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The Collision of Church and State: A Primer to Beth Din Arbitrarion and the New York Secular Courts

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THE COLLISION OF CHURCH AND STATE: A PRIMER TO *BETH DIN* ARBITRATION AND THE NEW YORK SECULAR COURTS

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When the United States of America was founded, the concept of the complete separation between Church and State was revolutionary and embedded deep within the foundation of this country.[1] In the twenty-first century, the American legal system embraced a different change: utilizing alternative dispute resolution methods such as arbitration, as an alternative to litigating in court.[2] This Comment discusses the dilemmas that arise when New York courts are asked to enforce arbitration decisions promulgated by a religious arbitration panel called a *beth din*,[3] which operates primarily under Jewish law.

J.D. expected, Fordham University School of Law, 2004. B.A., Business Communications, Baruch College. I dedicate this note to my husband Adam, whose loving support has helped develop my love of law into a career.

1. The framers' philosophical vision of the separation of Church and State, codified in the First Amendment to the Constitution, was inspired by the Enlightenment—a period of radical ideas. Daniel L. Dreisbach & John D. Whaley, *What the Wall Separates: A Debate on Thomas Jefferson's "Wall of Separation" Metaphor [A]greement, In the Abstract, That the First Amendment was Designed to Erect a "Wall of Separation Between Church and State," Does Not Preclude a Clash of Vows as to What the Wall Separates*, 16 CONST. COMMENTARY 627, 647 (1999).

> President [Thomas] Jefferson used the celebrated "wall of separation" metaphor to define the First Amendment religious clauses. Jefferson wrote . . . I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between Church & State.

Id. at 627-28.

2. Frank D. Emerson, *History of American Arbitration Practice and Law*, 19 CLEV. ST. L. REV. 155 (1970). New York State courts did not enforce arbitration agreements at all until 1920. N.Y. C.P.LR. § 7501.01 (McKinney 2003). With the adaptation of the Arbitration Law to the Consolidated Laws in 1920, however, New York began to recognize the enforceability of arbitration agreements. *Id.*

3. Also referred to as *beis din* and *beit din*, *beth din* is a rabbinical court or tribunal which means "house of law" in Hebrew. Jodi M. Solovy, *Civil Enforcement of Jewish Marriage and Divorce: Constitutional Accommodation of a Religious Mandate*, 45 DEPAUL L. REV. 493, 500 n.54 (1996).

For over four thousand years, Jews have been adjudicating disputes in their own court system in accordance with *halacha*[4] (Jewish law) and composed of *batei din*.[5] This practice endured, and the beth din largely mirrors the structure of an arbitration panel. One heralded benefit of arbitration is that an arbitrator can be selected based upon his specialized knowledge in a subject area, and can accordingly make an educated determination of the dispute.[6] In *beth din* proceedings, the specialized knowledge possessed by the arbitrator is knowledge of halacha.[7] *Beth din* decisions could become legally binding and enforceable by the secular courts if the parties were asked to sign an arbitration agreement enabling the beth din to decide their dispute.[8]

The interaction between the secular courts and *beth din* arbitration has created a distinct body of case law, where the secular courts have been called upon to either enforce or vacate decisions made pursuant to religious legal principles. These situations test the ability of the secular courts to walk the uncertain line separating Church and State when ruling on the enforceability of decisions made by a religious tribunal.

Part I of this Comment will examine the reasons why an independent Jewish religious court system is required and utilized despite the existence of a fair and equitable secular court system. This section will describe the Jewish legal principles involved, and how they impact both Jewish litigants and lawyers.

Part II will describe the mechanics of transforming a religious tribunal into a legally binding arbitration panel in New York State. This Comment will focus on courts in New York, the state with the

4. *Halacha* is the word "law" in Hebrew, literally "the way on which one goes." Chad Baruch & Karsten Lokken, *Research of Jewish Law Issues: A Basic Guide and Bibliography for Students and Practitioners*, 77 U. DET. MERCY L. REV. 303, 306 (2000). *Halacha* is based on the written law, known as the Bible or Old Testament, and the oral law, explanations of the written law as expounded by rabbinical authorities in the *Mishnah* and *Talmud*. *Id.* This comment will focus on the orthodox interpretation of Jewish law, as orthodox Jews most commonly utilize the *batei din* to adjudicate disputes.

5. The plural form of *beth din* is *batei din*.

6. ABRAHAM P. ORDOVER, ALTERNATIVES TO LITIGATION 124-25 (1st ed. 1993).

7. CNSNews.com, *Jewish Court Excommunicates Lieberman*, Oct. 24, 2000, *at* http://www.newsmax.com/articles/?a=2000/10/23/165511.txt (last visited Apr. 8, 2004). "Decisions from a beth din are not based on secular law, but rather the interpretation of Jewish teachings." *Id.*

8. *See, e.g.*, Elmora Hebrew Ctr. v. Fishman, Inc., 570 A.2d 1297, 1299 (N.J. Super. Ct. 1990).

largest orthodox Jewish population in the United States and, consequently, the state with the majority of existing case law.[9]

Part III will discuss the limited grounds upon which a *beth din* award may be vacated through statutory requirements and recent developments in the case law. This Comment will demonstrate the courts' reluctance to treat a *beth din* as a standard arbitration panel because of the possibility of encroaching on the Free Exercise Clause of the Constitution.[10] Lastly, this Comment will identify areas in which the courts have failed to vacate awards, seemingly deserving of vacature, due to a fundamental lack of understanding of Jewish mores and customs. This failure to vacate thereby demonstrates the need for further reform in this area of law.

I. HISTORICAL, *HALACHIC*, AND PRAGMATIC REASONS FOR THE *BETH DIN*

Beginning with a central authority of Jews established by the Roman conquerors to control the population after the fall of Judea in 70 C.E., most secular governments under which Jews lived throughout the Diaspora encouraged them to establish some form of self-government to further their own aims, such as tax collection.[11] Even when there was a general self-government policy for ethnic groups, particularly in Europe, Jews were unique in being allowed their own system of courts wherever they organized community life.[12]

The Jewish court system initially developed due to the Talmudic ban on Jews voluntarily presenting their cases to courts governed by idolatrous peoples, courts of Akkum.[13] This prohibition was ex-

9. A study by the United Jewish Communities placed the population of the Greater New York City Area at 1.4 million people, more than any other Jewish community studied this decade. North American Jewish Data Bank, *Local Jewish Community Studies: New York* (2002), *at* http://www.jewishdatabank.org/index.cfm?page=102. For a discussion of *beth din* arbitration in California, another state with a large orthodox Jewish population, see Randy Linda Sturman, *House of Judgment: Alternate Dispute Resolution in the Orthodox Jewish Community*, 36 CAL. W. L. REV. 417 (2000).

10. U.S. CONST. amend. I.

11. ISRAEL GOLDSTEIN, JEWISH JUSTICE AND CONCILIATION: HISTORY OF THE JEWISH CONCILIATION BOARD OF AMERICA, 1930-1968, AND A REVIEW OF JEWISH JUDICIAL AUTONOMY 3 (1983).

12. *Id.*

13. *See* TALMUD BAVLI, *Tractate Gittin* 88b; *see also* SHULCHAN ARUCH, *Hoshen Mishpat* 26:1 (restating MAIMONEDES, MISHNAH TORAH, *Tactate Sanhedrin* 25:7). The concept of religious self-adjudication is not unique to Judaism. GOLDSTEIN, *supra* note 11, at 4. The early Christians similarly did not permit the use of the Roman courts. *Id.* Some contemporary Christian teachings strongly discourage taking

tended to all secular courts because the phrase "courts of Akkum" was interpreted to include the Muslim courts, which were not presided over by idolatrous peoples.[14]

The *Talmud* in *Gittin* states:

> R. Tarfon used to say: In any place where you find gentile courts, even though their law is the same as the Israelite law, you must not resort to them since it says, 'These are the judgments which thou shalt set before them.' (Ex. 21:1) this is to say, 'before them' and not before gentiles.[15]

Thus, while the secular courts of the United States government may be just and proper, interpretation of the Talmud suggests that an obligation to utilize a Jewish forum to adjudicate disputes still exists.

Additional halachic reasons exist for the ban in contemporary Jewish law. A Jew who accuses another Jew in a secular court violates the supreme prohibition of *chillul Hashem*, which is the desecration of God's name.[16] The very mission of the Jewish people is to be or *lagoyim*, "a light unto the nations," and to serve as a model of those who are governed by God's divine law.[17] Bringing a dispute between Jews out of the Jewish community and into the eye of the general public, unnecessarily publicizes the wrongdoing. This results in a degradation of the law by exposing a Jew in violation of God's divine laws. After all, if an observant Jew acts wrongfully,

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disputes to a secular court, as well. *See* R. Seth Shippee, *"Blessed Are the Peacemakers": Faith-Based Approaches to Dispute Resolution*, 9 ILSA J. INT'L & COMP. L. 237, 242 (2002).

14. For a thorough discussion of this interpretation, *see* Rabbi Simcha Kraus, *Litigation in Secular Courts*, *available at* http://www.jlaw.com/Articles/litigation_in_secular_cou rts1.html (last visited Apr. 9, 2004).

15. *Id.* (translating TALMUD BAVLI, *supra* note 13). The Talmud includes an alternate explanation of this Biblical sentence, with "them" meaning "laymen" as opposed to "gentiles." This may explain the why there is disagreement in orthodox law as to the strength of the prohibition on utilizing the secular courts. However, "[t]he halacha against going to Arkhaoth [secular courts] is clear cut." *Id.*

16. GOLDSTEIN, *supra* note 11, at 4 (referring to *chillul Hashem*, where a Jew refers to another Jew in Gentile court as having committed the "major sin of denunciation").

17. The concept of *or lagoyim* is derived from the Book of Isaiah, which echoes statements in the Torah of the Jewish people's mandate to serve as an example to the nations of the world. The Torah states, "and you shall be to me a kingdom of priests, and a holy nation." *Exodus* 19:6. The prophet Isaiah expounded upon this duty: "I the Lord have called you in righteousness, and will hold your hand, and will keep you, and give you for a covenant of the people, for a light unto the nations." *Isaiah* 42:6; "I will also give you for a light unto the nations, that my salvation may be to the end of the earth." *Isaiah* 49:6; "[a]nd the nations shall come unto your light, and kings to the brightness of your rising." *Isaiah* 60:3.

sinfully, and shamefully despite being a practicing Jew, an onlooker might think that the laws of Judaism have little worth since following the laws does not seem to make one a better person. By extension, this brings shame upon the Jewish community at large.

Secondly, choosing a secular court despite the availability of a Jewish court undermines the authority of Jewish law and the rabbinical courts,[18] and what follows is the inference that the *beth din* lacks either the capability or sophistication to adjudicate an issue according to *halacha*.[19] The great rabbinical authority Maimonedes captured this sentiment when he wrote that a Jew who voluntarily brings his case to secular court instead of utilizing the *beth din* has behaved "as if he had raised his hand against the Torah."[20] Today, modern Jewish authorities still hold that "[a] central principle of *halacha* is that disputes between Jews should be adjudicated in duly-constituted rabbinical courts."[21]

There are some exceptions to the general rule banning Jews from the secular courts. It is important to note that the Talmudic ban only prohibits a Jew from being the first to resort to the secular courts, and does not prohibit a Jewish defendant from appearing in a secular court when summoned.[22] To the contrary, the overarching rule of *dina de'malchutah dina* would apply in that situation, meaning, "the law of the land is the law."[23] Therefore, Jews are *halachicly* obligated to obey a summons to appear in a secular court regardless of whether a Jew or a non-Jew initiated the suit, because that is the law of the governmental authority under which they reside.[24] There is also another exception when a defendant refuses to voluntarily submit to the jurisdiction of the *beth din* to decide a dispute, wherein the plaintiff must first apply to the *beth din* for a *heter* (exemption) from the ban, and thereafter may file his case in secular court with the permission of the *beth din*.[25]

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18. GOLDSTEIN, *supra* note 11, at 4.

19. *See id.*

20. *Id.* (quoting SHULCAN ARUCH, *supra* note 13, at 26(a)). "Torah" is the Hebrew word for the five books of Moses, the foundation of the practice of Judaism.

21. Dov Bressler, *Arbitration and the Courts in Jewish Law*, 9 J. HALACHA & CONTEMP. SOC'Y 105, 109 (1985).

22. TALMUD BAVLI, *Bava Kama* 92b; *see also* SHULCHAN ARUCH, *supra* note 13.

23. *E.g.*, TALMUD BAVLI, *Bava Kama* 113; *Gittin* 10.

24. *See* Sanford Levinson, *Colloquy: Identifying the Jewish Lawyer: Reflections on the Construction of Professional Identity*, 14 CARDOZO L. REV. 1577, 1608 (1993). Secular law trumps Jewish law in *dinei mamonot*, civil commercial law. Jewish law would trump secular law in regard to *dinei issurim*, which are religious and ritual observances. *Id.*

25. RAMBAM, *Hilchos Sanhedrin* 26:7.

Incidentally, the ban on being the first to resort to a secular court also applies to a Jewish lawyer representing a Jewish plaintiff.[26] This arises due to the Biblical prohibition of *lifnei iver lo titein machshol.*[27] This law has been interpreted to mean that a Jew cannot aid in the commission of a violation of the law.[28] "[T]here are a number of conditions that allow exceptions to be made, the most important of which is the likelihood that the potential sinner will in fact be able to gain his object even without the help of the particular abettor."[29] The Biblical commandment of *hochiach tochiach et amitecha* (the duty to rebuke a Jew in the commission of a wrongdoing) arises, however.[30] Therefore, at the very least, a Jewish plaintiff's lawyer has the religious duty to advise a Jewish client to avail himself of the *beth din* prior to filing suit in the secular courts.

The violation of the Talmudic ban on utilizing the secular courts merited *cherem* (excommunication), one of the most severe punishments the *beth din* could impose.[31] Unlike in Christianity, when a Jew is excommunicated, he does not lose his status as a Jew.[32] Rather, this decree calls for the expulsion of the individual from the religious and social life of the community.[33] This can include, withholding burial rites, prohibiting synagogue admittance, and preventing patronizing his livelihood or business.[34] One can imagine the harshness of this penalty where Jews lived separate from the rest of society. Enforcement of this ban, however, has relaxed through the centuries, first with the removal of the ban on a plaintiff upon consent of the other party,[35] then with inadequate enforcement of the ban overall.[36] This is in no small part due to the fact that a religious court that enforces its bans through social pressure alone is ineffective when the individual lives in an open soci-

26. Levinson, *supra* note 24, at 1603.

27. Translated in English as, "Before a blind man do not place a stumbling block." *Leviticus* 19:14.

28. Levinson, *supra* note 24, at 1605.

29. *Id.* (quoting Michael J. Broyde, *On the Practice of Law According to Halacha*, 20 J. HALACHA & CONTEMP. SOC'Y 5, 12 (1990)).

30. *Leviticus* 19:17.

31. GOLDSTEIN, *supra* note 11, at 4. *Cherem,* also spelled *Herem,* might include being locked out of the synagogue, the prohibition from patronizing one's business, and the inability to marry one's children within the community. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at 4-5.

36. *Id.*

ety like the United States.[37] It is clear today that many Jews will readily file suit against another Jew without first seeking permission of a *beit din,* due to lax enforcement of the ban and the view that the laws of the United States are equitable and fair.[38] Despite this fact, however, the *batei din* are still frequently utilized because the Talmudic ban is only one reason why the courts exist today.[39]

Aside from the *halachic* requirement for a *beth din*, there are additional reasons the *Beth Din* has been, and continues to be, an attractive forum to settle disputes between Jewish litigants. In some instances, there is simply a general distrust of the secular court system.[40] Historically, this feeling stems from a fear of anti-Semitism.[41] Today, there is a preference for a *beth din* when a dispute involves underlying Jewish concepts, and the disputants doubt whether a non-Jewish adjudicator could sufficiently comprehend those foreign concepts and properly rule on the dispute.[42] This echoes one of the positive aspects of arbitration in general, the

37. A good example of the ineffectiveness of a modern day *cherem* is that of Senator Joseph Lieberman, who was excommunicated by a Brooklyn *beth din* comprised of three rabbis while he was a Vice-Presidential candidate. Mark Oppenheimer, *'Shunning' Won't Hurt Lieberman; A New York Jewish Religious Court's Decree Against Vice Presidential Candidate Joseph Lieberman Carries Little Weight, Some Rabbis Say*, HARTFORD COURANT, Nov. 2, 2000, at A18. The decree of *cherem* was due to his public support of partial-birth abortion, homosexuality, and women in the military, all considered to be against *halacha. Id.* The *cherem* had no practical effect on Lieberman. *Id.* It should be noted that there are indeed several insulated orthodox Jewish communities that live within their own particular sect where the threat of *cherem,* or the related *siruv*, would be a potent threat for *beth din* enforcement today. *See* text accompanying *infra* notes 138-150.

38. Michelle Greenberg-Kobrin, *Civil Enforceability of Religious Prenuptial Agreements*, 32 COLUM. J.L. & SOC. PROBS. 359, 367-68 n.47-50 (1999).

39. *See* text accompanying *infra* notes 41-52, for a discussion of other reasons for the continued utilization of the *beth din.*

40. *See* GOLDSTEIN, *supra* note 11, at 4.

41. *Id.*

42. One example would be in a dispute involving a *heter iska*, which is a means for *halachically* allowing Jews to charge each other interest for a loan. *Hetter Isske* or *heter iska* was a device developed in the twelfth to fourteenth centuries to overcome the Biblical prohibition against one Jew charging interest to another. *Leviticus* 25:36-8; *see also Deuteronomy* 23:19-20. It was patterned upon an agreement of partnership or joint venture, wherein the "lender" would supply the money and the "borrower" or working partner had complete freedom to use the capital, and he guaranteed the investment against loss. He also guaranteed a minimum return. Heimbinder v. Berkovitz, 670 N.Y.S.2d 301, 306 (Sup. Ct. 1998) (quoting Leibovici v. Rawicki, 290 N.Y.S.2d 997, 1000 (Civ. Ct. 1968)). This is an example of the factual complexities a litigant in a secular court may face when dealing with Jewish law, when the *heter iska's* purpose would be self-evident in the *beth din. See id.*

ability to choose an arbitrator with expertise in a certain field to decide a case.[43]

A *beth din* is also an attractive option for Yiddish or Hebrew-speaking litigants who would like to participate in the proceeding, because it can be conducted in their native language.[44] Conducting the proceeding in their native tongue may make the parties feel more comfortable and facilitates their participation and understanding of the procedure.

Yet another reason the *beth din* has retained its popularity is because as an alternate dispute resolution method, it typically a quicker and more cost-effective means to settling a dispute than litigation.[45] There are even historically recorded instances of two non-Jewish parties that utilized the *beth din* for this very reason.[46] Recently, a woman in need of temporary support and maintenance shortly after commencing divorce proceedings was advised to submit her dispute to a *beth din* because it would be faster than the "many weeks" a *pendente lite* application would take.[47]

Lastly, a *beth din* must always play a major role in the area of Jewish divorce.[48] According to Jewish law, Jewish courts have exclusive jurisdiction in the divorce process.[49] One must obtain a religious divorce properly executed with the aid of a rabbinical court in order to terminate a Jewish marriage, a civil divorce alone does nothing to change the couple's marital status.[50] Due to this necessary interaction with the *beth din*, the parties are often encouraged

43. ORDOVER, *supra* note 6, at 124-25.

44. *See generally* James Yaffe, *So Sue Me! The Story of a Community Court* (1972) (discussing the procedures used by the Beth Din in American society).

45. ORDOVER, *supra* note 6, at 143, 145-46.

46. GOLDSTEIN, *supra* note 11, at 5.

47. Stein v Stein, 707 N.Y.S.2d 754, 757 (Sup. Ct. 1999).

48. "In order for the *get* to be universally recognized within the Jewish world, it is essential that the *get* procedures be effected under the auspices of an orthodox *beth din* (Court of Jewish religious law)." Agunot Campaign, *Why You Need a Get, at* http://www.agunot-campaign.org.uk/get.htm (last visited Apr. 9, 2004).

49. *Id.* "It is well known that she [a woman without a valid *get*] clearly cannot remarry in an orthodox synagogue, even if she has been through a civil divorce because, according to *halacha*, she remains married until she receives a *get.* If she decides to undertake a civil re-marriage, then this is held to be invalid under *halacha.*" *Id.*

50. Law based on *Deuteronomy* 24:1, describes the process whereby a man can divorce his wife by giving her a bill of divorce. Since the initial Jewish marriage ceremony established a contract between the parties, only a Jewish court can terminate that contract with a properly executed *get,* a bill of Jewish divorce. Rabbi Shlomo Riskin, *Shabbat Shalom: Parshat Ki Tetze Deuteronomy 21:10-25:19, at* http://www.ohrtorahst one.org.il/parsha/5760/kiteze60.htm (last visited Apr. 9, 2004). The *get* contract is devoid of any blessings, references to the divine, or apportionment of blame; it is simply a termination contract. *Id*; *see also* Shippee, *supra* note 13, at 253.

and even pressured to submit all disputes related to the divorce to the *beth din*, including child custody, visitation, maintenance, and equitable distribution.[51]

Therefore, the institution of the *beth din,* so firmly rooted in the history of the Jewish people, continues to play an active role in the adjudication of disputes.

II. THE MECHANICS OF ENDOWING A *BETH DIN* WITH LEGAL AUTHORITY

A. Establishing the *Beth Din* as an Arbitration Panel

A *beth din* is generally composed of three rabbis who sit as judges of Jewish law.[52] The Beth Din of America[53] has some flexibility in the structure of the *beth din*; it usually utilizes a single rabbi to decide a dispute where less than $10,000 is in controversy.[54] There is an option for a panel of three men, one of which must be a rabbi, when the amount in controversy is over $10,000.[55] While *batei din* issue their own summonses to appear (*hazmanos*), and render their own decisions, without a valid arbitration agreement between the parties, "the actions of the Beth Din or other religious tribunal need not be given recognition in the courts of New York State."[56] Only a *beth din* operating under the jurisdiction of New York's arbitration statute, Civil Practice Law and Rules Article 75, can produce legally enforceable decisions that can be confirmed and enforced by a New York Court.[57]

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51. *See* Susan Metzger Weiss, *Sign at Your Own Risk: The "RCA" Prenuptial May Prejudice the Fairness of your Divorce Proceeding*, 6 CARDOZO WOMEN'S L. J. 49, 70 (1999) (discussing how the *beth din* includes in its recommended prenuptial agreements clauses that grant jurisdiction over the division of marital property to a *beth din*).

52. *See* BERNARD J. MEISLIN, JEWISH LAW IN AMERICAN TRIBUNALS 123 (1976). Three Jewish men who are familiar with the law, however, may also sit as a *beth din* according to *halacha. See* Shippee, *supra* note 13, at 250 n.118 (citing MENACHEM ELON, THE PRINCIPLES OF JEWISH LAW 570 (1997)).

53. "The Beth Din [of America] was founded by and is affiliated with the Rabbinical Council of America (RCA) and is sponsored by the Union of Orthodox Jewish Congregations of America." Beth Din of America, *Our Mission, Background & Affiliations, Principals* (1999), *at* http://www.bethdin.org/mission.htm (last visited Apr. 9, 2004).

54. Beth Din of America, *Recent Developments at the Beth Din of America* (June 2002), *at* http://www.bethdin.org/062502.htm (last visited Apr. 9, 2004) [hereinafter *Recent Developments*].

55. *Id.*

56. *See* Moskowitz v. Moskowitz, N.Y. L.J., June 10, 1997, at 25.

57. *See, e.g.*, Kozlowski v. Seville Syndicate, Inc., 314 N.Y.S.2d 439 (Sup. Ct. 1970) (holding that where arbitrator's award was of no force and and effect as to deprive

There are two means by which *beth din* arbitration agreements can be created. An arbitration agreement may be entered into prior to the onset of any controversy,[58] such as contract clauses that bind the parties to submit future disputes regarding that transaction to the *beth din*.[59] The second way a *beth din* arbitration agreement is established is when the parties agree to arbitrate a current issue in lieu of litigation, then sign an arbitration agreement.[60] In either event, the agreement must state the parties' decision to submit to the *beth din* and "the scope of the Beth Din's Jurisdiction must be clearly, unequivocally and explicitly expressed in the arbitration agreement."[61] Very broad language, however, stating that the parties agree to "settle the arguments, claims and all disputes that are between us before the Rabbinical Court," has been held to fulfill this requirement.[62]

Once there is a valid arbitration agreement, the secular courts will not hear a case filed in court prior to a stay of the proceedings in the arbitration court.[63] The court places the burden on the parties to understand the nature of the arbitration proceedings and its binding effect, thus ignorance of the law is no excuse.[64] There is an even heavier burden to vacate an arbitration award, and so, one must be careful and make an informed decision about whether or not to sign an agreement to arbitrate.[65] In her dissent in *Silverman v. Benmor Coats, Inc.*, Chief Justice Kaye emphasized the need for extreme caution in undertaking an arbitration agreement because

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petitioner of his antecedent status as stockholder, director, and officer of corporation, petitioner was entitled to inspect books).

58. ORDOVER, *supra* note 6, at 139.

59. *See* Weiss, *supra* note 51 (regarding clauses in prenuptial agreements that confer jurisdiction on the *beth din* for matters ancillary to the couple's divorce).

60. *See* Meisels v. Uhr, 593 N.E.2d 1359, 1360-61 (N.Y. 1992) (involving a business dispute where parties agreed in writing to submit the dispute to a *beth din* arbitration panel).

61. Waldron v. Goddess, 461 N.E.2d 273, 275 (N.Y. 1984); *see also* N.Y. C.P.L.R. § 7501 (McKinney 2002). One instance where the agreement to submit to *beth din* arbitration was found to be too vague was when a contract referred all disputes to be resolved "in accordance with the 'regulations of Speyer, Worms, and Mainz.'" Sieger v. Sieger, 747 N.Y.S.2d 102, 103 (App. Div. 2002).

62. Lieberman v. Lieberman, 566 N.Y.S.2d 490, 492 (Sup. Ct. 1991).

63. *See Meisels*, 593 N.E.2d at 1359. The New York court must first examine threshold issues to determine whether it can hear the case at all, "whether a valid arbitration agreement has been made by the parties, and whether the agreement has been complied with." *Id.*

64. *Id.* at 1359.

65. N.Y. C.P.L.R. § 7511(b)(1) (McKinney 2003).

"once arbitration has been designated there is little hope of later containing it by way of judicial supervision."[66]

It is interesting to note a wrinkle in the necessity of a valid arbitration agreement between the parties, in order for the *beth din* to properly retain jurisdiction in disputes between synagogues and their members. If a synagogue's charter states that all disputes involving the synagogue must be adjudicated by a *beth din*, a valid signature of the individual is not necessary, because the passing of the rule by the Board of Trustees suffices to bind every member of the congregation.[67] Just as in arbitration agreements between individuals, however, the charter or constitution of the corporation must specifically confer jurisdiction upon the *beth din*.[68] For example, a vague obligation to "follow *halacha* in all dealings by and between the group, its members, its rabbi, its officers and directors, other branches of the Organization and the Organization"[69] in a charter will not suffice to bind the parties to *beth din* arbitration.[70]

B. *Halachic* Considerations of Enforcing *Beth Din* Decisions in a Secular Court

It might seem contrary to Jewish legal principles to resort to the secular courts to enforce a *beth din* decision, as the very reason one goes to a *beth din* is to avoid the usage of the secular courts in the first place.[71] Utilizing the secular court system to confirm an arbitration award, however, is *halachically* sound.[72] Since the enforcing party properly submitted the dispute first to the *beth din,* demonstrating the proper reverence and esteem to the *beth din's* authority, "[o]ne does not esteem the . . . [secular courts] when they are second choice."[73] Therefore, there is no violation of the prohibition against undermining rabbinical authority.

In addition, the prohibition of *chillul Hashem* is not violated. The legislative intent of conferring jurisdiction to arbitration panels was to prevent the involvement of the courts in the merits of a

66. 461 N.E.2d 1261, 1270 (N.Y. 1984) (Kaye, J., dissenting).

67. Congregation Derech Amuno v. Blasof, 640 N.Y.S.2d 564, 565 (1996).

68. *See Decision of Interest, New York Supreme Court, New York County; IA PART 59*, N.Y. L.J., Sept. 15, 2003, at 22, n.8.

69. *Id.*

70. *See id.*

71. *See* Kraus, *supra* note 14.

72. *See id.*

73. *Id.*

case.[74] As such, arbitration awards are not subject to judicial review, with few exceptions.[75] Therefore, because the facts of the case are not regurgitated in their entirety for adjudication before a secular court, there is little risk that the confirmation of a *beth din* award will result in a *chillul Hashem.*

C. Challenges in Conforming a *Beth Din* to the New York Arbitration Statute

Conforming a *beth din* to the rules of an arbitration panel is simply a matter of making the *beth din* conform to the secular requirements of an arbitration panel.[76] There are relatively few structural rules that must be followed in order to abide by New York arbitration law.[77] Arbitrators are not bound by principles of substantive law or by rules of evidence,[78] but may do justice as they see fit.[79] Thus, the arbitrators in a *beth din* are free to apply Jewish law exclusively, or to integrate it to varying degrees with secular law.[80]

In the past, each community had its own *beth din* and everyone in the community was aware of what procedures were involved.[81] A significant problem with the *beth din* today is that many people are not aware of the procedural safeguards in place under New York's arbitration statute.[82] Civil Practice Law and Rules Article 75 delineates the method by which an arbitration proceeding is convened, and the procedural safeguards that must be employed.[83] While a full discussion of the requirements for an arbitration panel in New York is beyond the scope of this comment, there are some

74. Silverman v. Benmor Coats, Inc., 461 N.E.2d 1261, 1265 (N.Y. 1984). ("C.P.L.R. §7501 mandates that 'the court shall not consider whether the claim with respect to which arbitration is sought is tenable, or otherwise pass upon the merits of the dispute.'")

75. There are situations when a court asked to confirm an arbitration award is required to review the issues de novo. *See infra* Part IIIA. When a secular court is asked to vacate an award based on the accusation of fraud or misconduct on the part of rabbi arbitrators, there would be an issue of *chillul Hashem* by bringing the integrity of a rabbi into question before a secular court.

76. *See* N.Y. C.P.L.R. § 7501 (McKinney 2003).

77. *See* N.Y. C.P.L.R. §§ 7501-10 (McKinney 2003).

78. *See* ORDOVER, *supra* note 6, at 144 (explaining that the procedures in arbitration are designed by the parties as opposed to required rules and procedures).

79. Hecht v. Gertler, 601 N.Y.S.2d 316, 317 (App. Div. 1993).

80. *See id.*

81. *Conference Revolutions Within Communities: The Fifth Annual Domestic Violence Conference, Issues in Representing Immigrant Victims,* 29 FORDHAM URB. L.J. 3, 83 (2001) [hereinafter *Conference Revolutions*].

82. *See id.* at 82.

83. Stein v Stein, 707 N.Y.S.2d 754, 759 (Sup. Ct. 1999).

safeguards in particular that are most often disputed in New York courts in determining the validity of a *beth din* arbitration decision.

Civil Practice Law and Rules section 7506(b)[84] states that the arbitrator must appoint a time and place for the hearing and notify the parties in writing personally or by mail no less than eight days prior to the hearing.[85] This is an important procedural safeguard, as one party cannot be forced into signing an arbitration agreement and appearing before the *beth din* on the same day.[86] This is doubly significant because the vast majority of *batei din* will accommodate a proceeding on a moment's notice, especially when facilitating a Jewish divorce.[87] While the *beth din* may grant the Jewish divorce on a moment's notice, as that is wholly unrelated to secular law, the parties cannot settle any ancillary financial issues to the divorce that are binding that same day if the original arbitration agreement solely encompassed a divorce proceeding.[88] Due to the fact that in a Jewish divorce only the male may grant the female a document of divorce, there is a substantial history of husbands making additional last minute demands upon the their wives, threatening withdrawal from the *get* process.[89] Such demands have included custody rights, visitation rights, and money from marital assets.[90] A violation of the required eight-day time delay[91] alone is enough to vacate an arbitration award, without requiring an examination into the factual details of the dispute.

Each party is also entitled to attorney representation, which cannot be waived by agreement.[92] Litigants in the *beth din* are not always aware of this right, and thus, unknowingly waive the added safeguard of legal representation in the *beth din* arbitration hearing.[93] The right to counsel in *beth din* arbitration can be an issue because "the role of the lawyer, especially defined as a client-ori-

84. N.Y. C.P.L.R. § 7506(b) (Mckinney 2003).

85. N.Y. C.P.L.R. § 7506(b).

86. *E.g., id.* (noting that where arbitration agreement was signed on the same day the proceeding commenced, the court refused to confirm the arbitration agreement).

87. *E.g., Recent Developments*, *supra* note 54 ("the Beth Din quickly arranged an emergency Get for a couple where the man was about to make *aliyah* [to Israel] and the woman was about to leave for Paris for an extended period of time.").

88. *See* N.Y. C.P.L.R. § 7506(b).

89. *See* Kent Greenwalt, *Religious and Civil Law: Using Secular Law to Assure Observance of Practices with Religious Significance*, 71 S. CAL. L. REV. 781, 811-12 (1998).

90. *See id.*

91. N.Y. C.P.L.R. § 7506(b).

92. N.Y. C.P.L.R. § 7506(d); *see also Conference Revolutions*, *supra* note 81, at 82-83.

93. *See Conference Revolutions*, *supra* note 81, at 82-83.

ented advocate, is not a featured (or valued) one within the Jewish tradition."[94] No lawyers existed in the *batei din* of ancient Israel.[95] The lawyer is depicted in *halachic* sources as one who is pursuing only his client's causes, not pursuing justice itself, in conflict with the Biblical commandment "*tzedek tzedek tirdof*"—meaning justice, justice thou shalt pursue.[96]

The Jewish legal system was based on the litigants themselves appearing directly before the judges and telling the truth, not a manipulated version of the truth.[97] Although Jewish legal procedure since the Middle Ages has allowed lawyers to continue to represent clients today,[98] this concept is by no means embraced.[99] The *batei din* of today may be discouraging the presence of counsel by not informing its participants of their right to counsel, or by their technical compliance with the law that is accompanied by a generally unfavorable attitude toward the use of counsel.[100] For example, the Beth Din of America's policy is that a "party that does not attend the proceedings with an attorney shall be deemed to have waived his right to counsel for that proceeding."[101] There is no requirement for the *beth din* to confirm that the participants have actually decided to waive their right to counsel at the proceeding, such as a required document or a statement recited by the arbitrator prior to the proceeding requiring the participants' consent to waive counsel.[102] Such a requirement would certainly serve to inform participants of this vital right and prevent future questioning the validity of the proceeding.

The problems with compliance with the procedural rules are counter-intuitive, as one would think the *beth din* has an incentive to ensure compliance with all procedural safeguards so that any decision reached will be confirmed. The collection of *beth din* vacatures, however, suggest that these problems are recurrent. One can merely guess the countless number of people who might have simply obeyed the decision of the *beth din*, unknowingly deprived

94. Levinson, *supra* note 24, at 1596-97.

95. *Id.* at 1597 (citing MYER GALINSKI, PURSUE JUSTICE: THE ADMINISTRATION OF JUSTICE IN ANCIENT ISRAEL 190 (1983)).

96. *Deuteronomy* 48:20.

97. Levinson, *supra* note 24, at 1596-1600 (providing a full history of *halachic* references to the undesirability of the aid of lawyers in the adjudication process).

98. *See* Aaron Kirschenbaum, *Representation in Litigation in Jewish Law*, in 6 DINE ISRAEL xxv-xli (Zeer W. Falk & Aaron Kirschenbaum eds., 1975).

99. *Id.*

100. *See, e.g.*, *Recent Developments*, *supra* note 54, at §12.

101. *Id.*

102. *Id.*

of their rights or unwilling to go through the costly and time-consuming procedure of vacating the resulting award. An arbitration agreement should be required to clearly state that the party is entitled to have an attorney present, and the arbitrator should have participants verbally acknowledge the waiver of this right before commencing the arbitration proceeding.

III. VACATING ARBITRATION AWARDS—NEW YORK CIVIL PRACTICE LAW AND RULES SECTION 7511

The main difference between litigation and arbitration is that the latter lacks an appeals process.[103] While the finality reached with the decision can be viewed as a positive aspect of arbitration, the flip-side of the situation is that whatever decision is reached will more than likely be confirmed by a secular court. This is because "[a] court cannot examine the merits of an arbitration award and substitute its judgment for that of the arbitrator simply because it believes its interpretation would be the better one."[104]

There are few grounds for vacating arbitration awards, and the party that seeks to vacate bears the burden of proof that the decision should be vacated.[105] Arbitration agreements may be vacated on the grounds that the original arbitration agreement was a product of duress, if the decision reached is a violation of public policy,[106] or a product of fraud, misconduct, or lack of impartiality.[107]

A. Public Policy Grounds

The threshold question as to whether the *beth din* may decide a dispute is whether the matter at hand is arbitrable.[108] The presumption is that most disputes are arbitrable, as "[o]ur State has long sanctioned arbitration as an effective alternative method of

103. William H. Knull, III & Noah D. Rubins, *Betting the Farm on International Arbitration: Is It Time To Offer An Appeal Option?*, 11 AM. REV. INT'L ARB. 531 (2000).

104. *In re* State Corr. Officers v. New York, 726 N.E.2d 462, 465 (N.Y. 1999).

105. *E.g.*, Sultan Mohiuddin v. Khan, 602 N.Y.S.2d 664, 665 (App. Div. 1993) (quoting Syracuse Cent. Sch. Dist. v N. Syracuse Educ. Ass'n, 379 N.E.2d 1193, 1195-96 (N.Y. 1978)).

106. *See* Susquehanna Valley Sch. Dist. v. Susquehanna Valley Teachers' Ass'n, 339 N.E.2d 132 (N.Y. 1975). "Public policy, whether derived from, and whether explicit or implicit in statute or decisional law, or in neither, may also restrict the freedom to arbitrate." *Id.* at 616-17.

107. N.Y. C.P.L.R. § 7511(b)(1)(i) (McKinney 2003).

108. *In re* Barnes, 731 N.E.2d 134 (N.Y. 2000). "The claim must be lawfully fit for arbitration, i.e., no public policy, statutory or constitutional restriction places arbitration off-limits." *Id.* at 136.

settling disputes in a nonjudicial forum."[109] "The granting of broad powers to Arbitrators to consider all issues submitted to them is the very essence of arbitration and is to be sanctioned by the authorities."[110] Based on public policy grounds, however, some disputes may not be definitively decided by a *beth din.*

Some non-arbitrable cases brought before the *beth din* involve child custody, visitation, and child support.[111] Because Judaism requires a religious divorce wholly separate from a civil divorce in order to remarry, couples are frequently pressured to arbitrate all issues arising subsequent to the divorce proceeding through the same *beth din* that officiated the religious divorce.[112] One who initially pursues a religious divorce may be prevented by the religion from dealing with issues in a secular court, under the threat that the religious divorce will be revoked.[113] For example, one *beth din* arbitration agreement included the following clause:

> The Certificate of Jewish Divorce is conditional upon compliance by both parties to the *Psak* [or decision] of the *Bais Din.* Should any party violate the original *Psak*, or the addendum, or take action in Civil Court without the permission of the *Bais Din*, the validity of the Get will be in question and the *Bais Din* reserves [their] right to revoke the Certificate of Jewish Divorce.[114]

Such clauses create fear, specifically in the female party, as she stands to lose her divorce, and accordingly her ability to ever remarry, if she pursues an action in the secular court system.

As a safeguard preventing any arrangement from violating New York's "in the best interest of the child" standard, disputes over child custody and visitation are not subject to arbitration and will

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109. Lieberman v. Lieberman, 566 N.Y.S.2d 490, 490 (Sup. Ct. 1991).

110. Lehman v. Sage Metal Trading, 503 N.Y.S.2d 804 (App. Div. 1986).

111. *E.g. Lieberman*, 566 N.Y.S.2d at 490; *see also* Stein v Stein, 707 N.Y.S.2d 754, 754 (Sup. Ct. 1999).

112. *See, e.g.*, Moskowitz v. Moskowitz, N.Y. L.J., June 10, 1997, at 25 (denying wife's motion to restrain husband from appearing before a *beth din*).

113. *See* Mr. S.W. v. Ms. T.W., N.Y. L.J., July 14, 1995 at 26 (denying motion to stay wife from litigating in court without her first obtaining permission to litigate from religious arbitrator).

114. *Id.* The threat of revoking a Jewish bill of divorce carries with it many serious social consequences. A woman without a *get* (Jewish divorce) cannot remarry or even date, regardless of a civil divorce. *Id.* If she has relations with another man while still technically married to her Jewish husband, she commits adultery. *Id.* If she has children by another man while still married, the products of that union are illegitimate and have the status of *mamzer* (illegitimate child) and these children can only marry other *mamzerim* (plural form). *Id.*

not be confirmed.[115] Similarly, although child support is an arbitrable issue, decisions of child support are subject to a court's supervisory power to intervene.[116] For example, when a *beth din* awarded joint-custody to parents who had a relationship characterized by animosity, the court vacated the decision and gave custody to the mother.[117] In that case, the court also duly vacated the disposition of the house to the non-custodial parent, so that the children would have a proper place to live with the custodial parent.[118]

A court may also vacate an arbitration award on public policy grounds if the award contains a clause that limits or deprives a party of his or her constitutional right to seek redress or protection under criminal or civil law.[119] For example, a clause that forbids the participant from obtaining an order of protection,[120] or one forbidding the reporting of information to Child Protection Services without permission of the *beth din* would fall under this category.[121] "While the parties may elect to arbitrate their differences in a religious tribunal, the tribunal cannot abrogate to itself exclusive jurisdiction over all civil and criminal matters involving the parties."[122]

Partial awards decided by the *beth din* ("partial *psak din*") may also be unenforceable on public policy grounds.[123] If the underlying dispute is arbitrable, however, the secular court in the case of a partial ruling must remand the dispute to the *beth din* to fully decide the dispute, because there is a valid arbitration agreement between the parties.[124]

Efforts to vacate *beth din* arbitration awards based on other public policy grounds on the whole have been unsuccessful.[125] In fact, in New York case a *beth din* arbitration case stands for the proposition that an attack on arbitrability premised on vagueness or over-

115. Rakoszynski v. Rakoszynski, 663 N.Y.S.2d 957, 958 (Sup. Ct. 1997) (citing Cohen v. Cohen, 600 N.Y.S.2d 996 (App. Div. 1993)); Glauber v. Glauber, 600 N.Y.S.2d 740 (App. Div. 1993)).

116. *See Lieberman*, 566 N.Y.S.2d at 495-96.

117. *Id.* at 494.

118. *Id.* at 495.

119. *Rakoszynski*, 663 N.Y.S.2d at 950-61.

120. Mr. S.W. v. Ms. T.W., N.Y. L.J., July 14, 1995 at 26 (noting that "efforts to secure specific enforcement of an agreement to arbitrate for purposes of enjoining proceedings relating to domestic violence is fundamentally flawed.").

121. *Rakoszynski*, 663 N.Y.S.2d at 961.

122. *Id.*

123. *See, e.g.*, Lieber v. Diamanstein, N.Y.L.J., July 19, 2001 at 20.

124. *Id.*; *see also* N.Y. C.P.L.R. § 7511(d).

125. *See, e.g.*, Meisels v. Uhr, 593 N.E.2d 1359 (N.Y. 1992); Holler v. Goldberg, 623 N.Y.S.2d 512, 512 (Sup. Ct. 1995).

breadth of the initial agreement will usually fail, as this is not against public policy.[126]

Ordinarily, when arbitration produces a decision that contradicts the law of the state, the decision will be vacated on public policy grounds.[127] The argument, however, that the decision of the *beth din* is against public policy due to an infringement of secular law is not always a means to vacate an arbitration award.[128] In one case, a rabbi who was fired submitted to arbitration with the Board of Directors of his synagogue regarding his termination, even though according to the Religious Corporations Law, only synagogue members may fire the rabbi.[129] Thus, one must infer that a violation of the Religious Corporations Law is not considered a "strong" enough statute to constitute a violation of public policy.[130]

B. Duress

An established principle of contract law states that a contract entered into under duress is voidable by the victim.[131] The test for duress, according to the Restatement Second of Contracts, is whether the threat leaves no reasonable alternative for the victim but to sign the contract.[132] Arbitration agreements are contracts and must be interpreted under the accepted rules of contract law.[133] What is reasonable, in a Jewish context, is a challenge for the courts to define due to the judges' limited experience and insight into Jewish cultural norms.

New York leads the nation in awareness of issues pertinent to Jewish divorce proceedings, as evidenced by the passage of the "Get Statute"[134] and other rulings recognizing the powerful coercive power a recalcitrant husband retains when he withholds a

126. *Meisels*, 593 N.E.2d at 1359 (approving arbitration clauses phrased in all-encompassing terms).

127. *See* Mineola Union Free Sch. Dist. v. Mineola Teachers Ass'n, 389 N.E.2d 111, 112 (N.Y 1979) ("Arbitration is foreclosed . . . when it contravenes a strong public policy, almost invariably involving an important constitutional or statutory duty or responsibility").

128. *Holler,* 623 N.Y.S.2d at 513.

129. *Id.*

130. *See Mineola Union Free Sch.l Dist.*, 389 N.E.2d at 112.

131. RESTATEMENT (SECOND) OF CONTRACTS § 175 (1981).

132. *Id.*

133. Salvano v. Merrill Lynch, Pierce, Fenner & Smith, 647 N.E.2d 1298, 1302 (N.Y. 1995).

134. Act of Aug. 8, 1983, 1983 N.Y. Laws ch. 979 (codified at N.Y. Dom. Rel. Law § 253 (McKinney Supp. 1983)). This Act determined that a secular court may take into consideration through equitable distribution a barrier to remarriage, an undisputed reference to the refusal of a husband to deliver a get. For example, this statute

get.[135] In New York, when a recalcitrant husband withholds a *get* in order to gain from the threat in a divorce settlement in a *beth din*, this behavior is legally recognized as duress.[136] The New York courts, however, have not yet recognized the power the *beth din* itself can exert over a person to unwillingly submit to its authority.

A tool the *beth din* utilizes to exert its power is called a *shtar siruv* (also spelled *seruv*), which is defined in the literature of the Beth Din of America as "a document noting that this person refuses to participate in the proceedings of the Beth Din of America, and permitting, according to Jewish law, the claimant to seek relief in secular court,"[137] which may be publicized "in any manner the *beth din* sees fit."[138] This definition is deceptive. It sounds as if a notice will be publicized in a newspaper as a legal notice, easily lost in the fine print, which is the impact this type of publicity would likely have in a secular context. In some communities, this may hold true, but in Jewish communities that are close-knit and insulated, a *siruv* is a formidable threat.[139] A *siruv* can result in the individual being shunned in the community that recognizes that rabbinical court; in other words, it is a modern-day version of the discontinued *cherem*, not simply a publication of refusal to submit to a court proceeding.[140]

In *D. G. v. J. G.*,[141] the threat of a *siruv* was imposed in a proceeding involving, among other issues, the delivery of a *get*.[142] Ms. G.'s testimony revealed that she initially refused to sign the arbitration agreement because she was solely interested in procuring a *get* from the process, and wanted to deal with the financial divorce issues in a secular court proceeding that she had already com-

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permits a court to grant a large amount of alimony on this factor alone. *E.g,*. Gindi v. Gindi, N.Y. L.J., May 7, 2001, at 21.

135. *Gindi*, N.Y. L.J., May 7, 2001, at 21; *see also* Golding v. Golding, 581 N.Y.S.2d 4 (App. Div. 1992).

136. *See Golding*, 581 N.Y.S.2d at 7 (stating that forcing a wife to sign a *beth din* arbitration agreement was invalid).

137. *Recent Developments*, *supra* note 54.

138. *Id.*

139. *See Conference Revolutions*, *supra* note 81, at 87, describing the pressure one can feel in an isolated Jewish community as a result of proceedings in the *beth din* (although not discussing *siruv*). One can be: "disinvited to weddings, asked not to come to the synagogue, disinvited to all social gatherings. The essence of the orthodox Jewish woman's life is her community and her friends. Generally there is no television, no Internet, no magazines. She does not have access to the media as most other people do. She is stuck. She has no way to get information." *Id.*

140. For a discussion of *cherem*, *see supra* note 31.

141. N.Y. L.J., Oct. 16, 1995 at 35.

142. *Id.*

menced.[143] A letter was issued to her from the *beth din* that a *siruv* would be set out against her if she did not withdraw the civil court proceedings for spousal support.[144] Realistically speaking, if Ms. G. wanted a *get*, she would not have cooperation from the *beth din* if she ignored the *siruv*. By this vehicle, the *beth din* managed to pressure her into entering binding arbitration without implicating Mr. G. at all.[145] If Mr. G. committed duress in forcing her to go to the *beth din* by threatening to withhold a *get*, the arbitration agreement would be invalid.[146] These actions by the *beth din*, however, do not constitute duress.[147] The disparate result is based on who imposes the duress, here it was not the *beth din* itself, it was thus demonstrating how the implementation of the law to this new area can run counter to common sense notions of justice.

The fact that the courts are reluctant to label the threat of a *siruv* as duress demonstrates a fundamental misunderstanding of what it means to be an observant Jew, and the *siruv's* potentially tragic effects on a person's social life, her livelihood, and that of her family's. The court in *Greenberg* stated that the pressure from a *siruv* to submit to the *beth din* only existed because it is a "manifestation of her [the wife] having voluntarily undertaken obedience to the religious law which such tribunals interpret and enforce. . . . an enforcement mechanism by the religious law to which the petitioner freely adheres, cannot be deemed duress."[148] Therefore, according to the law, if a religious body applies religious pressure on an individual to do something, it is not duress because that individual can reasonably refuse and abstain from religious pressure to do an act.[149]

When judged by the standard of "reasonableness" of the Restatement Second of Contracts, it does not seem reasonable that an individual would choose to forgo signing a decree if it meant that they will be cut off entirely from the only life they have ever known in a tight-knit community. A *siruv* can have the effect of ruining the very fabric of an individual's existence. If one is a member of a very small sect of Judaism, defying the *beth din* can potentially result in the failure of one's business, the inability to have one's children marry within the community, or the ability to participate in

143. *Id.*
144. *Id.*
145. *Id.*
146. *See* Golding v. Golding, 581 N.Y.S.2d 4 (App. Div. 1992).
147. Greenberg v. Greenberg, 656 N.Y.S.2d 369, 370 (App. Div. 1997).
148. *Id.*
149. *See id.*

necessary communal activities. The legal system should measure duress not by a secular yardstick, where the decision to be religious is optional, but in the case of *beth din* decisions, measure the reasonable person as an orthodox Jew who views religion as an unquestionable necessity.

IV. THE TENSION BETWEEN THE SEPARATION OF CHURCH AND STATE AND THE CONFIRMATION OF ARBITRATION AWARDS PROCURED BY A RELIGIOUS TRIBUNAL

Although *beth din* arbitration has been interacting with the New York courts for several decades, there is still tension when a secular court is called upon to vacate or enforce matters closely intertwined with religion. The Establishment Clause in the First Amendment of the Constitution states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[150] The Court of Appeals articulated the basic principle that allows for religious arbitration panels: while a court cannot consider religious doctrine, it can determine disputes involving religious aspects based upon "neutral principles of law."[151] Due to the tension in straddling the line between religion and the secular courts, this principle has not been consistently applied.[152] The courts will strive to adjudicate the dispute by avoiding religious principles entirely, if at all possible.[153]

The clash of secular and religious law is most prominent when an injunction is sought under Civil Practice Law and Rules section 7502(c) which provides:

> The supreme court in the county in which an arbitration is pending . . . may entertain an application . . . for a preliminary injunction in connection with an arbitrable controversy, but only upon the ground that the award to which the applicant may be enti-

150. U.S. CONST. amend. I. The First Amendment is applicable to the States through the Fourteenth Amendment. *See* Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 441 (1969). For a thorough constitutional analysis of the separation of church and state and the enforcement of religious agreements, see Laurence M. Warmflash, *The New York Approach to Enforcing Religious Marriage Contracts: From Avitzur To the Get Statute*, 50 BROOK. L. REV. 229 (1984).

151. Avitzur v. Avitzur, 446 N.E.2d 136, 138 (N.Y. 1983).

152. *See, e.g.*, Matthew Goldstein, *Court Refuses to Halt Beth Din Rulings on Custody*, N.Y.L.J., July 17, 1997, at 1.

153. *See* discussion *infra* and *supra* notes 150-160 and accompanying text.

> tled may be rendered ineffectual without such provisional relief.[154]

This arbitration statute is directly in conflict with the Free Exercise Clause when applied in conjunction with a *beth din*.[155]

A New York court has found an injunction against a *beth din* to be an impermissible curtailment of religious freedom.[156] A woman who sought an injunction to stop custody proceedings in a *beth din* was denied, in order to avoid the impermissible curtailment of a religious tribunal.[157] The court denied her application, and instead directed her to invalidate the proceeding after it is completed under Civil Practice Law and Rules Article 75, thereby successfully circumventing the issue of religious curtailment of the *beth din*.[158] Instead of possibly violating the Free Exercise clause by implementing New York law, the court directed other actions, which would produce an identical result.[159] This demonstrates the unwillingness of a secular court to control a *beth din* in the same way an ordinary arbitration panel would. Not only will an injunction not be imposed on the *beth din* itself, an individual may not be enjoined from going to a *beth din* to avoid the curtailment of religious freedom.[160]

CONCLUSION

While establishing a forum for the creation of legally binding religious courts was likely a thought that would have never crossed the minds of the Founding Fathers, the *beth din* thrives today as a forum where unique, sometimes complex religious law is invited into a legally binding decision-making process. The *beth din* has always been, and will continue to be, a vital component of the Jewish community. By incorporating itself into the American legal system as an arbitration proceeding, the *beth din* will continue to play an even greater role with the newfound enforceability of *batei din* decisions.

While an impressive body of case law has developed to govern the interaction between *beth din* arbitration and the secular courts, there are still many improvements that need to be made in order

154. N.Y. C.P.L.R. § 7502(c) (McKinney 2003).
155. *See* Goldstein, *supra* note 152.
156. *Id.*
157. *Id.*
158. *Id.*
159. *See id.*
160. *See* Moskowitz v. Moskowitz, N.Y. L.J., June 10, 1997, at 25.

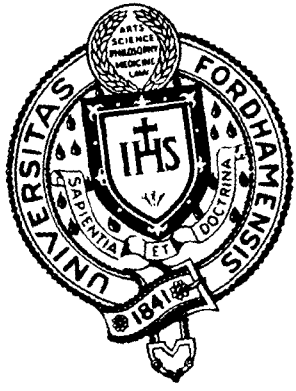
for justice to be served by using this particular means of alternate dispute resolution. Further preventative steps must be taken to ensure the decision reached through *beth din* arbitration are legally valid. Requirements should be instated to require the arbitrator to verbally confirm the right to counsel in a *beth din*, and include a similar clause to that effect in the arbitration agreement.

The most urgent area in which reform is necessary is the recognition that a *beth din* is just as capable of exercising duress upon a party as an individual party. The courts must begin to recognize that duress comes in many forms, and among them is community duress effected through a *beth din*. Actions formerly taken by a *beth din* to enforce their decrees when the force of law was not imbued in a *beth din* arbitration agreement, such as community embarrassment or pressure, cannot be dismissed as irrelevant in an action to vacate an agreement arising out of those manipulative practices.

The secular courts must also become more comfortable with broaching the barrier separating Church and State. The *beth din* should not be accorded any greater or lesser privileges because such issues involve religious aspects.

This is an area of law still in its infancy. While the law has made great strides in some respects, in incorporating the *beth din* into the secular legal system, the law still has to improve itself. Only with the implementation of these improvements can the *beth din* truly embody the dual secular and Biblical ideal: "Justice, justice thou shall pursue!"[161]

161. *Deuteronomy* 48:20.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