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A Proposal to Withhold Divorce Decrees on Grounds of Equity

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A PROPOSAL TO WITHHOLD DIVORCE DECREES ON GROUNDS OF EQUITY

by J. David Bleich[1]

I. THE PROBLEM OF THE *GET*

Throughout the medieval period, marriage was acknowledged by temporal rulers to be a religious matter governed by the ecclesiastic law of the Church which, to be sure, incorporated many principles of Roman law. Subsequent to the Reformation, the rulers of many European countries became disposed to regard marriage as a civil act, to withdraw marriage from the control of the church and to entrust it entirely to the state. The Napoleonic Code was the first example of a legal system that treated marriage as a purely civil act. The Napoleonic Code did not deny the religious element present in marriage nor did it attempt to control or interfere with the religious aspects of marriage. Recognizing the religious nature of marriage as beyond the domain of civil authority, it was content to allow the religious elements of marriage to remain under the exclusive control of ecclesiastic officials while reserving to the state the right to regulate all civil matters pertaining to the union.

Jews loyal to the teachings and practices of their faith are not free to enter into a second marriage unless the prior marriage has been terminated by the death of the spouse or dissolved by the execution of a particular form of divorce recognized by Jewish law. In Jewish law, divorce is effected by means of a *get* delivered by the husband (or his agent) to the wife (or her agent). A *get* is a document, usually written by a scribe but only at the behest of the husband, reciting the names of the parties, the date and place of its drafting, and containing a statement declaring the document to be a bill of divorce that serves to dissolve the marital relationship. Although the document is simple, there are myriad technicalities that must be observed both in its drafting and delivery for the *get* to be effective.[2]

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[2] *See generally* Ben-Zion Schereschewsky, *Divorce*, *in* THE PRINCIPLES OF JEWISH LAW 414–24 (Menachem Elon ed., 1975); Bernard Berkovits, Get *and* Talaq *in English Law:*

In recent times, there have been an increasing number of cases in which a couple is granted a divorce decree in a civil court but one of the parties refuses to cooperate in the execution of a *get*. Such refusal is usually motivated either by feelings of animosity or by a desire to use the *get* as an extortionary tool to obtain financial or custodial concessions.

On initial examination, it would appear that there is no method by which cooperation of a recalcitrant spouse in securing a *get* might be compelled by judicial process. In the United States, divorce is a matter reserved to the states, none of which recognizes the authority of ecclesiastic tribunals in matters of divorce. Moreover, it would appear that the First Amendment effectively bars all forms of judicial entanglement in such matters. However, the problem is placed in a quite different perspective if it is realized that: (a) A *get* is not a decree of a rabbinic court but an instrument that gains effect solely through the actions of the parties themselves. It is, in effect, the cancellation of a contractual relationship by mutual consent. (b) The *get* is not at all a sacerdotal or religious act. It is not an act of worship; it does not invoke the Deity; it involves neither profession of creed nor confession of faith. A court would have no cause to construe the execution of a contract or promissory note in accordance with the forms and procedures of Jewish law as a religious act. Judaism similarly describes execution of the *get* as a mundane act comparable in nature to the rescission of a contract.[3]

During much of the medieval period, European Jewish communities constituted a veritable *imperium in imperio*. Throughout that period, Jews were denied many of the rights and freedoms enjoyed by citizens of their host countries. Paradoxically, it was precisely acknowledgement of their status as an alien community, a state that gave rise to so many forms of discrimination, that served as the basis for according Jews a precious privilege, that is, judicial autonomy. Jewish communities were commonly authorized to establish their own independent judicial systems for the purpose of adjudicating monetary disputes that might arise between members of the Jewish community. At times, jurisdiction over criminal matters was vested in those courts as well.[4] But of greatest socioreligious significance was the absolute authority with regard to matters of marriage and divorce vested in those courts. To all intents and purposes, no Jew,

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Reflections on Law and Policy, *in* ISLAMIC FAMILY LAW 123–25 (Chibli Mallat & Jane Connors eds., 1990).

[3] *See* BABYLONIAN TALMUD, *KIDDUSHIN* 41b.

[4] *See generally* SIMHA ASSAF, *HA-ONSHIM AHAREI HATIMAT HA-TALMUD* (1922). For numerous examples drawn from a close examination of sources, see Leah Bornstein-Makovetsky, *Ottoman and Jewish Authorities Facing Issues of Fornication and Adultery: 1700–1900*, 4 INT'L J. JURIS. FAM. 159 (2013).

male or female, could contract a marriage without the acquiescence of the recognized rabbinic authorities. Hence, entry into a second marriage was effectively precluded unless the first marriage was terminated by the death of a spouse or dissolved by execution of a valid religious divorce. The option of a civil marriage without ecclesiastic sanction was simply nonexistent.

With emancipation and the conferral of the full complement of civil rights upon Jews, exclusive authority over matters of marriage and divorce was no longer permitted to remain the domain of rabbinic authorities. Thus, a marriage valid in terms of religious law might be terminated by the divorce decree of a secular court. Although of unquestionable validity for purposes of civil law, such divorce decrees are totally void of significance insofar as Jewish law is concerned.[5]

When both marriage partners profess allegiance to Jewish law and both desire to be free to enter into a new marital relationship, the parties may usually execute a religious divorce, or *get*, thereby satisfying the requirement of Jewish law. A problem arises when one of the parties is unconcerned with religious proscriptions concerning remarriage without a prior *get*, or when one party does not contemplate remarriage and, by reason of acrimony or malice, seeks to impede the other party from entering into a new marriage.

Such problems usually arise as a result of the refusal on the part of the husband to execute a *get*. It is true that, by virtue of an edict promulgated circa the year 1000 by Rabbenu Gershom of Mayence, no religious divorce may be effected without the consent of the wife, and hence a wife may prevent the remarriage of her estranged husband if she refuses to accept a *get*.[6] However, in practice, it often proves to be much easier to secure the compliance of a recalcitrant wife than of a recalcitrant husband.

Although all plural marriages are now banned by virtue of another edict promulgated by Rabbenu Gershom,[7] biblical law does allow polygamy. In certain very limited circumstances, for example, insanity or mental incapacity of the first wife, a man may marry a second wife even subsequent to the edict of Rabbenu Gershom. Another exception to the ban against polygamous marriage

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[5] For a discussion of a vexing case in which the authorities of the Hapsburg Empire sought to compel the rabbinate of Trieste to recognize the validity of a civil divorce, see J. David Bleich, *A 19th Century* Agunah *Problem and a 20th Century Application*, 38:2 TRADITION 15 (2004).

[6] The earliest references to the edict of Rabbenu Gershom are R. MEIR OF ROTHENBURG, *TESHUVOT MAHARAM ROTENBURG* no. 1022 (1608), and R. MOSHE MINTZ, *TESHUVOT MAHARAM MINZ* no. 102 (1617). *See Herem de-Rabbenu Gershom*, *in* 17 ENCYCLOPEDIA *TALMUDIT* 378, 382–84 (1983).

[7] *Id.* at 378–82.

is found in the situation of a husband whose wife has abandoned him but steadfastly refuses to accept a bill of divorce. Because the disintegration of the marriage is attributable to abandonment by the wife, and since it is she who refuses to accept a divorce, it would, in the absence of a biblical prohibition against polygamy, be inequitable to bar the husband from taking another wife by reason of rabbinic legislation. However, the edict of Rabbenu Gershom does require that a minimum of at least one hundred scholars domiciled in at least three different jurisdictions certify that dispensation for a second marriage is factually justified. The rationale underlying this exception to the ban against plural marriage is particularly cogent if the edict against plural marriage is construed as having been designed to safeguard the welfare and status of the wife.[8] A woman who has abandoned her husband and home without leave of a *Bet Din* (rabbinical court) is not entitled to, and presumably does not need, such protection. This resembles the principle of English and American law that equitable relief and protection are accorded only to those who appear before the court with "clean hands."[9] Hence, unless the wife has contested the civil divorce or otherwise professes a desire for restoration of domestic harmony, the wife's refusal to accept a *get* subsequent to the civil decree may, in fact, entitle the husband to a dispensation to remarry, known as a *hetter me'ah rabbanim.* Often the realization that, in light of her own intransigence, the husband's petition for a *hetter me'ah rabbanim* is likely to be granted is sufficient to engender a willingness on the part of the wife to enter into negotiations for the execution of a religious divorce.

Since polyandry is forbidden by biblical law, no provision similar in effect to that of the *hetter me'ah rabbanim* could possibly be instituted on behalf of the wife. In the absence of a valid *get*, any subsequent marriage that may be contracted by the wife is nothing other than an adulterous liaison, with the result that any issue of such an adulterous union will unavoidably suffer the stigma of bastardy. Since no expedient similar in nature to the *hetter me'ah rabbanim* could be devised in order to enable the wife to remarry, it is not surprising that the number of women prevented from remarrying by reason of religious scruples far exceeds the number of men finding themselves in the same quandary.

Post-emancipation Jewry is increasingly confronted by the problem of the modern-day *agunah*, a "chained" woman denied consortium and other marital prerogatives but unable to enter into a new marital relationship because of the

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[8] *Id.* at 379–80. For a discussion of conflicting opinions regarding the circumstances in which there is a requirement for one hundred scholars, see 1 *OZAR HA-POSKIM AL SHULHAN ARUKH, EVEN HA-EZER* 1:10, § 73 (1947).

[9] *See* T. Leigh Anenson, *Limiting Legal Remedies: An Analysis of Unclean Hands,* 99 KENTUCKY L.J. 63 (2010–2011). *See also* note 52, *infra*, and accompanying text.

husband's refusal to execute a religious bill of divorce. In an age of ever-increasing divorce rates, what was once the tragic plight of a few has become a societal problem of statistically significant dimensions. In times gone by, the husband's desire to be free to enter into a second marriage usually constituted a measure of self-interest sufficiently strong to guarantee cooperation. Moreover, an autonomous judiciary had available to itself other coercive measures that it might employ at its discretion in order to encourage him to cooperate. With the loss of formal judicial authority, there remains only the power of moral persuasion; with the erosion of moral authority such already-attenuated power may, at times, degenerate into total impotence. As a result there has arisen a pressing need for finding ways and means of assuring that a Jewish husband will not avail himself of civil remedies for relief of his own marital obligations and constraints while refusing to make it possible for his estranged wife to remarry with ecclesiastic blessing.

II. SIMILAR PROBLEMS IN ISLAMIC AND CATHOLIC LAW

Nor is the *agunah* problem limited to Jewish women. Islamic law is, at present, probably the most widely accepted family law system. In Moslem countries, Islamic law is reflected to a greater or lesser extent in the law of the land; elsewhere, practicing Moslems feel bound by its provisions by virtue of religious conscience. Although an analogous term is not found in Islamic jurisprudence, Moslem women may, at times, face problems identical to that of the Jewish *agunah*. With steadily increasing immigration from Islamic countries, it may be anticipated that Moslem women in the United States will be confronted by such problems with increasing frequency.

In contrast to Hinduism, Sikhism, and Christianity, in Islam, marriage is not regarded as a sacrament but as a civil contract between husband and wife that serves to legalize intercourse, regularize procreation of children, regulate financial matters, and generate personal rights and obligations.[10] The husband has the unilateral right to dissolve the marriage at will by performing one of the variations of the ceremony of *talaq*, the most common of which is pronouncing the formula "I divorce you" three times.[11] According to most schools of Islamic

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[10] *See generally* DAVID PEARL & WERNER MENSKI, MUSLIM FAMILY LAW 139–40 (3d ed. 1998); Rasha al-Disuqi, *Juristic Family Rulings: A Study of* Maqāṣid al-Sharī'ah, 3 INT'L J. JURIS. FAM. 145 (2012).

[11] *See* KEITH HODKINSON, MUSLIM FAMILY LAW: A SOURCE BOOK 220–21 (1984). *See also* JOHN L. ESPOSITO, WOMEN IN MUSLIM FAMILY LAW 27–28 (1982); Amira Mashhour, *Islamic Law and Gender Equality—Could There Be a Common Ground? A Study of Divorce and Polygamy in Sharia Law and Contemporary Legislation in Tunisia and Egypt,* 27 HUM.

jurisprudence, a wife may apply for judicial dissolution of her marriage on only two grounds: (a) the continuous and ongoing impotence of her husband from the time of marriage; (b) the husband's false accusation of adultery in a ritual known as *li'an*.[12] Although Islamic law permits polygamy, a Moslem residing in the United States is constrained from entering into a second marriage without a civil decree dissolving his first marriage by virtue of criminal sanctions imposed for bigamy by the secular state. Thus the Moslem husband may avail himself of a civil divorce but refuse to pronounce *talaq*, with the result that his wife may be unable to contract a new marriage with a good conscience.

There is an expedient available to Moslem women that would prevent such an unhappy situation from arising. A husband may delegate the power to pronounce *talaq* on his behalf to another person. Such delegation of that power does not extinguish the husband's inalienable[13] right to pronounce *talaq*, but simply empowers a second party to do so as well. A husband may delegate the right to exercise *talaq* on his behalf to his own wife.[14] The net result would be that the wife would be empowered to terminate her own marriage expeditiously.[15]

Delegation of the power to pronounce *talaq* may be conditional or unconditional. Accordingly, delegation of that authority might be conditioned upon issuance of a divorce decree by a civil court. Islamic marriages are generally accompanied by contracts providing for *mahr*, a bride dower payable by the

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RTS. Q. 562, 562–63 (2005); Kristine Uhlman, *Overview of Shari'a and Prevalent Customs in Islamic Societies—Divorce and Child Custody* § 6.1 (2004), http://www.expertlaw.com/library/family_law/islamic_custody.html

[12] *See* RAFFIA ARSHAD, ISLAMIC FAMILY LAW 127 (2010); HODKINSON, *supra* note 11, at 285.

[13] I am unaware of any discussion of whether *Shari'a* would recognize the validity of the husband voluntarily curtailing his right to *talaq* by including such a stipulation in the couple's marriage contract or, in the alternative, by including a provision renouncing the right of *talaq* other than with consent of the wife.

[14] *See* DAVID PEARL, A TEXTBOOK ON MUSLIM PERSONAL LAW 120 (1987); PEARL & MENSKI, *supra* note 10, at 322; M. A. Zahra, *Family Law*, *in* 1 LAW IN THE MIDDLE EAST 140–41 (Majid Khadduri & Herbert J. Liebesny eds., 1955). A fuller discussion is presented by Fareeha Khan, Tafwid al-Talaq: *Transferring the Right to Divorce to the Wife,* 99 THE MUSLIM WORLD 502–20 (2009).

[15] A proposal for a similar Jewish law remedy according to which a husband would appoint his wife as his agent to execute her own *get*, or religious divorce, was advanced in LOUIS M. EPSTEIN, *HAZA'AH LEMA'AN TAKKANAT AGUNOT* 1–272 (1930); LOUIS M. EPSTEIN, *LE-SHE'ELAT HA-AGUNAH* (1940). That proposal was firmly rejected, primarily because Jewish law presumes that cohabitation, subsequent to designation of an agent for execution of a *get*, nullifies the agency. *See LE-DOR AHARON* 1–114 (Union of Orthodox Rabbis of the United States and Canada ed., 1937); R. JOSEPH DOV LEVINE, *TESHUVAH LE-HA-MAZI'A HAZA'AH BE-TAKKANOT AGUNOT* 1–157 (1942).

husband to the wife, and *sadaq*, a deferred dower payable to the wife on a stipulated date or upon divorce or death, as well as rights and privileges during the course of the marriage. Assignment of the right of *talaq* to the wife, either conditionally or unconditionally, may readily be incorporated in such a contract. However, since assigning the right of *talaq* to the wife is, at present, hardly common practice, a remedy for women who have not protected themselves by insisting on such a clause in their marriage contracts remains necessary.

The Catholic Church regards marriage as a sacrament creating an indissoluble bond and, consequently, the Church does not recognize divorce.[16] Hence, it might reasonably be concluded that the issuance or withholding of a decree of divorce by a civil court would be of no consequence insofar as the religious prerogatives of Catholics are concerned. Or, to put the matter somewhat differently, the issuance or nonissuance of such a decree would have no effect upon the religious options of either party.

That, however, is not always the case. The Church does recognize annulment, that is, a procedure by which, in appropriate circumstances, a marriage is declared to have been void *ab initio*.[17] Grounds for annulment are extremely limited and must be established by evidence satisfactory to a diocesan tribunal. The establishment of grounds for annulment frequently requires testimony of one or both of the marriage partners. For example, since one of the basic purposes of marriage is procreation,[18] entry into marriage with intention to maintain a childless union constitutes grounds for annulment. Acknowledgement of that intention by a spouse is often crucial to establishing grounds for annulment. It is not difficult to imagine a situation in which one of the spouses, lacking fidelity to the teachings of the Church, seeks a civil divorce in contemplation of remarriage without ecclesiastic sanction. The same lack of fidelity led that individual to enter into the existing marriage with no intention to produce offspring. That spouse, for reasons of spite, embarrassment, or some other motive, may refuse to offer testimony to the tribunal or respond to interrogation. Under existing law,

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[16] CATECHISM OF THE CATHOLIC CHURCH §§ 1644–48 (1994) ("The unity and indissolubility of marriage"); *id.* § 2384 ("*Divorce* is a grave offense against the natural law. It claims to break the contract, to which the spouses freely consented, to life with each other till death. Divorce does injury to the covenant of salvation, of which sacramental marriage is a sign"); *id.* § 2385:

> Divorce is immoral also because it introduces disorder into the family and society. This disorder brings grave harm to the deserted spouse, to children traumatized by the separation of their parents and often torn between them, and because of its contagious effect which makes it truly a plague on society.

[17] *Id.* § 1629. *See* Code of Canon Law pt. III, title 1, ch. 1 ("Cases to Declare the Nullity of Marriage"), http://www.vatican.va/archive/ENG1104/_INDEX.HTM

[18] CATECHISM OF THE CATHOLIC CHURCH, *supra* note 16, §§ 1652 & 2449.

that spouse may take advantage of the provisions of his or her state's domestic relations act in order to terminate the marital union and enter into a second marriage, while the other marriage partner, unable to secure an annulment solely because of the lack of cooperation by the recalcitrant spouse, is denied the same opportunity for reasons of religious conviction.

III. THE NEED FOR A CIVIL LAW REMEDY

It has frequently been argued that the problem arising from the refusal of a recalcitrant spouse to cooperate in dissolving the marital union in accordance with the tenets of the faith to which the parties subscribe is entirely religious in nature, and hence responsibility for amelioration of the hardship to which it gives rise lies with ecclesiastic authorities exclusively. The problem, it is contended, is outside the purview of civil authorities, reflects concerns in which the state has no interest, and does not reflect a burden imposed by the state upon free exercise of religion. Consequently, goes the argument, religionists should not look either to the political arena or to the judiciary for relief, nor should the state or any of its institutions feel any political or moral responsibility for resolving a problem not of its making. Thus, in speaking of Judaism, Professor Michael Freeman has commented:

> It is a sad reflection upon the dilemma of a religious minority that, having forgotten its liberal heritage, it has to call upon the dominant culture to bale it out. The Jewish community should not have to go cap in hand to legislatures … when, by rediscovering their own sources and interpreting these creatively and dynamically they can solve problems which their interpretations have created.[19]

Those statements are quoted with approbation in a comment appended to an otherwise sympathetic decision of a British court issued by Justice Nicholas Wall in *N v. N.*[20]

Professor Freeman regards any plea for a civil law remedy to be inappropriate because of his presumption that rabbinic authorities might readily rediscover and reinterpret halakhic sources "creatively and dynamically," and with a wave of a Talmudic wand cause the problem to disappear. Discussion of those sources as well as "creative and dynamic" reinterpretation of those sources is beyond the scope of this article. Suffice it to say that every student of Jewish law is aware of

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[19] Michael Freeman, *Family Law Act 1996*, *in* 2 CURRENT LAW STATUTES, ch. 27, § 1, at 28 (1996). *See also* Michael Freeman, *Law, Religion and the State: The* Get *Revisited*, *in* FAMILIES ACROSS FRONTIERS 361, 382 (Nigel Lowe & Gillian Douglas eds., 1996).

[20] [1999] 2 F.C.R., [1999] Fam. Law, 691, 2 Fam. L. Rep. 745 (Fam. Div. 1999), described at note 149 *infra* and accompanying text.

the vast literature devoted to the problem of the *agunah* published over the course of the last two centuries. If a solution is so readily available, why is it so elusive? Be that as it may, since it is the consensus of opinion among knowledgeable rabbinic authorities that no facile remedy is available, for the community of the faithful who are bound in conscience by that consensus, the problem remains formidable.

More fundamentally, the notion that the state has no part in creation of the problem is simply factually incorrect. The state, for what it believes to be good and sufficient reason, has determined that marriage must be accorded secular legal status and must be regulated by appropriate civil statutes. The state has also determined that it will not simply grant a civil imprimatur to what for millennia had been a religious institution regulated by ecclesiastic authorities. The unfortunate result is that neither ecclesiastic marriage and civil marriage nor ecclesiastic capacity and civil capacity to contract a marriage will necessarily coincide. This discordant situation is the direct product of the state's determination to establish a secular juridical institution of marriage and to superimpose it upon an existing religious institution. Such intervention may well be necessary and appropriate; indeed, it may rise to the level of a compelling state interest. By the same token, the state should not, and need not, be oblivious to the resultant complications that arise and, arguably, should seek to achieve its ends by the least burdensome means possible.

IV. EQUITABLE RELIEF

A divorce court sits as a court of equity.[21] It is within the inherent power of a court of equity to devise an appropriate remedy for every wrong.[22] A wife denied a religious divorce may well argue that the civil decree is of no effective value to her without a religious divorce, and that the court should exercise its equitable power by ordering the husband to cooperate in executing a religious divorce. The inherent inequity in withholding the *get* after irremediable breakdown of a marriage is, the wife would argue, compounded by the husband's

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[21] Authorities for this proposition, besides those discussed in this Part IV, are discussed in Part V of this article.

[22] The common law maxim is *ubi jus ibi remedium*—wherever a legal right has been infringed, a remedy will be given. *See* P. V. BAKER & P. ST. J. LANGAN, SNELL'S PRINCIPLES OF EQUITY 28 (28th ed. 1982), which lists "[e]quity will not suffer a wrong to be without a remedy" as the first maxim of equity. *See also* JOHN NORTON POMEROY & SPENCER W. SYMONS , 2 A TREATISE ON EQUITY JURISPRUDENCE AS ADMINISTERED IN THE UNITED STATES OF AMERICA, PART II § 423 (5th ed. 1941). Pomeroy introduces that section of the chapter with the caption "Equity Will Not Suffer a Wrong without a Remedy."

selfish action in taking advantage of the judicial decree of a civil court in order to facilitate his own remarriage.

The first instance in which an American court considered the possibility of requiring cooperation in the execution of a Jewish divorce, other than on the basis of a specific undertaking, occurred in a Florida case, *Turner v. Turner*, which was decided at the appellate level in 1966.[23] *Turner* is one of the few cases pertaining to a *get* to have been decided in a state other than New York. Judge Henry Balaban, the trial judge, had entered a divorce decree that included a section ordering the husband "to co-operate with plaintiff in obtaining a Jewish divorce, any expense therefor shall be paid by the plaintiff."[24] On appeal, the Florida District Court of Appeal struck this portion of the decree on the grounds that the applicable Florida statute provided solely for civil divorce and did not empower the court to require the parties to secure a religious divorce. The appellate court avoided the constitutional issue entirely, stating that it had "not considered the appellee's contentions that requiring him to participate in a religious ceremony is a violation of his civil rights and the principle of separation of church and state."[25]

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[23] 192 So. 2d 787 (Fla. App. 1966), *cert. den.*, 201 So. 2d 233 (Fla. 1967).

[24] *Quoted* 192 So. 2d at 788.

[25] *Id*. The crucial issue is violation of the Establishment Clause. The husband rarely asserts that participation in a *get* is religiously repugnant to him. One reported instance in which a contention of that nature was advanced was in a Canadian case, *Marcovitz v. Bruker*, 2007 SCC 54. A decree nisi issued in that case ordered the parties to comply with an agreement negotiated through their counsel which, *inter alia*, contained an undertaking that the parties would "appear before the rabbinical authorities in the City and District of Montreal for the purpose of obtaining the traditional religious Get, immediately upon a Decree Nisi of Divorce being granted." *Id*. ¶ 39. Despite that consensual undertaking, the husband protested that he objected to executing a *get* on grounds of religious belief. Justice Abella, writing for the majority in a decision of the Supreme Court of Canada, questioned whether the husband "in good faith, seriously believed that granting a *get* was an act to which he objected as a matter of religious belief or conscience," *id.* at ¶ 68, and suggested that his refusal was motivated by anger rather than religious conviction. *Id.* at ¶ 69. Justice Abella further asserted that the husband's avoidance of his promise, rather than its enforcement, constituted an offense against public order. *Id*. at ¶ 79.

A free exercise claim was also advanced by the husband in *In re Marriage of Goldman*, 554 N.E.2d 1016 (Ill. 1990). Goldman testified "that he was a liberal Jew and that he abhorred the practices of Orthodox Jews, whom he characterized as discriminatory, repulsive and 'antimodern.'" *Id.* at 1023. The court found that, although the husband "expressed distaste for many practices of Orthodox Jews, he at no time attacked their religious beliefs" and concluded that his distaste for Orthodox Judaism did not rise to the level of constitutionally protected religious belief. *Id*. at 1023–24.

The court's argument that the Florida statute's provision only for civil divorce constituted grounds for denying the petition to order cooperation in arranging a *get* is a non sequitur. The appeal to the court was not on grounds of law but on the basis of equity. Because such relief was not specifically precluded by Florida law, the argument should have been examined on its merits.

Such an examination did occur at a later time in a Michigan court with a positive result. The unreported decision in *Roth v. Roth*[26] is probably the most far-reaching judicial decision calling for execution of a *get*. The circuit court had previously issued a decree annulling the marriage between Victoria and Yoel Roth. Victoria Roth then petitioned the court to order her husband to execute a Jewish divorce. The court granted her petition, not because of a contractual undertaking on the part of the husband, but because:

> In matters of divorce and annulment the circuit court sits as a court of equity. Thus, it may order a husband to obtain a "Get" by virtue of its inherent power to advise an appropriate remedy for every wrong. This is necessary in the instant case for a civil divorce or annulment is ineffective without the religious divorce since if Plaintiff were to remarry she would be branded an adulteress.[27]

In at least two earlier cases the courts emphasized the equitable aspect of divorce proceedings. In *Stoner* v. *Stoner*,[28] a Connecticut court declared that "while an action for divorce or dissolution of marriage is a creature of statute, it is essentially equitable in its nature." Several years later, in *Pasquariello v. Pasquariello*,[29] the court employed even broader language in affirming its authority to fashion equitable relief in dissolution of a marriage:

> The power to act equitably is the keystone to the court's ability to fashion relief in the infinite variety of circumstances which arise out of the dissolution of a marriage. Without this wide discretion and broad equitable power, the courts in some cases might be unable fairly to resolve the parties' dispute … .[30]

Corpus Juris Secundum 27A, § 9 reports that

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[26] No. 79-192,709-DO (Mich. Cir., Jan. 23, 1980).
[27] *Id.* at 2.
[28] 307 A.2d 146, 153 (Conn. 1972). Both *Stoner* and *Pasquariello*, *infra* note 29, are cited with approval in *Sunbury v. Sunbury*, 553 A.2d 612, 614 (Conn. 1989); *Serrano v. Serrano*, 566 A.2d 413, 418 (Conn. 1989); and *Lopiano v. Lopiano*, 752 A.2d 1000, 1012 (Conn. 1998).
[29] 362 A.2d 835 (Conn. 1975).
[30] *Id.* at 838.

> An action for divorce is sui generis, and, strictly speaking, it is neither an action at law nor a suit in equity, although it partakes of the nature of the latter and presents questions of purely equitable cognizance. Indeed, pursuant to various authorities actions for divorce are, or are essentially and to all intents and purposes, equity proceedings in which the courts follow and apply equitable principles.[31]

The *Roth* court examined the constitutional issue and recognized that the First Amendment, as applied to state courts through the Fourteenth Amendment, prohibits judicial action that "lacks a secular purpose, has the primary effect of advancing or inhibiting religion, or which entangles the government excessively with religion."[32] The court found that directing the issuance of a *get* would involve none of the above[33]:

> In *S.S. & B. Live Poultry Corp v. Kashruth Association*, 158 Misc 358, 360; 285 NYS 879, 883 (1936), it was stated that Jewish law would be properly divisible into two parts; one strictly religious—the relationship of man to God, and the other secular—controlling the relationship of man to man. Such affairs as marriage and kinship obligations fall within the second categorization: the secular relation of man to his fellow man. This is not religious so as to bring it within the First Amendment definitions.

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[31] 27A C.J.S. Divorce § 9 at 22 (2005). It is noteworthy that, for example, in *Sharon v. Sharon*, 7 P. 456 (Cal. 1885), the Court held that divorce is within the ambit of the provision of the California Constitution that vested the Supreme Court of California with appellate jurisdiction "in all cases in equity."

[32] Roth v. Roth, No. 79-192709-DO at 2 (Mich. Cir., Jan. 23, 1980).

[33] *Id.* To be sure, the drafting and delivery of a *get* is subject to myriad halakhic prescriptions. Accordingly, it is conceivable that a situation might arise in which the validity of a particular *get* is challenged by one of the parties on technical halakhic grounds as a basis for a demand that a new *get* be obtained. If it is recognized that execution of a *get* is not a religious act but a requirement of a legal system, such an issue should be regarded as analogous to a challenge to the validity of a divorce issued in a foreign jurisdiction and resolved by the court through hearing expert testimony or appointment of a special master for that purpose.

A quite different problem would arise if the *get* is challenged because it was executed by members of a denomination whose expertise and authority are not recognized by one of the parties. Such a situation was presented in *Scholl v. Scholl*, 621 A.2d 808 (Del. Fam. Ct. 1992). In fulfillment of his undertaking, the husband prepared and offered to deliver a *get* drafted under the auspices of a rabbinic court affiliated with the Conservative branch of Judaism. The wife contended that her needs could be met only by a *get* executed under the supervision of an Orthodox *Bet Din*. Consistent with the view that the *get* is secular rather than religious in nature, the issue posed in *Scholl* should be regarded as whether the contractual undertaking was to dissolve the marriage in accordance with the laws of foreign jurisdiction X or of foreign jurisdiction Y, and resolved by application of appropriate contract law.

> It is without question that a state court cannot interpret ecclesiastical law. Such is not at issue in the case before this Court. This Court is persuaded that the bill of divorce itself is theologically neutral amounting to a formal release by the husband of his former spouse.[34]

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[34] *Id.* at 2–3. The court was correct in maintaining that the execution of a *get* is not a religious act. *See infra* note 36 and accompanying text. However, in *Steinberg v. Steinberg*, 1982 WL 2446 (June 24, 1982), an Ohio appellate court considered the finding of a trial court that it had no authority to order performance of "what it considers a religious act." *Id.* at 1. The appellate court not only agreed that enforcement of a *get* would compel the recalcitrant wife to perform a religious act even though such an undertaking was incorporated in a separation agreement, but also found that a court could not indirectly force cooperation by enforcing modification of alimony because of nonperformance as provided in the separation agreement. *Id.* at 3. The latter finding represents a rejection of the ruling in *Rubin v. Rubin*, 348 N.Y.S.2d 61 (Fam. Ct. 1973). *Rubin* involved a separation agreement that incorporated a settlement of financial claims against the husband and an agreement to cooperate in securing a religious divorce. The husband refused payment in the absence of such cooperation on the part of the wife. The husband's position was upheld on the grounds that, although the court must refrain from involvement in religious matters and hence could not direct specific performance with regard to a *get*, it did have the authority to enforce a financial agreement in which the religious act constituted a condition precedent. The court's involvement, it reasoned, was not with religious practice but with obligations made contingent thereon. *Id.* at 61.

The First Amendment issues, including Establishment Clause issues, are discussed in this article in Part VI, *infra*.

Nevertheless, even were this to be a matter of doubt, such doubt should not bar judicial intervention. Professor Laurence Tribe asserts that governmental involvement in any matter arguably nonreligious is beyond the purview of the Establishment Clause:

> For the free exercise clause, a dichotomy can usefully be drawn between things "arguably religious" and things not even arguably having a religious character; all that is "*arguably religious*" should be considered religious in a free exercise analysis. For the establishment clause, an analogous dichotomy distinguishes all that is "arguably non-religious" from all that is clearly religious; anything "*arguably non-religious*" should not be considered religious in applying the establishment clause. Thus, when a government program has the effect of fostering, tolerating or encouraging—but not mandating—an activity, the fact that the activity is only *arguably* religious is *not* enough to make the government program a violation of the establishment clause; as long as the activity is arguably *not* religious, the establishment clause has not been violated by its facilitation.

LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-6, at 828 (1978) (citation omitted; emphasis in original).

In the second edition of that work, published in 1988, Professor Tribe notes that a "dual-definition approach," i.e., recognition that the term *religion* must be construed to exclude anything arguably nonreligious from the meaning of *religion* in applying the Establishment Clause was followed in two cases decided subsequent to publication of the first edition of his work. *Id.* at 1186 n.53 (2d ed. 1988). Nevertheless, Tribe observes that a number of legal scholars question the validity of that interpretation, and acknowledges that a dual-definition interpretation was much earlier considered and rejected by Justice Rutledge in *Everson v. Board of Education*, 330 U.S. 1, 32 (1947) (Rutledge J., joined by Frankfurter, Jackson, and

Similarly, in *Minkin v. Minkin*,[35] a judge of the Superior Court of New Jersey ruled that the *ketubah* (marriage contract) constitutes a binding contract requiring a *get* when mandated by Jewish law and ordered specific performance. The court accepted expert testimony from four rabbis who testified that execution of a *get* involves no religious act. Indeed, the court recognized that marriage is a contractual relationship and the *get* is a rescission of the contract. Moreover, no

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Burton, JJ., dissenting). Tribe notes that the interpretation was later advanced in a concurring opinion in *Malnak v. Yogi*, 592 F. 2d 197, 211 (3d Cir. 1979). TRIBE, *supra*, at 1186 n.54 (2d ed. 1988).

Tribe's response is an assertion that a dual-definition solution is really unnecessary since, on reconsideration, the problem may not exist. Tribe's revised thesis obviates the criticism that the term *religion* is not a homonym and, even if it were, it is improbable that the term was assigned two distinct meanings by the Framers in two clauses of a single sentence. Instead, Tribe focuses upon the conceptual dichotomy that is created by the terms *establishment* and *free exercise*. Definition of free exercise presents little difficulty and no argument is presented to negate application of the Free Exercise Clause to anything that is arguably religious. Forbidden establishment is limited, not because of a different definition of religion, but by virtue of the concept of *establishment*: "Whether a given practice constitutes a forbidden establishment may ultimately depend on whether most people would view it as religiously significant." *Id.* at 1187.

Substantively, the revised formulation represents old wine in new casks. Instead of assigning diverse meanings to the single term *religion*, it adopts the semantically more defensible position that the term *religion* in the first clause does not stand alone but is part of the phrase "establishment of religion," and serves to indicate that government actions that do not raise religious matters to the level of establishment are not prohibited. Establishment occurs only if (a) government action is born of a religious intent; (b) the effect of the government action is primarily religious; or (c) the government action creates excessive church-state entanglement. Enforcement of an otherwise legal undertaking to execute a *get* involves none of those factors—as indeed is the case with regard to any matter that is "arguably non-religious."

To this writer, Tribe's revised thesis is neither a retraction nor a revision of his original thesis, but simply a clarification. It was never stated that the term *religion* is a homonym having one meaning in the Establishment Clause and a second meaning in the Free Exercise Clause. The thesis was that free exercise is an expansive concept: whatever conduct is colorably religious is protected when a free exercise right is asserted. Establishment prohibits only matters that can be naught but religious; only when it is unambiguously religious is state action regarded as promotion, encouragement, or establishment of religion endowed with the imprimatur of the state. Accordingly, it is not *religion* that has two meanings, but *free exercise* and *establishment* that have different meanings; *religion* acquires diverse denotations only by virtue of diverse accompanying descriptions that serve to establish a limited restriction or broad license. Thus, the term *religion* has extremely broad meaning, but only when some aspect of that expansive notion rises to the level of state establishment is government action proscribed.

[35] 434 A.2d 665 (N. J. Super. Ch. Div. 1981).

one has considered statutes permitting clergymen to solemnize marriages as creating an excessive entanglement with religion: "The get procedure is a release document devoid of any religious connotation and cannot be construed as any more religious than the marriage ceremony itself." Accordingly, the court found "that the entry of an order compelling defendant to secure a get would have the clear secular purpose of completing dissolution of the marriage. Its primary effect neither advances nor inhibits religion since it does not require the husband to participate in a religious ceremony or to do acts contrary to his religious beliefs."[36]

Fifteen years after *Minkin*, in *Aflalo v. Aflalo*,[37] a judge of the Superior Court of New Jersey rejected the *Minkin* court's position that ordering a husband to give a *get* is consistent with the First Amendment. In *Aflalo*, a wife refused to settle a divorce claim she had brought against her husband unless the court ordered the husband to cooperate with her in obtaining a Jewish divorce. The husband refused to execute a *get* because he wanted to reconcile with his wife and asserted that he wished to appear with her before a *Bet Din* for that purpose. Unlike the court in *Minkin*, the court in *Aflalo* focused on the Free Exercise Clause, not on the Establishment Clause. Ordering the husband to give his wife a *get*, the court concluded, would violate his right to the free exercise of religion. The judge rejected the *Minkin* court's conclusion that executing a *get* is not a religious act. He argued, first, that a court would become entangled in religious affairs by becoming an arbiter of what is and is not religious. He also rejected the *Minkin* court's conclusion that an order to grant a *get* concerned purely civil

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[36] *Id.* at 668. In *Burns v. Burns*, 538 A.2d 438 (N.J. Super. Ch. Div. 1987), the husband claimed that his religious beliefs had changed and he no longer believed in the necessity of executing a *get*. That, of course, is irrelevant. Not believing a *get* to be necessary is not an assertion that participation is precluded by religious belief. In *Burns*, the husband offered to give his wife a *get* if the wife would invest $25,000 in an irrevocable trust for the benefit of their daughter, with the husband and another party of his choosing as joint trustees. Following *Minkin*'s treatment of the Establishment Clause, the court ordered the husband to submit to the jurisdiction of the *Bet Din* to initiate the proceedings for executing a *get*, or, in the alternative, to appoint an agent to act on his behalf. The husband also made a free exercise argument, claiming that ordering him to give a *get* would compromise his religious beliefs. The court rejected his argument, saying:

> A true religious belief is not compromised as the amount of money offered or demanded is increased. An offer to secure a "get" for $25,000 makes this a question of money not religious belief. This "offer," which is not denied by the plaintiff, takes this issue outside the First Amendment.

538 A.2d at 440. A Florida court found a waiver of First Amendment claims under similar circumstances in *Fleischer v. Fleischer*, 586 So. 2d 1253 (Fla. App. 1991).

[37] 685 A.2d 523 (N.J. Super. Ch. Div. 1996).

matters. The order in that case, he said, directly affected the religious beliefs of the parties. He characterized as unsound the argument that religion involves only one's relation to the Creator and not those aspects of one's relation to other persons as may be governed by religious traditions or teachings. Religion, he said, certainly does refer to the Creator, but it also refers to one's obedience to the will of the Creator.[38] Finally, the judge commented that "*Minkin* ultimately conjures the unsettling vision of future enforcement proceedings. Should a civil court fine a husband for every day he does not comply or imprison him for contempt for following his conscience? … The spectre of Henry being imprisoned or surrendering his religious freedoms because of action by a civil court is the very image which gave rise to the First Amendment."[39]

None of the arguments in *Aflalo* is persuasive. The first argument, that a court would become entangled in religious affairs by becoming an arbiter of what is religious ignores the fact that courts cannot avoid determining what is and what is not religious; they must, after all, determine the boundaries of establishment and free exercise. The fact that practitioners of a religion disagree about what qualifies as religious does not obviate the necessity of making those determinations. The second argument, that the order in *Minkin* directly affected the religious beliefs of the parties, is simply untrue. To be sure, the order affected the parties' actions, but not their beliefs: It did not require either of the parties to hold or not to hold any particular belief. It did not compel an act precluded by belief. The contention that religion refers to one's obedience to the will of the Creator as the reason for performing a particular act, would, if true, render religious any clearly secular action that is motivated by religious belief.[40]

Even accepting the court's conflation of belief and practice, it is the wife's beliefs that prompt the *get*; the husband in most of these cases does not wish to remarry. Nor is the husband under any religious mandate requiring obedience to the will of the Creator. Most significantly, there is no violation of the husband's religious freedom. Hence, there cannot be a "spectre of Henry being imprisoned or surrendering his religious freedoms."[41] The Free Exercise Clause means that a court cannot (a) compel any religious act, or (b) compel an act in violation of religious conscience. Insofar as the husband is concerned, the court in cases like *Aflalo* is not directing him to obey the will of the Creator. Neither the husband nor the court believes that to be the case. The wife's motives in seeking a *get* are

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[38] *Id.* at 529.
[39] *Id.* at 530.
[40] The judge in *Aflalo* did get one point right: that forcing a husband to provide a *get* would nullify the efficaciousness of the *get* under Jewish law, 685 A.2d at 529–30. For an explanation of this point, see text accompanying note 125 *infra*.
[41] 685 A.2d at 530.

irrelevant. Her free exercise is in no way compromised. Regarding point (b): no claim of violation of conscience is presented in such cases.

The court in *Aflalo* was really saying that compelling a *get* is a violation of the Establishment Clause, but confused the Establishment Clause with the Free Exercise Clause and erroneously assumed that secular purpose is not enough for compatibility with the Establishment Clause, but that secular intent is required as well. That is manifestly incorrect. Consider the following hypothetical: Assume that A has stolen $100 from B. B sues A for return of the $100, not because he wishes to recover his lawful property, but because he is concerned for the state of A's immortal soul. He subscribes to a religion in which the prayer uttered contains the formula, "Forgive us our debts even though we do not forgive our debtors," that is, his religion does not provide for forgiveness in instances of theft. Although but for religious motives the plaintiff would not seek recovery, the act of recovering stolen property is utterly secular. The court does not and should not inquire into the victim's motives for pursuing the cause of action. The religious motives have no constitutional significance.

Finally, the judge's "spectre" of fining or imprisoning the husband for following his conscience sweeps far too broadly. The question posed by the Free Exercise Clause is more precise: whether the court is punishing someone for following the dictates of a specifically religious conscience, that is, whether the state is forbidding someone to believe in or practice a religion or forcing someone to believe in or practice a religion. In *Aflalo*, at no time did the husband object to giving his wife a *get* for reasons of religious conscience. Rather, he refused to execute a *get* because he wished to reconcile with his wife. Indeed, at the very same time he was refusing the *get*, he was endeavoring to persuade his wife to appear before a *Bet Din* for the precise purpose of effecting a reconciliation—hardly the portrait of a conscientious objector.[42]

Somewhat later, the Australian Family Court, in the case of *In the Marriage of Gwiazda*,[43] invoked a section of the 1975 Australian Family Law Act to

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[42] In *Mayer-Kolker v. Kolker*, 819 A.2d 17 (N.J. Super. 2003), an intermediate appellate court declined to reach the free exercise issue decided in *Aflalo*. Instead, it remanded for development of a more complete record as to the parties' obligations under Mosaic law in their particular circumstances. A Pennsylvania trial court, in 1932, issued a flawed and laconic opinion refusing to order a husband to give a *get* in *Price v. Price*, 16 Pa. D. & C. 290 (Pa. Com. Pl. 1932). The judge refused on two grounds to enforce an oral contract that he interpreted as requiring a husband to execute a *get*: first, that the court had no right to order anyone to secure any kind of divorce, secular or religious, and second, that the court could not mandate giving a *get* as a religious duty. *Id.* at 291. *See supra* notes 38 and 39 and accompanying text.

[43] Unreported decision of the Family Court of Australia, No. M10631 of 1982, decided Feb. 23, 1983. This decision is not available online.

accomplish the same goal. In *Gwiazda*, the court ordered a wife to appear before a *Bet Din*, if asked to do so by her husband, and to take the steps a *Bet Din* might require in order to secure a Jewish divorce. The basis for this decision was Australian Family Law Act § 114(3), authorizing the court to grant an injunction "in any case in which it appears to the court to be just or convenient to do so."

The Australian Family Law Act is designed, in appropriate circumstances, to allow the termination of a marriage and to enable the parties to remarry. The court found that the wife's refusal to participate in effecting a *get* prevented the husband, "as a matter of fact and practicability," from remarrying, even though "as a matter of law" (that is, civil law) he was free to do so. The court found that the Australian divorce law is designed to facilitate marriage at the option of the parties and concluded that, when necessary, the authority to order execution of a *get* is integral to the equitable power vested in the court by the Family Law Act.

The broad powers reserved to a court of equity recognized in *Roth* and *Gwiazda* as authorizing the court to demand execution of a *get* have been regarded by other courts as having been extinguished by the provisions of divorce statutes.[44] One example—the decision of the Florida District Court of Appeal in *Turner*—has already been discussed.[45] Later, in *Ray v. Ray*, a New York intermediate court stated, "the equity powers of a court cannot be invoked to change the requirements and procedures set forth" in the controlling statutes.[46] More recently, in *Victor v. Victor*,[47] the Arizona Court of Appeals held that it lacked equitable power to order a religious divorce. The court quoted a somewhat earlier decision to the effect that "[e]very power that the superior court exercises in a dissolution proceeding must find its source in the supporting statutory framework."[48] The court held that the trial court enjoys only the powers granted by statute and that it finds "nothing in our statutes that gives the trial court authority to order a husband to grant a religious divorce document based on equitable considerations … . Our domestic relations court has no underlying power to grant equitable relief outside of the statutory framework from which it derives its authority."[49]

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[44] Divorce statutes employing terms to the effect that the court "may" grant a divorce on the basis of specified grounds surely are intended to allow a court to refuse a decree of divorce on equitable grounds. *See infra* note 74.

[45] *Supra* notes 23–25 and accompanying text.

[46] 309 N.Y.S.2d 53 (1970).

[47] 866 P.2d 899 (Ariz. Ct. App. 1993).

[48] *Id.* at 900, *quoting* Fenn v. Fenn, 847 P.2d 129, 132 (Ariz. Ct. App. 1993).

[49] 866 P.2d at 901. As discussed *supra* notes 23–25 and accompanying text, a similar conclusion was reached at a much earlier date in *Turner v. Turner*, 192 So. 2d 787 (Fla. Dist. Ct. App. 1966), *cert. den.*, 201 So. 2d 233 (Fla. 1967).

But, even if the reasoning of these decisions is accepted, one need conclude only that judges may not possess an equitable power to order cooperation in the execution of a *get* in the absence of statutory authority; one need not doubt the power of a legislature to grant such a power.[50]

V. RELIEF THROUGH NONINTERVENTION

Moreover, and more significantly, although in a matter governed by statute it may not be within the power of the court to fashion an equitable remedy, nonintervention in the form of refusal to entertain the petition of a person acting in an inequitable manner may yet be entirely appropriate. Indeed, in a number of decisions courts have acknowledged that, procedurally, divorce proceedings are governed by principles of equity,[51] including the principle that the granting of a petition for equitable relief requires that the petitioner possess "clean hands." That was precisely the thrust of the statement of the Missouri Supreme Court in *Franklin v. Franklin* with regard to another matter pertaining to a divorce:

> Divorce is a statutory action, but the courts generally follow the rules of equity and apply equitable principles in determining the rights and liabilities of the parties. … One seeking a divorce must prove himself to be the innocent and injured party. … The latter requirement is neither more nor less than an application of the equitable doctrine of "clean hands" to a divorce action. That doctrine says that "whenever a party, who, as *Actor*, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him … the court will refuse … to award him any remedy.[52]

Much earlier, in *German v. German*,[53] the court, citing Pomeroy's *Equitable Jurisprudence*, held that divorce is "a proceeding established by statute, of such

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[50] It must, however, be emphasized, that failure to obey an order to execute a *get* issued by a civil court constitutes contempt. The threat of sanctions that may be imposed for contempt poses a serious issue with regards to the validity of a *get* executed under such circumstances. *See infra* notes 125 and 144 and accompanying text.

[51] Authorities relating to this proposition, in addition to those here discussed, are cited at note 9, *supra*.

[52] 283 S.W.2d 483, 486 (Mo. 1955), *quoting* POMEROY & SYMONS, *supra* note 22, § 397, at 91–92 (5th ed. 1941). The above-quoted passage of the court's opinion in *Franklin v. Franklin* was quoted with approval in *Christenson v. Christenson*, 162 N.W.2d 194, 198 (Minn. 1968). For another authority relating to the "clean hands" doctrine, see note 9, *supra*.

[53] 188 A. 429 (Conn. 1936).

a nature that, as between courts of law and courts of equity, it necessarily would fall within the cognizance of the latter."[54]

The equitable powers of courts should not readily be seen as curtailed by divorce statutes. Such statutes typically specify grounds for divorce, establishing some as sufficient and excluding others. For example, a statute that restricts the right to divorce to situations involving adultery asserts, in effect, that only when the most sacred aspect of the marital union has been violated is the harm sufficiently grievous to warrant dissolution of the marriage. A statute of that nature does two things: (a) it declares that equitable relief may be warranted in the particularly egregious situations spelled out in the statute; and (b) more significantly, in its omission of other plausible grounds for termination of the marriage, it declares that those omitted grounds are not sufficiently serious to warrant equitable relief in the nature of decree of divorce. Such a statute typically says nothing specific about a court's equitable powers. It should be read and interpreted in the light of generally accepted principles of equity, most particularly in light of the consideration that an equitable remedy should not be available if the contemplated remedy imposes a disproportionate burden upon another party. A petition for equitable relief requires "clean hands,"[55] a condition not present when the petitioner unnecessarily and for no cogent reason imposes, or fails to remove, a barrier to his or her spouse's remarriage. Lack of authority to command an extrastatutory remedy does not compel the conclusion that the remedy provided by statute must be made available even when such relief is inequitable.

For similar reasons, statutes providing for no-fault divorce should not be understood as entirely removing divorce proceedings from the ambit of equity. Enactment of a no-fault statute does not imply that divorce is no longer to be deemed an equitable remedy made available to an aggrieved party and, consequently, to be governed solely by judicially administered technicalities of law without regard to principles of equity and hence without regard to ancillary effects. Such statutes are simply based on the purported undesirability of forcing persons to remain in a dead or disdained marriage and express recognition that, even in the absence of aggravated circumstances, termination of the marriage may serve to dispel a real or perceived harm. They do not extinguish other ethical concerns by mandating disregard of untoward effects upon one of the parties or even upon parties outside the relationship. Quite the contrary, these statutes invite an especially close equitable scrutiny of the petitioner, since he need have alleged no wrongdoing on the part of his spouse. Accordingly, equitable counterclaims that might not bar a petitioner's claim in proceedings based upon fault should be entertained in no-fault proceedings. "He who seeks

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[54] *Id.* at 431, *citing* POMEROY & SYMONS, *supra* note 22 § 112, at 131.
[55] *See* notes 9 and 52, *supra*, and accompanying text.

equity must do equity."[56] It should follow that he who advances, by petitioning for a no-fault divorce, what seems to be an especially aggressive instance of equitable relief, should be held to a commensurate standard of equity.

Recognizing that principles of equity govern divorce proceedings, it may well be argued that a petitioner for a civil decree must mitigate *any* untoward result of dissolution of the marriage to the extent that it is within his or her power to do so, and not only consequences related to the withholding of a *get*. Application of the "clean hands" directive requires no less.[57]

Recognizing that to petition for divorce is essentially to seek equitable relief leads to the conclusion that such a petition, even if fully supported by grounds spelled out in the applicable statute, should be denied if issuance of a decree of divorce would cause any sort of disproportionate harm to the respondent. A most extreme case is reflected in the following scenario: A husband sues for divorce on grounds of incompatibility in a jurisdiction in which such grounds are sufficient to support the petition. Neither the facts upon which that allegation is made nor the resultant flawed nature of the marital relationship are challenged. Despite conceded spousal incompatibility, the wife prefers to remain in a less-than-sublime relationship rather than to become a *femme sole*. She has come to be emotionally dependent upon her husband and, probably owing to aggravation of an underlying pathology, has become increasingly despondent during the course of the divorce proceedings. The wife, supported by the unchallenged expert testimony of competent and respected psychiatrists, alleges that, if a decree of divorce is issued, it is a virtual certainty that she will be driven to suicide. The husband, relying upon the explicit provisions of the applicable statute, demands a Shylockean pound of flesh.

Granted the facts as given, all would agree that entering a decree of divorce would be cruel and inhuman. Yet, assuming that the statute fails to provide for judicial discretion and confers upon the husband untempered power to seek a divorce as a matter of right, the court, as a matter of law, must grant the husband's petition, heartless as it may be.

However, viewed as a matter of equity, the situation assumes an entirely different guise. The grievous and irretrievable harm to the wife would be far, far greater than the corresponding benefit to the husband. The inequity in these circumstances is palpable. The court, in the exercise of its equitable powers, should withhold the decree.[58]

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[56] This maxim was cited by the U.S. Supreme Court in *Manufacturer's Finance Co. v. McKey*, 294 U.S. 442, 449 (1935).

[57] Authorities for the "clean hands" doctrine are cited in notes 9 and 52, *supra*.

[58] Taken to an extreme, the argument might prevent entry of a divorce decree over the objection of any man or, indeed, of any woman. *See generally* HANDBOOK OF MARRIAGE

The same considerations would lead to refusing to grant the divorce when the decree would cause disproportionate harm to third parties. It is not difficult to conceive of situations in which spouses seek to go their separate ways, not because they find married life intolerable or even unpleasant, but simply because the relationship has become stale or they are convinced, correctly or incorrectly, that they will find greater happiness in the greener grass of other pastures. Owing to hedonistic inclinations, extreme selfishness, denial, and self-delusion, or to sheer incapacity to appreciate the potential effect of divorce upon their children, the parties choose to ignore the emotional and psychological

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AND THE FAMILY 493 (Gary W. Peterson & Kevin R. Bush eds., 3d ed. 2013) (extensively citing primary sources):

> [D]ivorce has been rated the number one life stressor … .[D]ivorced parents are more likely to suffer psychological and emotional problems than married parents … . Divorced parents have higher risks of depression, anxiety, and unhappiness, physical illnesses, suicide, motor vehicle accidents, alcoholism, homicide, and overall mortality.

It is well established that married persons have lower mortality rates than unmarried individuals. In most countries, divorced individuals have the highest mortality rates. A host of studies of that phenomenon are cited and reviewed in Orjan Hemström, *Is Marriage Dissolution Limited to Differences in Mortality Risks for Men and Women?* 58 J. MARRIAGE & FAM. 366–78 (1996). Remarkably, Hemström's study, based upon 44,000 deaths in Sweden, showed that the excess mortality rate for divorced men, compared with men who were still married, was 143%; for comparable groups of women there was also an excess mortality rate, but the excess was 63%. *Id.* at 372.

Despite the demonstrated association between the dissolution of marriage, on the one hand, and mortality and numerous other distresses on the other, the global argument that divorce is always an inequity, while perhaps true, need not be accepted as grounds for abolishing all but uncontested divorces:

(a) Some of the factors associated with divorce distress include negative health behaviors such as increased alcohol consumption, failure to engage in risk avoidance, and adoption of unhealthy lifestyles. These reflect choices and do not give rise to the same ethical claim as would, for example, an involuntary suicidal tendency.

(b) The equitable considerations under discussion require a balancing of interests: a form of cost-benefit analysis. The balancing of interests include (1) a weighing of the extent of the benefit to one party versus the magnitude of harm to the other party, i.e., the quantitative advantage of divorce to one spouse as opposed to the intensity of its negative impact upon the other, and (2) the likelihood of both the benefit for one party and the negative impact upon the other. A diagnosis of pathology leading to certain, or even statistically probable, suicide represents an equitable consideration far more compelling than a statistic of mortality probabilities.

In any balancing of equitable concerns, the likelihood and magnitude of the benefits of divorce to the petitioning party must be weighed against the likelihood and magnitude of any adverse effect upon the other party. A court of equity is properly charged with making such determinations.

havoc divorce must wreak upon their progeny.[59] One may certainly question whether such insensitive or uncaring parents are capable of preserving a more

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[59] I am indebted to Professor Lynn D. Wardle for suggesting this example. For a detailed discussion of this theme, see Patrick F. Fagan & Aaron Churchill, *The Effects of Divorce on Children* (Marriage & Religion Res. Inst., Jan. 11, 2012), http://www.thefamilywatch.org/doc/doc-0283-es.pdf. *See* Paul R. Amato & Jacob Cheadle, *The Long Reach of Divorce: Divorce and Child Well-Being Across Three Generations*, 67 J. MARRIAGE & FAM. 191 (2005); R. H. Aseltine Jr., *Pathways Linking Parental Divorce with Adolescent Depression*, 37 J. HEALTH & SOC. BEHAV. 133 (1996); W. J. Doherty & R. H. Needle, *Psychological Adjustment and Substance Abuse Among Adolescents Before and After Parental Divorce*, 62 CHILD DEV. 328 (1991); Daniel Potter, *Psychosocial Well-Being and the Relationship Between Divorce and Children's Academic Achievement*, 72 J. MARRIAGE & FAM. 933 (2010); C. E. Ross & J. Misrowsky, *Parental Divorce, Life-Course Disruption, and Adult Depression*, 61 J. MARRIAGE & FAM. 1034 (1999); Tami M. Videon, *The Effects of Parent-Adolescent Relationships and Parental Separation on Adolescent Well-Being,* 64 J. MARRIAGE & FAM. 489 (2002).

In the context of Jewish divorce, it is instructive that Justice Wall wrote in *N v. N*:

> … I can envision extreme circumstances in which a father's refusal to provide a get so adversely affected the relationship between the child's parents and/or the father and the child that contact could not be said to be in the interests of the child whilst the issue of the get remained outstanding. In these circumstances it would, I think, be possible for the court either to make no order for contact or to refuse to order contact whilst the issue remained outstanding, provided always that the order so made was in the interests of the child.
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> That said, I would be extremely reluctant to interpret the wide words of s 11(7) [of the British Children Act of 1989, governing court-directed visitation] as embracing the obtaining of a get as a condition of contact. The courts have always set their face against financial provision for a child as a bargaining counter in proceedings for contact: it seems to me that similar considerations apply to the question of a get.
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> It should, however, be noticed that in *Frey v Frey* (unreported) 22 February 1984, the Family Court of Australia made access to children a condition of the granting of a get. In the chapter by Professor Freeman in *Law, Religion and the State: The Get Revisited* to which I have already referred Professor Freeman describes the decision as "unprecedented elsewhere." He comments further (at p 370):
>
> > The court made access to the children a condition to the granting of a get. It claimed that if it is entitled to deny the access of one parent when the tension between the former spouses detrimentally affects the children, a court must be entitled to impose such conditions as would reduce parental tensions. The decision has been praised (see (1987) 6 Jewish Law Annual 210) as establishing family needs as the cardinal principle, but it is dubious whether it meets the requirements of halakah and therefore cannot be recommended as a solution.
>
> I am dealing in this judgment with jurisdiction, not discretion. Whether a get obtained as the result of an order such as that made in *Frey v Frey* meets the requirements of halakah seems to me to go to the discretion whether or not to make such an order, not to jurisdiction, and thus outside the scope of this judgment.

N v. N, [1999] 2 F.C.R., [1999] Fam. Law, 691, 2 Fam. L. Rep. 745, 758–59 (Fam. Div. 1999).

nurturing home for their children as a couple rather than separately; nor is it inconceivable that the best interest of the child might lie in extinguishing parental rights, thereby rendering moot the question of divorce insofar as the children are concerned.[60] Nevertheless, equitable considerations mandate that the concerns of third parties be considered by the court and factored into its determination. Again, the process must involve identification and balancing of the equitable concerns of all affected parties, coupled with an assessment of the extent of benefit to the various parties versus the severity of adverse effects upon others. In considering a petition for divorce, a court exercising its equitable powers should carefully examine the impact of the divorce upon the interests of all affected parties, not least upon the respondent spouse.

The concern under discussion is the impact of civil divorce upon inability to remarry because of religious scruples that might be obviated by the recalcitrant spouse without significant effort or expenditure of emotional coin. Accordingly, it is argued that a "clean hands" doctrine requires that measures be taken—in the form of the granting of a *get*—before that party's petition for a divorce may be granted.[61]

Equitable considerations might be brought to bear in other important ways. Disputes involving termination of employment contracts, for example, often are resolved by the parties' submitting to confidentiality clauses that require reticence with regard to the motives for dissolving the relationship coupled with an undertaking that neither side will speak disparagingly of the other. Divorce is rarely amicable. Not infrequently, contested divorces, and, at times, even uncontested divorces, are accompanied by circulation of charges and countercharges among friends and acquaintances, as well as character assassination, salacious gossip, and malicious or disparaging comments. Even more distressing and damaging are such utterances by one parent regarding the other made in the presence of their children. Were divorce decrees within the exclusive jurisdiction of the parties themselves, one or the other might insist upon a confidentiality and nondisparagement clause as a condition of acquiescence to the termina-

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In the unreported case quoted above in *N v. N, Frey v. Frey*, Family Court of Australia, Treyvaud J. (Feb. 22, 1984), the court made granting a *get* a condition for visitation rights. The court reasoned that, since it is entitled to deny access to one parent when tension between the former spouses detrimentally affects the children, the court must also impose conditions designed to reduce parental tensions. Thus, although the court may not have the power to mandate execution of a *get*, it might refuse to hear a petition brought before it until a *get* is executed in a situation in which the court is convinced that failure to execute a *get* has an adverse effect upon a child.

[60] For a discussion of the concerns of children in preservation of the family unit, see Lynn D. Wardle, *Children and the Future of Marriage,* 17 REGENT U. L. REV. 288–298 (2004–2005).

[61] Authorities relating to the "clean hands" doctrine are cited in notes 9 and 52, *supra.*

tion of the formal relationship. Equitable considerations should augur in favor of the right of the defending party to demand such an undertaking on the part of the plaintiff as a condition of granting his or her petition for divorce. "Clean hands" should require that the party seeking equitable relief refrain from behaving in an inequitable manner vis-a-vis the other party. In the context of divorce proceedings, such undertakings would be more readily enforceable than comparable provisions in civil contracts, by virtue of the fact that they can be incorporated in a decree of the court and violation made subject to sanctions for contempt.

The spouse who petitions for a decree of divorce usually does so in order to be free to contract a second marriage. Equity requires that the other party be free to do so as well. Accordingly, failure to cooperate in securing a religious divorce without valid reason should constitute grounds for refusal to grant the petition. Although the impediment to remarriage is based upon religious scruples rather than civil law, equity should compel the petitioner's cooperation in removing that impediment by means of a *get*. In order to achieve that end, it is not necessary for a court to have recourse to the drastic action of commanding the petitioner to cooperate in the execution of a religious divorce. It is sufficient for the court to announce that it will not consider his or her petition for divorce unless and until such cooperation is forthcoming. In doing so, the court would simply be applying the principle that a party seeking equitable relief must also act equitably.

VI. CONSTITUTIONAL ISSUES

Despite the decisions in *Roth*[62] and *Minkin*,[63] it must be recognized that any attempt to involve secular courts in assuring, even by passively refusing to issue a decree of divorce, that the parties to a divorce action will also cooperate in the execution of a religious divorce will be perceived as posing serious constitutional problems. Any judicial action along such lines would have to be carefully crafted so as to avoid infringement of either the Establishment Clause or the Free Exercise Clause.

A number of factors must be considered in formulating an appropriate judicial response to the *get* issue:

(a) Every individual enjoys a constitutional right to marry. The state has a deep interest in enabling exercise of constitutional liberties. Thus, facilitating remarriage constitutes a highly laudable secular purpose.

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[62] No. 79-192,709-DO (Mich. Cir., Jan. 23, 1980), discussed *supra* note 26 and accompanying text.

[63] 434 A.2d 665 (N. J. Super. Ch. Div. 1981), discussed *supra* note 35 and accompanying text.

(b) Apart from a liberty interest with respect to marriage, an individual enjoys a free exercise right with regard to the practice of religion subject to limitations imposed by the Establishment Clause.

At the same time, there are a number of counterarguments that may be raised:

(a) A person cannot prevail based on a free exercise claim in a situation in which allowing his claim would infringe upon another person's right to free exercise of religion. However, a demand for cooperation in execution of a *get* is rarely met by a refusal rooted in free exercise grounds.

(b) Every person enjoys a constitutional right to marry and raise a family. It might be argued that such rights include the right to terminate an unsatisfactory marriage by means of a civil decree of divorce in order to facilitate a civil marriage that is satisfactory.

(c) Judicial involvement in matters of religious divorce may constitute excessive entanglement in matters of religious practice and, accordingly, be barred by the Establishment Clause.

Finally, it must also be recognized that it is the state that is the author of the underlying problem, and hence of the countervailing constitutional arguments. It is the state, rather the parties, that has created the constitutional dilemma. The state, in allocating to itself the prerogative of regulating both marriage and divorce, has usurped what was historically a matter within the province of ecclesiastic authorities. The state now confers its imprimatur upon marriages celebrated by the clergy of any denomination, but relies upon its own authority exclusively in terminating marriages. In doing so, it discriminates in favor of religions that regulate marriage but do not regulate divorce and discriminates against those that regulate both marriage and divorce.[64]

Furthermore, if it recognizes the religious marriage but takes a hands-off attitude to religious questions connected to divorce, the state discriminates against the respondent spouse. Under those circumstances, it will have given her a religious marriage but refused to take into account the religious burdens to which she will be subjected by a divorce without the *get*. Such a stance on the part of the state is tantamount to discrimination against adherents of a faith that requires both celebration and termination of marriage in accordance with

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[64] Arguably, extending civil recognition to religious marriage ceremonies does not constitute the establishment of religion since the alternative option of civil marriage is freely available.

The constitutionality of statutes that provide for penal sanctions to be imposed upon members of the clergy who perform purely religious ceremonies that are not in conformity with a state's domestic relations statute is an entirely different matter and beyond the scope of the present article.

religious prescriptions.[65] That discrimination is compounded by the state's tacit encouragement of the clergy of such denominations to celebrate marriages, as the state does by empowering, and indeed compelling, them to act as officers of the state when they do.[66]

In *Roth*, the court held that in instances where a marriage is dissolved without the execution of a *get*, with the result that the wife is effectively prevented from remarriage, it is the wife who is deprived of her right to liberty:

> [T]his court recognizes that plaintiff herein has Constitutionally provided rights which would be defeated were this Court to deny her relief. Her right to exercise "freedom of religion" would be destroyed would she wish to remarry. Her right to "liberty" under the 14th Amendment would be destroyed. In defining the liberty guaranteed under the 14th Amendment, the United States Supreme Court stated: "… the term has received much consideration … . [W]ithout doubt, it denotes not merely freedom from bodily constraint but also the right of the individual … to marry, establish a home and bring up children, to worship God according to the dictates of his conscience … ." *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).
>
> Plaintiff's Constitutional right to liberty as defined above must be protected. This Court finds that interest to be paramount to any possible intrusion upon the Defendant in ordering him to obtain a religious divorce which is secular in nature.[67]

Moreover, the husband's refusal to give his wife a *get*, knowing that she will not be able to remarry without suffering the distress of violating her deep beliefs, constitutes the intentional infliction of emotional harm. Under some circumstances the law allows damages for such an injury if the defendant's conduct is outrageous.[68]

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[65] Furthermore, by facilitating easy divorce, in most such instances the state deprives the respondent of what would, under the religious law of most denominations, be a potent inducement to secure spousal cooperation: i.e., the petitioner's need for respondent's consent and assistance in the divorce proceeding, so as to permit him to remarry validly and so avoid running afoul of the state's bigamy statutes.

[66] To be sure, refusing to recognize clergy of such denominations as authorized to perform civilly recognized marriages would be a blatant and egregious violation of the Establishment Clause. But, at the same time, the state is under no compulsion to confer civil powers upon the clergy of any denomination.

[67] Roth v. Roth, No. 79-192,709-DO (Mich. Cir., Jan. 23, 1980). Not cited in the *Roth* decision is the earlier case of *Koeppel v. Koeppel*, 138 N.Y.S.2d 366 (Sup. Ct. 1954), *aff'd*, 161 N.Y.S.2d 694 (App. Div. 1957). In *Koeppel*, the court stated that execution of a *get* would give the wife "peace of mind and conscience." 138 N.Y.S.2d at 373.

[68] *See*, *e.g.*, Limone v. United States, 579 F.3d 79 (1st Cir. 2009); Nickerson v. Hodges, 84 So. 37 (La. 1920). *See* RESTATEMENT (SECOND) OF TORTS § 46(1) (1965): "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to

The counterargument to the free exercise claim presented in *Roth* is the recalcitrant party's claim to free exercise in a hypothetical case in which the party claims that participation in the execution of *get* is a violation of his or her religious convictions. Although a respondent might claim that such cooperation constitutes participation in a religious act and hence an order to do so is barred by the Free Exercise Clause, to this writer's knowledge, no one has ever con-

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another is subject to liability for such emotional distress … ." *See also* comment f to this section: "The extreme and outrageous character of the conduct may arise from the actor's knowledge that the other is peculiarly susceptible to emotional distress, by reason of some physical or mental condition or peculiarity." *See generally* Steven F. Friedell, *The First Amendment and Jewish Divorce: A Comment on* Stern v. Stern, 18 J. FAM. L. 525, 532 (1979).

French courts have routinely used the threat of an award of damages as a means of compelling the husband to execute a *get*. Actually, this remedy, known as *astreinte,* is a civil pecuniary penalty and, since 1972, has been recognized as being entirely distinct from obligation. The penalty grows with the length of time the obligation has not been performed, and provision is usually made for downward revision in the event of performance. *See* Hugues Fulchiron, *The Family Court Judge Taking Religious Convictions into Account: A French and European Perspective*, 5 INT'L J. JURIS. FAM. 14 (2014); H. Patrick Glenn, *Where Heavens Meet: The Compelling of Religious Divorces,* 28 AM. J. COMP. L. 1, 25–29 & 32–33 (1980). A German court, despite its more restrictive view regarding nonintervention by the civil judiciary in what it viewed as an entirely religious matter, has also declared that compensatory damages in such cases are "certainly not excluded," at least where the husband had previously undertaken to grant a *get*. 9 *MONATSSCHRIFT FÜR DEUTSCHES RECHT* [MONTHLY MAGAZINE FOR GERMAN LAW] 768 (1973) (Olgz Köhn, 19 Mar. 1973). *See* Glenn, *supra*, at 31–32.

In a related instance, the Jerusalem Family Court, an Israeli secular court, concluded that the husband's failure to comply with a rabbinical court's ruling requiring a *get* constituted a grave violation of the wife's autonomy and caused her emotional damage by condemning her to a life of loneliness and lack of partnership and consortia. Accordingly, basing its ruling on general negligence theory, the court awarded damages, including aggravated damages, to the wife. *See* Jane Doe v. John Doe, *sub nom.* Anon v. Anon, FF 19270/03 (2004).

A Canadian court awarded damages to a woman whose husband delayed execution of a *get* for fifteen years despite his explicit agreement to facilitate a religious divorce. The Superior Court of Quebec awarded $2,500 for each year the husband denied a *get* and an additional sum of $10,000 because the wife was "prevented from bearing a legitimate child," for a total award of $47,500. S.B.B. v. J.R.M., [2003] Q.J. No. 2896 (S.C.) (QL), [2003] R.D.F. 342 [Bruker QCCS] ¶ 79. The award was confirmed on appeal by the Supreme Court of Canada, *Marcovitz v. Bruker*, 2007 SCC 54.

It appears that no action for compensatory damages for failure to execute a *get* has ever been adjudicated by an American court in any reported case. This would be an avenue worthy of exploration, provided the circumstances are such that there exist grounds in Jewish law for compelling the husband to execute a *get* and a qualified *Bet Din* has issued a decision to that effect.

tended that to do so would offend religious conscience. Indeed, it is difficult to fathom how such a bona fide claim might be advanced. The claim that he or she does not profess a religious belief requiring a *get* is not tantamount to an assertion that participation in such proceedings is a violation of a religious belief. The *get* may be regarded as unnecessary, doctrinally absurd, or frivolous, but such a contention falls far short of an assertion that it is repugnant on religious grounds. It is unlikely that any such person would claim a free exercise immunity by contending that his or her religious convictions actually bar his or her participation. Atheists may also be entitled to a First Amendment privilege to profess atheism, but for an atheist to claim that participation in what he or she regards as a meaningless ritual to be a violation of religious conscience is illogical. Other recognized religions, to the extent that they have pondered the question, do indeed regard the *get* as superfluous, meaningless, or antiquated, but not as religiously repugnant.

It is highly unlikely, but hypothetically possible, that some person might present a bona fide claim asserting that he or she has received a divine communication in which the Deity has revealed to him or her that such participation constitutes a grievous sin. Were such a claim actually to be advanced, the court would be confronted with one party's claim to free exercise in refusing to execute a *get* and the other party's opposing claim that the Free Exercise Clause gives her a right to receive a *get*. Under such circumstances, and particularly in light of the Supreme Court's long history of recognizing marriage as a fundamental liberty, a policy of nonintervention should be adopted.

The more cogent free exercise claim would be that the *get* is religious in nature and that no person can be compelled to participate in a religious act (as was the finding of the Superior Court in *Aflalo*[69]). As has been earlier contended,[70] the claim that a *get* is religious in nature is a miscategorization of the nature and function of a *get*. But even if the argument were correct, the escape from the horns of the dilemma posed by constitutional claims and counterclaims is nonintervention.

It might also be argued that the right to a civil divorce is itself a fundamental liberty and that, therefore, divorce cannot be withheld simply because a civil decree would present an inequity to another party with regard to that party's practice of religion. Denial of that liberty, it might be contended, would constitute state intrusion into the private sphere in order to facilitate religious practice. That contention, however, is based upon a misperception of the nature of divorce.

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[69] 685 A.2d 523 (N.J. Super. Ch. Div. 1996), discussed *supra* note 37 and accompanying text.

[70] *Supra* note 41 and accompanying text.

The key to a resolution of this problem lies in a proper understanding of the nature of a divorce decree. In civil law it is neither the petitioning party nor the respondent in a divorce action who dissolves the marriage; it is the state that does so.[71] For many centuries the civil law of all Western countries accepted the concept of the absolute indissolubility of marriage. This doctrine became part of the common law. The modern concept of civil divorce with the right to remarry did not originate until the middle of the sixteenth century. At first, absolute divorce was granted infrequently, and in many countries only by the grace of the sovereign or an act of the nation's legislative body. Thus, before 1857, no marriage could be dissolved in England other than by a specific act of Parliament.[72] In recent times, the institution of absolute divorce granted by judicial decree has become part of the statutory law of most Western nations. Divorce, then, must be viewed as a privilege rather than as a right.[73] No citizen enjoys a right to

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[71] In a civil divorce, the party seeking the divorce petitions the court to dissolve the marriage. However, neither the petitioning party nor the respondent dissolves the marriage. The parties merely bring the question before the court. It is the state, acting through the court, that dissolves the marriage. In Jewish law, however, the husband grants the divorce with the consent of the wife; the court merely supervises the proceedings.

[72] *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 181 (1st ed. 1973). (England prior to the nineteenth century was a "divorceless society." "There was no … judicial divorce. The very wealthy might squeeze a rare private bill of divorce out of Parliament.") *See also* 1 BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND ch. 15 (1765–1769), *available at* http://www.yale.edu/lawweb/avalon/blackstone/bk1ch15.htm. ("[T]he canon law, which the common law follows in this case, deems so highly and with such mysterious reverence the nuptial tie, that it will not allow it to be unloosed for any cause whatsoever, that arises after the union is made"—discussing what Blackstone calls "total divorce," allowing the parties to remarry, as distinct from "partial divorce," i.e., from bed and board); JOHN WITTE, FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND LAW IN THE WESTERN TRADITION ch. 4 and pp. 202–08 (1997).

[73] In one significant case, *Boddie v. Connecticut*, 401 U.S. 371 (1971), the U.S. Supreme Court seemed to describe divorce as a right, albeit in a very limited context. In *Boddie*, Justice Harlan stated: "[T]he State's refusal to admit these appellants to its courts … must be regarded as the equivalent of denying them an opportunity to be heard upon their claimed right to dissolution of their marriages … ." *Id.* at 380. However, this statement was made in the context of a holding that "due process does prohibit a State from denying, solely because of an inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages." *Id.* at 374. The focus of the decision in *Boddie* is an elucidation of the ambit of the due process clause and the right of access to the judicial process. The right to petition for redress of grievances does not imply that all petitions must be acted upon in an affirmative manner. Similarly, the right of access to the courts to be heard in a petition for divorce does not imply a concomitant right to receive a decree of divorce upon grounds provided by statute. Issuance of such decree may well be a matter within the discretion of the courts. The "claimed right" is the right to be heard and the right to petition for the exercise of judicial

divorce, but he or she may petition the state to confer a privilege and dissolve the marriage.[74]

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discretion in an equitable manner. *See Developments in the Law—The Constitution and the Family*, 93 HARV. L. REV. 1159, 1310 (1980) (offering a similarly limited interpretation of *Boddie* and stating, in n.8: "The right to seek dissolution is, of course, different from the right to obtain dissolution").

[74] Thus in *Worthington v. District Court*, 142 P. 230, 241 (Nev. 1914), the court declared:

> [D]ivorce is not among the inalienable rights of man or the ones granted by Magna Charta, the federal or state Constitution, or the common law, and, except at the will and subject to any restrictions imposed by the Legislature, has never been recognized as one of the guaranteed privileges of the citizen … .

More recently, it has been argued that "[t]he Supreme Court has not recognized a substantive constitutional right to divorce." *Developments in the Law*, *supra* note 73, at 1309. The decision of the U.S. Supreme Court in *Sosna v. Iowa*, 419 U.S. 393 (1975), is cited in support of that assertion. In *Sosna*, the Court used a rational basis test in rejecting a claim that a one-year residency requirement as a condition of instituting divorce proceedings unconstitutionally burdened the right to travel. *Id.* at 406. *See also* Note, *Jewish Divorce and the Civil Law*, 12 DE PAUL L. REV. 295, 298–99 (1963).

Nor is it to be presumed that divorce is mandated by legislative fiat, thereby giving rise to a statutory right. N.Y. DOM. REL. LAW § 170 (McKinney 2010) provides, *inter alia*, that "[a]n action for divorce may be maintained by a husband or wife to procure a judgment divorcing the parties and dissolving the marriage on any of the following grounds … ." The term *may* in the statute indicates that the court has the power to issue a divorce decree on the specific grounds but does not necessarily establish an absolute obligation to do so. The word *may* as ordinarily used is permissive and not mandatory. It has been stated in numerous court decisions that, ordinarily, when used in a statute, the word *may* is permissive only and operates to confer discretion. *See*, *e.g.*, Bechtel v. Board of Supervisors, 251 N.W. 633 (Iowa 1933); Novak v. Novak, 24 N.W.2d 20, 23 (N.D. 1946). At times, depending upon context and circumstance, the word *may* has been construed as being mandatory and equivalent to the word *must*. Decisions construing *may* in that manner have been based upon the supposed intent of the legislature. People *ex rel.* Comstock v. Mayor of Syracuse, 12 N.Y.S. 890 (Sup. Ct. 1891), *aff'd*, 29 N.E. 146 (N.Y. 1891); Novak v. Novak, 24 N.W 2d at 23. As formulated in the decision issued in *People* ex rel. *Comstock*, 12 N.Y.S. at 894:

> While many general expressions have been used which, when taken alone, might seem to indicate that the word "may" or words of similar import should be construed as mandatory when the public interest or the rights of individuals are involved, independent of any question of legislative intent, still, when the cases are examined, it will be seen such construction has prevailed only in cases where the statute under consideration, when taken as a whole, and viewed in the light of surrounding circumstances, indicated a purpose on the part of the legislature to enact a law mandatory in its character. In other words as mandatory. These cases are in harmony with the general and fundamental rule that statutes should be so construed as to give effect to the purpose of the law-makers.

Certainly, the intent of a legislature in using *may* in divorce statutes could not have been to mandate a decree of divorce in circumstances in which such a decree would present a patent inequity.

Assuredly, the privilege may not be withheld capriciously or arbitrarily. However, because the state is the active party in dissolving the marriage, and the petitioning party cannot demand a decree of divorce as a matter of absolute right, state action in granting a divorce should never be exercised in a manner that interferes with, or impedes, free exercise of religion.

The U.S. Supreme Court has indeed recognized the right to marry as a fundamental liberty. The earliest such acknowledgement was a brief inclusion of marriage in an enumeration of a number of fundamental rights in *Meyer v. Nebraska.*[75] Subsequently, in *Zablocki v. Redhail,*[76] the Supreme Court stated that it had routinely categorized the decision to marry as among the personal decisions protected by the right of privacy.[77] Less than a decade later, in *Turner v. Safley*,[78] the Court extended that right to prison inmates and declared that a Missouri statute effectively barring such marriages was an impermissible burden

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In two instances, appellate courts have ruled that courts have no discretion to deny a decree of divorce unless statutory grounds for such a denial exist: Brandt v. Brandt, 33 N.W.2d 620 (N.D. 1948); Mattson v. Mattson, 235 N.W. 767 (Wis. 1931). In neither decision does the court indicate why, as opposed to the usual rule, *may* is to be construed as *shall*. Presumably, these courts relied upon the general principle in statutory construction that where the word *may* is used in conferring power upon an officer, court, or tribunal, and the public or a third person has an interest in the exercise of such power, the exercise of that power becomes imperative. *See*, *e.g.*, Bascom v. Carpenter, 246 P.2d 223, 226 (Mont. 1952).

Although there may have been legislative intent to exclude discretion exercised in a subjective and arbitrary manner, there is no reason to posit legislative intent to mandate a divorce decree when there exist objective equitable grounds for withholding such a decree, particularly in view of the historical role of divorce courts as courts of equity. Moreover, despite the decisions in *Mattson* and *Brandt*, it is well established that a statute that is permissive in form will be construed as mandatory in compelling action in order to afford a remedy to third persons against a public officer only when the third person actually has an existing right, but not when that person must rely upon a right that the officer is authorized to create. As formulated by Justice Follet in People *ex rel.* Dinsmore v. Gilroy, 31 N.Y.S. 776, 779 (1894), *aff'd*, 40 N.E. 164 *(N.Y. 1895):

> But when the rule is invoked in aid of a personal right the right must be an existing legal one, and not one which the board or officer is by statute authorized to create. *Gilmore* v. *City of Utica*, 121 N.Y. 561 … *Buffalo & B.P. Road Co.* v. *Commissioners of Highways*, 10 How. Pr. 239; *Turnpike Road Co.* v. *Miller*, 5 Johns Ch. 101; Sedg. Stat. Law (2d ed.), 375, *et seq.*; Potter's Dwar. ST., 220, and End Interp. St. § 313).

Cf. Ram Rivlin, *The Right to Divorce: Its Direction and Why It Matters,* 4 INT'L J. JURIS. FAM. 133 (2013) (maintaining that one does not have a "claim right" to divorce).

[75] 262 U.S. 390, 399 (1923).

[76] 434 U.S. 374 (1978).

[77] *Id.* at 387.

[78] 482 U.S. 78 (1987).

of that right and hence unconstitutional.[79] In its pronouncement on that issue in *Loving v. Virginia,*[80] the Supreme Court declared that the right to marry "has long been recognized as one of the vital personal rights."[81]

Although a number of writers have argued that the right to divorce is no less fundamental than the right to marry,[82] that position is not supported by any judicial decision.[83] The right to divorce is not the correlate of a right to marry any more than the right to commit infanticide is a correlate of the right to procreate (or, for that matter, than the right to abortion is a correlate of the right to refuse contraception). Marriage and procreation are the choices of consenting adults and are matters most private and intimate in nature. Divorce, and particularly divorce without mutual consent, and infanticide (and, arguably, abortion), affect persons other than consenting adults and *ipso facto* cannot be regarded as fundamentally protected privacy rights.

Even the right to marry is not unlimited, precisely because the right to privacy is not absolute. Consanguineous marriages are neither recognized nor permitted. That limitation on the right of privacy is readily defended on the basis of the state's interest in limiting severe genetic burdens to which progeny of such unions might become subject. Criminalization of bigamy is, quite literally, a curtailment of the right to marry. Presumably, statutes prohibiting bigamy would survive even strict scrutiny because of their promotion of fundamental

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[79] *Id.* at 91.

[80] 388 U.S. 1 (1967).

[81] *Id.* at 12.

[82] *See, e.g.*, Laura Bradford, Note, *The Counterrevolution: A Critique of Recent Proposals to Reform No-Fault Law*, 49 STAN. L. REV. 607, 623 (1997); Melissa Lawton, Note, *The Constitutionality of Covenant Marriage Law,* 66 FORDHAM L. REV. 2471, 2481 (1998); Rhona Bork, Note, *Taking Fault with New York's Fault-Based Divorce: Is the Law Constitutional?* 16 ST. JOHN'S J. LEGAL COMMENT. 165, 183 (2002). *See also* sources cited by Bork, *id.* at 183 n.118.

[83] However, in a dissenting opinion in *Sosna v. Iowa*, 419 U.S. 393, 420 (1975), discussed *infra* at note 85 and accompanying text, Justice Marshall argued that the right to marry includes the right to divorce because it is so "closely related to the right to marry."

The decision of the U.S. Supreme Court in *Boddie v. Connecticut* was narrow in scope. *Boddie* involved an indigent spouse who was not permitted to seek a divorce because of his failure to pay the required filing fee; the Court held that this denied him due process. 401 U.S. 371, 373 (1971). That decision was based on due process considerations rather than on a liberty interest. The Supreme Court has long held that a person cannot be denied access to a civil court because of his inability to pay court fees. Meltzer v. C. Buck LeCraw & Co., 402 U.S. 954, 955 (1971), and, more recently, M.L.B. v. S.L.J., 519 U.S. 102, 113 (1996).

societal interests.[84] The right to divorce is certainly no broader than the right to marry. Just as some marriages may be barred because individual privacy interests may be curtailed in order to prevent harm to others, any privacy interest with regard to divorce is subject to curtailment in the face of negative or inequitable consequences to others.

The right to marry a partner of one's choice, even when lawfully exercised, is nevertheless regulated, and hence curtailed, in a variety of ways. For example, only designated persons may perform marriages, antecedent medical tests may be required, and a waiting period between issuance of a marriage license and solemnization of the marriage may be imposed. In *Sosna v. Iowa*,[85] a divorce petitioner was refused a decree of divorce because the petitioner had not met the one-year residency requirement imposed by statute. The petitioner relied heavily upon *Boddie v. Connecticut*, in which the Court invoked due process grounds in voiding a statute that prevented an indigent from obtaining access to the state's divorce courts. In *Sosna*, the U.S. Supreme Court held that only exclusion from a divorce court "forever" was constitutionally forbidden.[86] A one-year residency requirement, the Court asserted, is not to be equated with total deprivation.[87] Refusal to consider a petition for a civil decree of divorce until a barrier to remarriage is removed is not denial of a putative right to divorce, but only a temporary delay imposed in the exercise of that right.

Thus, the argument that a divorce may be withheld in situations involving inequitable consequences to a person or persons other than the petitioner is cogent even if, as claimed by some, divorce is a fundamental right akin to the right to marry: (a) The privacy interest in marriage does not extend to creating burdens for persons outside the marriage; (b) exercise of the right is subject to regulation by the state; (c) imposing a temporary or transient delay in exercising that right is not prohibited.

A divorce decree is designed to enable both parties to remarry. A woman who for reasons of religious conscience is not free to remarry is deprived, by virtue of judicial decree, of the potential for consortium, the ability to establish a home and raise a family, and often of ongoing support and maintenance. A court that issues a decree of divorce in favor of a Jewish husband who is unwilling to grant a *get* cooperates in this inequity and, in effect, tells the divorced wife that she may remedy the inequity only by abandoning her religious scruples. When

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[84] *Cf.* TRIBE, *supra* note 34 § 15–21 at 2433 n.84 (2d ed. 1988). ("A prohibition against polygamy … seems more secure [against constitutional challenge than do prohibitions of extramarital sexual contacts] if only as a matter of precedent.")

[85] 419 U.S. 393 (1975).

[86] *Id.* at 410.

[87] *Id.*

the husband presents a petition for divorce without making provision for a religious divorce, the court becomes a party to the creation of a state of affairs that may result in interference with free exercise of religion or lead to a gross inequity to the wife.

Under such circumstances, in acting upon a petition for a divorce decree, the court is confronted with a dilemma. A decree of divorce in the absence of a *get* impedes religious practice and constitutes judicial interference with liberty and free exercise of religion; a command of specific performance, on the other hand, arguably involves "excessive entanglement" in religious ritual and hence violates the Establishment Clause and, possibly, the Free Exercise Clause as well.

To be sure, the Supreme Court's decision in *Employment Division v. Smith* severely curtailed the protections of the Free Exercise Clause, holding that those protections do not excuse a believer from complying with "laws of general applicability," that is, laws not specifically designed to limit religious practices.[88] If divorce laws are laws of general applicability and, accordingly, permit judicial dissolution of a marriage for the benefit of one spouse despite the existence of a readily removable religious impediment to the remarriage of the other, the dilemma disappears. However, there are a number of responses to that contention:

(a) Divorce laws are designed to enable a spouse desiring to do so to enter into a new marital relationship. Recognition that, at times, a religious divorce is necessary to enable the other spouse to do so as well and that enforcement of an undertaking to do so, or withholding a civil decree until that is accomplished, does not thwart the state's interest in dissolving dead marriages. Enforcement of the *get* is not an exception to a law of general applicability that is antithetical to the purpose of the law; indeed, rather than thwarting the law, that accommodation of religious scruples actually advances the law's *telos*. Nothing in the Court's opinion in *Employment Division v. Smith* precludes the use of the Free Exercise Clause in support of this manner of statutory interpretation.

(b) *Employment Division* established the principle that the Free Exercise Clause does not require that an exception for situations involving religious practice be imputed to a law of general application. In *Employment Division*, the Court repeatedly referred to the criminal nature of smoking peyote and spoke of a state's right to restrict religious practice only with regard to "generally applicable prohibitions of *socially harmful conduct*."[89]

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[88] 494 U.S. 872, 879 (1990). The Court adhered to what it identified as its consistent holding "that the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Id.*

[89] *Id.* at 885, emphasis added.

In the context of the Court's decision, the reference to laws of general applicability is to laws banning undesirable conduct. In that context, not only is religious conduct insufficient to overcome a compelling state interest but it is insufficient to overcome any state interest. The reasoning appears to be that, practically speaking, an exception can become a slippery slope; with the multiplication of exemptions there is a danger that underlying rule will become so attenuated as to defeat its purpose. Quite arguably, there was no less-intrusive way to accomplish the desired result of the statute at issue in that case. *Employment Division* was silent as to the applicability of the free exercise protection in instances in which it might be possible to accord free exercise protection in a manner that did not undermine state interest.[90] Consider the following scenario: Some jurisdictions, such as Liechtenstein, Luxembourg, and Australia, mandate casting a ballot as a civic duty and impose a fine for failure to do so. Suppose an election is held on a Holy Day on which casting a ballot would offend the religious scruples of some citizens. Under *Employment Division*, does a citizen have a free exercise right not to vote and thus not to be penalized if he refrains from voting? A democratic state certainly has an interest in demanding that every citizen exercise his or her franchise. Granting exceptions from that mandate might conceivably undermine the goals the state is bent upon achieving. There are, however, simple, less intrusive expedients that would accommodate free exercise and serve equally well to achieve the state's goal, that is, accommodation in the form of a mail ballot or an alternative election day for religious objectors.

(c) The law prohibiting the use of peyote was blanket in nature and designed to eradicate a social evil. The Supreme Court maintained that, as such, an exception for religious conduct was not mandated. The burden placed upon religious practice was neither intended nor selective. The act of smoking peyote as part of a religious ceremony is indistinguishable from recreational use of the controlled substance. Divorce laws are also laws of general applicability, but only in the sense that any and every married couple may invoke such laws to dissolve their marriage. They apply only to those who choose to avail themselves of such laws. They are not general in the sense that they either restrict conduct or command performance on the part of any person, much less of all persons.

(d) In *Employment Division*, the Court acknowledged that earlier decisions barred application of a neutral, generally applicable law to religiously motivated

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[90] *Cf.* Religious Freedom Restoration Act § 1(b), 42 U.S.C.A. § 2000bb-1(b). ("Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person … (2) is the least restrictive means of furthering that compelling governmental interest.") *See generally* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. ___, 134 S. Ct. 2751(2014).

conduct, but only when the free exercise claim was presented "in conjunction with other constitutional protections, such as freedom of speech and of the press."[91] The Court asserted that those decisions were compatible with the doctrine it formulated in *Employment Division* and indicated that even laws of general application might not be enforced in "hybrid situations," in which a burden upon religious action was coupled with infringement upon another protected right.[92] As has already been noted, it has long been recognized that the right to marry, procreate, and raise a family is a fundamental right.[93] Consequently, even a law of general application may infringe the Free Exercise Clause when at the same time it results in curtailing a person's freedom to marry. Free exercise in that type of hybrid situation remains protected even if the burden is generated by a generally applicable law.

(e) Perhaps the most significant factor that removes divorce cases from the class of laws held constitutional in *Employment Division* is, as has been argued, that divorce laws are grounded in principles of equity. For that reason—again, as argued above—divorce law cannot be mechanically applied in situations in which the result would create inequity. Equity, by its very nature, is not general but fact-specific. If the court has the power to consider all relevant circumstances, it necessarily follows that what is equitable in one situation may be inequitable in another. Divorce law, then, is not one-size-fits-all. Therefore divorce laws are not laws of general applicability

Divorce is not a state-provided benefit available to one and all. Rather, each decree of divorce is case-specific, applicable to one couple only and entered with that couple's situation in mind. A decree is granted to or withheld from a petitioner depending upon a totality of circumstances. Because that is the case, divorce decrees are not laws of general application. Religious concerns, to the extent that they contribute to an inequitable result, must be given consideration. The requirements of the Free Exercise Clause mandate this even after the *Employment Division* case.[94]

If the principle established in *Employment Division* is not applicable to divorce law, the dilemma created by granting a demand for cooperation in executing a religious divorce in order to accommodate a spouse's free exercise claim, without violating the competing ban against excessive entanglement in matters of religion in ordering such cooperation, remains a vexing problem. There is, however, at least one avenue of escape from between the horns of the

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[91] Employment Division v. Smith, 494 U.S. 872, 881 (1990).

[92] *See id.* at 882. ("The present case does not involve such a hybrid situation.")

[93] *See supra* note 67 and accompanying text.

[94] I am indebted to Professor Scott FitzGibbon, who suggested some of the arguments advanced in this subsection (e).

dilemma: simple recognition that the court's hands are tied and that it cannot intervene in such a situation by granting the petition for divorce. In the face of competing but equally valid claims, the state must remain neutral. Although a decree of divorce may not be denied in an arbitrary manner, dissolution of a marriage is, in essence, an act of grace by the state. The state may not act in an inequitable manner; nor dare it, through judicial action, interfere with the free exercise of religion. Therefore, it should do nothing. The court need not direct the husband to issue a *get*, but it should not entertain his petition for divorce unless he has already removed any existing impediment to remarriage by his spouse or unless he undertakes to do so. If the husband wishes to petition for a divorce decree, he must, without prodding by the court, create a state of affairs in which the state may grant the petition without generating harm to others.

The U.S. Supreme Court has recognized that Jefferson's "wall of separation between Church and State" is in reality a "blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."[95] Professor Laurence Tribe has described a "zone of permissible accommodation" in which governmental actions "arguably compelled" by the Free Exercise Clause are not forbidden by the principle of separation of church and state.[96] Assuredly, the First Amendment does not require courts to be oblivious to concerns born of religious conviction. In *Zorach v. Clauson*,[97] the Supreme Court declared that there is "no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence."[98] Religious obligations and the traumatic personal and social effects of disregarding them should certainly be carefully weighed by courts in determining whether equitable relief is appropriate.

The arguments that purport to raise an Establishment Clause barrier, effectively barring enforcement of either an express or implied contractual undertaking to execute a *get*, focus upon two contentions: (a) A court order directing the execution of a *get* constitutes judicial entanglement in an act that is religious in nature. (b) Regardless of whether or not the act so mandated is religious in nature, its function and purpose is religious and hence judicial enforcement is a violation of the Establishment Clause.

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[95] Lemon v. Kurzman, 403 U.S. 602, 614 (1971). *See also* J. TUSSMAN, THE SUPREME COURT ON CHURCH AND STATE xv–xvi (1962).

[96] TRIBE, *supra* note 34 § 14-4, at 1168–69 (2d ed. 1988). The phrase "arguably compelled" appears at p. 1168 and the phrase "zone of permissible accommodation" appears at p. 1169.

[97] 343 U.S. 306 (1952).

[98] *Id.* at 314.

From 1971 until the 1990s, the basic standard for conformity with the Establishment Clause was the tripartite test of *Lemon v. Kurtzman*[99]: A law was valid if it (a) served to promote a secular purpose; (b) did not have a primary effect that promoted or inhibited religion; and (c) did not unduly entangle the government with religion. Although *Lemon* has never been overruled, there is some ambiguity with regard to presently applicable standards of constitutionality.[100] As early as 1992, in *Lee v. Weisman*,[101] forbidding prayer at school graduation ceremonies, the Supreme Court based its decision on the coercive nature of that practice. A year later, in *Lamb's Chapel v. Center Moriches Union Free School District*,[102] Justice White and Justice Scalia seemed to disagree with regard to whether the *Lemon* test was still applicable. In 1995, in *Rosenberger v. University of the Virginia*,[103] the Court held that a state university that supports a wide array of student publications cannot refuse to subsidize a magazine that advocates commitment to a Christian lifestyle. The Court found refusal of funding to be a content-based violation of constitutionally protected free speech, despite the fact that the publication in question "primarily promotes or manifests a particular belief in or about a deity or an ultimate reality."[104]

Further erosion of the *Lemon* test is evident in *Capitol Square Review and Advisory Board v. Pinnette*,[105] which involved a claim by the Ku Klux Klan to a right to plant a cross—an obvious religious symbol—on government property on the grounds that other private groups were permitted nonreligious displays. Justice O'Connor, joined by Justices Souter and Breyer, endorsed the position of the Ku Klux Klan on the grounds that because a reasonable, informed observer would not perceive the display as an endorsement of the Klan's religious agenda, there was no violation of the Establishment Clause. Four Justices, including Justice Scalia, Chief Justice Rehnquist, and Justices Kennedy and Thomas, went beyond that position in asserting that, provided that the government allows private speech on public property without discrimination, possible perceptions of endorsement are irrelevant. Justices Stevens and Ginsburg also advocated an endorsement test but found state endorsement to be discernible even though Justice O'Connor failed to perceive its presence. None of the justices invoked the

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[99] 403 U.S. 602 (1971).

[100] For a survey of evolving tests of applicability and consequent ramifications of the Establishment Clause, see Kent Greenawalt, *Quo Vadis: The Status of Prospects of "Tests" Under the Religion Clauses*, 1995 SUP. CT. REV. 323 (1995).

[101] 505 U.S. 577 (1972).

[102] 508 U.S. 384 (1993). *Compare id.* at 393 (Justice White's opinion) *with id.* at 397 (Justice Scalia's opinion).

[103] 515 U.S. 819 (1995).

[104] *Id.* at 819 (quoting university guidelines).

[105] 515 U.S. 753 (1995).

Lemon test. Failure to refer to the *Lemon* test is not necessarily an *argumentum ad silencium* substituting for an audible sounding of its death knell, particularly since in *Capitol Square Review*, Justice O'Connor, joined by Justices Scalia and Breyer, expressed the view that no single test suffices for determining establishment issues.[106] Little wonder, then, that in upholding the constitutionality of placement of a plaque containing the Ten Commandments in a government building in *Van Orden v. Perry*,[107] the Supreme Court appeared to be unsure of the status of the *Lemon* test: the Court used the phrase, "whatever may be the fate of the *Lemon* test."[108] The Court went on to declare that "[s]imply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause."[109]

Provision for termination of a marriage by means of a *get* is not a violation of the Establishment Clause under either the *Lemon* test or the now-emerging endorsement test. A requirement that a religious divorce be effected when required by one of the parties does not involve the state in entanglement with matters of religion. To be sure, deciding matters of religious doctrine would be a blatant form of religious entanglement. But in the absence of a dispute concerning the religious validity of a *get*—a dispute all would concede cannot be resolved by a civil court—a mere requirement for execution of a *get* presents no doctrinal entanglement. Undue entanglement may also include administrative entanglement. Thus, even when proper objectives are pursued, it may be necessary for state authorities to monitor the activities of religious organizations in order to ensure that legitimate objectives are fostered, for example, assuring that public funds granted to religious schools are used only for mundane purposes and not for furthering religious education. Since the courts would not be involved in monitoring the drafting and delivery of a *get*, administrative entanglement is simply not an issue.

As has been argued, the purpose of the *get* is to enable remarriage. Thus the *get* facilitates the exercise of a fundamental liberty, a goal that assuredly constitutes a secular purpose. Enabling a divorced spouse to enter into a new marriage with a clear religious conscience is secondary to enabling that social phenomenon to occur. A precise definition of *endorsement* as formulated by the various members of the Supreme Court is elusive.[110] A requirement that persons

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[106] *Id.* at 778. Justice O'Connor expressed that opinion earlier in *Board of Education v. Grumet*, 512 U.S. 687, 720 (1994).
[107] 545 U.S. 677 (2005).
[108] *Id.* at 686.
[109] *Id.* at 690.
[110] For a discussion of various possible understandings of that concept, see Greenawalt, *supra* note 100, at 370–75.

who have contracted a marriage in accordance with the tenets of the faith to which they adhere—and only such persons—be required to dissolve the marriage in accordance with the tenets of that faith in order to be eligible to contract a second marriage certainly cannot be construed as endorsement according to any definition of the concept.

Even if the Establishment Clause forbade a court to require the delivery of a *get*, it might still permit a court to make such a delivery a condition of divorce. The imposition of the condition would fall short of an outright command. This more modest step would surely not entangle the state in religious matters, nor could it be construed as endorsement.

Would imposing such a condition violate the Establishment Clause? This question must be examined in light of conflicting analyses of the First Amendment. A rigid "strict separation theory" of interpretation would indeed require a Jeffersonian "wall of separation between Church and State," which would preclude judicial cognizance of any religious issue or concern whatsoever. Such a construction of the Establishment Clause, however, could only serve to hamper free exercise. In *School District of Abington Township v. Schempp*,[111] Justice Stewart remarked that "a lonely soldier stationed at some faraway outpost could surely complain that government which did *not* provide him the opportunity for pastoral guidance was affirmatively prohibiting the free exercise of his religion."[112]

One approach would be to allow strong free exercise claims always to trump establishment claims. However, it is not necessary to adopt such an unequivocal position in order to defend a policy of refusal to issue a divorce decree. That end may be achieved by application of a "neutral principles" approach. Although such an approach may perhaps be incompatible with one of strict neutrality, which would hold that "government cannot utilize religion as a standard for action or inaction because [the two religion clauses] prohibit classification in terms of religion either to confer a benefit or impose a burden,"[113] it is nevertheless clear that the Supreme Court has never adopted a theory of that nature.[114] Instead, as formulated in *Walz v. Tax Commission*,[115] the Court has sought "to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other."[116] In *Everson v. Board of Educa-*

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[111] 374 U.S. 203 (1963).
[112] *Id.* at 309 (emphasis added).
[113] KURLAND, RELIGION AND THE LAW 18 (1962).
[114] *See* TRIBE, *supra* note 34 § 14-4, at 1167 (2d ed. 1988).
[115] 397 U.S. 664 (1970).
[116] *Id.* at 668–69.

tion,[117] the Supreme Court declared that neither a state nor the federal government "can pass laws which aid one religion, aid all religions, or prefer one religion over another."[118] As demonstrated by Professor Katz, the "no-aid" rule enunciated in *Everson* is merely a rule of neutrality.[119]

Nonintervention constitutes a particularly apt application of the neutrality doctrine formulated in *Walz*. Indeed, nonintervention is probably the most perfect expression of neutrality. It certainly serves to guarantee the realization of the standard of religious liberty formulated by Justice Goldberg in *Abington*, namely, that government "work deterrence of no religious belief."[120] Such neutrality should be required particularly in matters involving competing free exercise claims. As stated by Justice Black in *Everson*, "[The First] Amendment requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them."[121] The state must be neutral in its relations with individual believers no less than its relations with groups of believers; it should not become the adversary of one by conferring an inequitable benefit upon another.

Assuredly, adoption of such a policy involves an accommodation of religious belief and practice. However, it is well established that accommodation is consistent with a "neutral principles" understanding of the First Amendment. Accommodation through nonintervention is less sweeping than the form of accommodation at issue in *Zorach v. Clauson*,[122] where released-time programs for religious study and prayer were upheld by the Court. As aptly stated by Tribe in the first edition of his *American Constitutional Law*:

> This approach does, of course, entail a notion of accommodation—recognizing that there are necessary relationships between government and religion; that government cannot be indifferent to religion in American life; and that, far from being hostile or even truly indifferent, it may, and sometimes must accommodate its institutions and programs to the religious interests of the people.[123]

To paraphrase Justice Black's concluding comment in *Everson*:[124] The First Amendment has erected a wall between church and state. That wall must be

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[117] 330 U.S. 1 (1947).
[118] *Id.* at 15.
[119] KATZ, RELIGION AND AMERICAN CONSTITUTIONS 22 (1964).
[120] 374 U.S. at 305 (Goldberg, J., concurring).
[121] 330 U.S. at 18.
[122] 343 U.S. 306 (1952).
[123] TRIBE, *supra* note 34, § 14-4, at 822 (1978).
[124] 330 U.S. at 18.

kept high and impregnable. We could not approve the slightest breach. Adoption of the policy here advocated will not breach it.

VII. NONINTERVENTION VERSUS INTERVENTION FROM A JEWISH LAW PERSPECTIVE

Quite apart from considerations of constitutional law, concern for the validity of the *get* in Jewish law would favor a procedure that does not directly involve civil courts in the execution of a Jewish divorce. Unlike situations created in instances of a judicial order to execute a religious divorce, a *get* executed by a husband in order to secure a favorable response to a petition before the court is not subject to challenge, in Jewish law, on the grounds of duress.[125] The general rule is that, if a non-Jewish judicial authority compels a Jew to execute a *get*, the *get* is invalid even if its execution would normally have been required by Jewish law. In order for a *get* executed under duress to be valid in Jewish law, two conditions must be met: (a) there must be sufficient grounds in Jewish law to compel the husband to divorce his wife; and (b) the coercion must be in the form of a directive—not to issue a *get*—but to obey the command of the *Bet Din*.[126] The validity of a *get* in situations such as those in *Stern*,[127] *Minkin*,[128] *Roth*,[129] *Gelb*,[130] *Scholl*,[131] *Kaplinsky*,[132] *Steinberg*,[133] *Goldman*,[134] and *Aflalo*[135]

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[125] With very limited exceptions, a *get* executed under duress is invalid. *See generally* the sixteenth-century authority, REMA, *SHULHAN ARUKH, EVEN HA-EZER* 154:21 and accompanying commentaries.

[126] *See* the sixteenth-century authority, *SHULHAN ARUKH, EVEN HA-EZER* 134:7–9.

[127] Stern v. Stern, N.Y.L.J. Aug. 8, 1979, at 13, col. 5. In *Stern* the court directed the husband to deliver a *get* to his wife on the basis of a finding that the husband had obligated himself to do so in certain circumstances by virtue of execution of a *ketubah* at the time of the wedding. *Id.* at col. 6. The court's opinion did not cite but nevertheless relied heavily upon an earlier decision based on similar grounds by a Canadian court in *Morris v. Morris*, 36 D.L.R.3d 447 (Manitoba Q.B.), *rev'd*, 42 D.L.R.3d 550 (Manitoba App. 1973).

[128] Minkin v. Minkin, 434 A.2d 665 (N.J. Super. 1981). In *Minkin,* the court adopted the same approach as in *Stern* in ruling that the *ketubah* constituted a binding contract requiring a *get* when mandated by Jewish law.

[129] Roth v. Roth, No. 79-192709-DO (Mich. Cir. Jan. 23, 1980). The language employed in *Roth* directs the husband "to apply for and obtain a Jewish divorce." *Id.* at 3. Presumably, this language should be understood as directing the husband to execute a *get*.

[130] Gelb v. Gelb, Del. Fam., No. CN87-0310, Horgan, J. (June 27, 1990).

[131] Scholl v. Scholl, 621 A.2d 808 (Del. Fam. Ct. 1992). In both *Gelb* and *Scholl*, the court enforced a stipulation of the parties requiring the execution of a Jewish divorce. In *Scholl,* the court focused upon the language of the stipulation that provided, "Husband shall forthwith cooperate with Wife in allowing her to obtain a Jewish Divorce known as a GET." *Id.* at 812. The court concluded that the husband's conduct and procrastination, as well as his

is open to question,[136] because, in those cases, the court was asked to order the granting of a *get* rather than to order compliance with the mandate of a Jewish authority.[137] When, as in *Price*,[138] *Koeppel*,[139] *Burns*,[140] and *Margulies*,[141] the

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awareness that the *get* provided failed to meet wife's needs, violated his contractual undertaking "to *cooperate* with Wife in allowing her to obtain a GET" (emphasis in original). *Id.* at 812–13. It would seem to this writer that the clause "in allowing *her* to obtain a GET" (emphasis added) more fully reflects the nature of the contract and serves as a firmer basis for concluding that the husband failed to fulfill his undertaking. Those words can readily be construed as granting the wife the initiative in determining all aspects of the timing and venue of the *get*. If so, there was no need for the court to focus upon whether or not the husband's conduct was antithetical to his undertaking to "cooperate" in obtaining a *get*.

[132] Kaplinsky v. Kaplinsky, 603 N.Y.S.2d 574 (App. Div. 1993). In *Kaplinsky*, the parties entered into a stipulation in open court that was later incorporated in the judgment of divorce. The husband undertook to "remove any and all barriers to the wife's remarriage" and was found guilty of contempt for failure to do so. The appellate court refused to vacate an order of arrest. 603 N.Y.S.2d at 575.

[133] Steinberg v. Steinberg, 1982 WL 2446 (June 24, 1982) (described in note 34, *supra*, and in note 134, *infra*).

[134] In re Marriage of Goldman, 554 N.E.2d 1016 (Ill. App. 1990), *supra* note 25. In both *Steinberg* and *Goldman*, the court recognized the *ketubah* as a valid contract and construed it as requiring execution of a *get* upon breakdown of the marriage. In each of these cases the court would have been better advised simply to have ordered the parties to appear before a *Bet Din* for the purpose for adjudicating any controversy with regard to execution of a *get*. Such a judicial directive would be in the nature of: "Do that which the Israelites tell you"; *see* SHULHAN ARUKH, EVEN HA-EZER 134:9. In *Morris v. Morris*, 36 D.L.R.3d 447 (Manitoba Q.B.), *rev'd* 42 D.L.R.3d. 550 (Manitoba App. 1973), Justice Wilson astutely ordered: "[a]llied with the declaratory order earlier pronounced, there will be an order that the respondent do present himself before the Beth Din to institute inquiry whether a bill of divorcement is necessary as between the parties, and to institute proceedings for the same should the Beth Din so determine." 36 D.L.R.3d at 458.

However, in *Victor v. Victor*, 866 P. 2d 899 (Ariz. Ct. App. 1993) (described in the text at note 41, *supra*), the court refused order a *get* on the basis of the terms of the *ketubah*. Although the court accepted the contention that the phrase "laws of Moses and Israel" as it occurs in the *ketubah* refers not only to laws establishing marriage but also to laws relating to the dissolution of marriage, it found that provision vague in that it did not refer to securing a Jewish divorce. The court further found that if it were to rule on whether the *ketubah* includes an unwritten mandate to that effect, the court would be "overstepping our authority and assuming the role of a religious court." 866 P.2d at 902.

[135] Aflalo v. Aflalo, 685 A.2d 523 (N.J. Super. Ch. Div. 1996), discussed in the text at note 37, *supra*.

[136] *See, e.g.*, the discussion of this issue by R. MOSES FEINSTEIN, *IGGEROT MOSHEH, EVEN HA-EZER* 3, no. 44 (1973).

[137] Whether or not an order was formally entered pursuant to the decision of the court and whether or not the husband was actually threatened with sanctions for contempt of court appears to be of no material significance. The thirteenth-century scholar, R. MENACHEN HA-

court directs fulfillment of an explicit undertaking on the part of the husband, the problem is more complex.

Serious questions arise in cases in which the husband seeking the civil divorce has entered into an undertaking, on some previous occasion, to grant a *get*. This situation was presented in the case of *Margulies v. Margulies*, in which the court upheld the imposition of fines on a husband who had failed to perform his agreement to "appear before a Rabbi designated for the purposes of a Jewish religious divorce."[142] A case such as *Margulies* raises the question whether such an undertaking is binding and enforceable in Jewish law[143] and whether, even if the undertaking is otherwise enforceable in Jewish law, a self-imposed obligation constitutes duress.[144] Moreover, assuming that execution of a *get* pursuant

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ME'IRI, *BET HA-BEHIRAH, GITTIN* 88b, in defining the duress that serves to invalidate a *get*, declares: "[B]ut even if they confused and frightened him … it is absolute duress."

[138] Price v. Price, 16 Pa. D. & C. 290 (Ct. Common Pleas 1932). In *Price*, the wife applied for an order requiring her husband to execute a religious divorce on the grounds of an alleged antenuptial oral undertaking to "obey all regulations affecting marital and post-marital relations and practices among Hebrews." *Id.* at 290. The court denied the application on the ground that it had no authority to order a person to "follow the practices of his faith." *Id.* at 291.

[139] Koeppel v. Koeppel, 161 N.Y.S.2d 694 (S. Ct. 1957). While an action for annulment of the marriage was pending, the parties entered into an agreement to cooperate in securing a religious divorce "whenever the same shall become necessary." Enforcement was denied because the petitioner had already remarried in a religious ceremony with an ordained rabbi as the officiant. Given the circumstances the appellate court regarded the religious divorce as not "necessary."

[140] Burns v. Burns, 538 A.2d 438 (N.J. Super. Ch. Div. 1987).

[141] Margulies v. Margulies, 344 N.Y.S.2d 482 (S.Ct.), *appeal dismissed*, 33 N.Y.2d 894 (1973). In *Margulies*, the issue was the fulfillment of an undertaking entered into in open court rather than a contract between the parties. The court imposed a fifteen-day jail term and a fine of $450 for contempt. The appellate court vacated the order directing imprisonment but allowed the fine to stand. 344 N.Y.S.2d at 482.

[142] *Id.*

[143] According to the vast majority of rabbinic authorities, such an undertaking is neither enforceable nor binding. *See* R. JUDAH HA-KOHEN SCHWARTZ, *TESHUVOT KOL ARYEH, EVEN HA-EZER*, no. 85 (1904); R. MEIR ARAK, 1 *TESHUVOT IMREI YOSHER*, no. 6 (1913). *Cf.* R. SAMUEL BEN URI, *BET SHMU'EL, EVEN HA-EZER* 134:7 (1689). In two reported cases, rabbinical courts in Israel have ruled that such an agreement on the part of the husband cannot be enforced. 7 *PISKEI DIN SHEL BATEI HA-DIN HA-RABBANIYIM* 353, 358–61 (Rabbinical District Court of Tel Aviv-Jaffa 1969). Regarding enforceability of such an undertaking on the part of the wife, see 4 *PISKEI DIN SHEL BATEI HA-DIN HA-RABBANIYIM* 353, 354 (Supreme Rabbinical Court 1956).

[144] Such a question is presented by an oath to execute a *get* or an undertaking to pay a penalty in the event that a *get* is not issued. *See* conflicting authorities cited by *SHULHAN ARUKH, EVEN HA-EZER* 134:5, and accompanying commentaries.

to a self-imposed obligation is not regarded as an act performed under duress, such a *get* would be invalid when ordered by a secular court rather than at the behest of a *Bet Din*.[145]

The gravity of these questions concerning the validity of a *get* executed under threat of citation for contempt of court weighs against reliance upon such a procedure as a means of securing the cooperation of the husband. However, a *get* executed, not as the result of coercion or threat of penalty, but in anticipation of some benefit or gain is certainly valid.[146] Thus, execution of a *get* as a means of achieving freedom to marry another woman is not the result of coercion. There can be no question that a *get* executed by a husband, not as a result of an order from a court, but because of his desire for favorable consideration of a divorce petition, would be valid.[147]

VIII. NONINTERVENTION IN GREAT BRITAIN

A. Judicial

An early version of the proposal for nonintervention on grounds of equity was set forth in an article published by this author in 1984.[148] In 1999, in *N v. N*,[149] Justice Nicholas Wall declared that, even absent statutory authorization, a court has the power to prevent a decree nisi from becoming absolute owing to the petitioning spouse's refusal to grant a *get*. Judge Wall further declared that, under such circumstances, a court might go so far as to refuse to hear a petition for enhanced visitation rights owing to an unfulfilled agreement on the part of the husband to grant a *get*.

In *N v. N*, the husband and wife had entered into a prenuptial agreement stipulating that marital disputes would be submitted to the London *Bet Din* and that the parties would comply with the instructions of the *Bet Din*. The wife petitioned for a decree absolute. The decree was granted but the husband refused to appear before the *Bet Din*. Judge Wall denied the wife's petition for specific performance or injunctive relief on the grounds that prenuptial agreements entered in contemplation of a breakdown of a marriage are not enforceable in

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[145] *See* SHULHAN ARUKH, EVEN HA-EZER 134:8–9.

[146] *See generally* REMA, SHULHAN ARUKH, EVEN HA-EZER 154:21, and accompanying commentaries.

[147] *See, e.g.*, R. ISSAC JACOB WEISZ, 8 *MINHAT YITZHAK*, no. 137 (1983).

[148] J. David Bleich, *Jewish Divorce: Judicial Misconceptions and Possible Means of Civil Enforcement*, 16 CONN. L. REV. 201 (1984).

[149] N v. N, [1999] 2 F.C.R., [1999] Fam. Law, 691, 2 Fam. L. Rep. 745 (Fam. Div. 1999).

Great Britain, because they undermine the institution of marriage and hence are in violation of public policy. Nevertheless, Judge Wall declared:

> The court has a discretion to decline to make a decree nisi of divorce absolute on the application of a spouse against whom the decree nisi has been pronounced if there would be prejudice to the spouse who had obtained the decree: see, for example, *Wickler v Wickler* [1998] 2 FLR 326 and the cases there cited.
>
> Thus, in a case in which a husband had agreed to obtain a Get and had not done so, I have no doubt that it would be within the proper exercise of the court's jurisdiction to allow a wife petitioner to delay making the decree nisi absolute, and then to decline to give leave for the decree nisi to be made absolute on the husband's application until such time as he had honoured his agreement to obtain a Get.[150]

In a concluding statement, Judge Wall went well beyond that position in stating:

> [I]n an appropriate case the court, in my view, currently has the power to refuse to permit a decree nisi of divorce to be made absolute on the application of a spouse who is refusing to co-operate in the grant and receipt of a Get.[151]

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[150] 2 F.L.R. at 597. Rebecca Bailey-Harris, *Case Reports—Divorce: Comment*, 29 FAM. LAW 691, 692 (1999), asserts that a *get* executed in such circumstances would be invalid according to Jewish law on the grounds of compulsion. She bases that conclusion upon Michael Freeman's analysis of *Brett v. Brett*, [1969] All ER 1007, presented in Freeman's *Law, Religion and the State: The* Get *Revisited*, *supra* note 19, at 366. However, the cases are not similar and Bailey-Harris's conclusion is incorrect. In *Brett*, the husband refused to execute a divorce and, accordingly, the wife petitioned for a large lump-sum payment to compensate her for his refusal. The court awarded her £30,000, to be reduced by £5,000 upon execution of a *get* within three months. Freeman reports that the decision was accepted by British rabbinical authorities in 1969, but that by 1984 they had reversed their position and regarded a religious divorce executed under such circumstances as unacceptable. No citations or sources are provided.

The decree in *Brett* established a judicially enforceable penalty for nonissuance of a *get*. Such a decree clearly involves financial duress. Little wonder that it was recognized as such by rabbinic courts. As has been earlier demonstrated, refusal to issue a civil decree of divorce constitutes, at least in the eyes of Jewish law, withholding of a benefit rather than a penalty. There is a clear distinction between the proffering of an inducement and the imposition of a sanction. Bailey-Harris errs in asserting that, if the penalty imposed in *Brett* constitutes duress, *a fortiori* the threat to withhold a divorce, as discussed in *N v. N*, would have rendered the *get* invalid. Freeman himself commits the same error in commenting upon *N v. N* in his article, *The Jewish Law of Divorce*, [2000] INT'L FAM. LAW 58, 60. *See generally* the discussion of duress, *supra* notes 93–94 and accompanying text, and J. DAVID BLEICH, 1 *BE-NETIVOT HA-HALAKHAH*, 124–25 (1996).

[151] N v. N, [1999] 2 F.L.R. 745, 761 (Fam. D.), [1999] 2 F.C.R., [1999] FAM. LAW, 691.

Unfortunately, that remedy was not available in *N v. N* because Mrs. N. had already applied at the earliest possible time for the decree to be made absolute and her petition had already been granted.

Some six months later, in *O v. O*,[152] a case before the Watford County Court, Judge Viljoen, without citing *N v. N*, ruled that a court has power to refuse a decree absolute even when the outstanding issue between the parties relates solely to religious beliefs and laws of their religion that are not part of English civil law. Judge Viljoen found statutory authority for withholding the decree in Matrimonial Causes Act 1973 § 9, which "empowers the court, in the widest terms, to do justice between the parties, and justice cannot be done where the husband is free to continue his religion without sanction while the wife remains burdened with the shackles of marriage." Accordingly, he concluded, a court has the power to delay making a decree absolute when special circumstances make it just to do so.[153] Judge Wall and Judge Viljoen arrived at identical conclusions but on slightly different grounds. Judge Wall found the power to withhold a decree to be within the inherent equitable power of a family court, while Judge Viljoen found authority in the broad language of a legislative act.[154] Subsequent legislation has made such authority explicit.

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[152] O v. O, [2000] FAM. LAW 532, 2 F.L.R. 147 (Watford County Ct., Dec. 16, 1999).

[153] [2000] FAM. LAW. at 532. Freeman, *Family Law Act 1996*, *supra* note 19, at 60, applauds the "humanity and radicalism" of the British judges while censuring what he characterizes as the "dogmatism and conservatism of those who interpret Jewish law in England today." Freeman declares:

> If the husband in the Watford case now gives his wife a gift it may be expected that the *dayanim* will label this [the get] as me'useh [i.e., given under duress and therefore void], and nothing will have been achieved, save undermining the legitimacy of the *dayanim* still further.

That comment reflects animus against rabbinic judges as well as a failure to grasp nuances of Jewish law. Refusal to entertain a petition for a decree of civil divorce does not constitute duress under Jewish law as has been noted *supra* note 147 and accompanying text. Most assuredly, an inducement in the form of a gift to the wife does not result in a *get* that is *me'useh*.

[154] John C. Klerfeld & Amanda Kennedy, *"A Delicate Necessity":* Brucker v. Marcovitz *and the Problem of Jewish Divorce*, 24 CAN. J. FAM. LAW 205, 226–27 (2008), *citing* Bleich, *supra* note 148. They pay this writer the compliment of remarking upon the "elegance of Bleich's solution as implemented by Viljoen J. in O v. O," which they believe was traced "wittingly or unwittingly" by Judge Viljoen.

In point of fact, my argument was more closely traced in *N v. N* than *O v. O*, since I emphasized the inherent equitable powers of a divorce court rather than provisions of a statute. Moreover, both courts were influenced by the "*get* clause" contained in § 9(3) and (4) of the British Family Law Act 1996. As will be discussed *infra*, the provisions of that Act had not been implemented at the time the decisions in those cases were issued. In each case the court concluded, as I have argued, that even absent explicit statutory authority, the court

B. Legislative

The British Family Law Act 1996[155] effected a number of fundamental changes in British divorce law, including elimination of matrimonial fault from the divorce process and encouragement of mediation as the preferred method of settling disputes. The goal of the Act was to meet the twin objectives of saving salvageable marriages and promoting a conciliatory approach to divorce when it becomes evident that divorce is the sole viable option.

Part II of the 1996 Act contained a provision for informational meetings during nascent stages of the proceedings, on the principle that parties to a divorce should receive accurate, objective, and factual information at an early stage. The Act further required that the parties' financial arrangements be completed in advance. Under the Act, divorce could be granted only when all the financial arrangements had been finalized and were in place. The 1996 Act was scheduled for implementation in 2000. In the interim, pilot programs were established for purposes of testing various models of informational meetings and modes of mediation. The results were disappointing in the sense that there was no significant impact by way of preserving floundering marriages. As a result, the government announced its intention to ask Parliament to repeal Part II of the Family Law Act.

Judge Wall's reference in his 1999 decision in *N v. N* was to one of the provisions of the unimplemented Part II of the Family Law Act 1996. Section 9 (3) and (4) provided that either party might petition the court to prevent the divorce decree from becoming final until a declaration of both parties was produced indicating that the parties had taken the steps required to dissolve the marriage in accordance with the usages of the religion in which the marriage had been solemnized. Judge Wall found that, even absent legislation, the court has discretionary authority to withhold finality under those circumstances. Those provisions of Part II were subsequently enacted in the Divorce (Religious Marriages) Act 2002.[156]

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has the power to withhold a decree of divorce on equitable grounds. The "*get* clause" of the Family Law Act 1996 and its successor legislation, the Family Law Act 2002, were indeed directly influenced by my 1984 article.

[155] Family Law Act 1996, c. 27, http://www.legislation.gov.uk/ukpga/1996/27

[156] Divorce (Religious Marriages) Act, 2002, c. 27, http://www.legislation.gov.uk/ukpga/2002/27/section/1, reads:

> **1 Power to refuse decree absolute if steps not taken to dissolve religious marriage**
> (1) In the Matrimonial Causes Act 1973 (c. 18), insert—
> **"10A Proceedings after decree nisi: religious marriage**
> (1) This section applies if a decree of divorce has been granted but not made absolute and the parties to the marriage concerned—

The Divorce (Religious Marriages) Act of 2002, unburdened by the First Amendment, forthrightly addresses religious divorce and avoids vagueness and indirection. Eschewing circumlocution, the statute refers explicitly to "the usages of the Jews"[157] and also to "any other prescribed religious usages."[158] The statute provides that either party to a divorce may ask the court to order that a decree of divorce not be made absolute "until a declaration made by both parties that they have taken such steps as are required to dissolve the marriage in accordance with those usages is produced to the court."[159] It provides that the court's order "may be made only if the court is satisfied that in all the circum-

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a. were married in accordance with—
i. the usages of the Jews, or
ii. any other prescribed religious usages; and
b. must co-operate if the marriage is to be dissolved in accordance with those usages.
(2) On the application of either party, the court may order that a decree of divorce is not to be made absolute until a declaration made by both parties that they have taken such steps as are required to dissolve the marriage in accordance with those usages is produced to the court.
(3) An order under subsection (2)—
a. may be made only if the court is satisfied that in all the circumstances of the case it is just and reasonable to do so; and
b. may be revoked at any time.
(4) A declaration of a kind mentioned in subsection (2)—
a. must be in a specified form;
b. must, in specified cases, be accompanied by such documents as may be specified; and
c. must, in specified cases, satisfy such other requirements as may be specified.
(5) The validity of a decree of divorce made by reference to such a declaration is not to be affected by any inaccuracy by that declaration.
(6) 'Prescribed' means prescribed in an order made by the Lord Chancellor and such an order—
a. must be made by statutory instrument;
b. shall be subject to annulment in pursuance of a resolution of either House of Parliament.
(7) 'Specified' means 'specified in rules of court.'"

The "specified" form of the declaration to which reference is made in (4)(a) was later spelled out in the Family Proceedings (Amendment) Rules 2003. The specified declaration is to be in the form of certification by a relevant religious authority to the effect that the marriage has been dissolved in accordance with religious law. The applicant for the original order is empowered to determine which religious authority is competent to determine that the marriage has been dissolved.

The Family Law (Scotland) Act 2006 incorporated virtually identical provisions in Scottish law.

[157] The Divorce (Religious Marriages) Act 2002 § 10A(1)(a)(i), http://www.legislation.gov.uk/ukpga/2002/27/section/1

[158] *Id.* § 10A(1)(a)(ii).

[159] *Id.* § 10A(2).

stances of the case it is just and reasonable to do so."[160] Thus one knows precisely what it is that husband and wife must do, that is, comply with the provisions of Jewish law or the "usages" of any other religion in which the marriage was solemnized.

IX. THE NEW YORK STATE *GET* ACT

An attempt to provide explicit statutory authority for withholding a civil decree of divorce in the face of the husband's refusal to execute a religious divorce was embodied in a proposed addition to New York's Domestic Relations Law. The proposed amendment—A. 7980—was adopted by the legislature during the 1981–1982 legislative session, but was subsequently withdrawn from the governor's desk by its sponsor. The proposal explicitly provided judicial discretion in the issuance of a divorce decree in cases where one of the parties to a divorce action refused to cooperate in removing a barrier to remarriage by his or her spouse. The intent of the drafters was to give explicit recognition to the principle, articulated in *Roth*, that equitable relief in the form of a divorce decree ought not to be available to one party when the decree would result in a gross inequity to the other party, as would be the case if, for example, the other party would confront a barrier to remarriage that might readily be removed with the cooperation of the party seeking the decree. The passage of this bill was an attempt to cloak with legislative authority a power that, as here argued, is already inherent in the prerogatives of a court of equity.

Instead, in 1983, the New York legislature turned from affirming the equitable powers of the court, generating a mechanism and placing it predominantly in the hands of the parties. The legislature enacted Domestic Relations Law (DRL) § 253, which requires a plaintiff seeking a divorce or annulment of a marriage to file with the court and serve on the defendant a sworn statement that he or she has taken "all steps solely within his or her power to remove all barriers to the defendant's remarriage … ."[161] The statute requires both parties to file and serve the affidavit only when the defendant enters a general appearance and does not contest the requested relief.[162] If the statement is not provided, the court is not permitted to enter final judgment.[163]

The statute defines "barriers to remarriage" as including "any religious or conscientious restraint or inhibition, of which the party … is aware, that is

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[160] *Id.* § 10A(3)(a).
[161] N.Y. DOM. REL. LAW § 253(3). The provision applies only in cases of marriages solemnized by clergy.
[162] *Id.* § 253(4).
[163] *Id.* § 253(3).

imposed on a party to a marriage, under the principles held by the clergyman or minister who has solemnized the marriage, by reason of the other party's commission or withholding of any voluntary act."[164] The statute specifies that the phrase "all steps solely within his or her power to remove any barrier to the defendant's remarriage" does not include "application to a marriage tribunal or other similar organization or agency of a religious denomination which has authority to annul or dissolve a marriage under the rules of such denomination."[165] The statute thus expressly excludes an application for annulment of the marriage by a Catholic diocesan tribunal. Finally, the statute provides that, notwithstanding the filing of the prescribed statement, no judgment of annulment or divorce may be entered if the clergyman who solemnized the marriage certifies that the plaintiff has failed to remove all barriers to the defendant's remarriage.[166]

Though the statute was drafted in general terms, in practice it applies only to Jewish divorce and to Islamic divorce (*talaq*). Like Jewish divorce, Islamic divorce requires the consent of the husband but, unlike Jewish divorce, Islamic divorce does not require the consent of the wife. Note that, in a contested action, the statute requires only the plaintiff to serve the affidavit. The statute does not require the defendant to do so (unless the defendant cross-files by presenting his or her request for relief). Suppose, as is the case in the overwhelming majority of instances, that it is the wife who institutes divorce proceedings. The statute requires her to file and serve an affidavit but may not require the defendant husband to do so as well. It is also necessary to bear in mind that Jewish divorce can be effected only if both parties to the divorce consent. Suppose a husband files for civil divorce. The statute requires him to file and serve an affidavit but may not require his wife to file and serve an affidavit. But it may be the wife, not the husband, who refuses to participate in the Jewish divorce. As drafted, the statute does not, for many cases, provide a solution for the defendant. Thus DRL § 253 does not resolve all problems that may arise in instances of Jewish divorce.

New York's DRL § 253 rapidly proved to be an insufficient remedy for the simple reason that the recalcitrant party, generally the husband, might choose to forego the benefits of a civil divorce. To be truly effective, some sanction would have to be applied for failure to cooperate in executing a *get*. It was precisely for that reason that, some ten years after the enactment of DRL § 253, the New York legislature amended DRL § 236 to provide that upon a failure to cooperate in the removal of a barrier to remarriage, the court must take such failure into

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[164] *Id.* § 253(6).
[165] *Id.*
[166] *Id.* § 253(7).

consideration when assessing both maintenance and the equitable distribution of matrimonial assets. DRL § 253 is now commonly referred to as *Get* Law 1, and the amendment to DRL § 236 as *Get* Law 2.

The constitutional problems posed by a statute so ostensibly concerned with matters of religion are of greater magnitude than those attendant to legislation predicated upon more general concerns of equity, as in the model act discussed below. The drafters of DRL § 253 presume that participation in a denominational religious ceremony in effect constitutes tacit assumption of an obligation to dissolve the marriage in accordance with the tenets of that denomination, and that enforcement of such a contractual undertaking is warranted on the basis of the "neutral principles" doctrine.[167] Certainly, the statute serves to give notice that participation in a religious ceremony will constitute such an undertaking. The party who does not wish to enter into such an undertaking is free to seek out clergy whose religious beliefs do not require the removal of a barrier to remarriage other than civil divorce, or to choose the option of a civil marriage. He or she cannot choose marriage within a specific denomination without agreeing to terminate the marriage in accordance with the tenets of that denomination.

Furthermore, by singling out cooperation with ecclesiastical tribunals for exclusion, the statute severely diminishes the force of the "neutral principles" argument. In addition, allowing the member of the clergy who has solemnized the marriage, and only that person, to certify that the plaintiff has failed to remove all barriers to the defendant's remarriage constitutes an establishment of religion.

Moreover, the statutory phrase "barriers to remarriage" is vague. What constitutes a "barrier to remarriage"? Is a husband's refusal to pay for his wife's rhinoplasty a "barrier to remarriage"? Is his refusal to pay for her psychotherapy a barrier? If either cosmetic surgery or psychotherapy would facilitate the wife's remarriage and the husband is a man of means, it is certainly within his power to defray the cost of removing the barrier. It is highly unlikely that the drafters of the legislation meant to include such expenses within the ambit of the statute. Yet, a perfectly plausible reading of the statute supports the conclusion that the legislature does impose such financial obligations upon the petitioner.

Get Law 2 is certainly constitutionally more problematic than *Get* Law 1, because it involves not simply judicial nonintervention in the face of what are arguably equitable considerations, but instead applies pressure—and indeed duress—in the form of a financial penalty for noncooperation. Levying a penalty approaches establishment of religion more closely than does mere nonintervention.

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[167] For a discussion of the "neutral principles" standard in First Amendment adjudication, see *supra* notes 113–119 and accompanying text.

Moreover, from the vantage point of Jewish law, *Get* Law 2 poses problems with regard to the validity of any *get* executed subsequent to its enactment. *Get* Law 2 goes beyond *Get* Law 1 to mandate that the court take failure to cooperate in removing barriers to remarriage into account when awarding support and maintenance, and in effecting equitable distribution of marital assets. This requirement imposes a penalty upon the husband for noncooperation, and thus places him under duress.[168] Even if the requirement were limited to considering failure to remove a barrier solely as a factor in determining the wife's financial needs, owing to her consequent inability to remarry, Jewish law would characterize such an award as a penalty. The effect is a form of financial duress for failing to execute a *get*. *Get* Law 2 requires that the court "shall" take account of this factor. The term "shall" has the effect of commanding the judge to take that factor into consideration. Indeed, *Get* Law 2 requires that, should the judge find reason not to take failure to cooperate into consideration, he or she must state the reason in writing.

The effect of *Get* Law 2 is to create what in Jewish law constitutes financial duress, whether or not the court informs the husband that he will find withholding a *get* to be to his financial disadvantage.[169] The very existence of the statute poses a threat of a financial penalty for withholding a divorce. The question whether financial duress, and hence even a credible threat of financial duress, constitutes duress in Jewish law has been a matter of significant controversy over the span of centuries. As determined in a codification by Rema (*Even ha-Ezer* 134:5), a religious divorce should not be executed under financial duress.

In light of the foregoing, duress may well exist even if a judge has not expressly indicated that he or she will, as prescribed by law, invoke *Get* Law 2 in determining maintenance and distribution of marital assets. A credible threat of coercion constitutes duress. The very existence of the statute constitutes duress. An attorney who fails to inform a client of the negative financial consequences of not cooperating in removal of a barrier to remarriage is guilty of malpractice. Hence, one must assume that a competent attorney will make the contents of *Get* Law 2 known to his or her client. The knowledge that the court has no choice but to enforce the provisions of *Get* Law 2 is, *ipso facto*, duress. *Get* Law 2 thus

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[168] *See generally* the discussion of duress, *supra* note 125 and accompanying text.

[169] For a comprehensive discussion of the problems created by the New York *Get* Law 2, *see* 1 *BE-NETIVOT HA-HALAKHAH, supra* note 150. *See also* R. Zevi Gertner, *Kuntres Hok ha-Gerushin: Kashrut ha-Gittin al pi ha-Hukkah ha-Hadashah be-Medinat-New York de-Artsot ha-Brit* [*The Divorce Statute: Validity of Religious Divorces in Light of the New Law in New York, U.S.A.*], 8 YESHURUN 516 (*Nisan*, 5761-2001).

creates problems for all Jewish women seeking dissolutions of their marriages, including those whose husbands would cooperate in executing a *get* even in the absence of a financial threat. This is so because, when faced by a blatant threat, protest by the husband that the threat is not the motivating factor cannot be given credence by a rabbinic court.[170] The result is that the validity of every *get* executed by parties subject to the jurisdiction of a New York court is under a cloud. There are rabbis who have stated publicly that they will not perform marriages for women who have received a *get* subsequent to 1992.[171] The irony is that a statute designed to ameliorate the *agunah* problem has had precisely the opposite effect. The remedy, of course, is either to delay execution of the *get* until there is no longer any outstanding issue before the court, that is, after all financial matters have been adjudicated, or for the parties to execute a release having the effect of foregoing the advantages conferred by *Get* Law 2.[172]

Thus *Get* Laws 1 and 2 are beset by a variety of problems: (a) Both *Get* laws, but especially *Get* Law 2, raise potentially confounding constitutional problems; (b) the term *barriers to remarriage*, which appears in both laws, is excessively vague; (c) The threat of financial penalties mandated by *Get* Law 2 calls into question the validity of any Jewish divorce executed by individuals subject to the jurisdiction of New York state courts in matters of support and distribution of marital assets. Thus the New York legislature has found solutions to the problem of the "chained woman"—the *agunah*—that only create further problems.

X. A PROPOSED STATUTE

The seeds of the correct approach were planted in the proposed 1982 New York statute, which the legislature passed but that was, unfortunately, withdrawn before being signed into law. The following is a model statute patterned upon the proposed 1982 legislation but modified to make it clear that the provisions reflect broad equitable concerns rather than narrowly religious considerations:

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[170] *See* 1 *BE-NETIVOT HA-HALAKHAH*, *supra* note 150, at 47–49.

[171] *Id.* at 46–47. Statements decrying reliance upon *Get* Law 2, bearing the signatures of two foremost rabbinic authorities, R. Joseph Shalom Eliashiv and R. Shlomoh Zalman Auerbach, were published in 19 *MORIAH* 58 (Iyar, 5753-1993). Rabbi Eliashiv's statement was republished in his 1 *KOVEZ TESHUVOT*, no. 180 (Jerusalem, 5760-2000). Rabbis Eliashiv and Auerbach reiterated their position in communications published in 8 *YESHURUN* 534 (*Nisan*, 5761-2001).

[172] A New York court has held that, as provided by DRL § 253(4)(ii), the provisions of *Get* Law 2 are subject to waiver. *See* Becher v. Becher, 667 N.Y.S.2d 50 (App. Div. 2d Dep't 1997).

Section 1. The domestic relations law is amended by adding a new article to read as follows:

Article—

§ 1. Special procedure for prevention of inequitable consequences.

1. If, in an action for divorce or annulment, either the petitioner or respondent shall allege that, when and if final judgment is rendered dissolving the marriage, said party shall suffer lasting harmful emotional, psychological, or social consequences, including but not limited to consequences posing a potential barrier to prospective employment, choice of domicile, educational opportunities, or remarriage, as a result of the conduct of the other party, the court, unless it shall find the allegation to be devoid of merit, shall order the parties to submit the question to a fact-finding and mediation panel.

2. The panel shall consist of three members, one to be appointed by each party and the third to be appointed by the two members appointed by the parties; provided, however, that if the two members appointed by the parties fail to agree upon a third member within ten days, the court shall appoint the third member of the panel. If either party shall refuse or neglect to appoint a member to the panel within twenty days after the other shall have appointed a member and served written notice thereof upon the other requiring him to appoint a member, then the member so appointed by the first party shall have power to proceed as if he were appointed by both parties for that purpose.

3. The panel shall determine whether such inequitable consequences will indeed attend upon a judgment of divorce or annulment and if so, whether either party can prevent such consequences from occurring. It shall seek to mediate a resolution which reduces or eliminates the inequitable consequences.

4. The panel shall have the power to issue subpoenas and administer oaths. The provisions of the civil practice law and rules in relation to enforcing obedience to a subpoena lawfully issued by a judge, arbitrator, referee, or other person in a matter not arising in an action in a court of record shall apply to a subpoena issued by a panel authorized by this section.

5. The panel shall report to the court its findings and the results of its mediation efforts.

6. If the mediation efforts of the panel have not brought about an equitable resolution of the problem, the panel shall issue its recommendation for prevention of aforesaid consequences of a decree of divorce.

7. If either party fails to comply with the recommendation of the panel, the court, upon finding that a judgment of divorce would be inequitable under the prevailing circumstances, may withhold a final judgment of divorce until the recommendations of the panel have been implemented.

§ 2. This act shall take effect immediately.

This model statute gives the parties the opportunity for recourse to resolve equitable issues between them. The mechanism involves an arbitration panel composed of three members. If the issue between the parties is the issuance of a religious divorce, the members of the panel will have to determine whether a religious divorce is required or advisable under the circumstances of the case. When the issue is a religious divorce, the parties will presumably assure themselves that the members named to the panel are well versed in Jewish law. In effect, they are convening a *Bet Din* in accordance with the provisions of Jewish law, which in the absence of a communal *Bet Din* with requisite jurisdiction—an institution that does not exist in the United States—entitles each litigant to name one member and the third to be named by the two members chosen by the litigants.

The statute, of course, does not refer to either Jewish divorce or a *Bet Din*. It is much broader in that it is designed for the consideration of any equitable claim relevant to the divorce or annulment. If the concerns are entirely secular, the parties are in effect creating an arbitration panel to make a determination with regard to whether equitable relief is appropriate. Constitutional issues are obviated by the model statute by virtue of the fact that it is designed not to mandate either state or judicial action, but to relieve the court of a duty to issue a decree of civil divorce when such a decree would be inequitable for any reason.

The effect of the statute and its legal and practical appeal are that the panels it authorizes will rarely be convened. The statute places parties to a divorce or annulment on notice that no divorce or annulment will be granted until any inequity is rectified. When the inequity is obvious there is no rational reason for litigation. A panel will be convened only in situations in which the recalcitrant party believes that considerations of equity that would mandate acquiescence do not exist. Such instances will assuredly be few.

Quite apart from considerations of American constitutional law, concern for the validity of the *get* in Jewish law would favor a procedure that does not directly involve civil courts in the execution of a Jewish divorce. Unlike a *get* executed by a husband in response to a judicial order, a *get* executed in order to secure a favorable response to a petition before the court with regard to a beneficence entirely within the discretion of the state is not subject to challenge

in Jewish law on the grounds of duress.[173] Adoption of legislation in the form of the model herein presented would affirm a divorce court's role as a court of equity and preserve an individual's right to marriage without violation of religious scruples.

[173] Of course, a separation agreement or settlement is subject to challenge for duress under secular law should the husband use the threat of withholding the *get* to force the wife into making financial or other concessions. *See*, *e.g.*, Segal v. Segal, 650 A.2d 996 (N.J. Super. App. Div. 1994); Perl v. Perl, 512 N.Y.S.2d 372 (App. Div. 1987); Golding v. Golding, 581 N.Y.S.2d 4 (App. Div. 1st Dep't 1992).