

Kiddushei Ta'ut and Mental Illness

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There are, according to the Talmud in BT Kiddushin 2a, three methods by which a woman enters into a marriage (via contract, exchange of money or its equivalent, or intercourse) and two by which she leaves it. While this assertion is true, it is also incomplete. It is true that there are only two ways for a marriage to end: death and divorce, as the Talmud says. But there is another way that a marriage might dissolve. That process is called *hafka'at kiddushin*, and it refers to the power of the court to annul a marriage as though it never existed. A marriage that has been annulled has not been ended; it has been retroactively undone. Such a step is drastic but not unheard of throughout Jewish history. And although the rabbis are parsimonious in its use, they unequivocally believe in its power.

כל דמקדש - אדעתא דרבנן מקדש, ואפקעינהו רבנן לקידושין מיניה.

All who betroth do so under the will of the rabbis, and the rabbis can annul that betrothal (BT Gittin 33a).

One of the acceptable reasons for an annulment is when a betrothal and marriage happen under false pretenses. *Mekach ta'ut*—“mistaken acquisition”—is a legal category that applies broadly to all forms of acquisition but is used in the context of marriage to refer to situations where some information or known defect about either spouse ought to have been disclosed before the wedding and was not. These mistaken marriages, *kiddushei ta'ut*, are annulled because the spouse is understood to believe the following: “Had I known what I ought to have been told, I would never have entered into the marriage.” It is worth remembering that, in the Talmudic era, betrothals could have been carried out by messengers at a long distance, and so this solution to spousal misrepresentation

seems perfectly reasonable. In our day and age, the value of *mekach ta'ut* is that—in cases of *get* refusal where we can also determine that the marriage happened under false pretenses—it can be used to unilaterally free a woman chained in marriage.¹

The usefulness of *kiddushei ta'ut* should neither be over- nor understated. It is a tool in the rabbinic toolbox and one that has, historically, served as one possible key to unlock the chains of the *agunah*. The question that remains, about which we ought to be conscientious, is what constitutes “false pretenses.” The Gemara discusses two contradicting scenarios of *kiddushei ta'ut*. One (BT Ketubot 72b) is a case where a man explicitly states that he is marrying a woman on the condition that she has no blemishes, only to discover that she has some sort of blemish. Such a marriage is voided. However, the marriage is only annulled if the husband had stated explicitly that the marriage is conditioned on her being blemish-free. If he marries her without qualification and then discovers that she has a blemish, the marriage stands. The other scenario (57b) involves a defect or blemish that annuls the marriage without mentioning any conditions set by the husband. According to the Rishonim, the solution to this seeming contradiction regarding preconditions is that there are actually two kinds of *kiddushei ta'ut*. The first is deception: one partner makes the presence or absence of a particular trait a condition of the marriage and the other partner conceals the fact that they do not meet the criteria. The second is a *mum gadol*, a significant defect. Some issues are of such weight that the marriage is presumed to be under false pretenses unless the partner understands the situation completely from the outset and consents anyway (what,

¹As my goal is to discuss one particular part of *kiddushei ta'ut*, I will not go into the full details of how it has been used over the centuries. For a more extensive analysis of the history of *kiddushei ta'ut* as a method of unilaterally ending marriage, as well as a larger analysis of the halakhic positions and the reason that our community considers it a viable way to end a marriage, please see the International Beit Din's responsum “קידושי טעות” (<https://www.internationalbeitdin.org/wp-content/uploads/2023/05/Kiddushai-Taut.pdf>). For our purposes, we follow the International Beit Din's ruling that a *beit din* ought to rule *kiddushei ta'ut* when the situation warrants it.

in rabbinic language, is called *savra v'kibla*). Any marriage where one potential spouse sets a condition and the other fails to meet it can be annulled, but the only marriages that can be annulled without such pre-conditions are those where the defect is deemed sufficiently significant that it creates an unbearable marital situation.

“אין אדם דר עם נחש בכפיפה” — “No person would live in a basket with a snake.” This quote appears in multiple scenarios in rabbinic literature, most notably in BT Ketubot 77a to explain why a man who will only provide for his wife when forced to by the court is compelled to divorce. In more modern contexts, it is used more broadly to justify claims of *kiddushei ta'ut* when one spouse makes the other's life unbearable. According to the International Beit Din, “It is important to note that rulings of *kiddushei ta'ut* have been made hundreds if not thousands of times throughout Jewish history. Poskim offer examples such as impotence, mental illness,² and psychological dysfunction that make married life untenable.”³ While the rulings of the individual courts are kept private out of respect for the individuals, the rabbis who evaluate these issues will discuss when and how they decide *mekach ta'ut* and one of the factors that enters into consideration is whether the husband has been diagnosed with a mental illness. That is to say that, in addition to looking at the behavior that makes married life untenable, the courts will also look at whether that behavior is accompanied by a diagnosis of mental illness and, if so, will consider the diagnosis as supporting evidence for declaring *kiddushei ta'ut*. It is easier to declare *kiddushei ta'ut* on someone who has been diagnosed with a mental illness.

This leaves us, as contemporary Jews, with something of a conundrum. *Kiddushei ta'ut* is a vital and useful tool that can, for example, end a marriage in which a husband has a persistent pattern of erratic or frightening behavior that demonstrably preceded the wedding. At the

²For the purposes of this essay, I am going to use the language of “mental illness” to remain in line with the language of the modern sources, even if it is often not the language that best reflects any given individual's relationship with their psychological state.

³See the [Halakhic Methods](#) section of the International Beit Din's website.

same time, the language of *mum gadol* is discomfiting because it is inherently judgmental. By definition, a *mum gadol* is something no person would want in a partner unless they go on the record saying that they accept it. In effect, it states that certain kinds of people are unfit partners. I have no problem saying that unpredictable, erratic, and harmful behaviors make one an unfit partner. But, as the boundaries of this category are established, we have a responsibility not to further stigmatize those with disability or mental illness by presuming that they are unfit. Indeed, we see the difficulty inherent in finding the right boundaries when we consider both contemporary and historical cases of *kiddushei ta'ut*. In any number of those cases, longstanding patterns of unpredictable and harmful behavior on the part of the husband were instrumental in declaring *kiddushei ta'ut*. However, when the courts use the diagnosis itself as part of the evidence for *kiddushei ta'ut*, we move towards dangerous assumptions and stigma. The work of freeing *agunot* is critical, and I would not, for all the world, suggest that we interfere with its efficacy. Yet I believe it is possible to construct a better understanding of *mum gadol* that does not disparage those of us with psychological diagnoses in the holy service of freeing *agunot*.

Given the trustworthiness of the courts doing this work and the overwhelming evidence that is amassed in cases of *kiddushei ta'ut*, this problem may seem academic. There are, to my knowledge, no cases of *mekach ta'ut* that rest entirely on a diagnosis; modern courts use it as supporting evidence to make an obvious case of *kiddushei ta'ut* based on the husband's behavior appear more ironclad. My anger is on behalf of the *agunot* whose husbands' behaviors are equally untenable, but whose claims of *kiddushei ta'ut* are harder to support because there is no history or evidence of mental illness. As soon as the presence of a diagnosis is used to bolster a claim, the absence of one will inevitably be used to undermine it. The women chained in marriage deserve better. And so do those of us with mental illness.

There is a particular feeling, one that is not unique to those of us with psychological diagnoses, of sitting in a presentation and feeling unmoored as a halakhic conversation veers into the realm of talking about us and our own unfitness. To be in the room and hear about the role

that having a mental illness can play in declaring *mekach ta'ut* is, frankly, horrible. Even with all the qualifiers and emphasis that the diagnosis works to support the claim only when harmful patterns of behavior are already present, it is impossible not to hear the underlying message: “No one would agree to marry someone like you.” Halakhic thinkers owe us, the Jewish people, an ethical halakhic process and that means a process that works towards ethical ends through ethical means. Even if there will never be a case of *kiddushei ta'ut* that rests entirely on diagnosis, the way that the courts discuss the process is equally important. The conversation right now feels like a slap in the face to all of us doing our best to be good spouses while living with mental illness and psychological diagnoses. If it were necessary for freeing *agunot*, I could swallow the pain. Since, however, the courts can be equally if not more effective without relying on diagnosis at all, I believe they have a moral imperative to do so.

I want to suggest that, rather than using mental illness as evidence for *kiddushei ta'ut*, we only and always rely on behavior as evidence. The actual diagnosis should not enter into the *beit din's* calculation. Identifying behavior rather than diagnosis is preferable for three reasons. First, mental illness differs from physical illness in that a diagnosis does not explain the cause of distress; it merely describes it. Diagnosis is designed to help medical professionals help patients (and unlock treatment benefits), but the rates of misdiagnosis, likelihood of missed diagnosis, and subjective nature of the criteria for diagnosis make official diagnoses less objective and less reliable than observed behavior. Second, using mental illness diagnoses to support a claim of *kiddushei ta'ut*—despite the rarity of the claim and how irrelevant it is to most marriages—perpetuates the stigma of mental illness in the observant community and makes it harder for those who need help to seek it. Finally, this approach will increase the likelihood that cases where the spouse displays a lifelong pattern of harmful behavior can be resolved swiftly, as there is no impulse to diagnose a specific mental illness in order to bolster the claim of *kiddushei ta'ut*. Diagnosis of mental illness ought to be irrelevant to claims of *kiddushei ta'ut*.

The first advantage of ignoring diagnosis when evaluating *kiddushei ta'ut* lies in the increased objectivity that comes from focusing on behav-

ior. By definition, a *mum gadol* is a fact about the person that would be deemed a significant problem in a potential spouse. The paradigmatic example in the Talmud is that of an *aylonit*, a woman who never develops female sex characteristics and cannot bear children. For some rabbis, the figure of the *aylonit* defines the category of *mum gadol* as an insurmountable obstacle to procreation. Other rabbis suggest that this example refers to any trait that either interferes with procreation or makes cohabiting with the person impossible. This would include anything that a spouse would be presumed to find distasteful, including persistent halitosis or bodily defects. I am, to be clear, deeply uncomfortable when the Talmud cites examples of a *mum gadol* that map onto physical disabilities. I hope that, as our society shifts and our perspective on disability changes, we stop seeing physical difference as a *mum gadol*.⁴ Until that time, the last thing we should be doing is expanding the category of *mum gadol* to include other forms of difference.

The thread that connects the aforementioned examples is that they refer to objective features of the person. Mental illness, on the other hand, is a complex field where diagnosis rests on a clinician's judgment, the patient's experiences, and the constellation of symptoms. As indicated above, it remains subjective and misdiagnosis is always a concern. Specific behaviors, even those that constitute the criteria for certain diagnoses, are much more objective in the halakhic sense. The *beit din's* job is to ascertain that there is a pattern of behavior that no person would consent to living with and that said pattern has persisted since before the marriage. The more the *beit din* relies on behavior rather than a diagnosis as a proxy for persistent behavior, the stronger the case for *kiddushei ta'ut*.

This leads to the second key advantage of using behavior rather than diagnosis as the proof for *kiddushei ta'ut*. Focusing on formal diagnosis perpetuates the stigma around mental illness in the Jewish community, disincentivizes seeking help with mental illness, and rewards those who

⁴To some extent, what constitutes a *mum* depends in part on what is normalized by society, and my fervent hope is, as we normalize disabled bodies in Jewish spaces, this example becomes less and less relevant.

refuse to seek help. Asking for help is difficult enough under the best of circumstances without adding the knowledge that part of the process may include undermining one's marriage. Providing better support for people with mental illnesses in our community means that we ought never consider them defective as human beings, even if only within the realm of a particular halakhic reality. If we include mental illness in the criteria for declaring *kiddushei ta'ut*, even if only as corroborating evidence, we are saying that, by definition, mental illness makes one defective. It is useful to remember the two different kinds of *kiddushei ta'ut* here. Were the issue simply that one spouse failed to disclose their mental health struggles, then *kiddushei ta'ut* would only apply if the other spouse had explicitly stated that they only intended to marry someone without mental illness. *Kiddushei ta'ut* based on *mum gadol*, however, works when the standard assumption is that no one would willingly marry a person with mental illness unless they understand the situation and consent, *savra v'kibla*. This strikes me as both untrue—especially given the current rates of mental illness—and deeply painful. At the end of the day, the problem with a person who has mental illness who withholds a *get* as part of a longstanding pattern of coercion and control is exactly the same problem as a person without mental illness who withholds a *get* as part of a longstanding pattern of coercion and control. It is, after all, quite possible for a person to make married life untenable without having any formal diagnosis and there is no reason to look for one in order to make a better case for *kiddushei ta'ut*. Bringing mental illness into the conversation just serves to make life harder for all those currently grappling with mental illness who are doing their best to be good spouses.

Finally, the third benefit of using behavior to judge the criteria of *kiddushei ta'ut* is that it avoids the trap of conflating mental illness with immorality. Western culture has linked the concepts of evil and madness in narrative for a long time. The ancient myth of Herakles, for example, portrays madness as a curse from the gods that leads to murder. The more modern iteration of myth, the superhero legend, is similarly filled with stories of villains whose origins consist of being driven mad and

going on to harm others.⁵ It is, however, with the 19th-century's scientific bent and the dawn of modern psychology that we, as a culture, have sought to consider wrongdoing itself a pathology. One sees the proliferation of the diagnosis "moral insanity" in this era, a term which includes any of the following: melancholia (depression), lying, stealing, pyromania, and any behavior that is outside the bounds of good taste for one's class or station in life, especially if one is a woman.⁶

Since then, the idea that evil is a manifestation of mental illness has only entrenched itself further in our culture. We hear this rhetoric often in reactions to tragedy, that a person must have been insane to do the things that they did. We also hear it in attempts to explain bad behavior: they cannot help themselves because there is something wrong with them. Evil itself becomes a form of mental illness; if no sane person could do such an evil thing, then it must mean that all evil people are insane. There must *be* something wrong with people who *do* wrong. If we extend this logic to *igun*, we end up saying that anyone who withholds a *get* must have something wrong with them. Why else would they do wrong? If we can identify what is wrong with them, say, with a diagnosis of a specific condition linked to mental illness, we now have an answer to why they do wrong and will not change. Conversely, if we cannot find a diagnosis, we are taught to second guess whether the behavior is truly wrong. If there is nothing wrong with them, maybe what they are doing is not wrong. Perhaps this goes without saying, but this view of both mental illness and evil is incorrect.⁷ The more we learn, the more mental illness unfolds as complex psychological phenomena that is not about morality. Moreover, the more we learn, the more we understand that something is not evil just because it is either different or difficult.

⁵ For more resources, I highly recommend Amanda Leduc, *Disfigured: On Fairy Tales, Disability, and Making Space* (Coach House Books, 2020).

⁶ For more information about the evolution of psychology in the 19th century, see *Embodied Selves: An Anthology of Psychological Texts, 1830-1890*, Jenny Bourne Taylor and Sally Shuttleworth, eds., specifically Henry Maudsley on "A Case of Moral Insanity" (266-268) and George Henry Savage in "Moral Insanity" (282-4).

⁷ Disabled people and those with mental illness are far more likely to be victims of crimes than to commit them, and there is no difference in criminal activity between those with mental illness and those without.

In a culture that has so much stigma around mental illness and that makes so many unfounded assumptions about the criminality of those with mental illness, the judge and the *beit din* must be exceedingly cautious to counteract that influence. There is a principle in halakhah (found in BT Sanhedrin 6b and elsewhere) “אין לו לדיין אלא מה שעיניו” — “The judge has nothing but what his eyes can see.” We cannot know what goes on inside a person’s heart. We cannot see into the synapses of their brain. We cannot determine why mistreatment happens. We can, however, know whether there has been a pattern of controlling behavior and unreasonable demands since before the marriage. We cannot know whether that pattern comes from a person’s own trauma or poor guidance or an imbalance of neurochemicals or an evil nature. It is important for the *beit din* to remember that a diagnosis of mental illness is merely psychology’s way of affirming the presence of a certain constellation of symptoms. It is the *beit din*’s job to look at the behavior, not whether a doctor has ascribed a certain name to it.

An annulment based on *kiddushei ta’ut* is, and always has been, an important method for unilaterally ending marriages. Until *igun* itself is no more, and all participants in Jewish marriages are able to leave when they choose, we need halakhic interventions like *kiddushei ta’ut* to work whenever they can. I firmly believe that a focus on behavior rather than diagnosis will only strengthen the halakhic foundation and viability of this approach. We cannot hope to combat either the stigma of mental illness or spousal mistreatment—of which *get* refusal is often only the last in a long line of physical, emotional, and financial instances—if we are not absolutely clear that it is the behavior that is harmful, not the person’s diagnosis or identity. In emphasizing what people do rather than who they are, we ensure that the holy work of freeing *agunot* builds a more just and more ethical world in all ways.

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