the quality of their spiritual life. We should be offering as much as possible to them so they can feel and participate to the best of their ability.

The second anecdote occurred at my student pulpit in Kokomo, Indiana, in the fall of 1995. A woman no one knew walked into Friday evening services. In a tiny congregation, everyone was

203

delighted to see a new face. I greeted her warmly, as did many congregants. As the service began, she began to make loud, inappropriate comments. After the service she went up to various congregants and began talking about Jesus. I was talking to a newly bereaved widow; she approached us and told me she was the reincarnation of Freud. The president approached her and guided her away. She wandered into the room where the children were playing and began to make sexual comments. The president escorted her to the door and told her she had to leave. She said she would come back another time. He said no, he was sorry but she couldn't.

After she left, everyone began talking about what to do. had they done the right thing? What else could they have done? Was she Jewish? Did it make difference? I wondered what I could have done. Should I make an effort to find her and reach out to her?

These two anecdotes illustrate the imperatives and the limits of inclusion. Was the first woman's "Bim Bam" worth the years of investment by the rabbi? Was the second woman's exclusion unavoidable? We in the Reform movement today feel commanded to be inclusive, even of those who lack *mitzvot*.

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