Communications

To the Editor:

Rabbi A. Yehuda Warburg ("The Propriety of Awarding a Nezikin Claim by *Beit Din* on Behalf of an Agunah," *Tradition* 45:3, 55-71) argues that *battei din* should perhaps be able to invoke their powers *le-migdar milta* (to make measures for the protection of society) to allow women whose husbands refuse to give a *get* to submit a claim for damages (*tsa'ar* and/or *boshet*). He argues that this will not create a problem of *get me'useh* when the husband then gives the *get* in exchange for being released from his *tsa'ar/boshet* obligations, because the husband is not being coerced with regard to the *get* itself (it is rather *kefiyya le-davar aher*).

R. Warburg acknowledges that that there is room for disagreement. He therefore concludes his article by saying that even if some *posekim* reject his approach, "any subsequent *get* rendered after an award [of *tsa'ar* and/or *boshet*] is made ought to be recognized by all segments of [the Jewish] community. In other words, though a *get me'useh* administered by a Jew is *pasul,* i.e. invalid, nonetheless, *bedi'avad* (ex post facto) the execution of a *get* under duress is kosher."

As written, the two halves of the last sentence contradict each other. Perhaps R. Warburg meant the following? The *Rambam* (*Hil. Gerushin* 2:20) rules that a *get* given under duress, when it is compelled by Jews under circumstances that the Halakha does not permit *kefiyyah*, is only *pasul mi-deRabbanan*. And the Halakha (*Shulhan Arukh E.H.* 150:1) is that while a woman may not remarry pursuant to receiving a *get* that is *pasul mi-deRabbanan,* if she *does* remarry she need not get divorced from the second husband (*im niset lo tetsei*).

But this would not lead *posekim* to recognize the *get* (if "recognize" means "accept as valid to allow the woman to remarry"), for a woman may not remarry *a priori* with such a *get*. And there is a more significant difficulty: Despite the statement of *Teshuvot Ma'aseh Hiyya* (referenced on the spot in the article, in n. 51) that the view of the *Rambam* is shared by *"kol ha-posekim,"* in point of fact this opinion is not the accepted one. When *Shulchan Aruch* (*E.H.* 134:5 and 7) states that a *get* compelled by Jews *she-lo kadin* is *pasul*, he means that it is invalid *min ha-Torah,* not just *mi-deRabbanan*. See *Mahatsit ha-Shekel* on *Beit Shemuel* ibid. #10, who points out that this is clearly evident from the language of *Shulhan Arukh E.H.* 134:7.

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The *Ketsot ha-Hoshen* (*Meshovev Netivot* 3:1) goes so far as to state that even in those relatively rare circumstances where the Halakha says *kofin*, i.e. that the husband is to be coerced to give a *get,* if an individual Jew (as opposed to a *beit din*) takes it upon himself to enforce this Halakha, the *get* is *pasul mi-deOraita*.

It seems highly debatable indeed that suing a husband for the pain and suffering that he caused by his refusal to give a *get* should fall into the permissible category of *kefiyya le-davar aher*. In light of the above, a *get* given in exchange for release from payment of these damages is thus likely to be invalid *min ha-Torah*.

Speaking now in general terms: I do not believe that more and more adversarial litigation is the best way to achieve the results we seek – those results being husband and wife respectively giving and receiving a *get* "of their own free will, without compulsion or duress" (to use the language used in every *get* proceeding). Rabbi Dr. David Mescheloff has developed a prenuptial agreement that serves, in effect, to compel both parties *not* to give/receive a *get* but rather to enter into mediation when the marital relationship comes to an end (see his "A Marital Agreement to Mediate," *Tradition* 43:3, 29-50). Whether this agreement is used or not, I believe that as a community we should be promoting mediation as the best way to deal with divorce.

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Yehuda Warburg Replies:

In reply to Rabbi Nahum Spirn's letter regarding my essay, let me clarify certain matters. Firstly, R. Spirn represents that I invoke *le-migdar milta* as the avenue to empower a *beit din* to deal with *nezikin* claims. A read of my entire presentation, which includes my addendum, will demonstrate that I invoke three additional grounds for empowering a *beit din* to render a decision regarding a *nezikin* claim: the power of *peshara,* an arbitration agreement which specifically authorizes a *beit din* panel to deal with *nezikin* matters, and the *minhag* of *battei din* to appease the battered victim.

Secondly, the impression given by his representation of my proposal is that the meting out of *tsa'ar* and *boshet* obligations stemming from *get* recalcitrance is an example of *kefiyya le-davar aher* and therefore I allegedly argue that such *kefiyya* does not entail a *get me'useh* situation. Nothing could be farther from the truth. According to many posekim, meting out such obligations for a spouse's *get* recalcitrance is prohibited. My suggestion is that the *kefiyya le-davar aher* is linked to the wife's interest of remarrying

and/or having children. Given that she is either unable to perform this mitsva or is in need of the psychological security of marriage, therefore feelings of pain and embarrassment are engendered and consequently a claim for *tsa'ar/boshet* is in place. (Conversely, should the circumstances show that the wife is not interested in remarriage; there would be no grounds for a *nezikin* claim for *tsa'ar/boshet*.)

And, in fact, in contemporary times, as I mentioned in the text accompanying n. 36, the Supreme Rabbinical Court recognized a *nezikin* claim which as I discussed has its antecedents in the *teshuvot* of Rivash, Mabit, R. Feinstein and others.

Consequently, R. Spirn's depiction of my position that "suing for the pain and suffering that he caused by his refusal to give a *get*" reflects a misrepresentation of my view rather than my actual proposal, which offered a method of validating a *nezikin* claim based upon the notion of *kefiyya le-davar aher* as it relates to the wife's right to marriage and/or have children. See my n. 33a. In fact, in the text [and my note] accompanying n. 33a, I address the merits of the counterargument that the submission of a *nezikin* claim grounded in the right to marriage assumes that a *get* must be forthcoming and therefore there is a link to the *get* which would create a *get me'useh* situation, and I show that there still remains grounds to view the *nezikin* claim as another example of *kefiyya le-davar aher* which is permissible and does not run afoul of the strictures of a *get me'useh*.

In reply to R. Spirn's important observation that there are authorities (and they reflect the majority opinion) who consider a *get meuseh she-lo ka-din* invalid *min ha-Torah be-diAvad* (*ex post facto*) and should they fail to recognize such a *get* delivered as valid under the circumstances as outlined in my presentation, the resulting *get* would be invalid, let me note the following: Firstly, the fact that the majority of posekim disagree with Rambam's position does not mean *ipso facto* that the halakhah is in accordance with the majority view. See this writer's *Rabbinic Authority: The Vision & the Reality*, (Jerusalem: Urim, 2013), 50-51. Moreover, it is this author's hope that contemporary posekim would subscribe to the view of Rambam, following others who in the past have endorsed his view and/or noted that there are authorities who subscribe to Rambam's view. See Bahag, *Hilkhot Gerushin* (Machon Yerushalayim ed., p. 418), *Orhot Hayim*, Hilkhot Gittin 80b, *Meiri*, *Beit ha-Behira Bava Batra* 48b; *Yam shel Shlomo, Bava Batra* 9:27; *Teshuvot Agudat Ezov*, *E.H.* 19:18 in the name of Ra'avad, *Teshuvot ha-Rashba* 4:41[compare with 1:573], *Teshuvot Tsemach Tsedek E.H.* 262(3) and *Teshuvot Beit Avi* 4:143,169 (in the name of Rabbeinu Yeruham); *Ma'aseh Hiya* 24,

Teshuvot Oneg Yom Tov 167 [238:c-d,], Notes of R. Herzog, *Otzar ha-Poskim*, Vol. 2, section 4 [pages 1-2], section 20 [page 5]) that a *get me'useh* is *pasul mi-deRabbanan* but not *batel* (null and void) and therefore a *get* delivered under the circumstances as outlined in my essay ought to be valid. And following in Rambam's footsteps, these contemporary posekim would subscribe to the view of some well-respected Aharonim that if she remarries she remains with her second husband. See *Kenesset ha-Gedola*, *E.H.* 144, *Hagahot ha-Tur* 21 and *Hagahot ha-Beit Yosef* 21-22 in the name of Mabit, Maharashdam and Ranah. And it is these same *meshivim* (respondents) who have been scrutinized and numerous times accepted in other matters relating to *get* matters, including *kefiyyat get*. For example, see *Teshuvot ha-Mabit*, 1:1, 13, 22, 36, 76; 2:38, 41, 82, 138, 227; *Teshuvot Ranah* 1:42, 63, 73; *Teshuvot Maharashdam, Y.D.* 77,132; *E.H.* 41, 63, 71. Hopefully, their endorsement of Rambam's view will serve as grounds for accepting that a *get me'useh* is not *batel*.

Alternatively, though Maharashdam, *E.H.* 63 admits that many disagree with Rambam's view, he argues that Rambam's *pesak* ought to be controlling and therefore, in case of halakhic doubt, one should rule in accordance with his view. Moreover, there were certain decisors who subscribed to the majority opinion, but in a case of a *sefek sefeika* they ruled in accordance with Rambam's view. See *Mikhtav me-Eliyahu*, Sha'ar 7:13 (end); *Teshuvot Sha'arei Torah*, 3:63; *Kefiyya be-Get*, p. 203 in the name of *Teshuvot Hatam Sofer E.H.* 1:131 as understood by *Hazon Ish*, *E.H.* 99:1; R. Herzog, op.cit. In other words, there may be uncertainties regarding the halakha which stem from controversies among the earlier authorities which create a *sefek sefeika*, and one would rule leniently in such a situation. In our case, contemporary posekim may argue that the executed *get* is valid *be-diAvad* due to a *sefek sefeika*, a primary *safek* whether the awarding of a *nezikin* claim produces a *get me'useh* and a secondary *safek* that a *get me'useh shel lo-kadin* may be valid *min ha-Torah* and rabbinically *pasul* [rather than *batel*]. Let me conclude with the pesak of R. Tzvi Gartner, a well-respected authority on *kefiyyat get* and a veteran dayyan of Monsey, NY and Yerushalayim, who states the following (see *Kefiyya be-Get*, p. 207):

> Some aharonim have ruled against Rambam and there are those who state that Rambam is not a minority opinion, and we should rely upon him for *sefek sefeka* to act leniently. Consequently, if a woman received *kiddushin* from another, she requires another *get*.

For a Yerushalmi dayyan who followed in R. Gartner's footsteps, see *Yad Yehuda*, Hilkhot Gittin, 154:1, s.v. *kelalei pesika be-kefiyyat get*.

Moreover, the majority opinion that holds that a monetary imposition constitutes *ones mamon* (monetary duress) and therefore its imposition creates a *get me'useh* which is null and void is predicated upon the imposition of an exorbitant sum of money. However, if the *nezikin* award is a small amount, it is financially non-threatening and therefore permissible. What amount constitutes an *ones* is contingent upon the ability of the husband to pay the award. See the various Aharonim and contemporary posekim cited in my discussion in the text accompanying notes 13 and 17. For an additional contemporary application relating to a *nezikin* claim, see *Teshuvot Ateret Devorah* 1:76 (480-481). Therefore, if we are dealing with a small award, the question of the validity of a *get me'useh ex post facto* does not come into play.

In short, for all the aforesaid reasons, even if *posekim* reject such an approach as the one outlined in this essay, any subsequent *get* rendered by a *beit din* ought to be recognized *ex post facto* by all segments of our community.

Furthermore, the motivation of this essay is to deal with the contemporary reality where one encounters that many couples in all segments of our community, including the Modern Orthodox community, continue to marry without the signing of a prenuptial agreement. In fact, in recent months I have been involved in and/or served as a dayyan on divorce cases involving a Hasidic couple who were married for six years, a Yeshivish couple married for six years, two Yeshivish couples married for under two years, and a Modern Orthodox couple married for under two years, and in all instances a prenuptial agreement was not signed. In fact, in the majority of divorce cases that I have served as a dayyan during the last fourteen years, such an agreement was never executed. Consequently, the purpose of my presentation is to address this ongoing reality of our community where young men and women continue to marry without signing a prenuptial agreement, and, regretfully, in the event that there is a marital breakdown an *iggun* situation may emerge. As such, my proposal, which has a contemporary precedent in the aforementioned Israeli Rabbinical court *pesak din*, seeks to reduce the possibility of *iggun* arising. For R. Spirn to write that he personally believes that "adversarial litigation" by filing a *nezikin* claim is not the best way to address the situation and therefore suggests the adoption of a prenuptial agreement to mediate, fails to deal with the many couples who are married and continue to be married without the execution of any type of prenuptial agreement. My presentation should not be construed as rejecting the use of a prenuptial agreement but rather as a vehicle for reducing the *iggun* situation for couples who did not sign off on a prenuptial agreement.

Finally, I am in full agreement with R. Spirn's last comment that there is a need for the community to support mediation rather than litigation. On numerous occasions I have communicated to a couple or a spouse who were contemplating divorce to have their differences resolved through mediation. However, regretfully in many instances, couples are unable "to bridge the gap" and therefore litigation is the only option remaining for resolving their marital differences.

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