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CHAINED AGAINST HER WILL: WHAT A *GET* MEANS FOR WOMEN UNDER JEWISH LAW

*Michelle Kariyeva**

I. INTRODUCTION

Under *halachic* laws, when a Jewish couple undergoes a divorce, Jewish law requires the marriage to be terminated by both civil law and religious law.¹ The delivering of a divorce document, called a *get* under Jewish law, initiates the process.² Essentially, without a *get*, the couple is not considered divorced and neither spouse may remarry until the document is signed.³ However, the consequences are far more severe and life changing for women.⁴

For instance, without a *get*, a Jewish woman cannot remarry and is viewed as an adulterer if she engages in sexual intercourse with

* I am a Juris Doctor candidate at Touro College Jacob D. Fuchsberg Law Center and a CUNY Queens College graduate. I dedicate this Note to the memory of my late grandmother, Frida Kariyeva, whose love and support inspired me to make it this far. For all the times she picked me up when I fell down and could not get back up on my own—I know that her encouragement contributed in many ways to my academic achievement. May her soul rest peacefully. Furthermore, I would like to dedicate this Note to my professors, friends, and loved ones who helped me along the way. Your acts of kindness and support are greatly appreciated.

¹ Irving Breitowitz, *The Plight of the Agunah: A Study in Halacha, Contract, and the First Amendment*, 51 MD. L. REV. 312, 319 (1992) (“A civil divorce has no effect in the eyes of *halacha*, and any subsequent cohabitation or remarriage in the absence of a *get* is regarded as adulterous.”). I will discuss this in depth throughout this Note.

² *Id.* Today, with all the different types of movements of Judaism present in the United States, the common groups continue to be the Orthodox, Conservative, and Reform. As it seems, those who strictly comply with *halachic* laws not only adhere to the *get* requirement but also believe that they are bound to it. Jews who categorize themselves as a part of the Reform Movement believe that *halachic* law only *guides* them and does not bind them to a *get* requirement. Furthermore, the Reform Movement even goes as far as extinguishing the *get* requirement and recognizes that a civil divorce is enough to end the union.

³ *Id.* (“A *halachically* valid marriage may be terminated in only two ways: through death of a spouse, or by the granting of a *get*.”).

⁴ See *infra* note 8.

other men.⁵ Furthermore, if she has children without a *get* from her previous husband, those children are considered *mamzerim*.⁶ *Mamzerim* are children who are born from forbidden relationships.⁷ Because of the stigma placed on children born under this status, they are not allowed to marry freely within the Jewish community.⁸ This stigma is life changing, especially for religious Jews who believe that a woman's primary responsibility in *halacha* is to have a family and children.⁹ Nevertheless, many husbands who refuse to deliver a *get* to their wives can leave them in a "dead" marriage, which is known as the *agunah* problem.¹⁰

Once the husband delivers a *get*, the wife can accept it.¹¹ If a wife does not cooperate with the husband's demand for a *get*, the

⁵ See Breitowitz, *supra* note 1, at 323-24 (citing GEORGE HOROWITZ, *THE SPIRIT OF JEWISH LAW* 159-60 (1973)).

⁶ BABYLONIAN TALMUD, Gittin 5b, http://www.come-and-hear.com/gittin/gittin_5.html (last visited Aug. 29, 2018) ("If the bearer of a Get from foreign parts gave it to the wife without declaring, 'In my presence it was written and in my presence it was signed,' if she marries again the second husband must put her away and a child born from the union is a mamzer." (citation omitted)).

⁷ *Id.* The Babylonian Talmud calls it "[t]he product of an incestuous union." *Id.* at n.8.

⁸ Breitowitz, *supra* note 1, at 324. The consequences of not having a *get* affect the children's reputations and marital status. Breitowitz, *supra* note 1, at 324. *Mamzerim* are permitted to only marry converts to Judaism or other *mamzerim*. Breitowitz, *supra* note 1, at 324 n.48. This concept is different from having illegitimate children. Breitowitz, *supra* note 1, at 324. Illegitimate children, those who are born out of wedlock, do not carry this stigma. Breitowitz, *supra* note 1, at 324. We can see how grave the consequences are for a woman to have children with another man without obtaining a *get* from her previous husband.

⁹ Lisa Zornberg, *Beyond the Constitution: Is the New York Get Legislation Good Law*, 15 PACE L. REV. 703, 704 (1995). A woman's primary religious responsibility in *halacha* is to nurture Jewish values within the domestic sphere. M. MEISELMAN, *JEWISH WOMAN IN JEWISH LAW* 16-18 (1978); see also Sara Esther Crispe, *The Role of Women in Judaism*, CHABAD.ORG, https://www.chabad.org/theJewishWoman/article_cdo/aid/376141/jewish/The-Role-of-Women-in-Judaism.htm (last visited Sept. 14, 2018) ("For every woman, single or married, with children or without children, is able to bear fruit, is able to be an *eizer kenegdo*. . . . [T]his is fulfilling the commandment of 'to be fruitful and multiply' . . ." (citing GENESIS 1:28)). The literal translation of *eizer kenegdo* is a "helpmate to [the husband]." *Id.*

¹⁰ The literal translation of *agunah* is "chained." Breitowitz, *supra* note 1, at 313 n.3. It is a term used to describe a Jewish woman who is "chained" to her marriage. Breitowitz, *supra* note 1, at 313 n.3. The plural form is *agunot*. Refusing to comply with the *get* process, as an act of spite or demanding certain terms before agreeing to give one, has become the modern equivalence of the biblical and historical *agunah* problem. I will discuss the *agunah* problem in greater detail later on in this Note, including the modern *agunah* problem—*get* extortion. See discussion of the modern *agunah* problem *infra* Part III.B.

¹¹ Breitowitz, *supra* note 1, at 320; see also *Jewish Divorce and the Civil Law*, 12 DEPAUL L. REV. 295, 299 (1963) ("It is the husband who gives the divorce and not the court. . . . The function of the Religious Court in Jewish Law is that of a passive participant. Its role is to attempt to dissuade the parties and counsel them against proceeding with the divorce. . . . The justification for this is that by legally severing their relation the couple is fulfilling their

implications are far less severe for the husband.¹² That is because, a man may have sexual intercourse with other women without being branded as an adulterer, and if any children are born from a subsequent relationship, the children are not stigmatized as *mamzerim*.¹³ Furthermore, if the husband believes that his wife is unreasonable for not accepting the *get*, he can be set free from the *get* requirement by receiving one hundred signatures from rabbis.¹⁴ Jewish women cannot receive a hundred signatures from rabbis to “free” themselves from their “dead” marriages, although, now, many rabbis refuse to marry a couple unless a prenuptial agreement is signed or community pressure is applied for men to comply with the *get* requirements. It is unclear how many women fall under the definition of *agunah* today.¹⁵

Many states have tried forcing husbands to issue a *get* based on the civil enforcement of the *ketubah*.¹⁶ Further awakened by the issue and the complexities of the *agunah*, New York, specifically, has enacted legislation to help.¹⁷ In 1986, the New York legislature enacted Section 253 of the Domestic Relations Law—removal of religious barriers—to solve the *agunah* problem.¹⁸ The statute states that a party cannot receive an annulment or divorce unless the party claims in a verified complaint that the party took all the steps necessary, to the best of his or her knowledge, to remove any barrier to the defendant’s remarriage.¹⁹ There was a lot of backlash when this statute was enacted because of the well-rooted constitutional right found in the First Amendment’s Establishment Clause and Free

state of mind and heart and the court is merely asked to sanction this state.” (footnotes omitted)).

¹² See *infra* notes 13-15 and accompanying text.

¹³ Breitowitz, *supra* note 1, at 323-24.

¹⁴ A process known as *Heter Me’ah Rabbanim* (“Dispensation of 100 Rabbis”). Breitowitz, *supra* note 1, at 325.

¹⁵ Breitowitz, *supra* note 1, at 315. Many scholars have differed in opinion and have not been able to come up with a common figure. See Breitowitz, *supra* note 1, at 316 nn.5-6 (citing GEORGIA DULLEA, *Orthodox Jewish Divorce: The Religious Dilemma*, N.Y. TIMES (July 5, 1982), <http://www.nytimes.com/1982/07/05/style/orthodox-jewish-divorce-the-religious-dilemma.html> (estimating 150,000 *agunah*) and RABBI MENDEL EPSTEIN, *A WOMAN’S GUIDE TO THE GET PROCESS 2* (1989) (estimating that “there are no more than 50 women who meet the basic definition of *agunah*”). Whatever the exact figure may be today, this is a rude awakening. The disparity between the two figures is deeply concerning. Many factors may be contributing; however, one thing remains certain: every case shows us how easily manipulated the religious process can be when faced with selfish motives.

¹⁶ See *infra* Part II.A.

¹⁷ See *infra* Part IV.

¹⁸ N.Y. DOM. REL. LAW § 253 (McKinney 1986).

¹⁹ N.Y. DOM. REL. LAW § 253 (McKinney 2018).

Exercise Clause.²⁰ Despite the statute's inability to be successfully challenged in civil court, it brews a lot of controversy for proponents of Jewish law because the Mishnah (*Yevamot* 14:1) states that a man cannot divorce his wife under coercion;²¹ it must be made under his own free will.²² Therefore, the judicial involvement in such circumstances raises questions of *halachic* validity, looking to the context in which the *get* was ordered and subject to strict scrutiny by rabbis.²³

Some rabbis have proposed a modern solution to securing a *get* through the use of prenuptial support agreements.²⁴ Prenuptial support agreements encourage husbands to give a *get*, which encourages secular law to aid *agunot*. However, this proposed solution remains an issue because some people believe that premarital agreements created to encourage the husband to give his wife a *get* undercut Jewish law and are coerced.²⁵ Furthermore, Jewish law, presumably, did not foresee the coming of the modern *agunot* problem in regard to *get* extortion²⁶ which arises from the unparalleled power that a husband has over his wife.²⁷ Extortion occurs when the husband consents to give his wife a *get* only if she agrees, for example, to give up her

²⁰ See U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”).

²¹ The Mishnah is an edited record of the complex oral Torah laws. It was published after the destruction of the Second Temple. *Yevamot* 14:1 is a rule derived from Deuteronomy 24:1. See *infra* note 123 and accompanying text. It says, “A man who wishes to divorce his wife is not like a woman who seeks divorce from her husband. A woman is divorced in accordance with her will or against her will. A man cannot divorce his wife except of his own free will.” Mishnah (*Yevamot* 14:1).

²² Zornberg, *supra* note 9, at 709.

²³ See generally Breitowitz, *supra* note 1.

²⁴ See *infra* Part II.B.

²⁵ See generally Asher Maoz, *The Impact of Jewish Law on Contemporary Legal Systems With Special Reference to Human Rights*, OLIR (Nov. 2004), at 2-3, https://www.olir.it/areetematiche/73/documents/maoz_milano2003.pdf (quoting Ch. Povarsky, *The Enforcement of a Jewish Marriage Contract in a Civil Court*, JEWISH L. REP. 1, 2-3 (2000) (“Jewish religion and law are a single entity. The *Torah* makes no dogmatic distinction between religious teaching and legal provisions. In addition, Judaism is an ethical system, teaching a moral way of life: Jewish law is a combined system, consisting of law, religion and morality. These three elements are intertwined and interrelated, and form one system, known as *Halacha*, which means a way of life.” (internal quotations omitted))).

²⁶ See *supra* note 10 and accompanying text.

²⁷ See *infra* Part III.

property rights, pay a large sum, or make concessions on child custody.²⁸

This Note will be divided into five parts. Part II of this Note will examine the historical and biblical implications of marriage and divorce in Judaism. In this part, I will explain and analyze the case law that led to the civil enforcement of the *ketubah* to obtain a *get* and the requirements to initiate the *get* process. Part III will discuss the historical *agunah* and how the issue has changed in the modern world. Part IV will consider the issues associated with the enforcement of the *ketubah* and the issuance of a *get* under the First Amendment. I will argue that the New York *Get* Law is constitutional under the Establishment and Free Exercise Clauses and discuss its function. Finally, Part V will conclude and summarize my arguments. It is important to understand why such an issue exists in the first place and why it cannot be easily eradicated. Questions of *halachic* validity arise because the Jewish courts and American courts are different.²⁹ Though a judge may issue an order compelling a husband to give his wife a *get*, the question of whether this is a *halachically* valid divorce agreement in the realm of Jewish law still remains a sticky topic. It may very well be that there is no real solution that can extinguish this problem.

II. HISTORICAL AND BIBLICAL IMPLICATIONS OF MARRIAGE AND DIVORCE

Judaism does not forbid divorce, as it is seen within the Torah as a common occurrence.³⁰ Furthermore, the Talmud explains that the “altar sheds tears” and that there is no need to continue a marriage in which one, or both, parties are miserable.³¹ Jewish marriage comprises

²⁸ See *infra* Part III.

²⁹ See generally Samuel J. Levine, *Jewish Legal Theory and American Constitutional Theory: Some Comparisons and Contrasts*, 24 HASTINGS CONST. L.Q. 441 (1997); see also generally Samuel J. Levine, *An Introduction to Legislation in Jewish Law, with References to the American Legal System*, 29 SETON HALL L. REV. 916 (1999).

³⁰ *Deuteronomy* 24:1-4.

³¹ The literal translation of Talmud is “study.” It is comprised of the documents that comment on the Mishnah. See *supra* note 21. It is a central text in Judaism and discusses Jewish history, law, and customs. There are two Talmuds: the Jerusalem Talmud and the Babylonian Talmud. The Babylonian Talmud is easier to comprehend, which is important since the Talmud is difficult to understand. See RABBI PERRY NETTER, *DIVORCE IS A MITZVAH: A PRACTICAL GUIDE TO FINDING WHOLENESS AND HOLINESS WHEN YOUR MARRIAGE DIES* 76-77 (2002) (“It is at the altar that God cries about divorce. God cries about divorce not because God is judging us as sinners, as so many people believe. God cries not because God is

two components: spiritual and practical.³² Judaism advances the notion that every bride and groom must spiritually reenact Adam and Eve's physical and spiritual "one flesh" and further reminds the couple of the importance to live by the laws of "Moses and Israel."³³ The practicality of marriage under Jewish law is that the marriage is executed by the *ketubah* and can include the terms of divorce.³⁴

A. Civil Enforcement of the *Ketubah* to Obtain a *Get*

The marriage ceremony is initiated when the couple signs a document called a *ketubah*, which is the Jewish marriage contract.³⁵ It is a document, traditionally signed by two witnesses, that is presented and belongs exclusively to the wife as her property.³⁶ The purpose of the *ketubah*, and the reason it is the sole property of the wife, is to deter the husband from exercising the unilateral power to secure a divorce.³⁷ However, the *ketubah* also defines the parameters of the new relationship as well as personal status of the couple.³⁸

It is possible for a wife to be successful in the civil enforcement of her *ketubah*. To help compel a husband to grant her a *get*, the interpretation of the *ketubah* must be made under neutral principles of contract law, rendering it not an entanglement of the courts with issues of religion.³⁹ There have been numerous attempts in some states to

disappointed in our failure, as so many rabbis teach. God cries because God, like, us, is in pain and cries with us."). This note refers to the Babylonian Talmud, hereinafter TALMUD.

³² See *infra* notes 33-34 and accompanying text.

³³ See generally Breitowitz, *supra* note 1.

³⁴ Breitowitz, *supra* note 1, at 343.

³⁵ See generally Breitowitz, *supra* note 1, at 343.

³⁶ Breitowitz, *supra* note 1, at 343; see also Jodi M. Solovy, *Civil Enforcement of Jewish Marriage and Divorce Constitutional Accommodation of a Religious Mandate*, 45 DEPAUL L. REV. 493, 495 (1996).

³⁷ See Breitowitz, *supra* note 1, at 347 (noting that one of the original purposes of a *ketubah* was to promise to give financial security by "the creation of a lien on all real or personal property . . . to secure . . . all obligations under the *ketubah*").

³⁸ The document shows deep commitment and responsibility. See TALMUD (*Megillah* 29a). It provides the new married couple with a framework for mutual respect that would enable trust, openness, and love. *Id.* It aids in the fulfillment of a goal—the building of a *Mikdash Me'at*, translated to a small temple. *Id.* ("God will dwell in the holy places [we] create, for they are miniature temples.").

³⁹ See *infra* Part IV.

force a husband to give a *get*, normally characterized as “specific performance” actions.⁴⁰

Cases such as *In re Marriage of Goldman*,⁴¹ *Avitzur v. Avitzur*,⁴² and *Minkin v. Minkin*⁴³ are examples of successful civil enforcement of the *ketubah*, compelling the husband to give a *get*. In these cases, the courts were able to compel a *get* through specific performance without infringing on the husband’s constitutional rights.⁴⁴ Specifically, these courts determined that ordering the husband to give the *get* as part of the litigants’ marital contract would not infringe on his First Amendment rights.⁴⁵ However, many Rabbinical authorities have held that a *get* given subsequent to a civil order is coercive in nature, thus, invalidating it, which leaves the wife with no true sense of achievement.⁴⁶

A question that has posed a great deal of inconsistency in the New Jersey courts is whether a court can compel a husband to submit to the jurisdiction’s *beth din*⁴⁷ to initiate the *get* proceeding without violating the Establishment Clause.⁴⁸ In *Minkin*,⁴⁹ the trial court ruled under the premise that giving a *get* is not a religious act, and forcing a

⁴⁰ In these types of cases, the parties have attempted to use the terms of the *ketubah*, enforcing it as a contract, to require the husband to act in accordance with the laws of “Moses and Israel,” compelling the husband to grant the *get*. This means that the litigants would attempt to have the *ketubah* specifically performed, ordering the husband to abide by its terms. As we will come to see, there are many issues with the use of the *ketubah* as a neutral contract principle, one of them being the required proof mandating the *ketubah* to give a *get*, without the courts having to settle the matter through interpretations of religious text.

⁴¹ 554 N.E.2d 1016 (Ill. App. Ct. 1990).

⁴² 446 N.E.2d 136 (N.Y. 1983).

⁴³ 434 A.2d 665 (N.J. Super. Ct. Ch. Div. 1981) (holding that compelling a husband to issue a *get* was a proper enforcement of the Jewish marriage contract).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ See generally Breitowitz, *supra* note 1.

⁴⁷ The translation for *beth din* is “house of judgment.” A *Beth Din* is the rabbinical court of Judaism, commonly comprised of three rabbis, that is empowered to rule on matters of Jewish law and who make sure that everything is done precisely in accordance to Jewish law, thus making the process a valid one. Breitowitz, *supra* note 1, at 326. Under Jewish law, if the husband fails to comply with the *beth din* order to give a *get*, it may issue a *seruv*—an order of contempt to a husband who refuses to comply. Breitowitz, *supra* note 1, at 326. When ordered, it is considered that the husband lifted his hand against the Torah, subjecting him to the punishment of being shunned for being non-compliant. See generally Breitowitz, *supra* note 1, at 326.

⁴⁸ U.S. CONST. amend. I.

⁴⁹ *Minkin*, 434 A.2d at 668.

husband to submit to the jurisdiction's *beth din* would "neither advance nor inhibit religion."⁵⁰

Over a decade later, after *Minkin*, the New Jersey trial court in *Aflalo v. Aflalo*⁵¹ held that compelling the husband to give a *get* would violate his right to free exercise of religion.⁵² It further stated that the Establishment Clause did not permit the court to compel the husband to submit to the *beth din* to initiate *get* proceedings.⁵³ The court rationalized its decision by stating that there was no value in a *get* when it was ordered by a civil court because such an act went against the *halachic* requirement that a *get* must be given willingly and without restraint for the wife to truly be free.⁵⁴

Similarly, in *Victor v. Victor*,⁵⁵ the Arizona court denied specific performance as a remedy, claiming that the *ketubah* contained "no specific terms describing a mutual understanding that [a] husband would secure a Jewish divorce."⁵⁶ Furthermore, courts in Florida, Pennsylvania, and Ohio have also refused to enforce the marital contract either because of the fear that doing so would excessively entangle the state with religious matters, violating the Establishment Clause, or because such an order would go beyond the court's jurisdiction.⁵⁷ In *Price v. Price*,⁵⁸ the Pennsylvania court denied the wife's request for specific performance, stating that forcing a religious divorce may not only violate the Establishment Clause but also the Free Exercise Clause.

⁵⁰ *Id.*

⁵¹ 685 A.2d 523 (N.J. Super. Ct. Ch. Div. 1996).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 530. The court in *Aflalo* questioned why the civil court should order such relief if the *beth din* would not do so. *Id.* It further believed that if the husband could be coerced into giving a *get*, the *beth din* ought to be the one coercing. *Aflalo*, 685 A.2d at 530. The general fear by this court was that "[by] coercing the husband, the civil court is, in essence, overruling or superseding any judgment which the *Beth Din* can or will enter, contrary to accepted First Amendment principles." *Id.*

⁵⁵ 866 P.2d 899 (Ariz. Ct. App. 1993).

⁵⁶ *Id.* at 902.

⁵⁷ See *Turner v. Turner*, 192 So. 2d 787 (Fla. Dist. Ct. App. 1966) (holding that ordering the husband to cooperate with a *get* was unenforceable statutorily but could be enforced as a simple contract), *cert. denied*, 201 So. 2d 233 (Fla. 1967); *Steinberg v. Steinberg*, No. 44125, 1982 WL 2446 (Ohio Ct. App. 1982) (holding the compelling of a *get* unenforceable); *Price v. Price*, 16 Pa. D. & C. 290, 291 (1932) (holding that the court did not have a right to force anyone to consent to any kind of divorce, civil or religious).

⁵⁸ *Price*, 16 Pa. D. & C. at 291. The court reasoned that "[t]he civil tribunals are . . . without authority to order one to follow the practices of his faith. This is a matter dependent entirely upon his conscience, or upon his religious belief." *Id.*

Despite the few courts that have denied the enforcement of the *ketubah* to give a *get*, other jurisdictions have allowed it.⁵⁹ When the wife in *Koepfel v. Koepfel*⁶⁰ brought an action against her husband to compel him to grant her a *get* pursuant to their civil divorce, the husband moved for dismissal, arguing that compulsion would violate his First Amendment rights.⁶¹ The New York court was not persuaded.⁶² Rather, it stated:

Complying with his agreement would not compel the defendant to practice any religion His appearance before the Rabbinate to answer questions and give evidence needed . . . is not a profession of faith. Specific performance . . . would merely require the defendant to do what he voluntarily agreed to do. . . . especially if it will bring peace of mind and conscience to one whom defendant must at one time have loved.⁶³

In *Margulies v. Margulies*,⁶⁴ another New York case, the husband openly agreed in court to give his wife a *get*, the stipulation being incorporated into a court order.⁶⁵ The husband ignored the order and, as a result, was held in contempt of court twice.⁶⁶ However, he was given the opportunity to either purge himself, subjecting him to fines and other penalties, or appear in front of the *beth din* and participate in the *get* proceedings.⁶⁷ He continued to fail to comply with the court order and was sentenced to fifteen days in jail.⁶⁸ *Margulies* is an interesting case because the court agreed with the husband's argument that the court did not have the power to force him to comply with religious proceedings; however, the court still imposed

⁵⁹ See *supra* notes 41-50 and accompanying text.

⁶⁰ 138 N.Y.S.2d 366 (Sup. Ct. 1954).

⁶¹ *Id.* at 373.

⁶² *Id.*

⁶³ *Id.* After the trial, the court held the marriage contract unenforceable and too indefinite to support a judgment for specific performance. See also *Koepfel v. Koepfel*, 161 N.Y.S.2d 694 (App. Div. 1957) (stating that the language of the agreement obligated the husband to give his wife a *get* only if it were necessary).

⁶⁴ 344 N.Y.S.2d 482 (App. Div. 1973).

⁶⁵ *Id.* at 484.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* The Appellate Division reversed the order of the fifteen days in jail, but it imposed the fines instead. *Margulies*, 344 N.Y.S.2d at 484.

the fines.⁶⁹ The importance of this case reflects the court's ability to be open to the enforceability of the *ketubah*, despite the court's lack of authority and desire to do so.⁷⁰ The court did this by imposing less severe penalties on the husband (i.e., using the court's authority to bypass the issue involving the *ketubah*).⁷¹

In some instances where there was no express agreement regarding a *get*, few courts have allowed an inference of an express agreement to give or receive a *get*.⁷² The courts' rationale behind the inference was that the parties performed their marriage through religious tradition and in "accordance with the laws of Moses and Israel," or through the execution of the *ketubah*.⁷³ A case from Canada, *Morris v. Morris*,⁷⁴ was the first case seeking an order from a court to compel a *get* from a reluctant husband on the grounds that the *ketubah* served as a "civilly enforceable contract to grant a *get* upon civil dissolution and entered an order of specific performance."⁷⁵ The question presented to the court was whether a woman was able to compel her husband to grant a religious divorce through the civil court in situations where the husband refused to give a *get*, thus prohibiting remarriage.⁷⁶ The court answered in the affirmative, holding that the *ketubah* was an enforceable contract that allowed for specific performance.⁷⁷ Despite its uphill and inconsistent battle, the *ketubah* has been used to uphold a *get* and has been accepted by many courts.⁷⁸

In a New Jersey case, *Burns v. Burns*,⁷⁹ the wife was granted a civil divorce judgment but sought an order that would compel her ex-husband to issue a *get*.⁸⁰ The court, which had relied on *Minkin*,⁸¹ held that whenever there was a case of civil dissolution, the *ketubah* would

⁶⁹ *Id.*

⁷⁰ See generally Breitowitz, *supra* note 1.

⁷¹ *Margulies*, 344 N.Y.S.2d at 484. Although the court did not uphold the enforcement of the *ketubah* to give a *get*, it upheld the fines based on procedural grounds, thus imposing a less severe penalty for the husband's non-compliance. *Id.*

⁷² Breitowitz, *supra* note 1, at 343.

⁷³ Breitowitz, *supra* note 1, at 343.

⁷⁴ Breitowitz, *supra* note 1, at 343 (citing 36 D.L.R.3d 447, *rev'd*, 42 D.L.R.3d 550 (1973)).

⁷⁵ Breitowitz, *supra* note 1, at 343.

⁷⁶ Breitowitz, *supra* note 1, at 343.

⁷⁷ Breitowitz, *supra* note 1, at 344. The decision was later reversed by the Manitoba Court of Appeals, and the wife did not seek further review. Breitowitz, *supra* note 1, at 344.

⁷⁸ See *supra* notes 41-50 and accompanying text.

⁷⁹ 538 A.2d 438 (N.J. Super. Ct. Ch. Div. 1987).

⁸⁰ *Id.*

⁸¹ *Minkin*, 434 A.2d at 668.

impose an obligation to dissolve the marriage.⁸² Thus, the court compelled the parties to “submit [to] the jurisdiction of the Jewish ecclesiastical court, the ‘Bet[h] Din,’ and initiate the procedure to secure a ‘get’ [was] within the equity powers of [that] court.”⁸³ In denying the husband’s free exercise claim, the court, in dicta, held that a “true religious belief is not compromised as the amount of money offered or demanded is increased.”⁸⁴ The court further noted that “[t]his so-called ‘offer’ is akin to extortion.”⁸⁵ Although the court did not explicitly direct an order to the husband to initiate the *get*, it did order him to submit to the rabbinical court and initiate the procedure based on an inference of an express agreement.⁸⁶

B. Securing a *Get* Through Prenuptial Support Agreements

Prenuptial support agreements have been another indirect mechanism in helping secure a *get*.⁸⁷ Even though the *ketubah* generally spells out the promises a husband makes toward his wife, Jewish law mandates that a husband be obligated to support his wife

⁸² *Burns*, 538 A.2d at 438.

⁸³ *Id.* at 441 (citation omitted).

⁸⁴ *Id.* at 440. By examining the testimony offered, the court reasoned that the husband’s refusal to give a *get* was based not on his religious beliefs but rather on monetary gain. *Id.*

⁸⁵ *Id.* (citation omitted).

⁸⁶ *Burns*, 538 A.2d at 438.

⁸⁷ *See* Breitowitz, *supra* note 1, at 347.

These promises, all of which are made by the husband to the wife, include:

- (1) a declaration that he has betrothed his wife in accordance with the laws of Moses and Israel;
- (2) a promise that he will honor, support, and work for his spouse in accordance with the custom of Jewish husbands;
- (3) an obligation to provide food, clothing, and intimacy in accordance “with universal custom”;
- (4) an agreement to pay an alimony lump sum of 200 silver *zuz* in the event of divorce or death;
- (5) an agreement to pay a stipulated monetary value for property that the wife brings into the marriage;
- (6) a promise to pay an additional alimony sum in excess of the statutory minimum; and
- (7) the creation of a lien on all real or personal property, whether presently owned or after-acquired, to secure payment of all obligations under the *ketubah*.

See Breitowitz, *supra* note 1, at 347 (footnotes omitted).

both physically and financially.⁸⁸ In Israel, rabbinical courts have the authority to rule on matters regarding marital support because they have broad authority over such issues.⁸⁹ These courts create pressure on a reluctant husband to execute a *get*.⁹⁰ Forcing high money judgments puts pressure on the husband; however, because the only way to stop the support obligation would be through dissolving the marriage, high money judgments act as a major factor in deterring a husband from denying his wife a *get*.⁹¹

In prenuptial agreements, the couple agrees to “submit to the jurisdiction of a rabbinical court in the event of marital dissolution, and to abide by contractual provisions that either encourage or require the delivery or acceptance of a *get*.”⁹²

The prenuptial agreement has numerous advantages: it works preemptively rather than after the problem has already arisen; it can be uniformly implemented on a national level; and finally, while prenuptial agreements are designed to be legally enforceable, many rabbis hail the fact that they encourage spouses to resolve their problems in rabbinical, not secular, courts.⁹³

Thus, in an attempt to incentivize husbands to give their wives a *get*, some rabbis have drafted prenuptial agreements.⁹⁴ Specifically, the Rabbinical Council of America (hereinafter “RCA”) endorsed the prenuptial agreement drafted by Rabbi Mordechai Willig, which makes it an obligation for a husband to make fixed payments to his wife beginning from separation and ending once he grants her the *get*.⁹⁵

⁸⁸ SHULCHAN ARUKH, *Even HaEzer* 70:1. The Shulchan Aruckh is known as the code of Jewish law and is consulted by many Jewish communities. Once a marriage is dissolved through divorce, Jewish law does not recognize any obligations for support, other than the one-time payment of 200 *zuz*.

⁸⁹ See generally Yehiel S. Kaplan, *Enforcement of Divorce Judgments in Jewish Courts in Israel: The Interaction Between Religious and Constitutional Law*, MIDDLE EAST L. & GOVERNANCE 4 (2012).

⁹⁰ *Id.* at 22.

⁹¹ *Id.*

⁹² Zornberg, *supra* note 9, at 768.

⁹³ Zornberg, *supra* note 9, at 768.

⁹⁴ See *infra* note 95 and accompanying text.

⁹⁵ *A Powerful Advance to Prevent Using Jewish Law to Cause Human Suffering*, RABBINICAL COUNCIL AM. (Sept. 22, 2016), <http://www.rabbis.org/news/article.cfm?id=105862>. Here, the RCA issued a statement naming Rabbi Willig’s *halachic* prenuptial agreement as an “effective way to prevent *get*-abuse.” *Id.*

Preuptial agreements create no *halachic* concerns.⁹⁶ Because the husband refuses to grant the *get*, thereby keeping the couple religiously married, he subjects himself to the Jewish law that a husband must support his wife for as long as they are married.⁹⁷ Rabbi Kenneth Brander stated, “All we’re doing is actualizing in very definitive terms what his responsibilities are as he is not willing to change that [marital] status quo and give the *get*.”⁹⁸

Though prenuptial agreements have many advantages, they might have some disadvantages.⁹⁹ Like any law passed, it is only as effective as the officials making the effort to enforce it.¹⁰⁰ Here, although the prenuptial agreement is not one mandated by Jewish law, the solution to the *agunah* problem (i.e., using a prenuptial agreement as a vehicle to receive a *get*) can only truly be effective if the community rabbis agree to use them.¹⁰¹ Today, some rabbis agree to perform the marriage ceremony on the condition that a prenuptial agreement between the couple is executed.¹⁰² However, most rabbis disagree with the notion of a prenuptial agreement altogether, fearing that executing one would lead to marital conflicts revolving around trust.¹⁰³

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ Zornberg, *supra* note 9, at 769 (quoting Telephone Interview with Kenneth Brander, Orthodox Rabbi, Chair, RCA Committee on prenuptial agreements (Feb. 16, 1994)).

⁹⁹ Ben Sales, *Orthodox Rabbis’ Group Mandates Prenup To Prevent ‘Chained’ Wives*, JEWISH TELEGRAPHIC AGENCY (Sept. 23, 2016, 5:48 PM), <https://www.jta.org/2016/09/23/news-opinion/united-states/orthodox-rabbis-group-mandates-prenup-to-prevent-chained-wives>. Disadvantages arise because, as mentioned, there are rabbis that oppose the notion of a *halachic* prenuptial and actively discourage them from getting one. *See id.* Those rabbis who are not opposed to the prenuptials, like Rabbi Mark Dratch, believe that it would be difficult to enforce such a resolution because rabbis who are pro-prenuptial are not present to execute every wedding. *See id.*

¹⁰⁰ *Id.* (explaining that some rabbis “either don’t require the prenup or actively discourage couples they are marrying from signing one.”).

¹⁰¹ *Id.* (“The Rabbinical Council of America will mandate its member rabbis to require couples to sign a prenuptial agreement ensuring that husbands will not withhold a ‘get,’ or Jewish writ of divorce, from their wives.”).

¹⁰² Sales, *supra* note 99 (“Among some 200 mostly American Orthodox rabbis surveyed earlier [in the year 2016] by the Jewish Orthodox Feminist Association, approximately 75 percent already require couples to sign the prenup before getting married.”).

¹⁰³ *See* Zornberg, *supra* note 9, at 768. Some rabbis believe that the fear of prenuptial agreements leading to dissolution of marriage is something that can be overcome if more rabbis explained to marrying couples that the point of the prenuptial agreement was evidence of love and responsibility toward the one another in the event that a change in the relationship would occur. *See* Zornberg, *supra* note 9, at 768 (“If prenuptial agreements would be signed routinely at every wedding, we could wipe out this problem entirely.” (citation omitted)).

As discussed, the prenuptial agreement was created in the effort to discourage a husband from turning his wife into an *agunah*.¹⁰⁴ Furthermore, it was also created with the goal to stop the wife from becoming a victim of *get* extortion.¹⁰⁵ It protects the wife from a husband who abuses Jewish law as a mechanism of extorting money, property, and custody through the wife during the divorce proceedings.¹⁰⁶ It is important to conceptualize that a prenuptial agreement does not expressly grant a *get* at a time of dissolution, as that would compromise the husband's free will.¹⁰⁷ A prenuptial agreement simply enforces the husband's obligation to support his wife, something expressly provided for in the *ketubah*.¹⁰⁸ Today, many women's rights activists and some rabbis are pushing for more *halachic* solutions.¹⁰⁹ Though a prenuptial agreement may have some drawbacks and is not ideal for some, it is a step toward a solution to help free the *agunot*.¹¹⁰

Making a *get* invalid relies upon the finding that it was executed under any form of duress or compulsion.¹¹¹ An issue that arises once a *get* has been deemed executed under duress or compulsion is whether the penalty was contractually assumed.¹¹² Jewish law has recognized many situations where a husband could divorce his wife through compulsion.¹¹³ Though the idea of a

¹⁰⁴ See discussion of this concept *infra* Part III.

¹⁰⁵ See *infra* Part III.

¹⁰⁶ See *infra* Part III.

¹⁰⁷ A *get* must be given under the husband's free will in order to constitute a valid divorce under Jewish law. See *supra* note 22 and accompanying text.

¹⁰⁸ See *infra* note 113 and accompanying text.

¹⁰⁹ See *infra* note 186 and accompanying text.

¹¹⁰ See *supra* notes 99-103 and accompanying text.

¹¹¹ The invalidity of a *get* is called a *get meusah*. This is a big obstacle for any woman seeking a religious divorce, since a *get* must be given with the husband's consent and under his free will. As discussed in the previous paragraphs, what plays a major role in whether this obstacle can be overcome is based on civil enforcement and prenuptial agreements. However, issues still arise. Generally, civil courts have no say past the civil divorce proceeding. A civil court may have the authority to compel a reluctant husband to grant his wife a *get*, but the husband may still go before the Jewish court and say that the only reason he is there is because of compulsion of that civil court, making the religious divorce proceeding technically invalid. See generally TALMUD, Gittin 88b.

¹¹² See Breitowitz, *supra* note 1, at 331 n.73. The idea that transactions entered under duress are voidable is similar to American law. See Breitowitz, *supra* note 1, at 331 n.73 ("The fact that duress is recognized as a basis for the invalidation of a *get*—such a *get* is void, not merely voidable—underscores the crucial importance of consent and the problematic nature of judicial coercion.").

¹¹³ Breitowitz, *supra* note 1, at 333 n.80.

compelled *get* goes against the rule that a *get* must be granted without duress or compulsion, the Talmud briefly states that if the husband is forced until he states, “I am willing,”¹¹⁴ then it is to be considered a valid divorce decree. Although the consent must be formally expressed, it can be encouraged through applying any type of psychological, financial, or physical pressure.¹¹⁵ Another situation where compelling a *get* would remain valid is when the event did not arise from the purpose of influencing a *get*.¹¹⁶ A contemporary example would be a “separation agreement where one spouse agrees to forego property or custody rights in exchange for a *get*.”¹¹⁷ However, it seems that under these circumstances, by granting the *get* and holding it valid, the husband confers a benefit simply because he would be escaping financial burdens that would have been his responsibility had the *get* not been executed.¹¹⁸ Financial burdening

The Talmud enumerates a number of specified grounds that enable a woman to petition for divorce, and later authorities have supplemented the list:

1. If her husband becomes afflicted with certain loathsome diseases after marriage or even if the disease predated the marriage but, as of the date of the marriage, its existence was unknown to her.
2. Impotence or sterility.
3. Failure to provide material support.
4. Refusal to cohabit.
5. Physical or verbal abuse.
6. Husband forces wife to violate religious law.
7. Husband is engaged in certain occupations that are physically repulsive – dung gathering, tanning hides.
8. Husband becomes an apostate.
9. Habitual infidelity.

Breitowitz, *supra* note 1, at 333 n.80.

¹¹⁴ TALMUD, Yebamoth 106a, https://www.halakhah.com/yebamoth/yebamoth_106.html.

¹¹⁵ *Id.* “He is subjected to pressure until he says, ‘I am willing.’ And so you find in the case of letters of divorce for women: The man is subjected to pressure until he says, ‘I am willing.’” *Id.* (footnotes omitted).

¹¹⁶ Breitowitz, *supra* note 1, at 335. The category arose under the Spanish authority, *Rivash*. This case was about a person who was imprisoned for not paying a debt, an event completely unrelated to the *get*. His wife’s relatives had offered to help with the debt, thus releasing him from prison, conditioned upon him giving his wife a *get*. Here, there was no objection to the *get*, “for he was not seized in order to [compel] him to divorce [his wife] but on account of his debt; the *get* is not coerced but [the product] of free will.” Breitowitz, *supra* note 1, at 335.

¹¹⁷ *Id.*

¹¹⁸ See RESTATEMENT (SECOND) OF CONTRACTS §§ 174-76 (2018). As an example, imagine someone threatening to drown another person unless he or she agrees to the contract versus offering to save an already drowning person if he or she agrees to the contract. In the former, any contract created under such coercive circumstances would be *void* by means of duress. In

undoubtedly is a factor in what gave rise to the modern *agunah* problem—*get* extortion.¹¹⁹

III. THE AGUNAH PROBLEM

A Jewish woman who seeks a divorce from her husband must often times pay for her freedom to encourage her husband to give her a *get* and exercise his free will when doing so.¹²⁰ She may ultimately give up her rights to child support, marital property, or burden herself financially to rid herself from the bonds of a failed marriage.¹²¹ In a worst-case scenario, the wife may still unsuccessfully persuade her recalcitrant husband and remain handicapped by *halacha*, turning her into a lifelong *agunah*.¹²²

A. Religious Implications of the *Agunah* Problem

The requirement that a husband grant his wife a *get* comes from Deuteronomy, stating:

When a man taketh a wife, and marrieth her, then it cometh to pass, if she find no favour in his eyes, because he hath found some unseemly thing in her, that he writeth her a bill of divorcement, and giveth it in her hand, and sendeth her out of his house.¹²³

This verse gives a man the authority to divorce his wife at his own discretion and, in time, many Jewish scholars have sought to protect women in these types of divorce proceedings by providing *takkanot*.¹²⁴ Today, this means that a husband must voluntarily execute the *get*, and the wife must voluntarily accept it.¹²⁵ *Takkanot* would further allow either spouse to initiate the proceedings for divorce by summoning an

the latter, the contract would be considered *voidable*, because it depends on whether the alleged conduct was considered improper.

¹¹⁹ See *infra* Part III.B.

¹²⁰ See generally Breitowitz, *supra* note 1.

¹²¹ Breitowitz, *supra* note 1.

¹²² See *infra* Part III.B.

¹²³ Deuteronomy 24:1; see also Zornberg, *supra* note 9, at 708.

¹²⁴ *Takkanot* is “a legislative enactment by competent rabbinical authority to ameliorate the effects of an unduly harsh Biblical or Talmudic law or to enhance the social welfare.” See Breitowitz, *supra* note 1, at 317 n.13.

¹²⁵ Zornberg, *supra* note 9, at 708.

appearance before the *beth din*.¹²⁶ Lastly, where the rabbinic authorities decide that a religious divorce is necessary, the *beth din* can compel the husband to give it.¹²⁷

There are restrictions placed on rabbinical courts by Jewish law.¹²⁸ First, the husband retains the power to give a *get*, and, absent his consent, a rabbinical court cannot simply declare her divorced.¹²⁹ Second, a *get* must be given under the husband's own free will for it to be deemed valid under *halachic* laws.¹³⁰ However, the issue is not one of compulsion, but rather the issue is whether rabbinical courts can enforce such an order given its limitations.¹³¹

An *agunah* is a woman that is "chained" to what essentially is a dead marriage.¹³² Although she may have the desire to end her marriage and move on with her life, she is unable to do so because she has not been released under religious law.¹³³ According to Jewish law, a woman cannot remarry unless there is clear evidence that her husband died or gave her a *get*.¹³⁴ In the past, most women fell victim to disappearing husbands.¹³⁵ Husbands who were businessmen and travelled a lot were killed and their bodies were disposed of.¹³⁶ Husbands who were soldiers were sent off to war with the possibility to never return.¹³⁷ This led to the rise of the main categories of *agunah* today.¹³⁸ A wife becomes an *agunah* when:

1. A man divorces his wife in the civil courts and possibly even remarries, but refuses to give his wife a *get*, either because of malice or greed. All too

¹²⁶ Zornberg, *supra* note 9, at 708.

¹²⁷ Zornberg, *supra* note 9, at 709.

¹²⁸ See *infra* notes 129-130 and accompanying text.

¹²⁹ However, there are some rabbis, such as Rabbi Moshe Antelman, who believe a *beth din* may give a *get* under its own discretion in certain scenarios. Zornberg, *supra* note 9, at 772.

¹³⁰ See *supra* note 123 and accompanying text.

¹³¹ See *infra* note 141.

¹³² See *infra* note 138 and accompanying text.

¹³³ See *supra* note 123 and accompanying text.

¹³⁴ TALMUD, Gittin 3a. The deliverance of a *get* has a witness requirement. *Id.*

¹³⁵ Robert Gordis, *Agunot: A Different Kind of Hostage*, MY JEWISH LEARNING, <https://www.myjewishlearning.com/article/agunot-a-different-kind-of-hostage/> (last visited Aug. 29, 2018). Dr. Robert Gordis taught over half a century at the Jewish Theological Seminary of America.

¹³⁶ See *id.*

¹³⁷ See *id.*

¹³⁸ See *id.*

often the husband tries to extort money from this wife in exchange for the *get*.

2. A man disappears without leaving a trace, so that he is not available to issue the divorce¹³⁹
3. The man is lost in military action or dies in a mass explosion. . . .¹⁴⁰

The *agunah* problem has always been a big challenge for Jewish authorities.¹⁴¹ Scholars of the Talmud have recognized the devastating outcome for a woman with the status of *agunah* and have created various *halachic* “leniencies” in an attempt to lessen the problem.¹⁴² However, as one may come to find out, the *agunah* problem is nothing new.¹⁴³ The problem arises given the contractual nature of Jewish marriage and divorce.¹⁴⁴ Interestingly, although the Talmud discusses the issues involving husbands who disappear and various “leniencies,” the Talmud does not offer annulment as a solution for spousal abandonment.¹⁴⁵

Because the Jewish perception of the contractual nature of marriage and divorce, the issue involving spousal abandonment and the refusal of a husband to participate under his own free will causes

¹³⁹ MICHAEL J. BROYDE, MARRIAGE, DIVORCE, AND THE ABANDONED WIFE IN JEWISH LAW: A CONCEPTUAL UNDERSTANDING OF THE AGUNAH PROBLEMS IN AMERICA 6 (2001) (“With the movement of large segments of the Jewish community from Eastern Europe to America, a new form of *agunah* problem arose. A husband would emigrate to America, promising to send for his wife when he accumulated enough money to support her, and would then disappear. . . . As a general proposition. . . . [a solution] declaring the husband to be dead were few and far between.”). Under these circumstances, the rabbinical authorities started to prompt men who traveled to either write out a *get* before leaving or give authority to the *beth din* to do so.

¹⁴⁰ Gordis, *supra* note 137 (“During the Russo-Japanese war or 1905, some great Russian rabbis visited the troops before they left for the front and persuaded the Jewish soldiers to issue . . . a conditional divorce so as to free their wives from the status of *agunah* should the men fail to return.” (internal quotations omitted)).

¹⁴¹ This is an issue that many Jewish authorities grapple with because, as *halacha* mandates, giving a *get* is a direct right given to men. *See generally* KENNETH SEESKIN, JEWISH MESSIANIC THOUGHTS IN AN AGE OF DESPAIR (2012). Furthermore, the law cannot be rewritten or removed because of the codification of the thirteen core principles of Jewish belief by scholar and philosopher, Maimonides. *See generally id.* One of the codified principles is that the Torah is timeless and unchanging. *See generally id.*

¹⁴² TALMUD, Gittin 3a. Generally, two witnesses are required when verifying marital status. *See id.* With this law of “leniency” in place, the rabbis hold that one witness’s testimony is enough with regard to the *get*. *See id.*

¹⁴³ *See infra* Part III.B.

¹⁴⁴ Compare it to transactions that involve other contractual obligations—issues that arise would implicate parties’ rights if one party wished to withdraw from the contract.

¹⁴⁵ *See generally* TALMUD, Gittin 3a.

there to be no a solution to this problem.¹⁴⁶ While it seems that the solutions offered are the best that the rabbinic authorities can do to reach just results, the rise of the modern *agunah* problem shows that these solutions are not as just and successful as one may have hoped them to be.¹⁴⁷

B. The Modern *Agunah* Problem and its Developments

Rabbinic authorities have been conscious of the unjust results that may arise during religious divorce proceedings, as today the *get* has been used as a major vehicle for extortion.¹⁴⁸ Because it is uncommon for people to disappear out of thin air, the *agunah* problem arises through the abuse of the *get* process.¹⁴⁹

In prior centuries, when Jews lived in very closely-knit, interdependent communities, extortion or refusal of the *Get* was almost unheard of, because the price the man would pay as an outcast in his community simply prevented such action.¹⁵⁰

With the rise of mobility and modern technology, which makes communication easier, it is less challenging to find people who have disappeared and verify other important information.¹⁵¹ However, it can be argued that the modern *agunah* problem bloomed out of the rise in mobility, and perhaps the loosening of community ties in the modern world.¹⁵² Today, husbands refuse to grant their wives a divorce, even

¹⁴⁶ See *supra* note 113. The *ketubah* signed by the couple on their wedding day consists of promises that are made to the wife by the husband. These promises are contractual.

¹⁴⁷ The fact that *agunah* women are still prevalent in the modern world and there are husbands that still refuse to issue a *get* is evident enough that the proposed solutions, such as the prenuptial agreements, are not as successful in their entirety. See *supra* notes 99-103 and accompanying text. This is especially important because there are rabbis who refuse to acknowledge the prenuptial as a *halachically* valid solution. See *supra* notes 99-103 and accompanying text.

¹⁴⁸ Alexandra Leichter, *The Effect of Jewish Divorce Law on Family Law Litigation*, IAFL (Oct. 1, 2009), at 9, http://www.iafl.com/cms_media/files/the_effect_of_jewish_divorce_law_on_family_law_litigation.pdf?static=1 (“Rabbis have not been unmindful of this inequity in Jewish divorce law and the potential for major extortion.”).

¹⁴⁹ See generally BROYDE, *supra* note 139.

¹⁵⁰ Leichter, *supra* note 148.

¹⁵¹ BROYDE, *supra* note 139, at 7-8 (“Modern technology has made it easy to communicate. People who wish to be found are found. Death is much more easily verifiable, and facts are generally clearer.”).

¹⁵² See generally BROYDE, *supra* note 139, at 7-8.

if it clashes with a rabbinical order to do so.¹⁵³ Ultimately, they are motivated by sheer spite, unhappiness with divorce settlements, or custody agreements.¹⁵⁴ This leads the recalcitrant husband who uses the *get* as a bargaining chip or leverage against his wife.¹⁵⁵

In more recent years, rabbinical courts have not accounted for the vast significance of interference when they see husbands purposefully hold their wives hostage to a marriage by refusing her the *get*.¹⁵⁶ On a comparative level, the Israeli system combines secular law and religious law.¹⁵⁷ This permits the rabbinic courts to “order imprisonment, [revoke] driver’s and professional license, and [impose] other penalties . . . on a ‘recalcitrant’ husband, who refuse[s] to give his wife a *Get*.”¹⁵⁸ Any rabbinical court, with the exception of the rabbinical courts in the State of Israel, functions similarly to arbitration courts in the United States.¹⁵⁹

Rabbinical courts in the United States possess the authority to compel a husband in giving his wife a *get*.¹⁶⁰ However, the enforcement issues still persist.¹⁶¹ Unlike the courts in the State of Israel, rabbinical courts in the United States cannot use coercive methods at their disposal to force a recalcitrant husband to comply, nor can a court in the United States enforce coercive judgments set forth by the rabbinical courts.¹⁶² Thus, because Israel’s rabbinical court

¹⁵³ BROYDE, *supra* note 139, at 7-8.

¹⁵⁴ BROYDE, *supra* note 139, at 73.

¹⁵⁵ *See generally* BROYDE, *supra* note 139, at 73.

¹⁵⁶ As mentioned before, Rabbis have proposed solutions, i.e., prenuptial support agreements. Despite the interference, not all solutions have been accepted and many Rabbis still refuse to interfere with the husband’s discretion in granting a *get*. *See supra* note 103 and accompanying text.

¹⁵⁷ Leichter, *supra* note 148, at 10.

¹⁵⁸ Leichter, *supra* note 148, at 10; *see also* Yair Ettinger, *Israel’s High Court Invokes Medieval Punishment for Husbands Who Refuse Jewish Ritual Divorce*, HAARETZ (Mar. 01, 2017, 4:23 PM), <https://www.haaretz.com/israel-news/.premium-1.774684>. Israel’s rabbinical court, in a 5-2 vote, held that aside from pursuing punitive charges, it can shun the husband and subject him to ostracizing by the community if he denies his wife a divorce. *Id.* The court held that its authority was not exceeded when it publicly shamed those husbands and urged the community to stay away from “get refusers.” *Id.* It further publicly announced to not trade or pray with those who refused to give a *get* “until they set their wives free.” *Id.*

¹⁵⁹ Leichter, *supra* note 148, at 10.

¹⁶⁰ Although the authority really depends on morals and applying community pressure, rabbinical courts in the United States do not have actual authority like Israeli courts do.

¹⁶¹ *See infra* note 162 and accompanying text.

¹⁶² BROYDE, *supra* note 139, at 9 (“The single most significant reason is that Jewish law has been emasculated since the emancipation. Jewish law courts have been deprived of juridical authority and are powerless to impose obligations on individuals. They have only moral and

prefers to order payments for the wife's support as a way to push the husband toward giving her a *get*, it rarely uses coercive force against a noncomplying husband.¹⁶³

In its most recent case, the Rabbinical Court of Jerusalem attempted a settlement between the estranged couple, even though the case was active in America's civil court.¹⁶⁴ The couple lived in New York and filed for divorce in the *Beth Din* of America.¹⁶⁵ However, the husband refused to appear before the rabbinical court.¹⁶⁶ The court issued a *seruv* against him and banned members of the synagogue from getting involved in any type of economic or social transaction with him.¹⁶⁷ Despite the sanctions, he still refused to give her a *get*; the wife then contacted organizations in Israel for assistance.¹⁶⁸ The court held that jurisdiction over the religious divorce proceedings was proper because the husband was a citizen and resident; therefore, the court issued a ban because he was a flight risk and could have potentially fled the country leaving the wife "chained" in a marriage against her will.¹⁶⁹

In another recent Israeli case, the rabbinical court sentenced a man to five years in prison because he refused to give his wife a *get*.¹⁷⁰ The Israeli rabbis have implemented a "policy of stringent

ethical authority. This situation makes the emasculated Jewish law courts impotent, and vastly exacerbates the modern agunah problem in America.").

¹⁶³ BROYDE, *supra* 139, at 10 ("They are inclined to require counseling, therapy, mediation, and other techniques of reconciliation as alternatives to divorce, particularly when there are children in the marriage.").

¹⁶⁴ Jeremy Sharon, *Rabbinical Court Infringes on U.S. Civil Jurisdiction in 8-Year Agunah Case*, JERUSALEM POST (July 14, 2017, 2:50 PM), <http://www.jpost.com/Diaspora/Rabbinical-court-infringes-on-US-civil-jurisdiction-in-8-year-agunah-case-499686> ("Lawyers for the aguna[h] say that the case is a classic example of the problematic phenomenon of rabbinical courts trying the right of a woman to get divorced to her acceptance of a financial settlement, essentially acquiescing to an even abetting the extortion of women.")

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* Her husband was a citizen and resident of Israel; thus, contacting these organizations made them aware of her uphill battle with her husband regarding their religious divorce and would allow the rabbinical courts to get involved. *See* Sharon, *supra* note 164. Consequently, leading up to the rabbinical court banning the husband from leaving Israel. *See* Sharon, *supra* note 164.

¹⁶⁹ Sharon, *supra* note 164. The court further stated that it lacked jurisdiction over matters regarding child support and division of assets because these issues were pending before the civil courts in the United States. *See* Sharon, *supra* note 164.

¹⁷⁰ JTA, *Israeli Man Gets 5 years in Prison for Refusing Wife a Divorce*, FORWARD (July 15, 2016), <http://forward.com/news/breaking-news/345201/israeli-man-gets-5-years-in-prison-for-refusing-wife-a-divorce/>.

punishments against husbands.”¹⁷¹ This policy included publishing the husbands’ names, where they worked, and other details that would identify them.¹⁷² The objective behind these actions is to publicly humiliate the husbands into freeing their wives.¹⁷³ Consequently, the husband still refused to comply with the court’s orders to give his wife a *get*, which led the court to its decision—issue an injunction that placed a travel ban, order him to surrender his passport, and freeze all of his bank accounts.¹⁷⁴ The judges responded with the following statement:

Imprisoning a person is not easy and is in fact an extraordinary and harsh measure. But the husband leaves the court no other alternative as outweighing the pain that the sentence involves in the Halacha [Jewish law] given to the sages of Israel, which requires the court to do everything within its power to redeem a woman from her chains.¹⁷⁵

Taking away a noncomplying husband’s liberty may be a harsh punishment, but perhaps by placing him in physical chains, it will help him understand the consequences of his actions and how detrimental his actions can be when he chooses to keep his wife religiously chained.¹⁷⁶ The importance of this Israeli decision lies in the rabbinical courts’ acknowledgment that religious chains placed on an *agunah* can be equally limiting as placing a person in physical chains.¹⁷⁷

In one of most extreme cases known, a seventy-year-old Brooklyn rabbi, Mendel Epstein, was convicted for ten years for initiating and leading a violent coalition of Jewish men who would use coercive and violent means to force husbands into giving their wives a *get*.¹⁷⁸ Although the laws in the United States prohibit kidnapping,

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.* In the case, the panel of judges stated that “the husband [left] the court [with] no other alternative.” *Id.*

¹⁷⁴ JTA, *supra* note 170. Despite all of this, the husband stated, “I will never give her a *get*. Even if she gives me back the apartment and the property, my tefillin and prayer shawl, she will not receive a *get*.” JTA, *supra* note 170. To this, the rabbis responded by suspending his arrest for 10 days, hoping that this would encourage him to let her go. See JTA, *supra* note 170.

¹⁷⁵ JTA, *supra* note 170 (alteration in original).

¹⁷⁶ See generally JTA, *supra* note 170.

¹⁷⁷ See generally JTA, *supra* note 170.

¹⁷⁸ Reuven Blau, *Brooklyn Rabbi Gets 10 Years for Leading a Gang of Men Who Beat Up Jewish Husbands Reluctant to Divorce Their Unhappy Wives*, N.Y. DAILY NEWS (Dec. 15,

torture, and assault, some rabbis further believe that the actions of Epstein and his “gang” should be heavily sanctioned for they were inhumane.¹⁷⁹ Although these acts were inhumane and illegal, the arrests brought “national attention [to] the anguished situation . . . and perhaps will help put legal pressure on husbands who have separated from their wives but refuse to allow them to re-marry.”¹⁸⁰ Though Epstein is no martyr, his drastic actions further exposed the great need for some sort of systematic solution that is deeply rooted in *halachic* laws.¹⁸¹

In more recent years, the *agunah* problem has made its way up to the surface.¹⁸² The inevitable question frequently pondered, that does not necessarily have a definitive answer, is whether there is a possible solution.¹⁸³ Unfortunately, secular law cannot do much for women in these situations.¹⁸⁴ The granting of a *get* is completely a religious matter; thus, secular courts can only go as far as making a judgment that it cannot necessarily and specifically enforce.¹⁸⁵ Many active organizations advocate for the rights of *agunots* by taking action such as public shaming.¹⁸⁶

2015, 3:33 PM), <http://www.nydailynews.com/new-york/rabbi-10-years-beating-jewish-men-resisting-divorce-article-1.2466800>. Rabbi Epstein is commonly referred to as “The Prodfather,” for he charged wives a large sum of money to torture their husbands into complying. *Id.* Some of these torturous acts included kidnapping, beating, handcuffing, and electrocuting them with prods until the husbands agreed. *Id.*

¹⁷⁹ See generally Tzvi Ben-Gedalyahu, *FBI Arrests NY Rabbis for Beating Husbands Who Refuse Divorce*, JEWISH PRESS (Oct. 10, 2013), <http://www.jewishpress.com/news/fbi-arrests-ny-rabbis-for-beating-husbands-refusing-divorce/2013/10/10/>.

¹⁸⁰ *Id.*

¹⁸¹ See generally *id.*

¹⁸² With the help of Jewish rabbis, like Epstein, who have acknowledged the problem and organizations that have and continue to take a proactive stance on this issue. See *infra* note 188 and accompanying text.

¹⁸³ See *infra* Part IV. Indubitably, there is a clash between civil law and *halachic* law. Ultimately, the clash stems from the need to protect First Amendment rights while offering help to *agunot* under civil law can and the need to preserve the text of the Torah by religious adherents.

¹⁸⁴ See *infra* Part IV.

¹⁸⁵ See *infra* Part IV.

¹⁸⁶ A prominent New York-based nonprofit organization called, Organization for the Resolution of Agunot (ORA), advocates for the rights of the *agunot* and supports a universal adoption of the Jewish prenuptial agreement. Mark Oppenheimer, *Religious Divorce Dispute Leads to Secular Protest*, N.Y. TIMES (Jan. 3, 2011), <http://www.nytimes.com/2011/01/04/us/04divorce.html>. This organization stages protests in front of a noncomplying husband’s (sometimes a noncomplying wife who refuses to accept the *get*) home or place of work and actively raises awareness by forcing financial and legal pressures onto him (or her). See generally *id.*; see also Doree Lewak, *An Orthodox Woman’s 3-Year Divorce Fight*, N.Y. POST

Abolishing the *get* requirement as a whole is not a solution for the Orthodox community.¹⁸⁷ It may be that, perhaps, the only plausible solution would be a communal agreement to reinterpret the *halachic* laws of divorce in situations where the wife may successfully exit her marriage in accordance with *halacha*.¹⁸⁸ However, as of now, *agunot* can continue to fight against *get* refusal and remain hopeful for an improved, *halachically*-accepted development.¹⁸⁹

IV. THE AMERICAN JUDICIAL SYSTEM AS A REMEDY

The New York *Get* Law, amended into the Domestic Relations Law Section 253,¹⁹⁰ is an example of secular law coming to the aid of the *agunah* problem.¹⁹¹ This very controversial legislation was enacted with the goal of “ensur[ing] that persons who do not give or receive [a *get*] will be unable to receive the benefits of a civil divorce.”¹⁹² The statute states that a party cannot receive an annulment or divorce unless the party claims in a verified complaint that the party took all the steps necessary, to the best of his or her knowledge, to remove any barrier to the defendant’s remarriage.¹⁹³ Furthermore, the court must “defer entering final judgment until the plaintiff files with the court and serves on the other party a sworn statement of actual compliance.”¹⁹⁴ Even though the court does not have the authority over inquiring into the factual basis of a sworn statement, knowingly submitting a false statement may lead to a criminal proceeding for perjury.¹⁹⁵ Included in the “barriers to remarriage” would be “religious

(Nov. 04, 2013, 6:43 PM), <https://nypost.com/2013/11/04/orthodox-jewish-womans-plea-for-a-divorce/>.

¹⁸⁷ See generally KENNETH SEESKIN, *MAIMONIDES ON THE ORIGIN OF THE WORLD* (2005). One of the core principles of Jewish law is that the Torah is timeless and unchanging.

¹⁸⁸ As the rabbis once reinterpreted a woman’s grounds for divorce. See BROYDE, *supra* 139, at 19 (“Soon after the close of the Talmudic period, the rabbis of that time (called *geonim*) changed or reinterpreted the substantive understanding of Jewish law to vastly increase the right of a woman to sue for divorce.”).

¹⁸⁹ See generally Oppenheimer, *supra* note 186.

¹⁹⁰ N.Y. DOM. REL. LAW § 253 (McKinney 1986).

¹⁹¹ See *Masri v. Masri*, 50 N.Y.S.3d 801 (Sup. Ct. 2017) (“It is clear from the legislative history that it was precisely this purported unfairness of a Jewish husband’s refusal to provide a *Get* that drove the enactment of the [DRL § 253]. . . .” (internal quotations omitted)).

¹⁹² Breitowitz, *supra* note 1, at 375.

¹⁹³ § 253. With its adoption, questions of whether its enactment violated the First Amendment arose.

¹⁹⁴ Breitowitz, *supra* note 1, at 376; see also § 253(3)(i).

¹⁹⁵ § 253(8); see also N.Y. PENAL LAW § 210.40 (McKinney 1986) (making a knowingly false statement is a Class E felony that is punishable by at least four years in prison).

or conscientious restraints or inhibitions.”¹⁹⁶ Therefore, not executing a *get* would constitute a barrier and would limit the husband’s ability to truthfully file an affidavit for a civil divorce.¹⁹⁷

The *get* law was challenged, although unsuccessfully, under the First Amendment.¹⁹⁸ The First Amendment states that “Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.”¹⁹⁹ Inevitably, the *get* law creates a conflict between the Establishment Clause and the Free Exercise Clause.²⁰⁰ Challengers of the *get* law arguably believe that judicial intervention would violate a person’s constitutional right to free exercise, which provides that religion must be kept as a private matter; otherwise, it would constitute an impermissible establishment of religion.²⁰¹ Furthermore, there is a lot of *halachic* criticism of the *get* law because it “improperly diminishes the capacity of the husband and wife to offer and receive a *get* with free will, a requirement of Jewish law.”²⁰²

¹⁹⁶ § 253(6).

¹⁹⁷ See *supra* notes 193-94 and accompanying text. As mentioned, the court does not necessarily have the authority to inquire whether the affidavit is truthful or not. However, if the husband would want to take that risk, he would be subjecting himself to a criminal action of perjury. This legislation was created with the intent to help wives obtain a *get*. Consequently, Governor Cuomo stated, “If there was such a precedent, I would defer to it . . . [but] [g]iven the clarity of the need, the efficiency of this statutory solution and the uncertainty of the constitutional objection, I approve this measure.” Breitowitz, *supra* note 1, at 375.

¹⁹⁸ See *Chambers v. Chambers*, 471 N.Y.S.2d 958, 960 (Sup. Ct. 1983). *Chambers* is the only case that actually addresses the statute’s constitutionality though in dicta. *Id.* The court noted

It might very well be argued that the aspect of the *get* statute herein under scrutiny constitutes a denial of due process in that it requires a plaintiff to seek an undesired item of relief in order to obtain a desired item. It might further be argued, at least for the reason that there is no way to extract a removal of barriers statement from a defendant, that the requirement is as much a denial of due process as would be a law preventing the entry of a judgment

All of the foregoing is unnecessary to the determination at bar.

Id.; see also *Friedenberg v. Friedenberg*, 523 N.Y.S.2d 578, 581 (App. Div. 1988).

¹⁹⁹ U.S. CONST. amend. I.

²⁰⁰ See *infra* note 204 and accompanying text.

²⁰¹ See generally BROYDE, *supra* note 139, at 141.

²⁰² BROYDE, *supra* note 139, at 103. Broyde continues by saying

the threat of economic penalty undermines the free will needed by Jewish law, and a *get* given without free will can be void according to Jewish law. This criticism stands in contrast to the approval given to the earlier *Get* Law, which merely withheld a civil divorce in certain circumstances until a religious divorce was granted.

BROYDE, *supra* note 139, at 103.

In *Lemon v. Kurtzman*,²⁰³ the Supreme Court created a test that would indicate whether a state statute impermissibly established a religion.²⁰⁴ The *Lemon* test yields three prongs: first, the statute must have a legitimate state interest; second, the statute's primary effect must neither advance nor inhibit religion; finally, the statute cannot promote excessive entanglement between the government and religion.²⁰⁵ The test would hold a law that accommodates a certain religious practice valid if it satisfies the three prongs.²⁰⁶ Furthermore, when a statute is challenged under the Free Exercise clause, often the challenger concedes that the failure to apply the provision in a way that would exempt certain religious practices infringes on religious liberty.²⁰⁷ The test employed when individuals challenge the Free Exercise clause is one of "general applicability."²⁰⁸

The state has a legitimate state interest by addressing the free exercise of a secular state interest.²⁰⁹ Here, the purpose is not only to

²⁰³ 403 U.S. 602 (1971). This test is still applied today, although it is unclear whether these prongs function as elements or factors to be considered. Case law subsequent to *Lemon* would indicate that regardless whether the prongs are elements or factors, excessive entanglement between the government and religion is important when analyzing the constitutionality of a statute under the Establishment Clause. *See generally* *Everson v. Bd. of Ed. of Ewing Twp.*, 330 U.S. 1 (1947); *see also* *Bd. of Ed. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236 (1968). Notably, before *Lemon*, the Court upheld state statutes that allowed for parents of students enrolled in private and public schools to be reimbursed of transportation costs and provided textbooks to parochial schools for secular purposes, arguing that the money provided to the schools were not related to religious purposes. *See generally id.* In *Lemon*, however, the Court held a state program, which provided parochial school teachers with salary supplements, invalid. *Lemon*, 403 U.S. at 602. The majority opinion noted the distinction between textbooks and salary supplements, reasoning that the parochial school teachers would be able to advance religious texts even when teaching secular subjects and taken in tandem, the state would be excessively entangling itself with religious purposes by providing salary supplements. *Id.* at 612.

²⁰⁴ *Id.* at 612.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *See, e.g.,* *Emp't Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 919 (1990). The majority opinion held that the First Amendment's protection of the free exercise of religion does not allow a person to use a religious motivation as a reason not to follow a generally applicable law. *Id.* (quoting *Reynolds v. United States*, 98 U.S. 145, 166-67 (1990) ("To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.")).

²⁰⁸ *Lemon*, 403 U.S. at 612. The majority concluded that generally applicable laws that impose a burden on religion are not subject to the compelling interest test. *Id.* Under that standard, nondiscriminatory (general) laws should be analyzed under a rational basis test, which shows more deference to legislation than the compelling interest test would. *Id.* A rational basis test would hold a law constitutional so long as there is a rational or legitimate purpose behind it. *Id.*

²⁰⁹ *See* *Wallace v. Jaffree*, 472 U.S. 38, 83 (1985) (O'Connor, J., concurring).

facilitate a right to privacy, as established through case law, but to facilitate a recognized fundamental right to marriage, and arguably the right to a divorce falls under its penumbra.²¹⁰ As a general argument, the state has a legitimate interest in promoting the opportunity of its citizens to exercise and enjoy the constitutional rights afforded to them.²¹¹ Although the issue arises from a private actor rather than a public actor, states should have the power, especially in similar situations, to protect its citizens from infringement created by private actors.²¹²

When a husband withholds a *get* out of sheer spite or attempts to use the *get* as a scheme to gain a financial advantage over his wife, the state has a legitimate interest in protecting its citizens from coercion.²¹³ Furthermore, many states have accepted intentional infliction of emotional distress as a tort and states should be able to use the prevention of human suffering as a legitimate state interest.²¹⁴

In short, the justifications for the New York law appear to be secular in purpose: the furtherance of the state's divorce policy, the validation of the integrity of the judicial system, the facilitation of religious liberty, the encouraging of remarriage and a more stable family life, the protection of fundamental rights of privacy, and the curbing of victimization and extortion all appear to fall within the traditional ambit of general legislative competence. . . . [T]he "secular purpose" prong of *Lemon* can be easily satisfied.²¹⁵

²¹⁰ See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973) (recognizing the fundamental right to privacy); see also *Loving v. Virginia*, 388 U.S. 1 (1967) (recognizing that the fundamental right to marry, established before the right to privacy, is protected by the Due Process Clause).

²¹¹ See generally *supra* note 203. Courts apply the rational basis test when considering constitutional questions. It determines whether a law is rationally related to a legitimate government interest. Generally, states have an inherent police power to promote the general welfare of its citizens, where one may argue that general welfare includes a citizen's right to exercise and enjoy his or her constitutional rights.

²¹² See generally *The Civil Rights Cases*, 109 U.S. 3 (1883), which coined a limitation known as the "state action" doctrine, indicating that constitutional rights may be argued against the government or its agents.

²¹³ Breitowitz, *supra* note 1, at 386.

²¹⁴ See Breitowitz, *supra* note 1, at 386; see also, Daniel J. Givelbar, *The Right to Minimum Social Decency and the Limits of Even-handedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 COLUM. L. REV. 42, 43 (1982) (listing jurisdictions that recognize intentional infliction of emotional distress as a tort).

²¹⁵ Breitowitz, *supra* note 1, at 386.

The second prong may be somewhat problematic, because it requires that the statute's primary effect neither advances nor inhibits religion.²¹⁶ A statute that "indirectly compels an unwilling party to perform a religious act, even if there are legitimate secular purposes . . . seems to have the 'effect' of advancing religious observance."²¹⁷ However, just because the statute may have some effect, it does not necessarily make the statute invalid because the prong requires a "primary" effect.²¹⁸ Nevertheless, it can be argued that the statute facilitates religion in certain respects.²¹⁹ For instance, it could create a lesser hurdle on observers of Orthodox Judaism by helping adherents remove barriers they would have not been able to cross otherwise.²²⁰ Furthermore, though indirectly, it can force people into complying with religious practices that would not have been complied with but for the statute.²²¹

Excessive entanglement, the third prong of the test, would occur if the statute required continuous monitoring over the religious practice or institution.²²² Once the court receives the affidavit, the court must enter the judgment and need not inquire about the truthfulness of it.²²³

Issues concerning the technical validity of the *get*, the qualifications of the executing Rabbis, and whether the principles of the officiating clergyman have or have not been met and what those principles are—questions that could indeed entangle the court in complex doctrinal matters—pose matters that the court simply does not and may not address.²²⁴

²¹⁶ *Lemon*, 403 U.S. at 612.

²¹⁷ Breitowitz, *supra* note 1, at 387.

²¹⁸ Breitowitz, *supra* note 1, at 387.

²¹⁹ See *infra* notes 220-21 and accompanying text.

²²⁰ Breitowitz, *supra* note 1, at 386.

²²¹ Breitowitz, *supra* note 1, at 386. A noncomplying husband may be encouraged to give his wife a *get* if he is seeking a civil divorce. Breitowitz, *supra* note 1, at 386. Breitowitz notes that "the 'effect' of making the practice of Judaism less burdensome on its willing practitioners is probably nothing more than a permissible accommodation of free exercise and does not offend *Lemon*'s 'primary effect' criterion." Breitowitz, *supra* note 1, at 386 (citation omitted).

²²² *Lemon*, 403 U.S. at 612.

²²³ N.Y. DOM. REL. LAW § 253(9) (McKinney 1986) (The truth of any statement submitted pursuant to this section shall not be the subject of any judicial inquiry. . . ."). Thus, the affidavit is conclusive. § 253(2)-(4).

²²⁴ Breitowitz, *supra* note 1, at 389.

As the statute indicates, the only way to contest the submitted affidavit would be if the clergyman filed an affidavit and testified in a way that went contrary to the other one.²²⁵

The *Get* Law has not been successfully challenged thus far under the Establishment Clause.²²⁶ Although critics of the law have attempted to argue for its unconstitutionality, the law has remained, and, one hopes, will continue to remain, valid because it does not raise threatening problems under the Free Exercise Clause as well.²²⁷ “A careful examination of the *get* law, however, demonstrates that the unwilling spouse’s free exercise rights are not truly impaired.”²²⁸ When using this statute, the court cannot directly compel a plaintiff to comply because the terms of the statute merely places a condition to remove barriers before being granted a civil divorce.²²⁹ Though promoting a wife’s right to free exercise would probably not be a state interest sufficient enough to stand on its own, there are many other important state interests that would need protection.²³⁰ Consequently, the enactment of the *Get* Law decreased the amount of *agunot* in New York, despite the legal and religious challenges made against it.²³¹

V. CONCLUSION

In writing this Note, I have attempted to recognize the various civil remedies available for Jewish women who are unable to receive

The purpose of the law is to advance purely secular interests, including the facilitation of free exercise by those who otherwise would be burdened because of their religious beliefs. The primary effect of the law is not the “endorsement” . . . of religion[.] . . . [it] simply equalizes the rights of women holding certain beliefs with those of women who do not. Nor does the law invite excessive entanglement into religious affairs because the court is prohibited from inquiring into the truth of any matters alleged in the affidavit.

Breitowitz, *supra* note 1, at 392.

²²⁵ § 253(7).

²²⁶ See generally Breitowitz, *supra* note 1.

²²⁷ Breitowitz, *supra* note 1.

²²⁸ Breitowitz, *supra* note 1, at 394.

²²⁹ Breitowitz, *supra* note 1, at 394.

²³⁰ Enhancing the wife’s right to free exercise while infringing on the husband’s would seem counterintuitive. However, the state has other interests that it would want to protect. As mentioned before, “the furtherance of the state’s divorce policy, the validation of the integrity of the judicial system, the facilitation of religious liberty, the encouraging of remarriage and a more stable family life, the protection of fundamental rights of privacy, and the curbing of victimization and extortion. . . .” Breitowitz, *supra* note 1, at 386.

²³¹ See generally Breitowitz, *supra* note 1.

a *get* because of recalcitrant husbands who use their religious power to extort their wives.²³² Whether motivated by sheer spite, financial pursuits, or custody grounds, being denied a *get* is a heavy burden placed on adherents of *halachic* law.²³³ When a Jewish couple signs a *ketubah*, they implicitly agree to act in accordance with the laws of “Moses and Israel” and the state in which they marry.²³⁴ For such individuals, *halachic* laws serve as their guiding principles throughout the couple’s lives (i.e., during marriage or divorce).²³⁵ A couple can only hope for a “clean” divorce, one in which it would not resort to a brutal battle amongst former spouses, and in similar situations, a battle with an inherent loser.²³⁶

Furthermore, I have fervently contended that civil enforcement of the *get* process is valid, though many scholars and critics of civil involvement in religious proceedings have argued adversely.²³⁷ Although the *get* requirement is found in the Torah, a text that cannot be changed, religious leaders and civil courts have implemented prenuptial support agreements and have used the *ketubah* as an implied promise to secure a *get*.²³⁸ I presented a legal argument that the New York *Get* Law, codified in the Domestic Relations Law § 253, does not violate the First Amendment.²³⁹ Consequently, the *Get* Law is not deemed unconstitutional under the Establishment Clause or the Free Exercise Clause because there are many state interests that require protection under such circumstances.²⁴⁰ The number of *agunot* in New York has decreased because of the enactment of the *Get* Law and organizations that assist with this issue.²⁴¹

Challenges to the New York *Get* Law may very well continue to be unsuccessful.²⁴² However, whether the judgment remains *halachically* valid, is a question that will remain open for presumably a long time because of all the differing opinions concerning the

²³² See *supra* Part III.

²³³ See *supra* Part III.

²³⁴ See *supra* Part III.

²³⁵ See *supra* Part III.

²³⁶ See *supra* Part III.A (explaining why the wife is the inherent loser in divorce proceedings when the husband refuses to give her a *get*, making her into an *agunah*).

²³⁷ See *supra* Part II.

²³⁸ See *supra* Part II.

²³⁹ See *supra* Part IV.

²⁴⁰ See *supra* Part IV.

²⁴¹ See *supra* Part III.

²⁴² See *supra* Part IV.

question.²⁴³ The fact that such questions are still contemplated emphasizes the dilemmas that encompass *agunot* during Jewish divorce proceedings.²⁴⁴ Since the *get* right lies in the hands of the husband alone, as mandated by Jewish law, certain rabbis delay their involvement because of the fear and inability to undermine the important *halachic* doctrines.²⁴⁵ A determinative factor of the *get* lies with the free will of the husband rather than equity for the *agunah*, which leaves such women with virtually no real solution.²⁴⁶ Though individuals affected by this situation remain hopeful for a more *halachically* accepted solution, I have shown the legislative and judicial desire, and ability, to generate various solutions in an attempt to remove the chains and free *agunot* from their dead marriages.²⁴⁷

²⁴³ See *supra* Part IV.

²⁴⁴ See *supra* Part III.

²⁴⁵ See *supra* Part III.

²⁴⁶ See *supra* Part III.

²⁴⁷ See *supra* Part IV.