

Rabbi Aharon Lichtenstein

VALUES
IN
HALAKHA
SIX CASE STUDIES

EDITED BY

Reuven Ziegler

Mishnat HaRAL
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Values in Halakha
Six Case Studies

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אין עושיין נפשות לצדיקים דבריהם הן הן זכרון.
ירושלמי שקלים פ"ב ה"ה

In memory of

Rav Aharon Lichtenstein זצ"ל

Whose profound teaching and inspiring deeds
continue to enrich and sustain our community

and

In memory of his devoted sister

Dr. Shoshana Avner ז"ה

A woman of valor
1931–2019

*Dedicated by
The Bayer Hirt Family*



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Editor's Preface

The essays before you attempt to discern the values embedded within and emerging from a variety of halakhic topics. In other words, these are studies in the axiology and teleology of Halakha, that is, the value and meaning structures of Jewish law. This enterprise entails numerous risks, which, characteristically, Rabbi Lichtenstein addresses forthrightly. Following the discussion of the risks, Rabbi Lichtenstein sets forth what may be considered a programmatic statement for this volume:

These dangers are unquestionably real. And yet what is the alternative? Ethically – nay, religiously – speaking, none whatsoever. An automaton can respond to commands without seeking meaning in them or order among them. A fully human response relates a command to a total existential reality; and the moment such a relation is postulated, the quest for purpose becomes inevitable. If we are to grasp divine commands spiritually, indeed if we are to understand them at all in anything more than a semantic or mechanical sense, we must understand them teleologically. The contention that while mitzvot are purposeful we must act as if they weren't – because we have no surefire method of ascertaining

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their ends – emasculates one whole side of the religious life. Far from representing, *ipso facto*, an element of hubris, the attempt to interpret Halakha in categories of values constitutes a necessary phase of *kabbalat haTorah*, “the receiving of the Torah.” As a dynamic participant in the dialogic process of divine revelation, man cannot and should not rest content with receiving God’s message at only the most superficial of levels. Moreover, in assuming the validity of teleological interpretation, we need not rely upon our own intuition. A Torah value structure is clearly the basis of numerous rabbinic ordinances and it lies at the very heart of the concept of *lifnim mishurat hadin*. I am not at all sure that one *can* banish teleology. When barred at the door, it tends to sneak in through the window, and even professed legal literalists are apt to think and react in terms of an implicit value structure. Quite clearly, however, we *ought* not banish it – not even in the interests of the theological security. When the price of security is spiritual embalming, we can hardly avoid taking some risks.

The risks cannot be denied – indeed, they can hardly be exaggerated – but a meaningful set of values is too important a baby to be cast out with the bath water. Teleological interpretation can and often does entail hubris; but, given self-awareness and religious sensibility, it is fully consistent with absolute humility. Properly conceived, moreover, it is no usurpation but rather the exercise of a divinely mandated duty.¹

Indeed, in fulfilling this divinely mandated duty, the author amply demonstrates the self-awareness, religious sensibility, and absolute humility he so avidly pursued throughout his life.

On September 7, 1966, the Daily News Bulletin of the Jewish Telegraphic Agency announced:

1. Below, pp. 148–149.

Yeshiva [University] launched at its graduate center today the Israel Rogosin Center for Ethics and Human Values, a pioneering program that will focus on teaching and research into the history, philosophy and practical application of Jewish ethics. This Center, developed with the aid of a \$1,000,000 gift from Israel Rogosin, will have a student body of rabbis, teachers and other qualified graduate students.²

Rabbi Lichtenstein served as a research fellow at the Rogosin Institute from its inception, and the first four essays in this volume were composed in the late 1960s under its auspices.³ A glance at the bibliography of his published writings will reveal that the intersection of Halakha and ethics continued to concern Rabbi Lichtenstein throughout his career.⁴ Thus, after the first four essays, this volume continues with two essays (published in Hebrew in 1972 and 1980 and translated here) that flesh out issues raised but not developed in the Rogosin essays.⁵

Several decades elapsed between the composition of the Rogosin essays and their publication. In 1968, Rabbi Lichtenstein – then a *rosh kollel* and *rosh yeshiva* at Yeshiva University in New York – was invited by Rabbi Yehuda Amital to serve as head of the newly founded Yeshivat Har Etzion in Israel, a plan that came to fruition in 1971. At that time, the four Rogosin essays were at various stages of completion, as will be noted below; one was completed and published in 2007 and the other three appear here for the first time.⁶ Why were they originally set aside and why were they revived several decades later? Rabbi Lichtenstein offers insight in the “Prefatory and Explanatory Note” to the 2007 publication of the first essay in this volume:

2. Archived at pdfs.jta.org/1966/1966-09-07_171.pdf.

3. The latest sources cited in these four essays were written in 1968: see below, p. 34 n. 1 and p. 227 n. 29.

4. See etzion.org.il/en/RAL-bibliography.

5. See p. 209 n. 100 and p. 271 n. 175 below.

6. To be precise, “Judaism and Humanism” appears on pp. 1–112 below; pp. 34–103 of this essay were published in 2007 in *The Torah U-Madda Journal*.

Well in excess of the several years interlude between composition and publication recommended by Longinus and Cardinal Newman, this essay has been gathering dust – and, possibly, shedding interest and relevance – for almost four decades. Written as part of a broader project relating to elements of interface between Halakha and ethics shortly before we moved to *Erez Yisrael*, it gradually lapsed into dormancy and relinquished priority. As the pressures of adjusting to the challenges of a fresh social and intellectual climate mounted, and as, concurrently, my relations to some aspects of a prior academic matrix waned, this project was deferred, as yesteryears' endeavors were overshadowed by the immediate urgency of preparing tomorrow's *shiurim*; all the more so, insofar as some of the material, although not the central and crucial issues proper, was now severed from its organic linguistic and literary audience, beyond both the grasp and reach of most Israeli readers. And so, the dust accumulated.

In the interim, however, neither time nor the religious world stood still. Hence, when the prospect of publishing this material resurfaced recently, obvious reservations suggested themselves. Were the issues still significantly relevant? Had not some been the subjects of thorough monographs? Might not some of the material appear dated, once familiar allusions now anachronistic, on the one hand, and the failure to relate to more recent expressions of the *Zeitgeist* all too evident, on the other? With respect to this particular essay, for instance, hadn't the role of classical humanism in relation to Torah Judaism, as ally or adversary, receded substantially during the past generation? And hadn't I, in a sense, preempted myself and this piece by discussions of some of its themes strewn through later writings?

Given my own uncertainty, I submitted the material to qualified readers for evaluation. I present it here – and hope, *bisiy'atta di-shemayya*, to present related essays in the future – in deference to their favorable judgment and in response to their importunity. I presume that some of the concerns raised previously are indeed genuine, but I hope that the general audience, too, will find the material of interest and value nonetheless.

Rather than labor under the burden of an extensive overhaul, I am presenting the essay almost intact, as originally written, the excursus on privation at the conclusion of section VI constituting the only significant change.⁷ I leave the labor of overhaul and/or comparison to the individual reader. I trust he or she will not find it excessively onerous.⁸

As is clear from the above, Rabbi Lichtenstein intended to publish the remaining Rogosin essays. After some initial work on them, health reasons precluded him from completing the task. However, with the author's blessing and encouragement, and with appropriate care and circumspection, the essays are now being presented to the public.

At the time of Rabbi Lichtenstein's *aliya*, as noted earlier, the four Rogosin essays were at differing stages of preparation. The first two essays, "Judaism and Humanism" and "Formalism vs. Teleology," were the closest to completion, and required little more than transcription and copy editing. However, the next two essays, "Pursuit of Self-Interest" and "The Varieties of Halakhic Law: The Concept of *Lifnim Mishurat Hadin*," contained numerous lacunae. Though "Pursuit of Self-Interest" is a rich and resonant essay, two planned sections remain unwritten.⁹ Furthermore, the original manuscript contained only brief marginal annotations in Hebrew instead of fully written footnotes in English. In the final version below, most of source citations appearing in footnotes were provided by Rabbi Lichtenstein, while the footnotes containing longer comments are reconstructed from the author's terse Hebrew notes to himself. Finally, most of the lengthy quotations of rabbinic sources were absent from the manuscript and have been added.

The first six sections of "The Varieties of Halakhic Law: The Concept of *Lifnim Mishurat Hadin*" (pp. 217–260 below) were written and

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7. Ed. note: This excursus extends from p. 89, "With respect to dispensation," until the end of section VI on p. 92.
 8. "*Mah Enosh?*: Reflections on the Relation between Judaism and Humanism," *The Torah U-Madda Journal* 14 (2006–2007), pp. 1–2.
 9. These are the discussion of commercial rivalry, as noted on p. 191 n. 51, and the re-examination of the responsum of the *Havvot Ya'ir* in light of the preceding analysis, as noted on p. 216 n. 107.

edited while the author still resided in the United States, as is evident from the address appearing on the typescript. These sections were followed in the typescript by the author's outline for the remainder of the essay (p. 275 below), comprising six topics. Subsequently, the author appended two more sections in handwriting (pp. 260–274 below), covering items 1, 2, and the first half of item 3 in the outline.¹⁰ The projected conclusion of the essay (from the second half of item 3 until item 6) remains unwritten.¹¹

In addition to filling in missing sources and the like, some editing was deemed necessary to facilitate reader comprehension and clarify the development of an argument. Thus, for example, while the author divided the first five essays in this volume into numbered subsections, I provided explanatory titles to each subsection, and added further subdivisions when necessary. The titles of all essays were provided by Rabbi Lichtenstein, with the exception of “Formalism vs. Teleology” and “Pursuit of Self-Interest”; the titles of the two final essays, translated from Hebrew, were slightly modified. With minor exceptions, source references have not been updated to reflect more recent editions, nor have references been added to more recent discussions of the issues

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10. It is interesting to note that in a 1978 interview with Rabbi Lichtenstein in an Israeli newspaper, the interviewer writes: “Lately, Rabbi Dr. Aharon Lichtenstein has been writing a book of Jewish thought that will include, among others, chapters on the following topics: egoism and altruism in Halakha, humanism in Halakha, *lifnim mishurat hadin* in Halakha, *ha'arama* (circumvention) in Halakha, and the like,” and that Rabbi Lichtenstein was planning to publish the book in Hebrew (!) for both religious and non-religious readers. See Levi Yitzhak Hayerushalmi, “I Will Encourage My Daughter to Go to Sherut Leumi,” *Maariv*, Friday, October 6, 1978 (5 Tishrei 5739), *Yamim Veleilot* Supplement, p. 24, available online at <https://www.nli.org.il/he/newspapers/mar/1978/10>.
11. Rabbi Lichtenstein returned to the subject of *lifnim mishurat hadin* in his celebrated essay “Does Jewish Tradition Recognize an Ethic Independent of Halakhah?” (originally published in 1975 and reprinted numerous times, including in Rabbi Lichtenstein's 2004 collection *Leaves of Faith: The World of Jewish Living* [vol. 2]). As the essay in the current volume deals exclusively with *lifnim mishurat hadin*, the treatment here is more extensive. There are two brief passages of overlap between the two essays: a quote from the *Maggid Mishneh* and the subsequent paragraph (pp. 268–269 below; *Leaves*, p. 49), and a quote from the Maharal and the comment thereon (p. 272 n. 177 below; *Leaves*, pp. 45–46).

raised. Rabbi Lichtenstein's essays, even with the lacunae noted above, are valuable contributions in themselves; therefore they are being presented as written, while the work of comparison, analysis, and expansion remains for readers to ponder and, perhaps, to contribute to Torah literature on their own.

Many people deserve thanks for their help in bringing this volume to print.

First, Dr. Tovah Lichtenstein provided not only support and encouragement but also helpful comments.

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Above all, gratitude to *mori verabbi* Harav Aharon Lichtenstein *zt"l*, from whom we continue to learn even now.

Reuven Ziegler
Nisan 5782
Alon Shevut



Judaism and Humanism

INTRODUCTION AND BIOGRAPHY OF THE RAMA

Rav Moshe Isserles – or, as he is universally known, the “Rama”¹ – played a central role in one of the most creative periods in European Jewish history – the century of Polish Jewish life extending roughly from 1550 to 1650 which established the mores and institutions of Eastern European Jewry and which produced the *Shulhan Arukh* and its standard commentaries. He was born about 1525² into a pious, scholarly, and munificent family in Cracow, a budding center of Jewish learning in which he subsequently spent virtually all his life. Having gained youthful renown as a prodigy, he studied under R. Shalom Shachna, an almost legendary figure who left very few writings but who trained most of the leading Eastern

1. The word derives from an acronym of the Hebrew initials of his name, preceded by the title, Rav.
2. The exact date is unknown. For a discussion and review of various suggestions, see Myer S. Lew, *The Jews of Poland: Their Political, Economic, Social and Communal Life in the Sixteenth Century as Reflected in the Works of Rabbi Moses Isserles* (London, 1944), 12–16.

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European scholars of the next generation. The Rama rapidly attained a widespread reputation, and by 1550 was being consulted from various quarters on both halakhic and communal matters. Henceforth – both the exact date and the nature of his position are unclear – he assumed a post as rabbi in or of Cracow, in which capacity he served until his early death in 1572.

Living during a period in which the Jewish community was both highly organized and religiously saturated, the Rama was actively involved in almost every major aspect of civic life. This involvement helped earn him the extraordinary esteem of contemporaries, an esteem which, despite occasional controversy and the early tragic death of his first wife, enabled the Rama to lead a reasonably secure and serene life. It is through his writings, however, that he has become a household name to posterity. These covered a fairly extensive range: halakhic notes and compendia, a volume of homiletical biblical exegesis, a philosophical treatise, excursions into Kabbala, a collection of responsa, even a commentary on a medieval work on astronomy which had recently been translated from Latin.³ By far the most significant, however, has been a relatively modest undertaking – a collection of notes which the Rama can hardly have regarded as his *magnum opus* but which have been of great historical import. The publication of R. Yosef Karo's *Shulhan Arukh* in 1565 marked the appearance – in print, moreover – of the first new comprehensive halakhic code in over two centuries. However, despite its acknowledged excellence, it suffered, as far as Eastern and Central European Jews were concerned, from one grievous defect. Having been written by a Sephardi, it generally followed the opinions and practice of the Spanish and North African tradition rather than those of the Franco-German community which had been their spiritual forebears. This defect was rectified by the Rama, who interleaved the *Shulhan Arukh* with a gloss in which he took issue with many of its decisions by citing divergent texts and customs. Hence, he adapted it for Ashkenazic purposes and enabled it to gain its subsequent dominance as the basic halakhic code. Despite its relatively ancillary nature, it is upon this achievement – for

3. The works are described by Lew, *The Jews of Poland*, 58–79, and Asher Siev, *HaRama* (Jerusalem, 1957), 39–72 [second edition: (New York, 1972), 105–180].

his role as *baal hamappa*, “the master of the tablecloth”⁴ – that the Rama’s reputation preeminently rests.

The collection of the Rama’s responsa – representing, incidentally, only a part of those he wrote – has been published in six editions: Cracow (1640), Hamburg (1710), Hanau (1710), Amsterdam (1711), Sudylkow (1835), and Warsaw (1883; reprinted New York, 1954).⁵ Except where otherwise noted, I have followed the *editio princeps* which was published by the Rama’s nephew from a manuscript he had evidently prepared for publication. Parts of the following *teshuva* have also been published in translation under the title “A Radical Decision,” in Solomon B. Freehof, *A Treasury of Responsa* (Philadelphia, 1963), 113–17. Reference to this translation has been made in some of the notes.

“The precepts of the Lord are right,” sang the psalmist, “rejoicing the heart.”⁶ Or again, in a more personal vein, “I rejoice at Thy word, as one that findeth great spoil.”⁷ To the committed Jew, the observance of Torah and Halakha is a source of genuine joy. It is, to be sure, often demanding and even difficult. After all, the Rabbis always speak of “the yoke of the Kingdom of Heaven.”⁸ Yet, awareness of participation in a divinely ordained discipline – of responding, at the highest level, to a divine call – fills the Jew with a profoundly gratifying sense of engaging in what is at once the realization of God’s regimen and a process of self-fulfillment.

To the *posek*, however, fidelity to Halakha may be not only difficult but agonizing. Inevitably, he is periodically confronted by situations in which Halakha comes into apparent conflict with human needs – not simply with shallow utilitarian desires, but with genuinely worthwhile needs. Under these circumstances, the process of decision can be soul-searing. The sacrifices – and they can be enormous – which he may be ready and willing to make himself, he is morally, and psychologically,

4. *Shulhan Arukh* literally means “set table”; hence, the Rama’s epithet.

5. Ed. note: A critical edition was published by Rabbi Dr. Asher Siev (Jerusalem, 1971), and it is the Hebrew text of this edition that appears below. Minor modifications were made to the translation to accord with this text.

6. *Tehillim* 19:9.

7. *Ibid.* 119:162.

8. *Berakhot* 13a.

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reluctant to exact from others. The process of decision becomes therefore – quite apart from the specific issue being decided – a moment of truth, an ethical and religious problem in its own right. Were the *posek* less committed to Halakha, less aware of his responsibility to the observance and preservation of divine law, there would be no problem. He would cut a few corners, wink at an impending peccadillo – and hand down a pseudo-*pesak*. Were he less sensitive to human need, there would, again, be no problem. He would simply pronounce, “Let the law cleave the mountain,”⁹ issue a rigorous cut-and-dried decision, and let the chips fall where they may. It is the ethical and religious desire to be sensitive to both the halakhic and the human dimensions of a situation – or rather, to be sensitive to their interaction – which produces a profoundly agonizing dilemma.

The dilemma admits of no facile solution. At times, it admits of no solution at all. The conflict between personal and halakhic demands may be absolutely irreducible, the result being genuine tragedy. In tone and detail, Y. L. Gordon’s poems¹⁰ present caricatures of Halakha; but while they might be dismissed as mere anticlerical if not antinomian diatribe, the underlying problem of possible tension between law and self is very real. At other times, however, the *prima facie* conflict, while real and not merely apparent, may, through the initiative of a master *posek*, be blunted and finally transcended. Marshaling erudition and ingenuity, the sensitive scholar may exploit the element of flexibility within Halakha in order to avert personal tragedy. While remaining clearly within the bounds of the halakhic system as a whole, he combines general extenuating principles with specific personal insights in order to escape his tormenting dilemma. He strives to remain honest without being cold, to be faithful and yet related. In a word, he avoids either pole of the

9. *Sanhedrin* 6b.

10. Of the poems in this vein, the best known are *Kotzo Shel Yod*, about a woman whose life is ruined because of a minor technical flaw in a bill of divorce, and *Ashaka Derispak*, about a home and marriage which break up because of two grains of seed discovered in some food on Pesah, as a result of which the food itself and virtually all the utensils in the house are brusquely declared to be non-kosher by the rabbi. It might be noted, incidentally, that the “halakhic” decisions cited in both poems are highly dubious, if not, indeed, clearly erroneous.

shallow antinomy, neither sacrificing every Jew for a *din* nor every *din* for a Jew; and to this end, he draws upon every resource, personal and intellectual, at his disposal.

The following *teshuva*, written by Rav Moshe Isserles, provides a singular example of precisely such a dilemma and of a heroic attempt to resolve it. The situation concerned a young woman, a poor orphan at that, for whom, evidently with some difficulty, a match had been arranged by her father shortly before his death. Deserted by most of her relatives, the girl moved in with an uncle, to remain with him until her marriage. As the period of her engagement wore on, however, she noted indications that her relatives who, in accordance with current custom, were to supply her trousseau and dowry and arrange the wedding, were less than anxious to fulfill their responsibility. There was no sign of either dowry or wedding; only veiled rumblings transmitted through neighboring women that she should ready herself for marriage and all would soon be forthcoming. When the appointed day finally came, however, her recalcitrant relatives sought to cheat her of fully one-third of her dowry. The bridegroom, in turn, refused to go through with the wedding unless the promised sum were paid – a not uncommon stance in an era of arranged as opposed to romantic marriages.¹¹ No degree of remonstrance on the part of the rabbis present could move him, and it was only after lengthy haggling that he agreed to proceed. By this time, however, darkness had long set in and, the day being Friday, the Sabbath, on which no wedding may ordinarily be performed, had begun.

The dilemma was obvious. If the marriage were not performed immediately, the bridegroom might recant once more, leaving the girl poor and alone, and of course greatly embarrassed by the public ordeal. Yet the Halakha, with its frequently rigorous adherence to clocks and calendars, clearly seemed to proscribe any such performance. The Rama, who was present at the time, decided to proceed; and he personally

11. See, e.g., *Taz*, YD 192:6. Of course, from a modern perspective, the loss of this type of prospective husband may appear a blessing in disguise. However, the historical context should be kept in mind. In sixteenth-century Poland virtually any husband was deemed better than spinsterhood. Moreover, given the lower level of romantic expectation, the fact remains that many marriages which started under seemingly inauspicious circumstances turned out very well indeed.

arranged the ceremony. The decision evoked considerable criticism, however.¹² Subsequently, therefore, the Rama wrote this *teshuva*, partly by way of vindicating his personal reputation and partly by way of simply presenting a *post facto* exposition of the halakhic grounds of his action.

In developing his position, the Rama employs two general approaches, presenting both intrinsic and extrinsic arguments. He contends, on the one hand, that a Sabbath marriage under these circumstances may be inherently permissible – i.e., that this situation was simply never subsumed under the general prohibition; and he suggests three distinct possible grounds for this contention. Even assuming this to be wrong, however, he argues, secondly, that the prohibition needs to be overridden in this specific instance because of more general considerations; and he proceeds, in turn, to cite three of these. The net result is a web of arguments, each independent and yet perhaps insufficiently secure – at least in relation to this particular situation – to have been relied upon on its own, but which, collectively, justify the Rama’s conclusion.

The *teshuva* opens – after a brief narrative and vindicative prologue – with a discussion of the primary relevant text: a mishna in *Beitza* and its attendant gemara. The mishna lists various acts whose performance on the Sabbath, while permitted by the Torah, was proscribed by the Rabbis. These, in turn, are broken down into two categories: neutral and mitzva actions, with the effecting of *kiddushin*, i.e., betrothal, included among the former. In commenting upon the prohibition of *kiddushin*, the gemara asks: “But is he not performing a mitzva?” It then briefly replies that the mishna may be construed as referring to a special case – that of a person who already has children – in which the element of mitzva was relatively insignificant.¹³

The question may be variously interpreted, however. The gemara may be merely objecting to the mishna’s classification – the inclusion

12. There had been some general criticism of the Rama – e.g., by R. Hayim ben Bezalel, a brother of the Maharal of Prague – as being too lenient; see Siev, *HaRama*, 93–94. Judging from the tone of this *teshuva*’s prologue, however, it evidently evoked a storm of unusually strong protest.

13. *Beitza* 36b.

of *kiddushin* amongst forbidden neutral, rather than mitzva, actions; or it may be challenging the prohibition proper. The respective textual interpretations would, in turn, have clear legal consequences. On the first view, the gemara does not qualify the prohibition in any way. On the second, however, it concludes by confining it to special cases. Ordinarily, because of the mitzva they entail, Sabbath *kiddushin* would be fully permissible.

This text provides the raw material for the Rama's initial, internal arguments. The possible conflicting interpretations of the gemara's question had indeed been debated by the classical medieval commentaries. As generally understood, Rashi,¹⁴ followed by almost all *Rishonim*, adopted the first; hence the accepted view that Sabbath *kiddushin* are forbidden. Rabbenu Tam,¹⁵ however, opted for the second. The Rama's opening thrust consists of an attempt to prove, through involuted textual analysis, that Rabbenu Tam's is the superior rendering. Indeed, he argues that even Rashi's comments may be reconciled with it, so that Rabbenu Tam need not be regarded as a sole dissident overwhelmed by all other *Rishonim*; rather, the issue may be viewed as the subject of a more general controversy. However, the Rama readily concedes that this is not the way in which Rashi has been generally interpreted; and in any event, however Rashi be understood, the majority of *Rishonim* had explicitly rejected Rabbenu Tam's view.

He therefore introduces a second argument. Even barring textual support for his position and even assuming that he stands alone in the present case, Rabbenu Tam's view may be regarded as decisive because, under conditions of duress, one may rely upon the opinion of a minority – be it even a minority of one. And what, asks the Rama, could be a moment of greater duress than the situation at hand?

While expatiating upon the pressures involved in this case, the Rama veers in the direction of his second major approach – the citation of grounds which, in this specific instance, could warrant overriding the general prohibition against Sabbath *kiddushin*, even if the prohibition's existence be acknowledged. Three distinct grounds are mentioned. First,

14. Ibid., s.v. *velo mekaddeshin*.

15. Cited in *Tosafot*, *ibid.*, s.v. *veha mitzva*, and in numerous parallel sources.

referring solely to the ordeal of the bride's public embarrassment – even assuming, that is, that the groom would have consented to marriage after the Sabbath – the Rama cites the principle that the preservation of human dignity and the prevention of personal shame override rabbinic injunctions. Second, now with an eye to the possible severance of the match, he alludes to the license to violate certain laws in the interest of peace, especially domestic peace. Finally, he notes precedents setting aside certain prohibitions so that one may be enabled to undertake fulfilling the mitzva of “be fruitful and multiply.”

These general considerations are discussed briefly, in almost rapid-fire order. Having cited them, however, the Rama returns to intricate analysis and to the details of the specific prohibition concerning Sabbath *kiddushin*. This sixth argument, while essentially intrinsic in character, nevertheless clearly impinges upon broader issues of general halakhic method and outlook. Hence, the Rama introduces it by citing an analogue. The argument is that since, according to the gemara,¹⁶ Sabbath *kiddushin* were forbidden lest they be attended by some writing, their prohibition should not apply to circumstances in which no such danger exists. This, the Rama contends, is now generally the case. The prospect of Sabbath violation was only present so long as the various documents related to the wedding ceremony were ordinarily written by the groom. However now, in order not to embarrass the ignorant, these are invariably prepared by an appointed functionary, who is very unlikely to write them on the Sabbath, presumably because he is both less anxious and less harried, on the one hand, and because, as a professional, he generally draws them up long in advance of the wedding. Hence, the danger envisioned by the gemara no longer exists, and the prohibition ordained to guard against it can therefore be ignored.

This argument clearly rests upon two premises: first, that an injunction instituted to prevent a particular danger lapses with the danger itself; second, that the sole reason for prohibiting Sabbath *kiddushin* is indeed the possibility that it may lead to writing. The Rama attempts to prove the major premise – at least, with reference to the injunctions cited in this mishna in *Beitza* – by citing an analogy. The mishna also prohibits

16. *Beitza* 37a.

certain modes of clapping and dancing lest, the gemara explains, they lead to repairing musical instruments.¹⁷ Yet *Tosafot*¹⁸ at one point state that this injunction no longer applies, since such instruments are now generally repaired by experts; and this view has gained wide practical acceptance. As regards the minor premise, the Rama finds himself confronted by the Yerushalmi,¹⁹ which cites another reason: *kiddushin* are forbidden because they constitute an act of acquisition.²⁰ He disposes of this by arguing, *de silentio*, that this reason was rejected by the Babylonian Talmud, whose authority generally overrides its Jerusalem counterpart. In our specific case, moreover, the failure of leading *posekim* to cite the Yerushalmi's reason indicates that they, too, felt it had been rejected.

To this point, the Rama has merely advanced this argument and buttressed it by a somewhat shaky syllogism. Now, he attempts to offer more specific direct proof. Once again, he resorts to analogy. Moving from *kiddushin* to divorce, he assumes, first – on the basis of a close textual reading of *Tosafot* – that divorce on the Sabbath is forbidden only if one accepts the Yerushalmi's reason for prohibiting *kiddushin* but not according to the gemara in the Bavli. Second, he contends that the presumed distinction between *kiddushin* and divorce can only be explained in one way: documents relating to the former were written by the parties involved, while the more complex bill of divorce was generally written by a professional scribe. Hence, the danger of writing on the Sabbath existed in the case of *kiddushin* but not in the case of divorce. Similarly, in our own day, there being no danger with regard to *kiddushin* either, they, too, may be permitted on the Sabbath.

With this, the presentation of the Rama's substantive position essentially concludes. The *teshuva* itself does not end here, however. First, the Rama – evidently insecure about the validity of his last argument – summarily reviews all of his previous points. Second, he feels compelled to cite and reject an entirely fresh objection – an objection

17. Ibid. 36b.

18. Ibid. 30a, s.v. *tenan*.

19. *Yoma* 1:1; p. 5b.

20. Such acts are forbidden even if no physical object is acquired; see *Beitza* 17a and *Eiruv* 38b.

Values in Halakha

rooted in the structure of the wedding ceremony. Halakhically, the process of marriage consists of two distinct steps – *kiddushin* and *huppa*. The former, generally implemented by the groom's giving his bride money or an object of monetary value, merely effects a state of *eirusin*, betrothal. Not just an engagement, it has binding legal force and can be broken only by a bill of divorce. However, in human terms, it changes little. It does not permit the couple to live together²¹ – neither as man and wife nor even, if alone, in the same home. It establishes a legal bond but not that positive unity, the cleaving and becoming one flesh which is the essence of marriage. This is effected by *huppa*, generally held to be implemented by literal cohabitation – if not by sexual relations proper, at least by entering a common home or being alone in circumstances under which such relations are possible.²² Through *huppa*, the process of marriage is completed and the couple, no longer merely affianced but truly joined, enters fully into its state, *nissuin*, with all attendant rights and responsibilities.

This positive character of *huppa* confronts the Rama with a new difficulty. In early times, *kiddushin* and *huppa* were separated by a long interval – generally a year – during which the bride continued to live with her parents. This practice had long since been abandoned, however, so that the two were now invariably telescoped as successive phases of a single ceremony, the whole of which the Rama had of course performed. The difficulty therefore is that even if it should be conceded that Sabbath *kiddushin* are permissible, one might still entertain reservations about *huppa*; and this has indeed been contended by a number of critics. After all, they argued, acts of acquisition are prohibited on the Sabbath. If, as the Rama would have it, *kiddushin* are forbidden solely for another reason, this is not because the concept does not exist but rather because, in this case, it is inapplicable, since from one point of view, *kiddushin* may be regarded as primarily the imposition of a status and a related

21. Except, of course, for the purpose of effecting *huppa* and consummating the marriage; see Rambam, *Hilkhot Ishut* 10:1.

22. Most authorities assume that the canopy – a literal translation of *huppa* – traditionally used at weddings is only symbolic of the private residence which actually effects marriage. See *Even HaEzer* 55:1, and the summary of the various views in *Encyclopedia Talmudit*, 16:417–21.

injunction, less a taking unto oneself than a withdrawing from others. This can hardly be said of *huppa*, however. Here there is genuine giving and acquisition of rights – a procedure which, even according to Rabbenu Tam, therefore, should clearly be forbidden on the Sabbath.

The Rama acknowledges that several authorities, both contemporary and medieval – e.g., R. Yosef Karo and R. Yitzhak of Corbeil, respectively – have accepted this reasoning; yet he nevertheless goes on to reject it. He notes that a number of major sources cite Rabbenu Tam's view without introducing any distinction; that since Rabbenu Tam grounded his position on the fact that *kiddushin* relate to the mitzva of procreation, this should apply *a fortiori* to *huppa*; and that, in any event, most authorities accept the danger of writing rather than the Yerushalmi's reason as the basis for the prohibition of Sabbath *kiddushin*.

After refuting some evidence cited by proponents of this distinction, the Rama opens the concluding section of the *teshuva* with his final argument: an appeal to popular rather than to scholarly authority. He contends that the practice of arranging *kiddushin* after the start of the Sabbath has long been widespread in his area. Just how late after it has started is halakhically irrelevant, so that the *vox populi* – perhaps stimulated, as the Rama has been, by the pressure of circumstances – has evidently accepted his line of reasoning.

Finally, the *teshuva* concludes with a remarkable coda, a revealing passage reflecting both the powerful ethical impulse underlying the Rama's response and a lingering insecurity concerning its legal validity. It urges, on the one hand, that every effort be made to avoid the dilemma the Rama had been compelled to face. In the absence of any alternative, however, it gives comforting assurance that "whoever inclines to leniency has lost nothing. May he then partake in peace of Shabbat joy, and the mitzva can absolve him if his intention is for the sake of Heaven."

RESPONSA RAMA #125

My help cometh from the Lord, who maketh heaven and earth;¹ and may He save me from error.

[Lo!] I have heard behind me the sound of a great tumult² as some have spread word through the camp, saying, “Look after Moshe”;³ [this,] with respect to an action which was done by me recently, [namely,] that I arranged *kiddushin* beneath a *huppa* in the usual manner of which everyone knows the ritual involving the bride and the manner in which she enters the *huppa*.⁴ This took place in the heart of night on a Friday evening, about an hour and a half into the night. The cause which compelled me to [do] this is known openly to all who come within the gates of our city; and here is the [story of] the action which was taken.

There was a man in the land who had lost his money and who arranged the engagement of his eldest daughter to a suitable mate. During the period of her engagement, much time elapsing before her entry to *huppa*, the father passed on to his world, leaving life for all [the rest] of Israel. The daughter remained bereft and lonely, having neither father nor mother, but only near ones [i.e., relatives] who became distant to

1. *Tehillim* 121:2.

2. *Yehezkel* 3:12.

3. A reference to *Shemot* 33:8: “And it came to pass, when Moses went out unto the Tent, that all the people rose up, and stood, every man at his tent door, and looked after Moses, until he was gone into the Tent.” In applying the verse to his own situation, the Rama – also named Moses, of course – is probably alluding to the interpretation that the people’s look was one of suspicion, as many were envious and suggested Moses had been gaining power and eminence at their expense; see *Kiddushin* 33b and *Yerushalmi, Bikkurim* 3:3; p. 11b.

4. The text reads *shehakol yodin seder hakalla bameh nikhnesa lehuppa*, which I think clearly refers to the general procedure concerning the bride. However, Freehof assumes the Rama is referring to this specific bride, and he translates, “All knew the state of the bride as she entered under the huppah” – a more dramatic, but (to my mind) highly improbable, rendering. [Ed. note: The Siev edition reads *lama* instead of *bameh*.]

her,⁵ averting their gaze from her, with the exception of one redeemer,⁶ her mother's brother, who took her into his home, as she has no closer redeemer. As the time of her marriage approached, when it was fitting to arrange a feast and [other] wedding needs, she saw no semblance of the dowry or [her] other needs. [There was] only a rumor which reached her that she should immerse herself⁷ and prepare herself for the wedding as she would [then] receive the dowry. The aforementioned girl did as her neighboring women told her, and heeded them, and they covered⁸ her on Friday with a veil as is customary with virgins. As evening shadows lengthened and the [Sabbath] day almost became hallowed, when her relatives were to provide the dowry, they tightened their fists and subtracted from their proper gift, so that the dowry was almost one third⁹ short. The bridegroom, as well, retreated and refused to marry her under any circumstances. He paid no heed to everything which the leaders of the city said to him, [to wit,] that he should not embarrass a daughter of Israel in the interest of contemptible money. He refused to listen but, rather, like a deaf asp, stopped his ears and did not hearken to the voice of charmers¹⁰ nor could a sage's rebuke move him. As a result, due to dissensions and disputes – as it is stated, “There is no marriage settlement into which discord is not injected”¹¹ – time passed and Satan's work succeeded, until the aforementioned hour arrived at which time they settled among themselves and the bridegroom agreed to enter the *huppa*. In order to avoid embarrassing a decent daughter of Israel, I arose and arranged the *kiddushin* at that hour. Now, inasmuch as some have

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5. Freehof translates “who lived far from her.” However, the context clearly indicates emotional rather than physical distance – i.e., they acted as strangers and ignored her.
 6. The Hebrew word *go'el* means both a redeemer and a relative; see, e.g., *Vayikra* 25:26, *Bemidbar* 5:8, and *Ruth*, 3:9ff.
 7. Halakhically, once a woman has menstruated, she may not engage in sexual relations until she has immersed herself in a ritual pool. Hence, immersion constitutes part of the prospective bride's preparation for her wedding.
 8. Reading *kissu*, as in Ham., A., S., and W. However, C. and Han. have the noun *kissuy*, “a covering,” an obvious error.
 9. Freehof erroneously translates “at least a third.”
 10. See *Tehillim* 58:5–6.
 11. *Shabbat* 130a.

been complaining against me, I have come to remove their complaint, to cite evidence and my reasons and explanations, and [to explain] upon what I have relied to say, “Such see and betroth.”¹²

II

We read in the chapter *Mashilin*:¹³ “Every act for which one is culpable on Shabbat as a *shevut*,¹⁴ as an optional act, [or] as a mitzva, one is also culpable for on a festival . . . And the following [are deemed culpable] as optional acts: One may not judge nor effect *kiddushin*, etc. And the following are [deemed culpable] as mitzva [acts]: One may not dedicate [i.e., to the Temple] nor vow a personal valuation, etc.”¹⁵ The gemara [then] asks: “One may not judge’ – But is he not performing a mitzva? This refers to a case in which a more capable person is available. ‘Nor effect *kiddushin*’ – But is he not performing a mitzva? This refers to a case in which he [already] has a wife and children.”¹⁶ Rashi, o.b.m., comments: “But he is performing a mitzva, [i.e.,] in order to procreate and multiply,¹⁷ so why does he [i.e., the author of the mishna] call it an optional act?”¹⁸ The *Tosafot* write: “The gloss¹⁹ explains, ‘And he should have listed them at the end [i.e., of the mishna] among the mitzvot’; and it [i.e., the gemara] answers, ‘This refers to a case in which he [already] has a wife and children,’ and therefore it is not as much of a

12. *Rosh HaShana* 20a. In the Hebrew, there is a pun here. The word *kaddesh* means both “hallow” (the gemara in *Rosh HaShana* deals with sanctifying the month upon the appearance of the new moon) and “betroth.”

13. The fifth and final chapter of *Beitza*.

14. I.e., an act which the Torah has permitted but the Rabbis have proscribed.

15. *Beitza* 36b.

16. Loc. cit. The last phrase may mean either that one is now taking a second wife, bigamy not having yet been proscribed, or that he had previously been married, but the first reading is probably the more accurate. It should also be noted that in the latter case, the marriage would clearly be more of a mitzva; see *Yevamot* 61b.

17. The passage in *Beresheet* 1:28 – “And God blessed them; and God said unto them: ‘Be fruitful and multiply, and replenish the earth, and subdue it’” – is taken both as a blessing and as a command.

18. *Beitza* 36b, s.v. *velo mekaddeshin*.

19. I.e., Rashi.

mitzva as those which are [listed] at the end. According to this [interpretation], it is possible that even when there is no one²⁰ more qualified than himself, one is [nevertheless] forbidden to judge. Similarly, as concerns [taking] a wife, with respect to which [the Talmud] answers that he [i.e., the individual to whom the mishna applies] [already] has a wife and children, it seems that even if he does not [already] have a wife and children it [i.e., *kiddushin*] is nevertheless forbidden.” They [i.e., the *Tosafot*] [then] write, “But others²¹ explain that which it says, ‘But he is performing a mitzva?’ [as asking:] So why did they [i.e., the Rabbis] forbid it? To this it answers that this refers to a case in which he [already] has a wife and children. However, if he does not have them, it is [indeed] permissible to effect *kiddushin*, inasmuch as one is [then] performing a mitzva.”²²

They [i.e., the *Tosafot*] discourse at length, presenting questions and answers relevant to the respective interpretations of Rashi and Rabbenu Tam – for they subsequently mention that the “others” are Rabbenu Tam – and they cite a [text of the] Yerushalmi: “R. Huna said, ‘This indicates [that] those who marry²³ widows should do so while it is yet

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20. All editions read *bide'ikka*, “that there is someone.” However, the correct reading should clearly be *bidelekka*, and I have translated accordingly.
21. C., Han., and Ham. read the abbreviation מ”מ, which, in A., S., and W., was then written out as מכל מקום, “nevertheless.” However, the correct reading should clearly be the initials מ”י, written out as יש מפרשים, “and some interpret,” as is evident from the reference several lines later, שהיש מפרשים הוא ר”ת. The error resulted from the confusion of מ”י with מ”מ.
22. The text quoted by the Rama does not correspond to that of the *Tosafot* printed in the standard editions with the Gemara. The *Tosafot* were essentially collections of lecture notes and numerous variants are generally found. The standard *Tosafot* on *Beitza* were produced by students of R. Peretz; see E. E. Urbach, *Baalei HaTosafot*, 2nd ed. (Jerusalem, 1955), 479–80. Other collections are known to have been still extant in the sixteenth century, and it is possible that the Rama, who generally used the earlier *Tosafot* of Sens, may have used that collection from which R. Peretz’s students evidently drew – in studying *Beitza*. I know of no extant source for this particular quotation. However, the same material may be found in paraphrase in the standard *Tosafot*, *Beitza* 36b, s.v. *veha mitzva*.
23. Literally, “who induct,” into marriage or into their home; i.e., who are effecting *nissuin*, the legal consummation of the marriage proper, as opposed to mere *kiddushin*, betrothal.

day in order that they should not be like one who effects an acquisition on Shabbat.”²⁴ The reason given there [i.e., in the Yerushalmi] is that, prior to marrying her, he [i.e., the husband] is not entitled to what she finds nor to her income; once he marries, he is entitled to both,²⁵ so that he may be regarded as effecting an acquisition on Shabbat. That case, too, may be construed as referring to one who already has a wife and children.²⁶

Thus far, the text of the gemara and its interpretations. Now, although I am unworthy to decide, nevertheless I raise a difficulty concerning Rashi’s interpretation that the [gemara’s] question is only why these [i.e., judgment and *kiddushin*] are not listed at the end under the rubric of mitzva. If so, how effective is the answer that [the mishna refers to a case in which] there is a superior [judge] or that he already has a wife and children? It [i.e., the gemara] should nevertheless have rejoined that the mishna should have introduced an internal distinction [i.e., within the areas of judgment and *kiddushin*] and it should have included in its latter section [a statement] that it is forbidden to judge or marry even when a mitzva is involved. This would have been more noteworthy [i.e., than the present statement in the initial section] and would have rendered the initial statement superfluous. For if this is forbidden under circumstances of mitzva, must anything be said concerning neutral circumstances?

Furthermore, according to Rashi’s interpretation, the formulation, “But he is performing a mitzva,” is difficult. It [i.e., the gemara] should simply have said, “But these are [cases of] mitzva?” For the objection is only [being raised] against the *Tanna*, due to his failure to include them [i.e., judgment and *kiddushin*] among [the class of] mitzva. However, if [we understand] the question as Rabbenu Tam did, there is no difficulty. The objection concerns the performer of the mitzva: why is it

24. *Yoma* 1:1; p. 5b. Of course, the text refers only to those who marry on Friday.

25. See *Ketubbot* 65b. On most views, the husband is accorded these rights in return for supporting his wife. If she wishes, however, she can retain her income and support herself; see *Ketubbot* 58b.

26. In the ordinary case, however, the prohibition against acts of acquisition would be overridden by the mitzva entailed in marriage.

forbidden for him to act? This is clear to anyone who reads the text of the gemara closely.

Therefore, it would be possible for me to suggest that, even according to Rashi's view, it is permissible [to effect *kiddushin*] when one does not [yet] have a wife and children....²⁷

However, inasmuch as the *Rishonim*, o.b.m., namely, the *Tosafot* and the *Mordekhai*,²⁸ cited in Rashi's name [the view] that it is forbidden under all circumstances – and they disregarded these objections which, according to my lights, I have raised against Rashi's statements – I shall continue likewise after them to assume that Rashi's view proscribes [*kiddushin* on Shabbat] under all circumstances. This also appears to be the view of the [major] *posekim* – the Rif, the Rambam, the Rosh, and the *Tur*, OH 339²⁹ – all of whom, o.b.m., simply state, "It is forbidden to effect *kiddushin*," without introducing any distinction. Inevitably, these *posekim*, who did not qualify their statements, either interpreted the gemara along the lines of Rashi, o.b.m., as his position was understood by the *Rishonim* o.b.m.; or, they relied on the Yerushalmi which apparently proscribes [*kiddushin* on Shabbat] under all circumstances, as will be explained. However, it does not seem likely that they relied on the Yerushalmi against our [i.e., the Babylonian] gemara, as will be explained; so they must surely have interpreted along the lines of Rashi, o.b.m.

Nevertheless, may all such worthy statements be quoted in my name³⁰ – [to wit,] permitting this matter under these circumstances which constituted an emergency. The girl would have been shamed had she, after her immersion, waited for the *huppa* until after Shabbat – especially so, inasmuch as it is not the custom of these localities

27. In the section I have omitted, the Rama suggests extraneous reasons in order to explain why, despite the fact that, as the Rama would have it, Rashi agrees with Rabbenu Tam's position, he nevertheless interpreted the gemara differently; and he also briefly seeks to prove that the *Semag* had also understood that Rashi concurred with Rabbenu Tam.

28. No such citation appears in our texts of the *Mordekhai*, *Beitza*, 697–98, which simply cite two conflicting views without mentioning Rashi.

29. See, respectively, Rif, *Beitza*, 925; Rambam, *Hilkhot Shabbat* 23:14; Rosh, *Beitza*, 5:2; and *Tur*, OH 339.

30. See *Beitza* 28a.

[for a prospective bride] to wear a veil until after Shabbat and [then] to arrange the wedding on Sunday as is the custom of the Gentiles who arrange their weddings on their holiday. Rabbenu Tam is worthy of being relied upon in a time of emergency – particularly since the discourse of the [relevant] text supports his position (and the *Haggahot Ashri*, near the end of the chapter, *Ehad Dinei Mamonot*,³¹ has decided thus, in the name of the *Or Zarua*).

Rabbenu Tam has written thus in his responsum, cited by the *Semag*, “that only in a great emergency did they [i.e., the Rabbis] permit effecting *kiddushin* on Shabbat, and he would not rule thus [when applying the] Halakha in practice.”³² It would appear that in a great emergency, at any rate, it may be permitted.³³ And there can be no greater emergency than this, in which a grown orphan would have been shamed. Virtually throughout her lifetime, having been differentiated from other girls would have remained as a disgrace to her. Great is [the importance] of human dignity, in that it overrides the negative injunction of “Thou shalt not deviate from all the matters which they [i.e., the Rabbis] shall teach you”³⁴ in this matter which only involves a rabbinic injunction,

31. The fourth chapter of *Sanhedrin*.

32. *Mitzvot lo taaseh*, 75.

33. The Rama evidently understood Rabbenu Tam’s second statement as referring to an ordinary case in which no emergency exists. The whole statement then means that while, according to Rabbenu Tam’s interpretation, all first marriages should be permitted on the Sabbath, he would not rule *thus* as Sabbath *kiddushin* had only been permitted – presumably by later scholars rather than by the Gemara – very reluctantly in special circumstances. However, the statement should probably be translated “but he would not rule thus,” indicating that in all cases Rabbenu Tam hesitated to implement his sole dissident position in the face of its almost unanimous rejection by others. Maharshal, *Yam Shel Shlomo, Ketubbot*, 1:2, understood the *Semag*’s statement in the second sense. Likewise, *Haggahot Maimoniyot, Hilkhhot Ishut* 10:50, cites a responsum of Rabbenu Tam’s to the effect that he would not actually rule that Sabbath *kiddushin* are permissible, even though he assumed this to be correct theoretically. However, in the extant text of his responsa, Rabbenu Tam explicitly states that, in special circumstances, he would actually permit Sabbath *kiddushin* in practice; see *Sefer HaYashar: Helek HaShe’elot VeHaTeshuvot*, ed. S. F. Rosenthal (Berlin, 1898), 48:10.

34. See *Berakhot* 19b. The term used by the gemara is *kevod haberiyot*, which means, literally, “the dignity of the creatures,” but it generally refers to people exclusively.

[established either] as a precaution lest he write, as is specified in our [i.e., the Babylonian] gemara, or because he is regarded as effecting an acquisition on Shabbat, as is specified in the Yerushalmi and as will be explained subsequently.

Apart from this, we had to be concerned in this instance lest the engagement be broken off entirely and the match severed as a result of the dissensions and disputes between them to the extent that they wanted to remove the veil from the bride's head due to the tumult of the dissensions. And great is [the importance of] peace between husband and wife³⁵ – and even if she is only engaged to him, one may be permissive on this ground, since she is somewhat bound to him, just as Rabbenu Tam and the Rosh wrote in their responsa with respect to an engaged woman in mourning that it is permissible [for the prospective husband] to marry her after her *shiva* period in the interest of his own procreation.³⁶ Similarly, in the present era, we permit, against the dictum of our Rabbis o.b.m., marrying off girls who are minors, even though they, o.b.m., said, "It is forbidden for one to give his daughter in betrothal while she is a minor, [but he must wait] until she grows up and says, 'I desire so-and-so.'"³⁷ The *Tosafot*³⁸ and later *posekim* have

The verse cited is from *Devarim* 17:11. However, the Rama – evidently quoting from memory – writes the plural *kol hadevarim*, "all the matters" (a phrase found in a similar context in *Devarim* 28:14), whereas the verse has the singular *kol hadavar*, "every matter."

35. By citing their opening words, the Rama alludes to various statements in the gemara to the effect that certain prohibitions may be violated in the interest of domestic peace. See *Hullin* 141a and parallel sources, and cf. *Yevamot* 65b.
36. Normally, a mourner may not marry for thirty days following the death of his relative. However, Rabbenu Tam and the Rosh – see, respectively, *Sefer HaYashar*, ed. Rosenthal, 23, and *Teshuvot HaRosh*, 27:5 – permit a man who has not yet raised a family to marry after only a week of mourning. It should be noted, however, that these responsa, to which the Rama alludes, only deal with a man who is in mourning and not, as the Rama suggests, with the woman likewise.
37. *Kiddushin* 41a.
38. *Ibid.*, *Tosafot*, s.v. *asur*: "Our current practice to betroth our daughters even as minors is due to the fact that the [impact of] exile grows stronger daily, and while a man may presently have the means to give his daughter a dowry he may not have them later and she will remain a spinster forever." The Rambam, however, insisted upon the Gemara's injunction, and this was also taken by the *Shulhan Arukh*; see,

written that, in the present era, during which we are few in number, we are permissive etc. The same holds true in our case.

All this I have set before me in order to rely on the view of Rab-benu Tam (and the other *posekim* who take a permissive view) in an emergency. [However,] I say further that we may distinguish and suggest that, at present, all would agree that it is permitted. For we have studied [in the Mishna]: “One may not clap [his hands] nor dance [i.e., on Shabbat] etc.”³⁹ The *Tosafot*, near the beginning of the chapter, *HaMeivi*, noted: “Rashi explained, ‘lest he repair musical instruments.’ However, for us, these [acts] are permissible. For only in their days, when people were [generally] skilled in making musical instruments, was it feasible to introduce these restrictions. As for us, however, we are not [generally] skilled in making musical instruments and it is not feasible to introduce these restrictions.”⁴⁰ Indulgence in clapping and dancing on Shabbat has already become widespread everywhere – and non-Jews are even directed to play musical instruments – all because of the *Tosafot*’s statement that this ordinance is not feasible at present. The same holds true with respect to “one may not effect *kiddushin*,” of which the gemara says that the reason is “lest he write.” It is well known that the [presently] prevalent custom in Israel is that the groom does not write the *ketubba* or the betrothal deed⁴¹ himself. The reason [for this] is that we are not skilled in writing;⁴² and even whoever is able to write

respectively, *Hilkhot Ishut* 3:19, and *Even HaEzer*, 37:8. In his gloss on the latter, the Rama cites *Tosafot*’s view as the then prevalent Ashkenazic custom.

39. *Beitza* 36b. The text of the mishna includes “nor slap [his thighs]” between the prohibitions of clapping and dancing, but the Rama – again, perhaps quoting from memory – omits this.

40. *Ibid.* 30a, s.v. *tenan*.

41. These are different documents. The *ketubba* is a purely civil document describing and possibly effecting the civil and economic obligations devolving upon the husband whenever and wherever the marriage takes place. It bears no relevance, however, to effecting the marriage proper. A betrothal deed, on the other hand, is a simple self-validating statement, itself effecting *kiddushin*, that the bride is hereby betrothed to the groom. When given to the bride, it can substitute for money as an instrument of implementing *kiddushin*, with all attendant civil and religious consequences.

42. The Rama presumably does not refer to inability to write altogether. It is very doubtful that writing skills were more widespread in third-century Babylonia than

does not write [himself] in order to avoid discriminating between the skilled and unskilled. Therefore, a *hazan*⁴³ writes it in all cases, just as he reads the Torah for everyone for the benefit of the unknowledgeable. Hence, there is no reason to enjoin him who wishes to effect *kiddushin* lest he write inasmuch as we are unskilled therein and this writing is not incumbent upon the bridegroom. Nor need we fear lest the *hazan* write for [the purpose of arranging] the bridegroom's *kiddushin* for there is no source for such an injunction. Moreover, the *hazan*, after all, always writes the *ketubba* and the deeds of betrothal in the morning or long before entry into the *huppa* since he does not know when they will be ready with the *huppa*. Therefore, at present, there is no need to be concerned about this injunction at all.

Even if it should be rejoined that according to the Yerushalmi – which explains that the reason for this injunction is that we regard him [i.e., the bridegroom] as effecting an acquisition on Shabbat – there is no reason for distinguishing between their times [i.e., the gemara's] and the present, nevertheless, when [the Bavli is] opposed to the Yerushalmi, it seems [to me that] our gemara [i.e., the Bavli] is primary, and the *posekim* have always decided accordingly. Nor can it be argued that our gemara also acknowledges the Yerushalmi's reason

in sixteenth-century Poland, and the Rama probably sensed this. He rather means that people generally can no longer write the *ketubba* – now a foreign language document whose writing had become far more formal and stylized, so that the average person could not, in Hamlet's phrase, "as our statist's do... write fair."

43. In modern usage, *hazan* is used to refer to a cantor exclusively. Initially, however, it referred to any communal functionary.

The precedent cited by the Rama is itself based upon another precedent. Speaking of the text whose recitation was to accompany the bringing of the first-fruits to the Temple, the Mishna says: "Initially, everyone who could recite recited, and [as for] anyone who could not recite, others recited it to him [i.e., and he presumably repeated after his prompter]. [Many then] withheld from bringing. [Hence,] it was instituted that others should recite to both one who can and one who cannot recite [himself]" (*Bikkurim* 3:7). Rabbenu Tam insisted that the same principle should be applied to reading of the Torah. In talmudic times, anyone who was called to the Torah would ordinarily read himself. Now, however, Rabbenu Tam urged that a public reader read for all, regardless of whether they could or could not do so themselves, in order to avoid embarrassing the ignorant; see *Tosafot, Bava Batra* 15a, s.v. *shemoneh*.

but that it only cited one of two [self-sufficient] reasons, as the *Tosafot*⁴⁴ there wrote concerning a similar case. For this is not feasible with respect to two reasons between which there is some substantive difference. The *Semag*⁴⁵ has also written explicitly that our gemara is at odds with the Yerushalmi with regard to the ground of this matter [i.e., the injunction concerning *kiddushin*]. Certainly, there must be a substantive difference between them, and it is that which I have presented.

It is for this reason, I think, that the Rif and the Rosh (in the chapter, *Mashilin*) did not cite the Yerushalmi's reason nor did they cite that [dictum] of "those who marry widows should do so while it is yet day." The *Tur*, [OH] 339, likewise did not cite it, for surely we hold like our gemara as opposed to the Yerushalmi, and as regards heeding the precautionary prohibition, "lest he write," the acquisition is wholly irrelevant.

(Although the Rosh in the first chapter of *Ketubbot*⁴⁶ does cite "those who marry widows should do so while it is yet day" and he writes there that a virgin, likewise, should not be brought into *huppa* on Shabbat because he [i.e., the bridegroom] acquires her with respect to her findings and her income – and the same is written in *Even HaEzer* 63⁴⁷ – nevertheless, it seems to me that since he did not cite it in its proper locus, the chapter, *Mashilin*, this matter is not truly forbidden; and this is certainly because he held that our gemara's reason, i.e., "lest he write," is primary. They only cited it in the first chapter of *Ketubbot* and in *Even HaEzer* as a mere precaution, just as they mentioned there not to arrange a *huppa* on Friday because of some remote precautionary prohibitions. Since we disregard this and do arrange a *huppa* on Friday for reasons set forth by the *Aharonim*, o.b.m. – the primary reason being that we are now in exile and it is burdensome for us to arrange a wedding independently of Shabbat⁴⁸ – perhaps we should similarly disregard this [i.e., the Rosh's citation of the Yerushalmi] and be permissive on Shabbat proper, since the primary reason is "lest he write," as has been explained.)

44. *Beitza* 36b, s.v. *veha*.

45. *Mitzvot lo taaseh*, 75.

46. 1:3.

47. Actually 64.

48. See the Rama's commentary to the *Tur*, *Darkhei Moshe*, EH 64:4.

By way of proof, note that the *Tosafot*, after citing the Yerushalmi, wrote: “And according to this reason that it is forbidden [for one] to effect *kiddushin* because he appears to be effecting an acquisition, it is likewise forbidden to give a *get* on Shabbat.”⁴⁹ Now, why shouldn’t it also be prohibited according to our gemara’s interpretation that it is forbidden to effect *kiddushin* lest he write? The same holds true with regard to giving a *get*; [we should be concerned] lest he write the *get*? We should therefore infer from this as I have explained that, regarding a *get*, “lest he write” is inapplicable because it is [generally] the handiwork of an artisan and dextrous scribe who is necessary for writing the *get*, and not everyone is skilled in this. There is [consequently] no reason for concern lest the giver of the *get* write it since the giver does not ordinarily write the *get*. The same holds true, at present, with respect to writing the *ketubba* or the deed of betrothal. And although we do rely on the Yerushalmi’s statements and we do not grant divorces on Shabbat – as the *Tosafot*, [in the] chapter, *HaZorek*,⁵⁰ and the Ran,⁵¹ [in the] chapter, *Mashilin*, wrote, and as was cited by the *Tur*, *Even HaEzer*, 136 – that is because we find [this] explicitly in the *Tosefta* of the chapter, *Mashilin*,⁵² which explicitly states, “it is forbidden to divorce,” as was stated by the *Tosafot*, [in the] chapter, *HaZorek*. And although from the Ran, [in the] chapter, *Mashilin*, it would appear that, as concerns [giving a] *get* likewise, the reason for the injunction is “lest he write,” this is not indicated by the text of the *Tosafot*. According to them, there, indeed, the reason is because of [effecting an] acquisition. Not so, however, as concerns *kiddushin*, for, surely, our gemara’s reason is primary. And although from the *Tosafot*, [in the] chapter, *Mashilin*, it appears that it [i.e., divorce] was proscribed because of the Yerushalmi’s reason exclusively, and that we do not read “it is forbidden to divorce” in [the text of] the *Tosefta*, we

49. *Beitza* 36b, s.v. *veha*.

50. *Gittin* 77b, s.v. *vetezil*.

51. In commenting upon 36b.

52. *Tosefta Moed*, ed. Saul Lieberman (New York, 1962), 4:4; p. 300. Some manuscripts omit the prohibition of divorce. However, others include it, and this is the text generally quoted by *Rishonim*. See Lieberman, *Tosefta KiFshutah* (New York, 1962), 1000–1001, and the references cited there.

do not accept this [contention]; for the *Tosefta* was clearly overlooked by the *Tosafot* of [the] chapter, *Mashilin*.⁵³

Moreover, even if we should equate *kiddushin* to divorce completely, nevertheless it has already been established that divorce, likewise, is permissible at a time of emergency as is explained [in the] chapter, *HaZorek*. The *Tosafot*⁵⁴ [there] write that allowance has been made with respect to a mortally ill [person] so that his wife should not become involved with her husband's brother.⁵⁵ There is, then, *a fortiori*, grounds for being lenient under circumstances of mitzva – as he will fulfill [the mitzva] to procreate and multiply – which constitute, in addition, an emergency.

From all of the foregoing, it has been established that it is permissible to effect *kiddushin* on Shabbat in a case of emergency, and in which there is reason to be concerned about [personal] dignity, lest the matter lead to embarrassment and possibly result in severance of the match; and that we can rely on Rabbenu Tam who is permissive regarding this matter, as has been explained. However, many have risen up against me, challenging my position and contending that perhaps one might distinguish between *kiddushin* and entry into the *huppa*. This may be unanimously proscribed since he [i.e., the husband] thus acquires her with respect to various things regarding which a woman is acquired, so

53. The argument, as developed in this section, poses some difficulties. First, *Tosafot's* linking of the prohibition against divorce to the Yerushalmi can be readily explained without resorting to the Rama's inference. If the Yerushalmi's reason is correct, then divorce is necessarily prohibited simply as a particular instance of acquisition not requiring a separate act of rabbinic legislation to proscribe it. However, if *kiddushin* are forbidden out of concern for possible writing, we have no broader category under which divorce is automatically subsumed out of logical necessity. *Kiddushin* are, at most, an archetype and analogue which could have led the Rabbis to ban divorce as well. This would have constituted a fresh rabbinic ordinance, however, and it is entirely possible that, for any one of a number of reasons – the relative infrequency of divorce, for instance – the Rabbis never instituted such an ordinance. Secondly, the Rama contends that divorce was proscribed solely because it entails acquisition. Yet he never explains – what surely requires explanation – how divorce is a more acquisitive act than *kiddushin*.

54. *Gittin* 77b, *Tosafot*, s.v. *vetezil*.

55. If the husband had died childless; see *Devarim* 25:5–9.

that he is considered as effecting an acquisition on Shabbat, which all agree is initially⁵⁶ forbidden. This [view] is also found in the words of the *gaon*,⁵⁷ the renowned author, in [his] work, *Beit Yosef*, on the *Tur*, *Orah Hayim*, the aforementioned section 339, who writes that it is forbidden to marry her [i.e., the betrothed] even on Rabbenu Tam's view; and he writes [further] that this is suggested by the words of the *Haggahot Maimoniyot*, the *Kolbo*, and the *Ran*, [in the] chapter, *Mashilin*.

Now, although there is no compelling force to the aforementioned words of the *gaon* that it appears from the language of these *posekim* that Rabbenu Tam held thus, but rather the *Semak*⁵⁸ added this on his own as is clear from the text of the *Semak*; and furthermore, the *Ran*'s words can be dismissed readily⁵⁹ as he did not undertake to discuss this point at all but simply set down and transcribed the language of the *Tosafot*, and nothing concerning this matter can be inferred from his words, as is clear to anyone who studies them intelligently; nevertheless, it is proper to absolve myself from the *gaon*'s charge,⁶⁰ as one should have heeded his words on the side of stringency, especially since the *Semak* has written thus explicitly. Let me say, first, that this [apparent] leniency actually constitutes a more rigorous observance as has been established, for we had to be concerned about many pitfalls if the marriage had been held up. Secondly, that, from the *Tosafot* and the *Semag*, it appears explicitly that they do not distinguish at all between *kiddushin* and entry into *huppa*. ...⁶¹

56. I.e., it is a forbidden act although, should one transgress and perform it, the resultant acquisition is recognized as valid, the doctrine of *ex turpi causa non oritur actio* having rather limited scope in Halakha. [Ed. note: *Ex turpi* is a legal doctrine stating that a plaintiff will be unable to pursue legal remedy if it arises in connection with his own illegal act.]

57. I.e., R. Yosef Karo.

58. 174.

59. I.e., they do not support the *Beit Yosef*'s contention.

60. Of course, the *Rama* does not refer to any charge leveled at him directly by R. Yosef Karo as the latter had made no mention of him in this connection. He rather means that the position taken by the *Beit Yosef* could serve as a basis for criticizing him.

61. In the section I have omitted, the *Rama* quotes from *Tosafot* and the *Semag* to prove that they support his position; argues that their stature as major authorities should overrule the texts cited by the *Beit Yosef*; quotes and refutes, at some length, a contradictory inference drawn by the *Semak*; contends that since Rabbenu Tam's license

But why need I expatiate? [Just] go out and see how the people conducts itself everywhere,⁶² especially in our city which has, thank God, a substantial population. Sometimes, five or six *huppas* are arranged in one Friday, continuing into the night, with no murmur or chirp [of protest]. And what difference is there between the beginning of the evening and an hour or two into the night? No distinction can be made between whether or not they have accepted Shabbat by [reciting] *Barekhu*,⁶³ for as regards being permissive,⁶⁴ this does not depend upon their acceptance, as Shabbat establishes itself, once darkness falls, as is stated [in the] chapter, *Arvei Pesahim*, with respect to *kiddush* and *maaser*.⁶⁵ The truth is rather that the need of the hour leads to permissiveness with respect to these things which are but rabbinic injunctions which were not instituted with regard to an emergency.

With this I started and thus I conclude⁶⁶ that certainly one should be stringent so as to be energetic before Shabbat in order to avoid coming to this. However, if everything possible was done⁶⁷ and time was consumed until darkness [fell] and there is ground for concern about

was grounded upon the fact that *kiddushin* relates to the mitzva of procreation, it should certainly extend to *huppa*; and insists that, in any event, as he has argued earlier, most authorities accept the danger of writing rather than the Yerushalmi's reason as the basis for the prohibition of Sabbath *kiddushin*.

The Rama's last point presents a severe difficulty. His adversaries obviously assume that all agree that acquisition is forbidden on the Sabbath and that any leniency concerning *kiddushin* can only be based on the assumption that it is not to be regarded as an acquisitive act; hence, their contention that *huppa* must certainly be prohibited. Consequently, the Rama's rejection of the Yerushalmi's statement concerning *kiddushin* does not really affect the argument in any way.

62. See *Berakhot* 45a.

63. "Bless," the opening words of the evening service summoning the congregation to prayer.

64. I.e., one can usher the Sabbath in early and thus extend its injunctions but he cannot postpone its entry.

65. Once night falls, the Sabbath takes effect involuntarily, so that one may not eat before saying *kiddush* or partake, even in small quantities, of food which requires tithing, even though, if the agricultural phase of its preparation has not yet been completed, it may be so eaten on weekdays; see *Pesahim* 105a.

66. Literally, "with this I descended and with this I ascend," a phrase found in *Pesahim* 87b, where its general import is "this is my constant concern."

67. Freehof mistranslates, "But when it has occurred, what can be done if..."