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Comments: Give and "Get"? Applying the Restatement of Contracts to Determine the Enforceability of "Get Settlement" Contracts

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GIVE AND "GET"? APPLYING THE RESTATEMENT OF CONTRACTS TO DETERMINE THE ENFORCEABILITY OF "*GET* SETTLEMENT" CONTRACTS.

I. INTRODUCTION

Abraham has physically, sexually, emotionally, and psychologically abused his wife, Sarah, for the length of their marriage. Having put up with enough of the abuse, Sarah wants a divorce. Abraham says to her: I will grant you a Jewish divorce, but only if you sign this contract, which gives me all of our shared marital assets; all of our jointly owned business assets; and custody of our children. If you do not sign this contract, you will never be able to marry or cohabitate with another man. If you do have children with another man, those children and their progeny will forever be labeled bastards in the Jewish community, only able to marry other bastards. While Sarah obviously views the terms of the contract as unfair, the distress of Abraham's abuse is too much to handle – she signs the contract. As evidenced by a number of cases out of New York and New Jersey,[1] such unfair settlement agreements are formed all too often.

Unfortunately, this problem is not a recent one. Tractate Yebamoth of the Babylonian Talmud,[2] compiled centuries ago, tells the story of the niece of one of the great scholars of the Talmudic Era, Rabbi Papa.[3] The rabbi's niece consented to pay her husband's brother a large sum of money to perform the *Halitzah*[4] ceremony, which would

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1. *See infra* Part IV and the cases cited therein.
2. For a more complete discussion of the Babylonian Talmud and its place in the sphere of Jewish law, see Irving Breitowitz, *The Plight of the* Agunah*: A Study in* Halacha*, Contract, and the First Amendment*, 51 MD. L. REV. 312, 314 n.4 (1992) [hereinafter Breitowitz, *The Plight of the* Agunah]. As Professor Breitowitz does, this author will cite to the Babylonian Talmud as "BABYLONIAN TALMUD", with the specific tractate and pages following. As Breitowitz notes, "[t]he entire Talmud (without the commentaries) has been translated into English and published by the Soncino Press under the editorship of Isidore Epstein." *Id.* (citing BABYLONIAN TALMUD (Isidore Epstein ed., 1960)). Referencing the Epstein edition may be useful for those not proficient in the Hebrew and Aramaic languages.
3. BABYLONIAN TALMUD, TRACTATE YEBAMOTH 106a.
4. Literally, "taking off a shoe." *See infra* note 5.

then permit the niece to marry another man.[5] The *Beth Din*[6] in that case, and in others involving recalcitrant husbands, cancelled the payment aspect of such agreements.[7] Broadly, this Comment will address the enforceability of what this author coins "*Get*[8] settlement contracts." Such contracts are formed when a husband refuses to grant his wife a *Get* until she agrees to a collateral settlement agreement, oftentimes giving the husband a windfall in the divorce settlement proceedings.[9] Specifically, this comment will first detail the well-documented problem of the *Agunah*[10] and how *Get* settlement contracts arise. This Comment will then compare this situation to others implicating religion that secular courts have held to be within their purview, to argue that secular courts are not constitutionally barred from ruling on the enforceability of *Get* settlement contracts. Next, after discussing the few cases out of New York and New Jersey dealing with *Get* settlement contracts, this

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5. According to the Old Testament, when a husband dies childless, the widow must either enter into a "Levirite marriage" and marry her husband's brother, or, should the brother not want to marry her, he must have the widow perform the *Halitzah* ceremony. *See* 25 *Deuteronomy* 5–10 *in* THE STONE EDITION CHUMASH: THE TORAH, HAFTAROS, AND FIVE MEGILLOS WITH A COMMENTARY ANTHOLOGIZED FROM RABBINIC WRITINGS, 1063–65 (Nosson Scherman, ed., 11th ed. First Impression, Mesorah Publications 2000). The *Halitzah* ceremony entails the woman "remov[ing] his shoe from on his foot and spit[ting] before him . . . ." *Id.* at 9. Without either marrying the brother-in-law or performing *Halitzah*, a woman in this situation is effectively an *Agunah*, and cannot remarry. *See* Daniel B. Sinclair, *Assisted Reproduction in Jewish Law*, 30 FORDHAM URB. L.J. 71, 89 (2002).

6. Literally, "house of justice." A *Beth Din* is a Jewish rabbinic court. For a historical background of *Beth Dins*, see MICHAEL J. BROYDE, MARRIAGE, DIVORCE, AND THE ABANDONED WIFE IN JEWISH LAW 43–44 (2001) [hereinafter BROYDE, ABANDONED WIFE IN JEWISH LAW]; Ginnine Fried, Note, *The Collision of Church and State: A Primer to* Beth Din *Arbitration and the New York Secular Courts*, 31 FORDHAM URB. L.J. 633, 635–41 (2004).

7. *See* Shahar Lifshitz, *Distress Exploitation Contracts in the Shadow of No Duty to Rescue*, 86 N.C. L. REV. 315, 339 & n.88, 340 & n.98, 372–73 n.208 (2008).

8. A "*Get*" is a Jewish bill of divorce. For a more thorough analysis of a *Get*, its traditional text, and its ramifications, see Breitowitz, *The Plight of the* Agunah, *supra* note 2, at 319–21.

9. *See infra* Part II.C.

10. Literally "chained" from the Hebrew word "agun," meaning anchor. Aryeh Cohen, *Giddul's Wife and the Power of the Court: On Talmudic Law, Gender, Divorce and Exile*, 9 S. CAL. REV. L. & WOMEN'S STUD. 197, 216 n.73 (2000). There are four situations in which a woman may be unable to obtain a *Get*, and thus, have the status of an *Agunah*: "[T]he husband is mentally ill, thus legally incompetent to grant a divorce; the husband has died but there is no legally valid evidence of his death; a recalcitrant husband refuses to divorce his wife; or the husband abandons her and disappears." BLUMA GOLDSTEIN, ENFORCED MARGINALITY: JEWISH NARRATIVES ON ABANDONED WIVES 2 (2007).

Comment will apply pertinent sections of the Restatement of Contracts to typical *Get* settlement situations to determine potential enforceability issues. Finally, this Comment will then recommend another route to unenforceability after a recent decision by the Court of Appeals of Maryland.

II. HOW *GET* SETTLEMENT CONTRACTS COME ABOUT

When one has a full understanding of just how unfortunate the situation is for *Agunot*,[11] one can understand how a woman so situated would agree to a settlement that could potentially leave her financially and otherwise decimated.

A. Jewish Law and Agunot

> If a man marries a woman and lives with her, and it will be that she will not find favor in his eyes, for he found in her a matter of immorality, and he wrote her a bill of divorce and presented it into her hand, and sent her from his house.[12]

While ancient scholars debated the grounds for which a man may pursue a divorce,[13] it is clear from the original source of Jewish law, the Old Testament, that the choice to initiate the dissolution of a marriage rests solely with the man.[14] In fact, until the 10th century, a husband could divorce his wife, at his option, for any reason at all, with or without her consent.[15]

However, reform in the realm of Jewish marriage and divorce came in the 10th century by an Eastern European rabbi by the name of Rabbeinu Gershom.[16] Along with forbidding polygamy,[17] Rabbeinu

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11. *Agunot* is the plural form of *Agunah*.
12. 24 *Deuteronomy* 1 *in* THE STONE EDITION CHUMASH: THE TORAH, HAFTAROS, AND FIVE MEGILLOS WITH A COMMENTARY ANTHOLOGIZED FROM RABBINIC WRITINGS, 1059 (Nosson Scherman, ed., 11th ed. First Impression, Mesorah Publications 2000).
13. *See* IRVING A. BREITOWITZ, BETWEEN CIVIL AND RELIGIOUS LAW: THE PLIGHT OF THE *AGUNAH* IN AMERICAN SOCIETY 9 (1993) [hereinafter BREITOWITZ, BETWEEN CIVIL AND RELIGIOUS LAW].
14. BROYDE, ABANDONED WIFE IN JEWISH LAW, *supra* note 6, at 17.
15. *See* BABYLONIAN TALMUD, TRACTATE YEBAMOTH, 112b. One opinion in the Talmud even permits a husband to divorce his wife for as trivial a matter as burning the soup. *See* BABYLONIAN TALMUD, TRACTATE GITTIN, 90a.
16. Literally, "our Rabbi Gershom."
17. BREITOWITZ, BETWEEN CIVIL AND RELIGIOUS LAW, *supra* note 13, at 10 & n.32. However, under the biblical law of the Old Testament, polygamy was not prohibited. *See, e.g.*, 16 *Genesis* 1–4 ("So Sarai . . . gave her to Abram her husband, to him as a wife."); 26 *Genesis* 34 ("Esau . . . took as a wife Judith daughter of Beeri the Hittite,

Gershom's legislative enactments generally "introduced a spirit of equality in divorce proceedings and for the most part necessitate that all divorce occur through *mutual* consent."[18] However, despite there now being more mutuality in the divorce process than before the enactments of Rabbeinu Gershom, a more detailed analysis reveals that "a wife is still much more vulnerable than a husband because a failure to divorce carries uneven consequences."[19] That is, an *Agunah* who chooses to cohabitate or marry another man commits the serious biblical prohibition of adultery, and any children stemming from such a union are labeled *Mamzerim*,[20] as is the rest of the family lineage.[21] Thus, even if the wife wants to turn her back on her religious beliefs and cohabitate outside of her marriage, this decision not only affects *her* status in the Jewish community, but the status of all future generations stemming from the prohibited relationship. *Mamzerim* are tainted in that they are not free to marry amongst the Jewish people; they may only marry other *Mamzerim* and converts.[22] In contrast, because polygamy is only prohibited, post-10th century, by merely a *rabbinical* enactment, a man who has not obtained a religious divorce yet chooses to cohabitate outside of his marriage has not violated the biblical prohibition against adultery.[23] As such, any children begot from such a union would *not* shoulder the burden of being labeled *Mamzerim*.[24] And, even if the wife is not complicit in the divorce process, the man still has the option of obtaining a *Heter Meah Rabbanim*,[25] making her consent to the divorce unnecessary. While Rabbeinu Gershom's enactments protect women that want to stay married by providing that they must be complicit in divorce proceedings, "it did nothing for the woman who wished to

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and Bashemath daughter of Elon the Hittite . . . ."); 21 *Deuteronomy* 15 ("If a man will have two wives, one beloved and one hated . . . .").

18. BREITOWITZ, BETWEEN CIVIL AND RELIGIOUS LAW, *supra* note 13, at 11 (alteration in original).
19. Kent Greenawalt, *Religious Law and Civil Law: Using Secular Law to Assure Observance of Practices with Religious Significance*, 71 S. CAL. L. REV. 781, 811 (1998) [hereinafter Greenawalt, *Religious Law and Civil Law*].
20. Literally, plural of "illegitimate" or "bastard."
21. Greenawalt, *Religious Law and Civil Law*, *supra* note 19, at 811.
22. BREITOWITZ, BETWEEN CIVIL AND RELIGIOUS LAW, *supra* note 13, at 12 n.35.
23. *Id.* at 12–13 n.38.
24. *Id.* at 12 n.35.
25. Literally, a "'[d]ispensation of 100 rabbis.'" Breitowitz, *The Plight of the* Agunah, *supra* note 2, at 325. If the husband is able to obtain approval from one-hundred rabbis, he is permitted to divorce his wife despite his wife's refusal to accept the *Get*. *Id.* However, "as a practical matter, many Rabbinical authorities were extremely reluctant to participate in this annulment procedure." *Id.*

marry somebody else and whose husband refused to grant her a *get*."[26]

B. *The Suffering of* Agunot

Numbers fluctuate greatly as to the exact number of *Agunot* in the United States,[27] but in New York, the state with the largest Jewish population,[28] estimates have ranged from as few as 50 to as many as 15,000.[29] In response to this menacing problem, the New York State Legislature has passed two laws attempting to prevent women from becoming *Agunot* by statutorily providing disincentives to would-be recalcitrant husbands.[30] However, when one fully understands the magnitude of the plight that *Agunot* face, a number closer to the low end of published estimates remains an atrocity.

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26. Jessica Davidson Miller, *The History of the* Agunah *in America: A Clash of Religious Law and Social Progress*, WOMEN'S RTS. L. REP., Fall 1997, at 3.

27. The State of Maryland has not been immune to the *Agunah* problem. *See* Kelsey Volkmann, *Orthodox Jew Fights for Her Right to Divorce*, BALTIMORE EXAMINER, Sept. 18, 2006, http://www.examiner.com/a-293213~Orthodox_Jew_fights_for_her_right_to_divorce.html (detailing the case of a University of Baltimore Law School student who refused to give his wife a *Get*).

28. *See* World Jewish Congress: World Jewish Communities, http://www.worldjewishcongress.org/communities/northamerica/comm_usa.html (last visited Aug. 22, 2009).

29. *See* Breitowitz, *The Plight of the* Agunah, *supra* note 2, at 315–16; *Cf.* Jack Nusan Porter, *Introduction* to WOMEN IN CHAINS: A SOURCEBOOK ON THE *AGUNAH* xi, xiii (Jack Nusan Porter ed., 1995) [hereinafter WOMEN IN CHAINS] (explaining why the disparity in the figures is so drastic).

30. A 1983 law provides that one seeking a civil divorce must file an accompanying affidavit stating "that he or she has taken . . . all steps solely within his or her power to remove any barrier to the defendant's remarriage following the annulment or divorce." N.Y. DOM. REL. LAW § 253 (McKinney 1999). While § 253 has prevented a substantial number of women from becoming *Agunot*, many authors have debated both the utility and the constitutionality of the statute. *See, e.g.*, Ilene H. Barshay, *The Implications of the Constitution's Religion Clauses on New York Family Law*, 40 HOW. L.J. 205, 214 (1996); Breitowitz, *The Plight of the* Agunah, *supra* note 2, at 375–96; Jeremy Glicksman, *Almost, but Not Quite: The Failure of New York's* Get *Statute*, 44 FAM. CT. REV. 300 (2006); Edward S. Nadel, *New York's* Get *Laws: A Constitutional Analysis*, 27 COLUM. J.L. & SOC. PROBS. 55 (1993). The 1992 law allows New York courts to consider the withholding of a *Get* as one of the factors in determining the equitable distribution of marital assets. N.Y. DOM. REL. LAW § 236(B)(5)(h) (McKinney 1999). However, a *Beth Din* is likely to determine that a *Get* given in response to Section 236 is coerced, and thus, invalid. *See generally* BROYDE, ABANDONED WIFE IN JEWISH LAW, *supra* note 6, at 103–17 (explaining the validity of Jewish divorces since the 1992 law took effect); BREITOWITZ, BETWEEN CIVIL AND RELIGIOUS LAW, *supra* note 13, at 212–19 (detailing methods that could be employed to avoid a coerced *Get*); Gedalia Dov Schwartz, *Comments on the New York State* "Get *Law*," J. HALACHA & CONTEMP. SOC'Y, Spring 1994, at 26 (discussing the matter of a coerced *Get*).

An *Agunah* has essentially two options: seek relationships outside of her religious marriage,[31] tantamount to abandoning the religious faith that she has ostensibly adhered to and lived by for decades; or, stay committed to her religion, yet lead a life devoid of sexual intercourse, affection, and emotional attachment.[32] A woman in this predicament is presented with a true "Morton's Fork";[33] sacrificing either her religious interests or her personal interests.

Regardless of the sacrifice that an *Agunah* makes, negative psychological effects may result. In the 1950's, Leon Festinger conducted a substantial amount of research on the psychological construct termed "cognitive dissonance."[34] A person experiences cognitive dissonance when he or she is "forced to do or say something contrary to that [person's] opinion,"[35] and the presence of cognitive dissonance causes "unpleasant psychological tension."[36] It is possible that an Orthodox Jew, of the opinion that the requirement of obtaining a *Get* before entering into other relationships is proper, would experience a great deal of cognitive dissonance when choosing to ignore that requirement by engaging in extramarital relationships. An *Agunah* in this situation is not merely forced to act in a way that is at odds with an *opinion*; she is being forced to act in a way that is at odds with her entire *way of life*. Thus, from a mental-health standpoint, a wife who chooses to sacrifice her religious values by leaving the Orthodox way of life may be in a very compromising position.

However, the alternative—staying true to religion by opting to refrain from entering into extramarital relationships, yet living a life devoid of cohabitation and emotional attachment—may have similar negative psychological detriments. In 1943, Abraham Maslow,

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31. *See* Lucette Lagnado, *Of Human Bondage*, *in* WOMEN IN CHAINS, *supra* note 29, at 9 ("'At some point, I may even go out and try to date . . . .'").
32. *See* Miller, *supra* note 26, at 14 ("This means that Jewish women will be left with the choice of abandoning their faith or staying chained to a past life . . . .").
33. The term "Morton's Fork" is a choice between two undesirable options, and refers to John Morton, "who levied forced loans under Henry VII by arguing the obviously rich could afford to pay and the obviously poor were obviously living frugally and thus had savings and could pay, too." Dictionary.com, http://dictionary.reference.com/browse/morton%27s%20fork (last visited Dec. 19, 2008).
34. *See* Leon Festinger & James M. Carlsmith, *Cognitive Consequences of Forced Compliance*, 58 J. ABNORMAL & SOC. PSYCHOL. 203 (1959).
35. *Id.* An example of cognitive dissonance would be for a smoker, knowing that smoking is unhealthy, to continue engaging in that conduct. *See* ELLIOT ARONSON, THE SOCIAL ANIMAL, 179–83 (Richard C. Atkinson et al. eds., 7th ed. 1995).
36. Cognitive Dissonance, http://www.ithaca.edu/faculty/stephens/cdback.html (last visited Dec. 19, 2008).

widely regarded as the father of humanistic psychology,[37] published a seminal paper in which he conceptualized a "hierarchy of human needs."[38] According to Maslow's theory, "[h]uman needs arrange themselves in hierarchies . . . [and] the appearance of one need usually rests on the prior satisfaction of another . . . ."[39] At the base of his hierarchy, Maslow lists a number of physiological needs that must be met before moving on to higher-level needs.[40] Maslow suggests that when such physiological needs are not satisfied, "all other needs may become simply non-existent or be pushed into the background."[41] One such need, he suggests, is the need to engage in sexual behavior[42]—a component of healthy marriages of which *Agunot* are deprived. Thus, because *Agunot* are lacking one of Maslow's "physiological needs," they will be unable to focus on higher-level needs, such as self-esteem, confidence, achievement, and gaining the respect of others.[43] Furthermore, even if all of their physiological needs are met, *Agunot* are devoid of much of what Maslow discusses in the third-level of his hierarchy: "[t]he love needs."[44] Being technically married to a person who knowingly inflicts emotional pain on her, an *Agunah* will continually "hunger for affectionate relations,"[45] and will similarly be unable to focus on higher-level needs. If Maslow's theory is correct, *Agunot*, living without both the physiological needs and love that all people yearn, may lack self-esteem, confidence, achievement, and a sense of feeling respected by others.[46] As such, a woman refusing to leave the Orthodox tradition that she has lived for so long, while perhaps not suffering from as much cognitive dissonance, can remain compromised from a mental-health standpoint.

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37. DUANE P. SCHULTZ & SYDNEY ELLEN SCHULTZ, A HISTORY OF MODERN PSYCHOLOGY 366 (4th ed. 1987).
38. *See* A.H. Maslow, *A Theory of Human Motivation*, 50 PSYCHOL. REV. 370 (1943), *available at* http://psychclassics.yorku.ca/Maslow/motivation.htm (last visited Dec. 22, 2008).
39. *Id.*
40. *See id.* at 370–76.
41. *Id.* at 373.
42. *Id.* at 374. Also relevant to *Agunot*, Maslow discusses the desire for sex in the context of marriage in the third level of his hierarchy. *See id.* 380–81.
43. *See id.* at 381–82, 389.
44. *Id.* at 380–81.
45. *Id.* at 381.
46. *See* GOLDSTEIN, *supra* note 10, at xiii ("She, devastated and humiliated by abandonment, saw herself as incompetent, incapable of 'holding onto a husband,' and felt both victimized and ashamed of her victimization."), 4 ("[N]ot to mention the shame, social ostracism, and loss of self-esteem and status she would suffer.").

However, it should here be noted that this author does not assert that every *Agunah* faces severe psychological effects from the realities of her situation. Actually, it is possible that women faced with *Get* settlement contracts may suffer psychologically less than other *Agunot*, as they may be offered, and often accept, their settlement contracts in a relatively short span of time. The negative effects felt by these women likely come in the form of being forced to agree to an unfair divorce settlement, and having to deal with the subsequent fallout. Thus, while all *Agunot* assuredly are in a precarious position, the title does not inevitably carry the aforementioned negative psychological detriments posited by Festinger and Maslow.

Any negative psychological effects that may exist are exacerbated in situations where such psychological torment is accompanied by physical abuse. Some wish to deny that domestic violence is a problem in the Jewish world;[47] they are either in denial or grossly misinformed. Studies have approximated the rate of domestic violence in Jewish families at fifteen to thirty percent.[48] In fact, it has been argued that for Orthodox women, for whom the *Agunah* problem is most prevalent,[49] escaping from an abusive marriage is particularly difficult.[50] Ironically, one author suggests that a fear of living as an *Agunah* is what *keeps* certain abused women in such relationships.[51] While certainly not every *Agunah* experiences physical abuse at the hands of her recalcitrant husband, it has been an

47. *See* Beverly Horsburgh, *Lifting the Veil of Secrecy: Domestic Violence in the Jewish Community*, 18 HARV. WOMEN'S L.J. 171, 172 (1995) (quoting a rabbi who claimed, "[domestic violence] is not Jewish. I don't know any women in my congregation who are abused. Why is a nice Jewish woman writing about this?").

48. *Id.* at 178 & n.5. For an example of an empirical study of attitudes toward, and experiences with domestic abuse in the Jewish world, see Lydia M. Belzer, *Toward True Shalom Bayit: Acknowledging Domestic Abuse in the Jewish Community and What to Do About It*, 11 CARDOZO WOMEN'S L.J. 241 (2005).

49. *See* Breitowitz, *The Plight of the* Agunah, *supra* note 2, at 361 (explaining how, because of a proposed change to the Conservative marriage document, the *Agunah* issue is more easily remedied in Conservative Jewish circles).

50. *See* Horsburgh, *supra* note 47, at 203 ("Imagine the difficulties facing Orthodox battered women. First of all, it may be difficult for them to interpret their situation as abusive, given their submissive role in life. . . . They lack money and have restricted career options because of their religious practices. . . . Community mores dictate that Orthodox women turn to their rabbis for advice, instead of calling the police, a social worker, or a psychologist.") (footnote omitted).

51. *See id.* at 194 ("Some battered Jewish women, knowing that only the husband is empowered to divorce, view their situation as hopeless.").

issue for many,[52] and the existence of such abuse surely compounds any emotional or psychological abuse incident to the *Agunah* predicament.

C. The Inevitable Consequence: Get *Settlement Contracts*

While an *Agunah* may believe she has only two options[53]—abandoning her Orthodox faith by seeking extramarital relationships, or remaining in the psychologically-damaging marriage—there are times that a recalcitrant husband can offer his wife a way out of the misery. That is, a husband, knowing the distress that both of the two aforementioned options pose, may offer to give his wife a *Get* for the small price of her agreement to a contract. The problem is, however, that the price the wife pays in holding up her end of the bargain is often not small at all. Such contracts, which this author coins "*Get* settlement contracts," often require fearful wives to pay exorbitant amounts of money[54] or marital assets,[55] or to relinquish custody of the couple's children,[56] in exchange for freedom.[57] These contracts, which one prominent Orthodox rabbi and law professor calls "extortion in its simplest form,"[58] involve a gross disparity in bargaining power. Therefore, it is incumbent upon the secular courts to closely examine the facts and circumstances of each contract and its formation to determine if the bargained-for-exchange was so unjust as to necessitate invocation of one of any number of contractual doctrines to void, or make voidable, such *Get* settlement contracts.

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52. WOMEN IN CHAINS, *supra* note 29, at xii ("Indeed, often *agunot* are abused women as are their children.").
53. *See supra* Part II.B.
54. In one case, a man paid a recalcitrant husband $250,000 so that his granddaughter would receive a *Get*. Lucette Lagnado, *Of Human Bondage*, *in* WOMEN IN CHAINS, *supra* note 29, at 6.
55. *See* Perl v. Perl, 512 N.Y.S.2d 372, 374 (App. Div. 1987) (detailing a situation where the husband demanded all of the couple's jointly-held securities).
56. *See* Horsburgh, *supra* note 47, at 174.
57. Barbara J. Redman, *Jewish Divorce: What Can Be Done in Secular Courts to Aid the Jewish Woman?*, 19 GA. L. REV. 389, 392 (1985) ("The wife in this situation has two choices: she can refuse to impoverish herself and suffer the consequences of being an adulteress and raising bastards, or she can agree to an inequitable divorce contract which deprives her of all fair return from her contribution to the marriage and severely disadvantages her economically.").
58. BROYDE, ABANDONED WIFE IN JEWISH LAW, *supra* note 6, at 30. *See also* Burns v. Burns, 538 A.2d 438, 440 (N.J. Super. Ct. Ch. Div. 1987) ("This so-called 'offer' is akin to extortion.").

One final note is in order. It should be made clear from the outset that this author does not posit that all contracts made in the course of Orthodox separations or divorces are void or voidable. This author is well aware that hard bargaining is a natural part of the separation or divorce process,[59] and there is no reason to think that such hard bargaining is not also present in Jewish divorces. This Comment only wishes to elucidate scenarios where a husband is willing to desert his wife and leave her as an *Agunah* if she refuses to agree to a contract in which both the respective bargaining positions and terms of the contract are grossly unfair.

III. CLEARING THE CONSTITUTIONAL HURDLE

Before discussing the contractual doctrines that may allow courts to refuse the enforcement of *Get* settlement contracts, it must be first clearly established that secular courts are fit to adjudicate such disputes. While disputes involving civil divorces and secular contracts are clearly properly heard in civil courts, "[a] court . . . will refuse to decide an essentially religious issue even if the issue is otherwise properly before the court, and even if it is asked to decide it."[60] One could argue that *Get* settlement contracts should not be within a secular court's purview, running afoul of the First Amendment;[61] after all, "[a] wife who does not receive a *get* is harmed *only because she and others have a religious and cultural sense that the get is important.*"[62] However, after examining other scenarios implicating religious concerns that courts have held to be within their purview, it becomes apparent to this author that secular courts are not constitutionally barred from adjudicating *Get* settlement contract disputes.

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59. *See* Robert Dinerstein et al., *Connection, Capacity and Morality in Lawyer-Client Relationships: Dialogues and Commentary*, 10 CLINICAL L. REV. 755, 795 (2004) ("Yet it has to be recognized that divorce negotiations are inevitably focused on custody and money, and it is hard to imagine negotiations that do not involve pressure on each of these fronts . . . .").

60. Marsh v. Chambers, 463 U.S. 783, 804 n.15 (1983).

61. The pertinent part of the First Amendment to the United States Constitution reads: "Congress shall make no law respecting an *establishment of religion, or prohibiting the free exercise thereof*. . . ." U.S. CONST. amend. I (emphasis added).

62. Greenawalt, *Religious Law and Civil Law*, *supra* note 19, at 814 (emphasis added).

A. "Religious Duress"

The Superior Court of New Jersey, in *Smith v. Kelly*,[63] discussed the phenomenon of "religious duress."[64] There, a priest defined religious duress as "'a state of mind whereby a person feels internally compelled to do or not do something because of a fear induced by a religious power and/or authority [i.e. the Church hierarchy].'"[65] The priest further testified that, because of religious duress, a plaintiff would be afraid of taking action against the Church or its members, in fear of excommunication or damnation.[66] While the court ultimately held that the priest's statements "constitute[d] an impermissible net opinion,"[67] the court did not bar consideration of such a doctrine on constitutional grounds.[68] Similarly, *Agunot* suffer from their own type of religious duress. That is, whereas the religious authority compelling Catholics to act or not to act is the Church, *Agunot* have their own religious authority compelling them to enter into *Get* settlement contracts: Jewish law. *Agunot* ostensibly understand the realities of their situation: they are required to obtain a *Get* before dating or seeing other men. As such, they often feel compelled to give in to the recalcitrant husband's demands, as unfair as the terms may be. Thus, it is clear that at least some courts do not bar, on constitutional grounds, giving recognition to the realities that religion imposes upon its followers, to determine if such realities

63. 778 A.2d 1162 (N.J. Super. Ct. App. Div. 2001)

64. *Id.* at 1172. For more on religious duress and Catholicism, see Thomas P. Doyle & Stephen C. Rubino, *Catholic Clergy Sexual Abuse Meets the Civil Law*, 31 FORDHAM URB. L.J. 549, 591–92 (2004); Thomas P. Doyle, *Roman Catholic Clericalism, Religious Duress, and Clergy Sexual Abuse*, 51 PASTORAL PSYCHOL. 189, 218–19 (2003).

65. *Smith*, 778 A.2d at 1172.

66. *Id.*

67. *Id.*

68. *Id.* at 1172–73. There is, however, a line of cases that rejects the recognition of the doctrine of religious duress. *See, e.g.*, Doe v. Holy See, 793 N.Y.S.2d 571, 573 (App. Div. 2005); Langford v. Roman Catholic Diocese of Brooklyn, 705 N.Y.S.2d 661, 662 (App. Div. 2000). However, these cases are distinguishable from this situation, in that they involved claims of malpractice, and would have required the courts to determine a duty owed by a cleric to a parishioner. *See Langford*, 705 N.Y.S.2d at 662. The adjudication of *Get* settlement contracts does not involve a determination of a religious duty; it merely requires the courts to examine the realities of the *Agunah* predicament and determine if and how they affected the respective parties' bargaining powers at the formation of the agreement.

compelled an individual to act in a manner in which they otherwise would not have.[69]

B. Other Agunah *and* Get *Cases Implicating the First Amendment*

Secular courts, in cases dealing with other *Agunah*- and *Get*-related issues, have both ordered the parties to submit to rabbinic arbitration and ordered recalcitrant husbands to give their respective wives *Gets*.[70] A secular court's application of neutral contract law to *Get* settlement contracts falls well short of the level of religious entanglement involved when a secular court orders litigants to submit to rabbinic arbitration, or when they order husbands to deliver a religious document. If secular courts are willing to hold that such results are not violative of the First Amendment, *a fortiori*, they should similarly be willing to rule on the enforceability of *Get* settlement contracts.

1. Prenuptial Agreements

Both Orthodox and Conservative rabbis have sought to remedy the *Agunah* problem by having couples agree to submit to rabbinic arbitration in times of marital discord.[71] In the seminal case of *Avitzur v. Avitzur*,[72] the Court of Appeals of New York enforced a prenuptial agreement to arbitrate all post-marital religious obligations to a *Beth Din*.[73] *Avitzur* has often been described as a landmark decision,[74] for it "was the first time any American court ordered a husband to submit to a *bet[h] din* based on obligations undertaken in

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69. *See supra* notes 63–68 and accompanying text.

70. *See* discussion *infra* Parts III.B.1, III.B.2.

71. *See* ISAAC KLEIN, A GUIDE TO JEWISH RELIGIOUS PRACTICE 393 (1979); Breitowitz, *The Plight of the* Agunah, *supra* note 2, at 361.

72. 446 N.E.2d 136 (N.Y. 1983).

73. *Id.* at 136–39. It should be noted that *Avitzur* dealt with a Conservative *Ketubah* that added a rabbinic arbitration clause. Such a clause like the one used in *Avitzur* would not be agreeable to an Orthodox *Beth Din*. *See* Breitowitz, *The Plight of the* Agunah, *supra* note 2, at 361. For an example of a rabbinic arbitration agreement that would be agreeable to the Orthodox rabbinate, see BROYDE, ABANDONED WIFE IN JEWISH LAW, *supra* note 6, at 127–36; J. David Bleich, *A Suggested Antenuptial Agreement: A Proposal in Wake of* Avitzur, J. HALACHA & CONTEMP. SOC'Y, Spring 1984, at 34, 38–39.

74. *See, e.g.*, Lisa Zornberg, *Beyond the Constitution: Is the New York* Get *Legislation Good Law?*, 15 PACE L. REV. 703, 725 (1995); Edward S. Nadel, *New York's* Get *Laws: A Constitutional Analysis*, 27 COLUM. J.L. & SOC. PROBS. 55, 66 (1993); Redman, *supra* note 57, at 397.

the *ketubah*."[75] The Court of Appeals of New York held that ordering a couple to submit to such rabbinic arbitration, as required by a *Ketubah*,[76] did not violate the First Amendment, for it is "nothing more than an agreement to refer the matter of a religious divorce to a nonjudicial forum."[77] The court did take note of the fact that obligations stipulated by the *Ketubah* are "grounded in religious belief and practice,"[78] but nevertheless held that a secular court could order the parties to submit to rabbinic arbitration, emphasizing that their decision was based "solely upon the application of neutral principles of contract law, without reference to any religious principle."[79] Somehow, the court in *Avitzur* was able to rationalize judicial notice of the religious beliefs and practices set forth in a *Ketubah* and enforcement of provisions in that *Ketubah* by stating that they were merely applying "neutral" contract law.[80] If the law considers such judicial notice of religious practices in a religious contract (the *Ketubah*) formed at a religious ceremony (a wedding) neutral, surely the same would apply to *Get* settlement contracts, which are secular in nature, and for which any religious implications are only incidental.

2. Ordering the Husband to Grant His Wife a *Get*

a. Express promises to give a Get

While many argue that ordering parties to submit to rabbinic arbitration potentially runs afoul of the First Amendment,[81] many

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75. Marc Feldman, *Jewish Women and Secular Courts: Helping a Jewish Woman Obtain a* Get, 5 BERKELEY WOMEN'S L.J. 139, 144 (1989–1990) (alteration in original).

76. Literally "writing"; refers to a Jewish marriage document or contract. *See* Breitowitz, *The Plight of the* Agunah, *supra* note 2, at 343 n.119.

77. *Avitzur*, 446 N.E.2d at 138–39.

78. *Id.* at 139.

79. *Id.* at 138. The Supreme Court has also commented on the "neutral principles" approach:

> The primary advantages of the neutral-principles approach are that it is completely secular in operation, and yet flexible enough to accommodate all forms of religious organization and polity. The method relies exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges. It thereby promises to free civil courts completely from entanglement in questions of religious doctrine, polity, and practice.

Jones v. Wolf, 443 U.S. 595, 603 (1979).

80. *Avitzur*, 446 N.E.2d at 138.

81. *See* BREITOWITZ, BETWEEN CIVIL AND RELIGIOUS LAW, *supra* note 13, at 99 ("[T]he court's reliance on the so-called 'neutral principles of contract law' proves too much.

jurisdictions have not shied away from going even further. A number of courts have gone so far as to enforce express promises or contracts, made by husbands, to grant their wives *Gets*.[82] That is, they are not merely ordering the parties to go to a non-judicial arbiter; rather, they are ordering husbands to undertake a religious action in granting their wives Jewish bills of divorce.

For instance, the court in *Koeppel v. Koeppel*[83] specifically enforced an agreement made by a separated couple whereby the couple would "execute any and all papers and documents required by and necessary to effectuate a dissolution of their marriage in accordance with the ecclesiastical laws of the Faith and Church of said parties."[84] The court enforced that paragraph of the separation agreement and held that such enforcement did not violate the husband's freedom-of-religion rights under the Constitution:

> Complying with his agreement would not compel the defendant to practice any religion, not even the Jewish faith to which he still admits .... His appearance before the Rabbinate to answer questions and give evidence needed by them to make a decision is not a profession of faith. Specific performance herein would merely require the defendant to do what he voluntarily agreed to do.[85]

Essentially, the court cleared the constitutional hurdle by implicitly stating that "the mere fact that a ceremony, procedure, or activity is governed by religious law does not preclude its civil enforcement by way of a simple contract."[86]

More than two decades later, in *Waxstein v. Waxstein*,[87] another New York court enforced a similar clause in a separation agreement

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Could not the same be said about an agreement to pray or observe the Sabbath and yet it is inconceivable that any court of law would compel a person to perform an 'act of Divine worship' merely because he promised to do so.").

82. *See infra* text accompanying notes 84–85, 88–89, 91–92 and cases cited therein. However, many jurisdictions have held that their courts are constitutionally prohibited from specifically enforcing express promises to grant *Gets*. *See* Fleischer v. Fleischer, 586 So. 2d 1253, 1254 (Fla. Dist. Ct. App. 1991); Turner v. Turner, 192 So. 2d 787, 788 (Fla. Dist. Ct. App. 1966); Steinberg v. Steinberg, No. 44125, 1982 WL 2446 (Ohio Ct. App. June 24, 1982); *see also* Breitowitz, *The Plight of the* Agunah, *supra* note 2, at 339 n.90.

83. 138 N.Y.S.2d 366 (Sup. Ct. 1954).

84. *Id.* at 370.

85. *Id.* at 373. However, after trial, the court ruled that the clause was too indefinite to be enforceable. Koeppel v. Koeppel, 161 N.Y.S.2d 694, 695–96 (App. Div. 1957).

86. Breitowitz, *The Plight of the* Agunah, *supra* note 2, at 340.

87. 395 N.Y.S.2d 877 (Sup. Ct. 1976), *aff'd*, 394 N.Y.S.2d 253 (App. Div. 1977).

requiring a husband to obtain and grant his wife a *Get*.[88] Relying heavily on *Koeppel*, the court rejected the husband's contention that "the court may not enforce a contractual provision requiring a spouse to obtain a 'Get.'"[89] However, the court did caution that it could not specifically enforce the agreement "by means of imprisonment or the convening of a rabbinical tribunal."[90]

While the majority of the *Agunah* litigation has taken place in New York and New Jersey, the most recent reported opinion in which a court has enforced an express promise to give a *Get* is out of Delaware. In the 1992 case of *Scholl v. Scholl*,[91] the Family Court of Delaware dealt with a situation that was different from *Koeppel* and *Waxstein*, in that the husband did deliver a *Get*, as he was obligated to do pursuant to a separation agreement, from a *Beth Din*.[92] However, the wife contended that the *Get* was insufficient, being that it was obtained from a Conservative *Beth Din* and, as such, it could be given no effect or religious significance by an Orthodox *Beth Din*.[93] The court held that the husband did not meet his contractual obligations by supplying his wife with a Conservative *Get*,[94] and, relying heavily on both *Koeppel* and *Waxstein*, further held that it was not constitutionally barred from ordering specific performance.[95]

b. Implied promises to give a Get

Not only have some courts specifically enforced express promises or agreements to give *Gets*, others have gone even further yet to imply such agreements from the language of a *Ketubah*.[96] The most

88. *Id.* at 881.
89. *Id.* at 880.
90. *Id.* at 881.
91. Scholl v. Scholl, 621 A.2d 808 (Del. Fam. Ct. 1992).
92. *Id.* at 809.
93. *Id.* A Conservative *Get* is not considered valid in an Orthodox *Beth Din*. *See* Alexandra Leichter, *The Impact of Jewish Divorce Law on Family Law Litigation*, 14 DOMESTIC REL. J. OHIO 40, 41 n.1 (2002).
94. *Scholl*, 621 A.2d at 812 ("This language specifically requires Husband to *cooperate* with Wife in allowing her to obtain a *GET*. The facts of this case strongly suggest that Husband did everything *but* cooperate with his Wife. Husband went out on his own and obtained a conservative *GET* . . . . He did not ask Wife which type of *GET* she wanted . . . .").
95. *Id.* at 810–11.
96. BREITOWITZ, BETWEEN CIVIL AND RELIGIOUS LAW, *supra* note 13, at 81–83; *see also* Aziz v. Aziz, 488 N.Y.S.2d 123, 124 (Sup. Ct. 1985) (enforcing a *mahr*, an Islamic marriage document, despite it being entered into as a part of a religious ceremony). *But see* Victor v. Victor, 866 P.2d 899, 902 (Ariz. Ct. App. 1993) (holding that a *Ketubah* is not an enforceable antenuptial agreement under which a husband can be ordered to obtain a *Get* for his wife).

obvious example of this is *In re Marriage of Goldman*.[97] In *Goldman*, a couple was married in a Reconstructionist[98] Jewish wedding.[99] During the course of the marriage, the wife became an Orthodox Jew, and upon the civil dissolution of the marriage, she wanted her husband to grant her a *Get*.[100] When he refused, the wife instituted a legal action, arguing that a *Ketubah* contains an implied stipulation that the husband grant the wife a *Get* upon dissolution of the marriage.[101] The Appellate Court of Illinois agreed with Mrs. Goldman, holding that in signing a marriage contract containing the words "be thou my wife according to the law of Moses and Israel,"[102] the parties intended to be governed by Orthodox Jewish law.[103] The court stated that requiring a husband to obtain and deliver a *Get* to his wife does not violate the Establishment Clause[104] because the order had the secular purpose of enforcing a marriage contract, and to promote the settlement of a dispute.[105] Further, the court held that requiring a husband to so act did not violate the Free Exercise Clause,[106] because the husband's dislike for Orthodox Judaism did not reach the level of a "religious belief," and because the husband was merely using his withholding power as a bargaining chip in the settlement process.[107] Thus, we see that courts are not only willing to give legal effect to express promises to give a *Get*, but some also give

97. 554 N.E.2d 1016 (Ill. App. Ct. 1990). However, *Goldman* was not the first case to infer, in the absence of an express agreement, agreements from a *Ketubah*. *See* Minkin v. Minkin, 434 A.2d 665 (N.J. Super. Ct. Ch. Div. 1981) (involving implied agreements from the *Ketubah* to grant wife a *Get*, but only in situations where Jewish law mandates divorce); Burns v. Burns, 538 A.2d 438 (N.J. Super. Ct. Ch. Div. 1987) (involving an implied agreement from the *Ketubah* to submit to rabbinic arbitration and initiate *Get* proceedings); Stern v. Stern, 5 FAM. L. REP. (BNA) 2810 (N.Y. Sup. Ct. Aug. 7, 1979). For a criticism of the court's result in *Goldman*, see Breitowitz, *The Plight of the* Agunah, *supra* note 2, at 348–50.

98. Followers of reconstructionist Judaism believe that "Jewish theism should be abandoned, and Judaism should be conceived as an evolving religious civilization." Reconstructionist, http://www.myjewishlearning.com/ilg/Reconstructionist.htm (last visited Aug. 22, 2009).

99. *Goldman*, 554 N.E.2d at 1018.

100. *Id.* at 1018–19.

101. *See id.* at 1019.

102. *Id.* A similar language is verbalized by husbands in a prescribed formula under the marriage canopy. *See id.* at 1018.

103. *See id.* at 1021.

104. "Congress shall make no law respecting an establishment of religion . . . ." U.S. CONST. amend. I.

105. *Goldman*, 554 N.E.2d at 1023.

106. "[O]r prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I.

107. *Goldman*, 554 N.E.2d at 1023–24.

such effect to a *Ketubah* as a binding contract, and *infer* such promises to give a *Get* by its language.

Professor Breitowitz has detailed much of the above in his 1992 article, published in the University of Maryland Law Review.[108] The purpose of reviewing the cases dealing with other *Agunah-* and *Get-*related situations is not to repeat that which is already available to the legal community. Rather, this author elucidates these cases to establish the types of religious matters that secular courts have held to be within their purview, comparing such cases with our *Get* settlement scenario. To reiterate, courts have held that they are not constitutionally barred from enforcing an agreement to submit to rabbinic arbitration,[109] or from ordering a husband to grant his wife a *Get*.[110] Essentially, in these situations, secular courts force litigants to engage in religious activities, either in the form of going to a *Beth Din* or granting a wife a *Get*. While such decisions purport to pass constitutional muster, they have not gone without criticism from scholars, who argue that forcing individuals to engage in religious activities runs afoul of the Constitution.[111] However, in looking at *Get* settlement contracts, secular courts do not force a husband to engage in the religious activities of submitting to rabbinic arbitration, or go so far as ordering a husband to grant his wife a *Get*. Rather, the court is merely looking at a *secular* contract and determining whether any contractual doctrines apply, such that the contract should be held to be void or voidable. This author posits that when the Supreme Court uses the phrase, "neutral principles of law,"[112] it is more likely referring to courts applying contractual doctrines such as duress and unconscionability to secular contracts, than forcing litigants to submit to a *Beth Din* or grant a spouse a *Get*. Thus, if courts have deemed the latter to be constitutional, then *a fortiori*, secular courts should not be constitutionally barred from adjudicating the former: applying such principles to *Get* settlement contracts.[113] As Judge Wallach of the New York's Supreme Court, Appellate Division, First Department astutely put it:

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108. *See* Breitowitz, *The Plight of the* Agunah, *supra* note 2, at 338–57.

109. *See supra* Part III.B.1.

110. *See supra* Part III.B.2.

111. *See supra* note 82.

112. Jones v. Wolf, 443 U.S. 595, 602–03 (1979).

113. It is noteworthy that a number of cases dealing with *Get* settlement disputes do not undertake an extended discussion as to why the court is constitutionally permitted to adjudicate such disputes. This author opines that this is likely because this was not an issue at all for these courts. *See supra* Part III.B.2 and cases cited therein.

> The appropriate division of religious and secular power has long been a matter of concern to civilized communities, at least since the ancient advice provided to the perplexed Judean taxpayers to render unto Caesar the things that are Caesar's and unto God the things that are God's. During the next two millennia considerable blood has been spilled over which things belonged where. . . . [W]e hold that where either spouse has invoked the power of the state to effect a civil dissolution of a marriage, an oppressive misuse of the religious veto power by one of the spouses subjects the economic bargain which follows between them to review and potential revision.[114]

IV. THE NEW YORK AND NEW JERSEY *GET* SETTLEMENT CONTRACT CASES

Courts in New York and New Jersey have had a limited number of opportunities to rule on the enforceability of *Get* settlement contracts. To this author's knowledge, no court to date has declined to adjudicate the enforceability of *Get* settlement contracts on constitutional grounds. Illustrative is the case of *Perl v. Perl*,[115] which involved a husband who conditioned his giving of a *Get* on a settlement agreement that "constituted nothing less than a total surrender of her rights."[116] The court cited favorably to Governor Mario Cuomo's memorandum approving the 1983 *Get* statute:

> This bill was overwhelmingly adopted by the State Legislature because it deals with a tragically unfair condition that is almost universally acknowledged. The requirement of a get is used by unscrupulous spouses who avail themselves of our civil courts and simultaneously use their denial of a get vindictively or as a form of economic coercion.[117]

Specifically, the court ruled that this settlement was "brought about by the husband's duress and destruction of her independent

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114. Perl v. Perl, 512 N.Y.S.2d 372, 373 (App. Div. 1987).
115. 512 N.Y.S.2d 372.
116. *Id.* at 374. The settlement required the wife to deliver jointly-held securities, various cash payments, deed to one-half of the interest in the marital home, title to her automobile, and her engagement ring. *Id.*
117. *Id.* at 375 (alteration omitted).

willpower," and as such, cancelled the settlement arrangement.[118] Missing from the majority opinion was the slightest mention of the role of the courts in adjudicating disputes implicating the First Amendment.[119] While Judge Kupferman dissented in *Perl*,[120] it is clear that he was not aware of the realities that *Agunot* face. Judge Kupferman stated that while "[h]ere the husband may have been the beneficiary[; i]n other situations it could be the wife."[121] While there are undoubtedly divorce settlements that benefit the wife more than the husband, it is difficult to imagine such a situation when the litigation involves an Orthodox Jewish couple, for whom the husband has essentially all of the bargaining power.[122]

Five years later, New York was next afforded an opportunity to rule on the enforceability of a *Get* settlement contract, in *Golding v. Golding*.[123] In this case, a husband informed his wife that he would not be delivering her a *Get* until "she gave him everything that he wanted."[124] The wife went on to sign a document she did not understand, written in Hebrew, that enumerated the husband's demands.[125] Instead of delivering the *Get*, the husband tendered further documentation for the wife to sign, again making clear to her that she would not receive a *Get* unless she did so.[126] The court noted that the husband exploited the power differential "so as to completely dominate a process which should have entailed honest negotiating," in holding that the "plaintiff did not freely and voluntarily enter into the subject agreement but was compelled to do so by her husband's invocation of his power to refuse to give her a Jewish divorce."[127] While the court noted that secular courts should not settle such disputes "in a manner requiring consideration of religious doctrine,"[128] the court ultimately held that this dispute could "be decided solely upon the application of neutral principles of contract law, without reference to any religious principle."[129]

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118. *See id.* at 374–77.
119. *See supra* Part III.B.1.
120. 512 N.Y.S.2d at 377 (Kupferman, J., dissenting).
121. *Id.*
122. *See* BREITOWITZ, BETWEEN CIVIL AND RELIGIOUS LAW, *supra* note 13, at 18–19.
123. 581 N.Y.S.2d 4 (App. Div. 1992).
124. *Id.* at 5.
125. *Id.*
126. *Id.*
127. *Id.* at 6.
128. *Id.* at 7.
129. *Id.* (citing Avitzur v. Avitzur, 446 N.E.2d 136, 138 (N.Y. 1983)).

In 1994, the Superior Court of New Jersey had its first opportunity to invalidate a *Get* settlement contract.[130] In *Segal v. Segal*,[131] the husband refused to give his wife a *Get* "unless she conveyed [their home] property to him, waived any claim to child support or alimony, disclaimed any interest in all marital assets including [her husband]'s business, and in addition paid him $25,000."[132] The court held that, because the wife was subjected to "extreme pressures," the *Get* settlement contract was secured by duress, and the deed conveying the house was invalid.[133] Again missing from the court's opinion was a mention of the court's role in adjudicating claims implicating the First Amendment.[134]

V. THE RESTATEMENT APPLIED

While courts have not shied away from voiding *Get* settlement contracts, they have not examined them through the lens of the Restatement of Contracts.[135] With many jurisdictions either formally adopting as law[136] or seeking guidance from the Restatement of Contracts,[137] it is worthwhile to apply the sections pertaining to duress and unconscionability to a typical *Get* settlement contract scenario.

A. Duress

Section 175 of the American Law Institute's Restatement (Second) of Contracts, regarding duress, provides that "[i]f a party's

130. While New Jersey had previously dealt with a recalcitrant husband seeking to extort money from his spouse, the court in that case ordered the parties to submit to the jurisdiction of a *Beth Din*, without voiding or making voidable the contract. *See* Burns v. Burns, 538 A.2d 438, 440–41 (N.J. Super. Ct. Ch. Div. 1987).

131. 650 A.2d 996 (N.J. Super. Ct. App. Div. 1994).

132. *Id.* at 997.

133. *Id.* at 998.

134. *See id.*, 650 A.2d at 996.

135. For instance, the court in *Segal* simply said: "[W]e are satisfied that the overwhelming evidence at trial . . . compels the conclusion that Shirley's assent to the marital settlement agreement . . . was secured by duress, and that the March 25, 1987 deed . . . is invalid." *Id.* at 1000.

136. *See, e.g.*, Adler v. Fred Lind Manor, 103 P.3d 773, 782 (Wash. 2005) (Washington; unconscionability); Andreini v. Hultgren, 860 P.2d 916, 920–22 (Utah 1993) (Utah; duress). The Virgin Islands has adopted the Restatement of Contracts in its entirety. V.I. CODE ANN. tit. 1, § 4 (2005); Black v. Powers, 628 S.E.2d 546, 557 (Va. Ct. App. 2006).

137. *See, e.g.*, Wright v. Foreign Serv. Grievance Bd., 503 F. Supp. 2d 163, 174–75 (D. D.C. 2007) (District of the District of Columbia; duress); Cabot Corp. v. AVX Corp., 863 N.E.2d 503, 511 (Mass. 2007) (Massachusetts; duress); Hoover Slovacek LLP v. Walton, 206 S.W.3d 557, 565 (Tex. 2006) (Texas; unconscionability).

manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim."[138] The following section goes on to explain that:

> (1) A threat is improper if (a) what is threatened is a crime or a tort, or the threat itself would be a crime or a tort if it resulted in obtaining property, (b) what is threatened is a criminal prosecution, (c) what is threatened is the use of civil process and the threat is made in bad faith, or (d) the threat is a breach of the duty of good faith and fair dealing under a contract with the recipient. (2) A threat is improper if the resulting exchange is not on fair terms, and (a) the threatened act would harm the recipient and would not significantly benefit the party making the threat, (b) the effectiveness of the threat in inducing the manifestation of assent is significantly increased by prior unfair dealing by the party making the threat, or (c) what is threatened is otherwise a use of power for illegitimate ends.[139]

Thus, to determine whether a contract is voidable by the victim, one's analysis must first determine whether the threat was "improper"; and, if so, whether that threat left the victim with no "reasonable alternative."[140]

1. Improper Threat

a. Crime or tort

In a typical *Get* settlement contract scenario, as in the New York and New Jersey cases,[141] the husband is essentially threatening to leave his wife in a state whereby she may be compromised from an economic or mental-health standpoint, and she may never live with, cohabitate with, or even date another man.[142] The first inquiry under § 175 of the Restatement is whether threatening to leave a woman as an *Agunah*, with all of the aforementioned symptoms, constitutes a crime or a tort.[143]

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138. *See* RESTATEMENT (SECOND) OF CONTRACTS § 175(1) (1981).
139. *Id.* § 176.
140. *Id.* § 175(1).
141. *See supra* Part IV and cases cited therein.
142. *See supra* Part II.B.
143. RESTATEMENT (SECOND) OF CONTRACTS § 175(1) (1981).

In fact, many authors have argued that *Agunot* can recover from their recalcitrant husbands under the widely-accepted[144] tort of Intentional Infliction of Emotional Distress (IIED).[145] The Restatement (Second) of Torts provides that "[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm."[146] The Restatement's comments point out that the behavior must go beyond "mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities," by emphasizing that such behavior must be so extreme in degree, "as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community," such that an average member of the community would scream out, "'[o]utrageous!'"[147] Professor Breitowitz acknowledges that "in some cases of [*A*]*gunah*, [this] tort remedy may be appropriate," being that it should be easy to prove that a husband intentionally inflicts emotional distress, and because "in some cases, if not most, the anxiety, pain, and humiliation will be considerable."[148]

An injured party need not prove bodily harm to recover under IIED,[149] and the Restatement illustrates an example of a non-bodily harm situation that would suffice for IIED recovery:

> A, a police officer, arrests B on a criminal charge. In order to extort a confession, A falsely tells B that her child has been injured in an accident and is dying in a hospital, and that she cannot be released to go to the hospital until she

144. *See* Jarod S. Gonzalez, *State Antidiscrimination Statutes and Implied Preemption of Common Law Torts: Valuing the Common Law*, 59 S.C. L. REV. 115, 117 n.13, 122 n.35 (2007) (listing jurisdictions adopting the Restatement's approach to IIED). However, it has been argued that "since divorce settlements are usually acrimonious, the tort of intentional infliction of emotional distress does not apply. Therefore, any behavior, no matter how extreme, will be unaccountable in tort liability." Debbie Eis Sreter, *Nothing to Lose But Their Chains: A Survey of the* Aguna *Problem in American Law*, 28 J. FAM. L. 703, 713 (1989–1990).

145. *See generally* A. Yehuda Warburg, *Spousal Emotional Stress: Proposed Relief for the Modern-Day* Agunah, J. HALACHA & CONTEMP. SOC'Y, Spring 2008 (discussing potential recovery under emotional distress in *Beth Dins*).

146. RESTATEMENT (SECOND) OF TORTS § 46 (1965).

147. *Id.* § 46 cmt. d.

148. Breitowitz, *The Plight of the* Agunah, *supra* note 2, at 399. However, Professor Breitowitz does note that it may be more difficult for an *Agunah* to recover for IIED where the husband is merely using his recalcitrance as an economic bargaining chip, and not to intentionally inflict distress. *Id.* at 399–400.

149. RESTATEMENT (SECOND) OF TORTS § 46 cmt. k (1965).

> confesses. B suffers severe emotional distress but no physical consequences. A is subject to liability to B.[150]

A *Get* settlement contract scenario is highly analogous. The husband is effectively telling his wife that, unless she signs a *Get* settlement contract, she will lead a life devoid of emotional attachment, and should she choose to have children with another man, they will forever be recognized in society as bastards. That is, similar to Illustration 19, the liable party is telling a parent that his or her child is afflicted with a serious condition; in a *Get* settlement contract scenario, the husband is telling the wife that should she not assent to the settlement, any future children will be afflicted with a serious spiritual condition (the status of *Mamzerim*). While it can be argued that Illustration 19 presents a more compelling case because it involves a parent thinking that his or her child's death is impending, the *Agunah* situation "should be sufficient to demonstrate the genuineness of her claim of mental suffering."[151]

Another author, in arguing that *Agunot* should be able to recover under IIED, points out that "[t]he focus is not upon any particular kind of conduct, but rather on the actor's deviation from accepted societal behavior . . . ."[152] Despite a wide range in the reported number of *Agunot* in America,[153] any estimate of the prevalence of the *Agunah* problem is miniscule when compared with the total incidence of Jewish divorce.[154] Both the infrequency of the *Agunah* predicament and the realities of leaving one's wife a lonely celibate surely lead to the conclusion that a husband's refusal to grant a *Get* must be considered a deviation from accepted behavior—one that would cause an average member of society to exclaim, "'[o]utrageous!'"[155]

If the aforementioned authors are correct in asserting that leaving one's wife an *Agunah*, or threatening to do so in the absence of a *Get*

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150. *Id.* § 46 cmt. k, illus. 19.

151. David M. Cobin, *Jewish Divorce and the Recalcitrant Husband-Refusal to Give a* Get *as Intentional Infliction of Emotional Distress*, 4 J.L. & RELIGION 405, 420 (1986). Cobin argues that the remedy should not be monetary damages; rather, the court should order the parties to submit to rabbinic arbitration. *See id.* at 421–29. *See also* Redman, *supra* note 57, at 416.

152. Cobin, *supra* note 151, at 417.

153. *See supra* text accompanying notes 27–29.

154. *See* WOMEN IN CHAINS, *supra* note 29, at xiii (stating that according to some Orthodox rabbis, "about 5 percent of all Orthodox marriages end in the *agunah* stage.").

155. *See* RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965).

settlement contract,[156] is an actionable tort under IIED,[157] then such a threat is considered an improper one under the Restatement. Thus, assuming the threat left the wife with no "reasonable alternative,"[158] a *Get* settlement contract induced by a would-be recalcitrant husband should be deemed voidable by the court.

Furthermore, numerous authors have used the word "extortion" when referring to the actions of recalcitrant husbands seeking to obtain a windfall settlement.[159] If these authors are correct in asserting that such behavior meets criteria for the criminal offense of extortion, then the threat to leave one's wife as an *Agunah* must further be considered improper under the Restatement.[160]

According to the Model Penal Code, "[a] person is guilty of theft [or extortion] if he purposely obtains property of another by threatening to . . . (7) inflict any other harm which would not benefit the actor."[161] In our situation, a husband who chooses to withhold a *Get* from his wife and leave her as an *Agunah* gains no benefit from such actions. In addition to exposing himself to potential civil liability for the tort of IIED,[162] the recalcitrant husband is not allowed, according to Jewish law prohibiting polygamy, to remarry.[163] Furthermore, the husband may be ostracized from the Jewish community and be subjected to a host of social pressures; he may even be prohibited from praying in local synagogues.[164] Thus, aside from remaining married to his wife and any sadistic pleasure a recalcitrant husband feels by leaving his wife an *Agunah*, such horrible actions do "not benefit the actor."[165] As such, at least in some jurisdictions, threatening to withhold a *Get* may expose a husband to criminal liability sufficient to trigger an improper threat,

156. Redman, *supra* note 57, at 417 ("The wife should sue the husband for intentional infliction of emotional harm if he refuses to grant a *get or attempts to extort large financial concessions in exchange for one.*") (emphasis added).

157. *But see* Perl v. Perl, 512 N.Y.S.2d 372, 376 (App. Div. 1987) (affirming dismissal of a wife's IIED claim against her would-be recalcitrant husband).

158. RESTATEMENT (SECOND) OF CONTRACTS § 175 (1981).

159. *See supra* note 58 and accompanying text.

160. *See* RESTATEMENT (SECOND) OF CONTRACTS § 176(1)(a) (1981).

161. MODEL PENAL CODE § 223.4 (1962). The language of subsection 7 is substantially mimicked in numerous jurisdictions' theft or extortion statutes. *See, e.g.*, ALASKA STAT. § 11.41.520(7) (West 2008); CONN. GEN. STAT. ANN. § 53a-119(5)(I) (West 2007); MO. ANN. STAT. § 570.010(3)(g) (West 1999); 18 PA. CONS. STAT. ANN. § 3923(a)(7) (West 1999).

162. *See supra* notes 139–151 and accompanying text.

163. *See supra* text accompanying note 17.

164. E-mail from Dovid Gottlieb, Rabbi, Congregation Shomrei Emunah, Baltimore, Md., to author (Feb. 11, 2009, 00:15 EST) (on file with author).

165. *See* MODEL PENAL CODE § 223.4 (1962).

whereby a contract induced by the threat can be held voidable pursuant to the Restatement.[166]

b. Breach of the duty of good faith and fair dealing

The first issue regarding whether subsection (1)(d) of Restatement § 176 applies is whether, by agreeing to the terms of a *Ketubah*, the parties to a Jewish marriage are contractually bound to one another.[167] While a full analysis of this issue is beyond the scope of this Comment, it is clear from the *Goldman* line of cases that at least some courts are willing to conclude that a *Ketubah* is a binding contract between husband and wife.[168]

A person breaches the duty of good faith and fair dealing when, for example, "a threat of non-performance [is] made for some purpose unrelated to the contract, such as to induce the recipient to make an entirely separate contract."[169] To elucidate this, Illustration 9 provides:

> A contracts to excavate a cellar for B at a stated price. A begins the excavation and then threatens not to finish it unless B makes a separate contract to excavate the cellar of another building. B, having no reasonable alternative, is induced by A's threat to make the contract. A's threat is a breach of his duty of good faith and fair dealing, and the proposed contract is voidable by B.[170]

This type of situation is highly analogous to a *Get* settlement contract scenario. Applying our situation, the illustration could easily read: Husband and Wife contract to marry according to the stipulations found in a *Ketubah*. Husband and Wife are married for a period of time, when Husband threatens not to abide by the terms of the *Ketubah* [refusing to divorce Wife, leaving her an *Agunah*] unless Husband and Wife make a separate contract to give Husband a windfall in the separation proceedings. Wife, having no reasonable

166. *See* Burns v. Burns, 538 A.2d 438, 440 (N.J. Super. Ct. Ch. Div. 1987) ("This so-called 'offer' is akin to extortion."); RESTATEMENT (SECOND) OF CONTRACTS § 175 (1981).

167. That is, it is untenable to assume that a court will imply legal obligations from an agreement unless the agreement itself was a legally enforceable contract. *See* In re Marriage of Goldman, 554 N.E.2d 1016, 1023 (Ill. App. Ct. 1990).

168. *Id.* at 1021 ("[T]he ketubah on its face contains language of consideration and mutual promises."). *See also* Breitowitz, *The Plight of the* Agunah, *supra* note 2, at 347 n.153.

169. RESTATEMENT (SECOND) OF CONTRACTS § 176 cmt. e (1981).

170. *Id.* § 176 cmt. e, illus. 9.

alternative, is induced by Husband's threat to make the contract. Husband's threat is a breach of his duty of good faith and fair dealing, and the proposed contract is voidable by Wife.[171]

In order for the parallel scenario to be accurate, we must be of the opinion that refusing to divorce a woman, thereby leaving her an *Agunah*, is a breach of the *Ketubah* agreement. Such an opinion is not unequivocally held by all,[172] but it is clear that at least some courts have concluded that refusing to give a wife a *Get* is a breach of the *Ketubah's* requirement to be bound by the "laws of Moses and Israel."[173] In jurisdictions so holding, just as the scenario described by Illustration 9 is a breach of the duty of good faith and fair dealing, forcing a woman to agree to the *Get* settlement contract is a breach of the husband's duty of good faith and fair dealing under the *Ketubah* contract. In such a situation, § 176(1)(d) would deem a husband's threat to leave his wife an *Agunah* as an improper one, whereby the *Get* settlement agreement would become voidable at the wife's option.

2. "No Reasonable Alternative"

Assuming a threat is improper under § 176, the inquiry then shifts to whether, as a result of the improper threat, the victim has "no reasonable alternative."[174] If the language of the Restatement was merely "no alternative," it could then be argued that a woman faced with a *Get* settlement contract would not meet the requirements for duress; after all, a woman does have two other choices: to remain a lonely celibate, or to leave the Orthodox way of life.[175] However, in adding a reasonableness requirement, the Restatement seemingly understood that individuals posed with a threat may have alternatives, albeit ones falling short of being "reasonable." For instance, the Restatement gives an example of the "no reasonable alternative" requirement:

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171. *See id.*

172. *See, e.g.*, Victor v. Victor, 866 P.2d 899, 902 (Ariz. Ct. App. 1993) (holding that agreement to comply with the "'laws of Moses and Israel'" is too vague to describe "a mutual understanding that husband would secure a Jewish divorce"); Breitowitz, *The Plight of the* Agunah, *supra* note 2, at 348–50.

173. *See, e.g., In re* Marriage of Goldman, 554 N.E.2d 1016, 1021 (Ill. App. Ct. 1990); Burns v. Burns, 538 A.2d 438, 440 (N.J. Super. Ct. Ch. Div. 1987); Minkin v. Minkin, 434 A.2d 665, 665–66 (N.J. Super. Ct. Ch. Div. 1981).

174. RESTATEMENT (SECOND) OF CONTRACTS § 175(1) (1981).

175. *See supra* Part II.B.

> A, who has contracted to sell goods to B, makes an improper threat to refuse to deliver the goods to B unless B modifies the contract to increase the price. B attempts to buy substitute goods elsewhere but is unable to do so. Being in urgent need of the goods, he makes the modification . . . B has no reasonable alternative, A's threat amounts to duress, and the modification is voidable by B.[176]

Just as B's alternatives to agreeing to the subsequent contract leave him paying a higher price for his goods, an *Agunah's* alternatives to agreeing to a *Get* settlement contract leave her paying a higher price: her mental health. As discussed previously, a woman threatened with a *Get* settlement contract is presented with a "Morton's Fork":[177] choose to leave the Orthodox way of life, potentially causing extreme amounts of cognitive dissonance; or choose to remain true to the Orthodox way of life by leading a lonely celibate life sure to deprive the wife of self-esteem and confidence.[178] Thus, while a woman *technically* has alternatives, it cannot be said that potentially subjecting oneself to long-term mental health detriments is any sort of *reasonable* alternative. As such, a woman presented with a *Get* settlement contract passes the second prong of the Restatement duress inquiry because she lacks a reasonable alternative to her assent to the *Get* settlement contract.

The essence of the inequities of a *Get* settlement contract scenario, as it relates to the doctrine of duress, is embodied in a statement made by the Wisconsin Supreme Court in 1900:

> The making of a contract requires the free exercise of the will power of the contracting parties, and the free meeting and blending of their minds. In the absence of that, the essential of a contract is wanting; and if such absence be produced by the wrongful conduct of one party to the transaction, or conduct for which he is responsible, whereby the other party, for the time being, through fear, is bereft of his free will power, for the purpose of obtaining the contract, and it is thereby obtained, such contract may be avoided on the ground of duress.[179]

176. RESTATEMENT (SECOND) OF CONTRACTS § 175 cmt. b (internal citations omitted).
177. *See supra* note 33.
178. *See supra* Part II.B and text accompanying notes 34–46.
179. Galusha v. Sherman, 81 N.W. 495, 500 (Wis. 1900).

In the formation of a *Get* settlement contract, the wife lacks the free exercise of will power. There is no meeting or blending of the minds. It is an understatement to term the husband's conduct, which frightens a woman into assent, as "wrongful." As such, for the reasons explained, *Get* settlement contracts may be held voidable on the grounds of duress.

B. Unconscionability

Every one of the aforementioned New York and New Jersey cases invalidating *Get* settlement agreements did so on the grounds of duress.[180] However, this author believes a strong argument can also be made to void *Get* settlement contracts on the grounds of unconscionability. Section 208 of the Restatement (Second) of Contracts provides:

> If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.[181]

Whether or not a term of a contract is unconscionable is not determined in a sterile setting; rather, it must be considered "in the light of its setting, purpose and effect."[182] For instance, in *In re Marriage of Baltins*,[183] the court invalidated a divorce settlement agreement which left the husband with assets totaling $507,700, whereas the wife received assets totaling $63,000.[184] In reality, however, the settlement was worth much more to the wife, albeit not from a financial standpoint. That is, the husband threatened to avoid paying his wife or their creditors by declaring bankruptcy.[185] Furthermore, the husband threatened that, if the wife did not sign the

180. *See, e.g.*, Perl v. Perl, 512 N.Y.S.2d 372, 374, 376 (App. Div. 1987) ("[T]he distribution of the marital property before the referee constituted nothing less than a total surrender of her rights *brought about by the husband's duress* and destruction of her independent will power.") (emphasis added).

181. RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981).

182. *Id.* § 208 cmt. a.

183. 260 Cal Rptr. 403, 406 (Ct. App. 1989)

184. *Id.* at 408. *See also* Williams v. Williams, 306 Md. 332, 508 A.2d 985 (1986) (setting aside, on grounds of unconscionability, a divorce settlement agreement which left one spouse with approximately $131,000 in property, and the other merely $1,100 in property).

185. *Baltins*, 260 Cal. Rptr. at 408.

settlement agreement, he would have no contact with their child.[186] Thus, while the four corners of the settlement agreement left her with assets totaling only $63,000, the settlement was worth much more to her when considering the avoidance of the negative consequences of the husbands threats. Nevertheless, the court held that the husband "intentionally used coercion to induce Wife's consent to an unconscionable contract and a default judgment dissolving the marriage."[187] Therefore, it appears that in considering whether a contract is unconscionable, at least some courts merely look to the four corners of the contract without accounting for any non-monetary benefits a party to the contract receives.

When looking at the four corners of a *Get* settlement contract, the terms are most often at least as unequal as those in *Baltins*.[188] Gleaning facts from published cases, a *Get* settlement scenario can involve the husband receiving tens-of-thousands of dollars,[189] other marital assets,[190] or custody of the couple's children.[191] Compare this with what the wife receives: a divorce. The wife has just paid for a divorce—the same, albeit civil, divorce that she is free and empowered to obtain in a secular court; the same divorce that, were she not an Orthodox Jew, would allow her to cohabitate with other men; and the same divorce that the overwhelming majority of women in the United States obtain with little trouble[192]—by "spending" exorbitant amounts of money, marital assets, and even the custody of her own children. While it is undeniable that this divorce is quite valuable to her when considering the alternative of being left as an *Agunah*, courts taking the *Baltins* approach to unconscionability[193] would render this fact immaterial. That is, when looking solely to the four corners of the *Get* settlement contract and weighing what the husband receives against what the wife receives, the disparity should

186. *Id.* at 409.
187. *Id.* at 415 (citations omitted).
188. *See id.* at 408–10.
189. *See* Perl v. Perl, 512 N.Y.2d 372, 374 (App. Div. 1987).
190. *See id.* at 374.
191. *See* Horsburgh, *supra* note 47, at 174.
192. *See* Angela Mae Kupenda, *Law, Life, and Literature: A Critical Reflection of Life and Literature to Illuminate How Laws of Domestic Violence, Race, and Class Bind Black Women Based on Alice Walker's Book* The Third Life of Grange Copeland, 42 HOW. L.J. 1, 9 (1998) ("[P]olls show that many Americans believe that presently divorce is too easily obtained."); Janet L. Dolgin, *The Fate of Childhood: Legal Models of Children and the Parent-Child Relationship*, 61 ALB. L. REV. 345, 420 (1997) ("In fact, . . . divorce is easily obtained and common . . . .").
193. *See In re* Marriage of Baltins, 260 Cal. Rptr. 403 (Ct. App. 1989).

be enough for a court to find the contract void by means of unconscionability.

Aside from the specific terms of a contract suffering from unconscionability, a court may also deem the entire bargain unconscionable due to "[w]eaknesses in the bargaining process."[194] However, in forming a *Get* settlement contract, the wife does not suffer from a mere "weakness" in bargaining power; she has no such power at all. The husband has the only thing which she desires—a *Get*—and she must accede to whatever the husband requests to obtain it.[195] Because a woman so situated ostensibly wants neither to leave the Orthodox way of life nor live the rest of her life as a lonely celibate, she will agree to the terms of a *Get* settlement contract, regardless of how decimated it will leave her. In effect, for a woman wishing to maintain her Orthodox lifestyle, the choice to agree to a *Get* settlement contract is really no choice at all.

The Restatement foresees such a functional equivalent of a lack of choice by noting that "gross inequality of bargaining power, together with terms unreasonably favorable to the stronger party, may confirm indications that the transaction involved elements of deception or compulsion, or may show that the weaker party had no meaningful choice, [or] no real alternative."[196] In a *Get* settlement contract scenario, there is a gross inequality of bargaining power. The terms of such contracts are unreasonably favorable to the stronger party—the husband. Almost prophetically, the Restatement predicts the end result for women in such a situation: no meaningful choice and no real alternative.[197]

C. *Relief in Maryland: Unenforceability as Against Public Policy After* Aleem v. Aleem[198]

A recent decision by the Court of Appeals of Maryland leaves open the possibility of unenforceability of *Get* settlement contracts by another contractual doctrine: void as against public policy.[199] In

194. RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. d (1981). However, a "bargain is not unconscionable merely because the parties to it are unequal in bargaining position . . . ." *Id.*

195. In fact, in *Golding*, the wife had to sign, not one, but three sets of documents before the husband granted a *Get*. Golding v. Golding, 581 N.Y.S.2d 4, 5 (App. Div. 1992).

196. RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. d.

197. *See id.*

198 404 Md. 404, 947 A.2d 489 (2008).

199. *See id.* § 178 ("A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its

Aleem v. Aleem,[200] a divorcing wife sought to have her husband's pension declared "marital property," whereby she would be entitled to her half of the pension under Maryland law.[201] After the wife filed for divorce, the husband went to the Pakistan Embassy and performed a ceremony known as a *Talaq*.[202] A *Talaq* involves the husband saying "I divorce thee" three times, at which point the marriage is terminated.[203] However, only "a husband has a virtual automatic right to *talaq*, . . . but the wife only has a right to *talaq* if it is in the written marriage agreement or if he otherwise delegates that right to her."[204] In this case, neither the *Talaq* nor the marriage contract awarded the wife any of the marital property.[205] After establishing that the Maryland Legislature has recognized a public policy of equitably dividing the property interests of spouses,[206] the Court of Appeals held that:

> the enforceability of a foreign *talaq* divorce provision, such as that presented here, in the courts of Maryland, where only the male, i.e., husband, has an independent right to utilize *talaq* and the wife may utilize it only with the husband's permission, is contrary to Maryland's constitutional provisions and thus is contrary to the "public policy" of Maryland.[207]

Thus, we see that the court in *Aleem* did not balk at refusing to enforce a *Talaq*, a type of contract which only the husband has an independent right to utilize.

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enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.").

200. 404 Md. 404, 947 A.2d 489.

201. *Id.* at 411–12, 947 A.2d at 494.

202. *See id.* at 406, 947 A.2d at 490. *See generally* Katayoun Alidadi, *The Western Judicial Answer to Islamic* Talaq*: Peeking Through the Gate of Conflict of Laws*, 5 UCLA J. ISLAMIC & NEAR E. L. 1 (2005) (discussing cases in which American courts did not recognize transnational divorces performed at embassies).

203. *See Aleem*, 404 Md. at 406 n.1, 947 A.2d at 490 n.1. *See generally* Nehaluddin Ahmad, *A Critical Appraisal of "Triple Divorce" in Islamic Law*, 23 INT'L J.L. POL'Y & FAM. 53 (2009).

204. *Aleem*, 404 Md. at 406 n.1, 947 A.2d at 490 n.1.

205. *See id.* at 407, 947 A.2d at 491.

206. *Id.* at 421–22, 947 A.2d at 499–500 ("The Maryland Legislature declared Maryland's public policy in regard to property acquired during a marriage, stating in the preamble to Chapter 794 of the Acts of 1978, that 'the property interests of the spouses should be adjusted fairly and equitably.'").

207. *Id.* at 422–23, 947 A.2d at 500–01.

Similarly, only a Jewish husband has the ability to effectuate a *Get* settlement contract. While there is no religious law mandating this gender inequity as there is with a *Talaq*, it is through a combination of the realities *Agunot* face[208] and the recalcitrance of a Jewish husband that only the husband is in a position to offer a *Get* settlement contract. Of course, the result of a *Get* settlement contract is the same public policy ill that the Court of Appeals dealt with in *Aleem*: an unequal distribution of the marital property and assets.[209] Just as the Court of Appeals found that a contract which only the husband has the independent right to effectuate, and which leads to an unequal separation of marital assets, is unenforceable as against Maryland public policy, they could and should similarly find that *Get* settlement contracts, suffering from the same lethal ingredients, are likewise unenforceable as against the public policy of the State of Maryland.

VI. CONCLUSION

The rabbis teach that whoever is able to allow one *Agunah* to remarry, it is as if he or she has repaired a ruin in Jerusalem.[210] Because attempting to aid *Agunot* is considered such a great deed, it is no surprise that legal scholars have authored a plethora of articles seeking to use the secular court system as a measure to supply aid to these plighted women.[211] However, the issue has not received due attention within the Jewish community as a whole, likely stemming from a general sense of embarrassment over the issue.[212] After fully understanding the plight *Agunot* face,[213] it becomes clear that it is incumbent upon all members of society—religious and otherwise—to take any and all measures to potentially ease their suffering.

Contract law has long recognized that "[w]ords are not the only medium of expression."[214] One need not speak with a rabbi or with an *Agunah* herself to comprehend the atrocities such women face. A *Get* settlement contract alone demonstrates such atrocities. Husband receives tens-of-thousands of dollars,[215] other marital assets,[216] and

208. *See generally supra* Part II.B.
209. *See Aleem*, 404 Md. at 421–22, 947 A.2d at 500.
210. OVADIAH HADAYAH, TESHUVOT YASKIL AVDI 2:E.H. 5 (1931).
211. A search of legal journals on Westlaw for the word "*agunah*" returns 106 separate documents.
212. GOLDSTEIN, *supra* note 10, at 1.
213. *See supra* Part II.B.
214. RESTATEMENT (SECOND) OF CONTRACTS § 19 cmt. a (1981).
215. *See supra* note 54.
216. *See* Perl v. Perl, 512 N.Y.S.2d 372, 374 (App. Div. 1987).

custody of the couple's children.[217] Wife receives a divorce—the same divorce that the overwhelming majority of women obtain with ease. So why would one agree to such an unfair contract? Essentially, a woman in this situation has a gun to her head. However, it is not her physical life she stands to lose if the trigger is pulled; it is her emotional life that will end from the anguish of living as an *Agunah*.[218] Contract law has established that if a party enters a contract because he has a gun to his head, "the 'choice' to enter into the contract is not free and the contract is void."[219] For women wishing to maintain an Orthodox lifestyle, the choice to enter into the *Get* settlement contract is similarly no choice at all.

"[I]t was possible for five hundred years during the Geonic period to make significant gains in parity and protection for women, so it seems logical that now . . . the adoption of similarly reasoned solutions might be possible."[220] However, due to a general attitude that is opposed to change, such solutions are unlikely to come from the rabbinate. As such, it is important for those who understand the secular legal system to use its resources to help in any way possible.

Get settlement contracts are the inevitable consequence of the *Agunah* predicament. While authors have suggested that voiding *Get* settlement contracts may cause husbands to "refuse to act in the absence of a guarantee that the concessions will not be overturned by a court later,"[221] this author believes that many men will try to exploit their wives with such contracts if given the opportunity, but such men are not sadistic enough to withhold a *Get* if such contracts are held to be unenforceable. As such, secular courts should not shy away from refusing to enforce *Get* settlement contracts on the grounds of duress, unconscionability, or as against public policy. In their eyes, they will merely be applying doctrines of contract law to a given scenario; however, in the eyes of the rabbis, they will be saving the ruins of Jerusalem.[222]

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217. *See* Horsburgh, *supra* note 47, at 174.
218. For a discussion on the mental and emotional detriments suffered by some *Agunot*, *see supra* Part II.B.
219. *See* Caryn L. Beck-Dudley & Edward J. Conry, *Legal Reasoning and Practical Reasonableness*, 33 AM. BUS. L.J. 91, 126 (1995).
220. *See* GOLDSTEIN, *supra* note 10, at 8.
221. BREITOWITZ, BETWEEN CIVIL AND RELIGIOUS LAW, *supra* note 13, at 19 n.57.
222. *See supra* note 201 and accompanying text.