A. Yehuda Warburg

Rabbi A. Yehuda Warburg is the author of a forthcoming sefer, *Rabbinic Authority: The Vision and the Reality-Beit Din Decisions in English, Vol. 3.*

A Divorcee's Relief from the Consequences of an Exploitative Divorce Agreement

For many years, our Torah-observant community has encountered both in America and abroad, situations where a recalcitrant spouse chooses to condition the giving or the acceptance of a *get* upon receiving certain benefits such as monetary remuneration from the opposing spouse, custody of a child or having certain issues related and/or unrelated to the end-of-marriage resolved in a *beit din*. Such conduct raises halakhic issues which we will address here. At the conclusion of our presentation, we will raise the practical significance of this *limmud* (study) for our community.

Let me share a few cases which I have encountered in the last few years.

1. For over five years a Hasidic wife shares a bedroom with her husband and refuses to engage in conjugal relations with him and is unwilling to accept a *get* from her husband. Knowing very well that the majority of *battei din* in New York City, barring the existence of a wife's legal title to the marital home, will not give a wife a fifty per cent share of the market value of the marital home upon divorce, one day the wife informs her husband "I will accept the *get* on condition that you transfer fifty per cent of the ownership of our home to me." He transferred fifty per cent of the ownership of the home to his wife but she remained recalcitrant.
2. In another scenario a wife refused to receive a *get* unless her husband would transfer a certain sum of money to her.
3. A non-Orthodox wife in another case was recalcitrant regarding the *get* which her Orthodox husband requested of her due to an outstanding monetary claim which was still unresolved after a few years of marital separation.
4. A husband from the Yeshiva community whose wife earned significantly more income than him demanded hundreds of thousands of dollars from his wife in exchange for giving a *get*.

TRADITION 48:4 / © 2015
Rabbinical Council of America

5. A Conservative Jewish husband, in another situation, attempted to extort his wife for a significant sum of money as a precondition to giving a *get*.
6. In another scenario, due to the lack of the husband's creditworthiness, the wife possessed title to their multimillion dollar home in Beverly Hills, Los Angeles. Gradually, the husband borrowed three million dollars against the equity of the home in order to purchase real estate, the couple decided to divorce, and the husband refused to give a *get* unless he received fifty per cent of the market value of the couple's home.

Each of these stories are examples of one spouse extorting another for monies in exchange for giving or receiving a *get*. Aware that an offer on the table entails an exploitative agreement, prior to agreeing to the offer, the initial question is whether a *mesirat moda'ah*" (a notification of duress in the presence of two witnesses who will testify to the exploitative nature of the agreement indicating that at the first opportunity he intends to undertake steps to undo the agreement) by the distressed party will be effective. Addressing a matter of *kiddushin*, halakhic betrothal, a Talmudic passage relates to us the following incident:[1]

> A certain man wanted to betroth a woman, and she told him, "if you transfer the title of all your property to me, I will become betrothed to you; otherwise not." Therefore, he assigned all his property to her. In the interim, his oldest son had come to him and said, what about me? He took witnesses and he informed them, "proceed and hide yourself on the other side of the river and write out a transfer of my property to him." The case came before Rabba and he decided that neither party had acquired title to the property. Those who witnessed this proceeding thought that Rabba's reasoning was because the one deed was a *moda'ah* with respect to the other.[2] This is not entirely correct. (The secret gift) in that case did nullify the transfer because it demonstrated that the assignment was made under coercion. Here, however it is clear that the donor's desire is that the one (son) should receive title rather than the other one should possess it.

This incident is cited in the *Shulhan Arukh,* which invalidates a gift made under duress.[3]

[1] *Bava Batra* 40b.

[2] In other words, since a *mesirat moda'ah* transpired with the son, it invalidated the transfer to the woman.

[3] *Shulhan Arukh* (S.A.), Hoshen Mishpat (H.M.) 242:10.

Seemingly, as noted by Rabbi Hayyim Sha'anan, the same conclusion ought to apply to divorce. Just as we encountered that when a woman refused to betroth herself to a man without property and the man was thus pressured to obligate himself in the giving of a piece of property, the acquisition was voided; similarly, a husband who refuses to divorce his wife without receiving property and the wife thus obligated herself to give something, the acquisition may be voided based upon a *mesirat moda'ah*.[4]

Nonetheless, given that the argument to void the divorce agreement in each case are based upon a *mesirat moda'ah* executed a few years ago, the cases are complicated further. It is a matter of debate whether a claim of duress must be advanced prior to the execution of a *get* or even may be raised after the *get* has been given.[5]

Assuming there was no *mesirat moda'ah*, is there any relief that the coerced party can seek in *beit din*? The purpose of our presentation is to delve into the issue regarding the propriety of such a divorce agreement where a wife waives her entitlement to her husband's marital duties such as support or monies are paid in exchange for giving or receiving a *get*.[6]

[4] *Iyunim be-Mishpat*, Even Ha-Ezer (E.H.) 41, p. 423. The *mesirat moda'ah* must be stated in the presence of two Torah observant adult male witnesses. See *Teshuvot Tashbets* 1:1, 2:213; S.A. H.M. 205:1. Whether one has to state "you are my witnesses" or "know" and whether there is set formula for communicating this *moda'ah* is subject to debate. See *Teshuvot ha-Rivash* 127, 232; *Beit Yosef*, Tur E.H. 134 in the name of *Tashbets*; *Beit Meir*, E.H. 134:1; *Teshuvot Ginnat Veradim* H.M. 5:1; Rashbam on *Bava Batra* 40a; *Mishneh Torah*, Hilkhot Gerushin 6:19; Maggid Mishneh, ad. locum.; *Mishneh Torah*, Hilkhot Mehira 10:3; *Tur* E.H. 134; S.A. E.H. 134:1; *Beit Shemuel*, S.A. E.H. 134:2.

[5] Generally, there is no time limit in advancing a claim of duress. See S.A. H.M. 205:1. However, there are exceptions to this rule. See S.A. H.M. 98:2; *Teshuvot Ma'arkhei Lev* 1, Derush 8; File no. 803424/2, *Beit Din ha-Gadol*, December 12, 2010.

Even if the agreement would be voided, its nullification would not impact upon the propriety of the *get* which was executed. Though Maharam of Lublin (*Teshuvot Maharam Lublin* 122) and *Mishkenot Ya'akov* (E.H. 34) would raise under such circumstances the specter of a "*get mut'eh*," a *get* given in error due to the fact that, had the husband known that the agreement would be breached by his ex-wife, he would not have given the *get*, nonetheless most authorities would argue that the *get* remains valid. See *Taz* E.H. 145:16; *Beit Shemuel* E.H. 145:16; *Beit Meir* 37(26); Uriel Lavi, "Is there a fear of the propriety of the *get* when the husband was misled in the divorce agreement? [in Hebrew]," 2 *Shurat Hadin* 146 (5754).

[6] For earlier treatments of this issue, see Binyamin Be'eri, "The Validity of a Divorce Agreement that has Exploitative Demands," [in Hebrew], *Yeshivat Kerem be-Yavne Jubilee Volume*, 302-316 (5764); Shahar Lifshitz, "Distress Exploitation in Jewish Law," in *As a Perennial Spring: A Festschrift Honoring Rabbi Dr. Norman Lamm*, (N.Y.: Downhill, 2013), 313-340. Some of the sources for our presentation have been culled from these studies.

When is such an agreement halakhically proper and when is it viewed as exploitative? Is the agreement exploitative where the weaker party has no choice but to acquiesce to unfair terms? Are there "objective"criteria which determine that an agreement is unconscionable, namely that signing off on such an agreement was coercive and/or the terms of the agreement were reasonably unfavorable to one party? May the agreement be voided once compliance with the agreement's terms has commenced?

Let us address these questions in the context of the following scenario. Hypothetically speaking, a couple mutually agrees that "their marriage is dead" and reconciliation is not an option. The couple has been separated for over a year, and all end-of-marriage issues have been resolved, yet the husband refuses to give a *get*.[7] Extorting his wife, one of the terms of the divorce agreement mandates that the wife pay three hundred thousand dollars in exchange for the husband giving the *get*.

In terms of the halakhot of *ones*, duress, it is clear that regarding a sales transaction "*agav onsa ve-zuzei gamar u-makneh,*" loosely translated, in a situation of coercion he resolved to execute the sale by paying for the item.[8] Whether the coerced party must simply obligate himself to pay or must actually remit payment is subject to debate.[9] However, the consensus is that the obligation to pay or the actual repayment will bring finality to a sales agreement executed under duress. This same conclusion ought to apply to an agreement such as a divorce agreement executed under duress and would not run afoul of the strictures of a *get me'usseh*, a coerced *get*.[10] Consequently, a divorcee would be unable to recoup the excessive fee.

[7] Without focusing upon whether there is an *illat gerushin*, a ground for divorce such as nonsupport, infidelity, abuse, or, in accordance with certain decisors, due to the lapse of time since separation from "a dead marriage," the assumption is that he is halakhically obligated to give a *get*. See this writer's Rabbinic Authority: The Vision and the Reality (Jerusalem: Urim Publications, 2016), chapter 6(b).

[8] *Hiddushei ha-Rashba*, *Bava Batra* 47b.

[9] Rema, H.M. 205:1; *Sma*, H.M. 205:5; *Shakh*, H.M. 205:2.

[10] The dissolution of the halakhic matrimonial bond requires the voluntary agreement of both spouses. Coercing a recalcitrant spouse to grant a *get* produces a divorce that is arguably invalid, namely a *get me'usseh*. However, appeasing a recalcitrant spouse by offering tangibles such as monies in exchange for either giving or receiving a *get* is not deemed to be unlawfully coerced. See *Beit Yosef*, *Tur* E.H. 134 in name of Rashba, *Teshuvot Maharah Ohr Zarua* 126; *Teshuvot ha-Mabit* 1:76; *Teshuvot Avodat ha-Gershuni* 35; *Teshuvot Avnei Nezer* E.H. 167:6; *Piskei din Rabbanayim* (hereafter: *PDR*) 3:13, 5:71, 7:111, 8:36, 9:65, 16:275-276; *Teshuvot Yabbia Omer*, vol. 6, E.H. 10 (11); *Iggerot Moshe*, E.H. 1:137,3:44,4:106.

This transaction is similar to every mutual undertaking of obligations which entails a *quid pro* exchange, which is valid despite the presence of pressures such as economic

Given the finality of an agreement executed under duress, the question is whether the term of the divorce agreement regarding payment of $300,000 in exchange for the *get* is exploitative and oppressive. A Talmudic passage conveys to us the following,[11]

> If a person fleeing from prison (unjustly imprisoned- AYW) came to a ferry and said to the ferryman: Take a dinar to ferry me across the river," he would still have to pay him the customary fee. This shows that he may say "I was merely jesting with you."… But if he says "take this dinar for your compensation and he ferried him across the river, he must pay him his entire fee. Why is there a difference?… (In the latter case-AYW) we are dealing with a boatman who is also a fisherman…

Whereas in the first case of the ferryman we are dealing with a situation where an exorbitant fee is being charged for his services and consequently the Talmud concludes that the ferryman is only entitled to the market fee for his services, in the second case we are dealing with a boatman who equally works as a fisherman. Given that he lost the opportunity to trap fish by offering his services to the fugitive, therefore he is entitled to receive a fee for his loss of compensation for his fishing.[12] In effect, the basic rule which emerges from this passage is that a person is able to charge the market fee for his services. A fee which exceeds this amount allows a person (in this case a prisoner) to claim "*hashattah*," I was joking with you.[13] In other words, the fugitive was not earnest when he agreed to pay an outlandish fee for being ferried across the river to safety and therefore he may remit only the market fee. In short, should the boatman incur a loss and/or charge a fee which exceeds the market fee, the jesting rule is

---

ones. See *Teshuvot Maharik*, *shoresh* 118 (10); *Teshuvot Maharits* 145. Since he received something in exchange for undertaking the obligation, the agreement is valid. See *Sema* H.M. 205:8. In effect, the monetary benefit engenders *gemirat da'at*, the firm resolve to undertake the obligation and therefore nullifies the element of coercion. See *Bava Batra* 48a; *Hiddushei ha-Ran*, ad. locum; *Hiddushei ha-Ramban*, ad. locum; *Hiddushei ha-Rashba*, ad. locum; Rashbam, *Bava Batra* 47b. Similarly, the exchange of monies for the giving a *get* creates *gemirat da'at* that the husband desires to give a *get*. Consequently, such a transaction does not run afoul of the strictures of a *get me'usseh*.

Secondly absent the ability of an individual to follow through with his threat and the high degree of probability that damage or injury will ensue, the agreement is valid. See S.A. H.M. 205:7; *Netivot ha-Mishpat* 205:12.

[11] *Bava Kamma* 116a.

[12] In the event that his loss was minimal, the rescued party must pay the entire benefit that he derived from the rescue. See S.A. H.M. 363:7.

[13] *Tosafot*, *Yevamot* 106a; *Piskei ha-Rosh*, *Yevamot* 12:16.

applicable. He is entitled to recoup from the boatman the differential involved.

Our case of the ferryman who saves the fleeing prisoner entails the performance of the mitsva of *hashavat aveida*, the restoration of a lost object. It is noteworthy that the Talmud extends this positive obligation to encompass the saving of human life.[14] Seemingly, given that the boatman's act involves the performance of a mitsva, he should be proscribed from being compensated.[15] In particular, since there was nobody else present to save his life, he ought to have performed his duty without compensation![16] Nonetheless, there are certain exceptions to this rule and one of them is finding a lost object and restoring it to its owner while working.[17] Consequently, a ferryman who saves an individual during his working hours is entitled to receive compensation for his time investment and any loss incurred by being unable to attend to his work.[18] As such, assuming the fugitive proves that the fee charged exceeded the ferryman's fee for ferrying as well as compensation for his inability to work as a fisherman, the prisoner ought to be able to recoup the price differential.[19]

At first glance our explanation seems to stand at variance with the Talmudic reason which offers the rationale of *hashatta*, the jesting rule that in fact the prisoner never firmly resolved in his own mind to give an exorbitant figure and therefore he is exempt from payment. In accordance with our understanding, the Talmud should have advanced the argument that requesting an outlandish fee is proscribed because the ferryman was engaged in a mitsva while working and was therefore entitled to charge only for the loss of time investment and any attendant loss. Since the Talmud informs us that the prisoner may exclaim "I am joking with you"[20] due to his distress situation, we are being taught that he is

[14] *Bava Kama* 81b; *Sanhedrin* 73a.

[15] *Be'ur ha-Gra*, Y.D. 336:11; *Urim*, H.M. 34:39; S.A. H.M. 169:50. Cf. others who argue that the fugitive is exempt from paying the exorbitant fee due to the fact that this is a distress situation and he is under duress. See *Hiddushei ha-Ramban*, *Yevamot* 106a; *Hiddushei ha-Rashba*, ad. locum.; Rabbi Shimon b. Zemah Duran, *Teshuvot Hut ha-Meshulash*, 3:20.

[16] *Tur*, Y.D. 336 and Rema, Y.D. 336:3 in name of Ramban.

[17] S.A. H.M. 265:1; *Sema*, H.M. 264:19.

[18] Mordekhai, *Bava Kama* 174 in the name of Rabbi Hezekiah; *Beit ha-Behirah*, *Yevamot* 106a; *Mahaneh Ephraim*, Sekhirut 15; S.A., supra n. 17.

[19] Ramban, supra n. 15; Rashba, supra n. 15.

[20] In other words, we presume that an individual being in distress (i.e., with his life threatened) would raise the defense that he was joking when he agreed to pay the exorbitant price. See *Teshuvot Maimoniyot*, Sefer Shoftim 64. On the other hand, in the absence of a distress situation we cannot assume that he was joking and therefore he is obligated to pay the outlandish fee. See *Darkhei Moshe*, *Tur* H.M. 335:3 in the

exempt from paying the agreed upon amount. On the other hand, the Talmud insinuates that if such an argument cannot be raised, he remains dutibound to pay the agreed amount by dint of the fact that he must comply with the undertaking of any obligation despite the fact the boatman was engaged in a mitsva.[21] To state it differently, whether the boatman is obligated to pay the agreed amount is dependent whether there was *gemirat da'at*, loosely translated as "a meeting of the minds" or firm resolve between the parties.[22] The presence of distress precludes the existence of *gemirat da'at*.

The outstanding issue is whether the execution of a *kinyan*, a symbolic act of undertaking an obligation such as *kinyan sudar* (transferring a handkerchief from one party to the other) or memorializing the agreement into writing in the form of a contract which would be recognized as a *kinyan sittumta*, a commercial vehicle such as a contract for undertaking obligations,[23] may trump the argument of *hashatta*? Given that we are concerned with *gemirat da'at* of the parties, if a *kinyan* or contract is executed clearly the fugitive's intent was to pay the mutually agreed upon amount.[24] Others disagree and argue that the overarching fact is that we are dealing with a distress situation and given the circumstances he implemented a *kinyan*. Under these conditions, his readiness to finalize the transaction with a *kinyan* should be understood as the mindset of a distressed person who desires to honor his undertaking in order to extricate himself from his distressed state. However, since the commitment was made under duress, halakha does not recognize it as a free-will commitment even in the wake of the execution of a *kinyan* or contract. Hence, the jesting rule is applicable.[25] Others contend that the aforementioned debate centers around a matter of *reshut*, a voluntary act. However if we are dealing with a mitsva such as the incident of the prisoner, then there is a consensus that since the boatman is engaging in a mitsva and we are

---

name of Mordekhai; *Sema*, H.M. 185:29. Even if the prisoner does not advance the jesting rule in a given case, we do. See Rema H.M. 81:1.

[21] *Mahaneh Ephraim*, supra n. 18.

[22] *Hiddushei ha-Ramban*, *Yevamot* 106a; *Hiddushei ha-Rashba*, *Yevamot* 106a.

[23] For the validity of a contract as a *kinyan sittumta*, see *Teshuvot Maharashdam*, H.M. 380; *Teshuvot Hatam Sofer*, H.M. 66; *Teshuvot Maharsham*, 5:45; *PDR* 3,363, 5:310, 14:43, and others.

[24] *Teshuvot ha-Rosh* 64:3; *Rema*, H.M. 129:22; *Ketsot ha-Hoshen*, 81:4; *Netivot ha-Mishpat*, 81:2.

[25] *Teshuvot ha-Rashba* 1:1240; *Beit Shemuel* E.H. 169:53 in the name of Rashba; Rabbi Akiva Eiger, *Gillayon la-Shulhan Arukh*, E.H. 169 in the name of Rashba; *Tumim*, E.H. 129 (end) in the name of Rashba.

dealing with a situation of *ones*, he can only charge the market fee.[26] Consequently, even if a classical *kinyan* or contract would be executed, the jesting rule would be applicable.[27]

Now let us apply these principles to the case at hand, namely an exploitative divorce agreement. Assuming there are grounds for divorce, we are dealing with a mitsva to divorce one's spouse.[28] As such, the principles which underlie an exploitative divorce agreement deal with a husband who is performing a mitsva and therefore our scenario should be no different than the ferryman who is involved in a mitsva of rescuing a Jew who negotiates a fee for his services.

Should a couple agree to accept a *beit din's* jurisdiction regarding the propriety of an exploitative divorce agreement, the threshold question is a factual one. What is the conventional practice in their community regarding how much a wife may be asked from her husband for executing a divorce agreement? Does the community limit his fee to *sekhar tirha* (lit. compensation for the burden[29]) or may his fee exceed this amount?

Historically speaking, there were some communities in the sixteenth and seventeenth centuries where the customary fee was exorbitant.[30] If we assume that that we are dealing with a scenario where the husband is obligated to give a *get*[31] and refuses to release a *get* unless he receives the customary fee, which is an exorbitant amount that well exceeds what is usually paid in terms of *sekhar tirha*, should his wife accede to this arrangement, is the agreement valid? Does the *hashatta* rule apply here? Given that we are focusing upon a situation where the husband is duti-bound to divorce his wife, there exists no loss in a husband divorcing his wife and, therefore, depending upon the terms of negotiation, the *hashatta* rule may be raised.[32] Notwithstanding some opinions that focus upon the fact that we are dealing with a mitsva and therefore the husband is

[26] *Hiddushei ha-Ritva*, *Yevamot* 106a; *Netivot ha-Mishpat* 264:8; Rabbi Eiger, supra n. 25; *Tumim*, supra n. 25; *Ketsot ha-Hoshen* 81:4 agrees with these decisors. However his position is difficult to accept because the premise of his posture is that the ferry situation is not an example of *ones*.

[27] Cf. Shakh, H.M. 81:5.

[28] *Sefer ha-Mitsvot*, Aseh 222; *Sefer ha-Hinnukh*, Mitsva 455

[29] *Sehar tirha* is *sehar battalah*, namely remuneration for toil and effort. See *PDR* 3:369, 375.

[30] *Teshuvot Maharshal* 25; *Teshuvot Magen David*, E.H. 1.

[31] The grounds for the duty is either based upon one of the *illot kiddushin*, grounds for divorce such as spousal nonsupport or physically abusing his wife or according to certain decisors the length of time that the couple has been separated.

[32] See Rosh, supra n. 13.

entitled only to his *sekhar tirha*,[33] most *posekim* center their attention upon the importance of *gemirat da'at* and therefore claim that if these fees reflect the customary fee, albeit exorbitant, the jesting rule is inapplicable.[34] In other words, even absent the execution of a classical *kinyan* or a written divorce agreement, accepting orally an exploitative divorce agreement would mandate payment of an exorbitant fee. Since there existed a custom in certain communities to pay such an amount, we impute that wife's intent was to pay his fee. Based upon the foregoing, a husband's offer to give a *get* (which entails the performance of a mitsva) in exchange for $300,000 is unconscionable; nonetheless, in terms of *hilkhot hiyyuvim*, the laws dealing with obligations would recognize such an arrangement as valid.

The question is whether today in New York City it is customary for a husband to financially extort his wife in exchange for giving the *get*. If a *beit din* concludes that the prevailing fee structure is one of remuneration for toil and effort, then charging an outlandish fee would mean that the jesting rule is applicable. And even if this arrangement of charging excessive fees would be practiced amongst the minority in our community, the *hashatta* rule would be invoked.[35] On the other hand, should the *minhag* today be to give a *get* contingent upon receiving an exorbitant fee, then the jesting rule may not be invoked and the wife would have to remit the outlandish fee. Though intuitively one would expect that such behavior is relegated to a minority of husbands who are irresponsible and have no pangs of conscience, absent sociological studies which would corroborate our feeling, it is possible that a *beit din* may recognize from the perspective of *hilkhot hiyyuvim* an exploitative divorce agreement as reflecting the *minhag* in our community. As such, the charging of an excessive fee may be valid.

Given that the possibility exists that an exploitative agreement may be recognized, as remote and as reprehensible as it might seem, can a wife find another halakhic avenue for *beit din* relief if she consented to an exploitative divorce agreement? Dealing with a price discrepancy between the market price (in our case *sekhar tirha*) and the charged price of more than one-sixth of the market price entails a form of theft[36] which in rabbinic

[33] Mordekhai, *Bava Kamma* 172 in the name of Maharam of Rothenburg, *Magen Dovid*, supra n. 30 in the name of various Rishonim.

[34] Tosafot, supra n. 13; Rosh, supra, n. 13; Mordekhai, supra n. 33, in the name of Rabbi Simha and Rabbi Barukh; *Rema*, H.M. 264:7; Maharshal, supra n. 30; *Teshuvot Hatam Sofer*, H.M. 135.

[35] *Shakh*, H.M. 264:15.

[36] *Tur*, H.M. 227:1; *Sema*, H.M. 227:1.

nomenclature is labeled a claim of *ona'ah* (lit. overreaching, price fraud).[37] Under such circumstances, the agreement can generally be voided.[38]

Assuming experts determine that the disparity between the market price and agreed upon price of the divorce agreement is more than one-sixth,[39] are there grounds to void the agreement and thus allow a wife to recoup her monies? Why didn't the Talmud raise the claim of *ona'ah* as a defense for the distressed party rather than the plea of "*hashatta*"? We are dealing with payment for providing a service (*sehar pe'ulah*) akin to the ferryman who provided the fugitive with a service, conveying him across a river. Depending on whether one construes the ferryman's service as the work of a *po'el*, an employee, or as a *kablan*, an independent contractor, will impact whether an *ona'ah* claim may be advanced. Regardless of how one identifies this service, there is controversy whether the service of a *po'el* or a *kablan* is subject to *hilkhot ona'ah*. In other words, whether there is a claim for *ona'ah* concerning a *sekhar pe'ulah* is subject to that debate, which explains why the *ona'ah* claim was not advanced in the Talmud.[40] Consequently, if a husband's entitlement to money in exchange for a *get* is construed as an example of *sekhar pe'ulah,* whether *hilkhot ona'ah* would apply is subject to debate. Secondly, in our scenario, it clear that the wife knew that the fee was exorbitant and nonetheless agreed to remit the fee. The question arises whether once one knows that one is being oppressed and accepts the price differential, can one subsequently advance the claim of *ona'ah*, price fraud? This issue is equally subject to controversy.[41] Furthermore, it is subject to dispute whether if the party knows that he is a victim of exploitation and despite his awareness agrees to the outlandish fee, whether *hilkhot ona'ah* are applicable.[42] In other words, his acceptance of the offer was not due to his acquiescence to the fee (as there was no *mehilah*) but rather because he intended to advance a claim for *ona'ah* in *beit din*. He realized that he was unable to broker a fair deal with the seller and decided to subsequently pursue

[37] S.A. H.M. 227:1.

[38] S.A. H.M. 227:4.

[39] For the requirement of experts to assess whether a claim for *ona'ah* exists, see *Piskei ha-Rosh*, *Bava Batra* 4:20; *Arukh ha-Shulhan*, H.M. 227:21.

[40] Regarding a worker, see Rabbi Yonatan of Lunel, *Bava Kamma* 115a; *Beit ha-Behirah*, ad. locum; *Teshuvot Shevut Ya'akov*, 2:157; S.A. H.M. 227:33. Regarding a *kablan*, an independent contractor whose service may be viewed as provided by a husband, see debate between Rambam, Ramban, and Rashba found in *Mishneh Torah*, Mekhirah 13:15, 18; *Hiddushei ha-Ramban*, *Bava Metsia* 56b; *Hiddushei ha-Rashba*, *Bava Metsia* 56b; S.A. H.M. 227:36.

[41] S.A., H.M., 220:8; Rema 227:7.

[42] *Rema*, H.M. 227:7; *Ir Shushan*, H.M. 227:7.

the matter in *beit din*. Similarly, in our case, the wife was well aware that she would have to agree to pay the exorbitant fee in order to receive her *get* and expected to pursue the matter of the exploitative agreement in *beit din*. Finally, it is an open question whether *hilkhot ona'ah* regarding price differentials in sales transactions apply today.[43] As such, it is question whether an *ona'ah* claim has bearing today concerning instances of providing a service such as receiving a *get* for an exorbitant fee.

Assuming that *hilkhot ona'ah* are applicable and one may void the agreement under the circumstances, the wife is well aware that the fee is exorbitant and therefore her willingness to agree to the divorce agreement due to the distress of being still married to her husband demonstrates that she waived her right to void the agreement, i.e. *mehilah.* Consequently that is why the Talmud in the fugitive case raises the *hashatta* rule as a basis for exempting the fugitive from remitting this unconventional fee.[44] Similarly, in our scenario, the jesting rule is invoked and consequently the wife has grounds to advance a claim to void the agreement. Contending that common sense dictates that if one undertakes an obligation to remit monies in a distress situation, monies which both sides knowingly realize are outlandish, how can one claim that there is a violation of the prohibition against *ona'ah*![45]

In the event that remitting an excessive fee in exchange for giving a *get* would fail to run afoul of the jesting rule and *hilkhot ona'ah*, there is at least one outstanding avenue which may serve as grounds for a *beit din* to nullify a distress-exploitative divorce agreement. The Talmud teaches us:[46]

> Rabbi Hisda said to Rami bar Hama: Yesterday, you were not with us in the Beit Midrash where we discussed some especially interesting issues … The discussion was whether one who occupied his fellow's premises unbeknownst to him has to pay rent or not?...
>
> What was the situation? One cannot assume that the premises were not for rent and the occupier was similarly a man who was unaccustomed to rent, for what liability could there be in a case where the defendant derived no benefit and the plaintiff didn't suffer any loss? If, on the other

[43] Zalman N. Goldberg, "The law of price-fraud today," [in Hebrew], 3 *Mishpetei Erets* 337 (5772); Asher Weiss, "The law of price-fraud today," [in Hebrew], *Mishpetei Erets* 3 (5772), 342.

[44] *Netivot ha-Mishpat*, supra n. 26. In accordance with *Netivot ha-Mishpat*'s view, this argument would apply only to the case of independent contractor such as a husband executing a divorce agreement, where a claim for *ona'ah* is applicable. See supra n. 40.

[45] *Darkhei Hoshen*, 264:8, *Be'urei Hoshen*, p. 74.

[46] *Bava Kamma* 20a-21a.

> hand, the premises were available for rent and he was a man who customarily rented premise, why should no liability be incurred since the defendant derived a benefit and the plaintiff suffered a loss?
>
> However, the problem emerges in a case where the premises were not for rent, but he wanted to rent the premises… Is the occupier permitted to argue against the owner: What loss have I caused you since your premises were not for rent?" Or might the other party respond: "Since you have benefited, since you would have had to rent other premises, you must pay rent…
>
> It was stated: Rabbi Kahana citing Rabbi Yohanan said: In the case of the aforementioned issue there would be no legal duty to pay rent; but Rabbi Abbahu quoting Rabbi Yohanan said there would a halakhic obligation to pay rent… Rabbah bar Rav Huna… responded as follows: "Thus said my father… in the name of Rav: He is not legally bound to pay him rent… Rabbi Sehora said that Rav Huna quoting Rav had said: He who occupies his neighbor's premises without having any agreement with him is under no legal duty to pay him rent…

As we have read, whether or not in the scenario of "this one derived a benefit, but the other sustained no loss" the occupier is dutibound to remit rent is subject to Talmudic debate. Subsequently, Rambam and R. Yosef Caro ruled that, should the premises be utilized without the owner's consent, the occupier is exempt from paying rent.[47] Since the owner suffers no loss from the use of his premises, therefore we cannot view the occupier either akin to a *gazlan*,[48] a thief, a *mazzik*,[49] a wrongdoer who damages somebody's property, as an individual who derives *hana'ah*,[50] benefit from the property without the owner's permission. As such, the occupier is exempt from payment.

Seemingly, the invoking of the rule "*zeh neheneh ve-zeh lo haser*," "this one benefits, and this one sustains no loss" inexorably leads to the conclusion that the fugitive is exempt from paying the excessive price for the ferrying across the river. However, one of the exceptions to the rule of "*zeh neheneh ve-zeh lo haser*" is if the occupier expresses a readiness to pay the rent, then, despite the fact that the owner failed to suffer a loss by the

[47] *Mishneh Torah*, *Gezelah va-Avedah* 3:9; S.A. H.M. 363:6.
[48] *Tur*, H.M. 371:10; *Be'ur ha-Gra*, 363:14.
[49] *Nimmukei Yosef*, *Bava Kamma* 20a in the name of Ramah.
[50] *Ketsot ha-Hoshen*, 363:4; Rabbi Shimon Shkop, *Bava Kamma* 19. Additionally, since he sustains no loss, one can argue that the owner waives his entitlement to rent. See *Mahaneh Ephraim*, Gezela 10.

occupancy of his premises, he remains obligated to remit the rent.[51] Consequently, given the fact that the prisoner agreed to pay the outlandish fee, therefore in accordance with this well-trodden *mesorah* of *posekim*, a *beit din* would be unable to invoke the doctrine "*zeh neheneh ve-zeh lo haser*" and he would be dutibound to pay the excessive fee.

However, even if the fugitive expresses a readiness to pay and remits these monies, there is the talmudic rule of "*kofin al middat Sedom*," we compel one who acts in the manner of the townspeople of *Sedom* not to do so.[52] Given that the *zeh neheneh* rule is to be understood within the context of *middat Sedom*, that means that the owner's conduct reflects the negative trait of *Sedom*, namely "what is mine is mine."[53] In other words, halakha looks askance at one person refusing to confer benefit upon another individual even when the owner would not incur a loss.[54] Hence, in the absence of sustaining a loss, the owner of the premises should not charge any rental fee. Similarly, despite the fact that the fugitive paid the exorbitant fee, halakhic-ethical considerations demand that the ferryman refrain from exploiting a distress situation and therefore the monies ought to be returned to him.[55] Failure to act in such a fashion reflects a personality trait of the townspeople of Sedom. In accordance with this approach, even if an exploitative divorce agreement has been executed, a divorcee has a right to recover the exorbitant fee charged in exchange for receiving her *get*. In the interaction with individuals, surely in the performance of the mitsva of divorce, a husband ought to refrain from using the *get* as a bargaining chip and engage in extortion which imbibes the conduct of Sedom.

In conclusion, in the wake of an exploitative divorce agreement which has yet to be executed, a divorcee has the option to execute a *mesirat*

[51] Tosafot, *Bava Kamma* 20b, s.v. ta'ama; S.A. H.M. 363:8; *Teshuvot Noda be-Yehuda*, Mahadura Tinyana, H.M. 24; *Teshuvot Divrei Malkiel* 3:157; Rabbi Shimon Shkop, *Bava Kamma* 19, *Bava Batra* 4.

[52] See *Eruvin* 49a; *Ketuvot* 103a; *Bava Batra* 12b, 59a, 168a. In all these instances, the Talmud refrains from identifying this rule as a grounds for the exemption of payment in a case of "*zeh neheneh ve-zeh lo haser*." And the talmudic discussions of *zeh neheneh ve-zeh lo haser*" equally do not mention the doctrine of "*kofin al middat Sedom*." Yet, numerous authorities seek to reformulate the talmudic discussions of "*zeh nehene*" rule in light of the "*kofin*" rule. See Rashi, *Ketuvot* 103a, s.v. *middat Sedom*; *Mishneh Torah*, Shekhenim 7:38; *Hiddushei ha-Rashba, Ketuvot* 103a; *Yad Ramah*, *Bava Batra* 168a; *Or Zarua* 3:24.

[53] Mishnah *Avot* 5:10.

[54] See further, Aharon Lichtenstein, "*Kofin al middat Sedom*," *Alei Etzion* 16 (Iyar 5769), 31-70.

[55] Maharshal, supra n. 30; *Ketsot ha-Hoshen* 264:2; *Penei Yehoshua*, *Bava Kamma* 20b; *Levush Mordekhai*, *Bava Kamma* 15; *PDR* supra n. 29, at 375.

moda'ah and thus allow her to recoup her payment. In the event that this procedure was not implemented or for some reason the *mesirat moda'ah* was ineffective[56] and the agreement was finalized, a divorcee's relief may be found either by advancing a plea that she never firmly resolved (with *gemirat da'at*) to pay the nonconventional fee, a claim for *ona'ah*, and/or a declaration that her spouse is acting in a Sedomite fashion.

Deciding between the competing arguments regarding the readiness to recognize the merits of one of the three claims is the province of the *posek* or *dayyan*. The relative strength of each argument applicable in each situation, its effectiveness, and plausibility will hopefully be tested within the framework and constraints of future decisions of our *posekim* and *dayyanim*.

Since the phenomenon of "*get* extortion" has become "a fact of life" in all segments of our community, it behooves rabbis and laypeople to become aware of the halakhic arsenal that exists to address this problem. If at the end of the day, a wife and/or her family/friends are ready to succumb to this extortion in order for the woman "to move along with her life," then there should be an awareness of the institution of *mesirat moda'ah*, which may be implemented prior to signing off on a divorce agreement.[57] Additionally, a divorce agreement which embraces a "payoff" for receiving a *get* ought to provide that any disputes and differences be resolved in a mutually agreed upon *beit din*. So if the agreement is finalized then the wife has the option to advance one or all of the three claims outlined here in our paper in a *beit din*. Alternatively, even in the absence of such a mutually agreed provision in the agreement, if the couple had earlier executed a *shetar borerut*, an arbitration agreement which clearly empowers a *beit din* to resolve "all end of marriage issues including but not limited to the division of marital assets and parenting arrangements," then advancing claims against an exploitative divorce agreement is within the purview of *beit din* adjudication. In the event that the husband refuses to have any differences resolved in a *beit din*, the wife ought to seek a *hetter arka'ot*, permission to litigate in secular court the propriety of a distress exploitation contract. Counsel regarding this matter should be sought from a rabbinic authority that has expertise in *Hoshen Mishpat* and *Even ha-Ezer* and preferably experience in *dayyanut*.

[56] For example, the absence of witnesses, the presence of witnesses who are ineligible to submit testimony, or testimony which fails to state that the particular transaction was executed under duress will invalidate the *mesirat moda'ah*.

[57] See supra text accompanying nn. 1-5.