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# Religious Tribunals and Secular Courts: Navigating Power and Powerlessness

Michelle Greenberg-Kobrin

## *A. The Challenge of Integrating Multiple Systems of Law*

The growth and increased visibility of religious communities that seek to preserve their religious legal systems, a growing backlash against the use of these religious systems, and the inevitability that some aspects of the religious legal system will present themselves within the secular legal system all create opportunities to explore how religious communities attempt to navigate multiple legal norms, as well as multiple value systems that come into conflict with each other. The story of the modern day victim of *get* refusal, known as an *agunah*, allows for an exploration of how a religious community experiences power and powerlessness as its own religious laws intersect with the secular legal system, through which the religious community's goals are both advanced and hindered. The *agunah*'s story also allows for thinking about how to preserve one's interest in having personal status issues adjudicated in concert with one's religious-based legal systems.

In this Article, I will focus on the various ways that religious systems have attempted to navigate their relationship with the secular legal system and the secular system of values by looking at common law, legislation, and contract. I will think about the conceptualization of how contract can be used both to avoid interference of the secular legal system, as well as to provide the religious legal system with some enforceability. As the use of religious contracts to negotiate the intersection with secular law becomes more popular, contracts could be used to further the aims of those interested in protecting the autonomy of religious legal systems, while still thinking through how notions of basic protection available to both genders in secular law may be available to those interested in religious legal systems, and still balancing interests in equality and contemporary notions of basic rights with the religious legal system.

*B. A Case Study: The Agunah*

The case of *agunah* in *halakhic* literature typically involves a husband who was missing without proof of death, which was not uncommon before modern communication and travel.<sup>1</sup> A paradigmatic case involved a husband whose ship sunk in a large body of water out of sight of shore.<sup>2</sup> Without proof of death, the woman cannot remarry and must remain in a state of limbo, “chained” to a man whose whereabouts are unknown—she remains neither a widow nor a divorcee, unable to remarry for fear that her husband is still alive and may return some day.<sup>3</sup> A twentieth-century example involved women whose husbands were sent to death camps in Nazi Germany,<sup>4</sup> and a more recent example involved women whose husbands worked in the areas of the 9/11 attacks.<sup>5</sup> Without proof of death, they were *agunot*, married women neither widowed nor divorced. It was only after a lengthy period of time—during which the *beit din* (court of Jewish law) worked to adjudicate the missing husbands as dead under Jewish law—that they were free to remarry.<sup>6</sup>

The *agunah*, with whom modern contract law is concerned, is a very different creature than her historic counterpart and more accurately known as a *mesurevet get*, or one who is a victim of *get* refusal.<sup>7</sup> Although, the *agunah*'s husband is alive, and his whereabouts are well known, he nonetheless refuses to participate in the *get* process either out of spite or in order to obtain concessions on financial or custody matters that he would otherwise not be granted by a court.<sup>8</sup> Interestingly, even though the woman

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1. See BABYLONIAN TALMUD: YEBAMOT 12a.

2. See BABYLONIAN TALMUD: YEBAMOT 121a-121b. The Rabbinic rules addressing the presumptions of death are intensely fact specific and vary depending on the nature of the water body wherein the tragedy occurred, the specific legal question for which the presumption is sought, and the precise language of the testimony given. See EVEN HA'EZER 17:32, 34-35; BEIT SHMUEL 17:105; ARUCH HASHULCHAN E.H. 17:212-27.

3. See Encyclopedia Judaica, *supra* note 2.

4. See, e.g., TESHUVOT IGROT MOSHE E.H. 1:43 (discussing how the classic case of “water without end” applies to husbands who were not found following the Holocaust).

5. See generally MICHAEL J. BROYDE, CONTENDING WITH CATASTROPHE: JEWISH PERSPECTIVES ON SEPTEMBER 11TH (2011) (reflecting on the response of Jewish law to the tragedy of 9/11).

6. See *id.*

7. See IRVING A. BREITOWITZ, BETWEEN CIVIL AND RELIGIOUS LAW: THE PLIGHT OF THE AGUNAH IN AMERICAN SOCIETY xi (1993).

8. See Michelle Greenberg-Kobrin, *Civil Enforceability of Religious Prenuptial Agreements*, 32 COLUM. J.L. & SOC. PROBS. 359, 363 (1999). See also Shlomo Weissmann, *Ending the Agunah*

can technically also refuse to accept a *get*, and thereby trap her husband in the marriage, statistically the husband is almost always the perpetrator.<sup>9</sup> Withholding the *get* is an abusive act.<sup>10</sup> Often the latest in a series of abusive acts that brought the marriage to an end, this abusive act parallels other abuse statistics in the gender breakdown of perpetrators as opposed to victims.<sup>11</sup> The rise of the divorce rate in the observant Jewish community over the last sixty years, coupled with the courts' growing sophistication about gender inequalities in distribution of wealth and custody responsibilities and concomitant expenses, have created increased incentives for men to withhold the *get*, thus increasing the number of *agunot*.<sup>12</sup>

The seeming intractability of the *agunot* cases, the increase of the number of women in this position, the seeming inability of the current Jewish legal system to arrive at a solution, and the growth of an observant feminism that has identified this problem—the “*agunah* crisis”—as emblematic of the clash between a deeply held belief in the value of the Jewish system of *halakha* and the equality of men and women as fundamental to a just society.<sup>13</sup> This has all led to an intense public focus on the *agunah* crisis.<sup>14</sup> It is both the broader public policy questions of a resolution of the tensions within a *halakhic* system, which seems unable to cope with this aspect of modern reality, as well as the very real and scary possibility of one becoming a *mesurevet get*, that have led to the attempts by lawyers, judges, Jewish legal scholars, and activists to arrive at workable solutions to the *agunah* crisis

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*Problem as We Know It*, ORTHODOX UNION (Aug. 23, 2012), <http://www.ou.org/life/relationships/ending-agunah-problem-as-we-know-it-shlomo-wiessmann/>.

The discussion of the *get* often becomes an important factor in negotiations over a divorce settlement. *Id.* Even when not used explicitly as blackmail, the insistence that the *get* will only be used upon the conclusion of all negotiations, or at the time of the civil divorce, means that it looms large in the power dynamic of the negotiations. *Id.*

9. *Id.*

10. See *Why is get-refusal considered a form of domestic abuse?*, ORGANIZATION FOR THE RESOLUTION OF AGUNOT, <http://www.getora.org/#!faq/c10kz>.

11. See *id.*

12. See Abigail Jones, *Divorce in the Orthodox Jewish Community Can Be Brutal, Degrading and Endless*, NEWSWEEK (Nov. 12, 2013), <http://www.newsweek.com/divorce-orthodox-jewish-community-can-be-brutal-degrading-and-endless-3082>.

13. See Weissmann, *supra* note 8.

14. See, e.g., Beloff, *supra* note 7.

### *C. The Problem of Multiple Systems*

The issue derives, of course, from the essential structure of marriage and divorce in Jewish law, which is in opposition to that of the secular legal system. In the secular legal system, as in both the Catholic and Protestant legal systems, marriage is a status conferred on the couple by a third party, whether it be the state or the church.<sup>15</sup> Because the status is conferred by a third party, it can be removed by that third party in the case of divorce or annulment.<sup>16</sup>

In contrast, both the Jewish and the Islamic legal systems recognize marriage as a matter of contract between parties.<sup>17</sup> While religious officiants are present in Jewish marriage ceremonies, they merely serve to confirm that all is done in accordance with the law, not to confer a status upon the couple.<sup>18</sup> The *ketubah*, the Jewish marriage contract, imposes upon the husband a financial lien that must be paid upon divorce or his death and memorializes the husband's biblical duty to provide for his wife financially and sexually.<sup>19</sup> She, in turn, agrees to be bound by those obligations, and the *ketubah* then serves as the contract that sets forth some of those obligations.<sup>20</sup> It also sets forth the husband's obligations to the wife in the case of divorce or death.<sup>21</sup> Therefore, as marriage begins as a contractual relationship, it can only be terminated by a contract-termination agreement: the *get*.<sup>22</sup>

As with all contracts, both the marriage and the divorce agreements must be entered into freely.<sup>23</sup> Unsurprisingly, a meeting of the minds and mutual consent are much easier to achieve when entering into a marriage than when ending one. The *get* must be freely given, without duress, by the husband to the wife, who must in turn accept it freely.<sup>24</sup> The structural issue

15. See, e.g., CAL. FAM. CODE §§ 300–310 (Deering 2014).

16. See HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 110 (2d ed. 1988) (“The final [divorce] decree . . . grant(s) the dissolution of the marriage to one spouse or another, or in states permitting such a decree, to both spouses.”).

17. BABYLONIAN TALMUD: KIDDUSHIN 2a.

18. See “Ketubah” in Adin Steinzaltz *Madrich LaTalmud*; 1984 Keter Publishing House, Jerusalem. P. 172.

19. MOSES MAIMONIDES, *MISHNAH TORAH: HILCHOT ISHUT* 12:6,8; *EVEN HA'EZER* 66:9.

20. See Steinzaltz, *supra* note 18, p.172

21. *Id.*

22. See BREITOWITZ, *supra* note 7, at 5–6.

23. See 5 *ENCYCLOPEDIA TALMUDIT* 568 (1973) (defining “get”).

24. See “Get” in Steinzaltz, *supra* note 18, p. 150.

that plagues the *agunah* crisis is how much pressure can be placed on the parties to participate in the *get* process without invalidating the resulting *get* as one issued under duress.<sup>25</sup>

Of course, a secondary question is how to place any pressure at all on the parties in the absence of any enforcement authority of the *halakhic* legal system. An unfortunate development, which has contributed to this question, is the development in the matrimonial bar where some lawyers refuse to allow the *get* to be given until all other issues, including financial, custody, and visitation issues, are resolved.<sup>26</sup> This essentially allows the withholding of a *get* to remain a serious threat, whether silent or overt.<sup>27</sup>

#### D. Experiencing Power

Traditionally, the most intractable case arose where the husband had disappeared.<sup>28</sup> Without any proof of death, both the question of how to determine if someone died, as well as the need to balance the conflicting value of preventing a married woman from having children with another—and thus creating a child within the category of *mamzer*<sup>29</sup>—exist in opposition to the strong rabbinic precedent of finding all possibilities to free a woman from the status of *agunah* and allow her to remarry.<sup>30</sup> However, in a certain way, when confronted with such a question, the *beit din* retains all

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25. See Kent Greenawalt, *Religious Law and Civil Law: Using Secular Law to Assure Observance of Practices with Religious Significance*, 71 S. CAL. L. REV. 781, 812 (1998). While situations do exist where a doctrine of constructive consent would be applied even in the absence of apparent consent, these are rare and often not of practical use. In theory, the *beit din* could reach one of two findings while inquiring into the reasons for divorce: (1) a *kofin* finding, which gives the wife an absolute right to divorce; or (2) a *yotze* finding, which permits the divorce. Under the *kofin* finding, duress—including corporal punishment, monetary fines, or lashes—would not invalidate the resulting *get* as a document executed under duress. See EVEN HA'EZER 154:21; J. David Bleich, *Jewish Divorce: Judicial Misconceptions and Possible Means of Civil Enforcement*, 16 CONN. L. REV. 201 (1984); MOSES MAIMONIDES, MISHNAH TORAH: HILCHOT GERUSHIN 2:20 (discussing the doctrine of constructive consent).

26. See, e.g., Elli Fischer, *Withholding a Get: Between Leverage and Extortion*, JEWISH WEEK (Dec. 26, 2013), <http://www.thejewishweek.com/editorial-opinion/opinion/withholding-get-between-leverage-and-extortion>.

27. See, e.g., *id.*

28. See Encyclopedia Judaica, *supra* note 2.

29. See Gitit Paz, *The Fate of a Mamzer: The Religious/Human Rights Tug of War Over How to Treat Illegitimate Children*, JEWISH WEEK (Nov. 19, 2013), <http://www.thejewishweek.com/news/israel-news/fate-mamzer> (discussing the plight of the modern-day *mamzer*).

30. See, e.g., *Maimonides Hilchot Ishut 15:31*

power to resolve the issue because the questions are *halachic* entirely and require creative thinking about Jewish legal evidentiary standards.<sup>31</sup> Power rests solely within the *beit din*, which can do its work under its own procedures and timetable, and on its own terms.<sup>32</sup>

For example, the 9/11 cases demonstrate this principle in action.<sup>33</sup> The American *beit din* that adjudicated these cases, the Beth Din of America, was able to work methodically and on its own terms, and paid little attention to the secular legal system, which was struggling itself with the issuance of death certificates.<sup>34</sup> The *beit din*'s independence can occur when the matter is entirely one of religious concern and does not involve either the intersection with other legal systems or the encroachment on its power.<sup>35</sup>

The modern day *agunah*, the *mesurevet get*, is a more perplexing problem, as the *get* refuser essentially exists both within and outside of the community's power.<sup>36</sup> The *get* refuser, writ large, essentially sticks his hand on his nose and wiggles his fingers, leaving the rabbinic tribunals disempowered and small. From this perspective, he poses a challenge to the religious tribunal, which, perhaps out of fear of being ignored, is reluctant to issue a definitive statement.<sup>37</sup> Instead, the religious tribunal often chooses to pursue a path that involves negotiation in hopes of convincing the spouse to abide by its words without resort to secular courts, other religious tribunals, or communal pressure, all of which can be difficult to organize and are not always effective.<sup>38</sup>

#### *E. Proposed Jewish Legal Solutions*

With that, there have been ongoing attempts to mine Jewish legal tradition for innovative *halakhic* solutions to the *agunah* crisis.<sup>39</sup> While

31. *Maimonideis Hilchot Gerushin 13:6.*

32. *See id.*

33. *See* BROYDE, *supra* note 5 (discussing the adjudication of the 9/11 widows who required a Jewish court to declare them free to remarry).

34. *See id.*

35. *See, e.g.,* Ginnine Fried, *The Collision of Church and State: A Primer to Beth Din Arbitration and the New York Secular Courts*, 31 *FORDHAM URB. L.J.* 633 (2004) (discussing the relationship between the *beit din* and secular courts).

36. *See* Beloff, *supra* note 7.

37. *See, e.g.,* Shanah D. Glick, *The Agunah in the American Legal System: Problems and Solutions*, 31 *U. LOUISVILLE J. FAM. L.* 885 (1992).

38. *See, e.g., id.*

39. *Id.*

these attempts obviously are driven primarily by the desire to preserve the ethical integrity of the *halakhic* legal system and help individuals in pain, they are also driven, in part, by a desire to entirely separate matters of Jewish law from the secular legal system, and thus arrive at solutions that do not implicate the secular legal system at all.<sup>40</sup>

Some proposed solutions seek to change the status quo of marriage formation itself. For example, if there is no contractual marriage, then there is no need for a *get* to dissolve a marriage.<sup>41</sup> There are solutions that seek to re-envision and empower the *beit din* as a third party to the marriage, thus empowering the *beit din* to dissolve the marriage without the mutual consent requirement of the *get* process.<sup>42</sup> This would aim to structure marriage more in line with Christian marriage or state marriage in the United States, where a third party confers the status of marriage on the couple rather than having the marriage exist entirely as a matter of contract.<sup>43</sup>

There are other solutions that look into the act of contract formation at the time of marriage and identify potential flaws in the marriage formation itself.<sup>44</sup> For example, *kiddushei ta'ut*, a salient defect in the contract formation, precludes a meeting of the minds in the formation of the marriage.<sup>45</sup>

Another proposal is conditional marriage, wherein the breaking of some condition would render the marriage void.<sup>46</sup> Thus, without any other action by other parties, any intervention by the *beit din*, and any need for the giving of a *get*, the marriage ends.<sup>47</sup> Yet another proposal is conditional divorce,

40. *Id.*

41. Proposed solutions have included instituting “concubinage” as a sort of common law marriage rather than the current marriage system known as *kiddushin*. BREITOWITZ, *supra* note 7, at 68–70. Others suggest preemptively including a defective witness as part of the marriage ceremony in order to be able to annul the marriage in the future if necessary. *Id.*

42. See, e.g., Alexandra Leichter, *The Impact of Jewish Divorce Law on Family Law Litigation*, 14 OHIO DOM. REL. J. 41, 41 n.1 (2002).

43. One option that has been explored is *hafka'at kiddushin*, or the voiding or annulment of marriage for technical reasons, which assumes that the authorities are part of the marriage in a technical way. See SHLOMO RISKIN, *WOMEN AND JEWISH DIVORCE* (1989).

44. This method was advocated by the so-called “Rackman Beit Din,” which was established to free *agunot*. See Michael I. Rackman, *Kiddushei Ta'ut: Annulment as a Solution to the Agunah Problem*, in 33:3 TRADITION, 102 (1999), available at <http://www.jstor.org/discover/10.2307/23262207?uid=3739256&uid=2129&uid=2&uid=70&uid=4&sid=21103547758297>.

45. See *id.* at 103.

46. See ELIEZER BERKOVITS, *TNAI B'NISUIN UB'GET* (1967).

47. See *id.*

which states that divorce is automatic when present conditions are met.<sup>48</sup> In this case, the *beit din* serves a procedural function to ratify that the conditions have in fact taken place.<sup>49</sup>

The various proposed Jewish legal solutions have not yet been broadly adopted, although some are used in individual cases from time to time.<sup>50</sup> The lack of a broad acceptance of a particular *halakhic* solution is both symptomatic of a system that lacks a single supreme Jewish legal authority (unlike in Catholicism, for example) and descriptive of the complicated consequences of freeing a woman from marriage without a divorce document.<sup>51</sup> One such consequence includes the fear that the end of the marriage was improper, and as such, any children from a future relationship will be treated as *mamzerim*—children of an adulterous relationship.<sup>52</sup> The preponderance of legal authorities explain that the specter of the status of a woman being deemed by some authorities to still be married limits the possibility of future marriage.<sup>53</sup> Individual religious courts are thus reluctant to use the full power of their authority, for fear of creating a situation where a woman viewed by some as free is viewed by others as married.<sup>54</sup>

#### F. The Agunah in Common Law

There have been a number of attempts to utilize the courts to arrive at a solution to the problem of the recalcitrant spouse.<sup>55</sup> A review of the different approaches that state courts have attempted to level at this issue serves as a reminder of the difficulties of relying on the civil court system to adjudicate disputes that touch on matters of religious personal status.

One line of cases deals with an explicit agreement, usually in the civil divorce decree, whereby the parties agree to give a *get* at a specified time.<sup>56</sup>

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48. See ELIYAHU HENKIN, PERUSHEI IBRA 87–117 (1943).

49. See *id.*

50. See generally Glick, *supra* note 37 (discussing the proposed solutions to the *agunah* crisis in the American legal system).

51. See *id.*

52. The children of a female, but not male, adulterer are considered *mamzerim*—a status that attaches to them going forward and limits their ability to marry others in the Jewish community. See Leichter, *supra* note 42, at 41.

53. *Id.*

54. See *id.*

55. See, e.g., Glick, *supra* note 37.

56. See, e.g., Waxstein v. Waxstein 395 N.Y.S.2d 877 (Sup. Ct. 1976), *aff'd*, 394 N.Y.S.2d 253 (App. Div. 1977); Koepfel v. Koepfel, 138 N.Y.S.2d 366 (Sup. Ct. 1954); Rubin v. Rubin 348

When one of the parties fails to fulfill their obligation regarding the *get*, the other party brings an action for specific performance.<sup>57</sup> While some jurisdictions refuse to enforce actions for specific performance, others have stated that, as the giving of the *get* does not require the profession of faith, the *get* can indeed be enforced through a specific performance action.<sup>58</sup> A second line of cases has gone further and inferred an agreement to give a *get* by virtue of the initial participation in a religious ceremony.<sup>59</sup> The remedy has been either enforcing a requirement that the parties appear before a religious tribunal to resolve these issues<sup>60</sup> or enforcing a specific requirement that the *get* be given.<sup>61</sup> Such a remedy implicates questions of duress under Jewish law, potentially hoisting any resultant *get* on the petard of a coerced *get*, and thereby invalidating it.<sup>62</sup>

There appears to be little rhyme or reason as to what drives state court decisions in this area. The complicated issues of the constitutional questions raised by the courts' involvement in these issues and the various remedies and dictates as to whether giving the *get* is a religious act seem to indicate, in part, what drives some of the decisions: a sense by judges that their courtrooms are being used to perpetuate an injustice and an attempt by judges to rectify that injustice as much as they believe possible under the law.<sup>63</sup>

In interesting ways, the secular courts are attempting to navigate their intersection with religious tribunals. It is important, however, to note that the judges involved in these cases are often well aware of an injustice being perpetrated outside of their courtrooms, which at times will undermine their resolutions in the courtroom, such as those on custody or financial matters.<sup>64</sup>

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N.Y.S.2d 61 (Fam. Ct. 1973).

57. See Leichter, *supra* note 42, at 41.

58. See, e.g., Rubin, 348 N.Y.S.2d at 68.

59. See *In re Marriage of Goldman*, 554 N.E.2d 1016 (Ill. App. Ct. 1990) (holding that because the couple used an Orthodox *ketubah*, even though they were married in a Reconstructionist Jewish ceremony, the *ketubah* required the husband to give a *get*); see also *Burns v. Burns*, 538 A.2d 438 (N.J. Super. Ct. Ch. Div. 1987); *Minkin v. Minkin*, 434 A.2d 665 (N.J. Super. Ct. Ch. Div. 1981).

60. See, e.g., *Goldman*, 554 N.E.2d at 1021 (giving the husband a choice between freely giving a *get* or appearing before a *beit din*); *Burns*, 538 A.2d at 441; *Avitzur v. Avitzur*, 446 N.E.2d 136, 139 (N.Y. 1983); *Koepfel*, 138 N.Y.S.2d at 373.

61. See, e.g., *Scholl v. Scholl*, 621 A.2d 808, 812–13 (Del. Fam. Ct. 1992); *Minkin*, 434 A.2d at 668.

62. See 5 ENCYCLOPEDIA TALMUDIT, *supra* note 23, at 568.

63. See, e.g., *Scholl*, 621 A.2d at 812 (requiring the issuance of a *get*).

64. See, e.g., *id.* at 813 (finding for the wife when the husband withheld the *get* to “make her

It is also interesting to think about the role of the religious tribunals in the background. They too are aware of the limitations of their power to resolve the case at hand and well understand that the secular courts may hold the key to resolving the issue on their behalf. Yet, in addition to the specific *halakhic* concerns about duress, there is the larger concern about the lack of power and agency in addressing a question that is *halakhic* in nature, as well as the meta-*halakhic* concern about utilizing secular courts at all as a path to resolve disputes among faith members.<sup>65</sup>

### *G. Legislative Attempts to Address the Agunah Issue*

There have also been attempts at legislative solutions, most notably the two New York *get* laws.<sup>66</sup> The history of the *get* laws speaks to this as yet another attempt to harness the power of the secular law to resolve a religious dispute.<sup>67</sup> The thinking is that the courts themselves are an inadvertent party to the injustice; as such, this empowers them to right the wrong.<sup>68</sup> Although there have been attempts to pass other *get* laws in states with large Jewish communities, they have been mostly unsuccessful. However, both Canada<sup>69</sup> and England<sup>70</sup> have *get* laws.

The first New York *get* law,<sup>71</sup> passed in 1983, allowed the plaintiff in a civil divorce case to ask the judge to require that both parties submit an affidavit indicating that the party has removed all barriers to religious remarriage.<sup>72</sup> The second New York *get* law,<sup>73</sup> passed in 1992, permits the

suffer”).

65. See, e.g., Michael Broyde, *Marriage, Divorce and the Abandoned Wife in Jewish Law*, Ktav, NJ, 2001, p.104, and p. 110 (see footnote 25).

66. N.Y. DOM. REL. LAW §§ 253, 236B(5)(h), 236B(6)(d) (McKinney 2010).

67. See Malinowitz, *supra* note 65 (“The halachic process, which, under most circumstances solves [*agunah*] problems when followed through, is undercut by ‘solutions’ such as [the *get* laws:]”).

68. See *id.*

69. See Divorce Act, R.S.C. 1985, c. 3, s. 21.1 (2nd Supp.) (Can.) (refusing the recalcitrant spouse certain rights in court, such as the right to bring or defend a motion); Family Law Act, R.S.O. 1990, c. F.3, s. 2(4)–(7) (allowing similar relief, permitting parties to request of the other party to notify the court that barriers to remarriage have been removed, as well as permitting the voiding of separation or settlement agreements if the giving of the *get* was taken into account).

70. Divorce (Religious Marriages) Act, 2002, c. 27, (Eng.).

71. N.Y. DOM. REL. LAW § 253 (McKinney 2010).

72. *Id.* Interestingly, Governor Mario Cuomo, when asked about the constitutionality of the *get* law he signed, noted that New York’s “excellent courts will make that clear in due time.” and he was read by the press as perseverating about the constitutionality of the law. *Cuomo Signs Law to Block*

judge to take into account whether “barriers to remarriage” have been removed when distributing property, essentially “allowing judges to set a higher level of alimony until a *get* is executed, subject to reduction afterwards.”<sup>74</sup>

However, there is little to suggest that the *get* laws in New York have assisted in resolving a large number of *agunah* cases.<sup>75</sup> As such, the tactic of pursuing legislative solutions has mostly been abandoned.<sup>76</sup> Indeed, although the New York *get* laws are neutrally worded and hold the potential to assist women in the Muslim community as well, they appear not to have helped Muslim or Jewish women on that front.<sup>77</sup> It is interesting that while the second New York *get* law was originally backed by a large number of Jewish groups, at least one prominent group later declared that the structure of this law essentially meant that men divorcing in New York were under the specter of financial pressure to give a *get*; as such, every *get* given in New York was under the cloud of duress.<sup>78</sup> This complicated relationship with secular legal solutions is reflective of the ambivalent relationship between the secular courts and the *beit din*—which seeks to have its word enforced—regarding questions of the allocation of power to resolve these issues.<sup>79</sup>

*Misuse of Jewish Divorce*, N.Y. L.J., Aug. 10, 1983, at 1.

73. N.Y. DOM. REL. LAW § 236B(5)(h), (6)(d) (McKinney 2010).

74. Michelle Greenberg-Kobrin, *Civil Enforceability of Religious Prenuptial Agreements*, 32 COLUM. J.L. & SOC. PROBS. 359, 374 (1999); see also BREITOWITZ, *supra* note 7, at 209–10. Note that this *get* law is phrased neutrally, and as such, can be utilized both with reference to Islamic and Jewish divorce. See *infra* note 77 and accompanying text.

75. *But see, e.g., Gindi v. Gindi*, N.Y. L.J., May 7, 2001, at 31. In one case, where there was both emotional abuse and financial manipulation on the part of the husband, as well as some indications that the husband was hiding assets, the wife was granted a larger amount of maintenance than would normally have been expected, given the short duration of the marriage, because the husband seemed unwilling to give her a *get*. *Id.*

76. See Michelle Greenberg-Kobrin, *supra* note 74, at 374–75 (discussing alternative strategies used to circumvent legislation).

77. See Jill Wexler, *Gotta Get a Get: Maryland and Florida Should Adopt Get Statutes*, 17 J.L. & POL’Y, 735, 750.

78. See Greenberg-Kobrin, *supra* note 74, at 374. Agudat Israel, who sponsored the first *get* law had “argued that financial penalties for non-participation in the *get* process pressures the husband to such an extent” that any subsequent *get* is given under the specter of duress. *Id.*; see also Brief for Agudath Israel of America as Amicus Curiae Supporting Defendant-Appellant at 3, *Becher v. Becher*, 667 N.Y.S.2d 50 (App. Div. 1997) (No. 97–03205), *appeal dismissed*, 694 N.E.2d 885 (N.Y. 1998) (attacking the constitutionality of the law). The law received support from a good number of organizations. See BREITOWITZ, *supra* note 7, at 209 n.611.

79. See Choshen Mishpat 26:2, and Broyde, *supra* note 67 (noting that “the practice of resolving these disputes in secular court remain a clear violation of halachah, which requires that these types of disputes be resolved in Beit Din.” I’).

*H. The Prenuptial Contract as a Solution*

There have been growing attempts to utilize contracts to circumvent and prevent end-of-marriage issues. An examination of the successes and challenges of religious prenuptial agreements will allow us to focus on the ways in which contract might be useful in allowing parties to govern their own affairs in accordance with a belief system, while still allowing those parties access to the secular courts' powers of enforcement and assuring compliance.<sup>80</sup>

The various attempts to utilize prenuptial contracts often have different goals. Some, like the *ketubah* (and the *mahr*, for Muslims), are part and parcel of the religious marriage themselves, and thus aim to meet a religious obligation in the formation of marriage.<sup>81</sup> Others serve as binding arbitration agreements, which attempt to fix, ahead of marriage, a religious tribunal as the chosen forum for dispute resolution.<sup>82</sup> The most simple merely indicate (whether in the *ketubah* or in a standalone document) the forum in which end-of-marriage issues will be discussed, and thus function as arbitration agreements that name the religious tribunal as the arbitrator.<sup>83</sup> More detailed contracts further specify what issues the religious tribunal is authorized to address. At a minimum, these include the actual dissolution of the religious marriage, but the couple may also choose to have the religious tribunal act as an arbitration panel, adjudicate financial matters, and rule on issues related to child custody and visitation.<sup>84</sup> Some contracts may allow the couple to indicate further a choice of law provision by not leaving the religious tribunal to apply their own presumptions and religious law, but asking, for example, that the tribunal take into account the law of a particular state

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80. See Greenberg-Kobrin, *supra* note 74, at 374–78.

81. See *id.* at 376.

82. *Id.* at 376–77. The simplest of these is the so-called “Lieberman clause,” which was implemented by the Conservative movement. *Id.*; see also Avitzur v. Avitzur, 446 N.E.2d 136 (N.Y. 1983). This clause was rejected by the Orthodox movement. See Greenberg-Kobrin, *supra* note 74, at 375 n.99.

83. See Greenberg-Kobrin, *supra* note 74, at 375 (describing a prenuptial agreement requiring appearance before the *beit din*).

84. See *Binding Arbitration Agreement*, BETH DIN OF AMERICA, [http://www.theprenup.org/pdf/Prenup\\_Standard.pdf](http://www.theprenup.org/pdf/Prenup_Standard.pdf) (last visited Mar. 30, 2014). The initial version of this document was drafted by Rabbi Mordechai Willig at the behest of the Orthodox Caucus. Greenberg-Kobrin, *supra* note 74, at 377 n.108. It has since gone through several revisions. The most recent version is available on the website. See *Binding Arbitration Agreement*, *supra* note 84, at 4.

regarding division of property.<sup>85</sup> Religious tribunals tend to look at the observance levels of the spouses in thinking about fault and often struggle to apply law with which they are less familiar. The contracts often contain a financial penalty for the recalcitrant spouse; in practice, this amount is often forgiven in exchange for the *get*, much as in *kuhl*, where the *mahr* amount is forgiven in exchange for the divorce.

Arbitration agreements such as these have been upheld by various state courts as enforceable.<sup>86</sup> However, an anecdotal review of many such prenuptial agreements indicates that, as with many form agreements, a good number of them have been improperly filled out or are incomplete, dated wrong, or otherwise lack the marks of thoughtful contract formation.<sup>87</sup> Further, to the extent that the court views these documents through the lens of prenuptial agreements rather than simple contract law, the often higher standard of informed prior consent for contract formation for prenuptial agreements, the waiting periods, and issues of signatories and witnesses may raise difficulties.<sup>88</sup> In addition, where the forms are incomplete—for example, where the specific name of a *beit din* is omitted—the court may find itself unwilling to read into the contract a specific religious tribunal out of fear of constitutional concerns.<sup>89</sup>

Other religious prenuptial agreements include a simple document that uses the civil divorce as a trigger for the requirement of the husband to give the wife a *get*.<sup>90</sup> Such an agreement, as noted above, raises questions of

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85. See *Binding Arbitration Agreement*, *supra* note 84, at 4. The couple may also choose to allow the religious tribunal to take fault for the end of marriage into account. *Id.* at 4.

86. See, e.g., *Light v. Light*, 55 Conn. L. Rptr. 145 (Conn. Super. Ct. 2012); *Avitzur*, 446 N.E.2d at 138–39.

87. Not uncommon with form contracts, couples can leave provisions blank or can fail to get the document properly notarized. See *Guide to Signing the Prenup*, ORGANIZATION FOR THE RESOLUTION OF AGUNOT, <http://www.getora.org/#!/guide-to-signing/c561> (last visited Mar. 30, 2014). Couples often receive instructions from the officiating rabbi in a meeting prior to the wedding, or read (or fail to read) instructions included with the form. See *id.* Rarely do they seek legal advice. See *id.* The Organization for the Resolution of Agunot offers couples detailed in-person instructions, as well as notary and counseling services as a way to ensure that such forms are filled out correctly. See *What We Do*, ORGANIZATION FOR THE RESOLUTION OF AGUNOT, <http://www.getora.org/#!/what-we-do/c1476> (last visited Mar. 30, 2014).

88. See *Greenberg-Kobrin*, *supra* note 74, at 378 n.117.

89. See *id.* at 382 (“When a Beit Din is not specified, the prenuptial can potentially enmesh the secular court in the selection of a particular religious tribunal,” which may constitute excessive entanglement with religion.)

90. See, for example, the prenuptial agreement utilized by Rabbi Haskel Lookstein of Congregation Kehillat Jeshurun (on file with author).

enforcement of specific performance by the court of an obligation that many would consider religious.<sup>91</sup> A version of a prenuptial agreement, which consists of a promissory note by the husband for a very large sum of money along with a concomitant release note triggered by participation in the *get* process,<sup>92</sup> is a self-actualizing simple solution that seems to have gained little traction. This may be, in part, because of the need to execute multiple documents, the difficulty of predicting at the beginning of marriage what amount of money will be compelling at its end, and the challenges in collecting large amounts of money from a person who may not have access to such resources.<sup>93</sup>

Yet another version of a prenuptial agreement is one in which the parties contract into particular forms of religious assumptions about marriage.<sup>94</sup> Evoking the introduction of the Jewish community as a third-party partner in the formation of marriage, as well as the notion of conditional marriage, these agreements attempt to change the *halakhic* structure of marriage by attesting the parties' understanding of such at the entrance to marriage.<sup>95</sup> These types of agreements have not yet been tested by rabbinical or secular courts, but offer an interesting way to think about the interaction between developing internal religious legal norms and external authorities. Some could view this as a parallel to the notion of covenantal marriage,<sup>96</sup> which allows the couple to redefine their own understanding of the concept of marriage into which they wish to enter.<sup>97</sup>

### I. Challenges for the Contractual Solutions

These contractual solutions are limited by the necessary requirement that they are prospective, and thus do not help those without the foresight to sign them. However, they do hold the promise of greatly reducing the

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91. See *supra* note 89 and accompanying text.

92. BREITOWITZ, *supra* note 7, at 119. The promissory note is triggered when the husband refuses to grant the wife a *get*. Michelle Greenberg-Kobrin, *Civil Enforceability of Religious Prenuptial Agreements*, 32 COLUM. J.L. & SOC. PROBS. 359, 377 (1999).

93. See *id.*

94. Michael J. Broyde, *A Proposed Tripartite Agreement to Solve Some of the Agunah Problems: A Solution Without Any Innovation*, in JEWISH LAW ASSOCIATION STUDIES XX: THE MANCHESTER 2008 CONFERENCE VOLUME 1, 1 (Leib Moscovitz ed., 2010).

95. See *id.* at 5–6.

96. See, e.g., ARIZ. REV. STAT. ANN. §§ 25-901 to -906 (2013) (state covenantal marriage statutes).

97. See, e.g., *id.* § 25-901.

number of victims of *get* refusal—and still there is reluctance in many parts of the community to enter into such agreements.<sup>98</sup> In part, the backlash against broad-based acceptance of religious prenuptial agreements in the Jewish community stems from articulated public policy concerns regarding the effects on commitment to marriage that arise from discussing and planning for dissolution of marriage at its onset.<sup>99</sup> Perhaps more surprisingly, there has been a backlash among younger women who wish to indicate allegiance to an ideal of life-long, trouble-free marriage and against what they see as a feminist encroachment into the area of extreme fidelity to a traditional lifestyle.<sup>100</sup> This grappling of opposing, deeply held beliefs and value systems is at the heart of a struggle at both the communal and individual levels: how does one live as a religious person with a fidelity to religious law and ways of being while also being influenced and often engaged by ideas of gender equality, justice, and fairness with conflicting incentives, whether financial or custodial?

It is not only the parties themselves that are affected by these issues. As noted above, the judges who adjudicate cases where such issues arise often struggle with the idea that their courtrooms are being used to perpetuate an injustice, while they simultaneously remain concerned about addressing questions that they feel constitutionally constrained from hearing. Members of the matrimonial bar are also navigating these issues, as they attempt to gain full advantage for their clients but know the effects of withholding a *get* are serious and often tragic. Finally, religious judges, scholars, and leaders are often conflicted about resolving issues that arise within the Jewish legal context by utilizing the secular courts, as well as balancing conflicting values of a belief in the need for strong first marriages with protecting those who get trapped in the difficulties of an *agunah* situation.

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98. See *Frequently Asked Questions About the Prenup*, ORG. FOR RESOL. AGUNOT, <http://www.getora.org/#!faq-prenup/ct8s> (last visited Mar. 29, 2014).

99. See Paul Berger, *In Victory for 'Chained' Wives, Court Upholds Orthodox Prenuptial Agreement*, FORWARD (Feb. 8, 2013), <http://forward.com/articles/170721/in-victory-for-chained-wives-court-upholds-o/> (noting that prenuptial agreements are “gaining acceptance despite distaste and superstition among some couples who do not relish insuring against their divorce days before their wedding”).

100. See 7 AM. JEWISH COMM., AMERICAN JEWISH YEAR BOOK 196 (1997) (discussing the backlash towards the feminist movement’s interest in traditional Jewish marriage).

*J. From Powerless to Empowered and Back*

A review of the various attempts to utilize both religious and secular courts to resolve the *agunah* issue offers a window into how religious actors and religious tribunals attempt to utilize secular law to empower religion, while at the same time remaining conflicted about the nature of their own power. Religious communities have shied away from deep involvement in the secular legal system, but as religious tribunals attempt to empower themselves, they find that they must engage, however unwillingly and unpredictably, with the secular legal system. The use of contract is an increasingly common way of attempting to navigate the secular legal system and empowering religious communities to achieve results in line with secular norms of gender equality. While private contract at the time of marriage formation has the potential to address some of these issues, a great deal of thought, reflection, and education is still necessary to fully allow the empowerment of the individual.