

# Honesty and Analysis: A Reasoned Response to Passionate Letters

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As Rabbi Dr. Daniel Sperber is an eminent Torah scholar, his words deserve close attention. I am in some agreement with much of what R. Sperber wrote about the nature of *halakbah* and the requirements of our time. Compassion and sensitivity are among the hallmarks of classical normative *halakbah*, particularly in cases of *iggun*, and should be among the catalysts for innovative “problem solving.” The chained women, shackled by their recalcitrant spouses, do indeed cry aloud both to God and to the rabbis to find a compassionate and equitable solution to their tragic plight, and this search must be within the parameters of traditional normative Jewish law.<sup>1</sup>

However, the invocation of “*Torat Hayyim*” as a catch-all phrase to justify reinterpretation of *halakbah* is reminiscent of non-Orthodox treatments of Jewish law where serious analysis of the sources, their underlining principles and the need for consistency with Talmudic doctrines, are all given short shift. It produces result-oriented *halakbah* where the will for change is enough, as if that alone can create the way. Instead, classical *halakbah* examines innovations—even ones that generate pleasantness and seem to resolve urgent social needs—to ensure that they are textually and analytically consistent with the classical Jewish law texts. If not, then they are discarded, even if the

person advocating such is an ordained Orthodox rabbi. Unfortunately, the proposals actually put forward by the *beit din* of Rabbi Rackman are not within the parameters of traditional normative Jewish law, as I have pointed out in both the original review and this reply. Notably, R. Sperber does not say otherwise, for reasons that any astute reader will comprehend.

In fact, R. Sperber argues for the use of the principle of *kiddushei ta'ut* only “in certain cases where the defect can be proven to have been existent at the time the marriage was contracted” — a general position which I certainly endorse, as have many eminent *poseqim* of previous generations, including Rabbi Moshe Feinstein. Yet this assertion has almost nothing to do with the original formulation of *Tears of the Oppressed*.

Thus R. Sperber’s enthusiastic general endorsement of Hacoheh’s book might give readers the mistaken impression that R. Sperber identifies with the more sweeping statements that Hacoheh originally made—which apparently he has now withdrawn—allowing for the ending of marriages in cases where there is no evidence that a defect arose prior to entry into the marriage, or the even more far-fetched presumptions as those put forward by R. Haim Toledano, Dr. Susan Aronoff in the name of

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<sup>1</sup> The example given by R. Sperber in his first footnote seems uniquely ill-suited to this proposition, and completely *malapropos* to the matter at hand. It is important to note why. Rav Herzog’s discussion of women inheriting recognizes that *halakbah* cannot accomplish this goal and proposed the use of a *taqqanah*—a legislative device—to correct this issue. *Taqqanot* are, by their very nature, not to be examined to determine whether or not they are grounded in *halakbah* (as they are not), but only to determine if the area of law is one for which *taqqanot* may be enacted. Our topic under discussion is generally thought to be one in which *taqqanot* do not work, and thus proposals in this area have to be grounded in a proper interpretation of Jewish law without any *taqqanot* in place.

the R. Rackman's *beit din*, or by Susan Weiss in her own name. I assume that R. Sperber does not endorse these extra-halakhic solutions, as they lack the precedential sources that he—and I—agree are needed to validate any such proposal.<sup>2</sup> The use of the somewhat mythical "*Torat Hayyim*" doctrine is no substitute for the rigorous evaluation of the substance of the arguments. Hence the arguments of the supporters of the R. Rackman's *beit din* come up short.

Simply put, R. Sperber seems to me to be endorsing a book that Hachohen did not write about an application of *kiddushei ta'ut* that does not fit Hachohen's original presentation.<sup>3</sup> In truth, what disturbs me about R. Sperber's comment is its penumbra. R. Sperber's points—halakhically tenable in their own right and, outside of this discussion, perhaps even worth saying yet again in the right context—have the effect of appearing to validate much conduct that is not proper as a matter of Jewish law, and I assume is a concern to R. Sperber. I have no explanation why R. Sperber—eminent Torah scholar that he is—appears blind to this foreseeable consequence of his writings in their larger context. Perhaps R. Sperber's judgment been clouded by his legendary compassion for these enchained women, and this has precluded him—in this case—from engaging in his typical close reading of the Talmudic, medieval and latter-day sources. I am at a loss otherwise to explain this lapse.

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Dr. Hachohen, Rabbi Toledano, Attorney Weiss and Dr. Aronoff have spent a significant amount of

space restating points already made in Dr. Hachohen's book or elsewhere. I will spare the reader the necessity of rereading my rejoinder to them and simply make the following brief points.<sup>4</sup>

I wrote my review under the assumption that the final chapter of *Tears of the Oppressed* entitled "General Principles to be Derived from the Precedents" (which is a nine paragraph summary of the whole book) was a summary which conveyed accurately the true intent of the book's author. Paragraph seven of that chapter is boldly entitled "Timing of the Onset of the Blemish" and states:

The choice of halakhic methodology is inferable from the issue of the timing of the onset of the blemish. Here, too, there is great variability among the *poskim*. Some adhere to the requirement that the blemish must have been in existence prior to the marriage—or at least before *kiddushin* takes place—in order for the principle of *kiddushei ta'ut* to be applied. *Other poskim allow for blemishes that arose after the marriage.* [emphasis added]<sup>5</sup>

Aviad Hachohen writes that he did not intend this and he agrees that all blemishes—according to all *poseqim*—must be in existence prior to the marriage taking place before any claim of *kiddushei ta'ut* can take be advanced; any statements to the contrary in *Tears of the Oppressed* are to be discounted. Had he stated this as clearly<sup>6</sup> in *The Tears of the Oppressed*

<sup>2</sup> I do not at all understand R. Sperber's reference to Justice Elon's Foreword to *Tears of the Oppressed*. Even a casual read of the Foreword makes it clear that Elon does not consider Hachohen's proposal to be a significant one, and he does not expect it to considerably ameliorate the plight of the *agunah*. Indeed, Elon notes (p. IX, Foreword) that this work is an important study of "another approach which might offer some, **even slight**, solution for the problem of *agunot*" (emphasis in the original), which is far from the enthusiastic endorsement Sperber suggests Elon gave. Rather, as Justice Elon notes himself in his Foreword, he advocates a different solution to this problem.

<sup>3</sup> As I have noted before, this proposition has been stated many times by numerous eminent *poseqim*.

<sup>4</sup> A fuller and detailed response to these critiques will gladly be sent to anyone who emails me and requests it. My email address is mbroyde@emory.edu.

<sup>5</sup> *Tears of the Oppressed*, page 96.

<sup>6</sup> Clarity is extremely important in this matter and a simple misplaced modifier changes everything. For example, while Hachohen tells us that his summary of Rabbi Simha of Speyer is clear and addresses pre-marriage blemishes, since he writes "Rabbi Simha of Speyer clearly establishes that in the case of a major blemish [in this case, blindness] where the woman was not aware of it *prior to the marriage* it is a mistaken marriage," in fact a much clearer form of summary – completely lacking ambiguity—would have been "Rabbi Simha of Speyer clearly establishes that in the case of a major blemish present in the husband *prior to the marriage* where the woman was not aware of it, it is a mistaken marriage." The misplaced modifier creates ambiguity, as a reasonable person could read it as referring to her knowledge, rather than to the presences of the blemish.

itself as he did in his response to my review, I would not have found it necessary to write a review highlighting this inaccuracy.<sup>7</sup> Since I have no reason to doubt Hacoen's sincerity, I hope that this point will be carefully clarified in the second edition of the book. Given the potential for error on a matter of such profound halakhic significance, consideration should be given to fixing it in all the copies the publisher has not yet sold by covering this paragraph with a sticker containing the corrected text.

At the same time, I think it disingenuous to suggest that this book was an academic work unrelated to a defense of R. Rackman's *beit din*. The public relations surrounding the publication of the book,<sup>8</sup> its financial subsidy by supporters of the *beit din* of Rabbi Rackman, and simply the list of respondents in this issue belie that disclaimer.

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I am therefore willing to concede that I did not review the book as an academic adventure but as the practical halakhic suggestion that it was. In this respect it is important to focus on Hacoen's comments concerning the Maharam. Academics would find it relevant that centuries ago he proposed an approach that would support the *beit din* of R. Rackman. Halakhists, on the other hand, would be more concerned with the fact that normative *halakhah*, as it developed, did not allow that position to take root. (Indeed, there is hardly any issue in contemporary halakhic practice that does not have *poseqim* of major stature who centuries ago took an opposing view.) Surely, no one seriously suggests that normative *halakhah* can

be changed at will by reaching back centuries to resurrect long discarded positions.

In fact, Dr. Aviad Hacoen positions *Tears of the Oppressed* as of little help for agunot practically, since it is not limited to normative *halakhah*. As he states in this response:

One thing should be made clear B the book is not meant to be a *pesaq halakhah*. . . I am not a functioning rabbi. I don't pretend to be able to decide between the opinions of the great Torah authorities, and determine which of them is "accepted" and which is unacceptable. I certainly don't pretend to rule on questions of *halakhah*.

I do not have that luxury and did not write my review from that vantage point. I live in the world of practical Jewish law (*pesaq halakhah*) and deal daily with actual *agunot* and women seeking a get from a non-cooperative husband. They are interested in a resolution consistent with normative *halakhah* and following only accepted authorities. Part of my job in that world is to determine in what cases the weight of the *halakhah* and the established facts suffice to allow a woman to remarry without a *get* based on a defect in her initial marriage (or the apparent death of her husband). I stake my claim in the world-to-come on each and every decision that I make, as I know that both the decision to sign or not to sign letters that release women to remarry without a get are fraught with Divine as well as temporal consequences. Anyone can solve the *agunah* problem by relying on views that are rejected by *halakhah*.

Since Hacoen cannot refute the fact that

<sup>7</sup> Hacoen writes in his response that "a pre-existing defect in the spouse is a necessary condition for the use of *kiddushei ta'ut*".

<sup>8</sup> "New Book Seeks Agunah Solutions," *The Jewish Week* October 22, 2004 by Debra Nussbaum Cohen (available at [www.thejewishweek.com](http://www.thejewishweek.com)) which states:

A new book by an Israeli legal expert, Aviad Hacoen, promises to return to public attention the legal technique used to dissolve the marriages of *agunot*, women whose estranged husbands refused to grant them a Jewish divorce, an approach which prompted waves of controversy in 1997, when it was first used. That was when Rabbi Emanuel Rackman, chancellor emeritus of Bar Ilan University, went public with the fact that he was employing little-used aspects of Jewish law in order to free hundreds of women whose husbands were keeping them legally chained to dead marriages. Rabbi Rackman's work was met with criticism from rabbis in virtually all sectors of the Orthodox world. But, with the assistance of a handful of rabbinic colleagues and supportive women, he has continued to solve the dilemmas of *agunot*, doing so for several dozen in the last year or two and several hundred in total, he said in an interview.

normative *halakhab* rejects the approach of the Rackman *beit din*, he retreats to *ad hominem* abuse about the lack of courage of Modern Orthodox *poseqim*.<sup>9</sup> But it is not lack of courage that prevents *dayanim* from adopting these suggested solutions, but rather loyalty to normative *halakhab*.

Courage implies taking risks with one's own status. But Hacoen's courage entails inflicting the possible status of *mamzerut* on the children of women who rely on these unorthodox approaches. Advising women to take that risk for their children is not courageous but irresponsible. The fact that Rabbis Rackman and Hacoen may truly be acting *leshem shamayim* does not mitigate that unfortunate fact.

*"It is also not true that every problem has a Jewish law solution."*

Unfortunately, it is also not true, as Hacoen claims, that every problem has a Jewish law solution, any more than every sickness has a cure. Of course, in both cases we have to keep trying to add to our arsenal of approaches. But we cannot allow our frustration to drive us to invalid halakhic constructs anymore than our frustration with the limits of medical care should drive us to medical quackery.

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If Hacoen reaches to the past to justify his position, R. Toledano simply creates a new proposition that has no basis whatsoever in *halakhab*. He writes:

Rabbi Rackman's *beit din* maintains that

physical and psychological abusive behavior of husbands towards their wives and/or children is a pre-marital latent condition even when manifested only after marriage.<sup>10</sup>

Along similar lines, the Israeli newspaper *Ha'aretz* reports:

In a just-published book (in English), "*Tears of the Oppressed*" (KTAV), Hacoen proposes the use of the principle of *mekah ta'ut*—that is, when the wife was deceived about her husband at the time of the marriage—to argue that the husband's very aggressiveness in refusing to give his wife a divorce shows that the marriage was based on a mistake from the outset, and therefore can be annulled." The principle of annulment of marriage because of *mekah ta'ut* already exists in the halakha," Hacoen notes, "and my experience, in the wake of Rabbi Prof. Emanuel Rackman, is to expand it to encompass violence or unreasonable extortion."<sup>11</sup>

Women whose marriages have been "annulled" by the *beit din* of R. Rackman have reported to me that this is the logic on which the *beit din* relied in their cases without any further investigation of the husband.

There is no halakhic foundation to this presumption and one cannot find even a hint of this approach in any previous halakhic sources. No defense is given as a matter of *halakhab* to such a presumption, and no rabbinic sources are cited to validate such a presumption by R. Toledano. The

<sup>9</sup> For a transcript of Rabbi Joseph B. Soloveitchik's comments on a proposal of Rabbi Rackman's, see [http://mail-jewish.org/rav/talmud\\_torah.txt](http://mail-jewish.org/rav/talmud_torah.txt). One wry reviewer of my response, commenting on this paragraph observed: "if 'when the cat is out, the mice do play,' think about the games the mice play when the cat has gone to heaven. We all know that Rabbi Rackman would never have advanced this solution to the *agunah* problem in the lifetime of the Rav, and Rabbi Rackman withdrew every single proposal he ever made to solve the *agunah* problem in the face of the Rav's objections."

<sup>10</sup> Toledano makes it clear that this is, in fact, the view of the *beit din* of Rabbi Rackman, when he states at the end of his response that:

The position of Rabbi Rackman's *beit Din* is that defects which are in total discord with any reasonable concepts of marriage including physical and psychological abuse, sexual molestation, and adultery.... are types of behavior that renders the perpetrators unfit to be husbands, and are the sort of defects and character flaws that must be presumed to have been latent conditions pre-dating the marriage. People just don't turn into scoundrels out of the blue.

<sup>11</sup> See Yair Sheleg, "Unchain Their Hearts," *Ha'aretz* October 12, 2004 in English. See [www.Haaretz.com](http://www.Haaretz.com) for archival information.

reason for this is that no such sources exist in *halakhab*.

Equally important, there is absolutely no published literature in the psychology of abuse field that correlates (at a rate of 50% or higher) any pre-marriage conduct or experience (other than sexual deviance related to homosexuality) with any post marriage defect (other than homosexuality and its correlates). The strongest correlation found in the literature for a clear latent biological defect that correlates to physical abuse is testosterone and serotonin levels, which show a 12% correlation based on elevated levels, when testosterone levels are elevated more than one standard deviation.)<sup>12</sup> Such a correlation number is far lower than the categorical presumption needed to end a marriage without a get (under the *umdenah de-mukhab* doctrine spelled out by R. Feinstein in *Iggrot Moshe*, EH I:79, I:80 and IV:113) required by *halakhab*.<sup>13</sup>

*“The presumption advanced by R. Rackman’s beit din is wrong as a matter of fact.”*

Additionally, when one includes in the list of latent defects conduct like adultery (as Toledano does) one immediately encounters a problem of definition. What is a predisposition to commit adultery and how does one show it to be latent? Is it latent in everyone who is married? No professional that I have spoken to is aware of any literature in the field on this topic, making such presumptions without any foundation. The same is true for verbal abuse; there is no definition given for what qualifies as verbal abuse, and there are almost no studies of this conduct in the course of marital difficulties. The potential for verbal abuse would also seem latent in most people and is thus lacking any correlative effect.

Dr. Susan Aranoff’s suggestion for further research notwithstanding, I think there is little hope of obtaining credible scientific evidence to support Toledano’s thesis. Indeed, common sense says otherwise. We all know that people change over

the years. We are not necessarily what we were at the time of our marriage—or teenage years, or other early stages—decades later. We change for the better and for the worse, and not every unkind act is the result of mental illness or latent defect. This is even more so true given the length of the marriages—typically decades—that are declared ended by the *beit din* of R. Rackman. (For more on this topic, see the appendix to this article, which contains a detailed survey of the latent defect as cause of abuse literature in the psychology literature.)

Thus the presumption advanced by R. Rackman’s *beit din* is wrong as a matter of fact. Indeed, in the one area where there is abundant evidence of the presence of latent defect—sexual deviance related to homosexuality—there is a deep halakhic consensus that annulment of marriage is correct in cases of hidden homosexuality when the husband will not give a *get*.

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R. Toledano and Dr. Hacohen both object to my reliance on the view of the *Arukh Ha-shulhan* that the woman need not leave the marriage immediately upon discovery of the defect (and the realization that she can leave), even though this standard seems more lenient than that adopted by the *Shulhan Arukh* itself in *Even Ha-Ezer* 31:9. Toledano posits that *Iggrot Moshe Even Ha-Ezer* III: 45 adopts a more lenient standard. Unfortunately, he misunderstands the intent and effect of the *Iggrot Moshe*. Rabbi Feinstein is not introducing a leniency which extends the timeframe of the window of escape in the case of all defects; rather he is narrowing the window of opportunity in the case of impotence and insanity, where logically, even if the couple remained together for an extended period of time, no new marriage could be contracted (as sexuality is impossible in one case, and entering into a contract impossible in the other), and thus one would have thought that the window of opportunity would never close. Thus

<sup>12</sup> See the Appendix for a further exploration of this data.

<sup>13</sup> This is not the place to explain the differences between an *umdenah* and an *umdenah de-mukhab* or the different consequences. Rabbi Feinstein only permits the ending of a marriage without a get in a situation where the woman is an *agunah* and there is an *umdenah de-mukhab*, and not merely an *umdenah*. This matter requires more analysis than can be provided here. See also notes 16 and 21 and accompanying text.

despite claims to R. Feinstein's view and the fact that in most cases of *kiddushei ta'ut* an ongoing sexual relationship closes that window immediately (i.e. it recreates the marriage), I still think that the *Arukh ha-Shulhan's* view can be relied on to extend that period a short amount of time from the moment the woman realizes that an error of contract took place, and the marriage thus remains invalid from its inception..

So too, I and many others have responded to the arguments of *kiddushei ta'ut* II & III as presented by Aronoff. The reader should examine my article "*Kiddushei Ta'ut: Error in the Creation of Marriage*"<sup>14</sup> and—even more importantly—the extremely thoughtful article by R. J. D. Bleich "*Kiddushei Ta'ut: Annulment as a Solution to Agunah Problems*."<sup>15</sup> This matter is sufficiently clear that R. Toledano informs us that even the *beit din* of R. Rackman does not rely on either of these two grounds.

It is worth noting that my initial article raised a number of significant procedural questions about the conduct of the *beit din* of R. Rackman, in that they conduct *ex-parte* hearings without the parties present, and accept the testimony of the wife about the conduct of the husband even in the absence of any corroborating testimony, in apparent violation of explicit dictates of the *halakhab*.<sup>16</sup> No response to

these allegations has even been made.

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Susan Weiss' comment that "surely it does not matter if the marriage ended because the husband had bad breath or committed adultery" is a vast over-simplification of much Jewish divorce theory, is by no means intuitively correct, and in no way the unanimous voice of the rabbinic tradition. I have written a lengthy analysis of these issues in a book entitled *Marriage, Divorce and the Abandoned Wife in Jewish Law: A Conceptual Approach to the Agunah Problems in America*. (KTAV, 2001), and the reader is invited to examine that work for more information.<sup>17</sup>

Unfortunately, Susan Weiss's defense of *Tears of the Oppressed* and the *beit din* of R. Rackman as grounded in legal fiction cannot be supported by any halakhic sources. Simply put, Jewish Law does not allow for legal fictions in these areas of divorce law. But I am in full agreement with her comments on the necessity for maintaining a proper tone in this debate. I take to heart her kind rebuke over the tone of my initial review, although the substance remains, I believe, successfully unchallenged. I hope that I and others who write on the issue will keep her wise comments in mind in the future.

<sup>14</sup> Posted on jlaw.com

<sup>15</sup> *Tradition*, 33:1 (1998)

<sup>16</sup> See text accompanying notes 30-34 in the original review and sources cited therein.

<sup>17</sup> Weiss also questions the frequency of *kiddushei ta'ut* cases and notes how rare they are in Israel. There are numerous cases of *kiddushei ta'ut* emanating out of rabbinical courts in the United States and anyone who appears regularly in front of the rabbinical courts in America knows that fact. (Perhaps her lack of knowledge of this fact is a reflection of her lack of familiarity with the rabbinical courts of the United States and their practices.) I have written a four articles about this issue (as an appendix to a book; in Hebrew in *Tehumin*, in *Dinei Israel*; and posted on jlaw.com) and given many presentations on this topic (at EDAH and JOFA conferences at the Orthodox Forum and in many synagogues), describing the phenomena at some length in both Hebrew and English (see list below), many of which contain sample cases. (Indeed, for the readers' information, the one case Weiss refers to emanates out of the Beth Din of America.)

<sup>18</sup> In 1998 (in response to the initial conduct of the *beit din* of R. Rackman) I wrote an article on *kiddushei ta'ut* that outline the principles of *halakhab* as I understand them; see *Marriage, Divorce and the Abandoned Wife in Jewish Law: A Conceptual Approach to the Agunah Problems in America* (KTAV, 2001) in Appendix C. That article articulated four rules for *kiddushei ta'ut*, which are that (1) The woman must discover a serious defect present in her husband after they are married. (2) That defect must have been present in the husband at the time of the marriage. (3) The woman must have been unaware of the defect at the time of marriage. Finally, (4) The woman must discontinue marital relations with her husband very soon after the discovery of the defect (and the realization that she can leave him).

In these intervening years, this formulation has been accepted as a proper formulation of *halakhab* by many. In these same intervening years, R. Rackman and his *beit din* have been examining the *halakhab* to find a way to justify their *beit din's* conduct (initially done with little or no justification) and have put forward many different rationales, including now such now

However, I strongly disagree with the suggestion that the *beit din* of R. Rackman and my own analysis are growing closer.<sup>18</sup>

Finally, I note that this is not the forum for responding to criticism of either the Orthodox Forum/Bet Din of America prenuptial agreement or the agreement that I note as a possible alternative (called the Tripartite Agreement in my initial review). I will at some future date provide further analysis of these agreements, but if these reviews are to stay articles, rather than encyclicals, this topic will have to wait.

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While the plight of the *agunah* is tragic, there are times when Jewish law simply cannot achieve the result desired by people, and we struggle on with our life, seeking to obey our Creator's will. (This is not unique to Jewish law, but is endemic of every legal system with timeless principles.) Within Jewish law, this situation is not limited to *agunot*. A century ago there were women who could not conceive children because of *niddah* issue and there were men who could not marry as they were *petzu'ei dakka* [ones with crushed genitalia]. There are people unable to marry because they are *mamzerim*. Every week I am called by engaged couples deeply in love who cannot marry because he is a *kohen* and she belongs to a group forbidden

to a *kohen*. In each and every situation, some might wonder whether the community should just throw in the towel and abandon the halakhic system as an act of kindness to the human beings suffering in this situation. And yet we all recognize that such is not what the Giver Of Law Above wants from Jews committed to *Torah min ha-Shamayim*, those of us who believe that Jewish law derives from God's will and revelation, rather than our wants or wishes. So, in such cases we struggle on, seeking to do that which *halakhah* demands of us while acting with compassion to all.

The emotional appeal to the plight of the *agunah* alone is not enough to change the halakhah. We must find legitimate halakhic mechanisms grounded in the classical texts derived from the rabbinic tradition, and we must run far away from 'solutions' distant from the rabbinic tradition. Honest people can sometimes disagree, even strongly, about what rabbinic texts mean and how to apply them. However, the contours of the debate must be framed by honest study of the classical rabbinic texts and not by emotions.

It is my hope and prayer that we find a solution to the *agunah* problem and that it be one that resonates as true with the One Above as well as with His children below. As the Talmud tells us, "The seal of God is Truth."<sup>19</sup>

discarded rationales such as *hafkqa'at kiddushin* (annulment of marriage) or *get ziqui ma-ha-ba'al* (writing a get against the wishes of the husband), or what was called *kiddushei ta'ut II* (all marriages are void when coercion is factually impossible) or *kiddushei ta'ut III* (the lack of consent to a *qinyan*) and yet other theories. As the *beit din* of R. Rackman discarded the many different rationales that are untenable (and all of these are, even as for many years the *beit din* of R. Rackman continued to employ them) they are still drawn to one that is tenable—latent blemish, as it has impeccable credentials, having been defended by R. Feinstein.

However, since a halakhically proper definition does not suit their needs (which is to end marriages whenever the husband withholds a *get*, even with no evidence of a hidden defect) the *beit din* of R. Rackman has to modify the terms 'latent' and the terms 'defect.' Thus, the words 'latent defects' are now redefined to include things that are not defects and are not latent, or presumptions are introduced about what is latent or defective that have no foundation in reality or *halakhah*. Although the *beit din* of R. Rackman uses terms that are linguistically similar to those used me in my articles, these words—'latent' and 'defect' have a completely different meaning in the hands of the *beit din* of R. Rackman. Thus, the similarities are linguistic, rather than substantive.

<sup>19</sup> *Shabbat* 55a.

## Appendix: A Review of the Abuse Literature in the Context of Determining Latent Defect

This section reviews the state of this literature and research and makes it clear to the reader of these exchanges that the social science literature is in fact not at all supportive of the factual view of the *beit din* of R. Rackman.

In her response, Susan Aronoff has proposed:

Given the pervasiveness of domestic violence in *agunah* cases and the centrality of this issue in the quest for solutions to the *agunah* problem, I propose that the Orthodox rabbinic spearhead and sponsor such research [on the nature and origin of domestic violence]. . AGUNAH International would be pleased to partner in such a project.

This proposal is quite surprising to me, since such research has been done by many, and the literature robustly notes that most defects are not latent and most abuse does not derive from latent defects. One can only conclude from Aronoff's proposal that she is simply unfamiliar with the research that is extant.

Since my initial interest in this area in 1998,<sup>1</sup> I have faithfully read the social science literature closely in this field, looking at nearly every article in the premier journals on the topic from the *Journal of Aggression and Violent Behavior* to the *Journal of Family*

*Violence* and onto *Violence and Victims* that addresses latent defects or predictive factors in abuse. There are dozens of articles in this field. It is important to be clear here: There is absolutely no published literature anywhere that correlates (at a rate of 50% or higher<sup>2</sup>) any pre-marriage conduct or experience (other than sexual deviance related to homosexuality) with any post marriage defect (other than homosexuality and its correlates).

The strongest correlation found in the literature for a clear latent biological defect that correlates to physical abuse is testosterone and serotonin levels, which shows a 12% correlation based on elevated levels.<sup>3</sup> The data on testosterone compared men with levels over one standard deviation (SD) above the mean to those over one standard deviation below the mean. Since the "normal range" usually encompasses +/- 1.96 SD around the mean (if normally distributed), many of these men would be considered as having normal levels, further reducing the value of this data. The former group was 12% more likely to have hit/thrown something at their wives. (It would have been more interesting to knowing the percentage with violent behavior in those with abnormally high levels [above +1.96 SD of the mean] compared to those within the normal range. If 10% of the normal group expressed violent behavior, then well over 50% of the abnormally high group would need to have expressed violent behavior to meet

<sup>1</sup> When I wrote the article "Error in Creation of Marriage in Modern Times Under Jewish Law" for the Orthodox Forum of that year.

<sup>2</sup> For reasons that I have explained numerous times elsewhere, (see article cited above) a statistical correlation of less than 50% is not halakhically significant to end a marriage. Even correlations greater than 50% but less than an *umdenah demukhabah* (most likely, about 95%) generally are not acceptable. In a situation of greater than 50%, the marriage is not valid as a matter of torah law, and many leniencies flow from that. I suspect that the analytic tension found between *Iggrot Moshe* EH IV:83(2) and the last words of this *teshuvah* specifically and *Iggrot Moshe* EH 1:79 and 1:80 can be resolved by positing that that Rabbi Feinstein is of the view that one may only permit a woman to remarry based on an *umdena de-mukhabah* (95%), whereas one can permit a child to not be labeled a mamzer based on merely on an *umdena* (51%). For why this might be so, see my article cited in note 12.

<sup>3</sup> Holtzworth-Munroe, A. Bates, L., Smutzler N., and Sandin, E "A Brief Review of the Research on Husband Violence," *Journal of Aggression and Violent Behavior* 1:65-97 (1997).

<sup>4</sup> Thank you to Dr. Thomas Spira of the Centers for Disease Control for this analysis.

the halakhic criterion.<sup>4</sup> Such a correlation number is far lower than the categorical presumption needed to end a marriage without a get (under the *umdena de-mukhab* doctrine spelled out by Rabbi Feinstein in *Iggrot Moshe* EH I79, I80 and IV:113) required by *halakhah*.<sup>5</sup>

Indeed, this correlative number is below the correlative number that this same study found for men who became physically abusive to their wives due to traumatic head injury, which is clearly a post-marriage condition.<sup>6</sup> It is also below the correlative number for alcohol abuse, stress or many other factors discussed in the various articles on this topic, all of which can arrive in a marriage after its creation.<sup>7</sup>

Furthermore, when one reads the statement of Toledano closely and realizes that as grounds for *kiddushei ta'ut* he includes “psychologically abusive behavior of husbands towards their wives and or children” one sees that there is absolutely no substance in the psychological literature that validates the view that all or most psychologically abusive behavior towards spouses or children is a typically latent defect. This is even truer in the context of adultery, as there is no research at all about adultery as a form of latent defect.

Consider for example another recent article

entitled “A Model For Predicting Dating Violence,”<sup>8</sup> which seeks to correlate any and all latent defects with violence in dating. While this article shows some correlative effect, nothing cited in the article rises to anywhere near the level of greater than 50% correlation, as mandated by Jewish law. The study mentioned above that discusses testosterone increases as they related to increased violence (entitled “A Brief Review of the Research on Husband Violence”<sup>9</sup>) concludes that there is a long list of factors that correlate to marital physical abuse, many of which develop after the marriage has started, such as poverty, injury, drug use, alcohol abuse, stress, drug abuse and many others.<sup>10</sup>

Consider further the following from a forthcoming article entitled “The Gender Paradigm in Domestic Violence Research and Theory” by Donald G. Dutton and Tonia L. Nicholls.<sup>11</sup> (Importantly, Prof. Dutton is the sole expert cited by Susan Aronoff, and is the intellectual leader of this field.<sup>12</sup>)

It is because of intimacy that ...rates of abuse are similarly high; the impact of attachment and related anxieties produces anger and abuse. Dutton [elsewhere] further elaborates the psychosocial

<sup>5</sup> It is not even a simple *umdena*, (presumption) as it is much less than 50%.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* The literature makes this point in non-marital relationships as well. See G. Lie, R. Schilit, J. Bush, M. Montagne & L. Reyes, “Lesbians in Currently Aggressive Relationships: How Frequently do they Report Aggressive Past Relationships,” *Violence and Victims*, 6:2 121-135 (1991)

<sup>8</sup> Follingstad D.R., Bradley R.G., Helff, C.M. and Laughlin, J.E. (2002) in *Violence and Victims* 19(91) 35-47.

<sup>9</sup> Holtzworth-Munroe, A. Bates, L., Smutzler N., and Sandin, E., *Journal of Aggression and Violent Behavior* 1:65-97 (1997).

<sup>10</sup> Let us consider a theoretical hormone (made up just for this hypothetical), which if present in levels higher than a specified concentration, can be shown in the literature to correlate at a level of greater than 95% that any married man with this concentration of this hormone will punch his wife in the mouth and knock out at least three teeth. Would a husband who lies about his level of hormone to his wife (assume she insists on him being tested), create *kiddushei ta'ut*. The answer is yes. What about a case where she does not ask that he be tested, because less than one in ten thousand people have this hormone at that level, but he is tested and he knows his elevated levels. Would that create *kiddushei ta'ut*? The answer is still yes, as the *umdena de-mukhab* *h* is that no woman would marry a man who will knock out her teeth with a 95% likelihood. What about a case where she does not ask that he be tested, because less than one in ten thousand people have this hormone at that level, and he does not ask to be tested either, and thus he does not know it. Would that create *kiddushei ta'ut*? The answer is still yes, as the *umdena de-mukhab* still is that no woman would marry a man who will knock out her teeth with a 95% likelihood. This is no different than *mokher parah nimtzeah tereifah, mekho batel* (even though everyone is sincere and there is no fraud.)

<sup>11</sup> It is forthcoming in *Journal of Aggressive and Violent Behavior*, 2005.

<sup>12</sup> Actually, both also cite the work, “The Shame Borne of Silence” by Rabbi Abraham Twersky, but even the reader unfamiliar with this book specifically (but familiar with the author generally) should intuit (quite correctly) that there is no indication that this book—published by Mikrov Press in 1996—supports in any way shape or form the understanding of the reality put forward by the *beit din* of Rabbi Rackman.

phenomena that would increase an individual's propensity to experience such anxiety and react with abuse. The "intimacy problem" explanation constitutes an alternative to gender explanations and posits that abusiveness in intimate relationships occurs for both genders and that certain psychological features increase risk for individuals independent of gender... An alternative would be to view intimate violence as having psychological causes common to both genders. Psychological explanations for intimate violence have come from numerous sources... psychopathology, attachment, anger, arousal, alcohol abuse, skills deficit, head injuries, biochemical correlates, attitudes, feelings of powerlessness, lack of resources, stress and family of origin sources for male intimate violence.

In an email to me, Prof. Dutton elaborated on this and stated:

In psychology there are no sufficient causes; everything is a "risk factor" (i.e. it increases the probability of an action occurring). There are some risk factors that precede marriage, such as being victimized by or witnessing abuse. However, they still

do not make abusiveness rise to a 50-50 chance let alone to likelihood.<sup>13</sup>

The simple fact is that the presumption advanced by the Rackman *beit din*—that either verbal or physical abuse to both one's wife and children is a latent defect in more than half of the cases—is wrong as a matter of fact and is disagreed with by almost every professional who works in the psychology of abuse field. Indeed, in the one area where there is abundant evidence of the presence of latent defect—sexual deviance related to homosexuality—there is a deep halakhic consensus that *kiddushei ta'ut* is correct in cases of hidden homosexuality when the husband will not give a *get*.<sup>14</sup>

Thus, while Toledano hides behind the assertion that "reasonable people may differ" as to what is latent (which is somewhat true), that should not obscure the fact that the position taken with regard to this matter by the *beit din* of R. Rackman—that most physical and psychological abusive behavior of husbands towards their wives or children is a pre-marital latent condition even when manifested only after marriage—is not reasonable, is not supported by any evidence, is rejected by almost all the professionals in the field of abuse psychology, and thus cannot be relied on as a matter of *halakhab*.

<sup>13</sup> Dated April 10, 2005.

<sup>14</sup> See my article "*Kiddushai Ta'ut: Error in the Creation of Marriage*" posted on [www.jlaw.com](http://www.jlaw.com) and (much more importantly) *Iggrot Moshe* IV:113.