PRENUPS MEANT TO SOLVE THE PROBLEM OF THE AGUNAH: TOWARD COMPENSATION, NOT "MEDIATION"

Susan Weiss

This article begins by providing an overview of the prenups examined in the author's 1999 article, "Sign at Your Own Risk: The 'RCA' Prenuptial May Prejudice the Fairness of Your Future Divorce Settlement," adding three important prenups introduced since 1999: the 2004 Agreement for Mutual Respect, the 2013 revised RCA prenup and the 2015 Tzohar prenup. It goes on to survey the different ways that non-ecclesiastical state civil courts in the U.S. and Israel have championed the cause of *agunot*, including compensating them for the harms they have endured. The article offers an explanation for why prenups have, to date, been reluctant to provide clear and unambiguous relief to Jewish women, and, finally, it proposes a draft of a prenup written by the Center for Women's Justice, an Israeli NGO founded and run by the author. The CWJ prenup (Appendix A) allows for compensatory relief via a secular civil court in the event of *get* refusal. The revised Lookstein prenup (Appendix B) provides for similar relief.

"In the waning years of the twentieth century, the strongest champions Orthodox women had in their fight against becoming *agunot* were the civil courts."
Laura R. Frank, "Dependent on the Gentiles "[1]

Introduction

In this article I survey prenuptial agreements proposed by Orthodox rabbis in Israel and the Diaspora to solve the problems of Jewish women and divorce, revisiting an article I wrote in 1999 entitled "Sign at Your Own Risk: The 'RCA' Prenuptial May Prejudice the Fairness of Your Future Divorce Settlement"[2] (henceforth: "Sign at Your Own Risk"). There, I was critical of those agreements and wary of their utility. Here, I expand on that criticism, reviewing in depth three prenuptial agreements (henceforth: prenups) that have been introduced or revised since 1999, and suggesting a draft of still another prenup that I hope will better protect women.

As I posited in "Sign at Your Own Risk" and reiterate here, the prenups endorsed by rabbinic authorities in various streams of Jewish Orthodoxy fall short of solving the problem of the *agunah*—a Jewish woman "anchored" to her failed marriage because her husband has not delivered a bill of divorce (a *get*) into her hands.[3] They do not provide any solution at all to the problem of the "classic" *agunah*—a woman whose husband is comatose, missing or otherwise physically unable to deliver a *get* into her hands. Nor do they provide an adequate solution to what is often referred to as the "modern-day" *agunah*—a woman whose husband is alive, competent and available, but is using the *get* as leverage to achieve a better divorce settlement or to take revenge on his wife. Instead of embracing a clear policy of marriage and divorce equality, instead of courageously acknowledging that *get* refusal is an abuse of a religious privilege that causes harm and must be recompensed, many Orthodox responses to the problem

of the *agunah* seem largely preoccupied with other considerations, such as: consolidating and expanding official rabbinic control over Jewish divorces; insisting that "fault" and not "irreconcilable differences" should be grounds for Jewish divorce; encouraging reconciliation; mediating a non-hostile divorce process; or adhering meticulously to the rule in Jewish law that precludes the use of any "force" against a Jewish husband to obtain a *get*.[4]

Arguably, all prenups meant to solve the problem of Jewish women and divorce have had a chilling effect on *get* recalcitrance and have contributed to a dialogue of change. However, it is my contention that Jewish women deserve more. They deserve a prenup that is *transparent* about the patriarchal foundations of Jewish marriage and divorce and the resulting risks and consequences to women; that provides *tangible relief* in the event of abuse of those patriarchal privileges; and that allows for the greatest possibility of *actual enforcement* of the relief offered should abuse occur. Jewish communities must insist on a prenup that compensates the *agunah* for the harm done her—not one that merely sets the ground for enhanced "mediation" of the divorce process.

Section 1 of this article provides an overview of the prenups examined in "Sign at Your Own Risk." Section 2 reviews three important prenups introduced since 1999: the 2004 Agreement for Mutual Respect, the 2013 revised RCA Prenup and the 2015 Tzohar Prenup. Section 3 surveys the different ways that non-ecclesiastical state civil courts in the U.S. and Israel have championed the cause of *agunot*, including compensating them for the harms they have endured. Section 4 attempts to explain why prenups have, to date, been reluctant to provide clear and unambiguous relief to Jewish women. Finally, Section 5 proposes a draft of a prenup written by the Center for Women's Justice, an Israeli NGO that I founded and run. It allows for compensatory relief via a secular civil court in the event of *get* refusal. The CWJ prenup is attached as Appendix A. The revised Lookstein prenup provides for similar relief. It is attached as Appendix B.

1. Prenups before 1999

A brief survey of the Orthodox prenuptial agreements reviewed in "Sign at Your Own Risk" will show a peculiar cross-fertilization between Americans and Israelis interested in *agunah* reform, as well as a shifting of emphasis in their concerns. In the 1980s, a chief goal of U.S. Orthodox rabbis and lawyers was to draft a prenup that would be enforceable in secular, civil court. Since rabbinic tribunals in the Diaspora, unlike those in Israel, are voluntary religious apparatuses whose recommendations the parties to a case are free to accept or ignore, Orthodox leaders in the U.S., wanted a prenup that would be backed by the state.

Bleich, 1981

In 1981, inspired by an Israeli rabbi who noted that Israeli rabbinic courts routinely award spousal support until a *get* is given,[5] Rabbi J. David Bleich constructed a prenup that obligated a Jewish husband to support his wife – even if they lived apart, and even if his wife was financially independent – until the delivery of a *get*. Bleich, a leading U.S. Jewish law authority associated with Yeshiva University, argued that Jewish law (halakhah) allows a Jewish husband to undertake to support his wife in a manner that is more generous than the minimum ordinarily required. Halakhah customarily absolves a husband of his obligation to support his wife if she has left the marital home or has her own, separate sources of income. But under the 1981 Bleich prenup, as long as a man remained married to his wife according to Jewish law, he would owe her the extra-ordinary amount promised to her under the terms of the prenup – even after a civil

divorce had been awarded. If he gave his wife a *get*, he would be relieved of that extra-ordinary support undertaking.

Bleich was careful to note that his prenup did not violate either the halakhic rule that prohibits the use of "force" against a reluctant husband or the secular rule that would invalidate punitive damages. In addition, Bleich underscored that the proposed support undertaking was fixed and predetermined.[6] He explained:

> The presence of an obligation for support and maintenance which can be terminated only by issuance of a *get* is, of course, not viewed as a coercive element compelling a *get*. Were Jewish law to take a different view of the matter, no divorce would be valid.[7]

While he was also concerned that the fixed, non-discretionary spousal support undertaking might trigger divorce on demand and without fault, he felt that this was a necessary evil:

> No one seeks to increase the rising divorce rate. Yet in terms of remedying social evils and the injustices to women who are turned into *agunot*, the effect is, on balance, probably worth the price. The heart-rending anguish of the growing number of *agunot* and the ever rising number of *mamzerim*[8] constitute societal problems of a much more serious nature than a marginal increase in divorce statistics.[9]

Bleich, 1984

In 1983, a New York court held that the Jewish marriage contract (the *ketubah*) was an enforceable arbitration agreement. The judgment, referred to as "Avitzur,"[10] supported the notion that rabbinic arbitration decisions would be accepted by state courts and would not be dismissed as unconstitutional entanglement of the civil judiciary in religious matters. New York Orthodox leaders now put their efforts into drafting binding arbitration agreements. For the rabbis, arbitration was a better option than a well-crafted prenup. Arbitration would both draw couples into private rabbinic tribunals and render the decisions of those tribunals enforceable.

Indeed, in a 1984 article entitled "In the Wake of Avitzur," Bleich suggested that couples sign a prenuptial agreement that submitted *all* their divorce matters, including the *get*, to private rabbinic court arbitration. Arguably, with such broad-based authority, rabbinic tribunals would now be free to use the full panoply of halakhic tools available to them to ameliorate the plight of the *agunah*. Like their Israeli colleagues, U.S. rabbinic tribunals would not need to draw on incentives such as the support mechanism Bleich had conceived in 1981. Arbitration would allow U.S. rabbinic tribunals to mediate a fair divorce settlement and to deploy, in Bleich's words, "moral suasion" to convince a recalcitrant husband to deliver a *get*.[11]

Berman–Weiss, 1984 (RCA 1)

Around the same time that Bleich drafted the prenup that would give sweeping arbitration authority to U.S. rabbinic tribunals, Rabbi Abner Weiss, who headed the (Orthodox) Rabbinic Council of America's (RCA) Commission on Agunot, and Rabbi Saul Berman, an attorney as well as a Jewish law authority, drafted a much narrower one. Their prenup gave rabbinic tribunals limited arbitration power to award predetermined (liquidated) damages in the event of *get* refusal by either spouse.[12] The amount of these damages could not be adjusted by the arbitration panel and would come due if a *get* was not delivered in a timely manner subsequent to a civil divorce. In addition, it specifically excluded ancillary matters from the scope of its arbitration. The Berman–Weiss prenup was initially endorsed by the RCA but later abandoned, apparently due to halakhic objections.[13]

Willig, 1996 (RCA 2)

In 1996, the RCA embraced an arbitration agreement drafted by Rabbi Mordechai Willig, another Jewish law authority associated with Yeshiva University, as its prenup of choice to deal with the problem of the *agunah*. The agreement had two parts. In the first, the husband undertook to pay increased spousal support to his wife in the event of separation unaccompanied by a *get*, irrespective of any independent sources of support. But, unlike the extra-ordinary support obligation devised by Bleich in 1981, the support undertaking designed by Willig was not fixed. It could be modified by an RCA tribunal or even waived completely, once the parties appeared before the tribunal.[14] The second part was an arbitration agreement. It allowed the couple to choose in advance whether, in the event of divorce, to extend comprehensive arbitration authority to the RCA tribunal to determine all related matters, or to limit the tribunal's authority to the issuing of the *get* and the promised increased support undertaking.[15]

It was this RCA prenup that I warned about in "Sign at Your Own Risk." I worried that pious brides would feel pressured to give broad arbitration powers to rabbinic tribunals; that the RCA rabbinic tribunal would decline to deploy the mechanism of discretionary (rather than fixed) increased spousal support; and, in general, I suggested that the prenup was more preoccupied with empowering rabbinic tribunals than with solving the problem of the *agunah*.

Lookstein, 1990s

In stark contrast to all the prenups summarized above, the prenup constructed some time in the mid-1990s at the behest of Rabbi Haskel Lookstein is not an arbitration agreement; nor does it rely on the mechanism of extra-ordinary spousal support to ameliorate the problem of the *agunah*. Instead, under the Lookstein prenup, the couple agrees that a civil court can award attorney's fees, damages and specific performance in the event that one of them does not cooperate in arranging for a religious divorce subsequent to a civil one. In recent years, the Lookstein prenup has been revised to provide for such civil relief not only subsequent to a civil divorce, but also after annulment or a period of separation. The revised Lookstein prenup is attached to this article as Appendix B.

Thus, of the five pre-1999 US prenups surveyed here, two – the prenup proposed by Bleich in 1981, and the Lookstein prenup – do not refer the couple to rabbinic arbitration; while the other three – the prenup proposed by Bleich in 1984, and the successive RCA prenups proposed in 1984 and 1996 – demand that the couple agree in advance to submit their divorce proceedings to rabbinic arbitration, to a greater or lesser extent.

Meanwhile, in Israel, different considerations prevailed than those that had preoccupied most Orthodox leaders in the U.S. in the 1980s and 1990s. In Israel, so it seemed, there was no need to worry about convincing the state to enforce a religious prenup or to extend authority to rabbinic tribunals to act as arbitration panels, since the state extends sole jurisdiction to rabbinic tribunals, as courts of law, to determine the personal status of Israeli Jews in accordance with *din torah* (Jewish law).[16] Not only can Israeli rabbinic courts use "moral suasion" to persuade Jewish couples to divorce; they can also "order" a husband to give his wife a *get*. By 1995, the Knesset had also given judicial authority to rabbinic courts to take measures against a recalcitrant husband if they felt he was unfairly withholding a *get*. They could take away his professional licenses, suspend his driver's license, or even put him in jail.[17] Theoretically, at least, there was no reason to construct a prenup in Israel to incentivize a *get*. Israeli rabbinic courts operate as competent, experienced and fully staffed divorce courts, with all the tools available to them under Jewish law to make sure a *get* is delivered.

Nonetheless, it was clear to those of us in Israel interested in solving the problem of the *agunah* that rabbinic courts do not adequately address the problem of Jewish women and divorce. Worried about the invalid "forced" divorce, Israeli rabbinic courts hesitate to apply any pressure on recalcitrant husbands, rarely using their state-backed authority to "order" husbands to deliver a *get* or to penalize them if they don't. Instead, they mediate and cajole, not infrequently applying pressure on women to buy their freedom by giving in to their ex-spouse's financial demands. And when all else fails and the rabbis (finally) agree to apply the legal measures that the state has made available to them, including incarcerating a recalcitrant husband if need be, he can still refuse to divorce his wife. Without her husband's agreement to deliver a *get*, a woman remains married, irrespective of whether her husband has been enjoined in any way by the state, or even put in jail.[18] Something more was necessary.

Rosen-Zvi, 1986 (Israel)

In 1986, the late Prof. Ariel Rosen-Zvi, the dean of Tel Aviv University Law School, drafted a prenup that adopted the two principal elements of Bleich's 1981 prenup: the mechanism of fixed extra-ordinary spousal support as an incentive to deliver a *get*,[19] and its intended enforcement in a civil court. Drafted at the behest of Na'amat, and Israeli women's organization affiliated with the Labor Zionist Movement, Rosen-Zvi's prenup included a clause meant to neutralize the effect of an Israeli husband "racing" to a rabbinic court in advance of his wife's petition to a civil family court: Under Israel's peculiar dual divorce-court system, the court first approached – rabbinic or civil – is granted authority to hear matters ancillary to the *get* itself, including whether or not, and to what extent, a man owes support to his wife. Thus, a husband can block his wife's ability to collect the agreed-upon support obligation by "attaching" the matter of support to his divorce petition in the rabbinic court.[20] Rosen-Zvi anticipated that the rabbinic court, if granted jurisdiction, would invalidate the agreed-upon extra-ordinary support obligation, rendering his prenup and any incentive it might have provided for the *get* essentially moot.

Shear Yashuv Hacohen, 1990s (Israel)

In the 1990s, the late Rabbi Shear Yashuv Hacohen, Chief Rabbi of Haifa and a rabbinic court judge, introduced a prenup requiring a husband, if he did not deliver a *get* to his wife within a month of her request, to pay increased spousal support, along with the amounts promised her in the *ketubah*, the ritual Jewish marriage contract.[21] Obviously more optimistic than Rosen-Zvi about rabbinic courts—on which, as noted, he served as a judge—Hacohen anticipated that they, and not the civil courts, would both validate and implement his prenup.

By 1999, neither of the above prenups—or any other, for that matter—had been endorsed by Israeli's rabbinic establishment.

Thus, of the two prenups proposed before 1999 in Israel, one – Rosen-Zvi's – was meant to be adjudicated in civil court; the other – Hacohen's – in rabbinic court.

In short, before 1999, activists in the U.S. and Israel acted for the most part in diametrically opposed ways. In the U.S., the most heavily touted prenup and the one most often signed by marrying couples—the 1996 RCA prenup—endeavored to *expand the arbitration power* of private rabbinic tribunals, while simultaneously softening the force of the proposed remedy of extra-ordinary spousal support by making it subject to rabbinic discretion. In Israel, the prenup preferred by feminist activists, drafted at the request of a women's organization – the Rosen-Zvi prenup – attempted to *limit the power* of the rabbinic courts to make any determination regarding the proposed increased spousal support, while *buttressing* that remedy's impact by

rendering it fixed and nondiscretionary.[22]

2. Prenups after 1999

The Agreement for Mutual Respect, 2004 (Israel)

In 2004, Rabbi Dr. David Ben Zazon, Rabbi Elyashiv Knohl and Dr. Rachel Levmore initiated the construction of a prenup in Israel that eventually was entitled "The Agreement for Mutual Respect" (henceforth: AMR). Drafted, in their words, "in consultation with experts in various fields,"[23] it was conceived with the hope and intent of gaining the broad-based rabbinic approval that had eluded both the Rosen-Zvi and the Hacohen prenups.

Like the Rosen-Zvi prenup and the 1981 Bleich prenup, the Agreement for Mutual Respect incorporates a fixed, increased spousal support undertaking to encourage the delivery of a *get*. No judge, rabbi or arbitrator is authorized to dismiss or adjust the support amount after it comes due. Fault is irrelevant to its implementation. Moreover, unlike all the other agreements that incorporate the increased spousal support mechanism, the couple need not live separately before it can be put into effect. Under the AMR, the couple is obliged to try to "rehabilitate" their marriage for a period of at least six months after one party informs the other that they want to separate, and they appoint a marriage counselor to that end. The counselor, in turn, has discretion to extend the reconciliation period for an additional three months if he or she thinks that reconciliation is possible. Should the parties fail to reach an agreement by the end of the reconciliation period, the AMR allows the party that wants the divorce to enforce the support obligation against the still recalcitrant spouse.

Here, however, lies what I see as the major fault line in the AMR. Unlike the Rosen-Zvi prenup, the AMR makes no attempt to stop the "race to the Israeli courthouse" or to try to prevent a rabbinic court from taking jurisdiction over the interpretation and implementation of the prenup. Instead, it leaves the race in place, enabling a recalcitrant spouse to thwart the agreement with regard to extra-ordinary spousal support by attaching it to a petition for divorce filed in a rabbinic court, thus rendering that court the "original body" authorized to make determinations in its regard.[24] As Rosen-Zvi anticipated, a rabbinic court is likely to agree with a husband's claim, if he makes it, that the clause obligating him to pay extra-ordinary support exerts "invalid pressure" on him and should be deemed void.

A further problem, compounded by the ambiguity of the AMR's enforcement provision, is that it makes the increased spousal support obligation reciprocal. That is, unlike the Bleich, RCA and Rosen-Zvi prenups, which oblige only a recalcitrant *husband* to pay increased spousal support to his wife, the AMR also obliges a recalcitrant *wife* who refuses to accept a *get* to pay her husband. While drafted in order to encourage husbands to sign the agreement, the reciprocal support undertaking has unfortunate consequences. First, it obfuscates the patriarchal fact that halakhic obstacles to Jewish divorce are not the same for husband and wife.[25] And second, this lack of halakhic parity might well make a rabbinic court more likely to enforce a woman's obligation to pay support than a man's, since hers is not tainted by the threat of the invalid "forced" divorce.[26]

In sum, the rather paternalistic rehabilitation clauses, the deficient jurisdiction provisions and the confusing reciprocal support undertakings all combine, in my view, to burden the Agreement for Mutual Respect. While the considerations underlying those sections were surely good ones – the hopes of slowing down the divorce process, reaching a rabbinic consensus with respect to the agreement and making it more marketable—the combined result, I believe, is a prenup that compromises its own ability to serve as an adequate, tangible and enforceable remedy for an *agunah*, should she actually need it.

The Revised RCA Prenup, 2013

Since 1999, the RCA has made one major revision to its prenup. This change, along with express statements by Willig in a 2012 article, underscore what seem to have been key concerns of the RCA in drafting its prenup.

Though this was clearly not Willig's intention, the two-part structure of the 1996 RCA prenup made it possible for a woman to seek its enforcement directly in a civil court, without recourse to a rabbinic tribunal. Theoretically, if a couple did not sign the Arbitration Agreement, but signed only the Support Obligation Agreement, a rabbinic tribunal would have no authority to interpret or implement it, and the woman could turn to a civil court for relief. In 2012, a woman in Connecticut tried to do just that. When her husband asked the court to dismiss her petition, arguing that jurisdiction was restricted to a rabbinic tribunal, the court denied his motion. In response, in 2013, the RCA consolidated the two parts of its prenup into one "Binding [Arbitration] Agreement."[27] The RCA prenup now provides that the rabbinic tribunal has:

> exclusive jurisdiction to decide …. any disputes relating to the enforceability, formation, conscionability, and validity of this Agreement (including any claims that all or any part of this Agreement is void or voidable) and the arbitrability (sic) of any disputes arising hereunder. (§I)

Around the same time, the RCA verified that it interprets the support undertaking that lies at the heart of its prenup as discretionary and not absolute. In his 2012 article, Willig proclaims that the husband's support obligation is meant to be an "incentive" and not a fixed commitment:

> [T]he obligation is meant to serve as an incentive for the husband to issue a *get* upon his wife's request in a timely fashion. It was not intended to provide the wife a means to demand additional money beyond any negotiated or *beit din* or court imposed settlement.[28]

Willig makes it clear that the support obligation would not be imposed by the RCA tribunal if it decided that the husband had acted "in good faith"—"even if the plain language of the document may imply otherwise."[29] And while the RCA prenup expressly states that "this support obligation under Jewish law is independent of any civil or state law obligation for spousal support," Willig warns that a woman who pursues her claim for support in a civil court might waive any rights under the prenup:

> A wife's claim for support in secular court is fundamentally the same as the support clause of the prenuptial arbitration agreement. As such, if she pursues support in secular court, she may forfeit her right to pursue the support clause of the prenuptial agreement in *beit din*.[30]

In a similar vein, the RCA might well deny enforcement of the support obligation on behalf of a woman who sued under the second New York *get* law, which allows the court to take *get* refusal into consideration when making support or property allocations.[31]

Perhaps worst of all, a recalcitrant husband, knowing that the RCA is so tentative about enforcing the support obligation, may simply refuse to deliver a *get* for as long as he likes. He may well assume that the RCA tribunal will not require him to pay the promised support if he eventually does agree to give the *get*.

Like the 1996 version, the 2013 RCA prenup gives the couple the option to grant broad authority to the RCA tribunal to arbitrate all matters ancillary to the Jewish divorce (§§IIA and IIB). This includes the option to decide those matters in accordance with halakhah (§IIA.1) and

to take fault into consideration as a factor when making its determinations regarding property and maintenance (§IIC). While the Instructions to the 2013 RCA Prenup state that a couple may strike out this last clause, it notes that this is "discouraged by Jewish law" (Options).

In "Sign at Your Own Risk," I observed that religious couples might well be inclined to give broad jurisdiction to the RCA to adjudicate all their matters in the proper halakhic way, and I warned that arbitration of ancillary matters in rabbinic court could significantly prejudice the property rights of women.[32] I noted that arbitration panels do not have the same capacity as state courts to hear witnesses, assess facts and determine issues, and that arbitration is costly and can be appealed only on very narrow grounds. And I maintained that a rabbinic court is more likely than a secular, state one to encourage the bartering of rights in exchange for a *get*.[33] All those concerns remain relevant, along with the now-obvious fact that a woman deemed "at fault" for the breakdown of a marriage, or one who sues for her rights in a secular family court, will not likely find a sympathetic ear with the RCA, which has claimed broad discretion to deny the implementation of the increased spousal support obligation under those very circumstances.

Thus, it would appear that the RCA, in drafting its prenup, is preoccupied with a variety of considerations that largely eclipse the plight of the *agunah*, including: expanding its power as an arbitration court; withholding the rights provided by the agreement from a "guilty" woman; and adhering as closely as possible to the black letter of halakhah. Indeed, in describing the purpose of the RCA prenup, Willig does not once use the term *agunah*, and he emphasizes the RCA's commitment to strict adherence to halakhah:

> Its purpose was to ensure that a husband would deliver a *get* in a timely fashion, while being sensitive to the *halachot* that would render a "forced" *get* null and void.[34]

The 2016 Tzohar Prenup (Israel)

In 2016, Tzohar, an Israeli organization that describes itself as a "movement of 1,000 Zionist rabbis and women volunteers who are dedicated to halakhah and guaranteeing the Jewish future of Israel,"[35] rose to the challenge of drafting a prenuptial agreement that would finally be backed by a consensus of rabbis – albeit not those employed in state-backed rabbinic courts or the rabbinic establishment. Drafted by Prof. Dov Frimer, a Jewish law authority, attorney and professor of law at the Hebrew University, Tzohar's "Agreement of Love" (*Heskem ahavah*) takes the form of an arbitration agreement that incorporates the mechanism of increased spousal support as its answer to the problem of the *agunah*. Like the RCA prenup, it gives a couple the option to limit the arbitrator's authority to matters that arise with respect to the support obligation, or to open up that authority to all matters relating to a couple's divorce.

At first glance, the terms of the support obligation outlined in the Tzohar prenup seem to be almost identical to those set forth in the Agreement for Mutual Respect. It includes reciprocal increased spousal support obligations, detailed notification requirements and a designated period of "rehabilitation." Yet, upon closer examination, it would appear that the drafters of the Tzohar prenup want its support provisions to be implemented in a discretionary manner and not as a fixed obligation, rendering them more similar to those set forth in the RCA prenup. The Tzohar prenup leaves great wiggle room to delay their enforcement. If a couple chooses to sign the "optional" Clause 3, they appoint a third-party "professional entity" to help them through their rehabilitation period. The professional is given discretion to extend that period indefinitely—and likewise to delay implementation of the support undertaking. And even if the couple does not choose to appoint such a professional, the prenup, in Clause 5, requires them to designate an arbitrator to resolve "any dispute or disagreement" regarding the "manner of execution, interpretation or validity" of the support undertaking, and to determine "whether the conditions specified" for the purpose of its implementation have been met. Moreover, Appendix

A, in stating that the arbitrator is not bound by substantive law, by the laws of evidence or procedure or by time, gives the designated arbitrator broad discretion to construe the implications of the support clause as he or she may deem fit; nor must any reasons be given for his/her decisions .

Aside from the wide-ranging discretion given to the designated arbitrator, it is unclear why Tzohar is referring Israeli couples to arbitration at all. In the Israeli context, arbitration is superfluous, costly and problematic, for a number of reasons. First, Israeli courts are well equipped to hear all matters relating to a couple's divorce, including any issue that might arise with respect to the interpretation or implementation of the Tzohar prenup. Second, the services of Israeli family courts are free, with the exception of filing costs. Arbitration, by contrast, is costly. Under the terms of the Tzohar prenup, couples must pay both for the arbitrator and for attorneys to represent them in the arbitration process; in court, they need pay only for their attorneys, since the state pays for the judges. Third, the decision of a family court judge may be appealed, while those of an arbitrator cannot, except on very limited grounds. Why give up the right of appeal? Fourth, appointing an arbitrator won't prevent the "race to the courthouse" on ancillary matters if the couple does not give express authority to the arbitrator to decide them; and even if they do, the race would still persist with regard to child custody issues, which, by law, cannot be arbitrated. Finally, the very issue of choosing an appropriate arbiter is problematic and a likely source of contention. Religious women in particular may feel obligated to appoint a religious figure who might not serve their best interest.

It can be argued that the Tzohar Prenup represents an attempt to slow down the divorce process and encourage resolution of a divorce dispute in an "orderly and dignified manner" before a friendly arbitrator. Indeed, in a series of promotional advertisements, Tzohar emphasized that its prenup was meant to help couples avoid aggressive lawyers and prolonged, expensive litigation in court. Before the Israeli Bar insisted that the campaign be discontinued, Zohar embarked on a marketing strategy that promoted their prenup through a series of satiric videos and advertisements featuring an attorney referred to as "Dr. Jonah Rott-Weiler." The fictitious Rott-Weiler carped that couples who signed the Tzohar prenup were taking away well-earned money from attorneys who stand to benefit from contentious, adversarial divorce.[36] In the Hebrew introduction to its prenup, Tzohar declares that it "guarantees a fair separation process,"[37] while the English introduction emphasizes "dignity" in the divorce process:

> The object of the Tzohar Prenuptial Agreement ("PNA") is to ensure that during the period of separation preceding the actual termination of the marriage, each spouse will act in a manner that preserves his or her own dignity as well as that of the other spouse.[38]

While many might agree that discouraging divorce and streamlining the divorce process to avoid aggressive attorneys are good goals, it is not at all clear that this can be accomplished with the Tzohar prenup.[39] Nor is it clear that this is, or should be, the main purpose of prenups meant to address the problems of the *agunah*.

Thus, all three post-1999 prenups surveyed here employ the mechanism of increased spousal support as an inducement to give or receive a *get*. However, the 2004 Agreement for Mutual Respect is distinctive in predetermining the amount of this support and in not referring the couple to arbitration. The other two – the 2013 revised RCA prenup and the Tzohar prenup – oblige the couple to submit to arbitration and give the designated arbitrators broad discretion to interpret and implement the extra-ordinary spousal support obligation.

3. From Religious Right to Civil Wrong

While Orthodox authorities were drafting prenups that seemed increasingly reluctant to address the problems of the *agunah*, non-ecclesiastical civil courts and legislatures were rendering decisions and passing laws that seemed increasingly willing to do so.[40] Such civil responses on behalf of women held in what is now being called "marital captivity"[41] take a variety of forms.

Several countries and U.S. states passed statutes denying relief to petitioners who come to divorce court without "clean hands," in that they "withhold removal of barriers to remarriage" by refusing to deliver a *get*. Under a 1983 New York state law, plaintiffs cannot obtain a formal civil divorce decree until they have signed a sworn statement that they have "removed all barriers to remarriage."[42] South Africa,[43] England and Wales, and Scotland[44] passed similar statutes in the 1990s and in 2000. Canada, in 1990, adopted legislation allowing its divorce courts to dismiss applications or to strike any of the pleadings of a spouse who fails to remove religious barriers to remarriage in a timely fashion.[45]

In addition to clean-hands statutes, civil courts in various locations have held that a spouse who withholds a *get* engages in a tortious act that results in compensable harm. Others have determined that such a spouse must pay alimony until a *get* is actually delivered. Since the 1950s, French courts have maintained that *get* refusal is a wrongful act.[46] In Israel, in response to a series of cases brought by the Center for Women's Justice starting in 2001, family court judges in several cities have awarded women and men damages for *get* refusal, declaring that it constitutes unreasonable behavior.[47] Courts in Britain[48] and Australia[49] have held that a Jewish man must pay alimony until he delivers a religious divorce to his wife. In 1992, New York State passed a law allowing its courts to take failure to remove barriers to remarriage into consideration when determining support or property distribution.[50]

Still other courts have called on "neutral principles" of contract law to redress the problem of marital captivity. Since 1954, New York State has consistently upheld express agreements of the parties relating to the Jewish divorce—including ordering specific performance of the delivery of a *get*. In that year, a New York court ordered a man to appear before a rabbinic court when he had promised to do so in a written agreement signed while the parties were living apart.[51] In 1977, a court directed a husband to "take whatever steps necessary to secure a '*get*'" after he had undertaken to do so in a separation agreement, and it even withheld delivery of stocks and deeds to him until after the *get* ceremony was completed, on the principle that "a separation agreement is a contract, and if lawful when made will be enforced by the courts like any other contract."[52] In 1997 and 2010, judges held husbands in contempt for failure to deliver a *get* after they had specifically promised to do so in, respectively, a divorce judgment and a written stipulation.[53] And in 1993, the New York Appellate Court upheld a lower court's contempt and imprisonment orders, as well as its denial of all economic benefits, until a husband fulfilled his express promise in a settlement agreement to deliver a *get*.[54] A Canadian court held in 2007 that the breach of a promise to deliver a *get* as set forth in a divorce agreement entitled an ex-wife to damages.[55]

Secular courts have called on contract principles to set aside agreements, or parts of them, entered into under the shadow of the unconscionable power distributions of Jewish divorce.[56] In 1987, a New York judge explained this rationale:

> An oppressive misuse of the religious veto power by one of the spouses subjects the economic bargain which follows between them to review and potential revision.[57]

In a similar vein, the province of Ontario passed legislation in 1986 that specifically allows the court to set aside all or part of a separation agreement if the *get* was a consideration in making

the agreement.[58]

From all of the above, it can be surmised that when a contract is clear and unambiguous and the intent of the parties is set forth expressly and specifically, a non-ecclesiastical court is likely to uphold it. This conclusion is particularly cogent with regard to provisions made to pay damages for harms that result from marital captivity, since a court might well grant such relief even without the parties having made an express agreement in this regard, whether in the context of a divorce settlement or a prenup.

It is with this notion in mind – of the enforceability of clear and unambiguous contracts in non-ecclesiastical secular courts – that the Lookstein and CWJ prenups were drafted.

4. Why Such Reluctance?

As I have shown, almost all prenups endorsed by the Orthodox establishment to ameliorate the plight of the *agunah* fall short. None is *transparent* about the gendered, patriarchal foundations of Jewish marriage and divorce. With the exception of the Lookstein prenup, none offers *tangible relief* for the harms that women endure as a result of Jewish marriage and divorce rules. And almost all are reluctant to *enforce* even the smallest of inducements that their authors themselves have constructed. Some prenups seem more intent on expanding the powers of rabbinic institutions than with helping Jewish women.[59] With the exception of the Lookstein prenup and the (rejected) Berman–Weiss prenup, none even acknowledges that the *agunah*—a woman held in a state of marital captivity—suffers justiciable harm at all.

One might be tempted to argue that the watered-down prenups reviewed here reflect Orthodox rabbis' view of themselves as caught between Scylla and Charybdis—between the evil phenomenon of the *agunah* and the equally problematic dilemma of the "forced" divorce. Thus, they want to persuade recalcitrant husbands to divorce their wives, but they don't want to persuade too forcefully. How does one persuade without persuading? As Rabbi Willig points out, rabbis must be "sensitive" to the rules that would render a forced *get* null and void.[60]

Others, more sociologically inclined, might explain that reluctant prenups are a result of the odd compromises that the more liberal wing of Orthodoxy, which is largely responsible for the prenups described herein, must make for the sake of preserving its Orthodox legitimacy. On the one hand, the Conservative Movement has empowered its rabbinic tribunals to annul marriages in extreme cases of *get* abuse; on the other, the more traditionalist Orthodox tend to discredit any suggested mechanism to apply pressure on husbands to deliver a *get*.[61] The liberal Orthodox must strike a peculiar balance in seeking to distinguish themselves from the former while saving face with the latter.

Still others, from a more feminist perspective, might argue that this is the best that can be done with patriarchal tools drawn from an ancient tradition that privileges men. Real change will only happen when outsiders take a radical standpoint to critique the gendered, halakhic "common sense" that underlies the problem of the *agunah* in the first place. Asked why the perspective of women-outsiders was so necessary to correct patriarchal biases, radical black lesbian feminist Audre Lorde explained:

> What does it mean when the tools of a racist patriarchy are used to examine the fruits of that same patriarchy? It means that only the most narrow perimeters of change are possible and allowable …. *The master's tools will never dismantle the master's house.* They may allow us temporarily to beat him at his own game, but they will never enable us to bring about genuine change. And this fact is only threatening to those women who still define the master's house as their only source of support.[62] (Emphasis mine – S.W.)

5: The CWJ Agreement for a Just and Fair Marriage

I argue that reluctant prenups, whatever the reason for them, are not good enough. A Jewish woman who marries in accordance with Jewish law deserves, at the very least, to be compensated for the harm caused her if she is held in marital captivity. To make sure of that, any prenup she signs must articulate the nature of the harms that might transpire and provide for their compensation. Articulating and naming these harms in a contract establishes clear moral standards and specifies the intent of the parties to adhere to those standards and have them enforced. It also makes it easier for a non-ecclesiastical civil court to apply neutral principles of contract to redress those harms when the standards are broken and the agreement breached.

I also maintain that it is not good enough for a prenup meant to address the problem of the *agunah* merely to provide a woman with what might be more favorable conditions under which to negotiate a divorce settlement. Nor is it acceptable for such a prenup to require, or even suggest, that a woman cede authority to a rabbinic court or to any third party to arbitrate, negotiate or adjudicate issues ancillary to her *get*. The prenup must state clearly that the parties agree to the exclusive jurisdiction of non-ecclesiastical civil courts of law over all ancillary matters, such as child support, custody and division of marital property, as well as over any damage claims with regard to marital captivity. The prenup should limit rabbinic activity to the religious ritual of divorce and the actual delivery of the *get*. Only this can protect women from the all-too-rife courtroom gerrymandering that enables a husband to use the *get* and rabbinic court biases to his tactical advantage.[63] Moreover, and more generally, it is becoming increasingly clear that the human and civil rights of women are compromised in religious arbitration and tribunals. The interests of women are better served and protected in civil courts.[64]

The prenup drafted by the Center for Women's Justice, at whose head I am proud to stand, is made up of two parts—one legal and the other halakhic. The first, legal part, entitled "Undertaking," stands on its own and can be signed independently of the second part. It endeavors to meet the criteria for a good enough prenup outlined in this article: Husband and wife acknowledge the harms that result if a spouse, particularly the husband, keeps his partner in marital captivity; and they accede to the jurisdiction of civil, secular courts to adjudicate all matters excepting the *get* itself, In addition, in order to make the prenup more marketable – and in an acknowledged nod to social pressure – all undertakings in the Agreement are reciprocal. Because the CWJ prenup explicitly notes that the potential harm to women as a result of marital captivity is greater than any potential harm to men, it is our hope that such reciprocity will not serve to obfuscate the biases in favor of men inherent in halakhic marriage and reflected in the problem of the *agunah*. Furthermore, the CWJ prenup's specific provision for enforcement in non-ecclesiastical civil courts should obviate the risk of a rabbinic tribunal enforcing its provisions in a gendered way – only behalf of men, and not on behalf of women.

The second, halakhic part of the CWJ prenup, the "Bill of Conditions and Agency," adopts a condensed version of the halakhic "tripartite agreement" proposed in 2004 by Rabbi Michael Broyde, a U.S. Orthodox rabbi and law professor. Building upon the halakhic concepts of agency, conditional marriage and dissolution, Broyde constructs halakhic mechanisms to end a marriage without the need for a recalcitrant spouse's cooperation.[65] In addition to addressing the problem of a husband who is missing or comatose, the tripartite arrangement drafted by the CWJ addresses the injustice of the *mamzer* status as well as the issue of levirate marriage (a

widow whose husband died without children, leaving her bound to her brother-in-law until he releases her).

A full explanation of the halakhic implications and feasibility of the second part of the CWJ prenup is beyond the scope of this article. The CWJ acknowledges that Rabbi Broyde's tripartite mechanism has not (yet) been accepted by any mainstream Orthodox rabbis in Israel or the Diaspora. Nevertheless, it is our contention that the tripartite mechanism might provide solutions in extreme cases of marital captivity,[66] and we recommend that it be signed.

VI. Conclusion

The CWJ "Agreement for a Fair and Just Marriage" does not prevent the possibility of marital captivity, nor does it put Jewish women on an equal footing with Jewish men in the marriage context.[67] It does, however, provide for compensatory relief in the event of marital captivity, in a manner that ought to be enforceable in a secular, civil court. So does the Lookstein prenup. For this alone, I believe that the CWJ and Lookstein prenups are better for women than the reluctant prenups described above. At best, reluctant prenups provide women with better circumstances under which to mediate their divorces; at worst, they expand the power of not-very-effective rabbinic apparatuses. Reluctant prenups lull us all into thinking that nothing more can be done about the problem of Jewish women and divorce than what they have to offer. In the belief that Jewish women deserve better, I present below what I believe are more responsive, and potentially more effective, agreements in the Israeli and Diaspora contexts.

APPENDIX A: THE CWJ AGREEMENT FOR A FAIR AND JUST MARRIAGE, IN TWO PARTS

*Undertaking**:***

That was signed on ____(location)___day_____(month)____(year)
Between _____(name of groom), ID number _____ , (henceforth: "the groom")
And _____ (name of bride), ID number _____, (henceforth: "the bride")
Whereas the bride and groom (henceforth: "the couple") intend to marry in accordance with the laws of Moses and Israel;
Whereas the couple hopes and prays that their marriage will succeed, and that they will merit to live together for many years in love and harmony;
Whereas the couple agrees that in the event that, G-d forbid, marital strife should develop between them, they will make great efforts to reconcile their differences so that they may once again live together in love and harmony;
Whereas the couple acknowledges that in the event that, G-d forbid, marital strife should develop between them and they are unable to reconcile their differences, neither one will be able to marry another person if the other has not removed all religious barriers to marriage—even if a civil divorce decree has been issued to the couple by a court of competent jurisdiction. (For purposes of this agreement, "removal of religious barriers to marriage" shall mean, with respect to the husband, the actual delivery of the *get* to the wife, without any preconditions; and with respect to the wife, the actual acceptance of the *get* or the appointment of an agent by the wife to accept the *get* on her behalf, without any preconditions. If the couple resides in Israel, the "removal of religious barriers to marriage" shall not be deemed to have occurred until each party is able to marry in accordance with the Israeli Law of Marriage and Divorce (including, if needed, the issuance of a certificate of divorce to the couple).

Whereas the couple acknowledges that in the event that, G-d forbid, marital strife should develop between them and one of them refuses to remove all religious barriers to marriage, such refusal will result in harm that warrants compensatory damages, as described below.[68]
Whereas the couple understands that should the groom refuse to remove religious barriers to marriage for the bride, not only may the bride's autonomy and rights to spousal support be harmed, but so may her ability to have children that will not be stigmatized by the Jewish community.[69]

In order to effect a just and fair marriage, the couple agrees to marry on the following terms:

1. Resolution of Marital Disputes in Secular, Family Court
The couple agrees that any matter of dispute that may arise between them in matters of marital rights or obligations, including without limitation a dispute over the interpretation or enforceability of this agreement, shall be adjudicated exclusively in family court, or any other similar non-ecclesiastical civil court that has jurisdiction over their marital rights in accordance with the laws of the state of their residence (henceforth: "family court"), excluding the ritual act of writing and delivering the religious *get*. The family court will rule on all matters within its jurisdiction, including, but not limited to: division of marital property or balancing of family resources; guardianship and other matters relating to the couple's shared children; alimony payments; as well as any claims relating to the refusal to remove religious barriers to remarriage.

Each party waives any claim that is contrary to the granting of this exclusive jurisdiction to the family court with respect to the matters outlined in this agreement. The couple also agrees that should either of them, contrary to this agreement, apply to a rabbinic tribunal instead of, or in addition to, the family court for any matter save the *get* ceremony itself—whether as a state court of competent jurisdiction, as an arbitration panel, or as mediators—the party that applied to the rabbinic tribunal will pay all the other party's legal expenses for the rabbinic proceedings, including lawyers' fees. They also agree that all such matters brought before a rabbinic tribunal and heard there in breach of this contract will be adjudicated *de novo* by the family or a similar civil court.[70]

2. Additionally, the parties agree that the family court shall set aside all, or the relevant part, of a separation agreement or settlement as having been entered into "under duress" if the court is satisfied that, notwithstanding any declarations to the contrary in the agreement or settlement, the need or desire for removal of barriers to religious marriage was a consideration in the making of the agreement or settlement.[71]

3. **Damages for Loss of Spousal Support**
Should either the bride or the groom inform the other in writing of their intention to end their relationship, each party agrees to pay the other a monthly spousal support payment of $2,000, or the equivalent of half of the monthly salary of the obligor–whichever is greater– after twelve full months have passed from receipt of such request in writing and until such time as the parties undergo a ceremony to remove the religious barriers to marriage. This support obligation is not conditional on the party's income and cannot be offset against any other debts one party may have to the other. The couple agrees that the groom will have no spousal support obligation to the bride, as detailed in this clause, should she refuse to remove all religious barriers to marriage by the end of the 12-month period after his written request to do so; similarly the bride shall have no spousal support obligation to the groom if he fails to remove all religious barriers to marriage by the end of the 12-month period after her written request to him to do so.

The spousal support obligation under this clause is meant to reflect the damages incurred as a result of the loss of spousal support and earning capacity that the bride or groom might have had if the recalcitrant party had agreed to remove the religious barriers to marriage within twelve months of a request to do so. This support obligation is in addition to and independent of any other legal obligation for spousal support, or any imposed court order for spousal support, and the parties do not wish the court to take any support payment made under this clause into consideration when setting any other spousal support award.[72]

4. Damages for Intentional Infliction of Emotional Distress and Loss of Autonomy

In addition to payment of damages for loss of spousal support resulting from the failure to remove religious barriers to marriage as outlined in §2 above, the couple agrees that refusal by the recalcitrant spouse to remove religious barriers to marriage within 12 months of having been requested to do so in writing will be deemed an intentional infliction of emotional distress resulting in liability of the recalcitrant spouse for damages that will always ensue to the accommodating spouse, as well as for damages that will always ensue to the accommodating spouse for the loss of the spouse's freedom and autonomy, until the actual removal of all religious barriers to marriage. The couple affirms that an award of such damages is not meant to interfere with a religious act or to encourage a religious act, but that these are damages for actual harm that has occurred up to the removal of the religious barriers to marriage and therefore survives the removal of those barriers. Damages owed under this clause are in addition to and independent of any other legal obligations that a spouse may have for failure to remove religious barriers to marriage, whether by this agreement, by statute or by judicial decision.[73]

5. Authorization and Declaration of Intent

The couple agrees to authorize this agreement in such a manner that, should any provision of this Agreement be deemed unenforceable, all other provisions shall continue to be enforceable to the maximum extent permitted by applicable law.

Entered into this _____ day of _____ 20___.

_____

Signature of Groom Signature of Bride

_____

Signature of Notary/marriage registrar

Bill of Conditions and Agency:

_____ (Full name of groom), son of _____ (father's name) and _____(mother's name) (henceforth: "the groom") declares that he intends to marry _____(full name of bride), daughter of _____(father's name) and _____ (mother's name) (henceforth: "the bride") (the bride and groom are jointly, henceforth: "the couple"), provided that the marriage shall only be valid as long as the following conditions, as listed in Articles 1.1, 1.2 , and 1.3 (henceforth: "the conditions"), are met.

The groom hereby declares that these conditions are implied when he says the following words under the wedding canopy (the "ḥupah"): "You are hereby betrothed to me by this ring in accordance with the laws of Moses and Israel." The groom further declares that he intends to live with the bride solely under these conditions. The woman hereby declares that she agrees to marry the groom provided that the marriage shall only be valid as long as the conditions are met, and that the conditions are implied in her consent to be married under the wedding canopy.

1. Conditions of Marriage

1.1 First condition: Living Together

The couple agrees that the groom will marry the bride so that the couple can live their life together. The couple agrees that if they live apart for a period of 18 months or more, and, additionally, one party has petitioned a Rabbinic Court to execute this Bill, the marriage shall be retroactively null and void.

1.2 Second Condition: Avoiding Ḥalitzah (Ceremonial release from Levirate Marriage)

The couple agrees that the groom intends to marry the bride with the intention of leaving living offspring after him. If he has living offspring, the marriage shall be valid. In the event that he passes away and has no living offspring with her, and the need arises for a ḥalitzah ceremony, and the woman appeals to a Rabbinic Court to execute this bill, the marriage shall be retroactively null and void.

1.3 Third Condition: Abstention from forbidden marriages (pesulei ḥitun)

The couple agrees that the groom intends to marry the bride so that all of the bride's future children will be permitted to marry within the wider Jewish community. If the marriage will result, G-d forbid, in the birth of children who are not permitted to marry within the wider Jewish community, then the marriage shall be retroactively null and void.

2. Authorization to terminate the marriage:

The man and the woman authorize any Rabbinic Court (tribunal of three Jewish men) to declare their marriage retroactively null and void, in the event that any one of the aforementioned conditions is met. This is in accordance with the talmudic rule, "kol demikadhesh ada'ata derabanan mekadesh" (all who marry do so with the understanding that they defer to rabbinic discretion with regard to the marriage").

3. Permission to Act as Agent

The groom agrees that the delivery of a Jewish Bill of Divorce to the woman, provided the condition detailed above in §1.1 is met, would be to his benefit. The groom does hereby appoint any Rabbi, scribe or Rabbinic Court of any three Jewish men to view his signature on this Bill, obtain ink and feather, write and arrange the bill of divorce on his behalf, in his and her name and for the purpose of the divorce. The groom shall also appoint any two Jewish men to view his signature on this Bill and to sign the Bill of Divorce, and he shall also appoint anyone who is suitable to view his signature on this Bill and to act as his agent to deliver said Bill of Divorce to the woman in his stead. And they may write, sign and deliver even a hundred bills of divorce until one of them is acceptable in the opinion of the Rabbinic Court arranging the divorce. The bride agrees that accepting a Jewish Bill of Divorce from the groom, provided the condition as detailed above in §1.4 is met, would be to her benefit, and she hereby appoints anyone who is suitable to act as her agent to accept said bill of divorce. The groom commits not to cancel the Bill of Divorce and the aforementioned permission to deliver the *get*. The groom also cancels any announcement that he may have made or may make that is liable to adversely affect the *get* or the permission to deliver the *get*.

4. Miscellaneous:

Prior to any intimate act between them, the man and the woman declare that they intend that the marriage shall only be valid if it includes the stipulated conditions, and they do not intend for acts of intimacy to create a new and unconditional marriage. The man and the woman hereby declare that the conditions in this agreement are as "Conditions of Gad and

Reuven," and that the obligations in this bill apply now under a personal obligation (a *shi'abud guf*) and were made in a Rabbinic Court that carries weight and authority and should not be interpreted in any way that would invalidate them ("Dela ke'asmakhta vedela ketofsei shetarot"). The man and the woman accept upon themselves under public severe oath not to cancel any of the conditions included in this bill. Any announcements made (stating consent under duress), to the extent that any such announcements were made ("Moda'ot veModa'ei Moda'ot"), have been withdrawn, and the witnesses to them have been disqualified. The man and woman hereby declare that that if this agreement and bill is not accepted as valid in the future, their intention was not to be married in accordance with the laws of Moses and Israel, but rather to live together as man and woman in an unmarried state (the status of "concubine"), as per Jewish law.

Entered into this _____ day of _____ 20___.

_____	_____
Signature of Wife	Signature of Husband
_____	_____
Signature of Witness	Signature of Witness

APPENDIX B: THE LOOKSTEIN PRENUP

PRENUPTIAL AGREEMENT made this _____ day of _____, 20___, by and between _____ ("Husband to Be") residing at _____ and _____ ("Wife to Be") residing at _____.

Husband to Be and Wife to Be are to be married to one another on _____; and Husband to Be and Wife to Be execute this document in consideration of the parties' anticipated marriage, the love and affection each has for the other, the mutual promises of the parties and the terms and provisions contained herein, and this agreement shall be fully enforceable in a court of competent jurisdiction.

It is hereby agreed as follows:

Upon the earlier to occur of (1) entry of a Judgment of Divorce; (2) annulment; or (3) living separately and apart for a period of one year (365 days) or more, the Husband and Wife shall voluntarily and promptly upon demand by either of the parties present themselves at a mutually convenient time and place to terminate the religious marriage and relieve each other of the covenant of marriage in accordance with Jewish law and custom before the Ecclesiastical Court (Bet Din) of the Rabbinical Council of America – or before a similarly recognized Orthodox rabbinical court – by delivery and acceptance, respectively, of a *get* ("Jewish Divorce").

This agreement is recognized as material inducement to this marriage by the parties hereto. Failure of either of the parties to voluntarily perform his or her obligations hereunder if requested to do so by the other party shall render the noncomplying party liable for all costs, including attorney's fees, reasonably incurred by the requesting party to secure the noncomplying party's performance and damages caused by the demanding party's unwillingness or inability to marry pending delivery and acceptance of a *get*.

The parties hereto recognize that the obligations specified above are unique and special and they agree that the remedy at law for breach of this contract will be inadequate. Accordingly, in the event of any breach of this contract, in addition to any other legal remedies available, the injured party shall be entitled to injunctive or mandatory relief directing specific performance of the obligations included herein.

_____ _____

Husband Witness Date

_____ _____

Wife Witness Date

[1] Laura R. Frank, "Dependent on the Gentiles: New York State, the Orthodox Rabbinate and the Agunah Problem 1953–1993," at: www.academia.edu/4044598/The_Agunah_and_the_Secular_State (accessed May 18, 2017).

[2] Susan Weiss, "Sign at Your Own Risk: The 'RCA' Prenuptial May Prejudice the Fairness of Your Future Divorce Agreement," *Cardozo Women's Law Journal*, 6 (1999), no. 49 (henceforth: "Sign at Your Own Risk").

[3] According to Jewish law, a woman cannot be divorced by an act of court but only by the act of her husband through the delivery of a *get*. In the Orthodox view, there is no way that she can be released from her marriage in the lifetime of her husband if she has not received a *get* from him, even if she is civilly divorced, and even if a rabbinic court has determined that he is obliged to divorce her. Compare and contrast: Reform rabbis have held that there is no need for a *get* if a civil divorce has taken place. See Solomon Bennett Freehof, *Reform Jewish Practice and Its Rabbinic Background* (Cincinnati: UAHC Press, 1963); and Walter Jacob, "Reform Judaism and Divorce: American Reform Responsa," in idem (ed.), *American Reform Responsa* (New York: CCAR Press, 1983), pp. 511–514. Conservative rabbis have authorized rabbinic tribunals to annul marriages in extreme cases of desertion, abuse, blackmail or spiteful recalcitrance. They also encourage couples to agree to conditional betrothals that would allow a rabbinic tribunal to declare the marriage void subsequent to civil divorce. See Mayer E. Rabinowitz, *Agunot – Abandoned Wives*, https://www.jewishvirtuallibrary.org/jsource/Judaism/agunot.html (accessed May 17, 2017): "Out of concern for both the agunah and the Jewish Community, we refuse to accept the approach that 'there is nothing we can do.' We have found halakhic solutions and we have implemented them…. Today, there is no unity or unanimity here in Israel nor in the Diaspora. The argument of 'splitting the unity' is used by groups at the extremes, as an excuse to maintain the status quo and do nothing to solve this serious and heartbreaking problem."

[4] See generally Irving A. Breitowitz, *Between Civil and Religious Law: The Plight of the Agunah in American Society* (Westport, CT: Greenwood Press, 1993), Chap.1 and Appendix E, describing in detail, from the perspective of an Orthodox rabbi and law professor, the rules that dictate Jewish divorce, including the problem of the "forced divorce," often raised to challenge the validity of remedies suggested to ameliorate the plight of Jewish women stuck in failed marriages.

[5] Elyakim Ellinson, "Refusal to Give a *Get*," *Sinai*, 69/145 (5731–1971), pp. 135–158 (Hebrew).

[6] David Bleich, "Modern Day Agunot: A Proposed Remedy," *Jewish Law Annual*, 4 (1981), pp. 167, 173 and 178.

[7] *Ibid.*, p. 173.

[8] *Mamzerim*, children born of relations that are illicit under Jewish law, are permanently stigmatized, and they and their descendants are not permitted to marry other Jews (unless the latter, too, are *mamzerim* or are converts). If a woman enters into a new relationship without having received a *get* from her former husband, her subsequent children are considered *mamzerim*, even if she and her former husband were civilly divorced. That is Bleich's concern here. See my article, "Women. Divorce, and Mamzer Status in the State of Israel," in Sylvia Barack Fishman (ed.), *Love, Marriage, and Jewish Families: Paradoxes of a Social Revolution* (Lebanon, NH: University Press of New England, 2015), pp. 256–286.

[9] Bleich, "Modern Day Agunot" (above, note 6), p. 183.
[10] Avitzur v. Avitzur, 58 N.Y.2d. 108, 459 N.Y.S. 572, 446 N.E.2d 136 (1983)
[11] J. David Bleich, "A Suggested Antenuptial Agreement: A Proposal in the Wake of Avitzur," *Journal of Halacha and Contemporary Society*, 7 (1984), pp. 25 and 36.
[12] According to the Talmud in BT *Yevamot* 112b, biblical law allowed a man to divorce his wife against her will and for no cause. However, by rabbinic fiat in the Middle Ages, this is no longer permitted: A Jewish man will remain married to his wife until she agrees to accept a *get*. Thus, like a man, a recalcitrant Jewish woman can stymie her spouse's ability to remarry under Jewish law, causing him harm. However, a woman's untoward refusal to accept a *get* can effectively be undercut or disregarded without serious consequence to the man. See generally Breitowitz, *Between Civil and Religious Law* (above, note 4), pp. 9–14, explaining why the *agunah* issue is perceived correctly and predominantly as a woman's problem.
[13] Breitowitz (*ibid.*, pp. 145–150) suggests that this prenup was withdrawn because it violated the rule against the forced divorce and constituted a penalty clause of "questionable enforceability."
[14] See J. David Bleich, "A Proposal for a Solution to the Problem of a Husband Who Refuses to Divorce," *Ohr hamizraḥ*, 38/1 (1990), pp. 57, 65–66 (Hebrew), explaining why he would have constructed the increased support obligation as discretionary in Israel.
[15] "Sign at Your Own Risk," Appendix 1.
[16] Rabbinic Court Jurisdiction (Marriage and Divorce Law), 1953.
[17] Rabbinic Court Jurisdiction (Enforcement of Rabbinic Court Decisions), 1995, giving Israeli rabbinic courts broad authority to take measures against a recalcitrant spouse in order to encourage the delivery of a *get*.
[18] See Susan Weiss, "The Three Methods of Israeli Divorce Resolution: Fundamentalism, Extortion and Violence," *Eretz aḥeret*, 13 (2002), pp. 42–47 (Hebrew), describing the rather inefficient methods by which Israeli rabbinic courts decide their cases.
[19] "Sign at Your Own Risk," Appendix 3.
[20] The relevant clause in the Rosen-Zvi prenup reads: "Any claim that shall arise in accordance with this agreement shall not be construed as a cause of action which can be attached to or included in a petition for divorce" (Clause 5).
[21] "Sign at Your Own Risk," Appendix 5.
[22] Note that while grassroots initiatives in Israel were constructing prenups that sought to limit the power of rabbinic courts, the Knesset was passing laws to bolster the power of those courts to act in response to *get* refusal—among other things, by granting them authority to incarcerate recalcitrant spouses. See above, note 17.
[23] https://www.iyim.org.il/uploads/files/Englishtranslationrevised%208.09b.doc (accessed May 18, 2017).
[24] The Clause H ("Reservation of Rights") in the AMR reads: "In order not to disrupt marital harmony, any action granting authority to a juridical body shall be made upon mutual consent only. If no consent is given, jurisdiction shall remain with the original authoritative body" (http://iyim.org.il/wp-content/uploads/2017/05/Englishtranslationrevised-8.09b.doc; accessed June 21, 2017).
[25] See above, note 12.
[26] See FamCt Appeal 23464-10-09 (Haifa) A.S. vs D.S. (J. Shtemer) (in Hebrew), quoting expert opinion according to which there is no such thing as a coerced divorce against a woman under Jewish law.
[27] Susan Aranoff and Rivka Haut, *The Wed-Locked Agunot: Orthodox Jewish Women Chained to Dead Marriages* (Jefferson, NC: McFarland, 2015), Chap. 15, "Prenuptial Agreements," pp. 172–192, 194–195, describing how the Beth Din of America (BDA) exercises full discretion over whether or not the support obligation is implemented and how, save two cases, no woman has received any money pursuant to the prenup; and also describing how the BDA responded to the Connecticut case of Rachel Light vs Eben Light. 2012 WL 6743605 (Conn.Super.), 55 Conn. L. Rptr. 145.
[28] Mordechai I. Willig, "The Prenuptial Agreement: Recent Developments," *Journal of the Beth Din of America*, 1 (2012), p. 12.
[29] *Ibid.*, p. 14.
[30] *Ibid.*, p. 16. See also A. Klapper, "Systemic Misunderstanding between Rabbinical Courts and Civil Courts: The Perspective of an American Rabbinical Court Judge," in Fareda Banda and Lisa Fishbayn

Joffe (eds.), *Women's Rights and Religious Law: Domestic and International Perspectives* (London–New York: Routledge, 2016), suggesting that a rabbinic court might refuse to help out at all if a woman has sued for divorce in civil court and thus "rejected" the rabbinic court as the court of appropriate jurisdiction: "If one spouse files first for divorce in a secular court, a Rabbinic court may see them as rejecting its jurisdiction over property issues, and therefore decline to issue a *seruv* [contempt order—S.W.] against their spouse who is refusing to participate in a Jewish divorce" (p. 205).

[31] N.Y. Domestic Relations Law §236B(5)(h), (6)(d), (McKinney Supp. 1995), enabling a court to take *get* refusal into consideration when granting support or dividing marital property, arguably making the support obligation under the RCA prenup redundant.

[32] See Mordechai Willig, "Halakhic and Legal Considerations: The Halakhic Sources and Background of the Prenuptial," in Basil Herring and Kenneth Auman (eds.), *The Prenuptial Agreement: Halakhic and Pastoral Considerations* (Northvale, NJ–London: Jason Aronson, 1996), p. 33: "[S]ome women or their attorneys will object to the inclusion of monetary disputes (e.g., property settlements, alimony, child support) in the arbitration agreement, for the current secular law of equitable distribution and maintenance or community property will generally result in a larger financial settlement for women than does enforcing the provision of the standard ketubah."

[33] "Sign at Your Own Risk," notes 78–90. See generally Aranoff and Haut, *Wed-Locked Agunot* (above, note 27), esp. Chap. 6: "Extortion: Every Man Has His Price," showing how rabbinic courts "routinely deprive women of income and assets."

[34] Willig, "Prenuptial Agreement" (above, note 28), p. 12.

[35] www.tzohar.org.il/English/ (accessed May 18, 2017).

[36] "Agreement of Love: To Prevent the Next Case of Get Refusal," *Ynet*, June 14, 2016, at www.ynet.co.il/articles/0,7340,L-4815558,00.html (Hebrew; accessed May 18, 2017).

[37] www.tzohar.org.il/heskemeahava2/ (accessed May 18, 2017).

[38] www.tzohar.org.il/wp-content/uploads/2015/10/heskem.english.pdf (accessed May 18, 2017).

[39] Cf. Lynne Carol Halem, *Divorce Reform: Changing Legal and Social Perspectives* (New York: Free Press, 1980), showing how divorce laws, in their various historical permutations, have been unsuccessful in their attempt to curtail the divorce rate.

[40] See Frank, "Dependent on the Gentiles" (above, note 1), describing the history of the state's increasing responsiveness to the *agunah* problem. In "Four Methods of Civil Response to *Get* Recalcitrance" (unpublished article on file with the author), Susannah Dainow and I describe the different responses of state apparatuses to *get* refusal.

[41] Call for Papers, "Marital Captivity: Bridging the Gap between Religion and Law," International MARICAP Conference, November 24–25 2016, Ius Commune Research School Conference, Faculty of Law, Maastricht University, The Netherlands (funded by the Netherlands Organization for Scientific Research), at www.maastrichtuniversity.nl/nl/over-de-um/faculteiten/rechtsgeleerdheid/capaciteitsgroepen/privaatrecht/projecten/echtscheiding-e-6: "Marital captivity refers to a situation wherein someone is unable to terminate his or her religious marriage, i.e. keeping a spouse 'trapped' in a marriage against his or her will." See also the Femmes for Freedom website: www.femmesforfreedom.com/English, which translates *aginut* as marital captivity and explaining how it is a form of violence against women (both sites accessed May 18, 2017).

[42] New York Domestic Relations Law §253(3): Removal of Barriers to Remarriage: "No final judgment of annulment or divorce shall thereafter be entered unless the plaintiff shall have filed and served a sworn statement: (i) that, to the best of his or her knowledge, he or she has, prior to the entry of such final judgment, taken all steps solely within his or her power to remove all barriers to the defendant's remarriage following the annulment or divorce." This is the first New York *get* law.

[43] The Divorce Amendment Act, 95 (1996), §5a, http://www.justice.gov.za/legislation/acts/1996-095.pdf (accessed June 28, 2017).

[44] Divorce (Religious Marriages) Act 2002, revising Matrimonial Causes Act (1973) (England and Wales), http://www.legislation.gov.uk/ukpga/2002/27/section/1; Family Law (Scotland) Act 2006, revising section 3A to the Divorce (Scotland) Act 1976, http://www.legislation.gov.uk/asp/2006/2/section/15. Both these laws are similar to the 1983 NY Get Law (above, note 42). See also Sharon Faith and Deanna Levine, "Getting Your Get," providing

information for Jewish men and women in England, Wales and Scotland about divorce according to Jewish law, http://www.gettingyourget.co.uk/ (all accessed June 6, 2017).

[45] Divorce Act 1990 (Canada), §§ 21(1)ff: The consequences for failure to remove these barriers in a timely manner, and to come before the court with clean hands, is that "the court may, subject to any terms that the court considers appropriate, (c) dismiss any application filed by that spouse under this Act, and (d) strike out any other pleadings and affidavits filed by that spouse under this Act.

[46] Civil Code of France, Art. 1382

[46] See Mark Washofsky, "The Recalcitrant Husband: The Problem of Definition," *Jewish Law Annual*, 4 (1981), pp. 144–166.

[47] See, e.g., FamC 3950/00 S. v. S. (Jerusalem 2001, J. Greenberger), holding that *get* recalcitrance is an actionable tort under Israeli law. Since then, scores of Israeli family courts have agreed and awarded damages to both men and women. See my article, "From Religious Right to Civil Wrong: Using Israeli Tort Law to Unravel the Knots of Gender, Equality, and Jewish Divorce," in Lisa Fishbayn Joffe and Sylvia Neil (eds.), *Gender, Religion, and Family Law: Theorizing Conflicts Between Women's Rights and Cultural Traditions* (Waltham, MA: Brandeis University Press, 2013), pp. 119–135.

[48] Brett v. Brett 1 All ER 1007 (1967).

[49] In the Marriage of Steinmetz, 6 Fam LR 554 (Family Court of Australia) (1980).

[50] New York Domestic Relations Law § 236B(5)(h), (6)(d), known as the second New York *get* law (McKinney Supp. 1995). The constitutionality of this law has been recently called into question in Masri v. Masri 2017 NY Slip Op27007, decided on January 13, 2017, Supreme Court, Orange County Bartlett, J.

[51] Koeppel v. Koeppel 138 NYS2d 366 (S.Ct. Queens County, 1954) 110.

[52] Waxstein v. Waxstein, 90 Misc 2d 784 (Sup. Ct. Kings Co. 1976), aff'd 57 AD2d 863 (2d Dept. 1977), appeal denied, 42 NY2d 806.

[53] Fischer v. Fischer, 237 AD2d 559, 560–561 (2d Dept. 1997); Schwartz v. Schwartz, 913 N.Y.S.2d 313, 316–17 (App. Div. 2010).

[54] Kaplinsky v. Kaplinsky, 198 AD2d 212, 212–213 (2d Dept. 1993).

[55] Bruker v. Marcovitz, [2007] 3 S.C.R. 607, 2007 SCC 54.

[56] Perl v. Perl, 126 A.D.2d 91, 512 N.Y.S.2d 372 (1987); Golding v. Golding, 176 A.D.2d 20, 581 N.Y.S.2d 4 (1992); Schwartz v. Schwartz, 153 Misc.2d 789, 652 N.Y.S.2d 616 (1997).

[57] Perl (above, note 56).

[58] Ontario Family Law Act of 1986 §56(5)– (7).

[59] Some more recent prenups have tipped the peculiar compromise suggested by Orthodox rabbis even further away from the interests of Jewish women and toward the interests of rabbinic tribunals. The 2014 Habad/Agudah Prenup requires couples to arbitrate all divorce matters before the Union of Orthodox Rabbis (§V), which will make decisions "in accordance with Jewish law" (clause IX); and it also obligates a spouse who leaves the marital home to pay $150 a day unless that separation is for a "justified reason" (§§XII and XIII). Still another prenup composed in Canada in 2015, entitled "Agreement to Foster Mutual Respect and Remove Barriers to Religious Remarriage," directs Canadian couples to the RCA rabbinic tribunal in New York to determine whether they should "remove barriers to religious re-marriage by obtaining a *Get*." Such a prenup would dramatically interfere with the right of a Canadian Jewish woman to draw on the Canadian *get* law (above, note 45) to persuade her recalcitrant husband to give her a *get*. In order to call upon the Canadian "clean hands" statute, it would not be enough for a woman simply to prove that her husband did not deliver a *get* to her. Instead, she would have to travel to New York, plead her case for divorce in front of the RCA, and obtain a declaration of the tribunal that, in its opinion, the facts of the particular case warrant that the couple remove all barriers to religious remarriage.

[60] Willig, *Prenuptial Agreement* (above, note 28), p. 12.

[61] See above, note 3; and see Frank, "Dependent on the Gentiles" (above, note 1). See note 59 above, describing the Habad/Agudah prenup, which eliminates any incentive to deliver a *get* and, in fact, "fines" a spouse who leaves the marital home for no good reason.

[62] Audre Lorde, "The Master's Tools Will Never Dismantle the Master's House," in eadem, *Sister Outsider* (Crossing Press, 1984), p. 111.

[63] See Klapper, "Systemic Misunderstanding" (above, note 30), describing the interplay of rabbinic and civil courts.

[64] See, e.g., Nicholas Walter, "Religious Arbitration in the United States and Canada," *Santa Clara Law Review*, 52/2 (2012), comparing and contrasting the attitudes of the United States and Canada with regard to religious arbitration and arguing that holding religious arbitration agreements and awards binding in cases where civil courts are able to handle the dispute poses problems for religious freedom.

[65] The three halakhic mechanisms that, according to Broyde, might allow a rabbinic court to declare a marriage over without the husband's cooperation are: (1) appointment of an agent to deliver a *get* on his behalf; (2) authorization of a rabbinic court to dissolve the marriage; and (3) resting the marriage on the condition of continued cohabitation. See Michael J. Broyde, "An Unsuccessful Defense of the Beit Din of Rabbi Emanuel Rackman: *The Tears of The Oppressed* by Aviad Hacohen," *Edah Journal*, 4/2 (2004); and idem, "A Proposed Tripartite Prenuptial Agreement to Solve the Agunah Problem: A Solution without Any Innovation," *Jewish Law Association Studies*, 20 (2010).

[66] E.g., in the cases described by Yair Ettinger in "The Rabbi Who Released a Thousand *Agunot*," *Haaretz*, June 26, 2008 (Hebrew; www.haaretz.co.il/news/education/1.1333063, accessed May 18, 2017).

[67] Arguably, this could happen if the Jewish wedding ceremony were reimagined completely, as has been done, for example, by Meir Simcha Feldblum; see idem, "The Problem of Agunot and Mamzerim: Suggesting a Systemic and General Solution," *Dine Israel*, 19 (1997–1998), pp. 203–215.

[68] This clause emphasizes the couple's acknowledgement and attestation that *get* refusal is inherently an intentional harmful act that should be actionable in civil court, giving rise to the right of the cooperative spouse to compensation for the damages thus incurred, including past damages (see §4 below).

[69] Here it is underscored that the harm potentially done to women as a result of *get* refusal is greater than the harm to men. It is almost impossible to draft a perfectly reciprocal prenuptial agreement to correct the problem of *get* refusal, because of the differing status of women and men under the Jewish laws of marriage. A woman who starts a new relationship without having received a *get* from her former spouse risks being accused of *ni'uf* – adultery – and giving birth to children stigmatized as *mamzerim* (see above, note 8); her only alternative is to forego love and family. The man bears no such risks.

[70] For parties that live in Israel, this clause is meant to stop the "race to the court house" described in note 23 above; outside of Israel, it is meant to prevent one side from using religious adherence as an excuse to disregard decisions of secular courts and demand that everything be heard before a rabbinic arbitration tribunal.

[71] This clause adopts the remedy available under Ontario statutory law to persons whose partner refrains from removing barriers to remarriage in order to attain advantages upon divorce. See Rules of Family Law Act (Ontario, 1990), §5 (Barriers to remarriage): "The court may, on application, set aside all or part of a separation agreement or settlement, if the court is satisfied that the removal by one spouse of barriers that would prevent the other spouse's remarriage within the spouse's faith was a consideration in the making of the agreement or settlement."

[72] Here, increased spousal support is characterized as tangible damages to the loss of support and earning capacity that might be available to the cooperative spouse if the recalcitrant spouse removed all barriers to remarriage. It is in addition to, and not instead of, any other obligation that a spouse may have for alimony or support that might be awarded by a family court or a rabbinic tribunal.

[73] This clause gives expression to a series of judgments rendered in Israel confirming that *get* refusal causes intangible damages to the autonomy and dignity of the cooperative spouse. See, e.g., FamCt (Jerusalem) 3950/00 Anonymous v Anonymous. Courts in the US, Canada, France and Australia have held that such damages are compensable, pursuant to statute or common law principles.