IS ADR THE SOLUTION? HOW ADR GETS AROUND THE *GET* CONTROVERSY IN JEWISH DIVORCE

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I. INTRODUCTION

Aharon Friedman is a young, educated, and successful thirty-five-year-old man, a Capitol Hill aide, and a loving father to his three-year-old daughter who identifies as an Orthodox Jew.[1] However, Mr. Friedman is a religious outcast, shunned by his friends, family, and community.[2] Since 2007, Mr. Friedman has refused to give his wife, Tamar Epstein, a Jewish divorce, known as a *get*.[3] Though civilly divorced since April 2010, Mr. Friedman and Ms. Epstein remain married under Jewish law.[4] Ms. Epstein is considered an *agunah*, or a "chained woman," and will remain unable to remarry until Mr. Friedman provides her with a *get*.[5] The *get* can be granted only through the approval of a *beth din*, a Jewish religious court.[6] The *beth din* can approve a *get* only if the husband chooses to grant it to his wife.[7] Thus, the age-old conundrum of obtaining a *get* from a recalcitrant husband arises, and the hundreds of women throughout North America, Israel, and the rest of the world whose husbands, out of spite, malice, or both, refuse to issue a *get*, are condemned to a life of social limbo.[8]

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1 *See* Annys Shin, *Man Who Won't Grant Religious Divorce to Ex-wife is Given Rabbinical Sanction*, WASH. POST, Sept. 29, 2011, *available at* http://www.washingtonpost.com/local/man-who-wont-grant-religious-divorce-to-ex-wife-is-given-rabbinical-sanction/2011/09/27/gIQAU8SS8K_story.html.

2 *Id.*

3 *Id.*

4 *Id.*

5 *Id.*

6 It should be noted that the *beth din* can also be found transliterated in many different ways, including: *bet din*, *beit din, bais din* and *bait din*. For consistency, this Note will solely use *beth din*, and its plural version, *battei din*.

7 *See* BETH DIN OF AMERICA, http://www.bethdin.org/jewish-divorce.asp (last visited Feb. 19, 2012).

8 Rivkah Lubitch, *Who's Counting Agunot?,* YNET NEWS, (March 16, 2013), http://www.ynetnews.com/articles/0,7340,L-3861525,00.html.

In our modern, secularized society, the idea of a religious court holding sway over our private lives "seems like a fairy tale—or something out of our deepest, most fantastical idea of *Sharia* law, something like stoning, say, for adultery."[9] The Establishment Clause and the Free Exercise Clause in the First Amendment to the United States Constitution together state that "Congress shall make no law respecting an establishment of religion, or prohibiting the exercise thereof . . . ."[10] These Clauses essentially "prohibit the government from establishing an official religion or showing a preference among religions or between religion and non-religion,"[11] and from infringing on an individual's ability to exercise his or her own religious beliefs. Accordingly, a United States law prohibiting the free exercise of religion is unconstitutional. In this light, American courts for centuries have recognized traditional religious courts as being binding authority on inter-community disputes. For example, certain judges uphold and apply Islamic law instead of state or federal statutes in resolving disputes between Muslims, when the parties have agreed to go to "arbitration" before an imam prior to the onset of the dispute.[12] Similarly, Orthodox Jews use the *beth din* system of arbitration to resolve intra-community disputes. The *beth din* has survived for thousands of years and still represents a preferred method for dispute resolution between Orthodox Jewish parties in America today. *Battei din*[13] in every American Orthodox Jewish community apply Jewish law, and their arbitration decisions are held as binding by the American legal system.[14]

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9 Sarah Wildman, *Aharon Friedman, Capitol Hill Staffer Who Won't Grant Wife Jewish Divorce*, WASH. POST, Apr. 1, 2011, *available at* http://www.politicsdaily.com/2011/01/04/aharon-friedman-capitol-hill-staffer-who-wont-grant-wife-jewis/.

10 U.S. CONST. amend. I.

11 Cynthia Brougher, CONGR. RESEARCH SERV., APPLICATION OF RELIGIOUS LAW IN U.S. COURTS: SELECTED LEGAL ISSUES,. May 18, 2011, *available at* http://www.fas.org/sgp/crs/misc/R41824.pdf.

12 Rabbi Eliyahu Fink, *Judge Upholds the Law, Fox News Goes Insane*, PACIFIC JEWISH CENTER RABBI, http://finkorswim.com/2011/03/24/judge-upholds-the-law-fox-news-goes-insane/ (last visited Jan. 12, 2012). In May 2011, a Florida Circuit Judge, Richard Nielsen, applied Islamic law instead of state or federal statutes in determining whether an arbitration award was correct, holding that "based on testimony, 'under ecclesiastical law,' and pursuant to the Koran, 'Islamic brothers should attempt to resolve a dispute among themselves'" when the parties had "agreed ahead of time to use an imam and Islamic Law to resolve any potential differences through arbitration." *See Florida Judge Defends Decision to Apply Islamic Law in Tampa Case,* FOXNEWS.COM, Mar. 23, 2011, *available at* http://www.foxnews.com/us/2011/03/23/florida-judge-defends-decision-apply-islamic-law-tampa-case/#ixzz1kgtsaFlA.

13 *See* Shin *supra* note 1.

14 *See* Fink, *supra* note 12.

The New York State government in particular has attempted to find creative solutions to the modern problems associated with Jewish divorce issues. This Note first gives a brief historical background of the *beth din* and the reasons for its authority, elucidating why alternative dispute resolution (ADR) benefits the American legal system and explaining how and why the *beth din* serves as a preferred method of ADR in contemporary America. Using New York as a case study, this Note then proposes that, although New York civil legislative solutions and tort claims for intentional infliction of emotional distress may sometimes achieve satisfactory results, such results are likely unconstitutional and/or unacceptable under Jewish law. Thus, the only solutions to the controversy surrounding Jewish divorce are the preemptive techniques and other preventative methods employed through the ADR of the *beth din.*

II. BACKGROUND

A. *Obstacles Presented by Jewish Divorce*

Despite its many strengths in resolving *halachic*[15] issues within the Jewish community, the *beth din* often struggles with matters of Jewish divorce. Jewish divorce problems arise because the law itself presents a conundrum. The principle that one must obtain a religious divorce in order to terminate a Jewish marriage comes from *Deuteronomy*, the fifth book of the *Torah*, which states the law of Jewish divorce:

> When a man has taken a wife, and married her, and it come to pass that she find no favor in his eyes . . . then let him write her a bill of divorce, and give it in her hand, and send her out of his house. And when she is departed out of his house, she may go and be another man's wife.[16]

Literally interpreted, as by Jewish rabbis and sages for centuries, this passage allows only a man to initiate such divorce proceedings.[17] Thus, a husband's refusal to grant his wife a *get*[18] carries

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15 *Halaka* is defined by the Princeton wordnetweb dictionary as "Talmudic literature that deals with law and with the interpretation of the laws on the Hebrew Scriptures." *Available at* http://wordnetweb.princeton.edu/perl/webwn?s=halacha.

16 24 *Deuteronomy* 1–2.

17 *See Jewish Get Law,* WOMENSLAW.ORG, http://www.womenslaw.org/laws_state_type.php?id=12530&state_code=RL&open_id=12583 (last visited Sept. 18, 2011).

serious consequences for Orthodox Jewish women in modern society. A woman without a *get* becomes an *agunah*. If she marries another man, she is guilty of adultery, and any children born of her new relationship are considered *mamzerim*, or illegitimate.[19] Though a man is also considered guilty of adultery if he remarries, he has the choice to give his wife a *get*, so unlike his wife he can avoid this problem.[20]

Serious complications with this law arise because of the stipulation that a man must issue his wife a *get* under his own free will;[21] if the husband is forced to sign under duress, the *get* is invalid.[22] This spurs a cyclical problem with few, if any, solutions. If a man refuses to give his wife a *get*, they remain married. If a man is forced to give his wife a *get*, the document is invalid and they remain married.[23]

Currently, for an Orthodox Jewish couple to divorce in America, they must obtain a civil divorce as required by civil law, and a Jewish divorce as required by Jewish law.[24] Civil divorce laws are relatively straightforward and are governed almost exclusively by state, rather than federal, law.[25] Though states have varying requirements for grounds for divorce, every state requires a court of law to certify a civil divorce before it becomes effective.[26] If the divorce is amicable, parties can often negotiate through mediation to find mutually acceptable resolutions. If the divorce is contested or complicated, particularly when child custody or great sums of money are involved, the parties often have to undergo ex-

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18 The *get* itself is a short written document that essentially states something along the lines of, "[y]ou are hereby permitted to all men." *See What is a Get?,* KAYAMA: PRESERVING JEWISH CONTINUITY, http://www.kayama.org/get.htm (last visited Mar. 10, 2012).

19 *Id.*

20 *Id.*

21 14 *Mishnah* 1 (Yevamot). The *Mishnah* is the first major written work of formerly oral Jewish traditions, reflecting debates between the group of rabbinic sages known as the "tannaim" during the first century B.C.E. and the second century C.E.

22 *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, 811–12 (1998), (citing IRVING A. BREITOWITZ, BETWEEN CIVIL LAW AND RELIGIOUS LAW: THE PLIGHT OF THE AGUNAH IN AMERICAN SOCIETY 5–40 (1993)).

23 *Id.*

24 *See, e.g.*, Greenawalt, *supra* note 22, at 811 (stating that Jewish law requires a *get* regardless of civil divorce).

25 *See United States Federal Law: Federal Defense of Marriage Act*, MARRIAGEWATCH.ORG: A SERVICE OF THE MARRIAGE LAW PROJECT, http://marriagelaw.cua.edu/law/states/fed/fed.cfm (last visited Nov. 16, 2011).

26 *Marriage Laws,* USMARRIAGELAWS.COM, http://usmarriagelaws.com/search/united_states/divorce_laws/index.shtml (last visited Nov. 20, 2011).

pensive litigation.[27] Ultimately, however, regardless of the level of amicability or animosity between the parties, a couple is considered divorced when a civil judge declares them so, and both parties can marry whom they please with no legal repercussions.[28]

The laws of Jewish divorce pose greater difficulties. As noted above, a Jewish divorce takes effect only when a husband gives his wife a *get.* Historically, a husband could leave town without providing one and because he could not be found, he could not issue a *get.*[29] Today, however, with modern technology these men usually can be located yet may still refuse to issue *gets* for various reasons.[30] Four primary motivations for refusing to issue a *get* are: 1) money; 2) custody and visitation rights; 3) spite and revenge; and, 4) desire for control.[31] Especially in the Orthodox Jewish community, when a man like Mr. Friedman refuses to give a *get* to his wife, Orthodox Jewish women have few, if any, remedies to this problem.[32]

Activists find it hard to give an actual number of *agunot* in America today, because while many women say that their husbands did not give them a *get*, they never actually initiated the *beth din* process.[33] Though estimates vary, many activists agree that, regardless of the actual number, too many women in America are "chained."[34] One source found that the *Beth Din* of America handles approximately 350 divorces annually, with fewer than ten unresolved.[35] This relatively small number is largely due to the use of a pre-nuptial agreement approved by the Rabbinical Council of America ("RCA"), which inoculates young couples against the problems associated with Jewish divorce by forcing them to sign an advance agreement stating that the husband will give a *get* to his wife.[36] According to the new North American Study of Agunot, there have been "462 *agunot* over the last five years in the U.S. and

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27 *Id.*

28 *Id.*

29 Rabbi Jeremy Stern, Exec. Dir. of the Org. for the Resol. of Agunot (ORA), Lecture, (Feb. 22, 2012).

30 *Id.*

31 *Id.*

32 *Id.*

33 *Id.* There are differing interpretations of when one is considered an *agunah*. Some say it is when the *seruv* (writ to appear before the *beth din*) is served, others say it is when the civil divorce is finalized, and others say it is once the husband simply says he will not give the *get*.

34 *See Agunot: 462 Too Many*, THE JEWISH WEEK, Oct. 25, 2011, *available at* http://www.thejewishweek.com/editorial_opinion/editorial/agunot_462_too_many.

35 *Id.*

36 *Id.*

Canada."[37] But even one "chained" woman would be "one too many," since the problem leaves many women in an emotional, financial, and legal "black hole."[38]

B. *History of the* Beth Din

The Jewish rabbinic court of the *beth din* generally consists of a panel of three rabbis with the goal of resolving matters of *halacha*, Jewish law. Established by the Roman conquerors to control the population after the fall of Judea in 70 C.E., the *beth din* served as a central authority for the Jewish people.[39] Most secular governments under which Jews lived throughout the Diaspora encouraged them to establish some form of self-government to further their own aims, such as tax collection.[40] Thus, Jews have been adjudicating disputes between community members in such a court system for thousands of years.[41]

Though the institution of the *beth din* has waned in importance since its establishment in the days of ancient Israel, and though no single *beth din* has emerged as a central authority of Jewish law, local *battei din* have adjudicated all types of intra-community Jewish legal issues relating to ceremonial, civil, and even criminal law throughout history.[42] One of the most significant areas of authority for the *beth din* is Jewish divorce. The laws of Jewish divorce are found in the *Talmud*,[43] in the tractate of *Gittin*:[44]

> Rabbi Tarfon[45] used to say: In any place where you find gentile courts, even though their law is the same as the Israelite law, you must not resort to them since it says, "These are the judg-

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37 *Id.*

38 *Id.*

39 *See* 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, 635 (2004).

40 *Id.*

41 *Id.* at 634.

42 *Id.*

43 The *Talmud* is the central text of mainstream Judaism, taking the form of a record of rabbinic discussions pertaining to various facets of Judaism, including Jewish law, ethics, philosophy, customs, traditions and history. It is composed of the *Mishnah,* the first written compendium of Judaism's oral law, and the *Gemara*, a discussion of the *Mishnah* and other related writings.

44 *Gittin* is the tractate in the *Gemara* relating to the laws of Jewish divorce.

45 Rabbi Tarfon was a very respected sage who lived during the time of the destruction of the Second Temple, approximately 70 C.E. *See* Nissan Mindel, *Rabbi Tarfon*, CHABAD.ORG, http://

> ments which thou shalt set before them." (Ex. 21:1) this is to say, "before them" and not before gentiles.[46]

Rabbinic interpretation of this passage suggests that, although the secular courts of the U.S. state governments may be just and proper, an obligation to use a Jewish forum to adjudicate disputes still exists.[47] In turn, American governments have allowed, even encouraged, such a forum of dispute resolution.

C. *ADR Serves as a Preferred Method of Dispute Resolution in America*

In recent years, United States federal and state governments have increasingly permitted civil disputes to be resolved in private arbitration forums. The Supreme Court's promotion of the Federal Arbitration Act ("FAA"),[48] which provides judicial facilitation of private dispute resolution through arbitration in lieu of going to court, has led to wholesale endorsement of arbitration from all facets of the legal community.[49] The statute makes arbitrated agreements between parties legally enforceable once "confirmed" by a court of law.[50] The FAA not only reversed judicial hostility to the enforcement of arbitration contracts, but also espoused a strong national public policy in favor of arbitration.[51]

Initially drafted in 1955, the Uniform Arbitration Act ("UAA") has been the basis for arbitration models adopted by

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www.chabad.org/library/article_cdo/aid/112314/jewish/Rabbi-Tarfon.htm (last visited Jan. 12, 2012).

46 *See Talmud Bavli* 88b (Gittin).

47 *See* Fried, *supra* note 39, at 635.

48 *See* 9 U.S.C. §§ 1-16 (1990). 9 U.S.C. §§ 1-16 is popularly known as the Federal Arbitration Act (the "FAA").

49 *See* David K. Kessler, *Why Arbitrate? The Questionable Quest for Efficiency in Hallstreet Street Associates, LLC v. Mattel, Inc.* (2008), *available at* http://works.bepress.com/david_kessler/2 (last visited Sept 18, 2011). *See also* Michael C. Grossman, *Is This Arbitration?: Religious Tribunals, Judicial Review and Due Process*, 107 COLUM. L. REV. 169 (2007) (citing THOMAS E. CARBONNEAU, ALTERNATIVE DISPUTE RESOLUTION: MELTING THE LANCES AND DISMOUNTING THE STEEDS 105 (1989)) ("[C]ontemporary American statutory and decisional law on arbitration are in keeping with the unequivocal . . . acceptance of arbitral adjudication."); Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1, 17 (1997) (arguing that the Supreme Court tells lower courts to "favor arbitration over litigation").

50 *See* 9 U.S.C., *supra* note 48.

51 *See* Moses H. Cone Mem'l Hosp. v. Mercury Constr., 460 U.S. 1, 23 (1983).

many state courts.[52] New York State enacted Chapter 75 of New York's Civil Practice Law and Rules ("C.P.L.R."), finding arbitration a favorable dispute resolution method.[53] New York courts try to interfere "as little as possible with the freedom of consenting parties" to submit disputes to arbitration.[54] Under C.P.L.R. §7501, secular courts must accept and enforce the rules, procedures, and judgments of an arbitration forum.[55] Thus, if parties who take their claims to an arbitration forum comply with the requirements set forth in this statute, the arbitration forum can produce legally binding decisions that can and will be confirmed and enforced by a New York court.[56]

As federal and state arbitration statutes demonstrate, arbitration forums such as the *beth din* benefit American society for several reasons. First, forums for ADR maintain no public record of the proceedings and allow ultimate privacy for the parties involved.[57] Second, instead of waiting many stressful months for a court date, parties enjoy quick processes in ADR, because hearings are scheduled as soon as the parties and the arbitrator are available.[58] Third, parties save money because of limited discovery rules, informal hearing procedures, and the expedited nature of the processes.[59] Fourth, instead of judges who may not be familiar with the particular subject matter of the case at hand, arbitrators with expertise in the dispute's particular subject matter may be selected.[60] Thus, parties can retain some control over their dispute.[61] Finally, as a less adversarial and more informal process than litiga-

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52 U.A.A. §§ 1–33, 7 U.L.A. 9–94 (1955). (The Uniform Arbitration Act (UAA) attempts to make arbitration statutes uniform throughout the states).

53 *See* N.Y. C.P.L.R. 7501 (1983). *See* 166 Mamaroneck Ave. Corp. v. 151 E. Post Rd. Corp., 78 N.Y.2d 88, 93 (1991) ("Arbitration is a favored method of dispute resolution in New York, as this Court has repeatedly held . . . .").

54 *See, e.g.*, Siegel v. Lewis, 40 N.Y.2d 687, 689 (1976) (New York courts interfere "as little as possible with the freedom of consenting parties" to arbitrate disputes).

55 *See* N.Y. C.P.L.R. 7501.

56 *See* Kozlowski v. Seville Syndicate, Inc., 64 Misc.2d 109, 113 (Sup. Ct. N.Y. 1970).

57 *See* Christine L. Newhall, *The CPA in Mediation and Arbitration: Benefits and Opportunities in Mediation and Arbitration*, CPA JOURNAL 2003, http://www.nysscpa.org/cpajournal/2004/304/essencials/p62.htm (last visited Feb. 19, 2012).

58 *Id.*

59 *Id.*

60 *Id.*

61 *See* Caryn Litt Wolfe, *Faith-Based Arbitration: Friend or Foe? An Evaluation of Religious Arbitration Systems and Their Interaction with Secular Courts,* 75 FORDHAM L. REV. 427, 431 (2006).

tion, arbitration increases the likelihood that parties can maintain a business or personal relationship following the dispute.[62]

Notably, while arbitration has many benefits, certain drawbacks exist. Arbitration lacks the protections and quality control of the court system.[63] While some view the lack of public record as beneficial for privacy purposes, others recognize that such a lack inherently does not contribute to changing the law.[64] Additionally, arbitrators are not held accountable by any supervising authority, the rules of evidence are often relaxed, subpoena power is limited, the arbitrators rarely write reasons for their decision, and there is often no uniformity in decisions because arbitrators are not required to rely on precedent.[65] Furthermore, unless otherwise specified in a contract, discovery in arbitration is limited,[66] acquiring preliminary relief is difficult,[67] and there is limited review of awards.[68] However, the benefits of arbitration exceed its drawbacks, because it is often faster, cheaper, and more efficient than the American court system and, thus, it is becoming the preferred method of ADR in America.[69]

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62 *Id.*

63 *Id.* at 432.

64 *Id.*

65 *Id.*

66 *See* STEVEN C. BENNETT, ARBITRATION: ESSENTIAL CONCEPTS 8 (2002) (For example, arbitration will require a limited schedule of discovery, often implemented as a cost-saving and time-saving measure).

67 *See* Jeff A. Ronspies, *Does David Need a New Sling? Small Entities Face a Costly Barrier to Patent Protection*, 4 J. MARSHALL REV. INTELL. PROP. L. 184, 210 (2004) (explaining that although arbitration rules allow it, acquiring preliminary relief presents difficulties because the arbitration clause usually must provide for such relief). *See also* Melissa Devack, *Intellectual Property as an Investment: A Look at How ADR Relates to the European Union's Proposal for Electronic Commerce in the Single Market*, 2 CARDOZO J. CONFLICT RESOL. 57, 74 (2000) (stating even if the arbitrator does grant preliminary relief, the only way to force a party to comply is by going to court).

68 *See* JOHN W. COOLEY, THE ARBITRATOR'S HANDBOOK 6–7 (2005) (indicating a number of factors that the parties should consider in order to determine if arbitration is the proper method).

69 *See* John R. Miller, *Alternate Dispute Resolution (ADR): A Public Procurement Best Practice that has Global Application,* INT'L PUB.PROCUREMENT CONFER. PROCEEDINGS, 21–23, http://www.ippa.ws/IPPC2/PROCEEDINGS/Article_24_Miller.pdf (last visited Jan. 12, 2012).

D. *The* Beth Din *serves as a preferred forum of ADR in America*

Faith-based arbitration, a process in which arbitrators apply religious principles to resolve disputes, is also common today.[70] The *Beth Din* of America[71] serves as one of the many accepted, and even preferred, forums of faith-based ADR in the American legal system and has established separate *battei din* in practically every American Jewish community.[72] Parties may end up before a *beth din* in one of three ways: 1) under a preexisting contractual provision that requires the resolution of a dispute before that *beth din*; 2) after they have mutually agreed to have that *beth din* decide a dispute; or 3) because one party has chosen the use of the *beth din* through the *hazmana* (summons) process.[73] Secular courts are very deferential to religious courts when the parties have preemptively agreed to such a forum.[74]

Many parties prefer using *beth din* arbitration to taking claims to court because *battei din* are less costly and faster, and conduct affairs with confidentiality, competence, fairness and integrity.[75] *Battei din* also present an opportunity to preserve personal relationships while upholding reputations within the Jewish community.[76] As long as a *beth din* complies with the requirements in N.Y. C.P.L.R. 75,[77] it can produce legally binding decisions that can be confirmed and enforced by a New York court.[78] C.P.L.R. § 7501 states: "A written agreement to submit any controversy thereafter arising or any existing controversy to arbitration is enforceable without regard to the justiciable character of the controversy and confers jurisdiction on the courts of the state to enforce

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70 *See* Wolfe, *supra* note 61, at 437, n.97–126 and accompanying text.

71 THE BETH DIN OF AMERICA, http://www.bethdin.org (last visited Feb. 19, 2012). The *Beth Din of America* was founded by the Rabbinical Council of America (RCA) in 1960. In describing their services, the organization states: "The Beth Din of America is a rabbinical court [that] adjudicates commercial, communal and matrimonial conflicts." *Id.*

72 *Id.*

73 *Id.*

74 *See* Fink, *supra* note 12.

75 *Id.*

76 *Id.*

77 *See* N.Y. C.P.L.R. 7501 (1983).

78 *See* Jeffrey Haberman, *Child Custody: Don't Worry, A Bet Din Can Get it Right*, 11 CARDOZO J. CONFLICT RESOL. 613, 616 (May 2010) (citing Stein v. Stein, 707 N.Y.S.2d 754, 759 (N.Y. Sup. Ct. 1999)).

it and to enter judgment on an award."[79] Thus, decisions reached through *beth din* arbitration are enforceable in American courts.

E. *Orthodox Jews Require a* beth din *to resolve disputes in accordance with Jewish law*

The *Beth Din* of America supervises most, if not all, smaller *battei din* in Jewish communities throughout the country.[80] One of its primary purposes is to provide a forum in which "adherents of Jewish law can seek to have their disputes resolved in a manner consistent with the rules of Jewish law."[81] Jewish litigants take their claims to the *beth din* because the system enables them to resolve disputes over contemporary issues, while still observing *halacha* and Jewish customs and traditions that might not be fully understood by United States courts.[82] The rules are designed to "provide for a process of dispute resolution . . . in consonance with the demands of Jewish law that one diligently pursue justice, while also recognizing the values of peace and compromise."[83] The rules are carried out in a manner consistent with the requirements for binding arbitration so that the resolution will be enforceable in civil courts.[84] However, the decisions of such religious courts cannot be binding without the prior agreement of both parties. For example, to make arbitration binding, a contract must include a clause like the following:

> Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration by the *Beth Din* of America, Inc., currently located at 305 Seventh Avenue, New York, New York, in accordance with the Rules and Procedures of the *Beth Din* of America, and judgment upon the award rendered by the *Beth Din* of America may be entered in any court having jurisdiction thereof.[85]

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79 N.Y. C.P.L.R. 7501 (1983).

80 *See Organization and Affiliations*, BETH DIN OF AMERICA, 2010, http://www.bethdin.org/organization-affiliations.asp. (last visited Mar. 5, 2012).

81 *Preamble, Rules and Procedures of the Beth Din of America*, BETH DIN OF AMERICA, http://bethdin.org/docs/PDF2-Rules_and_Procedures.pdf (last visited Mar. 5, 2013).

82 *Id.*

83 *Id.*

84 *Id.*

85 *Sample Arbitration Clause,* BETH DIN OF AMERICA, *available at* http://bethdin.org/docs/PDF5-Sample_Arbitration_Clause.pdf (last visited Mar. 5, 2012).

The *Beth Din* of America, encourages including such clauses in contracts, as doing so ensures that disputes will be adjudicated in a *beth din*, consistent with the requirements of Jewish law.[86]

F. *Though a* beth din *serves as a forum to resolve conflicts within Jewish law, even the* beth din *finds difficulties with resolving Jewish divorce*

The *Beth Din of America* arranges Jewish divorces through the *get* process and "ensures that the *get* procedure is carried out in a sensitive and caring manner, respects the dignity of all participants in the process and adheres to the highest standards of Jewish law to ensure the universal acceptance of *gittin* [divorce laws] administered under its auspices."[87] The *beth din* also takes an active role in resolving cases involving spouses who refuse or are reluctant to deliver or receive a *get*. The *beth din* does everything in its power to avoid such *agunah* cases and specializes in the resolution of such cases.[88] However, even though the *beth din* specializes in *agunah* resolution, it lacks foolproof solutions. Thus, individual states, like New York, have attempted to develop their own solutions. New York courts and legislators have attempted to ameliorate this problem by proposing and enacting various civil strategies in recent years. Such strategies include Domestic Relations Law ("DRL") § 253, which is commonly referred to as the "*get* law"; the recognition of a *get* as a barrier to the termination of marriage; and the permission for Jewish women who suffer from this problem to sue for the tort of intentional infliction of emotional distress. Despite these attempts, *beth din* arbitration methods remain the only methods of solving the problem.

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86 *Services: Contractual Beth Din Arbitration Provisions*, BETH DIN OF AMERICA, http://bethdin.org/cases.asp (last visited Mar. 5, 2012).

87 *Jewish Divorce,* BETH DIN OF AMERICA, *available at* http://www.bethdin.org/jewish-divorce.asp (last visited Mar. 5, 2012)

88 *Id*.

III. Discussion

A. *New York Courts and the Legislative Branch have made various, partially successful attempts at solving the* agunah *problem*

In the United States, marriage has long been viewed as a personal relation, though one in which the state may affix rights, duties, and obligations, including the terms on which the marriage may be terminated.[89] A state may allow a civil divorce, even if one spouse objects on the basis of religious conviction, and regardless of whether a religious divorce can or has been granted.[90] At a civil level, the state of New York has allowed for two possible solutions to the *get* problem. First, New York State has enacted the "*get* law." Second, the state has permitted wives to sue their recalcitrant husbands in civil court for the tort of intentional infliction of emotional distress or for equitable distribution of marital property. Though these two solutions can offer assistance in certain situations, neither presents an ideal approach.

B. *New York Legislative attempts at solving the* agunah *problem are possibly unconstitutional, ineffective, and, at the very least, void against Jewish law*

The New York State legislature has made it clear that it will "not tolerate perversion of the Jewish [*g*]*et* process into an unconscionable instrument of coercion by husbands who have the sole power to cause delivery thereof, a situation putting wives at the mercy of unscrupulous, often sadistic husbands."[91] The *get* problem came to the forefront of legislative attention following the ruling in *Avitzur v. Avitzur*.[92] Susan and Boaz Avitzur had married in a Jewish wedding ceremony in 1966 and had signed a *ketubah*, a

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89 Alan D. Scheinkman, *Editors' Notes to DRL § 253,* Practice, 48 L.Ed.2d 826 (2010) (citing Maynard v. Hill, 125 U.S. 190 (1888)).

90 *Id. See also* Williams v. Williams, 543 P.2d 1401 (Okla. Sup. Ct. 1976), *appeal dismissed, cert. denied*, 426 U.S. 901.

91 *Giahn v. Giahn: New York Supreme Court judge awards woman damages in case where husband had withheld her get*, Jewish Law: Examining Halacha, Jewish Issues and Secular Law, http://www.jlaw.com/Recent/giahn.html (last visited Jan. 12, 2012).

92 *See* 58 N.Y.2d 108 (1983).

Jewish marriage license. Their *ketubah* provided that in the event of marital difficulties, the aggrieved party had the right to compel the recalcitrant spouse to appear before a *beth din*.[93] Though granted a civil divorce in 1978, Mr. Avitzur refused to appear before the *beth din*, and thereby prevented his wife from obtaining a *get* to end their marriage under Jewish law.[94] Mrs. Avitzur sued, seeking declaratory relief and specific performance of the *ketubah*'s requirement. She alleged that because a *ketubah* constitutes a marital contract, her husband breached that contract by refusing to appear before the *beth din*. Mr. Avitzur moved to dismiss, "arguing that resolution of the dispute and any grant of relief to plaintiff would involve the civil court in impermissible consideration of a purely religious matter."[95] In a four-to-three decision, the New York Court of Appeals upheld Mrs. Avitzur's complaint against her husband's motion to dismiss.

Because of the closeness of this decision, both the majority and dissenting opinions are critical. The majority likened the *ketubah* clause to an arbitration agreement, reasoning that enforcement of the clause did not involve religious doctrine but instead neutral principles of law. The majority saw that the suit's goal was to compel the husband to obey a secular contractual obligation.[96] The dissent, however, contended that Mrs. Avitzur's real purpose was to obtain a religious divorce, a matter beyond the powers of the secular courts, whose power in such a matter ended when the civil divorce was entered.[97] Judge Jones, writing for the dissent, concluded that any "judicial intervention in a dispute over the enforcement of a *ketubah* necessarily entails an examination of Jewish law and tradition and thus violates the constitutional prohibition against secular courts' entanglement in religious matters."[98] Additionally, the dissenting opinion asserted that:

> [L]ack of evidence in the record or allegations in the complaint coupled with the authorization of the Beth Din to punish non-

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93 *Id.* at 112. *See also* Lawrence M. Warmflash, *The New York Approach to Enforcing Religious Marriage Contracts: From Avitzur to the Get Statute*, 50 BROOK. L. REV. 229, 232 (1984) (citing 10 ENCYCLOPEDIA JUDAICA 926 (1971)) (noting that the clause in the *ketubah* that recognized the authority of the Beth Din of the Rabbinical Assembly and the Jewish Theological Seminary of America was the result of a resolution the Seminary put into effect in 1954 to alleviate the problem of the *agunah*)).

94 *See Avitzur*, 58 N.Y.2d at 112.

95 *Id.* at 112–13.

96 Warmflash, *supra* note 93, at 236.

97 *Id.*

98 *Id.* at 248.

> compliance indicated that the parties never intended the *ketubah* to be enforceable in civil court. Thus, the state's interest in the marriage ended with the grant of a civil divorce.[99]

Because this court merely enforced a contractual obligation to appear before a *beth din* and did not compel Mr. Avitzur to grant his wife a *get*, the *Avitzur* ruling established the "'neutral principles of law' approach" as a means of enforcing *ketubot*.[100] Thus, the *Avitzur* decision is supported by public policy because it rules on a contractual obligation instead of attempting to solve religious dilemmas.[101] Because of the narrowness of the *Avitzur* decision, the *get* problem has remained largely unresolved.[102]

Following *Avitzur*, in an attempt to rectify the situation, the New York State Legislature amended the DRL and added Section 253, "Removal of barriers to remarriage."[103] Section 253, the so-called "*get* law," seeks to provide a remedy for the "tragically unfair" situation of a Jewish husband's refusal to sign the religious documents needed for a religious divorce.[104] The law allows a judge to decide not to issue a civil divorce if all barriers to marriage are not removed.[105] In signing Section 253 into law, Governor Mario Cuomo accepted the argument that the state has an interest in fostering a public policy that favors remarriage, noting that "absent civil intervention, husbands were using their absolute power to give or deny *gets* as a means of forcing their wives to agree to relinquish claims for alimony and support."[106]

Under this "*get* law," New York State will not enter a final judgment of divorce until a plaintiff "whose marriage was solemnized by a clergyman submits a verified statement that he or she has removed any 'barrier to remarriage' that is 'solely within his or her power' to remove."[107] The statute lists "barrier[s] to remarriage" that include, without limitation, "any religious or conscien-

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99 *Id.* at 249.

100 *Id.*

101 *Id.*

102 Warmflash, *supra* note 93, at 250.

103 N.Y.DOM.REL. LAW § 253 (McKinney 1983).

104 Scheinkman, *supra* note 89 (citing Governor's Memorandum of Approval, 1983 N.Y. Sess. Laws 2818–19 (McKinney's)).

105 *See* Stern, *supra* note 29.

106 *See Avitzur*, 58 N.Y.2d at 112. *See also* Warmflash, *supra* note 93, at 250–1 (citing Governor's Memorandum on Approval of ch. 979, 1983 N.Y. Laws, *reprinted in* 1983 N.Y. Laws A–737 at 738 ("The requirement of a *get* is used by unscrupulous spouses who avail themselves of our civil courts and simultaneously use their denial of a *get* vindictively or as a form of economic coercion.")).

107 Warmflash, *supra* note 93, at 250 (citing N.Y. Dom. Rel. Law § 253(4) (McKinney)).

tious restraint or inhibition . . . that is imposed on a party to a marriage, under the principles held by the clergyman . . . who has solemnized the marriage, by reason of the other party's commission or withholding of any voluntary act . . . ."[108] The statute specifically excludes the removal of barriers to remarriage that can be removed only by appearing before a religious tribunal.[109] The section continues to say that:

> [I]t shall not be deemed a "barrier to remarriage" . . . if the restraint or inhibition cannot be removed by the party's voluntary act . . . [or] 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.[110]

In the absence of the statute's commentary, this statute presents difficulties with interpretation because it is phrased in "ostensibly neutral language."[111] As the commentary suggests, the statute's "avowed purpose is to curb what has been described as the withholding of Jewish religious divorces, despite the entry of civil divorce judgments, by spouses acting out of vindictiveness or applying economic coercion."[112] The statute does not seek to prohibit a religious practice on public policy grounds; instead, it intends to coerce parties to appeal to religious belief by depriving them of civil relief.[113]

Furthermore, the statute's lack of explicit references to Jewish religious divorces or Jewish religious tribunals "was hardly unintentional" because it "represents an obvious encroachment by the civil authorities into religious matters, particularly with respect to perceived unfairness in the religious divorce doctrines of one particular religion."[114] Attempting to skirt some of the difficult constitutional questions raised in the context of the relationship between church and state, the drafters of the statute wrote in neutral lan-

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108 N.Y. Dom. Rel. Law § 253(5) (McKinney 2010).

109 *Id.*

110 N.Y. Dom. Rel. Law § 236B(6) (McKinney 2010).

111 Scheinkman, *supra* note 89.

112 *Id. See also* Governor's Memorandum of Approval, 1983 N.Y. Sess. Laws 2818–19 (McKinney).

113 Scheinkman, *supra* note 89.

114 *Id.*

guage and thereby avoided any express singling out of Jewish practices.[115] Some conclude that this statute interferes with "the free practice of religion and transgresses the separation of church and state."[116] While secular courts may compel a party to perform a contractual obligation imposed by a religious writing (as allowed by the *Avitzur* decision), "it seems doubtful that a civil statute can compel, by mandating the withholding of relief, a party to a civil action to undertake religious proceedings or submit to religious authorities and practices."[117]

Additionally, when read with Section 236B, Section 253 rather than purporting to prohibit a religious practice on public policy grounds, "attempts to coerce parties to seek religious relief on pain of being deprived of civil relief."[118] Governor Cuomo stated that Section 253 was overwhelmingly adopted by the State Legislature because it deals with a tragically unfair condition that is almost universally acknowledged.[119]

However, despite the drafters' attempts at writing in neutral language, Section 253 presents various problems. First, even though the statute intentionally makes no express references to Jewish religious divorces or Jewish religious tribunals, scholars have contended that the entire statute is unconstitutional due to its interference with the free practice of religion and infringement upon the separation of church and state.[120] Second, some background knowledge of Jewish religious divorce is required to fully understand its provisions, and the circular nature of the Jewish divorce problem makes it difficult to understand.

Because the real purpose of Section 253 is to induce or compel Jewish spouses, especially men, to "voluntarily" accede to religious divorces or else be precluded from obtaining a civil divorce decree, it is questionable whether it and Section 236B can withstand a con-

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115 *Id*.

116 *Id.*

117 *Id.*

118 Section 236B is titled "Special controlling provisions; prior actions or proceedings; new actions or proceedings." DRL § 236B(5)(h) refers to the "Disposition of property in certain matrimonial actions," and states, "In any decision made pursuant to this subdivision the court shall, where appropriate, consider the effect of a barrier to remarriage, as defined in subdivision six of section two hundred fifty-three of this article, on the factors enumerated in paragraph d of this subdivision." DRL § 236B(6)(d), which is titled "Post-divorce maintenance awards," explains, "In any decision made pursuant to this subdivision the court shall, where appropriate, consider the effect of a barrier to remarriage, as defined in subdivision six of section two hundred fifty-three of this article, on the factors enumerated in paragraph a of this subdivision."

119 Scheinkman, *supra* note 89.

120 *Id.*

stitutional challenge.[121] While secular courts may possibly compel a party to perform a contractual obligation though imposed in a religious writing,[122] it seems doubtful that a civil statute can compel, by mandating the withholding of relief, a party to a civil action to undertake religious proceedings or submit to religious authorities and practices. The statute may be seen as interfering with the free practice of religion and transgressing on the separation of church and state.[123] However, the law has yet to be overturned as unconstitutional.[124] For example, in *Becher v. Becher*, the court upheld the constitutionality of Section 236.[125] In this action for divorce and ancillary relief, the husband, who refused to deliver a *get* to his wife, appealed a trial court's order denying his motion for a judgment declaring Section 236 (B)(5)(h) and (6)(d) unconstitutional. The Appellate Division found that the statute did not violate the Establishment Clause of the U.S. Constitution and was therefore constitutional.[126]

Constitutionality aside, the *get* law still directly conflicts with the tenets of Jewish law it seeks to correct. Notably, many rabbis consider invalid any Jewish divorces resolved through the statute.[127] In the *Talmud*, the laws of *gittin*[128] hold that the husband must give his wife a *get* of his own free will, without compulsion.[129] Consequently, interference with the husband's free will in the *get* procedure would raise the question of a *get me'usseh*, a coerced *get*. Jewish law does allow coercion as a valid means of effectuating a *get* in order to remove the wife from an intolerable situation, but only under very specific circumstances. First, the *beth din* must deliberate and rule that the husband is in the category of one who must be compelled to give the *get*. After the due deliberation phase, the *beth din* can allow for various methods to

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121 *Id.*

122 *Id.* It is important to note that this occurred in Avitzur, 58 N.Y.2d at 136. In *Avitzur*, the Court held that because a *ketubah*, or marriage certificate, shows itself to be a religious document by its own language, the court could not enforce it, as the *ketubah* was not incorporated into the already granted civil divorce.

123 *See* Scheinkman, *supra* note 89.

124 Various New York cases since the enactment of the statute have held it to be constitutional. *See, e.g.*, Becher v. Becher, 245 A.D.2d 408 (1997).

125 *See Becher*, 245 A.D.2d at 408.

126 *Id.* at 408–09, *quoting Matter of Schulz v. State of New York,* 182 AD.2d 3, 4–5.

127 Rabbi Gedalia Dov Schwartz, *Comments on the New York State "Get Law,"* JEWISH LAW: EXAMINING HALACHA, JEWISH ISSUES AND SECULAR LAW (1997), *available at* http://www.jlaw.com/Articles/get_law1.html.

128 The tractate of *gittin* pertains to the laws of Jewish divorce.

129 *See* Schwartz, *supra* note 127 (citing 14 *Mishnah* I (Yevamot)).

make recalcitrant husbands "want" to give their wives *gets*. Such methods include threats of physical violence against the offending man and community shunning,[130] as well as employing non-Jews to act as agents of the *beth din*. The agents must state to the recalcitrant husband, almost verbatim, "Do what the Jewish court has told you to do!"[131] As discussed in the *Talmud*, these methods of permissible coercion must be initiated and decided by a *beth din* before employing non-Jews to carry out the *get* procedure.[132] If first initiated by non-Jews without the ruling of a *beth din*, the *get* would be considered invalid.[133]

In certain specific cases, *halacha* allows coercion as a legitimate means of "effect[uating] a *get* in order to remove the wife from an intolerable situation."[134] However, in all such situations compulsion is employed only if the *beth din* first deliberated and ruled that the husband falls into the category of one who must be compelled to issue a *get* to his wife.[135] A few different methods of compliance exist; after *beth din* deliberations take place, some rabbis hold that physical force may be used and may even use non-Jews to act as their agents.[136] Again, the person using such force must state, "Do what the Jewish court has told you to do!"[137] However, if such physical force was initiated *before* the ruling of the *beth din* or if the person threatening such force failed to mention adherence to the *beth din*, a *get* thereafter given would be considered invalid.[138] In certain questionable situations, the *beth din* can employ sanctions against the husband, including "excommunication" and ostracism from the community, which are often highly effective.[139]

Some rabbis understand the *get* law not to constitute a coerced *get*.[140] The *get* law does not directly assign secular courts power to direct a husband to issue a *get*; instead it allows civil courts to deny

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130 JEWISH DIVORCE, *available at* http://www.bethdin.org/jewish-divorce.asp.

131 *See* Schwartz, *supra* note 127; *see also Comments on the New York State "Get Law,"* JEWISH LAW: EXAMINING HALACHA, JEWISH ISSUES AND SECULAR LAW, *available at* http://www.jlaw.com/Articles/get_law1.html (citing *Talmud* 88b (*Gittin*) and *Talmud* 48a (*Bava Batra*)).

132 *Id.*; *Talmud* 88b (*Gittin*) and *Talmud* 48a (*Bava Batra)*.

133 *See* Schwartz, *supra* note 127.

134 *Id*. at 27 (citing *Mishnah*, *Ketubot*, Chap. VII, 10; *Shulchan Aruch, Even Haezer*, 144).

135 *Id.*

136 *See* Schwartz, *supra* note 127.

137 Schwartz, *supra* note 127.

138 *Id.*

139 *Id.* at 29.

140 *Id.* at 33 (Harav Hagaon R. Yitzchok Liebes, Head of the *beth Din* of the Igud Harabbonim wrote that the *get* law does not intrude in the problem of a coerced *get*, since the possible

issuing a divorce unless all barriers to remarriage are removed. The statutory language indicates that the removal of a "barrier to remarriage" is done by the voluntary act of the husband, not directly coerced by the court. However, even the rabbis who argue this point agree that the *beth din* must determine the husband's free-will cooperation, and consequently, the *get* law cannot "serve as a vehicle of non-*halachic* issuance of *gittin*."[141] Thus, even if the *get* law serves as a facilitator in certain cases, ultimate authority lies with the *beth din*.

However, since a *get* is invalid if not signed under one's free will, many, if not most, rabbis consider the *get* law invalid.[142] The *get* law attempts to resolve the issue of a husband's refusal to give his wife a *get* by essentially forcing him to do so, out of fear of financial penalties.[143] According to popular rabbinic interpretation, the *get* law does not necessarily solve any of the problems associated with granting Jewish religious divorces in New York State.[144]

When a secular New York civil court compels a husband to issue a *get* out of threat of monetary penalties, even if the law itself is constitutional, the *get* might be still be invalid under Jewish religious law. The "*get* law" should be repealed not only due to questionable constitutionality, but also because it fails to solve the very problems it seeks to alleviate.

C. *Suing for the tort of intentional infliction of emotional distress or for equitable distribution of marital property: potential solutions to* get *refusal*

Another civil solution that certain women have sought to obtain a *get* from recalcitrant husbands is to sue in New York civil courts for the tort of intentional infliction of emotional distress.[145]

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pressure created is not directed toward the actual *get* process, but rather toward the husband's choosing to unburden himself from a financial obligation by giving a *get*).

141 *Id.* at 34. *Gittin* is the plural form of *get*.

142 *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 (citing Irving A. Breitowitz, BETWEEN CIVIL LAW AND RELIGIOUS LAW 5–40 (1993)).

143 Rabbi Gedalia Dov Schwartz, *Comments on the New York State "Get Law,"* THE JOURNAL OF HALACHA (1997), *available at* http://www.jofa.org/pdf/Batch%201/0023.pdf.

144 *Id.*

145 Beverly Horsburgh, *Lifting the Veil of Secrecy: Domestic Violence in the Jewish Community*, 18 HARV. WOMEN'S L.J. 171, 192–203 (1995).

If the wife prevails in such a lawsuit, the result could be huge financial burdens on the recalcitrant husband. While the *get* law itself is invalid as against Jewish law because its primary purpose is to coerce a husband to give a *get* to his wife, suing for this tort is not on its face coercive, and thus presents a possible solution to the *get* problem. Tort law allows lawyers to rearticulate and reframe the problem of Jewish women suffering from *get* refusal in a manner that allows for the "legitimacy of the familiar" to be "attached to the strange."[146] By shifting the religious belief that only the husband can issue a *get* into a tort violation, a suit for intentional infliction of emotional distress allows "lawyers to define and delineate the problem of Jewish women and divorce; rally consciousness and unite women; demystify an act of power; defrock a religious act; and bring the State in to redress the harms inflicted on its citizens."[147]

In one such case, *Giahn v. Giahn*,[148] the court voided an unconscionable agreement in which Mrs. Giahn gave up almost all of her marital property rights in exchange for a *get* from her husband.[149] Despite their agreement and the fact that Mrs. Giahn had fulfilled her part of the bargain, Mr. Giahn sadistically refused to give his wife a *get* for eight years. The judge held that the "coerced, unconscionable, and overreaching" divorce agreement "exploit[ed] the power differential between the parties." The judge invoked principles of "equity" and the "intentional infliction of emotional distress" to award all the marital property to the wife.[150]

In *Schwartz v. Schwartz,*[151] a case involving equitable distribution of marital property, the court, citing DRL § 236(B)(5)(d)(13), held that "any misuse of a power differential between the parties in relation to a *get* is a 'just and proper' factor for the court to consider in determining equitable distribution of the marital property."[152] The court found that Mr. Schwartz's refusal to deliver a

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146 Rabbi Mark D. Angel, *The Tort of Get Refusal: Why and Why Not?* INSTIT. FOR JEWISH IDEAS AND IDEALS, Nov. 10, 2009, http://www.jewishideas.org/articles/tort-get-refusal-why-tort-and-why-not. "The strange" that Rabbi Angel speaks of is the husband giving his wife a *get*. *Id.*

147 *Id.*

148 *See* 290 A.D.2d 483 (Sup. Ct. N.Y 2002), *available at* http://www/jlaw.com/Recent/giahnhtml.

149 *See* Angel, *supra* note 146 (citing *Giahn*, 290 A.D.2d at 483).

150 *Id*.

151 153 Misc.2d 789 (Sup. Ct. Kings Cty. 1992).

152 *Id*. at 134.

get represented conduct so egregious as to warrant award of all marital assets to his wife.[153]

Suing for the tort of intentional infliction of emotional distress or for equitable distribution of marital property still presents problems to the parties involved. When civil courts invoke the *get* law in making such determinations, it can be seen as coercive. Furthermore, even if the husband loses the lawsuit, he could manage to pay the damages without issuing a *get* to his wife. However, this method does have its benefits. Some recalcitrant husbands give a *get* to their wives for fear of losing all of their assets.[154] Giving a *get* in this manner is seen as a free choice and therefore permitted under Jewish law. Moreover, by constructing the tort of *get*-refusal, lawyers can draw attention to "the conflict of values between religious divorce laws and human rights, and force a dialogue that the rabbinic courts would otherwise avoid."[155] While upholding tradition represents an extremely important aspect of Judaism, forcing a dialogue about Jewish divorce through filing tort cases might lead rabbis to find new solutions to the *get* problem or require stricter enforcement of pre-existing methods for resolution.

IV. PROPOSAL

A. *The best solutions to the* get *problem are to employ the ADR methods of the* beth din

Because the *get* problem involves the Jewish community, it can best be arbitrated by Jewish courts of law. Furthermore, because the separation between Church and State is such an important tenet of American society, laws regarding the Jewish community should be resolved solely by the Jewish community to avoid unnecessary controversy. Though the *Beth Din* of America does important work and its efforts resolve many *agunah* cases, the *agunah* problem is increasing with higher divorce rates.[156] In recent years, various organizations have developed different methods to ameliorate the *get* problem. For example, the Organization for the Resolution of *Agunot* ("ORA") assists divorcing couples resolve

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153 *Id.*

154 *See* Angel, *supra* note 146.

155 *Id*.

156 Stern, *supra* note 29.

contested Jewish divorces in a timely fashion and in accordance with the highest standards of Jewish law.[157] ORA combines facilitation with advocacy, always trying first to resolve amicably the dispute between the parties through *get* mediation and confidential consultations.[158] If that approach does not work, ORA helps facilitate and explain the *beth din* process.[159] If need be, it will apply social and community pressure. For example, ORA organizes rallies to demonstrate community support for the wife and emphasize that Judaism does not tolerate the abuse of *halacha* through the withholding of a *get*.[160] As of June 2012, ORA has resolved over 175 *get* cases.[161] However, while such organizations offer assistance, *beth din* arbitration is still necessary.

B. *The signing of a halachic prenuptial agreement has been the single most effective measure taken by the* beth din *to help solve the* get *problem*

Other methods have been even more effective than those taken by organizations like ORA. Perhaps the most successful measure used for *get* resolution is that of the "*Halachic* Prenuptial Agreement."[162] Developed by Rabbi Mordechai Willig in the 1990s, the *Halachic* Prenuptial Agreement has been accepted by *battei din* worldwide, including by the head of the *Beth Din* of America, Rabbi Gedalia Dov Schwartz.[163] Since its creation, this preemptively binding arbitration agreement has become the preferred method of preventing *iggun* (delayed divorce proceedings) in the observant Jewish community.[164]

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157 *Id.* ORA was founded in 2002 by a group of Yeshiva University undergraduate students moved to take action after hearing about an *agunah* case in Monsey, New York. To date, ORA has resolved over 175 *agunah* cases. The organization is currently working on approximately 70 *agunah* cases in North America and Europe. *Id*.

158 *Id.*

159 *Id.*

160 *Id.*

161 *ORA resolves 160th Get Case,* ORG. FOR THE RESOL. OF AGUNOT, Aug. 10, 2011, *available at* http://www.getora.com/Press/160pressrelease.html.

162 *Explaining the Prenup*, THEPRENUP.COM, *available at* http://www.theprenup.org/rabbinic.html.

163 *Wide Acceptance of the Prenuptial Agreement*, ORG. FOR THE RESOL. OF AGUNOT, *available at* http://bethdin.org/agreement.asp.

164 *The Beth Din of America, the Rabbinical Council of America, and the Orthodox Caucus Announce the Release of a Revised Prenuptial Agreement,* UNION OF ORTHODOX JEWISH CONGREG. OF AMER., June 17, 2003, *available at* http://www.come-and-hear.com/editor/na-ou-prenup/index.html.

This agreement is both legally enforceable and *halachically* recognized. Rabbi Yonah Reiss, director of the *Beth Din* of America, has stated that "[i]n a number of divorce proceedings that have come before our court, when a spouse has produced a signed copy of the Agreement any potential problems in withholding a *Get* . . . have been avoided."[165]

In essence, the *Halachic* Prenuptial Agreement formalizes the husband's obligation under Jewish law to financially support his wife, thus providing an incentive for the timely delivery of a *get* in case the marriage fails and ensuring "that if the tragedy of divorce ever befalls them, the *get* will not become an issue of contention"[166] The *Halachic* Prenuptial Agreement states:

> The parties, who intend to be married in the near future, hereby agree as follows:
>
> I. Should a dispute arise between the parties after they are married, so that they do not live together as husband and wife, they agree to refer their marital dispute to the *Beth Din* of the United States of America, Inc. . . . acting as an arbitration panel, for a binding decision.
>
> II. The decision of the *Beth Din* of America shall be fully enforceable in any court of competent jurisdiction.
>
> III. The parties agree that the *Beth Din* of America has exclusive jurisdiction to decide all issues relating to a *get* (Jewish divorce) as well as any issues arising from this Agreement or the *ketubah* and *tena'im* (Jewish premarital agreements) entered into by the Husband-to-Be and the Wife-to-Be. Each of the parties agrees to appear in person before the *Beth Din* of America at the demand of the other party.[167]

The Agreement essentially provides that "in the unfortunate event of divorce, the [*Beth Din*] will have the proper authority to ensure that the *get* is not used as a bargaining chip."[168] The Agreement states that the decision of the *Beth Din* "shall be made in accordance with Jewish law or *Beth Din* ordered settlement in accordance with the principles of Jewish law . . . except as specifically provided otherwise in the Agreement."[169] It includes sections dis-

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165 *Id*. (quoting Rabbi Yonah Reiss, Dir. of the *Beth Din* of Amer.).

166 Rabbi Shmuel Herzfeld, *Rabbinical "Pre-Nups" Can Save Women Chained to a Jewish Marriage*, http://www.huffingtonpost.com/rabbi-shmuel-herzfeld/a-woman-chained-_b_1144586.html (Dec. 12, 2011).

167 *Binding Arbitration Agreement,* ORG. FOR THE RESOL. OF AGUNOT, http://bethdin.org/docs/PDF6-Standard_Prenuptial_Agreement.pdf.

168 JEWISH DIVORCE AND THE ROLE OF THE PRENUP, http://theprenup.org/explainingtheprenup.html.

169 *See Binding Arbitration Agreement, supra* note 167, at ¶ VI.

cussing financial obligations and parenting disputes if such issues are to arise. If a husband does not comply with the Agreement, the *Beth Din* will enforce the religious support provisions of the Agreement and make him pay his wife $150 per day.[170] Though this might not seem like a great deal of money, it would amount to over $54,000 per year, which can be financially devastating to many people.[171]

Signing the *Halachic* Prenuptial Agreement prior to a marriage is an act of mutual commitment by both parties and demonstrates their opposition to the improper withholding of a *get* following the breakup of a marriage.[172] The parties must:

> [W]aive their right to contest the jurisdiction or procedures of the *Beth Din* of America . . . .The parties agree to abide by the published Rules and Procedures of the *Beth Din* of America . . . which are in effect at the time of the arbitration . . . [and t]he parties agree to appear in person before the *Beth Din* of America at the demand of the other party, and to cooperate with the adjudication of the *Beth Din* of America in every way and manner. In the event of the failure of either party to appear before the *Beth Din* . . . upon reasonable notice, the *Beth Din* . . . may issue its decision despite the defaulting party's failure to appear, and may impose costs and other penalties as legally permitted . . . .[173]

The *Halachic* Prenup affirms that even in the worst of circumstances, the parties will treat each other with respect and comply with the requirements of Jewish matrimonial law.[174]

Today many rabbis will not officiate a marriage unless the couple has signed such an agreement.[175] In 1994, the RCA passed a resolution urging the use of the *Halachic* Prenuptial Agreement, and a 2006 RCA resolution provided that "'no rabbi should officiate at a wedding where a proper prenuptial agreement on *get* has not been executed.'"[176] Since the initiation of the *Halachic* Prenuptial Agreement, the number of *get* cases has decreased yearly in America. The *Beth Din* of America should compel Rabbis officiating at Jewish weddings to force both spouses to sign such an agree-

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170 *See* Stern, *supra* note 29.

171 *See id.*

172 *See Binding Arbitration Agreement, supra* note 167.

173 *Id.* at ¶¶ VI–VII.

174 *See Wide Acceptance of the Prenuptial Agreement*, *supra* note 163.

175 *See* Angel, *supra* note 146.

176 *See Wide Acceptance of the Prenuptial Agreement*, *supra* note 163.

ment prior to getting married. The number of *get* cases may thereby eventually disappear.

The provisions of the *Halachic* Prenuptial Agreement are considered binding under both New York and federal law. Article 75 of the C.P.L.R. grants arbitrators broad authority to grant injunctive relief. C.P.L.R. § 7501 states that "[a] written agreement to submit any controversy thereafter arising or any existing controversy to arbitration is enforceable without regard to the justiciable character of the controversy and confers jurisdiction on the courts of the state to enforce it and to enter judgment on an award."[177] Similarly, the FAA, Title 9, Chapter 1 § 2, "Validity, Irrevocability, and Enforcement of Agreements to Arbitrate," states that:

> [T]o settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.[178]

FAA § 4 states:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court . . . . If the jury finds that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.[179]

The FAA and CPLR agree that any written agreement to arbitrate is binding unless it is unconscionable and the terms of the *Halachic* Prenuptial Agreement are binding.

C. *Granting* battei din *greater authority to issue injunctive relief could further ameliorate the* get *problem*

To assist the *beth din* in such matters, secular courts could increase the authority of the *beth din* to grant injunctive relief. Nothing in the FAA or in C.P.L.R. Article 75 prohibits religious courts from granting injunctive relief. The signing of a *Halachic* Prenup-

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177 NY C.P.L.R. 7501. (L.1962, c. 308. Amended L.1963, c. 532, § 47).

178 9 U.S.C. § 2.

179 9 U.S.C. § 4.

tial Agreement would essentially make granting injunctive relief unnecessary. However, in the absence of such an agreement, the *beth din* should have increased authority to grant injunctive relief.[180] Parties can agree, in advance, to grant arbitrators the power to grant injunctive relief.[181] Injunctive relief is sometimes granted in civil divorce proceedings,[182] and could greatly aid the *beth din* in making judgments. Affirmative injunctions are common in divorce cases especially when relating to minor children and visitation. Previous New York legislative solutions have lacked high success rates, as they have attempted to take a matter of Jewish religious law into their own hands. Though the power to grant injunctions is generally limited to a civil court of law, extending this power to the *battei din* would be incredibly beneficial in the divorce context; such power could allow *battei din* to prevent husbands from refusing to grant a *get*.[183]

V. Conclusion

Jewish divorce presents a unique problem in Jewish law that calls for unique solutions. The *beth din*, and other Jewish community groups, should be given primary authority to determine and implement these solutions. Because the husband must give a *get* voluntarily, methods of coercion are often inappropriate unless the *beth din* has sanctioned them. Thus, attempts at passing civil legislation are often viewed as unacceptable under Jewish law. Suing for the tort of intentional infliction of emotional distress may present another solution, but it still inflicts tremendous burdens and stresses on the wife and is not foolproof.

ADR offers cost-effective, timely, and efficient forums of dispute resolution. Though not infallible, faith-based ADR through the *beth din* often presents the most appropriate means to solving the complicated problems surrounding Jewish divorce. Because of

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180 Injunctive relief essentially is a court order prohibiting a certain activity. *See* Cathy Meyer, *Injunctions, available at* http://divorcesupport.about.com/od/legaltermswordsgj/g/injunction.htm (last visited Feb. 7, 2013).

181 *Id*.

182 *See, e.g.* Comras v. Comras, 195 A.D.2d 358 (1st Dep't 1993) (For example, in *Comras*, the Appellate Division held that the trial court properly granted the wife's cross-motion for injunctive relief to preclude the possibility of her husband placing assets out of his wife's reach while there was an outstanding cash call against her.).

183 *See Injunctive Relief*, Divorce L.J., Sept. 4, 2009, *available at* http://louisvilledivorce.typepad.com/info/injunctive_relief/ (last visited Jan. 12, 2012).

the arbitration work that the *beth din* has engaged in over the past few decades and the efficacy of the *Halachic* Prenuptial Agreement, the *get* issue may not haunt Orthodox Jewish women indefinitely. The issue would be best solved by either preemptively forcing every Jewish couple to sign a *Halachic* Prenuptial Agreement or by having secular courts increase the authority of the *beth din* to grant injunctive relief. If Aharon Friedman and Tamar Epstein had only signed such an agreement before their marriage in 2007, perhaps Ms. Epstein would not have to suffer as she does today.