MAY SHE *GET* JUSTICE: HOW COERCIVE CONTROL STATUTES MITIGATE RELIGIOUS ABUSE IN CONTESTED JEWISH DIVORCES

GLOSSARY[1]

- *Agunah* (pl. *agunot*): a woman denied a *get*.
- *Beit din* or *bet din* (pl. *batei din*): a Jewish court that handles *halakhic* disputes.
- *Get* (pl. *gittin*): a divorce decree.
- *Halakha* (adj. *halakhic*): Jewish law.

INTRODUCTION

In September 2022, Michelle Hazani won full custody of her children after three years of legal proceedings against her abusive husband, Yaron.[2] Michelle was one of many women who have benefitted from a California statute[3] that creates a presumption against awarding custody to an abusive parent. However, Michelle's case was unusual in one respect: as evidence that Yaron abused Michelle and their four children,[4] Judge Iwasaki of the Superior Court of California pointed to Yaron's staunch refusal to grant Michelle a *get*, or a Jewish religious divorce.[5]

Michelle Hazani was an *agunah*—an observant Jewish woman[6] who is unable to obtain a religious divorce from her husband. These women remain, in their eyes and the eyes of their communities, functionally

1. Definitions are the author's own. *See also* JOYCE EISENBERG & ELLEN SCOLNIC, THE JPS DICTIONARY OF JEWISH WORDS (2001); IRVING A. BREITOWITZ, BETWEEN CIVIL AND RELIGIOUS LAW: THE PLIGHT OF THE *AGUNAH* IN AMERICAN SOCIETY 303–06 (1993).

2. Hazani v. Hazani, No. 19STFL10023, 2022 Cal. Super. LEXIS 87063 (Cal. Super. Ct. Feb. 7, 2022).

3. CAL. FAM. CODE § 3044(a), (c) (Deering 2023); *id.* at § 6320(c).

4. *Hazani*, 2022 Cal. Super. LEXIS 87063, at *2.

5. *Id.*

6. Men can also find themselves in this position. However, male *agunim* are, anecdotally, much less common, face fewer religious restrictions than female *agunot*, and enjoy a *halakhic* option to escape their marriages that is unavailable to their female counterparts. *See* Irving Breitowitz, *The Plight of the* Agunah*: A Study in* Halacha*, Contract, and the First Amendment*, 51 MD. L. REV. 312, 323–25 (1992); *see also* Jennifer Medina, *Unwilling to Allow His Wife a Divorce, He Marries Another*, N.Y. TIMES (Mar. 21, 2014), https://www.nytimes.com/2014/03/22/us/a-wedding-amid-cries-of-unfinished-business-from-a-marriage.html [https://perma.cc/8TEP-S2PE] (reporting on a man's modern use of the escape option to remarry while his wife remains an *agunah*). This Note discusses the more common and pressing scenario of female *agunot*, but its proposal would apply gender-neutrally.

married, even if they have obtained a civil divorce.[7] *Agunot* exist at the dysfunctional intersection of civil and religious legal systems that allow recalcitrant spouses to withhold religious divorces, often as a form of extortion or control,[8] with few repercussions.

Judge Iwasaki was the first American judge to penalize *get* refusal through an emerging type of domestic abuse statute that prohibits coercive and controlling behavior.[9] Inspired by Michelle and Judge Iwasaki, this Note argues that state-level coercive control statutes are a promising pathway to prevent *get* refusal and its harms. Part I outlines the problem and existing approaches in American law. Part II outlines the proposed coercive control statute. Part III addresses three areas of concern around the proposed statute. It argues that the statute approach (i) is better suited to the *agunah* problem than the currently popular contract-centered solution, (ii) passes constitutional muster, and (iii) facilitates recognition of the issue's gravity in *agunot*'s legal and social communities. Part IV briefly discusses the coercive control statute's *halakhic* status and discusses avenues for *halakhic* evolution that would aid *agunot*.

I. BACKGROUND

This Part explores the *agunah* problem and current approaches to remedying it. It first outlines the *agunah* problem's foundations in secular and religious law. It then outlines American law's existing remedies: prenuptial agreements and the New York Domestic Relations Law. Finally, it outlines the international community's legal remedy of choice: coercive control statutes.

A. The Agunah *Problem*

1. Religious Law and Divorce

Observant Jews[10] consider themselves bound by Jewish religious law, called *halakha* in Hebrew. Although today *halakha* exists only as a voluntary religious code, it was once the functional legal code of self-

7. BREITOWITZ, *supra* note 1, at 11–13.

8. Keshet Starr, *Scars of the Soul:* Get *Refusal and Spiritual Abuse in Orthodox Jewish Communities*, 31 NASHIM: J. JEWISH WOMEN'S STUDS. & GENDER ISSUES 37, 44–45 (2017) (describing how workers in *agunah*-aid organizations frequently encounter women who are forced to make concessions in their civil divorce to get a *get*).

9. Louis Keene, *California Ruling Deemed Step Forward for Jewish Women Stuck in Abusive Marriages*, FORWARD (Apr. 20, 2022), https://forward.com/news/500194/agunot-coercive-control-domestic-violence-ruling/ [https://perma.cc/9H2C-L5EB].

10. This Note uses "observant" to mean someone who considers themselves bound by *halakha* in some capacity that implicates the *agunah* problem.

governing Jewish communities.[11] As a result, it evolved to regulate both religious rituals and areas now in the purview of secular law, such as contract, tort, property, and family law.[12]

The law of marriage and divorce is one of the many areas *halakha* governs. When couples marry, the wife[13] receives a marriage document written in Aramaic called a *ketubah*.[14] The *ketubah* outlines her husband's responsibilities during their marriage and her right to alimony upon its end.[15] The marriage can then only be dissolved by legally valid death[16] or divorce.[17] To divorce, a husband must voluntarily commission and deliver a divorce decree called a *get*.[18] The wife must then voluntarily accept the *get*.[19] The *get* is a brief boilerplate document,[20] and a religious court's involvement is not required.[21]

2. Contested Divorces in Religious Law

The vital distinction between divorce in secular and religious law lies in the judiciary's role. *Halakha* views divorce as an act of private contracting premised on the spouses' consent.[22] This exists in stark contrast to the American legal system, where "both marriage and divorce are state-

11. Ginnine Fried, Comment, *The Collision of Church and State: A Primer to* Beth Din *Arbitration and the New York Secular Courts*, 31 FORDHAM URB. L.J. 633, 635–36 (2004) (detailing self-governing Jewish legal systems and their interaction with state powers).

12. *See* BREITOWITZ, *supra* note 1, at 304.

13. *Halakha* traditionally only imagines man-woman marriages. Jewish movements that perform gay marriage have interpreted *halakha* to avoid the *agunah* problem. *See infra* note 47.

14. *See* RONALD L. EISENBERG, THE JPS GUIDE TO JEWISH TRADITIONS 44–45 (2004). *See generally* Babylonian Talmud, Ketubot (dedicating a tractate of a foundational Jewish legal text to discussing the *ketubah*).

15. Linda S. Kahan, Note, *Jewish Divorce and Secular Courts: The Promise of* Avitzur, 73 GEO. L.J. 193, 197–98 (1984); BREITOWITZ, *supra* note 1, at 283–86.

16. Historically, the *agunah* problem arose when husbands died at war and wives lacked sufficient documentation to prove their deaths. *See, e.g.*, Babylonian Talmud, Shabbat 56a, *reprinted in* 2 KOREN TALMUD BAVLI: TRACTATE SHABBAT, PART ONE 267 (Shefa Found. ed., 2012) (claiming the biblical King David had his soldiers grant conditional divorces before leaving for war so their wives would not become *agunot* upon their deaths). The problem was acute in World War II and has resurfaced in Israel after the events of October 7, 2023. *See* Yuval Barnea, *Chief Rabbi David Lau Establishes Special Rabbinical Court to Support Agunot Affected by War*, JERUSALEM POST (Dec. 19, 2023, 9:44 AM), https://www.jpost.com/judaism/article-778598 [https://perma.cc/8V8Y-J9F8].

17. Kahan, *supra* note 15, at 199; BREITOWITZ, *supra* note 1, at 5.

18. Divorce proceedings derive from Deuteronomy 24, 1, which reads: "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 . . . ." Deuteronomy 24, 1. Later religious scholars dedicate an entire volume of a foundational text to divorce and its intricacies. *See generally* Babylonian Talmud, Gittin. For a quick overview of the *get* and its implications, see EISENBERG, *supra* note 14, at 67–68 (discussing the *get* generally).

19. BREITOWITZ, *supra* note 1, at 5–6, 10.

20. BREITOWITZ, *supra* note 1, at 6 (providing a translation of the *get*).

21. Kahan, *supra* note 15, at 199. While the process does not require outside actors, it typically involves some professional oversight to ensure legal validity. *See* BREITOWITZ, *supra* note 1, at 6.

22. Kahan, *supra* note 15, at 196–197.

conferred statuses."[23] *Halakha*'s strictly private view of divorce limits courts' powers to end a marriage without spousal consent.

Religious courts, limited by *halakha*'s demand for consent, cannot unilaterally dissolve a marriage;[24] they instead seek to secure the recalcitrant spouse's consent to divorce.[25] Without the power of the state behind them, religious courts cannot obtain that consent through legal penalties or acts that violate the law.[26] Further, absent specific grounds[27] that religious authorities have been hesitant to use against non-physical abuse,[28] a *get* secured by even non-criminal coercion or duress is invalid.[29]

As a result of these limitations, an *agunah* who married under traditional *halakhic* instruments (i.e., without a modern prenuptial agreement, discussed *infra* Section I.B.) has only one legal recourse: a religious court's contempt decree, called a *siruv*, that calls on a community to shun the recalcitrant spouse.[30] The contempt decree has been neutered both by the requirement for uniform communal participation and by modernity.[31] Some communities do not readily shame recalcitrant spouses.[32] Even if they do, the increased mobility within and decreased centralization of modern communities allows recalcitrant spouses to easily evade sanctions by simply joining another community.[33]

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23. Esther Rosenfeld, Note, *Jewish Divorce Law*, 1 U.C. DAVIS J. INT'L L. & POL'Y 135, 143 (1995).

24. BREITOWITZ, *supra* note 1, at 18, 40.

25. BREITOWITZ, *supra* note 1, at 44.

26. This has not stopped some people from trying to secure *gittin* through violence. *See* Jonathan Bandler & Steve Lieberman, *FBI Arrests N.Y. Rabbis in Jewish Divorce-Gang Probe*, USA TODAY (Oct. 10, 2013, 11:52 PM), https://www.usatoday.com/story/news/nation/2013/10/10/rabbis-fbi-divorce-sting/2959369/ [https://perma.cc/33A5-RL49].

27. BREITOWITZ, *supra* note 1, at 34–35; Babylonian Talmud, Ketubot 77a, *reprinted in* 17 KOREN TALMUD BAVLI: TRACTATE KETUBOT, PART TWO 73–76 (Shefa Found. ed., 2015).

28. Yuval Sinai & Benjamin Shmueli, *Changing the Current Policy Towards Spousal Abuse: A Proposal for a New Model Inspired by Jewish Law*, 32 HASTINGS INT'L & COMPAR. L. REV. 155, 218, 222–28 (2009) (discussing hesitancy to dissolve emotionally or psychologically abusive marriages).

29. *See* Breitowitz, *supra* note 6, at 359–361.

30. *See* Shulchan Aruch, Even HaEzer, 154:21, https://www.sefaria.org/Shulchan_Arukh%2C_Even_HaEzer.154.21 [https://perma.cc/QYC4-AUJ4] ("[T]hey can decree on any Jew to not do any kind deeds to him or do any business with him, to circumcise his sons or to bury them until he divorces (her)."); *see also* Michelle Greenberg-Kobrin, *Civil Enforceability of Religious Prenuptial Agreements*, 32 COLUM. J.L. & SOC. PROBS. 359, 368 (1999); Michelle Kariyeva, Note, *Chained Against Her Will: What a* Get *Means for Women Under Jewish Law*, 34 TOURO L. REV. 757, 763 n.47 (2018).

31. And, in some instances, creative legal challenges. *See* Channa Fischer, *Lawsuit Targeting Jewish Organizations in Agunah Case Dismissed*, JEWISH LINK (Feb. 15, 2024), https://jewishlink.news/lawsuit-targeting-jewish-organizations-in-agunah-case-dismissed/ [https://perma.cc/ERZ7-Q6KX] (reporting on a recalcitrant husband's Strategic Lawsuit Against Public Participation (SLAPP) lawsuit against a newspaper, rabbi, and organization that advocated for his wife).

32. *See* BREITOWITZ, *supra* note 1, at 18–19.

33. *See* Starr, *supra* note 8, at 45; *see also* ABRAHAM J. TWERSKI, THE SHAME BORNE IN SILENCE: SPOUSE ABUSE IN THE JEWISH COMMUNITY 117 (2d ed. 2017). *But see* Liana Satenstein, *How Orthodox Women Are Using Social Media to Liberate Each Other from Dead Marriages*, VOGUE (May

3. The Agunah

In the absence of effective intra-community aid, women whose husbands deny them religious divorces become *agunot*, trapped in their marriages.[34] The prototypical *agunah*'s husband withholds a *get* to extort a favorable civil divorce settlement or retain control over his wife.[35] Like other domestic violence survivors, *agunot* face tripartite social, emotional, and economic struggles from remaining tied to a spouse against their will.[36] Further, an *agunah* who begins a new relationship faces a religious penalty for committing adultery in the eyes of religious law—even if she has procured a civil divorce.[37] Any of her resulting children would be *mamzerim*, a legally stigmatized *halakhic* category of children born from sexually immoral or criminal relationships.[38]

Estimates of the *agunah* problem's prevalence vary wildly due to a lack of sound data collection,[39] different definitions of *agunot*,[40] and a sense of shame or privacy that prevents women from coming forward.[41] One high-end estimate asserts there are 150,000 *agunot* in New York State alone.[42]

5, 2021), https://www.vogue.com/article/agunah-get-refusal-social-media-campaign-orthodox-women [https://perma.cc/YX32-3EZM] (describing how Orthodox women use social media to shame on a wider scale); Michael A. Helfand, *Social Media Is a Powerful Tool to Lobby for Jewish Divorce. A Court Nearly Took It Away*, FORWARD (Sept. 15, 2023), https://forward.com/opinion/561111/social-media-jewish-divorce-agunah/ [https://perma.cc/U26X-QND4] (reporting on a New Jersey appellate court's holding protecting an *agunah*'s First Amendment rights to use social media to pressure her husband).

34. *See supra* note 7 and accompanying text.

35. *See, e.g.*, Beverly Horsburgh, *Lifting the Veil of Secrecy: Domestic Violence in the Jewish Community*, 18 HARV. WOMEN'S L.J. 171, 174 (1995) (describing one *agunah*'s situation); Georgia Dullea, *Orthodox Jewish Divorce: The Religious Dilemma*, N.Y. TIMES (July 5, 1982), https://www.nytimes.com/1982/07/05/style/orthodox-jewish-divorce-the-religious-dilemma.html [https://perma.cc/J7UV-VTCC] ("There are allegations that husbands are denying their wives religious divorce, sometimes out of spite, sometimes to coerce the wives to sign away rights to property, child support and maintenance in civil divorce actions. . . . [And sometimes to] extort[] money from the wife or from her parents in return for the get.").

36. *See infra* Section III.C. (discussing social and emotional stigma); Section III.A.iv. (discussing *agunot*'s typical economic positions and lack of communal aid).

37. BREITOWITZ, *supra* note 1, at 11.

38. BREITOWITZ, *supra* note 1, at 11–13, 12 n.35; *see also* David M. Cobin, *Jewish Divorce and the Recalcitrant Husband—Refusal to Give a* Get *as Intentional Infliction of Emotional Distress*, 4 J.L. & RELIGION 405, 409 (1986). In Israel, being a *mamzer* implicates paternity and inheritance issues. *See* Judah Ari Gross, *'Father Unknown': A Dread Biblical Status Leads to Modern Problems*, TIMES OF ISRAEL (Apr. 14, 2022, 11:01 AM), https://www.timesofisrael.com/father-unknown-a-dread-biblical-status-leads-to-modern-problems/ [https://perma.cc/HS6H-VK6R].

39. *See* Lisa Zornberg, *Beyond the Constitution: Is the New York* Get *Legislation Good Law?*, 15 PACE L. REV. 703, 717–20 (1995) (discussing issues associated with data collection and giving statistics from *agunah*-aid organizations); Starr, *supra* note 8, at 44 (discussing data-collection issues and studies conducted on *get* extortion in observant Israeli communities).

40. *See* Greenberg-Kobrin, *supra* note 30, at 362 n.17 (describing the definitional argument as whether an *agunah* is any woman denied a *get*, any woman who has appealed to a *beit din* for a *get*, or any woman whose husband is under a contempt order from a *beit din* for refusing to grant a *get*).

41. *See* Zornberg, *supra* note 39, at 718.

42. *See* Dullea, *supra* note 35.

Statistics aside, anecdotal evidence demonstrates these women's plight. *Agunot* exist both as open secrets in their communities[43] and in periodic news coverage.[44]

B. The Current Role of American Law

Traditionally, secular courts have no *halakhic* authority within religious divorces.[45] However, Judaism has, in the last seventy years, increasingly turned to secular courts while seeking a solution to the *agunah* problem.[46] Today, secular courts help *agunot* by enforcing secular legal instruments such as prenuptial agreements and statutes. This Section discusses these powers. It first outlines the rise of *halakhic* prenuptial agreements. It then outlines a New York state statute that stands alone as the only statutory attempt to remedy *get* refusal.

1. Contract Approach

To preemptively address *get* refusal, the Orthodox and Conservative[47] Jewish movements have adopted prenuptial agreements, commonly termed

43. *Id.*

44. *See, e.g.*, Keene, *supra* note 9 (Michelle Hazani); *see also* Allison Kaplan Sommer, *After Two Decades, America's Best-Known* Agunah *Is Still Fighting for Freedom*, HAARETZ (Sept. 14, 2022), https://www.haaretz.com/jewish/2022-09-14/ty-article/.premium/after-two-decades-americas-best-known-agunah-is-still-fighting-for-freedom/00000183-3c08-d414-adb3-bdad15d10000 [https://perma.cc/53V8-TRZZ]; Medina, *supra* note 6; Doree Lewak, *Orthodox Jewish Woman Finally Gets Her Divorce After 3 Years*, N.Y. POST (Feb. 5, 2014, 11:23 PM), https://nypost.com/2014/02/05/victory-orthodox-jewish-woman-finally-gets-her-divorce/ [https://perma.cc/K84Z-QFKR]; Sima Kotecha, Ellie Jacobs & Hazel Shearing, *'My Husband Refused a Divorce for Nine Years*,*'* BBC (Aug. 25, 2021), https://www.bbc.com/news/uk-58334745 [https://perma.cc/PC85-SMFC]; *Last Jew to Leave Afghanistan Divorces Wife After Refusing for Over 20 Years*, TIMES OF ISRAEL (Sept. 26, 2021, 6:54 PM), https://www.timesofisrael.com/last-jew-to-leave-afghanistan-divorces-wife-after-refusing-for-over-20-years/ [https://perma.cc/SDS7-LZSD]; Zornberg, *supra* note 39, at 718–20 (listing *agunot* stories).

45. *See* MICHAEL J. BROYDE, MARRIAGE, DIVORCE, AND THE ABANDONED WIFE IN JEWISH LAW: A CONCEPTUAL UNDERSTANDING OF THE AGUNAH PROBLEMS IN AMERICA 29–34 (2001); Fried, *supra* note 11, at 635–38, 643 (explaining the prohibition against using secular courts as courts of first resort, when not summoned, or when not enforcing a *beit din*'s arbitration settlement). *But see* David Novak, *Jewish Marriage and Civil Law: A Two-Way Street?*, 68 GEO. WASH. L. REV. 1059, 1061–63 (2000) (discussing areas where *halakha* integrates with secular law through the *halakhic* principle of *dina de-malkhuta dina*, "the law of the land is the law").

46. *See* J. David Bleich, *Jewish Divorce: Judicial Misconceptions and Possible Means of Civil Enforcement*, 16 CONN. L. REV. 201, 229–246 (1984) (discussing cases beginning in the 1950s where Jewish couples turned to secular courts); *see also* Mayer E. Rabinowitz, *The Joint Bet Din of the Conservative Movement*, *in* HAKOL KOL YAAKOV: THE JOEL ROTH JUBILEE VOLUME 265, 268 (Robert A. Harris & Jonathan S. Milgram eds., 2021) (detailing the 1953 addition of a civilly enforceable arbitration clause to the Conservative *ketubah*).

47. The Reform movement, America's largest Jewish movement, does not use *halakhic* prenups because it does not recognize the need for a *get*. *See NYP No. 5756.15*, CENT. CONF. OF AM. RABBIS, https://www.ccarnet.org/ccar-responsa/nyp-no-5756-15/ [https://perma.cc/6QD4-BFMK] (explaining

"*halakhic* prenups." *Halakhic* prenups take two forms: The Conservative movement inserts an additional clause—titled the Lieberman clause—into its *ketubah*,[48] while the Orthodox movement uses a separate document in the form of a civil contract.[49]

Both forms of prenups act as arbitration agreements that bind spouses to submit to a religious court.[50] Both create a monetary incentive to grant a *get* by fining a recalcitrant spouse.[51] However, the two movements formulate and frame the fine differently. The Conservative movement leaves the fine's amount open to a court's judgment.[52] The Orthodox movement, seeking to avoid claims of financial coercion,[53] reframes the fine as a continuation of the husband's *halakhic* financial maintenance duty and caps the amount to $150 per day.[54]

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that the Reform movement holds that only civil law governs divorce under the *halakhic* rule *dina demalkhuta dina*, "the law of the land is the law"). The Reconstructionist movement, a liberal outshoot of the Conservative movement, allows woman to deliver a *get* just as men traditionally do. *See* Horsburgh, *supra* note 35, at 202.

48. *See* Greenberg-Kobrin, *supra* note 30, at 375–76; *see also* 1 J. DAVID BLEICH, CONTEMPORARY HALAKHIC PROBLEMS 155 (1977) (describing the Conservative movement's approach and criticisms of it).

49. The standard Orthodox prenup is the Rabbinical Council of America (RCA) form. *See Signing the Prenup*, BETH DIN OF AM., https://theprenup.org/the-prenup-forms/ [https://perma.cc/9YNS-R97Q]; *see also* Susan Weiss, *Prenups Meant to Solve the Problem of the* Agunah*: Toward Compensation, Not "Mediation*,*"* 31 NASHIM: J. JEWISH WOMEN'S STUDS. & GENDER ISSUES 61, 64 (2017) (describing the RCA prenup).

50. *See* Avitzur v. Avitzur, 446 N.E.2d 136, 137 (N.Y. 1983) (enforcing the couple's Conservative *ketubah* that stated the couple "agree[s] to recognize the Beth Din of the Rabbinical Assembly and the Jewish Theological Seminary of America or its duly appointed representatives, as having authority to counsel us . . . and to summon either party at the request of the other, 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"), *cert. denied*, 646 U.S. 817 (1983); BETH DIN OF AM., BETH DIN OF AMERICA BINDING AGREEMENT § 1, at 1 (2018), https://res.cloudinary.com/orthodox-union/image/upload/v1718092624/prenup/forms%202024/Standard_Prenup_Rev_March_2024_3.pdf [https://perma.cc/S6L2-LQ3P] ("Should a dispute arise between the parties, so that they do not live together as husband and wife, they agree to submit to binding arbitration before the Beth Din of America . . . .").

51. *See Avitzur*, 446 N.E.2d at 137 (enforcing the couple's Conservative *ketubah* that stated: "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."); BETH DIN OF AM., *supra* note 50, § 3, at 1 ("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 . . . so long as the two of us remain married according to Jewish law . . . .").

52. BREITOWITZ, *supra* note 1, at 285–86.

53. *See* Greenberg-Kobrin, *supra* note 30, at 375 n.99, 391; *see also* BROYDE, *supra* note 45, at 66–68.

54. *See* BETH DIN OF AM., *supra* note 50, § 3, at 1–2.

2. Statutory Approach

In 1983, New York State enacted the country's only statutory remedy for *get* refusal.[55] The law was passed after widespread lobbying and careful drafting by Orthodox Jewish authorities to ensure its *halakhic* validity.[56] Lawmakers premised the statute's constitutional and *halakhic* validity on a "noninterventionist" theory of divorce: because a civil divorce is a grace conferred by the state, and because the state should not create inequities, a judge may validly choose not to grant a divorce when doing so would create inequities.[57] Such action, under this theory, is nonintervention rather than coercion or an unconstitutional establishment of religion. The statute therefore allows a judge to withhold a civil divorce until a plaintiff affirms they have "remove[d] all barriers to the defendant's remarriage."[58] The statute defines a barrier to remarriage as "any religious or conscientious restraint or inhibition . . . that is imposed on a party to a marriage, under the principles held by the clergyman or minister who has solemnized the marriage," which the plaintiff knows of and voluntarily creates or withholds.[59]

The 1983 law had a fatal flaw: it could only require the *plaintiff* to remove all barriers to remarriage. It did nothing for women whose defendant-husbands refused them a *get*. To remedy this, New York passed an amendment in 1992.[60] The amendment requires courts to "consider the effect of a barrier to remarriage" when determining alimony and the equitable division of assets.[61] Its underlying policy is to compensate and provide stability for an *agunah* who cannot regain a second income through remarriage.[62]

55. N.Y. DOM. REL. LAW § 253 (McKinney 2024); *see also* Jill Wexler, *Gotta Get a* Get*: Maryland and Florida Should Adopt* Get *Statutes*, 17 J.L. & POL'Y 735, 752 (2009).

56. *See* Zornberg, *supra* note 39, at 728 (describing the *halakhic* process as "trying to figure out a way of coercing without coercing and also a way of getting the state involved without getting the state involved").

57. *See* Bleich, *supra* note 46, at 281–82.

58. N.Y. DOM. REL. LAW § 253(3) (McKinney 2024). This is a "noninterventionist" approach designed on the principle that divorce is a "grace conferred by the state" and that the state can refrain from acting when doing so would create inequities. *See generally* Bleich, *supra* note 46, at 281–82.

59. N.Y. DOM. REL. LAW § 253(6) (McKinney 2024).

60. N.Y. DOM. REL. LAW § 236(5)(h), (6)(o) (McKinney 2024).

61. N.Y. DOM. REL. LAW § 236(h) (McKinney 2024).

62. *See* Zornberg, *supra* note 39, at 734.

C. Coercive Control: The International Approach Emerging in America

Historically, New York's noninterventionist approach has been the international norm. Canada[63] and the United Kingdom,[64] for example, enacted similar statutory schemes in the 1990s. However, both countries recently repealed those laws in favor of a new approach.[65] The new approach brings *get* refusal into the purview of domestic abuse laws—as in *Hazani*—by criminalizing "coercive control."[66]

The concept of coercive control stems from the work of sociologist Evan Stark, who recognized that a pattern of non-physical abuse marked by coercive and controlling behavior underlies many abusive relationships.[67] Today, the concept is an accepted sociological theory of domestic abuse.[68] Academic studies continue to quantify both its prevalence and the danger it poses to victims,[69] with one Department of Justice report finding that "partner control over the victim's daily activities" more than quintuples a domestic abuse victim's risk of being killed by their partner.[70]

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63. Divorce Act, R.S.C. 1985, c 3, § 21.1 (Can.) (requiring a removal of barriers affidavit and authorizing the court to strike the recalcitrant spouse's claims and defenses or impose adverse financial and property arrangements if the affidavit is not filed), *repealed by* Divorce Act Amendments of 2019, R.S.C. 1985, c 16, § 17 (Can.).

64. *See* Family Law Act 1996, c. 27, § 9(3) (UK) (requiring proof of religious divorce where parties were married under religions whose marriages were recognized under previous law), *repealed by* Children and Families Act 2014, c. 6, §§ 18(1), 139(4).

65. *See supra* notes 63–64. Indicating the repeal was not intended to void legislative concern for *agunot*, the United Kingdom's Home Office released statutory guidance explicitly recognizing the new law's anticipated application to *get* refusal. *See* HOME OFF., DOMESTIC ABUSE: DRAFT STATUTORY GUIDANCE FRAMEWORK 29–31 (2021).

66. *See* Divorce Act, R.S.C. 1985, c 3, §§ 16(3)(j), 16(4)(b) (Can.) (authorizing the court to consider coercive control when making custody arrangements); Domestic Abuse Act 2021, c. 17, § 1(3)(c) (UK) (defining domestic abuse to include "controlling or coercive behavior").

67. EVAN STARK, COERCIVE CONTROL: THE ENTRAPMENT OF WOMEN IN PERSONAL LIFE 203–05 (2007) (explaining the theory and analogizing the impact of continued psychological, economic, or spiritual control abused women face to wrongful imprisonment).

68. *See* Alexandra Michelle Ortiz, Note, *Invisible Bars: Adapting the Crime of False Imprisonment to Better Address Coercive Control and Domestic Violence in Tennessee*, 71 VAND. L. REV. 681, 687 (2018). For example, the National Domestic Violence Hotline defines domestic violence as "a pattern of behaviors used to gain or maintain power and control" that includes coercion and threats, intimidation, isolation, economic abuse, and emotional abuse. *See Power and Control*, NAT'L DOMESTIC VIOLENCE HOTLINE, https://www.thehotline.org/identify-abuse/power-and-control/ [https://perma.cc/9FBE-EVR2].

69. *See* STARK, *supra* note 67, at 276 ("Not only is coercive control the most common context in which women are abused, it is also the most dangerous."); DANIELLE MCLEOD, SAFELIVES, COERCIVE CONTROL: IMPACTS ON CHILDREN AND YOUNG PEOPLE IN THE FAMILY ENVIRONMENT 19 (Steve Flood ed., 2018) (citing studies in which coercive and controlling abuse predicted child homicide); Ortiz, *supra* note 68, at 690 (citing studies in which coercive and controlling behavior predicted partner homicide).

70. *See* ANDREW R. KLEIN, NAT'L INST. OF JUST., PRACTICAL IMPLICATIONS OF CURRENT DOMESTIC VIOLENCE RESEARCH: FOR LAW ENFORCEMENT, PROSECUTORS AND JUDGES 27 (2009).

The international community has increasingly criminalized coercive control. Australia,[71] Canada,[72] the United Kingdom,[73] and Ireland[74] have adopted coercive control statutes of their own. Additionally, forty-five European Union countries have signed the Istanbul Convention, which recognizes the coercive nature of domestic abuse.[75] Despite their international popularity, coercive control statutes have been slow to appear in American law. To date, few states have adopted the concept.[76]

II. PROPOSAL

This Note argues that the widespread adoption of state-level coercive control statutes will be a more effective and appropriate solution to *get* refusal than prenuptial agreements or the New York *get* law. Specifically, it proposes a model statute that would (1) define coercive control as domestic abuse, and (2) require a judge making a custody determination to consider a parent's coercive control that actually impairs a child's mental, emotional, or physical well-being. Because all fifty states and Washington, D.C., require family court judges to consider the effect of domestic abuse on child custody arrangements,[77] the statute's change is limited to (1) expanding the definition of domestic abuse, and (2) adding an actual harm requirement.

First, the statute would define coercive control. As an example of a statutory definition of coercive control, this Note reproduces Erin Sheley's

71. *Family Violence Act 2004* (Tas) pt 2 s 9 (Austl.) (prohibiting "a course of conduct" that the offender "knows, or ought to know, is likely to have the effect of unreasonably controlling or intimidating, or causing mental harm, apprehension or fear in, his or her spouse or partner"); *Domestic and Family Violence Protection Act 2012* (Qld) pt 2 div 2 s 8 (Austl.) (defining domestic violence to include a "coercive" "behaviour, or a pattern of behaviour"); *Crimes Act 1900* (NSW) pt 3 div 6A s 54D (Austl.) (defining abusive behavior to include a "course of conduct [intended] to coerce or control the other person"), *amended by Crimes Legislation Amendment (Coercive Control) Bill 2022* (NSW) sch 1 (Austl.).

72. Divorce Act, R.S.C. 1985, c 3, § 16(3)(j), (4)(b) (Can.) (defining family violence as including "a pattern of coercive and controlling behaviour in relation to a family member" and adding family violence to the "best interests" determination in custody cases).

73. Domestic Abuse Act 2021, c. 17, § 1(3)(c) (UK) (defining domestic abuse to include "controlling or coercive behaviour").

74. Domestic Violence Act 2018, § 39 (Act No. 6/2018) (Ir.), https://www.irishstatutebook.ie/eli/2018/act/6/section/39/enacted/en/html [https://perma.cc/8V6U-F3A6] (defining the offense of "knowingly and persistently" being "controlling or coercive" of a spouse, civil partner, or other intimate partner).

75. The Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence art. 3, *opened for signature* May 11, 2011, C.E.T.S. No. 210.

76. *See* ARK. CODE ANN. § 9-15-219 (2023); CAL. FAM. CODE § 6320(a), (c) (Deering 2023); CONN. GEN. STAT. § 46b-1(b) (2023); HAW. REV. STAT. ANN. § 586-1 (LexisNexis 2023); MISS. CODE ANN. § 93-21-125(1)(C) (2024).

77. Lisa A. Tucker, *Domestic Violence as a Factor in Child Custody Determinations: Considering Coercive Control*, 90 FORDHAM L. REV. 2673, 2679 (2022).

proposed criminal coercive control statute, designed to comply with due process.[78]

A person [engages in] coercive control when they:

a) Continuously engage in a coercive pattern of behavior over a substantial period of time with the intent to deprive another person of their autonomy to make decisions and engage in conduct to which they otherwise have the right; and

b) The two parties are spouses, intimate partners, or family members; and

c) The pattern of behavior causes or creates a risk of nontrivial economic, physical, mental, or emotional harm to the coerced party.[79]

The model statute below implements this definition of coercive control. To aid judges who are unfamiliar with the concept of coercive control, it follows the lead of a handful of American coercive control statutes and includes examples of relevant behavior or harms.[80]

In making custody determinations, the court shall consider a finding of a family member's coercive control that has caused actual harm to the child's emotional, mental, or physical well-being, including:

i) Controlling the child's movements, directly or indirectly, so as to isolate the child from friends, family, or education;

ii) Depriving the child, directly or indirectly, of reasonable hygiene or nutrition, including by controlling the other parent's financial means to provide those things; or

iii) Impairing a child's emotional, mental, or developmental well-being through a pattern of degrading, demeaning, or aggressive behavior.[81]

In full, the proposed statute would require a judge to consider whether a recalcitrant spouse's behavior meets the definition of coercive control and adjust custody based on the harm it causes to the child. This Note suggests a custody-based approach because it is both novel[82] and widely applicable

78. Erin Sheley, *Criminalizing Coercive Control Within the Limits of Due Process*, 70 DUKE L.J. 1321, 1387 (2021).

79. *Id.*

80. *See, e.g.*, HAW. REV. STAT. ANN. § 586-1 (West 2024).

81. This statutory language is the author's own.

82. Novel in the United States, but not abroad. *See supra* note 72 (incorporating coercive control into the best-interests-of-the-child custody determination in Canada).

to *agunot*. Due to a social and religious emphasis on childrearing in observant Jewish communities,[83] most *agunot* have children they and their husbands will seek custody of.[84] The specter of *get* extortion hangs over these custody battles.[85] Therefore, the law discourages *get* refusal by removing a considerable tool of control from a recalcitrant spouse.

Beyond its practical applicability, the statute affirms *agunot* and their children's experiences as survivors of domestic abuse. The custody provision recognizes that "coercive control by perpetrators/fathers dominates entire homes, creating overarching conditions of entrapment and constraint that affect children as well as mothers."[86] It can therefore be triggered whether the child is the direct or indirect victim of the coercive control. Even when an *agunah* is the direct victim of coercive control, her children may suffer indirectly by being weaponized as tools of control against their mother, being constrained to the same limited physical spaces as their mother, or being deprived of essential needs when a mother subject to financial control cannot provide for them.[87] The statute provides a pathway for courts to address this emotional, psychological, and economic control a recalcitrant spouse often holds over his wife and children.[88]

The proper role of secular law in aiding *agunot* is a matter of debate within Jewish communities. Some authors criticize secular solutions as imposing on religious freedom[89] or trampling on *halakha*'s historical

83. *See* Yisroel Dovid Klein, *"Be Fruitful and Multiply" – The Commandment to Raise Children*, CHABAD, https://www.chabad.org/theJewishWoman/article_cdo/aid/4623799/jewish/Be-Fruitful-and-Multiply-The-Commandment-to-Raise-Children.htm [https://perma.cc/EQ73-V5B8] (discussing the religious obligation to have children); *see also* Sarah Bronzite, *Don't Judge Us for Being Childless*, JEWISH CHRON. (July 14, 2016, 1:32 PM), https://www.chabad.org/theJewishWoman/article_cdo/aid/4623799/jewish/Be-Fruitful-and-Multiply-The-Commandment-to-Raise-Children.htm [https://perma.cc/V6DT-HWUN] (discussing social pressure to have children).

84. *See* Memorandum from the Mellman Grp., Inc. to Barbara Zakheim 5 (Oct. 10, 2011) [hereinafter Memorandum to Zakheim] (on file with the Berman Jewish Archive) ("Children are involved in most all of these divorce cases (86%), and *agunot* have an average of 2.20 children and a median of 2."); *see also* Bleich, *supra* note 46, at 202 ("[*Get*] refusal is usually motivated by feelings of animosity or by a desire to use the *get* as an extortionary tool to obtain financial or custodial concessions.").

85. *See* Starr, *supra* note 8, at 44 (outlining studies finding between one-third and one-half of divorcing Israeli women signed adverse settlements because of *get* extortion); *see also* Memorandum to Zakheim, *supra* note 84, at 3 (finding 30% of helping organizations encounter demands for custody and 40% encounter demands for financial payment).

86. EMMA KATZ, COERCIVE CONTROL IN CHILDREN'S AND MOTHERS' LIVES 78 (Claire Renzetti & Jeffrey L. Edleson eds., 2022).

87. *Id.* at 99–103.

88. *Id.*

89. Paul Finkelman, *A Bad Marriage: Jewish Divorce and the First Amendment*, 2 CARDOZO WOMEN'S L.J. 131, 135 (1995); *see also infra* Section III.B. (arguing the statute is constitutional under the First Amendment's Free Exercise Clause).

autonomy.[90] This proposal operates under a fundamentally different view, grounded in two major arguments. First, as Section I.A. discusses, the *agunah* problem in America is exacerbated by the interaction of secular and religious law.[91] This Note takes the position that secular law must have a role in correcting its own injustices. Second, as Part IV discusses, a shift toward accessible divorce does not require *halakha* to kowtow to external values; *halakha*'s historical acceptance of no-fault principles and its occasional willingness to defer to the "law of the land"[92] allows it to accept accessible divorce on its own terms.

III. ANALYSIS: SECULAR LEGAL IMPACT

This Part argues for the proposed coercive control law. Section A argues the law, if broadly adopted, would be better suited to the *agunah* problem than the currently popular contract approach. Section B argues the law is constitutional under the Free Exercise clause. Finally, Section C argues that the law will begin to address social and communal burdens on *agunot*.

A. Statutory vs. Contract Approach

This Section argues that a statute has four discrete benefits over the currently prevailing contract approach.[93] First, a statute provides more predictable enforcement in jurisdictions with little or no contract-based case law to standardize decisions. Second, a statute applies broadly and automatically rather than relying on case-by-case adoption. Third, a statute puts communities on notice of the law and can therefore act as a preemptive deterrent to *get* refusal. Fourth, a statute is a more easily accessible form of enforcement than contracts that rely on an *agunah*'s resources to enforce or her spouse's resources to recover.

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90. BROYDE, *supra* note 45, at 62 ("[T]he insistence that the Jewish tradition should simply fall in lockstep with the secular requirements of divorce, whatever they might be, would seem a profound abandonment of the historically autonomous conception of *halachah* . . . .").

91. *See also* Aryeh Klapper, *Systemic Misunderstanding Between Rabbinical Courts and Civil Courts: The Perspective of an American Rabbinical Court Judge*, *in* WOMEN'S RIGHTS AND RELIGIOUS LAW: DOMESTIC AND INTERNATIONAL PERSPECTIVES 202, 204–06 (Fareda Banda & Lisa Fishbayn Joffe eds., 2016) (arguing the *agunah* problem is a result of the interaction between religious and secular law).

92. For an explanation of how this sort of rule operates in marriage, see BROYDE, *supra* note 45, at 38. Reform Judaism already uses another rule under this principle to negate the *agunah* problem. *See supra* note 47.

93. Note that, while this Section points out contracts' flaws and an aspirational solution, contracts are an essential tool in the current legal landscape. This Section is not meant to discourage couples from using them.

1. Predictable Enforcement

The vast majority of published *agunot* cases come out of New York state courts.[94] Likely due to their large Jewish constituencies and relative familiarity with the *agunah* problem, New York state court judges generate favorable case law not seen in most other jurisdictions. New York courts have largely discounted the argument that ordering specific performance of an agreement to grant a *get* or arbitrate before a religious court is violative of the First Amendment's Free Exercise or Establishment Clauses.[95] To reach this conclusion, they focus on the *halakhic* prenup's form as a secular contract rather than its substance as a commitment to perform a religious act.[96] Under this reasoning, the court is "merely requir[ing] the [recalcitrant spouse] to do what he voluntarily agreed to do" rather than unconstitutionally compelling religious action.[97]

Similar cases and outside of New York are few and far between, and typically not favorable.[98] Illustrative of non-New York courts' reasoning is the Ohio case of *Steinberg v. Steinberg*,[99] which confronted and rejected facts analogous to the New York case *Rubin v. Rubin*.[100] In *Rubin*, a wife sought to enforce a settlement that awarded her alimony in exchange for her cooperation with religious divorce proceedings.[101] However, the wife failed

94. This is an anecdotal observation based on the sources cited within this Note and the author's own survey. For example, a search for ("Jewish divorce" AND "get") on Lexis+ returns a total of 108 state-level cases. Of those, fifty-one are in New York State courts. Thirteen are in Connecticut, eleven in New Jersey, and eight in Illinois—all jurisdictions with cases cited herein. All other states return fewer than five results.

95. *See* Ilene H. Barshay, *The Implications of the Constitution's Religion Clauses on New York Family Law*, 40 HOW. L.J. 205, 226 (1996). However, they still recognize limits to religious entanglement. *See* Pal v. Pal, 356 N.Y.S.2d 672, 673 (App. Div. 1974) (holding the court could not constitutionally select a rabbi to sit on the religious court that mediated the divorce).

96. *See, e.g.*, Avitzur v. Avitzur, 446 N.E.2d 136, 138–39 (N.Y. 1983) (holding the court could enforce the Conservative movement's Lieberman clause despite its context within a religious marriage document because its content approximates a secular arbitration agreement), *cert. denied*, 646 U.S. 817 (1983). This has longstanding support in New York precedent. *See* Kahan, *supra* note 15, at 211 (describing New York precedent as early as 1926 that enforced *ketubah* provisions).

97. Koeppel v. Koeppel, 138 N.Y.S.2d 366, 373 (Sup. Ct. 1954) (denying summary judgment against a motion to compel a *get* pursuant to a separation agreement); *see also* Waxstein v. Waxstein, 395 N.Y.S.2d 877, 879–80 (Sup. Ct. 1976) (requiring specific performance of a separation agreement that required a husband to grant a *get*), *aff'd*, 394 N.Y.S.2d 253 (App. Div. 1977).

98. *See, e.g.*, Price v. Price, 16 Pa. D. & C. 290, 291 (Ct. Com. Pl. 1932) (refusing to enforce an oral contract to comply with religious divorce proceedings on the grounds that "[t]he civil tribunals are certainly without authority to order one to follow his faith"); *see also* Bloch v. Bloch, 688 So. 2d 945, 947 (Fla. Dist. Ct. App. 1997) ("[T]he court lacks authority to order the former husband to participate in a religious ceremony . . . ."); Turner v. Turner, 192 So. 2d 787, 788 (Fla. Dist. Ct. App. 1966) (overturning a court order for a wife to accept a *get* because the court only had statutory authority to order civil divorces, not religious ones).

99. No. 44125, 1982 Ohio App. LEXIS 12314 (Ohio Ct. App. June 24, 1982).

100. 348 N.Y.S.2d 61 (Fam. Ct. 1973).

101. *Id.* at 63–64.

to meet the settlement's cooperation condition.[102] The New York judge enforced the condition by refusing to grant the recalcitrant wife relief until she accepted her *get*.[103] In *Steinberg*, an Ohio judge characterized the *Rubin* holding as indirectly inducing the wife to participate in a religious act.[104] This court held that enforcing a contractual "obligation relating to a religious practice," whether directly or indirectly, violated the Ohio state constitution's religion clause.[105]

Rubin and *Steinberg* demonstrate that enforcement of *halakhic* prenups is dependent on jurisdiction and judge. A single model statute, although still open to judicial discretion, lays the ground for more uniform and predictable application than the current contract approach. Few jurisdictions have favorable, if any, precedent to guide a judge who must interpret *halakhic* prenups.[106] Judges in jurisdictions without a catalog of favorable precedent or large Jewish constituencies seem more likely to raise constitutional objections to enforcing religious divorce agreements.[107] A statute would provide uniform guidance that these states lack.[108]

2. Widespread Adoption

The contract approach's unpredictable outcome problem is only implicated when couples sign a contract. This highlights another problem: the contract approach is limited by its reliance on case-by-case adoption. In accordance with calls from the Rabbinical Council of America, author of a popular Orthodox prenup, some rabbis condition their marriage services on a couple's signing of a *halakhic* prenup.[109] However, many other—or, by one approximation, most[110]—rabbis not only eschew prenuptial contracts but also may even discourage couples from signing them under the

102. *Id.* at 64.
103. *Id.* at 67.
104. *Steinberg*, 1982 Ohio App. LEXIS 12314, at *9.
105. *Id.* at *8.
106. *See supra* note 94.
107. *See, e.g.*, Wexler, *supra* note 55, at 754–60 (explaining how Maryland and Florida, states with relatively large Jewish populations, still failed to pass their own versions of the New York *get* law due to constitutional concerns).
108. *See id.* at 759 (asserting that Florida's proposed legislation would codify one court's decision "into legislation upon which courts throughout the state could rely"). The coercive control statute would also satisfy the heightened scrutiny some state constitutions, such as Ohio's, apply to issues of religious freedom and entanglement. *See infra* Section III.B.
109. Ben Sales, *Orthodox Rabbis' Group Mandates Prenup to Prevent 'Chained' Wives,* JEWISH TELEGRAPHIC AGENCY (Sept. 23, 2016, 5:48 PM), https://www.jta.org/2016/09/23/united-states/orthodox-rabbis-group-mandates-prenup-to-prevent-chained-wives [https://perma.cc/H6FR-U7RS] ("Among some 200 mostly American Orthodox rabbis surveyed earlier this year by the Jewish Orthodox Feminist Association, approximately 75 percent already require couples to sign the prenup before getting married.").
110. *See* Zornberg, *supra* note 39, at 769 ("[M]ost rabbis do not take this approach . . . .").

impression that preparing for possible divorce sows discord in an otherwise happy relationship.[111]

When couples do not sign a prenuptial agreement, *agunot* may argue that their unmodified *ketubot* constitute *halakhic* prenups. This "*ketubah* as a contract" theory requires judges to find that a *ketubah* is an enforceable civil contract, that its promise to marry "according to the laws of Moses and Israel"[112] requires the husband to grant a *get* upon civil divorce, and that ordering a husband to grant a *get* is constitutional.[113] Judicial actions are again unpredictable and jurisdictionally dependent. This theory has been adopted in New Jersey,[114] New York,[115] and Illinois.[116] It has been rejected in Arizona[117] and Connecticut.[118] While most states have not broached the "*ketubah* as a contract" question, this Note suggests that states have ample reason to reject it—leaving *agunot* who did not sign a prenup unprotected in the absence of statutory protections.

The first deficiency in the "*ketubah* as a contract" approach is a lack of evidence that, by effectuating a *ketubah*, the spouses intended to create a *get*-granting contract. The *ketubah*'s terms are not negotiated for at arm's length. While form contracts are certainly enforceable, couples often do not even know what a *ketubah* says. It is in Aramaic, a language that couples rarely understand, and translations are rare and often inaccurate to its legal terms.[119] Further, couples often view the *ketubah* as a religious ceremony, art, or tradition rather than an enforceable contract.[120] Courts that find a *ketubah* to be an enforceable contract therefore base their finding on equitable considerations rather than the parties' true intent.[121]

More lethal still, the *ketubah* contains no provision actually requiring a party to grant a *get*. The Arizona Court of Appeals outlined this deficiency

111. *See* Sales, *supra* note 109 ("Nearly 50 of the rabbis [25 percent], however, either don't require the prenup or actively discourage couples they are marrying from signing one.").

112. Kehot Publ'n Soc'y, *Text of Ketubah*, CHABAD.ORG, https://www.chabad.org/library/article_cdo/aid/532557/jewish/Ketubah.htm [https://perma.cc/9HCW-94U3].

113. *See, e.g.*, *In re* Marriage of Goldman, 554 N.E.2d 1016, 1021–22 (Ill. App. Ct. 1990) (discussing these issues), *appeal denied*, 555 N.E.2d 376 (Ill. 1990).

114. *See, e.g.*, Minkin v. Minkin, 434 A.2d 665, 666 (N.J. Super. Ct. Ch. Div. 1981); Burns v. Burns, 538 A.2d 438, 441 (N.J. Super. Ct. Ch. Div. 1987).

115. Breitowitz, *supra* note 6, at 333–34 (citing Stern v. Stern, 5 Fam. L. Rep. (BL) 2810 (N.Y. Sup. Ct. Aug. 7, 1979)).

116. *See, e.g.*, *In re Marriage of Goldman*, 554 N.E.2d 1016.

117. *See, e.g.*, Victor v. Victor, 866 P.2d 899 (Ariz. Ct. App. 1993).

118. *See, e.g.*, Tilsen v. Benson, 299 A.3d 1096 (Conn. 2023).

119. *See* Breitowitz, *supra* note 6, at 347.

120. *See* BREITOWITZ, *supra* note 1, at 84; *In re Marriage of Goldman*, 554 N.E.2d at 1020 (outlining a recalcitrant husband's arguments to this effect).

121. *See, e.g.*, *In re Marriage of Goldman*, 554 N.E.2d at 1019 (holding the *ketubah* is a contract because the wife relied on the husband's representations that he would grant her a *get*).

in *Victor v. Victor*,[122] which the Supreme Court of Connecticut has recently endorsed.[123] As the *Victor* court notes, the *ketubah* merely states the spouses will comply with the "laws of Moses and Israel."[124] The court held that to determine "the laws of Moses and Israel" requires a recalcitrant spouse to grant a *get* would require the court to "overstep [its] authority and assum[e] the role of a religious court."[125] If it were to do so, the court would discover that the "law of Moses and Israel" in fact does *not* generally require a recalcitrant husband to grant a *get*—this is one source of the *agunah* problem.[126]

In summary, the contract answer to the *agunah* problem relies on individual adoption, and, where couples do not adopt a contract, courts will only offer aid through the *ketubah* after a generous reading of the law and facts. Unlike individually adopted contracts, a state statute eschews opt-in mechanisms and provides a thought-out, standardized rule to all state residents. Statutes therefore promise to provide predictable and widespread protection that *agunot* lack under the current contractual regime.

3. Notice and Deterrence

Beyond their power to shape outcomes in the courtroom, statutes can prevent *agunot* from even needing to enter the courthouse. Statutes tend to put laypeople on notice of the law more frequently and easily than cases. This knowledge of the law can in turn act as a preemptive force and deter *get* refusal in the first instance.

Statutes provide better notice of the law to couples than the case-law-dependent contract approach. Statutes are easily accessible on state

122. *Victor*, 866 P.2d at 902 (holding, after reviewing New York and New Jersey precedent to the contrary, that a *ketubah* is not an enforceable prenuptial contract because reference to the "laws of Moses and Israel" is too vague to create any mutual understanding of specific obligation).

123. *See Tilsen*, 299 A.3d at 1114 (holding that enforcing the *ketubah* as a *get*-granting prenuptial agreement would violate the Establishment Clause because, to eliminate vagueness in "the laws of Moses and Israel," the court would need to determine what obligations exist under religious law (quoting *Victor*, 866 P.2d at 902 (internal quotation marks omitted))).

124. *See Victor*, 866 P.2d at 902.

125. *Id.* Similarly, the Supreme Court of Connecticut has found that the investigation necessary to read the *get* requirement into a *ketubah* would "require[] the court to partake in evaluation, investigation and interpretation of religious dogma." *Tilsen*, 299 A.3d at 1113 (internal quotation marks omitted) (quoting *In re Marriage of Goldman*, 554 N.E.2d at 1026 (Johnson, J., dissenting)).

126. *See supra* Section I.A.i (discussing the *ketubah* and divorce procedure); *supra* Section I.B.i (discussing a contractual approach to the *agunah* problem that amends the *ketubah* to require couples to grant a *get*, notable because this language is not present in the default document).

government websites[127] and their passage is often publicized in the news.[128] In contrast, cases may require specialized databases such as LexisNexis or Westlaw to find, if they are published at all, and their release is generally not widely publicized.[129] Further, the legislative process both allows and encourages community involvement, such as the New York community's lobbying for the *get* law,[130] which increases awareness of the law.

Notice of a law that complicates divorce for recalcitrant spouses has a preemptive effect, effecting change before a court ever needs to invoke it in litigation. In New York, attorneys and rabbis have found that recalcitrant spouses who understand the statutory hurdles they will face if they withhold a *get* during a civil divorce are more likely to grant a *get* simply to avoid the legal consequences.[131] Beyond the spouse's legal awareness, an attorney's legal awareness can further deter *get* refusal. Awareness of the *agunah* issue has caused some New York attorneys to refuse on ethical grounds to represent recalcitrant spouses, forcing these spouses to grant a *get* to receive legal services.[132]

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127. *State Legislature Websites*, CONGRESS.GOV, https://www.congress.gov/state-legislature-websites [https://perma.cc/4SQP-LZCA] (listing all fifty state legislatures' websites). State laws can be further circulated outside of official sources because the Supreme Court has held that state laws are not copyrightable. *See* Georgia v. Public.Resource.Org, Inc., 590 U.S. 255 (2020).

128. These announcements appear in a range of publications and can be tailored to readers' industry, politics, or locality, therefore reaching a broad audience. *See, e.g.*, Adeel Hassan, *New State Laws on Hot-Button Issues Take Effect Today*, N.Y. TIMES (Jan. 1, 2024), https://www.nytimes.com/2024/01/01/us/new-state-laws-2024.html [https://perma.cc/U5TY-78Q7]; Andrew Oxford, *A Slew of State Laws Take Effect in 2024 that Affect Businesses*, BLOOMBERG L. (Jan. 2, 2024, 4:02 AM), https://www.bloomberglaw.com/bloomberglawnews/in-housecounsel/X6P2U66O000000?bna_news_filter=in-house-counsel#jcite [https://perma.cc/CG5V-9SKP]; Meghan Smith, *New Laws Going into Effect in Missouri, Illinois on Jan. 1*, KFVS12 (Dec. 29, 2023, 9:49 AM), https://www.kfvs12.com/2023/12/28/new-laws-going-into-effect-missouri-illinois-residents-january-1st-2024/ [https://perma.cc/3F3E-BDXF]; *Notable New State Laws Effective July 1, 2024*, FAIRFAX CNTY. GOV'T NEWSCENTER (June 27, 2024), https://www.fairfaxcounty.gov/news/notable-new-state-laws-effective-july-1-2024 [https://perma.cc/F6DG-4FTH].

129. *Cf. Making the Law Computable: The Caselaw Access Project*, HARV. L. SCH. CTR. ON THE LEGAL PRO., https://clp.law.harvard.edu/knowledge-hub/magazine/issues/the-evolution-of-law-libraries/making-the-law-computable/ [https://perma.cc/XU6M-AREE] (explaining the U.S. caselaw's history of being haphazardly compiled by multiple, often paywalled, publishers). However, programs to improve access, such as the Caselaw Access Project, do not remedy all the barriers laypeople face when trying to understand caselaw. *See* Brian Sheppard, *Why Digitizing Harvard's Law Library May Not Improve Access to Justice*, BLOOMBERG L. (Nov. 12, 2015, 1:21 PM), https://news.bloomberglaw.com/business-and-practice/why-digitizing-harvards-law-library-may-not-improve-access-to-justice [https://perma.cc/5HQL-GR6G] (arguing that access to caselaw means little because non-experts struggle to understand how to search within, understand, and use caselaw).

130. *See* Zornberg, *supra* note 39, at 728–30 (describing how heavily involved Jewish communities and advocacy organizations were in the 1983 New York *get* law's passing).

131. *See id.* at 751–52, 761–62.

132. *See id.* at 751–52 n.226 (quoting a divorce attorney as saying "I think it's the attitude of the attorneys that really makes the law effective"); Aflalo v. Aflalo, 685 A.2d 523 (N.J. Super. Ct. Ch. Div. 1996) (ruling on a husband's divorce attorney's request to withdraw from the case because he objected to representing a recalcitrant husband). Awareness may also help *agunot* secure representation in related

4. Accessible Enforcement

A statute's notice and deterrence effect is vital to *agunot* who cannot or choose not to enforce prenuptial contracts. *Agunot* frequently face social and economic barriers to enforcing their prenups.[133] Rivka Haut, the director and founder of two *agunah*-aid organizations,[134] has observed that *agunot* avoid interactions with civil courts because they fear litigation will result in social ostracism and backlash.[135] Even those willing to brave social consequences often lack the financial resources to pursue litigation. In one survey of twenty *agunah*-aid organizations, 85% of the organizations reported that at least half of their clients could not afford a lawyer for civil litigation.[136] Despite their constituents' need, only 20% of those organizations provided financial assistance.[137] Finally, even if the *agunah*'s finances do not foreclose prenuptial enforcement, a recalcitrant spouse's financial means may; a contract's damages provision bears little weight when the recalcitrant spouse cannot pay. By situating its effects in the center of already commenced civil divorce proceedings, the coercive control statute provides a more accessible pathway to enforcement than contracts that require an *agunah* to have the bravery and financial resources to sustain litigation.

B. Coercive Control Statutes Are Constitutional

The First Amendment's dual religion clauses protect religious freedom by barring the state from "prohibiting the free exercise"[138] or "respecting an establishment"[139] of religion. The New York *get* law has been almost universally criticized as an unconstitutional violation of the Supreme Court's late-twentieth-century Religion Clauses jurisprudence.[140] Like that law, this proposal implicates the Religion Clauses by inserting the power of the state into a recalcitrant spouse's religious practice. However, this Section argues that the proposed coercive control statute is constitutional

litigation. *See* Fischer, *supra* note 31 (reporting on a husband's lawsuit and noting the *agunot* was represented by large law firm Gibson Dunn, which took the case pro bono).

133. *See* Zornberg, *supra* note 39, at 765–66.

134. *See id.* at 762 n.271.

135. *See id.* at 762.

136. *See* Memorandum to Zakheim, *supra* note 84, at 1, 3.

137. *See id.* at 3–4.

138. U.S. CONST. amend. I.

139. *Id.*

140. *See* Zornberg, *supra* note 39, at 706 n.22 (cataloging analyses finding the NY *get* law unconstitutional); Chambers v. Chambers, 471 N.Y.S.2d 958 (Sup. Ct. 1983) (theorizing the New York *get* law is an unconstitutional violation of the First and Fifth Amendments, but not holding as such).

because it is a valid restriction on the free exercise of religion that does not substantially implicate the Establishment Clause.

The coercive control statute does not substantially implicate the Establishment Clause. Following the Supreme Court's recent decision *Kennedy v. Bremerton School District*,[141] an Establishment Clause analysis looks to the "historical practices and understandings"[142] of prohibited establishments. The *Kennedy* Court's examples of the "foremost hallmarks"[143] of historical establishments suggest that the clause now prohibits only certain egregious cases,[144] such as a state-sponsored church.[145] No law of that type is at issue here. Rather than being an establishment of that type, the coercive control statute touches on a recalcitrant spouse's free exercise of their religion.[146] Therefore, the following constitutional analysis examines the statute's Free Exercise Clause implications.

1. Free Exercise Clause: Background

The Free Exercise Clause of the First Amendment states that Congress "shall make no law . . . prohibiting the free exercise" of religion.[147] Laws aimed at securing a *get* implicate the Free Exercise Clause because they

141. 597 U.S. 507 (2022).

142. *Id.* at 510 (internal quotation marks omitted) (quoting Town of Greece v. Galloway, 572 U.S. 565, 576 (2014)).

143. *Id.* at 537.

144. *See id.* at 537 n.5; *see also* Shurtleff v. City of Boston, 596 U.S. 243, 282–88 (2022) (Gorsuch, J., concurring) (listing "telling traits" of "founding-era religious establishments," such as the government controlling religious institutions, penalizing individual observance in favor of a state-sponsored religion, and delegating state functions to religious institutions); *see also* Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2144–46 (2003) (listing founding-era establishment laws). The theory the Court's originalists have espoused consider whether the state participates in direct legal coercion. *See* Lee v. Weisman, 505 U.S. 577, 640 (1992) (Scalia, J., dissenting) (endorsing an Establishment Clause that prohibits direct legal coercion "of religious orthodoxy and of financial support by force of law and threat of penalty" (emphasis omitted)); Am. Legion v. Am. Humanist Ass'n, 588 U.S. 29, 71 (2019) (Kavanaugh, J., concurring) ("And the cases together lead to an overarching set of principles: If the challenged government practice is not [legally] coercive and if it (i) is rooted in history and tradition; or (ii) treats religious people, organizations, speech, or activity equally to comparable secular people, organizations, speech, or activity; or (iii) represents a permissible legislative accommodation or exemption from a generally applicable law, then there ordinarily is no Establishment Clause violation." (emphasis omitted)).

145. *See Shurtleff*, 596 U.S. at 285–86.

146. *See* Michael W. McConnell, *Religious Participation in Public Programs: Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 160 (1992) (stating that, under this theory of the Establishment Clause, "indirect coercion . . . that merely makes noncompliance more difficult or expensive" is a Free Exercise Clause issue).

147. U.S. CONST. amend. I.

restrict a recalcitrant husband's ability to freely exercise his own religion by deciding whether to grant a religious divorce.[148]

The Supreme Court held in *Employment Division v. Smith* that a restriction on free exercise created by a neutral and generally applicable law does not give rise to a First Amendment claim.[149] A law is not neutral if it is "specifically directed at . . . religious practice,"[150] as shown by either its language or goal.[151] A law is not generally applicable if it "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way"[152] or if it provides a system of individualized exceptions.[153]

Smith's rule has three relevant exceptions: hybrid rights, state constitutions, and state-level Religious Freedom Restoration Acts (RFRAs).[154] First, courts may apply heightened scrutiny to "hybrid rights." Hybrid rights arise when the right to free exercise combines with a second fundamental right.[155] In custody cases considering the effects of a parent's religious beliefs on a child,[156] courts have found hybrid rights arising from the noncustodial parent's "fundamental right . . . to make decisions concerning the care, custody, and control of their children."[157] Second, courts may apply heightened scrutiny by analyzing cases under their state's

148. *See* Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 450 (1988) ("[I]ndirect coercion or penalties on the free exercise of religion, not just outright prohibitions, are subject to scrutiny under the First Amendment.").

149. Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 878 (1990).

150. *Id.* at 878; *see also* Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 525–26 (2022).

151. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533–34 (1993) (stating a law lacks neutrality if it "refers to a religious practice without a secular meaning discernable from the language or context" or "targets religious conduct for distinctive treatment").

152. Fulton v. City of Philadelphia, 593 U.S. 522, 534 (2021).

153. *Id.* at 533 (stating a law is not generally applicable if it "'invite[s]' the government to consider the particular reasons for a person's conduct" (quoting *Smith*, 494 U.S. at 884 (alteration in original))).

154. *See infra* notes 155–60.

155. *See Smith*, 494 U.S. at 881 (exempting from its rule cases involving "the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press"); *see also* Steven H. Aden & Lee J. Strang, *When a "Rule" Doesn't Rule: The Failure of the* Oregon Employment Division v. Smith *"Hybrid Rights Exception*,*"* 108 PENN STATE L. REV. 573, 580 (2003) (discussing the hybrid rights holding and resulting caselaw).

156. *See* Zummo v. Zummo, 574 A.2d 1130, 1138–40 (Pa. Super. Ct. 1990) (discussing *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and *Smith*, applying strict scrutiny, and finding a father's right to free exercise violated by a custody order stopping him from bringing his children to religious services); *In re* Marriage of McSoud, 131 P.3d 1208, 1214–17 (Colo. App. 2006) (same); Shepp v. Shepp, 906 A.2d 1165 (Pa. 2006) (applying hybrid rights analysis to the issue of whether a father could discuss his religious belief in illegal activity with his daughter); Bienenfeld v. Bennett-White, 605 A.2d 172, 180–83 (Md. Ct. Spec. App. 1992) (applying strict scrutiny and finding potential harm to the child sufficiently compelling to limit parent's free exercise).

157. Troxel v. Granville, 530 U.S. 57, 66 (2000); *see also Smith*, 494 U.S. at 881 (discussing the hybrid rights exception with parental rights in *Yoder*).

constitution if the state has no *Smith*-like precedent.[158] Third, and finally, courts may apply heightened scrutiny under state-level[159] versions of the federal Restoration of Religious Freedom Act (RFRA),[160] which reverses *Smith*'s loosened protections.

If a court invokes any of these exceptions, a coercive control statute that is neutral and generally applicable will nevertheless be subject to a higher degree of scrutiny.[161] The specific degree of scrutiny may vary.[162] This Note analyzes the issue under the strictest standard, strict scrutiny, and cites to cases that also apply strict scrutiny. To satisfy strict scrutiny, the statute must be narrowly tailored to achieve a compelling governmental interest.[163]

2. Free Exercise Clause: Application

The proposed coercive control law criminalizes coercive control and requires judges to consider evidence of a parent's criminal coercive and controlling behavior, including religiously framed behavior such as *get* refusal, in custody determinations. Properly drafted, the proposed statute is a valid restriction of a recalcitrant spouse's free exercise under both *Smith* and strict scrutiny.

A properly drafted coercive control law[164] is valid under *Smith.* The law is neutral because it would not be written or passed with the goal to target

158. *See, e.g.*, *In re* Marriage of Jensen-Branch, 899 P.2d 803, 808 (Wash. Ct. App. 1995); Coulee Cath. Schs. v. Lab. & Indus. Rev. Comm'n, 768 N.W.2d 868, 886 (Wis. 2009); Att'y Gen. v. Desilets, 636 N.E.2d 233, 235–36 (Mass. 1994); Swanner v. Anchorage Equal Rts. Comm'n, 874 P.2d 274, 281 (Alaska 1994); Hill-Murray Fed'n of Tchrs. v. Hill-Murray High Sch., 487 N.W.2d 857, 864–65 (Minn. 1992); *see also* Juliet Eilperin, *31 States Have Heightened Religious Freedom Protections*, WASH. POST (Mar. 1, 2014, 2:13 PM), https://www.washingtonpost.com/news/the-fix/wp/2014/03/01/where-in-the-u-s-are-there-heightened-protections-for-religious-freedom/ [https://perma.cc/8WWW-36UW].

159. *See Federal & State RFRA Map*, BECKET, https://www.becketlaw.org/research-central/rfra-info-central/map/ [https://perma.cc/5QL7-HYXX] (twenty-eight states with state-level RFRA statutes).

160. 42 U.S.C. § 2000bb-1 (2000); *see also* City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (invalidating the national RFRA statute as it applied to states).

161. *See* Michael E. Lechliter, Note, *The Free Exercise of Religion and Public Schools: The Implications of Hybrid Rights on the Religious Upbringing of Children*, 103 MICH. L. REV. 2209, 2213–14 (2005); *see also* Ariana S. Cooper, Note, *Free Exercise Claims in Custody Battles: Is Heightened Scrutiny Required Post*-Smith*?*, 108 COLUM. L. REV. 716 (2008).

162. On hybrid rights claims, courts typically either ignore the claim or impose strict scrutiny after the plaintiff passes some other standard. *See* Adam Schwartzbaum, Comment, *The* Niqab *in the Courtroom: Protecting Free Exercise of Religion in a Post*-Smith *World*, 159 U. PA. L. REV. 1533, 1550–54 (2011) (explaining circuit courts' approaches to hybrid rights claims). For examples of state constitutions that apply a stricter standard, see *supra* note 158. Twenty-three of twenty-eight state-level RFRAs now apply strict scrutiny. *See supra* note 159.

163. Ams. for Prosperity Found. v. Bonta, 594 U.S. 595, 607 (2021) ("Under strict scrutiny, the government must adopt 'the least restrictive means of achieving a compelling state interest' . . . ." (quoting McCullen v. Coakley, 573 U.S. 464, 478 (2014))).

164. In relevant part, the statute targets "a coercive pattern of behavior over a substantial period of time [done] with the intent to deprive [a spouse, intimate partner, or family member] of their autonomy

religious practice. Rather, its text is written to—and actually does—target the secular harm of domestic abuse. It only has "the incidental effect"[165] of restricting a religious practice when applied to cases like *get* refusal. The coercive control statute is generally applicable because it is written to apply equally to both religious and secular behavior with no system for individual exceptions. Because the statute is both neutral and generally applicable, it is a constitutional restriction of free exercise under the *Smith* rule.

If a court stops at the *Smith* analysis, a neutral and generally applicable coercive control statute is a constitutional restriction on the recalcitrant husband's free exercise.[166] However, a court may apply strict scrutiny under a hybrid rights analysis, state constitution, or state-level RFRA statute.[167] In these cases, a coercive control law must be narrowly tailored to achieve a compelling governmental interest. The rest of this Section explains why the coercive control law clears these hurdles.

The proposed coercive control law furthers a compelling governmental interest involving both mother and child. First, it aims to curb extortion against a mother whose children are used as a bargaining chip.[168] Second, it aims to curb harm to children—a harm the Supreme Court has long recognized[169]—from a parent's coercive and controlling behavior.[170] If a parent's coercive control is limited to refusing to grant the mother a *get*, children are likely to experience psychological harm by being collateral damage in the drawn-out, animosity-filled divorce proceedings that *get*

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to make decisions and engage in conduct to which they otherwise have the right" that "causes or creates a risk of nontrivial economic, physical, mental, or emotional harm." *See generally supra* notes 79, 81, and accompanying text.

165. Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 878 (1990).

166. *See, e.g.*, State *ex rel.* Hendrix v. Waters, 951 P.2d 317, 319–20 (Wash. Ct. App. 1998) (holding that the court could constitutionally limit a father's custody due to his religiously motivated illegal behavior under a *Smith* analysis).

167. *See supra* text accompanying note 154.

168. *See* Breitowitz, *supra* note 6, at 386 (asserting that preventing extortion is a compelling interest); *see also* Lawrence C. Marshall, Comment, *The Religion Clauses and Compelled Religious Divorces: A Study in Marital and Constitutional Separations*, 80 NW. U. L. REV. 204, 231 (1985) (same); Jordan C. Paul, Comment, *"You Get the House. I Get the Car. You Get the Kids. I Get Their Souls." The Impact of Spiritual Custody Awards on the Free Exercise Rights of Custodial Parents*, 138 U. PA. L. REV. 583, 593 (1989) (stating compelling interests are those "which either: (a) promote public health; (b) prevent physical harm; or (c) prevent acts which the state would classify as morally depraved").

169. *See* New York v. Ferber, 458 U.S. 747, 756–57 (1982) (stating the state has a "compelling" interest in "safeguarding the physical and psychological well-being of a minor" (quoting Globe Newspaper Co. v. Superior Ct., 457 U.S. 596, 607 (1982) (internal quotation marks omitted))); *see also* Palmore v. Sidoti, 466 U.S. 429, 433 (1984) ("The goal of granting custody based on the best interests of the child is indisputably a substantial governmental interest . . . ."); Prince v. Massachusetts, 321 U.S. 158, 166–67 (1944) ("The right to practice religion freely does not include liberty to expose . . . the child . . . to ill health or death." (citation omitted)).

170. *See* KATZ, *supra* note 86, at 78 ("A key point here is that coercive control by perpetrators/fathers dominates entire homes, creating overarching conditions of entrapment and constraint that affect children as well as mothers.").

refusal creates.[171] If a parent's coercive control extends beyond *get* refusal, children can be harmed either by being direct targets of abuse themselves or by suffering indirect harm through (1) experiencing the side-effects of their mother's abuse, (2) being used as weapons against their mother, or (3) living in an abusive household.[172] The state has a compelling interest in protecting both mother and child from these harms.[173]

In addition to furthering a compelling governmental interest, strict scrutiny requires that the court's use of the coercive control statute be narrowly tailored—i.e., "eliminate[] no more than the exact source of the 'evil' it seeks to remedy."[174] States handling issues of religious harm in custody determinations meet this requirement by restricting when a judge may consider the effects of a parent's religious actions on children's well-being.[175] Judges cannot compare types or the existence of religion, decide solely on religious grounds, or consider religion that does not bear on the child's well-being.[176] Beyond this, a state will apply one of three tests to restrict a judge's consideration of religion: best interests, threatened harm, or actual harm.[177] The least restrictive "best interests" test allows courts to consider a parent's religion when it bears on the child's ordinary well-being, even without a threat to mental or physical health.[178] The intermediate "threatened harm" test allows courts to consider a parent's religiously motivated behavior only when it has harmed or threatens to harm the child's mental or physical well-being.[179] The most restrictive "actual harm" test

171. *See* Benjamin Shmueli, *Commodifying Personal Rights and Trading the Right to Divorce: Damages for Refusal to Divorce and Equalizing the Women's Power to Bargain*, 22 UCLA WOMEN'S L.J. 39, 58 (2015) ("Needless to say, the children are a weak party negatively affected by *get* refusal [because] [t]hey are exposed to arguments and severe emotional distress, and often they are harmed financially by the situation.").

172. *See* KATZ, *supra* note 86, at 99–103 (explaining ways in which "the [surveyed] children were collateral damage in the perpetrator's/father's campaign of attack on the mother").

173. *See* Paul, *supra* note 168.

174. Frisby v. Schultz, 487 U.S. 474, 485 (1988) (quoting City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 808–10 (1984)).

175. *See* PRINCIPLES OF THE L. OF FAM. DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.12 cmt. d (AM. L. INST. 2002); *see also* Joanne Ross Wilder, *Religion and Best Interests in Custody Cases*, 18 J. AM. ACAD. MATRIM. LAWS. 211, 212 (2002) ("All custody decisions in the United States today purport to be based upon the best interests of the child.").

176. *See* Gary M. Miller, Note, *Balancing the Welfare of Children with the Rights of Parents:* Petersen v. Rogers *and the Role of Religion in Custody Disputes*, 73 N.C. L. REV. 1271, 1292 (1995).

177. Joshua S. Press, Essay, *The Uses and Abuses of Religion in Child Custody Cases: Parents Outside the Wall of Separation*, 84 IND. L.J. SUPPLEMENT 47, 49 (2009).

178. *See, e.g.*, Burnham v. Burnham, 304 N.W.2d 58, 61 (Neb. 1981) (stating best interests include "not only the spiritual and temporal welfare but also the minor's further training, education, morals, and the ability of the proposed guardian to best take care of the child"); *see also* UNIF. MARRIAGE & DIVORCE ACT § 402, 9A U.L.A. 53–54 (1974) (listing best interests considerations).

179. *See, e.g.*, *In re* Marriage of Hadeen, 619 P.2d 374, 382 (Wash. Ct. App. 1980) (requiring "a reasonable and substantial likelihood of immediate or future impairment" of the child's interests).

allows courts to consider a parent's religion only when it has actually harmed the child.[180]

This Note's coercive control law imposes an actual harm requirement because it argues the "best interests" and "threatened harm" tests are not sufficiently narrowly tailored to pass strict scrutiny. These tests suffer from twin deficits. First, the tests' vagueness allows judges to introduce their own judgments as to whether and what religion threatens the child's best interests.[181] This introduces an unacceptably large risk of unconstitutional judgments for or against particular religious observances. Second, the "best interests" and "threatened harm" tests exist in contrast to the more narrowly tailored "actual harm" test—a test that also effectively targets the harmful behavior at issue in this Note. Therefore, the proposed statute would require a showing of actual harm to pass constitutional muster.[182]

Unlike the "best interests" and "threatened harm" tests, a showing of actual harm precludes speculative judicial judgments and is the most narrowly tailored test available. One drawback of the actual harm standard is its inability to *prevent* harm where none has occurred yet. However, this restriction is consistent with both the proposed statute and existing legal recommendations. Because the proposed statute requires a judge to consider a finding of criminal coercive control that affects the child, the parent must have already caused actual harm to the child to trigger the statute's protections. Additionally, a showing of actual harm is consistent with the American Law Institute's heightened standard for considering religion in custody orders, which would only allow religion to be considered "to the minimum degree necessary to protect the child from severe and almost certain harm."[183] Consistent with these recommendations, the Supreme Court requires at least a showing of a "substantial threat" to the child to

180. *See, e.g.*, Quiner v. Quiner, 59 Cal. Rptr. 503, 516 (Ct. App. 1967) (requiring "actual impairment of physical, emotional and mental well-being contrary to the best interests of the child").

181. *See* Donald L. Beschle, *God Bless the Child?: The Use of Religion as a Factor in Child Custody and Adoption Proceedings*, 58 FORDHAM L. REV. 383, 397–99, 417 (1989) (explaining how courts can use the "best interests" test to impose impermissible social or moral judgments about religion); *see also* Eugene Volokh, *Parent-Child Speech and Child Custody Speech Restrictions*, 81 N.Y.U. L. REV. 631, 722–29 (2006) (listing eighty-six custody cases where courts favored religion over secularism); Press, *supra* note 177, at 56–57 ("[I]t is rare for a court applying a risk of harm analysis not to [impermissibly] delve into the benefits or detriments of a parent's unpopular or extreme religious practices.").

182. This should be combined with the least restrictive custody order available. *See* Osier v. Osier, 410 A.2d 1027, 1030 (Me. 1980) (stating a custody order considering religion should involve "the least possible infringement upon the parent's liberty interests consistent with the child's wellbeing").

183. PRINCIPLES OF THE L. OF FAM. DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.12(1)(c) (AM. L. INST. 2002).

regulate parental religious freedom,[184] and may—according to some authors' interpretations—require the higher "actual harm" standard.[185]

In summary, the coercive control statute as applied to *get* refusal implicates the recalcitrant spouse's right to free exercise because it restricts a recalcitrant spouse's ability to exercise his religion by not granting a religious divorce. Under the Supreme Court's standard in *Smith*, the law is a constitutional restriction on free exercise because it is both neutral and generally applicable. A court that employs strict scrutiny under a hybrid rights analysis, state constitution, or state-level RFRA statute will instead require the law to be narrowly tailored to reach compelling government interests.[186] A coercive control law that requires a showing of actual harm to adjust custody is narrowly tailored to further the compelling interests of preventing harm to both mother and child. Therefore, the proposed coercive control law is a constitutional restriction on the recalcitrant spouse's free exercise.

C. Coercive Control Statutes Create Social Benefits by Recognizing Abusive Relationships

Coercive control statutes risk being neutered by poor enforcement and disbelief of survivors. Reviews of outcomes in countries with longstanding coercive control statutes have found that coercive control statutes are rarely enforced.[187] However, these seemingly poor outcomes are partially explained by concomitant shortfalls in data collection and charging schemes that subordinate the coercive control offense to more familiar offenses.[188]

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184. *See* Wisconsin v. Yoder, 406 U.S. 205, 230 (1972) (stating that allowable regulation on parents' religious freedom has addressed a "substantial threat" to "the physical or mental health of the child or to the public safety, peace, order, or welfare").

185. Some writers argue that the actual harm standard is constitutionally required because the Supreme Court's decision in *Palmore v. Sidoti* should extend to religion cases. *See* Palmore v. Sidoti, 466 U.S. 429, 433 (1984) (holding, under the Equal Protection Clause, that custody determinations cannot consider the possibility of racial prejudice against a child due to their interracial parents); *see also* Jennifer Ann Drobac, Note, *For the Sake of the Children: Court Consideration of Religion in Child Custody Cases,* 50 STAN. L. REV. 1609, 1641 (1998) (arguing *Sidoti* applies to threatened harm from religion). *But see* Wilder, *supra* note 175, at 225 (arguing *Sidoti* only prohibits considering threatened religious *prejudice*, not all threatened harm from religion).

186. *See supra* notes 161–63 and accompanying text.

187. *See, e.g.*, Marilyn McMahon & Paul McGorrery, *Criminalising Emotional Abuse, Intimidation and Economic Abuse in the Context of Family Violence: The Tasmanian Experience*, 35 U. TASMANIA L. REV. 1, 11 (2016) (reviewing Tasmania's emotional abuse statutes and noting very few emotional abuse convictions, all with another form of domestic abuse co-charged); HOME OFF., REVIEW OF THE CONTROLLING OR COERCIVE BEHAVIOUR OFFENCE 22 (2021) (UK) (finding only 305 coercive control convictions in 2019, up from fifty-nine in 2015).

188. *See* McMahon & McGorrery, *supra* note 187, at 14–20 (discussing how Tasmanian offenses had too-short statutes of limitations and difficult-to-apply *mens rea*, did not expressly prohibit the acts they claimed to, and proscribed behavior that was typically charged under another statute); *see also*

With proper drafting and data collection, then, societal attitudes toward non-physical abuse pose the primary risk to coercive control statutes.

Lawyers', judges', and laypeople's attitudes toward nonphysical abuse currently discourage women from utilizing coercive control statutes.[189] Legal professionals are often unequipped to—or may refuse to—recognize long-term and non-physical abuse.[190] To overcome judicial disbelief, women must secure expert testimony from professionals who are both financially inaccessible and themselves unable to reliably recognize coercive control.[191] Finally, at the heart of this proposal, women's domestic abuse claims in custody cases wrongly subject them to the possibility of losing their children if judges believe they are simply being vindictive.[192]

This Note's proposed law lays a necessary groundwork for change. It first introduces the concept of coercive control to the law and creates a mechanism to punish it.[193] That mechanism puts the power and legitimacy of the state behind the condemnation of coercive control. Further, by asserting a moral judgment against coercive and controlling behavior, the law has potential to transform individual attitudes.[194] For example, laws delineating smoking areas have strongly stigmatized smoking by sending "a

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HOME OFF., *supra* note 187, at 16, 23 (discussing how initially lackluster numbers are partially attributable to changes in data collection, the time it takes cases to reach court, and an inability to use evidence from before the law's passage).

189. *Cf.* Wendy L. Patrick, *How Social Stigma Silences Domestic Violence Victims*, PSYCH. TODAY (Apr. 9, 2018), https://www.psychologytoday.com/us/blog/why-bad-looks-good/201804/how-social-stigma-silences-domestic-violence-victims [https://perma.cc/NTZ3-QYTL]; Christine E. Murray, Allison Crowe & Nicole M. Overstreet, *Sources and Components of Stigma Experienced by Survivors of Intimate Partner Violence*, 33 J. INTERPERSONAL VIOLENCE 515 (2018) (proposing a model of stigma in domestic violence that involves blame, discrimination, loss of social status, isolation, and shame).

190. *See* Tucker, *supra* note 77, at 2682 ("[M]any [family court judges] are undereducated about domestic violence in general and coercive control in particular."); Evan Stark & Marianne Hester, *Coercive Control: Update and Review*, 25 VIOLENCE AGAINST WOMEN 81, 84 (2019) (discussing how police respond poorly to ongoing abuse such as the patterns seen in classic coercive control cases).

191. *See* Tucker, *supra* note 77, at 2683; Glenda Lux, *The* Divorce Act *and Invisible Abuse: Coercive Control in Family Law*, LAWNOW, Sept/Oct/Nov 2021, at 41, 42 (recommending family lawyers carefully screen professional assessors for competence in recognizing coercive control because judges "have high levels of confidence in these often-unreliable opinions").

192. Joan S. Meier & Sean Dickson, *Mapping Gender: Shedding Empirical Light on Family Courts' Treatment of Cases Involving Abuse and Alienation*, 35 MINN. J.L. & INEQ. 311, 317 (2017) (describing "parental alienation syndrome," wherein a mother who alleges domestic violence in a custody dispute is assumed to be "a pathological or vengeful liar" who is teaching her children "to hate and fear their father"); Deborah Epstein & Lisa A. Goodman, *Discounting Women: Doubting Domestic Violence Survivors' Credibility and Dismissing Their Experiences*, 167 U. PA. L. REV. 399, 432 (2019) ("The judicial assumption that women falsely allege or exaggerate domestic violence in an effort to obtain custody runs so deep that family court judges appear to cling to it even in cases where they themselves determine that such a claim is untrue.").

193. *See supra* notes 79, 81, and accompanying text.

194. *See, e.g.*, Kenworthey Bilz & Janice Nadler, *Law, Moral Attitudes, and Behavioral Change*, *in* THE OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW 241 (Eyal Zamir & Doron Teichman eds., 2014).

message of banishment and ostracism to the smoker."[195] Law has been so successful influencing public attitudes in the smoking arena that some jurisdictions are now seeking to ban associated activities such as chewing tobacco or e-cigarettes that produce only water vapor, even though these activities do not pose the same public health threat that justified regulating smoking.[196] Coercive control statutes promise to change societal attitudes around coercive control by introducing a similar stigma via association with more familiar forms of domestic abuse.[197]

Spurring this social change will improve *agunot*'s interactions with the legal and their personal communities. Within the legal community, the domestic abuse framework places *get* refusal into a familiar and approachable arena so attorneys may understand its gravity. This encourages legal professionals to understand and address their clients' needs as abuse rather than dismiss *get* refusal as a personal religious dispute.[198] The same principle operates within *agunot*'s personal communities. For example, religious leaders are more likely to correctly identify and aid abuse survivors when a conflict is framed as domestic abuse rather than a marital dispute.[199] Similarly, peers who understand *get* refusal to be abuse rather than simple marital conflict are less likely to weaponize cultural values[200] such as the instruction to maintain a peaceful home[201] or prevent public embarrassment[202] against *agunot* who speak out.

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195. *See id.* at 250–51.

196. *Id.*

197. *See also, e.g.*, Lily Rothman, *When Spousal Rape First Became a Crime in the U.S.*, TIME (July 28, 2015, 3:07 PM), https://time.com/3975175/spousal-rape-case-history/ [https://perma.cc/PVZ6-DBEY] (describing the similar evolution of laws and attitudes around spousal rape); Roni Rosenberg & Hadar Dancig-Rosenberg, *Revenge Porn in the Shadow of the First Amendment*, 24 U. PA. J. CONST. L. 1285, 1288 (2022) ("[O]nly three states had criminalized revenge porn by 2013. As a result of the growth in the phenomenon and the understanding that it can result in significant harm to the victim, there has been a dramatic change in the attitude of the legal system toward this issue in many US states. By 2021, almost all US states had adopted specific laws combatting revenge porn." (footnote omitted)).

198. The reality of legal professionals interpreting *get* refusal as a religious dispute off limits to the law is explored in the contract cases in Section III.A.

199. Amanda Sisselman-Borgia & Rebecca Bonanno, *Rabbinical Response to Domestic Violence: A Qualitative Study*, 36 J. RELIGION & SPIRITUALITY SOC. WORK: SOC. THOUGHT 434, 446 (2017).

200. Principles and values not discussed in the text but also implicated include *lashon hara*, or the prohibition on gossip that can be used against women who report; *teshuvah*, or the act of repentance that *get*-refusers can weaponize to demand forgiveness; and *shidduchim*, or arranged dates where children of divorce may be penalized. *See* Stacey A. Guthartz, *Domestic Violence and the Jewish Community*, 11 MICH. J. GENDER & L. 27, 33, 36–40 (2004); *see also* TWERSKI, *supra* note 33, at 45.

201. This principle is called *shalom bayis*. *See* TWERSKI, *supra* note 33, at 117; *see also* Starr, *supra* note 8, at 42–43; Guthartz, *supra* note 200, at 34–35, 46–47; Sisselman-Borgia & Bonanno, *supra* note 199, at 435.

202. The principles invoked here are a *chilul hashem* (a disgrace to God) or a *shande* (embarrassment). Concern over embarrassment may reflect only one family or community, or it may be a broader fear of stoking antisemitism through a negative portrayal of Jews as a whole. *See* Starr, *supra* note 8, at 42–43; Guthartz, *supra* note 200, at 33, 42–44.

Agunot are disbelieved and underserved by their own communities and the legal world. By reframing *get* refusal as domestic abuse, coercive control statutes promise to harness the law's ability to influence societal attitudes to the *agunah*'s advantage by teaching those around her of *get* refusal's gravity. This attitude reform will in turn begin to address critics' arguments that coercive control statutes are neutered by poor enforcement and disbelief of survivors.

IV. ANALYSIS: RELIGIOUS LEGAL IMPACT

While this Note is primarily concerned with the secular law, it must touch on the religious legal intricacies that prevent Jewish communities from seeking and adopting secular solutions to the *agunah* problem.[203] As Section I.A. discussed, *halakhah*'s emphasis on voluntary, private contracting in marriage limits secular law's ability to obtain a valid *get* free of duress. Currently, *halakhic* prenups and New York's *get* law are America's only *halakhically* accepted secular remedies to the *agunah* problem.[204] The coercive control statute would probably not enjoy *halakhic* support because as it is an affirmative act to pressure a husband without his previous consent. This Part argues that, rather than continuing to limit secular legal solutions, *halakha* can and must be used to enable both secular and religious legal authorities to help *agunot*.[205] To that end, the following paragraphs discuss *halakhic* examples from history and modern authorities that, if replicated, would begin to remedy *halakha*'s contribution to the *agunah* problem.

Permissive *halakhic* divorce is not unprecedented; it was the standard throughout much of the Jewish diaspora for five centuries. The permissive rule stems from *kofin* grounds, or grounds on which a religious court can coerce a recalcitrant spouse to provide a *get* without invalidating the *get* through duress.[206] From the seventh to twelfth centuries,[207] *kofin* grounds included the equivalent of no-fault divorce for women.[208] A woman could

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203. Any secular remedy must be *halakhically* sound because women who doubt its validity may avoid using it for fear that it creates an invalid *get*. *See, e.g.*, Zornberg, *supra* note 39, at 762–65 (explaining how the 1992 New York *get* law amendments may have discouraged women from seeking help because they did not enjoy strong *halakhic* support).

204. *See supra* Section I.B.

205. *See* Weiss, *supra* note 49 (arguing the fundamental problem behind the trouble of *get* refusal cases is *halakhic* authorities' refusal to whole-heartedly rule for *agunot*).

206. *See* BREITOWITZ, *supra* note 1, at 42; Mishnah Ketubot 7:10, *reprinted in* THE MISHNAH: A NEW TRANSLATION 393 (Jacob Neusner trans.) (1988) (*kofin* grounds).

207. *See* BREITOWITZ, *supra* note 1, at 50 n.135, 51. The rule existed as early as the fifth century in Egyptian marriage contracts. *See* NAOMI GRAETZ, SILENCE IS DEADLY: JUDAISM CONFRONTS WIFEBEATING 80–81 (1998).

208. No-fault divorce allows divorce on the basis of a general breakdown in the relationship, often termed "irreconcilable differences." *See* DOUGLAS E. ABRAMS, NAOMI R. CAHN, CATHERINE J. ROSS, DAVID D. MEYER & LINDA C. MCCLAIN, CONTEMPORARY FAMILY LAW 531 (4th ed. 2015).

instigate a divorce without concern of duress invalidating her *get* simply by refusing to perform traditional spousal roles and declaring: "I am disgusted with [my husband]."[209] The law radically contracted in the twelfth century.[210] The at-will approach has no precedential value today.[211]

Despite the law's stagnation since the twelfth-century reversal, *halakha* can and does evolve to adjust to new developments and values. In fact, the twelfth century rule reversal seems to be such a culturally informed change, passed by a conservative authority who aligned Judaism's socio-cultural standing with that of his home, medieval Catholic France.[212] Such change can further women's rights instead. Judaism has tools to correct *halakhic* inequities or harmonize *halakha* with culture-specific values. To correct inequities, Judaism recognizes a category of corrective rulings, called *takkanot*, promulgated to meet case-by-case needs or correct perverse legal consequences.[213] These have famously been used to correct gendered power imbalances that harm women,[214] such as one eleventh-century *takkanah* that instituted the requirement for a wife to consent to divorce in order to protect economically vulnerable women from being suddenly abandoned by their husbands.[215] Beyond *takkanot*, *halakha* can and does harmonize itself with cultural values. This route for values-based evolution is reflected in rules such as the Reform movement's deference to secular law in issues of marriage and divorce[216] and Orthodox *halakha*'s deference to the majority culture's financial customs, including on issues of alimony and equitable division of assets.[217] Through tools like these, *halakha* can continue its tradition of evolution—this time to free *agunot*.

Even in the absence of *halakhic* change, rabbinical authorities can and must use their creative expertise to free *agunot*. By doing so, they will

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209. Babylonian Talmud, Ketubot 63b, *reprinted in* 16 KOREN TALMUD BAVLI: TRACTATE KETUBOT, PART ONE 360 (Shefa Found. ed., 2015); *see* Susan Weiss, *Divorce: The Halakhic Perspective*, JEWISH WOMEN'S ARCHIVE, https://jwa.org/encyclopedia/article/divorce-halakhic-perspective [https://perma.cc/8B8X-YHTL]; *see also* Mishneh Torah Hilkhot Ishut 14:8, *reprinted in* 4 THE CODE OF MAIMONIDES: THE BOOK OF WOMEN § 8, at 89 (1972) (Leon Nemoy ed., Isaac Klein trans.) (concurring opinion of the thirteenth-century scholar Maimonides).

210. *See* Rosenfeld, *supra* note 23, at 139.

211. *See* BREITOWITZ, *supra* note 1, at 56.

212. *See* Rosenfeld, *supra* note 23, at 139 n.31; *see also* BREITOWITZ, *supra* note 1, at 51 n.136. In contrast, the permissive rule seems to have been created in Muslim countries where women may have converted to Islam to obtain a divorce in the absence of a permissive *halakhic* rule.

213. *See Takkanah*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/takkanah [https://perma.cc/ZHE5-R4QW].

214. *See, e.g.*, PAMELA BARMASH, WOMEN AND MITZVOT 24 (2014), https://www.rabbinicalassembly.org/sites/default/files/public/halakhah/teshuvot/2011-2020/womenandhiyyuvfinal.pdf [https://perma.cc/R9MM-YJJ3] (discussing gender equality in the Conservative movement's counting of which Jewish adults contribute to the quorum required for certain prayers).

215. *See* Weiss, *supra* note 209.

216. *See supra* note 47.

217. *See* BROYDE, *supra* note 45, at 38–39, 149 n.28.

follow a long tradition; concern for *agunot* appears from rabbinical Judaism's earliest moments[218] to the beginning of the secular-religious legal conflict[219] and beyond.[220] In the words of Orthodox Jewish feminist Blu Greenberg, "[w]hen there's a rabbinic will, there's a *halachic* way."[221] Prominent and respected modern rabbis have exhibited this will, continuing a legitimate tradition that their peers should follow. For instance, after creating a dedicated a court to free *agunot* who were widowed during Israel's 1973 Yom Kippur War, Tel Aviv's Chief Rabbi Ovadia Yosef rebuked his critics as "fleeing from every doubt in the world so that they will be able to present clear and decisive halakhic ruling."[222] Instead, he stated he would "follow in the path of our early and late rabbis" to find creative or minority arguments to free *agunot*.[223] Over the course of his career, he freed over 1,000 women.[224] Most recently, the "Rackman *Beit*

218. In the sixth-century CE foundational religious text the Talmud, scholars discussed the biblical King David's concern with preventing his soldiers' wives from becoming *agunot*. *See* Babylonian Talmud, Shabbat 56a, *supra* note 16.

219. *See, e.g.*, Nancy Sinkoff, *The* Maskil*, the Convert, and the* Agunah*: Joseph Perl as a Historian of Jewish Divorce Law*, 28 AJS REV. 281 (2004) (discussing how one proponent of the European Jewish enlightenment (*Haskalah*) argued to eighteenth-century Galician Jewish authorities that a responsible rabbinical authority would prioritize finding creative *halakhic* solutions to the *agunah* problem). It was during this time that the dysfunctional intersection of secular and religious legal requirements arose, as proponents of the *Haskalah* sought to participate in broader Christian European society while maintaining their traditional identity and Jewish peoplehood.

220. *See, e.g.*, Barnea, *supra* note 16.

221. *See* Dvora Meyers, *On Agunah Issue, Pressure Rabbis, Not Rep*, FORWARD (Mar. 7, 2012), https://forward.com/life/152512/on-agunah-issue-pressure-rabbis-not-rep/ [https://perma.cc/55X3-HEK8]; *see also* Haim Toledano, *Some Thoughts on the Problem of Agunot*, AGUNAH INT'L, https://www.agunahinternational.com/halakhic.htm#1 [https://perma.cc/N2CL-RG39] (quoting various authorities on the importance of freeing *agunot*).

222. Chavie Lieber, *Rav Ovadia Yosef's Mission to Free Agunot*, FORWARD (Oct. 7, 2013), https://forward.com/life/185172/rav-ovadia-yosefs-mission-to-free-agunot/#:~:text=And%20although%20not%20all%20of,after%20the%20Yom%20Kippur%20War [https://perma.cc/M5DS-3DKV].

223. *Id.*

224. *Id.*; *see also Duty of Rabbis to Try to Alleviate the Plight of Agunot*, AGUNAH INT'L, http://agunahinternational.com/halakhic.htm [https://perma.cc/6B5W-PQ86] (quoting the Chief Rabbi of Egypt, Rabbi Abraham Halevi, as writing "[w]ere we . . . require[d] . . . to follow the majority opinion, no agunah will ever be permitted to remarry. . . . [T]herefore, what we must do is follow the path paved by the early masters (rishonim) to follow any logical and straightforward opinion (sebarah yesharah) even if it is not agreed upon by all the great halakhic sages who are otherwise our authorities (lit., from whose water we drink).").

Din"[225] and the International *Beit Din*[226] have honored Rav. Ovadia Yosef's call to justice by freeing *agunot* through a creative, but controversial, annulment-based *halakhic* theory.

Halakhic authorities resist widespread change for reasons that will be familiar to students of secular law. Change can be legitimized only with broad support, decision-makers may be unable or unwilling to break (or appear to break) from precedent,[227] and longstanding values and power structures limit innovation. This Part has briefly explained why, despite inevitable growing pains, change is possible and legitimate. *Halakhic* authorities today should take instruction from *halakha'*s history of values-based evolution to more closely align *halakha* with today's widespread values of no-fault divorce and protecting survivors of domestic abuse.

CONCLUSION

The Book of Deuteronomy tells a story of a man found mysteriously dead between two cities. It commands that city leaders publicly absolve themselves of guilt for his murder.[228] Ancient Jewish religious authorities interpret this command not as absolution for the act of murder, but as absolution for turning a person in need away. The city leaders must say: "It is not so that this victim came to us and we dismissed him, and it is not so that we saw him and left him."[229]

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225. The Rackman *beit din* attempted to free *agunot* through annulment rather than forced divorce, utilizing the *halakhic* equivalent of a fundamental mistake defense. *See* Susan Aranoff, *Halachic Principals and Procedures for Freeing Agunot*, AGUNAH INT'L, https://www.agunahinternational.com/halakhic.htm#1 [https://perma.cc/N8VF-9RHV] (explaining that, in Rabbi Rackman's opinion, the *agunah* would not have married had she known (1) that her husband has a "personality defect" that made him capable of coercively withholding a *get*, (2) that the religious court has no power to force a *get* on her behalf, or (3) that her husband has such power over the marriage). The *beit din* was generally rejected by mainstream authorities. Critics argued the *beit din*'s members were not leading authorities, misapplied their legal theories, and should have applied a stricter evidentiary standard. *See* Chaim Jachter, *Gray Matter I, Grappling with the Problem of Agunot, Flaws in the Proposal of Rabbi Emanuel Rackman*, SEFARIA, https://www.sefaria.org/Gray_Matter_I%2C_Grappling_With_the_Problem_of_Agunot%2C_Flaws_in_the_Proposal_of_Rabbi_Emanuel_Rackman?lang=en&with=all&lang2=en [https://perma.cc/7YQD-RYY8].

226. *About*, INT'L BEIT DIN, https://internationalbeitdin.org/about/ [https://perma.cc/R28C-3LGQ] (explaining the IBD's goal to "not shy away from using legitimate, accepted halachic approaches to nullify marriages" and "present halachic solutions that did not depend on or empower recalcitrant husbands further").

227. *See, e.g.*, Meyers, *supra* note 221 (quoting Rabbi Shlomo Riskin's opinion that "to a certain extent there is a lack of judicial courage in our time").

228. Deuteronomy 21, 7.

229. Babylonian Talmud, Sotah 38b, *reprinted in* 20 KOREN TALMUD BAVLI: TRACTATE SOTA 232 (Shefa Found. ed., 2015).

We must do the same.[230] Like the man, *agunot* are victims who fall between two regimes that each deny full accountability. Innovative legal minds have attempted to use secular legal instruments like *halakhic* prenups and the New York *get* law to help *agunot*, but these approaches fall short. Instead, American law must follow the international community in recognizing the coercive control that underlies the abusive dynamic where *get* refusal occurs.

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230. In the words of *Parsah Shoftim*, a portion of Dueteronomy that Jewish communities worldwide read at the same time as this Note's editing process began: "*tzedek, tzedek, tirdof*"—justice, justice you shall pursue. *See* Deuteronomy 16, 20.

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