2 The Covenant-Contract Dialectic in Jewish Marriage and Divorce Law

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It is an ancient question whether and to what extent Jewish marriage and divorce law is essentially covenantal or contractual. The answer has changed over time, varies according to different authorities, and is still in flux today.

On the one hand, the Jewish tradition is replete with references to the sacred nature of marriage. The Talmud recounts that a person is not complete until he or she marries, and is not even called a person until two are united.[1] Furthermore, the classical sources recount the profound divine hand in the creation of marriage. One Talmudic source goes so far as to state, "Forty days prior to birth, the Holy One, Blessed be He, announces that so-and-so should marry so-and-so."[2] Marriages appear to be holy relationships that embrace and are embraced by the Divine. For example, the earliest commentaries on the Bible posit that God performed the wedding ceremony between Adam and Eve.[3] Indeed, the blessings recited at a Jewish wedding recount that it is God who "commanded us with regard to forbidden relationships, forbade [merely] betrothed women to us, and permitted wives [to husbands] through the Jewish wedding ceremony."[4]

But the incorporation of godliness, sanctity, and covenant into the union is but one facet of marriage of the Jewish tradition. The tradition also presents the countervailing model of marriage as a private contract. Central to this model is the rabbinic tradition of the *ketubah*, the premarital contract to which the couple agrees that spells out the terms and conditions of both the marriage and its termi-

1. Babylonian Talmud (hereafter referred to as "BT"), *Yevamot* 63a. Translations throughout are by the author unless otherwise noted

2. BT *Sotah* 2a.

3. Louis Ginzberg, *The Legends of the Jews* (New York: Jewish Publication Society, 1968), p. 68.

4. See, e.g., Rabbi Nosson Scherman, ed., *The Complete Artscroll Siddur,* Rabbinical Council of America Edition (New York: Mesorah Publications, 1995), pp. 202-3.

nation. This tradition, discussed in dozens of pages of closely reasoned Talmudic texts (including an entire tractate in the Talmud devoted to the topic entitled "Ketubot," Hebrew plural of *ketubah*), describes marriage as a contract that is freely entered into by both parties, and dissolvable by divorce — with little sacred to it. Further refinements to marriage in the immediate post-Talmudic period were in keeping with the spirit of this contract or partnership model of marriage.

These two divergent perspectives on marriage in the Jewish tradition are not merely variant strands of Jewish law and lore, nor are they parallel courses that never crossed paths. In the second millennium C.E., European Jewish law worked to minimize the contractual view of marriage found in the earlier Talmudic *ketubah* literature. This backlash against the long-running Talmudic tradition moved Jewish marriage closer to a covenantal scheme and also established the normal mode of marriage as one husband and one wife for life. But in the past fifty years, Jewish law has perforce reemphasized and restored some elements of the contractual view of marriage.

This shifting between marriage as covenant and contract, coupled with the absence of authority of rabbinical courts in America to enforce even an equitable divorce settlement, has created a situation in which Jewish law in America is unable to regulate (or even determine) its own marriage constructs. This, in turn, has led to an absolutely unique situation — the regulation of Jewish marriage by the state of New York since 1983, and the creation of the first covenant marriage statute in the United States, to solve the problems created by Jewish marriage doctrines.

In this chapter, I shall describe the covenant-contract conflict and interplay in three parts. The first section will lead the reader though the Talmudic history of family law, emphasizing its contractual roots.[5] The second section will ex-

5. A full survey of the sources of godliness, sanctity, and especially the use of the specific term "covenant" with regard to Jewish marriage is beyond the scope of this chapter. Indeed, the collation and analysis of these sources would be a significant contribution to the field, which, to my knowledge, has yet to be undertaken. This would be particularly helpful to distinguish between variant understandings of covenant in Judaism and Christianity. For example, while a number of Christian Bible commentators take the use of the term in Proverbs 2:16-17, which extols the virtue of wisdom "To deliver thee from the strange woman. . . . That forsaketh the lord of her youth, and forgetteth the covenant of her God," as an explicit reference to the marriage covenant, three of the four classic medieval Jewish commentaries printed in the standard *mikraot gedolot* editions (Rashi, Ralbag, and Metzudot) understand the phrase as referring to the covenant of commandments between God and Israel, not a covenant of marriage. Only Ibn Ezra connects the repeated imagery of straying and adultery to the particular use of covenant: "For women enter with men into a covenant of God not to forsake them, and so too men with women, and she forsook him by straying." (Ibn Ezra also offers a second explanation indicating that God is a partner to the marriage, lending his name to the Hebrew words "man" and "wife"

plain the post-Talmudic developments in family law, and the rise of the marriage as covenant. The third section will examine the dialectic tension of Jewish covenant and contract marriage in the laws of New York state and explain how New York had, in effect, the nation's first covenant marriage act, and why it was a Jewish covenant marriage act.

Jewish Marriage Laws: Marriage As Contract in Talmudic Times

Marriage and divorce in Jewish law differ from many other mainstream legal and religious systems in that entry into marriage and exit from marriage through divorce are private contractual rights rather than public rights. In the Jewish view, one does not need a governmental "license" to marry or divorce. Private marriages are fundamentally proper; a political and even a religious official's regulation of marriage or divorce is the exception rather than the rule.[6]

As a brief aside, the mechanics of contracts in the Jewish tradition are different as well. While Jewish law requires the clear consent of both parties to a contract, the contract itself is executed by only one party.[7] Thus one who is transferring property drafts a contract, has it signed by witnesses, and finally hands it to the acquirer, thereby effecting the sale. Furthermore, Jewish law contracts encompass more than financial transactions — they may effect changes of personal or ritual statuses.[8] Marriage and divorce, it should be noted, fall into the latter category.[9]

While the Bible has a number of stories and incidents concerning marriage,[10]

— though this seems to imply that the marriage itself is not a covenant to God, but a human bond which God joins.)

6. This view stands in sharp contrast to the historical Anglo-American common law view, which treats private contracts to marry or divorce as the classic examples of an illegal and void contract; the Catholic view, which treats marriage and annulment (divorce) as sacraments requiring ecclesiastical cooperation or blessing; or the European view, which has treated marriage and divorce as an area of public law. This should not be misunderstood as denying the sacramental parts of Jewish marriage (of which there are many); the contractual view, however, predominates in the beginning-of-marriage and end-of-marriage rites. This is ably demonstrated by David Bleich, "Jewish Divorce: Judicial Misconceptions and Possible Means of Civil Enforcement," *Connecticut Law Review* 16 (1984): 201-89.

7. See Moshe Meiselman, *Jewish Woman in Jewish Law* (New York: Ktav, 1978), pp. 97-98.

8. Meiselman, *Jewish Woman*, pp. 96-97.

9. For more on this topic, see Menachem Elon, *Principles of Jewish Law* (Jerusalem: Keter, 1973), s.v. contracts.

10. See, e.g., Genesis 4:19-23, 25:1-6, 35:22, and Exodus 21:10-11, among many other instances.

in terms of divorce law little is known other than the Talmudic description of biblical law and the brief verses that incidentally mention divorce in the course of describing the remarriage of one's divorcee. Deuteronomy states,

> When a man marries a woman and lives with her, and she does not find favor in his eyes, as he finds a sexual blemish on her part, and he gives her a bill of divorce, puts it in her hand, and sends her from the house, she leaves his house and goes to the house of another. However, if the second husband hates her and writes her a bill of divorce, gives it to her and sends her from the house, or the second husband dies, the first husband, who sent her out, cannot remarry her. (24:1-4)[11]

According to the Talmudic understanding of biblical law, the husband has a unilateral right to divorce; the wife has no right to divorce except in cases of hard fault.[12] Because there was a clear biblical concept of divorce, no stigma was associated with its use.[13] In addition, marriages could be polygamous, although polyandry was never permitted in the Jewish tradition. Thus, according to biblical law, exit from marriage differed fundamentally from entry into marriage in that it did not require the consent of both parties. The marriage could end when the husband alone wished to end it. This was accomplished by the husband executing a writ of divorce (in Hebrew called a *get*, or plural *gittin*).

As soon as Jewish law was redacted, the notion of the dower *(ketubah)* was developed for all brides. The dower was payable upon divorce or death of the husband, and this became, by rabbinic decree, a precondition to every marriage. Thus, while the right to divorce remained unilateral with the husband, it was now restricted by a clear contractual financial obligation imposed on the

11. See also incidental mentions of divorce in Genesis 21:10, Leviticus 21:7, and Leviticus 22:13.

12. The Talmud records a three-sided dispute as to when divorce was proper. The school of Shammai recounted that divorce was only proper in cases of fault. The school of Hillel asserted that divorce was proper for any displeasing conduct. Rabbi Akiva maintained that a man could divorce his wife simply because he wished to marry another and could not support both wives. See BT *Gittin* 90a-b. As is always the rule in Jewish law, the school of Shammai is rejected as incorrect.

13. The exception is the case that proves the rule. There are a small number of cases where marriage is not discretionary but ethically mandatory. See, e.g., Deuteronomy 22:19. These cases involve either fault or detrimental reliance by the other. In the case of seduction, the Bible mandates that the seducer is under a religious duty to marry the seduced, should she wish to marry him. That marriage does not require the same type of free-will consent to marry, in that the religious and ethical component to the Jewish tradition directs the man to marry this woman; indeed, in certain circumstances he can be punished if he does not marry her. No divorce is permitted in such cases.

husband to compensate his wife if he exercised his right to engage in unilateral divorce absent judicially declared fault on her part.

The wife, as a precondition to entry into the marriage, could insist on a dower higher than the minimum promulgated by the rabbis.[14] Furthermore, the wife or husband could use the *ketubah* as a forum for addressing other matters between them that ought to be regulated by contract, such as whether polygamy would be permitted or what would be the response to childlessness or other potential issues in the marriage. These *ketubah* documents followed the standard formulation of contracts and openly contemplated divorce.[15] They said little about marriage as sacred or covenantal.

The *ketubah* also stipulated the wife's right to sue for divorce where her husband was at fault. These included not only hard faults such as adultery, but also softer faults such as repugnancy, impotence, cruelty, and a host of other such grounds. In such cases, the husband had to divorce his wife (and in most instances pay his wife her dower, too). The wife's access to fault-based divorce was expanded into a clear and concrete legal right in the Talmud. She also had a right to have children, and her husband's refusal to have children was grounds for divorce by her.[16] Though she could not sue for divorce as a general rule, she could restrict his rights through a *ketubah* provision.[17] Soon after the close of the Talmudic period, the rabbis of that time (called *Geonim*) changed or reinterpreted[18] Jewish law to increase vastly the right of a woman to sue for divorce. That change, however, had little impact on the basic nature of marriage as essentially contractual.[19]

In sum, the contractual model of marriage was basic to Talmudic Jewish law that prevailed until around 1000 C.E. While the Talmud imposed some limi-

14. See Michael Broyde and Jonathan Reiss, "The Ketubah in America: Its Value in Dollars, Its Significance in *Halacha,* and Its Enforceability in American Law," *Journal of Halacha and Contemporary Society* 47 (2004): 101-24. Nonetheless, in the case of divorce for provable fault by the wife, the obligation to pay the dower was removed.

15. For an excellent survey of the *ketubot* from Talmudic and the immediate post-Talmudic time, see Mordechai Akiva Friedman, *Jewish Marriage in Palestine,* 2 vols. (Tel Aviv: Tel Aviv University, 1983). Volume 2 contains dozens of actual *ketubot* from before the year 1000 C.E.

16. See BT *Yevamot* 64a, *Shulhan Arukh, Even HaEzer* 154:6-7, and *Arukh HaShulhan, Even HaEzer* 154:52-53.

17. BT *Yevamot* 65a; but see view of Rav Ammi.

18. Through a mechanism called *takanta demitivta,* or decree of the academy, whose exact mechanism is unclear. See Irving A. Breitowitz, *Between Civil and Religious Law: The Plight of the Agunah in American Society* (Westport, Conn.: Greenwood, 1993), pp. 50-53.

19. A more detailed explanation of this historical event and its mechanism is recounted in Michael J. Broyde, *Marriage, Divorce and the Abandoned Wife in Jewish Law: A Conceptual Approach to the Agunah Problems in America* (New York: Ktav, 2001).

tations on the private right to marry (such as castigating one who marries through a sexual act alone, without any public ceremony[20]), and the later Shulhan Arukh imposed other requirements (such as insisting that there be an engagement period[21]), Talmudic Jewish law treated marriage formation as a private contract requiring the consent of both parties,[22] and divorce as the other side of that marriage contract, albeit with certain limitations.

There was little notion in this Talmudic period of marriage as an inabrogable covenant. Three basic points highlight this. First, marriage was never centrally constructed as monogamous, and monogamy was never constructed in its hard form of one husband with one wife for life. Second, divorce was always recognized as normative and permissible; it was free of governmental or religious restrictions. Finally, couples constructed the social, fiscal, and logistical basis of their own marriage as they wished through contract.

Jewish Marriage Laws: The Rise of Covenant in Jewish Marriage

Among European Jews, this contractual model of marriage did not continue much beyond the end of the first millennium of the common era. Through the efforts of the luminous leader of tenth-century European Jewry, Rabbenu Gershom, a decree[23] was enacted that moved Jewish law toward a covenantal model of marriage. Rabbenu Gershom's view was that it was necessary to restrict the rights of the husband and prohibit unilateral no-fault divorce by either husband or wife. Divorce was limited to cases of provable fault or mutual consent. In addition, fault was redefined to exclude cases of soft fault such as repugnancy. In only a few cases could the husband be actually forced to divorce his wife or the reverse.[24] Equally significant, these decrees prohibited polygamy, thus placing

20. Even though such an activity validly marries the couple; see BT *Yevamot* 52a; *Shulhan Arukh, Even HaEzer* 26:4.

21. *Shulhan Arukh, Even HaEzer* 26:4.

22. Marriages entered into without consent, with consent predicated on fraud or duress, or grounded in other classical defects that modern law might find more applicable to commercial agreements are under certain circumstances void in the Jewish tradition. See Broyde, *Marriage, Divorce and the Abandoned Wife,* Appendix B.

23. The decree of Rabbenu Gershom was enacted under penalty of the ban of excommunication *(herem).* The collective decrees of Rabbenu Gershom are thus known as *Herem deRabbenu Gershom.* See *Herem deRabbenu Gershom, Encyclopedia Talmudit* (Yad Harav Herzog, 1996), 17:378.

24. This insight is generally ascribed to the eleventh-century Tosafist Rabbenu Tam in his view of the repugnancy claim (Heb.: *mais alay*). In fact it flows logically from the view of Rabbenu Gershom, who had to prohibit not only polygamy in order to end coerced divorce, but even divorce for soft fault.

considerable pressure on the man and woman in a troubled marriage to stay married. Since, absent fault, he could not divorce her without her consent, and she could not seek divorce without his consent, unless divorce was in the best interest of both of them (an unlikely scenario), neither would be able to divorce.[25] Divorce thus became exceedingly rare and possible only in cases of dire fault.

Once the refinements of Rabbenu Gershom were implemented, the basis for Jewish marriage changed. In Talmudic times, the parties negotiated the amount the husband would have to pay the wife if he divorced her against her will or if he died. She could not prevent the husband from divorcing her, except by setting the payment level high enough that the husband was deterred from divorce by dint of its cost. All this changed in light of the decrees of Rabbenu Gershom, which simply prohibited what the Talmudic sages had only discouraged. Together, the decrees severely restricted the likelihood of divorce and essentially vacated the economic provisions of the *ketubah*. As a result, though the original mechanism stayed in place, marriage in effect became a covenant between the parties, and not a contract.

Rabbenu Gershom's ban against divorcing a woman without her consent or without a showing of hard fault[26] called into question the value of the marriage contract itself. The Talmudic rabbis had instituted the *ketubah* payments to deter the husband from rashly divorcing his wife. But now, since the husband could not divorce his wife without her consent, there seemed to be no further need for the *ketubah*.[27] As the leading codifier of European Jewry, Rabbi Moses Isserles (Rama), put it:

> See Shulhan Arukh Even Haezer 177:3 [the case of rape discussed in note 27] where it states that in a situation where one only may divorce with the con-

25. Absent the prohibition on polygamy, the decree restricting the right to divorce would not work, as the husband who could not divorce would simply remarry and abandon his first wife. This decree prevented that conduct.

26. In which case, the value of the *ketubah* need not be paid as a penalty for misconduct imposed on the woman. What exactly is hard fault remains a matter of dispute, but it generally includes adultery, spouse beating, insanity, and frigidity; see *Shulhan Arukh, Even HaEzer* 154.

27. Thus, for example, *Shulhan Arukh (Even HaEzer* 177:3) states that "a man who rapes a woman . . . is obligated to marry her, so long as she . . . wish[es] to marry him, even if she is crippled or blind, and he is not permitted to divorce her forever, except with her consent, and thus he does not have to write her a *ketubah*." The logic seems clear. Since he cannot divorce her under any circumstances without her consent, the presence or absence of a *ketubah* seems to make no difference to her economic status or marital security. When both want to get divorced, they will agree on financial terms independent of the *ketubah*, and until then, the *ketubah* sets no payment schedule. Should she insist that she will consent to be divorced only if he gives her $1,000,000 in buffalo nickels, they either reach an agreement or stay married.

> sent of the woman, one does not need a *ketubah.* Thus, nowadays, in our countries, where we do not divorce against the will of the wife because of the ban of Rabbenu Gershom . . . it is possible to be lenient and not write a *ketubah* at all. . . .[28]

The *ketubah* did remain a fixture of Jewish weddings after the tenth century,[29] but it was transformed from a marriage contract to a ritual document whose transfer initiated the covenantal ceremony of marriage. The *ketubah* held no economic or other value as a contract. Indeed, the contractual model of marriage ended for those Jews — all European Jews — who accepted the refinements of Rabbenu Gershom. Consider the observation of Rabbi Moses Feinstein, the leading American Jewish law authority of the last century, on this matter:

> The value of the ketubah is not known to rabbis and decisors of Jewish law, or rabbinical court judges; indeed we have not examined this matter intensely as for nearly all matters of divorce it has no practical ramifications — since it is impossible for the man to divorce against the will of the woman, [the economics of] divorce are dependent on who desires to be divorced. . . .[30]

Elsewhere Rabbi Feinstein writes,

> One should know that in divorce there is no place for evaluating the ketubah, since the ban of Rabbenu Gershom prohibited a man from divorcing his wife without her consent. Thus, divorce is dependent on who wants to give or receive the *get.* . . . Only infrequently, in farfetched cases, is it relevant to divorce.[31]

The contrast between those Jewish communities that accepted the enactments of Rabbenu Gershom and those that did not can be clearly seen in the juxtaposed comments of the European and Oriental authorities which comprise the classic law code of the *Shulhan Arukh* in the area of family law. Rabbi Moses Isserles (of Poland) accepts these refinements and values the essence of marriage as a covenant. Rabbi Joseph Karo (of Palestine), who does not incorporate them, portrays a less lofty ideal of marriage. Consider the opening discussion of marriage which states:

> Karo: Every man must marry a woman in order to reproduce. Anyone who is not having children is, as if, they are killers, reducers of the place of people on

28. *Shulhan Arukh, Even HaEzer* 66:3.
29. See Broyde and Reiss, "The Ketubah in America."
30. Moses Feinstein, *Iggrot Moshe, Even HaEzer* 4:91. (This *responsum* was written in 1980.)
31. Moses Feinstein, *Iggrot Moshe, Even HaEzer* 4:92. (This *responsum* was written in 1982.)

this earth, and causing God to leave the Jewish people. *Isserles: Anyone who is without a wife lives without blessing and without Torah and is not called a person. Once one marries a woman, all of one's sins are forgiven, as it states, "One who finds a wife finds goodness, and obtains the favor of God;" Proverbs 18:22.*[32]

Rabbi Karo subscribes to a view that marriage, though mandatory, is but a necessary precondition to the fulfillment of the Jewish law obligation to have children. The marriage is a means to an end and governed by mutually agreeable contractual provisions. Rabbi Isserles, by contrast, sees the value of taking a wife in and of itself. One who marries moves beyond a state of incompleteness to the goodness inherent to finding one's life mate. It is the union of marriage itself that "obtains the favor of God." This is a marriage of covenantal nature.

The covenantal model of marriage set out by Rabbi Isserles, however, suffers from a grave defect. It eliminates the clear rules that are the foundation of Jewish divorce law. In the Talmudic period and beyond, Jewish divorce law was contractual: Women and men protected themselves from the consequences of divorce by contractually agreeing to the process and the costs of divorce. Although that approach had failings, it functioned and at least led to predictable results that the parties had negotiated in their *ketubah.* After Rabbenu Gershom's decree, Jewish divorce law lacked the basic element of a rules-based legal system, namely, clear rules to follow. Except in cases of fault (where a Jewish law court could order a divorce) all Jewish divorces became negotiated exercises between a husband and a wife. Jewish decisors could not force a divorce and could not direct its financial arrangements. At best, Jewish law courts could enact a settlement based on the principles of equitable authority, conferred or vested in them by the principalities and, later, nation-states. But these resolutions were not at all based on any provisions of the *ketubah,* but on the product of the later negotiation between the estranged parties.

This covenant understanding of marriage and divorce has proved difficult to maintain. It was workable only in pre-modern Europe because divorce was not common and was limited, given the social and economic reality of that time and place, to cases of hard fault.[33] Moreover, in these communities, Jewish law courts had the authority to provide equitable relief in cases where the parties appearing before the court desired to divorce but could not agree on the terms.

32. *Shulhan Arukh, Even HaEzer* 1:1.

33. For a detailed discussion of the problems posed in pre-emancipation Russia by this construct of Jewish law, see CheaRan Y. Freeze, "Making and Unmaking the Jewish Family: Marriage and Divorce in Imperial Russia, 1850-1914" (Ph.D. Diss., Brandeis University, 1997), who notes that Jewish divorce was more common than Orthodox Christian divorce but still relatively uncommon.

This use of the secular legal system to produce Jewish law solutions is unique and represents a noteworthy break from the Jewish tradition, which had a deep resistance to allowing a secular legal authority into the details of Jewish law. By contrast, Jews in the United States faced a central challenge in implementing this covenantal vision of marriage. Until the massive Jewish migration to the United States, there was no substantive Jewish family law that could be examined to compel the rabbinical courts to grant divorces except in cases of hard fault and where there was clear equitable authority in rabbinical courts to resolve matters of divorce fairly. The laws of nearly all European states recognized the authority of Jewish law courts in many matters to be binding and enforceable. The American states did not. American rabbinical courts thus ceased to be a significant source of authority in the American Jewish community unless and until the individuals in a particular marriage not only empowered the rabbinical court to resolve their dispute, but also refused to challenge the outcome in a secular court. In America, the Jewish marriage covenant was — in essence — unenforceable.

Three different solutions have been advanced to preserve the legal status of Jewish marriage. Each has involved the secular law of the United States in some form. None has worked very well.[34]

The Enforceability of the Ketubah *in American Law*

The earliest effort sought to have the provisions of the *ketubah* enforced as a matter of American contract law.[35] This was litigated in a number of cases. For example, in 1974 a widow tried to collect the amount of her husband's *ketubah* and claimed that the *ketubah* superseded her prior waiver of any future claims pursuant to a prenuptial agreement between herself and her husband. (The *ketubah* had been signed after the prenuptial agreement, and thus, if it were a valid contract, would have superseded it.) The New York Supreme Court denied the claim, concluding that, even for the observant Orthodox Jew, the *ketubah* had become more a matter of form and ceremony than a legal obligation.[36] The basic claim of the litigant seemed reasonable from a Jewish law

34. For more on this, see Michael Broyde, "Informing on Others for Violating American Law: A Jewish Law View," *Journal of Halacha and Contemporary Society* 41 (2002): 5-49.

35. See, e.g., *Hurwitz v. Hurwitz*, 215 N.Y.S. 184 (N.Y. App. Div. Second, 1926), where the court refers to the *ketubah* by the term "koshuba" and has no context to examine it.

36. *In Re Estate of White*, 356 N.Y.S.2d 208, at 210 (N.Y. Sup. Ct., 1974).

view. She had entered a marriage, which was bound by Jewish law, and the courts ought to enforce it. The New York courts did not agree.

There is not a single case that I know of where a secular court has enforced the *ketubah* provision mandating payments.[37] The financial obligations described in the *ketubah* — in *zuzim* and *zekukim,* which require determinations of Jewish law to ascertain the proper value — are not considered specific enough to be enforceable.[38] Moreover, since the *ketubah* texts are not in English and are not signed by the husband and wife, they are regarded as void contracts at American law.

Rabbinic Arbitration Agreements to Construct Jewish Marriages

The second method to provide American law support for Jewish marriage has been use of private arbitration law. The earliest use of arbitration agreements to govern Jewish marriages was in 1954 under the direction of Rabbi Dr. Saul Lieberman. These arbitration agreements were included in an additional clause to the *ketubah:*

> [W]e the bride and the bridegroom . . . hereby agree to recognize the Beth Din of the Rabbinical Assembly and the Jewish Theological Seminary of America or its duly appointed representatives, as having the 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 Beth 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.[39]

This exact formulation was upheld as a valid arbitration agreement by the New York Court of Appeals in the now famous case of *Avitzur.*[40] It is generally understood as a matter of secular law that all binding arbitration agreements

37. While it is true that in dicta, an Arizona court suggested that financial obligations described in a *ketubah* could perhaps be enforceable if described with sufficient specificity, *Victor v. Victor,* 866 P.2d at 902 (Arizona, 1993), the practice has never been to seek to conform the text of the *ketubah* to the contract requirements of American law.

38. Whether or not the language of a *ketubah* forms a basis for compelling a *get* according to secular law doctrine is a question beyond the scope of this essay.

39. *Proceedings of the Rabbinical Assembly of America XVIII* (1954), 67.

40. *Avitzur v. Avitzur,* 459 N.Y.S.2d 572 (1983).

undertaken to enforce religious values in a marriage are thus binding on the parties so long as they follow the procedure and forms mandated by New York (or whatever local jurisdiction governs procedure).[41]

While the particular form used in the Lieberman clause (as it became known) has been subject to intense criticism,[42] and ultimately not accepted by the vast majority of the Jewish law community, the idea of using binding arbitration agreements to enforce the promises and expectations of Jewish marriage has taken firm hold. Over the last fifty years, many different Jewish law–based arbitration agreements have been composed in an attempt to create a legal construct in which Jewish law has a significant stake in the outcome of a divorce and cannot simply be ignored when one of the parties wishes to ignore it. Indeed, there is an organization with a section of its Internet site devoted to sharing such agreements (and I myself have been involved in such).[43] The most recent version of the binding arbitration agreement widely used in the Orthodox Jewish community incorporates a binding arbitration agreement into a prenuptial agreement, such that one who signs this form of an agreement integrates Jewish law into the divorce process in a legally binding manner according to American law.[44]

Although Jewish law–based binding arbitration agreements designed to mandate adherence to Jewish law are quite common in the community that observes Jewish law, such agreements suffer from a number of defects. First, they require forethought. They must be composed, executed, and filed in anticipation of difficulty in the pending marriage. Second, they require — prior to the commencement of the marriage — a clear comprehension of the process of divorce and the various options available to the couple in terms of divorce. Such foresight is rare in newlyweds. Finally, they are subject to litigation that can hinder their effectiveness. Thus, while such agreements are clearly a part of the process of returning the legal covenant of Jewish marriage to its place among couples who seek a genuinely Jewish marriage, they are not the global solution they were thought to be when first developed.[45]

41. See, e.g., Linda Kahan, "Jewish Divorce and Secular Court: The Promise of *Avitzur*," *Georgetown Law Journal* 73 (1984): 193-224; Lawrence M. Warmflash, "The New York Approach to Enforcing Religious Marriage Contracts," *Brooklyn Law Review* 50 (1984): 229-54.

42. See Norman Lamm, "Recent Additions to the Ketubah," *Tradition* 2 (1959): 93-119; A. Leo Levin and Meyer Kramer, *New Provisions in the Ketubah: A Legal Opinion* (New York: Yeshiva University Press, 1955).

43. See www.orthodoxcaucus.org.

44. This document and its attendant instructions are available as a PDF file at www.orthodoxcaucus.org/prenup/PNA_2003.pdf.

45. For more on this issue and the many practical problems with these arbitration agreements, see Breitowitz, *Between Civil and Religious Law.*

The New York State Jewish Divorce Laws

A third way of using secular law to uphold Jewish marriage came with the passage of the New York Jewish Divorce Law in 1983, which was revised in 1984 and modified again in 1992.

Jewish law recognizes that marriage and divorce in their essential form require private conduct rather than court supervision. Both private marriages and private divorces are valid in the Jewish tradition, so long as the requisite number of witnesses (two) is present. Indeed, the Jewish tradition does not mandate the participation of a rabbi in any manner in either the marriage or divorce rite (although the custom has been to do so).[46] In the past thirty years, however, Jewish women have appealed to the state of New York to address the pressing problem of recalcitrant husbands who refused to participate in Jewish divorces or who were using the requirements of Jewish divorce to seek advantages in the division of finances in the secular divorce proceedings.

The 1983 Jewish Divorce Law responded to their plight.[47] The purpose of the 1983 statute was not to compel a secular vision of marriage and divorce onto the Jewish community. It was rather to tailor the model of divorce employed by the state of New York to the needs of those Jews who have an alternative model of marriage and divorce grounded in Jewish law. The New York statute recognized that it was fundamentally wrong to allow a husband who had been married in a Jewish ceremony to be civilly divorced, but not to allow his wife to divorce until a Jewish divorce had first been executed.

How did the 1983 law fix this problem? It prevented the civil authorities from exercising their authority to divorce a Jewish couple civilly if they had not yet received a religious divorce. The law prevented a splitting of the civil and religious statuses by precluding the civil authorities from acting in Jewish divorces absent prior action by religious authorities.[48] This law harmonized civil law with Jewish law: Jewish law maintains that the couple is married until a *get*, a Jewish divorce, is issued. New York committed itself to not issuing a civil divorce in such cases until a *get* had been issued. The law contained no incentive for a person to issue a Jewish divorce unless that person genuinely desires to be divorced. To put this in a different way, the divorce process employed by the state of New York was different for those married in the Jewish faith than for anyone else. In that, the 1983 New York Jewish Law was very

46. Indeed, as is demonstrated in Bleich, "Jewish Divorce," the term "rite" is a misnomer; "contract" would be more accurate.

47. N.Y. Dom. Rel. Law §213 (McKinney 1992).

48. N.Y. Dom. Rel. Law §236(b) (McKinney 1992).

much like the current covenant marriage schemes of Louisiana, Arkansas, and Arizona.[49] It enabled Jewish parties to opt out of the prevailing contract marriage governed by state law.

Although the 1983 New York Jewish divorce law addressed certain cases, it had one obvious limitation. It was written to be applicable only in cases where the plaintiff was seeking the secular divorce and not providing a religious divorce. Only the plaintiff was obligated to remove barriers to remarriage, and a defending spouse, who did not desire to comply with Jewish law, need not. To remedy this, the 1992 New York Jewish divorce law took a completely different approach. It allowed the secular divorce law to impose penalties on the recalcitrant spouse in order to encourage participation in the religious divorce. It did so by changing the division of the marital assets in cases in which a Jewish divorce has been withheld.[50] The 1992 law sought to prevent the splitting of the religious and civil marital statuses by encouraging the issuance of the religious divorce when a civil divorce was to be granted. This law, still in effect, functions in the opposite manner of the 1983 law. It harmonizes Jewish law with New York law by committing state authorities to a policy of encouraging Jewish divorce. This, too, is a form of covenant marriage, albeit one with a totally different focus on the relationship between Jewish and secular law.

The technicalities of both these laws are beyond the scope of this chapter. They have generated a considerable amount of scholarly debate, both within the Jewish tradition[51] and within the secular law community,[52] precisely be-

49. See discussion and citations in the chapters by Katherine Spaht and Peter Hay in this volume.

50. Domestic Relations Law §236 was modified to add: "In any decision made pursuant to this subdivision the court shall, where appropriate, consider the effect of a barrier to remarriage, as defined in subdivision six of section two hundred fifty-three of this article, on the factors enumerated in paragraph (d) of this subdivision," thus allowing a judge to change the equitable distribution in a situation where the husband or wife will not give or receive a Jewish divorce. Section 253(6) limits "barriers to remarriage" to situations where a *get* is withheld.

51. For an examination of the issues raised in the Jewish tradition, see Michael Broyde, "The New York State *Get* [Jewish Divorce] Law," *Tradition: A Journal of Jewish Thought* 29, no. 4 (1995): 3-14; this article was followed by Michael Broyde and Chaim Malinowitz, "The 1992 New York *Get* Law: An Exchange," *Tradition: A Journal of Jewish Thought* 31, no. 3 (1997): 23-41; Michael Broyde and Chaim Malinowitz, "The 1992 New York *Get* Law: An Exchange III," *Tradition: A Journal of Jewish Thought* 32, no. 2 (1999): 99-100, and 33, no. 1 (1999): 101-9.

52. See, e.g., Michelle Greenberg-Kobrin, "Civil Enforceability of Religious Prenuptial Agreements," *Columbia Journal of Law and Social Problems* 32 (summer 1999): 359-400; Kent Greenawalt, "Religious Law and Civil Law: Using Secular Law to Assure Observance of Practices with Religious Significance," *Southern California Law Review* 71 (1998): 781-844; Patti A. Scott, "New York Divorce Law and the Religion Clauses: An Unconstitutional Exorcism of the Jewish Get Laws," *Seton Hall Constitutional Law Journal* 6 (summer 1996): 1117-81; Lisa Zornberg, "Be-

cause they were an attempt to impose a vision of religious marriage on a subset of the population through the vehicle of secular law. The 1983 New York state *get* law did so by restricting access to secular divorce when the rules of religious divorce were not followed. The 1992 statute did so by compelling religious divorce. Both approaches, however, are grounded in the centrality of Jewish marriage to its adherents.

One could claim therefore that New York state not only had the first covenant marriage law, but the first two such laws — the 1983 Jewish divorce law and the 1992 Jewish divorce law, each with a different approach to Jewish marriage. Granted, New York does not offer a covenant marriage option to all, since, practically speaking, Jewish clergy will not allow non-Jews to opt into Jewish marriage. But in terms of reframing or superimposing secular and religious definitions of marriage and divorce and offering a state-sanctioned model of religious union and dissolution, these statutes pave the way.[53]

Indeed, not only does New York pave *the* way, but it actually paves *two* ways: The view of Jewish law in the 1983 New York law is a model of religious law superceding secular law and supplanting its values. The vision in the 1992 New York law is a model of secular law seeking to coerce the Jewish tradition into a particular model of Jewish marriage. Not only do both these models exist in New York, but they are both part of Jewish law also. In fact, there is a vast theological dispute within the Jewish tradition about the nature of Jewish marriage, which becomes particularly apparent when Jewish law discusses the natural law of marriage and divorce (that is to say, the universal laws which Judaism believes to be binding on all and which Jewish legal theory posits were revealed at creation and supplemented after the great flood). The basic theological dispute is simple: What was the Divine image of the marital bond and divorce? Should divorce be a simple ending of the contract, with no difficulties and complexities, or should marriage be viewed as a covenant that can end only in cases of dramatic breach?

This dispute between marriage as contract and marriage as covenant goes to core theology in the Jewish tradition. The natural law formulation of marriage is found in Genesis 2:24: "Thus a man shall leave his father and mother and cleave

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yond the Constitution: Is the New York Get Legislation Good Law?" *Pace Law Review* 15 (spring 1995): 703-84; Edward S. Nadel, "A Bad Marriage: Jewish Divorce and the First Amendment," *Cardozo Women's Law Journal* 2 (1995): 131-72; Paul Finkelman, "New York's *Get* Laws: A Constitutional Analysis," *Columbia Journal of Law and Social Problems* 27 (1993): 55-100.

53. The question of the applicability of this statute to Islamic marriages (a result never contemplated by the New York state legislature) is a fascinating one and requires further analysis; See Ghada G. Quaisi, "Religious Marriage Contracts: Judicial Enforcement of Mahar Agreements in American Courts," *Journal of Law and Religion* 15 (2000-2001): 67-82.

to his wife, and they shall be one flesh." In what instances and for what reasons is divorce proper? The biblical narrative here is quite silent on this point.

One answer is provided by the modern scholar of Jewish law, Rabbi Moses Feinstein.[54] He adopts the view that prior to the giving of Jewish law, *there was no institution of marriage and no institution of divorce.* Jewish law invented marriage, and divorce, he claims; prior to the giving of the Torah there was mere coupling, and when the coupling was over, the relationship was over. What then is the covenant that Jewish law added in terms of the marital relationship? This approach answers that Jewish law created marriage itself as part of the Divine covenant with the Giver of Jewish law, and restricted uncoupling to a written bill of divorce, issued by the husband to the wife.[55] It should be limited to cases where the covenant itself has been breached. Jewish law added divorce only as a rare escape valve for marriages gone very bad.

A diametrically opposite view is taken by Rabbi David ben Levi of Narbonne, a medieval scholar who adopts the view that under natural law, there is no divorce at all, for marriage was a permanent arrangement.[56] This model (similar to the ultimate conclusion reached in canon law) is that prior to the revelation of Jewish law, the marriage verses in Genesis dictate that marriage shall be permanent. Marriage — perhaps even monogamous marriage[57] without any possibility of divorce — was the legal norm prior to the Sinai revelation that created the Jewish people and Jewish law. The covenant of marriage granted to the Jewish people changed that, and permitted divorce. Marriage

54. Moses Feinstein, *Iggrot Moshe, Even HaEzer* 4:9(1).

55. A related answer is presented as derived from Maimonides, even as it is not explicitly stated; see commentary of Rabbeinu Nissim on *Sanhedrin* 58b in the name of Maimonides. Maimonides' ruling that following the Sinaitic revelation, Jewish marriage required a formal transaction parallels a similar development in divorce law, this theory claims. Prior to the revelation, marriage and divorce were purely functional relationships, and divorce (i.e., dissolution) was allowed through the simple activity of abandonment. When a husband or wife wished to end the marriage, either one of them could leave. Until such a time, they were married — but divorce was simple, informal, and grounded in natural law. It could be verbal or even simply an action (such as leaving the marital home). The Jewish law of divorce, by contrast, was procedural in nature, in that it derived from the need to create formal statuses, reflected in documentation. For more on this see Broyde, *Marriage, Divorce and the Abandoned Wife in Jewish Law.*

56. Quoted in *Novellae of the RaN* (Rabbenu Nissim), *Sanhedrin* 58b.

57. A small number of medieval commentators derive the monogamous ideal from the verse in Genesis 2:24; see *Baal haTurim* and *Hizkuni* ad. loc., and the notes in Menachem Mendel Kasher, *Torah Shelaimah,* Genesis 2:24. There are, however, no Talmudic homilies on the joys of monogamy, but one; see *Avot DeRabbi Natan* (Proverbs of Rabbi Nathan), version 2, chapter 2:1 (page 5a in the standard pagination), which states: "Rabbi Judah ben Betera states: Job would observe to himself that . . . if it had been proper for the first Adam to be given ten wives, it would have been done. But it was proper to give him only one wife, and I too need but one wife."

was not a part of the Divine covenant with the Jewish people — divorce was! Jewish law permitted divorce. Jewish law has, in this view, a weaker marital bond than its natural law predecessor, and marriages should end in the Jewish tradition when the parties want them to — and not only upon covenant-breaching events.

The ongoing relevance of this dispute is clear. On one view, the essential Jewish contribution to marriage doctrine is marriage, and in the other, it is divorce! The first model is theological and covenantal; the second is contractual and formal. These two views have parallels in the two models of Jewish marriage advocated by the 1983 and 1992 New York laws.

Conclusions

Jewish marriage is not a single institution that has been unchanged during its three-thousand-year history. The contests between conceptions of marriage as covenant and marriage as contract run deep in the Jewish tradition. Although these disputes are rarely manifested in the details of marriage law, they appear in full bloom in Jewish divorce law. There is no consensus regarding the earlier natural law rules of divorce which later Jewish law changed. There is no agreement about the path Jewish law has taken since it was revealed at Sinai or about the nature of and need for rules and procedures governing marriage formation and dissolution. There is not even agreement whether divorce is a salutary innovation of Jewish law or a concession to natural law. Furthermore, the recent interaction of Jewish law with American family law has been fraught with conceptual difficulty and even some missteps. The New York state experiment with Jewish divorce law is the best example of the problems that can be created when two different legal systems — one religious, one secular — are forced to mesh.

That said, it must also be said that the covenantal basis of marriage and divorce law in the Jewish tradition strongly affirms two basic values. The first is that sanctity is a basic component of the marriage relationship that spouses have with each other and with their Creator. The second is that divorce is a natural possibility in the covenantal process, which was created in the same Divine moment that Jewish marriage was created.