JEWISH DIVORCE AND THE RECALCITRANT HUSBAND—REFUSAL TO GIVE A GET AS INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

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Since the giving of the law on Mount Sinai more than three thousand years ago, a distinct legal system has governed the Jewish people. One of the areas included in Jewish law is domestic relations. As a result, when an American Jewish couple marries in a Jewish ceremony two distinct legal systems recognize the marriage: American civil law and Jewish law. If the marital relationship breaks down and one or both parties want a divorce American law requires that the moving party brings an action in a court of law. Assuming proper grounds exist, the court will order a divorce and American law will consider the marriage terminated. Jewish law, however, will consider the parties still married until such time as distinct Jewish legal procedures are performed. Jewish law requires that the husband give his wife a bill of divorcement, known as a get. If the husband refuses to give his wife a get, she cannot remarry in accordance with Jewish law. Such a woman, in Jewish terminology, is an Agunah, a chained woman.

With the increase of divorces in American Jewish society has come an increased number of Agunot. A further result has been legal activity, in courts and at least one legislature, to encourage or even force a recalcitrant husband to give his wife a get.

This article briefly describes the basic nature of divorce in Jewish law and summarizes recent court and legislative action in the area. It then examines a theory of relief yet to be considered in an American court, that the husband's refusal to give his wife a get can be the basis of a tort action for the intentional infliction of emotional distress. Finally, the article examines the appropriate form of relief should a court find that a tort has been committed as well as the possible constitutional objections that might arise from granting the proposed relief.

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THE BASIC NATURE OF DIVORCE IN JEWISH LAW

In most legal systems, if a husband and wife wish to sever marital bonds, they must secure the aid of a court of law. Even in the case of an uncontested divorce, the parties' mutual willingness will not suffice. They must bring their case before a court of law and demonstrate to the court's satisfaction that the requirements for a divorce are met. Only after the court enters a final judgment may husband or wife marry another without violating laws against bigamy. In Jewish law, however, if a husband and wife wish to sever Jewish marital bonds, rabbinic court intervention is neither necessary nor sufficient. Accomplishment of a Jewish divorce depends upon the acts of the parties themselves.

The basic nature of divorce in Jewish law comes from the language of Deuteronomy 24:1:

A man takes a wife and possesses her. She fails to please him because he finds something obnoxious about her, and he writes her a bill of divorcement, hands it to her, and sends her away from his house.1

In conformance with this language the essential acts to secure a Jewish divorce involve the husband's preparing, signing and delivering a bill of divorcement, a get pitturin or simply a get to his wife.2 While witnesses are necessary and tradition calls for the presence of a rabbi, the essential acts involve the parties themselves, and the change in

1. Deuteronomy 24:1 (Jewish Publication Society (1985)).
2. An English translation of the text of a get is as follows:
   On the _______ day of the week, the _______ day of the month of _______
   in the year _______ from the creation of the world according to the calendar reckoning we
   are accustomed to count here in the city _______ (which is also known as _______ )
   which is located on the river _______ (and on the river _______ ) and situated
   near wells of water, I _______ (also known as _______) the son of _______ (also
   known as _______ ) who today am present in the city _______ (which is also
   known as _______ ) which is located on the river _______ (and on the river _______ )
   and situated near wells of water, do willingly consent, being under no restraint, to
   release, to set free and put aside thee, my wife _______ (also known as _______ )
   daughter of _______ (also known as _______ ) who is today in the city of _______
   (which is also known as _______ ) which is located on the river _______ (and on
   the river _______ ) and situated near wells of water, who has been my wife from
   before. Thus, I do set free, release thee, and put thee aside, in order that thou may
   have permission and the authority over thyself to go and marry any man thou may
   desire. No person may hinder thee from this day onward, and thou art permitted to
   every man. This shall be for thee from me a bill of dismissal, a letter of release, and a
   document of freedom, in accordance with the laws of Moses and Israel.

_______the son of _______, witness

_______the son of _______, witness

From I. Haut, DIVORCE IN JEWISH LAW AND LIFE [hereinafter Haut], 17-18 (1983).
marital status will take place only as a result of the parties’ actions of giving and receiving a get. . . . 3

Up until the eleventh century, a husband could divorce his wife at will. She had no right to refuse a get. Thus, so long as the husband was able to place the document in his wife’s possession, they were divorced. In the eleventh century, a decree attributed to Rabbenu Gershom ben Judah Me’or HaGolah gave women the right to refuse a get.4 Since that time rabbis have developed grounds which entitle a husband to divorce. The husband must prove before a rabbinic court that such grounds exist. Wives, on the other hand, have always had to bring an action before a rabbinic court and prove grounds entitling them to a divorce under Jewish law.

Since a husband must give his wife a get for a divorce to be accomplished, obtaining a Rabbinic finding that the moving party is entitled to a divorce will not, in itself, lead to a divorce. Therefore, a reluctant husband or wife could prevent a party found to be entitled to a divorce from obtaining it. This problem has been mitigated somewhat in the case of reluctant wives. Some authorities have ruled that Rabbenu Gershom’s decree did not permit a wife to refuse a get following a rabbinic order that she accept one.5 Following that reasoning, if the court were willing to order the wife to accept a get, a husband’s placing the get in her possession, even against her will, would accomplish a divorce. Although a court can force a wife to accept a get, it cannot in this way justify forcing a husband to give one. Rabbenu Gershom made no such comparable provision for forcing husbands. Moreover, an additional basic requirement of Jewish law is that a husband must give a get willingly. A get given under compulsion, a get meuseh, will not result in a valid divorce.

At times and in places where the ruling government authorized rabbinic courts to take punitive actions, rabbis developed a justification for forcing delivery of a get, despite the problems of a get meuseh.

3. For a description of the procedure generally followed today for preparing and giving a get, see Haut, Id. at 31-41.
4. Rabbenu Gershom Ben Judah Me’or HaGolah (Our Rabbi Gershom Son of Judah Light of the Exile) lived approximately 960-1028 C.E. in Mainz, Germany. He is credited with many takkanot (enactments), including a ban forbidding the unauthorized reading of private letters and a ban against reminding Jews who had returned to Judaism after forceful conversions of their prior transgression. The decree giving women the right to refuse a get is attributed to him by Rabbi Meir of Rothenburg (c. 1215-1293), himself a great German Jewish scholar. Modern scholarship questions Gershom’s authorship of many decrees. See, e.g., Z.W. Falk, Jewish Matrimonial Law in the Middle Ages (1966). For more information, see Encyclopedia Judaica Vol. 7, 511-13 (1972) and sources cited therein.
5. See Haut, supra note 2 at 56 and authorities cited therein.
The Talmud states, "A get given under compulsion [exercised] by an Israelite court is valid . . ." *Gittin*, 88b. This exception was explained by Maimonides as follows:

. . . [D]uress applies only to him who is compelled and pressed to do something which the Torah does not obligate him to do, for example, one who is lashed until he consents to sell something or give it away as a gift. On the other hand, he whose evil inclination induces him to violate a commandment or commit a transgression, and who is lashed until he does what he is obligated to do, cannot be regarded as a victim of duress.

As in Talmudic times, in Israel today a rabbinic court finding sufficient grounds can force a husband to give a get.

This analysis is of little value in the United States and other countries outside of Israel, however, where rabbinic courts are not given authority to "lash", or otherwise force defendants until they consent. In these countries, even following a rabbinic court's finding that the moving party is entitled to a divorce, the rabbinic court must obtain the cooperation of at least the husband in giving the get.

The consequences of remarriage without a Jewish divorce are also different for a wife than they are for a husband. Polygamy, being married to multiple wives, is permitted under biblical law. The prohibition against polygamy was instituted by the same eleventh century decree which permitted wives to refuse a get. The decree is limited to Jews who follow Ashkenazic (European) traditions and those living in Israel today. Jews living in Islamic countries, for example, continued to practice polygamy. Under circumstances such as insanity or

8. "In terms of the *Rabbincal Courts Jurisdiction (Marriage and Divorce)* Law, 5713-1953, matters of marriage and divorce between Jews, citizens or residents of the state, fall within the exclusive jurisdiction of the rabbinical courts, which jurisdiction extends to any matter connected with the suit for divorce, including maintenance for the wife and for the children of the couple. [sec. 3(1)]. Divorce for Jews is performed in accordance with Jewish law [sec. 2]. M. ELON, *Principles of Jewish Law* 423 (1974) [hereinafter ELON].
While courts in Israel today do not lash a husband until he gives his wife a get, other methods are available. J. David Bleich writes:
In Israel, where rabbinic tribunals have jurisdiction over domestic matters, the husband can be held liable for the support of his wife until such time as he executes a bill of divorce. A decree ordering the husband to provide for the sustenance of his estranged wife will, in most cases, affect a change of heart in even the most recalcitrant of husbands.
9. "In general it can be said that the [ban] has been accepted as binding among Ashkenazi communities, but not among Sephardi and most of the Oriental communities. This
mental incapacity a second wife is permissible despite the ban. Furthermore, authorities have ruled that in cases where the wife has abandoned the husband, the husband is permitted to remarry without giving a get, provided he obtained the signatures of one hundred rabbis from three different jurisdictions approving the remarriage. Moreover, some authorities have ruled that, if the husband remarries without giving his wife a get the second marriage is valid, providing the first wife with only the right to seek a rabbinic order that the husband divorce the second wife. Such a right is of little use to a wife who cannot force her husband before a rabbinic court.

Polyandry, a wife's marriage to multiple husbands, has never been permitted in Jewish law. Since a woman cannot be divorced until she receives a get, she cannot legally remarry without a get. She is an agunah, a "chained woman." No rabbi observing Jewish law will conduct a marriage ceremony for an agunah. If a woman remarries by means of a non-observant rabbi or in a civil ceremony, the marriage will be considered invalid under Jewish law. The relationship formed by such a marriage will be considered adulterous, and any offspring which result from the marriage will be considered mamzerim, bastards. A mamzer, whether male or female, cannot marry a Jew other than another mamzer. Any issue of a mamzer and a legitimate Jew would likewise be mamzerim. Thus, the consequences for an observant Jewish woman whose husband refuses to give her a get are serious indeed, and these consequences have led to civil litigation and legislative action.

**SUMMARY OF LITIGATION**

As indicated above, a recalcitrant husband can prevent a civilly divorced wife from remarrying by refusing to give her a get. Husbands' exercise of this ability has induced aggrieved wives to file civil suits to force their husbands to deliver a get. To date, these suits have been based on contractual theories. Until quite recently courts have

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11. See ELOH, supra note 8, at 367.


13. See ELOH, supra note 8, at 435.
been unwilling to grant wives relief without reaching the contractual issue. Rather, they have based their decisions largely on ill-defined fears of becoming entangled with religion. This pattern can be illustrated by three court decisions.

In *Price v. Price* \(^{14}\) the plaintiff brought suit alleging that, prior to their marriage, her husband “promised orally that he would . . . submit all disputes that might arise out of their . . . intended civil and religious marriage contract to the arbitration and jurisdiction of a recognized Jewish rabbi. . . .” She asked the court to order Mr. Price to declare to a rabbi, “that he agrees to free his erstwhile wife from the bonds of matrimony.” Without reaching the question of whether the alleged promise would bring about contractual obligations, the court refused to grant the order, stating the following reasons:

We believe we have no right to order anyone to secure any kind of divorce—whether it be civil or religious. . . . The civil tribunals are certainly without authority to order one to follow the practices of his faith. This matter is dependant entirely upon his conscience, or upon his religious belief. \(^{15}\)

*In Re Morris and Morris*, \(^{16}\) a Canadian case, the plaintiff wife had been civilly divorced and remarried. She brought suit to enforce a written promise in her ketubah, the traditional Jewish marriage contract, that her first husband give her a *get*. \(^{17}\) The lower court declared

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\(^{15}\) Id. at 291.


\(^{17}\) An English translation of the traditional *Ketubah* is as follows:

On the ______ day of ________, thus did ________, son of ________, say unto ________, daughter of ________, never married bride: ‘Be unto me for a wife, according to the laws of Moses and Israel, and I will work, honor, support and maintain thee in accordance with the manner of Jewish men who work, honor, support and maintain their wives in faithfulness and I give thee bride price of ________ zuz which are due thee and thy food, clothing and needs, and shall come to thee according to the way of all the earth.’ And this is the dowry that she has brought from the house of in silver, gold, ornaments, articles of wear, utensils of dwelling, bedclothes; all has this bridgroom taken upon himself in refined pure silver, and this bridgroom has consented and added to it from his own another refined, pure silver corresponding to this, the sum total being refined pure silver. And thus did ________ this bridgroom say: ‘The responsibility of this ketubah, this dowry and this addition I take upon myself and on my heirs after me, to pay from all the best, desirable property and acquisitions that I have under all the heaven which I acquired or which I shall acquire in the future, property which has a guarantee or which does not have a guarantee, and all shall be guaranteed and assured to pay from this ketubah, this dowry and this addition, from me and even from the cloak on my shoulder, in my lifetime or after my death, from this day on forever!’ The guarantee and severity of this ketubah, this dowry and this addition, has ________ this bridgroom taken upon himself as the severity of all the documents of ketubah and additions which are customary for
that the wife was entitled to a *get*. In a 4-1 decision, the Manitoba Court of Appeal reversed. Two of the judges "took issue" with the lower court finding that the language of the *ketubah* constituted contractual obligations and noted that the plaintiff had come to the court without "clean hands." They held that:

. . . [T]he law relating to marriage and divorce in Canada is a Canadian civil matter and cannot be allowed to become uncertain and schismatic by reference to various sects or religions.\(^{18}\)

Another judge stated:

. . . [T]he real issue between the parties is whether the powers of the civil court are to be invoked by applicant to enforce her right to a religious divorce. . . . Presumably, if the husband refuses to present himself to the Beth Din to initiate proceedings for a *get*, he could be found in contempt of Court and subject to penalties for that conduct. He could thus be gaol or fined for disobeying, indirectly, an order of a religious court. In my opinion, this result would not be a desireable one.\(^{19}\)

In a third case, *Margulies v. Margulies*,\(^{20}\) the parties had been civilly divorced. When they were before the court stipulating to child visitation rights, the husband voluntarily agreed to "appear before a Rabbi to be designated for the purposes of a Jewish divorce."\(^{21}\) The husband then continually refused to appear before a rabbi. He was fined and committed to jail for a period of fifteen days with the opportunity to purge himself of the contempt if he appeared and participated in a Jewish divorce. The Appellate Division allowed the fines to stand. "The court had jurisdiction over the parties and the subject matter, and even if the orders were erroneous, the defendant was obligated, in the absence of a stay, to obey the court's mandate until vacated or reversed."\(^{22}\) The court reversed the order incarcerating the husband. In doing so, the court made the following statements:

- It is argued that the court was without power to direct defendant to participate in a religious divorce, as such is a matter of one's personal convictions and is not subject to the court's interference.
- We are told further, that since a Jewish divorce can only be granted upon the representation that it is sought by the husband of

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the daughters of Israel, which are made according to the ordinances of our sages, their memory be a blessing.

From HAUT, supra note 2, at 8 & 9. See also *In re Morris and Morris*, 42 D.L.R. 3d at 565-66.  
19. *Id.* at 573, 575 (Matas, J.A., concurring).  
21. 344 N.Y.S.2d at 484.  
22. *Id.*
his own free will, any such divorce, if obtained under compulsion by the court, would in any event be a nullity. We agree that the defendant may not, under these circumstances, be incarcerated for his failure to honor the stipulation (incorporated into a court order) and accordingly, vacate that portion of the order directing his commitment.23

The court gave no further indication of the reasons for its reversal. In three recent decisions, however, the courts of New York and New Jersey have overcome “religious entanglement” objections and have granted wives the relief they sought on contractual grounds.

The first two decisions, Stern v. Stern24 and Minkin v. Minkin25 share all essential characteristics and can be discussed together. In both cases the parties had married in Jewish ceremonies which had included a traditional ketuba. In the ketuba the parties agreed to conform to the provisions of the laws of Moses and Israel in the conduct of their marriage. The wives had brought suit for divorce and the husbands counterclaimed, alleging adultery. In both cases the court took expert testimony from rabbis well-versed in Jewish law on the law surrounding the ketuba and the get. Both courts found that the ketubah is an enforceable contract and that a wife who does not receive a get from her husband cannot remarry. On the basis of expert testimony the court in Stern found that, under Jewish law, the husband’s allegation of adultery required him to give his wife a get.26 The court in Minkin reached the same conclusion, but its basis is less clear. The court stated, “[T]he husband counterclaimed for divorce on the ground of adultery, giving rise to the wife’s claim to require her husband to secure a get. . . . To compel the husband to secure a get would be to enforce the agreement of the marriage contract (ketuba).”27 Both courts held that compelling the husband to secure a get would not violate the first amendment. They reasoned that Jewish law must be divided into distinct areas, one regulating the relationship of humans with God and the other regulating the relationship of humans with humans. The laws of marriage and divorce involve only the relationship of humans with humans. More specifically, writing, executing and delivering a get is not a religious act.28 The court in Minkin went on to find that an order compelling

23. Id.
27. Minkin, 434 A.2d at 666.
28. Stern, 5 Fam. L. Rep. at 2811; Minkin, 434 A.2d at 668.
defendant to secure a *get* would have a clear secular purpose, its primary effect would neither advance nor inhibit religion, and would not be an excessive entanglement with religion. On the final point, the court said,

In addition to testimony to that effect, the court takes judicial notice that the Legislature has seen fit to authorize the clergy to perform marriages and, in doing so, permits the use of a religious ceremony. Such conduct, as sanctioned by the Legislature, has never been considered to be an excessive entanglement with religion. The *get* procedure is a release document devoid of religious connotation and cannot be construed as any more religious than the marriage ceremony itself.\(^{29}\)

The third and most recent decision granting relief is *Avitzur v. Avitzur*.\(^{30}\) This decision differs from the earlier two in that it was made by the highest court of the state and that it involved the enforcement obligations not present in the traditional orthodox *ketuba*.

In *Avitzur*, the parties had been married in a Jewish ceremony which included a *ketuba* used within the conservative Jewish movement. The conservative *ketuba* contains the following undertakings not present in the traditional, orthodox *ketuba*:

[W]e, the bride and bridegroom . . . hereby agree to recognize the Beth Din\(^{31}\) of the Rabbinical Assembly and the Jewish Theological Seminary of America or its duly appointed representatives, as having authority to counsel us in the light of Jewish tradition which requires husband and wife to give each other complete love and devotion, and to summon either party and the request of the other, 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.\(^{32}\)

Defendant husband had been granted a civil divorce on the grounds of cruel and inhuman treatment, but had refused to appear before a Beth Din or to give his wife a *get*. The wife brought suit for specific performance of her husband’s promise to appear before the Beth Din. The trial court denied husband’s motion to dismiss. The

\(^{29}\) Stern, 5 Fam. L. Rep. at 2811; Minkin, 434 A.2d at 668.


\(^{31}\) A Beth Din, literally a House of Law, consists of a panel of rabbis, generally numbering three, who are empowered to render judgments under Jewish law.

\(^{32}\) *Avitzur*, 459 N.Y.S.2d at 573.
Appellate Division reversed, holding that the ketuba was a religious covenant beyond the jurisdiction of the civil courts.33 The Court of Appeals reversed, reinstating the order of the trial court, ruling 4-3 that the agreement to arbitrate postmarital disputes before the Beth Din were secular terms and enforceable. The majority reasoned that the relevant terms were no more than an agreement to refer the matter of a religious divorce to a nonjudicial forum, closely analogous to an antenuptial agreement to arbitrate a dispute in accordance with a particular law and tradition. Viewed as such, the agreement should be given the same dignity as any other civil contract to submit a dispute to a nonjudicial forum, so long as its enforcement violates neither the law nor public policy of the state. Constitutional concerns were satisfied because the case could be decided solely upon the application of neutral principles of contract law, without reference to any religious principle.34

LEGISLATION

The New York legislature has provided the only other method of solving, in part, the problem of the "recalcitrant husband." It has amended section 253 of the domestic relations law, adding what is popularly known as the "Get Law."35 The amendment provides that prior to filing divorce or annulment proceedings a party to a religious marriage must file an affidavit that he or she has removed, or prior to entry of a final judgment will remove, all barriers to the opposing party's remarriage. If the plaintiff has failed to file such an affidavit, or if the clergyman who solemnized the marriage files a verified statement that, to his or her knowledge, the plaintiff has failed to take necessary steps to remove barriers to remarriage, the court will not grant the divorce or annulment. To date there have been no court challenges to the statute, though it was the subject of considerable debate prior to enactment.36 The amendment provides a remedy when

35. MCKINNEY'S SESSION LAWS OF NEW YORK, Chapter 945 (1984).
36. See, e.g., N.Y.L.J., October 27, 1983, for arguments that the law is unconstitutional and N.Y.L.J., November 16, 1983, for arguments in defense of its constitutionality.
the husband files for divorce or annulment, but not when the husband is the responding party. Subject to that limitation, assuming constitutional validity, the amendment provides an effective remedy in New York state.

**INTENTIONAL INFILCTION OF EMOTIONAL DISTRESS**

**European Cases**

Some European court decisions suggest another remedy that might be available to the civilly divorced wife whose husband will not give her a *get*. For example, Martin B. Cohen reported a case in the *Bulletin* of the International Association of Jewish Lawyers and Jurists. In "A Right to a *Get* under Dutch Law," Cohen writes that the Supreme Court of Holland recently ruled "that a refusal by the husband to give his wife a *get* could be considered a tort, and the Dutch judge could order him to cooperate."\(^{37}\) The Court reasoned that the husband's refusal to give his wife a *get* left him the option of remarrying but denied it to his wife. This result constituted an intolerable inequity, contrary to the public interest of the state. As such, the husband's refusal constituted a tort under Dutch law entitling the court to give damages if the husband would not give his wife a *get*.\(^{38}\) Similar decisions have been reached in the courts of France.\(^{39}\)

**The Case of *B v B***

The Dutch court opinion calls to mind the opinion of the Supreme Court of New York in *B v B*.\(^{40}\) In that case the husband was a conservative rabbi, and, the court noted, both he and his wife considered themselves bound as much by Jewish law as by secular law. They had been married for about ten years and had one child. Each had separately filed for divorce and the court had consolidated the actions. As part of their settlement agreement announced in open court, the husband promised to take all necessary steps to immediately obtain a Jewish divorce. After the secular divorce had been

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\(^{38}\) 1982 NJ 489 at 1694 and 1695. The author wishes to express thanks to Ms. Linda Rakia of Jerusalem, Israel for translating this court opinion from Dutch into English.


granted, the husband remarried and had a child by the second marriage. Despite all of the above, at the time the present action was filed the husband had refused to give his wife a get. At a hearing on the wife's application for a finding of contempt, the court said:

He has reaped the fruits of the secular divorce and has carved out a new life for himself. He refuses to make it possible for the plaintiff to do the same. He has condemned her to a dismal future of never being free to remarry.

This situation outrages the conscience of this court.41

The wife had asked that the court fine the defendant. The court noted, however, that if defendant refused to pay the fine the only remaining enforcement device would be for the court to order defendant committed and that such an order had been disapproved in Margules v. Margules.42 The court instead, sua sponte, directed that a hearing take place in two months to determine whether the defendant had committed a fraud on the court in obtaining the original divorce judgment.43

The Restatement Definition

Does husband's conduct in B v. B amount to the tort of intentional infliction of emotional distress?

In Section 46(1), 1 Restatement of Torts 2d, the American Law Institute has defined the tortious infliction of emotional distress as,

One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, from such bodily harm.

The Institute's comments summarize discussion of the necessary severity of conduct to produce liability as,

Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"44

Other intentional torts, such as assault, battery and false imprisonment, proscribe specific behavior. For example, assault requires a physical act causing apprehension; battery requires a touching; false imprisonment requires a physical restraint of movement. As the Re-

41. Id.
44. 1 Restatement (Second) of Torts 2d, at 73 (1965).
statement definition and comment indicates, however, liability for infliction of emotional distress can arise from either word or deed. The focus is not upon any particular kind of conduct, but rather on the actor's deviation from accepted societal behavior, accompanied by the distress of the plaintiff. Moreover, defendant's intention need only be deemed reckless, a determination likely to accompany a finding of outrageousness. As noted by Daniel Givelber

Thus formulated, the test supports liability [even] in cases where the defendant is so insensitive to the feelings of others that it is believable that the defendant had no idea that his or her outrageous behavior towards plaintiff would inflict severe emotional distress.45

Early cases recognizing the intentional infliction of emotional distress as an independent cognizable tort contained some element allaying the facts with some more traditional tort. For example, many early English and American cases involved either falsity or the threat of future physical or reputational harm. In the leading case of Wilkinson v. Downton46, the defendant 'jokingly' told the plaintiff that her husband had been in a serious accident and was in the hospital with both legs broken. The defendant was held liable for the permanent physical injuries that resulted from her distress at hearing this information. In Janvier v. Sweeney47, a private detective represented himself as a police officer and threatened arrest for espionage if private letters were not surrendered to him. In an early American case, Johnson v. Sampson,48 a high school principal accused a school girl of immoral misconduct and threatened prison and public disgrace if she did not confess.

Later cases, in line with the Restatement definition, did not depend upon false statements or threats. Prosser and Keeton cite a basis for finding liability in cases where the extreme outrage stems from defendant's knowledge that plaintiff is especially sensitive, susceptible and vulnerable to injury through mental distress at the particular conduct.49 For example, they cite cases involving mishandling of dead

46. 2 Q.B. 57 (1897).
47. 2 K.B. 316 (1919).
48. 167 Minn. 203, 208 N.W. 653 (1926).
bodies. One such early case is *Gadbury v. Bleitz.*\(^{50}\) Two weeks after plaintiff’s son’s funeral, defendants refused to cremate the body, claiming that plaintiff still owed them money from the earlier burial of another relative. In another, *Stephens v. Waits,*\(^{51}\) defendants physically prevented burial of plaintiffs’ dead brother after the body had been brought to the cemetery for burial. Defendants in both cases were found liable for intentional infliction of emotional distress. The actionable wrong stemmed from the extreme insensitivity to the emotional needs of the plaintiffs in defendants’ choice of methods to achieve their financial needs. The appellate court in *Gadbury* stated, “It may well be said that it is hard to conceive of more refined cruelty and willful wrong than that which the evidence shows was practiced in this case.”\(^{52}\)

In his review of cases where intentional infliction of emotional distress have been recognized, Professor Givelber concluded that,

> The tort is most typically invoked when there is a pre-existing legal relationship between the parties, and the claim is that the defendant has behaved intolerably in attempting either to assert or to avoid his or her rights or obligations flowing out of the relationship.\(^{53}\)

In determining whether defendant’s conduct is actionable, Givelber notes, “These cases reflect a common theme—they require a basic level of fair procedure and decency in dealings between people who occupy unequal bargaining positions and are bound (or apparently bound) by voluntary agreements.”\(^{54}\)

**Applying the Restatement**

These findings indicate that the husband’s conduct in *B v. B* would, indeed, constitute intentional infliction of emotional distress. As observant Jews married in a Jewish ceremony the parties would have signed a *ketubah*. Both the traditional and the conservative *ketubot* contain husband’s promise to conduct himself “in accordance with the laws of Moses and Israel.”\(^{55}\) The conservative *ketubah* contains the additional agreement appointing the *Beth Din* of the Rabbinical Assembly and the Jewish Theological Seminary or its duly

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52. *Bleitz*, 233 P. at 300.
appointed representatives to have authority over the parties.\textsuperscript{56} These promises have been found to constitute valid contractual agreements in \textit{Stern, Minkin,} and \textit{Avitzur}. They certainly justify a finding that the parties be “apparently bound” by voluntary agreements. The husband in \textit{B v. B} additionally promised to take all necessary steps to obtain a Jewish divorce as part of the settlement agreement in the civil divorce action. By remarrying and having a child by the second marriage, while refusing to give his first wife a \textit{get}, which would permit her to remarry, husband has behaved intolerably. In terms of the Restatement comment, a recitation of the facts of this case would arouse resentment in an average member of the general community and lead him to exclaim, as did the judge in \textit{B v. B}, “Outrageous!”

A question of defendant’s motive may arise in some cases in defense of defendant’s conduct. For example, defendant husband may claim that his refusal to give a \textit{get} is necessary, for the time being, as a bargaining chip in retaining favorable visitation rights with his children. Defendant may also argue that he doesn’t want to harm his wife, but believing that she is responsible for the breakdown of their marriage, he does not wish to cooperate with her in any matter. Rather, he only wants to live his life separately and put his life back in order. It is possible for a defendant to put forth a very sympathetic case to a jury with the result that the jurors are not so likely to find his refusal to give a \textit{get} to be outrageous. Prosser and Keeton write,

When the more modern law began to inquire into the character of defendant’s conduct, and to base liability upon immediate intent to interfere with the interest of plaintiff, it was natural that underlying motives should be called into play.\textsuperscript{57}

The inclusion of mere recklessness in the Restatement definition as sufficient to find liability, without proof of defendant’s desired result, is inconsistent with a finding that innocent motive is a valid defense. In \textit{Gadbury}, defendant’s refusal to cremate plaintiff’s son’s remains was based on a desire to satisfy a past bill, not to cause pain to plaintiff. Nonetheless, he was held liable because of the cruelty produced by his methods. Insensitivity is not a sufficient defense. Likewise the recalcitrant husband, who may wish only gain for himself, or simply desire freedom from interaction, cannot satisfy his perceived self-interest without regard to the consequences.

Some jurisdictions have rejected the Restatement formulation

\textsuperscript{56} See \textit{Avitzur}, 450 N.Y.S.2d at 573.

\textsuperscript{57} W. Keeton, et. al, supra note 49, at 27.
and have required a finding of intention to harm.\textsuperscript{58} In such jurisdictions innocent motive may constitute a valid defense in some cases where the husband's actions would be deemed 'reasonable.'\textsuperscript{59} For example, if the wife has abandoned the husband, taken the children, and actively prevents the husband from seeing their children, husband's temporary refusal to give his wife a \textit{get} might well be considered a reasonable means of securing visitation rights. The result in such jurisdictions would depend upon a case by case determination of the husband's justifications for withholding a \textit{get}.\textsuperscript{60}

The only element remaining for a finding of liability for intentional infliction of emotional distress is the requisite harm. Once courts recognized that mental suffering—without either physical striking, or immediate fear of physical striking—could be a basis for recovery, no specific degree of mental suffering was required. Rather, the Restatement makes clear that so long as the circumstances demonstrate the genuineness of plaintiff's claim of mental suffering, recovery is proper.\textsuperscript{61} Objectively demonstrable physical harm will, of course, justify recovery. However, the extremity of the conduct, without such physical manifestations, can also justify recovery. Thus, Restatement Illustration 19 provides,

\begin{quote}
A, a police officer, arrests B on a criminal charge. In order to extort a confession, A falsely tells B that her child has been injured in an accident and is dying in a hospital, and that she cannot be released until she confesses. B suffers severe emotional distress but not physical consequences. A is subject to liability to B. 
\end{quote}

The expected emotional consequences on plaintiff wife resulting from defendant husband's refusal to give her a \textit{get}, while not so convincing as Illustration 19, should be sufficient to demonstrate the genuineness of her claim of mental suffering. As indicated earlier, an observant woman who is abandoned by her husband without a \textit{get} is an \textit{agunah}, a "chained woman." If she is to remain an observant Jew she cannot remarry. If she marries in violation of Jewish law she will be an adulteress. Children of her second marriage will be \textit{mamzerim}

\footnotesize{\textsuperscript{58} See M. Minzer, Damages in Tort Actions, § 6.12(1) (1985). 
\textsuperscript{59} Id. at § 6.31. 
\textsuperscript{60} Even in jurisdictions where intention to harm must be demonstrated, the severe distress caused by the status of an \textit{Agunah}, coupled with its foreseeability, may well justify a finding of intent to harm whenever the husband evinces an intention never to give his wife a \textit{get}. 
\textsuperscript{61} But see Hassing v. Wortman, 214 Neb. 154, 333 N.W.2d 765 (1983)(liability was denied because plaintiff could not prove that she had suffered emotional distress so severe that no reasonable person could have been expected to endure it).}
bastards, themselves unable to marry a Jew. A reasonable jury could easily find the prospects of such a future at the hands of a husband who may remarry another Jewish woman and have Jewish children of that second marriage, genuinely produces anguish, humiliation, depression and other forms of severe emotional pain.

**RELIANCE**

Inadequacy of a Damage Recovery

Once it is determined that a husband’s refusal to give his wife a get is tortious, determining the appropriate relief presents a difficult problem. The usual form of relief for tortious conduct, money damages, is inadequate in this instance for two reasons. First, the harm caused by a husband’s refusal to give his wife a get is the wife’s inability to remarry under Jewish law. An award of money damages does not enable the wife to remarry. Second, according to Jewish law, a court award of money damages to the wife may invalidate any get which the husband later gives to his wife. In such a case a damage recovery actually increases the harm caused the wife. The get’s invalidity is based upon the requirement that a husband must give a get willingly and has been the subject of two recent rabbinic rulings involving a French court award of money damages.

The two rabbinic rulings have been reported in Volume 5 *Responsa Shabbat Halevy* sec. 210 of Rabbi Shmuel Halevy Vazner and Volume 8 *Responsa Minchat Yitzhak* sec. 136 of Rabbi Isaac Jacob Weiss. Both rulings were in answer to inquiries made on the effect that a civil damage award to a wife for her husband’s refusal to give her a get would have on the validity of an ensuing get. The inquiries were prompted by a French case where the defendant husband was unable to pay a civil damage award granted to the plaintiff wife for his refusal to give a get. After the award was granted the husband wanted to give his wife a get to avoid payment. In both responsa the rabbis ruled that the wife must renounce her right to the damage award prior to receiving a get. Even if the husband said he was giving the get willingly, the presence of an obligation to pay a damage award would make the get a get meuseh, a forced get. Rabbi Weiss recognized that it is difficult to expect the wife to give up her right to damages before she receives a get. Nonetheless, he reasoned that since the French civil court was not authorized to determine the wife’s right to a divorce under Jewish law, a get indirectly compelled by its damage award would be invalid. One would expect a similar result from a
damage award from a court in the United States for intentional infliction of emotional distress.\textsuperscript{62}

Appropriate Equitable Relief

Once it is recognized that a tort has been committed and that the remedy at law, damages, is inadequate, one must look for appropriate equitable relief.

In his \textit{Handbook of Modern Equity} (1956), Professor de Funia\k has written,

Where equity prevents a threatened wrong or injury, it accomplishes this by the writ of injunction. Injunction is an order or process issuing from the court addressed to the defendant to abstain from doing, or commanding him to perform, a certain remedial act. It may be, therefore, either preventative or remedial in its operation, and, consequently, injunctions are divided into two great classes, prohibitory and mandatory injunctions.\textsuperscript{63}

Here the injury has already occurred and will continue without the intervention of equitable relief. Thus, here a mandatory injunction is required.\textsuperscript{64}

From the earliest times Courts of Chancery have tailored mandatory injunctive relief to fit defendant's injury to plaintiff. In perhaps the earliest case proposing mandatory injunctive relief, the English Chancery Court issued an order to show cause to defendant, who had apparently wrongfully ploughed plaintiff's land. The order asked why he should not have to lay down that which was

\textsuperscript{62} For a discussion of the problems of a forced get, see Rabbi Tzvi Gartner, \textit{Problems of a Forced Get}, in \textit{9 J. HALACHA & CONTEMP. SOC.} (1985). \textit{See also} J. DAVID BLEICH, \textit{2 CONTEMPORARY HALAKHIC PROBLEMS} 93-100 (1983). Bleich quotes from the earliest rabbinic \textit{responsa} concerning this form of indirect coercion, the thirteenth century work, \textit{IV TESHOVOT HA-RASHBA}, no. 40:

\begin{quote}
Question: Reuben, the husband of Leah, and the relatives of Leah entered into an agreement requiring Reuben to divorce his wife, Leah. They agreed to a penalty of 1,000 \textit{dinnar} [upon failure] to execute a divorce by a specified time. Subsequently, Reuben retracted and refused [to execute a divorce]; whereupon, the others warned him concerning the penalty. . . . Because of this fear Reuben divorced [his wife]. . . . Shall we rule this to be a coerced get? Answer: It appears to me that this get is coerced and invalid . . . .
\end{quote}

Bleich, \textit{supra} at 95.

\textsuperscript{63} W. DE FUNIA\k, \textit{HANDBOOK OF MODERN EQUITY} 15 (1956). \textit{See also} D. DOBBS, \textit{REMEDIES} 105-06 (1973) [hereinafter DOBBS].

\textsuperscript{64} At one time courts distinguished between personal and property rights and limited injunctive relief to the protection of rights. This distinction stemmed from dicta in \textit{Gee v. Pritchard}, 2 Swanston's Reports [Swanst.] 402, 36 \textit{ENG. REP.} 670 (Chancery 1818). This distinction is no longer made today and injunctive relief will be given for the protection of personal rights as well as property rights when appropriate. \textit{See DOBBS, supra} note 63, at 113.
ploughed. In *Vane v. Lord Barnard*, the earliest reported case where a mandatory injunction was issued, the defendant was found to have wrongfully pulled down part of Raby castle. The court issued an injunction ordering defendant to cease his wrongful conduct and to repair the castle so as to put it into a condition the same as it was in on August, 1714. The court organized a commission to ascertain what ought to be repaired, a master to see it done at the expense and charge of the defendant and decreed the plaintiff his costs.

In our case, effective relief must be some form of mandatory injunction which would enable the plaintiff to remarry in accordance with Jewish law. The most direct relief would appear to be for the civil court to order the husband to give his wife a *get*. A *get* delivered as result of a mandatory injunction, however, would certainly be invalid as being a *get meuseh*, a forced *get*, as was the *get* in the *responsa* discussed above. The American civil court, like the French civil court in the *responsa*, would not be authorized to determine the wife's right to a divorce under Jewish law. Moreover, the coercive effect of the injunction would be even more direct than the award of damages in the French case.

The Talmud suggests a solution. The *Mishnah, Gittin* 88b in its entirety provides,

A *get* given under compulsion [exercised] by an Israeliite court is valid, but by a [secular] court is invalid. A [secular] court, however, may flog a man and say to him, “Do what the Israeliite [authorities] command you,” (and it is valid).

The solution suggested would be for the civil court to issue a mandatory injunction ordering that the parties appear before a *Beth Din*, a rabbinic court, so that the *Beth Din* could determine whether the wife is entitled to a divorce under Jewish law. The civil court would further order that the defendant, husband obey the order of the *Beth Din*.

Such a procedure, referring the case initially to the *Beth Din*, is comparable to the doctrine of primary jurisdiction in administrative

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67. Lord Barnard gave Raby Castle to his son upon the son's marriage to Morgan Randall's daughter, retaining a life estate in himself. The reporter states,

The defendant, Lord Barnard, having taken some displeasure against his son, got two hundred workmen together, and of a sudden, in a few days, stript the castle of the lead, iron, glass doors, and boards, etc., to the value of 3000 pds.

*Id.*
law. The doctrine was announced by the United States Supreme Court in *Texas & Pacific Railway v. Abilene Cotton Oil Co.*69 A shipper, the Abilene Cotton Oil Co., had filed an action in federal court alleging that the Texas & Pacific Railway had overcharged it. The common law provided a remedy for excessive charges and the Interstate Commerce Act provided that common law remedies were to be preserved. Nonetheless, the Court referred the case to the Interstate Commerce Commission (ICC) for an initial determination, holding that following the creation of the ICC, the Commission had exclusive jurisdiction. The rationale behind the Court's action was that, "[u]niformity and consistency in the regulation entrusted to a particular agency are more rationally secured by preliminary resort to the agency, which is better equipped than courts by specialization and by insight gained through experience."70

In *United States v. Western Pacific R. Co.*,71 the Court expanded the scope of the doctrine providing that primary jurisdiction "comes into play whenever enforcement of the claim requires the resolution of issues which . . . have been placed within the special competence of an administrative body."72 Referral to the agency takes place even when the agency cannot itself grant the parties complete relief so long as the case presents issues calling for a kind of consideration only the administrative expert is in a position to give.73

In the case of a husband's refusal to give a get, the question of the wife's right to a divorce under Jewish law presents issues calling for a consideration only the special competence of a Jewish court can give. The need for uniformity and consistency deprives the civil court of the authority to make such a determination.

Civil courts have frequently acknowledged the special competence of Jewish courts to make determinations of Jewish law. For example, in *Berman v. Shatnes Laboratory*,74 the parties had agreed to submit disputes to a Jewish court. After defendant had circulated the Jewish court opinion that plaintiff was not qualified to test garments for *Shatnes*, the improper mixing of wool and linen, plaintiff brought

69. 204 U.S. 426 (1907).
70. SCHWARTZ, ADMINISTRATIVE LAW 484 (1976) [hereinafter SCHWARTZ] (citing Far East Conference v. United States, 325 U.S. 570, 574 (1952)).
71. 352 U.S. 59 (1956).
72. *Id.* at 64. See SCHWARTZ, supra note 70, at 488.
an action for trade libel. The Supreme Court of New York held that the complaint should be dismissed.

We are of the opinion that the complaint as against defendant Rosenberger cannot stand. The parties to this appeal, by submitting the issue . . . to a Din Torah, 75 made their own procedure and established the basis upon which their differences would be resolved. The determination of the Din Torah was in the nature of a common-law award in arbitration and acts as a bar to relitigating essentially the same issue that was decided thereby in the guise of the instant libel action.

Moreover, as the parties chose to resolve their difference in an ecclesiastical tribunal, temporal courts should not interfere with the binding results therein. 76 [citations omitted.]

Recognition of a Jewish court’s special competence in Jewish divorce matters was, of course, the basis of the New York Court of Appeals decision in Avitzur v. Avitzur. 77

Constitutionality of Equitable Relief

In Margulies v. Margulies, 78 the Appellate Division of the Supreme Court of New York refused to enforce a lower court order that a husband appear before a Beth Din and participate in a Jewish divorce. The Appellate Division reversed a lower court contempt order committing the husband to jail for a period of fifteen days for continually refusing to appear before the Beth Din. The court wasn’t clear about the reasons for its reversal. 79 It could hardly be that the husband’s inaction was insufficient to justify a finding of contempt. Refusal to comply with such an order is a classic form of civil contempt.

Civil contempts are those quasi contempts which consist in failing to do something which the contemnor is ordered by the court to do for the benefit or advantage of another party to the proceedings before the court. 80

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75. This is a term comparable to ‘Beth Din’ used in this article.
77. 58 N.Y.2d 108.
79. Id.
Rather, the court's concern was likely the constitutionality of the underlying order that the husband participate in a religious divorce. Such a concern would reflect the desires expressed by other courts in the seventies and earlier that they avoid entanglement with religious matters.

In our case a court would be ordering a tortfeasor husband to appear before a Beth Din to determine the victim wife's entitlement to a Jewish divorce, and further ordering that the husband comply with the Beth Din's findings. In examining the constitutionality of such an order, it is useful to contrast these circumstances with those in the case of *Lynch v. Uhlenhopp*.81

On April 9, 1953 the District Court of Iowa granted Gladys M. Lynch a decree of divorce ending her marriage to Francis L. Lynch. The decree included a stipulation that custody of five year old Richard R. Lynch, a child of the marriage, would be granted to Gladys Lynch and that Gladys would rear young Richard in the Roman Catholic religion.

On June 17, 1955, Francis Lynch filed an "Information for Contempt" alleging that Gladys Lynch,

has not reared and is not rearing said minor in the Roman Catholic Church or in accordance with the teachings and practice of said religion, and she has announced her purpose and determination not to observe, perform or comply with said provisions of said decree.82

The court found Gladys in contempt, but delayed passing sentence for two weeks to permit her to file an affidavit stating that she is rearing Richard in the Catholic faith. Gladys petitioned for certiorari to the Supreme Court of Iowa.

The Supreme Court of Iowa, voting 5-4, sustained the writ of certiorari with directions to the lower court to dismiss the information charging contempt. The court based its decision on a finding that the decree requiring that Gladys Lynch raise her son in the Catholic religion was void for uncertainty and indefiniteness.

How are we to determine what must be done to rear a child in any given religion? Religion is itself difficult to define.

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What constitutes "rearing" a child in the religion or cults of this church, or of any church? Must he be taken to church once a week, or once in two weeks, on Sunday? If mid-week services are

81. 248 Iowa 68, 78 N.W.2d 491 (1956).
82. Lynch v. Uhlenhopp, 78 N.W.2d at 493.
held, must he be taken to them? Is it required that he attend catechism class? Must he attend a parochial school if the particular denomination in question maintains such schools? What fast days must be observed, what Lenten observances followed? Would it be sufficient if the child be required to conform to a part of these things, and if so which part? Or are all of them required? The difficulty would be the same, no matter what church might be named in such a decree as the one now before us.\footnote{Id. at 496-97.}

Although it did not deem constitutional issues determinative in the case, the court found the contempt order constitutionally offensive. Among other references the court quoted the words of Mr. Justice Jackson in \textit{West Virginia State Board of Education v. Barnette}.,\footnote{319 U.S. 624 (1943).} If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.\footnote{Id. at 642.}

Mr. Justice Jackson's statement reflects the twin commands of the first amendment religion clauses, that government neither establishes religion nor prohibits its free exercise. The order to Mrs. Lynch that she rear her son in the Roman Catholic religion offends both provisions. If she is truly to rear the child as a Catholic, she must act to prefer Catholicism to Protestantism in the many ways in which they differ. Such a requirement offends the free exercise clause.\footnote{\textit{Cf. Wisconsin v. Yoder}, 406 U.S. 205 (1972).} To judge whether she has truly reared Richard as a Catholic, the court must determine the true course of Catholic upbringing. Such an “entanglement” with religion offends the establishment clause.\footnote{\textit{Cf. Lemon v. Kurtzman}, 403 U.S. 602 (1971).}

Neither of these characteristics are present in our case where a husband is ordered to appear before a Beth Din and comply with its determination of the wife’s right to a divorce. As the courts recognized in \textit{Stern v. Stern}, and \textit{Minkin v. Minkin}, writing, executing and delivering a get is not a religious act.\footnote{\textit{Stern}, 3 Fam. L. Rep. (BNA) 2810; \textit{Minkin}, 180 N.J. Super. 260.} Nor is appearing before a Beth Din an expression of religious faith. The wife needs this relief because the husband originally voluntarily married in a Jewish ceremony. Even if the husband has now adopted another religion, his appearance

\footnote{\textit{Cf. Wisconsin v. Yoder}, 406 U.S. 205 (1972).}
before a Jewish court at most amounts to an acknowledgement that the Jewish court has expertise in Jewish law. Thus the court’s order does not offend the husband’s free exercise of religion. 89

Such a court order would violate the establishment clause if it fostered “an excessive government entanglement with religion.” 90 Some entanglement of government with religion is inevitable. As the court noted in Minkin, 91 the state has already become entangled with religion when it provided for marriage conducted by a rabbi, the very act which created the parties’ obligations. The question becomes what kind of entanglement should be deemed “excessive.”

In his treatise, American Constitutional Law, Laurence Tribe has identified three types of governmental activity that would lead to a finding of “excessive” entanglement: 92 (1) Substantive governmental evaluation of religious practices, 93 (2) extensive state investigation into church operations and finances, 94 and (3) the entanglement of government into difficult classifications of what is or is not religious. 95 There have been circumstances where even these types of entanglements have not been deemed excessive. For example, when ownership of church property was in dispute following a schism, the Supreme Court ruled that a state court may adopt neutral principles of law to determine which faction is the “true congregation” entitled to occupy the property. 96

The court order in our case would avoid these pitfalls by leaving to the religious tribunal determination of the wife’s entitlement to a divorce. The court would thereby neither evaluate nor decide for itself the standards for divorce under Jewish law.

The Supreme Court has announced two other concerns in reviewing establishment clause challenges, that the governmental action have some secular legislative purpose and that its primary effect must be one that neither advances nor inhibits religion. 97 Neither of these concerns are seriously at risk here. The purpose of the court order is

89. See Mansfield, The Religion Clauses of the First Amendment and the Philosophy of the Constitution, 72 Cal. L. Rev. 847, 850 (1984) for a discussion of how "nonreligion" has no protection under the Free Expression clause.
94. Walz, 397 U.S. at 691 (Brennan J., concurring).
95. Id. at 698 (Harlan, J., concurring).
to provide an effective remedy for the husband's tort, a secular purpose. To the extent that the court's action advances Judaism, that would be no more than a secondary effect. The primary effect is to effectuate the civil law. If, however, the court were to deprive the wife of an effective remedy solely because the remedy would benefit religion, such a deprivation might well violate her rights under the Free Exercise Clause.

The leading Supreme Court decision on the free exercise clause is *Sherbert v. Verner*. In that case the plaintiff, a member of the Seventh-day Adventist Church, was fired from her job because she would not work on Saturday, the sabbath day of her faith. She could not obtain other work because of her continued refusal to work on Saturday, and filed for unemployment benefits under state law. The South Carolina Employment Security Commission disqualified her from receiving benefits because she would not work on Saturday. The South Carolina Supreme Court sustained the disqualification. The United States Supreme Court reversed, holding that disqualification from receiving unemployment benefits because of plaintiff's refusal to work on her sabbath violated plaintiff's right to the free exercise of religion.

Here not only is it apparent that [plaintiff's] declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits on the one hand, and abandoning one of the precepts of her religion in order to accept work on the other hand. Government imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against [plaintiff] for her Saturday worship.

Here the plaintiff is the victim of a tort. The proposed relief would, under appropriate circumstances, permit her to remarry consistently with her religious beliefs. Denying such effective relief forces the plaintiff to choose between following the precepts of her religion and forfeiting the opportunity to remarry on the one hand, and abandoning one of the precepts of her religion in order to remarry on the other hand. Such a choice, like the one in *Sherbert*, would operate as a penalty on plaintiff for the exercise of her religion.

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99. *Id.* at 404.
CONCLUSION

The existence of divorce laws in Deuteronomy indicates that divorce has been a Jewish reality for millenia. Nonetheless, the interface of American and Jewish divorce presents a contemporary crisis for American Jews whenever a secularly divorced husband refuses to give his wife a Jewish Bill of Divorcement, a get. Recognizing such a refusal as intentional infliction of emotional distress will not eliminate this crisis. A legal remedy is never a preferred solution in a domestic relations conflict. Appropriate relief involves a constitutional but extraordinary procedure with the civil court assigning a Jewish court to hear the issue of a wife’s right to a Jewish divorce. Moreover, the same result may well be reached using contract theories already recognized by American courts. Yet, finding that the recalcitrant husband is a tortfeasor does more than add another legal theory for relief. It signifies recognition that the recalcitrant husband’s conduct is wrong not only because it is a breach of an agreement, but because it is societally unacceptable. Even if a tort theory proves of only marginal value to wronged wives, it should find significance in the dignity of the law.