

**An Analysis of Modern Responsa
on the Status of the
Deaf-Mute (Heresh)
in Jewish Law as a
Response to Modernity**

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To my family:

To my parents: whose guidance and support has helped me be the best that I can be.

To my brothers and sisters: whose love and friendship has made this journey enjoyable.

To Samantha: whose support, patience, and love has enabled us to realize our dreams, together.

To Mark Washofsky:

Who with much patience, humor, and friendship taught me how to swim and not sink in the Sea of Halakha and the true meaning of the title Rabbi.

"A man should not say: "I will study in order to attain the degree of Rabbi."
He should study for the love of it, and the honor will come in the end as a by-product."

(Nedarim 62a)

TABLE OF CONTENTS

| | |
|--|----|
| Digest | i |
| Chapter One: Introduction | 1 |
| Chapter Two: Analysis of Talmudic Discussion | |
| Mishnah Terumot | 9 |
| Berachot 15a | 10 |
| Yevamot 104a | 12 |
| Yevamot 104b | 13 |
| Yevamot 112b | 17 |
| Yevamot 113a | 22 |
| Shabbat 153a | 27 |
| Yevamot 113b | 29 |
| Gittin 71a | 31 |
| Haqiqah 2b | 33 |
| Haqiqah 3a | 37 |
| Hullin 86a | 39 |
| Yevamot 68a | 40 |
| Chapter Three: Analysis of Compendia Literature | |
| Halakhot of Alfasi | 45 |
| RAMBAM, <i>Mishneh Torah</i> | 49 |
| Jacob ben Asher, <i>Arba'ah Turim</i> | 61 |
| Joseph Caro, <i>Shulchan Arukh</i> | 66 |
| Chapter Four: Analysis of Responsa | |
| Israeli Bet Din | 71 |
| Rabbi Asher b. Jehiel, <i>Teshuvot HaRosh</i> | 73 |
| Rabbi Moses Feinstein, <i>Iqerot Moshe</i> | 74 |
| Rabbi Ben-Zion Ouziel, <i>Mishpetei Ouziel</i> | 76 |
| Rabbi Hayyim Halberstam, <i>Divrei Hayyim</i> | 77 |
| Rabbi Shlomoh Drimmer, <i>Bet Shlomoh</i> | 78 |
| Rabbi Simchah Sofer, <i>Shevet Sofer</i> | 79 |
| Rabbi Ya'akov Haqiz, <i>Halakhot Ketanot</i> | 80 |
| Rabbi Yitzchak Herzoq, <i>Hekhal Yitzchak</i> | 80 |
| Rabbi Menachem Mendel Krochmal, <i>Tsemah Tsedek</i> | 81 |
| Rabbi Teomim, <i>Peri Meqadim</i> | 82 |
| Rabbi David Friedman, <i>Sh'eilat David</i> | 83 |
| Rabbi Moses Schick, <i>Maharam Shick</i> | 84 |
| Rabbi Wolf Hamburg, <i>Sha'ar Hazekenim</i> | 85 |
| MAHARSHAM, <i>Teshuvot MAHARSHAM</i> | 86 |
| Rabbi Ezekiel Hefets, <i>Meleket Heresh</i> | 88 |
| Rabbi Ephraim Oshry, <i>Shut Mi-ma'amakim</i> | 88 |
| Rabbi Grunwald, <i>Keren David</i> | 90 |
| Rabbi Medini, <i>Sedeh Hemed</i> | 90 |
| Rabbi Wolf Breur, <i>Nachalat Binyamin</i> | 91 |
| Rabbi Ovadiah Yosef | 92 |

| | |
|---|-----|
| Chapter Four: Cont'd. | |
| Rabbi Simcha HaLevi Bamberger, <i>Zekher Simchah</i> | 94 |
| Rabbi Aryeh Leib Grossnas, <i>Sh'eilah U'Teshuvah</i> | 94 |
| Rabbi Solomon Kluger, <i>Neot Desha</i> | 95 |
| Rabbi Isaac Dov Bamberger, <i>Yad HaLevi</i> | 96 |
| Rabbi Ezriel Hildesheimer, <i>Teshuvot Hildesheimer</i> | 98 |
| Rabbi Faitel Levin, <i>Or Hadorom</i> | 99 |
| Rabbi Yechiel Weinberg, <i>Seridei Eish</i> | 100 |
| Chapter Five: Conclusion | 101 |
| Bibliography | 106 |

DIGEST

This work examines the classic *halakhic* literature as well as modern responsa to investigate how the authorities struggle with the status of the *heresh* (deaf-mute) in Jewish law. The basis of all special provisions concerning deaf-mutes is that, according to Jewish law, they are not considered to be mentally competent. The *heresh* can no longer be defined strictly as a deaf-mute as in the days of the Talmud, though the conclusions are limited to special situations. The specific halakhic question analyzed is whether the limitations placed by Jewish law upon the responsibilities and rights of deaf-mutes are categorical in nature and remain unchanged despite changing circumstances, or whether the halakhic categorization of deaf-mutes as mentally deficient in nature does not apply to deaf-mutes who have overcome their handicap and manifest normal intelligence.

First, there is the need to demonstrate the historical developments in this area. The Talmudic sources which serve as the basis for the later halakhic discussions are analyzed. In addition, the patterns of interpretation of these sources in the traditional commentary are analyzed.

Secondly, the *Alfas*, the *Mishneh Torah*, the *Arba'ah Turim*, and the *Shulchan Arukh* are studied for the accepted halakhic view of these sources and for the "law" concerning

religious and legal practices with regard to the *heresh*.

Finally, the Responsa literature, primarily of the last two centuries, are examined in order to determine how these *halakhic* sources are interpreted and applied to modern day cases.

This work demonstrates that amongst the modern day *poskim*, there are two schools of thought regarding the status of the *heresh* in today's world. There are those who regard the deaf-mute as the same as that mentioned in the Talmud and his status is still equated with the insane person and the minor - as one who lacks mental competence. Others acknowledge the educational, technological, and sociological advances made and no longer place the *heresh* in the same category as the Talmud did.

Even though there is disagreement among modern authorities on the status of the *heresh*, both groups support their position with respect to the *halakhah*. This work explores their justifications and notes any similarities and differences.

Chapter One

Practical and ethical questions regarding the disabled and their interaction within Jewish society have not received much attention from halakhic authorities. Yet, these questions have considerable ethical, financial, humane, and legal implications. Jewish law recognizes that some Jews have physical and emotional limitations which prevent them from observing all biblical and rabbinic precepts. Jewish law exempts the disabled from any guilt they might feel because of their inability to perform certain commandments, thus affirming that the basic worth and spirituality of the disabled is not diminished in any way. Halakhah urges them to achieve their fullest potential as Jews, while exhorting society to assist them in making their religious observances possible.¹ Here, the halakhic history of the hearing impaired will be explored.

Under the rubric of talmudic law, a deaf person who did not speak was unable to assume full citizenship in the Jewish community. A born-deaf male could not be counted in establishing a minyan, nor could he enter into contracts. These restrictions were not meant to be cruel but were seen as the means of protecting such individuals from

¹Rabbi Moshe D. Tendler, Ph.D. and Fred Rosner, M.D., F.A.C.P., "The Physically and Mentally Disabled: Insights Based on the Teachings of Rav Moshe Feinstein," The Journal of Halacha and Contemporary Society, (22:Fall 1991), pp.87-96.

exploitation by others, while recognizing that they could not contribute fully to the religious life of the community. Those limitations, established almost two millennia ago, did not anticipate the advent of electronic hearing aids nor the advances in the education of deaf children. The very meaning of the word deaf must be reconsidered in the light of technological progress and educational changes that greatly alter its earlier connotations.

During the past few years, an awareness about the deaf and the hearing impaired in our society has been taking shape to an extent that is both encouraging and new. We are witnessing an aging population -- most of us probably have at least a relative or two with a hearing loss that worsens with time -- forcing many to confront deafness and what it entails. Equally, in the Jewish world, changes are taking place at a quickened pace and are more noticeable than the past.

There are some rabbis who sign and who serve the handful of deaf congregations that exist. A magazine is published by the youth section, National Council of Synagogue Youth of the Union of Orthodox Jewish Congregations that instructs its deaf Jewish readers in the ways of observance and ethical behavior. It also reports on events of particular interest to young traditional Jews who are deaf. From time to time one may see a professional manual interpreter signing during Friday night or High Holy Day services.²

All these steps are in the right direction. They help

²Eric L. Friedland, "Deaf and Jewish," in Jewish Spectator, Vol. 55 (Winter 1990-91), p.27.

heighten the sensitivity of the hearing towards the hearing-impaired among us and help furnish them with needed services. Tremendous gaps, however, remain, and most of these have yet to be dealt with.

The basis of all special provisions concerning deaf-mutes is that, according to Jewish law, they are not considered to be mentally competent. The phrase "the deaf-mute, the insane person, and the minor" recurs repeatedly in rabbinic literature in reference to persons who cannot be held responsible for their actions and who lack the requisite intelligence for the performance of various ritual and civil acts.

Thus, deaf-mutes cannot serve as ritual slaughterers or as witnesses before a *Bet Din*, cannot be counted in a *minyan*, cannot dispose of property, etc. They are considered incapable of entering into contracts or transactions requiring responsibility and independence of will.³

These provisions are predicated upon the halakhic presumption that one who can neither hear nor speak has not acquired the maturity of intellect necessary for legal responsibility. The deaf-mute, since he does not communicate, is deemed to be intellectually undeveloped and is regulated to a legal status similar to that of a minor.

Humanity has long recognized that speech and reason go hand in hand, although whether it is reason which gives rise to speech, or speech which is a prerequisite for the

³J. David Bleich, "Status of the Deaf-Mute in Jewish Law," in The Jewish Law Annual, 2(1979), pp. 187-194.

acquisition of reason, has been a matter of dispute among philosophers. "Medieval Jewish philosophy refers to man as a *medabber*, not because he possesses the faculty of speech, but because he possesses the faculty of reason."⁴ Some philosophers asserted that there can be no reasoning without speech. Thus, Thomas Hobbes writes in the fourth chapter of his Leviathan, "The Greeks have but one word, *Logos* for both Speech and Reason; not that they thought there was no Speech without Reason; but no Reasoning without Speech."⁵ Later in chapter five, he remarks, "Children, therefore, are not endued with Reason at all, till they have attained the use of Speech."⁶

The Jewish laws concerning the deaf does not necessarily view reasoning as a form of subliminal speech. Speech is indicative of a certain level of intelligence but the ability to speak is not the sole criterion in determining legal responsibility. It is the ability to engage in intellectual communication which is seen as the necessary condition of intellectual development. Similarly, it is the ability to comprehend human communication which Hobbes postulates as the basis of human intelligence.

⁴Julius Guttman, Philosophies of Judaism, translated by David W. Silverman (New York: Schocken Books, 1964), p. 220.

⁵W. T. Jones, A History of Western Philosophy: Volume 3 Hobbes to Hume (San Diego, Harcourt Brace Jovanovich, Publishers, 1969), pp.133-137.

⁶Ibid.

Until comparatively recent times, it was usually quite difficult to engage in meaningful communication with deaf-mutes and they were, to all intents and purposes, not able to be educated. At the present time, this is manifestly not so. It is recognized that the deaf who are also mute are not physically incapable of speech. Such persons possess normal vocal mechanisms, but they are incapable of developing speech by imitating sounds. Speech pathologists, audiologists and educators have developed, and now utilize a variety of other methods in developing the faculty of speech. Most deaf persons retain some residual auditory capacity. Sounds of speech may be communicated in amplified form either by means of hearing aids or auditory training units. Moreover, the deaf are capable of developing speech by imitating visual presentations of phonetic elements and through utilization of tactile and kinesthetic methods of stimulation. As a result, today, fortunately, there are very few deaf persons who remain totally mute. Moreover, many deaf-mutes, even those who are totally lacking in hearing and intelligible speech, have received specialized training and have taken their places as intelligent and responsible members of society.⁷ It is the status in Jewish law of such persons which requires investigation.

⁷For a review of the literature on deafness and intelligence as well as a discussion of the methods of determining the intelligence of deaf individuals see the Handbook on Clinical Audiology, ed. J. Katz (Baltimore, 1972).

The specific halakhic question which requires analysis is whether the limitations placed by Jewish law upon the responsibilities and prerogatives of deaf-mutes are categorical in nature and remain unchanged despite changing circumstances, or whether the halakhic categorization of deaf-mutes as mentally deficient in nature does not apply to deaf-mutes who have overcome their handicap and manifest normal intelligence. It shall be demonstrated that within the halakhic literature, i.e. the Bible, Talmud, compendia literature, and responsa literature, how some authorities recognize changing circumstances and grant those classified as a *heresh* the opportunity to perform their religious obligations with full dignity and respect. In addition, it will be shown why some authorities still insist that the deaf-mute be categorized along with the insane and the minor.

This work will examine the classic halakhic literature as well as modern responsa to investigate how the authorities grapple with the issue of how persons can best perform religious obligations if they are classified as *heresh*. How do the modern halakhic authorities justify their decisions with respect to the Halakhah and to what extent, if any, do the existence of modern technology and educational advances influence their conclusions? If the authority decides that it would be better if a deaf Jew should not perform a religious obligation, what is the

reasoning for this?

First, there is a need to demonstrate the historical developments with the definition of the *heresh* and its mental capacity for speech and understanding. The Biblical and Talmudic sources which serve as the basis for later halakhic discussions will be analyzed. Furthermore, the patterns of interpretations of these sources will be explored. Next, the codes literature will be studied to reveal the accepted halakhic view of these sources and for the "Law" concerning religious practices with regard to the *heresh*. Finally, the responsa literature of the modern era (the last two centuries) will be examined in order to determine how the previously mentioned halakhic sources are interpreted and applied to modern day cases.

It will become apparent that there are two schools of thought regarding the status of the *heresh* in today's technological age. Although the status of an educated and intelligent deaf-mute is the subject of doubt, some authorities maintain that the classification of deaf-mutes remains as legally incompetent. However, there exist a host of other authorities, some far more prominent, who are unequivocal in their view that one who has acquired speech by any means whatsoever can not be considered a deaf-mute.

It will become apparent that those who possess even minimal hearing or have acquired intelligible speech are certainly not subject to any of the halakhic restrictions

which apply to deaf-mutes. Furthermore, it will become clear that there is a highly significant body of rabbinic thought which deems even one who has acquired barely intelligible speech to be beyond the category of the rabbinic deaf-mute. This having been said, the examination begins with an analysis of the Biblical and Talmudic sources.

Chapter Two

The Bible states in Leviticus 19:14, "You shall not curse the deaf nor put a stumbling block before the blind, but you shall fear your God: I am the Lord." There are two general explanations of this passage -- a) one should not take advantage of the handicapped, and b) do not treat another person scornfully even if you think you can do it with impunity.¹ As ancient and timeless as this mandate may be, the ways it is transgressed are numerous. Discrimination of every kind is still rampant, but slow progress is still being made. To better understand this problem and its development, we begin by defining this special phenomenon known as *heresh*, a deaf-mute as it was understood by the Sages of the Talmud.

A *heresh* is defined first in Mishnah Terumot:

A *heresh* of whom the sages generally speak is one who neither hears nor speaks.²

R. Obadya of Bertinoro comments that this "*heresh* can not hear nor speak because he was born deaf and since he never heard sounds, it is impossible that he should have the ability to speak." Simply stated, the *heresh* is anyone who was a deaf-mute from birth. However, the Tosefta to Terumot

¹Sanhedrin 66a; In the case of the deaf, his very deafness may be the cause of this prohibition. See also Leviticus 19:14 in Torat Chaim Chumash. Hamakor Press: Jerusalem, 1990. pp.179-80.

²Mishnah Terumot 1:2.

makes another definition: "One who hears but does not speak - that is a mute. One who speaks but does not hear - that is a *heresh*."³ This clearly differs from Bertinoro's explanation. In an additional commentary on this mishnah, Rabbi Shimshon of Sens explains that both of these definitions of a *heresh* are valid. In order to understand his analysis, we need to look closer to the sources Rabbi Shimshon used.

The full text of Mishnah Terumot used earlier is as follows:

A heresh, who speaks but cannot hear, may not give terumah⁴; but if he does so, his terumah is valid. The heresh of whom the sages generally speak is one who neither hears nor speaks.⁵

Rabbi Shimshon comments on the first sentence by explaining the reason the *heresh* may not give terumah is because "he cannot hear the blessing to be made when giving the terumah."⁶ He comes to this conclusion based on the talmudic discussion in Berachot 15a. The mishnah in Berachot is as follows:

If one recites the Shema without hearing what he says, he has performed his obligation [according to Rabbi Judah]. Rabbi Yosi says: he has not

³Tosefta Terumot 1:2.

⁴This is a heave offering that is made in order to render agricultural produce fit for ordinary consumption.

⁵Mishnah Terumot 1:2.

⁶Rabbi Shimshon of Sens on Mishnah Terumot 1:2; See Lo.

performed his obligation.⁷

The Gemara asks, "What is Rabbi Yosi's reason? Because it is written "Hear" which implies, let your ear hear what you utter with your mouth."⁸ The Talmud comments additionally that the word "Hear" can also mean "in the language he understands," which is Rabbi Judah's understanding of *Shema*.⁹ Rabbi Yosi takes the word "hear" literally and believes if one does not hear the *Shema*, he has not fulfilled his obligation of reciting it. Likewise, the Gemara connects this mishnah to the one from Terumot by asking: "Who is it that teaches that the action of a *heresh* who can speak but not hear in setting aside the *terumah* is valid if done, but should not be done in the first instance? Rav Hisda says: It is Rabbi Yosi, as we have learned in the above mishnah¹⁰. Now Rabbi Yosi holds that the *heresh* has not performed his obligation only in the recital of the *Shema*, which is Scriptural, but the setting aside of *terumah* is forbidden only on account of the blessing. Blessings are an ordinance of the Rabbis¹¹, and the validity of the act

⁷Mishnah Berachot 2:3.

⁸Berachot 15a.

⁹Ibid. Also Rashi on Berachot 15a; See **Tartei shema minah**.

¹⁰Mishnah Berachot 2:3.

¹¹See Pesachim 7b which describes how rabbinic blessings are stated before the Scriptural commandment.

does not depend upon the blessing."¹²

We have learned here that the recitation of the Shema is a Scriptural requirement. If we accept Rabbi Yosi's argument that one must hear what he recites, then a deaf person cannot, by both of our earlier definitions, fulfill this mitzvah. In Mishnah Terumot 1:2, the issue is clearly the recitation of the blessing, a rabbinic requirement, before the ritual act of terumah. If one cannot hear the blessing, that does not mean if one went ahead and separated the terumah, which is the Scriptural commandment that the blessing introduces, the terumah is necessarily invalid. Therefore, whether one actually needs to hear a prescribed formula depends upon the source of the requirement, either Scriptural or Rabbinic. However, we can deduce that in both of these cases, the *heresh* is clearly defined as one who cannot hear.

Returning to the mishnah in Terumot (1:2), we find that Rabbi Shimshon refers us to the talmudic discussion in Yevamot 104a which explains the ceremony of *halizah*¹³. In the mishnah, there we learn:

*If she drew off the shoe and spat but did not recite [the prescribed formula], her halizah is valid.*¹⁴

¹²Berachot 15a.

¹³A special ceremony obtaining release from the obligation of Levirate marriage. See further Deut. 25:5-10.

¹⁴Mishnah Yevamot 12:3.

Rashi explains this by stating that "the omission of the act, but not that of a formula, renders a *halizah* invalid."¹⁵ This corresponds to the above discussion concerning the recitation of the blessing before doing the act of *terumah*. However, we read further in the mishnah and learn that the lack of hearing is not the only part of defining a *heresh*. The mishnah states:

If a male *heresh* submitted to *halizah*, or if a sister-in-law *hereshet* performed *halizah*, or if a *halizah* was performed on a minor, the *halizah* is disqualified.¹⁶

From this mishnah, Raba draws the following conclusion: "Now that you have stated that the recitation of the formula is not absolutely essential, the *halizah* of a dumb¹⁷ man or a dumb woman is valid."¹⁸ However, the gemara then asks if this is so, why can not the deaf man submit himself to *halizah*, or *halizah* performed by a deaf sister-in-law, or performed on a minor, be valid? "Now, what is the reason? Is it not because these are unable to recite the blessing? No; because they are not in complete possession of their mental faculties¹⁹."²⁰ The gemara continues by stating,

¹⁵Rashi on Yevamot 104a; See *Halizah kasherah*.

¹⁶Mishnah Yevamot 12:4.

¹⁷One who hears but does not speak; an *illem*.

¹⁸Yevamot 104b.

¹⁹The minor because of his immature age, and the deaf and dumb because of his physical defects which adversely affects his mental powers.

"If so, the same applies also to a dumb man and to a dumb woman."²¹ Raba replied: A dumb man and a dumb woman are in full possession of their mental faculties, and it is only their mouths that pain them."²² However, the gemara rejects this conclusion on the basis of Rabbi Yannai's ruling. We learn from this that the *heresh* is one who is unable to hear and who because of this physical defect, lacks possession of his mental faculties.

We have now defined the *heresh* as one who lacks the ability to hear and because of this possesses no mental capacity. Through the analysis of the two mishnayot, we have learned that the restriction placed upon the *heresh* in taking his *terumah* is because he would not be able to hear the blessing of his act. The same holds true when the *heresh* submits to the act of *halizah*. However, there is another issue concerning the *heresh* that needs to be understood as explained further in the talmudic discussion in Yevamot 104b.

Returning to the gemara in Yevamot 104b, we learn that "the school of Rabbi Yannai explained [that the reason why a deaf-mute is unfit for *halizah* is] because [the Scriptural instruction], *He shall say*²³ or *She shall say* is

²⁰Yevamot 104b.

²¹Ibid; Why should their *halizah* be valid?

²²Yevamot 104b.

²³See Deuteronomy 25:8.

inapplicable to such a case!" Rashi explains that since the deaf-mute can neither say nor hear the prescribed formula, the *halizah* is invalid.²⁴ From this, Rashi concludes that this is "the reason that [the Sages] teach us that a deaf person is one who neither speaks nor hears."²⁵

The gemara returns to Mishnah Yevamot 12:4 and tells us that Raba, who apparently accepts Rabbi Yannai's ruling, really said: "Now that you have stated that the recital of [the formula] is absolutely essential, the *halizah* of a dumb man or a dumb woman is invalid. And our Mishnah²⁶ [is based on the same principle] as [that propounded by] Rabbi Zera; for Rabbi Zera stated: Wherever proper mingling²⁷ is possible actual mingling is not essential²⁸, but where proper mingling is not possible²⁹ the actual mingling is absolutely essential."³⁰ From Rabbi Zera's teaching, we learn that with *halizah*, also, in the case of persons who are able to recite the prescribed formula, the omission does

²⁴Rashi on Yevamot 104b; see *V'amad v'amar v'antah v'amrah*.

²⁵Ibid. See *V'ha-amrei D'bei Rabi Yannai*.

²⁶Which stated that if she did not recite the formula the *halizah* is valid.

²⁷Of the flour and the oil of the meal-offering. Rashi explains the perfect mixture; see *Halitztah pasulah*.

²⁸Even if no mingling has taken place the meal-offering is acceptable.

²⁹The portions of the mixture were not correct.

³⁰*Menachot* 18b and 103b.

not invalidate the *halizah*. In the case of dumb persons for whom it is physically impossible ever to recite the formula, the omission of it does render the *halizah* invalid.

From this, we are able to conclude two important points. First, from the Sages we have learned a *heresh* is a person who neither speaks nor hears; therefore, he was never able to recite or hear the prescribed formula before performing a ritual and his actions were declared invalid. However, the second point deals with the statement in Mishnah Terumot 1:2. We learned that if a *heresh* went ahead and performed *terumah*, his action was declared valid. The rabbis declare the actions of a *heresh*, "*who does speak but cannot hear*,"²¹ valid because he was able to say the prescribed formula. Therefore, from these various mishnayot and talmudic discussions, we define two types of deaf people: a) "*one who does speak but cannot hear*"²²; and, b) "*one who neither hears nor speaks*"²³ and because of this physical defect, are declared "*not in complete possession of their mental faculties*."²⁴

We now understand how the *heresh* is defined. However, in the legal world of marriage and divorce, the rabbis treat

²¹Misnah Terumot 1:2.

²²Ibid. Also, he is declared mentally competent since he can speak.

²³Ibid.

²⁴Yevamot 104b.

the *heresh* differently than expected. To examine this matter closer, we return to Mishnah Yevamot 12:4:

If a male *heresh* submitted to *halizah*,
or if a sister-in-law *hereshet* performed
halizah, or if a *halizah* was performed
on a minor, the *halizah* is disqualified.

According to Rashi, in a case where the surviving brother is incapable of speaking, the widow is exempt from both *yibum*³⁵ and *halizah*, and is free to marry.³⁶ Rashi refers us to Mishnah Yevamot 13:8. He we read:

If someone was married to two minor orphan-girls and died, cohabitation or *halizah* with one of them releases her co-wife. So too, [in the case of] two deaf-mute [women].

We learn that if a man married two deaf-mutes and died, his brother's cohabitation with one releases the other. However, unlike the minors, *halizah* with the *heresh* is never possible.³⁷ The talmudic discussion directs us to the discourse in Yevamot 112b which is concerned with marriages of deaf-mutes. Before we look at this discussion, we need to understand how marriages were understood by the rabbis.

In the post-Biblical era the betrothal was realized by the performance of an act of acquisition and the making of a declaration by the bridegroom to the bride in the presence

³⁵A levirate marriage. When a man dies childless, the Torah commands [Deuteronomy 25:5-10] that one of his brothers marry his widow. This marriage is called *yibum*.

³⁶Rashi on Yevamot 104b. See V'hershet Shehiltzah.

³⁷Mishnah Yevamot 12:4.

of two witnesses."³⁸ "A woman is acquired in one of three ways and acquires her freedom in two. She is acquired by money, by deed, or by sexual intercourse."³⁹ This acquisition, *kinyan*, was basically a business transaction which required the mutual consent of the parties involved. "Deaf-mutes in the talmudic period were generally looked upon as a kind of idiot, hence considered legally incompetent to contract marriage. The Talmudic Law, however, conceded them the power of concluding such a contract by means of signs; but this marriage, being merely tolerated, had not all the effects and consequences of a perfectly valid marriage."⁴⁰ To better understand this phenomenon, we now look at Mishnah Yevamot 14:1-4 in Yevamot 112b.

If a deaf-mute man married a competent woman, or a competent man married a deaf-mute woman, if he wishes he may divorce her, and if he wishes he may retain her. Just as he marries by gesturing, so he may divorce by gesturing.

If a competent man married a competent woman and she became a deaf-mute, if he wishes he may divorce her, and if he wishes he may retain her. If she became insane, he may not divorce her. If he became a deaf-mute or insane, he can never divorce her. Rabbi Yochanan ben Nuri asked: Why is it that a wife who became a deaf-mute may be

³⁸"Part Two: The Deaf Mute vis-a-vis Marriage and Divorce," in The Status of the Deaf in Early Rabbinic Literature - Rabbinic Thesis. Douglas H. Goldhamer. 1972, p.15.

³⁹Mishnah Kiddushin 1:1.

⁴⁰"Chapter IX: Qualifications to Contract Marriage." in The Jewish Law of Marriage and Divorce. Rev. Dr. M. Mielziner. 1884, p.70.

divorced, but a husband who became a deaf-mute may not divorce? They replied: A husband who divorces is not comparable to a wife who is divorced, since a wife may be divorced with or without her consent, while a husband cannot divorce except by his consent.

Rabbi Yochanan ben Gudgedah testified that a deaf-mute who was given in marriage by her father may be released by a bill of divorce. They said to him: This one is also the same.

If two deaf-mute brothers were married to two deaf-mute sisters, or to two competent sisters, or to two sisters, one a deaf-mute and one competent; or, if two deaf-mute sisters were married to two competent brothers, or to two deaf-mute brothers, or to two brothers, one a deaf-mute and one competent -- these [widows] are exempt from halizah and from yibum. If they were not related, they should marry, and if they wish to divorce, they may.

If two brothers, one a deaf-mute and one competent, were married to two competent sisters, [and] the deaf-mute husband of the competent [sister] died, what should the competent husband of the [other] competent [sister] do? [Nothing, because] she is released as his wife's sister. [If] the competent husband of the competent [sister] died, what should the deaf-mute husband of the [other] competent [sister] do? He must discharge his wife with a bill of divorce, and his brother's wife is perpetually forbidden.

[If] two competent brothers were married to two sisters, one a deaf-mute and one competent, and the competent husband of the deaf-mute [sister] died, what should the competent husband of the competent [sister] do? [Nothing, because] she is released as his wife's sister. [If] the competent husband of the competent [sister] died, what should the competent husband of the deaf-mute [sister] do? He must discharge his wife with a bill of divorce, and his brother's wife with halizah.

[If] two brothers, one a deaf-mute and one competent, were married to two sisters, one a deaf-mute and one competent, and the deaf-mute husband of the deaf-mute [sister] died, what should the competent husband of the competent [sister] do? [Nothing because] she is released as his wife's sister.

[If] the competent husband of the competent [sister] died, what should the deaf-mute husband of the deaf-mute [sister] do? He must discharge

his wife with a bill of divorce, and his brother's wife is perpetually forbidden.

[If] two brothers, one a deaf-mute and one competent, were married to two unrelated competent women, and the deaf-mute husband of the competent [wife] died, what should the competent husband of the competent wife do? He [may] perform either **halizah** or **yibum**. [If] the competent husband of the competent [wife] died, what should the deaf-mute husband of the competent [wife] do? He should marry [her], and [he may] never divorce [her].

[If] two competent brothers were married to two unrelated women, one competent and one a deaf-mute, and the competent husband of the deaf-mute [wife] died, what should the competent husband of the competent [wife] do? He should marry [her].

[If] he [then] wishes to divorce [her], he may.

[If] the competent husband of the competent [wife] died, what should the competent husband of the deaf-mute [wife] do? He [may] perform either **halizah** or **yibum**.

[If] two brothers, one a deaf-mute and one competent, were married to two unrelated women, one a deaf-mute and one competent, and the deaf-mute husband of the deaf-mute [wife] died, what should the competent husband of the competent [wife] do? He should marry [her]. [If] he [then] wishes to divorce [her], he may. [If] the competent husband of the competent [wife] died, what should the deaf-mute husband of the deaf-mute wife do? He should marry [her], and he can never divorce [her].

The Gemara in Yevamot 112b begins by asking why is the marriage of a deaf-mute sanctioned by the rabbis and not a marriage of an insane person. It is because if an insane person or a minor married, and then died, their wives are exempt from **halizah** and from **yibum**. This baraita is merely cited to support the statement that the marriage of the insane are not valid. Rashi also comments by stating, "since **halizah** was required it is obvious that the preceding marriage, without which the question of **halizah** could never have arisen, is recognized as valid despite the fact that a

deaf-mute, owing to his inferior intelligence, is elsewhere ineligible to effect a *kinyan*.⁴¹ The gemara continues by stating that the marriages of deaf-mute persons are legal because of a Rabbinical ordinance which recognizes them, although the rabbis did not recognize a marriage which involves an insane person. Rashi defines the Rabbinical ordinance: Deaf-mutes might well lead a happy matrimonial life, not only when the husband or wife is deaf, but even when both are afflicted with deafness.⁴² The opposite explanation is given in the gemara with respect to a marital union between insane persons.

The discussion continues with the rabbis determining the difference between a deaf person and a minor in that the rabbis grant permission for marriage to the deaf person. According to Rashi, "were not his marriage recognized as valid, at least in Rabbinic law, marriage for him would have become an impossibility."⁴³ This conclusion is clear because "in due course [the minor] would be able to contract [a Toraitically valid] marriage."⁴⁴ However, this only applies to the male minor. An objection is raised in the gemara with respect to the minor girl. The rabbis have already legalized her marital status as a minor in order to

⁴¹Rashi on Yevamot 112b. See D'tekeinu.

⁴²Ibid. See D'kayeimah.

⁴³Rashi on Yevamot 112b; See Tekeinu leh Rabanan Nisuin.

⁴⁴Yevamot 112b.

prevent people from treating her as ownerless property. Rashi explains further stating that this measure was put into force so that people would not "take liberties with her."⁴⁵

Further in the gemara, the rabbis discussed the difference between a minor girl and a deaf woman that the former is permitted to exercise the right of *mi'un*.⁴⁶ This is an interesting question since in the case of either, marriage is Toraitically invalid. The gemara tells us "because men would abstain from marrying her [the deaf woman]." Rashi explains that "at any time throughout the deaf woman's life, she could leave her husband by merely making her declaration of refusal. This does not apply to a minor who loses her right to *mi'un* as soon as she becomes of age."⁴⁷

So far in our discussion, we find that the rabbis legalized the marriage of two deaf mutes or one of sound senses to one who was deaf, for they felt two deaf mutes or a couple involving a deaf mute could lead a well adjusted marital life. However, the rabbis could not validate the marriage of two insane persons, or one of sound senses to an

⁴⁵Rashi on Yevamot 112b; See *Shelo Yinhagu vah....*

⁴⁶Lit. (refusal): A declaration by a fatherless girl who has been married off by her mother or brothers under age, that she does not wish to live with her husband. Such a declaration made by her in the presence of a Bet Din secures her freedom without the requirement of a bill of divorce (Get).

⁴⁷Rashi on Yevamot 113a; See *Mimanei V'lah Nasvei Lah.*

insane person for they felt there could be no marital bliss between such a couple. We learn that the marriage of a deaf person, even though not Toraitically valid, became valid through Rabbinic authority because the rabbis felt that deaf persons have the right to marriage for the purpose of the general good. The rights of refusal were denied to a deaf woman simply because of her physical condition. Her lack of hearing is a correlation to a lack of mental capacity. If she were to make a declaration of refusal, her request would be suspect. This problem would prevent men from marrying her; therefore, her rights to *mi'un* are not permitted.

Further on in the gemara, a question is raised as to why is the minor entitled to her *ketubah*⁴⁸ and the deaf woman is not. Again, the reason given is that men would abstain from marrying her. Rashi helps us by explaining that while deafness, as a rule, is an affliction for life, "a minor does not remain forever in her minority."⁴⁹ If so, the gemara continues, where is it learned that a minor is entitled to a *ketubah*? We have learned elsewhere in Mishnah Ketubot 11:6:

If an orphan girl (minor) exercises the prerogative of refusal, or were within the secondary degree of blood relationship (whose marriage is forbidden according to the rabbis but not Toraitically) or were barren - she has no claim for her ketubah.

⁴⁸A document which stated the provisions for the maintenance of the divorced wife or widow.

⁴⁹Rashi on Yevamot 113a; See *Mimanei V'lah Nasvei Lah*.

The first mentioned, because her separation from her husband is effected even against his will; the second was penalized for contracting an unlawful marriage; while in the case of the last the marriage is regarded as a contract under false pretenses.⁵⁰ According to Mishnah Ketubot 11:6, this is only applicable to the minor who has exercised the right of *mi'un*, and who separation was effected even without the husband's consent.⁵¹ However, when the husband who delivers a *get* (a letter of divorce) to a minor woman, she is entitled to her *ketubah*. It is clear the husband has consented to the separation for only the husband can enact a letter of divorce. Now that we understand in which circumstance the minor girl is entitled to her *ketubah*, where do we learn that the deaf woman is not entitled to her *ketubah*? This is inferred from the gemara in Yevamot 113a:

A Tanna taught: A heresh or a shoteh who married women of sound senses, even though the heresh recovered his hearing or the shoteh his senses -- the wives have no claim whatsoever on them.

Rashi explains "at the time the marriage had been contracted, the men were not in possession of all their senses or faculties and were, in consequence, incapable of undertaking any monetary obligations."⁵² However, if the men wished to retain the women, they are entitled to a

⁵⁰Rashi on Ketubot 100b; See *Ein lahen ketubah*.

⁵¹Rashi on Yevamot 113a; See *Aval Yotze B'get*.

⁵²Ibid.; See *Ein Lahen Aleihem K'lum*.

ketubah at a lesser value.⁵³ The reason for this lessened value is because "their marriage is deemed to have taken place when the husbands recover their faculties, and at that time they were no longer virgins."⁵⁴

If however, a man of sound senses married a woman who was deaf or an insane person, her *ketubah* is valid. The reason is because he himself consented; had he not consented, however, she would receive no *ketubah* for if so, men would abstain from marrying her. This is how we learn that a deaf woman is not entitled to a *ketubah*. The man of sound senses has to consent to the marriage as well as the *ketubah*. Just like the deaf woman does not have the right to make a declaration of refusal; likewise, she is not entitled to a *ketubah* without her husband's consent.

If this is so, that eligibility to receive a *ketubah* is determined by the likelihood of the consent to marry the deaf person, then a *ketubah* should have been provided for a woman of sound senses who married a deaf man. If not, women would abstain from marrying deaf men. The gemara quotes: "More than the man desires to marry does the woman desire to be taken in marriage."⁵⁵ It is assumed that the lack of a *ketubah* would not prevent a woman from marrying a man even

⁵³The standard value of a *ketubah* is 200 zuzim. In this case, the value is set at a *maneh* [or 100 zuzim].

⁵⁴Bait Yosef, Even Ha-Ezer 67.

⁵⁵Gittin 49b.

if he were deaf. A parable is given to indicate that a deaf man is able to seek a wife over a maid-servant. If he is able to afford the value of a *ketubah* and is able to accept the responsibility of its value, then he should be permitted to seek a wife. A man seeks a wife for both matrimony and service. When the rabbis allowed this deaf man to marry, they are only doing it for the general good of society. Unlike our earlier discussion, the *heresh* here lacks any form of mental capacity. In the legal world of marriage where mental competence is necessary, it is essential to note the importance of the rabbis' decision to permit deaf-mutes to marry despite the doubt of their mental capacity.

The discussion continues in the Gemara concerning whether a marriage between a deaf man and a sound woman is valid. It might be argued, since the degree of her husband's intelligence or mental capacity can not be accurately gauged, the validity of her marriage should be deemed doubtful. If the *heresh* is declared mentally deficient, than he can not enter into a state of *kiddushin* (marriage) for it is a business transaction which requires consent of both parties. The example given, according to Rabbi Hiyya b. Ashi in the name of Samuel, when a person has intercourse with the wife of a deaf man, no *asham talui*⁵⁶ is incurred. Rashi explains further that "such an offering

⁵⁶The offering which is to be brought by one who is in doubt as to the transgression committed.

is due only when the offense is a matter of doubt."⁵⁷ In this case, however, as the marriage is valid in Rabbinic law only but remains definitely invalid in Toraitic law, no offering could be incurred. The gemara suggests Mishnah Terumot 1:1 as proof that the *heresh* does not possess mental capacity:

*There are five who may not set apart **terumah**, and if they did so their **terumah** is not valid. These are they: A deaf man, an insane person, a minor, he who gives **terumah** from that which is not his own, and an idolater who gave **terumah** from that which belonged to an Israelite, and even [if the latter gave it] with the consent of the Israelite his **terumah** is invalid.*

From this Mishnah, then, it follows, since the *terumah* of a deaf man is regarded as definitely invalid, that the incapacity of the deaf man is not a matter of doubt; and this apparently provides support for the above view stated in the name of Samuel. But, the gemara says Samuel holds the same view, with regard to *terumah*, as Rabbi Eleazar. "For it was taught: Rabbi Isaac stated in the name of Rabbi Eleazar that the *terumah* of a deaf man must not be treated as profane, because its validity is a matter of doubt."⁵⁸ The invalidity of the *terumah* spoken of in the Mishnah cited may consequently be due to a similar reason. Hence no support for Samuel's view concerning a deaf man's wife may be adduced from it. Therefore, if Samuel agrees with Rabbi

⁵⁷Rashi on Yevamot 113a; See *Ein Chayeivin Aleiha Asham Talui*.

⁵⁸Shabbat 153a.

Eleazar, an *asham talui* should be incurred in a case of intercourse with the deaf man's wife.

To better understand this problem, an analogy is presented. The analogy is made with partaking of permitted or forbidden meats. Rashi comments that "one of which was definitely forbidden and the other definitely permitted, and it is unknown whether a person ate the one or the other. Only in such a case, where the doubt is due to the existence of two objects, is an *asham talui* incurred. Similarly in the case of intercourse with one of two women, when it is unknown whether the woman affected was his own wife or a forbidden stranger, an *asham talui* is incurred. If the doubt, however, relates to one object, it being unknown, for instance, whether a piece of fat one has eaten was of the permitted or forbidden kind, no *asham talui* is involved. Similarly, in the case of the deaf man's marriage, where the doubt relates to one woman, it being uncertain whether she has the status of a married woman or not, no *asham talui* is incurred."⁹⁹ The conclusion is that Samuel agrees with Rabbi Eleazar with regard to the *terumah* but not in regard to the liability of an *asham talui*.

From the discussion on marriage of a deaf man to a woman of sound senses, we learn two important points. We learn: 1) The validity of the deaf man's actions, and consequently also his capacity, is a matter of doubt; and 2)

⁹⁹Rashi on Yevamot 113a; See Hoo D'amar K'rabi Eleazar.

Since the degree of a deaf man's intelligence or mental capacity cannot be accurately gauged, the validity of his marriage should be doubtful. This is clearly a different view presented earlier which recognizes a deaf person who possesses some form of mental capacity.

Continuing on Yevamot 113b, the question raised is whether the mind of the *heresh* is feeble or clear. Rashi comments that "whatever little his feebleness enables him to do he can do well at all times."⁶⁰ It becomes clearer when the rabbis argue that since his mental powers do not change, he is as capable of giving divorce as contracting a marriage. He was either capable of both transactions or of neither. If it is not clear when he is in which state, then how can he enact a marriage or deliver a divorce? Rashi tells us that "it being possible that at the time of the betrothal or marriage he happened to be in a normal state, and his act was consequently valid, while at the time of the divorce he may happen to relapse into imbecility, in consequence of which his act can have no validity."⁶¹ The argument is concluded with no decision.⁶² Perhaps the rabbis recognize that there are deaf persons who neither

⁶⁰Rashi on Yevamot 113a-b; See K'lishtah.

⁶¹Rashi on Yevamot 113b; See Oh Dilmah P'shitah leh.

⁶²Teko - "let it stand"; an expression occurring at the end of an inquiry when no definite answer is obtainable. Others consider it to be a combination of the initials *Elijah* the *Tishbite* will solve all difficulties and inquiries.

speaking nor hearing, yet have some form of mental capacity. Returning to Mishnah Yevamot 14:1, with respect to divorce, we learn that the deaf-mute is still declared incompetent.

In Mishnah Yevamot 14:1, we learn:

If a deaf-mute man married a competent woman, or a competent man married a deaf-mute woman, if he wishes he may divorce her, and if he wishes he may retain her. Just as he marries by gesturing, so he may divorce by gesturing.

The deaf-mute is considered feeble-minded, and is considered by Torah law to be legally incompetent. He is thus incapable of contracting for a valid marriage. However, the deaf-mute's marriage is recognized Rabbinically, whether one or both of the partners were deaf-mutes.⁶³ Although the deaf-mute husband's divorce is only Rabbinically valid, it is acceptable in divorcing his wife, since her marriage to him was also only Rabbinically valid. Just as his marriage act was Rabbinically effective, and, despite his diminished mental capacity and inability to speak, we allowed him to marry by gesturing -- i.e., motioning with the head and hands; so too, we allow him to divorce by gesturing. We need to look further in Mishnah Gittin 5:7 to understand this issue better.

The Mishnah states: "A deaf-mute gestures and is gestured to." This mishnah follows the previous one in discussing enactments for the sake of the general good.

⁶³Meiri from Yevamot 112b.

According to Biblical law, the transactions of a deaf-mute are void, since he is deemed mentally incompetent and thus incapable of executing a legal act. However, the Rabbis validated the transactions of a deaf-mute to enable him to take care of his basic needs. This has to be some recognition of some form of mental competency; yet the text neglects to support this. Since the rabbis permitted the heresh to marry, then he also had to be permitted to divorce. With respect to divorce, we look to Mishnah Gittin 7:1.

[If one] became mute, and they say to him: 'Shall we write a get for your wife?' and he nodded with his head, they test him three times. If he said 'no' for a 'no,' and 'yes' for a 'yes,' they may write and give [it].

Rashi explains that "a man was in possession of his faculties, but was struck dumb."⁶⁴ If so, then are we still speaking of the heresh or of another person? Continuing in tractate Gittin, we soon learn the distinctions the rabbis have made.

R. Kahana said in the name of Rab, "If a deaf-mute can signify his meaning by writing, a get (divorce decree) may be written and given to his wife."⁶⁵ Said R. Joseph, "What does this tell us? We have learned (from a baraita): If a man is struck dumb and when they say to him, shall we write a get for your wife, he nods his head, he is tested with three questions. If he signifies "no" and "yes" properly each time then the get should be written

⁶⁴Rashi on Mishnah Gittin 7:1; See Nishtatak.

⁶⁵If one is a heresh before the marriage and he betrothed by gestures; he also divorces by gestures.

and given for him?"⁶⁵ R. Zera replied to him, "You have quoted a statement about an illem. An illem is different as it has been taught (in a baraita): One who can speak but not hear is called *heresh* and one who can hear but not speak is called *illem* and both are considered to be in possession of their faculties for all purposes."⁶⁷

Rashi states, "the *heresh* that R. Kahana speaks of above can neither hear nor speak, he is a deaf-mute."⁶⁸ However, it is clear that the rabbis have made a distinction between two different types of *hereshim*. We learned that one who can speak but not hear is also called a *heresh* just as one is labeled as such for neither speaking or hearing. The first type possesses full mental capacity whereas the latter type does not.⁶⁹ There is another view that distinguishes between a deaf-mute and a mute who can hear. The communications of the former who is considered mentally incompetent are not acceptable in writing or body motion, whereas the latter may communicate in either way and it is tantamount to speaking.⁷⁰

Before dealing with the rulings of the rabbis concerning the *heresh*, it is important to give an alternative definition of *heresh* as used by the rabbis. One

⁶⁶And writing is surely as effective as nodding.

⁶⁷Gittin 71a.

⁶⁸Rashi on Gittin 71a; See *Heresh*.

⁶⁹Beit Ha-Bechirah al Massekhet Gittin of the Me'iri. Kalman Schlesinger: Jerusalem, 1980. pp. 262 -264.

⁷⁰Ibid.

who hears but cannot speak is called an *illem* (mute). For it says, "But I, like a *heresh* (deaf-man), hear not; and like an *illem* that opens not his mouth. Thus I was like a man that hears not, and whose mouth are no rebukes."⁷¹ Or, *illem* may be an abbreviation of the Aramaic *ishtakil miluey* (deprived of speech).⁷² A mute counts as normal in all respects,⁷³ for he has full understanding and merely lacks the power of speech.⁷⁴ Yet in one respect he is different from a normal person: a normal person does not have to be examined if he is intelligent, whereas a mute must be examined. He also differs from the normal in precepts and laws that depend on speech.

Throughout the lengthy discussion of the *heresh*, it is clear that the rabbis have defined the deaf-mute in three ways. One who neither hears nor speaks is a *heresh* who is declared mentally deficient. One who does not hear, but speaks is also a *heresh*. This person possesses mental capacity. Finally, the *illem* is one who hears, but does not speak. This person is also mentally competent. It is also

⁷¹Psalm 38:14.

⁷²Hagigah 2b; The Tosefot and Rashi further explain that the expression means "his speech has been taken away from him" and "lack of intelligence." Note that this Talmudic etymology should not be taken as grammatical truth. See further in Brown-Driver-Briggs-Gesenius Hebrew and English Lexicon, p.48 & p.361.

⁷³Ibid.

⁷⁴Yevamot 104b.

clear that the rabbis felt that for the purpose of the general good, the *heresh* (both types) should be permitted to marry and divorce. Yet, with respect to the legal world of marriage and divorce, talmudic law conceded them the power of concluding such a contract by means of signs; but this marriage, being merely tolerated, had not all the effects and consequences of a perfectly valid marriage. Even though the definition of the *heresh* is clear here, there are two exceptions found in the Tosefot.

The Tosafist⁷⁵ quotes two exceptions to the explanation that the *heresh* is one who can not hear nor speak. The first exception is found in Megillah 19b where it is maintained that "all are qualified to read the megillah except a deaf person, an insane person and a minor." The Tosefot states that the rabbinic *heresh* is one who could neither speak nor hear for here we must be dealing with one who speaks since it can not be assumed that he would fulfill the obligations of his listeners with gestures or hand signs. The other exception presented is from Mishnah Hullin 1:1 where it states that "all may slaughter except a deaf person, an insane person and a minor lest they impair what they slaughter." Again, the Tosefot states that this cannot be a deaf mute because the rabbis in this instance believe that the *heresh* will be able to confirm his act of slaughtering. This is because the law of ritual

⁷⁵Hagigah 2b; s.v. *heresh*.

slaughter depends on whether the *heresh* could maintain a steady hand.

Outside of the above exceptions, this is the *heresh* of whom the rabbis speak when they exclude him from participating in certain *mitzvot* (religious obligations), and introduce certain rules and regulations governing his life. In addition the rabbis added those individuals who became deaf later after birth.

As deduced, the rabbinic *heresh* is a deaf-mute. Returning to Tractate Hagigah, the rabbis clarified this point in another discussion:

All are bound to appear (at the Temple) and to rejoice except a *heresh* that can speak but not hear or hear but not speak, who is exempt from appearing at the Temple. Though he is exempt from appearing, he is bound to rejoice. One however that can neither hear nor speak, an insane person and a minor are exempt from even rejoicing since they are exempt from all the precepts in the Torah.⁷⁶

Therefore, the *heresh* that is traditionally grouped with the minor and the insane is the *heresh* who can neither hear nor speak. This is the *heresh* of whom the rabbis talk throughout the rabbinic literature.

The rabbis in discussing the *heresh* in tannaitic and amoraic literature use a formula which is generally consistent throughout. The formula is, "*heresh, shoteh ve-katan* - the deaf, insane, and minor." Whenever the rabbis want to speak about the *heresh* or when the rabbis want to

⁷⁶Hagigah 2b.

stipulate certain rules governing the life of the *heresh* they usually, in the same mishnah or baraita, discuss the status of the insane and the minor. The basic reason that these three groups are categorized together is that the rabbis felt that all three groups are, "*lav beney de'ah ninho* - mentally deficient,"⁷⁷ and "*rov ma'aseihem* - most of their actions confused."⁷⁸ However, one must translate the definition differently as it is applied to the deaf, insane, and minor.

The minor was considered mentally deficient, or possessed a lack of intellectual capacity on account of his immature age. The insane person was labeled as mentally deficient due to his loss of intelligence as a result of an unstable mind. The deaf person was declared mentally incompetent due to his physical impairment which prevented him from acquiring speech, a sign of intellectual capacity.⁷⁹

The factor which led the rabbis to assert that a deaf mute is "mentally deficient" was his "deafness" rather than any mental problem. According to rabbinic literature, there is no doubt about the mental competency of the *illem* - one who hears but can not speak - and even though there are limits with respect to his legal and religious status, he is

⁷⁷Yevamot 104b.

⁷⁸Hullin 86a.

⁷⁹Hagigah 2b.

for the most part given the same legal and religious rights as those who can hear.⁸⁰ Also, the biblical verse, "...that they may hear, and that they may learn...",⁸¹ is expounded upon with regard to the *illem* who can learn because he can hear. A story of two mute men is told who came regularly to the Beit Midrash and listened diligently to the teachings of R. Yehudah HaNasi. Whenever the rabbi spoke, their heads nodded and their lips moved trying vainly to respond to the words of wisdom. R. Yehudah HaNasi sympathized with their plight and prayed vigorously for them. One day miraculously they obtained the power of speech and were found to be well versed in the disciplines of rabbinic literature.⁸² Here we see the rabbis did make a distinction between the *heresh* and the *illem* with respect to their ability to possess "mental capacity."

The *heresh* was excluded from the religious life of the community because he was declared "mentally deficient" along with the insane person and the minor because of his physical impairment. We learn:

One that can neither hear nor speak, an insane person and a minor are exempt even from rejoicing, since they are exempt from all the precepts of the Torah.⁸³

⁸⁰Ibid.

⁸¹Deuteronomy 31:12.

⁸²Hagigah 3a.

⁸³Hagigah 2b - 3a.

Since the deaf were free from the obligation of performing the biblical precepts, *mitzvot*, they could never assume any leadership role in the community.

A deaf mute, an insane person, and a minor can not discharge the obligation of the many (to fulfill their duty). This is the general rule. Whoever is not obliged in a matter cannot discharge the obligation of the many.⁸⁴

They can not blow the shofar⁸⁵, nor can they lay an *eruv-techumin* (a Shabbat perimeter)⁸⁶, nor can a deaf-mute Kohen bestow upon his wife the privilege of *terumah*.⁸⁷ One minor exception is found in the case of *shechitah* - ritual slaughter - which can not be performed by the deaf-mute alone; however, if he does so under the supervision of a "mentally competent" person, his act is accepted.⁸⁸

The deaf-mute, as we have seen, was declared "mentally deficient" to actively participate in the religious activities of the community because of his physical impairment. The Talmud gives us a good insight of how the rabbis viewed the mentality of the deaf and why they excluded him from the religious activities of the community when it states:

He has the capacity of physical action but not of

⁸⁴Mishnah Rosh Hashana 3:8.

⁸⁵Ibid.

⁸⁶Eruvin 31b.

⁸⁷Tosefta Yevamot 9:3.

⁸⁸Hullin 2a.

intention.⁸⁹

That is, only such actions of his are valid which require physical capacity but not those which require mental capacity. In tractate Hullin, this attitude of the rabbis concerning the deaf-mute is greatly exaggerated further and somewhat disconcerting when they state, "because in the majority of cases what they (deaf-mutes) do is bungled."⁹⁰

The deaf-mute because of his limited mental competency also had very little legal standing in the community. Due to his physical deficiency he was not held responsible for any mishap and accordingly was not liable to damages for assault upon others while others were liable for assault upon him.⁹¹ His claims on others were not heard nor could an oath be administered to others on his account.⁹²

Because of his supposed lack of mental competency the rabbis prohibited deaf-mutes from formulating vows or making assessments while all other people (excluding the insane and minor) were deemed capable of making a vow to consecrate objects for the sanctuary.⁹³

In legal matters the deaf mute was not held culpable to guilt as was his hearing counterpart. A striking example of

⁸⁹Mishnah Machshirin 6:1.

⁹⁰Hullin 86a.

⁹¹Mishnah Bava Kamma 8:4.

⁹²Mishnah Shevuoth 6:4.

⁹³Mishnah Arachin 1:1.

this is found in tractate Meilah.

If one sent (money by) a deaf-mute or a mentally defective person or a minor (to buy food belonging to the temple) and they carried out his errand then the owner has committed sacrilege. If they did not perform his errand then the shopkeeper has committed sacrilege."⁴

In order to understand this mishnah we must be aware of the rabbinic maxim,

"the sender is not subject to sin with the exception of *m'ilah* (sacrilege i.e. making the holy things consecrated to the temple illegally profane). With *m'ilah*, the rabbis ordained the sender is subject to sin."⁵

Now according to this logic and according to the details of our mishnah it appears that the *heresh* should really be guilty but since the deaf-mute are not "permitted senders" and culpable to guilt, the guilt is transferred from the deaf person to the shopkeeper."⁶ Another example of the limited legal status of the *heresh* is illustrated in tractate Yevamot where it states that the *heresh* can not execute any *kinyan* (a business acquisition)."⁷

The rabbis regulated the deaf mute to a second class position in the religious and legal community. They were of the opinion that because of his serious physical impairment his mental competency suffered. He was considered "mentally

⁴Mishnah Meilah 6:2.

⁵Bertinoro to Mishnah Meilah 6:1.

⁶Bertinoro to Mishnah Meilah 6:2.

⁷Yevamot 68a.

deficient" and consequently declared like the insane person and the minor "because in the majority of the cases what they do is bungled." Therefore, the consequences were simply to place a limited religious and legal status in the community.

Even though today we are aware that there is no correlation between one's intelligence and one's hearing ability, the sages of the Talmud did not hold this opinion. However, in all fairness to the rabbis, it must be admitted that their insight into the effects of deafness on the individuals concerned was far reaching and brilliant for their day. The ancient rabbis of the Talmudic period were, to a limited extent, aware of a connection of communication skills and one's intellectual capacity. If the rabbis meant "mentally deficient", than they were quite accurate because,

a loss in hearing alters the integration and functioning of the sensory processes....and limitation in communication greatly increases the difficulties of understanding and relating to other people."⁸

Nonetheless, the rabbis did not make any concerted efforts to educate the deaf, to capitalize on his innate intelligence, and mostly to include the deaf as active participants in the religious and legal community of Israel. It must be remembered that the deaf were more or less

⁸Helmer R. Mykelbust, Ed.D., Arthur Neyhus, Ph.D., Ann M. Mulholland, M.A., "Guidance and Counseling for the Deaf", in American Annals of the Deaf, (107:4), p.371.

excluded from the religious life of the community"⁹⁹ and their legal status was definitely inferior to a person who had control of all his sensory equipment. Wasn't this evident when the rabbis said that "in the majority of cases what they do is bungled."

Even though the rabbis included the deaf-mute in the same category as the insane person, it must be stressed that the rabbis did not place the deaf mute on the same low level as that of the insane. That is the rabbis recognized degrees of mental incapacity. This should be clear from the earlier discussion concerning the marital bliss of two deaf persons but not that of two insane persons.

The difference in status between the *heresh* and the *shoteh* is most strikingly shown in the matter of the validity of sales. Business transactions by the insane, whether in movable goods or real estate are invalid¹⁰⁰ while the commercial transactions of the deaf mute are valid with regard to movable goods but not in real estate. The deaf mute can buy and sell movables by "gestures of the hand" or by "movements of the lips."¹⁰¹ They must however be quizzed to illustrate that they are fully aware of the nature of the deal which proves once more that the mental competency and the rationality of the deaf mute was

⁹⁹Hagigah 3a.

¹⁰⁰Rashi's on Hagigah 3a; See *Eizehu shoteh*.

¹⁰¹Gittin 59a and 71a.

challenged in every way.¹⁰²

The *heresh* as defined by our rabbis, is one who is congenitally deaf and mute - he can not hear nor speak - and because of his physical impairment he is declared mentally deficient. The *heresh* was a special person in rabbinic literature who required unique treatment. His religious and legal status was most affected by his physical impairment and his consequent lack of full mental competency. The rabbis definitely believed that the deaf mute was mentally deficient in many ways of life when they said, "he has the capacity of physical action but not of intention." Consequently the practice of many religious rites were denied to him and his legal status was on a much lower level than a hearing individual's.

When the Mishnah says *heresh*, the Talmud declares that it does not mean a deaf person only, it means the deaf-mute; it means one who can neither hear nor speak. One who can not hear or speak, it is presumed, has been denied the ability to communicate properly. If a person can not communicate or be communicated with, then it must be assumed that he can not learn what things are all about. Therefore, his *kavannah* (intent) to marry, to divorce, to buy, to sell, to give *halitzah* (in the levirate ritual), to put on tefillin or to perform other ritual observances - let alone the social deeds and activities he might engage in, if they

¹⁰²Ibid.

have legal context to them - is inadequate. We must assume he cannot do them if he cannot hear or speak. But if he can speak, then of course he can communicate even though he cannot hear. Because if he can speak, then he can say what he wants to know, and then the others can make these things known to him, knowing what he has said. And so one giant step forward has been taken by saying that as long as a person can speak, the loss of hearing alone no longer remains a disqualifying disability. By virtue of his ability to communicate through speaking, he is able to remove from himself the total restriction and total disqualification of the Mishnah. Once he can communicate he is able to understand and do much more.

However, in the development of the Talmud and Jewish law up until this day, there is a series of qualifying clauses of improvements and refinements. In fact, the concept of *heresh* has been well-nigh removed from the bad company in which the original mishnaic formulation of the Talmud had placed it.

Chapter Three

The first of the compendia literature to be examined is that of Rabbi Isaac ben Jacob¹ -- the Halakhot of Alfasi. In his abridgement of the Talmudic text from Yevamot 104b, there is no mention how the **heresh** is defined.² Instead, Alfasi analyzes the Talmudic discussion concerning why the Sages did not permit the male **heresh** to submit to **halitzah** nor allow the sister-in-law **hereshet** to perform **halitzah**, even though it was taught in the Mishnah that the prescribed formula did not need to be recited. He concludes as the Talmudic argument in that if one was never able to recite the proscribed formula, the **halitzah** would not be valid regardless if the blessing was not recited.

However, the *Nimukey Yosef*³ commenting on Alfasi's Talmudic abridgement writes:

The heresh that the Sages speak of in every place is one who neither speaks nor hears (Terumot 1:2).⁴

The *Nimukey Yosef* continues that the levir in the Mishnah on Yevamot 104b "participates in **halitzah** in that his intention to loosen is required," hence a deaf-mute levir who lacks

¹North Africa, 1013-1103.

²Halakhot Alfasi loc. cit.

³Commentary on the Epitome of Alfasi by Joseph ibn Habiba, 15th century, Spain.

⁴*Nimukey Yosef*, Commentary to Halakhot Alfasi on Yevamot 104b, See **Ha-Heresh**.

such intention is called the *nehlatz* (the "deliverer") and not the *holetz* (the "loosener").⁵ From this comment, the *Nimukey Yosef* defined the *heresh* in a narrow sense as one who neither speaks nor hears and because of this condition, lacks the ability to have the intent to make a decision.

Further on, Alfasi deals with the Talmudic discussion of Yevamot 112b. Both the Alfasi and the *Nimukey Yosef* merely abridge and repeat the Talmudic discussion of deaf-mutes using gestures to marry and divorce.⁶ In addition, the *Nimukey Yosef* adds an interesting note. He writes:

*A heresh may acquire marriage with money and it is valid, and divorce is permitted; but if he marries her with biah (sexual intercourse), his marriage is valid, yet divorce is not permitted.*⁷

From this comment, it would appear that the *Nimukey Yosef* is concerned with the use of gestures as a form of communication for contracting a marriage or enacting a divorce. In this case, the issue is whether a gesture, which is not a *ma'aseh kiddushin* or *ma'aseh gerusin*⁸, can override *biah*, which is a *ma'aseh kiddushin*. Since the marriage of deaf-mutes is only permitted through the enactment of the Rabbis, the use of gestures should only be

⁵Ibid.

⁶Halakhot Alfasi on Yevamot 112b.

⁷*Nimukey Yosef* in Yerushalmi Yevamot 14:1 (beginning of the Gemara). See also Rabbi Shelomo ben Advet (RASHBA) in his Chidushim to Yevamot 112.

⁸An "act of marriage" or "divorce."

for this acquisition of marriage and nothing else. However, since we have already learned from Yevamot 68a that a *heresh* is not eligible to enact a *kinyan* [acquisition], how can he be permitted to acquire marriage with *keseif* [money]? This may mean that it is only through a gesture that we know that the *keseif* is given for purposes of marriage. However, with *biah*, no further gesture is required.* Therefore, the Nimukei Yosef makes a distinction in the different methods of acquisition for marriage as it applies to the *heresh*.¹⁰

Alfasi deals with the Talmudic discussion in Gittin 71a concerning the divorce of deaf-mutes through gestures. He presents an abridged discussion of the same Talmudic text. However, the Rabbenu Nissim¹¹ adds:

*A sound woman is permitted to marry a deaf-mute man, but not to divorce him because even though had she been lucid and then became deaf, he may divorce her. Why? Because a woman may be divorced with or without her consent. But when she becomes insane, the rabbis decree that she cannot be divorced, since she cannot take care of herself and would be treated like ownerless property [i.e., by licentious men].*¹²

The Rabbenu Nissim is also concerned with the use of gestures. he wants to make it clear that only two deaf-

*Rabbenu Nissim to Gittin 71a (folio 34a); See K'shem Shenisah B'remizah.

¹⁰However, the Beit Yosef to TUR 121 remarks that none of the poskim accepts the distinction recorded by Nimukei Yosef.

¹¹Commentary on the Epitome of Alfasi by Rabbi Nissim Gerondi, the RAN, 1290-1380, Barcelona, Spain.

¹²Rabbenu Nissim, loc. cit., See K'sheaino Medaber V'aino Shomeah.

deaf-mutes who married each other with gestures may divorce from one another with gestures.

From these two discussions from Hilkhote Alfasi, it is clear that the **heresh** is permitted to communicate in the legal world of marriage and divorce using gestures. Yet, the assumption of the **heresh** is still a person who lacks the intelligence to create an intention to do something. This is further supported in Alfasi's comments on Eruvin 31b. He writes:

The sending of one's eruv by the hand of a deaf-mute, an insane person, or a minor, it stands [to reason] the eruv is invalid for public boundaries, but not for private boundaries.¹³

Alfasi's merely abridged and repeated the Talmudic discussion. Yet, the commentator, Rabbenu Y'honatan comments, "these three are grouped together because they have lower intelligence."¹⁴

Alfasi acknowledges some form of intelligence for the **heresh** when he agrees with the Talmudic conclusion that gesture is a valid form of communication. Yet, it is not a valid indication of competency. However, his succinct interpretation of the Talmudic discussion clearly neglects the other definition of the **heresh** found in the Talmud, one that speaks but does not hear.

The compendia literature continues to build upon the

¹³Hilkhote Alfasi loc. cit.

¹⁴Ibid.

ideas stated regarding the heresh. Moses ben Maimon,¹⁵ the RAMBAM, in his work the Mishneh Torah¹⁶ deals with the heresh in a rather negative light. He clarifies the definition of the heresh:

*Wherever male or female deaf-mutes are mentioned, they signify persons who can neither hear nor speak. A person able to speak but not hear, or hear but not speak, has the same status as any other person. A man or a woman of perfect mind, who is neither a deaf-mute nor an insane person, is called a normal [sound] man or a normal [sound] woman, respectively.*¹⁷

At this point, the RAMBAM is distinguishing between different types of hereshim. However, when RAMBAM speaks about the heresh with respect to giving testimony in a court of law, the restrictions increase. He says:

There are ten classes of ineligible, and whoever belongs to any of them is disqualified from giving evidence. They are as follows: women, slaves, minors, the mentally deficient, deaf-mutes, the blind, transgressors, the despised one, kinsmen, and interested witnesses -- ten in all.

The mentally deficient is incompetent by biblical law, because he is not subject to the commandments. By "mentally deficient" is to be understood not only one who walks around naked, break things, and throws stones, but anyone who is confused in mind, invariably mixed up with respect to some matters, although with respect to other matters he speaks to the point and asks pertinent questions; nevertheless his evidence is inadmissible and he is included among the mentally deficient.

The status of the heresh is that of the mentally deficient, because he is not of sound mind and is

¹⁵Spain/Egypt, 1135-1204.

¹⁶Written in Egypt in 1187.

¹⁷Rabbi Moses ben Maimon, Mishneh Torah. Sefer Nashim Hilkhos Ishut, 2:26. (hereafter referred to as Hilkhos Ishut).

not bound to observe the commandments. This applies also to the speaking deaf and the hearing mute; although the evidence of either of the last two may be convincing and the mind of the witness sound, it is required that he give oral testimony, and that he is able to hear the judges and the charge addressed to him.

So too, if the witness has lost his speech and presents his evidence in writing, his testimony is invalid, although he was tested (as to his competence) in the manner in which he would be tested if he were to divorce his wife and his evidence was found to be correct. The only instance when his testimony is accepted is in the case of an *agunah*¹⁸, in which event the Rabbis favor leniency.¹⁹

- A father or husband who is completely deaf may not revoke a vow, in spite of the fact that a husband may revoke vows which he has not heard. For actual hearing is not essential for one who is physically capable of hearing.²⁰

In one swift move, the inability to communicate through verbal speech or being able to communicate through speech but not having the ability to hear has placed the *heresh* into certain restrictions. In addition, the **RAMBAM** follows the same ruling from Berachot 15a and Yevamot 104b that even though the omission of reciting a blessing and hearing it with one's ears does not invalidate the ritual act, for a *heresh* this is not the case. Since he could never have heard it, this rule does not apply to him.

¹⁸A woman who is not allowed to remarry because her husband has abandoned her, or because he is believed to have died but there is no certifiable proof.

¹⁹Moses ben Maimon, *Mishneh Torah*, Sefer Shoftim, Hilkhos Edut, 9:1, 9:9, 9:11.

²⁰Moses ben Maimon, *Mishneh Torah*, Sefer Hafla-ah, Hilkhos Nedarim, 12:13.

The **RAMBAM** maintained that a person who can speak but not hear can engage in marriage or divorce or other ritual activities. This was because it was the ruling of the Sages. With respect to marriage, **RAMBAM** cites:

...the betrothal of a deaf-mute female is based on the ruling of the Sages....she was made subject to marriage in order that she should not remain unmarried forever.²¹

...the father may accept the token of betrothal in behalf of his daughter from the day of her birth until she comes of age. And even if she is a deaf-mute or becomes insane, and her father has her betrothed, she has the status of a fully married woman.²²

If a male deaf-mute marries a sound woman, and likewise, if a female deaf-mute marries a sound man, their betrothal is completely valid, not according to the Torah, but only according to the ruling of the Sages.

Therefore, if a sound man comes forth thereafter and betrothed this sound wife of the deaf-mute, she is betrothed to the former with a completely valid betrothal; consequently he must give her a get, and only then is she permitted to her deaf-mute husband.²³

A virgin who has come of age, or is blind, or barren, is entitled to a *ketubah* of two hundred zuz. For a *heresh* or *shoteh*, however, no *ketubah* has been instituted....As for a deaf-mute, even though marriage with her is valid according to the Sages, no *ketubah* has been instituted for her, in order that people should not abstain from marrying her. And just as she has no *ketubah*, so she is not entitled to any maintenance, nor to any of the conditions set forth in the *ketubah*.

If a man marries a deaf-mute, and she

²¹Moses ben Maimon, *Mishneh Torah*, *Sefer Nashim*, *Hilkhot Yibum*, 5:23. (hereafter referred to as *Hilkhot Yibum*).

²²Moses ben Maimon, *Mishneh Torah*, *Sefer Nashim*, *Hilkhot Ishut*, 3:11. (hereafter referred to as *Hilkhot Ishut*).

²³*Hilkhot Ishut*, 4:9.

subsequently becomes sound, she is entitled to a **ketubah**, and to the conditions contained therein, but the amount of her **ketubah** is only one hundred zuz.

If a man marries a deaf-mute or an insane woman and writes in their **ketubah** the sum of one hundred minas, their **ketubah** is valid, because he had voluntarily agreed to have his property suffer a loss.

If a male deaf-mute or an insane man marries a sound woman, their wives have no claim upon them, even if the deaf-mutes recovers or the insane becomes of sound mind. If the husbands after their recovery wish to retain their wives, the wives are entitled to a **ketubah** of one hundred zuz.²⁴

The following are to be warned by the court: a woman whose husband has become a deaf-mute or insane, or is away in another country, or is confined in prison - not to the extent of making her drink of the water²⁵, but only to the extent of declaring her subject to forfeiture of her **ketubah**.²⁶

The **RAMBAM** explains in great detail the various options of marriage available to the **heresh**. The deaf-mute is precluded, by Toraitic Law, from entering into a **kiddushin** since his/her legal capacity is the same as that of the minor or the idiot. However, the Rabbis regulated that a **kiddushin** entered into by a deaf-mute shall be valid, but they did so without creating any obligations between the parties to such a marriage. Hence if one of the parties is a deaf-mute, none of the legal obligations flowing from

²⁴Hilkhoh Ishut, 11:4-6.

²⁵The test for a woman accused by her husband of adultery. This is a mixture of earth from the Tabernacle and water and ink from a scroll of curses to drink. See Numbers 5:11-31.

²⁶Moses ben Maimon, Mishneh Torah, *Sefer Nashim*, Hilkhoh Sotah, 1:10.

marriage will devolve on them -- neither the obligation of *ketubah*, nor of a *ketubah* condition, nor of maintenance, except possibly where a deaf-mute or a sound man undertakes these obligations in the *ketubah*.

In addition to marriage, he also deals with divorce.

He said:

If a man who has lost his speech, but whose mind remains sound, is asked, "Shall we write a *get* for your wife?", and nods his head in approval, he must be examined three times, at intervals. If he answers "no" where "no" is proper, and "yes" where "yes" is proper, they write the *get* and deliver it. He should, however, be examined carefully, since his mind may have become deranged.

Thus also, if he writes with his own hand, "Write and deliver a *get* to my wife," they may write and deliver it to her, so long as his mind is settled, because the rule concerning one who has lost his speech is not the same as the rule concerning a deaf-mute.

If a man is married while in sound health, and then becomes a deaf-mute, or needless to say, if he becomes insane, he can never effect a divorce until he recovers, and one may not rely on the deaf-mute's gestures or on his handwriting, even if his mind is sound and settled.

If, however, he marries a woman while he is a deaf-mute, he may divorce her by gestures, since his marriage is not valid according to the Torah, as we have explained. Therefore, just as he may marry by gesture, so may he divorce by gesture.²⁷

Any person is qualified to write a *get*, with the exception of these five: a heathen, a slave, a deaf-mute, an insane person, and a minor. Even the woman herself may write her own *get*.

...And why is the [*heresh*] not qualified to write it? Because...he does not have normal understanding....If one of these five does write a *get* nevertheless, there is no *get*,....

If one of these five writes the formal part of

²⁷Moses ben Maimon, *Mishneh Torah*, *Sefer Nashim*, *Hilkhot Gerusin*, 2:16-17. (hereafter referred to as *Hilkhot Gerusin*).

the *get*, and leaves blank the spaces for the particular part,...it is a valid *get*.

It is permitted at the outset to let a *heresh*, *shoteh*, or a *katan* to write the formal part of the *get*, provided that an adult of sound mind supervises them.²⁸

All persons are qualified to act as agent, receiving, conveying, or fetching, for a *get*, with the exception of the following five: a heathen, a slave, a deaf-mute, an insane person, and a minor. If one of these receives it or brings it, there is no *get*.

If an agent had been...a deaf-mute, and became sound again,...the *get* is null and void.

If, however, the husband had given the *get* to the agent while the latter was sound, and he thereafter became a deaf-mute, and then became sound again,...the *get* is valid, because both at the beginning and at the end it was handled by a person of sound mind.²⁹

If a deaf-mute divorces his wife by way of gesture, as we have explained, and she goes forth and is betrothed to another deaf-mute, or, needless to say, to a sound man, she is forbidden to return to her first deaf-mute husband.

On the other hand, if the divorced wife of a sound man goes forth and marries a deaf-mute, who in turn also divorces her, she may return to her first, sound, husband.³⁰

With respect to divorce, the **RAMBAM** also explains in detail the laws as they apply to the *heresh*. Just like the Alfasi, he upholds the Talmudic ruling that permits the deaf-mute to marry and divorce with gestures.

The *heresh* was also limited in ritual activities. The **RAMBAM** continues:

Blemishes that disqualified a person [from

²⁸Hilkhos Gerusin, 3:15-18.

²⁹Hilkhos Gerusin, 6:6, 6:8.

³⁰Hilkhos Gerusin, 11:15.

entering the Temple] only were ninety in all; as follows:³¹

...if he was a deaf-mute; if he was insane; if he was epileptic, even if only rarely; if a madness would seize him, either continuously or only at certain times.³²

If an individual brought an animal offering, either obligatory or free-will, he was to lay his hands upon it while it was still alive;...For it is said: "And he shall lay his hands upon the head of his offering." (Lev. 3:2).³³

Anyone might perform the laying on of hands, except a **heresh**, **shoteh**, **katan**, a slave, a woman, a blind man, or a non-Jew. An agent may not perform the laying on of hands, for only the owner was permitted to do so, as it is said: "And he shall lay his hands" (Lev. 3:2) - but not his wife's hand, or his slave's hand, or his agent's hand.³⁴

If one acted unwittingly and took a consecrated object or money belonging to the Temple, and gave it to a messenger to use it as if it were unhallowed, the sender committed the trespass if the messenger performed his errand. But if the messenger did not perform his errand but did according to his own will, it was the messenger who committed the trespass.

....Even if the steward was a deaf-mute or an insane person or a minor, who could not act in the capacity of an agent, if he did as he was told the householder committed the trespass. If he did not perform the errand (as told) the householder was

³¹Rabbi Moses ben Maimon, Mishneh Torah. Sefer Avodah, Hilkhoh Biat Mikdash, 8:1. (hereafter referred to as Hilkhoh Biat Mikdash)

³²Hilkhoh Biat Mikdash, 8:16.

³³Rabbi Moses ben Maimon, Mishneh Torah. Sefer Avodah, Hilkhoh Ma'aseh Ha'Korbanot, 3:6. (hereafter referred to as Hilkhoh Ma'aseh Ha'Korbanot)

³⁴Hilkhoh Ma'aseh Korbanot, 3:8.

exempt.³⁵

...the law to appear before the Lord is incumbent upon all men except the deaf, mute,....The deaf, even though he can speak or even though he is deaf in but one ear, is exempt....The mute, even though he can hear, is exempt....And where do we know that all these are exempt from the law?...it is said there, That they may hear (Deut.31:12), thus excluding him whose hearing is not complete; and that they may learn (Ibid.), thus excluding him who cannot speak, for everyone commanded to learn is also commanded to teach.³⁶

Aside from the rulings concerning the heresh with respect to the Temple, the RAMBAM also states the rule concerning the **terumah** and its relation to the heresh. He states:

Five persons may not set aside **terumah** (the heave offering), and if they do so, their offering is invalid: The **heresh**, **shoteh**, **katan**, etc.³⁷

Five persons may not set aside **terumah**, but if they do nevertheless, their offering is valid: the deaf who can speak but cannot hear, because he cannot hear the appropriate benediction; the mute who can hear but cannot speak, [because he cannot recite the appropriate benediction].³⁸

Ten persons may not be allotted **terumah** at the threshing floor, even though they are permitted, and may entitle others, to eat of it. They are the following: a **heresh**, **shoteh**, and **katan** (who does not know how to spread his hands) -- these three

³⁵Rabbi Moses ben Maimon, Mishneh Torah. Sefer Avodah, Hilkhot Me'ilah, 7:1.

³⁶Moses ben Maimon, Mishneh Torah, Sefer Korbanot, Hilkhot Hagigah, 2:1. Also, this exemption does not touch upon the issue of competence, but rather is linked to specific textual warrants.

³⁷Rabbi Moses ben Maimon, Mishneh Torah. Sefer Zeraim, Hilkhot Terumot, 4:2. (hereafter referred to as Hilkhot Terumot)

³⁸Hilkhot Terumot, 4:4.

because they lack intelligence;³⁹

Even though the RAMBAM's Mishneh Torah appears to be strict when dealing with the laws regulating the life of a heresh, he does state some laws regarding the status of the deaf-mute with respect to ritual purity and one's interaction in the community. He states:

*If a man has intercourse with the wife of a deaf-mute, ...or with a deaf-mute who is the wife of a man of sound mind, or with a woman whose betrothal or divorce is in doubt -- in all these instances he is exempt. If, however, they have committed the act deliberately, they must be flogged for disobedience.*⁴⁰

*Deaf women...require normal women to examine them and to establish their fixed periods for them, after which they are permitted to their husbands.*⁴¹

There are three classes of **mamzerim**⁴²: an assumed **mamzer**, a doubtful **mamzer**, and a **mamzer** on the authority of the Sages....

A doubtful **mamzer** is the offspring of a doubtfully forbidden union, for instance, if a man has intercourse with a woman whose betrothal to another man or whose divorce is doubtful.⁴³

We have learned by tradition that a **zona** (prostitute) as designated in the Torah means any woman who is not a daughter of Israel, or a

³⁹Hilkhoh Terumot, 12:22.

⁴⁰Moses ben Maimon, Mishneh Torah, Sefer Kedushah, Hilkhoh Issureh Bi'ah, 3:1. (hereafter referred to as Hilkhoh Issureh Bi'ah)

⁴¹Hilkhoh Issureh Bi'ah, 8:15.

⁴²Usually translated as "bastard" - the child of a couple whose sexual relationship is forbidden according to the Torah. Except with regard to marriage, the personal status of a **mamzer** does not prejudice him in any way.

⁴³Hilkhoh Issureh Bi'ah, 15:10.

daughter of Israel who has had intercourse with a man whom she is forbidden to marry -- the prohibition applying equally to everyone in this category -- or one who has had intercourse with an unfit priest, even though she is permitted to marry him....

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

...if a deaf-mute or an insane person or a minor who has not "understanding enough to be inquired of" is found in a courtyard or alleyway entrance where lies some unclean thing and it is in doubt whether he did or did not touch it, he is deemed clean. So, too, with any who has not understanding enough to be inquired of: even though the doubt affecting him arises in private domain, he is deemed to be clean."⁴⁵

In addition to the laws concerning the status of the *heresh*, there are also laws concerning the proper treatment of the *heresh* which comes from the commandment, "You shall not curse the deaf" (Lev. 19:14). **RAMBAM** states the following:

If the traveler is accompanied by a *heresh*, *shoteh*, or *katan*, he should still place the purse upon his donkey, and not give it to any of these persons to carry, for they too are human beings of Israelite origin. If there is a deaf-mute and an insane person present, but no animal, he should give the purse to the insane person; if an insane person and a minor, he should give it to the insane person; if a deaf-mute and a minor, he may give the purse to whichever one he pleases."

He who seduces a virgin must be fined the weight of fifty *selas* or feigned silver. This is called

⁴⁴Hilkhot Issureh Bi'ah, 18:1, 18:16.

⁴⁵Moses ben Maimon, Mishneh Torah, Sefer Tahorot, Hilkhot Avot Hat-tumeot, 16:2.

⁴⁶Moses ben Maimon, Mishneh Torah, Sefer Zemanim, Hilkhot Shabbat, 20:7.

*kenas*⁴⁷. the same applies to one who violates a virgin.

...the following are not entitled to the fine: a woman who is of age, a girl who has exercised her right of refusal, a barren woman, an insane woman, a deaf-mute woman, a woman known since childhood to be of ill repute,...and a woman who, though divorced after marriage, is still in fact a virgin.⁴⁸

The reason the deaf-mute woman is not entitled to her fine is that since her intelligence is debatable, there is a doubt as to her state of virginity.

If a deaf-mute or an insane person or a minor picks up lost property for a sound person, the latter does not acquire title to it, seeing that the former are legally incompetent. If a deaf-mute and a sound person pick it up together, the rule is that inasmuch as the sound person does not acquire any of it, the deaf-mute does not acquire any of it either. If both are deaf-mutes, however, both do acquire title to it; the Sages decreed that they should acquire title to it, in order that they should not quarrel.⁴⁹

The Sages extended the commandment prohibiting robbery to property found by a deaf-mute, an insane person, or a minor, in order to safeguard peace. Consequently, if one transgresses and robs one of these of a find, it cannot be recovered by the court; and if one denies on oath having taken it, he need not pay a fifth part.⁵⁰

How is humiliation assessed? It depends upon the relative status of the one who causes the humiliation and the one who is humiliated.
...If one humiliates an insane person, he is

⁴⁷A fine of damages from the Roman Law.

⁴⁸Moses ben Maimon, *Mishneh Torah*, *Sefer Nashim*, *Hilkhos Na'arah Betulah*, 1:1, 1:9. Also see Rabbi Abraham b. David Posquieres (RABAD) (1125-1198), ad. loc.

⁴⁹Moses ben Maimon, *Mishneh Torah*, *Sefer Kinyan*, *Hilkhos Genevah*, 17:4. (hereafter referred to as *Hilkhos Genevah*)

⁵⁰*Hilkhos Genevah*, 17:12.

exempt, but if one humiliates a deaf-mute, he is liable.⁵¹

To clash with a deaf-mute, an insane person, or a minor is bad, seeing that if one wounds one of these, he is liable, whereas if they wound others, they are exempt. Even if a deaf-mute becomes sound, or an insane person becomes sane, or a minor reaches majority, they are not liable for payment inasmuch as they were legally irresponsible when they caused the wound.⁵²

Outside the laws of marriage, divorce, and other ritual activities, the **RAMBAM** allows the **heresh** to participate in a limited form without too much interference. But when it comes to buying or selling property, the **RAMBAM** felt that there may be a lot that the deaf person is missing by virtue of the fact that he cannot hear. With respect to business, the **RAMBAM** states:

There are three classes of persons whose purchase is no purchase and whose sale is no sale according to Biblical Law: the **heresh**, **shoteh**, and the **katan**. The Sages have decreed, however, that the transactions of the deaf-mute and of the minor should have validity in order to enable them to procure provisions for their livelihood.

How does a deaf-mute transact business? If he neither hears nor speaks, or if he speaks but is totally deaf, he can buy all movables, but not real estate⁵³, by gestures. But even with movables his transactions are valid only after he had been subjected to many tests and his case has been carefully deliberated.

As to a mute who hears but does not speak, or one who has been struck silent, his purchase is a

⁵¹Moses ben Maimon, Mishneh Torah, Sefer Kinyan, Hilkhoh Gezeilah Va-Avedah, 3:1, 3:4. (hereafter referred to as Hilkhoh Gezeilah Va-Avedah)

⁵²Hilkhoh Gezeilah Va-Avedah, 4:20.

⁵³RABAD objects to this simply because he doesn't understand why. loc. cit.

valid purchase and his sale is a valid sale and his gifts are valid in all matters, both in movable and real property, provided he has been examined (by the court), as it would examine him in the case of a divorce, or if he can write in his own hand.⁵⁴

If a *heresh*, *shoteh*, or *katan* of priestly descent purchases slaves on his own account, these slaves may not eat of *terumah*.⁵⁵ If, however, it is the court or the guardian who effects the purchase for these incompetents, or if the slaves fall to them by inheritance, the slaves may eat of *terumah*.⁵⁶

This is because these three are incompetent to effect legal purchase. There is a question of whether the slaves were purchased in a proper way.

Thus the **RAMBAM** suggests that perhaps we ought to preclude the *heresh* from the possibility of buying and selling because he might be misled by what he cannot hear -- things said behind his back. Therefore, even though he may speak, the fact that he cannot hear would seem to disqualify him from selling or buying of properties. Therefore, the **RAMBAM** retains that disability, even for the deaf person who is not a mute. Having analyzed the Mishneh Torah, this study continues with an analysis of the Arba'ah Turim.

In Jacob ben Asher's⁵⁷ Arba'ah Turim,⁵⁸ the definition

⁵⁴Moses ben Maimon, Mishneh Torah, Sefer Kinyan, Hilkhos Mekirah, 29:1-3.

⁵⁵Since slaves generally have the status of real estate. See Baba Metzia 56b and Lev. 25:46.

⁵⁶Moses ben Maimon, Mishneh Torah, Sefer Zeraim, Hilkhos Terumot, 7:15.

⁵⁷Spain, ca. 1270 - 1343.

of the *heresh* and his status is dealt with in *Hosen Mishpat*, chapter 35. There, the *TUR* begins its analysis of the Laws of Testimony (the giving of evidence) with this statement:

*A heresh is disqualified [from giving testimony]; and the heresh [according to the Sages, of Blessed Memory], in every case -- this is the one who neither speaks nor hears, and for the rest it was shown that if he speaks but does not hear or hears but does not speak, he is qualified to give testimony.*⁵⁹

It has been demonstrated that the *heresh* is now defined three different ways: 1) One who can neither hear nor speak; 2) One who can speak but not hear; and 3) One who can hear but not speak. The *TUR* points out the Talmudic definition from *Terumot* 1:2 and adds the other two from *RAMBAM's Mishneh Torah*. However, unlike the *Tur's* comment that some *hereshim* can give testimony, he points out that the *RAMBAM* differs with him.⁶⁰

In addition, the *TUR* brings in another perspective in *Yoreh De'ah*, chapter 1. In his analysis of the Laws of *Shechitah* (ritual slaughter), he states:

*...the five rules [concerning] the shechitah, the covering [of the blood], and the blessings...*⁶¹

The *Bait Chadash*⁶² declares that these pertain to the

⁵⁹Written in Spain during the 14th century.

⁵⁹*TUR, Hosen Mishpat, 35:12.*

⁶⁰See *Sefer Shoftim, Hilkhos Edut 9:1, 9:9, 9:11* in *RAMBAM's Mishneh Torah*.

⁶¹*Tur, Yoreh De'ah.*

⁶²Rabbi Joel Sirkes, Poland (1561-1640).

Talmudic discussion on *Hullin* 2a concerning the rules of *shechitah*. There it was commented from the Talmud that the *heresh* is not permitted to perform *shechitah* because he lacks mental capacity. However, the *Bait Chadash* says:

"Everyone who is permitted to slaughter" we learn from Mishnah *Hullin* 1:1 that their slaughter is valid, except the deaf-mute, the insane, and the minor, in that they would destroy the slaughter, but if they slaughter and others witness their act, it is valid.⁶³

He continues:

Also, one who is born in complete possession of his mental faculties and becomes deaf, ears which no longer hear, the Sages rule as a *heresh* in principle.⁶⁴

Returning to *Hosen Mishpat*, chapter 235, the *TUR* states:

The *heresh* is ruled like a *katan* (a minor) in that his actions with respect to movable goods are valid. How does he sell? With gestures, that he gestures with his fingers and not with the movement of his lips. It appears that one who speaks but does not hear is ruled as in complete possession of all his faculties.⁶⁵

From this, we learn that the hearing person, although he may be mute, is accounted fully responsible. Since the great majority of those considered to be deaf, even those who have not developed the capacity for speech, do possess at least minimal hearing, they must be considered fully competent insofar as Jewish law is concerned on this basis alone.

⁶³*Bait Chadash* to the *TUR*, *Yoreh De'ah* 1, See *Ha-kol*. The *Bait Chadash* is quoting from the *gemara* on *Hullin* 2a.

⁶⁴*Ibid.*, See *Umah she-katav*.

⁶⁵*TUR*, *Hosen Mishpat*, 235, folio 119a.

The majority of the laws dealing with the **heresh** are found in the *TUR*'s *Even Haezer*. In chapter 44, he states with respect to marriage:

The male and female deaf-mute have no valid kiddushin from the Torah; whether they marry other deaf-mutes or whether a heresh marries a sound woman or a sound man marries a hereshet, but the Sages decreed a kiddushin for them.

RAMBAN wrote that if a hearing man went and married the wife of a deaf man, she is Toraitically married to the hearing man. If he gives her a *get*, she is permitted to her deaf husband.⁶⁶

The **heresh** and the Laws of Divorce are also very complicated. However, we learn that the **heresh** has ways to communicate his intent and show some "possession of his faculties." The *TUR* states:

And even if he (the heresh) says to them, "Write and Seal for me a get," the scribe does not write nor do the witnesses seal until they hear it from his lips and although he is a heresh, even if he hears but does not speak or even if he is in complete possession of his faculties and writes [instructions] for them [the scribe and witnesses] in a letter, it is not valid unless they hear it from his lips."⁶⁷

The *Bait Yosef*⁶⁸ comments on the *baraita* "the scribe writes it for her sake" from *Gittin* 72b. He states:

The get is invalid until they hear his voice that he says to the scribe "write" and to the witnesses "seal". And they draw an inference that "voice" is to exclude the opinion of Rabbi Kahana who said a heresh is able to speak "out of writing" and that

⁶⁶*TUR*, *Even Haezer*, loc. cit.

⁶⁷*TUR*, *Even Haezer*, 120.

⁶⁸Written by Joseph ben Ephraim Caro in the 16th century.

they may deliver and write a *get* for his wife.⁶⁹

The Bait Yosef explains that even though the *heresh* can communicate through the written word, some activities require the sound coming from his mouth as a form of communication simply because the Torah says so.⁷⁰ However, it is also clear that it may be difficult for some to determine the level of mental capacity of the *heresh* because of the obstacle in understanding his speech. Therefore the use of gestures is deemed an appropriate form of communication for legal actions such as marriage and divorce.

Further, the *TUR* states that "there is no divorce with gestures for the *heresh* who neither hears or speaks if he married when he was sound and became deaf."⁷¹ The Bait Yosef again returns to the Talmudic discussion in *Gittin* 71a - 72b and comments on the Gemara:

The proper reading of Rav Papa's understanding of heresh poses a problem. Rabbi Asi asks, "What is the reason of Rabbi Eleazar that he explains that the heresh's intelligence is feeble-minded and on account of this, there is doubt concerning his intelligence?"

....As Rashi explains, "the heresh is feeble-minded," he cannot understand. But there is a : if his intent is clear and he possesses a little intelligence, does this "feeble" intelligence allow us to infer a sound intent (so that both his

⁶⁹Bait Yosef on the *Tur*, *Even Haezer*, 120. See *Af*.

⁷⁰The *TUR* refers to *RAMBAM*, who says that this law does not apply to one who loses his power of speech, but only to a *heresh*. Both the *ROSH* and *TUR* disagree. *Loc. cit.*

⁷¹*TUR*, *Even Haezer*, 121.

marriage and divorce would be valid)?.⁷²

Here the *Bait Yosef*'s analysis of Rashi's comments sheds a new light on the understanding of the *heresh*'s mental capacity. It is clear from the earlier literature that the *heresh* lacks in mental capacity. However, to enact a marriage or divorce, either with gestures or through writing, requires intention to do so. In order for someone to have intent, one has to be in "complete possession of their faculties."

In summary, the *TUR* has taken the Talmudic arguments primarily from *Yevamot* and *Gittin* dealing with laws of marriage and divorce to explain the *heresh* and his status. Asher concludes with the comments from the *Beit Yosef* and the *Beit Chadash* that the *heresh* who is forced to use gestures or writing to communicate is in complete possession of his faculties and therefore competent. Likewise, the laws limiting his participation are due to the specifics of the ritual acts. His physical defect is what limits him, not necessarily the mental defect resulting from his condition. The *TUR* has not dealt with the problem of other forms of communication, such as gestures or writing, being a valid alternative in fulfilling the ritual acts of Judaism. However, the *Shulchan Arukh* will deal with some of this.

In the *Shulchan Arukh*⁷³ of Joseph ben Ephraim Caro⁷⁴,

⁷²*Bait Yosef* to the *TUR*, *Even Haezer*, 121. See Garsinan.

⁷³Written in Eretz Yisrael around the 16th century.

the definition of the *heresh* is found in *Orach Hayyim*, chapter 55. The comments of Moses Isserles⁷⁵, as displayed in the *Shulchan Arukh*, will be presented in the following translations, in parentheses. It shall be demonstrated that the *Shulchan Arukh* brings together the Talmud, its commentators and the various codifiers previously examined.

A heresh that speaks but does not hear or hears but does not speak - each is in possession of all their faculties and are counted in a minyan⁷⁶; but, one who neither hears nor speaks: behold he is like the insane and the minor.⁷⁷

Caro has now compiled the three different definitions for *heresh* together. As long as one is able to either hear or speak, he is in possession of his faculties. However, if he lacks both speech and hearing, he cannot be competent and is equated to an insane person and a minor.

From this, most of the laws stated in the *Shulchan Arukh* define the *heresh* as one who neither hears nor speaks. Since this is correlated to one who lacks understanding, his participation in Jewish ritual life is limited. However, there are some exceptions:

A minor that reaches the age of pa'otote (at least six years old, maybe older) and knows to Whom the blessings are directed, he may join them [in a

⁷⁴Spain/Eretz Yisrael, 1488-1575.

⁷⁵Writing in Poland in the 16th century.

⁷⁶Quorum of ten males over the age of 13 required for a congregational service.

⁷⁷*Shulchan Arukh, Orach Hayyim, 55:8.*

minyan in **zimmun**⁷⁶ for **Birkat Ha-Mazon**⁷⁷]. (Others say that he is not permitted to join until he reaches his thirteenth birthday -- but a deaf-mute and an insane person who has intent and understanding may join the **zimmun** even though the **heresh** does not hear the blessings. (MAHARIL⁸⁰.)⁸¹

A **heresh**, or one that speaks but does not hear, cannot perform **shechitah** on account he does not hear the blessing; however, if he performs **shechitah** in private, his slaughter is valid.⁸²

From these two examples, we learn that Caro recognizes that the complete deaf-mute **heresh** can possibly possess intelligence because he has the intent to participate in a **minyan** and to perform **shechitah**. However, we find that even the **heresh** who speaks but does not hear or hears but does not speak is limited in his actions because of this defect.

A **heresh** is exempt [from offering testimony], whether he speaks but does not hear or hears but does not speak, whose intellect is sound, because it is necessary to testify in a **Beit Din** with one's mouth and to hear the instructions of the court....⁸³

Again, we see an example where the ruling is made because of the specific words "speak" and "hear." Since the **heresh** will always be restricted due to his physical

⁷⁶In company of three male adults. If less than three are present, no **zimmun** is recited and each person say **Birkat Ha-Mazon** to himself.

⁷⁷Grace after meals.

⁸⁰Rabbi Ya'akov Mulin, Germany, 15th century.

⁸¹*Shulchan Arukh, Orach Hayyim*, 199:10.

⁸²*Shulchan Arukh, Yoreh De'ah*, 1:6.

⁸³*Shulchan Arukh, Hosen Mishpat*, 35:11.

limitations, other forms of "hearing" and "speaking" need to be accepted. In various sections of the *Shulchan Arukh*, *Even Haezer*, the *heresh* is permitted to use gestures or writing to express himself or to acknowledge others.

He can write instructions for a *get* so long as his intent is tested⁴⁴ and he may gesture in place of the marriage formula as well as gesture to divorce⁴⁵. Outside of these special cases, the *heresh* has been prevented from improving his position in the world of *halakhah*. It is clear already that:

If one gave birth to both a son and a daughter, and even if one of them died, the commandment of "Fruitful and Multiply" will have been fulfilled, (even if the child was...a heresh).⁴⁶

The *heresh* is clearly a human being who unfortunately due to his physical condition is prevented from fully participating in the Jewish community. It is recognized that the deaf who are also mute are not physically incapable of speech, as the *TUR* has indicated, but they are incapable of developing speech by imitating sounds. If gestures and writing can be permitted in specific situations, perhaps when sound can be transmitted differently, he could be permitted to participate more in the rituals and legal systems.

⁴⁴*Shulchan Arukh, Even Haezer*, 120:5.

⁴⁵*Ibid.*, 121:6.

⁴⁶*Ibid.*, 1:6.

Today, sounds of speech may be communicated in amplified form either by means of hearing aids or auditory training units. Moreover, the deaf are capable of developing speech by imitating visual presentation of phonetic elements (sign language) and through utilization of tactile and kinesthetic methods of stimulation. As a result, many deaf people, even those who are totally lacking in hearing and intelligible speech, have received specialized training and have taken their places as intelligent and responsible members of society. It is their status in Jewish law of such persons which requires investigation. It will now be up to the later *poskim* to determine what that status is.

Chapter Four

The specific halakhic question which requires analysis is whether the limitations placed by Jewish law upon the responsibilities and rights of deaf-mutes are categorical in nature and remain unchanged despite changing circumstances, or whether the halakhic categorization of deaf-mutes as mentally deficient does not apply to deaf-mutes who have overcome their handicap and display normal intelligence. Following the outline of J. David Bleich's article, "Status of the Deaf-Mute in Jewish Law,"¹ we begin our review of the Responsa literature to determine the answer to this question.

We have seen that according to Jewish law, the *heresh* is not considered to be mentally competent. Even though expression through speech represents a certain level of intelligence, the ability to speak is not the sole criterion in determining legal responsibility. In a case decided by the Israeli Bet Din, consisting of Rabbis Chaim Zimbalist, Abraham Azulai, and Shlomoh Deichovski (members of the Tel Aviv Rabbinic District Court), the court rejected a deaf-mute candidate from Iran for conversion.² According to the decision, she was capable of speaking some Persian, although

¹J. David Bleich in The Jewish Law Annual, Vol. II, 1979, pp. 187-193.

²See Piske Din Bate Hadin Ha-Rabbaniyim, Vol. X, no. 17, pp. 193-209.

her speech was very difficult to understand. In addition, she spoke "with movements of her hands" indicating she understood the use of sign language. The court addressed several questions concerning this case, especially:

*Is it advantageous to convert her when she will not be able to accept all the commandments? With differing classes of deaf people and their rulings, is it acceptable to permit deaf people to convert?*³

The rabbis deal with these issues in this decision by analyzing the deaf-mute in Jewish law as understood historically. In addition, they analyze the conversion of a minor as a comparison, for a deaf-mute is equated to a minor due to his lack of mental competency. The rabbis declare, "the acceptance of commandments is the essence of converts and any (candidate) who does not accept all of the commandments, there is no conversion."⁴ It is important to note that in the minority opinion by Rabbi Deichovski, some doubt is cast on this. He rules in favor of accepting a deaf-mute as a convert, just as we accept a minor convert. He rules that since circumcision and ritual immersion may be the essence of conversion, a "competent" *heresh* may be converted, even without acceptance of all of the commandments.⁵ In addition, the rabbis point out the different types of *hereshim*:

³Ibid.

⁴Ibid.

⁵Ibid., See pages 194-5.

- a) The deaf-mute who learns to speak as everyone else is ruled as competent in all his deeds.
- b) The deaf-mute that speaks with movement of his hands and makes a stuttering voice, he is declared competent according to the Poskim.
- c) The deaf-mute that speaks with movement of his hands alone, there is no competence nor intent to do an action.
- d) The deaf-mute who does not speak with movement of his hands but instead through written [communication] is ruled like an insane person.⁶

The rabbis made it very clear that the *heresh* could only be declared competent and removed from this lower status if he possessed some form of verbal speech. Even though the Bet Din presented the various types of deaf-mutes and declared those who could speak as competent individuals, they still ruled this female *hereshet* as ineligible for conversion. Since the talmudic law states clearly that a person choosing Judaism must accept the commandments entirely, it would be cruel and unfair to convert a deaf-mute who would not be able to do so.

Furthermore, Bleich states, "the hearing person, although he may be mute, is accounted fully responsible."⁷ In addition, Rabbi Asher b. Jehiel⁸ in his responsa, Teshuvot haRosh, states that even minimal hearing is sufficient to convey full halakhic obligations and

⁶Ibid.

⁷Ibid.

⁸ c. 1250-1327, Worms (Germany).

responsibilities.⁹ Even though a great majority of those considered to be deaf have not developed the ability for speech, many do possess some minimal hearing.¹⁰ Therefore, they must be considered fully competent according to Jewish law on this basis alone.

According to Rabbi Moses Feinstein in his collection of responsa, Igerot Mosheh, there is a limit on this. He answers the question regarding the matter of the *heresh* that hears with a method of support in his ears. He states:

He learned to speak, even though it is not clear. He hears through the use of support (perhaps a hearing aid) and according to the halakhic ruling in Even Haezer 121, he is declared competent in his actions.¹¹

However, he goes in some detail of a support system of hearing that involves the use of plastic and water (an early precursor of the modern electronic hearing aid) and remarks that one can hear well with this. Yet he declares that a person must be capable of hearing speech, even if only very loud speech, without the benefit of artificial amplification.¹² According to Rabbi Feinstein, as long as

⁹ Rabbi Asher b. Jehiel, Teshuvot HaRosh, no. 85, sec. 13; In addition, this same statement is made by Joseph Caro, Shulchan Arukh, Hoshen Mishpat 235:19.

¹⁰Michael and Sheila Cole, "The Changing Nature Of Communication" in The Development of Children, 1989, pp. 205-6.

¹¹Rabbi Moses Feinstein, Igerot Mosheh; Even Haezer, Vol. III, no. 33.

¹²Ibid.

one is able to hear another person's speech without assistance of artificial amplification, he is declared competent with respect to Jewish law.

Yet, it clear that Rabbi Feinstein changes his mind with regard to the use of hearing aids. As the technology changed and the hearing aid became a tool to enable the hearing-impaired person to hear, he made a few comments on this. He stated that on the Sabbath, a hearing-impaired person may wear a hearing aid because it is considered an article of clothing, but he may not adjust the volume. If the hearing aid is built into his glasses, he can wear it or its battery in a public thoroughfare on the Sabbath. But a hearing aid may not be carried in one's pocket, because that would not be considered part of the person's body or clothing.¹³ However, a battery pack may be designed as part of a belt to permit Sabbath use. The halakhic principle involved is as described above -- namely, the item is worn and not carried, and serves the physical needs of the individual.¹⁴

It is permissible to use a microphone to enable a hearing-impaired person to hear the cantor and the reading of the Torah on weekdays, but not on the Sabbath or Yom Tov even for hearing the blowing of the *shofar* (the ram's horn)

¹³Moses Feinstein, Igerot Moshe, Orach Hayim, Vol. 4, no. 85.

¹⁴Ibid. Vol. 4, no. 81.

on Rosh Hashanah (The Jewish New Year).¹⁵ However, a microphone may be used to enable a hearing-impaired person to hear the reading of the *Megillah* on Purim.¹⁶ From all of this, it is clear that Rabbi Feinstein is incorporating technological advances into the halakhah. However, he is dealing with an individual who would not be declared a *heresh* according to the definition stated in Orach Hayim 55:8. Perhaps he is stating that the hearing-impaired person of today who is able to hear with a hearing aid is no longer classified as the non-competent *heresh*.

Furthermore, according to Rabbi Ben-Zion Meir Hai Ouziel in his responsa, Mishpetei Ouziel, the *heresh* who overcomes his disability is ruled as competent. Rabbi Ouziel deals with the question of the status of an individual who becomes a deaf-mute and learns to speak at a school for the deaf. He states:

*The heresh learns to speak in a stammering language, ...and is able to hear when [people] are speaking to him in a loud voice [according to Hoshen Mishpat 235:19]. It is ruled that he speaks under duress, nevertheless, he is competent in all his deeds.*¹⁷

As Rabbi Ouziel continues, it is clear that he disagrees with Rabbi Feinstein earlier when he states:

The Sages when talking of the heresh is one who

¹⁵Ibid., Vol. 4, no. 83.

¹⁶Ibid., Vol. 2, no. 108.

¹⁷Rabbi Ben-Zion Ouziel, Mishpetei Ouziel. Vol. II, Even Haezer, I., no. 89, sec. 2.

neither speaks nor hears -- meaning one who does not hear at all,[but if] he hears in a loud voice [by means of artificial amplification], this is sufficient to remove him from the category of heresh.¹⁸

Furthermore, it is clear that the deaf person who is capable of speech is also deemed fully responsible. This is supported by Rabbi Hayyim Halberstam¹⁹ in his responsa, Divre Hayyim. He addresses the question concerning deaf children who go to a special school and work hard overcoming their disability. He explains that they learn all aspects of Jewish ritual and laws and they learn how to speak, even though in a stammering speech. But, he also points out:

Speech without hearing is impossible; hence, the ability to speak is assumed by Halakhah to reflect at least minimal hearing ability.²⁰

From this, it clear that the heresh is now defined as one who can not hear at all and unable to express himself verbally. However, Rabbi Shlomoh Drimmer²¹ in his responsa, Bet Shlomoh, deals with the question of a deaf man in a congregation who is invited to join their minyan. They permit him because:

[Even though] he does not hear like other people when they read to him behind his back, even in a loud voice, he does not hear at all. But when they speak to him, he understands just what they say to

¹⁸Ibid.

¹⁹1793-1876,

²⁰Rabbi Hayyim Halberstam, Divrei Hayyim: Even Haezer, Chapter Two, no. 72.

²¹d. 1893

him. And it appears from them that he hears when speaking in his face."

In addition, Rabbi Drimmer states that according to Hoshen Mishpat 235:19 and Even Haezer 121 in the TUR, "the reason this man is not called a *heresh* is because he "hears" when one is speaking to him in his face." It appears that Rabbi Drimmer recognizes that speech may be developed in the absence of hearing on the basis of lip-reading alone. "It is clear that when he sees the lips of the speaker and understand, he is of great intelligence." From an interpretation of Gittin 59a and Rashi's comments to the Mishnah there, Rabbi Drimmer determines that lip-reading is a form of gestures which is an accepted form of communication for the *heresh*. From this interpretation, the lip-reading *heresh* is also declared in "complete possession of his faculties."

Although others disagree, as will be shown later, Rabbi Drimmer asserts that the ability to speak, no matter how acquired and even if the speech acquired is imperfect, is sufficient to establish full competence in all areas of *Halakhah*. Thus it is the ability to engage in intellectual communication which is seen as the necessary condition of intellectual development and ability to demonstrate intent

"Rabbi Shlomoh Drimmer, *Bet Shlomoh: Orach Havim*, I. no. 95.

"Ibid.

"Ibid.

in performing ritual activities.

The discrepancy of classifying deaf-mutes who have overcome their handicap as mentally incompetent was recognized and commented upon by Rabbi Abraham Samuel Benjamin Sofer¹⁸, also known as the *Ketav Sofer*. His son, Rabbi Simchah Bunim Sofer¹⁹ in his responsa, *Shevet Sofer* deals with the question of this special institute which teaches deaf children the laws and practices of Jewish rituals. He reports that, while on a visit to Vienna, his father was invited to visit the Vienna Institute for the Deaf and Dumb.²⁰ Rabbi Sofer was greatly amazed at the accomplishments of the pupils he observed and remarked that he was in doubt as to whether the exclusion of deaf-mutes from the obligation of *mitzvot* was applicable to persons who had been trained in such a manner. *Shevet Sofer* further reports that he "thinks" his father told him that he had requested that the students of the Institute be provided with *tefillin*²¹ for regular use. This would indicate that

¹⁸1815-1871, Pressburg.

¹⁹1842-1906, Hungary.

²⁰Rabbi Simchah Bunim Sofer, *Shevet Sofer*, II, Even Haezer, no. 21. Also, the existence of this school is also verified in a sermon, "The Morning & The Evening Sacrifice: How to be Represented in These Days with Special Reference to the Claims of Deaf-Mutes in the Jewish Community" by the Chief Rabbi of London, Rev. Dr. Adler, January 28th, 5625 [1865].

²¹Hebrew for "phylacteries," consist of a small leather case, one for the head and another for the arm, and contain Biblical injunctions for their use.

Ketav Sofer was of the opinion that performance of mitzvot was incumbent upon those students despite their disability.

Sentiments similar to those recorded by *Shevet Sofer* are expressed by Rabbi Ya'akov Haqiz in his responsa, *Halakhot Ketanot*. There, Rabbi Haqiz deals with the question of permitting a *heresh* to join a *minyan*. He presents an example in his response of a *heresh* who is a *Cohen*³⁸ "who became educated and knew when to take the prayerbook at its proper time and prayed with gestures."³⁹ Nonetheless, he hesitates to rule in accordance with his instinctive feeling because in rabbinic literature restrictions applying to deaf-mutes are stated categorically without provision for exception. He reasons that the Sages would not have stated that the *heresh* was exempt from the religious obligations of the Torah if there were exceptions.

The former Chief Rabbi of Israel, Rabbi Yitzchak haLevi Herzog⁴⁰ in his responsa, *Hekhal Yitzchak*, also deals with the *heresh* who becomes educated to speak. He responds to the question regarding the *get* of the *heresh* who has attended a School for the Deaf-Mutes. He states:

...as a result of this education which was non-existent in the days of the Sages, [the *heresh*] has exited from the category of the mentally deficient; at the very minimum [the matter] is

³⁸A member of the priestly tribe.

³⁹Rabbi Ya'akov Haqiz, *Halakhot Ketanot*, Section Two, No. 38.

⁴⁰1888 - 1959. Israel.

doubtful."

Even though Rabbi Herzog acknowledges that the educated *heresh* of today is different than the one which existed during the talmudic times, he still has some doubt to the *heresh's* competency. As a result of this doubt, he rules that the *heresh* is entitled to a regular *get*, but also needs a special *get* to remove any concern of doubt.

The leading exponent of the position that classification of true deaf-mutes as legally incompetent is categorical with respect to Jewish law is Rabbi Menachem Mendel Krochmal of Nikolsburg." In his responsa, Tsemah Tsedek, he describes two different deaf-mutes, each of whom was a highly skilled tailor." One is described as a successful businessman and a gifted litigant as well; the other is described as literate and proficient in the use of the prayerbook and in the order of the various prayers for the Sabbath and the Festivals, as well as of the daily service. In this responsum, he is dealing with the marriage of one of these tailors who desires to enter into the *hupah*" alone. However, despite the fact that both were

"Rabbi Yitzchak haLevi Herzog, Hekhal Yitzchak: Even Haezer, II, no. 47.

"1600-1661, Poland and Nikolsburg, Moravia.

"Rabbi Menachem Mendel Krochmal, Teshuvot Tsemah Tsedek, no. 77.

"Today the word refers to the canopy held above the bride and groom during a Jewish wedding ceremony. In ancient times it referred to the bridal chamber where the marriage was

highly intelligent individuals. Rabbi Krochmal ruled that the provisions of Jewish law applying to deaf-mutes extended to them as well. Therefore, according to the statement in the TUR, Even Haezer 44, the *heresh* needs to take an agent with him into the *hupah* to indicate proper intent for marriage.

As it will be explained by other writers, this position is based primarily upon a statement which appears in *Gittin* 71a to the effect that a deaf-mute is considered legally incompetent even though he is capable of communication by means of the written word. Since such communications, no matter how rational, are not accepted as evidence of mental competence, concludes Rabbi Krochmal, it may be inferred that no individual deaf-mute, no matter how clever he may be, is considered legally competent. The principle is that the law provides for no distinction between various deaf-mutes. This is also the position of a number of other authorities.

According to Rabbi Yosef ben Meir Teomim¹⁶ in his commentary to the *Shulchan Arukh*, he states:

According to Even Haezer 123, the heresh, shoteh, and katan are exempt from writing a get because they lack complete possession of their faculties."

consummated.

¹⁶1727-1792,

¹⁷Rabbi Yosef ben Meir Teomim, *Peri Megadim*, Introduction to Orach Hayim, chap. 2, sec. 3.

He acknowledges that the rabbis permitted the deaf-mute to write his intent for a get only if he married in the same manner, but he feels there is some doubt that the written word is sufficient to indicate intent.

Returning to Rabbi Halberstam's responsa, Divrei Hayyim, we also see that he believes according to Gittin 71a "that even though the *heresh* is permitted to 'speak' through the written word when giving a get, there is still doubt to his mental competency."¹⁸ Rabbi Halberstam knows that this particular *heresh* possesses intelligence for he was able to learn to read and write and demonstrate his religious knowledge; yet, this does not seem to matter. Again, we see a halakhic decision being formed due to one's doubt of the *heresh's* intelligence because the literature has already defined him within set limitations.

In addition, according to Rabbi David Friedman¹⁹ in his responsa, Sh'eilat David, it appears he has some doubt of the *heresh's* intelligence also. Here, Rabbi Friedman is dealing with the *heresh* or *hereshet* who either participates in or performs *halitzah*. He reviews the talmudic discussion presented in Yevamot 104b and agrees with the conclusion that the deaf-mute is exempt from *halitzah*. He also points out that the *heresh* that can speak, but not hear, is ruled

¹⁸Rabbi Hayyim Halberstam, Divrei Hayyim: Even Haezer, Chapter Two, no. 72.

¹⁹1822-1915.

as competent in all his deeds. However, "he is still exempt from *halitzah* for we are unable to teach him the prescribed formula."⁴⁰ Even though he continues and agrees with RAMBAM in his Mishneh Torah⁴¹ that the deaf-mute can deal in movable sales through gestures, he may not use any other form.⁴² From this, perhaps we can conclude that Rabbi Friedman also believes that the written word is not a sufficient form of competent communication.

Another writer, Rabbi Moses Schick⁴³ commented in his responsa, Teshuvot Maharam Schick, on the question of a *heresh* who neither hears nor speaks, yet learns to speak in a special school for the deaf.⁴⁴ He states that "one born as a *heresh*, according to the Sages, he is similar to the insane person in that he lacks intelligence." Rabbi Schick reviews Rabbi Krochmal's responsum and agrees that even though he may demonstrate a greater level of intellect than other deaf-mutes, he is still not permitted to marry according to the law of the Torah (only through the ruling of the rabbis). This is proven in Gittin 71a that even if he is able to speak through the written word, this is not

⁴⁰Rabbi David Friedman, Sh'eilat David, Sect. 2, Even Haezer, Hilkhoh Halitzah, no. 27.

⁴¹Mekirah, Hilkhoh 2.

⁴²Sh'eilat David, loc. cit.

⁴³1805-1879, Hungary.

⁴⁴Rabbi Moses Schick, Teshuvot Maharam Schick, Even Haezer, no. 79.

proof of mental capacity. "It is possible that he is in complete possession of his faculties, but we are not able to verify this."

The problem of the exact status of the deaf-mute is dealt with by Rabbi Abraham Wolf Hamburg⁴⁵ in his responsa, Sha'ar Hazeckenim. A question is raised concerning a child born a deaf-mute whose parents did not circumcise him because they erroneously thought it was not necessary because of his condition.⁴⁶ Others treated him as a non-Jew because the omission of this ritual; however, it is clear he is Jewish. Since a *heresh* can marry and divorce with gestures according to the ruling of the rabbis, is he permitted to do so also? Rabbi Hamburg answers in the affirmative and points out with respect to Gittin 71a that the *heresh* is feeble-minded, yet he is permitted to communicate through the written word or gestures. His actions are declared competent in all his deeds, but there remains a level of doubt due to not having a measure of determining his intelligence and intent.

Rabbi Shalom Mordechai Schwadron⁴⁷, popularly known as the Brezener Rav or MAHARSHAM, dealt with the question of a woman who fell to a levirate marriage with a *heresh* whose

⁴⁵1770 -1850. Fuerth (Germany).

⁴⁶Rabbi Abraham Benjamin Wolf Hamburg, Sha'ar Hazeckenim, Sec. II, 135.

⁴⁷1835-1911, Poland.

status was questionable since he learned to speak in a stammering voice and others understand him as he understands them.⁴⁸ He explains that all of the rules pertaining to the deaf-mute has been illustrated in Rabbi Krochmal's responsa, Divre Havim. In addition, he points out that regarding the Sages comments in Gittin 71a that "even though he is able to speak through the written word....his intelligence is feeble-minded."⁴⁹

In all of these responsa concerning the talmudic passage from Gittin 71a, it is clear that the issue of doubt is a very important concern. Even though the *heresh* is able to overcome his handicap through various means, this doubt still prevents him from being declared in complete possession of all his faculties in every case. It should be noted that these responsa acknowledge and agree that speaking through the written word or through gestures is acceptable, but only for the precise *heresh* -- one who neither hears nor speaks. Any other type of *heresh* is clearly deemed competent in all their deeds.

The question of whether the classification of a deaf-mute as legally incompetent is absolute in nature or whether this classification admits of exceptions should be resolvable on basis of the provisions of *Halakhah*. The issue is in regard to the status of a person who is normal

⁴⁸MAHARSHAM, Teshuvot Maharsham, II, no. 140.

⁴⁹Ibid.

at birth but who becomes a deaf-mute as a result of disease or traumatic injury subsequent to having acquired speech. The rationale underlying the special status of deaf-mutes, that since they lack the ability to communicate they are incapable of normal mental development, is not applicable in the case of one who has matured mentally before becoming a deaf-mute. However, if this legal classification is categorical in nature, admitting of no exception, the halakhic provisions governing deaf-mutes may well extend even to the normal person who subsequently becomes a deaf-mute. In point of fact, the status of a normal person who subsequently becomes a deaf-mute is the subject of controversy among halakhic authorities. Rabbi Halberstam in his responsa, Divre Havim, considers the status of such persons to be identical with that of congenital deaf-mutes.⁵⁰ This would indicate that the applicable provisions of Jewish law are categorical in nature and do not admit of exceptions in cases of manifest intelligence. However, two earlier authorities, RAMBAM and Bertinoro, in their respective commentaries on the Mishnah, Terumot 1:2, indicate that such persons are not regarded by Halakhah as legally incompetent. Nevertheless, there are two authorities who disagree.

Returning to Rabbi Sofer's responsa, Shevet Sofer, he recognizes that many individuals who have become deaf attend

⁵⁰Divre Havim, loc. cit.

a special School for the Deaf and learn how to read, write, and even speak. Even though he declares them competent, he still considers deaf-mutes in the category of doubt.⁵¹

Also, Rabbi Ezekiel Hefets in his responsa, Meleket Heresh deals with the question of one who becomes a deaf-mute after birth.⁵² He states:

*In truth, there is no difference of intellectual capacity between a person born a heresh and a person who becomes a heresh.*⁵³

The reason given is that there exists doubt regarding the condition of his intellectual state. He considers such deaf-mutes to be in the category of doubt and accorded doubtful status. The doubt expressed by Ketav Sofer with regard to the status of obviously intelligent deaf-mutes can readily be comprehended within the context of this disagreement. Also, Rabbi Ephraim Oshry⁵⁴ in his responsa, Sheailot U'Teshuvot Mi Ma'amakim⁵⁵, deals with the question of a man whom the Nazis beat deaf and dumb. He was beaten so severely that he lost his power of speech and hearing. Even though they broke his bones, battered his flesh, and left him unconscious, his intelligence had not been impaired

⁵¹Shevet Sofer, loc. cit.

⁵²Rabbi Ezekiel Hefets, Meleket Heresh, Introduction, sec. 9.

⁵³Ibid.

⁵⁴b. 1914. New York.

⁵⁵III, no.2.

at all. Though now a deaf-mute, he was able to communicate in writing his intent. The question asked was whether he could still be included in the *minyan* and be permitted to be called up to the Torah. Through an analysis of Gittin 71a and Rashi's commentary, Rabbi Oshry declares, "Even though he cannot hear nor speak, he is not equated to an insane person because his intelligence is not in doubt."⁵⁶ He rules that this man is permitted to join the *minyan*, but another reader would need to be called to read the Torah while he stands aside to concentrate on the words. Rabbi Oshry makes it very clear that his ruling is based on the halakhic principle that the Torah needs to be heard aloud and the reader needs to hear what he is saying. The ruling has nothing to do with the competency of the *heresh* since this is not in doubt.

Rabbi Menachem Mendel Schneersohn⁵⁷ in his responsa, Tsemah Tsedek⁵⁸, he is dealing with the wife of a *heresh* who has admitted to committing adultery. What makes the case interesting is that the man is clearly intelligent for he became a *heresh* later in his life. Rabbi Schneersohn makes it clear that he makes no distinction between one born

⁵⁶Ibid., It should be noted that this responsa was written during World War II during great distress and that Rabbi Oshry was relying on his memory to make rabbinic decisions rather than looking at actual texts.

⁵⁷1789-1866, .

⁵⁸Even Haezer, no. 35, sec. 1.

as a *heresh* or who became a *heresh*. Therefore, in either case, the man is entitled to a divorce on the grounds of her adulterous behavior and she is also forbidden in marriage to her lover.

Also, Rabbi Hefets in his responsa, Meleket Heresh,⁵⁹ also states that one who becomes deaf has a sense of doubt like the *heresh* who is born as such. In addition, Rabbi Eliezer David Grunwald⁶⁰ in his responsa, Keren LeDavid,⁶¹ also deals with a question concerning a person who became a deaf-mute and then went to a special school to learn to speak. This responsa is very similar to Rabbi Oshry's described above. Rabbi Grunwald states that the *heresh* is like the insane person and the minor in that they are exempt from all the *mitzvot* of the Torah. There is no difference whether one was born deaf or became deaf later in their life. All of these responsa and others are found in Rabbi Hayyim Hezekiah Medini's collection of responsa, Sedeh Hemed,⁶² where he describes how each one of these rabbis reject any distinction between a congenital deaf-mute and one who becomes a deaf-mute as a result of injury or illness.

⁵⁹Loc. cit.

⁶⁰1868 - 1928.

⁶¹Rabbi Eliezer David Grunwald, Keren David, Orach Hayim, no. 27.

⁶²Rabbi Hayyim Hezekiah Medini, Sedeh Hemed, Helek Hakellalim, Ma'areket Het, no. 108.

However, Rabbi Herzog in his responsa, Hekal Yitzchak,⁶³ states:

*From Divre Hayim, ...that after one becomes a heresh, his status as a heresh is in doubt as deduced from Gittin 72a.*⁶⁴

Unlike most other authorities, Rabbi Herzog does make a distinction between one born deaf and one who becomes deaf. In his mind, a person who becomes deaf is declared a doubted heresh because they were probably in complete possession of all their faculties prior to the physical change.

Although the status of an educated and intelligent deaf-mute is the subject of doubt, there exists at least one authority who maintains that this doubt does not extend to the question of including such a person as part of a minyan required for public prayer. Although, as we have seen earlier, Rabbi Bamberger in his responsa, Zeker Simchah, disagrees, Rabbi Wolf Breur in a rather lengthy responsa, Nachalat Binyamin⁶⁵, rules that a deaf-mute who understands the nature of prayer may be included in the requisite quorum of ten without question. The case deals with a fifteen year-old deaf-mute boy who attended a special school for the Deaf and learned to read, write, and speak. He also learned some Jewish ritual practices (laying tefillin and wrapping himself with his tallit). From Rabbi Breur's interpretation

⁶³Loc. cit.

⁶⁴Loc. cit.

⁶⁵Rabbi Wolf Breur, Nachalat Binyamin, no. 31.

of Orach Hayim 55:8, he understands that the *heresh* is not obligated in the mitzvah of prayer. However, there is a difference of opinions with regard to an elderly man who does not hear or speak. He is declared competent even though his physical condition due to age has deteriorated. How much more so should this particular *heresh* be declared competent since he is able to speak. Yet, Rabbi Breur rules that certain aspects of the service need to be repeated to remove any doubt. It is clear from this that the inability to hear or to make the appropriate responses does not in itself disqualify a person for inclusion in a minyan.

Rabbi Ovadiah Yosef, former Chief Rabbi of Israel, had a responsum published in Or Torah.⁶⁶ He addresses the following question:

*A deaf-mute studied at a school for the deaf and he acts like an intelligent person and he is able to speak a little, even though he does not pronounce himself clearly. Is he able to join a minyan for worship?*⁶⁷

He rules that the *heresh* may join the *minyan* because the *halakhah* is clear from Haqiqah 2b. There, it states that a person who speaks but does not hear or a person who hears but does not speak is ruled as competent. The *heresh* that the Sages speak of is one who neither hears nor speaks. Since this is the ruling, Rabbi Yosef follows the Shulchan Arukh, Orach Hayim 55:8 and rules that he may join the

⁶⁶Or Torah, vol. 10, no. 4, Elul 1977, Question 32.

⁶⁷*Ibid.*

minyan. However, he then raises the concern if this individual is able to hear or pronounce the prayers properly. Rabbi Yosef concludes by stating when a *heresh* who has acquired speech completes the quorum for a *minyan*, communal prayer may be offered including recitation of *Kaddish*⁶⁶ and *Kedusha*.⁶⁷ He advises, however, that, in light of conflicting views with regard to this matter, the reader should not repeat the *Amidah*⁷⁰, but rather recite the opening section, including the *Kedusha*⁷¹, together with the congregation in order not to cause anyone to doubt, Heaven forbid, the thought of a wasted effort!

Unfortunately, Rabbi Moses Feinstein in his collection of responsum, *Igerot Moshe*, probably responds differently. Since the *heresh* is equated to the minor according to talmudic law, his responsum sheds light on this situation. Rabbi Feinstein answers the question: "Can a minor be

⁶⁶Ancient prayer, recited in Aramaic, which sanctifies the name of the Lord.

⁶⁷A prayer which praises God with the kind of language Jewish tradition assumes is used by the angels when praising God: "Holy, holy, holy is the Lord of host; the whole earth is full of His glory." See also Isaiah 6:3.

⁷⁰Also known as the *Shmoneh Esreh* (Eighteen Blessings) which is the central prayer in the Jewish service.

⁷¹The *Amidah* is recited first silently and then recited a second time aloud. The public recitation of this prayer originally was instituted on behalf of Jews who were illiterate and could not recite it on their own.

permitted to join a *minyan* at a time of urgency?"⁷² He responds that the minor should not be permitted simply because there is a question of his competency and his ability to demonstrate that he understands what is going on. Even though a group of worshipers desire to have a *minyan* in order to recite their communal prayers and they train him in all of the practices of prayer, he is still not obligated to do so and may make an error due to the pressure of the urgency. From this, one may deduce that the same applies to the *heresh*.

In addition, returning to Rabbi Simcha Bamberger in his collection of responsa, Zekher Simchah, he also answers in the negative. He states:

*Indeed there are those who say that the minor has a greater advantage over the heresh in that he will some day come into the obligation of performing the mitzvot. And also it appears to me that the heresh was an outstanding deaf-mute and that he understood and knew to whom he was praying and moreover, he appears in complete possession of his faculties. However, he is not permitted to join the minyan....because his ears (lack of hearing) causes me to doubt his intelligence.*⁷³

Rabbi Aryeh Leib Grossnas in his responsa Teshuvot Lev Aryeh,⁷⁴ deals with the question of Bar Mitzvah of a deaf boy who speaks but does not hear. He wants to know if it is

⁷²Rabbi Moses Feinstein, Igerot Moshe, Orach Hayim, Vol. 2, no. 18.

⁷³Rabbi Simcha HaLevi Bamberger, Zekher Simchah, no. 9.

⁷⁴Rabbi Aryeh Leib Grossnas, Sh'eilah U'Teshuvah: Reading of the Torah by the Deaf. An offprint of the Decisions of the London Bet Din, Issue 10, Nisan 5723.

okay for him to be called up to bless and read the Torah portion and act as service leader. Even though it is very clear that he is competent and very intelligent, Rabbi Grossnas argues that since the person in question cannot pronounce the words properly, he may not pronounce the blessings upon the Torah on behalf of the congregation. In addition, one is obligated to hear in their own ears the reading that one leads the congregation in. He does permit the boy to do the blessing and the reading, so long as it is repeated by a hearing, sound person!

Even according to the authorities that maintain that the classification of deaf-mutes as legally incompetent does not admit of exception, there is one aspect of the training given to deaf-mutes in contemporary society which does not affect their halakhic status. As stated earlier, a person who possesses speech is legally competent in every way, although he may be deaf. The question of whether the speech acquired by deaf-mutes affects their status in Halakhah is discussed in a variety of sources.

Rabbi David Solomon Kluger⁷⁵ in his responsa, Neot Desha,⁷⁶ deals with the question of a *heresh* who neither speaks nor hears, yet communicates with members of the community through lip-reading and gestures. The members of

⁷⁵1783 - 1869. Brody.

⁷⁶Rabbi David Solomon Kluger, Neot Desha, Even Haezer, no. 132.

the community understand him and his intent. The problem is he married a woman in secret and now wishes to divorce her after living together for two years. Since their marriage is questionable without witnesses, it is difficult to determine the method of divorce, either by written communication or gestures. Rabbi Kluger states absolutely that the imperfect, guttural speech of a deaf-mute does not qualify as speech for purposes of effecting a change in that person's status. The argument advanced by this authority is that such barely intelligible speech is, for legal purposes, no more to be considered speech than is communication through the written word. Since the communication used for the formal acquisition of this wedding is in question, he may not have a divorce, ever.

The problem of barely intelligible speech is also commented by Rabbi Isaac Dov Bamberger⁷⁷ in his short responsa, Yad Halevi.⁷⁸ There, he deals with deaf-mutes who perform *halitzah*. An objection is raised by his teacher concerning the examination of said deaf-mutes. Rabbi Bamberger uses the responsa, Sha'ar Hazekanim and Zeker Simchah, to explain the ability of the *heresh* to speak. He concludes that even though the deaf-mute goes through the effort to learn to communicate, it is not the same for all

⁷⁷1808-1899, .

⁷⁸Rabbi Isaac Dov Bamberger, Yad Halevi, Even Haezer, no. 60.

hereshim. Therefore, since it is not uniform, he declares that any speech is not acceptable to remove the heresh from his limited status.

Returning to Rabbi Schick in his earlier cited responsum, Maharam Schick,⁷⁹ he expresses doubt with regard to the question of whether "artificially" acquired speech is sufficient to remove the person from the category of a deaf-mute. This doubt is echoed by Rabbi Eliezer David Grunwald in his responsa, Keren LeDavid,⁸⁰ where he questions the heresh's of "stammering-speech" as a form of speaking. If so, is this acceptable to remove a person from the category of heresh? He expresses doubt due to his concern of someone not being able to understand him.

However, a host of other authorities are certain in their view that one who has acquired speech by any means whatsoever cannot be considered a deaf-mute. Their position is that the ability to speak, albeit imperfectly, is a greater indicator of intelligence than the ability to communicate in writing. This is clearly the position of Rabbi Shalom Mordecai Schwadron⁸¹ who states in his responsa, Teshuvot Meharsham,⁸² that even though according to the RAMBAM deaf-mutes do not participate in halitzah

⁷⁹Maharam Schick, I., Even Haezer, no. 79.

⁸⁰Orach Hayim, no. 27.

⁸¹1835-1911, .

⁸²II, no. 140.

because they lack mental competency, he permitted a deaf-mute who had acquired the ability to speak to perform halitzah, even though his speech was unclear. Similarly, Rabbi Hayyim Halberstam in his responsa, Divre Hayyim⁸³ rules that the deaf-mute who learns to speak is ruled as competent even though it is difficult to understand him. Also, Rabbi Shlomoh Drimmer in his responsa, Bet Shlomoh⁸⁴, deems a deaf-mute who has learned to speak to be legally competent even though his speech is understood only with difficulty.

Similarly, Rabbi Ezriel Hildesheimer⁸⁵ in his responsa, Teshuvot Rabbi Ezriel, deals with the question of a *heresh* who learns to speak.⁸⁶ In a very detailed responsum covering all of the above mentioned responsa, he rules that a *heresh* who has acquired the ability to speak and who manifests normal intelligence is to be considered legally competent.

It would also appear that the position of Rabbi Moses Feinstein in his responsa, Igerot Moshe,⁸⁷ is that one who has acquired speech, no matter by what means, cannot be

⁸³II., Even Haezer, no. 72.

⁸⁴Orach Hayim, no. 94.

⁸⁵1820-1899, Berlin, Germany.

⁸⁶Rabbi Ezriel Hildesheimer, Teshuvot R. Ezriel Hildesheimer, Even Haezer, no. 58.

⁸⁷Even Haezer, III, no. 33.

considered to be a deaf-mute. The *heresh* would not be considered a deaf-mute, but only deaf, and in halakhic literature, he is now ruled as competent in all his activities.

Throughout halakhic literature, the list of incompetent individuals reads: the deaf-mute, the insane person, and the minor. Like an insane person or a minor, a deaf-mute is exempt from all duties and free from all liabilities. Now, with regard to the latter this is readily understandable for they lack adequate intelligence to assume normal responsibility. But why the deaf-mute? Once, it could have been claimed, that he too is mentally deficient: the deaf-mute who can not communicate can never develop normal mental faculties. That is, the special laws of the deaf-mute derive from the implication of his state -- mental deficiency. Nowadays however, it has become possible to train the deaf-mute to participate intelligently in all spheres of life. Is he nevertheless considered incompetent? This question is debated by halakhic authorities. Or, in other words, now that the deaf-mute phenomenon has been stripped of its (one-time) implication, some authorities contend that the relevant rulings no longer apply. Others argue that they still apply because the phenomenon of the deaf-mute as one with inadequate intelligence is of

essence."

A similar controversy relates to the question whether deaf-mutes who learn to speak are considered competent as are the deaf who were never mute. Rabbi Yechiel Ya'akov Weinberg⁴ paraphrases the debate: the matter depends on the question whether deafness is brain damage which causes a lack of intelligence, or that the lack of intelligence derives from the fact that he has no one to learn from. In part, at least, we might understand this question to imply: Is the criterion speech alone or its implication? If it is the latter, overcoming it is irrelevant; if the former -- when overcome, the problem itself has been overcome.

⁴Rabbi Faitel Levin, "Halakhah in the Modern Technological Age," in Or Hadorom: The Australian Journal of Torah Thought, Num. 4, Summer 5747, pp.58-9.

⁵Author of "Seridei Esh" in Shanah Beshanah, 5725.

Chapter Five

No doubt, for as long as there have been Jews on earth, there have also been deaf ones. Certainly the Torah acknowledges their existence as does rabbinic literature. Their status obviously perplexed the rabbis who were unable to communicate with them and were unable to ascertain their mental competence. They therefore created a legal category called the *heresh*, and lumped the *heresh* together with the *shoteh* (the insane person) and the *katan* (the minor). Under talmudic law, a deaf person who did not speak could not assume full citizenship in the Jewish community. This restriction was seen as a necessary means of protecting such individuals from exploitation.

The *heresh* as defined by the rabbis is one who is congenitally deaf and mute. One who cannot hear nor speak, it is presumed, has been denied the ability to communicate. Therefore, his intent to marry, divorce, to buy, to sell, to give *halitzah*, to put on tefillin or to perform other ritual observances is inadequate. However, the rabbis recognize the value of marriage and decree that the *heresh* should be permitted to marry. Therefore they allow a form of sign language, or gestures to indicate intent to marry or divorce.

The rabbis of the Talmudic period only imposed legal restrictions on the *heresh* who was not able to hear nor

speak. Yet, later in the compendia literature, the *heresh* is defined in a broader context with more restrictions. Alfasi recognizes some level of intellectual capacity for the *heresh* because the deaf-mute can signal intent with gestures. However, he expresses doubt whether this is a true test of mental competency.

The biggest change occurred in RAMBAM's Mishneh Torah. There, the RAMBAM takes the broad definition of the *heresh* as explained in the Talmud and restricts not only the deaf-mute, but also the speaking deaf and the hearing mute. He supports this conclusion from the talmudic discussion in Berachot and Yevamot concerning blessings. Since the *heresh* could never have heard nor recited the prescribed formula, this never applies to him. The use of gestures or written communication is denied since the rabbis only spoke of this with respect to marriage and divorce.

Both the *TUR* and the *Shulchan Arukh* maintain the restrictions the RAMBAM imposed. However, they do explain that it is the *heresh*'s physical defect which limits him, not a mental defect. His intellectual capacity is simply a matter of doubt. Furthermore, it is recognized that the deaf who are also mute are capable of some speech, but are incapable of developing speech by imitating sounds. Therefore, if gestures and writing can be permitted in special situations (marriage and divorce), perhaps it can be used in other legal and ritual acts. The later poskim will

determine if this is possible.

Rabbi Asher ben Jehiel, the ROSH, acknowledges that the *heresh*, no matter how deaf, possesses some hearing. Even this minimal hearing is enough to express intent to fulfill halakhic obligations. The *heresh* should be declared fully competent on this basis alone.

Rabbi Moses Feinstein adds to the ROSH's comments that the *heresh* is declared competent if he can hear, even if only by a loud voice. However, he cannot use any artificial substance to amplify the sound. Yet, with the advance of technology, Rabbi Feinstein adds that the hearing aid would be for an individual who is not like the *heresh* as explained in the Talmud. This means that Rabbi Feinstein recognizes the technological advances and no longer places any deaf person as the same *heresh* of the past.

Rabbis OUziel, Halberstam, and Drimmer all agree that the *heresh* who overcomes his disability is ruled competent. When the deaf-mute attends a special school for the hearing impaired and learns to speak, either in a mumbled sound or by lip-reading, he is deemed fully responsible in all his actions. The ability to speak, no matter how it is acquired or if it is of poor quality is sufficient to remove the *heresh* from being declared incompetent on his physical condition alone.

Even though some form of speech is recognized, several poskim express doubt over the competency of the *heresh*.

Rabbi Simcha Sofer followed his father's ruling that the commandments are incumbent upon the deaf, but he was not absolutely sure. Rabbi Haqiz recognizes that the *heresh* is able to express intent, yet since the Sages did not recognize this, he hesitates to rule otherwise. Rabbi Herzog also acknowledges the *heresh's* ability to communicate, but he still desires additional cautions due to his doubt over the mental competency of the deaf person.

Even though some authorities have some doubt about the status of the *heresh* who has been educated, Rabbi Schwadron declares that the ability to speak, although imperfectly, clearly indicates competency.

For the most part, the Responsa literature of the Middle Ages continues the restrictions on the *heresh*, but, increasingly, qualifications and exemptions obtain, so that by the late nineteenth century a schism occurred over what exactly constituted a *heresh*.

What led to the breakdown in the consensus on the *heresh*? The answer is clear: the advent of a specially designed educational program for deaf students. Thus, the success of these institutions at rehabilitating deaf Jews compelled the rabbis to refine their definition of the *heresh*. Was he restricted because of his deafness primarily? If so, then once a *heresh*, always a *heresh*, because deafness knows no cure. Or was he restricted because of the mental incompetence engendered by the

deafness? If so, then mental competence could be realized through the newly discovered techniques of special education. Thus, the debate within the rabbinate was a microcosm of the larger debate over the acceptance of Western culture and its practices.

In conclusion, those who possess even minimal hearing or have acquired intelligible speech are certainly not subject to any of the halakhic restrictions which apply to deaf-mutes. Furthermore, there is a highly significant body of rabbinic thought which deems even one who has acquired barely intelligible speech to be beyond the category of the rabbinic deaf-mute. Moreover, in the light of the degree of education attained even by true deaf-mutes in contemporary society, it is doubtful that they are to be considered examples of the *heresh* described in rabbinic references. Hence, they should be encouraged, and indeed required, to participate fully in Jewish religious life, including performance of all ritual obligations as well as in Torah study.

In view of the remarkable strides made in educating the deaf, it is certainly incumbent upon the Jewish community to provide them with every opportunity for instruction and study in all areas of Jewish knowledge. They are to be encouraged to participate fully in all areas of communal and religious life.

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