GENDER , MULTICULTURALISM AND DIALOGUE: THE CASE OF JEWISH DIVORCE

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I. Introduction: In Search of Dialogue

Can the law act as a catalyst to change minority practices that discriminate against women? Can civil law merely impose remedies from outside the minority culture or can legal mechanisms be devised which spur internal change? This article engages with the debate over the proper role of the state in reconciling conflicts over women's claims to gender equality and the accommodation of minority cultural or religious practices that undermine this equality. It takes up the notions of transformative accommodation and deliberative dialogue promoted by theorists in this area and asks how such transformative remedies might operate in practice. I seek to put into effect Bikhu Parekh's call for proponents of dialogic consensus to move beyond theoretical modeling of dialogue to facilitating engagement in genuine practical dialogue. While inter-cultural and intra-

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cultural dialogue may be necessary to resolving disputes over women's rights and cultural rights,

> … it is unlikely to take us far in the abstract and contextless form proposed by its advocates. Unlike philosophical deliberation about politics, a political dialogue occurs within a particular society with a particular moral structure, history and traditions, and its participants are not abstract moral beings but constituted in a certain way. [1]

To this end, this article examines the role of dialogue in the concrete context of state intervention to alleviate women's disadvantage under Jewish religious divorce practices in Canada. After locating the position of women in debates over the rights of individuals and minority cultural communities, the article outlines the role envisioned for transformative, dialogic remedies in theories of multicultural accommodation. It then describes the particular problem women face under the Jewish laws of divorce.[2] It identifies some of the pitfalls for agunah legislation which emerged in New York State's landmark legislation in 1983. It continues by discussing the role Canadian civil legislation to aid *agunot*[3] has played in fostering a lively and ongoing local, national and

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[1] B. Parekh, *Rethinking Multiculturalism: Cultural Diversity In Political Theory* 267 (London: MacMillan Press, 2000) at 267.

[2] *Halakha* or Jewish Law is not recognized or enforced *as law* by the Canadian state. Rather, it binds adherents who choose to be subject to its strictures and to submit to the jurisdiction of *Batei Din* (Jewish Rabbinical Courts). It may be possible, however, for parties to use rabbinical courts and religious law in order to arbitrate their private disputes. The different movements within Judaism hold diverse views about the binding nature of *halakha* and its interpretation. The issues discussed in this paper largely impact upon the adherents to Orthodoxy.

[3] In Hebrew, literally "anchored women" -- women denied a divorce by their husbands. Traditionally, the term *agunah* referred only to a woman whose husband had disappeared through abandonment or misadventure. The popular use of the term has now expanded to include women who are unable to remarry because their husbands refuse to divorce them. Some authorities refer to these women as *mesurevet get*, women who have been refused a *get.* While Talmudic law has developed a range of lenient remedial strategies to deal with women whose husbands have disappeared, these leniencies do not apply to women

international debate over how to find a Jewish law solution to this problem. It concludes that this law reform strategy was effective in fostering the transformation of a discriminatory minority norm and identifies certain distinctive features that may serve as a model for other similar efforts. Key among these were the fact that the reform responded to a need identified by diverse and influential members of the community, the reform was carefully drafted to respond to the nuances of the relevant minority cultural norms through a process of dialogue with women and religious authorities, and the reform was drafted in legislative terms flexible enough to be used in creative ways by cultural insiders.

II: Gender in faith based communities as a key conflict in multiculturalism

Women's rights are often at issue in legal struggles over multiculturalism and equality. The reasons for the centrality of women in these controversies are historical, pragmatic and symbolic.[4] Historically, a key strategy for accommodating cultural pluralism in ethnically plural societies has been to divide jurisdiction between the state and minority leaders. For example, under the British policy of indirect rule, the colonial state assumed authority to regulate matters of criminal and commercial law while

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whose husbands' whereabouts are known. The distinction in these terms and the distinct remedies available to these categories of women helps to explain the difficulty in pinning down the numbers of *agunot.* Activists estimate the numbers in the tens of thousands in the US alone while orthodox authorities argue that there are very few. This is because orthodox authorities view only the women whose husbands have disappeared as *agunot*; all others are *mesurevet gittin (*subjects of get refusal) who are in the process of negotiating a divorce, even where these negotiations drag on for decades.

[4] For an expanded discussion of the women's role as cultural defenders and cultural symbols, see Li. Fishbayn, "Culture, Gender and the Law, Recent Thinking and Practical Strategies" in T. Johnson ed.. *Gender And Human Rights In The Commonwealth*, (London: Commonwealth Secretariat, 2004) at 40-42.

allowing tribal and religious leaders to continue to retain power over family law. [5] The Ottoman millet system allowed religious communities to be self-governing on many issues including family law.[6] Under European feudalism, religious minorities enjoyed rights to self-regulation delegated by the State. Even as the modern liberal state has emerged and individuals have a direct relationship to the state as citizen, unmediated by the corporate community to which they might belong, in many places, plural systems of personal family law continue to operate within or alongside the civil legal system. In practice, this means that the cultural institutions over which many religious and cultural minority communities retain control or expect to retain control are those centrally concerned with the regulation of women's conduct in sexuality, reproduction, marriage and divorce.[7]

[5] This power was not unlimited however, The state could invoke the repugnancy clause to invalidate local rules which it viewed as contrary to public policy. For example, in Southern Africa, the clause was invoked to prohibit the infanticide of twins, trial by ordeal and slavery. T. W. Bennett, "Conflict of Laws – the Application of Customary Law and the Common Law in Zimbabwe", (1981) 30 Int. and Comp. L. Q. 59, at 83. It has also been used to bar controversial family law practices which are the subject of controversy in many jurisdictions today, such as levirate marriage, (in which a widow marries her husband's surviving brother), sororate marriage ("seed raiser unions" in which a woman is compelled to marry the widower of another woman in her family as her replacement), child betrothal, and marriages contracted without the consent of the bride. N.S. Peart, "Section 11(1) of the Black Administration Act No. 39 of 1927: The Application of the Repugnancy Clause" (1982) Acta Juridica 99, 111. See also, F. Kaganas and C. Murray, "Law, Women and the Family: The Question of Polygyny in a New South Africa" (1991) Acta Juridica 116, 120.

[6] W. Kymlicka, *Multicultural Citizenship: A Liberal Theory Of Minority Rights* (Oxford: Oxford University Press,1995). at 156.

[7] S. M. Okin, "Is Multiculturalism Bad for Women?" in S. M. Okin ed., *Is Multiculturalism Bad For Women?* (Princeton: Princeton University Press, 1999) at 15.

Pragmatically, women are often associated with the cultural traditions of a community because they play a direct, palpable role in the reproduction of cultural continuity through their roles as the bearers, nurturers and educators of children. [8]

Symbolically, the notion of sexual difference may allow a community to work out a challenging paradox of modern minority identity. Religious and cultural groups, and individual members of these groups, often have a sense of themselves as both authentically rooted in traditional cultural norms and as creatively adapting to modern social, political and economic challenges. A gendered division of epistemological labor allows both the cultural group and the individual to reconcile the notions of cultural continuity and cultural change over time. The anthropologist, Anne McClintock, puts it this way:

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[8] This emphasis on the role of women as mothers stresses the importance of ensuring that their reproduction occurs within communally sanctioned relationships, that their mothering is performed correctly and that women have the opportunity to take on the role of mothers. All these tropes appear in the *agunah* debate. The great wrong women may commit if not permitted to remarry legitimately is the reproduction of *mamzerim*, bastards whose illegitimate birth condemns them to a form of ostracism. The harm done to women who remain *agunot* and do not have *mamzerim* is that of being denied the opportunity for a fulfilling life that involves bearing children. I was once discussing the *agunah* problem, framing it as an infringement upon the autonomy of women to plan and conduct their post-marital lives. An orthodox woman I was speaking with saw it a different way. For her, the tragedy lay in all the *nefeshim* trapped in *bashamayim* (souls trapped in heaven) waiting to be born, who could not arrive because their mothers could not remarry to bear them legitimately. For this woman, and perhaps many more in the orthodox community, solving the problem of *agunot* is a means of further embedding themselves in practices such as childbearing and rearing that are central to an orthodox life, rather than exit from this life. John Syrtash also movingly describes the success of Canada's *get* law in terms of enabling women to remarry and bear children. He describes a woman approaching him in a restaurant, a baby in her arms and telling him "if it were not for your *Get* law, I could never have remarried and this baby would never have been born." J. Syrtash, "Celebrating the Success of Canada's" Get" Legislation and its Possible Impact on Israel", paper delivered at the *Conference On Resolving Get Refusal In Civil Laws And The Corresponding Halachic Approaches*, (Bar Ilan University, September 13, 2005) at 3.

> Women are represented as the atavistic and authentic body of national tradition (inert, backward-looking and natural), embodying nationalism's conservative principle of continuity. Men, by contrast, represent the progressive agent of national modernity (forward-thrusting, potent and historic), embodying nationalism's progressive or revolutionary principle of discontinuity"[9]

Attempts by women to repudiate the task of embodying the traditional in this symbolic equation by seeking to transform their roles may therefore be perceived as a particularly worrisome threat to the identity and continuity of the group.

III. The place of dialogue in multicultural theory

Theoretical responses to the problem of gender equality and multicultural accommodation vary. Some urge the abolition of discriminatory cultural practices, giving priority to equality and short shrift to the claims of culture. For example, Susan Okin argued that:

> In the case of a more patriarchal minority culture in the context of a less patriarchal majority culture, no argument can be made on the basis of self-respect or freedom that the female members of the culture have a clear interest in its preservation. Indeed, they *might* be much better off if the culture in which they were born were either to become extinct (so that its members would become integrated into the less sexist surrounding culture) or, preferably, to be encouraged to alter itself so as to reinforce the equality of women – at least to the degree to which this value is upheld in the majority culture. [10]

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[9] Anne McClintock, *Imperial Leather: Race, Gender And Sexuality In The Colonial Context* (New York: Routledge 1995) at 359.

[10] Okin , *supra* note 7 at 22-23. In her later work, Okin emphasized her preference for solutions which allow women a voice in identifying the significance of impugned cultural practices and using this information to ensure that multicultural accommodation does not become a pretext for perpetuating unequal intra-group social power. S. Okin, "Multiculturalism and Feminism: No Simple Questions, No Simple Answers", in A. Eisenberg and J. Spinner-Halev eds., *Minorities Within Minorities: Equality, Rights And Diversity* (Cambridge: Cambridge University Press, 2005) 67, at 72-75

At the other extreme, some theorists urge the immunization of discriminatory cultural practices for varying reasons. Chandran Kukathas argues against intervening to prohibit discriminatory customs on the basis that to do so would improperly entangle the liberal state in the promotion of an acceptable conception of a good life. [11] Will Kymlicka stresses the role cultural structures play in forming our identities, underpinning our self-esteem and shaping the ideas and preferences we reflect upon when engaging in reasoned autonomous action. [12] If culture is a value because it is instrumental to autonomy, it would appear to follow that cultural rights would cease to be justified when their exercise facilitates the denial of individual autonomy.[13] However, Kymlicka would only permit intervention to prohibit the discriminatory practices of immigrant ethnic groups who may reasonably be expected to participate in and derive meaning from a shared civil societal culture. [14] He recommends against intervening in the discriminatory practices of national minorities which are entitled for historical reasons to maintain their own societal cultures,

[11] C. Kukathas, "Cultural Toleration" in W. Kymlicka and I. Shapiro , eds *Ethnicity And Group Rights , Nomos 39* (New York: New York University Press, 1997). at 601

[12] W. Kymlicka, *Liberalism, Community And Culture* (Oxford: Oxford University Press, 1989) at 164-5.

[13] *Ibid* at 198.

[14] Kymlicka, *supra* note 6 at 169-70. It is unclear how Orthodox Jews fit into Kymlicka's framework. He draws a distinction between national minorities and immigrant ethnics based on their mode of integration into the state. Where a state was formed through the alliance of national groups into a federation, those national minorities ought to enjoy rights akin to sovereignty. *Ibid.* However, where people are integrated into a state through individual migration, they can neither expect nor demand to reproduce the mode of life they pursued in their homeland. *Ibid* at 77. Canadian Orthodox Jews practice a highly integrated form of life with its own language, institutions, rituals and ideals, but most Canadian Jews immigrated from Europe or North Africa, where they were neither a national minority nor a tolerated ethnic group. The community is an atypical ethnic immigrant minority in that its way of life is not integrally linked to any particular European homeland, members were permitted a certain degree of self-government on personal law issues in a number of source jurisdictions and adherents do expect to practice their tradition in a comprehensive way regardless of the nation in which they are domiciled.

except in the case of "gross and systemic violation of human rights such as slavery, genocide, or mass torture and expulsions".

Both the interventionist and immunization approaches have shortcomings. State intervention may not work if authoritative members of the community reject its innovations as illegitimate and women fail to take advantage of these changes. On the other hand, the immunization of cultural practices, even where accompanied by a formal right to exit for victimized women,[15] may allow conditions of injustice to be perpetuated.

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[15] The recommendation to immunize minority communities from state intervention to redress discrimination against female community members may be softened by a requirement that dissenting women have an opportunity to exit the community. If exit is understood in social and geographic terms, it may be difficult for a woman embedded in a traditional community to imagine, let alone achieve. Such exit may come at the cost of losing custody of her children, access to her home and relationships with friends, family and community. S. M. Okin, "'Mistresses of Their Own Destiny': Group Rights, Gender and Realistic Rights of Exit" (2002) 112 Ethics 205. If exit is understood in legal terms, from one regime of personal law to another, it may have greater utility but may also carry great personal costs. A. Shachar, *Multicultural Jurisdictions: Cultural Differences And Women's Rights* (Cambridge: Cambridge University Press, 2001) at 122-23.. Exit, however, may not be what women want at all:

> If they cannot get a *Get*, and if the law is difficult for them, or too patriarchal, and they don't like the authority of the male rabbis, let them leave". But that, of course, misses the point –both of Orthodoxy and of feminism. Orthodox Jews are Orthodox because they believe in Orthodoxy. They believe in the *halakha*; they believe in the integrity of the system. Women choose to remain Orthodox because they believe in it and accept and find it meaningful. They do not wish to abandon their beliefs, their heritage, and their community, no matter how they feel about a particular item, and no matter that at times they feel abandoned by that system. They have chosen to be Orthodox Jews. Their choice! And feminism is about choice . It's about the ability of a woman to choose to stay where she is, and perhaps to want to renovate from within.

N. Baumel Joseph , "*Agunot* and the Powers that Be", Jewish Orthodox Feminist Alliance Conference, *Chooosing Limits: Limiting Choices* March 13-14 2005. See also, O. Reitman, "On Exit", in Eisenberg and Spinner-Halev, *supra* note 10 at 191, and A. Fagan, "Challenging the Right of Exit `Remedy'" in the Political Theory of Cultural Diversity" (2006) 7 Essays In Philosophy at 1. For a defence of the exit principle in spite of these limitations, see C. Kukathas, "Exit, Freedom and Gender:"(manuscript: 2006) http://www.princeton.edu/values/whatsnew/Kukathas.pdf.

Some political theorists of multiculturalism have sought to identify a third way. These approaches seek to engage cultural communities in the processes of re-evaluating their discriminatory practices and identifying egalitarian solutions that will be both legitimate and enforceable. A key strategy in these approaches is the fostering of intra-cultural and cross-cultural dialogues about gender, equality and law reform.[16]

What does this dialogue look like and how effective is it at redefining contested norms? Before setting out to look for examples of dialogue that has been fostered by legal interventions, the notion of dialogue at play here needs to be clarified. The model of dialogue I consider has grown out of a critique and revision of John Rawls' notion of public reason in *Political Liberalism*. Rawls' conception suggests that people with diverse values and cultural commitments can reach meaningful agreements on the political principles and policies by which to govern themselves if they adhere to certain procedural rules.

[16] See, J. Tully, *Strange Multiplicity: Constitutionalism In The Age Of Diversity* (Cambridge: Cambridge University Press,1995); I. M. Young, "Communication and the Other: Beyond Deliberative Democracy" in S. Benhabib ed., *Democracy And Difference: Contesting The Boundaries Of The Political* (Princeton: Princeton University Press,1995); M. Nussbaum, *Women And Human Development: The Capabilities Approach* (Cambridge: Cambridge University Press, 2000) at 217, A. An-Na'im, "State Responsibility Under International Human Rights Law To Change Religious And Customary Laws" in R. Cook ed., *Human Rights Of Women* ,(Philadelphia: University of Pennsylvania Press, 1994); A. Shachar, *supra* note 15 and , "Religion, State and the Problem of Gender: New Modes of Citizenship and Governance in Diverse Societies" (2005) 50 Mcgill L. J. 49, 71; S. Benhabib, "*'Nous' et 'Les Autres'*: the Politics of Complex Cultural Dialogue in a Global Civilization"in C. Joppke and S. Lukes eds., Multicultural Questions (Oxford: Oxford University Press, 1999); M. Minow, "About Women, About Culture, About Them, About Us" in R. Shweder et al., Engaging Cultural Differences : The Multicultural Challenge In Liberal Democracies (New York: Russell Sage, 2002); L. Fishbayn, "Litigating the Right to Culture; Family Law in the New South Africa",(1999) 13 Int. J Of Law, Policy And The Family 147.

Rawls' notion of dialogue follows from his conception of liberalism as a political value rather than a comprehensive system. In comprehensive (or sometimes, perfectionist) liberalism, an autonomous reflective life is viewed as the best possible moral life. The political arrangements of the state, including its laws, ought to be structured to support this sort of life, sometimes at the expense of other more hierarchical ways of living founded on religious tradition.[17] In Rawlsian political liberalism, the commitment to liberal autonomy is not comprehensive, applying equally to the moral and political realms, but is confined to the political sphere. Treating people as autonomous individuals is viewed as the best way of organizing the shared political aspect of our lives and everyone is required to respect this value in their dealings as a citizen. However, the state makes no attempt to insist that all citizens accept autonomy and equality as guiding values in their personal moral worldview. It accepts that people may have meaningful, satisfying lives organized around rival values such as those of tradition and solidarity. In

[17] J. Raz, *The Morality Of Freedom* (Oxford: Oxford University Press, 1986) at 408. While comprehensive liberals see value in religious liberty as an expression of individual autonomy, Martha Nussbaum cautions that "given their views that autonomous lives are better than hierarchically ordered lives, they are bound to play favorites among the religions, using the state and its persuasive apparatus to wean people away from religions that do not foster personal autonomy…"M. Nussbaum, "A Plea for Difficulty" in Okin, *supra* note 7 at 108-9. Raz holds that cultural toleration is based on and limited by the capacity of cultural and religious communities, what he calls "social forms", to be a resource for living a meaningful, autonomous life. Where the cultural or religious group seeks to deny the autonomy of some members, the state may intervene to abolish these practices. Accommodation should not be accorded to groups which "survive as a dwindling community through the forceful stand of some of their members who sometimes combine with misguided liberal and conservatives to condemn many of the young in such communities to an impoverished , unrewarding life by denying them the education and the opportunities to thrive outside the community. In such cases, assimilationist policies may well be the only humane course, even if implemented by force of law." *Ibid* at 410-11. See also, J. Raz, "Multiculturalism: A Liberal Perspective" in *Ethics In The Public Domain: Essays In The Morality Of Law And Politics* (Oxford: Oxford University Press, 1995) at 177-8.

the context of gender and multicultural accommodation, political liberalism thus requires that women be treated as equals with regard to access to public goods distributed or regulated by the state, but is consistent with women being viewed and treated unequally in private cultural and religious life. [18]

However, the significance of this public/private distinction becomes less clear where the cultural and religious groups play a mediating role in distributing basic political goods such as access to education, freedom from illegitimate violence and, in the context of Jewish divorce, equality before and under the law. The political state may see an issue of political equality where representatives of the cultural or religious minority see a private moral practice. Members of the cultural community may disagree among themselves about the applicability of political equality norms. Dialogue is a strategy for working through these conflicts.

Dialogue in political liberalism has five key features:

1) It focuses on a narrow range of topics, ideally on the elaboration of political and legal norms which govern the elements of social life in which all groups must participate and co-operate.
2) The venue envisioned for this dialogue are the forums of official political life – electoral politics, civil administration and the judicial and legislative processes.

[18] Idanna Goldberg described the dynamic as it applies to women grappling with their position under Jewish law this way: "In 1866, when Eastern European Jews were first experiencing their own encounter with modernity, the poet Judah Leib Gordon suggested that Jews should be men in the streets and Jews in their home. For these Orthodox women this dictum now reads: "Be feminist in the streets and Jews at home." "Is Jewish Orthodox Life Threatened by Changing Gender Roles*", Choosing Limits, Limits Choices: Women's Status And Religious Life, supra*, note 15.

3) Agreements reached through this process should be durable Rawls cautions that dialogue aimed at finding consensus about norms across differences which does not adhere to these criteria might reach the appearance of agreement, but it would not be rooted in deep conviction. It would only be a *modus vivendi* , a temporary fix, liable to be abandoned by some of the parties when the balance of power between them shifts.[19]

4) It is carried out through certain forms of argument – Political liberalism tries to find bases for consensus about rules for interaction in the political sphere, not consensus on the moral values which underlie these rules. Thus people should not appeal to arguments which are only persuasive to others who share their moral beliefs in a religious or ideological system (a "comprehensive doctrine" in Rawls' jargon). They cannot, for example, invoke divine revelation or religious dogma to back up their arguments. Rather public reasons must be consistent with a shared commitment to the dominant conception of justice in the society and expressed through standard forms of inference and evidence

[19] Rawls worries that democracy which operates by simply allowing diverse parties to have their voices heard but which then decides based on majority opinion rather than on some unified set of reasons will not be stable. The instability will manifest itself in a lack of commitment to the political compromise because it is too dissonant with the comprehensive doctrines to which individuals are committed in their private lives. As a result of this limited commitment to and understanding of the political conception, people may lack the facility with public reason to be able to resolve conflicts as they arise in the future. *Political Liberalism* (New York: Columbia University Press, 1993) at 143-48. Amy Gutmann and Dennis Thompson would take the limits on public reason even farther, excluding arguments which are based on self-interested, strategic perspectives rather than perspectives rooted in moral argument. A. Gutmann and D. Thompson, *Democracy And Disagreement* (Cambridge, MA: Harvard University Press, 1996) at 192-205.

5) <u>Discussants should be able to affirm the political agreement because it is in accordance with values internal to their own comprehensive doctrines</u>. This means they are able to do the work of translating neutral public reasons into private ones which can be justified in terms of their religious or cultural moral values. This results in what Rawls calls an overlapping consensus where a legal strategy, for example, is accepted by different parties for different reasons. Some may agree to it because it reflects liberal values they hold dear. Others may be indifferent to such values, but accept it because it also happens to be consistent with their religious moral norms. Later in this paper, I suggest that the Canadian *get* legislation was able to achieve this overlapping consensus, acceptable to liberal lawyers, government and constitutional scholars because it addressed an injustice in ways that did not commingle church and state and was acceptable to rabbinic authorities because it addressed this harm in a way consistent with Jewish law.

Ideally, in the context of dialogue over how to reconcile women's rights to equality and cultural or religious claims to preserve practices which violate these rights, observance of these strictures on dialogue would encourage proponents of discriminatory practices to reflect critically upon them. They might revise their defenses of these practices by identifying some acceptable public reason which is served by them, or to revise or reject the practices themselves because they cannot be defended without resort to unpersuasive reasons.[20]

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[20] J. Cohen, "Deliberative Democracy" in A. Hamilton and P. Pettit, eds. *The Good Polity: Normative Analysis Of The State* (New York: Basil Blackwell, 1989) at 24.

However, as Monique Deveaux has pointed out, these formal limits may stop these important conversations before they start.[21] Rawlsian discussants must enter into dialogue already committed to a minimal set of liberal procedural and political values, and must be capable of translating their moral values into the language of liberal norms. How can members of orthodox religious groups or traditional cultural groups who have little experience with or facility with these ideals participate? How are they to develop these capabilities? Many critics have noted that this model does not give enough emphasis to the role that engagement in liberal dialogue may play in *building* a commitment to liberal values. As an alternative, Seyla Benhabib urges that we treat respect and reciprocity as aspirations for dialogue rather than as preconditions to it. James Tully stresses that we develop the capacity for respectful egalitarian dialogue by engaging in practical dialogue with those whom we do not yet understand. [22] These critics urge that dialogue not be valorized for its capacity to produce stable political consensus but as a *process* which is capable of transforming its practitioners and producing tentative progressive agreements over conflictual issues.

How would thinking of transformative dialogue in this aspirational, processual way require the recasting of some of Rawls' criteria for public deliberation? The emphasis upon finding an overlapping consensus between liberal authorities and religious adherents would be maintained, but some of the formal requirement would need to be relaxed.

[21] M. Deveaux, "A Deliberative Approach to Conflicts of Culture" in Eisenberg and Spinner-Halev, *supra* note 10, 340 , at 346-7.
[22] Tully, *supra* note 16 at 133.

1) Rather than focusing only on political principle and policy, useful normative discussion may also deal with the material interests which underlie debates about contested norms.[23]
2) Appeals to faith, revelation, one's religious convictions and the norms of religious law -- the arguments which adherents to traditional cultures might find the most compelling explanations and justifications for their practices -- should not excluded *a priori* as unreasonable. Rather, discussants should explicitly work towards solutions that meet religious as well as liberal needs.
3) Transformative public deliberation needs to be understood in more Habermasian terms of a number of overlapping public spheres, which include not only official political and legal fora but also interest groups, media and religious and communal institutions.[24] This entails facilitating individuals' involvement in smaller deliberative arenas or counter-publics in which they can invent and circulate minority discourses and their own interpretations and critiques of the norms of the wider community.[25] Indeed, some of the most significant transformative dialogue stimulated by the *agunah* legislation in Canada has taken place within women's groups, synagogues and Jewish communal organizations.

[23] See , Deveaux, *supra* note 21 at 344-353 and M. Deveaux, *Cultural Pluralism And The Dilemmas Of Justice* (Ithaca: Cornell University Press, 2000).
[24] *Ibid* at 348. Deveaux also urges the adoption of certain procedures aimed at minimizing abuse, such as a bar on domination within the dialogue (no application of pressure or threats on other weaker participants) , wherever possible, equal rights to participate as equals to all interested members, supported by state intervention to equalize the position of the vulnerable through funding where necessary.
[25] J. Mansbridge, "Using Power/Fighting Power: The Polity" in Benhabib, *supra* note 16 at 56-7.

4) Finally, Rawls' preference for durable solutions rather than short term accommodations may be misguided. A temporary fix may be all that is possible at a given point in time, but it may lay the foundation for future developments in terms both of establishing useful precedents and of creating competence in self-reflective moral argument. Tentative, revisable consensus about particular legal strategies should be seen as a resource, not a hindrance, to ongoing processes of law reform.[26]

So the political theory of multiculturalism prescribes a strategy of pragmatic, multi-local dialogue among discussants with potentially diverse interests, objectives and styles of argumentation. Can the state play a role in fostering such dialogue? Theorists such as Martha Nussbaum and Abdullah An'Na'im suggest that the law reform process be used as an occasion for dialogue between state and religious communities about the revision of discriminatory norms.[27] Ayelet Shachar has suggested that regulatory engagement with conflicts over gender equality and culture constitutes a terrain upon which transformative renegotiation of traditional norms may occur.[28] In the rest of this paper, I will test this approach by looking at Canadian legislation aimed at alleviating the plight of women under Jewish divorce law with a view to identifying the ways in which this legal intervention may have grown out of or may have fostered transformative dialogue about patriarchal norms in Jewish law.

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[26] Deveaux, *supra* note 21 at 351.
[27] Nussbaum, s*upra* note 16 at 8 ; A. An-Na'im, *Toward An Islamic Reformation; Civil Liberties, Human Rights And International Law* (Syracuse: Syracuse University Press, 1990) at 162.
[28] Shachar, *supra* note 15.

IV. The Problem in Jewish Law

When one marries in a Jewish ceremony in the Anglo-American legal world, two legal relationships are being created.[29] In his capacity as clergy person, the rabbi is assisting in the contracting of a Jewish marriage contract.[30] In his capacity as a marriage officer licensed by the state, he is also solemnizing a civil marriage. If the relationship should break down, the religious and civil marriages must be dissolved through two distinct processes.[31] The civil marriage may be terminated through a civil divorce in state courts. The Jewish marriage, however, can only be dissolved through termination of the contract before a Jewish religious court (a *beit din*).

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[29] *Lord Hardwicke's Marriage Act* of 1753 established that English marriages could only be contracted through participation in a sacrament of the Anglican Church. However, Jews and Quakers were exempted from this requirement and were entitled to solemnize marriages under their own religious norms. C. Hamilton, *Family, Law And Religion*, (London: Sweet and Maxwell, 1995) at 43. The British *Marriage Act of 1836* extended this right to adherents of other Christian denominations. S. 20 of the *Ontario Marriage Act* is to the same effect. When dissolution by divorce became possible in 1857, the civil aspect could be terminated and resolved in accordance with civil law. The Jewish marriage, however, can only be dissolved by a religious court. The parties are free to resolve questions of ancillary relief in accordance with civil law procedures, religious law norms or any other criteria they might elect in settlement negotiations.

[30] A purely religious marriage will not be recognized as valid in civil law, unless the parties entered into it in good faith, believing that they were thereby creating a valid civil marriage. See, *Friedman v. Smookler*, 43 DLR (2d) 219 (1963) (Ont. H. C.). The wife sued for a declaration that her *halakhic* marriage to her late husband had created a valid marriage which entitled her to inherit his estate. A recent immigrant, she had relied on her rabbi husband's assurances that religious marriages were recognized by the state in Canada.

[31] This formally applies only to members of the Orthodox and Conservative movements within Judaism. The Reform movement abolished the *get* requirement in 1869 and views the religious marriage as coterminous with the civil one. However, Reform clergy may urge their congregants to secure a *get* so that their divorce will be recognized by the other branches of Judaism. Reitman, *supra* note 15 at 7. The New York Supreme Court has held that withholding a *get* to dissolve a marriage solemnized by clergy of the reform movement constitutes refusal to remove an impermissible barrier to remarriage and may be taken into account in determining property redistribution and maintenance awards. *Megibow v. Megibow,* New York L.J. May 17, 1994

Marriage at Jewish law differs from Anglo-American civil marriage and the model of Christian religious marriage upon which it is based in three key ways:

Firstly, the marriage is not a sacrament administered by a clergy person. Rather it is a unilateral contract whereby a husband agrees to acquire a woman as his wife and to treat her in accordance with certain terms set out the in marriage contract (*Ketubah*) While a rabbi may officiate a Jewish wedding, his role is to offer blessings which sanctify the relationship and to ensure that the formalities for entering into the contract are complied with, but not to create the marital relationship itself.[32] A valid marriage may also be contracted, for example, through consummation alone. [33]

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[32] J. R. Wegner, "The Status of Women in Jewish and Islamic Marriage and Divorce Law," (1982)1 Harvard Women's L. J. 1, 12 .

[33] The Mishnah states that "a woman is acquired is three ways and buys herself [back] in two ways. She is bought by money, a document or sexual intercourse…And she buys herself back with a *get* or by means of the death of her husband. (M *Kiddushin*1:1) This tractate goes on to discuss processes for legitimately acquiring property such as slaves, goods and land. Judith Romney Wegner reads this text as treating a wife as a form of chattel and the marriage contract as "the formal sale and purchase of a woman's sexual function", J. R.Wegner, *Chattel Or Person? The Status Of Women In The Mishnah* (Oxford: Oxford University Press, 1988) at 42. Judith Hauptman stresses the ways in which the acquisition of a wife differs from that of a slave. She notes, for example, that the consideration for the marriage contract, (usually the ring) is presented to the woman herself, rather than to a 3rd party from whom she has been acquired. Moreover, the title to the tractate, *Kiddushin*, refers to rendering things holy or setting them aside. Marriage, she argues, is "an arrangement in which a man sets aside a woman to be his wife…It is neither a purchase of chattel nor a relationship between equals. It is somewhere in the middle".

J. Hauptman, *Rereading The Rabbis: A Woman's Voice* (Boulder: Westview Press, 1998) at 68-69. In the *ketubah,* the husband states that he will "work, honor, support and maintain" the wife. This is interpreted to mean that he will provide her with food, clothing and sexual intercourse. In return, the husband acquires rights to the property the wife brings with her into the marriage, acquires during the marriage or leaves behind upon her death. The contract provides a standard amount of maintenance to be paid upon divorce, 200 *zuzim* , apparently enough to support a family for a year. L. S. Kahan, "Jewish Divorce and Secular Courts : The Promise of Avitzur" (1984) 73 Georgetown L. J. 193, 197. A recent survey of those New York area *batei din* that collect *ketubah*

Secondly, except in rare situations of fundamental mistake that might warrant annulment[34], the marriage cannot be dissolved by religious authorities, only by the mutual consent of the parties. A divorce is achieved through the delivery of a bill of divorcement (in Aramaic, the vernacular language of biblical Judaism, a *get*)[35] in which the husband renounces the rights he had taken up over the wife and pronounces her a free woman. [36]

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money set the current value at between $5,000 and $10,000. Jewish Orthodox Feminist Alliance, *Guide To Jewish Divorce And The Beit Din System* (New York: JOFA , 2005).

[34] The doctrine of *kiddushei ta-ut* (error in the creation of a marriage) permits the annulment of marriages on the basis that a significant defect existed at the time of its inception, the defect was unknown to the other spouse and the defect was not condoned by the spouse once she became aware of it. The highly respected authority, Rabbi Moshe Feinstein, defined the grounds for annulment on this basis to include apostasy, homosexuality, impotence, and insanity. Some commentators would extend this doctrine to cover a propensity to domestic violence and to withhold a *get* out of spite. A. Hacohen, *The Tears Of The Oppressed: An Examination Of The Agunah Problem: Background And Halakhic Sources* (Jersey City, NJ: Ktav Publishing 2004). These latter grounds have been employed by the *Beit Din L'Inyanei Agunot* founded in 1996 by Rabbi Emanuel Rackman in collaboration with the activist group Agunah International, but are the subject of significant controversy in the Orthodox community. See M. J. Broyde, "An Unsuccessful Defense of the Beit Din of Emanuel Rackman: *The Tears of the Oppressed* by Aviad Hacohen" (5765/2004) 4:2 The Edah Journal, and responses by Aronoff et al. in the same volume.

[35] Being in Aramaic likely made its terms more accessible, particularly to women who were not taught Hebrew. M. Feldman, "Jewish Women and Secular Courts: Helping a Jewish Woman Obtain a Get," (1989/90) 5 Berkeley Women's L. J. 139, 141-2.

[36] The procedure is inspired by a single reference to what appears to be a pre-existing tradition of divorce mentioned in *Devarim* (Deuteronomy) 24:1.

> A man takes a wife and possesses her. She fails to please him because he finds something obnoxious about her, and he writes her a bill of divorcement, hands it to her, and sends her away from his house; she leaves his household and becomes the wife of another man; this latter man rejects her, writes her a bill of divorcement, hands it to her, and send her away from his house; or the man who married her last dies. Then the first husband who divorced her shall not take her to wife again, since she has been defiled – for that would be abhorrent to the LORD. You must not bring sin upon the land that the LORD you G-d is giving you as a heritage.

Tanakh: A New Translation Of The Holy Scriptures According To The Traditional Hebrew Text (Philadelphia: Jewish Publication Society, 1985).

Finally, the wife cannot end the marriage through a parallel process of renunciation. She may initiate proceedings that invite the husband to come before a *Beit Din* to discuss delivery of the *get*, but cannot compel him to deliver it. Again, rabbinical judges (*dayanim*) are present at the delivery of the *get* to ensure that formalities are complied with, but the court has no power itself to issue a divorce. [37]

Only the husband can give a *get* and rabbinic law states that it will be invalid (*meuseh*) if given under most forms of coercion from third parties, including coercion by civil authorities. The only permissible coercion is that aimed at enforcing a pre-existing rabbinical court ruling to deliver the *get*. A civil court may then be seen as acting to enforce a rabbinical court ruling if it essentially tells the husband "do what the Jews are telling you to do". [38] There are a strictly limited number of situations in which a rabbinical court will make such an order instructing the husband to give a *get* by issuing a

[37] The *get* procedure entails that the husband instruct a scribe to prepare the bill of divorcement in the presence of two legitimate witnesses. In theory, this is all that is required, but in practice, this is always done in the presence of a rabbinical court which will attest to his having followed all requisite procedures. Such attestation may be necessary to the *get* being considered valid in the future for the remarriage of the parties. The scribe writes out a boilerplate statement that the *get* is given and received freely. It is signed by the witnesses and delivered in their presence. The husband drops it into the wife's cupped hands and states that "This is your *get* and you are divorced from me and permitted to marry any other man". The wife accepts it and steps away. She then hands it to the Rabbi who makes a tear in it (so that it cannot be reused by other parties) and places it on file in the court archive. The wife then receives a document called a *ptur* which declares her status as a divorcee and her eligibility for remarriage. It is this document which will allow her to remarry. J, D. Bleich, "Jewish Divorce: Judicial Misconceptions And Possible Means Of Civil Enforcement" (1984) 16 Connecticut L. R 201, 234. These formalities were put in place for the protection of women in order to provide a disincentive to resort to divorce without careful deliberation. Hauptman, *supra* note.33

[38] …A forced bill of divorce – [if executed] by a Jewish [court], it is valid; by a non-Jewish court, it is invalid. *And in a non—Jewish court they may beat him and say, do what the Jewish court asks of you,* and it [i.e. the *get*] is valid. *Babylonian Talmud Gittin* 9:8, as translated in Hauptman, *supra* note 33 at 114 (Hebrew parentheses omitted, italics added).

chiyuv get (compulsory order)[39] but *batei din* are reluctant to make these orders and find it very difficult to enforce them when they do. Their reluctance may stem from a number of sources, including disapproval of women initiating divorce, fear of making an error which violates Biblical law, [40] and fear of mistakenly permitting an adulterous marriage.[41] Traditional forms of coercive enforcement of these orders, such as excommunication, withdrawal of economic privileges dispensed through the community and physical violence[42] have fallen into disuse.

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[39] *Ketubot* 77a states that a husband may be forced to divorce where he is afflicted with a disease with repellant symptoms (boils or severe halitosis), or pursues a career which causes him to give off an offensive smell (gatherer of dog excrement, copper miner or tanner), unless the wife explicitly stated that she would tolerate these defects prior to the marriage. Jachter. Other authorities include impotence or sterility, physical or verbal abuse, husband forcing wife to violate religious law, husband becoming an apostate after marriage and habitual infidelity of the husband. Rabbi Y. Breitowitz , "Domestic Relations Law 236B: A Study in Communications Breakdown",(http://www.jlaw.com/Articles/sec236b.html) at 4-5.. Situations in which the husband is under a moral but not legal obligation to give a *get* are more controversial, and may include where the husband forbids the wife to wear jewelry, forbids her to visit her father, refuses to support her, refuses to cohabit with her, converts from Judaism but allows her to continue observing mitzvot, the wife has committed adultery, the husband has epilepsy or the wife finds him intolerable. Bleich, *supra* note 37 at 234.

[40] It is a far more serious matter to erroneously instruct another to violate biblical law than to be responsible for the violation of a rabbinic rule extrapolated from the biblical source. In theory, a judge ought not to refuse to rule for fear of divine punishment if he errs. A judge "must be guided by what he sees". J. Roth, *The Halakhic Process: A Systemic Analysis*, Moreshet Series Studies in Jewish History, Literature and Thought 12 (New York: The Jewish Theological Seminary of America, 1986) at 83 (Hebrew omitted).

[41] In cases where a woman remarries after the disappearance of her first husband and the first husband re-appears, her second marriage will be invalid and her first husband will be compelled to divorce her because of her adultery. R. Biale, *Women And Jewish Law* (New York: Schocken Books, 1984) at 103.

[42] "And similarly with bills of divorce: They exert force on him until he says, I wish to [write this *get* of my own free will]. *Mishnah Arakhin* 5:6, in Hauptman, supra note 33 at 116.

In situations where a compulsory order would not be appropriate, the withdrawal of favors from the husband in order to encourage delivery of a *get* is permissible .[43] These permissible strategies include *cherem,* a decree of the *beit din* that all Jews must shun the recalcitrant spouse, refrain from engaging in business with him, refuse to circumcise his sons or bury his dead relatives.[44] However, the effectiveness of such remedies is contingent on the cohesion of the Jewish community which attempts to enforce it. It may work well where the husband's links to the Jewish community are multiplex, woven in to his religious, social and economic life. It fails to work where the husband is disconnected from the community or where he lives in proximity to other observant communities which are not enforcing the shunning order.

Since the 11th century, a woman may not be divorced without her consent.[45] However, on rare occasions, it is possible to get around this requirement. If the wife is mentally ill or otherwise incompetent and thus unable to receive the *get*, a *beit din* may allow the husband to remarry. In the Ashkenazi tradition, a man who can demonstrate that his wife is refusing her consent unreasonably can secure the consent of 100 rabbis[46]

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[43] Bleich, *supra* note 37 at 234-5.
[44] *Ibid.*
[45] The ban was instituted by Rabbenu Gershom Me'or Ha-Golah, alongside the prohibition on polygyny. Biale, *supra* note 40 at 82 .
[46] In Hebrew, a *heter mea harabbanim.* In theory, the permission might be granted when the first wife has remained barren for 10 years, in order to allow the husband to fulfill the superceding commandment to be fruitful and multiply, or where the first wife is insane and thus not competent to receive a get. Wegner, *supra* note 32 at 26-7. It might also be issued whre with wife refuses to receive a *get* despite a court order that she do so because she had committed adultery or the married is otherwise prohibited. In *Boronvsky v. Chief Rabbis of Israel* (FH 10/69, 25 (1) PD 7, the Supreme Court of Israel held that a heter could be issued for any halachically valid purpose, including in order to place pressure on a recalcitrant wife who refuses to receive a *get.* B. Schereschewsky and M. Elon, "Bigamy and Polygamy" in M. Berenbaum and F. Skolnik eds. *Encyclopaedia Judaica* Vol. 3, 2d. ed. (Farmington Hills, MI: Thomson Gale, 2007) at 693-4.

to permit him to remarry without divorce. In Sephardic communities, the consent of only a single rabbi may be sufficient.[47] For example, in a recent incident in Los Angeles, the son of the head of the Jerusalem Rabbinical court was granted the right to take a second wife without giving a *get* to his first wife. She had refused to attend at the *beit din* of his choice until the property issues between them had been settled in the civil courts because she feared the *beit din* would impose a disadvantageous settlement on her. [48] While *halacha* requires that a *get* be deposited with the *beit din* before consent to remarriage is permitted, many *batei din*, including the one in this case, are lax about enforcing this requirement.[49] It is thus possible for a man to remarry under Jewish law while leaving his first wife an *agunah*.

Either party may thus stand in the way of a Jewish divorce by withholding consent. Indeed, there may be just as many recalcitrant wives refusing to accept a *get* as recalcitrant husbands who refuse to give it.[50] Why then is the issue of Jewish divorce

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[47] While polygamy was banned for Ashkenazi Jews living in Christendom by Rabbi Gershom in 1025 A.D., the ban did not apply to Sephardi communities. The Israeli rabbinate banned polygamy for all Jews in 1950. This ban was made the law of the Israeli state by the *Personal Law Amendment (Bigamy) Law* of 1959 in response to the immigration of polygamous Jews from the Arab world. Wegner, *supra* note 32 at 26-27. This ban does not however, render the second marriage invalid and it must still be dissolved through delivery of a get. Schereschewsky and Elon, *supra* note 46 at 693.

[48] The events involved Luna and Hagay Batzri. Hagay is the son of Ezra Batzri, President of the Jerusalem Rabbinic Court which deals with many cases of *get* abuse. See T. Rotem "Son of Jerusalem Court Head Remarries – Without a Get" in *Ha'aretz Onliine,* February 22, 2006. I thank Michal Frenkel for bringing this incident to my attention.

[49] JOFA, *supra* note 33, at 7. See also incidents described in N. Baumel Joseph et. al *Untying The Bonds…"Jewish Divorce* (Canadian Coalition of Women for the Get, 1997)

[50] John Syrtash, personal communication, March 7, 2006. A *heter mea harabonim* is a complicated, difficult and expensive device which is frowned on in many communities and is not recognized in others, including by rabbinical courts in Israel. Refusal to receive a *get* in Israel is more problematic,. The wife may have an incentive to refuse

identified as a women's issue? The difference lies in the impact which this marital limbo has on the future of the chained spouse.

A man whose wife refuses to receive a *get* generally cannot remarry in Jewish law except under the extraordinary circumstances noted above, but if they are divorced under civil law, he can remarry under civil law. This marriage will not be recognized under Jewish law, but he and his descendents will not suffer any lasting legal disability as a result. If and when his first wife accepts the *get*, he can undergo a Jewish marriage ceremony with his new wife to secure recognition for it.

For a woman, however, refusal by her husband to deliver the *get* may have implications that last for generations. Should she remarry under civil law and have children, any children she has will be viewed as illegitimate, the products of adultery. These children, *mamzerim,* suffer a permanent legal disability, and are not eligible to have their marriages sanctioned under Jewish law unless they marry other *mamzerim* or converts.[51] This status impacts all of the woman's descendents for all generations to come.[52] Moreover, if she cohabits, or in some communities, merely dates, with a view to later marrying her new partner when the *get* comes through, she will be prohibited from marrying him because the relationship with him is deemed adulterous. [53]

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because she retains her entitlement to receive maintenance from the husband so long as the Jewish marriage subsists. John Syrtash, personal communication, December 16, 2006.

[51] *Babylonian Talmud Kiddushin*, chapter 4.

[52] "No one misbegotten shall be admitted into the congregation of the LORD, none of his descendents , even in the tenth generation, shall be admitted into the congregation of the LORD'. *Devarim* 23:3.

[53] Wegner, *supra* note 33 at 65, citing *Baylonian Talmud* Gittin 8:5. "[The wife who remarried on the strength of the invalid *get]* must leave both men. ***[Her first husband must divorce her for her technical adultery, and her second "husband" now recognized as her paramour, must likewise send her away].*** [Italics and bold in the original].

All this is awful, but why is this a concern of the civil law? It is problematic because the power men enjoy under Jewish law to withhold a *get* becomes an effective bargaining endowment in the resolution of civil family law disputes. [54] In many Anglo-American regimes, including Canada, the last decades have seen the adoption of doctrines that give women an equal share of the family property and an equal right to custody of children on divorce. In most cases, divorce law does not operate through having judges impose rulings in particular cases. Rather, expected outcomes under the law provide a framework of bargaining chips that the parties themselves deploy in negotiating their post-divorce rights and responsibilities regarding property, custody and maintenance. When the *get* is an issue, it is not unusual for husbands to offer a *quid pro quo* in these negotiations, asking the wife to renounce her rights under civil law in exchange for his agreement to give the *get*. These sorts of distorted negotiations may leave women and children in poverty after divorce, transferring the burden of their support on to the taxpayer. They also subvert the public interest in ensuring that decisions about custody are based on the best interests of the children, not on any extraneous factors. Such extortion makes a mockery of the civic public policy of ensuring equality between spouses and the provision for dependents upon divorce.

IV. The New York State Experience

In order to understand how the Canadian legislation was drafted and why it works effectively, it is useful to set it against the backdrop of the controversial legislative

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[54] On the concept of bargaining endowments, see R, Mnookin and L, Kornhauser, "Bargaining in the Shadow of the Law: The Case of Divorce" (1979) 88 Yale L. J. 950, 950

regime aimed at removing barriers to remarriage that was created in New York State in the early 1980s.

There are two moments in this legislative history. Legislation first passed in New York in 1983[55] allows a court to withhold a civil divorce decree from a petitioning husband unless and until he removes barriers to his wife's religious remarriage. It was developed through an effort led by the Orthodox group, Agudath Israel to develop remedies that were both constitutionally and halachically valid and was lobbied for by the Orthodox community.[56] It was opposed by the American Jewish Congress, Reform Jewish groups and civil liberties organizations as an unconstitutional entanglement of church and state.[57] This clause provides an incentive to provide the *get* only to those husbands who are anxious to be divorced civilly, perhaps because they wish to remarry. A husband who is not the petitioner or who does not file a counter-claim to his wife's petition, does not fall within the ambit of the clause. Apparently, this is not a large group. This legislation, and a similar provision passed in the United Kingdom in 2000, have thus had limited effect on *get* refusal.[58] Indeed, it sometimes has the paradoxical effect of

[55] *New York Domestic Relations Law* s.253 (McKinney 1986 & Supp. 1997).
[56] L. Zornberg, "Beyond The Constitution: Is The New York Get Legislation Good Law?" (1995) 15 Pace L. R. 703, 728-30.
[57] *Ibid* at 730.
[58] After first being introduced as part of an ill-fated broader divorce reform in 1996, the *Divorce (Religious Marriages) Act* 2001 came into effect in July 2002. It amends the divorce provisions of the *Matrimonial Causes Act* 1973, by adding s. 10A. This allows a court to withhold a decree absolute in divorce proceedings where one party has failed to cooperate in the dissolution of the marriage in accordance with "the usages of the Jews" or any other prescribed religious usage. This bill was passed with the support of the Chief Rabbi, Jonathan Sacks, who commented that" Without Get legislation, our efforts have lacked the force which, in the modern state, belongs to the civil courts alone. The new law greatly strengthens our efforts…" Office of the Chief Rabbi, *Divorce Bill to Become Law* (Press Release, 22 July 2002). The resort to legislation was lamented in a moving speech in the House of Lords by Baroness Miller of Hendon, the sister of Gloria

leaving a woman who is the respondent in the divorce petition doubly anchored, to a dead civil marriage as well as to a dead Jewish marriage.

New York addressed the problem of *get* refusal again in 1992.[59] However, opponents of the law argue that rabbinic authorities were not directly involved in the drafting of this legislation.[60] Rather, it was the codification of a principle developed in the New York Supreme Court in *Schwartz v. Schwartz.* The court there held that it could take *get* refusal into account under its power to consider all relevant factors in distributing marital property.[61] New York State then amended the Equitable Distribution Law to add the factor of "failure to remove barriers to religious remarriage" to the list of factors a court must take into account in determining appropriate property and alimony orders. In

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Proops, one of the leaders of the Agunot Campaign in the United Kingdom. She cautioned that the legislation allowed the British Rabbinate to persist in their refusal to find a solution to the agunah problem. HANSARD, (House of Lords, June 30 , 2000) The British Rabbinate takes the position that it cannot innovate without consensus among rabbinic authorities around the globe. Such a conference is proving difficult to organize. One was to be convened by the Rabbi Shlomo Amar, Sephardi Chief Rabbi of Israel, in November 2006. However, under pressure from leading Ashkenazi rabbis in Israel, he cancelled the conference four days before it was to take place. The Chief Rabbi has rejected the efforts of Rabbi Moshe Morgenstern to annul the marriages of agunot and has warned his members that such divorces will not be recognized by his courts or any recognized beit din. Office of the Chief Rabbi, *Morgenstern Adding to Agunah Anguish* (Press Release, June 22, 1999).

[59] *N.Y. Dom. Rel. Law 236(B)* (McKinney 1986 & Supp. 1997.

[60] Breitowitz , *supra* note 39 at 4-5. See C. D. Zwiebel, "Tragedy Compounded: The Agunah Problem and New York's Controversial New 'Get Law' " in Jack Nusan Porter ed., *Women In Chains: A Sourcebook On The* Agunah (Northvale, New Jersey: Jason Aronson, Inc., 1995) 141, at 146-150. Zwiebel, who was counsel to Agudath Israel during this period, notes that while the 1983 legislation was preceeded by years of analysis by rabbinic authorities, no such procedure was followed with the respect to the 1992 law.

[61] *Schwartz v. Schwartz,* 153 Misc 2d 789 (NY) 1992. The decision denied Mrs. Schwartz's motion to refuse all equitable distribution to her husband because he was withholding the *get,* but found that the court would take this factor into account when deciding equitable distribution on the merits at trial. At trial, the court ultimately held that his delay in issuing the *get* caused him to forfeit a portion of his interests in the marital property. See *Schwartz v. Schwartz* (1994) New York Law Journal October 12.

many cases, the court will award the wife only an additional 5% of the family property in recognition of this factor, but in some particularly egregious case, the court has given the wife of a *get* refuser all of the marital assets.[62]

While the 1992 law has the potential to be more effective, women in the Orthodox communities it aimed to help may not be taking advantage of it because its validity under Jewish law has been called into doubt. While a civil court may withdraw a privilege, order appearance before a *beit din* or order financial support in order to encourage delivery of a *get*, the imposition of a fine is considered coercion.[63] The imposition of a financial penalty through property distribution or maintenance may be understood as a fine.

There are three key concerns about the law. Firstly, some rabbinical authorities object that nothing in the law limits its effects to those situations where a rabbinic authority has found grounds for a compulsory order, and thus that in some cases, its operation might be impermissibly coercive. The actions of a civil court in those situations would provide no benefit to the chained wife because any *get* that might be issued in response to its actions would be invalid.[64] Secondly, some have taken the position that the 1992 law renders the *get* invalid even where the civil court only makes its order after a compulsory order has been issued by a rabbinical court. They argue that all *gittin* delivered in the jurisdiction are suspect because the husband may have been motivated by fear of the application of

[62] In a strongly worded judgment, Judge Gartenstein found that in order to "recognize the ravaging of the plaintiff committed by her husband first by coercing this grossly unfair "agreement" and then, after reaping its benefits, by depriving her of eight years of her life simply out of spite", he extinguished all the husband's rights in the marital property and awarded her everything. See, *Giahn v. Giahn*, Sup. Ct. NY April 2000) N. Y. L. J.
[63] Bleich, *supra* note 37 at 274-5.
[64] Rabbi C. Malinowitz, "The New York State Get Bill and Its Halachic Ramifications" http://www.jlaw.com/Articles/getart1.html.

the law. Finally, some orthodox rabbis argue that observant Jews are obliged to bring their marital disputes before rabbinic courts and are prohibited from resorting to secular courts at all.[65]

Indeed, in proposing to use the equitable distribution law to help *agunot* , a leading Jewish law scholar, Rabbi J. David Bleich, warned that a higher award that was linked to non-compliance might be seen as a penalty which invalidated the *get*. [66] Rabbi Bleich urged instead that New York follow the example of the United Kingdom in *Brett v. Brett* [67] in which an enhanced financial award for an *agunah* was explicitly linked to recognition of the financial disadvantage which would be imposed on her by an inability to remarry.[68] Some cases applying the 1992 law have followed this example. In *Izsak v. Izsak,*[69] Judge Gartenstein extinguished the husband's claim to the marital assets because the husband had "effectively destroyed [the wife's] chances to combine her economic resources with those of any prospective new spouse toward an end of establishing a decent future standard of living". Similarly, in *Gindi v. Gindi*, the court ordered the recalcitrant husband to pay the wife permanent maintenance in recognition of the economic impact of her inability to remarry within her community.[70] However, some orthodox authorities object to this analysis as well, arguing that it is coercion to award the wife more maintenance than she would be entitled to under Jewish law. [71]

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[65] *Ibid.*
[66] Bleich, *supra* note 37 at 274.
[67] [1969] 1 WLR 487
[68] In support of this position, see also, Rabbi M. Broyde, "The New York Get Law: An Exchange" http://www.jlaw.com/Articles/get_exchange2.html.
[69] October 12, 1996.
[70] N.Y. L. J. May 7, 2001.
[71] Malinowitz argues that Jewish law limits the wife's property claim to her ketubah money and prohibits the payment of post-divorce maintenance. However, the *Brett*

V Dialogue and Canadian *Get* Legislation

The legislative intervention by the state in Canada sought to break this nexus between patriarchal power under Jewish law and abusive negotiation tactics in civil divorce. [72] This concluding section will evaluate the effectiveness of this approach along two axes:

1) has it diminished the incidence of the use of the get as a tool for extortion in civil divorce?
2) Has it contributed to fostering transformative dialogue about the underlying norms of Jewish law which leave women vulnerable to get abuse?

The process of developing and drafting Canadian *get* legislation emerged from and has contributed to the continuation of a dialogue about women's rights under Jewish law. The *agunah* issue emerged at a pivotal point at which the Canadian Jewish women's

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approach only provides for enhanced maintenance unless and until the Jewish divorce is delivered. Halachic authority is clear than the husband is liable to maintain the wife so long as the Jewish marriage subsists. *Supra* note 65.

[72] Who is effected by this problem? As in the USA, Jews constitute around 1% of the population of Canada, some 360,000 out of a population of 30 million. 40% are Orthodox, 40% Conservative and 20% Reform. World Jewish Congress , *World Jewish Communities, Canada* http://www.worldjewishcongress.org/communities/comm_reg_nrtham.html#. In the USA, only 10% identify as Orthodox , 26% are Conservative, 35% are Reform, and 2% Reconstructionist. The rest do not identify with a movement. The Conservative movement convenes its own *beit din* and uses its power to annul the marriages of *get* refusers in extreme cases. Couples married in the Conservative movement sign a pre-nuptual agreement (*tennaim)* in which they agree to refer disputes over the granting of the *get* to the *beit din*. Should a husband refuse to abide by their advice as to his obligations under Jewish law, the *Beit din* view him as having repudiated the fundamental term of the *ketubah*, that he enters the marriage in accordance with the laws of Moses and Israel. If they cannot persuade him to give the *get*, they will treat the marriage as a nullity, obviating the wife's need for a *get*. While many Orthodox rabbis will accept a Conservative *get* in the USA, (personal communication, Rabbi David Lerner), I have personal knowledge of a situation in which the Orthodox *beit din* of Johannesburg has refused to accept an uncoerced *get* supervised by the Conservative *beit din* of Toronto.

movement was seeking to redefine itself. For example, when the male led organization, B'nai Brith Canada, decided to admit women as full members in 1985, it's sister organization, B'Nai Brith Women, had to decide whether they wished to be rolled into this new mixed gender institution. Instead, they chose to break away in order to maintain their focus as a woman-oriented organization and to pursue an agenda of particular relevance to Jewish women. Their formation coincided with heightened awareness of domestic violence as a serious challenge to women's equality in Canada and coalesced in the identification of the *agunah* issue as a distinctly Jewish form of domestic abuse.[73]

The initial idea to create a legislative remedy for *get* refusal was conceived by Toronto family lawyer, John Syrtash. In collaboration with and partially funded by Bnai Brith Canada, he worked with Rabbi Baruch Taub, and the Vaad Harabonim of Toronto, to propose the language incorporated into the Ontario *Family Law Act* in 1986 and lobbied pro bono for its passage. These same parties collaborated with the Toronto-based group, Women for Get, to introduce amendments to the federal *Divorce Act* which would extend the application of this remedy nation-wide. [74]Bnai Brith Women collaborated in the formation of the Canadian Coalition of Women for the Get to support these lobbying efforts in 198. [75]

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[73] Evelyn Brook, presentation to the Jewish Orthodox Feminist Alliance Conference, November 2002.
[74] John Syrtash, personal communication, December 13, 2006.
[75] This coalition was distinctive in that it included many experienced senior executives from the major Jewish women's organizations who had run successful campaigns in the past and with whom religious and governmental authorities may have had continuing collaborative relationships. Perhaps because of their visibility, expertise, connections and timeliness, this group, in collaboration with the efforts funded and led by Bnai Brith, was exceptionally effective in building support for the *get* legislation among religious and lay leaders in the Jewish community and members of the government. Personal communication with Evelyn Brook, former chair of the Coalition of Jewish Women for

The Canadian legislation has been drafted to avoid many of these orthodox objections to its *halachic* validity. Canadian civil courts do not have the power to order the delivery of a *get*.[76] Nor does the Canadian approach give the civil court an opportunity to link any particular financial or punitive order to failure to deliver the *get*. Rather, it merely allows the court to exercise its equitable jurisdiction to withdraw the privilege of even being heard to a party who comes to court with unclean hands. [77] A civil judge makes no judgment on the merits regarding refusal to deliver the *get*. The Canadian rabbinate is also not concerned that awards made by civil courts may exceed those made by *batei din,*

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the Get, March 9, 2006. The groups involved in the coalition along with Jewish Women International of Canada were Emunah Women of Canada, Hadassah-WIZO Organization of Canada, Na'amat Canada, Canadian ORT, and Women's Federation of the Canadian Jewish Appeal. They were later joined by: National Council of Jewish Women of Canada, Status of Women Committee of Canadian Jewish Congress, Toronto Jewish Women's Federation, and Women's League of Conservative Judaism. N. Baumel Joseph, "Jewish Women in Canada: An Evolving Role," in Ruth Klein and Frank Dimant, editors. *From Immigration to Integration, the Canadian Jewish Experience: A Millennium Edition*, (Toronto:
Institute for International Affairs B'nai Brith Canada, 2001). 182-195 at 187. Contrast this with the characterization of Agunah Inc. a leading agunah rights organization in the United States: "Haupt noted that the directors of AGUNAH consider themselves "Torah Feminists" and are viewed by many in the Orthodox community as "bad girls" due to their high visibility in challenging the rabbinate."Rivka Haupt, former director of Agunah Inc., as quoted in Zornberg, *supra* note 57 at 703.

[76] *Re Morris v. Morris* 42 DLR (3d) 550 (1973) (Man. C.A.).

[77] Syrtash, *supra* note 8 at 8. Legislation passed in South Africa in 1995 includes elements of both approaches. The *Divorce Amendment Act No 95* 0f 1996 added s. 5A of the *Divorce Act No. 70 of 1979*. A court may refused to grant a decree of divorce or *make any other order it deems just* unless the court is satisfied that a spouse who holds the power to remove barriers to remarriage or to dissolve a religious marriages has done so. Since passage of the act, family law practitioners reported no cases of get refusal. The Johannesburg beit din reports that the number of get refusers has dropped significantly and generally involves wives who have failed to take advantage of the Act by accepting the civil divorce before seeking the get. S, Shenhav, "Human Rights, Jewish Women and Jewish Law" (1999) 21 Justice 28, 37.

because they have adopted the matrimonial property regimes of the provinces as the basis for their own decision-making in finance and property cases. [78]

The *Family Law Act* of Ontario was amended in 1986 to permit the application of sanctions to spouses who fail to cooperate in the delivery of the *get*. [79] A similar amendment was made to the Federal *Divorce Act* in 1990. [80] Like the New York model, the Act speaks only to barriers to remarriage and does not mention Jewish law at all. This was meant to avoid the appearance that the state was enforcing Jewish law (important for validity under both regimes) and made it possible for the legislation to be used by

[78] Syrtash, *supra* note 8 at 11.

[79] The Ontario Act also addresses bribery to give a *get* which may have already occurred. A court may set aside a separation or settlement agreement, consent order, release, notice of discontinuance, or any other oral or written agreement, in part or in its entirety, when the court is satisfied that the removal by one spouse of barriers that would prevent the other spouse's remarriage within that spouse's faith was a consideration in the making of the agreement. s. 56(5), (6). This right cannot be bargained away or waived. S. 56(7).

[80] S. 21(1) , *Divorce Act*, R. S. 1985, c. 3 (2nd Supp.). The Federal Act deals with the procedures for solemnization of the divorce itself and maintenance and child custody correlative to the divorce. The provinces have jurisdiction over redistribution of property. Both statutes may be pleaded to cover all aspects of the dissolution of the marriage where appropriate. In addition, s. 21.1 contains a conscience clause which allows a spouse who fails to comply with a request to remove barriers to remarriage to argue that there are genuine grounds of a religious or conscientious nature for refusing to remove the barriers. S. 21(4). A case recently argued before the Supreme Court of Canada involves a challenge to s. 21.1. *Stephanie Brenda Bruker v. Jessel (Jason) Bemjamin Marcovitz* (appeal heard December 5, 2006, decision reserved) involves a suit for damages by a woman who was denied a divorce for more than 15 years. The plaintiff wife was awarded damages for being restrained from marrying in her faith, being restricted in her ability to have children (she was an agunah from age 31 to 46), and the social stigma of being classified as an agunah. She did not receive a divorce until making an application under s. 21.1, but the matter was not adjudicated. The husband challenged s. 21.1 in the Quebec Court of Appeal on the grounds that it validated a conception of public policy as opposed to get refusal upon which the damage award was based. Absent s. 21.1, he argued., the suit would have lacked "a veneer of acceptability". It is unclear whether the validity of s.21.1 will be dealt with in the current appeal.

members of other religious groups as well. The legislation has, for example, been successfully invoked by Shi'ite women seeking a Khul divorce under Islamic law.[81]

Under the protocol set out in the Act, one spouse sends a letter to the other asking them to remove all barriers to religious marriage within 15 days of receipt and warns that if he fails to do so, she will make an application under the Act. An application allows her to file a statement with the civil family court saying that she has removed all barriers within her control that would prevent the other spouse's remarriage within that spouse's faith but that the other party has not done, so despite a request. The other spouse then has 10 days to file a similar statement saying he has removed all barriers to remarriage within his control. If he fails to comply, the court has the discretion to strike out any pleadings he may have filed. [82] This means that if the chained spouse brings a claim for property or maintenance, the court may simply grant her application without considering her spouse's arguments in reply. She could be granted everything she requests. However, the bar is a temporary one. Upon remedying his misconduct, the recalcitrant spouse may be permitted to refile his pleadings and have his claims adjudicated. [83]

Note that the duty to provide a statement and the sanctions for failure to provide it do not apply to those who have made no claim for costs or other relief. [84]This is to avoid the *halakhic* prohibition on allowing civil law to withdraw a benefit in order to persuade a

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[81] Syrtash, personal communication, March 8, 2006. The doctrine of khul allows a woman to initiate a divorce by mutual consent under Islamic law, often by offering to forego all or part of the financial claims she might have against her husband. J, Esposito And N. Delong-Bas, *Women In Muslim Family Law* , Second Edition, (Syracuse: Syracuse University Press, 2001) at 32.

[82] S. 2(5), *Family Law Act* , R.S.O. 1990 Chapter F. 3,.

[83] *Tanny v. Tanny* [2000] O.T. c. 472 (Court of Ontario, Superior Court of Justice) June 28, 2000, finding that striking out pleadings under s. 21.1 did not create a *res judicata* and that parties struck out may refile once their misconduct has been remedied.

[84] S. 7.

husband to deliver a *get.* A *get* might be *meusah* if the legislation sought to deprive him of rights or property he was entitled to, but it is arguably not *meusah* if it merely prevents his claim or counter-claim for such rights from being entertained. A husband might avoid its effects by filing only a reply but no counter-claim. [85]

1) Impact on *get* extortion

The remedial legislation has vastly improved the *agunah* problem in Canada.[86] Informants who represent agunot before the religious courts estimate that at least 3/4 of *get* extortion and *get* withholding cases are resolved by the act. [87] The power of the court to dismiss applications of recalcitrant spouses has been invoked in only four cases.[88] For the most part, the caution letter is sufficient. It has also become accepted practice for family lawyers with Jewish clients to simply advise them of their obligation to cooperate with the *get* process before any element of the protocol is initiated.[89]

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[85] See Syrtash. *Supra* note 8 at 2-3 .
[86] *Ibid* at 3, note 4.
[87] Rabbi Mordechai Ochs of the Toronto Beth Din for Divorce stated that the legislation has led to an 85% drop in the incidence of get based extortion and get withholding, as quaoted in Syrtash, *supra* note 8 at 3, note 4. Feminist agunah activists also estimate that the legislation has solved 75% of the get refusal cases. See, N. Baumel Joseph, "*Agunot* and the Powers that Be", a panel discussion at *Choosing Limits, Limiting Choices: Women's Status And Religious Life*, *supra* note 18.
[88] In *Rokach v. Rokach* (1993) [unreported], Epstein J. stayed proceedings until the religious barriers were removed. In *Levy v. Levy* (1995) [unreported] Jennings J. made a consent order obligating the husband to obtain a *get* acceptable to the wife within eight months. In *E.S. v. O.S.* [1995] Q.J. No. 1263 (Que. Sup. Ct.) Tannenbaum J. dismissed the husband's petition for divorce because of his failure to comply with s. 21.1. In *Tanny v. Tanny*, Kitely J. used her discretion under s.21.1 to strike out the pleadings of a wife who was refusing to receive a *get*. In *Darel v. Darel*, the court refused jurisdiction for unrelated reasons, but speculated that failure to deliver the *get* after a s. 21.1 application would itself be grounds to refuse to hear an applicant's motion. 181 D.L. R (4th) 360 (1999) at para. 49-50. (Alta Q. B).
[89] Judges ask Jewish parties about it. It is now included in the bar admission course.

The legislative protocol was not ideal from a religious law perspective, but it was one the rabbis believed they could work with to free women within the constraints of orthodox conceptions of Jewish law. [90]John Syrtash quotes Rabbi Ochs, Rosh of the Toronto Beit Din, stating that the legislation did not, in the end, conform to their ideal conception of *halachic* validity. When it came back from the legislative drafting committee,

> Certain changes had been made which made the law coercive from the perspective of *halacha*. We were then faced with the prospect of either salvaging the law and losing our window of opportunity or letting it stand and *operating within its parameters* in such a way as not to conflict with *Halacha*. We chose the latter course. [91]

The Canadian religious authorities use the legislation as a tool to achieve resolution of the dispute in accordance with their conception of the requirements of Talmudic law. Recall that legitimate coercion can only be predicated on a rabbinical court ruling finding that the husband has an obligation to give a *get.* Accordingly, the religious authorities are wary of civil legislative remedies which might seek to coerce delivery of a *get* directly. Rather, they interpret the legislative remedy as the deployment of civil force to direct the husband to accept the jurisdiction of the *Beit Din*. A *get* will be *meusah* if given in response to civil legislation or the actions of a civil court, but will be acceptable if the civil court merely directs the husband to appear before a *beit din*.

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[90] In this, it is an excellent example of legislation which works with rather than against other pre-existing layers of social regulation. Sally Falk Moore notes that:

> [I]innovative legislation and other attempts to direct change often fail to achieve their intended purposes; and even when they succeed wholly or partially, they frequently carry with them unplanned or unexpected consequences. This is partly because new laws are thrust upon going social arrangements in which there are complexes of binding obligations already in existence.

S. F. Moore, "Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study" (1973) Law And Soc. Rev. 723, 744.

[91] Syrtash, *supra* note 8 at 10.

The legislation is a tool which enforces dialogue between the recalcitrant spouse and the religious authorities over delivery of the *get* . Once the legislation "gets them through the door", the rabbis begin a process which commingles their judicial and pastoral roles. They hear the husband out on the motivations which underlie his refusal and they acquaint him with negative view which religious moral norms cast on using his veto power to make his wife an *agunah*.[92] It may take months, but "on account of the having established a good relationship with the *Beis Din* ", eventually the recalcitrant spouse agrees to give the *get*.

It is only at this point that the Canadian *dayanim* turn their attention to the legislation. In order to avoid the *get* being declared invalid because of coercion, a husband must declare that he is giving the *get* of his own free will and not because he has been coerced to do so by the legislation or any other factor. Similarly, a wife must waive any remedies she might be entitled to under the Act if the husband does not deliver the *get*. At this point, a small number of husbands do say they have felt coerced by the legislation. In this case, the *Beit Din* refuses to proceed with supervising the *get.* In practice, this happens very rarely. [93] The religious courts have also become a more congenial place for

[92] Rav Y. E. Henkin held in *Eidut Leyisrael* 46 that "one who withholds a get because of unjust monetary demands is a thief" and compared such behavior to murder. See, C. Jachter, *Gray Matter: Discourses in Contemporary Halacha* Vol. 1 (Noble Book Press, 2001).

[93] N. Baumel Joseph, personal communication, March 9, 2006. Contrast this with the position taken by Agudah Israel, an American Orthodox group, in their amicus brief in the unsuccessful challenge to the constitutionality of the 1992 New York law in *Becher v. Becher*. They argued that the operation of the law made it impossible to accept a husband's word that he gave a *get* voluntarily:

"Having announced that he perceives a gun pointed at his head, Mr. Becher would have a hard time persuarding any *Beth din* that the gun has nothing to do with his decision to give a *get"*. Amicus Brief of Agundath Israel of America in *Mina Becher v. Yehuda*

women during this time. Proceedings are translated into English or French, rather than being conducted entirely in Yiddish, women are allowed to bring a companion, their congregational rabbi and lawyers if they deem it necessary. [94] This would suggest that this form of dialogue, about the appropriate mode of exercising men's power over the *get,* is working.

2_ Does the legislation encourage transformative dialogue in the Jewish Community?

The legislation has fostered dialogue between the *beit din* and *get* refusers about how patriarchal prerogatives embedded in Jewish law are used. Has the legislation fostered dialogue about revising the Jewish law framework that creates this power imbalance between spouses on divorce in the first place? In interviews, *Agunah* activists give the legislation mixed reviews. On the positive side, they say that its implementation has resolved 3/4 of outstanding cases, raised awareness and created social consensus around the issue. This in turn has placed pressure on religious authorities and has given rise to a number of creative strategies within the control of lay members of the community.

The dialogue which produced the legislation and resulted from it can be measured against the expansive conception of dialogue developed in part III. The *topics* of this dialogue can be understood broadly, to include both the intricacies of *halakhic* doctrine and also the practical impact that the deployment of gendered rights under Jewish family law has on women in the community. Debate explores both the possibilities for adopting

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Becher, New York Supreme Court Appellate Division, Docket No. 97-03205. See the judgment in *Becher v. Becher*, N. Y. L. J. March 18, 1997.
[94] Evelyn Brook, personal communication, March 9, 2006.

a novel interpretation of Talmudic principles on coercion and the development of concrete strategies for avoiding or remedying *get* abuse. Arguments commingle confessional dogma, statutory interpretation and generalizable liberal principles.

The *venues* for this dialogue are diverse and overlapping public spheres, ranging from institutional policymaking bodies to commercial relationships, voluntary associations, religious congregations and the internet. Women have sometimes simply gone around the *beit din* and sought to impose sanctions directly through community organizations. For example, synagogues and local and national Jewish federations have passed by-laws barring *get* refusers from participating in services and occupying positions of authority. The Coalition of Jewish Women for the Get has tracked these developments and published examples of by-law amendments to be used as models by other groups.[95] They have held a GET Education retreat to train activists from around the country in the law and in methods of advocacy.[96] Women in Canada (and in Jewish communities around the world) have used the internet and media to publicize cases of *get* refusal, to organize pickets outside the homes and places of work of these men and to organize boycotts against their businesses.[97] The Coalition of Jewish Women for the Get produced the documentary film, "Untying the Bonds… Jewish Divorce", which has had a dramatic educational impact on the Canadian Jewish community and collaborated with American and Israeli activists to form the International Coalition for Agunah Rights in

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[95] Coalition of Jewish Women for the Get, *What is Being Done in Our Community to Isolate Get Abusers?* (undated pamphlet on file with author).
[96] Brook 2002.
[97] D. Lipovenko, "The Ties that Continue to Bind" *The Globe And Mail*, Saturday January 28, 1989, page D2. Lipivenko went on to lead vigils against *get* refusers in Toronto in the mid-1980'. Canadian agunah activists have stopped using this strategy because of liability concerns and because the women at the centre of these pickets often found publicity about their situation embarrassing. Brook, supra .

1991. This coalition has appropriated Ta"Anit Esther, the fast day which preceeds the holiday of Purim, as a day of fasting and prayer on behalf of *agunot.* [98] Members of the coalition also maintain Jewish Divorce Helplines in Ontario, Quebec, Manitoba and Alberta to advise women and put them in touch with resources. [99]

The *durability* of this consensus is the subject of controversy. *Agunah* activists see the Act as now offering rabbinic authorities a means of avoiding community pressure to do something further about the state of Jewish law. The success of the legislation may have become a pretext for religious inaction on the remnant of cases that remain unresolved by the Act. Thus dialogue among rabbinical authorities may be stagnating on some fronts. While rabbinic commentators in other countries have been debating theoretically innovative strategies within Jewish law to solve the *agunah* problem, like expanding the power to grant annulments, encouraging pre-nuptial contracts[100] and reviving traditional remedies like excommunication, the Jewish authorities in Canada have channelled their creative energies to finding imaginative ways of using the Act. This lack of action is all the more significant because the cases that are not resolved by

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[98] Coalition of Jewish Women for the Get, *Added Meaning to Ta'Anit Esther*, (pamphlet, 1993 on file with the author). The day continues to be marked by *agunah* activists around the world and widely publicized in the Jewish press.
[99] This program is funded by Jewish federations and by the federal government through the Multiculturalism Programs of the Department of Canadian Heritage.
[100] The South African *Beit Din* approved conditional *gittin* for soldiers going to serve in the Angolan war in the 1970's and 1980's. The soldiers left a Power of Attorney with the Beit Din of Johannesburg instructing that if they were missing in action for two years or more, their wives could be given a get on their behalf. A. Harris, "Assisting the *Agunah* – the South African Experience" (1999) 21 *Justice* 32. It is unclear whether they were ever acted upon.

the operation of the Act tend to more horrendous than the cases which gave rise to calls for action on the *agunah* issue in the 1980's. [101]

The negotiated settlements suggested by rabbinical authorities are not always ideal either. Norma Baumel Joseph suggests that rabbis are not always aware of the practical economic and social realities of their proposals[102] The closed door nature and lack of published reasons in rabbinical courts impair the possibilities for constructive, informed dialogue. *Agunah* activists in Israel have begun their own informal reporting services[103] and participated in the making of a film, *Mekudeshet: Sentenced to Marriage,* which used hidden cameras to follow women and their advocates through the rabbinical courts. [104] The Jewish Orthodox Feminist Alliance in the US has published a survey comparing the practices of American *batei din*.[105] Baumel Joseph has called for improved record keeping in Canada as well.[106]

Dialogue about reforming Jewish law to end the plight of agunot employs a range of *forms of argument.* Agunah activists justify their claims in terms of in terms of moral

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[101] E. Brook, personal communication March 9, 2006.
[102] She describes a case in which the rabbis negotiated that the husband would deliver the *get* if the wife surrendered her share in the matrimonial home. The wife, however, needed the home to provide to care for the daughter of the marriage who was battling Leukemia and had been abandoned by her father upon receiving the diagnosis. Baumel Joseph, *supra* note 15 at 29.
[103] See, for example, the series, *Jewish Law Watch*, published bi-annually by the Center for Women in Jewish Law of the Schecter Institute of Jewish Studies, from 2000 onward. The goal of the project is "to encourage rabbinical courts to sue the halakhic tools which are at their disposal to free modern day-agunot."See also *The Law and its Decisors,* selected cases published by Yad L'Isha in collaboration with the Rackman Centre for the Advancement of the Status of Women at Bar Ilan University.
[104] A. Zuria, *Mekudeshet: Sentenced to Marriage* (Israel: 2005),. The film followed the work of female rabbinical court advocates working on behalf of women through the Max Morrison Legal Aid Center of Ohr Torah Stone.
[105] *Supra*, note 33.
[106] Baumel Joseph, *supra*, note 15.

equality rights, the subversion of civil policies of legal equality and the translation of get abuse as a form of distinctively Jewish domestic violence. They also, however, make arguments which fall entirely within the framework of Jewish jurisprudence and appeal to Jewish moral norms, such as the notion that this injustice brings shame upon the Jewish community in the eyes of outsiders. While these latter arguments might only be compelling to those who share an orthodox Jewish worldview, they have are an essential and powerful element in this debate.

The framing of the *get* law is such that it is the subject of an *overlapping concensus*. This shared objective was affirmed for different reasons internal to the diverse comprehensive doctrines of civil lawyers, Jewish feminists and religious authorities. It can be affirmed by Canadian lawyers as consistent with family law and Charter norms. It is affirmed by feminists as a recognition of women's disadvantage under Jewish law and an innovative attempt to redress it. It is acceptable to rabbinic authorities because it can be implemented in ways consistent with the norms of Talmudic law and suits heir interests in consolidaing their claims to jurisdiction in Jewish family law matters. Contrast this consensus with the rejection of the very possibility of an overlapping consensus on the role of the civil court expressed by some opponents of the New York legislation, who argue that coercion is invalid if it is imposed by the civil courts to achieve civil public policy objectives rather than specifically to enforce the order of a *beit din*. [107] It is clear that both the process leading up to the legislation and the changes in popular understanding of *agunah* issues occasioned by its implementation have dramatically expanded the frequency, modes and venues in which the impugned

[107] Breitowitz , *supra* note 36 at 4-5.

aspects of Jewish law are discussed and proposals for solutions are generated. The *get* legislation is an example of a transformative intervention in a minority religious practice which discriminates against women. It is carefully designed so that it can be used in ways that are consistent with Jewish legal norms for a valid divorce, but it has also supported continuing dialogue over the need for and nature of a more comprehensive solution within Jewish law. Perhaps most critically, it has involved rabbinic authorities in the process of drafting from its inception so that they felt comfortable with and invested in ensuring the success of the legislation. It has also created and maintained a model of engagement with leading Jewish women in reasoned debate over the need for egalitarian change.

It is neither a total solution nor a permanent one. The Canadian barriers to remarriage legislation was never intended to be a durable long term solution to the *agunah* problem. Nor was it expected that it would directly force religious authorities to revise their practices to treat men and women equally and it has not done so. It was however, meant to educate the Jewish community about the existence and scope of the *get* abuse problem, to create a moral consensus that something needed to be done by religious authorities, and to offer immediate freedom to some women being subjected to get-based extortion.[108] In this sense, it has been successful, in tandem with other strategies, in fostering transformative dialogue that has produced remedies which have freed many *agunot* , generated ideas that will help many Jewish women avoid becoming *agunot* in the future and it keeps the *agunah* issue on front burner of contemporary Jewish life.

[108] N. Baumel Joseph, personal communication March 9, 2006.