

## **REVIEW ESSAY**

### **An Unsuccessful Defense of the *Beit Din* of Rabbi Emanuel Rackman: *The Tears of The Oppressed* by Aviad Hacoheh**

Michael J. Broyde

**Abstract:** *The Tears of the Oppressed* was introduced at a press conference on October 22, 2004 as a solution to the *agunah* problem. It proposes that the doctrine of *kiddushei ta`ut\** (error in the creation of marriage) 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. This review essay demonstrates that such an expansion is supported neither by Jewish law sources nor by the *responsa* cited in the book itself. This review essay also addresses the procedural pitfalls of the book as well as its impact on marriage theory, and explores other solutions to the *agunah* problems.

**Biography:** Michael Broyde is a Professor of Law at Emory University School of Law and a *Dayan* in the Beth Din of America. He is the rabbi of the Young Israel in Atlanta and gives the daily Talmud class to the members of the Atlanta *Torah Mitzzion Kollel*.



## Review Essay

# **An Unsuccessful Defense of the *Beit Din* of Rabbi Emanuel Rackman: *The Tears of The Oppressed, An Examination of the Agunah Problems: Background and Halachic Sources* by Aviad Hachohen**

**Foreword by Menachem Elon, Retired Deputy President of the Supreme Court of Israel; Afterword by Emanuel Rackman, Chancellor Emeritus of Bar-Ilan University; Blu Greenberg, editor, (Ktav, 2004) 107 pp. plus 157 pp. Hebrew appendix**

Michael J. Broyde\*\*

### **I. Introduction**

In 1997, Rabbi Emanuel Rackman and a small group of rabbis who were not widely recognized as rabbinic decisors (*poseqim*)<sup>1</sup> formed a *beit din* (rabbinical court) that claimed to be freeing *agunot*<sup>2</sup> without requiring that a *get* be given by the husband to the wife; this *beit din* is now called “The Rabbi Emanuel Rackman—Agunah International *Beit Din L’Inyanei Agunot*.”<sup>3</sup> A great many rabbis denounced this *beit din*, which was defended in a text advertisement placed in the New York *Jewish Week* by Agunah International.<sup>4</sup> Nearly no Orthodox rabbis accept the pronouncements of this *beit din* as valid; one of the consistent criticisms of this court over the last seven years has been the absence of a serious scholarly work to demonstrate that the theoretical legal underpinnings of the mechanisms employed by the *bet din* are consistent with generally accepted halakhic

principles and precedent. Rabbi Dr. Aviad Hachohen of the Law Faculty of Hebrew University has now written that book, defending the practices of Rabbi Rackman’s *beit din*,<sup>5</sup> and he is to be thanked for that valuable contribution. A detailed intellectual analysis of the methods employed by Rabbi Rackman and his *beit din* is now possible. This review essay undertakes to do that.

The opening section of the essay sets down this author’s understanding of the book’s strengths as well as its weaknesses. The second section notes the possibility of an alternative thesis to this book, and demonstrates that that more minimal thesis, though halakhically correct, does not provide a justification for the practices of Rabbi Rackman’s *beit din* and thus

cannot be a correct explanation of its conduct. The section that follows notes three crucial procedural matters, one discussed in this book and two that ought to have been. The next section reviews some general methodological concerns which, in this reviewer's opinion, undermine the basic thesis of this book, and the final section reviews alternative solutions to the *agunah* problems not considered by this book and makes note of an avenue not explored. This review concludes that Rabbi Dr. Aviad Hacoen's proposed solution to the *agunah* problems is consistent neither with general halakhic principles nor with general marriage theory and thus is wrong.

## II. The Book's Thesis and A Critique

A serious approach to perhaps the most vexing halakhic problem of our time, *The Tears of the Oppressed* is well-written, interesting and usually lucid. The book accurately surveys many different Talmudic, medieval, and modern sources dealing with the problem of *agunah* and faithfully summarizes them. However, the work ultimately falls short, as its conclusions stray from the evidence presented and, unfortunately, its flaws overwhelm all else.

The book's central aim is to explore the idea of *kiddushei ta'ut*\* (error in the creation of marriage), with an eye to it as a robust solution to the *agunah* problems of our time. *Kiddushei ta'ut* is a doctrine derived from the Talmudic discussion at *Bava Qamma* 110a-111a that indicates that marriages that unexpectedly cause the

bride to fall to a levirate brother-in-law who is profoundly defective might be void. Although there are *risbonim* who maintain that only defects in the wife or in the brother-in-law are grounds for a finding of error in the creation of marriage (but never defects in the husband), this position is ultimately rejected by most halakhic authorities; they recognize that a severe defect in the husband not revealed at the time of the marriage can rise to the level of error in the creation of marriage such that if the woman were to otherwise remain an *agunah*, a rabbinic court would not require a *get* to end the marriage. For example, Rabbi Moshe Feinstein applied this doctrine to cases of hidden prenuptial apostasy, homosexuality, impotence, and other such situations.<sup>6</sup>

The intellectual foundation of *kiddushei ta'ut* postulates that a marriage, parallel to the construct of a commercial transaction, requires a "meeting of the minds" of both parties about all significant aspects of the marriage. The revelation of circumstances existing but unknown at the time of a deal indicates the absence of an agreement about the principal terms that is required to make a valid deal. In the case of information concealed by a spouse regarding a serious defect that his or her partner could not (and should not) have been aware of, the marriage could very well be void or voidable. In a previous article,<sup>7</sup> this author has encapsulated the three axial rules for *kiddushei ta'ut* as follows:

1. The woman must discover a serious defect present in the 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 the marriage.

(A fourth condition of *kiddushei ta`ut*, regarding the discontinuation of marital relations, will be discussed in section IV, procedural matters, below.)

The central chapters of *The Tears of the Oppressed* undertake a systematic exploration of the sources, understandings and applications of *kiddushei ta`ut*, from the Talmudic passages, especially the one in *Bava Qamma* mentioned above, to the analysis of the *rishonim* and codification of the *poseqim*, including 28 *teshuvot* on the topic; the entire presentation is valuable and interesting and informative. There is a basic dispute here among the *rishonim* as to the parameters of when and how one claims error in the creation of marriage, with some early and modern *poseqim* allowing the inclusion of subjectively societal sensibilities into the calculus and others arguing that such is not relevant, and pointing this out is a public service. Noting the contours of the dispute is helpful, and examining them case by case is of great value. Though it is unclear why specifically these *teshuvot* rather than others were examined—this author is aware of dozens more<sup>8</sup>—Hacohen provides a clear and lucid explanation of these *teshuvot* and the general principles employed.

It is most unfortunate, then, that the small percentage of the work that is wrong is deeply wrong, and it causes the entire treatise to be flawed. After undertaking a refined survey of *agunah* problems in the first eight chapters of his book, Rabbi Hacohen in chapter 9 (page 93) summarizes his conclusions, and the summary begins to veer far away from the *teshuvot* that he has compiled. He makes four basic points, three of which are correct and supported by the sources but one of which is unsupported even by his own sources, and that error is egregious. (In addition, there is a series of procedural lacunae that are addressed in Section IV of this review essay.)

First, Rabbi Hacohen correctly notes that the list of major blemishes or defects which form the grounds for women to claim *kiddushei ta`ut* has expanded over time, reflecting a (positive) change in the status of women, both economically and socially. That is not to say that categorical virtues of times past have been redefined suddenly as vices. Rather, social and economic reality affect the assumptions husbands and wives make as they enter into a marriage as well as the presumptions that halakhic experts make in forming their assessments of the mindset and intentions of the parties. As people's views of the goals and utility of marriage change, what we consider to be defects or blemishes changes, too. With the increased opportunities available to women in the modern world, women now have less patience for flawed

husbands and floundering marriages. *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 the marriage, she would not have agreed to marry.

Second, Rabbi Hacoheh correctly notes that there is a relationship between matters that would mandate coercion (*kefiyyah*) and those opening the possibility of *kiddushei ta`ut*. 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 is grounds for *kiddushei ta`ut* if found to have arisen (or been latent) before the marriage began. Of course, all agree that a defect which is revealed by a spouse-to-be during courtship is no longer grounds for *kiddushei ta`ut*, even though it might be grounds for coercion.

Third, Rabbi Hacoheh is correct in noting that some *poseqim* go so far as to create *umdenot* (presumptions of intent) that certain pre-existing defects void a marriage, which lead the *beit din* to aver that had knowledge of the defect come to light at the outset, no woman (including the one before the court) would have consented to marry. Furthermore, *tav lemativ tan du mi-lemativ armelo* (the Talmudic maxim that it is better for a woman to be with another [even unhappily] than to be alone, which supports the presumption that a woman is willing to accept any husband, even a flawed one) poses no obstacle to this concept. One could even go farther and posit that certain blemishes (impotence due

to hormonal deficiencies in testosterone levels, for example) must have been present at the beginning of the marriage, even if they were unknown. There is no need, in this writer's view, 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.

These *umdanot* allow one to assume that certain defects that are now present must always have been present and are thus considered latent defects. Employing statistical evidence in these types of cases is not without foundation in *halakhab*, as *umdenot* have a well-established provenance in the halakhic literature.<sup>9</sup> Indeed, a firm presumption (*umdena de-mukhabal*) allows a person to rely on it even without checking, just like a strong *hazaqah* (presumed status). To draw a parallel from a very different area of Jewish law, consider the question of when one must check vegetables for insects. *Halakhab* divides the obligation to check into three categories: (1) Cases where most of the vegetables have insect infestation (i.e., there is an *umdena* that insects are present); (2) Cases where a statistically significant number (but less than 50%) of the vegetables have insect infestation (i.e., there is an *umdena* that insects are not present); (3) Cases where insect infestation is statistically very, very unlikely (i.e., there is an *umdena de-mukhabal* [firm presumption] that no insects are present). In cases one and two one must check for infestation; in case three one need not.<sup>10</sup> It is quite conceivable that a

classification of blemishes by the relative likelihood of their latency will likewise form a body of presumptive knowledge that *batei din* will utilize in adjudicating cases of *ta`ut*.

Yet, to this writer's surprise, there is just one paragraph in the entire book on which types of defects can be assumed latent at the inception of the marriage when only expressed later. On pages 99-100, Rabbi Hachohen states that:

Moreover, today new scientific evidence helps satisfy the definition that the hidden defect had to be in existence prior to the marriage. Specifically, many studies show that characteristics such as violence, criminal behavior and vindictiveness in the husband have roots in childhood. For example, in the area of spousal abuse alone, it has been shown that there is a typical profile to a batterer and that his aggressive behavior as an adult has deep antecedents in his earlier life. This body of knowledge can be marshaled to allow even the more conservative *poskim* to interpret the defect of domestic violence as meeting the strictest parameters of *kiddushei ta`ut*.

*A significant addition to the literature of kiddushei ta`ut could have been undertaken if that paragraph had been elaborated upon in much greater detail.* Cataloging the social science literature, delimiting a set of principles, applying them to different situations, and determining which blemishes are never pre-existing, which are

always pre-existing and which need a case-by-case evaluation, would have been an important, valuable, and constructive contribution, which could change the way *poseqim* understand the concept of a latent blemish. The simple fact is that not all blemishes are latent, and 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. From this reviewer's studies of the behavioral science literature on sexuality, to give but one example, some sexual dysfunctions are latent, and some are developed. This subject is complex and in need of close analysis, which was not done in this work (or this essay).

Rabbi Hachohen's fourth point, however, drastically departs from the three valid points discussed above. The statement (page 96) that some "*poskim* allow for blemishes that arose after the marriage, explicitly citing the category of *umdenab*," to be used as the predicate for *kiddushei ta`ut*<sup>41</sup> is completely unsupported by credible evidence. There is not a single *teshuvab* cited that allows the voiding of marriage with a defect that was not present at the time of the marriage. The book's agenda is found in just this one line, but the line is completely unsubstantiated by the book itself. *Not a single one of the 28 responsa cited by him ends a marriage by noting a blemish that was created after the marriage was entered into.* Only Maharam of Rutenberg posits such, and then only in cases of *yibbum* (levirate marriage), where, we should recall, the husband is dead already, and his

view is clearly rejected by all later authorities. The best that can be said is that one finds occasional *teshuvot* positing that blemishes of certain types must have been in place prior to the inception of the marriage. But there are no *teshuvot* in the halakhic literature, and (not surprisingly, therefore) none cited in this book, that allow *kiddushei ta'ut* to apply to post-marriage blemishes in instances where the husband is still alive.<sup>12</sup> (Section V of this review essay will explain why.)

The state of the literature not only raises the issue of lack of precedent; it also points to further conceptual proof that Rabbi Hacoen's textual understanding of *umdenah* and its broad application is incorrect. According to his analysis, not only is the case of the apostate levir brother-in-law grounds for voiding the marriage, but even the apostasy of the husband should be grounds for declaring the marriage void based on this retrospective *umdenah* (where the wife says, "Had I known he would apostatize, I never would have married him."). One therefore would expect such a possibility to have been raised in the *agunah* literature over the centuries. In fact, not a single *rishon*—not even Maharam of Rutenberg or any of his disciples, who discussed at great length the problems associated with a husband who had apostatized—ever suggests that this retrospective *umdenah* is possible according to Jewish law. Hundreds of *responsa* have been written about *iggun* resulting from the husband's apostasy, none of which void the marriage based on this *umdenah*.

The reason this is so is that it is not possible.<sup>13</sup>

Beyond this *argumentum ex silentio*, Hacoen's conclusion is demonstrably in error in that it is reached by conflating different categories of *agunah*. The general attitude of *halakhab* toward matters of *iggun* is to seek to balance of two integral, opposing values: on the one hand, *mi-shum iguna aqilu bah rabbanan* (the rabbinic tradition to employ leniency when encountering cases of women who would otherwise become tied to lifeless marriages); on the other, *humra shel eshet ish* (the imperative to proceed cautiously in recognition of the gravity of releasing a married woman without a *get*). These values are not competing (in the sense that one should triumph), but operate in dialectic tension. Approaches that ignore one value over the other are misconceived and in error. Recognizing this balance leads one to see that situations of *yibbum* (levirate marriage) are completely different from our typical cases of *iggun* precisely because in cases of *iggun me-yavam* (the inability of a woman to marry because the levirate brother-in-law will not do *halitsah* [the ceremony releasing the widow from levirate marriage], *the husband is dead*.) When the husband is dead, the natural inclination of the *halakhab* is to be more lenient, as the need to balance the stringent posture *eshet-ish* demands against the desire to free bound women is no longer in play—only the second is present, subject to the normal rules of a Torah obligation. This book completely misses that balancing issue, in that it freely mixes cases of *iggun*

with cases of *iggum deyavama*, when they belong to distinct classes, not just factually, but conceptually and halakhically.

The same is true of situations where the husband has disappeared under circumstances in which Torah law allows one to assume that the husband is dead, and it is only by rabbinic decree that we need further proof (such as a report, by credible, but technically *pasul* [invalid] witnesses of disappearance in *mayim she'ein lahem sof* [limitless waters; e.g., an ocean]).<sup>14</sup> Thus, all of Rabbi Hacoheh's chapter four, with its list of leniencies in cases of *iggum*, is limited to cases where Torah law allows the assumption that the husband is dead and the marriage is really over. This is of little use to us in modern times in cases of recalcitrance. The common recitation of these Talmudic leniencies dealing with the presumed death of the husband in a work dealing with recalcitrance seems intellectually insupportable, especially since the modern scenario might not even be rightly classified as a case of *iggum*. When a court finds that the husband is most likely dead, the rabbinic calculus of stricture and leniency changes, but that recalibration does not occur in cases involving a husband who is very much alive.

As a further example, this basic failure of reasoning is reflected as well in Rabbi Hacoheh's analysis of Maharam of Rutenberg's unique view that the subsequent apostasy of the brother can be used to retroactively void the marriage and not require *halitsah*.

When Rabbi Hacoheh writes on page 40 that “the original marriage—which ended in her husband's death—is nullified *ab initio*, even without a *get*, and it follows that she does not now require *halitsah*,” he misses the point. Of course, she does not need a *get*—*her husband is dead*. The words “even without a *get*” are unneeded in cases where the husband is dead. This case is the epitome of why *yibbum* cases are different. Indeed, a close examination of the Mordecai (on *Yevamot* 4:107), which discusses the view of Maharam of Rutenberg, makes it quite clear that the unique issue here might relate to the dispute among the *rishonim* about how to understand the status of an apostate as a Jew who can marry (as an *ah mesummad* [apostate brother of the deceased husband] might be a gentile).<sup>15</sup> Maharam's crucial insight is that we can be more lenient in cases of *yibbum* than in cases of ongoing marriage (and yet even here, his leniency that post-marriage blemishes count to obviate *halitsah* is rejected, for reasons to be explained in Section V).

So too, Rabbi Hacoheh's presentation of the *Shulhan Arukh* and *Rama* is a bit twisted on this matter. He implies that *Rama* accepts the view of the Maharam of Rutenberg *be-di'avad*, when in fact it is clear that *Rama* only accepts the possibility of apostasy mattering as a blemish in cases where the brother had converted out *prior to the marriage* taking place. Indeed, there is not a single use of Maharam's *hiddush* (innovative insight)—that one can release a woman from a marriage based on the subsequent apostasy of the brother—in the



*Shulhan Arukh* or codes or even *responsa* (as far as I know). Rabbi Feinstein's *teshuvah* that is quoted so well on pages 41-42 also deals specifically with an apostate who had already converted out prior to his brother's marriage.<sup>16</sup> There is a significant overplaying of the *halakhab* here, in that Rabbi Feinstein merely created an implied condition to the marriage, which is itself quite remarkable, but still only pertaining to a pre-marriage defect.

This *teshuvah* of Rabbi Feinstein, however, does point to a crucial conceptual issue in *halakhab*'s understanding of *umdena*. *Umdena* (a presumption of intent) is conceptually—at best—a specific sub-unit of the category of *tenai* (a condition), in that a presumption held by all regarding the intent behind an action in question (anticipating or excluding a particular outcome) might also be regarded as an implied condition to that action.<sup>17</sup> Thus in the context of marriage, one could imagine circumstances where presumptions about the present and past are implicitly incorporated into a marriage at its inception.<sup>18</sup> Such an *umdena*, however, can never be more effective than a full-blown conditional marriage with a verbal expression explicitly addressing the same facts; Rabbi Feinstein's insight is that it sometimes can be equally effective, as in the case of *ah mumar* (heretic [levirate] brother[-in-law]). *But implied conditions can never be more effective than explicit conditions.* While Jewish law has a clear tradition allowing conditional marriages to avoid unresolvable levirate situations,<sup>19</sup> it has an equally firm

commitment that such conditional marriages should not be used in situations where the husband is alive.<sup>20</sup> Indeed, notwithstanding some scholarship and *teshuvot* to the contrary,<sup>21</sup> neither the Orthodox rabbinate nor the community has ever authorized conditional marriages (other than in situations where the husband dies prior to the woman benefiting from the condition), and the reason for this is clear: an ongoing sexual relationship is generally understood to void all conditions in a marriage, at least in situations where the marriage is still otherwise intact.<sup>22</sup> *Umdena* ought to suffer the same limitation. Thus, *Tears of the Oppressed* can also be understood as yet another proposal of conditional marriages, and if it is such, it would have been better served by doing so clearly, as an explicit conditional marriage has more validity than an implicitly conditional one,<sup>23</sup> although—as outlined above—conditional marriages as a solution to the *agunah* problem have never been deemed normative.

### Section Summary

*The Tears of the Oppressed* fails as a work advocating any change in the normative *halakhab*. The book's major premise—that *kiddushei ta'ut* can serve as an expansive solution to the modern *agunah* problem by employing the mechanism of *umdena* in retrospect to end marriages where a defect arose even after the inception of the marriage—is profoundly mistaken. The few sources throughout the halakhic literature that even raise such a possibility are limited to cases where the husband is dead already, where the usual requirement

to balance the stringencies of *esbet ish* with the leniencies of *agunah* therefore does not exist, and where the finding of the *umdena* does not actually end the marriage, for the death of the husband did. Hacoheh's conclusion that "There are simply two positions on the matter—a stringent one and a lenient one—and each has significant precedent in the halakhah" (page 98), is thus flatly untenable. And the description of *batei din* and *dayyanim* who have "searched under every crevice" and found the precedents that employed *kiddushei ta'ut* to be fully adequate and appropriate" (page 99)—the *beit din* of Rabbi Rackman—is equally unfounded.

### III. An Alternative Thesis of This Book and What Is Wrong With It

It is possible to construe Rabbi Hacoheh's arguments to be limited to situations where the defect, though it "arose" (page 96) after the marriage took effect, was latently present before the marriage was created. If that is what Rabbi Hacoheh means, then this statement and this book are valid and within the framework of *halakhab*, but hardly novel. Rabbi Moses Feinstein adopted that view,<sup>24</sup> and it is widely used by various *batei din* in situations that fit such a case. We hardly need a book to explain to us something widely known and used by *dayyanim* throughout the Torah world.<sup>25</sup>

If Rabbi Hacoheh intends to limit his analysis to cases where the defect was latent prior to the marriage, then the fundamental aim of his book—a defense of the work of Rabbi Rackman's *beit din*—has not been achieved. It can be shown that Rabbi Rackman's *beit*

*din* operates under the assumption that even a post-marriage defect, created by the post-marriage misconduct of the husband, is grounds for an annulment of the marriage. Consider the following transcribed conversation between a woman who was seeking a divorce through Rabbi Rackman's *beit din* and two of the directors of that rabbinical court, Estelle Freilich and Dr. Susan Aranoff,<sup>26</sup> provided to me by the woman in question. (Dr. Aranoff and Mrs. Freilich do the initial screening for Rabbi Rackman's *beit din* prior to the case's presentation before the rabbinic panel itself.) In this conversation, it is made clear that the *beit din* views the husband's decision not to support his wife upon separation to be grounds for voiding the marriage, since absence of support is a defect in the husband's conduct, albeit one that developed after marriage.

Freilich: Now according to your story, basically, you are living apart and he is not supporting you. And according to *halakhab*, it is the husband's obligation to support a wife so that, that would basically be the halachic grounds which is sort of weak, but it is still a ground, I mean your marriage is over. Susan, correct?

Aranoff: Right.

Freilich: Yeah, so based on that, if, if the Rabbis annul the marriage, you are not married to him.

Woman: Okay.

Freilich: Okay. You see, but according to Jewish law, the only way a woman can get out of a marriage is if the husband dies or if he gives her the *get*.

Woman: Oh, okay.

Freilich: Or if the Beit Din annuls the marriage. They cannot force the husband to

- give the *get*. That is not legally, you know, legally accepted in Jewish law today. But for a husband to release himself from a marriage, he is able to do that, so all he has to do is just give the *get* and then he could remarry.
- Woman: Now, if the marriage is annulled, isn't he free?
- Freilich: If the marriage is annulled, no, it is annulled for you.
- Woman: Oh, so you are not saying the whole marriage is annulled?
- Freilich: No, the marriage is declared illegal and you are free to remarry because the Beit Din freed you. But he has to give a *get* which is required by Jewish law for him to remarry.
- Aranoff: It's kind of a paradox and it is inconsistent because if you are not married to him, how can he be married to you but you do find it in the Rabbinic writings that the Rabbis say we do it for her but not for him because all he needs is to give the *get*, so....

Notwithstanding much of the technically erroneous material put forward in the name of Jewish law by Freilich and Aranoff in their colloquy, one sees from this the obvious: Rabbi Rackman and his *beit din* are prepared to free a woman from a valid marriage under Jewish law on the basis of a defect that developed after the marriage was entered into, including the post-marriage refusal of the husband to divorce his wife or support her or more general grounds that void all such marriages. Similar statements are found on the web site of Agunah International, the sponsor of Rabbi Rackman's *beit din*. Indeed, the basic view taken by Agunah International and Rabbi Rackman's *beit din* is

that every marriage entered into according to Jewish law is void as matter of Jewish law, and thus a *get* is never actually needed in any situation. They reach this somewhat startling conclusion with two sweeping assertions. The first is that:

[H]ad these women known at the time of marriage that they were agreeing to a union in which they could be literally imprisoned by an unscrupulous husband, they never would have consented . . .<sup>27</sup>

The second is that:

[N]o woman views marriage as a transaction in which her husband "acquires" her. No one can credibly maintain today that brides are consenting to the concept of *gufab qanui*, that marriage is a *kinyan* in which the husband acquires title to the wife's body. . . . Thus there is no informed consent by women to *kinyan* at the time of marriage and the marriage is void *ab initio* . . . . The *beit din* may dispense with the *get* and release the woman . . .<sup>28</sup>

Rabbi Rackman seems to have affirmed his ongoing agreement with these principles in a letter to the editor published in *Tradition*.<sup>29</sup>

Limiting Rabbi Hachohen's work to situations of preexisting defect (latent but present) compromises its basic purpose, which is to explicate to the public the grounds upon which Rabbi Emanuel Rackman's *beit din* operates.

## Section Summary

Utilization of *kiddushei ta'ut* (the claim of error in the creation of marriage) to end marriages without issuing a *get* in the set of cases limited to a demonstrable blemish that was in existence prior to the inception of the marriage is not a significant or valuable tool in resolving the *agunah* problem of our time (nor is it a novel insight). The reason is obvious: most marriages end due to post-marriage defects rather than pre-marriage defects, unless one is prepared to label all defects as latent (which is just a charade) or void all Jewish marriages.

## IV. Procedural Matters

Three procedural matters are worthy of review. The first is Rabbi Hacoheh's plea (pages 101-102) of *beit din ahar beit din lo dayyeqi*, which argues that Orthodox rabbinical courts of every stripe should respect the judgments of other rabbinical courts across the Orthodox spectrum, and those who utilize *kiddushei ta'ut* even for post-marriage blemishes accordingly should be respected. This is a plea of the desperate, reflecting a misunderstanding of how *batei din* work. Rabbinical courts do not generally examine *the facts* as determined by other honorable rabbinical courts (i.e., courts that follow the requirements of *halakhab* in making factual determinations), but they regularly examine the basic *legal* framework of rulings issued by other *batei din*, and refuse to honor those that are (in their view) wrong. That would seem a logical posture, and it is certainly the longstanding practice of *batei din*

in cases of innovation by other rabbinical courts. Innovation can be incorrect, and needs to be publicly identified and circumscribed when it is. Why defer to a wrong view?<sup>30</sup>

A second issue is equally pressing, but, to my surprise, not treated in the book. What are the evidentiary requirements needed for an honorable *beit din* to allow an assertion of "error in the creation of marriage"? How should a *beit din* evaluate such claims? Should all testimony be subject to robust cross-examination? It seems from my own review of the literature that Jewish law requires testimony on these matters be consistent with the general requirements of testimony for all contested Torah law matters.<sup>31</sup> Indeed, the *Shulhan Arukh* explicitly recounts that a woman lacks credibility with regard to matters of *iggun* once it is clear that her marriage was one that was leading to divorce.<sup>32</sup> It seems clear to me that one cannot find a marriage to have been erroneously entered into solely on the basis of the unsubstantiated testimony of one witness who is a party in the proceedings. Hacoheh's book should have had a chapter on criteria for evidence and establishing credibility,<sup>33</sup> particularly considering the reputation of Rabbi Rackman's *beit din* for procedural lapses.<sup>34</sup>

Another procedural matter ought to have been addressed by Rabbi Hacoheh. At what point must a woman who is aware of a glaring defect in her husband leave the marital relationship? Must she leave

the marriage immediately? Many authorities seem to adopt the view that she must leave as soon as the defect is discovered,<sup>35</sup> which would pose significant challenges to the use of *kiddushai ta'ut* in numerous cases.

The rationale for this requirement is clear. *Shulhan Arukh* rules<sup>36</sup> that if a couple whose wedding ceremony was technically flawed (as by use of a wedding ring worth only half a *perutah*) discover the error and continue to live together (sexually), that decision creates a valid marriage at the moment of the resumption of their sexual relationship, since both parties were aware of the error and of their ability to leave the marriage because of it, and chose not to.<sup>37</sup> Indeed this rule is explicitly described in the context of defects in the woman by the *Arukh ha-Shulhan*, who states:

In the case of defects in the woman which he explicitly stated before the marriage that he does not desire such defects . . . if he lives with her after their sexual relationship for an extended period of time, as a man and woman who are married do, they are certainly married . . . The marriage was completed with certainty, when he lived with her, as that made it clear that he really does not care about these defects.<sup>38</sup>

Of course, it is possible to create a construct in which the woman immediately decides to leave, but stays for a short period of time while planning to leave. It is

also quite conceivable that the *Arukh ha-Shulhan* provides a leniency when he states “for an extended period of time,” which indicates that the marriage is not ratified immediately (contrary to the apparent view of Rabbi Feinstein). So, too, it is possible to argue that general ignorance about *kiddushei ta'ut* is so widespread in our community that until the woman *knows she can leave*, her ongoing sexual relationship with her defective husband is not a ratification of the marriage at all, for ratification requires awareness of the option of leaving.

Yet another possibility is the view of the Beth Din of America that the woman need not leave until she discovers that the defect is incurable. None of these options is even considered in this work.

## Section Summary

The use of *kiddushei ta'ut* to void marriages requires adherence to a set of complex procedural rules dictated by Jewish law. Rabbi Hachohen's decision to ignore the three significant procedural problems posed leaves the reader who is familiar with Jewish law sensing that a great deal of technical Jewish law analysis is missing from this book.

## V. Some General Methodological Comments

Two final general methodological observations are needed about this book. First, the book is fundamentally flawed in its lack of definitions and perspectives on the problem of *iggum*. It makes no attempt to define an *agunah*, to explore which problems need solving, to relate *iggum* to the problems of a civil

divorce, or even to connect it to *herem de-Rabbenu Gershom* (the decree prohibiting coerced divorce absent a finding of fault) When should women (or men) be encouraged to leave the confines of a “dead” marriage?

In Talmudic times, *iggum* occurred when the husband had disappeared for an extended time and was feared, but not proven, dead. In medieval times, it occurred when a husband renounced the Jewish community and the authority of its leaders by abandoning the faith. In modern times, the situations have grown more complex. Should a rabbinical court consider a woman an *agumab* when she and her husband are in civil court fighting over the terms of the civil divorce, and the husband states that he will give a *get* when the civil divorce is over? When the wife will not go to a *beit din* to resolve claims and the husband wants to? When there is a pre-nuptial agreement mandating that they must go to a particular *beit din* and the woman will not? Much more care needs to be put into definitions. Why is a *mesarevet get* (a woman who declines to receive a *get*) an *agumab*? Does it matter what conditions are imposed and by whom? There is no analysis of those crucial definitional matters.<sup>39</sup>

Secondly, it is obvious to this writer that once one constructs any theoretical model of marriage, one quickly comes to the conclusion that blemishes that did not exist prior to the inception of the marriage cannot be grounds for voiding the marriage. This book gives little or no thought to the marital institution as it relates to error in the creation of marriage. The

relevance is obvious to this writer: Marriage involves a certain amount of change and growth (and even regression, too, sometimes). All marriages would become legal nullities if one allowed a man or a woman to exit a marriage (without a divorce) on the grounds that something very serious and unexpected had undermined (even eliminated) one spouse’s desire to be married to the other. It is obvious that when one’s spouse gets cancer after twenty years of marriage, it is not a case where *kiddushei ta`ut* ought to apply. Yet by the logic of Rabbi Hacoheh’s paper it does. Whether it be apostasy or adultery or Alzheimer’s (and those are just some of the A’s), marriage entails a future that is unknown, and marriages cannot become a nullity based on future events that cannot be predicted or disclosed through diligent investigation.<sup>40</sup>

Indeed, notwithstanding the length and breadth of this book, Rabbi Hacoheh can cite no precedent for the proposition—central to the reason he wrote this book—that blemishes developing after the marriage can ever be used to establish *kiddushei ta`ut* in situations where the husband is now alive (and a *get* would be required absent *kiddushei ta`ut*). The reason is obvious: this proposition is patently wrong as a matter of Jewish law, and blemishes that developed after entry into a valid marriage can never form the needed premise for *kiddushei ta`ut*. And this is a good thing, for 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, as already suggested, 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.<sup>41</sup> Jewish marriage will become a vehicle of convenience, discarded at the roadside of life the moment trouble occurs.

### Section Summary

Jewish law recognizes marriage as a central vehicle for family values and treats the ending of a marriage as a profound matter. “Solutions” to the *agunah* problem predicated on the ultimate destruction of all marriages (as all marriages involve change, growth, and some risk) violate fundamental precepts of Jewish family law theory. Rabbi Joseph B. Soloveitchik, in response to a proposal of Rabbi Rackman’s (thirty years ago) that annulments be reinstated as a regular procedure for solving the *agunah* problem, noted that such a proposal was unwise as a matter of policy and violated many meta-halakhic norms in family law. This proposal is similarly flawed.<sup>42</sup>

### VI. Can There Be Solutions to the *Agunah* Problem?

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<sup>43</sup> is part of the structure of Jewish marriage law.<sup>44</sup> This reviewer has dealt with this issue at some length elsewhere,<sup>45</sup> in a manner that makes it clear that solutions grounded in a global recasting of Jewish marriages will encounter fatal problems by definition, and we need not repeat those arguments here.

Any effort to craft a remedy must begin with a number of observations concerning potential solutions. First, solutions that incorporate secular law into the workings of Jewish law in a mandatory way should be sought only if they have the support of vast segments of the Orthodox community, since it is patently unethical (and a violation of halakhah) to impose one’s understanding of a disputed Jewish law matter on another person or group through the use of secular law. In the alternative, such legislation must have an opt-out clause allowing those who disagree to decline to be governed by it.<sup>46</sup>

Second, given the vastly different conceptions of the right to divorce found within the Jewish tradition and the resulting disagreements in how to solve the *agunah* problem, it is likely that the only solution that has the true possibility of “solving” the problem is one that recognizes the diversity of understandings found within Jewish law and allows each community to adopt whatever solution it deems religiously acceptable. But to prevent the religious posturing by spouses that comes with acrimonious divorce, such solutions have

to be spelled out prior to marriage and agreed upon by the parties. In the absence of such prior agreements as to what the base rules are, contemporary Jewish law will not be able to impose a solution.<sup>47</sup>

It is important to understand the impact of these two observations: just as there is diversity in the understanding and application of the Sabbath laws, the family purity laws, the financial laws, and the marriage laws of Judaism, there is diversity in the understanding of its divorce laws. And just as disputes over the Sabbath laws, family purity laws, financial laws, and marriage laws of Judaism are (almost) *never* resolved in a coercive manner (each community follows the *halakhab* as it understands it to be without any coercive direction from other communities), the same should hold true in the area of divorce law. But when the ground rules are not set at the outset, dispute resolution becomes much harder to accomplish in the area of divorce law. The contest between the spouses in an acrimonious divorce matter causes many individuals to misunderstand the norms of their community, either unintentionally or otherwise, and to seek a rule of Jewish law which, while normative, does not reflect the understanding of the *halakhab* found within his or her own community. Thus, every person involved in Jewish divorce can recount cases of one spouse or another seeking resolution of a contested Jewish divorce matter in front of a *beit din* that one spouse or the other believes is not representative of the Jewish law traditions of the community in which

the *res* of the marriage resided.

Just as solutions to the problems of kosher food fraud cannot be predicated on the community's agreeing on a single standard for keeping kosher, the same must be true for rules related to marriage and divorce. Individuals have the right and ability to discuss and agree in a halakhically binding way when and under what circumstances they, and not anyone else, determine that their marriage should end; they can then write a document directing their choice. There are a variety of models they can choose from, each grounded in the classical Jewish tradition and its sources, or common contemporary practice, or even simply mutual agreement of the parties. Once they reach such an agreement, it is binding on them and controls their end-of-marriage dispute should they have one.

#### **VI. A. Prenuptial Agreements: A Success**

In my own view, the only way to implement this type of a solution is through prenuptial agreements such as the kind endorsed by the Orthodox Caucus and the Beth Din of America. This is not the place to review the literature on these highly successful agreements.<sup>48</sup> Suffice it to say that my experience as a *dayyan* in the rabbinical court in the United States that arranges the largest number of *gittin* of any rabbinical court in the Diaspora is that they are highly successful and effectively eliminate the *agunah* issue when they are properly used. They do, in fact, solve the problem, but



they need to be used prior to marriage.

## VI. B. Other Possible Solutions?

Yet some argue that this solution still has its limitations and failures, and are seeking a solution that works independent of the will of the husband upon separation. The search for such solutions has been widely written about,<sup>49</sup> and I would like to use this review essay as an opportunity to present what such a proposal would have to look like in order to have a chance to be accepted. First, it would have to rely on opinions found in mainstream, classical halakhic sources that are inherently valid. One cannot build a system of Jewish divorce law based on opinions of writers and scholars no one has heard of. In addition, such a proposal would require acknowledgement on the part of significant halakhic authorities that even if it is not ideal (*le-kehatehila*), it is a halakhically satisfactory after-the-fact (*be-di-`avad*) response to a situation.

There are many valid reasons why such a proposal has never been forthcoming and endorsed by significant segments of the rabbinic community, and I have elsewhere explained them.<sup>50</sup> Were such a proposal to be crafted and accepted by mainstream halakhic authorities, it would likely be formulated, I think, to combine three different mechanisms into a single document, and in a way that if any of them were halakhically valid, then the resulting *get* would be valid.<sup>51</sup> The three elements would be conditions applied to the marriage (*tenai be-kiddushin*),<sup>52</sup>

authorization (*barsba'ah*) to give a *get*,<sup>53</sup> and broad communal ordinance to void a marriage (*taqqanat ha-qahal*).<sup>54</sup> Each of these avenues has significant halakhic support of both classical and modern *poseqim*; consequently, a real case could be made that a single document that successfully incorporates all three elements would survive any *be-di-`avad* halakhic criticism, and the *get* issued as a result of such a document would be valid according to most authorities. Indeed, in the twentieth century alone, one can cite a list of luminary rabbinic authorities who have validated such agreements in one form or another, including Rabbi Yosef Eliyahu Henkin, Rabbi Isaac Herzog, Rabbi Jechiel Jacob Weinberg, and Rabbi Ovadia Yosef, as well as many others.<sup>55</sup> And no less an authority than Rama approved of conditional marriages (although maybe only in *yibbum* situations).<sup>56</sup>

Even with this broad conceptual foundation, I would never actually use such a document unless and until a significant number of reputable *poseqim* determine that (at least) this document is effective *be-di-`avad* and that it would be respected as valid *be-di-`avad* even by *poseqim* who do not advocate its use. Maybe it would be halakhically better to rely on the array of leniencies advanced by various eminent *poseqim* in support of such documents with our understanding that *sha`at ha-dehag kemo be-di-`avad* (“a time of urgency is to be treated as if it is after-the fact”), rather than maintaining the none-too-pleasant or successful status quo, which also leads to *mamzerut*. That calculus would

require the approval of the foremost halakhic authorities of our times.

### Section Summary

Pre-nuptial agreements of the kind endorsed by the Orthodox Caucus and the Beth Din of America represent the best theoretical and practical solution to the *agunah* problem in the United States (and Canada) and need to be implemented with greater vigor by our community. Tripartite solutions (based on conditions applied to the marriage (*tenai be-kiddushin*), authorization (*barsba'ab*) to give a *get*, and broad communal ordinance to void a marriage (*taqqanat bakahal*)), even if theoretically advantageous, still require a great deal of further halakhic analysis.

### VII. Conclusions

An intellectual lion of Modern Orthodoxy at the height of his prowess, while prowling the byways of *halakhab* for shoddy reasoning forty years ago, noted:

Judaism's antinomies are important for an understanding not only of its theology and ethics, but also its Halakhah. Indeed, the data of Jewish theology and ethics are usually derived from the Law which fixes the essential character of all of Judaism. Unfortunately, however, many who are presently called upon to resolve questions of Jewish law are often oblivious to the antinomies which are implicit in their subject. Altogether too frequently they seize upon one or another of two or more possible antithetical

values or interests between which the Halakhah veers, and they assume there must be an exclusive commitment to that single norm. The

dialectic of the Talmud, however, reveals quite the contrary. Implicit in almost every discussion is a balancing of the conflicting values and interests which the Law seeks to advance. And if the Halakhah is to be viable and at the same time conserve its method and its spirit, we must reckon with the opposing values where such antinomies exist. An equilibrium among them must be achieved by us as objective halakhic experts rather than as extremists propounding only one of the antithetic values.<sup>57</sup>

The author of this paragraph is, of course, Rabbi Emanuel Rackman, and the elegant truth of his statement is timeless. Yet while *Tears of the Oppressed* takes passing note of the dialectic tension within *halakhab* between the stringency of releasing a married woman without a *get* (*lumra shel esbet ish*) and the leniencies provided to release women who are tied to “dead” marriages (*mishum iguna aqilu bah rabbanan*), it presents conclusions that far overreach the evidence offered to champion the overriding ideal of leniency and ultimately loses sight of any notion of equilibrium. The absence of that balance undermines the very nature of this book as a work of *halakhab*, for the *halakhab* here—true to its elemental meaning as “the path” of the law—must be tread between two values

in counterpoise. Rabbi Rackman correctly notes that the abandonment of one value to exclusively pursue the other represents an egregious methodological failure in understanding the processes of Jewish law.

Much as we all wish to find a solution to the *agunah* problem, truth is an ultimate value in Jewish law, and we must not hesitate to conclude that the expansive solution advocated by Rabbi Dr. Aviad Hachohen in *Tears of the Oppressed* is without any halakhic foundation. Women freed from their validly entered-into marriage based on a defect in their husband that was not present at the time of the marriage's inception are still married according to Jewish law, and any claim to the contrary is incorrect. Children born from a subsequent marriage of this woman to another man could well be<sup>58</sup> illegitimate. It pains this writer to write those words, and this writer cannot express to the reader how much he wishes it were not so.

### **Postscript: Some Personal Comments**

Those readers familiar with my writing or who have directly asked me questions of Jewish law on occasion know that I am not one who is afraid of controversy in matters of *halakhab*, or one who rejects ideas merely because they are new or novel, or who cannot go forward since he is continuously looking over his right or left shoulder. Rather, I feel instead a great deal of satisfaction when one can find an established solution to a complex problem grounded in the *rishonim* or *ahronim*, or even put

forward a well thought out *hiddush* that solves a communal or personal problem with integrity, even if others might disagree.<sup>59</sup> One need not cease to act merely because of controversy.

If, however, this book fails to persuade well nigh any members of the Orthodox rabbinate of its correctness (a not unreasonable assumption), the time has come for Rabbi Emanuel Rackman's *beit din* to cease operation, even if Rabbi Rackman continues to maintain his approach is correct. It is obvious to all involved that the conduct of his *beit din* does not fall within the confines of *halakhab* as apprehended by the Orthodox community. Even if Rabbi Rackman does not agree with this understanding of *halakhab*, he does no service to the many women whom he claims to have released from their status as *agunot* by placing his name—that of an esteemed Orthodox Rabbi now retired—on a document that purports to free these women from the bonds of their marriage according to Orthodox understanding of *halakhab*, when that document will not be accepted as valid by the Orthodox Rabbinate or community. Rather, he adds to these women's frustration when they discover that—even after Rabbi Rackman and his *beit din* gave them permission to remarry—they are still not an accepted part of the Orthodox community, and their conduct is still viewed as a sin.

No one is benefiting from Rabbi Rackman's

conduct, including the women whom he claims to release from their marriage. Rabbi Rackman should see that his rabbinic colleagues and community have rejected his view, and he should cease to act on his unique understanding of the *halakhab* in a *halakhab le-*

*ma`aseb* manner. He need not retract his sincerely held intellectual views, but he ought to cease acting on them for the betterment of Orthodoxy Jewry worldwide. It is the proper thing to do.

## Appendix: Suggested Tripartite Document (*Shelo le-Halakhah*)

This document is to certify that on the [ordinal number] day of the month of [name of month], in the year [calendar year], in [location], [name of groom], the groom, and [name of bride], the bride, of their own free will and accord entered into the following agreement with respect to their intended marriage.

The groom made the following declaration to the bride under the *huppah* (wedding canopy):

“I will betroth and marry you according to the laws of Moses and the people of Israel, subject to the following conditions:

“If I return to live in our marital home with you present at least once every fifteen months until either you or I die, then our betrothal (*kiddushin*) and our marriage (*nisu'in*) shall remain valid and binding;

“But if I am absent from our joint marital home for fifteen months continuously for whatever reason, even by duress, then our betrothal (*kiddushin*) and our marriage (*nisu'in*) will have been null and void. Our conduct should be like unmarried people sharing a residence, and the blessings recited a nullity.

“I acknowledge that I have effected the above obligation by means of a *qinyan* (formal Jewish transaction) before a *beit din hashuv* (esteemed rabbinical court) as mandated by Jewish law. The above condition is made in accordance with the laws of the Torah, as derived from Numbers Chapter 32. Even a sexual relationship between us shall not void this condition. My wife shall be believed like one hundred witnesses to testify that I have never voided this condition.

“Should a Jewish divorce be required of me for whatever reason, I also appoint anyone who will see my signature on this form to act as scribe (*sofer*) to acquire pen, ink and feather for me and write a *Get* (a Jewish Document of Divorce), one or more, to divorce with it my wife, and he should write the *Get lishmi*, especially for me, *ve-lishmah*, especially for her, *u'lesheim gerushin*, and for the purpose of divorce. I herewith command any two witnesses who see my signature on this form to act as witnesses to the bill of divorce (*Get*) to sign as witnesses on the *Get* that the above-mentioned scribe will write. They should sign *lishmi*, especially for me, *ve-lishmah*, and especially for her, *u'leshem gerushin*, and for the purpose of divorce, to divorce with it my above-mentioned wife. I herewith command anyone who sees my signature on this form to act as my agent to take the *Get*, after it is written and signed, and be my messenger to give it into the hands of my wife whenever he so wishes. His hand should be like my hand, his giving like my giving, his mouth like my mouth, and I give him authority to appoint another messenger in his place, and that messenger another messenger, one messenger after another, even to one hundred messengers, of his own free will, even to appoint someone not in his presence, until the *Get*, the document of divorce, reaches her hands, and as soon as the *Get* reaches her hands from his hands or from his messenger's hands, or from his messenger's messenger's hands, even to one hundred messengers, she shall be divorced by it from me and be allowed to any man. My permission is given to the rabbi in charge to make such changes in the writings of the names as he sees fit. I undertake with all seriousness, even with an oath of the Torah, that I will not nullify the effectiveness of the *Get*, the Jewish Document of Divorce, to divorce my wife or

the power of the above-mentioned messenger to deliver it to my wife. And I nullify any kind of a statement that I may have made which could hurt the effectiveness of the *Get* to divorce my wife or the effectiveness of the above-mentioned messenger to deliver it to my wife. Even if my wife and I should continue to reside together after the providing of this authorization to divorce her, and even if we have a sexual relationship after this authorization to write, sign and deliver a *Get*, such a sexual relationship should not be construed as implicitly or explicitly nullifying this authorization to write, sign and deliver a *Get*. My wife shall be believed like one hundred witnesses to testify that I have not nullified my authorization to appoint the scribe to write the *Get* on my behalf, or the witnesses to sign the *Get* on my behalf or any messenger to deliver it to the hand of my wife.

“Furthermore I recognize that my wife has agreed to marry me only with the understanding that should she wish to be divorced that I would give a *Get* within fifteen months of her requesting such a bill of divorce. I recognize that should I decline to give such a *Get* for whatever reason (even a reason based on my duress), I have violated the agreement that is the predicate for our marriage, and I consent for our marriage to be labeled a nullity based on the decree of our community that all marriages ought to end with a *Get* given within fifteen months. We both belong to a community where the majority of the great rabbis and the *batei din* of that community have authorized the use of annulment in cases like this, and I accept the communal decree on this matter as binding upon me.

“Furthermore, should this agreement be deemed ineffective as a matter of *halakhab* (Jewish law) at any time, we would not have married at all.

“I announce now that no witness, including any future testimony I might provide, shall be believed to nullify this document or any provision herein.”

Signature of Groom \_\_\_\_\_

The bride replied to the groom:

“I consent to the conditions you have made and I accept the *qinyan* (formal Jewish transaction) in front of the *beit din hashm* (esteemed rabbinical court).”

Signature of Bride \_\_\_\_\_

We the undersigned duly constituted *beit din* witnessed the oral statements and signatures of the groom and bride.

Rabbi \_\_\_\_\_

Witness 1 \_\_\_\_\_

Witness 2 \_\_\_\_\_

## NOTES

\*The conventional transliteration of *'kiddushin'* has been adopted to facilitate electronic searches—*ed.*

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<sup>1</sup>Currently, the members are Rabbi Eugene Cohen, Rabbi Asher Murciano and Rabbi Haim Toledano. Rabbi Moshe Morgenstern was a member as well but no longer is, as it was revealed that he himself had withheld a *get* from his wife for seven years. This review does not address issues of *get zikkui*, as upon Moshe Morgenstern's departure, that line of reasoning was discarded.

<sup>2</sup>"*Agunah*" (Heb., pl. *agunot*) is the popular term used to denote an estranged wife denied a divorce conforming to Jewish law (the issuing of a *get*) due to a missing or recalcitrant husband; the term *agunah* literally refers to the straps that bind this woman to her marriage. In Talmudic times this term was used only to refer to cases where the husband had disappeared and thus could not effectuate a divorce, but has now taken on the more generic meaning of a case where a woman cannot terminate her marriage and is desirous of doing so.

<sup>3</sup>See Agunah International Inc. Web site, [www.agunahintl.org](http://www.agunahintl.org).

<sup>4</sup>The initial ad announcing the creation of this rabbinical court was published in the Jewish Week on August 28, 1998. A response was issued by the Beth Din of America in October of 1998, and Rabbi J. David Bleich wrote two articles on this issue as well; see "*Kiddushei Ta'ut: Annulment as a Solution to the Agunah Problem*," *Tradition* 33:1 (1998), p. 90 and "*Constructive Agency in Religious Divorce: An Examination of Get Zikkui*," *Tradition* 35:4 (2001), p. 44.

<sup>5</sup>As Hacothen states in his introduction, "I have endeavored to examine the sources relevant to the subject of release of *agunot* through these new efforts." These "new efforts" are the actions of Rabbi Emanuel Rackman's *beit din*. Furthermore, in his conclusion he reiterates that a goal of the work is to "shed light on, and help to clarify, matters relating to the current controversy over the release of *agunot* through the application of the principle of *kiddushei ta'ut*."

<sup>6</sup>All references are to *Iggerot Mosheb*: for apostasy, see *Even ha-Ezer* 4:83; for homosexuality, see *Even ha-Ezer* 4:113; for impotence see *Even ha-Ezer* 1:79 and for insanity, see *Even ha-Ezer* 1:80.

<sup>7</sup>See Michael Broyde, "Error in Creation of Marriage in Modern Times Under Jewish Law", *Dinei Israel*, Tel Aviv Law School 22 (2003), pp. 39-65.

<sup>8</sup>See *ibid.* for a list of many other *responsa*.

<sup>9</sup>See *Intsiqlopediyah Talmudit*, s.v. "*umdena*."

<sup>10</sup>See *Shulhan Arukh*, *Yoreh De'ab* 39:1 and *Bi'ur ha-Gra* 39:2. See also *Mishkenot Ya'aqov*, *Yoreh De'ab* 16 for a discussion of what are the exact statistical ranges for each category. It is beyond the scope of this article to explain why the *umdena* (or *rov*) that insects are not present in case two is not sufficient to alleviate the need to check for insects; however, it will be made quite clear to the reader why a parallel *umdena* based on a statistical likelihood of 51 percent is insufficient in cases of *iggum*; this is another manifestation of *humra shel eshet ish* (the imperative to proceed cautiously in recognition of the gravity of cases involving the potential for adultery).

<sup>11</sup>This stands, he states, in contrast to *poseqim* who "adhere to the requirement that the blemish must have been in existence prior to the marriage" in order to be used as grounds for voiding a marriage (page 96).

<sup>12</sup>As far as I know. But see note 13 for one such citation, albeit *shelo le-halakhah*.

<sup>13</sup>Consider the lengthy exchange between Rabbis Isaac Herzog and Rabbi Jechiel Jacob Weinberg (found in *Seridei Aish* 1:90 (as numbered in the Bar Ilan Responsa) dealing with a number of Yemenite husbands who apostatized, leaving each wife an *agunah*. According to Rabbi Hacoen, this matter is simple: all one needs to do is posit that since no religious woman would marry an apostate, even though the apostasy developed many years after the marriage, the marriage is void, for the retrospective *umdena* allows such a claim. Indeed, this *responsum* is the only one I am aware of that even considers (at sections. 44-49) the possibility of such a calculus at all, and even Rabbi Weinberg is prepared to consider this view only as a possible understanding of the opinion of Maharam of Rutenberg, which is rejected by many other decisors, and only as a small, contributing factor in a *responsum* that has 58 sections. (Ultimately, Rabbi Weinberg declines to accept the claim, concluding at sections 52-53 that the views at sections 44-49 are not to be followed.) Thus, it would not be beyond the pale to regard the view presented in *Tears of the Oppressed* as a possible understanding of the opinion of a single *rishon* that is rejected by the later authorities and not even cited in any of the codes. It is, however, quite wrong to consider it normative. (Two parenthetical notes are worth making. First, this *responsum* by Rabbi Weinberg is rarely cited, as he collects many different, unique views on matters of *iggun* without differentiation between those that are mainstream and those that are not, citing even widely discredited theories such as *get zikui*. Second (and on the other hand), it is quite surprising that *Tears of the Oppressed* makes no mention of this *responsum*, for it quotes from and cites more far-fetched *responsa*, by far less prominent authorities.)

<sup>14</sup>See *Shulhan Arukh, Even ha-Ezer* 17:29-32.

<sup>15</sup>There is a group of *rishonim* who posit that an apostate Jew is like a gentile for many halakhic issues, and use this as grounds to analyze *yibbum* and *halitsah* issues in a unique light. For an excellent English article on this topic, see Rav Aharon Lichtenstein, "Brother Daniel and the Jewish Fraternity," *Judaism* 12 (1963), pp. 260-280.

<sup>16</sup>*Iggerot Moshe, Even Ha-Ezer* 4:121.

<sup>17</sup>BT *Kiddushin* 49b.

<sup>18</sup>That is exactly the case in *Iggerot Moshe* above, where Rabbi Feinstein reframes an *umdena* as an implied condition to a marriage where the husband is now dead so as to obviate the need for *halitsah*. Of course, the status that led to the *umdena* was present at the inception of the marriage.

<sup>19</sup>See *Rama, Even ha-Ezer* 157:3; *Terumat ha-Deshen* 223 and *Bach, Even ha-Ezer* 157. See also *Teshuvot Rabbi Akiva Eiger* 93; *Chatam Sofer, Even ha-Ezer* 111; *Noda Be-Yehudah, Even ha-Ezer* 1:56 and *Arukh ha-Shulchan, Even ha-Ezer* 157:15, all of whom agree with Rama.

<sup>20</sup>For a collection of the *responsa* on this matter, see Yehuda Lubetsky (ed.), *Ein Tenai be-Nisu'in* (Vilna, 1930).

<sup>21</sup>See Eliezer Berkovitz, *Tnai be-Nisu'in ve-Get* (Jerusalem, 1967).

<sup>22</sup>See Irving Breitowitz, *Between Civil and Religious Law: The Plight of the Agunah in American Society* (Greenwood Press, 1993) at pages 57-62, particularly 61-62 which states, "[V]irtually all responsible members of the world Orthodox rabbinate reject this [conditional marriage] approach."

<sup>23</sup>See *Imrei Aish, Even ha-Ezer* 95 for such a situation. For more on this, see section VI of this review and appendix A.

<sup>24</sup>*Iggerot Moshe, Even Ha-Ezer* 1:79 and 80.

<sup>25</sup>I myself, a minor player in the vast world of permitting *agunot* to remarry, have participated in several such cases.

<sup>26</sup>The third director is Dr. Elana Lazaroff.

<sup>27</sup>Quote taken from <http://www.agunahintl.org/halakhic.htm> on October 13, 2004.

<sup>28</sup>Quote taken from <http://www.agunahintl.org/halakhic.htm> on October 13, 2004.



<sup>29</sup>Communications, *Tradition* 33:4 (1999), p. 102, by Michael I. Rackman in the name of his father.

<sup>30</sup>This matter is more complex than can be fully addressed in this review. A *beit din* is generally called upon to do one of three things regarding cases of another *beit din*: enforce the prior ruling, validate the earlier decision or re-litigate a matter that was previously adjudicated. In this context, for example, when a husband approaches a *beit din* to determine whether he is still validly married to his wife according to Jewish law even after she has received a release from Rabbi Rackman's *beit din*, one has no choice but to reexamine the validity of the judgment of the previous rabbinical court.

<sup>31</sup>See *Shulhan Arukh, Even ha-Ezer* 11:4, 17:21 and 42:4 for more on this and whether cross-examination is needed.

<sup>32</sup>*Shulhan Arukh, Even ha-Ezer* 17:48. Of course, one could respond that this *halakhab* is only applicable to classical cases of *iggun* but not to recalcitrance. Such an argument would require an acknowledgement that not all cases of recalcitrance deserve either the strictures or the leniencies of *iggun* matters, which Rabbi Hacohen would not concede.

<sup>33</sup>Consider for example, the statement of Dr. Susan Aranoff:

To prevent *aginut*, testimony does not have to meet standards of Biblical *drishah* and *bakirah*. A single witness, circumstantial evidence, and hearsay are all admissible. (Rambam, *Hilkebot Gerushin*, 13:29.)

(<http://www.agunahintl.org/halakhic.htm>.)

This statement by Rambam is used by Dr. Aranoff to allow for these same liberalities in the case of a recalcitrant (as opposed to a presumed deceased) husband, which seems to be without halakhic foundation.

<sup>34</sup>Sadly enough, it is well known that Rabbi Rackman's *beit din* has weak procedural safeguards. I am aware of cases where that *beit din* has heard matters without ever contacting the husband, without even verifying the existence of the marriage, or without contacting the local rabbinate to verify the woman's story. Indeed I am aware of a case where the entire matter was handled long-distance by telephone and neither the *dayyanim* nor the directors of the *beit din* ever actually met the woman petitioning for a *beter* (permission) to remarry. Such procedural lapses are hard to justify.

<sup>35</sup>Rabbi Feinstein (*Iggerot Mosheh, Even ha-Ezer* 4:113) states:

If as soon as she found out that he was bisexual she left him, it is logical that if one cannot convince him to give a *get*, one should permit her to remarry because of the rule of *kiddushei ta'ut*....

Rabbi Feinstein repeats this:

But all this [her ability to leave without a *get*] is limited to when she leaves him immediately, but if she lives with him (sexually), it is difficult to rule the marriage void.

<sup>36</sup>*Shulhan Arukh, Even ha-Ezer* 31:9.

<sup>37</sup>Such is our practice, for example, when individuals who are married in a civil ceremony become religious. When they realize that their civil marriage was void in the eyes of *halakhab* and yet continue to stay married, they are married.

<sup>38</sup>*Arukh ha-Shulhan, Even ha-Ezer* 39:13.

<sup>39</sup>Yet I am aware of the fact that Rabbi Rackman's *beit din* has issued letters that claim to free women from the need for a *get* in exactly such procedurally murky situations, and particularly before a civil divorce has been issued, even when a *get* is held in escrow by another rabbinical court pending the granting of a civil divorce.

<sup>40</sup>As *Minhat Yitschaq* 5:44 put it:

Behold, it is obvious that before one marries one needs to disclose the situation in one's family so that each party to the wedding knows whom they are marrying, and through this process

[each] will grow comfortable and accepting [of the problems that each of us has]; with this process there will be no disputes and no error in the creation of marriage.

Obviously, one cannot reveal that which one cannot discover no matter how much diligence is employed. (Some predictable contingencies that cannot be detected could be covered, perhaps, through the use of the *tenai kaful* construct, which is beyond the scope of Rabbi Hacoheh's book or this review of it.)

<sup>41</sup>Not discussed in this review is the impact of the dual legal systems that Orthodox Jews adhere to in the United States and how that bears on the *agunah* problem. The need to be divorced according to both Jewish and secular law complicates certain matters. This is discussed at some length in Michael Broyde, *Marriage, Divorce and the Abandoned Wife in Jewish Law: A Conceptual Approach to the Agunah Problems in America* (Ktav, 2001) in chapters 4 and 5.

<sup>42</sup>Rabbi Joseph B. Soloveitchik stated:

“I also was told that it was recommended that the method *afkinu rabanan l'kidushin minei* be reintroduced. If this recommendation is accepted, and I hope it will not be accepted, but if it is accepted, then there will be no need for a *get*. *Ha-isha niknes b'shalosh d'rachim: b'kesef b'shtar ub'bia*, the *get* of a *gerushah*—we will be able to cross out this *mishna*, this *halachah*; every rabbi will suspend the *kidushin*. Why should there be this *halachah* if such a privilege exists? . . . *ribono shel olam*, what are you, out to destroy all of it? I will be relieved of two *masechtos*; I will not have to say *shiurim* on *Gitin* and *Kidushin*, and then *Yevamos* as well. I want to be frank and open. Do you expect to survive as Orthodox rabbis? Do you expect to carry on the *mesorah* under such circumstances? I hope that those who are present will join me in simply objecting to such symposia and to such discussion and debate at the Rabbinical Convention. When I was told about it, I thought, "Would it be possible?"”

([http://mail-jewish.org/rav/talmud\\_torah.txt](http://mail-jewish.org/rav/talmud_torah.txt).)

<sup>43</sup>Consider the question of a married soldier who goes off to war and disappears. Whether any legal system ought to allow his wife to remarry really depends on how certain we are that the soldier is dead. The American legal system, which allows courts to end such marriages, can also create enormous difficulties, as noted by President Jimmy Carter:

When the Japanese bombed Pearl Harbor, my uncle Tom Gordy and about thirty other sailors were stationed on Guam . . . Tom and the others were captured about a month after the war began, and taken to Japan as prisoners. Tom's wife, Dorothy, and their three children left San Francisco and came to Georgia to stay with my grandparents, who were then living with us in Archery. . . .

In the summer of 1943, the International Red Cross notified Dorothy officially that Tom was dead, and she began receiving a widow's pension. Everyone was heartbroken, and she and the kids moved back to San Francisco to live with her parents. After a year or so, she married a friend of the family who had a stable job and promised to care for her and the children.

Two years later, when the war ended and American troops entered Japan, they found Tom Gordy still alive!

(Jimmy Carter, *An Hour Before Daylight* (Simon & Schuster, 2001).) Jewish law avoids this problem by only allowing private divorce.

<sup>44</sup>Justice Menachem Elon in his forward takes excellent note of these issues; this review is not the place to assess his proposed solution, other than to note that it is not consistent with that proposed by Rabbi Hacoheh.

<sup>45</sup>See Michael Broyde, *Marriage, Divorce and the Abandoned Wife in Jewish Law: A Conceptual Approach to the Agunah Problems in America* (Ktav, 2001).

<sup>46</sup>See Chaim David Zweibel, "Accommodating Religious Objections to Brain Death: Legal Issues," *Journal of Halacha and Contemporary Society* 17 (Spring 1989), p. 49.

<sup>47</sup>This is completely consistent with the empirical theory related to methods of alternative dispute resolution. Theoreticians of alternative dispute resolutions insist that the only situation in which parties can agree on a system of law that governs their dispute different from the rules provided by secular law, which is the default law in society, is prior to the dispute arising. After a dispute has arisen, one party or another will decline to accept the jurisdiction of a third party resolution (including *beit din*) as such a forum will not be to his or her advantage. Precisely because prior to a dispute no one is certain whether switching forum will be advantageous, a choice of law and choice of forum agreement is possible. After the dispute has already arisen, the only type of agreement that is in fact possible is one that is purely efficient, providing benefits to each party. Consider the case of a simple Jewish divorce, in which the couple had assets of \$100 and two children. Assuming that secular law would divide the assets and children equally, so that each party got \$40 and one child, and \$20 went to legal fees, neither party would ever consent to appearing in front of a *beit din* that was likely to award them less than \$40 and one child. The *beit din* would be allowed to hear the case only if it were more efficient than the secular court, so that neither party would be "hurt," either financially or in terms of the custody arrangement. If the *beit din* could not do that, each party will invoke its halakhic right to *zevla* (Heb. acronym, "*zeh borer lo echad*" ["*ve-zeh borer lo echad*"]— the right of the parties to select one judge each, who together select the third panelist) and prevent the *beit din* from resolving the matter. However, before the dispute arose, each party would have the ability to craft rules or make choices concerning forum unaware of the direct consequences to his or her case, since the person would have no idea what the particular dispute (if one ever arose) would look like. For more on this matter from a law and economics view, see Steven Shavell, "Alternative Dispute Resolution: An Economic Analysis," *J. Legal Studies* 24 (1994), p. 1.

<sup>48</sup>For more on this, see the Orthodox Caucus Web site, [www.ocweb.org/index.php/pre\\_nuptial](http://www.ocweb.org/index.php/pre_nuptial).

<sup>49</sup>For an excellent survey, see Irving Breitowitz, *Between Civil and Religious Law: The Plight of the Agunah in American Society* (Greenwood Press, 1993).

<sup>50</sup>See Michael Broyde, *Marriage, Divorce and the Abandoned Wife in Jewish Law: A Conceptual Approach to the Agunah Problems in America* (Ktav, 2001).

<sup>51</sup>A suggested text for a document along these lines (*shelo le-halakhah*) can be found in Appendix A.

<sup>52</sup>See Rama, *Even ha-Ezer* 157:3; *Terumat Ha-Desben* 223 and Bach, *Even ha-Ezer* 157. See also *Teshuvot Rabbi Akiva Eiger* 93; *Chatam Sofer, Even ha-Ezer* 111; *Noda Be-Yehudah, Even ha-Ezer* 1:56 and *Arukh ha-Shulchan, Even ha-Ezer* 157:15, all of whom agree with Rama.

<sup>53</sup>Rabbi Yosef Eliyahu Henkin, *Perushai Ibra* 110-117. The section on sexuality prior to divorce not voiding the authorization can be found in Rabbi Yitzchak Isaac Herzog, *Hechal Yitzchak*, 2:41.

<sup>54</sup>*Teshuvot Rashba* 185, 1163. See Maharam Alshaker 48 who explicitly adopts this view. See also, Rabbi Ovadia Yosef, "*Kol ha-Meqaddesh Ada`ata de-Rabbanan Meqaddesh*," *Sinai* 48 (1961), 186-193. See also Rabbi Jechiel Jacob Weinberg in *Seridei Aish* 1:90, 1:168 and Rabbi Weinberg's introduction to Eliezer Berkowitz, *Tenai be-Nisuin ve-Get*.

<sup>55</sup>See above, notes 53 and 54.

<sup>56</sup>See Breitowitz, above note 49, at 59.

<sup>57</sup>Rabbi Emanuel Rackman, "The Dialectic of the Halakhah," *Tradition* 3:2 (1961), pp. 131-32. So renowned was Rabbi Rackman at that time that he is the author of the first article, in the first issue, of *Tradition*.

<sup>58</sup>Matters of *mamzerut* are complex, and many other grounds to be lenient might be present, including the intentional decision not to investigate second-generation facts (see *Rama, Even ha-Ezer* 2:5) as well as many other reasons and rationales not relevant to this review. 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*, and are horrified to find out that their second marriage is void and their children presumptively *mamzerim*.

<sup>59</sup>See *Iggerot Mosheh, Yoreh De`ab* 1:101, s.v. “*u-mah she-kataf yedid?*” for an extraordinarily elegant statement on this type of matter, involving a case similar to *iggum*, by Rabbi Moshe Feinstein.