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Bruce Perelman

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# Jewish Religious Divorce and American Jurisprudence: A Comparative Study\*

“Over him who divorces the wife of his youth,  
even the altar of God sheds tears.”<sup>1</sup>

## I. INTRODUCTION AND BACKGROUND

On August 8, 1983, New York Governor Mario Cuomo signed into law a “removal of barriers to remarriage” statute which became effective immediately thereafter.<sup>2</sup> Although ostensibly neutral on its face, all concede the legislation is directed towards the problem of the “*agunah*,” a Jewish woman who is unable to obtain a Jewish religious divorce (a “*get*”) from her husband.<sup>3</sup> The New York statute is the first American legislative attempt to remedy the plight of the *agunah*. This Comment will consider both this latest legislative effort and the previous judicial attempts to resolve the problem of the modern day *agunah* in light of the traditional Jewish law (the “*halakhah*”) and modern American jurisprudence.

The *halakhah*, of course, can have no legal effect on the civil status of married persons. A woman who is unable to secure a *get* from her husband has no barrier to civil remarriage other than obtaining a valid decree of secular divorce. However, the *halakhah*

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1. BABYLONIAN TALMUD, *Order Nashim: Tractate Gittin* 90b.

2. Act of Aug. 8, 1983, ch. 979, 1983 N.Y. Laws 1904-05, amended by Act of Aug. 6, 1984, ch. 945, 1984 N.Y. Laws 2660-62 (codified at N.Y. DOM. REL. LAW § 253 (McKinney Supp. 1984)). The full text of the statute as revised is contained *infra* in Appendix A.

3. In his memorandum approving the bill, Governor Cuomo stated that “[t]he bill solves a problem created by the interrelation of Jewish law and New York Civil Law. Traditional Jewish law does not regard a secular divorce as sufficient to dissolve a marriage. It requires that the husband give the wife a document referred to as a ‘get.’” 1983 N.Y. Laws 2818, 2819.

Courts and commentators alike refer to the legislation as the “*get* statute.” See generally *1983 Survey of New York Law*, 35 SYRACUSE L. REV. 1, 200-01, 391-93 (1984); Warmflash, *The New York Approach To Enforcing Religious Marriage Contracts: From Avitzur To The Get Statute*, 50 BROOKLYN L. REV. 229 (1984); *Chambers v. Chambers*, 122 Misc. 2d 671, 471 N.Y.S.2d 958, 959 (Sup. Ct., New York Co. 1983) (referring to the “Avitzur” or “*get*” statute).

takes a far stricter view of divorce and the requirements for a valid dissolution than the common law.

As with all Jewish law, the concept of divorce stems from Scripture:

When a man taketh a wife, and marrieth her, then it cometh to pass, if she find no favour in his eyes, because he hath found some unseemly thing in her, that he writeth her a bill of divorcement, and giveth it in her hand, and sendeth her out of his house.<sup>4</sup>

The "bill of divorcement," handed from the husband to his wife, is called a *get*. A wife may not give a *get* to her husband; the verse is not gender neutral. Absent the delivery of a *get* to a wife by her husband, the *halakhah* recognizes no divorce.

Because Jewish marriages are governed by a private contract between the husband and wife known as a "*ketubah*," under Jewish law a divorce may be achieved only through an act of the marital parties. A *halakhic* court (a "*Beth Din*") cannot dissolve a marriage by decree. Thus, the dissolution of marriage by divorce under the *halakhah* differs fundamentally from its counterpart in the Anglo-American common law: *halakhic* marriages may be dissolved only through an act of the marital partners, whereas civil marriages are dissolved only by the decree of a court.<sup>5</sup> A *Beth Din* may decide whether and on what terms a *get* should be given or received, and may also supervise the drafting of the document to ensure the complex procedural requirements for a valid *get* are followed.<sup>6</sup> But, even where the court independently believes a divorce is warranted, the husband must still deliver a *get* to his wife before the *halakhah* recognizes a valid religious divorce. Secular decrees of divorce are irrelevant.

It is the wife who suffers the most without a *get* in hand. Although she may be possessed of a valid secular divorce, under the *halakhah* she is still considered to be "chained" or "tied" to her husband and thus forbidden to remarry. Such a woman is an *agunah*. Should an *agunah* ever remarry, any children of the second marriage are presumptively bastards and are prohibited from ever marrying other Jews,<sup>7</sup> although the subsequent issue of the former husband fall

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4. *Deuteronomy* 24:1.

5. I. KLEIN, A GUIDE TO JEWISH RELIGIOUS PRACTICE 467 (1979).

6. *Id.*

7. "A bastard shall not enter into the assembly of the Lord; even to the tenth generation shall none of his enter into the assembly of the Lord." *Deuteronomy* 23:3.

Bastards under Jewish law also differ from their common law counterparts. Under the

under no such proscription.

The problem is compounded in that a *Beth Din* is powerless to compel a reluctant husband to deliver a *get* to his waiting wife.<sup>8</sup> If the wife never receives her *get*, either through the negligence, incapacity, or willful refusal of her husband, she remains an *agunah* for life.

Against this background, modern American judicial and legislative bodies have struggled to solve the problem of the Jewish *agunah*. Doubtless because of its large observant Jewish population, the vast majority of these efforts have taken place in New York. Thus, this Comment will first survey the American common law approaches to the *agunah* with particular emphasis on the New York decisions, analyze the response of the New York Legislature, and finally consider other possible *halakhic* solutions to the problem.

## II. NEW YORK CASE LAW

Over the past thirty years, the New York courts have had several opportunities to consider this problem. To trace the evolution of the modern law, each case is examined briefly.

### A. *Koeppel v. Koeppel*

The New York courts first encountered the *agunah* in 1954. In *Koeppel v. Koeppel*,<sup>9</sup> the parties had prepared and agreed to a separation agreement that would become effective immediately upon the successful conclusion of the wife's suit for annulment.<sup>10</sup> The agreement contained a provision whereby the Koeppels expressly promised that they would, "whenever called upon and if and whenever the same shall become necessary, appear before a Rabbi . . . and execute any and all papers and documents required by and necessary to effectuate a dissolution of their marriage" under Jewish law.<sup>11</sup>

The matter came to trial and the marriage was dissolved. Although the husband did not appeal the judgment, he subsequently

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*halakhah*, a bastard is *not* a child born out of wedlock, but a child born of an unlawful, incestuous, or adulterous marriage. I. KLEIN, *supra* note 5, at 437 (citing SHULCHAN ARUCH, *Even Ha Ezer* 4:13; BABYLONIAN TALMUD, *Order Nashim: Tractate Yebamoth* 49a; MISHNAH, *Order Nashim: Tractate Kiddushin* 3:12). The children of a woman who remarries without a *get* in hand would thus be issue of an adulterous marriage.

8. "A *get* given under compulsion is invalid." BABYLONIAN TALMUD, *Order Nashim: Tractate Gittin* 88b.

9. 138 N.Y.S.2d 366 (Sup. Ct., Queens Co. 1954).

10. *Id.* at 369.

11. *Id.* at 370.

refused to appear before a rabbi or deliver a *get* to his wife despite repeated demands for him to do so. The wife finally brought an equitable action to compel specific performance of the settlement agreement.<sup>12</sup>

Before trial the husband moved for summary judgment, contending, inter alia, that an order by a state court compelling him to appear before a rabbi would "interfere with his freedom of religion under the [federal] Constitution."<sup>13</sup> Dismissing this contention and ordering a trial on the merits, the appellate court concluded that "[c]omplying with his agreement would not compel the defendant to practice any religion, not even the Jewish faith to which he still admits adherence."<sup>14</sup> The court continued: "[h]is appearance before the Rabbinat to answer questions and give evidence needed by them to make a decision is not a profession of faith. *Specific performance herein would merely require the defendant to do what he voluntarily agreed to do.*"<sup>15</sup>

Mrs. Koepfel was thus entitled to a trial. Her complaint, however, was later dismissed by the trial referee, apparently as moot, in a decision affirmed by the Appellate Division of the New York Supreme Court.<sup>16</sup> Mrs. Koepfel had already remarried in a ceremony at which a rabbi had officiated.<sup>17</sup> In dismissing the action, both the trial and appellate courts relied on the specific language of the settlement agreement in which the husband agreed to appear before a rabbi and deliver a *get* "if and whenever the same shall become necessary."<sup>18</sup> From the record, neither court was able to determine that specific performance was "necessary."<sup>19</sup> The court stated it was "unable to

12. *Id.*

13. *Id.* at 373.

14. *Id.*

15. *Id.* (emphasis added). Thus, the court based its holding on the fact that there was already a voluntary agreement, a contract, to deliver a *get*.

The court was unimpressed by the husband's complaint that a *get* proceeding could be overly time-consuming, and displayed particular sensitivity towards the *agunah*:

Defendant's statement that the ceremony before the Rabbinat takes from two to two and one-half hours is not worthy of discussion. That is not much out of a lifetime, especially if it will bring peace of mind and conscience to one whom defendant must at one time have loved.

*Id.* (emphasis added).

16. *Koepfel v. Koepfel*, 3 A.D.2d 853, 161 N.Y.S.2d 694 (2d Dep't 1957). The Appellate Division of the New York Supreme Court is an intermediate level court; the state's highest court is the New York Court of Appeals.

17. *Id.* at 853, 161 N.Y.S.2d at 695.

18. *Id.*

19. *Id.*, 161 N.Y.S.2d at 695-96. Evidently, the rabbi who officiated at Mrs. Koepfel's second marriage did not require Mrs. Koepfel to obtain a *get* prior to remarriage. See Ellen-

determine from the terms of the contract and the evidence adduced[ ] what circumstances the parties intended to be sufficient to establish the necessity of the dissolution of their marriage in accordance with Jewish ecclesiastical law," and concluded that "[s]tanding alone, the agreement is too indefinite to support a judgment of specific performance."<sup>20</sup>

The Appellate Division thus dismissed the action because no *necessity* was shown—not because the court believed it lacked the power or jurisdiction to compel the defendant to deliver a *get*. The court merely stated that the record reflected insufficient evidence to support the showing of necessity required by the agreement,<sup>21</sup> and properly refused to undertake its own independent *halakhic* determination as to whether the requisite necessity existed.<sup>22</sup>

Thus, the net result may have been due only to insufficient pleading. Despite its outcome, *Koepfel* does *not* stand for the proposition that a state court is without the power to enforce a "get provision" when one is agreed to by the parties.

### B. Margulies v. Margulies

The issue remained quiescent until 1973 with the advent of *Margulies v. Margulies*.<sup>23</sup> The Margulies' marriage had been dissolved by secular divorce in June of 1970.<sup>24</sup> Shortly thereafter, disputes between the parties arose as to visitation rights and the division of certain personal property. These disputes were "ostensibly settled"

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son & Ellenson, *American Courts and the Enforceability of a Ketubah as a Private Contract: An Investigation of Recent U.S. Court Decisions*, CONSERVATIVE JUDAISM, Spring 1982, at 35, 37 (suggesting the rabbi was a member of the more liberal Reform movement of Judaism). See also *infra* note 120 and accompanying text.

20. 3 A.D.2d at 853, 161 N.Y.S.2d at 695-96.

21. *Id.*

22. The court was evidently aware, however, of at least some of the *halakhic* necessity for a *get*:

The evidence discloses that appellant has been remarried at a ceremony at which a duly ordained rabbi of her own faith officiated, and no question is raised as to the validity of that marriage under the laws of this State, nor does it appear that its validity has been otherwise questioned to appellant's detriment, or that there are children of the second marriage.

*Id.*, 161 N.Y.S.2d at 695.

Had there been children of the second marriage, presumptively bastards under the *halakhah*, see *supra* note 7 and accompanying text, the court may possibly have found the requisite necessity.

23. 42 A.D.2d 517, 344 N.Y.S.2d 482 (1st Dep't) (*per curiam*), appeal dismissed, 33 N.Y.2d 894, 307 N.E.2d 562, 352 N.Y.S.2d 447 (1973).

24. *Id.* at 517, 344 N.Y.S.2d at 484.

through stipulations made in open court, including a voluntary promise by the husband to "appear before a Rabbi . . . for the purposes of a Jewish religious divorce."<sup>25</sup>

Later, the husband refused to fulfill this obligation. Seeking to enforce the stipulation, the court twice held the husband in contempt, each time levying a fine against him and ordering him to appear before a rabbi. Still the husband refused, and the court finally ordered him jailed for fifteen days. The husband appealed from the incarceration order.<sup>26</sup>

The appellate court agreed that incarceration was improper, but let stand the fines imposed by the trial court subject to the condition that the husband be able to purge the contempt by participating in a *get* ceremony.<sup>27</sup> Though the opinion might be interpreted to suggest a state court is without the power to enforce a directive to deliver a *get*,<sup>28</sup> the dissenting opinion infers the majority believed the lower court order was enforceable.<sup>29</sup> The case best stands for the proposition that a defendant may be fined, but not jailed, for failure to comply with an order to issue a *get*.<sup>30</sup>

Of particular interest are the dissent's convictions that a "Hebrew divorce has no validity unless the husband's consent is given voluntarily and without coercion or duress," and that "[h]ad defendant appeared and given his consent to the 'get' under threat of imprisonment, the religious divorce thus obtained would have been a nullity."<sup>31</sup> These arguments overlook the fact that the husband had

25. *Id.*

26. *Id.*

27. *Id.*

28. The majority opinion stated that the "[d]efendant failed to perfect any appeals from the prior orders . . . nor did he obtain a stay of the provisions contained in those orders," implying that had appeals been taken, they might have been successful. *Id.* The court's holding may also have been based solely on the defendant's petulant behavior in flouting the court's authority or attempting to use legal process for ulterior motives. *See id.* at 518, 344 N.Y.S.2d at 485.

29. The dissenting judge believed the order directing the husband to appear before a rabbi was unenforceable, and that the motion to punish, granted by the majority, should have been denied. *Id.* (Nunez, J., dissenting).

30. Although the court did not explain this distinction, one explanation consonant with the facts and holding of *Margulies* is that the judges did not wish to allow the husband to purge his contempt merely through a civil commitment of fifteen days, but wished instead to compel the husband to perform his agreement. "The [appellate court] refused to let stand the [trial court's] exercise of its [contempt] power in order to compel the husband to perform his agreement, i.e., to participate in a Jewish divorce." *Pal v. Pal*, 45 A.D.2d 738, 740, 356 N.Y.S.2d 672, 674 (2d Dep't 1974) (Martuscello, J., dissenting).

31. 42 A.D.2d at 518, 344 N.Y.S.2d at 485 (Nunez, J., dissenting) (citing 3 UNIVERSAL

already voluntarily agreed to appear before a rabbi to issue a *get*, and thus was only being required to do something to which he had already agreed.<sup>32</sup>

### C. Rubin v. Rubin

A slightly different situation faced the court in *Rubin v. Rubin*,<sup>33</sup> where it was the wife who refused to accept a *get* in violation of a separation agreement. The Rubins were divorced in 1961 by decree of an Alabama court.<sup>34</sup> In 1972, proceedings were instituted in New York to enforce the 1961 agreement, but were later dropped when the parties reached a new accord. Although the new agreement specifically called for both parties to cooperate in securing a *get*, the wife subsequently refused to receive the instrument.<sup>35</sup>

The next year the wife brought a second action praying that the original Alabama decree be enforced. In that action, the court awarded her a consent order specifying monthly support payments and the payment of arrears with the "understanding" she would "cooperate" in securing a *get*.<sup>36</sup> Upon the failure of the husband to comply with the terms of the latest settlement, the wife instituted yet another action, even though she herself had refused to appear before the rabbinical court for the *get*.<sup>37</sup>

The Family Court first vacated the 1973 agreement because the condition precedent to its enforcement—the wife's cooperation in securing a *get*—had failed, and "rolled back" the proceedings to the 1972 agreement.<sup>38</sup> Stating that "[t]he courts of this State have recog-

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JEWISH ENCYCLOPEDIA 578 (1948) and 6 ENCYCLOPEDIA JUDAICA 130 (1971)). The judge's *halakhic* analysis was criticized in Ellenson & Ellenson, *supra* note 19, at 38. The Ellensons also note the dissenting judge first offered his interpretation of substantive Jewish law, but then concluded that religious law was not a legitimate concern for a secular court under the first amendment. *Id.*

32. Thus, these facts may be distinguished from the situation in which a secular court attempts to force an unwilling husband to issue a *get* in the first instance. See *infra* notes 117-18 and accompanying text.

33. 75 Misc. 2d 776, 348 N.Y.S.2d 61 (Fam. Ct. 1973).

34. *Id.* at 778, 348 N.Y.S.2d at 63.

35. *Id.*

36. *Id.*

37. *Id.*, 348 N.Y.S.2d at 64. Cf. *Pal v. Pal*, 45 A.D.2d 738, 739, 356 N.Y.S.2d 672, 673 (2d Dep't 1974) (motion for contempt denied for want of clean hands). *Pal*, of course, had not yet been decided. See *infra* notes 42-48 and accompanying text.

38. 75 Misc. 2d at 783, 348 N.Y.S.2d at 68.



nized the validity of an agreement to obtain a *Get*,"<sup>39</sup> the court ordered the husband to consult a rabbi for the purpose of securing the *get*, and conditioned further enforcement of the 1972 agreement upon the wife's acceptance of it.<sup>40</sup> Should the wife refuse the *get*, the court ordered her petition be dismissed on the merits.<sup>41</sup> The *Rubin* case thus extended the recognized power of the court to compel a husband to deliver a *get* pursuant to an agreement to also compel a wife to accept a *get*.

#### D. *Pal v. Pal*

The enforceability of a *get* provision arose once again in *Pal v. Pal*.<sup>42</sup> In *Pal*, the parties stipulated in open court that they would "submit themselves to a Rabbinical Tribunal on the question of whether the [husband] shall be directed to take all steps necessary to grant a Jewish divorce."<sup>43</sup> The stipulation and order also provided that the court could select a rabbi to choose the members of the tribunal should the parties fail to agree on its composition.<sup>44</sup>

While the matter was pending before the parties' tribunal, the husband claimed the wife had deprived him of his visitation rights. Thereafter, a rabbi withdrew from the tribunal and the wife moved the court to appoint another rabbi pursuant to the agreement.<sup>45</sup> Over a strong dissent, the reviewing court summarily held the trial court "had no authority to, in effect, convene a rabbinical tribunal."<sup>46</sup>

The dissent argued that far from convening a rabbinical tribunal, the trial court had simply attempted to enforce a voluntary agreement between the parties, and the court's appointment of a rabbi was akin to the appointment of a skilled arbitrator.<sup>47</sup> As the stipulation and order only required the parties to appear before a rabbinical tribunal on the question of *whether* the husband should deliver a *get*, and not to *compel* such delivery, the dissent concluded that appellate courts "should not anticipate or speculate as to the religious consequences of

39. *Id.* at 782, 348 N.Y.S.2d at 67 (citing *Koepfel v. Koepfel*, 138 N.Y.S.2d 366 (Sup. Ct., Queens Co. 1954)).

40. *Id.* at 783, 348 N.Y.S.2d at 68.

41. *Id.* at 783-84, 348 N.Y.S.2d at 68. A decision on the merits would invoke *res judicata* and end the litigation.

42. 45 A.D.2d 738, 356 N.Y.S.2d 672 (2d Dep't 1974)

43. *Id.* at 739, 356 N.Y.S.2d at 673 (Martuscello, J., dissenting).

44. *Id.* (Martuscello, J., dissenting).

45. *Id.* (Martuscello, J., dissenting).

46. *Id.* at 739, 356 N.Y.S.2d at 673.

47. *Id.* at 740, 356 N.Y.S.2d at 674 (Martuscello, J., dissenting).

[a] mere appearance and participation before a rabbinical tribunal.”<sup>48</sup>

Although perhaps decided incorrectly for the reasons stated in the dissent, *Pal* nevertheless circumscribes further limits around the enforceability of a stipulation to appear before a *Beth Din*: such a stipulation may be enforced, but apparently only so long as the court remains clear of the actual process.

### E. Waxstein v. Waxstein

In *Waxstein v. Waxstein*,<sup>49</sup> the court was again faced with a husband who had agreed to deliver a *get* to his wife but failed to do so. In 1973, the Waxsteins executed a separation agreement containing a provision that the parties would obtain a *get*. Upon the husband's failure to deliver the *get*, the wife instituted proceedings to compel specific performance of the agreement.<sup>50</sup>

The husband argued that a court is powerless to compel a spouse to obtain a *get*, citing the earlier decisions in *Margulies* and *Pal*.<sup>51</sup> Rejecting this argument and distinguishing the cited cases, the court concluded it could order specific performance of a contractual obligation to obtain a *get* and, further, could condition enforcement of other separation provisions on the delivery of the *get*.<sup>52</sup> *Waxstein* is particularly noteworthy in that it regards the power of a court to order enforcement of a *get* provision as settled law. Curiously, *Waxstein* was affirmed per curiam by the same department of the Appellate Division that had reversed *Pal*<sup>53</sup> three years earlier.

### F. Shapiro v. Shapiro

An interesting expansion of the court's power appeared in *Shapiro v. Shapiro*.<sup>54</sup> The Shapiros were married in France in 1959, and subsequently moved to Israel.<sup>55</sup> In 1962, the wife moved the Israeli Rabbinical Court for a hearing as to her marriage, at which the par-

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48. *Id.*, 356 N.Y.S.2d at 675 (Martuscello, J., dissenting).

49. 90 Misc. 2d 784, 395 N.Y.S.2d 877 (Sup. Ct., Kings Co. 1976), *aff'd per curiam*, 57 A.D.2d 863, 394 N.Y.S.2d 253 (2d Dep't 1977).

50. *Id.* at 785, 395 N.Y.S.2d at 879.

51. *Id.* at 787, 395 N.Y.S.2d at 880.

52. *Id.* at 789, 395 N.Y.S.2d at 881.

53. 45 A.D.2d 738, 394 N.Y.S.2d 253 (2d Dep't 1977). *See supra* notes 42-48 and accompanying text.

54. 110 Misc. 2d 726, 442 N.Y.S.2d 928 (Sup. Ct., Kings Co. 1981), *aff'd*, 88 A.D.2d 592, 449 N.Y.S.2d 806 (2d Dep't 1983).

55. *Id.* at 726, 442 N.Y.S.2d at 928.

ties agreed to a six-month trial separation.<sup>56</sup> After the six-month period had elapsed, the wife renewed her request for a divorce. Shortly thereafter, the husband fled Israel, leaving his wife and two infant children unsupported, eventually settling in New York. In 1979, seventeen years after the initial hearing, the Rabbinical Court issued an order directing the husband, in absentia, to deliver a *get* to his wife.<sup>57</sup>

The wife, still a resident of Israel, sued for divorce in the United States, and asked the court to treat the 1979 Rabbinical Court decree as a New York decree. After reviewing authorities relating to the recognition of foreign judgments and the doctrine of comity, the court recognized the Israeli order and agreed to enforce the directives therein, specifically ordering the husband to "schedule an appointment with the Rabbinical Council of America and . . . perform all the ritual acts of the 'get' ceremony."<sup>58</sup> The court thus ordered the husband to deliver a *get* without resort to a previous voluntary agreement such as a separation agreement or other contract to do so.

### G. Avitzur v. Avitzur

Up to this point, the New York courts had little difficulty enforcing provisions of separation agreements or other contracts calling for a spouse to give or receive a *get*. In *Avitzur v. Avitzur*,<sup>59</sup> New York's highest court considered the issue of the enforceability of a slightly different provision contained not in a separation agreement, but in the *ketubah*, the ritual contract of marriage.

The parties in *Avitzur* were married in 1966, and, in accordance with the *halakhah*, signed both a Hebrew/Aramaic and an English version of their marriage *ketubah*.<sup>60</sup> The *ketubah* contained a clause which stated:

[W]e, the bride and bridegroom . . . hereby agree to recognize the Beth Din of the Rabbinical Assembly . . . as having authority to counsel us in the light of Jewish tradition which requires husband and wife 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 the Jewish law of marriage throughout his or her

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56. *Id.*, 442 N.Y.S.2d at 929. The Israeli Rabbinical Court has exclusive jurisdiction over all matters of domestic relations. *Id.*, 442 N.Y.S.2d at 928-29. See also I. KLEIN, *supra* note 5, at 467.

57. 110 Misc. 2d at 727, 442 N.Y.S.2d at 929.

58. *Id.* at 731, 442 N.Y.S.2d at 931.

59. 58 N.Y.2d 108, 446 N.E.2d 136, 459 N.Y.S.2d 572, *cert. denied*, 104 S. Ct. 76 (1983).

60. *Id.* at 111, 446 N.E.2d at 137, 459 N.Y.S.2d at 573.

lifetime.<sup>61</sup>

After the marriage was dissolved in 1978, the husband refused to either appear before the *Beth Din* or deliver a *get* to his former wife. The wife subsequently brought an action requesting that the secular court grant specific performance of the *ketubah* clause.<sup>62</sup> The husband moved to dismiss the suit on the ground that "any grant of relief to [the wife] would involve the civil court in impermissible consideration of a purely religious matter."<sup>63</sup>

The trial court denied the husband's motion to dismiss, reasoning that "the relief sought could be granted without impermissible judicial entanglement in any doctrinal issue."<sup>64</sup> The Appellate Division reversed on appeal, holding that the state, having already granted the parties a civil divorce, had no further interest in their marital status and thus the *ketubah*, a religious contract of marriage, was unenforceable by a secular court.<sup>65</sup>

The Court of Appeals reversed the Appellate Division, holding that nothing in law or public policy prevents the judicial recognition and enforcement of the secular terms of a *ketubah*.<sup>66</sup> "[T]he provisions of the Ketubah . . . constitute nothing more than an agreement to refer the matter . . . to a nonjudicial forum."<sup>67</sup> The court specifically noted that by deciding the case before it "solely upon the application of neutral principles of contract law, without reference to any religious principle,"<sup>68</sup> the judicial enforcement of the *ketubah* would be consistent with the first amendment "neutral principles of law" standards recently articulated by the United States Supreme Court.<sup>69</sup>

However, the court was careful to limit its holding to the facts before it, and noted that Mrs. Avitzur was "not attempting to compel

61. *Id.* at 112, 446 N.E.2d at 137, 459 N.Y.S.2d at 573. The clause is a recent addition to the Conservative *ketubah* by Professor Saul Lieberman in a rabbinical attempt to solve the problem of the *aganah* by imposing a civil obligation on the recalcitrant husband to appear before a *Beth Din*. The clause is apparently not included in Orthodox *ketubot*. I. KLEIN, *supra* note 5, at 393-94. See *infra* text accompanying note 132.

62. 58 N.Y.2d at 112, 446 N.E.2d at 137, 459 N.Y.S.2d at 573.

63. *Id.* at 112-13, 446 N.E.2d at 137, 459 N.Y.S.2d at 573.

64. *Id.*, 446 N.E.2d at 137, 459 N.Y.S.2d at 573.

65. *Id.*, 446 N.E.2d at 137, 459 N.Y.S.2d at 573-74.

66. *Id.* at 111, 446 N.E.2d at 136-37, 459 N.Y.S.2d at 573.

67. *Id.* at 113-14, 446 N.E.2d at 138, 459 N.Y.S.2d at 574.

68. *Id.* at 115, 446 N.E.2d at 138, 459 N.Y.S.2d at 574-75.

69. *Id.* In *Jones v. Wolf*, 443 U.S. 595 (1979), the Court held that a state court may adopt any approach to resolving a religious dispute which does not entail consideration of doctrinal matters, such as the application of well-established principles of secular real property or contract law to the dispute. *Id.* at 602-03.

defendant to obtain a Get or to enforce a religious practice arising solely out of principles of religious law."<sup>70</sup> Moreover, the court observed that "nothing the Beth Din can do would in any way affect the civil divorce."<sup>71</sup>

Even so, the court in *Avitzur* was closely divided four-to-three. The dissent argued "that to grant the relief plaintiff seeks in this action, even to the limited extent contemplated by the majority, would necessarily violate the constitutional prohibition against entanglement of our secular courts in matters of religious and ecclesiastical content."<sup>72</sup> In support, the dissent contended the *ketubah* at issue was "indisputably in its essence a document prepared and executed under Jewish law and tradition";<sup>73</sup> that no secular obligations could be "fractured" out of the *ketubah*;<sup>74</sup> and that any action to enforce the provisions of the *ketubah* would necessarily involve a detailed examination of the underlying Jewish law and tradition.<sup>75</sup> However, these arguments overlook the fact that although a *ketubah* may indeed be "in its essence" a document prepared under Jewish law and tradition, in the eyes of the law it should be no more than a civil antenuptial contract between the parties to the marriage. Just as a court may order specific enforcement of any contract when the alternative damage remedy at law is inadequate, the religiously undisputed terms contained in a *ketubah* should be specifically enforceable by a secular court.

### III. OTHER CASE LAW

In addition to New York, two other jurisdictions have addressed the problem of the *agunah* with varying results.

In 1966, Florida's intermediate appellate court summarily struck a provision in a divorce decree which required a husband to "cooperate with [the wife] in obtaining a Jewish divorce."<sup>76</sup> The court held that the trial judge had exceeded his authority because it was "apparent" his order required the husband to "submit to a religious cere-

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70. 58 N.Y.2d at 113, 446 N.E.2d at 138, 459 N.Y.S.2d at 574.

71. *Id.* at 115, 446 N.E.2d at 139, 459 N.Y.S.2d at 575.

72. *Id.* at 116, 446 N.E.2d at 139, 459 N.Y.S.2d at 575 (Jones, J., dissenting).

73. *Id.* (Jones, J., dissenting).

74. *Id.* (Jones, J., dissenting).

75. *Id.* at 120, 446 N.E.2d at 142, 459 N.Y.S.2d at 577-78 (Jones, J., dissenting).

76. *Turner v. Turner*, 192 So. 2d 787 (3d Dist. Fla. 1966), *cert. denied*, 201 So. 2d 233 (Fla. 1967).

mony in which he will be required to take an active part.”<sup>77</sup> Although New York’s *Koepfel* opinion had already been handed down, the Florida court cited neither it nor any other authority to support its position. Florida has not yet reconsidered the issue.

On the other hand, New Jersey recently considered the issue in *Minkin v. Minkin*,<sup>78</sup> where the court concluded it could order specific performance of a *ketubah* without infringing upon the husband’s constitutional rights.<sup>79</sup> In *Minkin*, the plaintiff-wife had moved the court for an order compelling her husband to pay for and deliver to her a *get* based on a provision of the marriage *ketubah*. Relying upon the expert testimony of four rabbis, and citing the New York decisions in *Koepfel* and *Rubin*, the court held a *ketubah* to be a civil, not religious, document,<sup>80</sup> and ordered the husband to deliver the *get*.

*Minkin* is especially noteworthy in that the court ordered the husband to obtain a *get* based solely upon the *ketubah* some two years before the New York Court of Appeals’ decision in *Avitzur* was handed down.

While the results in these two states are by no means indicative of the results in other jurisdictions, courts that analyze the issue in depth and consider the New York and New Jersey precedents are more likely to be persuaded by those decisions than the summary Florida opinion. By merely enforcing a previous voluntary agreement contained in a *ketubah* or other agreement, those courts have established a system of relief for the *agunah* which is both inoffensive to the first amendment and valid under the *halakhah*.

#### IV. THE LEGISLATIVE RESPONSE

New York courts have recognized the *ketubah* as a private contract which may be enforced by a secular court when neutral principles of contract law are used and to the extent that no religious principles are involved. Thus, a *ketubah* that contains an agreement to submit to the jurisdiction of a *Beth Din* may be enforced by an order of a state court. Earlier New York cases held that a separation agreement containing a provision for the husband (or wife) to participate in the *get* ritual may also be enforced, although a state court is without the power to jail an unwilling party or to “convene a

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77. *Id.* at 788.

78. 180 N.J. Super. 260, 434 A.2d 665 (1981).

79. *Id.* at 266, 434 A.2d at 668.

80. *Id.*

rabbinical tribunal" in order to do so. A court may, however, condition the enforceability of an agreement's remaining provisions on the delivery and acceptance of a *get* or impose continuing fines for noncompliance.

Still, the question of whether a court could simply order a husband to tender a *get* in the absence of an existing contractual obligation remained unanswered. The New York Legislature addressed this issue in 1983 by enacting a new section to the New York Domestic Relations Law obliquely entitled "Removal of barriers to remarriage."<sup>81</sup>

#### A. Provisions Of The Get Statute

Essentially the new law requires a plaintiff to file and serve a sworn statement that either "to the best of his or her knowledge, he or she has[ ] . . . taken all steps solely within his or her power to remove all barriers to the defendant's remarriage," or "that the defendant has waived in writing the requirements" of the law as a condition precedent to the entry of a final judgment of divorce or annulment.<sup>82</sup> Notwithstanding the filing of such a statement, however, the law also provides that the entry of a final judgment may be withheld when the "clergyman or minister who has solemnized the marriage" files a sworn statement indicating that "to his or her knowledge" all of the possible steps were not taken.<sup>83</sup> The statute applies to any divorce or annulment action brought in New York,<sup>84</sup> wherever solemnized by a clergyman or minister,<sup>85</sup> and further provides that any person who knowingly submits a false sworn statement will be punished in accordance with the New York penal law.<sup>86</sup>

Although perhaps well-intentioned, the statute arguably violates both the establishment and free exercise clauses of the first amend-

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81. N.Y. DOM. REL. LAW § 253 (McKinney Supp. 1984). See *supra* notes 2-3 and accompanying text.

The statute was amended in 1984. Act of Aug. 6, 1984, ch. 945, 1984 N.Y. Laws 2660-62. The full text of the revised statute is contained *infra* in Appendix A.

82. N.Y. DOM. REL. LAW § 253(3) (McKinney Supp. 1984). Both parties are required to file statements in an uncontested action. *Id.* § 253(4).

83. *Id.* § 253(7).

84. *Id.* § 253(2).

85. *Id.* § 253(1).

86. *Id.* § 253(8). Section 210.40 of the New York Penal Law provides that making "an apparently sworn false statement in the first degree is a class E felony," N.Y. PENAL LAW § 210.40 (McKinney 1984), punishable by imprisonment not to exceed four years. *Id.* § 70(1), (2)(e), (4).

ment, the due process and equal protection clauses of the fourteenth amendment, and the contracts clause of article I, section 10.<sup>87</sup> Indeed, Governor Cuomo acknowledged possible constitutional infirmity when he signed the legislation.<sup>88</sup> In addition to constitutional concerns, the statute may be ineffective or have unintentional effects in some cases merely by virtue of the facts surrounding the dissolution proceeding or through astute tactical maneuvering by a party.<sup>89</sup> Finally, the validity of a *get* compelled by the statute is questionable under the *halakhah*. These objections are analyzed briefly below.

### B. Constitutional Validity

From the outset, the statute has been sharply criticized on constitutional grounds, especially as being repugnant to the religious freedom guarantees of the first amendment.<sup>90</sup> The first amendment grounds are two-fold.

#### 1. Establishment clause considerations

The establishment clause of the first amendment, applicable to the states through the due process clause of the fourteenth amendment,<sup>91</sup> essentially prohibits government sponsorship or active involvement in religious activities.<sup>92</sup> Over the years, the Supreme Court has developed a tripartite test for determining whether legislation can withstand scrutiny under the establishment clause: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entangle-

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87. The statute has already been held partially void under the contracts clause. *Chambers v. Chambers*, 122 Misc. 2d 671, 471 N.Y.S.2d 958 (Sup. Ct., N.Y. Co. 1983). See *infra* notes 106-10 and accompanying text.

88. "If there is a constitutional impediment, I am sure our excellent courts will make that clear in due time." 1983 N.Y. Laws 2818, 2819.

89. See *infra* notes 111-16 and accompanying text.

90. See generally Warmflash, *supra* note 3, at 250-53. See also Kochen, *Constitutional Implications Of New York's 'Get' Statute*, N.Y.L.J., Oct. 27, 1983, at 1, col. 2. In rebuttal, arguments for the statute's constitutionality have been published by its draftsman. Lewin, *The Constitutional Validity Of New York's 'Get' Statute*, N.Y.L.J., Nov. 16, 1983, at 1, col. 3.

The first amendment provides in pertinent part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I.

91. *Everson v. Board of Education*, 330 U.S. 1, 8 (1947).

92. *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970).



ment with religion.' ”<sup>93</sup> Assuming arguendo the *get* statute advances the secular legislative purpose of encouraging remarriage by removing any barriers thereto, the statute may nonetheless fall short of the constitutional mark.

The statute arguably violates both the second and third parts of the Court's establishment test in that subdivision seven allows a clergyman or minister to effectively block a secular dissolution proceeding by certifying that “to his or her knowledge,” all steps within the sole power of the plaintiff to remove any barriers to the defendant's remarriage have not been taken.<sup>94</sup> “Barriers to remarriage” are defined to include “*without limitation, any religious or conscientious restraint or inhibition . . . imposed . . . under the principles held by the clergyman or minister who has solemnized the marriage.*”<sup>95</sup> Because independent consideration of the principles held by the clergyman, or even of the truth of his statement, appear to be foreclosed by subdivision nine of the statute,<sup>96</sup> the clergyman is afforded almost unlimited power to block the decree.

Invalidating a Massachusetts statute that afforded churches and schools the power to block applications for liquor licenses under the primary effect test, the Supreme Court stated that even the “mere appearance of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion . . . by reason of the power conferred.”<sup>97</sup> Presumably a joint exercise of judicial authority by church and state would be similarly proscribed. In that event, the New York law may have an impermissible primary, albeit unintentional, effect of advancing religion under the Court's most recent application of the primary effect test.

In the same case, the Court also considered the “entanglement implications of a statute vesting significant governmental authority in

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93. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (citing *Board of Education v. Allen*, 392 U.S. 236, 243 (1968), and quoting *Walz*, 397 U.S. at 674).

94. N.Y. DOM. REL. LAW § 253(7) (McKinney Supp. 1984).

95. *Id.* § 253(6) (emphasis added).

96. “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 . . . .” *Id.* § 253(9). Subdivision nine was enacted as part of a 1984 amendment to the law, presumably to reduce perceived first amendment objections to the law as originally drafted. See *supra* note 90 and accompanying text.

97. *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 125-26 (1982). See also *Warmflash*, *supra* note 3, at 252 (criticizing statute on second test); *Kochen*, *supra* note 90, at 32, col. 2 (same). This argument was ostensibly refuted in *Lewin*, *supra* note 90, at 2, col. 3.

churches.”<sup>98</sup> Reiterating the “core rationale” underlying the establishment clause, the Court concluded the “Framers did not set up a system of government in which important, discretionary governmental powers would be delegated to or shared with religious institutions.”<sup>99</sup> Again analogizing judicial power to governmental power, the statute may create a system in which an important discretionary judicial function—the power to grant or block decrees of civil divorce—may be unintentionally shared with an agent of a religious institution.

Moreover, the statute does not appear to contain a “reset” clause. Thus, once a clergyman or minister files a statement which has the effect of blocking the entry of a final judgment of divorce or annulment, strict interpretation of the statute does not allow entry of the judgment even if the parties subsequently remedy the source of the clergyman’s objection.

Considering the New York law under the tests outlined by the Supreme Court, it seems plain a court could reasonably find the statute fails the establishment provision of the first amendment.

## 2. Free exercise implications

The statute may also violate the free exercise clause of the first amendment by conditioning the entry of a final judgment upon a litigant’s participation in an essentially religious ritual. Also applicable to the states through the fourteenth amendment,<sup>100</sup> the free exercise clause absolutely prohibits governmental interference with any religious belief or citizen’s wish to practice any religion. Conversely, the clause also protects an individual’s right to *not* hold any religious belief or be forced to participate in any religious practice or ritual whatsoever. Invalidating a 1981 statute authorizing a one minute period of silence in all Alabama public schools “for meditation or voluntary prayer,” the Supreme Court recently reaffirmed that “the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith *or none at all.*”<sup>101</sup>

Although on its face the statute merely requires a plaintiff to file and serve a sworn statement, before such a statement can be honestly

98. *Larkin*, 459 U.S. at 126.

99. *Id.* at 126-27.

100. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

101. *Wallace v. Jaffree*, 53 U.S.L.W. 4665, 4669 (1985) (emphasis added). See also *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961) (government can neither force a person to profess a belief or disbelief in any religion nor compel the affirmation of a belief that God exists).

made the plaintiff may be required to engage in a purely religious act. Thus, the New York statute may interfere with an individual's constitutionally protected right to be free of all religious practices by requiring an affirmative religious act of one who may not wish to participate therein. While a secular court may arguably enforce a previous voluntary agreement to submit to a religious tribunal, unlike a court order enforcing a previous commitment, the statute seeks to impose far more on the reluctant party in the first instance.

### 3. Equal protection considerations

Because the law appears to be specifically tailored towards Orthodox and perhaps Conservative Jews to the exclusion of other religions, the statute is suspect on fourteenth amendment equal protection as well as first amendment freedom of religion grounds.

Since 1938, the Supreme Court has applied a "strict scrutiny" equal protection analysis to any legislation that distinguishes between persons in terms of any "fundamental right," including the freedom of religion guarantees of the first amendment.<sup>102</sup> In order for the statute to withstand an equal protection challenge, New York must demonstrate both that the law is "closely fitted" to further a "compelling" state interest which is advanced by the statute, and that there

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102. The seminal case was *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938), in which Justice Stone suggested "[t]here may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth." *Id.* at 152 n.4. Both freedom of religion clauses have been held to be incorporated into the fourteenth amendment. See *supra* notes 91 & 100.

The Court recently reaffirmed the application of strict scrutiny to legislation which discriminates among religious groups. Invalidating Minnesota's "fifty per cent rule" which imposed certain registration and reporting requirements only upon religious organizations which solicit over one-half of their funds from non-members, the Court in *Larson v. Valente*, 456 U.S. 228, 246 (1982), noted that "[i]n short, when we are presented with a state law granting a denominational preference, our precedents demand that we treat the law as suspect and that we apply strict scrutiny in adjudging its constitutionality." The Court went on to state that "the *Lemon v. Kurtzman* 'tests' are intended to apply to laws affording a uniform benefit to *all* religions, and not to provisions . . . that discriminate *among* religions." *Id.* at 252 (emphasis in original) (footnote omitted).

The legislative history of the fifty per cent rule in Minnesota clearly indicated the law was carefully tailored to apply to some religions but not to others—essentially a form of "religious gerrymandering." *Id.* at 254-55 (quoting *Gillette v. United States*, 401 U.S. 437, 452 (1971)). Given the explicit legislative history of the New York statute, especially the Governor's comments upon signing the bill, see *supra* note 3 and accompanying text, an analogy between the instant situation and that presented in *Larson* may be easily drawn.

are no less constitutionally burdensome alternatives available to achieve that interest.

On its face, the statute is applicable to all marriages solemnized in New York or elsewhere by a clergyman or minister.<sup>103</sup> However, subdivision six of the law states that “[a]ll steps solely within his or her power’ [of the plaintiff to remove barriers to the defendant’s remarriage] shall not be construed to include application to a marriage tribunal . . . of a religious denomination which has authority to annul or dissolve a marriage,” and therefore concentrates the effect of the statute on eliminating only those barriers to remarriage that can be dissolved through the “voluntary” acts of a party.<sup>104</sup> Thus, for example, Catholics, who are unable to dissolve a marriage through the unilateral act of one party, appear specifically exempted from the requirements of the law. The statute unquestionably targets followers of Jewish religious practice.

The statute may even discriminate between observant and non-observant Jews. Because the barriers to remarriage are defined by the principles held by the clergyman or minister who solemnized the marriage,<sup>105</sup> the statute may be of little avail to a Jewish plaintiff—married by a Reform rabbi who personally does not recognize the necessity of a *get* for remarriage—who nonetheless now desires a *get*.

Assuming *arguendo* that New York could demonstrate the removal of religious barriers to remarriage constitutes a “compelling” state interest, it is unlikely that this statute, even as revised, could withstand a constitutional equal protection attack under the strict scrutiny standard of review.

#### 4. Contracts clause implications

Finally, one subdivision of the statute was unexpectedly declared an unconstitutional impairment of contractual obligations shortly after its enactment in *Chambers v. Chambers*.<sup>106</sup>

In *Chambers*, the parties had entered into a separation agreement

103. N.Y. DOM. REL. LAW § 253(1) (McKinney Supp. 1984).

104. *Id.* § 253(6). To remove all doubt, the statute also states that “[i]t 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.” *Id.* See also Kochen, *supra* note 90, at 32, col. 2.

105. N.Y. DOM. REL. LAW § 253(6) (McKinney Supp. 1984).

106. 122 Misc. 2d 671, 471 N.Y.S.2d 958 (Sup. Ct., N.Y. Co. 1983).

Article I of the Constitution provides in pertinent part that “No State shall . . . pass any . . . Law impairing the Obligation of Contracts.” U.S. CONST. art. I, § 10, cl. 1.

before the effective date of the *get* statute, but found entry of their final judgment blocked for want of a "removal of barriers" statement by the husband. The husband had made a general appearance at the divorce proceedings but did not contest the action.<sup>107</sup> Because the statute applies to cases commenced before its effective date, and requires both parties to file statements in an uncontested divorce, the entry of the Chambers' divorce was blocked.<sup>108</sup>

After questioning the constitutionality of the statute on various grounds,<sup>109</sup> the court concluded that inasmuch as the "judicial remedies available to parties to a contract at the time of its making are part of the constitutionally protected obligations of contracts," the statute was void as applied because it impaired the judicial remedies available (i.e., the decree of divorce) to the parties when their separation agreement was executed.<sup>110</sup> No appeal was taken from this decision.

### C. Factual and Tactical Considerations

Several situations are easily imagined in which the legislation is powerless to help the *agunah* and may even work unforeseen mischief. First, because the statute applies only to marriages solemnized by a clergyman, minister, or ethical culture leader,<sup>111</sup> it is inapplicable to couples who were married by a civil official such as a judge or mayor. Thus, the law offers little recourse to the plaintiff with after-acquired religious conviction who now seeks the statutory remedy.

Secondly, in a contested dissolution proceeding and absent a waiver, the statute requires a sworn statement only from the party who commences the action.<sup>112</sup> A defendant who does not file a counterclaim is under no reciprocal obligation to either remove any barriers to the plaintiff's remarriage or file a statement that he or she has done so. Thus, if a wife sues for dissolution and her husband does not file a counterclaim, the statute will *not* prevent entry of the final judgment even where the husband refuses to give the wife a *get*.<sup>113</sup>

Conversely, because the statute requires statements from both parties only in an uncontested action,<sup>114</sup> a spiteful husband is now

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107. 122 Misc. 2d at 672, 471 N.Y.S.2d at 959.

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

109. *Id.*

110. *Id.* at 674, 471 N.Y.S.2d at 961.

111. N.Y. DOM. REL. LAW § 253(1) (McKinney Supp. 1984).

112. *Id.* § 253(2)-(3).

113. See Warmflash, *supra* note 3, at 253.

114. N.Y. DOM. REL. LAW § 253(4) (McKinney Supp. 1984).

able to prevent a civil divorce simply by not contesting the divorce or by filing a counterclaim and thereafter refusing to file a removal of barriers statement or a statement of waiver.<sup>115</sup> Although it is the *wife* who is the ultimate beneficiary, the statute appears to be predicated upon the *husband's* desire to obtain a valid secular divorce. Thus, even though the parties may be separated, the husband's willful failure to comply with the statute will block the entry of a final judgment of dissolution, possibly relieving his conditional obligation to make maintenance or child support payments. The parties could fall into a statutorily created limbo, being divorced by neither state nor church. All other constitutional arguments aside, these results alone may cause the statute to be vulnerable to a fourteenth amendment due process attack.<sup>116</sup>

#### D. Halakhic Validity Of A Statutorily Compelled Get

Finally, the *halakhic* validity of a *get* procured under compulsion of statute is unresolved as well. Although the *halakhah* appears well-settled in that a *get* given under compulsion is invalid,<sup>117</sup> there is some authority that such a *get* might be acceptable. Maimonides offers the following explanation:

And why is [a compelled] *get* not null and void, since it is the product of duress, whether exerted by heathens or by Israelites? Because duress applies only to him who is compelled and pressed to do something which the Torah does not obligate him to do, for example, one who is lashed until he consents to sell something or give it away as a gift. On the other hand, he whose evil inclination induces him to violate a commandment or commit a transgression,

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115. In the first case, subdivision four of the statute would block entry of a final judgment where the husband does not contest the action but refuses to file a statement. In the second case, the defendant-husband who files a counterclaim would become the plaintiff in the action-over and therefore might be required to file a statement by subdivision three of the statute. By refusing to file a statement once the counterclaim is filed, entry of the judgment would be blocked.

116. One aspect of the original statute which was particularly suspect on due process and free exercise grounds appears to have been remedied by the 1984 amendments. The original version of the statute allowed no waiver of its requirements. Thus, since plaintiffs in *all* New York divorce actions were required to file statements, the original law may have blocked judgments in both cases where the parties were unconcerned with the statutory remedy and where the parties were offended by the requirements. The revised statute now permits the statutory provisions to be waived. N.Y. DOM. REL. LAW § 253(2)-(4) (McKinney Supp. 1984).

117. BABYLONIAN TALMUD, *Order Nashim: Tractate Gittin* 88b. The *gets*, however, ordered by the secular courts above would *not* fall within this proscription. In those cases, the husband had already *voluntarily* agreed to deliver a *get*, either expressly, in a separation agreement or other contract, or impliedly, in the *ketubah*.

and who is lashed until he does what he is obligated to do . . . cannot be regarded as a victim of duress . . . Therefore, [once a] man who refuses to divorce his wife . . . is lashed until his inclination is weakened and he says "I consent," it is the same as if he had given the *get* voluntarily.<sup>118</sup>

Whether one accepts Maimonides' rationale or not, the validity of a statutorily compelled *get* has yet to be tested in a *Beth Din*. Despite its laudable intent, the legislative response may ultimately operate to invalidate the very goal it sought to achieve.

#### V. HALAKHIC ALTERNATIVES TO JUDICIAL OR LEGISLATIVE REMEDIES

There is no generally accepted *halakhic* solution to the problem of the *agunah*. Indeed, there is even some sentiment among the traditional rabbinate that the *agunah* is a necessary evil of the *halakhah*.<sup>119</sup> However, precisely because the *agunah* is purely a creation of Jewish law, the most effective solution to the problem would seem to lie not in a civil courtroom or state capital, but in the *halakhah* itself. Although a complete discussion and critical analysis of possible *halakhic* solutions is well beyond the scope of this Comment, several alternatives are presented to illustrate the fundamental difference between the *halakhic* approach to the problem and the limited nature of the remedies available from secular American judicial and legislative bodies.

The Reform movement has neatly sidestepped the issue entirely by deciding that a *get* is no longer necessary: "[a]t the present time, the Central Conference of American Rabbis makes no provision for a religious divorce and civil divorce is recognized as dissolving a marriage by most Reform rabbis."<sup>120</sup>

In the Conservative movement, the French rabbinate suggested a

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118. M. MAIMONIDES, MISHNAH TORAH, *Sefer Nashim: Hilchot Gerushin 2:20*, quoted in I. KLEIN, *supra* note 5, at 468.

119. When asked to comment on the *halakhic* validity of Rabbi Louis Epstein's proposed solution to the problem of the *agunah*, one rabbi "of great fame" questioned the need for any solution whatsoever:

When America entered the war, it knew that with war would come widows and orphans and cripples. Yet in defense of country and national honor they took these things for granted. Our country and our honor is our Torah; why not take *agunot* for granted in our defense of the Torah?

Epstein, *A Solution To The Agunah Problem*, 4 PROCEEDINGS OF THE RABBINICAL ASSEMBLY OF THE JEWISH THEOLOGICAL SEMINARY OF AMERICA 83, 88 (1933).

120. AMERICAN REFORM RESPONSA 514 (W. Jacob ed. 1983).

“conditional marriage” as a solution to the problem as early as 1907.<sup>121</sup> Under this theory, the religious marriage is deemed retroactively void if a civil divorce is granted to either party, and thus the wife could not be considered an *agunah* even absent the delivery of a *get*. However, this early French conditional marriage theory was met with the “united protest” of over four hundred rabbis, and was apparently held in abeyance.<sup>122</sup>

The conditional marriage theory was reviewed and raised again in 1938.<sup>123</sup> Although conditional marriages might be possible under the letter of the *halakhah*, it was felt that the children of such a marriage would be placed in an “anomalous” position should the condition ever obtain and the marriage be declared void.<sup>124</sup>

A second suggestion called for the husband to execute a conditional divorce at the time of the marriage to be given effect should the wife become an *agunah*.<sup>125</sup> Although this theory was considered sound under the *halakhah*, it seemed impractical to require that every marriage be both a marriage and divorce combined.<sup>126</sup>

A third proposal would “have the groom appoint an agent at the time of the marriage to issue a divorce to the wife under the supervision of a specified court, in the event she becomes an *Agunah*.”<sup>127</sup> The major objection to this solution was that the husband is required to speak directly with the scribe and witnesses, and in the event the scribe and witnesses did not attend every wedding, or were dead or otherwise unavailable at the time the divorce becomes necessary, the agency would be “defaulted.”<sup>128</sup>

Another solution involved a modification of the agency proposal:

What Epstein proposes is a double marriage ceremony and an in-

121. Epstein, *Adjustment Of The Jewish Marriage Laws To Present-Day Conditions*, 5 PROCEEDINGS OF THE RABBINICAL ASSEMBLY OF THE JEWISH THEOLOGICAL SEMINARY OF AMERICA 227, 231 (1939).

122. *Id.*

123. Aronson, *Dr. Louis M. Epstein's "The Agunah Question,"* 7 PROCEEDINGS OF THE RABBINICAL ASSEMBLY OF THE JEWISH THEOLOGICAL SEMINARY OF AMERICA 301, 303 (1941).

124. *Id.* Rabbi Aronson raised another objection to conditional marriages: “my strongest personal objection to such a solution is that it would make every marriage psychologically a ‘trial marriage,’ and I have serious misgivings regarding the social effects and moral consequences of ‘trial marriages.’” *Id.* at 303-04 (emphasis in original).

125. Epstein, *Adjustment Of The Jewish Marriage Laws To Present-Day Conditions*, *supra* note 121, at 231.

126. *Id.*

127. *Id.*

128. *Id.*



strument added to the regular *Ketubah* whereby the husband delegates the woman herself to write his Bill of Divorcement for her, under certain conditions. The woman is also appointed to become, upon the completion of the writing of the *Get*, the husband's messenger to convey the document to another messenger whom she is authorized to appoint and who would duly deliver the document back to her in the traditional form as the final act of the divorce process.<sup>129</sup>

This proposal was adopted by the Conservative Rabbinical Assembly in 1935,<sup>130</sup> but was later withdrawn "in the hope that the partisan passions [against the proposal] of the Orthodox [rabbis] would soon abate and that they would come to approach the problem in a deliberative and judicial manner as becomes rabbis in Israel."<sup>131</sup>

Much later the issue was reconsidered. At the request of the Conservative Joint Law Conference, Professor Saul Lieberman added a clause to the traditional marriage *ketubah* reflecting a private agreement between the bride and groom to authorize the "*Beth Din* of the Rabbinical Assembly of America . . . 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 the Jewish Law of Marriage throughout his or her lifetime."<sup>132</sup> Such a clause was specifically enforced in *Avitzur v. Avitzur*.<sup>133</sup>

The issue has now apparently come full circle in the Conservative movement:

The latest effort on the part of the Rabbinical Assembly was in 1968, when the Law Committee adopted an antenuptial agreement signed by the man and the woman in which they agree that if the marriage should end with a civil divorce, and one of the parties refuses to agree to the granting of a *get*, the marriage should retro-

129. Aronson, *supra* note 123, at 304.

130. *Id.* at 306. Although first proposed in 1930, the Conservative Rabbinical Assembly had waited for the Orthodox rabbis to consider the *halakhic* aspects of the proposal and "take up seriously the search for some kind of practical solution to the problem." *Id.* However, the ensuing response of the Orthodox rabbis was unexpected, at best:

What followed, however, was not a Halakic discussion, not a rabbinic reply, but a class-struggle. The Union of Orthodox Rabbis of America used this as an opportunity to declare war on the Conservative rabbis as a class[, and] . . . started a campaign of vituperation which would put a fisherwoman to shame.

*Id.* at 306-07.

131. *Id.* at 307.

132. I. KLEIN, *supra* note 5, at 393.

133. 58 N.Y.2d 108, 446 N.E.2d 136, 459 N.Y.S.2d 572, *cert. denied*, 104 S. Ct. 76 (1983). See *supra* notes 59-75 and accompanying text.

actively become null and void.<sup>134</sup>

Thus, there seems to be no generally accepted *halakhic* solution to the problem of the *agunah*, and the enactment of the *get* statute in New York may provide an avenue for rabbinical abdication of the responsibility for the *agunah*. Nevertheless a *halakhic* solution could strike at the root of the problem and perhaps eliminate it entirely, while state judicial or legislative solutions are only able to remedy symptoms on a case-by-case basis.

## VI. CONCLUSION

New York has experimented with both judicial and legislative responses to the problem of the *agunah*. Judicial efforts seek to compel recalcitrant husbands to fulfill their obligations by resort to secularly enforceable separation agreements or provisions of the marriage *ketubah*. *Koepfel*, its progeny, and *Avitzur* provide both adequate precedent for future cases and persuasive guidance for other jurisdictions. In addition, by relying solely upon "neutral principles of contract law," the cases also avoid the excessive governmental entanglement with religion proscribed by the first amendment.

Nevertheless, the New York legislature attempted to provide an additional civil remedy to those without an enforceable contract by enacting Domestic Relations Law section 253, the so-called "*get*" statute. Of questionable constitutional and *halakhic* validity, hypotheticals are easily postulated in which the statute provides no assistance to the aggrieved party. Although well intended, perhaps the clearest lesson to be learned from the statute is the problem of the *agunah*—essentially a problem of Jewish ecclesiastical law—is best left to resolution in a *halakhic*, and not legislative, forum.

*Bruce Perelman*

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134. I. KLEIN, *supra* note 5, at 498-99.

## APPENDIX A

## New York Domestic Relations Law section 253

## § 253. Removal of barriers to remarriage.

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 con-

scientious 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 shall it be deemed a "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 (McKinney Supp. 1984).

