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## GOTTA GET A *GET*: MARYLAND AND FLORIDA SHOULD ADOPT *GET* STATUTES

*Jill Wexler\**

### I. INTRODUCTION

After suffering mental and emotional abuse for thirteen years, Rachel, a mother of four, sought a divorce from her husband.<sup>1</sup> Although it was unknown to Rachel at the time, her husband's abuse would continue well after the civil divorce papers were signed. He refused to give her a Jewish divorce,<sup>2</sup> which would leave her unable to "remarry within the Jewish faith,"<sup>3</sup> unless she abandoned her claims for alimony and child support for her four young children.<sup>4</sup> While Rachel was anxious to move forward with her life, she was bound to her former husband in the eyes of the Jewish faith until he provided her with this divorce.<sup>5</sup> After five long years of bitter fighting and living in marital limbo, Rachel

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\* Brooklyn Law School Class of 2010; B.A., University of Wisconsin-Madison, 2007. The author wishes to thank her mom for her love, guidance and constant reassurance; her grandma for endless inspiration; and Josh for his encouragement, love and patience. She would also like to thank the rest of her family for their support: Dad, Abby, and Alan. Finally, she would like to thank Professors Aliza Kaplan and Joel Gora for their advice and educational direction, as well as the *Journal of Law and Policy* for their editorial assistance.

<sup>1</sup> Gail Ravnitzky-Silberglied, *JCADA Working to Help Agunot, or "Chained Women"*, [http://www.jwi.org/site/c.okLWJ3MPKtH/b.2541223/k.2C98/JCADA\\_Working\\_to\\_Help\\_Agunot\\_or\\_Chained\\_Women.htm](http://www.jwi.org/site/c.okLWJ3MPKtH/b.2541223/k.2C98/JCADA_Working_to_Help_Agunot_or_Chained_Women.htm) (last visited Feb. 2, 2009).

<sup>2</sup> A Jewish divorce occurs when a husband gives his wife a "*get*." Plural *gittin*. See *infra* Part I.A.

<sup>3</sup> Ravnitzky-Silberglied, *supra* note 1.

<sup>4</sup> *Id.*

<sup>5</sup> See *id.*

ceded to her husband's demands in exchange for a Jewish divorce.<sup>6</sup> She became the sole provider for her four children and had to make "major adjustments in their lives . . . [she] had to work full time to pay their bills, yet still could not maintain anywhere near their former lifestyle . . . [and] their standard of living dropped significantly."<sup>7</sup> Rachel's story is only one of thousands, which have been told around the country, featuring women unable to obtain a Jewish divorce until they comply with their husband's threats and demands.<sup>8</sup>

This manipulation of the system is called the *agunah* problem.<sup>9</sup> This Note describes the current state of the *agunah* problem and uses the conditions in Florida and Maryland—states with significant Jewish populations<sup>10</sup>—to illustrate the need for reform. This Note focuses on these two states in particular because of the potential for widespread support, as Florida and Maryland lawmakers have attempted their own versions of a *get* statute in recent years. Although passage of the proposed statutes seemed close to fruition at various points, administrative and political hindrances disrupted the momentum. However, an adjusted approach by lawmakers in these two states, using New York's success as the paradigm, would appropriately counter the growing coercive and extortive tactics that affect the substantial Jewish populations in both states and protect burdened women in these communities who have no other refuge. Such a program would

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> Over the past twenty-five years, divorce rates have grown to approximately thirty-three percent of marriages. Jeremy Glicksman, *Almost, But Not Quite: The Failure of New York's Get Statute*, 44 FAM. CT. REV. 300, 302 (2006); see also FL. JUD. SERVS., BILL ANALYSIS AND FISCAL IMPACT STATEMENT, S. 2008-96, at 5 (Fl. 1008), available at <http://www.flsenate.gov/data/session/2008/Senate/bills/analysis/pdf/2008s0096.ju.pdf> [hereinafter FL. JUD. SERVS.]. Almost six million Jews live in America, and data reveal that 15,000 Orthodox Jews in New York are considered to be in "marital limbo" and unable to obtain a Jewish divorce. Glicksman, *supra* at 302-03. "Marital Limbo" is a term of art designed to describe the position of an *agunah*. See *id.* at 303.

<sup>9</sup> See discussion *infra* Part I.B.

<sup>10</sup> See *infra* notes 106, 108.

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require minimal state funds, and a properly drafted law could avoid the limited constitutional entanglements with respect to the First Amendment. In light of the success of the New York *get* statute, the adoption of similar statutes in both Florida and Maryland should be encouraged as a necessary action by these state governments.

In Part I, this Note outlines the current problem of the *agunah*<sup>11</sup> and presents some of the major legal and non-legal attempts to alleviate the problem. While contract law offers a legal solution, this has generally been unsuccessful because holdings are unpredictable, especially in different jurisdictions. Non-legal options have also been attempted, but result in inconsistencies and inequitable remedies. Legislation is a better alternative because it provides uniformity on which people can rely and deters husbands from engaging in coercive tactics. In Part II, this Note surveys the different forms of legislation that have been proposed in Florida (Removal of Religious Barriers to Remarriage) and Maryland (Equitable Distribution Law), and discusses why these types of statutes are necessary in both states. Next, in Part III, this Note addresses the constitutional concerns that may arise from these proposed statutes and suggests how a properly drafted law, such as the law passed in New York, can alleviate such concerns. Lastly, using the New York law as a paradigm, this Note provides suggestions for Maryland and Florida concerning ways they can improve their proposed *get* statutes.

*A. The "Get"*

Although divorce laws in the United States have long enabled parties to dissolve their marriages with support of the civil system, for many observant Jewish women the divorce process is more complicated and problematic. While Jewish principles encourage marriages to be permanent and "indissoluble union[s]," it is also recognized that matrimonial unions are sometimes breached.<sup>12</sup> One

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<sup>11</sup> See discussion *infra* Part I.B.

<sup>12</sup> BENJAMIN MIELZINER, JEWISH LAW OF MARRIAGE AND DIVORCE 115 (Bloch Publ'g Co. 1901).

main passage in *Deuteronomy* anticipates marital problems and describes the manner in which one should obtain a divorce. This passage states:

When a man hath taken a wife, and married her, and it come to pass that she found no favor in his eyes, because he hath found some uncleanness in her: then let him write her a bill of divorcement, and give in her hand, and send her out of his house. And when she is departed out of his house, she may go and become another man's wife.<sup>13</sup>

Judaism firmly establishes that human suffering should be mitigated and, therefore, divorces are acceptable in certain circumstances.<sup>14</sup>

Under Jewish law, a woman becomes free to remarry if one of two events occurs: one, her husband passes away, or two, her husband delivers her a *get*.<sup>15</sup> A *get* is defined as a "bill of divorce,"<sup>16</sup> which a wife must receive and only a husband can deliver.<sup>17</sup> The standard form of a *get* document reads as follows:

On the \_\_\_\_\_ day of the week, the \_\_\_\_\_ day of the month of \_\_\_\_\_ in the year \_\_\_\_\_ from the creation of the world according to the calendar reckoning we are accustomed to count here, in the city \_\_\_\_\_ ... which is located on the river \_\_\_\_\_ ... and situated near wells of water, I, \_\_\_\_\_ ... the son of \_\_\_\_\_ ... who today am present in the city \_\_\_\_\_ ... which is located on the

<sup>13</sup> *Id.* at 116 (citing 24 *Deuteronomy* 1:2 (King James)).

<sup>14</sup> *Id.* The *Beth Din*, "a duly constituted court of Jewish Law," IRWIN H. HAUT, *DIVORCE IN JEWISH LAW AND LIFE* 145 (1983), will allow a wife to demand a divorce if her husband: develops a terrible disease, is sterile or impotent, does not provide support, declines cohabitation, physically or verbally abuses her, compels his wife to violate religious law, engages in physically revolting occupations, becomes an apostate, or habitually engages in acts of infidelity. Irving Breitowitz, *The Plight of the Agunah: A Study in Halacha, Contract, and the First Amendment*, 51 MD. L. REV. 312, 333 n.80 (1992). See also MIELZINER, *supra* note 12, at 123.

<sup>15</sup> HAUT, *supra* note 14, at 17; see also Breitowitz, *supra* note 14, at 319.

<sup>16</sup> HAUT, *supra* note 14, at 145.

<sup>17</sup> *Id.* at 18.

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river \_\_\_\_\_ . . . and situated near wells of water, do willingly consent, being under no restraint, to release, to set free and put aside thee, my wife \_\_\_\_\_ . . . daughter of \_\_\_\_\_ . . . who art today in the city of \_\_\_\_\_ . . . which is located on the river \_\_\_\_\_ . . . and situated near wells of water, who has been my wife from before. Thus do I set free, release thee, and put thee aside, in order that thou may have permission and the authority over thy self to go and marry any man thou may desire. No person may hinder thee from this day onward, and thou are permitted to every man. This shall be for thee from me a bill of dismissal, a letter of release, and a document of freedom, in accordance with the law of Moses and the Sages Israel.<sup>18</sup>

As described in eyewitness accounts, the *get* process is a simple one-hour ceremony performed in front of three rabbis.<sup>19</sup> The parties spend most of their time in front of the rabbi filling out paperwork with proper names, dates, residences, and words of separation, and then two witnesses sign the bottom of the document.<sup>20</sup> At the end of the ceremony, the husband and wife are asked whether either of the parties were coerced or placed under duress or extortion to enter into the agreement.<sup>21</sup> Following this, the husband takes the document and places it in his wife's hand; this marks the official delivery of the *get*.<sup>22</sup> At this point, the woman is permitted to marry another man, subject to certain restrictions.<sup>23</sup> In comparison, a civil divorce is not considered a

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<sup>18</sup> 6 ENCYCLOPEDIA JUDAICA 131 (1971); HAUT, *supra* note 14, at 17–18.

<sup>19</sup> Breitowitz, *supra* note 14, at 320.

<sup>20</sup> *See id.* at 320–21; *see also* HAUT, *supra* note 14, at 27.

<sup>21</sup> Breitowitz, *supra* note 14, at 321.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* The only men she may not marry are:

(a) a *Cohen*-descendent of the priestly class, (b) a man with whom she committed adultery, (c) persons who served as witnesses for the *get*, (d) her former husband if in the interim she marries someone else who then dies or divorces her, or (e) her former husband if she was guilty of adultery during the course of a marriage.

*Id.*

valid substitute to the *get* in the eyes of Conservative and Orthodox Jews, and thus in order to religiously dissolve a marriage, this ceremony must take place.<sup>24</sup>

### B. The “Agunah” Problem

Jewish law leaves a wife in a difficult predicament, whereby if a husband does not deliver a *get* to his wife, it precludes her from the possibility of a religious divorce. This leaves the woman as an *agunah*,<sup>25</sup> or a “chained woman,” who remains married and cannot remarry in the Jewish community.<sup>26</sup> The problem of the *agunah* is “one of the most complex in *halakhic*<sup>27</sup> discussions”<sup>28</sup> because once a woman is tainted as an *agunah*, she is forbidden to remarry.<sup>29</sup> If the *agunah* engages in sexual activity with another man and bears a child, that child is looked upon as a *mamzerim*, or “bastard.”<sup>30</sup>

To be valid, “a *get* must be given by the husband of his free will and is therefore invalid if given while he is of unsound mind,

<sup>24</sup> See *id.* at 313, 319, 321.

<sup>25</sup> Plural is *agunot*. Organizations and campaigners believe there are “tens of thousands” of *agunot* in the

US alone while Orthodox authorities argue that there are very few. This is because Orthodox authorities view only the women whose husbands have disappeared as *agunot*; all others are *mesurevet gittin*) [sic] subjects of *get* refusal) who are in the process of negotiating a divorce, even where these negotiations drag on for decades.

Lisa Fishbayn, *Gender, Multiculturalism and Dialogue: The Case of Jewish Divorce*, 21 CAN. J.L. & JURIS. 71, 96 n.3 (2008).

<sup>26</sup> HAUT, *supra* note 14, at 145; see also Glicksman, *supra* note 8, at 300.

<sup>27</sup> Alternative transliteration *halachot*, which refers to “all of Jewish Law.” Judaism 101: A Glossary of Basic Jewish Terms and Concepts, <http://www.ou.org/about/judaism/di.htm> (last visited Jan. 28, 2009).

<sup>28</sup> 2 ENCYCLOPEDIA JUDAICA 429 (1972).

<sup>29</sup> See Marc Feldman, *Jewish Women and Secular Courts: Helping a Jewish Woman Obtain a Get*, 5 BERKELEY WOMEN’S L.J. 139, 139 (1990).

<sup>30</sup> The *mamzerim* are “forbidden to marry any Jew except another *mamzer* or a convert, and their children are also *mamzerim*. Thus, the social ostracism is hereditary.” *Id.*

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or under duress contrary to law.”<sup>31</sup> Unlike the husband, if the wife opposes the divorce, Jewish law does not provide her with similar veto power.<sup>32</sup> In order for a husband to be given a divorce, he need only present a justified reason<sup>33</sup> and he may receive *hetter nissu'in*, or “permission to contract an additional marriage.”<sup>34</sup> The Jewish husband will not be considered an adulterer for taking a new wife, nor will his new children be branded as *mamzerim*.<sup>35</sup> All of the power of a Jewish divorce rests with men—consequently, women are left standing on unequal and tenuous ground.

The *agunah* problem has become more publicized in recent years, as men have increasingly used the impending “chains” both as a means to extort their wives and as a “bargaining chip”<sup>36</sup> to demand all of the marital property. Rabbi Irwin Haut explains that thousands of women have reported to him, as well as to other rabbis, that they were unable to obtain a *get* until they agreed wholesale to the terms their husbands demanded.<sup>37</sup> The husbands use the elusive *get* as a proxy to extort more beneficial post-separation conditions, including custody of the children and favorable division of the marital property.<sup>38</sup> In a *New York Times* article, the author described former *agunah* Felice Bienenstock, and explained that, “it took her three and a half years to obtain a *get*, but only after a civil court granted her a divorce.”<sup>39</sup> The author went on to state that Felice Bienenstock’s “husband beat her and took drugs and said he would give her a *get* only if she agreed to liberal visitation rights with their children.”<sup>40</sup> These husbands use

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<sup>31</sup> 6 ENCYCLOPEDIA JUDAICA 130 (1971) (emphasis added).

<sup>32</sup> MIELZINER, *supra* note 12, at 118.

<sup>33</sup> *See id.* at 117.

<sup>34</sup> 2 ENCYCLOPEDIA JUDAICA 430 (1972). This requires the husband to gain the signature of one hundred rabbis. 6 ENCYCLOPEDIA JUDAICA 131 (1971).

<sup>35</sup> *See* Lisa Zornberg, *Beyond the Constitution: Is the New York Get Legislation Good Law?*, 15 PACE L. REV. 703, 704 (1995).

<sup>36</sup> *Id.* at 705.

<sup>37</sup> HAUT, *supra* note 14, at 101–02.

<sup>38</sup> Feldman, *supra* note 29, at 140.

<sup>39</sup> John T. McQuiston, *Jewish Divorce Law Plagues Wives*, N.Y. TIMES, Dec. 28, 1986 (emphasis added).

<sup>40</sup> *Id.* (emphasis added).



the *get* “as a weapon in divorce litigation,”<sup>41</sup> and Jewish women are left with two options: give up all of their rights and assets or accept their position as an *agunah* in their communities.<sup>42</sup>

More recently, the rising divorce rates in this country have caused the *agunah* to become more common in matrimonial actions.<sup>43</sup> It has been estimated that thirty percent of Jewish marriages end in divorce,<sup>44</sup> and in New York alone, there are 15,000 Orthodox Jewish women “who are civilly divorced but unable to obtain a *get*.”<sup>45</sup> These women are “unable to remarry under Jewish law, and thus are forced to live in marital limbo.”<sup>46</sup>

### C. Jewish Courts Attempt to Alleviate the Get Problem

The tragedy of the *agunah* has become so urgent that rabbis, organizations, and legislators have attempted to resolve the problem in different ways. Highly sensitive to the women’s undeserved suffering, rabbis and scholars created “Constructive Consent,”<sup>47</sup> which allows the *Beth Din*<sup>48</sup> to engage in forceful acts to compel the husband to give a *get* to his wife.<sup>49</sup> The rabbis rationalized their actions in different *halachah*; for example, “[we must] speak up for those who are mute,”<sup>50</sup> and “[o]ne who is

<sup>41</sup> HAUT, *supra* note 14, at 102.

<sup>42</sup> Feldman, *supra* note 29, at 140.

<sup>43</sup> See sources cited *supra* note 8.

<sup>44</sup> Mariah Wojdacz, *What’s the real status of marriage in America?*, LEGALZOOM.COM, <http://www.legalzoom.com/legal-articles//article13746.html> (last visited Jan. 28, 2009).

<sup>45</sup> HAUT, *supra* note 14, at 101.

<sup>46</sup> *Id.*

<sup>47</sup> Feldman, *supra* note 29, at 143. Constructive Consent is a “legal fiction [which] permit[s] a [*B*]et[*h*] [*D*]in to use force and other means of coercion against the husband until he agree[s] to give a *get*. The tactics [may] range from community ostracism to corporal punishment.” *Id.*

<sup>48</sup> “A duly constituted court of Jewish Law.” Plural is *battei din*. HAUT, *supra* note 14, at 145.

<sup>49</sup> Feldman, *supra* note 29, at 143.

<sup>50</sup> Aviad Hacoen, *The Tears of the Oppressed: An Examination of the Agunah Problem: Background and Halakhic Sources*, 54 JUDAISM 116 (2005) (quoting *Proverbs* 31:8).

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*halachically* required to divorce his wife and refuses to do so, a Jewish *bet[h] din* – at any place and at any time – [may] corporeally punish him until he says, ‘I wish [to divorce].’ The *get* is then written and it is a kosher *get*.<sup>51</sup> Rabbis and scholars rationalize these severe punishments with the explanation that for a Jewish man who really wants to abide by Jewish law, it is his obligation to give his wife a *get*.<sup>52</sup> In turn, the *Beth Din* applies pressure on the husband to “release his wife where [his wife was] warranted.”<sup>53</sup> Rabbi Naftali Silberberg has explained that these tactics have included sanctions against those who carry on business with a husband who will not divorce his wife.<sup>54</sup>

While “Constructive Consent” has leveled the playing field somewhat, the legal fiction has crucial limitations.<sup>55</sup> One such limitation is that only a *Beth Din* can apply this method, and not a civil court, or else the *get* is considered invalid.<sup>56</sup> Therefore, a *Beth Din* could choose not to intervene if it believes a divorce is inappropriate.<sup>57</sup> The Jewish courts are also limited in applying force on non-compliant husbands because today, unlike long ago, Jewish communities live under the laws of their respective states and must act within those parameters.<sup>58</sup> For instance, *Beth Din* judges, or *Dayanim*, cannot apply too much force upon a husband or the *Dayanim* may be held civilly or criminally responsible

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<sup>51</sup> Naftali Silberberg, Chabad.org, The Agunah, [http://www.chabad.org/library/article\\_cdo/aid/613084/jewish/The-Agunah.htm](http://www.chabad.org/library/article_cdo/aid/613084/jewish/The-Agunah.htm) (last visited Jan. 31, 2009).

<sup>52</sup> HAUT, *supra* note 14, at 23.

<sup>53</sup> Hacoen, *supra* note 50, at 116.

<sup>54</sup> Silberberg, *supra* note 51.

<sup>55</sup> Feldman, *supra* note 29, at 143.

<sup>56</sup> HAUT, *supra* note 14, at 23–24; *see also* Feldman, *supra* note 29, at 143.

A *get* issued on the basis of threats from a court is only valid if there has been a finding by the *[B]et[h] [D]in* that the husband may be compelled to divorce his wife under Jewish Law, and if a secular court does not itself compel the execution of the *get*, but simply coerces the husband [to follow the instructions of the *Beth Din*].

*Id.* (emphasis added).

<sup>57</sup> HAUT, *supra* note 14, at 24–25.

<sup>58</sup> Silberberg, *supra* note 51; *see also* Feldman, *supra* note 29, at 144.

within the state.<sup>59</sup> Not surprisingly, as discussed in the next subpart, other groups and organizations have tried to step in where the Jewish courts' actions are limited.

#### *D. Organizations*

Throughout the country, groups have organized to respond to the tragedy of the *agunah*. These organizations use different techniques to persuade the husband to provide a *get*.<sup>60</sup> One such organization, Getting Equitable Treatment (GET), provides information and counseling to women who are suffering from this barrier to remarriage.<sup>61</sup> Other groups exert influence by posting announcements on websites revealing men who would not give *gittin*,<sup>62</sup> publishing notices in the *Jewish Press*, or circulating *agunah* pins, which read "Freedom for Agunot Now."<sup>63</sup> While these groups have raised the general public's awareness of the problem, they, like the Jewish courts, lack the authority and jurisdiction to compel a husband to deliver the *get*.

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<sup>59</sup> "In Israel, rabbinic courts can impose fines and order a man to be placed in jail for refusing to deliver a *get*. . . . [S]ometimes husbands have spent years in jail instead of giving *gittin*." Feldman, *supra* note 29, at n.35 (citing HAUT, *supra* note 14, at 85–86) (emphasis added).

<sup>60</sup> HAUT, *supra* note 14, at 102–03.

<sup>61</sup> JOFA Advocacy for Agunot, Other Agunah Organizations and Resource Links, <http://www.jofa.org/about.php/advocacy/otheragunaho> (last visited Jan. 30, 2009).

<sup>62</sup> The Awareness Center posts such announcements:

Sam Rosenbloom is owner of the *succhah.com*. He has refused to give his wife a *get* (a Jewish divorce decree). He also is non-complaint with the *Beit-din* (Jewish court panel). Until he gives a *get*, his wife cannot remarry. Please do not buy from his website. Let him know that this is unacceptable behavior.

The Awareness Center, Case of Sam Rosenbloom, [http://www.theawarenesscenter.org/Rosenbloom\\_Sam.html](http://www.theawarenesscenter.org/Rosenbloom_Sam.html) (last visited Jan. 30, 2009) (emphasis added) [hereinafter Awareness Center].

<sup>63</sup> Rivka Haut, *Jewish Women and the Feminist Revolution*, [http://jwa.org/feminism/\\_html/JWA033.htm](http://jwa.org/feminism/_html/JWA033.htm) (last visited Jan. 30, 2009).

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*E. Contract Remedy*

Recognizing that non-legal attempts provide limited success, secular courts have recently begun to confront the *get* issue in matrimonial actions. Through the use of contract law, courts have found either express or implied agreements between couples that require the husband to perform the *get* or, in the alternative, find him in breach of contract. While attempts to use contract law to deal with the *agunah* problem have frequently been successful, outcomes are inconsistent and courts oftentimes fashion remedies that are not in the best interests of either party. Additionally, these remedies may be constitutionally problematic under the First Amendment.<sup>64</sup>

The contract remedy has proven most effective when a couple includes a written agreement in their divorce settlement or pre-annulment agreement in which the husband is obligated to grant his wife a *get* once the parties have been civilly divorced.<sup>65</sup> In this situation, should a husband fail to complete his “contractual undertaking[s],” the wife would bring an “equitable action for specific performance.”<sup>66</sup> In *Koepfel v. Koepfel*, for example, the wife sued her husband to uphold their pre-annulment agreement and deliver her a *get* upon “the dissolution of [their] marriage.”<sup>67</sup> The husband moved to dismiss the case on the ground that the provision offended his First Amendment rights.<sup>68</sup> The court denied the motion to dismiss, reasoning that specific performance would simply compel the husband to do something that he had contracted

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<sup>64</sup> See discussion *infra* Part III.

<sup>65</sup> See Breitowitz, *supra* note 14, at 339–42.

<sup>66</sup> *Id.* at 340. An action for specific performance is brought in lieu of an action for money damages because financial compensation would be inadequate in this situation. Many states, like Florida, Ohio and Pennsylvania, refuse to enforce these agreements, “either on the theory that judicially compelling a religious divorce would excessively entangle the state in sectarian matters, offending the Establishment Clause, or on the narrower ground that such an order is beyond the statutory jurisdiction of the court.” *Id.*

<sup>67</sup> *Koepfel v. Koepfel*, 138 N.Y.S.2d 366, 369–70 (N.Y. Sup. Ct. 1954).

<sup>68</sup> *Id.* at 373.

to do.<sup>69</sup> Professor Breitowitz noted that “the mere fact that a ceremony, procedure, or activity is governed by religious law does not preclude its civil enforcement by way of a simple contract.”<sup>70</sup> Over the next several years, the New York courts became more assertive in upholding express contracts where Jewish women were being denied *gittin*. For example, in *Waxstein v. Waxstein*,<sup>71</sup> the New York trial court emphasized the “inherent unfairness” in allowing the husband to obtain all the advantages of the separation agreement, without fulfilling certain provisions, like the delivery of a *get*.<sup>72</sup> Although these cases provide helpful precedent for an *agunah*, they have limited impact in that they are only applicable in situations where parties have expressly consented to a *get* provision in their agreement.

While many courts have relied on couples’ express agreements that have outlined the direct granting of a *get*, some courts have presumed the existence of a *get* when the couple was married in harmony with religious traditions.<sup>73</sup> New Jersey first inferred this type of agreement in the seminal case of *Minkin v. Minkin*.<sup>74</sup> In that case, the court held that requiring the husband to give his wife a *get* did not violate the Establishment Clause, reasoning that when

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<sup>69</sup> *Id.* (“Complying with [defendant’s] agreement would not compel [him] to practice any religion, not even the Jewish faith to which he still admits adherence . . . . His appearance before the Rabbinat to answer questions and give evidence needed by them to make a decision is not a profession of faith. Specific performance herein would merely require the defendant to do what he voluntarily agreed to do.”). *But see* *Koeppel v. Koeppel*, 161 N.Y.S.2d 694, 695–96 (N.Y. App. Div. 2d Dep’t 1957) (affirming the trial court’s decision to deny specific performance because the contract was too vague).

<sup>70</sup> Breitowitz, *supra* note 14, at 340.

<sup>71</sup> *Waxstein v. Waxstein*, 395 N.Y.S.2d 877 (N.Y. Sup. Ct. 1976).

<sup>72</sup> Breitowitz, *supra* note 14, at 341. Significantly, the *Waxstein* decision is limited to cases in which the husband denies a *get* to his wife and she has completed all of her responsibilities under their agreement. *Id.*

<sup>73</sup> *Id.* at 343. For example, courts will view “recit[ing] a formula at the ceremony that the marriage was ‘in accordance with the laws of Moses and Israel,’ or execut[ing] the traditional *ketubah* or marriage contract” as evidence of the couples’ connection and submission to religious principles at marriage. *Id.*

<sup>74</sup> *Minkin v. Minkin*, 434 A.2d 665 (N.J. Super. Ct. Ch. Div. 1981). In this case, a woman moved to require her husband to provide her with a *get* following her civil divorce and pay the costs of the Jewish divorce. *Id.*

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he signed the *ketubah*,<sup>75</sup> the husband agreed to follow the “laws of Moses and Israel,” and therefore he was required to deliver a *get* to his wife because he alleged that she committed adultery.<sup>76</sup> From a contract law perspective, the court found that “[t]o compel the husband to secure a *get* would be to enforce the agreement of the marriage contract (*ketuba[h]*).”<sup>77</sup> The court noted that it was required to enforce contracts so long as the contract was not unconscionable, would not violate public policy,<sup>78</sup> and would pass constitutional muster.<sup>79</sup> Since this contract obligated the parties to engage in “reciprocal obligations pertaining to the marriage,” there were no requirements inconsistent with public policy.<sup>80</sup>

The holding in *Minkin* was later expanded in *Burns v. Burns*,<sup>81</sup> where the court instructed the husband not to issue the *get* himself,

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<sup>75</sup> Refers to a “Jewish marriage contract.” Sheri Stritof & Bob Stritof, About.com: Marriage, Ketubah, <http://marriage.about.com/od/jewishmarriage/traditions/g/ketubah.htm> (last visited Jan. 21, 2009).

<sup>76</sup> *Minkin*, 434 A.2d at 666. The court noted that “the provisions and laws of Moses and Israel” require the husband to give his wife a *get* if he alleges his wife committed adultery. *Id.*

<sup>77</sup> *Id.* (emphasis added). The same decision was reached by an Illinois court. See *In re Marriage of Goldman*, 554 N.E.2d 1016 (Ill. App. Ct. 1990) (directing husband to deliver his wife a *get*).

<sup>78</sup> *Minkin*, 434 A.2d at 666.

<sup>79</sup> See *infra* Part III.

<sup>80</sup> *Minkin*, 434 A.2d at 666. Significantly, New Jersey courts have issued inconsistent decisions regarding *get* delivery. See *Aflalo v. Aflalo*, 685 A.2d 523 (N.J. Super. Ct. Ch. Div. 1996) (refusing to follow *Minkin*, and finding that ordering the delivery of a *get* would violate the husband’s First Amendment rights).

<sup>81</sup> 538 A.2d 438 (N.J. Super. Ct. Ch. Div. 1987). In *Burns*, the husband told his wife that he would grant her a *get* in exchange for a \$25,000 payment. *Id.* at 439; see also Breitowitz, *supra* note 14, at 344–45; Edward S. Nadel, *New York’s Get Laws: A Constitutional Analysis*, 27 COLUM. J.L. & SOC. PROBS. 55, 65 (1993). The *Burns* court held that a husband is required to grant his wife a *get* when:

- (1) he unjustifiably refuses conjugal rights;
- (2) if the husband shows unworthy conduct toward his wife such that the wife cannot be expected to live with him as his wife;
- (3) if the husband’s unjustified refusal to maintain her when he is in the position to do so, or could be if he was willing to work and earn an income;
- (4) if the husband is

but to acquiesce to the jurisdiction of the *Beth Din*.<sup>82</sup> While the *Burns* decision enhanced the court's authority to order a husband to begin the *get* process, the court was inaccurate in its Jewish terminology and interpretation of the *ketubah*.<sup>83</sup> Courts' unfamiliarity with Jewish terms and practices has resulted in subsequently inconsistent holdings on this issue, and this is precisely why state legislatures should adopt statutes for a uniform solution to the *agunah* problem. This will enable Jewish scholars to monitor the legislative process, and ensure consistency with Jewish law.

As the *Burns* decision illustrates, a serious problem with using contract law to require a husband to grant his wife a *get* is that courts have to create legal obligations under the *ketubah*, which do not actually exist.<sup>84</sup> In the *ketubah*, the husband makes a variety of promises to his wife concerning the marriage.<sup>85</sup> Notably, the

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unfaithful to his wife, or (5) if the husband habitually assaults or insults her, or is the cause of unceasing quarrels, so she has no choice but to leave the household.

*Burns*, 538 A.2d at 441.

<sup>82</sup> *Burns*, 538 A.2d at 441; see also Breitowitz, *supra* note 14, at 345; Nadel, *supra* note 81, at 65. Legal scholar Edward Nadel commented that

[t]here is an important *halachic* distinction between cases in which a secular court forces a husband to deliver a *get* and those in which the court merely forces the husband to appear before a [*B*]eth [*D*]in. In the former cases, any resulting *get* would be *halachically* invalid as a *get me'useh*, since the delivery of the *get* was coerced, and therefore the wife would not ultimately gain the relief she desires. In the latter cases, there is often no such problem, since coercion may indeed be used to force a recalcitrant husband to comply with the directives of a [*B*]eth [*D*]in that has ordered the delivery of a *get*.

*Id.* at 67 (emphasis added).

<sup>83</sup> “[T]he *Burns* opinion makes a number of errors concerning Jewish law—for example, it describes a *get* as evidence of a divorce, and it misinterprets the *ketubah* . . . .” Breitowitz, *supra* note 14, at 345.

<sup>84</sup> See *id.*

<sup>85</sup> These promises include:

- (1) a declaration that he has betrothed his wife in accordance with the laws of Moses and Israel;
- (2) a promise that he will honor, support, and work for his spouse in accordance with the custom of Jewish husbands;
- (3) an obligation to provide food, clothing, and intimacy in accordance

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*ketubah* is written in Aramaic, which makes it difficult, if not impossible, to understand; most times, it is not translated into a language in which the couple can understand.<sup>86</sup> As a result, many couples consider the document as an element of Jewish ritual practice, as opposed to a legally binding contractual agreement with the requisite intent, since the couples likely do not know what the *ketubah* says.<sup>87</sup>

In sum, while state courts can use contract law to compel husbands to grant their wives a *get*, it is not the most ideal measure a state can take to deal with this problem. Divorce law is a “creature of statute,” so when the state creates legislation to address this problem it reduces the public’s uncertainty concerning the court’s role.<sup>88</sup> In other words, a statute, as opposed to “discretionary judicial intervention,” provides a “uniform solution” to the *agunah* problem upon which people can rely; a husband will be aware that he will not be offered a divorce by the state until the statute is followed.<sup>89</sup> Therefore, a statute will better deter Jewish husbands from utilizing this extortive tool than would inconsistent applications of contract law.<sup>90</sup>

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‘with universal custom’; (4) an agreement to pay an alimony lump sum of 200 silver *zuz* in the event of divorce or death; (5) an agreement to pay a stipulated monetary value for property that the wife brings into the marriage; (6) a promise to pay an additional alimony sum in excess of the statutory minimum; and (7) the creation of a lien on all real or personal property, whether presently owned or after-acquired, to secure payment of all obligations under the *ketubah*.

*Id.* at 347.

<sup>86</sup> *Id.* at 345. In *In re Marriage of Goldman*, the husband testified, “that he considered the *ketubah* to be poetry or art rather than a contract.” 554 N.E.2d 1016, 1020 (Ill. App. Ct. 199). Rabbi Rachlis then testified that most couples view “the *ketubah* in a symbolic rather than a literal sense.” *Id.* at 1020; *accord* Nadel, *supra* note 81, at 66 n.91.

<sup>87</sup> If this document were to be considered enforceable, a heavy burden of proof would be placed on the party trying to enforce the contract. Breitowitz, *supra* note 14, at 348.

<sup>88</sup> Feldman, *supra* note 29, at 163.

<sup>89</sup> *Id.* at 163–64.

<sup>90</sup> *Id.* at 164.



*F. New York's "Get" Statute*

While support groups and court decisions involving contract law have helped many women, the *agunah* problem is too pervasive to be handled on a case by case basis, and state legislation, like that in New York, is necessary. In 1983, the New York Legislature enacted Domestic Relations Law § 253, known as the "get statute," which denies a civil divorce to any party who does not remove all barriers to remarriage.<sup>91</sup> The statute provides:

No final judgment of annulment or divorce shall thereafter be entered unless the plaintiff shall have filed and served a sworn statement: (i) that, to the best of his or her knowledge, he or she has, prior to the entry of such final judgment, taken all steps solely within his or her power to remove all barriers to the defendant's remarriage following the annulment or divorce; or (ii) that the defendant has waived in writing the requirements of this subdivision.<sup>92</sup>

This statute was passed to provide a solution to the growing *agunah* problem in New York, where recalcitrant husbands were using their *get* power to put their wives in unequal negotiating positions concerning their civil divorces. New York correctly found that this economic coercion was a matter that needed to be resolved by the state.<sup>93</sup> When enacting the statute, the legislature

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<sup>91</sup> *Id.* at 152.

<sup>92</sup> N.Y. DOM. REL. LAW. § 253(3) (McKinney 1999). New York defines a "barrier to remarriage" as "any religious or conscientious restraint or inhibition, of which the party required to make the verified statement is aware, that is imposed on a party to a marriage." *Id.* § 253(6). The statute contains two provisions, which guard against false statements by attaching criminal liability and allowing a clergyman to counter a false affidavit by stating that the plaintiff has not really removed all barriers to remarriage. *Id.* §§ 253(8), (7).

<sup>93</sup> Former New York Governor Mario Cuomo stated that the

bill was overwhelmingly adopted by the State legislature because it deals with a tragically unfair condition that is almost universally acknowledged. The requirement of a *Get* is used by unscrupulous spouses who avail themselves of our Civil Courts and simultaneously use their denial of a *Get* vindictively or as a form of economic coercion.

Memorandum from New York Governor Mario Cuomo approving N.Y. DOM.

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took extra precaution to make sure it did not mention Jewish religious practices, in an apparent attempt to protect the statute from any First Amendment violations.<sup>94</sup> Unfortunately, the New York Legislature quickly found that there were other problems with the statute,<sup>95</sup> specifically that “the bill has had limited effect, since it is not always the plaintiff, but the defendant who is recalcitrant in acquiring a [*g*]*et*.”<sup>96</sup> The 1983 *get* statute only insisted the plaintiff remove barriers to remarriage; if the defendant did not counterclaim in the matrimonial action, he was exempt from the statute.<sup>97</sup> In this situation, a Jewish wife was advised not to be the party to file for divorce, since, under the 1983 statute, the defendant husband would not be required to take all the necessary steps to remove barriers to remarriage.<sup>98</sup> Frequently, this left the woman in a precarious situation with only two viable options if her husband did not file for the civil divorce: remain a member of an unhappy and unfulfilling marriage, or be stigmatized in her community as an *agunah*.

In 1992, the Legislature responded to this problem and created a new *get* law by amending New York’s equitable distribution statute, which applies to both the plaintiff and the defendant in a matrimonial action.<sup>99</sup> The statute provides that when considering equitable distribution in marital dissolution, “the court shall, where appropriate, consider the effect of a barrier to remarriage.”<sup>100</sup> After this amendment, New York’s courts were granted the authority to take into account any barriers to remarriage when considering the factors for dividing marital assets and those that must be

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REL. LAW § 253 (Aug. 8, 1983) (emphasis added).

<sup>94</sup> “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .” U.S. CONST. amend. I. *See infra* Part III (discussing constitutional issues).

<sup>95</sup> Zornberg, *supra* note 35, at 733.

<sup>96</sup> McQuiston, *supra* note 39 (quoting Andrew J. Stein, City Council President).

<sup>97</sup> Zornberg, *supra* note 35, at 733.

<sup>98</sup> *See id.*

<sup>99</sup> N.Y. DOM. REL. LAW. §§ 236(B)(5)(d), (B)(6)(a) (McKinney 1999).

<sup>100</sup> *Id.* §§ 236(B)(5)(h), (B)(6)(d).

considered in setting maintenance.<sup>101</sup> Lisa Zornberg explains that the policy reasons at the heart of the 1992 amendment were to allow courts to fairly assess and divide marital assets, and “[i]n the case of the *agunah*, whose prospects of financial security may be seriously impaired by her inability to remarry, the 1992 law allows judges to award the woman a greater percentage of the marital assets to compensate for this disability.”<sup>102</sup> Following the 1992 amendment, New York’s *get* laws have proven to be successful remedies for *agunot* within New York.<sup>103</sup> Because of the success of New York’s *get* statute and its subsequent reform, it provides a good model for other states also concerned with ending abuse of the *get* system among their Jewish populations.

## II. ATTEMPTED LEGISLATION

Currently, New York is the only state to have adopted a *get* statute. However, the recent experiences of two states, Maryland and Florida, demonstrate the difficult tasks of balancing the positive remedial functions of a state-sponsored *get* statute with the underlying constitutional concerns.<sup>104</sup> Since the *agunot* problem extends beyond the borders of New York, Maryland and Florida legislators have similarly attempted to respond to the needs of their constituents in this tragic situation.<sup>105</sup> Maryland, a state with a

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<sup>101</sup> *Id.* §§ 236(B)(5)(d)(1)-(13), (B)(6)(a)(1)-(11). Some of these factors include: the duration of the marriage, the age and health of both parties, the income and property of each party at time of both marriage and divorce, the present and future earning capacity of each party, and “any other factor which the court shall expressly find to be just and proper.” *Id.* §§ 236(B)(5)(d), (B)(6)(a).

<sup>102</sup> Zornberg, *supra* note 35, at 734 (emphasis added).

<sup>103</sup> Reports have found that “[a]lmost simultaneously with the signing of the law . . . [cases] suddenly resolved themselves . . . . The mere fact that people knew that it was on the books caused things to be resolved.” *Id.* at 761 (quoting David Long).

<sup>104</sup> *See infra* Part III (discussing Constitution).

<sup>105</sup> Maryland’s Senate Bill 533 was sponsored by Senators Lisa A. Gladden (Dist. 41), Gwendolyn Britt (Dist. 47), Jim Brochin (Dist. 42), Jennie M. Forehand (Dist. 17), Brian E. Frosh (Dist. 16), Rob Garagiola (Dist. 15), Nancy Jacobs (Dist. 34). S.B. 533, Reg. Sess. (Md. 2007). Florida’s key sponsor for the

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significant Jewish population,<sup>106</sup> has proposed *get* legislation five times, encountered constitutional hurdles, and most recently fell one vote short in its Senate of passing a *get* statute.<sup>107</sup> In 2008, Florida, with over ten percent of the nation's Jewish population,<sup>108</sup> proposed its own version of a *get* statute.<sup>109</sup> Even though it advanced further than Maryland's proposed legislation, the Florida bill fell short of becoming law at the House of Delegates stage.<sup>110</sup> Unfortunately, because these recent legislative attempts have been unsuccessful, the *agunah* problem remains prevalent in both Maryland and Florida, and requires an innovative solution, built upon the shortcomings of the previous attempts.<sup>111</sup> This section will outline each state's legislative history in the order in which they were proposed; Maryland's failed *get* statute began to percolate on the legislative floor in 1997,<sup>112</sup> while the Florida initiative began in 2007.<sup>113</sup>

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legislation was Senator David Aronberg, who introduced the bill on the Senate floor. S.B. 96, Reg. Sess. (Fla. 2007).

<sup>106</sup> Maryland's Jewish population makes up 4.2 percent of Maryland's total population and 3.65 percent of the total U.S. Jewish population. AMERICAN JEWISH YEAR BOOK (David Singer & Lawrence Grossman eds., vol. 106, 2006) [hereinafter JEWISH YEAR BOOK].

<sup>107</sup> Because the "[l]egislation needs a majority vote to pass," the third reading failed despite a vote of twenty-two yays to twenty-two nays. E-mail from Jacqueline M. Greenfield, Constituent Liaison to Senator Lisa A. Gladden to author. (Feb. 5, 2009) (on file with author).

<sup>108</sup> Florida's Jewish population makes up 3.7 percent of Florida's total population and 10.1 percent of the nation's total Jewish Population. JEWISH YEAR BOOK, *supra* note 106.

<sup>109</sup> FLORIDA LEGISLATURE, REGULAR SESSION 2008, HISTORY OF SENATE BILLS, SB 96, at 36, *available at* <http://www.flsenate.gov/data/session/2008/citator/final/senhist.pdf> (last visited Mar. 15, 2009) [hereinafter HISTORY OF SB 96].

<sup>110</sup> *Id.*

<sup>111</sup> Reliable statistics on the number of *agunot* are not available, possibly because of the private nature of the matter. Zornberg, *supra* note 35, at 718. However, the large number of organizations dedicated to *agunot* serves as a good indication of the scope of the problem. *Id.* Still, the primary source of data remains the fact that many people in the Orthodox community have provided anecdotal evidence of the problem. *Id.*

<sup>112</sup> *See* DEP'T OF LEGISLATIVE SERVS., MD. GENERAL ASSEMBLY, FISCAL

*A. Maryland*

In the last decade, Maryland has made significant attempts to follow New York's lead and enact *get* legislation to deal with non-compliant husbands who will not grant their wives a *get*. With approximately 3.65 percent of the country's Jewish population living in Maryland, the state has had experience with Jewish divorces and, consequently, has become aware of the problems of *agunot*.<sup>114</sup> In one highly publicized case, Sarah Rosenbloom, a Maryland resident who civilly divorced her husband Sam in 1999, is still considered married in the eyes of the Jewish faith because her husband refuses to give her a *get*.<sup>115</sup> In an attempt to help Sarah, groups like the Jewish Coalition Against Domestic Abuse (JCADA) and Organization for the Resolution of Agunot (ORA) have organized protests outside Sarah's husband's house chanting "Sam Rosenbloom, unchain your wife" and "Free Your Wife, Free Your Soul."<sup>116</sup> Barbara Zackheim, JCADA President, has been quoted as saying that the *get* is "the last vestige of abuse that a husband can perpetrate on his wife. . . . [I]t's incumbent on the Jewish community to help."<sup>117</sup> Unfortunately, these efforts have been unsuccessful and the *agunah* problem remains prevalent in Maryland.<sup>118</sup>

In response to the situation, Maryland legislators began to propose legislation in the late 1990s.<sup>119</sup> Their yearly efforts were

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AND POLICY NOTE, SB 533 (2007), available at [http://senate.state.md.us/2007RS/fnotes/bil\\_0003/sb0533.pdf](http://senate.state.md.us/2007RS/fnotes/bil_0003/sb0533.pdf) (last visited Jan. 30, 2009) [hereinafter DEP'T OF LEGISLATIVE SERVS].

<sup>113</sup> HISTORY OF SB 96, *supra* note 109, at 36.

<sup>114</sup> JEWISH YEAR BOOK, *supra* note 106; DALE E. JONES ET AL., RELIGIOUS CONGREGATIONS & MEMBERSHIP IN THE UNITED STATES 2000: AN ENUMERATION BY REGION, STATE AND COUNTY BASED ON DATA REPORTED FOR 149 RELIGIOUS BODIES (Glenmary Research Center 2002) [hereinafter RELIGIOUS CONGREGATIONS].

<sup>115</sup> Michelle Boorstein, *Ancient Divorce Laws' Modern Quandary*, WASH. POST, Feb. 5, 2006, at C01; *see also* Awareness Center, *supra* note 62.

<sup>116</sup> Awareness Center, *supra* note 62.

<sup>117</sup> *Id.* (quoting Barbara Zackheim, JCADA President).

<sup>118</sup> *See supra* note 111.

<sup>119</sup> The 2000 proposed legislation was favored over the 1999 version

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unsuccessful from 1997 to 2000, and again, most recently, in February 2007.<sup>120</sup> The 2007 bill, “Removal of Religious Barriers to Remarriage Act,” was based on the 1983 New York statute and required “removal of religious barriers to remarriage” before a civil divorce would be entered for either party.<sup>121</sup> The bill sought to “address a problem for people who obtain a civil divorce, but still face religious barriers to remarriage if the party wishes to remarry within the faith.”<sup>122</sup> It was estimated that the financial implications of this particular bill were minimal, which suggests that funding issues would not hamper its passage in the legislature.<sup>123</sup>

This law, if enacted, would have contained important limitations in its effect on religious groups and would not have

[a]uthorize[d] a court to order a party to remove a religious barrier to remarriage; inhibit or restrain an individual from taking part in ecclesiastical tribunal proceedings for a decree of matrimonial nullity or dissolution according to religious tenets; or inhibit or restrain a religious body from

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because the 1999 version “might affect uncontested divorces, and ones where religious divorce would not be an issue.” Divorce Reform Page, Legislation to Help Agunot—“Chained Women,” <http://www.divorcereform.org/agunot.html> (last visited Jan. 15, 2009).

<sup>120</sup> See DEP’T OF LEGISLATIVE SERVS., *supra* note 112, at 3; Ovetta Wiggins, *Senate, Fearing an Entanglement of Church and State, Kills Divorce Bill*, WASH. POST, Mar. 18, 2007, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/03/17/AR2007031701126.html>; Boorstein, *supra* note 115.

<sup>121</sup> DEP’T OF LEGISLATIVE SERVS, *supra* note 112, at 1–2.

<sup>122</sup> *Id.* at 2.

<sup>123</sup> The Department of Legislative Services estimated that the proposed statute would require some increase in general funds of the state due to the penalty provision. However, because “[t]he number of people convicted of this proposed crime is expected to be minimal,” there would be no real increase in funds at all. The proposed statute states that “[a] violator is guilty of the misdemeanor of perjury and is subject to imprisonment for up to 10 years. The State may institute a prosecution for this misdemeanor at any time.” All other requirements of the bill could be covered through resources the state already possessed. DEP’T OF LEGISLATIVE SERVS., MD. GENERAL ASSEMBLY, FISCAL AND POLICY NOTE, HB 324 1–3 (2007), available at [http://mlis.state.md.us/2007RS/fnotes/bil\\_0004/hb0324.pdf](http://mlis.state.md.us/2007RS/fnotes/bil_0004/hb0324.pdf).

adhering to its ecclesiastical tenets governing marriage.<sup>124</sup>

Moreover, rather than affirmatively mandating that the judicial system require the husband to give a *get*, the bill would have ordered the presiding judge to withhold the civil divorce unless religious barriers were removed, which only the husband could authorize. Additionally, the proposed bill established boundaries upon the court so as not to enhance its jurisdiction into religious rituals and practices. These limitations are significant in light of the First Amendment controversy, and serve to preserve the constantly-shifting barrier between church and state.<sup>125</sup>

This most recent attempt at legislation included a spirited debate between Maryland representatives concerning both the constitutionality of the bill and women's rights issues.<sup>126</sup> Senator Lisa Gladden, the bill's sponsor, "argued that the measure was not about religion but 'about fairness. It's a women's rights issue.'"<sup>127</sup> Agreeing with Senator Gladden, The Women's Law Center wrote in support of the bill because it "removes one tool of power and control commonly used in abusive relationships."<sup>128</sup> Other organizations from all over the state, as well as Maryland's Assistant Attorney General, wrote letters of support to try to persuade the legislature that the bill would be highly beneficial and would not violate any constitutional rights.<sup>129</sup> The proponents of

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<sup>124</sup> *Id.* at 2.

<sup>125</sup> See discussion of constitutional issues, *infra* Part III.

<sup>126</sup> Wiggins, *supra* note 120.

<sup>127</sup> *Id.* (quoting Senator Lisa Gladden).

<sup>128</sup> Letter from The Women's Law Center of Maryland, Inc., to Judicial Hearings Committee (Feb. 22, 2007) (on file with Maryland Legislative Services).

<sup>129</sup> Letter from Kathryn M. Rowe, Assistant Attorney General, to Delegate Samuel I. Rosenberg (Jan. 12, 2007) (on file with Maryland Legislative Services); Letter from Union of Orthodox Jewish Congregations of America to Chairman Brian E. Frosh (Feb. 28, 2007) (on file with Maryland Legislative Services); Letter from The Greater Washington Jewish Coalition Against Domestic Violence to House Judicial Committee and Senate Judicial Proceedings (Feb. 22, 2007) (on file with Maryland Legislative Services); Letter from Maryland Jewish Alliance to Senate Judicial Proceedings Committee (Feb. 22, 2007) (on file with Maryland Legislative Services); Letter from The Rabbinical Council to Senate Judicial Proceedings Committee (Feb. 21, 2007)

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the bill hoped that recent highly publicized cases, like Sarah Rosenbloom's, would illuminate the problem more clearly for the legislature and help accelerate the bill's passage.<sup>130</sup> However, opponents of the bill, such as Senator Rona E. Kramer, argued that "the state should not legislate religious doctrine," which she claimed this divorce bill would largely mandate.<sup>131</sup> Some legislators were undecided and clearly conflicted, including Delegate Luiz R. S. Simmons, who found the witnesses at the legislative hearings to be "very eloquent;" however, he also appreciated the possible constitutional entanglements, where he noted that if the bill "doesn't breach the barrier [of the First Amendment], then it toes right up to it and whistles."<sup>132</sup>

With these opinions in mind, it became unclear how the legislature would vote. The bill cleared the Senate Judiciary Proceedings Committee before the legislators voted a first time; the first vote passed thirty-five to ten.<sup>133</sup> In the second vote, however, the bill failed on the floor at a stalemate, each side garnering twenty-two votes.<sup>134</sup> While the bill was expected to pass through the Senate, several votes were changed at the last minute.<sup>135</sup> Due to these last minute changes, the bill did not have a

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(on file with Maryland Legislative Services); Letter from Maryland Catholic Conference to Delegate Samuel I. Rosenberg (Feb. 2, 2007) (on file with Maryland Legislative Services); Letter from The Women's Law Center of Maryland, Inc., to Judicial Hearings Committee (Feb. 22, 2007) (on file with Maryland Legislative Services).

<sup>130</sup> Caryn Tamber, *Maryland Lawmakers Debate Constitutionality of 'Chained Wives' Bill*, BALT. DAILY RECORD, Feb. 23, 2007.

<sup>131</sup> Total Divorce, *Maryland Divorce Legislation for Orthodox Jews Passes Senate's Initial Vote*, <http://blog.totaldivorce.com/2007/03/15/maryland-divorce-legislation-for-orthodox-jews-passes-senates-initial-vote/> (last visited Jan. 26, 2009) (citing Rona E. Kramer).

<sup>132</sup> Tamber, *supra* note 130 (quoting Delegate Luiz R. S. Simmons).

<sup>133</sup> E-mail from Jacqueline M. Greenfield, Constituent Liaison to Senator Lisa A. Gladden, to author (Feb. 5, 2009) (on file with author).

<sup>134</sup> Because a majority of votes are needed for passage, the twenty-two to twenty-two vote resulted in the bill's failure. Wiggins, *supra* note 120.

<sup>135</sup> E-mail from Jacqueline M. Greenfield, Constituent Liaison to Senator Lisa A. Gladden, to author (Feb. 5, 2009) (on file with author). "We thought there would be no problem passing it at the third reading." *Id.*



chance to go to the House of Delegates and has not re-surfaced. While the proposed Maryland *get* statute was not passed in this last attempt, the bill had wide and strong support that suggests it would have enough support to be voted into law if it were proposed again in a modified form that better addressed the constitutional concerns.

### *B. Florida*

Last year, Florida legislators, like those in Maryland, proposed *get* legislation that failed to become law.<sup>136</sup> Senator David Aronberg plans to sponsor the bill again; however, the House sponsor from 2007 is no longer available so the Senator is looking for a new co-sponsor.<sup>137</sup> Florida, like New York and Maryland, is a well-populated Jewish state; its constituency comprises more than 10 percent of the country's Jewish population.<sup>138</sup> Senator Aronberg first sponsored the bill after he was approached by Mrs. Abisoror, a constituent who has not been able to receive a *get* from her husband, Dr. David Abisoror, for over ten years.<sup>139</sup> Organizations like ORA attempted to help Mrs. Abisoror by organizing, rallying and shouting "Free your wife" outside Dr. Abisoror's office, but nothing has helped.<sup>140</sup> Women's International Zionist Organization's (WIZO) executive director, Joan Peppard Winograd, explained that a *get* statute would aid women<sup>141</sup> like Dr. Abisoror's wife to receive a complete divorce and be unburdened by her unfortunate lack of negotiating stature due to her gender.

The legislation that Senator Aronberg and others in Florida now seek to propose is similar to the 1992 amendment to New York's equitable distribution laws. Currently, Florida permits

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<sup>136</sup> HISTORY OF SB 96, *supra* note 109.

<sup>137</sup> Telephone Interview with Kristen Pesicek, Legislative Assistant to Senator Dave Aronberg (Oct. 22, 2008) [hereinafter Pesicek].

<sup>138</sup> JEWISH YEAR BOOK, *supra* note 106.

<sup>139</sup> Pesicek, *supra* note 137; see also Lisa J. Huriash, *Rally Supports Woman Seeking Jewish Divorce*, S. FLA. SUN-SENTINEL, Feb. 28, 2007, available at <http://www.giveheraget.com/media.htm>.

<sup>140</sup> Huriash, *supra* note 139.

<sup>141</sup> *Id.*

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courts to consider a list of factors in determining the equitable distribution of marital assets and liabilities.<sup>142</sup> In a 1997 case, *Bloch v. Bloch*, the Florida District Court of Appeals “implicitly held” that the court could take barriers to remarriage into account when deciding and distributing assets and liabilities.<sup>143</sup> Florida’s proposed legislation, if passed, would codify the *Bloch* decision into legislation upon which courts throughout the state could rely.

Florida’s proposed amendment to the equitable distribution laws would also add a provision that would include “the failure or refusal of one spouse to remove a barrier to remarriage of the other spouse” as another factor for judges to use in evaluating matrimonial cases.<sup>144</sup> The legislation would have *no* fiscal impact in taxes or upon the government sector,<sup>145</sup> and would provide a uniform legal remedy to Florida’s *agunah* problem.

## III. CONSTITUTIONAL ISSUES

A. *Establishment Clause*

Critics of the proposed Maryland and Florida *get* legislation argue that those laws would violate the Establishment Clause of the United States’ Constitution, which states: “Congress shall make no law respecting an establishment of religion . . . .”<sup>146</sup> At

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<sup>142</sup> Equitable Distribution of Marital Assets and Liabilities, FLA. STAT. § 61.075(1)(a)-(j) (1997). Section (1)(j) allows a Florida court to take into account “[a]ny other factors necessary to do equity and justice between the parties.” *Id.* § 61.075(1)(j). This final provision allows the court to use judicial discretion in dividing property.

<sup>143</sup> FL. JUD. SERVS., *supra* note 8, at 6; *Bloch v. Bloch*, 688 So. 2d 945, 946–47 (Fla. Dist. Ct. App. 1997).

<sup>144</sup> FL. JUD. SERVS., *supra* note 8, at 7. “Barrier to remarriage” is defined as “any religious, secular or conscientious restraint or inhibition of which the spouse is aware, which is imposed on the other spouse, and which exists by reason of the spouse’s commission or withholding of any voluntary act.” *Id.* at 6.

<sup>145</sup> *Id.* at 8.

<sup>146</sup> U.S. CONST. amend. I. The Maryland bill provides

that a party who files a complaint or countercomplaint for an absolute divorce or annulment must file, on request of the other party, an affidavit stating that the affiant has taken all steps solely within the

the heart of these criticisms is the notion that by entangling the civil and religious divorce procedures in state courts, the legislation is tantamount to state-established religion, which inevitably operates to the detriment of other faiths, religious practices and to those who do not believe in established religion.<sup>147</sup> However, after scrutinizing this issue in the context of the Supreme Court's Establishment Clause jurisprudence, it is clear that such criticisms are misplaced.

Although the Court has yet to rule on this precise constitutional quandary, it developed a three-prong test in *Lemon v. Kurtzman*<sup>148</sup> to evaluate possible First Amendment violations, vis-à-vis the Establishment Clause. The test determines the degree and type of connection between government and religion. To satisfy the test: 1) there must be a secular purpose for the legislation (purpose prong); 2) there must be a principal or primary effect that neither advances nor inhibits religion (effects prong); and 3) the statute cannot "foster an excessive government entanglement with religion" (entanglement prong).<sup>149</sup> The *Lemon* test's demanding criteria have been somewhat controversial;<sup>150</sup> however, a bill that can meet

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affiant's control to remove all religious barriers to remarriage by the other party. If such an affidavit is requested, the court may not enter a decree for an absolute divorce or annulment until the affidavit is filed.

DEP'T OF LEGISLATIVE SERVS., *supra* note 112. The Florida bill states that judges could consider "the failure or refusal of one spouse to remove a barrier to remarriage of the other spouse" as another factor in evaluating matrimonial cases. FL. JUD. SERVS., *supra* note 8, at 7.

<sup>147</sup> See generally Feldman, *supra* note 29, at 157; Eric Fingerhut, *Maryland Holds Hearing on 'Get Law'*, WASH. JEWISH WEEK ONLINE EDITION, Feb. 28, 2008, available at <http://www.washingtonjewishweek.com/main.asp?SectionID=4&SubSectionID=4&ArticleID=6773&TM=39366>; Nathaniel Popper, *Divorce Bill Leaves Feminists and Ultra-Orthodox in Bed Together*, FORWARD, Feb. 2, 2007, available at <http://www.forward.com/artciles/10003/>; Wiggins, *supra* note 120.

<sup>148</sup> 403 U.S. 602, 612–13 (1971).

<sup>149</sup> *Id.*

<sup>150</sup> In a recent decision, the Supreme Court noted that due to the wide array of possible Establishment Clause conflicts, courts have been reluctant to broadly apply the *Lemon* test as a universal prism through which to interpret these issues. See, e.g., *Van Orden v. Perry*, 545 U.S. 677, 685–86 (2005) (noting that the *Lemon* test was not particularly applicable to the erection of a "passive" Ten

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*Lemon*'s three prongs will likely satisfy any other Establishment test.<sup>151</sup>

*1. Purpose Prong*

Critics, like Maryland's Senator Jamie Raskin, argue that the proposed *get* legislation<sup>152</sup> does not satisfy the first prong of the *Lemon* test, which requires legislation to have a secular purpose, because "the entire purpose of this bill is religious . . . ."<sup>153</sup> Additionally, opponents argue that New York's stated primary purpose in enacting legislation was to "remedy the plight of the *agunah*" and that her "dilemma is created by her own religious convictions."<sup>154</sup>

However, courts have consistently stipulated that *Lemon*'s first prong is "a fairly low hurdle" where any "clearly secular purpose" will suffice.<sup>155</sup> Only in rare circumstances has legislation or

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Commandments Monument on the Capitol grounds, where Justice William Rehnquist said, "[W]e noted that the factors in *Lemon* serve as 'no more than helpful signposts.'" (quoting *Hunt v. McNair*, 413 U.S. 734, 741 (1973)). Furthermore, the Court, in its overview of particularly recent judicial precedent on this matter, noted that a great deal of cases have not applied the *Lemon* test at all. *See, e.g., Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001). Others have only applied the *Lemon* test after noticing the practice at issue failed one of the other Establishment Clause tests. *See Van Orden*, 545 U.S. at 685–86.

<sup>151</sup> Professor Breitowitz properly defended the *get* statute in the context of the *Lemon* test, while presupposing that by passing the three prongs of the *Lemon* test the statute would ultimately survive the First Amendment's Establishment Clause bar. He stated:

To the extent the *get* law furthers state interests of a secular nature and does not endorse or advance the cause of religion, but simply levels the playing field by removing a disability that is peculiar to a particular religious class, the statute passes muster not only to *Lemon* but under any probable alternative test that the Supreme Court is likely to adopt.

Breitowitz, *supra* note 14, at 419.

<sup>152</sup> Including both New York § 253 and the proposed Maryland statute.

<sup>153</sup> Wiggins, *supra* note 120 (quoting Senator Jamie Raskin).

<sup>154</sup> Feldman, *supra* note 29, at 156.

<sup>155</sup> *Brown v. Gilmore*, 258 F.3d 265, 276 (4th Cir. 2001); *see McGowan v. Maryland*, 366 U.S. 420 (1961) (finding that there was a secular purpose in

governmental action been invalidated on the ground that a secular purpose was lacking.<sup>156</sup> In such cases, the conduct was “motivated wholly [by] religious considerations.”<sup>157</sup> According to Marc Feldman, the *get* statute’s secular purpose is to “remove[] a husband’s ability to hold his wife hostage to his demands . . . [p]reventing extortion or infliction of emotional distress . . . .”<sup>158</sup> Furthermore, a “state has a legitimate secular interest” in guaranteeing that its laws maintain “integrity and efficacy” in its courts; therefore, the policies underlying the *get* laws are to do away with dead marriages and to allow parties to “have the freedom to rebuild their lives anew.”<sup>159</sup>

As Sarah Rosenbloom, a Maryland resident and *agunah*, explained, she “just want[ed] to live . . . [in] freedom . . . [and not to] be a caged bird anymore.”<sup>160</sup> When barriers to remarriage are sustained, the divorce laws of a state are “frustrate[d],” as is the “integrity of the judicial system.”<sup>161</sup> *Get* legislation is aimed at giving wives the same rights as husbands and removing women from a “hostage situation” where husbands have the power to deny a *get* and abuse their wives.<sup>162</sup>

Maryland’s proposed *get* legislation has several additional secular purposes.<sup>163</sup> For instance, the legislation promotes “new family formation by removing voluntarily maintained barriers to remarriage.”<sup>164</sup> Maryland advocates have emphasized that one of the purposes of civil divorces is to allow parties to remarry; this

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Closing laws on Sundays).

<sup>156</sup> See *Brown*, 258 F.3d at 276.

<sup>157</sup> *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984) (emphasis added).

<sup>158</sup> Feldman, *supra* note 29, at 157.

<sup>159</sup> Breitowitz, *supra* note 14, at 385.

<sup>160</sup> Tamber, *supra* note 130 (quoting Sarah Rosenbloom).

<sup>161</sup> Breitowitz, *supra* note 14, at 385.

<sup>162</sup> Tamber, *supra* note 130 (quoting Cynthia Ohana).

<sup>163</sup> For similar arguments to those made throughout Part III, see Letter from Kathryn M. Rowe, Maryland Assistant Attorney General, to Samuel I. Rosenberg, Bill Sponsor, Maryland Delegate (Jan. 12, 2007) (on file with Maryland Legislative Services) [hereinafter Rowe].

<sup>164</sup> *Id.* at 2.

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legislation would act in concert with that purpose.<sup>165</sup> Furthermore, the proposed legislation would require parties seeking a divorce to do so fairly and with “clean hands,”<sup>166</sup> so that “[h]e who seeks equity, must do equity.”<sup>167</sup> Ultimately, the legislation will protect women’s rights and avoid coercion<sup>168</sup> and spousal abuse in negotiations related to divorce, as has been the response to the New York legislation.

Similar to Maryland, Florida officials have also stated that a secular purpose of passing their *get* legislation is to promote the “right to marry (or remarry).”<sup>169</sup> Florida proponents also suggest that the proposed *get* statute encourages fair distribution of assets, as in the situation of “a wife whose future income is limited by the inability to remarry a larger amount.”<sup>170</sup> Lastly, the Florida bill was written in an impartial fashion to avoid constitutional problems.<sup>171</sup> Both the Maryland and Florida bills, then, would pass the first prong of the *Lemon* test because they both have valid secular purposes.<sup>172</sup>

## 2. *Effects Prong*

Under the *Lemon* test’s second prong, government conduct or legislation is valid if it “neither advances nor inhibits religion.”<sup>173</sup> Critics to *get* laws argue that they “incorporate[] Jewish divorce law into state law, and thus advance[] the Jewish religion by facilitating remarriage of observant Jews . . . [and also that] the mere appearance of the joint exercise of judicial authority by church and state provide[] symbolic endorsement of the Jewish

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<sup>165</sup> *See id.*

<sup>166</sup> *Id.* (quoting *Schneider v. Schneider*, 644 A.2d 510, 514 (Md. 1994)).

<sup>167</sup> *Id.* (quoting *Merryman v. Bremmer*, 241 A.2d 558, 565 (Md. 1968)).

<sup>168</sup> *Id.*

<sup>169</sup> FL. JUD. SERVS., *supra* note 8, at 5.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* Florida defined “‘barrier[s] to remarriage’ to include ‘without limitation, any religious or conscientious restraint or inhibition.’” *Id.*

<sup>172</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

<sup>173</sup> *Id.* at 612.

religion to the detriment of others.”<sup>174</sup> Although it is true that such legislation will have a direct impact on *get* deliveries among Jewish couples, the Supreme Court has stated that “[c]omparisons of the relative benefits to religion of different forms of governmental support are elusive and difficult to make.”<sup>175</sup> Additionally, the Court has upheld a variety of endorsements and benefits to religion and stated that they did not violate the Establishment Clause.<sup>176</sup> Furthermore, in *Lynch v. Donnelly*, Justice O’Connor explained that government conduct should be invalidated if it sends “a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.”<sup>177</sup> Here, the law does not fail Justice O’Connor’s standard because it does not send a message that Jews are a favored class of people. It merely seeks to eliminate a problem for which only observant female Jews suffer and are victimized into a subordinate position where they cannot remarry within their faith.<sup>178</sup>

In analyzing the Maryland bill, a court should find that the primary or principal effect of the proposed bill is not to further religion, but rather to further the stated secular purposes.<sup>179</sup> There is no governmental endorsement of religion because the proposed legislation contains no explicit mention of any Jewish custom or practice; specifically, neither the *get* nor *agunah* is mentioned.<sup>180</sup> While the statute was formulated to combat coercion and extortion afflicting Jewish women, “it is not drafted so as to be limited to

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<sup>174</sup> Feldman, *supra* note 29, at 157.

<sup>175</sup> *Lynch v. Donnelly*, 465 U.S. 668, 681 (1984).

<sup>176</sup> *See, e.g.*, *Bd. of Educ. v. Allen*, 392 U.S. 236, 236 (1968) (holding that the purchase of textbooks, bought through state tax funds and supplied to students attending religious schools, is valid because the law had a relevant benefit to all children in school); *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947) (holding that a statute reimbursing parents for bus fares to their children’s religious schools passes constitutional muster).

<sup>177</sup> *Lynch*, 465 U.S. at 688 (O’Connor, J., concurring).

<sup>178</sup> *See* discussion *supra* Part I.B.

<sup>179</sup> *See* Rowe, *supra* note 163, at 2.

<sup>180</sup> *Id.*

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that religious group and does not incorporate into civil law any aspect of Jewish religious practice.”<sup>181</sup> The legislation has a desired long-term effect to encourage remarriage, which is a secular purpose, and although the short-term effect of avoiding coercive civil divorce proceedings is religious in character, this should not invalidate its predominantly secular effect.<sup>182</sup>

The counterargument to *Lemon*'s second prong is that the proposed legislation would compel a husband to complete a religious act, i.e., deliver a *get*, before a civil divorce is entered.<sup>183</sup> Critics argue that “the delivery of a [*g*]*et* is clearly a religious act because the sole justification for it is attached to the Jewish religion and that ‘there is no secular justification for such a [religious] divorce since a civil divorce legally terminates the marriage.’”<sup>184</sup>

There is a question, however, as to whether the *get* even constitutes a religious act.<sup>185</sup> The *get* can be construed as a non-

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> FL. JUD. SERVS., *supra* note 8, at 5.

<sup>184</sup> *Id.* at 4 (quoting Lawrence C. Marshall, *The Religion Clauses and Compelled Religious Divorces: A Study in Marital and Constitutional Separations*, 80 NW. U. L. REV. 204, 219 (1985) (emphasis added)).

<sup>185</sup> *Id.* at 5–6. Litigation over contract law (*see* discussion *infra* Part I) sheds further light on the judicial approach to the Establishment Clause controversy with respect to whether the *get* is in fact a religious act. In *Minkin v. Minkin*, the court, *sua sponte*, heard testimony from several different rabbis to ascertain whether delivering a *get* should be considered a “religious act.” *See Minkin v. Minkin*, 434 A.2d 665, 667–68 (N.J. Super Ct. Ch. Div. 1981) (emphasis added).

Rabbi Macy Gordon testified that the *get* is the “severance of a contractual relationship between two parties,” and, therefore, ordering delivery of a *get* would not entangle the court with religion. *Id.* at 667. Rabbi Judah Washer agreed that the *get* is a civil document that makes no mention of God and does not require “religious feelings of people, but is only concerned with the right of the wife to remarry.” *Id.* Rabbi Menahem Meier and Rabbi Richard Kurtz testified that the *get* deals with the relationship between man and man and not God and man, and therefore it is civil and not religious in nature. *Id.* at 668. Under this line of reasoning, the court concluded that it was not infringing on the husband’s constitutional rights by ordering a *get* and the court ordered Mr. Minkin to do so. *See id.* at 667.



religious act because “it does not involve worship or the profession of faith, a husband who has renounced Judaism can obtain a [*g*]*et*, and appointed representatives can actually obtain the [*g*]*et* on behalf of the husband.”<sup>186</sup> If in fact the *get* does not constitute a religious act, the proposed equitable distribution laws and *get* statute would not have the principal or primary effect of advancing religion. The husband would thus not be engaging in a religious activity, and any religious effect would be indirect or incidental. Under these circumstances, the *get* bills would pass the *Lemon* test’s second prong.<sup>187</sup>

### 3. Entanglement Prong

Under the *Lemon* test’s third prong, government conduct is valid if it does not “foster an impermissible degree of entanglement” with religion.<sup>188</sup> Maryland Senator Jamie Raskin, as well as other critics, argued that the bill “*does* entangle the state with religion.”<sup>189</sup> Further, Maryland residents expressed concern that Maryland “would [have to] entertain detailed and extensive discussions of religious doctrine in a civil matter . . . .”<sup>190</sup> However, the Supreme Court has continuously interpreted this element not to require complete separation of church and state, since some governmental interaction with religion or religious organizations is inevitable and may in some cases be necessary.<sup>191</sup> The Court’s interpretation finds entanglement to be a question “of kind and degree,” and for invalidation there must be *excessive* entanglement between the government’s conduct and religion or a religious organization.<sup>192</sup>

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<sup>186</sup> *Id.* (citing Zornberg, *supra* note 35, at 74; Marshall, *supra* note 185, at 218).

<sup>187</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

<sup>188</sup> *Id.* at 612.

<sup>189</sup> Wiggins, *supra* note 120 (quoting Senator Jamie Raskin) (emphasis added).

<sup>190</sup> Tamber, *supra* note 130 (quoting Tim Faith).

<sup>191</sup> *Lemon*, 403 U.S. at 614.

<sup>192</sup> *Lynch v. Donnelly*, 465 U.S. 668, 684 (1984). *See Lemon*, 403 U.S. at 615 (holding that the direct government aid for teachers’ salaries and textbooks

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Nathan Lewin, a Washington D.C. lawyer, explained that “the bill is constitutional because it does not force anyone to ‘profess a belief’ or commit a ‘religious act,’ only take ‘objective secular steps’ such as signing a document affirming any barriers to remarriage have been eliminated.”<sup>193</sup> Furthermore, Maryland’s proposed legislation was in fact “drafted to avoid excessive entanglement.”<sup>194</sup> The parties to the litigation decide whether to require an affidavit stating that the *get* was delivered. When it is required, the court need not involve itself in religious matters, rather it only needs to record whether the affidavit was filed and consider any evidence if there was a “knowingly false statement.”<sup>195</sup> Justifiably, Maryland’s Assistant Attorney General, Kathryn Rowe, found these limited responsibilities far short of “excessive entanglement.”<sup>196</sup> However, assuming *arguendo* that the legislation does run into First Amendment problems, Ms. Rowe contends that “it would likely be upheld if challenged.”<sup>197</sup>

Florida’s proposed *get* law is also likely to pass *Lemon*’s third prong because the proposed statute only requires the court to serve as a document checker in an effort to determine whether the *get* was granted.<sup>198</sup> This does not overly entangle government with religion because the “determination is made by the sworn statements of the plaintiff and the officiating cleric.”<sup>199</sup> While the bill analysis, performed by the Florida judiciary committee, shows some hesitance, it notes that the proposed *get* statute has survived judicial scrutiny.<sup>200</sup> To conclude, while the *Lemon* test’s three

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in religious schools resulted in an excessive entanglement).

<sup>193</sup> Fingerhut, *supra* note 147 (quoting Nathan Lewin).

<sup>194</sup> Rowe, *supra* note 163, at 3.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 1. In the only constitutional challenge to the New York *get* statute, the appellate court found the lower court should not have entertained the husband’s motion that Domestic Relations Law § 236(B)(5)(h) was unconstitutional because upon the husband’s filing, the wife waived all of her rights under the *get* statute, making the issue moot. *Becher v. Becher*, 245 A.D.2d 408, 409 (N.Y. App. Div. 1997).

<sup>198</sup> FL. JUD. SERVS., *supra* note 8, at 6.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* See also *Becher*, 245 A.D.2d at 409.

prongs present demanding criteria, attacks on the constitutionality of proposed *get* laws under the Establishment Clause will likely fail.

### *B. Free Exercise Clause*

Critics also argue that *get* legislation would violate the Free Exercise Clause of the First Amendment, which states that “Congress shall make no law. . . prohibiting the free exercise [of religion].”<sup>201</sup> The Free Exercise Clause “affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.”<sup>202</sup> A violation under the Free Exercise Clause takes place when “government action interferes with a sincere religious belief.”<sup>203</sup> Free Exercise violations include when

(1) the state forces an individual to do that which his religion prohibits or discourages; (2) the state prevents an individual from doing that which his religion requires or encourages; (3) the state makes religious observance more difficult or expensive; or (4) the state forces an individual to do something ‘religious’ that he wishes not to do, although his opposition is not necessarily based on his religious beliefs.<sup>204</sup>

The Supreme Court uses the “highest level of scrutiny” for Free Exercise cases, employing the “compelling interest” test to make constitutional determinations.<sup>205</sup> Under this test, the government has the burden to show that its conduct or legislation

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<sup>201</sup> U.S. CONST. amend. I.

<sup>202</sup> *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984).

<sup>203</sup> Jamie Alan Aycok, *Contracting Out of the Culture Wars: How the Law Should Enforce and Communities of Faith Should Encourage More Enduring Marital Commitments*, 30 HARV. J.L. & PUB. POL’Y 231, 270–71 (2006).

<sup>204</sup> Marshall, *supra* note 185, at 214.

<sup>205</sup> *Sherbert v. Verner*, 374 U.S. 398 (1963). In *Employment Division v. Smith*, 494 U.S. 872 (1990), the Court reduced the standard of review in religious freedom cases to a reasonableness standard. However, the Court limited this new standard to situations involving religiously neutral laws. *Id.* The proposed *get* laws address the *agunah* problem and thus the *Smith* standard does not apply.

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does not impose “a significant burden upon a person’s free exercise of religion” and that there is in fact a compelling state interest.<sup>206</sup>

Critics of the *get* law argue that “[b]y conditioning the grant of a civil remedy on the performance of a religious ceremony, the statute arguably infringes the free exercise rights of the otherwise unwilling spouse.”<sup>207</sup> In other words, critics argue that the proposed legislation essentially forces a husband to deliver a *get* to his wife, or else receive an inequitable distribution of property during the civil divorce proceedings. Thus, it could violate the Free Exercise Clause because the laws operate regardless of the husband’s objections to giving a *get*, and because the husband is pushed to engage in activities he does not want to do.

Ardent supporters of the proposed *get* laws, however, contend that *get* legislation does not raise Free Exercise problems because it does not force couples to do, or not do, anything. Professor Breitowitz explains that under New York’s *get* legislation, the court does not directly command the husband to do anything; “it simply conditions obtaining relief on the removal of barriers.”<sup>208</sup> If a husband chooses not to remove barriers to remarriage, there are no additional burdens placed upon him; rather, he is left in the same position and maintains “the status quo.”<sup>209</sup>

In Maryland, the proposed *get* legislation would not violate the Free Exercise Clause because it does not force a person to join or engage in a religious practice that he has “not already accepted voluntarily.”<sup>210</sup> When a husband delivers his wife a *get*, there are no “professions of faith nor devotional acts.”<sup>211</sup> The text of the *get* does not make any mention of God, but rather states that the husband is announcing to the world that this woman is able to

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<sup>206</sup> Aycock, *supra* note 203, at 271.

<sup>207</sup> Breitowitz, *supra* note 14, at 394.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> Rowe, *supra* note 163, at 3.

<sup>211</sup> *Id.* (quoting Tanina Rostain, Note, *Permissible Accommodations of Religion: Reconsidering the New York Get Statute*, 96 YALE L.J. 1147, 1168 (1987)).

remarry in the Jewish community.<sup>212</sup> Thus, Maryland's proposed legislation would not violate the Free Exercise Clause.

The constitutional analytical framework for Florida's bill asks whether the *get* laws "force a husband to commit an act despite his religious objection and therefore place a substantial burden on the husband's religious conduct."<sup>213</sup> The question of Free Exercise turns on whether the *get* is in fact a religious act.<sup>214</sup> On one hand, jurists and scholars have argued that there is no "secular justification" because a couple does not need a *get* in order to obtain a civil divorce.<sup>215</sup> Such a couple's marriage would effectively cease to exist under state law after obtaining a civil divorce.<sup>216</sup> On the other hand, the *get* does not require any actual religious devotion, or professing one's religious faith. For instance, "a husband who has renounced Judaism can obtain a *Get*, and appointed representatives can actually obtain the *Get* on behalf of the husband."<sup>217</sup>

While the *get* statutes in both Maryland and Florida do raise some potential constitutional issues because they would be enacted to remedy an arguably religious concern, they are likely to be upheld, if challenged, following the New York model.

#### IV. PROPOSED SOLUTIONS FOR MARYLAND AND FLORIDA CONCERNING THE *GET* LEGISLATION

The proposed *get* statutes in Maryland and Florida did not fail because people were opposed to the fundamental premise of the statute, but due to political pitfalls that can be avoided in the future.<sup>218</sup> By avoiding these pitfalls, proponents of the *get* statutes

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<sup>212</sup> Rostain, *supra* note 211, at 1168; Rowe, *supra* note 163, at 3.

<sup>213</sup> FL. JUD. SERVS., *supra* note 8, at 4 (citing Nadel, *supra* note 81, at 95; Zornberg, *supra* note 35, at 742).

<sup>214</sup> See *supra* Part III.A.

<sup>215</sup> FL. JUD. SERVS., *supra* note 8, at 4 (quoting Marshall, *supra* note 185, at 219).

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* (emphasis added). See also Marshall, *supra* note 185, at 218; Zornberg, *supra* note 35, at 741.

<sup>218</sup> Senator Aronberg's office explained that the *get* statute failed to pass in

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can take steps to assure each bill's successful passage into law.

First, it almost goes without saying that an uncontroversial title is a good start. In Maryland, the 2007 *get* bill was initially titled, "Removal of *Religious* Barriers to Remarriage."<sup>219</sup> The *get* statute's purpose already raises constitutional concerns; therefore, including the word "religious" in the title invites obvious critique from opponents. A *get* bill's title should remain religiously neutral; any future bill should either remove the word "religious" or create another title. In New York, for example, the statute is called, "Removal of Barriers to Remarriage,"<sup>220</sup> excluding the "religious" title and connotation.

Second, in framing the issue within the legal context, the statute's flexibility in providing the wife with her fair share of the assets should be considered a paramount goal. Even though New York uses the equitable distribution model, alimony is friendlier to all parties involved because it makes the amount of alimony essentially contingent on whether the wife receives a *get*. Unlike equitable distribution, which is determined at one instant by the court and is thereafter unchanged, alimony has the elastic capability to be adjusted over time.<sup>221</sup> In this situation, a judge can amend the alimony requirements after a *get* is obtained. This benefits all parties involved: the woman benefits because receiving the *get* inevitably frees her of the *agunah* problem as it allows her to remarry within her faith, while the former husband benefits by having the alimony reduced when he provides the woman with the *get*.

By having the proposed *get* statute involve alimony as the ideal

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2008 for "political reasons" that were not in any way connected to the proposed legislation. The legislation is said to have "sailed" through the Senate and while the statute's advocates in the Senate were ready to speak, they were told there was no need because there was already so much support for the legislation. Pesicek, *supra* note 137. *See also supra* Part II.A.

<sup>219</sup> DEP'T OF LEGISLATIVE SERVS., *supra* note 112 (emphasis added). The Senate Judicial Proceedings agreed that this title was inappropriate and amended the title to "Removal of Barriers to Remarriage" before the second vote. Floor Report, Senate Bill 533, Senate Judicial Proceedings Committee.

<sup>220</sup> N.Y. DOM. REL. LAW § 253 (McKinney 1983).

<sup>221</sup> Bay Hill Area Law Firm, Family Law, [http://www.lawgrp.net/family\\_law.html](http://www.lawgrp.net/family_law.html). (last visited Jan. 25, 2009) [hereinafter Bay Hill].

tool for marital asset distribution, it also allows the judge to alleviate the financial burdens of post-divorce maintenance on the husband after he performs his civic and religious duties *vis-à-vis* the delivery of the *get*. Keeping in mind the constitutional pitfalls of punishing American citizens for the failure to perform religious duties, this statute treads the fine line of the First Amendment by incentivizing *get* deliverance, thereby promoting ideals of egalitarianism and an extortion-free atmosphere post-marriage.

To illustrate the deficiencies of using equitable distribution, it is helpful to briefly view Florida's most recent failed attempt to pass *get* legislation. Florida proposed that when a spouse fails to remove a barrier to remarriage for the other spouse, the court may use this obstacle in determining equitable distribution of marital assets.<sup>222</sup> In Florida, equitable distribution requires all marital assets<sup>223</sup> to be distributed equally, unless there has been "unequal treatment."<sup>224</sup> The court will consider a variety of factors in distributing the assets.<sup>225</sup> A property settlement following a divorce is "final and *not modifiable*,"<sup>226</sup> therefore, using equitable distribution to solve the *get* problem creates a serious dilemma. Situations will arise where a "divorcing party may not know about the barrier to remarriage until after the Final Judgment has been entered . . . and you cannot go back and re-do equitable distribution."<sup>227</sup> Alternatively, alimony<sup>228</sup> can be modified "upon a

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<sup>222</sup> FL. JUD. SERVS., *supra* note 8, at 6.

<sup>223</sup> Marital assets include "all property acquired by either spouse during the marriage . . . plus interspousal gifts." Bay Hill, *supra* note 221.

<sup>224</sup> *Id.*

<sup>225</sup> These factors include:

contribution to the marriage, economic circumstances, interruption of personal career or education by a spouse, contribution by one spouse to the career and education of the other, the desirability of one spouse retaining a particular asset, the length of the marriage, the desirability of retaining the marital home as a residence for dependent children, and misconduct that depleted the marital assets within 2 years of filing.

*Id.*

<sup>226</sup> Letter from Nelson Diaz, Florida Attorney, to Kristen Pesicek, Legislative Aide, Senator Aronberg (Apr. 21, 2008) (emphasis added) (on file with author).

<sup>227</sup> *Id.*

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showing of a substantial change in circumstances or financial ability to pay of either party.”<sup>229</sup>

This model was utilized in the British case, *Brett v. Brett*,<sup>230</sup> where the court did not deny the husband a divorce, but rather raised his alimony payment so that the wife could maintain her standard of living. The court explained that this award of maintenance could not be used to punish the husband; however, the husband’s actions were taken into account and were relevant to some extent.<sup>231</sup> The court then awarded the wife a lump sum in alimony and an additional amount every year until the husband gave the wife a *get* to compensate her for the disadvantage she faced by not remarrying and gaining financial security from a new husband.<sup>232</sup> A statute codifying *Brett*’s holding would warn the husband that in order to hold on to more property and assets, a *get* must be delivered. Additionally, the law would not force or coerce the husband to grant his wife a *get*, but rather place the wife in the financial position she would be in if her husband granted her a *get* and she was free to remarry and obtain more property. The *get* statute would also eliminate any extortion the husband may induce upon the wife because the court could balance the assets in alimony, which it awarded to the wife. Notably, the fact that alimony is modifiable would enable the court to change the alimony if the husband eventually grants the wife a *get*, or allow it to increase the alimony as well.

Lastly, Maryland and Florida sponsors should invoke judicial

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<sup>228</sup> Alimony is a “support obligation available to either spouse.” Bay Hill, *supra* note 221. Maryland law concerning alimony is very similar and would allow for alimony modification. The “Court may Modify the amount of alimony awarded as circumstances and justice require.” Overviews of the Laws in Maryland Regarding Alimony, Alimony in Maryland, <http://www.matneylawfirm.com/maryland.alimony> (last visited Jan. 25, 2009).

<sup>229</sup> Bay Hill, *supra* note 221.

<sup>230</sup> *Brett v. Brett*, (1969) 1 W.L.R. 487 (Eng.). In this case, the husband refused to grant his wife a *get* for “tactical reasons” and “thus precluding the possibility of the wife remarrying and finding some other man to support her in the event of her wishing to do so.” *Id.* at 488.

<sup>231</sup> The court emphasized “the wife’s age and the prospect that she might remarry were she to become free to do so . . . .” *Id.*

<sup>232</sup> *Id.* at 487.



precedent to attract widespread support and promote its passage into legislation. Legislators will be more persuasive in urging the bill's passage if they emphasize that jurists have already shown that the bill is workable and equitable in practice, as was shown over a decade ago in New York. In 1992, for example, this tool was utilized to pass the New York equitable distribution amendment, following the decision in *Schwartz v. Schwartz*,<sup>233</sup> which held that if a man withholds a *get* from his wife, such a barrier could be taken into account when dividing marital property and assets.<sup>234</sup> New York legislators cited *Schwartz* for the proposition that the equitable distribution amendment merely clarified existing law.<sup>235</sup> Judges already had the equitable discretion to make such considerations in factor thirteen of the equitable distribution law,<sup>236</sup> but by passing a law that would apply uniformly to such situations the legislature announced that the judges' considerations were appropriate.

Similarly, Florida legislators could put greater emphasis in their next attempt on the *Bloch* decision, which implicitly held that a court could take a husband's withholding of a *get* into consideration when determining equitable distribution and alimony.<sup>237</sup> Using a judicial decision as the backdrop to the bill's campaign, proponents of the bill would be further justified in saying, "Judge[s] . . . ha[ve] agreed with this and . . . believe that the law does empower [them] to do this."<sup>238</sup> By properly making use of such judicial authority, proponents could provide additional reassurance to other legislators so that the bill could quickly move to passage.

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<sup>233</sup> 153 Misc. 2d 789, 792 (1992).

<sup>234</sup> Zornberg, *supra* note 35, at 735 ("Justice Rigler found statutory authorization for this decision in factor thirteen of the equitable distribution law, the 'catchall' provision requiring the court to consider 'any other factor which the court shall expressly find to be just and proper.'").

<sup>235</sup> *Id.*

<sup>236</sup> N.Y. DOM. REL. LAW § 236(B)(5)(d)(13) (McKinney 1983). "[A]ny other factor which the court shall expressly find to be just and proper." *Id.*

<sup>237</sup> *Bloch v. Bloch*, 688 So. 2d 946, 946 (Fla. Dist. Ct. App. 1997).

<sup>238</sup> *Id.* (quoting Anthony Daniele, Matrimonial Attorney).

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## V. CONCLUSION

This Note recommends that Maryland and Florida adopt *get* legislation in order to alleviate the *agunah* problem and reform the growing coercive and extortive tactics of Jewish husbands concerning the terms of delivery of the *get*. While community outreach and contract law have tried to conquer the *agunah* problem, Jewish women remain “in [a] state of marital limbo.”<sup>239</sup> The large Jewish populations in both Maryland and Florida suggest similarly large groups of women in those states face the *agunah* problem. A legislative effort, which is already under way in states that have significant Jewish populations like Maryland and Florida, is the best tool to protect these female victims whose religious standards pressure them into an inferior bargaining position and *de facto* subordination.

Maryland and Florida’s past attempts, though unsuccessful, have shown that there is potentially widespread support and growing need for help and legislation. If passed, a *get* statute would only require minimal state funds and, if properly drafted, could avoid the limited constitutional entanglements with respect to the Free Exercise and Establishment Clauses of the First Amendment. This Note proposes the New York statute as the paradigm for success—substantively, focusing the bill on alleviating alimony payments as an incentive to “remove barriers to remarriage” instead of the currently-used equitable distribution model would provide flexibility without unconstitutionally forcing a religious practice. It is also quite possible to present a religiously neutral statute, while at the same time galvanize the religious communities to support the process. The plight of women suffering the *agunah* problem is serious, and both Florida and Maryland need to address it through effective *get* legislation.

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<sup>239</sup> Feldman, *supra* note 29, at 140.