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Two Cases of Adultery and the Halakhic Decision-Making Process*

by

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Biblical sources that speak of God's participation in human courts notwithstanding, the judicial decision-making process is a human act.[1] Rabbinic authorities, like judges in other legal systems, are fully subject to the many factors beyond the formal rubric of the law that influence interpretation, including educational background and personal experiences and values.[2] Still, construing jurists may not always be aware of the existence of such non-legal considerations in their thought, and the influence that such concerns wield may rest just beneath their consciousness.[3] Even when they were aware of the influence of extra-legal factors, medieval and pre-modern Ashkenazic rabbis seldom, if ever, revealed them in the course of their halakhic discussions, for the halakhah, like any other legal system, has its own terms of discourse that rarely admit uncloaked expressions of extra-legal concerns into its process of reasoning.[4]

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1. On biblical sources, see Ḥanina Ben-Menaḥem, "Postscript: The Judicial Process and the Nature of Jewish Law," in *An Introduction to the History and Sources of Jewish Law,* ed. N. Hecht et al. (Oxford: Clarendon Press, 1996), pp. 423–424, 434.

2. From a historical perspective, there is no place for conjectures that halakhic decision-making simply uncovers what was already revealed at Sinai or that it reflects ongoing divine revelation. See the summary of such views in Aaron Kirschenbaum, "Subjectivity in Rabbinic Decision-Making," in *Rabbinic Authority and Personal Autonomy,* ed. Moshe Sokol (Northvale, NJ: Jason Aronson, 1992), pp. 63–64, 66–67. A criticism of judges as "living oracles" of the law who simply pronounce the meaning of various statutes in general jurisprudence can be found in Jerome Frank, *Law and the Modern Mind* (1930; reprint ed., Gloucester, MA: Peter Smith, 1970), pp. 35–36.

3. See Benjamin Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921), p. 167.

4. Hanina Ben-Menahem, *Judicial Deviation in Talmudic Law* (Chur: Harwood, 1991), p. 13, argues that extralegal considerations were accepted in the decision-making process of the Babylonian Talmud but were rendered normative halakhic criteria by their incorporation into the halakhah by post-talmudic authorities. An extended discussion of extra-halakhic considerations in the legal thinking of Rabbi David Ibn Zimra (Egypt, Safed; 1479–1573) can be found in Samuel Morell, "Darkei ha-shikul be-meṣiut ha-speṣifit be-piskat ha-RaDBaZ," in *'Atarah le-Ḥayyim: Meḥkarim be-sifrut ha-talmudit ve-ha-rabbanit le-khevod Professor Ḥayyim Zalman Dimitrovski,* ed. Daniel Boyarin et al. (Jerusalem: Magnes Press, 2000), pp. 413–438. On the question of determining matters based on internal legal standards alone, see Ernest Weinrib, *The Idea of Private Law* (Cambridge, MA: Harvard University Press, 1995), pp. 12–13, 23–24, comments germane to the halakhic endeavor as well.

Without explicit information about the non-legal factors that guide halakhic decision-making, one is left to search for clues that might reveal the extra-legal concerns that shape judicial thought. Historical circumstances may aid in understanding such forces, but ultimately any evidence of judicial attempts to harmonize the law with other values must be found within the interpretation of the law itself.

Telltale signs are not often found, for the simple application of talmudic cases, precedents, and/or customs creates an all-but-seamless fit between the sources and the case at hand. In other instances, the rule of the law is clear and unquestioned, and only the application remains in doubt. Here there may be indications of a jurist's own values, reflecting his time, personal experience, and demeanor, for the decision to apply known rules in unfamiliar situations is clearly a judicial choice revealing both of the jurist and his age.[5] In still other responsa, the appearance of radical exegesis, whether of canonical texts or judicial precedents, reformulation of legal principles, contextualization of sources and/or precedents (i.e., the limiting of a text or case to a particular time or circumstance), and even the reshaping of the facts of the case point to the possibility that non-textual concerns have shaped the law.

The identification of extra-legal concerns in a legal discussion may also be possible through a comparison of a jurist's interpretation of the same text or precedent in different contexts. Incisive authorities must often interpret the law to make it applicable to unfamiliar circumstances, to preserve or further fundamental values, or to decide between competing legal principles. Admittedly, a jurist's reading of a source can evolve over time in light of his own study and restudy of the subject or of new information that comes to his attention.[6] However, disparate interpretations of the very same passage, particularly in practical legal decisions, may suggest that the author has changed his understanding of a text or precedent due to factors beyond the sources.

Among the published responsa of Rabbi Joel Sirkes (Cracow, d. 1640) there is something of a halakhic anomaly that can contribute to an understanding of supererogatory forces in the halakhic process: two responsa by the same author that deal with similar cases but come to diametrically opposed conclusions.[7] Each of the responsa deals with a married woman suspected of adultery. There were no eyewitnesses in either case, but there were ongoing rumors and testimonies about the sexual conduct of the accused women. Sirkes was asked to determine the halakhic status of both women. He used many of the same legal sources in preparing his responsa, and at times the very same language appears in both, suggesting that he copied sections from one responsum for use in the other.

5. See Cardozo, *Nature of the Judicial Process,* pp. 163–164.

6. An example of a change of opinion based on new information can be found in Nissim Gerondi, *She'elot u-teshuvot ha-Ran,* ed. A. Feldman (Jerusalem: Machon Shalem, 1984), no. 79, p. 97.

7. Different responses by the same author to the very same problem are not unknown. See Mosheh ben Maimon, *Teshuvot ha-Rambam,* ed. J. Blau, vol. 1 (Jerusalem: Mekize Nirdamim, 1957), nos. 34 and 45. However, as Renée Levine Melammed in "He Said, She Said: A Woman Teacher in Twelfth-Century Cairo," *AJS Review* 22, no. 1 (1997): 19–35, has pointed out, Maimonides' different responses were engendered by questions that presented substantially different versions of the circumstances of the case.

A word of caution: A reading of all of Sirkes' responsa might suggest that he did not share some of the juridical assumptions noted above. Perhaps not, but he never invoked the divine as the source of his insights or as a participant in the judicial process. His use of the phrase "as I have been taught from heaven" in a number of his responsa was not an attribution of divine participation to his decision-making but, rather, a pious acknowledgment of the source of knowledge.[8] Sirkes knew that he and he alone was the author of his decisions. His use of phrases asking God to save him from mistakes and of subscriptions in which he claimed that he had written what was correct "in my humble opinion" were stock-in-trade expressions of the Ashkenazic halakhist that only emphasized that the writer believed himself responsible for his decisions.[9]

Case One

The seventh commandment of the Decalogue is unequivocal: "Thou shall not commit adultery" (Exodus 20:13). The biblical punishment for the sin is equally clear. Leviticus 20:10 states, "If a man commits adultery with a married woman, committing adultery with his neighbor's wife, the adulterer and the adulteress shall be put to death." According to the Talmud, both parties were to be strangulated for their sin if two witnesses had seen the wrongdoing.[10] Few couples, however, were so obliging to the demands of legal procedure as to perform their illicit sexual act before two witnesses. Since it was usually not possible to prove an adulterous relationship with eyewitness testimony, adultery became tied up with legal doubt. If the doubt was compelling, the husband of a woman suspected of adultery had the right—but not always the obligation—to divorce her without paying the amount stipulated in her marriage contract (*ketubbah*).[11]

Like almost all responsa dealing with adultery, the two cases treated here exclusively examine the status of the woman involved in the affair: was she permitted to return to her husband or not? Without capital punishment, the legal status of the adulterer was simply a non-issue. As an older contemporary of Sirkes from

8. The phrase appears in Joel Sirkes, *She'elot u-teshuvot* (Frankfurt, 1697), nos. 77, 78, 100. On the pious nature of such phrases, see the comments of S. D. Goitein, "Religion in Everyday Life as Reflected in the Documents of the Cairo Geniza," in *Religion in a Religious Age,* ed. S. D. Goitein (Cambridge, MA: Association for Jewish Studies, 1974), pp. 13–14. Also see Isadore Twersky, *Rabad of Posquières,* 2nd ed. (Philadelphia: Jewish Publication Society, 1980), pp. 291–299, regarding the meaning of this phrase in particular and the lack of a divine role in the halakhic process in general in the thought of Rabbi Abraham ben David of Posquières and some of his contemporaries. My thanks to Professor Haym Soloveitchik for these references.

9. Relevant sources can be found through a search of the Bar-Ilan Responsa Project Compact Disc (ver. 6.0) using the search formulas *יציל and *הנראה ל in the rishonim and sixteenth-century sections of the database.

10. BT, Sanhedrin 52b. In the talmudic period, capital punishment was generally not a morally acceptable penalty; in seventeenth-century Poland, it was also not in the jurisdiction of Jewish courts. Nevertheless, an adulterous woman was prohibited both to her husband and to her paramour (see BT Sotah 27b).

11. The rabbis of the Talmud offered a number of paradigms in which circumstances were so incriminating of a woman that her husband could divorce her despite the legal uncertainty. See BT Yevamot 24b–25a.

Lithuania wrote, if a married man had a sexual encounter with an unmarried "whore" who had ritually immersed herself and was not a *niddah,* then the sin was "not so great."[12] Even double adultery had no repercussions for the marital status of the adulterer. If contrite, he was expected to perform penances, but even if he did not, he could always return to his wife.[13] It was only the married adulteress whose personal status was affected by the extramarital relationship, for she who had willingly violated the marriage bed had to be divorced.[14]

The following question appears in responsum number 98 in the first volume of Sirkes' responsa, published posthumously in Frankfurt am Main in 1697. The events described took place or, more likely, came to Sirkes' attention in the late summer of 1619, just after he arrived in Cracow to assume the position of rabbi and head of the rabbinic court, a post that he held until his death.[15] The query was addressed to Sirkes by a rabbi in a community somewhere along the route between Lublin and Cracow. The question posed by the rabbi was reformulated by Sirkes as part of the responsum:

> Re what you asked regarding the status of a married woman who came home with a particular male guest who was passing through the town in which the woman lived. The woman's husband was not in town. There was also no one else in the house except for an important woman who saw the two of them coming and then they vanished from her sight and she did not know where they went. Then a great fear fell upon her and she thought that maybe they went to the cellar. As quick as the blink of an eye, she heard the sound of the hinges of the cellar door and her fear increased. She went from the "winter house" to near the cellar and she heard the cellar doors close. While she was standing there, several other women came and asked whether she had seen the aforementioned woman with X [*peloni*], the guest, and where had they gone, since the cart driver would [soon] be on his way. The woman replied that she had seen both of them coming to the house and then she lost sight of them. The women [who had come] said that maybe they had gone into the cellar, and

12. Benjamin Slonik, *Seder miṣvat nashim* (Cracow, 1577), no. 102.

13. In mid-seventeenth-century Poland, as in earlier periods in German Jewish history, some form of worldly penance was expected from sinners who had experienced physical pleasure from their sins. In this regard, see Jacob Elbaum, *Teshuvat ha-lev ve-kabbalat yisurim* (Jerusalem: Magnes Press, 1992). A contemporary example of penances for a married man who had sexual intercourse with a married woman can be found in Meir ben Gedaliah, *She'elot u-teshuvot* (Venice, 1618), no. 45. In this responsum Rabbi Meir specifically allowed the man to have intercourse with his wife during his period of penance; his extramarital affair had no effect on his personal status. Rabbi Meir warned that after the man had completed the penances, anyone who embarrassed him would be excommunicated, while anyone who was supportive of the penitent "will merit seeing the comforts of Zion and Jerusalem, the Holy City."

14. Medieval Christianity did little to temper the halakhah's dual view of those who had committed adultery, for canonists, too, held women to a higher standard of chastity than men (James Brundage, "Carnal Delight: Canonistic Theories of Sexuality," reprinted in his *Sex, Law and Marriage in the Middle Ages* [Aldershot: Variorum, 1993], p. 337).

15. The responsum ends with the following note: "An event that took place when I arrived in the holy community of Cracow at the end of the year 5679 [late summer 1619]," a description not part of the original responsum but reflecting a later review by Sirkes.

> they [all] waited for them to come out. Then one woman said, "Let us light a candle and look for them in the cellar," but in the middle of her saying this, the aforementioned woman came from the cellar and said that X was sitting in the cellar in the cold and would like to drink some mead there. While she was talking, X came behind her from the cellar in front of all the people standing there, and they saw that the back of the woman's scarf was dirty with mud and the earth of the cellar [presumably she was surprised and turned around at his approach]. Based on these things, the whole city was abuzz with an unending rumor about the woman who had committed adultery with X.
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> And afterwards, on the third day [after the events], the woman came before your honor [the rabbi who sent the query] in tears and cried out in a great voice about how great her sins were, that she had sinned with X in the cellar, and in addition to your letters, we have seen in documents that she admitted as a form of repentance that she had also sinned before this with two [other] adulterers. And so it is well known here in Cracow from travelers from Lublin by way of the city in which she sinned. And you also wrote that she admitted before her husband regarding her many sins.
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> And the husband and wife came one after another before your court in tears because they greatly loved each other. And the woman cried and was confused and asked for repentance and atonement. A pure spirit swelled up in the man as well, and he wished to dismiss her with a proper bill of divorce because he was disgusted with her.

According to Sirkes, the local rabbi had inquired whether the woman was indeed legally prohibited to her husband under these circumstances. In addition he asked that Sirkes recommend appropriate forms of repentance for her to perform.[16]

Sirkes responded matter-of-factly that, if the woman stood by her admission that she had committed adultery with the visitor and requested forms of penance, and the husband continued to demand a divorce, the wife would have to be divorced. However, seemingly on his own initiative, Sirkes raised the possibility that the woman might recant her confession or that her husband might change his mind and decide not to divorce her, and that each could offer some sort of plausible explanation for the retraction of their earlier statements. Likely some distance from the locale of the questioner and fearing "what if," Sirkes decided to undertake a full legal review of the woman's case.

A responsum is not a piece of exploratory legal writing but an argumentative text in which sources are introduced and examined to advance a particular view. The technical legal discourse and the interpretations of the halakhah are the author's way of expressing his sense of justice and therefore must be scrutinized, for if properly evaluated they may point to the real interests of the jurist and his community.[17]

Fully intending to forbid the woman to return to her husband, Sirkes opened his survey with two views of the tosafists on a basic talmudic source regarding adultery. The last *mishnah* in Nedarim states:

16. If Sirkes replied to the request for penances, it was not included in this printed responsum.

17. In a somewhat different context, see the comments of Moshe Halbertal, *People of the Book* (Cambridge, MA: Harvard University Press, 1997), p. 92.

> Originally they used to say that three wives must be divorced yet receive their *ketubbah*: A woman who says [to her husband], "I am unclean to you" [due to having had sexual intercourse with another man]; [a woman who says that] "heaven is between us" [i.e., the husband is impotent]; [a woman who says that] "I vow not to have any [sexual] pleasure from Jews." They [the rabbis] later said that [such statements are not admissible in order that] a woman not look at another man and thus destroy her relationship with her husband. [Therefore] a woman who says that she is unclean must bring a proof of her statement.[18]

A simple reading of the *mishnah* suggests that the court would not accept any admission of adultery by a woman unless substantiated by other admissible evidence. However, the Babylonian Talmud explained the *mishnah* to be a case of the wife of a kohen who told her husband that she had been raped and would therefore have been prohibited to him. It was obvious to the rabbis of the Talmud that any woman who admitted to having willingly had an adulterous affair was prohibited to her husband. As one of the tosafists explained, and as Sirkes cited, by confessing to an extramarital affair a woman legally declared herself prohibited to her husband (*de-shavyyeh nafshah ḥatikhah de-'issura*).[19]

The Babylonian Talmud's discussion of the *mishnah* included two additional cases that were central to subsequent legal developments regarding a woman who admitted to an adulterous affair.

> A certain man was closeted in the house with a married woman. Her husband came. The adulterer broke through the hedge and ran off. Raba said, "The wife is permitted; if he had committed a sin he would have hid [in the house and not have had the husband see him running off]."
>
> A certain adulterer went up to a certain woman. Her husband came. The adulterer went and sat in an arch of the doorway [so that he would not be seen]. There was cress there and a serpent tasted it. The husband wanted to eat from the cress without his wife's knowledge.[20] The adulterer said to him, "Do not eat it, for a serpent ate from it." Raba said, "The wife is permitted; if he had committed a sin he would have wanted him to eat [from the cress] and die."[21]

Following the tosafists, Sirkes noted that Raba's ruling that "the wife is permitted" meant that the woman was allowed to marry her lover after her divorce from her husband or after the husband's death. She was not permitted to return to her husband. Translated into the contemporary case, the woman's initial declaration that she had an adulterous affair with the traveler prohibited her to her husband. There was no legal room for reconciliation.

A second view of the tosafists, however, was far more problematic for Sirkes,

18. Nedarim 11.12.

19. Tosafot, BT Ketubbot 63b.

20. Rashi explained that if she had known that her husband wanted to eat the cress, she would have told him not to.

21. BT Nedarim 91b with Sirkes' glosses.

for one of the greatest halakhic authorities of the Middle Ages, Rabbi Isaac ben Samuel of Dampièrre (d. ca. 1185), read the talmudic sources very differently. Following the rationale of the Mishnah, Rabbi Isaac maintained that a woman's confession to an extramarital affair was not admissible, for a woman's apparent self-incrimination might really be an attempt to force her husband to divorce her.[22] As for the talmudic cases, they were specific examples of instances in which a wife could return to her husband because the circumstances suggested that no prohibited sexual act had taken place between her and the other man.[23] The practical significance of Rabbi Isaac's opinion for Sirkes was that the woman's confessions of wrongdoing in the matter before him were legally inadmissible and she remained permitted to her husband irrespective of whether she recanted her testimony or not.

Although Rabbi Isaac's position posed a severe difficulty for Sirkes in his attempt to bar the woman from returning to her husband, it offered an invaluable methodological opportunity. If Sirkes could prove that the ostensibly opposing view of one of the greatest of the tosafists would admit that in this specific case the woman was prohibited to her husband, Sirkes' argument would not only be inestimably bolstered, it would appear to be uncontested. Sirkes took up the gauntlet.

With the woman's confession ruled inadmissible by Rabbi Isaac of Dampièrre, Sirkes was forced to focus on a different facet of the evidence: Was the testimony of the women who had seen the couple in the cellar and the ongoing rumor about their sexual intrigue sufficient to prohibit the woman from returning to her husband?

This was not a new legal question. Rabbi Isaac Alfasi (Fez, d. 1103), Rabbi Jacob ben Meir Tam (known as Rabbenu Tam, Ramerupt; d. 1171), Rabbi Isaac of Dampièrre, and the author of the *Sefer Halakhot Gedolot* had all ruled that a woman could only be prohibited to her husband if she had been formally warned before witnesses not to go off alone with a particular male but nonetheless did so before witnesses (*kinnui ve-setirah*) or if there were two witnesses to a forbidden sexual act. However, Rabbi Jacob ben Meir was reported to have changed his position on the issue later in life and entertained the view of Rabbi Aḥa of Shabḥa (d. 752), author of the *She'iltot,* that two witnesses to an "ugly act" (*davar mekho'ar*) were sufficient to prohibit a woman to her husband. The view was subscribed to and elaborated by Rabbi Meir of Rothenburg (d. 1293), the outstanding Ashkenazic halakhist of the thirteenth century, who claimed that Maimonides also embraced this position.[24]

Historically, both the *She'iltot* and Rabbi Meir of Rothenburg were authoritative figures in Ashkenazic jurisprudence. The *She'iltot* was thought to represent ancient rabbinic traditions (*divrei kabbalah*), and Rabbi Meir was viewed as the last

22. The Babylonian Talmud expressed similar concerns in two other cases related to the *mishnah.* See Nedarim 91a–b.

23. Tosafot, Yevamot 24b.

24. See the views as cited in Mordekhai ben Hillel, Yevamot 15. In a gloss to this passage, Sirkes' teacher, Rabbi Zebi Hirsch Schorr, also maintained that Rabbi Meir of Rothenburg believed that Maimonides followed the view of Rabbi Aḥa. Given Sirkes' esteem for Maimonides in legal matters (see the following note), this point should not be overlooked.

great jurist of medieval Ashkenaz and therefore often a deciding view in determining the law.[25] Still, Rabbi Meir's most outstanding student, Rabbi Asher ben Yeḥiel (Germany, Spain; d. 1327), did not follow his teacher's view on this matter.[26] Rabbi Solomon Luria (Lublin, d. 1574), Rabbi Meir ben Gedaliah of Lublin (d. 1616), formerly a rabbi in Cracow, and Rabbi Joseph Karo (Safed, d. 1575), author of the *Shulḥan 'Arukh,* all rejected Rabbi Meir of Rothenburg's view.[27] However, forced to argue the case before him on the basis of the witness and the rumor, Sirkes pushed to show not only that the halakhah was as construed by Rabbenu Tam and Rabbi Meir of Rothenburg, but that Rabbi Meir (a) was correct in ascribing this position to Maimonides, and (b) would agree to extend the principle to the case where there was one witness to an "ugly act" and an unending rumor. To bolster his point, Sirkes demonstrated that his understanding of Rabbi Meir of Rothenburg's position solved certain textual problems better than other approaches, including that of Rabbi Solomon Luria, who had rejected Rabbi Meir's view, and a Cracow rabbinic court decision of 1558 concerning adultery that was signed by halakhists of no less standing than Rabbi Moses Isserles and Rabbi Joseph Katz.[28]

Returning to the talmudic discussion in Nedarim, Sirkes noted that Rabbi Nissim Gerondi (Spain, d. ca. 1375) argued that the talmudic cases implied that the husband would have had to divorce his wife if the lover had not run off or had let the husband taste the cress. Gerondi further contended that if a man and woman were found in circumstances similar to those mentioned in the Talmud but without comparable evidence of the couple's chastity, a scrupulously observant individual (*ba'al nefesh*) should divorce his wife in order to fulfill his heavenly, if not purely legal, duty (*la-ṣet yedei shamayim*). An anonymous opinion cited by Geron-

25. On the authority of the *She'iltot,* see, for example, Israel Isserlein, *Terumat ha-deshen* (Venice, 1519), nos. 208, 215, and especially 258; Solomon Luria, *She'elot u-teshuvot* (Lublin, 1574), no. 6 (also appears in Moses Isserles, *Shu"t ha-Rema,* ed. A. Siev [Jerusalem: Feldheim, 1971], no. 18, p. 119). With respect to Rabbi Meir of Rothenburg, see Isserlein, *Sefer pesakim u-ketavim* (Venice, 1519), nos. 222 and 223. Maimonides' place in the Ashkenazic pantheon of jurists was less secure, but Sirkes held him in high esteem. See, for example, Joel Sirkes, *She'elot u-teshuvot ha-bayit ḥadash ha-ḥadashot* (Koretz, 1785), no. 61.

26. Jacob ben Asher, *Arba'ah turim,* 'Even ha-'ezer 11, with the comments of Joseph Karo.

27. Luria, *Responsa,* no. 33 (also appears in Isserles, *Responsa,* as no. 13); Meir ben Gedaliah, *Responsa,* no. 80; Karo, *Beit Yosef,* Even ha-Ezer 11. In 1558 the rabbinic court in Cracow wrote that the law was according to Rabbi Meir and Rabbi Aḥa—at least in theory. Faced with a scandalous case from Prague regarding a husband who had hired witnesses to testify falsely against his wife, the Cracow rabbinic court noted in 1558 that the law agreed with Rabbi Meir of Rothenburg on this point but the opinion was irrelevant in the proceedings before the court (see Isserles, *Responsa,* no. 12, with slight variations in Joseph Katz, *She'erit Yosef,* ed. Asher Siev [New York: Yeshiva University Press, 1984], no. 77; Isserles' responsa were not published until 1640, the year of Sirkes' death, but a copy of the decision appeared in 1590 in the aforementioned responsa of Isserles' brother-in-law and fellow member of the rabbinic court, Rabbi Joseph Katz, from which Sirkes cited the opinion). Isserles appears to have been the author of the court's decision. The responsum uses the first-person throughout (i.e., one of the signatories authored the decision and the other two signed), and a copyist's signature at the end of the version in Katz's volume implies that this text did not come from Katz's own writings. A summary of the Prague case is given by Asher Siev, "Ha-Rema ke-fosek u-makhri'a be-Yisrael," *Hadarom* 25 (1967): 211–219.

28. Luria, *Responsa,* no. 33; Katz, *Responsa,* no. 77.

di went further and maintained that in all instances of "ugly acts" in which the explanations offered in the talmudic paradigms could not be brought to bear, a rabbinic court must force the husband to divorce his wife.[29]

Sirkes drew the practical conclusions. In the case of the woman and the traveler, the anonymous opinion cited by Gerondi would demand that the husband divorce his wife because there had been an "ugly act" (they had been alone together in a dark place) that did not have the saving graces of the talmudic examples.[30] Gerondi himself, however, would argue that under such circumstances only a very observant individual should divorce his wife. This weakened Sirkes' position, and so he dared to suggest that Gerondi only believed that the husband could not be forced to divorce his wife if the information about her misdeeds was based on his word alone. If, however, there was an ongoing rumor and one witness to the "ugly act" (the women who stood outside the cellar door were considered the equivalent of but one witness for they were women, not men), and since, Sirkes stated as a simple matter of fact, the law follows Rabbi Meir of Rothenburg, even Gerondi would maintain that in this case the court must force the husband to divorce his wife.[31] Here Sirkes was legally presumptuous. Not only was it unclear that the law was as stated by Rabbi Meir of Rothenburg, but Gerondi explicitly limited the circumstances in which a woman could be prohibited to her husband and nevertheless Sirkes expanded them.

By extending Gerondi's view, Sirkes shifted the focus of the legal discussion from the woman's admission to the acts that took place, ostensibly bypassing Rabbi Isaac's objections and developing a new legal avenue that would strengthen his efforts to prohibit the woman from returning to her husband. Sirkes was pushing the limits of the law, but there was more to be done.

In his authoritative legal code, the *Arba'ah Turim,* Rabbi Jacob ben Asher (Germany, Spain; d. 1340), had ruled that, according to Rabbi Jacob ben Meir, arguably—if not unquestionably—the greatest of the tosafists, a claim by a husband that his wife had had an extramarital affair was insufficient basis to prohibit continued cohabitation. However, if the allegation was accompanied by an unending public rumor and there were no children from the marriage, a rabbinic court should force the couple to divorce.[32] Again, Sirkes extended the legal parameters. He argued that if one can impose a divorce on the basis of the husband's word and an unending rumor, then certainly if there was an unending rumor and one independent witness to apparent marital infidelity the court should move the husband to divorce his wife if there were no children. Thus, in the case before him, where the couple was childless and there was an ongoing rumor and "one witness," Sirkes contended that Rabbenu Tam, too, would have ruled that the woman must be divorced.

29. Nissim ben Reuben Gerondi, *Ḥiddushei ha-Ran,* Kiddushin, p. 29b, in the commentary of Rabbi Isaac Alfasi.

30. On being alone together in a dark place as an act that raised suspicions, see PT Ketubbot 7:6 (31c); Maimonides, *Mishneh Torah,* Hilkhot Ishut 24.15, a source cited in the Ashkenazic world by Mordecai ben Hillel, Yevamot 15.

31. On considering the women as but one witness, see Jacob ben Asher, *Arba'ah turim,* 'Even ha-'ezer 178 with the commentary of Joseph Karo.

32. Jacob ben Asher, *Arba'ah turim,* 'Even ha-'ezer 11 with the comments of Karo.

Having "established" that Rabbi Meir of Rothenburg and Rabbenu Tam would concur that the woman had to be divorced on the basis of the unending rumor and the testimony of the women, Sirkes could more aggressively return to the issue that he had previously evaded: the woman's confession. Rabbi Isaac of Dampièrre's ruling was not the only legal hurdle that Sirkes had to overcome in this regard. In his glosses to the *Shulḥan 'Arukh,* Isserles had ruled that if after admitting to a romantic tryst a woman was actually able to offer an explanation as to why she had incriminated herself, her clarification would be believed and she could recant her earlier confession of wrongdoing.[33] To make matters worse from Sirkes' perspective, a leading Ashkenazic halakhic authority of the fifteenth century, Rabbi Israel Isserlein (Germanic lands, d. 1460), had ruled in an actual case that if such a woman explained her original testimony, her explanation should be accepted.[34] Not only statute but precedent declared that the woman should be able to recant her testimony and return to her husband.

Legally adroit, Sirkes sought to limit the applicability of the *mishnah* and the force of precedent by declaring that the rules and assumptions of the *mishnah* did not apply to an admission made in court. An explanation can only be used to overturn an earlier confession made out of court, maintained Sirkes, but in this case, where the woman made an in-court admission, an explanation could not nullify earlier testimony.

Sirkes was correct in stating that Jewish law accorded a higher value to statements made in court than to those made out of court.[35] An in-court admission was viewed as a "total admission" that could not be recanted, but this was only true in monetary cases when a defendant stood accused in court. The rules of explaining testimony applied for those who came to court without having been summoned and made statements of their own volition. By Sirkes' own admission, the case before him was not a monetary matter or, strictly speaking, even one of testimony, but rather a matter of admission that involved "prohibiting something to oneself," and in halakhah, "prohibiting something to oneself" can always be explained and set aside. Moreover, following the *mishnah* in Nedarim, Rabbi Jacob ben Asher specifically stated that a married woman who said that she had an affair with a man is not believed precisely because the rabbis feared that she might be using her statement as a means to free herself from her husband.[36]

There was no support for Sirkes' opinion in the language of the *mishnah,* in the words of its commentators, or in the rulings of earlier jurists. Even Sirkes himself made no reference to such a possibility in his legal commentary to Jacob ben Asher's *Arba'ah Turim* when the legal statutes derived from this *mishnah* were discussed.[37] It is precisely the extreme exegesis in this responsum that suggests that Sirkes was moved by forces beyond the pale of the law.

33. See *Shulḥan 'arukh,* 'Even ha-'ezer 115:6 with Isserles' comments.

34. Isserlein, *Sefer pesakim u-ketavim,* no. 222.

35. See, for example, Asher ben Yeḥi'el, *She'elot u-teshuvot le-Rabbenu Asher ben Yeḥi'el,* ed. Yitzhak Yudlov (Jerusalem: Machon Yerushalayim, 1994), no. 52:4.

36. Jacob ben Asher, *Arba'ah turim,* 'Even ha-'ezer 115.6–7.

37. See Joel Sirkes, *Bayit ḥadash,* 'Even ha-'ezer (Cracow, 1639), 115.6–7. Sirkes' commentary was first published during his lifetime, some twenty years after he wrote this responsum.

Well aware that his position rested on, at best, questionable grounds, Sirkes sought further proof to disqualify any explanation that the woman might offer. To do so he returned to the source most damaging to his argument: the *mishnah* as understood by Rabbi Isaac of Dampièrre. Sirkes knew full well that, according to Rabbi Isaac, the rabbis of the Mishnah had rejected the woman's claims due to a concern that she might have wished to repudiate her husband and escape the marriage. Sirkes moved to limit the applicability of the *mishnah.* It only applied, he claimed, when there was but one beau who might tempt her away from her spouse, but here, in the present case, she admitted to having had three lovers! Her admitting to lewd behavior beyond what was legally necessary to secure her release from her husband was, asserted Sirkes, a sure sign that she was telling the truth.

Only the most formalistic reading of the *mishnah* could in any way substantiate Sirkes' hypothesis. Clearly the reasoning of the *mishnah* applied equally to one lover or several lovers. With the rumor of the acts of the man and woman in the case before him spreading, Sirkes mustered every possible legal proof to make her face the consequences of her actions, including offering a third proof as to why her original admission must stand.

According to the *mishnah,* a woman who says "I am unclean to you" is not believed. Without citing any earlier commentators to this effect, Sirkes inferred that the language "to you" meant that the rule of the *mishnah* only applied if the statement was made directly to the husband and no one else, for the only possible explanation for such brazen behavior before her husband was a base desire for another man. If, however, her admission was made in court, there was no reason not to believe her.

Sirkes' limitation of the *mishnah* to the most specific of circumstances meant that it would not apply in the case before him, where the husband was not in town at the time of admission. As such, the woman's original declaration would stand "even according to Rabbi Isaac," and no explanation on her part would invalidate its legal import.

Sirkes knew full well that the *mishnah* could certainly be interpreted as inclusive rather than exclusive (i.e., *even* if she admitted to her husband she was not believed, and not *only* if she admitted to her husband). Nevertheless, Sirkes argued that his interpretation was correct even though no one before him had ever seen it quite in this light; indeed Sirkes admitted outright that Isserlein likely would have rejected such an inference.

How convinced Sirkes was of his view remains questionable. Here too, in his glosses to the *Tur,* Sirkes let stand without comment Jacob ben Asher's ruling that if the woman says that she has had an affair we do not believe her, for perhaps she fancies someone else. Only when faced with a practical case did Sirkes stretch the canonical sources. Clearly, he wanted to thwart any possibility that this couple might return to live together, and in order to do so he not only interpreted sources in new ways but ignored legal precedent.

Rabbi Meir of Rothenburg himself had been asked about a case in which a man left his wife and home on business in the spring of 1271, and twelve months later she gave birth to a baby girl. About three months after the husband's depar-

ture, on the night of Shavuot 1271, a Jew who had gone to the house to make Kiddush for the wife had seen her physically cavorting with non-Jews in her home. The townspeople assumed that she had been impregnated that evening. Apparently, the child died soon after its birth, and the woman's father, ashamed of her adulterous deed and fearing that she might convert, went to the local rabbinic court asking permission to kill her. The women in the town were gossiping about her acts and, like her father, assumed that she had murdered the child to hide her folly. This was a case with one witness to an "ugly act" and an ongoing rumor, yet Rabbi Meir himself ruled that two witnesses and an ongoing rumor were necessary to formally prohibit the woman to her husband. He ultimately ruled that the man must divorce his wife, but for different reasons.[38]

Rabbi Asher ben Yeḥiel, a jurist of indisputably high standing, was also asked to consider the status of a woman who was suspected of an extramarital affair. As in the case before Sirkes, there was an unending rumor regarding the affair and, more significantly, one witness *who could testify to the prohibited sexual act.* Unlike Sirkes, Rabbi Asher ruled:

> Know that with one witness a married woman cannot be prohibited to her husband except after having been formally warned and then going off to a secluded place (*kinnui ve-setirah*) . . . and with respect to unending rumors the author of the *Halakhot Gedolot* and Rabbenu Tam ruled that we do not force [her] from the husband, because unending rumors after marriage are inadmissible.[39]

Sirkes knew this responsum; he cited the very next section of the text to different ends. His failure to cite this precedent, in which there was one witness to the sexual act and still the jurist allowed the woman to return to her husband, is telling.

In the fifteenth century, Rabbi Israel Isserlein had been asked about the wife of a kohen who was suspected of adultery.[40] In this case, too, there was an unending rumor and one witness to an "ugly act." An earlier query sent to a colleague had reported the information somewhat differently: that the woman had actually admitted to an adulterous affair. In light of this, Isserlein felt obliged to consider the case as if she had indeed confessed, and he dismissed the charges out of hand.[41] Here was an on-point case for Sirkes, yet he barely made mention of it.

Rabbi Meir ben Gedaliah of Lublin also dealt with a case in which rumors of an extramarital affair had spread regarding the wife of a certain kohen. Here, too, there were possible witnesses to "ugly acts." Even worse from the standpoint of the woman's reputation, she had given birth to a fully developed child only six months after her marriage to her husband and was suspected of having murdered

38. *Teshuvot Maimoniyyot,* Nashim, no. 25, with parallel texts listed in the S. Frankel edition of the *Mishneh Torah* (Jerusalem: Yeshivat Ohel Yosef, 1977).

39. Asher ben Yeḥiel, *Responsa,* no. 32.14. On Rabbi Jacob ben Meir's rule with respect to post-marital rumors of sexual misconduct, see Tosafot, Yevamot 24b.

40. The wife of a kohen would be prohibited to her husband even if she had been an unwilling partner in an extramarital sexual encounter.

41. Isserlein, *Sefer pesakim u-ketavim,* no. 222.

it immediately after its birth. Rabbi Meir strongly rejected the allegations and made special mention of the need to clear the name of the accused.[42]

A lenient ruling regarding the woman's status in the case before him would have left Sirkes in agreement with Isaac Alfasi, Isaac of Dampièrre, the simple reading of Gerondi, Isserles, Luria, the precedents of Meir of Rothenburg, Asher ben Yeḥiel, Isserlein, and Meir ben Gedaliah, and, of no small importance, a very cogent reading of the *mishnah* itself. His ongoing determination to do otherwise suggests that it was not the legal sources that determined his conclusions.

It is not likely that the values of the host Polish community are what pushed Sirkes to be stringent here. True, under Sixtus V (r. 1585–1590) the church had been extremely severe in punishing adulterers (as well as panderers, fortune-tellers, and other ordinary criminals).[43] Nevertheless, in many areas of Christian Europe secular law had encroached on canon law in matters of fornication and adultery as early as the fourteenth and fifteenth centuries.[44] Seventeenth-century Polish law threatened adulterers with death, and from time to time the authorities made good on the threat. However, male members of the nobility generally faced light punishments if convicted of adultery, since they could only be sentenced to death by their peers, many of whom had mistresses of their own.[45] Municipal courts, too, imposed lesser punishments on adulterers or simply accepted ecclesiastical penances.[46] Indeed, lenience was the rule in rural courts in Poland.[47] In this matter, the values of contemporary Polish society were obviously not in harmony with the letter of the law.

While at this point it is possible to make some tentative suggestions as to Sirkes' motives in maintaining the need for the couple to divorce, a comparison

42. Meir ben Gedaliah, *Responsa,* no. 80.

43. See Ludwig Pastor, *The History of the Popes,* ed. Ralph Kerr, vol. 21 (St. Louis: B. Herder, 1932), pp. 89–90.

44. On the powers of secular courts, see James Brundage, *Law, Sex, and Christian Society in Medieval Europe* (Chicago: University of Chicago Press, 1987), p. 517.

45. The English traveler Fynes Moryson visited Poland in 1593 and noted that "adulterers by the law are beheaded, if they be accused; but I heard that gentlemen maryed, did many tymes keepe concubines, seldome questioned, never condemned to death for it." Fynes Moryson, *Shakespeare's Europe,* ed. Charles Hughes (London: Sherratt & Hughes, 1903), p. 88. How female members of the aristocracy—and other women in contemporary Poland so accused—fared requires archival investigation. In sixteenth-century Germany, for example, women were accused of adultery as a capital offense far more often than men (Ulinka Rublack, *The Crimes of Women in Early Modern Germany* [Oxford: Clarendon Press, 1999], p. 220). However, writing in the second half of the sixteenth century, Rabbi Solomon Luria noted that Polish society was "more merciful" to women than to men in capital cases. (*Yam shel Shelomoh,* Ketubbot [Warsaw, 1850], 2.44).

46. See Julius Bardach et al., *Historia państwa i prawa polskiego* (Warsaw: Państwowe Wydawnictwo Naukowe, 1987), p. 240. In sixteenth-century Wurttemberg, too, penances sufficed as punishment for adulterers and religious leaders instructed the community not to stigmatize those who repented (Rublack, *Crimes of Women in Early Modern Germany,* p. 223).

47. Bardach et al., *Historia państwa i prawa polskiego,* p. 240. Bardach makes no differentiation between the punishments meted out to adulterers and adulteresses. More lenient attitudes toward adultery in rural centers were also common in the mid-sixteenth century in areas under Genevan control. See Robert Kingdom, *Adultery and Divorce in Calvin's Geneva* (Cambridge, MA: Harvard University Press, 1995), p. 116.

with a similar case will not only highlight the changes in his thought but provide some additional clues as to the forces that shaped his judicial decision-making.

Case Two

The very next responsum in Sirkes' collection, number 99, also deals with a case of suspected adultery, and it is unlikely that the placement of the two responsa next to each other in the collection was simple happenstance.[48] The question has again been reformulated by Sirkes, but it contains what may well be verbatim testimony in Judeo-German from some individuals called to testify in the matter.[49]

> Reuben makes a claim against his wife [saying] that he has been told that she made for herself a potion to abort the child in her womb since she became pregnant through an illicit relationship while he [Reuben] was away. He also made a number of "ugly" [*mekho'arim*] claims against her that were told to him upon his return. His wife replied that such things had never occurred.
>
> The husband provided a witness who testified before the court how, before Passover, the woman came to him and her face was "bad" [*ra'ot*] like a sick woman and she said to him, " 'I am afraid that my stomach is not well. There is constant pressure around my chest. What should I do?' I told her that she must show me her urine, and thus the next day I saw her urine and saw that it was clouded with her sinews and limbs.[50] I asked her if she was now having her regular menstrual period. She said no." Until here are his words [*sic*].
>
> Additionally, a second witness testified in Judeo-German [*be-leshon Ashkenaz*].[51] "I was living in her father's house, and a number of times I saw many obscene acts. One of them [was that] a certain young man was clapping and dancing [with her] in the 'winter house,' and then I saw that this young man had hugged and kissed this woman. Also the young man came a few times at night and rang the bells, and sometimes he came quietly and sneaked upstairs into her room when she was out [of her room]. She would go up to him

48. Responsum 100 is also a case in which a rumor and one witness are central to the legal discussion. There, however, a levirate marriage is the issue at hand. On the editing of the collection, see Elijah Schochet, *Rabbi Joel Sirkes* (Jerusalem: Feldheim, 1971), pp. 83–85.

49. The first edition of Sirkes' responsa included an appendix with a Hebrew translation of the Judeo-German testimonies in the collection. The appendix was intended to assist "Sephardic scholars" who did not know the language. I have relied on this translation when uncertain of the meaning of the original.

50. The phrase reads "וראיתי שהיתה אטומה בגידיה ובאיבריה." Literally, שהיתה does not refer to the urine or what was in it, for the word שתן ("urine") is masculine. However, in the body of the responsum Sirkes refers to this section and specifically states that sinews were seen in the urine. Given that Sirkes or the questioner paraphrased this testimony (it is in Hebrew, not Judeo-German), his understanding of the material must rule. This explanation poses a physiological difficulty, for such a discharge would not come from the bladder via the urethra but only from the uterus. Presumably the reference is to vaginal discharge, not simply urine. Based on BT Niddah 23b–24a, the word אטום could be a reference to part of the embryo. Since the woman claimed not to be having her menstrual period, this certainly is the thrust of the testimony. Yet, in light of the uncertainty of meaning, I have taken the more cautious position in translating the term.

51. At times, the Judeo-German has been paraphrased (by Sirkes?), leading to several grammatical inconsistencies in the text.

> in the night [and would come back downstairs], and so she would do until her father went to bed, and then they both [i.e., the young man and the woman] went to bed." He also testified that she would open a window so that he [the young man] could secretly enter her house. He also testified that he heard them talking together in her room upstairs in the upper floor [*be-'aliyyah*] and that they had closed the room. He also testified that a number of times she and her mother went to the house of the organ maker and sugar maker, and they would both return home intoxicated from drinking wine, and the woman praised these non-Jews for they had given her presents. Additionally, he testified that she had a drink to bring on her menstrual period made for her, and that he [the witness] said that he himself had tasted it.[52] He also testified that the elderly Jewish woman who made the drink came to him complaining that the woman had not paid her for the drink. The elderly Jewish woman also said to him that the woman and her mother, together with X, were going to a female witch to do something, "but God forbid, I did not want to go with them to do this."[53] Until here are his words [*sic*].
>
> Additionally, a third witness testified: "I often went with the young man mentioned above to X's house because here he [*sic*] had a relative in his house. And we would drink with the aforementioned woman and play dice and dance. And we saw that the aforementioned young man, when dancing, would hug and kiss the aforementioned woman." And we [the court] asked him whether she was hugging and kissing him. He replied, "I cannot give a truthful opinion of what took place because I was playing on the board [i.e., a board game; he was paying attention to the game and not to the couple]." He also testified, "I saw how the aforementioned woman would drink non-kosher wine [*yein nesekh*] with the organist in X's house." Until here are his words.

This case lacked the self-incrimination aspect of responsum 98, but it, too, had unending rumors about illicit sexual behavior and witnesses who saw what were deemed legally abhorrent acts. The matter elicited from Sirkes a lengthy discussion of testimony and rumors that paralleled, at times verbatim, material in responsum 98.[54]

Sirkes acknowledged that if there were two witnesses to an "ugly act" and an unending rumor regarding the wife's sexual misconduct, the husband would have to divorce her.[55] If, however, there was only one witness and an unending ru-

52. From Sirkes' response it would appear that the emmenagogue was intended as a form of abortifacient. See, for example, John Riddle, *Contraception and Abortion from the Ancient World to the Renaissance* (Cambridge, MA: Harvard University Press, 1992), p. 156.

53. The late fifteenth-century *Malleus Maleficarum* by Heinrich Kraemer, trans. Montague Summers (1928; reprint ed., London: Hogarth, 1969), p. 66, accused witches of, among other things, procuring abortions for women. Similarly, a 1484 papal bull of Innocent VIII alleged that in the German lands, magic was used to affect abortions. Translated in Montague Summers, *The Geography of Witchcraft* (1927; reprint ed., Secaucus, NJ: Citadel, 1973), p. 534.

54. Responsum 99 is not dated, and I cannot determine with certainty whether it precedes or post-dates the case in responsum 98. My impression, however, is that it post-dates responsum 98, as will be discussed below.

55. The two witnesses did not have to see the wrongdoing together or even see the same trans-

mor, the court could not demand that a divorce be given, for in this case the couple had children.

There was little doubt that unending rumors existed with respect to the woman's behavior. The husband had heard them upon returning home from his trip, and they propelled his pursuit of the case. Based on the testimony presented, it appeared that there were at least three individual witnesses who could claim that the woman had been involved in what was thought to be promiscuous behavior.[56] Even if the court could not force the man to divorce his wife, there was apparently sufficient evidence to encourage him to do so. Sirkes argued not so. He took a two-pronged approach, discrediting the legal standing of the rumor and limiting the number of witnesses to improper acts.

Following the dicta of the Talmud, Jacob ben Asher had offered two qualifications regarding ongoing rumors in his legal code. A rumor had to last for at least a day and a half, and it could not have been started by adversaries of the accused.[57] Here, the rumor had clearly lasted more than a day and a half, but Sirkes made a bold assumption about those who had started it. "Truth to tell," wrote Sirkes, "in these generations, when there are enemies with great strength and great power, it is a simple matter that this rumor does not have the legal status of an unending rumor." Sirkes made absolutely no attempt to prove this legally—and morally—devastating evaluation of contemporary society or that this particular rumor had begun under such circumstances.[58] He entered a statement of legal fact without any substantiation beyond the disarming claim that it was a "simple matter."[59]

The judicial daring displayed in the practical use of this characterization of the community stands in stark contrast to responsum 98. There, too, there was an ongoing rumor that had spread to many a town in southern Poland, yet Sirkes made no attempt to discredit the rumor, let alone to introduce a principle that would effectively eliminate all such rumors. Quite the contrary: he relied upon the hearsay

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gression for their testimony to be counted together. See *Teshuvot Maimoniyyot,* no. 25, and Isserles, *Responsa,* no. 12, p. 60.

56. While the halakhah generally requires two witnesses to establish any issue related to sexual misconduct, in cases where there was a rumor and an individual witness the husband could declare that he believed the witness as he would two witnesses and thus have to divorce his wife. See Maimonides, *Mishneh Torah,* Hilkhot 'ishut 24:17; *Tur,* 'Even ha-'ezer, 115 and 178 with Sirkes' comments; and *Shulḥan 'arukh,* 'Even ha-'ezer 115.7 and 178.9, particularly with the glosses of Isserles. Rabbi Meir of Rothenburg relied on this view in his above-cited responsum regarding the wife of the traveler (*Teshuvot Maimoniyyot,* no. 25).

57. BT Yevamot 25a; Jacob ben Asher, *Tur,* 'Even ha-'ezer 11.

58. In responsum 100, signed in the spring of 1629, Sirkes used a similar view from a responsum of Rabbi Judah Mintz (Padua, d. 1506) as the basis for an analogy to support the untrustworthiness of rumors in his own generation. Only rarely did Sirkes cite Mintz in his responsa, and his failure to cite Mintz's view in responsum 99 may well be due to his having been unfamiliar with Mintz's opinion when writing this responsum. See also Sirkes, *Responsa* (new), no. 58, an undated responsum in which he wrote an addendum concerning a relevant case in Mintz's responsa that Sirkes saw only after writing his opinion.

59. Cf. Isserles, *Responsa,* no. 12, pp. 70–71. Isserles too rejected the rumor in the case before him, but he made efforts to prove his assessment.

to build an argument that would circumvent Rabbi Isaac of Dampièrre's ruling that confessions of adultery were inadmissible.[60]

As for the witnesses cited in this question, only the second was deemed admissible by Sirkes. The damning testimony of the first witness, who claimed to have seen the remains of an abortion in the "urine" that was brought before him, was rejected.

> This testimony is insufficient to substantiate that she was pregnant, since it seems highly probable [*kerovim ha-devarim*] that a physical event took place through which she became weak and she skipped her menstrual period, for this is what most often happens to women.

Pinning the incriminating evidence on a medical event, again without any substantiation of the claim beyond his own say-so (even if the woman had skipped her period, could this explain the limbs and sinews found in the discharge?), was an absolutely audacious legal position. As for the third witness, Sirkes did not even bother to disqualify him and simply ignored him, presumably because the witness could not clarify whether the woman reciprocated the affections conferred upon her. Left with but one witness, there was no legal basis to demand that the husband divorce his wife.

Nevertheless, Sirkes had a legal loophole to close. Conceivably the husband could declare that he believed all the reports about his wife's behavior and thus declare her forbidden to himself. Not so, ruled Sirkes. Drawing a conclusion from a responsum of Rabbi Joseph Colon (northern Italy, d. 1480), Sirkes asserted that a unilateral declaration of this kind could only be made on the basis of the testimony of others but not on hearsay.[61] Moreover, allowing the husband to prohibit himself to his wife would effectively allow him and others to divorce their wives without spousal consent, an act prohibited by an ordinance attributed to Rabbi Gershom ben Judah (d. 1028).[62]

In a responsum that reflects judicial daring and the traditional inclination of Ashkenazic authorities to find ways to permit women suspected of adultery to continue to live with their husbands, Sirkes dismissed the case.[63] However, here,

60. Sirkes was probably well aware that if he failed to dismiss the rumor in this case then the contradiction between the two responsa would have been not simply in character but also in content.

61. See Joseph Colon, *She'elot u-teshuvot* (Venice, 1519), no. 82, who argued that a husband can only believe a witness in whom he places complete trust. Sirkes inferred from this that a husband may only rely on an actual witness, not on hearsay.

62. Sirkes' ruling was based on the opinion of Rabbi Joseph of Corbeil cited in *Haggahot Maimoniyyot,* Hilkhot Ishut 24.10. See also Isserles' glosses to *Shulḥan 'arukh,* 'Even ha-'ezer 178:9, and Solomon Luria, *Responsa,* no. 33.

63. Isserlein, *Sefer pesakim u-ketavim,* no. 222, noted that "Rabbi Meir of Rothenburg was very lenient in order not to prohibit a woman to her husband even though he generally was stringent here and stringent there." "Therefore," added Isserlein, "we cannot but follow in his path." It could be argued that this passage meant that Rabbi Meir was generally stringent in matters of adultery, but a reading of his responsa nos. 8 and 25 in *Teshuvot Maimoniyyot* immediately dispels any such notion. (The allowance in no. 8 was so novel that a copyist could not accept it and added ideas of his own after Rabbi Meir's signature.) See too, Jacob Weil, *She'elot u-teshuvot* (Venice, 1549), no. 8, who noted that "we do not easily prohibit a woman to her husband."

unlike in the previous responsum, he was well aware that the husband was suspicious of his spouse, if not outwardly hostile to her, and so Sirkes outlined in detail the husband's financial obligations to his wife should he insist either on not returning to live with her or on divorcing her. Permitted to her husband, she enjoyed the full legal and financial protection that the halakhah offered loyal Jewish wives.

Was Sirkes conscious of the change that he had wrought in the law in these two responsa? Few of the legal texts he mustered demanded such readings. He did not admit to being innovative, yet he had manipulated the halakhah and added a new stage to its evolution.

Why the difference in attitude and approach to the two cases? Both women were involved in "public sins," that is, misdeeds that many members of the community knew about and believed to be true. Clearly the woman in responsum 99 was of no higher moral standing than the woman in responsum 98. She was said to have caroused with numerous men, including local non-Jews, seems to have had at least one extramarital love affair, and then very likely sought out and used abortifacients. Yet in responsum 98 Sirkes rejected numerous possibilities to allow the woman to return to her husband. He ignored precedent; he rejected the opinion of Rabbi Isaac Dampièrre and the Ashkenazic rabbis who followed his lead about confessions of adultery and then, by use of no small amount of legal casuistry, expanded Rabbi Meir of Rothenburg's view regarding witnesses to "ugly acts" further than anyone else ever had before—all this in an attempt to make it seem as if his most severe critic, Rabbi Isaac Dampièrre, would have agreed with his conclusions.

Sirkes offered no explanation of his motives in either case, yet an examination of the sources rules out the possibility that he was being strictly and legally objective. His legal discussion and notes suggest a number of explanations for the divergent approaches.

Proscriptive Jurisprudence

One of the two important factual differences between the two cases was the confession of wrongdoing by the woman in responsum 98. The woman in responsum 99 may have been thought to be immoral by others, but she maintained her innocence. In so doing she opened a window of doubt. The Talmud itself had stated that a witness who was contradicted was worthless, a theme developed by Rabbi Meir ben Gedaliah of Lublin in rejecting an adultery charge that came before him.[64] Rabbi Jacob Weil (Nuremberg, d. after 1456) had ruled that if a woman declared her innocence, her case had to be thoroughly investigated.[65] There was doubt regarding the deeds of the woman in responsum 99, and Sirkes exploited it to advance a barely plausible argument to support her continued status as a faithful wife. There was no such doubt with regard to the woman of responsum 98, for

64. BT Kiddushin 65b; Meir ben Gedaliah, *Responsa,* no. 80. See, too, the responsum of Rabbi Eliezer ben Manoaḥ in Isserles, *Responsa,* no. 16, p. 103, a responsum that may not have been known to Sirkes.

65. Weil, *Responsa,* no. 8.

she had admitted not only this offense but others as well, and her sins were public knowledge.[66]

Despite the specific disqualification of confessions of adultery by the Mishnah and Rabbi Isaac of Dampièrre, it would not have strengthened communal mores to let a woman widely known to have admitted to being involved in adulterous relationships simply return to her husband—and as a communal rabbi this was a factor that Sirkes had to consider. Although a student of Sirkes' in Cracow would later note that the laws of fornication generally held firm among contemporary Jewry, a communal leader newly assuming his position in Cracow may have felt the need to be vigilant about the matter.[67] Then, as now, sexual allurement was a part of life, and at the very beginning of his tenure in Cracow, Sirkes may not have wanted to convey the message that an adulterous woman could walk away from her misdeeds on his watch. Sirkes would not have been the first to let such communal concerns influence his decision-making. Rabbi Meir of Rothenburg may have rejected the witness and the rumor in the aforementioned case of the man whose wife became pregnant during his absence, but he ruled that the husband had to divorce his wife even without her consent. Among his rationales was concern for the community: "That all women shall take warning not to imitate your lewdness" (Ezekiel 23:48).[68]

If Sirkes decided the case on the basis of communal concerns, then he was judging prospectively rather than considering the behavior of the accused retrospectively. This obviously raised serious legal, if not ethical, conflicts, yet responsum 98 lacked the immediacy of responsum 99.[69] Taking a tough stand in a "what if" scenario was hardly the same as declaring a woman with children an adulteress not entitled to financial support. So long as the husband in responsum 98 wanted to divorce his wife and she seemed to agree, the entire discussion remained a hypothetical question and, as such, a relatively safe forum in which Sirkes could push public concerns.

The Welfare of the Children

Without doubt, the issue of children was also important to Sirkes' decision-making. The couple in responsum 98 was childless. Forcing them to divorce would have social and economic ramifications for the wife, but she had brought them upon herself. No children would have been harmed. The halakhah itself, as noted

66. There is probably no better illustration of the importance of legal doubt in such matters than the case of a thirteenth-century kohen who claimed that with his ear next to the wall, he heard the sounds of his wife engaged in sex with another man, not once but twice. The wife had never liked her husband, and he had always had to force himself upon her sexually, but she vehemently denied the charges. Rabbi Meir of Rothenburg argued that despite the evidence, she should be permitted to her husband, for he had seen nothing, he had only heard, and evidence must be seen. *Teshuvot Maimoniyyot,* Nashim no. 8.

67. Menahem Krochmal, *She'elot u-teshuvot ṣemah ṣedek* (Amsterdam, 1675), no. 55.

68. *Teshuvot Maimoniyyot,* no. 25 (end).

69. George Fletcher, *Basic Concepts of Legal Thought* (New York: Oxford University Press, 1996), pp. 189–190, has noted the serious legal conflict between judging personal behavior retrospectively and deciding in the public interest prospectively.

above, was far more willing to accept damaging testimony against a childless woman than against one who had children. In responsum 99 there were children.

Even if Sirkes believed that a marriage, even a fragile if not hostile one, was the appropriate forum for the raising of children, and therefore did his utmost to salvage the marriage from a legal perspective, he could not force the couple of responsum 99 to continue to live together. Sirkes specifically noted that the husband could not be coerced by the court to return to his wife and maintained his right to divorce her, albeit with her consent. Yet if he refused to cohabit with his wife, he continued to bear responsibility for her financial maintenance (*mezonot*) as well as for the children. By maintaining the woman's innocence, Sirkes had immeasurably improved her financial situation and thus that of the children over what it would have been had she been declared an adulteress.

Beyond the economics of marriage, there was also a traditional fear of tainting the personal status of the children. As far back as the Talmud there were concerns that if a woman was declared unchaste, people would assume that her children, even though born in wedlock well before any claims of sexual impropriety against their mother, were the offspring of illicit sexual relationships.[70] Socially if not legally tainted, they would have difficulty marrying anyone but other children of dubious personal status.

Rumors surrounding personal status were no small matter in Eastern Europe in the era we are discussing. During Sirkes' youth, charges of impure family lineage had been made against no less a family than that of Rabbis Judah Leb ben Bezalel and Ḥayyim ben Bezalel, the Maharal of Prague and his brother. According to Rabbi Solomon Luria, who staunchly defended the honor of the brothers' family, labeling someone a *nadler* (a needle or pin-maker) was even worse than calling him or her a bastard, for it cast a pallid shadow not only on the individual but on the entire family.[71] The Maharal was so perturbed by the claims against his family that he petitioned the leadership of Polish Jewry to prohibit such slurs in the most severe terms.[72] So serious was the affront that in at least one case the fam-

70. See BT Yevamot 24b with Rashi's comments. Others, including Rabbi Isaac Alfasi (on Yevamot 24b) and Maimonides, *Mishneh Torah,* Hilkhot sotah, 2:13, understood the concern of the Talmud as applying to children from the marriage of the woman and her paramour. They understood that the issue did not relate to bastardy but to a tarnish on personal status. See Moses Namanides, *Ḥiddushei ha-Ramban,* Yevamot, ed. Samuel Dickman (Jerusalem: Machon Talmud ha-Yisraeli ha-Shalem, 1987), pp. 83–84.

71. Luria, *Responsa,* nos. 12, 101. Responsum 11 in the collection deals with an informer and mentions him by name. Due to opposition to including the informer's name in print, the page of the responsum was republished with only an anonymous reference to him. In reprinting the page, the editors reproduced the end of responsum 11 without the offensive passages and then concluded the responsum. The next responsum is number 13; number 12 is wanting. See Isaac Yudlov, *Sefer ginze Yisra'el* (Jerusalem: Jewish National and University Library Press, 1984), no. 752. The omission of responsum 12 may have been unintentional, but it may equally well have been an attempt to avoid further discussion of what must have been a most unpleasant scandal. On the term *nadler,* see *Pinkas va'ad 'arba 'ara ṣot,* ed. Israel Halperin, revised by Israel Bartal, vol. 1 (Jerusalem: Mossad Bialik, 1990), no. 9 (1558), with Halperin's notes.

72. Luria, *Responsa,* no. 101 (the testimony was given in court in 1572); *Pinkas va'ad arba' araṣot,* no. 9 with notes.

ily whose name had been besmirched went to a rabbinic court demanding that it punish the slanderer.[73] Nevertheless, such taunts did not cease in the sixteenth century, and in 1623 the Lithuanian Council prohibited matchmakers from casting aspirations on the lineage of families.[74] Probably well aware that rumors could prove disastrous to the family's social standing and to the future of the children of the couple in responsum 99, Sirkes worked hard to clear their names.

If in responsum 99 Sirkes reevaluated the halakhah in light of the interests of the children, then the case was decided, at least in part, on the basis of values that were part-and-parcel of the legal order but beyond the doer-sufferer relationship. As a result, the husband's case in responsum 99 was not judged on its legal merits. His accusations against his wife were probably in consonance with the values of contemporary Polish and Jewish society, and if he knew Sirkes' views from responsum 98, he had every right to expect that Sirkes would rule in his favor. Instead the husband was forced to pay the price, literally, for the greater good of his children's personal status.

Values beyond the direct doer-sufferer relationship propelled Sirkes to favor one of the litigants at the expense of the other. Unjust? Perhaps. Immoral? Not from Sirkes' perspective. Responsa 99 reveals that, for Sirkes, the correct legal decision had to be informed not only by the rules governing the doer-sufferer relationship but by other values from within the halakhic orbit.[75] A halakhic notion from beyond the immediate arena of the conflict was in "direct engagement" with the merits and demerits of the case and ultimately affected the legal decision.[76] By contrast, responsum 98 shows few signs of such halakhic probity.

A Maturing Jurist

As noted, responsum 99 is not dated, but it demonstrates so much more legal fortitude and daring than responsum 98 that one can only conclude that it is the work of a more mature halakhist, one who was confident in his pronouncements and legal assertions, so much so that he was willing to permit what at first glance appeared to be prohibited.[77]

Does responsum 99 show a development of Sirkes' social thought, or a greater willingness to advance social positions that he may have held for some time but had once hesitated to act upon? In an earlier responsum, Sirkes admitted that over the years he had developed greater sensitivity to the financial hardships connected with religious observance, and that this had led him to take a lenient posi-

73. Luria, *Responsa,* no. 101 and his *Yam shel Shelomoh,* Baba Kamma (Prague, 1616–18), 8.54. Already in talmudic times slander was considered actionable (see BT Kiddushin 28a).

74. *Pinkas ha-medinah,* ed. Simon Dubnow (Berlin: Ajanoth, 1925), no. 36.

75. Prevention of bastardy was a recognized legal criterion, particularly but not uniquely in questions of bills of divorce, as a search through the Bar-Ilan Responsa Project Compact Disc (ver. 6.0) for the phrase "*marbeh mamzerim be-Yisrael*" will show.

76. The use of the phrase "direct engagement" in this context follows Weinrib, *Idea of Private Law,* p. 25.

77. In light of the citation of Mintz in responsum 100 and the failure to cite him in responsum 99 (see above n. 58), it would seem reasonable to posit that responsum 99 was written between 1619 and 1629.

tion in a matter in which he had earlier been stringent.[78] Perhaps after years of being a rabbi and judge he had softened his views on punishing adulteresses or simply had become more sensitive to the Ashkenazic tradition. Still, the timing of responsum 98 in terms of Sirkes' rabbinic career must also be considered.

Responsum 98 was written just as he succeeded his teacher, Rabbi Phoebus, as the chief rabbi of Cracow, probably the most important rabbinic post in all of Poland in the first half of the seventeenth century.[79] At first glance, this may give the illusion of strength, but Sirkes was a public servant who had just taken up his post and had to answer to the laity who had hired him. During his career he had several turbulent relationships with members of the laity. According to legend, adversaries had forced him to leave a previous rabbinic post, and his son's introduction to Sirkes' commentary on the *Tur* made specific mention of enemies who had troubled his father.[80] Although Sirkes was a recognized halakhic authority of some stature before his arrival in Cracow, he had published but one book prior to 1619, and that a biblical commentary.[81] His multi-volume commentary to the *Tur,* which would become a standard fixture along the margins of the printed text, did not appear until the 1630s. Sirkes had students before his arrival in Cracow, but it was in the larger urban center of Cracow that his fame as a *ro'sh yeshivah* was embellished.[82] In addition, his students had not yet assumed the mantle of leadership that they would in Sirkes' final days. In 1619 he was still not the dean of Polish rabbis to whom rabbis meeting in the Council of Four Lands would turn for an opinion

78. See Sirkes, *Responsa* (new), no. 23. The responsum is dated 1611 at Bełz, where Sirkes held a rabbinic post.

79. See Majer Balaban, *Historja Żydów w Krakowie i na Kazimierzu, 1304–1868,* vol. 1, 2nd ed. (Cracow: Nadzieja, 1931), p. 499.

80. See Yeḥiel Zunz, *'Ir ha-ṣedek* (1874; reprinted., Jerusalem: Zion, 1970), p. 68; Mordecai Kosover, "R. Yoel Sirkes (ha-Baḥ)," *Bitzaron* 14 (1946): 25; Samuel Mirsky, "R. Yoel Sirkes Ba'al ha-Baḥ)," *Ḥoreb* 6, no. 11 (1941): 43; and Schochet, *Rabbi Joel Sirkes,* p. 43. The introduction to Sirkes' commentary on *Tur,* 'Oraḥ ḥayyim, was written by Sirkes' son Samuel Zebi, after the death of his father. Professor Yaakov Sussmann has pointed out to me a story about Sirkes in S. Y. Agnon's "Shenei talmidei ḥakhamim she-hayu be-'irenu," in *Samukh ve-Nir'eh* (Tel Aviv: Schocken, 1964), p. 42, in which one of the protagonists blurts out, "And I, thank God, my livelihood is at hand and my shrouds are ready for me. If so, what do I have to worry about? They won't take me out on a garbage cart as the people of Bełz did to their rabbi, our teacher the Baḥ, of blessed memory, whom they took out of town on Friday night after midnight." I do not know the exact source of Agnon's remarks, but various legends told by both the Jews of Bełz and the Belzer hasidim recount a serious rift between Sirkes and the local communal leadership. See, for example, Ḥayyim Holzman, "Le-toledoteha shel Belz," in *Belz: Sefer zikkaron* (Tel Aviv: Irgun yoze'ei Belz ve-ha-sevivah be-Yisra'el, 1974), pp. 26–27, a story that attributes the poor taste of the local water to a curse that Sirkes placed on the town, and, only slightly less harsh, Israel Klapholtz, *Admore Belz* (Bnei Brak: Pe'er ha-Sefer, 1972), pp. 23–24. If Sirkes indeed experienced harassment that included slander, his aforementioned comments about the social ill of rumor-mongering in his generation are that much more understandable.

81. Halakhic queries had already been addressed to Sirkes well before his arrival in Cracow. By 1611, if not earlier, other rabbis had asked him to decide in the matter of a woman who had been an *agunah* for about five years. See Sirkes, *Responsa* (old), no. 82.

82. Sirkes did have students before his arrival in Cracow. He notes in his introduction to his commentary on the Book of Ruth that his students had for years pressured him to write down his ideas. Joel Sirkes, *Sefer meshiv nefesh* (Lublin 1617), p. 8b.

on a matter of divorce and agree to be bound by his decision.[83] At this stage of his tenure in Cracow, when he had just arrived, it seems unlikely that Sirkes was so daring as to allow the return to her husband of a woman who had admitted to extramarital affairs and was publicly known to be promiscuous.[84] Some years later, however, Sirkes was well established as one of the leading rabbis of the age. Living in a society where personal status was crucial both to marriage and to standing in the community, Sirkes was faced with a case that had only *overtones* of bastardy. He evidenced no self-doubt or hesitation, baldly reinterpreting the law in order to clear the woman's, and ultimately the children's, names.[85]

At the end of responsum 98 there is an editorial note written by Sirkes well after the responsum was sent: "An event that took place when I arrived in the holy community of Cracow at the end of the year 5679 [late summer 1619]."[86] The addendum has absolutely no bearing on the halakhic argument, and one is left to ponder why Sirkes bothered to add it. Could it be that toward the end of his life, when, as a mature halakhist, he was reviewing his responsa for publication, he saw that this responsum was out of sync with his current thought and felt the need to explain?[87]

A year before Sirkes' death, in 1639, the volume of his magnum opus, the *Bayit Ḥadash,* on marriage and personal status, was first published in Cracow. In it, Sirkes tendered a lengthy analysis of the question of witnesses to "ugly acts" and rumors in adultery cases. Again he championed the view of Rabbi Meir of Rothenburg against the claims of Isserles, Katz, and Luria, but here he was far more circumspect. He acknowledged that Alfasi and others had ruled differently, and that a husband could claim that he accepted these views and remain with his wife, but Sirkes himself continued to be of a different mind. He ruled that "we cannot be lenient against Rabbi Meir of Rothenburg," and therefore, where there are *two* witnesses to an "ugly act" and an ongoing rumor, the husband should be told that he must divorce his wife.[88]

83. See Sirkes, *Responsa* (old), no. 91, an event that took place in 1632.

84. Lay resistance could certainly alter the judicial decisions of even the most rigorous clergymen, as a young Richard de Clyve found out in thirteenth-century France. De Clyve had spent most of his life in a cloister, but when he emerged to serve as a religious leader in the "outside world," he was forced to alter his views. See Charles Donahue, Jr., "The Monastic Judge: Social Practice, Formal Rule, and the Medieval Canon Law of Incest," *Studia Gratiana* 27 (1996), 49–70.

85. It is entirely possible that the woman in responsum 99 and her family were persons of substance and standing in the contemporary Polish Jewish community, and that Sirkes felt pressured to advance her interests at the expense of her husband. Social, financial, and political status certainly influenced the outcome of adultery cases in contemporary non-Jewish society both in Poland and beyond. See Carolyn Ramsey, "Sex and Social Order: The Selective Enforcement of Colonial American Adultery Laws in the English Context," *Yale Journal of Law and the Humanities* 10, no. 1 (Winter 1998): 220–221, and Moryson, *Shakespeare's Europe,* p. 88. However, the parties involved in the cases before Sirkes are unidentified, and there is no textual support for such a reading.

86. Many of Sirkes' responsa are dated as part of the original response. This is the only case that I am familiar with in which he added the date as a postscript well after having written the original letter.

87. At the beginning of responsum no. 44 (old), Sirkes referred his reader to ideas that he wrote "in the previous responsum." This shows that he not only reviewed his responsa with an eye towards publication after having sent them but also decided on the order of at least some of the collection.

88. Sirkes, *Bayit ḥadash,* 'Even ha-'ezer 11.

Sirkes made no mention of a far bolder and more questionable interpretation of Rabbi Meir of Rothenburg's view that he had advocated some years earlier on his arrival in Cracow. Unable to change what was, Sirkes left a brief, almost enigmatic note at the end of responsum number 98 to explain the circumstances of his decision and thus the contradiction with the very next responsum in the collection.

As Robert Cover astutely observed, "To know law—and certainly to live the law—is to know not only the objectified dimension of validation, but also the commitments that warrant interpretations."[89] The commitments that moved Sirkes in responsa 98 and 99 were very different. In each case they outweighed any formalistic legal claims and pushed him to interpret the law in new and daring ways. They show that the outcome of two adultery cases depended on interests beyond the formal dictates of the law, among them the self-confidence of the jurisprudent.

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89. Robert Cover, "Nomos and Narrative," reprinted in his *Narrative, Violence, and the Law: The Essays of Robert Cover,* ed. Martha Minow et al. (Ann Arbor: University of Michigan Press, 1993), p. 146.