# *TZEDEK TZEDEK TIRDOFI*: HOW FEMALE RELIGIOUS COURT ADVOCATES CAN MITIGATE A LACK OF JUDICIAL REVIEW OF THE AMERICAN *BETH DIN* SYSTEM

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## INTRODUCTION

When Julie Lang and Zion Levi were married they signed a prenuptial agreement stating that if they separated, Levi would pay Lang $100 per day until he granted her a *get,* a Jewish divorce decree.[1] The clause was intended to present Levi with a monetary incentive to make a timely offering of the divorce decree, and to prevent him from ultimately deciding not to give his wife a *get* at all.[2] In a Jewish divorce, the husband holds the power to give the divorce decree; the wife cannot demand a *get*; she may only accept the offer.[3]

The couple also signed an arbitration agreement providing that a *beth din,* or Jewish arbitration panel, would decide issues regarding separation, divorce, the prenuptial agreement, and any monetary disputes.[4] However, in April 2011 the *Beth Din of America*[5] refused to award Lang any of the $108,000 in liquidated damages she was entitled to under the provisions of the prenuptial agreement.[6]

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[1] Lang v. Levy, 198 Md.App. 154, 157-58 (2011).

[2] *Id.* at 160.

[3] *See infra* Part II.C discussion.

[4] *Lang*, 198 Md.App. 154.

[5] *See infra* I.B discussion. The Beth Din of America is the most prominent of Jewish arbitration tribunals. One of the purposes of the Beth Din is to "provide a forum where adherents of Jewish law can seek to have their disputes resolved in a manner consistent with the rules of Jewish law." Rules and Procedures of the Beth Din of America, Preamble (a), BET DIN OF AMERICA, http://www.bethdin.org/docs/PDF2-Rules_and_Procedures.pdf.

[6] *Lang*, 198 Md.App. 154. The couple separated on October 1, 2005. In 2006, Levi sued for a divorce and Lang counter-claimed, requesting sole custody, alimony, attorney's fees, determinations regarding property, and a monetary award. The circuit court entered a decree of absolute divorce on March 28, 2008. Lang agreed to a *beth din* scheduled arbitration session for September 17, 2008 before a panel of three rabbis. At the session, the *beth din* heard arguments on both the prenuptial agreement and the get. At that time, Levi offered and Lang accepted the get. The *beth din* held that the purpose of the prenuptial agreement was to ensure the timely offering of a *get* by the husband, concluding that Lang was entitled to $100 a day from October 1, 2005, when the parties no longer resided together, to January 10, 2006, when Levi first offered her a *get*, a cumulative amount of $10,200. At a March 30, 2009

The *beth din* reasoned that because Levi had been willing to give her the *get* soon after the parties stopped living together, but Lang had refused to accept the *get,* Lang was not entitled to any damages.[7] Lang turned to the civil court to review the *beth din*'s decision, arguing that the prenuptial agreement should have been upheld; she urged the district court to recognize that the *beth din* had exceeded its authority in ordering an irrational and unfair decision where it blatantly ruled against the plain language of the prenuptial agreement.[8] The Maryland district court disagreed and upheld summary judgment for Levi, holding that the Establishment Clause of the First Amendment barred it from entangling the courts in religious question doctrine[9] concerning whether there is a basis in Jewish law for the procedures used by the *beth din* that resulted in an initial decision being reversed.[10] The court further held that so long as the proceedings conform to notions of basic fairness, and the litigants knowingly and voluntarily agree to the procedures of a *beth din*, an arbitration proceeding in a *beth din* is valid; the court cannot vacate the *beth din*'s decision, despite its failure to comply with the state's requirements for arbitration.[11] Thus, Levi was never forced to provide evidence of Jewish law in making his motion for summary judgment, and Lang left court with no monetary damages at all.[12]

Julie Lang's claims of misuse of authority and failure to explicate accurate applications of Jewish law are not uncommon in Jewish arbitration settings across the country, nor is it rare for civil courts to refuse to apply judicial review to *beth din* proceedings. Yet, despite such a lack of protection, parties facing legal consequences intertwined with questions of Jewish law have increasingly turned to arbitration as an alternative method of dispute resolution, rather than litigating in court, which can be more time consuming, expensive, and adversarial.[13] The United States courts have recognized the significant benefits of faith-based arbitration, as they have for conventional arbitration, and the enactment of federal statutory regulation under the Federal Arbitration Act ("FAA"),[14] as well as state

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modification hearing, the *beth din* rejected the panel's determination and eliminated the monetary award to Lang completely. *Id.*

[7] *Id.* at 160-162.

[8] *Id.*

[9] *See infra* Part III.B (1) discussion. The religious question doctrine stands for an interpretation of the First Amendment prohibiting civil courts from examining religious doctrine or from becoming entangled in religious law, so that courts are required to defer to religious authorities for determinations of religious doctrine.

[10] *Lang*, 198 Md.App. at 170. "[T]he Establishment Clause precludes civil courts from resolving disputes involving religious organizations whenever such disputes affect religious doctrine or church polity or administration . . . [a]s far as the rigor of our review is concerned, this is an area where treading lightly is not enough. Here, we cannot tread at all."

[11] *Id.* at 171.

[12] *Id.* at 172.

[13] *See infra* Part I.A discussion.

[14] *Id.*

statutory requirements under the Uniform Arbitration Act ("UAA"),[15] signify the courts' general respect for arbitration panels and their decision-making authority.

This Note addresses how a lack of judicial review in faith-based arbitration proceedings permits insufficient protections for parties disputing in a *beth din*, where arbitration decisions involving Jewish religious doctrine are not checked by civil courts. More specifically, this Note focuses on women as a vulnerable group of disputants utilizing the *beth din* system without the protection of judicial review. It proposes that due to a lack of external protection through judicial review, an internal solution is necessary and available where incorporating female religious court advocates ("RCAs")[16] into the *beth din* system in America offers a two-fold solution: it can cure the general unfairness in the American *beth din*, as well as any injustice toward women who visit the male-dominated American *beth din*. First, incorporating female RCAs would require a total restructuring of the role of the American RCA. By recreating the professional goals and requirements for RCAs, the American *beth din* would set standards to guarantee that RCAs provide and safeguard justice in religious arbitrations.[17] Second, incorporating female RCAs would serve as a strong preemptive method of protecting women while they are in a male-dominated arbitration setting, ensuring that women feel comfortable relaying private testimony so that the correct Jewish laws are applied to particular fact scenarios.[18]

Part I of this Note provides a brief history of conventional and faith-based arbitration in the United States, as well as some background on the creation of the FAA and its protections. It then discusses the American *beth din* system as a specific form of faith-based arbitration. Part II assesses the current structural pitfalls of the *beth din* system in America, and of the RCA framework specifically. By zeroing in on women as a particularly vulnerable group of litigants in the *beth din*, and asserting that women need significant protection where judicial review cannot intervene to ensure they receive fairness in the *beth din*, this Part explains why restructuring the RCA framework from within is vital to ensuring that fairness is met in the *beth din*.

Part III affirms the need to restructure from within. An analysis of recent Supreme Court decisions, which have narrowed the courts' authority to vacate arbitration orders, shows the limited and weak external protection provided by the FAA. It next examines how the religious question doctrine further limits judicial review over faith-based arbitration tribunals, more so than conventional arbitration,

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[15] *Id.*

[16] Nava Bak, Yedida Goldman, & Shira Hecht, *Resting Our Case: Toanot Beit Din*, AMIT MAGAZINE, Winter 2000, at 38-39, http://www.jofa.org/pdf/Batch%201/0039.pdf (last visited Nov. 7, 2011). Rabbinic court advocates represent parties in rabbinic tribunal settings, advocating on a client's behalf based on applications of Jewish law to the disputed claims. It is similar to a lawyer representing a client in civil court, arguing applications of civil law before the court. *Id.*

[17] *See infra* Part IV.B discussion.

[18] *See infra* Part IV.A discussion.

arguing that the FAA requirements and standard of review meant to protect parties in arbitration circumvent faith-based arbitration in the *beth din*.

Finally, Part IV proposes that incorporating female RCAs into the *beth din* system in America, as Israel has done in its religious courts, is a strong internal solution for restructuring the *beth din* system from within. Incorporating female RCAs would require an overhaul of the current *beth din* system—one that could demand explicit and uniform standards for RCA qualifications and for the RCA-arbitrator relationship in the *beth din*. Accordingly, restructuring the system from within would serve to protect women from the perils of injustice in the American *beth din*, where judicial review is not an available means of checking the *beth din*'s authority.

## I. HISTORY OF ARBITRATION AND THE FEDERAL ARBITRATION ACT (FAA)

### *A. Arbitration Generally and the FAA*

The Supreme Court's support of the FAA has solidified arbitration as a valid, respectable, and efficient method of alternative dispute resolution.[19] Congress passed the FAA in 1925, when the economic and political climate of the earlier decades of the twentieth century saw a rise in organized labor movements, an expansion of social welfare regulation, and the amplification of administrative power in the government.[20] As modern industrial operations evolved and grew, and litigation proved too time-consuming and expensive, parties needed a faster and less expensive method to solve disputes.[21] The FAA established that a written agreement of arbitration "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[22] In 1955, the National Conference of Commissioners on Uniform State Laws drafted the Uniform Arbitration Act (UAA), which served as the template for the individual state arbitration statutes enacted to validate and enforce arbitration agreements made in state courts.[23]

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[19] Michael C. Grossman, *Is This Arbitration?: Religious Tribunals, Judicial Review, and Due Process*, 107 COLUM. L. REV. 169, 177-180 (2007). Arbitration is a form of private dispute resolution, where the parties choose an arbitrator who, after a hearing, renders a legally binding and generally non-appealable decision, subject to limited court review. *Arbitration Defined*, JAMS ARBITRATION, MEDIATION, AND ADR SERVICES, http://www.jamsadr.com/arbitration-defined/ (last visited Jan. 12, 2012).

[20] Federal Arbitration Act, 43 Stat. 883, 68 P.L. 401, 83 Cong. Ch. 213 (1925) (codified as amended at 9 U.S.C. §§ 1-14 (1990)).

[21] *See* STEVEN C. BENNETT, ARBITRATION: ESSENTIAL CONCEPTS 10 (2002).

[22] 9 U.S.C. § 2. For a summary of the Federal Arbitration Act (FAA) provisions, see BENNETT, *supra* note 21, at 17-29.

[23] Unif. Arbitration Act (UAA) §§ 1-25, 7 U.L.A 102-768 (1956). For a summary of the UAA provisions, see BENNETT, *supra* note 21, at 29-31. In 1920, New York was the first state to enact a statute recognizing the validity and enforceability of arbitration agreements. *Id.* at 10. The Revised Uniform Arbitration Act (RUAA) was drafted in 2000. For a summary of the RUAA provisions, see *id.*, at 32-39.

The Supreme Court remained ambivalent toward arbitration, until the 1960s.[24] In *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, the Court expanded the FAA, holding that Congress lawfully enacted the FAA under the Commerce Clause, and federal courts must apply those rules in diversity suits.[25] The Court also articulated an "unmistakably clear congressional purpose that [arbitration] . . . be speedy and not subject to delay and obstruction."[26] In the decades that followed, the Supreme Court began to see arbitration as an equally viable method of dispute resolution to litigation, pronouncing in several cases that Congress' purpose in enacting the FAA was to reverse the courts' hostility toward enforcing arbitration agreements.[27] Moreover, in *Southland Corp. v. Keating* the Court held that, in suits involving interstate commerce, the FAA preempts state statutes that restrict arbitration and contradict Congressional intent, creating a duty on both state and federal courts to apply the FAA.[28]

Today, arbitration is a common method of dispute resolution, and is used in a variety of legal contexts.[29] Arbitration is commonly used in insurance disputes, commercial and contract disputes, labor and employment disputes, international disputes, discrimination disputes, and divorce and family disputes, to name a few.[30] Arbitration is utilized because it allows parties to retain some control over the dispute and its outcomes, and to choose the decision maker.[31] In comparison to the court systems, the process is less adversarial, time consuming, and expensive than litigation; it allows parties more flexibility and privacy than proceedings in a civil court setting.[32] Arbitration also benefits the judicial system by relieving the courts of increasing dockets, and by reducing the administrative costs of discovery and trials.[33]

However, arbitration has its drawbacks as well, and is not always the best method of dispute resolution for a particular case. Arbitration lacks the protections of the court system, as parties can impose their own rules and procedures.[34] Arbitration also limits discovery and eases the rules of evidence; arbitrators are not required to rely on precedent or strive for uniformity in their decisions; and, written

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[24] Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967).

[25] *Id.* at 405.

[26] *Id.* at 404.

[27] *See, e.g.*, Allied Bruce Terminix Cos. V. Dobson, 513 U.S. 265 (1995) (holding that the FAA preempted Alabama statute making pre-dispute arbitration agreements invalid and unenforceable); Southland Corp. v. Keating, 465 U.S. 1, 16 (1984) (holding that the FAA overrides state laws regarding enforceability of arbitration agreements); Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974) (holding that an arbitration clause in a securities context was enforceable).

[28] *Keating*, 465 U.S. at 15-16.

[29] *See* JOHN W. COOLEY, THE ARBITRATOR'S HANDBOOK 13-16 (2d. ed. 2005).

[30] *Id.*

[31] *See* Diane P. Wood, *The Brave New World of Arbitration*, 31 CAP. U. L. REV. 383, 396 (2003).

[32] *Arbitration Overview*, NATIONAL ARBITRATION FORUM, http://www.adrforum.com/main.aspx?itemID=324&hideBar=False&navID=178&news=3 (last visited Nov. 7, 2011).

[33] *See* Wood, *supra* note 31, at 383.

[34] BENNETT, *supra* note 21, at 6-8.

opinions are rare.[35] Moreover, arbitration provides limited judicial review of arbitration awards.[36] Due to a lack of uniform regulation of the arbitration court system, formal arbitration bodies and private arbitration forums, like the American Arbitration Association ("AAA") and the National Arbitration Forum ("NAF"), provide their own services and impose their own rules and regulations.[37] There are also individual entities, like the Financial Industry Regulatory Authority ("FINRA"), which conduct their own arbitration proceedings for their specific markets.[38] Religious groups often organize their own arbitration forums as well, where clergy or religious experts preside.[39]

### *B. Faith-based Arbitration: The* Beth Din *System in America*

Private arbitration forums are also common among religious communities, where Jewish, Christian, Muslim, and other religious panels adjudicate internal disputes.[40] The Jewish *beth din* system has local forums across the United States, as well as national associations that created dispute resolution boards.[41] The most prominent *beth din,* the Beth Din of America,[42] is affiliated with the Rabbinical Council of America ("RCA"), an Orthodox Jewish institution.[43] A *beth din* usually consists of three judges,[44] with at least one being a rabbi, though they need not meet formal qualifications.[45] While the procedures of each panel differ, the *beth din*'s arbitrators generally conduct their arbitrations following secular arbitration law, though they also apply Jewish law, which may override civil law.[46] Jewish law prohibits bringing claims to secular courts.[47] Therefore, the *beth din* presides

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[35] *Id.*

[36] BENNETT, *supra* note 21, at 8.

[37] *About American Arbitration Association*, AMERICAN ARBITRATION ASSOCIATION, http://www.adr.org/about_aaa (last visited Nov. 7, 2011).

[38] *About the Financial Industry Regulatory Authority*, FINRA, http://www.finra.org/AboutFINRA/ (last visited Nov. 7, 2011).

[39] *See infra* Part I.B discussion.

[40] Grossman, *supra* note 19 (describing Christian and Muslim panels, and their respective rules).

[41] *cRc Beth Din*, CHICAGO RABBINICAL COUNCIL, http://www.crcweb.org/bethdin.php (last visited Nov. 7, 2011); *Batei Din*, ORGANIZATION FOR THE RESOLUTION OF AGUNOT (ORA), http://www.getora.com/beitdin.html (last visited Nov. 7, 2011) (listing *battei din* in New York, New Jersey, Boston, Chicago, and California).

[42] *About Us*, BETH DIN OF AMERICA, http://www.bethdin.org/organization-affiliations.asp (last visited Nov. 7, 2011).

[43] RABBINICAL COUNCIL OF AMERICA, http://www.rabbis.org/ (last visited Nov. 7, 2011).

[44] 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, 641 (2004) (explaining that the Beth Din of America usually utilizes a single rabbi to decide disputes where less than $10,000 is in controversy, and offers a panel of three judges for controversies over $10,000).

[45] *Id.*

[46] *Id.*

[47] *See* TALMUD BAVLI, *Tractate Gittin* 88b ; *see also* SHULCHAN ARUCH, *Hoshen Mishpat* 26:1. *See* Fried, *supra* note 44, at 635. The prohibition aims to prevent one Jew from accusing another Jew in a secular court, thereby creating a *chillul Hashem* (desecration of G-d's name). A fear is that an onlooker, seeing an Observant Jew brought to secular court for violating a Jewish law, will think that the Jewish laws have little worth since following the laws does not seem to make one a better person. *Id.*

over a variety of matters including contract and commercial claims, employment disputes, inheritance disputes, Jewish law-compliant loans, family law issues, in addition to religious matters of divorce and conversion.[48] There are certain claims, like divorce, that are deeply rooted in Jewish law, and consequentially, can only be settled by a *beth din*.[49]

In addition to the benefits of using arbitration in general as a means of dispute resolution, parties may opt to utilize faith-based arbitration for various other reasons.[50] First, members of a religious community may feel obligated to turn to religious arbitration out of religious conviction.[51] Social pressure may also be a factor, where it is generally accepted in the community that religious courts are most reliable or knowledgeable. A specific illustration of Jewish social pressure in the Jewish community is the authority the *beth din* has to issue a *seruv*, a publicly declared order of contempt, which can result in the community ostracizing the individual as a means of pressuring him to accept the summons.[52] Another reason may be that members of a minority community fear the secular courts will discriminate against them, so they prefer disputes to be settled internally by arbitrators who understand and identify with the religious doctrine and communal standards.[53] Lastly, religious arbitration offers communities a protectionist approach to resolving disputes internally, in that it helps preserve minority cultures and values, free from state interference.[54]

## II. PITFALLS OF THE *BETH DIN* SYSTEM IN AMERICA REQUIRE ALTERNATIVE PROTECTIONS TO JUDICIAL REVIEW

### *A. Pitfalls of the Current RCA Framework in the American Beth Din*

Many of the *battei din*—plural for *beth din*[55]—in the Unites States incorporate rabbinic court advocates ("RCAs"), but there is no female equivalent.

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The prohibition also applies to a Jewish lawyer representing a Jewish plaintiff. *Id.* at 638.

[48] *Arbitration and Mediation,* BETH DIN OF AMERICA, http://www.bethdin.org/arbitration-mediation.asp (last visited Nov. 7, 2011).

[49] Fried, *supra* note 44, at 640. A Jewish couple in America typically gets both civil and religious divorce decrees. A Jewish couple can get a civil divorce decree from a civil court, but they are only divorced according to Jewish law upon the wife's receipt of a *get*.

[50] *See id.*, at 639.

[51] *Id.*

[52] *Layman's Guide to Dinei Torah (Beth Din Arbitration Proceedings)*, BETH DIN OF AMERICA, 6 http://www.bethdin.org/docs/PDF1-Layman's_Guide.pdf (last visited Nov. 7, 2011). A *seruv* is a public declaration by a *beth din* that someone was summoned to *beth din*, but refused to meet his or her obligation under Jewish law to appear. Sometimes, Jewish communities or synagogues impose sanctions on such people, such as not giving them *aliyos* (being called up to the reading of the Torah) or refraining from social interaction, to pressure them to meet their obligations.

[53] Fried, *supra* note 44, at 639.

[54] Suzanne Last Stone, *The Intervention of American Law in Jewish Divorce: A Pluralist Analysis,* 34 ISR. L. REV. 170, 179 (2000).

[55] *See Bet Din,* JEWISH ENCYCLOPEDIA, http://www.jewishencyclopedia.com/articles/3189-bet-din (last visited June 29, 2012).

However, the Beth Din of America, the most prominent national *beth din*, has a strict prohibition against using an RCA,[56] though it permits parties to employ male or female attorneys.[57] Even the right to counsel in a *beth din* can be an issue because the role of the attorney is not a featured or valued one within the Jewish tradition.[58] There were no lawyers in the *battei din* of ancient Israel, and sources on Jewish law depict the lawyer as one who pursues only his client's causes, and not justice itself, in conflict with the Biblical commandment of "*tzedek tzedek tirdof*" (justice, justice thou shalt pursue).[59] Instead, the Jewish legal system was based on litigants themselves appearing before the *beth din* to tell the truth, and not a strategically modified version of the truth.[60]

The reason for the Beth Din of America's firm stance against RCAs is that American RCAs are notorious for their unprofessionalism in the courtroom and propensity for manipulating the Jewish law.[61] Ami Magazine recently conducted an interview with Rabbi Hershel Schachter, a prominent Rabbi and Dean of the Rabbi Isaac Elchanan Theological Seminary at Yeshiva University, one of the main consultants to the Orthodox Union on issues of Jewish law, and a renowned scholar of Torah and Jewish law.[62] Rabbi Schachter is an outspoken proponent of *beth din* reform, and the interview sheds ample light on the current state of the *beth din* system in America, and the system's relationship with RCAs.[63]

Rabbi Schachter describes the present *beth din* system as "terrible" and "ridiculous," "a *chutzpah* (disrespect)" and an overall "*chillul Hashem*" (defamation of G-d's name).[64] In his opinion, the *beth din*'s current predicament is "worse than a crisis," and he attributes much of the problem to the RCAs.[65] Rabbi Schachter explains that many Jews, especially in Ultra-Orthodox communities, are taking their cases not to the *beth din,* but to civil court, because they perceive the current *beth din* system as unjust on account of the RCAs and the arbitrators.[66]

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[56] *Layman's Guide*, *supra* note 52, at 8 ("[S]imilar to a lawyer in secular court, a toen acts a representative of one of the parties. The Jewish court system does not expect the parties to have such representation, and the Beth Din of America disallows such representation except, in certain cases, with the explicit agreement of all parties and the judges.").

[57] *Rules and Procedures of the Beth Din of America*, BETH DIN OF AMERICA, 6 *www.bethdin.org/docs/PDF2-Rules_and_Procedures.pdf* (last visited Jan. 19, 2013) ("Any party shall have the right to be represented by an attorney who must be licensed to practice law in any jurisdiction in the United States and may claim such right at any time as to any part of the arbitration that has not taken place. If a party is represented by an attorney, all papers served on such party shall be served on such attorney.").

[58] Fried, *supra* note 44, at 645-646.

[59] *Id.* at 646; DEUTERONOMY 48:20.

[60] *See* Fried, *supra* note 44, at 646.

[61] Interview with Ilana Blass, Administrative Attorney at Beth Din of America (Oct. 11, 2011).

[62] ORTHODOX UNION, http://www.ou.org/convention/speaker/rabbi_herschel_schachter.

[63] *AMI Magazine Exclusive Interview with Rav Hershel Schachter on "Terrible" Bais Din System,* AMI MAGAZINE (Oct. 12, 2011), http://baltimorejewishlife.com/news/news-detail.php?SECTION_ID=1&ARTICLE_ID=10121.

[64] *Id.*

[65] *Id.*

[66] *Id.*

Further, those who insist on using a *beth din* will go to a weaker *beth din*, where unprofessional or unknowledgeable RCAs are allowed to practice, because they know that the arbitrators there are more likely to disregard the facts, accept bribes,[67] and rely on the RCA's presentations, however inaccurate they may be.[68] As a result, the arbitrators in stronger *battei din* are hard-pressed to prohibit RCAs, for fear that litigants will stop bringing claims to their *beth din*.[69]

According to Rabbi Schachter, the issues in the weaker *battei din* are created by the techniques used by American RCAs and arbitrators, and the general RCA-arbitrator relationship. There are three main ways that RCAs corrupt the system in America. First, the RCAs are permitted to meet with arbitrators in private meetings, for which the clients pay both the RCAs and the arbitrators by the hour for their extra time and advice.[70] Therefore, there is great incentive for RCAs and arbitrators to have unlimited sessions at the litigants' expense. Rabbi Shachter calls such a waste of clients' time and money "a *shanda* and a *cherpa*" (a shame and repulsive matter).[71]

Second, RCAs impede the justice process because they do not follow professional modes of conduct and respect in the courtroom, and act "nastily" toward the arbitrators.[72] Further, the Jewish legal system emphasizes that litigants should present their own claims before the *beth din*, in order for arbitrators to interact with claimants and accurately extract the facts and apply the correct law.[73] However, the RCAs present the case without the litigants ever speaking, which prevents the arbitrators from getting to the underlying facts in order to render a proper decision.[74] For instance, Rabbi Schachter sat on one panel where an RCA responded to an arbitrator's fact-finding question, posed to the litigant by screaming out, "Don't answer! You're not [obligated] to answer!"[75] Rabbi Schachter states, "that was the end of the case. Had this been a secular court, they would have thrown [the RCA] out the window . . . [for] *chutzpah* (disrespect)! The

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[67] *Id.* (accepting bribes disqualifies a judge from presiding as a judge).

[68] *Id.*

[69] *AMI Magazine*, *supra* note 63.

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *Id.* Rabbi Schachter explains how litigants must present their own cases so that the judges can sense their emotion and trepidation as indicators of their underlying involvement in the claims. Whereas an RCA can present the facts with confidence despite his client's actionable conduct, the litigant himself would otherwise be shaking with trepidation while repeating his claims before the judges. Rabbi Schachter argues that if the litigant can't express the facts for himself, for instance, if he is a minor or simply does not know the facts, there is a rule of *psach picha l'ilaim* ["speaking for the mute"]. However, Rabbi Schachter believes that every litigant should be able to pose the facts, as often there is no argument about what the facts are. Even if they must offer the litigant some assistance, he asserts that the judge, who is learned, can help without the need for an RCA. *Id.*

[74] *Id.*

[75] *AMI Magazine*, *supra* note 63.

[judges] want to find out the facts. But that was the end; there was nowhere to go after that."[76]

Third, the RCAs obfuscate the facts and the Jewish law.[77] The RCAs create additional aggravation during the proceedings by confusing Jewish laws, either accidentally, due to their lack of formal education, or purposely to strengthen their clients' cases.[78] For example, the RCAs will quote Jewish law out of context.[79] Rabbi Schachter offers a striking example of such behavior, specifically in the context of divorce proceedings. He explains a current practice, where RCAs instruct husbands going through divorce proceedings to tell the arbitrator that his wife is a *moredes*—a rebellious wife—who denies him basic *shalom bayis*, or peace in the home, an honored principle in Jewish law and culture.[80] If the arbitrator agrees to the wife's status as a *moredes,* the *beth din* must deny her the *get* according to Jewish law.[81]

The arbitrators, and the arbitrator selection process, also contribute to the crisis. Rabbi Schachter begins his analysis of the problem with the arbitration panels by posing a rhetorical question: "Do you think that all of the [judges] are honest? Many are acting like RCAs; many of the RCAs are acting like criminals."[82] He says that the arbitrators misuse the system and do not arbitrate for justice; they accept bribes, make up their minds in advance about which side should win, and misemploy their authority by instituting orders of contempt to those who do not deserve to receive such a debilitating decree, thereby defaming the innocent reputations of litigants.[83]

Furthermore, Rabbi Schachter says the *borer*—choice—system of appointing judicial panels, whereby two of the judges are chosen by the litigants, and the two judges then choose the third judge,[84] is in itself a "*shanda* (shame)."[85] The *borer* structure is problematic because each litigant thinks that the judge he chose must side with him, and the judges often act accordingly to appease the parties.[86] Often times, the third judge will take bribes from RCAs and litigants who want to sway the last vote in their favor.[87]

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[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] *AMI Magazine*, *supra* note 63.

[82] *Id.*

[83] *Id.*

[84] *See* Rabbi Chaim Manilowitz, *Pitfalls to Avoid in Obtaining a Get,* ORTHODOX UNION (1999), http://www.ou.org/publications/ja/5760winter/avoid%20get%20pitfalls.pdf.

[85] *AMI Magazine*, *supra* note 63.

[86] *Id.*

[87] *Id.*

### *B. Rabbi Schachter's Solution: Removing RCAs from the* Beth Din

Rabbi Schachter offers a number of strategies that litigants and arbitrators can utilize to ensure that justice prevails in the *battei din.* In his opinion, the most important step is to prohibit the use of RCAs altogether. Rabbi Schachter asserts that if he had the supreme authority to change or create a new Jewish law, he would abolish the entire RCA system.[88] He states that an RCA is unnecessary when the judicial panel is learned enough to ascertain the facts and assist any litigant who cannot advocate on his or her own behalf.[89] Additionally, arbitrators should focus on the truthfulness of the facts and the correct application of Jewish law, so that both parties can leave the *beth din* with an arbitrated judgment or compromise order, as well as assurance that they received justice, even if the arbitration panel did not find in one party's favor.[90]

In terms of selecting arbitrators, Rabbi Schachter advises litigants to forego a panel of three judges, if they cannot secure three trustworthy people.[91] He says "people who have a dispute should find an honest [rabbi] to make a [judgment] between them . . . [because it is] better to just have one person that both [parties] trust."[92] Lastly, he advises community rabbis to speak out about issues that lead to going to *beth din*, like cheating in business, and to expose the crisis in the *beth din* system so that their congregants and students are aware of the current injustices. Further, the rabbis should tell people that if they take unmerited or unlawful money, G-d will see to it that they will lose that money in the future.[93] In his opinion, if the rabbis talk about the crisis in the American *beth din* system long enough, discussions will have an effect on community members, who will ultimately advocate to reform the system.[94]

### *C. The Vulnerability of Women in the* Beth Din*: Why They Need the Protection of an RCA*

Removing the RCA position all together, however, is not the best solution. Parties, especially vulnerable individuals who lack the knowledge and advocacy skills necessary to defend their claims, need professionals to advocate on their behalf.[95] Women are a particular group of vulnerable litigants in the *beth din.* Instead of displacing incompetent and inexperienced RCAs, the system should reform the RCA qualifications and reincorporate the RCA role under new and stricter standards. Instead of leaving a vulnerable female litigant to fend for herself

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88 *Id.*
89 *Id.*
90 *Id.*
91 *AMI Magazine*, *supra* note 63.
92 *Id.*
93 *Id.*
94 *Id.*
95 *See infra* Part IV.A discussion.

in a male-dominated arbitration setting of male arbitrators and RCAs, the *beth din* should incorporate female RCAs under these stricter standards so that there is a place for female advocacy in the *beth din* setting.

Most women who visit a *beth din* are there to resolve family law disputes, such as divorce and related child custody and support issues.[96] Family law generally involves traditionally more vulnerable members of society—women and children.[97] Women who visit the *beth din* to get a religious divorce are particularly at risk of prejudice because according to Jewish law, only a man can dissolve a marriage by delivering a bill of divorce, called a *get*,[98] which he must grant willingly.[99] Biblical law allows a husband to engage in polygamy, and provides him with legal avenues to take in order to circumvent his spouse's veto power over divorce in extraordinary circumstances.[100] The Torah provides no such liberty to women.[101] Further, the consequences for a wife who cohabitates with another man while still married are harsher than those imposed on a man: she is deemed an adulteress and any child that comes from such a union is labeled a *mamzer*, or an illegitimate Jew who is forbidden to marry a legitimately born Jew.[102] This gives the husband substantial bargaining power in obtaining a favorable divorce settlement with regard to property division and child custody.[103]

Suzanne Last Stone, Professor of Law and Director of the Center for Jewish Law and Contemporary Civilization at the Benjamin N. Cardozo School of Law, explicates the notion that instituting civil marriage and divorce, and relegating religious law to the private domain, does not dispose of issues of religious rights and equality in marriage; rather, it transfers them to another plane.[104] Because Jewish law forbids utilization of the civil courts,[105] civil law does not remove the barriers to marriage for a Jewish woman; there is no alternative forum for a

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[96] *See* Fried, *supra* note 44, at 641.

[97] *See* Perl v. Perl, 512 N.Y.S.2d 372, 375 (1st Dep't 1987) (noting the "unequal allocation of power between spouses to terminate religious marriage—particularly where the partners are of the Jewish faith").

[98] *See* Deut. 24:1-4; Mishna, Yevamot 14:1.

[99] BABYLONIAN TALMUD, *Yevamot* 112b; MAIMONIDES, MISHNEH TORAH, *Laws of Marriage* 1:1. There is substantial history of husbands making additional last minute demands upon their wives, threatening withdrawal from the *get* process. Fried, *supra* note 44, at 645.

[100] Stone, *supra* note 54, at 175 n.15 (stating that if one hundred rabbis agree, the husband is permitted to remarry even though his first wife has not accepted the divorce).

[101] *Id.*

[102] *Id.*

[103] Requiring couples to visit the *beth din* to get a religious divorce often encourages couples to bring associated custody, visitation, maintenance, and equitable distribution disputes to the *beth din*. Fried, *supra* note 44, at 641.

[104] Stone, *supra* note 54, at 176 ("To the extent that individuals hold onto their religious practices within the private domain – a domain now further crippled from doing justice from within – they enter the public domain of law clothed with burdens that prevent full realization of the rights and benefits that not only civil law but also religious law provides.").

[105] Fried, *supra* note 44.

religious Jewish woman seeking a divorce. She must therefore go to the *beth din* and navigate her way through the system of Jewish law as best she can.

## III. LIMITED JUDICIAL REVIEW OF ARBITRATION

### *A. Supreme Court Doctrine: Limited Judicial Review under the FAA*

The FAA was created with the intent of mandating limited judicial review, but the limiting effect of the religious question doctrine on the FAA further weakens judicial review protection of religious arbitration in a *beth din*. FAA Section 9, which introduces the enforcement provisions of arbitration, is the restricting section that limits judicial discretion. Specifically, FAA Section 9 states, "court[s] must grant [confirmation] order[s] unless the [arbitration] award is vacated, modified, or corrected."[106] FAA Sections 10 and 11 then provide the exclusive bases for a court's decision to vacate or modify a judgment, providing that a court may vacate a decision:

> (1) where the award was procured by *corruption, fraud, or undue means*;
> (2) where there was evident *partiality or corruption in the arbitrators*, or either of them;
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
> (4) where the *arbitrators exceeded their powers*, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.[107]

The courts have narrowly defined each of these restrictions as a means of preserving congressional intent to keep arbitration from civil judicial review.[108] Thus, for instance, courts have interpreted the fraud ground as creating a means of vacating a judgment only for misrepresentations to the arbitrator or omissions of material fact.[109] The bias ground only permits vacating a judgment upon a showing of either non-disclosure of a potential or actual bias on the part of the arbitrator.[110] The misconduct ground only permits vacating a decision for procedural irregularities that deprive a party of a fair hearing.[111] Finally, the contractual powers ground permits vacating a judgment only when the arbitrator has exceeded the powers provided by the parties in the contract.[112] Additionally,

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[106] Federal Arbitration Act, 9 U.S.C. § 9 (2006).

[107] Federal Arbitration Act, 9 U.S.C. §§ 10-11 (2006) (emphasis added).

[108] Jonathan A. Mercantel, *The Crumbled Difference Between Legal and Illegal Arbitration Awards: Hall Street Associates and the Waning Public Policy Exception*, 14 FORDHAM J. CORP. & FIN. L. 597, 605-607 (2009).

[109] *Id.* at 605-606.

[110] *Id.* at 606.

[111] *Id.*

[112] *Id.* at 606-607.

neither the contractual powers ground nor any other of the statutory grounds have been interpreted to encompass violations of public policy, generally an expansive basis for vacating any decision.[113]

The Supreme Court's rulings in two recent commercial arbitration cases, *Hall Street Associates LLC v. Mattel, Inc.*,[114] and *AT&T Mobility LLC v. Concepcion*,[115] show a trend toward narrowing judicial review of arbitrations under the statutory provisions in the FAA. Though commercial arbitration differs from religious arbitrations, specifically those dealing with family law, the holdings in these cases highlight the Supreme Court's narrow interpretations of the FAA grounds for vacating a judgment, so as to prevent any interference with the finality of an arbitrator's decision via judicial review.

The arbitration provision under examination in *Mattel* permitted a reviewing court to vacate the decision of the arbitrator on grounds not included within the FAA.[116] Applying a strict plain meaning analysis, the Supreme Court held that federal courts cannot enforce an arbitration agreement that provides for more expansive judicial review of an arbitration award than the narrow standard of review provided for in the FAA.[117] The Court interpreted the review provisions of the FAA to be "exclusive," and held that the phrase "must grant" within Section 9[118] unequivocally instructs courts to grant confirmation in all cases, except when the FAA explicitly provides a method for vacating a decision in FAA Section 10.[119] Thus, the Court emphasized that vacating a judgment is permitted only on the narrow basis of procedural irregularities such as fraud, corruption, bias, and exceeding contractual powers.[120]

In *AT&T Mobility*, the Supreme Court affirmed its prior conclusion in *Mattel*.[121] A California law banned contracts that asked consumers to agree to arbitration clauses prohibiting them from bringing class action suits because such clauses unfairly exculpated one party—the corporation—from its wrongdoing.[122] The Court held that the FAA preempted this state law, so that California must enforce arbitration agreements even if the agreement requires that consumer complaints be arbitrated individually, instead of on a class-action basis. Based on a textual analysis of the FAA, the Court concluded that the principal purpose of the FAA is to ensure that private arbitration agreements are enforced according to their

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113 *Id.* at 607.

114 Hall St. Assocs. v. Mattel, Inc., 552 U.S. 576 (2008).

115 AT&T Mobility LLC. v. Concepcion, 131 S. Ct. 1740 (2011).

116 Mercantel, *supra* note 108, at 598.

117 *Mattel*, 552 U.S. 576.

118 Federal Arbitration Act, 9 U.S.C. § 9 (2006).

119 *Mattel*, 552 U.S. at 587.

120 *Id.* at 585-87; *see* 9 U.S.C. § 10(a).

121 AT&T Mobility LLC. v. Concepcion, 131 S. Ct. 1740 (2011).

122 *Id.*

terms;[123] parties may not contractually expand the grounds or nature of judicial review.[124]

The Court further held that the only valid grounds for vacating are found in Section 10 of the FAA.[125] In that regard, the Court expressly recited the grounds found in FAA Section 10, including two grounds set forth in Section 10(a)(4), namely "any misbehavior by which the rights of any party have been prejudiced" and when "arbitrators exceed[] their powers."[126] Thus, *AT&T Mobility* further cemented the Supreme Court's attitude toward limiting judicial review of arbitration proceedings by upholding arbitration provisions that allow parties to craft their own arbitration processes without judicial interference.

### *B. Religious Question Doctrine: A Further Limitation on Judicial Review of the* Beth Din

#### 1. FAA and UAA Requirements

In the 1960s and 1970s, the Supreme Court "constitutionalized" the religious question doctrine, finding that the First Amendment prohibited courts from examining religious doctrine or from becoming entangled in religious law, so that courts are required to defer to religious authorities for determinations of religious doctrine.[127] In *Jones v. Wolf*, the Court then established a new approach to resolving religious disputes called "neutral principles," whereby applying neutral secular principles to the facts of a case would entail no inquiry into religious doctrine.[128] Accordingly, a court can hear religiously underscored cases if it can apply secular law without examining religion. The neutral principles approach, however, often does not protect the vulnerable parties in family-related *beth din* proceedings, where examination of Jewish law and related documents is necessary to make a religion-based determination. For example, courts are forced to refrain from reviewing ecclesiastical pronouncements within contracts, such as divorce decrees.[129]

Furthermore, though the FAA and UAA arbitration requirements provide some statutory protection for parties visiting a *beth din*, applying the four main FAA and UAA requirements to both conventional and religious arbitration panels shows that the *beth din* system falls outside the scope of the protective measures

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123 *Id.* at 1748.

124 *Id.* at 1752.

125 *Id.*

126 *Id.*

127 Grossman, *supra* note 19, at 183-184 (2007) (stating that commentators note that the Court has not distinguished which clause of the First Amendment provides this rule, but has drawn on both the Free Exercise and the Establishment Clauses).

128 Jones v. Wolf, 443 U.S. 595, 602 (1979).

129 Grossman, *supra* note 19, at 186-187.

contemplated by the creators of these standards.[130] The FAA demands three basic requirements or rules of fairness: a written agreement to arbitrate, the right to selection of arbitrators and applicable law, and the right to cross-examine witnesses; the UAA adds the right to counsel, and expands the evidence and discovery right under the FAA to include the right to present material evidence.[131]

Requiring parties to sign a written agreement to arbitrate is quite unspecific, as the FAA states only that "an agreement in writing to submit to arbitration an existing controversy . . . shall be valid, irrevocable, and enforceable."[132] Since agreements need not specifically use the word "arbitration" to satisfy the provision, religious tribunals at first glance fall within the scope of the FAA.[133] However, the major difference between a written agreement in a *beth din* and that of a conventional arbitration is that, in a sense, the agreement to submit to a religious panel is a "religious document."[134] *Beth din* agreements are, therefore, governed by religious law and may contain terms subject to dispute among religious authorities, thus preventing civil courts from interpreting them.[135]

Both the FAA and UAA recognize that parties can contract for a method of arbitrator selection, but neither prescribes requirements for the process. In the absence of an agreed upon method, or upon failure to utilize a specified method, the FAA and UAA authorize courts to appoint arbitrators.[136] While this may not present problems for conventional arbitration, in religious tribunals, judges will confront the religious question doctrine if they select or compel parties before a panel organized by the court.[137] For example, vague agreements to submit to an unspecified rabbinical court will cause problems when parties themselves do not specify the tribunal.[138] Additionally, religious panels differ where the religious doctrine determines whom parties can select as arbitrators. Jewish law requires a certain level of rabbinical ordination or education to preside as an arbitrator, and further bans the selection of women as arbitrators. Thus, while the requirement provides that the parties should choose arbitrators based on their expertise, Jewish law—not the parties themselves—dictates arbitrator selection in a *beth din*.[139]

Another difference between conventional and religious arbitrations lies in the right to present evidence and discovery. The FAA authorizes arbitrators to issue summonses for witnesses and grants courts the authority to compel witnesses to

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130 *Id.* at 187.

131 *Id.*

132 9 U.S.C. § 2 (2000).

133 Grossman, *supra* note 19, at 188.

134 *Id.*

135 *Id.* at 188-189.

136 *See* 9 U.S.C. § 5 (2000); UAA § 11(a), 7 U.L.A. 41 (2000).

137 Grossman, *supra* note 19, at 189-190.

138 *Id.* at 190.

139 *Id.* Grossman also adds that some commentators argue that selection of arbitrators on the basis of a characteristic that would be unlawful in jury selection should be illegal, and that the federal government's arbitration referral service prohibits selection on the basis of gender, race, or religion. *Id.*

testify before arbitration panels.[140] The UAA further grants arbitrators the authority to make determinations as to the admissibility of witness testimony and evidence.[141] Under Jewish law, women, non-Jews, the young or handicapped, or relatives of disputants cannot act as witnesses.[142] Though such exclusions are permissible under the UAA's grant of arbitrator discretion, the exclusion occurs before the arbitrator can exercise discretion, which differs from the type of exclusion envisioned in the UAA.[143]

Lastly, though the FAA contains no provision requiring access to counsel, the UAA expressly allows parties the right to be represented by lawyers, and further makes that right non-waivable prior to the initiation of arbitration proceedings. However, while some religious tribunals allow counsel, disputants are often unaware of their right to counsel.[144]

### *2. FAA and UAA Standards of Review*

The FAA and UAA standards of review further distinguish religious arbitration from conventional arbitration. Returning to the discussion of the Supreme Court's emphasis on FAA Section 10 as the sole source of standards for judicial review and vacating judgments, this subsection addresses the failure of the FAA and UAA standards of review as applied to the *beth din* as a means of further emphasizing the need for protective measures where judicial review is not a viable safeguard. The religious question doctrine restricts application of the four grounds for vacating a judgment outlined in FAA Section 10.

For example, FAA Section 10(1) permits judicial review for duress or coercion during arbitration;[145] however, the courts do not consider religious duress, such as a *siruv,* to fall under this category.[146] The courts argue that the parties subscribe to a religion that allows such coercion, and that neutral principles do not allow the courts to review in such cases.[147] FAA Section 10(2) allows for judicial review where there is evident partiality or corruption in the arbitrators.[148] This element is difficult to prove for two reasons: first, arbitrators' actions are often undocumented or secretly corrupted,[149] and second, much of the partiality is intertwined with details of Jewish law, which courts will not review due to the religious question doctrine.

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140 9 U.S.C. § 7 (2000).
141 UAA § 15(a).
142 Grossman, *supra* note 19, at 191.
143 *Id.*
144 *Id.*
145 9 U.S.C. § 10(a)(1) (2000).
146 *See* Grossman, *supra* note 19, at 197.
147 *See id.*
148 9 U.S.C. § 10 (a) (2) (2000).
149 *See infra* Part II.A discussion.

FAA Section 10(3) and FAA Section 10(4) set out the standards for vacating a judgment. FAA Section 10(3) allows courts to vacate awards where arbitrators excluded material evidence.[150] However, in a *beth din*, rules of evidence are determined by religious doctrine, which may prevent judicial review, or at the very least presents a choice of law issue where courts must decide if secular or religious law applies to the statutory review of material evidence.[151] Finally, FAA Section 10(4) permits the court to vacate a determination where the arbitrator exceeded the authority assigned to him in the arbitration agreement, or acted contrary to the express provisions of the agreement.[152] This ground presents problems because the scope of a *beth din* arbitrator's powers may be determined by religious doctrine, which is itself in dispute. For instance, proceedings before a *beth din* can take the form of *din*—where the strict rule of Jewish law is applied—or *p'shara*—where the arbitrators use *ad hoc* compromises.[153] Even though courts may be able to apply neutral principles to see if an arbitrator abided by a certain strand of religious doctrine dictated in the arbitration agreement, neutral principles cannot necessarily be used to determine which type of authority has been conferred on a *beth din* according to religious law, or whether the arbitrator abided by the legalities associated with that particular religious doctrine.[154]

## IV. THE INTERNAL SOLUTION: A PROPOSAL FOR RESTRUCTURING THE AMERICAN *BETH DIN* BY INCLUDING FEMALE RCAS

The solution offered here is a proposal to restructure the *beth din* internally, by reforming the American RCA role and requirements based on the current system used in Israeli religious courts, which incorporates female RCAs into the framework. By providing the option for a female RCA, this subsection argues, women will be less vulnerable during *beth din* arbitration proceedings. Due to fairer proceedings under the counsel of a female RCA, women will have less need to rely on judicial review, a weak protective measure, to vacate inequitable *beth din* decisions.

### *A. The Israeli RCA Framework*

Israel, founded as a Jewish State, has a unique dual legal system, comprised of civil and rabbinic courts.[155] Unlike the *battei din* in America, the rabbinical courts in Israel hold the same power as the civil courts that share their jurisdiction.[156] The two systems hold parallel jurisdiction for certain matters, like

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150 9 U.S.C. § 10 (a) (3) (2000).

151 Grossman, *supra* note 19, at 195.

152 9 U.S.C. § 10 (a) (4) (2000).

153 Grossman, *supra* note 19, at 196.

154 *See id.* at 197.

155 Bak, *supra* note 16, at 38.

156 *Id.*

financial or communal claims, and maintain sole jurisdiction over other areas of law, such as divorce and marriage.[157] Whereas Israeli litigants may choose to bring a financial claim before the civil court, or agree to come before the *beth din,* only the *beth din* has jurisdiction over divorce cases.[158] Therefore, in the State of Israel, all Jewish couples,[159] regardless of religious affiliation or the type of wedding ceremony performed, whether it was civil, conservative, reform or orthodox, may only seek divorce through the rabbinic courts.[160]

Just as the civil courts hear arguments from attorneys on behalf of their clients, so too do the rabbinic courts.[161] However, RCAs in the rabbinic courts are not lawyers schooled in civil law; rather, they are advocates of Jewish law, educated and certified in Jewish law.[162] An RCA is licensed by the Ministry of Justice, just as a civil lawyer would be.[163]

Originally, the RCA position was only held by men, educated in Jewish law in Orthodox yeshivot.[164] In 1990, Rabbi Shlomo Riskin, Dean of Ohr Torah Stone Institutions ("OTS"),[165] approached the chief rabbinate with the concept of introducing female RCAs. Riskin argued that ninety percent of all rabbinic court cases are divorce cases, of which 50 percent of the litigants are women.[166] Often the facts needed to resolve a divorce trial are intimate and painful; women felt uncomfortable relaying private anecdotes to male RCAs and before all-male panels of arbitrators.[167] Though female attorneys could represent women before the *beth din,* they were not well versed in Jewish law, and often appeared before the rabbinic judges in dress considered inappropriate for a religious court.[168] Women were trapped: they could be the sole woman in a courtroom of learned men, or they could have an uneducated female representative make no impression—or worse, a negative impression—on a courtroom full of men.[169] The system, Riskin argued,

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157 *Id.*

158 *Id.*

159 *Id.* (indicating that the requirement to visit a *Beth Din* to get a divorce applies to people of any religion, not just Jewish couples).

160 *Definitions*, YAD L'ISHA, http://www.yadlaisha.org.il/page-eng.aspx?id=47 (last visited Nov. 7, 2011).

161 Bak, *supra* note 16.

162 *Id.* at 39. Many do have JDs so that they can expand their practices to work in both religious and civil courts. Leah Abramowitz, *Women Advocates Make Their Mark*, JEWISH ACTION (2004), http://www.ou.org/publications/ja/5765/5765winter/WOMENADV.PDF.

163 Rivka Lubitch, *Kol Isha: A New Voice in the Courtroom,* JOFA JOURNAL (2006), http://www.jofa.org/pdf/uploaded/1262-EZDZ7822.pdf.

164 Bak, *supra* note 16, at 39. Yeshiva is a school of higher Jewish learning that is Talmud based. *Id.*

165 Ohr Torah Stone (OTS) is a network of Jewish high school, college, and graduate programs in Israel, founded by Rabbi Shlomo Riskin in 1983. *OTS, Institutions*, OHR TORAH STONE, http://www.ohrtorahstone.org.il/inst.htm (last visited Nov. 7, 2011).

166 Bak, *supra* note 16, at 39.

167 *Id.*

168 *Id.*

169 *Id.*

needed to evolve to bring dignity and justice to the courts.[170] The chief rabbis demurred, but OTS won on appeal in the Israeli Supreme Court in 1991,[171] and consequently opened the Monica Dennis Goldberg Women's Rabbinical Court Advocate Program at Midreshet Lindenbaum[172] as the first school in the world to train female RCAs.[173]

Although the program has since closed, admissions qualifications were demanding. Applicants were required to hold a B.A. degree from a recognized university or seminary, which usually translated into a degree in civil legal studies, social work, education, or psychology; they were required to have at least four years of yeshiva education; and, students were required to be married and practicing Orthodox Jews.[174] Students in the program studied for three years to pass a rigorous RCA exam administered by the Israeli rabbinate.[175] The same exam was given to male and female qualifiers.[176] The intense training and education in Torah, Talmud, and Jewish law studies was on the level of attaining Orthodox rabbinic certification.[177] The students had classes three times a week, and were required to do independent study.[178] The program offered classes in Jewish law, as well as in marriage counseling, mediation, and negotiation.[179] The women focused primarily on studying testimonial law and civil damages in the *Choshen Mishpat* and laws of personal status in the *Even Ha'ezer*,[180] as well as earlier rabbinic court decisions.[181] They also studied women's rights in the context of Jewish law.[182]

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[170] *Id.*

[171] Lubitch, *supra* note 163, at 15.

[172] Midreshet Lindenbaum functions as Ohr Torah Stone's women's campus in Jerusalem. It provides college and graduate Jewish studies programs for women. MIDRESHET LINDENBAUM, http://www.lind.org.il/ (last visited Nov. 7, 2011).

[173] Abramowitz, *supra* note 162.

[174] Bak, *supra* note 19, at 39-40.

[175] Abramowitz, *supra* note 162.

[176] *Id.* Of the twenty-one students in the first graduating class of *toanot,* nineteen passed the certification exam, getting higher scores than many of the male test-takers. *Id.*

[177] E-mail from Rachel Levmore (on file with Author). A Rabbinical Court Advocate since 1995, Dr. Rachel Levmore specializes in cases of Agunot and Get-Refusal within Israeli and Diaspora Rabbinical Courts. In January 2000 she became the first woman to join the "Agunot Unit" in the Directorate of the Israeli Rabbinical Courts. She is the Coordinator for Matters of Iggun and Get-Refusal, a joint project of the Council of Young Israel Rabbis in Israel and the Jewish Agency; Claimants, authorization test for Rabbinic Advocates, RABBINICAL COURTS OF ISRAEL (RBC), http://www.rbc.gov.il/claimants/authorization_tests/index.asp.

[178] Abramowitz, *supra* note 162.

[179] *Id.*

[180] Two of the four sections in the Arba'ah Turim, a book of Jewish law written by Jacob ben Asher. The four sections are divided as follows: Orach Chayim (laws of synagogue, prayer, holidays, etc); Yoreh De'ah (laws of ritual slaughter, and kashrut); Even ha-ezer (marriage, divorce); Choshen Mishpat (business and finance). *See Codes – Rabbinic Literature – Subject Research Guide,* LIBRARIES AT HEBREW UNION COLLEGE, http://huc.edu/libraries/exhibits/rablit/codes.php (last visited June 29, 2012).

[181] Lubitch, *supra* note 163, at 15.

[182] Bak, *supra* note 19, at 39. There is a focus on women's issues, yet graduates represent both husbands and wives. *Id.*

Rivka Lubitch, a female RCA certified at the Monica Dennis Goldberg Women's Rabbinical Court Advocate Program, asserts that the female RCA position is necessary because the Orthodox, knowledgeable women who get certified have four "special strengths" to offer the *beth din* system.[183] First, there is great empathy between female RCAs and the women they represent because the relationship operates within a support framework.[184] It strengthens the rabbinic advocate in her work, knowing she is protecting the rights of another woman.[185] Second, the woman advocate is marginal to the Orthodox community because of her gender; she cannot be a judge or a community rabbi, and is relegated to the sidelines to make her observations.[186] Therefore, Lubitch argues, she has less to fear because she has less to lose, for she will never find herself head-to-head in the community with a judge or rabbi whose judgment she is seeking or opposing.[187] The female RCA, therefore, can observe from afar, which allows her to more easily identify weaknesses and develop creative approaches to problems within the *beth din* system.[188] Third, because many of the women who choose to become RCAs are extremely ideological as feminist professionals, they are empowered to take courageous steps against the Orthodox establishment in order to ensure their clients get justice.[189] Lastly, a female RCA has legitimacy to challenge accepted Jewish law in an arena where there is an obligation for advocates to argue with judges, and to challenge them whenever possible.[190] While this may seem obvious in a secular court, "there is an element of revolution and renewal when this occurs in a religious setting . . . [where the female rabbinic advocate] is trained to argue before the rabbis in a manner never before permitted to women."[191]

### *B. Proposal for Female RCAs in America*

Rabbi Schachter certainly exposes the need for change, so that the *beth din* system can emerge from this crisis of corruption to better serve claimants and bring justice and honor back to the Jewish legal system.[192] However, abolishing the RCA position may not be in the litigants' best interests.[193] This is especially true for female litigants who approach the *beth din* feeling marginalized and vulnerable because of their gender, and who often need emotional and psychological support to properly convey their claims and private situations to an intimidating panel of

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183 Lubitch, *supra* note 163, at 16.
184 *Id.*
185 *Id.*
186 *Id.*
187 *Id.*
188 *Id.*
189 Lubitch, *supra* note 163, at 16.
190 *Id.*
191 *Id.*
192 *See supra* Part II.B discussion.
193 *See* Lubitch, *supra* note 163, at 16.

male judges. A woman may be embarrassed to convey the details of her private life as a wife or mother, or feel disenfranchised in the courtroom.[194]

The Beth Din of America gives parties the right to representation by a licensed attorney of any gender.[195] However, attorneys are often unfamiliar with Jewish law, and even experienced female attorneys may not feel comfortable arguing issues of Jewish law before a panel of Orthodox male rabbis.[196] The Beth Din of American also advises litigants to bring family members or friends with them for emotional support; however, if the arbitrators are focused on fact-finding and the litigants' conveyance of the facts, they need more than a passive ally to make a strong claim.[197] This is particularly true for women, for even if they can give a formidable presentation to the judges, they may not be familiar with the pertinent Jewish law, which means they cannot effectively argue for a judgment they need or deserve from the *beth din.*[198]

By using a framework similar to the RCA system in Israel, which requires strict educational and professional standards of all its RCAs, both male and female, the *beth din* system in America could safely protect disputants against unfair decisions.[199] If educated and professional RCAs were utilized in the American *battei din*, fewer claims relying on incorrect applications of Jewish law would be brought to the *beth din.* Additionally, parties and their counsel would be less likely to obstruct the facts and the applicable Jewish laws. Consequently, male, and especially female, disputants would feel empowered knowing they were making justifiable claims, and consequentially getting justifiable judgments. Such a framework may also empower arbitrators to be more judicious by infusing the RCA-arbitrator relationship with a positive emphasis on knowledge, professionalism, and respect for a legal system of justice and fairness.[200]

Moreover, by incorporating female RCAs into the newly structured framework, female litigants would feel more comfortable conveying the details of their claims to counsel, where another woman might better relate to the role of a woman, wife, or mother in the Orthodox Jewish community. Additionally, female litigants may feel less marginalized in a courtroom full of men if there was another powerful woman present. An increased female presence in the courtroom would in turn change the *beth din's* view of women disputants as weak or vulnerable because female RCAs would make strong claims and assert themselves in a public forum with confidence and respect. Generally, allowing female RCAs would garner increased respect for the knowledgeable and educated Jewish woman in the public sphere. It would create a new space for feminist activity in the public Jewish

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194 *See id.*

195 *See Rules and Procedures*, *supra* note 5.

196 Lubitch, *supra* note 163, at 16.

197 Interview with Ilana Blass, *supra* note 61.

198 *Id.*

199 *Supra* Part IV.A discussion.

200 *Supra* Part II.A discussion.

sphere, and an increased potential for women to challenge and influence Jewish law, potentially in their favor.

The standard qualifications for RCAs in American *battei din* should apply equally to men and women, and they must take the same qualifying exam. A committee of rabbis and judges from a spectrum of *battei din* should write the qualifying exam, together with male and female RCAs from Israel who can advise the restructuring process based on experiences in the Israeli system. To ensure that RCAs follow the guidelines, the rules of procedure should be standardized and implemented in all American *batei din.*

Accordingly, educational and training programs of equal stature must be available to both men and women.[201] Even if men and women are educated separately,[202] the curriculum must be identical so that all RCAs attain equal knowledge of the law and arbitration guidelines, as well as intensive training in Jewish studies and courtroom procedure and etiquette. The curriculum should also incorporate training to advocate for either male or female clients, so that RCAs can build substantial practices and counsel disputants of any gender. However, a female RCA may decide to specialize in advocating for female disputants and train specifically for that in addition to her basic training, and a male RCA may do the same with only male disputants.

Although the Israeli system does not require an RCA to acquire a juris doctor in order to practice, a total restructuring of the RCA role in the American system provides an opportunity to set an even higher standard of professionalism. By requiring a legal education, or at the very least a degree from a mediation or negotiation course, the American RCA would stand on equal footing with a civil attorney. RCAs would be knowledgeable in both civil and Jewish law; their professionalism would reflect the etiquette and respect for civil procedure in a civil courtroom; and, they would be held to the same professional ethics standards as attorneys. Moreover, requiring a legal degree would benefit the RCA profession, providing RCAs with potential for more successful practices in both the *beth din* and in civil court, as well. Consequentially, the profession could expand and garner more respect as a strong mode of alternative dispute resolution for religious claims.

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201 *See* Yeshiva University, *Graduate Programming, GPATS,* YESHIVA UNIVERSITY, http://yu.edu/cjf/graduate/GPATS/ (last visited Mar. 11, 2012). One issue here is that no program on the same level as rabbinical ordination for men exists for women in America. The Yeshiva University Graduate Program for Women in Advanced Talmudic Studies is an intensive educational curriculum, but it does not focus on Jewish law in the context of *beth din* arbitration. Yeshiva University recently awarded its first women doctorate in Talmud to a graduate of this program, so perhaps they would start an RCA certification program. Otherwise, a program similar to the one at OTS would need to be created in America.

202 Jewish studies are often not taught in co-ed classrooms for modesty reasons that are too complicated to discuss here.

## CONCLUSION

The FAA and UAA requirements and standards of review do not protect disputants in *beth din* religious arbitrations because the federal question doctrine prevents civil courts from reviewing arbitration decisions that discuss Jewish law. Consequentially, parties are vulnerable to potentially corrupt decisions made by arbitrators in the *beth din,* where they cannot appeal the decisions to the civil courts to demand a review. Women disputing family law and divorce issues are especially open to the risk of an unfair decision, where women are less empowered in the *beth din.* Therefore, an internal protective measure must be incorporated into the *beth din* system in order to protect women and other vulnerable parties from the unfair decisions made by *beth din* arbitrators.

One internal solution is to professionalize the RCA position in the American *beth din* system by remodeling it after the RCA position in the Israeli *beth din* system. In doing so, the American system would go through a significant renovation, reforming the purpose and goals of incorporating RCAs into religious arbitration. Israel has a highly professionalized program for training RCAs to advocate on behalf of the parties in a *beth din* arbitration, in order to ensure that they receive a fair decision. The Israeli programs train both men and women in the Jewish laws applicable to *beth din* proceedings, and instruct them on how to successfully advocate for their clients. By accepting women into the RCA program, the Israeli *beth din* ensures that female disputants are highly protected and informed, and that they have an advocate they can open up with and relate to in order to ensure that all of the facts, however private, are relayed to the arbitrator.

Despite the corruption connected to RCAs in America, getting rid of the RCA position completely would be for naught, where professionalizing the position by applying universal educational and training standards would ensure that RCAs are knowledgeable in applicable Jewish law, and are able to apply it correctly to make a strong case for their clients. Further, altering the current structure to incorporate female RCAs would broaden the impact of the RCA role to offer female disputants increased protections against unfair decisions. Judicial review over religious arbitrations may be severely limited, but examining and restructuring the *beth din* from within by reforming and strengthening the RCA role is a strong method of protecting disputants relying on religious arbitration as a fair and binding form of private dispute resolution.