NOTES

INVOLVED, EMPOWERED AND INSPIRED: HOW MEDIATING HALAKHIC PRENUPTIAL AGREEMENTS HONORS JEWISH AND AMERICAN LAW AND BUILDS HAPPY FAMILIES

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I. INTRODUCTION

The United States of America prides itself in being a destination for individuals from various nations and cultures. While citizenship offers an opportunity to benefit from the laws and protections of the United States, many constituents live under the additional influence of their own legal structures. A most striking example appears in the Jewish community, a community that comprises approximately two percent of the American population and is governed by complicated, and occasionally controversial, legal doctrine.1

The Orthodox Jewish community recognizes the existence of divorce in its midst and has developed its own processes for marital dissolution.2 While religious arbitration tribunals retain ultimate authority over the behaviors of the community, Jewish individuals in diaspora also strive to reconcile Jewish Law with the laws of the nation where their community claims citizenship.3 Accordingly, observant Jewish couples seeking to divorce in New York adhere to two concurrent processes, seeking a civil divorce judgment from

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1 Michael Lipka, How many Jews are there in the United States, PEW RESEARCH CTR. (Oct. 2, 2013), http://www.pewresearch.org/fact-tank/2013/10/02/how-many-jews-are-there-in-the-united-states. This amounts to approximately 5.3 million people.


the state as well as a ceremonially delivered religious bill of divorce from a religious arbitration tribunal. This religious bill of divorce, the *Get*, is an item of great importance, and even greater controversy.

The First Amendment of the U.S. Constitution complicates the interrelationship of American and Jewish legal structures, informing inconsistent approaches to resolving Jewish family disputes. While rabbis attempt to preempt jurisdictional complications with prewritten *halakhic* prenuptial agreements, the lack of customized contribution to the drafting of these neutrally enforceable contracts leaves couples dissatisfied with subsequent results. *Halakhically* conscious mediation offers an alternative approach to the prenuptial agreement drafting process and would resolve this problem.

This Note discusses the pitfalls of existing *halakhic* prenuptial protocols and advances the use of mediation in the prenuptial drafting process. Section II of this Note provides a history of Jewish marital and divorce law, explaining the significance of *halakhic* legal documents and religious arbitration units. Section III examines the unresolved relationship between Jewish and American systems, discusses the advent of American prenuptial agreements, and highlights the shortcomings of existing prenuptial agreements in the Orthodox Jewish community. Section IV proposes that prenuptial mediation best honors *halakha*, American law, and individual interests.

II. BACKGROUND

A. Jewish Marital and Divorce Law

Jewish Law, *halakha*, has evolved over the course of thousands of years. Informed by a religious promise between God and the Jewish people, Jewish communities have embraced this legal paradigm and organized their communities according to its

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4 See id.
HALAKHIC PRENUPTIAL AGREEMENTS

Halakha codified tenets. The Torah, the five Mosaic books of the Old Testament, contains the basic rules of Jewish Law. Oral Law, purportedly conveyed to Moses at Mount Sinai, expands upon the laws of the Torah. Due to the challenges of diaspora and the dispersion of Jews throughout the world, Jewish Oral Law was memorialized via a combination of the Mishnah, rabbinic interpretations of Oral Law, and Gemara. Halakha, in turn, consists of a combination of the writings of the Torah, the Oral Law, and this subsequent commentary. Select members of the Orthodox Jewish community devote their entire lives to studying the intricacies of halakha, but most Orthodox Jews adhere to the interpretations of their communal leaders and rabbis in order to determine how to behave.

In many ways, Jewish Law addresses the same aspects of daily life as American law, guiding the resolution of commercial, business, and property disputes. Over and above that, however, halakha governs minute details of observant Jewish moral life, regulating immodest attire, untruthful speech, and diet. One of the most complex areas of Jewish Law, an area that attracts attention from the secular American community and straddles the domains of traditional observance and legal doctrine, is the subject of marital disputes.

The Torah includes little comment on marital and divorce law. Most Jewish Law regarding these subjects is codified in the Mishnah, Gemara, Babylonian Talmud, and Shulchan Arukh. All these texts agree that marriage is a covenant that can only be dis-

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9 See id.
11 Katz, supra note 6.
12 See Talmud Gittin 88b (discussing the Jewish divorce process); see also Choshen Mishpat 26:1 (restating Moses Maimonides, Sanhedrin 25:7).
13 Katz, supra note 6.
16 The Mishnah detailed how a man can make a woman his wife. The Jewish marriage process involves money, a contract, and sexual intercourse. The gift of a metallic ring satisfies the monetary requirement by providing a gift of substantial worth. The Ketubah, the contract, is signed, and sexual intercourse, after the wedding, seals the covenant. To avert pre-marital rape causing women to be halakhically wed to her rapists, Jewish Law holds that intercourse is a wife’s entitlement. It must be provided at her request, not otherwise coerced. See Fried, supra note 3.
banded by death or divorce.\textsuperscript{17} While a myriad of rituals accompany the ceremonial sealing of this covenant, the contract accompanying the process is of most interest to contemporary legal debate.\textsuperscript{18}

1. The Ketubah and Marriage

During a Jewish marriage ceremony, a groom transfers a \textit{Ketubah}\textsuperscript{19} to his bride.\textsuperscript{20} The \textit{Ketubah} is a standard marriage document signed by the groom and two observant male witnesses that details marital obligations as well as promised monetary payments upon divorce.\textsuperscript{21} Debates arise as to whether a \textit{Ketubah} truly functions as a traditional prenuptial agreement, but the original formulation of a \textit{Ketubah} does seem to advance such an objective.\textsuperscript{22}

While the \textit{Ketubah} resembles a contract in many ways, its formation and impact sport complex religious undertones. The \textit{Ketubah} defines a husband’s marital estate and child support obligations, but its role in a sanctified marriage process gives it spiritual weight.\textsuperscript{23} Although some clauses are reminiscent of a prenuptial agreement, anachronistic wording and allegiance to the Laws of Moses offer spiritually intertwined responsibilities.\textsuperscript{24}

\textsuperscript{17} John Witte & Eliza Ellison, Covenant Marriage in Comparative Perspective (2005).
\textsuperscript{18} Id.
\textsuperscript{21} Id.
\textsuperscript{24} A \textit{Ketubah} includes various financial promises, obligating a husband to care for his wife in exchange for her virginity and childbearing potential. The groom sets aside a certain amount of money in escrow to be paid in case he decides to pursue divorce. In \textit{Talmudic} times, fathers of brides and grooms negotiated this amount of “divorce compensation.” Hoping to deter divorce, a father seeking more security for his daughter would request a higher sum. Towards the conclusion of the \textit{Talmudic} era, however, Rabbi Gershom, an authoritative Talmudic scholar circa the 10th Century, suggested that requiring a wife’s consent to the divorce would discourage divorces more effectively than deterrence via financial penalty. He emphasized the covenantal nature of the agreement rather than the contractual one. Later, in the \textit{Shulchan Arukh}, Rabbi Moshe Isserles expanded upon this suggestion, concluding that financial promises in the \textit{Ketubah} were
The differences between contracts and covenants in a marital setting are not simple for the secular mind to comprehend. In Jewish Law, holiness is said to exist in the marital relationship rather than in the contract that binds the couple to one another.25 While the form of the Ketubah is contractual, the bond that it institutes is covenantal.26 Beyond an agreement to certain behaviors, the covenantal aspect of the Ketubah involves a discussion of spiritual destinies that tie people to one another.27 The dissolution of such a bond becomes more complicated than an evaluation of breached contractual duties.28 Thus, as discussed later, secular courts disagree as to whether they may evaluate a Ketubah with neutral contract principles or whether religious entanglement is unavoidable when dissecting the terms of a Ketubah.29

2. The Get and Divorce

Just as a nuanced contractual process governs Jewish marriage formalities, another contractual ceremony controls Jewish divorces.30 During the latter process, a husband presents his wife with a Get,31 a document drafted by the rabbinical arbitrators of the rabbinical arbitration tribunal, the Beit Din.32 The Get releases a woman from her obligations to her husband and removes barriers to her remarriage.33 The husband must deliver this Get of his own

of negligible significance and that Jewish Law should cease to evaluate divorce allotments according to numbers stipulated in a Ketubah. While Rabbi Karo’s view still described marriage as a contract bringing people closer to God in their fulfillment of a primarily reproductive promise, both Rabbi Karo and Rabbi Isserles stipulated that the Ketubah is not to be evaluated as a contract, but rather, as a covenant. This remains the prevailing view today. See Teshuvot HaRosh 42:1; see also Cyril Mazansky, The Sages of Our Tradition: Interpreters of the Tanakh and Talmud (2013); supra note 12; Broyde, supra note 20.

25 See Mazansky, supra note 24.
26 See id.
27 See id.
28 See Greenberg-Kobrin, supra note 23.
29 Id.
30 See Breitowitz, supra note 5.
31 Id.
32 The Beth Din of America is as an ADR organization that governs the behavior of religious courts. The courts arbitrate commercial, communal, and family disputes, and consist of a rabbinic panel that applies halakha. While halakha prefers that Jews decide disputes amongst themselves, it is sensitive to their dual citizenship and avoids res judicata by equating Beit Din decisions to arbitral awards, which may be evaluated by secular courts. However, the Beit Din remains the only body able to dissolve a Jewish marriage by issuing a Get. See Thomas H. Oehmke & Joan M. Brovins, Arbitration of Faith-Based Disputes—Render Unto Caesar, 133 AM. JUR. TRIALS 379 § 33 (2014).
33 Dinei Gerushin 2:20.
free will and the wife must accept it accordingly.34 Without the Get, a woman remains bound to her husband by the Ketubah’s contractual marital obligations and is unable to remarry within her community, becoming a “chained woman” or an agunah.35

Contemporary media networks across the world have a myriad of visceral reactions to the Jewish divorce process and Get controversy.36 Stereotypes regarding the Get involve images of largely libelous publications paired with violent group assaults in religious communities.37 However, few delve deeply enough to understand the nuances of why a Get, while causing power imbalances, plays an instrumental and non-negotiable role in the Jewish divorce process.

The Get is a bill of divorce that is written by rabbis of a religious arbitration tribunal and uniquely tailored to the individuals that it addresses.38 Get is an Aramaic term, codified by rabbis during the Talmudic era.39 During a Get ceremony, the husband presents this uniquely scribed bill of divorce to the wife in the pres-

34 See Shulchan Aruch Erev He’Ezer 1:134 (stating that husbands must give a Get voluntarily).
35 The term agunah is derived from a word meaning anchor, and describes women literally “anchored” or “chained” to their former husbands. See Judith Romney Wegner, The Status of Women In Jewish and Islamic Marriage and Divorce Law, 5 HARV. WOMEN’S L. REV. 1, 26 (1982); Marc Feldman, Jewish Women and Secular Courts: Helping A Jewish Woman Obtain A Get, 5 BERKLEY WOMEN’S L.J. 139, 139 (1990).
37 See supra note 36 and accompanying text.
39 Breitowitz, supra note 5.
ence of two observant male witnesses. The wife must extend her hands, palms facing upward, and accept the Get. At the conclusion of this process, the religious arbitration tribunal, the Beit Din, produces a religious certificate of divorce. Jewish Law then discourages the divorced individuals from interacting with one another in any capacity, causing problems for those individuals who must realistically continue to co-parent their common children.

While laws surrounding Get delivery have evolved over time, there have always been parameters governing the Jewish divorce process. Prior to the Talmudic era, tractates in the Torah connoted that a husband must write a bill of divorce and present it to his wife only while of sound mind, pay spousal support of some amount, and stay with his wife altogether if he married her knowing she was not a virgin. These Mosaic caveats set a precedent for post-biblical rabbinic rumination and halakhic codification.

Talmudic rabbis expanded upon biblical divorce requirements in numerous ways. While husbands retained their exclusive right to pursue divorce and to deliver a Get, the rabbis decided to give broader discretion to the Beit Din. They expanded the scope of a husband’s financial obligations, and added the requirement that a wife consent to the divorce. The Mishnah went even further than the rabbis who preceded it, noting that while divorce was generally a male right, a wife could request that the Beit Din compel a divorce where the husband was physically repugnant or failed to provide her with necessary food, clothing, physical security, or physical intimacy.

Concerns surrounding the Get process focus on gender imbalances. Only a husband can release his wife from marriage.

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wife cannot deliver a Get to her husband.53 Furthermore, while a man is able to remarry within the community if he decides not to release his wife by delivering a Get—due to a theologically historical loophole that permitted a man to have many wives—a woman does not have that same right.54 Thus, a woman who does not receive a Get remains “chained” to her husband.55 She may not remarry and any child of a subsequent relationship is deemed a bastard, mamzer,56 and shunned in the community.57 This chained woman is called an agunah.58 Arguments that this woman may still remarry in a different religious community fall flat, for an agunah is deprived of the ability to live with integrity within the community that she has chosen and undermines her ability to fulfill the tenets of her faith.59

While some attempts have been made to balance this injustice, such as legal adjustments that enable the Beit Din to compel a husband to deliver a Get, such compelled behavior may be unconscionable under Jewish Law.60 A nonconvertible requirement of the Get process is that the husband and wife complete the process freely and willingly.61 The husband must deliver the Get of his own free will, just as the wife must consent to receiving it.62 When a Beit Din compels a husband to deliver a Get, as when financial threat or communal pressure coerce him to do so, the absence of free will undermines the conscionability of Get delivery and renders the divorce invalid.63 A better solution to the agunot crisis would encourage willing, not compelled, Get delivery.

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53 See id.
54 See id. Historically, bigamy was halakhically permissible, as seen via King Solomon. It is no longer accepted.
55 See id.
57 Traditionally, if a husband cohabitates with another woman without releasing his former wife, that sin is considered less severe, and subsequent children are not mamzerim. Deuteronomy 23:3.
58 Feldman, supra note 35, at 139.
59 Id.
61 See supra note 12.
62 Dick, supra note 60.
63 See supra note 12 (discussing that compulsion is not permitted).
3. The Beit Din

The Beit Din is the religious arbitration tribunal that governs adherents to Jewish Law. Every Orthodox Jewish community is required to establish, or subscribe to, a presiding Beit Din. A permanent Beit Din consists of three rabbis, at least one of whom has a broad halakhic knowledge base. While the Beit Din’s present day jurisdictional significance varies depending on the nature of a dispute, and alternative forms of dispute resolution are permitted within the Jewish legal system, the Beit Din still retains exclusive control over marital dissolution in the Orthodox Jewish community.

III. Discussion

A. The Unresolved Relationship Between Jewish and American Divorce Law

While Jewish Law governs behaviors within the Orthodox Jewish community, adherents to Jewish Law are still citizens of the countries in which they live. In the United States, the intersection of Jewish and American law has caused confusion, inconsistency, and controversy as applied to matrimonial disputes. While each legal construct respects the importance of the other, with

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64 Beit Din translates to “House of Law.” This rabbinic tribunal typically consists of three rabbis, and although it has complete authority under Jewish Law, separation of church and state in the United States has deprived the Beit Din of coercive power and it only functions as an arbitration tribunal. See Breitowitz, supra note 5, at 314.


66 Id.

67 A unique trait of Judaism is that even within its divine texts, judicial systems were deemed important. In the Torah, Moses was encouraged to delegate his authority. While he taught the Jewish people about the laws that God established, it was Jethro who built courts to interpret the laws and to render relevant decisions. According to the Mishnah, a tiered court system was created, incorporating a grand central court, the Sanhedrin, and two tiers of lower courts, Sanhedrin Ketana. Due to a break in the chain of teachings passed from the Mosaic era to judges in diaspora, the rabbis who presided over communal disputes during the Middle Ages were instead dubbed religious judicial arbitrators. See supra note 12; Choshen Mishpat 1:27 (detailing Beit Din procedures).

68 See Baruch & Lokken, supra note 38, at 306; Goldstein, supra note 65; Katz, supra note 6, at 11–40.

American Free Exercise laws protecting the religious autonomy of the Beit Din while the Beit Din echoes most secular rulings, their divorce systems are not reconcilable. Only anticipatory mediation, conducted in the prenuptial planning stages, can honor both systems.

1. US Perspectives on American Courts Deciding Jewish Divorce Issues

A basic overview of Constitutional law reminds us that the Establishment Clause prevents the state from advancing religion, while the Free Exercise Clause prohibits government restrictions on the practice of religious beliefs. The Due Process Clause extends these restrictions to the States by incorporation, and state constitutions parallel this bare minimum or go even further. The right to practice religion freely in our nation receives great protection.

These First Amendment clauses have been taken further to protect the rights of families in danger of excessive state intervention. In Wisconsin v. Yoder, the Supreme Court held that a state’s compulsory education statute violated the free exercise right of Amish parents to educate their children according to their religious beliefs. While subsequent case law allowed states to override some family interests, the Religious Freedom Restoration Act (“RFRA”) governs today’s Constitutional mindset and honors

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70 See Kochen, *supra* note 69.

71 U.S. CONST. amend. I. The United States Supreme Court, in its seminal decision in *Lemon v. Kurtzman*, clarified the Establishment Clause’s attempt to avoid improper entanglement with religion by prohibiting civil courts from resolving “controversies over religious doctrines and practices.” *See* *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (constructing three elements for evaluating whether a state action constituted establishment. “When state action (1) lacks a secular purpose; or (2) has a primary purpose of advancing or inhibiting religions; or (3) constitutes excessive government entanglement with religions, that action is constitutionally prohibited”).

72 U.S. CONST. amend. V, § 1.

73 *See* U.S. CONST. amend. I.


the lens employed by the Yoder court.\textsuperscript{77} Secular courts, in evaluating the role of religious law in family disputes, risk undermining religious values and violating individuals’ First Amendment rights.\textsuperscript{78}

Secular state court judges have primary authority over domestic relations law and avoid deciding the complicated religious conflicts that often arise when families seek dissolution.\textsuperscript{79} In an honorable attempt to exhibit separation of state and religion, they compartmentalize family issues, ruling on items such as child support and asset distribution, but avoiding topics of faith-based child rearing.\textsuperscript{80} Unfortunately, family life is far more fluid.\textsuperscript{81} In many contexts, faith influences finances.\textsuperscript{82} Religious education may require monetary re-distribution.\textsuperscript{83} Stringent observance may influence the logistics of visitation and parenting plans.\textsuperscript{84} Secular judges find themselves in an impossible position, evading entanglement while evaluating the best interests of children who experience the very religious conflicts that judges evade.\textsuperscript{85}

2. The New York Approach

Prior to 1983, New York courts inconsistently decided issues arising from religious marital agreements.\textsuperscript{86} While some believed that neutral contract principles enabled them to enforce religious premarital agreements, others felt that this would entangle the courts in religious interpretation.\textsuperscript{87} Even after a 1983 statute codified some parameters for considering religious matters in civil di-

\textsuperscript{77} Yoder, 406 U.S. at 205.

\textsuperscript{78} See Fried, supra note 3; Jay M. Zitter, Application, Recognition, or Consideration of Jewish Law by Courts in United States, 81 A.L.R. 6th 1 (2013) (discussing the relationship between Jewish Law and United States courts).

\textsuperscript{79} See supra note 78 and accompanying text.


\textsuperscript{81} See supra note 80 and accompanying text.

\textsuperscript{82} See Barbara Yngvesson, Re-Examining Continuing Relations and the Law, WIS. L. REV. 623, 624 (1985); Novak, supra note 22; Blum, supra note 80; Barshay, supra note 80.

\textsuperscript{83} Blum, supra note 80; Barshay, supra note 80.

\textsuperscript{84} See supra note 83 and accompanying text.

\textsuperscript{85} See id.

\textsuperscript{86} See id.

\textsuperscript{87} See id.
orce proceedings, many prior inconsistencies regarding civil courts’ religious interpretation and entanglement remain.88

i. Decisions Preceding the New York Get Statute of 1983

The New York Supreme Court first held that a Ketubah was a civilly enforceable contract in Hurwitz v. Hurwitz, separating the religious clauses from those typically enforceable in a secular contract.89 While standard Ketubah language asserted that the signing parties promised to uphold the laws of Moses and Israel, the court felt that a clause entitling the wife to the parties’ marital residence upon the death of her husband could be evaluated according to neutral contract principles and, being consistent with the parties’ intentions, was enforceable.90

Later, the same court took a more controversial approach in Wener v. Wener, holding that a husband was obligated to pay child support for a mutually adopted child.91 The New York Supreme Court found reason to order child support on two theories.92 First, the court found evidence of the parties’ implied agreement to adopt, obligating the husband to support the adoptive child.93 Second, the court asserted that the couple has to adhere to their mutual assent to a Ketubah, which halakhically obligates heads of households to support all children taken into their households.94 In this second assertion, the court embraced an evaluation of religious doctrine to ground its reasoning.95

Unfortunately, New York’s attempts to honor free exercise were not always successful.96 In Margulies v. Margulies, the court’s seemingly neutral disapproval of holding a man in contempt of court for not issuing a Get was undermined by its willingness to

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88 See Neiman Ginsburg v. Goldburd, 684 N.Y.S.2d 405 (Sup. Ct. 1998) (holding a Beit Din decision about a party’s noncooperation religious and not subject to review); Blum, supra note 80; Barshay, supra note 80.
90 Id.
91 Wener v. Wener, 301 N.Y.S.2d 237 (Sup. Ct. 1969) (stating that, according to Jewish Law, the head of a house is financially responsible for any child he takes in, pushing the boundaries of neutral contract interpretation).
92 Id.
93 Id.
94 Id.
95 Id. The Appellate Division only affirmed the first basis for the lower court’s decision, resisting the religious entanglement of the second approach.
96 See Warmflash, supra note 69.
HALAKHIC PRENUPTIAL AGREEMENTS

impose fines for this noncompliance, still erring on the side of honoring a halakhic requirement that a Get be provided.97 Similarly, the court in Rubin v. Rubin98 allowed a husband to withhold alimony due to his wife’s non-consent to a Get, just as the court in Waxstein v. Waxstein99 compelled a husband to specific performance of Get delivery pursuant to contract promises in their Ketubah. While New York Courts did strive to avoid religious entanglement, they often failed.100

ii. The New York Get Statute and Its Impact

In 1983, the seminal case Avitzur v. Avitzur101 instigated a shift in New York’s approach to civil enforcement of religious legal expectations. In this case, the parties were non-Orthodox, Conservative Jewish individuals who signed a Ketubah containing a clause permitting either party to request Bet Din adjudication of a marital dispute.102 In Avitzur, the husband refused to grant his wife a Get after the civil divorce was obtained.103 Under Jewish

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100 A noteworthy example of the court’s infamous invasions of private parental religious autonomy appears in Schwartzman v. Schwartzman. In Schwartzman, the court obligated two non-Orthodox parties to a halakhic analysis of their family decision-making. See Schwartzman v. Schwartzman, 388 N.Y.S.2d 993 (Sup. Ct. 1976). A Jewish non-custodial father brought suit against his former wife for introducing their children to Catholicism. His ex-wife had converted through a Reform Jewish process prior to their marriage and neither party had subscribed to Orthodox Jewish doctrine at any point. After their divorce, the mother discarded her Jewish identity and remarried within her original Catholic tradition, deciding to introduce the children to the Catholic faith. While the court’s holding that the father did not have a right to impose his children’s Jewish birthright may have been appropriate in result, the reasoning in this opinion was constitutionally problematic. Under a “best interests” analysis, the court could have weighed the benefits of exposing children to diversified religious experiences against the confusion of introducing them to a new religious system, focusing on developmental psychology. Instead, the court evaluated the children’s identities according to halakha, stating that a mother’s religion determines the religion of her children and that, since the mother did not convert according to Orthodox conversion rituals, neither she nor her children were halakhically Jewish at any point. Taking such reasoning further, one can infer that the Ketubah would have been invalid as well, since the couple had not married according to traditional requirements.

101 Avitzur v. Avitzur, 58 N.Y.2d 108 (1983) (concluding that a prenuptial agreement requiring submission to Bet Din jurisdiction for Get issuances is enforceable. The dissent did worry that this decision involved an evaluation of the Jewish Law within the Ketubah, causing first amendment entanglement).
102 Id. Conservative Jews live more progressively than Orthodox Jews, but still subscribe to elements of halakha.
103 Id.
Law, only the man can obtain a Get for his wife.\textsuperscript{104} The New York Court of Appeals held that neutral principles applied.\textsuperscript{105} After scrutinizing the religious agreement under “purely secular terms,” as per the Supreme Court’s decision in \textit{Jones v. Wolf},\textsuperscript{106} the New York Court of Appeals concluded that the \textit{Ketubah} must be enforceable under neutral contract principles in order to protect reasonable contract expectations.\textsuperscript{107} Thus, deference to the \textit{Bet Din} regarding this question was upheld.\textsuperscript{108} The court in \textit{Avitzur} finally instituted a distinct approach to the issue of Get delivery, establishing “neutral contract principles” as the standard of review for civil interpretation of religious marriage contracts.\textsuperscript{109}

Cognizant of the seminal decision in \textit{Avitzur}, the New York State legislature enacted New York Domestic Relations Law §253, commonly known as the \textit{Get} Statute.\textsuperscript{110} This statute requires that divorcing parties who were married in a religious ceremony lift all barriers to remarriage according to whichever process the given religious institution mandates.\textsuperscript{111} To assure compliance, civil courts require that parties provide a signed, sworn statement promising to lift such religious barriers.\textsuperscript{112} A subsequent amendment to the statute further empowered judges to consider the effects of barriers to remarriage when deciding distribution and support awards.\textsuperscript{113}

Despite the advent of the \textit{Get} Statute, civil courts continue to struggle.\textsuperscript{114} While the court in \textit{Gindi v. Gindi}\textsuperscript{115} allowed Get refusal to inform support awards, the court avoided entanglement by deeming a debate between former spouses as to Reform or Conservative Jewish Hebrew School enrollment to be a “merely sectarian dispute,”\textsuperscript{116} and a custodial parent’s right to control religious upbringing despite a visiting parent’s opposition to be in a child’s

\begin{itemize}
\item \textsuperscript{104} See Novak, \textit{supra} note 22.
\item \textsuperscript{105} \textit{Id.}
\item \textsuperscript{106} \textit{Jones v. Wolf}, 443 U.S. 595 (1979) (holding that secular terms should be applied to topics of religious contracts in order to protect contract expectations).
\item \textsuperscript{107} \textit{Avitzur}, 58 N.Y.2d at 108.
\item \textsuperscript{108} \textit{Id.}
\item \textsuperscript{109} \textit{Id.}
\item \textsuperscript{110} N.Y. DOM. REL. LAW § 253 (McKinney 1983) (stating that prior to a the court granting a civil divorce, both parties shall take all steps possible to remove any barriers to remarriage that the other party might encounter).
\item \textsuperscript{111} \textit{Id.}
\item \textsuperscript{112} \textit{Id.}
\item \textsuperscript{113} N.Y. DOM. REL. LAW § 236B (McKinney Supp. 1993).
\item \textsuperscript{114} Blum, \textit{supra} note 80; Barshay, \textit{supra} note 80.
\item \textsuperscript{115} \textit{Gindi v. Gindi}, N.Y. L.J., 7 May 2001 at 31 (Sup. Ct. 2001).
\end{itemize}
best interest. 117 Similarly, while Gindi implied that withholding a Get could inform equitable distribution awards, the court in Schwartz v. Schwartz refused a wife’s attempt to stay economic aspects of her divorce trial pending delivery of a Get. 118 While equity is within the purview of civil courts, resistance to religious entanglement remains. 119 Inevitably, civil courts still rely on the Beit Din to resolve matters of religious law. 120 However, questions regarding enforcement of those Beit Din decisions may still require civil judicial oversight. 121

iii. New York Enforcement of Beit Din Decisions

Article 75 of the Civil Practice Law and Rules of New York State gives arbitrators discretion to apply substantive law or rules of evidence as they see fit. 122 While arbitration plays a significant role in American legal culture, the scope of the Beit Din’s discretionary power regarding family issues is not as clear. 123

New York court decisions in Lieberman v. Lieberman 124 and Stein v. Stein 125 consider that some topics brought before the Beit Din, such as child custody, visitation, and child support, may not be arbitrable issues under New York law. 126 However, while New York standards have guidelines for calculating support and awarding custody after evaluating a child’s best interests, halakha evaluates decisions regarding children quite differently, causing a conflict of laws. 127

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119 See Novak, supra note 22; Greenberg-Kobrin, supra note 23; Bleich, supra note 20; Koc- hen, supra note 69.
120 See supra note 119 and accompanying text.
121 Id.
124 Lieberman v. Lieberman, 566 N.Y.S.2d 490 (Sup. Ct. 1991) (confirming a child support award while deeming a child custody award against public policy).
126 Lieberman, 566 N.Y.S.2d 490.
127 Halakha directs custody awards in one of two ways. First, the Beit Din evaluates which parent has the ‘right’ to the child, prioritizing parental rights over children’s rights. Alternatively, the Beit Din may consider which parent is best capable of “providing” for the child. While the latter sounds like the New York approach, it is not an absolute ground for decision-making. According to Maimonides, a father is presumed to be better able to provide for a child and, for this reason, may be entitled to custody as a matter of law. According to Rabbi Asher,
In matters pertaining to Get enforcement, the reciprocity between civil court and Beit Din adjudication becomes even more complicated. A civil court’s decision to compel the delivery of a Get in furtherance of public policy may be unconscionable under the halakhic requirement that a Get be delivered of a husband’s free will. Furthermore, the New York Get Statute is not reconcilable with a halakhic loophole known as heter, which enables the Beit Din to overlook the statutory requirement. Inconsistent case law leaves Orthodox Jewish couples beholden to the decrees of both the Beit Din and civil courts. Parties cannot rely on finding sanctuary in a singular setting. The struggle to discover a stable and reliable outlet for matrimonial disputes remains.

3. Halakhic Perspectives on Bringing Family Law Disputes to Secular Court

In light of the diaspora and dispersion of Jews throughout the world, late Talmudists and codifiers of Jewish Law acknowledged the need to recognize certain legal decisions of secular nation states. Accordingly, the Mishnah accepts many decisions that

children under the age of six and all girls are better situated with their mothers, while boys over the age of six should be relegated to paternal custody. Many other philosophies exist as well, most of which offer insufficient consideration of children’s best interests as required under New York law. Thus, New York courts retain supervisory discretion over Beit Din decisions on such matters. See Reiss, supra note 123.

128 See Novak, supra note 22; Greenberg-Kobrin, supra note 23, at 359; Bleich, supra note 20.
129 See supra note 128 and accompanying text.
130 Heter is a legal device that enables a man to remarry despite his wife’s refusal to accept a Get. The Beit Din, along with one hundred signing rabbis, must approve. While the man is required to issue the Get in case his wife changes her mind, her acceptance remains unnecessary if she has committed adultery, abandoned her husband, disappeared, lost capacity, or fallen into a coma. While a man must support his wife in those latter instances, a heter enables him to remarry via a historic loophole that permitted polygamy. See Sieger v. Sieger, 747 N.Y.S.2d 102 (N.Y. App. Div. 2002) (holding that heter did not violate the Get statute, since the husband’s willingness to give a Get was sufficient to imply the removal of barriers to remarriage).

133 Id.
134 See Talmud 74a (Bava Metzia); supra note 34; Choshen Mishpat 2:201 (recognizing the importance of binding obligations in the broader societies where Jews choose to live).
2015] HALAKHIC PRENUPTIAL AGREEMENTS 195

HALAKHIC PRENUPTIAL AGREEMENTS

After the fall of Judea to the Romans and the Jewish people entered diaspora, Jewish isolation and autonomy remained a reality for thousands of years. Secular nation states preferred the segregation of Jews, allowing them to create their own judicial bodies and live according to their own codes. This structure enabled Jews to 135. See supra note 134 and accompanying text. 136. See supra note 135 and accompanying text. 137. See Blum, supra note 80. 138. See supra note 137 and accompanying text. 139. Id. 140. Id. 141. Id. 142. See supra note 133 and accompanying text. 143. In Jewish texts, secular courts are seen as "Arbaot Shel Nochrim," referring to corrupt bodies that are unjust towards Jews. Since ADR processes exist outside of the secular court system, they may offer a loophole. 144. GOLDSTEIN, supra note 65. 145. Jewish legal autonomy remained feasible until the integration of Jews as legal citizens during the reign of Napoleon. Upon acquiring citizenship, Jews became beholden to the nation-state's legal governance. Conscious of the challenges of this adjustment, Napoleon convened a Sanhedrin of rabbis to discuss which areas of secular governance were more reconcilable with the religious practices and traditions of the Jewish people.
honor a Talmudic prohibition against the use of non-Jewish courts.\(^{146}\) While this stipulation did not prevent Jews from being defendants before a secular court, it discouraged them from initiating such disputes.\(^{147}\)

The caution against secular courts was not exclusively Talmudic.\(^{148}\) Persecution was a consistent reality, and fear of Anti-Semitism prevented Jews from turning to secular courts.\(^{149}\) Similarly, isolation caused linguistic disconnect.\(^{150}\) Parties could speak to Beit Din arbitrators in Yiddish or Hebrew, averting the danger of losing important nuances in secular court translation.\(^{151}\) The Beit Din offered cultural sensitivity, familiarity, and accessibility.\(^{152}\)

Most importantly, halakha endows the Beit Din with exclusive jurisdiction in divorce proceedings.\(^{153}\) While commercial or business disputes can be resolved in a secular setting without undermining too many halakhic tenets, only a Beit Din can issue a Get, posing a significant obstacle to secular adjudication.\(^{154}\) Not only do historic prohibitions discourage secular litigation, secular courts cannot offer comprehensive decisions or closure.\(^{155}\)

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\(^{146}\) The prohibition stipulates that in any place where Jews find gentile courts, even though their law is the same as the Israelite law, Jews must not resort to them. See R. SHIMON BEN TZEMACH DURAN, 2 Shu”t Tashbetz 290 (1444) (understanding the prohibition against secular courts to have a biblical foundation); R. DAVID IBN ZIMRA, Teshuvot Radvaz 172 (1573) (citing Talmud Sanhedrin 2b; Talmud Sanhedrin 23a; Choshen Mishpat 158; Choshen Mishpat 26:3 (understanding the prohibition against secular courts to have a biblical foundation). But see BARUCH EPSTEIN, SEFER MEKOR BARUCH 32 (2013) (suggesting that the prohibition against the use of secular courts is only founded in rabbinic writings and does not have a biblical foundation, invoking less authority).

\(^{147}\) Since Jewish Law is deemed divinely endowed, the use of alternative legal constructs casts problematic doubt on the authority and supremacy of halakha. The Oral Torah was purportedly passed down from God and should not be supplanted by anything lesser. Similarly, due to a responsibility to live as a light upon the nations, Jews are discouraged from bringing negative attention to members of their own community. These responsibilities informed isolated caution. See id. But see Choshen Mishpat 26:178 (stating that secular litigation is not seen as denial of the authority of Torah).

\(^{148}\) Id.

\(^{149}\) SCHWARZFUCHS, supra note 145.

\(^{150}\) See generally JAMES YAFFE, SO SUE ME! THE STORY OF A COMMUNITY COURT (1972) (discussing the procedures used by the Beth Din in American society).

\(^{151}\) Id.

\(^{152}\) Id.

\(^{153}\) WITTE & ELLISON, supra note 17.

\(^{154}\) Id.

While Jewish use of secular courts has evolved over time, it is still problematic for many communities.\textsuperscript{156} A coerced \textit{Get} is not valid under Jewish Law, nor is it within the purview of secular law due to religious entanglement prohibitions.\textsuperscript{157} American courts may have ultimate authority over custody and visitation matters, but litigating in those settings involves linguistic barriers, implications regarding the inadequacy of Jewish Law, and public disparagement of a fellow Jew.\textsuperscript{158} Neither setting offers a completely comfortable solution.\textsuperscript{159} Only mediation and preventative planning offer holistic recourse.\textsuperscript{160}

B. \textit{The Shortcomings of American and Jewish Prenuptial Agreement Processes}

Prenuptial agreements have been a cornerstone of global family planning for centuries, formalizing the promises between husbands and wives.\textsuperscript{161} A prenuptial agreement is a contract between prospective spouses that becomes effective upon their marriage.\textsuperscript{162} Historically, such contracts have covered various topics, ranging from safeguarding property to clarifying the roles of prospective spouses.\textsuperscript{163} Husbands seeking to preserve their estates negotiated with future fathers-in-law who hoped to assure their daughters’ financial security.\textsuperscript{164} Negotiations were often heated and conten-
tious, not only addressing what would occur in the event of divorce or death, but also setting expectations for the relationship.165

In American society, the prenuptial agreement was deemed damaging until the 1980s.166 Since the 1980s, however, public policy has shifted in favor of prenuptial agreements, acknowledging that it is preferable to have spouses, as close parties to a contract, speak to its terms more broadly.167 Accordingly, many states have reevaluated their policies and subscribed to the Uniform Premarital and Marital Agreements Act,168 or otherwise revised their laws to reflect this approach.169 Additional clauses pertaining to Get delivery and other issues arising under Jewish Law became of paramount interest after 1983.

1. Enforcing Prenuptial Agreements: The Uniform Premarital Agreement Act, New York Domestic Relations Law, and Religious Clauses

In 1983, the National Conference of Commissioners on Uniform State Laws approved the Uniform Premarital Agreement Act (“UPAA”), now adopted by many jurisdictions throughout the United States.170 The UPAA defines a prenuptial agreement as “an agreement between prospective spouses made in contemplation of marriage and to be effective upon marriage,” requiring no consideration for enforceability beyond the act of marrying.171 To be enforceable, the prenuptial agreement must merely accord with

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165 See id.
166 Id.
169 While some clauses remain unenforceable, parties now contract to a variety of marital topics, erring on the side of over-inclusion since unenforceable clauses do not negate the agreement and can only enhance it. See Restatement (Second) of Contracts § 184 (1981) (“(1) If less than all of an agreement is unenforceable . . . a court may nevertheless enforce the rest of the agreement in favor of a party who did not engage in serious misconduct if the performance as to which the agreement is unenforceable is not an essential part of the agreed exchange. (2) A court may treat only part of a term as unenforceable under the rule stated in Subsection (1) if the party who seeks to enforce the term obtained it in good faith and in accordance with reasonable standards of fair dealing”).
170 Uniform Premarital and Marital Agreement Act, supra note 168; see also Margaret F. Brinig, Commentary, Feminism and Child Custody under Chapter Two of the American Law Institute’s Principles of the Law of Family Dissolution, 8 DUKE J. GENDER L. & POL’Y 301, 301 n. 3 (2001) (noting that twenty six states adopted the UPAA).
171 Uniform Premarital and Marital Agreement Act, supra note 168.
neutral contract principles. Most markedly, the UPAA acknowledges the rights of parties to choose the terms of their own marriages, broadly construing which topics they may formalize and strongly favoring enforcement of the agreements. While the UPAA prioritizes property considerations, the scope of its provisions sees little limitation, for all terms except those that are "in violation of public policy of [the given] state" may be included. Therefore, while enforcement is subject to the governing jurisdiction, states under the UPAA accept the presumption that prenuptial agreements are valid, making it harder to undermine premarital intentions.

New York State has not adopted the UPAA. However, New York’s statutory scheme reflects the modern approach to prenuptial agreements in that it trusts parties to contract broadly when forming prenuptial agreements. New York State’s Domestic Relations Law (“DRL”) §236B(3), discussing agreements between parties to a marriage, permits and encourages broad prenuptial contracting. Under the statute, parties may opt out of other statutory schemes, setting aside property that could later be classified as marital property. Parties may even include clauses addressing

172 Prenuptial agreements require mutual assent and good faith to be enforceable, and are unconscionable in the event of involuntary duress or inadequate representation. See C. Katherine Mann, Enforceability of Premarital Agreement Based on Fairness of Terms and Circumstances of Execution, 7 AM. JUR. PROOF OF FACTS 581 (2014); Robert Roy, Enforceability of Premarital Agreements Governing Support or Property Rights Upon Divorce or Separation as Affected by Circumstances Surrounding Execution—Modern Status, 53 A.L.R. 4th 85 (1987).
173 Id.; Brinig, supra note 170.
174 Id.
175 Id.
176 N.Y. DOM. REL. LAW § 236B(3) (McKinney Supp. 1993)
An agreement by the parties, made before or during the marriage . . . may include (1) a contract to make a testamentary provision of any kind, or a waiver of any right to elect against the provisions of a will; (2) provision for the ownership, division or distribution of separate property; (3) provision for the amount and duration of maintenance or other terms and conditions of the marriage relationship, subject to the provisions of section 5-311 of the general obligations law, and provided that such terms were fair and reasonable at the time of the making of the agreement and are not unconscionable at the time of entry of final judgment; and (4) provision for the custody, care, education and maintenance of any child of the parties, subject to section two hundred forty of this article.
177 Id. This is only capped by the requirement that the contract accord with § 244 and child support guidelines.
178 Id.
custody, care, education, and maintenance.\textsuperscript{180} As in the UPAA, a New York prenuptial agreement can provide for any terms that do not violate public policy.\textsuperscript{181}

The multifaceted nature of modern prenuptial agreements gives people pause.\textsuperscript{182} While prenuptial agreements were traditionally limited to a discussion of property rights and responsibilities, contemporary prenuptial agreements have gone further to include a wide array of matters such as how many times a couple plans to have sexual relations, whether there shall be “fling fees”\textsuperscript{183} associated with incidents of adultery, and what domestic or professional roles are anticipated.\textsuperscript{184} Topics such as how many children a couple shall have may involve results that are against public policy,\textsuperscript{185} but judges still consider and evaluate such clauses.\textsuperscript{186}

Unfortunately, clauses that mandate religious behavior remain controversial.\textsuperscript{187} Standard application of contract law and constitutional law suggests that provisions requiring particularized religious upbringing of children are not enforceable.\textsuperscript{188} However, case law demonstrates that such clauses may still be relevant.\textsuperscript{189} While

\begin{itemize}
\item \textsuperscript{180} N.Y. DOM. REL. LAW § 236B(3) (McKinney Supp. 1993).
\item \textsuperscript{181} Id.
\item \textsuperscript{182} Joline F. Sikaitis, \textit{A New Form Of Family Planning? The Enforceability of No-Child Provisions in Prenuptial Agreements}, 54 CATH. U. L. REV. 335 (2004).
\item \textsuperscript{184} See Graham, \textit{supra} note 161.
\item \textsuperscript{185} Sikaitis, \textit{supra} note 182; UPAA § 10(c), “A term in a premarital agreement . . . which defines the rights or duties of the parties regarding custodial responsibility is not binding on the court”.
\item \textsuperscript{187} Id.
\item \textsuperscript{189} Even in the 1930s and 1940s, New York courts deemed marriage to be sufficient consideration for enforcement of prenuptial religious upbringing agreements. See Weinberger v. Van Hessen, 183 N.E. 429 (N.Y. 1932) (ordering a father to comply with support agreement that conditioned his control over the child’s religious upbringing); Shearer v. Shearer, 73 N.Y.S.2d 337 (App. Div. 1947) (holding that children were to be raised according to the father’s faith, as agreed upon in the prenuptial agreement).
\end{itemize}
HALAKHIC PRENUPTIAL AGREEMENTS

2015] 201

courts try to avoid religious issues, religious prenuptial agreements still inform judicial decision-making.190

In recent decades, courts have bypassed religious decision-making by using secular factors such as the best interests of children, the rights of custodial parents to make upbringing determinations, and the reciprocal requirements of conflicting laws to evaluate religious questions.191 While this comprehensive evaluation alleviates certain constitutional concerns, these additional considerations do not lend themselves to strict application of neutral contract principles.192 While courts have concluded that religious provisions cannot be enforced as a matter of law, when judges strive to consider children’s spiritual and psychological consistency, prenuptial agreements offer evidence of marital intent and impact judicial conclusions.193

Those provisions of a prenuptial agreement that might not be enforced as a matter of law still have profound relevance to the terms of a divorce agreement.194 Just as provisions pertaining to marital property are enforced as a matter of contract law, provisions connoting child custody arrangements weigh on the judge’s decision-making, and even religious provisions may be considered.195 The process of drafting the agreement is of utmost importance, informing conscionability, the clarity of the parties’ intent, and the agreement’s future impact.196

2. Jewish Prenuptial Agreements and the Get

In the Orthodox Jewish community, prenuptial agreements routinely require religious consideration.197 While the first contemporary Jewish prenuptial agreement made a 12th Century debut in Sefer Nachalat Shiva,198 in the form of a Tenaim,199 official Jewish prenuptial agreements did not appear in the United States until the 20th Century when introduced by Rabbi Saul Lieberman

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190 See Jocelyn E. Strauber, Note, A Deal is A Deal: Antenuptial Agreements Regarding the Religious Upbringing Agreements Should Be Enforceable, 47 DUKE L.J. 971 (1998); Fields, supra note 186.
191 Blum, supra note 80; Barshay, supra note 80.
192 See id.
193 Id.
195 Fields, supra note 186.
196 Id.
197 See Metzger Weiss, supra note 2.
198 Nachalat Shiva 9:14 (discussing a German custom of drafting a tenaim to determine the legal conditions of marriage, including a clause pertaining to spousal support and Beit Din jurisdiction).
CARDOZO J. OF CONFLICT RESOLUTION [Vol. 17:179

of the Conservative Jewish movement.200 Rabbi Lieberman incorporated an arbitration clause into the Ketubah, authorizing the Beit Din to impose punitive damages for failure to respond to its summons or judgment.201 Similarly, Orthodox Jewish versions of prenuptial agreements began to appear, featuring comprehensive arbitration agreements tied to penalties such as extensive spousal support payments for each day that a Get is not delivered.202 For decades, it was unclear whether a court would uphold these clauses as legally binding.203 The answer arrived in 1983 in the aforementioned case, Avitzur v. Avitzur, which enforced a prenuptial agreement that bound a man to the contractual promise of a Lieberman Ketubah.204 The court demonstrated that even though the Ketubah was a religious agreement, as was the clause that required Beit Din jurisdiction, this prenuptial agreement was still enforceable and eluded unconstitutional religious entanglement.205 The Orthodox Jewish community seized the precedent set by Avitzur as an opportunity to officially craft a halakhically appropriate prenuptial agreement.206 Aspiring to liberate agunot while honoring halakha, Get-related prenuptial agreements became a topic of theological debate. Unfortunately, on both a theological and legal level, the debate continues.207

i. Jewish Prenuptial Agreements Today

Orthodox Jewish rabbis and arbiters of Jewish Law have crafted several form prenuptial agreements that honor halakha.208 Many versions of the halakhic prenuptial agreement exist, with the preeminent version being endorsed by the Rabbinical Council of America (“RCA”), the main body of centrist Orthodox rabbis in

199 The Tenaim is a document signed upon engagement, one year prior to the marriage, binding the parties to the promise to marry, as well as discussing conditions of the marital relationship and expectations upon dissolution.


202 See Metzger Weiss, supra note 2; Shapiro, supra note 200.

203 See supra note 202 and accompanying text.

204 Avitzur, 58 N.Y.2d at 108.

205 Id.


207 See supra note 206 and accompanying text.

208 See id.
the United States. Unfortunately, the Get delivery provision does not stand alone, and its powerful progress is tainted by the painful pitfalls of an accompanying provision discussing Beit Din jurisdiction.

Halakhic prenuptial agreements have the potential to empower women, for both parties are involved in reviewing the terms and signing to them. Unfortunately, the halakhic terms are prewritten with the primary intention of providing the Beit Din with arbitral loopholes to enforce Get delivery, so the opportunity for party ownership over the actual terms is lost as a result. Impressively progressive at the outset, the RCA prenuptial agreement provides that a husband will pay increased spousal support between the time of separation and Get delivery, helping women seek divorce without financial suppression. Tensions arise, however, when this clause is paired with a second provision, an arbitration clause requiring that the couple appear before the Beit Din and suggesting that parties be bound its decisions on a broader array of matters.

The RCA prenuptial agreement offers a few variations on an arbitration clause. Parties can select whether they shall be bound to Beit Din jurisdiction for Get delivery alone, or allow for the Beit Din to resolve issues beyond the Get as well. While this clause seems to be derived from the decision in Avitzur, the offered scopes are problematic. In offering the Beit Din jurisdiction over broader issues pertaining to divorce, the provision suggests allowing the Beit Din to decide matters beyond the Get, such as equitable distribution, maintenance, and child support. Couples that sign the RCA prenuptial agreement, striving to accommodate

\footnotesize{\begin{itemize}
\item[210] See id.
\item[211] See id.
\item[212] See Vogelstein, supra note 206.
\item[213] The obligation ceases if the wife refuses to appear before the Beit Din in order to accept the Get or other Beit Din decisions. Still, it serves as a powerful disincentive for husbands who wish to maliciously withhold a Get. The Rabbinical Council of America, serving Orthodox rabbis in the United States, Canada, Israel and beyond, details this and other rules and, as the spokesperson for the Orthodox community, is the source for the most commonly used halakhic prenuptial agreement. See supra note 209.
\item[214] Id.; Vogelstein, supra note 206.
\item[216] Id.
\end{itemize}}
their partner while embracing the religious covenant that they are about to enter, may select the broader provision without second thought. Unfortunately, a haphazard selection of this expansive provision disempowers women in a significant way. Secular laws protect women, offering legal representation and opportunities for expression, while Beit Din arbitration clauses bind them to a process that offers less recourse. A woman may fall prey to extortion, with the arbitrators letting the husband leverage Get delivery against other elements, such as lowered spousal support awards or waived equitable distribution entitlements. Thus, the clause in the halakhic prenuptial agreement that aspires to emulate the beneficial decision in Avitzur actually limits recourse options for women.

Not only does the halakhic prenuptial agreement present options that fail to safeguard women, it may not be conscionable under Jewish Law. To be valid, halakha requires two elements; the Get must be delivered without coercion, and it must be freely given. While voluntarily signing the agreement addresses the issue of free will by speaking to a spouse’s mens rea, fulfilling Get delivery solely to avoid a breach of contract penalty may still result in an invalid Get.

Carefully crafted form halakhic prenuptial agreements seem like a perfect solution, but mens rea and free will concerns re-

\footnote{217} Metzger Weiss, supra note 2.  
\footnote{218} Id.  
\footnote{219} Id.  
\footnote{220} Greenberg-Kobrin, supra note 23.  
\footnote{221} See supra note 12 (“A Get given under compulsion (exercised) by an Israelite court is valid, but by a heathen court is invalid”); see also Greenberg-Kobrin, supra note 23.  
\footnote{222} Mens rea is a legal phrase used to describe the mental state a person. This concept exists in Jewish Law as well and is called asmachta. See id.  
\footnote{223} To be valid, the husband’s Get delivery must be without the influence of coercion and involve a primary intent of releasing the wife from the marriage. Thus, drafters of the form halakhic prenuptial agreement could not attach financial penalty to non-performance of delivery, as this could be coercive. Instead, they attached the calculation of spousal support, emphasizing the concerns of women unable to remarry and seek new sources of financial support. This mirrors the American rule, noting that spousal support should terminate upon a former spouse’s remarriage. See Greenberg-Kobrin, supra note 23 (explaining the terms of parnasah, halakhic spousal support). But see supra note 12 (discussing when compulsion is permitted, and asserting that it may be permissible for community members to compel Get delivery under the notion that delivery after a man is violently beaten is still a display of free will, for he has the choice to be beaten further); Metzger Weiss, supra note 2 (confirming that Rabbinic scholars disagree on the validity of violent coercion and the negative light it casts on their communities, as well as discussing the Beit Din’s compulsion limitations, since American law enforcement is an arm of the secular court).
main.\textsuperscript{224} Since the parties signing a form halakhic prenuptial agreement do not contribute to its contents, signing such a document may not actually reflect as true an act of free will.\textsuperscript{225} Consequently, enforcing the form halakhic prenuptial agreement may render the Beit Din guilty of duress and invalidate the Get.\textsuperscript{226} Only halakhic prenuptial mediation honors individual autonomy and averts coercive approaches.

IV. PROPOSAL

A. Mediating Halakhic Prenuptial Agreements

American and Jewish legal systems both recognize the importance of offering avenues for Alternative Dispute Resolution (“ADR”); endorsing processes that help parties resolve disputes outside of the court system.\textsuperscript{227} ADR suggests that parties should seek resolution via the process that is most appropriate for achieving their goals.\textsuperscript{228} When a couple is interested in resolving non-violent family disputes\textsuperscript{229} or crafting prenuptial agreements, adversarial battles in courtrooms are inappropriate venues.\textsuperscript{230} Mediation offers the most conducive environment for creative and productive dialogue, empowering parties to form a prenuptial agreement that best reflects their intentions and addresses nuances of financial, religious and family issues alike.\textsuperscript{231}

\textsuperscript{224} Id.

\textsuperscript{225} See Dick, supra note 60; supra note 12 (discussing whether compulsion is and is not permitted).

\textsuperscript{226} Id.


\textsuperscript{228} Id.

\textsuperscript{229} The only instance in which mediation may not work or be appropriate is if there has been physical violence in the home. See Alexandria Zylstra, \textit{Mediation and Domestic Violence: A Practical Screening Method for Mediators and Mediation Program Administrators}, 2001 J. Disp. Resol. 2 (2001); Lisa G. Lerman, \textit{Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women}, 7 Harv. Women’s L.J. 57 (1984).


1. Mediation and Divorce

Mediation is a method of ADR that empowers parties to negotiate agreements with the assistance of a neutral third-party facilitator.\textsuperscript{232} The benefits of mediation have been documented in many articles, surveys, and reports that contrast the mediation process against litigation, which can last many years and cost the parties tens, if not hundreds, of thousands of dollars.\textsuperscript{233} Conversely, mediated divorces are completed in a much shorter timeframe and, while divorce almost always leads to deficit, the mediation process costs nearly five times less than the litigation process.\textsuperscript{234} Mediation is entirely confidential and anything shared in a session cannot be held against parties in the future, leaving the door to litigation open if mediation is not successful.\textsuperscript{235} While litigation and collaborative practice are viable processes for marital dissolution, mediation has become a preferred method for couples to draft divorce agreements.\textsuperscript{236}

In the context of family dispute resolution, a mediator helps couples untangle problems pertaining to their finances and their children.\textsuperscript{237} While agreements must comply with relevant statutes

\textsuperscript{232} In divorce mediation, mediators who are well versed in domestic relations law facilitate negotiations between couples seeking a divorce. Without passing judgment or giving advice, mediators help the couple establish a framework for constructive discussions about issues surrounding parenting and asset distribution. The presence of a mediator helps the parties express their concerns and negotiate for their needs. At the conclusion of mediation, an attorney drafts the terms in an agreement. Parties may consult with their own attorneys prior to signing the enforceable agreement to ensure that it addresses each individual’s concerns fairly, but many find that unnecessary. See David Hoffman, Mediation and the Meaning of Life, 11 Disp. Resol. Mag. 3 (2005).


\textsuperscript{234} See supra note 233 and accompanying text.

\textsuperscript{235} Meroney, Mediation and Arbitration of Separation and Divorce Agreements, 15 WAKE FOREST L. REV. 467, 483–84 (1979).

\textsuperscript{236} Collaborative divorce practice involves a comprehensive team of professionals, including attorneys, mental health professionals, and financial experts. This can also include rabbis. However, involving many professionals is more expensive than mediation. Many Orthodox Jews, who are not of a high socioeconomic disposition, would not be able to pursue this process. See Kelly, supra note 233. But see NANCY CAMERON, COLLABORATIVE PRACTICE: DEEPENING THE DIALOGUE (2004) (discussing the nuances of collaborative practice that suggest there may be a place for more comprehensive divorce negotiation in a collaborative setting).

\textsuperscript{237} See supra note 236 and accompanying text.
and laws, parties can go beyond legal parameters and discuss additional topics of importance to them.\textsuperscript{238} Even where results are identical to those that would be issued in court, parties that collaboratively contribute to the contents of the agreement are more likely to adhere to its terms.\textsuperscript{239} Transparent conversations offer the added advantage of preparing couples for future co-parenting, encouraging detailed and direct communication while negotiating divorce terms.\textsuperscript{240} In the setting of divorce and subsequent co-parenting, this is especially powerful.

*Halakhic* prenuptial agreements should include a mediation clause requiring parties to mediate in the event of divorce. The RCA prenuptial agreement does not. In addition to addressing asset distribution and parenting questions, couples participating in mediation can tackle issues that entangle the First Amendment if raised in court, such as religious upbringing and observance.\textsuperscript{241} Every *halakhic* prenuptial agreement should account for that need. To offer a common example, many couples disagree about whether or not their child should attend a religious day school. At first glance, it may seem that the parent who opposes sending a child to religious day school is primarily concerned with the expense. A mediator can help the couple uncover deeper considerations, addressing the benefits of diversity as well as the dangers of external influences affecting the child’s theological indoctrination. In considering the child’s best interests, a judge may explore questions regarding educational stability, but not actual details of preserving religious identity. To an observant Jew, religious identity may be of primary concern. A mediator can engage with the issue and honor the family’s Judaism.

Furthermore, nuanced religious concerns can have significant impact on eventual outcomes. Where one parent observes most tenets of observing *Shabbat* and does not use electricity or money on Saturdays, that same parent may not go so far as to avoid tearing sheets of toilet paper for personal use, an act that violates a


\textsuperscript{239} ROBERT BARUCH BUSH & JOSEPH P. FOLGER, *The Promise of Mediation* 73 (1994) (noting that a primary purpose of mediation is empowerment and recognition).


\textsuperscript{241} See *supra* note 240 and accompanying text.
prohibition against destroying and creating items on the Sabbath. The other parent may find this desecration of Shabbat to be far more significant and fear a child’s exposure to such prohibited activities. While a judge would scoff at such details or, at best, abstain from becoming involved in the religious question, a mediator could pursue the topic. By discussing the issue of torn toilet paper, the mediator could help the couple understand each other’s concerns regarding the impact of such a gesture on the child’s religious messaging. Delving deeper, such a conversation could unearth other issues surrounding the parents’ trust for one another. While this nuance seems inconsequential, it becomes a cornerstone for resentful arguments that define significant issues such as child custody and visitation and, in turn, inform decisions surrounding child support and asset distribution. By allowing couples to engage in discussions about religious activity, mediation offers financial and emotional stability for couples and their children after divorce, providing a productive space for comprehensive and holistic discussions.242

2. Mediation and Jewish Law: P'Sharah

While religious Jews are not immune to the American instinct to litigate, the Torah actually prohibits Jews from initiating legal action against a fellow Jew in a court other than a Beit Din.243 By pursuing resolution elsewhere, a Jew insinuates that Jewish Law is not sufficient to resolve a problem, incurring a chillul hashem.244 Similarly, a secular decision that is not informed by Jewish legal principles may cause injustice under Jewish Law.245 Despite these halakhic concerns, Jewish citizens of the United States are not unlike other citizens who want their matters to be resolved in the most authoritative and enforceable manner.246 Since law enforcement officers respond to secular court orders, not Beit Din decisions, Orthodox Jews inevitably seek avenues with the most promise of enforced resolution, despite significant religious prohi-

242 Id.
243 See generally GOLDSTEIN, supra note 65; Reiss, supra note 123, at 17.
244 See id; Leviticus 22:32. Chillul Hashem acts bring shame to Jewish law, faith, or community.
245 Id. Some common differences arise in Jewish and American legal remedy structures. Jewish Law does not allow for courts to seize the property of one without means in order to fulfill a court order. In contrast, American law may allow such a remedy. The Jewish legal system would consider such a remedy to be unjust.
246 Id.
bition. Many may not realize is that mediation offers a middle ground.

Mediation is endorsed by halakha. In the Torah, the Book of Exodus introduces the concept of mediation by distinguishing between Moses and Aaron. Among the roles endowed upon Moses, the Exodus notes that Moses was a judge and, as such, was the pursuer of truth tasked with seeking absolute answers to life’s questions. The same chapters of the same book offer contrast in the form of Aaron, Moses’s brother. Just as Moses was a beacon of absolute truth, Aaron was called rodef sholom and extolled as the “pursuer of peace.” Aaron was responsible for resolving communal problems, being best poised to fulfill this role because he was a mediator and not a judge. In the Jewish legal system, while judges are responsible for seeking absolute truth, non-judges are encouraged to mediate in pursuit of compromise.

Following Aaron’s example, Talmudic teachings officially endorsed the concept of p’sharah, an approach to compromise. P’sharah is a process similar to mediation, where a neutral individual can oversee and facilitate a negotiation between parties. This approach is not merely an alternative to Beit Din arbitra-

247 Id.
249 See supra note 248 and accompanying text.
250 Id.
251 Id.
252 Id. Rodef Sholom is translated to mean pursuer of peace.
254 See id.
255 See id.
257 In the Shulchan Arukh, it is also written that agreements binding parties to a decision, kinyan, may be signed after negotiations have taken place. Parties to a mediation similarly sign agreements at the conclusion of a mediation process. See supra note 34 (suggesting that judges should refrain from deciding cases according to strict law).
Jewish texts suggest that mediating disputes outside of court is preferable, since doing so is more supportive of parties’ peace of mind and strength of spirit. Thus, men, as well as women, would welcome this process option as one that honors the intentions of their sacred texts.

Finally, the cultural benefits to seeking recourse before a Beit Din are available in mediation. While American court proceedings are conducted in English where much can be lost in translation, mediations can be conducted in Yiddish and Hebrew by bilingual mediators. Since gender biases melt away when neutral mediators facilitate, mediation also circumvents the pitfalls of appearing before a Beit Din while retaining the benefits.

3. Prenuptial Mediation and Halakhic Prenuptial Agreements

In addition to suggesting that all halakhic agreements include mediation clauses that mandate mediation, I propose that the mediation process and all its benefits be applied to the formation of halakhic prenuptial agreements. The adversarial framework of attorney-negotiated prenuptial agreements counter-intuitively ignores the presence of a couple that is in love and collaboratively inclined. Happy, prospective spouses have the capacity to build agreements together. Mediating such agreements in the shadow of both American and Jewish Law can avert strife during the marriage, let alone in the event of its dissolution.

Just as mediation has become a preferred process for resolving disputes, it has also prevented disputes from occurring in the first place. In personal and business contexts alike, preventative me-

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259 The Shulchan Arukh suggests that parties should be availed of the p’sharah option before proceeding with a religious court process, going further than New York State law by supporting mandated divorce mediation referrals. See supra note 34; Talmud Sanhedrin 6a-7a; Talmud Bava Kama 100a; Exodus 21:1.
260 Id.
261 Mediators can work to elicit input from both parties, rectifying any dynamic imbalances that exist. See id.
262 Donna Beck Weaver, The Collaborative Law Process for Prenuptial Agreements, 4 PEPP. DISP. RESOL. L.J. 337, at 339 (2004) (noting that the traditional process, consisting of unilaterally drafted proposals and counter proposals by attorney adversaries, creates a belligerent framework for what should be a positive process).
263 Id.
264 Preventative Mediation, supra note 241.
diation is a healthy approach to contract formation, establishing relationships and expectations in a warm and neutral environment.\footnote{266 Id.} While prenuptial agreements are often crafted in contemplation of divorce, they can be a powerful device for exploring and memorializing party expectations for the marriage itself.\footnote{267 Lurvey, supra note 161.} In a society that wishes to avert increasing divorce rates, prenuptial mediation becomes the perfect preventative process.\footnote{268 Preventative Mediation, supra note 240.}

Prenuptial mediation also teaches beneficial marital communication skills.\footnote{269 See generally Bush & Folger, supra note 239.} Traditional approaches to prenuptial agreement formation, involving representation-oriented attorneys experienced in adversarial lawyering, cause unnecessary tension and put happy new families at risk.\footnote{270 Preventative Mediation, supra note 240.} Instead of preempting and averting issues of possible tension via open discussion, this approach encourages prospective couples to hide behind their lawyers and delay confrontation.\footnote{271 Kraut, supra note 233; Yngvesson, supra note 82, at 624 (1985); Mosten, supra note 238.} For individuals hoping to build a life together, this tactic is shortsighted.\footnote{272 See supra note 271 and accompanying text.} In helping prospective spouses craft their agreement, not only does a mediator offer substantive guidance, but she encourages communicative transparency and enhances the likelihood of marital bliss.\footnote{273 See id.}

While not conclusive or controlling, American law informs how mediators navigate negotiations between parties.\footnote{274 See Bush & Folger, supra note 239.} Similarly, mediators who are knowledgeable in halakha can mediate in the shadow of Jewish Law.\footnote{275 See supra note 273.} Individuals who live with the blended identities of being observant Jewish Americans want to honor both legal constructs, and this is only possible in mediation.\footnote{276 See id.} In forming their own halakhic prenuptial agreement, prospective couples can address their plans regarding finances, children, and divorce with both American and Jewish Law in mind.\footnote{277 See id.} Most importantly, mediated prenuptial agreements retain halakhic integrity without implicating the same coercion problems as the RCA prenuptial agreement.\footnote{278 See id.}
Prewritten halakhic prenuptial agreements attempt to protect Orthodox Jewish women from becoming agunot upon the dissolution of their marriage.\(^{279}\) However, they overlook the historical origins of the agunot crisis, where the Get delivery system requirements served to preserve marriages.\(^{280}\) Halakhic prenuptial mediation offers a new process for advancing this ancient objective. Studies show that addressing topics of tension while a couple is still in love may avert potential issues that destroy the marriage itself.\(^{281}\) When merely signing a form agreement with clauses pertaining to Get delivery and Beit Din jurisdiction alone, the opportunity for a more thorough discussion about preventing marital dissolution in the first place is neglected.\(^{282}\) Parties have no personal influence over the contents of form agreements and no opportunity to decide whether they may wish to include clauses accounting for the many nuanced issues that arise throughout the course of a marriage, such as religious education and observance expectations.\(^{283}\) The form halakhic prenuptial agreement becomes an agreement in contemplation of divorce, not one in contemplation of marriage. Prenuptial mediation results in a significantly different document.

Even if the Jewish divorce itself were the only element to consider in drafting a halakhic prenuptial agreement, parties deserve an opportunity to decide whether they wish to provide for specific aspects surrounding the Jewish divorce.\(^{284}\) Couples can consider narrowing the scope of the Beit Din’s jurisdiction to resolving only the Get issue, while adding a mediation clause to determine the process for subsequent dispute resolution. They can also consider atmospheric circumstances, allowing for a less traumatizing Get delivery experience.\(^{285}\) While halakhic divorce requires Get delivery and the Beit Din remains the only body that can issue a Get, the mediation process can help alleviate negative associations regarding the Get ceremony.\(^{286}\) Thoughtful terms might mitigate the

\(^{279}\) See Metzger Weiss, supra note 2.

\(^{280}\) Id.


\(^{282}\) Nuanced word choice is not integral to contract negotiation under Jewish Law. Texts note that where conditions appear in a contract, the intention supersedes language. However, this is difficult for secular courts to enforce. Unambiguous language is easier to enforce. Form language is insufficient and problematic. See supra note 29.

\(^{283}\) Id.

\(^{284}\) Id.

\(^{285}\) Id.

\(^{286}\) See Breitowitz, supra note 5, at 312; Bush & Folger, supra note 239.
power imbalances of this process. For example, parties could consider selecting which rabbis are present at the ceremony, offering the woman a chance to take ownership over some aspects of the Get delivery process by involving individuals who give her comfort. Parties could negotiate increased maintenance calculations, honoring the creative incentives of the RCA while involving both parties in negotiating the actual obligations, consequences, and emotional connotations of divorce. With the security of a mediation clause, a woman need not submit to a panel of rabbis with authority over a broad range of post-marital issues, and can instead limit the role of the Beit Din to Get issuance alone. Mediating halakhic prenuptial agreements helps couples address concerns about the psychological integrity of a potential agunah during the Get delivery process and lets parties parse out the details of what truly makes them comfortable.

During halakhic prenuptial mediation, an Orthodox Jewish woman can express her concerns about the Get process and contribute to planning the circumstances surrounding the ceremony. She can retain her beliefs while being heard by the man she is about to marry and the contract she is about to sign. During halakhic prenuptial mediation, a man can honor his community’s prohibition against the use of secular courts by averting litigation via anticipatory contracting. After discussing halakhic prenuptial terms during mediation, both parties understand the emotions and intentions behind any subsequent traditional gestures, preserving both spiritual and human integrity in a way that form halakhic prenuptial agreements cannot.

287 See Bush & Folger, supra note 239.
288 Minchat Shlomo 3:103 (noting that where agunot are at stake, a woman’s selection of a Beit Din is binding).
289 Id.
290 A mediation clause in a prenuptial agreement commits parties to returning to mediation to negotiate their divorce agreement. In doing so, couples can avoid submitting to the overbroad jurisdictional scope bestowed upon the Beit Din, relegating only Get delivery while averting halakhically prohibited filings in the secular court system. Given that p’sharah prefers mediation, and that divorce mediation saves time and money for both parties, a mediation clause fulfills both personal and religious preferences. See supra note 260.
291 See id; Bush & Folger, supra note 239 (highlighting the power of empowerment and recognition).
292 Id.
293 See id.
294 See id.
V. Conclusion

Mediation, in offering couples an alternative method to arrive at a divorce agreement, is a powerful tool that enables parties to take ownership over their decisions, gain closure, and move forward as empowered individuals and parents. For Jewish couples, divorce mediation has been a successful tool for facilitating nuanced conversations on topics not addressed in the courtroom, such as questions regarding child rearing, religious observance, and Jewish education. However, the moment that couples seek to dissolve their marriages should not be the first time that couples find themselves at a mediator’s table.

Halakhic prenuptial mediation simultaneously navigates the parameters of Jewish and American law while averting overbroad submission to biased judicial powers. Since Jewish Law informs Jewish questions just as civil law informs child support considerations, a mediator well versed in both civil and religious family law can give parties ownership over their dual legal allegiances as they create their halakhic prenuptial agreements. The mediation of halakhic prenuptial agreements allows prospective spouses to embark on a marital journey that honors their comprehensive identities as Jews, as American citizens, as members of a family unit, and as individuals. By holistically addressing topics of Jewish observance and American logistics, mediated halakhic prenuptial agreements build happier families.