

Continued Discussion of *Agunah*, *Kiddushei Ta'ut* and *Tears of the Oppressed*

A Plea for the Chained Daughters of Israel: Comments on Aviad Hacoheh's
Tears of the Oppressed

Daniel Sperber

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Honesty and Analysis: A Response to Passionate Letters

Michael J. Broyde

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A Plea for the Chained Daughters of Israel: Comments on Aviad Hacohen's *Tears of the Oppressed*

Daniel Sperber

(This essay was written prior to R. Michael Broyde's review—*ed.*)

Jewish marriage is not merely a contractual agreement on the part of two consenting individuals, but a sacred bond between them. Hence, the marriage is called *qiddushin*, from *qedushah* (holiness). It is one of the most basic building-blocks of Jewish society, rightly commanding our greatest respect. Hence, we must beware of de-sanctifying it in any way.

Jewish marriage, however, also implies love and mutual respect on the part of both partners. In the *sheva berakhot*, the seven marital benedictions, we pray to God that He bring joy (*same`ah tesamah*) to *re'im abuvim*, friends who are lovers, meaning that both friendship and love are the requirements of a successful marriage. And in *Derekh Erets Zuta* 9.12, we are cautioned to take heed to respect our wives.

When love, friendship and respect are not part of the marital relationship, and conflict and enmity replace those values, then, the rabbis may rightly demand the dissolution of that sacred bond, the continuation of which can only be a source of further grief and anguish. In such cases, an unwillingness to dissolve the marital bond permits further extreme suffering, and the shackles of marriage cry out to be broken.

We are fully aware of the potential danger involved in any act which may undermine the sacrament of marriage and erode its halakhic validity. And, in this respect caution is admirable. Yet, excessive caution may lead to stultification, and an even greater erosion of the adherence to halakhic marital norms. (See B. *Gittin* 56b on the rabbinic censure

of Rav Zechariah ben Avkulas' excessive caution.) It is to protect the special status of our marriage, then, that we must seek creative, permissible solutions. Else, these tragic situations may endanger the institution itself.

After reading carefully the meticulous analysis of Dr. Aviad Hacohen and his very persuasive, and indeed compelling, arguments for the use of the principle of *kiddushei ta'ut* in certain cases where the defect can be proven to have been existent at the time the marriage was contracted, I highly commend his outstanding work. I find the need for further comments on the subject on my part quite unnecessary. This is all the more true after reading the introduction by Professor Menachem Elon, the doyen of *Mishpat Ivri* studies, with its familiar clarity of expression, and his general approbation of Dr. Hacohen's findings and suggestions.

Nonetheless, I am aware of the fact that despite the force of the argument put forward in this study, and its firm basis, it may evoke negative criticism and even outright rejection on the part of some Torah scholars. The main thrust of their argument, I believe, will be concern that accepting the recommendations of the study can easily lead to a morass of conservative and reform halakhic thinking. Much simpler suggestions in less radical fields of *halakhab* have evoked precisely this kind of response, and the initiators have been severely criticized and even denigrated. The reason for such reactions is sometimes the fear of

"innovation" and creative thinking, which, it is argued, breaks with sanctified tradition.¹

What such critics fail to appreciate, or even choose to overlook, I fear, is that innovation and creative thinking are the hallmarks of the halakhic process, and were brilliantly practiced throughout all generations until recent times, and by the greatest of authorities. As Professor Elon comments in his introduction, throughout all Jewish history, the *halakhab* has faced the challenge of changing societal situations and creatively found viable solutions within its own normative parameters.

It is because I foresee such negative criticism—as opposed to creative critical analysis which we all welcome—that I have taken it upon myself to pen the following general comments.

The danger inherent in innovation was succinctly formulated by one of the greatest authorities of the early 19th-century, R. Moses Sofer, (the “Hatam Sofer”) when, in his struggle against the newly emerging reform movements, he stated in his famous play on the wording of the *halakhab* on an unrelated point, “*hadash asur min ha-Torah*”—

“innovation is forbidden by biblical law”. At the other extreme, R. Abraham Isaac Hacoen Kook, one of the most outstanding halakhic thinkers and decisors of the early twentieth century, made his counter formulation: “The old will be renewed, and the new will be sanctified.” In the socio-political circumstances obtaining in his time, he found that the need for highly creative innovative thinking was an absolute necessity, as indeed it is today.

“It is because I foresee such negative criticism that I have taken it upon myself to pen the following general comments.”

Changing socio-economic and political situations require—nay demand—halakhic responses. Our *halakhab* is flexible enough and its normative parameters are broad enough to admit of such proactive thinking. For, above all, our legal system is a *Torat Hayyim*, a “living Torah” and a livable system (Lev. 18:5), whose “ways are ways of pleasantness, and all her paths are peace” (Prov. 3:17). This is a guiding principle intrinsic in rabbinic thinking, and has determined the *halakhab* in a great variety of

¹ See for example, how Rabbi Yitzchak Isaac Halevy Herzog, Chief Rabbi of Israel in the 1950’s, believing that certain changes in the area of inheritance law were critical to the future survival and development of the Jewish legal system, and that there was sufficient justification for enacting *taqqanot* that would explicitly and directly equalize the inheritances of all heirs - contrary to classical Jewish law—suggested adding a clause in the *ketubbah* whereby the couple leave their future children, male and female, equal shares in their estates. Ben Tzion Greenberger, in his essay, “*Takkanot* in the Matter of inheritance”, in *The Halakhic Thought of Rabbi Isaac Herzog*, B.S. Jackson ed. (Jewish Law Association Studies V) Atlanta 1991 p. 52 writes:

Rabbi Herzog’s approach in this matter is illustrative of a fundamental element in his halakhic methodology: a willingness, on the one hand to probe the boundaries of halakhic flexibility, and to take positions on disputed issues, that is, a “readiness to decide”, and, on the other hand, a certain degree of “political realism” that influenced him to seek less radical solutions whenever possible so as to avoid potential criticisms from the broader community of more conservative halakhic authorities.

Nonetheless, continues Greenberger:

As was perhaps to be expected, Rabbi Herzog’s proposals were nevertheless strongly opposed by various halakhic scholars and his proposals ultimately were not enacted.

One of the main arguments against Rabbi Herzog’s suggestions put forward by Rabbi Ovadya Hadaya, a member of the Council of the Chief Rabbinate, is described by Greenberger as follows (p. 53):

“...that it was futile to attempt to make Jewish law more palatable” to the public by correcting injustice in Jewish inheritance law, since this...would lead the general public to believe, and therefore to demand, that the Rabbinate should amend many other areas of *halakhab* as well.

In the continuation of his analysis, Greenberger shows that there were halakhic authorities who concurred with Rabbi Herzog’s approach. But, for a variety of reasons, they were not involved in the debate, and therefore it did not affect its outcome. Greenberger (p. 56):

These analyses indicate that, at least from a purely halakhic perspective, Rabbi Herzog stood on firm ground. He was unfortunately slightly “ahead of his time” and was therefore unsuccessful in convincing his contemporaries of the validity, and more importantly, of the timeliness and critical necessity, of the course of action he proposed.

Examples of this kind are unfortunately legion, and we have cited this one example to demonstrate what might be the tragic outcome of such a “rejectionist” attitude.

legal contexts. Thus, for but one example, the sages, in clarifying which plants were to be used with the *lulav* (Lev. 23:40), rejected certain suggested identifications because they were of plants which were prickly and spiky and would serrate the hands of whomever handled them, and it is not feasible that the Torah would demand the use of such, for “her ways are the ways of pleasantness” (B. *Sukkah* 32). Numerous examples of the use of this verse and guiding principle are to be found in a variety of halakhic contexts throughout rabbinic literature². Indeed, in B. *Gittin* 59b, Abbaye responds to Rav Yosef:

All the Torah is *mi-pnei darkhei shalom*, is intended to engender peaceful relations, as it is written "her ways are the ways of pleasantness, and all her paths are peace."

Perhaps this is one of the underlying, although unstated, reasons for the remarkably sensitive attitude of the sages to the *agunah* issue. As Maimonides wrote in his *Mishnah Torah (Hilkhot Gerushin 13:29)*:

...for the sages directed us in this matter to be lenient, and not to be stringent, in order to free the *agunah*.

And he continues:

Let it not be difficult in your eyes that the sages freed such a serious *ervah* (state of forbidden union) through the testimony of a woman or a slave or bondwoman, or a gentile, or on the basis of casual narrative (*mesiah le-fi tumo*), or by hearsay, or based on a written document (*u-mi-pi ha-ke'atav*) [all

normally inadmissible as evidence]... . [And this is] in order that the daughters of Israel should not remain in chains (*agunot*)³.

The sages showed similar compassion towards the *mamzer*, the illegitimate child, who, through no fault of his own is so stigmatized by the *halakhab*. They sought all manner of ways to remedy that status to permit him or her to marry. Thus, according to B. *Yevamot* 80a, if a husband goes away, leaving his wife alone for twelve months, and she gives birth at the end of this period, we assumed that her pregnancy lasted twelve months(!), rather than suspecting her of infidelity. And if this occurred even after twelve months, according to the author of *Halakhot Gedolot*, we posit that the husband returned secretly in the interim period, and brought about his wife's pregnancy, unless he makes a declaration to the contrary. So too, if a woman declares that her offspring is not of her husband, we do not accept her word, to rule the child as illegitimate, (B. *Yevamot* 47b, B. *Bava Batra* 127a). And there is no such thing as an uncertain *mamzer* (*safeq mamzer*). If there is uncertainty as to his legitimacy, he is not a *mamzer*. (B. *Qiddushin* 76a)⁴

Compassion and sensitivity are then among the hallmarks of classical normative *halakhab*, and were the catalysts for creative and innovative "problem solving". In the words of Rambam (*Hilkhot Shabbat* 2:3):

Thus you have learned that the laws of the Torah are not intended to be vindictive in [this] world, but [to display] mercy and charity and peace in [this] world.

² See, for example B. *Yevamot* 15a; 87b.

³ Rambam here gives as a primary reason for this leniency: "For the Torah not only demanded two witnesses and the new rules of testimony in a case where one cannot clarify a situation without recourse to the witnesses and their testimony.... However when it is possible to determine the facts... it is highly unlikely that the witnesses will give false testimony." However, he ends this statement with the main justification, which is to free the chained woman. Furthermore in other circumstances the Rabbis were suspicious of possible falsification of evidence. See B. *Gittin* 67a (we suspect him of hiring witnesses); B. *Yevamot* 112a, (so that a woman should not put her eye upon [become enamored with] another [man], and spoil relations with her husband [*meqalkalet al ba'alah*]). The whole subject of how to deal with the *agunah* problem has a vast bibliography and the guiding principle throughout is “because of *iggun* (enchainment) its sages were lenient with her”. (B. *Yevamot* 88a).

⁴ See, as just a few examples, *Otsar Yisra'el*, ed. J.D. Eisenstein, New York 1952, vol. 6, pp. 231-232; *Otsar ha-Poseqim*, vol. 1, Jerusalem 1955, 65a et. seq.; Louis Jacobs, *A Time of Life: Diversity, Flexibility and Creativity in Jewish Law*, New York 1989, pp. 257-295, in an appendix entitled “The Problem of the Mamzer.”

Indeed, this sensitivity expresses itself clearly in the halakhic use of the principle of *kevod ha-beriyot*, human dignity, which plays so important a role in many legal contexts.⁵ And again in the words of Rambam (*Hilkehot Sanhedrin* 24:10):

All these matters [are judged] according to how the judge views what is suitable for them, and what the hour requires. And overall, his deeds should be directed towards heaven, and let not human dignity be treated lightly in his eyes.

The particular issue under discussion is undoubtedly one that involves the issue of human dignity, requiring compassion and sensitivity to the pain and suffering of the woman enchained by the recalcitrant husband. There is yet an additional element to be taken into account, namely that the refusal to grant a divorce even at times, after it has been mandated by the *beit din*, is often aimed at extorting financial and other benefits from the other side. Here again, the Torah speaks with the utmost clarity against any form of extortion⁶—so much so that biblical law, for example, forbids the taking of interest on the part of the lender, a prohibition that later rabbinic law had to evade in a variety of innovative ways (primarily the *heter isqa*).

Another indication of the Torah's emphasis on compassion is the law related to pledged collateral:

If thou at all take thy neighbor's garment to pledge, thou shalt restore it unto him by that the sun goeth down; for that is his only covering, it is his garment for his skin: wherein shall he sleep? And it shall come to pass, when he cries unto Me, that I will hear; for I am gracious. (Exodus 22: 25-26).

The chained women, shackled by their recalcitrant spouses, do indeed cry aloud—both to G-d and to the rabbis, to find them a compassionate and equitable solution to their tragic plight, and this within the parameters of traditional normative Jewish law. The Lord surely hears them. But the rabbinic leadership also must hear them. For just as He is gracious and compassionate, so must we be.⁷

Let us hope, then, that this thoughtful, sensitive and cogently reasoned study will fall upon willing years and open hearts, the hearts and intellects of our rabbinic leadership. May they hearken with compassion, and as they firmly adhere to tradition, may they also see Dr. Hacohen's approach as a natural, organic continuation of the tradition of resolving perplexing challenges.

⁵ See G. Blidstein, "Gadol Kevod ha-Beriyot", *Sbenaton ha-Mishpat ha-Ivri* 9-19, 1982-3, pp. 127-185; N. Rakover, *Gadol Kevod ha-Beriyot: Kevod ha-Adam ke-Erech-Al*, Jerusalem, 1999 and my study "Congregational Dignity and Human Dignity: Women and Public Torah Reading," *The Edah Journal* 3:2, 2002, pp. 1-14. We may further add the article by Chaim Reines, *Kevod ha-Beriyot*, Sinai 27, 1950 pp. 157-166, and Eliezer Berkowitz's book, *Ha-Halakhah Kokhav ve-Tafkidah*, Jerusalem 1981, pp. 105-117. A full bibliography may be found in N. Rakover, *Otsar ha-Mishpat*, vol. 1 (Jerusalem 1975) pp. 317-318, vol. 2 (Jerusalem 1991) p. 317.

⁶ Related to this is the highly developed set of laws on charity, and the rabbinic principle that the Torah was concerned not to cause monetary loss to Israel, (*ha-Tora Hasab all Memonam Shel Yisra'el*). See Rabbenu Bahya's commentary to Exodus 12:4, ed. Chavel, (Jerusalem 1967) pp. 89-90; *Torat Kohanim Metsora* 5, M. *Rosh ha-Shanah* 3:4, Bavli *ibid* 27a; B. *Menabot* 76b; B. *Yoma* 39a; M. *Negaim* 12:5; *Encyclopedia Talmudit* vol. 11, (Jerusalem 1965) 240-245, etc.

⁷ See B. *Shabbat* 133b; Y. *Pe'ab* ad init.

Misreading, Misrepresenting and Rabbinic Politics: A Response to Rabbi Michael Broyde

Aviad Hacoheh

Introduction

Usually an author is happy to see a review published about a book on a halakhic issue with the aim of commenting, correcting, improving, and shedding additional light on the topic. This is even more true when the review relates to a work that touches on life and death issues, a book whose topic is one of the greatest challenges faced by the contemporary halakhic world: to find a real solution (not just a theoretical one) for the thousands of *agunot* and *mesoravot get* whose freedom is constantly denied them by violent or extortionate husbands.

There is one hurdle that should be passed by every review, whatever its nature. It has to be written in a spirit of fairness, integrity, honesty and impartiality. *The reviewer must describe the book fairly, even if he disagrees with its content.* He has to relate to what *is in the book*, and not ascribe to the author things that the author never wrote. In the last edition of *The Edah Journal*, there was an article written by Rabbi Prof. Michael Broyde claiming to be a “critique” of my book, *Tears of the Oppressed*. Sadly however, this review failed to clear the above hurdle in both spirit and substance.

The enormous task of finding an appropriate solution for the thousands of *agunot* and *mesoravot get*, including through the use of the *meqah ta`ut* solution in appropriate circumstances, is too important to subject it to the mercies of the negative impression that R. Broyde attempts to attach to it.

R. Broyde’s critique is aimed more at living people, whose activities for *Am Yisra’el*, *Erets Yisra’el* and *Torat Yisra’el* make them deserving of our appreciation and praise. Unlike fair criticism, which relates to what is actually written in the book, R. Broyde attributes to me statements I never made, and then constructs his argument on that basis. Significant portions of his review have nothing to do with my book.

“Neither Rabbi Rackman’s beit din nor AGUNAH International is mentioned in the book.”

The title of Broyde’s article is a noteworthy example. One who reads the title, the abstract at the beginning of the article, or the article’s various sections, might conclude that the main character of the book is Rabbi Emanuel Rackman and his *beit din*, while the *agunot* and the *mesoravot get*—for whom and about whom the book is written—are merely secondary players in the “plot,” mentioned only in passing. In the body of his article, Broyde also vents his anger at AGUNAH International, as another body for whose activities the book, allegedly, serves as a mouthpiece.

Yet, neither R. Rackman’s *beit din* nor AGUNAH International is mentioned in the book. This is not because their activities are unworthy of being discussed, and not because they are immune to either praise or criticism, but because I do not

live in the United States, am not familiar with their methods or their membership, and thus I do not see myself qualified to express an opinion on them or on their activities.

Broyde's review, and the way in which it appeared—its style, its wording, and its content—reflects not only the “micro” issue, namely, the appropriate solution for the problem of *agunot* and *mesoravot get*. It reflects also the “macro” issue, which is no less important: the state of the contemporary rabbinic world in general, and some of the rabbis who seek to lead Modern Orthodoxy in the United States in particular. This is a sad, perhaps even tragic, phenomenon, one that should concern all those for whom the Torah is dear, those for whom the Torah is a *Torat Hayyim*, one that shapes our actions and is not merely a theoretical construct. It should certainly concern those who care about the fate and future of Modern Orthodoxy.

Hanging in the balance is the fate of an outstanding community, one that integrates “*Torah u-Madda*” with *Torah va-Avodah*, a love of Torah, of *Am Yisra'el*, of *Erets Yisra'el* and of *Medinat Yisra'el*. The review shows, even if unintentionally, a lack of tolerance for other views and the lack of an honest desire to deal with one of the most vexing questions faced by the halakhic world in our own day.

The Rupture within the Contemporary Halakhic World

It is not true that *halakhab* cannot solve the serious problem of the *agunah* issue that we face today. Of course, the halakhic world has a firm basis and solid boundaries. However, within these boundaries there is still a very broad area that enables a true *poseq*, one who seeks solutions (and doesn't look over his shoulder all the time to see

what his disciples might say), to find the right halakhic solution for the pain and suffering of the Torah community today.

Unfortunately, we often find among some rabbis who make claims to Modern Orthodox rabbinical leadership too many signs of inertia, a constant bowing of the head before the *haredi* world, an incessant worry over “what will people say?”¹, and, most sadly an inability to cope with the tremendous challenge thrown at us by the modern era: to apply *halakhab*, which we all view as *Torat Hayyim*, within the boundaries of *halakhab* as well as the changing world.

“I am not prepared remain complacent in the face of hundreds and thousands of agunot.”

In contrast to the impression that R. Broyde attempts to convey, this writer does not view the *meqah ta'ut* solution as one that can be applied universally, or as a magic bullet that can solve all problems. The author is willing to support *any halakhic solution* that can offer real relief for the problem of *agunot* and *mesoravot get*, within the framework of *halakhab* and in line with its principles. It makes no difference whether the solution involves forcing the husband to give a *get*, *meqah ta'ut*, conditional *qiddushin*, a prenuptial agreement, *tenai be-qiddushin*, or any other reasonable solution that might be found within the framework of *halakhab*. *The outcome*—the release of *mesoravot get* from their chains—*not the means*, is the main thing. This is the goal, this is our mission. Unlike R. Broyde, who sticks to a solution that might solve at most the problems of only a very small proportion of *mesoravot get* today, and that might only help them in the future, I am not prepared to give up and remain complacent in the face of *hundreds and thousands of agunot and mesoravot get* who are among us at this present moment. Never in Jewish history, has there been a situation in which there were so many *agunot* and *mesoravot get*

¹ Some fifty years ago, one of the great rabbis of the modern era expressed himself thus: that the tragedy of the world of *halakhab* of our times is that, instead of being afraid of the *Ribbono shel Olam*, (the Master of the Universe) and the *Shulhan Arukh*, the rabbis are more afraid of one another

for whom no halakhic response has been found to set them free².

A situation in which there are thousands of *agunot* and *mesoravot get* because of what is generally described as the “inability of the *halakhab*” to release them from their chains, is a badge of shame on the rabbinic establishment of today. It is also dangerous for the entire halakhic system, and a constant source of pain and sorrow for these women and their families whose lives have been destroyed.

The presence of *thousands of agunot and mesoravot get* among us means that, in practical terms, the Torah cannot serve as *Torat Hayyim*. It implies that Torah and *halakhab* were given to the angels, who are able to continue to bear the mistreatment meted out to them by their spouses, husbands who refuse to provide a *get*, or who extort everything they have before they grant one. But it was not given to human beings, whose only desire is to live in freedom, to marry and raise a family, and to retain their dignity.

Background

From the abstract and the article itself, the reader learns that the book was presented as “a solution to the problem of *agunot*” at a “press conference” on October 22, 2004. Yet to the best of this writer’s knowledge, no such “press conference” ever took place. The reader also learns that the doctrine that it proposes in regard to *kiddushei ta`ut* is “is supported neither by Jewish law sources nor by the *responsa* cited in the book itself.” “This review essay,” the abstract states, “explores other solutions to the *agunah* problems.”

R. Broyde prefers the solution of the prenuptial agreement, in one or another formulation. Yet on his way to implementing “his” solution, and as part of his fight against other solutions, the reviewer chose my book—which deals with halakhic sources and has nothing to do with R. Rackman’s *beit din*. It

does not reject the application of other solutions alongside that of *meqah ta`ut*.

Even readers not familiar with the major changes that have taken place in the world of the “Modern Orthodox” rabbinate in the last twenty-five years might ask themselves, “Why would a fairly small book of about one hundred pages be the subject of such a comprehensive critique that covers no less than twenty-eight double-column pages, with dozens of footnotes?”

The review slips into a tone that is polemic, insulting and occasionally unreasonable. Thus, for example, the unfortunate comparison that Broyde makes between the role of *umdenas* in releasing a woman from being an *agunah* and... checking vegetables for insect infestation (page 5). Thus his attempts to threaten those who utilize the services of R. Rackman’s *beit din*. Prophet-like, Broyde seeks to inform us unequivocally and in his own style of the consequences of the decisions made in R. Rackman’s *beit din*.

I have **no doubt** that the Orthodox rabbinate will be **plagued for decades** with cases of women who remarried based on a document issued by Rabbi Rackman and his *beit din*.

Broyde pays little attention to detail. He presents my book as a “magic solution” suggested by me in order to solve every *agunah* case in the same way through *mekah ta`ut*. But I clearly stated in the Introduction to *The Tears of the Oppressed* that:

It is not at all my intention to propound a halakhic ruling, as this is a task reserved only for *poskim*.

and

Nor do I deal here with a specific case that needs resolution, for each case is different and the way to resolve one case does not necessarily apply to another.

² The reasons lie, of course, in the historic changes that have taken place within the Jewish community: the loss of its judicial autonomy and its ability to impose its will on its members. Indeed, it is interesting to compare this problem with another, equally painful and no less important, issue, that of children who are *mamzerim*, for whom a halakhic solution of one sort or another is almost always found.

From his lofty perch Broyde does not hesitate to give “grades” to the great sages of our people. He dismisses the approach of Maharam of Rutenberg (“only Maharam”—p. 6), as though he were referring to a minor figure in the world of *halakhab*, and not one of the greatest among the *rishonim*, whose enormous influence on the world of *halakhab* up to our own times is obvious.

“In the world of halakhah—as in the world of serious research—validity is tested first and foremost by its quality, not by quantity.”

Rabbi Ya`akov Yehiel Weinberg, the author of the “*Seridei Esh*,” and one of the outstanding and most daring figures in the world of *halakhab* in the past generation³, does not escape Broyde’s pen. He maintains that one of Rav Weinberg’s responsa in *Seridei Esh* is unimportant, since he “collects” many different views in regard to *iggun*, without distinguishing—in Broyde’s view—between those that are within the halakhic “mainstream” and those that are not.

R. Broyde informs us of a new strange “test” for the correctness of *halakhab*. In his opinion, halakhic literature is rated by the number of times it is quoted by other *poseqim*⁴. Hence the fact that the position taken by Rav Weinberg is only rarely quoted is evidence of its poor quality and its insubstantiality, as though the world of *halakhab* runs on the basis of a superficial rating system, like that used in the world of television. Yet in the world of *halakhab*—as in the world of serious research—the validity of something is tested first and foremost by its *quality*, and not by *quantity*, by the number of times it gets quoted.

As I mentioned above, Broyde emphasizes, both in the title of his critique and throughout that the

book is meant to be a “defense” of R. Rackman’s *beit din*, as though the *beit din* and its members are the “accused,” who require the services of the author as a defense attorney. The harsh statements Broyde aims at R. Rackman and his *beit din*, whether directly or implicitly, are particularly surprising. This is especially so when one reads the last paragraph of Broyde’s review where he gives advice to R. Rackman as to “how to behave.”

Thus the reviewer has benefited twice from his review: He is able to attribute to the book and to the author things that never appear and in addition conduct his campaign against R. Rackman’s *beit din*.

A Rabbinate “For Theory and Not For Practice”

R. Broyde devotes a significant portion of his essay not to the book under review, but to an entirely different (though no less important) issue, that of prenuptial agreements and *tenai be-qiddushin*. In his view, these—particularly the prenuptial agreement—are the ultimate solutions to the problem of *agunot* in our time. But one wonders how this solution would provide a relief to the thousands of *agunot* who are already among us, and who had not signed such a prenuptial agreement.

Moreover, Rabbi Yosef Shalom Elyashiv, considered among the *haredi* community as the senior *poseq* of our generation, recently launched a scathing attack on this solution⁵. In Rav Elyashiv’s view, such a solution is totally at variance with *halakhab*, and has a similar, if not the same effect as a *get me`useh* (forced *get*), which will lead to instances of *mamzerut*.

³ Regarding his life and activities, the reader is referred to the excellent work by Marc Shapiro, *Between the Yeshiva World and Modern Orthodoxy* (1999).

⁴ Such an approach is a bit puzzling, for in spite of Broyde’s long service as a *dayyan* and writer, I can hardly remember any prominent *poseq* (or even a prominent academic figure) who quotes Broyde’s judgments and halakhic articles extensively (if at all) to support a halakhic ruling.

⁵ Rav Elyashiv, so it seems, is not alone in his criticism. Other *dayyanim* and rabbis, such as Rav Yisrael Rosen, one of the famous rabbinical figures in religious Zionist circles (Head of the Conversion Rabbinical Court System in Israel, head of the Zomet Institute in Alon Shevut and editor of the prestigious halakhic journal *Tehumin*), stated, in an article published recently, that prenuptial agreements are nothing less than a “social disaster,” something that may increase the incidence of divorce in Israel and lead to a breakdown of the family unit. Even if we disagree with some of what he writes, it is impossible to ignore the problems inherent in this solution.

What would R. Broyde say about this halakhic ruling, which has already been quoted in *batei din* in Israel as a matter of course? Does the fact that such a prominent *pesaq* has already been quoted widely mean that R Broyde are “increasing,” God forbid, the number of *mamzerim* among the Jewish people? Should we “have no doubt” that “the Orthodox rabbinate will be *plagued for decades* with cases of women who remarried based on a document issued by these *batei din*?”

Until recently, everyone recognized the key difference between a *talmid hakham* or *rosh yeshiva* and the community rabbi, with the latter being required to decide on questions of *halakhab*, rather than simply raising theoretical constructs or academic ideas. Broyde, it would seem, would like to shake off that responsibility as well. At the end of his essay (p. 17) he again presents his solution of prenuptial agreement (“the only way to implement a global solution”), and adds to it his *tenai be-qiddushin*. In the Appendix to his article he adds text that could serve as a solution to the problem of *agunot* based on his innovation.

However, Broyde emphasizes in his article and appendix that his suggestive agreement is “*she-lo le-halakhab*.” That is, it is a theoretical example only, and not, Heaven forbid, for actual practical use. The little note “*she-lo le-halakhab*” expresses particularly well one of the more significant, perhaps the most significant, problems of the Modern Orthodox rabbinate today.

In areas such as that of medicine and *halakhab*, courageous solutions have been found. Yet while the issue of *agunot* and *mesoravot get* is one of the most significant and heartbreaking problems in *halakhab*, few are willing to exercise leadership. The outcome of this lacuna is tragic.

The Content of *Tears of the Oppressed* and Its Critique

To balance the erroneous impressions left by Broyde’s review, I will summarize the content of the book, and indicate those points of disagreement that may exist between R. Broyde

and me. As the reader will see, and, in contrast to the position expressed in Broyde’s review, the points of difference are not many. That being the case, the struggle that Broyde wants to conduct through the book is even more unfortunate, given that there is really very little that divides us.

The following paragraphs will explain briefly what the book discusses, and what it does not discuss, what its aims were and what they were not. The book seeks to present the reader with the issues related to *agunot* and *mesoravot get*, the halakhic background and some relevant halakhic sources.

One thing should be made clear: The book is not meant to be a *pesaq halakhab*. Unlike the impression given by Broyde, I am not a functioning rabbi. I don’t pretend to be able to decide between the opinions of the great Torah authorities, and determine which of them is “accepted” and which is unacceptable.

“On the issue of agunot, few are willing to exercise leadership.”

I certainly do not rule on questions of *halakhab*. That role is reserved for those scholars of *halakhab* who have been found worthy, and who have been authorized to do so. The authority—as well as the heavy responsibility—to provide a real solution for the problem of *agunot* (and not just point out difficulties, or limit themselves to statements that are “theoretical, not practical”) rests firmly on their shoulders.

Because I am not in the role of halakhic decisor, I sought—as I stressed in the introduction to the book—to examine the issue from as broad a point of view as possible, without any prior assumptions, free of any emotional involvement, and without any of the baggage that now encumbers the issue as a result of the public fights between different *batei din* in the United States. I wanted to examine the whole issue anew. This is neither a statement in defense of anything, nor a statement attacking anything. Neither R. Rackman’s *beit din*, nor any other *beit din*, is the subject of the book. The focus of the book is the problem of the *agunah* and its solution.

The study of the issue was not made on the basis of assumptions, but on the basis of a careful study of the various halakhic sources. To this end, the bulk of the sources are included in the book, so that the reader can see them firsthand, without having to rely on anybody else's interpretation.

The following are some of the key points on which my work is based:

A. There IS a solution to the problem of *agunot*

The problem of *agunot* is not a Heavenly decree, against which there is no appeal. Yes, it is a troublesome problem—serious, complex and complicated—but this does not mean that there is no solution. Other problems with a similar level of complexity and difficulty have been solved, and this should be no exception.

I do not believe that this problem has an easy solution, or a magic one that will work in all cases. The Jewish family, and the values that underlie it, are too important to allow it to be broken up with a mere wave of the hand, even if the decision to do so comes from a *beit din*.

I stressed repeatedly in my book the seriousness of the issue of permitting a woman to remarry and the concern about her children subsequent to her remarriage being *mamzerim* makes this one of the gravest issues within the world of *halakhab*. It requires deliberation, discretion, thought and a great deal of care. Yet none of this should lead us to conclude that there is no solution for *agunot* and *mesoravot get*. In my view, no potential solution should be rejected, summarily or simply because “it has never or not often been used before.” This applies equally to the *meqah ta`ut* solution, with which my book deals.

The fact that the *meqah ta`ut* approach is not much used results not from its being wrong, but from the

its not having been needed. In the past, the vast majority (over 95%) of cases dealt with in the halakhic literature involved cases in which the husband's whereabouts could no longer be ascertained. The solution to this problem utilized various leniencies in the laws of evidence, and thus other solutions were not required.

In those isolated cases in which the husband had not disappeared, but was refusing to provide a *get*, the Jewish community utilized its coercive power against the recalcitrant husband, e.g., by ostracizing him (*niddui*) or by applying physical coercion—corporal punishment or similar. In the vast majority of cases, that was sufficient to solve the problem.

“No potential solution should be rejected, simply because ‘it has never been used before.’”

Not so in our own day. The bulk of problematic cases are not instances of *agunut*, i.e. where the wife is chained to the marriage because of the husband's disappearance, but of refusal to provide a *get*: Extortionate or vindictive husbands who seek to make their wives' lives miserable often will issue a *get* only in exchange for a sizeable sum of money. Correspondingly, in the modern era, the community has lost its coercive power. In democratic countries, such as the United States and Israel, and the bulk of Western countries in which Jews find themselves, physical coercion cannot be utilized against a recalcitrant husband⁶. Even ostracism, which was a powerful sanction in the Jewish community for hundreds of years, has lost its power. Under these circumstances, other solutions that are found in the halakhic source literature, such as *meqah ta`ut* or the annulment of *qiddushin*, which were almost never needed over the centuries because of the alternatives that existed, need to now be utilized.

Hence the fact that extensive use of the *meqah ta`ut* solution has not occurred till recent years (upon

⁶ From this point of view, the situation in Israel is somewhat better than that in the United States. Although, in Israel, it is not permitted to beat a recalcitrant husband, the law does permit women to have such husbands placed in prison (even in solitary confinement), and to prevent them from holding a driver's license, opening a bank account, or leaving the country. Unfortunately, the *batei din* in Israel do not utilize these sanctions (based on the opinion of Rabbenu Tam, one of the great Tosafists of the twelfth century) sufficiently often.

which Broyde bases the bulk of his critique) is not surprising; its very limited earlier use should not preclude its greater use today, in appropriate cases.

In addition, the idea that in the case of a recalcitrant husband, and where no prenuptial agreement has been entered into, “there is no halakhic solution to the problem of such *agunot*” — should shock anyone to whom *Torat Yisra’el* is dear. Were such a view to take root, it could have destructive effects both on the national and on the communal level (such as the “flight” of *agunot* and *mesoravot* get to seek easier solutions among other Jewish streams, or by their entering into relationships that are contrary to *halakhab*). It would increase the despair of such women, and perhaps bring about an increase in the number of *mamzerim* born into the community. Ultimately, some of these women will be left miserable for the rest of their lives.

B. There are many solutions, none of which is free of difficulty

The problem of *agunot* has a number of potential solutions. Disqualification of the witnesses to the *qiddushin*, “*meqah ta’ut*”, “prenuptial agreements”⁷, “imposed” get, conditional *qiddushin*, annulment of *qiddushin*, creation of only a “*zizqat qiddushin*” etc., are but some of the possible solutions suggested so far by various people. Obviously, not every solution can be applied in every instance, but often one or more of them can be utilized.

Each of the solutions proposed has its advantages and disadvantages. Some of those disadvantages depend on objective circumstances (e.g., the reason for the wife being an *agunah*, the coercive ability of the *beit din* or the community), while others are subjective (the willingness of the *dayyan* to rely on an individual opinion—*da’at yahid*—or the combination of a number of considerations that tend toward leniency). Each of the solutions proposed also has its advantages, some objective (independence from the husband’s wishes, independence from the *beit din*), while others, again, are subjective.

These difficulties should not prevent us from using an appropriate solution in a given case. They only emphasize the need to search for creative solutions within the world of *halakhab* that would permit use of all the halakhic tools (of which there are many) in order to free a woman from the bonds that keep her an *agunah*.

“The idea that ‘there is no halakhic solution to the problem of such agunot’ should shock anyone to whom Torah Yisra’el is dear.”

The book focuses on the solution of *meqah ta’ut*, not because this is the only, or necessarily preferred, solution, but because of the fact that until now this solution has been almost summarily rejected as an approach because of the idea that it is not possible to implement it. It is this assumption that the book comes to address, independently of any other solutions.

C. *Meqah ta’ut* is an appropriate solution for the problem of *agunah* in certain instances

There is no wonder solution for any given situation. Each case has its own specific circumstances. In every instance the *beit din* needs to examine the totality of the circumstances, and, based solely on those circumstances, determine how to act.

In contrast to the blanket rejection often heard in relation to the *meqah ta’ut* solution, my book suggests that this solution is applicable in certain circumstances. Note well: *certain* circumstances, but not all cases.

It seems to me that no one, including R. Broyde, would dispute that we have sufficient sources that indicate that this solution has been used in certain circumstances, and not merely been raised as a theoretical option. The difficulty—and perhaps the only point of dissension between Broyde and me—is the question of under what circumstances the solution should be utilized.

⁷ For a discussion of Rav Elyashiv’s view of this solution, and the questions it raises for Broyde and his colleagues, see above.

Meqah ta`ut is based on a determination that marriage, like other contracts, requires a “meeting of wills” between the two parties. A fundamental deception (not a marginal one) by one party of the other, may create a flaw in this meeting of minds, and thus create a fundamental defect in the contract. The assumption is that, although the husband and wife have formally entered into an agreement, and to an outside observer the agreement seems completely valid, it is actually void or voidable. Had the wife been aware, at the time of the marriage, of the defect whose existence had been hidden from her (whether deliberately or unconsciously), she would never have considered marrying her husband. Thus, there is a fundamental flaw in the intention of the couple, and this fundamental flaw renders the act of *qiddushin* void *ab initio*, as though it had never taken place.

D. The circumstances under which such a solution might be used

The question of the circumstances in which it might be possible to apply this solution is, perhaps, the core of the debate. This question can be subdivided into three areas of concern: I. the type of defect involved; II. the point in time at which the defect arose or was discovered; III. the period of time between the discovery of the defect and the wife’s demand for a divorce.

(i) The type of defect involved

The book seeks to reveal two insights. The first is that the list of “defects” does not necessarily have to be a “closed list.” Although there are a number of stricter views in *halakhab*, according to which the list is both closed and limited to defects mentioned explicitly in the Talmud, there are also quite a few opinions that differ. Both Rav Moshe Feinstein, of blessed memory, and Rav Ovadiah Yosef have sided with the view that the list may be expanded to include defects not listed in the Talmud.

Since there is no dispute over that in fact the list of “defects” has been added to over time, the question of how far the list can be extended, and which defects may be included in it, is one of “halakhic policy,” something that derives from a number of considerations.

(ii) The time at which the defect was arose or discovered

According to R. Broyde, the book’s main weakness revolves around the time at which the defect was arose or discovered. However, *in contrast to what Broyde attributes to me*, I do not suggest that a defect that was “born” (*nolad*) after the marriage—as opposed to one that only “discovered” (*nitgalah*) after the marriage—could serve as a basis for freeing the wife from the marriage. In countless places in the book I emphasized that the “defect” that serves as the basis for applying the doctrine of *meqah ta`ut* is one that existed in the husband *prior* to the marriage.

Nevertheless, R. Broyde “begs the question,” puts words in my mouth, and builds his argument on that shaky foundation. Thus, for example, in the Abstract that appears at the beginning of his article, Broyde writes that my book ostensibly:

...proposes that the doctrine of *kiddushei ta`ut* ...be expanded to include blemishes that arose after the marriage was entered into and that this doctrine then be used by rabbinical courts to solve the modern *agunah* problems related to recalcitrance (Abstract).

R. Broyde makes this point throughout the review in varying ways. Thus he refers to the “basic thesis of the book” (p. 3); the “book’s agenda” (p. 6); Hacoheh’s “proposition” (p. 14); and “central to the reason he [Hacoheh] wrote this book...” (p. 14).

Broyde’s point is demonstrably, not true. This should be apparent from a simple reading of my book in its entirety. I explicitly stated that a *pre-*

existing defect in the spouse is a necessary condition for the use of *kiddushei ta`ut*. Thus, under a section headed “Methodologies—*Umdenab*; *Kiddushei Ta`ut*” I wrote that *kiddushei ta`ut* involves:

... a mistake regarding the facts, **extant at the time of the marriage** but concealed from the *agunah* at that time. **In such a circumstance**, the woman lacked full knowledge of conditions on which to make an informed decision (p. 96).

Again on p. 30, in distinguishing between *kiddushei ta`ut* and *umdenab*, I stated that:

These two approaches—*kiddushei ta`ut* and *umdenab*—have very different determinants. **In the case of ‘mistaken transaction’ the basis of the ‘mistake’ had to exist at the time of the transaction.**

Additionally, from the responsa carefully set out, it is absolutely clear that I am demonstrating that a *pre-existing* defect is necessary for *kiddushei ta`ut* to be invoked. One need go no further than the first responsum, that of Rabbi Simha of Speyer, in which, in the last paragraph of my summary of the responsum, I stated:

...be that as it may, Rabbi Simha of Speyer clearly establishes that in the case of a major blemish [in this case, blindness] where the woman was not aware of it **prior to the marriage** it is a mistaken marriage.

Regrettably, Broyde has fixed upon one sentence on p. 96, and declared that it undoubtedly demonstrates that the agenda of my study is to establish post-marital defects as the basis for the invocation of *kiddushei ta`ut*. Again, as the quoted material set out above explicitly states, and as can be seen from the entire tenor of the volume, this is not the case.

A fair and truthful review cannot be based on a single sentence that appears at the end of the book and that Broyde associates with all sorts of agendas. An honest review must consider the

book’s entire content, with the many examples upon which the book’s logic was based.

Indeed, the whole thesis of *meqah ta`ut* relies on the fact that, at the time the “marriage contract” was entered into (to borrow a term from contract law), there was a defect in the marriage, and any defect that came into existence subsequently is not relevant to the issue.

In fact, R. Broyde had to go no further than the first two lines of the same p. 96 to which he refers, in order to find the reference to “facts extant at the time of the marriage,” mentioned above. He fails to refer to this statement in his criticism.

Another important and related question is, “What is the law in regard to certain types of fundamental defects that are discovered only after the marriage, perhaps a great deal of time subsequent to it?” Can we, under certain circumstances (though not in all instances), apply and view it as a defect that already existed at the time of the marriage, but which was concealed and only now came to light. A reading of R. Broyde indicates that he agrees with me totally that there are certain defects that are “latent,” and even though they may appear many years after the marriage, they may be deemed, under certain circumstances and with the concurrence of the relevant professionals, as defects that existed already at the time of the marriage. Thus, for example, this might apply in the case of physical violence that stems, not from a momentary outburst of rage, but from mental illness at some level or another, a condition that may have been “suppressed” and only came out later.

In such instances, halakhic approaches need to be integrated with information from professionals.⁸ Among professionals there may be differing opinions in regard to a given case. The more that we adopt those approaches—provided, of course, they are well-founded scientifically—that “extend” the defect’s existence back to the time of the marriage or even prior, the easier it will be to apply the *meqah ta`ut* solution.

⁸ Here, too, we might expand the framework of “professionals”, for the purpose of defining a “defect,” to include not only psychiatrists but also psychologists, sociologists, social workers and other professionals.

(iii) The time between the discovery of the defect and the wife's demand for a divorce

According to Broyde, there is significant precedent for requiring that the wife demand a divorce from her husband as soon as she discovers the defect; otherwise the talmudic principle that she “considered and accepted [the defect]” would apply. In simple terms, this means that the wife accepted the defect, and did not deem it so fundamental, or that she preferred to continue to live with her husband, in the spirit of the axiom “*lav lemeitav tan du*,” that a woman prefers to live with a husband, whatever his defects, rather than be alone.

In this regard I believe that Broyde's application of the *gemara's* words is simplistic, and certainly is not consistent with either reality or the sources included in the book. “Considered and accepted” is a talmudic expression that is open to a number of interpretations. The restrictive interpretation would argue that, at the very moment that the wife became aware of the “defect” (e.g., the first time her husband beat her, assuming we view such violence as a “defect” according to professional criteria) she has to demand a divorce from him, and, should she not do so, we will assume that she has “considered and accepted” this defect, and thus closed the door on any possibility of the marriage being cancelled through the argument of *meqah ta`ut*.

However, as an analysis of the sources will show, in contemporary circumstances a woman who does not “immediately” express her desire to divorce does not necessarily express thereby a desire to continue living with her husband. There are a whole range of reasons for her not expressing her wish to divorce. Some may be personal (e.g., the desire to “prepare” for the dissolution of the marriage in a way that would not disadvantage her or shame her, or her fear of a violent reaction on the part of her husband). Others may be social (e.g., the potential negative reaction of her family or the surrounding community), or economic (e.g., the desire to save sufficient money to obtain proper legal advice regarding the divorce process), or tactical (e.g., to gather additional information

about her husband, which would support her case in the divorce proceedings). Other reasons can also be suggested.

The length of this time interval cannot be determined in advance. It is influenced by the circumstances of each case. At the one end of the spectrum is the case in which a very short interval passed between the discovery of the defect and the wife expressing her desire to divorce. In this instance, everyone (or, almost everyone) would agree that the wife's prompt reaction indicates that the defect is, indeed, fundamental. Had the woman known of the defect in advance, she would not have been prepared to remain with the husband a moment longer, and thus this instance could be deemed *meqah ta`ut*.

“Like all legal questions there is no one correct solution.”

At the other end of the spectrum is the case in which an extended period of time passes, perhaps even decades, between the discovery of the defect and the wife's expressing her desire for a divorce. In this instance, everyone (or, almost everyone) would agree that the wife's belated reaction indicates that this is not, in fact, a fundamental defect. In this case, we might say that, even if the woman had known about the defect in advance, she would still have been prepared to remain with her husband. And the proof is in the fact that, indeed, she did remain with him for years after discovering the defect.

The problem is, of course, all of that “gray” area in between, in which the answer to the question of whether the wife “considered and accepted” is not at all clear. It may be because the defect—of whatever type—did not appear all at once, but only in stages, and the wife was not aware of its seriousness until a certain point in time, or because external factors influenced the wife's decision to continue with married life, for one or another of the reasons outlined above. In any case, it is clear to the *poseq* that, had the woman known of the existence of the “defect” at the time of the marriage (assuming that this is indeed a “defect”), she would never have agreed to marry the man.

This is not a mathematical question with an exact answer, but a legal one, and like all legal questions there is no one “correct” solution. In such instances, the decision of the *poseq* derives from a whole string of factors, some of them formal and others influenced by halakhic policy (e.g., the concern that “Jewish girls might go astray,” or, that if we do not permit her to marry, she will leave the Jewish fold or the community framework).

I would hope that the real gap between Prof. Broyde’s position and my position is not all that wide. In any event, the gap is not related to the fundamentals, but, at most, to their application to individual cases.

The “Only Way” to Solve the Problem, According to Broyde

Broyde states (beginning of Section VI, p. 16) that the “only way” to solve the difficult problem before us is through prenuptial agreements. It takes a great deal of eminence in the Torah world to claim that this or that is the “only solution,” while rejecting all alternative solutions mentioned above, despite their disadvantages.

Broyde assumes that the approach of signing prenuptial agreements has been highly successful in the United States. As I stated at the outset, I am not familiar with what goes on in the United States, and do not have the proper tools to judge whether this is the case. But what we do hear in Israel is an echo of the cries of dozens of *mesoravot get* in the United States and other countries, and, as far as we can tell, this “solution” is not of assistance to the majority of them.

Such agreements have come into use only in recent years, and there are thousands of Jewish couples who enter into marriage every year without having signed such an agreement. For those hundreds, or perhaps thousands, of Jewish women, who had not signed prenuptial agreements, and who are now in the situation of *mesoravot get*, this solution is not available.

What answer will Broyde give them? Will he wave his article at them, and say: “Because *you* didn’t listen to me prior to your marriage, now you will remain *mesoravot get* for ever”?

Is the magnificent words of the R. Shimon ben Tzadoq (*Tashbeẓ*) quoted in full on page 8 of my book, “Is this the answer that a rabbi, any rabbi, would dare to give his own daughter, if, Heaven forbid, she would be in the same situation?” Would someone dare tell their own daughter, who had not signed a prenuptial agreement, “What can we do? There is no solution. Stay an *agunah* for the rest of your life”?

In the words of the *Tashbeẓ*: “Should this be our answer to the oppressed?” The answer is obvious: “No, not at all!” For such an answer is not a human answer. Such an answer is definitely not a Jewish answer.

“One wonders how a Jew can utter a statement that contemporary halakhab has no real solution for the distress of thousands of women.”

As noted, Rav Yosef Shalom Elyashiv, who is considered among many circles in the Torah world today as the leading *poseq* of our time, recently ruled that this solution, the use of prenuptial agreements, is of no use since its application to the husband, at the time of the divorce, creates a real concern over the possibility of a *get me`useh*, a forced *get*. And since the vast majority of *dayyanim* in the rabbinic courts throughout the world, and particularly in Israel, see themselves as subject to Rav Elyashiv’s directives, it is likely that they would not easily accept a *get* given on the basis of this solution.

To summarize: I do not believe that the appropriate approach is to disqualify any possible solution merely on the basis of rabbinic politics. This is, indeed, a very serious issue, but it is for that very reason that we cannot be content with only one “miracle” solution. Every solution—including *meqab̄ ta`ut* and the prenuptial agreement—has both advantages and disadvantages. What we need to do is neutralize, as

far as possible, the disadvantages, and bolster the advantages.

Can There Be No Solution to the Contemporary *Agunah* Problem?

R. Broyde writes (page 15) the following:

In truth, the *agunah* problem is most likely—at its core—**insoluble** in a global manner because marriage as a private law matter subject to dissolution only with the consent of the parties is part of the structure of Jewish marriage law.

Lest we be mistaken in understanding his intent, R. Broyde repeats his assertion, that:

“in the absence of such prior agreements as to what the base rules are, [the only possible conclusion is that] **contemporary Jewish law will not be able to impose a solution.**”

Here, perhaps, is the key to the basic difference between R. Broyde and the approach taken in my book. One wonders how a Jew, let alone a rabbi, can utter a statement that suggests that contemporary *halakhab* has no real solution for the distress of thousands of women whose husbands have withheld a *get*!

As one who believes wholeheartedly in the *halakhab*, and in the Torah as *Torat Hayyim*—a Torah that shapes our lives—I cannot accept R. Broyde’s statement. Fortunately, it is not accepted either by those Torah scholars who do struggle, day and night, to find solutions for *mesoravot get*, in spite of the well-known difficulties referred to by R. Broyde.

Notwithstanding the difficulties that R. Broyde lists in his essay, the conclusion he reaches is erroneous. Can it be that all of the great *poseqim* who sought to free *agunot*, even in the absence of agreement by both parties, were not aware of the existence of the problem?

The answer to this is simple: Unlike the one-dimensional approach adopted by Broyde, the truly great *poseqim* always knew that the world of *halakhab* is not simply black or white. It is made up of a variety of colors and shadings. Of course, everyone would agree that, were it possible to find a solution that is acceptable to all (or, at least, the majority) of the *poseqim* (a rare occurrence in itself), such a solution should be preferred over any other. But, in the absence of such a solution, the true *poseq* has to demonstrate a sense of responsibility, audacity and courage, and take the path less traveled. The risk is still worth it, if it can save another Jew.

Afterword

During the first half of the twentieth century, a great controversy arose within the halakhic world over the Jewish practice of *shehitah*. One of the issues involved related to the demand that was raised (and which is still raised from time to time) by animal welfare organizations and some national governments, that the animals should be stunned by means of an electric shock prior to *shehitah*, in order to prevent them from experiencing unnecessary pain and suffering. This controversy involved all the rabbis of the time, most of whom, not surprisingly, forbade the use of stunning.

One day one of those rabbis came to Rabbi Yehuda Leib Maimon, the leader of the Mizrachi movement, and brought him a weighty manuscript on the topic of *shehitah*, in the hope that it would be published by Mosad Harav Kook, which was then headed by Rav Maimon.

“What is the *sefer* about?” asked Rav Maimon, surprised to see a closely-written manuscript of over 500 pages.

“The *sefer* reviews all of the approaches in regard to *shehitah*,” answered the author proudly. “It classifies them, analyzes them, and proposes a conclusion.”

“And what is the conclusion?” asked Rav Maimon.

“Well,” continued the author, “after analyzing all aspects of the issue of stunning the animal before

shehitah, I come to the conclusion that it is strictly forbidden, *assur*.”

Rav Maimon took the manuscript, handed it back to the author, and said to him: “To say *assur*, to forbid something—that even my grandmother can do. For that you don’t have to write 500 pages.”

“There is a growing movement of people who are tired of helplessness and inaction when it comes to finding a halakhic solution for the problem of *agunot*.”

One need not read Broyde’s article to know that R. Broyde and his colleagues object to R. Rackman and his *beit din*, rejecting out of hand new solutions proposed for the problem of *agunot*. If, on the other hand, they had applauded the solution of *meqah ta’ut*, or similar solutions (such as the proposal for annulment of *qiddushin* suggested by R. Riskin), it would have been noteworthy. That would have shown that something phenomenal had happened, something that would have made rabbis more lenient in their decisions regarding *mesoravot get*, rather than taking the stricter approach.

The energy and passion that show themselves in every line of R. Broyde’s essay indicate that something has angered him. Perhaps this “something” is the growing movement of people who are tired of helplessness and inaction when it comes to finding a suitable halakhic solution for the problem of *agunot* and *mesoravot get*.

We know from generations long gone that the power of the *halakhab* has been shown to be greater than that imagined by certain rabbis, who claim to represent it and who see themselves as the sole “masters” of the *halakhab*. We will all have to face the *Beit Din shel Ma’alah*, the Heavenly Tribunal, and it is God alone who will judge whether we have acted in good faith.

There have never been so many instances of women who are *agunot* or whose husbands have

refused to give them a *get*. Even those who play down the numbers admit that there are thousands of cases in which women cannot find an appropriate solution to their predicament within the halakhic framework. They have three choices: (1) They can abandon the dictates of their faith, and live in an illicit relationship with another man, with the risk of having children who are *mamzerim* and who would be subject to all the implications thereof; (2) They can “buy” their freedom for tens of thousands of dollars (if not more), money that would simply pass to the extortionate husband; (3) They can choose to remain *agunot* for the rest of their lives.

Instead of losing sleep in order to find a solution for the *Agunah*, as did the great sages of our people, some rabbis look for various stringencies. Indeed, whoever is stricter than his fellow is sometimes regarded as more praiseworthy than his fellow.

It is a great pity that those energies that are put into disputation and settling accounts, could not be put into an honest, serious attempt to find an appropriate halakhic solution—a practical one, not just a theoretical one—for the question of *agunot*.

The solution espoused by R. Broyde, i.e. the prenuptial agreement, even if appropriate in those cases in which the parties signed it prior to their marriage, and even if we discount the *pesaq* of Rav Elyashiv who sees it as a recipe for the wholesale production of *mamzerim*, does not provide an answer for all of the *agunot* and *mesoravot get* already among us, who have none to espouse their cause.

In spite of the cold “welcome” by some, *The Tears of the Oppressed* has been favorably welcomed by many⁹. Yet the book is not, in itself, important at all. Neither is Broyde’s critique, or this response.

What is important is to find a real solution that actually frees all those hundreds and those thousands of *agunot* and *mesoravot get* who are held captive by their husbands, trapped in their chains, and whose cry rises to heaven.

⁹ Although it appeared but a short time ago, the book has been quoted in a decision of the Supreme Court of the State of Israel, which dealt extensively with the question of an appropriate solution to the distress of *mesoravot get* (BGZ 6751/04, Michelle Sebag v. Supreme Rabbinical Court et al., unpublished, decision issued 29.11.04), and in a number of articles.

Response of R. Haim (Henry) Toledano

Rabbi Broyde concludes his harsh and scathing criticism of Rabbi Emanuel Rackman's *beit din* by arguing that “expanding the category of error in the creation of marriage to encompass changes in people following marriage would fundamentally destroy every Jewish marriage.” That is so, he explains, “because all marriages entail change in the parties that cannot be anticipated—some of it good, and, sadly enough, some of it bad. To allow marriages to break up in the face of any and every unanticipated changes is not only to solve the *agunah* problem; it is to dissolve every Jewish marriage whenever either party wishes, and to do so without any divorce. Jewish marriage will become a vehicle of convenience, discarded at the roadside of life the moment trouble occurs.” (Section V, pp.14-15).

This hyperbolic assessment betrays the weakness of this criticism. It is simply a misrepresentation of the facts. No one is advocating dissolving marriages “whenever either party wishes” or because of “any and every unanticipated change,” certainly not R. Rackman's *beit din*. Not a single case that came before R. Rackman's *beit din* involved the frivolous desire of the woman to terminate her marriage simply because of any unanticipated change.

“If anything will weaken the institution of marriage, it is the inflexibility of the Orthodox rabbinate.”

All the *agunot* that come before R. Rackman's *beit din*, almost without exceptions, are victims of malevolent and injurious behavior by the husbands towards them and/or their children, and all report that the aberrant behavior of their respective husbands began very early in the marriage, in some cases even as early as on the wedding night itself. These are women who discover soon after entering into marriage that the caring and loving suitors

they knew before the marriage suddenly metamorphosed into violent, abusive and adulterous husbands, who on top of all that also sadistically refused to give them a *get*. These are hardly women who wish to dissolve their marriage for “any and every unanticipated change.” To describe or treat them as such is to demean their suffering.

On the contrary, if anything will weaken and even destroy the institution of marriage, it is the inflexibility of the Orthodox rabbinate and its unwillingness to come to the succor of the *agunot*. For if women knew that they have no exit from an intolerable marriage, they would not marry.

Indeed, this is the very rationale offered by Rashba for *kefiyyah*, the ability of a *beit din* to compel a man to give a *get* (*Hiddushei ha-Rashba, Gittin* 88b, in the 1986 Mosad ha-Rav Kook edition). Rashba explains that just as the rabbis coerce debtors to pay their creditors so that the poor would be able to borrow (“so that doors will not be locked in the face of the borrowers”), by the same logic, women would not marry if they had no exit from a marriage to a man who became their tormentor (“And in *gittin* too, similar to indebtedness and loans, for if not [we did not coerce a *get*] women would not marry, and the daughters of Israel would be *agunot*”).

Thus Rashba understood that in earlier times, women consented to enter into a religious marriage because they relied on the rabbis to protect them from intolerable marriages. Nowadays, however, *kefiyyah* is no longer available, and it is the responsibility of the Orthodox rabbinate to step up to the challenge of the new circumstances and offer an effective alternative to avoid or resolve the problem of *iggun*. For although *kefiyyah* is no longer available, Rashba's rationale still applies; that is if religious marriage entailed the possibility of being trapped in an unlivable marriage, “women

would not marry, and the daughters of Israel would be *agunot*.”

In addition, the unwillingness on the part of the Orthodox rabbinate to free *agunot* results not only in the untold and unjustifiable suffering of the *agunot*, but it also has unintended consequences. It tarnishes the image of *halakhab* and Orthodox Judaism in general. It projects a very negative image of Jewish law as being cruel and insensitive, which leads inevitably to a great *hillul ha-Shem*. In worst cases, inaction on the part of the rabbinate could lead to outright *mamzerut* if and when chained women totally despair of ever gaining their freedom through halakhic means. In such cases, they might just give up and engage in illicit relations, or marry a secular Jew in civil marriage and give birth to *mamzerim*.

This very concern was expressed by Rabbi Obadyah Yosef and Rabbi Shalom Messas, the late Chief Sephardic Rabbi of Jerusalem, in their respective responsa. Rabbi Obadyah Yosef writes in his Responsa, *Yabi'a Omer*, that when a woman who is no longer able to tolerate the suffering of her *iggun* sees that some non-Orthodox women remarry even though they have only a civil divorce from their previous marriage, “she will turn to the non-Orthodox marriage or completely abandon Judaism with all that that implies.” He states further that “it is understood that an *agunah* who is granted her freedom by the rabbis and therefore marries, continues to observe Torah and commandments; but an *agunah* who is not permitted by a rabbinical court to marry, will either be exposed to depravity or travel to Argentina or some other place to hide the matter of her *iggun*.” (See *Tears of The Oppressed*, p. 92, #27)

Rabbi Messas, a major Sephardic *poseq* of the past generation, states in several of his responsa (dealing with a subject too complex to go into here) that although in marital matters we tend to follow the more stringent opinion, when there is a risk of *iggun* and possible *mamzerut*, we don't do so, for this is a matter where “following the stringent opinion leads to opposite results (*she-nimtza lahumro kqulo*). For were we to follow the stringent opinion..., we would be causing the woman to be

agunah which in turn could lead to *mamzerut*. For as we have seen, many such women, having no other choice, end up marrying a secular Jew in civil marriage and give birth to *mamzerim*.” [*Shemesh u-Magen*, Vol. I, *Eben ha-Ezer*, #11, pp.233-37; vol. II, *Eben ha-Ezer*, #36, pp. 271-76]

“An *agunah* who is not permitted to marry will be exposed to depravity or travel to some place to hide the matter of her *iggun*.”

Similarly R. Broyde quotes two “sweeping statements” from the web site of AGUNAH International to show that “the basic view taken by AGUNAH International and R. Rackman's *beit din* is that every marriage entered into according to Jewish law is void as a matter of Jewish law.” [Section III, pp.10-11] This “sweeping” assessment is not warranted by the context in which these statements are made. Both statements are made by Dr. Susan Aranoff in her article outlining R. Rackman's *beit din* approach in freeing *agunot*, and represents arguments she labeled *kiddushei ta'ut* II and III. However, these arguments are offered by her as additional ones to the central argument justifying the freeing of *agunot*, labeled *kiddushei ta'ut* I, which is based on premarital blemishes in the husband. And although Dr. Aranoff's *kiddushei ta'ut* II and III are well argued, Rabbi Rackman's *beit din* bases its freeing of *agunot* principally on *kiddushei ta'ut* I.

As for the transcript of an alleged conversation between a certain woman and Dr. Aranoff and Mrs. Estelle Freilich, I do not know how Rabbi Broyde got hold of such transcript or how accurate that woman's report is. Nor do I know the full context of that conversation. What I know and can attest to is that Rabbi Rackman's *beit din* never voided a marriage solely on the basis of the husband's lack of support.

Moreover, R. Broyde's assertion that all the talmudic leniencies dealing with the presumed death of the husband are of little use in modern times in cases of recalcitrance seems to reflect a narrow interpretation of these leniencies. I submit that these leniencies are but one example of our

sages' concern for the welfare of *agunot*. Other examples include *kefiyyah* and certain cases of *hafkeqa'at qiddushin* (the cancellation of marriage). Thus in two of the five cases of *hafkeqa'at qiddushin* discussed in the Talmud, (*Gittin* 33a; *Baba Batra* 48b), the rabbis cancel a biblically valid marriage in order to avoid the possibility of *iggun*. Perhaps the most telling example is the one in *Baba Batra*, since Rav Ashi's opinion is also codified in *Rambam Maimonides' Mishneh Torah (Hilkebot Isbut 4:1)* and in the *Shulhan Arukh (Hilkebot Kiddushin # 42:1)*. Rav Ashi maintains that if a man who coerces a woman into accepting a betrothal, his betrothal is not valid. That is because "he acted improperly [towards the woman], therefore, the rabbis likewise acted improperly towards him and annulled his betrothal (*hu 'asah shelo ke-hogen, u-lefikbakb 'asu lo shelo ke-hogen we-aqi'inhu rabbanan le-qiddushab minel*).

"A man can always get out of unwanted marriage; not so in the case of a woman."

Rashbam explains that because of this consideration, the rabbis invalidated a betrothal which is biblically valid. Commenting on Maimonides' ruling in this connection, the *Maggid Mishneh* explains that the reason why the rabbis did not invalidate the betrothal when it is the man who is coerced into it is that upholding such betrothal does not entail the risk of his being trapped in unwanted betrothal. A man can always get out of unwanted marriage, since a man can divorce a woman against her will. This is not so in the case of a woman.

What we have here then, is a case in which the rabbis annulled a biblically valid betrothal in order to avoid the possibility of a woman being stuck in an unwanted betrothal. Incidentally, the *Maggid Mishneh's* explanation is a good rationale for why Rabbi Rackman's *beit din* policy, though voiding the marriage *ab initio* to free the *agunah*, of insisting that the husband must still give a *get* before he can remarry since it is within his power to do so.

To set the record straight, R. Broyde's criticisms should not obscure the fact that his position is not that far apart from that of R. Rackman's *beit din*.

He and R. Rackman are in agreement on many aspects of this controversy. Thus for example, R. Broyde and R. Rackman's *beit din* are in agreement that there are three necessary conditions for *kiddushei ta'ut* to be applicable in voiding a marriage: that the woman must discover a serious defect in the husband after they are married; that the defect must have been present [or latent-see below] in the husband at the time of marriage; and that the woman must have been unaware of the defect at the time of marriage. [Section II, p.4]

In addition, R. Broyde agrees that "with the increased opportunities available to women in the modern world, women now have less patience for flawed husbands and floundering marriages." R. Broyde notes also that "*halakhab* recognizes that there are more and more cases nowadays where, had the woman been aware of the full reality of the situation at the time of marriage, she would have not agreed to marry." [*Ib.*, pp.4-5] This is precisely the underpinning rationale of R. Rackman's *beit din* in voiding certain marriages on the basis of *kiddushei ta'ut*.

Likewise, R. Broyde agrees with R. Aviad Hacoen that "A defect that were it to arise after the marriage had begun, would be grounds for a court to compel an end to the marriage (*kefiyyah*), is ground for *kiddushei ta'ut* if found to have arisen (or been latent) before the marriage began." [p. 5]. This is indeed the position of Rabbi Moshe Feinstein in his *Iggrot Mosheh (Eben ha-Ezer, #79)*.

This has important implications for the expansion of possible blemishes that might be grounds for *kiddushei ta'ut* to include wife abuse and other domestic violence. Both the *Mishnah (Ketubbot 77a)* and Maimonides (*Hilkebot Isbut, 25:11*) call for *kefiyyah* if the husband suffers from certain medical conditions, develops certain physical odors, or if he assumes certain malodorous or repulsive occupations. This means that if defects such as the development of bad odors or the assumption of repulsive occupations had taken place before the marriage, and the woman was unaware of them at the time of marriage, they should be good enough for the application of *kiddushei ta'ut* to free the woman. Hence, pre-existing defects constituting

grounds for *kiddushei ta'ut* need not be limited to cases of impotence, insanity, or epilepsy, as some have argued. Surely, violence, glaring abusiveness, and adultery (if determined to have existed or have been latent before the marriage) are no less severe defects than a malodorous husband.

Most important, R. Broyde agrees that *halakhab* allows for the *umdena* that “certain defects that are now present must always have been present and are thus considered latent defects.” He states further that in the case of these latent defects, “there is no need ...that even the blemished spouse be aware of the blemish, never mind fraudulently hide it; it is sufficient that the blemish be present and not revealed.” R. Broyde observes however that “not all blemishes are latent, and that the explication of the tools available to determine what is a pre-maritally latent blemish and what is a postnuptial development would be very helpful.” [Section II, pp.5-6]. Fair enough. But R. Rackman’s *beit din* maintains that physical and psychological abusive behavior of husbands towards their wives and/or children is a pre-marital latent condition even when manifested only after marriage.

In “Procedural Matters” (Section IV, pp.12-13), R. Broyde raises the question of whether a woman who discover a serious defect in the husband after marriage must leave the marital relationship immediately. He cites several authorities who maintain that she must leave as soon as she discovers the blemish; otherwise her continuing to live with the blemished husband constitutes her acceptance of his condition (*sabra ve-qibbelah*). This opinion, he continues, “would pose significant challenges to the use of *kiddushei ta'ut* in numerous cases.”

But R. Broyde concedes that a number of considerations could account for the woman’s failure to leave the marriage as soon as she discovers the defect, such as her taking some time for planning to leave, or her being unaware of her option to leave etc. However, he fails to refer to a responsum by Rabbi Moshe Feinstein that which addresses a case where the woman lives with an impotent or insane husband for seven weeks

before going to the rabbi or the *beit din* with her complaint. R. Feinstein ruled that while the *beit din* must ascertain why she did not complain immediately as soon as she discovered his condition, if she offers a reasonable explanation (*ta'am bagun*) or valid excuses (*terutsim nekhonim*) for her delayed complaint, we do not say that she reconciled herself to his situation (*sabra ve-qibbelah*) and therefore she has no recourse. (*Eben ha-Ezer*, Part III, sec. 45, pp.489-90; a brief synopsis of this responsum appears in *Tears of The Oppressed*, p. 92, # 28). The operative words in this responsum are clearly “*ta'am bagun*” and “*terutsim nekhonim*”. The circumstances listed by R. Broyde as possibly accounting for a woman’s failure to leave immediately upon discovering the offending defect fall within the parameters of *ta'am bagun* and *terutsim nekhonim*, as do other circumstances such as when the woman has no place to go to, or when the rabbi or the *beit din* to whom she turns for help upon discovering the defect advise her to “try and make a go of it” for the sake of *shalom bayit*.

“The controversy between Rabbi Broyde and Rabbi Rackman’s beit din comes down to what constitutes latent defects.”

Essentially, then, the controversy between R. Broyde and R. Rackman’s *beit din* comes down to what constitutes latent defects, which R. Broyde concedes explicitly may serve as the basis for the application of *kiddushei ta'ut* to free the *agunot*. And here reasonable people may differ.

Suffice it to say, that the position of R. Rackman’s *beit din* is that defects which are in total discord with any reasonable concepts of marriage, including physical and psychological abuse, sexual molestation, and adultery (which more and more endangers the life of the spouse—in one of our *beit din* dealt cases, the husband, in addition to being abusive and cruel, admitted to his wife that he engaged in unprotected sex before and after marriage—see [www. agunahintl.org /sample rulings](http://www.agunahintl.org/sample_rulings))—are types of behavior that renders the perpetrators unfit to be husbands, and are the sort of defects and character flaws that must be presumed to have been latent conditions pre-

dating the marriage. People just don't turn into scoundrels out of the blue. It must be pointed out that in our questioning the women who that come before our *beit din*, we always investigate to determine that the women had no inkling before marriage of the behavior manifested by the husbands after marriage. We also inquire why the women stayed with their husbands (if they did) after discovering his defects, and their answers are invariably reasonable and valid explanations. Recent research on the subject (including Rabbi Abraham Twerski's seminal work, *Shame Born In Silence: Spouse Abuse In The Jewish Community*) supports our position.

Finally, however effective R. Broyde's suggested solutions of "prenuptial agreements" and the "tripartite solutions" may (or may not) prove to be in avoiding *iggun* in the future, they provide no relief for women who are already stuck in unbearable marriages. R. Rackman's *beit din* takes up that challenge. Instead of being criticized, R. Rackman should be celebrated as the only Orthodox leader to face the new reality head-on boldly and creatively, basing his solution on an enlightened and logical (rather than narrow and restrictive) interpretation of the precedents established by R. Moshe Feinstein in using *kiddushei ta`ut* to free *agunot*.

Response of Dr. Susan Aranoff

The Rabbi Emanuel Rackman *beit din* first began functioning in 1996 and was publicly announced in February 1997. In 1997 the Rackman *beit din* published an article outlining its approach to *kiddushei ta`ut* as a means of freeing *agunot*. The article dealt with classical *kiddushei ta`ut* based on a premarital blemish in the husband, which we labeled *kiddushei ta`ut* I. The article also presented additional justifications for rulings of *kiddushei ta`ut* to liberate *agunot* in light of the impotence of modern *batei din* and the enhanced status of women in modern times. These additional arguments were labeled *kiddushei ta`ut* II and III.

Rabbi Broyde and his colleagues at the Beth Din of America challenged all three of our approaches to *kiddushei ta`ut*, and R. Broyde continues to do so in his review essay of *Tears of the Oppressed*. While R. Broyde's objections to the Rackman *beit din* are quite apparent, what is less obvious is that over the years R. Broyde has moved closer to the Rackman *beit din*'s position on a number of key elements of classical "*kiddushei ta`ut* I." It is my hope that this continuing exchange will clarify the remaining points of contention, further narrow the gap between us and help move us toward a more widely accepted halakhic solution that will finally put an end to the suffering of *agunot* and restore dignity and justice to Orthodox family law.

The Rackman *beit din* is in full agreement with R. Broyde that classical "*kiddushei ta`ut* I" entails the wife discovering a serious blemish in the husband, which predated the marriage and of which she was unaware until after the marriage. Back in 1997-98, R. Broyde and his colleagues insisted, in addition, that in order for a woman to have a viable claim of *kiddushei ta`ut*, she must have left the marriage immediately upon discovering the defect. The Rackman *beit din*, on the other hand, maintained from the outset that numerous factors such as attempting to rehabilitate the husband through

therapy, listening to rabbis who counsel remaining in the marriage, preparing financially to leave, fear of physical retribution for leaving absolved the woman from a requirement to exit the marriage immediately. In his review essay, R. Broyde has clearly moved closer to our position by allowing that there are many possible justifications for a woman to stay in a failed marriage for a prolonged period of time without losing her right to claim *kiddushei ta`ut*.

"I propose that the Orthodox rabbinate spearhead and sponsor research; AGUNAH International would be pleased to be a partner."

Back in 1997-98 R. Broyde and his colleagues criticized our conceptualization of classical "*kiddushei ta`ut* I" because we expanded the scope of *kiddushei ta`ut* I beyond the limited cases found in the responsa of R. Moshe Feinstein (homosexuality, insanity, impotence and perhaps apostasy). The Rackman *beit din* maintained that R. Feinstein never deemed himself to be a legislator who closed the canon and that additional grounds such as pre-existing personality disorders like drug and alcohol addiction and abusiveness were valid grounds for "*kiddushei ta`ut* I." In his review essay, it is clear that R. Broyde has moved closer to our more expansive view of the class of defects that may be valid grounds for *kiddushei ta`ut* and away from rigidly limiting *kiddushei ta`ut* to those defects enumerated by R. Feinstein.

However, though R. Broyde now allows for expanding the possible blemishes that might be grounds for *kiddushei ta`ut* I, he continues to question whether wife abuse and other forms of domestic violence are a manifestation of a premarital disorder which would constitute grounds for *kiddushei ta`ut* I. R. Broyde indicates that further research on the nature and origin of domestic violence would be a valuable addition to

the literature of *kiddushei ta`ut*. Given the pervasiveness of domestic violence in *agunah* cases and the centrality of this issue in the quest for solutions to the *agunah* problem, I propose that the Orthodox rabbinic spearhead and sponsor such research. AGUNAH International would be pleased to partner in such a project.

For the moment, while R. Broyde may question whether we have enough data to support an *umdena* that a wife abuser can be assumed to have a pre-existing personality disorder, the Rackman *beit din* is convinced that we have enough case-by-case data and support in existing literature and expert opinion to validate a determination that the domestic violence encountered in our cases pre-existed the marriage. *Agunah* after *agunah* describes an almost identical experience with her abusive husband. The husband was highly attentive and solicitous before the marriage. Shortly after the wedding, sometimes within hours, the husband begins to intimidate the wife with bursts of anger and to humiliate her with disparaging remarks. He displays an obsessive need to control his wife's social and family contacts. He uses his control of family finances to dominate the wife. Pregnancy almost always exacerbates the abuse as the husband views the expected child as "competition" for the wife whose exclusive attention he craves. The bouts of abuse are followed by the husband's avowed contrition, but he always reverts to his abusive pattern. Countless interviews I have had with domestic violence specialists and books like *The Batterer* by Dr. Donald G. Dutton and *The Shame Borne in Silence* by Rabbi Dr. Abraham Twerski confirm this profile of wife abusers. What we are dealing with is a well documented and largely untreatable pre-marital personality disorder, which the Rackman *beit din* has deemed grounds for *kiddushei ta`ut* I.

After seven years of debate between R. Broyde and the Rackman *beit din*, the disagreement between us concerning *kiddushei ta`ut* I has been reduced to the question of whether *batei din* can decide on a case-by-case basis or based on a wider *umdena* that wife-abuse indicates a pre-marital defect in the husband. The Rackman *beit din* feels the evidence favors its

position which results in freedom for countless *agunot*, a clear desideratum of generations of sages who sought every possible leniency to free *agunot*.

On now to questions which R. Broyde raises after quoting excerpts from my writings about *kiddushei ta`ut* II and III, which revolve around the wife's mindset when she consented to the marriage. *Kiddushei ta`ut* II is based on the presumption that a woman would not knowingly consent to a marriage in which she could be virtually imprisoned by a cruel husband. *Kiddushei ta`ut* III emphasizes that a woman would not knowingly consent to a domestic partnership based on *gufah qanui*, that the husband acquires control of her sexual freedom and that this control survives even if he abuses or abandons her or has extra-marital sexual relations.

"The disagreement concerning kiddushei ta`ut I is whether batei din can decide on a case-by-case basis or on a wider umdena that wife-abuse indicates a pre-marital defect."

R. Broyde takes issue with these approaches to *kiddushei ta`ut* because the mistake that nullifies the wife's consent to the marriage is not a pre-existing defect in the husband but a defect in the wife's understanding of what she was agreeing to at the time of the marriage. In R. Broyde's scheme of things, these approaches to *kiddushei ta`ut* void or eradicate all marriages since every woman whose husband turns out to be problematic could claim that she never would have agreed to be chained to a man who turns out to displease her in some way.

I will first deal with R. Broyde "voiding of marriage" objection on a practical basis and then on a theoretical basis. On a practical basis, almost without exception, the cases of *agunot* who turn to the Rackman *beit din* involve *kiddushei ta`ut* I, women chained to deeply flawed men whose aberrant behavior early in the marriage indicating a serious personality disorder that pre-existed the marriage. In such cases, *kiddushei ta`ut* II and II serve only as adjunct arguments in support of the *beit din*'s ruling of *kiddushei ta`ut* I.

While in practical terms, *kiddushei ta`ut* I is at the heart of our *beit din*'s proceedings, the theory behind *kiddushei ta`ut* II and III as independent grounds for releasing an *agunah* should be explored. R. Broyde's takes the position that the annulment of marriages based on gross misconduct after the marriage results in all marriages being void or, as he has written in the past, "eradicated." This position reflects, I believe, a failure to appreciate the role of common sense and the need to make distinctions in judicial rulings. Perhaps an analogy is the best way to make my point. Suppose an employer contracted with a worker for several years of labor in return for room and board as well as a cash salary. A few months into the contract the worker is alarmed when the boss repeatedly supplies spoiled food and inadequate heat and when working conditions deteriorate creating risk of injury to the worker. The worker attempts to negotiate a solution to these problems but to no avail. When the worker comes to court to break the contract, would the judge take the position that this contract cannot be broken because then all worker-management contracts will be void anytime workers register any sort of complaint? Of course not. The judge would release the worker because, when signing the contract, the worker never had in mind to accept such abusive working conditions. Such a verdict would not lead to the absurd conclusion that all workers' contracts are void.

Likewise, releasing women from marriages that are in total discord with any reasonable concept of marriage does not void all marriages. Nor would this mean that marriages are voided when a spouse becomes gravely ill. (I refer here to R. Broyde's jarring example of cancer.) For wouldn't a bride, if queried under the *huppah*, say that should her husband fall ill she would be grief stricken and try to nurse him back to health?. Thus the *umdena* would be that unforeseen illness, unlike unforeseen brutality, would not be grounds for voiding the marriage.

Interestingly, I believe that the prenuptial agreement that R. Broyde presented at the end of his review article, embodies the concept of *kiddushei ta`ut* II and III. For R. Broyde's formula

takes the position that when there has been a fifteen-month breakdown in the marriage, even when the husband has been excluded from the marital home under duress, the marriage will be considered a nullity or a *get* will automatically be issued through irrevocable agency. This is very close to *kiddushei ta`ut* II, which maintains that women want marriages that can be terminated when the husband is guilty of grievous misbehavior that results in an irreparable breakdown of the marriage.

"This position reflects a failure to appreciate the role of common sense and the need to make distinctions in judicial rulings."

As to the surreptitiously taped conversation which R. Broyde made use of, what the out-of-context quote indicates is that in deliberating a ruling of *kiddushei ta`ut*, our *beit din* considers factors such as the couple living apart, the cessation of marital relations, the failure of the husband to support the wife. Other relevant information which is elicited and considered includes the husband's having begun a new intimate relationship, the husband being the plaintiff in the civil divorce proceedings, the failure of the husband to contest the civil divorce, as well as many other factors particular to each case. All of these are indicators that the husband has quit the marriage, leaving only the fiction that a marriage still exists.

Furthermore, the Rackman *beit din* takes the position that rabbis should not remarry the recalcitrant husband to another wife despite the fact that his first wife has been freed to remarry through an annulment. This is because while the wife has no route to freedom other than an annulment, the husband has the power to end the marriage by issuing a *get* and should be prevented from remarrying until he does so. The Babylonian Talmud, *Ketubbot* 75b, raises questions about the appropriateness of making annulment available to a husband given the fact that he can easily exit the marriage by issuing a *get*.

As for the Rabbinical Council of America (RCA) pre-nuptial agreement which R. Broyde advances

as a remedy for the *agunah* problem, it is at best a flawed and limited solution. AGUNAH International has already dealt with *agunot* each of whom suffered close to two years of agony before receiving her *get* despite having signed the RCA pre-nuptial. One woman ended up paying extortion to secure her *get*. Neither received the \$100-125 per day which the husband was obligated to pay due to having withheld the *get*. Both women were disappointed with the utter failure of the Beth Din of America to invoke the pre-nuptial agreement to secure the financial award due to them. Both said they felt the pre-nuptial had been worthless to them. So the efficacy of pre-nuptials is questionable at best.

“Respect and affection for Orthodox marriage has been transformed into rejection and fear.”

A full discussion of the limitations of the pre-nuptial is beyond the scope of this article. But it goes without saying that for the thousands of *agunot* without a pre-nuptial and already trapped, it is meaningless.

Far from the Rackman *beit din* undermining Orthodox marriage as R. Broyde maintains, it is

the refusal of Orthodox rabbis to terminate dangerous, insufferable marriages that has done the damage. Countless couples in Israel, who might otherwise be attracted to traditional Orthodox nuptials, marry in Cyprus or set up households without any marriage ceremony rather than submit to the Israeli Orthodox marriage and divorce system. Former Israeli Sephardic Chief Rabbi Bakshi Doron has repeatedly advocated civil marriage in Israel in order to quell the growing scorn for Orthodox family law. Here in the United States, I receive more and more phone calls from women inquiring about how to armor themselves against the dangers of Orthodox marriage. Respect and affection for Orthodox marriage has been transformed into rejection and fear.

Three decades ago, Associate Chief Justice of Israel Menachem Elon proposed a *taqqanah* as a solution to the *agunah* problem. In the wake of the ferment created by the Rackman *beit din*, Rabbi Shlomo Riskin and now R. Broyde have suggested solutions to the *agunah* problem. But only Rabbi Rackman, filled with pathos for the suffering of *agunot*, has had the courage to take action, based on a persuasive, just and compassionate reading of the letter and spirit of *halakhab*.

Response of Susan Weiss

At the outset I state that my response is a critical one. I found Broyde's critique of Hacoheh's book to be apologetic, and without humility, empathy and vision. I will address each failing in turn. Yet before I do so, I must applaud Broyde's willingness to attach the "Tripartite Agreement" to his review. Though I feel compelled to respond to Broyde's critique, his attaching the "Tripartite Agreement" indicates that, notwithstanding his vitriol against Hacoheh, the two men may have more in common than Broyde is willing to admit. Both are trying to introduce a proposal that may not be ideal, but is halakhically satisfactory.

I. Applaud: The Tripartite Agreement

The Tripartite Agreement offers a comprehensive solution to the problem of *get* recalcitrance (1) by appointing an agent for delivery of the *get*; (2) by issuing a *taqqanah* allowing the rabbis to declare a marriage void; and (3) most importantly, by imposing a condition on the marriage that will render it null and void in the event that the husband and wife are living apart for a period of fifteen months. This suggestion resurrects, as R. Broyde knows, a solution suggested by Turkish and French rabbis at the turn of the twentieth century, and supported by Rabbi Prof. Eliezer Berkowitz in his important book, *Tenai be-Nissuu'in ve-Gerushin*.

The Tripartite Agreement is a significant improvement over past proposals.

Because it takes a realistic vision of modern married life—acknowledging that separation for an

extended period of time is the most accurate measure of whether or not a marriage is over, not the opinion of either of the parties, not allegations of fault, not the finding of fault. It is indeed absurd for a court to debate the grounds for a divorce when the parties have been living apart for a significant period. The marriage is clearly over, irrespective of the cause of the breakdown. Surely it does not matter if the marriage ended because the husband had bad breath or committed adultery. (The former, ironically, being talmudic grounds for divorce, whereas the latter is not).

Second, because the Tripartite Agreement is a good attempt to acknowledge the main philosophical problem of Jewish divorce: that of dominion. The agreement wrests the ultimate power to end a marriage from the hands of a recalcitrant and embittered husband and transfers it to those of the rabbis who have been authorized to declare the marriage over if the parties are living separately. This is a comprehensive solution to the problem of the *agunah* that far surpasses others that merely fashion a monetary incentive to the husband to give a divorce—like the current RCA Prenuptial Agreement.¹

In addition to emphasizing the substantive improvement of the Tripartite Agreement over previous suggested solutions to the problem of the *agunah*, I suggest that the Tripartite Agreement is also the direct result of the untiring efforts of people like R. Rackman, R. Dr. Aviad Hacoheh, Dr. Susan Aranoff and the multitude of women's organizations who demand all-inclusive solutions to the problems of Jewish women and divorce. Without such efforts of activism, I doubt whether R. Broyde would have attached such a proposal like the Tripartite Agreement to his critique.

¹ For a critique of the RCA prenuptial agreement, see my article: "Sign At Your Own Risk— The 'RCA Prenuptial' May Prejudice The Fairness Of Your Future Divorce Settlement" *Cardozo Women's Law Journal* (1999). Note that this article is not referred to in the website of the Orthodox Caucus mentioned as the source for a review of the literature regarding prenups by Rabbi Broyde in footnote 48.

II. No Humility

The tone of Prof. Broyde's article is fraught with an air of condescension, sweeping generalizations, rhetoric, and hyperbole. Let's start with the title: "An *Unsuccessful Defense* of the *beit din* of Rabbi Emanuel Rackman..." Here Broyde elegantly dismisses both R. Rackman, whose *beit din* is in need of "defense"; and Hacoheh, whose efforts to do so are "unsuccessful." Lest anyone doubt his dismissal, Broyde expands on it in the very first section, saying without flinching that: "Rabbi Dr. Aviad Hacoheh's proposed solution to the *agunah* problems is consistent with neither general halakhic principles nor with general marriage theory and thus is *wrong*." (p. 3, emphases mine—S.W.)

Broyde continues relentlessly, throughout his critique, to similarly label Hacoheh's conclusions or analysis; as well as to support his position with rhetorical conceits like: "it is obvious," or "one comes quickly to the conclusion," and hyperbolic adjectives like: "fundamentally flawed" or "pleas of the desperate." Here is a sampling:

The Tears if the Oppressed ...ultimately falls short... flaws overwhelm all else. (p. 3)

Rabbi Hacoheh's textual understanding of *umdenah* and its broad application is *incorrect*...Rabbi Hacoheh's presentation of the *Shulhan Arukh* and *Rama* is a bit *twisted* ... (p. 8)

The Tears of the Oppressed fails as a work advocating any change in the normative *halakhab*...Hacoheh's conclusion is... flatly *untenable*... [His] description... is equally *unfounded*... If this is what R. Hacoheh means, then this statement and this book are valid and within the framework of *halakhab*, but *hardly novel*... [R. Hacoheh's thesis is a] *plea of the desperate*, reflecting a *misunderstanding* of how *batei din* work...[It]

is *fundamentally flawed* in its lack of definitions and perspective on the problem of *igun*...(p. 13).

It is *obvious* to this writer that when one constructs any theoretical construct of marriage one comes *quickly to the conclusion* that blemishes that did not exist prior to the marriage *cannot be grounds* for annulment...This book *gives little or no thought* to the marital institution... *No one is benefiting from Rabbi Rackman's conduct*, including the woman whom he claims to release from marriage. (all emphases mine—S.W.)

I cannot avoid the impression that R. Broyde doth protest too much.

III. No Empathy

R. Hacoheh's book is entitled *The Tears of the Oppressed*. His legal analysis flows from his empathy to those tears. Legal theorists, particularly feminist theorists, have written on the importance of empathy in engendering crucial changes to the status quo.² The philosopher Richard Rorty has written that morality is about the wider and wider expressions of empathy.³ Hacoheh's thesis acknowledges both the need for a change in the status quo, as well as the threat to the moral integrity of Jewish law that the problem of the *agunah* raises.

Broyde ignores the tears of the oppressed, or at least suppresses them. For him, Hacoheh's thesis is not about women's pain. What Broyde seems most concerned about is whether or not Hacoheh is suggesting that a major defect of a husband that arose *after* the marriage may be the basis for ending it, or whether Hacoheh thinks that he can label all defects as *latent* and present at the time of the marriage. Both of these possibilities are rejected by

² Lynne N. Henderson, "Legality and Empathy," *Feminist Jurisprudence* 244, at 246-7, (Patricia Smith Ed., (1993).

³ Richard Rorty, "Philosophy and Social Hope," 72-103 (1999); *Truth and Progress* 186-227 (1998).

Broyde, who discards the first as halakhically impossible (“profoundly mistaken,” p. 9; “just a charade.” p. 12)

R. Broyde deflects the issue raised by the plight of the *agunah* from the tears of the oppressed to the casuistic manipulations of the law. He pivots and parries with Hachohen as if he were in a moot court room, or in a yeshiva *beit midrash*, instead of dealing with real women’s lives.

IV. Apologetics

There are quite a few moments in Broyde’s article in which he overstates his case and takes advantage of an audience that is less well-versed than he in the legal and halakhic literature. I give examples from the particular to the general. The basic upshot of these overstatements and distortions is that R. Broyde underplays R. Hachohen’s contribution. And Broyde dismisses the need for a solution that would wrest power away from recalcitrant husbands by whitewashing the source of the problem—the fact that Jewish marriage is not an equal partnership and that the rights of exit differ radically. A man has exclusive rights to his wife’s sexuality (having made an acquisition [*qinyan*]), and only he can agree to their divestiture.⁴

1. Regarding the widespread use of *kiddushei ta’ut*, Broyde writes:

“It is possible to construe Rabbi Hachohen’s arguments to be limited to situations where the defect, though it “arose” after the marriage took effect, was latently present before the marriage was created. ... Rabbi Moses Feinstein adopted that view, and it is *widely used* by various *batei din* in situation that fit such a case. We hardly need a book to explain to us something *widely known* and used by *dayanim* throughout the Torah world. (emphases mine—S.W.)

If such a solution is so widely known, why do we

not know about it? I have been working professionally in the area of Jewish divorce in Israel for over twenty years. During those years, I have not been privy to even one case in which the Israeli Rabbinical Courts declared a marriage over on the basis of *meqah ta’ut* alone. The closest I got was a recent case in which the rabbi held that the witnesses to the marriage were not kosher, thereby rendering the marriage void *ab initio*. One rabbi involved in the case also referred to the fact that the husband suffered from a mental defect before the marriage. But this was not part of the final decision. (The husband had been in a vegetative state for seven years before the rabbi voided the marriage on a technicality.) And the only American case I know of is one in which the husband raped his children and was sitting in jail for thirty-five years. The marriage was held void on the basis that the husband was a homosexual, not on the basis of the rape. A book that explains the “hardly novel and widespread” use of latent defects to end a marriage is indeed an important contribution. The *Tears of the Oppressed* does just that.

In note 25 R. Broyde says that he was involved in “several such cases.” He would do us all a great service if he would publish the facts of these more recent cases and the halakhic precedent cited in them, so that we would all benefit from those widely known decisions.

2. Regarding balancing, he writes:

“The general attitude of *halakhab* toward matters of *iggun* is to seek to balance two integral, opposing values: on the one hand... the rabbinic tradition to employ leniency when encountering cases of women who would otherwise become tied to lifeless marriages; on the other ...the imperative to proceed cautiously in recognition of the gravity of releasing a married woman without a *get*.”

R. Broyde overstates the balancing act done by *halakhab*. My experience indicates that little balancing is done. Rabbis are far more concerned with the problem of *esbet ish* than with *iggun*. The

⁴ Rabbi J. David Bleich, “*Kiddushei Ta’ut*: Annulment as a Solution to the Agunah Problem,” *Tradition*, 33:1 (1998). p. 115.

rabbi will often claim that this concern is prompted by fear of the proliferation of *mamzerim*. I suspect it is a concern for the loss of male control over the ending of a Jewish marriage. This concern is echoed in some of R. Broyde's fearful ruminations that "by expanding the category of error in the creation of marriages to encompass changes in people following marriage *would fundamentally destroy every Jewish marriage...* Jewish marriage will become a *vehicle of convenience, discarded at the roadside of life* the moment trouble occurs." (emphases mine—S.W.)

Why would taking the keys to ending the marriage from the hands of vengeful husbands and giving them to a (hopefully) neutral *beit din* destroy Jewish marriages?

3. Regarding Jewish marriage as a private matter, Rabbi Broyde writes:

"In truth the *agunah* problem is —*at its core* —*insoluble* (sic) in a global manner because marriage as a *private law matter* subject to the dissolution only with the *consent of the parties* is part of the structure of Jewish marriage..." (emphases mine—S.W.)

Borrowing from Rabbi Broyde, I must label this statement "fundamentally flawed." Jewish marriage is not a private law matter subject to the dissolution only with the consent of the parties. The dissolution of a Jewish marriage is dependent on the will of the husband. It is true that, *de jure*, since the legislation of Rabbenu Gershom, *Me'or ha-Golah*, a woman must accept the *get* in order for the marriage to be over. But this legal balancing act was only partial. Unlike their wives, men have legal tools at their disposal—e.g., the dispensation of one hundred rabbis—to overrule their wives' refusal to agree to the divorce. And should a man choose to set up a new life and home, the children of his union with another unmarried woman would not be subject to the stigma of *mamzerut*. *De facto*, most Jewish men can leave their wives who refuse to accept the *get* with little consequence to their

action.

Using the insights of Catherine MacKinnon,⁵ I also object to Broyde's invocation of abstract legal argument about reciprocity and equality regarding a situation that is not socially or economically equal. Equality in the air cannot be compared with subordination on the ground.

4. Regarding Jewish law and family values, R. Broyde writes:

"Jewish law recognizes marriage as a central vehicle for family values. ...global recasting of Jewish marriage will encounter *fatal problems of definition.*" (15)." (emphases mine—S. W.)

In this sweeping statement, what exactly are those values? R. Broyde fails to identify the values he refers to, how they are protected under the existing system, and in what sense recasting Jewish marriage will encounter fatal problems. "*Fatal*" problems? The lack of specificity makes a detailed response impossible.

V. Charades and Fictions

Charades and fictions are the survival tools of the law. They allow the legal system to be maintained when times may render the rules obsolete. The Israeli Rabbinate used such fictions to enable the state and its farmers to survive economically during the sabbatical years. Charades and fictions are also used to insure justice when the implementation of the formal law results in inadequate solutions for the human situation being evaluated in accordance with the rule of law. The law abounds with such fictions—like implied contracts; or presumptions (*umdanot*). Rather than constituting fatal blows to the *halakhab*, R. Hacoheh's creative use of *umdanot* and expansion of latent defects that might be found in a marriage is a way of ensuring that Jewish law survives.

⁵Catherine Mackinnon, *Feminism Unmodified: Discourses on Life and Law* (1987).

VI. No Vision

R. Broyde asks seemingly rhetorical questions:

When should women (or men) be encouraged to leave the confines of a “dead” marriage?

Should a rabbinical court consider a woman an *agunah* when she and her husband are in civil court fighting over the civil divorce?

...Does it matter what conditions are imposed and by whom? (14)

Sociological and historical studies have shown that law does not have the power to encourage or curtail divorce.⁶ Marriages are made in heaven and are ended on the ground. As presently used, the *get* does not insure against divorce—it only facilitates extortion. As yes, such, a *get* should be given unconditionally. Yes, even if the parties are

fighting in the civil courts, and even if the wife refuses to go to the *beit din*. R. Broyde’s vision of a Jewish divorce law as maintaining family values, or of curtailing divorce, is a fantasy—or borrowing again from him, a “plea of the desperate” to maintain the status quo. Furthermore, R. Broyde’s idea of giving the freedom to the marrying couple to decide how to fashion their divorce is not realistic. It will, at the end of the marriage, be subject to the manipulations of the vengeful or recalcitrant spouse—the original contract notwithstanding.

Once I appeared to argue a motion in the chambers of Judge Vardi Zylar, Chief Judge of the Jerusalem Circuit Court. There the judge taught me an important lesson: “More important than what you have to say, is what your adversary is saying. Listen carefully.” I suggest that R. Broyde reread the book.

⁶ See e.g. Lynn Carol Halem, *Divorce Reform* (1980), describing her book as the “history of efforts of American society to understand the etiology of a disease called divorce and to find a cure,” *Id.* at 284. The author maintains that divorce law in American society has its origins in the Christian attitude towards marriage as “immutable.” In that context “fault” changes along with different explanations for the origins of the pathology of divorce. She also shows how divorce laws, in their various historical permutations, have been unsuccessful in their attempt to curtail the rate of divorce.

Honesty and Analysis: A Reasoned Response to Passionate Letters

Michael J. Broyde*

As Rabbi Dr. Daniel Sperber is an eminent Torah scholar, his words deserve close attention. I am in some agreement with much of what R. Sperber wrote about the nature of *halakhab* and the requirements of our time. Compassion and sensitivity are among the hallmarks of classical normative *halakhab*, particularly in cases of *iggum*, and should be among the catalysts for innovative “problem solving.” The chained women, shackled by their recalcitrant spouses, do indeed cry aloud both to God and to the rabbis to find a compassionate and equitable solution to their tragic plight, and this search must be within the parameters of traditional normative Jewish law.¹

However, the invocation of “*Torat Hayyim*” as a catch-all phrase to justify reinterpretation of *halakhab* is reminiscent of non-Orthodox treatments of Jewish law where serious analysis of the sources, their underlining principles and the need for consistency with Talmudic doctrines, are all given short shift. It produces result-oriented *halakhab* where the will for change is enough, as if that alone can create the way. Instead, classical *halakhab* examines innovations—even ones that generate pleasantness and seem to resolve urgent social needs—to ensure that they are textually and analytically consistent with the classical Jewish law texts. If not, then they are discarded, even if the

person advocating such is an ordained Orthodox rabbi. Unfortunately, the proposals actually put forward by the *beit din* of Rabbi Rackman are not within the parameters of traditional normative Jewish law, as I have pointed out in both the original review and this reply. Notably, R. Sperber does not say otherwise, for reasons that any astute reader will comprehend.

In fact, R. Sperber argues for the use of the principle of *kiddushei ta'ut* only “in certain cases where the defect can be proven to have been existent at the time the marriage was contracted” — a general position which I certainly endorse, as have many eminent *poseqim* of previous generations, including Rabbi Moshe Feinstein. Yet this assertion has almost nothing to do with the original formulation of *Tears of the Oppressed*.

Thus R. Sperber’s enthusiastic general endorsement of Hacoheh’s book might give readers the mistaken impression that R. Sperber identifies with the more sweeping statements that Hacoheh originally made—which apparently he has now withdrawn—allowing for the ending of marriages in cases where there is no evidence that a defect arose prior to entry into the marriage, or the even more far-fetched presumptions as those put forward by R. Haim Toledano, Dr. Susan Aronoff in the name of

* My thanks to Dr. Moshe Bernstein, Rabbi Michael S. Berger, Marshall Cohen, Rabbi Shmuel Kadosh, Daniel Schlanger, Prof. David Shatz, Dr. Thomas Spira, Rabbi Gil Student, Rabbi Eliyahu Teitz, Rabbi Jeremy Weider, Rabbi Mordechai Willig and Dr. Joel Wolowelsky. Particularly without the help of Joel Wolowelsky, this article would not be in the form it is in.

¹ The example given by R. Sperber in his first footnote seems uniquely ill-suited to this proposition, and completely *malapropos* to the matter at hand. It is important to note why. Rav Herzog’s discussion of women inheriting recognizes that *halakhab* cannot accomplish this goal and proposed the use of a *taqqanab*—a legislative device—to correct this issue. *Taqqanot* are, by their very nature, not to be examined to determine whether or not they are grounded in *halakhab* (as they are not), but only to determine if the area of law is one for which *taqqanot* may be enacted. Our topic under discussion is generally thought to be one in which *taqqanot* do not work, and thus proposals in this area have to be grounded in a proper interpretation of Jewish law without any *taqqanot* in place.

the R. Rackman's *beit din*, or by Susan Weiss in her own name. I assume that R. Sperber does not endorse these extra-halakhic solutions, as they lack the precedential sources that he—and I—agree are needed to validate any such proposal.² The use of the somewhat mythical “*Torat Hayyim*” doctrine is no substitute for the rigorous evaluation of the substance of the arguments. Hence the arguments of the supporters of the R. Rackman's *beit din* come up short.

Simply put, R. Sperber seems to me to be endorsing a book that Hacoen did not write about an application of *kiddushei ta'ut* that does not fit Hacoen's original presentation.³ In truth, what disturbs me about R. Sperber's comment is its penumbra. R. Sperber's points—halakhically tenable in their own right and, outside of this discussion, perhaps even worth saying yet again in the right context—have the effect of appearing to validate much conduct that is not proper as a matter of Jewish law, and I assume is a concern to R. Sperber. I have no explanation why R. Sperber—eminent Torah scholar that he is—appears blind to this foreseeable consequence of his writings in their larger context. Perhaps R. Sperber's judgment been clouded by his legendary compassion for these enchained women, and this has precluded him—in this case—from engaging in his typical close reading of the Talmudic, medieval and latter-day sources. I am at a loss otherwise to explain this lapse.

Dr. Hacoen, Rabbi Toledano, Attorney Weiss and Dr. Aronoff have spent a significant amount of

space restating points already made in Dr. Hacoen's book or elsewhere. I will spare the reader the necessity of rereading my rejoinder to them and simply make the following brief points.⁴

I wrote my review under the assumption that the final chapter of *Tears of the Oppressed* entitled “General Principles to be Derived from the Precedents” (which is a nine paragraph summary of the whole book) was a summary which conveyed accurately the true intent of the book's author. Paragraph seven of that chapter is boldly entitled “Timing of the Onset of the Blemish” and states:

The choice of halakhic methodology is inferable from the issue of the timing of the onset of the blemish. Here, too, there is great variability among the *poskim*. Some adhere to the requirement that the blemish must have been in existence prior to the marriage—or at least before *kiddushin* takes place—in order for the principle of *kiddushei ta'ut* to be applied. *Other poskim allow for blemishes that arose after the marriage.* [emphasis added]⁵

Aviad Hacoen writes that he did not intend this and he agrees that all blemishes—according to all *poseqim*—must be in existence prior to the marriage taking place before any claim of *kiddushei ta'ut* can take be advanced; any statements to the contrary in *Tears of the Oppressed* are to be discounted.. Had he stated this as clearly⁶ in *The Tears of the Oppressed*

² I do not at all understand R. Sperber's reference to Justice Elon's Foreword to *Tears of the Oppressed*. Even a casual read of the Foreword makes it clear that Elon does not consider Hacoen's proposal to be a significant one, and he does not expect it to considerably ameliorate the plight of the *agunah*. Indeed, Elon notes (p. IX, Foreword) that this work is an important study of “another approach which might offer some, **even slight**, solution for the problem of *agunot*” (emphasis in the original), which is far from the enthusiastic endorsement Sperber suggests Elon gave. Rather, as Justice Elon notes himself in his Foreword, he advocates a different solution to this problem.

³ As I have noted before, this proposition has been stated many times by numerous eminent *poseqim*.

⁴ A fuller and detailed response to these critiques will gladly be sent to anyone who emails me and requests it. My email address is mbroyde@emory.edu.

⁵ *Tears of the Oppressed*, page 96.

⁶ Clarity is extremely important in this matter and a simple misplaced modifier changes everything. For example, while Hacoen tells us that his summary of Rabbi Simha of Speyer is clear and addresses pre-marriage blemishes, since he writes “Rabbi Simha of Speyer clearly establishes that in the case of a major blemish [in this case, blindness] where the woman was not aware of it *prior to the marriage* it is a mistaken marriage,” in fact a much clearer form of summary – completely lacking ambiguity—would have been “Rabbi Simha of Speyer clearly establishes that in the case of a major blemish present in the husband *prior to the marriage* where the woman was not aware of it, it is a mistaken marriage.” The misplaced modifier creates ambiguity, as a reasonable person could read it as referring to her knowledge, rather than to the presences of the blemish.

itself as he did in his response to my review, I would not have found it necessary to write a review highlighting this inaccuracy.⁷ Since I have no reason to doubt Hacoheh's sincerity, I hope that this point will be carefully clarified in the second edition of the book. Given the potential for error on a matter of such profound halakhic significance, consideration should be given to fixing it in all the copies the publisher has not yet sold by covering this paragraph with a sticker containing the corrected text.

At the same time, I think it disingenuous to suggest that this book was an academic work unrelated to a defense of R. Rackman's *beit din*. The public relations surrounding the publication of the book,⁸ its financial subsidy by supporters of the *beit din* of Rabbi Rackman, and simply the list of respondents in this issue belie that disclaimer.

"Anyone can solve the agunah problem by relying on views that are rejected by halakhah."

I am therefore willing to concede that I did not review the book as an academic adventure but as the practical halakhic suggestion that it was. In this respect it is important to focus on Hacoheh's comments concerning the Maharam. Academics would find it relevant that centuries ago he proposed an approach that would support the *beit din* of R. Rackman. Halakhists, on the other hand, would be more concerned with the fact that normative *halakhah*, as it developed, did not allow that position to take root. (Indeed, there is hardly any issue in contemporary halakhic practice that does not have *poseqim* of major stature who centuries ago took an opposing view.) Surely, no one seriously suggests that normative *halakhah* can

be changed at will by reaching back centuries to resurrect long discarded positions.

In fact, Dr. Aviad Hacoheh positions *Tears of the Oppressed* as of little help for agunot practically, since it is not limited to normative *halakhah*. As he states in this response:

One thing should be made clear B the book is not meant to be a *pesaq halakhah*. . . I am not a functioning rabbi. I don't pretend to be able to decide between the opinions of the great Torah authorities, and determine which of them is "accepted" and which is unacceptable. I certainly don't pretend to rule on questions of *halakhah*.

I do not have that luxury and did not write my review from that vantage point. I live in the world of practical Jewish law (*pesaq halakhah*) and deal daily with actual *agunot* and women seeking a get from a non-cooperative husband. They are interested in a resolution consistent with normative *halakhah* and following only accepted authorities. Part of my job in that world is to determine in what cases the weight of the *halakhah* and the established facts suffice to allow a woman to remarry without a *get* based on a defect in her initial marriage (or the apparent death of her husband). I stake my claim in the world-to-come on each and every decision that I make, as I know that both the decision to sign or not to sign letters that release women to remarry without a get are fraught with Divine as well as temporal consequences. Anyone can solve the *agunah* problem by relying on views that are rejected by *halakhah*.

Since Hacoheh cannot refute the fact that

⁷ Hacoheh writes in his response that "a pre-existing defect in the spouse is a necessary condition for the use of *kiddushei ta'ul*".

⁸ "New Book Seeks Agunah Solutions," *The Jewish Week* October 22, 2004 by Debra Nussbaum Cohen (available at www.thejewishweek.com) which states:

A new book by an Israeli legal expert, Aviad Hacoheh, promises to return to public attention the legal technique used to dissolve the marriages of *agunot*, women whose estranged husbands refused to grant them a Jewish divorce, an approach which prompted waves of controversy in 1997, when it was first used. That was when Rabbi Emanuel Rackman, chancellor emeritus of Bar Ilan University, went public with the fact that he was employing little-used aspects of Jewish law in order to free hundreds of women whose husbands were keeping them legally chained to dead marriages. Rabbi Rackman's work was met with criticism from rabbis in virtually all sectors of the Orthodox world. But, with the assistance of a handful of rabbinic colleagues and supportive women, he has continued to solve the dilemmas of agunot, doing so for several dozen in the last year or two and several hundred in total, he said in an interview.

normative *halakhab* rejects the approach of the Rackman *beit din*, he retreats to *ad hominem* abuse about the lack of courage of Modern Orthodox *poseqim*.⁹ But it is not lack of courage that prevents *dayanim* from adopting these suggested solutions, but rather loyalty to normative *halakhab*.

Courage implies taking risks with one's own status. But Hacoheh's courage entails inflicting the possible status of *mamzerut* on the children of women who rely on these unorthodox approaches. Advising women to take that risk for their children is not courageous but irresponsible. The fact that Rabbis Rackman and Hacoheh may truly be acting *leshem shamayim* does not mitigate that unfortunate fact.

"It is also not true that every problem has a Jewish law solution."

Unfortunately, it is also not true, as Hacoheh claims, that every problem has a Jewish law solution, any more than every sickness has a cure. Of course, in both cases we have to keep trying to add to our arsenal of approaches. But we cannot allow our frustration to drive us to invalid halakhic constructs anymore than our frustration with the limits of medical care should drive us to medical quackery.

* * *

If Hacoheh reaches to the past to justify his position, R. Toledano simply creates a new proposition that has no basis whatsoever in *halakhab*. He writes:

Rabbi Rackman's *beit din* maintains that

physical and psychological abusive behavior of husbands towards their wives and/or children is a pre-marital latent condition even when manifested only after marriage.¹⁰

Along similar lines, the Israeli newspaper *Ha'aretz* reports:

In a just-published book (in English), "*Tears of the Oppressed*" (KTAV), Hacoheh proposes the use of the principle of *mekah ta'ut*—that is, when the wife was deceived about her husband at the time of the marriage—to argue that the husband's very aggressiveness in refusing to give his wife a divorce shows that the marriage was based on a mistake from the outset, and therefore can be annulled." The principle of annulment of marriage because of *mekah ta'ut* already exists in the halakha," Hacoheh notes, "and my experience, in the wake of Rabbi Prof. Emanuel Rackman, is to expand it to encompass violence or unreasonable extortion."¹¹

Women whose marriages have been "annulled" by the *beit din* of R. Rackman have reported to me that this is the logic on which the *beit din* relied in their cases without any further investigation of the husband.

There is no halakhic foundation to this presumption and one cannot find even a hint of this approach in any previous halakhic sources. No defense is given as a matter of *halakhab* to such a presumption, and no rabbinic sources are cited to validate such a presumption by R. Toledano. The

⁹ For a transcript of Rabbi Joseph B. Soloveitchik's comments on a proposal of Rabbi Rackman's, see http://mail-jewish.org/rav/talmud_torah.txt. One wry reviewer of my response, commenting on this paragraph observed: "if 'when the cat is out, the mice do play,' think about the games the mice play when the cat has gone to heaven. We all know that Rabbi Rackman would never have advanced this solution to the *agunah* problem in the lifetime of the Rav, and Rabbi Rackman withdrew every single proposal he ever made to solve the *agunah* problem in the face of the Rav's objections."

¹⁰ Toledano makes it clear that this is, in fact, the view of the *beit din* of Rabbi Rackman, when he states at the end of his response that:

The position of Rabbi Rackman's *beit Din* is that defects which are in total discord with any reasonable concepts of marriage including physical and psychological abuse, sexual molestation, and adultery.... are types of behavior that renders the perpetrators unfit to be husbands, and are the sort of defects and character flaws that must be presumed to have been latent conditions pre-dating the marriage. People just don't turn into scoundrels out of the blue.

¹¹ See Yair Sheleg, "Unchain Their Hearts," *Ha'aretz* October 12, 2004 in English. See www.Haaretz.com for archival information.

reason for this is that no such sources exist in *halakhab*.

Equally important, there is absolutely no published literature in the psychology of abuse field that correlates (at a rate of 50% or higher) any pre-marriage conduct or experience (other than sexual deviance related to homosexuality) with any post marriage defect (other than homosexuality and its correlates). The strongest correlation found in the literature for a clear latent biological defect that correlates to physical abuse is testosterone and serotonin levels, which show a 12% correlation based on elevated levels, when testosterone levels are elevated more than one standard deviation.)¹² Such a correlation number is far lower than the categorical presumption needed to end a marriage without a get (under the *umdenab de-mukhab* doctrine spelled out by R. Feinstein in *Iggrot Moshe*, EH I:79, I:80 and IV:113) required by *halakhab*.¹³

“The presumption advanced by R. Rackman’s beit din is wrong as a matter of fact.”

Additionally, when one includes in the list of latent defects conduct like adultery (as Toledano does) one immediately encounters a problem of definition. What is a predisposition to commit adultery and how does one show it to be latent? Is it latent in everyone who is married? No professional that I have spoken to is aware of any literature in the field on this topic, making such presumptions without any foundation. The same is true for verbal abuse; there is no definition given for what qualifies as verbal abuse, and there are almost no studies of this conduct in the course of marital difficulties. The potential for verbal abuse would also seem latent in most people and is thus lacking any correlative effect.

Dr. Susan Aranoff’s suggestion for further research notwithstanding, I think there is little hope of obtaining credible scientific evidence to support Toledano’s thesis. Indeed, common sense says otherwise. We all know that people change over

the years. We are not necessarily what we were at the time of our marriage—or teenage years, or other early stages—decades later. We change for the better and for the worse, and not every unkind act is the result of mental illness or latent defect. This is even more so true given the length of the marriages—typically decades—that are declared ended by the *beit din* of R. Rackman. (For more on this topic, see the appendix to this article, which contains a detailed survey of the latent defect as cause of abuse literature in the psychology literature.)

Thus the presumption advanced by R. Rackman’s *beit din* is wrong as a matter of fact. Indeed, in the one area where there is abundant evidence of the presence of latent defect—sexual deviance related to homosexuality—there is a deep halakhic consensus that annulment of marriage is correct in cases of hidden homosexuality when the husband will not give a *get*.

* * *

R. Toledano and Dr. Hachohen both object to my reliance on the view of the *Arukh Ha-shulhan* that the woman need not leave the marriage immediately upon discovery of the defect (and the realization that she can leave), even though this standard seems more lenient than that adopted by the *Shulhan Arukh* itself in *Even Ha-Ezer* 31:9. Toledano posits that *Iggrot Moshe Even Ha-Ezer* III: 45 adopts a more lenient standard. Unfortunately, he misunderstands the intent and effect of the *Iggrot Moshe*. Rabbi Feinstein is not introducing a leniency which extends the timeframe of the window of escape in the case of all defects; rather he is narrowing the window of opportunity in the case of impotence and insanity, where logically, even if the couple remained together for an extended period of time, no new marriage could be contracted (as sexuality is impossible in one case, and entering into a contract impossible in the other), and thus one would have thought that the window of opportunity would never close. Thus

¹² See the Appendix for a further exploration of this data.

¹³ This is not the place to explain the differences between an *umdenab* and an *umdenab de-mukhab* or the different consequences. Rabbi Feinstein only permits the ending of a marriage without a get in a situation where the woman is an *agumab* and there is an *umdenab de-mukhab*, and not merely an *umdenab*. This matter requires more analysis than can be provided here. See also notes 16 and 21 and accompanying text.

despite claims to R. Feinstein's view and the fact that in most cases of *kiddushei ta'ut* an ongoing sexual relationship closes that window immediately (i.e. it recreates the marriage), I still think that the *Arukh ha-Shulhan's* view can be relied on to extend that period a short amount of time from the moment the woman realizes that an error of contract took place, and the marriage thus remains invalid from its inception..

So too, I and many others have responded to the arguments of *kiddushei ta'ut* II & III as presented by Aronoff. The reader should examine my article "*Kiddushei Ta'ut: Error in the Creation of Marriage*"¹⁴ and—even more importantly—the extremely thoughtful article by R. J. D. Bleich "*Kiddushei Ta'ut: Annulment as a Solution to Agunah Problems.*"¹⁵ This matter is sufficiently clear that R. Toledano informs us that even the *beit din* of R. Rackman does not rely on either of these two grounds.

It is worth noting that my initial article raised a number of significant procedural questions about the conduct of the *beit din* of R. Rackman, in that they conduct *ex-parte* hearings without the parties present, and accept the testimony of the wife about the conduct of the husband even in the absence of any corroborating testimony, in apparent violation of explicit dictates of the *halakhab*.¹⁶ No response to

these allegations has even been made.

Susan Weiss' comment that "surely it does not matter if the marriage ended because the husband had bad breath or committed adultery" is a vast over-simplification of much Jewish divorce theory, is by no means intuitively correct, and in no way the unanimous voice of the rabbinic tradition. I have written a lengthy analysis of these issues in a book entitled *Marriage, Divorce and the Abandoned Wife in Jewish Law: A Conceptual Approach to the Agunah Problems in America*. (KTAV, 2001), and the reader is invited to examine that work for more information.¹⁷

Unfortunately, Susan Weiss's defense of *Tears of the Oppressed* and the *beit din* of R. Rackman as grounded in legal fiction cannot be supported by any halakhic sources. Simply put, Jewish Law does not allow for legal fictions in these areas of divorce law. But I am in full agreement with her comments on the necessity for maintaining a proper tone in this debate. I take to heart her kind rebuke over the tone of my initial review, although the substance remains, I believe, successfully unchallenged. I hope that I and others who write on the issue will keep her wise comments in mind in the future.

¹⁴ Posted on jlaw.com

¹⁵ *Tradition*, 33:1 (1998)

¹⁶ See text accompanying notes 30-34 in the original review and sources cited therein.

¹⁷ Weiss also questions the frequency of *kidushai ta'ut* cases and notes how rare they are in Israel. There are numerous cases of *kiddushei ta'ut* emanating out of rabbinical courts in the United States and anyone who appears regularly in front of the rabbinical courts in America knows that fact. (Perhaps her lack of knowledge of this fact is a reflection of her lack of familiarity with the rabbinical courts of the United States and their practices.) I have written a four articles about this issue (as an appendix to a book; in Hebrew in *Tehumin*, in *Dinei Israel*; and posted on jlaw.com) and given many presentations on this topic (at EDAH and JOFA conferences at the Orthodox Forum and in many synagogues), describing the phenomena at some length in both Hebrew and English (see list below), many of which contain sample cases. (Indeed, for the readers' information, the one case Weiss refers to emanates out of the Beth Din of America.)

¹⁸ In 1998 (in response to the initial conduct of the *beit din* of R. Rackman) I wrote an article on *kiddushei ta'ut* that outline the principles of *halakhab* as I understand them; see *Marriage, Divorce and the Abandoned Wife in Jewish Law: A Conceptual Approach to the Agunah Problems in America* (KTAV, 2001) in Appendix C. That article articulated four rules for *kiddushei ta'ut*, which are that (1) The woman must discover a serious defect present in her husband after they are married. (2) That defect must have been present in the husband at the time of the marriage. (3) The woman must have been unaware of the defect at the time of marriage. Finally, (4) The woman must discontinue marital relations with her husband very soon after the discovery of the defect (and the realization that she can leave him).

In these intervening years, this formulation has been accepted as a proper formulation of *halakhab* by many. In these same intervening years, R. Rackman and his *beit din* have been examining the *halakhab* to find a way to justify their *beit din's* conduct (initially done with little or no justification) and have put forward many different rationales, including now such now

However, I strongly disagree with the suggestion that the *beit din* of R. Rackman and my own analysis are growing closer.¹⁸

Finally, I note that this is not the forum for responding to criticism of either the Orthodox Forum/Bet Din of America prenuptial agreement or the agreement that I note as a possible alternative (called the Tripartite Agreement in my initial review). I will at some future date provide further analysis of these agreements, but if these reviews are to stay articles, rather than encyclicals, this topic will have to wait.

* * *

While the plight of the *agunah* is tragic, there are times when Jewish law simply cannot achieve the result desired by people, and we struggle on with our life, seeking to obey our Creator's will. (This is not unique to Jewish law, but is endemic of every legal system with timeless principles.) Within Jewish law, this situation is not limited to *agunot*. A century ago there were women who could not conceive children because of *niddah* issue and there were men who could not marry as they were *petzu'ei dakka* [ones with crushed genitalia]. There are people unable to marry because they are *mamzerim*. Every week I am called by engaged couples deeply in love who cannot marry because he is a *kohen* and she belongs to a group forbidden

to a *kohen*. In each and every situation, some might wonder whether the community should just throw in the towel and abandon the halakhic system as an act of kindness to the human beings suffering in this situation. And yet we all recognize that such is not what the Giver Of Law Above wants from Jews committed to *Torah min ha-Shamayim*, those of us who believe that Jewish law derives from God's will and revelation, rather than our wants or wishes. So, in such cases we struggle on, seeking to do that which *halakhab* demands of us while acting with compassion to all.

The emotional appeal to the plight of the *agunah* alone is not enough to change the halakhah. We must find legitimate halakhic mechanisms grounded in the classical texts derived from the rabbinic tradition, and we must run far away from 'solutions' distant from the rabbinic tradition. Honest people can sometimes disagree, even strongly, about what rabbinic texts mean and how to apply them. However, the contours of the debate must be framed by honest study of the classical rabbinic texts and not by emotions.

It is my hope and prayer that we find a solution to the *agunah* problem and that it be one that resonates as true with the One Above as well as with His children below. As the Talmud tells us, "The seal of God is Truth."¹⁹

discarded rationales such as *hafkqa`at kiddushin* (annulment of marriage) or *get ziqni ma-ba-ba'al* (writing a get against the wishes of the husband), or what was called *kiddushei ta'ut II* (all marriages are void when coercion is factually impossible) or *kiddushei ta'ut III* (the lack of consent to a *qinyan*) and yet other theories. As the *beit din* of R. Rackman discarded the many different rationales that are untenable (and all of these are, even as for many years the *beit din* of R. Rackman continued to employ them) they are still drawn to one that is tenable—latent blemish, as it has impeccable credentials, having been defended by R. Feinstein.

However, since a halakhically proper definition does not suit their needs (which is to end marriages whenever the husband withholds a *get*, even with no evidence of a hidden defect) the *beit din* of R. Rackman has to modify the terms 'latent' and the terms 'defect.' Thus, the words 'latent defects' are now redefined to include things that are not defects and are not latent, or presumptions are introduced about what is latent or defective that have no foundation in reality or *halakhab*. Although the *beit din* of R. Rackman uses terms that are linguistically similar to those used me in my articles, these words—"latent" and 'defect' have a completely different meaning in the hands of the *beit din* of R. Rackman. Thus, the similarities are linguistic, rather than substantive.

¹⁹ *Shabbat* 55a.

Appendix: A Review of the Abuse Literature in the Context of Determining Latent Defect

This section reviews the state of this literature and research and makes it clear to the reader of these exchanges that the social science literature is in fact not at all supportive of the factual view of the *beit din* of R. Rackman.

In her response, Susan Aronoff has proposed:

Given the pervasiveness of domestic violence in *agunah* cases and the centrality of this issue in the quest for solutions to the *agunah* problem, I propose that the Orthodox rabbinic spearhead and sponsor such research [on the nature and origin of domestic violence]. . AGUNAH International would be pleased to partner in such a project.

This proposal is quite surprising to me, since such research has been done by many, and the literature robustly notes that most defects are not latent and most abuse does not derive from latent defects. One can only conclude from Aronoff's proposal that she is simply unfamiliar with the research that is extant.

Since my initial interest in this area in 1998,¹ I have faithfully read the social science literature closely in this field, looking at nearly every article in the premier journals on the topic from the *Journal of Aggression and Violent Behavior* to the *Journal of Family*

Violence and onto *Violence and Victims* that addresses latent defects or predictive factors in abuse. There are dozens of articles in this field. It is important to be clear here: There is absolutely no published literature anywhere that correlates (at a rate of 50% or higher²) any pre-marriage conduct or experience (other than sexual deviance related to homosexuality) with any post marriage defect (other than homosexuality and its correlates).

The strongest correlation found in the literature for a clear latent biological defect that correlates to physical abuse is testosterone and serotonin levels, which shows a 12% correlation based on elevated levels.³ The data on testosterone compared men with levels over one standard deviation (SD) above the mean to those over one standard deviation below the mean. Since the "normal range" usually encompasses +/- 1.96 SD around the mean (if normally distributed), many of these men would be considered as having normal levels, further reducing the value of this data. The former group was 12% more likely to have hit/thrown something at their wives. (It would have been more interesting to know the percentage with violent behavior in those with abnormally high levels [above +1.96 SD of the mean] compared to those within the normal range. If 10% of the normal group expressed violent behavior, then well over 50% of the abnormally high group would need to have expressed violent behavior to meet

¹ When I wrote the article "Error in Creation of Marriage in Modern Times Under Jewish Law" for the Orthodox Forum of that year.

² For reasons that I have explained numerous times elsewhere, (see article cited above) a statistical correlation of less than 50% is not halakhically significant to end a marriage. Even correlations greater than 50% but less than an *umdenah demukbah* (most likely, about 95%) generally are not acceptable. In a situation of greater than 50%, the marriage is not valid as a matter of torah law, and many leniencies flow from that. I suspect that the analytic tension found between *Iggrot Moshe* EH IV:83(2) and the last words of this *teshuvah* specifically and *Iggrot Moshe* EH 1:79 and 1:80 can be resolved by positing that that Rabbi Feinstein is of the view that one may only permit a woman to remarry based on an *umdena de-mukbah* (95%), whereas one can permit a child to not be labeled a mamzer based on merely on an *umdena* (51%). For why this might be so, see my article cited in note. 12

³ Holtzworth-Munroe, A. Bates, L., Smutzler N., and Sandin, E "A Brief Review of the Research on Husband Violence," *Journal of Aggression and Violent Behavior* 1:65-97 (1997).

⁴ Thank you to Dr. Thomas Spira of the Centers for Disease Control for this analysis.

the halakhic criterion. ⁴ Such a correlation number is far lower than the categorical presumption needed to end a marriage without a get (under the *umdena de-mukhab* doctrine spelled out by Rabbi Feinstein in *Iggrot Moshe* EH I79, I80 and IV:113) required by *halakhab*.⁵

Indeed, this correlative number is below the correlative number that this same study found for men who became physically abusive to their wives due to traumatic head injury, which is clearly a post-marriage condition.⁶ It is also below the correlative number for alcohol abuse, stress or many other factors discussed in the various articles on this topic, all of which can arrive in a marriage after its creation.⁷

Furthermore, when one reads the statement of Toledano closely and realizes that as grounds for *kiddushei ta`ut* he includes “psychologically abusive behavior of husbands towards their wives and or children” one sees that there is absolutely no substance in the psychological literature that validates the view that all or most psychologically abusive behavior towards spouses or children is a typically latent defect. This is even truer in the context of adultery, as there is no research at all about adultery as a form of latent defect.

Consider for example another recent article

entitled “A Model For Predicting Dating Violence,”⁸ which seeks to correlate any and all latent defects with violence in dating. While this article shows some correlative effect, nothing cited in the article rises to anywhere near the level of greater than 50% correlation, as mandated by Jewish law. The study mentioned above that discusses testosterone increases as they related to increased violence (entitled “A Brief Review of the Research on Husband Violence”⁹) concludes that there is a long list of factors that correlate to marital physical abuse, many of which develop after the marriage has started, such as poverty, injury, drug use, alcohol abuse, stress, drug abuse and many others.¹⁰

Consider further the following from a forthcoming article entitled “The Gender Paradigm in Domestic Violence Research and Theory” by Donald G. Dutton and Tonia L. Nicholls.¹¹ (Importantly, Prof. Dutton is the sole expert cited by Susan Aronoff, and is the intellectual leader of this field.¹²)

It is because of intimacy that ...rates of abuse are similarly high; the impact of attachment and related anxieties produces anger and abuse. Dutton [elsewhere] further elaborates the psychosocial

⁵ It is not even a simple *umdena*, (presumption) as it is much less than 50%.

⁶ *Id.*

⁷ *Id.* The literature makes this point in non-marital relationships as well. See G. Lie, R. Schilit, J. Bush, M. Montagne & L. Reyes, “Lesbians in Currently Aggressive Relationships: How Frequently do they Report Aggressive Past Relationships,” *Violence and Victims*, 6:2 121-135 (1991)

⁸ Follingstad D.R., Bradley R.G., Helff, C.M. and Laughlin, J.E. (2002) in *Violence and Victims* 19(91) 35-47.

⁹ Holtzworth-Munroe, A. Bates, L., Smutzler N., and Sandin, E., *Journal of Aggression and Violent Behavior* 1:65-97 (1997).

¹⁰ Let us consider a theoretical hormone (made up just for this hypothetical), which if present in levels higher than a specified concentration, can be shown in the literature to correlate at a level of greater than 95% that any married man with this concentration of this hormone will punch his wife in the mouth and knock out at least three teeth. Would a husband who lies about his level of hormone to his wife (assume she insists on him being tested), create *kiddushei ta`ut*. The answer is yes. What about a case where she does not ask that he be tested, because less than one in ten thousand people have this hormone at that level, but he is tested and he knows his elevated levels.. Would that create *kiddushei ta`ut*? The answer is still yes, as the *umdena de-mukhab* is that no woman would marry a man who will knock out her teeth with a 95% likelihood. What about a case where she does not ask that he be tested, because less than one in ten thousand people have this hormone at that level, and he does not ask to be tested either, and thus he does not know it. Would that create *kiddushei ta`ut*? The answer is still yes, as the *umdena de-mukhab* still is that no woman would marry a man who will knock out her teeth with a 95% likelihood. This is no different than *mokher parah nimitzah terefah, mekho batel* (even though everyone is sincere and there is no fraud.)

¹¹ It is forthcoming in *Journal of Aggressive and Violent Behavior*, 2005.

¹² Actually, both also cite the work, “The Shame Borne of Silence” by Rabbi Abraham Twersky, but even the reader unfamiliar with this book specifically (but familiar with the author generally) should intuit (quite correctly) that there is no indication that this book—published by Mikrov Press in 1996—supports in any way shape or form the understanding of the reality put forward by the *beit din* of Rabbi Rackman.

phenomena that would increase an individual's propensity to experience such anxiety and react with abuse. The "intimacy problem" explanation constitutes an alternative to gender explanations and posits that abusiveness in intimate relationships occurs for both genders and that certain psychological features increase risk for individuals independent of gender.... An alternative would be to view intimate violence as having psychological causes common to both genders. Psychological explanations for intimate violence have come from numerous sources... psychopathology, attachment, anger, arousal, alcohol abuse, skills deficit, head injuries, biochemical correlates, attitudes, feelings of powerlessness, lack of resources, stress and family of origin sources for male intimate violence.

In an email to me, Prof. Dutton elaborated on this and stated:

In psychology there are no sufficient causes; everything is a "risk factor" (i.e. it increases the probability of an action occurring). There are some risk factors that precede marriage, such as being victimized by or witnessing abuse. However, they still

do not make abusiveness rise to a 50-50 chance let alone to likelihood.¹³

The simple fact is that the presumption advanced by the Rackman *beit din*—that either verbal or physical abuse to both one's wife and children is a latent defect in more than half of the cases—is wrong as a matter of fact and is disagreed with by almost every professional who works in the psychology of abuse field. Indeed, in the one area where there is abundant evidence of the presence of latent defect—sexual deviance related to homosexuality—there is a deep halakhic consensus that *kiddushei ta'ut* is correct in cases of hidden homosexuality when the husband will not give a *get*.¹⁴

Thus, while Toledano hides behind the assertion that "reasonable people may differ" as to what is latent (which is somewhat true), that should not obscure the fact that the position taken with regard to this matter by the *beit din* of R. Rackman—that most physical and psychological abusive behavior of husbands towards their wives or children is a pre-marital latent condition even when manifested only after marriage—is not reasonable, is not supported by any evidence, is rejected by almost all the professionals in the field of abuse psychology, and thus cannot be relied on as a matter of *halakhab*.

¹³ Dated April 10, 2005.

¹⁴ See my article "*Kidushai Ta'ut*: Error in the Creation of Marriage" posted on www.jlaw.com and (much more importantly) *Iggrot Moshe* IV:113.