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The Agunah Crisis: What, If Anything, Can Be Done? Is a Prenuptial Agreement Halachically Condoned?

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PRENUPTIAL AGREEMENTS

שולחן ערוך אבן העזר הלכות גיטין סימן קלד סעיף ד

אם נשבע הבעל ליתן גט צריך שיתירו לו קודם שלא יהא דומה לאונס; אך ערבות יתן, אם ירצה, שאין זה דומה לאונס. הגה: והוא הדין אם קבל קנין לגרש (פסקי מהרא"י סימן קע"ג). **אבל אם קבל עליו קנסות אם לא יגרש, לא מקרי אונס, מאחר דתלה גיטו בדבר אחר, ויוכל ליתן הקנסות ולא לגרש** (ב"י בשם תשובה וכן הוא במהרי"ק שם בפסקים). ויש מחמירין אפילו בכהאי גוונא (שם בתשובת הרשב"א), וטוב לחוש לכתחלה ולפטרו מן הקנס.

פתחי תשובה שם ס"ק ט

ויש מחמירין אפילו בכה"ג. כתב בס' תו"ג וז"ל והנה להמחמירין בקנסות וסוברין שאף בקנסות הוי גט מעושה א"א לעשות תקנה כשעושין פשר בין איש ואשה שיקנוס עצמו שיעשה הגירושין ואפילו לעשות באופן המבואר בח"מ סי' ר"ז גבי אסמכתא כדרך שעושין חכמי ספרד המבואר שם דהיינו שהבעל יתחייב עצמו נגד אשתו או נגד אחר באלף זהובי' אף אם לא יגרש והאשה או האחר יתחייבו נגדו שאם יגרש יפטרוהו מהחוב הנ"ל וכשפוטרין אותו מחובו כשיגרש ודאי דלא הוי גט מעושה כמבואר בתשו' הרשב"ץ שהביא הב"י שאם כפו אותו בדברים שהדין נותן לכופו כגון פריעת כתוב' דפריעת בע"ח מצוה ומכין אותו עד שת"נ ולהצילו מאותו עישוי נותן גט לא הוה גט מעושה כו' ע"ש לא דמי כלל דשאני הכא גבי פשר כיון ששני הקנינים מהאיש והאשה הי' במעמד אחד כשעוסקין באותו ענין ובודאי אם האשה לא תרצה לקבל ק"ס שתפטור אותו מחובו כשיגרשנה הבעל יחזור בו מהקנין שלו דכשעוסקין באותו ענין יכול לחזור מהק"ס כמבואר בח"מ סי' קצ"ה הרי תלוי הקנס בהגירושין כו' אמנם נראה דבאופן זה יכולין לעשות קנינים בהפשר על הגירושין שיקבל הבעל ק"ס שמוחל כל החיובים שיש להאיש על האשה תשמיש ומעשה ידי' אף אם לא יגרשנ' והוא ישאר על חיובים שלו מזונות ושאר חיובים וממילא יגרש כיון שמונעת ממנו כל דבר והוא מחוייב בכל החיובים ואינו גט מעושה רק כשתולה הקנס בגט משא"כ כאן שאין הקנס תלוי בגט כלל עכ"ל: וכתב עוד שם דלהך דיעה דס"ל דבקנס הוי גט מעושה נראה דאין

יכולין לתבוע ממנו גם הקנס כיון שהבעל אומר אנא קאמינא לקיים הגירושין ומה אעשה שהב"ד אינם רוצים לקבל הגט ואומרים שהוא גט מעושה וכן אפילו נתחרט ואומר שאינו רוצה לגרש אין הב"ד יכולין לומר בל' זה או תן הקנס או גרש אשתך דהוי כגט מעוש' להך דיעה ואין לומר כיון דא"א לגרש שוב א"כ כשהתחייב עצמו מעיקרא בתנאי הגירושין דמי לתנאי שא"א לקיים בסופו דהתנאי בטל והמעשה קיים וה"נ א"א לקיים התנאי כלל דהא א"א לגרש שוב דזה אינו זה לא דמי לחיוב על תנאי שהחיוב חל מיד והתנאי מילתא אחריתי הוא משא"כ כאן דהחיוב לא בא רק לקנס כשלא יגרש. אמנם אם התחייב עצמו בקנס כשלא יגרש לזמן קבוע ונתחרט ולא רצה לגרש עד שעבר הזמן ממילא כשעבר הזמן נתחייב בהקנס אפי' אם יגרשנ' שוב דהא חיוב הקנס חל תיכף כשהגיע הזמן ולא גירש וא"כ הב"ד יכולין לתובעו כדין בהקנס והוי ככופין אותו לשלם חובו וכשמגרש להיפטר מחובו לא הוי גט מעושה כמ"ש הרשב"ץ הנ"ל עכ"ד:

רמ"א אבן העזר הלכות יבום סימן קנז סעיף ד

והמקדש אשה ויש לו אח מומר לקדש ולהתנות בתנאי כפול שאם תפול לפני המומר ליבום שלא תהא מקודשת (מהרא"י ברי"ן).

To see the קונטרס אין תנאי בנישואין *click here*

רמב"ן פרשת יתרו (יח, טו)

כי יבא אלי העם לדרוש אלהים - השיב משה לחותנו צריכים הם שיעמדו עלי זמן גדול מן היום, כי לדברים רבים באים לפני, כי יבא אלי העם לדרוש אלהים להתפלל על חוליהם ולהודיעם מה שיאבד להם, כי זה יקרא "דרישת אלהים", וכן יעשו עם הנביאים כמו שאמר (ש"א ט ט) לפנים בישראל כה אמר האיש בלכתו לדרוש אלהים לכו ונלכה עד הרואה, וכן ודרשת את ה' מאותו לאמר האחיה מחלי זה (מ"ב ח ח), שיתפלל עליו ויודיענו אם נשמעה תפלתו, וכן ותלך לדרוש את ה' (בראשית כה כב), כמו שפירשתי שם, ועוד שאני שופט אותם, כי יהיה להם דבר בא אלי ושפטתי. ועוד אני מלמד אותם תורה, והודעתי להם את חקי האלהים ואת תורותיו: ובפסוק כ: והזהרת אתהם את החקים ואת התורות - ותודיע להם את הדרך אשר ילכו בה על פי התורה והמצוה. שתזהירם אתה מאד, ותלמדם התורה והמצוה. הודה לו גם במה שאמר והודעתי את חקי האלהים ואת תורותיו. וגם בזה עצה, להזהיר אותם מאד, ולהתרות אותם במצות ועונשם, אחרי אשר לא יעשה הוא בהם את הדין. אבל במשפט אשר אמרת ושפטתי בין איש ובין רעהו, שים לך שופטים עמך, כי כבד ממך דבר המשפט יותר מן הכל, וטוב לך ולהם להקל מעליך, ונשאו אתך. ובידוע כי היו עם משה שוטרים נוגשים בעם, להביא הנתבעים לפניו ולנגשם בדבר המשפט, והרבה מהם עם השופטים האלו, ולכך אמר במשנה תורה (דברים א טו) ושוטרים לשבטיכם. ואין צריך להזכיר זה בכאן, כי לא היה מעצת יתרו:

תלמוד בבלי מסכת בבא מציעא דף ל עמוד ב

דתני רב יוסף: והודעת להם - זה בית חייהם, את הדרך - זו גמילות חסדים, (אשר) ילכו - זה ביקור חולים, בה - זו קבורה, ואת המעשה - זה הדין, אשר יעשון - זו לפנים משורת הדין.

השגות הרמב"ן לספר המצוות לרמב"ם שורש א

אבל בעל ההלכות הוציאן למצות האלו מוהלכת בדרכיו שהיא מצות עשה באמת כתב [אות לב - ו] וללכת בדרכיו ולהלביש ערומים לקבור מתים לנחם אבלים לבקר חולים. ומצוה אחת הן. וזה ממה שאמרו בגמר סוטה (יד א) אמר רבי חמא בר' חנינא מאי דכתיב אחרי י"י אלהיכם תלכו וכי איפשר לו לאדם ללכת אחר הקדוש ברוך הוא אלא מה הקדוש ברוך הוא מלביש ערומים אף אתה הלבש ערומים מה הקדוש ברוך הוא מבקר חולים אף אתה בקר חולים מה הקדוש ברוך הוא קובר מתים אף אתה תקבור מתים מה הקדוש ברוך הוא מנחם אבלים אף אתה תנחם אבלים. מכאן הוציא אותם ומנאן מצוה. והרב מנה מצות ח' להדמות בו ית' כפי יכלתנו והוא שנ' והלכת בדרכיו והביא מ"ש מה הקדוש ברוך הוא רחום אף אתה היה רחום וגו'. ואמר וכפל זאת המצוה בלשון אחר שנ' אחרי י"י תלכו ובא בפירוש עניינו להדמות אליו בפעליו הטובים. וא"כ למה יתמה על בעל ההלכות. הוא תפש הלשון השנוי בספרי במצוה הזאת ובעל ההלכות תפש לו הלשון השנוי בגמ'. והנראה בכל זה שכל אלו גמילות חסדים הם ובכלל ואהבת לרעך כמוך הם נכנסים וכל שנתרבה בגמילות החסד בזקן ואינה לפי כבודו ובבן גילו מאי זה מקום שיתרבה הכל מצוה אחת היא לגמול חסד עם האח. ולפי דעתי עוד כי אין ראוי למנות שום מצוה משום אזהרת יתרו למשה רבינו באילו להודיע אותם לישראל ולדרוש להם שיהיו זריזים באלו המצות תמיד כדי לשכן ביניהם אהבה ואחוה שלום וריעות כי בכך יתמעטו התרעומות והדינין ביניהם ולא יצטרכו למשפטים בכל עת וזה מעצתו אליו וגם כל העם הזה על מקומו יבא בשלום כמו שהזהיר והודעת להם זו בית חייהם ופירושו שילמדו אומנות יחיו ממנה כי בה גם כן יתמעטו הגזלות והדינין ואין מי שיביא זו בחשבון המצות.

תלמוד בבלי מסכת בבא מציעא דף פה עמוד א

אמר רבי: חביבין יסורין. קבל עליה תליסר שני - שית בצמירתא, ושבע בצפרנא. ואמרי לה: שבעה בצמירתא, ושית בצפרנא. אהורייריה דבי רבי הוה עתיר משבור מלכא, כד הוה רמי כיסתא לחיותא הוה אזיל קלא בתלתא מילי, הוה מכוין דרמי בההיא שעתא דעייל רבי לבית הכסא, ואפילו הכי מעבר ליה קליה לקלייהו, ושמעו ליה נחותי ימא. ואפילו הכי, יסורי דרבי אלעזר ברבי שמעון עדיפי מדרבי. דאילו רבי אלעזר ברבי שמעון - מאהבה באו ומאהבה הלכו, דרבי - על ידי מעשה באו ועל ידי מעשה הלכו. על ידי מעשה באו מאי היא? דההוא עגלא דהוו קא ממטו ליה לשחיטה, אזל תליא לרישיה בכנפיה דרבי, וקא בכי. אמר ליה: זיל, לכך נוצרת. אמרי: הואיל ולא קא מרחם - ליתו עליה יסורין. ועל ידי מעשה הלכו - יומא חד הוה קא כנשא אמתיה דרבי ביתא, הוה שדיא בני כרכושתא וקא כנשא להו, אמר לה: שבקינהו, כתיב ורחמיו על כל מעשיו. אמרו: הואיל ומרחם - נרחם עליה.

בית יוסף חושן משפט סימן רה

ומצאתי שכתב הרשב"א בהניזקין (נה: ד"ה מתניתין) ואף על גב דקיימא לן כרב הונא דאמר תליוהו וזבין זביניה זביני שאני התם דקא יהיב דמי ואגב אונסיה עם קבלת מעות גמר ומזבין ומיהו בהרוגי המלחמה אף על גב דלא יהיב דמי אין בו דין סקריקון דאגב אונסייהו גמרי ומקני הואיל והפקיר אותם המלכות להריגה ואינם מקוים לשוב לנחלתם עוד עכ"ל נראה מדבריו דשאני התם שלא היו מקוים לשוב לנחלתם עוד ומשום הכי הוי כאילו קיבלו דמי השדות שהרי לא היו שלהם כלל ולא היו מקוים לשוב לביתם עוד והילכך אגב אונסייהו גמרי ומקני ולי נראה לתרץ בענין אחר דכשהאנס אומר תן לי קרקע זו ואי לא קטילנא לך ודאי לא גמר ומקני אלא אם כן נתן לו דמים אבל כשאין האנס תובע ממנו כלום אלא שהוא רוצה להורגו וזה נותן לו קרקעו כדי שיניחנו ודאי שאף בלא דמים גמר ומקני ומשום הכי בשתי גזירות כיון שהופקרו להריגה האנס היה בא להרגו בלא שיתבע ממנו קרקעו וזה היה פודה עצמו בקרקעו וגמר ומקני אבל בגזירה בתרייתא כיון דאמרי כל דקטיל ליקטליה ודאי לא היה בא להורגו אלא על ידי שתובע ממנו קרקעו ומגזם לו שיהרגנו אם לא יתננו לו ולפיכך לא גמר ומקני כיון שלא נתן לו דמים. ועוד יש לומר דכי אמרינן דלא גמר ומקני אגב אונסיה אלא כי יהיב דמי דוקא היינו היכא דאיפשר ליה למיקבל עליה למחר וליומא אחרא דאע"ג דהשתא שעה משחקת לו עשויין בעלי זרוע ליפול הילכך לעולם דעתיה למיתבעיה והילכך כל דלא יהיב דמי לא גמר ומקני אבל כשהיא גזירת מלך כגון בשתי גזירות ראשונות חושב שתתקיים הגזירה כל ימי אותו הדור ומשום הכי לא מסיק אדעתיה למיתבעיה והילכך אגב אונסיה גמר ומקני בלא נתינת דמים ואיפשר שזה בכלל דברי הרשב"א

שו"ת אגרות משה אבן העזר חלק ד סימן קז

בענין להוסיף בשטר התנאים שאם יבואו לידי פירוד לא יעכב מליתן גט פטורין.

בדבר שאלת כת"ה אם נכון להוסיף בשטר התנאים לשון כזה: אם אחרי הנשואין יבואו לידי פירוד, ח"ו, אז הבעל לא יעכב מליתן גט פטורין והאשה לא תסרב לקבלו, כאשר כך יצוה הב"ד פלוני ע"כ. ועל ידי הוספה זו יכריחו הערכאות שיצייתו שני הצדדים להב"ד.

הוספת דבר זה מותר והגט לא יהיה גט מעושה. גם יש תועלת להצילה מכבלי העיגון. אבל טוב שיראה את החתן והכלה ויכירם היטב אם יש לחוש מצד טבעם שתנאי כזה יגרום למחלוקת ומריבות ביניהם ח"ו.

והנני ידידו, משה פיינשטיין.

Alternatives to Cattle Prods: In Search of a Solution to the *Aguna* Problem

In October 2013, the media was awash with reports of the arrest of three prominent Tri-State area rabbis who allegedly ran a violent "divorce business," taking large sums of money from women seeking release from their marriages. The rabbis hired thugs who employed numerous kinds of brutal methods to force recalcitrant husbands to consent to give their wives a halachic divorce. An FBI agent cited by news outlets described the alleged "use of 'tough guys' who utilize electric cattle prods, karate, handcuffs and place plastic bags over the heads of husbands." This discovery, along with the embarrassing and highly-publicized battle between a young husband and wife from prestigious families, the latter of which took her fight for a *get* to a New York tabloid,[1] has drawn a great deal of attention to the vexing problem of *agunos* — women who are divorced in every practical sense but not in a halachic sense, and are thus unable to remarry.

The core of the *aguna* problem is the rule that a *get* must be delivered by the husband to the wife willingly. Not only must the husband perform the act of handing the wife a *get*, or commission an agent to do so, but he must have made a willed decision to divorce his wife in order for the divorce to be halachically valid. This gives spiteful and greedy husbands a powerful weapon to use against their estranged wives, either as sheer vengeance or to force the wives' hands in their battles over custody or assets. The *aguna* problem has been a source of great pain for the women effected (and their children), as well as a source of embarrassment for the Orthodox Jewish world.

This paper will first address the conceptual underpinnings of this issue by exploring the relevant halachic sources and trying to define more precisely the kind of consent required for a *get* to be valid. The second section will focus on the practical strategies that have been formulated to help address this problem, as well as possible alternatives.

1. Doree Lewack, "An Orthodox Woman's 3-Year Divorce Fight," *The New York Post* (November 4, 2013).

Part 1: Background

I. לא יגרש האיש אלא ברצונו

The Mishna in *Gittin* (88b) establishes that a גט מעושה — a "coerced *get*" — is valid, but the Gemara there clarifies that this ruling refers only to situations of כדין, cases in which a husband is halachically required to divorce his wife (such as if she becomes forbidden to him or if he has certain physical defects[2]). In all other situations, however, a coerced *get* is invalid, and hence a *get* given under coercion does not terminate the marriage.

In the beginning of *Hilchos Geirushin*, the Rambam lists the various conditions that must be met for a *get* to be valid, including שלא יגרש האיש אלא ברצונו — that a man must give the divorce willingly. As the source for this *halacha*, the Rambam cites the Torah's discussion of *gittin* in *Sefer Devarim* (24), where it speaks (in verse 1) of a husband divorcing his wife because "she does not find favor in his eyes" — והיה אם לא תמצא חן בעיניו. On this basis, the Rambam asserts, the Sages understood that a *get* must be given willingly and not under coercion.

The Rashbam (commentary to *Bava Basra* 48a) points to a different word in that same verse — ונתן ("he shall give [the writ of divorce]"), which implies that the *get* is given wholeheartedly and not under duress.

Regardless, the question arises as to why an exception is made in the case of כדין, in which a husband is halachically obligated to divorce and the *beis din* is authorized to undertake coercive measures to force him to give his wife a *get*. Why is a *get* given under such circumstances valid, whereas in all other cases a coerced *get* is invalid?

The answer is alluded to by the Gemara in *Bava Basra* (48a) in the course of its discussion of financial transactions made under coercion. In this context, the Gemara cites a *beraysa* that states regarding a recalcitrant husband, כופין אותו עד שיאמר רוצה אני — "He is coerced until he says, 'I want.'" When a husband refuses to give a *get* that he is required to give, he is forced by the authorities into expressing his consent, such that the divorce is given willingly. The Gemara initially proposes viewing this technique as a model for property transactions as well, such that we may infer from this *halacha* that if a person is forced to sell something, the sale is valid. But the Gemara then distinguishes between the two cases, noting, "Perhaps that situation [of a required divorce] is different, because it is a *mitzva* to heed the words of the Sages." In other words, coercion is effective only in the context of a husband who refuses to give a halachically-required *get* because once he is coerced, we can assume he gives the *get* wholeheartedly,

2. See Mishna, *Kesubos* 77a.

in light of the halachic requirement he thereby fulfills. Thus, even if in general a legal act performed under coercion cannot be viewed as having been done willingly, such an act will be valid when it constitutes a *mitzva*, as the individual can be presumed to willingly want to perform the act.

The Rambam explains this concept more fully in a celebrated passage in *Hilchos Geirushin* (2:20):

> מי שהדין נותן שכופין אותו לגרש את אשתו, ולא רצה לגרש – בית דין של ישראל בכל מקום ובכל זמן, מכין אותו עד שיאמר רוצה אני ויכתוב הגט, והוא גט כשר... ולמה לא בטיל גט זה – שהרי הוא אנוס... שאין אומרין אנוס, אלא למי שנלחץ ונדחק לעשות דבר שאינו חייב מן התורה לעשותו, כגון מי שהוכה עד שמכר, או נתן; אבל מי שתקפו יצרו הרע לבטל מצוה, או לעשות עבירה, והוכה עד שעשה דבר שחייב לעשותו, או עד שנתרחק מדבר שאסור לעשותו – אין זה אנוס ממנו, אלא הוא אנס עצמו בדעתו הרעה.
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> לפיכך מי שאינו רוצה לגרש – מאחר שהוא רוצה להיות מישראל, רוצה הוא לעשות כל המצוות ולהתרחק מן העבירות; ויצרו הוא שתקפו. וכיון שהוכה עד שתשש יצרו ואמר, רוצה אני – כבר גירש לרצונו.

> If the law requires forcing one to divorce his wife and he did not want to divorce, the Jewish court — in any place and at any time — beats him until he says, "I want," and he writes the *get*, and the *get* is valid… And why is this *get* not invalid, as he [the husband] is under coercion? …Because we do not say he was coerced unless he was pressured and pressed to do something which he is not required to do by Torah law, such as someone who was beaten until he sold or gave [his property]. But if one's evil inclination overcame him to neglect a *mitzva* or commit a sin, and he is beaten until he did the proper thing which he is required to do or until he distanced himself from that which is forbidden to do, he is not considered coerced in this regard, as it was he who had coerced himself through his evil character trait.
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> Therefore, one who does not wish to divorce — since he wants to be part of [the Nation of] Israel, he wants to do all the *mitzvos* and distance himself from sins, and it is his evil inclination that has overcome him. And once he was beaten to the point where his evil inclination was weakened and he said, "I want," he has divorced willingly.

According to the Rambam, being forced to perform a *mitzva* does not fall under the halachic definition of "coercion" because the true desire of any Jew who "wants to be part of the Nation of Israel" is to obey Halacha. Thus, when the *beis din* applies coercive measures, they are not forcing the husband to give a *get*, but rather eliminating the "evil inclination" which is forcing the husband not to give a *get*. When no *mitzva* is involved, however, an act performed under

coercion is invalid, as it is not done wholeheartedly. Hence, in cases in which the husband is not halachically required to grant his wife a divorce, a *get* given under coercion is invalid.

Underlying the Rambam's comments is a subtle but crucial distinction between רצון (will or desire) and הסכמה (consent). The Rambam rules, based on the Gemara, that it is not sufficient for the husband to give the *get*; he must **want** to give the *get* — עד שיאמר רוצה אני. This is in contrast to the Rambam's corresponding ruling in *Hilchos Mechira* (10:1) regarding one who is coerced to sell something. The Rambam there writes that even if physical force is applied until the person agrees, the sale is valid, שמפני אונסו גמר ומקנה — he makes the decision to sell as a result of the pressure applied. In the case of a *get*, the husband must announce רוצה אני, expressing his desire to give a *get*. Moreover, as mentioned, a *get* given under such circumstances is valid only when it is halachically required, as we may then presume a desire on the part of the husband to grant the divorce in fulfillment of the divine command. In clear contradistinction, a forced sale is valid even if no *mitzva* is involved and even without a declaration of רוצה אני. This is because the transfer of property requires only the individual's **consent**, whereas divorce requires the husband's **will**. It is not sufficient for him to **agree** to divorce; he must **wish** to divorce. This clarification is made by the *Nesivos* (205:1),[3] as explained and developed more fully by the *Zecher Yitzchak* (23).

This distinction explains why, as mentioned earlier, the Rambam and Rashbam cite textual sources for the requirement that a *get* be given willingly. At first glance, one might have thought that this requirement stems from the general requirement of גמירות דעת — definitive consent — that applies to all transactions. Clearly, *gittin* require the husband's consent no less than the purchase or sale or property, and one might have thus wondered why the Rambam and Rashbam found it necessary to identify a specific Biblical source for the requirement that a *get* be given willingly. In light of the distinction noted by the *Nesivos*, the answer is clear. These *Rishonim* enlisted a Scriptural source for the requirement that is unique to *gittin* and extends beyond the standard requirements of consent that apply to financial transactions. If not for this source, we would have required only that a husband agree to grant the divorce; this source establishes the additional provision of רצון, which requires that the husband **want** to grant the divorce, beyond his **consent** to do so.[4]

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3. The *Nesivos*' formulation is: דבגט בעינן גם שיהיה ריצוי בלב...אלא ודאי דבמכירה לא בעינן שיהיה ריצוי בלב משא"כ בגט.

4. Curiously, the Rashbam, commenting on the Gemara's discussion in *Bava Basra* (ד"ה עד שיאמר רוצה אני), writes that in the case of a transaction as well, the sale is valid only once the owner expresses his willingness to sell by declaring רוצה אני, in seeming opposition to

II. Defining אונס and רצון

Having established the need for רצון as a prerequisite for a valid divorce, we turn our attention to the question with which *poskim* have wrestled throughout the centuries: how precisely do we define this term? Which factors motivating a husband to divorce his wife can be considered רצון — his willed decision — and which are regarded as אונס (duress)?

It seems clear that the definition of אונס extends beyond physical force. The Rambam (*Hilchos Mechira* 10:4), based on the Gemara (*Bava Basra* 40a), writes explicitly that forcing one's hand through financial threats also qualifies as אונס. He cites the Gemara's example of a person who leased property for three years and then threatened to destroy the lease contract and claim ownership over the land if the owner did not sell it to him.[5] If the owner sells the field due to the threat, this situation is treated as אונס, such that a מודעא (formal disclaimer) issued before the sale is effective in nullifying the transaction. Applying this rule to divorce, which requires רצון, a *get* given in response to financial threats would be considered a גט מעושה — a *get* given under duress — and thus would not be valid.[6]

The more complex question that arises relates to the category of אונסא דנפשיה — self-imposed pressure. The Gemara mentions this term in the discussion cited above concerning a sale made under coercion. After citing Rav Huna's ruling that such a sale is valid, the Gemara initially explains this ruling as based on the fact that any time a person sells his possession, he is "coerced" to do so by the need for money. Since all sales are driven by a compelling need, the Gemara reasons, if a person is forced to sell his property, the sale is similarly valid.[7] But

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the distinction drawn by the *Nesivos*. It is unclear, however, whether the Rashbam made this comment in reference to the final *halacha* or only in the context of the Gemara's initial suggestion that the validity of a sale made under coercion is inferred from the validity of a *get* given under coercion — a suggestion which the Gemara ultimately rejects. A full discussion of the Rashbam's comments lies beyond the scope of this essay.

We should also note that the Rashba (*Kiddushin* 50a) appears to take a much different view, stating that according to the Gemara's conclusion in *Bava Basra*, a *get* given under coercion is valid just as a sale made under coercion is legally binding. See *Shiurei Rav Baruch Ber* and *Dibberos Moshe*, *Bava Basra*, vol. 1, 41:1.

5. One who can prove that he has resided on a piece of property for three years is the presumed owner until it can be proven otherwise, so after three years of leasing, the tenant was able to threaten a claim of ownership.
6. Below, however, we will see that some question this assumption that a *get* given under financial duress constitutes a גט מעושה.
7. A number of *Acharonim* question the Gemara's initial suggestion, noting the obvious difference between the motivation to sell and the sale itself. Even if one is driven to sell

the Gemara then dismisses this argument, distinguishing between self-imposed duress and external pressure. When a person feels pressured for cash and is thus driven to liquidate assets, this "coercion" is self-imposed due to his desire or need for money. Such pressure does not qualify as אונס, and thus cannot serve as a precedent for the validity of transactions made in response to external threats and coercive measures imposed by others.

The concept of אונסא דנפשיה comes into sharper focus in light of an important passage in the *Beis Yosef* (C.M. 205) concerning land given as a bribe to escape execution. The Mishna and Gemara in *Gittin* (55b) discuss the tragic situation of סיקריקון, when governments encouraged, and at times even required, their citizens to kill Jews, and Jews would offer their property to bribe the executioners and save their lives. The Gemara writes that such gifts are legally binding; the Jew cannot later claim that the transfer was made under duress, because אגב אונסיה גמר ומקני — "As a result of his duress, he resolves himself to transfer [the property]." Several *Rishonim* question this *halacha*, noting that the Gemara in *Bava Basra* validates only sales made under duress (תליוהו וזבין), but not gifts.[8] The Rashba explains, הואיל והפקירה אותם המלכות להריגה ואינם מקוים לשוב לנחלתם עוד — "[The gift is legally binding] because the government condemned them all to be killed, and they have no hope of ever returning to their property again." According to the Rashba, the situation described in the Gemara, in which the Jews were condemned to die, marks an exception to the rule, as given the dire circumstances, the landowners were fully prepared to relinquish their property to save their lives.[9]

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his belongings by force of circumstance, he obviously makes a willed decision to go through with the transaction, which is far different than being physically coerced to sell property that he does not wish to sell. In light of the *Nesivos*' remarks, however, the explanation becomes clear. The Gemara at this stage speaks of רצון and seeks to prove that a sale is valid even if one does not truly want to sell the item in question. (A similar explanation is given by Rav Moshe Feinstein in *Dibberos Moshe*, cited above, note 4.)

8. Rashi, commenting on the Gemara's discussion (ד"ה לקטלוהו), makes reference to the Gemara's ruling in *Bava Basra* concerning sales made under coercion as the basis for the validity of the transfer of property to the סיקריקון. Rabbi Akiva Eiger, in his commentary to the Mishna, notes that Rashi appears to equate sales with gifts in this regard, in contrast to the Rashba. See Rav Moshe Feinstein's discussion of Rashi's comments in *Dibberos Moshe* (cited above, note 4).

9. See also Meiri and Ritva, who explain similarly. The Mordechai (394) appears to suggest a much different answer. Citing Rabbenu Tam, he writes, דהא מילתא דמי לזביני...כיון דאי לא יהב ליה קרקע מסתפי דלמא קטיל ליה דמי כאילו הסיקריקון מכר עצמו לו בשביל הקרקע שלו. According to the Mordechai, when a person is condemned to die and he gives his property in exchange for his life, this transaction qualifies as a "sale," as the owner receives something — his life — in return for the property. Therefore, the transfer of property is legally

The *Beis Yosef* similarly suggests distinguishing between a threat to life and other forms of pressure, but he then questions this answer, noting the Gemara's comments in *Kesuvos* (33b) that physical suffering is worse than death. If the threat of death suffices to lead one to wholeheartedly relinquish his property, then certainly such a decision made in the face of physical torture should also be legally binding.[10]

The *Beis Yosef* therefore proposes a different solution,[11] drawing a fundamental distinction between one who offers property in exchange for his life and one who is forcibly coerced to surrender property. The situation described in *Gittin*, the *Beis Yosef* explains, is one in which the Jews were condemned to death due to their faith, not in an effort to seize their property. It is the Jew himself who initiates the offer of property in exchange for the right to live,[12] and when one initiates such an offer, his intent is indeed to legally transfer the property in question. In *Bava Basra*, however, the Gemara speaks of a case in which one is approached by a person seeking something in his possession and pressures him to relinquish it. It is the oppressor who initiates the demand for the property in question, and the Gemara establishes that under such circumstances, the transfer is legally binding only if the owner receives something in exchange. Otherwise, he has no intention to relinquish ownership over the item.

The *Beis Yosef* here establishes an important rule relevant to the definitions of אונס and רצון, stating that a legal act taken at a person's own initiative is binding

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binding just as a sale made under duress. However, a number of *Acharonim* understand the Mordechai's comments differently. See *Mishneh Le-Melech* (*Hilchos Mechira* 10:1), who understands the Mordechai as referring to the Rashba's answer, and Rav Elchanan Wasserman (*Kovetz Shiurim*, *Bava Basra* 201), who understands that the Mordechai refers to the second answer given by the *Beis Yosef*.

10. Curiously, the *Beis Yosef* also raises a second objection, noting that no *Rishonim* draw such a distinction between a threat to life and other forms of coercion, despite the fact that, as mentioned above, the Rashba and others indeed make this precise point.
11. Surprisingly, the *Nesivos* (205:8) understands the *Beis Yosef*'s answer as intended to explain the Rashba's comments. It seems quite clear, however, that this is an entirely different approach to answering the question.
12. It should be noted that the Ramban, in his commentary to *Gittin*, cites from the Yerushalmi a different account of the סיקריקון decrees, according to which the plan was indeed to confiscate the Jews' property. The *Beis Yosef* clearly works off the assumption that the decree was to have the Jews killed and they would try saving their lives by offering their property as a bribe. The Ramban takes an entirely different approach to the Gemara's discussion, claiming that the surrender of lands during this period of persecution was legally binding only as a temporary, extraordinary measure (מפני תיקון העולם), and does not reflect the standard rules governing transactions made under duress. (The Meiri also accepts the version that the goal of the סיקריקון was to confiscate the Jews' property: סיקריקון הוא...אנס גוי שאונס הקרקעות לישראל.)

even if it was taken to save himself from harm. Since he initiated the act and it was not forced upon him by someone else, he is considered to have performed the act with רצון, even if the initiative was taken in response to adversity. This theory is likely rooted in the Gemara's comment in *Bava Basra* concerning sales. All sales are made under "duress," by force of circumstance, and yet they are valid because they result from אונסא דנפשיה — the person's initiative taken to improve his condition. No one forces him to sell his property, but he makes this decision to meet his current need for money. The *Beis Yosef* extends this basic principle to surrendering property. As long as no pressure was applied specifically with regard to the property, if the person initiated the surrender of property to escape adversity, the gift is legally binding.

We find different reactions among the *Acharonim* to the *Beis Yosef*'s theory. The *Chasam Sofer*, in his commentary to *Gittin*, speaks in praise of the *Beis Yosef*'s distinction ("ודפח"ח וראוי לו דברי אלקים חיים"), whereas the *Chazon Ish* (E.H. 99:6) claims that the *Beis Yosef* did not draw this distinction as a definitive halachic ruling. The *Chazon Ish* notes that, as mentioned, other *Rishonim* explain the *halacha* regarding the סיקריקון differently, and he adds that if it is evident that the property is given under duress, it should make no difference who initiated the transfer.[13]

III. The Attitude of the *Poskim* Toward Various Forms of Pressure

With this background, let us now turn our attention to the particular situation of a *get* given by a husband under pressure. The *Shulchan Aruch* and Rama (E.H. 134:4) address a number of different scenarios in which a husband grants his wife a divorce in order to avoid the adverse consequences of withholding a *get*:

Vow

The Gemara in *Gittin* (46b) establishes that if one vows to abstain from all fruits in the world if he does not divorce his wife, and he indeed gives her a *get*, the *get* is valid, even though he was forced to give the *get* to avoid coming under his vow. The halachic authorities debate the question of whether this ruling would also apply if the husband vowed directly to give a *get*. The Rama cites the Ritva as ruling that such a *get* is valid, since the husband initiated the vow and was not coerced to give a *get*. Although he gives the divorce only by force of his vow, the divorce is nevertheless valid since the pressure to divorce was

13. We will see below that the *Toras Gittin* accepts the *Beis Yosef*'s distinction as halachically authoritative, whereas others dispute his ruling.

self-imposed. Others, however, disagree, distinguishing between this vow and the vow described by the Gemara. In the case discussed by the Gemara, as the *Beis Yosef* explains, the husband is not forced to give the *get*; rather, he makes the decision to give the *get* instead of being compelled to abstain from eating fruit. This is quite different from a vow to divorce, whereby the husband is under direct pressure to divorce by force of a vow. Accordingly, the *Shulchan Aruch* rules that the husband must first have the vow annulled before granting the divorce, but the Rama adds that if the *get* was given in fulfillment of the vow, it is valid.[14]

Escrow

The *Shulchan Aruch* rules that a husband may place a sum of money into escrow (ערבות), entrusting it with a third party who is authorized to keep the money until the divorce is given, whereupon the third party will return it to the husband. The *get* which is given is valid, the *Shulchan Aruch* rules, "because this does not resemble coercion." It seems that since the money had already been given and the husband merely chooses whether or not to retrieve it, we do not consider him under coercion to deliver the *get*. The Rama applies this ruling to a קבלת קנין, a situation in which the husband had made a formal act (such as a handshake) expressing his commitment to grant the divorce.

Self-Imposed Penalties

Different opinions exist regarding the validity of a *get* given under the pressure of self-imposed penalties. The *Beis Yosef* (134) cites a responsum of Rav Maimon Noar concerning the case of a man who committed himself to pay an exorbitant sum of money to the local authorities if he remarried his wife and did not then divorce. Rav Maimon rules that if the husband ultimately grants a divorce, the divorce is valid, despite the fact it was given to avoid a severe penalty, since the penalty was self-imposed and reflected the husband's desire to divorce. He writes:

> בנדון זה שהוא חייב עצמו במה שהוא רוצה לעשות אין זו כפייה שכל זמן שהוא מגרש ברצונו מגרש ואף על פי שאין בידו להחזירה אם לא יפסיד לא הוה ליה אונס שזה רצונו היה מתחילה לגרש וברצונו הוא מגרש והקנס שעשה ברצונו עשאו לחזק עצמו לגרש ולא הוה ליה אונס.
>
> In this case, in which he obligated himself to do what he wants to do,

14. The *Pischei Teshuva* (134:8) records an interesting debate among the *poskim* as to whether, according to the first view, *beis din* can force the husband to divorce his wife in order to fulfill his vow.

> this is not coercion, for when he divorces, he divorces of his own volition. And even though he is unable to remarry her [and stay married] without losing [money], this is not "duress," for this was his will from the outset — to divorce her, and he divorces her out of his own will. The penalty he imposed was willingly done to incentivize himself to divorce, and this is not coercion.

According to Rav Maimon, a self-imposed penalty reflects the will of the husband. Thus, even if he divorces to avoid the penalty, this is nevertheless precisely what he wanted — to pressure himself to grant the divorce — and this qualifies as רצון.

The *Beis Yosef* then proceeds to cite the view taken by the Rashba in one of his responsa (4:40). The Rashba addresses the case of a man who made an agreement with his wife's relatives that he would divorce her at a certain time or else incur a very large penalty. In the interim, the man retracted his consent and refused to divorce. The wife's relatives warned him that they would demand the stipulated sum, and he then went to the local authorities to try to absolve himself of the penalty. When he saw that he would have no way of avoiding the penalty, he divorced his wife. The Rashba ruled that this constitutes a גט מעושה, and the divorce is invalid. According to the Rashba, then, even self-imposed pressure constitutes coercion and renders the *get* a גט מעושה.[15]

The Rama (134:4) rules that in the case of a self-imposed penalty, the husband

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15. The Rashba's ruling seems difficult to understand in light of the Gemara's ruling regarding a vow to abstain from fruit, which does not invalidate the *get* even though it is given to avoid this self-imposed penalty. Possibly, one could distinguish between a penalty that requires a payment, the specter of which is regarded as coercive force, and a penalty requiring abstention, which may be seen as a choice the husband must make, as opposed to coercion.

    In truth, however, as noted by the *Aruch Ha-Shulchan* (E.H. 134:23,26), the Rashba and Rav Maimon Naor might not be in disagreement at all. Rav Maimon accepts the *get* given to avoid the self-imposed penalty because all along the husband's desire was to divorce. In the case addressed by the Rashba, however, the husband explicitly changed his mind and decided against divorce, and it was only because of the penalty that he would incur that he eventually gave the *get*. It seems clear that Rav Maimon would concede that such a *get* is invalid, and that, conversely, the Rashba would agree that in the case discussed by Rav Maimon, the divorce would be valid, since the husband had wanted to divorce all along. Thus, although the Rama (134:4) presents these two responsa as representing conflicting views, in truth they do not seem to be in disagreement with one another. Accordingly, the Gemara's ruling concerning the vow to abstain from fruit poses no difficulty for the Rashba, as in that case the husband never retracted his initial decision to divorce.

should not give a *get* until he is formally absolved of the penalty, but if he did give a *get* while under the threat of penalty, the divorce is nevertheless valid.

A *Get* Initiated by the Husband to Avoid Financial Loss

The *Beis Yosef* also notes a discussion by the Rashbatz concerning the case of a wife who seized some of her husband's money and refused to return it until he divorced her or a case in which a woman threatened financial harm if she is not given a divorce. The Rashbatz was uncertain whether a *get* given under such circumstances constitutes a גט מעושה.

The author of the *Nesivos*, in his *Toras Gittin* (cited in *Pischei Teshuva* 134:11), questions this discussion, noting that financial pressure is certainly considered a situation of אונס, as evidenced by the aforementioned case of a tenant who threatens to claim ownership over the leased property. It is inconceivable, the *Toras Gittin* writes, that the Rashbatz would even consider validating a *get* given in response to a threat of confiscation or property damage. To explain the Rashbatz's comments, the *Toras Gittin* claims that he is not speaking at all of a woman who caused or threatened damage in order to obtain a divorce. In the case under discussion, the wife was taking the husband's money (or threatening to take his money) and he therefore initiated the divorce to free himself from the immense financial pressure caused by his wife. Hence, although the husband was clearly divorcing to save himself from financial collapse, the *get* was nevertheless valid because it came at his initiative. The *Toras Gittin* draws upon the distinction made by the *Beis Yosef*, discussed above, between a person who is forced to sell his property and one who is condemned to execution and offers his property as a bribe. In the latter case, the *Beis Yosef* argues, the transfer is legally binding because it was initiated by the owner.[16] Similarly, the *Toras Gittin* contends that if the husband initiated the divorce, even if this was done in response to overbearing pressure, the divorce is valid.[17]

The *Toras Gittin* supports his contention based upon empirical evidence:

> וכן מעשים בכל יום שהאשה לפעמים מצירה להבעל בגזילת ממון ובשאר דברים ומחמת זה מגרש ואין מי שחש לגט מעושה.

In fact, this happens all the time — the wife sometimes causes her

16. The *Toras Gittin* makes reference to the comments of the Rama in *Choshen Mishpat* 236:1, which indicate that he accepted this distinction drawn by the *Beis Yosef*. The *Chazon Ish* (in the passage cited above), however, dismissed this proof from the Rama's ruling.
17. Below, we will cite a different reading of the Rashbatz's comments from the *Pischei Teshuva*.

> husband anguish by stealing his money and in other ways, and because of this he divorces. Nobody raises the concern that this is a coerced *get*.

According to the *Toras Gittin*, this is precisely the situation addressed by the Rashbatz — where the husband divorces to rid himself of the distress caused by his wife, which she did not cause specifically to pressure him to divorce.[18]

The *Chazon Ish* raises a number of objections against this view of the *Toras Gittin*. For one thing, he maintains (as mentioned earlier) that the *Beis Yosef* does not advance his theory as a normative halachic ruling, but rather as a possible approach to reconcile seemingly conflicting Talmudic passages. In addition, the *Chazon Ish* contends that even if we accept the *Beis Yosef*'s theory with respect to property transferred as a bribe to save one's life, this ruling cannot be applied to *gittin*. If the rule of גט מעושה applies only when the pressure is applied with the explicit intention of forcing a *get*, then any woman seeking a divorce can simply find people to beat her husband without mentioning anything about a *get*, and the entire literature on the subject of גט מעושה would thus be rendered superfluous. When a woman or people sent by her threaten or cause harm to the husband, it is obvious that this is done to force a *get*, and his offer to grant a divorce thus cannot possibly be compared to the case of the סיקריקון discussed by the *Beis Yosef*, where the threats that were made had nothing to do with the Jews' property.

The argument advanced by the *Chazon Ish* was actually made centuries earlier by Rav Betzalel Ashkenazi (author of the *Shita Mekubetzes*) in one of his responsa (15). He cites the ruling of the Ri Migash (cited by the *Tur*, C.M. 205) that if the authorities come to seize a person's money and he offers a parcel of land in exchange for his money, the transfer is legally binding. Rav Betzalel Ashkenazi raises the question of whether a *get* given under such circumstances would also be valid — precisely the question addressed by the *Toras Gittin*. He writes unequivocally that the *get* would be invalid, as it is clearly given under duress:

> אבל גיטא כל שאנסו לו בממון סתם ושוב מתרצה האנס בגירושי אשתו כיון דזוזי לא תלו בגירושין דאטו גרושי אשתו של הלה מייתי זוזי הילכך אומדנא דמוכח דבעקיפין קא אתו עליה ואע"ג דאין מזכירין לו גט כלל...דאי קא מהדרי אזוזי היאך נתרצו בגירושין.

> But when it comes to a *get*, whenever one is under financial coercion without an explicit reason, but the coercer is then appeased through his

18. In describing the case, the Rashbatz does, in fact, mention that the wife refuses to return the stolen money until she is granted a divorce. Apparently, the *Toras Gittin* understands that the woman did not initially steal for the purpose of pressuring the husband to divorce, and only afterward conditioned the money's return on her receiving a *get*.

> divorcing his wife, since money has nothing to do with the divorce — for does his divorcing his wife bring the other fellow money? — it is clearly evident that they came upon him indirectly, despite the fact that no mention was made of a *get*… For if it was money they were after, why would they be appeased by his divorce?

Unlike in the case of thieves or oppressors who seek to kill or confiscate money and are prepared to accept a piece of property instead, when a man satisfies those who pressure him by consenting to a divorce, it is clear that this is what they were after. Even if they had made no mention of a *get*, the fact that they withdrew upon receiving his consent itself shows that this was their objective all along. This calls into question the *Toras Gittin*'s attempt to apply the *Beis Yosef*'s ruling to divorce, as when a husband grants a divorce in response to the distress caused by his wife, it can be reasonably assumed that this is precisely what she wanted. As such, the *get* constitutes a גט מעושה.[19]

On the other hand, the *Toras Gittin*'s approach also appears in an earlier source, in a responsa of the Ranach (63). The Ranach writes explicitly that the Rashbatz addressed a situation in which it was clear and evident that the pressure applied was intended to coerce the husband to divorce, but since no explicit mention was made of this objective, the Rashbatz was uncertain whether this qualifies as a גט מעושה. Since the coercive measures were not expressly taken to force the husband to grant a divorce, his consent may constitute אונסא דנפשיה, in that the divorce was, at least formally, his initiative. The Ranach distinguishes between the Rashbatz's discussion and that of the Rivash, who, according to the Ranach's understanding, allowed a *get* when the husband was subjected to pressure for some other reason that did not relate to divorce, but was able to persuade his tormentors to withdraw by agreeing to divorce.

Of course, those who reject the *Toras Gittin*'s reading of the Rashbatz's comments must answer the question that led the *Toras Gittin* to his controversial reading: why would there be any reason to accept a *get* given in response to a

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19. It is told that in the time of the Brisker Rav, there was a case of a man who consented to a divorce after the people involved, relying on the *Toras Gittin*, significantly raised his wife and children's living expenses until he could not afford to support them. They figured that since this was not done explicitly for the purpose of forcing a *get*, this does not qualify as a גט מעושה. The Brisker Rav reportedly ruled that the *get* was not valid and this constituted עריות בפרהסיא (public immorality, as the wife was still married).

    A further difficulty with the *Toras Gittin*'s theory is that it seems to contradict the Rashbatz's own comments. Before citing this responsum of the Rashbatz, the *Beis Yosef* quotes the Rashbatz as writing, אם כפוהו שלא כדין בדבר אחר ומתוך אותה כפייה גירש אפשר דהוי גט מעושה. The Rashbatz seems to be referring to a case in which pressure is applied without mentioning the demand for a *get*, and yet he rules that the divorce is invalid.

wife's confiscation of the husband's money or threat of confiscation? As noted earlier, financial coercion clearly qualifies as אונס. Why should the case described by the Rashbatz be any different?

The *Pischei Teshuva* suggests that the Rashbatz was indeed questioning whether financial pressure qualifies as אונס in the context of *gittin*, as it does in regard to commercial transactions. People accord far greater value to their spouses than to any sum of money or material asset. If a husband is prepared to divorce his wife to save himself financial harm, we can only assume that he made a firm decision to divorce. This might be analogous to one who is forced to pay a meager sum of money if he does not relinquish a precious diamond and he agrees to give the diamond. This can hardly be considered "coercion," as he was given the reasonable option of paying a small amount of money and keeping the diamond. Similarly, a husband who is under financial pressure to divorce has the option of parting with the money in order to keep his wife, who is far more valuable. Thus, if he decides to divorce, he cannot be said to have been coerced to do so. According to the *Pischei Teshuva*, the Rashbatz was uncertain whether we should indeed draw this distinction between financial transactions and divorce, or if perhaps a *get* is invalid whenever it is given under any sort of pressure, including financial pressure.

It must be noted, however, that regardless of how we understand the Rashbatz's question, in the end he concludes that the *get* in the case he discusses is invalid.[20] Thus, it appears that even financial pressure and, in all likelihood, even financial pressure imposed without explicit mention of divorce, renders a *get* a גט מעושה.

Part 2 — In Search of a Solution

I. The New York Get Law

In 1980, the New York State Legislature passed a bill requiring that a spouse initiating a divorce proceeding in the civil courts must first certify that he or she has removed all "barriers to remarriage." Essentially, this law made it impossible for a husband to file for divorce in court before granting a *get*. Several leading *poskim* approved of the bill, whereby the husband is not coerced to give a *get*, but is rather denied the possibility of civil divorce without granting a religious divorce. Since he has the option of remaining legally married, he is not forced into giving a *get*. Rav Moshe Feinstein (*Iggeros Moshe*, E.H. 4:106) lent his emphatic approval to a similar bill that was passed by the South African

20. He writes: זה היה נראה לי, אבל קושטא דמילתא דתליוה ויהיב לא הויא מתנה.

parliament, comparing this measure to offering the husband a large bribe to divorce, a practice which, Rav Moshe says, is very common. By this law, the husband is not forced to give the *get*, but is rather given an attractive incentive to divorce, and this certainly does not constitute coercion.

As a practical matter, however, this law had a very limited effect. Even if it was effective in preventing husbands from threatening to withhold a *get* to gain leverage in court proceedings, it did not address situations in which the husband insists on remaining married to his wife.

II. The Second Get Law

In light of the limited impact of the law, pressure was applied to come up with a more effective legal solution to the plight of *agunot*, and in 1992, a second bill was passed in New York State. This law required judges to take a husband's recalcitrance into account when determining the division of the couple's assets and alimony obligations. Under this new law, husbands are condemned to significant financial harm for withholding a *get*, and thus the validity of a *get* given to avoid these legal consequences is questionable. A number of leading halachic authorities, including Rav Shlomo Zalman Auerbach and Rav Yosef Shalom Elyashiv, determined that such a *get* would, indeed, constitute a גט מעושה,[21] as it is given in response to financial coercion applied for the specific purpose of forcing a *get*. Consequently, this bill was resoundingly rejected in Orthodox circles, and thus proved useless as a method of resolving the painful problem of *agunot*.

III. The R.C.A. Prenuptial

In light of the failure to resolve this issue through legislation, a number of rabbis set out to find a practical, halachically viable solution internally. The impotence of the first New York bill and the fatal halachic flaw of the second prompted rabbinic leaders to explore other options that do not rely on U.S. lawmakers.

The proposal that has become the most popular in recent years is a prenuptial contract wherein the husband makes certain commitments in the event that the couple separates. The notion has its origins in a passage in the *Toras Gittin* (134, cited in *Pischei Teshuva*), which speaks of an agreement made between spouses that if they are separated, the husband waives all the wife's marital obligations but remains bound by his obligations. The *Toras Gittin* contends that a

21. Recall that even the Rashbatz, who considered the possibility of allowing financial pressure at least under certain conditions, ultimately concluded that this renders the *get* invalid.

get given under this arrangement is valid because when the couple separates, the husband is not penalized for withholding a *get*, but rather finds himself in a situation that makes it undesirable for him to remain halachically married to his wife. Married life becomes expensive and offers him no benefits, and this incentivizes divorce. This incentive is fundamentally different from a penalty imposed to force a *get*. The model devised by the *Toras Gittin* opens the door for other prenuptial agreements whereby the husband makes commitments that make marriage after physical separation an undesirable condition.

Accordingly, in 1994, the Beth Din of America introduced a prenuptial contract drafted by Rav Mordechai Willig, a legally binding document in which each spouse commits to appear before a *beis din* when so demanded by the other spouse and to abide by the *beis din*'s ruling regarding a *get*. Furthermore, the husband commits that in the event of separation, he will pay $150 a day to support his wife. This obligation makes it more desirable for the husband to divorce than to remain married and incur this significant expense. Since the agreement is formulated as a commitment to support the wife, as opposed to a penalty for withholding a *get*, the husband is not coerced into divorcing. The prenuptial agreement was embraced and adopted by the Rabbinical Council of America (R.C.A.).[22]

But this solution is also plagued by significant limitations, as it offers no help for wives of wealthy husbands, for whom $150 a day — just over $50,000 a year — might be a small or even insignificant price to pay to avoid what they perceive as capitulation. We must bear in mind that many, if not most, recalcitrant husbands are unreasonable, unyielding, and vengeful, and if such a husband is wealthy, he would happily pay $50,000 a year to avoid relenting to his wife.

IV. Tweaking the Prenup: Raising the Bar of Spousal Support

This flaw could be rectified by revising the commitment made in the prenuptial agreement. The husband could commit himself to support his wife and children in the event of separation in accordance with his financial means. In other words, rather than committing himself to a fixed daily amount, he would commit to support his family according to his means, as determined by the *beis*

22. More information about the Beth Din of America's prenuptial contract is available at the Beth Din's website dedicated to the prenup — www.theprenup.org. The site notes that several leading rabbis endorsed the prenuptial agreement, including Rav Zalman Nechemya Goldberg, Rav Ovadia Yosef, and Rav Asher Weiss.

din.[23] This way, *beis din* is empowered to charge even a wealthy husband a sum that would prove financially crippling, thus making it worthwhile for him to grant the divorce. Let us consider, for example, a family that lived in a luxurious mansion and employed several housekeepers, and the husband would buy his wife a new fur coat each winter, and they went on exotic vacations twice a year. If the couple separated, the *beis din* named in the prenuptial contract — a legally binding arbitration agreement — would be authorized to demand that the husband continue providing these amenities, which could mean daily payments of $1000 or perhaps even more.

These payments would not halachically constitute a "penalty" because they are required by force of the husband's commitment to support his wife as mentioned in the *kesuba*. The Mishna in *Kesuvos* (64b) writes explicitly that a husband is obligated to support his wife in accordance with his means (במכובד הכל לפי כבודו). The Meiri clarifies that this refers to amenities such as luxurious food and jewelry. If either the wife or the husband is accustomed to a luxurious standard of living, the husband is obligated by force of the *kesuba* to support his wife at that standard. This *halacha* is explicitly codified in the *Shulchan Aruch* (E.H. 70:3).[24] Thus, even if, as the Rashbatz concludes, financial threats may not be used to coerce a recalcitrant husband, it would be perfectly legitimate to compel a husband to pay what he in any event is required to pay by force of his obligations written in the *kesuba*. And once the husband signed a formal, legal document committing himself to the *beis din*'s assessment of this financial obligation, his commitment is enforceable by the secular courts. Under the pressure of having to support his wife to the tune of some $1000 a day, he will likely relent and grant his wife a *get*.

V. A Revolutionary New Solution: Making the NY Get Law Work

The obvious flaw of solutions predicated upon a prenuptial agreement is that they are only as effective as the number of couples who agree to sign the contract

23. One might, at first glance, object to this proposal on the grounds of *asmachta*, the halachic rule that voids conditional commitments that were made on the assumption that the condition would not be met. In this instance, seemingly, the husband commits himself to support the family because he assumes he and his wife will never separate, and thus this commitment is not binding. However, the Rama (C.M. 207:3) rules that the law of *asmachta* does not apply if the condition's fulfillment is entirely within the person's power. Since the husband is fully capable of divorcing his wife immediately upon separating, the rule of *asmachta* does not apply.

24. אבל אם היה עשיר הכל לפי עשרו.

before they get married. Understandably, couples preparing for their wedding are not interested in preparing for the dissolution of their marriage. Signing legal documents relevant to their possible eventual separation is something that they might, justifiably, find unnecessary and distasteful. This is besides the fact that this solution relies upon the standardization of the prenup, which itself depends upon the support and cooperation of the majority of rabbis officiating at weddings, which certainly cannot be expected anytime in the foreseeable future.

Therefore, instead of prenuptial agreements, we would be far better served by finding a way to overcome the halachic challenges of the revised New York Get Law so it can be used to force the hand of recalcitrant husbands in a halachically acceptable manner.

As we noted earlier, the major halachic impediment to the law is that it imposes financial liabilities for withholding a *get*, and the general consensus among the authorities disqualifies a *get* given under financial coercion. We can overcome this obstacle, however, if we find a precedent for a form of financial pressure that has been accepted by the consensus of halachic authorities and apply it to modern-day *aguna* situations.

Indeed, we find such a precedent in the Rama (E.H. 154:21), who cites Rabbenu Tam's ruling that although formal excommunication (נדוי) cannot be used against a recalcitrant husband, an edict may be issued forbidding Jews from providing him with any benefit or engaging in financial dealings with him. The Rama writes:

> יכולין ליגזור על כל ישראל שלא לעשות לו שום טובה או לישא וליתן עמו או למול את בניו או לקברם עד שיגרש.
>
> They can issue an edict forbidding all Jews from doing him any favor, engaging in commerce with him, or circumcising or burying his sons, until he divorces.

If a husband gives a *get* under the pressure of such sanctions, the *get* is valid and does not constitute a גט מעושה.

The question naturally arises as to the precise point of distinction between economic sanctions and other forms of financial coercion. Why is a boycott any less a form of "coercion" than direct penalties? If the court orders the community to stop patronizing the husband's store or employing his professional services, how is this different from forcing the husband to pay a fine? By pinpointing the precise basis of this distinction, we may be able to apply Rabbenu Tam's landmark ruling to permit other forms of financial pressure.

The distinction likely lies in the different halachic categories of *nezikin* (torts). One who directly causes his fellow financial damage — such as by wrecking his

car — must pay restitution, whereas one who causes damage indirectly — גרמא — is obligated to compensate his fellow only בדיני שמים, meaning, as a religious obligation, but not as a formal legal obligation enforceable by the courts. Thus, for example, the *Shulchan Aruch* (C.M. 386:3) rules that if one gave his fellow bad advice that resulted in financial harm, this type of damage falls under the category of גרמא and compensation is not required. The source of this *halacha* is a responsum of the Rashba (1:99), who indicates that although one is legally exempt from paying compensation in such a case, he still bears an obligation מדיני שמים.

It stands to reason that this applies as well to actively discouraging people from patronizing a business or employing someone's services. Causing financial damage in this fashion would likely constitute גרמא, and as such, it is not subject to the jurisdiction of *beis din* but incurs liability מדיני שמים.

This classification may form the conceptual basis of Rabbenu Tam's ruling. Measures that would normally warrant enforceable compensation constitute "coercion" and thus render a *get* invalid, but measures that indirectly cause harm, and would thus not be subject to *beis din*'s jurisdiction, are allowed as a means of encouraging the husband to give a *get*. When the infliction of harm would not ordinarily result in enforceable liability, it is not viewed as forcing the husband's hand to give a *get*.

If so, then Rabbenu Tam's ruling permits not only communal sanctions, but any form of indirect damage that would lie outside *beis din*'s jurisdiction. One example is preventing a person from accessing his property, known in halachic jargon as מבטל כיסו של חבירו, which is a form of damage that does not incur enforceable liability.[25] In light of Rabbenu Tam's ruling, we might ask whether a wife can force her husband to grant a divorce by taking the key to his store, for example, or the key to his safe, and threatening to incinerate it. The Rashbatz, as discussed earlier, addressed the situation of a woman who threatens to steal or damage the husband's property, and, as we saw, he concluded that a *get* given under such circumstances in invalid. He did not, however, address the case of a wife who threatens indirect damage, such as a threat to bar access to the husband's assets. It stands to reason that just as Rabbenu Tam allows a community to deny the husband the ability to earn a living, he would also allow denying a husband access to his property.

If so, then Rabbenu Tam's ruling offers us an effective way of overcoming the halachic barriers of the revised New York State Get Law. Very simply, the wife can sign a formal document renouncing all claims to assets awarded to her by the court as a penalty for her husband's recalcitrance. She then hands this

25. המבטל כיס של חבירו אין לו עליו אלא תרעומת (Yerushalmi, *Bava Metzia* 5:3).

document over the *beis din* to hold in escrow, without the husband knowing about it. A person cannot halachically acquire property without consent, and thus by signing this document, the wife essentially blocks the court's attempt to transfer the husband's assets over to her. Hence, the court's decision does not, from a halachic standpoint, take any property away from the husband. The result of the court ruling is that he is denied access to property that halachically belongs to him, as opposed to being forced to relinquish property. As such, the consequence of his withholding a *get* is not a direct penalty, but rather a situation of מבטל כיסו, whereby he is denied access to his property. As this constitutes only indirect damage, it is a legitimate form of coercion according to Rabbenu Tam's ruling, which has been accepted by the consensus of halachic authorities.

This proposal is predicated on the assumption that dissuading people from financially engaging with somebody constitutes גרמא, such that we can expand Rabbenu Tam's ruling to include any type of גרמא used as a coercive tactic against a recalcitrant husband. One might, however, question this assumption by distinguishing between *nezikin* — damaging or causing damage to one's property — and discouraging potential clients from employing one's services. *Nezikin* is defined as damage caused to property that one already owns, and this would include מבטל כיסו של חבירו, which entails making someone's property unusable. This is quite different from blocking clients and customers, who are not under the person's ownership and are free to make their own decisions of where to shop and whose services to employ. Thus, even though Rabbenu Tam permitted announcing sanctions against a recalcitrant husband, we may not necessarily expand this ruling to allow indirectly damaging a husband's property by freezing assets and the like.[26]

We may, however, draw proof from two sources that the measures allowed by Rabbenu Tam indeed fall under the category of *nezikin*. The Maharam Shick (C.M. 20) addresses a situation in which city merchants were bound by law to

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26. This argument was made by two scholars with whom I shared this proposal, Rabbi Meir Shmuelevitz of Jerusalem and Rav Michael Bleicher of Haifa. Rav Shmuelevitz noted that one could, at first glance, draw proof from the view among the *poskim* (see *Beis Yosef*, C.M. 156) that residents of a block may not bar someone else from moving in, even if they are legitimately concerned that he would compromise their ability to earn a livelihood. These *poskim* perhaps classify such measures as "damage," as the townspeople cause this individual harm by limiting his housing options. Rav Shmuelevitz added, however, that this situation cannot be compared to sanctions against a recalcitrant husband. Everyone has a natural right to live where he or she chooses, and infringing upon this right may constitute *nezek*. A business owner, by contrast, has no natural "right" to receive customers, and thus announcing a boycott cannot necessarily be regarded as "damage."

sell liquor at a high price, and merchants in the nearby villages, who were not under government regulation, began selling their liquor for less than half of that price.[27] In his discussion of this case, the Maharam Shick cites a responsum of the *Panim Meiros*[28] claiming that lowering prices in such a case falls under the category of גרמא,[29] and thus although the city merchants could not sue the villagers for compensation, it was nevertheless forbidden for the villagers to attract customers in this fashion. This discussion clearly reflects the view that even discouraging customers from patronizing a business qualifies as *nezikin*.

Another possible precedent is the *Chafetz Chayim*'s discussion of the financial consequences of *lashon ha-ra* (*Be'er Mayim Chayim*, *Hilchos Rechilus*, 9). The *Chafetz Chayim* notes that since even indirectly causing damage is forbidden (even though it does not result in enforceable liability), one violates this prohibition through negative speech about his fellow that results in financial harm. (He gives the example of a person who is dissuaded from hiring or partnering with someone because of irrelevant *lashon ha-ra* spoken about that person.) Here, too, the loss of a potential business or employment opportunity is classified as indirect damage.

Hence, we may reasonably claim that declaring sanctions against someone would also fall under the category of *nezikin*, in which case we may apply Rabbenu Tam's ruling to all cases of indirect damage. As discussed, this conclusion allows us to utilize the Get Law in a halachically viable way. Once the woman formally declares her refusal to take possession of the property awarded to her by the court, all such property remains in the husband's possession, and thus the halachic consequence of the court's division of assets is the husband's inability to access his assets. As this qualifies as indirect damage, it is akin to the sanctions allowed by Rabbenu Tam, and the *get* given due to this pressure is perfectly valid.

27. The *Shulchan Aruch* (C.M. 228:18) allows shopkeepers to offer free gifts and lower prices to attract customers away from competitors because the competitors are also able to offer these promotions. In the case discussed by the Maharam Shick, however, the merchants in the city were bound by government regulations requiring selling at an inflated price, and thus the villagers were unfairly taking away customers.
28. I did not find this citation in the *Panim Meiros*.
29. The *Panim Meiros* (as cited by the Maharam Shick) also considered the possibility of classifying this situation as גרמי, a form of indirect damage which is under the jurisdiction of *beis din*.