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CIVIL ENFORCEMENT OF JEWISH MARRIAGE AND DIVORCE: CONSTITUTIONAL ACCOMMODATION OF A RELIGIOUS MANDATE

INTRODUCTION

When a Jewish couple marries, both parties sign an ornate document known as a *ketubah*. In layman's terms, the *ketubah* is the Jewish marriage license.¹ The majority of rabbis officiating a wedding will require the signing of a *ketubah* as part of the wedding ceremony.²

Legal and Jewish scholars have interpreted the *ketubah* as a legally binding contract which sets out the guidelines for a Jewish marriage and divorce.³ Using this interpretation, a number of courts have required that one party accommodate the other in following the specified divorce proceedings that are mandated by Jewish law.⁴ The Jewish law requirements for a valid divorce are strict and often difficult to enforce; namely, the law requires that a husband "voluntarily" give his wife a document called a *get* in order to dissolve the marriage according to traditional Jewish law.⁵

While the civil marriage contract alone binds the marriage in the eyes of the state, courts nonetheless have found the *ketubah* to be binding as well, and they have enforced both express and implied provisions of the *ketubah* in granting a civil dissolution of a marriage between a Jewish couple. This includes the requirement that a *get* be given.

This Comment opens with a discussion of the historical origins and religious significance of the *ketubah* and the *get*. Noting that enforcement of these two Jewish documents raises constitutional issues, this Comment will then provide a brief review of the First Amendment to

1. See *infra* notes 10-27 and accompanying text (explaining that the *ketubah* is signed by the couple immediately before the wedding ceremony and that the *ketubah* sets forth the obligations of a husband towards his wife).

2. However, in order for their marriage to be civilly binding, couples must also sign a civil marriage license, as required by the state in which they are married. See, e.g., CAL. FAM. CODE §§ 422-23, 307 (West 1994) (setting out the procedures for signing a civil marriage license, which is required whether or not the wedding is officiated by a clergyman).

3. See *infra* notes 140-42, 286 and accompanying text (noting the view that the *ketubah* is equivalent to a civil contract spelling out the obligations of the parties during the marriage).

4. See *infra* notes 177-180, 196-212 and accompanying text (noting cases which have upheld the *get* procedure based upon contract theory).

5. See *infra* notes 28-70 and accompanying text (discussing the *get* generally).

the United States Constitution and its accompanying doctrine. The discussion will show that it is constitutionally "kosher" for a civil court to order one party to grant the other a Jewish divorce since it does not violate the First Amendment.

In reaching its conclusion, this Comment uses the guidelines set forth in two landmark Supreme Court rulings. Specifically, this Comment purports that a court order enforcing the *get* procedure for marital dissolution does not violate the Establishment Clause since the order effectuates a number of secular goals, does not advance Judaism, and does not excessively entangle the civil court with religious dispute or doctrine. In addition, not only does the order accommodate one party's free exercise of religion, but the other party is essentially precluded from asserting a genuine free exercise claim since Jewish authority contends that the specific act of giving or receiving a *get* is not religious in nature.⁶ However, even if one's right to the free exercise of religion is burdened, compelling state interests may override any possible First Amendment challenge.⁷ This Comment discusses the right to contract, the right to remarry, and the right to equal protection of the law, and the role that each may play as a compelling state interest.

Next, this Comment examines a number of courts' reasoning and techniques underlying orders which have enforced the *get* proceeding. In doing so, this Comment pays special attention to a recent Illinois case, *In re Marriage of Goldman*,⁸ which not only currently governs this area of the law in Illinois, but is in line with court orders of a number of other jurisdictions as well.⁹

Noting that numerous courts have upheld the *get* requirement under general contract theory, this Comment nevertheless determines that the *ketubah* document should not be enforced as a civilly binding contract under the guise of a compelling state interest. Rather, this Comment contends that the *ketubah* is an ornamental and highly sentimental document with terms and obligations which lack validity in a modern and secular society. Moreover, the *get* requirement itself is not found in the original *ketubah* at all, but rather, has its origin in the Torah.

6. See *infra* notes 259-61 and accompanying text (referring to the view of many Jewish and legal scholars that the *get* procedure is secular in nature).

7. See *infra* notes 292-98 and accompanying text (discussing the compelling state interests, provided by the Fourteenth Amendment, that may overcome a Free Exercise claim).

8. 554 N.E.2d 1016 (Ill. App. Ct. 1990).

9. See *infra* notes 176-80 and accompanying text (discussing the *get* cases).

Notwithstanding its invalidity as a contract, this Comment concludes that a court may enforce the *get* procedure. The Fourteenth Amendment provides the two compelling state interests for enforcing the *get* procedure: the equal protection of the law and the fundamental right to remarry.

I. BACKGROUND

A. *The Ketubah*

Under Jewish law, marriage is an oral, not written, contract which is effectuated by a religious ceremony.¹⁰ Immediately before the ceremony, the bride and groom sign a document known as a *ketubah* ("writing").¹¹ The *ketubah* is usually written in Aramaic or Hebrew and may or may not be translated into English.¹² Although the *ketubah* is publicly read at the wedding ceremony, most of the audience, including the couple being married, generally do not understand what they are hearing since the *ketubah* is usually left untranslated.¹³

The *ketubah* is a standard document, traditionally signed by two witnesses; thereafter, it is presented to the wife remaining her property.¹⁴ The reason that the written document belongs exclusively to the wife, rather than the couple, is that its purpose was to discourage the husband from exercising what was his unilateral and unconditional power to divorce his wife.¹⁵ In order to protect women from being randomly dismissed, the authorities insisted on a formal marriage contract, the *ketubah*, in which the husband agrees to pay a predetermined sum of money to his wife in the event of a divorce.¹⁶ The authorities hoped that by making divorce costly, the *ketubah* would promote marital stability.¹⁷ Thus, the development of the institution of marriage in Jewish law has been said to be related directly to the

10. IRWIN H. HAUT, *DIVORCE IN JEWISH LAW AND LIFE* 3-4 (1983); Marc Feldman, *Jewish Women and Secular Courts: Helping A Jewish Woman Obtain A Get*, 5 *BERKELEY WOMEN'S L.J.* 139, 141 (1990).

11. Feldman, *supra* note 10, at 141.

12. *Id.* Aramaic is a language similar to Hebrew in that it uses Hebrew script. *Id.* at 141 n.14. Aramaic was the Jewish vernacular in the time of the Talmud (the Jewish legal compilation), circa 500 C.E. *Id.* at 142 n.14. For a more intricate discussion of the Talmud, see *infra* note 35.

13. IRVING A. BREITOWITZ, *BETWEEN CIVIL AND RELIGIOUS LAW: THE PLIGHT OF THE AGUNAH IN AMERICAN SOCIETY* 283 (1993).

14. *Id.*

15. Solomon Zeitlin, *The Origin of the Ketubah: A Study in the Institution of Marriage*, 24 *JEWISH Q. REV.* 1, 4-6 (1933-34); see also BREITOWITZ, *supra* note 13, at 283, 287 (noting that the *ketubah's* "original purpose" was to give financial security to widowed or divorced women by placing a lien on the husband's property).

16. BREITOWITZ, *supra* note 13, at 287.

17. *Id.*

"continuous advancement in the status, freedom and dignity of women."¹⁸

The *ketubah* does not in itself effectuate the marriage.¹⁹ Rather, it sets out the obligations of a husband toward his wife.²⁰ In the *ketubah*, the husband agrees to provide such essentials as food, clothing, and sexual intercourse for his wife.²¹ The *ketubah* also provides the amount of money the husband, or his estate, must pay his wife not only upon divorce but also upon his death.²² However, the husband, in return, is entitled to use the property that his wife brings into the marriage, to use her earnings during the marriage, and to be an heir of her estate should she die before him.²³

The text of the *ketubah* has remained unchanged in all important aspects since the Middle Ages.²⁴ The most significant alteration oc-

18. GEORGE HOROWITZ, *THE SPIRIT OF JEWISH LAW* 253 (1953).

19. Linda S. Kahan, Note, *Jewish Divorce and Secular Courts: The Promise of Avitzur*, 73 *GEO. L.J.* 193, 197 (1984).

20. *Id.*

21. Feldman, *supra* note 10, at 141.

22. *Id.* Since the husband's monetary obligations set forth in the *ketubah* document are guaranteed by the husband's property, the *ketubah* essentially creates a lien on his estate. *Id.* (citing HAUT, *supra* note 10, at 9).

23. HAUT, *supra* note 10, at 6.

24. Feldman, *supra* note 10, at 141. The translation of a standard Orthodox *ketubah* is as follows:

On the _____ day of the week, the _____ day of the month of _____ in the year _____ since the creation of the world according to the manner of reckoning here in the _____, the groom — the son of _____ said to the virgin _____ daughter of _____:

Be thou my wife in accordance with the law of Moses and Israel and I will work, honor, support, and maintain thee in accordance with the practices of Jewish husbands who work, honor, support, and maintain their wives in faithfulness. And I will give thee 200 zuz as alimony for thy virginity which is due to thee under the law of the Torah as well as food, clothing, needs, and cohabitation according to the way of the world.

This virgin _____ daughter of _____ consented and became his wife. The dowry that she brought from her father's home in silver, gold, ornaments, clothing, household furnishings, and her clothes amounting in all to the value of _____, the groom has taken upon himself. The groom has also consented to match the above sum by adding the sum of _____ making a total in all of _____. Thus, did the groom _____ son of _____ declare:

I hereby accept upon myself and my heirs the responsibility of this *ketubah* document, the dowry, and the addition, that it shall be paid from all my property and possessions, wherever located, that I now possess or that I will acquire in the future. All my property, even the shirt on my shoulders, shall be security for and subject to this *ketubah* document, this dowry, and the addition in my lifetime and after my death, forever more. The responsibility of this *ketubah* document, the dowry, and the addition did the groom take upon himself with the full force and effect of all *ketubah* documents and their additions as is customarily practiced for the benefit of Jewish women and in accordance with the enactments of the Sages (may their memory be a blessing) not as a void penalty not as a mere form. And this groom has received in our presence

curred in 1954, when the Conservative branch of American Judaism²⁵ added a clause to the *ketubah*.²⁶ While the Conservative movement has slightly modified the text of the Orthodox *ketubah*, the Reform movement does not use a *ketubah* at all unless the couple so desires.²⁷

B. *The Get Proceeding*

As the *ketubah* was intended to protect the wife in marriage, another device, the *get*, was instituted to protect the wife in securing a divorce. Orthodox and Conservative Judaism impose strict requirements on a couple's ability to divorce beyond those imposed by the state.²⁸ The parties must go through a divorce ceremony in accordance with Jewish law, in addition to obtaining a civil divorce.²⁹ A

good and valuable consideration to bind himself in accordance with all that is stated above and all is binding and irrevocable.

The words of _____

The words of _____

BREITOWITZ, *supra* note 13, at 283-85.

25. There are three main branches of American Judaism: Orthodox, Conservative, and Reform. Orthodox is the most observant of traditional Jewish law and Reform is the least observant. Feldman, *supra* note 10, at 140 n.5. The problems discussed in this Comment are relevant only to Orthodox and Conservative Jews, since only those two branches, with some differences, recognize Jewish law as binding. The Reform Movement, on the other hand, abolished the requirement of a *get* in 1869. J. David Bleich, *Jewish Divorce: Judicial Misconceptions and Possible Means of Civil Enforcement*, 16 CONN. L. REV. 201, 232 n.96 (1984).

26. BREITOWITZ, *supra* note 13, at 285. The additional clause that was approved by the Rabbinical Assembly in 1954 for the Conservative *ketubah* is as follows:

We, the bride and groom . . . hereby agree to recognize the *bait* or [] *Din* of the Rabbinical Assembly and the Jewish Theological Seminary of America or its duly appointed representatives as having authority to counsel us in the light of Jewish tradition which requires husband and wife to give each other complete love and devotion, and to summon either party at the request of the other, in order to enable the party so requesting to live in accordance with the standards of the Jewish law of marriage throughout his or her lifetime. We authorize the *Bait* or [] *Din* to impose such terms of compensation as it may see fit for failure to respond to its summons or to carry out its decision.

Id. at 285-86.

27. *Id.* at 283; HAUT, *supra* note 10, at 64. The Orthodox movement has rejected the Conservative addition based on its strict interpretation of Jewish law. See MOSHE MEISELMAN, JEWISH WOMAN IN JEWISH LAW 109-110 (Ktav Publishing House, Inc. 1978) (stating that Orthodox scholars rejected the 1954 proposal principally because its compensation provision was indeterminate and in contradiction to Jewish law, which requires that the parties specifically know their obligations under a contract).

28. See Irving Breitowitz, *The Plight of the Agunah: A Study in Halacha, Contract, and the First Amendment*, 51 MD. L. REV. 312, 313-21 (1992) (discussing the origin and procedural requirements of a *get*). See *infra* notes 32-70 (elaborating on the origin and procedural requirements of a *get*).

29. Breitowitz, *supra* note 28, at 313. The religious ritual must be carried out in order for the parties' subsequent marriages to be recognized in the Jewish faith. *Id.* See *infra* note 63 (discuss-

*halachically*³⁰ valid marriage may only be terminated through the death of a spouse or by the granting of a *get*.³¹

1. History of the Get

Historical analysis sheds light on the modern-day requirement of the *get*. In Biblical times, unlike today, there was little concern about the recalcitrant husband, who refused to grant his wife a divorce in order to use his “*get* power” as leverage over her.³² Rather, the concern was over prolonged and unexplained periods of absence, usually due to war.³³ Since “Jewish law does not require a presumption of death arising from prolonged absence,” a wife would only be permitted to remarry after her husband’s death could be clearly established.³⁴

According to the Talmud,³⁵ King David required all fighting soldiers to write *gittin*³⁶ and give them to their wives.³⁷ This was required to allow a wife to remarry if her husband did not return home

ing religious officials’ refusal to marry couples without the parties having fulfilled the *get* requirement).

30. Breitowitz, *supra* note 28, at 318 n.17. *Halacha* is the whole body of Jewish law. Judaism is not a religion concerned solely with prayer and rituals, but rather contains “a complete body of substantive and procedural law that regulates every aspect of human conduct and interaction.” *Id.*

31. *Id.* at 319 (citing BABYLONIAN TALMUD, *kiddushin* 2a) (noting that Jewish law does not recognize civil divorces when the *get* requirement has not been met; thus, subsequent remarriage is considered “adulterous”). “*Get* is an Aramaic term meaning document.” *Id.*

32. *See id.* at 316 (discussing long and unexplained absences, usually due to war, as the original purpose of giving a *get*). *See infra* note 66 and accompanying text (discussing the possible reasons for a husband’s withholding of a *get* and explaining the notion of “*get* power”).

33. Breitowitz, *supra* note 28, at 316-317.

34. *Id.*

35. Because of the intricacies of Jewish law, an overview of its basic structures is necessary in order to understand the sources in this Comment. The chief source of authority on Jewish law is the Torah, which is the first five books of the Old Testament. *Id.* at 314 n.4. This serves as a “detailed legal code” of both civil and religious matters. *Id.* Supplementing this written legal text, there arose an oral tradition which interpreted the text and constantly applied it to more modern situations. *Id.* After the passing of many centuries, this oral tradition was “committed to writing,” becoming part of what is known as the Talmud. *Id.* “The Talmud is the authoritative and definitive source of Jewish law and practice[, and remains so] to this day.” *Id.* Out of the Talmud came a form of literature known as rabbinic law. *Id.* Rabbinic law is the written responses of prominent rabbis to questions of how to apply the existing principles of Jewish law to modern situations, which were most probably unanticipated by the ancient scholars. *Id.* These responses from all over the world have been collected over the millennia, and have become what is now a great collection of volumes which cover every conceivable facet of Jewish law. *Id.* This written dialogue continues even today. *Id.*

36. The plural of *get*. *Id.* at 317 n.11; Feldman, *supra* note 10, at 142.

37. Breitowitz, *supra* note 28, at 317 (citing BABYLONIAN TALMUD, *shabbat* at 56a; *ketuboth* at 9b).

from war.³⁸ If, however, the soldier returned safely, the couple would be able to remarry each other.³⁹ Needless to say, this procedure created new and complicated problems, such as the unfortunate risk that a soldier's wife would remarry another man before the soldier returned home, since nothing compelled the wife to await her husband's return.⁴⁰ Jewish authorities considered the risk justified since the wife's anguish from waiting "in limbo" indefinitely would be avoided.⁴¹

2. Modern Application of the Get Requirement

At the divorce ritual, the husband, or a designated agent, must physically hand to the wife, or her designated agent, the written document of the *get*.⁴² Traditionally, the *get* is given in the presence of two witnesses.⁴³ While the *get* is Biblically mandated,⁴⁴ it has been asserted that the *get* procedure is not religious in nature.⁴⁵ The execution of a *get* is essentially a private act since "it does not require the participation of, or even the consent of, a rabbinical tribunal."⁴⁶ However, due to the formalities surrounding the actual writing of the *get*, a rabbinical court of at least three is usually present to supervise.⁴⁷ It

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 320-21. Unlike the *ketubah*, the entire *get* document must be handwritten for the particular divorce for which it is being used. BREEROWITZ, *supra* note 13, at 6. Like the *ketubah*, the *get* is written in Aramaic and Hebrew. *Id.* at 6, 283.

43. Breitowitz, *supra* note 28, at 320-21.

44. See Lawrence C. Marshall, Comment, *The Religion Clauses and Compelled Religious Divorces: A Study in Marital and Constitutional Separations*, 80 NW. U. L. REV. 204, 208 n.26 (1985) (stating that the requirement of a *get* is originally found in Chapter 24:104 of the Book of Deuteronomy of the Old Testament). *Deuteronomy* 24:104 provides that

when a man takes a wife and marries her then it comes to pass, if she finds no favor in his eyes, because he has found some unseemly thing in her, that he writes her a bill of divorce, and gives it in her hand, and sends her out of his house

Id.

45. See, e.g., *In re Marriage of Goldman*, 554 N.E.2d 1016, 1020 (Ill. App. Ct. 1990) (relying on expert testimony that, according to Jewish law, marriage and divorce are secular, contractual undertakings which do not require the presence of a clergyman for validation); *Minkin v. Minkin*, 434 A.2d 665, 667-68 (N.J. Super. 1981) (holding that the *get* requirement is not a religious act and that an order to compel its obtainment would not violate the First Amendment, after its review of supporting expert testimony by Jewish clergymen). Similarly, Professor J. David Bleich argues that the *get* is not at all a religious act since "it involves no worship and it does not invoke the deity, a profession of creed, or confession of faith." Bleich, *supra* note 25, at 202. See also *infra* notes 107-10 and accompanying text (discussing the two components of Jewish law).

46. Breitowitz, *supra* note 28, at 320.

47. *Id.*

must be noted that the rabbis' role is only supervisory; they do not effectuate the divorce since a husband is the only person who may divorce his wife.⁴⁸ The basic ceremony is quite simple and can usually be accomplished in less than an hour.⁴⁹

Notwithstanding developments to protect the woman in marriage and divorce, the actual power to effectuate a divorce remains exclusively with the husband, or his agent.⁵⁰ In order for the procedure to be accomplished, the husband must physically place the bill of divorce, the *get*, into his wife's hands.⁵¹ Thus, according to Jewish law, it is actually the husband who divorces his wife, as opposed to civil law, which requires the state to dissolve the marriage.⁵²

While a wife may be coerced into receiving or accepting a *get*, a husband may be divorced only pursuant to "his free will."⁵³ Although the husband must willingly grant the divorce, under very limited circumstances the Jewish court, the *beth din* (or *bait din*),⁵⁴ may impose penalties on the husband if he refuses to freely comply with the divorce proceeding.⁵⁵ The coercive tactics used could range from fines or community ostracism to corporal punishment.⁵⁶ However, commentators have made special note of the fact that if the husband is willing to suffer those penalties, the *beth din* is powerless to order the divorce since the *get* ultimately must be authorized exclusively by the husband.⁵⁷ Thus, if the husband's "consent" cannot be obtained even

48. *Id.* See *infra* notes 50-62 and accompanying text (discussing the source of a husband's unilateral power to divorce his wife and idea of "coerced consent").

49. Breitowitz, *supra* note 28, at 320.

50. HOROWITZ, *supra* note 18, at 273-75.

51. Breitowitz, *supra* note 28, at 319.

52. *Id.* at 320.

53. BREITOWITZ, *supra* note 13, at 320 (citing BABYLONIAN TALMUD, *Yebamoth*: 112b; Rambam, MISHNA TORAH, *Ishut*) (some citations omitted). In addition, if a husband produces a *get* out of compulsion, it is invalid for the reason that it was not a product of his free will. *Id.*

54. *Beth Din* is Hebrew for "House of Law," or the rabbinic tribunal, normally comprised of three rabbis. *Id.* at 14. While Biblical and Talmudic law gives extensive enforcement powers to the *beth din*, today in the United States it does not possess such authority. *Id.* Rather, the development of the separation of church and state in this country has created a situation where the *beth din* no longer has coercive power and "can decide only those disputes that the parties have voluntarily submitted to its jurisdiction." *Id.*

55. See Kahan, *supra* note 19, at 200-01 (explaining that under the legal fiction of "constructive consent" the Jewish court may apply coercive tactics in certain limited instances where the wife is recognized as having a right to divorce).

56. *Id.*; see also 4 ENCYCLOPEDIA JUDAICA, *Beth Din and Judges* 719-27 (1973) (discussing the history, composition and jurisdiction of Jewish courts generally); MEISELMAN, *supra* note 27, at 101.

57. See MENACHEM ELON, *THE PRINCIPLES OF JEWISH LAW* 414-19 (1975) (noting that courts can only compel "constructive consent" when there is a basis for either party to assert his or her right to divorce (e.g., either is incapable of parenting a child or leads the other into "transgressing the law of Moses"); otherwise the compulsion is perceived as duress and the "consent"

with the application of coercive sanctions, the *beth din* has no power to terminate the marriage.⁵⁸

Aside from the requirement that only a husband has the power to divorce his wife, another crucial limitation on the civil court's power to compel a religious divorce is that only a *beth din* may apply coercive tactics.⁵⁹ The reason for this is contained in classical written commentary of Jewish law.⁶⁰ Therefore, if a civil court forces a husband to give a *get*, the divorce is presumptively invalid under Jewish law.⁶¹ Although a civil court may not itself execute a *get*, it may compel a husband to obey an order of the *beth din* once the *beth din* has decided that the divorce may be granted under Jewish law.⁶²

If either party refuses to participate in the Jewish divorce ceremony, then the other party is prohibited from remarrying within the Jewish

is nullified); HAUT, *supra* note 10, at 19-20, 85-86 (noting that courts ultimately have no power to enforce consent to giving a *get* since marriage and divorce in Jewish law are both personal acts between a man and woman).

58. BREITOWITZ, *supra* note 13, at 40.

59. Feldman, *supra* note 10, at 143. "When Jewish communities were self-contained and self-governing, as they were in the time of the Talmud," coercive tactics by the *beth din* could be quite successful. *Id.* at 144. However, today in the United States, since all Jews live under secular law, the *beth din* has no civil enforcement powers outside moral and social pressures. *Id.* Moral persuasion, however, is only effective where the man is sensitive to traditional Jewish values since the *beth din* cannot force a man to appear before it any more than it can inflict punishment. *Id.*; Kahan, *supra* note 19, at 201. In Israel, rabbinic courts can impose fines and order a man to be placed in jail for refusing to deliver a *get* since the entire area of marriage and divorce in that country is still governed exclusively by Orthodox Jewish law. HAUT, *supra* note 10, at 85-86; MEISELMAN, *supra* note 27, at 101.

60. The seemingly contradictory solution of coercing a husband to give his wife a *get* when it must only be given of his own free will has been explained by the ancient sage Rambam who stated as follows:

It is assumed that every Jew truly desires to comply with the dictates of religious law and any refusal to do so is merely the result of an "evil disposition" which temporarily overpowers or vanquishes his "free will." Duress is therefore applied not to overcome the husband's exercise of will but to remove the impediment that prevents that "free will" from emerging.

BREITOWITZ, *supra* note 13, at 34-35.

61. HAUT, *supra* note 10, at 24.

62. *See id.* (asserting that while a secular court's direct order would be tantamount to duress, a civil court may generally enforce a Jewish court's doctrine, despite "some minority opinion to the contrary"); MEISELMAN, *supra* note 27, at 100 ("[A] woman may not initially approach a non-Jewish court to force her husband to grant her a Jewish divorce. However, if a *beth-din* orders a Jewish divorce and the non-Jewish court merely enforces the decision of the *beth-din*, the divorce is valid."); Kahan, *supra* note 19, at 210, 215 (stating that a secular court may enforce the decision of a rabbinic court that a husband is required to give a *get*). As will become apparent later in this Comment, civil courts today may now compel a husband to appear before a *beth din* for the purpose of determining whether or not the marriage may be terminated under Jewish law as a condition of the civil dissolution. *See infra* notes 182-89 and accompanying text (discussing *Avitzur v. Avitzur*, 446 N.E. 2d 136 (N.Y. App. Ct.), *cert. denied*, 464 U.S. 817 (1983), the first case to hold that civil courts may compel a couple to appear before a *beth din*).

faith.⁶³ For a number of reasons the "victimized" spouse is most often the wife.⁶⁴ A woman whose husband leaves her and refuses to grant a *get* is known as an *agunah*, meaning "bound woman."⁶⁵ Courts have recognized that the husband's *get* power to bind his wife to the marriage "gives him enormous leverage over the wife in seeking favorable custody and/or property settlements."⁶⁶

A civil divorce is not valid under religious law, just as a religious divorce is not civilly recognized.⁶⁷ Unlike marriage, where "almost all states now recognize the legitimacy of a ceremony officiated by an authorized minister of the faith of the parties," the power to divorce is exclusively that of the secular judiciary.⁶⁸ Thus, the *get* requirement is completely separate from the granting or withholding of a civil marital dissolution.⁶⁹ Nevertheless, it is clear that the *get* is essential to the divorce of a traditional Jewish adherent.⁷⁰

63. Breitowitz, *supra* note 28, at 313. Under most circumstances, Orthodox and Conservative rabbis will not officiate the marriage of a divorced person where a properly executed *get* has not been obtained from a recognized *beth din* dissolving the previous marriage. HOROWITZ, *supra* note 18, at 281.

64. See Breitowitz, *supra* note 28, at 313 ("[T]he consent principle of Jewish divorce law is not applied equally" since, if a husband refuses to consent to the divorce the wife is bound to the marriage and may not remarry.); Kahan, *supra* note 19, at 200 ("The remarriage of a Jewish woman without a *get* entails the most serious consequences: her remarriage will be considered an act of adultery, and children of such a union . . . will suffer religious disabilities including a prohibition against marriage to other Jews."). However, if the wife refuses to accept a *get* when her husband has proper grounds to divorce her, he is permitted to remarry. HAUT, *supra* note 10, at 56; Kahan, *supra* note 19, at 199. See *infra* notes 71-83 and accompanying text (discussing the different consequences for men and women when remarrying without having obtained a *get*).

65. Feldman, *supra* note 10, at 139. The term *aguna* is derived from the term *agun*, or anchor, and refers to women who are literally "chained" to their former spouses. BREITOWITZ, *supra* note 13, at 1 n.1.

66. Feldman, *supra* note 10, at 139. A few of the reasons for a husband's refusal to grant a *get* are spite, greed or leverage to extort other concessions from his wife, such as custody of children, favorable property divisions or maintenance agreements. See Barbara J. Redman, *Jewish Divorce: What Can Be Done in Secular Courts to Aid the Jewish Woman*, 19 GA. L. REV. 389, 392 (1985) ("The wife in this situation has two choices: she can refuse to impoverish herself and suffer the consequences of being an adulteress and raising bastards, or she can agree to an inequitable divorce contract which deprives her of all fair return from her contribution to the marriage and severely disadvantages her economically.").

67. Breitowitz, *supra* note 28, at 321.

68. *Id.*

69. *Id.*

70. Kahan, *supra* note 19, at 201. Since a civil divorce is not recognized by Jewish law, parties who fail to comply with the *get* requirement are unable to remarry within the Jewish faith. *Id.* This is especially true of women, as will become evident from the discussion immediately following.

3. *Consequences of the Get Requirement*

Since a civil divorce is not recognized by Jewish law, any subsequent cohabitation or remarriage exercised in the absence of a *get* is considered adulterous.⁷¹ Jewish law, however, provides different consequences for men than for women regarding remarriage and subsequent children in the absence of a *get*.⁷² For example, children resulting from a wife's remarriage, without a *get* from her previous marriage, are regarded as illegitimate.⁷³ However, the husband's subsequent children are not stamped with the same inferior status.⁷⁴ This disparate treatment relates back to the Biblical allowance for men, but not women, to practice polygamy.⁷⁵

While Talmudic law officially banned the practice of polygamy, Jewish law regarding relations in general, and remarriage specifically, is still far more lenient for men than it is for women.⁷⁶ For instance, the consequences of adultery for a married man are substantially more relaxed than those for a married woman.⁷⁷ Additionally, if a woman whose marriage has not yet been dissolved by the receipt of a *get* cohabitates with another man, regardless of whether the man is married, she and the man are guilty of a capital offense according to Jewish law.⁷⁸ Any children resulting from that union are considered illegitimate and are prohibited from marrying another Jew unless that person is also illegitimate or a convert.⁷⁹ Moreover, subsequent to the wife's divorce from her husband, she may not marry her lover.⁸⁰

On the other hand, if a married man commits adultery with an unmarried woman, "under Biblical law no crime has been committed."⁸¹ "The husband is permitted to remain with his wife if she consents and

71. Breitowitz, *supra* note 28, at 323.

72. *Id.* at 323-25. These consequences will be significant to this Comment's assertion that a court's refusal to compel recalcitrant husbands to procure a *get* amounts to a denial of Equal Protection under the law for women.

73. Breitowitz, *supra* note 28, at 323-24.

74. *Id.* at 324.

75. *Id.* at 322-23.

76. *Id.* at 322-25.

77. *Id.* at 323.

78. *Id.* (citing *Deuteronomy* 23:22).

79. *Id.* at 324 n.48.

80. *Id.* (citing SHULCHAN ARUCH, *Even Haezer* 11:1). "The *Shulchan Aruch* . . . is regarded as the definitive code of Jewish law by Orthodox Jewry." *Id.* at 318 n.15.

81. *Id.* at 324. This simply means that the husband has not committed adultery. *Id.* Under strict Biblical law, a married man cohabitating with an unmarried woman is no different than if both were unmarried. *Id.* "The marital status of the man is simply irrelevant." *Id.* Moreover, the children of such a relationship are not stigmatized as illegitimate. *Id.*

even perhaps if she does not."⁸² While a woman can never remarry within her faith without a *get*, a man may marry again while remaining religiously married to the first spouse.⁸³ Thus, according to traditional Jewish law, even if the man does not procure a valid *get*, his remarriage will not be condemned and his children will not be considered culturally inferior, while the same clearly does not hold true for his wife.

Recently, there have been a growing number of cases which grapple with issues of Jewish marriage and divorce.⁸⁴ The question of the *get* requirement necessarily arises whenever a Jewish couple divorces and one party seeks an accompanying religious divorce while the other denies it.⁸⁵ Not only is Jewish law pertinent in deciding these cases, but several First and Fourteenth Amendment issues are raised as well.

C. First Amendment Issues

The First Amendment mandates that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." ⁸⁶ The first clause of the First Amendment is termed the "Establishment Clause."⁸⁷ The second is the "Free Exercise Clause."⁸⁸ There is a "natural antagonism between the two clauses of the First Amendment."⁸⁹ Specifically, the Establishment Clause commands no establishment of religion and the Free Exercise Clause commands no inhibition of the practice of religion.⁹⁰ Essentially, the First

82. *Id.* Further, should the husband subsequently divorce his wife, he is allowed to marry his lover. *Id.*

83. *Id.* at 325.

84. See *infra* notes 175-232 and accompanying text (discussing *In re Marriage of Goldman*, 554 N.E.2d 1016 (Ill. App. Ct. 1990); *Burns v. Burns*, 538 A.2d 438 (N.J. Super. Ct. 1987); *Minkin v. Minkin*, 434 A.2d 665 (N.J. Super. Ct. 1981); *Avitzur v. Avitzur*, 446 N.E. 2d 136 (N.Y. Ct. App.), *cert. denied*, 464 U.S. 817 (1983); *Rubin v. Rubin*, 348 N.Y.S.2d 61 (N.Y. Sup. Ct. 1977) and other *get* cases).

85. See, e.g., *Goldman*, 554 N.E.2d at 1020-24 (referring to expert testimony that a *get* is required to dissolve a Jewish marriage and addressing the enforceability of the same); *Minkin*, 434 A.2d at 665 (noting the wife's assertion that without a *get* she is restrained from remarrying within the Jewish faith and the husband's claim that he cannot be compelled to give a *get* because to do so would violate the Establishment Clause of the First Amendment).

86. U.S. CONST. amend. I.

87. JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* (4th ed. 1991). See *infra* notes 97-110 and accompanying text (discussing the Establishment Clause).

88. NOWAK & ROTUNDA, *supra* note 87, at 1157. See *infra* notes 111-26 and accompanying text (discussing the Free Exercise Clause). The First Amendment is applicable to the states by the Due Process Clause of the Fourteenth Amendment. NOWAK & ROTUNDA, *supra* note 87, at 1157. The Free Exercise Clause was first held applicable to the states in *Cantwell v. Connecticut*, 310 U.S. 296 (1940). *Id.*

89. NOWAK & ROTUNDA, *supra* note 87, at 1157.

90. *Id.* (citing U.S. CONST. amend. I.).

Amendment prohibits the government from affording special treatment to any religion.⁹¹ At the same time, the First Amendment requires the government to reasonably accommodate religious practices.⁹² This tension between the clauses often requires courts to choose between competing values in religion cases.⁹³

Some legal scholars have read the First Amendment in its entirety to require that the government "act to achieve secular goals in a religiously neutral manner."⁹⁴ Inevitably, situations arise where the state helps or hinders religious groups, individuals, or practices although it proceeds with its secular goals in a neutral manner.⁹⁵ Whether or not this situation is viewed as undesirable may depend upon whose rights, and what rights, are being protected or jeopardized.⁹⁶

91. *Id.*

92. *See, e.g.,* Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 338 (1987) (asserting that there is "ample room" for accommodation where the government acts with a proper purpose). *Cf.* Breitowitz, *supra* note 28, at 350-51 (stating that the Free Exercise Clause requires the government to "structure its programs" so as not to interfere with the practice of religion).

93. NOWAK & ROTUNDA, *supra* note 87, at 1157 ("In a sense, the conferral of a benefit on one group may be perceived as a burden to another."); Lawrence M. Warmflash, *The New York Approach to Enforcing Religious Marriage Contracts: From Avitzur to the Get Statute*, 50 BROOK. L. REV. 229, 240 (1984) (citing Sherbert v. Verner, 374 U.S. 398 (1963); Wisconsin v. Yoder, 406 U.S. 205 (1972)).

94. NOWAK & ROTUNDA, *supra* note 87, at 1157.

95. *Id.*; *see* Amos, 483 U.S. at 327 (holding that the government may accommodate religious practices without violating the Establishment Clause even though a statute may "single out religious entities for benefit"); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987) (holding that the state's denial of unemployment compensation benefits to an individual who was discharged because she refused to work on her Sabbath constituted a violation of the Free Exercise Clause of the First Amendment); Thomas v. Review Bd., 450 U.S. 707 (1981) (holding that the state's denial of unemployment compensation benefits to an individual who terminated his job because his religious beliefs forbade him from participating in the production of armaments violated the First Amendment right to free exercise of religion); Wisconsin v. Yoder, 406 U.S. 205 (1972) (holding that the First and Fourteenth Amendments prevented the state from compelling Amish parents to cause their children, who have graduated from eighth grade, to continue to receive formal education where their religious beliefs called for informal religious and vocational education); Sherbert v. Verner, 374 U.S. 398 (1963) (holding that the state may not deny unemployment compensation benefits to an individual who had refused alternative employment due to her religious beliefs, which forbade her to work on Saturday).

96. *See* Board of Educ. v. Grumet, Nos. 93-517, 93-527, 93-539, 1994 U.S. LEXIS 4830, at *58-65 (June 27, 1994) (O'Connor, J., concurring) (praising the plurality's refusal to focus on the strict Establishment Clause test of Lemon v. Kurtzman, 403 U.S. 602 (1971), because issues of the separation of church and state are highly contextual). Justice O'Connor asserted that "what makes accommodation permissible, even praiseworthy, is not that the government is making life easier for some particular religious group as such. Rather, it is that the government is accommodating a deeply held belief." *Id.* at *54 (O'Connor, J., concurring).

1. Establishment Clause

"The essence of the Establishment Clause is that states must remain neutral and detached from religious activities."⁹⁷ In *Lemon v. Kurtzman*,⁹⁸ the Supreme Court set forth a three-prong test for determining whether a state action constitutes a violation of the Establishment Clause.⁹⁹ According to the test, the Establishment Clause requires that any governmental action, including a court order, (1) have a secular purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) not lead to excessive entanglement with religion.¹⁰⁰

In adhering to the strictures of the Establishment Clause, then, courts are prohibited from becoming involved in disagreements over religious doctrine or practice since such disputes necessarily "entangle" the government with religion.¹⁰¹ As a means of sidestepping the constraints of the excessive entanglement doctrine, courts have examined "undisputed points of religious doctrine."¹⁰² The Supreme

97. Warmflash, *supra* note 93, at 240.

98. 403 U.S. 602 (1971).

99. *Id.* at 612.

100. *Id.* at 612-13. Although the *Lemon* test is still applied in Establishment Clause cases, there is doubt as to its continuing validity. See, e.g., *Grumet*, Nos. 93-517, 93-527, 93-539, 1994 U.S. LEXIS 4830, at *59 (O'Connor, J., concurring) (suggesting that "setting forth a unitary test for a broad set of cases may sometimes do more harm than good"); *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984) (stating that "[r]ather than mechanically invalidating all governmental conduct . . . that confer[s] benefits or give[s] special recognition to religion in general or to one faith . . . the Court has scrutinized challenged legislation or official conduct to determine whether, in reality, it establishes a religion or religious faith, or tends to do so").

101. A group of cases, known as the "church property cases," illustrates the nature of this prohibition against excessive entanglement. See *Jones v. Wolf*, 443 U.S. 595, 602-04 (1979) (holding that application of the "neutral principles of law" approach does not constitute excessive entanglement "since it relies exclusively on objective, well-established concepts of . . . law," even though it requires some examination of religious documents); *Serbian Eastern Orthodox Diocese v. Milivojevic*, 426 U.S. 696, 724-25 (1976) (holding that the First Amendment requires that civil courts defer to the decisions of the highest court of the hierarchical church organization in order to avoid entanglement in religious issues that ultimately rest on interpretation of religious doctrine for resolution); *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 449 (1969) (holding that the First Amendment prohibits civil courts from resolving church property disputes on the basis of religious doctrine and practice; such a resolution requires a court to become entangled in the interpretation of ecclesiastical doctrine).

102. Warmflash, *supra* note 93, at 245-48. For example, in *Schwartzman v. Schwartzman*, 388 N.Y.S.2d 993 (N.Y. Sup. Ct. 1976), a husband sought to enjoin his ex-wife from attempting to change the religion of their children from Judaism to Catholicism. *Id.* The court, in holding that the husband could not claim a Jewish birthright for his children, based its reasoning on an examination of Jewish law, which mandates that a child's religion is the same as that of its mother. *Id.* at 996 (citing TALMUD, *Order Nashim: Tractate Kiddushen* 66b); see also *Rubin v. Rubin*, 348 N.Y.S.2d 61 (N.Y. Fam. Ct. 1973) (holding that secular courts, in enforcing the religious rights of groups or individuals, must note religious requirements).

Court has held that courts may look to and apply religious doctrine as long as they "defer to the interpretation given by the religious authority [and] do not attempt to resolve any dispute within the church about the substance of the doctrine."¹⁰³ Courts often justify their resort to religious doctrine with a compelling state interest.¹⁰⁴ In determining whether the Establishment Clause has been violated, courts must first decide whether the act in question is religious in nature.¹⁰⁵ This may be answered by examining "whether the act has any rational justification other than the significance that some religion puts on it."¹⁰⁶

According to many Jewish scholars, the *get* procedure is not religious in nature because it involves no act of prayer or worship.¹⁰⁷ It concerns only the relationship between a married couple and is therefore considered secular. Numerous scholars maintain that Jewish law is divisible into two parts, one "strictly religious" because it involves the relationship between man and God, and the other "essentially secular" since it controls the relationship between man and man.¹⁰⁸ According to such a classification, Jewish marriage and divorce laws would necessarily fall into the latter category.¹⁰⁹ Although there are arguments to the contrary, authority for the proposition that appearance before a *beth din*, for purposes of procuring a religious divorce, is not a religious act has been determinative in the courtroom.¹¹⁰

2. Free Exercise Clause

The Free Exercise Clause requires that states accommodate religious beliefs so that there is no imposition of undue burdens on the

103. *Jones*, 443 U.S. at 602 (citing *Milivojevich*, 426 U.S. at 724-25); see also *Aglikin v. Kovachef*, 516 N.E.2d 706 (Ill. App. Ct. 1987) (holding that a court may adopt neutral principles of law but must defer on doctrinal issues).

104. *Warmflash*, *supra* note 93, at 246 (stating that in *Schwartzman*, the court considered the general welfare of children as its overriding interest in validating its review of Jewish law).

105. *Marshall*, *supra* note 44, at 217-18.

106. *Id.* at 219.

107. See *infra* notes 208-09 and accompanying text (discussing the expert testimony of four rabbis in *Minkin* which recognized the secular nature of the *get* procedure).

108. See e.g., *Bleich*, *supra* note 25, at 202 (arguing that "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").

109. See *Warmflash*, *supra* note 93, at 243 (concluding that Jewish law concerning domestic relations is secular and not religious in nature); see also *Stern v. Stern*, N.Y. L.J., Aug. 8, 1979, at 13 (N.Y. Sup. Ct. 1979) (holding that the Jewish divorce procedure is not a religious act).

110. See *Minkin v. Minkin*, 434 A.2d 665, 667-68 (N.J. Super. Ct. 1981) (relying on rabbinic testimony in finding that procuring a *get* is not a religious act). But see *Marshall*, *supra* note 44, at 219 ("[I]t is clear that any appearance before a religious tribunal for the purpose of exercising a religious divorce is *per se* religious in nature. There is no secular justification for such a divorce since a civil divorce legally terminates the marriage.").

free practice of religion.¹¹¹ In order to claim a violation of the Free Exercise Clause, two requirements must be satisfied by the proponent of the claim: (1) a "sincere" religious belief or practice must have been violated; and (2) the violation must be the result of a governmental action.¹¹² The Court in *Yoder*¹¹³ relied on four factors to determine whether a particular belief was, in fact, religious.¹¹⁴ Those four factors are as follows: (1) the belief must be shared by an organized group rather than a personal preference; (2) the belief must be related to certain theocratic principles and interpretations of religious literature; (3) the system of beliefs must pervade and regulate the believers' daily lives; and (4) the system of beliefs and life style resulting therefrom must have been in existence for a substantial period of time.¹¹⁵

The Supreme Court established a two-prong test in *Sherbert v. Verner*,¹¹⁶ for determining whether a governmental action, including a court order, constitutes a violation of an individual's free exercise of religion.¹¹⁷ In order for an action to violate an individual's free exercise rights, it must (1) impose a significant burden upon the individual's free exercise of religion; and (2) not be overcome by a compelling interest.¹¹⁸

Courts have allowed interference with a party's religious beliefs if the interference was slight and based on a compelling state interest.¹¹⁹

111. U.S. CONST. amend. I. Numerous cases illustrate the principle that the Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984); see *County of Allegheny v. ACLU*, 492 U.S. 573 (1989) (permitting the municipality to erect an 18-foot Chanukah menorah in its holiday display); *Mueller v. Allen*, 463 U.S. 388, 394-95 (1983) (allowing tax deductions for expenses of religious education); *Wolman v. Walter*, 433 U.S. 229, 236 (1977) (upholding aid to religious schools); *Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664, 672 (1970) (permitting tax exemption for church property); *Board of Educ. v. Allen*, 392 U.S. 236, 243 (1968) (upholding textbook loans to students in religious schools).

112. *Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1972). The Free Exercise Clause protects only sincere religious beliefs. *Id.* at 215. The *Yoder* Court defined a "sincere" religious belief as a belief that is central to the faith and the continuing survival of the religion as it exists. *Id.* at 209-10.

113. 406 U.S. 205 (1972).

114. *Id.* at 215-17.

115. *Id.*

116. 374 U.S. 398 (1963).

117. *Id.* at 403; see also *Marshall*, *supra* note 44, at 214 (discussing the test applied in *Sherbert*).

118. *Sherbert*, 374 U.S. at 403.

119. There are a number of cases which have held that the state's compelling interest in ending discrimination is sufficient to override an incidental burden on a party's religious beliefs. See, e.g., *Ohio Civil Rights Comm. v. Dayton Christian Schools*, 477 U.S. 619 (1986) (holding that an incidental burden on religion is overridden by the compelling state interest in ending discrimination); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) (holding that the compel-

For example, in *In re Marriage of Tisckos*,¹²⁰ the court upheld a judgment requiring a father to drive his daughter to Catholic services during visitation even though he was a Baptist, and driving his daughter to church would interfere with his activities at his Baptist church.¹²¹ The court decided that driving his daughter to church would only slightly interfere with the father's religious activity, and further held that the father had a duty to enable the daughter "to fulfill her religious obligation."¹²² Similarly, in *In re Marriage of Roberts*,¹²³ the court rejected a father's attempt to deny visitation rights to his ex-wife on the ground that visitation would violate his free exercise rights.¹²⁴ Here, the court found that continued visitation rights affected only the mother's rights, and any burden imposed on the father's free exercise of religion were slight and incidental.¹²⁵ Thus, when the parties' free exercise rights are in conflict or when there is an overriding concern, the state will tolerate an incidental burden on one party's religious beliefs.¹²⁶

D. Burden on Free Exercise Rights In Religious Divorce Context

According to the first part of the *Sherbert* test, a court must examine whether, in compelling a religious divorce, the state is imposing a burden on the party's free exercise of religion.¹²⁷ In order to clarify exactly what constitutes a burden on an individual's right to free exercise, one commentator has recognized four distinct categories of burdens on free exercise on religion.¹²⁸ First, there is a burden where the

ling state interest in ending discrimination is enough to overcome a First Amendment freedom of association claim); *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (removing the tax-exempt status from a religious college that engaged in racial discrimination).

120. 514 N.E.2d 523 (Ill. App. Ct. 1987).

121. *Id.* at 529.

122. *Id.*

123. 503 N.E.2d 363 (Ill. App. Ct. 1986).

124. *Id.* at 364. The court held that "[t]he order is unrelated to the [the father's] freedom to practice his religion as he desires because the order is only directed at the rights of the [ex-wife]." *Id.*; see also *Lane v. Lane*, 340 N.E.2d 705, 709-10 (Ill. App. Ct. 1976) (rejecting the divorced husband's claim that continued provision of alimony payments to his ex-wife who had become a nun constituted an infringement on his free exercise rights and an establishment of religion); *Smith v. Smith*, 92 N.E.2d 358 (Ill. App. Ct. 1950) (affirming enforcement of a custody decree requiring the child to be reared Catholic).

125. *Roberts*, 503 N.E.2d at 364.

126. See *Jehovah's Witnesses v. King County Hosp.*, 390 U.S. 598 (1968) (per curiam) (holding summarily that a parent could not, on religious grounds, withhold a blood transfusion that was necessary to save the child's life).

127. *Sherbert v. Verner*, 374 U.S. 398, 403 (1963); see also *Marshall*, *supra* note 44, at 214 (discussing the application of the *Sherbert* test).

128. *Marshall*, *supra* note 44, at 214.

state forces an individual to do something forbidden by his religion;¹²⁹ second, the state imposes a burden when it prevents an individual from doing that which is required by his religion;¹³⁰ third, where the state makes religious observance more difficult or expensive, it is burdening the individual's free exercise;¹³¹ and fourth, a burden exists where "the state forces an individual to do something 'religious' which he wishes not to do, although his opposition is not necessarily based on his religious beliefs."¹³²

Often, in religious divorce cases, one spouse (most often, the husband) raises a free exercise claim that the state cannot force him to do something that he considers religious.¹³³ Where the party seeks to remain "religiously neutral" the court must initially determine whether the act of giving a *get* is in fact "religious."¹³⁴ While arguments exist both for and against the proposition that obtaining a *get* constitutes a "religious" act,¹³⁵ the prevailing legal theory is that forcing a religious divorce is not forcing an act religious by nature.¹³⁶ This Comment adopts the predominant view of the courts, and thus contends that any burden such an act imposes on an individual is not only incidental but disassociated from a genuine free exercise claim.¹³⁷ If, however, the

129. *Id.*; see, e.g., *United States v. Lee*, 455 U.S. 252 (1982) (forcing Amish to withhold social security tax).

130. Marshall, *supra* note 44, at 214; see, e.g., *Reynolds v. United States*, 98 U.S. 145 (1978) (prohibiting Mormons from practicing polygamy).

131. Marshall, *supra* note 44, at 214; see, e.g., *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (removing the tax-exempt status from a religious college that engaged in racial discrimination).

132. Marshall, *supra* note 44, at 214; see also John H. Garvey, *Freedom and Choice in Constitutional Law*, 94 HARV. L. REV. 1756 (1981) (arguing that the Free Exercise Clause "guarantees that the state can no more command piety than it can forbid it").

133. Marshall, *supra* note 44, at 215. The cases in this area frequently address the husband's claim that the state cannot enforce the *ketubah* without violating the Free Exercise Clause. See e.g., *In re Marriage of Goldman*, 554 N.E.2d 1016, 1022-24 (Ill. App. Ct. 1990) (finding the husband's free exercise claim without merit).

134. Marshall, *supra* note 44, at 215 (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 215-16(1972)).

135. For example, one commentator feverently argues that obtaining a *get* is a religious act. Marshall, *supra* note 44, at 219-223. Marshall asserts that since the act of procuring a *get* "has no rational secular justification," it must be considered a religious act. *Id.* at 219. He maintains that "any appearance before a religious tribunal for the purpose of securing a religious divorce is *per se* religious in nature," and there can be "no secular justification for such a divorce since a civil divorce legally terminates the marriage." *Id.* Marshall equates the "mundane" act of securing a religious divorce with taking communion or eating nonkosher food. *Id.* at 219. "While neither of those acts explicitly invokes the deity, a court is prohibited from ordering an individual to perform such acts which are considered religious by nature." *Id.*

136. See *Goldman*, 554 N.E.2d at 1024 (finding that the *get* procedure did not require any act of worship or any expression of religious beliefs); *Minkin*, 434 A.2d at 667-68 (determining that the *get* procedure is not religious in nature).

137. See *infra* notes 261-75 and accompanying text (discussing the *get* cases in light of the Free Exercise Clause).

proponent of the claim is able to convince the court that the state has imposed a real burden on his free exercise of religion, this claim may be readily overcome by more than one secular and compelling state interest.

E. *Compelling State Interests*

Authority supporting the theory that domestic relations should be governed by Jewish secular law is strong. Thus, a court order compelling the husband to provide his wife with a *get* often has not been considered as enforcing a "religious" act. However, assuming for the sake of argument, that such an order does infringe upon the husband's free exercise rights, it does so only incidentally and is overridden by a number of compelling state interests.¹³⁸ While numerous scholars and courts have found the freedom to contract to be the overriding compelling interest,¹³⁹ as will be duly discussed, this Comment rather favors equal protection of the law and the freedom to remarry as the more substantial and convincing state interests with which to counter a free exercise claim.

1. *The Ketubah as a Contract*

It has been argued quite successfully that the *ketubah* is an enforceable contract, and that in compelling husbands to grant their wives a *get*, courts are merely upholding a secular provision of a contract.¹⁴⁰ In so ruling, a number of courts have equated the *ketubah* to other antenuptial agreements, which set out methods for resolving disputes in advance.¹⁴¹ In fact, one author has stated that the "only interest

138. See *infra* notes 233-45, 292-98 and accompanying text (discussing various state interests furthered by compelling a religious divorce proceeding).

139. See, e.g., *Goldman*, 554 N.E.2d at 1023 (finding that the order at issue did not violate the Establishment Clause because it had the secular purpose of enforcing a contract between the parties); *Avitzur*, 446 N.E.2d at 138-39 (deciding the case at hand "solely upon the application of neutral principals of contract law"); see also *Marshall*, *supra* note 44, at 233 ("[I]t seems evident that the only potential compelling governmental interest in religious divorce cases is the enforcement of contractual obligations.").

140. See *Goldman*, 554 N.E.2d at 1018-22 (holding that the *get* procedure is secular in nature); *Avitzur*, 446 N.E.2d at 138-39 (concluding that the procurement of the *get* requires no religious affirmations).

141. See, e.g., *Avitzur*, 446 N.E.2d at 138-39 ("[T]he relief sought . . . is simply to compel [the husband] to perform a secular obligation . . ."). The *Avitzurs* did not use a traditional *ketubah*, which makes no mention of submission to the *beth din*. *Id.* Rather they signed an English translation containing a clause requiring the parties to appear before the *beth din* to solve marital problems, which *Marshall* argues serves to emphasize the document's secular, legal impact. *Marshall*, *supra* note 44, at 225 n.98.

sufficiently compelling to justify enforcing a religious divorce on unwilling parties is the state's interest in enforcing valid contracts."¹⁴²

While the notion of the *ketubah* as a legally valid contract is widely accepted, there is an equally convincing argument to the contrary. The opposing argument is that the *ketubah* may not be interpreted under traditional contract law because it fails to comply with basic contract principles.¹⁴³ One author asserts that in most cases, the signing of the *ketubah* is part of a ritual that is "entered into out of respect for tradition and family expectations rather than an intent that its contents may be enforced in a secular court."¹⁴⁴ This is especially true since the vast majority of couples signing a *ketubah* do not even understand, or bother to have translated, the provisions therein.¹⁴⁵ Thus, the *ketubah* may be differentiated from other antenuptial agreements in that it is neither negotiated nor bargained for at arms length.¹⁴⁶

2. Fourteenth Amendment

The Fourteenth Amendment commands that no state shall "deny to any person within its jurisdiction the equal protection of the laws."¹⁴⁷ The Equal Protection Clause guarantees that all individuals similarly situated will be treated in a similar manner.¹⁴⁸ This constitutional guarantee governs "all state actions which classify individuals for different benefits or burdens under the law."¹⁴⁹ The Supreme Court has used the notion of equal protection to guarantee that all individuals are "accorded fair treatment in the exercise of fundamental rights or in the elimination of distinctions based on impermissible criteria."¹⁵⁰

142. Marshall, *supra* note 44, at 206, 233. Marshall looks to the *Avitzur*-type of *ketubah* to show that parties may exhibit a knowing intention to be bound by its terms. *Id.* at 225.

143. Kahan, *supra* note 19, at 216-19 (arguing that the intent to be contractually bound is absent when signing the *ketubah*).

144. *Id.*

145. *Id.*; see also Marshall, *supra* note 44, at 225 n.98 (recognizing that the parties infrequently understand the meaning of the *ketubah* in a literal sense). Even Marshall, who defends the notion that the *ketubah* is a binding legal contract, concedes that the typical *ketubah*, which is written in Hebrew and Aramaic, is more often viewed as a "liturgical rather than legal" document. *Id.*

146. Kahan, *supra* note 19, at 216.

147. U.S. CONST. amend XIV.

148. See NOWAK & ROTUNDA, *supra* note 87, at 568 (discussing the Equal Protection Clause of the Constitution).

149. *Id.*

150. *Id.*

Our nation's definition of "liberty" includes the freedom of choice to engage in, or refrain from, certain activities.¹⁵¹ When those activities are specifically recognized in the Constitution, the right to engage in them is protected by the Due Process guarantee of the Fourteenth Amendment.¹⁵² The Court, however, will actively protect only those constitutional rights deemed to be "fundamental."¹⁵³ "Fundamental rights are those with textual recognition in the Constitution, or its amendments, or values found to be implied because they are indispensable to our notion of freedom, as reflected by history and interpretation by the Supreme Court."¹⁵⁴

The Court recognized this concept of "fundamental rights" when it incorporated most of the guarantees of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment and applied them to the states.¹⁵⁵ Among those fundamental rights found to be implied in the Constitution, the most significant are the right to freedom of association,¹⁵⁶ the right to interstate travel,¹⁵⁷ the right to vote,¹⁵⁸ and the right to privacy¹⁵⁹ which includes freedom of choice in marital,¹⁶⁰ fam-

151. *Id.* at 505. The Court has recognized these rights as being "essential to individual liberty in our society." *Id.* at 388.

152. *Id.* The Due Process Clause provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV.

153. *Id.*

154. *Id.* The Supreme Court also guards those rights which do not have specific textual basis in the Constitution. *Id.* at 388. In particular, the Court has used the Due Process Clause to advance the use of a "natural law analysis to select and protect those liberties which are essential in our society." *Id.*

155. *Id.* at 505. In the early cases, the Court determined whether a specific right was so fundamental that it could be said to be "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). Subsequently, the Court relaxed the test to ascertain whether the right was "fundamental to the American scheme of justice." *Duncan v. Louisiana*, 391 U.S. 145, 148-49 (1968). The modified test shows a "willingness on the Court's part to enforce those values which have a special importance in the development of individual liberty in American society, even if that value was not deemed to be absolutely necessary to the system of a democratic government." *NOWAK & ROTUNDA*, *supra* note 87, at 385.

156. *See NAACP v. Alabama*, 357 U.S. 449 (1958) (recognizing the freedom to engage in association for the advancement of beliefs and ideas).

157. *See U.S. v. Guest*, 383 U.S. 745, 757 (1966) (holding that the right to travel from one State to another is a fundamental right).

158. *See Reynolds v. Sims*, 377 U.S. 533, 560 (1964) (holding that voting is a fundamental right protected under the Constitution).

159. *NOWAK & ROTUNDA*, *supra* note 87, at 505. The term "right to privacy" has come to mean a right to engage in certain highly personal activities. *Id.*

160. *See, e.g., Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (holding that individuals have a fundamental right to marry under the Fourteenth Amendment); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (striking down a statute prohibiting interracial marriage as a denial of due process); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (finding that state interference with the fundamental rights of marriage and procreation requires a compelling government interest).

ily,¹⁶¹ and sexual matters.¹⁶² Numerous Supreme Court decisions “make clear that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.”¹⁶³

3. *Fundamental Right to Remarry*

The right to freedom of choice regarding matters of marriage and family relationships is “at the core of the right to privacy.”¹⁶⁴ The fundamental right to remarry may be inferred from the freedom of choice in marital matters. For example, in *Boddie v. Connecticut*,¹⁶⁵ the Court held that the state could not refuse to grant a divorce to those persons who are unable to pay court filing fees since the Court has decided that the right to marry, and hence divorce, is a fundamental right under the Due Process Clause.¹⁶⁶ In *Zablocki v. Redhail*,¹⁶⁷ the Court took the right to privacy one step further by indirectly protecting the right to remarry.¹⁶⁸ There, the Court struck down a state law which prevented persons from marrying if they failed to meet their financial obligations to pay alimony or child support arising from an earlier marriage and divorce.¹⁶⁹ This ruling effectively extended the right to privacy to include the right to subsequent marriages as one of the fundamental rights that the Fourteenth Amendment seeks to protect.¹⁷⁰

States have a secular interest in enabling its citizens to remarry following a decree of dissolution, and in facilitating the removal of any barriers that prevent the exercise of this fundamental right.¹⁷¹ Some states have even enacted statutes in order to effectuate such goals.¹⁷²

161. See, e.g., *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (holding that the Fourteenth Amendment guarantees the right to marry, establish a home and raise children).

162. See, e.g., *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (holding that the right to contraception is a fundamental right).

163. *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 564 (1989) (Stevens, J., concurring in part and dissenting in part); see also *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (holding that decisions regarding child rearing and education are matters of privacy properly protected by the Fourteenth Amendment).

164. NOWAK & ROTUNDA, *supra* note 87, at 763.

165. 401 U.S. 371 (1971).

166. *Id.* at 374.

167. 434 U.S. 374 (1978).

168. See *id.* at 384-87 (extending the fundamental right to marry to include decisions related to marriage).

169. *Id.* at 383-86.

170. *Id.* at 384-87.

171. See Breitowitz, *supra* note 28, at 354 (referring to the New York *get* statute).

172. See, e.g., 750 ILCS 5/102 (West 1995) (providing statutory support for the right to remarry).

For example, in Illinois, the Illinois Marriage and Dissolution of Marriage Act serves to "promote the amicable settlement of disputes that have arisen between parties to a marriage;" and to "mitigate the potential harm to the spouses and their children caused by the process of legal dissolution of marriage."¹⁷³ By enforcing the *get* proceeding, courts are not only enforcing the state's secular goals as expressed by its statutes, but are also protecting the parties' constitutional rights.¹⁷⁴

E. Case Law Governing Enforcement of the Get Procedure

The current Illinois law governing Jewish divorces, as decided by *In re Marriage of Goldman*,¹⁷⁵ follows the majority of courts in finding ways to civilly enforce the *get* procedure.¹⁷⁶ Most courts dealing with the issue of enforcement of the *get* provision have upheld it against contentions that enforcement would infringe upon the constitutional separation of church and state since the court would, in effect, be forcing one of the parties to participate in a religious divorce proceeding against his/her will, or that it would promote divorce in contravention of public policy.¹⁷⁷ Courts have been most successful in upholding the

173. *Id.*

174. See Breitowitz, *supra* note 28, at 354 (recognizing that enforcement of the *get* proceeding encourages marriage, stabilizes family life, and protects the fundamental right of privacy which encompasses the freedom to remarry).

175. 554 N.E.2d 1016 (Ill. App. Ct. 1990).

176. See *id.* at 1024 (finding that the *get* procedure is essentially secular in nature, and therefore, the husband's constitutional rights were not infringed).

177. See *Cook v. Cook*, No. FA 90-0376937, 1992 Conn. Super. LEXIS 1589 (Conn. Super. Ct. May 26, 1992) (holding that the court could order both parties to cooperate in obtaining the *get*); *In re Scholl v. Scholl*, 621 A.2d 808 (Del. 1992) (holding that enforcement of the *get* provision was proper because the husband may be compelled to do that which he already agreed to do when he signed the *ketubah*); *Fleischer v. Fleischer*, 586 So. 2d 1253 (Fla. Dist. Ct. App. 1991) (holding that the husband waived his First Amendment challenge to enforcement of the *get* provision by signing the *ketubah* and so the court order requiring him to deliver a *get* was proper); *In re Marriage of Goldman*, 554 N.E.2d 1016 (Ill. App. Ct. 1990); *Burns v. Burns*, 538 A.2d 438 (N.J. Super. Ct. Ch. Div. 1987) (holding that since the husband's refusal to grant the *get* was not based on genuine religious beliefs, the court order compelling him to submit to the jurisdiction of the *beth din* to initiate the procedure to secure a *get* would not violate the Establishment Clause); *Megibow v. Megibow*, 612 N.Y.S.2d 758 (N.Y. App. Div. 1994) (relying on § 253 in reaching its conclusion that the husband is required to cooperate in all phases of securing a *get*); *Kaplinsky v. Kaplinsky*, 603 N.Y.S.2d 574 (N.Y. App. Div. 1993) (holding that the court may hold the husband in contempt for failure to deliver a *get* to his wife); *Perl v. Perl*, 512 N.Y.S.2d 372 (N.Y. App. Div. 1987) (holding that once a party seeks the court's civil relief of divorce, the husband's misuse of his *get* power is subject to review and revision by the court); *Waxstein v. Waxstein*, 394 N.Y.S.2d 253 (N.Y. Sup. Ct. 1977) (granting specific performance of an agreement to give a *get* where it was incorporated into the written separation agreement); *Shapiro v. Shapiro*, 442 N.Y.S.2d 928 (Sp. Term. 1981) (holding an Israeli divorce decree as enforceable in the jurisdiction and so the court may force the husband to procure the *get* for his wife); *Rubin v. Rubin*, 348 N.Y.S.2d 61 (N.Y. Fam. Ct. 1973). *But see* *Victor v. Victor*, 866 P.2d 899 (Ariz. Ct. App. 1993) (holding that the court was without jurisdiction to order a husband to

get provision of the *ketubah* by construing the *ketubah* as a legally binding contract, with some courts equating it with any other antenuptial contract.¹⁷⁸

In so finding, courts have relied on the expert testimonies of Orthodox rabbis who contend that the acquisition of a *get* does not constitute a religious act, but rather is the "severance of a secular contractual relationship between the two parties."¹⁷⁹ Thus, the majority of courts have determined that an order compelling a recalcitrant husband to secure a *get* has the secular purpose of completing a dissolution of a marriage since it does not require the husband to participate in a "religious" ceremony.¹⁸⁰ As such, a court order enforcing the *get* provision effectively serves the state's interest in allowing parties to remarry without violating the First Amendment.

1. Pre-Goldman Cases

A 1983 New York case involving enforcement of the *ketubah* set the current trend in this area of the law, and caused the enactment of a statute in New York.¹⁸¹ In *Avitzur v. Avitzur*,¹⁸² the court held that the provision in the *ketubah* which articulated the parties' intention to appear before the *beth din* in seeking marital advice or counseling was civilly enforceable and subject to specific performance under general contract principles.¹⁸³ Rejecting the husband's argument that enforcement of the *ketubah* provision would necessarily intrude upon matters

grant his wife a *get*); *Turner v. Turner*, 192 So. 2d 787, cert. denied, 201 So. 2d 233 (Fla. 1966) (holding the *get* provision in a *ketubah* unenforceable by a civil court); *Steinberg v. Steinberg*, No. 44125, slip op. (Ohio Ct. App. June 24, 1982) (holding that the *get* provision was unenforceable as a contractual provision on the basis that its enforcement would violate the Constitution); *Pal v. Pal*, 356 N.Y.S.2d 672 (N.Y. App. Div. 1974) (holding that a civil court had no authority to order the parties to submit to the *beth din*); *Margulies v. Margulies*, 344 N.Y.S.2d 482 (N.Y. App. Div. 1973) (holding that a *get* must be obtained from the husband's own free will and so the court order forcing him to comply with the proceeding would be a nullity). For a complete discussion of the foregoing cases, see Andrea G. Nadel, Annotation: *Enforceability of Agreement Requiring Spouse's Cooperation in Obtaining Religious Bill of Divorce*, 29 A.L.R. 4TH 746 (1995).

178. *Avitzur*, 446 N.E.2d at 138-39. See *infra* notes 196-203 and accompanying text (discussing pre-*Avitzur* cases which enforced the *ketubah* on general contract principles).

179. *Goldman*, 554 N.E.2d at 1022; *Avitzur*, 446 N.E.2d at 138-39; *Minkin*, 434 A.2d at 667-68.

180. *Goldman*, 554 N.E.2d at 1022; *Avitzur*, 446 N.E.2d at 138-39; *Minkin*, 434 A.2d at 667-68.

181. N.Y. DOM. REL. LAW § 253 (McKinney Supp. 1983). For a discussion of the New York statute, see *infra* notes 190-95 and accompanying text. One commentator has suggested that the *Avitzur* decision is consistent with the current developments in family law, which includes increasing judicial enforcement of antenuptial agreements. Kahan, *supra* note 19, at 194.

182. 446 N.E.2d 136, cert. denied, 464 U.S. 817 (1983).

183. *Id.* at 139.

of religious doctrine and practice,¹⁸⁴ the court said that it was not compelling a religious procedure arising out of religious law, but rather was enforcing a prenuptial agreement made by the parties to "appear before and accept the decision of a designated tribunal."¹⁸⁵ The court noted that the order only compelled the husband to appear before the *beth din*, not to actually obtain a *get*.¹⁸⁶

Viewed in this manner, the court found that the *ketubah* was "closely analogous to an antenuptial agreement by which parties agree in advance to resolution of disputes which may subsequently arise."¹⁸⁷ The court said that the *ketubah* should be entitled "no less dignity" than other civil contracts to submit a dispute to a nonjudicial forum, so long as its enforcement violates neither the law nor the public policy of the state.¹⁸⁸ The *Avitzur* court decided that merely because the obligation to appear before the *beth din*, spelled out in the *ketubah*, was grounded in religious belief and practice, should not preclude enforcement of its secular terms.¹⁸⁹

The state of New York enacted a statute shortly after the *Avitzur* decision which was a clear attempt by the legislature to alleviate the problem created by Jewish law.¹⁹⁰ The statute requires a spouse, upon divorce, to take all steps within his or her power to remove "any religious or conscientious restraints" on the other spouse's remarriage.¹⁹¹ Since the statute essentially requires spouses either to give or to accept a *get* before a civil court will enter a final divorce decree, the statute has been appropriately labelled the "get statute."¹⁹² Propo-

184. The court determined that the case could be decided solely upon the application of neutral principles of contract law without consideration of religious matters. *Id.* at 138 (citing *Jones v. Wolf*, 443 U.S. 595, 602-03 (1976)).

185. *Id.* at 138.

186. *Id.*

187. *Id.*

188. *Id.* In this case, the court found that the parties had agreed, by signing the *ketubah*, to arbitrate disputes in accordance with Jewish law and tradition. *Id.*

189. *Id.* at 139. The court noted that the relief sought by the wife was simply to compel her husband to appear before the *beth din*, a secular obligation to which he contractually bound himself. *Id.* The court reasoned that since "no doctrinal issue need be passed upon, no implementation of a religious duty is contemplated, and no interference with religious authority will result," the wife is entitled to the relief sought. *Id.*

190. Kahan, *supra* note 19, at 202 (citing N.Y. DOM. REL. LAW. § 253 (McKinney Supp. 1983)).

191. N.Y. DOM. REL. LAW § 253 (McKinney Supp. 1983).

192. Kahan, *supra* note 19, at 194. One commentator, who argues that the *get* statute is unconstitutional as violating the First Amendment, states that the statute is "nothing more than 'religious gerrymandering' since it turns the differences between the Catholic and Jewish divorce procedures on their heads." Marshall, *supra* note 44, at 219 n.82. While the statute compels issuance of a Jewish divorce, it purposefully fails to compel participation in a Catholic annulment procedure. *Id.* The statute explicitly provides that it "shall not be constituted to include applica-

nents of the *get* statute maintain that its purpose is secular and that it only requires parties to do "what they implicitly agreed to do when they initially signed the *ketubah*."¹⁹³ By insisting that the parties remove all religious barriers to remarriage, the statute advances the secular purpose of divorce law and protects the fundamental right to remarry.¹⁹⁴ Nonetheless, numerous commentators have criticized both the *Avitzur* decision and the *get* statute as being unconstitutional.¹⁹⁵

Even before *Avitzur* and the *get* statute, courts were finding ways to enforce the *get* proceeding.¹⁹⁶ In these early cases, courts usually em-

tion 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." *Id.* (citing N.Y. DOM. REL. LAW § 253 (McKinney Supp. 1983)). This effectively precludes the Catholic annulment process from the confines of the statute. *Id.* In sum, Marshall argues that "the obvious attempt to draft the statute to apply to a single religion is itself a violation of the Establishment Clause." *Id.*

193. Nathan Lewin, *The Constitutional Validity of New York's Get Statute*, N.Y. L.J., Nov. 16, 1983, at 1; see *Avitzur v. Avitzur*, 446 N.E.2d 136, 138 (N.Y. App. Ct.), *cert. denied*, 464 U.S. 817 (1983) (finding that the *get* procedure is essentially secular). Under this view, the secular purposes of the statute are to "facilitate the state interest in ensuring complete dissolution of the marriage, providing for the care of the children, ensuring an equitable property settlement, and ensuring freedom for the parties to remarry." *Id.*; see also *In re Marriage of Goldman*, 554 N.E.2d 1016 (Ill. App. Ct. 1990) (holding that the *get* procedure does not require an act of worship or a religious affirmation).

194. Kahan, *supra* note 19, at 202.

195. See Feldman, *supra* note 10, at 140 (contending that the *get* procedure invokes religious freedoms); Madeline Kochen, *Constitutional Implications of New York's Get Statute*, N.Y. L.J., Oct. 27, 1983, at 1; Elizabeth R. Leiber, *Avitzur v. Avitzur: The Constitutional Implications of Judicially Enforcing Religious Agreements*, 33 CATH. U. L. REV. 219 (1983) (arguing that states are in need of Supreme Court direction to resolve religious disputes between individuals); Marshall, *supra* note 44 (arguing that the *get* statute is both an unconstitutional burden on the free exercise of religion and an unconstitutional establishment of religion); Nadel, *supra* note 177 (concluding that the *get* law presents serious problems under the First Amendment). *But see* Warmflash, *supra* note 93 (concluding that while the New York *get* statute is of questionable constitutionality and will most likely fail to accomplish its intended result, the approach taken by the *Avitzur* court is one that presents an appropriate and constitutionally adequate response to the issue of secular enforcement of Jewish legal obligations); Kahan, *supra* note 19 (arguing that the judicial approach taken by the *Avitzur* court is far superior to the solution crafted by the New York legislature); Tanina Rostain, Note, *Permissible Accommodations of Religion: Reconsidering the New York Get Statute*, 96 YALE L.J. 1147 (1987) (concluding that the *get* statute is a permissible accommodation of religion).

196. See Kahan, *supra* note 19, at 211-12 (discussing the application of general contract principles to enforce the *get* procedure). A number of pre-*Avitzur* cases involved a written separation agreement between the parties where one party was seeking to enforce one provision while refusing to comply with another, usually the *get* provision. See, e.g., *B. v. B.*, N.Y. L.J., May 4, 1978, at 7 (N.Y. Sup. Ct. 1978) (holding that an agreement to give a *get* constituted a vital term of the settlement agreement); *Waxstein v. Waxstein*, 57 A.D.2d 863, (N.Y. Sup. Ct. 1977) (granting specific performance of an agreement to give a *get* where it was incorporated into the written separation agreement); *Rubin v. Rubin*, 348 N.Y.S.2d 61 (N.Y. Fam. Ct. 1973) (upholding a separation agreement that required the wife to accept a *get* where the wife was seeking enforcement of the support provisions of the same agreement).

ployed general contract principles, not hesitating to force parties to adhere to agreements to give *gittin* when such parties wished to benefit from other terms of the agreement, such as rights to support and alimony.¹⁹⁷ For instance, in *Rubin v. Rubin*,¹⁹⁸ the parties had executed a separation agreement that made support and alimony contingent upon the wife's acceptance of a *get*.¹⁹⁹ When the wife sued for support under the separation agreement, the court refused to enforce the support provision until she accepted the *get*.²⁰⁰ The court saw cooperation in a Jewish divorce as a condition precedent to enforcement of the separation agreement between the parties.²⁰¹ Thus, unlike *Avitzur* and subsequent cases, which concerned the *ketubah* itself, pre-*Avitzur* cases generally involved separation agreements that arguably were negotiated at arms length and reflected the parties' real intentions.²⁰² In this setting, judges had little difficulty enforcing the *get* promise as only one of the many conditions of the entire separation agreement.²⁰³

Subsequently, some courts began to require a husband to deliver a *get* on the basis of the traditional *ketubah*.²⁰⁴ For example, in *Minkin v. Minkin*,²⁰⁵ the court found it proper to compel the husband to secure a *get* in accordance with the terms of the traditional *ketubah*.²⁰⁶ The *ketubah* provides that the parties agree to abide by the "law of Moses and Israel," laws which require the husband to give his wife a *get* upon dissolution of the marriage.²⁰⁷ The court rejected the husband's contention that the enforcement of the *ketubah* would violate his First Amendment right to freedom of religion since, based on the expert testimony of several distinguished rabbis, the court concluded

197. Kahan, *supra* note 19, at 211-12; see, e.g., *Waxstein*, 57 A.D. 863 (granting specific performance of a promise to give a *get* where such a promise was part of a separation agreement demanding that the wife vacate the marital residence and transfer title to the house and some stock to her husband, and the wife had complied with her part of the deal). The court noted the inherent unfairness of the husband's receipt of the benefits of the agreement without complying with the "relatively-light burden" of giving a *get*. *Id.*

198. 348 N.Y.S.2d at 61.

199. *Id.* at 63-64.

200. *Id.* at 68.

201. *Id.* at 67.

202. Kahan, *supra* note 19, at 212.

203. One commentator has said that "a prenuptial or separation agreement conditioning various benefits on the execution of a *get* may well have the desired effect of indirectly inducing compliance." BREITROWITZ, *supra* note 13, at 80 n.224. In this way, the court is able to enforce the *get* provision without having to touch upon the religious claim. *Id.*

204. Kahan, *supra* note 19, at 212.

205. 434 A.2d 665 (1981).

206. *Id.* at 666.

207. *Id.* at 665.

that the *ketubah* document and *get* procedure were devoid of any religious connotation.²⁰⁸ Relying on the evidence of the rabbis' testimonies, the court held that an order compelling the husband to secure a *get* has the "clear secular purpose of completing a dissolution of the marriage."²⁰⁹

Like *Minkin* and similar cases before it, *Avitzur* was predicated on neutral principles of contract law, which interpret the *ketubah* as any other secular marriage contract that delineates the procedure to be taken upon divorce.²¹⁰ However, unlike *Minkin*, which required the delivery of a *get*, the *Avitzur* court merely ordered the parties to appear before the *beth din*.²¹¹ The *Goldman* court used the *Minkin* approach by extracting the *get* requirement from the text of the *ketubah* itself, rather than the *Avitzur* approach of granting specific performance of the *beth din* clause in the *ketubah*.²¹²

2. *The Goldman Case*

One of the most recent cases in this area, *In re Marriage of Goldman*,²¹³ is the first case on the appellate level to construe the *ketubah* as an implied contract to give a *get*. Unlike the *Avitzur* court, which equated the *ketubah* with an antenuptial agreement allowing parties to agree in advance to methods of dispute resolutions,²¹⁴ the *Goldman* court found that the *ketubah* document implicitly required

208. *Id.* at 667-68. Two of the rabbis who testified stated that the *ketubah* is basically a civil contract which sets out the obligations of the parties during the marriage, under which the marriage may be dissolved only by the death of one of the parties or by the acquisition of a *get*. *Id.* at 667. The rabbis further testified that the *get* procedure does not involve a religious ceremony or require a rabbi's presence. *Id.* Moreover, the husband does not have to believe in the religious tenets, state any doctrine or creed, or even acknowledge his Jewishness. *Id.* Two other rabbis stated that Jewish law is not solely comprised of religious law, but instead is made up of two components — one regulating man's relationship with God and the other controlling the relationship between man and man. *Id.* at 668. The *get* procedure falls into the latter category since it contains no reference to God and only affects the relationship between the parties. *Id.* Therefore, according to the rabbis' testimony, the *get* procedure is a civil rather than religious matter. *Id.*

209. *Id.*

210. See *Avitzur v. Avitzur*, 446 N.E.2d 136, 138 (N.Y. App. Ct.), cert. denied, 464 U.S. 817 (1983) (using the neutral principles of law approach to permit judicial resolution of religious disputes to the extent that it can be accomplished without consideration of doctrinal matters).

211. *Id.*

212. BREITOWITZ, *supra* note 13, at 81. The reason that the *Goldman* court looked to the actual wording of the *ketubah* is that the *ketubah* signed by the Goldmans and Minkins did not contain the *beth din* clause found in the *Avitzur ketubah*. *Id.*

213. *In re Marriage of Goldman*, 554 N.E.2d 1016 (Ill. App. Ct. 1990).

214. See *Avitzur*, 446 N.E.2d at 138 (finding that the signing of the *ketubah*, with its provisions which resemble an antenuptial agreement, is valid and enforceable as a contractual obligation to refer the matter to a nonjudicial forum).

the husband to give his wife a *get* upon divorce.²¹⁵ *Goldman* is the only recorded Illinois case in this area of the law.

In *Goldman*, the parties signed a *ketubah* prior to their wedding ceremony, which contained a provision stating: “[b]e thou my wife according to the law of Moses and Israel.”²¹⁶ Unlike the *ketubah* in *Avitzur*, the Goldmans’ *ketubah* did not contain the provision which requires the parties to appear before a *beth din*.²¹⁷ The court nonetheless found that the *get* requirement could be enforced by adhering to contract law.²¹⁸ Interpreting the relevant provision, the court held that the *ketubah* was intended to be a contract which required that the “status and validity of the marriage would be governed by Orthodox Jewish law.”²¹⁹ Two Orthodox rabbis testified that termination of a marriage under Orthodox Jewish law requires the giving of a *get*.²²⁰ In this way, the court inferred the *get* provision from the traditional *ketubah*.

The court rejected the husband’s contention that the *ketubah* is not a contract, but was rather more like “poetry or art.”²²¹ Instead, the court found that the *ketubah* is a contract with sufficiently certain terms, and that the parties did manifest an intention that it would be binding upon their marriage based upon the parties’ request for an Orthodox Jewish *ketubah* prior to their marriage, and on the parties’ conscious calculations that the *ketubah* would bind their marriage to the tenets of Orthodox Jewish law.²²²

Finally, the court found that compelling the husband to secure a *get* for his wife would not violate his First Amendment rights.²²³ Applying the *Lemon* test,²²⁴ the court concluded that an order compelling the husband to obtain a *get* would not violate the Establishment

215. See *Goldman*, 554 N.E.2d at 1020-22 (concluding that the *ketubah* is an agreement between the parties that their marriage would be governed by Orthodox Jewish law which requires the delivery of a *get* upon dissolution of the marriage).

216. *Id.* at 1020.

217. *Id.*

218. See *id.* at 1022 (finding that because the terms of the *ketubah* were certain and definite, specific performance was appropriate).

219. *Id.*

220. See *id.* at 1020-1022 (finding that the expert testimony presented to the trial court established that Orthodox Jewish law requires the delivery of the *get* upon dissolution of the marriage).

221. *Id.* at 1021.

222. *Id.* at 1018-20.

223. *Id.* at 1022-24.

224. See *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (creating the following test to determine whether a state statute violates the Establishment Clause: (1) whether the statute goes beyond a secular purpose; (2) whether its effect inhibits or advances religion; and (3) whether the statute creates an entanglement between government and religion).

Clause.²²⁵ Next, the court, using the guidelines set out in *Yoder*, held that the order satisfied the requirements of the Free Exercise Clause.²²⁶ Furthermore, the appellate court found that the lower court's order required the husband to do nothing more than what he had promised when he signed the *ketubah*.²²⁷ Because the expert testimony by rabbis established that the *get* procedure is secular in nature and does not require the husband to engage in any act of worship or to express any religious belief, the court was satisfied that compelling the husband to obtain a *get* would not violate his First Amendment rights.²²⁸

The dissenting opinion disagreed that a civil court has the authority to compel a party to perform terms of the *ketubah*.²²⁹ In dissent, Justice Johnson stated that the court's order violated the husband's constitutional rights under the First Amendment.²³⁰ He argued that "[a]ny order of the court which requires extensive investigation and evaluation of religious doctrines and tenets is prohibited by the First

225. *Goldman*, 554 N.E.2d at 1023. First, the order had the secular purpose of enforcing a contract between the parties. *Id.* Two additional secular purposes were to promote a settlement of disputes between the parties to a marriage, and to mitigate potential harm to the spouses and their children caused by the process of a legal dissolution of marriage. *Id.* Second, the primary effect of the court order was to further the secular purposes stated above rather than to advance or inhibit religion. *Id.* The court based its finding on the testimonies of two expert witnesses to the effect that Jewish law contains both religious rules and secular laws, and that marriage and divorce are secular, contractual undertakings. *Id.* To the extent that the order advances Orthodox Judaism, it is an incidental effect of the enforcement of the parties' contract. *Id.* Third, the order avoids excessive entanglement with religion since it was applying "objective, well-established principles of contract law which do not entail a consideration of doctrinal matters." *Id.*; see also *Jones v. Wolf*, 443 U.S. 595, 602-03 (1979) (holding that the application of "neutral principles of law" does not constitute excessive entanglement); *Lemon*, 403 U.S. at 612-13 (holding that state payments to parochial schools violated the First Amendment because such payments created an excessive entanglement between government and religion).

226. *Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1972). The *Goldman* court found that the husband's dislike or disrespect for Orthodox Judaism did not rise to the level of a true religious belief. *Goldman*, 554 N.E.2d at 1023. According to *Yoder*, only religious, as opposed to personal or philosophical, beliefs are protected by the Free Exercise Clause. *Yoder*, 406 U.S. at 215. See *supra* note 112 (discussing the definition of a "sincere" religious belief).

227. *Id.* at 1024; see also *Avitzur v. Avitzur*, 446 N.E.2d 136, 139 (N.Y. App. Ct.), cert. denied, 464 U.S. 817 (1983) (holding that the husband only had to appear before the designated tribunal and accept the decision on the matter of dissolution as agreed upon by the parties when they signed the *ketubah*).

228. *Goldman*, 554 N.E.2d at 1024.

229. *Id.* at 1025 (Johnson, J., dissenting). The dissent claimed that while the trial court had the authority to make a ruling on the contract issue, the court could not compel the husband to perform a provision within the contract which requires interpretation of a religious doctrine. *Id.* at 1026 (Johnson, J., dissenting). The dissent further claimed that the terms of the *ketubah* were not "so definite and certain as to allow the court to require specific performance of the inferred *get* provision." *Id.* (Johnson, J., dissenting).

230. *Id.* (Johnson, J., dissenting).

Amendment.”²³¹ The dissent concluded that since a civil court does not have the authority to dictate one’s religion or the form in which it is practiced, the court order was unconstitutional.²³² Since the dissenting opinion neglected prior Supreme Court rulings discussed herein, this Comment contends that the dissent lacks the merit of the majority opinion.

II. ANALYSIS

After thoroughly analyzing the various approaches of civil courts in solving the domestic problems caused by the Jewish divorce procedure, this Comment concludes that “specific performance” of the *get* provision is constitutional because it does not violate the Establishment Clause or the Free Exercise Clause of the First Amendment. Furthermore, enforcement of the *get* requirement advances several compelling state interests. However, courts should refrain from interpreting the *ketubah* as a contract since it fails to conform materially with contract law. Instead, courts would be wise to follow the dictates of the Fourteenth Amendment in accommodating what may be termed “a religious mandate.”

A. Constitutional Analysis

Enforcement of the *get* procedure, which requires a husband to procure a *get* for his wife, or conversely, forcing a wife to accept her husband’s *get*, does not violate the First Amendment because enforcement of the *get* procedure satisfies both the *Lemon* and *Sherbert* tests set forth by the Supreme Court. Moreover, requiring a husband to give a *get* advances several compelling state interests including equal protection and the fundamental right to remarry.

1. *Get Cases Do Not Violate the Establishment Clause*

Civil enforcement of the *get* procedure does not violate the Establishment Clause since enforcement satisfies all three prongs of the *Lemon* test. In the *get* cases, courts have recognized several secular purposes for compelling the husband to obtain a *get*.²³³ First, a

231. *Id.* at 1026 (Johnson, J., dissenting).

232. *Id.* (Johnson, J., dissenting).

233. For examples of the secular purposes cited by the *Goldman* court which support an order compelling a Jewish husband to give his wife a *get*, see *infra* notes 234-45 and accompanying text.

The Supreme Court has noted that the Establishment Clause is violated only where there is clearly no secular purpose for the state action. See, e.g., *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984) (“The Court has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but only when it has concluded that there was no question that the statute or activity was motivated *wholly* by religious considerations.”).

number of courts have recognized the secular interest of enforcing contracts.²³⁴ The *Goldman* court held that the right to contract is a fundamental right recognized by both federal and state constitutions, and that states have a compelling interest in enforcing contractual obligations.²³⁵

Second, in *Goldman*, the Illinois Marriage and Dissolution of Marriage Act was identified as a secular interest supporting enforcement of the *get* requirement.²³⁶ The Illinois Act seeks "amicable settlement[s] of disputes that have arisen between parties to a marriage" and to lessen any harm which the divorce process may cause to the separating spouses and their children.²³⁷ The *Goldman* court stated that to leave the *get* issue unresolved by not enforcing the husband's obligation to release his wife from the marriage "would have a negative effect on both the spouses and their children."²³⁸

Third, there is the secular interest of complete severance of the marriage in order to allow for remarriage.²³⁹ Several courts, including the *Goldman* court, have taken notice of the fact that without a valid *get* release, the wife would be forever bound to the husband to the extent that she can never remarry within her faith.²⁴⁰ The *Goldman* court relied on *Minkin*, which stated that an order compelling the husband to secure a *get* has "the clear secular purpose of completing a dissolution of the marriage,"²⁴¹ in finding that the most effective way to guarantee the wife's fundamental right to remarry and have chil-

234. The *get* cases recognizing the state's compelling interest in enforcing contracts are *In re Marriage of Goldman*, 554 N.E.2d 1016 (Ill. App. Ct. 1990); *Burns v. Burns*, 538 A.2d 438 (N.J. Super. Ct. Ch. Div. 1987); *Minkin v. Minkin*, 434 A.2d 665 (N.J. Super. Ct. 1981); and *Avitzur v. Avitzur*, 446 N.E.2d 136, 139 (N.Y. App. Ct.), *cert. denied*, 464 U.S. 817 (1983).

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

236. *Id.*

237. *Id.* (citing 750 ILCS 5/102 (West 1995)).

238. *Id.* The court duly noted that without a *get*, the wife is prohibited by her religious beliefs from remarrying. *Id.*

239. *See, e.g.*, N.Y. DOM. REL. LAW § 253 (McKinney Supp. 1983). Further, if the right to remarry is viewed as a constitutionally protected right, this secular state interest becomes sufficiently compelling to override any First Amendment challenges. *See, e.g.*, *Sherbert v. Verner*, 374 U.S. 398 (1963) (finding that a burden imposed on an individual's free exercise of religion is valid if it is necessary to achieve a compelling state interest).

240. *See In re Marriage of Goldman*, 554 N.E.2d 1016 (Ill. App. Ct. 1990) (noting that a wife who does not receive a *get* from her husband is precluded from remarrying according to Jewish law); *Minkin v. Minkin*, 434 A.2d 665 (N.J. Super. Ct. 1981) (ordering specific enforcement of a *get* on the rationale that without compliance with the contract, the wife could not remarry in accordance with her religious beliefs); *Rubin v. Rubin*, 348 N.Y.S.2d 61 (N.Y. Fam. Ct. 1973) (describing the *get* as an act of release freeing the wife so she may remarry).

241. *Goldman*, 554 N.E.2d at 1023 (quoting *Minkin*, 434 A.2d at 667).

dren is by forcing the husband to give her a *get* upon the civil dissolution of the parties' marriage.²⁴²

The primary effect of the cases requiring the husband to secure a *get* is to effectuate the secular purposes behind the order: to enforce a contract, to promote family harmony and to permit the wife to remarry.²⁴³ As the *Goldman* court held, "the primary effect of the court order was to further the secular purposes . . . and not to advance or inhibit religion."²⁴⁴ That the order also touched upon a religious issue should not invalidate the court order altogether. This is especially true since the Supreme Court has held that even if a given state action incidentally infringes upon the freedom of religion, the Establishment Clause is violated only where there clearly is no secular purpose for the state action or where the action is motivated "wholly by religious considerations."²⁴⁵

In reaching its conclusion, the *Goldman* court, like the *Minkin* and *Avitzur* courts, relied upon the abundant evidence which confirmed that the giving of a *get* is a secular act creating a contractual release that is effected by the parties themselves.²⁴⁶ The court was convinced by the expert testimony that "[i]t does not involve worship or an expression of faith; the procedure contains no divine reference; no one says any blessing or states any professions of faith or credos; and the husband and wife do not, and are not required to subscribe to any particular set of beliefs."²⁴⁷ The court found that although many rules and details are associated with the *get* procedure, "this alone does not

242. See *infra* notes 294-98 and accompanying text (analyzing the *get* procedure in light of the Fourteenth Amendment right to remarry).

243. See *supra* notes 164-74 and accompanying text (discussing the fundamental right to remarry).

244. *Goldman*, 554 N.E.2d at 1023. Similarly, the *Minkin* court concluded that the primary effect of requiring husbands to give a *get* "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." *Minkin*, 434 A.2d at 668.

245. *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984). Further, the *Lynch* court noted that the First Amendment "affirmatively mandates accommodation, not merely tolerance, of all religions." *Id.* at 673. This requires a policy of neutrality in applying general principles to the practices of a religious group even though it may "operate[] to afford an indirect" benefit to a religion. *Walz v. Tax Comm'n of N.Y. City*, 397 U.S. 664, 674 (1970).

246. See *supra* notes 215-28 and accompanying text (discussing the *Goldman* court's treatment of the *get* requirement). The *Goldman* court made special note of the ample expert testimony that "Judaism contains both secular and religious laws and . . . the *get* procedure [is] secular in nature." *Goldman*, 554 N.E.2d at 1023. The *Avitzur* court held that the relief "sought by the plaintiff in this action is simply to compel defendant to perform a secular obligation to which he contractually bound himself." 446 N.E.2d 136 (N.Y. App. Ct. 1983), *cert. denied*, 464 U.S. 817 (1983).

247. Brief for Appellee at 42, *In re Marriage of Goldman*, 554 N.E.2d 1016 (Ill. App. Ct. 1990) (No. 89-1025).

transform the procedure into a religious act.”²⁴⁸ Thus, the primary effect of the courts’ orders in the *get* cases was to enforce the consensual terms of the agreement and to sever the relationship in accordance with Jewish law.

Finally, the *Goldman* court held that its order requiring the husband to obtain the *get* does not foster an excessive entanglement with religion.²⁴⁹ First, the court’s inquiry was not itself a prohibited entanglement since it is well established that a court “may apply objective, well-established principles of secular law, or ‘neutral principles of law,’ which do not entail a consideration of doctrinal matters.”²⁵⁰ The *Goldman* court only interpreted the procedures and requirements of the *get*, and the evidence clearly showed that these procedures and requirements could be interpreted by purely secular means.²⁵¹

It is a well-settled principle that courts may look to and apply religious doctrine as long as they defer to the interpretation given by the religious authority and do not attempt to resolve any dispute within the church about religious doctrine.²⁵² In *Goldman*, *Avitzur*, and *Minkin*, the courts recognized as evidence expert testimony as to the

248. *Id.*

249. See *Goldman*, 554 N.E.2d at 1023 (basing its holding on the fact that the order “ha[d] the secular purpose of enforcing a contract between the parties”).

250. *Id.* (citing *Jones v. Wolf*, 443 U.S. 595, 602-03 (1976)). See *supra* notes 101-06 and accompanying text (discussing the prohibition against excessive entanglement under the Establishment Clause).

251. See *supra* note 228 and accompanying text (discussing the rabbis’ testimony that procuring a *get* has only secular purposes).

252. From the “church property” cases, it would appear at first glance that if there is a dispute within Judaism as to the obligations imposed by the *ketubah*, a court would be prohibited by the Establishment Clause from resolving the dispute. See, e.g., *Jones v. Wolf*, 443 U.S. 595, 602 (1976) (holding that state courts must examine religious documents in a strictly secular manner); see also *Serbian Eastern Orthodox Diocese for the United States v. Milivojevic*, 426 U.S. 696, 724-25 (1976) (holding that the First Amendment requires that civil courts defer to resolution of issues of religious doctrine by the highest court of the hierarchical church organization); *Aglikim v. Kovachef*, 516 N.E.2d 706 (Ill. App. Ct. 1987) (adopting the neutral principles analysis and noting that deference must be given on doctrinal issues). However, the *get* cases may be distinguished from the church property cases in two significant ways: (1) the requirement of the *get* is uncontested so the court is not resolving a dispute as to interpretation and (2) the *get* procedure is not religious by nature. Thus, enforcement of the *get* proceeding is not violative of the Establishment Clause. See *Warmflash*, *supra* note 93, at 242 (referring to the proposition that Jewish law is divisible into two parts: one strictly religious, because it concerns the relations between man and God, and the other essentially secular since it controls the relations between man and man). There is authority for the proposition that Jewish law regarding marriage and divorce is not considered religious within the meaning of the First Amendment since it affects only the relationship between a husband and wife and makes no reference to God. *Bleich*, *supra* note 25, at 202 (arguing that the *get* procedure is not at all religious because there is no confession of faith or worship).

nature of the *get* proceeding.²⁵³ Remaining clearly within the parameters of the law, the courts made only a cursory examination of Jewish law, accepting the rabbis' interpretation as to the meaning of the religious doctrine delineating the *get* procedure. In so acting, these courts did not attempt to resolve a religious dispute. Rather they merely applied the law as interpreted by the religious authorities in reaching their conclusions.²⁵⁴ As the court in *County of Allegheny v. ACLU*²⁵⁵ stated: "[a] prescription of ignorance obviously would bias [the court] according to the religious and cultural backgrounds of its members, a condition much more intolerable than any which results from the [c]ourt's efforts to become familiar with the relevant facts."²⁵⁶ Accordingly, if the *Goldman* court, as well as the others preceding it, had precluded evidence of the *get* procedure on the grounds that to do so would constitute excessive entanglement with religion, the courts would not have discovered the *get*'s secular nature and most certainly would not have ordered the husband to give his wife the *get*, a policy which effectuates a number of secular and compelling interests. Thus, civil enforcement of the *get* procedure is not only sound policy, it is clearly within the bounds of the law.

Using the guidelines set forth in *Lemon v. Kurtzman*, courts have determined that civil enforcement of the *get* proceeding avoids violating the Establishment Clause.²⁵⁷ First, enforcement advances several clear and convincing secular purposes; second, enforcement does not advance nor inhibit religion since, according to the proper authorities, the giving of a *get* does not constitute a religious act at all; and third, enforcement does not involve the courts in excessive entanglement with religion because the courts, by relying exclusively on the inter-

253. *Goldman*, 554 N.E.2d at 1022; *Minkin v. Minkin*, 434 A.2d 665, 667-68 (N.J. Super. Ct. 1981). The court is not interpreting Jewish law or resolving disputes over conflicting interpretation since it is uncontested that Orthodox Jewish law requires the giving of a *get* in order to dissolve a Jewish marriage; see also *Avitzur v. Avitzur*, 446 N.E.2d 136, 136 (N.Y. App. Ct.), *cert. denied*, 464 U.S. 817 (1983) (accepting the lower court's finding that the husband's giving of the *get* accomplished a Jewish divorce and refraining from making a determination as to the religious nature of the proceeding).

254. The *Goldman*, *Minkin* and *Avitzur* courts merely used Jewish law as a reference in resolving the issue of marital dissolution. This level of judicial involvement has been deemed appropriate to avoid entanglement with religion. See *supra* note 102 and accompanying text (discussing *Schwartzman* and the importance of examining "undisputed points of religious doctrine" when analyzing religious matters). See also *Wisconsin v. Yoder*, 406 U.S. 205, 208-13 (1972) (taking notice of Amish religious doctrine and relying on expert opinion in reaching its conclusions).

255. 492 U.S. 573 (1989).

256. *Id.* at 614 n.60.

257. See *supra* notes 98-100 and accompanying text (discussing the *Lemon* test).

pretation of religious authority, remain well within the legal boundaries previously set out by the Supreme Court.

2. *Get Cases Do Not Violate the Free Exercise Clause*

One commentator has asserted that the *get* cases "are more likely to run afoul of the Establishment Clause than of the Free Exercise Clause."²⁵⁸ However, there is a potential free exercise problem which must be overcome as well. Since the Free Exercise Clause prohibits governmental interference with both an individual's practice of and refusal to practice religion,²⁵⁹ it may be argued that a court order compelling a husband to obtain a *get* may be treading on the husband's right to free exercise of religion.²⁶⁰

The free exercise claim may be overcome by the accepted proposition that since the husband is not being compelled to practice his religion nor to profess his faith in God, the *get* procedure is not religious in nature.²⁶¹ As such, neither mandatory appearance before a *beth din* nor the act of giving a *get* constitutes a burden on the husband's free exercise of religion. Arguably, since the *get* proceeding is not religious in nature, the husband's free exercise rights are not actually violated. However, any perceived incidental burden civil enforcement of the *get* procedure imposes on such rights have been deemed to be overridden by a number of compelling state interests.²⁶²

Since, in many instances, the husband's refusal to grant the *get* is not based on sincere religious beliefs at all, no valid free exercise claim is even invoked.²⁶³ For example, in *Goldman*, the court found that the husband never clearly stated how an adverse ruling would

258. Warmflash, *supra* note 93, at 242.

259. Marshall, *supra* note 44, at 224.

260. *But see* Warmflash, *supra* note 93, at 242 (arguing that although this proposition is tenable, it has been substantially refuted "because a decree of specific performance would merely require the defendant to do what he voluntarily agreed to do" upon signing the *ketubah*).

261. *See supra* notes 107-10 and accompanying text (discussing the two components of Jewish law and noting that Jewish and legal scholars place the *get* procedure in the secular category).

262. Marshall, *supra* note 44, at 233. Possible state interests which may justify compelling individuals to procure a religious divorce are (1) allowing divorced spouses to remarry freely, (2) eliminating opportunities of extortion or the intentional infliction of emotional suffering, and (3) the protection of the welfare of any children involved. *Id.* Marshall also found the enforcement of contractual obligations to be a compelling state interest, a proposition which this Comment refuses to espouse for reasons set forth *infra* notes 276-91 and accompanying text.

263. *See In re Marriage of Goldman*, 554 N.E.2d 1016, 1023 (Ill. App. Ct. 1990) (discussing the court's finding that the husband's "dislike" for Orthodox Judaism did not rise to the level of a religious belief and thus, his claim was not grounded in the First Amendment); *see also* *Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1972) (holding that personal or philosophical beliefs are not protected by the Free Exercise Clause).

affect the exercise of his religion.²⁶⁴ He never articulated to his wife that he had any religious objections to giving the *get*.²⁶⁵ Instead, the court found that while the husband may have “abhorred the practices of Orthodox Jews, whom he characterized as discriminatory, repulsive and ‘antimodern,’” he never actually attacked their religious beliefs.²⁶⁶ The court therefore found that the husband’s free exercise claim failed to reach the minimum level required by the First Amendment.²⁶⁷

The Supreme Court has held that “purely secular views” are not afforded constitutional protection and that states are “clearly entitled to assure themselves that there is an ample predicate for invoking the Free Exercise Clause [by] distinguishing between religious and secular convictions and in determining whether a professed belief is sincerely held.”²⁶⁸ Consequently, the *Goldman* court found that the husband’s professed hatred of Orthodox Jews combined with his efforts to “punish and extort” did not qualify for constitutional protection.²⁶⁹

Further, courts may assume that the husband’s participation in the Jewish wedding ceremony implies his agreement to conform to Jewish law until such time that a dissolution of the marriage occurs in accordance with Jewish law. In *Goldman*, one rabbi expert witness testified that there is “simply no doctrine in any branch of Judaism that says a husband ought not give his wife a *get* if they are divorced and she wants one in accordance with Orthodox procedure.”²⁷⁰

264. See *Goldman*, 554 N.E.2d at 1023 (finding that the trial court had simply applied principles of contract law to enforce the agreement and the terms of the order were limited to avoid any interference with religious doctrine).

265. *Id.* at 1019. In fact, the court-appointed attorney for the couple’s children testified that the husband told her that he “would not be adverse to giving his wife a Jewish divorce” if he got his custody terms. *Id.* at 1020. The husband never denied having made these comments. *Id.*

266. *Id.* at 1023.

267. *Id.* The Free Exercise Clause requires that an action actually violate or conflict with a sincerely held religious belief. See *Yoder*, 406 U.S. at 215-16 (holding that the state must actually deny an individual’s free exercise of religion by its requirements). The *Goldman* court also duly noted that the husband had given his first wife a *get* and that there was testimonial evidence that he was withholding the *get* as a bargaining tool in the ensuing custody dispute. 554 N.E.2d at 1023-24.

268. *Frazee v. Illinois Dept. of Empl. Sec.*, 489 U.S. 829, 832 (1989).

269. *Goldman*, 554 N.E.2d at 1023-24. Similarly, the *Yoder* court stated that to have the protection of the Religion Clauses, the claims must be rooted in religious belief. Although a determination of what is a “religious” belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests. 406 U.S. at 215-16; see also *Thomas v. Review Bd. of the Ind. Empl. Sec. Div.*, 450 U.S. 707, 713 (1981) (“Only beliefs rooted in religion are protected by the Free Exercise Clause. . .”).

270. Brief for Appellee at 21, *In re Marriage of Goldman*, 554 N.E.2d 1016 (Ill. App. Ct. 1990) (No. 89-1025).

One commentator has stated that compelled religious divorces "bring into focus the inherent conflict in the Free Exercise Clause."²⁷¹ This refers to the dilemma resulting from the court's obligation to choose to protect one party's free exercise rights at the expense of the other party's rights. The Free Exercise Clause mandates that the wife's religious beliefs, which require her to obtain a *get* before she may remarry, be accommodated by requiring the husband to cooperate in securing the *get*. According to the wife's religious beliefs, the *get* is the only way to effectuate the divorce and allow her the freedom to remarry. However, the Free Exercise Clause supposedly also protects the husband's right to refuse to participate in the ritual if the court is convinced that the act is religious in nature.²⁷²

While it may be argued that the court is burdening the husband's right to free exercise in protecting that of the wife, this Comment provides an alternative explanation. Accepting the theory that the *get* procedure is not religious in nature, this Comment contends that courts are not forcing the husband to participate in a *religious* practice against his will. Also, numerous cases illustrate the Supreme Court's policy of accommodation.²⁷³ Accordingly, a court order which accommodates the wife's free exercise of religious beliefs by granting her a *get* not only fails to interfere with the husband's free exercise rights, but is firmly grounded in legal history.²⁷⁴

Protecting the wife's free exercise rights also advances a number of compelling state interests, none of which would be served if the court favored the husband's free exercise claim.²⁷⁵ Further, protection of these interests greatly outweighs any minor burden incidentally imposed on the husband's free exercise rights.

B. *Compelling State Interest Analysis*

This Comment contends that the *ketubah* should not be enforced as a binding contract for the various reasons discussed below. Instead of looking to the freedom to contract as the compelling state interest on

271. Warmflash, *supra* note 93, at 252.

272. *But see* Lewin, *supra* note 193, at 2 (suggesting that a husband's decision not to practice his religion should not be protected under the Free Exercise Clause when that decision impacts and interferes with his wife's decision to practice her religion).

273. *See supra* notes 92-96, 111 and accompanying text (discussing the Supreme Court's policy of accommodation).

274. *See supra* notes 111-26 and accompanying text (discussing the Free Exercise Clause).

275. *See supra* notes 236-43 and accompanying text (discussing several compelling state interests which the *Goldman* court recognized as being served by enforcing the *get* procedure). *See also infra* notes 292-96 and accompanying text (discussing the compelling state interests proposed by this Comment).

which to base a court order enforcing the *get* proceeding, this Comment proposes that enforcement of the *get* proceeding advances the compelling state interests of ensuring equal application of the law to both parties involved and protecting the fundamental right to remarry.

1. Contractual Analysis

There are numerous reasons for asserting that the *ketubah* is not analogous to other antenuptial agreements.²⁷⁶ Disregarding the fact that most antenuptial agreements are freely negotiated at arms length and are written in a language both parties understand, the primary problem lies with the parties' intent at the time of "contracting."²⁷⁷ Courts have recognized that in some situations, there is a presumption that no legal obligations will arise from the transaction, and so an unusual manifestation of intention is necessary to actually create a binding contract.²⁷⁸ Courts have recognized that there exist a few situations in which the typical intent is not to create an enforceable contract, such as in social, intra-family, and arguably, religious settings.²⁷⁹ Since the marital setting fits into these categories, the presumption that the parties did not intend the religious Hebrew document to be binding holds true.

While the most prominent reason to disregard the *ketubah* as a binding legal contract is the parties' lack of intention to be bound, there are numerous other reasons why the *ketubah* fails to stand up to standard contract requirements. First, most often the *ketubah* signifies nothing more than adherence to a religious tradition.²⁸⁰ Commenta-

276. In other areas as well, the *ketubah* has not been upheld as a contract that gives the parties recognizable legal rights. See, e.g., *In re Estate of White*, 356 N.Y.S.2d 208 (N.Y. Sup. Ct. 1974) (holding that a *ketubah* did not give a widow any inheritance rights because the *ketubah* had no binding effect on the property rights of signers).

277. See *supra* note 143-46 (noting Kahan's and Marshall's denial that the parties intend to be contractually bound to the terms of the *ketubah* upon their signing thereof).

278. See, e.g., *Balfour v. Balfour*, 2 K.B. 571 (1919) (holding that interspousal agreements generally are not viewed as "contracts"); see also 1 CORBIN ON CONTRACTS § 34 (1963) ("If the subject matter and terms are not such as customarily have affected legal relations, the transaction is not legally operative unless the expressions of the party indicate an intention to make it so."). Cf. RESTATEMENT (SECOND) OF CONTRACTS § 21 (1981) ("Neither real nor apparent intention that a promise be legally binding is essential to the formation of a contract, but a manifestation of intention that a promise shall not affect legal relations may prevent the formation of a contract."). These authorities illustrate that different guidelines exist for marital and nonmarital situations.

279. Marshall, *supra* note 44, at 224 n.97; see, e.g., *Mitzel v. Hauck*, 105 N.W.2d 378 (1960) (holding that social agreements among friends are not binding).

280. See *supra* notes 144-45 and accompanying text (discussing the significance of the *ketubah*).

tors have argued that the *ketubah* does not necessarily reflect a "knowing intention to assume certain obligations, including that to arbitrate marital problems before a *beth din* or to procure a *get* upon divorce."²⁸¹ A problem also arises in enforcing outmoded terms of the *ketubah*, such as the promise to pay the monetary sum of 200 *zuzim*²⁸² in the event of a divorce or the husband's death.²⁸³

Furthermore, the fact that the *ketubah* is usually an elaborately decorated document, similar to an "illuminated manuscript," merely enhances the impression that the *ketubah* is more of a religious symbol than a legal document.²⁸⁴ In sum, the *ketubah* has been labeled as "no more than a set of 'boilerplate' clauses which cannot be assumed to capture the expectations and intentions of the parties."²⁸⁵

Finally, courts need not construe the *ketubah* as a binding contract in order to require the husband to perform his "contractual" obligation of securing the *get*.²⁸⁶ Not only is the *get* requirement absent from some *ketuboth*,²⁸⁷ it is not historically rooted in the *ketubah* document at all.²⁸⁸ The *get* requirement originated in the Bible, and is

281. Kahan, *supra* note 19, at 216-17. While the couple may associate the signing of the *ketubah* with the notion that they "are really being married in accordance with Jewish law, it is unlikely that their signatures manifest a knowing assent to the specific obligations enumerated in the *ketubah*." *Id.* Indeed, usually no one even offers to explain that a clause included in the *ketubah* can require an appearance before a *beth din* in order to facilitate the dissolution of the marriage. *Id.*

282. *Zuzim* is plural for *zuz*. A *zuz* was a small silver coin used in Palestine and Babylonia during the Talmudic period. BREITOWITZ, *supra* note 13, at 284 n.4. How 200 *zuzim* translates into dollars is uncertain. To determine an approximate dollar amount, the going market rate of the metallic content of the ancient *zuz* coin is quantified. *Id.* at 288. Since the *zuz* was a silver coin that contained approximately .2 ounces of pure silver, and 200 of those equals forty ounces of silver, depending on the current market value of silver, the alimony payment should be approximately \$320 — hardly a significant sum in this day and age. *Id.* at 288-89. In terms of alimony, therefore, since the *ketubah* provides for only minimal recovery, it is usually not regarded as sufficient protection and its enforcement is rarely sought. *Id.*

283. See *supra* note 24 (providing a translation of the *ketubah*).

284. See Kahan, *supra* note 19, at 216 (concluding that the *ketubah* has no more than religious significance); see also E. DORFF & A. ROSSETT, A LIVING TREE: MATERIALS ON THE JEWISH LEGAL TRADITION WITH COMPARATIVE NOTES XIII-12 (3d prelim. ed. 1983) (unpublished manuscript).

285. Kahan, *supra* note 19, at 216.

286. Rabbis view the Jewish legal requirement of obtaining the *get* as contractual. See *In re Marriage of Goldman*, 554 N.E.2d 1016, 1022 (Ill. App. Ct. 1990) (noting that the *ketubah* requires the marriage to be governed by Jewish law, which mandates the giving of a *get* upon divorce); *Minkin v. Minkin*, 434 A.2d 665, 667 (N.J. Sup. Ct. 1981) (concluding that the *ketubah* provides that the parties agree to abide by Jewish law in matters regarding their marriage, and that Jewish law requires a husband to give his wife a *get* to terminate the marriage).

287. Plural for *ketubah*.

288. See *supra* note 44 and accompanying text (noting that the *get* requirement originated in the Torah).

therefore a Biblical mandate rather than a contractual provision.²⁸⁹ In fact, a number of courts have held the *get* obligation to be binding on the husband as a matter of Jewish law regardless of whether the *ketubah* is considered a contract.²⁹⁰ Since courts are able to enforce the *get* ritual based on a policy of accommodation, legal straining to fit the *ketubah* into the mold of a binding contract is simply unnecessary.²⁹¹

2. Fourteenth Amendment Analysis

States have a compelling interest in ensuring that all parties are afforded equal protection under the law as a constitutional guarantee.²⁹² By definition, this right must also be guaranteed in the case of religious divorces. However, under Jewish law, a husband may refuse to grant his wife a *get* and effectively prevent her from ever again remarrying within the Jewish faith while he is free to do so without being faced with the same dire consequences.²⁹³

By the very nature of this situation, then, the law is applied unequally if courts permit such a practice. To cure this inequity, the court may, as many already have, fashion a legal remedy and enforce the *get* provision of the *ketubah* to ensure equal application of the law. Not only does the court have the authority to do so, it has the moral obligation to the woman whose fundamental rights are being jeopardized by an antiquated rule.

Since remarriage has been deemed to be a fundamental right,²⁹⁴ and public policy favors remarriage,²⁹⁵ the state has a compelling in-

289. The Bible states that when a man divorces a woman "he writes her a bill of divorce, and gives it in her hand." *Deuteronomy* 24:104.

290. These courts have held that even without a *ketubah*, a court may use its equity powers to order a husband to give a *get* to protect the wife's civil liberties. See *Burns v. Burns*, 538 A.2d 438 (N.J. Super. Ct. Ch. Div. 1987) (holding that since the husband's refusal to grant a *get* was not based on genuine religious beliefs, the court order compelling him to submit to jurisdiction of the *beth din* to initiate the procedure to secure the *get* would not violate the Establishment Clause). *But see Turner v. Turner*, 192 So. 2d 787, *cert. denied*, 201 So. 2d 233 (Fla. 1966) (holding the *get* provision in the *ketubah* to be unenforceable by a civil court).

291. See *supra* notes 92-96, 111 and accompanying text (discussing the Supreme Court's policy of accommodation).

292. See *supra* notes 147-50 and accompanying text (discussing the Equal Protection Clause).

293. See *supra* notes 63-83 and accompanying text (discussing the husband's leverage over his wife in divorce proceedings and the differing religious consequences of remarriage for husbands and wives without a *get*).

294. See *supra* note 164-74 and accompanying text (discussing remarriage as a fundamental right).

295. See *supra* notes 171-73, 190-95 and accompanying text (discussing state statutes which have been enacted in order to foster "amicable" dissolutions and remove obstacles to remarriage).

terest in aiding a wife in obtaining a *get* when her religious adherence to the tenets of Orthodox Judaism prevents her from remarrying without one.²⁹⁶ Absent state intervention on the wife's behalf, there is the potential risk that a husband will abuse his unilateral power to grant the *get*.²⁹⁷ Clearly, such a practice is contrary to public policy, and state intervention in this situation is necessary to protect the wife's fundamental civil rights.²⁹⁸

Jewish law unfortunately provides different consequences for remarriage on the basis of sex. The Equal Protection doctrine, however, provides the remedy to cure the inherent inequity imposed by Jewish law. The fundamental right in need of preservation in this case is that the wife be given the same opportunity as her husband to remarry. In sum, the state's compelling interest that all parties be treated equally under the law as well as that of protecting parties' fundamental civil rights requires courts to enforce the *get* proceeding upon civil dissolution of a marriage. Unlike prior court decisions, enforcement need not, and in fact should not, be grounded in contract law.

III. CONCLUSION

When a Jewish couple signs a *ketubah* on their wedding day, they implicitly agree that their marriage will be governed by Jewish law in addition to the civil law of the state of their marriage. Although the vast majority of couples do not understand the content of the *ketubah*, they fathom the symbolic significance of their signatures upon the document. Jewish law is deemed to guide their marriage throughout their lifetimes or until the misfortune of divorce arises. Accordingly, both parties implicitly agree to comply with the religious divorce proceeding in order to dissolve their marriage under Jewish law and enable them both to remarry within the faith.

This Comment has fervently argued that civil enforcement of the *get* proceeding in divorce cases is proper, although it is improper to uphold the *ketubah* as a legally binding contract. Notwithstanding that the *get* proceeding is articulated in the modern adaptation of the Conservative *ketubah*, the original requirement of the *get* upon marital

296. Warmflash, *supra* note 93, at 249.

297. Alternatively, the husband may condition his granting of the *get* on diminished alimony, maintenance, or support payments, thus employing the *get* as a bargaining chip. See *supra* note 66 and accompanying text (noting that many husbands use their "get power" as extreme leverage over their wives to extort favorable settlements or just to keep their wives bound to the marriage against their will).

298. The New York *get* statute recognized the state's interest in fostering a public policy that favors remarriage. Warmflash, *supra* note 93, at 250 (citing N.Y. DOM. REL. LAW § 253 (McKinney Supp. 1983)).

dissolution is found in the Torah, and is therefore not a contractually-based requirement. Rather, the act of giving and receiving a *get* is a command which finds its origin in the oldest work of literature and which has been fortified by an enduring and unique culture and legal tradition. That courts should find ways not to enforce such a mandate would be a great travesty of justice.

This Comment has presented a sound legal argument explaining that civil enforcement of the *get* procedure does not violate the First Amendment of the Constitution. Neither the Establishment Clause nor the Free Exercise Clause is breached by a court order requiring a husband to give his wife a *get* in accordance with Jewish law. This Comment has further shown that enforcement serves to protect vital constitutional rights of the wife. By forcing a husband to grant his wife a *get* upon civil dissolution of their marriage, the court is ensuring equal application of the law by remedying an inherently discriminatory situation, and enabling both parties to freely remarry on equal footing.

As this Comment has shown, even in the face of a religious issue, civil courts have the power to effectuate a just result. As such, it is clearly within the scope of the courts' authority to remove the chains of the "bound woman."

Jodi M. Solovy

