

THE MODERN *AGUNAH* CRISIS – PROBLEMS AND POSSIBLE SOLUTIONS: A COMPARATIVE LAW ANALYSIS

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I. INTRODUCTION

Ari and Chavi Satz married in 2006 and, because of marital problems, separated in 2018. Under normal circumstances, one might assume Ari would allow his “former spouse” the courtesy of moving forward with her life. Instead, Ari has withheld a *get* from Chavi for six years¹ making her an *Agunah*.² As a result, Chavi cannot to remarry under her faith’s law and remains effectively bound to a marriage that has otherwise ended. The whole community knows about her situation, making it not only restrictive but also deeply embarrassing, demeaning, and distressing.³ This is the plight that many Orthodox Jewish women face, and it raises the question of how governmental policy and the law can work in tandem with normative Orthodox Jewish law to address the problem and help free them from their “chains.”

The *Agunah* problem is one of the most pressing and public international issues within the Orthodox Jewish faith.⁴ All references to “Jewish law” in this note follows the Orthodox tradition of *Halacha*, Jewish law. This note examines the modern *Agunah* problem as it exists across jurisdictions. Specifically, it will examine how various countries across the globe have used to their courts and legal frameworks to address the issue and what those approaches reveal about civil law in resolving religious martial constraints. It then turns to the United States (“U.S.”) and uses a comparative approach to outline the steps states and courts have taken to identify the limits of those efforts. While some progress has been made, there is still significant room for further action. Drawing on the comparative analysis, this note argues that the U.S. should look to international examples as proof that legal intervention is both *possible* and *effective*, and that more robust solutions should be adopted to address the ongoing *Agunah* crisis that exists in the U.S.

¹ *Recalcitrant Parties: Ari Satz*, ORAH, <https://www.getora.org/satz> [<https://perma.cc/J8XX-4P5X>].

² An *Agunah* is the word used in Judaism to describe a woman who is “chained” to her recalcitrant and estranged husband.

³ *Id.*

⁴ Rachel Levmore, *Rabbinic Responses in Favor of Prenuptial Agreements*, 42 TRADITION no. 1, at 29 (2009).

II. Basic Background for Understanding the Stakes of the Agunah Crisis

The process of marriage in *Halacha* is quite complex and deals with stringent requirements⁵ that are for the most part beyond the scope of this note. It involves a formal betrothal and a formal consummation, which together create a new legal status for the parties involved: they are now married. Just as the process of *Halachic*⁶ marriage is intricate, so too is the process of divorce.⁷ A marriage according to the strictures of *Halacha*, “may be terminated in only two ways: through death of a spouse, or by the granting of a *get*.”⁸ A *get* is the Aramaic term for the Jewish bill of divorce, which is referenced—though not by that name—in the Bible.⁹ The giving over of the *get* is not a mere symbolic act in *Halacha*, it effectuates the divorce. Without the *get*, the couple remains *Halachically*, according to *Halacha*, married and is prohibited from remarrying or cohabiting with other individuals.¹⁰ Irving Breitowitz summarizes the *get* ceremony as follows:

The husband and wife meet at a prearranged time and place with three rabbis present. One rabbi, known as the *Mesadar HaGet* (“arranger of the *get*”), will be primarily responsible for ensuring observance of the requisite religious formalities and the other two will serve as witnesses. Also present will be a scribe, who will compose the text of the *get* by hand . . . The *get* must contain proper dates based on the traditional Jewish calculation, location, and names of the husband and wife . . . Upon completion of the writing of the *get*, two witnesses sign at the bottom. The husband and wife are both asked a set of formalized questions as a final assurance that the *get* is not a product of duress, compulsion, extortion, or the like. The husband then takes the

⁵ RABBI ARI N. ENKIN, DALET AMOT: HALACHIC PERSPECTIVES 128 (2008).

⁶ Conjugation of *Halacha*.

⁷ *Id.*

⁸ Breitowitz, *The Plight of the Agunah: A Study in Halacha, Contract, and the First Amendment*, 51 MD. L. REV. 312, 319 (1992) (quoting from passages of the Babylonian Talmud).

⁹ “A man takes a woman [into his household as his wife] and becomes her husband. She fails to please him because he finds something obnoxious about her, and he writes her a bill of divorcement, hands it to her, and sends her away from his house.” *Deuteronomy* 24:1 (translation available at <https://www.sefaria.org/Deuteronomy.24.1?lang=bi&with=Mishnah%20ConnectionsList&lang2=he> [<https://perma.cc/KTV9-5Y4C>]).

¹⁰ *Jewish Divorce Basics: What Is a ‘Get’?*, CHABAD (2026), https://www.chabad.org/library/article_cdo/aid/557906/jewish/Jewish-Divorce-Basics-What-Is-a-Get.htm [<https://perma.cc/45TJ-C6CU>] [hereinafter *Chabad*].

document, physically deposits it in his wife's hands, again in the presence of witnesses, and upon the *get*'s delivery, the marriage is officially terminated.¹¹

The formality of the procedure is a byproduct of how serious a *Halachic* divorce is. If not properly executed, or not carried out in front of experts in the field,¹² significant consequences follow (most notably, that the couple would remain married and unable to remarry).¹³ With respect to the wife, if she were to cohabit with another man before receiving a valid *get*, the relationship would be deemed adulterous—a capital offense—and the child of the relationship would be *mamzer*, a *Halachic* bastard.¹⁴

The term *Agunah*, which often appears in the Babylonian Talmud, roughly translates to “chained.” In the context of marriage, the *Agunah*, without her *get*, is “chained” to her husband.¹⁵ When referenced in the Talmud, the woman referred to as an *Agunah* was generally a woman whose husband is missing and there is no specific evidence that points to where he is, whether alive (keeping her married) or dead (thus ending the marriage).¹⁶ This traditional form of *Agunah* resurfaced in the aftermath of the September 11, 2002 terrorist attacks in the U.S., where, in some cases, the absence of definitive proof of death left women unable to establish that their marriages had ended.¹⁷

Today, the common usage of the term *Agunah* refers to a *mesurevet get*, a Jewish woman whose husband declines to deliver her

¹¹ Breitowitz, *supra* note 5, at 320-321 (internal citations omitted).

¹² Chabad, *supra* note 7.

¹³ Breitowitz, *supra* note 5, at 319; See also J. DAVID BLEICH, CONTEMPORARY HALAKHIC PROBLEMS vol. 1, at 152–53 (1977) (discussing the *Takkanah* (“rule”) of Rabbeinu Gershom *Me'or HaGolah* (“Light of the Exile”), the famed medieval Rabbinic sage, and his ban on polygamy, which would now restrict a man’s ability to marry a second wife if still Halachically married to his first wife).

¹⁴ Breitowitz, *supra* note 5, at 324; See also *infra* note 48 (discussing the ramifications of being designated a *mamzer*).

¹⁵ IRVING A. BREITOWITZ, BETWEEN CIVIL AND RELIGIOUS LAW: THE PLIGHT OF THE AGUNAH IN AMERICAN SOCIETY 1 n. 1 (1993).

¹⁶ Sara Wijkander, *Agunah* Problems and Solutions in Israeli-Jewish Divorce Law (2002), at 7, (Master’s thesis, University of Lund), <https://lup.lub.lu.se/luur/download?func=downloadFile&recordId=1563047&fileId=1566158> [<https://perma.cc/A8H5-V6XM>].

¹⁷ For a further discussion of this topic, which beyond the scope of this note, see Chaim Jachter, *Family Matters, The Beth Din of America’s Handling of the World Trade Center Agunot*, in GRAY MATTER II: DISCOURSES IN THE COMPLEX HALACHIC ISSUES OF TODAY (independently published 2012).

a *get*.¹⁸ This problem arises under many circumstances, including situations where the husband's refusal to grant the *get* constitutes a bad-faith exercise of control, motivated by animus or by the use of his power as a "stranglehold to wring favorable concessions."¹⁹ It is not exactly known how many *agunot* (plural for *Agunah*) there are; some estimates place the number at around 150,000 in New York state alone, while others suggest it may be as low as fifty women.²⁰ Nonetheless, the problem has generated a substantial body of literature and numerous attempts to alleviate the issue.²¹

One might wonder why the recalcitrant husband cannot simply be forced to grant the *get*, resolving the issue altogether. Unfortunately, it's not that simple. In *Halacha*,²² a *get* must, under normal circumstances, and with a few exceptions,²³ be given by the husband's free will and not through any form of coercion.²⁴ If a man is wrongly coerced to give his wife a *get*, the *get* is invalid²⁵, and the couple remains married. Therefore, efforts to compel the delivery of a *get* must be carefully structured to avoid rendering it ineffective. Also, as instituted by Rabbeinu Gershom *Me'or Hagolah*, the wife's consent is also required for a valid *get*.²⁶

The question then becomes: what is coercion, and what forms of coercion are prohibited within the context of a *get*? This has become the subject of significant *Halachic* debates among Rabbinic authorities over many generations.²⁷ Coercion, or duress, includes "use or threats of physical force against person or property."²⁸ Some *halachic* authorities permit psychological pressure, such as community boycotts and public shaming.²⁹ Another set of tactics that may be permitted, which would not invalidate the *get*, are referred to as

¹⁸ Wijkander, *supra* note 13, at 7.

¹⁹ BREITOWITZ, *supra* note 12, at 4.

²⁰ *Id.* at 2.

²¹ *Id.* at 3.

²² ENKIN, *supra* note 3, at 128; *See also* Babylonian Talmud, Ketubot 77a (parenthetical needed).

²³ Michael J. Broyde, *The 1992 New York Get Law*, 29 TRADITION 5, 5 (1995).

²⁴ ENKIN, *supra* note 3, at 128.

²⁵ CHAIM JACHTER, GRAY MATTER: DISCOURSES IN CONTEMPORARY HALACHA 9 (2000).

²⁶ *Id.*

²⁷ BREITOWITZ, *supra* note 12, at 21.

²⁸ *Id.* at 20-21.

²⁹ *Id.* at 22.

“*Harchakot d’Rabbeinu Tam*” (“the distancing of Rabbeinu Tam”).³⁰ These include: withholding favors from the husband, refraining to do business with him, denying him access to certain religious services, and other measures the *Beit Din* (“Jewish religious court”) deems appropriate, short of a formal excommunication.³¹ If, however, the recalcitrant husband fails to respond to the *Beit Din*, they may issue a *seiruv* (contempt order), and may even excommunicate him and ban him from entering and utilizing synagogues.³²

These are some of the attempts to remedy the *Agunah* problem from within the Orthodox Jewish community and *halacha*. The following sections explore how select countries have attempted to address the problem through their own legal framework and courts. For the purposes of this note, this analysis does not undertake a deep examination of the *Halachic* implications of each country’s civil or criminal legal tools used to procure a *get* for the “chained” wife, as it is outside of the scope of this note.

III. THE AGUNAH IN THE STATE OF ISRAEL

Unlike the U.S., the modern State of Israel has no clear separation of church and state, and as such, all matters of marriage and divorce are handled under the strict jurisdiction of the Rabbinical Courts (*Batei Din*, singular *Beit Din*).³³ The original mandate of power comes from the very beginning of the state with the famous “status quo” agreement between David Ben Gurion, Israel’s first Prime Minister, and the Orthodox establishment.³⁴ The arrangement surrounded the idea that the state would not change “values and way of life of religious Jews” and confirmed that *Batei Din* would have specific jurisdictions over matters concerning Jewish life.³⁵

³⁰ JACHTER, *supra* note 21, at 18.

³¹ *Id.*

³² *Id.* at 20.

³³ *The Rabbinical Courts*, GOV’T OF THE STATE OF ISR., https://www.gov.il/en/departments/the_rabbinical_courts/govil-landing-page [<https://perma.cc/QKP4-3C5G>]; see also MICHAEL J. BROUDE, MARRIAGE, DIVORCE, AND THE ABANDONED WIFE IN JEWISH LAW: A CONCEPTUAL UNDERSTANDING OF THE AGUNAH PROBLEMS IN AMERICA 9 (2001).

³⁴ Pascale Fournier, *Halacha, the Jewish State and the Canadian Agunah: Comparative Law at the Intersection of Religious and Secular Orders*, 44 J. LEGAL PLURALISM & UNOFFICIAL L. 165, 181 (2012).

³⁵ *Id.*

The *Batei Din* are very powerful within the state, holding significant power and sway in many areas.³⁶ Even with their significant power, the Rabbinical Courts are limited to what the Knesset, Israel's legislature, designates within their jurisdiction.³⁷ This is based on the seminal Israeli case from the High Court of Justice ("HCJ"), *Katz v. Jerusalem Regional Rabbinical Council*.³⁸ In that decision, Justice Zamir argued that because the *Batei Din* are institutions rooted in the British Mandatory Palestine, and are not truly connected to "any tradition proceeding[s]," they do not possess the "natural jurisdiction" they claim.³⁹ He then explained that state-authorized Rabbinical Courts are restricted to the powers granted to them by the legislature.⁴⁰ Accordingly, even with the restrictions imposed by the *Katz* case, the state *Batei Din* still retain civil jurisdiction over divorce proceedings, as granted to them by the Knesset in the Rabbinical Court Jurisdiction (Marriage and Divorce) Law of 1953.⁴¹

The *Agunah* problem is quite significant in Israel. Some sources estimate that about 10,000 women are actively being denied a *get* by their husbands, while others predict a lower number in the hundreds.⁴² This may seem odd as one might assume then that, given the powers of civil enforcement over marriage and divorce, the *Agunah* problem in Israel would be more manageable and easier to alleviate.⁴³ This is not generally the case,⁴⁴ but the *Batei Din* do retain certain powers

³⁶ Michael J. Broyde & Ezra Ives, *Religious Alternative Dispute Resolution in Israel and Other Nations with State-Sponsored Religious Courts: Crafting a More Efficient and Better Relationship Between Rabbinical Courts and Arbitration Law in Israel*, 36 *TOURO L. REV.* 901, 918-919 (2021).

³⁷ *Id.*

³⁸ See HCJ 3269/95 *Katz v. Jerusalem Regional Rabbinical Council*, 50(4) P.D. 590 (1996) (Isr.).

³⁹ See *id.*; Broyde, *supra* note 32.

⁴⁰ Broyde, *supra* note 32.

⁴¹ *Id.* at 918.

⁴²

Jewish Week Editors, *Agunot: 462 Too Many*, N.Y. JEWISH WK. (Oct. 25, 2011), <https://www.jta.org/2011/10/25/ny/agunot-462-too-many#:~:text=In%20Israel%2C%20estimates%20of%2010%2C000%20agunot%20have,in%20contrast%20to%20claims%20by%20Agudath%20Israel> [https://perma.cc/4A6R-J4TM].

⁴³ BREITOWITZ, *supra* note 12, at 172.

⁴⁴ Breitowitz goes on to explain how the law as presently situated, for him in as of 1993, in Israel is not overly helpful to women who are suffering from being classified as an *Agunah*. *Id.* This assessment though may look different today, as

over the civil enforcement of divorces, which can compel a husband to grant a *get*. For example, as pointed out by Breitowitz,⁴⁵ paragraph six of the Rabbinical Court Jurisdiction (Marriage and Divorce) Law of 1953 reads:

If a rabbinical court has ordered in a final judgment to compel a man to give a divorce to his wife⁴⁶ . . . a district court may, after six months from the date of issuing the order, at the request of the Attorney General, compel by imprisonment to comply with the order.⁴⁷

This creates a situation in which, following a ruling of the *Beit Din*, the secular/civil court is granted the jurisdiction and authority to jail a husband who is refusing to grant a *get* to his wife.⁴⁸

A seminal Tel Aviv Rabbinical Court case in 1977 demonstrates the potential power that the *Batei Din* can wield on such matters. The case dealt with a young woman's application to the *Beit Din* for an order requiring her husband to execute a *get*.⁴⁹ The notable wrinkle in this story was that the husband was serving a four-year sentence in an Israeli prison for drug-related offenses and theft.⁵⁰ After she petitioned, the *Bet Din* issued a ruling directing, but not forcing, the husband to give her a *get*.⁵¹ But, as is unfortunately common, the husband ignored the order from the *Beit Din* and left his wife an *Agunah*.⁵² The *Beit Din* realized that despite the *Halachic* obstacles, it may use its influence as a state-sanctioned body to "encourage" the husband to grant the *get*.⁵³ In many prison systems across the globe, including within Israel, it is common practice for parole boards to

soon described, there have been some changes in the law that would seem to grant the Rabbinical Courts and secular courts more tools to use in their fight against this problem. It would be interesting for Breitowitz to reanalyze his conclusion based on the more modern laws.

⁴⁵ *Id.*

⁴⁶ "Compel" in this context does not mean force. It really means that if the situation is such that after deliberation the *Beit Din* determines that the wife is fully entitled to a *get* and they will order, but really encourage, the husband to provide said *get*. *See id.*

⁴⁷ *See id.*; *Judgement in Matters of Marriage and Divorce Law*, 5713-1953, https://www.nevo.co.il/law_html/law00/73178.htm#Seif12 [<https://perma.cc/LGQ7-SWFD>] (original Hebrew, translated via Google Translate) (Isr.).

⁴⁸ *See id.*

⁴⁹ J. DAVID BLEICH, CONTEMPORARY HALAKHIC PROBLEMS II 94.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*; *See also* JACHTER, *supra* note 21, at 24.

reduce a sentence based on good behavior.⁵⁴ Accordingly, the question presented to the *Beit Din* was whether they could act against the husband by arguing “bad behavior” as a tactic to encourage him to give a *get*.⁵⁵ Due to some *Halachic* concerns and doubts, the *Beit Din*, in a two-to-one decision, held that they should not use parole recommendations as a tool to pry a *get* from the recalcitrant husband.⁵⁶ Nonetheless, the Rabbinical Courts in Israel *may* decide in a similar case to use that power in the future.

After the original Rabbinical Court Jurisdiction (Marriage and Divorce) Law of 1953, additional legislation was enacted to grant more enforcement power to the *Batei Din*. Specifically, both the Religious Courts (Forcing Compliance and Hearing Procedures) Law, 5716-1956, SH No. 200 p. 40, and the Rabbinical Courts (Enforcement of Divorce Decisions) Law 5755-1995, SH No. 1507 p. 139 (RC Law),⁵⁷ (both as amended), grant significant authority to the Rabbinical Courts and secular courts to enforce certain rulings issued.⁵⁸ These laws authorized various measures against noncompliant husbands, including “issuing injunctions to prevent defendants from leaving the country, seizing their property, and blocking Israeli passports from being issued to them.”⁵⁹ Included within the courts’ power was the ability to prohibit individuals from “receiving, possessing, and renewing a driver’s license, being appointed to government positions; operating a licensed business; and opening or possessing bank accounts.”⁶⁰ Most strikingly, the power to imprison for up to ten years, including solitary confinement, was also included.⁶¹

⁵⁴ *Id.*

⁵⁵ BLEICH, *supra* note 45.

⁵⁶ *Id.*

⁵⁷ Sometimes referred to as the “Sanction Laws.” See Pascale Fournier, Pascal McDougall, & Merissa Lichtsztral, *Secular Rights and Religious Wrongs? Family Law, Religion and Women in Israel*, 18 WM. & MARY J. WOMEN & L. 333, 336 (2012).

⁵⁸ Ruth Levush, *Releasing Israeli Agunot from the Chains of Marriage*, LIBR. OF CONG. (May 22, 2017), <https://blogs.loc.gov/law/2017/05/releasing-israeli-agunot-from-the-chains-of-marriage/> [<https://perma.cc/852B-QKZR>]; See generally Religious Courts (Forcing Compliance and Hearing Procedures) Law, 5716-1956 (Isr.); Rabbinical Courts (Enforcement of Divorce Decisions) Law 5755-1995 (Isr.).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

In recent years, the Israeli government has attempted to broaden the scope of their tactics in fighting the *Agunah* crisis. In 2012, the Knesset passed a bill that requires men to grant their ex-wives a *get* within forty-five days of a Rabbinical Court's ruling that a *get* should be given.⁶² The bill aimed to "significantly decrease the number of recalcitrant husbands in Israel,"⁶³ although in hindsight it might not have achieved its intended effect. The new law requires the *Batei Din* to "follow through" on all divorce cases from judgment to completion⁶⁴ and "empower the courts to impose sanctions on a spouse who refuses to grant a divorce, including forbidding to leave the country, blocking the person's bank account, denying a driver's license, or imprisonment."⁶⁵

In 2016, then-State Prosecutor Shai Nitzan issued a directive through the Justice Ministry of Israel "allowing civil courts to prosecute and punish recalcitrant husbands,"⁶⁶ on a broader scale than previously utilized. Nitzan adamantly wrote in the order that, "[w]hen a man is found guilty of the crime of ignoring a legal order by refusing to grant the *get*, the prosecution will sentence him to imprisonment for a real period of time."⁶⁷ The basis for the new directive, as explained by Nitzan, was that "one who refuses to give a *get* impinges on the freedom and basic rights of the other, including the right to remarry . . . "⁶⁸

In 2017, the Knesset adopted new amendments providing even more measures of possible enforcement.⁶⁹ The amendments granted

⁶² Asher Zeiger, *New divorce bill passes second and third readings in Knesset*, TIMES OF ISRAEL (Mar. 21, 2012 5:13 am) <https://www.timesofisrael.com/new-divorce-bill-passes-second-and-third-readings-in-knesset/> [<https://perma.cc/NF8Z-ZMJB>]; *Issues in Jewish Ethics: Divorce*, JEWISH VIRTUAL LIBR., <https://www.jewishvirtuallibrary.org/divorce-in-judaism> [<https://perma.cc/VSL5-LKPT>] (last visited Oct. 6, 2024).

⁶³ Zeiger, *supra* note 60.

⁶⁴ *Id.*

⁶⁵ *Id.*; see also JACHTER, *supra* note 21, at 23-24.

⁶⁶ *Israeli men could be jailed for refusing divorce*, TIMES OF ISRAEL (Nov. 15, 2016, 12:52 a.m.) <https://www.timesofisrael.com/israeli-men-who-refuse-divorce-could-face-jail/> [<https://perma.cc/J7MC-9VFY>].

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ See generally Rabbinical Courts Law, 5777-2017, SH 2627 593, as amended (Isr.) https://fs.knesset.gov.il/20/law/20_lsr_382428.pdf [<https://perma.cc/2J83-TMM8>]; Ruth Levush, *Releasing Israeli Agunot from the Chains of Marriage*, LIBR. CONG.: BLOGS (May 22, 2017) <https://blogs.loc.gov/law/2017/05/releasing-israeli-agunot-from-the-chains-of-marriage/> [<https://perma.cc/852B-QKZR>].

the *Batei Din* with greater powers over *get*-refusing prisoners in the Israeli prison system.⁷⁰ These include: restricting the inmate from “from participating in any prison organized educational activities; subject to some requirements, receiving food that complies with special Jewish dietary laws; staying in a special place in prison that is designated for religious prisoners; and wearing personal clothes”.⁷¹ The amendments also gave the *Batei Din* the power to restrict the possessions of a prisoner in solitary confinement to just a prayer book.⁷²

In 2018, Israeli State prosecutors filed a criminal indictment against a recalcitrant husband who had refused to give his wife a *get* for over twenty years.⁷³ The husband had been in jail for the past seventeen years, pursuant to orders from the *Batei Din*, but not as an official criminal offense.⁷⁴ Now, both Rabbinical and secular courts are utilizing their authority to officially criminalize *get* refusal, thereby generating a criminal record for the refuser.⁷⁵ This is yet another tool utilized by the courts in Israel.

As demonstrated, the State of Israel, through both its Rabbinical Courts and secular courts, have developed varying strategies to address the modern *Agunah* problem. Criminalizing *get* refusal appears to be the one of the most aggressive approaches, and it remains unclear whether this has meaningfully encouraged compliance.⁷⁶

IV. THE *AGUNAH* IN CANADIAN LAW

Widely regarded as among the strongest enforcement mechanisms available in secular courts,⁷⁷ Canadian law may offer the world a potential strategy. The Canadian responses to the *Agunah* situation,

⁷⁰ Levush, *supra* note 67.

⁷¹ *Id.* (on Amendment Law § 1 and the RC Law §2(a)(7)(10-13)).

⁷² Levush, *supra* note 67 (on Amendment Law § 2 and the RC Law § 3(A)(f)).

⁷³ Stuart Winer, *In First, Israeli man indicted for refusing his wife a divorce*, TIMES OF ISRAEL (Sept. 12, 2018, 9:01 p.m.) <https://www.timesofisrael.com/in-first-israeli-man-indicted-for-refusing-his-wife-a-divorce/> [<https://perma.cc/9JAP-ZG87>].

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ Comparing and drawing lessons to U.S. law will be discussed in a later section.

⁷⁷ SUSAN ARANOFF & RIVKA HAUT, THE WED-LOCKED AGUNOT: ORTHODOX JEWISH WOMEN CHAINED TO DEAD MARRIAGES 170 (2015).

which stem from civil law and reach out into the religious sphere, “take the form of judicial enforcement of contractual agreements related to the *get* and of sanctions against refusing husbands” who engage with the courts.⁷⁸

The primary enforcement measures come from Canada’s Divorce Act of 1985.⁷⁹ The section of the Act that engages with a potential *Agunah* is entitled, “Affidavit re removal of barriers to religious remarriage.”⁸⁰ The law permits a woman who has begun the civil divorce process and faces the risk of becoming an *Agunah* to file an affidavit explaining that her husband is preventing her religious remarriage, for example by withholding a *get*.⁸¹ If the husband does not submit an affidavit confirming that he has removed those barriers, the court has the authority to dismiss the civil divorce altogether.⁸² Evidently, the Canadian legislature⁸³ has created a significant tool to use that can pressure a *get*-refusing husband to comply and release his “chained: wife.

There have also been attempts in Canada to engage with the *Agunah* problem through the usage of the Court system.⁸⁴ The most significant case in the Supreme Court of Canada was that of *Bruker v. Marcovitz*.⁸⁵ In this case, Mr. Marcovitz, the husband, signed a separation agreement containing a clause binding him to “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.”⁸⁶ After the divorce was granted by the civil court, Mr. Marcovitz refused to fulfill his contractual obligation of going to the *Beit Din* and instead left Ms.

⁷⁸ Fournier, *supra* note 32, at 167.

⁷⁹ *Id.*

⁸⁰ Divorce Act, R.S.C. 1985, c. 3, art. 21.1 (2nd Supp.) (Can.) (repealed 2019).

⁸¹ *Id.*

⁸² *Id.*

⁸³ In addition to Canada’s “federal” government’s action, the Province of Ontario has also taken action in the form of amendment to the Ontario Family Law Act. The amendment gives discretion to the judge in a divorce case to issue financial sanctions in at the asset distribution stage of divorce. *See* Fournier, *supra* note 32, at 175.

⁸⁴ *Id.* at 171.

⁸⁵ *Id.*; *see* *Bruker v. Marcovitz*, [2007] 3 R.C.S. 607 (Can.).

⁸⁶ Fournier, *supra* note 32, at 171.

Bruker, his ex-wife, as an *Agunah* for fifteen years.⁸⁷ He ultimately granted the *get*, but only after that extended delay.⁸⁸

Ms. Bruker then initiated litigation, suing for damages based on breach of contract.⁸⁹ The trial judge awarded damages of approximately \$47,500, but on appeal to the province's Court of Appeal, the Court reversed on the grounds that such a contract was "religious in nature," and therefore unenforceable under Canadian law.⁹⁰ The Supreme Court of Canada subsequently reversed the Court of Appeal's decision and reinstated the awarded damages for the husband's contractual violations.⁹¹ The Court refused to treat the "religious aspect of the obligation [as a] barrier to its civil validity"⁹² which ultimately allowed the court to implement "wholly secular remedies."⁹³

While the Canadian Supreme Court did create an avenue to alleviate the plight of a potential *Agunah*, its scope is relatively narrow. First, the decision primarily applies where there is some form contract, whether pre or postnuptial.⁹⁴ Additionally, the agreement must include some reference to appearing in a *Beit Din* or to the obligation to give a *get*.⁹⁵ Without a contract, this decision is largely inapplicable.

Even if the court-based strategy in Canada is a narrow remedy, it nonetheless presents a viable option for women in the country. Through its court-based approach and the statutory tools discussed, there are meaningful mechanisms that can be used to help these women in Canada, and that other jurisdictions may look to as models.

V. THE AGUNAH IN THE UNITED KINGDOM

As the *Agunah* crisis is a matter of global concern, the problem also exists within the United Kingdom ("U.K."). There have been several approaches taken by the U.K. legislature, Parliament, to address the ongoing crisis, as well as efforts within the court systems of the country.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 172.

⁹² *Bruker v. Marcovitz*, [2007] 3 R.C.S. 607, para. 51 (Can.).

⁹³ *Fournier*, *supra* note 32, at 172.

⁹⁴ *Id.* at 167.

⁹⁵ *Id.* at 187.

The first attempt by the U.K. Parliament was the enactment of the Divorce (Religious Marriages) Act 2002, which amended the Matrimonial Causes Act 1973.⁹⁶ Section 1(1)(2) of the act provides:

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 [religious] usages [of the Jews] is produced to the court.⁹⁷

The Act allows for either party, though for purposes of this discussion we assume the wife, to ask the Court to suspend the civil divorce process until she receives her *get*. This is largely similar to the language and process of the Divorce Act in Canada.⁹⁸ One notable difference, however, is that the UK law does not provide an exception allowing the husband to justify his refusal to grant the *get*.⁹⁹

A more recent development in the U.K. has created an avenue in which a *get* refusing husband may face criminal charges. In 2021 the UK government amended the Domestic Abuse Act of 2021 to use inclusive language that allows for prosecution for the refusal to give a *get* as a recognized form of domestic abuse.¹⁰⁰ A seemingly small but significant change to the Domestic Abuse Act clarified that someone can be a victim of “controlling and coercive behaviour” even if the couple no longer live together.¹⁰¹ This is particularly important in the context of an *Agunah*, because presumably the *Agunah* no longer lives with her “husband.”¹⁰² Now that “controlling and coercive behaviour,” which is one of the definitions given for domestic abuse,¹⁰³ can be applied to a couple that no longer live together but instead are “personally connected,”¹⁰⁴ *Agunot* have another tool to encourage their husbands to give the *get*. If they choose to press charges against

⁹⁶ Fournier, *supra* note 32, at 176, n.14.

⁹⁷ Divorce (Religious Marriages) Act 2002, c. 27, § 1(1)(2) (UK).

⁹⁸ Fournier, *supra* note 32, at 176.

⁹⁹ *Id.*; see also Divorce (Religious Marriages) Act 2002, c. 27 (UK).

¹⁰⁰ Ellie Jacobs, *Religious divorce refusal can now be recognised as a criminal offence*, JEWISH NEWS (Mar. 4, 2021), <https://www.jewishnews.co.uk/get-refusal-clarified-as-a-criminal-offence/> [://perma.cc/SMP9-57AA].

¹⁰¹ *Id.*; See also Domestic Abuse Act 2021, c. 17 (UK).

¹⁰² Jacobs, *supra* note 98.

¹⁰³ Domestic Abuse Act 2021, c. 17 § 1(1)(3) (UK).

¹⁰⁴ *Id.*

their husbands, via the Serious Crime Act of 2015, they can expose them to penalties of up to five years in prison.¹⁰⁵

Until this point, the 2015 Act may have provided a potential basis for treating a *get* refusal as criminal, but legal experts had noted that the law was ambiguous and that courts lacked clarity on its application.¹⁰⁶ With the new amendments to the Act, particularly when combined with the Domestic Abuse Act's amendments, the uncertainty surrounding whether an *Agunah* has an actionable legal remedy seems to have been significantly reduced.¹⁰⁷ As a result of these developments, two prosecutions have occurred, enabling women to receive their *get* despite the difficult circumstances of refusal.¹⁰⁸

The courts in the UK have also been utilized to address and combat the *Agunah* problem. As a way of "compelling" a husband to grant his wife a *get*, a British court ruled that the amount of alimony payments should be higher than customary because of her lack of prospects for remarriage, due to her *Agunah* status.¹⁰⁹ In *Brett v. Brett*, a civil Court of Appeals, agreed with the wife's argument, stating ". . . it would be right to make provision in the award for the possibility of the husband persisting in his refusal to grant the [*get*] which would make it possible for the wife to remarry if she wants to."¹¹⁰

The U.K.'s framework demonstrates an evolving and multifaceted response to the *Agunah* crisis. Given its sizable Orthodox Jewish community, the development of legal mechanisms to confront *get* refusal reflects a meaningful effort to engage with the issue at both the legislative and judicial levels.

VI. THE AGUNAH IN AUSTRALIA

Another country that has tried to utilize its court system and laws to help quash the *Agunah* problem is Australia. Through the courts and statutory frameworks, there have been documented attempts to apply pressure and move a recalcitrant husband along to grant the *get*.

This primary avenue of civil enforcement that would benefit an *Agunah* is the Family Court. Civil courts in Australia that deal with

¹⁰⁵ Serious Crime Act 2015, c. 9, § 76(11)(a) (UK).

¹⁰⁶ Jacobs, *supra* note 98.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ BREITOWITZ, *supra* note 12; *see also* Brett v. Brett [1969] 1 All ER 1007.

¹¹⁰ Brett v Brett [1969] 1 All ER at 1013.

marriage and divorce are governed by the Family Law Act of 1975. The Act states that “proceedings by way of matrimonial cause shall not be instituted except under this Act”.¹¹¹ Therefore, if Jewish divorce proceedings constitute a “matrimonial cause,” as argued by Andrew Strum, then they will be governed by the Family Law Act and adjudicated in Family Court.¹¹² The Act defines a “matrimonial cause” as, “proceedings between parties to a marriage for an order or injunction in circumstances arising out of the marital relationship.”¹¹³ In such proceedings, a judge “may make such order or grant such injunction as it considers proper with respect to the matter to which the proceedings relate.”¹¹⁴

The Family Law Act restricts any activity that would qualify as a “matrimonial cause” to be dealt with in the Australian Family Court.¹¹⁵ Strum further argues whether the Family Law Act has jurisdiction to adjudicate issues that arise from the religious Jewish divorce process, such as going to a *Beit Din* and the giving of a *get*, depends on whether such proceeding would constitute as “circumstances arising out of the marital relationship”¹¹⁶ Australian courts have interpreted “circumstances arising out of . . .” and have suggested that the proceedings must be “a consequence of the act of marriage between the parties and as an exercise of the rights, and a performance of the duties, to which the marriage has given rise.”¹¹⁷ Accordingly, there needs to be a further discussion as to whether the *get* giving process would fall within the scope of the Australian courts. Some in Australia argue that religious divorce has no place within secular courts and that Jewish divorce proceedings fail to qualify for Family Court adjudication.¹¹⁸ This view was commonplace within the Australian legal community for years, but in 2001 the Family Law Council (of Australia) challenged this understanding and proposed that new legislation be passed to formally grant the Family

¹¹¹ Andrew Strum, *Getting a Gett in Australian Courts*, JLaw, <https://www.jlaw.com/Articles/getaus.html> [<https://perma.cc/6ED8-WBEP>].

¹¹² *Id.*

¹¹³ Family Law Act 1975 (Cth) s 90AD (Austl.).

¹¹⁴ *Id.* s 114(a).

¹¹⁵ Strum, *supra* note 109.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

Court jurisdiction over religious divorce.¹¹⁹ While this is a start, it still seems that nothing will be changing the immediate future.¹²⁰

Nonetheless, some, including Sturm, have argued that the courts can and should be utilized within the context of religious divorce, even with the present legislative framework, namely the Family Law Act.¹²¹ Sturm notes that the Marriage Act provides that if the religious marriage ceremony is in the presence of an authorized clergy member, the court system must recognize the validity of the marriage as a marriage.¹²² Thus, a Jewish marriage can be a legally binding marriage in Australia if it is presided over by an authorized rabbi and conducted in accordance with the religion's laws, i.e., *Halacha*.¹²³

Sturm further argues that, under this interpretation, Australian law implicitly recognizes a Jewish religious marriage.¹²⁴ If the marriage is recognized, then Australian law governing its dissolution should account for the fact that such a marriage cannot be dissolved, under the *Halachic* system, solely by a civil divorce decree.¹²⁵ This interpretation aligns with the underlying purpose of the Family Law Act, which, in the context of divorce, seeks to “free the parties to a marriage that has broken down irretrievably, both in law and in fact.”¹²⁶ Until the woman receives her *get* she is really still married “in fact.”¹²⁷ Although the court in the meantime was able to distribute assets and take care of other divorce-related matters, it only dissolves the marriage “in law,” while leaving the parties married “in fact.”¹²⁸ Therefore, the events related to the Jewish divorce process should meet the legal standard set by the Australian courts of being “circumstances arising out of the marital relationship,”¹²⁹ and further

¹¹⁹ Amanda Williamson, *An Examination of Jewish Divorce Under the Family Law Act 1975 (Cth)*, 11 JAMES COOK U. L. REV. 132, 132 (2004).

¹²⁰ *Id.* at 132-33.

¹²¹ Sturm, *supra* note 109.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ Sturm, *supra* note 107.

¹²⁸ *Id.*

¹²⁹ Family Law Act, *supra* note 109.

become a “matrimonial cause,”¹³⁰ bringing them within the jurisdiction of the Family Court.¹³¹

The Australian courts have already taken certain actions under particular circumstances. One such action is the issuance of what are referred to as “Gwiazda Orders.”¹³² The order is named after an unreported Australian family court case in which the judge, Judge Emery, ordered the wife to appear before the Beit Din to accept her *get*.¹³³ Judge Emery wrote,

If I correctly understand the intention of the [Marriage] Act, then it is the clear duty of a judge of this court to ensure that appropriate orders are made fully effective, *not only in theory but in fact*. In this case the husband as a matter of law can marry any woman who is free to marry, subject only to the prohibitions in the Marriage Act, *but as a matter of fact and practicability he cannot do so* [due to the religious impediments still in place].¹³⁴

Although in that specific case the woman was refusing to accept the *get*, the courts may be able to apply this logic to cases in which the *husband* is *refusing to give the get*.¹³⁵ In such cases, the Court, like Judge Emery, may order the couple to appear in front of the *Beit Din* and to accept the findings of their proceedings, namely requiring the refusing party to grant the divorce.¹³⁶ This may be a useful tool for the Australian courts, but the *Gwiazda* decision has not, at this point,¹³⁷ been considered by the Full Court of the Family Court, so it remains to be seen whether Judge Emery’s approach will be adopted as accepted practice in the courts.¹³⁸

¹³⁰ *Id.*

¹³¹ Sturm, *supra* note 107.

¹³² Graham Segal, *Family Lawyers Need to Know Religious Law*, LAWYERS WEEKLY [https://www.lawyersweekly.com.au/newLaw/950-family-lawyers-need-to-know-religious-law](https://www.lawyersweekly.com.au/newlaw/950-family-lawyers-need-to-know-religious-law) [<https://perma.cc/3ZCS-CGRQ>].

¹³³ Ruth Levush, *Releasing Agunot From Chains of Marriage in Selected Countries*, LIBRARY OF CONGRESS BLOGS <https://blogs.loc.gov/law/2017/05/releasing-agunot-from-chains-of-marriage-in-selected-countries/> [<https://perma.cc/6P3E-HDAH>]. As a side note, the issue, although much smaller in scale, does exist in which a wife will refuse to accept the *get*, which is another prerequisite for *Halachic* divorce.

¹³⁴ *Gwiazda*, *In the Marriage of* 23/02/1983 FamCt M10631/82 (emphasis added). (text found on Wikipedia and in the Sturm article).

¹³⁵ Sturm, *supra* note 107.

¹³⁶ Segal, *supra* note 128.

¹³⁷ At the time of the article’s writing.

¹³⁸ Sturm, *supra* note 103.

A separate tactic that the Australian courts might utilize is encouragement through potential monetary “penalties” or losses. Similar to the aforementioned *Brett v. Brett* case from the U.K.,¹³⁹ courts have tried to condition alimony payment sizes and property settlement issues on the granting of a *get*.¹⁴⁰ The leading case from Australia, decided by the Full Court of Family Court of Australia, was the *Steinmetz* case.¹⁴¹ In *Steinmetz*, the court reasoned that because the wife could not remarry without a *get*, her ability to obtain financial support from a future spouse has been greatly diminished.¹⁴² The judge in *Steinmetz* subsequently ordered the husband to pay alimony in a lump sum amount of \$4,000.00.¹⁴³ The order also included an exception providing that, if within a certain period the husband granted the *get*, the amount owed would be reduced to \$2,000.00.¹⁴⁴

The Court’s rationale in *Steinmetz*, and the broader logic underlying it,¹⁴⁵ is that as long as the husband refuses a *get*, his wife is effectively precluded from remarrying and obtaining support from another spouse.¹⁴⁶ Accordingly, under the Family Law Act, such conduct by a recalcitrant husband may properly be considered in when determining alimony payments.¹⁴⁷

Another attempt at a remedy within the Australian legal system was the withholding of the civil divorce decree until the husband formally delivered the *get* to his wife, officially ending the marriage

¹³⁹ See *infra* Section IV.

¹⁴⁰ Williamson, *supra* note 116, at 137.

¹⁴¹ See *In the Marriage of Steinmetz*, (1980) 6 Fam LR 554.

¹⁴² Sturm, *supra* note 108.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ Although, such an argument wouldn’t work in every marriage situation as there are plenty of women who are the primary bread winner for a family, or that have the same or more earning potential than her male counterpart and could support herself with or without a husband. For statistics and discussion on the topic see Richard Fry, et. al, *In a Growing Share of U.S. Marriages, Husbands and Wives Earn About the Same*, PEW RESEARCH CENTER (Apr. 13, 2023), [https://www.pewresearch.org/social-trends/2023/04/13/in-a-growing-share-of-u-s-marriages-husbands-and-wives-earn-about-the-same/#:~:text=Women%20are%20contributing%20an%20ever,50%20years%20earlier%20\(5%25\)\[https://perma.cc/UUC8-YEPD\]](https://www.pewresearch.org/social-trends/2023/04/13/in-a-growing-share-of-u-s-marriages-husbands-and-wives-earn-about-the-same/#:~:text=Women%20are%20contributing%20an%20ever,50%20years%20earlier%20(5%25)[https://perma.cc/UUC8-YEPD]).

¹⁴⁶ Sturm, *supra* note 108.

¹⁴⁷ Williamson, *supra* note 116, at 137.

according to Jewish law.¹⁴⁸ In *In re Shulsinger*,¹⁴⁹ the Court decided not to issue an official civil divorce decree until the husband agreed to do “everything necessary to give his wife a [*get*] in order for her to be remarried according to her faith.”¹⁵⁰ The husband in *Shulsinger* attempted to appeal the Courts order on constitutional grounds, but his motion was rejected.¹⁵¹ The decision was premised on the idea that because the order was meant to prevent an injustice that would otherwise result from the divorce decree, it did not rise to the level of impermissible religious interference, and therefore did not constitute an unconstitutional order.¹⁵²

In addition to the present tactics used, as just described, Australians have attempted to reform the laws and procedures to better address the issue. In 1992, the Australian Law Reform Commission, in its report on “Multiculturalism and the Law,” considered the issue of the removal of religious barriers to remarriage.¹⁵³ The commission recommended amending the Family law Act 1975 to address these concerns, as follows:

[t]o provide that, on application, in specified circumstances, a decree nisi does not become absolute until the court is satisfied... [that] ... the applicant has removed, or has undertaken to remove, any impediments to the other party’s remarriage ...has asked the other party to remove a specified impediment to the applicant’s remarriage [but]...the other party has not complied with the request.¹⁵⁴

Until the present day, this recommendation has yet to be enacted and there does not seem to be any indication that it is likely to be adopted in the near future.¹⁵⁵

¹⁴⁸ *Id.* at 136.

¹⁴⁹ *See generally* In the Marriage of Shulsinger, 2 Fam LR (1977) 611, 13 Australian LR (1976-77) 537 (Australia).

¹⁵⁰ Williamson, *supra* note 111, at 136.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ RUTH LEVUSH, *Releasing Agunot from the Chains of Marriage in Selected Countries*, IN CUSTODIA LEGIS (May 30, 2017), <https://blogs.loc.gov/law/2017/05/releasing-agunot-from-chains-of-marriage-in-selected-countries/> [https://perma.cc/GVE3-DBE6]

¹⁵⁴ AUSTRALIAN LAW REFORM COMMISSION ON MULTICULTURALISM AND THE LAW, ALRC REPORT 57 § 5.42 (April 14, 1992) (Austl.).

¹⁵⁵ Williamson, *supra* note 115; An October 2015 report of the Australian Law Reform Commission regarding implementation of the report, however, noted that “The ALRC recommendations relating to customary and religious divorce have not

As demonstrated, Australia is actively engaged in addressing this issue, as it has made significant efforts to utilize its existing legal framework, as well as proposed reforms, to alleviate the Agunah crisis within its jurisdiction.

VII. THE AGUNAH IN THE UNITED STATES

The *Agunah* problem in the U.S. is quite significant,¹⁵⁶ and although there have been attempts address it, they have not been particularly successful.¹⁵⁷ Also, due to a string of “anti-foreign” laws in a number of states, aimed at preventing the application of Islamic “Shariah” law, new *get* legislation in many states is considered unlikely.¹⁵⁸

A. The New York Get Law

1. Description and Orthodox Jewish Response

The most significant steps have been taken by the State of New York. In 1983, responding to strong lobbying efforts by New York’s Orthodox Jewish population, New York State decided to take action on the *Agunah* problem.¹⁵⁹ The new *get* provision, Section 253 of New York State’s Domestic Relations Laws, passed both houses of the New York Legislature with ease, and on August 8, 1983, Governor Mario Cuomo signed the so-called “*get* law/statute” into law.¹⁶⁰ Other states have had model *get* bills introduced in their respective legislatures,

been implemented.” Australian Law Reform Commission, *Implementation* (Oct. 9, 2015), <https://www.alrc.gov.au/inquiry/multiculturalism-and-the-law/implementation-11/> [https://perma.cc/Z84Q-3D9A].

¹⁵⁶ Lisa Zornberg, *Beyond the Constitution: Is the New York Get Legislation Good Law*, 15 PACE L. REV. 703, 705 (1995).

¹⁵⁷ U.S. CONST. amend. I.

¹⁵⁸ SUSAN ARANOFF & RIVKA HAUT, THE WED-LOCKED AGUNOT: ORTHODOX JEWISH WOMEN CHAINED TO DEAD MARRIAGES 170 (2015).

¹⁵⁹ Breitowitz, *supra* note 5, at 375; The main driving force behind the enactment was the Orthodox political and communal organization Agudath Israel. The ideas and contributions to what eventually became a law came out of a Agudath Israel sponsored conference in 1980 which was attended by rabbis and legal scholars with the focus on how to use the secular law to help with the *Agunah* crisis. Originally the draft bill was authored by (now former) Harvard Professor Alan Dershowitz and the bill included provisions for compulsory arbitration on the issue of compliance, but it was subsequently removed after amendments were made and through the help of Nathan Lewin. Instead, a verified affidavit was to be used. See Breitowitz, *supra* note 5, at 376.

¹⁶⁰ Zornberg, *supra* note 152, at 706.

including California, Connecticut, Maryland, Michigan, and New Jersey, but none have been enacted as in New York.¹⁶¹ The New York *Get* Law is only applicable to marriages solemnized by a religious ceremony.¹⁶²

The law received much praise from within the Orthodox Jewish community,¹⁶³ including from significant New York based *poskim* (halachic decisors), such as Rabbi Moshe Feinstein and Rabbi Yosef Eliyahu Henkin.¹⁶⁴ The law was found not to be coercive by these *poskim*¹⁶⁵ as it does not directly punish the husband; rather, it conditions the grant of a civil divorce on the husband's willingness to deliver the *get*.¹⁶⁶ Rav J. David Bleich explains that, under civil law, a person does not have a "right" to a civil divorce, but instead, it is considered a privilege granted by the court.¹⁶⁷ Therefore, "withholding a civil divorce until the husband gives his wife a *get* is equivalent of not giving the husband a gift until he gives a *get*,"¹⁶⁸ which under the Orthodox *halachic* system would be a legitimate way of procuring the *get* from a potential recalcitrant husband.

The specifics of how the *Get* law works are as follows. The statute stipulates that a divorce decree will not be granted unless the original petitioner states in the verified complaint that they have taken or will take all "steps solely within his or her power to remove any barrier to the defendant's remarriage."¹⁶⁹ If the petitioner states that they intend to take such steps but have not yet done so, the judge will delay the issuance of a final decree until proof is submitted that those

¹⁶¹ Breitowitz, *supra* note 5 at 376.

¹⁶² *Id.*

¹⁶³ Although not from the Reform Jewish community and from others who viewed the law as "an unconstitutional intrusion into religious affairs". For a further discussion of some of the constitutional challenges raised by scholars of the time see *See Zornberg, supra* note 152, at 706.

¹⁶⁴ Each of these rabbis wrote *teshuvos*, responsa, arguing why the *get* law could be used as a tool within the scope of the *halachic* system and that it would not be considered to be coercion, which as noted earlier in the note would invalidate the *get*. JACHTER, *supra* note 21, at 20. For a longer list of *poskim* who have also recognized the positive potential of the New York *Get* Law and advocated for it, see Breitowitz, *supra* note 5, at 376.

¹⁶⁵ *See supra* Part I.

¹⁶⁶ JACHTER, *supra* note 21, at 21.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *See* N.Y. DOM. REL. LAW § 253(2) (McKinney 1986); The law also says that the defendant (i.e. the wife) may waive this requirement, which would likely be commonplace in divorces where a *get* is not at issue. *Id.*

efforts had been taken.¹⁷⁰ If the petitioner were to falsely claim that he had taken the proper steps, then such a knowingly false declaration may lead to criminal perjury charges.¹⁷¹

The most current text of the *Get* Law, Section 253, reads:

Any party to a marriage defined in subdivision one of this section who commences a proceeding to annul the marriage or for a divorce must allege, in his or her verified complaint: (i) that, to the best of his or her knowledge, that he or she has taken or that he or she will take, prior to the entry of final judgment, all steps solely within his or her power to remove any barrier to the defendant's remarriage following the annulment or divorce; or (ii) that the defendant has waived in writing the requirements of this subdivision.¹⁷²

Although ambitious and a great step, the New York *Get* Law does not fully solve *Agunah* problem. The statute creates a narrowly defined fact pattern that triggers its protections and thus applies only to a limited set of cases, offering a “fairly limited protective remedy.”¹⁷³ It does not directly compel the husband to comply with religious law; instead, it withholds the civil divorce decree unless he complies with religious law.¹⁷⁴ If the husband chooses not to pursue a civil divorce, he can leave his wife without a remedy, and she will remain an *Agunah*.¹⁷⁵ Furthermore, a significant limitation is that only the original petitioner must show proof that the remarriage barriers were removed.¹⁷⁶ Accordingly, the statute is most effective only when the husband initiates the divorce proceedings.¹⁷⁷ Nonetheless, due to its potential effectiveness in certain circumstances, some Orthodox community leaders have advocated for similar laws to be enacted elsewhere.¹⁷⁸

In response to the issue discussed above, the New York Legislature looked for a new solution.¹⁷⁹ Sponsored by State Senator Stephan Seland and Assemblyman Sheldon Silver, a new bill to address the *Agunah* crisis passed unanimously in both houses and was

¹⁷⁰ Breitowitz, *supra* note 5, at 376.

¹⁷¹ *Id.*

¹⁷² N.Y. DOM REL. LAW § 253(2) (2023).

¹⁷³ Breitowitz, *supra* note 5, at 376.

¹⁷⁴ *Id.* at 377.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*; see § 253(2).

¹⁷⁷ Breitowitz, *supra* note 5, at 376.

¹⁷⁸ Jachter, *supra* note 21, at 21.

¹⁷⁹ Zornberg, *supra* note 152, at 733.

signed by Governor Cuomo on July 17, 1992.¹⁸⁰ This second *get* law, Domestic Relations Law 236B(5)(h),¹⁸¹ provides that courts may consider “*the effect of a barrier to remarriage*, as defined in subdivision six of section two hundred fifty-three of this article, on the factors enumerated in paragraph d of this subdivision,”¹⁸² namely equitable distribution and maintenance. The language is placed in a section of Domestic Relations Law that is about equitable distribution of the marital property and maintenance payments and is listed amongst the other respective factors that a judge should consider when deciding.¹⁸³ The policy choice behind the 1992 amendment is that an inability to remarry may significantly affect a party’s financial situation and should therefore be taken into account.¹⁸⁴ As a result, an *Agunah*, whose “prospects of financial security may be seriously impaired by her inability to remarry,” could potentially receive a larger judgment and percentage of assets from the judge.¹⁸⁵

This 1992 addition faced great backlash from the New York Orthodox community, as many rabbis¹⁸⁶ argued its application would render the *get* ultimately invalid; thus negating the whole purpose of the law.¹⁸⁷ The Rabbinic debate centered on whether the law constitutes a *financial penalty* imposed on the husband for his refusal to give a *get*, or a provision for a recalcitrant husband to provide his wife with monetary support.¹⁸⁸ If interpreted as a support mechanism, the resulting *get* may be considered to have been coerced, thus invalidating the *get*.¹⁸⁹ Alternatively, if the text follows the reading that it is just a support mechanism, then the *get* may remain valid.¹⁹⁰

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 707.

¹⁸² N.Y. Dom. Rel. Law § 236.

¹⁸³ Zornberg, *supra* note 152, at 734.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ Including noted scholars, Rabbi Shlomo Zalman Auerbach and Rav Yosef Shalom Eliashiv from Israel. Jachter, *supra* note 21, at 23.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* Rabbi Kenneth Auman told Jachter that he had asked two judges how they interpreted this law, and each judge responded by offering one of the two possible interpretations. *Id.*

Interestingly, the statute has been interpreted in both ways by the same judge in New York State court.¹⁹¹ In *Schwartz v. Schwartz* (1992), Justice William Rigler awarded the wife a larger share of marital assets due to the husband's prior refusal to grant a *get*, reflecting a punitive interpretation¹⁹² and therefore a problem according to many *poskim*.¹⁹³ By contrast, in *Becher v. Becher* (1997), Justice Rigler criticized "the statutes in question . . . [as] merely address[ing] the parties' status as they come before the court and how that status will affect their individual economic futures"¹⁹⁴—reflecting a support-based interpretation, which would be less problematic.¹⁹⁵

Some in the Orthodox community called for the law's repeal, arguing that it may exacerbate the *Agunah* problem by creating situations of invalid *gittin* (*get* in plural).¹⁹⁶ Others, like the late Rabbi Zalman Nechemia Goldberg, have advocated for clarification through amendment, so that the statute is unambiguously understood as a support provision and its implementation is *Halachically* valid according to more *Halachic* authorities.¹⁹⁷ To date, the law remains in effect and has neither been repealed nor amended to clarify this ambiguity.

2. Constitutional Validity and Challenges

Even though the legal precedents at the time were inconclusive, the drafters of the New York law, its sponsors, and Governor Cuomo understood that enacting such legislation would likely invite challenges on First Amendment grounds.¹⁹⁸ To date, however, there have been no successful challenges against the core

¹⁹¹ *Id.*

¹⁹² Gartner, T., & Broyde, M. (1998). THE 1992 NEW YORK GET LAW. Tradition: A Journal of Orthodox Jewish Thought, 32(3), 91–97. <http://www.jstor.org/stable/23261124>; See *Schwartz v. Schwartz*, 583 N.Y.S.2d 716 (N.Y. Sup. Ct. 1992) (Which he called "cruel and inhuman treatment of her.") See *id.* at 716.

¹⁹³ Broyde, *supra* note 190, at 93.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ Including the late Torah giants from Israel, Rabbi Shlomo Zalman Auerbach and Rav Yosef Shalom Eliashiv. See Jachter, *supra* note 21, at 23.

¹⁹⁷ *Id.*

¹⁹⁸ Breitowitz, *supra* note 5, at 380.

aspects of the statute.¹⁹⁹ The most significant constitutional concerns arise under the Free Exercise Clause and the Establishment Clause, respectively.²⁰⁰ Requiring the performance of an act “prescribed solely by religious law” as a condition for receiving a civil remedy can be framed as “state-compelled religious obedience.”²⁰¹ That concern is strongest where the state appears to condition access to civil relief on compliance with a religious obligation. If the husband is refusing to give the *get* for non-religious reasons, then using the civil remedy to compel the “religious act” shifts the inquiry away from coercion and toward whether the law maintains sufficient neutrality, which is closely aligned with the Establishment Clause principles.²⁰²

For a significant period, the seminal case for evaluating Establishment Clause issues was *Lemon v. Kurtzman*.²⁰³ *Lemon* established a tripartite test when evaluating potential impermissible establishment of religion.²⁰⁴ Under the *Lemon* test, many scholars argued that the New York *Get* Law satisfied constitutional muster and was therefore a permissible piece of legislation.²⁰⁵ In recent years, however, the United States Supreme Court has moved away from the *Lemon* test, directing courts to interpret Establishment Clause by “reference to historical practices and understandings.”²⁰⁶ This doctrinal shift introduces uncertainty, as it is unclear how the New York *Get* Law would be evaluated under this newer approach.

With respect to the Free Exercise Clause, Breitowitz argues that a careful analysis of the New York *Get* Law reveals that the “unwilling spouse’s Free Exercise rights are not truly impaired.”²⁰⁷ His argument rests on the distinction between coercion and conditional benefit: the statute does not impose penalties for noncompliance but instead conditions access to civil remedies on the

¹⁹⁹ For a lengthy list of New York cases that have attempted to challenge the law’s constitutionality, *see id.* at n. 307.

²⁰⁰ Breitowitz, *supra* note 5, at 381.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *See Lemon v. Kurtzman*, 403 U.S. 602 (1971).

²⁰⁴ *See id.* (articulating the tripartite test requiring (1) a secular purpose, (2) a primary effect that neither advances nor inhibits religion, and (3) no excessive entanglement with religion).

²⁰⁵ *See* Breitowitz, *supra* note 5, at 385-393.

²⁰⁶ *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507 (2022) (quoting *Town of Greece v. Galloway*, 572 U.S. at 576 (2014)).

²⁰⁷ Breitowitz, *supra* note 5, at 394.

removal of barriers to remarriage.²⁰⁸ Thus, if a spouse elects not to comply with the court's requirement, no "additional burdens" are imposed and the "status quo" remains unchanged.²⁰⁹ This framing weakens the claim that the statute compels religious conduct.

Additionally, the statute applies only where the parties entered into a religious marriage ceremony officiated by a member of the clergy,²¹⁰ suggesting an "implied understanding" that both "the marriage and its dissolution will be governed by religious law."²¹¹ While this does not create an "independently enforceable contract[ual]" obligation, it does support the argument that the parties voluntarily assumed certain religious expectations, thereby reducing the appearance of a First Amendment violation.²¹²

Breitowitz further argues that the United States Supreme Court case of *Smith II*²¹³ strengthens the statute's position under the Free Exercise Clause.²¹⁴ Before *Smith II*, "general legislation that adversely impacted on religious observance would be sustained only if it served a 'compelling state interest.'"²¹⁵ This would mean that even the broadest of laws—that arguably impact religious observance—would only be upheld if "a compelling state interest" was proved.²¹⁶ *Smith II* rejected that framework for neutral, generally applicable laws.²¹⁷ Under this standard, the New York *Get* Law's neutral language—requiring the removal of "barriers to remarriage"²¹⁸—may qualify as a "generally applicable law" under *Smith II*.²¹⁹ If the law does qualify as a "generally applicable law," it could be constitutionally permissible even without the need to satisfy strict scrutiny.²²⁰

Another supporting the statute's constitutionality under the Free Exercise clause stems from the fact that *Agunah* problem may be,

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Employment Div. Dep't of Human Resources v. Smith (Smith II)*, 494 U.S. 872 (1980).

²¹⁴ Breitowitz, *supra* note 5, at 394, n. 359.

²¹⁵ *Id.* (internal citations omitted).

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ And no mention of religion whatsoever.

²¹⁹ Breitowitz, *supra* note 5, at 394, n. 359.

²²⁰ *Id.*

in part, exacerbated by state law itself.²²¹ New York State has, in a sense, added to the religious burden by permitting couples to “combine religious and secular marriages into one event, without likewise requiring spouses to dissolve their religious union when they civilly divorce.”²²² With this understanding, the New York *Get* Law truly doesn’t encroach on religious expression and observance, but instead attempts to remedy that aspect of the *Agunah* crisis that the state has created.²²³

Under the Establishment clause, the law can also be justified by its legitimate secular purpose of encouraging remarriage and protecting the “fundamental right to marry” and remarry.²²⁴ Some have also pushed that by “protect[ing] the enforceability of secular court judgments, and prevent[ing] the extortion of its citizens,” a legitimate secular interest is created, thus justifying the existence of the law.²²⁵

Finally, Breitowitz contends that claims of Free Exercise violations are often overstated because refusals to grant a *get* are frequently motivated not by religious belief²²⁶ but by spite or strategic leverage.²²⁷ If the conduct is not religiously motivated, it falls outside the core protections of the Free Exercise Clause.²²⁸ Even where a husband claims a religious basis, all that he would be entitled to is an evidentiary hearing in which the sincerity of his claim will be scrutinized by the court to determine the sincerity of his belief.²²⁹ If the claim is insincere, it fails; if sincere, the court may still weigh competing state interests to override his free exercise rights.²³⁰ For example, the state’s interest in allowing individuals to remarry freely may justify limited interference.²³¹

Though some constitutional uncertainty remains around the New York *Get* Law, what is clear is that the New York State

²²¹ Zornberg, *supra* note 154, at 739.

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.* at n.174.

²²⁶ Breitowitz, *supra* note 5, at n. 365.

²²⁷ *Id.* at 395.

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ Zornberg, *supra* note 154, at 739.

government recognized the *Agunah* problem and chose to address it through legislation. While other states have considered similar measures, none have enacted a comparably comprehensive solution, leaving New York's approach as a leading—though still debated—model.

VIII. COMPARATIVE ANALYSIS AND SUGGESTION FOR THE UNITED STATES

Now that the legislative and judicial approaches of various countries, including those in the United States, have been outlined, this Note turns to a comparative analysis to identify which mechanisms are most effective and which may be adapted across jurisdictions.

The most comprehensive plan of action, via the courts and legislation, clearly comes out of the state of Israel. While its methods are far-reaching and unique, they are not easily replicable in other countries. As mentioned, the religious courts are enshrined within the general administration of law, and religious authorities have significant power over religious matters, particularly with respect to marriage and divorce.²³² With such a relationship between the Jewish religion and the secular government, no other country can truly replicate or fully utilize the tools available to authorities in Israel. Even so, important lessons can still be drawn from its approach.

For example, the process of jailing individuals who withhold a *get* by decree of the Rabbinical Court could, in theory, be utilized in other countries as well. Specifically, this form of compulsion appears to be accepted by the *halachic* authorities in Israel, as it has been directed by the Rabbinical Courts within the country.²³³ The threat of jail time in other crimes and similar situations is often deemed a valid form of deterrence and is frequently used by governments. It would seem that such a tool could be considered by other countries, particularly United States.

The most far-reaching legislative methods for dealing with the *Agunah* crisis, outside of Israel, come out of Canada and the United Kingdom.²³⁴ In Canada, as described, there is nationwide law, unlike

²³² Broyde, *supra* note 36.

²³³ Israel Divorce Law 1953, *supra* note 45.

²³⁴ While the United Kingdom legislation seems similar to the one employed in Canada, for the purposes of this Note we will focus on Canada's as it receives more notoriety.

in the United States where law only exists in New York State.²³⁵ Their “*get*” law is similar to the one used in New York’s 1983 addition. The Canadian law allows a woman to require her recalcitrant husband to issue a legal affidavit testifying to the fact that he has removed barriers to her remarriage by giving her a *get*.²³⁶ If the husband does not comply, the Court may, at the request of the woman, dismiss the civil divorce proceeding in its entirety.²³⁷

While similar to New York’s legislation, there are some differences. The most significant difference is that the New York law is only applicable if the husband filed for civil divorce.²³⁸ If the wife filed, then the 1983 legislation does not apply. By contrast, the Canadian law applies regardless of which spouse initiated the divorce. While New York attempted to respond to this issue with the amendments made in 1992, the Canadian law appears to function more effectively because it allows the issue to be raised even when the wife initiates the divorce proceedings.²³⁹

The 1992 New York legislation follows a similar pattern to approaches used in court proceedings in both the United Kingdom and Australia. Just as New York law requires that barriers to remarriage be taken into consideration when it comes to distribution of marital assets and alimony, the courts in the United Kingdom and Australia have also done so.²⁴⁰ The United Kingdom case of *Bret* and Australian case of *Steinmetz* demonstrate the court system’s willingness to consider a woman’s *Agunah* status. In doing so, New York, the United Kingdom, and Australia each recognize the *Agunah* crisis and attempt to address its practical consequences.

The United Kingdom also pursued the issue through legislation, as described, and classified the withholding of a *get* as a form of criminal domestic abuse.²⁴¹ This tactic is unique amongst the other countries discussed and should serve as a model for others. The potential deterrence created by such a law is significant. While receiving a final divorce decree is important to people, as the New York and Canadian

²³⁵ See Canada Divorce Act 1985, *supra* note 78.

²³⁶ See *id.*

²³⁷ *Id.*

²³⁸ See *supra* Part VI (A) (1).

²³⁹ See *supra* Part III.

²⁴⁰ See *supra* Part IV-VI.

²⁴¹ See *supra* Part IV.

law seeks to accomplish, possibility of criminal consequences introduces a much stronger level of deterrence.

Barring constitutional challenges,²⁴² it would be beneficial for other states within the United States to consider approaches similar to those adopted in Canada and the United Kingdom. As demonstrated by the fact that New York's 1983 legislation has survived countless challenges, such laws are not only possible but *plausible* for other states to enact. This would require adjustments to the New York statute to allow a woman who files for divorce to utilize the law and condition the civil divorce decree on receiving a *get* from her recalcitrant husband. It may also require amendments to states criminal codes to include *get* refusal as a form of psychological abuse, potentially subject to criminal penalties. While more aggressive, this approach aligns with the growing recognition that psychological abuse can be as harmful as physical abuse.

Recognizing an issue is often the hardest part in the process of solving it. So far, many countries and states have achieved a level of recognition for the *Agunah* crisis and the need to address it. Recognition, however, is only the first step. More must and can be done to help these "chained" women in their fight against evil and abusive recalcitrant husbands, especially in the United States. The United States can look to both foreign jurisdictions and its own experience in New York as proof that solutions exist. The opportunity to act is present, and it falls on legislators and courts to make a meaningful step toward addressing the *Agunah* crisis.

²⁴² As well as technical *halachic* problems that may come up.