

Crazy, Just Like You:
Toward an Understanding of the
Halakhic Category of the *Shoteh*

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To my family,

Thank you for your love and support, not only during my years in the seminary, but throughout my entire life. I love you very much.

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Thank you for your patience and wisdom, your insight and direction in guiding my Rabbinic studies and in the process of composing this thesis.

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DIGEST

This thesis examines the *halakhic* literature as well as modern *responsa* on the subject of the *shoteh*, usually translated as mental defective, in Jewish Law. The mainstream of the tradition considers the *shoteh* incompetent and therefore unable to perform the *mitzvot*, and often groups him with the deaf-mute, the minor, or other members of the community who are excluded from full participation.

The literature examined in this thesis includes the *Mishnah*, several references to the Babylonian *Talmud*, the *Mishneh Torah* of Maimonides, and selected modern Orthodox and Reform *responsa*. The *halakhic* question is twofold: first, what constitutes incompetence due to mental defect and second, whether all individuals who meet certain criteria should be lumped into one category, or whether there are gradations in the nature of the *shoteh*. Patterns of interpretation arise in the literature and are examined herein. Additionally, selected works addressing the psychological and psychiatric issues of mental illness have been brought to bear, where appropriate.

The analysis in this thesis suggests an emphasis on excluding the *shoteh*, however defined, from participation in Jewish life. This has led, particularly in the Reform *milieu*, to a discrepancy between the *halakhah* and the professed desire on the part of the Reform rabbinate to include in our community those Jews who have heretofore been marginalized.

INTRODUCTION

There was a middle aged woman in a small congregation who was mentally disturbed. Her behavior in public was unpredictable; sometimes she was an annoyance, at other times a distraction; her presence often made others feel uncomfortable. No one knew why she behaved the way she did, though many people had theories and gossiped regularly about her condition. She was oblivious to the responses of others; neither their comments about her nor their discomfort seemed to register. The one thing that was clear was that she loved coming to Temple. She came to services Friday nights, she came to Hebrew class and Torah study, she came to adult education lectures, she came to everything the Temple offered. She loved to talk to other congregants, but most of all she loved to ask the Rabbi questions. She would ask many different questions on wide ranging topics, sometimes related to an adult education topic at hand, sometimes completely unrelated. Still other times she would ask the same question over and over and over again. The Rabbi was very patient and tried to answer her questions as best he could and to deflect her when necessary, but it was a constant struggle. Her fellow congregants were not always so patient. Eventually, attendance at Torah study dwindled down to nothing as people stopped coming, tired of her actions manipulating and monopolizing the Rabbi's time. Finally, when no one else was attending besides her and the Rabbi, she stopped coming as well. After a while and many requests from the Rabbi, other congregants began returning to the Torah study class, but she did not. She still came to services from time to time and to the occasional lecture, but she never attended regularly again. The Temple had been an important part of her life; had her priorities changed? Had the attitudes of her fellow congregants chased her away or had they simply confused her to the point of non-participation? Could the Rabbi have done more to make her feel welcome or should he have done more to protect the rest of the congregation from her disruptive behavior?

There are many questions raised by this episode, which is repeated in congregations across the country and around the world. Who are the mentally ill and how do we, as modern Reform Jews respond to their presence in our communities? We have a goal of making all who enter our doors feel welcome, but what do we do when someone is, by their very presence, disruptive of all that takes place inside those doors? This thesis will seek to examine the legal category of the שוטה (*shoteh*): the mentally insane individual who is exempted from almost all legal responsibility by reason of his lack of comprehension and inability to form an intention. We will ask who is a שוטה and what are the general rules concerning members of the category? The category will be traced from the *Mishnah*, through the codificatory literature, specifically Maimonides' *Mishneh Torah*, and eventually to the responsa literature, including selected modern responsa. This thesis will conclude with a few comments on the role of the mentally ill in our congregations and the difficult balance to be struck between respect and care for the disabled and the need to protect the rest of the congregation from undue stress at the hands of those without even an understanding of their own actions.

There are many examples of individuals suffering from mental illness in Jewish literature. The prophets see visions,¹ King Saul is terribly troubled,² and Ben Zoma goes into the famous garden and becomes demented,³ just to cite a few.⁴ For our purposes, though, we can start by turning to the Talmud, *Hagigah* 3b, where the Rabbis put forward several options as to who may be a שוטה.

¹Numbers 11:26-29, Hosea 12:11, Ezekiel 1:1, etc.

²I Samuel 16:14-23, 18:8-12, 19:9-10, etc.

³*Hagigah* 14b "בן זומא הציץ ונפגע."

⁴While this paper will address the issue of the legal category of the שוטה, as seen through Rabbinic Literature, for a more Bible-specific treatment of the issue of mental disorders, one should consult: Albert I. Rabin, *Psychological Issues in Biblical Lore*, New York, NY: Springer, 1998.

Text 1: *Hagigah 3b*

איזהו שוטה? היוצא יחידי בלילה, והלך בבית הקברות, והמקרע את כסותו. איתמר, רב הונא אמר: עד שיהו כולן בבת אחת. רבי יוחנן אמר: אפילו באחת מהן. היכי דמי? אי דעביד להו דרך שטות - אפילו בחדא נמי. אי דלא עביד להו דרך שטות - אפילו כולהו נמי לא! - לעולם דקא עביד להו דרך שטות, והלך בבית הקברות - אימור כדי שתשרה עליו רוח טומאה הוא דקא עביד, והיוצא יחידי בלילה - אימור גנדרופס אחדיה, והמקרע את כסותו - אימור בעל מחשבות הוא. כיון דעבדינהו לכולהו - הוה להו כמי שנגח שור חמור וגמל, ונעשה מועד לכל. אמר רב פפא: אי שמיע ליה לרב הונא הא דתניא: אי זהו שוטה זה המאבד כל מה שנותנים לו, הוה הדר ביה. איבעיא להו: כי הוה הדר ביה - ממקרע כסותו הוא דהוה הדר ביה, דדמיא להא, או דלמא מכולהו הוה הדר? - תיקו.

The answer to the question, “Who is a שוטה,” comes from a debate between two *baraitot*.⁵ The שוטה could be “one who wanders around alone at night, sleeps in the cemetery, and rends his garment,” for no apparent reason. The Rabbis then debate whether a person needs to perform just one of these acts, all three of these acts, one act three times, or each act three times in order to be called a שוטה. Then, Rav Huna attacks the position of accepting one isolated incident as proof of insanity by addressing possible reasons for each separate act. Perhaps the person is just sad and goes out walking alone; surely that by itself would not make him insane, for example. Eventually, the Rabbis decide that if a person performed all three acts, he would be like the ox that “gored an ox, a donkey, and a camel, making it מועד (*muad*)⁶ for all animals.” Rashi helps by explaining that, like the wildly unpredictably ox described in *Baba Kama 37a*, a person who performed three unrelated abnormal acts could be ruled generally insane. Nevertheless, another *baraita* is raised that suggests a שוטה is a person who destroys everything that is given to him. This seems to relate to the “rending of garments,” symptom noted in the first *baraita*, but doesn’t take into account the possibility of wildly varying actions. Instead, the

⁵A *Baraita* is a Tanaitic source that is not from the *Mishnah*.

⁶“Warned.” An animal who had gored in the past is assumed to be likely to try to gore again and if such a second incident occurs, the owner, who by this point should have known better, is fully liable. In this case, the dangerousness of the ox would be undeniable as it had gored three different types, not merely picking on other oxen, for example.

irrational destructiveness of the individual is taken as evidence enough on its own. Interestingly, the Rabbis do not choose to resolve the debate between the two ברייתאות, nor do they answer the question of how many symptoms a person needs to exhibit to be ruled insane. This little section of גמרא (*gemara*) serves, therefore, not as a definitive rule for insanity, but rather as an indication that the question is open, and a jumping off point for further investigation. It is worth noting that this discussion comes in reference to *Mishnah Hagigah* 1:1 on the topic of who is exempt from making the pilgrimage to the Temple, one of the משניות that will be examined in Chapter One.

Also in the Talmud, we find a passage about קורדייקוס (*kurdaikos*):

Text 2: *Gittin* 67b

מתני'. מי שאחזו קורדייקוס, ואמר כתבו גט לאשתי - לא אמר כלום. אמר כתבו גט לאשתי ואחזו קורדייקוס, וחזר ואמר לא תכתבו - אין דבריו האחרונים כלום. נשתתק, ואמרו לו נכתוב גט לאשתך והרכין בראשו, בודקין אותו שלשה פעמים, אם אמר על לאו לאו ועל הן הן - הרי אלו יכתבו ויתנו. גמ'. מאי קורדייקוס? אמר שמואל: דנכתיא חמרא חדתא דמעצרתא. וליתני: מי שנשכו יין חדשו הא קמ"ל, דהא רותא קורדייקוס שמה. למאי נפקא מינה? לקמיעא.

The rules for one stricken by קורדייקוס, seem similar to the rules for the שוטה we will find in the coming chapters. The stricken man is ineligible to write a גט (*get*) "bill of divorcement" for his wife due to his inability to form an intention while being not of sound mind. This is the root of the problem: intention and understanding are required for most actions to count in Jewish law. Indeed, anything he says while suffering its effects is deemed as if he had said nothing at all. What exactly is קורדייקוס? Shmuel seems to suggest that it is an overwhelming drunkenness from drinking undiluted wine, though the Rabbis suggest that it is really the name of an evil spirit that attacks the drinkers of such wine. Rashi agrees with the demon assessment, but Maimonides, in his commentary to this משנה, suggests that it is really a seizure; an example of one who is temporarily

incapacitated due to mental illness. Dr. Julius Preuss, in his famous medical treatise, *Biblisches-Talmudische Medizin*, translated by Dr. Fred Rosner, discusses the various interpretations presented by authorities both medical and rabbinic and suggests, in the end, that while the Talmud is likely referring to the ancient diagnosis of *morbus cardiacus* “a disease of the stomach (or perhaps heart)”, that it is not *nimia imbecillitas corporis* “greater complete insanity.” Regardless, Preuss suggests that the true nature of קורד”יקוס is unclear.⁷

While the גמרא goes on from this point to a long discussion of remedies for various ailments and stories of heroes and demons, this passage indicates that the issues of mental illness and the incapacity that it creates were hard to understand by those not affected. Still today we refer to the “demons” that plague a mentally ill person. As Dr. Paul Dobransky of the Mind Horizons mental health organization noted poetically,

“Demons do exist. In the most severe forms of mental illness — like Bipolar and Schizophrenic disorders — these creatures tend to wrestle their victims and families into feeling trapped, jailed inside invisible walls of distorted ideas, and confined by twisted perceptions. At times the lock seems to rust over, begging for keys that have not yet been invented.”⁸

How, though, does our Jewish tradition respond to the inclusion of such individuals, demons and all, in the Jewish community and in society as a whole? At this point it is worth turning in earnest to the sources: the *Mishnah*, the הלכות (*hilchot*) “laws” of Maimonides’ *Mishneh Torah*, and the responsa literature to see what they have to say. In the end, this thesis will evaluate the source material to see if the general rules continue throughout and what bearing they have on our larger issue.

⁷Preuss, Julius, “Mental Disorders,” in *Biblisches-Talmudische Medizin*, trans. Fred Rosner, *Journal of Psychology and Judaism* 3, no. 2 (1978), 126–143.

⁸Dr. Paul Dobransky, M.D., *Freedom Within (Not From) Mental Illness*, 2003, <http://www.mindhorizons.org/>

CHAPTER ONE. The *Shoteh* in the *Mishnah*

There are several mentions of the term שוטה in the *Mishnah* and, as such, an investigation of each provides an important starting point for the overall examination of the legal category. These individual texts can be divided into three main categories: various cases which establish the legal status of the שוטה, cases which include the שוטה in the familiar trio of the חרש (*heresh*, “deaf-mute,”) the שוטה, and the קטן (*katan*, “minor”) as an example of צרוף הלכות שונות (*tzeiruf halakhot shonot*, “the combination of various הלכות”), and cases in which the term שוטה is used in an alternative sense. Each משנה will be followed by a short commentary and analysis. A more detailed evaluation appears at the end of the chapter.

Category One: *Shoteh* Status References

Text 3: *Terumah* 1:1

(א) חמשה. לא יתרמו. ואם תרמו. אין תרומתן תרומה. החרש. והשוטה. והקטן.
והתורם את שאינו שלו. נכרי שתורם את של ישראל. אפילו ברשות. אין תרומתו
תרומה:

This משנה places the שוטה in a decidedly low legal status. The משנה discusses the rules of who may and who may not participate in the ritual of the heave offering. The trio of the חרש, the שוטה, and the קטן may not tithe their own grain, a thief may not tithe from that which is not his, and a non-Jew may not tithe on behalf of an Israelite, and if any of them should do so, their tithe is deemed invalid. This is not surprising, except when compared with *Terumah* 1:2, the following משנה, in which a deaf person who is not mute is similarly forbidden from the beginning, but if such a person did perform the tithe, it counts. This is an example of the legal principle of מלכתחילה (*milakhatkhilah*) in which a stricter standard is encouraged from the start but a more lenient ruling, בדעבד (*bidiavad*),

is allowed for after the fact. Likewise, *Terumah* 1:6 also forbids tithing by mutes, drunks, naked people, the blind, and those unclean due to a semen emission, yet allows their tithes after the fact. It seems, therefore, that the status of the *שוטה* is lower than that of the deaf, the mute, the drunk, the blind, and the unclean, and equal to that of the thief and the non-Jew.

Text 4: *Yevamot* 4:6

(ו) תלה בקטן עד שיגדיל או בגדול עד שיבוא ממדינת הים, או בחרש, או בשוטה, אין שומעין לו, אלא אומרים לו, עליך מצוה, או חלוץ או יבם:

This *משנה*, on the topic of *יבום* (*yibum*, “levirate marriage”)⁹, explains that one brother may not wait for the *שוטה* to recover his sanity in order to take responsibility ahead of him to fulfil his duties. In this *משנה*, the category of the *שוטה* is linked with a brother who is a *קטן* and one who is across the sea and, therefore, unavailable. This is truly an interesting comparison. Certainly the *קטן* will grow up, and the one who is across the sea could come home; does this mean that the *שוטה* can in fact recover from his illness? We will see from other *משניות* (*mishnayot*), that the status of insanity is sometimes regarded as temporary. The only drawback is that the *שוטה* here is linked with the *חרש* who, while he may recover, is unlikely to do so.

Text 5: *Sotah* 4:5

(ה) ואלו שבית דין מקנאין להן, מי שנתחרש בעלה או נשתטה, או שהיה חבוש בבית האסורין. לא להשקותה אמרו, אלא לפסלה מכתובתה. רבי יוסי אומר, אף להשקותה. לכשיצא בעלה מבית האסורין ישקנה:

⁹Levirate marriage is the obligation of a man to marry his widowed sister-in-law in order to provide an heir for his dead brother as commanded in Deuteronomy 25:5-10. The passage also explains the rule, which would later become the preferred solution, in which the brother-in-law would reject and thereby release the widow through the custom of *חליצה* (*chalitzah*).

This משנה allows for issuing a warning to the wife of a man who has become a חרש, a שוטה, or has been sent to prison. The understanding is that such a man is unable to act on his own and therefore the בית דין (*Beit Din*, "Court") stands in as his representatives in dealing with the suspected adultery of his wife. While they are grouped together, the חרש and the שוטה are unable to act due to their lack of knowledge, whereas the prisoner is unable to act to confront his wife due to his confinement.

Text 6: *Gittin* 2:6

(ו) קבל הקטן והגדיל, חרש ונתפקח, סומא ונתפתח, שוטה ונשתפה, נכרי ונתגיר, פסול. אבל פקח ונתחרש וחזר ונתפקח, פתוח ונסתמא וחזר ונתפתח, שפוי ונשתטה וחזר ונשתפה, כשר. זה הכלל, כל שתחלתו וסופו בדעת, כשר:

If a husband gives a גט through a שוטה acting as an agent who in turn delivers it to the wife, this משנה questions the mental status of the שוטה during the delivery process. If he was insane at the time he received it from the husband but sane at the time he delivers it to the wife, it is an invalid גט. If, however, the agent is sane at the time of receipt then goes insane, but recovers his sanity before delivering the document to the wife, then the delivery is deemed valid. The משנה declares, "If at the beginning and at the end an act is performed knowingly, it is valid." This supports the theory of temporary insanity and renders the שוטה status a non-factor as long as a person is sane at the outset and recovers prior to completing an action. The issue at stake is the ability of the agent to understand his mission. The חרש, שוטה and the קטן are always assumed to lack the ability to understand due to their respective conditions. Their association with the convert in this case is not a linking based on social status but rather an admission that at the time of engagement for agency, the now converted person was then a non-Jew and couldn't possibly have been aware of the laws concerning the גט, nor could he have been expected to understand the rules of agency.

Therefore his act was just as unknowing as that of the חרש, שוטה, or קטן, but for different reasons.

Text 7: *Baba Kama* 4:4

(ד) שור של פקח שנגח שור של חרש שוטה וקטן חייב. ושל חרש שוטה וקטן שנגח שור של פקח. פטור. שור של חרש שוטה וקטן שנגח. בית דין מעמידין לתן אפוטרופוס ומעידין לתן בפני אפוטרופוס. נתפקח החרש. נשתפה השוטה והגדיל הקטן. חזר לתמותו. דברי רבי מאיר. רבי יוסי אומר הרי הוא בחזקתו. שור האצטדין אינו חייב מיתה. שנאמר (שמות כא) כי יגת. ולא שיגיחיהו

In the case of an ox that gores another ox, this משנה rules that a שוטה is entitled to damages as a victim owner of an ox gored by another, but as the owner of the offending ox, the שוטה is not culpable. If both owners are handicapped in any way (e.g., חרש, שוטה, קטן), a guardian is to be appointed by the court to determine any potential damages. If the owner of the offending ox recovers, Rabbi Meir declares that the ox should be deemed harmless once more but Rabbi Jose claims that the ox retains its status as a gorer. Perhaps Rabbi Meir presumes that a knowing owner would have been able to prevent the incident. This משנה provides two important insights into the status of the שוטה. First, it shows that the handicapped can be exempted from responsibility for their possessions as an offending owner but still claim damages as a victim, a built in protection for the otherwise disenfranchised. Second, it once again supports the concept that the שוטה can recover, perhaps just as a קטן will surely grow up.

Text 8: *Bekhorot* 7:6

(ו) המקיש בקרסוליו. ובארכובותיו. ובעל פיקתו. והעקל. איזהו עקל. כל שמקיף פרסותיו ואין ארכובותיו נושקות זו לזו. פיקה יוצאה מגודלו. עקבו יוצא לאחריו. פרסתו רחבה כשל אוז. אצבעותיו מורכבות זו על זו. או קלוטות עד הפרק. כשר. למטה מן הפרק וחתכה. כשר. היתה בו יתרת וחתכה. אם יש בה עצם. פסול. ואם לאו. כשר. יתר בידיו וברגליו שש ושש עשרים וארבע. רבי יהודה מכשיר. וחכמים פוסלים. השולט בשתי ידיו. רבי פוסל. וחכמים מכשירים. הכושי. והגיחור. והלבקן. והקפת. והגנס. והחרש. והשוטה. והשכור. ובעלי נגעים

טהורין. פסולין באדם. וכשרין בבהמה. רבן שמעון בן גמליאל אומר שוטה בבהמה
אינה מן המוכחר. רבי אליעזר אומר אף בעלי דלדולין. פסולין באדם. וכשרין
בבהמה:

Being a שוטה is but one of many disqualifications to being a priest presented in this משנה, itself a definition of the law expressed by Leviticus 22:16-23 prohibiting anyone with a defect from serving as a priest. In this משנה, as in the section from Leviticus, all of the disqualifying factors are physical except here the שוטה, the חרש, and the drunk are added as additional defective categories; not exactly happy company. Interestingly, insane beasts are deemed acceptable for sacrifice, but Rabbi Simeon ben Gamaliel declares them unfit as a mentally disturbed beast would surely not be the choicest animal available as mandated by Deuteronomy 12:11. This משנה raises an important question: if the חרש and the insane are grouped with the drunk and a long list of “crazy” physical imperfections, is being a שוטה unsightly and socially inappropriate or an actual disability? The issue of social ineptitude versus severe illness is one that will need to be examined in more depth later on.

Text 9: *Tohorot* 5:8

(ח) שוטה אחת בעיר. או נכרית. או כותית. כל הרוקים שבעיר טמאין. מי שדרסה
אשה על בגדיו. או שישבה עמו בספינה. אם מכירתו שהוא אוכל בתרומה. כליו
טהורין. ואם לאו. ישאלנה:

On the issue of doubtful ritual purity, if there is a שוטה, a female non-Jew, or a Samaritan in a given town, all spittle in the town is assumed to be unclean. This משנה implies that there is an assumption of uncleanness for the שוטה¹⁰. If one can likewise assume that the non-Jewish woman and the Samaritan do not follow the laws, are we to understand that the שוטה does not as well? The non-observance of the שוטה is due to a lack

¹⁰Compare with *Tohorot* 3:6 as discussed below.

of obligation like the non-Jew, but the exemption stems from the lack of comprehension of the laws, and certainly it is not a disagreement over authority like the case of the Samaritan. While not equating the שוטה with the non-Jew and the Samaritan directly, all three do end up together in the same unpleasant category with an assumption of ritual impurity.

Text 10: *Niddah* 2:1

(א) כל היד המרבה לבדוק בנשים. משובחת. ובאנשים. תקצץ. החרשת והשוטה והסומא ושטרפה דעתה. אם יש להן פקחות. מתקנות אותן והן אוכלות בתרומה. דרך בנות ישראל. משמשות בשני עדים. אחד לו ואחד לה. הצנועות. מתקנות להן שלישי לתקן את הבית:

In a very interesting משנה, we learn that someone may assist the חרש, the שוטה, the blind, or the unconscious in checking for blood at the time of menstruation as they can't necessarily take care of themselves. An important question arises from the categories of people concerned. Whereas the blind and unconscious women can't see in order to be able to tell, and the שוטה might not understand the rules involved, why is the חרש included in this group? Indeed, this seems to be simply a grouping of all disabilities, all women who would be unable to check and/or to understand their findings on their own. The assumption of a lack of understanding for the חרש woman puts her in a category with the שוטה, even though in this case such a woman might have been able to check herself.

Category Two: The Trio: Deaf-mute, Shotah, and Minor

Text 11: *Eruvin* 3:2

(ב) מערבין בדמאי. ובמעשר ראשון שנטלה תרומתו. ובמעשר שני והקדש שנפדו. והכהנים בחלה ובתרומה. אבל לא בטבל. ולא במעשר ראשון שלא נטלה תרומתו. ולא במעשר שני והקדש שלא נפדו. השולח ערובו ביד חרש שוטה וקטן. או ביד מי שאינו מודה בערוב. אינו ערוב. ואם אמר לאחר לקבלו ממנו. הרי זה ערוב:

One can transform a public space into a private one for the purpose of Shabbat use through the establishment of an עירוב (*eruv*). One way to set up an עירוב is to place a meal

in a designated public space before Shabbat so that on Shabbat the space can be considered private. A meal designed to establish an עירוב that is sent using a חרש, שוטה, or a קטן is not valid even though other agents are not required to have functionality in the delivery of such meals. For example, in *Eruvin* 3:1, a priest can deliver a meal to a graveyard, and a nazirite can prepare such a meal using wine. If the recipient of the meal is advised in advance to accept the meal from a חרש, שוטה, or a קטן, then the delivery is ruled valid. The משנה equates a חרש, שוטה, or a קטן with one who does not accept the lawfulness of an עירוב and likewise implies that they are not responsible acting on their own.

Text 12: *Rosh HaShannah* 3:8

(ח) והיה כאשר ירים משה ידו וגבר ישראל וגו', (שמות יז) וכי ידיו של משה עושות מלחמה או שוברות מלחמה. אלא לומר לך, כל זמן שהיו ישראל מסתכלים כלפי מעלה ומשעבדין את לבם לאביהם שבשמים היו מתגברים. ואם לאו, היו נופלין. כיוצא בדבר אתה אומר, (במדבר כא) עשה לך שרף ושים אתו על נס, והיה כל הנשך וראה אתו וחי. וכי נחש ממית, או נחש מחיה. אלא, בזמן שישראל מסתכלין כלפי מעלה ומשעבדין את לבם לאביהן שבשמים, היו מתרפאים, ואם לאו, היו נמוקים. חרש, שוטה, וקטן, אין מוציאין את הרבים ידי חובתן. זה הכלל, כל שאינו מחויב בדבר, אינו מוציא את הרבים ידי חובתן:

A חרש, שוטה, or a קטן cannot fulfil an obligation for another as the obligation, in this case the blowing of the shofar on Rosh HaShannah, is not incumbent upon them. It makes sense that the חרש who cannot hear the sound of the shofar, and the קטן who is not yet of age to receive the obligation are not able to do for others what they are exempted from themselves, but why is the שוטה included in this list? Is the שוטה unable or simply unreliable? Perhaps this is yet another case of the שוטה being exempted due to a lack of comprehension of the laws regarding, in this case, the blowing of the shofar. One who does not understand or cannot understand is not obligated to perform the מצות himself and therefore cannot perform מצות on behalf of others.

Text 13: *Megillah* 2:4

(ד) הכל כשרין לקרות את המגלה, חוץ מחרש, שוטה, וקטן. רבי יהודה מכשיר בקטן. אין קורין את המגלה, ולא מלין, ולא טובלין ולא מזין, וכן שומרת יום כנגד יום לא תטבול, עד שתנץ החמה. וכולן שעשו משעלה עמוד השחר, כשר:

A חרש, שוטה, or a קטן may not read the scroll of Esther in public. Rabbi Judah says that the קטן actually can do so. The משנה goes on to note that the three cannot read publicly, perform circumcisions, or immerse in a mikveh. This משנה follows the logic of *Rosh HaShannah* 3:8 in which those who are themselves exempt cannot perform a *mitzvah* on behalf of others, and yet the קטן is permitted in this case to read in public.

Text 14: *Hagigah* 1:1

(א) הכל חייבין בראיה, חוץ מחרש, שוטה וקטן, וטומטום, ואנדרוגינוס, ונשים, ועבדים שאינם משוחררים, החגר, והסומא, והחולה, והזקן, ומי שאינו יכול לעלות ברגליו. איזהו קטן, כל שאינו יכול לרכוב על כתפיו של אביו ולעלות מירושלים להר הבית, דברי בית שמאי. ובית הלל אומרים, כל שאינו יכול לאחוז בידו של אביו ולעלות מירושלים להר הבית, שנאמר, שלש רגלים:

A חרש, שוטה, or a קטן is exempt from making a pilgrimage to the Temple for the three pilgrimage festivals: Passover, Shavuot, and Sukkot¹¹. However, the three are grouped with those of doubtful sex, double sex, women, slaves, the lame, the blind, the sick, the aged, and those unable to walk. Is the exemption out of compassion for the disabled like the sick, aged, lame, blind, and those unable to walk, or, should we see the שוטה as linked with the ineligible: those of doubtful or double sex, women, and slaves? The Talmud does, in fact, present detailed explanations of why each group receives its own exemption. While they all end up together, each category of exempt individuals gains their exemption for its own reason. Women and those of doubtful sex, for example, are exempted because the commandment in the Torah clearly requires *men* to make the

¹¹Exodus 23:14 and Deuteronomy 16:16

pilgrimage.¹² The חרש, שוטה, and קטן are exempted for the general reason that they are not able to understand the obligation.

Text 15: *Gittin* 2:5

(ה) הכל כשרין לכתוב את הגט, אפילו חרש שוטה וקטן. האשה כותבת את גטה, והאיש כותב את שוברו, שאין קיום הגט אלא בחותמיו. הכל כשרין להביא את הגט, חוץ מחרש שוטה וקטן וסומא ונכרי:

The validity of a גט depends on the signatory and the method of delivery, not on the author of the document. Therefore, a חרש, שוטה, or a קטן can write a גט but not deliver it. This משנה and the issue of delivery is related to *Gittin* 2:6, as discussed above.

Text 16: *Gittin* 5:8

(ח) ואלו דברים אמרו מפני דרכי שלום. כהן קורא ראשון ואחריו לוי ואחריו ישראל, מפני דרכי שלום. מערבין בבית ישן, מפני דרכי שלום. בור שהוא קרוב לאמה מתמלא ראשון, מפני דרכי שלום. מצודות חיה ועופות ודגים יש בהם משום גזל, מפני דרכי שלום. רבי יוסי אומר, גזל גמור. מציאת חרש שוטה וקטן, יש בהן משום גזל, מפני דרכי שלום. רבי יוסי אומר, גזל גמור. עני המנקף בראש הזית, מה שתחתיו גזל, מפני דרכי שלום. רבי יוסי אומר, גזל גמור. אין ממחין ביד עניי גוים בלקט ובשכחה ובפאה, מפני דרכי שלום:

This משנה discusses the issue of found goods which may have been stolen. In the interest of peace, the laws of theft apply to that which is found by a חרש, שוטה, or a קטן, at least in part, though Rabbi Jose says in all respects. The issue here is whether or not those who lack intent and understanding can claim and or own material goods. According to the Torah, they cannot as possession requires intent, but the Rabbis made a תקנה (*takkanah*) allowing for the “trio” to have some property rights. Therefore, if any of them takes something inadvertently from someone else by finding it on the ground, or if something is taken from any of them, it can be reclaimed in a Rabbinic court, but no damages for theft

¹² *Hagigah* 4a, for example, on case of double or doubtful sex.

can be assigned. This ruling is similar to that of *Baba Kama* 4:4, which exempts them from responsibility but entitles them to damages.

Text 17: *Baba Kama* 5:6

(ו) בור של שני שותפין. עבר עליו הראשון ולא כסהו. והשני ולא כסהו. השני חייב. כסהו הראשון. ובא השני ומצאו מגולה ולא כסהו. השני חייב. כסהו כראוי. ונפל לתוכו שור או חמור ומת. פטור. לא כסהו כראוי. ונפל לתוכו שור או חמור ומת. חייב. נפל לפניו מקול הכרית. חייב. לאחריו מקול הכרית. פטור. נפל לתוכו שור וכליו ונשתברו. חמור וכליו ונתקרעו. חייב על הבהמה ופטור על הכלים. נפל לתוכו שור חרש שוטה. וקטן. חייב. בן או בת. עבד או אמה. פטור:

This משנה involves an ox who is a חרש, שוטה, or a קטן that falls into a pit. When such an ox falls into a pit, the pit owner is liable for damages to be paid to the ox owner. The משנה suggests that the ox owner can't be held responsible for an animal that doesn't behave normally, but shouldn't he know better than to allow his disabled animal to roam free? Rabbi Meir seemed to suggest that this was the owner's responsibility in *Baba Kama* 4:4 as discussed in Category One. Nevertheless, the ruling here in keeping with the general standard that the שוטה, here even the שוטה animal and by extension his owner, is devoid of responsibility and liability is always passed to others. This and other cases of non-human references to the שוטה will be covered in Category Three.

Text 18: *Baba Kama* 6:2

(ב) הניחה בחמה. או שמסרה לחרש שוטה וקטן. ויצאה והזיקה חייב. מסרה לרועה. ובנס רועה תחתיו. נפלה לגינה ונהנית משלמת מה שנהנית. ירדה כדרכה והזיקה. משלמת מה שהזיקה. כיצד משלמת מה שהזיקה שמין בית סאה באותה שדה. כמה היתה יפה וכמה היא יפה. רבי שמעון אומר אכלה פירות גמורים משלמת פירות גמורים. אם סאה סאה אם סאתים סאתים:

If a man leaves his flock in the care of a חרש, שוטה, or a קטן and the flock causes any damage, the owner, not the shepherd, is liable. It seems unlikely that someone would hire such a person to be a shepherd.

If such a person can't be held responsible for his actions, then the משנה implies that such a person is unworthy of responsibility.

Text 19: *Baba Kama* 6:4

(ד) השולח את הבערה ביד חרש, שוטה וקטן, פטור בדיני אדם, וחייב בדיני שמים. שלח ביד פקח פקח חייב. אחד הביא את האור, ואחד הביא את העצים, המביא את העצים חייב. אחד הביא את העצים, ואחד הביא את האור, המביא את האור חייב. בא אחר ולבה, המלבה חייב. לבתה הרוח כולן פטורין. השולח את הבערה ואכלה עצים, או אבנים, או עפר, חייב. שנאמר (שמות כב) כי תצא אש ומצאה קוצים ונאכל גדיש או הקמה או השדה, שלם ישלם המבעיר את הבערה. עברה גדר שהוא גבוה ארבע אמות, או דרך הרבים, או נהר פטור. המדליק בתוך שלו, עד כמה תעבור הדלקה, רבי אלעזר בן עזריה אומר רואין אותה כאלו הוא באמצע בית כור, רבי אליעזר אומר שש עשרה אמות כדרך רשות הרבים. רבי עקיבא אומר חמשים אמה. רבי שמעון אומר שלם ישלם המבעיר את הבערה (שמות כב). הכל לפי הדליקה:

If a man allows a fire to break out at the hands of a חרש, שוטה, or a קטן, he is not liable by the laws of man, but he is deemed liable by the laws of Heaven. This משנה seems to suggest that while the חרש, שוטה, and קטן are not responsible for their own actions, one should be careful not to take advantage of them. In cases where דיני שמים (*dinei shamayim*, “judgement of Heaven”) is the proscribed punishment, the Rabbinic authorities, in an effort to make the law an effective human instrument, encouraged offenders to submit to an earthly punishment of fines and or flogging as appropriate, on the theory that such a punished person would repent and God would be satisfied. Further, if applicable, the fine could be paid directly to the injured or damaged party, thereby circumventing the lack of explicit compensation.¹³

Text 20: *Baba Kama* 8:4

(ד) חרש שוטה וקטן פגיעתן רעה. החובל בהן חייב. והם שחבלו באחרים פטורין. העבד והאשה פגיעתן רעה. החובל בהן חייב. והם שחבלו באחרים. פטורין. אבל משלמין לאחר זמן. נתגרשה האשה. נשתחרר העבד. חייבין לשלם:

¹³Menachem Elon, “Divine Punishment,” in *The Principles of Jewish Law* (Jerusalem: Keter, 1974), 524.

If a man injures a חרש, שוטה, or a קטן, he is liable but if they wound others, they are not liable. This rule is similar to that for slaves and married women, but slaves may have to make restitution later if they are freed and women if they become divorced. This seems to be another moral injunction against harming the disabled like *Baba Kama* 6:4, as the משנה describes hurting a חרש, שוטה, or a קטן as, “an ill thing to do.” More interesting, however, is the idea that the slave or the married woman may become liable later if their status changes, but no mention is made here of the קטן growing up or the חרש and שוטה recovering as are allowed for elsewhere.

Text 21: *Shevuyot* 6:4

(ד) אין נשבעין על טענת חרש שוטה וקטן. ואין משביעין את הקטן. אבל נשבעים לקטן ולהקדש:

No oath is imposed on a חרש, שוטה, or a קטן, but an oath may be imposed in a case against the property of a קטן. Any oath involves an intent on behalf of the swearer and since a שוטה cannot form an intention as noted in *Tohorot* 8:6, *Makshirin* 3:8, and *Makshirin* 6:1 explained below, it is obvious why an oath is not applicable to such an individual. Regarding the property of a קטן, however, it is possible that some other legal guardian who is of majority age could be held responsible for the goods.

Text 22: *Menahot* 9:8

(ח) הכל סומכין. חוץ מחרש. שוטה. וקטן. סומא. ונכרי. והעבד. והשלית. והאשה. וסמיכה. שירי מצוה. על הראש. בשתי ידים. ובמקום שסומכין שוחטין. ותכף לסמיכה שחיטה:

Anyone can perform the laying on of hands for the acceptance of a burnt offering as mandated by *Leviticus* 1:4 except a חרש, שוטה, a קטן, the blind, a gentile, a slave, an agent, or a woman. This is in keeping with other משניות that exempt a חרש, שוטה, or a קטן from

sacrificial cult service. Once again, the Talmud does provide specific reasons for the exemption of each category. They are not to be understood as being linked directly in a social status sense, but rather, for a variety of reasons, just as in *Hagigah* 1:1, they all end up together in the same disenfranchised boat.

Text 23: *Hullin* 1:1

(א) הכל שוחטין ושחיטתן כשרה. חוץ מחרש. שוטה. וקטן. שמא יקלקלו בשחיטתן. וכולן ששחטו ואחרים רואין אותן. שחיטתן כשרה. שחיטת גברי. נבלה ומטמאה במשא. השוחט בלילה. וכן הסומא ששחט. שחיטתו כשרה. השוחט בשבת. וביום הכפורים. אף על פי שמתחייב בנפשו. שחיטתו כשרה:

A חרש, שוטה, or a קטן may not slaughter meat for consumption lest they injure the animal and render it unfit, as ritual slaughter is a rather precise business. However, if someone else helps them to make sure that they do it right, their slaughtering is deemed valid! This is a very interesting comment: a חרש, שוטה, or a קטן isn't supposed to do the slaughtering in the first place, but if they do so with help, they can succeed. The requirement of assistance seems to mirror other cases of assumed responsibility, where a guardian or assistant becomes responsible on behalf of the pair. The clear point is that the שוטה cannot slaughter effectively on his own. Nevertheless, this משנה opens a door to some level of participation in society for the otherwise incapable.

Text 24: *Hullin* 6:3

(ג) חרש שוטה וקטן ששחטו ואחרים רואין אותן. חייב לכסות. בינן לבין עצמן. פטור מלכסות. וכן לענין אותו ואת בנו. ששחטו ואחרים רואין אותן. אסור לשחוט אחריהם. בינן לבין עצמן. רבי מאיר מתיר לשחוט אחריהן. וחכמים אוסרים. ומודים שאם שחט. שאינו סופג את הארבעים:

If a חרש, שוטה, or a קטן does in fact slaughter an animal with the help of another, it is the other who is obligated to cover the blood with earth. If the חרש, שוטה, or a קטן slaughtered on their own, there is no need to cover the blood as the slaughtering is invalid

and doesn't count. Likewise, when faced with the dilemma of animals who are parent and offspring as noted in Deuteronomy 22:6-7, the חרש, שוטה, or a קטן who is slaughtering with the help of a witness should not, out of obedience to the commandment, kill the parent with the offspring. Rabbi Meir says that it is permissible for a חרש, שוטה, or a קטן to slaughter both parent and offspring if he is acting alone as the ritual slaughtering would be invalid for consumption anyway. The sages however, rule that the חרש, שוטה, or a קטן still may not violate the negative commandment from Deuteronomy, even when acting alone. This is a very important point as it makes a חרש, שוטה, or a קטן responsible for his actions vis-a-vis the Toraic commandment and suggests that in fact, even without intention, the actions of the חרש, שוטה, and קטן do count in a larger sense, as the Talmud notes, "חרש שוטה וקטן אין להם מחשבה אבל יש להם מעשה"¹⁴.

Text 25: Arakhin 1:1

(א) הכל מעריכין. ונערכין. נודרים. ונדרים. כהנים ולוים וישראלים. נשים ועבדים. שומטום ואנדרוגינוס. נודרים ונדרים ומעריכין. אבל לא נערכין. שאינו נערך אלא זכר ודאי ונקבה ודאית. חרש שוטה וקטן. נדרין ונערכין. אבל לא נודרין ולא מעריכין. מפני שאין בהם דעת. פחות מבן חודש. נדר אבל לא נערך:

A חרש, שוטה, or a קטן cannot vow another's worth or valuation as they have no understanding of the matter. This is another case of disability, specifically non-comprehension, preventing participation.

Text 26: Meilah 6:2

(ב) שלח ביד חרש. שוטה. וקטן. אם עשו שליחותו. בעל הבית מעל. לא עשו שליחותו. החנוני מעל. שלח ביד פקח. ונוכר עד שלא הגיע אצל חנוני. החנוני מעל כשיוציא. כיצד יעשה. נוטל פרוטה או כלי ויאמר. פרוטה של הקדש בכל מקום שהיא. מחוללת על זה. שההקדש נפדה בכסף ובשוה כסף:

¹⁴Hullin 13a.

This משנה describes the case of a חרש, שוטה, or a קטן sent as an agent for an improper transaction such as buying personal goods with money vowed for donation to the Temple. If a חרש, שוטה, or a קטן is sent on such an errand, the householder who sent him is guilty. If a חרש, שוטה, or a קטן came on his own to attempt an improper transaction, it is the shopkeeper who enabled his transgression who is liable. Once again, we see that a חרש, שוטה, or a קטן is not responsible for his own actions and blame for the result is passed to others who abused or enabled the disadvantaged.

Text 27: *Parah* 5:4

(ד) שפופרת שחתכה לחטאת. רבי אליעזר אומר יטביל מיד. רבי יהושע אומר יטמא ויטביל. הכל כשרים לקדש. חוץ מחרש שוטה וקטן. ר' יהודה מכשיר בקטן. ופוסל באשה ובאנדרוגינוס:

A חרש, שוטה, or a קטן is not allowed to mix the ashes with water to create the red heifer purification potion. Rabbi Judah says that a קטן can, in fact, mix the potion, but that neither a woman nor a person of double sex can do so. Again, although they come to the list for different reasons, we find the same result. Either way, we see yet another example of those deemed ineligible from performing a mitzvah on behalf of others as noted in *Rosh HaShannah* 3:8.

Text 28: *Tohoroth* 3:6

(ו) חרש שוטה וקטן שנמצאו במבוי שיש בו טומאה. הרי אלו בחזקת טהרה. וכל הפקת. בחזקת טומאה. וכל שאין בו דעת להשאל. ספקו טהור:

If a חרש, שוטה, or a קטן is in an alleyway with something that causes ritual uncleanness, they are assumed to be clean while people of sound senses are assumed to be unclean! If there is a matter of doubt in a private domain, people are deemed unclean but if the doubt is in the public domain they are considered clean. However, the benefit of the

doubt is to be given to those deemed unable to understand and they are ruled clean. It seems counter-intuitive that the *חרש*, *שוטה*, or a *קטן* would be given the benefit of the doubt in cases of ritual purity. One might think that, not understanding the situation, we could assume the *חרש*, *שוטה*, or a *קטן* to have touched the impure object, but this *משנה* rules otherwise.

Text 29: *Tohoroth* 8:6

(ו) כלל אמרו בטהרות. כל המיוחד לאוכל אדם. טמא. עד שיפסל מאוכל הכלב. וכל שאינו מיוחד לאוכל אדם. טהור. עד שייחדנו לאדם. כיצד. גוזל שנפל לגת וחשב עליו להעלותו לנכרי. טמא. לכלב. טהור. רבי יוחנן בן נורי מטמא. חשב עליו *חרש*. *שוטה*. וקטן. טהור. אם העלוהו. טמא. שיש להן מעשה ואין להן מחשבה:

That which is not really food cannot be deemed unclean. This *משנה* concerns items that are not considered food for people but that might be fit for dogs being served as food for people and the effect of ritual impurity on such dishes. The issue is whether the server knowingly intends to serve another person something that isn't normally considered food for people. A *חרש*, *שוטה*, or a *קטן* cannot form an intention to make unfit food into a meal for another person but if they do so, the food does become susceptible to uncleanness as the would-be eater has to decide whether or not to consume it. Action ultimately trumps intention anyway. The inability to form an intention renders a *חרש*, *שוטה*, or a *קטן* unable to affect others but he can still influence other with his crazy actions to which others must then respond.

Text 30: *Makshirin* 3:8

(ח) המוריד את הגלגלים ואת כלי הבקר בשעת הקדים למים בשביל שיחוצו. הרי זה בכי יותן. המוריד בהמה לשתות. המים העולים בפיה. בכי יותן. וברגליה. אינן בכי יותן. אם חשב שיודחו רגליה. אף העולין ברגליה בכי יותן. בשעת היחף והדיש. לעולם טמא. הוריד *חרש* *שוטה* וקטן. אף על פי שחשב שיודחו רגליה. אינן בכי יותן. שיש להן מעשה ואין להן מחשבה:

This *משנה* takes up the case of a *חרש*, *שוטה*, or a *קטן* sent as an agent in charge of an animal who then puts the animal in a situation that could bring it in contact with a source of uncleanness. The normal rule of water-borne contact¹⁵ do not apply to the actions of the *שוטה* as a *חרש*, *שוטה*, or a *קטן* cannot form an intention and all that matters is the act itself. Here, even when acting on behalf of another, even when the “intent” of the *שוטה* is the express intent of the owner, it is of no consequence. Unlike like *Meilah* 6:2 where the householder was liable for sending the *חרש*, *שוטה*, or the *קטן* on the improper errand, here even when the owner instructs a *חרש*, *שוטה*, or a *קטן* to put water on the feet of his animal, the rule of putting water on an object does not apply. If the action is truly what matters in the end, however, shouldn't the fact that the *חרש*, *שוטה*, or *קטן* got the animal wet automatically render it susceptible to uncleanness regardless of intent, not the opposite?

Text 31: *Makshirin* 6:1

(א) המעלה פרותיו לגג מפני הכנימה. וירד עליהם טל. אינם בכי יותן. אם נתכון לכך. הרי זה בכי יותן. העלן חרש שוטה וקטן. אף על פי שחשב שירד עליהן הטל. אינן בכי יותן. שיש להן מעשה ואין להן מחשבה:

In a similar case to *Makshirin* 3:8, produce is placed on the roof which and then comes contact with dew. Once again, if it was a *חרש*, *שוטה*, or a *קטן* who took the produce to the roof, even if the owner's intent was for it to get wet, the rule does not apply since a *חרש*, *שוטה*, or a *קטן* cannot form an intention. Not only can't a *חרש*, *שוטה*, or a *קטן* make a legally binding decision, *any* decision he makes is ruled inconsequential.

¹⁵Leviticus 11:37-38 explains that if a dead carcass were to fall on dry seeds, the carcass, normally a source of uncleanness does not make the seeds unclean. However, if the seeds had gotten wet and then came in contact with the carcass, they would be unclean. This verse establishes a general rule for ritual impurity: things that get wet are susceptible to uncleanness, even when the same object, had it stayed dry, would not have been.

Text 32: *Zavim* 2:1

(א) הכל מטמאין בזיבה. אף הגרים. אף העבדים. בין משוחררין בין שאינן משוחררין. חרש. שוטה. וקטן. סריס אדם. סריס חמה. טומטום ואנדרוגינוס. נותנין עליהן חומרי האיש וחומרי האשה. מטמאין בדם כאשה. ובלבן כאיש. וטומאתן בספק:

Even a חרש, שוטה, or a קטן, as well as a proselyte, a slave, a natural or man-made eunuch, and the doubtful or double-sexed are susceptible to ritual uncleanness due to an emission of semen. Everyone is together in the natural process of discharges; no special treatment is required. Perhaps this is because the discharge involves a complete lack of intentionality and further, unlike *Tohoroth* 3:6, there is no doubt involved.

Text 33: *Yadaim* 1:5

(ה) המים שהנחתום מטביל בהם את הגלוסקין. פסולים. וכשהוא מדיח את ידיו בהן. כשרים. הכל כשרים לתן לידים. אפילו חרש שוטה וקטן. מניח חבית בין ברכיו ונוטל. מטה חבית על צדה ונוטל. והקוף נוטל לידים. ר' יוסי פוסל בשני אלו:

Even a חרש, שוטה, or a קטן can pour out the water for hand washing. This case seems to suggest that a חרש, שוטה, or a קטן can assist others in the fulfillment of a mitzvah as long as it is one in which they too can participate.

Category Three: Additional Mishnaic References

In addition to the reference in *Baba Kama* 5:6 describing the ox who was a חרש, שוטה, or a קטן, there are a few other Mishnaic references to the term שוטה. In *Yoma* 8:6 the term refers to a mad dog, כלב שוטה (*kelev shoteh*). In *Eduyot* 5:6, Akivah ben Mahalaleel uses the term in a derogatory sense, מוטב לי להקרא שוטה כל ימי, (*mutav li l'hikarei shoteh kol yamai*, "Better I be called a fool all my days...") Likewise, the term describes a foolish, wicked, arrogant man, שוטה רשע וגס רוח (*shoteh rasha v'gas ruach*) who rushes

forward to take a judicial position in *Avot* 4:7. Such usages of the term שוטה to refer to foolish, crazy, or mad behavior parallel our own modern understanding of the term “crazy” in a derogatory sense. As such they do not affect the investigation of the שוטה as a legal category but they do remind us of the negative social stigma of mental illness.

Summary

There are several overarching comments that can be made from an examination of the משניות cited in this chapter. Individuals in the legal category of שוטה are exempted from almost all responsibility but can still become victims at the hands of others. As they are not obligated to perform most מצות, their performance cannot be efficacious for others. The only exception was the case of pouring water for handwashing. Just as they cannot help someone else fulfil an obligation to perform a mitzvah, so too they are not effective as agents; when they succeed in completing their assigned task it doesn't count and when they err, the one who hired them takes the blame. Further, their exemption from most מצות stems from an assumed inability to form an intention which likewise explains their failure as agents. The only time their agency is effective is when a second party either assists them or is notified in advance to accept whatever they deliver. The שוטה in the *Mishnah* is definitely not a positive category, but it seems that it is not merely a neutral category either. In addition to being equated with other disabled individuals, the שוטה is often grouped with criminals, drunks, slaves, and non-Jews. Not merely inept and ineffective, the שוטה is also a potential nuisance, likely to spread uncleanness, start fires, and feed others food unfit for human consumption. And, even where irrelevant in a legal sense, the term is often used in a derogatory sense by the sages themselves.

Not all examples from these משניות are completely negative. On the positive side, we learn from these משניות that the שוטה can change his status. This implies that insanity

is an illness and not a lifelong categorization. Further, both people and animals can be stricken, lending credence to the illness argument. There is a moral imperative not to harm or take advantage of the שוטה, offering him a protected status like the widow or orphan. Perhaps by relieving him of obligations and responsibilities, the משנה seeks to protect him not only from others but from himself as well. Certainly the שוטה is a full participant in all natural life functions like any other member of the community as seen through his inclusion in the rules of *Zavim*. Lastly, and perhaps most importantly for those of us examining the status of the mentally ill in our own communities today, the שוטה is deemed capable of participating in society with the help of others. True, the helper does assume most of the risk, but the שוטה is able to feel a sense of participation, accomplishment, and communal membership. That this sense of inclusion is validated by the משניות themselves is truly encouraging.

In conclusion, at this strata of the legal material, the general rule is simply that the שוטה is always exempted from personal responsibility for his own actions. This includes both obligations to God through the performance of the מצוות and also obligations to the rest of society for proper behavior and management of one's own property and affairs. As such, the שוטה is free from blame both for taking improper actions and for not taking action at all. The penalty is that a שוטה is excluded from many communal activities and is not deemed worthy of public trust. The שוטה benefits from a protected status, free from blame but still entitled to damages. The only exceptions seem to be for limited participation when the שוטה is assisted by a fully functioning member of the community and for natural functions which involve no intent and need no comprehension.

CHAPTER TWO. The Shoteh in the Codificatory Literature

Rabbi Moses ben Maimon, born in Cordova, Spain in 1135, became one of the greatest scholars and codifiers of Jewish law. While he composed many important works, including a commentary on the *Mishnah*, the philosophical *Guide For the Perplexed*, and several letters of exposition to various Jewish communities, his greatest contribution to Jewish law was the *Mishneh Torah*, completed around 1178. Maimonides' *Mishneh Torah* provides the reader with a guide to observance of the מצות, written in Hebrew, that is designed to be more concise and easy to use than the confusing and unwieldy Talmud. Maimonides explains that his book can even serve as a replacement for the Talmud itself.¹⁶ As such, it is worth investigating the rules regarding the שוטה as presented in the *Mishneh Torah* to see if they mirror the משניות already presented in the previous chapter. In most cases, they do and one can assume that those הלכות remain constant from the *Mishnah* in the second century through the Talmud in the sixth century to Maimonides' own time in the late twelfth century. The following are some examples of הלכות from the *Mishneh Torah* on subjects dealing with the category of the שוטה. Here are some selected הלכות:

Text 34: *Hilchot Berachot* 6:13

יג הכל כשרין ליתן לידים אפילו חרש שוטה וקטן, אם אין שם אחר מניח הכלי
בין ברכיו וצק על ידיו, או יטה החבית על ידיו ויטול או נוטל ידו אחת וצק בו
על זו ותוור וצק בראשונה על השנייה, והקוף נוטל לידים.

In this הלכה, Maimonides explains that even the חרש, שוטה and קטן can wash hands, presumably their own and perhaps even someone else's as he relates this mitzvah to the mitzvah of one person pouring out water onto the hands of another based on Numbers 19:19 and the rules of the Red Cow water of purification. Here, Maimonides faithfully

¹⁶Maimonides' introduction to the *Mishneh Torah*, in Isadore Twersky, *A Maimonides Reader* (West Orange, NJ: Behrman House, 1972), 35–41.

follows the rule presented in *Mishnah Yadaim* 1:5 as discussed in the previous chapter. The only change is that Maimonides also allows for a monkey to pour out the water. If a monkey can pour the water, an animal certainly devoid of knowledge, so too can a similarly unknowing but helpful שוטה.

Text 35: *Hilchot Shabbat* 20:7

ז היה עמו חרש שוטה וקטן מניה כיסו על החמור ואינו נותנו לאחד מהן מפני שהן אדם מישראל, היה עמו חרש ושוטה ואין עמו בהמה נותנו לשוטה, שוטה וקטן נותנו לשוטה, חרש וקטן נותנו לאי זה מהן שירצה, לא היתה עמו בהמה ולא נכרי ולא אחד מכל אלו מהלך בו פחות פחות מארבע אמות, ואפילו מציאה שבאה לידו מהלך בה פחות פחות מארבע אמות, אבל קודם שתבא לידו אם יכול להחשיך עליה מחשיך ואם לאו מוליכה פחות פחות מארבע אמות.

If a person is travelling with a חרש, שוטה, or a קטן and he is carrying a purse of money and Shabbat draws near, the traveller is encouraged to place the money on a pack animal such as a donkey rather than ask his companion to carry it. One might assume that since the three are exempt from the rules regarding Shabbat observance, it would be acceptable to ask them to carry the money so as to keep the knowing person from violating the Sabbath. But no! Maimonides rules that even those exempted due to incompetence are people and members of the Jewish community. However, if no animal is present, Maimonides does suggest giving the money to the exempt travelling companion. If one has a choice of such companions, the שוטה is the preferred choice. The חרש is assumed to have more comprehension than the שוטה and other people might see him and assume that it is acceptable for them to carry money on the Sabbath as well. The קטן will some day grow up and be obligated to observe Shabbat correctly and it would therefore be less desirable to set a bad example in his youth. Despite the positive opening, suggesting that the חרש, שוטה, and קטן are to be accorded higher standing than the animal as humans and members of the Jewish people, they are quickly exploited as loopholes to circumvent Shabbat restrictions.

Further, unlike the in the *Mishnah*, here the חרש, שוטה, and קטן are ranked, with the שוטה clearly coming out at the bottom of the list.

Text 36: *Hilchot Eruvin* 6:22

כב הרוצה לשלח עירובו ביד אחר להניחו לו במקום שהוא רוצה לקבוע שביתתו שם הרשות בידו, וכשהוא משלחו אינו משלחו ביד חרש שוטה וקטן ולא ביד מי שאינו מודה במצות עירוב, ואם שלח אינו עירוב, ואם שלחו ביד אחד מאלו הפסולין להוליכו לאדם כשר כדי שיוליכו הכשר ויניחו במקום העירוב הרי זה כשר, ואפילו שלחו על הקוף או על הפיל, והוא שיהיה עומד מרחוק עד שיראה זה הפסול או הבהמה שהגיעו אצל הכשר שאמר לו להוליך את העירוב, וכן רבים שנשתתפו בעירובי תחומין ורצו לשלח עירובן ביד אחר הרי אלו משלחין.

Just as in the discussion in *Mishnah Eruvin* 3:2, one cannot use the חרש, שוטה, or a קטן as an agent for establishing an עירוב. However, here, the law has been expanded to allow such a person to carry the עירוב materials to another person who is a legitimate agent who will then carry the materials to the designated location. This is valid as long as the original sender watches the חרש, שוטה, or קטן hand the items to the eventual agent. The משנה allowed for the sending of such an incompetent agent as long as the recipient knew they were coming. It also allowed for their agency so long as they came with an assistant, seemingly making the חרש, שוטה, or a קטן seem as useful as a pack animal. Here, Maimonides explicitly allows for an elephant or even a monkey to perform the same tasks as a חרש, שוטה, or a קטן. Are they all mindless but capable of being directed? Perhaps it is because no intent is necessary to create an עירוב תבשלין (*eruv tavshilin*); the person simply needs to gather and deliver two meals worth of food, a task even a חרש, שוטה, a קטן, a monkey or an elephant could accomplish with help and direction.

Text 37: *Hilchot Lulav* 7:19

יט כל שחייב בשופר ובסוכה חייב בנטילת הלולב, וכל הפטור משופר וסוכה פטור מלולב, קטן היודע לנענע חייב בלולב מדברי סופרים כדי לחנכו במצות. כ הלכה למשה מסיני שמביאין במקדש ערבה אחרת חוץ מערבה שבלולב, ואין אדם יוצא ידי חובתו בערבה שבלולב, ושיעורה אפילו עלה אחד בבד אחד.

Here, amid a discussion of sukkot observance regarding the waving of the lulav, the חרש, שוטה, and קטן are exempted due to their lack of understanding of the rules, just as was the case in the *Mishnah*, *Rosh HaShannah* 3:8 in particular.

Text 38: *Hilchot Megillah* 1:2

ב אחד הקורא ואחד השומע מן הקורא יצא ידי חובתו והוא שישמע ממי שהוא חייב בקריאתה, לפיכך אם היה הקורא קטן או שוטה השומע ממנו לא יצא.

Just like the משנה in *Megillah* 2:4, one who is exempted from the public reading of the scroll of Esther cannot fulfil the obligation for others. Such a public reading requires the intent that one's reading will serve to fulfil the obligation for others and the חרש, שוטה, and קטן are devoid of intent. While Maimonides does not allow a קטן to read, the *Mishneh Berurah* suggests that a קטן is allowed to read for others as he will one day be obligated and such a reading serves a training purpose for a child just short of the age of responsibility.¹⁷

Text 39: *Hilchot Hanukkah* 4:9

ט נר חנוכה שהדליקו חרש שוטה - כ וקטן או גוי לא עשה כלום עד שידליקנו מי שהוא חייב בהדלקה, הדליקו מבפנים והוציאו דלוק והניחו על פתח ביתו לא עשה כלום עד שידליקנו במקומו, אחז הנר בידו ועמד לא עשה כלום שהרואה אומר לצרכו הוא עומד. עששית שהיתה דולקת כל היום כולו למוצאי שבת מכבה ומברך ומדליקה שההדלקה היא המצוה ולא ההנחה, ומותר להדליק נר חנוכה מנר חנוכה אחר.

¹⁷*Mishneh Berurah* 689:6 “(ו) או קטן” The child is allowed to read for the purpose of learning how since the mitzvah for reading the *Megillah* is only Rabbinic in nature. As such, the Rabbis can make an exception.

Much like *Hilchot Megillah* 1:2 above, a menorah kindled by a חרש, שוטה, or קטן, or a gentile is of no consequence as they are all exempt from the mitzvah. Again, the child's participation is allowed for training purposes.

Text 40: *Hilchot Ishut* 3:17

יז הכל כשרין לשליחות חוץ מחרש שוטה וקטן לפי שאינן בני דעת והגוי לפי שאיננו בן ברית ונאמר במדבר י"ח כן תרימו גם אתם לרבות השליח ומה אתם בני ברית אף שלוחכם בן ברית להוציא את הגוי, אבל העבד אע"פ שהוא נעשה שליח לדבר שבממון הרי הוא פסול לשליחות הקידושין והגיטין לפי שאיננו בתורת גיטין וקידושין.

As in the mishnaic cases where a חרש, שוטה, or קטן cannot serve as an agent for גט delivery or עירוב establishment, here Maimonides notes that such a man cannot serve as an agent for betrothal, either, nor can these individuals serve as the witnesses to such an agent-delivered betrothal as noted in *Hilchot Ishut* 3:16. As the חרש, שוטה, and קטן are not responsible for their own actions, they can neither act on behalf of someone else, as an agent, nor on behalf of the community, as a witness. Likewise, a non-Jew cannot serve as either an agent for betrothal nor a witness as these are task set aside for Jews, as Maimonides interprets from Numbers 18:28.¹⁸ Normally, a slave could serve as an agent for a monetary errand such as the transfer of goods to complete betrothal, but he is not eligible, either, in this case for agency, since like the חרש, שוטה, קטן, and non-Jew, he is not subject to the laws of קידושין (*kiddushin*).

Text 41: *Hilchot Ishut* 4:9

ט חרש שנשא פקחת וכן חרשת שנשאת לפקח אין קידושיהן גמורין מן התורה אלא מדברי סופרים, לפיכך אם בא פקח וקידש אשת חרש הפקחת הרי זו מקודשת לשני קידושין גמורין ונותן גט והיא מותרת לבעלה החרש, אבל השוטה שקידש פקחת או פקח שקידש שוטה אין כאן קידושין כלל לא מדברי תורה ולא מדברי סופרים.

¹⁸Interpreting the "setting apart" to mean that certain tasks can only be filled by Jews.

Here Maimonides explains that while a חרש, devoid of intention, cannot marry under Toraic law, apparently he can marry under Rabbinic law and such a marriage would require a גט to be dissolved. Contrarily, there can be no marriage for a שוטה under Toraic or Rabbinic law. The suggestion is that while someone could tolerate living with a חרש, no one could possibly be comfortable married to an insane person. Interestingly, Rabbi Moshe Isserles, the Ramah, in his commentary on *Even HaEzer* 44:2, does note that this seems unfair as it is hard to tell if a person is completely insane or not, bringing in the issue of עתים חלים עתים שוטה (*itim chalim, itim shoteh*, “sometimes whole, sometimes crazy”).

Text 42: *Hilchot Ishut* 11:4

ד בתולה שהיא בוגרת או סומה או אילונית כתובתן מאתים, אבל החרשת והשוטה לא תיקנו להן חכמים כתובה, השוטה לא תיקנו לה נישואין כלל, והחרשת אע"פ שיש לה נישואין מדבריהם לא תיקנו לה כתובה כדי שלא ימנעו מלשאת אותה, וכשם שאין לה כתובה כך אין לה מזונות ולא תנאי מתנאי כתובה, ואם כנס החרשת ונתפקחה יש לה כתובה ותנאי כתובה וכתובתה מאה.

This הלכה explains that there is no provision for a כתובה (*ketubah*) for a חרש or a שוטה as there is no recognition of such a marriage, as noted above in *Hilchot Ishut* 4:9. A חרש can marry under Rabbinic law, but in such a case no כתובה is required to serve as an enticement for a man to propose to such a disabled and otherwise prospectless woman. If the חרש recovers her hearing, however, the man must pay the normal כתובה rate of one hundred זוזים (*zuzim*), but not the virgin rate of two hundred. Even if she was a virgin at the time of their marriage, she was then a חרש, while now that she is recovered, she is clearly no longer a virgin as she had been married for some time. There is no parallel case for the שוטה who recovers her sanity as there was no marriage in the first place.

Text 43: *Hilchot Ishut* 11:5

ה נשא חרשת או שוטה וכתב להן מאה מנה כתובתן קיימת מפני שרצה להזיק נכסיו.

Despite the allowance for no כתובה to be written for the חרש or the שוטה in the preceding הלכה, if a person is so foolish as to write an exorbitant כתובה, ten thousand זוזים, for example, for such a disabled would-be bride, it does become binding as he chose to diminish his own assets.

Text 44: *Hilchot Ishut* 11:6

ו חרש או שוטה שנשא נשים פקחות אע"פ שנתפקח החרש ונשתפה השוטה אין לנשיהם עליהם כלום, רצו לקיימן אחר שהבריא יש להן כתובה מאה, ואם בית דין הם שהשיאו החרש וכתבו לה כתובה על נכסיו נוטלת כל מה שכתבו לה בית דין, אבל השוטה אין בית דין משיאין אותו, במקום שאין תקנת חכמים עומדת לא תיקנו לו נישואין. וכן קטן לא תיקנו לו חכמים נישואין הואיל וסופו לבוא לידי נישואין גמורין, ומפני מה תיקנו נישואין לקטנה ואע"פ שהיא באה לידי נישואין גמורין, כדי שלא ינהגו בה מנהג הפקר, ואין משיאין את הקטן עד שבודקין אותו ויודע שהביא סימנין.

In this, the third of three related הלכות on the issue of marriage for the חרש or the שוטה, we get what appears to be a final, definitive ruling on the subject. If a man who is a חרש or a שוטה does get married, he bears no obligation to his wife, even if he recovers, as the act of marriage took place when he was without the ability to form an intention and the marriage contract is therefore invalid. However, if, after he recovers, he does wish to remain married, he does not need to remarry the woman but does need to write her a כתובה for the standard value of one hundred זוזים. On the other hand, if the court had arranged an acceptable marriage on behalf of the חרש, whatever was in the original כתובה is fully binding. There is no valid marriage for one incapable of forming intention, though there are acceptable unions for the חרש. Here, again, we see a grading of those deemed without intent that has appeared elsewhere in the *Mishneh Torah*. The שוטה is clearly of an even

lower status than the חרש; not only is he without intent, he is without hope. The חרש might at least be a decent person to live with, and is therefore eligible for marriage by Rabbinic standards, whereas the שוטה is a danger to himself and to others and therefore is to be avoided.

Text 45: *Hilchot Yibum v'Halitzah* 4:16

טז חליצה בלילה , או שחליצה בפני שנים, או בפני שלשה ונמצא אחד מהן קרוב או פסול, או שהיה המנעל קשור למעלה מן הארכובה, או שהתיר הוא ושמטה היא, או שהתירה היא ושמט הוא, או שנתכוונה היא ולא נתכוון הוא, או שנתכוון הוא ולא נתכוונה היא, וכן קטנה שחליצה לגדול, חליצתה פסולה. וכן אם חליצה בפני יחיד ואפילו בינו לבינה ובלילה הרי זו חליצה פסולה , אבל חרש שוטה וקטן שחלצו וכל החולץ למי שהיא פטורה מן החליצה ומן היבום אינה חליצה.

As there is clear intent involved in the חליצה (*halitzah*) process, such a ritual performed by a שוטה is not only unacceptable, but also of no consequence. Had the ritual been deemed simply unacceptable, the woman may have had to redo it, but it would suffice enough to relieve anyone else of the need to volunteer to be a יבום. By describing the performance as being of no consequence, Maimonides rules that it is exactly the same as if nothing had happened at all. Like *Mishnah Arakhin* 1:1, even if the שוטה displayed some measure of knowledge and attempted to perform purposefully an action that required intent, nevertheless, it counts for nothing.

Text 46: *Hilchot Na'arah Betulah* 1:9

ט ואחת שיש לה אב או שאין לה אב יש לה קנס. ואלו שאין להן קנס הבוגרת והממאנת והאילונית והשוטה והחרשת ומי שיצא עליה שם רע בילדותה ובאו שנים והעידו שתבעה אותן לזנות עמה והמתגרשת מן הנישואין ועדיין היא נערה בתולה אבל המתגרשת מן האירוסין אם נאנסה יש לה קנס וקנסה לעצמה ואם נתפתתה אין לה קנס.

No fine¹⁹ is demanded of one who rapes a virgin girl who is a שוטה, as it is assumed that she had probably been raped before and simply didn't know it. It is worth noting that the Ra'avad, a major critic of Maimonides' *Mishneh Torah* in general, disagrees on this point and insists that the one who rapes a girl without comprehension still must pay the fine. Notably, in his comment on this passage, the Ra'avad also insists on the payment of fines for the other categories of excluded women listed in the הלכה. Only the first rapist would be liable for the fine for violating a virgin and no one would know who that man might have been. Likewise, rapists of other non-virgins: divorcees and women of loose morals, are exempted from paying the fine.

Text 47: *Hilchot Na'arah Betulah* 2:9

ט כבר הודענו הבנות שאין להן קנס ועשר הן, הבוגרת, והממאנת, והמגורשת, והאילונית, והשוטה, והחרשת, והגיוורת, והשבוייה, והמשוחררת, והיוצא עליה שם רע, ושאר הבנות יש להן קנס.

In this הלכה, Maimonides adds a few other categories of women for whom rapists are not required to pay the virgin fine, including converts, former captives, and freed slaves. It is assumed that the captive was taken advantage of by her captors, while slaves and former non-Jews have weak morals and were unlikely still virgins at the time they were raped. Where in either of these two הלכות is the idea, prominent in *Mishnayot Baba Kama* 6:4 and 8:4, that the less fortunate should be protected by the community and that it was particularly bad to cause them harm? Where is the concept of protection for those unable to protect themselves? “You shall not curse the deaf nor place a stumbling block before the blind. You shall fear your God, I am the Lord.”²⁰ While the חרש and the שוטה are lacking in knowledge and unable to form an intention for relations with the opposite sex, they can still be victimized and it seems particularly cruel to assume previous violations

¹⁹Deuteronomy 22:28–29.

²⁰Leviticus 19:14.

in order to exempt a criminal from punishment when an actual violation is reported. It is likely that the distinction to be made is between issues of morality and issues of legal categorization. While no one advocates such cruel behavior toward the mentally ill or those otherwise without comprehension, it would be impossible to prove such a case in court as the victim would be unable to testify due to their exemption from the מצות noted in *Hilchot Edut* 9:9, noted below, and the accused would be unable to testify against himself as his self-incrimination is not acceptable according to the *Talmud* in *Ketubot* 41a in the first גמרא on the משנה addressing this very topic.

Text 48: *Hilchot Nizkei Mammon* 4:6

ו מסר בהמתו לחרש שוטה וקטן אע"פ שהיה חשור קשור הבעלים חייבין שדרכו של שור וכיוצא בו להתיר הקשר ולצאת ולהזיק , אפילו שמרוה שמירה מעולה וחתרה ויצאת והזיקה הבעלים חייבים.

Here Maimonides explains that even when a חרש, שוטה, or קטן does an excellent job of tending to animals on behalf of another, if any harm comes to the flock or if the animals escape and cause damage to other property, the owner is liable, not the shepherd, for the competent owner should have known better than to entrust the job to those exempt from responsibility. Here the ruling is very similar to *Mishnah Baba Kama* 6:2.

Text 49: *Hilchot Nizkei Mammon* 6:3

ג שור של חרש שוטה וקטן ומי שהוא במדינת הים שנגחו פטורין , אבל בית דין מעמידין להם אפטרופין ומעידין בהן בפני האפטרופין.

Just as in *Baba Kama* 4:4, if an ox belonging to a חרש, שוטה, or a קטן gores someone or something else, they are not liable. Maimonides suggests that the court appoint guardians over the livestock property of such individuals, much as was suggested in *Mishnah Shevuyot* 6:4 for the property of a קטן.

Text 50: *Hilchot Nizkei Mammon* 6:6

ו שור שהועד ונמכר או ניתן במתנה חזר לתמותו, שהרשות שנשתנית משנה דינו, אבל אם השאילו או מסרו לשומר הרי הוא בחזקתו, וכן שור שהועד בפני אפטרופין ונתפקח החרש ונשתפה השוטה והגדיל הקטן אע"פ שבטל האפטרופוס הרי הן מועדין בחזקתן שהרי ברשות בעליהן הן.

In this הלכה, Maimonides shows that the position of R. Jose in Mishnah *Baba Kama* 4:4 is to be upheld: when an ox who has gored belongs to a חרש, שוטה, or a קטן whose status changes, the status of the ox as מועד²¹ remains the same as, ultimately, the owner is the same. In contrast, when any person sells a מועד ox to a new owner, the ox reverts to the תם (*tam*, “unwarned”), state as the new owners have yet to experience an incident. This הלכה seems to establish a key point: the חרש, שוטה, and קטן are clearly legitimate owners of property, even in their intentionless knowledgeable state. It is interesting to note that for the newly recovered שוטה, who never understood any warning given to him about the actions of his goring ox in the past, the ox remains מועד. Meanwhile, the knowing owners of a מועד ox can sell him to a person completely capable of understanding the dangers associated with possession of such an animal, and yet in that case the ox reverts to an unwarned, תם, status.

Text 51: *Hilchot Nizkei Mammon* 12:8

ח המוסר בורו לשומר השומר חייב בנזקיו, ואם מסרו לחרש שוטה וקטן אע"פ שהיה מכוסה הרי הבעלים חייבין שהבור עשוי להתגלות ואלו אין בהן דעת.

Following the same principle extant in the *Mishnah* and noted in הלכה *Nizkei Mammon* 4:6 above, an owner of a cistern who leaves a חרש, שוטה, or קטן as the watchman is himself liable for any damage caused if someone falls in and hurts himself.

²¹“Warned.” An animal who had gored in the past is assumed to be likely to try to gore again and if such a second incident occurs, the owner, who by this point should have known better, is fully liable (as noted in the introduction).

Text 52: *Hilchot Nizkei Mammon* 12:16

טז וכן אינו חייב על מיתת הבהמה בבור או על חביטתה בתל אלא אם היתה הבהמה קטנה או חרשת או שוטה או סומא או שנפלה בלילה, אבל אם היתה פקחת ונפלה ביום ומתה פטור שזה כמו אונס מפני שדרך הבהמה לראות ולסור מן המכשולות. וכן אם נפל לתוכו אדם ומת אפילו היה סומא או שנפל בלילה בין שהיה בן חורין או עבד הרי זה פטור, ואם הוזק בו האדם או הבהמה הפקחת חייב נזק שלם כמו שביארנו.

On the subject of cisterns and other dangerous holes in the ground that could cause damage, an owner of such a hole or even a mound of dirt from which one could fall, is liable if a חרש or a שוטה are injured, even if the injury happens during the day when, in theory, they could have seen the danger and avoided it. This is exactly the point Maimonides wishes to make: they are not capable of comprehending the danger so the owner remains liable.

Text 53: *Hilchot Nizkei Mammon* 14:5

ה השולח את הבעירה ביד חרש שוטה וקטן פטור מדיני אדם וחייב בדיני שמים, במה דברים אמורים שמסר להן גחלת וליבוה שדרך הגחלת להכבות מאיליה קודם שתעבור ותדליק, אבל אם מסר להן שלהבת חייב שהרי מעשיו גרמו.

Just as in *Mishnah Baba Kama* 6:4, one who puts fire in the hands of a חרש, שוטה, or קטן is fully liable for any damage they cause. However, Maimonides goes on to limit the liability by saying that this is not in a case where a person gave a חרש, שוטה, or קטן a hot coal which was later fanned into a flame by the incompetent recipient, but only in cases where an actual flame was given. There could have been a reasonable expectation on the part of the giver that the coal might have burned out before causing any damage. This is in contrast to the succeeding הלכות which describe the full liability of the fire spreaders, not the flame providers in cases of sane and competent individuals.

Text 54: *Hilchot Gezelah Va'avedah* 17:4

ד הגביהה לו חרש או שוטה או קטן לא קנה הפקח לפי שאין להן דעת, הגביהה חרש ופקח כאחד מתוך שלא קנה פקח לא קנה חרש, היו שניהם חרשים קנו שניהם, תקנו להם חכמים שיקנו כדי שלא יבאו להנצות.

If a חרש, שוטה, or קטן finds something on behalf of another individual, the item does not transfer to the other person from the finder's possession as they lack the intent to act as an agent of another.

Text 55: *Hilchot Gezelah Va'avedah* 17:12

יב מציאת חרש שוטה וקטן יש בה גזל מפני דרכי שלום, לפיכך אם עבר אחר וגזלה מידן אינה יוצאה בדיינים ואם כפר בה ונשבע אינו חייב בחומש.

Much as in *Mishnah Gittin* 5:8, a חרש, שוטה, or קטן is allowed to possess something they find on the ground for the purpose of keeping peace in the community. However, if someone else comes and steals the found object from the חרש, שוטה, or קטן, the court cannot recover the item on behalf of the victim because the Torah law preventing ownership takes precedence over the Rabbinic allowance for possession.

Text 56: *Hilchot Chovel U'mazik* 3:4

ד המבייש את השוטה פטור והמבייש את החרש חייב, המבייש את הגר או את העבד חייב, המבייש את הקטן אם כשמכלימין אותו נכלם חייב ואם אינו נכלם פטור, ומכל מקום אינו דומה המבייש את הקטן למבייש את הגדול ולא המבייש את העבד למבייש בן חורין ולא מבייש חרש למבייש פקח.

If one embarrasses a שוטה in public, he is not liable for punishment because the שוטה is assumed to have no sense of shame and likely embarrasses himself in public all the time. The חרש, on the other hand, while incompetent does possess a sense of shame and should not be publicly embarrassed. Again, one wonders where is the sense of morality promised in *Leviticus* 19:14? Just because the שוטה may not be aware that he is being

embarrassed and even if he regularly embarrasses himself; this does not excuse bad behavior, especially from those fully competent individuals who actually know better. Unfortunately, this is, again, not a moral question for Maimonides, but only a legal one. No one encourages the teasing of the incompetent, but it is given, based on the laws of **בושת** established in the *Talmud*, in *Baba Kama* 86b, that the **שוטה** does not receive payment for public embarrassment. Here Maimonides is simply following faithfully the rules already established.

Text 57: *Hilchot Chovel U'Mazik* 4:20

כ חרש שוטה וקטן פגיעתן רעה, החובל בהן חייב והן שחבלו באחרים פטורין, אע"פ שנתפתח החרש ונשתפה השוטה והגדיל הקטן אינם חייבין לשלם, שבשעה שחבלו לא היו בני דעת.

Maimonides explains that it is simply bad to have an encounter with a **חרש**, **שוטה**, or a **קטן** as they are never liable for injuring you or your property, but do get rights as victims at your hand. The law here is the same as presented in the *Mishnah Baba Kama* 4:4, though Maimonides goes on to note that if such a person's status changes, they do not become liable for past acts which occurred during the time they were incompetent.

Text 58: *Hilchot Edut* 9:9

ט השוטה פסול לעדות מן התורה לפי שאינו בן מצות, ולא שוטה שהוא מהלך ערום ומשבר כלים וזורק אבנים בלבד, אלא כל מי שנטרפה דעתו וגמצאת דעתו משובשת תמיד בדבר מן הדברים אע"פ שהוא מדבר ושואל כענין בשאר דברים הרי זה פסול ובכלל שוטים יחשב, הנכפה בעת כפייתו פסול ובעת שהוא בריא כשר, ואחד הנכפה מזמן לזמן או הנכפה תמיד בלא עת קבוע, והוא שלא תהיה דעתו משובשת תמיד שהרי יש שם נכפים שגם בעת בריאותם דעתם מטרפת עליהם, וצריך להתיישב בעדות הנכפין הרבה

Here Maimonides addresses the issue of who is a **שוטה**, which recalls the definition in the Talmud passage from *Hagigah* 3b in the Introduction. He suggest, however, that the **שוטה** is not only someone who runs around naked, breaks vessels, and throws stones

while alone, but even someone who's mind while seemingly fine in almost all regards, is disturbed on a single subject. Even if there is only one subject about which a person is a *שוטה*, this defect makes such a person ineligible to serve as a witness. However, if a person is only affected by temporary insanity; if he has episodic problems, even if they are irregular, he can serve as a witness during his times of clarity. This is encouraging as it suggests that even a person who suffers from severe mental illness can function fully in society during times when his mind is clear, but troubling at the same time that a person who is obsessive, for example, about a single issue but still functions normally in society, is ruled to be *שוטה*, completely insane and ineligible. Most interesting here is that the primary exemption for the *שוטה* is based not on such an individual's lack of comprehension, but rather on his overall exemption from the *מצוות*. A person not bound by the *מצוות* is automatically ineligible to serve as a witness.²²

Text 59: *Hilchot Edut* 9:10

י הפתאים ביותר שאין מכירין דברים שסותרין זה את זה ולא יבינו עניני הדבר
 כדרך שמבינין שאר עם הארץ, וכן המבוהלים והנחפזים בדעתם והמשתגעים
 ביותר הרי אלו בכלל השוטים, ודבר זה לפי (מה) שיראה הדיין שאי אפשר לכוין
 הדעת בכתב.

In this *הלכה*, Maimonides discusses the issue of the *פתי*, often referred to as mentally retarded, an individual who does not possess the knowledge of even a common uneducated person, the *Am Ha'aretz*. The condition of the *פתי* is such that he cannot serve as a witness due to his lack of comprehension and his inability to understand what is going on. However, Maimonides notes that one cannot fully describe in writing the condition of a *פתי* and therefore the ultimate decision of whether a *פתי* can serve as a witness is left to the discretion of the judge. The issue of discretion in determining functionality will be addressed more fully in the conclusion.

²²Based on the discussion in the *Talmud*, *Baba Kama* 14b-15a.

Text 60: *Hilchot Melachim U'Milchamoteihem* 10:2

ב בן נח שאנסו אנס לעבור על אחת ממצותיו, מותר לו לעבור, אפילו נאנס לעבור ע"ז עובד, לפי שאינן מצווין על קדוש השם, ולעולם אין עונשין מהן לא קטן ולא חרש ולא שוטה לפי שאינן בני מצות.

Here Maimonides shows that just as the Jewish חרש, שוטה, and קטן are exempt from following the מצות, so too are their non-Jewish counterparts exempt from obedience to the Noahide laws.

Summary

Most of the rules presented in this chapter are in keeping with the general guidelines established in the *Mishnah* as explained in the preceeding chapter. The שוטה is exempted from responsibility due to a lack of ability to form an intention. Additional examples, such as the rules governing the lighting of Hanukkah candles, reveal Maimonides' response to the expansion of Jewish observance as a whole. The rules on agency, מצות exemptions, damages, liability, and property ownership all seem to be structured by Maimonides along similar lines as they were presented in the *Mishnah*. The case for property ownership seems to be actually strengthened on the basis of the rules governing the ox that gores. Even the rule allowing the שוטה to participate in the hand washing ritual, including providing aid to others, is carried over as well. Unfortunately, Maimonides also codifies the rules discounting the potential for public embarrassment and allowing rapists freedom from fines on the basis of assumed promiscuity. These rulings are based in the *Talmud* and maintain a negative bias against the שוטה. While his writing may seem morally disappointing, Maimonides is not interested in codifying morality, only in codifying the law. Further, unlike the *Mishnah*, we see a clear ranking of the famous trio of the חרש, שוטה, and קטן. Here, the קטן is at the top, en route to someday becoming a responsible man and limited only by his age, not any physical or mental disadvantage. Next comes the חרש, granted

additional rights such as court arranged marriage and protections such as that from public shame. The שוטה falls to the bottom of this social list of people who, like it or not, are already at the bottom of society. Perhaps later commentators and respondents will add to the understanding of the legal status of the שוטה to find a balance between accomodation, protection, and relation to the larger community.

CHAPTER THREE. The Shoteh in Modern Responsa

In the modern era, indeed for most of the post-Talmudic period, Jewish law has been shaped by the responsa literature. When a question arose in a Jewish community as to the appropriate application of the law, it was posed to a leading rabbinic authority and he responded with an official opinion that presented not only an answer to the question, but also the basis of his reasoning. This process of שאלות (*she'elot*, “questions”) and תשובות (*tshuvot* “answers”) led to an expansion of the law to account for cases not explicit in the הלכה. From an orthodox point of view, these responses were taken as binding; one consulted a rabbi specifically in order to get a legal ruling. For those of us living as Reform Jews today who see the body of Jewish law as only a guide to living rather than obligatory, these responses can help enlighten us and lend a hand in making tough decisions. There are several responsa that deal with the issue of the legal status of the שוטה.

An Inclusionary Tale

In the thirteenth century, in a responsa on the issue of establishing local communal rules separate from the laws specifically laid down by the Torah, Rashba, Rabbi Shlomo ben Adret, notes that following the Torah law strictly will lead to the destruction of the world. Since people will need to wait for witnesses and warnings before prosecuting any crime, the law will be unenforceable. If the law is unenforceable, then it is as if there is no law, and “נמצא העולם חרב” (*nimtzah ha'olam chareiv*, “the world will come to be destroyed.”) Instead, each community needed select officials who would make rules and judge as they saw fit. Interestingly enough, this included “ולייסר השוטים והנערים המטים” (*v'li-aser hashotim v'hanayarim hamtim akalkalotam*, “the torture of the insane and youngsters with evil ways”). Unlike the traditional הלכה which granted immunity to the שוטה, here we see an eminent authority calling for them to be punished for their

actions when such actions offended communal standards, whatever those might be.²³ While this responsa surely goes a long way toward including the שוטה in society and making such a person responsible for his actions, it fails to strike a balance with the need to care for the person as ill. Though it may be suggested that Rashba's use of the term שוטים is a negative term evokative of, "those crazy evil people," Dr. Jonathan Cohen suggested that it was, in fact, a reference to the legal category of the insane and the expression of a real desire to punish them for their actions.²⁴

Category One: Orthodox Opinions

The revolutionary ruling of Rashba aside, Rabbi Moshe Feinstein makes a very inclusive ruling, disallowing the use of contraception, including forced sterilization, for the mentally ill or the mentally retarded.²⁵ Further, abortion is not permitted for the disabled; rather the community should assume the care of the infant. These two rulings seem to suggest that the mentally ill are allowed and even encouraged to participate in the community *vis-a-vis* marriage and procreation. On the subject of communal support, Rosner cites a ruling by Rabbi Moshe Sofer that reminds us of the burdens carried by the relatives of the mentally ill. Sofer suggests that in the case of an eighteen-year-old woman who is mentally disabled, the expenses for her sustenance and medical care are "not the sole responsibility of her father." Rather, the entire community bear the obligation to help in her care.²⁶

Also from the Orthodox perspective, Dr. Moshe Halevi Spero addresses the issue

²³Rabbi Shlomo ben Adret, Responsa 3:393.

²⁴Dr. Jonathan Cohen, personal communication during Rabbis 521, a course entitled, "Setting Communal Priorities: A Halakhic Perspective." I was surprised by Rashba's comment and asked Dr. Cohen if it was to be taken pejoratively or as an actual reference to the legal category, as such individuals are not to be held responsible for their actions, and he noted that here that was precisely how Rashba intended it: to hold such people responsible.

²⁵Fred Rosner, M.D. *Biomedical Ethics and Jewish Law*. (Hoboken, NJ, KTAV Publishing, 2001), 508.

²⁶Rosner, 504.

of fulfillment of the הלכות through neurotically motivated religious acts. Spero argues that it is incorrect to assume that all religious obligations should be forgiven a person who shows any mental distress in order to secure the mental health of the individual. He insists that it is equally incorrect to suggest that all obligations are still in force for any individual, no matter how distressed, so long as they are short of the category of a שוטה, completely insane.²⁷ Already, this suggests that there are gradations to be seen in the category of mental illnesses, an issue to be considered below. On this particular topic, however, Spero asks what the status should be of a religious act that fulfills an obligation if it was performed without the intention of fulfilling such an obligation. For example, what of the obsessive-compulsive who is diligent in cleaning his home so that no חמץ (*chametz*, “leaven”) is present in the home at Passover. Spero suggests that in such a case, the individual should not be credited with completion of the positive commandment to remove חמץ from one’s home which requires intent, but that the individual “would successfully avoid transgressing the passive aspects of not having any leavening in his possession.”²⁸ Spero notes that the halakhic authorities rule that all such inadvertent completions of מצוות that require intention do not count toward the individual’s obligation to fulfill such commands. He gives as another example, unrelated to the issue of the mentally ill, the case of the father who, in teaching his son the grace after meals, unknowingly recites the words himself. Such a recitation is not a fulfillment of the commandment and neither is the cleaning of the obsessive compulsive, despite the fact that both actually complete the action. Nevertheless, in a statement of inclusion, Spero notes that the gradations of mental illness can allow for a measure of participation in ritual observance.

There is, on the other hand, another range of less-than-psychotic personalities, such as the overrideational obsessive or hysteric or the preschizophrenic, whose emotional liabilities or rigidity may and frequently does interfere with

²⁷Moshe Halevi Spero. “The Halakhic Status of Neurotically Motivated Religious Acts,” in *Handbook of Psychotherapy and Jewish Ethics* (Jerusalem: Feldheim, 1986), 34.

²⁸Spero, *Handbook*, 38.

the necessary, free qualities of thinking and interpersonal relating. Such persons *are* religious, but in a disorganized and conflict-ridden way. In these cases, the therapeutic goal is not liberating the personality from his or her religion, but rather to liberate the autonomous and healthy aspects of the personality and the religious beliefs from their conflicted sources and pathologic qualities.²⁹

As such, we can find an argument for inclusion in Jewish religious practice, but only through the healing of the individual. We should not write off everyone who is disturbed as a שוטה, but they need to recover from their illness before they can really participate again in a meaningful way.

Spero does go into great depth about the need to facilitate healing for the mentally ill through the process of psychotherapy. He tackles the issue of Orthodox Jews who might be reluctant to reveal during therapy the issues that are causing them mental anguish for fear of violating the prohibition of having evil thoughts, lest one act upon them. The therapy process that would necessitate divulging of secret thoughts and fantasies would necessitate a transgression by the patient, making the patient feel uncomfortable opening up to the doctor and thereby prohibiting progress. He suggests reconceiving of psychotherapy as an opportunity to make ודוי (*vidui*), a confession of the sinful thoughts.³⁰ As Judaism doesn't follow the Catholic model of a designated confessor, the therapist could instead be reconceived as a מוכיח (*mochiach*), the fellow Jew obligated to rebuke his neighbor lest he sin, in this case by actuating the things about which he had fantasized.³¹ In this way, the ailing Jew can still obey the הלכה while receiving treatment for mental illness. Spero acknowledges that this is a legal fiction, suspending the rules of הרהור אסור (*hirhur asur*)

²⁹Spero, *Handbook*, 38–39.

³⁰Spero, "The Halakhic Status of *Hirhur Asur* in Psychotherapeutic Communication," in *Handbook of Psychotherapy and Jewish Ethics* (Jerusalem: Feldheim, 1986), 48.

³¹Spero, *Handbook*, 49.

during the therapy session, but he values the gains that can be made toward the health of the individual. Nonetheless, in a later essay, Spero notes,

I wish to emphasize that the halakhically observant client's desire to afford "mental adjustment" or "balance" will always be secondary to a primary concern — what one is halakhically obligated to do and to not do to achieve such psychological desiderata.³²

As such, even with the legal fiction of *מוכית ודוי* in place, there are still limits to the options available to the Orthodox psychotherapist and the Orthodox patient.

In an essay seeking to define the psychiatric dangers that could be construed as potential harms to the woman in labor, Spero notes that there are different levels of psychiatric distress, some of which, while dangerous, may not actually be life threatening. He makes a crucial distinction on the issue of *תירוף דעת* (*teiruf da'ath*, "mental damage").

In earlier papers, I favored translating *teiruf da'ath* as what we call "psychological decompensation," or the virtual disorganization and disintegration of ego structure and reality testing. However, since "psychological decompensation" itself always requires further and more specific qualification (e.g., *Which* ego function are involved? Have hallucinations occurred? Is reality testing totally impaired?), the same would apply when using the *teiruf da'ath*. Thus, in view of the fact that *teiruf da'ath* is characterized in terms of gradients rather than as an absolute, the lenient rulings referred to here and elsewhere may be subsuming a very wide range of emotional states. Indeed, if even the *possibility* of *teiruf da'ath* is sufficient to favor a lenient ruling, then one is already talking of a less severe *actuality* that exists when one talks of the *presence* of severe psychiatric disorder.³³

He cites several major Rabbinic authorities who make rulings that individuals can violate certain *הלכות* in order to prevent a mental breakdown. For example, Rabbi Moshe Feinstein allows eating on Yom Kippur, Rabbi Israel Mizrahi allowed the eating of non-kosher broth, much like the case from the *Talmud Yoma* 82a (which will be noted below in the Conclusion), and Rabbi I. Untermann, former Chief Rabbi of Israel, Rabbi Eliezer Walden-

³²Spero, "The Concept of Psychiatric Hazard and the Halakhic Disposition toward Contraception and Abortion," in *Handbook of Psychotherapy and Jewish Ethics* (Jerusalem: Feldheim, 1986), 54.

³³Spero, *Handbook*, 58.

berg, and Rabbi Y. Y. Weiss have allowed individuals to violate the Sabbath itself in order to prevent such a breakdown. The reason, Spero notes, is that

in all the cases cited here, apparently making use of some psychiatric-hazard principle, the psychiatric hazard is not considered as dangerous as the life-threatening acts which the affected individual might commit.³⁴

We can see that there is a recognition of states of mental illness which are less than complete insanity. The categorization of complete insanity, שטות (*shtut*), seems, according to Spero, to occur when the individual is no longer able to understand reality. He adds that שטות can also refer to the loss of emotional control and could therefore result from symptoms like general sadness or intense emotion which themselves are far short of insanity.³⁵ The question then becomes, if minor symptoms can lead to complete disability, do the minor symptoms count as symptoms of the disability itself? Should a person who is distressed, but still functioning at a diminished emotional capacity but who still possesses a full mental capacity be ruled a שוטה because without intervention, he will become one? In a lengthy footnote, Spero cites several authorities, including Rabbi Aaron Shimon ben Jacob (*Or ha-Yashar*), Rabbi Chizkiah Medini (*Sedei Chemed*), and Rabbi Frenkel of Leibnitz (*Ateret Hakhamim*) who use the idea of symptomology to include even those whose distress is less than complete שטות as שוטים. Most powerful is the insight of Rabbi Moshe Sofer (*Chatam Sofer*) who suggests that “anyone who appears normal in that he does not act bizarrely yet who still cannot respond appropriately to questions would be legally unfit as a *cheresh* even if, according to others, he could not be considered a *shoteh*.”³⁶ It is not surprising to find the man who defined the school of “*Chadash asur min ha Torah*” would seek to limit the ways in which new understandings could allow for gradations and categories of mental illnesses, ruling instead to exclude individuals by any means available.

³⁴Spero, *Handbook*, 58.

³⁵Spero, *Handbook*, 62.

³⁶Spero, *Handbook*, 74-75.

Spero, on the other hand, investigates the issue of suicide for reasons to rule leniently on the issue of mental distress. The consensus of the Orthodox authorities seems to suggest that if an individual's death by suicide came as a result of an unsound mind, no matter how unsound, then one could suggest that the death did not violate the prohibition against killing one's self.³⁷ Alas, once the person has died, it is too late to argue about how he and his mental distress should be handled by the community.

Spero finally gives his own ruling on the category of the שוטה in an essay on postponing the circumcision of a mentally disturbed child. While Rabbi Yoseif ben Moshe Babad (*Minchat Chinuch*) and Rabbi Meir Don Plotzky (*Kli Chemdah*) debate over the issue of exemption from the מצות in comparing the case of the סומא (*soma*, "blind person") to the שוטה, Spero notes that the reason given by Maimonides for prohibiting the שוטה from giving testimony is his overall exemption from the מצות, not, as one might have thought, his lack of comprehension. Rabbi D.S. Shapiro suggests that this was done intentionally, in order to include in the prohibition against testimony, even those mentally ill individuals who did, in fact, show some signs of moderate comprehension.³⁸ As such, the category שוטה remains inclusive of those individuals with mental illnesses that, while serious, are of a lesser status than complete insanity. Therefore, Spero concludes,

In fact, since *shoteh* is actually a description of a legal state of noncompetence rather than an exhaustive characterization of emotional turmoil (e.g., *mi she-nitr^efah da'ato*), it may not be the most instructive paradigm for disorders relevant to the postponement of brith. Psychiatric pain or *tza'ar*, rather than intellectual impairment alone, may be the more relevant criterion.³⁹

It is clear, therefore, that the Orthodox authorities struggle with the gradations of mental illness provided through modern psychology and psychiatry, as well as categories

³⁷Spero, *Handbook*, 62–63, 75.

³⁸Spero, *Handbook*, 83, 87–88.

³⁹Spero, *Handbook*, 83.

evidenced by the varied examples presented in the Rabbinic literature. For the purposes of determining obligations *vis-a-vis* the law, it seems that most Orthodox authorities deem it appropriate to make the category of שוטה more inclusive of lesser disorders and thereby to remove from such individuals their obligation to perform the מצות, while still addressing the need for appropriate treatment for such individuals based, not on a presumption of complete disability, but on a hope that they might recover and rejoin the Jewish community as full participants.⁴⁰ In fact, Spero even insists on a more open interpretation of ברכת הגומל (*birkat hagomel*), that upon recovery from a psychiatric illness, a person would be required to say the blessing.⁴¹

The notion of ברכת הגומל for recovery from mental distress will be revisited in the Conclusion of this thesis.

Category Two: Reform Opinions

In the modern era we find a case from the eighteenth century in Germany:

Isaac Neuberg married Leah Gunzenhausen in Mannheim August 13, 1766, and a few days later deserted his wife under peculiar conditions which were considered a clear evidence of insanity. On August 26, 1766, he appeared before Israel Lipschitz, rabbi of Cleve, and asked for a divorce, which the rabbi granted. The rabbis of Mannheim, where a rabbinical college of ten rabbis, the *Lemle Moses Klausstiftung* existed, declared the *get* invalid on the grounds that the man was mentally incompetent. The rabbinate of Frankfurt am Main supported this view.⁴²

The issue in this case is not what to do with the שוטה. Clearly an insane person is not allowed to divorce his wife, as divorce requires intent. The issue is whether or not he

⁴⁰ A very useful compendium of Orthodox responsa regarding a variety of proposed cases can be found in Appendix II, "Cognitive / Emotional Presentations and Halakhah: A Typologic Index in re Mental Incompetence," on pages 300-306 of Spero's *Handbook*.

⁴¹ Moshe Halevi Spero. *Judaism and Psychology: Halakhic Perspectives*. (New York, NY: KTAV Publishing, 1980), 207-209.

⁴² *American Reform Responsa*, vol. XXIX, 80.

was insane and that topic is not addressed. In fact, the case eventually boiled down to an unresolved dispute between the two rabbinic authorities with neither side able to prove its intention. This case is itself cited by Rabbi Gotthard Deutsch in a responsum from 1919 on the issue of whether a woman whose husband has been confined to a lunatic asylum for over a decade could be granted a divorce. Unlike the case of Isaac Neuberg, it was clear in the case presented to Rabbi Deutsch that the man was insane and could not divorce his wife since divorce is an action that requires intent and the *שוטה* is devoid of intention. While Rabbi Deutsch cites the Talmud *Gittin* 67b, in which a person can be assisted during a time of disability,⁴³ he recognizes that case does not apply here either. He also cites *Yevamot* 112b, that if the person had been married while sane and then becomes a *חורש* or a *שוטה*, he can no longer grant a divorce. While the *גמרא* in *Yevamot* allows for the legal writing of a *גט* during a period of lucidity, so long as the entire process of writing and delivering the *גט* takes place while the person is temporarily sane, even that isn't the case here.

Left with the clear realization that a man who becomes insane after marriage is incapable of divorcing his wife, Rabbi Deutsch takes a different tack in citing Proverbs 3:17: "Her ways are ways of pleasantness...." Understanding the line from Proverbs to mean that the law should be imposed in a humane manner (that it might be a way of pleasantness)⁴⁴, Rabbi Deutsch insists that rabbis are allowed to change the law in order to make it more functional. He cites a long list of lenient rulings by famous Orthodox rabbis in which antiquated rules are allowed to be overturned. His own final ruling is that the court could appoint a guardian for the insane man to write and to deliver the *גט*, to state the facts in court and to publish its findings, but ultimately he suggests that the *גט* is a form of

⁴³ Other people can test the person by asking questions which have clear yes or no answers, and if the person nods appropriately for those questions, then he is allowed to answer with a nod the much more serious question, "Shall we write a *גט* for your wife?"

⁴⁴ Similar to the Rabbinic use of Leviticus 18:5, "And you shall live by them..." to allow for Sabbath violation in order to save a life. (*Talmud Bavli, Yoma* 85b).

rabbinic civil legislation. He alludes to the first article of the Philadelphia Principles, written in 1869, noting that reform Jews no longer sought a judicial system separate from other nations. Therefore nowadays in America, the wife and the Jewish community may assume that the civil court divorce subsumes the granting of a גט, even if the man could neither write nor deliver it himself according to Jewish law.

In 1979, a question was posed regarding a potential convert who appeared to be mentally unbalanced and whose understanding of Judaism was therefore limited.⁴⁵ The question, from Elizabeth Levine of Congregation Beth El of Fort Worth, Texas, was whether or not to accept such a convert. In his response, Dr. Walter Jacob cites all of the relevant sources that describe the need for mental competence in order to complete an act such as conversion — and its accompanying acceptance of the מצוות — which requires intent. Rabbi Jacob understands that the conversion would not be acceptable מלכתחילה but if a person who had already converted was determined to be mentally incompetent, the conversion would be accepted בדעבך. In the end, Dr. Jacob notes that the basis of conversion is an understanding and acceptance of Judaism which in turn can be done only by someone of sound mind, and therefore the prospective convert in this case could be turned away.

The subject of insanity as a criminal defense comes up in a responsum from October, 1982.⁴⁶ Dr. Walter Jacob cites all the relevant passages that show the חרש, the שוטה and the קטן to be exempt from punishment for damage they cause to others due to their lack of intention. Further, the temporarily insane are also excused from actions committed during their periods of insanity. Ultimately Dr. Jacob notes that while the

⁴⁵Dr. Walter Jacob, editor. *American Reform Responsa* (New York, NY: CCAR Press, 1983), No. 67, 215.

⁴⁶Dr. Walter Jacob, editor. *Contemporary American Reform Responsa* (New York, NY: CCAR Press), 1987, No. 7, 9.

insane are not liable for acts which they commit, the determination of their sanity in a criminal case is to be left to the court.

The issue of a potential convert who is mentally disturbed comes up again in a question posed to the CCAR Responsa Committee in 1998.⁴⁷ The questioner writes:

A woman in my congregation married to a Jewish man has been coming to me to study for conversion to Judaism. Her own religious background is quite mixed, and she feels no particular attachment to any other faith. She has some knowledge of Judaism, and has been reading and studying with me for about six months. I believe she is sincere about wanting to convert to Judaism, although some of the motivation undoubtedly comes from her in-laws. In my opinion, however, she is not mentally stable. The first thing she told me when we met was that she was a borderline personality who had been sexually abused by both of her parents. In the fairly brief time I have known her she has been on the verge of divorce twice, stated that her husband was abusing her, changed therapists, and asked if she could bring her dog into the sanctuary with her for emotional solace in a new environment. She often makes very dramatic statements, only to back away from them later. From everything I have been able to learn, she is quite clearly a borderline personality, a well-recognized diagnosis of significant mental illness. She is not, however, insane or incapable of making decisions for herself. May I reject her for conversion on grounds of her mental illness?

In their response, the Committee begins by noting that we are “entitled and even required to reject a candidate for conversion should we find that he or she does not possess the necessary mental competence.” The שוטה, devoid of intention, is unable to accept the מצות and is therefore certainly ineligible for conversion. From here the Committee presents a discussion of who is a שוטה, but notes that the issue is open to dispute. However, in the case presented by the questioner, the woman is certainly not a שוטה, since she is able to make decisions. She is not mentally insane but she is mentally ill. Ultimately, therefore, as seen in other cases, a decision will have to be made by those who can examine her further. In any case, the issue of mental illness versus mental insanity is an interesting one for the Committee. They note that the rabbi would be allowed to accept or reject any

⁴⁷Central Conference of American Rabbis Responsa Committee, *Conversion of a Person Suffering from Mental Illness*, 1998, <http://www.ccarnet.org/cgi-bin/respdisp.pl?file=7&year=5758>

potential convert based on his or her own assessment of the potential convert's ability to understand and to accept Judaism. In their conclusion the Committee members note, "the term 'mental illness' is a broad descriptive category and not a diagnosis of the fitness of the individual person; we should beware of taking any step which suggests that those who suffer from 'mental illness' are to be labelled as 'insane.'" Nevertheless the rabbi in this case can reject her if he feels that anything about her motivation is questionable; there is no need for the potential convert to be ruled insane. This view is in keeping with the concept of gradations of mental illnesses put forward by Dr. Spero and other Orthodox authorities. Unfortunately, it does not help our issue of seeking out inclusion as the woman's mental illness, while not the more pejorative "insanity" with its denial of competence and intention, is still a very serious potential disqualification for her conversion in this case.

In 1992, the CCAR Responsa Committee answered the following question asked by the CCAR's Committee on Justice and Peace, "What are the obligations of the community, and specifically of congregations, toward physically and mentally disabled persons?"⁴⁸ From here the Responsa Committee undertook an explanation of Jewish views for inclusion of blind people, deaf people, otherwise physically disabled people and mentally disabled people. While many suggestions are given based on Jewish legal precedent for ways in which congregations can reach out to the disabled in their community, *e.g.*, special hearing devices for the deaf, braille prayerbooks for the blind, wheelchair access to the facility, etc., very little help is given on the subject of our concern, the שוטה. Amid paragraphs of suggestions for including all members of the community we find one lonely sentence: "Mentally disabled persons could be encouraged to do as much as possible." Nice to know, but not terribly helpful. Furthermore, the Committee's choice of the word "could" leaves open the very real possibility that many communities might not want to include the mentally disabled, and just as some disabled people "could" be encouraged to participate, others

⁴⁸Central Conference of American Rabbis Responsa Committee, *Disabled Persons*, 1992, <http://www.ccarnet.org/cgi-bin/respdisp.pl?file=5&year=5752>

“could” be discouraged. The Committee cites a responsum of Rabbi Moshe Feinstein which seeks to differentiate between the שוטה, the mentally insane, and the פתי, possibly translated as the “mentally retarded.” Rabbi Feinstein suggests that if a פתי has at minimum a comprehension equal to that of a six-year-old, then at the age of his or her majority, he should be welcomed into the community.⁴⁹

Summary

In general, we see in the responsa literature a continuation of the same themes we have seen in the *Mishnah* and in Maimonides’ *Mishneh Torah*. The שוטה is a legal category which denies its members the possibility of forming an intention. As such, the שוטה is ineligible to perform most functions in the community and is likewise granted an exemption from communal obligations. Once again we see the שוטה has a protected but excluded status. What, then, are we to do in order to meet the challenge put forth by the CCAR’s Responsa Committee, for example, to include the mentally ill as much as possible. No concrete examples have been given as to how to reach out to such individuals. Indeed, the greatest part of their protection from the community and its expectations and obligations comes from the fact that they are excluded. For example, Maimonides in the *Mishneh Torah* notes that those individuals who create a distraction during services should not be required to participate therein.⁵⁰ Rabbi Mark Washofsky notes the fundamental problem with this situation:

⁴⁹Moshe Feinstein. “The Difference between *Shoteh* and *Peti* and the Obligation of Keeping Commandments and Learning Torah in Relation to a *Peti*.” *Proceedings of the Associations of Orthodox Jewish Scientists* 7 (1984): 227–229.

⁵⁰Maimonides, *Mishneh Torah Tefillah* 15:2.

In such a community, the performance of *mitzvot* is the way in which one expresses one's attachment and acts out one's destiny. In such a community, which sees the ritual *mitzvot* as the key to its daily, sacred relationship with God, to be exempted from the obligation to perform these *mitzvot* is to be excluded from the mainstream of Jewish religious experience.⁵¹

These responsa answer difficult questions about how communities can deal with the problems presented by interacting with the mentally ill, but they do not give us direction as to how or if we should encourage such interactions. This issue will have to be examined further in the Conclusion.

⁵¹Mark Washofsky. *Jewish Living* (New York, NY: UAHC Press, 2001), 315.

CONCLUSIONS: Applications for the Modern Reform Rabbinate

The הלכה seems to present a clear case for the שוטה: such a person cannot form an intention, is devoid of competence, and is unable, therefore, to participate in society. In the face of this evidence, however, we find numerous well-meaning resolutions from organizations representing Reform Judaism. In 1997 at their annual convention, the Central Conference of American Rabbis adopted the following resolution based on their expressed concern for those suffering with mental illness:

THEREFORE BE IT RESOLVED, that the CCAR

1. call upon its members to work with their congregations, chaplaincies, and other constituencies to inform them of the necessity for greater sensitivity with respect to the mentally ill and their needs, and to help reduce the stigma of mental illness, and
2. call upon its members to participate in communal efforts aimed at providing a more positive attitude toward those suffering from mental illness, and
3. call upon its members to work with persons afflicted with mental illness and their families so that they may feel welcome within our synagogues, as Abraham made strangers feel welcome in his home, and
4. call upon its members to visit patients, when appropriate and professionally advisable, in psychiatric hospitals and other mental health care facilities, and to join groups that seek to provide housing and employment for de-institutionalized persons, and
5. agree to work with the Union of American Hebrew Congregations to establish a Joint Commission on Mental Illness, and
6. commend the work of the National Alliance for the Mentally Ill (NAMI) in Washington, and the work of Pathways to Promise: Interfaith Ministries and Prolonged Mental Illnesses, in St. Louis, and encourages our colleagues to be in touch with them, and
7. Call upon its members to support and advocate for federal and state legislation that protects against all forms of discrimination by health insurance carriers in the coverage of severe mental illnesses relative to other diseases of the body.⁵²

⁵²Central Conference of American Rabbis Board of Trustees, *Caring for Those with Mental Illness*, 1997, <http://www.ccarnet.org/cgi-bin/resodisp.pl?file=mental&year=1997>

While the sentiment is clear, its application is anything but certain. Point number three is particularly glaring. When a raving insane person comes into a Temple on a Friday evening do we welcome him as Abraham welcomed strangers into his home, or do we whisper and point, perhaps even going so far as to ask the authorities to help remove the individual? The very presence of the mentally ill often makes us uncomfortable. We don't know how to relate to people who behave irrationally, unpredictably, and even dangerously toward themselves and toward others. How then are we to welcome them? Further, why should we welcome them when the הלכה suggests that they are exempted from most communal responsibilities and even Maimonides urges that encounters with the שוטה are to be avoided?⁵³ We find a further "call to action" in another resolution from the CCAR from 2001:

THEREFORE, the Central Conference of American Rabbis resolves to:

1. Call upon its member rabbis to
 - a. Participate in communal efforts aimed at destigmatizing mental illness, and work with other members of the Jewish community to develop resources and programming aimed at addressing stigmatization of mental illness;
 - b. Work with persons afflicted with mental illness and their families so that they may feel welcome within our synagogues;
 - c. Prepare materials for training synagogue, religious school, camp and youth program personnel to recognize and deal appropriately with members and participants with mental illnesses.
 - d. Work with other groups performing mental health outreach within the Jewish community toward persons with mental illness.⁵⁴

Even the calls to action themselves can be confusing. The Union of American Hebrew Congregations trumpets its openness on the website of its Department of Jewish

⁵³ *Hilchot Chovel U'Mazik* 4:20

⁵⁴ Central Conference of American Rabbis Board of Trustees, *Resolution on Establishing a Complete System of Care for Persons with Mental Illness*, 2001, <http://www.ccarnet.org/cgi-bin/reso-disp.pl?file=mentalillness&year=2001>

Family Concerns⁵⁵ declaring that “access to Judaism has been a hallmark of the Reform movement since our first congregation began seating women and men together over 120 years ago.” Yet within the same website, under “Creating a Caring Congregation,” we find that congregations can receive help with the following issues:

We help UAHC congregations by providing the educational resources and referrals that they need to create or enhance this caring community. Together, we build the synagogue as a safe place to heal; when suicide or loss befalls a family, when an addict/alcoholic wants to return to his/her spirituality through the synagogue, when gays and lesbians struggle for acceptance, when AIDS befalls our families and friends; when our congregants grapple with divorce, single-parenting, domestic violence, or sexual abuse. Synagogues, as caring communities, can be their shelter of peace.⁵⁶

Notably absent from that list are the issues of welcoming in the mentally ill and supporting stricken individuals and families. Don't they need our caring, too? Likewise, under the heading, “Health and Healing,” the UAHC's website provides resources for many social and health-related issues:

“Bio-Ethics Study Guides,” “Confronting the AIDS Crisis,” “Eating Disorders,” “Fighting Substance Abuse,” “Issues of Assisted Death,” “Organ and Tissue Donation,” “Materials in Time of Disaster-9/11,” and “Preventing Youth Suicide”⁵⁷

...but dealing with mental illness doesn't make that list, either.

The worst problem, however, seems to be when the שוטה is seen as a uniform group of individuals when clearly there are gradations. The Orthodox responsa and the psychological fieldwork of Dr. Spero and others recognize the valuable contributions made by the modern sciences of psychology and psychiatry towards understanding the many types of mental illnesses. There truly are different types of mental illness and each illness

⁵⁵Union of American Hebrew Congregations, *Lehiyot: Special Needs*, 2002, <http://uahc.org/jfc/lehiyot.shtml>

⁵⁶Union of American Hebrew Congregations, *Creating a Caring Congregation*, 2002, <http://uahc.org/jfc/caring.shtml>

⁵⁷Union of American Hebrew Congregations, *Resources: Health and Healing*, 2003, <http://uahc.org/resources/>

affects its sufferers in different ways. The website of the National Alliance for the Mentally Ill lists a wide array of mental illnesses, each with its own symptoms and difficulties for the patient.⁵⁸ In fact, the American Psychiatric Association lists three hundred and seventy different diagnoses in its *Diagnostic and Statistical Manual of Mental Disorders*.⁵⁹ The person who is mentally insane when it comes to one issue, might be completely lucid for other functions in life including, perhaps, full participation in the life of the congregation. Yet, in contrast to this we find in the הלכה suggestions like Maimonides' ruling (on witness regulations) that even people who function properly but are insane with respect to only one issue, be ruled completely insane. Further, we find an Orthodox push toward including sufferers of less than complete incapacity in the larger category of insanity until they can be treated and made full participants again. And yet Dr. Spero notes insightfully that, "implicit in fact that the Halakhah addresses itself to mundane reality is the notion that it must be conditioned to limitations and changes in reality."⁶⁰ Victor Sanua finds in his sociological fieldwork that there is a discernable difference between "mildly impaired," and "severely impaired individuals."⁶¹ Therefore, if the הלכה allows for a person to be עתים חלים עתים שוטה, then why can't a person similarly be partially insane all the time? When the obsessive-compulsive individual isn't busy washing her hands, she may be completely capable of rational thoughts and decision making, yet through it all she is suffering from a severe mental illness.

⁵⁸A sampling from the NAMI website list yields: Anorexia Nervosa, Anxiety Disorder, Asperger's Syndrome, Attention Deficit / Hyperactivity Disorder, Autism, Bipolar Disorder, Borderline Personality Disorder, Bulimia Nervosa, Depression, Dissociative Amnesia, Dissociative Fugue, Dissociative Identity Disorder (multiple personalities), Dual Diagnosis (drug addiction + mental illness), Insomnia, Narcolepsy, Obsessive Compulsive Disorder, Panic Disorder, Post-Traumatic Stress Disorder, Schizophrenia, Seasonal Affective Disorder, Sleep Apnea, Tardive Dyskinesia, Tourette Syndrome. National Alliance for the Mentally Ill, *Information on Illnesses and Treatments*, 2003, <http://www.nami.org/illness/index.html>

⁵⁹American Psychiatric Association. *Diagnostic and Statistical Manual of Mental Disorders*, Fourth Edition, Text Revision (Washington, DC: American Psychiatric Association, 2000), 857-865.

⁶⁰Spero, *Handbook*, 53.

⁶¹Victor Sanua. "The State of Mental Health Among Jews," in Bulka and Spero, 1982, 42

The גמרא recognized, almost a millennium and a half ago, that there were different types of mental illness. That there is a discussion of several different crazy actions that a person might perform is clear proof that such illnesses manifest themselves in different ways for different individuals. Perhaps the person who is so depressed that he wanders alone at night is truly insane, but perhaps during the day, he can participate, at least to some degree, in society. Why, then, are all שוטים lumped together in one category, assumed to be equally unable to function? The case of the חרש is as troubling. We know full well that the חרש can form intentions and can function in society. Abraham, Jacob, Moses, and Samuel heard God with their own ears; everyone else is taught by reading as well as hearing. Through sign language and through the written word, the חרש can learn and truly come to understand anything we wish to teach. Isn't it possible there may be some שוטה who may understand and participate even during times of insanity? If the authorities in a given case are responsible for determining the mental status of an individual, we should be allowed to use such powers of discernment to appreciate gradations.

Clearly the הלכה allows for gradations in other areas. An excellent example comes from *Yoma* 82a and the case of a pregnant woman who craves food on Yom Kippur. In the *Mishnah*, we learn that such a woman is to be fed until she is satisfied and likewise a sick person should be fed on the advice of experts. However, in the גמרא following the משנה allowing the woman's craving to be satisfied, the Rabbis bring a ברייתא on a related topic which shows that there is room to make gradations.

Text 61: Yoma 82a

משנה. עוברה שהריחה - מאכילין אותה עד שתשיב נפשה. חולה מאכילין אותה על פי בקיאים, ואם אין שם בקיאים - מאכילין אותה על פי עצמו, עד שיאמר די. גמרא. תנו רבנן: עוברה שהריחה בשר קודש או בשר חזיר - תותבין לה כוש ברוטב, ומניחין לה על פיה. אם נתיישרה דעתה - מוטב, ואם לאו - מאכילין אותה רוטב עצמה, ואם נתיישרה דעתה - מוטב, ואם לאו - מאכילין אותה שומן

עצמו, שאין לך דבר שעומד בפני פקוח נפש חוץ מעבודה זרה וגילוי עריות
ושפיכות דמים.

No longer dealing with the issue of violating Yom Kippur's prohibition on consumption in general and dealing instead with the pregnant woman's craving for strictly prohibited meat: meat from the sacrificial cult or even pork, the Rabbis establish a precedent that "a little" is less bad than "a lot." The Rabbis suggest making a soup with the prohibited meat and offering the woman a drop of the soup to satisfy her craving. If it does not, then she is given some of the soup itself. If that doesn't cure her craving either, then she is allowed to eat the very fat of the forbidden meat. Even though soup made from prohibited meat has the same halachic status as the meat itself, טעם כעיקר, the Rabbis determine that eating a drop of soup is less bad than eating more of the soup, and eating the soup is less bad than eating the meat. This gradation, especially on an issue as seemingly clear as meat that is prohibited, suggests that the הלכה could allow for gradations on our issue. Similar is the idea, suggested immediately prior to this משנה in *Yoma* 82a, that children could fast a little on Yom Kippur to learn how to do it. This is a common practice even to this day, in which children are encouraged to skip a meal, to fast for a little longer each year before Bar Mitzvah age, so that when they reach the age of obligation they will be able to fulfil it.⁶²

Not all insane people are equally insane, to say nothing of the distinction already made by the responsa committee between those who are officially insane and those who are only mentally ill. Indeed, Spero concludes that

⁶²Mark Washofsky. *Jewish Living* (New York, NY: UAHC Press, 2001), 125.

the rabbinic admission of the broad range of psychologically disordered states into the halakhic decision-making process requires that such states be gauged, measured, and described, and that analogies be sought between contemporary psychiatric nomenclature and the select terms used in the Talmud and codes which appear to describe psychiatric phenomena. And it is in these tasks that the caseworker/therapist as *mumcheh* (expert) plays a significant role in the halakhic process.⁶³

We have seen that the Orthodox authorities respond to modernity and recognize that there are gradations of mental illnesses. Further, they recognize the value of psychology and psychiatry and seek to engage science in the path toward healing for individuals who are afflicted, yet not allowing for the participation of such people until they are completely healed. Reform Judaism seems to go a step further, issuing a call for inclusion of such troubled souls, even while they are still struggling with the sources of their distress. Yet no one in the Jewish community identifies actions that can be taken to achieve the goal of inclusion which we as Reform Jews espouse. Empty calls to involve the mentally ill and to welcome “them” continue to deny the individuality and the unique situation presented by *each person* who is suffering from mental illness. We are obligated to welcome each individual into our communities; the Holiness Code commands us to “Love the stranger as thyself.”⁶⁴ Each individual neighbor comes to us in his or her own way, with his or her own issues, including, perhaps, a lack of personal boundaries, an inability to control one’s words or actions, even a difficulty in comprehending reality. On the one hand, it is up to our communal leaders to use their discernment to protect the community from being hijacked by the needs of any one member (lest we forget, “sane” people also sometimes try to monopolize and manipulate the Rabbi’s time and the community’s agenda). On the other hand, it is up to us to see in the mentally ill individual his inherent humanity; when he speaks it is not as if he has said nothing. The הלכה is too neatly dismissive of the שוטה. We need instead to be clear in insisting that the Jewish community change to relate better to

⁶³Spero, *Handbook*, 56.

⁶⁴Leviticus 19:34

the realities of our world. We cannot avoid the question and deny the mentally ill a spiritual home in our congregations by hiding behind the הלכה which exempts merely in order to exclude. We must urge Rabbis to make decisions, using their powers of discernment to decide on a case-by-case basis issues of marriage and divorce, issues of property and damages, issues of responsibility and exemption. Only then will we fulfil our mission to live as holy people.

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