

Tav Lemeitav Tan Du Mi-Lemeitav Armalu: An Analysis of the Presumption

Ruth Halperin-Kaddari

Abstract: This article traces the development of the *tav lemeitav* presumption, examining its *talmudic* origin with its rationale through Rashi and the Tosefot, its development in *responsa* literature, eventually focusing on the analyses of Rabbis Y. Spector and M. Feinstein. Early sources indicate the underlying rationale for negating the possibility of a claim of mistake is the woman's irrepressible desire for sexual relations. However, more recent *responsa* reflect a change in the deterministic approach and construe it more flexibly. They demonstrate a venue to apply the law differently to changing perceptions and social norms. A careful examination of the presumption also reveals support for the incorporation of women's voices into the evolution of the presumption. These results lead toward a process of overriding the *tav lemeitav* presumption. This thesis is based on a contractual conception of the marital bond. The topic of the *tav lemeitav* presumption could be understood as an example for the potential of contractual analysis of *halakhic* marriage.

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I. INTRODUCTION

The presumption known as *tav lemeitav tan du mi-lemeitav armalu* (better to dwell as two than to dwell alone) has lately generated lots of interest, as part of the on-going debate surrounding the applicability of *qiddushei ta`ut* (voiding a marriage on the grounds of error).¹ This presumption is traditionally presented in the responsa literature, based upon its main source in the *gemara* (*Bava Qamma* 110b-111a), as negating the possibility of voiding marriage on the basis of an error (*meqah ta`ut*) claimed by the woman. Since women supposedly always prefer being married—regardless of to whom—to being single, this contractual claim simply cannot be made. Obviously, exceptions to this reasoning have been made over time, most recently by Rabbi Moshe Feinstein, *z”tl*. The current controversy centers on the possible extent of these exceptions to and rejections of the *tav lemeitav* presumption.² This article traces the development of the *tav lemeitav* presumption, suggesting that the responsa of the more recent *poseqim* reflect a change in the determin-

istic approach to the presumption and to its reasoning, construing it in an empathic, more flexible and understanding manner that may actually advance women's interests. Their *teshuvot* demonstrate a clear willingness to adjust the law to changing perceptions and social norms. More broadly, at the basis of this thesis lies a contractual perception of the marital bond, and this specific topic of the *tav lemeitav* presumption could be used to exemplify the potential for contractual analysis of *halakhic* marriage.

II HALACHIC WAYS TO END MARRIAGE

A. An Overview

Broadly speaking, there are three main methods for easing the plight of the *agunah* and facilitating Jewish divorce. The premise is that the problem of *agunot* is brought about by the need for the man's uncoerced, freely given cooperation. Consequently, the three methods present three ways of overcoming or bypassing this premise.³

The most traditional method entails broadening the circumstances in which the use of coercion and force is

¹ See, e.g., J. David Bleich "Survey of Recent Halakhic Periodical Literature," 33 *Tradition* (1998) 90; Michael J. Broyde *Marriage, Divorce and the Abandoned Wife in Jewish Law* (New Jersey: Ktav 2001), Appendix B; Matityahu (Michael) Broyde, "Qiddushei Ta`ut in Our Time," 22 *Tehumin* (2002) 210 (Hebrew).

² See, e.g., Shlomo Riskin, "Annulment of *Qiddushin* - A Solution for *Aginut*," 22 *Tehumin* (2002) 191 (Hebrew); Susan Aranoff, "Two Views of Marriage - Two Views of Women: Reconsidering *Tav Lemeitav Tan Du mi-Lemeitav Armelu*," 3 *Nashim* 199 (2000); Aviad Hachohen *The Tears of the Oppressed - The Agunah Problem and Its Resolution: An Examination of Background and Halakhic Sources* (Forthcoming 2004).

³ Several years ago, Professor Simcha Meir Feldblum, *z”tl*, published an innovative article, suggesting that the lack of informed consent by a woman at the time of marriage to the acquisition (*qinyan*) nature of the transaction undermines the *mi-de-oraiyeta* (biblical) and even the *mi-de-rabbanan* (rabbinical) validity of the marriage, putting it in the category of *derekh qiddushin* (perhaps the proper legal term is "quasi-marriage"), which does not require a *get* for its termination. See Simcha Meir Feldblum "The Problem of *Agunot* and *Mamzerim*—A Suggestion for a Comprehensive Solution," 19 *Dinei Israel* (1998) 203 (Hebrew). The study of this resourceful suggestion, which will probably lead to intense debate, is beyond the scope of this article.

nonetheless permissible, also known as adding grounds for compelling the *get*.⁴

The premise is that the problem of agunot is brought about by the need for the man's uncoerced, freely given cooperation.

The second method works in the direction of broadening the circumstances that will in fact convince the man to issue the *get*, without being regarded as actual "compulsion" or "coercion."

This method comes under the rubric *kefiyah be-derekh*

bereirah, this is, "compulsion by way of choice," or indirect compulsion, which is regarded as legitimate compulsion.⁵

The last, and most radical, method tries to bypass the need for the man's cooperation in giving the *get*, either by delegating his power to someone else (for example, an agent⁶) or by making the *get* unnecessary altogether. The most familiar legal device within this last resort is, of course, the annulment.⁷ However, it can also be achieved through the legal device of declaring the marriage void on contractual grounds, i.e. *qiddushei ta`ut*. The *qiddushei ta`ut* tool highlights an inherent flaw in the *qiddushin* itself.

In declaring the marriage void, the rabbinical authority

⁴ See, e.g., Zerach Warhaftig, "The Coercion of a Get," in *Studies in Jewish Law* (Bar-Ilan University Press 1985) 148-208 (Hebrew); Elimelech Westreich, "The Rise and Fall of the *Moredet* Ground for Divorce," 21 *Shenaton ha-Mishpat ha-Ivri* (Jewish Law Annual) 123-147 (2000) (Hebrew); Ruth Halperin, "Husband's Adultery as a Ground for Divorce," 7 *Mehqarei Mishpat* (Bar-Ilan Law Studies) 297-329 (1989) (Hebrew); Irving Breitowitz, "The Plight of the *Agunah*: A Study in *Halacha*, Contract, and the First Amendment," 51 *Maryland Law Review* (1992) 312-421.

Even though this is indeed the most traditional and the least revolutionary method, with clear precedents in the Talmud and many *rishonim*, Orthodox authorities over the past two hundred years have declined to use it, following the *Hatam Sofer's* directive never to resort to compulsion unless the specific ground is clear and consensual. See *Resp. Hatam Sofer, Even ha-Ezer* A 116; see Moshe Zilberg *Personal Status in Israel* (Hebrew University, Jerusalem 1957) 109, 103-117 (Hebrew); Ze'ev Falk, *The Divorce Action by the Wife in Jewish Law* (Hebrew University, Jerusalem 1973) 114, 109-117 (Hebrew).

⁵ The coercive means used in the context of this method vary between social sanctions, also known as "*harhaqot Rabbeinu Tam*," and indirect monetary sanctions, such as high support payments. One contemporary expression of this method is the 1995 *get* legislation in Israel, which permits rabbinical courts to infringe on the rights of a man refusing to give a *get* to his wife, including the right to leave the country, to keep his driver's license or to engage in any work where a professional license is required. Rabbinic Courts (Enforcement of Divorce Judgments) Law, 5755-1995, *Sefer Huqqim* 1507. The tool of prenuptial agreements is another expression of this method, where the enforcement of the husband's earlier voluntary commitment for high support payments serves as a catalyst for giving the *get*.

⁶ The Conservative Movement's proposal based on this concept was not accepted by contemporary halakhic authorities. See Proceedings of the Committee on Jewish Law and Standards of the Conservative Movement 1927-1970, Rabbi Epstein's proposal of 1930, Vol. II, 86-7.

⁷ A. Freiman, *Seder Qiddushin ve-Nisu'in* (Jerusalem: Mosad Harav Kook, 1966) (Hebrew); E. Berkovitz, *Tenai ba-Nisu'in u-va-Get* (Jerusalem: Mosad Harav Kook, 1945) (Hebrew) 118; Eliav Schochetman, "Annulment of Marriage - A Possible Solution for the Problem of the *Get*?" 20 *Shenaton ha-Mishpat ha-Ivri* (Jewish Law Annual) 349-397 (1997) (Hebrew) (concluding that the annulment method is irrelevant for the contemporary problem of *agunot*); for a different view see Riskin, *supra* note 2 (concluding that the method is relevant and appropriate as a last-resort solution for today's *agunot*, and calling upon the Chief Rabbinate to establish a *taqqanah* that allows a special *beit-din* to annul the *qiddushin* in extreme cases).

applies legal-contractual principles, such as error or fraud, which question the intent of the parties to the transaction.⁸ Rabbi Feinstein has been known to favor this tool, in contrast to the tool of annulments.⁹ The current and most controversial use of it is being made by the *Beit Din le-Ba'ayot Agunot*, operating in New York.¹⁰

Subjective knowledge and intent are key factors in the application of this latter construction. But these factors are always hard to prove, and the context, which is both delicate and emotional, makes it all the more difficult. The need for diverse methods of gathering and deducing these subjective elements becomes clear. It is in this context that the use of various evidentiary and normative assumptions and presumptions has developed.

B. Voiding of Marriage and the Tav Lemaitav Presumption

In the light of this overview, the significance of the *tav lemeitav* presumption becomes very clear. As perhaps the most powerful of the presumptions, *tav lemeitav* assumes a woman's constant and perpetual interest in being married to a man, regardless of any faults, defects, vices, or other circumstances that might otherwise be perceived as giving rise to a negative attitude towards entering into that marriage. Taken at face value, as an absolute, irrefutable presumption, unqualified in any way, this perception would make it totally impossible for a woman to claim that her marriage is void due to error. A classic expression of such a "blocking" effect of the presumption can be found in *Bava Qamma* 110b-111a.¹¹

After describing a basic case of *meqah ta'ut*, the *gemara* challenges its validity by showing its questionable outcome if applied in other contexts. Among these, it claims that according to this reasoning, a woman who is wid-

⁸Although these two tools seem almost identical at first sight (they even use the same term in English, namely 'annulment' and 'null,' though the Hebrew language differentiates between them as *hafqa`ah* and *bittul* respectively), there are a number of theoretical and practical differences between them. A detailed survey of these differences is obviously beyond the scope of this essay, but what must be emphasized for our purposes are the different legal and perhaps even theological rationales underlying them. The annulment relies on the alleged intrinsic religious and social powers of a *bet-din* [religious court] to annul marriages, based upon the principle that "*Kol de-meqaddesh a-da`ata de-rabbanan meqaddesh, ve-afqinhu rabbanan le-qiddushin minei*" [Whoever betroths (a woman in a Jewish marriage) betroths (her) subject to the will of the Rabbis, and (in cases such as ours) the Rabbis (retroactively) abrogated his (original) betrothal], *Gittin* 33a. See, also, Menachem Elon, *Jewish Law: History, Sources, Principles*, (Hebrew) (Hebrew University, 1978) 518, who explains the different grounds for this process. Essentially, annulment of marriage is employed when the *qid-dushin* is not disqualified as such, but the *batei-din* exercise their power to annul the marriage, *ab initio*, for reasons which are outside the *qiddushin* process. The *qiddushei ta'ut* tool, on the other hand, highlights an inherent fault in the *qiddushin* itself. In declaring the marriage void, the rabbinical authority applies legal-contractual principles that call into question the intent of parties to a transaction, such as error or fraud. In concentrating on the woman, they have the possibility of declaring the marital contract void by reason of a fundamental error that took place at the time of the betrothal. Under either method, the actual result of employing the rabbinical authority's power of judgment is the termination of any marriage link between the husband and his supposed wife, as if the initial marriage never existed. Thus, for example, in these situations the man is allowed to marry the closest relatives of his former supposed "wife," contrary to a divorce scenario. *Ketubbot* 75a.

⁹See, e.g., R. Moshe Feinstein, *Iggerot Mosheh*, Even a-Ezer 79.

¹⁰See footnote 97.

¹¹But in the case of a widow who is obligated to marry [her brother in law who is] a leper, should she not be freed without [the need for] *halizah*, since she did not betroth herself with this intention? However, in that case, we all know that she is willing to accept anyone, as Resh Laqish held, for Resh Laqish stated, "It is better to dwell as two than to live as a widow."

owed with no children and whose *yavam* (brother-in-law whom she must marry her under these circumstances, under the laws of levirate marriage [*yibbum*]) is a leper¹² would not need *halizah* (the ceremony releasing her and her brother-in-law from the obligation to marry), since her marriage can be deemed *meqkah ta'ut*, for had she known of these circumstance prior to her marriage, she would not have become betrothed to her now-dead husband. The *gemara* rejects this application by simply stating that in this context "we all bear witness" (*anan sahadet*) that a woman always prefers marriage.

Indeed, the primary use of this presumption is within the context of invalidating marriages on the grounds of error. Although there are four other contexts where this presumption was raised by the *gemara*,¹³ this particular text from *Bava Qamma* is the one most frequently quoted by later sources, most often in the context of limiting the use of invalidation as a means of terminating a marriage.¹⁴ The reason for its primacy seems to be that in three of the five sources mentioned in the *gemara* the presumption comes only as a supportive source for a prior ruling. Only two sources use the presumption as a basis for making an actual ruling, and of these two, the other one discusses the rare practice of a *get zikkui*.¹⁵ The *Bava Qamma* text is the only source that explicitly relies upon the *tav lemeitav* presumption in making an actual ruling that is concretely applicable and relevant for use by later sources. *According to Tosafot, this gemara teaches that even a betrothed-but-as yet-unmarried woman who loses her husband-to-be cannot claim meqah ta'ut.*

It is therefore quite understandable that this specific use of the presumption is the one that became the most effective and influential.

The centrality of this text is well reflected in one of Rabbi Feinstein's responsa on the possibility of voiding marriages. After first laying the groundwork for a simple and straightforward structure of *qiddushei ta'ut*, he then raises the impediment of the *tav lemeitav* presumption, and devotes the major part of the responsum to rebutting the conclusions that this presumption implies. I shall elaborate on this responsum below. Obviously, there are many other *teshuvot* that use this presumption to bar the conclusion of error in the marriage/betrothal, or to forestall the coercion of the husband to divorce.¹⁶ They all demonstrate the significance of this presumption and its predominant effects.

C. Halakhic Presumptions and the Legal Tool of *Sevara*

Before discussing the scope of this presumption and its limits, we should what consider the actual institution of assumptions or presumptions should be and their particular nature in our context. So far the terms '(legal/normative) presumption' and 'assumption' have been used here interchangeably. The *hazaqah*, or presumption, comes in several forms within the halakhic legal system, all of which serve as evidentiary tools, in a manner quite similar to the role of presumptions in the Israeli civil legal system.¹⁷ Whether they are normative-legal or factual presumptions, they provide an evidentiary basis upon

¹² According to Maimonides, this is true for any other defect as well. "Similarly, if the *yavam* were a leper, or suffered from any other human defect, he performs *halizah*, and she is entitled to her *ketubbah* [payment]." Maimonides, *Mishneh Torah, Hilkhoh Yibbum ve-Halizah*, 2:14.

¹³ *Yevamot* 118b; *Ketubbot* 75a; *Qiddushin* 7a; *Qiddushin* 41a.

¹⁴ R. Yaacov Yitzchak Weiss, *Minhat Yizhaq* 7:122; Appeal 137/5737, 10 *Pisqei Din Rabbaniyim* 327; *Resp. Hatam Sofer, Even ha-Ezer* B, responsum 74.

¹⁵ *Yevamot* 118B, *see infra*, text preceding note 54.

¹⁶ *See Supra* note 13; R. Azriel Hildesheimer, *Resp. R. Azriel, Even ha-Ezer*, responsum 31.

¹⁷ See 1 Harnon, *Dinei Re'ayot* (Hebrew University, 1977) (Hebrew) 193; Kedmi, *Al ha-Re'ayot bi-felilim* (Tel Aviv University, 1984) 308; *Encyclopedia Judaica* (Jerusalem, 1971) (Hebrew) 1521

which legal rules can later be applied.¹⁸ Halakhic presumptions are often divided into several categories.¹⁹ *Tav lemeitav*, however, is never referred to as an actual *hazaqah* in any of the primary sources that use it²⁰ and is not listed as such in traditional secondary halakhic sources.²¹ Does that affect its possible classification as a presumption? Does that in any way affect its validity, force or function as an evidentiary tool? Does that mean that treating the statement “*tav lemeitav tan du mi-lemeitav armalu*” as a presumption is erroneous?

First, although *tav lemeitav* is not itself designated a *hazaqah*, there is a parallel expression that is so designated: “*Hazaqah: kol ha-nashim rozot lehitqadesh*” (it is a presumption that all women wish to be betrothed),²² which is classified within the category of presumptions relating to human nature. This leads to the possibility that *tav lemeitav* is a presumption as well.

More importantly, it seems that, in determining whether

or not an expression represents a *hazaqah*, no significance is attached to the expression not being labeled as such.²³ In this case, the labeling of a specific saying as a *hazaqah* affects its weight as evidence in the face of contradictory evidence. The weight of different presumptions varies with their character. Although presumptions concerning human nature are fairly strong relative to other types of evidence,²⁴ they have been refuted.²⁵ Furthermore, the *Encyclopedia Talmudit* states that according to many *rishonim*, this specific category of human nature presumptions should not be relied upon when circumstances permit actual investigation of their credibility.²⁶ A thorough investigation of the entire subject matter shows that both the *tav lemeitav* statement and halakhic presumptions in general originate from the tool of *sevara*.²⁷ Thus, the classification of *tav lemeitav* as a *sevara* affords the saying only limited value as evidence. At the same time, as the above discussion demonstrates, even the designation of *tav lemeitav* as a *hazaqah* would not necessarily guarantee its

¹⁸See Elon, *supra*, note 8, at 132-3.

¹⁹The Talmudic Encyclopedia, for instance, lists them in the following manner: 1) A presumption of the continued existence of a once ascertained state of affairs until the contrary is proved. 2) A presumption of the existence of a fixed and accepted custom or of the psychological nature of man and (in our case) of woman. 3) A presumption based on acceptance by society. 4) A presumption that repeating misfortunes are not coincidental. R. M. Berlin and R. S.Y. Zevin eds. *Encyclopedia Talmudit* (Jerusalem 1973) 453; see also *Encyclopedia Judaica* 1521.

²⁰That is, it is never preceded by the term *hazaqah*, e.g. *Hazaqah: tav lemeitav*, in the manner of the presumption of a man's intention to betroth a woman if he has sexual relations with her: *Hazaqah: ein adam oseh be`ilat be`ilat zenut*.

²¹*Encyclopedia Talmudit* 453. Similarly, none of the *teshuvot* surveyed here refers to the *tav lemeitav* presumption “*hazaqah*.” As far as I can tell, it was only R. Joseph Ber Soloveitchik, in his famous address mentioned below (see *infra*, note 28) who treated *tav lemeitav* as an actual *hazaqah*, with all its implications.

²²R. Shlomo ben Adret, *Resp. ha-Rashba, Qiddushin* 13a.

²³Prof. Moshe Zilberg, “*Kakh Darkho shel Talmud*”, (Jerusalem, 1964), p. 113 (Hebrew).

²⁴Such as “*safeq sefeqa*,” “*rov*,” etc.

²⁵For example, the refutation of the presumption *ein adam oseh be`ilat be`ilat zenut* (*supra*, n. 19) in modern times. *Shulhan Arukh, Even ha-Ezer* 149:5

²⁶*Encyclopedia Talmudit* 713.

²⁷I.e., reason as perceived by halakhists. Elon, *supra*, n. 8, at pp. 805, 812; Eliezer Berkovits, *The Halakhah: Its Power and its Role* (Mosad Harav Kook: Jerusalem 1981) 11-33. For a clear reference to *tav lemeitav* as a *sevara*, see, e.g. *Resp. R. Azriel, supra*, n. 15.

superiority in the face of other evidence.²⁸

Having emphasized the flexibility and adaptability of this particular presumption as part of the presumptions applied in the area of divorce law, we can now turn to a deeper examination of the manner in which this presumption was dealt with, and the precedential limits and qualifications that were applied to it, by later halakhic sources. Our appraisal of developments in the area will be significantly helped if we keep in mind the inherent

pliability of this concept, as it emerges from our earlier analysis. A review of these developments reveals how this presumption was perceived; whether it was taken at face value or treated on the basis of further reasoning; and if so, what that reasoning was.

III THE TAV LEMEITAV PRESUMPTION

A. The Bava Qamma Text

My aim in this essay is to provide an overview of the talmudic origin of the presumption and its evolution in the

²⁸ It should be noted that R. Soloveitchik's approach differs widely from the analysis offered here. In a fascinating address, titled "Surrendering To The Almighty" and delivered at a convention of the Rabbinical Council of America in November 1975, R. Soloveitchik considered the Sages' *halakhot* and *hazaqot* and offered the following observations on the *tav lemeitav*.

This has absolutely nothing to do with the social and political status of the woman in antiquity. The *hazaqah* is not based upon sociological factors but on a [verse] in *Bereishit*, "and thy desire shall be to thy husband." It is a **metaphysical curse** rooted in the feminine personality. She suffers incomparably more than the male while in solitude. Solitude to a male is not as horrifying an experience as solitude is to a woman. And this will never change "as the days of heaven upon the earth." It is not a psychological fact; **it is an existential fact**. It is not due to the inferior status of the woman, but to the basic distinction between the female and the male personality... To say that "*Tav lemeitav tan du mitemeitav armelu*" was due to the inferior political or social status of woman at that time is simply misunderstanding the *hazaqah*. No legislation can alleviate the pain of a single woman; no legislation can change this role. She was burdened with it by the Almighty after she committed the first sin.

.... Not only the *halakhot*, but also the *hazaqot* (established presumptions) [our Sages of blessed memory] introduced are indestructible. You must not tamper, not only with the *halakhot*, but even with the *hazaqot*. For the *hazaqot* [the Sages] spoke of rest, not upon transient psychological behavioral patterns, but on **permanent ontological principles rooted in the very depths of the metaphysical human personality**, which is as changeless as the heavens above. (emphases added by R.K.H.)

The address was first printed in *Light Magazine*, and was reprinted in the *Jewish Press* (October 16, 1998, at 32), as part of the *agunah* debate that occupied the pages of the *Jewish Press* and the *Jewish Week* at the time. Apparently, as suggested by Rabbi Emanuel Rackman (at a conference held at Bar-Ilan University on June 20-21, 1999, dedicated to the *agunah* problem, and titled "Marriage, Freedom and Equality: Shall the Three Walk Together?"), R. Soloveitchik directed his address at R. Rackman himself, who by that time had published his theories regarding halakhic development, including his view on the problem of the *agunah* and the possibility of overcoming the *tav lemeitav* presumption (E. Rackman, *One Man's Judaism* (New York: Philosophical Library, 1970), at p.243). Note that R. Soloveitchik's address begins by referring to "a limit [that] has been reached," leading to a "duty to make the following statement." And later, when specifically addressing the *tav lemeitav* presumption, he explains that "that's what I was told about." A reference to this encounter, with a description of R. Rackman's perception of the underlying substantive disagreement between R. Soloveitchik and himself, can be found in a short essay by Rabbi Rackman, "Soloveitchik: On Differing with My Rebbe", *Sh'ma* 15/289, March 8, 1985.

responsa literature, in an attempt to uncover its underlying rationale, both at its inception and through the more recent usage made of it. I do not purport to present a comprehensive survey of all the sources that have addressed this presumption;²⁹ rather, I aim to discern its theoretical and ideological underpinnings and explore future courses, through an analysis of the key sources. Accordingly, and in line with the earlier explanation regarding the "hierarchy" among the five sources where this presumption appears, our new starting point is the text in Bava Qamma, which deals with the legal construction of a claim for invalidation of a purchase-contract on the grounds of *meqah ta'ut* (error in the premise of the transaction).

It is assumed that the satisfaction of sexual needs, whether actual or anticipated, overwhelms any possible objections the woman might have to the relationship.

It should be recalled that the *gemara* there rejects the possibility that a woman whose *yavam* turns out to be a leper (*muqeh shehin*) may rely upon the *meqah ta'ut* construction to claim that her marriage is invalidated *ab initio*, and this rejection is based on the *tav lemeitav* presumption. Rashi explains that the woman's preference for marriage is inferred with regard to her dead husband, whom she

married even though his brother was a leper. The woman's presumed preference for marriage led her to take this remote risk: she willingly become betrothed to her first (now deceased) husband, and this precludes her contention of *meqah ta'ut*. Tosafot stresses that the issue arises only with respect to a betrothed, but as yet unmarried woman, a *me'oreset*. The reason is that, had she already been married, she clearly could not have even tried to make that claim. Consequently, according to Tosafot, this *gemara* teaches that even a betrothed-but-as-yet-unmarried woman who loses her husband-to-be cannot claim *meqah ta'ut* to avoid levirate involvement with the deceased's leprous brother.³⁰ This is a significant expansion compared to Rashi's understanding.³¹

At this stage, the reasoning behind both explanations of the *gemara*—Rashi's and Tosafot's—is unclear, as is the rationale they see underlying the *gemara's* use of the *tav lemeitav* presumption. Also unclear is the object of the woman's perpetual preference for marriage: Is it the (dead) husband, marriage to whom supposedly compensates for any future harsh circumstances, or is it the *yavam*, whose faults are perceived as dismissed in light of the woman's immutable inclination towards matrimony? The latter ambiguity, which some of the later authorities take as the basis for the distinction between Rashi and Tosafot,³² may be quite significant for possible interpretive applications of this statement.³³ All these questions

²⁹For such a survey of all five sources in the *gemara* see Aranoff, *supra*, n. 2.

³⁰The obligation of *yibbum* applies to every woman after betrothal, even if her marriage did not materialize, if her husband or her intended husband died childless. Maimonides, *Mishneh Torah, Hilkhoh Yibbum va-Halizah* 1:1.

³¹This is an expansion, since apparently, according to Rashi, it might still be possible for a *me'oreset* to claim error in betrothal, and thus be free from the obligation of levirate marriage. A supporting source for the understanding that this is an expansion is the responsum of *Havvot Ya'ir*, to be discussed shortly. See also *infra* nn. 32 and 38, which discuss further ways in which *Tosafot* expands Rashi's view.

³²Namely Rashi is understood as assigning the preference to the husband, while *Tosafot* is understood as assigning it to the *yavam*. See *Resp. Hatam Sofer*, *supra*, note 15; R. Isaac Elhanan Spector, *Ein Yizhaq*, Part A, *Even ha-Ezer*, 24.

³³Obviously, if the preference is assigned to the *yavam*, it is much further reaching than if it relates to the husband, since the woman has some control over the selection of the husband, but no control over the possibility of a need for *yibbum*. Thus, applying the statement to the unforeseen and unexpected *yavam* is a much stronger and expansive interpretation than applying it only to the husband, whom the woman supposedly knew and agreed to marry. If this expansive interpretation is adopted, it may actually imply that women are indeed better off being married to literally anyone. For R. Feinstein's clear rejection of this broad interpretation see *infra*, text following n. 45. Note that Rashi and *Tosafot* actually differ on two points, namely, the status of the woman involved (i.e., betrothed or married) and the identity of her marital preference (i.e., husband or *yavam*). *Tosafot's* view is much more expansive than Rashi's, on both issues. The two matters, it should be noted, are not necessarily interconnected, and a broad interpretation on the first point does not require a similarly broad interpretation of the second one, as demonstrated *infra*, end of n.38.

achieve greater prominence in later sources, primarily in the responsa literature.

The responsa literature dealing with such severe defects in marriages and in levirate marriages usually focuses on three typical cases.³⁴ Of these, two are regarded as "classic," or most commonly occurring - one is the case of the impotent husband, the other the case of the apostate *yavam* (*yavam mumar*).

B. Attempts to Locate the Underlying Rationale of the Presumption

A rather short responsum by the *Havvot Ya'ir*³⁵ which discusses whether a woman married to a proven impotent requires a *get* to be free to remarry or can simply claim error in the betrothal, goes to the heart of the reasoning behind the presumption.³⁶ When raising the possibility claiming *qiddushei ta'ut*, the responsum acknowledges that this claim is usually dismissed on the grounds of the *tav lemeitav* presumption. But, the *Havvot Ya'ir* continues, the rationale for the presumption is "*hemdah*" (desire), which does not apply when the man cannot engage in sexual

relations at all:

Although it has been said that a woman is prepared to accept any bodily defects in a man, the reason for that can be explained because of *hemdah*, as is said: "A woman prefers one *qab* [a unit of measure, referring here to wealth] and sexual indulgence (*tiflut*) to nine *qab* and continence (*perishut*)" [*Mishnah Sotah* 3:4]. But this saying would not apply where the man cannot have sexual relations at all.

The *Havvot Ya'ir* clearly singles out sexual relations as the focus and the rationale of the *tav lemeitav* presumption. This is evident not just from the ending of the quoted phrase, but from the choice of words and the quotation which he uses to support his explanation. The central word, *hemdah*, comes from the root h-m-d, which is often used to imply sexual desire, as in "*Lo tahmod eshet re'ekha*" ("Do not covet your fellow's wife"). The quotation itself,³⁷ uses the word *tiflut*, which, when contrasted with *perishut*, clearly implies sexual relations, and has been interpreted as such by *Rashi* and by others.³⁸

³⁴ Namely, the leprous *yavam*, as the example in the *gemara* itself; the *yavam* who converted out of Judaism (*yavam mumar*, *yavam meshumad*); and the impotent husband.

³⁵ R. Ya'ir ben Mosheh Shimshon (Germany, 1638-1702), *Havvot Ya'ir*, 221.

³⁶ There are obviously many other *responsa* that address various aspects of this issue, but since this does not purport to be a comprehensive survey of all the sources that discuss and use the *tav lemeitav* presumption, I have focused on the clearest, most central and more often cited of them. See, e.g., R. Simhah of Speyer as quoted in *Or Zaru'a*, Part A 760-761; R. Jehiel Jacob Weinberg, *Seridei Esh*, 44; *Resp. Hatam Sofer*, *supra*, n. 13; R. Jacob ben Joseph Reischer, *Shevut Ya'akov*, Part A 101; R. Isaac Jacob Weiss, *Minhat Yizhaq*, Part 7, 122. For a comprehensive survey of all sources dealing with this construction see Aviad Hacohen, *supra*, n. 2.

³⁷ The translation is from A. Cohen (trans.), *Hebrew-English Edition of the Babylonian Talmud: Sotah* (London: Soncino, 1985), p. 20a.

Returning to the responsum, the centrality of the sexual relations factor becomes apparent through its role as a distinguishing factor in various circumstances that are discussed. In this particular case, the *Havvot Ya'ir's* interim conclusion is that since no sexual relations are possible in circumstances where the husband is impotent, the *tav lemeitav* presumption does not apply, and, therefore, *meqah ta'ut* can be asserted by the woman.³⁹ His final conclusion is the same, but only "in theory" (*la-halakhah*), and not "in practice" (*le-ma'aseh*).⁴⁰

Notwithstanding that reservation, the analysis offered in

this responsum was adopted by later sources, including Rabbi Isaac Elhanan Spector and Rabbi Moshe Feinstein, whose responsa are particularly significant for the purposes of this essay.⁴¹ Both accept the *Havvot Ya'ir's* reasoning⁴² and maintain that marriage to an impotent is indeed void, notwithstanding the *Havvot Ya'ir's* reservation and the objections posed by other authorities.⁴³

R. Spector's responsum involves the "multi-faceted" situation of an impotent husband and a brother who has disappeared, and will be discussed later. Rabbi Feinstein's responsum only involves an impotent husband, and it is

³⁸ For a fascinating account of the different versions and interpretations of the term *tiflut* in this sentence (which, incidentally, comes right after R. Eliezer's infamous statement: "*Kol ha-melammed et bitto Torah ke-ilu lomdah tiflut*" ("One who teaches his daughter Torah is as if he teaches her *tiflut*") and for Rashi's role in them, see Tal Ilan, "Rashi's Influence on the Scholarly Perception of Gender in the Babylonian Talmud" delivered at conference in Duisburg, Germany 1999 [on file with the author].

³⁹ The responsum goes on to reconcile this conclusion with *Tosafot's* interpretation. At first, they seem to contradict each other, since according to *Tosafot*, the woman to whom the presumption is attributed has only been engaged to the man who died. Consequently, the *tav lemeitav* presumption applies even where no sexual relations were involved. In the *Havvot Ya'ir's* words: "This implies that even in the absence of desire for sexual relations, she would prefer it." The *Havvot Ya'ir* reconciles this in two ways. The first one focuses on the legal structure of the *meqah ta'ut* assertion. It explains that the circumstances that form the alleged error in *Tosafot's* case were not present at the time of the betrothal, but were only formed later. Accordingly, no legal error can be claimed. In other words, there is no need to use the *tav lemeitav* presumption to overcome the error allegation, since no ground for this allegation existed in the first place. The second method simply confronts the factual basis for the assertion, and contends that the presumption may well apply to an engaged woman just as it applies to an already married one, since the engaged woman had naturally expected to get married and "have sexual relations" with the man who became betrothed to her. Once again, the sexual relations motif is crucial. Note that this second explanation in the *Havvot Ya'ir* brings *Tosafot's* understanding of the situation very close to Rashi's reading and logic: In both circumstances, whether the situation involves an already married woman (Rashi) or a not-yet-married woman (*Tosafot*), the object of the woman's marital preference is the husband. In either case, the promise of sexual relations with him, and not with the *yavam*, is what compensates for the harsh circumstances involving the *yavam*. This conclusion obviously contradicts *Tosafot's* original perception of the object's identity as the *yavam*, as explained *supra*, n. 32 and accompanying text.

⁴⁰ It should be noted that the "theoretical" result seems to contradict Maimonides' ruling that an impotent's betrothal is valid. The *Havvot Ya'ir* reconciles this by saying that Maimonides' ruling applies where the woman had known of the defect beforehand.

⁴¹ R. Moshe Feinstein, *Iggerot Mosheh, Even ha-Ezer*, 79; *Resp. Ein Yizhaq, supra*, n. 31.

⁴² R. Feinstein relies on the reasoning only indirectly, through discussion of and reliance on R. Spector's responsum.

⁴³ See, e.g., R. Jehiel Jacob Weinberg, *Seridei Esh*, 44; *Resp. Hatam Sofer, supra*, n. 13; R. Jacob ben Joseph Reischer, *Shevut Ya'aqov*, Part A 101.

the most significant of R. Feinstein's responsa on the issue of voiding a marriage on the grounds of error.⁴⁴ On the surface, the analysis is straightforward: "Since it is clear that he (the husband) is not fit for sexual relations, which form the centerpiece of marriage and are the (only) reason for women to marry... therefore it is clear that if that is the case, it is a 'major defect' (*mum gadol*) ... and calls for applying *meqah ta'ut* and for voiding the *qid-dushin*."⁴⁵ Following this straightforward statement, Rabbi Feinstein turns to the major obstacle to the application of the law of error in this context, namely, the *tav lemeitav* presumption.

The description of women's marital preference is not a male construction of women, but an articulation of women's authentic views and aspirations—or if one prefers, of women's own voice.

His once again very simple analysis (before he proceeds to distinguish it from *prima facie* contradictory rulings), is that the presumption applies only in those circumstances that are presented in the *Bava Qamma* text, namely, where the husband is faultless and only the *yavam* is flawed.

Hence, if the husband himself is flawed, the presumption does not apply. In reaching this conclusion, Rabbi Feinstein clearly embraces Rashi's interpretation, which stresses the flawlessness of the husband, and thus obviously rejects the applicability of the presumption to the state of the *yavam*, or to anyone else in that condition.⁴⁶ It is noteworthy that this reasoning entails a clear rejection of *Tosafot's* broader interpretation, which holds the presumption to be relevant to the *yavam*, notwithstanding (and perhaps even due to) his defects.

As already mentioned, Rabbi Spector had preceded Rabbi Feinstein in adopting the *Havvot Ya'ir's* conclusion and in offering a direct and simple distinction between the case discussed in *Bava Qamma*, where the *yavam* is flawed, and the cases at hand where the husbands are flawed.⁴⁷ Rabbi Spector's responsum indeed deals not only with an impotent husband, but also with an absent brother-in-law, another common situation considered by the responsa literature in this context.⁴⁸ Due to the complexity of these circumstances, which involve two separate grounds for inspection, the responsum proceeds along two parallel lines of reasoning, which sometimes overlap. Both lines of reasoning seek to base a case for voiding the marriage on grounds of error, and both confront the obstacle posed by the *tav lemeitav* presumption. The first one does so from the perspective of the husband, while the second

⁴⁴ See for example R. Feinstein, *Iggerot Mosheh, Even ha-Ezer*, 80, which clearly relies on the preceding responsum.

⁴⁵ *Iggerot Mosheh* 79, *supra*, n. 40, anaf A.

⁴⁶ "As Resh Laqish stated, 'It is better to live as a couple,' which Rashi explains to mean that she would certainly prefer to marry the first one, being that he is healthy, even with the possibility that, should he die, she would be required to marry his brother. What may be concluded is that, where the *yavam* is a leper, there is not even the consideration of 'any kind of husband'; on the contrary, we can conclude that she would prefer to marry the healthy one, and not be concerned over the possibility that he might die childless and that she would be subject to the leprous *yavam*, since this is certainly no different than the case of 'any kind of husband,' where it is clear that she prefers marriage. If so, this demonstrates that, where the groom is the leper, the principle of 'It is better to live as a couple' does not apply, and since she was unaware of this fact, this constitutes *meqah ta'ut*..."

⁴⁷ *Ein Yizhaq, supra*, n. 31, at par. 41.

⁴⁸ The case involved a woman who was the third wife of the deceased, and who married him in ignorance of his total impotence. Her request for a *get* was refused by the deceased husband, claiming that according to an agreement they had, she was obligated to stay with him six years before he would grant the *get*, unless they had a child before then. When the six year period was almost over, the husband died, without first divorcing her. Only four years after their marriage had the woman learned of her husband having had a brother, who had been deported to Siberia twenty years prior to their marriage, and whose whereabouts were completely unknown to anyone, including to his *agunah* wife and their children. The question presented to Rabbi Spector was whether the woman could be permitted to be remarried without first going through the process of *halizah* from the missing brother-in-law.

one refers to the *yavam* as the object of the presumption. Rabbi Spector's final conclusion, which permits the widow to be remarried without *halizah* from her brother-in-law, is based on uniting the two rationales. The central point of the rationale that discusses the husband has already been mentioned; its more far-reaching implications will be discussed below.

In the context of voiding marriages on the grounds of error, it clearly calls for a sociological assessment of what is expected by men and women with regard to their hypothetical future spouses.

The rationale that deals with the missing brother-in-law is no less interesting. Rabbi Spector draws an analogy to the case of the *yavam meshumad*, the apostate brother-in-law, which constitutes the other "classical" case considered in the responsa literature. These circumstances have

indeed often been discussed in the literature, but with a much lower degree of consensus than in the case of the impotent husband. In fact, only one early source has openly offered a supportive explanation for an earlier text of the *ge'onim*, which inexplicably stated that "a woman who has become subject to an apostate *yavam* leaves without *halizah*." The supporting explanation is found in Mordekhai, citing "Ram" (see footnote for his identity), who relied on the *Bava Qamma* text.⁴⁹ Ram stated that a woman can never be presumed to desire levirate marriage to an apostate, since he would turn her away as well and force himself upon her even in times of impurity. Nevertheless, Ram affirmed that notwithstanding this theoretical analysis, he refrained from actually applying it when the opportunity arose, since Rashi had ruled otherwise. Indeed, most later sources rejected Ram's analysis, to the point that R. Feinstein could claim "...since we do not rely on them [the *ge'onim*] at all."⁵⁰

A thorough examination of various sources that attempted to understand Ram on the one hand and Rashi on the

⁴⁹ Mordekhai, end of *Ha-Holez*, 29: "There is a statement in the responsa of the *ge'onim*, that a woman who is subject to an apostate *yavam* is exempt from *halizah* and from *yibbum*, where there is no other *yavam* but he, but they brought no proof for their statement. However, Rashi wrote in a certain responsum that we do not rely on this statement at all, since, even though he has sinned, he still remains a Jew (although not for all purposes): if he betroths, the betrothal is binding, and he performs *halizah* and not *yibbum*. Now, Maharam [R. Me'ir of Rothenburg] offers a proof for the position of the *ge'onim*, from the question raised in *Ha-Gozel*. But where a woman's *yavam* is a leper, should she not be free to marry without *halizah*, for it was not with this intention that she married the first husband? But this argument is refuted there: She is certainly more willing to accept it, since it is better to live as two, than to live as a widow; that is, she would prefer being married to any sort of husband. However, in the case of an apostate, we cannot argue thus, since it is clear that she does not prefer to [to be married to] this *yavam*, since he will attempt to convert her, or force himself upon her when she is *niddah*, and so it is certainly clear that she does not wish to be married to him, and so she is free to marry even without *halizah*, in the absence of another *yavam*. On this, Maharam wrote: Even though I have brought arguments in support of the *ge'onim*, I am not comfortable with going against the statement of Rashi when such a case comes before me." Mordekhai (Germany, killed in 1310 during a pogrom), was a student of Maharam of Rothenburg. And the reference in his commentary seems to be to *Resp. Maharam of Rothenburg* Part 4, 564. Later sources that quote Mordekhai mention the name Rabbi Meir (instead of "Ram"); see, e.g., *Beit Yosef to Shulhan Arukh, Even ha-Ezer* 157.

⁵⁰ R. Moses Feinstein, *Iggerot Mosheh, Even ha-Ezer*, 83 (beginning of the third paragraph); the authorities cited *supra*, n. 43.

other reveals once again the predominance of the sexual relations theme underlying all the rationales offered here. Thus, Ram's position is understood as implying that no sexual relations can take place between the woman and the apostate brother-in-law (whether her resistance stems from purely religious reasons, or from the hateful feelings she is bound to have towards him on account of his apostasy);⁵¹ while 's position is understood to assume that some women might nevertheless prefer their "bodily comfort" and engage in sexual relations with the apostate brother-in-law.⁵² Rabbi Spector similarly understands that Ram's position assumes the impossibility of sexual relations between the women and the *yavam*, thus rebutting the *tav lemeitav* presumption and consequently permitting the woman's remarriage without *halizah*. Although he is well aware that Ram's position was not accepted by most authorities, he nevertheless adopts it as a possibility ("*sefeq sefeqa le-gula*"), and along the same line emphasizes the impossibility of sexual relations between

the woman and the missing brother-in-law in the case at hand.⁵³

C. Suggestions of a Traditional Rationale

By now the traditional rationale for the *tav lemeitav* presumption is clear. All the responsa surveyed so far reflect a unanimous conception of this presumption, which relies on the woman's sexual needs and desires. It is assumed that the satisfaction of these needs, whether actual or even anticipated, overwhelms any possible objections the woman might have to this relationship. Some feminists have viewed this as an extreme and offensive portrayal of women, in line with many other similar descriptions in halakhic sources.⁵⁴ But a deeper reflection reminds us that marriage was the only state within which women could legitimately engage in sexual relations. Accordingly, the traditional rationale could perhaps even be viewed as progressive and empathic towards women.

⁵¹ See, e.g., *Hatam Sofer*, *supra*, n. 13; *Ein Yizhaq*. *Hatam Sofer's* analysis is particularly interesting in this respect. He tries to distinguish between the leper brother-in-law and the apostate brother-in-law in terms of sexual relations. In other words, he seeks to learn why the case of the apostate is worse than that of the leper, so that the former precludes claiming the *tav lemeitav* presumption while the latter does not. His rather troublesome conclusion is that although in principle the woman and the leper brother-in-law will not be able to marry [see *Shulhan Arukh*, *Even ha-Ezer* 154:6], the reason offered there is "*mipenei she-hi memiqato*"; namely, that she (i.e., intercourse with her) will enervate him (see *Jastrow Dictionary*, *mqq*), he will still be permitted to have intercourse with her once, and then they will be able to live together under supervision. In other words, the sexual relations element is partially fulfilled in this case, thus making it a more bearable situation for the woman who seeks sexual relations, at least in the view of some of the early authorities, as understood by *Hatam Sofer*.

⁵² See, e.g. R. David Ha-Kohen (16th century, Italy and Corfu) *Resp. Ha-Radakh*, sec. 9: "However, Rashi holds that a woman views an apostate *yavam* and a leprous *yavam* in the same way, even though, in the case of an apostate *yavam*, he will cause her to transgress in many areas, nonetheless she will have sexual satisfaction from him, and she would prefer this, even at the expense of transgressing Torah prohibitions, as we have shown, and a woman prefers one *qab* and sexual indulgence, etc., while from a leper she will have no sexual satisfaction..." Note the quoted expression, "a woman prefers one *qab* and sexual indulgence," explained *supra*, n. 37 and accompanying text.

⁵³ The impossibility in that case derived not only from the fact that the brother-in-law had disappeared, but also from a normative cause, which centered on the husband's impotence, and which made the validity of his marriage questionable. These doubts could possibly affect a ruling that would prohibit the levirate marriage altogether, leading, once again, to the impossibility of future sexual relations between them.

⁵⁴ See, e.g., Judith Hauptman, *Rereading the Rabbis* (Oxford: Westview Press 1998), Chapter 2 ("Relations Between the Sexes"). Hauptman there offers a different interpretation of the rabbinical perception of gender differences regarding sexual relations and of women's sexuality, maintaining that it is the "men [who] recognized that their own sexual nature makes social interchange with women impossible" (*ibid.* at 30). For others who hold the contrary position, namely, that the rabbis perceived women as incapable of restraining their sexual desires etc., see *id.* at 30-31, nn. 1-5.

IV GEMARA SOURCES REVISITED

A. Rationale Offered in the *Gemara*

Whether perceiving the *tav lemeitav* presumption as offensive or as empathic, it would be interesting to return to the other places in the *gemara* where it is mentioned, in order to determine whether the same rationale, derived from the *responsa* literature and based upon the *Bava Qamma* text, applies in every case where the presumption appears or is used. This understanding of the rationale underlying the presumption is certainly supported by the *gemara* in one of the other sources that cite the *tav lemeitav* presumption. In discussing another rule in *Yevamot* 118b, the *gemara* questions the validity of a *get* granted by the husband to his wife in her absence on the ground of quarrels within the marriage. The *gemara* debates whether the *get* is perceived as a privilege for the wife, or, whether, notwithstanding the quarrel, she still prefers *niha de-gufa* ("comfort of the body"). This expression, which at first sight could be taken to refer to sustenance and economic considerations, is in fact a euphemism for sexual relations.⁵⁵ An opposite expression, "*za'ara de-gufa*" ("anguish of the body"), is used by Rashi elsewhere to describe the absence of sexual relations. This interpretation, together with the discussions in the various *responsa* mentioned above, clearly demonstrate the underlying consideration of women's sexual needs, and the perception of women's sexuality, as the key factors in the traditional construction of women by men, in relation to men.

Supportive as this text may be, much stronger substantiation is found in a fascinating, yet straightforward, explanation offered by the *gemara* for this very presumption, where the latter is presented as one of four distinct assertions, each of which expresses the uniform idea of women's "absolute marital preference." It is found in two of the five appearances of the presumption in the

gemara.⁵⁶ In all five places, the actual saying is attributed to Resh Laqish, but in *Ketubbot* 75a and in *Yevamot* 118b, the saying is revealed as part of a much larger manifesto consisting of four different statements, each of which is attributed to a different sage, and all of which together constitute a comprehensive portrayal of women's uncompromising marital bias:

Resh Laqish stated: It is better to live as two than to dwell in widowhood. Abaye said: Even if her husband is comparable to an ant, her seat is placed among the great. R. Papa said: Though her husband be a carder [a trade regarded as demeaning], she calls him to the threshold and sits down (at his side). R. Ashi said: Even if her husband is only a cabbage seller, she requires no lentils for her pot [and is satisfied simply with being married].

The bottom-line comes at the end of this manifesto, in the form of an ultimate explanation that the *tanna* offers for all these sayings. The *tanna* asserts that all married women may engage in extra-marital sexual relations without fear of reprisal, since they can always attribute any resulting child to their husbands. Hence the great advantage of married women, which justifies the absolute marital preference expressed in the four sayings:

A *tanna* taught: But all these women play the harlot and attribute the consequences to their husbands.

A review of the commentators reveals a cautious (and somewhat indecisive) attempt to narrow the offensive generalization implied by the *tanna's* explanatory assertion. Thus, Rashi suggests that this applies only to those women whose husbands are lowly but who nonetheless express fondness for them. Similarly R. Adin Steinsaltz,

⁵⁵ Rashi on *Qiddushin* 19b, s.v. "*b'devar shebemammon*": "Regular sexual relations, [the absence of which] is an issue of anguish of the body, is not subject to her waiver". See also *Iggerot Mosheh, Even ha-Ezer* A 139, where Rabbi Feinstein discusses this *gemara* and explains that the expression "bodily comfort" refers to sexual relations, and not to alimony and maintenance; see also the quotation from Radakh, *supra*, n. 51.

⁵⁶ See *supra*, nn. 12-14 and accompanying text.

basing himself on the *ge'onim*, explains that only some women like to engage in extra-marital relations.⁵⁷ Either way, the underlying rationale for women's alleged marital preference, as offered explicitly by the *gemara*, also revolves around sexual relations and women's uncontrollable sexual desires, just like the fundamental theme running through the responsa surveyed above. It is only the direction pursued by this central element that differs to some extent.

B. Investigating the Sources of the *Gemara's* Expressions

The reconsideration of the *gemara* sources in the preceding section referred to the rationale and the ideology behind the presumption. We shall now turn to the question of the actual source of the presumption, as a form of expression in itself. Earlier in this essay I suggested that an investigation into the *tav lemeitav* presumption's origins might reveal an unexpected affirmation of the interpretive method that calls for adaptation and incorporation of contemporary social conventions. This fascinating development is found in the commentators' treatment of all four sayings in *Ketubbot* 75a and in *Yevamot* 118b as a whole. It should be recalled that the *gemara's* own account appears to be quite clear: four different sages had made four different assertions regarding women's preference for marriage. Yet a quick glance at the commentators indicates that the matter is not as simple as it appears. What is initially striking is Rashi, who remarks in relation to the *gemara's* attribution of the *tav lemeitav* presumption to Resh Laqish, that this is a popular aphorism that **women say**.⁵⁸ In other words, Rashi rejects the simple meaning of the *gemara*, namely, that it was Resh Laqish (and the three other sages) who made

those statements about the women. Instead, we are now to understand that they simply reported those sayings in the name of the women themselves.⁵⁹

Rabbi Feinstein apparently perceives the gemara as reflecting pervasive social norms, and not as constructing them.

This is a significant modification. It may mean that the consequential description of women's marital preference is not a male construction of women, but rather an articulation of women's authentic views and aspirations; or if one prefers, of **women's own voice**. Still, we have to bear in mind that even this intimation of what is purported to be women's own voice is reported to us by men. We have no way of knowing whether these were in fact common expressions uttered by women or not. But even so, it is still remarkable that Rashi and others sought to create the impression—whether well founded or groundless—that the *gemara* was here actually incorporating women's voices, and not just assuming them. It is rather far-fetched, however, to hypothesize that Rashi was pursuing a deliberate agenda. What, then, was the origin of this modification?

The answer is found in an interesting collection of various sources from the period of the *ge'onim*.⁶⁰ In a fascinating commentary, *Ozar ha-Ge'onim*, we are told that all these sayings (including Resh Laqish's *tav lemeitav* presumption) are aphorisms that were widespread among all people (not just women!) in Babylonia.

⁵⁷ See Rashi to *Ketubbot* 75a, s.v. *Ve-khullan mezannot ve-tolot be-ba`aleihen*, Steinsaltz to both sources.

⁵⁸ See Rashi to *Ketubbot* 75a, s.v. *Tan du*, and to *Qiddushin* 41a, s.v. *De-amar Resh Laqish*, see also Steinsaltz to all the sources, who explains that both Resh Laqish and the other sages only quoted aphorisms used by women.

⁵⁹ Note that it is not quite clear whether he says that Resh Laqish reports the aphorism common among the women (in other words, he says that women say), or that Resh Laqish reports a general aphorism that states that women have that saying among themselves (in other words, he says that there is a saying that women say).

⁶⁰ B. Levin, ed., *Ozar ha-Ge'onim* (Haifa, 1928), *Ketubbot* 74-75, page 223.

Their purpose, so we are told, is to let it be known that a woman wants a husband, whether or not he be prominent; and that she desires to be married more than the man desires to marry.

The *Ozar ha-Ge'onim* proceeds to translate and explain all the four aphorisms, and concludes with the *tanna's* inference discussed above. Although Rashi does not refer to the geonic source, it seems to be the basis for his commentary. Yet there is significant difference between the two: the source included in *Ozar Ha-Ge'onim* says these aphorisms are used by all, meaning not only by women, while Rashi attributes them to women alone.⁶¹ I do not think this variation is inadvertent.

C. Intermediate Summary

Let us try to summarize our findings so far about the perception of the *tav lemeitav* presumption and its scope. Both the *gemara* sources and the responsa literature seem to ascribe exclusive significance to the sexual element and see this presumption as expressing women's irrepressible sexual urges. However, the responsa deviate somewhat from the path proposed in the earlier *gemara* source. The *gemara* (in the name of the *tanna*) sees women's desire to engage in illicit extra-marital sexual relations as a key factor in the construction of the presumption, whereas the later responsa sources are satisfied with focusing on women's desire for sexual relations within marriage as the major element in the construction of the presumption. It is important to bear this difference in mind, for it shows some degree of change and development. The perception of the need for sexual relations as the guiding principle in applying the presumption has led to some interesting conclusions in the typical cases dealt with by the responsa literature. Thus, a woman whose *yavam* turns out to be a leper cannot claim the marriage to be void on the grounds of error, since this claim is obstructed by the *tav lemeitav* presumption. On the other hand, in circumstances where the husband himself turns out to be defec-

tive, classically because of impotence, the marriage can be voided on the grounds of error, and the *tav lemeitav* presumption does not apply. The case of an apostate *yavam* is less clear, and most authorities seem to reject the attempt to distinguish this case from the leper *yavam*.

As we saw in the last section, there may be a trace of the influence of accepted social norms built into the presumption. Still, it may still be asserted that the basis for the construction and for the application of the *tav lemeitav* presumption, as it appears from the research thus far, seems very deterministic. Whether the "sexuality based" rationale relies on prejudiced perceptions of women and of women's sexuality, or is derived from women's purported authentic perceptions of themselves, it appears rather inflexible and deterministic, quite remote from what some might see as the simple meaning of the presumption. It seems to me that a plain, unmediated reading of the *tav lemeitav* text, uninformed by all the secondary sources, would suggest a totally different understanding. Such a reading would perceive the presumption as reflecting common-sense wisdom (which is obviously contingent upon culture, time and place) concerning women's and men's interests and social conventions with regard to the institution of marriage, within the matrix of which the sexual element is but one factor.⁶² Thus, the presumption could be viewed as expressing the understanding of people's (and not just women's) general need for companionship; of women's more particular need for economic support; and of women's stronger need for the social benefits that are associated with marriage, such as the legitimization of off-spring, the sense of security, and higher social status in general. Furthermore, all these considerations that are supposedly reflected in the presumption are naturally a result of specific societal mores in a specific time and place, and are therefore subject to change. Such a reading is obviously critical and historical, and entails an understanding of *halakhah* as a dynamic and evolutionary process.

⁶¹ To be more precise, Rashi discusses specifically only the *tav lemeitav* saying reported by Resh Laqish. But it is fair to assume, as apparently Steinsaltz does, that all four sayings have a common source.

⁶² See, e.g., *supra*, n. 53, for an example of such a culturally and historically based reading.

V. AN ALTERNATIVE CONTEMPORARY RATIONALE

A. The Challenge

Is there a place for this innocent and uninformed understanding of the presumption within the halakhic process? I believe there is. This is the time to turn to the more recent halakhic authorities mentioned in the earlier discussion,⁶³ Rabbi Spector and Rabbi Feinstein, and explore their unique contribution to the development of this presumption, thereby making it potentially liberating instead of oppressive.⁶⁴ One factor to be borne in mind when examining their responsa in the light of the earlier sources is the characterization of this presumption as a *sevara*, and the particular nature of conjectures within the halakhic framework, as discussed above. These positions are hardly present within the earlier responsa, but are of prime importance for understanding those of Rabbi Spector and Rabbi Feinstein. What distinguishes them, apart from the unusually liberal outcomes of their rulings, are their extensive references to women's attitudes towards marriage in general, and towards particular circumstances relevant to their cases, all the while bearing in mind contemporary reality, and their refusal to focus on the sexual-relations motif as the single most important issue in the cases. In what follows, I elaborate on these points and demonstrate the valuable potential inherent in

the approach adopted by these rabbis.

B. Rabbi Spector's Responsum

Rabbi Spector's lengthy responsum in *Ein Yizhaq* 24⁶⁵ has already been described,⁶⁶ and its complex structure has been explained. It should be recalled that he bases his liberal conclusion about voiding the marriage⁶⁷ on grounds of error on two parallel constructs, one that relies on the disappearance of the brother-in-law, and the other on the impotence of the deceased husband.⁶⁸

Although the former ground has probably achieved greater halakhic consensus in its approval and reliance on *Ram's* reasoning in the *Mordekhai*, the latter ground is the more significant for our purposes here. Rabbi Spector begins the latter argument by establishing the centrality of sexual relations to the marital bond, and he cites Rashba's famous declaration that "everyone knows why the bride enters the *huppah*, and she marries on that basis."⁶⁹ This statement served as a basis for establishing the husband's impotence as grounds for compelling him to divorce. In other words, Rashba himself had formulated women's purpose in marriage, and turned it into an implied condition in the marital contract, so that upon failure to fulfill it, the husband could actually be forced to divorce his wife.⁷⁰

⁶³ See *supra*, nn. 40-52 and accompanying text.

⁶⁴ As suggested in part C to the Introduction above.

⁶⁵ *Even ha-Ezer*, Part A, 24 (hereafter, the *Ein Yizhaq* responsum).

⁶⁶ See *supra*, n. 47.

⁶⁷ In his words: *ha-qiddushin beteilin*.

⁶⁸ See the summary of both grounds at the *Ein Yizhaq* responsum, par. 48. There is a third (or rather, a first) ground that relates to the husband's impotence, but which is not relevant to our subject here. The analysis of voiding the marriage on the grounds of the husband's impotence is mainly developed there in part 6, starting at par. 38.

⁶⁹ *Resp. Ha-Rashba*, 1255: "Furthermore, it appears to me that everyone knows why the bride enters the *huppah*, and she marries on that basis; therefore, even if she makes the unsupported claim that, since he is impotent, he should divorce her, we accede to her claim."

⁷⁰ This analysis should certainly not be confused with other conclusions drawn from what seems to be a similar understanding of women's purpose in marriage, as we have seen above. There is a major difference between those lines of thinking. Rashba takes the centrality of sexual relations to explain the woman's purpose in a particular marriage, to a particular man, while the traditional understanding of the *tav lemeitav* presumption that we examined above takes that centrality to imply women's perpetual aspiration to get married to any man, under any circumstances. The former analysis is liberating for women; the latter is oppressive.

Rabbi Spector follows this reasoning, and relies on the fact that such a condition provides a grounds for compelling divorce to conclude that no woman would ever agree to relinquish the sexual relations factor in the marriage.⁷¹

The more progressive step comes afterwards, when Rabbi Spector uses the expression "*heskem benei ha-medinah*" to describe the status of the sexual relations element within the marital contract. Bringing this element within the rule of a general and ordinary "people's agreement" serves as the leverage for incorporating contemporary perceptions and changing social conventions into the application of these laws. Rabbi Spector actually compares the defect of impotence to a defect in any ordinary agreement. The references he cites for this elaboration are the general laws of error and fraud in *Shulhan Arukh, Hoshen Mishpat*.⁷² He specifically refers to the rule that any defect in merchandise that is generally accepted as justifying cancellation of the sale may be relied on by the purchaser to cancel the sale even if it is not specified as a

condition in the contract. The premise is that any negotiation is carried out according to the customs of the land. The implications of this rule in the context of marriage, as suggested by Rabbi Spector's reference, are obviously quite far-reaching. In the particular context of voiding marriages on the grounds of error, it clearly calls for a sociological assessment of what is and what is not accepted by men and women with regard to their hypothetical future spouses. Certainly, Rabbi Spector had prominent authority upon whom to rely for this expansion. R. Elijah of Vilna's (the Vilna Ga'on's) commentary to the cited section of the *Shulhan Arukh* contains numerous such applications of ordinary commercial laws to the special marital contract.⁷³ The concept of the "ordinary agreement" is particularly potent, as it symbolizes the ultimate flexibility and adaptability of the legal structure. The choice of this analogy corresponds well with the simple, commonsense understanding of the *tav lemeitav* presumption suggested above. Once again, the liberating potential of the presumption becomes manifest.

⁷¹ More specifically, he explains that had there been even a remote possibility that some women would agree to relinquish sexual relations in marriage, then a man's impotence could not have been made into a grounds for compelling divorce.

⁷² Sec. 232, sub-section 6.

⁷³ *Ibid.*, Vilna Ga'on's commentary, letters 9,11,13.

C Rabbi Feinstein's Responsa

C.1. An Overview

Rabbi Feinstein wrote several responsa on the issue of error as a ground for voiding marriages and on the question of the *tav lemeitav* presumption. The principal one has been noted and described above.⁷⁴ The creativity

and ingenuity that characterizes his work is evident not only in the substantive content of the responsa, to which we shall turn immediately, but also by a consideration of the circumstances and outcomes of various cases. The following table summarizes these variables.

Reason for need for invalidation	Nature of husband's defect as basis for error	Ruling and Reasoning	Handing the <i>tav lemeitav</i> presumption
1) <i>Even ha-Ezer</i> A, 79: Runaway husband, absolute impossibility of obtaining a <i>get</i>	<u>Impotence</u> ; medical evidence that it existed prior to marriage	Error in marriage, wife released	Presumption not applicable when husband is impotent; no woman would accept such a defect.
2) <i>Even ha-Ezer</i> D, 113: Couple separated, likely impossibility of obtaining a <i>get</i> .	<u>Bisexuality/Homosexuality</u> ⁷⁵	If situation is permanent and wife left immediately, then error in marriage and wife released	Presumption was never absolute; women were never willing to marry <i>any</i> man, either in the past, or at present.
3) <i>Even ha-Ezer</i> D, 13: Removing <i>mamzerut</i> from wife's children from second marriage; first husband refused to give a <i>get</i> .	Refusal to have children; forced her to abort; wife left immediately after abortion and sought civil divorce	In addition to other grounds for doubting the marriage, declares error in marriage, stressing the need to release the children.	Not mentioned.
4) <i>Even ha-Ezer</i> C, 46: Husband dead, brother-in-law refuses to release widow.	<u>Insanity</u> ; medical evidence that it existed prior to marriage; wife left immediately upon learning of husband's condition.	Even if husband was sane when he became betrothed to her, declares error in marriage.	Such grave defects constitute error in marriage, even for women to whom the presumption might have applied.
5) <i>Even ha-Ezer</i> A, 80: Absolute impossibility of obtaining a <i>get</i> .	<u>Insanity</u> ; medical evidence that it existed prior to marriage.	Error in marriage, wife released	Marriage is void notwithstanding the presumption.
6) <i>Even ha-Ezer</i> D, 83: Couple civilly divorced; wife not observant.	<u>Apostate</u> ; left Judaism long before marriage; wife left immediately upon learning this.	If wife remarries, her children will not be <i>mamzerim</i> .	Discusses the reason given by the <i>tanna</i> ; concludes that her reactions rebut the presumption.
7) <i>Even ha-Ezer</i> A, 139: Couple civilly divorced, difficulties in arranging for a <i>get</i> .	Not an issue of error in marriage. ⁷⁶	Permits <i>get zikui</i> to the wife.	Discusses the reason given by the <i>tanna</i> ; concludes that the <i>get</i> may be a favor to the wife, notwithstanding the presumption.

⁷⁴ *Supra*, n. 40, and the discussion at p. 11.

⁷⁵ The nature of the man's sexuality in this case is not entirely clear. Rabbi Feinstein describes the man as "*shatuf bemishkav zakhur*", which is the traditional term used to describe homosexual activity, but since the case refers to the wife's reaction after having discovered her husband's tendency, it can be inferred that the man had also engaged in heterosexual relations.

⁷⁶ Although this was not a case of voiding marriage on the grounds of error, I have included it in the table since it contains an important discussion of the presumption, its reasoning and its relevance.

What may readily be seen from the table is the diversity of the questions and circumstances dealt with by Rabbi Feinstein, ranging from the classic case of husband's impotence to contemporary problems such as homosexuality and refusal to procreate. In these cases, Rabbi Feinstein did not refrain from resorting to the useful method of voiding marriages by reason of contractual error, nor did he confine its use to situations where a childless widow had to be released from an uncooperative brother-in-law, or the label of *mamzerut* removed from the children of an undivorced woman, fathered by another man. Rather, he utilized it to alleviate the plight of the "classic" and the "modern-day" *agunot*, i.e. women whose husbands had run away or simply refused to give them a *get*.⁷⁷ Bypassing the actual participation of the husband in the *get* procedure is perceived as more easily effected when the husband is truly gone, and his participation no longer physically possible. Resorting to this process when the husband is alive and capable of participation is perceived as a much more serious and even dangerous step to take, as the risk of a *get me'useh* (a divorce issued under compulsion) is inevitably much higher.

The main message conveyed here is the "common sense" nature of this presumption, and the refusal to clothe it with "existential" attributes.

Recognition of the necessity of this measure, notwithstanding its perils and its deviation from standard rulings, is clearly expressed in the central responsum. One may even receive the impression that the *meqah ta'ut* method is specifically applicable to these very circum-

⁷⁷ The term "modern-day *agunot*" is taken from J. David Bleich, "Modern-Day *Agunot*," 4 *Jewish Law Annual* (1981):167.

⁷⁸ See the A79 responsum, towards the end of *anaf* 5: "And even at a time when Jews had authority, and could compel a man to divorce his wife, sometimes such coercion would not be effective, where he does not give in and say "I so desire," or where they are not in a position to compel him, such as where he ran away and so on. In our times this is even truer, when the Jewish courts have no power to compel him, and it may be inferred that no woman would agree to marry him... And therefore, in our case, where he is impotent, and it has become clear that this was true even prior to the betrothal, and it is impossible to obtain a *get* from him, she should not be left an *agunah*, and should be freed on the basis of *qiddushei ta'ut*."

⁷⁹ Cases 1 and 7 in the table above.

⁸⁰ Cases 6 and 7 in the table above.

⁸¹ See his words, "for it would seem that it offers neither a legal nor a moral statement," quoted *infra*, text accompanying n. 93. Clearly, this approach is an antithesis to Rabbi Soloveitchik's position, as expressed in his address, discussed *supra*, n. 27.

stances of the *agunot* who came before him.⁷⁸ What is more significant for the purpose of this essay is that Rabbi Feinstein did not hesitate to confront the *tav lemeitav* presumption in such varied contexts and apply his own understanding to its rationale and pertinence.

What is also incontrovertible is that the understanding seen in the various responsa is not as uncomplicated as might be expected. In fact, the opposite is true.

There are occasions when Rabbi Feinstein seems to accept the traditional reading and reasoning of the presumption, stressing the preeminence of the sexual relations element,⁷⁹ and there are occasions when he discusses the reason supplied in the *gemara* by the *tanna*, and seems to accept it at face value.⁸⁰ Nevertheless, I believe that there is an overall approach that may be discerned in these seemingly divergent texts. In my view, the main message that is conveyed here is the "common sense" nature of this presumption, and the refusal to clothe it with "existential" attributes.⁸¹ What may seem like an inconsistent approach towards the issue is in fact a combination of several tactics within one overall strategy. The major achievement is in hearing the women, letting them speak for themselves, even if not as comprehensively or as exclusively as we would perhaps like. This is a definite reflection of the "simple," "common sense," understanding of the presumption. The innovation in this strategy is in taking women seriously, or at least more seriously than ever before. The paradox is that this is not a radical approach at all. Its outcome and its future potential may be radical, but the strategy itself is very well grounded in the basics of the subject matter.

The presumption focuses on subjective ambitions, and its primary source is evidently based upon such subjective statements.⁸² Thus, Rabbi Feinstein's (partial) appeal to the women themselves is really a timely anticipated evolution, and not a revolution.

C.2. "Hearing the Women"

"Listening to the women" is reflected in many of Rabbi Feinstein's responsa, surveyed above, and can be seen as a natural extension of his perception of marriage as contract. The principal responsum concerning the impotent husband contains numerous illustrations of this type of appeal to women's conjectured preferences, pivoting on the specific circumstances arising in each of the situations considered.⁸³ Thus, for example, Rabbi Feinstein suggests a "common-sense" distinction between a man whose brother's whereabouts are unknown, and a man who is a leper. Regarding the former, he says, clearly no woman would refrain from marrying him only by reason of the extremely remote possibility of his death before they have children. On the other hand, most women would refrain from marrying the latter, on account of his condition. Similar reasoning is applied throughout the responsum, and the key word that is consistently used is '*mistabber*' - "it is plainly inferred." It is noteworthy that this term has the same root as the word *sevara*, the term that captures the significance of logic and reasoning as independent sources of law in and of themselves.⁸⁴ The recurring use of this term brings us into the arena of reasonableness and sense as governing principles. As already emphasized,

these principles guarantee continuous progress and development by allowing adjustments to differing circumstances. They also allow the recognition of diversity among women. This recognition is reflected in several places in the responsum, where Rabbi Feinstein admits the possibility that no statement is absolute and that there may always be some women whose preferences differ from those he assumes women to hold. Nevertheless, women in this category would constitute such a minority that they would not affect the central conclusion.⁸⁵

An even more innovative form in which resort was made to women's own perceptions is reflected in the responsum concerning the husband who refused to have children.⁸⁶ That responsum demonstrates the important process by which a woman's preferences and attitudes are inferred from her own actions and words, and are never suspected of being insincere. Thus, in that specific case, Rabbi Feinstein attributes great importance both to the fact that the wife had left the home immediately upon learning of her husband's total refusal ever to have children; and to her own testimony saying that had she known of her husband's attitude in advance, she would never have married him.⁸⁷ A similar construction is found in the responsum concerning the husband who converted out of Judaism.⁸⁸ There, too, Rabbi Feinstein accords great weight to the wife leaving him immediately upon learning of his conversion. These facts are sufficient to support the inapplicability of the *tav lemeitav* presumption.

⁸² See the discussion at p. 18.

⁸³ Case 1 in the table above.

⁸⁴ See the discussion at p. 6.

⁸⁵ See, e.g., *id.*, towards the end of part E: "And even if we might say that occasionally some woman might agree to marry, this is certainly an insignificant minority, and for such a case the Sages did not make a [general] ruling that she would need to receive a get."

⁸⁶ Case 3 in the table above.

⁸⁷ Sect. 13 of the facts description, at the opening of Part B and at the closing.

⁸⁸ Case 6 at the table above.

Of course, the liberal approach of "listening to the women" has not been pursued all the way to its conclusion. It may even be argued that Rabbi Feinstein merely perpetuated the self-same process of making assumptions for women, and hence constructing them, for he did not actually conduct interviews or surveys of women's attitudes and preferences.⁸⁹ Nevertheless, as I have demonstrated above, his analysis shows much greater awareness of changing circumstances as factors that may effect shifts in attitudes, and his appeal to women's assumed preferences discloses a much higher degree of adaptability. It certainly does not accept the presumption as immutable.⁹⁰ Furthermore, in directly addressing women's own testimony, and concluding that errors had indeed taken place and that the presumption was inapplicable (or had been rebutted), Rabbi Feinstein clearly incorporated women's own voices into the equation.

Beyond this, the responsum that may be most significant in its rejection of the deterministic approach to the presumption is the one concerning the homosexual husband.⁹¹ It starts with a remarkable comparative sociological analysis of women's perceptions and attitudes towards marriage in past generations and in contemporary times. The analysis comes in response to a question posed to Rabbi Feinstein, in which the questioner apparently suggested that contemporary women are more uncompromising than men about defects in the opposite sex, in contrast to the position in the past. Rabbi Feinstein disagrees, although he admits that the description may make sense. His disagreement stems from reliance on various sources in the *gemara* which show that even in the past the majority of women were not indifferent to whom they married. Interestingly, Rabbi Feinstein apparently perceives the *gemara* as reflecting pervasive social norms, and not as constructing them. Consequently, he can draw on episodes and rulings described in the text in order to learn of those social norms and attitudes. Contemporary norms and

attitudes, on the other hand, are stated independently of any sources. Clear from the whole analysis is an awareness of the changing and evolving nature of social norms, and a refusal to treat the idea expressed in the *tav lemeitav* presumption as absolute and controlling. A final interesting point is that the sociological nature of the analysis comes in response to the challenge posed in the question itself.

C.3. Confronting the *Tanna's* Approach

Supplementing these means of "simplifying," or rather "demystifying," the presumption is the somewhat incoherent analysis of the *tanna's* explanation of the presumption, as offered in the *gemara*. At first sight, this analysis seems incompatible with the progressive, empathic picture described above. In two of the surveyed responsa, Rabbi Feinstein quotes the *tanna's* declaration and then examines its applicability to the cases at hand. He does not challenge its actual truth, nor does he attempt to reduce its offensive implications in relation to women. It appears that he regards the derogatory description of women in the *tanna's* reasoning to be accurate. This is not surprising in the light of the analysis so far. It may be that no prominent halakhic authority is immune from this kind of prejudice against women, which finds its roots in their threatening sexuality and their suspicious character as potential temptresses. Alternatively, as I would like to suggest, the truth may be that we are witnessing here a carefully planned attempt to undermine the power and the magnitude of the presumption.

This can more clearly be seen in the case of the apostate husband.⁹² In the second paragraph of part B of the responsum, after suggesting that an error had occurred in the betrothal, Rabbi Feinstein proceeds to question this analysis by quoting all four of the aphorisms from the *gemara*, including the *tanna's* conclusion.

⁸⁹ Cf. Rabbi Rackman's concrete proposal to actually conduct such a survey, as reported in a 1996 essay in *The Jewish Press*, under the title "A Painful Chapter" (*The Jewish Press*, November 29, 1996, p. 8).

⁹⁰ See *supra*, n. 80.

⁹¹ *Even ha-Ezer* D, 113.

⁹² *Even ha-Ezer* D, 83.

He then elaborates on that conclusion, to make its reasoning totally clear, in the following way:

However, since she desires sexual activity, it may be that she has with whom to have an illicit relationship, but out of embarrassment, she cannot have such a relationship when she does not have a husband, and therefore she agrees to marry any kind of husband whom she could obtain easily, in order to have an illicit relationship with those whom she desires to have relations with.⁹³

This seems like a very harsh and even insulting description of women, and it appears as if Rabbi Feinstein endorses the *tanna's* suggestion. Nevertheless, it should be noted that this elaboration comes after a firm rejection of any normative trait that might otherwise be attributed to the presumption, as indeed actually occurred:

And apparently the *baraita's* intention in this is strange, **for it would seem that it offers neither a legal nor a moral statement**, and thus it is possible that the *baraita* is coming to teach us that this concern is not based on the reason that this is woman's nature, that she does not care to whom she is married, and that she may, in the absence of a suitable partner whom she desires, not wait and simply marry any husband at all...⁹⁴

This is a clear negation of the perception that the presumption embodies inherent qualities of women and that it entails normative ramifications that are applicable to all woman in every case. Rabbi Feinstein denies that the presumption, together with the other aphorisms, are meant to tell us that women's nature is such that they do not really care whom they marry. Only then does he proceed to elaborate, approvingly, on the *tanna's* conclusion. This stratagem enables him to turn to the pre-

sumption disentangled from the former transcendental, existential, and essential connotations with which it was enmeshed. When the presumption no longer holds such imperatives, it may be handled in a much more temperate manner. Regular methods of practical and factual examination may then be applied. This is achieved when a supposedly pragmatic rationale is found for the presumption. Unfortunately, the rationale is indeed offensive, but it does supply the possibility of a pragmatic, matter-of-fact analysis. The point is that by reducing the argument to the level of women's sexual needs and women's sexual way of life, the validity and relevance of the presumption are made much easier to deal with. Indeed, in the particular case being considered, Rabbi Feinstein proceeds to distinguish the presumption—and thereby deny its application—by confining its relevance to those women only who may be assumed to care for their reputations and be concerned about adultery. "Unfortunately", Rabbi Feinstein continues, "in these times when many women do not follow the Torah laws... and those women are not concerned about adultery, *tav lemeitav tan du* should not be said about them."

VI EPILOGUE

The objective of this survey and analysis of Rabbi Spector's and Rabbi Feinstein's responsa has been to demonstrate the dynamic and evolving nature of their understanding of the *tav lemeitav* presumption, in contrast to the views expressed toward it in the past. The liberating potential that lies in their approach is indeed quite far-reaching, as reflected in the operative implications of the constructions offered most clearly in Rabbi Spector's lengthy *responsum*. In short, these implications are that in circumstances establishing grounds for imposing divorce on the husband, the *tav lemeitav* presumption has been overridden, and therefore becomes inapplicable. In other words, a decision that the husband can be forced to divorce also means that *tav lemeitav* cannot be claimed against the wife. Indeed, says

⁹³ *Id.*, part 2.

⁹⁴ *Id.*, *id.* (emphasis added).

Rabbi Spector, all the instances where the *tav lemeitav* presumption was applied dealt with cases where the husband could not have been compelled to divorce.⁹⁵ The implications of this reasoning are broad. Thus, whenever the circumstances are such that the husband can be compelled to give a *get*, on the ground of some fault or defect affecting him, and the wife was not aware of that condition at the time of the betrothal and marriage, those circumstances amount to error, which makes the marriage void.⁹⁶ The *tav lemeitav* presumption cannot prevent the application of the law of error, since it was rebutted through the possibility of compelling the husband to give a *get*. Thus, a direct path to the radical method for easing the plight of the agunah as described above, namely, one that bypasses the need for the man's cooperation in the *get* procedure, has been opened. The great potential of this construction has not escaped proponents of the rights of the *agunah*.⁹⁷

Whether this method will be accepted by other halakhic authorities remains to be seen.

On a more pragmatic level, the interpretive method that is suggested here is compatible with a contractual perception of the marital bond, and the specific topic of the *tav lemeitav* presumption may illustrate the potential for a contractual analysis of halakhic marriage. The contractual potential is at least two-fold: it brings in the flexible-adaptable tool of interpretation with regard to the parties' intentions and undertakings in contracting, and it enables the use of legal tools for the voiding of the bond without requiring the parties' cooperation. These two elements are obviously complementary and they are both demonstrated in this fascinating subject of the *tav lemeitav* presumption: in its sources, its uses throughout the ages, the current controversy surrounding it, and its future potential.

⁹⁵ Par. 41 in the *Ein Yizhaq* responsum.

⁹⁶ Pars. 38-39 and 48 in the *Ein Yizhaq* responsum.

⁹⁷ Evidently, this construction serves as one of the bases for the operation of the special *Bet-Din le-Ba`ayot Agunot* established in New York by Rabbi Rackman, who had in fact espoused reliance on this construction some thirty years ago. See, e.g., Broyde, "*Qiddushei Ta'ut* in Our Time", *supra*, n. 1 at 90, referring to "the establishment of a *bet din* devoted exclusively to freeing *agunot* from the shackles of dead marriages by means of nullifying their marriages *ab initio*"; Riskin "Annulment of *Qiddushin* - A Solution for *Aginut*," *supra*, n. 2, at 195 n. 20.