Communications

THE 1992 NEW YORK GET LAW

TO THE EDITOR:

I have read with interest Michael Broyde's article, "The 1992 New York Get Law: An Exchange" (*Tradition*, 31:3, Spring 1997). Because I am quoted extensively there, I feel compelled to record my thoughts on this matter.

Much of what follows is, perhaps, implicit in Rabbi Broyde's presentation; in fact, from conversations with him I am convinced that he subscribes, both in theory as well as in practice, to many of the points I mention below. Nonetheless, because the issues at stake are of such paramount importance, there is a need for utmost clarity.

A. In any discussion of the 1992 New York Get Law, it is crucial to differentiate between *le-khat-hila* and *be-di-avad* (before-the-fact and after-the-fact.) As anyone conversant with halakhic dialectic knows, the decisor approaches a question of before-the-fact much more conservatively than he does one of after-the-fact; thus, arguments and reasoning valid in a *be-di-avad* situation are not employed in a *le-khat-hila* situation.

In the context of the 1992 New York Get Law, *le-khat-hila*, before the fact, refers to the dilemmas: a) should the law have been passed, or, now that it has been passed, b) should the law be allowed to stand as is. On the other hand, *be-di-avad*, after the fact, is defined as the question of the halakhic viability of *gittin* in the State of New York under the aegis of the law.

As far as *le-khat-hila* is concerned, the position accepted by the major halakhic authorities of our times has been: There are valid grounds for concern that the 1992 New York Get Law will be interpreted by the courts as a mandate to impose a halakhically unwarranted monetary loss upon a recalcitrant spouse (be it husband or wife) for his refusal to give (or receive) a *get*, when adjudicating the issues of equitable distribution and/or maintenance and support. A *get* administered for the purpose of averting a halakhically unwarranted monetary loss, or the reasonable threat thereof, is deemed a *get me'usse*—a *get* given under duress—which is in *the majority of instances invalid even be-di-avad.*

These two facts together combine to create a situation in which

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the halakhic viability of a percentage of *gittin* administered in the State of New York would be suspect—even after the fact. For this reason, the foremost decisors of halakha of our generation have expressed their opposition to the law. They took this position despite the epidemic dimensions of the modern-day *aguna* problem and everything that this involves.

Proponents of the law have variously argued the following:

1) Economic duress does not invalidate a *get*.

2) The law is compensatory, rather than punitive, in nature, designed to redress the *aguna* for the reasonably forseeable financial consequences stemming from her inability to enter into a new marriage with another potential breadwinner; it is therefore not a form of duress which would invalidate a *get*.

3) No competent Jewish *bet din* will be a party to such a *get*; consequently, any party penalized by the court would be able to plead before the court that he or she is unable to execute the *get*, after which, presumably, the court would exempt him from the penalty.

Moreover, they add, the very fact that a *get* has been administered constitutes de-facto affirmation on the part of the presiding *bet din* that the case at hand presents no problem vis-a-vis *get me'usse*; to even suggest otherwise is to impugn the integrity and competence of said *bet din*.

All three arguments have been rejected by halakhic decisors (within the context of a before-the-fact discussion), as follows:

1) The first argument, presented in *Teshuvot Bet Avi* 4:169:8-10, is problematic. As I demonstrate in Section 96 of my soon-to-be-published manuscript on this topic, the overwhelming consensus of *poskim* is to the contrary; namely, that halakhically unwarranted economic duress does indeed invalidate a *get* even after the fact. In Section 97, I offer a point-by-point rebuttal of the arguments in *Bet Avi*.

Interestingly, the line of reasoning in *Bet Avi* closely parallels that of *Teshuvot Tsemah Tsedek (Aharon), Even haEzer* 262:3, on this point. Ultimately, however, *Tsemah Tsedek* is unwilling to utilize this argument in the case before him, as can be seen from his important concluding qualification, to wit:

> . . . but nevertheless, inasmuch as the consensus of all the *poskim* is that monetary duress is considered coercion . . . Heaven forbid that we should stray from this [ruling] . . .

2) The second argument (that the law is designed merely to compensate the *aguna* for the reasonably forseeable financial consequences

stemming from her inability to enter into a new marriage with another potential breadwinner, and is therefore not an invalidating monetary duress) is also problematic. As mentioned earlier, the question of a *get me'usse* exists even if there is a reasonable threat that halakhically unsanctioned economic duress has been applied. Until there is a definitive ruling by the courts that the law is solely for the aforementioned purpose of compensation to the *aguna*, the fact that the law might be intended to apply pressure on the husband is enough to render it unacceptable.

To date, this issue has not been conclusively resolved. Indeed, we have even witness to mixed signals from the same judge on this count! In Schwartz vs. Schwartz (1994), a *get* had already been administered (and the plaintiff already remarried to another potential breadwinner) before the issue of equitable distribution came before the court for final judgement. Nonetheless, New York State Supreme Court Justice William Rigler cited the defendant's conduct in initially withholding the delivery of the *get* solely for the purpose of extracting economic concessions from the plaintiff as grounds for his having forfeited his right to any distributive award; as a result, the plaintiff was awarded a substantially larger portion of the marital estate—clear indication that the law is to be viewed as punitive in nature. In Becher vs. Becher (1997), however, Justice Rigler states that "the statutes in question . . . merely address the parties' status as they come before the court and how that status will affect their individual economic futures."

Moreover, the law would still be unacceptable even in the aftermath of a definitive ruling such as that outlined above. The law would still promote halakhically unacceptable coercion, for even a compensatory award of this sort may well be lacking halakhic justification in at least a portion of the cases (since the woman may be halakhically unentitled to any support at all, or at least to support in the degree, or in the manner, that the court might stipulate).

3) The third argument is obviously too weak to serve as a basis for having the Get Law foisted on all people in all situations. It is easy to envision various scenarios in which a presiding judge would decline to exempt the husband from the need to deliver a *get* as a prelude to equitable distribution, despite the husband's alleged inability to do so; and it is equally easy to envision a scenario in which the husband will choose to deliver a *get*, rather than rely on the judge's possessing a talmudic bent of mind.

To rely on the integrity and competence of the *batei dinim* is equally sophomoric. It is entirely possible for a *bet din* to do all the necessary halakhic research, to gather all the facts as best they can, and to

fall short nevertheless. The fact is that people, and even *dayanim mumhim*, are prone to making mistakes. Nor is this a twentieth-century innovation; indeed, entire *sugyot* in the Talmud are devoted to the subject—see, for instance, *Sanhedrin* 33a-b with *Shulhan Arukh, Hoshen Mishpat* 25, and *Avoda Zara* 7a with *Shulhan Arukh, Yore De'a* 242. This is especially so in matters such as these, where the halakhic issues at stake are intricate in the extreme, and where both husband and wife may well have a vested interest in dissembling, and in concealing from the *bet din* the true circumstances of the case at hand—the wife to facilitate obtaining her *get*, and the husband to avoid the threat of monetary loss.

B. The above discussion is operative within a before-the-fact context. But what of *be-di-avad*? As Rabbi Broyde points out in his official article (*Tradition*, 29:4, Summer 1995):

> The 1992 Get Law remains the law in New York State . . . Couples are still divorcing and Jewish divorces are still being written. Divorced individuals are seeking to marry again. Thus an examination of the after-the-fact ramifications of the law are needed.

It is within this context that Rabbi Broyde's comments should be taken.

Certainly, some of his points are worthy of consideration; others I would tend to disagree with. However, it is important to note that because of the complexity and the severe gravity of the issues at stake, as well as the many variables which fluctuate from case to case, it is impossible to issue a blanket ruling that would either validate, or invalidate, all the *gittin* under discussion. Rather, each and every case must be judged on an individual basis, according to its own particular merits—ideally before, but if not, then after, the *get* has been administered.

Moreover, it is necessary to point out the following. Every Torah scholar reserves the right to engage in *pilpula de-oraita* and to present his views on this matter, as in every area of Torah, before the great halakhic authorities. For, as expressed in the Talmudic dictum, *Torah hi ve-li-lmod ani tsarikh.* However, ultimately the prerogative and the responsibility to decide matters of this sort rests in the hands of the greatest halakhic authorities of the generation.

The words of Rabbi Naftali Tsevi Yehudah Berlin, נצי"ב (Netsiv) in his *Teshuvot Meishiv Davar* (4:50) are important review:

> *Ve-lo ta'aleh be-ma'alot al mizbechi* ("you shall not take a gross step—*pesi'a gassa*—on My altar") . . . From this passage previous generations

> learned to preserve the various levels of halakhic decision without a *pesi'a gassa* [overstepping their bounds]. As the *baraita* states in *Sanhedrin* 88b, originally a judge was appointed to be a judge in his city; then to serve in the Temple Mount; then in the *Azara* [of the Temple]; then in the *Lishkat haGazit* [the seat of the *Sanhedrin*]. This was to ensure that [the judge] would not "overstep his bounds" [act beyond his authority] on the "altar" of judgment. In our great sins nowadays we have lost this order, but at least we should preserve that same order in other matters [by recognizing] that not all matters [to be ajudicated] have the same status. Judges appointed [to serve] in their city should avoid ruling in matters which are not common; also error in these [matters] are very serious, whether towards stringency or leniency. Consequently, [when these matters come before them] they should present their ideas before someone whom they recognize and know as experienced in these rulings. In this manner the correct ruling will emerge with the help of God.

It is obvious that the halakhot of *get me'usse* fall under the category of "matters which are not so common; also error in these [matters] are very serious, whether towards stringency or leniency". Thus, it is fitting that they be adjudicated along the lines delineated by Netsiv, with the most difficult and complex among them being dealt with exclusively by front-line halakhic authorities whom we "recognize and know as experienced in these rulings."

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MICHAEL BROYDE RESPONDS:

Rabbi Gartner's contributions to potential solutions to the *aguna* problem and the problems of *get me'usse* (coerced divorces) are well known; we all look forward to his work, *Orhot Tsevi,* dealing with these halakhic issues. His distinction concerning before-the-fact and after the fact is completely correct, and I explicitly limit my analysis to after-the-fact cases.

The strongest rationale for supporting the 1992 Get Law as a before-the-fact rule would be to label it as a support and maintenance law which, as noted in the previous article, many rabbis aver can never lead to coerced divorce. However, the secular purpose of the 1992 Get Law remains very unclear, and we all wait for some clarification of that matter from the New York Court of Appeals.

Of course, Rabbi Gartner is correct that "it is impossible to issue a blanket ruling that would either validate, or invalidate, all the *gittin*" issued since the 1992 Get Law. There are many cases where the facts and the halakha would unquestionably incline one to rule the *get* valid. So, too, one can construct a case where both the facts and the halakha are clear and the resulting *get* is void, particularly if one does not accept *be-di-avad* the view of Rabbi Feinstein explained in *Iggerot Moshe, Even haEzer* 3:44.

However, keeping a firm grasp on the actual facts and the true reality is vitally important. During the past year I was involved in arranging many *gittin* in New York, and found that most parties were completely unaware of the 1992 Get Law or its implications. Less than 10% of the parties had heard of the 1992 Get Law, or were told by a judge or attorney to participate in a "Jewish divorce"—they came to be divorced according to Jewish law because they want to be divorced in God's eyes. It is important to understand how small a percentage of *gittin* the 1992 Get Law actually affects, and even in those few cases that it affects, how even fewer of the *gittin* are actually invalid because of the 1992 Get Law. Other *mesadrim,* at other *batei din,* can confirm this picture of reality. Indeed, I have reviewed all of the reported cases in New York since the Get Law was passed, and cannot find more than ten cases where the 1992 Get Law was used or referred to by a judge in addressing the lack of a *get.* There are more articles about the Get Law than cases using it!

In light of these facts, and considering the various halakhic arguments advanced validating Jewish divorces issued in light of the 1992 Get Law, Jewish divorces continue to be issued by every single recognized *bet din* in New York. One who questions the halakhic validity of all the actions of all the *batei din* in New York State, the halakhic validity of all the second marriages of thousands of Jewish men and women, and the ability to enter into future marriages of tens of thousands of Jews born from these marriages, is doing so contrary to both the facts and the halakha.

One additional point needs to be considered in discussing the 1992 Get Law. The possible relationship between the rule *sha'at hadehak kemo be-di-avad* (a time of urgency is to be treated as if it is after-the-fact) and the 1992 Get Law also requires some exploration. Given the reality of the *aguna* problem in America, and the fact that not solving the *aguna* problem in any given case can also lead to *mamzerut* (due either to women abandoning Orthodox Judaism and marrying anyway, or receiving a "Jewish divorce" from a "*bet din*" that claims to

be releasing many *agunot* without a *get*), perhaps a less than ideal, but minimally acceptable solution is all that we can realistically aspire for, and the 1992 Get Law is such. Maybe it is halakhically better to rely on the many leniencies advanced by many different *poskim* in support of validating *gittin* issued in light of the 1992 Get Law as *sha'at ha-dehak kemo be-di-avad,* rather than maintaining the none-too-pleasant or successful status quo, which also leads to *mamzerut.* This is even more true given the recent public desecrations of God's name that have occurred relating to the use of physical force to address the *aguna* problem. That calculus, as Rabbi Gartner notes, would require the approval of the foremost halakhic authorities of our times.

". . . WHO HAS NOT MADE ME A WOMAN"

TO THE EDITOR:

Rabbi Emanuel Feldman (*Tradition* 32:2, Winter 1998) is troubled by Prof. Menachem Kellner's suggestion that Orthodox women become active in pressuring for ritual change. For Rabbi Feldman, accepted practice is, by definition, normative.

For Torah Judaism, the Talmudic text is trump, and post-Talmudic commentaries may interpret, but not nullify, Talmudic law. Maimonides writes that a post-Talmudic rabbi may make customs for his community as long as those customs do not violate Talmudic law. If it can be demonstrated that women's prayer groups do not violate Jewish law, then it is up to the *mara de-atra* to make the determination for the community. Rabbi Joseph Colon (*Maharik)* is of the opinion that if a practice was not done it must be forbidden; the *Shulhan Arukh* rules otherwise, and for good reason. Following R. Colon's line of thinking, there was a time that *yizkor* was not said. If *yizkor* was not said in Talmudic times, there must have been good grounds for the practice then. The innovative nature of *yizkor* would, as to R. Colon's logic, forbid the institution of the practice. Theologically, the *Shulhan Arukh* must be accepted because of the principle that the Torah is not in heaven. And if we would take the position of R. Colon, the very existence of customs other than those mentioned in the Talmud would be incomprehensible. Furthermore, if, as R. Colon claims, a custom may override a law, then surely a custom may override another custom.

Prof. Kellner's call for aggressive agitation is, to my mind, religiously irresponsible. Lay people cannot distinguish between the nice-

ties of rabbinic law as well as the social dislocation caused by indiscriminate changes in custom. Agitation will only make it more difficult for the agitators to be taken seriously as participants and members in the halakhic community.

Rabbi Feldman's specific appeal to "tradition" is, to my mind, misplaced. The only tradition that binds and reflects our contract with God at Sinai is the Talmudic legislation. Customs bind locally, not globally, and they are not holy. The fact that communities believed that their practices were correct because their teachers would not consciously mislead them only means that they were pious, sincere, believing Jews. Belief, however intense, does not insure halakhic infallibility or theological orthodoxy.

More troubling is R. Feldman's claim that the Torah assigns certain roles to women. Both women and men must keep their Torah contract with God, which is defined by specific laws. There are objective laws and different aggadic voices. We must not confuse specific legislation and the apologia that we may legitimately use to justify that legislation. For the Orthodox Jew, the mere fact that legislation is made provides sufficient ethical grounds to be obedient. This position is not limiting, it is liberating. Where the law stops, authentic autonomy begins. We do not have the right to legislate in God's name, based on what we surmise is God's intention. God gave the whole Torah to all Israel; nothing was left for mortals to intuit. According to Maimonides and Talmudic precedent, local rabbinic leaders legislate for their communities and not synods of rabbis—unless, of course, a rabbi wishes to defer to them.

The Frimer essay demonstrates that there is precedent for women's prayer groups. R. Moshe Feinstein, of blessed and sainted memory, provided the pious and prudent path for addressing this issue. *If* the innovation is made with piety and is consistent with the letter of Jewish law, *then* it may be put into practice. I ruled for my community that *when* observance of *taharat ha-mishpaha* was virtually universal and a significant majority of our married women wore head coverings in public, *then* I would happily permit women's prayer groups following the model of student prayer in Bais Yaakov schools. Sadly, my offer did not inspire a significant religious renewal of commitment.

There is no post-Talmudic *gadol* who, to my understanding, is equal in number and wisdom to the *Sanhedrin* or even the court of Ravina and Rav Ashi's Talmud of Babylon. I appreciate R. Feldman's traditional instincts, but I also appreciate the legitimate concern regarding "what is the law" of Orthodox Jewish women. When we allow post-Talmudic blessings and fail to complain when Ashkenazic Jews adopt

nusah Sepharad, and then tell our women that *they* may not ask for accommodations of custom, it is our integrity and consistency that will be called into question, if not by women and lay people who are not Torah scholars, then by the Author of the Torah who will ask us why we were knowingly inconsistent. We may take pleasure when we answer our opponents with glib affirmations of tradition; will we be so glib when we are confronted, in 120 years, by the Author of the *masoret* Tradition, regarding our consistency and integrity?

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THE BOOK AND THE BOOK

TO THE EDITOR:

In his excellent review essay "The book and The Book" (*Tradition* 32:1, Fall 1997), Emanuel Feldman strongly contends with David Halivni's formulation that halakhic changes "came about imperceptibly, unnoticed, the result of a gradual process . . . . The changes were integrated into community life long before they . . . received legal sanction."

Although Rabbi Feldman calls this a "tortuous attempt to have one's halakhic cake and eat it", Prof. Halivni's position would seem to have backing in respected traditional sources. *Magen Avraham (Orah Hayyim* sec. 490, no. 9) quotes *Teshuvot Rama* (no. 35) that when Rama uses the phrase "*Ve-ha-am nahagu*" as opposed to "*Ve-khein nohagin*", it indicates that the community had the custom "on their own" without having halakhic approval from *posekim*. Furthermore, halakhic literature is replete with examples of *posekim* attempting to rationalize established customs that are halakhically questionable, rather than changing the custom to what the ideal practice should be. (For example: the practice of many Hasidim is not to eat in the *sukka* on *Shemini Atseret,* although the Talmud is clear that one must. See *Arukh haShulhan* 668:3-5.)

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EMANUEL FELDMAN RESPONDS:

Rabbis Oratz and Yuter make an important contribution to the ongoing discussion concerning *minhag.* Although the issue of *minhag* and halakhic change is far too broad and complex for a *Communications*

column, a few clarifications are in order:

I do not maintain, as R. Yuter claims I do, that "if a practice is not done, it must be forbidden." I do maintain that the concept of *aval ein nohagin kein* is an important halakhic category that is often ignored by those who push for halakhic change. (See my comments in *Tradition* 31:3, p. 114). Suffice it to say that accepted halakhic practice takes precedence over theory.

My specific comments were directed at the proposal in our *Communications* column that urged women to "take the initiative" so that "the rabbinic establishment" will make the changes they seek (32:2, p. 171). This, I maintain, is not how halakha works.

Certainly customs and practices that are not proscribed by Torah do undergo change, but such changes are not conscious or deliberate. They do not come about as a result of storming the halakhic barricades. Rabbi Yuter himself admits as much when he writes that the "call for aggressive agitation is . . . religiously irresponsible."

Although the process and dynamics of *minhag* are very subtle, one fact is clear: changes do not come about as a result of a community's conscious decision to effect changes. Development and variations occur on their own, almost naturally and spontaneously; they are not premeditated, prearranged, or artificially induced.

The sanctity of a *minhag* is a faith-based construct: that a holy and halakhically loyal *am Yisrael* which thirsts for contact with its Creator will inevitably develop practices over long periods of time that enhance that relationship—and will refrain from practices that hinder it.

R. Oratz is on target when he agrees with Prof. Halivni that "halakhic change came about imperceptively . . . the result of a gradual process." So far, so good. If a practice was not seen as anti-halakhic, it might receive some unofficial sanction. But I take issue with Prof. Halivni's implication that even anti-halakhic changes could somehow take root in this same manner, and then receive "legal sanction" by the *posekim*. See the discussion in *Ba'er Hetev* at *O.H.* 690:17, who cites *Teshuvot Rema* 51 (a typographical error cites it as 21) and the seminal *Maharik* # 8 and 9, which make it clear that an anti-halakhic *minhag* can never be sanctioned, and that the validity of any *minhag* is based on its approval by a *posek*. That is to say before it can be considered valid, a *minhag* is presumed to have an halakhic basis. See especially Tractate *Soferim,* 14:18: ". . . a custom that has no support from the Torah is a result of an error in judgment" [and should not be followed] (. . . "*aval minhag she-ein la ra'aya in haTorah eina ela ke-to'e be-shikul ha-da'at*").

It is therefore clear that, contra R. Oratz, no later *posek* could

"rationalize" or sanction an earlier *minhag* that was clearly anti-halakhic. *Posekim* are not, after all, communal functionaries whose job it is to rubber-stamp practices that they know are erroneous and not based on Torah. In those cases where rabbinic authorities did sanction a *minhag* for which they could find no clear basis in halakha, they assumed that the *minhag* had the approval of prior *posekim*.

A NOTE ABOUT THE "NOTEBOOK"

TO THE EDITOR:

I write as an ordinary, simple Jew who has been reading your Editor's Notebook for the last few years and feel impelled to express my sincere appreciation for their incisive, brilliant, and helpful insights. They have assisted me in forming balanced concepts by the logical excellence of your ideas, and have provided concise understanding of complicated issues. I thank you very much.

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EMANUEL FELDMAN RESPONDS:

Dr. Sack's letter is very much appreciated. On the other hand, the most recent Editor's Notebook—concerning my consistent failure to win the Nobel, Pulitzer, Booker and other prizes—has elicited a number of verbal responses. While many were very amused, others found it very puzzling. Herewith, a background note:

This particular Editor's Notebook was originally designed to appear at *Purim* time, as a kind of tongue-in-cheek *Purim* joke. Because of unexpected publication delays, however, it did not appear until well after *Pesah*—with the result that the tongue disappeared from the cheek and some readers took it a bit too seriously.

It was intended, however, to bear a message under its surface silliness. Its two-fold message was this (with full cognizance of the old maxim that if humor requires explanation, it isn't humor in the first place): 1) It poked fun at our human tendency to blame others, events, anti-Semitism, enemies, circumstances—anything except our own selves—for our not being world-famous or appreciated. 2) It suggested that it is pointless in the first place to expend energies in vain pursuit of the Nobel Prizes of life; what is necessary is to look at ourselves honest-

ly, and to develop those talents and skills which God has given us so that we can live each day as He wants us to. Such a person is the real prize winner.

Question: If that's what you meant, dear editor, why didn't you just come out and say so? Answer: That is a very good question.