Current Jewish Questions
Solutions to the Agunah Problem

I. Summary of the Agunah Problem
(See previous class "Understanding the Agunah Problem" for additional sources)

Deut. 24:1-2 When a man takes a wife, and marries her, then it cometh to pass, if she find no favor in his eyes, because he hath found some unseemly thing in her, that he writes her a bill of divorce and gives it in her hand, and sends her out of his house, and she departs out of his house, and goes and becomes another man's wife	**דברים כד** (א) כִּי יִקַּח אִישׁ אִשָּׁה וּבְעָלָהּ וְהָיָה אִם לֹא תִמְצָא חֵן בְּעֵינָיו כִּי מָצָא בָהּ עֶרְוַת דָּבָר וְכָתַב לָהּ סֵפֶר כְּרִיתֻת וְנָתַן בְּיָדָהּ וְשִׁלְּחָהּ מִבֵּיתוֹ׃ (ב) וְיָצְאָה מִבֵּיתוֹ וְהָלְכָה וְהָיְתָה לְאִישׁ אַחֵר׃
Lev. 20:10 If a man commits adultery with his neighbor's wife. Then the man and the woman must be put to death.	**ויקרא כ:י** וְאִישׁ אֲשֶׁר יִנְאַף אֶת אֵשֶׁת אִישׁ אֲשֶׁר יִנְאַף אֶת אֵשֶׁת רֵעֵהוּ מוֹת יוּמַת הַנֹּאֵף וְהַנֹּאָפֶת׃

1. Husband must give wife get 2. Must do so willingly 3. Halakhically illegal coercion invalidates get.
Risk permitting married woman to another man violating capital biblical offense, creating *mamzerim*

Types of Agunot
1. Recalcitrant Husband
2. Missing husband / location unknown: e.g. MIA, lost at sea, 9/11. Willing, but unavailable
3. Diminished faculties: deaf mute, dementia, loses *halakhic* capacity to voluntarily give wife get.

Understanding Solutions
1. How does the solution work *halakhically* to free the woman without illegal coercion of a get?
2. What are the *limitations* – which problems does it not solve?
3. What are the *flaws* or deficiencies inherent in the proposed solution?

II. Types of Solutions

1. Retroactive Solutions – Hafka'at Kiddushin / Nullification of the Marriage
Through action in present, retroactively end the marriage such that she would never have been married.

1.1. Flaw in the Marriage Ceremony

B. Bava Batra 48b Amemar has laid down that if a woman consents to betroth herself under pressure of physical violence, the betrothal is valid. Mar son of R. Ashi, however, said: In the case of the woman the betrothal is certainly not valid; he treated the woman cavalierly and therefore the Rabbis treat him cavalierly and nullify his betrothal. Rabina said to R. Ashi: We can understand the Rabbis doing this if he betrothed her with money, but if he betrothed her by means of intercourse, how can they nullify the act? — He replied: The Rabbis declared his intercourse to be fornication.	**תלמוד בבלי בבא בתרא מח:ב** ואמר אמימר: תליוה וקדיש - קדושיו קדושין. מר בר רב אשי אמר: באשה ודאי קדושין לא הוו, הוא עשה שלא כהוגן, לפיכך עשו עמו שלא כהוגן ואפקעינהו רבנן לקידושיה מיניה. אמר ליה רבינא לרב אשי: תינח דקדיש בכספא, קדיש בביאה מאי איכא למימר? אמר ליה: שויוה רבנן לבעילתו בעילת זנות.

1.2. Limitations

It would appear from the responsa of Rabbi Moshe Feinstein that four conditions must be met in order to declare a marriage invalid for having arisen in error.

1. The heretofore-unknown blemish must have existed already at the time of marriage.

2. The unknown factor only came to the other party's attention after the marriage had already taken place.

3. The previously unknown factor affects the essence of the marital bond (such as impotence), or is a major defect that makes it impossible to live with the affected partner (such as mental deficiency)

4. The unknown factor is a matter that would seriously vex most people and deter them from marrying the affected partner had they known about the matter from the outset. (Riskin 2002:7)

(RJY – Note: these options do not preclude the possibility of invalidating the marriage due to invalidating the witnesses)

1.3 Hafka'at Kiddushin – Deficiency in the Divorce Proceeding

M. Gittin 4:2 In former times a man was allowed to bring together a beth din wherever he was and cancel the get (which was sent by messenger to his wife). Rabban Gamaliel the Elder, however, laid down a rule that this should not be done, so as to prevent abuses (lit. "to repair the world").	**משנה גיטין ד:ב** בראשונה היה עושה בית דין במקום אחר ומבטלו התקין רבן גמליאל הזקן שלא יהו עושין כן מפני תקון העולם
B. Gittin 33a TO PREVENT ABUSES, What is referred to? — R. Johanan said: To prevent illegitimacy. Resh Lakish said: To prevent wife-desertion. 'R. Johanan said to prevent illegitimacy,' for he held with R. Nahman who said [that the Get could be cancelled] before [a Beth din of] two: [the proceedings] of two are not generally known, so she, not having heard and not knowing [that the Get is cancelled] might go and marry again, and bear illegitimate children. 'Resh Lakish said to prevent wife-desertion,' for he again held with R. Shesheth who said [that he has to cancel it] before [a Beth din of] three. The proceedings of three are generally known, so she hearing and knowing [that the Get was cancelled] would remain unmarried, and we have therefore to save her from being a deserted wife. [Hence the enactment of R. Gamaliel the Elder]	**תלמוד בבלי גיטין לג:א** מפני תיקון העולם. מאי מפני תיקון העולם? ר' יוחנן אמר: מפני תקנת ממזרים, ריש לקיש אמר: מפני תקנת עגונות. ר' יוחנן אמר מפני תקנת ממזרים, סבר לה כרב נחמן, דאמר: בפני שנים, ובי תרי לית להו קלא, והיא לא שמעה ולא ידעה ואזלה ומינסבא, ואיכא ממזרים; וריש לקיש אמר מפני תקנת עגונות, סבר לה כרב ששת, דאמר: בפני ג', ובי תלתא אית להו קלא, ושמעה וידעה ולא מינסבא, ותקנת עגונות הוא דאיכא.
Our Rabbis have taught: If [the husband] did cancel [the Get before a Beth din] it is cancelled [In spite of the regulation of Rabban Simeon b. Gamaliel]. This is the ruling of Rabbi. Rabban Simeon b. Gamaliel, however, says that he can neither cancel it nor add any additional conditions, since if so, what becomes of the authority of the Beth din? [The Beth din of Rabban Gamaliel which made the regulation] And is it possible then, that where a Get is according to the Written Law cancelled we should, to save the authority of the Beth din, [declare it valid and] so allow a married woman to marry another? — Yes. <u>When a man betroths a woman, he does so under the conditions laid down by the Rabbis, and in this case the Rabbis annul his betrothal</u>. Said Ravina to R. Ashi: This is quite right if the husband had originally betrothed his wife with money [Transforming retrospectively the money of the betrothal (cf. Kid. 2a) given to the woman at her first marriage into an ordinary gift. Since the hefker of money comes within the power of a legal tribunal the Beth din is thus fully empowered to cancel the original betrothal, and the divorcee assumes, in consequence, the status of an unmarried woman who is permitted to marry any stranger]. But if he had betrothed her by the act of marriage, what can we say? — The Rabbis declared the act of marriage to be	ת"ר: בטלו - מבוטל, דברי רבי; רשב"ג אומר: אינו יכול לא לבטלו ולא להוסיף על תנאו, שא"כ, מה כח ב"ד יפה. ומי איכא מידי דמדאורייתא בטל גיטא, ומשום מה כח ב"ד יפה שרינן אשת איש לעלמא? אין, <u>כל דמקדש אדעתא דרבנן מקדש, ואפקעינהו רבנן לקידושין מיניה</u>. אמר ליה רבינא לרב אשי: תינח דקדיש בכספא, קדיש בביאה מאי איכא למימר? שויוה רבנן לבעילתו בעילת זנות.

retrospectively nonmarital. [From the moment a divorce is annulled in such a manner, the cohabitation, it was ordained, must assume retrospectively the character of mere intercourse, and since her original betrothal is thus invalidated the woman resumes the status of the unmarried and is free to marry whomsoever she desires.]	
B. Gittin 73a Are we to understand from this that the gift of a sick person who passes from one illness to another [and dies] is valid? — Yes, since R. Eleazar has said in the name of Rav, The gift of a sick person who passes from one illness into another is valid. Rabbah and Raba did not concur in this opinion of R. Huna, as they were afraid it might lead people to think that a Get could be given after death. But is it possible that where a Get is invalid according to the Torah [Because the condition that he should die is not fulfilled] we should, for fear [of misleading people], declare it effective for making a married woman marriageable? — Yes; whoever betroths a woman does so on the conditions laid down by the Rabbis, and the Rabbis have nullified the betrothal of such a one. Said Ravina to R. Ashi: This can well be where he betrothed by means of a money gift, but if he betrothed by means of intercourse what can we say? — He replied: The Rabbis declared his intercourse to be fornication.	**תלמוד בבלי גיטין עג:א** שמעת מינה: שכיב מרע שניתק מחולי לחולי - מתנתו מתנה! אין, דאמר רבי אלעזר משמיה דרב: שכיב מרע שניתק מחולי לחולי - מתנתו מתנה. רבה ורבא לא סבירא להו האי דרב הונא, גזירה שמא יאמרו יש גט לאחר מיתה. ומי איכא מידי, דמדאורייתא לא הוי גיטא, ומשום גזירה שרינן אשת איש לעלמא? אין, כל דמקדש אדעתא דרבנן מקדש, ואפקעינהו רבנן לקדושין מיניה. א"ל רבינא לרב אשי: תינח דקדיש בכספא, קדיש בביאה מאי איכא למימר? א"ל: שויוה רבנן לבעילתו בעילת זנות.

1.4. Argument for Contemporary Hafka'at Kiddushin – Rabbi Shlomo Riskin

It is my opinion that in difficult times like today, when many women are forced to live as agunot chained to their husbands, and recalcitrant husbands are taking advantage of their wives as well as abusing the halaka to hold up their wives for ransom and/or prevent them from marrying, there are certainly grounds to make use of the option of hafka'at kiddushin even without a get) but with an explicit enactment; this would release those women from their chains and from an almost certain life of sin. This is especially so when the problem of agunot causes such great human suffering and degradation of halaka. But this can only be done by a large gathering of the rabbis of Israel who must decide on the matter, so that many authorities share the burden of the decision, and the Torah not become like two Torahs. Much thought is needed in order to carefully define the circumstances in which hafka'a would be implemented, as well as to formulate the stipulation that would have to be added at the time of betrothal. My suggestion would be that the Chief Rabbinate in Jerusalem adopt an enactment stipulating that if a religious court orders a husband to divorce his wife, and he refuses to do so even after sanctions have been imposed upon him, then a special court should be stablished with the authority to cancel his marriage and free his wife to remarry. (Riskin 2002:29-30)

1.5 Rebuttal – Rabbi Jeremy Weider

To my mind, there are three serious substantive problems with this approach.

(1) Granting for the moment the premises of the above analysis, there is a large group of major Rishonim (Rashbam, Raban, Rashba, Re'ah) who adopt the second approach to these "retroactive" annulments. In the area of ishut there is a long established tendency to be stringent in all elements that touch upon the possibility of a married woman remarrying without a proper get, probably due both to the severity of the prohibition of *lo tin'af* to the potential for *mamzerut*…

(2) On a more fundamental level, even according to those Rishonim for whom the get is primary cosmetic, there is no precedent in halakhic literature for a retroactive annulment without a get. Rashi, whose position serves as the basis for R. Riskin's proposal, repeatedly states (no fewer than four times in the sugya on *Ketubot* 3a) that the mechanism for annulment is the dissolution of the original marriage by means of the get involved.

(3) Finally, it should be noted that even R. Riskin recognizes the importance of precedents when he acknowledges that according to the approach of Rashbam and his followers (the second approach), retroactive annulment cannot be used to solve our aguna problem. Those Rishonim assert that the rabbis merely *threatened* to annul the marriage

and therefore the husband chooses to let his get be valid. Such a threat obviously assumes that the rabbis have the power to annul a marriage without a get (if the husband chooses not to allow the get to be valid), for otherwise what kind of a threat would it be? The reason that no one would cite the position of Rashbam as support for hafka'a without a get, even though Rashbam must acknowledge the theoretical possibility, is that, according to Rashbam, *the rabbis never actually annulled a marriage retroactively* and hence there is no precedent for the future. Similarly, even according to Rashi and those who follow him, *the rabbis never actually annulled a marriage retroactively without a get*. [Emphasis original] (Weider, 2002:39-40)

2. Preemptive Solutions

2.1. Designating Divorce Agents at Wedding – Rabbi Louis Epstein 1930

We have applied ourselves to this problem, keeping in mind one objective, to invest the court with the power of granting a divorce to the wife without the consent and in the absence of the husband. We find that this is possible on the basis of existing halakhah. It may be achieved by the husband's making out an instrument at the time of the marriage authorizing the court to grant his wife a divorce in his absence and appointing the necessary agents and witnesses for this purpose.

This requires a brief and simple ceremony which must take place prior to the marriage. This instrument which is part of the Ketubah is made out by the rabbi filling in the names of the parties in the blank spaces left for that purpose. Then he summons the bride and the groom before him and before two witnesses and tells the groom the contents of the instrument and whether he agrees to it. If he does, the Rabbi tells him to put the ring on the bride's finger and pronounce the marriage formula, then to read the instrument in its English translation, then to sign it. Thereafter the Rabbi and the two witnesses attest to that instrument. This concluded, the marriage ceremony is gone through under the canopy and in the presence of the guests in the usual manner. That instrument must be kept by the wife, or special arrangement may be made that it be kept by the officiating rabbi. If at any time later the wife is deserted, she goes to the Beth Din named in the instrument and presents that document and the Beth Din cause the divorce to be given to her without consulting the husband, if the case merits such action. (Epstein, 1930:86-87)

2.1.1. Social Challenge: External Politics

It may be said that from preliminary conversations with leading Palestinian scholars, I am convinced that no serious objections will be raised by them to our theoretical treatment of the halakhah. Certain modifications of the instrument may be suggested, certain flaws may be picked in the arguments, but nothing that would seriously endanger the validity of the main thesis. This was either stated to me explicitly or was definitely implied by every rabbi with whom I discussed the subject.

But just as liberal as I found them on the theoretical side, so reluctant, fearful, suspicious, reactionary did I find them on the side of the practical application of our thesis. The more liberal among them simply show a disinclination to be the first on the list of those who seek reforms in Jewish law. They are afraid of their more conservative colleagues or opponents. But they indicate that when the movement is well on its way, they will join. One, who was suspicious that by my very coming to him I labeled him a "radical" said to me, "It is your good fortune that I am a man of calm temperament, or you would find yourself out of my house." Relying on the favorable temperament I stayed on and found him delightful company in halakaic discussion. But if I reverted back to my subject and asked him to tell me why he would not give his consent to my proposal, the calm temperament would flare up again with the exclamation: "Please say no more!" Another rabbi of great fame argued in the following line. "When America entered the war, it knew that with war would come widows and orphans and cripples. Yet in defense of country and national honor they took these things for granted. Our country and our honor is our Torah; why not take agunot for granted in our defense of the Torah?" (Epstein, 1930:88)

2.1.2. Social Challenge: Internal Conservative Judaism Politics

The Committee has been blamed for many things which the Rabbinical Assembly and not the Committee is responsible. It was not the Committee that brought our effort on behalf of the Agunah to an end; it was the Rabbinical Assembly. In connection with the war, the Committee formulated a *ketubah* clause to protect soldiers' wives should their husbands be reported missing in action. I should be ashamed to ask for a show of hands how many of our members employed this device proposed by the Committee (Epstein, 1948:168)

2.1.3. Halakhic Problem: Nullification of Agency

Rambam Divorce 6:5, 6:30 A woman is only divorced with a get sent through her husband's messenger or accepted by her own messenger until the get reaches her hand. A husband who sends a get to his wife is obligated to provide her monetary support and every condition of the marriage document until the get reaches her hand or the hand of her designated agent.	**רמב"ם גירושין ו הלכה ה, ל** ואין האשה מתגרשת בגט ששלח הבעל או שהביא לה שליח הבאה עד שיגיע גט לידה הבעל ששלח גט לאשתו הרי הוא חייב במזונותיה ובכל תנאי כתובה עד שיגיע הגט לידה או ליד שליח קבלה.
B. Gittin 33a Our Rabbis have taught: 'If a man said to ten persons, Write a Get for my wife, he can countermand the order to each of them separately. This is the ruling of Rabbi. Rabban Simeon b. Gamaliel, however, says that he can only countermand the order when they are together. What is the point at issue between them? — The point at issue is whether if part of an evidence has been nullified the whole of it is nullified.	**תלמוד בבלי גיטין לג:א** ת"ר: אמר לעשרה, כתבו גט לאשתי - יכול לבטל זה שלא בפני זה, דברי רבי; רשב"ג אומר: אינו יכול לבטל אלא זה בפני זה. במאי קמיפלגי? בעדות שבטלה מקצתה בטלה כולה קמיפלגי
Rambam Divorce 9:25 If a husband secludes himself with his wife after he tells them to write and sign a get and to give it to her, they should not write the get. And this is a logical inference since if a get which was given to her is invalidated if they seclude themselves together lest they have intercourse, it is logical that here they should not write the get, and if they wrote it and gave it to her after they were secluded it is not a get.	**רמב"ם גירושין ט הלכה כה** נתייחד עמה אחר שאמר להן לכתוב ולחתום וליתן לה הרי אלו לא יכתבו, וקל וחומר הדברים אם הגט שניתן לה לידה כשנתייחד עמה נפסל הגט שמא בעל קל וחומר לזה שלא נכתב, ואם כתבו ונתנו לה אחר שנתייחד עמה אינו גט.
Beit Yosef E.H. 149:7 And these words are confusing since this is not a logical inference at all for in one instance there is what to suspect of a remarriage (though cohabitation) but in Rambam's law there is no such concern. And furthermore, how can he rule explicitly that it is not a get since at best it is a general doubt from the doubts if they require a second get, <u>and certainly there is the concern if the husband made peace and nullified the agency of his messenger</u>. These are reasonable suspicions, but there is no basis to say that the get is nullified completely.	**בית יוסף אבן העזר קמט:ז** ודבריו תמוהין שאין זה קל וחומר של כלום דבשמעתין איכא למיחש לקידושין ובנדון שלו ליכא למיחש להכי ועוד היאך פסק בפירוש דאינו גט דהא בשמעתין ספוקי בעלמא מספקי להצריכה גט שני <u>ובודאי לשמא פייס וביטל השליחות הוא דאיכא למיחש להכי</u> אבל אין מקום לומר שיהא הגט בטל לגמרי

2.2. Designating Beit Din – The Leiberman Clause

2.2.1. Proceedings of the Rabbinical Assembly 1954 p. 67-68

And in solemn assent to their mutual responsibilities and love, the Bridegroom and Bride have declared: As evidence of our desire to enable each other to live in accordance with the Jewish law of marriage throughout our lifetime, we, the Bride and Bridegroom, attach our signatures to the Ketubah, <u>and hereby agree to recognize the Beth Din of the Rabbinical Assembly and the Jewish Theological Seminary of America, or its duly appointed representatives, as having authority</u> to counsel us in light of the Jewish Tradition which requires husband and wife to give each other complete love and devotion, <u>and to summon either party at the request of the other</u>, in order to enable the party so requesting to live in accordance with the standards of the Jewish law of marriage throughout

his or her lifetime. We authorize the Beth Din to impose such terms of compensation as it may see fit for failure to respond to its summons or to carry out its decision.

2.2.2. Alternate Text

http://www.galleryjudaica.com/articles/ConsLieberman.html

And both together agreed that if this marriage shall ever be dissolved under civil law, then either husband or wife may invoke the authority of the Beth Din of the Rabbinical Assembly and the Jewish Theological Seminary of America or its duly authorized representatives, to decide what action by either spouse is then appropriate under Jewish matrimonial law; and if either spouse shall fail to honor the demand of the other or to carry out the decision of the Beth Din or its representative, then the other spouse may invoke any and all remedies available in civil law and equity to enforce compliance with the Beth Din's decision and this solemn obligation.

2.2.3. Critique – Rabbi Jacob Agus: Mr. Chairman, I feel that this תקנה is very important. I speak for a certain section of the Rabbinical Assembly, which like Rabbi [William] Greenfield, has its doubt about this תקנה. We feel, nevertheless, it is a very great step forward. However, there is one sentence in this formulation which I believe should be brought forth to this convention for action, and that is the sentence calling for compensation. I have opposed it before, and I believe it will arouse the greatest amount of resentment when it is applied, and I do not believe it is essential to the body of the תקנה. I should, therefore like the Steering Committee to obtain the feeling of the members of this Rabbinical Assembly at this convention before it is applied. If this sentence is removed, I do not believe that anybody will object to the תקנה. (83)

2.2.4. Orthodox Opposition – Rabbi Norman Lamm 1959

The Orthodox opposition to this innovation is based mainly on two factors: The competence of the proposed Beth Din (religious court), and the halakhic validity of the amendment itself. The first matter is serious indeed. How can Orthodox Jews – or, for that matter any intellectually honest person – be expected to recognize the authority of an ecclesiastical court which denies (or, at the very least, seriously questions) the origin and hence the authenticity of the very Halakhah in whose name it presumes to speak and whose tenets it seeks to interpret? There are rules which guide us in choosing the officers of the law, just as there are rules for applying the law itself. Nevertheless, we shall in this essay restrict ourselves to the somewhat more impersonal and dispassionate second factor: the amendment proper…The leaders of Orthodoxy have stated unequivocally that the amendment is not halakhically valid. Unfortunately, no detailed refutation by a competent scholar has been published to date. This essay, without laying claim to scholarly thoroughness is an attempt to make good, in an elementary and popular manner, a debt that the Orthodox rabbinate owes to the American Jewish public. (Lamm, 1959:94)

The first clause, as stated, is the one in which husband and wife promise to enable each other to live according to Torah. Halakic considerations aside, this seems completely unnecessary and even somewhat amusing. What did the Conservative rabbinate expect to accomplish with this piece of piety, especially when it is no secret that most young couples, unfortunately, neither do nor expect to "conduct themselves all the days of their life in the way of Torah?" Will this clause ameliorate the situation in any perceptible way?...

But there is an even more serious objection than irrelevancy or ineffectiveness. If we accept the Conservative amendment, then this clause becomes an integral part of the Ketubah, the violation of which entails forfeiture of the rights of the Ketubah by the violating spouse. Thus, for instance, if a day after the wedding, the young bride, in her first culinary venture, should serve her husband a non-kosher dish, the husband would legally have the right, upon suing for divorce at some later date, to refuse to honor his financial obligations to his wife, as stipulated in the Ketubah, because she did not "enable" him to live in "the way of Torah." Considering the present low level of religious observance and living according to "the way of Torah," this clause actually threatens to deprive the woman of the rights granted to her by the traditional Ketbah. What we have here, therefore, is an absurdity - because, practically speaking, it negates the entire intention of the Ketubah, which is the protection of the woman. (Lamm, 1959:100-101)

The second clause is the one in which bride and bridegroom accept and recognize the authority of the Conservative Beth Din. Now for the clause to be binding and legally valid there must be some legal procedure by which that binding is effected, and by which bride and groom submit themselves to the authority of this Beth Din. If there is no special act of commitment, the whole clause is invalid, since if it is to be enforceable it must be more than mere promissory language; it requires legal, halakhic formulation which indicates clear intent to contract. The only possible act of legalization is through the kinyan of the grasping of the handkerchief which the marriage performer has the groom (and now the bride) engage in for the Ketubah proper. Thus, it might be argued, by virtue of this symbolic act of consent by which the groom accepts the financial terms of the Ketubah itself, he also accepts the authority of the Beth Din and its sole jurisdiction in all matters affecting the married life of this couple. But the mistake in this reasoning is obvious. You simply cannot perform a kinyan on a matter which is objectively insubstantial. "To recognize" is a mental process and is certainly no stronger than "to divide"; both are overly abstract, and therefore in both cases kmyan is ineffective even when performed. Since there was no acceptance of this Beth Din by this couple, the Beth Din can never exercise its authority over them at any later date. (Lamm, 1959:104)

Now there is a kid of contract which, by its very nature precludes this complete and undivided focusing of, commitment to, and reliance on the term of the contract to the exclusion of any and all outside factors. This contract is such that because of some element in it, it is improbable that there will be achieved the total psychological awareness of all the consequence of the matter. This element of unsureness or distraction is called "אסמכתא" (n. 18 From the root סמך which means "to rely upon" i.e. there is an external factor which stimulates unfounded overconfidence), a word which defies easy definition. A contract which partakes of the nature of asmakhta is deemed invalid, although there are prescribe ways of neutralizing or circumventing a state of asmakhta by reinforcing the psychological integrity of the contract. There are several kids of asmakhta, as well as several different definitions of this sometimes elusive legal concept. We shall mention the more important ones and, with them, test the validity of the Conservative third clause…

Certainly, therefore, our case is, on the same principle, invalid. Here bride and groom obligate themselves to pay, at the demand of the Beth Din, penalties of undetermined sum. And this is to be done only if they become involved in controversy, and if they summon each other to Beth Din, and if they fail to appear or if Beth Din finds against one of them. And then the amount of the fine is undetermined at present, when the young couple are preparing for the supreme moment of marriage. Complete awareness of and consent to a contract of an undetermined sum in an improbable situation is a virtual impossibility. Hence, kinyan under such conditions is a meaningless act. However, this would not in itself be a sufficiently valid point of criticism. Although a legal opinion of Maimonides is never to be treated lightly, in this case most other medieval authorities are in opposition to Maimonides… (Lamm, 1959:106-107)

There is general agreement that contracts providing for the payment of a fine or penalty upon non-compliance with a specific stated condition are subsumed under the category of asmakhta and are thus invalid (Lamm, 1959:108)

…The fulfillment of any contractual agreement fits into one of the three following categories… Those which depend only partly upon the obligating party. One illustration might be a game which is partly a matter of chance and partly a matter of skill. The talmudic case is where the first party appoints the second to buy wine for him at a low price, on condition that if he should fail to do so he must pay the first party the difference between the current and the lower price. Here the fulfillment of the condition is only partially in the hands of the obligating party; it is up to him to offer to buy the wine, but it is up to the wine-merchant to be willing to sell it to him. Either one can frustrate the transaction. In this case, the entire contract is invalid as asmakhta, and the second party is not required to pay the difference. The reason for this is the element of distraction resulting from overconfidence. The second party, relying completely on his capacity to buy, never really considers the possibility that the merchants may not sell to him. His mind is distracted from that possibility by his overconfidence in himself. It is possible that were he fully aware of all ramifications of the contract he would not obligate himself so readily. It is on the basis of this element of distraction, because of the dual nature of the terms, that the Halakhah considers the second party's

possible lack of consent under more favorable psychological conditions. This contract is therefore invalid because of asmakhta. If we now investigate the third clause of the Conservative addition to the Ketubah as to categorization, it is obvious that it belongs in the third group. The success or failure of a marriage is always contingent upon two independent wills - husband and wife. The very fact that in the case of this Conservative Ketubah the document is bilateral, and both bride and groom obligate themselves to each other by the same clause, makes it obvious that the entire matter is as much in the province of the one as of the other. The psychological pattern here is analogous to that of the wine contract. Both parties are distracted from the prosaic considerations of the uncontrollable element, the independent behavior of the spouse, by overconfidence in the controllable element - the bride's or groom's own personal desire to make a success of the marriage venture. From this point of view, too, then, the contract is invalid because of asmakhta. (112-113)

2.3. Designating Beit Din for Binding Arbitration The Halalkhic Prenup

2.3.1. Origins of The Prenup

http://theprenup.org/rabbinic.html

The Prenup was drafted by Rabbi Mordechai WIllig, Sgan Av Beth Din of the Beth Din of America, and a Rosh Yeshiva at the Rabbi Isaac Elchanan Theological Seminary of Yeshiva University, in consultation with halachic and legal experts. The concepts contained in The Prenup predate 1994, when it was introduced. In 1664, Rabbi Shmuel Ben David Moshe Halevi, the rabbi of Bamberg, Germany, published a compilation of Jewish legal forms called the Nachalas Shiva. One of the forms in that book is a version of the tana'im, a Jewish wedding document, with a provision that is very similar to The Prenup. In a footnote to that provision, the Nachalas Shiva cites some authorities who held that the provision dates back to the Takanos Shum, the authoritative communal enactments adopted in the early Middle Ages by the leaders of the German communities of Speyer, Worms and Mayence.

2.3.2. Text of the Halakhic Prenup

http://theprenup.org/pdf/Prenup_Standard.pdf

The parties, who intend to be married in the near future, hereby agree as follows:

I. Should a dispute arise between the parties after they are married, so that they do not live together as husband and wife, they agree to refer their marital dispute to the Beth Din of the United States of America, Inc. (currently located at 305 Seventh Ave., New York, NY 10001, tel. 212 807-9042, www.bethdin.org), acting as an arbitration panel, for a binding decision.

II. The decision of the Beth Din of America shall be fully enforceable in any court of competent jurisdiction.

III. The parties agree that the Beth Din of America has exclusive jurisdiction to decide all issues relating to a get (Jewish divorce) as well as any issues arising from this Agreement or the ketubah and tena'im (Jewish premarital agreements) entered into by the Husband-to-Be and the Wife-to-Be. Each of the parties agrees to appear in person before the Beth Din of America at the demand of the other party.

IV:C. The Beth Din of America may consider the respective responsibilities of either or both of the parties for the end of the marriage, as an additional, but not exclusive, factor in determining the distribution of marital property and maintenance, should such a determination be authorized by Section IV:A or Section IV:B

V. Failure of either party to perform his or her obligations under this Agreement shall make that party liable for all costs awarded by either the Beth Din of America or a court of competent jurisdiction, including reasonable attorney's fees, incurred by one side in order to obtain the other party's performance of the terms of this Agreement.

VI. The decision of the Beth Din of America shall be made in accordance with Jewish law (halakha) or Beth Din ordered settlement in accordance with the principles of Jewish law (peshara krova la-din), except as specifically provided otherwise in this Agreement. The parties waive their right to contest the jurisdiction or procedures of the Beth Din of America or the validity of this Agreement in any other rabbinical court or arbitration forum other than the Beth Din of America. The parties agree to abide by the published Rules and Procedures of the Beth Din of America (which are available at www.bethdin.org, or by calling the Beth Din of America) which are in effect at

the time of the arbitration. The Beth Din of America shall follow its rules and procedures, which shall govern this arbitration to the fullest extent permitted by law. Both parties obligate themselves to pay for the services of the Beth Din of America as directed by the Beth Din of America.

VII. The parties agree to appear in person before the Beth Din of America at the demand of the other party, and to cooperate with the adjudication of the Beth Din of America in every way and manner. In the event of the failure of either party to appear before the Beth Din of America upon reasonable notice, the Beth Din of America may issue its decision despite the defaulting party's failure to appear, and may impose costs and other penalties as legally permitted. Furthermore, Husband-to-Be acknowledges that he recites and accepts the following:

I hereby now (me'achshav), obligate myself to support my Wife-to-Be from the date that our domestic residence together shall cease for whatever reasons, at the rate of $150 per day (calculated as of the date of our marriage, adjusted annually by the Consumer Price Index–All Urban Consumers, as published by the US Department of Labor, Bureau of Labor Statistics) in lieu of my Jewish law obligation of support so long as the two of us remain married according to Jewish law, even if she has another source of income or earnings. Furthermore, I waive my halakhic rights to my wife's earnings for the period that she is entitled to the above stipulated sum, and I recite that I shall be deemed to have repeated this waiver at the time of our wedding. I acknowledge that I have now (me'achshav) effected the above obligation by means of a kinyan (formal Jewish transaction) in an esteemed (chashuv) Beth Din as prescribed by Jewish law. However, this support obligation shall terminate if Wife-to-Be refuses to appear upon due notice before the Beth Din of America or in the event that Wife-to-Be fails to abide by the decision or recommendation of the Beth Din of America. Furthermore, Wife-to-Be waives her right to collect any portion of this support obligation attributable to the period preceding the date of her reasonable attempt to provide written notification to Husband-to-Be that she intends to collect the above sum. Said written notification must include Wife-to-Be's notarized signature.

VIII. This Agreement may be signed in one or more duplicates, each one of which shall be considered an original.

IX. This Agreement constitutes a fully enforceable arbitration agreement. Should any provision of this Agreement be deemed unenforceable, all other surviving provisions shall still be deemed fully enforceable; each and every provision of this Agreement shall be severable from the other. As a matter of Jewish law, the parties agree that to effectuate this agreement in full form and purpose, they accept now (through the Jewish law mechanism of kim li) whatever minority views determined by the Beth Din of America are needed to effectuate the obligations contained in Section VII and the procedures and jurisdictional mandates found in Sections I, II, III and VI of this Agreement.

X. Each of the parties acknowledges that he or she has been given the opportunity prior to signing this Agreement to consult with his or her own rabbinic advisor and legal advisor. The obligations and conditions contained herein are executed according to all legal and halachic requirements.

2.3.3. Endorsement – Rabbinical Council of America

http://www.rabbis.org/news/article.cfm?id=101025

Jun 1, 1993 -- RESOLUTION: MATTER OF PRE-NUPTIAL AGREEMENTS & RECALCITRANT SPOUSES

I. WHEREAS it was clearly the desire of G-D that couples live together in peace and harmony, in love and devotion all of their lives, so that strong marriages could serve as the heart of a strong Jewish community; but

WHEREAS the Torah recognized that some marriages could not be sustained and therefore provided procedures for the termination of those marriages, so that husband and wife could then be freed to create new and stronger marriages; but

WHEREAS in some unfortunate instances husbands or wives, for reasons of spite or venality, refuse to cooperate with the appropriate instructions of a Beit Din regarding the termination of their marriages with a Get, thereby preventing the spouse from rebuilding family life.

II. THEREFORE, BE IT RESOLVED that every member of the Rabbinical Council of America will utilize Pre-Nuptial Agreements, which will aide in our community's efforts to guarantee that the Get will not be used as a negotiating tool in divorce procedures. We realize that there are several Pre-Nuptial agreements and many may raise halachic or legal difficulties. We, therefore, call upon the Executive Committee of the Rabbinical Council of

America to disseminate a list of approved Pre-Nuptial agreements with procedures of implementation to the chaverim. All pre-nuptial agreements are to be approved by the RCA Beit Din.

III. THEREFORE, BE IT RESOLVED that every member of the Rabbinical Council

of America will seek to have adopted in his Synagogue, either by Rabbinical Pesak

Halacha, or through adoption by the appropriate lay board, the following Synagogue policy in regard to the enforcement of Sh'tarei Siruv.

Resolved, that any person against whom there is an outstanding Shetar Siruv, issued by a Beit Din consisting of three Orthodox Rabbis, in regard to matters of issuance or receipt of a Get:

1. Shall not be permitted to occupy any elective or appointed position, or position as employee, within the Synagogue organization or within any of its affiliates.

2. Shall be excluded from membership in the Synagogue or in any of its affiliates.

3. Shall not be called to the Torah nor be given any other liturgical honor on any occasion.

Further, that such person who reside within our community:

4. Shall have his or her name announced on a regular monthly basis at the conclusion of Sabbath services.

5. Shall have his or her name published in the Synagogue bulletin with a call to the membership to limit their social and economic relations to such persons.

IV. The RCA in assembly supports the New York State Get Law as model law for all states around North America. The New York State has the approval of the RCA Rosh Beit Din (Chief of Rabbinical Council of America's Jewish Court), Rabbi Gedalia D. Schwartz.

2.3.4. Lieberman Clause vs. Halakhic Prenup

	Lieberman Clause	**Halakhic Prenup**
Year Introduced	1954	1994
Document	Integrated in the Ketuvah (marriage contract) itself	Independent document of binding arbitration
Beit Din / Jewish Court	"Beth Din of the Rabbinical Assembly and the Jewish Theological Seminary of America, or its duly appointed representatives"	"Beth Din of the United States of America"
Enforcement / Penalties	"We authorize the Beth Din to impose such terms of compensation as it may see fit for failure to respond to its summons or to carry out its decision"	"Failure of either party to perform his or her obligations under this Agreement shall make that party liable for all costs awarded by either the Beth Din of America or a court of competent jurisdiction, including reasonable attorney's fees, incurred by one side in order to obtain the other party's performance of the terms of this Agreement." "In the event of the failure of either party to appear before the Beth Din of America upon reasonable notice, the Beth Din of America may issue its decision despite the defaulting party's failure to appear, and may impose costs and other penalties as legally permitted"

2.3.5. Halakhic / Social Concern: Integrity of the Beit Din System

2.3.5.1. Rabbi Barry Freundel on Aharon Friedman / Tamar Epstein Case

"A Time for Clarification and Understanding" January 12, 2011 Washington Jewish Week
http://washingtonjewishweek.com/main.asp?SectionID=57&SubSectionID=79&ArticleID=14181

What started as an ugly divorce needing a get for final resolution has become much more. Public protests, rabbis publically arguing with Rabbis, New York Times article, viral coverage in other media, a harsh demand that the House Ways and Means committee (the husband's employer) get involved, a public presence of Jewish religious issues in the halls of Congress that makes many of our co-religionists- especially those who work there- very uncomfortable, and painful words exchanged between members of this community, sometimes even between those in the same family, as this issue is discussed and debated.

What happened? Why isn't this simple? The answer is because it is not the usual Agunah case even of the contemporary variety. Usually, in these cases, a husband is summoned to a court and refuses to comply. That leads to a siruv, and to what should be a virtually unanimous decision by the community to reject, protest and pressure the recalcitrant husband to give the get.

But that is not the case here. These two people were before a Bet Din in Baltimore, in fact they both signed that this court would adjudicate the issues between them including the get. For whatever reason after presenting the case but before a verdict, they both took some of these issues to secular court (a violation of Jewish law), and those issues were decided in that tribunal. However the get was not and could not be adjudicated in that forum.

At this time the Baltimore Bet Din is willing to continue the case, or by mutual agreement of the parties, allow it to go to another Bet Din. One or the other of the parties has not yet accepted these possible solutions that might well move the process forward to a conclusion.

2.3.5.2. Seruv from the Union of Orthodox Rabbis of the United States and Canada

http://getora.org/Seiruvim/Aharon%20Friedman%20seruv.pdf

DECLARATION OF CONTEMPT
(translation from original)

On the 26th of Sivan 5771 (28 June 2011) the Beth Din of the Union of Orthodox Rabbis of the United States and Canada issued a "Final Warning" to Mr. Aharon Friedman wherein the history of the matter between him and his wife Tamar Epstein was summarized and particular reference was made to his continued and repeated refusal to give her a get in accordance with Jewish law. He was requested to appear before the Beth Din for a final adjudication on the matter of his refusal as well as other matters but he refused to even respond to their request.

Several Gedolei Yisroel have spoken to him about this matter and he has previously received subpoenas to a Beth Din, letters, and other requests both formal and informal but to the dismay of the Beth Din he has ignored them all and turned a deaf ear to their pleas. The Beth Din is therefore left with no other alternative but to declare him in "Contempt of Beth Din" and to regard him as "One who does not heed Jewish law" – as such status is described in Shulchan Aruch etc. Any person who has the ability or opportunity to influence him to free Tamar Epstein from the chains of her agunah status is obligated to do so and doing so will indeed be the fulfillment of a great mitzvah. Tamar Epstein is hereby granted permission to take whatever appropriate steps are necessary to extricate herself from the chains of this agunah status. Accordingly we have affixed our signatures this 9th day of Elul 5771 (8 September 2011).

s/Rabbi Aryeh Ralbag
s/ Rabbi Yisroel Belsky
s/ Rabbi Mordechai Wolmark
s/ Rabbi Gavriel Stern
s/ Rabbi Shmuel Kamenetsky

The words of the revered rabbis, signatories above, do not need any further endorsement, and certainly the entire community should urge the husband to give his wife a Jewish divorce.

s/ Rabbi Hershel Schachter

2.3.5.4. Letter from the Vaad Harabannim of Greater Washington Inc. The Rabbinic Council
http://tinyurl.com/vaad100511
7 Tishrei 5772 (5 October 2011)

To the members of the Washington D.C. Jewish community:

Several months ago a very difficult situation involving the unfortunate breakdown of the marital relationship between Aharon Friedman and Tamar Epstein became public within our community. At that time, the Vaad, after careful and thorough consideration, determined that (i) the dispute was pending before the Baltimore Beis Din; (ii) that the Baltimore Beis Din had retained its jurisdiction over the matter; and (iii) that no seruv (order) had been issued declaring Mr. Friedman in breach of the orders of the Beis Din. Accordingly, we indicated at that time that the circumstances did not then warrant our declaring Ms. Epstein and agunah. Since that time there have been new developments, most notably the issuance of a seruv ("Servuv") against Mr. Friedman by the Beis Din of the Union of Orthodox Rabbis of the United States and Canada which now has jurisdiction over the matter.

2.3.5.5. Previous Endorsement of R. Herschel Schachter
(Translation which accompanied original letter)
To whom it may concern:

The Vilna Gaon in Bava Kama (74b) demonstrates from the Bavli and Yerushalmi that, even to be exempt from any obligations in Heaven, there is no concept of paying a penalty as long as there has not been a ruling form *beit din*. However, to prevent a husband from causing his wife to be an *agunah* – this matter does not require a ruling from *beit din*, and it is obvious that an instruction from a sage is sufficient.

Consider the writings of Rabbi Akiva Eiger on Orach Chaim Hilkhot Shabbat 399:4 in which he cites the responsa of the Shvut Yaakov, that even though we do not punish someone on Shabbat, and we cannot incarcerate someone on Shabbat, that refers specifically to a punishment from an earlier transgression. However, it is obvious that it is permissible to restrain him if he wants to flee and cause his wife to be an *agunah*, since this is the principle of enforcing the fulfillment of *mitzvot*. Consider [the case of] the *gemara* in Bava Kama (28a) regarding a slave whose master provides for him a Canaanite maidservant, that until now it is [sic] has been permissible, and now it is forbidden…[in which the *gemara* states that] one's actions become an extension of the *beit din*.

If the sage Rav Shmuel Kaminetsky instructed that it is proper to pressure the husband to divorce his wife, then this wise elder has issued his instruction, and one cannot question his instruction, because, if so, one has to judge every single beit din that has stood from the time of Moshe until now. It is a *mitzvah* to listen to the words of the Sages, because we uphold a fundamental principle in Jewish law and philosophy of believing in the Sages, since we always rely on them because, presumably, the sage received Divine assistance in issuing proper instruction. As the verse states, "The secrets of God are for those who fear Him," unless it becomes absolutely clear that he has erred.

I have written and signed in honor of the Sages of the Torah,

Herschel Schachter
Thursday, 16 Tevet 5771 (23 December 2010)

2.3.5.6. R. Herschel Schachter Interview on Batei Din

Originally in Ami Magazine, posted on Vos Iz Neias October 11, 2011
http://www.vosizneias.com/92931/2011/10/11/new-york-in-exclusive-ami-magzine-intreview-noted-rabbi-schachter-slams-set-up-of-rabbinical-court-system/

…

Q: Would you call then the problem in the bais din system a crisis?

A: It's worse than a crisis. They tell me that there is a prominent talmid chacham in Flatbush who tells his baalei battim to go to a secular court because they stand a better chance of yoshor [justice] in a goyishe [non-Jewish] court than in a din Torah. If you ask him, he'll deny it, but that's what he tells people. Unfortunately, I think that the comment about yoshor is true.

…

Q: Do you have a problem with the borerim system [in which two of the dayanim are chosen by the litigants and the two dayanim choose a third]?

A: The borerim system is also a shanda. A lot of the borerim act like toanim. I was involved in a din Torah. The borer took shochad (bribes). I had to resign from the case. He felt insulted. It was before Rosh Hashanah, and he told me that he was not going to be mochel [forgive] me. I told him, "I don't need mechila. You took shochad. You're pasul to be a dayan."It says in Shulchan Aruch that you can't have one litigant pay his dayan and the other pay his dayan, unless, which Reb Moshe writes in a teshuva, it is clear that both are being paid the same amount, in which case each one can pay his dayan and they both pay the third. But that isn't what happens. They don't pay the same amount. The payment depends on how long each one bothers the dayan. So they don't pay the same amount and it is true shochad.

Q: You mean that they are not allowed to charge for the private sessions, as well?

A: Of course not. That's shochad! They pay more money for the private sessions, and then the dayan, instead of talking like a dayan, talks like a toain. I was once involved in a din Torah. One of the dayanim was making up his mind: "This side is wealthier than the other, so let him pay." What way to talk is that? A din Torah of a penny has to be treated like a din Torah of a million dollars.

Q: Are you saying there is a problem with the dayanim?

A: Of course. Do you think that all of the dayanim are honest? Many are acting like toanim; many of the toanim are acting like criminals. They make up their minds in advance that their side has to win. I don't walk into a din Torah with the attitude that my side always has to win. If I think my side is wrong, I'll pasken against them. The Rosh in the beginning of Perek Zeh Borer says that people think that their dayan always has to side with them. He has to explore their position; that's true. But not to invent reasoning out of nowhere. Once we had a din Torah here. It was over real estate in California where they had invested a couple of million dollars. We asked them, "Do you want a din Torah, or would you rather have a peshara [compromise]?"We told them that a peshara is not a fifty-fifty split. It is whatever yoshor dictates. They agreed. The din of peshara in this case turned out to be one hundred percent in favor of one person. That was the peshara. They thanked us. They shook hands with us, shook hands with each other. That's the way it should be. Regrettably, dayanim today don't judge with yoshor.

Works Cited

Epstein, Louis M. "A Solution to the Agunah Problem." Proceedings of the Rabbinical Assembly (1930): 83-90.
Epstein, Louis M. "Statement and Resolutions Proposed by Rabbi Louis M. Epstein." Proceedings of the Rabbinical Assembly (1948): 167-174.
Lamm, Norman. "Recent Additions to the Ketubah: A Halakhic Critique." Tradition 2.1 (1959) 93-118
Riskin, Shlomo. "Kiddushin: Toward Solving the Aguna Problem in Our Time." Tradition 36.4 (2002): 1-36.
Weider, Jeremy. "Hafka'at Kiddushin: A Rebuttal." Tradition 36.4 (2002) 37-43