The 1992 New York *Get* Law: An Exchange

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Rabbi Michael Broyde's "The 1992 New York State *Get* Law" (*Tradition*, Summer 1995) contains a number of inaccuracies and misrepresentations that deserve further discussion.

[1] Rabbi Broyde begins by saying that "Jewish Law mandates that *ideally* [emphasis mine] a *Get* be given with no coercion present at all." This implies that we are dealing with a *humra* (stringency) or a *le-ha-thila* (a desirable condition, but a dispensable one). But a coerced *Get* is totally invalid *mi-de-Oraita*, by Torah Law, with serious consequences of adultery and *mamzerut.*

[2] There are two major flaws in the *Get* bill which Rabbi Broyde never addresses. First, the law helps women obtain a *Get* when there has been no finding whatsoever by any halakhic body that a *Get* is either warranted or appropriate. A contested *civil* divorce requires a court verdict; surely a contested *Get* deserves no less, and in a halakhic forum. The *Get* bill has no such provision. Thus, any speculation that a *Get* is called for remains speculation.

Second, even if a *Get* is warranted, if there are no halakhic grounds for *coercion*, then writing such a *Get* is not just forbidden, it also invalidates the *Get.* Indeed, even when a case theoretically calls for coercion, the *Get* will be invalid if a *bet din* does not *formally rule* that coercion is proper. Moreover, if such a ruling is obtained, the civil courts cannot constitutionally act as a *bet din*'s agent, carrying out their verdict; and without such a mandate, the resulting *Get* is invalid.

[3] Rabbi Broyde argues that "where illicit coercion is present, the *bet din* will decline to write the *Get.*" Then what is the point of the *Get* Law? He continues: "In other situations, supporters of the *Get* bill argue, the law can be an effective tool to curtail instances where a *Get* is improperly withheld." But how, in these "other situations," can an invalidating monetary coercion *ever* be "an effective tool" to "curtail a *Get* being improperly withheld"? Any resultant *Get* would be invalid and meaningless!

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[4] Rabbi Broyde continues, "For this reason alone, in this author's opinion, the 1992 *Get Law* is at the very least a bad idea, even as its intentions are laudable and its goals commendable, as noted by the late Rabbi Shlomo Zalman Auerbach in his discussion of this law." This makes the reader think that Rabbi Auerbach *zt"l* "noted" that "its intentions were laudable and its goals commendable." But Reb Shlomo Zalman expresses no such sentiment anywhere. On the contrary, he clearly writes in his letter that the *Get* bill is a "*sakana, ve-lo takana*"—a danger, not a remedy" [because it poses a terrible danger by creating invalidating coercion]. There is no "dispute" between Rabbi Auerbach *zt"l* and Rabbi Eliashiv *shelita*, as Rabbi Broyde suggests. It is commonly known that they both shared the opinion that the *Get* bill creates economic coercion which would invalidate any *Get* written as a result of said bill.

[5] Rabbi Broyde discusses Rabbi Moshe Feinstein's responsum in the first of his "Halakhic Considerations" (page 7). I think it intellectually dishonest to relegate to a footnote Rav Moshe's statement that his logic is *not* to be relied upon, while prominently displaying that "*sevara*" as point number one. More importantly, Rav Moshe *zt"l* was discussing a specific case where it was indeed clear that "the husband actually wished to end the marriage and be divorced, and is only contesting the fiscal details of the divorce, but has no desire to remain married to his wife." But there is no such requirement in the *Get* bill. How, then, in any divorce case, would such a fact ever be determined, and by whom? Similarly, the *Hazon Ish* quoted is discussing a case where the husband made it quite clear *before any coercion existed* that he wanted a *Get.*

[6] The opinion of Rabbi Herzog, *zt"l*, which is also quoted on page 7, is likewise misrepresented. Firstly, Rabbi Herzog writes that he is expressing himself "*le-pilpula, ve-lo le-halakha*" [for academic discussion, not for practical application to an actual case] and concedes that all *posekim* rule against him. Second, an examination of his *teshuva* reveals that he is considering a case where a *duly constituted bet din has already made a determination* that there is a case which possibly calls for coercion. In such a case, Rabbi Herzog posits, the rationale applicable to every halakhically properly coerced *Get* becomes relevant and the *bet din* may order the coercion which would result in a kosher *Get*, using the principle of "*sefek sefeka.*" This has nothing to do with the *Get* bill, which has no requirement for any type of halakhic verification whatsoever.

[7] Rabbi Broyde's next point (that there be an application of *dina de-malkhuta dina* to the equitable distribution law) is implausible,

given the 14 subjective factors which New York State law insists be weighed by each judge in each case in making any determination. In addition, it should be noted that there is no law *mandating* that a divorcing couple use the State's Equitable Distribution Law. They are free to reach any agreement they want, including a division of property which holds true to Torah Law; this in itself precludes the application of *dina de-malkhuta*. Rabbi Broyde's legal reasoning here is unsound as well. Secular law does *not* rule that "equitable distribution assets belong individually to neither partner in the marriage." Rather, it allows money to be *transferred* to one partner, being *taken* from the other—and now, the withholding of a *Get* will accomplish that.

[8] Rabbi Broyde's next point is that many times, the penalty caused by the bill would be quite reasonable, and as such, not considered an invalidating coercion. While it is true that it is impossible to predict the 'reasonableness' of an award based on the Get bill, a law designed with the avowed purpose of procuring a *Get* is not one which would tend to encourage the judge to be 'reasonable'—for it would then be completely ineffective!

[9] Rabbi Broyde's fourth and sixth points are that there may be cases which indeed call for coercion. All *posekim* agree that a coerced *Get* is invalid unless there exists a prior, valid *bet din* verdict that coercion is allowed, and the verdict is then carried out by agents of the *bet din*. The Get bill has no provision for anything of this nature.

[10] Rabbi Broyde feels that there are opinions that hold that economic duress does not constitute invalidating coercion. But these opinions are not halakhically normative: all *posekim*, from *Bet Yosef* (in *Even HaEzer* 134) and R. Betsalel Ashkenazi (#16) to the *posekim* of today, (and the *Shulhan Arukh* itself) discuss many cases of invalidating coercion due to monetary factors, with no dissenting opinions. (See *Even HaEzer* 134 and *Hoshen Mishpat* 205:7.)

[11] Gra is likewise cited inaccurately. He is actually stating the well-established principle that a coercion which can be avoided (somewhat) easily is not an invalidating coercion. Gra neither discusses, nor mentions, anything else. In fact, Gra *Hoshen Mishpat* 205:18 explicitly agrees that monetary coercion is an invalidating coercion!

[12] Rabbi Broyde feels that "perhaps most, and certainly many, divorces" fall into the category of a woman who has provable ground that her husband is repugnant to her. As a Rabbinical Court Judge for about fifteen years, I can emphatically state that that is *not* the case. And if the *rishonim* who constitute normative halakha argue with Rambam, for fear of "*shema eyneha natna be-aher*," can we ignore their fears?

[13] Regarding the plausibility of marriages entered into post-*Get* bill carrying an automatic "pre-agreed-upon-penalty," few couples would declare, either before or during their marriage, that they wish to be governed by the laws of New York State in marital division of property in the event of a divorce. But even this would be coercion if the husband changed his mind and declared that he did not want to give the *Get*. (See *Even HaEzer* 134.)

[14] Rabbi Broyde argues that Rabbi Yitshak Elhanan Spektor ruled that a *Get* is valid so long as the illicit coercion from a secular court is not used directly to compel the actual writing of the *Get*. If the coercive action is separated in time and manner from the husband's order that the *Get* be written, and the husband states to a *bet din* at the time of the writing of the *Get* that his actions are voluntary, and it appears that there is no imminent coercion present, the *Get* is valid.

But there is no logical way to consider the coercion of the *Get* bill indirect. It directly, explicitly extracts a *Get* from a husband under a threat of monetary loss. Rabbi Yitshak Elhanan's discussion revolves around a case where it was forbidden for a couple to be married under the prevalent secular law; there was no interest by anyone in a *Get per se*. The husband came to the *bet din*, presumably on his own, and stated that under the circumstances, he would indeed divorce his wife—*i.e.*, give her a *Get*. Reb Yitshak Elhanan rules that since in such a case a *bet din* may coerce the husband to give a *Get*, and there was no indication that when he came to the *bet din* he was under any coercion from the government, the *Get* that was given can be relied upon *ex post facto*.

[15] Rabbi Broyde maintains (p. 9) that "even when a penalty is explicitly imposed by the judge under the '*Get* Law' for withholding a *Get*, if the amount of the penalty is clearly related to the wife's support needs and is comparable to the amount which a *bet din* could have ordered as maintenance (*mezonot*) for the wife, then there is no halakhically improper coercion." This is simply not so. A woman who, without permission from a *bet din*, initiates a court proceeding against her husband is almost always, by the nature of that action, a *moredet*, and as such, is not entitled to any *mezonot* until any claims she has are clarified and verified by a *bet din*. (See *Even HaEzer* 77). In addition, the *Get* bill provides for division of marital property, not just maintenance payments. Furthermore, it provides for support even post-divorce, which generally constitutes out and out halakhic theft.

[16] Rabbi Broyde argues that "the mere presence of a penalty provision in the judicial divorce decree is not evidence of illicit coercion." But there is a clear-cut halakha which states, "*devarim she-ba-lev*

einam devarim"—we ignore unexpressed thoughts a person has if his actions indicate the opposite—i.e., if the normal perception of those actions is contrary to what he claims he had in mind. This means that when we have an act of coercion, we cannot speculate, "Perhaps he really wants to give the *Get.*" (Unless, possibly, that "will" was expressed *before* the coercion, as per Hazon Ish quoted above.)

We also cannot accept Rabbi Broyde's argument that "it is nearly impossible for any outside observer to distinguish cases where coercion is present in the settlement negotiations from cases where it is not, thus creating significant factual doubt as to the presence of coercion in the issuing of the *Get* in most cases." A good "outside observer" to consider would be someone who knows the circumstances of the particular case, one who knows the monetary issues at stake, not a person picked out at random. And those who understand the *Get* bill would realize that a significant financial loss is "at stake."

In short, the *Get* bill remains an ever-present danger, in all likelihood causing invalid *gittin* in cases of contested divorces now being litigated in New York State Courts.

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Rabbi Malinowitz's comments advance a number of theses that can be divided in two categories. The first are those that address fundamental issues relating to the process of Jewish divorce in America and the crucial general issues related to coerced divorces and the *Get* process. The second are technical comments on the sources that I cited in the course of my discussion of whether the *Get* Law voids Jewish

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divorces written in its shadow even *be-di-aved*. Since the first set of issues are much more fundamental to this problem, and how one understands them generally colors all other issues, I will respond to them initially. The questions concerning whether the sources support my analysis will be addressed afterwards.

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Rabbi Malinowitz advances two fundamental theses that need to be understood, as they have profound implications for how one views the background that creates the many *aguna* problems and the scope of halakhically legitimate solutions. Rabbi Malinowitz writes:

> A secular, contested civil divorce requires a court verdict; surely a contested *Get* deserves no less, and in a halakhic forum.

and he also states:

> Without th[e] halakhic process, no one is justified in assuming that a *Get* is obligatory or even appropriate. . . . The [*Get*] law helps women obtain a *Get* when there has been no finding whatsoever by any halakhic body that a *Get* is either warranted or appropriate.

Elsewhere he states:

> Action taken by anyone to facilitate a *Get* for a man/woman if the *Get* is halakhically unjustified, even if that action does not halakhically invalidate the *Get*, is anti-halakhic.[1]

In Rabbi Malinowitz's opinion, in a situation where there are no halakhic grounds for *bet din* to order (or rule a mitsvah) a divorce, there can be no *aguna* problem, since there is no halakhic "right" for the woman to be divorced and receive a *Get*, and thus there is no "wrong" for the husband to seek enrichment from his wife as a price for writing a *Get*. Rabbi Malinowitz thus maintains that any pressure on the husband to write a *Get* is unethical and wrong in such circumstances.

I believe that Rabbi Malinowitz's basic approach is mistaken and is inconsistent with normative halakha on this topic. The sources quoted in my original article showed that at some basic level, it is obvious that an honorable person would and should seek a divorce when the marriage really is over, and halakha sees no problems in licit coercion or persuasion designed to encourage this.

Based on these and many other sources, a proper halakhic posture should be that once the marriage is functionally over, and neither spouse wishes to remain married to the other, the role of a *bet din* (and everyone else) should be to settle the financial disputes between the parties, and to facilitate and encourage the writing of a *Get*. Encouraging the writing of a *Get* in such a circumstance is certainly not "anti-halakhic," as Rabbi Malinowitz states, but is rather a mitsvah, as Rav Henkin writes. It is in this spirit that the many prenuptial agreements (which do not require a finding of fault to require that a *Get* be given) have been suggested, and have received approbation or been formulated by such eminent contemporary *posekim* as Rabbis Bleich, Feinstein, Goldberg, Leibes, Yosef, Willig, Zimbalist and others.

While halakha restricts the *type* of pressure that can be put on the husband in a variety of ways to insure that the requisite free will required by the husband for a valid *Get* be present, encouraging and pressuring a Jewish divorce in cases where the marriage is dead and the couple permanently separated is completely proper and appropriate even when there are no halakhic grounds for a *Get* to be mandatory or a mitsvah. Were the contrary to be the normative halakhic rule, even the 1980 *Get* Law—which received unanimous approbation in the Torah community—would be problematic, as its purpose clearly is to encourage the giving of a *Get* in a situation where there is no ruling from a *bet din* that a *Get* is to be encouraged.

Thus, once one understands Rabbi Malinowitz's basic approach to this issue, one senses that many of his criticisms of my article, and his broad criticism of the 1992 New York *Get* Law, reflect his approach that every form of pressure is suspect and to be discouraged. The proper response to Rabbi Malinowitz's comments are obvious once one accepts that there is no halakhic problem in encouraging—or even coercing in manners permitted by halakha—a *Get* when the marriage is over.

Rabbi Malinowitz indicates that it is intellectually dishonest of me to quote Rav Moshe Feinstein's approach, which permits any and all force to be used to encourage the writing of the *Get* without any halakhic problem once the marriage is *de facto* over, without my noting *in the text* that Rav Feinstein had reservations about it. (I noted such in a footnote.) I will leave that allegation of intellectual dishonesty to the reader's judgment, as defending one's own virtue is very hard.

However, it is extremely significant to note that Rav Feinstein's approach to the *aguna* situation is fundamentally rejected by Rabbi Malinowitz, who does not agree that there always is a halakhic duty to

provide a *Get* when the marriage is actually over. His position is one Rav Feinstein and Rav Henkin explicitly reject. Surely, one who disagrees with the normative halakhic approach advocated by these two deans of Torah life in America should have noted that fact.

In his responsum, Rav Feinstein (*Igrot Moshe EH* 3:44) advanced two very important insights. The first is that in a situation where the marriage is actually over, there is no halakhic problem with using what would otherwise be illicit coercion to compel the giving of a *Get*, even if no money is paid at all to the husband. The second is that in a case where payment is made by the wife to settle this matter and that payment is combined with some coercion placed on the husband—but the marriage really is, in fact, over—that coercion does not violate halakha and void the *Get*. Halakha accepts that the husband is issuing the *Get* in return for the payment of money, since the marriage really is over and he derives no real benefit from continuing the marriage.

The first insight, while by no means unique to Rav Feinstein, is found in only a small number of authorities.[2] However, the second insight is found in a large number of halakhic authorities of the last thousand years, and is completely normative.[3] Indeed, no less an authority than the *Bet Shemuel* (*EH* 134:14) notes that there are many circumstances where one can rely on this approach, even when only a small amount of money is given by the woman.

Many other authorities could be cited to support this halakhic rule, and it appears to be accepted *le-ha-tehila* by many. Rav Tzvi Gartner, in a forthcoming *sefer* dealing with many aspects of coerced divorce, summarizes the halakha by stating:

> It appears that it is difficult to rely on the approach of *Iggrot Moshe* and *Tiferet Tzvi* in a case where the only benefit which accrues to the husband is removal of the obligation to support his wife, since this is a matter in dispute between Tosaphot and Rashba. Nonetheless, their analysis is persuasive at the minimum in the case where the husband does not desire a marital relationship, and only desires to extract something from the woman in exchange for a *Get*, and she gives him money for the divorce.[4]

Indeed, a plausible reading of Rav Feinstein's own words incline one to accept that he only was hesitant to rely on his "novel insight" for the first of them—when there was no payment to the husband. The second insight is certainly accepted by many great *posekim* as normative halakha, and validates any *Get* given in the process of a settlement

where the wife gives anything of value to the husband that he is not entitled to. Nearly all contested secular divorces fit into this category.

The second significant issue about which Rabbi Malinowitz and I disagree is the intent of the parties to accept secular law as the basis for resolving marital disputes. Rabbi Malinowitz believes that: "[The 1992 *Get* Law] provides for support [alimony] even post divorce, *which generally constitutes halakhic theft, out and out*"; and "few couples would declare, either before or during their marriage, that they wish to be governed by the laws of the State of New York in marital division of property in the event of divorce."

The scope of the halakhic duty to follow the law of the land, or the ability of the Jewish community to incorporate the law of the land into Jewish financial dealings through common commercial custom (*minhag ha-soherim*), remains one of the fundamental issues in the whole discussion of the *Get* Law. I believe that the custom of the Orthodox Jewish community—or vast portions of it—is to accept as part of our customary financial law the concept of alimony, post-divorce payments, and very likely equitable distribution.

Indeed, for the last number of years, at every wedding where I am invited to sit at the groom's table (*hatan's tisch*) while the *ketuba* is signed, I ask the husband whether, if the marriage were to end by divorce, does he expect to pay his wife the value of the *ketuba* and return to her the assets that she brought to the marriage, or does the couple expect some other form of asset division in cases of divorce?

I am almost always told by the husband and wife that they do *not* intend for the *ketuba* to control the division of assets. *That really is the intent of many couples.* This fact is reflected in the American custom of *not* negotiating the dollar amounts in the *ketuba,* either in terms of how much money the woman actually brings into the marriage or how much the husband shall pay her upon divorce or his death, as is done in Israel, or was the custom in Europe centuries ago. Indeed, the standard *ketuba* used in Israel leaves these amounts blank, to be filled in for each couple, and the standard American *ketuba* fills in the amount of "200 silver coins," an amount worth considerably less than $10,000. The simple fact is that our community has accepted some sort of equitable distribution and alimony as the *minhag ha-makom* to determine the financial rights of each party in a divorce. Indeed, a number of halakhic authorities seem amenable to this practice,[5] and many divorces have occurred in the Orthodox community where alimony has been paid without the rabbinic community ruling such payment to be theft.

If one is not prepared to accept this understanding of our *minhag* in the Orthodox community, what, then, provides the basis for the common practice of not enforcing the financial provisions of the *ketuba*, which in the many divorces I have been involved in, I have never seen done? Rather, it is common commercial custom (*minhag ha-soherim*) or secular law (*dina de-malkhuta*) that provides the relevant rules.[6] This reality is obvious even to people far removed from America. As Rav Avigdor Nevetzal, Rabbi of the Jewish Quarter in Jerusalem, states, ". . . in many activities that are dependent on the state of mind of a person, their state of mind follows the secular law and not the Torah law."[7]

It is important to understand that this rationale, standing alone, validates Jewish divorces given in light of the 1992 *Get* Law, as it changes the nature of the penalty imposed by the *Get* Law into either a self imposed one (valid only *be-di-avad*, see paragraph [13] or a denial of benefit to induce the writing of a *Get*, which is permitted *le-ha-tehila*. In fact, some have argued that 1992 *Get* Law is actually merely a maintenance and support law (even in asset division). This approach contends that the woman who will not receive a *Get* will need greater support payments, both in terms of alimony and a larger share of the marital assets for support, since she cannot remarry even after her civil divorce, and New York State recognizes that fact in its equitable distribution law—no penalty to give a *Get* is intended at all. Although Rav Elyashiv clearly disagrees, Rav Moshe Feinstein (*Igrot Moshe EH* 4:106) clearly states that when a man is ordered to pay higher support provisions until he writes a *Get*—even if the higher payments are completely without any basis in halakha—the resulting *Get* is not considered a compelled divorce, and is valid.[8] However, many secular legal authorities argue that the asset division provision of the 1992 *Get* Law is in fact a penalty provision, and this approach is thus only half correct.

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I will now provide a paragraph-by-paragraph response to Rabbi Malinowitz's specific criticisms.

[1] Rabbi Malinowitz's point that "a coerced *Get* is totally invalid *mi-de-Oraita*" is true in some literary simplistic way, but implies a falsehood. By not adding the adjective "illicit" before the word "coercion," as I did throughout my article, the reader might think that any form of inducement or coercion is prohibited according to Jewish law. Such is

quite false. The *Pithei Teshuva* on *Even HaEzer* 134, and many other commentators, both before and after, devised many perfectly legal forms of coercion to encourage the giving of a *Get*. Included in this is social ostracization, dismissal from one's job, denouncement, withholding of benefits, and many other actions. Even in circumstances where there is no halakhic reason to give a *Get*, such coercion or persuasion is still permitted. I added the word "ideally" to reflect the fact that "in the ideal," even halakhically permitted forms of coercion would be unneeded.

[2] The themes of Rabbi Malinowitz's observations in this paragraph are responded to in the first part of this exchange.

[3] Rabbi Malinowitz attributes to me the idea that if "illicit coercion is present, *bet din* will realize that it is present and decline to write the *Get*." This is a misreading of my article. I am simply noting that this is what others claim. Indeed, it is obvious that when a *bet din* thinks that any particular *Get* is coerced, it should not write that *Get*. However, there are many situations where no coercion is present at all, and a *Get* should be written. An examination of the sources I cite indicate that such actually is what those writing in defense of the *Get* Law claim.

[4] Rabbi Malinowitz's linguistic comments about the lack of clarity in the way I explain the approach of Rav Shlomo Zalman Auerbach are correct, and I regret that there was some ambiguity in my phraseology. Clarity in this area is vital. It is also quite clear, however, that Rav Auerbach has never stated that "the *Get* bill creates economic coercion which would invalidate any *Get* written as a result of said bill," as Rabbi Malinowitz claims. Indeed, even Rav Elyashiv only stated that there was a *possibility* that *some* of the *gitten* given *might* be coerced,[9] a position that is certainly true—but the question is, are one in a hundred *gitten* questionable, one in a thousand *gitten* questionable, or some other percentage.

[5] Rabbi Malinowitz's opening analysis of Rav Feinstein in this paragraph is discussed above. His second point, limiting Rav Feinstein's logic, is equally specious, as he implies that in fact, there are many cases where—at the time of the writing of the *Get*—the husband actually wishes to return to living with his wife in a family relationship, and is coerced into divorce when in fact a marital relationship is desired. I have participated in nearly 100 *gittin*, and I have yet to encounter a case where—at the time of the writing of the *Get*—the husband genuinely desired to remain married to his wife. The rationale of *Hazon Ish* (*EH* 99:2)—that when there is a genuine desire to issue a *Get*, there is

not a problem of coercion, even when it is present—is the absolute norm in modern American divorces, although (of course) it is not correct in all cases.

Rabbi Malinowitz's questioning of who should make this determination is simply answered: before one asserts that a validly written *Get*, given by recognized *mesader* which comes with a strong presumption of validity, is not valid, one should investigate to determine what the facts were. The burden should be on those who question the *petur* of a recognized *bet din*, which attests to the validity of the *Get*. As Rav Feinstein (*Igrot Moshe EH* 1:137) states, "we should not contemplate the invalidity of a *Get* arranged by a rabbi appointed for this process and claim that perhaps a *Get* was written in violation of halakha."

[6] Rabbi Malinowitz's caveats concerning Rav Herzog's approach (which are also found in the writings of Rav Hadia, *Yaskil Avdi* 6:96) are worth noting. However, in the collection of approaches that would rule a *Get* given under complex circumstances valid, and the children of the second marriage not *mamzerim*, Rav Herzog's approach is worthy of mention and consideration, and is even more valid in a case where there has been an order of a *bet din*.[10]

[7] Rabbi Malinowitz's observations concerning *dina de-malkhuta* are discussed above. However, one additional fact should be noted. While Rabbi Malinowitz states that "secular law does not rule that equitable distribution assets belong individually to neither party in the marriage," he is clearly mistaken. The theory of equitable distribution is very simple. Unlike the classical common law, which ruled that whomever title resided in, kept the item on divorce, modern American equitable distribution law recognizes that marital property is held in the marital estate, which is like a trusteeship, and upon divorce, the court divides the property according to the statutory direction. (In communal property states, the division is always even.) One recent hornbook stated, "In all states today, statutes provide that upon divorce the property of the spouses shall, in one way or another, be divided between them, regardless of the state of the title."[11]

An article devoted exclusively to New York family law notes:

> Contrary to the title theory of property, equitable distribution is based upon the premise that marriage should be viewed as a form of economic partnership. This concept reflects the modern awareness that marriage is a union dependent upon a wide range of non-remunerated services to the partnership, such as homemaking, raising children and providing emotional and moral support necessary to sustain the other spouse.[12]

This theory is equally valid in secular law for both maintenance payments and marital asset division, Rabbi Malinowitz's comments about secular law notwithstanding.

Rabbi Malinowitz's final assertion on this topic, that any situation where the secular law recognizes that the parties "are free to reach any agreement they want" precludes an application of *dina de-malkhuta*, misunderstands the relevant issue here. The question is, "Does the husband own the assets according to secular law?" and the answer is that assets in the marital estate are owned by neither party, and can only be distributed by mutual consent or judicial declaration. This type of ownership can certainly be accepted by halakha and is even more legitimate under a theory of common commercial practice (*minhag ha-soherim*) as it is under *dina de-malkhuta*.

[8] Rabbi Malinowitz's observations concerning the reasonableness of the penalty imposed by the *Get* Law are not borne out by conversations with practicing lawyers or judges. I have spoken to a number of practitioners in New York State specializing in Jewish divorce law, and they confirm that the penalties imposed typically are very small. I have been told that it is rare for a penalty ordered under the 1992 *Get* Law to increase the total monthly payments by more than 3%, or shift the distribution of assets by more than 5%.

While 5% of one's assets can be a significant amount of money, *Responsa Bet Efrayyim* (*Tenyana EH* 70) notes that in order to determine whether any particular *Get* is void because of financial coercion, the *bet din* has to investigate whether the amount forfeited is sufficiently great to compel this particular person to divorce, and if it is an amount of money that is sufficiently small that most people would not divorce their wife to avoid such a loss, it is obvious that even if this person asserts that he is of those who are weak of mind and a lover of money and thus feels compelled to divorce his wife to save the expense, we do not listen to him.

A similar approach can be found in *Igrot Moshe EH* 1:137. One is not believed merely when one asserts financial coercion and only a small amount of money is involved. The same should logically be true for a small percentage of the marital estate, even if it is a large amount of money.

This is even more so if one accepts the approach of those authorities cited in the end of the previous section who rule that government-ordered support payments (even when lacking any basis in halakha) can never create a situation where the *Get* awarded to avoid paying them is invalid. According to this approach, one would have to determine how

much of the court-ordered payments to the wife under the 1992 *Get* Law are support payments, and how much are penalty payments, and then one must evaluate whether the amount of the penalty alone—independent of the support component—is large enough to be a coercive amount.

[9] I agree with Rabbi Malinowitz's assertion that the *Get* Law has no requirement for one to first appear in front of a *bet din*. As the initial article states clearly, in cases where one party does go in front of a *bet din*, the *Get* Law provides a formidable weapon to encourage compliance with the orders of the *bet din*. No more is claimed.[13]

[10] Rabbi Malinowitz is correct that the opinions I cited that financial duress does not rise to the level of creating coercion—fifth in a list of seven—are not normative to halakha, and I note explicitly that they should only be used as one side of a multi-sided *sefek sefeika*, as numerous *aharonim* have done.

[11] In the same vein, Rabbi Malinowitz indicates that my reading of *Gra* (as supporting the concept that economic duress does not create coercion) is incorrect. While it is true that this understanding of Gra would put Gra in tension with most *rishonim* and *aharonim*, such a reading of *Gra* is not unique to me (See Rav Ovadia Yosef's comments in *Yabia Omer*, *Even haEzer* 7:23 and 8:25). While *Gra* in *Hoshen Mishpat* 205:18 is ambiguous on this issue, as Rabbi Malinowitz notes, *Gra* in *Biur haGra Even haEzer* 154:67, that I cite, states:

> Since he can flee to another city and *any situation where they do not do violence to his body is not called force.*

Either way, of course, it is clear that this approach is a minority opinion that should only be used in combination with other rationales.

[12] Rabbi Malinowitz's factual assertion that divorce, when initiated by the woman, is not normally grounded in some halakhically cognizable claim, can be questioned, and I will leave it to the reader to judge the correctness of this assertion. More significantly, in a case where the woman's claim of repugnancy toward her husband is based on reasonable and provable grounds (*amatla mevu'eret*), many authorities accept Rambam's rule that coercion is permissible as correct either *le-ha-tehila* or *be-di-avad*. (See the many sources cited in Rav Ovadia Yosef, *Yabia Omer, Even haEzer* 3:18).

[13] I respond to Rabbi Malinowitz's initial assertion above. His assertion that even a "pre-agreed upon penalty" constitutes coercion according to halakha "if the husband changes his mind and declares

that he does not want to give the *Get* (see *Even HaEzer* #134)" is the type of vast simplification of halakha that one should hesitate to accept. Rama (*Even HaEzer* 134:5), after citing the various opinions, rules that "it is better *le-ha-tehila* to be fearful of the strict opinions, and to nullify the penalty, but if they are already divorced because of this [the *Get* is valid]." While it is true that *Mishkenot Ya'akov* (38) is strict on this matter and argues with Rama, a clear consensus agrees with Rama in this regard, at least *be-di-avad*. Certainly in a case where the husband does not categorically state at the time of the *seder haGet* that he is being coerced, which is a very rare circumstance, the *Get* is valid (*Levush* 134 and *Hazon Ish EH* 99:5, but see *Arukh HaShulhan EH* 134:26-29). (Were the husband to state that he is being coerced, without a doubt the *bet din* would not write the *Get*, although many *posekim* would permit such a *Get* to be written.)

[14] Rabbi Malinowitz's understanding of Rav Spector's rule is perplexing to me. Even Rav Elyashiv's *teshuva* addressing the *Get* Law concedes that the *Get* Law would not lead to a void *Get* under the approach of Rav Spector. What Rav Spector asserts is that secular coercion used outside the *bet din* does not create a void *Get* when the husband states that he is not being coerced. Such is exactly the case of the *Get* Law, and I fail to understand the distinction pressed by Rabbi Malinowitz.[14]

[15] Rabbi Malinowitz's claim that most women who file for divorce are halakhically classified as *moredot* and thus not entitled to any support at all, can readily be questioned. One can well imagine many cases where the woman files for divorce but it is the husband who abandons the wife; indeed, in most cases that I have been involved in, it is the husband who moves from the abode and ceases providing support, and not the reverse. In those circumstances, the wife is not typically a *moredet* (rebellious wife) (see *EH* 77), although she would be well advised to seek permission from a *bet din* before filing a request for support in secular court lest she violate the prohibition of litigating in secular court.[15]

Even in the case of woman who is a *moredet*, a very strong case can be made that a husband has no right to *both* decline to support her *and* decline to divorce her. As Rav Eliezer Waldenberg notes:

> [When a woman is a *moredet*], she forfeits her *ketuba* rights and other financial claims against the husband. However, on the other side, the husband must [*hayyav*] divorce her and may not keep her connected to him.[16]