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Beyond the Constitution: Is the New York Get Legislation Good Law?

Lisa Zornberg*

Introduction

In *halacha*,¹ or Jewish law, a civil divorce decree does not dissolve the bonds of marriage.² Rather, in order for a husband and wife to be religiously divorced, the husband must give his wife a bill of divorce, called a *get*.³ Without a *get* a Jewish woman cannot remarry and is condemned as an adulteress if she has sexual relations with other men.⁴ Moreover, any children she bears from a subsequent relationship are branded *mamzerim*, children born of an adulterous relationship who are

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Editorial Note: Appendix A contains profiles of all commentators interviewed in the course of my research, as well as their affiliated organizations. Please refer to it freely as a way to keep track of the many commentators quoted throughout this article. Unless noted otherwise, all quotes by these individuals come directly from these interviews.

1. Alternate spelling: *halachah*.

2. In Jewish law, a marriage can be dissolved in one of only two ways: through the death of a spouse or by the deliverance of a *get*. Irving Breitowitz, *The Plight of the Agunah: A Study In Halacha, Contract, and the First Amendment*, 51 MD. L. REV. 312, 319 (1992).

3. Significantly, only those Jews who adhere strictly to the *halacha* consider themselves bound by the *get* requirement. Although the countless varieties of Jewish religious practice in the United States defy categorization, the three most recognized "movements" of Judaism continue to be the Orthodox, Conservative, and Reform. Of these, only the first two consider themselves bound by the dictates of Jewish law. The Reform Movement, which considers itself to be "guided", not bound, by *halacha*, abandoned the *get* requirement in 1869 (recognizing a civil divorce as sufficient to dissolve the religious union). Linda S. Kahan, Note, *Jewish Divorce and Secular Courts: The Promise of Avitzur*, 73 GEO. L.J. 193, 198 n.37 (1984); J. David Bleich, *Jewish Divorce: Judicial Misconceptions and Possible Means of Civil Enforcement*, 16 CONN. L. REV. 201, 232 n.96 (1984).

4. GEORGE HOROWITZ, *THE SPIRIT OF JEWISH LAW* 204 (1953).

barred from marrying freely within the Jewish community.⁵ The inability to remarry or bear legitimate children is a devastating prospect, especially among religious Jews, who consider family and childbearing central to a woman's life.⁶ As a result, a religious woman whose husband disappears, or abandons her, or refuses to comply with Jewish divorce procedures can spend years (perhaps the rest of her life) trapped in a "dead" marriage. A woman in this situation is called an *agunah*, literally translated, a "chained woman."⁷

Under *halacha*, Jewish men can face obstacles to remarriage as well. In addition to requiring that a husband deliver a *get*, Jewish divorce law requires that the wife accept it,⁸ and occasionally, it is the woman who refuses to cooperate in the *get* process. Nevertheless, the sanctions confronting men in this situation are significantly less severe than those facing women. They may cohabit with other women without being guilty of adultery,⁹ and any children born from these subsequent relationships do not bear the stigma of *mamzerim*. Furthermore, by obtaining the signature of one hundred rabbis, a man can be *halachically* "exempted" from the *get* requirement entirely.¹⁰

5. Considerable stigma is placed by Jewish law upon *mamzerim* (single tense: *mamzer*), who are to be distinguished from illegitimate children. A *mamzer* is prohibited from marrying any Jew other than a convert to Judaism or another *mamzer*. Significantly, Jewish children born out of wedlock do not bear this disability. Thus, a woman who remarries and bears children with another man prior to receiving a *get* jeopardizes not only herself but her children as well. Breitowitz, *supra* note 2, at 324 n.48.

6. See Tanina Rostain, *Permissible Accommodations of Religion: Reconsidering the New York Get Law*, 96 YALE L.J. 1147, 1166 n.117 (1987) (citing M. MEISELMAN, *JEWISH WOMAN IN JEWISH LAW* 16-18 (1978) (a woman's primary religious responsibility in *halacha* is to nurture Jewish values within the domestic sphere); R. GORDIS, *SEX AND THE FAMILY IN THE JEWISH TRADITION* 33 (1967) ("Judaism regards marriage and not celibacy as the ideal human state, because it alone offers the opportunity for giving expression to all aspects of human nature.")).

7. Translated from Hebrew (plural: *agunot*).

8. See *infra* note 30 and accompanying text.

9. Because strict Biblical law permits polygamy, a married man may cohabit with another woman without committing adultery. Breitowitz, *supra* note 2, at 324 n.51.

10. This provision, called a *Hetter Me'ah Rabbonim* ("Dispension of 100 Rabbis"), is available to a man when it is determined that his wife unreasonably refuses to accept the *get*. No such mechanism is available to women. *Id.* at 325.

Significantly, a man is never considered "chained," as is an *agunah*.¹¹

For more than one thousand years, Jewish scholars have grappled with the tragedy of the *agunah* and the facial and formalistic aspects of gender inequity within Jewish divorce law;¹² yet, the problem remains unresolved. Moreover, in the last several decades a distinctively modern twist on the problem has arisen: *get* extortion. Unlike the historically classic cases—in which a woman became an *agunah* because her husband disappeared in a forest and never returned or became missing in battle without witnesses to his death¹³—the modern-day *agunah* is often a woman whose husband intentionally abuses the *get* process for purposes of avarice or spite.¹⁴ The *get*, in many instances, has become a bargaining chip, with husbands demanding that their wives "buy" their divorces with money or other valuable assets, such as property and custody rights. In other cases, spiteful husbands refuse to give a *get* on any terms, abandoning women to the sad plight of a life in a "dead" marriage. In New York State alone, which houses the largest Jewish community in the United States,¹⁵ one frequently cited estimate puts the number of *agunot* at 15,000.¹⁶

New York State courts have been confronted by the problems of *agunot* for some time. Over the course of the twen-

11. Edward S. Nadel, *New York's Get Laws: A Constitutional Analysis*, 27 COLUM. J.L. & SOC. PROBS. 55, 61 (1993). Because a spouse's recalcitrance has more severe and permanent implications for women, and because in the large majority of cases women are the victims of a unilateral refusal to grant the *get*, this article will focus primarily on how women, rather than men, are affected by abuse of the *get* process.

12. See discussion *infra* notes 28-32 and accompanying text.

13. In Judaism there exists no practice of declaring missing persons dead after a certain number of years have elapsed.

14. The form of *agunah* often seen today allegedly did not exist in Europe because there was sufficient community pressure to influence a husband to give a *get*. Telephone Interview with Aaron Twerski, Professor of Law, Brooklyn Law School, Officer, Agudath Israel (Mar. 21, 1994).

15. The Brooklyn and Queens boroughs of New York City are home to nearly one million Jews. Nationwide it is estimated that three million Jews consider themselves to be Orthodox or Conservative. Scott Kraft, "Chained Women" Lack Religious Divorce, ASSOC. PRESS, Aug. 13, 1983, available in LEXIS, News library, AP File.

16. See, e.g., Steven Feldman, *Grappling with Divorce and Jewish Law*, GENESIS 2, Apr. 1984, at 15. The 15,000 figure has been highly contested, however. See *infra* note 73.

tieth century, and especially in the last several decades, Jewish women have often sought state court intervention to assist them in obtaining religious divorces.¹⁷ In 1983, however, New York became the first state to address the *agunah* problem legislatively.¹⁸ Lobbying efforts, spearheaded by Agudath Israel,¹⁹ persuaded state legislators that the plight of *agunot* merited attention. The *get* bill easily passed both houses of the New York Legislature, and on August 8, 1983, Governor Mario Cuomo signed into law section 253 of the Domestic Relations Laws of New York State, the so-called "*get* law" or "*get* statute."²⁰ The law bars a Jewish plaintiff from obtaining a secular divorce until he or she has removed barriers to the other party's remarriage by giving or accepting a *get*.²¹

From its enactment, the 1983 *get* statute has been assailed by academics, civil liberties organizations, and numerous organizations of Reform Judaism as an unconstitutional intrusion into religious affairs.²² Many anticipated that the law would be

17. See *infra* part II.A.

18. To date, New York remains the only state to have addressed the *agunah* problem with legislative measures. See *infra* note 228.

19. Agudath Israel of America is a national organization that represents over 100,000 Orthodox Jews in the United States. Telephone Interview with Dovid Zwiebel, Legal Counsel to Agudath Israel (Feb. 21, 1994). See Appendix A for a description of Agudath Israel.

20. Act of Aug. 8, 1983, ch. 979, [1983] N.Y. Laws 2818, 2819 (codified at N.Y. DOM. REL. LAW § 253 (McKinney 1986 & Supp. 1995)). In signing the law, Governor Cuomo issued a memorandum stating that the bill "was overwhelmingly adopted by the State Legislature because it deals with a tragically unfair condition that is almost universally acknowledged." Governor's Memorandum of Approval on ch. 979, N.Y. Laws (Aug. 8, 1983), reprinted in [1983] N.Y. Laws 2818, 2819 (McKinney). For the complete text of the law see *infra* note 134.

21. See *infra* part II.C for a description of the law's operation.

22. See Nadel, *supra* note 11, at 83-90 (*get* law violates Establishment Clause); Marc Feldman, *Jewish Women and Secular Courts: Helping a Jewish Woman Obtain a Get*, 5 BERKELEY WOMEN'S L.J. 139, 159-60 (1990) (*get* law violates Due Process Clause of the Fourteenth Amendment); Lawrence C. Marshall, Comment, *The Religion Clauses and Compelled Religious Divorces: A Study in Marital and Constitutional Separations*, 80 NW. U. L. REV. 204 (1985) (*get* law violates Establishment and Free Exercise Clauses); Lawrence M. Warmflash, *The New York Approach to Enforcing Religious Marriage Contracts: From Avitzur to the Get Statute*, 50 BROOK. L. REV. 229 (1984) (*get* law violates Establishment Clause); Suzanne M. Aiardo, Note, *Avitzur v. Avitzur and New York Domestic Relations Law Section 253: Civil Response to a Religious Dilemma*, 49 ALB. L. REV. 131 (1984) (same); Kahan, *supra* note 3, at 202-10 (*get* law violates Establishment and Free Exercise Clauses, as well as Equal Protection Clause of Fourteenth Amendment); Madeline Kochen, *Constitutional Implications of New York's 'Get' Statute*,

swiftly struck down on constitutional challenge. However, more than a decade later, the 1983 *get* law continues to operate, having survived one early constitutional attack.²³ Nevertheless, questions remain. Has the 1983 *get* statute helped *agunot*? What, if any, have been the law's other effects on the Jewish community? Is civil legislation the best way, or even an appropriate way, to resolve the *agunah* problem?

Analysis of these questions is timely. In 1992, the New York State Legislature passed a second so-called "*get* law,"²⁴ indicating that the state is continuing to address the *agunah* problem with legislative measures. This additional *get* law amended New York's equitable distribution statute to allow a judge, where appropriate, to consider the potential effects of a woman's religious inability to remarry in dividing marital assets or setting maintenance.²⁵ The 1992 amendments have sparked a tremendous controversy in the Orthodox community, with some groups declaring that the legislation violates Jewish law and must be immediately repealed or amended.²⁶ The 1992 *get* law has been criticized on constitutional grounds as well.²⁷

This article analyzes the New York *get* legislation from a perspective that includes and looks beyond constitutional considerations to see what effects the *get* laws have had in actual practice. Part I provides an overview of the religious and sociological dimensions of the *agunah* problem. Part II recounts New York's judicial and legislative involvement in addressing *get* extortion and discusses the logistical operation of the 1983

N.Y. L.J., Oct. 27, 1983, at 1 (*get* law violates Establishment, Free Exercise, and Due Process Clauses).

23. The constitutionality of the 1983 *get* law was raised in *Chambers v. Chambers*, 122 Misc. 2d 671, 471 N.Y.S.2d 958 (Sup. Ct. N.Y. County 1983). See *infra* notes 193-201 for a discussion of the *Chambers* case.

24. Act of July 17, 1992, ch. 415, [1992] N.Y. Laws 1212 (codified at N.Y. DOM. REL. LAW § 236B(5)(h), (6)(d) (McKinney Supp. 1995)). For complete text of this law, see *infra* note 148.

25. See *infra* note 149 and accompanying text for description of the law's operation.

26. Significantly, Agudath Israel, the chief sponsor of the 1983 *get* law, is the organization now leading the charge against the 1992 legislation. Dovid Zwiebel, the legal counsel to Agudath Israel, said the organization is "a little schizophrenic" as a result. Telephone Interview with Dovid Zwiebel, Legal Counsel to Agudath Israel (Feb. 21, 1994).

27. See Nadel, *supra* note 11, at 78 (the 1992 *get* law violates the Establishment and Free Exercise Clauses of the First Amendment).

and 1992 *get* laws. Part III discusses whether New York's *get* legislation should be considered "good law." Finally, Part IV looks at alternative proposals for helping *agunot* within the Jewish community and then reassesses, against this backdrop, whether civil legislation is an appropriate way to address the *agunah* problem.

I. Religious and Sociological Dimensions of the *Agunah* Problem

A. *Religious Dimensions of the Agunah Problem*

The requirement that a man give his wife a *get* derives from the Biblical verse in Deuteronomy that provides:

When a man takes a wife and marries her, if it then comes to pass that she finds no favor in his eyes for he has found something unseemly in her, he shall write her a document of divorce and give it to her, and send her out of his house.²⁸

Literally read and applied, this Biblical provision grants a man absolute discretion to divorce his wife. Over the centuries, however, Jewish scholars seeking to protect women in divorce matters have tempered that absolute discretion through the issuance of *takkanot*, binding edicts in Jewish law.²⁹ Thus, in current religious practice a man cannot divorce his wife against her will; he must voluntarily give the *get*, and she must voluntarily receive it.³⁰ Secondly, either husband or wife can initiate divorce proceedings by summoning the other spouse to appear before a *bet din*, a rabbinical court.³¹ Thirdly, in cases in which

28. Deuteronomy 24:1.

29. A *takkana* (singular tense) 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." Breitowitz, *supra* note 2, at 317 n.13.

30. Nadel, *supra* note 11, at 57-58. This restriction dates back to the Tenth Century, when Rebbenu Gershom, a famous German *halachic* authority, issued an edict prohibiting a husband from divorcing his wife against her will. In an accompanying edict, he banned polygamy, which is Biblically permissible. *Id.* at 58.

31. A *bet din* (literally, "house of judgment"; alternate spelling: *beth din*) is the Hebrew term for a Jewish court of law. In earlier times, rabbinical courts possessed broad enforceable powers over all civil, criminal and religious matters in the Jewish community. Since the rise of the modern state, however, *batei din* (plural) have lost their coercive powers and can only decide disputes if parties voluntarily submit to their jurisdiction. Although as a matter of Jewish law, Jews today are still required to submit all civil and religious disputes to a *bet din* rather than a secular tribunal, the issues most frequently resolved by rabbinical courts concern

rabbinic authorities determine that divorce is required by Jewish law, the *bet din* can order the husband to give a *get*.³²

The issue, however, is not whether the *bet din* can order that a *get* be executed, but whether and how it can enforce that order. Jewish law places two important restrictions on the power of rabbinical courts in this regard. First, even if a *bet din* determines that a *get* is required, the power to give a *get* ultimately resides with the husband, and not even a rabbinical court can declare a woman divorced absent his consent.³³ Secondly, in order for a *get* to be *halachically* valid the husband must deliver it voluntarily, of his own free will. A *get* that results from unlawful coercion, called a *get me'useh*, is void.³⁴ In light of these *halachic* restrictions, the issue long debated among Jewish scholars has been the kinds of pressure that may be applied to a recalcitrant husband to persuade him to give a *get* without upsetting the *get's* validity.

In the Twelfth Century, Maimonides³⁵ declared that even severe forms of coercion, such as physical abuse, can be lawfully applied to a recalcitrant husband. "If one who is obligated by law to divorce his wife refuses to do so," Maimonides wrote, "a Jewish court . . . may beat him until he says, 'I am willing.' At

divorce, religious conversion, and supervision of dietary laws. Kahan, *supra* note 3, at 193 n.3; Breitowitz, *supra* note 2, at 326. With regard to the delivery of a *get*, the *bet din's* supervision is not a religious requirement but a practical necessity due to the complexities involved in the *get's* proper execution. Bleich, *supra* note 3, at 256-58.

32. Not all rabbis agree on what conditions will give rise to a wife's *halachic* right to a divorce. Some rabbinic authorities declare that whenever a woman wants a divorce she deserves to receive one. Other authorities, however, limit a woman's right to divorce to situations in which she discovers after marriage that her husband possesses physical defects that prevent cohabitation; is engaged in a malodorous occupation; is impotent or sterile; refuses to support her; refuses to cohabit with her; abuses her physically or verbally; causes her to violate a religious precept; seeks to leave the country permanently; is habitually unfaithful; or becomes an apostate. Breitowitz, *supra* note 2, at 333 n.80; Nadel, *supra* note 11, at 59 n.34.

33. *But see infra* text accompanying notes 309-11 discussing the controversial approach of Rabbi Moshe Antelman, who asserts that in some situations a *bet din* can issue a *get* of its own accord.

34. Nadel, *supra* note 11, at 57.

35. Moses ben ("son of") Maimon (1135-1204). Maimonides is considered one of the greatest Jewish scholars ever to have lived. Born in Spain, he was a distinguished rabbinical authority, codifier of Jewish law, philosopher, and royal physician. *Id.* at 59 n.38. *See also* 11 ENCYCLOPAEDIA JUDAICA 754-79 (1972).

that point, he may write the *get* and it is a valid contract.”³⁶ Maimonides justified this declaration upon the legal fiction that all Jewish men really want to comply with religious divorce proceedings. By pressuring a man to give his wife a divorce, he reasoned, one is only defeating the evil disposition that prevents him from doing so of his own accord, and therefore any *get* he subsequently delivers is valid.³⁷

This theory of “constructive consent” has been widely followed by the rabbinate.³⁸ However, while at one time rabbinical courts would typically have a recalcitrant husband flogged or stoned until he agreed to give a *get*, this remedy is neither available nor appropriate in the modern state. “Beating a scoundrel in the hope of forcing him to shout ‘I will’ is more likely to provoke a lawsuit for felonious assault,” said one commentator.³⁹ Short of physical coercion, rabbinical courts can pressure a recalcitrant spouse to give a *get* in other ways. Rabbis can publicly announce the name of a congregant who is unwilling to religiously divorce his wife, or bar the recalcitrant husband from receiving honors normally bestowed upon men during worship, such as being called to read the Torah. On Manhattan’s Upper West Side, one group of Orthodox rabbis have banded together in addressing the *agunah* problem;⁴⁰ Rabbi Allen Schwartz recounted that one recalcitrant husband agreed to give his wife a *get* only after the rabbis ejected him from each and every synagogue in the neighborhood.⁴¹ In Israel, where rabbinical courts exercise some state enforcement powers, a *bet*

36. *Mishne Torah, Hilkhos Gerushin 2:20*, quoted in Roselyn Bell, *Coming Apart Jewishly*, HADASSAH MAG., Mar. 1991, at 22.

37. Nadel, *supra* note 11, at 59-60.

38. “Rabbinate” is the collective term for the Jewish clerical body.

39. Eliahu Shevin, *Plight of Agunos*, JEWISH PRESS, June 26, 1992, at 35. Nonetheless, threats by community members to physically abuse a recalcitrant spouse are not unheard of. Telephone Interview with Alan Dershowitz, Professor of Law, Harvard Law School (Feb. 16, 1994). Professor Dershowitz, who grew up in Brooklyn as an Orthodox Jew, recalled: “I know when I was a kid, the story always went around that, when in a particular Hassidic community a man would not give a woman a *get*, a group of tough Hassidim would corner him in a hallway or a backyard somewhere, and say, ‘Look, you have a choice. Your wife is either going to be a widow or a divorcee.’” *Id.*

40. See Allen Schwartz, *Responding to Recalcitrant Husbands (Letter)*, JEWISH PRESS, May 15, 1992, at 73.

41. Telephone Interview with Allen Schwartz, Orthodox Rabbi (Mar. 31, 1994). Rabbi Schwartz recounted:

din can recommend that the state incarcerate a man for his refusal to give a *get*.⁴² Furthermore, legislation in Israel, passed earlier this year, dramatically expanded the power of rabbinical courts to pressure recalcitrant spouses through civil restrictions.⁴³

Finally, if a man repeatedly ignores the summons to appear before a *bet din*, the rabbinical court can issue a *seruv*, analogous to a contempt of court order. The *seruv* no longer carries legal sanction, but its moral weight authorizes community members to pressure the recalcitrant spouse in numerous ways, including organized efforts to telephone him, contact important people in his life, avoid social interactions with him, and picket his home or business.⁴⁴ *The Jewish Press*, for instance, publishes a regular column, entitled, "Chained: The Agunah Saga," that publicly scorns Jewish men who refuse to give their wives religious divorces.⁴⁵

This guy showed up in my shul [synagogue] one time, and there were over 700 people in shul. In front of everybody, two people walked up the aisle and escorted him out. He didn't even have to be told, he knew what they were saying. And I got big time heat for asking him to leave shul on shabbas [Sabbath]. And I said, "You know what? I went easy on him. I should have announced to the shul: You see that man walking out? He won't give his wife a *get*."

Id.

42. See Haskel Lookstein, *Prenuptial Agreements: The Solution for Women Seeking a Religious Divorce*, JEWISH PRESS, June 19, 1992, at 4, 48 (Israeli imprisonment method helps defer *get* extortion). But see Goldie Wachsman, *No End to Despair of Chained Wife*, JEWISH J., Apr. 14, 1989, at 2 (imprisonment of recalcitrant spouses in Israel underutilized).

43. The Israeli bill gives rabbinical courts the ability to prevent a recalcitrant spouse from leaving the country, receiving a state-issued passport, receiving a driver's license, being appointed to public office, practicing any profession that requires a license, and opening a bank account or using a credit card. Jan-Uwe Ronneburger, *Israel's Would-be Divorcees' Thorny Road to Success*, DEUTSCHE PRESSE-AGENTUR, Mar. 22, 1995 available in LEXIS, News Library, NON-US file. In extreme cases, the new law allows a rabbinical court to impose a jail term of up to ten years on the recalcitrant husband as a "kind of coercive detention." *Id.* A similar pending bill would impose these sanctions on recalcitrant wives as well. Evelyn Gordon, *Same Penalty for Goose or Gander Who Refuses Divorce*, JERUSALEM POST, Mar. 30, 1995, at 3.

44. Breitowitz, *supra* note 2, at 326-27. Even absent a *seruv*, members of the community can apply pressure to a recalcitrant spouse. However, the official endorsement of the rabbinical court can make such pressure more effective. *Id.*

45. See, e.g., *Chained: The Agunah Saga*, JEWISH PRESS, July 30, 1993, at 38.

Community pressure is also the primary tactic used by grass roots organizations in New York and elsewhere to assist *agunot*. In New York City, three organizations—Getting Equitable Treatment (G.E.T.), Get Free, and AGUNAH—incorporate community pressure into their normal operations.⁴⁶ “We will do whatever we can . . . to convince the recalcitrant spouse [to give a *get*],” said Gloria Greenman, G.E.T.’s founder, adding that the organization does not employ tactics of physical coercion.⁴⁷ According to Yehuda Levin, a caseworker at Get Free, while community pressure is no “miracle solution,” it can often be effective. “It’s a question of perseverance and being in the right place at the right time,” he said.⁴⁸

At least two types of coercion, however, are considered to produce invalid *gittin*. The first is the imposition of direct financial penalties upon a man for his recalcitrance.⁴⁹ The second is the compulsion of a *get* by a secular court.⁵⁰ Significantly, in Jewish law, pressure that may be lawfully applied to a recalcitrant spouse by a *bet din* is considered unlawful when applied by a secular judge.⁵¹ This does not mean, however, that secular court involvement in Jewish divorce matters will automatically invalidate a *get*. To the contrary, rabbinic authorities approve the secular court’s coercion of a recalcitrant spouse when two conditions are met: (1) a *bet din* has previously determined that a divorce is required by Jewish law; and (2) the secular court does not itself compel the husband to execute a *get*, but rather compels him to comply with the order of the *bet din*.⁵² Thus, if a

46. See Appendix A for organizational profiles.

47. Georgia Dullea, *Orthodox Jewish Divorce: The Religious Dilemma*, N.Y. TIMES, July 5, 1982, at A40.

48. Telephone Interview with Yehuda Levin, Caseworker, Get Free (Mar. 14, 1994).

49. This restriction plays a central role in the opposition of many rabbis to the 1992 *get* legislation. See *infra* notes 238-40 and accompanying text.

50. Nadel, *supra* note 11, at 60 (“[S]ecular courts may not force a husband to give a *get*, and if they do, the resulting *get* is an invalid *get me’useh*.”).

51. See Stuart Vincent, *Rabbis Won’t Hear Divorce*, NEWSDAY, May 17, 1989, at 21 (reporting Brooklyn case in which three *batei din* refused to officiate the delivery of a husband’s *get* because they believed he was acting under the unlawful coercion of a civil order to do so).

52. Bleich, *supra* note 3, at 235. Bleich explains that

[e]ven when Jewish law mandates the husband to give a *get*, it must be executed pursuant to an order of a rabbinical tribunal; that tribunal is empowered to request a civil court to enforce its decree. The action of a civil court

secular court acts as the *agent* of a *bet din* in coercing the husband to give a *get*, the ensuing *get* is *halachically* sound. However, if the secular court acts independently (for instance, if a secular judge orders the execution of a *get* absent prior determination by a *bet din* that a *get* is required), the ensuing *get* is invalid—even if a *bet din* would indeed have found a *get* to be required by Jewish law.⁵³

These *halachic* nuances are critical because they constitute the foundational principles which any secular attempts to address the *agunah* problem must take into account. As the following sections will demonstrate, in order to succeed on a practical level, civil legislation designed to help *agunot* must pass not only constitutional muster, but *halachic* muster as well.

B. *Sociological Dimensions of the Agunah Problem*

While the problem of *get* extortion is a problem of individual actors who abuse Jewish divorce procedures, larger social forces at work have contributed to its relatively recent rise. First and foremost, the *agunah* problem must be viewed in light of the spiraling divorce rate among American Jews toward the national rate of 40 to 50 percent.⁵⁴ Between 20,000 and 30,000 Jewish couples divorce annually in the United States, about fourteen percent of American Jews have been divorced at some time, and about seven percent are currently divorced.⁵⁵ In addition, since the 1960s divorce has significantly impacted the Orthodox community. As the number of traditionally observant divorcing couples increases, so too does the likelihood—and ef-

under most circumstances will be deemed ancillary to the decree of the ecclesiastical body and therefore valid.

Id. at 235-36.

53. Dovid Zwiebel called the relationship between civil and rabbinical courts "an enormously complicated issue" which has generated both discussion and debate in the *halachic* community. Telephone Interview with Dovid Zwiebel, Legal Counsel to Agudath Israel (Feb. 21, 1994).

54. Lookstein, *supra* note 42, at 4 (estimating that one in three marriages between Jews now ends in divorce).

55. KAYAMA, DESCRIPTION OF OPERATIONS (on file with *Pace Law Review*) (citing 1990 National Jewish Population Study). The study was commissioned by the Council of Jewish Federations and undertaken with the City University of New York. It was the first major study of its kind conducted in 20 years. *Id.*

fectiveness—of *get* extortion.⁵⁶ Indeed, as one commentator notes, “it is precisely because the husband knows that a *get* is needed that he is able to use it as a bargaining chip.”⁵⁷

But rising divorce rates are not solely to blame. A second explanation attributes the problem of *get* extortion to the weak position of rabbinical courts in the modern state.⁵⁸ Because rabbinical courts no longer employ severe sanctions, such as the flogging of recalcitrant husbands, men can flout the *bet din*’s order that they execute *gittin*, and get away with it. Moreover, such men can still divorce and remarry civilly. The result, concludes one commentator, is that the Jewish woman who wants to follow religious divorce procedures ends up a victim of the modern state: “She is left with all the handicaps inherited from thousands of years of the history of Jewish law, and is prevented from benefiting from the protections which have been created on her behalf by the Jewish courts through the centuries.”⁵⁹

Yet another explanation attributes the current *agunah* problem in part to the weakening of the Jewish community through urbanization and increased mobility. Given the ease with which individuals can move among distinct Jewish communities, recalcitrant spouses can often escape the community pressure that might otherwise persuade them to give a *get*. Particularly in New York City, Isaac Skolnik commented, a recalcitrant husband

can run from here to there. If he’s thrown out of one community he can go to another—that’s the reality. It’s not like the old days where everybody knew everybody else. If you have a problem like

56. Dullea, *supra* note 47, at A40 (“[L]eaders of Orthodox Judaism say it is only in recent years that the marriages in their largely cohesive community have been breaking up in significant numbers. With the rise in the divorce rate, rabbis say, has come an increase in complaints of unethical conduct by parties to divorce, mostly husbands.”); Lookstein, *supra* note 42, at 4 (given increased divorce rate, “the opportunities . . . for vengeful and hateful oppression by a former spouse are far greater today than they were 40 years ago when divorce was relatively rare”).

57. Breitowitz, *supra* note 2, at 395.

58. The political and legal disempowerment of rabbinical courts dates back to the period following the French Revolution, when Jews were required to sacrifice the autonomy of their rabbinical courts in exchange for political citizenship. EDWARD M. GERSHFIELD, *THE JEWISH LAW OF DIVORCE* 14-15 (1967); Breitowitz, *supra* note 2, at 326. See also *supra* note 31.

59. GERSHFIELD, *supra* note 58, at 16.

this in Kansas City, you can deal with it a little differently because the guy can't run.⁶⁰

Other commentators, however, place the greatest blame for the current *agunah* problem upon the rabbinate, for failing to seriously address the issue. The problem, they say, is not that rabbis and rabbinical courts lack power, but rather that they have been reluctant to use their power to help *agunot*. Adhering to this view is AGUNAH, an organization initially founded to help individual *agunot* that now devotes the bulk of its energies to rabbinic reform:

We used to hold demonstrations against individual men, but a number of years ago we completely changed the focus of our organization when we realized that it was not the individual men who were the problem but the rabbinate as a whole. What we are basically doing now is attacking the Orthodox rabbinate in very serious ways, pointing the finger at them, because they are the guilty ones. They could create a different climate so there would no longer be *agunot*. There is no question about it.⁶¹

While some attribute the New York rabbinate's failure to collectively address the *agunah* problem to the absence of any central rabbinic authority in the Orthodox community,⁶² AGUNAH rejects this explanation, asserting that rabbis have been slow to respond to *get* extortion because it is a problem that primarily victimizes women.⁶³ "*Halacha* never appears in a vacuum,"

60. Telephone Interview with Isaac Skolnik, Director, Kayama (Feb. 28, 1994). Similarly, Allen Fischer remarked that, "Community pressure only works if the person is religious, and even then, he can go down the block to the next shul [synagogue]." Telephone Interview with Allen Fisher, Orthodox Attorney (Mar. 7, 1994).

61. Telephone Interview with Rivka Haut, Director, AGUNAH, Founder, ICAR (Mar. 6, 1994).

62. "We have no one great *halachic* leader that commands the respect of the entire spectrum of the Orthodox community," said Rabbi Kenneth Auman, consequently forecasting slim prospects of Orthodox rabbis achieving consensus on any innovative *halachic* approach to the *agunah* problem. Telephone Interview with Kenneth Auman, Orthodox Rabbi, Rabbinical Advisor to the G.E.T. Organization (Mar. 2, 1994). According to Rabbi Auman, the one great *halachic* leader in New York who did command universal respect was the late Rabbi Moshe Feinstein. He said that Rabbi Feinstein's death in 1986 left a void in the leadership of the Orthodox community that has not been filled.

63. See Honey Rackman, *Getting a Get: How Some Husbands Are Blackmailing Their Wives—And Getting Away With It*, MOMENT, May 1988, at 36 (declaring that, "Ostrich-like, some Orthodox rabbis have even suggested that there is no problem. They maintain that they are dealing satisfactorily with the individual

said Rivka Haut, Director of AGUNAH, "and if you look in general at the history of *halacha* in the modern world, in every single area other than this one, where it's only women who are suffering, *halacha* has managed to keep pace very well."⁶⁴ Haut noted that the directors of AGUNAH consider themselves "Torah feminists" and are viewed by many in the Orthodox community as "bad girls" due to their high visibility in challenging the rabbinate.⁶⁵

Where rabbis have failed to address *get* extortion, women in the Orthodox community have often done so on their own. High-profile neighborhood demonstrations on behalf of *agunot* are not uncommon and have attracted media attention in recent years.⁶⁶ In one particularly well-publicized event, a group of Orthodox women in Canada ceased all sexual relations with their husbands until a particular man in the community agreed to give their friend a *get*.⁶⁷ But such initiatives by Orthodox women remain the exception, not the rule. According to Chaya Cooper, Assistant Director of Get Free, most Orthodox women

cases that come before them. With their best handwringing gesture, they gently shoo from their presence "feminist" troublemakers, with the condescending assurances that they too are deeply troubled and suffer sleepless nights but cannot change the law").

64. Telephone Interview with Rivka Haut, Director, AGUNAH, Founder, ICAR (Mar. 6, 1994). Haut said the example she always gives of *halachic* adaptation to modern circumstances is the issue of finance. "Nobody is disadvantaged financially because the Torah, in a very clear statement, says that a Jew can't take interest from another Jew. The banking system in Israel works perfectly." *Id.*

65. *Id.* Haut said that although AGUNAH is a small organization, numbering fewer than 50 members, "in New York we have a very loud voice. The rabbis all know of us. They know enough to say terrible things about us, and they feel threatened by us because we have no respect for them." *Id.* At the organizational level, G.E.T., AGUNAH, and ICAR were all founded by women, and women continue to hold key leadership roles in those organizations.

66. See Breitowitz, *supra* note 2, at 330 n.71 (noting that "[i]n recent years, women themselves have organized support groups to exert pressure on unwilling husbands"). See also *Coalition Helps 'Chained Women,'* GAZETTE (MONTREAL), Mar. 1, 1993, at F1 (reporting that on March 4, 1994 Jewish women in Montreal and other cities around the world planned a fast in support of *agunot*); Peter Hellman, *Playing Hard to Get: Orthodox Jews and the Women Who Have Trouble Divorcing Them*, N.Y. MAGAZINE, Jan. 25, 1993, at 40 (reporting women's protest in Brooklyn in support of an *agunah*).

67. Breitowitz, *supra* note 2, at 330 n.71 (citing JEWISH PRESS, Oct. 26, 1979 (Magazine), at M41). Their friend's husband had been holding out for \$25,000 in exchange for a *get*, but he was quickly prevailed upon to execute the *get* free of charge.

prefer to keep a low profile and "stay out of the limelight."⁶⁸ In fact, Rivka Haut compared the reactions of Orthodox women to *get* extortion to an "underground":

Just walk into a supermarket in Flatbush and start talking about *agunot*. You will find that women will come over and express their very, very deep anger at the situation. But the women don't know what to do about it; they don't have power in the Orthodox world; they're not important in shuls; they're not in control of the money. There's no meaningful way for women to express their displeasure.⁶⁹

Haut added that part of AGUNAH's goal is to channel women's anger into reform efforts.⁷⁰

Although its feminist attributes cannot be ignored, the *agunah* problem is not just a woman's issue. Beyond its impact upon women, the inequity created by Jewish divorce law is a community-wide problem that hurts entire families and causes innocent children to bear the stigma of *mamzerim*. Furthermore, national media attention to the issue has often embarrassed Judaism, depicting it as an unfair system unable to resolve a serious endemic problem.⁷¹ "Any Jewish legalist or jurist who wants to stand up and say the Jewish law is a just system needs to fix this," said Norma Baumel Joseph.⁷² Others share this view.

C. Quantification of the Agunah Problem

How many *agunot* are there in New York State? Estimates have ranged dramatically, from a few hundred in the entire United States to 150,000 in New York State alone.⁷³ According

68. Telephone Interview with Chaya Cooper, Assistant Director, Get Free (Mar. 14, 1994).

69. Telephone Interview with Rivka Haut, Director, AGUNAH, Founder, ICAR, (Mar. 6, 1994).

70. *Id.*

71. Dovid Zwiebel, *Tragedy Compounded: The Aguna Problem and New York's Controversial New "Get Law,"* JEWISH OBSERVER, Sept. 1993, at 2.

72. Telephone Interview with Norma Baumel Joseph, Founder and President, ICAR (Mar. 21, 1994).

73. Dullea, *supra* note 47, at A40 (citing 150,000 *agunot* in New York State alone). In stark contrast, see RABBI MENDEL EPSTEIN, A WOMAN'S GUIDE TO THE GET PROCESS 4 (1989) (claiming that no more than 50 women in the United States meet the basic definition of *agunah*). See also John McQuiston, *Jewish Divorce Law Plagues Wives*, N.Y. TIMES, Dec. 28, 1986, at B35 (estimating 15,000 *agunot* in

to Deborah Eifferman, reliable statistics are almost impossible to come by, in large part due to the privacy of the matter: "Prior to the time that a woman gets her divorce very few are ready to come out in the open. Once they get their divorce they want to forget about it. . . . We only see the tip of the iceberg."⁷⁴

The caseloads of organizations that help *agunot* provide some indication of the numbers involved. G.E.T. reports having helped 500 clients achieve divorces since 1979;⁷⁵ Get Free has concluded approximately 27 *gittin* since its establishment in 1992 and has 70 to 80 active cases on file;⁷⁶ AGUNAH, which now refers individual cases out to other organizations, reports that it receives two or three calls for assistance each week.⁷⁷ But these figures are underinclusive for two reasons. First, they reflect only those *agunot* who decide to "go public" with their situation and seek organizational assistance. Second, these organizational caseloads fail to account for those women who have obtained *gittin*, but only after yielding to the extortionate demands of their recalcitrant spouses.

Given the lack of hard numbers, the primary source of "data" regarding *agunot* has been anecdotal; indeed, the fact that so many members of the Orthodox community either know an *agunah* personally or have a story to tell of one may be the best indication of the extent of the problem.⁷⁸ Accounts of women's efforts to obtain *gittin*, such as those that follow, have captured local and national public attention over the past decade:

* "It was the worst time in my life," recalled Rachel (not her real name). "He basically put me in prison for a year." An Orthodox Jew in her 40s, Rachel is one of the growing number of women

New York State). It has been suggested that the *New York Times* report of 150,000 *agunot* in New York State may have been a typographical error. Breitowitz, *supra* note 2, at 316 n.6. Nonetheless, the range of projections is vast.

74. Telephone Interview with Deborah Eifferman, International Vice President, ICAR (Mar. 2, 1994).

75. *Id.*

76. Information provided by Yehuda Levin, Caseworker, Get Free.

77. Information provided by Rivka Haut. See Appendix A.

78. Rackman, *supra* note 63, at 35 (declaring that "[o]ne could fill as many volumes as there are books of the Talmud (20, and they are massive) with tearful sagas of Jewish women waiting for *gittin* from tormenting husbands who dangle the *get* on a string of preposterous demands, as a cat might toy with a mouse before devouring it.").

who have suffered a uniquely Jewish twist on the general nastiness of divorce. . . . Ultimately, Rachel got her *get*, after she agreed to give her recalcitrant spouse \$150,000.⁷⁹

- * In one case, a guy came to see me, and I threw the gentleman out. For eighteen years the guy wouldn't give her a *get*. I mean he put his life away, he put his life on hold. He buried himself and he buried her. . . . There's a famous expression Sampson said when he brought down the temple: I'm going to kill myself but kill them too.⁸⁰
- * Shira's *get* is nowhere in sight: Her former spouse asked for \$100,000, then \$1 million, and finally her father's pension. In addition, he is demanding full custody and has said he will submit to a *bet din* only if all the terms of the divorce—settlement, custody—are retried through the rabbinical court.⁸¹
- * I had a consultation with a woman and three rabbis. She had to raise \$40,000 to give her husband in order for him to give her a *get*. The reason he wanted \$40,000 was that his brother was going into business and he needed this money to start a business. And of course I was appalled by it because this lady was going to have to work probably for the rest of her life to pay off this \$40,000. She was an office worker who made about \$250 a week, so you can guess how long it was going to take her to pay back the loan that she had to take out to do this. I took her aside and I said, "Now listen, you know for \$5,000 I know this guy who'll kill him for you and you'll really be ahead of the game." Obviously, I was joking, but I was really angry.⁸²
- * It's a crazy thing that we don't have figures, but we find *agunot* in the weirdest places. My friend, who's another director of AGUNAH, told me last week that she walked into the bakery wearing her button that says "free *agunot* now" and the woman behind the counter who was helping her saw the button and started to cry. She's a woman in her sixties and she's still an *agunah*. . . . They're all over the place. Within the radius of three or four blocks of my house I know five or six *agunot* that are not generally known in the community. For whatever rea-

79. Patricia W. Biederman, *When A Jewish Divorce Is Really Hard To Get*, L.A. TIMES, May 17, 1992, at J4. See also Kraft, *supra* note 15 (in which a lawyer relates how a client's father paid \$100,000 in exchange for his daughter's *get*).

80. Interview with Allen Fisher, Orthodox Attorney (Mar. 7, 1994).

81. Roselyn Bell, *Coming Apart Jewishly*, HADASSAH, Mar. 1991, at 23.

82. Telephone Interview with Harvey Jacobs, Matrimonial Lawyer (Mar. 7, 1994).

son they're just quiet about it. But they've gone for years without a *get*.⁸³

It was stories like these that twice within the last decade inspired the New York State Legislature and Governor Mario Cuomo to enact civil legislation designed to help *agunot*. The next three sections will assess the operation and effectiveness of their legislative efforts.

II. New York State's Involvement in the *Agunah* Problem: A Judicial and Legislative History

New York State, like virtually all other states, recognizes religious marriages by according civil validity to a marriage ceremony performed by an authorized minister or clergyman.⁸⁴ There is no such civil recognition of religious divorce. State court judges are the exclusive state agents authorized to dissolve marriage unions.⁸⁵ Consequently, prior to the passage of the 1983 *get* statute, the state regarded civil and religious divorce as two entirely unrelated affairs; the granting of one had no impact upon the granting of the other.⁸⁶ For *agunot*, this meant that a woman possessed no automatic legal recourse when her husband refused to grant her a *get*.

Women who have sought the aid of New York courts in obtaining *gittin* have thus done so on a variety of legal theories, ranging from express and implied contract, to fraud, tort and equity.⁸⁷ While New York courts have been largely sympathetic to these appeals, they have also recognized that judicial intervention raises constitutional difficulties. This section will sketch the history of New York's judicial involvement in "*get*

83. Telephone Interview with Rivka Haut, Director, AGUNAH, Founder, ICAR (Mar. 6, 1994).

84. N.Y. DOM. REL. LAW § 11(1), (7) (McKinney 1986 & Supp. 1995).

85. See generally N.Y. DOM. REL. LAW § 160(6) (McKinney 1986).

86. Breitowitz, *supra* note 2, at 321. Similarly, in the eyes of those who adhere to the *halacha*, only the delivery of a *get* can dissolve the marriage union for religious purposes. The fact that a couple may have already obtained a civil divorce is of no consequence. *Id.* Consequently, many *agunot* today have already obtained civil divorces, but are unable to remarry because they have not received a *get*.

87. See, e.g., Weiss v. Goldfeder, N.Y. L.J., Oct. 26, 1990, at 21 (Sup. Ct. Queens County Oct. 26, 1990) (holding that withholding of a *get* constituted the tort of intentional infliction of emotional distress).

cases" before turning to the enactment of the 1983 and 1992 *get* laws.

A. *Getting a Get in the Civil Courts*

1. *Enforcement of Private Agreements*

Most *get* cases have involved women seeking specific performance of an express contractual agreement between the spouses. In *Koeppel v. Koeppel*, the first New York State case of its kind, the husband and wife had signed a prenuptial agreement requiring both spouses to appear before a *bet din* in the event of divorce.⁸⁸ When Mr. Koeppel refused to honor the agreement, his wife sued. Although the court found the agreement to be valid, it held that the provision in question was too vague to support an order of specific performance.⁸⁹

Marguiles v. Marguiles, the second *get* case to arise in the New York courts, involved a husband who promised in open court to give his wife a *get* and later refused.⁹⁰ The appellate court did not order specific performance of the *get's* delivery, but, after vacating the trial court's more severe imposition of a fifteen-day jail term on the husband, upheld a fine imposed upon him for contempt of court.⁹¹

In the cases of *Rubin v. Rubin*⁹² and *Pal v. Pal*,⁹³ the courts "acted" by refusing to grant any affirmative legal request of the recalcitrant spouse. In *Rubin*, a case in which the wife breached an agreement to accept a *get*, the court refused to enforce the support provisions of the parties' separation agreement until the wife fulfilled her contractual obligation to

88. 138 N.Y.S.2d 366 (Sup. Ct. Queens County 1954), *aff'd*, 3 A.D.2d 853, 161 N.Y.S.2d 694 (2d Dep't 1957).

89. *Id.* at 371.

90. 42 A.D.2d 517, 517, 344 N.Y.S.2d 482, 484 (1st Dep't 1973).

91. *Id.* Some commentators have interpreted the willingness of the appellate court in *Marguiles* to authorize fines but not jail terms to mean that New York courts will allow enforcement of *get* agreements through measures less severe than incarceration. See IRWIN H. HAUT, *DIVORCE IN JEWISH LAW AND LIFE* 73-74 (1983). This hypothesis has since been disproved. See *Kaplinsky v. Kaplinsky*, 198 A.D.2d 212, 603 N.Y.S.2d 574 (2d Dep't 1993) (upholding lower court's imposition of term of imprisonment upon recalcitrant husband).

92. 75 Misc. 2d 776, 348 N.Y.S.2d 61 (Fam. Ct. Bronx County 1973).

93. N.Y. L.J., July 25, 1973, at 13 (Sup. Ct. Kings County July 25, 1973), *rev'd*, 45 A.D.2d 738, 356 N.Y.S.2d 672 (2d Dep't 1974).

cooperate in obtaining a religious divorce.⁹⁴ Similarly, in *Pal*, in which the husband reneged on his promise in open court to appear before a *bet din*, the court dismissed the husband's motion to hold his wife in contempt for failure to comply with the visitation provisions in the judgment of divorce.⁹⁵

Although the courts in these cases took some action against the recalcitrant spouse and recognized the validity of an agreement to obtain a *get*, none granted the actual remedy requested—specific performance of an express contractual provision to give a *get* or appear before a *bet din*. With the exception of *Koeppel*, in all of the above cases the courts duly noted either potential constitutional or *halachic* problems in requiring specific performance of a religious requirement.⁹⁶ It was not until 1976 in *Waxstein v. Waxstein*, that a New York court ordered specific performance of an agreement requiring the husband to give a *get*.⁹⁷

2. Theory of Implied Contract

In a second line of cases, absent express agreement between the spouses, women have sought civil enforcement of the *get* based on an implied obligation set out in the *ketubah*.⁹⁸ The *ketubah* is the traditional Jewish marriage contract in which a groom agrees to a set of provisions, including the following: "Be unto me for a wife, according to the laws of Moses and Israel,

94. *Rubin*, 75 Misc. 2d at 783, 348 N.Y.S.2d at 67.

95. *Pal*, 45 A.D.2d at 739, 356 N.Y.S.2d at 673.

96. In *Pal*, the appellate court succinctly stated that a secular court lacks authority to convene a rabbinical tribunal. *Id.* In *Marguiles*, the court raised constitutional concerns, but apparently considered them to be preempted by the *halachic* concern that ordering the husband to execute a *get* would in any event render the *get* invalid. *Marguiles*, 42 A.D.2d at 517, 344 N.Y.S.2d at 484. In *Rubin*, in which the trial court directly raised the First Amendment difficulties of ordering the execution of a *get*, the court concluded that where performance of a religious act constitutes a condition precedent to an agreement, no First Amendment problems arise from the court's simple refusal to enforce the agreement's contingent obligations if that condition has not been satisfied. *Rubin*, 75 Misc. 2d at 782, 348 N.Y.S.2d at 67. For a discussion of the constitutional implications of these *get* cases, see Bleich, *supra* note 3, at 227-41.

97. 90 Misc. 2d 784, 395 N.Y.S.2d 877 (Sup. Ct. Kings County 1976), *aff'd*, 57 A.D.2d 863, 394 N.Y.S.2d 253 (2d Dep't 1977).

98. Literally, "writing." Dating back to Talmudic times, the traditional *ketubah* was instituted to protect the bride by obligating the groom to pay her a specific sum in the event of death or divorce. See Kahan, *supra* note 3, at 198; Breitowitz, *supra* note 2, at 343 n.119.

and I will work, honor, support and maintain thee in accordance with the manner of Jewish men who work, honor, support and maintain their wives in faithfulness"⁹⁹ Women have argued that this language impliedly obligates a husband to deliver a *get* to his wife when a divorce is required by Jewish law.¹⁰⁰

The court in *Stern v. Stern* agreed.¹⁰¹ In *Stern*, the wife sued for divorce and the husband counterclaimed, alleging adultery. Relying on expert testimony that Jewish law absolutely requires a husband to divorce an adulterous wife, the court ordered the man to deliver a *get* to his wife based on his agreement in the *ketubah* to act in accordance with "the laws of Moses and Israel."¹⁰² In so holding, the *Stern* court held that the *ketubah* is a valid, binding contract, "a simple agreement between a man and a woman in contemplation of marriage [which] . . . should be enforced according to the intent of the parties"¹⁰³

Civil enforcement of the *ketubah* is problematic for a number of reasons, however. Due to the ceremonial nature of the *ketubah*, it is questionable whether the groom possesses the

99. Nadel, *supra* note 11, at 64.

100. The first *get* case to proceed on a theory of the *ketubah* was the Canadian case of *Morris v. Morris*, 36 D.L.R.3d 447, *rev'd*, 42 D.L.R.3d 550 (1973). In *Morris*, the trial court sustained the argument that the *ketubah* is a civilly enforceable contract and ordered the deliverance of a *get*. Although that holding was reversed on appeal, the argument has gained ascendancy in a number of jurisdictions in the United States. See *In re Marriage of Goldman*, 554 N.E.2d 1016 (Ill. App. Ct.), *appeal denied*, 555 N.E.2d 376 (Ill. 1990); *Burns v. Burns*, 538 A.2d 438 (N.J. Super. Ct. Ch. Div. 1987); *Minkin v. Minkin*, 432 A.2d 665 (N.J. Super. Ct. Ch. Div. 1981); *Stern v. Stern*, 5 Fam. L. Rep. (BNA) 2810 (Sup. Ct. N.Y. County 1979).

101. 5 Fam. L. Rep. (BNA) 2810 (Sup. Ct. N.Y. County 1979).

102. 5 Fam. L. Rep. at 2811. See Steven F. Friedell, *The First Amendment and Jewish Divorce: A Comment on Stern v. Stern*, 18 J. FAM. L. 525 (1979-1980) (defending the constitutional validity of the *Stern* decision).

103. *Stern*, N.Y. L.J., Aug. 8, 1979, at 13. Prior to *Stern*, a number of New York courts had declared the *ketubah* a valid contract, although not for the purpose of requiring a *get*. See *Hurwitz v. Hurwitz*, 216 A.D. 362, 215 N.Y.S. 184 (2d Dep't 1926); *Kaplan v. Kaplan*, 69 Misc. 2d 198, 329 N.Y.S.2d 750 (Sup. Ct. Kings County 1972) *But see In re Estate of White*, 78 Misc. 2d 157, 158-59, 356 N.Y.S.2d 208, 209-10 (Sup. Ct. N.Y. County 1974) (the *ketubah* has no legally binding effect); *Wener v. Wener*, 35 A.D.2d 50, 54, 312 N.Y.S.2d 815, 819 (2d Dep't 1970) (holding that trial court erred in relying on the *ketubah* to find child support obligation).

requisite intent to make it a legally binding contract.¹⁰⁴ Difficulties include that the traditional *ketubah* is written in Aramaic, often without English translation;¹⁰⁵ that it is composed of "boilerplate" language that may not codify the true wishes of the marrying couple;¹⁰⁶ and that it is signed in a highly emotional setting just moments before the wedding ceremony.¹⁰⁷ Finally, even if the *ketubah* does constitute a civilly enforceable contract, nowhere does the document mention divorce or a husband's obligation to deliver a *get*. Some commentators therefore condemn judges' efforts to read this obligation into the general requirement that a groom act in "accordance with the laws of Moses and Israel" as unconstitutional interference with a set of highly complex religious issues.¹⁰⁸

In 1954, the Conservative Jewish movement tried to eliminate ambiguity and the potential for judicial entanglement by adding to its "official" form of *ketubah* an arbitration clause (known as the Lieberman clause) in which both bride and groom agree to appear before a *bet din* at the other's request, and to abide by any decision rendered by the *bet din* under penalty of financial sanction.¹⁰⁹ This clause, which in effect binds a recal-

104. Kahan, *supra* note 3, at 216-17; Nadel, *supra* note 11, at 65 n.89; Friedell, *supra* note 102, at 533; *In re Estate of White*, 78 Misc. 2d 157, 158-59, 356 N.Y.S.2d 208, 209-210 (Sup. Ct. N.Y. County 1974) (*ketubah* is ceremonial, not legal, document).

105. Breitowitz, *supra* note 2, at 347. "Even where some English words do appear," Breitowitz states "the legal portions of the *ketubah* are rarely reproduced in English," such that a majority of couples are probably ignorant of the *ketubah*'s substantive legal obligations. *Id.*

106. Kahan, *supra* note 3, at 216; Friedell, *supra* note 102, at 533 ("[I]t is part of a ceremony that the parties may regard as quaint, symbolizing one's connection with tradition but not an actual legal relationship").

107. See Kahan, *supra* note 3, at 216-17. Often the *ketubah* is signed in the company of celebrating family members and photographers, absent any enumeration of the specific clauses in the document and their legal import. *Id.*

108. *Id.*

109. See Nadel, *supra* note 11, at 66 n.93. The added provision reads:

As evidence of our desire to enable each other to live in accordance with the Jewish law of marriage throughout our lifetime, we, the bride and bridegroom, attach our signatures to this Ketubah, and hereby agree to recognize the authority of the Beth Din of the Rabbinical Assembly and the Jewish Theological Seminary of America, or its duly appointed representatives, as having authority to counsel us in the light of the Jewish tradition which requires the husband and wife to give each other complete love and devotion, and to summon either party at the request of the other, in order to enable the party so requesting to live in accordance with the standards of

citrant spouse to appear before a *bet din* when summoned, is significant for *agunot*, who often have difficulty just getting their husbands to appear before a rabbinical tribunal.

In the landmark 1983 case of *Avitzur v. Avitzur*, the highest court in New York State upheld the enforceability of the Lieberman clause by a four-to-three margin and specifically ordered Boaz Avitzur to appear before a *bet din*.¹¹⁰ The court in *Avitzur* declared that, despite the religious nature of the *ketubah*, its arbitration clause could be enforced "solely upon the application of neutral principles of contract law," thereby avoiding any entanglement of the courts in religious issues.¹¹¹ The dissent rejected this claim and deemed the *ketubah* a liturgical document, the enforcement of which would impermissibly entangle secular courts in ecclesiastical affairs.¹¹²

Although the *Avitzur* case has symbolic importance for *agunot* in New York, its ability to help resolve their problems is limited. First, because the court's decision only applies to parties bound by the Conservative *ketubah*, *Avitzur* has no significance for Orthodox Jews, whose marriage contracts contain no such arbitration clause.¹¹³ Second, by its explicit terms, *Avitzur*

Jewish law of marriage throughout his or her lifetime. We authorize the Beth Din to impose such terms of compensation as it may see fit for failure to respond to its summons or to carry out its decision.

Id. This clause is called the Lieberman clause after its drafter, Rabbi Saul Lieberman of the Jewish Theological Seminary. Nadel, *supra* note 11, at 66 n.93; Marshall, *supra* note 22, at 208 n.26; Breitowitz, *supra* note 2, at 361-63; Kahan, *supra* note 3, at 221 n.175.

110. 58 N.Y.2d 108, 446 N.E.2d 136, 459 N.Y.S.2d 572, *cert. denied*, 464 U.S. 817 (1983). This case arose prior to the enactment of the *get* statute later that year.

111. *Id.* at 114, 446 N.E.2d at 138, 459 N.Y.S.2d at 574. Writing for the majority, Judge Wachtler analogized the Lieberman clause to an antenuptial provision in which parties agree to arbitrate in a particular forum. "This agreement—the Ketubah," he wrote, "should ordinarily be entitled to no less dignity than any other civil contract to submit a dispute to a nonjudicial forum, so long as its enforcement violates neither the law nor the public policy of this State." *Id.* (citations omitted).

112. *Id.* at 116, 446 N.E.2d at 139, 459 N.Y.S.2d at 575 (Jones, J., dissenting). See Ralph M. Stein, *Marriage Contracts Unsuitable for Civil Courts*, N.Y. TIMES, Feb. 25, 1983, at A30 (criticizing the Court of Appeals as being "disingenuous when it finds that some aspects of the Jewish marriage contract are severable and civilly enforceable while others are not").

113. See Nadel, *supra* note 11, at 67 (calling *Avitzur* "only a partial solution to the *agunah* problem" in light of the Orthodox Movement's refusal to accept the Conservative modification of the *ketubah*). The Orthodox Movement has rejected

only requires a recalcitrant husband to *appear* before a *bet din*; it does not require him to deliver a *get* or to comply with the *bet din*'s order that he do so.¹¹⁴ Thus, *Avitzur* does not help a woman whose husband appears before a religious tribunal but nonetheless refuses to grant her a religious divorce.¹¹⁵

3. *Non-Contractual Theories*

In several *get* cases, New York courts have resorted to entirely non-contractual theories in addressing *get* extortion. In *B. v. B.*, the court scheduled a hearing to determine whether the husband's conduct in refusing to give his wife a *get* constituted fraud.¹¹⁶ In *Weiss v. Goldfeder*, the court sustained as a valid cause of action the claim that a husband's withholding of a *get* amounted to tortious conduct, namely intentional infliction of emotional distress.¹¹⁷ Finally, on grounds of equitable relief, in two cases New York courts voided agreements entered into by women under duress to obtain *gittin*. In *Perl v. Perl*, the court

the Lieberman clause on *halachic* grounds. *Id.* But see Breitowitz, *supra* note 2, at 363 n.227 (stating that the Orthodox Movement's *halachic* problems with the Lieberman clause could be easily eliminated by revising the provision). See also Kahan, *supra* note 3, at 222 (suggesting that the "uncompromising rejection" of the Lieberman clause by some Orthodox commentators may stem from their unwillingness to recognize the validity of the Conservative Jewish Movement and its rabbinical tribunals).

114. *Avitzur*, 58 N.Y.2d at 115, 446 N.E.2d at 139, 459 N.Y.S.2d at 575.

115. But see Breitowitz, *supra* note 2, at 363-65 (discussing possible theories upon which the *Avitzur* holding could be extended to require actual compliance with the *bet din*'s decision requiring that the husband execute a *get*).

116. N.Y. L.J., May 4, 1978, at 7 (Sup. Ct. N.Y. County May 4, 1978). In *B. v. B.*, the wife withdrew her opposition to a civil divorce decree based on her husband's agreement to give her a *get*. However, once the civil divorce judgment was entered, the husband, a Conservative rabbi, reneged on his promise. The court responded by scheduling a hearing to determine whether the husband's actions constituted fraud, a finding of which would have voided the order of civil divorce. The husband gave his wife a *get* soon after the judge's action, making the hearing unnecessary. *Id.*

117. N.Y. L.J., Oct. 26, 1990, at 21, 31 (Sup. Ct. Queens County Oct. 26, 1990). The possibility of seeking tort remedies for *agunot* has received attention. See Breitowitz, *supra* note 2, at 397-406; Friedell, *supra* note 102, at 532; Barbara J. Redman, *Jewish Divorce: What Can Be Done in Secular Courts to Aid the Jewish Woman?*, 19 GA. L. REV. 389 (1985). However, New York courts to date have been generally reluctant to equate a man's refusal to give his wife a *get* with tortious offense. See *Perl v. Perl*, 126 A.D.2d 91, 96, 512 N.Y.S.2d 372, 376 (1st Dep't 1987) (rejecting tort theory as valid cause of action against recalcitrant spouse); see also Breitowitz, *supra* note 2, at 406-07 (stating that tort remedy, either by statute or common law, would raise serious *halachic* problems).

voided a property settlement in which a wife had transferred nearly all marital property to her husband in exchange for a religious divorce.¹¹⁸ The court stated that

the husband, knowing that his wife was of the Orthodox Jewish faith and could never remarry or bear children without a [*g*]et, and aware that only he, under Jewish law, could permit such an instrument to issue, used this knowledge to crush the wife's resistance to his extortionate financial demands and that she, because of her desperation to be free and remarry, bear children, and live a normal life, simply capitulated.¹¹⁹

Similarly, in *Golding v. Golding*, which quoted *Perl* at length, the court voided a settlement agreement upon finding that the husband had abused his power to deny the *get* in negotiating its terms.¹²⁰ The opinion noted that the prospect of not receiving a *get* was "particularly terrifying to the plaintiff" because her sister was an *agunah*.¹²¹

Despite the desire of many New York courts to help *agunot*, judicial intervention in the *get* process raises potential constitutional and *halachic* problems. Given the complexities of Jewish law, a court that tries to help an *agunah* may unknowingly create a situation in which any *get* delivered will be deemed invalid.¹²² However, courts cannot be expected to understand these doctrinal complexities,¹²³ and those that try to do so risk entanglement in religious issues. In light of this tension, judicial intervention constitutes an attractive but complicated and potentially dangerous option for helping *agunot*.

118. 126 A.D.2d 91, 512 N.Y.S.2d 372 (1st Dep't 1987).

119. *Perl*, 126 A.D.2d at 93-94, 512 N.Y.S.2d at 374. Writing for the court, Justice Wallach emphasized that courts possess broad equitable powers in overseeing divorce settlements: "[C]ourts have thrown their cloak of protection about separation agreements and made it their business, when confronted, to see to it that they are arrived at fairly and equitably, in a manner so as to be free from the taint of fraud and duress" *Id.* at 95-96, 512 N.Y.S.2d at 375-76 (quoting *Christian v. Christian*, 42 N.Y.2d 63, 72, 365 N.E.2d 849, 855, 396 N.Y.S.2d 817, 824 (1977)).

120. 176 A.D.2d 20, 23, 581 N.Y.S.2d 4, 6-7 (1st Dep't 1992).

121. *Id.* at 21, 581 N.Y.S.2d at 5 (quoting New York County Supreme Court's findings).

122. See *supra* notes 50-53 and accompanying text.

123. See Bleich, *supra* note 3, at 220-24 (noting repeated instances of judicial error and misunderstanding with regard to the nature of the *get*).

B. *Enactment of the 1983 Get Statute*

In 1980, Agudath Israel undertook a major effort to develop legislative approaches to the *agunah* problem that would satisfy both constitutional and *halachic* mandates. Convening rabbis, attorneys and legal scholars for a full-day brainstorming session, the organization set in motion the intellectual machinery that eventually produced the 1983 *get* statute.¹²⁴ Alan Dershowitz recalled the meeting: "Everyone was trying to figure out a way of coercing without coercing and also a way of getting the state involved without getting the state involved."¹²⁵ What emerged was the central concept behind the 1983 *get* statute, that the state has a legitimate interest in ensuring that barriers to remarriage are removed prior to granting spouses a civil divorce. As Nathan Lewin explained, civil divorce is "designed to sever the parties from the marital relationship and to leave each free to remarry. The purpose of a divorce decree would plainly be frustrated if the party securing the divorce were able to restrain the defending party from ever remarrying."¹²⁶

In designing the *get* statute, the drafters followed the non-interventionist approach taken in *Rubin* and *Pal*.¹²⁷ Instead of requiring spouses to give or accept a *get*, courts are directed to take no action until the party requesting civil divorce voluntarily removes existing barriers to remarriage. By minimizing judicial intervention in this manner, the drafters of the *get* statute sought to avoid constitutional and *halachic* difficulties, as well as to advance the policy that courts will not confer the secular benefit of divorce upon any individual who comes before

124. Breitowitz, *supra* note 2, at 375 n.276.

125. Telephone Interview with Alan Dershowitz, Professor of Law, Harvard Law School (Feb. 16, 1994).

126. Memorandum from Nathan Lewin, Miller, Cassidy, Larroca & Lewin, to Assemblyman Sheldon Silver, in Support of A. 6423, June 8, 1983, in Legislative Bill Jacket, [1983] N.Y. Laws ch. 979.

After a bill is passed by both houses of the New York State Legislature, records of the voting, along with all memoranda submitted in support and opposition to the bill proceed to the Governor's desk for consideration before signing. This packet, called the "bill jacket," is kept on file at the New York State Archives in Albany, New York.

127. See *supra* notes 92-95 and accompanying text. See also Bleich, *supra* note 3, at 277-89 (arguing for secular relief of the *agunah* problem through approach of judicial non-intervention).

it with "dirty hands" (i.e. who is preventing his spouse from remarrying).¹²⁸

The first *get* bill, proposed in 1981, easily sailed through both houses of the New York legislature.¹²⁹ However, anticipating that Governor Carey would veto the legislation on constitutional grounds, the sponsors withdrew it for further evaluation.¹³⁰ They introduced a slightly revised *get* bill two years later, after Mario Cuomo had become Governor.¹³¹ Despite the bill's questioned constitutionality, it passed unanimously in the Senate and by an overwhelming majority in the Assembly,¹³² thanks primarily to the strong political lobby of New York's Orthodox community and the influence of New York legislators who were themselves Orthodox Jews (including the bill's chief sponsor, Sheldon Silver).

The bill proceeded to Governor Cuomo's desk with an impressive list of opponents urging veto of the legislation on constitutional grounds. Among them were the American Jewish Congress, the Committee on Matrimonial Law of the New York City Bar Association, the National Federation of Temple Sisterhoods (representing 12,000 Reform Jewish women), the New York Federation of Reform Synagogues, the New York Civil Liberties Union, and Americans United For Separation of Church and State.¹³³ Nonetheless, on August 8, 1983 Governor Cuomo signed into law section 253 of the Domestic Relations Law, a

128. See Bleich, *supra* note 3, at 281-82.

129. Breitowitz, *supra* note 2, at 375 n.276. This bill was primarily authored by Alan Dershowitz. *Id.*

130. *Id.* The bill's chief sponsors were Assemblyman Sheldon Silver and Senator Martin Connor. See Letter from Charles J. Tobin, New York State Catholic Conference, to Honorable Martin Connor and Honorable Sheldon Silver, (June 23, 1983), in Legislative Bill Jacket, [1983] N.Y. Laws ch. 979.

131. The revised *get* bill was authored by Nathan Lewin. It differed from the earlier version in that the original version contained a provision for compulsory arbitration on the issue of compliance, whereas a revised bill eliminated this provision, relying instead upon a verified affidavit. Breitowitz, *supra* note 2, at 375 n.276.

132. The Senate passed the 1983 *get* bill by a margin of 58 to zero. The Assembly passed it by a margin of 136 to 7. Legislative Bill Jacket, [1983] N.Y. Laws ch. 979 (reporting results of the vote on N.Y.S. 6647, N.Y.A. 6423, 206th Sess. (1983)).

133. All of these organizations filed memoranda in opposition to the *get* bill. Legislative Bill Jacket, [1983] N.Y. Laws ch. 979.

new statutory provision entitled "Removal of barriers to remarriage."¹³⁴

134. N.Y. DOM. REL. LAW § 253 (McKinney 1986 & Supp. 1995). Bernard Zlotowitz, *A Religious Requirement Imposed By Cuomo in '83*, N.Y. TIMES, Sept. 26, 1984, at A22 (in signing the 1983 *get* bill "Governor Cuomo bowed to the Orthodox [lobby]"). The law took effect immediately, and was deemed applicable to all pending annulment and divorce actions at the time of passage. *Pinkesz v. Pinkesz*, N.Y. L.J., Dec. 4, 1984, at 13 (Sup. Ct. Kings County Dec. 4, 1984). The complete text of the 1983 *get* statute (as amended in 1984) is as follows:

1. This section applies only to a marriage solemnized in this state or in any other jurisdiction by a person specified in subdivision one of section eleven of this chapter.

2. Any party to a marriage defined in subdivision one of this section who commences a proceeding to annul the marriage or for a divorce must allege, in his or her verified complaint: (i) that, to the best of his or her knowledge, that he or she has taken or that he or she will take, prior to the entry of final judgment, all steps solely within his or her power to remove any barrier to the defendant's remarriage following the annulment or divorce; or (ii) that the defendant has waived in writing the requirements of this subdivision.

3. No final judgment of annulment or divorce shall thereafter be entered unless the plaintiff shall have filed and served a sworn statement: (i) that, to the best of his or her knowledge, he or she has, prior to the entry of such final judgment, taken all steps solely within his or her power to remove all barriers to the defendant's remarriage following the annulment or divorce; or (ii) that the defendant has waived in writing the requirements of this subdivision.

4. In any action for divorce based on subdivisions five and six of section one hundred seventy of this chapter in which the defendant enters a general appearance and does not contest the requested relief, no final judgment of annulment or divorce shall be entered unless both parties shall have filed and served sworn statements (i) that he or she has, to the best of his or her knowledge, taken all steps solely within his or her power to remove all barriers to the other party's remarriage following the annulment or divorce; or (ii) that the other party has waived in writing the requirements of this subdivision.

5. The writing attesting to any waiver of the requirements of subdivision two, three or four of this section shall be filed with the court prior to the entry of a final judgment of annulment or divorce.

6. As used in the sworn statements prescribed by this section "barrier to remarriage" includes, without limitation, any religious or conscientious restraint or inhibition, of which the party required to make the verified statement is aware, that is imposed on a party to a marriage, under the principles held by the clergyman or minister who has solemnized the marriage, by reason of the other party's commission or withholding of any voluntary act. Nothing in this section shall be construed to require any party to consult with any clergyman or minister to determine whether there exists any such religious or conscientious restraint or inhibition. It shall not be deemed a "barrier to remarriage" within the meaning of this section if the restraint or inhibition cannot be removed by the party's voluntary act. Nor

C. Operation of the 1983 Get Statute

Strategically, the so-called “get statute” makes no specific mention of the *get* or of Judaism. Neutral on its face, it applies to all persons married in religious ceremonies, whether or not they are Jewish.¹³⁵ Conversely, the law excludes from its coverage all persons married in civil ceremonies, even if they are Jewish.¹³⁶ Despite its facial neutrality, however, by limiting the statutory definition of “barrier to remarriage” to “voluntary” acts, the statute confines its practical application to the delivery of the *get* in Jewish divorce cases.¹³⁷

shall it be deemed “barrier to remarriage” if the party must incur expenses in connection with removal of the restraint or inhibition and the other party refuses to provide reasonable reimbursement for such expenses. “All steps solely within his or her power” shall not be construed to include application to a marriage tribunal or other similar organization or agency of a religious denomination which has authority to annul or dissolve a marriage under the rules of such denomination.

7. No final judgment of annulment or divorce shall be entered, notwithstanding the filing of the plaintiff’s sworn statement prescribed by this section, if the clergyman or minister who has solemnized the marriage certifies, in a sworn statement, that he or she has solemnized the marriage and that, to his or her knowledge, the plaintiff has failed to take all steps solely within his or her power to remove all barriers to the defendant’s remarriage following the annulment or divorce, provided that the said clergyman or minister is alive and available and competent to testify at the time when final judgment would be entered.

8. Any person who knowingly submits a false sworn statement under this section shall be guilty of making an apparently sworn false statement in the first degree and shall be punished in accordance with section 210.40 of the penal law.

9. Nothing in this section shall be construed to authorize any court to inquire into or determine any ecclesiastical or religious issue. The truth of any statement submitted pursuant to this section shall not be the subject of any judicial inquiry, except as provided in subdivision eight of this section.

N.Y. DOM. REL. LAW § 253.

135. *See id.* § 253(1).

136. *See id.*

137. *Id.* § 253(6). The *get* statute’s drafters cleverly defined “barriers to remarriage” so as to exclude Catholics from the statute’s coverage. Catholics face barriers to religious remarriage as well, but because the annulment that Catholics must obtain before remarrying within the Catholic Church is considered an act of the Church, and not a “voluntary” act of the parties themselves, Catholics are excluded the statute’s practical coverage. Consequently, in 1983 the New York State Catholic Conference filed a memorandum stating that it had no objection to the *get* bill’s enactment. Memorandum from Charles J. Tobin, New York State Catholic Conference, to Senator Martin Connor and Assemblyman Sheldon Silver, regard-

As amended in 1984,¹³⁸ the *get* statute requires the party who initiates an action for civil divorce or annulment to do two things before final judgment can be entered. First, in filing his or her verified complaint, the plaintiff must allege, "to the best of his or her knowledge, that he or she has taken or that he or she will take, prior to the entry of final judgment, all steps solely within his or her power to remove any barrier to the defendant's remarriage following the annulment or divorce."¹³⁹ Second, prior to judgment, the plaintiff must submit an affidavit stating that he or she has *actually* taken the steps necessary to remove the barrier to remarriage.¹⁴⁰

Two provisions in the *get* statute guard against the filing of false affidavits. First, a plaintiff may be criminally liable for the intentional filing of a false statement.¹⁴¹ Second, the statute allows the clergyman who performed the wedding ceremony to counter the plaintiff's affidavit with an affidavit stating that barriers to the defendant's remarriage still exist.¹⁴² In this situation, the clergyman's statement prevails and no final judgment of divorce will be entered.¹⁴³

Finally, the statute requires the defendant to reimburse the plaintiff for reasonable expenses incurred in connection

ing A. 6423 and S. 6647, June 23, 1983, in Legislative Bill Jacket [1983] N.Y. Laws ch. 979.

138. In August 1984, in response to the *Chambers* case, 122 Misc. 2d 671, 471 N.Y.S.2d 958 (Sup. Ct. N.Y. County 1983), see *infra* notes 193-201 and accompanying text, and to further guard against constitutional impediment, the New York State Legislature amended the 1983 *get* statute in two ways. First the amendment allowed a defendant to waive the statute's requirements in writing. N.Y. DOM. REL. LAW § 253(3). Second, the 1984 amendment eliminated any need for spouses to consult religious authorities in determining whether barriers to remarriage exist. *Id.* § 253(6). Whereas the law originally required a plaintiff to attest that he or she had taken all steps to remove barriers to remarriage, after amendment plaintiffs are required to make statements based only on their best "knowledge." *Id.* § 253(2).

139. *Id.* § 253(2).

140. *Id.* § 253(3). In the case of a conversion divorce, in which the defendant appears but does not contest the action, both parties must file the required affidavits. *Id.* § 253(4). A conversion divorce is a separation decree that is changed to a divorce action.

141. *Id.* § 253(8).

142. *Id.* § 253(7).

143. *Id.* This "clergy veto" provision only applies "if the said clergyman or minister is alive and available and competent to testify at the time when final judgment would be entered." *Id.*

with the removal of a barrier to marriage; if the defendant refuses to do so, no barrier to remarriage will be deemed to exist.¹⁴⁴

D. *Enactment of the 1992 Get Law*

In operation, the 1983 *get* statute has an obvious loophole: because it requires only the plaintiff to remove barriers to remarriage, a recalcitrant spouse who is the defendant in a divorce action can escape the law entirely by simply not counterclaiming.¹⁴⁵ It is for this reason that in 1992, the New York State Legislature once again enacted legislation directed at helping *agunot*, this time by authorizing a court to take a party's inability to remarry into account in the context of equitable distribution.¹⁴⁶ Unlike the 1983 *get* statute, the more extensive 1992 law applies to both plaintiffs and defendants, regardless of whether the parties were married in a religious ceremony. Sponsored by Assemblyman Sheldon Silver and Senator Stephan Seland, the bill passed unanimously in both houses,¹⁴⁷ and was signed by Governor Cuomo on July 17, 1992.¹⁴⁸

The 1992 *get* law amended New York's equitable distribution statute to provide that "the court shall, where appropriate,

144. *Id.* See also N.Y. DOM. REL. LAW § 253 commentary at 860 (McKinney 1986).

145. By counterclaiming, a defendant also becomes a plaintiff and so is subject to the *get* statute's provisions.

146. N.Y. DOM. REL. LAW §§ 236B(5)(h), 6(d) (McKinney 1986 & Supp. 1995). See *Historic 'Get' Bill Signed*, JEWISH PRESS, July 23, 1992, at 1 (reporting that the 1992 *get* bill greatly expands the scope of those affected by the 1983 *get* statute).

147. The Senate vote was 58 to zero. The Assembly vote was 139 to zero. Legislative Bill Jacket, [1992] N.Y. Laws ch. 415 (reporting vote on N.Y.S. 7863, N.Y.A. 2098, 215th Sess. (1992)).

148. Act of July 17, 1992, ch. 415, [1992] N.Y. Laws 1212 (codified at N.Y. DOM. REL. LAW §§ 236B(5)(h), 6(d) (McKinney Supp. 1995)). The complete text of the 1992 *get* amendment is as follows:

(5)(h) - In any decision made pursuant to this subdivision the court shall, where appropriate, consider the effect of a barrier to remarriage, as defined in subdivision six of section two hundred fifty-three of this article, on the factors enumerated in paragraph d of this subdivision.

(6)(d) - In any decision made pursuant to this subdivision the court shall, where appropriate, consider the effect of a barrier to remarriage, as defined in subdivision six of section two hundred fifty-three of this article, on the factors enumerated in paragraph a of this subdivision.

N.Y. DOM. REL. LAW §§ 236B(5)(h), 6(d).

consider the effect of a barrier to remarriage" (as defined by the 1983 *get* statute) on the thirteen factors that must be considered in dividing marital assets, and on the eleven factors that must be considered in setting maintenance in a divorce action.¹⁴⁹ The policy underlying the 1992 amendment is that, in order for courts equitably to divide marital assets and set maintenance, they must be able to consider the financial implications of one party's inability to remarry. In the case of an *agunah*, whose prospects of financial security may be seriously impaired by her inability to remarry, the 1992 law allows judges to award the woman a greater percentage of the marital assets to compensate for this disability.

If the intent of the 1992 *get* law is clear, the political forces that gave rise to its passage are less so. Initially proposed in 1984,¹⁵⁰ the legislation lay dormant for years. Once reintroduced in January 1992, the bill was passed and signed in a matter of months. Many commentators attribute this reactivation and swift passage of the *get* bill to Justice Rigler's decision in *Schwartz v. Schwartz*.¹⁵¹

Schwartz was a widely broadcast case with strong political undertones. The father of plaintiff, Naomi Schwartz, is Rabbi Sholom Klass, publisher of *The Jewish Press* and an influential figure in the Orthodox community; the defendant, Naomi's ex-husband, was the newspaper's former managing editor.¹⁵² De-

149. N.Y. DOM. REL. LAW §§ 236B(5)(d)(1)-(13), (6)(a)(1)-(11) (McKinney 1986). In New York divorce actions, if the spouses fail to reach a settlement regarding the financial aspects of the divorce, the court will impose its own terms. In doing so, courts are instructed by New York's Equitable Distribution Law to consider thirteen separate factors in dividing marital assets and eleven factors in setting maintenance. These factors include duration of the marriage, age and health of both parties, the income and property of each party at time of marriage and divorce, and present and future earning capacity of each party. *Id.* Significantly, the thirteenth factor (and the eleventh factor in the case of maintenance) requires the judge to consider "any other factor which the court shall expressly find to be just and proper." *Id.* § 236B(5)(d)(13).

150. See Zwiebel, *supra* note 71, at 5 (stating that proposed legislation resembling the 1992 *get* bill was introduced as early as 1984).

151. 153 Misc. 2d 789, 583 N.Y.S.2d 716 (Sup. Ct. Kings County 1992). Notably, *Schwartz* is a case in which the 1983 *get* statute did not apply because the recalcitrant husband was the defendant.

152. *Id.*

cided just five months prior to the *get* bill's passage,¹⁵³ Justice Rigler held in *Schwartz* that the withholding of a *get* could be taken into account by the court in determining the equitable distribution of marital assets. Justice Rigler found statutory authorization for this decision in factor thirteen of the equitable distribution law, the "catchall" provision requiring the court to consider "any other factor which the court shall expressly find to be just and proper."¹⁵⁴

Subsequent to this ruling, Rabbi Klass strongly lobbied for the 1992 *get* bill, in part because its swift passage would positively impact the final judgment in his daughter's case.¹⁵⁵ Furthermore, according to Anthony Daniele, the plaintiff's attorney in *Schwartz*, following Justice Rigler's decision, "proponents of such a bill were able to convince other legislators and say: 'Here's a Supreme Court Judge who has agreed with this and who believes that the law does empower him to do this.'"¹⁵⁶

Many commentators, including the law's chief sponsor, believe that the 1992 *get* law merely codifies the *Schwartz* holding.¹⁵⁷ If so, then *Schwartz* bears ongoing significance because it suggests that New York courts can consider the effect of one party's withholding of a *get* in the context of equitable distribution *even without* the 1992 *get* amendments. For opponents of the new law, *Schwartz* therefore signifies that repeal or amend-

153. *Schwartz* was decided on March 11, 1992. The 1992 *get* legislation was signed, and became immediately effective, on August 12, 1992.

154. N.Y. DOM. REL. LAW § 236(B)(5)(d)(13).

155. In July 1992, when the 1992 *get* bill proceeded to Governor Cuomo's desk, there had not yet been a final resolution of economic issues in the *Schwartz* case. Rabbi Klass' Memorandum to the Governor in support of the bill declared: "I am of course, aware that the enactment of the legislation will no doubt have a positive effect on my daughter's case and that its rejection will have an adverse impact. But I also sincerely wish that others in my family's unfortunate position will be assured of being able to share in the ray of hope provided to us by Justice Rigler's ruling." Memorandum from Rabbi Sholom Klass, to Governor Cuomo, regarding A. 2098 and S. 7863, July 16, 1992, in Legislative Bill Jacket, [1992] N.Y. Laws ch. 415.

156. Telephone Interview with Anthony Daniele, Matrimonial Attorney (Feb. 14, 1994).

157. *Historic 'Get' Bill Signed*, JEWISH PRESS, July 23, 1992 at 1 (reporting statement by Assemblyman Sheldon Silver that "the *get* bill would codify a recent decision by Brooklyn Supreme Court Justice William Rigler . . . Silver said that the benefits of Justice Rigler's ruling would now be available to litigants statewide.")

ment of the 1992 *get* legislation might not be sufficient to prevent *Schwartz*-type holdings in the future.

III. Evaluating the New York *Get* Legislation

A. *Selecting Criteria*

What do we mean when we call something a “good law”? Is a good law simply a law with good intentions or is more required—for instance, that it have the good effects intended? Moreover, if we measure a law by its “effects,” upon what criteria should we base this measurement? These questions strike deeply at the very meaning of government, but their answers are also of practical and immediate importance to those who make laws and have the power to change them, as well as to those whose lives are regulated by laws that affect them. This is particularly true in the case of the New York *get* legislation. To date, New York remains the only state in the United States that has legislatively addressed the *agunah* problem. Whether the *get* legislation is “good law” bears important indications of whether New York State, and other states, should continue down this legislative course or retreat.

This section will evaluate the success of the New York *get* legislation from the viewpoint that determining whether or not a law is “good” must include an evaluation of whether the law has achieved its stated and underlying intentions; whether its anticipated positive effects have in fact materialized, and whether it has had any unforeseen negative consequences. The discussion that follows will separately analyze the 1983 and 1992 *get* laws on the basis of four criteria that incorporate this viewpoint. They are: (1) *Impact Within Civil Law*—As frequently evidenced in United States history, how long a law stays in force may not be the best indication of whether it is constitutional. Passed amid a flurry of constitutional opposition, the 1983 *get* statute has now operated for over a decade, essentially undisturbed by judicial or legislative challenge. Is its survival a sign of the law’s constitutional strength or of the legal system’s inability or unwillingness to repeal or overturn it? (2) *Impact Within Jewish Law*—Have the 1983 and 1992 *get* laws met with *halachic* approval and, moreover, is a lack of *halachic* consensus fatal to any *get* law’s successful operation? (3)

Quantifiable Effects—Do the 1983 and 1992 *get* laws actually help *agunot* and prevent *get* extortion? (4) *Unquantifiable Effects*—What have been the *get* laws' positive and negative immeasurable effects? How have the laws impacted divorcing non-Jews, the matrimonial bar, rabbinical courts, and grass roots organizations that help *agunot*?

B. *Evaluation of the 1983 Get Statute*

1. *Impact of the 1983 Get Statute Within Civil Law*

From its inception, critics have attacked the 1983 *get* statute on a number of constitutional grounds, asserting that it violates the Establishment¹⁵⁸ and Free Exercise Clauses¹⁵⁹ of the First Amendment,¹⁶⁰ and the Due Process¹⁶¹ and Equal Protection Clauses¹⁶² of the Fourteenth Amendment.¹⁶³ Nearly all published evaluations of the 1983 *get* statute deem the law un-

158. The Establishment Clause, as incorporated by the Fourteenth Amendment, requires states to steer clear of religious affairs. For a law to be consistent with the Establishment Clause, the traditional three-part test requires that it: (1) have a secular purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) avoid excessive government entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971) (first setting forth this three-part test). The *Lemon* test is a useful, not fixed, rule, see *Lynch v. Donnelly*, 465 U.S. 668 (1984) and *Mueller v. Allen*, 463 U.S. 388, 394 (1983) and recent cases indicate that the Supreme Court may now disfavor the *Lemon* test. See *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 114 S. Ct. 2481, 2484 (1994). But see *Nadel*, *supra* note 11, at 80 (the Supreme Court has nonetheless applied the *Lemon* test in nearly every Establishment Clause case decided since 1970).

159. The Free Exercise Clause requires states to affirmatively accommodate religious beliefs to ensure that particular groups are not unduly burdened in the practice of their religion. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 14-4, at 1166-69 (2d ed. 1988).

160. The First Amendment of the Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." U.S. CONST. amend. I. Together, the religion clauses regulate the boundary-line between church and state, and both constitutional mandates must be carefully balanced to determine when state accommodation of religion is prohibited, when it is permissible, and when it is arguably compelled in order to remove state-imposed burdens on the free exercise of religion. See generally TRIBE, *supra* note 159, at 1168.

161. The Due Process Clause guarantees an individual rights to certain procedural safeguards in the administration of justice, including, most importantly, the right to be heard. *Id.*

162. The Equal Protection Clause, U.S. CONST. amend. XIV, § 1, essentially entitles persons under like circumstances to equal protection in the enjoyment of personal rights and the prevention and redress of wrongs. See TRIBE, *supra* note 159, at 1437.

constitutional.¹⁶⁴ Furthermore, in *Chambers v. Chambers*,¹⁶⁵ the only New York court to ever expressly consider the *get* statute's constitutionality cast serious doubt on the law's validity and deemed it unconstitutional as applied to the facts of that case.

Critics' constitutional analyses of the *get* statute vary considerably. Some defend the statute's validity under the Establishment Clause but not the Free Exercise Clause. For some, the conclusion is reversed—The Establishment Clause is the problem and the Free Exercise Clause is not offended.¹⁶⁶ Still others feel the 1983 *get* statute's most serious violation is of due process rights. As such, the body of constitutional literature criticizing the 1983 *get* statute at once presents the law's strongest defenses and greatest weaknesses. While it is not within the scope of this article to explore the subtle contours of these different arguments, it is significant that nearly all of the constitutional analyses of New York's *get* legislation turn on the answers to the following three questions: Is the *agunah* problem a religious or secular problem? Is the execution of a *get* a religious or a non-religious act? And lastly, is it possible, as a practical matter, to draft any *get* legislation that satisfies all constitutional mandates at once? Consideration of each of these questions highlights why it would be difficult, if not impossible, for any *get* law to remain free of constitutional doubt.

a. *Is the Agunah Problem a Religious or Secular Problem?*

Underlying many First Amendment attacks on the 1983 *get* statute's constitutionality is the perception that the *agunah*

163. The Fourteenth Amendment provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

164. Not one law review article analyzing the 1983 *get* statute concludes that it is free of constitutional difficulty. See *supra* note 22.

165. *Chambers v. Chambers*, 122 Misc. 2d 671, 471 N.Y.S.2d 958 (Sup. Ct. N.Y. County 1983). See *infra* notes 193-203 and accompanying text.

166. See Rostain, *supra* note 6, at 1149 ("Divergent analyses of the *get* statute's constitutionality under the establishment clause are not surprising, given the absence of a generally accepted approach that unifies free exercise and establishment jurisprudence.").

problem arises from a woman's religious convictions and her desire to live within a religious community that burdens her right to remarry. The problem, by this account, is internal to the Jewish community and essentially religious in nature, such that any *get* legislation will raise serious First Amendment problems.¹⁶⁷ Thus, critics assert that the 1983 *get* statute violates the Establishment Clause because it lacks a legitimate secular purpose; that it impermissibly incorporates religious law into secular law by premising legal status on religious status;¹⁶⁸ and it impermissibly advances Judaism over other religions by facilitating the remarriage of Jews while implicitly excluding members of other religious groups from the statute's coverage.¹⁶⁹

These constitutional infirmities do not necessarily arise, however, if one views the burden on *agunot* as a problem exacerbated by the state's policies toward marriage and divorce. By this alternative account, the state has amplified the *agunah* problem already existing under Jewish law by allowing couples to combine religious and secular marriages into one event,¹⁷⁰ without likewise requiring spouses to dissolve their religious union when they civilly divorce.¹⁷¹ As one commentator explains:

When the husband presents a petition for divorce without making provision for a religious divorce, the court becomes a party to the creation of a state of affairs that may result in interference with the free exercise of religion or lead to a gross inequity to the wife. A divorce decree is designed to enable both parties to remarry. A woman who for reasons of religious conscience is not free to remarry is deprived, by virtue of a judicial decree, of the potential for consortium, the ability to establish a home and raise a family, and often of ongoing support and maintenance. The court, in issuing a decree of divorce, establishes this inequity and, in effect,

167. Indeed, from the state's perspective, both spouses are perfectly free to remarry upon the entrance of secular divorce judgment.

168. Kahan, *supra* note 3, at 206 ("To hold a person's divorce hostage to a religious requirement *cannot* be a proper secular concern of the state"); Nadel, *supra* note 11, at 83 ("[T]he *get* statute incorporates a religious requirement into secular law. This matter cannot be a proper secular concern of the state.").

169. Nadel, *supra* note 11, at 86.

170. See *supra* note 84 and accompanying text.

171. See *supra* note 85 and accompanying text. See also Breitowitz, *supra* note 2, at 393; Rostain, *supra* note 6, at 1165-66.

tells the divorced wife that she may herself remedy the inequity only by abandoning religious scruples.¹⁷²

From this perspective, the 1983 *get* statute does not advance religion, but merely seeks to rectify that dimension of the *agunah* problem that is actually caused by the state.¹⁷³ Thus, under the Free Exercise Clause, the 1983 *get* statute is arguably compelled to eliminate a state-imposed burden on a Jewish woman's religious observance, and under the Establishment Clause, the statute advances the legitimate secular interests of encouraging remarriage and protecting the fundamental right to (re)marry.¹⁷⁴

The difficulty with this account, however, is that even if the *agunah* problem is proper for secular concern, address of the problem must either directly or indirectly implicate religious practices. Consequently, it is difficult to escape the conclusion that, at some level, all *get* legislation will fail strict First Amendment scrutiny.

b. *Is the Execution of a Get a Religious or a Non-Religious Act?*

Critics assert that by conditioning the granting of a secular divorce upon the husband's delivery of a *get*, the 1983 *get* statute's violations are twofold: it interferes with the husband's constitutional right not to participate in religious acts,¹⁷⁵ and it impermissibly advances religion by promoting the execution of a *get*.¹⁷⁶

Both of these arguments are premised on the characterization of a *get*'s delivery as a religious act. While this might seem like a foregone conclusion, in fact, the issue has generated considerable debate. Several commentators¹⁷⁷ and courts¹⁷⁸ have contended that there is nothing at all religious about a *get*, such

172. Bleich, *supra* note 3, at 280. See also Rostain, *supra* note 6, at 1166.

173. Feldman, *supra* note 22, at 157 (arguing that the *get* statute places Jews on equal footing with other religious groups with respect to remarriage).

174. Some commentators have defended the 1983 *get* statute's legitimate secular purpose on the additional grounds that it protects the enforceability of secular court judgments, and prevents the extortion of its citizens. Feldman, *supra* note 22, at 155-57.

175. Warmflash, *supra* note 22, at 241-49.

176. Kahan, *supra* note 3, at 206.

177. Bleich, *supra* note 3, at 202, 256-58; Rostain, *supra* note 6, at 1168-69.

that requiring its execution neither advances nor compels religious participation.

Many features of the *get* process support this view. The delivery of a *get* involves neither worship nor profession of faith.¹⁷⁹ No blessings are uttered by either spouse during its delivery, nor does the text of the *get* itself invoke the name of God.¹⁸⁰ In fact, a *get* may even be (and must be to enable the wife to remarry) executed by a husband who has formally renounced Judaism.¹⁸¹ While the delivery of the *get* is customarily supervised by rabbinic authorities to ensure that it is executed in accordance with Jewish law, conceptually it is an act of the parties themselves, not of a rabbinical court.¹⁸² Moreover, the spouses themselves are not even required to participate in the actual procedure; duly appointed representatives can give or receive the *get* on their behalf.¹⁸³ On the basis of these considera-

178. *Stern v. Stern*, 5. Fam. L. Rep. (BNA) 2810 (Sup. Ct. Kings County 1979) (holding that execution of a *get* is not a religious act); *Minkin v. Minkin*, 434 A.2d 665, 667-68 (N.J. Super. Ct. Ch. Div. 1981) (relying upon expert testimony of four rabbis in concluding that delivery of a *get* is not a religious act).

179. Bleich, *supra* note 3, at 257.

180. A literal translation of the text of the traditional *get* reads as follows:

On the . . . day of the week, the . . . day of the month of . . . in the year . . . from the creation of the world according to the reckoning we count here, the city of . . . which is situated on the river . . . (and on the river . . .) (and situated near springs [or: wells] of water), I, . . . (also known as . . .), the son of . . . (also known as . . .), who stands this day in the city of . . . (also known as . . .), which is situated on the river . . . (and on the river . . .) (and situated near springs [or: wells] of water), have desired of my own will without being subject to duress and have abandoned and sent forth and dismissed thee to thyself, you, my wife, . . . (also known as . . .), daughter of . . . (also known as . . .), who stands this day in the city of . . . (also known as . . .), which is situated on the river . . . (and on the river . . .) (and situated near springs [or: wells] of water), who has been my wife from before. And now I have sent forth and abandoned and dismissed thee to thyself that thou be permitted and have authority over thyself to go and marry any man thou may desire, and no person shall protest against thee from this day and for ever more, and thou art permitted to every man (lit: and thou art unfettered with regard to every man). This shall be unto thee from me a bill of dismissal, and a letter of abandonment, and an instrument of divorce in accordance with the law of Moses and Israel.

. . . the son of . . . , witness.

. . . the son of . . . , witness.

Translated by Rabbi J. David Bleich, *supra* note 3, at 257 n.177.

181. *Id.* at 257.

182. *Id.*

183. *Id.*

tions, some commentators conclude that the *get* is no more than the rescission of a marital contract,¹⁸⁴ such that requiring its execution poses no free exercise problems.¹⁸⁵

This view of the *get* is ultimately unpersuasive, however. Even absent the trappings of a religious ceremony, the delivery of a *get* constitutes a religious act for the sheer fact that it lacks any rational justification other than the significance attached to it by the Jewish religion.¹⁸⁶ Consequently, any civil legislation that even indirectly pressures a man to give a *get* will most likely run afoul of the Free Exercise Clause.

c. *Is it Possible to Draft Get Legislation that Satisfies All Constitutional Mandates at Once?*

This final question asks: Even assuming that the *agunah* problem is a valid secular concern, and that the execution of a *get* is not a religious practice, is it possible to draft *get* legislation that, in actual operation, does not run afoul of some constitutional provision, either by entangling courts in religious affairs or violating due process rights? The technical provisions of the 1983 *get* statute indicate that constitutional violation of some kind may be unavoidable.

Consider, for instance the 1983 *get* statute's "clergy veto" provision, which permits the clergyman who performed the wedding ceremony to block a civil divorce decree by filing an affidavit stating that barriers to remarriage still exist.¹⁸⁷ As

184. Bleich, *supra* note 3, at 256. See also Minkin, 434 A.2d at 668 (declaring that "[t]he [g]et procedure is a release document devoid of religious connotation" such that the court may, "without infringing on his Constitutional rights, order the defendant to specifically perform his contract" to execute a *get*).

185. Alternatively, others have argued that even if the *get* is a religious act, the Free Exercise Clause is still not violated in the vast majority of cases in which the husband's refusal to give a *get* is motivated by avarice or spite, not religious belief. Nadel, *supra* note 11, at 95-96; Breitowitz, *supra* note 2, at 395-96. Breitowitz asserts that husbands who contest the 1983 *get* statute as a violation of their free exercise rights should be required to show that giving a *get* is offensive to their sincerely held religious principles. He concludes that such a showing would be difficult to make. *Id.* at 396.

186. Nadel, *supra* note 11, at 87-88; Marshall, *supra* note 22, at 218-19. One critic further maintains that to treat the severing of a Jewish marriage on par with the dissolution of a commercial transaction "distorts the special regard with which Jewish tradition treats marriage." Kahan, *supra* note 3, at 207.

187. N.Y. DOM. REL. LAW § 253(7).

written, this provision gives the rabbi the last word on whether or not barriers to remarriage have been removed, and thereby seems to quash a defendant's right to be heard under the Fourteenth Amendment. Absent such a provision, however, courts would themselves be forced to investigate the truth or falsity of affidavits stating that religious barriers had been removed, thus entangling courts in the doctrinal questions of whether a plaintiff had complied with Jewish law. As one commentator concludes, "[t]he drafters of the law had to risk offending either the Establishment Clause or the Due Process Clause; they chose the latter."¹⁸⁸

A second example of the difficulties of drafting any constitutional *get* law is the provision of the 1983 *get* statute requiring the defendant to reimburse the plaintiff for cost incurred in removing a barrier to remarriage (i.e. by executing a *get*); otherwise no "barrier to remarriage" is deemed to exist.¹⁸⁹ As one commentator asserts, the result is that "an indigent woman who cannot pay the fees necessary for a Jewish divorce theoretically might be unable to stop the civil courts from granting her spouse a judgment. She would be deprived of a *get* because of her inability and her husband's unwillingness to pay for one."¹⁹⁰ But again, the alternative would be for courts to order plaintiffs to pay for a religious procedure of no secular import—an even greater constitutional concern.

Yet another constitutional tension in the drafting of the 1983 *get* statute is that, despite its facially neutral language, the 1983 *get* statute cannot disguise its exclusive focus on Judaism.¹⁹¹ Under the Equal Protection Clause, therefore, the statute raises concerns under the Equal Protection Clause both because it places an additional burden only upon Jewish persons and because it seeks to help only Jewish individuals.¹⁹²

The statute's difficulties under the Due Process Clause arose in the *Chambers* case,¹⁹³ the only case to date that has evaluated the constitutionality of the 1983 *get* statute. In

188. Feldman, *supra* note 22, at 159.

189. N.Y. DOM. REL. LAW § 253(6).

190. Kahan, *supra* note 3, at 205.

191. See *supra* notes 135-37 and accompanying text. Cf. Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 114 S. Ct. 2481 (1994).

192. Kahan, *supra* note 3, at 205.

193. 122 Misc. 2d 671, 471 N.Y.S.2d 958 (Sup. Ct. N.Y. County 1983).

Chambers, in which neither party was Jewish, the wife filed for divorce shortly after the *get* statute's enactment. The parties had lived apart for one year pursuant to a separation agreement and, because the divorce action was uncontested,¹⁹⁴ the court would normally have entered a divorce judgment as a matter of course. However, under the new statute's provisions, both spouses were now additionally required to file affidavits stating that they had removed all barriers to remarriage before a final divorce decree could be entered.¹⁹⁵ The husband refused to do so.¹⁹⁶

The *Chambers* court declared that, applied to the facts of this case, the 1983 *get* statute had the perverse effect of preventing a woman from receiving a divorce because her husband refused to grant an item of relief that she had never requested, and as such, could amount to a violation of due process under the Fourteenth Amendment.¹⁹⁷ Furthermore, given that neither party in *Chambers* was Jewish, the court questioned whether a law that placed procedural requirements on all faiths, while applying substantively to members of only one faith, violated due process requirements as well.¹⁹⁸

In spite of raising these broad reaching due process arguments, the *Chambers* court ultimately decided the case on the narrower ground of the Contracts Clause of the Constitution.¹⁹⁹

194. *Id.* at 672, 471 N.Y.S.2d at 960.

195. Significantly, at the time of the *Chambers* case, the 1983 *get* statute had not been amended to include a waiver provision. N.Y. DOM. REL. LAW § 253(2)(ii) (McKinney 1986 & Supp. 1995).

196. *Chambers*, 122 Misc. 2d at 671, 471 N.Y.S.2d at 959.

197. *Id.* at 673, 471 N.Y.S.2d at 960.

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 (in any type of action) where a defendant refuses to appear or answer.

Id. at 673, 471 N.Y.S.2d at 960.

198. *Id.* at 672, 471 N.Y.S.2d at 960.

199. *Id.* at 674, 471 N.Y.S.2d at 961. See U.S. CONST. art. I, § 10, cl. 1.

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; Coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

Id.

The court declared that at the time the parties entered into the separation agreement, each party had a *right* to the judicial remedy of divorce upon substantial compliance with the agreement for one year. Therefore, to allow the 1983 *get* statute to prevent a divorce judgment would interfere with the constitutionally protected obligations of contracts.²⁰⁰ The court entered a judgment of divorce and voided the 1983 *get* statute as applied to spouses who had entered into similar contractual agreements prior to the statute's passage.²⁰¹

The issue presented in *Chambers* never arose again and has become moot with the passage of time.²⁰² Furthermore, since *Chambers*, no New York court decision has challenged the 1983 *get* statute's constitutionality and at least one court has expressly declined to do so.²⁰³ In short, the *get* statute's survival has been quite remarkable: it has enjoyed twelve years of nearly uninterrupted operation, despite a consensus (at least among academics) that it is unconstitutional. The host of constitutional attacks leveled against the 1983 *get* statute, while compelling, remain confined to law review articles, classroom discussions, and the dicta of one court's holding that is now considered obsolete. But why?

The simplest and most frequently offered explanation is that the 1983 *get* statute was passed for admirable reasons and does not seem to offend or threaten anyone—except perhaps, for the recalcitrant spouse.²⁰⁴ As one commentator declared in criticizing a Reform organization for its vocal opposition to the 1983 *get* bill:

200. *Chambers*, 122 Misc. 2d at 675, 471 N.Y.S.2d at 961.

201. *Id.* at 675, 471 N.Y.S.2d at 961.

202. Nadel, *supra* note 11, at 73 (contracts clause challenges to the *get* statute now moot).

203. In the recent case of *Kaplinsky v. Kaplinsky*, 198 A.D.2d 212, 603 N.Y.S.2d 574 (2d Dep't 1993), the court declined to consider constitutional arguments against the 1983 *get* statute, even though the American Jewish Congress had filed a brief on the constitutional issues as *amicus curiae*. *Id.* at 213, 603 N.Y.S.2d at 575.

204. See Nadel, *supra* note 11, at 99 (although technically unconstitutional, the *get* statute has escaped invalidation because of its good intentions). Cf. Mark Berman, Comment, *Kosher Fraud Statutes and the Establishment Clause: Are They Kosher?*, 26 COLUM. J.L. & SOC. PROBS. 1, 66 (1992) (employing this same rationale to explain the survival of kosher fraud statutes, which he deems unconstitutional).

[I]s it necessary to oppose [the *get* bill] in such trenchant and vigorous manner? Is it not conceivable that in some issues we can be passive, letting matters slide by without intervention, or even comment? This posture may be perceived as quite appropriate, for no individual will suffer personal loss by allowing this law to take effect, while, clearly, so many others have everything—their very lives—to gain. Under these circumstances it is rather hollow and empty to assail a law in order to pursue a principle for its own sake.²⁰⁵

This same rationale helps to explain why judges have been so reluctant to consider the law's constitutionality. "It's one of these questions that everyone would like to see avoided," said Alan Dershowitz.²⁰⁶ Likewise, Richard Kurtz asserted, "[n]obody wants to be the bad guy and knock it out constitutionally, so every Supreme Court judge, when faced with that issue, is simply going to uphold the statute."²⁰⁷ Kurtz maintained that appellate courts are just as likely as trial courts to avoid the issue, effectively leaving it to the New York Court of Appeals to decide.²⁰⁸

But even assuming that the Court of Appeals would review a challenge to the 1983 *get* statute, opponents of the law must first find a plaintiff who is willing to act as a constitutional test case.²⁰⁹ This obstacle is not insignificant. Few plaintiffs in the last decade have independently sought to challenge the law's constitutionality, and organizational efforts to recruit such individuals have failed.²¹⁰ Consequently, although nearly all com-

205. Julian M. White, *Do Not Oppose the Get Bill*, SH'MA, J. JEWISH RESPONSIBILITY, Nov. 25, 1983, at 10.

206. Telephone Interview with Alan Dershowitz, Professor of Law, Harvard Law School (Feb. 16, 1994). "It's obviously a very well-intentioned statute," Dershowitz explained, "and nobody likes these guys who hold out and won't give the *get*." *Id.*

207. Telephone Interview with Richard Kurtz, Matrimonial Attorney (Mar. 7, 1994).

208. *Id.*

209. Under the rules of standing, only those who are directly affected by the 1983 *get* statute's provisions have the right to challenge its constitutionality in court. Thus, organizations like the ACLU cannot institute a constitutional challenge on its own, but must rely on the "test cases" of actual plaintiffs. *TRIBE, supra* note 159, § 3-14, at 107-08.

210. Rabbi Bernard Zlotowitz recalled that after the enactment of the 1983 *get* statute the Union of American Hebrew Congregations and the New York Federation of Reform Synagogues (both representing Reform Jews) proclaimed their readiness to assist and finance any legal challenge of the law. He said that the one

mentators interviewed for this article predicted that the statute's constitutionality would eventually be ruled on by the Court of Appeals, no one reported any current challenges to the law or knew of any organizational plans to foster such a challenge in the near future.

For Nathan Lewin, the fact that plaintiffs would rather comply with the 1983 *get* law than challenge it is a sign of the law's success.

I think what has happened in these cases is that, by and large, as stubborn as people may be, or as much as they may want to use [the *get*] for leverage, they're not ready to go the all-out constitutional battle. And that means that as a practical matter this resolves cases.²¹¹

From an alternate viewpoint, however, the 1983 *get* statute's longevity is not a sign of its success, but of Governor Cuomo's disingenuousness in stating, upon signing the *get* law, that "[i]f there is a constitutional impediment, I am sure our excellent courts will make that clear in due time."²¹² According to Ralph Michael Stein, by leaving to the courts a bill surrounded by constitutional doubt, Governor Cuomo violated his inherent obligation as a chief magistrate to make an independent assessment about the bill's constitutionality before signing it into law. From Stein's perspective, the 1983 *get* statute's longevity therefore stands out as a glaring example of the government's failure to scrutinize and weed out unconstitutional legislation.

Both Lewin's and Stein's analyses are flawed. In suggesting that the unwillingness of plaintiffs to challenge the 1983 *get* statute should be interpreted as a sign of the law's merit, Lewin overlooks the disincentives that might discourage or prevent an individual from challenging the law *despite* a be-

person who agreed to act as a test case backed out once realizing that a law suit could take several years. Telephone Interview with Bernard Zlotowitz, Reform Rabbi (Feb. 24, 1994).

211. Telephone Interview with Nathan Lewin, Attorney, Miller, Cassidy, Larroca & Lewin, Washington, D.C. (Apr. 7, 1994).

212. Governor's Memorandum on Approval of ch. 979, N.Y. Laws (Aug. 8, 1983), reprinted in [1983] N.Y. Laws 2818, 2819 (McKinney). "I think his tongue must have been pretty deep into his cheek when he made that statement," said Ralph Michael Stein of the Governor's statement. Stein asserts that, as a former law professor, Governor Cuomo probably knew how unrealistic that statement was when uttered. Telephone Interview with Ralph M. Stein, Professor of Law, Pace University School of Law (Mar. 2, 1994).

lief that it offends the Constitution. Litigation requires time and money. Especially in the area of divorce, individuals might forego the vindication of their constitutional rights in order to get on with their lives.²¹³ Taken to its logical extreme, Lewin's analysis could have the perverse effect of hailing as a success unconstitutional legislation that survives because it is too big a burden to challenge.

Stein's analysis is flawed as well. Assuming that Governor Cuomo had a good faith doubt as to whether the *get* bill was constitutional, and that he had no way of decisively resolving the question in advance,²¹⁴ he justifiably signed the bill on the basis of other considerations. To require our legislators and executive officials to predict how courts will rule on the novel constitutional questions raised by proposed legislation would make every legislator a judge who could quash, from their inception, many innovative proposals that might later have been constitutionally upheld.

The longevity of the 1983 *get* statute should instead be interpreted in two ways: First, it should be regarded as a remarkable example of how a law's chances for enactment and constitutional survival are greatly bolstered when the law has moral and political force standing squarely behind it. Second, and more importantly, the 1983 *get* statute's longevity should be perceived as an indication that the law's constitutional problems are less severe in practice than they are in theory. In twelve years, no court has declined to apply the statute for reasons of entanglement; no case has challenged the unfairness of the "clergy veto" or the monetary reimbursement provisions;²¹⁵ and few plaintiffs have claimed that the 1983 *get* statute inter-

213. See *supra* note 210.

214. New York State courts, like most state and federal courts (including the United States Supreme Court) do not issue advisory opinions on proposed legislation.

215. One commentator asserts:

The drafters of section 253 seem to have taken the chance that it would be rare for a spouse denied a divorce by the clergy veto to contest a rabbi's affidavit. The gamble seems to have paid off. The law has not yet been challenged on these grounds, perhaps because no plaintiff with a sincere due process claim has come forward. Most recalcitrant husbands, it appears, could not honestly claim that all the requirements of religious divorce have been met.

Feldman, *supra* note 22, at 160.

feres with their free exercise rights. These facts do not eliminate the law's constitutional difficulties or the possibility that a court will declare the statute unconstitutional; but to the extent that the 1983 *get* statute is judged on the basis of its practical effects rather than its facial implications, these facts do indicate that the law may be more constitutionally sound than critics assert.

2. *Impact of the 1983 Get Statute Within Jewish Law*

In contrast to the complications it raises within civil law, from the vantage point of Jewish law, the 1983 *get* statute is an unquestioned success. Rabbinic authorities agree that the *get* statute does not coerce a man to give a *get* and therefore poses no problems under Jewish law.²¹⁶ Their rationale, explained Rabbi Kenneth Auman, is as follows:

If a person comes to the *bet din* and says, "I'm only giving this *get* because the court is telling me to," the rabbis will say, "Now just a minute. The court isn't telling you to give a *get*. The court is only telling you that if you want the civil divorce, you have to give a *get*. But that's your decision."²¹⁷

The 1983 *get* statute owes much of its *halachic* success to extensive efforts by Agudath Israel and the law's drafters to obtain the approval of rabbinic leaders before presenting any proposal to the legislature. "It was [our] working hypothesis," said Aaron Twerski, "that we would back no legislation that did not have wall-to-wall approval. In other words, it would do us no good to create a situation in which somebody would be [religiously] divorced in the eyes of some and not in the eyes of others."²¹⁸

3. *Quantifiable Effects of the 1983 get Statute*

Despite the *get* statute's popular appeal and *halachic* success, the truth of the matter is that, in its twelve years of opera-

216. See *supra* text accompanying note 34 explaining that for a *get* to be *halachically* valid it must be given of the man's free will. Nadel, *supra* note 11, at 97 (unlike the 1992 amendments, the *get* statute poses no *halachic* problems).

217. Telephone Interview with Kenneth Auman, Orthodox Rabbi (Mar. 2, 1994).

218. Telephone Interview with Aaron Twerski, Professor of Law, Brooklyn Law School, Officer, Agudath Israel (Mar. 21, 1994).

tion, the law has helped few *agunot*. Even optimistic accounts admit that the law has been useful in only "a handful of cases,"²¹⁹ and caseworkers at G.E.T. and Get Free report that the 1983 *get* statute rarely makes any difference in their work.²²⁰ The chief problem is that the law only helps if the recalcitrant spouse is the one who sues for divorce, but in the vast majority of divorce actions in which the *get* becomes an issue, women are the plaintiffs.²²¹

Despite this disappointing picture, casting the 1983 *get* statute to the pile of ineffective legislation may be too hasty. First of all, those who drafted the law knew its limitations from the outset. From their perspective, rather than a disappointment, the 1983 *get* statute has achieved its purported, if limited goals. "It was not a panacea and it was not intended to be a panacea," asserted Aaron Twerski, explaining the statute was designed to help *agunot* only in the narrow range of cases to which the law applies.²²² And in some cases, however few, commentators agree that the law has been the decisive factor in a recalcitrant husband's decision to give a *get*. "Even if it causes the giving of a *get* in a handful of situations in which otherwise

219. Dovid Zwiebel ("helps for a narrow range of cases"); J. David Bleich ("marginal success"); Deborah Eifferman (effective in "some" cases); Marvin Jacob ("didn't work too well"); Ruth Englart ("not that helpful"); Mordechai Willig ("had no teeth"); Bernard Zlotowitz ("didn't help women"); Yehuda Levin ("hasn't made much difference"); Rivka Haut ("did nothing really"); Marvin Schick ("not much impact"); Richard Kurtz (worked in "a few" instances); Jeffrey Sunshine ("flawed"). See Appendix A.

220. The *get* law is useful, said David Long, only if the *agunah* seeking help has not yet filed for a secular divorce. In that case, G.E.T. advises the woman to wait for her husband to file the action, so that the *get* statute's provisions will apply. Telephone Interview with David Long, Chairman, G.E.T. Organization (Mar. 2, 1994).

221. See *supra* note 145 and accompanying text. Commentators estimate that Orthodox women initiate the secular divorce action in anywhere from 80 to 99 percent of all cases for a host of social, financial and religious reasons. A woman who is involved in an abusive relationship may pursue a secular divorce even it means that she risks not obtaining a religious divorce. Telephone Interview with Rivka Haut, Director, AGUNAH, Founder, ICAR (Mar. 6, 1994).

222. Telephone Interview with Aaron Twerski, Professor of Law, Brooklyn Law School, Officer, Agudath Israel (Mar. 21, 1994). Menachem Lubinsky, who in 1983 served as Agudath Israel's vice president of Government and Public Affairs, agreed. "Well, look, we knew it wouldn't be perfect," he said. "But we figured that even if it helped in only a percentage of the cases, it was far better than we had at that time." Telephone Interview with Menachem Lubinsky, Former Vice President, Agudath Israel (Feb. 21, 1994).

the *get* might not have been given," said Nathan Lewin, "I believe it would have been worth putting into effect. And I think it has, at the very least, achieved that."²²³

Those who quickly dismiss the 1983 *get* statute as ineffective may also be overlooking the law's immeasurable preemptive force. Because the statute erects formal requirements with which all individuals married in a religious ceremony must comply before they can even file a divorce complaint, it is nearly impossible to determine the number of cases in which a Jewish man who sued for divorce would have refused to deliver a *get* absent the law. "You're dealing with what's going on inside the cranium of a man," said Rabbi Bleich. "You'll never know in most cases where a man does execute the divorce whether he would have done it anyway, or whether he did it because his attorney told him, 'You don't need the hassle.'"²²⁴ According to personal accounts of rabbis and lawyers, the law's preemptive force is not merely speculative; one rabbi reported that he has concluded over 150 *gittin* since 1983 in which the *get* statute has been helpful.²²⁵ Similarly, attorney Jeffrey Sunshine said he has represented several clients who agreed to cooperate in religious divorces only after he explained the statute's impact on their ability to file for civil divorce.²²⁶

223. Telephone Interview with Nathan Lewin, Attorney, Miller, Cassidy, Larroca & Lewin, Washington, D.C. (Apr. 7, 1994).

224. Telephone Interview with J. David Bleich, Orthodox Rabbi, Professor of Jewish Law and Ethics, Cardozo Law School of Yeshiva University (Mar. 2, 1994). Nathan Lewin similarly declared:

There may be out there hundreds of situations where a party has said, "I'm not going to be able to use [the *get*]," and looked to other factors that he could legitimately use as a bargaining chip. If in fact this has happened in a number of cases—and there's no way of knowing if this has happened in a significant number of cases—then it seems to me the law is a success.

Telephone Interview with Nathan Lewin, Attorney, Miller, Cassidy, Larroca & Lewin, Washington, D.C. (Apr. 7, 1994).

225. Zwiebel, *supra* note 71, at 4 (citing Interview with Rabbi Leib Landisman, Head of the *bet din* of the Kollel Horabbonim in Monsey, New York, in *JEWISH HOMEMAKER*, Oct. 1992).

226. Even in situations in which the *get* statute does not apply, Sunshine said that he refuses to represent Jewish men who plan to use the *get* as a bargaining tool or device for extortion. "When I represent men," Sunshine said, "I tell them if they're going to use a *get* as a weapon to go somewhere else. I have the wherewithal and the ability to do that." Telephone Interview with Jeffrey Sunshine, Matrimonial Attorney (Mar. 21, 1994). So does attorney Harvey Jacobs, who declared that "maybe what the legislation really reflects is what we as attorneys feel

While these reports are encouraging, they do not erase the fact that the direct impact of the 1983 *get* statute has still been marginal. For most *agunot*, whose husbands can strategically escape the *get* statute's provisions or are never subject to them in the first place, the 1983 *get* statute is a weak law that has done little or nothing to improve their situation.

4. *Unquantifiable Effects of the 1983 Get Statute*

More important than the law's direct assistance to women has been its symbolic and teaching force in sensitizing attorneys, lawmakers, and the general public to the problems confronted by *agunot*. "It was very important," said Alan Dershowitz, "to be the first state to do something and to, in effect, symbolically announce that the law and the state *care* about women who can't remarry, for whatever reason."²²⁷ Since its enactment, four other state legislatures have considered *get* legislation modeled after the 1983 *get* statute.²²⁸ In 1986, Ontario adopted *get* legislation based upon the New York example which was later incorporated into federal Canadian law.²²⁹

is the appropriate way of handling it. . . . I think it's the attitude of the attorneys that really makes the law effective." Telephone Interview with Harvey Jacobs, Matrimonial Attorney (Mar. 7, 1994). The ethical responsibilities of lawyers who represent recalcitrant spouses is an interesting subject for consideration that goes beyond the scope of this article. At the time he assisted in drafting the 1983 *get* statute, Alan Dershowitz also proposed to the New York Bar Association a provision that would make it unethical for a lawyer to assist a client in using a religious restriction as a bargaining device in negotiations relating to divorce. Dershowitz said the matrimonial bar rejected his proposal. Telephone Interview with Alan Dershowitz, Professor of Law, Harvard Law School (Feb. 16, 1994). Jeffrey Sunshine likewise rejected this proposal on principle: "Society is trying to place upon matrimonial lawyers the burden of undoing society's ills." Telephone Interview with Jeffrey Sunshine, Matrimonial Attorney (Mar. 21 1994).

227. Telephone Interview with Alan Dershowitz, Professor of Law, Harvard Law School (Feb. 16, 1994).

228. Legislation modeled after the New York *get* statute has been proposed in California, New Jersey, Connecticut, and Pennsylvania. Significantly, the legislation has failed to pass in all of these states, supporting accounts that attribute the *get* statute's passage in New York to the strong political lobby of New York's large Orthodox Jewish population.

229. The Canadian statutes were initially enacted in 1986 as an amendment to the Ontario Family Act. Ontario Family Act §§ 2(4)-(6). By an act of June 12, 1990, the Ontario law was incorporated into the federal Canada Divorce Act. Canada Divorce Act, I S.C. ch. 18, § 21.1 (1990). The Canadian *get* statute goes much further than the New York *get* statute in that it requires a husband to remove barriers to remarriage whether he is a plaintiff or a defendant. Under the strin-

Efforts by the New York Bar Association and grass roots organizations to disseminate information about the 1983 *get* statute have further helped to educate matrimonial lawyers about the problems of *agunot*.²³⁰ Finally, local and national media coverage of the *agunah* problem generated by the statute's enactment have educated the public, contributing to a legal and social climate that increasingly encourages women to come forward with their troubles in obtaining *gittin*.²³¹

Weighing its impact on civil law and Jewish law, as well as its quantifiable and unquantifiable effects, the 1983 *get* statute has been a moderate success. Although the law has certainly not solved the *agunah* problem, it has produced several beneficial results with correspondingly few drawbacks. Its burden upon divorcing spouses for whom the *get* is not an issue is de

gent Canadian provision, a husband's failure to deliver a *get* within 15 days of his wife's demand (10 days under the Ontario Family Act) will trigger the automatic striking of all the husband's claims and defenses in a divorce proceeding, including those relating to child custody and support. While the Canadian law reportedly has been very effective in assisting women, it also poses serious *halachic* problems and would clearly violate the U.S. Constitution.

230. Several programs on the New York *get* legislation have been sponsored by the family law section of the New York Bar Association. According to Jeffrey Sunshine, most Brooklyn attorneys are informed of the *get* statute's existence and implications, in part due to these programs. Telephone Interview with Jeffrey Sunshine, Matrimonial Attorney (Mar. 21, 1994). Deborah Eifferman and David Long report that one of the G.E.T. organization's focuses over the past decade has been to inform matrimonial lawyers of the *get* law's existence and of the plight of women who do not receive *gittin*. David Long said that representatives of G.E.T. have conducted numerous sessions and provided information to the matrimonial bar. "I would say that a very high percentage of lawyers in the matrimonial bar of the state of New York are aware of the *get* law," Long said. "It's almost routine in a separation agreement where the parties are Jewish that there is a clause put in that the parties agree they will appear before an acceptable *bet din* for the purposes of going through the *get* process." Telephone Interview with David Long, Chairman, G.E.T. Organization (Mar. 2, 1994).

231. Not everyone regards the higher profile of the *agunah* problem as a positive effect, however. Dovid Zwiebel declared:

When the plight of the *aguna[h]* stirs the creative imagination of television programmers and pulp novelists; when individual cases become the subject of feature articles in such mass media publications as *New York Magazine* and *The Village Voice*; when prominent *rabbonim* [rabbis] and *batei din*, and even *Hashem's* [God's] holy Torah itself, are publicly portrayed as insensitive and inhumane—the [result] is terrible.

Zwiebel, *supra* note 71, at 2.

minimis.²³² Yet, in divorces in which the *get* is an issue, for some women the 1983 statute has been the decisive reason they received a *get*, which is significant even if their number is few. Moreover, the statute has helped to raise awareness of the *agunah* problem among judges, lawyers, and the general public—in New York and elsewhere—who may be able to assist *agunot* in other ways, even if the law falls short. Finally, the law has impressively avoided the serious *halachic* obstacles that confront any attempt to legislate in this area; venturing into the uncharted territory of civil legislation, the 1983 *get* statute has won unanimous rabbinic approval.

The only serious and potentially fatal flaw of the 1983 *get* statute is its suspected unconstitutionality, a concern which has yet to be decisively addressed by the New York courts. In this regard, however, the *get* statute's longevity indicates that the law's constitutional flaws may be worse in theory than in practice, and that political and moral support for the legislation remains strong.

C. *Evaluating the 1992 Get Legislation*

In many ways it is too early to evaluate the 1992 *get* law. Attorneys and courts have only begun to implement it, and analysis of its impact upon the Jewish community are still based more on prediction than fact. Nonetheless, several factors urge early analysis. Unlike the 1983 *get* statute, the 1992 law has sparked a major *halachic* controversy within the Orthodox community, with some rabbinic authorities supporting the measure and others asserting that any *get* delivered pursuant to the law is invalid.²³³ The dispute continues to flare and casts doubt on the law's chances for survival. Thus, we stand at an important juncture in the 1992 law's history, when community leaders and policy makers are themselves deciding what the

232. In light of the law's formal requirements, it has become standard for parties to allege in complaints and settlement agreements that they will remove barriers to remarriage. Moreover, the *get* statute's affirmative requirements can easily be waived if neither party cares about a religious divorce, or if the parties are not Jewish.

233. See *Editor's Note*, JEWISH PRESS, Jan. 21, 1994, at 37 ("The so-called New York Get Law has generated more debate than any other legislative issue in recent memory").

law's future should be. Objective evaluation of the law at this time is critical.

1. *Impact of the 1992 Get Legislation Within Civil Law*

There has been little academic analysis of the constitutional implications of 1992 *get* law. The one article on the subject concludes, however, that the 1992 *get* amendment to New York's equitable distribution statute represents an even greater violation of First Amendment principles than its 1983 predecessor.²³⁴

In particular, the 1992 law raises problems under the Free Exercise Clause that do not arise with the 1983 *get* statute. If one agrees with rabbinic authorities who assert that any *get* delivered pursuant to the 1992 *get* legislation is invalid under Jewish law,²³⁵ the 1992 amendments have the perverse and unconstitutional effect of *preventing* individuals from performing a religious act:

This free exercise claim is a unique one. While most free exercise claims involve laws of general applicability that somehow interfere with religious practices, the [1992] amendments involve laws passed for the express purpose of solving a religious problem but that backfired and actually aggravated the problem. Such a result suggests an overlooked yet important justification for the Religion Clauses of the First Amendment. Without the separation of church and state, the government may pass a law in order to solve a religious dilemma; yet because of poor drafting or legislative unfamiliarity with the details of a given religion, the law may backfire with disastrous results.²³⁶

This free exercise analysis only applies, however, insofar as one agrees that the 1992 *get* law violates *halacha*. There is no rabbinic consensus on this point. Fundamental questions such as "[i]s the delivery of a *get* a religious act?" and "[w]hat types of coercion will invalidate a *get*?" are as controversial from a *halachic* perspective as a constitutional one, in effect further nar-

234. Nadel, *supra* note 11, at 56. Nadel concludes that the 1992 *get* law violates both the Establishment Clause and the Free Exercise Clause, whereas the 1983 *get* statute violates only the former. Nadel likewise asserts that the holding in the *Schwartz* case is unconstitutional. *Id.* at 99.

235. See *infra* notes 241-44 and accompanying text.

236. Nadel, *supra* note 11, at 98.

rowing the ground upon which any *get* legislation may constitutionally and *halachically* stand.

Given its generation of both constitutional and *halachic* concerns, the longevity of the 1992 *get* amendments is not assured. Agudath Israel has already been seeking a legislative amendment that would explicitly undo the 1992 law's legal effect.²³⁷ Moreover, because the 1992 *get* law has actual financial ramifications upon the division of marital assets and setting of maintenance, individuals affected by the law may have strong incentive to challenge it. Nonetheless, if the *Schwartz* case and the longevity of the 1983 *get* law provide any indication, New York judges who support the equitable purpose behind the 1992 *get* law may be unwilling to strike it down.

2. *Impact of the 1992 Get Law Within Religious Law*

It is in the area of religious law that the 1992 *get* law has raised the greatest problems. In the words of Dovid Zwiebel, the 1992 *get* legislation "has torn apart the *halachic* community."²³⁸ Although numerous rabbinic and Jewish organizations supported the 1992 *get* bill,²³⁹ after its enactment, Agudath Israel came out in fierce opposition to the law, sparking a controversy that has generated confusion and bitterness.²⁴⁰

237. Agudath Israel seeks legislative amendment, rather than outright repeal, of the 1992 *get* law because it worries that repeal would leave the effect of the *Schwartz* holding intact. See *supra* note 157 and accompanying text. "The ideal solution, therefore," said Dovid Zwiebel, "would be to amend the statute so as to preclude any possibility of judicial compulsion through equitable distribution." Zwiebel, *supra* note 71, at 8 n.13.

238. Telephone Interview with Dovid Zwiebel, Legal Counsel to Agudath Israel (Feb. 21, 1994).

239. Organizations urging the governor's endorsement of the bill included the Union of Orthodox Jewish Congregations of America (representing approximately 1000 Orthodox congregations in the United States), The National Council of Young Israel (comprising more than 300 synagogues in the United States and Israel), *The Jewish Press*, and COLPA (a voluntary association of attorneys and social scientists organized to represent the Orthodox community in public matters). Only one organization filed a memorandum in opposition, the Association of the Bar of the City of New York. Agudath Israel filed no memorandum either in support of or in opposition to the bill. See Memorandum from Margo Paz, Legislative Coordinator of the Association of the Bar of the City of New York, to Elizabeth Moore, Counsel to the Governor, regarding A. 2098, July 17, 1992, in Legislative Bill Jacket, [1992] N.Y. Laws ch. 415.

240. Disagreement over the 1992 *get* law's *halachic* implications stems in part from the political process by which it was enacted. Opponents maintain that, in

Opponents declare that by enabling a secular court to deprive a man of financial assets on the basis of his failure to give a *get*, the 1992 *get* law nullifies the man's free will and renders any *get* he delivers to avoid the law's financial ramifications *halachically* invalid.²⁴¹ Consequently, opponents assert, the 1992 *get* law represents "a dangerous time-bomb to the validity of many [*g*]ittin" that will harm women, not help them.²⁴² Moreover, they warn, the 1992 *get* law endangers the entire Jewish community because women who obtain a *get* pursuant to the law may later discover that part of the community considers their *get* invalid and regards the children of a second marriage as *mamzerim*.²⁴³ "These problems will become germane and ac-

contrast to the sponsors of the 1983 *get* legislation, who sought universal *halachic* consensus before introducing the bill to the legislature, the sponsors of the 1992 legislation made no such effort. Zwiebel, *supra* note 71, at 5; Rabbi Chaim Malinowitz, *The New York State Get Bill and Its Halachic Ramifications*, J. HALACHA & CONTEMP. SOC'Y, Spring 1994, at 7 (1992 *get* bill passed without public hearings or input from *halachic* authorities). However, the 1992 law's proponents counter that comments on the 1992 *get* bill were widely solicited from rabbinic authorities and organizations, including Agudath Israel, and that when no criticism of the bill was offered, its drafters assumed there was no objection. Marvin Jacob, *The Agunah Problem—Clearing Up Some Misunderstandings About the So-Called New York State Get Law*, JEWISH PRESS, Jan. 21, 1994, at 41 n.10.

Either way, comparison of the 1992 *get* law with the 1983 *get* statute illustrates that, when legislating in sensitive areas, the process by which a law is drafted and passed can be as important as its substance. Part of the controversy generated by the 1992 law has emanated from the perception that comment from religious authorities was not sufficiently solicited and considered. In contrast, the legitimacy of the 1983 *get* statute has stemmed in part from rabbinic faith in the thorough process employed by the statute's drafters in seeking *halachic* consensus.

241. See *supra* note 34 and accompanying text.

242. Malinowitz, *supra* note 240, at 8. Dovid Zwiebel states: "[T]he law provides a wily recalcitrant husband with yet an additional weapon in his arsenal to ensure that his wife will not receive a *get*. All he needs to do is tell the *beti* *din* that he wants to give his wife a *get* in order to avoid losing assets in equitable distribution." Zwiebel, *supra* note 71, at 8. In this situation Zwiebel explains, no rabbinical court will oversee the giving of an invalid *get*; nor will a secular court reduce the husband's assets once presented with evidence of the *bet din's* conclusion that the husband is not *halachically* capable of giving a *get*. *Id.* at 7. By the law's definition, a husband who attempts to give a *get* but is refused by the rabbinical tribunal has taken all "voluntary" steps to remove barriers to remarriage and therefore has technically complied with the law's requirements. *Id.*

243. Malinowitz, *supra* note 240, at 8. See *supra* note 5 for an explanation of *mamzer* status.

Malinowitz further admonishes that by encouraging *agunot* to bring their divorce matters to secular fora, the law contravenes the *halachic* mandate that Jews resolve all civil and religious disputes in *batei din*. See *supra* note 31. "This prohi-

tual twenty years from now when you're dealing with the rights of children to marry legitimately," predicted Rabbi J. David Bleich, one of the 1992 law's most vocal opponents, who has taken the public position that *any get* issued since the passage of the 1992 amendments is under a cloud of doubt and presumptively invalid.²⁴⁴

Supporters of the 1992 *get* legislation reject this draconian approach as both a misinterpretation of what the 1992 law says and a "sad commentary" on rabbinic unwillingness to help *agunot*.²⁴⁵ "It is the law, not the *Halachah*, that is in controversy," said Marvin Jacob, who asserts that, when correctly interpreted, the legal effect of the 1992 *get* amendments is far more limited than opponents believe.²⁴⁶ By Jacob's account, rather than a punitive or mandatory provision, the 1992 *get* amendment allows judges only "*where appropriate*" to consider the *indirect effect* of a woman's ability to remarry upon her actual financial prospects, such that women with substantial incomes or financial resources would not stand to benefit from the law's provisions.²⁴⁷ Nor, Jacob asserts, does the 1992 *get* law violate *halacha*; because only "voluntary acts" can constitute "barriers to remarriage,"²⁴⁸ he asserts, if a man is judged by a *bet din* to be acting involuntarily, no "barrier to remarriage" will be deemed to exist and the 1992 law will not apply.²⁴⁹ Conse-

bition is a most severe one no matter how lackadaisical an attitude people have towards it," asserts Rabbi Chaim Malinowitz. "It hardly behooves the Orthodox community, its institutions and its organizations, to take steps which encourage people to transgress this prohibition, which is, of course, exactly what this [1992 *get*] bill does." Malinowitz, *supra* note 240, at 13.

244. Telephone Interview with J. David Bleich, Orthodox Rabbis, Professor of Jewish Law and Ethics, Cardozo School of Law of Yeshiva University (Mar. 2, 1994).

245. Jacob, *supra* note 240, at 41.

246. *Id.* at 37.

247. *Id.* at 38.

248. The 1992 amendments utilize the definition of "barrier to remarriage" provided by the 1983 *get* statute. N.Y. DOM. REL. LAW § 253(6). See *supra* note 148.

249. "Surely, it makes no sense whatsoever to punish a husband for failure to carry out a court order, which is impossible for him to perform, especially where it is the very compulsion of the court order that creates the impossibility of performance." Jacob, *supra* note 240, at 38. See also Gaudily D. Schwartz, *Comments on the New York State "Get Law"*, J. HALACHA & CONTEMP. SOC'Y, Spring 1994, at 26 (asserting, in defense of the 1992 *get* law, that rabbinical courts can readily distinguish when a man is giving a *get* under duress, thereby safeguarding against the

quently, Jacob concludes, the 1992 *get* law in fact *narrows* Justice Rigler's decision in the *Schwartz* case, which treated barriers to remarriage as a *direct* consideration in making equitable distribution and setting maintenance.²⁵⁰

More important than which interpretation of the 1992 *get* law is arguably correct, is how state courts will apply the law in actual practice. Ironically, to date, the only decision by a New York State court applying the 1992 *get* law was issued by Justice Rigler in the *Schwartz* case,²⁵¹ the same case that engendered the law's enactment. Although Justice Rigler ruled in March 1992 that a court could consider a spouse's withholding of the *get* in dividing marital assets or setting maintenance, the court did not make its final determination on the economic issues in *Schwartz* until October 1994—after the 1992 *get* law had been enacted.²⁵²

In this second *Schwartz* decision, Justice Rigler found as a factual matter that the defendant had intentionally withheld the *get* from his wife as a means of obtaining a greater share of the couple's marital property.²⁵³ "Clearly, defendant comes to this court with unclean hands," Rigler stated, holding that, in these circumstances, the court's equitable powers under the 1992 *get* law should be invoked.²⁵⁴ Applying the law to the Schwartz's marital property, Rigler then ruled that, by his ac-

execution of invalid *gittin*). Rabbi Schwartz is the head of the *bet din* of the Rabbinical Council of America and of the *bet din* of the Chicago Rabbinical Council.

250. Jacob, *supra* note 240, at 38.

251. *Schwartz v. Schwartz*, N.Y. L.J., Oct. 12, 1994, at 27 (Sup. Ct. Kings County Oct. 12, 1994).

252. *Id.* In *Schwartz*, Justice Rigler conducted a bifurcated divorce trial. In the first part of the trial, decided in March 1992, the court granted plaintiff Naomi Schwartz a divorce judgment and ruled, as a legal matter, that the court could consider the parties' actions regarding the *get* in making equitable distribution of marital assets and setting maintenance. *Schwartz v. Schwartz*, 153 Misc. 2d 789, 583 N.Y.S.2d 716 (Sup. Ct. Kings County 1992). See also *supra* notes 151-54 and accompanying text. What remained to be decided in the second part of the trial was the actual determination of equitable distribution, maintenance, and counsel fees. *Schwartz*, N.Y. L.J., Oct. 12, 1994, at 27. Recognizing the odd sequence of events surrounding both *Schwartz* decisions, and the excitement of the 1992 *get* law, Justice Rigler stated in his second decision: "It is ironic that the case that engendered the new 'GET statute' should be the very same case in which this court is required to apply the Statute." *Id.*

253. *Schwartz*, N.Y. L.J., Oct. 12, 1994, at 27.

254. *Id.*

tions in withholding the *get*, defendant had forfeited his claim to one-half of the increased value of his wife's stock in *The Jewish Press*—an amount valued at \$184,500.²⁵⁵

This second *Schwartz* decision indicates that, while Marvin Jacob's narrow interpretation of the 1992 *get* law is feasible,²⁵⁶ in fact courts are likely to apply the law more broadly, in the nature of a financial penalty.²⁵⁷ Significantly, by the time Justice Rigler rendered his decision on equitable distribution in *Schwartz*, the defendant had already granted plaintiff Naomi Schwartz a *get* and both parties had remarried.²⁵⁸ Thus, Justice Rigler's invocation of the 1992 *get* law to deny Mr. Schwartz a share of assets to which he otherwise would have been entitled cannot be justified on grounds that Naomi Schwartz faced a prospective economic disadvantage due to her inability to remarry. Rather, Justice Rigler's decision imposes exactly the sort of financial penalty that some opponents of the 1992 *get* law argue will invalidate a *get*,²⁵⁹ and other opponents urge renders the law unconstitutional.²⁶⁰

Far from settling the controversy over the 1992 *get* law, Justice Rigler's recent holding in *Schwartz* is likely to further sharpen the *halachic* divide. For those who support any legislative initiative that helps *agunot* to obtain *gittin* and receives significant, if not unanimous, *halachic* backing, the 1992 *get* law is worthwhile. But for those who believe that any proposed

255. *Id.* See also Ronald Sullivan, *Refusing to Agree to a Religious Divorce Proves Costly*, N.Y. TIMES, Oct. 5, 1994, at B3 ("The refusal of an Orthodox Jewish man to grant his wife a religious divorce cost him more than \$180,000 yesterday, when a Brooklyn judge ruled that the husband's obstinacy and pressure to extract financial concessions were grounds for forfeiting any claim to a larger share of the couple's marital wealth.").

256. See *supra* notes 245-50 for a discussion of Jacob's interpretation of the 1992 *get* law.

257. See Sullivan, *supra* note 255, at B3 (reporting that Anthony Daniele, lawyer for Naomi Schwartz, "said the ruling was the first in New York State in which a husband was financially penalized in a civil court for withholding a religious divorce."). Nor did Justice Rigler perceive the 1992 *get* law as narrowing his earlier decision, as Jacob contends. To the contrary, Rigler stated in his decision that the 1992 *get* law "in essence codified this court's position." *Schwartz*, N.Y. L.J., Oct. 12, 1994, at 27.

258. *Schwartz*, N.Y. L.J., Oct. 12, 1994, at 27.

259. See *supra* notes 241-43 and accompanying text for a criticism of the 1992 *get* law.

260. See *supra* notes 235-37 and accompanying text.

solution to the *agunah* problem must receive universal *halachic* approval before being implemented, the 1992 *get* law stands as an abysmal failure that threatens the entire Jewish community.

3. Quantifiable Effects of the 1992 Get Law

The 1992 *get* law is regarded by opponents as a threat in large part because it has the potential to be extremely effective. In contrast to the 1983 *get* statute, early accounts indicate that the 1992 law has the "teeth" lacking in the earlier law.²⁶¹ "It is really potentially a tremendous tool in the hands of women," said Rivka Haut. "It finally gives women a balance of power."²⁶² David Long reported that the 1992 law has been the determining factor for several women receiving religious divorces with G.E.T.'s help. "Almost simultaneously with the signing of the law," Long said, "there were cases that had been kicking around for a while that suddenly resolved themselves. In many instances, the mere fact that people knew that it was on the books caused things to be resolved."²⁶³ Similarly, Larry Rothbart described the Brooklyn family court as "quieter" with regard to *get* cases since Justice Rigler's decision in *Schwartz* and the enactment of the 1992 law.²⁶⁴ "Apparently, people are following the law," Rothbart said. "The holding up of the *get* seems to be a little less of an issue."²⁶⁵

One reason for the law's effectiveness is its preemptive force which, in effect, gives as much power to lawyers who use the law as a negotiating tool as it does to courts in dividing marital assets.²⁶⁶ Jeffrey Sunshine said that when he represents

261. Deborah Eiferman called the 1992 amendment "far more effective" in helping *agunot* than the 1983 *get* statute. "The amendment counteracts some of the lack in the original law," she said. Telephone Interview with Deborah Eiferman, International Vice President, ICAR (Mar. 2, 1994).

262. Telephone Interview with Rivka Haut, Director, AGUNAH, Founder, ICAR (Mar. 6, 1994).

263. Telephone Interview with David Long, Attorney, Chairman of the Board, G.E.T. (Mar. 2, 1994).

264. Telephone Interview with Larry Rothbart, Legal Secretary to Justice Rigler (Mar. 7, 1994) (Justice Rigler decided the *Schwartz* case).

265. *Id.*

266. *But see* Jacob, *supra* note 240, at 38 (maintaining that the true power of the law resides neither with courts nor lawyers but with rabbinical courts, which can prevent the law's application with a finding of coercion).

Orthodox women he typically informs opposing counsel that he will seek application of the 1992 law if the husband fails to give a *get*. "Usually that resolves the question," Sunshine said.²⁶⁷ Similarly, Harvey Jacobs recounted that in situations in which he has employed these preemptive tactics, any issue over the delivery of a *get* resolved itself prior to court determination of equitable distribution.²⁶⁸

Despite these positive reports, the controversy generated by the 1992 law has also had the negative effect of discouraging some *agunot* from seeking the law's help. Caseworkers at G.E.T. and Get Free report that, in light of the *halachic* controversy surrounding the law, some Orthodox women are afraid to utilize it for fear that it will produce an invalid *get*.²⁶⁹ "Women are just weary," said Ruth Englart, a case consultant at G.E.T. "They hear some rabbis saying it's not kosher, others say that it is. So I think they're just really afraid at this point to deal with it."²⁷⁰ Moreover, according to Rivka Haut the *halachic* controversy over the law has produced a backlash, in which women are being pushed to litigate everything in a *bet din* and not go to civil court.²⁷¹ Many women would rather forego the law's protection than incur the social ostracism that would accompany their decision to litigate in a secular court, Haut said.²⁷² The implications of this backlash are serious; although the 1992 *get* law may potentially help many *agunot*, in some cases it has already had the negative and unforeseen effect of making their situation worse by frustrating the state's ability to help them at all.

267. Telephone Interview with Jeffrey Sunshine, Matrimonial Attorney (Mar. 21, 1994).

268. Telephone Interview with Harvey Jacobs, Matrimonial Attorney (Mar. 7, 1994).

269. Telephone Interview with Yehuda Levin, Caseworker, Get Free (Mar. 14, 1994).

270. Telephone Interview with Ruth Englart, Case Consultant, G.E.T. (Mar. 2, 1994).

271. Telephone Interview with Rivka Haut, Director, AGUNAH, Founder, ICAR (Mar. 6, 1994).

272. *Id.*

4. *Unquantifiable Effects of the 1992 Get Law*

Like the 1983 *get* statute, the 1992 *get* law demonstrates the state's ongoing concern for *agunot* and helps to educate and sensitize courts, lawyers, and the general public to the *agunah* problem.²⁷³ More important, however, has been the 1992 law's unforeseen socio-religious impact upon the New York rabbinate. In light of the controversy surrounding the law, some rabbinical courts are scrutinizing husbands much more closely to ensure that *gittin* are freely given.²⁷⁴ Moreover, rabbis who oppose the law are being pressured to develop alternative solutions to the *agunah* problem that would eliminate or minimize the need for secular court involvement (several of these proposals are discussed at length in the next section).²⁷⁵ Although these rabbinic initiatives have not been triggered solely, or even directly, by the 1992 *get* law, the controversy and national media coverage sparked by the law have at least contributed to the increasing feeling among rabbis that more must be done to solve the problem internally.²⁷⁶

273. See, e.g., Elaine Rudnick-Sheps, *The 'Get' Law & Agunos*, JEWISH PRESS, Aug. 14, 1992, at 60 (reporting that the American Academy of Matrimonial Law, New York Chapter, established a Committee on the 1992 *get* law to bring the issue to the attention of attorneys nationwide).

274. E.g., Telephone Interview with Kenneth Auman, Orthodox Rabbi (Mar. 2, 1994). Rabbi Auman noted that some rabbinical courts "are being much more careful in terms of the questions they ask the husbands" while others are proceeding "business as usual, as if there's no difference." *Id.*

275. Zwiebel, *supra* note 71, at 8. "[W]e must redouble our efforts to find other ways of dealing with the tragic *aguna[h]* problem, communal approaches that enjoy the halachic support of all circles," proclaimed Dovid Zwiebel. "To permit the frustrations of the 1992 legislative experience to cause us to throw up our hands in despair, and simply assign the *aguna* problem to the 'Tsk, Tsk, What a Shame' file, would be one of the saddest legacies of the entire sorry episode." *Id.*

276. The movement of the Orthodox rabbinate toward the local and national implementation of more effective internal solutions to the *agunah* problem has taken place over many years, as many rabbis have increasingly realized that *get* extortion is not disappearing and that new solutions to the problem must be found. Rabbi Kenneth Brander asserted that many members of the Rabbinical Council of America (RCA) have only a general awareness of the New York *get* legislation, such that recent actions by the RCA to address the *agunah* problem were in a way responding to the 1992 *get* law. Similarly, the G.E.T. organization has lobbied for various proposed solutions to *get* extortion for the better part of fifteen years. Telephone Interview with Deborah Eifferman, International Vice President, ICAR (Mar. 2, 1994).

Even if the 1992 *get* law induces some rabbis to seek alternative solutions more aggressively, this positive effect must be viewed against the threat of the current controversy to permanently damage the Orthodox community. It is yet unclear whether the divisiveness sparked by the 1992 *get* law will leave permanent scars. While some predict that any wounds inflicted by the current *halachic* controversy will probably not be serious,²⁷⁷ others are less optimistic.²⁷⁸

The crucial question, therefore, is whether the 1992 *get* law—or any *get* law—can be considered “good” absent *halachic* consensus. The answer must be no. Although the potential of the 1992 *get* law to help *agunot* makes it extremely compelling, it has engendered negative side-effects that legislators never intended. Political infighting among rabbinic authorities and Jewish organizations, confusion on the part of Orthodox women about whether to seek the law’s assistance, community backlash against those women who do—all of these unintended, negative by-products of the 1992 legislation have already materialized in the New York Orthodox community. Moreover, the most threatening social cost of all, which looms as a distinct future possibility, is that some rabbis will invalidate *gittin* received by women pursuant to the 1992 law. If this were to happen—and even supporters of the law cannot deny the possibility—the 1992 *get* law could permanently divide the Orthodox community or, even worse, harm the very women it was intended to help.

Supporters of the 1992 law may counter that the 1992 law’s immense social benefits of reducing *get* extortion and sparing women the burden of becoming *agunot* far outweigh the law’s negative effects, some of which may never materialize. This cost-benefit analysis may be correct, but it overlooks another

277. Telephone Interview with Kenneth Auman, Orthodox Rabbi (Mar. 2, 1994). “Organizationally,” Auman said, “you often have a lot of different fights [within the Orthodox community]. When it boils down to it, it doesn’t always make much of a difference.” *Id.*

278. Telephone Interview with Marvin Schick, Publisher, *Journal of Halacha and Contemporary Society* (Mar. 7, 1994). Schick said that the recent *halachic* conflict has left the Orthodox community “bitterly divided,” commenting that “[e]ven assuming that there is a legitimate issue here, that there is room for disagreement, there is no good reason one can point to to explain the intensity of this conflict except . . . that religious conflict has an inextricable capacity to get out of hand, to breed intensity.”

major drawback of the 1992 *get* law: Beyond its social costs, the law has implicitly forced the state to take sides in a religious dispute. The law's continued operation in the face of a divisive *halachic* debate has, in effect, lent state support to one set of religious beliefs over another. From this perspective, who is "right" in the *halachic* dispute over the 1992 law matters far less than the fact that, because the dispute exists, the law's actual operation constitutes a violation of First Amendment principles. Even after its brief operation, it is apparent that the 1992 *get* law has had the effect of entangling the state in a religious dispute. As such, it cannot stand.

V. A Comparative Analysis: Is Civil Legislation A Good Solution To The *Agunah* Problem?

Both supporters and opponents of the New York *get* legislation overwhelmingly agree that civil legislation is not the best way to solve the *agunah* problem.²⁷⁹ Beyond the flaws of the New York *get* laws, and beyond the constitutional and *halachic* parameters that constrain any legislative initiatives in this area, inherent limitations in *get* legislation make it at best a partial solution to the *agunah* problem. First, *get* legislation such as the 1983 and 1992 *get* laws, which apply to those seeking civil divorces, cannot help the many *agunot* who are already civilly divorced.²⁸⁰ A second problem is that many *agunot* face religious,²⁸¹ social,²⁸² and economic²⁸³ barriers that prevent them from seeking the aid of civil courts, regardless of the law's

279. Of all the commentators interviewed, only Marvin Jacob thought that the combination of the 1983 and 1992 *get* laws presented the best available solution. Telephone Interview with Marvin E. Jacob, Attorney, Weil, Gotshal, & Manges, New York, N.Y., Adjunct Professor of Law, New York Law School (Feb. 28, 1994).

280. Significantly, a tort law that established the refusal to give a *get* as the intentional infliction of emotional harm would be available to *agunot*, whether civilly divorced or not. Nathan Lewin said he has proposed the creation of this type of statutory remedy, but that rabbinic authorities have told him such legislation would raise serious *halachic* problems. Telephone Interview with Nathan Lewin, Attorney, Miller, Cassidy, Larroca & Lewin, Washington, D.C. (Apr. 7, 1994). Constitutional problems would be raised as well. See *supra* note 117 and accompanying text.

281. Orthodox women and men are prohibited from resolving their marital disputes in secular courts absent permission from a *bet din*. See *supra* note 31.

282. See *supra* text accompanying notes 271-72, discussing social backlash against Orthodox women who go to civil court.

effectiveness. Finally, for those organizations and individuals who seek a national or international solution to the *agunah* problem, even good civil legislation is geographically limited to the citizens of a particular jurisdiction.

While commentators thus agree that the best (and perhaps only) solution to the *agunah* problem must come from within the Jewish community itself, there is far less consensus on what that internal resolution should be. This section will look at three models for internal redress of the *agunah* problem that are now in various stages of implementation in the Jewish community. In this broader context, it will then reconsider the appropriate role of civil legislation in addressing the *agunah* problem.

A. *Increased Application of Community Pressure*

One approach to solving the *agunah* problem advocates the more aggressive application of traditional forms of community pressure. Even those commentators who participated in the drafting of the 1983 *get* statute agree that the New York Jewish community could have done more to address the *agunah* problem before turning to civil legislation. "I thought that the rabbis were not taking enough authority in using their bully pulpits to put pressure on men," said Alan Dershowitz.²⁸⁴ Similarly, Aaron Twerski continues to believe that "with significant community pressure we could probably reduce the problem by 95 percent."²⁸⁵

In the last several years, various initiatives have been launched at the national and local levels to make community pressure a more effective remedy. New organizations have been formed that help *agunot* by pressuring recalcitrant spouses to deliver *gittin*.²⁸⁶ Rabbinic organizations, including Agudath

283. Many Orthodox women simply lack the economic resources needed to finance the sizable attorney's fees associated with litigation.

284. Telephone Interview with Alan Dershowitz, Professor of Law, Harvard Law School (Feb. 16, 1994).

285. Telephone Interview with Aaron Twerski, Professor of Law, Brooklyn Law School, Officer, Agudath Israel (Mar. 2, 1994).

286. *Get Free* was founded in 1992. See also *Vaad Harabanim of Far Rockaway Agunah Fund*, JEWISH PRESS, June 26, 1992, at 53 (announcing the establishment of a new organization in the Far Rockaway section of New York dedicated to helping *agunot*).

Israel and the Rabbinical Council of America (RCA), have endorsed the increased imposition of synagogal sanctions on recalcitrant spouses.²⁸⁷ In Canada, a nationwide campaign has been launched in which major Jewish organizations and synagogues have agreed to deny both membership and leadership positions to individuals who refuse to participate in the *get* process.²⁸⁸ Finally, continued efforts by organizations like *The Jewish Press*, AGUNAH and G.E.T. to draw local and national attention to the plight of *agunot* have contributed to the growing feeling in Jewish communities that abuse of the *get* process cannot be tolerated.

The problem with the community pressure model is not its lack of support, but rather the difficulty in making it work. Especially in places like New York City where the absence of any unified leadership in the Orthodox community makes well-coordinated community pressure difficult. Furthermore, given the decentralized nature of city life and the mobility of people in the United States, many recalcitrant spouses can escape community pressure simply by moving to another state or, in some cases, another street. Finally, and perhaps most significantly, the underlying force that historically made community pressure so effective in earlier times—the power of rabbinical courts to enforce their orders—is absent in the United States today.²⁸⁹ Consequently, although in many cases community pressure can and does help *agunot*, in cases in which spiteful husbands will go to any length to avoid giving *gittin*, even heightened community pressure will be ineffective.

B. *Utilization of Prenuptial Agreements*

A second proposed remedy to the *agunah* problem that has been espoused by many Orthodox rabbis in New York and else-

287. At its 1993 convention, the RCA adopted a resolution that imposes strict synagogal sanctions upon any recalcitrant spouse who ignores the summons of a *bet din*. The approved sanctions include preclusion from holding membership or office in the synagogue; preclusion from being called to read the Torah or receiving any other honor; and the regular announcement in synagogues of the names of recalcitrant spouses. Zwiebel, *supra* note 71, at 8 n.14.

288. Telephone Interview with Norma Baumel Joseph, Founder and President, ICAR (Mar. 21, 1994). "This takes it back into the community realm, which is of course where we want it." *Id.*

289. See *supra* note 31.

where is the utilization of prenuptial agreements.²⁹⁰ In these agreements, the bride and groom agree 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*.²⁹¹ 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. "The prenuptial agreement, in my mind, is the only hope of any kind of solution," asserted Rabbi Kenneth Auman.²⁹² According to Rabbi Haskel Lookstein, "If prenuptial agreements would be signed routinely at every wedding, we could wipe out this problem entirely."²⁹³

Although several different versions of prenuptial agreements are currently in use, the one drafted by Rabbi Mordechai Willig has been the most widely circulated and has received official RCA backing.²⁹⁴ The Willig prenuptial agreement creates a financial incentive for a husband to give a *get* in the event of marital breakdown by obligating him to make fixed support payments to his wife from the time they separate to the time he grants her a religious divorce.²⁹⁵ Rabbi Kenneth Brander, who chaired the RCA committee on prenuptial agreements, explained that, unlike the 1992 *get* law, this provision raises no *halachic* concerns because a man is already obligated under Jewish law to financially support his wife for as long they are

290. The RCA's endorsement of prenuptial agreements at its 1993 convention has been hailed by many as an important step in solving the *agunah* problem. See Zwiebel, *supra* note 71, at 8 (declaring that the RCA's *agunah*-related initiatives "deserve to be given careful study by all who recognize the gravity of the problem and the urgency of its compelling demand for attention and amelioration").

291. Premarital agreements would therefore compensate for the lack of an arbitration clause in the Orthodox *ketubah*. See *supra* notes 109, 113.

292. Telephone Interview with Kenneth Auman, Orthodox Rabbi (Mar. 2, 1994).

293. Lookstein, *supra* note 42, at 4, 48 (Rabbi Lookstein is the leader of Congregation Kehilath Jeshurun and the principal of the Ramaz School in Manhattan).

294. A copy of this prenuptial agreement is attached at Appendix B.

295. To adjust for inflation, the amount set for support is indexed to the consumer price index. See Appendix B.

married: "So we're not fining the husband," Brander said, "[a]ll 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*."²⁹⁶

The Willig prenuptial agreement is not free of problems, however. Some commentators, including both J. David Bleich and Marvin Jacob, assert that, because the support provision in the Willig agreement requires the husband to pay a fixed sum that is unrelated to the parties' actual financial circumstances at the time of separation, it may be struck down by secular courts as a penalty clause.²⁹⁷ Consequently, Jacob cautions that the Willig prenuptial agreement is "lulling people into a false sense of security," when in fact it may subsequently be deemed legally unenforceable.²⁹⁸

A second drawback is that prenuptial agreements can effectively solve the *agunah* problem only to the extent that rabbis in the community widely utilize them. Although some rabbis now refuse to perform marriage ceremonies without them, most rabbis do not take this approach; concerned that prenuptial agreements might not be right for every couple, and could actually plant the seeds of marital discord, many rabbis hesitate to insist upon them.²⁹⁹ This obstacle could be easily overcome if

296. Telephone Interview with Kenneth Brander, Orthodox Rabbi, Chair, RCA Committee on prenuptial agreements (Feb. 16, 1994).

297. In contract law, penalty clauses are invalid. Rabbi Bleich has proposed an alternative prenuptial agreement that he says establishes support as a right, not a penalty. Telephone Interview with J. David Bleich, Orthodox Rabbi, Professor of Jewish Law and Ethics, Cardozo School of Law of Yeshiva University (Mar. 2, 1994).

298. Telephone Interview with Marvin Jacob, Attorney, Weil, Gotshal, & Manges, New York, N.Y., Adjunct Professor of Law, New York Law School (Feb. 28, 1993). To date, however, no court has confronted this issue. Cf. Adrienne Marks, *Prenuptial Agreements As a Solution to Agunah Problem*, JEWISH PRESS, July 24, 1992, at 60 (advising couples who enter into prenuptial agreements to consult with experienced attorneys to ensure enforceability).

299. Rabbi Lookstein asserts that these concerns could be easily overcome if rabbis explained the prenuptial agreement to marrying couples "as a mark of love and responsibility where each partner wants to protect the other in the event of any change in the relationship. It should be presented as something which is done not alone for a particular couple but, rather, for the entire community." Lookstein, *supra* note 42, at 48. See also Sylvia Mandelbaum, *Save the Victimized Agunah*, JEWISH PRESS, Aug. 21, 1992, at 10 ("The safest ocean-liner carries life boats — just in case. Entering into a marriage with complete trust, by shaping each other's hopes and intentions is the best form of marriage insurance").

marrying couples themselves insisted on signing a prenuptial agreement. However, prevailing social attitudes often discourage couples on the brink of marriage from entering into agreements that contemplate divorce. Consequently, although prenuptial agreements represent a promising solution to the *agunah* problem, their successful implementation depends upon the reform of social and rabbinic attitudes. Such reform is already occurring, but slowly. Other solutions are required in the interim.

C. *Religious Reform* — “Halachic Reinterpretation”

The third and most controversial approach to solving the *agunah* problem proposes the reform of Jewish law, deemed by some as “*halachic* reinterpretation.” Proponents of this approach assert that, at its core, the *agunah* problem is a *halachic* problem that demands a *halachic* solution; toward this end, organizations world-wide united in 1993 to form the International Coalition for Agunah Rights (ICAR). ICAR’s ultimate goal is to procure from distinguished Israeli rabbis one or more *halachic* solutions to the *agunah* problem that can be universally implemented.³⁰⁰

But labels like “reform” and “reinterpretation” are controversial, because proponents maintain that solutions to the *agunah* problem already exist in Jewish law. By this account, what requires reform is not *halachic* doctrine, but rather the unwillingness of rabbis to implement any remotely innovative approach to help *agunot*, even if it has precedent in Jewish law. Rabbinic conservativeness, proponents declare, disregards that Jewish law accords the highest priority to freeing *agunot*,³⁰¹ and

300. Telephone Interview with Deborah Eifferman, International Vice President, ICAR (Mar. 2, 1994). The organization has already made strides. Eifferman reported that, in response to ICAR’s efforts, distinguished Israeli rabbis have agreed to establish an ad hoc committee composed of scholars, rabbis, and ICAR members that will address *halachic* approaches to the *agunah* problem.

301. See Jacob, *supra* note 240, at 37:

“Nowadays, if one frees a single Agunah from the chains of her Iygun [plight], it is as if he rebuilt one of the desolate places of Jerusalem on high.” T’shuvos Maharsham in the name of the T’shuvos HaBach Hachadoshos, Pt. 1, Siman 84; “It is a matter of greatest importance, and may God bring success to all who toil in these great matters involving remedies for the daughters of Israel.” Igros Moshe, Even HaEzer, Pt. 4, Siman 106.

Id. (quoting Talmudic sources).

that rabbis have historically implemented many creative solutions to do so. "I have no doubt," said Rivka Haut, "that if the rabbis of the Talmud were here today, this *agunah* situation wouldn't exist."³⁰²

One frequently offered example of the *halachic* mandate to help *agunot* is that, in order to spare from *agunah* status a woman whose husband has disappeared, Jewish law lowers its normally stringent testimonial requirements and accepts testimony from almost anyone claiming to have witnessed her husband's death.³⁰³ "When it comes to an *agunah*," declared Rabbi Sholom Klass, "we accept *aidose*, testimony, from anyone, even from a relative, a woman, a slave, even from those normally disqualified as witnesses, even from a child and an honest Gentile. We do everything to make it easier to free the chained woman."³⁰⁴

Several *halachic* solutions to the *agunah* problem have been proposed. One proposal is to release *agunot* from dead marriages through retroactive annulments of the marriage.³⁰⁵ Although the concept of annulment has precedent in Jewish law, it has never been widely implemented as a means of helping *agunot*.³⁰⁶ However, some rabbis have recently begun to use this approach, with one rabbi even proposing the establishment of a "Special Rabbinical Court for Annulments."³⁰⁷

A second proposal is to have marrying couples sign an undated, conditional divorce, called a *tenai get*, prior to the wedding ceremony. In the event of separation, if the husband refuses to give his wife a *get* in violation of Jewish law, the *bet din* could then date the agreement and declare the woman free

302. Telephone Interview with Rivka Haut, Director, AGUNAH, Founder, ICAR (Mar. 6, 1994).

303. Only the confirmable death of a spouse will dissolve the marriage. See *supra* note 2.

304. Rabbi Sholom Klass, *Religious Annulment of a Marriage: The Editor Replies*, JEWISH PRESS, June 19, 1992, at 62B.

305. See Rabbi Sholom Klass, *Freeing an Agunah: The Editor's Response*, JEWISH PRESS, July 3, 1992, at 35 (advocating annulment as a valid way of freeing *agunot*).

306. Telephone Interview with Kenneth Auman, Orthodox Rabbi (Mar. 2, 1994). While the retroactive nullification of marriage was used in ancient times, it has not been regularly implemented in over fifteen hundred years.

307. See Emanuel Rackman, *Parole for Prisoners*, JEWISH PRESS, June 12, 1992, at 25.

to remarry. According to Rabbi Bernard Zlotowitz, this mechanism was widely employed by rabbis during World War II to prevent women from becoming *agunot* if their husbands became missing in action.³⁰⁸

A third proposal, which Rabbi Moshe Antelman has controversially implemented in several cases, is to allow a *bet din* to itself certify a *get* in situations where the husband has effectively abandoned his wife.³⁰⁹ "It's a *mitzvah* [good deed] for a man to give his wife the right to dual divorce," Antelman said. "If he doesn't want to do it, the *bet din* can do it for him."³¹⁰ This *halachic* approach, which is considered radical, would effectively eliminate a woman's dependence upon her husband as the exclusive authority who can allow her to remarry.³¹¹

Although a *halachic* solution to the *agunah* problem would be ideal, all of the above mentioned proposals have met with the sharp criticism of rabbis who deem them *halachically* invalid.³¹² Moreover, many other rabbis simply refuse to endorse any proposal that is controversial. Echoing the dispute over the 1992 *get* law, a key point of disagreement is whether unanimous *halachic* consensus is required before any approach to help *agunot* can be implemented. Answering this question in the affirmative, Dovid Zwiebel declared:

Here is an area where you almost have to, by definition, be conservative. If you move in a direction that is not accepted by the full spectrum of rabbinic authority, you could have a tragic situation where a woman has a *get* and in some segments of the community is considered able to remarry, and in other segments of the community is considered still unable to remarry.³¹³

308. Telephone Interview with Bernard Zlotowitz, Reform Rabbi (Feb. 24, 1994).

309. Telephone Interview with Moshe Antelman, Scientist, Orthodox Rabbi (Mar. 7, 1994).

310. *Id.*

311. Despite the controversial nature of this approach, Antelman asserts that he has located historical evidence demonstrating that some rabbinical courts have in fact employed this solution in the past. *Id.*

312. See Rabbi Chaim Z. Malinowitz, *A Response to Rabbi Rackman*, JEWISH PRESS, June 26, 1992, at 34 (criticizing Rabbi Rackman's proposal to establish a rabbinical court for the annulment of marriage as having "absolutely no practical *halachic* basis").

313. Telephone Interview with Dovid Zwiebel, Legal Counsel to Agudath Israel (Feb. 21, 1994).

On the other side of the debate, supporters of *halachic* solutions (most of whom also support the 1992 *get* law) assert that *halachic* disagreement should not thwart the more pressing need to help women get on with their lives. Given this divide, and the conservative climate among the New York rabbinate, the odds of any *halachic* approach receiving unanimous or even major backing are slim.

The foregoing survey of proposed internal solutions to the *agunah* problem demonstrates that no one approach has commanded universal approval. Moreover, there may be no one "best" solution. Given the many social and religious dimensions of the problem,³¹⁴ a variety of solutions will be required to solve it. The combined force of local community pressure, national implementation of prenuptial agreements, and international efforts to find *halachic* remedies offers the greatest hope for wiping out *get* extortion and the *agunah* problem. However, it remains to be seen whether any of these approaches will gain the widespread rabbinic support required for their successful implementation.

It is against this backdrop of imperfect solutions that one must consider the appropriate role of civil legislation in addressing the *agunah* problem. Those who oppose *get* legislation of any kind insist that the Jewish community must not look to the state to solve its problems.³¹⁵ This approach is compelling, but ignores the fact that the persistent inability of the Jewish community to solve the *agunah* problem is part of the problem itself. While the Jewish community is making strides toward possible solutions, the immediate and pressing nature of the *agunah* problem justifies that all practical, interim solutions be explored, including those that look to civil legislation. As Nathan Lewin asserts:

I admire and can agree with those who say, "Look, we ought not to turn to the legislature to solve our problems." And, you know, if this were a perfect world then I'd say fine, let's solve our own

314. See generally *supra* part I.

315. One vocal advocate of this view is Marvin Schick, President of the Rabbi Jacob Joseph Schools, publisher of the *Journal of Halacha and Contemporary Society*, and founder of the National Jewish Commission on Law & Public Affairs (COLPA). Telephone Interview with Marvin Schick, President, Rabbi Jacob Joseph Schools (Mar. 7, 1994).

problems. But that's not reality. And when you deal with reality and real people's problems, you shouldn't wait until the messiah comes to resolve them or get a consensus of religious view.³¹⁶

But here too there is a problem; for while all legislative initiatives that can help *agunot* should be pursued, it is difficult to draft *any get* law that stays within constitutional and *halachic* parameters, and helps *agunot* in significant numbers.³¹⁷ Comparison of the 1983 and 1992 New York *get* laws aptly demonstrates that civil legislation aimed at helping *agunot* carries with it a serious tradeoff: the more aggressive the law, the harder it will be to tread the thin line between constitutionality and *halachic* validity on one hand, and religious entanglement and controversy on the other. The 1983 *get* statute has tread this tightrope well, but the price has been that it helps few women. The 1992 *get* law has far greater potential to help *agunot*, but the cost of its effectiveness has been a religious controversy with harmful social ramifications and unconstitutional effects. Thus, while in theory civil legislation designed to help *agunot* seems like an attractive option, in practice it is problematic, suggesting that future efforts would be better devoted to other solutions.

The quest for alternative solutions must not abandon the legal system, however. As evinced by the recent movement toward prenuptial agreements, given the reality that rabbinical courts in the United States cannot enforce their own orders, even "internal" solutions to the *agunah* problem must contemplate the possibility of judicial enforcement. The challenge, therefore, is not to eliminate the state's role in helping *agunot*, but rather to deliberately advance it in ways that minimize the risk of state entanglement, religious controversy, and the judicial misapplication of Jewish law.

The most promising avenue in this regard is the civil enforcement of private agreements. As the holdings in *Wax-*

316. Telephone Interview with Nathan Lewin, Attorney, Miller, Cassidy, Larroca & Lewin, Washington, D.C. (Apr. 7, 1994).

317. This is at least true of civil legislation passed in the United States. In other countries, such as Canada, the constitutional obstacles to *get* legislation may be less restrictive. See *supra* note 229.

stein,³¹⁸ *Stern*,³¹⁹ and *Avitzur*³²⁰ indicate, New York courts are willing to specifically enforce contractual terms that require parties to cooperate in the Jewish divorce process. This important avenue of relief must be pursued. Compared to civil legislation, private agreements can more easily avoid *halachic* and constitutional pitfalls because concerns raised by ordering the performance of a religious act are diminished (if not eliminated) when parties have expressly agreed to such performance. More importantly, private agreements can circumvent constitutional and *halachic* obstacles to specific performance by *indirectly* pressuring a man to deliver a *get*. For instance, by requiring husbands to make support payments to their wives until the spouses are religiously divorced, the Willig prenuptial agreement pressures recalcitrant husbands to deliver *gittin* without raising First Amendment obstacles to civil enforcement.³²¹ Likewise, in the *Rubin* case, both spouses were indirectly pressured to cooperate in a Jewish divorce because the legal enforceability of their settlement agreement was conditioned upon the delivery and acceptance of a *get*.³²² Similar provisions, which help to curb abuse of the *get* process, should be developed.

The legal system will never be able to solve the *agunah* problem. However, it can be of real assistance to the Jewish community and to individual *agunot* through the monitoring³²³ and enforcement of private agreements between Jewish spouses. The impetus is now upon the Jewish community to promote their utilization.

318. 90 Misc. 2d 784, 395 N.Y.S.2d 877 (Sup. Ct. Kings County 1976), *aff'd*, 57 A.D.2d 863, 394 N.Y.S.2d 253 (2d Dep't 1977). See *supra* note 97 and accompanying text.

319. 5 Fam. L. Rep. (BNA) 2810 (Sup. Ct. N.Y. County 1979). See *supra* notes 101-03 and accompanying text.

320. 58 N.Y.2d 108, 446 N.E.2d 136, 459 N.Y.S.2d 572, *cert. denied*, 464 U.S. 817 (1983). See *supra* notes 110-15 and accompanying text.

321. See *supra* note 297-98 and accompanying text.

322. 75 Misc. 2d 776, 348 N.Y.S.2d 61 (Fam. Ct. Bronx County 1973). See *supra* note 94 and accompanying text.

323. Following the lead of *Golding* and *Perl*, New York courts should and most likely will continue to void private agreements in which wives agree to extortionate terms in order to obtain *gittin*. See *supra* notes 118-21 and accompanying text.

APPENDIX A:
Table of Commentators Interviewed and
Their Affiliated Organizations

List of Commentators Interviewed

MOSHE ANTELMAN is both a practicing scientist and Orthodox rabbi who divides his time between Israel and Rhode Island. He serves on rabbinical courts in both locations. Telephone Interview on March 7, 1994.

KENNETH AUMAN is an Orthodox rabbi who serves as rabbinical advisor to the G.E.T. organization and chairman of an Orthodox *bet din* in the Flatbush section of Brooklyn. Telephone Interview on March 2, 1994.

J. DAVID BLEICH is an Orthodox rabbi and a professor of Jewish Law and Ethics at the Cardozo School of Law of Yeshiva University. He is currently the leading rabbinic opponent to the 1992 *get* legislation. See J. David Bleich, *Jewish Divorce: Judicial Misconceptions and Possible Means of Civil Enforcement*, 16 CONN. L. REV. 201 (1984). Telephone Interview on March 2, 1994.

KENNETH BRANDER is a practicing Orthodox rabbi in Boca Raton, Florida. He also chairs the RCA committee on prenuptial agreements. Telephone Interview on February 16, 1994.

CHAYA COOPER is the assistant director of Get Free. Telephone Interview on March 14, 1994.

CYNTHIA CREEM is a practicing lawyer in Boston, Massachusetts and a member of the Council for Family Law of the Massachusetts Bar Association. She is currently working on *get* legislation, modeled after New York's, that she hopes to introduce in Massachusetts. Telephone Interview on March 14, 1994.

ANTHONY DANIELE is a practicing matrimonial lawyer in New York. He was plaintiff's attorney in the important *Schwartz* case. Telephone Interview on February 14, 1994.

ALAN DERSHOWITZ is a practicing lawyer in Massachusetts and a professor of law at Harvard Law School. He participated in the drafting of the 1983 New York *get* statute. Telephone Interview on February 16, 1994.

DEBORAH EIFFERMAN is the International Vice President of the International Coalition for Agunah Rights (ICAR). She formerly served as the casework manager for the G.E.T. organization. Telephone Interview on March 2, 1994.

ALLEN FISCHER is a practicing lawyer in New York City who is an Orthodox Jew and represents mostly Orthodox clients. He represented the plaintiff in the *Pinkesz* case. Telephone Interview on March 7, 1994.

PHILLIP HIAT is a Reform rabbi and an officer of the Federation of Reform Synagogues. Telephone Interview on February 2, 1994.

ROBERT HIRT is an Orthodox rabbi affiliated with Yeshiva University who was involved in drafting the prenuptial agreement endorsed by the RCA. Telephone Interview on February 2, 1994.

RIVKA HAUT is one of the five directors of AGUNAH, and one of the founders of ICAR. Telephone Interview on March 6, 1994.

MARVIN E. JACOB is a partner at the New York firm of Weil, Gotshal, & Manges and an adjunct professor of law at New York Law School. He also serves as the chairman of the Commission on Law and Legislation of the Institute for Public Affairs of the Orthodox Union. Mr. Jacob is regarded as a leading advocate in support of the 1992 *get* statute. See Marvin Jacob, *The Authentic Legal Explanation of the 1992 Amendments To Section 236B of the Domestic Relations Law—The So-Called “Get Law”*, JEWISH PRESS, June 18, 1993, at 58-59. Telephone Interview on February 28, 1994.

HARVEY JACOBS is a Brooklyn matrimonial lawyer whose clientele includes a large percentage of Orthodox Jews. Telephone Interview on March 7, 1994.

NORMA BAUMEL JOSEPH is a founder and the current president of ICAR. She lives in Canada, where she has played an important role in lobbying for Canadian *get* legislation. Telephone Interview on March 21, 1994.

RICHARD KURTZ is a matrimonial attorney in New York. He represented the defendant in the *Golding* case and the plaintiff in the *Perl* case. Telephone Interview on March 7, 1994.

YEHUDA LEVIN is a caseworker at Get Free. Telephone Interview on March 14, 1994.

NATHAN LEWIN is a partner at the Washington, D.C. firm of Miller, Cassidy, Larroca & Lewin. He is regarded as a leading expert on church-state questions, and was the primary drafter of the 1983 *get* statute. Telephone Interview on April 7, 1994.

DAVID LONG is a lawyer who serves as chairman of the board of the G.E.T. organization. Telephone Interview on March 2, 1994.

MENACHEM LUBINSKY served as Agudath Israel's vice president on government and public affairs at the time of the 1983 *get* statute's enactment. Telephone Interview on February 21, 1994.

LARRY ROTHBART is the legal secretary of Justice Rigler, who decided the *Schwartz* case. Telephone Interview on March 7, 1994.

MARVIN SCHICK is the president of the Rabbi Jacob Joseph Schools in New York. He is also the publisher of the *Journal of Halacha and Contemporary Society*, and the founder of the National Jewish Commission on Law & Public Affairs (COLPA). Telephone Interview on March 7, 1994.

ALLEN SCHWARTZ is an Orthodox rabbi who leads Congregation Ohab Zedek on Manhattan's Upper West Side and an officer of the Rabbinical Council of America. See Allen Schwartz, *Responding to Recalcitrant Husbands (Letter)*, JEWISH PRESS, May 15, 1992, at 73. Telephone Interview on March 31, 1994.

DR. ISAAC SKOLNIK is the director of Kayama. Telephone Interview on February 28, 1994.

AMY SOLOMAN is the legislative director for New York Senator Mark Connor, the chief sponsor of the 1983 *get* bill in the New York State Senate. Telephone Interview on March 21, 1994.

RALPH MICHAEL STEIN is a professor of law at Pace University School of Law. See Ralph M. Stein, *Marriage Contracts Unsuitable for Civil Courts*, N.Y. TIMES, Feb. 25, 1983, at A30. Telephone Interview on March 2, 1994.

JEFFREY SUNSHINE is a matrimonial lawyer in Brooklyn whose clientele include many Orthodox Jews. Telephone Interview on March 21, 1994.

AARON TWERSKI is a professor of law at Brooklyn Law School and an officer of Agudath Israel. He chaired the Agudath Israel committee that drafted the 1983 *get* statute. Telephone Interview on March 21, 1994.

MORDECHAI WILLIG is the Orthodox rabbi who wrote the prenuptial agreement recently endorsed by the Rabbinical Council of America. Telephone Interview on February 24, 1994.

BERNARD ZLOTOWITZ is a Reform rabbi who served as the director the New York Federation of Reform Synagogues at the time of the 1983 *get* statute's enactment and strongly urged its veto. See Bernard Zlotowitz, *A Divorce Bill That Involves the State in Religion*, N.Y. TIMES, July 18, 1983, at A14; Bernard Zlotowitz, *A Religious Requirement Imposed By Cuomo in '83*, N.Y. TIMES, Sept. 26, 1984, at A22. Telephone Interview on February 24, 1994.

DOVID ZWIEBEL is the legal counsel to Agudath Israel. He is a leading spokesman in opposition to the 1992 *get* law. See Dovid Zwiebel, *Tragedy Compounded: The Aguna Problem and New York's Controversial New "Get Law"*, JEWISH OBSERVER, Sept. 1993 at 1. Telephone Interview on February 21, 1994.

List of Affiliated Organizations

AGUDATH ISRAEL OF AMERICA is an organization, founded in 1922, that unites a broad coalition of Orthodox Jews under the leadership of rabbinic scholars, and aims to advance Torah observance and the welfare of Jewish people in the United States and around the world. Through its Office of Government Affairs, Agudath Israel has emerged as a leading advocate and political force for the religious and civil rights of observant Jews. Furthermore, Agudath Israel Of America's Commission on Legislation and Civic Action is the prime governmental spokesman and liaison for yeshivas (Jewish all-day schools), synagogues, and community charitable causes before governmental and legislative bodies. The organization was primarily responsible for the drafting of the 1983 *get* statute. It is also the organization most fervently opposing the 1992 *get* law.

AGUNAH is an organization of approximately 50 members dedicated to rabbinic reform and finding *halachic* solutions to the *agunah* problem. Its five directors are all women, and AGUNAH accepts only women as clients.

GET FREE is a an organization that helps both men and women obtain religious divorces through community pressure of recalcitrant spouses. It was founded in 1992 by an Orthodox Jew whose daughter had difficulty obtaining a *get*. It has two paid staff members and offers its services free of charge.

GETTING EQUITABLE TREATMENT (G.E.T.) was founded in 1979 by Jewish men and women from lay and professional backgrounds "in response to a growing need to assist individuals seeking a Jewish divorce from a recalcitrant spouse." G.E.T. brochure. The organization accepts both women and men as clients, it assumes a non-adversarial role in its efforts to secure a religious divorce, and it offers its services free of charge. G.E.T. is endorsed both by rabbinic and lay organizations, and its casework services are provided by over 200 volunteers.

INTERNATIONAL COALITION FOR AGUNAH RIGHTS (ICAR) was founded in 1992 and is the only organization that addresses the *agunah* problem at the international level. Its membership includes 1.5 million people who are concerned about the plight of *agunot*. ICAR's goal is to obtain from distinguished Israeli rabbis, a *halachic* solution to the *agunah* problem that can be universally implemented.

KAYAMA grew out of a pilot program begun in 1985 by Mark Bane and Gary Litke, both practicing attorneys in New York City. Its goal is to educate American Jews about the importance of obtaining a *get*, and to facilitate the actual delivery of *gittin*. Kayama makes all arrangements for the *get* proceeding and pays its cost if that is an issue (the administrative expense of the *get* proceeding typically costs about \$300 dollars). In 1993, the organization sent information regarding the *get* requirement to over 3,000 members of the matrimonial bar in the New York metropolitan area.

THE RABBINICAL COUNCIL OF AMERICA (RCA) is the largest professional organization of Orthodox rabbis in the world. Its membership includes 980 Orthodox rabbis in the United States, Canada, Israel and elsewhere. The RCA serves as a spokesman

for Orthodoxy on the national and international levels. Its affiliate, the Beth Din of America, services the RCA's membership and the Jewish community both by administering and processing Jewish divorces (*gittin*), and by adjudicating and arbitrating civil litigation.

APPENDIX B:

Sample Prenuptial and Arbitration Agreements Approved by the Orthodox Caucus

The following two premarital agreements have been distributed to thousands of Orthodox Rabbis throughout the United States in an attempt to resolve the *agunah* problem.

I. PRENUPTIAL AGREEMENT:

HUSBAND'S ASSUMPTION OF OBLIGATION

I, the undersigned, _____, husband to be, hereby obligate myself to support my wife to be, _____, in the manner of Jewish husbands who feed and support their wives loyally. If, Heaven forbid, we do not continue domestic residence together for any reason, then I obligate myself, as of now, to pay to her \$— per day (indexed to the consumer price index as of December 31st following the date of marriage) for food and support (*parnasa*) for the duration of our Jewish marriage, which is payable each week during the time due, under any circumstances, even if she has another source of income or earnings. Furthermore, I waive my *halachic* rights to my wife's earnings for the period that she is entitled to the above-stipulated sum. However, this obligation shall terminate if my wife refuses to appear upon due notice before a Bais Din for purpose of a hearing concerning any outstanding disputes between us, or in the event that she fails to abide by the decision or recommendation of such Bais Din.

II. The husband to be is executing this document as an inducement to the marriage between the parties. The obligations and conditions contained herein are executed according to all legal and *halachic* requirements. The husband to be acknowledges that he has effected the above obligation by a *kinyan* (Jewish formal transaction) in an esteemed (*choshuv*) Bais Din.

III. The husband to be has been given the opportunity prior to executing this document of consulting with a rabbinic advisor and a legal advisor.

Signature

Date: _____
Place: _____
Witness: _____

Name: _____
Address: _____
Witness: _____

II. ARBITRATION AGREEMENT BETWEEN HUSBAND AND WIFE

MEMORANDUM OF AGREEMENT made this _____ day of _____ 575_____, corresponding to the _____ day of _____, 199_____, in the City of _____, State of _____, between _____, the husband to be, who resides at _____, and _____, the wife to be, who resides at _____.

WHEREAS, the aforementioned parties are presently to be united in matrimony as husband and wife:

THEREFORE, IT IS HEREBY AGREED by and between then that,

I. Should a dispute arise between the parties, Heaven forbid, so that they do not dwell together as husband and wife, then they will submit their dispute to the herein stipulated Bais Din for a binding decision. The parties hereby agree to arbitrate all matters pertinent to any dispute between them, before an arbitration panel, namely, the Bais Din of _____. Each of the parties agrees to appear in person before the panel upon the request of the other party. The award or decision of the panel or a majority of them shall be enforceable in any court of competent jurisdiction.

II. (a) The parties agree that the Bais Din is authorized to decide all issues relating to a *get* (Jewish Divorce) as well as any and all issues arising from agreements (e.g. *kesuba*, *tena'im*) entered into by the husband and the wife.

(b) The parties agree that the Bais Din is authorized to decide any monetary disputes that may arise between them, as well as issues of child support, visitation and custody, if both parties consent to such inclusion in the arbitration at the time that the arbitration itself begins.

III. This agreement is recognized as a material inducement to this marriage by the parties hereto. Failure of either of the parties to voluntarily perform his or her obligations hereunder if requested to do so by the other party shall render the noncomplying party liable for all costs as shall be awarded by the Bais Din, including attorneys' fees, reasonably incurred by the requesting party in order to secure the noncomplying party's performance.

IV. In the event any of the aforementioned Bais Din members are no longer willing or able to serve, then their successors designated by them, (individually or organizationally), shall serve in their place and stead. If there are no successors, the parties will choose a mutually acceptable institutional Bais Din at the time of arbitration. If no such Bais Din can be agreed upon, the parties shall each choose one member of the Bais Din and the two shall then choose the third member. The award or decision of the Bais Din shall be rendered in accordance with Jewish Law ("Halakha") and/or the general principles of arbitration and equity (Pshara) customarily employed by rabbinical tribunals.

Should at any time there be a division of opinion among the Dayanim, the award or decision of a majority of the Dayanim shall be binding. Furthermore, should any of the Dayanim upon conclusion of the evidence remain in doubt as to the proper award or decision, resign, withdraw or refuse or become unable to perform his duties for any reason, the remaining Dayanim shall render the award or decision and it will be deemed that of the Bais Din.

In the event of the failure or refusal of either party to appear before it upon reasonable notice, the Bais Din may issue its decision in default of said party's appearance.

V. This agreement may be executed in one or more counterparts, each one of which shall be deemed an original.

VI. The signing of this agreement constitutes a full and complete arbitration agreement, required in order to submit the indicated claims to the arbitration tribunal as indicated above.

VII. The parties acknowledge that they have been given the opportunity, prior to executing this document, to consult with a rabbinic advisor and a legal advisor.

IN WITNESS WHEREOF, the Bride and Groom have entered into this Agreement in the City of _____, State of _____, U.S.A.

Name: _____, Bride

Address: _____

Signature: _____

Witness: _____

Name: _____, Groom

Address: _____

Signature: _____

Witness: _____