Bargaining in the Shadow of Get Refusal: How Modern Contract Doctrines Can Alleviate This Problem

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I. INTRODUCTION

II. WHY LOOK TO CONTRACTUAL DOCTRINES TO ALLEVIATE THE PROBLEM OF GET REFUSAL?

III. MODERN CONTRACT LAW DOCTRINES AS A BETTER SOLUTION TO THE PROBLEM OF GET REFUSAL
   A. General
   B. The Theory of Relational Contract and Its Remedies
   C. Unconscionability
   D. Religious Duress

IV. CONCLUSION

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Abstract

One of the most troubling issues in the Jewish family throughout the generations has been the problem of the agunah (literally a “chained woman”—one denied a divorce by her husband). In this paper my intent is to explore how modern contract doctrines can mitigate this problem. In my opinion, modern contract law supplies us with the necessary doctrines and a framework for dealing appropriately with such an acute legal, religious, and social problem. I will discuss several common and well-known contractual doctrines. Inter alia, following the research in the field of the relational theory of contract, I will investigate the feasibility and efficacy of implementing this theory as a contractual tool to alleviate the get refusal challenge. In addition, I will explore unconscionability, a doctrine that is based on public values and standards of appropriate behavior, as an additional contractual tool for claiming that the free will and informed consent of the spouse bound to the “get settlement” was compromised. Finally, I will elaborate on the theoretical usage of the unique “religious duress” doctrine, which has been extensively discussed so far mostly in the Christian context and examine its potential implications in our Jewish scenario.
I. INTRODUCTION

One of the most troubling issues in the Jewish family throughout the generations has been the problem of the Jewish chained woman (hereinafter: *agunah*, pl. *agunot*). This acute secular and religious problem stems from the fact that according to the Pentateuch, the husband should intentionally divorce his wife of his own free will and with his informed consent by granting her a divorce bill (hereinafter: *get*). This basic, traditional framework originates in the account of the biblical act of divorce described in Deuteronomy 24:1, with the husband the active party and the wife, passive: “A man takes a wife and possesses her. She fails to please him because he finds something obnoxious about her, and he writes her a bill of divorcement, hands it to her, and sends her away from his house.”¹

Thus, divorce is not a constitutive judicial decree adjudicated by a judge or a religious authority that ends a marriage. Rather, according to biblical law, a divorce depends entirely on the willingness of the husband to give his wife a *get*. If the husband does not hand the *get* to his wife of his own free will and with his informed consent, no judicial decree can affect the couple’s divorce. However, the decrees of Rabbenu Gershom Meor ha-Golah (c. 1000 C.E.) equated the wife’s position with that of her husband: the husband could no longer divorce his wife against her will, but both sides had to agree to the divorce.²

It should be emphasized that the *agunah* is not only a local Israeli problem, but a worldwide, universal Jewish challenge.³ This problem and its possible solutions, either secular or religious, have been discussed in

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¹ Deuteronomy 24:1 (The New JPS Translation, 2d ed. 1999).
countless secular and rabbinic books and articles. Amongst the halakhic solutions that have been suggested through the ages are several contractual solutions—most importantly, prenuptial agreements—as well as partially contractual solutions, such as mistaken marriage (kiddushei taut) and conditional marriage.


5 See, e.g., the prolific writing of Benjamin Shmueli, Commodifying Personal Rights and Trading the Right to Divorce: Damages for Refusal to Divorce and Equalizing the Women’s Power to Bargain, 22 UCLA WOMEN’S L.J. 39 (2015); Benjamin Shmueli, Sticks, Carrots, or a Hybrid Mechanism: The Test Case of Refusal to Divorce, 18 INT’L J. CONST. L. 893 (2021); Benjamin Shmueli, Post Judgment Bargaining (With a Conversation with the Honorable Judge Prof. Guido Calabresi), 50 WAKE FOREST L. REV. 1181 (2015); and his other articles, which will be mentioned and discussed throughout this article. See also Karin Carmit Yefet, Unchaining the Agunot: Enlisting the Israeli Constitution in the Service of Women’s Marital Freedom, 20 YALE J.L. & FEMINISM 441 (2009).


7 See the following landmark articles and book: THE PRENUPTIAL AGREEMENT: HALAKHIC AND PASTORAL CONSIDERATIONS (Basil Herring & Kenneth Auman eds., 1996); Michelle Greenberg-Kobrin, Civil Enforceability of Religious Prenuptial Agreements, 32 COLUM. J.L. & SOC. PROBS. 359 (1999); Susan M. Weiss, Sign at Your Own Risk: The RCA Prenuptial May Prejudice the Fairness of Your Future Divorce Settlement, 6 CARDOZO WOMEN’S L.J. 49 (1999).

8 For a scholarly discussion, see BROYDE, supra note 4, at 89–102; HACOHEN, supra note 4; Susan Aranoff, Two Views of Marriage—Two Views of Women: Reconsidering Tav Lemetav Tan Du Milemetav Armelu, 3 NASHIM 199 (2000); J. David Bleich, Survey of Recent Halakhic Periodical Literature: Kiddushei Ta’ut: Annulment as a Solution to the Agunah Problem, 33 TRADITION 90 (1998); Michael J. Broyde, Error in the Creation of Marriages in Modern Times under Jewish Law, 22 DINE ISRAEL 39 (English Section) (2003).

9 For rabbinic discussions of conditional marriage in Hebrew, see THE CONSTANTINOPLE BET DIN, KIDDUSHIN AL TENAI (1924); YEHUDAH LUBETSKY, EYN
Since the contractual per se as well as the partially contractual solutions to the agunah problem have been extensively discussed in either the secular or religious literatures, the essence of this article is a fresh and unique attempt to enlist the doctrines of modern contract law in alleviating the abovementioned problem. It bears mention that I am not seeking a halakhic solution to achieving the get (something that unfortunately hasn’t yet happened as of the writing of this article). I mainly focus on finding a secular contractual solution to the agunah problem in the various U.S. jurisdictions, using modern American contract doctrines either as an independent legal tool or combined with a supplemental tort solution. The extension of this discussion to other jurisdictions outside the states of the U.S., to include Israel, is unfortunately beyond the scope of this article and deserves an additional independent research.

It is worth noting that although divorce settlements typically are framed as court orders, they may very often be consensual. Furthermore, as far as I know, in many jurisdictions in the states of the U.S., as in

Tenai BeNissuin (1930), and the series of articles by Zevi Gertner & Bezalel Karlinski, Eyn Tenai benNissuin, 8 Yeshurun 678 (2001); Zevi Gertner & Bezalel Karlinski, Eyn Tenai benNissuin, 9 Yeshurun 569 (2001); Zevi Gertner & Bezalel Karlinski, Eyn Tenai benNissuin, 10 Yeshurun 711 (2002). For a scholarly writing, see Eliezer Berkovits, Conditionality in Marriage and Divorce (1967); Avraham C. Freiman, Seder Kiddushin Venisuisin Aharei Hatimat Hatalmud 366–94 (1944); Moshe Meielsen, Jewish Woman in Jewish Law 103–09 (1978).


13 For a further clarification of the relationship between secular and religious courts in get-related disputes, particularly the role of secular courts in the United
Israel, in the vast majority of cases these ‘get settlements’ are agreed upon in the rabbinical courts before the divorce is finalized. Afterwards, one of the spouses may claim in civil court against the unfair nature of such agreement, and that he, or actually she, had been coerced into signing such draconian contractual stipulations. Admittedly, the question whether or not they can be set aside due to unconscionability or duress may basically turn upon the relevant laws in each jurisdiction. Anyway, in my opinion, since these contractual doctrines are well rooted in the various American jurisdictions, and due to the strong contractual character of these agreements, the innovation of this article is still significantly relevant.

Similarly, I won’t discuss the constitutional problem of separation of church and state, since it, too, has already been extensively explored in the scholarly literature in general, and more specifically regarding the agunah problem. I will therefore dedicate my entire discussion only to exploring the doctrines of modern contract law that may be adjudicated in U.S. civil courts. This may nonetheless be problematic from both the secular and religious perspectives: from the secular, because some constitutional aspects may be in question; and from the religious, as some rabbinical courts may reject the use of these doctrines on Jewish law grounds. Since in both discussions we actually deal with only an indirect method of resolving the agunah problem, which is at the end of the day indeed a religious case, the two concerns may be more easily mitigated, as will be extensively elaborated in the next Part.

As mentioned briefly above, in this paper, my intent is to explore how modern contractual doctrines, including the theory of relational contract and its remedies, unconscionability, and religious duress, can mitigate the agunah problem. In my opinion, contract law supplies us with

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the necessary doctrines and a framework for dealing appropriately with such an acute legal, religious, and social problem. To be more precise, in addition to discussing the theory of relational contract, I will try to show why using secular contractual terminology, there is a righteous demand to terminate the marriage contract. I will argue that the chained spouse, the aggrieved party, may use her/his basic right to unilaterally withdraw from the marriage agreement. As will be extensively explored in Part III.B, the unique traits of the modern conceptualization of spousal relations as a relational contract dictate that the whole process of marriage and its termination should be much more humane and respectful, and, therefore, courts should be significantly less tolerant of and more aggressive towards any indication of get refusal.

Similarly, I will turn in Parts III.C and III.D to enlisting the doctrines of unconscionability and religious duress, respectively, to convince both the rabbinical as well as the civil courts ex-ante not to validate any problematic “get settlement,” and likewise to provide ex-post justification for entirely invalidating these agreements; or at least monetarily compensating the aggrieved spouse, even though s/he was finally released from the marriage contract. The hope is, as articulated at the end of Part III.C, that my suggested “cooling effect” will eventually turn the entire Jewish divorce practice into a much more egalitarian, just, and fair negotiation. Finally, I am fully aware that my contention will not entirely resolve the agunah problem; unfortunately, however, as of this writing neither a halakhic nor a secular solution has been forthcoming. This article, then, may add another substantial perspective to both the secular contract and family law writings regarding spousal relations and the relational contract, as well as the rabbinical literature on a resolution to the agunah problem.

The article proceeds as follows: In Part II, I explore why we should look to contract doctrines at all to alleviate the problem of get refusal, and why other civil solutions, such as tort claims, are insufficient. In Part III, which constitutes the main thrust of the article, I will suggest using some of the most prominent tools of modern contract law as a better solution to the problem of get refusal. Part IV concludes this article.

In the heart-wrenching case of the agunah, I believe that the flexibility and complexity of modern contract law are conducive to greater fairness in the ordering of the family realm—especially in this problematic issue. I will try to apply the following doctrines: the theory of relational contract and its remedies; unconscionability; and religious duress, a doctrine that has been extensively discussed so far mostly in the Christian context, and whose potential implications in our Jewish scenario I will examine. I will start my discussion by exploring why we should specifically look to contractual doctrines to alleviate the problem of get refusal.
II. WHY LOOK TO CONTRACTUAL DOCTRINES TO ALLEVIATE THE PROBLEM OF GET REFUSAL?

In the past decades around the globe, and recently in the last decade in Israel, tort law has been enlisted to alleviate the agunah problem. In these typical civil actions, recalcitrant husbands are sued in tort claims in civil court to compensate their chained wives. It is clear that the main goal of these actions is at the end of the day to *ex-ante* empower the wife with a meaningful stipend sum that may eventually convince her husband to release her by conducting the following transaction—the woman buys her freedom by purchasing the get from the husband, at the expense of forgiving him his secular “debt” to her. As mentioned above, this tradeoff has been used also in Israel from 2004 onward against both recalcitrant husbands and wives. The main two pitfalls of this tort avenue may be strongly connected with the problem of the separation of church and state. It is ironic that the root of the agunah problem in Israel is the absence of any such separation, while outside Israel the problem is actually due to this separation. Put differently, in Israel, the rabbinical courts have exclusive authority to deal with the divorce process of Jews on both religious and civil grounds.

Such civil tort claims are bitterly opposed by these Israeli religious tribunals, since in their opinion, they may, rightly or not, degrade the husband’s own free will and informed consent, which may render the get ineffective. Due to the lack of separation of church and state in Israel, there is only one competent authority that can deal with the agunah problem—the rabbinical courts. Sadly, however, not only are they unable to release the wife, but they themselves do not (or maybe cannot by Israeli law) implement any such tort claims. The civil courts can adjudicate compensation as much as they like, but not infrequently it is pointless and

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16 For an overview of this issue in international perspective, see Talia Einhorn, *Jewish Divorce in the International Arena*, in *PRIVATE LAW IN THE INTERNATIONAL ARENA—LIBER AMICORUM KURT SIEHR* 135, 148–49 (Jurgen Basedow et al. eds., 2000).

17 For this elaborate mechanism, see the prolific writing of Shmueli, *supra* notes 5, 10, and 11. For the claim that this tradeoff is eventually successful and helpful, see Amihai Radzyner, “*The Essential Thing is not Study, but Deed*: Get Procedures after Tort Claims and the Policy Respecting Publication of Rabbinical Court Judgments, 45 *HEBREW U. L. REV.* 5 (2012) (Isr.).


useless, since the rabbinical courts reject these civil outcomes out of hand and claim that a woman who sues her husband may only complicate her situation.

In other words, the common rhetoric of the rabbinical courts strongly contends that such civil intrusion into their work may severely damage rather than improve the wife’s position. Moreover, in extreme cases the rabbinical court may even deem a wife who applies to the civil court, amongst others, with such a tort claim as a rebellious woman (moredet), who, by definition, may lose all her marital rights.\(^\text{20}\) In other countries outside Israel, the problem is exactly the opposite. Since there is separation of state and church, the religious Jewish tribunals, the rabbinical courts, sit only as arbitration panels. It is a pity that without the cooperation of the two spouses, they don’t have any authority over them, and in any event they cannot enforce on the parties the fulfillment of their marital (religious) obligation to get divorced.\(^\text{21}\)

Furthermore, any attempt by the civil court in America to interfere in the religious spousal relationship may open a Pandora’s Box regarding the constitutional nature of such interference. As has been argued over and over again both in the academic literature and in the judiciary,\(^\text{22}\) such civil intrusion may deprive the unscrupulous spouse of one of the most basic constitutional rights—the Establishment Clause of the First Amendment.\(^\text{23}\)

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\(\text{20}\) For a criticism of such brand-new stringent trend, see Amihai Radzyner, *Problematic Halakhic Creativity* in Israeli Rabbinical Court Rulings, 20 JEW. L. ANN. 103, 135–54 (2013). For the far-reaching ramifications of such “status” for women, see Shlomo Riskin, Women and Jewish Divorce: The Rebellious Wife, the Agunah and the Right of Women to Initiate Divorce in Jewish Law—A Halakhic Solution (1989).


Thus, in Israel the tort route is problematic at the macro level because of the fear of fueling the constant tension between the civil and religious courts, and at the micro level such a claim may only complicate the agunah’s situation. At the same time, in America this avenue not infrequently, may be risky, shaky, and fragile, because it may raise acute constitutional barriers. In addition, the tort claim demands a lot of money, time, and effort from the chained woman, which not infrequently she doesn’t have, to fight against her (ex-) husband in an uphill battle in both the rabbinical and civil courts.24

Alternatively, a contractual claim basically may be used ex-post the divorce process on the grounds of violation of good faith, or that the divorce agreement is unconscionable, contrary to public policy, and/or was achieved with coercion and (religious) duress, etc. The relational contract and its remedies can also be enlisted either to convince the courts ex-ante that termination is the most suitable or just remedy for the aggrieved spouse, or as ex-post justification for monetarily compensating this party, even though s/he was finally released from the marriage contract.

First and foremost, while in the common tort claim the wife trades off her civil compensation for her get, in the typical contract claim she has already received her divorce bill in the rabbinical court and only later applies to the civil court in a supplemental claim to compensate her for the contractual drawbacks in the divorce bargaining process. Hopefully, at the end of the day, she will receive both the religious get and the civil compensation. At the least, she will receive only the latter.

Likewise, this sort of civil action is dramatically less problematic in the eyes of the rabbinical court, since in the vast majority of cases it is used only after the divorce process has already ended and the intrusion of the civil court is only into the monetary aspects of the process and by no means directly touches the get.25 Thus, in Israel, the contractual avenue is much preferred, from both the religious and civil perspectives, to its counterpart—the tort claim. In addition, this device is also a much better option in any American jurisdiction, due merely to the fact that the constitutional problems it may raise, if any, are much less problematic. The essence of this contention is that applying American contract law to validate and enforce an explicit agreement to get divorced is a better way


24 An extensive discussion of the shortcomings of tort claims is beyond the scope of my paper. See, in the meantime, Blecher-Prigat & Shmueli, supra note 11; Shmueli, supra note 10; and, more recently, Shmueli, supra note 5, and the various references enumerated there.

25 Excluding one extremely hardline opinion, which maintains that if the bill of divorce was granted with the agreement that there would be no recourse to the civil court, even if only afterwards, the get may be retroactively annulled. For a critique of this harsh halakhic creativity, see Radzyner, supra note 20, at 110–35.
to avoid any possible collision with the constitutional pitfalls, since such mutual agreement clearly blocks any further claim to violation of religious freedom. In addition, even regarding the procedural aspects, an explicit prenuptial agreement to get divorced is very common in the U.S. therefore, such an explicit stipulation to release the wife can easily be enforced in the civil courts.

All in all, the contractual claim, concerning either an explicit or implied contractual undertaking, may be very friendly to the chained woman, since the burden of proof is much lower in such a claim, in stark contrast to the typical tort claim. Therefore, the agunah must invest much less time, effort, and money, and consequently this may be a more helpful and easier avenue of civil recourse. Similarly, practically speaking, the chained woman may receive the contractual compensation much faster than in a tort claim, which may take a much longer time for a court to deal with. On contractual grounds, the claim is independent and based only on a civil infrastructure, whereas the tort claim is based, in the vast majority of cases, on the previous refusal of the husband to cooperate with the rabbinical court. Since, according to the mainstream opinion in the Israeli civil courts, everything depends on the decisiveness and straightforwardness of the rabbinical verdict, it is definitely not an independently reliable civil claim.

III. MODERN CONTRACT LAW DOCTRINES AS A BETTER SOLUTION TO THE PROBLEM OF GET REFUSAL

A. General

With the passage of time, at the end of the nineteenth century and the beginning of the twentieth, different social and economic changes prompted courts to abandon the sanctity of the freedom of contract, following the understanding that there was no longer the option of relying solely on the free will of the contracting parties. In the face of many market regulation shortcomings, it was clear that judicial intervention would strengthen, not weaken, genuine freedom of contract. This new contention prevailed in the legislative and judicial decisions of the twentieth century,

26 See, e.g., Lazerow, supra note 10, at 115; Shmueli, supra note 10, at 866, 868–69.
28 For a fuller discussion of the advantages of the contractual actions as opposed to the tort claims, see Shmueli & Phux, supra note 12.
which sought to rein in and narrowly apply the concept of freedom of contract.\textsuperscript{29}

Thus, modern contract law is sensitive to the special characteristics of any given contract. Following the understanding that not intervening in the contractual relationship may perpetuate the inequality between the sides, modern contract law expects the contracting parties to honor social values and especially consider the other party’s needs (collectivism).\textsuperscript{30} Due to the modern notion that often there is no real freedom of contract in choosing whether to enter into a contract to begin with, or with whom to enter into such a contract, today the judiciary practices scrutiny and intervention in contractual stipulations to preserve fairness for both sides. Courts no longer blindly follow the initial agreement but conceptualize the contract in public terms while inserting social and communal values, such as considerations of fairness, distributional justice, reasonableness, expectation of collaboration, solidarity, mutuality, and even encouragement to renegotiate in the case of changed circumstances.\textsuperscript{31}

In modern contract law, which is the prevailing philosophy in the Anglo-American system today,\textsuperscript{32} there is a sort of withdrawal from freedom of contract toward applying paternalistic principles and obligatory legislation. Courts have wide discretion and a free hand to intervene while educating the parties, and even to insert various social interests,\textsuperscript{33} such as the responsibility of one contracting party toward the other. This modern shift enables substantial scrutiny of contract stipulations and imposes obligations on the parties to promote their mutual contractual interest with cooperation.


\textsuperscript{32} Id. at 813.

Since the existing scholarly literature describes the transformation of classical contract law into modern contract law at length, I will focus only briefly on the aspects of the shift embodied in the modern model most relevant to our discussion of the agunah problem. The essence of my argument is that the flexibility and complexity of the modern model supplies us with better tools to cope with this problem. In stark contrast to classical contract law, the modern model demands greater fairness in the ordering of the family realm, especially in this intimate relationship. It allows us to be much more sensitive to the fragile, sensitive, and problematic situation of the woman, due to the acute problem of unequal power of the contracting parties in the typical Jewish divorce process.

It is therefore logical to use one of modern contract law’s various doctrines for the purpose of successfully coping with this problem, as will be extensively elaborated upon in the remaining sections of this Part. Furthermore, modern contract law clearly teaches us the extent to which all contracting parties, the spouses in the discussion at hand, are nowadays conceptualized as conducting their interaction in considerable closeness and trustfulness, which are indeed very high in this familial structure. Therefore, even should none of the possible doctrines be used explicitly, the spouses’ interactions should feature much more justice, solidarity, interdependency and fairness, close cooperation, and even altruistic motivations. Even the abovementioned doctrines of classical contract law, such as good faith, public policy, breach of the marital contract, and coercion and duress, should be interpreted in a much more expansive and nuanced manner in order to be fairer and more just to both of the parties, especially the wife.

To be more precise, the first suggested modern contract law doctrine, the theory of relational contract and its remedies, may empower the agunah’s ex-ante claim to receive the get due to her righteous demand to terminate the marriage contract. Since no spouse can unilaterally rescind it while continuing to hold his (ex-) spouse to the breached agreement without letting him/her demand the remedy of its termination. Likewise, this can be used also as only an ex-post claim to convince the court to remedy her with contractual compensations, since according to this working premise, even if she has already received her divorce bill, she should be compensated due to the mere fact that she has the full right to be released from her marriage without agreeing to any sort of draconian contractual stipulations. Alternatively, the modern doctrines of unconscionability and/or religious duress can be used only retroactively after the divorce bill has been received in order to convince the court to invalidate either entirely or only partially her “get settlement,” since it is obviously an unfair agreement in light of these doctrines.
B. The Theory of Relational Contract and Its Remedies

In this section I want to lay out a doctrine, the theory of relational contract, which may assist us enormously in resolving the problem of get refusal. It emerged in the 1970s as a reaction to classical contract law’s limits; some even argue that it is a “mirror image” of the old contract model and the answer to real-world situations that arise. The relational contract theory was fueled by the criticism of Ian R. Macneil, following empirical studies on the gap that exists between the initial contractual rights and obligations, and those that are eventually applied during the contract’s performance.

Many sociologists and psychologists also contend that there are extrinsic factors that influence the contract’s performance, primarily the importance of keeping promises, consideration of the other’s needs, and the parties’ readiness to cooperate. This pertains not so much to discrete short-term transactional contracts as to long-term contracts between two stable contracting parties, which represent a long-term extra-contractual relationship that develops mutual interests, expectations, and interdependency. The unique long-term relationship, which may be driven by public values, such as justice, solidarity, interdependency, and fairness, requires close cooperation and even altruistic motivations.

According to the common relational contract theory, the interdependency of the parties causes them to assign less weight to the initial planning and documentation of the contract and its stipulations, and more weight to the flexible, reciprocal, and solidary behavior of the two sides. This means that the agreement is dynamic and should not be inspected solely at the moment of its execution, but throughout its performance as well. When changed circumstances occur, the sides should consider each other’s needs and not insist on following the initial agreement. Instead, they should adjust the agreement to new...

34 See Eisenberg, supra note 31, at 812.
circumstances in recognition of the dynamic and flexible character of the modern contract.

Furthermore, it is very difficult to speak today about one singular relational contract theory, since one can find in the research literature a variety of theories developed by scholars.\(^{37}\) Similarly, the prevailing contention is that in any given contract one can find some aspects of the relational contract, and as we get closer to the relational contract's special character, we should treat it in a more communal and public manner.\(^ {38}\) Scholars disagree as to whether the relational contract deserves special regulation in addition to the classical and modern law models,\(^ {39}\) or whether it fits into the latter model.\(^ {40}\) Scholars also disagree on how de facto this sort of contract should be operatively implemented.\(^ {41}\) In spite of the vast amount of scholarly literature, the relational contract theory has yet to reach full maturity and so far is used mostly in the long-term contract realm. Some scholars, nonetheless, anticipate that it will gain greater influence.\(^ {42}\) Already today many practical implementations of this theory can be found in various legal relationships in general, specifically in the fields of insurance, employment, arbitration,\(^ {43}\) and more recently biotechnology.\(^ {44}\)

In the recent legal literature, increasingly one can find a conceptualization of the spousal relationship as a relational contract. It is worth noting that in his early writings, Macneil conceptualized the

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\(^{39}\) See the opinion of Melvin A. Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 251 (1995); and Ian R. Macneil in his various articles.

\(^{40}\) See the opinions of Eisenberg, supra note 31, at 806; McKendrick, supra note 36, at 332; Robert E. Scott, *The Case for Formalism in Relational Contract*, 94 NW. U. L. REV. 847, 848 (2000).


\(^{42}\) See Gordon, supra note 35, at 566–67.

\(^{43}\) For a similar modern implication, see id. at 565–69.

marriage contract as a relational contract.\textsuperscript{45} That conceptualization is accurate because the spousal relationship is long-term and dynamic, and while the economic aspects are not central to the contract, the relationship nonetheless is characterized by economic interdependency, cooperation, and altruistic motivations. Furthermore, the spousal relationship includes explicit and implicit public values and social interests.\textsuperscript{46} Indeed some scholars have applied this theory in various specific spousal relationships—i.e., the private ordering of the financial affairs of married couples or cohabitants,\textsuperscript{47} and even of gay couples.\textsuperscript{48}

Still, only quite recently scholars have begun to explore the substantial potential there may be in the application of the relational contract theory to the family realm, and, in my view, the relational contract theory should be applied to the agunah problem as well. As Lloyd R. Cohen has written, marriage is a classical long-term contract, where the spouses, two consenting adults, voluntarily agree to love, honor, and cherish each other for the rest of their lives. The undefined spousal obligations and rights, at least outside Jewish marriage, are very similar to those of other long-term agreements, such as an employment contract.\textsuperscript{49}

\textsuperscript{45} See Macneil, \textit{Contracts}, supra note 38, at 725. For the conceptualization of relational contract theories in terms of marriage in the writings of Macneil and Macaulay, see Gordon, supra note 35, at 569.


Not infrequently in the scholarly literature, the terms long-term contract and relational contract are used synonymously. In the prolific writing of Shahar Lifshitz, other prominent features of marriage as a relational contract are enumerated: the start and end points are undefined; closeness and trustfulness are very high; altruism, solidarity, and cooperation are very common, even more than in the market realm; the economic aspect is not necessarily the most important, especially when the spousal partnership is about to be dissolved; and lastly, it involves very personal and intimate aspects of the spouses’ lives, which obviously incents the parties to try solving their problem by themselves instead of suing each other and applying to courts.

In contrast to classical contract law, modern contract law in general, relational contracts in particular, is better suited to coping with these complex social arrangements. Modern contract law offers devices that are capable of dealing with noncommercial contractual relationships and allows renegotiation and even readjustment of the contract to the changed circumstances, including a breach of it. Since the traditional contract marriage in general, the Jewish arrangement in particular, is riddled with huge gender disparities, the most appropriate contract doctrine for dealing with and, even successfully bridging those troubling gaps in bargaining power, is the relational contract.

This is due to the fact that a relational contract is open to renegotiation and creates protective mechanisms such as mandatory rules, meticulous and separate regulation of each contractual issue, etc. At the least, the special features of marriage as a relational contract demand more collaboration, solidarity, mutuality, and even encouragement to renegotiate in the case of changed circumstances, such as separation or even divorce. Inter alia, in light of these social ethics and exalted norms, the collaboration of the spouses, even in the event that they decide to terminate their marriage contract, should be more humane and respectful.

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50 See, e.g., Antony W. Dnes, Marriage Contracts, in 3 ENCYCLOPEDIA OF LAW AND ECONOMICS 864 passim (Boudewijn Bouckaert & Gerrit De Geest eds., 2000); Morten Hvid, Long-Term Contracts and Relational Contracts, in 3 ENCYCLOPEDIA OF LAW AND ECONOMICS 46 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000).


52 See Lifshitz, Regulation, supra note 51, at 286–91.

53 See Margaret F. Brinig & Steven M. Crafton, Marriage and Opportunism, 23 J. LEGAL STUD. 869, 870 nn.7–8, 881–83 (1994); Melanie B. Leslie, Enforcing Family Promises: Reliance, Reciprocity, and Relational Contract, 77 N.C. L. REV. 551 (1999); Scott & Scott, Marriage, supra note 46, at 1230–32.

and therefore the rabbinical as well as the civil courts should be significantly less tolerant of and more aggressive towards any indication of get refusal.

In a relational contract, the explicit agreement is much less central because other extracontractual issues obligate the parties to keep their contractual undertakings, even during its termination. Similarly, in the agunah context, the religious, personal, and social consequences of marriage and/or get refusal are so far-reaching that the breach of such a Jewish relational marriage contract should at least be subordinated to the various civil and religious norms of good faith, public (Jewish) policy, etc. The recalcitrant husband should be required to cooperate with the rabbinical court in releasing his wife, especially in light of the general Jewish ethical practice of pursuing justice and not harming the other. Solid Jewish solidarity with regard to fighting the get refusal problem and the condemnation of any husband who refuses to release his wife may create a strong feeling of social obligation to follow the Jewish communal and judiciary authority, posing the threat of severe damage to the recalcitrant husband’s social reputation and pushing him to grant the divorce bill to his spouse.55

According to the prevailing modern conceptualization of marriage as contract,56 this unique relationship enables each of the spouses to breach the marriage contract and demand to get divorced at any time, without the traditional prerequisite of proving some fault on the part of the spouse.57 This is similar to any other agreement where the unilateral rescission of


the agreement is permitted, since there is no point to enforcing continued adherence to the initial agreement upon the breaching party.\footnote{See Sharon Shakargy, Choice of Law in Marriage and Divorce in Light of Changes to Substantive Law 266 (2015) (Isr.).} There is a substantial self-commitment element in marriage, which, not infrequently, may be much stronger than a mere promise. The flip side of this is that you cannot breach the marriage contract unilaterally while continuing to hold your (ex)spouse to the breached agreement without letting him/her demand the remedy of its termination. Indeed, a breach of the marriage contract should justify giving the aggrieved spouse some contractual remedies, as is very common in classical contract law.\footnote{For the landmark books on this issue, see Hugh Beale, Remedies for Breach of Contract (1980); Comparative Remedies for Breach of Contract (Nili Cohen & Ewan McKendrick eds., 2005); Jill Poole et al., Contract Law Concentrate: Law Revision and Study Guide 143 (3rd ed. 2017); Solene Rowan, Remedies For Breach of Contract: A Comparative Analysis of the Protection of Performance (2012). See also the following seminal articles: Richard Craswell, Contract Remedies, Renegotiation, and the Theory of Efficient Breach, 61 S. Cal. L. Rev. 629 (1988); Lewis A. Kornhauser, An Introduction to the Economic Analysis of Contract Remedies, 57 U. Colo. L. Rev. 683 (1986); Peter Linzer, On the Anomality of Contract Remedies—Efficiency, Equity, and the Second “Restatement”, 81 Colum. L. Rev. 111 (1981); Thomas S. Ulen, The Efficiency of Specific Performance: Toward a Unified Theory of Contract Remedies, 83 Mich. L. Rev. 341 (1984).}

In their seminal article, Yehuda Adar and Moshe Gelbard argued that contrary to a widely held assumption, formal remedies do play a significant role in the relational contract. In their opinion, understanding the function of formal remedies in the relational context is crucial for the development of a full-scale relational theory of contract. In light of this basic assertion, they proposed a theoretical model of relational remedies.\footnote{See Adar & Gelbard, supra note 15, at 409. For a previous discussion of the role of remedies also in modern contract law, see David Campbell, The Relational Constitution of Remedy: Co-Operation as the Implicit Second Principle of Remedies for Breach of Contract, 11 Tex. Wesleyan L. Rev. 455 (2005). For the more general nexus of remedies for breach of contract and relational contract, see Donald Harris et al., Remedies in Contract and Tort 34 (1st ed. 2002).} At the outset of their article, they enumerated three factors, each representing a central and dominant aspect of a relational contract, which play a crucial role in determining the remedial rights of the parties to a breached contract: the duration of the contractual relationship; “personal relationship”; and the investment the contract requires from each of the parties.\footnote{See Adar & Gelbard, supra note 15, at 412–14.}

The first two factors are clearly at play in the Jewish marriage contract, as the duration of this contractual relationship should be, \emph{a priori}, everlasting, and there is no other such personal relation in Judaism specifically or even more generally in other faiths and jurisdictions. The third factor is also very relevant to the Jewish family, since getting married
involves building spousal trust, interdependency, cooperation, etc.—heavy investments in contractual terminology. Likewise, getting divorced may dramatically change a person’s personal, social, and religious reputation and status—high costs of retreat in contractual discourse. Thus, in signing the Jewish marriage contract both spouses commit to making enormous personal investments in intimate aspects of their lives, which definitely cannot be evaluated or compensated for in fungible and monetary value.

Whatever remedial venues may be available to the aggrieved party upon the breach of their relational Jewish contract, first and foremost, he or more likely she may demand the remedy of termination of their dead-end marriage contract by a grant of the divorce bill. Due to the strong interpersonal relationship in marriage, the remedy of enforcement is very problematic, since in the vast majority of Western jurisdictions this remedy will not be granted if it involves personal service, as is obvious in our case. That strongly induces the chained spouse, the aggrieved party, to use her/his basic right to terminate and unilaterally withdraw from the marriage agreement.

C. Unconscionability

This doctrine is based on public values and standards of appropriate behavior. Here, I explore its application in the general commercial contract context, the spousal context, and in particular, the relevant agunah context, as a means of coping more successfully with the get refusal problem. The doctrine of unconscionability is well-rooted in the ancient history of contract law. It first appeared in equity but was later embedded in common law. Some assume that its ancestors are the Roman doctrine of Laesio Enormis and the medieval theory of the fairness consideration doctrine, which was very common in the American judiciary and is the basis upon which courts invalidated unconscionable contracts. In the modern era, this doctrine was anchored in law by the Uniform Commercial Code (U.C.C.) in 1954 and later in the Restatement (Second) of Contracts. Some scholars have considered this doctrine to be one of the most innovative sections of the U.C.C., the biggest change in contract

62 See id. at 414–20.
63 Id. at 417–19.
65 See U.C.C. § 2-302 (Am. L. Inst. & Unif. Law Comm’n 1954); see also Restatement (Second) of Contracts § 208 (Am. L. Inst. 1981). For the widespread acceptance of this doctrine in every jurisdiction in the U.S., by either the legislature or the judiciary, see Eisenberg, supra note 64, at 1415 nn.6–9.
BARGAINING IN THE SHADOW OF GET REFUSAL

law, and even its most valuable clause. In its modern form, this doctrine enables courts to directly inspect unconscionable bargains, without having to use any of the rigid classical doctrines, and, if necessary, to intervene in the conditions of the contract.

Using this doctrine, courts weigh the fairness of the bargain when the contract was signed from both procedural and substantive aspects. According to the vast majority of courts, it is necessary that both aspects be unconscionable in some degree to justify any judicial intervention. When a court concludes that a contract is unconscionable, it may prevent its enforcement, invalidate the problematic clauses, or otherwise restrain the unconscionable implications of the problematic stipulations.

There is no doubt that this doctrine has challenged classical contract law notions and therefore, has drawn numerous opponents and supporters. Many scholars have tried to justify the unconscionability doctrine in light of philosophical and contractual theories, others to reshape it into a more concrete and practical model. Nevertheless, prima facie, the bulk of the modern literature, at least in the U.S., supports its existence. Amongst the claims are the following justifications: in the

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67 See Frank P. Darr, Unconscionability and Price Fairness, 30 Hous. L. Rev. 1819, 1829 n.64 (1994).


70 For basing the doctrine on the theories of Aristotle and Hegel, see, respectively, James Gordley, Equality in Exchange, 69 Cal. L. Rev. 1587, 1604–11, 1633–7 (1981); Peter Benson, Abstract Right and the Possibility of a Nondistributive Conception of Contract: Hegel and Contemporary Contract Theory, 10 Cardozo L. Rev. 1077, 1080 (1989).


72 See, e.g., Bender, supra note 69; and the other articles enumerated at Darr, supra note 67, at 1831 n.76.
commercial world, where adhesion contracts are very common, this
d Doctrine is very important, its wide spectrum provides a very useful tool
in the court’s hands where other objective doctrines have failed and over
the years the courts have agreed on a clear and unified framework of when
and how to use it. Even adherents of the economic analysis of law are
inclined to impose some restrictions on the freedom of contract precisely
in order to strengthen welfare policy inside the free market.

Despite the criticisms of the doctrine, over the years courts have
widened and deepened its usage with flexible implications, and today it is
applied in the commercial context and in a wide range of other contexts.
As of 1995, every state in the U.S. had anchored the doctrine in its
jurisdiction. Moreover, the majority of research studies agree on its
necessity and today it is an inherent part of the common law.

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73 See Carol B. Swanson, Unconscionable Quandary: UCC Article 2 and the
Unconscionability Doctrine, 31 N.M.L. REV. 359, 359 (2001). For a comparison of
adhesion contract and unconscionability and for the need to see them as completing
each other, see Shmuel I. Becher, A “Fair Contracts” Approval Mechanism:
Reform 747, 748 nn.1, 3 (2009).

74 See Swanson, supra note 73, at 386–87; see also Blake D. Morant, The Salience
of Power in the Regulation of Bargains: Procedural Unconscionability and the
that were decided especially due to the flexibility and convenience of this doctrine,
see Barnes, supra note 68, at 159–60 n.175.

75 This is the conclusion of the following researchers: Darr, supra note 67, at
1848; Daniel T. Ostas, Predicting Unconscionability Decisions: An Economic Model

76 See Eric A. Posner, Contract Law in the Welfare State: A Defense of the
Unconscionability Doctrine, Usury Laws, and Related Limitations on the Freedom to
Contract, 24 J. LEGAL STUD. 283, 284 (1995). For the justification of this doctrine from
an economic analysis of law perspective, see F.H. Buckley, Three Theories of
Substantive Fairness, 19 Hofstra L. REV. 33, 37–64 (1990); see also Russell
Korobkin, A “Traditional” and “Behavioral” Law-and-Economics Analysis of

77 See Swanson, supra note 73; Darr, supra note 67, at 1832; DiMatteo & Rich,
supra note 71, at 1084.

78 See SLAWSON, supra note 66, at 5.

79 See Jeffrey W. Stempel, Arbitration, Unconscionability, and Equilibrium: The
Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism,

80 For an overview of many articles that document the widespread acceptance of
this doctrine, see Prince, supra note 69, at 462 n.12; Swanson, supra note 73, at 362–
70 n.29. See also Erin Canino, Note, The Electronic “Sign-In-Wrap” Contract: Issues of Notice and
Assent, the Average Internet User Standard, and Unconscionability, 50 U.C. DAVIS L.
REV. 553 (2016); Bryant Lee, Note, Knocked Unconscionable: College Football
Scholarships and Traumatic Brain Injury, 85 GEO. WASH. L. REV. 613 (2017). But see
potential implications of this doctrine in the private ordering of spousal relationships have been explored by some scholars, and it was found that from the very first days of the Anglo-American system, the notion of freedom of contract, especially in equity, was restricted due to the notions of best interests of the child and intrinsic unconscionable characteristics, such as fairness ideals.

Here I explore the application of the unconscionability doctrine in the spousal context, and in particular the relevant agunah context, as a means of coping more successfully with the get refusal problem. Since there are no clear criteria regarding how the doctrine of unconscionability should be implemented in the context of the agunah, there is plenty of room for using this doctrine, even if only to retroactively cancel any unconscionable “get settlement.” This in turn may lead to a better means of invalidating specific problematic conditions—such as a waiver of spousal entitlements, the marital assets, the continuation of the right of maintenance, insofar as it is relevant to Jews, and other aspects regarding child custody—and in the worst-case scenarios, of entirely invalidating such agreements. The implementation of this doctrine is even more important in light of the prevailing criticism that the entire negotiation process towards signing the divorce contract might be unconscionable for women in general, more specifically in the Jewish practice.

Generally speaking, in the scholarly literature one finds a lively discussion of the existing and even increasing gender disparity between the husband and wife during their marriage’s lifetime. This unequal power of the contracting parties prevails even where the spouses at the outset of the marriage have privately regulated their spousal relations,


86 For a survey of these contentions, see Lifshitz, *Regulation,* supra note 51, at 286–91.
which, on its face, should enormously alleviate the disparity.\textsuperscript{87} Furthermore, this disparity is only exacerbated when the marriage is dissolved and the wife, for several biological, religious, sociological, psychological, and economic reasons, is very eager to get divorced and remarried.\textsuperscript{88} This spousal disparity is even worse in Jewish marriage, as was discussed at the outset of this article and will be extensively elaborated in the next section. The inherent halakhic disparity between the genders is obvious and dramatically biases the entire divorce process against women as a gender and against the agunah in each specific get refusal scenario. As a matter of fact, unequal power of the contracting parties commonly serves as a proxy for procedural unconscionability.\textsuperscript{89}

According to this contention, the stipulations of any given “get settlement” might be inherently unconscionable. Certainly, if a court were to find that unconscionability exists due to duress, then the contract becomes voidable.\textsuperscript{90} Therefore, courts should carefully inspect such agreements for any unconscionable procedural or substantive terms. The important and central point is that the judicial scrutiny should not only hunt for any clear and obvious unconscionable stipulation, but also examine the spousal history, which may reveal unseen unconscionability underlying the entire contract. The clearest incident is where there is a history of spousal violence,\textsuperscript{91} so even if the agreement was not signed following any clear violent action, the whole agreement should be carefully inspected also for any substantive unconscionability.\textsuperscript{92}

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\textsuperscript{87} But see Mary Becker, Maternal Feelings: Myth, Taboo, and Child Custody, 1 S. CAL. REV. L. & WOMEN’S STUD. 133 (1992); Gail Frommer Brod, Premarital Agreements and Gender Justice, 6 YALE J.L. & FEMINISM 229, 240–41 n.49–51 (1994).


\textsuperscript{91} See, in the meantime, besides the references that will be enumerated by me at infra notes 120–121: Lisa Fishbayn, Gender, Multiculturalism and Dialogue: The Case of Jewish Divorce, 21 CAN. J. L. & JURIS. 71 (2008); Yael Machtinger, In the Name of God? “Get” Refusal as Domestic Abuse, in RELIGION, GENDER, AND FAMILY VIOLENCE: WHEN PRAYERS ARE NOT ENOUGH 209 (Catherine Holtmann & Nancy Nason-Clark eds., 2018); Blecher-Prigat & Shmueli, supra note 11.

\textsuperscript{92} See, for example, the following seminal writings: CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989); LENORE E. A. WALKER, THE BATTERED WOMAN SYNDROME (1st ed. 1984); Lenore E. A. Walker, Battered Women and Learned Helplessness, 2 VICTIMOLOGY 525 (1977).
\end{small}
IN THE SHADOW OF GET REFUSAL

In light of the conclusions of some prominent scholars in the field of the nexus between family and contract law, such as Shahar Lifshitz and Hila Keren, any such coercive divorce agreement should be invalidated, *inter alia*, due to the unconscionability doctrine. Thus, it is crucial that, especially in the Jewish context, the “get settlement” should be inspected thoroughly for any procedural and/or substantive unconscionability, since the default starting point of many divorce negotiations strongly inclines against the woman’s interests.

Procedural unconscionability can be found, generally speaking, in the following cases: gross inequality of bargaining power, inability to read or understand the provisions of the contract, a significant gap in age, intelligence or education, fraud, unfair surprise, and the like. In the Jewish context, it is found whenever the husband explicitly threatens to leave the wife chained if she will not agree to whatever he dictates to her in their “get settlement.” In a scenario involving a history of violence, such a threat may even be inherent in the contract and, therefore, the entire agreement should be thoroughly inspected. In the most problematic incidents, such circumstances may justify the invalidation of the entire contract, where “plaintiff did not freely and voluntarily enter into the subject agreement but was compelled to do so by her husband’s invocation of his power to refuse to give her a Jewish divorce.”

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95 See BREITOWITZ, *supra* note 4, at 354; Lazerow, *supra* note 10, at 130–32.


Substantive unconscionability can be found in extreme circumstances where the “get settlement” stipulates unequal terms substantially different from reasonable and fair conditions. It also emerges wherever there are obviously oppressive terms that are unreasonably favorable to one party, mostly the husband, at the expense of the other, his wife. For example, a provision that the wife should give up (almost) all of her marital property rights in exchange for a get from her husband should be voided by the court as an unconscionable agreement.99 Similarly, in another case, the court found that the husband’s refusal to grant a get represented conduct so unfair as to warrant the award of all marital assets to his wife.100

The above cases are obviously unfair and unjust due to their clearly unconscionable terms, but substantive unconscionability can be deduced from even subtler stipulations, such as a grossly unequal asset distribution reducing the wife’s entitlement to alimony, concessions regarding child custody, etc. Practically speaking, courts used to invalidate any separation agreement that dictated a dramatically unequal assets distribution.101

Nonetheless, we are dealing only with an ex-post evaluation and, in some cases, even a partial or full cancellation of the “get settlement” and its unfair stipulations. In my opinion, the thorough and comprehensive implementation of this unique doctrine is central to alleviating the get refusal problem. Once unscrupulous husbands realize that such unconscionable agreements will not pass the scrutiny of the rabbinical and/or civil courts, this miserable practice ex-ante will be stopped. Step by step, slowly but surely, this “cooling effect” will turn the entire Jewish practice from one-sided bargaining into a much more egalitarian, just, and fair negotiation, which hopefully will yield much more conscionable agreements.

D. Religious Duress

Before the twentieth century, the definition of duress was traditionally limited to physical compulsion and/or such a threat as “a big man forcing a poor widow woman to sign a deed at the point of a gun.”102 This narrow spectrum was extended both statutorily and judicially over the years. For example, the definition of duress in the Restatement (Second)
of Contracts states that a contract is also voidable if it was entered into following an improper threat. This much wider definition was itself dramatically broadened by being interpreted to include also “economic coercion/duress.” This term means that, due to inequality of bargaining power, the contract in extreme circumstances may be voidable. In the context of the agunah, in a series of verdicts, this extended common law defense was practically recognized as “economic coercion” in invalidating draconian “get settlements.”

In the following paragraphs, I want to import another relatively new extension of the duress defense—“religious duress,” which is of Catholic origin—and try to implement it in the Jewish marriage context in order to resolve the get refusal problem. In my opinion, this unique sort of duress should be defined much more broadly to include anything that coerces any religious believer to accept his miserable condition, which is unrightfully abused by this religious authority; nonetheless, there is no real civil need to accept it. Since 1984, this unique form of duress has captured public attention and resulted in a series of criminal prosecutions as well as civil suits.


105 John P. Dawson, Economic Duress: An Essay in Perspective, 45 Mich. L. Rev. 253, 259 (1947) (explaining “Inequality of bargaining power, the inevitable product of state-conferred monopoly, was used to justify this extension of the doctrine of economic duress.”).


109 Thomas P. Doyle, Roman Catholic Clericalism, Religious Duress, and Clergy Sexual Abuse, 51 PASTORAL PSYCH. 189, 189 (2003). See also Thomas P. Doyle, Clericalism: Enabler of Clergy Sexual Abuse, 54 PASTORAL PSYCH. 189 (2006);
But while the notion of religious duress is acknowledged in Christianity, in Judaism, it has rarely been discussed. One could find the civil courts’ common refusal to treat seruv—a sort of decree of condemnation that the rabbinical court may issue in light of a refusal by one of the parties to subordinate themself to its authority as a legitimate religious arbitrator—to be religious duress. Traditionally, the courts have maintained that if the parties subscribe to a religious tribunal which has the authority to allow such coercion, there is nothing that can be done in civil law. Nonetheless, some scholars have argued that such social denunciation may result in ostracism and cause severe monetary harm, a sort of economic duress.

The essence of the problem is that while the courts often scrutinize any agreement for duress, when it comes to religious agreements, such scrutiny becomes much shallower and more superficial. In my opinion, this common practice is very wrong. As the research into Roman Catholic clericalism and religious duress has taught us, the victims are mentally entrapped in their faith, totally constrained, and unable to come forward. Similarly, in the get refusal context, the agunah has to fight an uphill battle, not only against her (ex-) husband, but also against the entire religious system.

This chained woman, according to Jewish law, has only two bad options. On the one hand, she can choose to be forever trapped in her broken and empty religious marriage without the basic right to remarry.


112 See Baker, supra note 21, at 201–02.


and/or even to receive fertility treatments. That is due merely to the fact that when a married woman has a sexual relationship with another Jew, and according to several halakhic decisors, even when she only is impregnated with donated semen, without having any adulterous relationship with the donor, the offspring is regarded as a mamzer (bastard). The mamzer and all his descendants cannot marry a Jewish woman unless she herself is a mamzer or proselyte.

On the other hand, her only other choice is to abandon her religion and beliefs and remarry not according to Jewish law. This may force her to leave behind not only her marriage, residence, and neighborhood, but also her extended family, including her children and relatives. I agree that the secular conception of the “religious community as an association that members join and quit at will” is absolutely wrong, since a typical believer is actually an “agency […] embedded in religion,” and chances that he or she will at the end of the day abandon their faith are slim. Since an agunah actually has no other choice, she obviously is suffering from religious duress. Trapped in the hands of her recalcitrant husband, who is manipulating her in the name of her religion, she no doubt suffers enormously from this sort of spiritual duress.

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117 See Yehezkel Margalit, Towards Establishing Parenthood by Agreement in Jewish Law, 26 AM. UNIV. J. GENDER, SOC. POL’y & L. 647 (2018); Margalit, supra note 2, at 140–42.


Against the background of modern contract law, which is much more sensitive to and nuanced as regards the disparity in the powers of the contracting parties, I absolutely agree with the recent Australian Supreme Court decision that defined get refusal as domestic violence/abuse, which obviously includes a religious duress component. Therefore, the courts, especially the civil judiciary, should add this important doctrine of modern contract law to their toolbox as another central and important device for tackling the agunah problem.

IV. CONCLUSION

Following a decade of researching the nexus of family and contract law from both the halakhic and civil perspectives, I would suggest that classical as well as modern contract law is becoming more and more prevalent in and important for family law. Contractual devices and doctrines are slowly but surely penetrating the field and influencing and shaping familial arrangements, mainly in the spousal relationship. Unfortunately, though, the most important and substantial modern contractual devices—which have been extensively elaborated upon in this article, including the theory of relational contract and its remedies, unconscionability and religious duress—have not received the attention they deserve in either the halakhic or scholarly literature as a reliable solution to the agunah problem. I hope that the theoretical and practical conclusions of this article may go some way towards filling this lacuna.

After centuries of distress in the Jewish community due to the problem of the agunah, the time has come for the American civil courts to abjure their indifference to this heart-wrenching issue. If the Jews themselves have not rectified the miserable ramifications of bargaining in the shadow of get refusal, the civil courts should urgently use modern contract doctrines to alleviate this problem. I am quite confident that this principled civil attitude—less tolerant of and much more aggressive towards any indication of get refusal—will increasingly penetrate the circles of halakhic authorities, both in the U.S. and in Israel, and consequently around the globe.

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