

RESPONSE TO LISA FISHBAYN JOFFE, “GENDER AND JEWISH LAW”

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ABSTRACT: This piece is a response to the challenging and inspirational paper presented by Dr. Fishbayn Joffe as part of the University of Manchester’s Sherman Conversations on the last fifty years in Jewish Studies and Gender Studies. I engage with Dr. Fishbayn Joffe’s focus on various attempts to resolve the legal problems related to *kiddushin*, and explore these issues through my academic experiences learning and teaching about *kiddushin* with a wide range of scholars and students over the past 25 years. After examining various avenues for legal change, given the inherent inequity of *kiddushin*, I ultimately argue in favour of its abandonment.

Response:

It is an honour to have the opportunity to respond to Lisa Fishbayn Joffe, a scholar and activist who is at the forefront of activism and scholarship in Jewish Studies and Gender Studies. Joffe has rightly highlighted the practical problems stemming from the unilateral character and gendered imbalance inherent in the marital acquisition known as *kiddushin*. Scholars have noted that these difficulties are not limited to the classical problems of unilateral divorce and the *agunah* (a woman trapped in a marriage and unable to obtain a divorce, as a result of a husband who is unable or unwilling to grant the *get* or bill of divorce). Issues of consent and age at marriage are also central problems for *kiddushin* as a ritual of Jewish marriage. Indeed, Rachel Adler’s seminal book, *Engendering Judaism*, which proposed innovations in Jewish marriage rituals, has been followed by Adler’s recent research into problems related to historical marriages of minor girls.¹ She shared with me her finding that rabbis in the medieval period were aware of the problem of marriages of minor girls, but were reluctant to act. One of her examples that left a lasting impression was that of the family of a child bride writing to the rabbi to request that the husband’s family provide a maid because the bride’s hands were too small to make the marital bed.²

In the absence of a rabbinic will towards finding a halakhic way to deal with these problems, other paths are being forged. Lisa Fishbayn Joffe argues that the jurisgenerative role of alternative rituals, such as the *brit ahuvim* suggested by Rachel Adler, is central to this process of change. In my teaching at the Leo Baeck College (London, UK), I have incorporated Tractate Kiddushin as a key element of training for student rabbis to consider the problematic nature of *kiddushin* and *nisuin*, with the goal of raising awareness amongst future religious leaders of the existence and benefit of alternative rituals.

In terms of problematizing *kiddushin*, perhaps one of the most challenging texts I study with rabbinical students is the teaching in the Yerushalmi (Palestinian Talmud) that a father may betroth (*meqaddesh*) his minor daughter to a man through sexual intercourse (*bi’ah*) and can receive a financial remuneration from the groom for offering him this method of *kiddushin*.³ Experiencing this collision between *nomos* and *nomos* often results in grief on the part of the student.⁴ Through this distress, genuine change can develop as former rabbinical students choose to marry their own spouses through alternative rituals and are able to speak to engaged couples about *kiddushin* in a meaningful way.

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¹ Rachel Adler, *Engendering Judaism: An Inclusive Theology and Ethics* (Boston: Beacon Press 1999).

² Personal conversation with Rachel Adler, Leo Baeck College, London, June 23rd, 2014.

³ Palestinian Talmud *Ket.* 4:4 28d and see also BT *Kidd.* 3b Tosafot *s.v. Ha’av zakai b’vito*. Other methods of enacting *kiddushin* are *keseif* (money) and *shetar* (document), see Mishnah *Kidd.* 1:1.

⁴ Lisa Fishbayn Joffe’s work, as well as my own, is inspired in part by that of Robert Cover, including his essay “Foreword: Nomos and Narrative,” *Harvard Law Review* 97/1 (1983): 4-68.

Another element of this process of alternative jurisgenesis that is worthy of exploration is that of the halakhic prenuptial agreement. Lisa Fishbayn Joffe notes that “Jewish feminist legal theorists and activists query whether such remedies can provide widespread relief for this gendered disadvantage.”⁵ In short, Joffe argues that prenups are perceived as a superficial remedy, as they are limited in scope and vulnerable to punitive responses within the religious court (*beit din*) as well as in the private sphere of the family. Furthermore, such prenuptial agreements have no precedential value, are secret rather than public, and the *beit din* itself may be castigated for the use of prenups and *gittin* (divorces), where such prenups are involved, may be called into doubt, resulting in an instability in the woman’s status (i.e. whether the woman is divorced or not). Any resolution of such problems would lie exclusively within the sphere of the religious court. Ultimately, the prenup results in a transfer of power from the woman’s husband to the rabbinical courts, thus still failing to equalize the imbalance in power and legal agency between wife and husband.⁶

In stark contrast to this critique, however, Joffe also makes a compelling argument for the Rabbinical Council of America’s halakhic prenup as an example of successful jurisgenerative change. She writes that, “The effective modelling of new legal norms is perhaps most clear in the campaign to promote the signing of the Rabbinical Council of America (RCA) halakhic prenuptial agreement...”⁷ With respect to its efficaciousness, she notes the features of easy online access, effective lobbying, its presence in the public sphere (with signings at parties and on university campuses) and its inclusion in the marriage festivities. The prenup is required by RCA and also supported by rabbinic authorities, and becomes normative as rabbis require it and couples expect it, and this, in turn, shapes the preferences and expectations of couples, families, communities and rabbis. All of this, Joffe suggests, is part of an emergent theme in the ongoing narrative of Jewish legal meaning, the creation of a renewed *nomos*.

How can we explain this apparent contradiction? Are prenuptial agreements an ineffective and superficial solution, or do they solve the problem? What is the nature and methodology of changes related to *kiddushin* and *agunot*? I would suggest that perhaps, it is not the prenup itself then that has any real effect. It is rather the campaign in the public sphere, the shared adoption of a common understanding by a range of persons – rabbinic, female and male, couple and community – that affects change.

In a similar vein, the work of activists, beyond the scope of prenups, to enlist the assistance of the state and its Law has also been a significant development in finding ways to tackle the problem of the recalcitrant husband and the *agunah*. In Canada, for example, my first study of the problem of the *agunah* was with Professor Norma Baumel Joseph who was instrumental in working towards a Canadian Get law, which ensures that a man can only receive a civil divorce if there is no outstanding religious divorce. Where the rabbinate refuses to create a means towards that way, this law aims to apply some pressure from outside the halakhic system, through an amendment to the Canadian federal divorce law that seeks to enact complex mechanisms, which allow a spouse to present a case for non-compliance.⁸

⁵ Lisa Fishbayn Joffe, presentation paper, 40.

⁶ I would also note that the prenup gives the *beit din* authority to charge \$150 a day to the recalcitrant spouse (necessarily a man). It is unclear whether this is understood as a fine or support payment and, if so, on what basis. This lack of clarity and complexity is reminiscent of the talmudic discussions of the *ketubah* payment (a payment from the husband, received by the wife upon divorce or widowhood), where it is debated whether the *ketubah* payment is a fine, and, if so, for what, or some other form of payment such as a *taqanah* (a rabbinic improvement upon the wife’s biblical situation) or indeed a biblical ordinance (see for example BT *Ket.* 10a). Answering the question of how we might understand the prenup, or the *ketubah*, within its *nomos* is not a simple task. Regardless of how we might interpret and contextualise the RCA prenup, the public website for the prenup notes not only contemporary authorities but medieval precedent for similar stipulations. Will this small way, with some will, lead to the creation of new laws and new norms that further transform Jewish marriage and woman’s personhood? See <http://theprenup.org>. Accessed online on 31/08/17.

⁷ Lisa Fishbayn Joffe presentation paper, 42.

⁸ See Norma Baumel Joseph, “Civil Jurisdiction and Religious Accord: Bruker v. Marcovitz in the Supreme Court of Canada,” *Studies in Religion/Sciences religieuses* 40/3 (2011): 318-336 and Norma Baumel Joseph, “Women’s Rights and Religion: Jewish Style” [forthcoming in Morny Joy, ed., *Explorations in Women, Rights and Religions* (Sheffield: Equinox Publishing Ltd.: Sheffield, 2020). This theory, however, can manifest quite differently in practice, as where there is no will there may not be a way. Norma Baumel Joseph emphasizes that the amendment must be activated by the woman and relies upon the cooperation of the rabbinical courts, with the *beit din* in Montreal proving more engaged with the amendment than the Toronto *beit din*. While Joseph admits that the amendment can be a useful tool, she argues that genuine change can only come through halakhic reform (personal correspondence of May 9, 2019). See also, Lisa Fishbayn Joffe’s excellent description of the complex power negotiation involved in

A significant development in my own thinking about the role of the state in religious matters was inspired by a legal piece by Madhavi Sunder, entitled *Piercing the Veil* when I studied law, religion and public discourse at the University of Toronto with Professor Jennifer Nedelsky.⁹ Sunder critiques the liberal state’s privileging of Orthodox religious bodies and patriarchal interpretive, legal and ritual traditions, which seek to maintain power, control and influence over the so-called private sphere, i.e. woman and family, and argues compellingly for a state that engages with a full range of religious communities and norms. She further argues for a woman’s right to her religion.¹⁰

In a discussion in Professor Nedelsky’s graduate seminar on religion and public discourse I raised the problem of *kiddushin* and its relationship to the state, in particular with respect to the status of the *agunah* and that of *manzerut*.¹¹ I argued that halakhah should be understood as Law with real effects and that the state, amongst others, should be concerned about the women’s and children’s right to religion, to family, to community, to childhood, to consent, and to personhood in view of finding a “way”. I received the following response from some students of the Law: “she should move to Ohio.” This liberal legal notion that halakhah is not Law, and that its effects on culture, persons and lives is not real, or only so real as one’s immediate communal space, that it may be summarily circumvented through moving outside of this space, is a denial of the impact of religious law and culture on individuals, and an abdication of responsibility for a woman’s fate, towards finding a way, whether in Ohio or otherwise.

If the halakhic theorist Haninah ben Menahem is correct that halakhah is governed by “men” rather than by rules, the “men” or “humans” must be a central element in any problem and its resolution.¹² Indeed, my own anecdotal sense is that talmudic discourse often shows more awareness of the imbalance inherent to rabbinic modes of marriage and more willingness on paper to mitigate this imbalance than contemporary rabbinate. The ways then are possible, but “man” declines to take or make them. *Kiddushin* and its attendant problems are such that my own teacher Professor Tirzah Meacham has argued for the abolition of *kiddushin* entirely. Such an effective move, however, is not always well received by academics, nor across the range of movements of Judaism.¹³ Norma Baumel Joseph states the case for internal halakhic change, while acknowledging the toll taken on women’s lives in the meantime, “Personally, I would like to see a new structure that enables either spouse to initiate simpler divorce proceedings. But that will not come in my lifetime and who can wait. We cannot in good conscience ask a woman to put her life on hold. Compassionate and concerned individuals must use whatever means are practicable and available.”¹⁴

The Babylonian Talmud discusses whether a woman may be acquired (in marriage, to be acquired as a slave is a different transaction) through exchange or *khaliḥin*.¹⁵ The Gemara proposes that

the *beit din*’s responses to the Get Law, which she suggests has been increasingly negative and unresponsive, “Negotiating Divorce at the Intersection of Jewish and Civil Law in North America,” in Sylvia Barack Fishman, ed., *Love, Marriage and Jewish Families: Paradoxes of The Gender Revolution*, 1st ed. vol. 1, (Waltham: Brandeis University Press, 2017), especially 251-52 and n. 44 and Fishbayn Joffe, “Gender Multiculturalism and Dialogue: The Case of Jewish Divorce,” *Canadian Journal of Law and Jurisprudence*, 21/1 (2017): 93. This approach of course has no effect on communities in jurisdictions where couples are permitted to divorce through *kiddushin* in the absence of civil marriage, a situation that some activists have argued amounts to the state’s abrogation of its responsibilities to its female citizens.

⁹ Madhavi Sunder, “Piercing the Veil”, *Yale Law Journal* 112 (2003): 1399-1472.

¹⁰ Sunder also cites Robert Cover in relation to her notion that the law impedes the dynamism and diversity that are characteristic of legal communities, and that judges are “jurispathic” rather than “jurisgenerative”, that is they “kill” law, especially law “offered by dissenters”, rather than create it. It may be that rabbinical courts have a tendency to act in the former way privileging the powerful, while others operate in the latter, “Piercing the Veil”: 1466, n. 337, and citing Robert Cover, “The Supreme Court, 1982 Term - Foreword: Nomos and Narrative,” *Harvard Law Review* 97/1 (1983): 53. The issue of the RCA prenupt thus falls in a liminal space between the jurispathic power of the *beit din*, and activist jurisgenesis.

¹¹ The status of the *manzer*, often translated as a bastard or illegitimate child, normally the child of adultery or incest.

¹² Hanina Ben-Menahem, *Judicial Deviation in Talmudic Law: Governed by Men not by Rules*, Jewish Law in Context: The Institute of Jewish Law, Boston School of Law, vol. 1, (Chur: Harwood Academic Publishers, 1991).

¹³ For her critique and proposed alternative to *kiddushin*, see, Tirzah Meacham (leBeit Yoreh), “Legal-Religious Status of the Married Woman,” *Jewish Women’s Archive*. Accessed online on 15/05/18 at: <https://jwa.org/encyclopedia/article/legal-religious-status-of-married-woman>. Anecdotaly, I would suggest that resistance to eliminating the ritual of *kiddushin* is prevalent also in the progressive movements of Judaism, and even in those that are not bound by halakhah.

¹⁴ Norma Baumel Joseph, “Women’s Rights and Religion: Jewish Style” [forthcoming] in Morny Joy, ed., *Explorations in Women, Rights and Religions*. (Sheffield: Equinox Publishing Ltd.: Sheffield, 2020), 6 (with current unpublished pagination, 1-9).

¹⁵ BT *Kidd.* 3a-b. On the subject of the female slave in Jewish law, see Diane Kriger, *Sex Rewarded, Sex Punished: A Study of the*

a woman might be acquired as a wife through exchange just as a field could be acquired through barter for another object.¹⁶ The Gemara notes that the Mishnah fails to mention exchange/*khalifin* as a method of acquiring a woman as a wife, and so excludes it as an effective mode of marriage.¹⁷ It further dismisses this option on the basis that exchange/*khalifin* is effective with less than the value of a *perutah*, which is to say an insignificant monetary value that is less than the minimum requirement for acquiring a woman through money, according to mKiddushin 1:1. The reason that the Gemara provides for its rejection of exchange/*khalifin* as a method for acquiring a wife is because “a woman does not cause herself (or: allow herself) to be acquired for less than the value of a *perutah*.”¹⁸

Rashi’s commentary to this statement adds an interesting dimension to this question. He writes, “For it is insulting” to her, therefore, the law of *khalifin* is invalidated for *kiddushin*.” Tosafot’s lengthy disagreements with this view highlight that Rashi’s understanding of the Gemara here is a remarkable, even dangerous, moment in rabbinic thought.¹⁹ A form of acquisition of a woman by a man may be invalidated because it is insulting to her.

This notion places, even if only for a fleeting moment, woman’s self-perception, experience and personhood, woman as subject, at the centre of the effectiveness of the transaction which forms the marital bond. Might one reason from here that any mode of marriage that is insulting to woman (in particular) or to Woman (in general) might be deemed ineffective? This would necessarily be a subjective and shifting stance, as all law and ritual live inevitably in their socio-historical context, in their Coverian nomos. One might further speculate that *kiddushin* itself, in any and all of its methods and forms, could be deemed demeaning to women, and so be rendered an ineffective mode of marriage. Even within its very own nomos, might *kiddushin* invalidate itself by its very nature as a unilateral acquisition of a woman (or girl) by a man (or boy?), as Woman finds it demeaning to be exclusively acquired in such a unilateral and unequal fashion, one that insults and even denies her sense of self and personhood?

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Status Female Slave’ in Jewish Law (Brighton: Academic Studies Press, 2011).

¹⁶ Ruth indeed appears to have been symbolically exchanged, along with a field, for a sandal, where she is acquired by Boaz in a sort of Levirate marriage. See Ruth chapter 4, especially 4:7-10, and BT *Kidd.* 3a, Rashi s.v. ‘mah sadeh meqanyah b’chalifin’

¹⁷ As noted above, m*Kidd.* 1:1 enumerates money, a document and sexual intercourse as ways of acquiring a wife.

¹⁸ BT *Kidd.* 3a-b, “v’isha b’pachot mishaveh perutah la meqanyah nafshah.”

¹⁹ Rashi uses the term *ganai*, which can also signify that it is shameful or disgraceful.

²⁰ BT *Kidd.* 3b, Rashi, s.v. “la meqanyah nafshah” and BT *Kidd.* 3a, Tosafot, s.v. “v’isha b’pachot mishaveh perutah la meqanyah nafshah.”

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DISCUSSION POINTS FOLLOWING THE PAPER BY LISA FISHBAYN JOFFE AND THE RESPONSE BY LALIV CLENMAN

Should a global solution be pursued when the community is already split on the issue?

Does progress in the Modern Orthodox community lead to backlash in the Haredi community with detrimental effect on Haredi women?

Jurisgenerative action has impact on halakhic decision-making and becomes the canon for future decision-making. But what if nobody participates in legal performativity as seen in the Haredi community's reluctance to engage with *agunah* developments?