RESPONSE—RABBI SHLOMO RISKIN:

Rabbi Wieder begins his rebuttal of my position by restating my citation of the talmudic sources—but his usage of language is such that he actually distorts the talmudic position. He divides the five incidents of annulment found in the Talmud into two separate typologies: one in which the marriage is annulled right after it occurs—and in these incidents there is no mention of any *get*—and the other in which the marriage is annulled much later on. The first category he refers to as "a situation in which the marriage was defective from its inception" leading us to believe that a valid marriage had never taken place; indeed, he goes on to say "the marriage was never viewed as having gotten off the ground"—and *therefore* "no *get* was required."

However, a study of each of the two cases in which the marriage is annulled immediately after it occurs reveals that in each instance the marriage was a perfectly valid and legal marital act: in the one (*Bava Batra* 48b) because any legal transaction which is accepted under duress is considered legally valid under Torah law as long as the recipient receives all necessary compensation and benefits, and in the other (*Yevamot* 110a) because the second suitor betrothed the woman as soon as she reached the age of majority. A valid and legal betrothal had taken place and had gotten off the ground. In both instances, however, the betrother took unfair advantage of the letter of the law to the disadvantage of the original husband. Hence the rabbis *annulled a legal marriage that had already taken place* by utilizing their power to either make *hefker post facto*, the money with which the groom had betrothed his bride or to "prostitute" *post facto* the marital act of coitus with which the marriage had become legalized. This is how the Talmud itself in both these instances explains the annulment; there is no hint in these two Talmudic passages of the idea proffered by R. Wieder that betrothal was defective and had never gotten off the ground; had that been the case, an act of annulment predicated upon "*hefker*" or "prostitution" would have been superfluous.

II

He then goes on to discuss the second typology or category of annulment, three instances in the Talmud which involve some kind of *get*. Once again R. Wieder's choice of words is misleading at best: He

writes, "In each case the *get* was perfectly written but lacked something in its delivery . . . and hence the rabbis resorted to a retroactive annulment of the marriage;" he even translates the belittling Hebrew phrase *get kol de-hu* as "when a valid *get* is ordered."

In fact, in each of these three cases the *get* is not a *get*! In the first, (*Ketubot* 3a) a man gives his wife a *get*, but only on the condition that he will not return within 30 days; he does not return within 30 days—but only because he was prevented from doing so by a river which had overflown. Since Torah law always recognizes the validity of the claim of unavoidable interference (*ones Rahmana patreh*), from a halakhic perspective the *get* is not at all a *get*. But because the woman might not be aware of the overflown river, and might mistakenly think that she is legally divorced and accept betrothal from someone else, the rabbis annul her marriage to her first husband. The *get* is not the mechanism for the annulment; it is rather the reason why the rabbis have to resort to annulment by means of "*hefker*" or "prostitution."

The other two instances are exactly parallel. In *Gittin* 33a, a husband cancelled a *get* that he had sent to his wife by agent before a *bet din* but without notifying either the agent or the wife; since the *get* was cancelled before it was accepted by the wife, it has absolutely no validity whatsoever. However, because the wife might receive the *get* never having been informed of its cancellation, and might even accept betrothal by another, the sages opt to annul the initial marriage—not through the medium of the *get* (which is totally invalid), but because of the complication which might arise as a result of a "private" cancellation of a *get*. In *Gittin* 73a, a man on his deathbed instructs that a *get* be given to his wife—and then recovers. The halakha clearly stipulates that any deathbed gift is rescinded upon the recovery of the patient, so that the *get* in this instance is no *get*. The sages annul the marriage nevertheless, lest people think that a *get* can be administered after the death of the husband. Once again, the *get* is no *get*, and so it is hardly the medium for effectuating the annulment; it is rather because of a confusion regarding the halakhah that may result from the recovery of the sick man and consequent cancellation of the *get*, that the sages ruled to annul the marriage.

This analysis—on the very basis of the talmudic language in the five instances cited above—buttresses my position that there are not two separate apparatuses of annulment: one immediately following a "defective" marriage and another after many years of a valid marriage, but only with the administering of a *get*. There is, rather, one apparatus of annulment, solely based upon the rabbinic powers of "*hefker*" or "pros-

titution," which our Talmud invoked when a husband took unfair halakhic advantage of his wife or when the woman might mistakenly accept the betrothal of another without realizing that she is legally married to her first husband. Clearly both Rashi and Rashbam indubitably understand all five cases as emanating from one and the same principle and apparatus of annulment, with Rashi adding the one missing line of "anyone who betroths, does so with the consent of the rabbinic sages" in his interpretation of the passage in *Yevamot* 110a, and Rashbam adding it to his interpretation of *Bava Batra* 48b; in any case, all five talmudic passages insist upon the mechanism of "*hefker*" or "prostitution" without giving any validity to the *gittin* in the three instances they are mentioned.

III

R. Wieder then makes the all-encompassing charge that "on a more fundamental level, even according to those Rishonim for whom the get is primarily cosmetic, there is no precedent in halakhic literature for a retroactive annulment without a *get*." He claims that even Rashi, "whose position serves as the basis for [my] proposal repeatedly states . . . that the mechanism for annulment is the dissolution of the original marriage by means of the *get*."

> *KOL HA-MEKADESH: Kol ha-mekadesh isha al da'at she-hinhigu hakhmei Yisrael be-Yisrael hu mekadesha she-yiheyu kayyamin kiddushin lefi divrei hakhamim ve-yiheyu bettilim lefi divrei hakhamim al yedei gittin she-hikhshiru hakhamim.*
>
> *VE-AFKINHU RABBANAN LE-KIDDUSHIN: Ke-sheyavo get ka-zeh aharehem.*
>
> *(Rashi, Ketubot 3a)*

I do not believe that R. Wieder is correctly interpreting Rashi's words. Rashi is not saying that the only time there can be an annulment of a betrothal is when there is a *get*; he is merely saying that in this instance an invalid *get* was made valid by the rabbis when they annulled the marriage—in order to prevent *agunot* and *mamzerim*. And Rashi concludes that the rabbis will always annul the betrothal when there is a *get* that can cause such complications after the act of betrothal. Thus Rashi is saying that the reason for the annulment in this instance is the possible, even probable, difficulties with this invalid *get*; he never meant

to say that there can never be an instance of an annulment of a marriage without a *get*. (R. Ovadia Hadaya, author of *Yaskil Avdi* gives precisely this interpretation in *Noam* 10, 5727.)

The truth is that Rashi could not be insisting on a *get* for an annulment of a marriage since we have already seen how he interprets the passage in *Yevamot* 110a as an instance of a cancellation of a marriage—and there is no *get* in that case. Moreover, Rashi explains our leniency to allow an *aguna* to marry even on the basis of testimony of a witness who merely heard from another witness that her husband had died, because "our sages were lenient regarding an *aguna*, since anyone who betroths does so with the consent of our sages, and our sages can annul his betrothal" (*Shabbat* 145b). Now certainly in this instance there is no possibility of a *get* since the fate of the husband is unknown—and yet Rashi invokes the principle of the cancellation of our sages!

IV

R. Wieder also questions my interpretation of Me'iri, claiming that I quoted "only half of the sentence," when I cited his words, "that which (the rabbis) said that they cancelled a betrothal . . . is even in a case where there is no *get* at all." After all, R. Wieder charges, Me'iri goes on to say, "nonetheless the sages of Spain . . . have written that whenever the *kiddushin* were executed improperly, the woman goes out without a *get*; but whenever the *kiddushin* were executed properly and because of some event that occurs later they dissolve the *kiddushin*, (this can happen) only with some semblance of a *get* (*get kol de-hu*). And, concludes R. Wieder, "at no point does Me'iri disagree with this assertion of the Spanish sages."

I beg to differ; I believe it is R. Wieder who neglects to read Me'iri to the end. Me'iri opens his commentary with a clear statement of his position, that there is no need for a *get* at all when there is a rabbinic annulment. He then cites the "great ones of the world" (*gedolei olam*) who insist on "some kind of a *get*" (*get kol de-hu*), but then immediately defends his initial position: "You can learn our words from the text in Yevamot 110a . . . where there was no need for a *get*; he [the husband] acted improperly, so they [the sages] will act improperly towards him and annul his *kiddushin*." From here it is clear that Me'iri takes all five talmudic passages together as expressing one united principle of annulling *kiddushin*—and so justifies the "*get*-less" annulment on the basis of the high-handed *kiddushin* in Neresh.

Me'iri then explains the position he rejects, the distinction made by the Spanish sages between an "improper" k*iddushin* which doesn't require a *get* and a proper *kiddushin* which runs into difficulties later on in the relationship and which requires a *get kol de-hu*—this is cited by R. Wieder—and then Me'iri concludes

> There is not room for the question as to why here [*Ketubot* 3a] they require a *get* and there [*Yevamot* 110a] they do not require a *get*, because here the annulment [is not by means of a *get*, but] is only brought about because of the problematic doubt which is caused by the *get*.

In other words, the last word of Me'iri as to his own position is that annulment does not require any kind of *get* for its effectiveness; the annulment in all five instances in the Talmud comes as a result of the fact that everyone who betroths does so with the consent of the sages, and the sages can nullify the *kiddushin*. In the three instances where a *get* appears, the invalid *get* is the reason why the sages had to invoke their power of annulment but it is by no means a factor in the annulment itself!

The *Mishna* (*Nedarim* 90b) states,

> A woman who says to her husband that she is impure for him [for she has committed adultery]—according to the first teaching, she is believed and leaves the marriage with her *ketuba*; but according to the final teaching she is not believed [as to the adultery] without real proof lest she cast her eyes on another man [and therefore is making up the story of adultery in order to get out of her marriage].

Ran asks how the woman can be permitted to her husband according to the final ruling. After all, Torah law forbids such a woman to continue to live with her husband, so how can the mere suspicion "lest she cast her eyes on another" rescind the biblical prohibition? He responds, "To me, that is not a question. Just as we say in several talmudic passages that anyone who betroths, betroths with the consent of the rabbinic sages, and the rabbinic sages can cancel the *kiddushin* from him, so is that the case in this instance here: any woman who says to her husband that she is impure, has her *kiddushin* annulled by the rabbinic sages retroactively—so that at the time she was raped, she was a single woman. Because of this, she may be permitted to her husband and can also eat of his *teruma* [if he is a *kohen*] as we said in the *Gemara* . . . ."

Hence, Ran joins the list of *Rishonim* who maintain that the *get* is not a necessary factor in annulling a betrothal.

Maharam (cited by Mordekhai, *Kiddushin* 522) asks why an individual who transgresses the sanctions of Rabbenu Gershom and betroths a second wife does not have that betrothal annulled. After all, he has acted improperly by going against an enactment accepted by the whole of Ashkenazi Jewry—so ought not the rabbinical sages to annul his betrothal? Maharam answers that in the instances of an individual who cancelled his *get* without the knowledge of either the agent or his wife, and of an individual who came up against unavoidable interference, it is logical to say that since at the time of the betrothal he had not transgressed, he betrothed his bride with the understanding that if in the future he would transgress (by canceling a *get* without proper publicity), or if he were to give a conditional *get* which would cause problems, the rabbinical sages would annul his betrothal: "Even in the case in Neresh [*Yevamot* 110a] where the groom 'seized' the woman as soon as she reached the age of majority, the groom did not actually transgress a rabbinical enactment; he merely acted impudently, but he never intended to transgress the words [of the sages]."

From this statement we may derive four principles: first, from Maharam's query itself we see that it is possible to annul a marriage without a *get*; second, the rabbis have the authority to annul a marriage after the talmudic period; third, all the talmudic passages dealing with annulment of marriages are based upon a single apparatus; finally, in contrast to what R. Wieder would have us believe, it is easier to annul a betrothal that was done properly after a significant period of time has elapsed than it is to annul immediately a betrothal done improperly!

V

Once again R. Wieder resorts to a categorical statement to the effect that "even according to Rashi and those who follow him, the rabbis never actually annulled a marriage retroactively without a *get*." To be sure, R. Wieder does take note of my citation of Rema (*Darkei Moshe, Even ha-Ezer* 7:13), but (in a footnote) raises three supposed difficulties with my use of the commentary of this greatest of Ashkenazi *posekim* as a precedent.

One recalls that the author of the *Terumat ha-Deshen* (241) allowed Jewish-Austrian women who had been taken captive to return to their

husbands, a ruling Rema attributes to the ruling that "whoever betroths a woman, betroths her with the understanding that he has rabbinical approval, and the court is authorized to cancel the marriage." Since, if these women were forbidden to the husbands of their youth they might have fallen into a life-style of sin, "they were considered to have been like unmarried women," which is to say that the rabbis cancelled their marriages before they "sinned" with their captors.

R. Wieder objects to the use of this case as a precedent because Rema himself "suggests that perhaps it was a *hora'at sha'a* . . . an exceptional case, not to be used for any kind of *takkana.*"

Once again, R. Wieder does not read Rema carefully enough; Rema does not invoke "*hora'at sha'a*" but "*tsorekh sha'a*"— a very different concept, one which can serve as a precedent whenever the particular need still exists. Indeed, this distinction is discussed at length by Rav Kook (*Mishpat Kohen* 143), who proves conclusively that *tsorekh sha'a* must itself be based on halakhic precedent and process, and can thus serve as added halakhic precedent for future cases.

R. Wieder's second objection is that with respect to wives of *kohanim*, the mechanism enabling them to return to their husbands could not possibly have been annulment because that would not have helped, for "even a single woman who has a sexual relationship with a gentile is not permitted to marry a *kohen.*" Interestingly enough, both R. Isaac Herzog (*Tehuka le-Yisrael* 1) and R. Ovadia Yosef (*Torah she-be-Al Peh* 3) deal with this issue, and both conclude that Rema sides with Rambam (see *Hilkhot Issurei Bi'a* 17:2) that only if such women were to have a second marriage with their *kohen* husbands would they violate a biblical prohibition; so long as they return to their husbands without a re-marriage, they incur no guilt.

Finally R. Wieder rejects the application of Rema because "even if we accept the idea that [the leniency was based on a marital annulment] the stakes [in that case] were much lower [than in ours]. . . . Even if . . . [the Austrian women were involved in] a violation of Torah law . . . in our case the issue at hand . . . is one of *arayot* and . . . *mamzerut.*"

I must admit that such an objection seems to me mere quibbling. The fact of the matter remains that Rema sanctions the invocation of the principle of "*hafka'at kiddushin*" to permit what would otherwise be a biblical violation of *davar she-be-erva*—and this in the sixteenth century, long after the close of the Talmud, despite the lack of a precise talmudic precedent and without any type of *get.* I would argue that the precedent stands firmly on its own strength.

And indeed, Rema's ruling was used as a precedent by a contemporary *posek*, R. Mordekhai Ya'akov Breisch of Zurich, who permitted female survivors of the Holocaust to re-marry even though the whereabouts of their former husbands could not be determined conclusively, on the basis of the rabbinic power to cancel marriages! (*Helkat Ya'akov, Even ha-Ezer* 40, 49, 56). It goes without saying that no *get* was involved in these cases.

As a matter of fact, some of the most prominent of our contemporary *posekim* used Rema's precedent. R. Yehiel Ya'akov Weinberg (*Seridei Esh* 90) states: "But in any case we see that it is the position of Rema that even in our days it is possible to use this principle [of annulling a marriage] under certain conditions. And even though the permissibility granted in the Austrian decree only rescinded a biblical negative prohibition [and not a capital offense] . . . nevertheless we do see that the sages of Austria utilized this principle and that Rema concurred with their ruling." R. Herzog, likewise: "In any case we find here that it is his [Rema's] opinion that marriages were annulled after much time had elapsed after the sealing of the Talmud. According to this, it is necessary to say that also in our time the rabbinic sages have the power to annul a marriage on the basis of 'all who betroth . . . and so the Sages can annul the betrothal.'" R. Ovadia Yosef, after a lengthy analysis of the words of the Rema, concludes: "No matter what, we learn from the sages of Austria that we may permit annulments also in our times in cases of great necessity." And although Rav Kook initially says that only the sages of the Talmud had the right to invoke annulments, he concludes his discussion thus: "Nevertheless we do find that even in the later generations, our sages have utilized their power of annulment in times of great need, as is explained in the *Terumat ha-Deshen* which is cited by Rema . . . . But that is merely a hint concerning the issue, because there the matter was decided by a gathering of the sages of the generation and for the sake of a case which touched a multitude of people. Nevertheless, it is not at all a closed matter "that it is impossible to include the principle of cancellation of marriages after the time of the sages of the Talmud" (*Ezrat Kohen* 69). Even Rav Shlomo Zalman Auerbach leaves the door open for our utilization of this principle, when he writes: "The fact that we find Sages who annulled marriages as is cited in the *Darkei Moshe* and in other places, this occurred in time of persecution and great slaughter in a matter which pertained to the multitudes; one should not utilize the principle of annulling marriages in order to save one single individual" (*Torah she-*

be-Al Peh 8). After all, my suggestion relates to an enactment that would indeed prevent a miscarriage of justice affecting multitudes.

I would also venture to add that even the two major voices on the other side, Rashbam and Rashba, who are cited as maintaining the necessity of at least a *get kol de-hu* with a marriage which has continued for a reasonable period, are not as locked into that position to the extent that R. Wieder would have us believe. We have already seen how Rashbam hastens to add the words "anyone who betroths does so with the consent of the sages" to the talmudic passage in Yevamot, although we are there dealing with an annulment of a "high-handed" *kiddushin* without any form of *get* whatsoever—demonstrating that he believes that all the talmudic instances of annulment are cut of the same cloth. Moreover, Tosafot Rashba mi-Shants (*Ketubot* 3a) limits the non-retroactive annulment of the marriage suggested by Rashbam to a case where the husband is in the position of being the initiator—as in *Gittin* 33b, where the husband has cancelled a *get* without informing either the agent or his wife—and so may commit such an act in order to avoid implicating his wife in an act of adultery. At least according to this view, Rashbam would accept a *get*-less cancellation in any other instance.

The position of Rashba is likewise not so clear-cut. In his *Hiddushim* (*Nedarim* 9b) Rashba interprets the mishnaic provision for a woman to return to her husband after confessing to an act of adultery as based on the rabbinic power of annulment!—and here there is no *get* whatsoever. And in the *Responsa* there are at least two instances where Rashba suggests a rabbinic enactment based upon the retroactive annulment of a marriage (1:206 and 551).

VI

R. Wieder warns against my proposal by invoking the "long established tendency to be stringent . . . probably due both to the severity of the prohibition of *lo tin'af* and to the potential for *mamzerut*."

However, one can well argue precisely to the contrary. The Talmud iterates and reiterates the principle that "in order to prevent the situation of the *aguna*, our sages judge leniently," and because of this—despite the legal principle that any matter of personal status requires two male observant witnesses—a woman's testimony, one witness's testimony, hearsay testimony, and even the testimony of a gentile "in the manner of conversation" is acceptable in determining the death of a

missing husband, all so that his wife may remarry. Even in the case of forcing the husband to give a *get* desired only by the woman, the sages of the Talmud and the majority of *Rishonim* and *posekim* up to and including contemporary times have been most lenient.

Moreover, it must be remembered that in our post-modern period of mobility and individual autonomy, the ability of any Jewish court to enforce its decisions has been greatly enervated. In the words of R. Herzog: ". . . in those instances when the husband could be forced to divorce his wife, our sages were not lenient in terms of annulling the marriage. There was no necessity for it; they [judges] had the power to compel with force and to declare sanctions that were adhered to. This is not true in our times."

Finally, I believe that were the Chief Rabbinate in Israel to set up a properly responsible *bet din* in Jerusalem to have the exclusive jurisdiction over annulling those marriages where the husband had been ordered by a proper local *bet din* to give a *get* and refused to do so, the worldwide problem of *aguna* would find a meaningful solution. Indeed, the very existence of such a *bet din* would discourage unscrupulous husbands from taking unfair halakhic advantage—and would render such annulments few and far between.

I also believe that responsible rabbis across the spectrum of Orthodoxy would accept these annulments. Firstly, they would know that they were done responsibly, and had prevented less responsible "courts of divorce" from springing up. Secondly, they would act in accordance with the precedent established by the academies of Hillel and Shammai two millennia ago: although these great schools had significant differences of opinion in laws of marriage and divorce, their adherents nevertheless intermarried with each other (*Yevamot* 13a). Thirdly, the Haredi community is also increasingly being plagued by unscrupulous husbands taking advantage of the letter of the law to "hold up" their wives and their wives' families in order to obtain a *get*. And finally, such a course is a vital necessity in order to wipe away the tears of *agunot* from within our midst, and in order to remove the desecration of God's name from our Torah and its laws.