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GIDDUL'S WIFE AND THE POWER OF THE COURT: ON TALMUDIC LAW, GENDER, DIVORCE AND EXILE

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The codes that relate our normative system to our social constructions of reality and to our visions of what the world might be are narrative. The very imposition of a normative force upon a state of affairs, real or imagined, is the act of creating narrative To live in a legal world requires that one know not only the precepts, but also their connections to possible and plausible states of affairs. . . . Narrative so integrates these domains. Narratives are models through which we study and experience transformations that result when a given simplified state of affairs is made to pass through the force field of a similarly simplified set of norms.¹

Legal doctrine itself may be seen as a set of stories. The substantive law of contracts, for example, may be perceived as telling a story of free will and free choice. Or the substantive law of rape may be understood as telling a story about how men and women communicate (dis)interest in sex. The justifications for the formalities of wills law might be said to involve a story about the potential for carelessness and greed in the setting of donative transfers. Any given set of doctrinal rules might be said to dictate what stories may emerge and how they may emerge in potential cases involving those rules; the substantive law determines which facts will and which will not be deemed to bear on the problem at hand.²

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1. ROBERT COVER, *Nomos and Narrative*, in *NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER* 95, 102 (Martha Minow et al. eds., 1992) [hereinafter COVER, *Nomos and Narrative*].

2. Jane B. Baron & Julia Epstein, *Is Law Narrative?*, 45 *BUFF. L. REV.* 142, 142-43 (1997).

Legal interpretation takes place in a field of pain and death. This is true in several senses. Legal interpretive acts signal and occasion the imposition of violence upon others . . . Interpretations in law also constitute justifications for violence which has already occurred or which is about to occur. . . . Neither legal interpretation nor the violence it occasions may be properly understood apart from one another.³

Legal interpretation is (1) a practical activity, (2) designed to generate credible threats and actual deeds of violence, (3) in an effective way.⁴

It is time to take stock when an article about the postmodern vitality of liberalism proclaims as its "paradigm" Rabbi Joseph Caro, the sixteenth-century author of one of the most austere codes of Jewish law, the *Shulhan 'Arukh*, and one of the most fantastic diaries of mystical experience, the *Maggid Mesharim*.⁵

I. INTRODUCTION

In his oft-cited article *Nomos and Narrative*, Robert Cover develops a theory of legal meaning. Cover's theory can be presented as a series of interconnected binary oppositions. The opposing positions are competing models of law. One understanding Cover calls *paideic*, while the other he calls *imperial*.⁶

The following series of binary oppositions schematically present the difference between the two understandings:⁷

3. ROBERT COVER, *Violence the Word*, in *NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER* 203, 203 (Martha Minow et al. eds. 1992).

4. *Id.* at 214.

5. Suzanne Last Stone, *In Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory*, 106 *HARV. L. REV.* 813, 814 (1993).

6. See COVER, *Nomos and Narrative*, *supra* note 1, at 108, 163.

7. Some of these distinctions Cover explicitly refers to as oppositions, while others I have taken from his rhetoric. See generally *id.*, at 95-172.

Paideic	Imperial
normative universe ⁸	world of right and wrong/lawful and unlawful/valid and void/rules and principles/formal institutions/conventions
narrative ⁹	legal institutions or prescriptions
inhabit	create
epic ¹⁰	constitution
scripture	decatalogue
world in which we live ¹¹	system of rules to be observed
worlds to be inhabited ¹²	bodies of rules or doctrines to be understood
strong forces ¹³	weak forces
create the normative worlds	system/world maintaining
culture specific	universalist
law is a system of meaning ¹⁴	law is an imposition of force
unity ¹⁵	diversity
attachment	separation
engagement ¹⁶	disengagement
identification	objectification
vision	reality

All the terms in the left column serve to construct what might be called an *organic* vision of law. This would be law that grows naturally out of a culturally specific time, place and community. The members of that community have certain commitments to each other which are expressed in the narrative of the community and which give the law meaning. There is no need in this picture of the law for a coercive enforcement mechanism since there is a high level of mutual respect

8. "We inhabit a *nomos*—a normative universe. We constantly create and maintain a world of right and wrong, of lawful and unlawful, of valid and void." COVER, *Nomos and Narrative*, *supra* note 1, at 95 [emphasis in original].

9. "No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning." *Id.* at 95-6.

10. "For every constitution there is an epic, for each decatalogue a scripture." *Id.* at 96.

11. "Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live." *Id.*

12. "These materials present not only bodies of rules or doctrine to be understood, but also worlds to be inhabited." *Id.* at 97.

13. "[T]he broad principles of our law, are essentially system-maintaining 'weak' forces. . . . The systems of normative life that they maintain are the products of 'strong' forces: culture-specific designs of particularist meaning." *Id.* at 105.

14. "These 'strong' forces . . . create the normative worlds in which law is predominantly a system of meaning rather than an imposition of force." *Id.* [emphasis in original].

15. "The paideic is an etude on the theme of unity. Its primary psychological motif is attachment. . . . The imperial is an etude on the theme of diversity. Its primary psychological motif is separation." *Id.* at 109-10.

16. "In the normative universe, legal meaning is created by simultaneous engagement and disengagement, identification and objectification. . . . Objectification is crucial to the language games that can be played with the law and to the meanings that can be created out of it." *Id.* at 144-45.

along with commitment, and "obedience is correlative with understanding."¹⁷

The terms in the right column construct a system of law which is institutionally based, alienated and coercive. It is not engaged in the business of visionary movement to a better world, but rather in the ordering of the *real* world. It is pragmatic and explicitly *artificial*. A thick line is drawn between the system of law and *life*. Whereas in the paideic, one inhabits a world of legal meaning, in the imperial model the system of law is imposed from the outside onto the world.

Cover locates these two worlds on a time continuum. The paideic community generates a *nomos*, that is, a thick cultural web of law and meaning. This community is unified and its members are committed to one another. The nomic community generates principles and precepts, and the community is bound by a common scripture, a common ritual and strong interpersonal obligations. All is fine until this "community of interpretation" comes into contact with other nomic communities, which are also communities of interpretation. These other communities also generate their own specific principles and precepts. It is then necessary to fall back upon an imperial model of law in order to settle the conflicts that are created by all the law that these competing communities of interpretation have generated.

The imperial model does not represent a particular community's understanding; instead, it represents the institutionalization and systematization of a common law which all the communities can more or less live with, and have to live by. It is, in Cover's term, "jurispathic."¹⁸ The function of the imperial system is to kill off law,¹⁹ to pare the legal system to one set of laws from all the law generated by the different competing and conflicting communities of interpretation.

These two models are in constant tension with each other. It is a dialectic tension which generates new legal meaning from old law, and then new law from that new legal meaning. All law is understood by the individual communities of interpretation in consonance with the individual narratives that the communities tell about themselves. This

17. COVER, *Nomos and Narrative*, *supra* note 1, at 106.

18. *Id.* at 155.

19. "Judges are people of violence. Because of the violence they command, judges characteristically do not create law, but kill it. . . . Confronting the luxuriant growth of a hundred legal traditions, they assert that *this one* is law and destroy or try to destroy the rest." *Id.* [emphasis in original].

narrative is the Scripture which is the background to the Decalogue, that is, this or that precept.

This notion of legal meaning is significant in that it locates legal meaning *not* in the institutions of law, but rather, in communities of interpretation. This theory also recognizes that the narrative is central to the *nomos* of interpretive communities which generates legal meaning. This meaning is generated upward; it is not legislated with the precepts that it explains.

It is this part of Cover's theory that I find most interesting: the notion that all law is embedded in, and can only be understood in the background of, a community's narrative. As Cover writes: "In this normative world, law and narrative are inseparably related. Every *prescription* is insistent in its demand to be located in discourse—to be supplied with history and destiny, beginning and end, explanation and purpose. And every *narrative* is insistent in its demand for its prescriptive point, its moral."²⁰ In each nomic community, every law makes sense only as it is embedded in a narrative.²¹

I propose to use this part of Covers's theory as a methodological underpinning to ask the following question of Talmudic²² divorce law:

20. *Id.* at 96 [emphasis supplied].

21. *Cf. id.* at 146. "The narratives that any particular group associates with the law bespeak the range of the group's commitments. Those narratives also provide resources for justification, condemnation, and argument by actors within the group, who must struggle to live their law."

22. For those not familiar with Jewish legal terminology and history, the following brief glossary and historical overview may be helpful:

Jewish law and the Hebrew term *halakhah* (adj. halakhic) are used here interchangeably. The term *halakhah* designates both the system of Jewish law and also the concept of a single rule of law. The *halakhah* comprises the entire subject matter of Jewish law, including public, private, and ritual law. Jewish law consists of the written law and the oral law; both, according to Jewish legal theory, were given to Moses on Mt. Sinai. The five books of Moses are often referred to as the Torah. The term Torah also may refer to the entire contents of the Hebrew Bible, including the five books of Moses, the prophets, and the writings. Finally, Torah (literally, teaching) often refers to the entire content of the divine revelation and, by extension, to all the teachings of the Jewish legal tradition. In about 200 C.E., Rabbi Judah Ha-Nasi edited a written compilation of the oral law, the Mishnah. The scholars of the Mishnaic era (c. 70 C.E. to 220 C.E.) were known as *tannaim*. The term tannaitic refers to the period of the Mishnah.

Stone, *supra* note 5, at 816 n.13. Mishnah is cited by chapter and law (e.g., *Mishnah Shabbat* 12:2).

"The next three centuries (c. 200 C.E. to 500 C.E.) were dominated by scholars called *amoraim* (interpreters), who debated and reconciled the rulings of the *tannaim*" and generated their own legal interpretations, rulings and legislation. The statements attributed to them were edited into the Gemarah. *Id.* at 816-17 n.13.

"Together, the Mishnah and Gemarah comprise the Talmud." *Id.* at 817 n.13. Two Talmuds exist. "The first, edited in the Palestinian academies, is referred to as the Jerusalem or Palestinian Talmud," and was completed in the fifth century. *Id.* The second version, the Babylonian Talmud, is much larger than the Palestinian Talmud and was completed at the academies of

What is the narrative which gives these laws meaning? Given that the Talmud represents a nomic community, the prescriptions that are found would have to have been "located in discourse"²³ and "supplied with history and destiny, beginning and end, explanation and purpose."²⁴ What is the narrative which gives meaning to these specific prescriptions? What is the narrative that makes these particulars of Talmudic divorce law meaningful for the nomic community represented by Rabbinic literature?

The argument of this essay is that the laws of divorce are embedded in the narrative of Exile, and that the narrative of Exile is told by way of the categories of Talmudic divorce law. It is the narrative of Exile which supplies the laws of divorce with their "history and destiny, beginning and end, explanation and purpose."²⁵

II. TALMUD, NARRATIVE AND GENDER

The Babylonian Talmud, to this day, has a privileged position in the Rabbinic curriculum.²⁶ Edited in Sassanian Persia largely in the sixth century, it contains earlier and possibly later material.²⁷ The rhetoric of the Babylonian Talmud claims it as a commentary on the *Mishnah*—the original codification of Jewish Law written in the third

Babylonia in the sixth or seventh century. The Babylonian Talmud is cited by folio and side (e.g., BABYLONIAN TALMUD TRACTATE GITTIN 37a) according to the nineteenth century Vilna edition (published by the brothers and widow Re'em), and based in large part on the first printed edition of Venice 1527. The Vilna edition has been consistently reprinted and to this day is considered the text of record. The text must be compared to manuscript versions and earlier printed editions for transmission and scribal errors. All translations and transliterations in this article are mine.

The other significant material produced in this rabbinic period is *midrash*. "*Midrash* is the interpretive study of the Bible and consists primarily of rabbinic exegesis tied to scriptural verses. *Midrash* is further subdivided into *midrashei halakhah* and *midrashei aggadah*." *Id.* See also BOYARIN, *infra* note 35.

23. COVER, *Nomos and Narrative*, *supra* note 1, at 96.

24. *Id.*

25. *Id.*

26. This was not inevitable. See generally MOSHE HALBERTAL, *PEOPLE OF THE BOOK: CANON, MEANING AND AUTHORITY* (1997) (arguing that the work of Rabbi Shlomo Yitzchaki, the French Jewish Scholar of the late-eleventh to early-twelfth century, popularized the Talmud and won for it its prized position. The Talmud's preeminence was challenged at various times by those who would privilege mystical or philosophical texts).

27. The controversies over the time of the editing of the Talmud are legendary. See RICHARD KALMIN, *THE REDACTION OF THE BABYLONIAN TALMUD: AMORAIC OR SABORAIC?* 1-11 (1989).

century. It is the latter of the two talmuds that was composed as commentaries (in a very loose sense) on the Mishnah. The Palestinian Talmud was edited in the Land of Israel about a century before the Babylonian Talmud.²⁸

That the Babylonian Talmud has been continuously studied for well over a thousand years, and that many of the commentaries have been consistently studied together with the Talmud,²⁹ sometimes blur the fact that the Talmud is not merely commenting on, but is rather constructing law. The Babylonian Talmud is probably the most important single source for the formative (post-Mishnaic) layer of Jewish law. At the same time, it is important to note that the point of most Talmudic discussions or *sugyot* (singularly *sugya*) is not deciding law. Most *sugyot* are left without a final *halakhic* or legal decision. The Babylonian Talmud then is about something else. It is about the clarification of law and legal concepts. It is about the playing out of both sides of a legal dispute, rather than the clarifying of the ultimate legal decision.³⁰

Sugyot in the Babylonian Talmud include direct comments on: earlier, especially Mishnaic, texts; apodictic statements of law; challenges to legal interpretations based on logic; recourse to earlier, authoritative texts and stories; and disputes generated by earlier texts or by case law. Within the rhetoric of legal dialogue (and the Talmudic discourse has chosen the dialogic mode as its rhetoric of choice), it is of the utmost importance to understand the cultural stories—the narrative, within which any discursive move is grounded in order to understand the full implications of that move.

There are three levels of narrative in the *sugyot* of the Babylonian Talmud.³¹ First, there are the explicit stories. These stories

28. See *supra* note 22.

29. Some of the earliest printed editions of the Talmud from pre-expulsion Spain have the commentary of Rashi printed side by side with the Talmud. For representations of these fragments, see S'RIDEI BAVLI: FRAGMENTS FROM SPANISH AND PORTUGUESE INCUNABULA AND SIXTEENTH CENTURY PRINTINGS OF THE BABYLONIAN TALMUD AND ALFASI (Haim Z. Dimitrovsky ed., 1979).

30. As a result of this, there is a whole body of literature written to provide the readers of Talmud with the tools to make Halakhic decisions based on Talmudic discussions. Among the authors who attempted to reread the Talmud as a Halakhic work is Rabbi Yitzchak Alfasi, whose work *Halakhot* is an abridgement of the Babylonian Talmud for the purpose of highlighting the correct opinions, and is considered prominent and perhaps first among the literature. *Halakhot* is printed in the back of most standard editions of the Babylonian Talmud and in a critical edition. See RABBI YITZCHAK ALFASI, HALAKHOT RAV ALFAS (Nissan Zaks ed., 1969).

31. See ARYEH COHEN, REREADING TALMUD: GENDER, LAW AND THE POETICS OF SUGYOT 131-32, 144-47 (1998) (hereinafter COHEN).

depend on larger cultural narratives in order to make sense, and in turn, they add to those larger narratives. Second, as Jane B. Baron and Julia Epstein point out in the epigraph quoted above, law itself can be read as narrative.³² The third and final layer of narrative is the larger cultural and religious narrative within which the law is embedded.³³

In my work in general,³⁴ and in this article, I have chosen to focus on *sugyot* from *Tractate Gittin* (the tractate that deals with divorce law) for two reasons. First, in the case of divorce, the larger cultural and religious narrative within which the law is embedded is very close to the surface. It is the contention of this article that the laws of divorce are embedded in the narrative of Exile. It is this narrative of Exile—a narrative of chaos and loss of control—which informs the Rabbinic need to control and interpret all parts of the divorce between a man and a woman. Actually, the Rabbinic divorce, in the *sugya* under discussion, erases the role of the man, and injects the court in his stead.

Second, I am interested in the way gender is constructed through Talmudic law. Again, in the case of divorce, much of the cultural work around the production of gender is very close to the surface, and is instructive of the way that gender differences are produced in Talmudic law in general.

III. TALMUDIC LAW AND EXILE

This section illustrates the way that the laws of divorce are embedded in the narrative of Exile and how the narrative of the Exile is told by way of the categories of Talmudic divorce law. The texts I analyze are from midrash collections from approximately the same time as the Talmud. Midrash is another form of Rabbinic textuality which uses the Biblical text (often in a verse-by-verse commentary) as its base text. Midrash refers equally to the collections of these comments and to the midrashic reading practice.³⁵

32. See Baron & Epstein, *supra* note 2, at 142-43.

33. See COHEN, *supra* note 31, at 131-32, 144-47.

34. See *id.*

35. For more information on midrashic reading practice, see DANIEL BOYARIN, *INTERTEXTUALITY AND THE READING OF MIDRASH* 31 (1990) (reading “[A]ll of the generic patterns of midrash have this function of exposing and creating intertextual hermeneutic relations between different biblical texts.”) [emphasis in original]; DAVID STERN, *MIDRASH AND THEORY: ANCIENT JEWISH EXEGESIS AND CONTEMPORARY LITERARY STUDIES* 58 (1996) (reading “[T]he structure of the *petihta* exemplifies a fundamental tendency of midrash, the urge to unite the diverse parts of Scripture into a single and seamless whole reflecting the unity of God’s will.”).

Beginning in the Bible, the relationship between God and Israel is viewed in terms of marriage and fidelity. Concomitantly, the end of that relationship, God's ultimate wrath, is represented as divorce. This is done both when the prophet is railing against Israel, and when the prophet is comforting Israel. *Isaiah* (50:1) and *Jeremiah* (3:8) both use the language and content of the Deuteronomic divorce laws (24:1-4) in their discussion of the covenantal relationship.³⁶

Isaiah, in reassuring the people that there was no formal, and therefore irrevocable, break with God, says:

Thus said the Lord: Where is the bill of divorce of your mother whom I dismissed? And which of My creditors was it to whom I sold you off? You were only sold for your sins, And your mother dismissed for your crimes.³⁷

Jeremiah, threatening Israel, has God saying:

I noted: Because Rebel Israel had committed adultery, I cast her off and handed her a bill of divorce; yet her sister, Faithless Judah, was not afraid—she too went and whored.³⁸

Similarly, the Rabbis use the divorce scene and the dispute over alimony (e.g., the payment stipulated in the *ketubah*, or prenuptial agreement) as a—if not the—significant site for the discussion of the covenantal relationship.³⁹ There is often the sense, however, that there is less hope and more anxiety that divorce is actually at hand. The following Midrash, commenting on the culmination of the Garden of Eden story, is quoted in a number of midrashic collections:

“He drove the man out.” (Genesis 3:24)

On the connection between the various genres of Rabbinic textuality, see DANIEL BOYARIN, *CARNAL ISRAEL: READING SEX IN TALMUDIC CULTURE* 10-13 (1993) (stating “I propose that the older insight that there is connection between the genres of rabbinic textuality and also between them and a society can be preserved when we understand literature as discourse—as discourse in the Foucauldian sense . . .”).

36. See MICHAEL FISHBANE, *BIBLICAL INTERPRETATION IN ANCIENT ISRAEL* 307-12 (1985) (demonstrating that Isaiah and Jeremiah use the language and content of the Deuteronomic divorce laws).

37. *Isaiah* 50:1.

38. *Jeremiah* 3:8.

39. In addition to the following midrashim, compare SIFRI DEUTORONOMY (Ha'azinu) #306 (Finkelstein ed.); BABYLONIAN TALMUD TRACTATE SANHEDRIN 105a; *Midrash Exodus Rabbah* 31:10; *Midrash Tanhuma Mishpatim* 11; *Midrash Numbers Rabbah* 1:5; *Midrash Tanhuma Vayeshev* 4; *Midrash Tanhuma Numbers* 5; *Midrash Psalms* (Shoher Tov) 139:1 (Buber ed.). All citations of midrashic homilies represent the relationship between God and Israel as divorce. This very partial list is meant to show that divorce as a site of the existential tensions of the Exile, is a motif common to most layers of Rabbinic discourse.

R. Yohanan said: "As the daughter of a priest who was divorced and couldn't return [to her husband]."

R. Shimon b. Lakish said: "As the daughter of an Israelite [who was divorced] but could return [to her husband]."40

The Midrash reads the phrase "God drove the man out" by attending to the verb translated as "drove out"—*garesh*. This is the verb that is used in Rabbinic Hebrew to mean divorce. It is obvious then to the author of the Midrash that the interaction between God and Adam is divorce. The subsequent discussion in the Midrash between Rabbi Yohanan and Rabbi Shimon ben Lakish concerns whether the divorce is final or not. The Midrash, assuming that the daughter of a priest would herself marry a priest,⁴¹ sees the Edenic situation as being analogous either to the irrevocable divorce of a priest (who cannot remarry the wife he has divorced) or to the divorce of a non-priest (who is permitted to remarry the wife he has divorced).

By either account, the foundational moment of history is the divorce of Adam by God. Whether or not the divorce is ultimately revocable, present (that is, Rabbinic) reality testifies that the effects of that divorce are still felt. This original moment of divorce is seen not as a fleeting historical moment, but rather as a principle of cosmic history for the Jewish people. This original divorce prefigures the divorce of Israel by God at the time of the destruction of the Temple and the Exile.

In another early Midrash that appears in *Genesis Rabbah* (19:9) and elsewhere,⁴² there is the following:

The Lord God called out to the man and said to him, "Where are you?" (Genesis 3:9)

R. Abahu in the name of R. Hanina said: It is written, 'But they, to a man, have transgressed the Covenant.' (Hosea 6:7)

[Read, rather] they, like the first man, [Adam].

Just as I brought the first man into the Garden of Eden, and commanded him, and he transgressed my command, and I sentenced him with banishment, and with driving out/divorce, and I wailed over him Lamentations.⁴³

This scene, the banishment of Adam from Eden, is then repeated in the second half of the Midrash with all of Israel.

40. *Genesis Rabbah* 21:8 (J. Theodor & Ch. Albeck eds., 1965).

41. *See id.* at 202 n.10.

42. *See, e.g., PESIKTA DE RAB KAHANA piska* 15 (Mandelbaum ed.); *LAMENTATIONS RABBAH Petihta* (Proem) 5 (Buber ed.).

43. *Genesis Rabbah* 19:9 (J. Theodor & Ch. Albeck eds., 1965).

So too with his [Adam's] children.

I brought them into the Land of Israel, and I commanded them, and they transgressed my commands, and I sentenced them with banishment, and with driving out/divorce, and I wailed over them Lamentations.⁴⁴

For the author of the Midrash, the divorce in Eden is a prefiguring (and perhaps a determinative prefiguring) of the divorce in the Land of Israel. The question that plagues the dreams, or nightmares, of the rabbis is: Will the divorce go through? Will it be like a priest who has divorced his wife, and is not allowed to remarry her? Or will it be like the non-priest who divorced his wife and can take her back?

This dilemma is forcefully articulated in another early Midrash, this one from *Eichah Rabbah* (1:1):

Another interpretation of "She . . . is become like a widow" (Lamentations 1:1).

...

The Rabbis said:

It is like a king who became angry at his consort. He wrote her a bill of divorce and gave it to her, but then he returned, and grabbed it from her.

Whenever she wished to marry someone else, the king said to her: Where is the writ of divorce with which I divorced you?

And whenever she claimed support from him, he said to her: I have already divorced you.

Similarly, whenever Israel wishes to worship idolatry, the Blessed Holy One says to them: "Where is the bill of divorce of your mother whom I have dismissed?" (Isaiah 50:1)

And whenever they ask Him to perform a miracle for them, He tells them: I have already cast you off, as it is written, "I cast her off and handed her a bill of divorce" (Jeremiah 3:8).⁴⁵

The Midrash, stressing the indefiniteness of the "like a widow" and not a widow, in the verse from *Lamentations*, precisely articulates the existential fears of the exilic situation. Rather than reading the verse in *Jeremiah* as referring to God's divorce of Israel and *not* Judah, the Midrash reads the verse's reference to Israel as to contemporary Israel, meaning the Jewish people as a whole. Israel is then pictured as the *agunah*, the anchored woman who cannot leave her husband (for he will not furnish her with a writ of divorce) and who does not have her husband's support because he has already divorced her. The only

44. COVER, *Nomos and Narrative*, *supra* note 1, at 96.

45. *Eichah Rabbah* 1:1. See also BABYLONIAN TALMUD TRACTATE SANHEDRIN 104a (presenting the Midrash from *Eichah Rabbah* as well).

situation that is considered worse for the Rabbis (though probably not for the woman of the parable) is that the divorce (from God) ultimately goes through.

This is therefore the narrative which underlies the Halakhic discussions of divorce. I do not claim that there is a direct causal relationship between the mythic narrative and the law. Rather, I claim, with Cover, that law is not understood and does not grow in a vacuum. Cover explains:

No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. For every constitution there is an epic, for each decalogue a scripture. Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live.⁴⁶

That is, there is a necessity for a narrative in order for this body of law to make sense to those for whom it is supposed to be normative. I suggest that the Talmudic discussions of divorce reflect and react to the cultural negotiation around Exile that divorce is woven into.

IV. GIDDUL, HIS WIFE AND THE COURT

This section analyzes one narrative moment in a larger Halakhic *sugya*, or discussion. The issues that the larger discussion deal with are the authority of the court in the area of divorce, and whether a husband's revealed intent to cancel a divorce should or could be taken into account by the court.

The structure of a divorce in Rabbinic law is fairly uncomplicated. Only the man may initiate a divorce. In rare occasions, the court will force a man to initiate the divorce.⁴⁷ In the actual divorce ritual, the man writes a formula on a paper which clearly states that he wishes to sever the relationship between himself and his wife completely, thereby freeing her to marry anyone else she chooses. He writes the writ in front of two witnesses who, optimally, sign it. The man then delivers this writ, called a *get*, to the woman. He may either deliver it himself or send it by messenger. When delivering the writ of divorce, the man (or the messenger) says to the woman, "This is your writ of divorce." The woman then saves the writ as proof of the divorce. None of these steps, of course, are as simple as they seem,

46. See COVER, *Nomos and Narrative*, *supra* note 1, at 95-96.

47. See *Mishnah Ketubot* 7:10 (lists instances where a court will force a man to initiate a divorce).

and the bulk of the *Tractate Gittin* (or Writs [of divorce]) deals with these issues.⁴⁸

The following story serves to initiate the discussion of whether the court can take into account the husband's intent to cancel a writ of divorce after it has been sent and before it is received by the wife. After the wife receives a writ, the divorce is final and there is no recourse. Immediately preceding this moment in the *sugya*, there is a discussion of whether in certain cases the concern for the effective authority or power of the court should be a factor in the court's decision. After analyzing this part of the discussion, I will situate it within the larger discussions of which it is a part.

The story is as follows:

Giddul bar Re'ila'i sent a writ of divorce to his wife.

The agent went.

He found her as she was sitting at the loom.

He said to her, "Behold your writ of divorce."

She said, "Go now, out!"

He came and told him [the husband].

He began and said, "Blessed is the Good and the One who does good."

Abayye said, "'Blessed is the Good and the One who does good.' And the writ of divorce is not voided."

Raba said, "'Blessed is the Good and the One who does good.' And the writ of divorce is voided."

What matter was in dispute? The matter of "[the Halakhic principle of whether] revealing of intention in [the case of] a writ of divorce is a [substantive] matter" was in dispute.

For Abayye said, "Revealing of intention in [the case of] a writ of divorce is not a [substantive] matter."

And Raba reasoned, "Revealing of intention in [the case of] a writ of divorce is a [substantive] matter."⁴⁹

The distinction between the narrator and the narrated should be immediately noted. The story is being told by an omniscient and anonymous narrator. The story's immediate audience, within the linear rhetoric of the *sugya*, is comprised of two of the more significant Sages of the Amoraic period,⁵⁰ Abayye and Raba, who lived during the

48. See HANOCH ALBECK, *THE MISHNA: SEDER NASHIM 268-72* (1998) (overviewing the issues in *Tractate Gittin*).

49. BABYLONIAN TALMUD TRACTATE GITTIN 34a (Leningrad-Firkowitz eds.). The text is based on MS Leningrad-Firkowitz 180. The author has provided the translation.

50. The *Amoraim* are the named Sages who appear in the Talmud. The Amoraic period extends from the editing of the Mishnah in the early third century, to the fifth century. After the

fourth century in Sassanian Persia, and headed the two main academies.⁵¹ The story concerns one Giddul bar Re'ila'i (or Giddul),⁵² his unnamed wife and a messenger. Yet, whose story it is is the contested heart of the matter.

Giddul is introduced by name, thus giving the impression that he is of the Rabbinic circle. This, however, is misleading. In fact, Giddul is only mentioned one other time in the Talmud, later in *Tractate Gittin*, where he is mentioned as someone who has a case before the Rabbis, but is not a Rabbi himself. No law or interpretation of law is ever quoted in his name in the Babylonian Talmud. Giddul is therefore more properly understood as a Jew not of the circle of the Sages, but who accepts the authority of the Sages—a Rabbinic Jew. This affiliation is evidenced by Giddul's actions.

Giddul does only two things in the story. His first action is to send a writ of divorce to his wife. The manner in which he performs this action clearly marks Giddul as a Rabbinic Jew. Divorce law appears in the Bible only once, mainly in one verse, or actually half a verse:

When a man takes a wife and marries her, if then she finds no favor in his eyes because he has found some indecency⁵³ in her, and he writes her a bill of divorce and puts it in her hand and sends her out of his house.⁵⁴

Almost the entire mechanics of Rabbinic divorce law can be (and is) read back into this verse. Every word is given a weight well beyond what would have been immediately apparent. The point in the divorce

period of the Amoraim is the period of the anonymous contributors to the Talmud, the *Stammim*, and finally the *Saboraim*, who are the ultimate editors of the Babylonian Talmud. For an overview of the periodization and the range of opinions regarding the editing of the Talmud, see KALMIN, *supra* note 27, at 1-65.

51. See THE IGGERES OF RAV SHERIRA GAON 103, 105 (Nosson Dovid Rabinovich trans., 1988).

52. There are differences among the manuscripts as to what the name is.

53. There is a lot of controversy about how to translate the Hebrew *'ervah* in *Deuteronomy* 24:1, which the Revised Standard Version translates as "indecency." The King James Version translates it as "uncleanness." The Jewish Publication Society version translates it as "unseemly." The Everett Fox version translates it as "'nakedness'" [quotation marks in original]. This point of unclarity is also translated into a Halakhic dispute over what justifies a man initiating a divorce. See *Mishnah Gittin* 9:10.

54. *Deuteronomy* 24:1 (Revised Standard). The King James version reads: "[T]hen let him write her a bill of divorcement, and give it in her hand, and send her out of his house." *Deuteronomy* 24:1 (King James). The Jewish Publication Society version reads: "[T]hat he writeth her a bill of divorcement, and giveth it in her hand, and sendeth her out of his house." *Deuteronomy* 24:1 (Jewish Publication Society ed.). Everett Fox's version reads: "[H]e may write for her a Document of Cutoff; he is to place (it) in her hand and (thus) send-her-away from his household." *Deuteronomy* 24:1 (Everett Fox trans.).

process that is missing from the Biblical account—the point that is typically Rabbinic which marks Giddul as a Rabbinic Jew—is the messenger. In the Torah, the man places the bill of divorce in the woman's hand.⁵⁵ In the Talmud, a majority of the legal discussions concern cases where a messenger brings a divorce.

The use of a messenger is based on the Talmudic principle that “a person's (literally, a man's) messenger is like himself.” This principle is applied in a broad range of cases, but the fact remains that it is a Rabbinic principle. In the specific case of divorce, the messenger at times is accorded higher legal status than the normal messenger. At times, the single messenger has the same status as a witness, even though the law normally requires two witnesses to testify.⁵⁶

Further, the messenger changes the choreography and therefore the dynamics of the divorce relationship. The divorce is no longer an intimate act, or even an immediate one. The space and distance created by the use of a messenger paves the way for second thoughts and misunderstood communication. This change is a very serious change and has many implications. For now, I merely mention one immediate result—that is, having a Rabbinically sanctioned messenger implicates the institutional representatives of the law in the divorce. The messenger is the product of the legal institutions—the Academy and the court (the *bet din*). Once the writ of divorce is assigned to the messenger, the court oversees the divorce proceedings. It is the court that decides whether this messenger might authorize another messenger. Likewise it is the court that decides (if there is another messenger authorized by the husband) whether the agency of the latter is stronger than the agency of the former. The court or the academy must decide whether this messenger is the personification of the husband, or perhaps, also the wife. In that situation, when does the divorce take effect?

Giddul's wife, like most women in the Talmud, is anonymous. When she first makes her appearance, she sits at her loom, which is a mark of domesticity. One of the obligations of a woman to her husband is weaving a certain amount of wool.⁵⁷ Rabbi Eliezer ordains

55. See *Deuteronomy* 24:1.

56. See *Mishnah Gittin* 1:1; BABYLONIAN TALMUD TRACTATE GITTIN 2b-4a.

57. See *Mishnah Ketubot* 5:5. On the use of spinning in the Rabbinic construction of domesticity, see MIRIAM B. PESKOWITZ, SPINNING FANTASIES: RABBIS, GENDER, AND HISTORY 95-105 (1997). In *Mishnah*, “[t]he spindle appears repeatedly, a stable sign of unstable and changing notions of femininity.” *Id.* at 102.

that even if a woman brings a hundred servants with her into the marriage she is still forced to weave, for "idleness brings to unchastity."⁵⁸ At the same time, in a discursive move that is structurally similar to the "whore or madonna" concept of much of Western culture, the woman weaving in other than prescribed settings is deemed licentious. The Mishnah teaches that the woman who weaves in the market might be divorced without receiving her *ketubah* payment, since she has "abrogated the law of Moses and the law of the Jews."⁵⁹

In its comment on the woman who weaves in the market, the Talmud tells another story:

Said Rabbah bar bar Hannah, one time I went after R. 'Uqba.

I saw an Arabian woman who was sitting and throwing the spindle and weaving a rose colored thread in front of her face.

When she saw us, she stopped the spindle, threw it [on the ground].

She said to me, young man, bring me the spindle.⁶⁰

In the continuation of the Talmudic text, Rabbi 'Uqba declares this woman to be "the woman who weaves in the market."⁶¹ That is, this woman is liable to be divorced and not paid her *ketubah* money.

This story is Rabbah bar bar Hannah's. It is, in a sense, a story about the interpretative power of law. It is not a story about a woman earning her living in the market place. Moreover, it is not really about the woman. The interaction between Rabbah bar bar Hannah and the woman acquires a sinister character in the telling. For the purposes of our story of Giddul's wife, it is important that the story marks spinning as a potentially seductive and therefore dangerous act. It is an act that abrogates the Law of Moses and the Jews. Giddul's wife being inside (she tells the messenger to "go out") marks her as domestically proper.⁶²

When the messenger brings the writ to Giddul's wife and she says: "Go now, out!," she, in effect, chases the messenger away. What

58. *Mishnah Ketubot* 5:5.

59. See *Mishnah Ketubot* 7:6. Peskowitz understands these restrictions as pertaining more to the economic possibilities of the woman, rather than the deployment of her sexuality. See PESKOWITZ, *supra* note 57, at 139-43. Either way, the *real* story is in the minds of the Rabbis.

60. BABYLONIAN TALMUD TRACTATE KETUBOT 72b.

61. *Mishnah Ketubot* 7:6.

62. Perhaps in response to this concern, the medieval French commentator Menachem HaMeiri in his retelling of this story, stresses the fact that the messenger meets the woman in the "inner chamber" of the house. See RABBI MENACHEM HAMEIRI, *BET HABEHIRAH 'AL MASECHET GITTIN* 142 (1964).

does this action mean? According to Talmudic law, the woman's consent is not required for divorce.⁶³ If a writ is thrown within four cubits of where she is sitting (the Halakhically defined parameters for one's personal space), she has "acquired" the divorce. What, then, is the legal or cultural meaning of "Go now, out!"?

There are a number of legal narratives, or *ma'asim*, which seem to constitute a genre of the type: "The Purloined Writ," or stories of the writ of divorce that never gets there. Further in *Tractate Gittin*, in a discussion of the status of the messenger, the following story is told. This story is embedded in a discussion of whether we rely on the explicit statement of the husband or of the wife to determine if the messenger is charged with accepting the divorce for her, or merely with carrying the divorce from him to her.

A certain man who sent a writ of divorce to his wife.

The messenger went, found her as she was sitting and kneading,

He said to her, "Here is your writ of divorce,"

She said to him, "It should be in your hand."⁶⁴

While the legal issues under discussion are different, this *ma'aseh* is stunningly similar to our original *ma'aseh* concerning Giddul's wife. Basically, an anonymous man sends his wife a writ of divorce through a messenger. The messenger finds her involved in a task which marks her domesticity. She does not accept the *get*, but also does not refuse it. The Talmudic discussion concerns whether or not the Sages can interpret her words to mean she was appointing the messenger as *her* messenger for receiving the divorce. If she was appointing the messenger as her messenger for receiving the writ, she is then divorced.

In the Palestinian Talmud, in a discussion generated by *Mishnah Gittin* 4:1 (the same *Mishnah* to which the story of Giddul's wife is attached) there is the following *ma'aseh*:

[A husband sends a writ of divorce to his wife. He reconsiders and wants to nullify it.]

He goes [to find the messenger] to nullify the writ of divorce.

He finds him [the messenger] on the highway.

He says to him, "That writ of divorce that you were to give her . . ."

He [the messenger] says to him: "I gave it to her."

While they were there, [the husband] heard it [the writ of divorce] fall from [the messenger.] he said to him, "Did you not tell me that you gave it to her?"

63. See *Mishnah Yebamot* 14:1 (stating "[A] woman can be divorced with or without her consent.").

64. BABYLONIAN TALMUD TRACTATE GITTIN 63b.

He said, "I gave it to her and she said to me, it should be for me in your hands."⁶⁵

While the issue under discussion here is whether we believe the messenger or not (that is, since the messenger has certain legal power, do we trust him against or in spite of the *apparent circumstances* of his situation?), the structure of the story remains.⁶⁶

These two parallel *ma'asim* highlight that Giddul's wife did not say "you keep it for me," or something of the kind. Rather, her response, though not completely unambiguous legally, is much closer to an outright refusal. Interestingly, Giddul's wife's response was apparently disturbing enough to have jarred some copyists into adding the phrase "and return tomorrow" to her statement.⁶⁷ That is, she was definitely not refusing the writ of divorce outright, but she was objecting to the timing. In any event, I leave this dissonant thread here to be collected later.

As the story continues, the messenger returns to Giddul and recounts his wife's refusal of the writ of divorce. It is now Giddul's turn to surprise us. He makes the blessing that is associated with fortunate occurrences or good news. We have no way of knowing what this means. That is, we have no way of divining his intentions. Why did he send the writ in the first place if he did not want to divorce her? Was this some sort of test of her loyalty? Was he just doing it to cause her anxiety? Did he just want to prolong the process? There is really no way of knowing. The *sugya* itself, as I discuss later, assumes in part the bad intentions of the husband. At this point, however, there is a shift in voice as the omniscient narrator fades into the background and the Sages interpret and adjudicate.

Abayye rules that Giddul's statement did not nullify the writ. In disagreement, Raba rules that Giddul's statement did nullify the writ. Abayye and Raba do not disagree about whether or not Giddul wanted to nullify the writ. The only dispute they have is whether or

65. *Mishnah Gittin* 4:1.

66. In addition, there is a *ma'asim* of a husband who throws a writ of divorce to his wife, whereupon it lands behind water storage pitchers and then disappears. See BABYLONIAN TALMUD TRACTATE GITTIN 19b. In another *ma'asim*, a man gives his wife a writ of divorce and then grabs it away from her and throws it into the ocean. See *id.* In another, a man sends a writ of divorce via a messenger, who cannot find the wife because nobody seems to know her. See *id.* at 29b.

67. The printed editions have this latter version. The better manuscripts (e.g., Leningrad Firkowitz 180; Munich 96) and many of the medieval commentators (e.g., Alfasi, Tosafot Rid) have the former version.

not Giddul's statement, which they interpret as a disclosure of intention to nullify, though not an explicit nullification, is an efficacious statement. Abbaye's ruling is grounded in the position that the revealing of intention means nothing once the writ of divorce is sent. Raba holds the opposite. This means that the question is: Who controls the meaning of the divorce transaction between the time of its initiation by the husband and the time of the wife's acquisition of the writ?

If the husband personally puts the writ of divorce in his wife's hand, there is neither a question that the writ is valid, nor any chance that he might be able to retroactively cancel the writ.⁶⁸ It is only when the writ moves into the space created by the Rabbis—the space of the messenger—that there is room for ambiguity.

The debate is joined here and continued to the end of the *sugya* by way of three more *ma'asim*. All three *ma'asim* concern the court (in the person of one or another Sage) forcing a man to send his wife a writ of divorce and then ignoring his entreaties, or reinterpreting them out of existence, once the writ of divorce is written and on its way. The law is ultimately decided according to Abbaye—that is, revealing the man's intention once the writ is written is meaningless. However, in order to understand the significance of this to the story of Giddul and his wife (and also to understand the significance of the narrativizing of Giddul's wife to the *sugya*) it is important to return to the authorizing narratives of this discussion.

V. THE GOOD ORDER OF THE WORLD AND THE POWER OF THE RABBIS

The story of Giddul, his wife, and the ill-fated divorce are part of one in a series of *sugyot*, or discussions, which were generated by a reading of the last part of *Mishnah Gittin* 4:1.

At first he would constitute a court in another place and nullify it. Rabban Gamliel the Elder ordained that they should not do so for the good order of the world (*tikkun 'olam*).⁶⁹

68. See *Mishnah Gittin* 4:1.

69. See *id.* Whether this is actually the end of *Mishnah Gittin* 4:1 or the beginning of *Mishnah Gittin* 4:2 is a somewhat contested question. The more significant *Mishnah* manuscripts place these lines at the end of 4:1, a division which seems to be supported by the literary evidence of the Talmudic discussions. There are Talmud manuscripts, including Leningrad-Firkowitz 180, which places these lines in 4:2.

The apparent intent of Rabban Gamliel the Elder's decree is to prevent an abuse of the system. A man might send a writ of divorce, and then (prior to the wife's receiving it) nullify that writ "in another place."⁷⁰ This other place was either other than the wife's place (so therefore she wouldn't know about it), or other than the place from where it was sent, in which case the people initially involved⁷¹ would not know about it either. The wife would then receive the writ and, believing it to be valid, inadvertently act in a legally inappropriate manner. Embedded in Rabban Gamliel's decree is an implicit narrative of bad faith on the husband's part. This is borne out by the Talmud's interrogation of the Mishnah's invocation of inappropriateness.

The first part of the discussion in the Talmud that is generated by these lines begins as follows:

What is "for the good order of the world?"

Rabbi Yohanan says, For the prescription [against] *mamzerim*.⁷²

Resh Lakish says, For the prescription [of] anchored⁷³ women.

For Rabbi Yohanan, a third century Palestinian Sage, the legally inappropriate behavior resulting from a canceled writ of divorce reaching the wife would be that she would marry and have children. Since she would not have been divorced from the first husband, the children would be *mamzerim*—that is, children born of the union of a man and the wife of another man. The concern here is not for the wife per se,⁷⁴ but rather for the children, since the legal sanctions on *mamzerim* are

70. *Mishnah Gittin* 4:1.

71. A scribe, the witnesses to the writing and the signing, and, of course, the messenger.

72. *Mamzerin* refers to children born of the union of a man and "the wife of a[nother] man" (*eishet 'ish*). *Mamzer* is usually translated as "bastard," but the usage of bastard in English obscures rather than clarifies the meaning of *mamzerim*. The other translation that is used, "illegitimate," also has connotations (e.g., "out of wedlock") that obscure rather than clarify.

73. The translation of *'agunah* as "the anchored [woman]," or *takanat agunot* as "the prescription [of] anchored women," is based in part on the comment in Babylonian Talmud Tractate Baba Bathra 73a explaining the Mishnaic word "*ugin*" as "anchor." The Talmud there refers to *Ruth* 1:13 (New Jewish Publication Society trans.), which asks: "Should you on their account debar [*te'agannah*] yourselves from marriage?" Rashi *ad locum* explains the phrase in *Ruth* as "be obstructed from marrying;" In BABYLONIAN TALMUD TRACTATE BABA KAMMA 80a, Rashi explains it as "be delayed from marrying." The usage in *Ruth* is a *hapax*, which gives itself to being translated (within the parallelism of the verse) as "delayed" (The Septuagint translates *Ruth* 1:13: be held back, be detained). Maurice Simon's translation of *takanat agunot* as "to prevent wife-desertion" misses the point by trying to finesse the problematic complexity, or the ungrammaticality of the Bavli's term *takanat agunot*. MAURICE SIMON, *THE HEBREW ENGLISH EDITION OF THE BABYLONIAN TALMUD: GITTIN* (Maurice Simon trans., 1963).

74. If the concern would have been more directly for the wife, the objection would have been phrased as a prescription against the marriage of an already married woman. This abrogation is a serious one itself as it carries the death penalty.

heavy.⁷⁵ For Resh Lakish (Rabbi Yohanan's legendary study partner) the concern is that the husband might indefinitely "anchor" the woman—that is, to not allow her to remarry or to keep her in this marriage by virtue of being able to cancel the writ of divorce even after he had sent it.

One strategy for reading against the rhetoric of a *sugya* is denying its inevitability. For example, one might ask the question: How else might this have been written? A way of answering this question is by comparing the *sugya* to the parallel discussion in the earlier Palestinian Talmud.⁷⁶ When we compare the language of this exchange with the parallel exchange in the Palestinian Talmud, two interesting things come to the fore. First, in the Palestinian Talmud, both sides of the debate are attributed to Resh Lakish as possibilities.⁷⁷ More importantly, the two rationales are not given as ordinances, but rather are quoted without the institutional trappings: "There are those who say in the name of Resh Lakish, 'so that she should not come to having *mamzerim*.' And there are those who say in the name of Resh Lakish, 'so that she should not end up sitting anchored.'" ⁷⁸ The concerns are the same as those expressed in the *sugya* in the Babylonian Talmud. The important difference is that in our discussion of the Babylonian Talmud, the concern is marked by the language of the institutions of law and of those who make ordinances or prescriptions.

If we place this exchange into narrative,⁷⁹ there is the court who is charged with protecting the wife or the children, the husband who is suspiciously regarded as a conniver and must be overridden by the court, and the woman who might misinterpret the proceedings and therefore need the protection of the court.

75. The heaviest sanction is social ostracization since *mamzerim* are only permitted to marry other *mamzerim*, and their children are automatically *mamzerim*. See *Mishnah Yevamot* 4:13; *Mishnah Kiddushin* 10:1.

76. The Palestinian Talmud is also constructed around the Mishnah and therefore many of the same issues come up in both texts. It is therefore often most instructive to note the differences between the two texts.

77. In the form of "There are those who say in the name of Resh Lakish. . . and there are those who say in the name of Resh Lakish . . ." PALESTINIAN TALMUD TRACTATE GITTIN 4:2.

78. See *id.* at 4:2.

79. "The point of narrativizing is to expose and thereby subject to debate the values hidden by the apparently nonnarrative format of pieces written in traditional 'academic' styles. We will call this the antifoundationalist challenge." Baron & Epstein, *supra* note 2, at 173.

The *sugya* continues by raising the question (via an early source text⁸⁰): What happens if the husband cancels the *writ of divorce* in another place anyway?

Our Rabbis have taught: If [the husband] canceled [the writ of divorce] it is canceled. The ruling of Rabbi.

Rabban Simeon b. Gamaliel says, He can neither cancel it nor add to its conditions.

If he could, what is the effective power of the court?⁸¹

Rabbi holds that, despite the ordinance, if the husband cancels the writ of divorce, it is canceled. In other words, the ordinance cannot override a specific act executed properly by the husband in a court. On the other hand, Rabban Simeon b. Gamaliel separates the husband from the writ as soon as he dispatches the writ. That is, the man's power over the writ ends when he sends it on its way with an agent; the man can no longer tamper with it. Rabban Gamaliel's reasoning is instructive. It is not out of concern for the legal or social consequences that might result if a woman receives an already nullified divorce which she thinks is valid. Rabban Simeon b. Gamaliel's concern is rather for the integrity of the institution.⁸² If any man were able to

80. A *beraita* (that is, a source-text) supposedly coevals with, but is not found in, our Mishnah. With the exception of the last line, the *beraita* is found in *Tosefta Gittin* 3:3 (Lieberman ed.) and PALESTINIAN TALMUD TRACTATE GITTIN 4:2. The whole *beraita* (and most of the unit) is found also in the *sugya* BAVLI YEBAMOTH 99b.

81. BABYLONIAN TALMUD TRACTATE GITTIN 33a.

82. Scholars have pointed out that the last line of this *beraita* ("If he could, what is the effective power of the court?") is problematic. See, e.g., AVRAHAM WEISS, *THE TALMUD IN ITS DEVELOPMENT* 389 n.366 (1954) (hereinafter WEISS); DAVID HALIVNI, *SOURCES AND TRADITIONS: A SOURCE CRITICAL COMMENTARY ON SEDER NASHIM 531-532* (1968) (hereinafter HALIVNI). The *beraita* appears in *Tosefta Gittin* and in the parallel discussion in the Palestinian Talmud without this line.

Weiss further illustrates that for the line to make sense, it must be read as: "for if he could, that is, when the ordinance of Rabban Gamliel does not void the betrothal retroactively, and since any [man] who betroths [a woman] betroths with the consent of the Rabbis (emphasis supplied), what is the effective power of the court?" That is, the *beraita* needs to presuppose the later editorial understanding of Rabban Gamliel in order for the line to be intelligible. See WEISS, *supra* note 82, at 389 n.366.

Halivni points out that the line does not fit anyway since the Rabbi could also claim that the power of the court is upheld by the fact that at least initially the man cannot nullify the writ of divorce, and that the voiding of the writ had to be done in a court. See HALIVNI, *supra* note 82, at 531-532.

This leads both Halivni and Weiss to suggest that this line is later than the *beraita*. Weiss suggests that it is an early explanatory comment which attempts to bring the Babylonian Talmud in line with the Palestinian Talmud's position that the words of the Rabbis do, in fact, "uproot the words of Torah." WEISS, *supra* note 82, at 389 n.366. Halivni suggests that it is an interpolation by an Amora suggested by the linguistic similarity of this Mishnah to *Mishnah Ketubot* 11:5, in which R. Simeon b. Gamliel cites the argument: "for if he could what is the effective power of the court?" See HALIVNI, *supra* note 82, at 531-532.

override an ordinance, what would become of the power of the court? This conflict between the power of the court and the power of a man to nullify his written deed becomes, in the continuation of this discussion, a conflict between the power of the court and the "power of Torah."

The *sugya* continues:

And is it possible that according to the Torah⁸³ the writ of divorce is nullified,
and because of [our concern with] "what is the effective power of the court?" we permit a married woman to the world?⁸⁴

The editorial voice of the *sugya* forcefully challenges the reasoning of Rabban Gamliel. According to the Torah (that is, according to the strata of Rabbinic law which is accorded the status of, and is identified as, "Torah Law"⁸⁵), a man may nullify a writ of divorce after he has sent it and before the woman has received it. Once the man nullifies the writ of divorce, whether or not the woman knows that he has nullified it, the woman remains his wife; that is, she is "the wife of a man" for all intents and purposes. Prior to the ordinance of Rabban Gamliel that holds that the husband may not nullify the writ of divorce, the woman who was the recipient of a nullified writ would still be married.

The question that is thus posed is whether the Sages can assume that the "power of the court" is such an overriding concern that it would, in effect, allow a married woman to marry another man? Or, to put it another way, do the Rabbis really have the power to override a Torah law with a Rabbinic prescription? These questions go to the heart of the Rabbinic enterprise. The power of authoritative interpretation is the power that the Rabbinic class claims.⁸⁶ The anonymous voice of the *sugya* raises the possibility that Rabban Gamliel overstepped Rabbinic authority for insufficient reason.

There is no way to decide between these two views. However, the resolution of this question is irrelevant to my point, which is that this line (which both Halivni and Weiss agree existed by the time the editorial layer of the *sugya* was composed) serves as a catalyst to generate the authorizing narrative of this discussion, whatever its originary integrity. See WEISS, *supra* note 82, at 389 n.366; HALIVNI, *supra* note 82, at 531-532.

83. *Torah* literally means "from the teachings."

84. BABYLONIAN TALMUD TRACTATE GITTIN 33a.

85. See MENAHEM ELON, *JEWISH LAW: HISTORY, SOURCES, PRINCIPLES* 194-207 (1978) (discussing the distinction between Torah laws and Rabbinic Laws).

86. BABYLONIAN TALMUD TRACTATE SHABBAT 23a (grounding the Rabbinic power of authoritative interpretation in a midrashic reading of *Deuteronomy* 17:11 as "[Y]ou shall not stray . . .").

The following uncompromising answer to this question raises the stakes:

Yes.

Any [man] who betroths [a woman], betroths with the consent of the Rabbis.

And the Rabbis annul his betrothal.⁸⁷

The religious-legal audacity of Rabban Gamliel's statement is lauded and exploited as the grounding for any marriage. The institutions of law in the person of the Rabbis are implicated in every marriage, and therefore hold sway over the existence of the marriage. In the same manner, they may declare a marriage null. The anonymous editor answers his own question by saying that the man betrothed the woman in the first place only by leave of the Rabbis. Therefore, if the Rabbis decide for whatever reason to nullify the marriage, this too is their prerogative. It is no longer a matter of Torah law as opposed to Rabbinic ordinance. The Rabbis have taken complete control of the betrothal and wrested it out of the hands of the Torah.

It would be hard to overstate the importance of this statement. With this Rabbinic principle, the character of marriage as a whole is completely changed. Marriage is no longer a relationship between a man and a woman. Marriage is now a relationship between the court, a man, and a woman. When push comes to shove, however, the court steps in to untie the knot and the husband is elided from the relationship.

The final two lines of this part of the discussion reinforce the impression that the power of the Sages is the power to interpret events. Nullifying a marriage is essentially interpreting it out of existence.

Said Rabina to R. Ashi: This is quite right if he betrothed her with money. [If] he betrothed her with coition, what can we say?

The Rabbis declare his intercourse, a profane intercourse.⁸⁸

Rabina, a Babylonian Sage who lived in the fifth century,⁸⁹ challenges the way in which the discussion is moving. It might make sense if the discussion was limited to one of the modes of betrothal—money. The Rabbis power of forfeiture is well-documented.⁹⁰ Moreover, the monetary transaction is reversible. In the same manner in which the man

87. BABYLONIAN TALMUD TRACTATE GITTIN 33a.

88. BABYLONIAN TALMUD TRACTATE GITTIN 33a.

89. See THE IGGERES OF RAV SHERIRA GAON, *supra* note 51, at 115, 116.

90. See, e.g., BABYLONIAN TALMUD TRACTATE GITTIN 36a (stating "That which the court confiscates is confiscated.").

gave the woman the value of a *perutah* coin, the court transfers the *perutah* coin back to the man. However, how is this possible if the man betrothed the woman by means of intercourse?⁹¹ Rabbi Ashi's answer underscores the Rabbis authority to interpret. The Rabbis reinterpret the act of betrothing (literally sanctifying) intercourse as profane or mundane intercourse which had no contractual efficacy.

Before moving on, it would be appropriate to consider the origins of the principle: "Any [man] who betroths [a woman], betroths with the consent of the Rabbis."⁹² It is not clear where, and even whether, this principle is grounded outside of our *sugya*. In fact, this is one of only two places that the principle appears in the Babylonian Talmud.⁹³ The *sugya* itself offers no outside textual support for it.

The leading medieval commentaries on the Babylonian Talmud (Rabbi Shlomo Yitzhaki⁹⁴ in the eleventh century, and the Tosafist school⁹⁵ of the twelfth to the fourteenth century, among others) see this Rabbinic authority over marriages as deriving from the statement that a marriage is effected "according to the laws of Moses and Israel"⁹⁶ which is part of the declaration made by the groom during the marriage ceremony (and written in the marriage contract, the *Ketubah*).⁹⁷ According to these commentaries, this declaration is the man's own assertion that his marriage is by the consent of the Rabbis, and therefore the Rabbis have the full right to annul it.

91. There are three ways in which a man may betroth a woman: money; contract; and intercourse. See *Mishnah Kiddushin* 1:1.

92. BABYLONIAN TALMUD TRACTATE GITTIN 33a.

93. The other occurrence of the phrase is in BABYLONIAN TALMUD KETUBOT 3a, which is apparently a direct quote of our text here. Cf. Menahem Kahane, *giluy da'at ve'ones be gittin*, (in Hebrew), 62 *TARBIZ* 225, 225-263 (1993) (arguing that the editorial agenda of the discussion in Tractate Gittin is to support the proposition that a claim of extenuating circumstances is inadmissible for a man in a case of a writ of divorce).

94. See BABYLONIAN TALMUD TRACTATE GITTIN 33a s.v. 'ada'ata derabbanan mekadesh; BAVLI YEBAMOTH 90b s.v. bitlo and 'ada'ata derabbanan.

95. See BABYLONIAN TALMUD TRACTATE GITTIN 33a s.v. kol demekadesh.

96. BABYLONIAN TALMUD TRACTATE GITTIN 33a.

97. See 1 MORDECHAI AKIVA FRIEDMAN, *JEWISH MARRIAGE IN PALESTINE: A CAIRO GENIZA STUDY* 164 (1980).

We can not expect on the basis of the testimony of the Geniza texts to be able to conclude which of the interpretations of the phrase that have been suggested is most correct, if any of them. It is safe to assume that [according to the Law of Moses and Israel] was intended to stress legality. The different contexts in which legality was emphasized explain the varied connotations that were imported to it, whether referring to some requirements of law, to the legality of the marriage or to the Jewishness of the law. Many of the interpretations that are found in the literature are not mutually exclusive, and the phrase is general enough for it to be assumed that varied emphases may have been intended initially, according to the context in which it was used.

This is a problematic interpretation as the only Rabbinic (Mishnaic or Talmudic) attestation of the phrase “according to the laws of Moses and Israel” refers to certain specific customs and mores that both husband and wife must uphold.⁹⁸ If they do not, the wife might demand a divorce, and the husband might divorce without paying the *ketubah*, or prenuptial agreement, payment. If anything, these sources point to a much narrower area in which a divorce might be initiated against the will of one of the parties. They definitely do not delineate rules for nullification of a marriage.

Avraham Weiss, a mid-twentieth century Talmud scholar, follows a similar line, though without invoking the husband's participation, via the formula “according to the laws of Moses and Israel.”⁹⁹ He states the dilemma of the rabbis very starkly—they do not have the power to assert that this nullification, which was done in accordance with the requirements of the law, is invalid. They therefore make the original betrothal conditional upon this type of nullification not being executed by the husband. When the husband nullifies the writ, the Rabbis are not invalidating his action; instead they are simply stating that because the condition of the original betrothal was not met, it does not exist, and neither man nor woman were ever married. In this event, the nullification and the writ of divorce are both rendered meaningless. While possibly explaining how the mechanism of annulment might work, Weiss smoothes over the very active way that the principle is phrased (“[the Rabbis] *annul*”).¹⁰⁰ As a result, the crucial aspect of this moment in the *sugya* is missed.

I argue that we are left then with the following way of understanding this discussion. The authority of the rule that “Any [man] who betroths [a woman], betroths with the consent of the Rabbis,” is grounded in the interpretation of the phrase: “What is the effective power of the court?” In other words, the anonymous voice of the *sugya* first reads Rabban Gamliel's invocation of the effective power of the court as raising this concern to a higher level than possible adultery. This strong reading of “the effective power of the court” clears

98. See *Tosefta Ketubot* 7:6; *Mishnah Ketubot* 7:6.

99. See Weiss, *supra* note 82, at 391.

100. See *id.* at 391 (noting that this might be a solution to the contemporary problem of *agunah*—a woman who is “anchored” and cannot remarry since her husband refuses to grant her a divorce, or he cannot be found).

the space for understanding all betrothals as directly enabled by the Rabbis.¹⁰¹

Once the concern for the effective power of the court is read strongly (e.g., that it is an essential rather than a tangential issue) the path is clear to the assertion that all who marry do so with the consent and by leave of the Rabbis. If all who marry do so by leave of the Rabbis, then it is easy to assume that the Rabbis may nullify the marriage.

This description generates the following narrative. There are two poles in the legal system. One pole, the Rabbinic pole, is active. At this pole, law is decided both in principle (at the legislative level) and in practice (at the judicial level). The other pole is the passive pole of obedience. This is a wonderful example of how a nomic community, having generated law through interpretation, institutionalizes that law (as Cover has described) through the Imperial model of law or the social organization of law as power.¹⁰²

It is this narrative which underlies the stories or *ma'asim* at the end of the series of *sugyot* on this Mishnah. They are all stories of Rabbinic coercion of men to divorce their wives. In each story the explicit statements of the men are ignored or reinterpreted so that the Rabbinic will be done. The only exception to this is the story of Giddul's wife. She is the only actor whose actions are not interpreted or countermanded by the Rabbis. The Rabbis do not even attempt to interpret her actions. They only discuss whether or not Giddul's statement should have any efficacy in canceling the writ of divorce.

101. There is an affinity between this picture of Rabbinic law making and theories of judicial review, especially what Robert Post has called "responsive interpretation." See Robert Post, *Theories of Constitutional Interpretation*, 30 REPRESENTATIONS 13, 19 (1990). Post defines this as "a form of interpretation that reads the Constitution in a manner designed to express the deepest contemporary purposes of the people." *Id.* at 18. Post records the following caveat:

Responsive interpretation does, however, have an important vulnerability. It contains within it no particularly persuasive response to the counter-majoritarian difficulty. If doctrinal interpretation portrays courts as merely the instruments of the law, if historical interpretation portrays courts as merely the instruments of an original democratic will, responsive interpretation portrays courts instead as arbiters of the fundamental character and objectives of the nation. And why, it may be asked, should courts be entrusted to act in that capacity . . . ?

Id. at 25.

As opposed to constitutional interpretation, Rabbinic interpretation has no problem with counter-majoritarianism. A basic claim of the Rabbis is that they *are* the authoritative interpreters of Torah law, or the "arbiters of the fundamental character and objectives of the nation." BABYLONIAN TALMUD TRACTATE SHABBAT 23a.

102. See COVER, *Nomos and Narrative*, *supra* note 1, at 106, 112.

VI. GIDDUL'S WIFE AGAIN

In this section, I analyze the stories at the end of the *sugya* and ask what the uniqueness of the story of Giddul's wife might say about the construction of women in the Talmudic legal system. Once the debate whether "revealing of intention in [the case of] a writ of divorce is a [substantive] matter" is joined, the disputants (Abbaye and Raba) each attempt to prove their point by the effective use of case law, or stories of legal decision making. Ultimately, Abbaye is victorious. However, my interest is not in the outcome of this Halakhic dispute, but rather in the cases themselves. The stories that are pressed into the service of this debate when read against, or at least without regard to, the rhetoric of the linear argument,¹⁰³ are performances of the effective power of the court. The stories illustrate power both as authority and, in a more literal sense, as coercive physical power.

The stories are as follows:

I.

For R. Sheshet compelled a certain man to send a writ of divorce against his will.

He [the man] went and said to the witnesses, Thus said R. Sheshet to you, 'Let the writ of divorce be canceled.'

And R. Sheshet forced him [to give] another writ of divorce.

II.

For R. Yehudah compelled the son-in-law of R. Jeremiah Bira'ah to send a writ of divorce, and he [the son-in-law] canceled it.

He once again compelled him to send [a writ of divorce]. He [the son-in-law] canceled it.

He once again compelled him to send [a writ of divorce] against his will,

and he said to the witnesses, Put squash into your ears¹⁰⁴ and write it for her.

III.

For a certain man said to them, If I do not come within thirty days this shall be a writ of divorce.

He came [within thirty] and was stopped by the ferry.

He said to them, See that I have come! See that I have come!

And Samuel said, this was not called coming.¹⁰⁵

103. I have argued for this kind of a reading in my book. See COHEN, *supra* note 31, at 131-151.

104. This was done so the witnesses would not hear the protestations of the husband.

105. BABYLONIAN TALMUD TRACTATE GITTIN 34a.

Although the first two cases are brought as proofs for opposing opinions (Case I for Raba and Case II for Abbaye), they are almost structurally identical. In both stories, a man is compelled to give his wife a writ of divorce. In both, the man makes it very clear that he has no desire to give his wife a writ of divorce. In both, the husband's desire is obliterated by the court in the person of a named Sage. In the first case, R. Sheshet forces the man to give a second writ of divorce even though the husband went so far as to lie in order to cancel the first writ. In the second case, the husband, after canceling several writs which he was forced to send, is effectively silenced by stopping up the ears of the witnesses. In both of these cases, it is the court that essentially sends a writ of divorce to the woman from the man. In the third case, Samuel, one of the legendary founders of the Babylonian academy in the third century, interprets the husband's actions and words against the interpretation of the husband.

The common denominator of the three cases is the effective deployment of the power of the court. Since by law a man has to divorce willingly, the court effectively decides what willingness is. The man's actions and words are interpreted against him. His refusals are not recognized as refusals and his interpretation of his own actions are not accepted as valid.

This stands in stark contrast with the actions of Giddul's wife. Her refusal is neither undermined nor interpreted against itself. In fact, the discussion revolves around the interpretation of the husband's somewhat cryptic blessing. If we now look at the way in which men, women and the court are narrated in this *sugya* as a whole, we can say the following: the locus of production of both legal meaning and power is the court. Men not of the Rabbinic circle are consumers or passive subjects of this legal meaning. They have no voice (literally) in its production or implementation, yet it is a coercive power in their lives. On the other hand, women are constructed or narrated at an oblique angle to this relationship. Women are not subjects before the law; they have neither voice in the academy nor access to the courts. They are, however, the object of the law. In other words, the law defines their personal status and therefore their future (e.g., anchored and unable to marry another; married and therefore subject to the death penalty if they cohabit with another man; divorced) while they are simultaneously not part of the law. Women remain as a powerful unknown in the system. Since they are not given voice, they can

neither dissent nor assent. Their participation (that is, by accepting the yoke of the law) is, however, necessary for the system.

VII. CONCLUSION

The Rabbinic insistence on the effective power of the court is a strategy of Exile. Jonathan Z. Smith writes, "While the exile is an event which can be located chronologically as after A.D. 70, it is above all a thoroughly mythic event: the return to chaos, the decreation, the separation from the deity analogous to the total catastrophe of the primeval flood."¹⁰⁶ We saw above that the chaos and loss of control that was felt as a result of the Exile was located in the divorce from God. In this context of divorce, all the power was in God's male hands. Female Israel had no control at all over the proceedings. In a move which is an almost exact mirroring and reversal, the Rabbis interpret into existence their own ultimate power over all marriages and divorces, and insist on their exclusive right for interpretation of action and word. The husband is silenced, and the transaction is between the court and the wife. In this situation, control is restored and Exile deferred.

106. JONATHAN Z. SMITH, *MAP IS NOT TERRITORY: STUDIES IN THE HISTORY OF RELIGION* 119 (1978).