Jewish Women and Secular Courts: Helping a Jewish Woman Obtain a Get

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INTRODUCTION

Divorce laws are designed to enable husbands and wives to terminate failed marriages and to pursue other relationships in the future. For many observant Jewish women, however, the easy availability of civil divorce has exacerbated a longstanding problem. Under Jewish law, a couple can only be divorced if the husband delivers a bill of divorce, called a get, to his wife. A woman whose husband leaves her and refuses to give her a get is known as an agunah (in plural agunot), which literally means “bound woman.” According to Jewish law, she remains married to her husband and cannot remarry. If an agunah remarries or has sexual relations with another man, Jewish law considers any children she bears from such a relationship to be mamzerim, which translates roughly as bastards. They are forbidden to marry any Jew except another mamzer or a convert, and their children are also mamzerim. Thus, this social ostracism is hereditary.

Governor Mario Cuomo of New York has called the situation of the agunah “tragically unfair.” Her husband can obtain a civil divorce in state court but refuse to give her a get. A wife who is devoted to Jewish law can never remarry or enter another intimate relationship.†


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2 Id at 435-36. See Deuteronomy, 23:3. Traditionally, if a husband cohabits with another woman, his sin is considered less severe and the children of such a union are not considered mamzerim.


4 Governor’s Memorandum of Approval, 1983 NY Session Laws 2818-19 (McKinney).

5 There are three main branches of American Judaism: Orthodox, Conservative, and Reform.
By one estimate, more than 15,000 Orthodox Jewish women in New York alone are in this state of marital limbo, civilly divorced but unable to obtain a get. This situation gives husbands tremendous power. Some may refuse to give a get out of spite and thus ruin their wives’ chances for successful future marriages. Other husbands may use their leverage to extort concessions from their wives, dangling a get in front of them in exchange for custody of children, favorable property divisions, or maintenance agreements. An observant Jewish woman may face an unfair, unjust, but legal choice: accept an inequitable divorce settlement and impoverish herself economically, or remain an agunah who can never remarry and who will be deemed an adulteress if she tries.

New York has been in the forefront of devising strategies to combat this problem. In the 1983 case Avitzur v Avitzur, the Court of Appeals held that a recalcitrant husband could be forced to appear before a rabbinical court based upon promises he made in the Jewish marriage contract. A year later, New York passed its “get statute” which, in certain situations, requires spouses either to give or to accept a get before a court will enter a final divorce decree. Commentators, though, have both criticized the Avitzur decision and argued that the get law is unconstitutional.

This Article analyzes the Avitzur decision, the get statute, and other possible solutions to the problem of the modern agunah. First, it will describe the pertinent aspects of Jewish divorce law. Then it will review the Avitzur decision and show that, while the decision was correct, its practical implications are limited. Next, the Article will examine the get statute and conclude that while it can withstand First Amendment attack, it raises serious due process concerns. The last section will discuss the relative advantages of a different type of get law, explain how the

The problems discussed herein are relevant only to Orthodox and Conservative Jews, since only those two branches, with some differences, recognize Jewish law as binding. The Reform Movement abolished the requirement of a get in 1869. J. David Bleich, Jewish Divorce: Judicial Misconceptions and Possible Means of Civil Enforcement, 16 Conn L Rev 201, 232 n96 (1984) (“Jewish Divorce”).


7. Id at 101-02. See also Barbara J. Redman, Jewish Divorce: What Can Be Done in Secular Courts to Aid the Jewish Woman, 19 Ga L Rev 389, 392 (1985) (“Aiding the Jewish Woman”). See, for example, note 67.

8. Redman, Aiding the Jewish Woman at 392 (cited in note 7).


Avitzur decision can be more broadly applied, and propose a solution based upon Jewish law that would eliminate the need for secular court involvement with Jewish divorce.

I. THE PROBLEM

A. Jewish Marriage and the Ketubah

Under Jewish law, marriage is an oral contract solemnized by a religious ceremony, rather than a status conferred upon the parties by the state. In the marriage ceremony, known as kiddushin or consecration, the groom presents and the bride accepts an item of monetary value, usually a ring. Two witnesses must be present, and the groom must declare: "You are hereby wedded to me with this ring according to the laws of Moses and Israel."13

Before the ceremony, the bride and groom sign a document known as a ketubah (in plural, ketubot), which is usually written in Aramaic, but may also be accompanied by an English translation. The ketubah does not effectuate the marriage; rather, it is a set of obligations to which husband and wife are mutually beholden. The husband promises to provide his wife with food, clothing, and sexual intercourse. The ketubah also lists the amount of money the husband, or his estate, must pay his wife upon death or divorce. This obligation is guaranteed by the husband's property, so the ketubah, in effect, creates a lien and prior claim on his estate. In return, the husband is entitled to use the property his wife brings into the marriage, to her earnings during marriage, and to be an heir of her estate. While the ketubah is essentially designed to protect the wife in the event of divorce, the wife may by her misconduct forfeit the sums due to her.

The ketubah has remained essentially unchanged in form since the Middle Ages. However, in 1954 the Conservative branch of American Judaism added a clause to the traditional ketubah. In this section, the husband and wife agree to recognize the bet din, the rabbinical court, to counsel them in light of Jewish tradition, and to summon either party at the request of the other "in order to enable the party so requesting to live in accordance with the standards of the Jewish Law of Marriage.

12 Haut, Divorce at 3 (cited in note 6); Moshe Meiselman, Jewish Woman In Jewish Law 96 (Ktav Publishing House, 1978) ("Jewish Woman").
13 Haut, Divorce at 3-4 (cited in note 6).
14 Aramaic is a language similar to Hebrew which uses Hebrew script. It was the Jewish vernacular in the time of the Talmud, circa 500 C.E.
15 Kahan, Jewish Divorce and Secular Courts at 197 (cited in note 11).
16 Id; Haut, Divorce at 9 (cited in note 6).
17 Haut, Divorce at 6 (cited in note 6).
18 Id at 10.
throughout his or her lifetime." Though worded in general terms, the clause is intended to make the couple consult the bet din should they contemplate divorce.

B. Jewish Divorce

A Jewish couple can be divorced within the religion only if the husband writes and delivers, and the wife accepts, a get (in plural, gittin). Just as marriage is a relation created by the parties, divorce can only be accomplished by the parties—with the husband’s role again being dominant. Since only a husband can give a get, a wife cannot write a get to her husband; she is limited to being the recipient of the get. Usually, the get is written by a rabbi at the husband’s direction. The language of the get must follow an exacting formula, and for this reason the text is usually in Aramaic. Two witnesses must sign the get and then witness the husband deliver it to the wife. Proper delivery and acceptance renders the spouses divorced and free to remarry. Neither party need be present for the delivery of the get if he or she chooses to appoint an agent to act in his or her place. In order to appoint an agent, the party must execute a document similar to a power of attorney before the bet din. Customarily, once the wife receives a get she gives it to the bet din, which gives her a document stating that she has been divorced according to law.

It is crucial to note that the divorce does not emanate from a court decree. Technically, no outside aid, other than the presence of two witnesses, is necessary for a divorce to take place. A rabbi or bet din merely ensures that all formalities required for execution of a get are followed. Today, since these rules are quite technical, rabbinical supervision is almost a necessity. Still, it is the husband who must initiate the divorce by delivering the get.

Under Jewish law, mutual consent of the parties suffices for dissolution; no court need assign responsibility or fault. Absent mutual consent, however, divorce can be granted on certain grounds. A husband

19 Id at 64. The Orthodox movement has rejected this innovation for a number of reasons based on its interpretation of Jewish law. Meiselman, Jewish Woman at 109-11 (cited in note 12).
21 Haut, Divorce at 18 (cited in note 6).
22 Elon, Principles of Jewish Law at 421 (cited in note 1).
23 Id at 420.
25 Haut, Divorce at 21 (cited in note 6).
26 Under classical Talmudic law, a husband could divorce his wife for almost any reason and against her will. Haut, Divorce at 18-19 (cited in note 6). An eleventh century rabbinical enactment prohibited the husband from divorcing his wife against her will, except in certain limited circumstances. Id at 55-56. Rabbi Louis Epstein cites as the best safeguard against non-consensual divorce the clause found in the ketubah stating "[t]hat at no time may he or his agent divorce her, except with her consent and through a just (another word for Jewish) court." Louis M. Epstein, The Jewish Marriage Contract 276-77 (Jewish Theological Semi-
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has the right to divorce his wife based on her conduct, such as adultery, or where the wife suffers physical defects unknown to him at the time of marriage. Counted as such defects are disease, the wife's inability to cohabit with the husband, or her inability to bear him children. A wife, too, has grounds for divorce based on the husband's conduct or his physical defects. Thus, if he refuses to have sex with her or has a loathsome disease, she can demand a divorce. However, only the husband can deliver a get, and he must do so of his own free will. A get given under duress not authorized by Jewish law is invalid.²⁷

In light of the problem faced by the agunah, the rabbis of the Talmudic Period formulated the doctrine of "constructive consent."²⁸ This legal fiction permitted a bet din to use force and other means of coercion against the husband until he agreed to give a get. The tactics used could range from community ostracism to corporal punishment.²⁹ Maimonides' rationale for the doctrine is that if the law specifically requires the husband to give a get, the get is not considered to be given under duress since the husband's prior refusal to give it was contrary to law. Since deep down a person really desires to comply with the law, the otherwise coerced get is regarded as given of the husband's free will, and the get is valid.³⁰

A crucial limitation on the doctrine of constructive consent is that only a bet din can apply coercive tactics. Such a court must first determine that valid grounds for a divorce exist. If a civil court forces a husband to give a get, it is invalid as being given under duress, even if otherwise required by Jewish law.³¹ Yet, if a civil court merely compels a husband to obey the order of a bet din which had previously ordered him to give a get, a get so given is generally held to be valid.³² A get issued on the basis of threats from a court is only valid if there has been a finding by a bet din that the husband may be compelled to divorce his wife under Jewish law, and if the secular court does not itself compel the execution of the get, but simply coerces the husband to "do what the Jewish bet din tells you."³³

²⁷ Elon, Principles of Jewish Law at 415-20 (cited in note 1); Haut, Divorce at 19 (cited in note 6).
²⁸ Kahan, Jewish Divorce and Secular Courts at 200-01 (cited in note 11).
²⁹ Id. See also 4 Encyclopaedia Judaica, Bet Din and Judges 719-27 (MacMillan, 1973); Meiselman, Jewish Woman at 101 (cited in note 12).
³⁰ Haut, Divorce at 23-24 (cited in note 6); Elon, Principles of Jewish Law at 419 (cited in note 1).
³¹ Haut, Divorce at 24 (cited in note 6). There is a debate among older rabbinic sources whether the get is void under Biblical law or merely as a result of rabbinic enactment. Maimonides was of the latter view. Moses Maimonides, The Code of Maimonides, Book of Women, Laws of Divorce 2:20 (Yale U Press, 1949) ("Laws of Divorce").
³² Haut, Divorce at 24 (cited in note 6); Meiselman, Jewish Woman at 100 (cited in note 12).
³³ Bleich, Jewish Divorce at 234-35 (cited in note 5).
C. The Agunah Today

Jewish law evolved and developed the concept of constructive consent to help alleviate the plight of the agunah. However, this remedy is based on the power of a bet din to impose sanctions or arouse social pressure. When Jewish communities were self-contained and self-governing, as they were in the time of the Talmud, this solution could be successful. Today in the United States, all Jews live under secular law and a bet din has no civil enforcement powers. The bet din cannot force a man to appear before it, nor can it mete out punishment. State law allows a husband to obtain a civil divorce regardless of his marital status in the eyes of his religion. The liberalization of divorce laws and the advent of no-fault divorce have made it easier for a husband to secure a civil dissolution, thus making a religious wife’s position even more precarious. In the eyes of the state, she and her husband may be divorced and his obligations to her may have ended; yet she cannot remarry within her religion.

While it is Jewish law that creates the problem of the agunah, the intersection of the religious and the secular in our society amplifies it. Consequently, the situation of the agunah has drawn the attention of secular courts and lawmakers. But secular attempts to solve the problem must face two major obstacles. First, the government is constrained by both the Establishment and Free Exercise Clauses of the First Amendment and other constitutional provisions. Second, if civil authorities do help a woman obtain a get, they must do so in such a manner that the get is valid under Jewish law; otherwise, the woman remains an agunah.

II. Judicial Enforcement of the Ketubah: Avitzur v Avitzur

In 1983, the New York Court of Appeals decided the landmark case of Avitzur v Avitzur. Although a New York court had previously ordered a husband to give a get when he agreed to do so in a separation agreement, this was the first time any American court ordered a husband to submit to a bet din based on obligations undertaken in the ketubah.

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34 Kahan, Jewish Divorce and Secular Courts at 201 (cited in note 11).
35 Id. In Israel, rabbinic courts can impose fines and order a man to be placed in jail for refusing to deliver a get, but cannot administer corporal punishment. Usually the available punishments are sufficient, but sometimes husbands have spent years in jail instead of giving gittin. Meiselman, Jewish Woman at 101 (cited in note 12); Haut, Divorce at 85-86 (cited in note 6).
37 Waxstein v Waxstein, 90 Misc 2d 784, 395 NYS2d 877 (Sup Ct Special Term 1976) aff'd 57 AD2d 863, 394 NYS2d 253 (NY App Div 1977) (court orders specific performance of husband's promise in separation agreement to give get); but see Marguiles v Marguiles, 42 AD2d 517, 344 NYS2d 82 (NY App Div 1973) (appellate court reversed trial court's order to husband to secure a get when he promised to do so in open court).
A. The Case

Boaz and Susan Avitzur were married in a “ceremony in accordance with Jewish tradition” in 1966. Prior to the ceremony, they signed both a Hebrew/Aramaic and an English version of the ketubah. Their ketubah followed the traditional form, but also included the clause added by the Conservative Movement. They declared their desire to live in accordance with the Jewish law of marriage, and agreed to recognize the bet din of the Jewish Theological Seminary of America or its representatives as having authority to counsel them in light of Jewish tradition and to “summon either party at the request of the other, in order to enable the party so requesting to live in accordance with the standards of the Jewish law of marriage throughout his or her lifetime.”

Boaz was granted a civil divorce in 1978 on the ground of cruel and inhuman treatment. However, he refused to give Susan a get. Susan sought to summon Boaz before the bet din, but he refused. She then brought suit in the Superior Court alleging that the ketubah constituted a contract which Boaz had breached, and requesting an order of specific performance that he appear before the bet din. Boaz moved to dismiss the complaint on the ground that it impermissibly would involve the court in a “purely religious matter.”

The trial court rejected his motion, holding that Susan merely sought to compel Boaz to perform what he had contracted to do. It held that relief could be granted “without reference to any religious principle,” let alone impermissible judicial entanglement in religion. The court also ruled that issues regarding the translation, meaning and effect of the ketubah raised factual questions necessitating a trial.

The Appellate Division modified the trial court’s decision and granted Boaz’s motion to dismiss. The majority ruled that since the ketubah was entered into as part of a religious ceremony and since, “by its own terms, [it] was executed and witnessed in accordance with Jewish law,” it was a liturgical agreement that was unenforceable in a civil court. Moreover, because the state had already dissolved the marriage, it had no further interest in the parties’ marital status.

The Court of Appeals reversed the Appellate Division in a four-to-three decision. The majority first noted that Susan did not seek to com-

38 Avitzur, 58 NY2d at 111.
39 Id at 112.
40 Id at 112-13.
41 Id at 113.
43 Id at 134.
44 Id. Justice Levine dissented and his reasoning was essentially adopted by the Court of Appeals.
pel Boaz to give her a get. Rather, she sought to enforce his agreement to appear before a bet din for a determination of whether a get was warranted. 46 Therefore, the court analogized the ketubah to an “antenuptial agreement to arbitrate a dispute in accordance with the law and tradition chosen by the parties.” 47 Consequently, the court could use the “neutral principles of law” approach and enforce the agreement on the basis of secular contract law without entangling itself in a religious dispute. 48 The fact that the ketubah was entered into as part of a religious ceremony, and the fact that not all of its provisions may be judicially recognized, did not prevent enforcement of that portion in which the parties agreed to refer their disputes to a particular forum. Since the court did not have to pass on any issue of religious doctrine, it could compel the defendant to perform a secular obligation to which he had contractually bound himself. 49

In dissent, Judge Jones first questioned whether the parties truly intended that any part of the ketubah have the status of a secular contract, since it was entered into as part of a religious ceremony. 50 Second, the dissent argued that even the part of the ketubah that the majority regarded as secular could only be interpreted by inquiry into religious principles. 51 Judge Jones noted that the ketubah stated only that the bet din could summon one party at the request of the other, not that a party could herself summon the other before the bet din. Susan’s construction of the ketubah to imply the latter was based upon religious tradition, and was to be proved by the testimony of a rabbi. A determination based on such testimony would necessarily be religious in nature. 52

B. Analysis

Boaz based his claim on the Establishment Clause of the First Amendment. 53 The Supreme Court has employed a three-prong test to determine whether a law or practice violates the Establishment Clause:

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46 Avitzur, 58 NY2d at 113.
47 Id at 114.
48 Id, citing Jones v Wolf, 443 US 595, 602 (1979) (courts cannot resolve disputes over religious doctrine but can use settled principles of secular law to judge a case).
49 Id at 115.
50 Id at 118.
51 Id at 119.
52 Id at 119-20.
53 The First Amendment of the U.S. Constitution states: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof,” (emphasis added). It is made applicable to the states by the Fourteenth Amendment.

Boaz did not raise any objection under the Free Exercise Clause. He conceded that as a believing and practicing Jew, he had no objections on religious grounds to participating in a religious divorce. Bleich, Jewish Divorce at 245 (cited in note 5).

When a couple signs a Conservative ketubah, as in Avitzur, the argument that they waived their rights to assert a free exercise claim may be stronger, since the agreement to submit to a bet din is more explicit. For discussion of the free exercise problems raised by state involvement with Jewish divorce see text accompanying notes 95-116.
1) the practice must have a clear secular purpose; 2) its primary effect must neither advance nor inhibit religion; and 3) it must not create excessive governmental entanglement with religion.54

Neither the Avitzur majority nor the dissenters explicitly employed the three-part test. Rather, both used a two-step analysis. First, each dealt with the threshold question of whether any secular contract existed.55 Then, each addressed the problem of whether the agreement could be enforced without excessive judicial entanglement with religious doctrinal matters.

1. The Existence of a Contract

Avitzur was decided on a motion to dismiss,56 so the majority was correct in accepting Susan's allegations that the ketubah was a contract and that Boaz had breached it.57 The dissent was premature in disputing this issue at the pleading stage since it was a factual one to be determined at trial.

At trial, though, it could be much more difficult to prove the existence of an enforceable contract. Professor Bleich, an Orthodox rabbi, argues that examination of the ketubah's text reveals that it can only be construed as effecting the parties' intent to enter into a binding obligation.58 He concludes that the ketubah contains nothing that could be described as "merely moral, religious, or platitudinous" in nature, and that it is "no more religious in content—or romantic in tone—than an insurance policy."59 Even if this is true, the fact that one version of the ketubah is in Aramaic, a language most people do not understand, makes it look liturgical. The ketubah contains exclusively boilerplate language and is, therefore, not reflective of the parties' intentions and expectations; it is not a contract negotiated at arm's length. Moreover, the reference to

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54 See Lemon v Kurtzman, 403 US 602, 612-13 (1971). While Lemon has not been overruled, the Supreme Court's analysis of Establishment Clause doctrine is evolving. In Lynch v Donnelly, 465 US 668 (1984), the Supreme Court noted that the Lemon test has merely been "useful" and is not a fixed per se rule. The Court seemingly prefers to consider whether a reasonable observer would interpret the state's activity as an endorsement or disapproval of certain religious beliefs. See Jimmy Swaggart Ministries v Board of Equalization of California, 1990 US LEXIS 485, *28, 58 USLW 4135 (1990); County of Allegheny v ACLU of Pittsburgh, 492 US __, 109 S Ct 3086, 106 L Ed2d 472 (1989).

55 This question, though, implicitly subsumes the first two prongs of the Lemon test. If a valid contract did exist, its enforcement would further the secular purpose of upholding contracts. The primary effect of such court action would not be to advance religion but to enforce the contract. If the ketubah did not contain any secular agreement, then enforcing it would further a religious purpose and have a primarily religious effect.

56 Avitzur, 58 NY2d at 113.

57 "The position of the court in granting a motion to dismiss the complaint as a matter of law is that, even if the view of the evidence most favorable to the plaintiff is taken and even if [she] is given the benefit of all reasonable inferences from the evidence, [she] still has failed to establish a cause of action." Kazansky v Bergman, 4 AD2d 79, 83, 164 NYS2d 93 (1957).

58 Bleich, Jewish Divorce at 244-45 n134 (cited in note 5).

59 Id.
the *bet din*, while intended to deal with the event of divorce, does not explicitly mention dissolution, and so may not put a husband on notice of its intended effect. The *ketubah* is also signed amidst a day of religious ceremonies and celebrations; it could be regarded as just part of the wedding celebration, with the parties not understanding its true significance.\(^6^0\)

A plaintiff's task of proving the existence of a contract, however, would not be impossible. She could rely upon the objective theory of contract formation, according to which the subjective intent of the parties is not relevant if the document manifests the assent of the parties.\(^6^1\) As long as a husband intended to sign the *ketubah*, there is no further requirement that he must have done so with the intention of assenting to an agreement. It is enough that the wife had reason to believe that her husband had that intention.\(^6^2\)

In *Avitzur*, Susan may have been able to establish at trial that the *ketubah* contained a valid contract because she and Boaz had signed an English document.\(^6^3\) However, when a couple signs only an Aramaic document, it could be much more difficult for a plaintiff to prevail. Thus, while the *Avitzur* majority may have been justified in assuming, at the pleading stage, that at least part of the *ketubah* constituted an enforceable contract, another plaintiff in Susan's position may have a difficult time establishing that fact at trial.

2. Entanglement

In the second part of its opinion, the *Avitzur* majority concluded that the arbitration clause of a *ketubah* could be enforced on purely neutral principles of contract law.\(^6^4\) Hence, no judicial entanglement with religion would result. The dissent, however, raised a strong objection on the facts. Susan herself sought to summon Boaz before the *bet din*, rather than having the *bet din* summon him at her request, as provided in

\(^{60}\) See Kahan, *Jewish Divorce and Secular Courts*, at 216-17 (cited in note 11).

\(^{61}\) E. Allen Farnsworth, *Contracts* § 3.7 at 118 (Little, Brown, 1982). One commentator has suggested that the dissent may have decided that, since the *ketubah* was a religious document, the ordinary presumption that the parties to a contract intend it to have legal effect should be reversed. He notes that such a shift in presumptions is found in interspousal agreements. Comment, *The Religion Clauses* at 224 (cited in note 11), citing *Balfour v Balfour*, 2 KB 571 (1919). Yet, as Farnsworth states, "judicial hostility toward contracts between spouses has abated in recent years." § 3.7 at 118. If the parties specifically intended not to be bound, no contract would exist. But lack of intent would have to be shown by all of the circumstances. Thus, it would still be a factual question which should be determined after hearing all the evidence at trial.

\(^{62}\) See Farnsworth, *Contracts* § 3.7 at 118 (cited in note 61); see also Redman, *Aiding the Jewish Woman* at 403 (cited in note 7).

\(^{63}\) Susan, however, abandoned her case before trial after becoming frustrated with the litigation process. To the best of her lawyer's knowledge, she never obtained a *get*. Conversation with Richard Hanft, Susan Avitzur's attorney, Sept 11, 1989.

\(^{64}\) *Avitzur*, 58 NY2d at 114.
the ketubah. In fact, she was prepared to have a rabbi testify that her construction of the ketubah was valid, which could have necessitated judicial investigation of religious questions.\textsuperscript{65} The majority did not address this concern.

This problem, however, is primarily a product of Susan's pleadings. Had she merely asked the bet din to summon Boaz before she brought suit, this difficulty would not have arisen. Moreover, even if the dissent was correct in this particular case, its argument would not undercut the majority's general rationale that a provision in a ketubah to refer a dispute to a bet din could be enforceable if the party seeking enforcement adheres to its terms.\textsuperscript{66} Thus, another plaintiff in Susan's position could more precisely present her case so as to avoid judicial entanglement in doctrinal interpretation of a ketubah.

C. Implications of Avitzur

Avitzur is significant in that it focuses attention on the plight of the agunah,\textsuperscript{67} yet its implications are limited. The Court of Appeals ruling came on a motion to dismiss; it held only that Susan could pursue her case in the lower court. Establishing the existence of a contract at trial could be quite difficult, especially if no English version of the ketubah were signed. It is a factual question that could as easily come out against a wife as in her favor.

Moreover, the court merely allowed a suit to compel Boaz to appear before a bet din. This narrow holding could help wives whose recalcitrant husbands have resisted appearing before a rabbinical tribunal. The bet din's persuasive powers and the solemnity of the moment could induce the husband to yield and give a get.\textsuperscript{68} Still, the Avitzur court did not say if it would enforce a bet din's order to give a get, or permit a civil court to issue such an order itself if the husband remained obstinate.

Arguably, the Avitzur court would sanction civil enforcement of the bet din's decision; otherwise, referral of the matter to arbitration could be pointless.\textsuperscript{69} Civil enforcement would be supported by New York law, which provides that "[a] written agreement to submit any controversy thereafter arising or any existing controversy to arbitration is enforceable

\textsuperscript{65} Id at 119-20.

\textsuperscript{66} Perhaps the majority was unwilling to penalize Susan for this mistake or felt that upon remand she could cure or avoid this error.

\textsuperscript{67} The Avitzurs' divorce illustrates how a husband can use a get as a bargaining chip. In the opinion of Susan's attorney, Boaz withheld the get because Susan had won custody of the children and he wanted custody for himself. Conversation with Richard Hanft, Sept 11, 1989.

\textsuperscript{68} See Kahan, Jewish Divorce and Secular Courts at 214 (cited in note 11). The Avitzur decision does not offend Jewish law because it merely orders the parties to submit to the bet din, not to deliver a get.

\textsuperscript{69} Bleich, Divorce at 246 n146 (cited in note 5).
without regard to the justiciable character of the controversy." Also, a court would not necessarily have to order the husband to give a get pursuant to the bet din's decision. The Avitzurs' ketubah provided that the bet din could impose "such terms of compensation as it may see fit for failure to respond to its summons or to carry out its decision." Hence, a court could merely enforce a monetary award. It is possible, however, that a future court would construe Avitzur as only requiring the husband to appear before a bet din, and would not enforce any rabbinical decision.

Finally, whatever promise Avitzur might present to agunot, it would only help Jewish women who sign a Conservative ketubah. The traditional Orthodox ketubah contains no arbitration clause empowering the parties to summon each other before a bet din. Thus, Orthodox women, or those who do not sign an English ketubah, are unlikely to benefit from the decision.

D. Beyond Avitzur

Two courts have gone further than Avitzur and ordered husbands to give gittin based upon traditional ketubot. In Minkin v Minkin, the New Jersey Superior Court held that the husband, in signing the ketubah, obligated himself to obey the laws of Moses and Israel. Since he alleged adultery on the part of his wife, the court noted, under Jewish law he was obligated to give a get. The court construed the ketubah as a contract that did not violate public policy and ordered the husband to give a get pursuant to its implicit terms. On its own motion, the court heard the testimony of four rabbis who asserted that giving a get is not a religious act. Therefore, it found that ordering the delivery of a get would not have the purpose or effect of advancing religion. Furthermore, since religious marriages have been legislatively sanctioned, ordering the delivery of the get would not involve any significant entanglement

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70 NY Civil Practice Law § 7501 (emphasis added).
71 Avitzur, 58 NY2d at 112 (quoting language from the Avitzurs' ketubah).
72 Enforcement of the monetary award should not invalidate a get given to avoid the penalty since the fine was initially imposed by the bet din.
73 See Bleich, Jewish Divorce at 246 n146 (cited in note 5), citing Board of Education v Cracovia, 36 AD2d 851, 321 NYS2d 496, 549 (1971) (arbitration agreement to seek an advisory opinion upheld).
74 180 NJ Super 260, 434 A2d 665 (Ch Div 1981).
75 180 NJ Super at 261. Recently, another New Jersey court expanded upon Minkin in holding that Minkin was not limited to cases in which the divorce was based on grounds of adultery. Burns v Burns, 223 NJ Super 219, 538 A2d 438 (1987). The court cited various grounds which compel a husband to give a get, and concluded that a bet din could find that a get was required after a no-fault divorce. Under its equity powers, it ordered the husband either to appear before the bet din or to execute a document authorizing the execution of a get.
76 Minkin, 180 NJ Super at 263-64.
77 Id at 264-66.
with religion.\textsuperscript{78}

Similarly, in \textit{Stern v Stern},\textsuperscript{79} the Supreme Court of New York ordered the husband to give a \textit{get} based on its finding that he had obligated himself to do so by signing the \textit{ketubah}. Judge Held noted that Jewish law has both religious and secular components, and that execution of a \textit{get} was a secular requirement.\textsuperscript{80} Hence, he did not address the constitutional issues.

These cases go farther than \textit{Avitzur} in two respects and are therefore of much more dubious validity under both constitutional and Jewish law. First, each court based its holding on the language of an Orthodox \textit{ketubah} which contained no additional clauses about divorce or arbitration. Both held that by promising to abide by the laws of Moses and Israel, a husband obligated himself under Jewish law to give a \textit{get}. Thus, the courts were expressly passing on matters of religious doctrine. Instead of using neutral principles to enforce an arbitration clause, they explicitly stated what \textit{Jewish law} required.\textsuperscript{81} Second, in both \textit{Minkin} and \textit{Stern}, the court ordered the husband to deliver a \textit{get}, not merely to submit to a \textit{bet din} or to comply with its order. Such direct compulsion by a secular court may well constitute coercion that would invalidate a \textit{get} under Jewish law.\textsuperscript{82}

These lower court decisions have yet to be approved by any state appellate court. In any event, a woman’s ability to obtain a judicial order compelling a \textit{get} would depend on the vagaries of the court hearing her

\textsuperscript{78} Id.
\textsuperscript{79} NY L J at 13, col 5 (Aug 8, 1979).
\textsuperscript{80} Id at col 6.
\textsuperscript{81} The \textit{Minkin} court also may have entangled itself excessively with religion by calling for the testimony of rabbis. But see Warmflash, \textit{NY Approach} at 248 (cited in note 11), arguing that courts regularly hear the testimony of expert witnesses, so there should be no obstacle to hearing expert religious testimony. This may be so if there is no dispute as to religious doctrine, but if conflicting views as to religious requirements exist, impermissible entanglement may result.
\textsuperscript{82} According to some authorities the divorce would be valid under Biblical law, but would be declared void by rabbinical enactment. See Meiselman, \textit{Jewish Woman} at 100 (cited in note 12). If the \textit{get}'s validity is indeed subject to rabbinic interpretation, and if direct court enforcement as in \textit{Minkin} and \textit{Stern} would become prevalent, rabbinic authorities should re-evaluate the position that the \textit{get} is invalid. The original purpose behind the enactment was to prevent Jewish women from circumventing Jewish courts, attaching themselves to Gentiles, and going directly to Gentile courts. See Steven F. Friedell, \textit{The First Amendment and Jewish Divorce, A Commentary on Stern v Stern}, 18 J Family L 525, 534 n29 (1979-80) ("First Amendment and Jewish Divorce"); Babylonian Talmud, \textit{Gittin} 88b (Soncino, 1963). Since Jewish courts no longer have secular enforcement powers, the logic behind this decree may be outdated. Moreover, since the wives in \textit{Stern} and \textit{Minkin} sought secular compulsion of \textit{gittin}, they may have received rabbinic advice that the divorces would be valid.

An Illinois court has also recently held that an Orthodox \textit{ketubah} is an enforceable contract. \textit{Marriage of Goldman}, Ill Tr Ct Divorce Dig, Apr 1989, at 6 (Cir Ct Cook Cty). In an attempt to avoid court entanglement with religion, the judge specified that she was not ordering "a \textit{Get} to be obtained," but instead was ordering the husband to proceed with a "Jewish bill of divorce." It is unclear what the judge intended by this distinction. But if she intended for the husband merely to appear before a \textit{bet din}, such a solution could alleviate the problem of a coerced \textit{get} under Jewish law, as well as the problem of state entanglement with religion.
case; this judicial avenue is thus uncertain at best.83

III. The New York Get Statute

In 1983, shortly after Avitzur was decided, New York enacted section 253 of its Domestic Relations Law,84 commonly referred to as the "get statute." The practical effect of the statute is to prevent a plaintiff husband from obtaining a civil divorce until he swears to the court that he has given his wife a get.85 Although the law has been heralded by observant Jews,86 it has also been widely criticized as unconstitutional.87 To date, however, the New York courts have yet to strike it down.88

A. How It Works

Section 253 applies only to parties who were married in a religious ceremony.89 In a contested divorce action, the plaintiff must allege in the complaint that, to the best of his or her knowledge, he or she has taken all steps solely within his or her power to remove all barriers to the other spouse's remarriage.90 In uncontested actions, however, both parties must file a statement that no barriers exist.91 A "barrier to remarriage" is defined to include "any religious or conscientious restraint or inhibition imposed on a party to marriage, under the principles of the denomination of the clergyman [sic] or minister who solemnized the marriage, by the other party's commission or withholding of any voluntary act."92 Even if a spouse files a statement, a divorce cannot be granted if the

83 One court went even further than Minkin and ordered a husband to give a get, not based on the ketubah, but based upon the court's inherent power to grant equitable relief. Roth v Roth, No 79-193709-DLI, slip op (Mich Cir Ct, Jan 23, 1980). But see Turner v Turner, 192 So 2d 787 (Fla Dist Ct App 1966) (court has no power to require parties to secure a religious divorce). Because the Roth solution faces the same problems as those in Minkin and Stern, it also cannot be relied upon by agunot.
84 NY Dom Rel Law § 253.
85 The law also prevents a plaintiff wife from obtaining a civil divorce until she agrees to accept a get from her husband.
87 See Haut, Divorce at 101 (cited in note 6).
88 In one case, section 253 was found unconstitutional as applied. Chambers v Chambers, 122 Misc 2d 671, 471 NYS2d 958 (Sup Ct 1983). There, the couple sought an uncontested divorce based on a separation agreement executed prior to passage of the statute. The plaintiff wife filed the statement required of her (see text at note 90), but the husband did not. The court noted that it was bizarre to deny a wife a divorce based upon an item of relief she did not even want, and that to bar a divorce under section 253 would be an unconstitutional impairment of contracts. This holding, though, is limited by the unusual circumstances and timing of the case. It should have no bearing on the constitutionality of the statute as it applies to women who do seek gittin from their husbands.
89 NY Dom Rel Law § 253.1.
90 Id at § 253.2.
91 Id at § 253.4.
92 Id at § 253.6.
clergy member who performed the marriage swears that the party has not done everything within his or her power to remove all barriers to the spouse’s remarriage.93

No final judgments of divorce can be entered until the court receives the required statement or statements, but the defendant spouse can also waive the required affidavit.94 Thus, under section 253, a Jewish husband whose wife wants a get may not be able to procure civil dissolution without first initiating a religious divorce.

B. Constitutional Problems

1. Free Exercise

Critics argue that section 253 conditions the receipt of a state benefit, divorce, upon compliance with a religious practice, the giving of a get.95 Thus, it could force the husband to violate his current set of religious beliefs, if for example he converted from Judaism, or it could compel the husband to perform a religious act against his will. The Free Exercise Clause prohibits governmental interference with both an individual's practice of and refusal to practice religion.96

In examining the free exercise claim one must look at three questions: 1) Does the statute interfere with free exercise? 2) Can such interference be justified by a compelling governmental interest? and 3) Would granting an exemption from the law unduly interfere with the government’s goal?97

For section 253 to interfere with free exercise, giving a get must constitute a religious act. Some argue that giving a get is nothing more than the rescission of the marital contract,98 and that it is “not at all a sacerdotal or religious act[,] not an act of worship; it does not invoke the Deity; it involves neither profession of creed nor confession of faith.”99 The husband need not even be a believing Jew.100 Further support for the argument that divorce is not religious is based on the division of Jewish law into two parts, the theo-human (religious) and the interpersonal commandments. The law of divorce is categorized among the latter.101

Still, the giving of a get should be regarded as a religious act. First,
despite the dichotomous nature of Jewish law, all regulations, from prayer to prohibitions on usury, are regarded as divinely ordained or inspired.\textsuperscript{102} Second, what constitutes a religious act for constitutional purposes should be defined from the viewpoint of the objecting party; it is that person's free exercise claim that is being raised.\textsuperscript{103} Finally, from a secular perspective, the only rational justification for the get is the significance placed upon it by a religion; therefore it should be regarded as religious \textit{per se}.\textsuperscript{104}

Another response to the free exercise claim is that the parties waived their rights when they participated in a religious marriage. However, this argument would only apply to those couples who were married after the enactment of section 253; those married before its passage could not have been put on notice of the get law.\textsuperscript{105} A better way of stating the argument is that, regardless of the statute, the parties were married with the knowledge that a get would be required to effectuate religious divorce. It was the parties who initially intertwined religion with civil marriage, so regardless of the husband's current religious commitment, it is only reasonable that he comply with the religious requirements necessary to make the civil remedy of divorce equitable.\textsuperscript{106} The husband impliedly obligated himself to grant his wife a get and should be estopped from raising an objection to granting one.\textsuperscript{107}

Even if the get statute interferes with free exercise, it can be upheld if the state has a compelling interest and if allowing religious exemptions would defeat that goal. Here, the state has a compelling interest in facilitating the wife's remarriage. In fact, the Supreme Court has called the right to marry fundamental.\textsuperscript{108} If the wife cannot obtain a get, her ability to remarry will be stifled. Exempting a husband because of his professed religious objection would directly defeat the state's interest.\textsuperscript{109}

Yet, in the eyes of the state, the wife is free to remarry. Only religious convictions prevent her from marrying again. Therefore, it can be argued, the state's real interest is protecting the wife's free exercise right.\textsuperscript{110} Why, then, should her right trump her husband's? Why must

\begin{thebibliography}{110}
\bibitem{102} Freidell, \textit{First Amendment and Jewish Divorce} at 529 (cited in note 82); see generally Elon, \textit{Principles of Jewish Law} at 6-18 (cited in note 1).
\bibitem{103} Laurence Tribe, \textit{American Constitutional Law} § 14-12 at 1249 (Foundation, 2d ed 1988) ("Tribe Text").
\bibitem{104} Marshall, \textit{The Religion Clauses} at 219 (cited in note 11).
\bibitem{105} Id at 233-35.
\bibitem{106} See Lewin, \textit{Constitutional Validity of Get Statute} at 2, col 6 (cited in note 95).
\bibitem{107} The waiver/estoppel argument is stronger in a situation like Avitzur where the parties signed an English version of the ketubah. The Supreme Court has held that waivers must be voluntary, knowing, and intelligently made. See, for example, \textit{Miranda v Arizona}, 384 US 436 (1966). The get situation, though, is different from other contexts involving waivers in that the husband, by signing a ketubah or marrying in a religious ceremony, induces another party to rely to her detriment upon an express or implied promise to give a get.
\bibitem{108} Zablocki v Redhail, 434 US 374 (1978).
\bibitem{109} Redman, \textit{Aiding the Jewish Woman} at 413 (cited in note 7).
\bibitem{110} Marshall, \textit{The Religion Clauses} at 228-29 (cited in note 11).
\end{thebibliography}
the state place a higher priority on facilitating the wife's practice of religion than upon avoiding interference with the husband's right not to practice?

The answer, it seems, stems from the actions of the parties. By availing themselves of the state's recognition of religious marriage ceremonies, they both benefited from the state's practice of facilitating religious exercise. Upon dissolution, the wife merely wants to continue to practice her religion. If the state facilitated her free exercise in the first instance—one in which the husband benefited as well—it should not obstruct her now. The husband, after participating in religious marriage sanctioned by the state, holds a great deal of power over his wife. Now he claims the right not to be forced to do a religious act. Yet, the state is not conditioning his divorce upon a purely private act such as praying. Rather, it requires the husband to release the control he has over another person—control he obtained with the state's aid. Arguably, he might not even have a constitutional right to object to this request. At the least, his claim should be subordinate to his wife's.

The state also has a compelling interest in preventing extortion or the intentional infliction of emotional distress upon the wife. Courts have held persons liable for the latter when they knowingly take advantage of another person's peculiar sensibilities, superstitions, or delusions. Preventing a husband from taking advantage of his wife's genuine religious beliefs would be a much greater concern and should qualify as a compelling state interest.

Finally, even if a husband's free exercise interest is deemed paramount, in most situations section 253, as applied, would still survive attack. A party's free exercise claim must be based on a sincere belief, and courts are free to inquire into the sincerity of the party's beliefs. "Where extrinsic evidence exists to establish that religion is being used as a completely fraudulent cloak, such 'evidence' must be considered [by the court]." It would seem that the most likely reason for a husband's

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111 Lewin, Constitutional Validity of Get Statute at 2, col 5 (cited in note 95).
113 It has been suggested that since tort law can deal with the problem by providing for damages and acting as a deterrent, legislative action is not necessary. Marshall, The Religion Clauses at 231-32 (cited in note 11); see also Redman, Aiding the Jewish Woman at 416-24 (cited in note 7), suggesting that wives sue for intentional infliction of emotional distress. However, money damages would hardly be an adequate remedy for an agunah who would still be unable to remarry. Moreover, there is no record of a wife successfully suing a husband for intentional infliction of emotional distress for failure to deliver a get. This lack of precedent makes the deterrent effect of such an action quite dubious. A get given under the threat of a lawsuit may also be invalid as given under duress.
115 Tribe Text at 1246 (cited in note 103). Religion should not be invoked as a "cheap excuse." For example, in Burns v Burns, 223 NJ Super 219, 538 A2d 438 (1988), the husband claimed that giving a get violated his new religious beliefs. However, this claim was refuted by evidence of his offer to give a get if his wife transferred $25,000 into a child's trust fund.
refusal to give a get would be to extract concessions from his wife or simply to spite her. Evidence that the husband continues to practice Judaism in any way could be introduced to prove his hypocrisy. Extortionate or vindictive husbands thus could not succeed in challenging the statute. Those who have sincere religious objections will likely be few in number.\textsuperscript{116}

2. Establishment Clause

As noted earlier, the Supreme Court has employed a three-part test to determine whether a law is consistent with the Establishment Clause. It must: 1) have a secular purpose; 2) have a primary effect that neither advances nor inhibits religion; and 3) avoid excessive governmental entanglement with religion.\textsuperscript{117}

a. Purpose

Critics argue that section 253 lacks a clear secular purpose. The law’s main sponsors were in fact Orthodox Jews.\textsuperscript{118} Although its language mentions no specific religion, the law’s primary purpose, as acknowledged by Governor Cuomo,\textsuperscript{119} was to remedy the plight of the agunah, whose dilemma is created by her own religious convictions.

Still, the secular purpose test, as set forth by the Supreme Court, is a very generous one. If there is at least some arguable secular purpose behind a law, it will survive. The Court will even look for a secular purpose on its own.\textsuperscript{120} Furthermore, in \textit{Lynch v Donnelly},\textsuperscript{121} the Supreme Court explained that the legislature’s purpose need not be “exclusively secular.”\textsuperscript{122} In \textit{McGowan v Maryland},\textsuperscript{123} the Court upheld Sunday clos-
ing laws, finding a secular purpose in having a uniform day of rest. Here, the statute itself evinces its legislative intent to promote remarriage, which is no less of a legitimate state interest.

It could be argued that the law only facilitates a woman's ability to marry within her religion, and that the state has no interest in this form of remarriage. Still, the statute removes a husband's ability to hold his wife hostage to his demands. Preventing extortion or infliction of emotional distress—while arguably not a compelling state interest—is certainly a valid secular purpose.

b. Effect

Critics claim that section 253 has a primary effect of advancing religion in four different ways. First, it incorporates Jewish divorce law into state law, and thus advances the Jewish religion by facilitating remarriage of observant Jews. Second, the mere appearance of the joint exercise of judicial authority by church and state provides a symbolic endorsement of the Jewish religion to the detriment of others. Third, section 253 advances one religion over another since it helps Jews obtain religious divorces, but implicitly excludes Catholic annulments from its coverage. And, fourth, it advances Judaism by giving a rabbi veto power over a spouse's ability to obtain a civil divorce. If the rabbi files an affidavit stating that barriers still exist, he can block a final divorce decree.

Section 253, however, does not advance Judaism. Rather, it seeks to accommodate religious practice and put Jews on an equal footing with others, as would a law requiring the army to make kosher food available. Furthermore, Justice O'Connor has noted that the effects test should not invalidate a statute even if the law in fact causes the advancement of religion. The key question should be whether the state action sends a message of endorsement to adherents of a particular religious group, while telling others that they are outsiders and not full members of the political community. Here, the get law does not convey a message that Jews are a favored group. On the contrary, it merely seeks to eliminate a particular problem from which observant Jews suffer and

125 Kochen, Constitutional Implications of Get Statute at 32, col 2 (cited in note 11).
126 Lewin, Constitutional Validity of Get Statute at 2, col 2 (cited in note 95). See, for example, Walz v Tax Commissioner, 397 US 664 (1970) (courts must find neutral course between both religion clauses; upholds church property tax exemptions); Everson v Board of Education, 330 US 1 (1947) (parochial school bus fare reimbursement upheld). Compare Committee for Public Education v Nyquist, 413 US 756 (1973) (direct monetary aid to parochial schools struck down). If the distinguishing principle among these cases is that direct monetary aid is forbidden, but indirect aid is allowed, the get statute should survive as well, since no direct aid is present. See Tribe Text at 1166-67 (cited in note 103) (discussing the “no-aid” test).
to enable them to participate in remarriage as others can. Thus, the first
two objections should not invalidate section 253.

Section 253 does not help Catholics obtain church annulments
because it defines a "barrier to remarriage" as something that can be
removed by an individual's voluntary act, and states that "[all] steps
solely within his or her power" shall not be deemed to include application
to a "marriage tribunal . . . which has authority to annul or dissolve
a marriage under the rules of such denomination."¹² Eight Unlike the giving
of a get, an annulment is granted by a church tribunal, not by the parties
themselves. Thus, because the problem of the agunah simply does not
exist under Catholic law, section 253 does not create a denominational
preference. A Catholic husband does not have unilateral power to hold
his wife in marital limbo by withholding a divorce; only a Jewish wife
suffers from this disadvantage. The law does not put Catholics in a
worse position than Jews; it merely remedies Jewish women's unique
problem.¹²⁹

The ability of a rabbi to block the divorce by filing an affidavit con-
testing a party's removal of barriers statement is a more troubling aspect
of the statute. In Larkin v Grendel's Den,¹³⁰ the Supreme Court invali-
dated a Massachusetts law that gave churches absolute power to prevent
the issuance of liquor licenses to establishments located within 500 feet of
a church. Here, too, section 253 grants a rabbi veto power.

The get statute, though, can be distinguished. Unlike the law at
issue in Larkin, the get law does not give a rabbi unfettered discretion to
veto a divorce for any reason whatsoever, or without stating any reason
at all. Rather, it merely permits him to dispute the husband's factual
assertion that all barriers to remarriage have been removed.¹³¹ His
power to prevent divorce is not absolute. If the husband has removed all
barriers, the rabbi cannot stop the divorce.

c. Entanglement

Section 253 should be free from entanglement problems because

¹²8 NY Dom Rel Law § 253.6.
¹²⁹ This attack on the statute could also be cast in equal protection terms. The response would be
that due to the differences in their laws of divorce, Jews and Catholics are not similarly situ-
ated.

The Supreme Court has held that statutes employing denominational preferences are sub-
ject to strict scrutiny, not just the three-prong test. Larson v Valente, 456 US 228, 244-46
(1982). Larson, however, involved a statute which made "explicit and deliberate distinctions
between different religious organizations." The provision distinguished between "well-establish-
ished churches" and "churches which are new and lacking in constituency, or which, as a
matter of policy, may favor public solicitation over general reliance on financial support from
members." Larson, 456 US at 246-47 n23. The get statute is distinguishable from the statute
in Larson, because section 253 is not intended to hurt one particular group, but rather to
accommodate the religious practices of another.

¹³¹ Lewin, Constitutional Validity of Get Statute at 2, col 5 (cited in note 95).
courts are prohibited from inquiring into the existence of barriers to remarriage or from questioning the truth of a party’s affidavit. However, a rabbi’s veto could be said to violate the entanglement test since the Court in *Larkin* found the church’s veto to cause excessive entanglement. Yet, given the extent to which a rabbi’s power under section 253 differs from the church’s in *Larkin*, it should not violate this test. Just as clergy are allowed to officiate at civilly recognized marriages without causing entanglement, their participation in divorce proceedings should also be permitted.

3. **Due Process**

   While a rabbi’s power to block a divorce may not constitute a religious veto that violates the Establishment Clause, it raises serious due process concerns. A husband may file the required statement sincerely believing that he has removed all religious barriers to his wife’s remarriage. The rabbi who performed the wedding, though, can still block the divorce by filing an affidavit. The rabbi might attest that barriers still exist, believing that the husband failed to comply with some aspect of Jewish law. Yet, section 253 gives the husband no opportunity to contest the rabbi’s claim. Instead, the law states that a court is precluded from inquiring into or determining any ecclesiastical or religious issue. This limitation stems from First Amendment concerns; had the law permitted a court to determine whether a husband has satisfied the religious requirements for giving a *get*, it would foster excessive entanglement with religion. As section 253 is written, however, the rabbi has the last word in every instance. Even a well-intentioned husband is denied the chance to rebut the rabbi’s claim. This denial of any opportunity to be heard may well violate the husband’s due process rights. Essentially, the drafters of the law had to risk offending either the Establishment Clause or the Due Process Clause; they chose the latter.

   Section 253 could be cured if the clergy veto provision were removed. But then there would no longer be an effective way to ensure that a plaintiff is telling the truth when he claims to have removed all barriers. The statute does allow for prosecution under the perjury laws and, presumably, a finding of perjury would invalidate the divorce. Yet, a perjury trial could well entangle a court in the doctrinal question of whether a party has complied with Jewish law. Furthermore, section 253 only requires a party to attest that he has removed all barri-

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132 NY Dom Rel Law § 253.9.
133 Id.
134 The fundamental due process right to a hearing generally is found to embrace the right to present evidence and to cross-examine witnesses. *Tribe Text* at 736 (cited in note 103), citing *Morgan v United States*, 304 US 1 (1938); *Green v McElroy*, 360 US 474 (1959).
135 NY Dom Rel Law § 253.8.
ers to the best of his or her knowledge.\textsuperscript{136} Thus, there would be no way to attack the statement of a spouse who sincerely believes he has followed the religious requirements for divorce.

It is possible that the formal requirement of a sworn statement alone would induce spouses to behave honestly. But it is doubtful that demanding an oath that can never be questioned will have much effect on vindictive husbands who withhold religious divorces to spite or to obtain concessions from their wives. Again, the drafters had to choose: either a less effective statute or a more effective law that possibly infringed upon due process. Again, they chose the latter.

The drafters of section 253 seemed to have taken the chance that it would be rare for a spouse denied a divorce by the clergy veto to contest a rabbi’s affidavit. The gamble seems to have paid off. The law has not yet been challenged on these grounds,\textsuperscript{137} perhaps because no plaintiff with a sincere due process claim has come forward. Most recalcitrant husbands, it appears, could not honestly claim that all the requirements of religious divorce have been met.\textsuperscript{138}

C. Technical Problems

Section 253 is underinclusive in several respects. First, if a husband sues for divorce, or a wife sues and the husband does not contest, the husband must file a statement;\textsuperscript{139} however, the statute does not apply to a husband who contests divorce proceedings initiated by his wife. As a consequence, when the husband avoids the requirements of section 253 by contesting the divorce, the wife’s position has not been improved; he is not required to file a statement and she could be divorced under civil law and still obtain no \textit{get}.\textsuperscript{140} To correct this deficiency, section 253 could be amended to require both husband and wife to file statements in every dissolution proceeding. Perhaps, though, the omission was purposeful.

\textsuperscript{136} Id at § 253.1.
\textsuperscript{137} See Kochen, \textit{Constitutional Implications of Get Statute} at 32, col 4 (cited in note 11).
\textsuperscript{138} The courts are cognizant of the due process issue. For example, one court wrote, "[i]t might very well be argued that the [affidavit requirement, § 253.4] of the Get Statute herein under scrutiny constitutes a denial of due process in that it requires a plaintiff to seek an undesired item of relief in order to obtain the desired item. It might further be argued, at least for the reason that there is no way to extract a removal of barriers statement from a defendant, that the requirement is as much a denial of due process as would be a law preventing the entry of a judgment (in any type of action) where a defendant refuses to appear or answer." \textit{Chambers v Chambers}, 122 Misc 2d 671, 673, 471 NYS2d 958 (Sup Ct, Special Term, 1983). However, the court found for the invalidation of the affidavit requirement on narrower constitutional grounds (Art I § 10, cl 1). Id.
\textsuperscript{139} The applicable practice commentary urges an expansive reading of section 253 so that a counter-claiming husband would also be treated as a plaintiff for the purposes of the statute and, as such, would be required to file a statement. NY Dom Rel Law, Practice Commentary 253:6.
\textsuperscript{140} Of course, the wife could withdraw her complaint and prevent the divorce. While this would prevent her husband from availing himself of the benefits of civil divorce, her objective of divorcing him would also be defeated.
Under Jewish law, when a husband objects to a divorce proceeding initiated by his wife, no *get* may be mandated. If the husband is compelled to file a statement that no barrier to remarriage remains, the *get* the woman obtains might be invalidated since doctrine of constructive consent might not apply.\(^{141}\)

Second, the statute cannot help women who were not married in an observant Jewish ceremony. A "barrier to remarriage" under section 253 includes only a restraint under the principles of the denomination of the clergy member who performed the marriage.\(^{142}\) Under the statute, then, a woman who was married in a Reform or civil ceremony cannot oppose her husband’s claim that no barriers to remarriage exist—even if during her marriage, she becomes more observant of Jewish law and desires a *get*. Indeed, no one could file an affidavit to contest the husband’s statement. A Reform rabbi would not state that barriers to remarriage exist, simply because they do not exist according to the terms of her or his denomination. And, it would not be fair to allow an Orthodox rabbi to file the statement, since by marrying in a Reform (or civil) ceremony, the parties can be said to have waived the requirement of a *get*.\(^{143}\)

Third, if the rabbi who solemnized the marriage is unavailable, no one can contest a party’s affidavit. To remedy this problem, the provision could be changed to allow clergy of the same denomination as the one who officiated at the wedding to file the statement. The drafters, though, may have purposely selected the bright-line rule of only allowing the rabbi who performed the ceremony to file a statement. Court determination of what constitutes the “same denomination” might require entanglement with doctrinal issues.

Finally, section 253 exempts a party from removing barriers to remarriage if the other party refuses “to provide reasonable reimbursement for such expenses.”\(^{144}\) Conceivably, a poor Jewish woman may be unable to avail herself of the law.\(^{145}\) This could even be deemed a violation of due process.\(^{146}\) Yet, given the doctrine that courts should construe a law as constitutional,\(^{147}\) New York courts would most likely construe “reasonable” as meaning within a party’s ability to pay. Alternatively, that provision could be deleted from the statute, and courts could account for the cost of procuring a *get* under their broad power of

\(^{141}\) See section on “Jewish Divorce” (text accompanying notes 20-33).

\(^{142}\) NY Dom Rel Law § 253.6.

\(^{143}\) The husband’s free exercise claim would also be much stronger in such a situation.

\(^{144}\) NY Dom Rel Law § 253.6.

\(^{145}\) Kahan, *Jewish Divorce and Secular Courts* at 205 (cited in note 11).

\(^{146}\) *Boddie v Connecticut*, 401 US 371 (1971) (holding that indigents cannot be denied access to divorce court because of inability to pay filing fees).

\(^{147}\) See, for example, *Commodity Futures Trading Comm’n v Schor*, 478 US 833, 841 (1985) (citing *Machinists v Street*, 367 US 740, 749 (1961)).
equitable distribution.\textsuperscript{148}

D. Section 253 and Jewish Law

The get statute does not seem to offend Jewish law. A get executed under coercion by a civil court is invalid, but a get given "in anticipation of some benefit or gain is certainly valid."\textsuperscript{149} For example, delivery of a get as a husband’s means of achieving civil divorce and freedom to remarry someone else would not be deemed to be the product of coercion.\textsuperscript{150} The husband’s motivation would be his desire to obtain a civil divorce; he does not act under compulsion by the state. Thus, the execution of a get in order to obtain the benefit of civil divorce should not invalidate the get under Jewish law.

E. Section 253 and Avitzur

The get statute reaches much farther than the Avitzur decision and is a powerful tool with which to remedy the plight of the agunah. Under section 253, the ketubah and the presence or absence of a clause to refer disputes to a bet din are irrelevant. Accordingly, the statute can help Orthodox and Conservative women alike. Further, the statute does more than merely direct husband and wife to appear before a bet din; it withholds civil divorce until the husband swears that he has given a get.

However, section 253 does fall short of Avitzur in one respect: it can only help women who are not yet civilly divorced. Women whose husbands have already divorced them under state law would still have to resort to court process in order to obtain a get. Thus, the statute and the Avitzur contractual remedy can be seen as complementary avenues of relief for Jewish women—the former for those still married, the latter for those already divorced.

IV. Improving Upon Existing Solutions

The constitutional problems with section 253 are not insubstantial. Although good arguments can be made for the statute’s constitutionality, it is by no means certain that a court would not strike down the law in the future. This danger is perhaps greatest in a case where a husband could make a good faith claim that the submission of a rabbi’s affidavit denied his due process right to a hearing. In addition, Avitzur was decided in a four-to-three decision and on a motion to dismiss. It is unclear how far courts would extend that ruling in future cases or in the

\textsuperscript{148} See NY Dom Rel Law § 236(B)(5).
\textsuperscript{149} Bleich, Jewish Divorce at 288 (cited in note 5).
\textsuperscript{150} Id.
latter stages of divorce litigation. Therefore, it is important to consider whether both solutions can be improved or supplemented.

A. A New Get Statute

Professor Bleich has outlined a model statute based upon an earlier draft of section 253.151 Under the model, if either spouse alleges that a final judgment of divorce would cause him or her negative emotional, psychological, or social consequences—including \textit{inter alia} a potential barrier to remarriage—the judge must order the parties to submit to a mediation panel. This panel would consist of two members chosen by the parties and a third chosen by the first two. The panel would determine what inequitable consequences would result from a judgment of divorce and mediate between the parties to prevent those consequences—i.e. facilitate the giving of a \textit{get}. If mediation fails, the panel would report to the court its recommendation for preventing the inequitable result. If either party fails to comply with that recommendation, the court, upon finding that inequity would result, may withhold a judgment of divorce until the parties comply.152

Professor Bleich believes that courts have the power to withhold a civil divorce even absent legislative imprimatur.153 He argues that divorce is not a right but a privilege conferred by the state, and that courts should withhold that privilege if granting a divorce would work a grave injustice to one of the parties—such as when a husband refuses to give a \textit{get}. If a court grants a divorce it may abridge a wife’s free exercise right by forcing her to abandon her religion if she chooses to remarry. But ordering a husband to give a \textit{get} could create excessive entanglement with religion or violate a husband’s free exercise right. Therefore, a court should neither grant the civil divorce nor order him to give a \textit{get}; it should simply do nothing. Enactment of a statute is merely an attempt to cloak with “legislative authority” a power “already inherent in the judicial prerogatives of a court of equity.”154

Nevertheless, a statute has important advantages over discretionary judicial non-intervention. In New York, divorce is regarded as exclusively a creature of statute.155 Codifying a court’s authority to withhold a divorce for particular reasons eliminates doubt whether a court is so empowered by the general divorce statute. The presence of a law also

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151 Bleich, \textit{Jewish Divorce} at 286 n264 (cited in note 5) (setting forth a model statute). The proposed bill was enacted by both houses of the state legislature in 1982, but was withdrawn under the threat of veto from Governor Carey. Kochen, \textit{Constitutional Implications of Get Statute} at 32, col 4 (cited in note 11).

152 Bleich, \textit{Jewish Divorce} at 286 n264 (cited in note 5) (Model Statute at § 1(7)).

153 Id at 277-87.

154 Id at 286.

alerts individual judges to the problem of the agunah. And, in some states a court may not have any discretion to delay a divorce decree. Therefore, a statute is a uniform solution that could be adopted in a variety of jurisdictions. Finally, a get law provides more protection for Jewish women by making non-intervention, at least initially, mandatory. A husband knows that a court cannot grant a divorce unless the provisions of the statute are followed—whether they require a removal of barriers statement under section 253, or deferral of a divorce judgment if the wife raises a colorable claim of inequity as envisioned in the model statute. Thus, a statute will more effectively deter a husband from withholding a get.

A statute based on Bleich's model would eliminate many of the constitutional objections to section 253. It involves no denial of a spouse's due process rights since it does not grant a rabbi unilateral power to block a divorce; that is, there is no clergy veto provision. Further, the statute does not prevent the spouse from disputing the rabbi's claim, since both spouses can voice their views in the mediation process. The model statute allays some First Amendment problems as well. The absence of a clergy affidavit provision eliminates Larkin concerns about religious vetoes. The law is also worded to avoid excluding Catholics or specifically applying to Jews. Unlike section 253, which defines barriers to remarriage as those which a spouse has sole power to remove, the model contains a broad description of what the inequitable consequences of divorce might be. Religion is nowhere mentioned, and a barrier to remarriage is just one of the inequitable consequences that the law seeks to prevent.

In addition, the alternative statute cures some of the technical problems with section 253. It applies equally to both spouses regardless of who is plaintiff or defendant. It also allows a spouse to alert the court to the get problem even if the rabbi who performed the marriage is absent, while avoiding the problem of determining which clergy member represents the denomination under which the parties were married.

The new statute does have some disadvantages compared to section

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156 See, for example, Collis v Collis, 355 Mass 25, 242 NE2d 423 (Sup Jud Ct 1968) (once party proves cause for divorce, under Massachusetts law granting or denying divorce decree is not a matter of discretion).

157 A variation on the idea of equitable non-intervention was employed in the British case, Brett v Brett, 1 Weekly Law Reports 487 (1969). There, the court did not withhold a divorce, but increased a husband's alimony payment because he refused to give a get. While this solution may be possible in states that employ equitable distribution, like New York (see NY Dom Rel Law § 236(B)), it provides little certainty for Jewish women as a whole. It also may produce a coerced get that is invalid under Jewish law. See Bleich, Jewish Divorce at 273 (cited in note 5).

158 See text accompanying note 130.

159 See Bleich, Jewish Divorce at 286 n254 (cited in note 5) (Model Statute at § 1(1)). Consequences could include barriers to potential employment, choice of domicile, educational opportunities, or remarriage.
Most importantly, it raises serious concerns about excessive entanglement since courts would have to initiate a mediation proceeding in which religious issues would be investigated to determine whether barriers to remarriage exist. Still, it is not the court, or even a court-appointed functionary, who hears the religious dispute. Referral to the mediation panel is similar to the referral to the bet din in Avitzur, which the court held to be constitutional. Under the model statute, the mediation panel is not even a rabbinical tribunal. The court itself decides, based on the panel’s recommendation, whether granting a divorce will work an inequity upon one of the parties. In doing so, it cannot ignore or be indifferent to religious concerns, but rather, should accommodate them. Withholding the divorce, yet not forcing the husband to give a get, would show neutrality toward religion by respecting both spouses’ First Amendment claims.

The model statute creates a potentially expansive and costly mechanism. It would apply whenever spouses seek divorce, and would not be limited to cases involving the refusal to give a get. For example, the mediation process may be involved when a spouse can make some colorable claim of inequity. However, the proposal allows judicial discretion to determine whether the allegation of inequitable consequences is “devoid of any merit,” so as to limit the number of cases referred to mediation. In any case, having mediation as an available procedure in all divorce proceedings may be useful in a variety of contexts and may economize judicial resources.

The Bleich model also gives much more discretion to individual judges than does section 253. The present get law prohibits a judgment of divorce unless a removal of barriers statement has been filed. Under the model, the ultimate decision of whether inequitable consequences will result rests with the court. The greater degree of uncertainty which comes with more judicial discretion, though, may be the price that has to be paid for avoiding the due process problems of section 253.

Finally, the referral to mediation may persuade many husbands to deliver gittin. And the fact that mediation may be a prerequisite to civil

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160 Bleich proposes that the panel be given the power to issue subpoenas and administer oaths. Id (Model Statute at § 1(4)). Since such provisions tend to cloak the panel with judicial authority, the provisions should be deleted to avoid entanglement problems. This would not harm the process; if a husband refused to appear before the panel, it could certainly take that into account in making its recommendation. Indeed, by not appearing, the husband loses his chance to dispute the wife’s claim.


162 Bleich, Jewish Divorce at 285 (cited in note 5).

163 Id at 286 n264 (Model Statute at § 1(1)).
dissolution might deter husbands from withholding religious divorces for vindictive or frivolous reasons.

B. Premarital Agreements

In the wake of *Avitzur*, several commentators have suggested that Jewish couples draft premarital agreements concerning divorce, instead of incorporating their agreement in the *ketubah*. A prospective husband and wife should not contract to give and receive a *get*, since secular enforcement of such an agreement might constitute coercion which would invalidate the *get*. Rather, they should state that in the event of a civil divorce, each agrees to submit to the jurisdiction of a *bet din* for the purpose of effecting a religious divorce. The agreement should also contain provisions identifying the *bet din* and providing that the *bet din*’s determination shall be enforceable by civil courts. Thus, the premarital contract would be similar to the “arbitration” clause in the Avitzurs’ *ketubah*, but would be a separate and more explicit document. Such an agreement might be more palatable to the Orthodox authorities who disapprove of the Conservative *ketubah* and reject altering the traditional text.

The premarital agreement would also avoid many of the constitutional difficulties encountered in *Avitzur*. A court would enforce a separate and clearly secular document. It could not be asserted that the contract was liturgical or religious in nature like the *ketubah*. The intent of the parties to create a binding obligation would not be at issue. Enforcement of the spouses’ freely undertaken obligations would be a clearly secular purpose and would not advance religion. Unlike *Avitzur*, there would not be the entanglement problem of a court attempting to distill secular terms from a document that also contains purely religious provisions. A spouse still could raise free exercise objections to enforcement of a *bet din*’s decision, but genuine claims would probably be rare, and even then, answerable. The existence of the agreement would strengthen the argument that the spouse knowingly waived his right to assert a free exercise claim.

In New York, precedent exists for enforcing a separation agreement in which a husband obliged himself to give a *get*. Hence, premarital agreements which merely provide for referral to a *bet din* should work as well. And if the *Avitzur* court approved of such an agreement when con-

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165 See Bleich, *Jewish Divorce* at 249 n164 (cited in note 5).
166 See “Free Exercise” discussion at text accompanying notes 95-116.
tained in a *ketubah*, *a fortiori* it would approve of one evidenced by a separate secular writing.

Nevertheless, some civil courts, particularly in jurisdictions other than New York, may be reluctant to enforce such contracts, or at least be hesitant to specifically enforce a *bet din*’s decision. Therefore, a solution that could circumvent civil courts altogether would be particularly attractive.

C. Using Jewish Law to Circumvent Secular Courts

Jewish law recognizes the concept of agency and permits a husband or wife to appoint an agent to give or receive a *get*. Appointment of an agent is done before a *bet din*; one can even appoint a *bet din* to act as the agent. Jewish law has also sanctioned the use of a conditional *get*. For example, when Jewish soldiers went to battle they would write *gittin* to their wives which stipulated that if the husband did not return by a specified time, the *get* would be deemed effective and the wife would be divorced. This was used to prevent the wives of those missing in action from becoming *agunot*. In modern times, for convenience, Jewish soldiers combined the doctrines of agency and conditional divorce and appointed agents to write *gittin* to their wives in the event they did not return from war.

These principles can be used to fashion a solution to the problem of the *agunah*. Before marriage, a husband could execute a document appointing the *bet din* to be his agent for writing and delivering a *get* upon the condition that the spouses obtain a secular divorce. The husband need not appear before the *bet din* again. Once the parties are civilly divorced, the *bet din* would execute and deliver the *get* to the wife on its own; there would be no need for civil enforcement. Secular courts would thereby be taken “out of the loop.”

In 1930, Conservative Rabbi Louis Epstein proposed a similar solution whereby a man would appoint his wife as agent to deliver a *get* to herself. His idea was rejected by most Orthodox rabbis on the grounds

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168 Price v Price, 16 Pa D & C 290, 291 (1932) (court rejects wife’s claim that husband had made an oral contract to appear before *bet din*, since court cannot order him “to follow the practices of his faith”); Margulies v Margulies, 42 AD2d 517, 344 NYS2d 482 (1973) (husband undertakes in open court to appear before *bet din*; appeals court overturns 15 day jail term for refusal to comply); Steinberg v Steinberg, No 44125, slip op (Ohio Ct App, 8th Dist, June 24, 1982) (no specific enforcement of separation agreement to give and receive *get* since it would require a religious act).


170 Id at 422.


that cohabitation between the spouses would render the get void.\textsuperscript{173} The general rule is that if a husband lives with his wife after a get has been written but before it is delivered, the get is invalid. Therefore, the logic goes, a get that is not yet written should \textit{a fortiori} be void.\textsuperscript{174}

This reasoning, though, is not unassailable. In the case where a get is already executed, cohabitation between the spouses evinces their intent to live as husband and wife, and thus contradicts the intention behind the prior execution of the get. However, when a husband merely appoints the bet din to act as his agent in the event of a secular divorce, a different situation exists. It is not as if his cohabitation with his wife contradicts the prior act of writing a get and intention to be divorced. Rather, cohabitation is perfectly consistent with the creation of the agency, which is done to prevent the wife from becoming an agunah should the parties obtain a civil divorce at some later date. In fact, one noted Orthodox authority stated that in the case of a Jewish soldier who had appointed an agent for divorce and subsequently came home to his wife on furlough, reappointment of the agent was unnecessary. Since the husband’s sole purpose was to prevent his wife from becoming an agunah, there was no reason to suppose that he would annul his agency while on leave.\textsuperscript{175} Appointing the bet din, rather than the wife, to act as agent could also allay concern that cohabitation with the agent of divorce—the wife—is somehow contradictory and self-defeating.

Undoubtedly, most Orthodox authorities initially will be hostile to a new solution involving agency principles.\textsuperscript{176} Yet the Conservative Movement, which has generally shown a greater willingness to innovate, as shown by its modification of the traditional ketubah, is likely to be more receptive to new proposals.\textsuperscript{177} It is beyond both the scope of this paper and the competence of the writer to resolve difficult and disputed areas of Jewish law. But it is hoped that in light of the growing prominence of the agunah problem, rabbis from all points of view will re-evaluate solutions which could circumvent the need for involvement by secular courts.

\textsuperscript{173} Meiselman, \textit{Jewish Woman} at 105-07 (cited in note 12) (citing Louis Epstein, \textit{Ha\textsuperscript{\textcircled{a}}h Lema\textsuperscript{\textcircled{a}}n Takanat Agunot} (1930) and Epstein, \textit{Le\textsuperscript{\textcircled{a}}h Shalat ha-Agon} (1940)).
\textsuperscript{174} Id. See Maimonides, \textit{Laws of Divorce} at 9:25 (cited in note 31).
\textsuperscript{175} Bleich, \textit{Halakhic Problems} at 153 (cited in note 171), referring to the opinion of Rabbi Yechezkel Abramsky, former head of the London bet din. Other rabbis, however, required the agents to be reappointed.
\textsuperscript{176} See Meiselman, \textit{Jewish Woman} at 105-09 (cited in note 12); Haut, \textit{Divorce} at 61 (cited in note 6) (describing the rejection of Epstein’s proposal by Orthodox rabbis).
\textsuperscript{177} In 1968, the Conservative movement voted to adopt a proposal, based upon the notion of a conditional marriage, under which the marriage would become retroactively void if a husband refused to give a get. Meiselman, \textit{Jewish Woman} at 107-08 (cited in note 12). Apparently, the proposal has not been put into practice. A solution based upon agency principles may be easier to implement since it would not involve the problems, such as the legitimacy of children, that are attendant upon retroactive invalidation of a marriage.
CONCLUSION

The Avitzur decision and the New York get statute represent significant attempts to alleviate the plight of the agunah in our secular society. Both solutions can be improved. The use of a different get law would eliminate many of the constitutional infirmities of legislation such as New York's get statute. Premarital agreements to submit to a bet din, executed in English and accompanied by the ketubah, will avoid questions as to a couple's intent and problems of court entanglement with religious issues. The best solution would be one in which secular courts would not be involved at all. Jewish authorities should once again explore the use of a conditional agency arrangement for delivery of a get.

The agency approach, though, along with pre-marital agreements, is a prophylactic measure designed to avoid problems anticipated in the future. Once a marriage deteriorates and a husband refuses to execute a get, it will be too late for a wife to avail herself of these solutions. Therefore, a get statute remains a crucial remedy for Jewish women who are already married and who may face recalcitrant husbands in divorce proceedings.

Unfortunately, women who are already divorced are not granted relief by the statute. They can attempt an Avitzur type suit (if they have signed a Conservative ketubah) or a Minkin type action to compel a get. Thus, for them relief remains uncertain. The use of premarital agreements, agents and get laws should help prevent more women from becoming agunot in the future.