

SIGN AT YOUR OWN RISK-- THE "RCA" PRENUPTIAL MAY PREJUDICE THE FAIRNESS OF YOUR FUTURE DIVORCE SETTLEMENT

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David called Rabbi Applebaum, his Talmud teacher, on the phone. "Rabbi," began David, "I'm engaged. Will you perform the ceremony?" "Mazal Tov, " responded Rabbi Applebaum. "With pleasure David. However, you know that I will not perform any marriage unless the couple signs the premarital agreement recommended by the Rabbinical Council of America." "No problem, Rabbi," answered David. "All my friends are signing them. I even have a copy on my bedside table."

SYNOPSIS

Various premarital agreements have been proposed to offset the power given to men over women by Jewish law in the event of divorce and to ameliorate the resulting injustices to Jewish women. Premarital agreements like the one endorsed by the Rabbinical Council of America ("RCA"), which expand the jurisdiction of the rabbinical courts and allow for the discretionary imposition of the suggested penalty clauses, do not adequately realign the imbalance of powers or correct the ensuing injustices. Such premarital agreements may even prejudice the interests of women in marital property, alimony or child support.

This Article analyzes the premarital agreement recommended by the RCA, in contrast to other premarital agreements, and discourages its signing in favor of other agreements that better protect and promote the interests of Jewish women.

INTRODUCTION

Almost all-Orthodox Jewish couples who marry today in the United States are advised to sign premarital agreements. The RCA, one of the leading Orthodox institutions in the United States¹, encourages couples to sign a premarital agreement, made up of two documents: (1) "Prenuptial Agreement, Husband's Assumption of Obligation" and (2) "Prenuptial Arbitration Agreement Between Husband and Wife."² In this Article, both documents are referred to as the "RCA Prenup."³ The documents are printed on heavy-grade colored paper and sealed with a round gold seal with embossed writing. They are placed inside a folder entitled "Jewish Marriage Documents." In the inside flap of the folder, the new couple is informed that:

The marriage documents in this collection will facilitate the fulfillment of the requirements of Jewish marriage in a format that is halakhically correct, legally effective, and aesthetically consistent.⁴

The documents are usually presented to the new couple by the rabbi asked to officiate at the ensuing marriage. Eager to enter into a marriage which is halakhically correct, legally effective and aesthetically

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¹ See <<http://www.rabbi.org/overview.htm>> (visited on September 16, 1999) ("The Rabbinical Council of America is a dynamic professional organization serving 980 Orthodox Rabbis in the United States of America, Canada, Israel and throughout the world. The Rabbinical Council of America serves as a spokesman for Orthodoxy on the national and international level. It sponsors conferences and disseminates information on timely issues and defends the interests of the religious Jewish Community.")

² THE PRENUPTIAL AGREEMENT, HALAKHIC AND PASTORAL CONSIDERATION at 45-53 (Basil Herring and Kenneth Auman, eds. 1996) [hereinafter cited as HALAKHIC AND PASTORAL CONSIDERATIONS"]. As I describe the body of this Article, these documents are disseminated by the RCA along with "The *Ketubah*, the Jewish Marriage Contract" and "The *Tenaim*, the Terms of Betrothal" in a separate folder entitled "Jewish Marriage Documents."

³ I have called these documents the "RCA Prenup" but the text of the agreements was formulated by Rabbi Mordechai Willig and developed under the auspices of the "Orthodox Caucus." See HALAKHIC AND PASTORAL CONSIDERATIONS, *supra* note 2 at x. "[B]e it resolved that every member of the Rabbinical Council of America will utilize prenuptial agreements...All prenuptial agreements must be approved by the Rabbinical Council of America's *Bet Din*. To date only Rabbi Willig's prenuptial agreement has been accepted." *Id.* at 22.

⁴ The RCA folder "Jewish Marriage Documents." This information can be found on the inside flap of the folder. A copy is on file in the Cardozo Women's Law journal office at Benjamin N. Cardozo School of Law.

consistent,⁵ many Orthodox couples sign these documents, often without legal counsel and despite their legal implications.

Premarital agreements, like the RCA Prenup, are meant to ameliorate the imbalance of power given to men over women in Jewish law in the event of divorce and to remedy the resulting injustices to Jewish women.⁶ With those ends in mind, rabbis encourage traditional Jewish couples who voluntarily bind themselves to Jewish law to sign these documents. They recommend similar agreements to Jewish Israeli couples, all of whom are bound by the laws of Israel and must marry and divorce in accordance with Jewish law.⁷

Though well-intentioned, the RCA Prenup does not achieve its attested goal of alleviating the plight of Jewish women in the area of divorce. Rather, the direct effect and end result of the RCA Prenup and other premarital agreements referred to as “Reifying Agreements”⁸ in this Article, is to expand the jurisdiction and power of the rabbinical courts (*beit din*). Indeed, Reifying Agreements confirm, augment, support and justify the social domination of men over women, which is legitimated in the name of God under the current application of Jewish law. Under the guise of progress and reform, Reifying Agreements purport to address the issues of Jewish women and divorce, but, at best, offer only palliative solutions. By appearing to respond to the distress of women, Reifying Agreements suppress the rising consciousness of women and, as a result, obscure the search for real reform. They divert the attention of the fledgling activist from seeking out the source of the problem, thereby enabling the existing order to continue. Reifying Agreements refuse to confront the “maldistribution” of power⁹, examine its sources and remove the mask of legitimacy given to the existing structure.

Instead of Reifying Agreements, this Article will encourage the use of what it shall refer to as “Circumventing Agreements.” Circumventing Agreements acknowledge the biases of the Jewish social structure and attempt to find solutions that do not duplicate the current status quo. The distinctions, criticisms and recommendations in this Article invite young people to make informed decisions. Moreover, the analysis should give pause to the rabbinical establishment and encourage real and lasting solutions to a problem that challenges the integrity of Jewish law. If real solutions are not found, if only palliative or partial solutions are suggested, one should be concerned about the consequential injustices to women and the further viability of Jewish law, both in Israel and in the Diaspora.

I. JEWISH LAW ALMOST GIVES HUSBANDS UNFETTERED POWER

Halakha (“Jewish law”) is a body of law that developed over thousands of years.¹⁰ It is ancient, but still very much alive. *Halakha* is not confined to the halls of academia. Rather, it is a legal system, which molds the lives of traditional Jews.¹¹ It also dictates the personal status of all Jewish couples living in Israel who, pursuant to the laws of Israel, must marry or divorce in accordance with Jewish law.¹²

⁵ See *id.*

⁶ The explanatory flap of the RCA “Jewish Marriage Documents” folder explains that: “A Prenuptial Agreement works to prevent the exploitation by one partner to the marriage of the other, in the unlikely event that the marriage fails.” The explanatory flap does, however, refer the couple for “further instructions” to HALAKHIC AND PASTORAL CONSIDERATIONS. In that booklet, Dr. Norman Lamm, president of Yeshiva University introduces the RCA Prenup as one of the solutions suggested to ameliorate “the tragic fate of women who find themselves indefinitely and literally ‘anchored’ to their absent spouses.” See Norman Lamm, FORWARD to HALAKHIC AND PASTORAL CONSIDERATIONS, *supra* note 2, at ix.

⁷ See § 2 Rabbinical Courts Jurisdiction (Marriage and Divorce) Law 5713-1953 No. 64 (7 LAWS OF THE STATE OF ISRAEL [LSI] 139) (“Marriage and divorce of Jews shall be performed in Israel in accordance with Jewish religious law.”)

⁸ See generally, Peter Gabel, *Reification in Legal Reasoning*, 3 RESEARCH IN L. & SOC. 25 (1980); ROBERT W. GORDON, *Some Critical Theories of Law and Their Critics*, in THE POLITICS OF LAW, A PROGRESSIVE CRITIQUE 641, 650 (3rd ed. D. Kairys, ed. 1998). “Reification” is the “process of allowing the structures that we ourselves have built to mediate relations among us so as to make us see ourselves as performing abstract roles in a play that is produced by no human agency.” *Id.*

⁹ See CATHARINE MACKINNON, *Toward Feminist Jurisprudence*, in FEMINIST JURISPRUDENCE 610, 613 (P. Smith ed. 1993). “Inequality is about power, its definition and its maldistribution.” *Id.*

¹⁰ See Irving Breitowitz, *The Plight of the Agunah: A Study in Halacha, Contract, and the First Amendment* 51 MD. L. REV. 312 (1992) (outlining the structure of Jewish Law).

¹¹ See generally 7 ENCYCLOPEDIA JUDAICA, 1156, 1166 (1972).

¹² See § 2 Rabbinical Courts Jurisdiction (Marriage and Divorce) Law 5713-1953 No. 64 (7 LAWS OF THE STATE OF ISRAEL [LSI] 139; see also FREDERIC M. GOADBY, INTERNATIONAL AND INTER-

Under Jewish law, a marriage dissolves only after a husband gives his wife a Bill of Divorce (a “*get*”). Thus, for example, religiously observant Jews in New York, Paris or Johannesburg will not consider themselves divorced if a *get* ceremony has not taken place, whether or not the relevant family court has rendered a judgment of divorce.¹³ Accordingly, in Israel, where there is no civil divorce and religious laws of marriage and divorce bind Jewish couples,¹⁴ Jewish wives will remain married to their Jewish husbands until they receive a *get*, irrespective of whether the wives or their husbands are Orthodox, Conservative, Reform, secular, agnostic or atheist.¹⁵

In Israel, if a Jewish woman desires to divorce her Jewish husband and he does not agree to that divorce, she must petition the rabbinical courts of the State of Israel to decide whether she has a cause of action for divorce.¹⁶ These courts serve as the official divorce courts of the state with respect to Jewish marriages and decide cases in accordance with Jewish law.¹⁷ This Article will refer to the decisions of these courts to illustrate the real and pragmatic applications of Jewish law today, extrapolating from these decisions to suggest how rabbis outside of Israel would interpret Jewish law if they were given the authority to decide such issues by fiat of arbitration, agreement or community pressure.

Jewish law has developed many complex rules regarding the validity of the acts of marriage and divorce. This Article suggests that the following “Rules of Law,” direct, mold and determine the nature of Jewish divorce. These rules must be examined and understood before reform measures can be constructed and implemented.

A. *First Rule of Law: According to Biblical Law, A Man Could Divorce His Wife Against Her Will*

In the Book of Deuteronomy it is written that:

A man takes a wife and possesses her. She fails to please him because he finds something obnoxious about her, and he writes her a bill of divorcement, hands it to her and sends her away from her house.¹⁸

According to this Biblical verse, the husband writes the bill of divorce, gives it to his wife, and banishes her from his house. The divorce is initiated and executed by the husband at his will and in accordance with his subjective evaluation of the nature and quality of his marriage.¹⁹ If his wife fails to please him he may divorce her. His wife has no capacity, voice or power to protest.

Over the thousands of years Jewish law developed, rabbis introduced various laws to bridle the unilateral power the Bible gave to men over their wives, and to shield wives from the capricious whims of their husbands.²⁰ Since

REFLIGIOUS PRIVATE LAW IN PALESTINE 115-120, 142-155 (1926); EDUARDO VITRA, THE CONFLICT OF LAWS IN MATTERS OF PERSONAL STATUS IN PALESTINE 153-163 (1947); MENAHEM ELON, 4 JEWISH LAW: HISTORY, SOURCES AND PRINCIPLES 1652 (Bernard Auerbach and Melvin J. Sykes, [Engl.] trans JPS 1994).

¹³ The Conservative and Orthodox movements require the execution of a *get* in order to dissolve a marriage. The Reform movement does not. According to the Reform movement, civil divorce is sufficient to completely dissolve the marriage. See SOLOMON BENNETT FREHOF, REFORM JEWISH PRACTICE (1963); Walter Jacob, REFORM JUDAISM AND DIVORCE, AMERICAN REFORM RESPONSE 511-514 (1983).

¹⁴ See § 1 Rabbinical Courts Jurisdiction (Marriage and Divorce) Law 5713-1953 No. 64 (7 LAWS OF THE STATE OF ISRAEL [LSI] 139 (“Matters of marriage and divorce of Jews in Israel, being nationals or residents of the State, shall be under the exclusive jurisdiction of rabbinical courts.”)).

¹⁵ See *id.*

¹⁶ See *id.*

¹⁷ See *id.* at § II.

¹⁸ DEUTERONOMY 24:1 (The JPS Torah Commentary 1996).

¹⁹ See generally, *infra* note 152. But see Yair Zakovitch, THE WOMAN'S RIGHTS IN THE BIBLICAL LAW OF DIVORCE, 4 JEWISH L. ANN. 28, 35-36 (1981); E. Lipinski, *The Wife's Right to Divorce in Light of an Ancient Near Eastern Tradition*, 4 JEWISH L. ANN. 9 (1981); MORDECHAI A. FRIEDMAN, *Divorce Upon the Wife's Demand as Reflected in Manuscripts from the Cairo Geniza*, 4 JEWISH L. ANN. 103 (1981) cited in Jeffrey H. Tigay, THE JPS TORAH COMMENTARY, DEUTERONOMY 388 (1996) (suggesting that women in Biblical Israel may have had some limited right to initiate divorce, in particular if that right were stipulated in the marriage agreement).

²⁰ See Judith Hauptman, REREADING THE RABBIS 102-105 (1998).

rabbis presumed that a woman would rather be married than live alone,²¹ the main thrust of these laws insured that the wife would remain under the aegis of her husband.²² The introduction of the marriage contract, the *ketubah*, served that purpose by requiring the husband to pay his wife a large sum of money in the event that he divorced her for no good reason.²³ In addition, a rabbinic edict known as a *takkanah* attributed to Rabbenu Gershom in the 11th century,²⁴ prevented an Ashkenazi Jewish husband from divorcing his wife against her will and from taking a second wife,²⁵ both of which were allowed under Biblical law.

The impact of these corrective measures, however, did not equalize the positions of husband and wife with respect to their autonomy over their personal status.²⁶ Rabbinical laws are mutable. Biblical laws are not.²⁷ Should a husband initiate a divorce and his wife refuse to accept a *get*, the rabbis, at their discretion, can quash the wife's resistance by overriding their protective legislation and ordering the wife to accept the *get*, or by simply allowing the husband to take another wife.²⁸ These procedures still occur in Israel, where the legislature has recognized such rabbinic acts as exceptions to the criminal law that prohibits bigamy.²⁹

In an article titled "Modern-Day *Agunot*, A Proposed Remedy," Rabbi J. David Bleich explains that should a woman abandon her husband and "steadfastly refuse to accept a bill of divorce, it would be *inequitable* to bar the husband from taking another wife by reason of rabbinical legislation" (emphasis added)³⁰ Since the rationale behind the ban against plural marriages can be construed as having been designed to protect the wife, a woman who has abandoned her husband and home is not entitled to such protection.³¹ Thus, Rabbi Bleich asserts that if a wife who is not entitled to the protection of the law invokes the *takkanah* to justify her refusal to accept the *get*, she should not be entitled to equitable relief since she does not appear before the court with "clean hands."³²

The pragmatic impact of this First Rule of Law is that if a Jewish husband initiates a divorce action, a Jewish wife does not have the ultimate and unfettered capacity to prevent that divorce. Accordingly, a court may apply its discretion and rely upon its sense of justice, ethics, equity, morality, fault, right or wrong, the "clean hands" doctrine or *halakha* to help the Jewish husband out of an unsuccessful marriage.

B. Second Rule of Law: A Man Must Give His Wife a Get Out Of His Own Free Will

In the Mishna, a rabbinic legal canon redacted by R. Yehudah Ha-Nasi about the beginning of the third century C.E., it is written:

²¹ See T.B. KETUBOTH 75a.

²² See generally, Gerda Lerner, THE CREATION OF THE PATRIARCHY 217-218, 239-240 (1986)(discussing "paternalistic dominance").

²³ See Hauptman, *supra* note 20, at 62-68; TAL ILAN, JEWISH WOMEN IN GRECO-ROMAN PALESTINE 147 (1996); see generally IRVING A. BREITOWITZ, BETWEEN CIVIL AND RELIGIOUS LAW, THE PLIGHT OF THE *AGUNAH* IN AMERICAN SOCIETY 286-291 (1993).

²⁴ See ZE'EV FALK, JEWISH MATRIMONIAL LAW IN THE MIDDLE AGES 13-18, 18 (1966) ("An examination of sources from the eleventh and twelfth centuries ... apprises us that monogamy found its way into French/German Jewry by slow degrees, and not as the result of a single legislative act.")

²⁵ See Judith Romney Wegner, *The Status of Women in Jewish and Islamic Marriage and Divorce Law*, 5 HARV. WOMEN'S L. REV. 1, 26 (1982) (referring to this edict as a "jurisprudential anomaly, forced on the Ashkenazi Jews of Europe by Christianity's rejection of polygamy.")

²⁶ See T'SHUVOT HAROSH 42:1 (Rabbi Asher ben Jechiel 1250-1327 Spain); Chaim Malinowitz, *infra* note 40, at 9. Authorities also claim that, since the edict of Rabbenu Gershom, the parties have equal power under Jewish law to extort one another in the divorce process. *Id.*

²⁷ Consequently, rabbis do not hold that a *get* which has been given by the husband against his wife's will is void *ab initio*. See BENZION SCHERESCHEWSKY, DINEI MISHPACHA (Family Law in Israel) 423 n. 42 (3rd ed. 1984) citing, *eg.*, the Rema (Rabbi Moses ben Israel Isserles 16th c. Poland) commentary to the SHULHAN ARUKH, EVEN HA'EZER 119:6.

²⁸ See SCHERESCHEWSKY *supra* note 27, at 421-423.

²⁹ See § 179 PENAL LAW 5737-1997 (Special Volume) LAWS OF THE STATE OF ISRAEL [LSI] 56.

³⁰ J. David Bleich, *Modern Day Agunot, A Proposed Remedy*, 4 JEWISH L. ANN. 167, 168 (1981).

³¹ See *id.*

³² *Id.*

A man who wishes to divorce his wife is not like a woman who seeks divorce from her husband. A woman is divorced in accordance with her will or against her will. A man cannot divorce his wife except of his own free will.³³

A *get* which is given under duress or coercion (known as a *get meuseh*, a “forced divorce”)³⁴ is void.

Rabbis derive this Second Rule of Law from the same verse in Deuteronomy, which serves as the basis for the First Rule of Law. Since the husband has the unilateral power to divorce his wife, the act of divorce can only occur if it complies with his discretion and free will.³⁵

The fact that rabbis derived this rule from the Bible,³⁶ and not from secular principles of contract or any sense of justice, ethics or morality underscores the impact of this rule and determines its consequences. Accordingly, the rule that a *get* must be drafted and delivered at the “uncoerced behest of the husband”³⁷ cannot be compared to rules developed under the common law regarding the freedom of the individual to enter into contracts and the invalidity of contracts entered into as a result of duress. It cannot be compared to norms derived from concepts of “natural justice” or morality. Because the Second Rule of Law is attributed to the Bible and to God, the question of whether a husband has agreed to give his wife a *get* out of his own free will is subject to strict scrutiny by rabbis and is analyzed well beyond the notions of fraud, duress and free will.

Rabbis carefully examine the motives behind a husband's decision to give a *get* to insure that his freedom of choice, as well as his free will, is not hampered.³⁸ The following are examples of questions raised by Jewish rabbis, judges and theorists concerning the context under which a *get* is given: Is a *get* valid if a husband gives his wife a bill of divorce to avoid a financial penalty that he assumed in a divorce agreement?³⁹ Is it valid if a man gives his wife a *get* because he is afraid that a New York judge may award him less property than he would otherwise receive under the laws of equitable distribution?⁴⁰ If a woman pays her husband significant sums of

³³ T.B. YEVAMOT 112b.

³⁴ See T.B. GITTEN 88b.

³⁵ See DEUTERONOMY 24:1.

³⁶ See id.

³⁷ Bleich, *supra* note 30, at 171.

³⁸ This substantive Rule of Law is reflected in procedural rules. Every *get* ceremony requires that the husband state that he gives the *get* of his own free will and that he revoke any statement he may have made claiming that he will never give his wife a *get*, or that the *get* is not being given voluntarily. SHULHAN ARUKH, EVEN HA'EZER 134:1.

³⁹ See Bleich, *supra* note 30, at 172 n. 6 (citing 2 PISKEI DIN RABBANIYIM (Israel Rabbinical Court Cases) 9 (5717-1957)); Elyakim Ellison, *Siruv Latet Get* (Refusal to Give a Get) 69 Sinai 145 (5731-1971); see generally, Breitowitz, *supra* note 23, at 20-27, particularly n. 63-65, (citing Rema, Rabbi Moses ben Israel Isserles 1525, 1530 - 1572 Krakow, Poland) commentary to the SHULHAN ARUKH, EVEN HA'EZER 134:5. TESHOVOT HA-RASHBA 4:40 (*responsa* of Rabbi Solomon ben Abraham Adret (or Aderet) 1235 - 1310, Spain).

⁴⁰ See Rabbi Chaim Malinowitz, *The New York State Get Bill and its Halachic Ramifications*, 27J. OF HALACHA & CONTEMP. SOC. 5, 19 (1994) (“[I]f a *Get* is given in circumstances where it is even just plausible that coercion is a factor, it would be under a cloud until its validity could be determined beyond any doubt.”). “[T]he ‘new Get Bill’ represents an ever-present danger.” *Id.* at 25. See also Chaim Z. Malinowitz, *The New York State Get Law: An Exchange*, 31:3 TRADITION 23, 26 (1997) (“But there is no logical way to consider the coercion of the *Get* bill indirect. It directly, explicitly extracts a *Get* from a husband under a threat of monetary loss.”) Rabbi Gedalia Dov Schwartz, *Comments on the New York State, “Get Law”* 27 J. OF HALACHA AND CONTEMP. Soc. 26, 33 (1994) (“[O]ne has to remember that even absent the existence of the *Get* Law every Bet Din is faced with the need to determine the husband's free-will cooperation.”); Michael Broyde, *The 1992 New York Get Law*, 29:4 TRADITION 5, 10 (1995) (“[T]he 1992 *Get* Law is not a positive development and raises the possibility of illicit coercion in Jewish divorces.”); Michael Broyde, *The New York Get Law: An Exchange* 31:3 TRADITION 27, 39 (1997) (“I believe the 1992 New York *Get* Law is a bad idea, as all coercive secular regulation to enforce Jewish law should only be sought to enforce Jewish law norms that are accepted by (nearly) all members of the halakhic community. The 1992 *Get* Law is not and thus should be opposed. However, I believe that most Jewish divorces issued in the shadow of the 1992 New York *Get* Law are, at the very least, minimally valid according to the halakha.”); Tzvi Gartner, *The 1992 New York Get Law*, 32:3 TRADITION 91, 91 (1998) (“There are valid grounds for concern that the 1992 New York *Get* Law will be interpreted by the courts as a mandate to impose a halakhically unwarranted monetary loss upon a recalcitrant spouse. A *get* administered for the purpose of averting a halakhically unwarranted monetary loss, or reasonable threat thereto, is deemed a *get me'usse* - a *get* given under duress . . .”); J. David Bleich, *Get Law* 32:1 TRADITION 99 (1998) (“I concur in Rabbi Malinowitz’ conclusion [that the *Get* bill creates economic

money in consideration for a *get*, is the subsequent bill of divorce suspect since the husband did not give her the *get* of his own free will but in order to enjoy the money that he has extorted?⁴¹ Does a premarital agreement designed to encourage the husband to give his wife a *get* tamper with the husband's free will in a manner which violates Jewish law?⁴²

Although rabbis will render different opinions concerning the above questions, the fact that these questions are even deliberated highlights the intrinsic problem in Jewish divorce. Since the Biblical rule, as understood by rabbis, is that the free will of the husband cannot be compromised, rabbis hesitate to use the rabbinic authority vested in them to interfere with that will.

In the same manner that rabbis recognize the need to protect the wife from the rule which gives the husband the unfettered right to divorce her, the men who have molded and shaped Jewish law have acknowledged that a woman may want to initiate a divorce from her husband and free herself from the "protective" sphere of a marriage which no longer affords her the protection, maintenance and care originally intended. The Mishna lists various loathsome physical traits of the husband which serve as a basis for divorce.⁴³ Rabbis set forth grounds upon which a rabbinical court could legitimately force the husband to divorce his wife, without having that force constitute an unlawful interference with the husband's free will.⁴⁴ Maimonides (Rabbi Moses Ben Maimon 1135-1204) proclaimed that, should *halakhically* valid grounds for a divorce exist, the court may even flog the husband until he says that he gives the *get* of his free will.⁴⁵

Yet, despite these enlightened rabbinical enactments, progressive views and what Judith Hauptman calls "the benevolent patriarchy,"⁴⁶ the rule that a husband must give a *get* out of his own free will prevails to the detriment of these innovations. Man hesitates to tamper with God's law. The list of grounds for divorce set forth in the Mishna is limited, mostly irrelevant in modern times, and largely unused.

Rabbis rarely order husbands to give a *get* even when the "fault" for the breakdown of the marriage clearly lies with the husband.⁴⁷ Few divorce cases in Israel are decided as a result of an order from the courts requiring a husband to grant his wife a divorce.

sanctions]. I will decline to officiate at the wedding of any person domiciled in the state of New York who was divorced subsequent to the enactment of the 1992 legislation unless it is manifestly clear that, at the time of the execution of the *get*, there were no ancillary matters subject to the jurisdiction of the court."); Breitowitz, *supra* note 23, at 202-203, 212-219, 225-237, 236. "Unless and until halachic authorities achieve broad-based consensus as to: (1) whether § 236B of the N.Y.Dom.Rel.Law (1) constitutes invalid coercion ... § 236B will indeed generate *gittin* that are *halachically* problematical." *Id.* at 236.

⁴¹ See Rav Haim Shlomo Shaanan, *Ofanim L'Kfiyat Ha'Get* (Ways to Compel a *Get*), 11 TEHUMIN 203 (5750-1990).

⁴² See generally Bleich, *supra* note 30, at 171-173; Judah Dick, *infra* note 126, at 92; Breitowitz, *supra* note 23, at 107-162, 106-161; David Joseph Mescheloff, *The Problem of a Forced Jewish Divorce and Pre-Nuptial Agreements as a Solution to the Problem of Abandoned Wives* (unpublished MA thesis in Hebrew submitted to the Talmud Department of Bar Ilan University) (available on loan at the Hebrew University, Givat Ram Campus).

⁴³ See T.B. KETUBOT 77a.

⁴⁴ See SHULHAN ARUKH, EVEN HA'EZER 154; see also Hauptman, *supra* note 20, at 104-105; Breitowitz, *supra* note 23, at 42-45.

⁴⁵ See Rambam, DINEI GERUSHIN (Laws of Divorce) 2:20; THE CODE OF MAIMONIDES Book Four, The Book of Women 177 (Isaac Klein trans. 1972); see also, Rambam, DINEI ISHUT (Laws of Personal Status) 14:8; THE CODE OF MAIMONIDES Book Four, The Book of Women 89 (Isaac Klein trans. 1972)). The court may even compel the husband to divorce his wife on the grounds that the husband is repulsive to her. This progressive position, however, is not accepted by most *halakhic* authorities.

⁴⁶ Hauptman, *supra* note 20, at 5.

⁴⁷ Israeli Rabbinical Courts have held that sexual relations with a woman who is not one's wife is not grounds for divorce unless the husband is unrepentant and a recidivist. See, e.g., 8 PISKEI DIN RABBANIYIM (Israeli Rabbinical Court Cases) 254 (Tel Aviv Rabbinical Court file 7831/ 5327-1967) (refusing to "order" or "compel" a husband to give his wife a *get* when he expressed remorse for frequently engaging in sexual relations with prostitutes. The Court suggested to the husband that he divorce his wife); Higher Rabbinical Court file 830/5355-1995 (holding that extramarital relations and physical violence are not grounds for "ordering" a husband to give his wife a *get* unless he is "warned, once or twice," that his behavior is not acceptable). Here too, the Court "highly recommended" that the couple divorce. See generally Ruth Halperin, *Begidat HaBaal Kellah LeKefiyat Get (Adulterous Behavior on the Part of the Husbands as a Cause of Action to Coerce Him to Divorce His Wife)* 7 MEHKAREI MISHPAT 297-329 (1989). Similarly, an Israeli Rabbinical Court will not "order" a husband to give his wife a *get* on the grounds of physical violence unless the violence is extreme, repeated, incontrovertible and the husband has been warned to cease his violent behavior. See, eg., 11 PISKEI DIN RABBANIYIM (Israeli

This sad reality is underscored by cases in which the Israeli rabbinical courts have exercised their authority under Jewish law to interfere with a husband's free will and have used the power given to them under Israeli law to compel a husband to give his wife a divorce by incarcerating him or by imposing lesser sanctions such as revoking his driver's license or taking away his banking privileges.⁴⁸ If the husband remains recalcitrant and refuses to give his wife the *get* despite the order, imprisonment or the revocation of his driver's license, the court can do nothing more.

The courts are similarly impotent in cases where the husband is missing. Here the rabbis, frustrated but resigned, must admit that they have done everything that Jewish law allows them to do and that, ultimately, only the husband can give the *get*.

The impact of this Second Rule of Law is that if a woman initiates the divorce, her husband has the ultimate power to determine whether or not she remains married. The ability of rabbis to interfere with the husband's free will is limited by their hesitation and their fear of God, and is overshadowed by the rule that the free will of the husband cannot be tampered with. Accordingly, this Second Rule of Law, in theory, and even more so in practice, allocates almost unfettered power to the husband over the wife.

C. Third Rule of Law: Violation of the Second Rule of Law will Result In the Social Stigmatization of the Wife's Subsequent Offspring

The imbalance of power that results from the Rules of Law, requiring a *get* to be given only of a husband's free will and allowing the husband to divorce his wife unilaterally, is compounded by the unequal treatment of men and women with respect to extramarital sexual relations. Jewish law does not apply sanctions against a married man who has sexual relations with an unmarried woman.⁴⁹ Since a man can have more than one wife under Biblical law, a married man who has sexual relations with an unmarried woman does not commit adultery under Jewish law.⁵⁰ Since the sexual relationship of a married man and unmarried woman is not forbidden by the Bible, the children of such a union are not censured by Jewish law.⁵¹ However, a married woman who has sexual relations with another man without obtaining a valid divorce from her husband is deemed an adulteress.⁵² Moreover, the children born to a woman from such a union are branded as "*mamzerim*"⁵³ and are forbidden

Rabbinical Court Cases) 327 (Higher Rabbinical Court file 73/ 5339-1979) (ordering husband to give a *get* when he beat his wife repeatedly, including once when he kicked her in the head until she bled and required medical attention, and the police warned him not to hit his wife). 15 PISKEI DIN RABBANIYIM (Israeli Rabbinical Court Cases) 145 (Haifa Rabbinical Court file 1530/5542-1984) (ordering husband to give a *get* when a couple was living apart for 10 years and husband had been convicted of assaulting his wife); *see also*, Mordechai Frishtik, *Physical and Sexual Violence by Husbands as a Reason for Imposing a Divorce in Jewish Law*, 9 JEW. L. ANN. 145 (1991); Beverly Horsburgh, *Lifting the Veil of Secrecy: Domestic Violence in the Jewish Community*, 19 HARV. WOMEN'S L. J. 171 (1995) (maintaining that Jewish Law fosters a battering culture). Even when the court "orders" a divorce, the husband may ignore the court's decision with no repercussions, unless the court can and will enforce that order with some sort of sanction.

⁴⁸ *See Hok Batei Din Rabbaniim (Kiyum Piskei Din Shel Gerushin) 5755-1995* (Rabbinical Courts Law (Enforcement of Divorce Decrees) 5755-1995).

⁴⁹ *See* 2 Encyclopedia Judaica, 313 (1972), ("The extramarital intercourse of a married man is not *per se* a crime in biblical or later Jewish law.")

⁵⁰ *See* LOUIS M. EPSTEIN, SEX LAWS AND CUSTOMS IN JUDAISM, 194-215, 194 (New Matter Ktav 1967) ("[A] dultery is possible only on the side of the wife, because she is the property of the husband, but not on the part of the husband ... the wife owes faithfulness to her own marriage; the husband owes faithfulness to another man's marriage."); *see also* Bleich, *infra* note 61, at 114 ("The legalistic essence of marriage is, in effect, an exclusive conjugal servitude conveyed by the bride to the groom ... Understanding that the essence of marriage lies in a conveyance of a 'property' interest by the bride to the groom serves to explain why only the husband can dissolve the marriage.")

⁵¹ *See* 11 ENCYCLOPEDIA JUDAICA, 840 (1972).

⁵² *Exodus* 20:13, *Deuteronomy* 5:17.

⁵³ *See* 11 ENCYCLOPEDIA JUDAICA, 840 (1972) (" 'mamzer,' usually translated as 'bastard'

... is the issue of a couple whose sexual relationship is forbidden according to the Torah and punishable by *karet* or death ... [A] marriage between a mamzer (male or female) and a legitimate Jew is prohibited ... The offspring of a mamzer (whether male or female) and a legitimate Jew or Jewess are also mamzerim."); *DEUTERONOMY* 23.3 ("A mamzer shall not enter the congregation of the Lord."); *M. YEVAMOT* 8:3; *M. KIDDUSHIN* 3:12.

from marrying other Jews. This stigma serves as a powerful disincentive to any thought of disobedience. A woman may be willing to defy the religious requirement of obtaining a religious divorce from her estranged husband, but she will hesitate to bear children who will be shunned by the Jewish community. Rabbi Bleich maintains:

Since Biblical law forbids polyandry, no provision similar to the effect of the "*heter meah rabbanim*"⁵⁴ could possibly be instituted on behalf of the wife. In the absence of a valid *get* any subsequent marriage which the wife may contract is nothing other than an adulterous liaison and any issue of such an adulterous union will unavoidably suffer the stigma of bastardy.⁵⁵

D. The Result of First, Second and Third Rules: A Woman Pays for Her Freedom Men She Desires to Divorce Her Defiant Husband

The will of the husband, as opposed to justice, ethics or a determination by a court of law, is the dispositive factor in determining whether a Jewish woman remains married to her husband. No court, third party or even God (except by "fatal" intercession) can free a woman. A disgruntled wife can be freed of the bonds of an unsuccessful marriage only when her husband decides that he is willing to release her.

A Jewish woman who seeks a divorce from her husband often pays for her freedom in order to persuade her husband to "exercise" his free will to give her a *get*. She may give up her rights to child support, marital property and even the custody of her children, to release herself from the bonds of a recalcitrant spouse and a failed marriage. Under the worst of circumstances, such coercion may not resolve the woman's situation and she will eventually grow old, embittered and repressed by the *halakah*.⁵⁶ A woman so handicapped by the system and her recalcitrant husband will be referred to in the Article as an *agunah*.⁵⁷

II. PARTIAL "SOLUTIONS" IN PREMARITAL AGREEMENTS: AN ATTEMPT TO REALIGN THE BALANCE OF POWERS

Various suggestions have been proposed to interpret, reform or circumvent Jewish law in ways that will ameliorate the plight of the *agunah* and consequently, realign the balance of powers between husband and wife.

Some reformists believe that the answer lies in the expansion of the theoretical grounds upon which rabbis could coerce the husband to give a *get*. This expansion would include modern causes of action such as the "irretrievable breakdown of the marriage,"⁵⁸ or the unilateral subjective desire of the wife to end the marriage because her husband revolts her, whether for good reason⁵⁹ or not.⁶⁰ Others suggest that rabbis should be given

⁵⁴ Rabbinical dispensation to marry a second wife.

⁵⁵ Bleich, *supra* note 30, at 169.

⁵⁶ See Shear-Yeshuv Cohen, Kefiyat Haget Bazeman Hazeh (Compelling a Get in Contemporary Times) II Tehumin 195, 195-196 (5750-1990).

⁵⁷ This definition of the *agunah* (a woman hostage to a dead marriage) is a modern one. See, *eg.*, Bleich, *supra* note 30, at 169; Shanah D. Glick, *The Agunah in the American Legal System: Problems and Solutions* 31 J. OF FAM. L. 885, 885 (1992-1993); Breitowitz, *supra* note 23, at 1.

⁵⁸ HAHAYIM V'HASHALOM para. 112 (response of Rabbi Hayim Palagi, Turkey, 1788-1869) ("If all efforts to bring the couple together have failed, and there is no hope for reconciliation, the couple should wait eighteen months. Then, if the Rabbinical court firmly believes that there is no hope for the marriage ... the court must sunder the marriage and force the husband to grant a *Get*.")

⁵⁹ See Moshe Silverberg, HA'MAAMAD HA'ISHI B'YISRAEL (Laws of Personal Status in Israel) 116-117 (1965) (If a woman's claim that her husband is repulsive to her is trustworthy, and not an excuse in order to free her to marry a different man, it is possible even to "coerce" a husband to grant a divorce based on Maimonides' ruling.); Breitowitz, *supra* note 23, at 56 ("[I]f a woman's claim of *mais alai* [that her husband is repulsive] is grounded in objectively verifiable criteria such as non support or physical or verbal abuse, a *get* can be ordered [but not necessarily "coerced"].")

⁶⁰ See SHLOMO RISKIN, WOMEN AND JEWISH DIVORCE at xiii (1989); *but see*, Breitowitz, *supra* note 23, at 45-57, 56-57 ("The *get* that Rambam or the Gaonim would compel [when a woman finds her husband repulsive, even if not grounded in objectively verifiable criteria] would be an invalid product of coercion according to Rabbeinu Tam, the *Shulchan Arukh* and virtually every other halakhic authority for the past 700 years . . . In the absence of a centralized rabbinical court that could promulgate uniform directives that would be binding on all

the authority to nullify marriages, thereby wresting the power from the husband to determine the personal status of his wife and placing that power in the hands of the rabbi.⁶¹ Some claim that it is possible to enter into a marriage subject to conditions which would dissolve the marriage. Accordingly, if such conditions were present, the marriage would dissolve, without placing the wife at the mercy of the husband or the court.⁶² Still others suggest the imposition of penalties⁶³ or financial disincentives upon a recalcitrant husband who wields religious precepts to gain advantages in the divorce process or to exact revenge on his spouse.

An example of legislation that threatens a defiant husband with such financial disincentives is the New York Get laws.⁶⁴ These laws preclude a plaintiff from obtaining a civil divorce if he has not given his wife a *get*.⁶⁵ In addition, these laws give the court the authority to consider the withholding of the *get* when deciding the allocation of marital property or the amount of spousal maintenance.⁶⁶

Like the New York Get law, the RCA Prenup and the other premarital agreements analyzed in this Article deter husbands from withholding the *get* from their wives by imposing financial burden if they do so.

All of the premarital agreements described here have been drafted by Orthodox scholars or have been used by Orthodox rabbis.⁶⁷ This Article does not analyze which of these contracts better conform to the requirements of Jewish law. This has been done by others.⁶⁸ Rather, the Article attempts to analyze the following questions:

Does the prenuptial agreement acknowledge the inequities and abuses resulting from the imbalance of power inherent in the Rules of Law, which characterize Jewish divorce; and do it attempt to realign, correct or at least, address that imbalance? Does it merely corroborate the current status quo? Or worse, does it exacerbate that imbalance and place women at a greater disadvantage?

A. *The RCA Prenup:*⁶⁹ A "Reifying Agreement" That Confirms the Status Quo and Exacerbates the Plight of the Agunah

The RCA Prenup includes two documents. One is the husband's unilateral "Assumption of Obligation" to pay his wife increased support payments in the event that the parties are living apart.⁷⁰ The second document is an "Arbitration Agreement" which is signed by both husband and wife.⁷¹

rabbinical courts, any court unilaterally ordering a *get* on the basis of Rambam's ruling runs the significant risk that other courts would deny recognition to the divorce ... In short, reacceptance of the now-discarded view of *Rambam* is unwise and impractical.")

⁶¹ T.B. GITTEN 33a ("The sages reserve the right to nullify the marriage."); see Menahem Elon, 2 JEWISH LAW: HISTORY, SOURCES AND PRINCIPLES, ENGLISH TRANSLATION JPS 1994) 631-642, 846-879; Avraham Haim Freiman, SEDER KIDDUSHIN VE'NISUIN AHAREI HATIMAT HA'TALMUD (The Marriage Ceremony in the Post Talmudic Era) 21, 38, 67-80, 87-92 (1945); *but see*, Breitowitz, *supra* note 23, at 65 ("Unless the annulment would be recognized by all major rabbinical authorities, it would be irresponsible to allow a remarriage without a *Get*."); *contra*, David Bleich, *Kiddushei Ta'ut. Annulment as a Solution to the Agunah Problem* 33:1 TRADITION 90 (1998); Eliav Shochetman, *Hafkaat Kiddushin* (Annulment of Marriages) 20 SHNATON HA'MISHPAT HA'IVRI 349 (rejecting annulment as a viable solution).

⁶² See Eliezer Berkovits, T'NAI B'NISUIN v'GET (Conditional Marriages and Divorces) (1967); *see generally* Breitowitz, *supra* note 23, at 60-63. ('For a variety of technical reasons, primarily the notion that cohabitation subsequent to a conditional marriage constituted a waiver of condition . . . virtually all responsible members of the Orthodox rabbinate rejected this approach.")

⁶³ I use the term "penalties" or "financial disincentive" as descriptive terms, which in no way reflect upon the status of these agreements under Jewish law. Penalties, *per se*, are not enforceable under Jewish law. See J. David Bleich, *The Device of the Sages of Spain As A Solution to the problem of Modern-Day Agunah*, 22:3 TRADITION 77, 78 (1986); Breitowitz, *supra* note 23, at 107-118.

⁶⁴ See N.Y. DOM. REL. §§236B and 253 (McKinney 1988).

⁶⁵ See *id.* at §236B Section 5(h).

⁶⁶ See *id.*

⁶⁷ I am well aware that not all Orthodox rabbis will approve of all the agreements described in this document. But each individual document described in this article has been either written by an Orthodox scholar, or endorsed and used by an Orthodox rabbi.

⁶⁸ See, *eg.*, Breitowitz, *supra* note 23, at 107-162.

⁶⁹ See Appendix 1.

⁷⁰ The original version of this document had no place for the wife's signature. The most recent version of this document includes a place for the wife's signature so that she can "acknowledge" her husband's undertaking. See Appendix 1, section IV; HALAKHIC AND PASTORAL CONSIDERATIONS, *supra* note 2, at 46-47.

⁷¹ See Appendix 1a; HALAKHIC AND PASTORAL CONSIDERATIONS, *supra* note 2, at 45-53.

On its face, the "Assumption of Obligation" attempts to redress the problem of the agunah by imposing a penalty on a recalcitrant husband. It requires a husband to pay increased spousal support to his wife in the event that the parties are living apart (the marriage has presumably "irretrievably broken down"). It is based on the rule that a husband can voluntarily obligate himself to pay his wife higher spousal support than the amount he would otherwise be obligated to pay under Jewish law.⁷² Since Halakha absolves a husband of any obligation to support his wife upon divorce, the "assumed obligation" can be avoided simply by the giving of the *get*.

The problem, however, with the "Assumption of Obligation" is that the obligation to pay increased spousal support does not continue until the delivery of the *get*. Rather, the "assumed obligation" ceases if the wife refuses to appear before a pre-appointed *Beth Din*, or if she "fails to abide by the decisions or recommendations of [the] *beth din*."⁷³ Thus, the ultimate goal of the "Assumption of Obligation" is not the *get*, but the submission of the parties to the authority of the *beth din*.

Accordingly, consider the woman who desires to leave her husband because he bores her or because he subjects her to harsh criticism or because she thinks someone else would be more attractive. She decides to leave the marital home and asks her husband for a *get*. However, he refuses and she sues under the husband's "Assumption of Obligation." Her husband then appears before the *beth din* arguing that his wife's reasons for leaving him are not justifiable under Jewish law, and therefore, he should not have to pay spousal support. In such cases, it is unlikely that the rabbinical court will come to the aid of the woman and order the husband to pay the increased spousal support obligation. In fact, based on past incidents in Israeli rabbinical courts, one should question whether any rabbinical court faced with this document would necessarily award the increased spousal support even if the fault for the breakdown of the marriage lay squarely with the husband.⁷⁴

Jewish law has always allowed rabbis to impose the penalty of increased support payments when a recalcitrant husband ignores an order to give a *get*.⁷⁵ However, strict adherence to the Rules of Law, especially the second, has inhibited rabbis from applying any pressure on a husband, even in form of a directive "ordering" him to give a *get* let alone 'compelling' him⁷⁶ or requiring him to pay increased spousal support or penalizing him in any way if he refuses. Fearing a forced divorce, rabbis hesitate to acknowledge any "fault" grounds as adequate for taking judicial action against a husband who refuses to grant his wife a *get*.⁷⁷

⁷²See Bleich, *supra* note 30, at 174.

⁷³See Appendix 1a; HALAKHIC AND PASTORAL CONSIDERATIONS, *supra* note 2, at 45-53.

⁷⁴For example, if the husband has had a long-term, open, and admitted affair with another (preferably married and Jewish) woman. He has no interest in breaking off that relationship. His wife is pious and fault-free.

⁷⁵See T.B. BAVA METZIAH 12b; *IO Piskei Din Rabbaniyim* (Israeli Rabbinical Court Cases) 294 (Supreme Rabbinical Court File No. 205/5735-1975). *But see* minority opinion which held that high support award would result in a *get meuseh*, a forced divorce. *See also* Otmagzin v. Otmagzin 50:3 PISKEI DIN (Israeli Supreme Court Cases) 449 (1990); Schereschewsky, *supra* note 27, at 228-229; Breitowitz, *supra* note 23, at 133 (claiming that a common practice for the rabbinical courts is to award \$250 a day when faced with the specter of a recalcitrant spouse).

⁷⁶See Breitowitz *supra* note 23, at 42-45 (distinguishing between a court directive ordering a husband that he must give his wife a divorce, and one *compelling* him to divorce his wife).

⁷⁷See generally 8 PISKEI DIN RABBANIYIM (Israeli Rabbinical Court Cases) 354 (Tel Aviv Rabbinical Court file 78731/ 5327-1967); Higher Rabbinical Court file 830/5355-1995; Ruth Halperin, *Begidat HaBaal Kellah LeKefiyat Get* (Adulterous Behavior on the Part of the Husbands as a Cause of Action to Coerce Him to Divorce His Wife) 7 MEHKAREI MISHPAT 297-329 (1989); Mordechai Frishtik, *Physical and Sexual Violence by Husbands as a Reason for Imposing a Divorce in Jewish Law*, 9 JEW. L. ANN. 145 (1991); Beverly Horsburgh, *Lifting the Veil of Secrecy: Domestic Violence in the Jewish Community*, 18 HARV. WOMEN'S L. J. 171 (1995).

Therefore, when the rabbinical courts do "order" husbands to grant a *get*,⁷⁸ they rarely impose the sanctions available to them under the *halakha* or Israeli law to ensure that the order is obeyed.⁷⁹

The "Assumption of Obligation" may have a chilling effect on solvent husbands. Such husbands may hesitate to withhold a *get* because of the perceived sanction that hovers over their heads. It may also help in cases where the wife bears no blame for the breakdown of the marital home. It may also help the devout wife who carries no blame for the breakdown of the marital home.

However, the benefits of the "Assumption of Obligation" document are limited, at best, and create a false sense of security. It gives a new bride the false notion that she is protected from *get* extortion, when the most direct outcome of the "Assumption of Obligation" is to draw the couple into the jurisdiction of rabbinical courts. Without any assurance of receiving the *get*, this places the wife back in the domain of the status quo with its existing limitations and power distortions.⁸⁰ Moreover, by purporting to address the needs of women, the "Assumption of Obligation" document deflects the rising consciousness of women. It prevents women from both identifying and confronting the imbalance of power that lies at the source of the problem.

THE ARBITRATION AGREEMENT

In the second document of the RCA Prenup, the "Arbitration Agreement," the *agunah* is no better served. Like the "Assumption of Obligation" document, its main objective is to bind the couple to appear before the rabbinical court "to arbitrate all issues relating to a *get*, as well as any issues arising from premarital agreements."⁸¹

The Arbitration Agreement also requires the parties to separately include or exclude clauses, which would authorize the *beth din* to decide issues of. Child support, visitation and custody or monetary disputes which, at the couple's choice, can be decided in accordance with the secular law of the state, rather than Jewish law.

If signed in its more expansive version, the Arbitration Agreement does more than reconfirm the status quo. It threatens to compromise the alimony, custody, visitation and marital property rights achieved by women under the secular law.⁸² Ironically, this conclusion is also articulated by Rabbi Mordechai Willig, the rabbi credited in the overleaf of the RCA Prenup with the agreement's formulation. In the RCA endorsed booklet entitled "*THE PREMARITAL AGREEMENT: Halakhic and Pastoral Considerations*," he writes:

[S]ome women or their attorneys will object to the inclusions of monetary disputes (e.g. property settlements, alimony, child support) in the arbitration agreement, for the current secular law of equitable distribution and maintenance or community property will generally result in a larger financial settlement for women than does enforcing the provision of the standard *ketubah*. *Halakhically*, however, resolutions of marital

⁷⁸In the twelve years that I practiced as a private attorney, I had only one case in which the rabbinical court ordered a husband to give his wife a *get*. This order was overturned in the Supreme Rabbinical Court. My experience was typical of other attorneys and rabbinical court advocates that I inter-viewed. Since I have headed a legal aid service for agunot, a position which enables me to oversee, or come in contact with, some of the hardest cases, I have seen about twenty cases in which the courts have ordered a *get*. The cases are divided almost evenly among husbands who are in prison (murder, child molestation, assault of his wife); husbands who are not in the jurisdiction of the State and any order against them is of no consequence; husbands who have been separated from their wives for over five years; in only one case was the order given after a separation of only two years.

⁷⁹See Rabbinical Courts Law (Enforcement of Divorce Decrees) 5755-5995, supra note 48 (allowing rabbinical courts to impose sanctions against recalcitrant husbands which include: imprisonment, the revocation of driver's license, professional licenses and credit cards. According to statistics given by the rabbinical court administration in January 1998, rabbinical courts have imposed these sanctions 106 times since the law was passed in 1995. A tribunal in Haifa who used this sanction 30 times imposed a disproportionate number of these sanctions. But in the Tel Aviv area, where the majority of the Israeli population lives, the rabbinical courts imposed sanctions only twice, and no *get* was given as a result.

⁸⁰In January 1997, in a conference held in Jerusalem under the auspices of Yeshiva University, Rav Zalman Nehemia Goldberg confirmed this conclusion, stating openly that the main purpose of the RCA Prenup was to insure that litigating couples bring their dispute before religious courts, rather than secular courts.

⁸¹ Appendix Ib, (III(a)); HALAKHIC AND PASTORAL CONSIDERATIONS, supra note 2, at 50.

⁸² See Horsburgh, supra note 47, at 201-202. ("[R]abbinical law is less likely than the secular law to respect the woman's need for alimony and an equitable distribution of the marital assets. The Orthodox solution appears to further entrench religious control rather than address the woman's needs.")

property disputes are within the jurisdiction of a *bet din*, unless *bet din* permits the parties to resolve them in court.⁸³

Rabbi Willig knows that agreeing to let the Beth Din arbitrate monetary disputes may harm women, but he effectively rules that it is forbidden under Jewish law to litigate such matters in the civil courts. Thus, although section III of the Arbitration Agreement gives the couple the option to choose whether or not to give *the beth din* the authority to arbitrate matters that are ancillary to the *get*, Rabbi Willig encourages couples, in the name of God and Jewish law, to submit all their claims to the *beth din*.

Indeed, many couples will probably heed Rabbi Willig's admonition and sign the Arbitration Agreement in its more comprehensive form. Religious couples bow to God's will upon the sacred occasion of their impending marriage. Husbands may condition their signing of the RCA Prenup on the acceptance of the broader jurisdiction of the rabbinical courts. Besides, couples are too busy planning the details of their wedding to take the time necessary to seek serious legal advice regarding the implications of Rabbi Willig's or their rabbi's recommendations.

The fact that Rabbi Willig considers it improper to go to the civil courts to litigate matters of marital property suggests that the *beth din* may take the initiative to decide such matters even if a couple has expressly refrained from giving the *beth din* arbitration power over those issues.

Rabbinic judges are loyal to the *halakha*. When a couple appears before the *beth din* to resolve the *get* issue, rabbis may pressure the wife to transfer the visitation, custody or monetary matters in dispute to the *beth din*, as a matter of principle. Rabbinic judges may claim, as Rabbi Willig strongly implies, that Jewish law does not allow Jews to submit their disputes to the secular courts. Similarly, they may feel Jewish law requires them to take jurisdiction of ancillary matters because the free will of the husband has been or will be compromised either by the decision of the secular courts or by the need to pay for legal representation in the secular courts, thereby violating the rule against a forced divorce.

As a practical matter, the rabbinic judges may also pressure women to transfer monetary issues to the *beth din* in order to give for the *beth din* more leverage with to induce the cooperation of a recalcitrant husband. Desperate to convince the husband to give his wife a *get* out of his own will, rabbis may encourage a woman to agree to have the *beth din* "reevaluate" a secular court's determination regarding alimony, custody, visitation, child support and the division of marital property.⁸⁴

Furthermore, even if the couple instructs the *beth din* to decide their monetary disputes in accordance with the secular law (Section III), this is insufficient to protect the rights of women in marital property. Rabbinical judges often do not have the training or the sophistication necessary to deal with issues such as the valuation of pension benefits, business "good will" and professional licenses, in addition to the tracing, commingling and transmutation of those properties.⁸⁵ Feminist attorneys have bemoaned the fact that secular establishments have neglected these matters when dividing marital property, thereby placing women who have devoted themselves to the family home at a disadvantage to husbands who have devoted themselves to their jobs and the workplace.⁸⁶ It is difficult to imagine that the definition and evaluation of marital property of women would be dealt with in a sympathetic and expansive manner by an all-male establishment, such as the *beth din*.

⁸³HALAKHIC AND PASTORAL CONSIDERATIONS, *supra* note 2, at 33 (emphasis added).

⁸⁴I have often witnessed this type of conflict resolution. In a recent case that has come to my attention, the Jerusalem rabbinical court used this tactic in the attempt to extract the cooperation and free will" of a husband who had, for five years, ignored a rabbinical court order to give his wife a *get*. In desperation to resolve her case, the wife initially agreed to the proposal of the rabbinical court that it be allowed to review the decisions of the secular court. But when the wife realized that she might be financially harmed by a review of the secular decisions, she withdrew her agreement. In response, the rabbinical court declared that the woman no longer had the special status of an *agunah*. The decision is on appeal. The same court, acceding to the demands of recalcitrant husbands, has urged women to compromise on the custody of their children, to sell the marital home, or to transfer all their rights in the marital home to their husbands in return for a *get*. Similarly, I am aware of cases in the United States in which the rabbinical courts recommended that women give up property awarded to them under equitable distribution laws in exchange for the *get*. The strict Talmudic model of Jewish law does not recognize the rights of a married woman in the property of her husband. See Breitowitz *supra* note 23, at 293-294. Hence some rabbinical courts may view a transfer of the husband's property to his wife pursuant to an award of the secular court as the equivalent of "theft." See Malinowitz in HALACHA AND CONTEMP. SOC., *supra* note 40, at 13-15.

⁸⁵ See, e.g., J. Thomas Oldham, *Tracing, Commingling and Transmutation*, 22 FAM. L.Q. 219 (1989); Harriet N. Cohen and Patricia Hennessey, *Valuation of Property in Marital Dissolution*, 22 FAM. L.Q. 339 (1989).

⁸⁶ See LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION* 110-141 (1985); Debra Baker, *Wealthy Wives' Tales*, 84 ABA J. 72, 72-76 (July 1998); see e.g. *Wendt v. Wendt*, <<http://ctdivorce.com/wendtl.htm>> (Conn. Super.

Moreover, when rabbinic arbitrators are granted the authority to decide monetary disputes, they are likely to defer judgment given the difficulty in deciding such financial issues, the bias of Jewish law against the interests of women in property accumulated by their husbands,⁸⁷ and the fear of the forced divorce. Rabbinical judges will delay and cajole particularly where there is no clear basis under Jewish law for ordering the husband to give his wife a *get*. Diaspora rabbinic arbitrators, like their Israeli colleagues, are likely to pressure the couple to reach a comprehensive agreement—even to exhort the wife to make significant financial concessions to her husband—rather than decide those issues on the merits. If the rabbis render their decisions regarding financial matters before the husband has agreed to give his wife a *get*, their decision may place undue pressure on the husband to divorce his wife. Or worse, the husband may refuse to give his wife a *get* because he does not agree with the decision of the rabbinical court, thereby wielding his ultimate power over his wife and mocking the authority of the *beth din* to interfere with his will.

Finally, couples who sign the RCA preup should note that the following caveat is added to section III of the Arbitration Agreement:

Notwithstanding any other provision of the Equitable Provision Law, bet din may take into account the respective responsibilities of the parties for the end of the marriage, as an additional, but not exclusive factor, in determining the distribution of marital property and support obligations.⁸⁸

This clause alters the laws of equitable distribution in an unforeseeable manner, reinstating the notion of fault into the divorce negotiations with its concomitant mudslinging and burdens of proof.⁸⁹ Although some commentators have suggested the limited reintroduction of fault when determining the distribution of marital property,⁹⁰ the advantages of these suggestions have not been proven.

B. The Israeli Prototype of the RCA Prenup

Rabbi Lau, the Ashkenazi Chief Rabbi of the State of Israel, has referred to the Hebrew version of the RCA's Husband's Assumption of Obligation agreement to assist in ameliorating the problem of the *agunah* in Israel. The Hebrew version of this document preceded the RCA Prenup and served as the model for it.⁹¹ It is endorsed on its face by Rabbi Ovadia Yosef,⁹² Rabbi Zalman Nechemia Goldberg,⁹³ Rabbi Chaim G. Zimblist,⁹⁴ Rabbi Yitzchok Liebes,⁹⁵ and Rabbi Gedalia D. Schwartz.⁹⁶

LEXIS 1023); cf., MARTHA ALBERTSON FINEMAN, THE ILLUSION OF EQUALITY 36-52 (1991) (criticizing marital property decisions that distribute assets equally and do not take into account the special needs of women and children).

⁸⁷ See eg., High Court File No. 1000/92 Bavli v. Bavli, 48 (2) PISKEI DIN 221 (Israeli Supreme Court Cases) (1994) (remanding a decision of the Israeli Rabbinical Court refusing to apply principles of secular law when deciding the disposition of marital property); Malinowitz, in HALACHA AND CONTEMP. SOC., *supra* note 40, at 13-15; Breitowitz *supra* note 23, at 293-294.

⁸⁸ Appendix 1b (III(d)); HALAKHIC AND PASTORAL CONSIDERATIONS, *supra* note 2, at 50.

⁸⁹ See Weitzman, *supra* note 86, at 6-51.

⁹⁰ See Barbara Bennett Woodhouse, *Sex, Lies, and Dissipation: The Discourse of Fault in a No-Fault Era*, 82 GEO. L. J. 2525 (1994); see also MILTON C. REGAN JR., FAMILY LAW AND THE PURSUIT OF INTIMACY 137-143 (1993).

⁹¹ See IC AND PASTORAL CONSIDERATIONS, *supra* note 2, at 15-16.

⁹² Former chief Sephardi rabbi of the State of Israel. See HALAKHIC AND PASTORAL CONSIDERATIONS, *supra* note 2, at 19.

⁹³ A rabbinical court judge of the Jerusalem Rabbinical Court, the son-in-law of Rav Shlomo Zalman Auerbach. (Rav Goldberg now sits in the High Rabbinical Court). See HALAKHIC AND PASTORAL CONSIDERATIONS, *supra* note 2, at 19.

⁹⁴ A rabbinical court judge in the Tel Aviv Rabbinical Court. See HALAKHIC AND PASTORAL CONSIDERATIONS, *supra* note 2, at 20.

⁹⁵ The presiding rabbinical court judge in the Beth Din, Igud Ha'Rabbonim. See HALAKHIC AND PASTORAL CONSIDERATIONS, *supra* note 2, at 19.

When asked to comment on the use of the agreement in Israel, Rabbi Zalman Nehemia Goldberg maintained that the agreement was not drafted for Israel but rather for the Diaspora.⁹⁷ Since the main goal of the agreement, as stated by Rabbi Goldberg,⁹⁸ is to secure the appearance of the couple before the

beth din, such an agreement is superfluous in Israel, where the religious courts have both the exclusive jurisdiction to decide issues of divorce in accordance with Jewish law and the discretion to impose increased spousal support if they order the husband should be ordered to give a *get*.

Yet, despite the apparent redundancy of the agreement to the existing Israeli status quo, it is the prenup most often endorsed by the Israeli rabbinical establishment. Like the English RCA Prenup, the Hebrew prototype may assist women who bear no blame whatsoever for the breakdown of the marriage. For the most part, however, its benefits are also limited and illusory. The Hebrew prototype of the RCA Prenup may even harm Israeli women, particularly if the support clause (which is in effect until the parties appear before the *beth din*) is interpreted as an agreement of the wife to subject herself to the exclusive jurisdiction of rabbinical courts in matters of spousal support and matters ancillary to the divorce, such as child support, custody and the division of marital property.⁹⁹

Some prenuptial agreements that have been authorized by Israeli rabbinical courts¹⁰⁰ are variations of the RCA Assumption of Obligation document. In addition to the husband's assumption of increased support obligations until the parties appear before a *beth din*, they have included reciprocal provisions obligating the wife to pay her husband spousal support if she refuses to accept the *get*. These prenuptial agreements have also included clauses that give the rabbinical courts exclusive jurisdiction over matters ancillary to the divorce.

Like the Arbitration Agreement of the RCA Prenup, these agreements do more than maintain the status quo; they prejudice the interests of women. While the rabbinical court will hesitate to enforce the support obligations of the husband to his wife because of the rule against a forced divorce, it may not hesitate to enforce the woman's agreement to support her husband if she should refuse to accept a *get*. Similarly, by agreeing to the jurisdiction of the rabbinical courts in matters ancillary to divorce, the Israeli wife, like her American counterpart, gives up the benefits which accrue to her in the secular courts of Israel, such as higher child support awards and more progressive and inclusive rights to marital property.

C. J. David Bleich (1981) Prenup:¹⁰¹ A "No-Fault Prenup" - An Improvement Over the RCA Prenup

When Rabbi J. David Bleich introduced the idea of increased spousal support as a solution for the modern day agunah, he wrote a prenuptial which, in effect, obligated the husband to pay the increased support amounts

⁹⁶The presiding rabbinical court judge in the Beth Din of America. See HALAKHIC AND PASTORAL CONSIDERATIONS, supra note 2, at xi-xii.

⁹⁷Rabbi Goldberg confirmed this conclusion at a January 1997 conference in Jerusalem under the auspices of Yeshiva University.

⁹⁸ See *id.*

⁹⁹ Israeli rabbinical courts have exclusive jurisdiction over issues of marriage and divorce, supra note 7 at 139. But the family courts have parallel jurisdiction over matters ancillary to the divorce, such as support, custody and marital property. Often a race to the courthouse determines which court will hear a particular matter. See generally, Menashe Shava, SUGIOT NWHAROT BE'DINEI ISHIM MISHPAHA VEYERUSHA 129-176 (SELECTED ESSAYS IN THE MATTER OF THE LAWS OF PERSONAL STATUS, FAMILY AND INHERITANCE) (1987); ARIELROSEN-ZVI, DINEI HA'MISHPAHA BE'YISRAEL, BEIN KODESH LE'HOL, Part One (ISRAELI FAMILY LAW, THE SACRED AND THE SECULAR) (1990).

¹⁰⁰ For a premarital agreement to be valid, it must be authorized in accordance with § 2 The Israeli Spouses (Property Relations) Law 5733, 1973 No. 107 (27 LAWS OF THE STATE OF ISRAEL [L.S.I.] 313)). This law allows for such authorization by the rabbinical courts. *Id.* at § 2.

¹⁰¹ See Appendix 2.

until the delivery of the *get*.¹⁰² However, Rabbi Bleich preferred not to refer to the *get* "in an explicit manner"¹⁰³ and, for various reasons,¹⁰⁴ he used a "euphemistic circumlocution"¹⁰⁵ to allow for the imposition of the increased support awards until a judgment is issued by a *beth din* declaring that she is not prevented from marrying in accordance with the law of Moses and Israel because of him."¹⁰⁶ Aware that this type of prenup ignores the issue of fault and allows for divorce on demand, he wrote:

The net effect of the introduction of the proposed document would be the creation of a situation in which the wife could, to all intents and purposes, secure a religious divorce upon demand. As a result, the incidence of divorce might indeed rise. No one seeks to increase the rapidly rising divorce rate. Yet, in terms of remedying social evil and the injustice to women who were turned into agunot, the effect is, on balance, probably worth the price. The heart-rending anguish of the growing number of *agunot* and the ever-rising number of *mamzeyim* constitute social problems of a more serious nature than a marginal increase in the divorce statistics.¹⁰⁷

By applying a financial disincentive until the giving of the *get*, and not merely until the parties appear before a *beth din*, Rabbi Bleich's Prenup circumvents the deliberations of the *beth din* concerning the merits of the divorce and the concomitant Rules of Law, and will help the agunah who cannot present a fault-free record to rabbis. Although clearly an improvement over the RCA Prenup, the Bleich Prenup includes a problematic clause that gives *the beth din* broad powers to decide "any dispute between them whether with regard to payment of maintenance, or whether with regard to custody and support of their issue."¹⁰⁸ This clause should be modified or deleted by couples presented with Rabbi Bleich's Prenup. Couples should allow the *beth din* the discretion to decide only the factual issue of whether the husband has given the *get* and, as such, whether the increased support obligation has been terminated.

It must also be noted that Rabbi Bleich is well aware of the distinctions between the RCA Prenup model, which requires the husband to pay increased spousal support only until the husband appears before the *beth din*, and his proposal, which requires the husband to pay increased support payments until the delivery of the *get*. In the Hebrew version of the article in which Rabbi Bleich introduces increased spousal support as a remedy for the *agunah*, he discusses these two options.¹⁰⁹ He explains that the first option (the RCA Prenup model) would require the husband to pay increased support payments to his wife as long as he would be required to support his wife under Jewish law (i.e., so long as she is not at fault for the separation).¹¹⁰ The second option (Bleich English version) would require the husband to pay his wife increased support even in cases where he would not be obligated to do so under Jewish law (i.e., even where the fault lies with the wife and until the delivery of the *get*).¹¹¹

Although Rabbi Bleich recommends that couples outside of Israel sign agreements in which the husband is obligated to pay increased support until the delivery of a *get*, he suggests that in Israel, the husband's obligation to increase support payments should only apply until he appears before rabbinical courts.¹¹² Rabbi Bleich argues that this distinction can be made because parties in Israel cannot remarry in a secular ceremony and therefore, there is no fear of *mamzerim*.¹¹³

¹⁰² See Bleich, *supra* note 30, at 175; *cf.*, Bleich, *A Suggested Antenuptial Agreement: A Proposal in the Wake of Avitzur*, 7 J. of Halacha and Contemp. Soc. 25, 36 (1984) suggesting that the couple sign an Arbitration Agreement which gives the *Beth Din* the discretion to determine "all disputes and differences with regard to a *get*." Rabbi Bleich explains that the goal of the agreement is to compel a couple to appear before the *Beth Din* where it is anticipated that the *Beth Din* will use its "ample powers of moral persuasion in order to effect the desired result."). The Bleich agreement discussed in this Article provides for a financial disincentive that is more powerful than moral persuasion.

¹⁰³ Bleich, *supra* note 30, at 176.

¹⁰⁴ See *id.* at 175-176.

¹⁰⁵ *Id.* at 176.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 183.

¹⁰⁸ *Id.* at 186.

¹⁰⁹ See Yehuda David Bleich, *Hatzaah le'Pitaron Baayat Baal haMesarev le'Garesh*, 38:1 OHR HAMIZRACH 57, 65-66 (1990).

¹¹⁰ See *id.* at 65.

¹¹¹ See *id.*

¹¹² See *id.*

¹¹³ See *id.* at 65.

However, Rabbi Bleich's distinction is misplaced. Although Jewish couples in Israel cannot be civilly divorced and cannot remarry in a civil ceremony, many persons simply choose to ignore Jewish law and live with another partner, often starting a new family. The threat of *mamzerim* is no less real in Israel. Thus, the Diaspora version of Rabbi Bleich's Prenup is no less relevant to Israelis.

D. Ariel Rosen-Zvi Prenup:¹¹⁴ A "Circumventing Agreement"

A premarital agreement requiring husbands to pay increased spousal maintenance if the parties are living apart for a period of time and until a *get* is given, and which also includes a provision that specifically allows for a secular court to decide all issues ancillary to the divorce, would be a significant improvement over the RCA Prenup, its Hebrew prototype and the Bleich Prenup.

An example of such an agreement is the prenup written in 1986 by Professor Ariel Rosen-Zvi, at the behest of Israel's Naamat Women's Organization. In addition to providing for increased spousal support until the delivery of the *get*, the Rosen-Zvi Prenup expressly establishes that Israeli secular courts will have jurisdiction to determine the issues of marital property in accordance with Israeli secular law.¹¹⁵

Moreover, the Rosen-Zvi prenup addresses issues of Israeli property law, which, unfortunately, exacerbate the problems of the agunah in Israel. Under the Israeli Spouses (Property Relations) Law § 5733-1973, no cause of action arises for the division of marital property until the dissolution of the marriage.¹¹⁶ Thus, there is even less incentive for the husband to conclude the divorce proceedings, since he can prevent his wife from receiving not only her *get* but also her part in the marital property.¹¹⁷ The Rosen-Zvi prenup, however, calls for the division of marital property before the end of the marriage.

Though written for Israeli couples, the Rosen-Zvi Prenup could well serve as a model for a prenup outside of Israel. Its particular strengths are twofold. First, Professor Rosen-Zvi uses the "Increased spousal support" model to create the financial incentive that will encourage a husband to give his wife a *get*. This model was recommended by Rabbi Bleich in 1981,¹¹⁸ endorsed by Rabbis Goldberg, Liebes, Yosef, Zimbalist and Schwartz in 1991¹¹⁹ and adopted by the RCA in 1993.¹²⁰ There appears to be a consensus among the Orthodox camp that the "increased spousal support" model does not violate the prohibition against a forced divorce (the Second Rule of Law) or any other constraint of the *halakha*,¹²¹ whereas, such a consensus does not exist with regard to other financial incentives such as liquidated damages, or the payment of indefinite sums of money.

Second, the Rosen-Zvi Prenup, unlike the Bleich Prenup or the Shear-Yashuv Prenup does not allow for divorce upon the immediate unilateral demand of the wife. Before a woman can sue for increased spousal support, the Rosen-Zvi Prenup requires that the couple be living apart for 12 months or that the marriage be irretrievably broken down or that there is a rabbinical court ruling that the marriage is no longer viable.¹²² Whereas it is my belief that prenups do not contribute to the "rising incidence of divorce."¹²³ People, not laws or prenups, determine the rate of divorce.¹²⁴ The prior restraints placed by the Rosen-Zvi Prenup on the imposition of the increased spousal support provisions better reflect the value of the traditional Jewish intent of keeping marriages together than does a prenup which does not place such restraints.

By adjusting the clauses relating to Israeli marital property law to reflect the relevant secular laws and by including a civil divorce as a trigger for the increased spousal support award, the Rosen-Zvi Prenup can also be easily adapted for use outside of Israel.

¹¹⁴ See Appendix 3.

¹¹⁵ See *id.*

¹¹⁶ See Israeli Property Relations Law § 5.

¹¹⁷ See Civil Appeal File No. 1915/91, 3208/91 Yakobi vs. Yakobi, Knobler vs. Knobler, 48 (3) Piskei Din 529, 550 (Israeli Supreme Court Cases) (1994) (decisions of Chief justice Shamgar describing the consequences of the Spousal (Property Relations) Law as infuriating, absurd and facilitating abuse in the name of the law.).

¹¹⁸ See Bleich *supra* note 30, at 174-475.

¹¹⁹ See HALAKHIC AND PASTORAL CONSIDERATIONS, *supra* note 2, at 19.

¹²⁰ See *id.* at 21-22.

¹²¹ See generally Breitowitz, *supra* note 23, at 132-134, 138 n. 395.

¹²² See Appendix 3 at section 3 a-c.

¹²³ Compare Bleich *supra* note 30, at 183 (expressing concern that there might be a marginal increase in divorce statistics if his prenup were adopted since it would create a situation where a wife could secure a religious divorce on demand).

¹²⁴ See Halem, *supra* note 156.

E. *The rabbi Judah Dick PrenUp:*¹²⁵ *Mutual Promissory Notes and Waivers of Indebtedness - An Equivocal Alternative*

The prenup written by Rabbi Judah Dick¹²⁶ appears to circumvent, rather than reify, the existing status quo and power structure. Rabbi Dick suggests that both husband and wife sign separate "Promissory Notes" and "Waivers of Indebtedness." The Promissory Note obligates the signatory to pay his or her spouse \$100,000. The accompanying Waiver of Indebtedness allows for the waiver of that note unless the spouse refuses to give or accept a *get* within 30 days of a civil divorce or within 30 days of a rabbinical court decree that "there is no prospect for a successful married life between [the couple]."¹²⁷

Rabbi Dick's agreement does not, however, refer to issues of fault. Should a secular court issue a civil divorce and the grounds for a secular divorce be met, whether those grounds are separation, no-fault divorce, unilateral divorce, irretrievable breakdown of the marriage or divorce by consent, the terms of the promissory note obligation arise. Husband and wife sign identical documents. Both the "guilty" husband or the "guilty" wife would be entitled to sue for payment for the amount set forth in the promissory note if the "innocent" party refuses to cooperate with the *get* procedure. Rabbi Dick confirms this assessment of his proposal. He writes:

Under the proposal in its purest form, the Bet Din's role would be rather ministerial and non-discretionary in nature. Its function would be to determine whether the monetary obligation has been triggered by a civil divorce. If a civil divorce has in fact Occurred, the recalcitrant party has no choice other than to give or to accept a *get* or become liable for the \$100,000 Bond...¹²⁸

Even though Rabbi Dick's prenup can be characterized as a "Circumventing Agreement," he equivocates in both form and theory.

The Promissory Notes which Rabbi Dick drafted, as well as the Arbitration Agreement¹²⁹ which Rabbi Dick suggests should be signed in addition to the reciprocal Notes and Waivers, allow for Judicial discretion which would impede the effectiveness of his proposal. Rabbi Dick gives rabbinical courts the discretion to allow for payment of the \$100,000 obligation in weekly installments of one hundred dollars "in order to avoid any conceivable contention that imposing an exorbitant amount beyond the husband's means may constitute a 'coerced' *get*"¹³⁰ This qualification effectively undermines the impact of the financial disincentive which forms the basis of Rabbi Dick's proposal.

Similarly, Rabbi Dick himself qualifies the ministerial and non-discretionary nature of his proposal. He maintains that:

Of course, one must be sure that this formula does not encourage needless divorces where patient friends could save marriages and professionals. The Bet Din would in all cases have authority to stay enforcement of any claim for the \$100,000 if it felt that there is any hope of salvaging the marriage despite the civil divorce, since it must find in addition to the civil divorce, that there is no prospect of reconciliation.¹³¹

It is possible to envision a situation in which a husband could convince a *beth din* to stay the enforcement of the notes indefinitely where the fault for the breakdown of the marriage lies with the wife and the husband expresses his sincere desire for reconciliation.

Couples should carefully read any accompanying arbitration agreement before they decide to sign the notes and waivers, which form the basis of Rabbi Dick's Prenup.¹³² They should limit the discretion given to the *beth din*, in both the Promissory Note and Arbitration Agreement, to allow the recalcitrant party to pay the

¹²⁵ See Appendix 4.

¹²⁶ See Judah Dick, *Is An Agreement To Deliver A Get In The Event Of A Civil Divorce Halakhically Feasible?* 21:2 Tradition 91, 101-104 n.35 (1983); see also Bleich, *supra* note 63 at 85 (critiquing Rabbi Dick's proposal and approving of it, with some changes); Breitowitz *supra* note 23 at 119-132, 132 (this arrangement effectively facilitates the obtaining of a divorce at will by either party.).

¹²⁷ Appendix 4; Dick *supra* note 126, at 101, 103.

¹²⁸ Dick, *supra* note 126, at 95.

¹²⁹ See *id.* at 94.

¹³⁰ *Id.* at 94.

¹³¹ *Id.* at 97.

¹³² Rabbi Dick suggests that "[e]ven if the arbitration feature were not present or cannot be invoked for any reason, it would appear likely that the courts would sustain the 'fictional' indebtedness as a liquidated damages provision to compensate for loss of consortium and conjugal rights . . ." *Id.* at 94.

indebtedness in weekly installments of \$100. Moreover, couples should clarify that the *beth din* does not have the right to stay the enforcement of the indebtedness in the event of a civil divorce.

Finally, it is important to emphasize that the Dick proposal better serves couples outside of Israel, where the dissolution of the marriage by a civil court would trigger indebtedness. Since there is no civil divorce in Israel, the indebtedness would ensue only after the rabbinical court determined that "there [was] no prospect for a successful married life between [the couple]."¹³³

F The Rabbi Shear-Yashuv Cohen Prenup:¹³⁴ Prepayment of Ketubah, Addition to the Ketubah, and Punitive Spousal Maintenance - A "Circumventing Agreement "

Rabbinic judge and Chief Rabbi of Haifa, Shear-Yashuv Cohen, suggests another agreement whose penalty clause and financial disincentive are only forgiven upon the delivery of the *get*.¹³⁵ The drafted document is intended to be an addendum to the *ketubah*, the Jewish marriage contract, and, as such, is signed only by the husband, before the marriage ceremony, under the bridal canopy.¹³⁶ According to this prenuptial, the husband waives any right he may have under Jewish law to the property or income of his wife and is obligated to pay his wife the following amounts should he not give his wife a *get* within 30 days upon demand: her *ketubah*, her addition to the *ketubah* and increased spousal support which would be paid to her as if he had been commanded by the *beth din* to give her a divorce.¹³⁷

Like other "Circumventing Agreements," this agreement does not refer to issues of fault. Therefore, should a "guilty" woman desire a *get* from her "faultless" husband and should he ignore her request, the terms of this contract would arguably arise. She would be entitled to any money promised her under the *ketubah*, any "addition to the *ketubah*," and increased spousal support in an amount which is not stated.

It would appear, at first glance, that Rabbi Shear-Yashuv Cohen's recommendations are the most progressive yet. Rabbi Shear-Yashuv Cohen's premarital agreement is more user-friendly than Rabbi Dick's prenup, which requires the couple to sign four or five different documents. In addition, it provides a greater financial disincentive to a recalcitrant husband than the prenups based on increased spousal support. Furthermore, the obligation for payment does not arise subsequent to a secular divorce or rabbinic decree, but within 30 days of the wife's demand for a divorce.

However, it may be difficult to implement Rabbi Shear-Yashuv Cohen's premarital obligations. The amount of the financial disincentives is somewhat vague.¹³⁸ How much is the *ketubah* worth? How much money should be awarded for increased spousal support? Would a secular court be able to define those sums? Would a secular court outside of Israel be willing to define those sums since they involve a determination based on Jewish law? Considering the Rules of Law, would a rabbinical court be willing to define those sums? Nonetheless, it is a serious effort to deal with the problem at hand. It illustrates the voice of a courageous halakhic authority who knows that the Rules of Law are not insurmountable and that they can be, and should be, circumvented.

G. The 1983 RCA Liquidated Damages Prenup:¹³⁹ A "Circumventing Agreement"

Ironically, the original premarital agreement suggested by the RCA in 1983¹⁴⁰ is far superior to the one that was finally adopted as the official RCA Prenup in 1993. The 1983 document limits the jurisdiction of the *beth din* to a determination as to whether a marriage has been terminated in compliance with the *halakha*, and, if not, what acts must be performed for such termination, imposing a penalty upon a recalcitrant spouse until the delivery or receipt of the *get*, irrespective of fault. Furthermore, it allows for the imposition of liquidated

¹³³ Dick, *supra* note 126, at 101, 103.

¹³⁴ See Appendix 5.

¹³⁵ See *id.*

¹³⁶ *Id.* ("after the nuptials (*kiddushin*) and before the marriage (*nissuin*)").

¹³⁷ *Id.*; see generally Rabbi Jacob Bezalel jolts, *Binyan Takanat Agunots In the Matter of Reform with Regard to Agunot 7 Hapardess 6* (1997).

¹³⁸ Jewish Law does not recognize conditions which are uncertain, indecisive or contingent as binding. See Bleich, *supra* note 30, at 177-178 (regarding the invalidity of unspecified obligations).

¹³⁹ See Appendix 6.

¹⁴⁰ See *id.*; MENACHEM M. BRAYER, *THE JEWISH WOMAN IN RABBINIC LITERATURE* Vol. II. Appendix A at 223 (1986).

damages in the amount of \$250 a day¹⁴¹ in the event that a court of competent jurisdiction has terminated the marriage for any reason and a party fails to give or accept a *get*.¹⁴² It also precludes the *beth din* from deciding any matters regarding property settlement, equitable distribution, alimony, child support or custody arrangement.¹⁴³

The 1983 RCA Liquidated Damages Prenup, therefore, acknowledges the problems inherent in the Rules of Law and allows for their circumvention.¹⁴⁴

H. Haskel Lookstein Prenup:¹⁴⁵ A "Circumventing Agreement"

Another "Circumventing Agreement" is a document used by Rabbi Haskel Lookstein, the Rabbi of Kehillatjeshurun in Manhattan. Rabbi Lookstein has recommended that couples sign an agreement which requires a husband or wife to deliver or accept a *get* upon demand (and irrespective of fault) in the event that the marriage has been "terminated, dissolved or annulled" by a civil court.¹⁴⁶ If a husband refuses to comply with his agreement, the Lookstein Prenup gives the wife the contractual right to demand court-imposed non-discretionary penalties on her husband. The penalties include: payment of all the "costs" incurred by her to secure the *get*, including attorney's fees, payment of "damages" caused to her because she is "unwilling" or "unable" to marry and even imprisonment of the husband until he delivers the *get*.¹⁴⁷ The agreement makes no reference to the *beth din* except with respect to the *get*, thereby implying that civil courts have the authority to impose the penalties.

Although the Lookstein prenup clearly attempts to ameliorate the imbalance of power given to Jewish men by imposing a non-discretionary penalty due to non-compliance, the document may be difficult to implement. Unlike the RCA Liquidated Damages Prenup or the increased spousal maintenance clause suggested in the Bleich and Rosen-Zvi Prenups, the amount of "costs" or "damages" which a woman can claim under the Lookstein Prenup is unclear. How much of her attorney's fees are attributable to the securing of a *get*? And how does a court calculate the damages incurred by her "unwillingness or inability" to remarry? Moreover U.S. courts may well hesitate to entangle themselves in the direct attempt to "specifically enforce" the giving or receipt of a *get*. Thus, it is easier for a civil court to enforce an arbitration award regarding predetermined liquidated damages or spousal support, than it is to award damages against a husband or to imprison him for not giving his wife a religious divorce.

III. SHOULD FAULT PLAY A ROLE IN JEWISH DIVORCE?

A. Fault

"No fault" divorce lies at the heart of Jewish law. If the parties agree to divorce, Jewish law does not interfere with that decision.¹⁴⁸ A rabbinical court will not prevent the couple from divorcing.¹⁴⁹ There is no separation period required.¹⁵⁰

Under Biblical law, the concept of fault appears to be absent. A husband could divorce his wife at any time. It did not matter whether she was at fault for the breakdown of the marriage, having refused conjugal relations

¹⁴¹ See Appendix 6 (4).

¹⁴² See *id.* at (1).

¹⁴³ *Id.* at (5).

¹⁴⁴ But see Breitowitz, *supra* note 23, at 145. ("In a letter to its membership on June 20, 1984, the RCA requested that all Orthodox rabbis suspend use of the [liquidated damages] document 'until further notice.' . . . While personal and political factors may have played a role in the withdrawal of the proposal and while some rabbis had indicated that they would continue to employ the model form even after the RCA disowned it, it cannot be denied that the RCA "liquidated damages" model form was highly questionable in terms of both its legal enforceability and more importantly, its *halachic* validity.").

¹⁴⁵ See Appendix 7.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* According to the Lookstein Prenup, an "injured" party is entitled to "injunctive or mandatory relief directing specific performance." *Id.* This would arguably include imprisonment of a recalcitrant husband.

¹⁴⁸ See generally 6 ENCYCLOPEDIA JUDAICA, 122-135, 126 (1972).

¹⁴⁹ See *id.* at 125. ("Divorce is an act of the parties ... [not] a decree of the court ... it is the function of the court to ensure that all the formalities required for a divorce are carried out according to law.").

¹⁵⁰ See *id.*

with her husband, committed adultery or merely burnt his dinner.¹⁵¹ The husband had the unilateral right to divorce his wife and his motivation was not questioned.¹⁵² In contrast, the wife had no recourse against her husband even if he was at fault for the dissolution of a marriage, having treated his wife poorly or having made life unbearable for her.

Initially, rabbis introduced concepts of fault to prevent the husband's unilateral power to divorce his wife and to give her the right to initiate a divorce.¹⁵³ A husband could justifiably divorce his wife only if she was at fault.¹⁵⁴ It was not meant to punish the wife for her wrongdoing but to curtail the unilateral powers of the husband to do what he wanted without restraint.

Similarly, over time, rabbis introduced the concept of fault to enable a wife to petition the rabbis to extract her from a bad marriage.¹⁵⁵ Again, the goal was to protect the wife from a capricious husband, not to condemn his behavior.

Thus the concept of fault was originally introduced into Jewish divorce law to protect women and to correct oppressive practices and concomitant laws, not to moralize, punish or control behavior.¹⁵⁶ Therefore, the use of circumventing prenups does not impinge on the goals of halakha, but rather advances those ends.

B. The Integrity of the Jewish Family

The integrity of the Jewish family is challenged, not by the introduction of prenups designed to circumvent rabbinical courts and the Rules of Law which limit their ability to respond to new social realities, but by the perpetuation of the existing system, which encourages women to defy halakha or succumb to the extortion which it incubates.

Jewish law has, throughout the ages, developed many strategies to accommodate changing perceptions of justice, morality and a higher good.¹⁵⁷ Similar strategies should be adopted for women, unless the system fears the loss of control, or intends to retain the imbalance of power, or cares more for the Rules of Law than it does for the standards and spirit of Jewish law which abhors the misuse of power and protects the weaker elements of society. The recognition of the abuse caused by power and the subsequent relinquishment of that power are the greatest examples of a legal system's strengths.

C. Rules vs. Standards

¹⁵¹ T.B. GITTEN 90a; YEVA MOT 112b. (opinion of Beit Hillel). See ENCYCLOPEDIA JUDAICA *supra* note 148, at 123-24 (Beit Hillel was clearly correct in its interpretation of *ervat davar* ... as any kind of obnoxious behavior or mannerisms...).

¹⁵² See *eg.*, ZE'EV FALK, HEBREW LAW IN BIBLICAL TIMES 154 (1964) (under Biblical law, divorce was the "arbitrary, unilateral, private act of the husband."); JUDITH ROMNEY WEGNER, CHATREL OR PERSON? THE STATUS OF WOMEN IN THE MISHNAH (1988) (stating that even in the time of the Mishna, a woman could be discarded like an "old shoe"); *but see*, Roland deVaux, Vol. 1 ANCIENT ISRAEL (SOCIAL INSTITUTIONS) 34 (1965); Hauptman, *supra* note 20, at 102-105 ("the term *"ervat davar"* is enigmatic, and even if interpreted to allow divorce for no cause, the Mishnah discouraged such practice").

¹⁵³ See Hauptman *supra* note 20, at 102-105.

¹⁵⁴ See *id.*

¹⁵⁵ *Id.*

¹⁵⁶ However, see LYNNE CAROL HALEM, DIVORCE REFORM (1980). This book is a "history of efforts of American society to understand the etiology of a disease called divorce and to find a cure." *Id.* at 284. The author maintains that divorce law in American society has its origins in the Christian attitude towards marriage as "immutable." In that context "fault" changes along with different explanations for the origins of the pathology of divorce. She also shows how divorce laws, in their various historical permutations, have been unsuccessful in their attempt to curtail the rate of divorce.

¹⁵⁷ See Tamar Ross, The Feminist Challenge to Orthodoxy 16 STUDIES IN CONTEMP. Judaism, (forth coming Jan. 2000). Dr. Ross lists and describes various internal corrective measures to the rules of law, including: "apologetics, reviving neglected practices, invoking extenuating principles, creatively exploiting loopholes, and relegating *halakhot* to dead letter status"; see also Hauptman, *supra* note 20, at 112 (discussing changes made to the rules of law for the benefit of women "for the sake of peace" [*mipnie darchei shalom*] and "for the sake of repairing the social order" [*tikkun ha-olam*]).

Order and certainty are goals in any legal system. A strict adherence to the rules of law promotes those goals. However, order and certainty are not, or should not be, the primary goals of the law.¹⁵⁸ A body of law which is not a totalitarian instrument of the ruling class should, at the very least, reflect a *narrative*,¹⁵⁹ an ethos, a standard or a value system which at its heart has the ability to disallow the victimization of one group by another. In the search for order and certainty, adherence to rules of law should not be so strict that the soul of the system is lost. Rules of law should never be used to victimize one group by another. That would be a tragic and ironic use of those rules.

Jewish law has built into its system rules of law which allow for the circumvention of other rules of law, whenever social realities dictate that end. Jewish law recognizes the existence of loopholes and warrants their use so that the system as a whole can remain intact.¹⁶⁰ The rules of Jewish law with regard to divorce have lost contact with their original spirit and purpose. They are now subjugating women, who once were protected by those laws. Finding circumventing remedies is not a destructive act but one, which confirms the system and allows for its continued integrity.

D. CAVEAT

One final caveat is that the "circumventing" prenuptial agreements recommended in this Article have limited value. They ameliorate the plight of the agunah but they do not solve it.¹⁶¹ If a husband has disappeared, is insane, has no assets, or is rich and vindictive, the prenups discussed in this Article will sadly have no impact on him at all.

CONCLUSION

Premarital agreements that obligate the recalcitrant husband to meet an absolute financial commitment until the religious dissolution of the marriage may ameliorate the plight of the agunah and limit get extortion. Prenuptial agreements, like the RCA Prenup, that give the rabbinical courts the discretion as to whether to impose that financial commitment, as well as power to arbitrate matters ancillary to the divorce, can prejudice the rights of the woman who seeks a religious divorce from her recalcitrant husband. Understand the rules of law. Know your rights. Keep your options open.

¹⁵⁸ See generally JEROME FRANK, *LAW AND THE MODERN MIND* (1932) (advocating a supple, flexible, viable and pliable law).

¹⁵⁹ See Robert M. Cover, *The Supper new Court 1982 Term, and Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4,10 (1983).

¹⁶⁰ See Ross, *supra* note 157, at 92.

¹⁶¹ See Mark Washofsky, *The Recalcitrant Husband, The Problem of Definition*, 4 JEWISH L. ANN. 144, 146 (1994-1995).

APPENDIX IA (RCA PRENUP)

PRENUPTIAL AGREEMENT

HUSBAND'S ASSUMPTION OF OBLIGATION¹⁶²

1. I, the undersigned, _____, Husband-To-Be, hereby obligate myself to support my Wife-To-Be, _____, in the manner of jewish husbands whom feed and supports their wives loyally. If, God forbid, we do not continue domestic residence together for whatever reason, then I now (*me'achshav*) obligate myself to pay her \$_____ per day, indexed annually to the Consumer Price Index For All Urban Consumers (CPI-U), as published by the U.S. Department of Labor, Bureau of Labor Statistics, beginning as of December 31st following the date of our marriage, for food and support (*parnasah*) from the day we no longer continue domestic residence together, and for the duration of our jewish marriage, which is payable each week during the time due, under any circumstances, even if she has another source of income or earnings. Furthermore, I waive my *Halakhic* rights to my wife's earnings for the period that she is entitled to the above-stipulated sum. **However, this obligation (to provide food and support, *parnasah*) shall terminate** if my wife refuses to appear upon due notice before the Bet Din of _____ or any other Bet Din specified in writing by the Bet Din before proceedings commence, for purpose of a hearing concerning any outstanding disputes between us, or **in the event that she fails to abide by the decision or recommendation of such Bet Din.**
- II. I execute this document as an inducement to the marriage between my wife-to-be and myself. The obligations and conditions contained herein are executed according to all legal and *halakhic* requirements. I acknowledge that I have effected the above obligations by means of a *Kinyan* (formal Jewish transaction) in an esteemed (*Chasshuv*) *Bet Din*.
- III. I have been given the opportunity, prior to executing this document, of consulting with a rabbinic advisor and a legal advisor.
- IV. I, the undersigned Wife-To-Be, acknowledge the acceptance of this obligation by my Husband-To-Be, and in partial reliance on it agree to enter into our forthcoming marriage.

Groom

Signature: _____

Name: _____

Address: _____

Bride

Signature: _____

Name: _____

Address: _____

Signed at _____ date _____

Witness: _____

¹⁶² See HALAKHIC AND PASTORAL CONSIDERATIONS, *supra* note 2, at 45-47 (emphasis added).

Witness: _____

APPENDIX IB (RCA PRENUP)

PRENUPTIAL ARBITRATION AGREEMENT

BETWEEN HUSBAND AND WIFE¹⁶³

Memorandum of agreement made this _____ day of _____ 57____, which is the _____ day of _____, 199____, in the city of _____ State/Province of _____ between _____ the husband-to-be, who presently lives at _____ and the wife-to-be _____, who presently lives at _____. The parties are shortly going to be married.

- I. Should a dispute arise between the parties after they are married, Heaven Forbid, so that they do not live together as husband and wife, they agree to refer their marital dispute to an arbitration Panel namely the *Bet Din* of _____ for a binding decision. Each of the parties agrees to appear in person before the *Bet Din* at the demand of the other party.
- II. The decision of the panel, or a majority of them, shall be fully enforceable in any court of competent juris diction.
- III. (a) The parties agree that the *Bet Din* is authorized to decide all issues relating to a *Get* (Jewish divorce) as well as any issues arising from premarital agreements (e.g. *ketubah*, *tena'im*) entered into by the husband and wife.

[The following three clauses (b,c,d) are *OPTIONAL*, each to be separately included or excluded, by mutual consent, when signing this agreement.]

(b) The parties agree that the *Bet Din* is authorized to decide any other monetary disputes that may arise between them.

(c) The parties agree that the *Bet Din* is authorized to decide issues of child support, visitation and custody (if both parties consent to the inclusion of this provision in the arbitration at the time that the arbitration itself begins.)

(d) In deciding disputes pursuant to paragraph III B, the parties agree that the *Bet Din* shall apply the equitable distribution law Of the State/Province _____ of as interpreted as of the date of this agreement, to any property dispute which may arise between them, the division of their property, and questions to support. Notwithstanding any other provision of the equitable provision law, the *Bet Din* may take into account the respective responsibilities of the parties for the end of the marriage, as an additional, but not exclusive factor, in determining the distribution of marital property and support obligations.

- IV. Failure of either party to perform his or her obligations under the agreement shall make that party liable for all costs awarded by either a *Bet Din* or a court of competent jurisdiction, including reasonable attorney's fees, incurred by one side in order to obtain the other party's performance of the terms of this agreement.

- V. (a) In the event any of the *Bet Din* members are unwilling or unable to serve, then their successors shall serve in their place. If there are no successors, the parties will at the time of the arbitration choose a

¹⁶³ See *id.* at 49-53.

mutually acceptable *Bet Din*. If no such *Bet Din* can be agreed upon, the parties shall each choose one member of the *Bet Din* and the two members selected in this way shall choose the third member. The decision of the *Bet Din* shall be made in accordance with Jewish law (*Halakhah*) and/or the general principles of arbitration and equity (*Pesharah*) customarily employed by rabbinical tribunals.

At any time, should there be a division of opinion among the members of the *Bet Din*, the decision of a majority of the members of the *Bet Din* shall be the decision of the *Bet Din*. Should any of the members of the *Bet Din* be in doubt as to the proper decision, resign, withdraw, or refuse or become unable to perform duties, the remaining members shall render a decision. Their decision shall be that of the *Bet Din* for the purpose of this agreement.

In the event of the failure of either party to appear before **it** upon reasonable notice, the *Bet Din* may issue its decision despite the defaulting party's failure to appear.

- VI. This agreement may be signed in one or more copies each one of which shall be considered an original.
- VII. This agreement constitutes a fully enforceable arbitration agreement.
- VIII. The parties acknowledge that each of them have been given the opportunity prior to signing this agreement to consult with their own rabbinic advisor and legal advisor.

IN WITNESS of all of the above, the bride and groom have entered into this agreement in the City of _____, State/Province of _____.

Groom
Signature: _____
Name: _____
Address: _____

Bride
Signature: _____
Name: _____
Address: _____

Acknowledgments

State/province of _____
County of) ss;
On the _____ day of _____ 199 __,
Before me personally came _____,
the groom, to be known and known to me to
be the individual described in, and who
executed the foregoing instrument and Duly
acknowledged to me that he executed the same.

State/ province of _____
Country of _____) ss;
On the _____ day of _____ 199 __,
Before me personally came _____,
the bride, to be known and known to me to
be the individual described in, and who
executed the foregoing instrument and Duly
acknowledged to me that she executed the same.

Notary public

Notary public

Appendix 2 (Bleich Prenup)

The following is a translation of the text of the proposed document:

FINAL ARTICLES OF ENGAGEMENT¹⁶⁴

May good fortune sprout and ascend to the greatest heights even as a well-watered garden. These are the words of the covenant and the provisions which were spoken and stipulated between the two parties at the time of the nuptials on the _____ day of the month of _____ in the year _____ in the city of _____; to wit; Between _____ and his son, the groom, _____, the party of the first part; and _____ and his daughter, the bride, _____, the party of the second part.

Firstly, _____ wedded and married _____ by means of a wedding ring and caused her to be brought under the nuptial canopy in accordance with the law of Moses and Israel and she accepted the wedding ring from him.

_____ provided his son with dignified clothing for the Sabbath, festivals and weekdays in a proper manner and in accordance with his status and presented his son with marriage gifts in accordance with his status.

_____ provided his daughter, the bride, with dignified clothing for the Sabbath, festivals and weekdays, clothing, kerchiefs, marriage gifts and furnished bed, all in accordance with his status.

Henceforth, the aforementioned couple will comport themselves with love and affection and will neither alienate nor conceal nor lock away, neither he from her nor she from him, any property whatever, but they shall both equally exercise jurisdiction over their property.

The aforementioned groom, _____ will work, honor, support and maintain the bride in accordance with the manner of Jewish husbands who work, honor and support their wives in truth. And _____ agreed to support and maintain the aforementioned bride in accordance with universal custom so long as she shares his board and **at any time that she does not share his board, may it be for any reason whatsoever, the groom obligated himself that he will thereupon immediately give his wife the sum of 200 dollars to spend for food, clothing and domicile and will give her a like sum every single day throughout the period during which she does not share his board until a judgment is issued by a Bet Din declaring that she is not prevented from marrying in accordance with the law of Moses and Israel because of him** [i.e., because of the man's feascance or nonfeascance]. And from this day and forever it is the prerogative of the aforementioned bride either to share her husband's board or to receive from him the aforementioned sum to spend for food, clothing and domicile in accordance with her desire. **If, Heaven forbid, there be any dispute between them whether with regard to payment of maintenance whether with regard to any marital matter, or whether with regard to custody and support of their issue, they will then present their suit before an established Bet Din** composed of competent judges in their city or community and if there is no established Bet Din composed of competent judges in their city or community they will bring their suit before a *Bet Din* of three qualified judges which shall be composed of one judge designated by each party and a third judge chosen by the two judges designated by the parties, within fourteen days after the application of either of the parties. Any quarrel or controversy shall be settled in accordance with their decree and the award of said *Bet Din* may be entered. After a settlement is reached and the wife _____ returns to her husband's home she shall return any balance of the funds received from her husband for purposes of maintenance, clothing and domicile which remain in her possession as well as her clothing and jewelry, to their original site.

All of the foregoing in the presence of us, the undersigned witnesses through conveyance of a sudar (kerchief) and in the most efficacious manner, not in a manner of an *asmakhta* (penalty) and not in the manner of a mere documentary form. We have accepted conveyance in the form of a vessel halakhically fit for purposes of conveyance from each of the aforementioned parties on behalf of the other party with regard to all which is written and stated and Everything is Valid and Confirmed.

_____(Witness)

¹⁶⁴ See Bleich, *supra* note 30, at 185-187 (emphasis added).

_____ (Witness)

And we also have affixed our signatures in order that our signatures may attest even as a hundred competent and trustworthy witnesses to all, which is written and stated above.

_____ (Groom)

_____ (Bride)

AGREEMENT

Made and concluded in on the day of, 1998
Between

(hereinafter "the Wife")

And betzveen:

(hereinafter "the Husband")

Whereas the parties intend to be married, and

Whereas the parties desire to determine, in accordance with this agreement, and upon their marriage, the nature of the rights and obligations of each side concerning marital property.

Whereas the parties agree that all the conditions of this agreement be incorporated into and considered part of the conditions of the Ketubah.

It is therefore agreed and stipulated between the parties as follows:

1. Introduction and Definition

The introduction to this agreement constitutes an inseparable part hereof.

2. Acceleration of Right to balance joint Resources

- a. The right of either party to "balance their resources" and to realize their right to "balance their resources" pursuant to the Israeli Spouses (Property Relations) Law of 1973 (hereinafter referred to as the "Property Relations Law") shall arise should any one of the following circumstances occur:
 - (1) The parties are living apart for a period exceeding six months and one of the parties has filed to dissolve their marriage, including a petition for divorce (hereinafter referred to as a "petition for divorce"), to the appropriate court of law.
 - (2) Any delay in the realization of the right to "balance the resources" of the parties will result in irreparable harm to the plaintiff spouse.
 - (3) The death of one of the parties.
- b. A party may request that a District Court of the State of Israel¹⁶⁶ stay any action taken to enforce the right set forth in paragraph 2a until a later date to be determined by the District Court. The District Court shall agree to stay such action if the Court is convinced that the action taken is a misuse of this agreement, or that such action is in bad faith, or that such action is unfair under the circumstances.

¹⁶⁵ This is my translation of the Hebrew document written by Ariel Rosen-Zvi and Recommended by Naamat Women's Organization. The headings have been added.

¹⁶⁶ The District Court of the State of Israel no longer has jurisdiction over issues which are ancillary to divorce. Jurisdiction has transferred to the Family Courts. § (a) *Hok Beit Ha'Mishhpah LInyanei Mishpaha* (Family Court Law) 5755-1995.

- c. The terms of the above sub-paragraphs 2a and 2b accelerate the date upon which a party may sue for the "balancing of resources" under the Property Relations Law.

3. *Obligation of the Husband to Pay Predetermined Maintenance*

Should any of the circumstances listed below occur, the husband shall pay maintenance to the wife in the amount of \$1,500 (one thousand five hundred U.S. dollars (_____ or any other sum agreed upon by the parties) a month until the delivery of a writ of divorce (a get) to the wife. Such maintenance shall be paid without the need to take into consideration the extent of the wife's income from wages, earnings, property or any other source. Should any of the circumstances listed below occur, the rights defined under section 2 shall not accrue to the benefit of the husband:

- a. The wife files a petition for divorce in an appropriate court of law, she is willing and ready to accept a writ of divorce and the parties are living apart for more than 12 months.
- b. An appropriate court of law has decided that: there is no chance of restoring marital harmony between the parties; or that the parties "must" divorce; or that it is "commanded" upon the parties to divorce; or if the Court uses any other language which can be understood that the parties can no longer live together; or orders or commands the deliverance of a writ of divorce.
- c. There has been an irretrievable breakdown of the marriage and
The wife is ready to accept the divorce.

4. *Terms upon which the Obligation of the Husband to Pay Maintenance is Absolved*

Should the husband file a petition for divorce in an appropriate court of law, and he is willing to give his wife a writ of divorce and the parties are living apart for 12 months, or should any of the circumstances described in sub-paragraphs 3(B) or 3(C) above occur, and the wife refuses to accept the writ of divorce (*Get*), the husband shall be absolved of any obligation to support the wife and the terms of paragraph 2 and 3 of this agreement shall not accrue to the benefit of the wife.

5. *Any claim of which shall arise in accordance with this agreement shall not be construed as a cause of action which can be attached to or included in a petition for divorce.*

6. *Miscellaneous*

- a. The parties shall authorize this agreement as a "Property Agreement" in accordance with the Property Relations Law.
- b. The parties affirm that this agreement shall constitute an appendix to the ketubah and an integral part thereof.
- c. The parties affirm their acceptance of the obligations set forth in this document in accordance with Jewish Law (*kinyan*).

In witness whereof the parties have signed, sealed, and acknowledged this agreement

Husband

Wife

1. *Note of Husband* (signed by husband)

I, the undersigned, hereby obligate myself to Ms. _____ (name of bride) in the sum of One Hundred Thousand (\$100,000) United States Dollars. In addition, I also obligate myself to Ms. _____ to reimburse her for reasonable attorney's fees up to fifteen (15%) percent of the indebtedness if it becomes necessary for her to engage an attorney to collect this indebtedness. This obligation is effective immediately as a personal obligation made before a competent Bet Din in the manner most effective (under Jewish law). My signature shall testify for me as 100 competent and trustworthy witnesses and as a full and complete admission of liability and is also binding on my heirs and estate for the benefit of Ms. _____, her heirs and assignees. The time for payment of the indebtedness shall be thirty (30) days after service upon me of a written demand by Ms. _____ whenever she pleases. I have the right to pay the indebtedness in weekly payments of \$100.00 or any other sum, which a rabbinical court determines, is within my ability to pay, whether more or less. This obligation is independent of all other legal instruments, and no other instruments shall be effective to modify or amend the validity of this obligation, and I have no right to retract my obligation after execution for any reason whatsoever.

The holder of this note shall be believed without an oath or *herem* to state that this indebtedness was not paid; that such indebtedness was not waived in whole or in part and also her heirs shall be so believed, as long as she or her heirs have custody of such instrument and there is no release proving payment of the debt. All of my assets, whether I now own same or whether I will hereafter acquire same, are hypothecated to the payment of this debt, whether under Jewish Law or under the Law of The State.

All of the foregoing was made in a way free from *asmakhta* and not as mere form and with renunciation of any claims of duress and with disqualification of any witnesses to any claims of duress in terms which are effective according to our Sages of blessed memory.

IN WITNESS WHEREOF, I signed on the _____ day of _____, in the year _____.

s/Bride

CERTIFICATION

Before us, the aforementioned groom, Mr. _____ (name of groom), signed this note from his own free will and without any coercion or duress and we hereby certify that this is his signature and acknowledge it in accordance with law.

Dayan

Dayan

Dayan

2. *Waiver of Indebtedness of Husband* (signed by wife)

Whereas, Mr. _____ is obligating himself to me with a note in the sum of One Hundred Thousand Dollars (\$100,000) which is due 30 days after service of my written demand, I hereby agree effective immediately without reservation not to make a demand upon him unless a civil court has decided upon a legal dissolution of our marriage or a rabbinical court has decided upon a legal dissolution of our marriage or a rabbinical court has determined that there is no prospect for successful married life between us, and if within such 30 day period, my husband notifies me that he is prepared to give me a *get* (jewish bill of divorce) in accordance with the laws of Moses and Israel within thirty (30) days of. (1) The date of demand of payment of the debt, (2) the date of the legal dissolution of our marriage or the determination of a rabbinical court that there is no prospects for a successful married life between us, or (3) from the date I

¹⁶⁷ See Dick, *supra* note 126, at 101-104 at n.35.

inform him that I am ready, willing, and able to accept a get immediately without any payment or other consideration (whichever date is the later one), and my husband does in fact give me the get without any monetary demands or the considerations, then his indebtedness is completely waived and released and the funds shall be deemed a gift to him and his heirs, not to be claimed forever.

I also agree that if my husband elects to pay the indebtedness in weekly installments in accordance with the provisions of the note, and prior to the satisfaction of the entire debt, he or I depart from this life, he shall be exonerated from payment of all installments which have not matured prior to the date of death.

And if the conditions of the aforementioned release shall not be complied with for any reason whatsoever, the note shall remain fully effective.

All of the foregoing was made in a way free of *asmakhta* or objection, and with making of a Kinyan in a manner most effective in accordance with the law of the Torah and the law of the State and with renunciation of any claims of duress and with disqualification of any witness to any claims of duress in terms are effective according to our sages of blessed memory.

IN WITNESS WHEREOF, I signed on the _____ day of _____ in the year _____.

s/Bride

CERTIFICATION

Before us, the aforementioned groom, Ms. _____ (name of bride) signed this note from her own free will and without any coercion or duress and we hereby certify that this is his signature and acknowledge it in accordance with law.

Dayan

Dayan

Dayan

3. Note of Wife (signed by wife)

I, the undersigned, hereby obligates myself to Mr. _____ (name of groom) in the sum of One Hundred Thousand (\$100,000) United States Dollars. In addition, I also obligate myself to Mr. _____ to reimburse him for reasonable attorney's fees up to fifteen (15%) percent of the indebtedness if it becomes necessary for him to engage an attorney to collect this indebtedness. This obligation is effective immediately as a personal obligation made before a competent Bet Din in the manner most effective (under Jewish law). My signature shall testify for me as 100 competent and trustworthy witnesses and as a full and complete admission of liability and is also binding on my heirs and estate for the benefit of Mr. _____, his heirs and assignees. The time for payment of the indebtedness shall be thirty (30) days after service upon me of a written demand by Mr. _____ whenever he pleases. I have the right to pay the indebtedness in weekly payments of \$100.00 or any other sum, which a rabbinic court determines, is within my ability to pay, whether more or less. This obligation is independent of all other legal instruments, and no other instruments shall be effective to modify or amend the validity of this obligation, and I have no right to retract my obligation after execution for any reason whatsoever.

The holder of this note shall be believed without an oath or herem to state that this indebtedness was not paid; that such indebtedness was not waived in whole or in part and also his heirs shall be so believed, as long as he or his heirs have custody of such instrument and there is no release proving payment of the debt. All of my assets, whether I now own same or whether I will hereafter acquire same, are hypodieticated to the payment of this debt, whether under Jewish Law or under the Law of the State.

All of the foregoing was made in a way free from *asmakhta* and not as a mere form and with renunciation of any claims of duress and with disqualification of any witnesses to any claims of duress in terms, which are effective according to our Sages of blessed memory.

We also agreed that Shmitta should not affect this indebtedness.

IN WITNESS WHEREOF, I signed on the _____ day of _____ in the year _____ .

s/Bride

CERTIFICATION

Before us, the aforementioned bride, Ms. _____ (name of bride), signed this note from her own free will and without any coercion or duress and we hereby certify that this is her signature and acknowledge it in accordance with law.

Dayan

Dayan

Dayan

4. *Waiver of Indebtedness of Wife* (signed by husband)

Whereas, Ms. _____ (name of bride) is obligating herself to me with a note in the sum of One Hundred Thousand Dollars (\$100,000) which is due 30 days after service of my written demand, I hereby agree effective immediately without reservation not to make a demand upon her unless a civil court has decided upon a legal dissolution of our marriage or a rabbinic court has decided upon a legal dissolution of our marriage or a rabbinic court has determined that there is no prospect for successful married life between us, and if within such 30 day period, my wife notifies me that she is prepared to accept from me a *get* Jewish bill of divorce) in accordance with the laws of Moses and Israel within thirty (30) days of. (1) The date of demand of payment of the debt, (2) the date of the legal dissolution of our marriage or the determination of a rabbinic court that there is no prospects for a successful married life between us, or (3) from the date I inform her that I am ready, willing, and able to give a *get* immediately without any payment or other consideration (whichever date is the later one), and my wife does in fact accept the *get* without any monetary-y demands or the considerations, then the indebtedness is completely waived and released and the funds shall be deemed a gift to her and her heirs, not to be claimed forever.

I also agree that if my wife elects to pay the indebtedness in weekly installments in accordance with the provisions of the note, and prior to the satisfaction of the entire debt, she or I depart from this life, she shall be exonerated from payment of all installments which have not mattered prior to the date of death. And if the conditions of the aforementioned release shall not be complied with for any reason whatsoever, the note shall remain fully effective.

All of the foregoing was made in a way free of *asmakhta* or objection, and with making of a *Kinyan* in a manner most effective in accordance with the law of the Torah and the law of the State and with renunciation of any claims of duress and with disqualification of any witness to any claims of duress in terms are effective according to our sages of blessed memory.

IN WITNESS WHEREOF, I signed on the _____ day of _____ in the year _____ .

s/Groom

CERTIFICATION

Before us, the aforementioned groom, Mr. _____ (name of groom), signed this note from his own free will and without any coercion or duress and we hereby certify that this is his signature and acknowledge it in accordance with law.

Dayan

Dayan

Dayan

Appendix 5 (Rabbi Shear-Yashuv Cohen Prenup)¹⁶⁸

do hereby affirm that the Groom _____ (name of groom)

after the nuptials (*kiddushin*) and before the marriage (*nissuin*)

"I do hereby waive any claim that I may have in your property, including the appreciation, rents, issues, profits of such property, the proceeds of the sale of such property, and the investment, reinvestments and transmutations of such property."

Similarly, the Groom _____ (name of groom) undertook to: "Give to the Bride _____ (name of bride) a Bill of Divorce (a *Get*) within 30 days of receipt of a written demand from MY wife that she no longer wishes to remain married to me. If I do not accede immediately to my wife's demands, I agree to pay her immediately the full sum of her marriage contract (*Ketubah*), all additions to the marriage contract, and her dowry; and, in addition, I agree to pay her maintenance as if she were a women who is prevented from marrying in accordance with the law of Moses and Israel because of her husband's feasance or nonfeasance, all this in a manner of largess and in accordance with Jewish law, and in accordance with the laws of the State, and by means of a formal Halakhic transaction (*kinyan*)."

In Witness thereof:

First Witness _____ (signature of witness)

Second Witness _____ (signature of witness)

I do hereby affirm the aforementioned _____ (signature of Groom)

Acknowledged by the Officiating Rabbi _____

¹⁶⁸ I translated this document from the Hebrew. In a telephone conversation on, or about, September 1999, Rav Shear Yashuv Cohen confirmed that he has used this document and that it is, in his opinion *halakhically* sound and effective. He also emphasized that it is best to draft each prenuptial in accordance with the needs of the individual couple. On Nov. 3, 1999, Rav Cohen's wife, Dr. Nomi Cohen, sent me an e-mail confirming that her husband read the translation of the original Hebrew document and maintained that, although it is not a literal translation, it successfully reflects the intent of the document.

Appendix 6 (The RCA Liquidated Damages Prenup)¹⁶⁹:

PRENUPTIAL AGREEMENT

AGREEMENT, dated _____ 198__ between _____, an individual residing at _____ (the "Bride") and _____ an individual residing at _____ (the "Bridegroom").

WHEREAS, Bride and Bridegroom, both of the Jewish Faith, are about to be married in accordance with the laws of this jurisdiction as well as the laws, traditions and teachings of the Jewish religion ("Halacha"), with the mutual desire and expectation that for the remainder of their natural lives they will live together as man and wife; and

WHEREAS, the Bride and Bridegroom agree that in the unfortunate event that their marriage is terminated by a court of competent jurisdiction, such termination will also be effected in accordance with the procedures mandated by Halachah.

NOW THEREFORE, in consideration of their forthcoming marriage and in order to give effect to the foregoing, the Bride and Groom agree:

1. In the unfortunate event that our marriage be terminated for any reason by a court of competent jurisdiction, each of us agrees that we shall promptly take such steps as will effect the termination of our marriage by the giving and acceptance of a divorce (a "Get"), which Get shall comply with the dictates of Halachah. Such get will be given and received, as the case may be without further consideration, within thirty (30) days of the above-mentioned termination.
2. Each of us agrees that any dispute as to full performance by either of us of our obligations under paragraph 1. Above shall be resolved by final, binding and enforceable arbitration. The Beth Din of America or its successor or its designee shall conduct such arbitration for such purpose the ("Arbitrator(s)") in accordance with the rules established from time to time by the Arbitrator(s) for such purpose. Each of us agrees that the decision of such Arbitration shall not be subject to review. Each of us agrees to take such actions, including the giving and acceptance of a Get, in such form and manner as the Arbitrator(s) may prescribe. Each of us consents to the exclusive jurisdiction of the Arbitrator(s) for the foregoing purpose.
3. The Arbitration referred to in paragraph 2 above may be initiated by either of us, by a written notice to the other and to the Arbitrator(s) of an intention to arbitrate. The Arbitrator(s) shall then designate the time and place for such arbitration. We shall each of us appear before the Arbitrator(s) at the place and time specified in its/their foregoing notice.
4. Each of us recognizes that pursuant to Health, each of us will be unable to remarry without a Get. Each of us recognizes that such inability to remarry will constitute actual substantial damage, which is not quantifiable. Since actual damages will be incapable of determination, **the Arbitrator(s) shall be authorized to impose in its/their decree liquidated damages in an amount of \$250.00 per day (the "Liquidated Amount") for the failure of either of us to abide by the decision of the Arbitrator(s) as provided for in the Agreement**, provided that neither the imposition of such liquidated damages nor any payment thereof shall release either of us from our obligations to comply with the remainder of the decisions of the Arbitrator(s). The liquidated Amount shall be adjusted based upon the percentage of change in the consumer price index from the date of this Agreement to the date of the imposition by the Arbitrator(s).
5. **Without limiting the authority conferred upon the Arbitrator(s) by paragraph 4 above, the jurisdiction of the Arbitrator(s) under this Agreement shall be restricted to a determination as to whether our marriage has been terminated in compliance with the Halachah, and, if not, what acts must be performed for such termination. This Agreement does not authorize the Arbitrator(s) to determine any property settlement, equitable distribution, alimony, child support, or custody arrangement.**

¹⁶⁹ See BRAYER, *supra* note 140, at 223-226 (Appendix A) (emphasis added).

6. The obligations of each party under this Agreement shall be in Addison to any and all obligations, which are contained in the Ketubah, which will be given at our religious marriage ceremony.
7. This Agreement shall be construed and shall be enforceable in accordance with the laws of his jurisdiction. This Agreement may be executed in one or more counterparts, each one of which shall be deemed an original.

IN WITNESS WHEREOF, Bride and Bridegroom have entered into this Agreement in the City of _____, State of _____ U.S.A.

Witness:

Name:

Address:

Signature:

Witness:

Bride:

Name:

Address:

Signature:

Groom:

Acknowledgments:

State/province of _____
County of) ss;

On the _____ day of _____ 199__

Before me personally came _____,
the groom, to be known and known to me
to be the individual described in, and who
executed the foregoing instrument and Duly
acknowledged to me that he executed the same.

State/province of _____
Country of) ss;

On the _____ day of _____ 199__

Before me personally came _____,
the bride, to be known and known to me
to be the individual described in, and who
executed the foregoing instrument and Duly
acknowledged to me that she executed the same.

Notary public

Notary public

