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The effectiveness of (Rabbinic) prenuptial agreements in preventing marital captivity

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Jewish law (also known as Halakha) requires that a man give and a woman receive a get, *a Jewish bill of divorce, in order to end their Jewish marriage, which has a legal existence independent of their civil marriage and is not ended by a civil divorce. Since around 1960, there have been many attempts to solve this problem of marital captivity in North America. American prenuptial agreements (PNAs) best address this problem of Orthodox Jewish husbands withholding a* get. *This article explains why Jewish law prefers contract-based solutions over legislative or judicial solutions and presents empirical research on which type of PNA best solves this problem in America.*

1. Introduction

There is a well-known legal and religious issue in the United States and Canada concerning Jewish family law called the *agunah* problem. The problem is simple to explain but difficult to solve. Jewish law requires that a man gives and a woman receives a *get*, a Jewish bill of divorce, by his own free will[1] in order to end their Jewish marriage. The Jewish marriage has a Jewish legal existence independent of the civil marriage[2] and is not ended by a civil divorce. Furthermore, if a Jewish bill of divorce is coerced illicitly, the divorce is void as a matter of Jewish law. The *agunah* problem only occurs when the man refuses to participate in the giving of a *get*, or,

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1 See Appendix 1 for a brief introduction to Jewish law. Jewish law requires a divorce bill to be granted only through the free will of the husband, or, in limited cases, through coercion by an authorized rabbinical court. This renders divorce executed under terms of duress generally invalid. Should a Jewish divorce be deemed invalid, critical status issues arise for the woman and for children born in the subsequent relationship. For a thorough treatment of Rabbinic principles defining coercion in Jewish divorce, see Michael J. Broyde, Marriage, Divorce, And The Abandoned Wife In Jewish Law: A Conceptual Understanding of the Agunah Problems In America 103–13 (2001); Irving Breitowitz, *The Plight of the Agunah: A Study in Halacha, Contract, and the First Amendment*, 51 Md. L. R. 312, 331–8 (1992).

2 Jewish law imposes no obligation to marry civilly.

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when the woman refuses to participate in the receiving of a *get*. In the United States and Canada, the consensus is that the problem of Orthodox Jewish husbands who withhold a *get* is best addressed by prenuptial agreements (PNAs). These PNAs are contracts between husbands and wives, constructed for the purpose of religion, and addressing when a Jewish divorce will be delivered along with the penalties for non-delivery at the right time.[3]

This article addresses three questions about PNAs. First, it explains why the Jewish tradition has chosen contract law as the mechanism for addressing the *agunah* problem, rather than legislation or some other mechanism. Second, the article provides some initial and tentative empirical data to help determine the best type of PNA to resolve the *agunah* problem in the United States and Canada. This section also addresses the related question of whether the ability to resolve underlying divorce disputes unrelated to the *get* either positively or negatively impacts the value of these PNAs. This question has both a theory component and a preliminary empirical component, which will be summarized. Third, this article asks whether enhanced religion-based dispute resolution is a wise idea in a robust democracy, whether it is one with an established church—like in Israel and England—or without, like in the United States and Canada.[4]

2. What are the various models of PNAs currently used within the Orthodox Jewish community in North America?

Essentially, there are five models (one of which has two permutations) used within the Orthodox Jewish community in North America.

The first PNA model is the rabbinical court in charge, where a single rabbinical court resolves every aspect of the divorce to the extent the couple cannot resolve it through mutual agreement. This includes all financial matters, all child custody matters, and all status-related matters including the *get* and the civil divorce. Consensual paperwork is then filed in a secular court, which typically endorses the rabbinical court order as a consent decree.[5]

[3] This sentence is the starting point of this article and will not be defended or demonstrated as correct. There is extensive literature on this matter. *See, e.g.*, Broyde, *supra* note 1; Breitowitz, *supra* note 1; Bernard Jackson, Agunah: The Manchester Analysis (2011). For a longer discussion of these issues, see generally The Prenuptial Agreement: Halakhic and Pastoral Considerations (Kenneth Auman & Basil Herring eds., 1996); Rachel Levmore, Min'I 'Enayikh Mi-Dim'Ah [Hold Back Your Tears] 53–67 (2009); Rachel Levmore, *Preventing Get Refusal: From the Beth Din of America to the Israeli Agreement for Mutual Respect*, Rabbinical Council of America (Aug. 23, 2013), https://bit.ly/3jrcRse.

[4] The final footnote to this article contains six highly specific suggestions for making the BDA-PNA better as a matter of Jewish law and American arbitration law. Many of the themes in this article relate very much to some of the matters discussed in Michael J. Broyde, Sharia Tribunals, Rabbinical Courts, and Christian Panels: Religious Arbitration in America and the West (2017).

[5] A copy of the agreement can be found at Michael J. Broyde, *Some Thoughts on New York State Regulation of Jewish Marriage: Covenant, Contract or Statute?*, 5 Fam. L. Rev. 55 (2012). After the present article was written, the BDA-PNA was slightly updated. *See* Beth Din of America, Binding Agreement (revised Nov. 2018). None of these changes affect the argument of this article.

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In this forum, the parties may choose whether they want the rabbinical court to adopt principles of equitable distribution or communal property or native Jewish law, but in any case, *a rabbinical court will make the final determination*. Note that the Beth Din of America Prenuptial Agreement (BDA-PNA) contains a non-optional clause authorizing the rabbinical court to take fault into consideration.

The second PNA model is the secular court in charge and the rabbinical court to give *get*. In this model, a secular court is used to resolve every aspect of the divorce that it can legally resolve and a rabbinical court is involved *only* in the giving of a *get* or otherwise ritually ending the marriage. This model has two permutations:

(i) The New Jersey model,[6] in which the secular court *ignores* the *get* issues and the parties issue a *get* without notifying the secular court of any issues.
(ii) The New York model, in which the secular court is *aware* of the *get* issues and withholds final secular status until a religious divorce is issued.

These two models are different. The New York model has an elaborate set of two *get* laws that give the state quite a bit of regulatory clout over the process of Jewish divorce when and if the parties bring the matter to the attention of the judge who is hearing the matter.[7] *Get* law I will prevent the finalization of the civil divorce in which the plaintiff has not given a *get*. *Get* law II will authorize the judge to impose fuller compensation for failure to provide a *get* in the distribution of assets in cases in which a *get* is withheld.[8] In the New Jersey model, Jewish matters are invisible in secular court.

A third possibility is for the parties to use a standard Beth Din of America-type PNA with no optional clauses selected and use a different (typically more "traditional") rabbinical court to resolve all other remaining matters. This allows the Beth Din of America (BDA) to serve as the cudgel to force the giving of the Jewish divorce while allowing a more accepted and a second rabbinical court to control all other matters. While at first glance, one wonders why any parties would choose two different rabbinical courts, the answer is actually quite clear: this ensures that two values—rabbinical adjudication of the whole matter and ensuring that a *get* is given—are manifested.

[6] This is called the New Jersey model as it is derived from Aflalo v. Aflalo, 295 N.J. Super. 527, 685 A.2d 523, 1996 N.J. Super. LEXIS 459 (Ch. Div. Feb. 29, 1996), where New Jersey made it clear that the *get* is invisible to the state.

[7] It is beyond the scope of this article to delve into these two regulations as a stand-alone solution to the *agunah* problem; however, this has been discussed a few times as both a matter of internal Jewish law (*see* Michael J. Broyde, *The 1992 New York* Get *Law*, 29 Tradition: J. Orthodox Jewish Thought 5 (1995); Chaim Z. Malinowitz & Michael J. Broyde, *The 1992 New York Get Law: An Exchange*, 31 Tradition: J. Orthodox Jewish Thought 23 (1997)) and as an academic matter (*see* references cited *supra* note 3; Michael J. Broyde, *The Covenant-Contract Dialectic in Jewish Marriage and Divorce Law*, *in* Covenant Marriage in Comparative Perspective 53 (Eliza Ellinson & John Witte, Jr. eds., 2005); Michael Broyde, *Some Thoughts on New York State Regulation of Jewish Marriage: Covenant, Contract, or Statute?*, *in* Marriage and Divorce in a Multicultural Context: Multi-Tiered Marriage and the Boundaries of Civil Law and Religion 138 (Joel A. Nichols ed., 2011)).

[8] The various important technical Jewish law issues raised by the New York state *get* laws are discussed in Michael J. Broyde, The Pursuit of Justice and Jewish Law 165–80 (2d ed. 2007).

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It empowers the Beth Din of America to ensure that a *get* is given and gives them exclusive jurisdiction to accomplish that task, as well as a payment incentive directed against the husband to enforce their authority. Yet, it also ensures that other religious values, which one or both spouses have, actively influence the outcome.[9] Typically, in such a case, the alternative rabbinical court selected is one that is traditionally more ultra-Orthodox than the BDA. However, there are more than a few PNAs written that direct less traditional rabbinical courts to resolve all matters other than by giving the *get*, which is put to the BDA.[10]

In the fourth model, *a self-effectuating* PNA like the tripartite agreement[11] is used, leaving the *get* as outside the framework of the negotiated divorce (at least in theory). This allows the parties to resolve their dispute in any forum they wish, whether it be a rabbinical court, secular court, or binding arbitration in some other forum. What does this model accomplish? The advantages of this agreement are clear from a policy standpoint. However, this type of an agreement is subject to a great deal of Jewish law controversy which clearly discounts the value of its use.[12] Its frequency of use is uncertain although this author senses that they are used quite frequently.

The fifth PNA model is *agreement to give a* get *only after* the conclusion of the civil divorce procedure. In this model, the parties' expectations of when a *get* will be provided are determined by the pace of the civil divorce.[13] In theory, this type of PNA has many advantages: it connects the right to be religiously divorced to the right to

[9] This model of PNA is particularly common when addressing the situation where a couple is not civilly married or where one of the parties is civilly married to someone else. This is also useful in marriages where the husband and wife do not come from the same basic religious community.

[10] The rationale for such an agreement is clear: the married couple wants the universal acceptance of their Jewish divorce that comes from the Orthodox court administering it; however, they also wish to have the financial practices and customs common in the Conservative Jewish community applied, while incorporating the virtues of arbitration generally.

[11] The tripartite agreement was first mentioned in Michael Broyde, *An Unsuccessful Defense of the Beit Din of Rabbi Emanuel Rackman: The Tears of the Oppressed by Aviad Hacohen*, 4 Edah J. 1 (2005); developed more clearly in Michael Broyde, *A Proposed Tripartite Agreement to Solve Some of the Agunah Problems: A Solution Without Any Motivation*, *in* Jewish Law Association Studies XX: The Manchester Conference Volume 1 (Leib Moscovitz ed., 2010); and fully explained in Michael Broyde & Rachel Levmore, *Hahut Hameshulash Lo Bemeharay Inatek* [*The Thrice Braided Rope Cord Does Not Easily Break: The Tripartite Prenuptial Agreement*], 37 Techumin 228 (2017).

[12] *See, e.g.*, Mattityau Broyde, Rachel Levmore, & Yona Reiss, *Prenuptial Agreements, Pre-Authorized Divorces and Communal Decrees*, 37 Techumin 228 (2017). Rabbi Reiss's point certainly represents the rabbinic consensus on this matter and is reproduced in his new work. *See* Yona Reiss, Kanfei Yona 276 (2018).

[13] For many years Rabbi Haskel Lookstein used and advocated the following type of PNA:

> The undersigned hereby agree, promise and represent: In the event that the covenant of marriage to be entered into this day 20XX by husband and wife shall be terminated, dissolved or annulled in accordance with any civil court having jurisdiction to effectively do so, then in that event husband and wife shall voluntarily and promptly upon demand by either of the parties to this marriage present themselves at a mutually convenient covenant of marriage in accordance with Jewish law and custom before the Ecclesiastical Court (Bet Din) of the Rabbinical Council of America—or before a similarly recognized Orthodox rabbinical court—by delivery and acceptance, respectively, of the *get* (Jewish divorce).

See, e.g., Susan Metzger Weiss, *Sign at Your Own Risk: The "RCA" Prenuptial May Prejudice the Fairness of Your Future Divorce Settlement*, 6 Cardozo Women's L.J. 49, 79 (1999).

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be civilly divorced. Further, it creates a clear and objective expectation of when the *get* will be given: after the secular divorce has been concluded. There are a variety of Jewish law and policy reasons why the Orthodox community did not generally use this type of PNA:

(i) it has no clear Jewish law enforcement mechanism;
(ii) it connects a Jewish law obligation to secular law;
(iii) it does not work in Israel or any other nation without a civil divorce process;[14]
(iv) it works independent of any mechanism at all;
(v) secular divorce is sometimes cumbersome and not promptly granted; and
(vi) it does not work if the couple are not civilly married.

The models outlined above show that the different types of PNA are distinct, and each one creates an alternative construct of marriage. Building on the excellent work by Amihai Radzyner in his recent article,[15] PNAs are very different in Israel, the United States, and Canada. Israel is a nation with a rabbinical court that has mandatory jurisdiction over Jewish divorce; therefore, Israel might have different views of the value of the various PNAs. This situation is distinct from North America where secular law will not compel participation in any religious rituals absent a contractual obligation.

As Section 4 will show, the author conducted extensive research, both empirical and theoretical, on what these PNA processes look like by examining this in reference to other religions, primarily Christianity and Islam, and their divorce procedures. It is worth noting that the construct of withholding a religious divorce is not unique to the Jewish religion.[16] It arises in many situations and has a secular correspondent in the term "marital captivity." There was a conference on this at Maastricht University in 2017[17] that focused on marital captivity in the Netherlands. There is even some literature on this problem in faiths other than Judaism in Israel. Consider, for example, the following statement:

> Consider the plight of Israel's minority Christian community. Some of the Christian denominations recognized in Israel do not permit divorce under any circumstances. . . Under this reign of indissoluble marriage, couples in Catholic and Maronite communities have developed ingenious ploy[s] to escape the deadlock of the no-exit regime: temporary conversion to Orthodox Christianity, which does (if begrudgingly) grant religious divorce. This "solution" makes everybody happy; the divorcing couple is happy in that they got what they bartered for: freedom.[18]

[14] It does not work in Israel because divorce is adjudicated in rabbinical courts exclusively. There is no civil divorce or marriage.

[15] *See* Amihai Radzyner, *Commandments Connected to the Land of Israel? Prenuptial Agreements to Prevent Get Refusal: Between Israel and America*, Mishpatim 5 (5778).

[16] *See* Benedicta Deogratias, Trapped in a Religious Marriage: A Human Rights Perspective on the Phenomenon of Marital Captivity (2019).

[17] *See, e.g., Marital Captivity: Bridging the Gap Between Religion and Law (MARICAP)*, Maastricht U., https://bit.ly/3lfZPzl (last visited Sept. 1, 2020). The proceedings of the conference are available in Marital Captivity: Divorce, Religion and Human Rights (Susan Rutten, Benedicta Deogratias, and Pauline Kruiniger eds., 2019).

[18] Karin Carmit Yefet, *Israeli Family Law as a Civil-Religious Hybrid: A Cautionary Tale of Fatal Attraction*, 2016 U. Ill. L. Rev. 1505, 1515.

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All of which leads us to the next point: the focus in North America remains on contract-based solutions that are worthy of an explanation, as a matter of bothJewish law and North American law.

3. Why does Jewish law use a contract to solve the *agunah* problem?

Why a contract? Why not legislation, case law from a secular or religious court, or something else entirely? Why have all the other, seemingly great, solutions failed to solve the *agunah* problem? From the proposals of annulment in the 1930s to preauthorized Jewish divorces in the 1950s, to conditional marriages in the 1970s, and many others, none of the solutions have been accepted by Orthodox Jews. Rabbinical courts sought to solve the *agunah* problem by invoking a mixture of non-contract rationales that have been widely discussed in literature but are fundamentally lacking in the gravitas to be widely supported and accepted as general solutions.[19] Non-contract solutions have not been historically accepted and one suspects they never will be.

3.1. Why do previously suggested solutions not work?[20]

Over the last fifty years, Justice Menachem Elon, Rabbi Emanuel Rackman,[21] and many others have failed to succeed in persuading the traditional Jewish community to adopt non-contract solutions. These non-contract solutions tend not to conform to the normative Jewish law as understood by the mainstream codes and the early authorities. Those Jewish law authorities who did not accept the three doctrinal ideas these great men advanced—that one can issue a Jewish divorce against the will of the husband, or the liberal use of error in the creation of marriage or annulment authorized by a rabbinical court—twenty, thirty, or fifty years ago will still not accept any of these three doctrines now. Most contemporary rabbinic authorities, in both Israel and the diaspora, consider the non-contract solutions proposed by Justice Elon and Rabbi Rackman to be contrary to the normative Halakhic views of the mainstream codes and the early authorities.[22]

[19] *See further* Irving Breitowitz, Between Civil and Between Civil and Religious Law: The Plight of the Agunah in American Society (1993); Michael J. Broyde, Marriage Divorce and the Abandoned Wife in Jewish Law: A Conceptual Understanding of the Agunah Problems in America chs. 1–2 (2001).

[20] There are three main non-contractual alternatives to PNAs for dealing with the problem of Jewish marital captivity. In Israel, courts can use penal sanction to coerce the defendant to grant his wife a *get*—a route clearly impossible to implement in the diaspora. As a second possibility, rabbinic court-mandated annulments have been considered, but never significantly practiced or broadly accepted by rabbinic authorities, so they are unlikely to become widely instituted. A third venue involves secular court interference, as modeled after the two New York state *get* laws.

[21] For Elon, see 4 Menachem Elon, Jewish Law, History, Sources, Principles: Jewish Law in the State of Israel (1994). For Rackman, see Emmanuel Rackman, *Afterword* to Aviad Hakohen, The Tears of the Oppressed: An Examination of the Agunah Problem: Background and Halakhic Sources (2004). The topic is also discussed in many of Rabbi Rackman's writings found at Rabbi Emmanuel Rackman: Books, Articles, and More, www.rabbirackman.com/. *See also* Michael J. Broyde, *Review Essay: An Unsuccessful Defense of the Bet Din of Rabbi Emanuel Rackman: The Tears of the Oppressed*, 4 Edah J. 1 (2005).

[22] It is beyond the scope of this article to explore the history of the various solutions to the *agunah* problem. For more information, see Broyde, *supra* note 1; Breitowitz, *supra* note 1.

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Furthermore, if we look at the most viable solutions not adopted—those that were actually grounded in precedent and that attracted deep support from great rabbis such as Rabbi Yosef Eliyahu Henkin and Rabbi Yechiel Yaakov Weinberg[23] in the early twentieth century—they included conditional marriages and conditional divorces, both essentially carried out through contract-like mechanisms. Any non-contractual solution would not be able to take advantage of contract law doctrines and the Jewish law authorities who supported them. By adopting solutions to the *agunah* problem that are not contractual, one has no choice but to adopt solutions that are weaker than contractual agreements. History has shown contracts to be a consistently effective solution in helping to solve the *agunah* problem for more than forty years.

3.2. Examples of successful attempts of using contracts in conjunction with Jewish law

Any quest for solutions to the *agunah* problem starts out at a very important point: Jewish law. Like many legal systems, Jewish law has confronted profound challenges to its very system of rules in specific areas. Rabbinic authorities of their times were not sure Jewish law could continue to function unless somehow the rules as practiced were changed in the given area. However, it survived that process of change without being ripped asunder. How did it do that?

The answer is clear: Jewish law actually has provided a rich history and context of contract law for us to work with to solve the *agunah* problem. Five distinctly different examples from different periods and areas of Jewish law are provided to persuade the reader of the range of uses of contract in Jewish law. These are five dramatic examples of functionally permitting what was generally considered prohibited in the face of a contractual solution.[24] The first example is debt forgiveness and *prosbul*, a writ that technically transfers debt to a rabbinical court and thus prevents its discharge in the Sabbatical year.[25] The Jewish system of debt forgiveness assumed the landed and mercantile economies were being deeply hindered by the inability to issue loans with any assurance that the money would be repaid. Hillel identified the mechanism of *prosbul*, a contract-based solution, to overcome this problem. Since debts owed to a rabbinical court are never discharged, even during the sabbatical year, a creditor will sell or give his debt to a rabbinical court, who will collect on his behalf and remand to him the proceeds. How does this work? One has to use the *prosbul* (a contract) in order for it to be effective. Although many mechanisms are proposed (eminent domain by the court and others), the one that wins is contract. If one does not actually use the contract—signed in front of a *bet din*—it does not work. No contract, no solution.

The second example is owning bread on Passover and ritual selling of leavened products prior to Passover.[26] With the popularity of the whiskey trade among Jews,

[23] *See further* Breitowitz, *supra* note 1.

[24] Rather than prohibiting that which is permitted, which is a different problem in Jewish law.

[25] For a discussion of this topic, see Jacob Karo, Shulchan Aruch, Choshen Mishpat 67 and commentaries therein. For more on this work, see Appendix 1.

[26] For a discussion, see Mishnah Berurah 448:12.

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they found themselves in a bind—they had large amounts of valuable but not perishable leavened grain products, and the prevailing law of discarding all such products prior to Passover proved economically very challenging. Although many solutions were proposed, including some views that liquid leavened grain products were not truly leavened grain, none of these solutions were accepted. Instead, Jewish law adopted a contract-based solution: A person will sell leavened grain to a gentile by contract, while keeping functional possession so as to make sure that the gentile does not sell it or drink it. The deal was crafted so that the gentile could not afford to keep the product after Passover, ensuring the return of the product after the holiday. In order for this to work, the Jew had to draft the contract of sale before Passover. Again, in the absence of contract, there is no solution.

The third example is levirate divorce and *agunah* from levirate marriage (*yibum*).[27] During the early and late medieval periods, the Jewish tradition confronted an enormous practical challenge from levirate marriage, namely the Biblical directive (*Deuteronomy* 25:5–6) where if a husband dies childless, his brother may marry his widow. If the brother of the widow does not want to marry the widow, then the levirate divorce (*halitza*) ceremony would take place. Widows often awaited such a divorce from a brother who was far away, an apostate, unfit, or would not appear. Many solutions were proposed, including the idea that the apostate brother was not really a brother; however, in the end, Jewish law adopted a contract-based solution: at the time of marriage, husband and wife enter into what we would now call a prenuptial agreement of conditional marriage. Husband and wife agree that if the husband should die childless, the marriage is void. Again, this solution is not a Jewish law decree or rule of law, but an agreement—absent this contract, there is no solution.

The fourth example where a contract-based solution is utilized is charging interest on loans and the invention of the *heter iska*, a contract nominally converting a loan into a business partnership.[28] In modern times, and with the rise of the interest-driven economy, the Jewish law prohibition against charging interest to fellow Jewish people proved to be economically impossible to observe. Many solutions were proposed, from the use of Gentile middlemen to even more radical solutions related to confiscating collateral; however, a contract-based solution was finally adopted and is currently accepted. The parties sign an agreement recasting their loan as a business deal and the interest payments as profit payments—this solution is universally accepted. An agreement was needed to make this work. No contract, no solution.

The final example is the most modern: where one does not farm every seven years in Israel, and the nominal and ritual selling of the land to a gentile in the Sabbatical year.[29] Modern settlement in Israel restarted about 150 years ago and became an agricultural enterprise.[30] Rigorous observance of the prohibition against farming every

[27] For a discussion, see Rama Shulchan Aruch Yoreh Deah 157:4.

[28] *See further* Yakov Yeshiaya Blau, Brit Yehuda (1983) (on the laws of interest; from ch. 25 onward, the laws of *heter iska*.).

[29] *See further* 1 Yitzchak Yosef, Yalkut Yosef: Laws Relating to the Land of Israel (2002) (see esp. the final third of the book).

[30] Alon Tal, *To Make a Desert Bloom: The Israeli Agricultural Adventure and Quest for Sustainability*, 81 Agricultural Hist. 228 (2007).

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seven years, it was claimed, might jeopardize the resettlement of the land—what to do? The answer again laid in contract and agreement: sell the land to a gentile to putatively avoid the prohibited activity with the understanding that after the sabbatical year all the owners will buy the land back; other solutions are possible also (such as the collective ownership of the fruits), but the common universal practice is still the contract- based one. Although controversial, it became the standard solution in Israel and is widely supported and used. If one does not sign the sale of land nominal contract for the Sabbatical year, then the sale does not work. No contract, no solution.

There are many other examples as well.[31] These five were picked because they span the 2200-year history of the rabbinic legal tradition and are drawn from various areas of law including marriage law. More importantly, in each of these cases there were alternative Jewish law solutions possible that were not based on contract but founded on more radical constructs of Jewish law. These more radical proposals each had a time in which they were tried but were ultimately never adopted for the long term.[32] Why? The basic answer is that Jewish law has dynamic contract doctrines that allow for deeper systemic ambiguities or loopholes—even in areas that impact ritual or family law—than it has in other areas. Dramatic changes in the law as practiced on the ground are possible in many interpersonal areas of Jewish law (even when they directly affect areas of marriage) when the parties agree to rules by contract. The Jewish legal tradition recognizes that if two people agree to do something, it creates a deep sense in the Jewish legal system that the individuals ought to honor such an agreement, even if the agreement might be less than ideal or even wrongful (and includes clauses that are contrary to the spirit or even law of Judaism).

[31] Five more examples can be cited: the contract used to avoid the disinheritance of daughters (*shtar chazi zachar*); the contract used to allow a Jewish-owned store to remain open on the Sabbath with Gentile workers (*shtar shabbes*); the contracts used to address ownership issues related to access to residences for eruv purposes (*sechirat reshut*); the contract used to sell the first-born animals to a gentile (*mechirat bchor behama*); and the picking of arbitrators who are otherwise ineligible to sit as judges in rabbinical court (*zebla*). Of course, the whole institution of the *ketubah* is an example of this as well.

> The tendency of Orthodox Jews to use contracts to solve problems of Jewish law has even made its way into Jewish humor. Note the following well-known rabbi joke:
>
> > The question arose, is smoking equivalent to suicide, and therefore a violation of Jewish law? The question was posed to representatives of each of the major movements of American Judaism: Reform, Conservative, and Orthodox. The Reform rabbis considered the question and concluded. "Yes, smoking is equivalent to suicide, and is a violation of Jewish law. From now on, all Reform Jews will have to make an informed choice about whether or not to smoke." The Conservative rabbis considered the question and concluded: "Yes, smoking is equivalent to suicide, and is a violation of Jewish law. From now on, all Conservative rabbis will stop smoking." Members of their congregations will do whatever they wish. The Orthodox rabbis considered the question and concluded: "Yes, smoking is equivalent to suicide, and is a violation of Jewish law. From now on, all Orthodox Jews who want to smoke will have to sell their lungs to a gentile."
>
> *See Jewish Humor: Movements of Judaism*, Jewish in a Gentile World Blog (Dec. 15, 2008), https://bit.ly/31q7K5v. Funny as it is—or is not—the joke is about Orthodox Jews' use of a contract-based solution.

[32] In each of these examples, note that other solutions were proposed that were also plausible. It is precisely because Jewish law is so amenable to contract-based manipulation of principles that contract-based solutions were adopted.

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Why exactly this is the case is beyond the scope of this article, but one can point to six rabbinic legal principles:

(i) Jewish law's broad and deep acceptance of conditions in almost all agreements, including marital ones;[33]
(ii) Jewish law's general enforcement of agreements that violate Jewish law—so even a conditional marriage that results in an after the fact arrangement of non-marital sex is a valid condition;[34]
(iii) Jewish law's emphasis on formalism as an important type of legal reasoning;[35]
(iv) Jewish law's flexible consideration (*kinyan)* doctrines—no consideration is frequently needed in Jewish law;[36]
(v) Jewish law's affinity for "workaround" solutions to complex problems that avoid direct resolution of intractable legal disputes;[37] and
(vi) the acceptance of the idea that a self-imposed penalty validates an otherwise invalid divorce agreement.[38]

All together these have created a "perfect storm" within Jewish law for contracts to be very powerful and flexible even in divorce law.

What then is the key solution to the *agunah* problem? It is clear that a prime solution lies in contract law. Rabbi Saul Lieberman first intuited this contract approach decades ago in America and others have followed. The excellent BDA agreement still in use works very well in nearly all cases, although it depends on secular law and enforcement (which some do not like), and yet other agreements are around of many different flavors.[39]

While, of course, the absence of a theoretically complete solution pains many who are looking for solutions that help even those who refuse to sign any contracts or are already *agunot* (plural of *agunah*), Orthodox Jews have been using contract-based solutions for decades already and they work nearly all the time (of course, they could work better).[40] It is also worth noting that Jewish law never developed a solution to the problems of interest, the Sabbatical year, leavened bread, or many other issues affecting those who, as a matter of principle, refuse to sign a contract.

[33] *See* Shulchan Aruch Even Haezer 38 for a fuller recitation of conditional marriage laws.
[34] *See, e.g.*, Shulchan Aruch Even Haezer 112:10; Choshen Mishpat 16:2, 71:3, or 225:5. Cases abound and are common.
[35] See, e.g., most recently, Chaim Saiman, Halakah: The Rabbinic Idea of Law chs. 2–3 (2018).
[36] *See further* Shulchan Aruch Choshen Mishpat 201:2.
[37] For example, the rules of double doubt and many other such cases. *See* Shulchan Aruch Yoreh Deah 110 and 242. For an elaborate discussion, see the comments of Rabbi Shabtai ben Meir (Shach) on Yoreh Deah 110.
[38] Rama, Shulchan Aruch Even Haezer 134:4.
[39] All of this is explained in Michael Broyde, Marriage, Divorce and the Abandoned Wife in Judaism (2001).
[40] *See infra* note 55 for a list of suggestions that might make the current standard agreement better.

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3.3. Disease prevention: Vaccination as a metaphor for prenuptial agreements

Non-contract-based solutions present many issues. The most important is that when non-contract-based solutions are proposed, there is false hope that the problem can potentially be resolved without a contract. If the given non-contract-based solution is ultimately rejected by Jewish law authorities after couples relied on it, the work would not only have done no good, but would have invariably caused unintentional harm, as the couple would not have a PNA either. There are two ways to eradicate an illness: a cure and a vaccine. In the cure model, you can "contract the disease" and be cured. In the vaccine model, once you "contract the illness" it is too late to be vaccinated—you have to agree to be vaccinated and receive the vaccine before experiencing symptoms.[41] Similarly, there are two ways to solve the *agunah* problem: one is the cure model, which is to find a mechanism in Jewish law to end marriages where the husband will not give a *get*. In the vaccine model, the PNA prevents husbands from delaying a divorce, thus eradicating the *agunah* problem, but only for those who are vaccinated, or initially sign a PNA. People who refuse a PNA are banking on their marriage not resulting in divorce.[42] Bluntly, because the divorce rate is greater than 0%, it may be wise to ensure that there is a solution in place—or in other words to "vaccinate the marriage"—should it end in divorce.

Contracts have solved various problems in Jewish law. Therefore, it may be worthwhile to spend time, effort, and energy on a contract-based solution to the *agunah* problem that is in line with the historical solutions to generally very hard Jewish law problems. PNAs are a central and viable systemic solution to the *agunah* problem in the United States and Canada (and in other nations with vibrant arbitration laws). This is because of both structural limitations on civil law's ability to regulate end of marriage situations absent a contract and Jewish law's extensive tolerance and acceptance of non-standard solutions to a variety of Jewish law matters, if the parties to the matter agree to such by contract.

4. Which PNA contract works best?

As explained above, there are four basic models of PNA that can be used: (i) full rabbinical court arbitration on all issues with *get* given at the end; (ii) full secular resolution of all issues with *get* given on demand; (iii) self-effectuating agreement (such as the tripartite agreement); and (iv) a Jewish divorce given after the secular divorce PNA.

The categories developed in Section 2 are compacted into cases (a) governed by substantive Jewish law; (b) governed by substantive North American law; (c) in which

[41] By way of example, after the polio vaccine was discovered, the drive to discover a cure for polio almost completely disappeared. Naturally, the vaccine could not cure individuals with polio; the vaccine only ensured that no new cases of polio would occur. Indeed, there still is no cure for polio; however, but there have been no cases of polio in the United States in decades.

[42] True, no one likes using PNAs as they undermine the romantic model of marriage, and people only use them since they are an effective solution.

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the Jewish divorce is triggered; and (d) in which the Jewish divorce is linked to the civil divorce. There is no empirical data yet available on category (c) as it is both recent and controversial. Thus, data was collected only on the three remaining categories.

In this section, the author presents a sampling of data collected from many law firms which regularly work on *agunah* matters or end-of-marriage rabbinical-court adjudications within the Orthodox community. This data shows that, in general, individuals are getting what they want when obtaining a PNA. In other words, some individuals opt for religious substance, while others do not. It is important to recognize that couples have various options for their PNA selection, and, based on the limited empirical data below, there is evidence of various types selected by many couples.

4.1. An empirical approach with limited and incomplete data

Empirical data on the *agunah* problem was collected over the last few years.[43] Law firms which regularly work on *agunah* matters or end-of-marriage rabbinical-court adjudications or who work in the Orthodox Jewish community in family law matters were asked to comb their files of the last twenty years (1997–2017) for cases involving a PNA discussing Jewish divorce. They were then asked to divide those cases (in which there was any sort of a PNA addressing the *get*) into the three categories above and rate the "hardness of the cases" and the number that did not end with the giving of a *get*.[44]

Of course, recognizing that the scale of case difficulty is somewhat subjective, the author created a baseline from 0 to 10 and imposed an arbitrary average of 5.0. Some participants gave no cases a rating lower than 6 and some had an average of 2. By reconfiguring these cases around an average of 5.0, the rule that the average "hardness" was a 5.0 became a common average. Table 1 shows the data gathered.

Cases in which any of the following criteria were present were excluded from this tabulation:

(i) neither party asked for a *get*, and none was ever given or received, even if it was mentioned in the PNA;

[43] The data is intended to provide an insight into the overall effectiveness of the different PNA models, rather than a thorough statistical survey. The law firms that have dealt with *agunah* issues for decades were willing to share their experience of working with the various PNAs only on condition of anonymity. The questions put to the lawyers were basic, limited, and targeted, since fewer attorneys were willing to cooperate when more data was requested. Very extensive privacy—both to the law firms and also to prevent identification of specific clients—were provided. Therefore, the author chose not to include that underlining data. Be aware of the fact that this data was not collected in a scientific manner and had a rater's bias both by the firms that initially collected the data and by the author who processed it. There is no clear solution on how to address these concerns. It is possible but unlikely that the data has a huge sampling bias problem. Again, there is no qualitative or quantitative way to assess this.

[44] Every single one of these law firms both asked for and was given complete anonymity. They are all based in the United States and Canada. Painting with a broad brush, some of the firms are part of the Chasidic-Yeshivish Jewish community partially, a plurality more directly part of the Modern Orthodox Jewish community, and an important segment span the broad Orthodox Jewish community. Some of these lawyers are also *toanim* (rabbinical court advocates). Information about Israel-based matters was not solicited, and when it was provided it was discounted.

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Table 1. Effectiveness of various Jewish PNAs

Type of PNA used	Number of cases	Average difficulty of the case to be resolved (scale 1 to 10)	Percentage (and number) of divorces concluded without a *get*	Other comments
Full rabbinical court arbitration on all issues with a *get* given at end.	572	5.61	4.02% (23)	Some form of PNA is very common in the Yeshiva and Chasidic community in America. About 23% of these cases involved people who were not civilly married.
Full secular resolution of all issues with a *get* given on demand or penalties imposed.	415	3.3	1.68% (7)[45]	This is more common in the Modern Orthodox community. 6.2% of couples involved lived in more than one nation.
A *get* delivered at the conclusion of civil divorce.	136	2.1	0.73% (1)	This agreement is still more common than I thought. Lawyers commented on how clear this agreement was.

(ii) a *get* was promptly given and received in an uncontested way, and there was *no* litigation about this matter and *no* indication at all that this matter was contested;
(iii) the rabbinical court concluded that no Jewish divorce was needed due to one party not being Jewish or for any other reason;
(iv) any cases in which the couple did not intend to be functionally divorced, but simply sought a civil divorce without a marital separation;[46] and
(v) two cases in which one of the spouses died mid-divorce and thus no *get* was needed or possible.

Needless to say, this data is incomplete and not systematic. It is not a full description of the North American PNA scene. However, it is quite worthy of some discussion and conversation.

[45] This number is so low because such an agreement implicitly empowers the secular judge to treat this as a term of the civil divorce and threaten civil contempt. This note is somewhat speculative.

[46] It is beyond the scope of the article to explain why, but this is sometimes done to address certain tax issues and even Jewish law issues. *See further* Michael J. Broyde & Rachel M. Peltzer, *Rethinking Religious Marriages When Done Without Any Civil Marriage: Non-Marriage, Neo-Marriage, Marriage, Or Something Else?*, 59 Fam. Ct. Rev. (forthcoming 2020).

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At first glance, it is clear that the full rabbinical court arbitration presents the most difficult cases to resolve. This is followed by full secular resolution of all issues with a *get* given on demand or penalties imposed, followed finally by the delivery of the *get* at the conclusion of the civil divorce. In other words, this data shows that those individuals who treat their Jewish divorce as pro forma have the most effective, least number of "hard" cases.

Three things are clear from this data. First, there are two communities present here: one wishes rabbinical adjudication of end of marriage issues and then the giving of a Jewish divorce. The second group desires secular adjudication of all aspects of divorce, with the Jewish divorce being treated as a ritual event at the end with no substantive implications beyond. Each of these communities adopts agreements reflecting their values. Second, the most effective model for obtaining a Jewish divorce is the PNA that directly connects its issuing to the judge granting the civil divorce. Third, there are many couples who are aware of complications related to withholding a Jewish divorce and agreements of varying types have arisen within the Orthodox Jewish community on this matter. These agreements differ from each other in substance and goals.

This well relates to general arbitration law theory, since when secular law allows both choice of law and choice of forum, people who have important values present diligently work harder on selecting the forum and law that works best for them. In this case, the "forum" is a set of choices between various rabbinical courts and secular courts and the "law" is between Jewish law and American law.

In the author's recent book on religious arbitration, he notes:

> In short, arbitration allows parties to agree to settle disputes which may arise from their dealing outside of the traditional court system and beyond the realm of the traditional rule of law, opting instead for a venue and law they find mutually agreeable. Therefore, the rule of law, at least in the customizable realm of arbitration, has become less of a fixed structure and more adaptive to individual needs and desires. This development has shifted the law from being viewed as a science from which a singular correct answer can be found to a search for more contextual answers dictated by the parties' agreement to arbitrate. Stemming almost entirely from the contract setting, this newly discovered malleability of the law at most highlighted the fact that courts are not experts in all things and often do a poor job of settling disputes to the satisfaction of either —if any—of the parties, and at least justified allowing another avenue for parties to take in settling their disputes.[47]

This robust choice of values is part of what is going on here. One group wants their "end-of-marriage dispute" to be adjudicated under Jewish law and uses arbitration to accomplish that task. Another group does not want that—they want civil law to govern their end-of-marriage dispute with a mechanism in place to make sure that a *get* is given. This *get* is a mere formalism and has no substantive Jewish content. The Modern Orthodox community, which values both religious doctrine and Jewish law, as well as principles inhering in secular law, seems deeply divided over which approach is correct. Is the presence of substantive Jewish law values a good thing or a

[47] Michael J. Broyde, Sharia Tribunals, Rabbinical Courts And Christian Panels: Religious Arbitration In America And The West 6 (2017).

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bad thing? Should it encourage "Jewish law" adjudication or just ensure that a technical formalism of Jewish law is accomplished? These questions cannot be answered here. Perspectives vary, and assorted answers are reflected through the particular model of PNA selected.

These findings are validated within the larger North American religious community. Recent polls indicate that the United States population is becoming less religious and more secular.[48] This seems to mirror the nation's—and its laws'—movement away from reflecting certain traditional Judeo-Christian values. While these movements have left some members of the religious population in a precarious situation surrounded by a society whose values are changing before their eyes, it has also caused deeply religious members of Jewish and Christian communities to cling closer to their respective faiths and become more entrenched in the values they profess.[49] Prenuptial agreements are a way for the more traditional to cling tightly to their values, which may differ from those of secular law, and these competing values are revealed or expressed, in part, through the various PNA models. As secular law is no longer broadly reflective of traditional values, religious communities may be motivated to step outside the framework of secular law into the realm of private dispute resolution to implement their values.[50] This can easily be shown to be broadly valid.[51]

Although religious groups may not be able to influence secular law as much as they once did, they have changed their approach, focusing on developing their own internal legal process. This follows key developments in the United States legal system, which has evolved from offering only one venue and method for dispute resolution to permitting numerous options from which parties can choose. The rabbinical court system is one of these religious tribunals that have collectively come to be known as Alternative Dispute Resolution (ADR). The reasons ADR developed are many, but the one on which we will focus is the customization it allows parties, and how it enables them to gauge their expectations for dispute resolution either at the outset of their relationship or later on. ADR's customization is notable, and by 2000 most of its branches had the teeth necessary to render resolutions legally binding.

In other words, today in North America, Jewish couples are getting what they want in terms of their PNAs. There are many different types of PNAs which are being executed and there is not a "one size fits all" model. Couples understand the options that

[48] *See, e.g.*, *America's Changing Religious Landscape*, Pew Res. Ctr. (May 12, 2015), https://bit.ly/32KbqhF. *See, recently*, Robert P. Jones, The End of White Christian America (2016) (confirming the trends found in the Pew Report).

[49] *See further* Fundamentalisms Comprehended (Martin Marty & R. Scott Appleby eds., 1995).

[50] Some religious communities even welcome this, as they see a greater threat from alternative religious values than from secular ones. *See* Michael J. Broyde, *Jewish Law and American Public Policy: A Principled Jewish Law View and Some Practical Jewish Observations*, *in* Religion as a Public Good: Jews and Other Americans on Religion in the Public Square 161 (Alan Mittleman ed., 2003).

[51] *See* Michael J. Broyde, Ira Bedzow, & Shlomo Pill, *The Pillars of Successful Religious Arbitration: Models for American Islamic Arbitration Based on the Beth Din of America and Muslim Arbitration Tribunal Experience*, 30 Harv. J. Racial & Ethnic Just. 33, 33–76 (2014); *see also* David Aikman, *America's Religious Past Fades in a Secular Age*, Wall St. J., Oct. 25, 2012, https://bit.ly/2GeTUKV.

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are available to them and they are comfortable discerning between them. There are some individuals who cling to ritual Jewish law, and there are others who feel comfortable with and seek out ritual Jewish law without substance.

4.2. Is having religious arbitration at all a good idea? The *Cheyenne River Sioux Tribe* case study

Simply because religious arbitration is historically explainable does not mean that it is necessarily desirable. Arbitration can result in the underhanded waiver of rights. As a recent example of the problems arbitration's choices of law and forum can cause for justice, consider a recent case, *Hayes v. Delbert Services Corporation*.[52] The facts of this case are easy to understand. There was a payday loan company that was making very-high-interest loans—widely considered ethically debatable, as the court noted, and illegal in many states. The company loaned someone USD 2600 and charged him an annual interest rate of nearly 140%, in violation of both state and federal law. To avoid the heavy hand of the secular law, it inserted a simple provision into its loan agreement: "This Loan Agreement is subject solely to the exclusive laws and jurisdiction of the Cheyenne River Sioux Tribe, Cheyenne River Indian Reservation." As one can easily guess, the Cheyenne River Sioux Tribe has no usury limitations. To make the company's intent to get around usury laws even clearer, another provision of the agreement stated:

> *Neither this Agreement nor Lender is subject to the laws of any state of the United States of America. By executing this Agreement, you hereby expressly agree that this Agreement is executed and performed solely within the exterior boundaries of the Cheyenne River Indian Reservation, a sovereign Native American Tribal Nation.* You also expressly agree that this Agreement shall be subject to and construed in accordance only with the provisions of the laws of the Cheyenne River Sioux Tribe, and that no United States state or federal law applies to this Agreement.[53]

The agreement repeated this yet again in still another form:

> GOVERNING LAW. This Agreement is *governed* by. . . the *laws of the Cheyenne River Sioux Tribe*. We do not have a presence in South Dakota or any other states of the United States. Neither this Agreement nor lender is subject to the *laws* of *any state* of the United States of *America*. . . You also expressly agree that this Agreement *shall* be subject to and construed in accordance only with the provisions of the *laws* of the *Cheyenne River Sioux Tribe*, and that no United States state or federal law applies to this Agreement.[54]

Having selected a legal system that permits this conduct and an Indian tribal court that will enforce it, is it all now permitted? The United States Court of Appeals refused to enforce this agreement because:

> [T]he [Cheyenne River Sioux] Tribe has no authorized representatives who conduct arbitrations, and . . . the Tribe does not even possess a method through which it might select and appoint such a person. In fact, one official from the Tribe has acknowledged that the tribal "governing

[52] 811 F.3d 666 (4th Cir. 2016).
[53] *Id.*
[54] *Id.*

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> authority does not authorize Arbitration" and the tribal court "does not involve itself in the hiring of an arbitrator."[55]

This decision tells us that "a party may not underhandedly convert a choice of law clause into a choice of no law clause—it may not flatly and categorically renounce the authority of the federal statutes to which it is and must remain subject."[56]

To the extent the court is focusing on the word "underhandedly," and the fact that the tribe in question does not even have arbitrations, the opinion makes perfect sense. The first step to a waiver of one's rights is to be aware of them, and almost any underhanded waiver is bad. Given such outcomes, perhaps arbitration is undesirable full stop.

But would invalidation have been the right result if the parties hand engaged in an overt and knowing waiver of their civil-law rights in favor of arbitration in a legal system that was fully functional but simply lacked any usury prohibition?

Let's consider, for example, a standard provision of the most common Jewish prenuptial agreement that states simply and directly that it does not accept no-fault divorce as a principle of financial adjudication of end of marriage finances. The prenuptial agreement states that the parties may agree to authorize the BDA to decide all monetary disputes consistently with either equitable distribution or community property as the parties direct. However, the standard agreement then adds the following clause:

> The Beth Din of America may consider the respective responsibilities of either or both of the parties for the end of the marriage, as an additional, but not exclusive, factor in determining the distribution of marital property and maintenance. . .[57]

The BDA is doing exactly what Jewish law directs it to do—considering marital fault in the distribution of assets[58]—but doing so directly contravenes the law and intent of the "no-fault" divorce revolution in North America.

On the one hand, why *shouldn't* parties be able to structure their marriage rules in a way that reflects the values that they both agree to at the time of their marriage? Is it truly objectionable to have a clause in a prenuptial agreement which states that one who commits adultery shall receive less money due to the adultery, even if many states do not have such a clause as part of their default law? Unlike the *Hayes* case above, where the agreement nefariously required arbitration in front of a nonexistent tribunal with no clear waiver of rights, here one has a clear waiver of rights and submission to a highly reputable panel.

Arguably, the BDA's relationship to "no-fault divorce" might be no different from the Cheyenne River Sioux Tribe's relationship to usury law. The parties in the BDA example authorized fault-based communal property or fault-based equitable distribution, even though no American state has fault-based community property.

[55] *Id.*

[56] *Id.*

[57] *See supra* note 3.

[58] *See, e.g.*, Ketubot 72a for a discussion in the Talmud of fault-based adjudication of the financial aspects of divorce.

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When all is said and done, the central question remains—is allowing the arbitration of a contractual revision that conflicts with fundamental principles of secular divorce law a good idea? Does it help solve the *agunah* problem? Or is the ritualization of Jewish divorce law, that is, limiting the scope of Rabbinic courts to arranging a *get*, and allowing secular courts to determine the divorce details, a better approach? The empirical data above suggests that changes in secular law norms make the situation harder to work out, but as noted the data is tentative.

Empirical data has demonstrated that the most effective, least "hard" Jewish divorces are those where the *get* is given at the end of the civil divorce. Based on the limited data, it is notable that the Orthodox Jewish community is opting to ensure technical formalism of Jewish law, rather than participate in full rabbinic procedure. It is important to further interrogate whether this choice is a product of society's trends today, or whether there is simply a diversity of values among individuals who want a divorce process imbued with Jewish values from A to Z, and others who prefer that a civil court arranges divorce details.

5. Conclusion

This article advances a series of arguments. First, contract law generally and prenuptial agreements specifically mark an effective long-term hope to solve the problem of husbands refusing to participate in the Jewish divorce ritual in North America. Second, contractual solutions are deeply grounded in Jewish law and are well accepted by North American courts, as a welcoming of alternative dispute resolution. Third, there are two very different types of prenuptial agreements—one tries to regulate the rules of law governing divorce including the giving of a *get* and the other tries to ensure that when civil divorce is in the making, a Jewish divorce is also given. These are very different agreements, even as they are both called "anti-*igun* PNA." Fourth, the data is only now being collected about the advantages and disadvantages of the various agreements, although a very tentative read of the data suggests that the coupling of the Jewish divorce with civil divorce directly and explicitly is the method that seems most effective.

With this information in hand, perhaps better solutions can be crafted.[59] There is a heightened awareness of the *agunah* problem as well as the assorted contractual solutions available, leading individuals to make conscious choices in their PNA agreements, and determine the extent to which they want components of their divorce to be arranged by Jewish law.

[59] This note outlines some suggested improvements to the standard BDA-PNA widely used in the United States. This type of agreement presents six basic problems that need to be fixed in order to increase the agreement's long-term viability as a matter of both Jewish law and American arbitration law:

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Appendix 1

Introduction to Jewish law

Jewish law, or *Halakha*, is used herein to denote the entire subject matter of the Jewish legal system, including public, private, and ritual law. A brief historical review will familiarize the new reader of Jewish law with its history and development. The Pentateuch (the five books of Moses, the *Torah*) is the historical touchstone document of Jewish law and, according to Jewish legal theory, was revealed to Moses at Mount Sinai. The Prophets and Writings, the other two parts of the Hebrew Bible, were written over the next 700 years, and the Jewish canon was closed around the year 200 BCE. From the close of the canon until 250 CE is referred to as the era of the *Tannaim*, the redactors of Jewish law, whose period closed with the editing of the *Mishnah* by Rabbi Judah the Patriarch. The next five centuries mark an epoch during which the two Talmuds (Babylonian and Jerusalem) were

(i) Addressing Rabbi Moshe Sternbuch's Halakhic criticism of the agreement so as to make it clear that support correlates with means. See *An Initial Analysis of Rabbi Moshe Sternbuch's Teshuva on the Beth Din of America's Prenuptial Agreement*, Emes Ve-Emunah Blog (Aug. 14, 2017), https://bit.ly/34vYrTu.
(ii) Addressing the civil law criticism of this agreement as a prenuptial agreement rather than as a binding arbitration agreement (as formal prenuptial agreements have become something that are distinctly subject to much tighter disclosure and regular procedure as many have noted). This issue is discussed in Broyde, *supra* note 4.
(iii) Incorporating solutions to the case in which the husband is in a permanent vegetative state and thus cannot authorize a Jewish divorce. For more on this issue, *see* Michael J. Broyde, *Ploni v. Ploni: The Get from the Man in a Permanent Vegetative State*, 18 Hakira 59 (2014).
(iv) Addressing problems of levirate divorce (*chalitza*) in which the husband's brother refuses to cooperate in the ritual to end the marriage after the death of the husband with no children. *See* Rama Even Haezer 154:4.
(v) Addressing secular (and Jewish law) criticism of the standard PNA as interfering with secular support mechanism.
(vi) The penalty provision found in section II.C of the BDA-PNA is an unwise idea (as noted in this article) and ought to be eliminated.

The opening section of the agreement should be rewritten to reflect that this is not legally a prenuptial agreement but merely a binding arbitration agreement between two parties who need not even be legally married to each other. Thus the identification section of this agreement should change their identification from "Husband to be" and "Wife to be" to "First Party" and "Second Party" to make it clear that this agreement is effective even if they are not civilly married. So too, the website should not be named "www.theprenup.org" as judges might take judicial note of that and consider that factor in whether this agreement legally is a prenuptial agreement when it is actually a binding arbitration agreement.
So too, a "Purpose" section ought to be inserted that explains the purpose of this agreement to both judges and parties who read this agreement. This should read as follows:

> The purpose of this agreement between the parties is to ensure that the two parties are properly divorced according to Jewish law. Its goal is to make sure that the man gives and the woman receives a Jewish divorce (*get*) if either of them wants one. It has no other purpose and it is not a prenuptial agreement at all and exists independent of whether the parties are civilly married now or in the future or never. This agreement shall not and is not intended to effect in any way any rights granted as a matter of secular law to any civilly married couple or any couple living together without the benefit of marriage.

The agreement should insert a secular choice of law provision so as to ensure that if this agreement is challenged, it is framed by a state law that is most deferential to arbitration and has a public policy favoring the ending of marriages contracted according to Jewish law with a Jewish divorce. That state is New York, which has a clear statute directing that no civil divorce be given when the plaintiff is withholding a Jewish divorce and allows consideration of Jewish divorce refusal in alimony allocations. A clause should be inserted stating:

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written and edited by scholars called *Amoraim* ("those who recount" Jewish law) and *Savoraim* ("those who ponder" Jewish law). The Babylonian Talmud is of greater legal significance than the Jerusalem Talmud and is a more complete work.

The post-Talmudic era is conventionally divided into three periods: (i) the era of the *Geonim*, scholars who lived in Babylonia until the mid-eleventh century; (ii) the era of the

> This agreement is governed by the laws of the state of New York to the extent that Jewish law does not govern it.

Rabbi Moshe Sternbuch has voiced a great deal of criticism of the BDA-PNA, arguing that it is actually a penalty agreement and thus invalid as a matter of Jewish law. With small and simple refinements, his criticism can be responded to and made irrelevant. Such changes are found in the next paragraph:

> If the Beth Din of America determines that a *get* should be given and received and one party declines to do as the Beth Din of America has directed within 90 days, the party who declines to obey the directives or suggestion of the Beth Din of America shall be obligated to make support payments to the other as directed by the Beth Din of America and as reasonably calculated to reflect the costs of residence of this couple until such time as a they are divorced according to Jewish law (i.e., a *get* is given) starting from the date of separation, retroactively. Each side acknowledges that they recite and accept the following:
>
> I hereby now (*me'achshav*) obligate myself to support my spouse from the date that our domestic residence together shall cease for whatever reasons in the manner we customarily lived prior to our separation or in the manner she lived prior to our marriage [whichever is a higher amount], at the rate calculated by the Beth Din of American and no more than $150 per day, adjusted by the Consumer Price Index B All Urban Consumers, calculated as of the date of signing this agreement in lieu of my Jewish law obligations so long as the two of us remain married according to Jewish law, even if the other has another source of income or earnings. Furthermore, I waive my *halakhic* rights to my spouse's earnings for the period that they are entitled to the above stipulated sum. I recite that I shall be deemed to have repeated this waiver at the time of our *chupa* (after *erusin*, but before *nisuin*). I acknowledge that I have affected the above obligation by means of a *kinyan* (formal Jewish transaction) in an esteemed (*chashuv*) *bet din* as mandated by Jewish law.
>
> However, this support obligation shall terminate if the party receiving support refuses to appear upon due notice before the Beth Din of America or in the event that the party receiving support fails to abide by the decision or recommendation of the Beth Din of America related to the issuing of a Jewish divorce.

Recently, a case arose in Israel concerning an incapacitated man whose wife wished to remarry. The paragraph below incorporates a solution to such a problem. Furthermore, it incorporates a solution to the problem of a married man who dies without children, but whose brother will not (or cannot) cooperate in the levirate divorce (*chalitza*) ritual. This paragraph should read:

> Should either party even become incapacitated and incapable of giving or receiving a Jewish divorce and their spouses wishes to be divorced, the incapacitated party agrees now that they would like such a Jewish divorce to be issued, authorizes such a *get* to be written and received, witnessed and delivered as needed, when such is proper in the judgement of the Beth Din of America. Furthermore, should the man die without children but with male siblings, the parties have agreed that this Jewish marriage shall be a nullity as a matter of Jewish law upon his death since the marriage was conditional on him having children. Both parties both accept whatever conditions needed to be made to the Jewish marriage to effectuate this provision and authorize the Beth Din of America to implement this paragraph to the fullest extent applicable as Jewish law permits.

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Rishonim (the early authorities), who lived in North Africa, Spain, France-Germany, and Egypt until the end of the fourteenth century; and (iii) the period of the *Acharonim* (the latter authorities), which encompasses all scholars of Jewish law from the fifteenth century to the present. From the mid-fourteenth to the early seventeenth centuries, Jewish law underwent a period of codification, which led to the acceptance of the law code format of Rabbi Joseph Karo, called the *Shulchan Aruch*, as the basis for modern Jewish law. The *Shulchan Aruch* (and the *Arba'ah Turim* of Rabbi Jacob ben Asher, which preceded it) divided Jewish law into four separate areas: *Orach Chaim* is devoted to daily, Sabbath, and holiday laws; *Even Haezer* addresses family law, including financial aspects; *Choshen Mishpat* codifies financial law; and *Yoreh Deah* contains dietary laws as well as other miscellaneous legal matter. Many renowned scholars—equal in status and authority to Rabbi Karo—wrote annotations to his code which made the work and its surrounding comments the modern touchstone of Jewish law. The most recent complete edition of the Shulchan Aruch (2011) contains no less than 150 separate commentaries on the text of Rabbi Karo. In addition, hundreds of other volumes of commentary have been published as self-standing works, a process that continues to this very day. Beside the law codes and commentaries, over the last 1200 years, Jewish law authorities have addressed specific questions of Jewish law in written responsa (in question and answer form). Collections of such responsa have been published, providing guidance not only to later authorities but to the community at large. Finally, since the establishment of the state of Israel in 1948, the rabbinical courts of Israel have published their written opinions deciding cases on a variety of matters.

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