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Civil Actions for Acts that Are Valid According to Religious Family Law but Harm Women's Rights: Legal Pluralism in Cases of Collision Between Two Sets of Laws

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Civil Actions for Acts that Are Valid According to Religious Family Law but Harm Women's Rights: Legal Pluralism in Cases of Collision Between Two Sets of Laws

*Benjamin Shmueli**

ABSTRACT

This Article analyzes the implications of legal pluralism when religious family law conflicts with state civil tort law. Refusal to grant a get (a Jewish divorce bill) in Jewish law, divorcing a wife against her will in Muslim Shari'a law, and bigamy and polygamy in Muslim Shari'a law are practices permitted by personal-religious family law that harm human rights. This Article seeks to answer the question whether tort law should overrule family law, with the proviso that it be applied sensibly when deciding family matters; or whether the two disciplines of law are complementary, in the sense that liberal tort law completes nonliberal religious family law by supplying remedies in the form of damages only, whereas religious family law determines exclusively the status (married or divorced). This Article further examines whether tort law and contract law should act independently in the area of damages, even if the indirect but inevitable outcome may be a change in marital status.

The case of a worldwide harmful practice, in which there is a tension (even collision) between two fields of law—religious

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family law and civil tort and contract law—is one of legal pluralism, which makes it possible for the two systems of law and courts to coexist. But should legal pluralism contribute to the creation of a more liberal society by asking that the message of liberal tort law be embraced? Or should legal pluralism promote a compromise solution and seek a middle ground in order to minimize the conflict between the contradictory views? This Article addresses these questions, presents the prevailing solutions being offered in the literature, and suggests a unique intermediate multifaceted solution. In doing so, it seeks to become the first in an extensive literature on legal pluralism, suggesting solutions (or at least platforms for solutions) to collisions, rather than merely providing descriptions of them, and thus helping to ease the tension between different laws and courts in the same state.

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I. INTRODUCTION

The present study aims to analyze tort and contract actions for acts that are valid according to religious-personal family law, but at the same time seriously harm women’s rights. This is a case study of the implications of legal pluralism when religious family law conflicts with state civil tort law.

The application of religious norms by legal systems of the state is deeply problematic in some countries that have retained colonial-era practices because they apply only a portion of religious law—religious family law, which does not support fundamental human rights in the same way as liberal laws do.¹ Refusal to grant a *get* (a Jewish divorce

1. See Adam S. Hofri-Winogradow, *A Plurality of Discontent: Legal Pluralism, Religious Adjudication and the State*, 26 J.L. & RELIG. 57, 58–59, 62, 80–82 (2010) (describing the application of religious norms conflicting with legal order); see also Ayelet Blecher-Prigat & Benjamin Shmueli, *The Interplay Between Tort Law and*

bill)² in Jewish law, divorcing a wife against her will in Muslim *Shari'a* law, and bigamy and polygamy in Muslim *Shari'a* law are practices permitted by personal-religious family law. In some countries, these laws constitute the state law in matters of marriage and divorce. In other countries, they constitute nonstate law, and cases of marriage and divorce are adjudicated before the private courts of the various religions, with judgments enforced at times by state civil courts.³ These private courts have the authority to issue orders (e.g., that the husband should grant his wife a *get*), but they lack the power to enforce these orders or to impose any kind of sanctions such as imprisonment, removing a driving or professional license, etc.⁴

These practices can harm human rights. Until recently, tort law in various countries did not seek to intervene in family law even when criminal law in these countries perceived the acts as improper and regarded them as felonies. Few husbands have been indicted for the practices considered in this Article: refusing to grant a *get*, divorcing a wife against her will, and bigamy or polygamy. Recently, recognizing the harm that these behaviors cause to women, tort law has been introduced to adjudicate these practices.

The question of what constitutes "harm" under tort law is not trivial, and the answer has undergone many changes in recent decades. Where does one draw the line? Can a woman receive damages following her husband's tortious practice of refusing to grant her a divorce, or divorcing her against her will, or committing bigamy and polygamy by marrying another woman and thus harming her rights both economically and emotionally? To impose damages in these cases, tort law must overcome the main obstacle of common law immunities in intrafamilial tort actions that have been operational in some countries and in some cases still operate, albeit unofficially.⁵

Religious Family Law: The Israeli Case, 26 ARIZ. J. INT'L & COMP. L. 279, 283 (2009) (discussing the application of religious norms in Israel).

2. See Talia Einhorn, *Jewish Divorce in the International Arena*, in PRIVATE LAW IN THE INTERNATIONAL ARENA—LIBER AMICORUM KURT SIEHR 135, 137 (Jürgen Basedow et al. eds., 2000) (defining *get* as a "bill of divorce, twelve lines written in a fixed form mandated by Jewish law").

3. See *infra* notes 18–32 and accompanying text (discussing state civil courts' involvement in enforcing and cooperating with religious courts); see also Alexandra Leichter, *The Effect of Jewish Divorce Law on Family Law Litigation*, INT'L ACAD. MATRIMONIAL L. 10, http://www.iaml.org/cms_media/files/the_effect_of_jewish_divorce_law_on_family_law_litigation.pdf (last visited Apr. 6, 2013) (discussing cooperation between Rabbinic courts and civil courts in Jewish divorce proceedings).

4. See Leichter, *supra* note 3 (noting roles and responsibilities that lie with the Rabbinic court).

5. See, e.g., Benjamin Shmueli, *Tort Litigation Between Spouses: Let's Meet Somewhere in the Middle*, 15 HARV. NEGOT. L. REV. 195, 201 (2010) (outlining the familial approach to tort litigation); Note, *Litigation Between Husband and Wife*, 79 HARV. L. REV. 1650 (1966) (discussing spousal immunity and other immunities in intrafamilial tort actions).

These immunities effectively block the access of tort law to the family arena because it is considered an intervention in the affairs of family law. Another, related reason is the reluctance to intervene in the autonomy of the family, even in cases of a family in crisis.⁶

The involvement of tort law in family life may not be surprising given that in recent decades, tort law has become involved in many types of issues that were previously considered taboo. Tort law recognizes the damage caused by these practices as harm even if this may affect marital status in family law. Tort action may be leveraged to obtain the primary remedy regarding status, thereby liberally shaping religious family law by directing husbands (who refuse to grant a *get*, divorce their wives against their will, or marry another woman) to reconsider their harmful acts. When the outcome of religious family law is not compatible with liberal human rights with regard to status, tort law seeks to eliminate harmful practices by awarding damages even at the cost of confrontation with religious family law and the religious courts.

Should tort law in some cases be independent in considering these cases? Should the solution to the collision between the laws lie in the examination of each case according to the objectives of tort law, or should there be some compromise between laws that have different objectives? Should civil law overrule family law in the case of conflict between the laws, but with the proviso that tort law be applied with sensitivity when deciding family matters? Or is it a question of complementarity between the two disciplines of law, in the sense that liberal tort law completes nonliberal religious family law by supplying remedies in the form of damages only, whereas religious family law still determines exclusively the status (married or divorced)? Can and should tort law act in the area of damages, even if the indirect but inevitable outcome may be a change in marital status?

The case of a worldwide harmful practice, in which a tension (even collision) exists between two fields of law, religious family and civil tort (and sometimes also contract law), presents a case of legal pluralism. The tension arises because within a particular domain, there is competition between different legal systems that do not share

6. See Benjamin Shmueli, *Who's Afraid of Banning Corporal Punishment? A Comparative View on Current and Desirable Models*, 26 PENN. STATE INT'L L. REV. 57, 66 (2007) (introducing different models for the law's intervention in intrafamilial relations). I have previously distinguished between a family in an unsolvable crisis, where there is room for tort actions in principle, and a family in which the crisis seems solvable, where greater caution is needed. See Shmueli, *supra* note 5. I also distinguished between the actions of spouses and ex-spouses and those of children against their parents, given the fact that children never divorce their parents. Furthermore, I suggested distinguishing between interspousal tort actions where no children are involved and actions where the couple has children, because these actions may significantly harm the spousal relations, and children may suffer as a result. But even in the most problematic cases, I suggested never blocking these actions and creating immunities, but only called for greater sensitivity in litigation. *Id.*

the same source of normative authority. Although they apply simultaneously to the same behavior, each one bases its normative position on the behavior of a different source, and each one seeks to dominate the other with regard to damages and status. Legal pluralism reflects a situation in which it is possible at times for the two systems of law and courts to coexist. But does it also play another role? And if so, should legal pluralism contribute to the creation of a more liberal society by asking that the message of liberal tort law be embraced, understanding that the different points of view of the legal systems cannot be reconciled? Or is this solution not a pluralistic one in reality because pluralism means subjecting people to more than one normative order?⁷ Does the preference of one system necessarily eliminate the other? Should legal pluralism promote a compromise solution and seek a middle ground to minimize the conflict between contradictory views and thereby help harmonize them, despite the fact that the two disciplines of law have different objectives? Should legal pluralism guide courts in interpreting tort law in a sensitive way, thereby releasing them from the classic formulation of the goals of tort law?

Part II of this Article introduces the case of damages in tort law for acts that are valid according to (state or private) religious family law as a case of legal pluralism. Part III discusses cases of divorcing a wife against her will and bigamy or polygamy under *Shari'a* law. Part III also raises the question of whether, in these cases, tort law actually complements religious family law, demonstrating that legal pluralism allows a compromise. Part IV addresses the case of refusal to grant a *get* in Jewish law and shows that there is a high cost to a possible collision in this case because tort law actually circumvents religious family law and tries to change marital status. In this state of collision between two sets of law, the question is raised of whether it is the role of legal pluralism to resolve the collision or merely to describe it, i.e., whether the role of legal pluralism is prescriptive or merely descriptive. This Article lists several possible solutions to the collision (including solutions not only from tort law, but also from contract law and civil family law), proposes a multifaceted solution for implementing tort law in a sensitive manner, and offers methods of implementation. Part V concludes by suggesting that there is room for breaking the stranglehold of state law recognizing only one agent: religious family law (a state-law agent in some jurisdictions and a community or private agent in others). This arrangement harms human rights. This Article recommends enabling tort law, always a state-law agent, to intervene and empower human rights by awarding damages. In the course of this intervention, any possible collision

7. See, e.g., Joseph Raz, *Autonomy and Pluralism*, in *THE MORALITY OF FREEDOM* 369–99 (1986) (explaining that subjecting people to more than one normative order reflects a liberal perspective).

between the agents must be handled sensitively, with mutual respect between the agents.

II. DAMAGES IN TORT LAW FOR ACTS THAT ARE VALID IN RELIGIOUS FAMILY LAW: A CASE OF LEGAL PLURALISM

Legal pluralism addresses situations in which several legal systems operate concurrently in one social unit or sphere,⁸ in other words, it describes cases of competing sovereignties and sources of law.⁹ This paradigm struggles against the hegemonic perception of legal centralism, especially of the state as the sole source of the system of normative arrangements.¹⁰ Indeed, the classic—but not only—form of legal pluralism is that of one state legal system versus one private, nonstate legal system, but the possibility also exists of a collision between two state-law agents.¹¹ Thus, legal pluralism often “criticizes the idea that state-made law is the only form of law used to regulate society, offering instead a polycentric or polymorphic concept of law.”¹² Early scholars of legal pluralism emphasized the substantial social influence of nonstate, private normative bodies.¹³

8. See, e.g., Sally Engle Merry, *Legal Pluralism*, 22 LAW & SOC'Y REV. 869, 870 (1988) (defining legal pluralism).

9. See Carol Weisbrod, *Family, Church and State: An Essay on Constitutionalism and Religious Authority*, 26 J. FAM. L. 741, 745 (1987–1988) (elaborating on how legal pluralists describe the existence of different sources of authority).

10. See John Griffiths, *What Is Legal Pluralism*, 24 J. LEGAL PLURALISM & UNOFFICIAL L. 56, 59 (1986) (describing conflict between legal pluralism and the concept of the state as the sole source of legality).

11. For the history of legal pluralism, see, e.g., Ruth Halperin-Kaddari, *Expressions of Legal Pluralism in Israel: The Interaction Between the High Court of Justice and Rabbinical Courts in Family Matters and Beyond*, in JEWISH FAMILY LAW IN THE STATE OF ISRAEL 185, 210–13 (Michael D.A. Freeman ed., 2002). Halperin-Kaddari has distinguished between classical and new trends of legal pluralism. *Id.* As a reminder of the division between classic and new trends of legal pluralism, she suggests distinguishing also between legal pluralism in the context of social systems classified on the basis of unique cultural, ethnic, or religious characteristics, as opposed to legal pluralism outside this context. See *id.* at 233.

12. See Oren Perez, *Legal Pluralism*, in OXFORD ENCYCLOPEDIA OF AMERICAN POLITICAL AND LEGAL HISTORY 97 (Donald T. Critchlow & Philip R. VanderMeer eds., 2012).

13. See, e.g., LON L. FULLER, *THE MORALITY OF LAW* 3–32 (rev. ed. 1969) (discussing the relationship between social morality and the law); Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 116 (1992) (describing the diamond industry's rejection of state-created law and preference for “extralegal agreements” and private law); Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623, 672–73 (1986) (describing how norms, not legal rules, are the source of basic entitlements); Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1400 (1993) (pointing out that while some forums may be considered “outside” the official law, they can be “regarded as legal forums in the strict sense”); Griffiths, *supra* note 10, at 85

But in recent years, legal pluralism has also come to include global phenomena, referred to as “global legal pluralism.” This form of legal pluralism challenges the notion of the state as the exclusive source of regulation and norm making in the international domain and highlights the increasing influence of nonstate regimes.¹⁴ Another form of legal pluralism, relevant to the present case, relates to ideological diversity *within* national legal systems,¹⁵ and it involves

(noting the influences of various nonstate associations); Merry, *supra* note 8, at 870 (discussing the interplay between European law and customary indigenous traditions during the colonial period).

14. Perez, *supra* note 12, at 97 (describing a polymorphic concept of law); see also Paul Schiff Berman, *From International Law to Law and Globalization*, 43 COLUM. J. TRANSNAT'L L. 485, 493 (2005) (noting there is “no need to see law as necessarily encapsulated only by formal governmental acts”); Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155, 1159 (2007) (asserting the influential interplay between overlapping legal systems); William W. Burke-White, *International Legal Pluralism*, 25 MICH. J. INT'L L. 963, 963 (2004) (noting that international law is “being transformed into a pluralist system”); Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT'L L. 999, 1005 (2004) (discussing the polycentric global society); Ralf Michaels, *Global Legal Pluralism*, 5 ANN. REV. L. & SOC. SCI. 243 (2009) (discussing the interaction between globalization and legal pluralism); Oren Perez, *Normative Creativity and Global Legal Pluralism: Reflections on the Democratic Critique of Transnational Law*, 10 IND. J. GLOBAL LEGAL STUD. 25 (2003) [hereinafter Perez, *Normative Creativity*] (discussing the legitimacy of transnational law in a legal pluralism world); Oren Perez, *Purity Lost: The Paradoxical Face of the New Transnational Legal Body*, 33 BROOK. J. INT'L L. 1 (2007) [hereinafter Perez, *Purity Lost*] (analyzing the “increasing complexity of the international legal system”); Brian Z. Tamanaha, *Understanding Legal Pluralism: Past to Present, Local to Global*, 30 SYDNEY L. REV. 375 (2008) (giving an overview of legal pluralism and challenges associated with overlapping areas of law); Gunther Teubner, ‘Global Bukowina’: *Legal Pluralism in the World Society*, in *GLOBAL LAW WITHOUT A STATE* 3–28 (Gunther Teubner ed., 1997) (asserting that global law is “a legal order in its own right”); William Twining, *Normative and Legal Pluralism: A Global Perspective*, 20 DUKE J. COMP. & INT'L L. 473 (2010) (examining, among other issues, whether “global legal pluralism” is largely, but not entirely, attributable to globalization and whether this represents an extension of the mainstream sociolegal tradition or a qualitatively new departure, even a new “paradigm”); Peer Zumbansen, *Transnational Legal Pluralism*, 1 TRANSNAT'L LEGAL THEORY 141, 149 (2010) (describing the “increasingly transterritorial nature” of law).

15. See Perez, *supra* note 12, at 97 (discussing the “interaction dynamic between different normative regimes”); cf. Twining, *supra* note 14, at 488–89 & n.53. William Twining notes:

It is important to distinguish between state legal pluralism (sometimes called weak legal pluralism), legal polycentricity (the eclectic use of sources within different sectors of one state legal system),⁵² and legal pluralism conceived as the coexistence of two or more autonomous or semi-autonomous legal orders in the same time–space context.⁵³

...

53. The literature on legal pluralism sometimes refers to plurality of sources of law or of arguments, plurality of centers of law creation, plurality of sets of rules and so on. However, the main focus of social fact pluralism is on institutionalized normative orders, i.e., fairly large scale phenomena.

tensions between religious and secular-liberal commitments in family law.¹⁶ “[N]early all mainstream studies [of sociolegal pluralism] have focused on sub-state or sub-national phenomena within a single country.”¹⁷

Recent literature on legal pluralism presents two models of religious adjudication services. The first is the *integrationist model*, in which the state itself provides religious adjudication services in some types of cases, mainly in family matters: marriage and divorce.¹⁸ This is the model employed in Israel and in some Muslim-majority countries.¹⁹ Although legal pluralism in the state arena usually

Twining, *supra* note 14, at 488–89 & n.53.

16. See Hofri-Winogradow, *supra* note 1, raising the question whether a modern state provides its citizens, residents, and others subject with a just and stable legal order by referring them to norms associated with their respective religions and enforced by state courts. Hofri-Winogradow examines the case of Israel, where nonstate religious-Jewish tribunals litigate matters of civil law, and observant Jews refer to them because the secular state system does not provide a stable legal order for them. I present two models described below, the *integrationist model* and the *community court model*. Hofri-Winogradow, among others following John Griffiths, views these models as legal pluralism, although Griffiths is currently referring to “pluralism in social control” or to “normative pluralism.” See *id.* at 57 (referring to John Griffiths, *The Idea of Sociology of Law and Its Relation to Law and Sociology*, 8 CURRENT LEGAL ISSUES 49, 63–64 (2005)); cf. MENACHEM MAUTNER, LAW AND THE CULTURE OF ISRAEL (2010); Twining, *supra* note 14. The tension often stems from cases that are typical of multicultural societies. See MAUTNER, *supra*; Hofri-Winogradow, *supra* note 1, at 62 (describing concurrent jurisdiction between religious courts and state civil courts). See generally WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS (1995) (discussing the relationship between minority rights and human rights in the context of cultural pluralism); AYELET SHACHAR, MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN’S RIGHTS (2001) (discussing challenges with multicultural accommodation of laws); CHARLES TAYLOR, MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION (1994) (discussing current preoccupation with identity and recognition in politics); Joseph Raz, *Multiculturalism: A Liberal Perspective*, in ETHICS IN THE PUBLIC DOMAIN 170 (1994) (describing the potential necessity for “mitigating actions in the multicultural society” for tensions between culture and human rights).

17. See Twining, *supra* note 14, at 510.

18. See Hofri-Winogradow, *supra* note 1, at 57, 59–60 (describing the Israeli state’s application of religious norms).

19. See *id.* at 60 (discussing Israel’s use of the integrationist model). As to Israeli law, see Blecher-Prigat & Shmueli, *supra* note 1 (discussing marriage and divorce proceedings in Israel); Pascale Fournier, Pascal McDougall & Merissa Lichtsztral, *Secular Rights and Religious Wrongs? Family Law, Religion and Women in Israel*, 18 WM. & MARY J. WOMEN & L. 333, 335 (2012) (“Israel’s family law regime . . . confers jurisdiction over divorce and marriage to (religious) rabbinical courts.”); Halperin-Kaddari, *supra* note 11 (regarding the situation in Israel, at least as far as personal status in family law is concerned, as a state of legal pluralism); Hofri-Winogradow, *supra* note 1, at 70–71 (outlining how “core status issues of family law” are still largely left to rabbinical courts); see also Perry Dane, *Maps of Sovereignty: A Meditation*, 12 CARDOZO L. REV. 959, 979 (1991) (considering the role of religious law in Israel and India); Weisbrod, *supra* note 9, at 744 (describing the interaction between Rhode Island state law and Jewish divorce). Halperin-Kaddari also offers a new perspective on the dual system of family law in Israel and on the interaction between the civil and the religious systems. She describes a different collision than the one

concerns nonstate law,²⁰ this is a different case. This Article focuses on this model because *Shari'a* and Jewish family law include personal-status laws for adherents to their religions, with adjudication in *Shari'a* and rabbinical state courts. All other family²¹ and civil interspousal litigation, including tort actions, is conducted according to civil law in state civil courts.²² To the extent a collision exists between the laws and the courts, it is a collision between different courts and laws of the state itself. The collision may be serious because it may lead to the perception that the state speaks with two different voices at the same time, with one state agent oriented toward human rights, the other less so, and neither court of law relenting because both have the power and the authority of the state.

The other model of religious adjudication services is the *community court model*, in which all state adjudication is secular, but nonstate private religious courts, operated by various minority and ethnic communities, serve as arbitrators. Occasionally, state courts enforce agreements arbitrated before these community courts.²³ As William Twining notes:

[L]egal pluralism studies did not break very far away from a weak form of state centrism: a great deal of the attention has been focused on the relations and interaction between non-state legal orders and the state. This includes not only studies of the responsiveness or otherwise of state legal systems, but also stories of resistance, "customary law" as a hybrid creation out of interaction between colonial rulers and locals who claimed to be or were treated as chiefs, spokespersons, or representatives of their people.²⁴

This Article concerns family affairs, but it should be noted that in U.S. law there are manifestations of this model in other branches

described in this Article: one within family law itself, between the religious and the secular civil portions of family law in Israel. See also ISLAMIC FAMILY LAW IN A CHANGING WORLD: A GLOBAL RESOURCE BOOK (Abdullahi An-Nai'm ed., 2002) [hereinafter FAMILY LAW IN A CHANGING WORLD] (expanding on Muslim-majority jurisdictions).

20. See Twining, *supra* note 14, at 515 ("[L]egal pluralism typically presupposes a conception of non-state law.").

21. See Hofri-Winogradow, *supra* note 1, at 62 (pointing out some ancillary family matters such as paternity, custody, guardianship, and the economic aspects of personal status); *id.* at 70–71 (expanding on Israeli law); see also Blecher-Prigat & Shmueli, *supra* note 1 (same); Fournier, McDougall & Lichtsztral, *supra* note 19, at 342 (same); FAMILY LAW IN A CHANGING WORLD, *supra* note 19 (expanding on Muslim-majority jurisdictions).

22. See Fournier, McDougall & Lichtsztral, *supra* note 19, at 341 (describing the civil law system in Israel).

23. See Hofri-Winogradow, *supra* note 1, at 60–61 (discussing the role of community courts in some jurisdictions).

24. Twining, *supra* note 14, at 511; see also Gad Barzilai, *Beyond Relativism: Where Is Political Power in Legal Pluralism?*, 9 THEORETICAL INQUIRIES L. 395 (2008) (generally discussing customary law and legal pluralism).

of law as well, at least since the 1940s.²⁵ In the United States, private religious courts of various religions (Catholic, Episcopal, Methodist, Presbyterian, Lutheran, Mormon, Amish, Jewish Orthodox, and Jewish Conservative) address a variety of issues—such as intrachurch monetary disputes, intrasocial sanctions against members of the congregation, etc.—not only matters of religious divorce.²⁶ Members of religious communities who have been punished by decisions of intracongregational tribunals turn to secular state courts against the community tribunals, asking for damages or injunctions.²⁷ The classic cases concern pleas against religious social remedies, such as ostracism, imposed because of conduct that conflicted with the behavior codes of the congregation. The claimants base their pleas to secular state courts on the ground that the decisions of the community tribunals are contrary to liberalism and human rights and therefore harm their rights.²⁸ They usually ask for damages or injunctions in cases of emotional, social, or economic harms.²⁹ One cannot find a unified U.S. approach in these cases, but in certain cases secular legal courts have intervened, mostly by awarding damages and at times even by granting injunctions.³⁰ The courts had to face arguments such as the free exercise of religion in the First Amendment to the U.S. Constitution, or arguments based on contract law claiming that members of the religious congregations had consented, at least implicitly, to the rules of the congregation.³¹ Although these cases fall outside the scope of the present Article, similar arguments can be raised by husbands against women who marry according to *Shari'a* or Jewish law, namely that they had consented to the judicial outcome of the religious courts even if the rulings harmed their human rights. But at times litigants have no

25. See generally Ruth Halperin-Kaddari, *More on Legal Pluralism in Israel*, 23 TEL-AVIV L. REV. 559, 568–70 (2000) (referring also to Ruth Halperin-Kaddari, *The Interaction Between Religious Systems of Adjudication and the Secular Legal System in the United States* 6–36 (unpublished J.S.D. thesis, Yale Law School, 1993)).

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*; see also, e.g., *Paul v. Watchtower Bible & Tract Soc'y of N.Y., Inc.*, 819 F.2d 875 (9th Cir. 1987) (awarding damages for ostracism in a religious sect based on the free exercise of religion enshrined in the First Amendment to the U.S. Constitution); *Guinn v. Church of Christ of Collinsville*, 775 P.2d 766 (Okla. 1989) (rejecting the church's contract law arguments and awarding damages to a woman who was accused by the church of demonstrating inappropriate behavior); *Yoder v. Helmuth*, No. 35747 (Ohio C.P. Wayne Cnty. Nov. 7, 1947) (awarding damages and an injunction in a case of ostracism of the Amish congregation against one of its members); *Bear v. Reformed Mennonite Church*, 341 A.2d 105 (Penn. 1975) (rejecting a claim for damages in a case of ostracism by the church owing to difficulties of proof, but acknowledging in principle the possibility of state intervention in intrareligious judgments in cases in which there is a paramount state interest).

real choice, as in countries in which civil marriage does not exist. By contrast, in cases such as ostracism, the member always has the choice of leaving the congregation. In addition, many women, especially secular, but also Orthodox and even ultra-Orthodox, are not aware of the detailed *halakhic* (Jewish law) rules of marriage and divorce, as opposed to members of congregations who sometimes know well the rules of their congregation. But even if women are aware of possible outcomes of *get* refusal at the time of their marriage, most of them hope for a good future and do not believe that they will reach a state of divorce; therefore, they do not ascribe great importance to the fact that the *get* depends on the husband's will. By contrast, when a person enters a congregation, the person presumably is willing to assume all the commitments of that congregation.

In family affairs, the community court model is found primarily in North American countries and in EU jurisdictions. Collision is possible in this model, too, but at times less than in the integrationist model because the religious courts, unlike the civil courts, are not state courts. They are therefore likely to have less *de facto* power if they do not rule according to human rights principles, because state courts may not always acquiesce in their judgments and enforce them.³² This Article addresses the community model as well, but it emphasizes that the more serious clashes stem from the integrationist model.

This discussion focuses on two models of legal pluralism when there is diversity *within* national legal systems. One of the agents is a state-law agent: civil courts that adjudicate according to tort law; the other consists of religious family law courts, a state-law agent in some jurisdictions and a nonstate-law agent in others. Both agents act according to their authority and power, but civil judgments for damages, which are in the exclusive jurisdiction of secular civil courts, may infringe in one way or another upon the exclusive jurisdiction of the religious agent. This does not present a classic case of potential conflict between liberalism of the state-law agent versus pluralism for the sake of the community or group.³³ In this case, liberalism and pluralism do not contradict one another. Often legal pluralism serves as an invaluable tool, especially for communities in multicultural societies, for preserving local cultures alongside state norms (usually liberal ones), thereby promoting cultural pluralism,³⁴

32. See Hofri-Winogradow, *supra* note 1, at 61–62 (explaining that Western jurisdictions are more willing to accept, in this regard, private Jewish courts than private *Shari'a* courts).

33. See Halperin-Kaddari, *supra* note 11, at 235–36.

34. See Barbara J. Flagg, *The Algebra of Pluralism: Subjective Experience as a Constitutional Variable*, 47 VAND. L. REV. 273, 279 (1994) (debating the extent to which we want a culturally pluralist society); Halperin-Kaddari, *supra* note 11, at 234–35; Maurice Rickard, *Liberalism, Multiculturalism, and Minority Protection*, 20 SOC.

but the situation differs in this case because legal pluralism promotes liberal norms by enabling the legal intervention of tort law. Therefore, the problem of collision between the agents is best described by literature on legal pluralism,³⁵ which may also provide solutions. Indeed, matters of marriage and divorce; family law and private law; and minorities and relatively small groups, clans, and communities constitute the focus of many sociolegal pluralism studies.³⁶

Some authors have emphasized the *risks* of legal pluralism creating potential incoherence or even collisions between regimes, legal systems, or legal disciplines; others, however, have pointed out the possible *contribution* of legal pluralism to the creation of a more liberal, democratic, and tolerant society.³⁷ The two ideas reflect different aspects of legal pluralism, not merely describing a situation in which there is multiplicity of normative systems, but also regarding legal pluralism as an ideal of reaching a compromise or aspiring to reach maximum harmony between conflicting normative interests.

Is tort law really on a collision course with religious law in cases of divorcing a wife against her will, bigamy, polygamy, or refusal to grant a *get*? All tort actions against spouses, ex-spouses, or a parent relate in some way to family *affairs*, but not all of them relate to family *law* (e.g., actions for violence, libel, slander, or abuse).³⁸ Certain tort actions reflect a “positive” and complementary

THEORY & PRAC. 143 (1994). Note that in countries in which there is separation between state and religion, the religious law is applied also to people who are not necessarily members of the group; in other words, the religious law applies to every Jew, Muslim, or Christian regardless of their consent, including secular people who do not share the relevant religious commitments. This is definitely not an ordinary case of multiculturalism.

35. Indeed, the phenomenon of two different legal systems, both national or one of them global, dealing with similar topics and thus encouraging forum shopping, is not rare nowadays. See generally Fischer-Lescano & Teubner, *supra* note 14, at 1000–01 (noting the “astonishing figure of around 125 international institutions in which independent authorities reach final legal decisions”).

36. See Twining, *supra* note 14, at 510–11 (indicating that “[u]ntil recently, much less attention has been paid to commercial and economic law, migration, governance structures, criminal law, and human rights,” but also that “there are notable exceptions”).

37. See Fischer-Lescano & Teubner, *supra* note 14 (presenting the problem of regime collision from different aspects); Perez, *Normative Creativity*, *supra* note 14 (introducing the different views in this issue); Perez, *Purity Lost*, *supra* note 14; Twining, *supra* note 14 (examining the relations between legal pluralism, normative pluralism, and general normative theory from a global perspective; trying to differentiate between social and other norms; and presenting the mainstream literature on legal pluralism).

38. See generally Benjamin Shmueli, *What Have Calabresi & Melamed Got To Do with Family Affairs? Women Using Tort Law in Order To Defeat Jewish and Shari'a Law*, 25 BERKELEY J. GENDER L. & JUST. 125, 141 (2010) (describing a category of lawsuits that creates no conflicts between religious courts and family courts because the cases relate exclusively to tort law).

interaction between the laws. For example, tort actions for child abduction or violations of visitation rights rely on findings and decisions given in religious or civil family courts, and actually assist family law in enforcing decisions.³⁹ Nevertheless, some actions are alleged to reflect a clash between tort law and personal-religious family law. These are matters of marriage and divorce under the jurisdiction of the religious courts, especially in cases in which religious family law validates the actions of one spouse, usually the husband, but liberal societies regard them as causing serious harm to human rights. In these cases, collisions often appear between different and complicated perceptions and values: liberal democratic on one hand, and nonliberal, traditional, and religious on the other.

The challenge of legal pluralism is to successfully settle the collision within national legal systems.⁴⁰ Alternatively, it may be argued that it needs merely to describe the collision.⁴¹ Can state tort law complement religious family law that harms women's rights, or

39. See Rhona Schuz & Benjamin Shmueli, *Between Tort Law, Contract Law, and Child Law: How To Compensate the Left-Behind Parent in International Child Abduction Cases*, 23 COLUM. J. GENDER & L. 65 (2012) (analyzing different models for compensation in a situation where civil and religious law may interact in a positive manner); Shmueli, *supra* note 38, at 142–44 (discussing a category of law in which civil courts and religious courts interact in a positive manner).

40. Note that a possible solution of randomization, which has been offered by a few legal pluralism scholars for problems of pluralism in which a consent on values cannot be reached, does not seem to fit in our case. For the solution of randomization in general, see, e.g., NEIL DUXBURY, *RANDOM JUSTICE* (1999) (discussing relying on chance and randomization as a legal model); JON ELSTER, *SOLOMONIC JUDGMENTS* 36 (1989) (describing randomizations as a method); Lewis A. Kornhauser & Lawrence G. Sager, *Just Lotteries*, 24 SOC. SCI. INFO. 483 (1988); Adam Samaha, *Randomization in Adjudication*, 51 WM. & MARY L. REV. 1 (2009) (defending the judicial treatment of randomized decisions); Peter Stone, *Why Lotteries Are Just*, 15 J. POL. PHIL. 276 (2007) (asserting that a properly constituted lottery is a reliable way for dealing with legal collisions). For randomization in different family affairs that may be compatible with this type of solution, as opposed to our case, see ELSTER, *supra*, at 163–72 (using a randomization rule in cases of child guardianship in which there is no clear-cut solution for implementing the principle of the best interests of the child); Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226 (1975) (same). In two cases, U.S. judges have used this rule and were subjected to disciplinary action. See *In re Brown*, 662 N.W.2d 733 (Mich. 2003) (holding that public censure was appropriate against a judge who used a coin flip to determine custody); *Judicial Inquiry & Review Comm'n of Va. v. Shull*, 651 S.E.2d 648 (Va. 2007) (establishing that flipping a coin to determine a matter was a violation of the Canons of Judicial Conduct). Other relevant family affairs may be the division of property in cases in which the asset is indivisible, etc. I want to thank Ori Aronson for directing me to the sources on rules of randomization. Note also that the assumption is that the basic structure of family law is not going to change, and therefore the challenge is simply to reduce its cost and not to justify this situation on pluralistic grounds.

41. Cf. Bernard Williams, *Conflict of Values*, in MORAL LUCK 71, 77, 79–80 (1981) (dealing with the third option—the possibility of some value that can be appealed to, whether independent or not, in order to rationally resolve the conflict of values—and differentiating between values as commensurate or incommensurate).

does the intervention of tort law necessarily collide with religious law? Does the intervention of one state agent in the affairs of another provide an incentive for the practice of forum shopping, which at times can be problematic?

In the next two Parts, this Article shows that it is possible to break the stranglehold of the exclusivity of religious family law (a state-law agent in some jurisdictions and a community-private agent in others) that harms human rights by enabling another (state-law) agent—tort law—to award damages to the injured party and in this way change a substantive right in one way or another. However, the cases presented by *Shari'a* and Jewish laws differ. In the cases of divorcing a wife against her will and of bigamy or polygamy under *Shari'a* law, discussed in Part III, the solution offered by legal pluralism may be simpler than that in the case of *get* refusal in Jewish law. The reason for this is that tort actions for divorcing a wife against her will and for bigamy or polygamy under *Shari'a* law do not affect *marital status*, at least not directly and in the short term, and they therefore intrude less into the affairs of religious family law than damages imposed for *get* refusal in Jewish law, discussed in Part IV.

III. DIVORCING A WIFE AGAINST HER WILL AND BIGAMY OR POLYGAMY UNDER *SHARI'A* LAW

A. *Divorcing a Wife Against Her Will and Bigamy or Polygamy*

A Muslim husband divorcing his wife against her will acts legitimately according to religious *Shari'a* law.⁴² Although *Shari'a*

42. See *Qur'an* 2:226–27 (discussing Islamic rules for divorce). This was also the case in the original Jewish law. Alan Lazerow indicates:

[R]eform in the realm of Jewish marriage and divorce came in the 10th century by an Eastern European rabbi by the name of Rabbeinu Gershom. Along with forbidding polygamy, Rabbeinu Gershom's legislative enactments generally "introduced a spirit of equality in divorce proceedings and for the most part necessitate that all divorce occur through *mutual* consent." However, despite there now being more mutuality in the divorce process than before the enactments of Rabbeinu Gershom, a more detailed analysis reveals that "a wife is still much more vulnerable than a husband because a failure to divorce carries uneven consequences."

Alan C. Lazerow, *Give and "Get"? Applying the Restatement of Contracts To Determine the Enforceability of "Get Settlement" Contracts*, 39 U. BALT. L. REV. 105–06 (2009). Talia Einhorn has also noted that original Jewish law prohibited a woman from marrying more than one man, but

[t]he husband's position is very different. His second marriage is permitted under Biblical law, and is dissolved only by death or divorce. Another rabbinical enactment, *herem de-Rabbeinu Gershom*, prohibits men from marrying a second wife. But should the husband, the enactment

court judges prefer to order a divorce following a claim for divorce filed with the court and consented to by both parties, they must admit that, according to *Shari'a* law, the husband's act is valid even if it is carried out outside the court and even if it is one-sided, without the wife's consent.⁴³ The harms may be both monetary and nonmonetary. The divorcée often finds herself with no sources of subsistence, since in many countries alimony is not granted after divorce, only child support.⁴⁴ Moreover, in conservative societies, it seems that it will be very difficult for her to be married again.⁴⁵ Therefore, she can apply for monetary damages.⁴⁶ As to nonmonetary damages, she can claim intentional infliction of emotional distress (IIED), as well as shame and emotional distress for being divorced against her will.⁴⁷

notwithstanding, marry a second wife, this marriage would be valid, and his children would enjoy all rights of legitimate children. Unlike the prohibition on divorcing a wife against her will which applied in all Jewish communities, the *herem* forbidding bigamy only applied where *Ashkenazi* Jews formed the majority of the community, polygamy being forbidden also by the dominant religion, Christianity. The *herem* did not extend to *Sephardi* Jews.

In addition, the husband may be released from the prohibition on bigamy under special circumstances. A BD [*beth din*—a rabbinical court] may grant him permission to marry a second wife if the first becomes insane and cannot be divorced because of her incapacity to consent. Permission may also be granted if the wife disappears, or refuses to accept a *get* despite the BD's order that she do so, e.g., in the case of a prohibited marriage; the wife's adultery; or when the couple have been married for ten years and have no children. Following the BD's decision to exempt the husband from the *herem*, the matter is referred to 100 rabbis for approval, and, if approved, the permit (*heter me'ah rabbanim*) becomes effective.

The wife will never be permitted to remarry. Even if the husband disappears and his abode is unknown, she remains *agunah*, unless she can prove his death.

Einhorn, *supra* note 2, at 138–39.

43. I'ad Zahalka, CEO, Israeli *Shari'a* Courts, Lecture at a Sha'arei Mishpat Law College Conference on *Shari'a* and Church Courts (Sept. 16, 2009).

44. See, e.g., Act for Amendment of Family Laws (Maintenance) 1959, S.H. No. 726 p. 72 (Isr.); MOSHE CHIGIER, HUSBAND AND WIFE IN ISRAELI LAW 99–104, 191–93 (1985) (“[T]hough the divorcée does not get maintenance formally, she gets it informally in the form of payment for her services to the children . . .”); TALIA EINHORN, PRIVATE INTERNATIONAL LAW IN ISRAEL 50 (2009).

45. Cf. FamF (Nz) 9371-08/09 N.S. v. M.H.S. (2012) (Isr.) (arguing that social stigma surrounding divorce causes women severe emotional distress); FamA (Nz) 49212-02/12 Doe v. Roe, § 2 (July 16, 2012), Nevo Legal Database (by subscription) (Isr.) (acknowledging that divorce causes shame, sorrow, and suffering, affecting prospects of remarriage).

46. See, e.g., CA 245/81 Sultan v. Sultan, 38(3) IsrSC 169 [1984] (Isr.) (ruling in favor of the female plaintiff receiving damages for being divorced against her will); CA (TA) 1059/94 Jaber v. Jaber, PM 1994(1) 458 (1994) (Isr.) (same).

47. E.g., CA 245/81 Sultan, 38(3) IsrSC 169; CA (TA) 1059/94 Jaber, PM 1994(1) 458.

Tort law provides the injured woman the secondary remedy of damages,⁴⁸ but has no ability to grant the primary remedy of status. Damages cannot make her married again. Indeed, even if the husband wishes to remarry her (perhaps in exchange for renouncing the claim and cancelling the damages), this is not practical because *Shari'a* law requires that she first marry and then divorce another man before she can remarry her former husband.⁴⁹

A similar example of tort law providing a secondary remedy involves polygamy or bigamy.⁵⁰ Here again the woman can apply for monetary damages if, as a result of a second wife, she receives less maintenance and support for herself and her children, and for nonmonetary damages if she can prove emotional distress due to the bigamy or polygamy.⁵¹ But once more, the damages cannot change the status and cancel the other marriage.

B. Does Tort Law Complement Religious Family Law? Legal Pluralism as a Compromise

Implementing legal pluralism may result in a separation of the right to be married or to be a sole wife into two dimensions: status and damages. This separation seems possible, and it may be argued that it creates *harmony* between religious family law, which addresses the status aspect, and tort law, which addresses the damages. Ostensibly, the separation eliminates the collision, and legal pluralism succeeds in creating a more liberal and democratic society and harmony between two different disciplines of law without changing the status quo in those countries where family-personal law is conducted according to religious laws. As tort law is not supposed to affect marital status, the separation of the right into two aspects attests to the success of legal pluralism in finding a new and liberal solution—tort law—with the understanding that only religious family law can change status.

48. See, e.g., cases of divorcing a woman against her will: CA 245/81 *Sultan*, 38(3) IsrSC 169; CA 1730/92 *Masarwa v. Masarwa*, [1995] *Dinim Elyon* 38, 369 (Isr.) (awarding NIS 100,000 in damages to a woman who was divorced against her will); CA (TA) 1059/94 *Jaber*, PM 1994(1) 458. See also, e.g., in cases of bigamy or polygamy, FamF (Jer) 14150/04 *G.M. v. A.A.S.G.*, Nevo Legal Database (by subscription) (Isr.); FamF (Jer) 26680/05 *H.G. v. T.G.* (May 16, 2007), Nevo Legal Database (by subscription) (Isr.) (allowing a wife to sue her husband also for multiple marriages where the husband married a second wife and then divorced the plaintiff against her will, and she sued for both acts).

49. See *Qur'an* 2:230 (explaining divorce procedures under Islamic law).

50. Here again this was the case in the original Jewish law. See Einhorn, *supra* note 2, at 138 (describing a rabbinical enactment that prohibited men from marrying a second wife).

51. See, e.g., FamF (Jer) 14150/04 *G.M.*; FamF (Jer) 26680/05 *H.G.* (defining breach of statutory duty as causing the suffering, anguish, and humiliation inherent in a woman's status changing from "married" to "divorced").

But this solution does not result in real harmony. To understand why, one must review the theoretical issues concerning the awarding of damages in cases in which a woman is divorced against her will or the husband takes another wife. It appears that the tort action solution has developed in steps.⁵² Women recognized that family law represented a dead end and sought a solution in a different, liberal discipline of law. Tort law provided an answer to an ongoing problem, but no solid theoretical ground supported this solution. It was not created by legislature *ex ante*, despite the fact that tort laws (like criminal laws) have been present all along.

This Article argues that the courts should acknowledge these actions based on two main theoretical foundations. The first is an analysis of the goals of tort law: optimal deterrence, corrective justice, compensation, and distributive justice.⁵³ Optimal deterrence directs practice by causing husbands to think twice before perpetrating these evils, knowing that they must pay a price for them. The tort action, similarly to the criminal felony, serves as an incentive to prevent the harm. According to the Learned Hand formula,⁵⁴ the husband's precautions cost less than the expected monetary and nonmonetary damages, and Guido Calabresi's approach presents the husband as the cheapest cost avoider⁵⁵ and best decision maker.⁵⁶ Damages

52. Cf. generally Oren Perez, *The Institutionalization of Inconsistency: From Fluid Concepts to Random Walk*, in PARADOXES AND INCONSISTENCIES IN LAW 119 (Oren Perez & Gunther Teubner eds., 2006) (expanding on vagueness and vague notions in law, some of them developed in an evolutionary way, and that can be constructive in finding ways to cope with complex realities).

53. For a discussion of the overall objectives of tort law, see W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS 20–26 (5th ed. 1984); Glanville L. Williams, *The Aims of the Law of Tort*, 4 CURRENT LEG. PROBS. 137, 138 (1951).

54. See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (implementing the Learned Hand formula); *Conway v. O'Brien*, 111 F.2d 611, 612 (2d Cir. 1940) (same); ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 349–53 (5th ed. 2007) (explaining the Learned Hand rule); DAN B. DOBBS, THE LAW OF TORTS 340–43 (2000) (discussing the Learned Hand formula); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 167–71 (7th ed. 2007) (same).

55. According to this doctrine, strict liability is imposed on the entity that can prevent the damage in the cheapest way. If, according to this approach, the objective of tort law is prevention, that is, a reduction in the number of accidents and of the costs of accidents that do occur, there is economic reason for imposing liability on those who can prevent the damage at the lowest cost. Calabresi developed a multistage test for identifying the cheapest cost avoider from a group of possible avoiders. See GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 26–31 (1970).

56. According to this doctrine, liability is imposed on the entity that belongs to the group that is in the best position to reach

a decision as to which of the parties to the accidents is in the best position to make the cost-benefit analysis between accident costs and accident avoidance costs and to act on that decision once it is made. The question for the court reduces to a search for the cheapest cost avoider.

... The issue becomes not whether avoidance is worth it, but which of the parties is relatively more likely to find out whether avoidance is worth it.

represent a correction of the evil (corrective justice and compensation). According to distributive justice theory, compensation enhances weak sectors of society⁵⁷—in this case, women divorced against their will and women whose husbands married an additional wife. But it is important to state at the outset that this situation is highly inequitable and problematic from a distributive point of view, even if at first glance the tort action comports with distributive justice, as mentioned above. A rich man can exercise this religious right much more easily than a poor one, because if he really wants to divorce his wife against her will or marry another wife, he can afford it.

The second foundation lies in the work of Calabresi and A. Douglas Melamed,⁵⁸ who raise the possibility of protecting the same legal entitlements at times by a primary remedy (in this case, a change in marital status, such as remarriage or divorcing the second wife), and at other times by a secondary remedy (in this case, damages awarded in torts).⁵⁹ The categories of tort action can be analyzed using Calabresi and Melamed's "liability rule" in favor of the plaintiff.⁶⁰ According to this rule, the tortfeasor compensates the damaged party, providing a secondary remedy, but is not compelled to cease or change his activities. Because ceasing or changing activities falls within the exclusive jurisdiction of another system, the damaged party does not receive the main remedy it seeks. This is actually a case in which Calabresi and Melamed's liability rule in favor of the plaintiff may help explain and even justify situations in which a woman cannot achieve the primary remedy of her status under family law, i.e., to block the possibility of the husband divorcing her against her will or marrying another wife, and therefore pleads for a secondary remedy of damages in torts, perhaps as a type of consolation.⁶¹

Guido Calabresi & Jon T. Hirschoff, *Toward a Test of Strict Liability in Torts*, 81 YALE L.J. 1055, 1060–61 (1972) (emphasis omitted) (citations omitted); see also *id.* at 1060 n.19 (describing the difference between this doctrine and that of the cheapest cost avoider).

57. See DOBBS, *supra* note 54, at 13–14 (discussing distributive justice); IZHAK ENGLAND, CORRECTIVE AND DISTRIBUTIVE JUSTICE: FROM ARISTOTLE TO MODERN TIMES (2009) (same); Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 586, 586–90 (1982) (same).

58. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability*, 85 HARV. L. REV. 1089, 1116–17 (1972) (discussing various remedies for private nuisance).

59. Calabresi and Melamed addressed the issue of property remedy vs. compensation regarding nuisances, in which the tortfeasor continues his actions but compensates the damaged party. See *id.* at 1116 (describing the continued right to pollute in exchange for compensation).

60. *Id.* at 1116, 1119.

61. See Shmueli, *supra* note 38, at 144 (expanding on this issue).

Does the awarding of damages in tort law affect, if only indirectly, marital status in religious family law?

Allegedly, tort law is used here as a second option only, not as an absolute solution to the problem, and it does not make *Shari'a* religious family law more liberal or more modern. Therefore, the laws do not collide, and legal pluralism succeeds in supplying a solution that, although not optimal from the human rights aspect, nevertheless contributes to harmony between the laws and the courts, providing the best option available under the circumstances.

Reality is somewhat different, however. The awarding of damages in tort law does affect, if only indirectly, marital status in religious family law. A Muslim husband may act differently if he knows that divorcing his wife against her will or marrying another wife, although permitted under *Shari'a* law, carries a certain price tag, either civil (damages) or criminal (fine or imprisonment). Tort law may deter that husband and direct his behavior. He may act out of fear of having to pay extensive damages. In this way, tort law affects religious family law de facto, even if indirectly and not in the short term, and makes state law generally more compatible with human rights because fewer husbands will divorce their wives against their will or marry other wives without divorcing the first one.⁶² This is true especially if the damages being awarded are sufficiently high to deter. In the case of bigamy or polygamy, it is difficult to imagine that following the tort action the husband would divorce his new wife or wives. Therefore, a tort action rarely results in a change in status, although it may achieve an indirect effect on future cases by creating a disincentive to act in this way. Therefore, this solution is the lesser of two evils and is preferable over inaction.

In a global sense, however, and from a general perspective, tort law fills a vacuum. It functions as a state control, apart from religious state or nonstate control, but in a way that harmonizes with the other two forms of control and does not breach the legal status quo. Nevertheless, Muslim husbands can divorce wives against their will and marry several wives. But given the secondary remedies, that conduct may cost them money. Because *Shari'a* law courts agree that this conduct is not prohibited (although not desirable either), they do not challenge secular civil law on this point, and each discipline of law handles its own matters. It is true that this arrangement leaves the religious right incomplete because of the threat of exposure to a fine, imprisonment, or tort liability; in other words, exercising the right has a price attached to it.

62. As mentioned, one can even envision a situation in which a husband who divorced his wife against her will would try to remarry her, but here *Shari'a* law places a serious obstacle: he cannot remarry his divorced wife unless she first marries another man and divorces him. See *Qur'an* 2:230.

But note also the fact that liberal law similarly compromises its values, because the harmful practices may continue, although they may cost money, as in Calabresi and Melamed's liability rule in favor of the plaintiff. Thus, the law may convey the message that liberal society accepts these harms and does not combat them—it merely puts a price on them. Nevertheless, it appears that that this is the best compromise that legal pluralism can produce.

In sum, legal pluralism does not offer *harmony* between *Shari'a* and tort laws but merely a *compromise*. Even if this compromise partially harms religious law, it seems balanced and perhaps inevitable in an era of human rights. The presumption is that *Shari'a* law cannot be changed and made more liberal. Legal pluralism does not directly change marital status, and it retains some distinction between the laws and the courts. In practice, it seems that *Shari'a* courts and scholars are not challenging these tort actions.

This being the case, it appears that the solution provided by legal pluralism causes minimal harm to the opposing values. It does not abolish practices opposed to human rights, but it puts a price on them and in this way contributes to reducing the prevalence of these phenomena in the future. It does so with the understanding of tort law's limitations and with the knowledge that it cannot be used to change marital status directly and thus bring about a more human rights-oriented society.

It would be interesting, however, to consider the long-term effects of this type of pluralism. Could prevalent use of tort action affect the content of religious law over time? Will there be a real disincentive for Muslim husbands to act according to their religious laws because of the "threat" the price exacted by tort law? Are the different normative systems within a single-state apparatus operating with relatively little friction and not affecting each other at all?

IV. REFUSAL TO GRANT A *GET* (JEWISH DIVORCE BILL) IN JEWISH LAW

A. *Refusal to Grant a Get*

Tort actions brought in response to a husband's refusal to grant a *get* to his wife are problematic. Under Jewish religious law, a divorce cannot be obtained without the husband granting it of his free will.⁶³ Although consent constitutes a proper ground for divorce, each

63. 4 Code of Maimonides: Laws Concerning Divorce 1:1–2; 18.B THE TALMUD OF BABYLONIA: GITTIN fol. 49b (Shaye J.D. Cohen et al. eds., Jacob Neusner trans., 1992) [hereinafter BAVLI GITTIN]. The rabbinical court cannot order the divorce without the man's consent, which is the *sine qua non* of the process. This means that the rabbinical court can only order the parties to divorce on specific *halakhic* grounds, but

spouse may also demand to divorce upon justified grounds.⁶⁴ But even if justified grounds exist for demanding divorce, a judgment by the rabbinical courts does not by itself dissolve the marriage.⁶⁵ The role of the rabbinical courts, whether state or private, is to help enforce rights that already exist.⁶⁶ This means that the couple remains married until the delivery of a *get*, and both must agree to this act: the husband must grant it of his free will and the wife must accept it of her free will.⁶⁷ Although granting the *get* is usually a voluntary act, and a *get* granted by the husband under duress or coercion is invalid (*get me'useh*),⁶⁸ a certain degree of monetary and even physical compulsion is acceptable⁶⁹ if it is carried out by a rabbinical authority according to Jewish law.⁷⁰ Thus, if the husband refuses to divorce his wife, she is considered an *agunah*—a woman who has been refused a

it cannot pronounce the divorce itself. See Michael S. Berger & Deborah E. Lipstadt, *Women in Judaism from the Perspective of Human Rights*, in HUMAN RIGHTS IN JUDAISM: CULTURAL, RELIGIOUS, AND POLITICAL PERSPECTIVES 77, 99 (Michael J. Broyde & John Witte, Jr. eds., 1998) (discussing the respective rights of men and women in Jewish law); Fournier, McDougall & Lichtsztral, *supra* note 19, at 349–50 (discussing Jewish divorce procedure); Amanda Williamson, *An Examination of Jewish Divorce Under the Family Law Act 1975 (Cth)*, 11 JAMES COOK U. L. REV. 132, 134 (2004) (same).

64. Einhorn, *supra* note 2, at 137 (explaining that examples of justified grounds for divorce are adultery or bad conduct); David Lieber, Ben-Zion Schereschewsky & Moshe Drori, *Divorce*, in 5 ENCYCLOPEDIA JUDAICA 710, 712–13 (Michael Berenbaum & Fred Skolnik eds., 2d ed. 2007) (explaining that there are cases where some form of physical defect makes cohabitation or procreation impossible, and that a *get* must be given also where one of the parties has engaged in specific harmful conduct towards the other).

65. Blecher-Prigat & Shmueli, *supra* note 1, at 281–82 (detailing the specifics of Jewish divorce procedure).

66. Einhorn, *supra* note 2, at 138 (discussing the marriage dissolution procedure for both men and women).

67. *Id.* at 137; A. Yehuda Warburg, *The Propriety of Awarding a Nezikin Claim by Beit Din on Behalf of an Agunah*, 45 TRADITION 55, 56 (2012); Williamson, *supra* note 63, at 134.

68. Einhorn, *supra* note 2, at 138; Warburg, *supra* note 67, at 56; Williamson, *supra* note 63.

69. See Einhorn, *supra* note 2, at 138 (explaining that these compulsory measures are possible if, e.g., the husband has abandoned his wife and refuses to cohabit with her and support her according to the terms of the marriage contract).

70. See *id.* at 151–53 (explaining that the basis for the possibility of such coercion is found in the *Talmud* and in Maimonides's ruling). According to the *Talmud*, enforcement proceedings such as fines, imprisonment, and corporal punishment apply also to *get* orders. BAVLI GITTIN, *supra* note 63, fol. 88b. According to Maimonides, the husband really wants to follow the decision of the rabbinical court and is prevented from doing so only by an evil inclination. Therefore, according to the legal fiction, the court applies coercion not to overcome the husband's free will but rather to remove the impediment that prevents him from exercising it. The *Talmud* validates the use of coercion by non-Jewish courts only to enforce rabbinical court decisions. *Id.* There are conflicting opinions as to the validity of a ruling of a non-Jewish court decision directly requiring the husband to execute a *get*. In Israel, these sanctions have become a statute of the state: Jurisdiction of Rabbinical Courts (Marriages and Divorces) Law, S.H. 134 [1953].

get.⁷¹ In this situation, she cannot receive the remedy of a valid divorce, and the very act of refusal causes harm (usually emotional distress).⁷² This painful problem affects all classes of Jewish society worldwide, undermines women's autonomy, and causes them significant distress. In addition, the women cannot remarry, while husbands in a similar situation can receive, albeit rarely, special dispensation to remarry without a *get*.⁷³ Notwithstanding several proposals for a *halakhic* solution, the problem persists.⁷⁴

Indeed, the problem exists throughout the world. As noted, in some states, e.g., Israel, religious law regulates the personal status of marriage and divorce; in others, civil law regulates that status.⁷⁵ Jews who regard themselves as bound not only by the civil laws of their state of habitual residence but also (by individual choice) by the precepts of Jewish faith may find themselves in a serious conflict.⁷⁶ For example: "A Jewish couple, married and domiciled in Israel, may move to a country which recognizes only civil divorces. Following an irretrievable marriage breakdown, one spouse sues for divorce and has the marriage dissolved by the civil court. Civil divorce is not recognized by Jewish law."⁷⁷ This would also be the case if the couple had married in both Jewish and civil fashion in a state that acknowledges civil marriage. If the husband refuses to grant a *get*, the wife is considered an *agunah* even if she is divorced according to civil law. Children that she may have in a relationship with another Jewish man would be considered unlawful (*mamzerim*) according to

71. Fournier, McDougall & Lichtsztral, *supra* note 19, at 334; Warburg, *supra* note 67, at 56 (discussing when a wife becomes an *agunah*). Note that the term *agunah* in Hebrew includes also women whose husbands have disappeared and nobody knows their whereabouts, and therefore their wives cannot break free from the marriage.

72. Lazerow, *supra* note 42, at 108–11 (demonstrating the psychological harm, tension, and negative effects of *get* refusal).

73. Williamson, *supra* note 63, at 134–35 (noting the discrepancy in ability to *get* remarried between men and women).

74. For suggested solutions, including extending the grounds justifying women's claims for divorce, the conditional *ketubbah*, rabbinical annulment, *get zikkui* (a *get* that benefits), relationships contracted out of (religious) wedlock, finding fault with the marriage, and more, see MOSHE SHLOMO ANTELMAN, *THE GREAT AGUNA DEBATE* (1997); IRVING A. BREITOWITZ, *BETWEEN CIVIL AND RELIGIOUS LAW: THE PLIGHT OF THE AGUNAH IN AMERICAN SOCIETY* (1993); AVIAD HACOHEN, *THE TEARS OF THE OPPRESSED: AN EXAMINATION OF THE AGUNA PROBLEM* (Blu Greenberg ed., 2004); Einhorn, *supra* note 2, at 140–44.

75. See, e.g., Family Relations Act, R.S.B.C. 1996, c. 128 (Can.) (Canadian family statute); Family Law Act, 1996, c. 27 (Eng.) (English family statute); Marriage Act, 1949, 12 & 13 Geo. 6, c. 76 (Eng.) (English marriage statute); David Cobin, *Jewish Divorce and the Recalcitrant Husband—Refusal To Give a Get as Intentional Infliction of Emotional Distress*, 4 J.L. & RELIG. 405, 410–11 (1986) (discussing Jewish law).

76. Einhorn, *supra* note 2, at 136 (highlighting the tension between civil and Jewish law).

77. *Id.*

Jewish law⁷⁸ because an *agunah* cannot marry a Jew, unless the intended spouse is also a *mamzer* or a proselyte.⁷⁹ This is the case for Orthodox, ultra-Orthodox, and Conservative Jews.⁸⁰ For Reform Jews, civil divorce suffices, but if the divorced spouse later wishes to marry an Orthodox, ultra-Orthodox, or Conservative Jew, she or he would still have to obtain a *get*—a religious divorce.⁸¹

Here too, the presumption is that Jewish law cannot be changed and made more liberal, and therefore civil reform must be sought to overcome this religious obstinacy.⁸² As Amanda Williamson explains, in countries in which there is separation between state and religion, the main difficulty arises when a recalcitrant spouse seeks a civil divorce without first obtaining a religious divorce.⁸³ The effect of this is twofold. First, the wife is generally unable to remarry according to her faith without jeopardizing her status (or her children's status) as a member of that religion.⁸⁴ Second, if the husband eventually grants a religious divorce, he may offer it at a high personal or financial cost to the woman, forcing an unfair compromise on property distribution and maintenance or contact with the children. This also holds true in countries in which there is no separation of state and religion.⁸⁵ Either way, the woman suffers harm, which can be remedied in principle by tort or contract law.

Superficially, the solution offered by legal pluralism in the case of *get* refusal should be similar to that offered within the context of *Shari'a* law in cases of divorcing a woman against her will and of bigamy or polygamy. In this case also, the outcome of the implementation of legal pluralism may be a separation of the right to be divorced into two dimensions: status and damages. But matters are more complicated in Jewish law.⁸⁶

78. See Fournier, McDougall & Lichtsztral, *supra* note 19, at 349; Lazerow, *supra* note 42, at 106; Warburg, *supra* note 67, at 56.

79. See Einhorn, *supra* note 2, at 136, 138; Warburg, *supra* note 67, at 56.

80. See Einhorn, *supra* note 2, at 137.

81. *Id.*

82. See Williamson, *supra* note 63, at 135 (discussing civil reform as a means to overcome religious obstinacy).

83. *Id.* at 135–36.

84. *Id.*

85. *Id.*

86. In both cases, the prominent and usually only damage is emotional distress. But the type of damage sustained by women is different in each case: in the case of Muslims, she can be released from the relationship, even if against her will, whereas in the case of Jews, she is held captive in the marriage. See, e.g., ISALIAH BERLIN, LIBERTY 118–72 (2002) (demonstrating the theory of liberty from different aspects). Expanding on this issue is beyond the scope of the present Article.

B. *The High Cost of a Possible Collision: Tort Law
Circumvents Religious Family Law and
Tries to Change Marital Status*

Tort actions for *get* refusal represent the pinnacle of interaction between civil and religious laws and between civil and rabbinical courts. Allegedly, in this case also, the goal of tort law is to provide a secondary remedy of damages if it is impossible to grant the primary remedy of status.

On the one hand, it seems that here too tort law is used as a second option, not as an absolute solution to the problem, as in the case of *Shari'a* law. Tort law does not make Jewish family law more liberal or more modern. On the other hand, a Jewish husband may act differently if he knows that while he may refuse to grant a *get* under Jewish law, he must pay a price for this conduct, either civil (damages) or criminal (fine or imprisonment). Here too, this is a case of optimal deterrence, because tort law may direct the husband's behavior and thereby influence religious family law *de facto*. This indirect influence makes the law generally more compatible with human rights. In practice, however, and in contrast to *Shari'a* law, rabbinical courts (*beth din*) are challenging this outcome, as discussed below,⁸⁷ and in some cases, the outcome is not necessarily beneficial to human rights. In these situations, legal pluralism does not achieve harmony, or even a balanced compromise.

In most of the civil actions filed, the plaintiffs (women who have been refused a *get*) attempt to obtain the *get* indirectly by means of a "two-way transaction": the husband grants the *get* in exchange for the wife waiving the damages awarded in the tort action.⁸⁸ But the case becomes more complex because of a *halakhic* problem: rabbinical courts claim that forgoing damages in exchange for the *get* constitutes monetary coercion, which would mean that the *get* has been unlawfully coerced and is therefore invalid from the point of view of Jewish law.⁸⁹

87. See File No. 7041-21-1 High Rabbinical Court (Mar. 11, 2008) (unpublished) (Isr.); *infra* text accompanying note 110.

88. See Warburg, *supra* note 67, at 57 (describing the typical transaction).

89. See Yehiel S. Kaplan, *Enforcement of Divorce Judgments by Imprisonment: Principles of Jewish Law*, 15 JEWISH L. ANN. 57, 61–107 (2004) (discussing ways Jewish law has been used to compel granting of a *get*); Yehiel Kaplan & Ronen Perry, *Tort Liability of Recalcitrant Husbands*, 28 TEL AVIV U. L. REV. 773, 782, 802, 804 & n.110 (2005); Warburg, *supra* note 67, at 57. Ronnie Warburg explains:

Halakhically, there are three possible reasons for such a posture:

First, as we mentioned, the awarding of compensation may result in a private exchange transaction between the couple resulting in the *get* being tainted by compulsion.

Note, however, that there are some highly pluralistic *halakhic* opinions concerning the possibility of regarding the *get* as not being coerced because Jewish law acknowledges emotional distress as a cause of action, especially for preventing the wife from remarrying and therefore from observing a *mitzvah* (religious commandment).⁹⁰ The approach taken by Ronnie Warburg makes it possible to file a tort action in a rabbinical court or even in a secular civil court based on a construction of Jewish law whereby *get* refusal constitutes an emotional distress.⁹¹ In many aspects, the distress does not directly relate to the granting of the *get*, but rather to the inability to remarry, have sexual relations, and bear children—all of which serve to prevent the observance of other religious obligations.⁹²

Warburg argues that an *agunah* may be emotionally distressed because of the fact that she cannot remarry or have children, and such feelings are in principle acknowledged by the *Halakha* as grounds for a claim.⁹³ In all periods of Jewish law, including in contemporary rabbinical court rulings in Israel, decisors have imposed damages based on *boshet* (shame) and *tsaar* (suffering), for defamation of character, and for broken wedding engagements. Some of the justifications for these rulings are *lemigdar milta* (fencing the

Moreover, should *battei din* [rabbinical courts] have rendered such awards in the past, the mere advancement of such a claim in *beit din* may motivate the husband to divorce his wife fearing the impending threat of financial loss due to *battei din*'s track record in handing down such relief.

Furthermore, should we impart validity to such an award and permit a wife to submit such a claim even *after* the delivery of a *get*, a husband fearful of the impending possibility that he may incur financial losses due to a potential award may feel coerced in giving the *get*. Hence, such threats and fears will engender a *get me'useh*.

Warburg, *supra* note 67, at 57–58 (footnotes omitted). This “coercion” must be distinguished from a lawfully coerced *get* (*get meuseh kadin*), in which the rabbinical court was involved in the coercion of the husband based on causes that allow this coercion under the law. See Rabbinical Courts Jurisdiction (Marriage and Divorce) Law 5713-1953, 7 LSI 139 (1953–1954) (Isr.) (stating that “[m]arriage and divorce of Jews in Israel will be conducted according to Jewish Law”); Leichter, *supra* note 3, at 10 (describing penalties that rabbinical courts may impose on husbands who refuse to grant a *get*). The “distancing of Rabbeinu Tam” is the basis for these sanctions, under which these means are not considered to be coercing a *get*: an opinion that has been accepted over generations by additional *halakhic* decisors. Shmueli, *supra* note 38, at 139 n.57 (citing Avraham Be’eri, *Harchakot de’Rabenu Tam [Distancing of Rabbeinu Tam]*, 65 SHENATON HAMISHPAT HAIVRI [JEWISH L. Y.B.] 18–19 (1992–1994); Uriel Lavi, *Sidur Get Le’achar Khiuv Ha’Ba’al Bepitzui Kaspi Leishto [Arranging a Get After Holding the Husband Liable To Pay Compensation to His Wife]*, 26 THUMIN 160 (2006)); see also Fournier, McDougall & Lichtsztral, *supra* note 19, at 350–51 (presenting the sanctions and explaining that usually they empower women).

90. Warburg, *supra* note 67, at 62–63.

91. *Id.* at 66.

92. *Id.* at 62–64.

93. See *id.* at 61–62 (discussing Talmudic interest in obviating women’s loneliness).

law), which is the attempt to prevent the wife from committing a sin by living with another man while she is still married. The understanding is that if an individual prevents another from observing a *mitzva*, a religious commandment, the individual being precluded is entitled to monetary damages. The *mitzva* here is the populating of the world, and *get* refusal prevents the woman from remarrying and having children, therefore she may seek compensation for being unable to observe a *mitzva* and for not being able to engage in sexual relations.⁹⁴ Warburg explains that each of these claims is unrelated to divorce and therefore a *halakhically* legitimate demand based on the notion of *kefiyyah ledavar aher* (unrelated duress); that is, in many instances, upon receiving the *get* the ex-wife does not desire to remarry.⁹⁵ Indeed, her experiences with her husband may cast doubt on her ability to identify “the right man to marry” or generate negative feelings toward the institution of marriage, so that marriage is no longer an option for her.⁹⁶ Warburg also explains that the act of divorce does not inevitably produce a wish to remarry and therefore a tort action for *tsaar* or *boshet*.⁹⁷ Thus, a woman’s monetary claim based on her right to marriage is independent and unrelated to the divorce, and therefore should be *halakhically* justified.⁹⁸ In other words, as long as the submission of such a tort claim is aimed to address a breach of an independent claim that is *halakhically* justified—in our case, the right to marriage and to bring children—and is sincerely desired by the wife for the reasons mentioned above and not simply as a means of pressuring the husband to grant a *get*, the subsequent granting of a *get* will be valid.⁹⁹ Thus, although her desire to obtain a *get* is needed before she can remarry, her monetary claim is linked directly to her manifest desire to remarry or to have children.¹⁰⁰

Warburg also addresses the important question of intent in Jewish law: in our case the question of the possibility of acknowledging a claim that is ostensibly independent of the *get* but used for the purpose of compelling a husband to grant one.¹⁰¹ There are two questions here: (1) whether there is a need for intent in order to initiate such a claim in rabbinical court (something that in most countries in which there is no separation between state and religion is not possible because the rabbinical court has no authority in this issue, and in other countries may be possible if the parties view the rabbinical court as an arbitrator) for determining whether a divorce is

94. *Id.* at 63.

95. *Id.*

96. *Id.*

97. *Id.* at 65.

98. *Id.* at 63–65.

99. *Id.*

100. *Id.* at 64.

101. *Id.*

coerced;¹⁰² and (2) how intent is to be ascertained: by noting whether anything is mentioned about the granting of a *get* when the tort claim is submitted, by assessing the wife's behavior, or by inference from the circumstances.¹⁰³ Warburg states that many contend that the mere mention of the matter of a *get* indicates that the claim is in actuality submitted to persuade the husband to divorce.¹⁰⁴ If the matter is not mentioned, we can assume that the wife's intent is to have the rabbinical court address the merits of her plea rather than for it to serve as leverage to procure her *get*.¹⁰⁵ Others contend that even a self-standing claim that is not linked to a request for execution of a divorce is problematic if there is an *umdena demukhah* (a proved presumption) that the claim was put forward primarily to procure a writ of divorce, and therefore any subsequent delivery of a *get* would be invalid.¹⁰⁶

Warburg explains that in principle, a tort action of this type can be submitted to rabbinical court in addition to claims for parenting arrangements, child support, division of marital assets, and the delivery of a *get*, regardless of whether these matters are construed as not specifically mentioned in the arbitration agreement that empowers the rabbinical court to resolve these matters or as related to the matter of the *get*.¹⁰⁷ He explains that if both the husband and wife submit themselves to the rabbinical court's jurisdiction to address the end-of-marriage issues, should at any juncture during the proceedings the husband refuse to deliver a *get*, the court may acknowledge the wife's claim for either a monetary award (which ought not be excessive for *get* recalcitrance) or for emotional distress due to her right to marry or have children, or for her inability to observe the *mitzva* of marriage or of having children.¹⁰⁸ The rabbinical court can order the husband to pay damages, and if he refuses, the damages can be enforced in civil court.¹⁰⁹ If he does not refuse, he has the option of suggesting to his wife that, in exchange for granting a *get*, she waive her entitlement to the monetary damages.¹¹⁰ In this case, the resulting *get* will not be considered to be coerced.¹¹¹

Warburg emphasizes that it is only when a husband is threatened with harm, imprisonment, or death if he refuses to

102. See *id.* ("Is the *kavana* (intent) to initiate such a claim in *beit din* relevant in determining whether a divorce is coerced?").

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 65-66.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

consent to a divorce, is the *get* unlawfully coerced.¹¹² If, however, the husband is threatened with a monetary claim that is too remote to rise to the level of coercion—and given that we are not sure whether a rabbinical court will agree that it is empowered to award such damages, nor is the amount of the award known in advance should such a decision be rendered—it seems that the *get* granted would not be unlawfully coerced.¹¹³ The wife may threaten to submit a claim, never follow through with her threat, and never complete the two-fold transaction, which proves that she may not be interested in the *get* but in the compensation, and therefore, if the husband decides to grant her the *get*, it would not be unlawfully coerced.¹¹⁴

But Warburg warns that if rabbinical courts begin to award such damages, which then become “a clear and present danger” akin to the threat of imprisonment, the threat that such a claim will be submitted may make the execution of the *get* coerced.¹¹⁵ Nevertheless, even if this practice were to become commonplace, the amount of the award would not be known in advance, and therefore the threat would remain remote and would not invalidate the *get*.¹¹⁶

He concludes by stating that deciding between the competing arguments relating to the propriety of the different types of tort claims for an *agunah* would be the sole prerogative of the *posek* (decisor).¹¹⁷

Note that in his opinion, the parties’ signing of an arbitration agreement (*shetar borerut*) gives the rabbinical court authority to resolve this matter. Assuming that this decision complies with the rules of secular arbitration procedure, it would be legally enforceable in a competent civil jurisdiction in the United States.¹¹⁸ Should the husband fail to agree to submit to the jurisdiction of a rabbinical court, the wife should receive permission from the rabbinical court, or alternatively from a rabbinical authority with expertise in this matter, to litigate the matter in civil court, contingent upon the monetary claim advanced in civil court being equally based on the parameters mentioned above.¹¹⁹ Warburg emphasizes that should someone receive permission to file a suit in civil court,

it is extremely important that the individual consult with a recognized rabbinic authority who has expertise in Even ha-Ezer and Hoshen Mishpat and possesses legal and jurisprudential education in order to receive competent advice in preparing a claim statement and

112. *Id.* at 67.

113. *Id.* at 68.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at 66 n.39.

119. *Id.*

submitting expert testimony in civil court which will avoid the strictures of a *get me'useh*.¹²⁰

This new and creative approach may not be widely accepted among rabbis, however.

These problems exist throughout the world. In Israel, these cases play out against the background of a longstanding jurisdictional struggle between the rabbinical and secular civil courts, both operated by the state.¹²¹ The rabbinical courts regard the civil

120. *Id.* For the admissibility of such a claim in civil court, see also Ronald Warburg, *Recovery for Infliction of Emotional Distress: Toward Relief for the Agunah*, 18 JEWISH L. ANN. 213, 257–58 n.164 (2009). This is also true for rabbinical courts outside the United States, for example in Israel. E-mail from Ronald Warburg to author (Jan. 9, 2013).

121. See Blecher-Prigat & Shmueli, *supra* note 1, at 280 (noting the jurisdictional split over issues of family law in Israel); Fournier, McDougall & Lichtsztral, *supra* note 19 (considering difficulties in family law adjudication and the conflicts inherent in a dual-jurisdiction system with a sharp divide between secularism and religion); Halperin-Kaddari, *supra* note 11. There is a debate over the question of whether state rabbinical courts (such as those in Israel) are actually state-law agents in all aspects (not only technically, given that the judges are considered to be civil servants). Issi Rozen-Tzvi, *Subject, Community, and Legal Pluralism*, 23 TEL-AVIV U. L. REV. 539 (2000), and Ruth Halperin-Kaddari, *More on Legal Pluralism in Israel*, 23 TEL-AVIV U. L. REV. 559 (2000), analyze the different opinions of the judges in HCJ 3269/95 Katz v. Jerusalem Rabbinical Court, 50(4) IsrSC 590 [1996], about this issue in different ways. In this case, the rabbinical court sanctioned someone who refused to litigate before it in a monetary dispute, although the exclusive and only jurisdiction of rabbinical courts is to litigate matters of marriage and divorce. Rozen-Tzvi interprets the majority opinion of Justices Zamir and Dorner as a positivist view. According to this view, state rabbinical courts are part of state law; their jurisdiction is derived from the state and is bound by it, if only by the fact that one can appeal judgments of the rabbinical courts to the High Court of Justice. See Rozen-Tzvi, *supra*, at 543–46. He interprets the dissenting opinion of Justice Tal as arguing that rabbinical courts have been a traditional part of the laws of the Jewish nation since Moses and have therefore derived their jurisdiction from this source, thousands of years before the establishment of the State of Israel. *Id.* at 547–49. This means that although technically the rabbinical courts are state made, they act according to the *Torah* rules, with full autonomy, are not subject to the rules of the state, and do not need state recognition. *Id.* at 555. Halperin-Kaddari disagrees with this analysis of the dissenting opinion and maintains that Justice Tal's argument lacks the operative dimension of the relations between the secular and religious systems, on the one hand, and the parallel activity of the courts, on the other, and therefore his judgment remains in the domain of the purely ideal. See Halperin-Kaddari, *supra* note 25, at 563–64. In the opinion of Halperin-Kaddari, Rozen-Tzvi interprets the opinions in a purely descriptive rather than a normative and prescriptive way. *Id.* She does not think that the analysis of the dissenting opinion leads to the conclusion that the rabbinical courts form an autonomous system, entirely separated from the state and its rules, and she suggests a different analysis. *Id.*

Note, however, that the *Katz* case is different from our cases of collision between religious and civil courts. In the *Katz* case, it was clear that the rabbinical court applied a rule that is not compatible with state law, and the argument was that it acted without jurisdiction in applying that rule. In our case, all religious courts act within their exclusive jurisdiction, and the question is whether it is appropriate for tort law as well to award damages—a remedy that is different and separate from the remedies that can be imposed by religious courts in matters of personal status. But as

decisions as an intervention in matters of divorce, over which they retain exclusive jurisdiction.¹²² Therefore, the mission of legal pluralism in this case is twofold: to find some compromise in the collision between the laws (religious-Jewish and civil-tort) and, especially in countries in which the rabbinical courts are state made, to find some compromise between the courts (religious-rabbinical and secular-civil). Indeed, in countries in which the rabbinical courts are private actors and not state agents, there may be a collision especially between the laws, and not so much between the courts.¹²³ In these cases, legal pluralism also faces the danger that a liberal civil law being implemented by a civil court may coerce the *get* and make it invalid.

The first civil actions for *get* refusal were accepted in Israel in 2004¹²⁴ and in Canada (based mainly on contract law, regarding the marriage as a contract and the refusal as a breach) in 2007.¹²⁵ To

we shall see below, awarding damages in cases of *get* refusal may be a de facto intervention in matters of personal status as well, unlike in the case of damages imposed for divorcing a woman against her will or for bigamy and polygamy, where the status is final. But in our case, there is no doubt that the religious courts will rule according to religious law, even if the outcome is not liberal and it contradicts human rights. Therefore, the *Katz* case is less relevant for us because in our case, it is obvious that religious courts are acting within their jurisdiction, and the question is only whether civil law can restrict their judgments in the name of liberal human rights. In one case—that of the intervention of tort if there is no rabbinical decree, to be discussed below in Part IV.C.6.(c)—the situation is even more complicated. But generally, in all of these situations (refusal to grant a *get*, divorcing a woman against her will, bigamy and polygamy, and the rabbinical court sanctioning someone who refused to litigate before it in a monetary dispute), the issue is subjecting the religious system and its rules to that of the state, in one form or another.

122. See, e.g., File No. 7041-21-1 High Rabbinical Court (Mar. 11, 2008), Nevo Legal Database (by subscription) (Isr.) (arguing that the monetary claims of civil proceedings essentially force a husband to divorce his wife by means of extortion); Rabi Uriel Lavi, *supra* note 89 (same); Eliyahu Hayshrik, Lecture at a Tel Aviv District Bar Association Course on “Family Law and Inheritance Law”: Tort Awards and Their Effect on Divorce Law (Feb. 17, 2009); Eliyahu Hayshrik, Speech at the 9th Annual Conference of the Israeli Bar Association: Nor Shall They Learn War Anymore (June 1, 2009); Uriel Lavi, Speech at the Hebrew University Family and Society Conference on “Global, Regional, and Local: Law, Politics, and Society in Comparative Perspectives”: Does the Family Court Act with Restraint when It Decides Damages Against Husbands Who Refuse a *Get*? (Dec. 25, 2008) (examining the complicated balance and operation of both family and rabbinic Courts and when one may violate the jurisdiction of the other, and arguing that tort actions should be considered illegitimate).

123. See *supra* notes 25–31 and accompanying text.

124. See File No. 19720/03 FamC (Jer), K.S. v. K.P. (Dec. 21, 2004), Nevo Legal Database (by subscription) (Isr.) (stating that the humanitarian and legal problems unresolved in religious law in instances of *get* refusal force the civil court to hear the case).

125. See generally *Bruker v. Marcovitz*, [2007] S.C.R. 607 (Can.) (holding that a husband’s failure to obtain a *get*, when a contractual commitment to do so had been made during civil divorce proceedings, was a breach of contract).

date, several dozen judgments have been issued in various countries.¹²⁶ Dozens of other actions are pending before the courts.

Again, the courts should consider these actions based on two main theoretical foundations. The goals of tort law form the first theoretical basis for acknowledging a wide scope of intrafamilial tort actions. These actions play a social role, as a means of distributive justice, in promoting women's status in general and the rights of women who have been refused a *get* (an even *more* oppressed sector) in particular. The actions may also serve as a deterrent against refusal to grant the *get*, especially if damages are high. But in cases of *get* refusal, and given the fear of a coerced *get*, the *halakhic* dead end may de facto offset the social, distributive, and deterrent advantages of the claim. Because damages are used to achieve a desired goal (the primary remedy of the status), it is not clear that the goal of corrective justice is achieved, as the damages are not an objective in and of themselves. At the same time, it does not matter what the plaintiff does with the damages awarded to her. She can use them, donate them to charity, or exchange them for the *get*. The damages, especially if they are high enough, affect her bargaining position and give her the leverage she lacked before¹²⁷ if her husband was merely trying to blackmail her and extort money in return for the *get*.¹²⁸ Therefore, the action seems compatible with corrective justice, not contrary to it.

The other theoretical basis for acknowledging these actions is Calabresi and Melamed's liability rule in favor of the plaintiff. This rule can also fit tort actions in which the *real objective* is to use the damages awarded in order to obtain the primary remedy of status, in this case the *get*. Tort law tries to break out of the dead end in family

126. See Einhorn, *supra* note 2, at 144–51 (considering civil actions for *get* refusal in Western countries); Shmueli, *supra* note 38, at 148–55; see also, e.g., D. v. France, App. No. 10180/82, 35–39 Eur. Comm'n H.R. Dec. & Rep. 199, 202 (1983) (holding that a husband's refusal to provide his wife with a *get* following a civil divorce was impermissible because such refusal was not in the nature of "manifesting his religion in observance or practice").

127. See generally, on bargaining positions under the implementations of the law, Ward Farnsworth, *Do Parties to Nuisance Cases Bargain After Judgment? A Glimpse Inside the Cathedral*, 66 U. CHI. L. REV. 373 (1999); Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

128. See Lisa Fishbayn, *Gender, Multiculturalism and Dialogue: The Case of Jewish Divorce*, 21 CAN. J.L. & JURISPRUDENCE 71, 85 (2008) (indicating that "[t]he power men enjoy under Jewish law to withhold a *get* is of concern to civil law because this power becomes an effective bargaining endowment in the resolution of civil family law disputes," meaning that the tort damages improve the wife's situation); Fournier, McDougall & Lichtsztral, *supra* note 19, at 345 (explaining this issue); Karin Carmit Yefet, Comment, *Unchaining the Agunot: Enlisting the Israeli Constitution in the Service of Women's Marital Freedom*, 20 YALE J.L. & FEMINISM 441, 447 (2009) ("[Men] can also validly condition their consent upon non-monetary criteria, even restraining their wives' most basic and private affairs by controlling, for example, what they can eat or wear.").

law by causing the husband-defendant to reconsider his tortious act and provide him with an incentive to accept the two-way transaction: granting the *get* in exchange for cancellation of the civil judgment for damages. If the damages are sufficiently high, this transaction may succeed. It is true that in some cases the wife-plaintiff, for various reasons, seeks the damages and no longer wants the *get*.¹²⁹ But in almost all the actions, the woman desires to carry out the transaction and change her marital status following a civil-tort intervention.

The outcome is clear: there is no attempt to create harmony between the laws and the courts. The important outcome is that when religious family law lands a spouse at a dead end, a secondary remedy of damages remains possible. Tort law should challenge and eradicate harmful practices against women, even if the confrontation between the laws and the jurisdictions results in serious friction. The result can be the shaping of a modern family law that is more liberal than the existing religious laws. This process is carried out by tort law.

But the price for this liberalization may be high: a collision between laws and between courts, with the latter more evident and more challenging primarily because both court systems are operated by the state. The collision between the courts, or even between the laws only, may result in the rabbinical courts declaring a *get* that has been granted following a tort action and a two-way transaction as coerced and therefore invalid.

When there is a collision not only between the laws, but also between the courts—as in Israel—the situation is even worse. In the liberal view, women hold an inferior status in rabbinical courts and in Jewish family law.¹³⁰ Therefore, rabbinical courts regard these actions as a conspiracy to improve women's status and rights in rabbinical courts by unlawful means.¹³¹ In the opinion of rabbinical courts, tort law does not complement Jewish family law, but rather contradicts or circumvents it, even if the possible change in status is indirect.¹³² The change is indeed indirect, because tort law provides only damages,¹³³ and the parties themselves conduct the transaction that exchanges the *get* for the cancellation of the damages.

129. See File No. 19480/05 FamC (Kfar Sava), *Doe v. Doe* (Apr. 4, 2006), Nevo Legal Database (by subscription) (Isr.) (involving a claim against the estate of a husband for the award of damages where the husband had already passed away and the *get* was not longer relevant); Yifat Bitton, *Feminine Matters, Feministic Analysis and the Dangerous Gap Between Them*, 28 TEL-AVIV U. L. REV. 871 (2005) (explaining that in certain cases, the woman actually wants damages for the harm she suffered and does not want to exchange it for the *get* for various reasons).

130. This is the conventional view. *But see* Fournier, McDougall & Lichtsztral, *supra* note 19, at 356–57 (challenging this view).

131. See, e.g., Lavi, *supra* note 89.

132. *Id.*

133. It seems that although tort law can provide an injunction in principle, ordering the husband by tort law to divorce is highly problematic because injunctions

In practice, rabbinical courts in Israel have decided to block all divorce litigation of women who have filed civil actions for damages.¹³⁴ This practice is not always carried out, and occasionally there are silent agreements between the parties to go ahead with the divorce in exchange for withdrawing the civil action. At other times, however, it is carried out. In any case, the rhetoric remains impassioned, and the struggle over jurisdiction between the courts seriously escalates. Ostensibly, if the husband agrees to the transaction, neither party has an incentive to tell the rabbinical court about the civil action. But observant Jews may not hide this information from the rabbinical courts because the *get* issued following a civil transaction may be invalid, as mentioned above, and even can be annulled later, *ex post*, if the true facts are revealed because *res judicata* does not apply to a *get*.¹³⁵ If the rabbinical court learns about the tort action and the transaction after the divorce, it may retroactively declare the *get* to be invalid, which means that the woman, who in the meantime may have married another man, remains married to her first husband.¹³⁶ In this case, Jewish law prohibits her from living with either man and deems any children from the second man to be unlawful.¹³⁷ This is a possibly serious and harmful outcome of legal pluralism, which clearly does not create a more human rights-oriented law in practice.

In theory, here too the rights are separated into status (the exclusive jurisdiction of rabbinical courts) and damages (the exclusive jurisdiction of civil courts). In practice, however, the case of *get* refusal differs from divorcing a wife against her will and bigamy or polygamy because the separation into status and damages is not real or clear-cut, since the damages may be used to achieve a change in status. This is impossible when divorcing a wife against her will and in cases of bigamy or polygamy.¹³⁸

are being used in religious laws too. This means that tort law does not operate in a vacuum in this case, and it is not clear whether it has the authority to do so.

134. File. No. 7041-21-1 High Rabbinical Court (Mar. 11, 2008), Nevo Legal Database (by subscription) (Isr.) (arguing that claims for monetary damages in civil divorce proceedings are coercive measures and out of the jurisdiction of the civil court).

135. See Amihai Radzyner, *Annulment of Divorce in Israeli Rabbinical Courts*, in 23 JEWISH LAW ASSOCIATION STUDIES 193, 213–15 (Daniel B. Sinclair & Larry Rabinovich eds., 2012) (“[T]he rabbinical court appears to be . . . decreeing that filing a claim in civil court that is contrary to the clauses of the divorce agreement that was approved in the rabbinical court, is liable to have repercussions regarding the validity of the divorce.”).

136. See Blecher-Prigat & Shmueli, *supra* note 1, at 281 (considering the legal rights of women whose husbands have not consented to a *get*).

137. See *id.* at 281–82 (discussing the status of, and stigmas faced by, children of married women where the father is not the husband).

138. This may change in the long term because tort liability may provide incentives to husbands not to divorce their wives against their will or not to marry another wife, as mentioned above. It is less likely that the outcome of the damages will be that the husband remarries his wife or divorces the second wife.

Thus, legal pluralism tries to shape nonliberal family law by using liberal tort law, but the cost may be high both at the state and personal levels. At the state level, the problem lies in an escalation in the struggle over jurisdiction between the courts, especially in countries in which both courts are state agents. One undesirable outcome is forum shopping, in which each spouse tries to use the laws and courts that better serve his or her interests, at times resorting to one set of laws (tort law) in order to fight another set of laws (religious family law). This means that although the status can be changed only in religious courts, the appellant uses the secular court to try to change the status indirectly in a way that may be considered as manipulative. At the personal level, the danger is that rabbinical courts will not permit the divorce when they learn about the tort action, or worse, abolish the divorce retroactively, resulting in serious harm to the woman, who ends up precisely where she was before filing the tort action, with fewer resources and emotionally defeated. This serious danger also exists in countries like the United States and Canada where the rabbinical courts are private and do not struggle with civil courts over jurisdiction.¹³⁹ In these countries, if a woman is divorced in civil court and not according to Jewish law, although the marriage was contracted in both fashions, she is considered divorced according to state law but married according to Jewish law.¹⁴⁰ From a *halakhic* perspective, this situation is highly objectionable: if the wife remarries, her new marriage is not considered valid, and she is forbidden from living with either the new or the original husband.¹⁴¹ Therefore, the original husband must later grant her a *get*.¹⁴²

As Talia Einhorn explains, this situation also poses a constitutional challenge for civil courts in Western civilizations, since the separation of state and religion is enshrined in the constitutions

139. See sources cited *supra* note 75.

140. See, e.g., BREITOWITZ, *supra* note 74, at 5, 8, 81, 163–64, 170–74 (demonstrating no connections in some countries between civil divorce and the religious *get*); MICHAEL J. BROYDE, MARRIAGE, DIVORCE, AND THE ABANDONED WIFE IN JEWISH LAW: A CONCEPTUAL UNDERSTANDING OF THE *AGUNAH* PROBLEMS IN AMERICA 37–41 (2001) (discussing the dual system of civil and Jewish law); Cobbin, *supra* note 75, at 410–11 (demonstrating this through two cases, one from the United States—*Marguelis v. Marguelis*, 344 N.Y.S.2d 482 (App. Div. 1973), and the other from Canada—*In re Morris & Morris*, 42 D.L.R.3d 550 (Manitoba Ct. App. 1973)).

141. See Blecher-Prigat & Shmueli, *supra* note 1, at 281–82 (discussing the conflicts between civil law and Jewish law with respect to the validity of a divorce not approved by the original husband).

142. She is forbidden to live with the new man even if the first one dies. See Einhorn, *supra* note 2, at 138 (considering the limitations imposed by religious law on a woman who has not received a *get* from her first husband); Ben-Zion Schereschewsky & Menachem Elon, *Bigamy and Polygamy*, in 3 *ENCYCLOPAEDIA JUDAICA* 691, 691 (Michael Berenbaum & Fred Skolnik eds., 2d ed. 2007).

of Western states.¹⁴³ The recalcitrant husband often argues that granting a *get* against his free will would encroach on his freedom of religion.¹⁴⁴ An overwhelming number of courts in the United States, Australia, the Netherlands, and England have rejected those allegations.¹⁴⁵ As shown below, these courts have accepted that the *get* procedure is a release document devoid of religious connotation and handle the issues primarily through contract rather than tort law.

C. *The Options Offered by Legal Pluralism in Case of Collision Between Two Sets of Laws*

As shown above, using tort law in the case of *get* refusal means circumventing the religious values, not only putting a price on them as in the case of *Shari'a* law. It is true that tort laws are liberal and more compatible with human rights than religious law is. But one should be careful not to upset the delicate status quo in countries in which society has decided to separate practices and apply religious law in the area of family law.¹⁴⁶ Indeed, the consequences of the severe collision may not be in the best interest of human rights and of women who have been refused a *get*, both in the long and short term. The sense of affront experienced by rabbinical courts exacerbates the struggle over jurisdiction. In practice, legal pluralism often means forum shopping and does not contribute to reaching a reasonable solution. But recall that an undesirable outcome of a coerced *get* is possible even in countries in which the rabbinical courts are private.

As a sociological endeavor, legal pluralism also seeks to describe how the legal system resolves potential collisions between different legal doctrines or views. Legal pluralism takes into account that the underlying ideologies of the different doctrines make them irreconcilable. Therefore, the fact that the solution, if any, is not absolute—and perhaps cannot be absolute—should form the starting point.

Describing collisions, even in a critical fashion,¹⁴⁷ should not be the only function of the legal pluralism literature. Although this

143. See Einhorn, *supra* note 2, at 144–46 (examining how Western civil courts have addressed the thorny issue presented in ruling on claims that potentially implicate inappropriate entanglement with religion).

144. See *id.*

145. See *id.* at 144. See generally Williamson, *supra* note 63 (considering how courts in various countries have addressed the claim that granting a *get* against the husband's wishes may encroach on the fundamental freedom of religion).

146. See Hofri-Winogradow, *supra* note 1, at 63 (expanding on the status quo in countries such as Israel and Lebanon, and explaining that it is a product of a silent political compromise).

147. Fournier, McDougall & Lichtsztral, *supra* note 19, at 338–39 (arguing that law cannot be understood through the “ontological tools of ‘legal evangelicism,’” but must be understood through critical legal pluralism).

constitutes an important role of legal pluralism, it should also try to propose general and even specific options for solving the conflicts between the values and the collisions it describes, attempting to bridge them or to create some harmony between them, or else prefer one of them over the other in some circumstances.¹⁴⁸ Andreas Fischer-Lescano and Gunther Teubner raised the question of “whether traditional, nation-state informed modes of tackling collisions of law will suffice, or whether a radical rethinking of conflicts law is necessary.”¹⁴⁹ Indeed, given that the literature on legal pluralism is rich in worldwide examples of collisions, both between national and global laws and among local national laws themselves, the literature should try to offer either solutions or at least platforms for solutions derived from the knowledge about these collisions.

Several solutions have been offered to the collision in cases of *get refusal*. This Article presents them below, then offers a novel solution.

1. Tort Law Should Step Aside

One possible rational solution to a conflict between values is to prefer one over the other.¹⁵⁰ However, in some of the cases presented here, both values are state made, and no reason exists to prefer either, unless the interpreter prefers *ex ante* a human rights liberal value or a religious one. Even if conflicting values are both state made, however, there cannot be a real compromise between them

148. For different views regarding pluralism and the question of the possibility of providing rational or other solutions to conflicts between conflicting values or preferring one value over another, see, e.g., JOHN KEKES, *PLURALISM IN PHILOSOPHY: CHANGING THE SUBJECT* 1–6, 66–79, 199–205 (2000); Isaiah Berlin, *The Pursuit of the Ideal*, in *THE CROOKED TIMBER OF HUMANITY* 1 (1998); Thomas Nagel, *The Fragmentation of Value*, in *MORTAL QUESTIONS* 128 (1979); Michael Smith, *Dworkin on External Skepticism*, 90 B.U. L. REV. 509 (2010); Bernard Williams, *Conflict of Values*, in *MORAL LUCK* 71 (1981); Ronald Dworkin, Keynote Address at Boston University School of Law Symposium: Justice for Hedgehogs (Sept. 25–26, 2009).

149. See Fischer-Lescano & Teubner, *supra* note 14, at 1002 (asking this question mainly about collisions between national and global legal systems, but this is a general question that should be asked also about intranational collisions between legal systems); see also Halperin-Kaddari, *supra* note 11, at 217 (arguing that legal pluralism may be both prescriptive and descriptive, and referring, in order to reach this conclusion, also to Gunther Teubner, *The Two Faces of Janus: Rethinking Legal Pluralism*, 13 CARDOZO L. REV. 1443 (1992), who argues that legal pluralism has many faces); cf. Brian Z. Tamanaha, *The Folly of the ‘Social Scientific’ Concept of Legal Pluralism*, 20 J.L. & SOC’Y 192, 202 (1993) (analyzing the theoretical development of legal pluralism).

150. See Williams, *supra* note 41, at 77, 79–80 (dealing with the third option: the possibility of some value that can be appealed to (independent or not) in order to resolve the conflict of values rationally, and differentiating between values as commensurate or incommensurate).

because their aims differ entirely.¹⁵¹ Nevertheless, it seems that according to this opinion, the inevitable outcome is total preference of one value over the other, without compromise.

Indeed, in some jurisdictions, tort law steps aside and does not act at all when there is an *ex ante* possible collision between it and other laws. Examples of this approach include the *non-cumul* principle¹⁵² in French contract law and with the situation of contract law in UK law until 1995.¹⁵³ According to this approach, tort law steps aside in difficult cases of collision.¹⁵⁴ Indeed, as a reflection of legal pluralism, one may consider it wrong to provide normative solutions based on the classic formulations of the goals of tort law theories because they do not adequately take into account the social complexities involved in living in a pluralistic society, in which some

151. Cf. *id.* at 72–73.

152. *La règle de non-cumul* is a principle of nonconcurrency of actions. Cass. 1e civ., Apr. 6, 1927 (Fr.); see also Nuno Garoupa & Carlos Gómez Ligüerre, *The Syndrome of the Efficiency of the Common Law*, 29 B.U. INT'L. L.J. 287, 313–18 (2011) (presenting a general explanation of *non-cumul* in the context of tort and contract actions that parties seek to bring concurrently). According to this principle, contractual and tortious liability are distinct, even if complementary, so that an action should be brought either under contract law (*la responsabilité civile*) or under tort law (*la responsabilité délictuelle*). According to this principle, in cases in which there is a contract, a civil action can only be brought under contract law, which means that contractual liability imposes sanctions for the nonobservance of contractual obligations, and tort law cannot be used instead or alongside. In other words, a victim of a breach of contract cannot pursue a tort claim concurrently, and when an obligation exists by virtue of a contract, it cannot also exist in tort; and vice versa, when there is no contract between the parties, a civil action can be brought only under tort law, which means that tort law deals only with sanctions to breaches of rules of conduct that are imposed by statute, regulation, or case law. See also Denis Tallon, *Contract Law*, in INTRODUCTION TO FRENCH LAW 205, 231 (George A. Bermann & Etienne Picard eds., 2008). In common law, the contractual relationship between the plaintiff and the defendant does not exclude a tort action, for example in case of harm (emotional or other) from defective products, given that contract remedies are sometimes insufficient. See, e.g., *Donogue v. Stevenson* [1932] A.C. 562 (H.L.) (appeal taken from Scot.) (U.K.) (holding that manufacturers are liable in tort for injuries their goods cause their ultimate consumers irrespective of whether contract remedies are also available); Restatement (Second) of Contracts § 378 (1979); TONY WEIR, *ECONOMIC TORTS* 25 (1997) (discussing generalization in tort law). This is also the situation in German and Italian law, in which courts tend to consider tort and contract rules on damages as complementary. See Garoupa & Gómez Ligüerre, *supra*, at 315–16 (considering the exclusion of *non-cumul* in German and Italian law).

153. Garoupa & Gómez Ligüerre, *supra* note 152, at 315 (explaining that the rule of traditional English law, according to which contractual and tort claims should not be filed in the same cause of action (except in claims for physical injury), was overruled by *Henderson v. Merrett Syndicates Ltd.*, 2 A.C. 145 [1995] (U.K.), which allowed a party to the contract to sue the other party for financial losses due to negligence in performing the contract, in addition to contractual remedies for breach of contract); see also DONALD HARRIS, DAVID CAMPBELL & ROGER HALSON, *REMEDIES IN CONTRACT AND TORT* 575–78 (2d ed. 2002) (discussing “concurrent liability in both contract and tort”). I thank Israel Gilead for the idea.

154. See Garoupa & Gómez Ligüerre, *supra* note 152, at 315 (noting that tort and contract claims could not be pursued concurrently).

live according to religious norms that are at times enshrined in state marriage and divorce laws. Therefore, using tort law should be permitted only in a way that does not interfere with the basic tenets of religious family law. This means that if tort action could possibly result, even indirectly, in a change of status, tort law should step aside. Thus, tort actions in cases of divorce against the woman's will and of bigamy or polygamy should be permitted, but tort actions in case of *get* refusal should be rejected.

But even legal nonintervention acts as a type of legal intervention because it perpetuates the harms and consents to the prevailing nonliberal outcome. This outcome does not comport with human rights, and the high price it exacts necessitates seeking a way to solve the problem. Note also that in some countries in which there is no separation between state and religion, such as in Israel, the religious elements of the law are not a service offered to one community but rather are offered and enforced, even without consent, on every Jew, including secular Jews who do not share the relevant religious commitments.

Therefore, tort law should not step aside in these cases, as opposed to cases in which two liberal law systems, such as tort law and contract law, collide and result in an unquestionable liberal, human rights-oriented outcome. For those collisions, the legislature or the courts can decide *ex ante* which of the systems has supremacy and which one must withdraw. Even in the case of two liberal law systems that are liable to collide, reasons of both efficiency and victims' rights enable one system of law to intervene when the correct outcome cannot be achieved by another system of law.¹⁵⁵ Even French law allows the derogation of the principle of *non-cumul* for reasons of public interest, which Nuno Garoupa and Carlos Gómez Ligüerre explain could be interpreted as "serious negative externalities."¹⁵⁶ The reasons for intervention resonate all the more so when a liberal human rights-oriented system of law intervenes in a situation of a dead end resulting from applying the less human rights-oriented

155. *Id.* at 316–17. Nuno Garoupa and Carlos Gómez Ligüerre suggest that the use of tort law concurrently with contract law should be limited to specific situations where,

for different reasons, we suspect contractual damages are unable to achieve the correct outcome. . . .

. . . As a consequence, allowing tort claims concurrent with breach of contract claims can only be efficient in very exceptional conditions. One example is when contractual damages are unable to internalize the losses of non-performance due to externalities or the existence of serious asymmetries of information that undermine the optimality of contractual rules.

Id. In our case, it is obvious that tort law will not enter the picture whenever family law deals with the case satisfactorily.

156. *Id.* at 317 n.143.

legal system.¹⁵⁷ Unlike contract law, which can be changed and expanded to include or accommodate the tort rules, religious family law cannot evolve and change in order to repair the damages caused by *get* refusal.¹⁵⁸

2. Tort Law Should Call for a Change in Religious Law, but Not More

Another possibility is for tort law to adjudicate *get* refusal but not to award damages or grant any other remedy, only calling on the religious agent to make a change. There are situations in which courts that do not wish to be overly activist call on the legislature to change the legal situation.¹⁵⁹

This approach may differ in theory from the nonintervention approach because it is a type of intervention. When it is carried out intensively, it can pressure the religious courts to make a change (although only in a utopia could that change occur without a struggle over jurisdiction in countries in which both courts are state agents). One may argue that secular law cannot understand religious values and *halakhic* considerations. Therefore, this call for a change may be baseless and inconsequential. One may even claim that each system has its own power and authority and that a call for a change is not legitimate; thus, in practice (at least in the short term), the consequences do not differ from those of the first approach presented above.

Other, more practical solutions may exist, and they are enumerated below.

3. Civil Law Should Disregard the Collision

Another possible rational solution to a conflict between values is to prefer the liberal value of civil law over religious law, and not vice versa, as in the first two solutions offered above.¹⁶⁰ There are several versions of this solution, as described below.

157. See *id.* at 317 (discussing different rules under tort and contract law).

158. See *id.* at 317–18 (supporting this process, but adding that there are also costs associated with the balancing by the courts).

159. Cf. Halperin-Kaddari, *supra* note 11, at 226 (presenting a similar approach, but in the case of two family-law agents, secular and religious, both state made).

160. See Williams, *supra* note 41, at 77, 79–80; see also *supra* Part IV.C.1–2.

(a) Tort Law Is Implemented Sweepingly

Another option, located at the other end of the scale, is to disregard the possible collision,¹⁶¹ leave matters as they stand, and wait for further developments. Naturally, it is easier for civil courts to effortlessly implement tort law without regard to possible collisions with Jewish law in countries in which religion and state remain separate (e.g., France¹⁶² or the Netherlands¹⁶³) than in countries in which they do not (e.g., Israel). Either way, the sweeping implementation of tort law means that legal pluralism has accomplished what it had set out to do by enabling human rights laws to operate through tort law. A silent agreement between the courts may be achieved if rabbinical judges find that many women file tort claims, and they will not be able to disregard this phenomenon or to stop all *get* procedures in all cases. But there is always the danger that this will not happen and that the situation will remain as it is today, or will even worsen. Furthermore, one must take into account the present suffering of women who have reached a dead end after filing the tort claim because the rabbinical court blocked their divorce proceedings due to considerations of Jewish law, the struggle over jurisdiction, or both. These women do not have time to wait for silent agreements in the future.

161. Cf. Halperin-Kaddari, *supra* note 11, at 228 (presenting a method of disregarding, in cases of secular-civil family law, judgments that wish to direct and change the state of religious family laws).

162. Einhorn explains that French courts regard *get* refusal as a civil delict, either on the grounds of *faute* (fault), *abus de droit* (abuse of right), or *abus de liberté* (abuse of freedom), and hold that the plaintiff should be compensated. See Einhorn, *supra* note 2, at 148–49. The courts do not order the recalcitrant spouse to grant or accept the *get* or to appear before the rabbinical court, because that would be an impermissible infringement on his or her freedom of conscience. Einhorn shows that in recent years, the amount of damages has become substantial. In one case, after the husband had paid FF 80,000, imposed as compensation in 1992, the wife sued him again in 1995, claiming that the compensation covered only her damages prior to the 1992 decision. The husband argued that this was a *chose jugée* (*res judicata* applied). The court upheld the wife's claim and imposed an additional sum of FF 130,000 for the period of 1992–1995. An appeal was dismissed. *Id.* (citing Cour d'appel [CA] Versailles, Arrêt n° 54-1, Nov. 14, 1996 (unreported)).

163. See Einhorn, *supra* note 2, at 148; see also Matthijs de Blois, *Religious Law Versus Secular Law: The Example of the Refusal in Dutch, English and Israeli Law*, 6 UTRECHT L. REV. 93, 94, 96, 98 (2010) (explaining that the Netherlands adheres to a unitary system of family law while Israel identifies pluralism in family law, and furthermore that the Dutch Supreme Court exceeds the Jewish divorce law requisites to reach a result conforming to Dutch tort law). Einhorn explains that under Dutch law, *get* refusal is considered a breach of the duty of care that a husband owes to his wife. Such behavior is unlawful and amounts to a civil delict. She argues that Dutch courts have not hesitated to remedy this situation by ordering the husband to cooperate with a rabbinical tribunal in granting the *get*.

Tort law should be implemented in these cases, but in a more sensitive manner than in other cases. Achieving good empirical understanding of the case can help produce a normative argument and solution. It may be necessary to guide the courts on how to interpret tort law in cases of collision with religious family law, in a way that tries to minimize the fundamental conflict between the two systems. Therefore, the claim that these actions should be accepted sweepingly, in accordance with the feminist view,¹⁶⁴ is not sufficiently sensitive and does not respect the religious courts and law. In my opinion, it makes the religious courts inferior and does not address their needs and problems. This approach, which is a form of legal centralism, has been criticized.¹⁶⁵

(b) Contract Law is Implemented Sweepingly

The same considerations apply to contract law. Although a wide analysis of the implications of this system of law is beyond the scope of the present Article, it at least bears mentioning that in countries in which civil marriage and divorce are recognized by the state, it is also possible to regard these as valid contracts that can be litigated within the framework of contract law. In this way, refusal to grant a *get* may be viewed as a breach of the marital contract, and the plaintiff can be awarded damages from her spouse. This occurred in Canada in 2007.¹⁶⁶ In most jurisdictions of the United States, contract law

164. See Bitton, *supra* note 129 (proposing a clear supremacy of tort law over Jewish family law in an attempt to suppress these “depressing” laws).

165. Ruth Halperin-Kaddari has criticized Justice Barak’s opinion in two decisions of the Israeli High Court of Justice, defining it as centralism or as a theory of unity. Halperin-Kaddari, *supra* note 11. She presents the view that these decisions may be substantively contrary to the character of the Israeli legal system as a system of legal pluralism, and it therefore narrows and ignores the advantages that may be garnered from that legal pluralism. An opposite possible view holds that the decisions were inevitable and must be seen as an indication that the unique structure that characterizes legal pluralism is impossible in Israel. She suggests an alternative model, that of nonrecognition, that does not compel religious courts to rule against their religious doctrines, as the theory of unity does, but instead regards various issues as being appropriated by the civil system, thus narrowing the jurisdiction of the religious system. The new remedies developed in this manner in the civil arena keep the new system out of the reach of the religious system. *Id.* at 201–04. As mentioned earlier, *supra* note 19, Halperin-Kaddari deals with collision within family law itself (secular and religious), but some of the issues raised in her article, and above all the question of legal pluralism in Israel, are relevant to our issue as well.

166. See *Bruker v. Marcovitz*, [2007] S.C.R. 607, ¶ 63 (Can.) (“[T]he enforceability of a promise by a husband to provide a *get* harmonizes with Canada’s approach to religious freedom, to equality rights, to divorce and remarriage generally, and has been judicially recognized internationally.”); see also John C. Kleefeld & Amanda Kennedy, “A Delicate Necessity”: *Bruker v. Marcovitz and the Problem of Jewish Divorce*, 24 CANADIAN J. FAM. L. 205, 279–80 (2008) (commending the *Bruker* decision, which, in a principled and sensitive manner, balanced the competing interests of protection of equality and accommodation of diversity). *But see* F.C. DeCoste, *Caesar’s Faith: Limited Government and Freedom of Religion in Bruker v. Marcovitz*,

action, unlike tort action, does not require a jury trial and is therefore much cheaper.

But here again all the problems that have been raised with reference to tort action apply, above all the coercive manner of the two-way transaction that may result in the *get*'s invalidation.

Note further that the insistence of rabbis on prenuptial agreements as a condition for a *halakhic* Jewish marriage may solve the problem in countries in which civil marriage is acknowledged.¹⁶⁷ The prenuptial agreement usually contains an obligation by the husband to pay a large sum to his wife for each and every day of the marriage, approximately \$100 or \$150, to meet the *halakhic* demand of maintaining his wife.¹⁶⁸ One possible basis for this agreement is the *ketubah*, the Jewish religious marriage contract.¹⁶⁹ It means that

32 DALHOUSIE L.J. 153, 167 (2009) (criticizing the *Bruker* majority for failing to protect religious liberty and multiculturalism in Canada from the state's "predatory management"); Richard Moon, *Bruker v. Marcovitz: Divorce and the Marriage of Law and Religion*, 42 SUP. CT. L. REV. 2d 37, 59–61 (2008) (Can.) (suggesting that when a community is so insular as to make membership involuntary, the state may intervene to shield members from unjust rules, but also indicating that it is unclear the plaintiff's community in the *Bruker* case was sufficiently insular to warrant such state action).

167. See, e.g., Lazerow, *supra* note 42, at 115–20, 122–32 (presenting the mechanism of these agreements and their enforceability in the United States according to the Restatement of Contracts and according to the First Amendment to the Constitution). I thank Michael Broyde, Professor of Law at Emory University and a member (*dayan*) of the Beth Din of America, the largest Jewish law court in the United States, for providing these details in an interview. See Interview with Michael Broyde, Professor of Law, Emory University (Dec. 28, 2012).

168. Interview with Michael Broyde, *supra* note 167; see also *Light v. Light*, No. NNHFA124051863S, 2012 Conn. Super. LEXIS 2967, at *1–7 (Dec. 6, 2012) (approving the validation of a prenuptial agreement by the Rabbinical Council of America, and stating that it does not contradict the Constitution, and that it may be enforceable according to civil law); Leichter, *supra* note 3, at 11–12 (presenting some dangers for women in Jewish prenuptial agreements). The Connecticut Superior Court validated such an agreement in *Light v. Light*. *Light*, No. NNHFA124051863S, 2012 Conn. Super. LEXIS 2967. The agreement was created by Rabbi Mordechai Willig of Yeshiva University, one of the students of Rabbi Yosef Dov Halevi Soloveitchik. It obligates the husband to pay \$100 maintenance per day since the separation of the couple and until the *get*. Similar agreements were offered in Israel, e.g., by Adv. Rabbi Professor Dov Frimer, Dr. Rachel Levmore, Rabbi Eliashiv Knohl, and Rabbi David Ben-Zaron. These types of agreement are created based on rulings by important rabbis such as Betzalel Zolti, Zalman Nechemia Goldberg, Aharon Lichtenstein, Nahum Eliezer Rabinovitz, Eliahu Bakshi-Doron, Shlomo Moshe Amar, and others, and supported by the rabbis and heads of Yeshiva University.

169. See *Goldman v. Goldman*, 554 N.E.2d 1016, 1022 (Ill. App. Ct. 1990) (reading an implied agreement in the *ketubah* by the husband to give his wife a *get* in the event of dissolution of their marriage); Lazerow, *supra* note 42, at 114–15, 117–19 (describing courts' willingness to enforce prenuptial agreements, and implied promises to give a *get*, set forth in a *ketubah*). Einhorn describes the Jewish view of marriage:

Marriage, under Jewish law, is a contract initiated and terminated by the parties involved. The marriage contract is recorded in the *ketubbah*, stating the date of marriage, the names of bridegroom, bride and witnesses, and that the bridegroom says to the bride, "Be thou my wife in accordance with the law of

get refusal can be considered as a breach of the contract, if only according to some opinions.¹⁷⁰ But there is more. Both Orthodox and Conservative rabbis encourage and almost enforce couples agree to submit to rabbinic arbitration in times of marital discord in order to solve the *Agunah* problem.¹⁷¹ In *Avitzur v. Avitzur*,¹⁷² the New York Court of Appeals enforced a prenuptial agreement to arbitrate all postmarital religious obligations undertaken in the *ketubah* in a private rabbinical court (*bet din*).¹⁷³ "The Court of Appeals of New York held that ordering a couple to submit to such rabbinic arbitration, as required by a *Ketubah*, did not violate the First Amendment, for it is 'nothing more than an agreement to refer the matter of a religious divorce to a nonjudicial forum.'"¹⁷⁴ The court did not consider it improper to order the parties to apply to rabbinical arbitration because the obligations in the *ketubah* are grounded in religious belief and practice.¹⁷⁵ It reasoned that the decision was based "solely upon the application of neutral principles of contract law, without reference to any religious principle."¹⁷⁶ As a New Jersey court explained:

[T]he entry of an order compelling defendant to secure a *get* would have the clear secular purpose of completing a dissolution of the marriage. Its primary effect neither advances nor inhibits religion since it does not require the husband to participate in a religious ceremony or to do

Moses and Israel and I will work, honor, support and maintain thee in accordance with the practices of Jewish husbands"

Einhorn, *supra* note 2, at 137.

170. See BREITOWITZ, *supra* note 74, at 324–69 (presenting the different opinions); Lazerow, *supra* note 42, at 128 (arguing that nevertheless "it is clear that at least some courts have concluded that refusing to give a wife a *Get* is a breach of the *Ketubah's* requirement to be bound by the 'laws of Moses and Israel'"); see also BREITOWITZ, *supra* note 74, at 63 n.173 (discussing the distinction between sales and gifts as they relate to coerced consent in the annulment context); Leichter, *supra* note 3, at 7–8 (presenting the different opinions).

171. See, e.g., BREITOWITZ, *supra* note 74, at 82 n.226 (noting that a court "did not directly order the husband to execute a *get* but ordered him to submit to the jurisdiction of a rabbinical court and initiate the *get* procedure"); Lazerow, *supra* note 42, at 114–15.

172. 446 N.E.2d 136 (N.Y. 1983).

173. *Id.* at 138–39; see also BREITOWITZ, *supra* note 74, at 97–98 (summarizing the case); Lazerow, *supra* note 42, at 114–15 (describing the court's reasoning in *Avitzur* and the case's landmark status).

174. Lazerow, *supra* note 42, at 115 (quoting *Avitzur*, 446 N.E.2d at 138–39); accord *Avitzur*, 446 N.E.2d at 138.

175. See *Avitzur*, 446 N.E.2d at 138–39 ("[D]efendant's objections to enforcement of his promise to appear before the Beth Din, based as they are upon the religious origin of the agreement, pose no constitutional barrier to the relief sought by plaintiff.").

176. *Id.* at 138; see also Lazerow, *supra* note 42, at 115 (discussing this case); Leichter, *supra* note 3, at 6–8 (discussing the various judgments and opinions); cf. Jones v. Wolf, 443 U.S. 595, 603 (1979) (considering the role of the First Amendment in resolution of church property disputes).

acts contrary to his religious beliefs. Nor would the order be an excessive entanglement with religion.¹⁷⁷

It means that the refusal to grant a *get* is considered an issue of monetary gain.¹⁷⁸ But note that the Arizona Court of Appeals considered the ordinary Orthodox *ketubah* too vague to be interpreted as including an obligation to deliver a *get*.¹⁷⁹ Einhorn thinks that the result might have been different had it been a Conservative *ketubah*.¹⁸⁰

If the husband refuses to divorce his wife, she can file an action in civil court to enforce the monetary obligation in the prenuptial agreement.¹⁸¹ In this case, the civil court must only enforce an explicit and direct monetary obligation, that is, perform a monetary judicial enforcement.¹⁸² This does not raise the issue of a coerced *get* because it merely enforces a maintenance agreement and does not impose damages for *get* refusal.¹⁸³ This solution can be applied even in countries in which civil marriage does not exist. Naturally, in the United States, for example, if the civil court issues an order forcing the husband to divorce his wife, it may be considered an unlawful intervention in the freedom of religion according to the First Amendment.¹⁸⁴ In that case, the *get* may be considered coerced.¹⁸⁵

177. *Minkin v. Minkin*, 434 A.2d 665, 668 (N.J. Super. Ct. Ch. Div. 1981). Compare *Aflalo v. Aflalo*, 685 A.2d 523, 527–30 (N.J. Super. Ct. Ch. Div. 1996) (criticizing *Minkin's* investigation of whether a *get* was a religious act and regarding it as a violation of the entanglement prong of Establishment Clause analysis), with Noah Gradofsky, *Refusal To Grant a Jewish Divorce as Infliction of Emotional Distress* 33 (Jan. 13, 2013), http://www.e-ark.net/legal_writings.html (indicating that he thinks that this charge against *Minkin* is unfounded: “Aflalo also argued that even if an area of religious practice relates to interpersonal behavior, it may still be considered ‘religious’”).

178. See, e.g., *Burns v. Burns*, 538 A.2d 438, 440 (N.J. Super. Ct. Ch. Div. 1987) (“An offer to secure a ‘get’ for \$25,000 makes this a question of money not religious belief.”); Einhorn, *supra* note 2, at 144 (noting an “overwhelming number of courts” in the United States, the United Kingdom, the Netherlands, and Australia have treated the *get* as a document “devoid of religious connotation”).

179. See *Victor v. Victor*, 866 P.2d 899, 901–02 (Ariz. Ct. App. 1993) (concluding the *ketubah* failed the specificity requirement for an antenuptial agreement to be enforceable).

180. Einhorn, *supra* note 2, at 147.

181. See BROYDE, *supra* note 140, at 66–68.

182. *Id.*; see also, e.g., Rule 78 of the New York Civil Practice Law and Rules, which contains a strict list of cases in which a rabbinical judgment is to be cancelled by the civil court and not enforced by it, especially in cases of bribery, etc. Similar rules are found also in other jurisdictions.

183. See BROYDE, *supra* note 140, at 66–68.

184. See *Avitzur v. Avitzur*, 446 N.E.2d 136, 138–39 (N.Y. 1983), 136, 138–39 (N.Y. 1983); see also Lazerow, *supra* note 42, at 114–15 (examining the court’s reasoning in *Avitzur*).

185. See *Avitzur*, 446 N.E.2d at 138–39 (“[T]he relief sought by plaintiff in this action is simply to compel defendant to perform a secular obligation to which he contractually bound himself.”). But see Lazerow, *supra* note 42, at 119 (specifying that civil courts do not force a husband to give a *get* to his wife in this context, but rather,

Hence, in this way, the civil court deals with the enforcement of a debt and not with *get* refusal.¹⁸⁶ However, there is a distributional problem with this solution because it may encourage wealthy husbands to refuse granting *gets* to their wives.¹⁸⁷

This is the case of the Modern Orthodox Jewish congregation (members of the Rabbinical Council of America) in the United States. Because there is no struggle over jurisdiction between private rabbinical courts and civil courts in the United States, this solution works in practice and almost no case reaches the courts.¹⁸⁸ Ultra-Orthodox Jews in the United States usually do not sign prenuptial agreements.¹⁸⁹ Although they do not claim that these are not valid according to Jewish law, they believe that prenuptial agreements can bring bad luck.¹⁹⁰ They also usually avoid approaching the state courts and prefer to use only Jewish courts.¹⁹¹ This solution therefore does not apply to them in practice.¹⁹² In Israel, there is also intense debate about prenuptial agreements.¹⁹³ Some of the agreements suggested do not grant exclusive jurisdiction to the rabbinical court, unlike in the United States, and Israeli rabbis do not acknowledge some agreements.¹⁹⁴ If accepted, the prenuptial agreement could present a pluralistic solution across the world.

With respect to U.S. contract law, referring to an explicit agreement is the best way for the civil court to avoid possible collision with freedom of religion according to the First Amendment. Since the

enforce secular contracts concerning *gets* if the courts find such agreements to be valid under contractual doctrines).

186. See BROYDE, *supra* note 140, at 66–68; cf. Paul Finkelman, *A Bad Marriage: Jewish Divorce and the First Amendment*, 2 CARDOZO WOMEN'S L.J. 131, 161–65 (1995) (describing the fundamentally religious nature of the *get*).

187. See Leichter, *supra* note 3, at 10–11 (“[I]t has the drawbacks of any contract that imposes monetary penalties: the very rich husband, and the very poor husband, can both afford to thumb their noses at these agreements and still refuse to give the wife her *Get*.”).

188. See BROYDE, *supra* note 140, at 12–13; see also, e.g., *Light v. Light*, No. NNHFA124051863S, 2012 Conn. Super. LEXIS 2967, at *1–7 (Dec. 6, 2012).

189. See BROYDE, *supra* note 140, at 66–68.

190. See *id.*

191. See, e.g., Yaacov Feit, *The Prohibition Against Going to Secular Courts*, 1 J. BETH DIN AM. 30, 30–31 (2012) (stating the general rule that, with limited exceptions, the *Torah* prohibits attendance at secular courts).

192. Interview with Michael Brody, *supra* note 167.

193. See, e.g., Rachel Levmore, *The Agreement for Mutual Respect: The Workings of a Prenuptial Agreement for the Prevention of Get-Refusal as a Halakhic Autonomous Tool*, in 23 JEWISH LAW ASSOCIATION STUDIES, *supra* note 135, at 147.

194. See, e.g., Uriel Lavi, *Pre-Nuptial Agreement in Which the Spouse Refusing To Divorce Is Liable for Payment*, 14 SHURAT HADIN (2008) (Isr.) (explaining the opposition in Israel to prenuptial agreements and that they are not considered desirable from a *halakhic* point of view); Mordechai Willig, *The Prenuptial Agreement: Recent Developments*, 1 J. BETH DIN AM. 12, 13–16 (2012) (enumerating the exceptions to the prenuptial agreement in which a husband is released from his obligation to pay a daily sum to his wife); Beth Din of Am., PRENUP, <http://theprenup.org/> (last visited Apr. 7, 2013) (expanding on prenuptial agreements in the United States).

parties (the spouses) signed the agreement of their own accord, they consciously forfeited religious freedom. But it appears that no published state court or Supreme Court decision in the United States has tested the enforceability of a Jewish prenuptial agreement.¹⁹⁵ Although there have been disagreements between rabbis in the United States and other countries regarding its validity,¹⁹⁶ this effective *ex ante* solution¹⁹⁷ should be widely used, together with other *ex post* solutions, in the absence of an agreement. As Williamson states:

As in the United States, if affected religious groups were encouraged to promote prenuptial agreements before the performing of a religious marriage, an increase in such agreements would potentially follow. With more agreements in existence, the court would have a greater opportunity to enforce the removal of barriers to remarriage upon dissolution.¹⁹⁸

Indeed, the solution depends first and foremost on reaching a consensus regarding the mandatory signing of these contracts as a condition for Jewish marriage, as is done in the Modern Orthodox Jewish congregation in the United States. But as noted, the law should also provide a solution in cases in which no *ex ante* agreement exists.

In the United Kingdom, the situation is somewhat different. UK courts have ruled that prenuptial agreements are contrary to public policy because they undermine the concept of marriage as a lifelong union, and they are therefore unenforceable.¹⁹⁹ Einhorn explains:

[S]uch agreements could still have evidential weight if the terms of the agreement are relevant to subsequent divorce proceedings before the court. Furthermore, some aspects of those agreements may be enforceable. In one case the parties entered before their wedding an ante-nuptial agreement, in contemplation of and conditional upon their marriage. It included a clause that, in the event of any matrimonial dispute they will both attend the London BD [*bet din*—rabbinical court] when requested to do so and that they will comply with the instructions of the BD, which would resolve their disputes in accordance with

195. See Leichter, *supra* note 3, at 11 (confirming no published state court decision has tested the enforceability of a Jewish prenuptial agreement).

196. See Williamson, *supra* note 63, at 145 (admitting the prenuptial solution has not received unanimous support from religious leaders).

197. See Andrew Strum, *Getting a Gett in Australian Courts*, 12 AUSTL. FAM. LAW. 21 (1997) (arguing that this solution is effective and suggesting that it should be embraced in Australia too); Andrew Strum, *Jewish Divorce in Australian Family Law*, 17 MELBOURNE U. L. REV. 182, 183 (1991) ("In the light of what is perceived to be, on the whole, the favourable attitude of courts in various jurisdictions to devising solutions to the problem posed by a former civil law spouse resisting a divorce at Jewish law, an enforceable prenuptial arbitration agreement is proposed."); Williamson, *supra* note 63, at 145–46 (arguing that this solution should be embraced in Australia).

198. Williamson, *supra* note 63, at 146–47.

199. See *N v. N* (1999) 2 F.C.R. 583 (U.K.) (finding the public policy concerns presented in this case persuasive).

halakhah under the Arbitration Acts in accordance with the BD's procedural rules. The Court held that the agreement was meant to regulate the parties' affairs in the event of divorce, and therefore the public policy argument applied.²⁰⁰

Over time, however, the Chief Rabbinate of the United Kingdom developed prenuptial agreements for new couples to sign, but they are not compulsory and not enforced by law; this means that "those signing such an agreement are generally a 'self-selected group,'" most (or at least some) of whom would not "seek to withhold a religious divorce in the event of the dissolution of marriage anyway."²⁰¹ This differs from the Modern Orthodox Jewish congregation, which treats this signature as almost socially mandatory, as stated above.²⁰²

In tort law the situation differs because liability is not based on prior agreement. Therefore, it raises issues of civil intervention in the freedom of religion, which may conflict with the First Amendment. Note in this context that in *Perl v. Perl*, the New York Supreme Court ruled that "[a] husband's refusal to deliver a *get* unless his wife agreed to a property settlement giving him virtually all of their property does not subject him to liability in tort."²⁰³ The court reasoned that tort liability required proof of intention, which would "entangle the court[] in an exploration of . . . the sincerity" of "any spouse who refused to furnish a *Get*, upon religious grounds in whole or in part."²⁰⁴ The separation of religion and state requires that the courts not resolve controversies in a manner that requires consideration of religious doctrine. But according to Irving Breitowitz, U.S. law is able to recognize a tort for severe emotional distress that was caused intentionally or recklessly by extreme and outrageous conduct.²⁰⁵

Furthermore, referring to contract law without a prenuptial agreement is possible only in countries in which there is civil marriage and a separation between religion and the state. But if there is no explicit agreement with regard to maintenance payments

200. See Einhorn, *supra* note 2, at 147 (recounting the court's application of public policy to the case).

201. See Williamson, *supra* note 63, at 146 (citing M. Cohen, *The Agunot Controversy*, in A LEADERSHIP DIALOGUE: VOICES OF BRITISH AND AMERICAN JEWISH WOMEN COMMUNITY LEADERS 37 (Sarah Silberstein Swartz ed., 2001)) (concerning the adoption in the United Kingdom of a prenuptial agreement that is not required or enforced by law).

202. See *supra* note 188 and accompanying text.

203. Einhorn, *supra* note 2, at 149 (reporting the court's decision in *Perl*); see also *Perl v. Perl*, 126 A.D.2d 91, 96 (N.Y. App. Div. 1987) (reasoning that to extend tort liability to husbands who deny their wives *gets* would entangle the courts too closely with ecclesiastical concerns).

204. See *Perl*, 126 A.D.2d at 96 (exploring the potential interaction between religion and the state that this case presented).

205. See BREITOWITZ, *supra* note 74, at 239-49 (discussing the tort of IIED and its application to the refusal of a *get*); see also Einhorn, *supra* note 2, at 149 (examining the court's reasoning in *Perl*).

(which are in reality remedies in cases of a refusal to divorce), the civil court may be facing the same problems as in the case of a tort action.

Regarding Catholic couples that cannot divorce according to their religion, and whose only solution is to sign an annulment paper, taking the case to civil court if one spouse refuses to sign the document may be problematic both in torts and in contract law in the United States. In tort law, the same problems of intervention in the freedom of religion arise. In this case, however, contract law does not help either. If the recalcitrant spouse refuses to sign the annulment, the civil court usually cannot coerce him to do so because of the same reason of freedom of religion. Expanding on this issue any further is beyond the scope of this Article.

Another possible solution to the problem is the signing of an ex post *get* settlement contract, if the husband is reluctant to grant a *get*.²⁰⁶ Naturally, if a woman has to bargain with her husband for the *get*, the price may be very high (e.g., exorbitant amounts of money, marital assets, or relinquishing custody of the children).²⁰⁷ Secular courts may declare these contracts void based on a finding that the exchange gained in the bargain was unjust²⁰⁸ owing to coercion, extortion, or duress.²⁰⁹ That extortion can also be considered a tort,²¹⁰

206. *But see* Einhorn, *supra* note 2, at 147–48 (discussing the treatment of *gets* in British and U.S. courts); Lazerow, *supra* note 42, at 111–12 (warning an ex post *get* may force a desperate wife into an unfair bargain).

207. *See* Lazerow, *supra* note 42, at 111 (“[A] husband . . . may offer to give his wife a *Get* for the small price of her agreement to a contract. The problem is, however, that the price the wife pays in holding up her end of the bargain is often not small at all.”).

208. *See id.* (discussing the secular courts’ close examination of the circumstances surrounding each contract as well as its formation).

209. According to Alan Lazerow:

In the formation of a *Get* settlement contract, the wife lacks the free exercise of will power. There is no meeting or blending of the minds. It is an understatement to term the husband’s conduct, which frightens a woman into assent, as “wrongful.” As such, for the reasons explained, *Get* settlement contracts may be held voidable on the grounds of duress.

See id. at 130. A New Jersey Superior Court case involved such an example of coercion. *Segal v. Segal*, 650 A.2d 996, 997 (N.J. Super. Ct. App. Div. 1994). In this case, the husband refused to give his wife a *get* “unless she conveyed . . . property to him, waived any claim to child support or alimony, disclaimed any interest in all marital assets including [the husband’s] business, and in addition paid him \$ 25,000.” *Id.* at 997. The court held that the wife was subjected to “extreme pressures,” and it meant that the agreement was secured by duress, and the deed conveying the house was invalid. *Id.*; *see also* Lazerow, *supra* note 42, at 122 (“Again missing from the court’s opinion was a mention of the court’s role in adjudicating claims implicating the First Amendment.”). Lazerow also argues that

[w]hile courts have not shied away from voiding *Get* settlement contracts, they have not examined them through the lens of the Restatement of Contracts. With many jurisdictions either formally adopting as law or seeking guidance

although not necessarily, and the court must examine the circumstances carefully.²¹¹ It seems that there is no constitutional hurdle in this case in the United States;²¹² some courts have gone even further and enforced express promises or contracts made by husbands to grant their wives *gets*, and explicitly ordered husbands to undertake a religious action in granting the *gets*.²¹³

from the Restatement of Contracts, it is worthwhile to apply the sections pertaining to duress and unconscionability to a typical *Get* settlement contract scenario.

Lazerow, *supra* note 42, at 130–34 (footnotes omitted). Lazerow also thinks that a woman who has been refused a *get* can use the contractual doctrine of unconscionability according to the Restatement (Second) of Contracts § 208. *Id.* at 130–33.

210. RESTATEMENT (SECOND) OF CONTRACTS § 175(1) (1981) (“If a party’s manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim.”); *see also* Lazerow, *supra* note 42, at 123–26 (discussing the Restatement).

211. *See* Lazerow, *supra* note 42, at 111 (“[I]t is incumbent upon the secular courts to closely examine the facts and circumstances of each contract and its formation to determine if the bargained-for-exchange was so unjust as to necessitate invocation of one of any number of contractual doctrines to void, or make voidable, such *Get* settlement contracts.”).

212. [S]ecular courts are fit to adjudicate such disputes. While disputes involving civil divorces and secular contracts are clearly properly heard in civil courts, “[a] court . . . will refuse to decide an essentially religious issue even if the issue is otherwise properly before the court, and even if it is asked to decide it.” One could argue that *Get* settlement contracts should not be within a secular court’s purview, running afoul of the First Amendment; after all, “[a] wife who does not receive a *get* is harmed only because she and others have a religious and cultural sense that the *get* is important.” However, after examining other scenarios implicating religious concerns that courts have held to be within their purview, it becomes apparent to this author that secular courts are not constitutionally barred from adjudicating *Get* settlement contract disputes.

Id. at 112 (alterations in original) (emphasis omitted) (footnotes omitted) (quoting *Marsh v. Chambers*, 463 U.S. 783, 804 n.15 (1983)); *see also* Kent Greenawalt, *Religious Law and Civil Law: Using Secular Law To Assure Observance of Practices with Religious Significance*, 71 S. CAL. L. REV. 781, 814 (1998).

213. *See* Lazerow, *supra* note 42, at 114–16 (discussing the *Avitzur* case and the requirement of “[e]xpress promises to give a *Get*”); *see also* Einhorn, *supra* note 2, at 147–48 (describing a New York Supreme Court ruling that rejected a husband’s claim that the undertaking was contrary to public policy, holding that not all agreements conditioned on divorce are illegal). Einhorn discusses *Waxstein v. Waxstein*, 395 N.Y.S.2d 877, 881 (Sup. Ct. 1976), *aff’d*, 394 N.Y.S.2d 253 (App. Div. 1977), in which the court granted specific performance of a separation agreement that provided that the parties should obtain a *get* before the wife vacates the premises, *id.* at 88; she also discusses *Scholl v. Scholl*, 621 A.2d 808 (Del. Fam. Ct. 1992), in which the court ordered a husband to properly cooperate and grant an Orthodox *get* rather than the Conservative one he was willing to grant, *id.* at 812–13. Einhorn concludes that although it has been stated that oppressive misuse of the religious veto power by a spouse subjects the economic bargain that follows between them to review and potential revision, and that a divorce settlement tainted by duress is void, not merely

According to Alan Lazerow, if the law considers judicial notice of religious practices in a religious contract (the *ketubah*) issued at a religious ceremony (a wedding) to be neutral, as in *Avitzur*,²¹⁴ surely the same applies to *get* settlement contracts, which are secular in nature and for which any religious implications arise only incidentally.²¹⁵ Expansion on this issue is, however, beyond the scope of the present Article.²¹⁶

Tort cases have not been tested in the U.S. Supreme Court with reference to the First Amendment, but it is likely that the situation in these cases may be more difficult to resolve than in cases of contracts because no agreement exists between the parties. Pointing at emotional distress as an outcome of applying Jewish law, secular courts may collide with the First Amendment.

(c) Civil Remedies Should Not Be Granted Unless All Barriers to the Remarriage Are Removed: The “*Get* Law”

A somewhat similar solution to that of tort law (and contract law) is used in some states and countries that have sought to find a solution through secular civil family law. Because civil marriage and divorce are widely acknowledged in some countries (but not in Israel),²¹⁷ a situation may arise in which there is no civil cause for compensation for *get* refusal because the civil court has declared the couple divorced, despite the fact that Jewish law considers the couple married until the arrangement of the *get*. In these countries, civil family law deals with civil remedies such as the division of property and civil divorce.

voidable, civil courts have been reluctant to review the agreements. See *Perl v. Perl*, 126 A.D.2d 91, 95–97 (N.Y. App. Div. 1987). In *Golding v. Golding*, the New York Appellate Division reasoned that, absent a showing of fraud, mistake, duress, or overreaching, property settlements in divorce proceedings will not be disturbed by the court. 581 N.Y.S.2d 4 (App. Div. 1992). There is strict surveillance of all transactions between married persons, and the courts have protected separation agreements and made it their business to see to it that they are arrived at fairly and equitably. The court held, however, that the wife did not freely and voluntarily enter into a separation agreement allegedly produced through rabbinical arbitration. *Id.* at 7. The court was presented with evidence that the procedure did not properly protect the wife, who was compelled to sign the settlement under the threat of becoming forever chained to her husband. *Id.* at 6.

214. See *Avitzur v. Avitzur*, 446 N.E.2d 136, 138–39 (N.Y. 1983) (discussing judicial involvement in matters concerning religious ceremonies).

215. See Lazerow, *supra* note 42, at 115 (discussing the requirement of judicial notice in *get* contracts).

216. See *id.* at 112 (discussing different aspects of the issue, including difficulties).

217. See HANNA LERNER, MAKING CONSTITUTIONS IN DEEPLY DIVIDED SOCIETIES 214 (2011) (discussing how neither formal marriage nor divorce is recognized in modern-day Israel); Fournier, McDougall & Lichtsztral, *supra* note 19, at 335–36 (adding that there is tension surrounding this matter in Israel and there are several developments).

In a few countries, civil family law does not ignore the problem but tries to prevent a situation in which a woman is refused a *get* under Jewish law, despite the fact that the couple is considered divorced under civil law. In so doing, civil family law tries to enforce decisions of the private rabbinical courts in sanctioning husbands who fail to act in accordance with these decisions. The sanctions may include not granting civil divorce or other civil remedies (such as division of the property) unless the husbands have done what they could to divorce their wives according to Jewish law. The effect of this practice is similar to that of a tort action. In countries in which civil marriage and divorce are acknowledged by the authorities, civil family law acts in a similar way as tort law.

The process of using civil family law is more direct than using tort law because there is no need for a two-way transaction in using the damages: the civil family courts direct the entire process by not enabling the husband to remarry according to civil law until he divorces his wife according to religious law.

In some countries (e.g., the United Kingdom and Australia), the courts have taken this step, i.e., they ordered the withholding of the civil divorce until the delivery of the *get*.²¹⁸ In Australia, the separation of church and state has created a problem for some religious groups—not only Jewish—so that “religious marriages are recognized under the *Family Law Act*, but divorce according to personal ethnic or religious traditions is not.”²¹⁹ As Williamson explains, the civil law therefore cannot free parties bound by religious marriages to remarry according to their personal beliefs upon the dissolution of their civil marriage.²²⁰ “[T]he main problem arises where one party is placed in a position of disadvantage as a result of another party withholding a cultural or religious divorce upon the dissolution of their civil marriage.”²²¹

Australian case law offers a few rulings in which “the Family Court managed to extract an undertaking from the husband that he

218. See *In the Marriage of Shulsinger* [1977] 2 Fam LR 611 (Austl.) (holding that no dissolution of marriage could be effected until the husband paid “to the wife all costs occasioned by her in all the proceedings in which the wife appeared or was represented”); *W v. W*, [1998] 2 FCR 304 (U.K.) (ordering “that the respondent/husband . . . not apply for a decree absolute until he has complied with any order for ancillary relief”); see also Einhorn, *supra* note 2, at 150 (“Another remedy has been the withholding of the civil divorce until the *get* has been delivered.”). See generally Amanda Williamson, *An Examination of Jewish Divorce Under the Family Law Act 1975 (Cth)*, 11 JAMES COOK U. L. REV. 132 (2004) (discussing the implications of withholding a divorce).

219. See Williamson, *supra* note 63, at 133 (noting that in Australia, “religious marriages are recognised under the *Family Law Act*, yet divorce according to personal ethnic or religious traditions is not”).

220. See *id.* (“The civil law is therefore unable to place parties bound by such religious marriages in a position where they are free to remarry according to their personal beliefs upon the dissolution of their civil marriage.”).

221. *Id.*

would do everything necessary to give his wife a *gett* in order for her to be remarried according to her faith,” so that the “civil divorce would be ineffective unless the husband agreed to grant the *gett*.”²²² Courts rejected appeals on the grounds that it lacked the authority to enforce an undertaking to perform a religious act by virtue of § 116 of the Commonwealth Constitution.²²³ It held that “the requirement of the undertaking [served] to avoid any injustice that would result in the granting of the civil divorce, rather than [serving to intervene in] religious affairs in contempt of the *Constitution*.”²²⁴ Furthermore, the court held that it was the court’s duty to ensure that all parties were afforded the same freedom from the obligations of marriage, which may involve enforcing any undertakings given by the parties to complete a religious divorce, or perhaps even involve the imposition of an injunction.²²⁵ In certain cases, the courts ordered the husband to pay a lump sum maintenance if he continued to refuse to grant a *get*.²²⁶ If he granted the *get*, the sum was to be reduced, and in assessing the sum the court considered the fact that the husband was preventing the woman from remarrying.²²⁷ Despite efforts to lead a reform by legislation, this has not happened yet,²²⁸ likely because the

222. *Id.* at 136–37, 141–43 (discussing *Shulsinger*); see also, e.g., *In the Marriage of Frey* [1984] FamCt 65/84 (Austl.); *Shulsinger* [1977] 2 Fam LR at 611 (“At the hearing for dissolution of marriage H. undertook to the court to do all things necessary to give W. a Bill of Divorcement in accordance with the Jewish faith and with the law of the State of Israel.”); Williamson, *supra* note 63, at 141 (citing *In the Marriage of Gwiazda*, 14–15 (Feb. 23, 1983) (unreported) (Austl.) (ordering the recalcitrant spouse to appear before a rabbinical court, but also enforcing the orders of the tribunal to accept the *get*, noting that it was the duty of the court to “ensure that appropriate orders are made fully effective, not only in theory but in fact”).

223. See Williamson, *supra* note 63, at 136 (discussing how the court rejected the husband’s argument).

224. *Id.*

225. See *id.* at 137 (“[P]rovided the need can be shown for the Court to intervene, in order to exercise effectively its jurisdiction in respect of matrimonial causes, it is no objection that the granting of a *gett* involves proceeding before a religious tribunal.” (quoting *Frey* [1984] FamCt 65/84) (internal quotation marks omitted)).

226. See *id.* at 137 (noting that in one case, “a lump sum maintenance payment was imposed upon a husband in the event that he continued to refuse to grant a *gett*.”).

227. See *In the Marriage of Steinmetz* [1980] 6 Fam LR 554 (Austl.); *Brett v. Brett*, [1961] All ER 1007 (U.K.); see also Williamson, *supra* note 63, at 137 (noting that “[a]s it was within the husband’s power to prevent the wife from remarrying (and therefore gaining the financial benefits that would accrue from remarriage) it was held that a larger sum of maintenance could be imposed due to the denial of the wife’s right to remarriage”).

228. Williamson has suggested a few proposals for reforms, among them:

(1) An Order that the Decree Nisi [for not acknowledging the civil divorce until the *get* is granted] shall not become absolute until the Court is satisfied that both parties have taken all steps reasonably within their power to remove barriers to remarriage.

suggested reform possibly contradicted the constitution²²⁹ and the no-fault system of civil divorce in Australia,²³⁰ However, it may be relevant to other constitutions and other countries where it would not come in conflict with the no-fault civil divorce mechanism.

New York is also one of the few states whose laws address the religious barriers to remarriage in legislation—by means of § 253 of the Domestic Relations Law,²³¹ known as the “Get Law.”²³² Section

(2) An Order requiring a party to appear before a recognized tribunal of the religious or cultural group, and a further Order that parties follow the recommendations of the relevant tribunal provided to the court.

(3) An Order that any application, defense, pleading or affidavit by a party in respect of an application for the payment of maintenance by or to that party be adjourned or struck out, if the party has willfully refused to remove any barriers to remarriage.

(4) An Order enforcing a prenuptial agreement that encourages the removal of barriers to remarriage in a form approved by the religious / cultural group.

Williamson, *supra* note 63, at 139.

229. *See id.* at 142–43.

230. *See id.* at 144, 151.

231. *See* DOM. REL. § 253(B)(5)(h) (removing the barriers to marriage in the state of New York).

232. *See* Leichter, *supra* note 3, at 8–9 (describing the two-stage history of the Get Law and the initial objections of the ultra-Orthodox rabbis to it); *see also* Einhorn, *supra* note 2, at 150–51 (same); Williamson, *supra* note 63, at 148–51 (same); Edward S. Nadel, *New York's Get Laws: A Constitutional Analysis*, 27 COLUM. J.L. & SOC. PROBS. 55, 71–72, 74–78 (1993) (presenting a scholar's criticism of the original and of the 1992 statutes on constitutional grounds). Leichter explains that given the vagaries of the judicial system and the likelihood that civil courts would not deem the *ketubah* to be an enforceable agreement that would allow them to order the husband to grant a *get*, New York adopted the “Get Law” in 1983, prohibiting the granting of a divorce to a party requesting it if that party failed to remove barriers to the other party's ability to remarry. The 1983 statute required only that the plaintiff seeking the divorce must remove all impediments to the other party's ability to remarry, but it did not help the one spouse seeking the divorce who was ready to remove the impediments, but whose spouse was unwilling to do so. Therefore, a second “Get Law” (DOM. REL. § 236(B)) was enacted in New York state, which enables the judge in a divorce case to award a larger proportionate interest in the marital property and/or increase the spousal support award to the wife whose husband refuses to give her a *get* (or to the husband if the wife refuses to accept the *get*). When awarding property or support, the court can take into consideration whether one party has refused to “remove the impediments to the other party's ability to remarry.” *Id.* at 8. Leichter explains that although this statute has been under constitutional attack in the courts in several cases, no decision has been rendered holding it unconstitutional. According to Leichter, the most vocal opponents of the second Get Law have been the ultra-Orthodox rabbis who argue that the specter of a penalty to be imposed by the courts, in the form of loss of property or additional payment of spousal support, may create a monetary coercion that can invalidate the *get*. Some ultra-Orthodox rabbis even believe that since the enactment of the second Get Law, no *get* granted in New York is valid because of this coercion. Leichter argues that notwithstanding the legal and religious attacks on the *get* statute, it is undisputed that the number of cases of possible *agunot* in New York has decreased as a result of the law. She also explains that a recent attempt to enact a similar statute in Maryland failed. She argues that the second New York Get Law is workable in New York primarily because New York is an equitable property-division state; that is, property acquired during marriage is equitably divided by the court, unlike in California, for

253 states that before the entry of a final judgment, the plaintiff shall affirmatively state to the civil court that to the best of his or her knowledge, he or she has taken all steps within his or her power to remove all barriers to the defendant's remarriage following the annulment or divorce.²³³ If the husband refuses to grant a *get*, the civil court can dismiss the civil divorce proceeding or make it contingent upon granting the *get*.²³⁴ The court can also consider the refusal as a factor to be balanced by the court when it determines the equitable distribution of marital assets in the context of the divorce.²³⁵ An amendment made in 1992 permits the award of compensation to aggrieved spouses for any hardship suffered because

example, where it is divided equally. The New York courts have therefore far more latitude in determining what is equitable in the property division. Williamson adds that some rabbis have also refused to perform marriage ceremonies for women who have received *gittin* under this legislation, stating that the *gittin* are under the "shadow" of coercion, and therefore invalid. Williamson, *supra* note 63, at 148–51. At the same time, many Orthodox rabbis counter these arguments and lend support to the validity of *gittin* obtained under this legislation. Naturally, the consent of the rabbis, as chief leaders of the religious congregation, should be an important part of the solution and contribute to legal pluralism as well as to better understanding. Williamson also mentions some rabbinical commentaries that have noted that in some cases, the existence of a civil divorce justifies the application of coercion on a party to grant or accept a *get*. In particular, the *Talmud* notes that a non-Jewish court may coerce a Jewish party to grant or accept a *get* as long as such an order is based on the decision of a Jewish tribunal. In the absence of a decision from an appropriate tribunal, if a party is directly coerced to grant a *get*, this will be invalid. Williamson explains, however, that if such coercion is indirect, as in the case of an imposition of maintenance that is reduced upon the subsequent granting or acceptance of the *get*, the *get* is valid because the order regarding the maintenance was made for a purpose other than for directly obtaining the *get*. Representatives from the Orthodox rabbinical community have voiced support for such indirect coercion.

233. DOM. REL. § 253(2).

234. *See id.* (discussing the circumstances under which no final judgment of annulment or divorce may be entered by a court).

235. *See* DOM. REL. § 253(6). Section 253(6) of the *Get* Law defines a barrier to remarriage to include:

without limitation, any religious or conscientious restraint or inhibition, of which the party required to make the verified statement is aware, that is imposed on a party to a marriage, under the principles held by the clergyman or minister who has solemnized the marriage, by reason of the other party's commission or withholding of any voluntary act.

Id. *See also id.* § 253 (B)(5)(h) (codifying a decision that characterized the husband's refusal to give a *get* as another "factor" to take into consideration when determining the distribution of assets between parties); *Schwartz v. Schwartz*, 583 N.Y.S.2d 716 (Sup. Ct. 1992), *aff'd*, 652 N.Y.S.2d 616 (App. Div. 1997) (indicating that *Get* Law § 236(B)(5)(d) requires "courts in equitably dividing the marital property [to] consider 13 factors," which include "any other factor which the court shall expressly find to be just and proper" (quoting DOM. REL. § 236(B)(5)(d) (internal quotation marks omitted)); *BROYDE supra* note 140, at 103 (2001) (indicating that the refusal to grant a *get* should be weighted heavily against the refusing party in a court's determination of the equitable distribution of marital assets).

of the absence of a religious divorce.²³⁶ Indeed, the courts have relied on this provision to prompt the recalcitrant spouse to cooperate in granting the *get*.²³⁷

Before the 1992 amendment, aggrieved spouses were forced to rely on tort or contract actions to encourage the other spouse to grant a *get*.²³⁸ As noted, contract actions were effective only if the parties had signed prenuptial or separation agreements. Before 1992, tort actions in New York and in other places were generally based on IIED, which requires outrageous conduct, and this remains the case today in other U.S. jurisdictions.²³⁹ This mechanism proved

236. See Williamson, *supra* note 63, at 148 (discussing the *Get* Law).

237. See, e.g., Schwartz v. Schwartz, 583 N.Y.S.2d 716, 792-94 (1992) (discussing the application of Domestic Relations Law § 253); Friedenberg v. Friedenberg, 136 A.D.2d 593, 595 (1988) (discussing the application of *Get* Law § 253(3)); see also Einhorn, *supra* note 2, at 150-51 (discussing the application of *Get* Law § 253).

238. See CHAIM POVARSKY, JEWISH LAW REPORT: INTERVENTION BY NON-JEWISH COURTS IN JEWISH DIVORCES 1 (1994); Williamson, *supra* note 63, at 148 (noting the statute "removed the need for claims in tort for an intention to cause emotional distress").

239. There are only a few decisions of this type. See, e.g., Barbara J. Redman, *Jewish Divorce: What Can Be Done in Secular Courts To Aid the Jewish Woman?*, 19 GA. L. REV. 389, 417 n.160 (1985) ("Moreover, refusal to give his wife a *get*, knowing that she will not be able to remarry without the distress of violating her deep beliefs, constitutes the intentional infliction of emotional harm. Under some circumstances the law allows damages for such an injury if the defendant's conduct was outrageous." (quoting Roth v. Roth, No. 79-192709-DO (Mich. Cir. Ct. Jan. 23, 1980))); see also Noah Gradofsky, *supra* note 177, at 19-26 (owing to the lack of case law discussing refusal to grant a *get* as infliction of emotional distress, reviewing the four requirements of the emotional distress tort: (a) extreme and outrageous conduct, which (b) intentionally or recklessly (c) causes (d) severe emotional distress). Noah Gradofsky thinks that the proof of outrageous conduct goes a long way towards proving the three other elements. The refusal to grant a Jewish divorce is at least a highly reprehensible act. Many cases of refusal to give a Jewish divorce will be seen as outrageous. These decisions leave a spouse bound to someone they do not love. They render a person unable to find closure for their failed marriage, and unable to remarry. Because of the reprehensible nature of the refusal to grant a Jewish divorce, the other requirements of the emotional distress tort will fall in line easily. Thus, it can be said that the tort of emotional distress should be available as a cause of action for the spouse who has been denied a Jewish divorce. The IIED claim is not without its limitations. First, although recognition of this tort is increasing, it is not yet universal. See Redman, *supra*, at 422 ("[N]ot all states recognize the intentional infliction of emotional harm as an independent cause of action where no physical impact has occurred and no physical consequences appear."). Second, there is a certain resistance to finding liability in individual emotional distress cases because of fears of frivolous litigation. Shanah D. Glick, *The Agunah in the American Legal System: Problems and Solutions*, 31 U. LOUISVILLE J. FAM. L. 885, 910 (1992). The unique nature of this claim may alleviate this reluctance. Third, some states still recognize interspousal immunity. This tort would be unavailable in such states. See Redman, *supra*, at 422 ("Historically, the wife's legal identity was merged with that of the husband, so an interspousal suit amounted to suing oneself."). These shortcomings will limit the applicability of the tort, but there is still ample room for the successful use of the emotional distress claim. See Noah Gradofsky, *supra* note 177, at 37-41 (discussing the compatibility of this tort claim with the Constitution). See generally Benjamin Shmueli, *Tort Litigation Between*

problematic (as described above in connection with *Perl*) because U.S. jurisdiction demands intentional, rather than negligent, infliction of emotional distress.²⁴⁰ This is difficult to prove if the husband seeks “merely to gain an advantage in bargaining for property and maintenance” because “the emotional distress [is merely] a by-product of the main dispute,” and the husband did not intend to make the wife suffer emotional distress.²⁴¹ This demand seems problematic because negligence, rather than intentional behavior, ought to suffice in this situation, as is the case in Israeli courts. Note, however, that even negligent infliction of emotional distress (NIED) does not affect the problem of possible coercion and invalidation of the *get*, only the question of whether these tort actions are to be acknowledged or denied. Since 1992, the New York legislation has enabled an independent mechanism of compensation in matters of religious divorce, with no need to refer to tort actions or to prove intention to cause emotional distress, in addition to granting punitive or increased maintenance claims.²⁴² This means that “the recalcitrant spouse[s] are] not necessarily denied a civil divorce, but if it is clear that they have caused hardship to the other party, they may be required to pay compensation for this hardship—regardless of a lack of intention to cause such harm.”²⁴³

Similar *get* laws have been enacted in Scotland,²⁴⁴ Canada,²⁴⁵ England,²⁴⁶ and South Africa,²⁴⁷ and some criticism was directed at

Spouses: Let's Meet Somewhere in the Middle, 15 HARV. NEGOT. L. REV. 195 (2010) (expounding on interspousal immunity in the United States).

240. See *supra* note 213 and accompanying text.

241. Williamson, *supra* note 63, at 148 (discussing *Perl*); see also *supra* note 203 and accompanying text (discussing how compromises between couples can become virtually impossible because each spouse's aims differ entirely).

242. As also in Canada. See Williamson, *supra* note 63, at 148, 152 (presenting a New York case in which “a relatively high alimony payment was imposed upon a recalcitrant husband who refused to grant his wife a *gett*,” but where the payment would be reduced upon grant of the *get*). Williamson argues that this outcome is similar to the Australian case of *In the Marriage of Steinmetz*. See *In the Marriage of Steinmetz* [1980] 6 Fam LR 554 (Austl.).

243. Williamson, *supra* note 63, at 148.

244. See Leichter, *supra* note 3, at 9 (“Statutes similar to the first N.Y. *Get* law were enacted in Scotland, Ontario (Canada), England, [and] South Africa . . .”); Williamson, *supra* note 63, at 147 (referring to SCOTTISH COUNCIL OF JEWISH CMTYS., FAMILY LAW BILL (2001)).

245. See Divorce Act 1985, § 21.1(2) (Can.) (discussing the general principles in Canadian divorce law). Einhorn explains that since 1990, Canadian Divorce Act § 2(4) requires that in divorce proceedings, both spouses file affidavits that they have, or shall, remove all barriers to religious remarriage. She explains that the court may dismiss applications and strike out other pleadings and affidavits made by a spouse who does not comply with this provision. The Ontario Family Law Act requires such an affidavit to be submitted by any party to an application regarding family property, questions of title between spouses, or support. The court may dismiss the proceeding, or strike out the defense of a party that fails to comply. See Einhorn, *supra* note 2, at 151. Williamson explains that this provision allows the court, if not satisfied that barriers to remarriage had been removed, to adjourn or strike out an application for or

this type of legislation for lacking supporting sanctions and for imitating the problematic 1980 New York *Get* Law legislation.²⁴⁸

Some problems arose with regard to the *Get* Law. As mentioned, this solution raises similar obstacles to obtaining a valid *get* as does a tort action:²⁴⁹ the *get* may be considered coerced and thus invalid according to rabbinical law because the *Get* Law is a form of economic coercion and the *get* is not given according to Jewish law, that is, out of the husband's free will.²⁵⁰ Naturally, declaring the *get* coerced and invalid does not help the woman, nor does it enhance her human rights. It is reasonable to assume, however, that when faced with the actions of the civil courts, and in the absence of a struggle over jurisdiction, rabbinical courts will try and find a way to cooperate and not declare the *get* coerced and invalid.²⁵¹ But even the optimistic opinions do not ignore the *halakhic* problem in coercive secular regulation that enforces norms of Jewish law that are not always accepted by (nearly) all members of the *halakhic* community.²⁵² This is also the case after the 1992 amendment, because the *get* may be

a defense against the payment of maintenance. Williamson also adds that Canada has successfully adopted the awarding of increased maintenance payments if a party refuses to grant a religious divorce. The 1985 Act allows judges to order higher alimony and child support payments against a spouse who maintains a barrier against another's religious remarriage. The legislation also works retrospectively, so that a spouse who was divorced before the passage of the amendment may bring a claim for an increase in support or maintenance payments. As noted, the significant maintenance or child-support payment imposed upon the recalcitrant party may be reduced later if the party agrees to grant the religious divorce. This is not viewed by the rabbis as coercion that could invalidate the *get*. A similar provision exists in Australia. Williamson explains that there has been reluctance to recognize a jurisdiction that imposes financial penalties for noncompliance with religious law, but under § 75(2)(o) of the Australian Family Law Act, a court can take the refusal of a religious divorce into consideration when deciding financial adjustment issues. Note that other sanctions can be imposed in Canada, such as punitive restrictions on contact with children. Williamson, *supra* note 63, at 151–53.

246. See Einhorn, *supra* note 2, at 151 (explaining that when § 9 of the English Family Law Act 1996 (or alternatively, the Divorce (Religious Marriages) Bill, which reiterates the principle of § 9) comes into force, it empowers the courts, before issuing a divorce order, to direct spouses married in a religious ceremony to declare that they have taken all necessary steps to dissolve the marriage in accordance with the usages applicable to such marriages).

247. See Leichter, *supra* note 3, at 9 ("Statutes similar to the first N.Y. *Get* law were enacted in Scotland, Ontario (Canada), England, [and] South Africa . . ."); see also Williamson, *supra* note 63, at 141, 147 (explaining that under the Divorce Amendment Act 1996 (South Africa), the court has the ability to refer cases to an appropriate religious or cultural tribunal for hearing).

248. See Williamson, *supra* note 63, at 147 (noting the laws "lack supporting sanctions and have been criticised for mimicking the problematic 1980 New York legislation").

249. See BROYDE, *supra* note 140, at 69–70 (discussing the similarities in civil disputes between obtaining a *get* and bringing a successful tort action).

250. See *id.* at 104. For other *halakhic* problems, see *id.* nn.6–10.

251. For different opinions, see *id.*

252. See *id.* (discussing the "halakhic problem" in coercive secular regulation).

considered to be coerced and therefore invalid because of high alimony payments, in addition to damages in tort action.²⁵³ Williamson argues that “if the compensation is directed at easing the pain and suffering . . . experienced by not being able to freely remarry, rather than at promoting a party to grant a *gett*, a *gett* that is delivered in anticipation of a reduced payment amount could still be seen as valid.”²⁵⁴ According to Williamson, this ultimately depends on the construction of the secular court’s decision and on whether emphasis has been placed on awarding damages to the party or on bargaining with the recalcitrant spouse to grant a *get*.²⁵⁵

Yet another problem arose with regard to the *Get* Law. Some argued that “the vast majority of recalcitrant husbands are quite content not to have a civil divorce [because] many become obsessed with tormenting their wives by any means possible[, and they take] pleasure in prolonging the civil litigation to harass and impoverish their wives.”²⁵⁶ This situation can also help recalcitrant husbands in bargaining for maintenance and property settlements.²⁵⁷ Some argue that in these cases there should be some mechanism to enable the woman to withdraw when the law proves inefficient.²⁵⁸ But it seems that at least in some cases (e.g., when the husband wishes to remarry) this law can work. Nevertheless, the problem emphasizes the need for using other means in addition to dealing with *get* refusal.

Recently, a New York trial court implemented the *Get* Law in the case of a Muslim husband who refused to divorce his wife.²⁵⁹ In

253. One case that demonstrates the problem is *Becher v. Becher*, 706 N.Y.S.2d 619, 620 (Sup. Ct. 2000). The husband cited rabbinical authorities that stated that he could not grant a valid *get* because of the provisions of the statute. As such, a *get* would be coerced and would damage his wife who would mistakenly think she was free to have a new relationship, whereas she was still married, and would thus be committing a sin if she had a relationship with another man. The wife therefore waived the provisions that would have allowed the judge to grant her damages and instead sought community-based sanctions from *agunot* support groups. See Williamson, *supra* note 63, at 149 (discussing the *Becher* case).

254. Williamson, *supra* note 63, at 151; see also Susan Aranoff, *Orthodox Jewish Divorce—Imbalance in Bargaining Power: An American Response*, in A LEADERSHIP DIALOGUE: VOICES OF BRITISH AND AMERICAN JEWISH WOMEN COMMUNITY LEADERS 47 (Sarah Silberstein Swartz ed., 2001) (discussing Williamson’s view on reduced amount in *get* payments).

255. See Williamson, *supra* note 63, at 151 (“Ultimately this would depend upon the construction of the secular court’s decision and whether emphasis was placed upon compensating the party or upon bargaining with the recalcitrant spouse to grant a *gett*.”).

256. See *id.* at 140 (quoting Aranoff, *supra* note 254, at 45) (internal quotation marks omitted) (discussing intentional delay as one of the reasons behind extended divorce proceedings).

257. See *id.* (noting the bargaining power the recalcitrant spouse holds).

258. See *id.* (“NCJWA suggested that the introduction of specific time periods would assist in allowing the aggrieved spouse an opportunity to withdraw the application or to seek alternative remedies.”).

259. See Leichter, *supra* note 3, at 8–9 (mentioning that this was the original meaning of the 1992 statute).

Mojdeh M. v. Jamshid A.,²⁶⁰ the court applied the *Get* Law to an action involving maintenance and equitable distribution awards in a Muslim divorce.²⁶¹ The wife asserted that she would have no remedy unless she obtained a religious divorce, because a civil judgment of divorce would have no effect in her situation.²⁶² The court held that the husband, who refused to divorce his wife despite the fact that four years earlier the wife was granted a divorce on the grounds of constructive abandonment following a grounds trial, shall have forty-five days to take the necessary steps to remove any barriers to the wife's remarriage. In the event that he failed to comply, he would forfeit the maintenance and equitable distribution award and repay the wife a \$4,000 cash advance that was agreed to in the decision.²⁶³ In so deciding, the court denied the husband's claim that the issue of the religious divorce should have no effect on his award of maintenance or equitable distribution and held that the misuse of the unequal allocation of power between spouses to terminate a religious marriage can be taken into consideration when determining equitable distribution, as acknowledged by prior judicial opinions implementing the *Get* Law.²⁶⁴

Applying the *Get* Law to Muslim divorce, in the absence of the problem of coerced *get*, means that the intervention of civil family law through this section is entirely beneficial. It fills a vacuum, as *Shari'a* law (similarly to other religious law systems, especially private ones) at times does not provide for sufficient monetary sanctions.²⁶⁵ Civil

260. 954 N.Y.S.2d 760 (Sup. Ct. 2012) (unreported). I want to thank Professor Sherman Cohn for giving me the decision.

261. The court held:

In the case at bar, the wife testified that she is a Muslim and if she does not obtain a religious divorce she will be unable to remarry. Although she will be divorced in accordance with secular law, she will not be considered a single woman within her religious community. She further testified that in the event she were to travel to Iran that her husband, or then ex-husband, could withhold his permission for her to leave Iran. The court credits the wife's testimony that she made arrangements for the parties to meet at a local mosque to address the religious divorce but that the husband simply did not respond. . . .

The credible testimony by the wife leads this court to find that the husband's refusal to give the wife a religious divorce, thereby removing barriers to her remarriage, is a basis to exercise its discretion under Domestic Relations Law 236 [B] [5] [h] to disproportionately distribute marital assets.

Id. at 42–43.

262. *Id.* at 16.

263. *Id.* at 43. The court also held that the *mehrieh* (the parties' dowry agreement), although not enforceable in a matrimonial action, can be enforced as a separate contract claim. The court rejected the husband's claim that the *mehrieh* is merely a religious document. *Id.*

264. *Id.* at 41–42.

265. Similarly, Halperin-Kaddari has discussed an Israeli Supreme Court decision, CA 3077/90 Doe v. Roe 49(2) IsrSC 578 [1995], in which the court

family law complements it by means of this section. The outcome resembles that of a Muslim husband facing a tort action for divorcing his wife against her will or marrying another wife, as discussed earlier.

In practice, using a prenuptial agreement²⁶⁶ makes the *Get* Law redundant,²⁶⁷ which means that in the U.S. Modern Orthodox Jewish congregation there is usually no need for it.²⁶⁸ This also holds true for ultra-Orthodox Jews in the United States, but for a different reason, namely that most of them do not contract a civil marriage and therefore the *Get* Law simply does not apply to them.²⁶⁹

Most countries have not enacted a *get* law, and a further discussion of this interesting idea falls beyond the scope of this Article. Assuming that no proper solution can be found within the framework of civil family law, this Article now returns to tort law and seeks other options besides those that have been mentioned so far. I believe that tort law should be implemented, but not sweepingly. What, then, are the options for applying tort law in a more sensitive way, to reflect greater harmony between the conflicting values by trying to reach a compromise?

4. Tort Law to Be Qualified Ex Ante

One way of acting in a sensitive manner is to qualify tort law ex ante in cases of actions against *get* refusal, to avoid reaching a state

acknowledged a civil possibility of paternity, ordering a Muslim father to pay child support to a child born out of wedlock. Halperin-Kaddari, *supra* note 11, at 201–03. *Shari'a* law does not acknowledge this possibility, and given that the religious court has exclusive jurisdiction in this matter, no support can be awarded. The Israeli Supreme Court viewed the refusal of the *Shari'a* court to acknowledge the legal consequences of paternity on the child–father relationship as a refusal to exercise jurisdiction in the matter and allowed the secular courts to take the case because according to Israeli law, if a religious court cannot or would not exercise its jurisdiction and rights are denied as a consequence of this move, the jurisdiction is not exclusive anymore and civil laws and courts can intervene. But it seems that in this case, contrary to most of the cases addressed in this Article, civil-secular law did not enforce a decision of the religious courts or fill a vacuum in an area in which the religious law does not have jurisdiction, such as damages. Here there was no *lacuna*; the religious court decided that the matter of paternity is simply not recognized by religious law and therefore no remedy could be provided. The religious court did not withdraw its jurisdiction. On the contrary, it used its jurisdiction by ruling that this matter was not acknowledged under *Shari'a* law. It is possible to compare this with a situation in which a religious court has decided not to issue a decree obligating the husband to divorce his wife, and the civil (family or tort) law intervenes to award the wife a remedy. This type of case is discussed below, in Part IV.C.6.(c).

266. See *infra* Part IV.C.3.(b) (explaining that if a husband refuses to divorce his wife, the wife can file an action in civil court to enforce the monetary obligation in the prenuptial agreement without raising the issue of a coerced *get*).

267. See BROYDE, *supra* note 140.

268. See *id.*

269. And they are not considered by the government as common law spouses either. See *id.*

of collision. This means that tort law is inferior to religious family law. Yehiel Kaplan and Ronen Perry recommended a set of qualifications for the tort action to avoid contradicting Jewish law.²⁷⁰ For example, they offered to seriously qualify the rate of damages, based on one school of thought in Jewish law according to which low damages do not render the *get* coerced and therefore invalid. This is a creative idea even if it contradicts some of the aims of tort law.²⁷¹ The problem is that in most cases, low damages will not provide an incentive for husbands to agree to the two-way transaction. Considering the fact that husbands can try to extort money in rabbinical court in return for the *get* (a common practice, made possible by the fact that the husband must grant the *get* out of his free consent and by the fact that the procedure is one-sided), they will simply raise the amount of the settlement in rabbinical court to cover payment of the tort damages.

Another suggestion by Kaplan and Perry is to acknowledge the tort action only if the rabbinical court has ordered the husband to divorce his wife, but not if that order has not (yet) been issued.²⁷² This appears to be a logical qualification. If tort law regards the husband as a tortfeasor because of his refusal to grant a *get*, but the rabbinical court, which has exclusive jurisdiction in cases of marriage and divorce, did not rule that he should do so, tort law directly intervenes in family affairs (as opposed to enforcing a norm determined by family law).²⁷³ If this were the case, however, and given the struggle over jurisdiction, rabbinical courts may end up not issuing decrees ordering husbands to divorce their wives in order to prevent the filing of tort actions.²⁷⁴

5. A Special Joint Committee for Rabbinical Courts and Family Courts Should Be Created to Deal with Cases of Collision

Is it possible to bring the opposing views closer to each other in a different and original way, reflecting real pluralism and a new kind of dialogue?

The following proposal is especially suitable for countries in which both tort and religious family laws are state made, and

270. See Kaplan & Perry, *supra* note 89.

271. See Warburg, *supra* note 67, at 58–61 (explaining the *halakhic* grounds for these opinions); see also Bitton, *supra* note 129 (criticizing Kaplan and Perry's work on distributive-feminist grounds); Benjamin Shmueli, *Tort Compensation for Abandoned Wives (Agunot—Women Whose Husbands Refuse To Give Them a Get)*, 12 HAMISHPAT [C. MGMT. L. REV.] 285 (2007) (criticizing Kaplan and Perry's work based on a pluralistic analysis of the aims of tort law: compensation and restoring the status quo ante, corrective justice, distributive justice, and optimal deterrence).

272. Kaplan & Perry, *supra* note 89, at 868.

273. Cf. BROYDE, *supra* note 140, at 104.

274. There is another way of dealing properly with this serious qualification. See *infra* Part 6.C.6(c).

religious and civil courts struggle over jurisdiction, but it is also applicable in countries in which rabbinical courts are private. A joint committee for rabbinical and family courts could be established, composed of retired family and rabbinical court judges, together with representatives of academia and the bar association. This committee would continually debate and examine the methods of cooperation between the courts, in order to lower friction and to advise and aid all parties in overcoming the mutual distrust. The committee could help each side in the struggle over jurisdiction internalize its task and show sensitivity toward the tasks and authorities of the other side.

This could help rabbinical courts understand that tort actions will not, so far as can be anticipated, fade away or disappear, despite efforts to fight them. Therefore, rabbinical courts ought to focus on the core of the matter under their jurisdiction, the validity of the *get*, even if the tort action may indirectly affect the *get*. They must truthfully examine whether the compensation leads to an unlawfully coerced *get*, and not make a *prima facie* ruling, at the expense of women who are refused a *get*, that the mere filing of the action necessarily prevents the continuation of proceedings and the arrangement of the *get*. Rabbinical courts must also realize that even if the tort action indirectly intervenes in issues relating to the *get*, at the same time, a private transaction is taking place between the parties, which is not in any way conducted under the auspices of the family court.

On their part, family courts must be sensitive to the fact that the rabbinical courts feel that these actions infringe upon their jurisdiction and may coerce the *get*. Family courts must also understand that their job is to focus on the tortious nature of the action only, without attempting to use it to solve the status problem of women who have been refused a *get* or to push the plaintiff into a two-way transaction that may end up hurting her. On the one hand, they must continue wholeheartedly on the tort path and consider additional developments relating to this process. On the other hand, they must also consider defenses such as the contributory negligence of the plaintiff, if she contributed to the harm by her behavior, for example by threats and curses that precipitated the deterioration of the relationship.

Suggestions have been raised in the past for the formation of special tribunals with jurisdiction similar to that of a court of appeals in case of collision between national and global laws, or of tribunals that can provide advisory opinions in case of conflicts between jurisdictions.²⁷⁵ Forming a committee—not a legal tribunal—in the

275. See Fischer-Lescano & Teubner, *supra* note 14, at 1002–03 (presenting those suggestions in regard to the International Court of Justice, stating that “the only possible perspective for dealing with such policy conflicts is the explicit politicization of legal norm collisions through power mechanisms, negotiations between relevant

present case may offer another creative proposal derived from the literature on legal pluralism.

One option for the suggested committee or special tribunal is to try to reach an agreement between the family and the rabbinical court, for example, to embrace the U.S. solution of civil courts that enforce prenuptial agreements by regarding them as mere contracts. For this to happen, a blanket agreement is necessary on the validation and wording of the prenuptial agreements. Moreover, the courts must be less suspicious of one another and start cooperating: rabbinical courts should acknowledge the prenuptial agreements and the authority of civil courts to enforce the monetary obligations of the husband. This would not help to solve the problem of men who are refused a *get* (since monetary obligations are of the husband towards the wife), but it would represent an important step forward.

Unfortunately, it appears unlikely that this type of committee will be established and operating in every country, or that a real compromise will be struck, even if on a case-by-case basis, between the views of religious and liberal secular courts, although in 1997 a special committee was established in Israel to handle the delicate *halakhic* issue of conversion to Judaism in different Jewish sectors (Orthodox, Conservative, and Reform).²⁷⁶ Nevertheless, it is important to try to advance practical solutions to the extent possible.

6. Proposed Multifaceted Solution: Tort Law Should Be Implemented in a Sensitive Manner

At times it is not possible to reach a rational compromise between conflicting values, especially if they have different aims.²⁷⁷ But at times it is possible to reach a rational solution to the conflict that may not represent the exact middle point between the values but can, by the value selected, reflect some consideration of important aspects of the other value, which was not chosen, in order to minimize unnecessary collisions.

Is another intermediate solution possible, in which tort action is filed and acknowledged without qualifications such as specifying a low rate of damages or the requirement for a rabbinical court order that the husband grant a *get* as a condition for filing the civil action,

collective actors, public debate and collective decisions," but also stating that some of these suggestions are far reaching and that such hierarchical schemes have a minimal chance of success).

276. For the report of the Knesset (Israel's Parliament) Committee, see Rep. of the Comm. in the Matter of Conversion in Israel, transmitted by letter dated Jan. 22, 1998 from the Chairman of the Comm. addressed to the Prime Minister of Isr. (Isr.), available at <http://www.knesset.gov.il/docs/heb/neeman.htm>, and translated at http://www.jewishvirtuallibrary.org/jsource/Judaism/conversion_law.html.

277. Cf. Williams, *supra* note 41, at 72-73.

as in the fourth solution offered above? Can there be a real compromise, without one system coming out inferior to the other?

The solution cannot reflect a real compromise,²⁷⁸ but it should consider the following facts: (a) the religious law will not be changed easily;²⁷⁹ (b) it is only logical for rabbinical courts to react and fight back when another system of law intervenes in its matters, even if indirectly (naturally, the civil court can also fight back, e.g., by raising the amount of the damages). In countries in which the rabbinical court is also a state agent, this response can be especially expected. But legal pluralism should act thoughtfully, and it must not only describe the reality but also try to facilitate a compromise between the conflicting values, in order to make society better because of the multiplicity of opinions and the integration between them.

I believe that an intermediate and sensible solution can be found. A possible solution would be sufficiently sensitive not to try to apply tort law without taking into account considerations of religious law and without respecting the other state or nonstate system. Below are the highlights of the proposed solution.

This type of solution is compatible in principle with notions of legal pluralism in a broad sense, i.e., considering all legal norms in the same legal system as related to each other at least in some way. Thus, the legal interpreters cannot disregard the values of the system as a whole, and if they were to do so, they would arrive at a poor understanding of the law.²⁸⁰ In the present case, this may mean that a civil court dealing with an intrafamilial tort action cannot disregard

278. As Fischer-Lescano and Teubner indicate:

In the place of an illusory integration of a differentiated global society, law can only, at the very best, offer a kind of damage limitation. Legal instruments cannot overcome contradictions between different social rationalities. The best law can offer—to use a variation upon an apt description of international law—is to act as a “gentle civilizer of social systems.” In the words of Ladeur, contradictions “cannot be avoided, rather a new form of self-observation and self-description within the legal system must, in fact, take on the task of maintaining compatibility and lines of communication between differing legal arenas.” A realistic option is that legal “formalization” might be able to dampen the self-destructive tendencies apparent within rationality collisions.

Fischer-Lescano & Teubner, *supra* note 14, at 1045 (footnotes omitted) (quoting MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960, passim* (2002); KARL-HEINZ LADEUR, *POSTMODERNE RECHTSTHEORIE: SELBSTREFERENZ—SELBSTORGANISATION—PROZEDURALISIERUNG* 159–60 (1992)).

279. Cf. Williamson, *supra* note 63, at 135 (asserting that “[a]s religious reform seems impossible, civil reform must be sought to overcome this religious obstinacy”).

280. See generally AHARON BARAK, *THE JUDGE IN A DEMOCRACY* (2006) (noting how law reflects the values of society and is based on a reality that is always changing, and clarifying that the role of the judge is to “understand the purpose of law in society and to help the law achieve its purpose”); Ronald Dworkin, *Law as Interpretation*, 9 *CRITICAL INQUIRY* 179 (1982) (stating that law is “deeply and thoroughly political”).

the general values of the system and must incorporate notions from religious family law, especially if both laws are created by the state.

(a) A High-Level View: *Get* Refusal of Any Kind Is a Tort, and Damages Should Be Awarded According to the De Facto Proven Harm to Wives or Husbands

It is best to take a broad view of the civil actions. A general view, from the perspective of legal pluralism, reveals a reality in which one party does not release the other from marriage. This is not merely a feminist issue, but a breach of one's autonomy in general and a matter of basic human rights.

There are also cases of husbands who are refused a *get*, not only wives. The difference is that the husband grants the *get* and the wife accepts it.²⁸¹ The wife can refuse to accept the *get*.²⁸² It is true that the situation of a husband who is refused a *get* is better than that of a wife in a similar situation: if he lives with another woman without being divorced from his first wife, his sin is less serious in the eyes of Jewish law,²⁸³ he is not considered an adulterer (as a woman would be in this situation),²⁸⁴ and if children are born out of this relationship, they are not considered unlawful.²⁸⁵ Moreover, on rare

281. See BROYDE, *supra* note 140, at 103; Fournier, McDougall & Lichtsztral, *supra* note 19, at 345 ("If a Jewish woman cannot grant the *get* on her own initiative, she may refuse her husband's *get*, which will prevent rabbinical authorities from dissolving the marriage contract.")

282. See Fournier, McDougall & Lichtsztral, *supra* note 19, at 345 (explaining that "Jewish women may refuse consent to the *get* for reasons related to the best interests of their children, to extract further concessions from the husband or for pecuniary incentives").

283. Code of Maimonides: Laws Concerning Prohibited Relations 1:1. The husband can demand that the rabbinical court order the acceptance of the *get* if he proves that he has reason to suspect his wife of being adulterous or if she leads him to transgress against Jewish law. Fournier, McDougall & Lichtsztral, *supra* note 19, at 350.

284. See Code of Maimonides: Laws Concerning Prohibited Relations 15:1; Rashi's Commentary on *Exodus* 20:13 ("Adultery applies only [to relations] with a married woman . . ."); Fournier, McDougall & Lichtsztral, *supra* note 19, at 349–50 (stating that an adulterous man "is not considered to have committed adultery, but merely to have contravened a rabbinical decree prescribing monogamy"); see also Lazerow, *supra* note 42, at 106 (stating that "because polygamy is only prohibited, post-10th century, by merely a rabbinical enactment, a man who has not obtained a religious divorce yet chooses to cohabit outside of his marriage has not violated the biblical prohibition against adultery"); Williamson, *supra* note 63, at 134–35 (noting that although men can remarry without a *get*, "[c]hained wives cannot seek to remarry under the Jewish faith, as without a *get*, a subsequent marriage is viewed as adulterous").

285. See Code of Maimonides, Laws Concerning Prohibited Relations 15:1; see also Lazerow, *supra* note 42, at 106 (explaining that since "a man who has not obtained a religious divorce yet chooses to cohabit outside of his marriage has not violated the biblical prohibition against adultery," "any children begot from such a union would not shoulder the burden of being labeled Mamzerim"); Williamson, *supra* note 63, at

occasions, the rabbinical court permits him to marry another woman without being considered a bigamist,²⁸⁶ unlike in the opposite case, where a woman can never be married to two husbands.²⁸⁷ But if one embraces the view that *get* refusal is an evil and a tort, and that it is a violation of human rights, it must also be acknowledged that a husband has a cause of action in torts.

The differences between the situations of husbands and wives who are refused a *get* should be examined with reference to the practical implications for the case at hand, and the results of the examination should affect only the *rate* of damages. If the husband sustains emotional harm similarly to a wife who is refused a *get*, and cannot go on with his life because of the *get* refusal, he should be awarded damages at the same rate as a wife would be awarded in a similar situation. And if the wife-defendant proves that the husband-plaintiff proceeds with his life and, for example, lives with another woman, he should still be awarded damages, but at a lower rate.

The same should apply to women who are refused a *get*. Observant women would not live with another man while still married to their husbands, even in cases of *get* refusal, because it is considered a sin according to religious law. Some secular women would, however. Some of these women would not have children born from the new relationship because of the problems unlawful children face under Jewish law (among others, they are not permitted to marry according to Jewish law, except to other unlawful children).²⁸⁸ Other secular women would pay no attention to these rules and have children born from the new relationship. Finally, it is possible that a younger spouse who is refused a *get* sustains greater harm than an older one because he or she would still be able to marry again and have children with the new spouse, an issue that may not be relevant for an older spouse, especially a woman. At the same time, some older

134–35 (explaining that while recalcitrant husbands are “placed in a great position of power, and can withhold the *gett* from the *agunah* to induce property settlements and increase contact with children,” wives “cannot seek to remarry under the Jewish faith, as without a *gett*, a subsequent marriage is viewed as adulterous”).

286. See, e.g., File No. 3738-21-1 Rabbinical Court (Nov. 8, 2009), Nevo Legal Database (by subscription) (Isr.); File No. 6649-12-1 Rabbinical Court (June 7, 2009), Nevo Legal Database (by subscription) (Isr.); Fournier, McDougall & Lichtsztral, *supra* note 19, at 350 (stating that a man who remarries can “marry his adulterous lover, have legitimate children with her, and even receive a permit from an Israeli rabbinical court to remarry if his wife refuses to accept the *get*”).

287. See Code of Maimonides: Laws Concerning Prohibited Relations 21:8; Fournier, McDougall & Lichtsztral, *supra* note 19, at 350 (indicating that a woman who enters another relationship before receiving a *get* from her husband would be considered “rebellious,” and “even after a potential Jewish divorce, [would] not be allowed to marry her partner under Jewish law or remarry her ex-husband”).

288. Code of Maimonides: Laws Concerning Prohibited Relations 15:7–9, 19; Fournier, McDougall & Lichtsztral, *supra* note 19, at 334; Williamson, *supra* note 63, at 135.

spouses may claim that the refusal denies them a last chance for a second marriage.²⁸⁹

Damages should be awarded in all these cases because autonomy has been breached, and it constitutes an IIED. The rate of the damages may differ in each case according to the harm caused.

The outcome is that *get* refusal of any type is a tort, and damages should be awarded according to the de facto proven harm. This outcome is also compatible with the aims of tort law, because according to the basic goals of corrective justice, compensation and restoration of the status quo ante relies on the premise that the tortfeasor must pay exactly in proportion to the harm he caused, not less and not more. This is also the situation according to distributive justice. Given that, at times, the gap in power between the parties is not only a function of gender (since the woman can also refuse to accept a *get*, and on occasion the problem is age or some other issue), each civil action for *get* refusal must be acknowledged, and the difference between the outcomes should be only in the rate of the damages awarded. But even if the defendant proves that the plaintiff (the husband, the secular wife, or the aging wife) succeeds in proceeding with his or her life, some damages should be awarded in any case because the autonomy of the plaintiff has been breached and some emotional harm has been caused in the process of *get* refusal. This conclusion is also compatible with optimal deterrence because this instrumental goal focuses primarily on the tortfeasor and on the prevention of damages. Tort law aims to deter any form of *get* refusal, which means that damages must be awarded to deter potential spouses from refusal, even if eventually it turns out that the refusal did not harm the spouse as much as it might have or as much as the same conduct harms others.

This broad view shows that tort law does not intend to challenge religious family law. Nor is it concerned exclusively with improving women's marital status, which is considered to be inferior to men's in Jewish family law, as noted above.²⁹⁰ It is concerned only with correcting evils and deterring future torts. In this sense, it is blind to gender and addresses all cases of *get* refusal. This is the function of tort law, and it should discharge this function in family affairs as much as in other fields (e.g., property, intellectual property, and medical malpractice). Therefore, this is not a conspiracy to enhance women's rights but an attempt to correct a situation in which women's or men's status is inferior as a result of the other spouse's *get* refusal.

This liberal but nonfeminist approach uses tort law for its regular aims. Using tort law in order to transact a change in status

289. This was the claim in File No. 21162/07 FamC (Jer) Doe v. Roe (Jan. 21, 2010), Nevo Legal Database (by subscription) (Isr.), and it was accepted by the court.

290. See *supra* note 130 and accompanying text.

may indeed be problematic, but this does not mean that tort law and civil courts challenge religious family law and rabbinical courts. They only do their job. As noted, doing this job in a delicate way may contribute to pluralistic thinking and to some integration between what seem to be conflicting ideas.

(b) Not Awarding Future Damages

Another sensitive way of using tort law is by not awarding future damages. Tort law enables civil courts to award damages not only for past evils but also for each day, month, or year during which the tort continues after the judgment.²⁹¹ According to Jewish law, granting future damages results in a clear case of coerced *get*.²⁹² This being the case, civil judges can avoid awarding damages for future harms.²⁹³ Naturally, this means that there is no *res judicata* in case of future harms, that is, for another tort action in the future for the harm resulting from *get* refusal since the time of the last judgment.²⁹⁴

This is a balanced solution because in this way, there is less of a chance that the rabbinical court will declare the *get* coerced, although the option still exists, as explained above. It is true that a judgment without damages for future harms leads to less deterrence and therefore reduces tort law's realm, but it is a reversible restriction, unlike the qualifications by Kaplan and Perry, because the plaintiff can file another claim in the future if the tort continues, although this represents an added burden.

(c) Tort Actions in Cases in Which the Rabbinical Court Has Not (Yet) Issued a Decree to Divorce

Even greater sensitivity is required in cases in which the rabbinical court has not (yet) ordered the husband to divorce his wife (or the wife to accept the *get*). If the rabbinical court did issue an order, the basic interests of the two systems are similar in nature,

291. This has been decreed in a few judgments. See, e.g., File No. 18561/07 FamC (Jer) S.D. v. R.D. (May 26, 2010), Nevo Legal Database (by subscription) (Isr.) (ruling that a wife who refuses to accept a *get* must pay damages to her husband for each month of refusal until she accepts).

292. One case indicates that linking the harm to the woman refused a *get* with the damages awarded to her may be a case of a coerced *get*. See File No. 7041-21-1 Rabbinical Court (Nov. 3, 2008), Nevo Legal Database (by subscription) (Isr.). This is all the more so with regard to future damages awarded by the court because in this case, there can be no possibility of claiming that the damages are awarded for any other reason, such as a past debt or obligation of the husband toward the wife resulted from the marriage.

293. In one case at least, the judge avoided awarding damages for future harms for this reason. File No. 24782/98 FamApp (Tel Aviv), N.S. v. N.Y. (Dec. 14, 2008) Nevo Legal Database (by subscription) (Isr.).

294. This was the case in a court ruling in France. See *supra* note 162.

and the husband breaches an important right of his wife. However, there is still no agreement between the two systems regarding the enforcement measures to be taken, if any, to remedy this breach.²⁹⁵ In other words, enforcing a remedy for a breach of religious family law by a mechanism of damages in tort law may unlawfully intervene in marital status, although tort law aims at complementing religious family law and enforcing it. But if the rabbinical court has not (yet) issued a decree, the interests of the two systems diverge. Tort law may find a breach of the duty of care even without a decree by the rabbinical court,²⁹⁶ whereas the rabbinical court does not view the husband as a sinner (at least not yet).

Therefore, in these cases, the principle should be to respect the (state or nonstate) agent that has exclusive authority over marital status, that is, the rabbinical court. This means that the tort action should not acknowledge this situation as one of *get* refusal, since the determinant factor should be the ruling by the rabbinical court, based on religious law. This solution nevertheless differs from the one qualifying tort law *ex ante*. Therefore, an outcome in which a tort judgment for damages is issued in a case in which the rabbinical court has not ruled that this is a situation of *get* refusal should not be totally impossible. In cases in which clear factual proof shows that the marriage is *de facto* over (e.g., the spouses have been living with other partners for a long period), but because of technical procedures the rabbinical court has not ruled that this is a situation of *get* refusal (e.g., in cases in which the recalcitrant spouse has missed every court date), it is possible to envisage a tort action in civil court that results in the awarding of damages.²⁹⁷ Note that no country has in its laws a tort cause of action of *get* refusal. It is IIED in the United States, or NIED in Israel (because in Israel the tort of negligence includes intentional acts as well).²⁹⁸ Therefore, the plaintiff must demonstrate

295. And it may constitute a *halakhic* problem. See BROYDE, *supra* note 140, at 103–04.

296. This has been the case in a few judgments. See, e.g., File No. 18561/07 FamC (Jer), *S.D. v. R.D.* (arguing through various precedents that refusal to accept a *get* falls under tort law as it is a violation of the personal autonomy of the party requesting the *get*).

297. See Shmueli, *supra* note 38, at 162–67 (offering a few theoretical bases for this proposal).

298. See, e.g., CA 2034/98 Amin v. Amin 53(5) IsrSC 69, § 13 [1999] (England, J.) (Isr.), translated at http://elyon1.court.gov.il/files_eng/98/340/020/Q07/98020340.q07.pdf (stating that negligence is also relevant in intentional acts). It is to be mentioned that in Israel, there is no clear division between intentional and unintentional acts as in most common law countries. The laws of torts include all kinds of torts mixed together, some of them intentional—as they require intention or outrageous conduct—but most of them unintentional. In that case, the tort of negligence, being a very general tort that includes almost each and every tortious act, is also relevant in intentional acts. It means that acts that were done intentionally and on purpose, like the case of *get* refusal, can be sued through the tort of negligence, without the need to prove the

that the defendant's conduct has led to emotional distress. This may be possible at times even without an official decree by the rabbinical court. It would not be a determination that the recalcitrant husband is considered as refusing to grant the *get* according to Jewish law, but merely a civil declaration that his acts harmed his spouse in the process of the divorce, with damages awarded for this tort. It is a delicate distinction.

(d) Tort Actions that Can Meet the Conditions of Jewish Law According to Ronnie Warburg's Approach

Among other solutions, legal pluralism should encourage Warburg's creative approach whereby under certain conditions, a tort claim for *get* refusal can be brought also in civil courts, not only in rabbinical courts. As noted,²⁹⁹ Warburg argues that an *agunah* may be emotionally distressed because she cannot remarry or have children, and those feelings are in principle acknowledged by Jewish law as grounds for a tort claim, based on *boshet* (shame) and *tsa'ar* (suffering). Some of the justifications are based on *lemigdar milta* (fencing the law), which attempts to prevent the wife from committing a sin by living with another man while she is still married.³⁰⁰ In this case, the husband prevents her from performing the *mitzvah* of populating of the world, by preventing her from remarrying, having sexual relations, and having children.³⁰¹ On these grounds, the wife can ask for damages based on reasons other than the husband's refusal to grant her a *get*. As noted, Warburg explains that this claim is unrelated to the divorce and therefore a *halakhically* legitimate demand, based on the notion of *kefiyyah ledavar aher* (unrelated duress); that is, in many instances, upon receiving the *get*, the ex-wife no longer desires to remarry.³⁰² Thus, the monetary claim is grounded in the woman's right to marriage, a right that is independent and unrelated to the divorce, and therefore *halakhically* justified.³⁰³ The condition is that there should be no mention of the granting of a *get* when the tort claim is submitted, so that the presumption is that the woman seeks damages.³⁰⁴ Another condition is that there be no fixed sum for the damages that might cause the action to appear as a threat for the husband according to

intention. It will be sufficient to point at a breach of the duty of care between the spouses in the very refusal.

299. See Warburg, *supra* note 67, at 62 (recognizing a right to file a claim based on emotional distress).

300. *Id.*

301. See *id.* at 63 (describing how a wife can submit a claim based on her wish to engage in the *mitsvahs* of marriage or child bearing).

302. *Id.*

303. *Id.* at 62–64.

304. *Id.* at 64.

Jewish law, which means the amount of the award cannot be known in advance.³⁰⁵ Each and every action should be carefully examined according to its circumstances with regard to the amount of the award. Finally, a recognized rabbinical authority with expertise in this area should grant permission to file a suit in civil court.³⁰⁶

These terms (except the last one, which may be difficult to meet in practice, especially for secular women) are not difficult to meet in civil courts, even in Israel. This approach reflects a genuine attempt to bridge different approaches based on the principles of legal pluralism, especially if combined with other proposals suggested in this Part.

(e) Alternative Torts

Finally, if the plaintiff can point to another tort committed against him or her in the course of the marriage, which is not related to the *get* refusal (e.g., assault, battery, abuse, defamation, or breach of privacy), filing an action for that other cause is preferable. It is true that this would not solve the problem of a coerced *get* resulting from the two-way transaction, but at least it would not exacerbate the struggle over jurisdiction and would not block the divorce proceedings in rabbinical courts. It is therefore especially relevant in countries in which there is a struggle over jurisdiction between the courts. The reason is that rabbinical courts are not against interspousal tort actions in general, only against claims that blatantly intervene in their exclusive jurisdiction over marriage and divorce. Indeed, tort claims for domestic violence, defamation, and breach of privacy usually do not infringe upon religious family law.

This solution may be a thoughtful way of using legal pluralism, but it is relevant only in cases in which other intrafamilial torts can be proven.

Furthermore, if this method were to be used extensively, one may assume that rabbinical courts might come to view these actions in practice as actions for *get* refusal and treat them exactly the same way as they treat tort actions for *get* refusal. Here again, conforming to some other parameters presented in this Part may help.

305. See *id.* at 67–68 (explaining that the threat of a monetary claim may in some instances rise to the level of compulsion, yet such a threat remains remote when the amount of the award is not known in advance).

306. See *id.* at 66 n.39 (“Should the husband fail to agree to submit to a *beit din*’s jurisdiction, then the wife should optimally receive permission from the *beit din* or alternatively receive permission from a rabbinic authority who has expertise in Even ha-Ezer and Hoshen Mishpat to litigate the matter in civil court.”).

V. CONCLUSION

There are a few causes of action and remedies available to the civil legislature and the civil courts to help oppressed spouses in cases in which the actions of the oppressed are legitimate according to religious law.³⁰⁷ This is true both for countries in which there is separation of state and religion—in which there is civil marriage and divorce and in which the religious courts are not state made but private—as well as for countries in which there is no separation and in which religious courts are state made.³⁰⁸ This means that in cases of interspousal harm, familial relations are settled not only by family law but also by tort law and even by contract law. This is especially true for contract law, which by encouraging couples to sign prenuptial agreements can settle possible cases of *get* refusal, as has been accomplished successfully in the Modern Orthodox Jewish congregation in the United States. Civil law should be *independent* in its considerations, even at the cost of clashing with religious (state or nonstate) family laws and courts. In some countries, this may contradict the constitution. However, in most cases, legislation or case law has found a way to overcome this hurdle by granting the civil courts the authority to rule in monetary issues by way of contract law, and at most to order the parties to refer to rabbinical court, without direct interference in religious divorce laws and without coercing a religious divorce. In countries like Israel, where civil and rabbinical courts struggle over authority and jurisdiction, this cooperation is unfortunately rare, and in any case, divorce is handled in the rabbinical courts. But legal pluralism should encourage a cooperative solution when it is relevant. Moreover, the pluralistic approach according to which a tort claim for *get* refusal can also be brought before civil courts under certain conditions³⁰⁹ should be embraced. At the same time, other countries may learn from Israeli tort law, which considers *get* refusal in torts as NIED, with negligence serving also as an intentional tort, and not as IIED (as, for example, in the United States or Australia), which may be difficult to prove because of the element of intent (except in New York, where the *Get* Law makes these actions redundant). The best way, naturally, is to try to obtain the consent of the leaders of the religious congregation

307. Cf. Einhorn, *supra* note 2, at 153 (asserting that “there is a range of causes of action and remedies available to the civil legislature and the civil courts to help chained women in getting the *get*”).

308. See *id.* (arguing that “[e]ven in the absence of civil divorce in Israel, the Knesset and the Israeli civil courts should avail themselves of solutions used in other jurisdictions to encourage recalcitrant spouses to cooperate in obtaining the *get*”).

309. See Warburg, *supra* note 67 (discussing when a suit in civil court may be appropriate); *supra* Part IV.D (discussing the possibility of filing a tort action in a rabbinical court or a civil-secular court based on a construction of Jewish law whereby *get* refusal constitutes an emotional distress).

for any type of solution. Nevertheless, the law should still operate if they refuse to give consent.

Scholars have offered a variety of suggestions for solving the problem of *get* refusal by means of various civil law mechanisms.³¹⁰ Although the tools of tort law have been available since time immemorial, their intervention in family affairs is not trivial, and when these actions are litigated in the civil court, sensitivity must be shown. The actions should be examined carefully, taking into account that on both sides of the conflict are members of the same family who may have joint children and who at times still live under the same roof while the action proceeds.³¹¹ But one must not surrender to ideas of immunities and block these actions on the grounds of privacy and family autonomy, or because of unwillingness to intervene in the affairs of another field of law.³¹²

The solution of legal pluralism in cases of divorcing a wife against her will, bigamy, and polygamy in the Muslim sector is not optimal. There is no harmony between *Shari'a* family law and tort law, but there is a balanced compromise.

The multifaceted solution suggested in cases of *get* refusal is far from optimal, but there appears to be no optimal solution to the collision between laws and courts in this case. Even a compromise in

310. See, e.g., David M. Cobin, *Jewish Divorce and the Recalcitrant Husband—Refusal To Give a Get as Intentional Infliction of Emotional Distress*, 4 J.L. & RELIG. 421–25 (1986) (proposing the remedy of equitable relief and arguing that the remedy is appropriate because a money award would not remove the *agunah* problem that led to the victim's emotional distress, and damages would possibly invalidate the *get*, whereas this solution would not); Einhorn, *supra* note 2, at 153 (presenting different solutions); Gradofsky, *supra* note 177, at 28–30 (arguing that a recalcitrant spouse's refusal to give or accept a *get* might render that spouse's hands unclean, so that the spouse may be precluded from subsequent equitable relief in matters concerning the divorce of the parties). Gradofsky believes that if the use of this idea were applied successfully,

it would have at least the same force as the first New York Get Law. It would surpass the effectiveness of the New York law in several ways. First, statutory enactment would not be unnecessary. Second, at least to some limited degree the doctrine will affect the spouse who did not file for divorce as well. Third, there is a potential remedy for refusal to give a *get* after the divorce. . . . [A] refusal to grant a Jewish divorce lead [sic] the court to deny enforcement of a support order.

Gradofsky, *supra* note 177, at 30. Other solutions focusing on tort actions are presented in this Article.

311. See Shmueli, *supra* note 6, at 134 (“Judges who are well aware of the family conflict and do not view the dispute as being between two strangers can create a gap between sweeping declaration and moderate enforcement and if necessary punish severely.”); cf. Shmueli, *supra* note 5, at 227–32 (suggesting a distinction between interspousal tort actions in which there are no children and actions where the couple has children).

312. See William E. McCurdy, *Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030 (1930) (expanding on these issues); *Litigation Between Husband and Wife*, *supra* note 5 (same).

the spirit of legal pluralism, as in the cases of divorcing a wife against her will, bigamy, and polygamy, is not possible in this case. Nevertheless, legal pluralism can offer a sensitive way of using tort law in order to carefully reach a better society that is more human rights oriented.

This Article aimed at breaking the stranglehold of the exclusivity of one agent of law, a state-law agent in some jurisdictions and a community-private agent in others, which harms human rights by enabling another (state-law) agent to enter the picture and enhance human rights by awarding a remedy that eases the harm. In the long term, this remedy may even affect the essence of the right and deter husbands from acting according to norms that, although permitted under religious family law, have prices associated with them under tort law.

When one state-law agent (tort law) directly intervenes in the affairs of another state- or nonstate-law agent (religious family law), much sensitivity is required, but tort law should not step aside. It is legal pluralism that enables different views, by not rejecting the human rights-oriented state-law agent from acting in an arena that until recently has been governed exclusively by another law agent. The classic literature on legal pluralism emphasizes the ability of legal pluralism to acknowledge nonstate agents alongside the state agent, even if it may harm human rights. It should be no less important, therefore, and perhaps obvious, to acknowledge also two state-law agents acting side-by-side when the outcome is empowering human rights, as long as the collisions are handled in a sensitive manner. These are the grounds for the multifaceted solution offered here, which is no less relevant to cases in which the religious family courts are private, as in North American countries.

Gunther Teubner views legal pluralism as multifaceted:

It is the ambivalent, double-faced character of legal pluralism that is so attractive to post-modern jurists. . . . [L]egal pluralism is at the same time both: social norms *and* legal norms, law *and* society, formal *and* informal, rule-oriented *and* spontaneous. And the relations between the legal and the social in legal pluralism are highly ambiguous, almost paradoxical: separate but intertwined, autonomous but interdependent, closed but open.³¹³

One may definitely add: “descriptive but also prescriptive.”

Hopefully this Article will become the first in an extensive literature on legal pluralism suggesting solutions, or at least platforms for solutions, to collisions, rather than mere descriptions of them, and it will help ease the tension between different laws and courts in the same state.

313. See Teubner, *supra* note 149, at 1443.
