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FAITH-BASED ARBITRATION EVALUATED: THE POLICY ARGUMENTS FOR AND AGAINST RELIGIOUS ARBITRATION IN AMERICA

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ABSTRACT

This article explores whether allowing such expansive arbitration is a wise idea for the United States (and other western democracies). Like all arbitration, religious arbitration starts with a contract to arbitrate, but frequently does not invoke the law of the United States as the law to be used to resolve disputes, but instead allows parties to resolve disputes according to their own religious principles, both procedurally and substantively. The article is organized into two substantive parts. One part explores the strengths and weaknesses of the seven arguments against faith-based arbitration, which are (1) one law for one people; (2) religious arbitration produces substantive injustice; (3) religious arbitration produces procedural injustice; (4) religious arbitration is often subtly coercive to its members; (5) liberal society has a difficult time policing religious arbitration; (6) enforcement of religious arbitration sometimes violates people's rights to religious freedom; and (7) allowing religious arbitration promotes isolation and non-integration of religious communities. The next part explains and criticizes the five arguments in favor of religious arbitration, which are (1) religious arbitration is a religious freedom imperative; (2) religious arbitration can resolve some commercial disputes more accurately than secular courts can; (3) religious arbitration is the only way to resolve certain religious problems; (4) secular regulation of religious arbitration helps moderate and integrate religion; and (5) religious arbitration promotes value sharing between religious and secular cultures and as such enriches public discourse. The article concludes with an endorsement of the value of religious arbitration subject to reasonable procedural and substantive limitations.

KEYWORDS: religious arbitration, contract law, alternative dispute resolution, religious freedom

INTRODUCTION

For close to twenty years, I served as an arbitrator in the Beth Din of America, first as a consultant hired to write the rules that are still in use, then as the director, and then as one of the four standing members of the rabbinical court. During that time, I grew to appreciate what a successful religious court did, and how it helped shape a religious community. Like all communities, "justice" and "law obedience" are very important values within the Jewish tradition, and like many communities, crafting a process for enforcing religious norms that is successful is not a simple

task.[1] Communities that fail to provide justice to their members consistently and regularly, one suspects, fail as thicker communities. Religious communities also fail when they are not sources of justice, both on a theoretical and practical level. So the virtues of having a functioning religious legal system, including a court system, that can "compel" (at least after the litigants agree to be "compelled") play a very important role in community formation and development—and even more so to those religious communities that are law-based.[2]

The first few chapters of my book *Sharia Tribunals, Rabbinical Courts and Christian Panels: Religious Arbitration in America and the West* demonstrate that the rise of contract law as the central touchstone of dispute resolution has contributed to the rise of religious communities in America. Contract-based arbitration law works to provide religious legal systems with a model of secular law with which they can successfully interact.[3] This contractual approach stands in stark contrast to more affirmatively secular law models, which deny people and communities with alternative legal rules the right to resolve disputes internally and privately in accordance with norms other than the law of the state. In this latter model, the state's laws are viewed as sacrosanct and binding, so that even if the parties wish to apply mutually agreed upon alternative rules and decision-making processes, the legal system refuses permission to do so.[4]

If Justice Benjamin Cardozo (in his classical work *The Paradoxes of Legal Science*) is correct that law is a search for truth no different than science is a search for truth,[5] then he is also correct when he tells us, "If jurisdiction is to be ousted by contract, we must submit to the failure of justice that may result from these and like causes." And he is also correct when he disallows all arbitration.[6]

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1 This is discussed in my recent book: Michael J. Broyde, Sharia Tribunals, Rabbinical Courts, and Christian Panels: Religious Arbitration in America and the West (2017). Some of the material in this article is found in the final sections of the book.

2 This basic idea is the focus of a series of articles of mine. *See* Michael J. Broyde, *Shari'a and Halakha in North America: Faith-Based Private Arbitration as a Model for Preserving Rights and Values in a Pluralistic Society*, 90 Chicago-Kent Law Review 111–40 (2015); Michael J. Broyde, Ira Bedzow & Shlomo C. Pill, *The Pillars of Successful Religious Arbitration: Models for American Islamic Arbitration Based on the Beth Din of America and Muslim Arbitration Tribunal Experience*, 30 Harvard Journal of Racial & Ethnic Justice 33–76 (2014); Michael J. Broyde, *Jewish Law Courts in America: Lessons Offered to Sharia Courts by the Beth Din of America*, 57 New York Law School Law Review 287–311 (2012/2013).

3 *See* Broyde, *supra*, note 1. *See also Arbitration*, Black's Law Dictionary 119 (9th ed. 2009) at 119. Arbitration is defined as "[a] method of dispute resolution involving one or more neutral third parties who are usually agreed to by the disputing parties and whose decision is binding."

4 For an example of this, see Shelley v. Kraemer, 334 U.S. 1 (1948), which applies to racial matters. Although this requires more analysis, *Shelley* is undoubtedly correct in its analysis of racial matters exactly because the choice to discriminate based on race is constitutionally suspect. The single greatest challenge politically to religious arbitration agreements remains, I suspect, the sense (perhaps even true in certain settings) that religious arbitration discriminates based on values that secular society views as improper bases of discrimination. I would suggest however that *Shelley* is unusual in that the contract in *Shelley* was designed to impact those who had not signed it (by creating covenants that ran with the land). Parties ought to have the right to conduct their more private matters with values that otherwise discriminate. For example, most states have doctrines of sexual freedom that protect the right to commit adultery, see, for example, People v. Onofre, 415 N.E.2d 936, 943 (N.Y. 1980), but that does not mean that parties cannot agree in a prenuptial agreement that such conduct is to be financially penalized by contract. *See also* Note: *Racial Steering in the Romantic Marketplace*, 107 Harvard Law Review 877–94 (1994) (discussing societal tolerance for racial steering in personal ads).

5 Benjamin N. Cardozo, The Paradoxes of Legal Science 142 (1928), (reprinted 2000 by The Lawbook Exchange Ltd.)

6 Meacham v. Jamestown, Franklin & Clearfield Railroad Company, 105 N.E. 653, 655 (N.Y. 1914) (Cardozo, J., concurring) (internal citation omitted).

But, as I have explained elsewhere,[7] this is not the pathway the U.S. legal system has taken. Rather, both choice of law and choice of forum (including private arbitration) are considered proper. For example, if there is one central characteristic of the Uniform Commercial Code, it is that almost any of its provisions may be modified by agreement of the parties.[8] The U.S. legal system is moving faster and faster into contract as the foundational doctrine.

Under a system that adopts contract as a foundational doctrine, religious communities with well-written religious arbitration contracts will grow, thrive, and prosper. But, what has yet to be addressed is whether this is really a good idea from the perspective of a western liberal society, generally one that draws upon a constitution as the basis of law and protects its people's political freedoms and civil liberties. Is the rise of religious arbitration a good idea for the general liberal community? This article is an attempt to answer that question in the affirmative and explain why a secular society ought to encourage—actually promote the growth of—religious arbitration (albeit within contractual limits).

Besides this introduction, this article is organized into two main parts with many subsections. The first part reviews the policy arguments against religious arbitration and is divided into many subsections. The second part reviews the virtues of religious arbitration and is also divided into many subsections. The conclusion states why the case for religious arbitration is superior to the case against it from a liberal western perspective.

THE CASE AGAINST ALLOWING FAITH-BASED ARBITRATION IN AMERICA

One Law for One People

Contemporary Western societies are diverse places. Individuals are often bound up in a complex array of cross-cutting authorities and normative allegiances owing to concurrent national, cultural, racial, ethnic, class, gender, and religious identities. According to many commentators, while it is important for the liberal state to be respectful of this de facto normative pluralism, the state should not afford such multiple, conflicting normative systems the status of law. In this regard, there is a valuable distinction to be made between "normative pluralism" on the one hand, and "legal pluralism" on the other. Legal pluralism connotes the idea that "multiple legal systems exist alongside state law on equal footing, and that citizens of the state have a wide amount of discretion to choose which legal system should apply to their lives."[9] Normative pluralism, by contrast, refers to the idea that while it may be important for the state to be respectful of the various nonstate norms and value systems to which individuals feel bound, the state ought not to grant those systems the force of state

7 *See* Part II of BROYDE, *supra* note 1.

8 Variation by Agreement:

> Except as otherwise provided in subsection (b) or elsewhere in [the Uniform Commercial Code], the effect of provisions of [the Uniform Commercial Code] may be varied by agreement . . . .
>
> The presence in certain provisions of [the Uniform Commercial Code] of the phrase "unless otherwise agreed," or words of similar import, does not imply that the effect of other provisions may not be varied by agreement under this section.

U.C.C. § 1-302 (AMERICAN LAW INSTITUTE & UNIFORM LAW COMMISSION 1977) (brackets in original).

9 Amanda M. Baker, *A Higher Authority: Judicial Review of Religious Arbitration*, 37 VERMONT LAW REVIEW 157–202, 190 (2012).

law.[10] While proponents of religious arbitration typically advocate for a legally pluralistic relationship between the state and other normative systems observed by its citizens, opponents of secular enforcement of religious arbitration push for a more limited, normative pluralist model.

This conflict is not something specific to domestic law. There are ongoing conflicts within international law as nations attempt to find ways to govern and exist among one another. The result is that international law exists as a soft law, save certain laws that have been adopted by all nations through custom.[11] It should come as a surprise to no one, however, that international law over the centuries has gone away from the customary approach and focused more on treaty law. The ability for nations to come to a set of terms, reduce them to paper, and then voluntarily bind themselves to their own choice of law shares almost an identical reasoning with private individuals who opt for arbitration. In both contexts, the existing law or status quo does not sufficiently address concerns, leaving consenting parties to fill the gaps among themselves. Just as the United States and Canada would prefer to govern their transactions on their own terms, so do two members of a similar faith background.

Normative pluralism opponents to secular recognition of religious arbitration have offered a number of arguments supporting this position. First, some contend, quite sensibly, that it is necessary for any society to have only a single legal order by which all citizens are bound and all societal relationships are governed.[12] Law is a reflection of and a means of actualizing policy, and policy, in turn, represents society's collective vision of the substantive, procedural, and constitutional terms on which public-sphere—and even many private-sphere—relationships should be ordered. Permitting the simultaneous existence of multiple conflicting legal orders, many of which may be reflective of deeply differing values, undermines society's ability to structure itself in accordance with majoritarian preferences.[13] Moreover, such legal factionalism undercuts one of the more important bonds that helps hold liberal societies together: a common commitment to core norms and values.[14] Liberal societies value individual autonomy, disagreement, debate, and conflicting visions of the good all vying for public recognition.

Despite such dissonance, liberal democracies largely manage to hold together very diverse populations comprised of numerous interest groups precisely because all are committed to contingently abide by the legal and political results of democratic processes. You may win today's election or today's legislative vote, but I will have the opportunity to effect change more in line with my own preferences next time around, and I can expect that you will abide by the results of my political successes precisely because I agree to abide by the results of your own. Permitting discrete groups to opt out of societal laws and policies through religious arbitration undermines this sense of collective commitment to make society function. In other words, legal pluralism allows for religious groups to use the law's private arbitration framework to simply withdraw from the state-law game and play

10 *See* William Twinning, *Normative and Legal Pluralism: A Global Perspective*, 20 Duke Journal of Comparative & International Law 473–517, 475–85 (2010).

11 For an overview of the rules of international law, see Genc Trnavci, *The Meaning and Scope of the Law of Nations in the Context of the Alien Tort Claims Act and International Law*, 26 University of Pennsylvania Journal of International Law, 193–266 (2014).

12 *See* Charles Taylor, *The Politics of Recognition*, *in* Multiculturalism: Examining the Politics of Recognition 25–50, 43–44 (Amy Gutmann ed., 1994).

13 *Cf.* Brian Barry, Culture and Equality (2001) (arguing that the multicultural agenda undermines liberalism's core commitment to equality).

14 *See generally* Michael A. Helfand, *Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders*, 86 New York University Law Review 1231–1305, 1272–76 (2011).

by themselves whenever they happen to not like the outcomes or processes of the secular system, rather than playing by the rules and respecting the results.

Additionally, opponents of religious arbitration contend that legal pluralism rests on a very thin theory of justice, one that is inadequate to meet the standards of contemporary liberal commitments. At its root, the kind of legal pluralism that would support secular recognition and enforcement of alternative legal systems through religious arbitration views numerous normative systems as equally valid.[15] Not only should individuals and communities be able to abide by such systems on a purely voluntary basis, but the state should even hold people to the commitments they make to such systems. Such a theory of justice is procedural. It maintains that society ought not to make substantive value judgments about the content of the norms and values by which citizens wish to live.[16] Instead, as long as individuals have made free-willed choices to order their lives and affairs in accordance with certain rules, the state ought to respect those decisions, and even enforce such commitments in order to protect the interests of those for whose benefit they were made.[17] This thin theory of justice is incompatible with many contemporary theories of liberal justice, which hold that the rule of law is not merely procedural, and that societal norms cannot be grounded in consent alone. Instead, these theories hold that societal commitments are, at least in important part, about maintaining a commitment to certain fundamental rights that cannot and should not be alienated.[18]

In truth, the "one people one law" argument presented above is likely the weakest challenge to secular enforcement of religious arbitration. In the United States in particular, the claim rings hollow. Like it or not, there is not now, nor has there ever really been only one law of the land in the United States. The country's basic federalist framework is built on the idea that there is no single "correct" law that should apply to all Americans all the time. Unlike many other nations that have uniform national laws, the United States maintains a much deeper commitment to substantive federalism in which there are fifty states, each with its own laws, an overlay of federal law, Indian tribal law, and a maddening patchwork of overlapping local codes and regulations at the county, city, and town levels.[19] This diversity provides Americans with myriad opportunities to choose which kinds of legal regimes they will use to order their lives. Americans make such choices of law by deciding which states, cities, or counties to live in; where to organize and register their business entities; where to practice their professions; and where to marry, divorce, and raise their children.[20] United States Supreme Court Justice Louis Brandeis noted that while messy and perhaps

15 *Id.* at 1276.

16 As explained in BROYDE, *supra* note 1, chapters 5 and 6.

17 *See* Natan Lerner, *Group Rights and Legal Pluralism*, 25 EMORY INTERNATIONAL LAW REVIEW 829–51, 836 (2011).

18 As explained in BROYDE, *supra* note 1, chapter 4.

19 *See* PAUL SCHIFF BERMAN, GLOBAL LEGAL PLURALISM: A JURISPRUDENCE OF LAW BEYOND BORDERS 3–4 (2012).

20 Of course, U.S. law is not completely pluralistic in this sense. The United States Constitution, the "supreme law of the land," places some significant limits on the kinds of state and local laws that can validly exist. No state or local government, for instance, can adopt measures that criminalize political speech, authorize law enforcement officers to unrestrictedly search private homes without warrants, or abolish jury trials in criminal proceedings. Moreover, the Constitution's Supremacy Clause, see U.S. CONSTITUTION article VI, clause 2, establishes that state laws are subordinate to federal law, and that in cases of conflict the uniformity of federal law will override the diversity of state laws. *See* Gibbons v. Ogden, 22 U.S. 1, 210–11 (1824). In various areas of public life, Congress has utilized its power to create uniform legal standards throughout the country by preempting state legislation and regulation. *See, e.g.*, 17 U.S.C. § 301 (preempting state laws regulating materials subject to federal copyright laws); 21 U.S.C. §350k(a) (preempting state safety or effectiveness requirements for medical devices different from federal standards); 29 U.S.C. §§ 1144(a)-(b) (preemption of state employee insurance benefit plans by the Employment Retirement Income Security Act of 1974); Hines v. Davidowitz, 312 U.S. 52 (1941) (holding federal immigration law is sufficiently pervasive in the field as to preempt all state regulation of alien registration). Likewise, the

inefficient, this legally pluralistic approach serves an important purpose. It permits various semiautonomous legal systems to act as "laboratories of democracy," wherein citizens can experiment with law and policy solutions at a local level.[21] Good, workable laws might be adapted and adopted in other jurisdictions, while poor, unworkable laws can be replaced without broader adverse consequences to the whole nation.

In some states, there are even different official legal regimes that provide citizens with the opportunity to choose which of several state law frameworks they wish to use to organize their affairs. In several states, for instance, there is a two-tiered system of marriage and divorce law. In Louisiana when obtaining a marriage license, couples may choose to structure their union as a "covenant marriage," which is governed by more traditional and stringent rules relating to the formation and dissolution of the marital relationship. Alternatively, Louisiana couples may choose to enter into a more modern "contractual marriage," in which the formation and dissolution of the relationship resembles the making and breaking of a private contractual relationship. Both marriage frameworks are encoded into Louisiana state law, and the state will enforce the terms of whichever of the two unions marrying parties choose to create.[22]

Similar opportunities to choose the legal system by which one will be bound are afforded by American contract law, which affords contracting parties the benefit of choosing the laws that will govern their contractual relationship. Parties can agree to structure their relationship not only under New York or California law, but under Canadian, French, or Chinese law as well. This strong trend favoring freedom of contract and contractual autonomy suggests that the United States is very much a choice-of-law country. People and organizations regularly choose under which state's laws they wish to order their affairs on given matters. The availability of legal choices of this kind is so ingrained in American civic, commercial, and family life that the

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sovereignty and independent lawmaking power of American Indian nations is subject to congressional discretion, and so, technically speaking, federal law controls Indian law as well. *See* 25 U.S.C. §§ 1301-1303 (applying most of the Bill of Rights to American Indian tribes). In practice, however, there is substantial pluralism in American law, and owing to this plurality of legal regimes, citizens are given ample opportunity to choose the kinds of laws they will live under. Constitutional impositions on state and local policy and law making are of course limited, and individual states retain a general police power to enact local criminal, tort, contract, property, family, and procedural rules as they see fit. While there has been substantial movement toward greater legal uniformity among states, the differences remain stark; depending on what state a person chooses to live in, they will have vastly different experiences with landlord-tenant laws, gun-control measures and legal standards for the use of force in self-defense, limits on tort liability, drug laws and policies, zoning regulations, driver's license requirements, vehicle safety and emission standards, and the availability and eligibility requirements of various programs providing welfare, education, and medical support. The list goes on. The Supremacy Clause, moreover, gives primacy to federal laws over state laws in cases in which Congress has the constitutional power to regulate. Even in spheres of concurrent state and federal lawmaking power, where federal rules do control state laws, the federal government often declines to regulate uniform rules for the entire country, and instead leaves individual states to develop a plurality of different standards. Current Supreme Court jurisprudence helps further limit legal uniformity even when Congress does legislate by holding that congressional intent to preempt alternative state law standards must be manifestly clear. *See* Garcia v. San Antonio Metropolitan Transportation Authority, 469 U.S. 528 (1985); Pacific Gas & Electric Company v. State Energy Resources Conservation & Development Commission, 461 U.S. 190, 206 (1983). Even when federal law does control, moreover, it must be interpreted by ninety-four different district courts in twelve different federal court circuits, which often disagree about the meaning and applicability of federal laws, leading to different applicable legal standards in different parts of the country, absent a clear determination of a uniform standard by the Supreme Court.

21 *See* New State Ice Company v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

22 Katherine S. Spaht, *Louisiana's Covenant Marriage: Social Commentary and Legal Implications*, 59 Louisiana Law Review 63 (1998), http://faculty.law.lsu.edu/katherinespaht/covenantmarriage.htm (last visited Feb. 9, 2018).

forces of law strongly favor the idea that people can and should be able to use contractual mechanisms to select the normative systems that will govern their affairs, regardless of whether the choice is among New York, Delaware, or California law, or if it is between the laws of the state of New York and the norms and values of Judaism, Islam, or Christianity.[23] Importantly, the ability to contractually choose the laws under which contractual relationships shall be governed is not unique to the United States. It is embraced to a greater or lesser extent by many other common law and civil law jurisdictions as well.[24]

Of course, even in the United States, such choice of law is not absolute. No state system could function under conditions of perfect legal pluralism. Instead, the United States' constitutional system reflects the idea that choices about which legal regime should order one's affairs should be permitted except in those relatively rare situations in which the kind of very broad national consensus ultimately reflected in overarching constitutional norms preempts and precludes the simultaneous existence of alternative legal regimes.[25] Likewise, in the context of arguments over secular recognition of religious arbitration, the notion that the adoption of a legally pluralistic stance entails complete normative anarchy is a bit of a straw man. No serious argument in favor of religious arbitration actually maintains that states ought to enforce all the results of all religious proceedings all the time. Actual claims in support of religious arbitration are far more modest. Much as there are substantial limits placed on choice of law in the secular realm, based in part on constitutional requirements grounded in broad and strong national consensus, reasonable limits on what religious arbitral tribunals can do to resolve disputes and how they can do them may be perfectly compatible with an overall commitment to legal pluralism.

Not all countries maintain the kind of federated choice of law system embraced for largely historical reasons by the United States. Nevertheless, the largely well-functioning existence of such a regime in the United States undercuts some of the more salient concerns posed by critics of legal pluralism in general, and of secular recognition of religious arbitration more specifically. First, the American experience suggests that legal pluralism, or the ability to choose which state-enforced legal system one will use to order one's affairs, does not undermine societal order and predictability. On the contrary, it enhances these values, as well as broader liberty interests. Enabling individuals to be bound by legal systems they directly choose to adopt allows them to predictably order their affairs and constitute legal relationships based on the norms that they regard as conducive to their own interests and needs, the future applications and consequences of which they feel better equipped to plan for and anticipate.

Additionally, the American approach to legal pluralism does not merely reflect a thin, consent-based theory of legal justice, but remains consistent with thicker liberal conceptions of substantive justice. As discussed above, American legal pluralism is not absolute; the United States' constitutional system places significant substantive limits on what alternative legal regimes and choices can be made available through diverse state and local laws. No laws can contradict the positive requirements and negative limits created by constitutional rights and governmental frameworks. To the extent that they apply, federal laws preempt and are superior to state and local laws. The substantive terms of these superseding federal and constitutional norms represent precisely the kind of thicker theory of justice that some supporters of normative pluralism argue is lacking in

23 *See* Ed Anderson & Roger Haydock, *History of Arbitration as an Alternative to U.S. Litigation*, WEST'S LEGAL NEWS 8257, Aug. 12, 1996, at 1996 WL 449743.

24 *See* Friedrich K. Juenger, *Contract Choice of Law in the Americas*, 45 AMERICAN JOURNAL OF COMPARATIVE LAW 195 (1997).

25 *See* Helfand, *supra* note 14, at 1254–58; Michael A. Helfand, *Litigating Religion*, 93 BOSTON UNIVERSITY LAW REVIEW 493, 508 n.74 (2013); *see generally* Baker, *supra* note 9, at 163–64.

a legally pluralistic regime. Despite its wide purview for choice of law, justice in the United States is not merely a function of individual contractual agreements. Choice of law cannot contravene basic substantive commitments to human rights and societal order. For example, a party cannot contractually absolve another of criminal liability by contractually agreeing to be murdered, and parties could not effectively structure a real estate conveyance with a racially-based restrictive covenant merely because local ordinances permit the same in violation of the U.S. Constitution and federal law. Put differently, the state can recognize and uphold citizens' choices to structure their lives using various alternative legal systems without completely abrogating substantive limits on what kinds of alternative norms society will be willing to permit people to adopt. Secular legal systems can and in practice do uphold thick, substantive conceptions of justice and the rule of law consistent with liberal principles while also respecting and upholding a plurality of different legal regimes that citizens can turn to in structuring their affairs.

Religious Arbitration Produces Substantive Injustice

Many of the most substantiated and well-placed concerns about religious arbitration relate to alleged injustices perpetuated through the religious arbitration process. These claims are considered in this and the following two sections. This section reviews some of the main arguments that religious arbitration produces substantive injustices by applying and enforcing norms and values that are often substantially at odds with contemporary liberal rights and commitments maintained by secular laws and societies. The next section turns to the issue of procedural justice and explores concerns that religious arbitration proceedings lack the requisite procedural protections necessary to ensure fair and impartial dispute resolution. The last section discusses the concern that while religious arbitration is supposed to be voluntary, at least some parties are forced to participate in these proceedings under significant communal pressure that approximates genuine duress.

One of the most common arguments offered in opposition to secular enforcement of religious arbitration awards is the claim that religious norms and values often include commitments that clash severely with contemporary liberal notions of gender equality, religious liberty, freedom of choice, personal privacy, and distributive justice.[26] The much publicized 2005 ban on religious arbitration enacted in Ontario, for instance, was pushed by a broad coalition of different interest groups arguing that the practice and implementation of religious norms through religious arbitration produces substantive injustices to women and other traditionally disadvantaged parties.[27] Such concerns are particularly acute in the context of religious family law arbitration. In both the Jewish and Islamic legal systems, for example, divorces can generally only be granted by a husband to a wife. Traditional Jewish law maintains that to be considered divorced, a woman must have received a ritual bill of marital separation, called a *get*, which must be given to the wife by the husband of his own volition. The giving of a *get* cannot be directly coerced by rabbinic arbitrators, and in virtually all circumstances there is no recourse in Jewish law for judicial divorce or annulment. Moreover, Jewish law discriminates between the statuses and consequences of extramarital relationships by still-married Jewish men and women. It is possible—if difficult—for a Jewish man who has not divorced his wife with a *get* to obtain religious permission to marry again, and that the previous marriage will be regarded as technically invalid.[28]

26 As explained in Broyde, *supra* note 1, chapter 8.

27 *Id.*

28 *See generally* Michael J. Broyde, Marriage, Divorce, and the Abandoned Wife in Jewish Law: A Conceptual Understanding of the *Agunah* Problems in America (2001).

A woman who has not received a *get*, by contrast, cannot marry another under Jewish law; any relationships she may engage in will be considered adulterous, and any children produced from such relationships will be considered illegitimate and unable to marry under Jewish law. In practice, this religious legal framework affords husbands substantial leverage in divorce settlement negotiations. Jewish wives are often compelled to accede to their husbands' demands for inequitable property divisions and child custody arrangements in order to secure the willing giving of a *get*.[29] According to some opponents of religious arbitration, such inequities resulting from religious legal frameworks should not be recognized or enforced by secular courts.[30]

Islamic law, too, contains family law norms that are viewed by opponents of religious arbitration as prejudicing the legitimate interests of women and children. As in Jewish law, divorce in Islamic law is largely dependent on the husband. Typically, a divorce is affected through *talaq*, a voluntary thrice-repeated statement by the husband declaring his intent to divorce his wife. While it is possible for a wife to request that an Islamic religious court broker a judicial divorce, absent a failure of the husband to uphold his marital duties, such a divorce—called a *khul*—typically necessitates the wife's giving the husband some form of material consideration. Thus, unlike the Muslim husband, who can unilaterally effect a *talaq* divorce whether or not his wife is at fault for the breakdown of the marriage, a wife will usually have to pay her unwilling husband to grant a divorce, likely in the form of an inequitable property settlement, and may only be able to do so for cause.[31] Gender inequalities are present in other aspects of Islamic family law as well. Many conservative Muslim scholars may permit some forms of physical coercion by a husband against a wife.[32] There is also a strong presumption favoring paternal rather than maternal custody of male children after they reach the age of seven or eight years old in the event of a divorce, while mandating maternal custody of girls until marriage.[33]

Substantive incongruities between the religious norms likely to be applied by religious arbitration tribunals and those of secular law go beyond the realm of family law. Many Christian arbitration organizations explicitly commit themselves to resolving disputes brought before them in accordance with biblical principles. It is not too difficult to imagine, however, how in some Christian arbitrations such principles might clash sharply with contemporary liberal legal commitments in commercial and other contexts. Consider, for example, the case of a Christian-owned

29 *See* AVIAD HACOHEN & BLU GREENBERG, THE TEARS OF THE OPPRESSED: AN EXAMINATION OF THE AGUNAH PROBLEM: BACKGROUND AND HALAKHIC SOURCES 20–23 (2004).

30 *See* Caryn Litt Wolfe, *Faith-Based Arbitration: Friend or Foe? An Evaluation of Religious Arbitration Systems and Their Interaction with Secular Courts*, 75 FORDHAM LAW REVIEW 427–69, 460–61 (2006).

31 *See* Shaista Gohir & Nazmin Akthar-Sheikh, *British Muslim Women and Barriers to Obtaining a Religious Divorce*, *in* GENDER AND JUSTICE IN FAMILY LAW DISPUTES: WOMEN, MEDIATION, AND RELIGIOUS ARBITRATION 166–85, 175 (Samia Bano ed., 2017); JULIE MCFARLANE, ISLAMIC DIVORCE IN NORTH AMERICA: A SHARI'AH PATH IN A SECULAR SOCIETY 171 (2012); Sebastian Poulter, *The Claim to a Separate Islamic System of Personal Law for British Muslims*, *in* ISLAMIC FAMILY LAW 147, 161 (Chibli Mallat & Jane Connors eds., 1990). Islamic law also provides for a form of judicially mandated divorce, or *faskh*, which a woman may be able to obtain for cause in case her husband is substantially delinquent in fulfilling his marital obligations. The existence of this judicially mandated form of divorce does not obviate the gender imbalance, however. In practice, since a wife has no elective right to divorce her husband, she will typically bear the burden of proving to a religious judge that her husband has acted in a manner that warrants granting a *faskh* divorce. *See* Rehana Parveen, *Do Sharia Councils Meet the Needs of Muslim Women?*, *in* GENDER AND JUSTICE IN FAMILY LAW DISPUTES: WOMEN, MEDIATION, AND RELIGIOUS ARBITRATION, *supra*, at 142–65.

32 *See generally* Azizah Y. al-Hibri, *An Islamic Perspective on Domestic Violence*, 27 FORDHAM INTERNATIONAL LAW JOURNAL 195–224 (2003).

33 *See* Aayeesha Rafiq, *Child Custody in Classical Islamic Law and Laws of Contemporary Muslim World*, 4 INTERNATIONAL JOURNAL OF HUMANITIES & SOCIAL SCIENCES 267–77 (2014).

bakery, which as part of its standard custom baking contract includes an arbitration clause. After entering such a contract with a customer to bake a cake for a wedding, and just shortly before the cake is scheduled to be delivered, the baker discovers that the wedding will be that of a same-sex couple and refuses to perform under the contract. The customer might seek legal redress for this breach of contract, but find him or herself bound to resolve the dispute through Christian conciliation or some similar religious dispute resolution forum that applies what it regards as biblical norms and values. Religious arbitrators might hold squarely in favor of the baker, holding that no valid agreement could be made to provide support services for a union that contravenes what they view as biblical principles and values.

While the above scenario is, to the best of my knowledge, only a hypothetical, there are actual examples of religious arbitrations reaching results that depart substantially from what might be considered contemporary liberal substantive justice. In one case, an arbitration award issued by the Institute for Christian Conciliation applied what it regarded as biblical values in holding that a Christian religious school wrongfully fired its principal without first notifying her of her impending dismissal, or attempting to resolve the matter through direct negotiations or by resorting to third-party dispute resolution.[34] As a result, the arbitrator awarded the principal nearly $150,000 in damages for wrongful termination, harm to her reputation, and lost future earnings. When challenging the award, the school argued that the arbitral award was substantially inconsistent with the normative standards governing employer-employee relationships under applicable state law, which would have permitted the school to fire its principal, an at-will employee, without cause and without first seeking reconciliation as required by the biblical standards applied by the arbitrator. The reviewing court rejected this argument, affirming the general American law rule that "the fact that the remedy ordered by an arbitrator is inconsistent with state law is not grounds for vacating an award."[35] The court's decision, however, merely begs the question: Why should secular courts enforce arbitral awards that apply norms and values that are substantially inconsistent with those embraced as sound policy by state law? Opponents of religious arbitration could argue that from the perspective of society's laws, the arbitrator in this case worked a significant distributive injustice by ordering the school to pay the fired principal money that under the legally enshrined public policy of the state, it should not have had to pay. Religious arbitration in that case resulted in a structuring of the employee-employer relationship along very different lines from the ones envisioned by secular society.

Similar inconsistencies between religious and secular substantive law can be found in other ecumenical systems as well. As Michael Helfand notes, for example, traditional Jewish laws allowing for restricting certain kinds of competitive business practices can be viewed as conflicting with U.S. antitrust laws and policies designed to promote competition and prevent any particular business from gaining monopolistic control over particular markets.[36] Both Jewish and Islamic law, moreover, contain substantial restrictions on contractual autonomy. Islamic law, for instance, does not recognize contracts based on speculation, such as agreements for the future sale of goods or most kinds of insurance arrangements, as well as loans and other transactions that include interest payments. Traditional Jewish law includes price controls, restrictions on interest-based lending, and departs from common law doctrines in matters of land use and nuisance, torts, and other areas. In these and other matters, the results of religious arbitration proceedings may well differ significantly from the results parties might expect to receive in secular courts. More importantly, however,

34 *See* Prescott v. Northlake Christian School, 141 Fed. Appx. 263 (2005).

35 *Id.* at 272.

36 *See* Helfand, *supra* note 14, at 1258–60.

the societal enforcement of such arbitral awards would undermine the degree to which secular notions of substantive justice actually order commercial relationships in society.

It is worth noting that the thrust of substantive justice arguments against religious arbitration is blunted somewhat by the fact that this problem is not limited to the religious arbitration context. Many commentators have observed that traditionally vulnerable parties are often placed at substantial disadvantages by nonreligious arbitration as well. Especially with respect to arbitration in consumer and employment matters, consumers and employees often find themselves bound by decisions that strongly favor retailers, wholesalers, manufacturers, and employers in ways that cut against contemporary progressive notions of distributive justice and fair dealing.[37] One notable example of this phenomenon is the use of arbitration agreements in service contracts for credit cards, cable and internet services, and online retail commerce to preclude class action suits. Research has shown that as a result of this move by banks, credit card companies, and retailers to prevent consumer class actions, most people with claims against these companies did not pursue them. Typically, class action suits are the only pragmatically cost-effective way of pursuing most claims for predatory lending, wrongful billing, wage theft, and discrimination. Oftentimes, these claims are each too small to make litigation practical; the only way of pursuing them is through class actions. Such lawsuits are a critical means of holding corporations accountable for misbehavior, and the public status of such court actions are a valuable source of data that helps government regulators better uncover patterns of corporate abuse and misconduct.[38] The legal enforcement of these kinds of arbitration agreements and the results of such arbitral proceedings undermine an important aspect of American law and public policy—the reliance on class action law suits to help ensure good corporate conduct. Of course, these commercial arbitrations are not religious at all; they are decidedly secular. Nevertheless, they too produce results that reflect deep incompatibilities with contemporary notions of substantive justice.

The danger of religious norms and values displacing secular standards of justice is further reduced by existing arbitration law frameworks. In the United States, arbitration awards that seriously conflict with the law can be vacated by a reviewing court. As the U.S. Supreme Court has held, "a substantive waiver of federal civil rights" in an arbitration agreement "will not be upheld."[39] Additionally, American courts have long held that arbitration awards—whether secular or religious—can and should be vacated by courts when the substance of such awards is contrary to "public policy." This practice helps protect important public interests in cases where a disputant participating in an arbitration proceeding has privately agreed to alienate certain legal rights that are intended to protect the public generally.[40] In such cases, courts often refuse to enforce the arbitration award, reasoning that the waiver of substantive rights is not merely a matter of private contract, but implicates broader societal interests that ought not to be permitted to be abrogated by contract. Importantly, the Supreme Court has held that public policy vacatur may be implicated not only when an arbitration award contradicts important policies enshrined in positive legislation or constitutional norms. Even arbitration decisions that conflict with broader, but not strictly *legal*

37 *See, e.g.*, Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, 67 Law & Contemporary Problems 75–103 (2004); Herman Schwartz, *How Consumers are Getting Screwed by Court-Enforced Arbitration*, Nation (July 18, 2014), https://www.thenation.com/article/how-consumers-are-getting-screwed-court-enforced-arbitration/.

38 *See* Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere: Stacking the Deck of Justice*, New York Times, November 1, 2015, at A1.

39 14 Penn Plaza, LLC v. Pyett, 129 S.Ct. 1456, 1474 (2009).

40 *See* Helfand, *supra* note 14, at 1254.

policy concerns may be vacated on these grounds.[41] Thus, some courts have refused to enforce arbitration decisions regarding child custody matters, holding that such issues must be dealt with by state courts for public policy reasons.[42] In Canada, too, arbitration awards may be vacated if they are found to violate substantive provisions of the Canadian Charter of Rights and Freedoms.

The hesitation critics experience in this context stems from the development of liberalism. The textbook case is that a party—not knowing what they are getting themselves into or later wishing for different terms—binds themselves inextricably to a harsh term based on religious law that will produce a manifest injustice. This fear comes from a place of well meaning, but it is not well warranted. The same fears associated with making a "bad" contract are those associated with religious arbitration, and yet the secular law does not go to too great a length to protect an individual from a bad contract. What the American experience shows, whether for a religious or secular contract, is that the wishes of the individual at the time of contract creation are paramount. What should come after the fact when the marriage ends or a sales contract falls through is precisely what courts are meant to address. To be sure, there are protections built into the system. There exist consumer protection laws and standardized contracts, but these are all post hoc legal creations that only came to fruition after someone made a "bad" deal. To think that religious law has not addressed these same issues before is—without being too harsh—naïve. The Jewish tradition, for example, has developed modern standardized religious contracts, a rich jurisprudential history spanning over a few millennia, thoroughly trained jurists and advocates, and still will defer to secular courts in some instances where no other feasible option exists. Yes there are specific issues—like the *agunah* problem described further herein—but there are also specific answers for those problems. Therefore, the fear associated with contract-based religious arbitration is not a legitimate fear of what is known, but an illegitimate fear of the unknown and uninvestigated.

Religious Arbitration Produces Procedural Injustice

Opponents of religious arbitration further argue that religious dispute resolution often lacks the kinds of procedural protections necessary to ensure a fair and unbiased arbitration process.[43] Existing arbitration law frameworks provide that parties to arbitration proceedings are entitled to certain basic procedural protections that help ensure the fairness of the proceedings and protect vulnerable parties. These protections include

(1) the right to have notice of when and where a hearing will take place;
(2) the right to have an attorney present for the proceedings;
(3) the right to be heard and present and impeach evidence;
(4) the right to a fair and impartial tribunal; and
(5) the right to have the tribunal consider relevant evidence.[44]

41 *See* Eastern Associated Coal Corporation v. United Mine Workers of America, 531 U.S. 57, 62–63 (2000).

42 *See, e.g.*, Berg v. Berg, No. 25099/05, 2008 WL 4155652, at *12–14 (N.Y. Sup. Ct., Sept. 8, 2008); Rakoszynski v. Rakoszynski, 663 N.Y.S.2d 957 (Sup. Ct. 1997). *See also*, *In re* Marriage of Dajani, 251 Cal. Rptr. 871 (Cal. Ct. App. 1988) (refusing to enforce a prenuptial contract because the contract's provision of a dowry only in the event of divorce encourages divorce and is therefore void for public policy).

43 *See* Wolfe, *supra* note 30, at 463–65.

44 *See, e.g.*, Revised Uniform Arbitration Act §§ 2, 9, 11, 12, 15–17.

More generally, standard liberal conceptions of the rule of law assume that legitimate adjudicatory processes entail limited judicial discretion in applying the law to resolve specific disputes.

In many cases, the selection of religious arbitration also entails the selection of the procedural rules posited by that particular religious tradition. Unlike in ordinary commercial arbitration, where parties are largely free to contractually choose the procedural rules that will be applied in the proceedings, in a religious arbitration setting, procedures derived from religious norms and values are typically part of the whole package. Opponents of secular recognition of religious arbitration argue that religious arbitration processes are often unfair because religious procedural rules fail to provide the kinds of protections for vulnerable parties and even playing fields that we have come to expect from contemporary due process standards. Both traditional Jewish and Islamic law, for instance, maintain formal procedural distinctions between men and women in a number of respects. Under traditional Jewish law, women cannot serve as rabbinic court judges, which means that Jewish religious arbitration panels are typically all-male. Women are also formally ineligible from offering witness testimony in rabbinic courts, along with unrepentant sinners, relatives of litigants, and others with financial interests in the outcome of a case.[45] Traditional Islamic law accords different weight to the verbal testimony of men and women, and religiously inspired conceptions of female modesty leads some Islamic courts and tribunals to compel female litigants, advocates, and lawyers to take a less public and obtrusive role in religious proceedings.[46]

Religious law rules of evidence and burdens of proof may also be taken as being inconsistent with secular notions of how to protect disadvantaged parties, ensure fair dealing, and produce truthful results in dispute resolution settings. In Islamic jurisprudence, for instance, burdens of proof typically depend on which of the litigants in a given case becomes procedurally classified as the plaintiff, and which as the defendant.[47] In contrast to most every other legal system, however, these designations may not correlate to which party brings the action or seeks a change to his or her current circumstances. Instead, the plaintiff, who is the party that typically bears the higher burden of proof, is usually the party who in the arbitrator's assessment is advocating a legally weaker claim, and who must therefore bear the burden of demonstrating (by additional showing of fact and law) that his or her claims should prevail.[48] From a policy perspective, it can be argued that this kind of procedural posturing runs counter to standard notions of due process. It can encourage frivolous or dishonest litigation on the part of claimants who expect to successfully shift the burden of proof to defendants that may be unable to reach it.

Moreover, in both Jewish and Islamic law, burdens of proof can be shifted, and in some cases entire claims can be sustained or refuted as a matter of law by various parties taking ritual oaths as to the truth of their own factual assertions.[49] This method of "fact finding" is at odds with secular notions of due process and good judicial procedure under which objective considerations of the weight of evidentiary proofs are the principal determinants of facts to which the law will be applied.

45 *See* EMANUEL QUINT, A RESTATEMENT OF RABBINIC CIVIL LAW 52, 275–300 (1990).

46 *See* Saher Tariq, *Muslim Mediation and Arbitration: Insights from Community and Legal Practice*, *in* GENDER AND JUSTICE IN FAMILY LAW DISPUTES, *supra* note 31, 126–41, at 128–36; Shaista Gohir & Nazmin Akthar-Sheikh, *British Muslim Women and Barriers to Obtaining a Religious Divorce*, *in* GENDER AND JUSTICE IN FAMILY LAW DISPUTES, *supra* note 31, 166–85, at 171–72; HAUWA IBRAHIM, PRACTICING SHARIAH LAW: SEVEN STRATEGIES FOR ACHIEVING JUSTICE IN SHARIAH COURTS 140–41 (2012).

47 *See* Brinkley Messick, *The Judge and the Mufti*, *in* THE ASHGATE RESEARCH COMPANION TO ISLAMIC LAW 83–84 (Rudolph Peters & Peri Bearman eds., 2016).

48 *See id.*

49 *See id.* at 84; THE PRINCIPLES OF JEWISH LAW 615–19 (Menachem Elon ed., 2007).

Some religious traditions also oppose the inclusion of counsel or attorneys in dispute resolution proceedings.[50] Unlike common law systems premised on the discovery of truth through attorney-driven adversarial processes, many modes of traditional religious adjudication are more inquisitorial and judge-driven. In this model, which is embraced by Jewish and Islamic law, as well as modern Christian conciliation organizations, the goal of the dispute resolution process is not merely—or perhaps even primarily—to reach the most accurate, formally legalistic resolution of a dispute. Instead, religious arbitration processes seek to promote fairness, reconciliation, acknowledgment of wrongdoing, and the establishment of equitable and peaceful relations between disputants.[51] Within this framework, the inclusion of lawyers and other kinds of counsel is often seen as counterproductive as the goal of the dispute resolution process is not to enable each party to press its right to the furthest extent of the law, but to help each litigant fulfill his or her religio-legal and moral obligations to others.[52] Some religious arbitration tribunals proscribe the involvement of lawyers in direct contradiction to the legal framework for arbitration established by many secular law regimes. Among those tribunals that do permit attorney involvement in the proceedings, many do not make this fact clear to litigants up front.[53]

This general religious preference for equitable, conciliatory dispute resolution results in religious dispute resolution processes taking on highly flexible postures in which results are often not determined by the religious norms for which parties may have bargained. Jewish law, for example, encourages rabbinic arbitrators to resolve disputes with an eye toward equity and amicable settlement, a procedural posture called *peshara*, or "compromise," which stands in contrast to *din*, or dispute resolution strictly in accordance with the law.[54] This authorization for flexible decision-making gives rabbinic arbitrators wide discretion in crafting decisions based largely on their own senses of fairness, and also creates opportunities for judicial abuse. This potential is enhanced by the fact that Jewish law also empowers rabbinic courts to do away with their own default rules of evidence and procedure in order to flexibly achieve pragmatic and just results in specific cases, repeatedly authorizing arbitrators to act "in accordance with what appears in the eyes of the judge."[55] Likewise, many Islamic arbitration tribunals operate using a procedural posture called *tahkim*, which typically involves a flexible, less law-based arbitral process in which decisions are grounded in *maslahah*, or equitable, pragmatic policy.[56] While this sort of flexible, result-oriented dispute resolution helps achieve the kinds of conciliatory results preferred by many religious systems, it also leaves disputants subject to the vagaries of arbitrators' personal subjectivities in ways that secular standards of due process are intended to prevent.[57]

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50 *See* C. Paul Dredge, *Dispute Resolution in the Mormon Community: The Operation of Ecclesiastical Courts in Utah*, *in* 4 Access to Justice: The Anthropological Perspective 191, 198 (Klaus-Freidrich Koch ed., 1979); Michael J. Broyde, The Pursuit of Justice and Jewish Law 14–20 (1996).

51 *See* Mahdi Zahraa & Nora A. Hak, *Tahkim (Arbitration) in Islamic Law within the Context of Family Disputes*, 20 Arab Law Quarterly 2–42, 33–34 (2006).

52 *See* Broyde, *supra* note 50, at 11–14.

53 *See, e.g.*, Parveen, *supra* note 31, at 159.

54 *See* Broyde, *supra* note 1, at chapter 4.B.3–4.

55 *See, e.g.*, Shulchan Aruch, Yoreh Deah 2:2 (judicial discretion with regard to fitness to be a communal leader); 64:21; (judicial discretion with regard to whether a thief has repented); Even Haezer 11:1 (judicial discretion with regard to evidence of adultery); 93:31 (judical discretion with regard to proper level of support in divorce matters); Hoshen Mishpat 24:1 (judicial discretion with regard to measuring damages in tort); 72:19 (judicial discretion with regard to bias); 157:4 (judicial discretion with regard to common commercial customs); 388:15 (judicial discretion with regard to torts related to improperly informing on a person).

56 *See*, *e.g.*, Parveen, *supra* note 31, at 159.

57 *See* Broyde, *supra* note 1, at chapter 8.B–C.

Over the past decade, the question of arbitration agreements and how best to handle them has drawn more scholarship. While arbitration clauses may have once been less than standard, the fact remains that they have become "consumerized" over time, but not necessarily unfair.[58] Secular arbitration clauses have addressed some of the unfair characteristics in their own way, including rules around the selection of the arbitrators who will ultimately decide the case. Still, concerns over secular arbitration have been addressed previously by the Supreme Court.[59] Further, criticisms of arbitration are often focused on anecdotal evidence of unfair rulings, while the empirical evidence—admittedly small in amount due to the private nature of arbitration agreements—points to a decidedly less one-sided situation than critics would have us believe.[60] The fact is that arbitration clauses are generally not as lopsided against some parties as critics would have some believe.[61]

It should be pointed out, moreover, that the very existence of religious procedural laws that govern religious arbitration proceedings does offer litigants procedural protections not always afforded to parties in commercial arbitrations, regardless of the degree to which these rules comport with standard societal conceptions of due process. One of the more salient critiques of arbitration in general has been that many commercial arbitral proceedings are plagued by unfairness, informal preferences favoring corporate parties, and uncertainty about applicable rules of procedure and evidence.[62] Research has shown that because corporate parties often arbitrate regularly in the same forums, their attorneys are often on friendly terms with arbitrators. Arbitrators, in turn, often owe their own jobs to the willingness of corporate clients to continue to appear in front of them time after time. The employees and consumers who are typically forced to bring their claims against corporations to arbitration, by contrast, are single-use players in these forums. Arbitrators have much to gain and little to lose by producing favorable outcomes for their corporate clients.[63] This potential for unfairness and bias is exacerbated by the fact that, unlike religious tribunals, commercial arbitration organizations do not typically consider themselves bound to any particular procedures. While parties can in theory prescribe the use of certain procedural rules in their arbitration agreement, oftentimes arbitrators get to make it up as they go along. The admission and consideration of evidence, selection of arbitrators, procedures for making arguments and countering opponents' claims, discovery, and other procedural matters can be—and at times are—thus crafted in ways that favor corporate parties. Rather than protect vulnerable disputants, the procedures (or lack thereof) employed in many secular arbitration contexts often disadvantage consumers and employees in ways that can be appalling to standard notions of adjudicatory due process.[64]

While the existence of religiously prescribed procedural rules can help alleviate some of the concerns that exist in the procedural vacuum of commercial arbitration, religious dispute resolution suffers an important disadvantage that undermines the likelihood of fair dealings. Specifically, religious arbitration is often far less professional than its secular counterpart. While this is based predominantly on anecdotal evidence, there is proof within some of the procedures. For one, the type of people selected as arbitrators in a religious arbitration is telling. Pastors, ministers, rabbis, and

58 *See* Christopher R. Drahozal, *"Unfair" Arbitration Clauses*, 2001 University of Illinois Law Review 695–790, 705 (2001).

59 *Id.* at 708–15.

60 *Id.* at 720–41.

61 Peter B. Rutledge & Christopher R. Drahozal, *Contract and Choice*, 2013 Brigham Young University Law Review 1–63, 5–9 (2013).

62 *See* Jessica Silver-Greenberg & Michael Corkery, *in Arbitration, a "Privatization of the Justice System,"* New York Times, November 1, 2015.

63 *Id.*

64 *Id.*

imams are spiritual teachers and leaders, not legal practitioners. It is possible that the pastor, minister, rabbi, imam, or someone else was formally trained as a legal practitioner, but it is unnecessary for the purposes of the arbitration and could even strike against the intent of the arbitration. After all, people who choose to arbitrate based on religious laws are choosing their set of laws precisely because it offers something that the secular world cannot. If their intent was to have a neutral observer picked for them with formal legal training, they have courtrooms for that in every municipality in the country. While some notable religious arbitration organizations make sure that their arbitrators are trained in dispute resolution law, and other related disciplines, and may also include experts in specific fields on arbitral panels hearing matters that fall within that subject area, many others offer no such professionalism or expertise. In such forums, decision making can be highly informal, haphazard, and without sufficient attention to the kinds of procedural subtleties that professional legal experience has shown to be important to ensuring fair proceedings and just results.

Religious Arbitration Is Often Coercive and Is Used to Entrench Unjust Power Relations in Religious Communities

Another concern raised by opponents of secular enforcement of religious arbitration is the problem of coercion. The legitimacy of all arbitration is premised on the parties' voluntary agreement to submit their dispute to a nonjudicial forum. While all citizens have the right to have cases resolved by state courts in accordance with state laws, contemporary commitments to freedom of contract permit individuals to waive this right, and instead choose to have their conflicts adjudicated in the forum and according to the law of their own choosing. Based on these theoretical underpinnings, standard arbitration laws provide that arbitration agreements, like all contracts, are void if secured through coercion or duress.[65] At least in the United States, the standard for voiding a contract procured through duress is that courts will invalidate agreements produced by means of "improper threats by the other party that leave[] the victim no reasonable alternative" but to enter into the coerced contract.[66]

Problematically, however, courts have a poor track record of recognizing various forms of pressure exerted by religious communities to get individuals to agree to arbitrate disputes before religious tribunals as legal duress. Traditional Jewish law, for instance, maintains that Jews are obligated to resolve their disputes with coreligionists in rabbinic courts in accordance with Jewish law. Jewish litigants that refuse to appear before a rabbinic tribunal when summoned in response to a complaint being filed may be subject to a *seruv*, a public declaration that such parties are in contempt of court. The practical ramifications of a *seruv* vary widely from community to community, but can include exclusion from participation in religious services, denial of the rights and privileges of membership in the Jewish community, and expulsion of one's children from private religious schools. Additionally, an individual's being subject to a *seruv* may result in other members of the Jewish community refusing to engage in business with him or her, and thus have real economic consequences.

In some communities, refusal to consent to resolve disputes in rabbinic courts and resorting to secular adjudication can result in ostracism by friends and family. In numerous instances, parents who seek to leave the observant Jewish community and refuse to adjudicate divorce, property division, and child custody matters in a religious forum have had the full financial and political

65 *See, e.g.*, 9 U.S.C. §10(a)(1) (2002).

66 Restatement (Second) of Contracts § 175(1) (American Law Institute 1981).

resources of some Jewish communities brought to bear against them in secular court proceedings, sometimes resulting in their loss of custody or visitation rights. Despite the very real consequences of refusing to arbitrate a dispute in a rabbinic court, American courts have regularly held that a *seruv* does not constitute legal coercion, and that arbitration agreements signed under threatened or actual issuance of a *seruv* are not void for duress.[67]

Jewish law and some Jewish communities use the *seruv* as a formal procedural means of pressuring members of the community to appear before a religious arbitration tribunal. While similar mechanisms may not necessarily exist in other religious systems, many other religious communities exert all kinds of informal communal pressure to compel members—as well as those who no longer wish to remain members—of the faith to resolve litigious matters internally. Cases have been reported in which members of tight-knit Christian communities who refuse to arbitrate disputes in a religious forum have lost jobs in churches and religious schools, been made unwelcome in their places of worship, and been socially ostracized by friends and neighbors.[68] The more highly organized and isolationist a religious community is, the more harmful such pressure can be, and the more effectively it can be brought to bear in order to compel a recalcitrant member of the community to resolve a dispute internally.

The ways in which some well-organized religious groups have dealt with allegations of sexual abuse committed by religious leaders is illustrative, although not strictly an instance of religious arbitration. Such allegations have been rippling through Catholic, Jewish, and more recently Muslim communities. In many cases, the religious establishments in these communities seek to resolve such matters internally, without involving secular law enforcement authorities. The Catholic Church has used a variety of different means to convince alleged victims and whistleblowers to keep such matters within church disciplinary channels.[69] In one headline-making case of alleged sex abuse of a minor girl by an unlicensed community therapist and rabbi, communal leaders enacted numerous measures to punish the victim and her family for handling the matter through the secular criminal justice system. The victim and her family received threatening calls, were ostracized by neighbors, and the victim's husband had his local business boycotted and was forced to close.[70]

Despite the prevalence of such tactics to compel members of religious communities to agree to participate in religious arbitration proceedings, courts rarely recognize such pressures as constituting duress. One commentator has summarized the view of American courts on the matter: "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."[71] Opponents of religious arbitration can argue, however, that this approach badly misunderstands the nature of individuals' religious commitments, and their social, familial, and economic ties to their religious communities. Many religious traditions maintain that adherents are bound to resolve

67 *See* Ginnine Fried, Comment, *The Collision of Church and State: A Primer on Beth Din Arbitration and the New York Secular Courts*, 31 Fordham Urban Law Journal 633–55, 652–53 (2004).

68 *See* Wolfe, *supra* note 30, at 460–65.

69 *See* Anna Stolley Persky, *Prosecutors Battle the Wall of Silence around Sex Assault in Religious Communities*, ABA Journal (December 1, 2013), http://www.abajournal.com/magazine/article/the_religious_wall_of_silence.

70 *See* Josh Saul, *Sex Abuse Victim Shamed During Synagogue Prayers*, New York Post (September 9, 2013), http://nypost.com/2013/09/09/sex-abuse-victim-shamed-during-synagogue-prayers/; Hella Winston, *Weberman Abuse Case Exposes Role of Shadowy "Modesty Committees,"* Jewish Week (Dec. 10, 2012), http://www.thejewishweek.com/news/new-york-news/weberman-abuse-case-exposes-role-shadowy-modesty-committees.

71 Fried, *supra* note 67, at 652. *See also*, Greenberg v. Greenberg, 656 N.Y.S.2d 369 (App. Div. 1997); Golding v. Golding, 581 N.Y.S.2d 4 (App. Div. 1992).

their disputes in religious courts and in accordance with religious norms and values.[72] Such duties exert genuine pressure upon faithful members of the community to accede to even unfair, unprofessional, and biased religious arbitration proceedings.

Rejecting this religious duty can often entail serious consequences to one's standing in the community, and in the mind of the individual adherent, to his or her standing in the eyes of God as well. While this sense of obligation to abide by religious arbitration proceedings may not be the result of duress in the external sense typically contemplated by the law, for the religious individual there is often no reasonable alternative but to conform to the norms and values of his or her faith community. Leaving the faith, moreover, is often less of a choice than courts may be willing to acknowledge. It is rare for religious communities to physically prevent an individual from leaving the fold, but nevertheless abandoning one's religion and religious community can lead to one's ostracism by friends and family, loss of access to one's children, and severe financial hardship, especially for those seeking to leave isolationist communities where the teaching of secular education and skills for functioning in secular society is kept to a minimum.

Religious Arbitration Cannot Be Adequately Policed or Regulated in Liberal Societies Committed to Religious Freedom

The challenges to religious arbitration discussed in the previous three sections are limited in a very important sense. While concerns for substantive injustice, procedural unfairness, and coercive pressure to appear before religious tribunals are indeed quite real, they can—at least in theory—be addressed through secular judicial oversight over the religious arbitration process. Secular law arbitration regimes like the Federal Arbitration Act provide for judicial review of arbitration agreements, procedures, and awards. Such review might also be—and in practice often is—applied by state courts to evaluate the validity and enforceability of religious arbitration proceedings as well.[73]

Arbitration agreements are subject to the ordinary rules of contract law, and can therefore be voided if procured through coercion or duress. Arbitration law also requires arbitration proceedings to respect basic norms of procedural due process. Arbitrators cannot be biased or have interests in the cases they decide; they are required to hear and take cognizance of relevant evidence, give all parties adequate notice of proceedings and an opportunity to be heard, and respect other basic notions of procedural fairness. Additionally, courts will not typically uphold arbitration agreements in which parties agree to alienate basic procedural due process rights protected by the Constitution. Moreover, secular law arbitration frameworks often include provisions empowering courts to review the substance of arbitration awards, and to vacate those awards if they are contrary to public policy. In theory, these legal limits on the judicial recognition and enforcement of all arbitration decisions can greatly limit the occurrence of coercive, unfair, and substantively unjust, but still legally binding religious arbitration proceedings. Furthermore, to the extent that current legislative limits prove inadequate to address special concerns arising in the religious arbitration context, law makers can modify existing frameworks for judicial review of arbitral proceedings to better resolve such problems.[74]

While existing legal frameworks from judicial review of arbitration may help prevent substantive and procedural unfairness and duress in theory, in practice, courts are highly deferential to religious

72 *See* Wolfe, *supra* note 30, at 440–41.

73 *See* Broyde, *supra* note 1, at chapter 6.A.

74 For examples of such proposals, see Baker, *supra* note 9, at 197–201.

arbitrators.[75] Such deference significantly heightens the concern that individuals may be pressured to participate in religious proceedings that are unfair, lack important procedural protections, and produce results that are at odds with standard notions of substantive justice. Judicial deference to arbitral proceedings is not only a concern in religious dispute resolution. Courts regularly uphold commercial and other nonreligious arbitration agreements and awards, often with only cursory review. The United States and many other arbitration-friendly jurisdictions have clear policies favoring the use of private arbitration to resolve litigious conflicts outside state courts. These policies are grounded in several different concerns, including personal autonomy and freedom of contract; a desire to keep cases out of overworked and clogged court systems; the belief that private arbitration can often be used to craft better results more consonant with parties' expectations and interests; and a belief that arbitration is often cheaper, faster, and more efficient than formal adjudication. As a result of this broad, overarching public policy favoring arbitration, courts are often hesitant to void arbitration agreements or vacate arbitral awards.

When it comes to judicial review of religious arbitration, courts appear to be even more hesitant. This is largely a result of free exercise and religious establishment concerns, which give courts significant pause at the prospect of telling parties to religious arbitration proceedings what the norms and values of particular faith traditions are, and whether or not they may contract with each other to resolve private disputes accordingly.

In the United States, these concerns take the form of the "religious question doctrine." The origins of the religious question doctrine date back to the late nineteenth century, when the Supreme Court considered an appeal from a lower federal court ruling enjoining the enforcement of a state court decision that resolved a property dispute between two factions of a church. In upholding the lower court's refusal to permit a judicial disposition of the dispute, the Court held that because the case turned on an interpretation of church doctrine, a state authority could not resolve the issue without infringing on important First Amendment principles. Instead, the Court ruled that such matters must be resolved by relevant ecclesiastical authorities, to which state courts must then defer.[76] Almost a century later, in *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Church*, the Supreme Court affirmed this doctrine. In that case, the Court reversed a ruling by the Georgia Supreme Court that awarded church property to two local congregations because it found that the broader institutional church organization failed to uphold its own tenets of faith and practice. In reversing the Georgia court's decision, the Supreme Court held that state authorities cannot determine the truth or falsity of religious doctrine.[77] However, an exception is made to the "religious question doctrine" when there is a manifest disregard of the law.[78]

The religious question doctrine places major limitations on courts' abilities to review religious arbitrations for duress or procedural or substantive injustice. The Federal Arbitration Act, for instance, provides that courts may vacate an arbitration award issued as the result of arbitrators

75 *Id.*

76 *See* Watson v. Jones, 80 U.S. 679 (1872).

77 *See* Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Church, 393 U.S. 440 (1969).

78 As the doctrine so describes, courts have sometimes disregarded arbitration awards when it can be shown that the arbitrator's decision constitutes a manifest disregard of the law. Courts did this in addition to the statutory exceptions under Section 10 of the Federal Arbitration Act, which names things like fraud, corruption, misconduct, and other malfeasance. To add complexity to the issue, a circuit split has developed over those who recognize the doctrine, those who do not, and those who have yet to rule on the subject. *See* Jason P. Steed, *Appealing Arbitration Awards and the Circuit Split over "Manifest Disregard of the Law,"* AMERICAN BAR ASSOCIATION (May 10, 2016), http://apps.americanbar.org/litigation/committees/appellate/articles/spring2016-0516-appealing-arbitration-awards-circuit-split-manifest-disregard-law.html.

exceeding their authority as provided by the litigants' arbitration agreement.[79] In the secular context, this might mean that if parties to an arbitration agreement had provided that their dispute should be resolved according to French law, and instead, the arbitrators flipped a coin, it would be appropriate for a court to vacate the award because the arbitrators overstepped their grant of authority. Pursuant to the arbitration agreement, the arbitrators' authority was limited to resolving the parties' dispute in accordance with their understanding of French law. While a court would likely not expect the arbitrators to resolve the case exactly as a French judge might, a coin-flip would clearly be a means of dispute resolution that the arbitrators were not contractually authorized to utilize.

Strangely, however, the religious question doctrine may prevent courts from making similar kinds of judgments with respect to religious arbitration proceedings. Courts have explicitly held that where arbitrators purport to have based their decisions on religious norms and values, courts cannot decide whether those religious standards actually support the award.[80] Under current applications of the religious question doctrine, courts may not make judgments about what religious laws and values *really* are or require; they cannot second guess the purported religious determinations of ecumenical officials. Doing otherwise would amount to the government's making determinations about what are and are not correct statements of the teachings and commitments of particular faith traditions, essentially establishing some interpretations of those traditions and not others as normative. To avoid such governmental encroachments on the integrity and independence of religions, courts typically avoid any review of religious arbitral proceedings that would be making substantive judgments about the underlying religious issues or laws. This cuts at the heart of a central issue regarding religious law and its powers derived from the secular legal system, that both gives it a space to exist and thrive while simultaneously refusing to openly interact with it. It means these laws are a "unique hybrid, inhabiting the space between law and religion."[81] This is by no means a new problem, but just an old problem in different garb. What was centuries ago a matter of choice between two parties is now a contractual arrangement with the full support of a federal statute. Still, this should not suggest shying away from religious arbitration, but recognizing the conflict is there and growing from it.

Similar judicial review problems exist with respect to questions of duress and procedural fairness in religious arbitration proceedings. Evaluating the degree to which communal pressure and formal religious doctrines like the rabbinic *seruv* unduly coerce parties to agree to arbitrate disputes in religious forums would require courts to examine and make judgments about religious values. Not only is there good reason to think that courts are simply bad at such determinations, but under religious freedom doctrines they may be barred from doing so. By default, such restrictions leave vulnerable parties unable to seek redress through the courts in the ways that existing legal frameworks for arbitration anticipate.

For the same reasons, there is good reason to think that legal standards for judicial review of arbitration are largely ineffective at protecting vulnerable parties from procedural unfairness in religious proceedings. Arbitration laws often provide for vacating arbitration awards if arbitrators refuse to hear and consider relevant material evidence with respect to the dispute they are resolving.[82] In religious contexts, questions such as evidence, pleading procedures, and how arbitrators

79 *See* 9 U.S.C. § 10(a)(4) (2002).

80 *See, e.g.*, Lang v. Levi, 16 A.3d 980 (2011).

81 Michael A. Helfand, *Between Law and Religion: Procedural Challenges to Religious Arbitration Awards*, 90 Chicago-Kent Law Review 141–62, 157 (2015).

82 *See* 9 U.S.C. § 10(a) (2002).

ought to go about resolving cases are often determined by religious law. If a court is asked to vacate a religious arbitration award because the arbitrators failed to properly evaluate material evidence, or otherwise prejudiced the rights of the litigants, it would have to interpret and make determinations about relevant religious norms. The judge would have to decide what the relevant religious system says about what kinds of evidence are or are not material in order to determine whether the arbitrator—who by the terms of the arbitration agreement is supposed to apply religious law—failed to consider evidence that the religious laws he or she is supposed to apply consider material. Likewise, reviewing courts would have to consider which procedural rights the relevant religious laws and values afford to each litigant in order to determine whether the arbitrators acted in a manner that prejudiced such rights. Under many standard contemporary approaches to the religious question doctrine in particular, and government determinations of religious norms and standards in general, however, judges could not make such determinations. Rather than reviewing such claims of procedural unfairness and duress, state judges would have to defer to the religious arbitrators' decisions, leaving vulnerable litigants without meaningful recourse to ensure the truly volitional nature and procedural and substantive justice of religious arbitration proceedings.

Secular Enforcement of Religious Arbitration Violates Disputants' Rights to Freedom of Religion

Opponents of secular enforcement of religious arbitration proceedings further argue that the use of state resources—and ultimately state coercion—to give force to religious arbitration represents a serious violation of individuals' right to the free exercise of religion. By recognizing and enforcing religious arbitration agreements and the decisions of religious arbitration tribunals, secular courts compel recalcitrant parties to participate in what are essentially religious practices or to abide by religious norms and values that they may not hold.[83]

Take, for example, the 1999 case of *Encore Productions, Inc. v. Promise Keepers*.[84] In that case, Promise Keepers, a Christian organization that conducts meetings and conferences for men in large venues across the United States entered into a contract with Encore productions under which Encore would provide production and consulting services for Promise Keepers' events. The agreement included an arbitration clause in which the parties agreed that disputes between them would be resolved through binding arbitration in accordance with Christian conciliation procedures.

When the relationship between Encore and Promise Keepers broke down, Encore sued Promise Keepers, and the defendants moved to have the action dismissed and sent to Christian arbitration pursuant to the parties' original service contract. In ruling to dismiss the claim, the court rejected an argument made by Encore that compelling it to engage in and abide by the decision of a Christian conciliation proceeding would violate its rights to the free exercise of religion. Encore argued that its agents and employees could not be compelled to participate in a religious proceeding conducted in accordance with the tenets and values of a faith to which they did not subscribe. The court rejected Encore's argument. The presiding judge found that enforcing the results of the Christian conciliation proceedings would not violate the freedom of religion rights of Encore or its employees because they had already "voluntarily signed a contract containing a written arbitration agreement that clearly and expressly disclosed that arbitration would be submitted to Christian

83 *See* Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 Stanford Law Review 1631–75, 1635 (2005).

84 Encore Productions v. Promise Keepers, 53 Fed. Supp. 2d 1101 (D. Colo. 1999).

Conciliation."[85] This, the court found, manifested Encore's decision to waive any rights it may have had to refuse to participate in a religious proceeding or abide by the religious norms and values that would form the basis of any arbitral award.

Encore illustrates, as many have noted, a serious challenge to religious freedom posed by secular court enforcement of religious arbitration agreements and awards. Of course, from one perspective, religious arbitration helps enhance religious freedom. It gives members of particular faith traditions the opportunity to order their lives and affairs in accordance with the norms and values of their own religious convictions. Secular recognition of religious arbitral decisions, moreover, helps concretize such religious commitments by providing a sometimes necessary enforcement mechanism. But religious freedom is a two-way street. The right to believe in a faith tradition and observe its practices also entails the right to choose to not believe or practice any specific faith against the dictates of one's own conscience. As James Madison put it, and as American courts have confirmed time and again, "The Religion ... of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate."[86] The right to believe or not to believe in a religion, moreover, assumes the right to change one's beliefs. Opponents of secular enforcement of religious arbitration argue that courts' compelling of individuals to participate in and abide by the decisions of religious arbitration proceedings abridges this right.

The problem raised by *Encore* can be highlighted by the following hypothetical. Consider the case of an individual who has decided to become a member of a particular religious faith. Imagine that as part of its ritual for admitting new members, this faith requires that members make firm commitments to remain faithful adherents of this religion for life. This commitment is memorialized in a legally binding contract that provides for financial and social consequences in the event that the new convert decides to leave the faith or stop practicing the religion. Imagine, moreover, that this tradition requires those who are already members of the faith to periodically renew this commitment by signing such contracts as part of important life-cycle events and other religious ceremonies. Under the court's reasoning in *Encore*, it is not unreasonable to suppose that the state might be put in the position of having to enforce such contracts and apply such penalties, which most certainly abridge and restrict individuals' ability and freedom to choose their own religious practices and beliefs.

Indeed, it is unnecessary perhaps to resort to such hypotheticals in order to illustrate the problem. Religious groups often place various hurdles before those who wish to leave the faith, and impose consequences on community members that are less than scrupulous in their religious observances and beliefs.[87] While in modern liberal societies such religious communities do not have any direct enforcement powers, they often make use of secular court enforcement of religious arbitration agreements, arbitral proceedings, and other contracts to help bind individuals to the religious community. As mentioned earlier, some isolationist Jewish communities use various forms of communal pressure, consequences, and informal religious supervision councils to keep adherents on the correct religious path. Ultimately, members of such communities are strongly discouraged from leaving by the likelihood of their facing serious economic and familial consequences at the hands of communal religious authorities acting as arbitration panels to resolve divorce, child support,

85 *Id.* at 1113.

86 James Madison, *Memorial and Remonstrance against Religious Assessments*, *in* CONSTITUTIONAL DEBATES ON FREEDOM OF RELIGION: A DOCUMENTARY HISTORY 48–53, 50 (John J. Patrick & Gerald P. Long eds., 1999). *See also* Wallace v. Jaffree, 472 U.S. 38, 53 n.38 (1985).

87 *See* Ann Laquer Estin, *Embracing Tradition: Pluralism in American Family Law*, 63 MARYLAND LAW REVIEW 540–604, 600 (2004).

custody, and property division matters. Communal pressure is used to force community members who have decided to leave the faith or become less strict in their religious observances to appear before religious arbitrators whose determinations will be enforced by secular courts. The likelihood of such eventualities places a serious bar on individuals' freedom to change their religious beliefs and practices or convert out of their religious community.

Similar problems have been recorded in connection to the Church of Scientology. In some reported instances, the church has obligated its members to sign dozens of legally binding arbitration agreements that provide that any disputes between members and the church will be resolved through binding arbitration conducted by arbiters who are church members in good standing, and in accordance with rules and procedures established by the church itself. Members who question or rebel against church teachings or who seek to leave the Church of Scientology are labeled "Subversive Persons." According to church doctrine, members of the church in good standing, including friends, family, and business associates are prohibited from dealing, speaking, or otherwise interacting with such Subversive Persons, and they can face sanctions for doing so. The arbitration agreements signed by church members, and the significant membership dues, donations, and tuition for church courses and lectures that members are expected to pay place significant, legally enforceable burdens on church members' freedom to practice or change their religious affiliations and practices.[88]

Secular enforcement of parties' commitments to participate in and abide by the decisions of religious arbitration proceedings can limit the right to freedom of religion in more direct ways too. In particular, it can be used to actually compel individuals to perform religious rituals or engage in religious practices in which they may be unwilling, as a matter of conscience, to participate. A recent Canadian case is illustrative. *Marcovitz v. Bruker* involved a civil divorce settlement agreement between two spouses in which both agreed to appear before a rabbinical arbitration court in order to secure and arrange for the giving of a *get*, or Jewish bill of divorce.[89] At the time they entered the agreement, both parties were traditionally observant Jews and ostensibly committed to abiding by Jewish law, which prescribes that in the event of a divorce, a Jewish wife may only remarry after having received a *get* that is voluntarily given by her husband. Following their civil divorce in Canadian court, the defendant waited for over nine years to receive her *get*, which the plaintiff, her ex-husband refused to provide, and she finally began legal proceedings for breach of the original divorce settlement.

Several years later—fifteen years after the couple's civil divorce—Marcovitz gave the *get*, finally permitting Bruker to remarry under religious law. Bruker, however, sued for damages for breach of the original divorce agreement. The matter wound its way through the courts, and ultimately the Canadian Supreme Court ruled that the promise to give the *get* was a justiciable matter. The Court reasoned that the divorce settlement was an ordinary secular contract within the purview of the courts, and the fact that the agreement included a promise to perform a religious rite did not prevent the court from hearing an action for damages for breach of that contract, claims of religious freedom to not perform a religious ritual like the giving of a *get* notwithstanding.[90]

The action in *Marcovitz* was for damages rather than for specific performance of the promise to give a *get*. Nevertheless, it is worth considering what may have happened had Bruker asked the court to compel her ex-husband to give the *get* itself, arguing perhaps that no amount of financial

88 *See* Michael Corkery & Jessica Silver-Greenberg, *In Religious Arbitration, Scripture is the Rule of Law*, NEW YORK TIMES, November 3, 2015, at A1.

89 Marcovitz v. Bruker, [2007] 3 S.C.R. 607 (Canada).

90 *Id.*

compensation would qualitatively compensate her for her inability to remarry under Jewish law. Some commentators have argued that it is unlikely Bruker could have prevailed in a legal action to compel Marcovitz to appear before a rabbinical court or to give the *get*, since this would have been "an impermissible breach of the husband's constitutionally protected freedom of religion."[91] The fact remains, however, that courts do in fact routinely compel recalcitrant parties to uphold their obligations under arbitration agreements. They can be compelled, under threat of being in contempt of court, to appear before religious arbitration tribunals, and can be forced to obey the decisions of religious arbitration tribunals that have been conformed and converted into judicial orders enforceable by courts and the state and the state. This raises serious questions about whether and to what extent secular enforcement of religious arbitration can be achieved without seriously abridging individuals' rights to freely choose, change, and practice religion as their own consciences dictate.[92]

Secular Recognition of Religious Arbitration Promotes Isolation and Non-Integration among Religious Communities

Some commentators have argued that societal recognition and enforcement of religious arbitration is a problematic social ill that undermines important interests in the assimilation of religious communities into secular society.[93] Some others have argued that the recognition of religious arbitration helps promote a multicultural society in which numerous religious groups can better maintain their own identities, cultures, and practices.[94] However, opponents of religious arbitration—including members of some religious communities—have countered that such multiculturalism is to be avoided rather than encouraged.[95] Even from a standard liberal perspective, these commenters argue that by permitting religious groups to remain insular and unintegrated into mainstream societal norms, secular enforcement of religious arbitration actually highlights and widens gaps between ordinary members of society and religiously observant "others."[96] Rather than encourage isolation and factionalism, society ought to encourage minority groups and cultures to more fully integrate into a broader societal ethos. At least in part, this means that all members of society ought to order their lives and affairs under the same sets of norms and values; or, at the very least, they should not be given encouragement and governmental support for avoiding doing so.

Religious isolationism within secular societies, moreover, correlates to a number of serious communal ills within religious communities that ought to be discouraged and if possible avoided. Some of the most often referenced concerns relate to the subjugation and oppression of traditionally disempowered members of religious communities, especially women and children. Feminist criticisms of religious group autonomy within secular societies maintain that by giving faith communities limited powers of self-government through the legal enforcement of religious arbitration, the state

91 Ayelet Shachar, *Privatizing Diversity: A Cautionary Tale from Religious Arbitration in Family Law*, 9 Theoretical Inquiries in Law 573–607, 595 n.52 (2008).

92 *See* Broyde, *supra* note 1, at chapter 9.

93 *See* Pragna Patel, *The Growing Alignment of Religion and the Law: What Price Do Women Pay*, *in* Gender and Justice in Family Law Disputes, *supra* note 31, 77–109, at 79–80. *See generally* Marion Boyd, *Religion-Based Alternative Dispute Resolution: A Challenge to Multiculturalism*, *in* Belonging? Diversity, Recognition and Shared Citizenship in Canada 465–73 (Keith Bantinh, Thomas J. Courchene & F. Leslie Seidle eds., 2007).

94 *See* Helfand, *supra* note 14.

95 *See* Wolfe, *supra* note 30, at 461–63.

96 *See* Shahnaz Khan, *Canadian Muslim Women and Shari'a Law: A Feminist Response to "Oh! Canada,"* 6 Canadian Journal of Women & Law 52–65, 62–63 (1993).

entrenches traditional power structures, and puts vulnerable parties at a greater disadvantage within their communities.[97] This is especially true in connection with secular recognition of religious dispute resolution. By legally enabling internal problem-solving through communal channels, many abuses and problems within religious groups are kept in house. Victims of domestic violence, sexual abuse, predatory lending, unfair business and real estate practices, poor education, and religious coercion to conform to communal norms can be effectively pressured to keep their complaints within the community, where oftentimes they will not be effectively addressed. Indeed, in some isolationist communities, members may not even understand or be aware of alternative options.[98] While there are numerous factors that contribute to such internal communal dynamics, secular recognition and enforcement of religious arbitration helps enable and give force to some of the kinds of communal institutions and authority structures that make them possible.

Another, possibly counterintuitive, argument against secular enforcement of religious arbitration suggests that enabling religious communities to be more autonomous and separate from the broader society actually hampers such groups from preserving and transmitting their religious practices and cultures. In order for religious traditions to remain relevant sources of norms and values, those traditions must offer compelling accounts of the world in which their adherents live which they experience. Doing so requires religions to take cognizance of, and perhaps interact with the real-world contexts in which they are situated. Such interaction produces subtle but unmistakable interpretive evolutions in religious thinking and practice. Dogmas and rituals deeply irreconcilable with societal norms and values are negotiated, cabined, and sometimes marginalized. Consider as an example of this, the recent reexamination of the status of same-sex relationships in evangelical Christianity, where the interaction with secular society has generated a deep reconsideration.[99]

At the same time, religious values enter into public discourses, and societal sensibilities and cultures take on traditional elements. In short, by being forced to interact and contend with societal realities, religions organically adapt to their environments in a way that keeps them relevant and vibrant, but also integrous and true to their roots and traditions. Opponents of religious arbitration argue, however, that to the extent that secular institutions permit religious communal autonomy, they also enable religious groups to avoid such dialectical interactions with the wider contexts in which they exist. The result can often be the development of static and archaic religious traditions and practices that have no resonance for many of their adherents and the real world. Such faiths become dead letters rather than meaningful mediums for communicating values and structuring human relationships with each other and with the divine.[100] Put differently, the kind of religious autonomy facilitated through secular recognition of religious arbitration fosters an ossification of faith. Rather than bend and adapt, minority religions and cultures are more apt to break. By

97 *See* Ayelet Shachar, *Religion, State, and the Problem of Gender: New Modes of Citizenship and Governance in Diverse Societies*, 50 McGill Law Journal 49–88, 58 (2005).

98 *See* Fried, Comment, *supra* note 67, at 646–47; Nicholas Pengelley, *Faith Based Arbitration in Ontario*, 9 Vindobona Journal of International Commercial Law & Arbitration 111–22, 122 (2005).

99 *E.g.*, The Christian Broadcasting Network, http://www1.cbn.com/cbnnews/us/2017/july/were-in-a-transition-and-its-for-the-best-eugene-petersons-about-face-on-gay-marriage (last visited Feb. 9, 2018) (noting simply that "The trend of evangelicals affirming homosexuality is not going away.") *See also* Matthew Vines, God and the Gay Christian: The Biblical Case in Support of Same Sex Relationships (2015); Brad Harper & Stafford Harper, Space at the Table: Conversations between an Evangelical Theologian and His Gay Son (2016); Mark Achtemeier, The Bible's Yes to Same Sex Marriage: An Evangelical's Change of Heart (2014); Joseph Adam Pearson, Christianity and Homosexuality Reconciled: New Thinking for a New Millennium (2014).

100 *See* Suzanne Last Stone, *The Intervention of American Law in Jewish Divorce: A Pluralist Approach*, 34 Israel Law Review 170–210, 202–05 (2000).

denying religious communities dispute resolution autonomy based on ecumenical norms and values, society can actually help religious traditions remain relevant.[101]

RELIGIOUS ARBITRATION AS A SECULAR VALUE: THE CASE FOR RELIGIOUS ARBITRATION

In the previous section, the arguments against religious arbitration were laid out, examined, and parsed for their strengths and weaknesses. This section does the same for the case in favor of religious arbitration.

Recognizing Religious Arbitration is a Religious Freedom Imperative

The foregoing discussion offers a powerful case against secular law recognition and judicial enforcement of religious arbitration agreements and awards. Commitments to religious liberty and religious nonestablishment may require liberal states to give religious arbitration the benefit of the same legal protections offered to commercial and other nonreligious dispute resolution. If society wishes to enable and encourage citizens to utilize private dispute resolution forums rather than state courts to resolve litigious conflicts, then it must do so by putting both religious and nonreligious arbitration mechanisms on equal footing. Any other result would amount to a government attempt to disestablish religion in favor of irreligion, a serious constitutional problem, at least in the United States. From this perspective, secular societies ought to create frameworks for legally enforceable religious arbitration, not because they want to, but because they have to. Either all forms of arbitration must be permitted, or else none may be.[102]

The doctrine of government neutrality between religion and irreligion is firmly established in American law and policy. In several important cases, the Supreme Court has held that this kind of neutrality is an important aspect of First Amendment limits of government involvement with religion. The Establishment Clause of the United States Constitution provides that "Congress shall make no law respecting an establishment of religion."[103] In addition to its prohibiting the government from creating an official state church, lending aid to particular religious faiths, or incorporating particular religious doctrines, practices, or teachings into law, this provision has also been understood as precluding attempts by government to establish or privilege secularism or irreligion over religion. In short, it requires the state to take a neutral stance toward religion, neither supporting it nor hamstringing it. As Justice Hugo Black wrote in *Everson v. Board of Education of the Township of Ewing*: "The [Establishment Clause] requires the state to be a neutral in its relations with groups of religious believers and nonbelievers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them."[104]

This sentiment has been confirmed numerous times by U.S courts. In *Lemon v. Kurztman*, in which the Supreme Court established an important test for determining whether government

101 *See* Wolfe, *supra* note 30, at 462–63.

102 *See* Nicholas Walter, *Religious Arbitration in the United States and Canada*, 52 SANTA CLARA LAW REVIEW 501–69, 563–67 (2012).

103 U.S. CONSTITUTION amendment I.

104 Everson v. Board of Education of the Township of Ewing, 330 U.S. 1, 18 (1947). *See also* Committee for Public Education & Religious Liberty v. Nyquist, 413 U.S. 756, 792–93 (1973) ("A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of 'neutrality' toward religion.").

actions violate the Establishment Clause, the Court held that the state cannot enact laws whose principal or primary effect either advances or inhibits religion.[105] Likewise, in one concurring opinion, Justice Sandra Day O'Connor urged that "[e]very government practice must be judged … to determine whether it constitutes an endorsement or disapproval of religion."[106] In *Grand Rapids School District v. Ball*, the Supreme Court invalidated two state educational programs that provided classes to religious private school students on religious school premises using public school teachers. The court found that these programs principally advanced religion by relieving private religious schools of the burden of paying for such instruction themselves, making the religious school more educationally compelling, and freeing up private school funds to be used for additional religious purposes. In its ruling, however, the Court reasserted the importance of a neutral approach to religious establishments in general, ruling that "[if] … identification [of the government with religion] conveys a message of government endorsement or disapproval of religion, a core purpose of the Establishment Clause is violated."[107]

To date, there have not been any cases that have explicitly raised the issue of the government favoring irreligion over religion that have been decided on Establishment Clause grounds. More typically, such cases involve government actors, such as public schools and universities, discriminating between religious and nonreligious groups or interests in providing public funding or public space. In *Rosenberger v. Rector and Visitors of the University of Virginia*, for example, the court reviewed the policy of a public university that provided funds to student organizations that met certain criteria, but which denied such funding to a group that met those qualifications because the group planned to use the funds to publish a Christian magazine.[108] Another case concerned a policy by some New York public schools to permit residents of the school district to use school facilities for after school educational or artistic programming, but which denied an application to use school facilities for meetings of a religious group.[109]

In both cases, the schools argued that their discrimination against religious groups was grounded in their desire to avoid infringing on the Establishment Clause; they believed that they could not provide public money or facilities to religious groups to further religious purposes without violating the First Amendment. In both cases, the Supreme Court ruled the schools' actions unconstitutional, not because the schools had impermissibly favored irreligion over religion, but because both had engaged in illegal restrictions on free speech based on the viewpoints that the religious groups sought to express. Underlying the Court's rulings in such cases is a concern that discrimination against religious speakers or viewpoints risks "fostering a pervasive bias or hostility to religion, which could undermine the very neutrality that Establishment Clause requires."[110]

A legal framework that permitted and enforced nonreligious arbitration, while not giving the same benefit to religious dispute resolution, would likely not implicate free expression concerns. Nevertheless, based on the United States Supreme Court's Establishment Clause jurisprudence, it seems reasonable to say that such a discriminatory arbitration regime could not pass constitutional muster. It is almost beyond doubt that a scheme in which courts were instructed to enforce religious arbitration agreements and awards, but not irreligious ones, would constitute an unlawful establishment of religion because it would endorse and advance religion. But "if giving special benefits

105 *See* Lemon v. Kurtzman, 403 U.S. 602, 613 (1971).
106 Capitol Square Review & Advisory Board v. Pinette, 515 U.S. 753, 778 (1995) (O'Connor, J., concurring).
107 School District of the City of Grand Rapids v. Ball, 473 U.S. 373, 389 (1985).
108 Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819 (1995).
109 Good News Club v. Milford Central School, 533 U.S. 98 (2001).
110 Rosenberger, 515 U.S. at 845–46.

to religion is favoritism, advancement, and endorsement, then discriminating against religion is hostility, inhibition, and disapproval."[111] Therefore, if American law is to permit private arbitration that meets certain qualifications, it cannot categorically refuse to recognize and enforce religious dispute resolution processes that satisfy the same requirements. To put it more directly, it is nearly impossible to rule court enforcement of religious arbitration agreements as being unconstitutional under the Establishment Clause. That said, there will always be some who argue this point.[112] For their argument to be true, the powers that be would have to allow religious arbitration agreements to remain in place while simultaneously eliminating secular arbitration agreements, thereby creating a scenario where government would be favoring a religious establishment. The likelihood of that happening is nil. The only way to address their nonexistent Establishment Clause issue would be to do away with arbitration altogether, which would shift the full balance of grievances to the court, undo decades of alternative dispute resolution efforts, and somehow ignore the free will and contractual rights of all parties who have up until this point found arbitration in any form to be their preferred method. It cannot be overemphasized how unlikely this would be. Rather than be concerned about whether religious arbitration is constitutional, efforts are better spent ensuring it is operating appropriately and efficiently.

There are, however, important limits on governments' constitutional obligations to respect religious practices and commitments. These qualifications permit the state to burden religious practices provided that it does so in a neutral, generally applicable way. This doctrine enables the state to address many of the salient concerns for the procedural and substantive justice of religious arbitration processes without impermissibly treading upon constitutional guarantees of free exercise or prohibitions on religious establishments. This doctrine was first articulated by the United States Supreme Court in *Employment Division v. Smith*.[113] The case concerned two individuals who had used the drug peyote as part of a Native American religious ritual. The individuals were fired for using the peyote, which was a crime under state law. The Court ruled that it was not unconstitutional to criminalize peyote use or to apply the criminal statute to the Native American religious users in that case.[114] This decision was based on the understanding that the Free Exercise Clause does not "relieve an individual from the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[115] *Smith* thus stands for the important idea that facially neutral, generally applicable and otherwise valid laws not designed to either advance or inhibit religion or religious practice, but which nevertheless burden the ability of religious individuals or communities to fully observe their faiths, do not violate the First Amendment.

Following *Smith*, then, it would be perfectly valid for the state to refuse to respect or enforce all private arbitration awards, both religious and nonreligious, since that would be a neutral and generally applicable law that only happens to burden religious practice.[116] Likewise, laws designed to ensure the fairness and justice of all arbitration proceedings—such as many of the existing provisions of federal and state arbitration frameworks—would likely pass constitutional muster even

111 Eugene Volokh, *Equal Treatment Is Not Establishment*, 13 Notre Dame Journal of Law, Ethics & Public Policy 341–73, 369–70 (1999).

112 *See* Brian Hutler, *Religious Arbitration and the Establishment Clause*, 33 Ohio State Journal on Dispute Resolution 337 (2018).

113 Employment Division v. Smith, 494 U.S. 872 (1990).

114 *See id.*

115 *Id.* at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.2 (1982) (Stevens, J., concurring)).

116 *See* Walter, *supra* note 102, at 563–64.

if they did restrict the ability of some religious groups to fully observe and implement the totality of their respective traditional judicial and dispute resolution processes and remedies.[117] Indeed, it is not hard to imagine a secular law arbitration framework that imposed such onerous requirements on all arbitration proceedings as to make religious arbitration—at least arbitration that would comply with traditional religious norms and values—practically impossible. Such laws could require arbitration panels to follow state rules of evidence or pleadings, regardless of religious laws to the contrary. They might also provide that religious tribunals must respect the same kinds of equality rules respected in secular adjudication, such as the inclusion of women as arbitrators or not drawing gender, age, or faith distinctions between the statuses of the testimony of different witnesses. State laws could also prohibit arbitration panels from enforcing norms or ordering remedies that are substantially at odds with secular notions of substantive and distributive justice embraced by societal law and policy. Such rules would substantially restrict the actual practice of many forms of traditional religious dispute resolution without actually violating either Free Exercise or Establishment concerns.

Of course, not all jurisdictions maintain the kind of strict establishment limits that exist in the United States nor are such restrictions on states' privileging of religion over nonreligion or irreligion over religion strictly necessary from a standard liberal perspective. Modern Western nation states have adopted a range of different approaches to this issue ranging from American-style neutrality, to freedom of religion alongside an official state church, as in the United Kingdom, to the affirmative secularism and public hostility toward religious practice seen in countries like France. In many cases, the United States included, these commitments are products of unique historical experiences.[118]

Canadian restrictions, specifically on religious dispute resolution, are illustrative. In 2006, Ontario moved to place a total ban of faith-based arbitration in family law matters. This move, grounded in a variety of different concerns about Islamic arbitration, was reinforced by a more general policy in Canada that permits public restrictions on religious practices or religious access to public institutions, provided that such restrictions are applied in an even-handed way, and do not privilege or burden any particular faith more than any other.[119]

In any case, it seems reasonable to say that not all societies should be expected to enforce religious dispute resolution as a nonestablishment necessity. Even in the United States, the First Amendment likely does not absolutely require societal enforcement of religious arbitration agreements and awards. Establishment concerns provide some basis for arguing that religious arbitration must be permitted and judicially enforced, even as there are good reasons to be wary of it. However, Free Exercise doctrine under *Smith* suggests that states can severely restrict the practice of traditional religious arbitration, provided they do so in a religiously neutral manner.

Portions of the holding of the recent case *Trinity Lutheran Church v. Comer* reinforce the idea that government attempts to restrict arbitration in ways that discriminate against religious arbitration would be unconstitutional. In *Trinity Lutheran Church*, a private school on church grounds had applied for a Missouri grant program that would have subsidized the costs of resurfacing the playground with recycled rubber material, increasing the safety of the playground.[120] Claiming it violated the Missouri Establishment Clause, the church was denied the subsidy, only

117 *See* Baker, *supra* note 9, at 197–98.

118 *See generally* Stephen V. Monsma & J. Christopher Soper, The Challenge of Pluralism: Church and State in Five Democracies (2009).

119 *See* Walter, *supra* note 102, at 539.

120 Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017).

to have the case overturned at the Supreme Court. *Trinity Lutheran Church* was a 4-2-1-2 opinion, with seven Justices ruling that withholding of government funding for playground resurfacing from a church is unconstitutional if generally available to non-churches. Four Justices expressly limited the holding of the case (in footnote 3) to "express discrimination based on religious identity" with respect to playground resurfacing.[121] Two Justices dissented to allow such discrimination generally, two Justices concurred, explicitly noting this disagreement with footnote 3, and one Justice wrote a more general concurrence without elaborating much on this issue.

While the fragmented nature of the opinion seemed odd, the controlling opinion was not. Since the decision in cases like *Everson*, the Court has maintained that depriving a religious person or group of something otherwise available to a secular person or group would be unconstitutional.[122] There, parents of children attending private religious schools were allowed to seek a reimbursement for travel costs from the children's commute on city buses.[123] A similar approach was taken in *Mueller v. Allen*, where the Court upheld a Minnesota tax credit to parents for costs associated with their children's education, including those associated with private and religious schools.[124] Taking a neutral benefit and otherwise depriving someone of it because of their religious beliefs would be inconsistent with First Amendment jurisprudence, and American culture in general. Consistently, the American attitude toward religion has been to allow individuals to carve out areas within society to practice as they see fit and only step in when the practice would otherwise violate a core societal tenet. Therefore, it is only in those rare circumstances where individuals are unsure if the government is helping or hindering religious practices that litigants make their way to the courthouse.

From this formulation, it would seem reasonable that a law that explicitly restricted arbitration to secular legal systems would run afoul of the "express discrimination based on religious identity" portion of footnote 3 in *Trinity Lutheran Church*. Consider that the right to seek arbitration is not unlike the right to have the playground resurfaced, and as I show elsewhere, such discrimination shares many of the controlling characteristics of "playground resurfacing" as well, and thus would be unconstitutional under *Trinity Lutheran Church*.[125]

Religious Arbitration Often Resolves Disputes Better than Secular Adjudication

Even if affording wide latitude and strong legal backing to religious dispute resolution processes may not be legally required—and certainly not in all jurisdictions—there are a number of strong policy reasons for why secular societies *should* judicially enforce religious arbitration. One such claim is highly pragmatic, and speaks to an important personal liberty interest that undergirds

121 *Id.* at 2024 n.3.

122 *See* Everson v. Board of Education, 330 U.S. 1 (1947).

123 *Id.*

124 Mueller v. Allen, 463 U.S. 388 (1983).

125 *See* Michael J. Broyde, *Playground Resurfacing and Religious Arbitration Are Very Similar Activities:* Trinity Lutheran Church *As Applied to Religious Arbitration*, 18 Rutgers Journal of Law & Religion 298–330 (2018). That article notes that playground resurfacing is a set of legal activities that have five criteria: (1) Playground resurfacing is neutral and can be done without any theological overtones; (2) Playgrounds can be used by all and do not require any religious or theological test to play on; (3) All religions and many secular institutions can benefit from playground resurfacing; (4) Worship is not directly facilitated by playground resurfacing (i.e., it is the playground and not the chapel under discussion); (5) Many playgrounds are present and many secular or religious playgrounds can be played in. This listing is important, as it highlights the relationship between playground resurfacing and religious arbitration.

much of liberal law and policy. Put briefly, by allowing religious arbitrators rather than state courts to resolve disputes between parties who choose to appear and litigate in such forums, society can better ensure that conflicts are resolved judiciously; and that those resolutions reflect as much as possible the understandings and expectations of the parties involved.

As discussed above, the religious question doctrine often prevents courts from addressing and deciding questions that touch on religious issues. Despite the fact that disputes that arise between religiously observant individuals or within religious institutional or organizational contexts often raise such religious questions, and despite the fact that such questions must be answered in order to resolve such matters, courts in the United States are often hesitant to address them lest they become entangled in making normative judgments about correct religious dogma or practice.[126] Whether courts are willing to address them or not, however, such matters represent genuine disputes between individuals and organizations that must be resolved if people are to exist and function together in society. It is important to realize that these kinds of conflicts *will* get resolved. The critical question is whether society wants such matters dealt with internally by religious authorities without any legal oversight.

If there are legitimate concerns about unfairness, injustice, duress, and discrimination against disadvantaged parties even in legally recognized and nominally legally compliant religious arbitration proceedings, such concerns are only exacerbated by forcing religious dispute resolution underground. It is important, therefore, for society to provide ways in which such conflicts can be addressed. If they cannot be dealt with by the courts because doing so would infringe on important interests in maintaining strict separations between religion and state, then the law ought to provide other avenues of dispute resolution. Legally recognizing and judicially enforcing religious arbitration agreements and awards provides such an outlet. Indeed, American courts have noted repeatedly when invoking the religious question doctrine that religious disputes should properly be resolved by religious authorities.[127]

Of course, the religious question doctrine does not bar courts from addressing all disputes that touch on ecumenical concerns. American courts have held that they may adjudicate religious issues if they can do so using "neutral principles of law." This doctrine was announced in *Jones v. Wolf*, a case involving a property dispute between a local church and its broader umbrella organization.[128] The Court did not refuse to resolve the case on account of its being an essentially religious dispute between two ecumenical institutions and implicating religious documents, such as the general church's bylaws. Instead, the Court held that judges can resolve religious conflicts if they use neutral principles of law. The property dispute in *Jones* could have been disposed of by applying ordinary contract and statutory interpretation doctrines to the bylaws and agreements that existed between the church and its parent body. Since no doctrinal or theological questions had to be considered in order to resolve the matter, the Court found that it could be adjudicated, even if the basic dispute was a religious issue.[129]

The neutral principles of law doctrine has been applied numerous times to permit state courts to address questions that touch on religious concerns without running afoul of constitutional limits.

126 *See, e.g.*, Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969). *See also* Jared A. Goldstein, *Is There a "Religious Question" Doctrine? Judicial Authority to Examine Religious Practices and Beliefs*, 54 Catholic University Law Review 497–551 (2005).

127 *See generally* Ira C. Lupu & Robert W. Tuttle, *Courts, Clergy, and Congregations: Disputes between Religious Institutions and Their Leaders*, 7 Georgetown Journal of Law & Public Policy 119–63 (2007).

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

129 *See id.*

Indeed, in one case, a court went so far as to hold that an agreement to arbitrate a dispute before a *beth din*—without specifying which particular rabbinical court was intended—could be enforced under the neutral principles of law doctrine. This is correct, even though enforcing the contract would require a court to make decisions about whether particular dispute resolution tribunals qualified as *beth din* and did or did not satisfy the terms of the agreement.[130]

Even as courts can and do address religious issues, there is good reason to think that perhaps they should not do so: such matters may be better resolved through religious arbitration processes.[131] One of the main objectives of secular arbitration frameworks is to provide dispute resolution forums that will be able to approach specific kinds of cases with more focused expertise in the relevant facts and concerns than can state courts. There are arbitration panels with special expertise in construction, international trade, consumer credit, various professional and vocational trades, education and school administration, and numerous other fields. This helps ensure that disputes arising in these fields get resolved as efficiently and effectively as possible, and with a close correlation between adjudicatory results, parties' understandings and expectations, and the actual realities of the fields in which conflicts arise.

Religious disputes are no different. Many of the conflicts that arise between religiously observant individuals, institutions, and organizations are situated in particular religious and communal contexts that are best—and perhaps really only—understood by those who are themselves situated within those same contexts. As Caryn Litt Wolfe observes, many people turn to faith-based arbitration precisely because they feel that religious arbitrators will understand their problems and the nature of their dispute better than secular judges. Likewise, disputants often view religious arbitrators as being better positioned to reach effective solutions to litigious matters because arbitrators will be situated within the same communal contexts, ecumenical world views, and intuitive understandings of the workings of the religious community as the litigants.[132] "[J]ust as people prefer bringing commercial disputes to arbitration because the arbitrator will have specific knowledge of the area, parties utilize religious arbitration because the arbitrator is better equipped to deal with religious issues."[133]

The notion that religious arbitration ought to be legally recognized because it helps secure dispute resolution more in line with the understandings and expectations of religious litigants is reinforced by general legal preferences for freedom of contract and respect for parties' contractual autonomy. Many contemporary legal systems are premised on the idea that individuals should as a matter of principle be able to enter into whatever contracts they like, and be able to rely on those agreements to be binding on other contracting parties as well as themselves. There are limits to this, of course. Contractual autonomy cannot be used to consent to be the victim of violence in order to absolve the perpetrator of criminal liability, and courts will refuse to enforce contracts made freely but under circumstances in which there were large differences between the relative bargaining powers of contracting parties, or where parties contract extremely unfair terms. However, in general, the law presumes that people are the best judges of their own interests and respects their contractual choices and preferences.[134]

One of the chief reasons for this respect for contractual freedom is a policy stance that views contracting parties as being the ones best positioned to really understand their own needs and

130 *See* Meshel v. Ohev Shalom Talmud Torah, 869 A.2d 343 (2005).

131 *See* BROYDE, *supra* note 1, at chapter 3.

132 *See* Wolfe, *supra* note 30, at 441.

133 *Id.*

134 *See* Walter, *supra* note 102, at 559–61.

preferences and to form agreements that meet those interests and expectations. This policy of regard for individuals' own assessments of their interests and understandings of their circumstances suggests that judicial enforcement of religious arbitration may be appropriate. When parties have chosen to have a dispute resolved by a religious tribunal, there is good reason to assume that they did so precisely because religious arbitrators are more likely to understand the critical subtext of the underlying facts, conflict, and sought-after remedies, and will therefore craft better decisions.

As this article touched upon previously, there is good reason to think that religious arbitrators can better address cases arising in religious contexts even when the religious question doctrine would not preclude secular courts from adjudicating such matters. Indeed, there are numerous examples of judges reaching the wrong decisions in these kinds of matters precisely because they are not well-situated to understand the religious issues at hand—and cannot become fully conversant without treading upon religious freedom concerns. Judicial treatment of Islamic *mahr* agreements[135] and Jewish *ketubah* contracts in the family law context,[136] as well as the *heter iska* in commercial settings,[137] are but a few examples of this concern. Courts dealing with such matters often reach inconsistent results and also issue rulings that respond poorly to litigants' actual needs and interests.[138]

In a recent and particularly glaring example, federal courts considered an appeal by a Jewish prison inmate who was denied a request to engage in group Torah study with two other Jewish prisoners.[139] While the prison regulations at issue permit such study in order to allow prisoners to observe their faiths, the prison warden reached the conclusion that Judaism only permits Torah study to take place with a rabbi, or else in the presence of a *minyan*, a quorum of ten adult Jewish men. In upholding the prison warden's policy, a trial court found that the policy did not substantially burden the inmate's religion because he could still engage in private worship.[140] The court reasoned that since the inmate's own religion dictated certain conditions for group study, it could not be burdensome to his religion to require those conditions be met before such study would be permitted in the prison.[141] This case highlights how badly courts or other government officials can get religion wrong. Simply put, the prison warden's understanding of Jewish law is astoundingly incorrect. Torah study, whether individually or in groups, does not require either the presence of a rabbi or of a *minyan* quorum. Jews everywhere do and have studied alone, with partners, in small groups, with and without rabbis for millennia. Moreover, it is also incorrect to suppose that significant restrictions on a Jewish prisoner's ability to engage in Torah study do not substantially burden his or her religious practice. Torah study is a basic feature of Jewish life and practice for clergy and laity alike. Jewish law prescribes that Jews must maintain set times to study Torah each and every day, and the culture of Torah learning is one of the most prominent features of traditionally observant Jewish life. While it is certainly possible that a Jewish prisoner's interest in studying Torah could be outweighed by concerns for prison safety

135 *See* Hibibi-Fahnrich v. Fahnrich, no. 46186/93, WL 507388 (1995). *See also In re* Marriage of Dajani, 129 Cal. App. 2d 1387 (1988); *In re* Marriage of Obaidi, 154 Wash. App. 609, 616 (Wash. Ct. App. 2010).

136 *See In re* Marriage of Goldman, 554 N.E.2d 1016 (1990). *See also* Koeppel v. Koeppel, 138 N.Y.S. 2d 366 (1954); Avitzur v. Avitzur, 446 N.E.2d 138 (1983).

137 *See* IDB v. Weiss & Wolf, NYS Sp. Ct. 1984, NYLJ 2/4/85 at p. 14. *See also* Bank Leumi Trust Co. of New York v. Morris Spitzer, NYS Sup. Ct. 9/18/86 no. 017734/1986; Bollag v. Dresdner, 495 NYS 2d 560 (1985).

138 *See, e.g.*, Presbyterian Church v. Mary Elizabeth Bull Hull Memorial Presbyterian Church, 393 U.S. 440 —(1969).

139 *See* Ben-Levi v. Brown, 60 Fed. Appx. 899 (4th Cir. 2015) (*cert. denied*, Ben-Levi v. Brown, 577 U.S. —(2016)).

140 *See* Ben-Levi v. Brown, 577 U.S. _ , *6–7 (2016) (Alito, J., dissenting).

141 *See id.* at *8–9 (Alito, J., dissenting).

and order, it is plainly incorrect to think that not being able to study does not place substantial burdens on Jewish religious practice.

Some have suggested that the law might draw a distinction between religious and secular disputes. These commentators argue that while religious disputes should be resolved through religious arbitration for many of the reasons discussed above, secular conflicts ought not to be allowed to be submitted to faith-based dispute resolution processes. This scheme would accommodate the need to have religious matters dealt with by those most familiar and best situated to address them fully and properly, while also limiting as much as possible the potentials for injustice and abuse in religious dispute resolution processes.[142] This approach misses the fact that for many religious individuals and communities, there is no such thing as a purely secular dispute. While some religious traditions, such as Catholicism, distinguish between ecumenical concerns governed by religious law and secular matters governed by societal norms, other faiths, including Judaism, Islam, and others make no such distinction. This does not mean, of course, that Judaism and Islam posit that secular law is never binding; it merely suggests that for many observant Jews and Muslims, religion means resolving all private disputes in accordance with religious rules in religious courts. In these traditions, religious norms and values govern virtually all aspects of life, and impact the ways in which many religious people think about how they ought to order their affairs in both the conventionally "ecclesiastical" and also the secular realms. Drawing what is, from a religious perspective, an artificial distinction between purely secular and purely religious disputes denies the very real normativity of religious systems for their adherents who often feel genuinely bound to such rules in all aspects of their private affairs and relationships. It does little to help religious people and communities resolve what they regard as important religious issues through religious channels and also signals to them that the state and society do not respect, understand, or accommodate their genuine religious commitments.

Religious Arbitration Is Necessary for Resolving Religious Problems

The foregoing section considered the value of religious arbitration for cases that courts either cannot address due to religious question doctrine, or should not resolve due to their lack of expertise and immersion in the religious contexts from which such disputes arise. In some of these cases, secular societies should provide for legally enforceable religious arbitration because courts will be constitutionally incapable of addressing religious issues, and societal order demands that there be some normative means of binding third-party dispute resolution. In other cases, while courts adjudicate them in theory, religious arbitration offers a model of dispute resolution that will resolve such conflicts in ways that best reflect the understandings, intentions, and needs of religious parties. Religious dispute resolution is important in a third category of cases as well. There is a class of cases that state courts *could* decide based on neutral principles of law without violating the religious question doctrine, but the nature of these questions is such that secular judicial rulings would have no religious effect in the eyes of religiously observant disputants. These matters typically involve the fulfillment of ritual obligations which can only be ordered by religious authorities. Even if and when courts dispose of such cases, from the perspectives of religious individuals and communities, such judicial resolutions would not solve the basic religious problem. Court rulings in such cases would leave parties no better off—and indeed sometimes even worse off—than before.

142 *See, e.g.*, Walter, *supra* note 102, at 552–54.

Perhaps the most famous example of this phenomenon is the "*agunah* problem" in Jewish law.[143] As discussed earlier, traditional Jewish law prescribes that a divorce can only be affected by the willing giving of a *get*, or bill of divorce written in a prescribed ritual manner, by the husband to the wife. Because the *get* must be given willingly, and because except in the rarest and most exceptional circumstances, Jewish law does not provide for the judicial dissolution of a marriage, husbands can and sometimes do use their refusal to grant a *get* as leverage in divorce proceedings. Without the *get*, the wife will continue to be considered religiously married; will not be able to marry anyone else under rabbinic law; and any romantic relationships she subsequently has with other men will be considered adulterous, with serious religious, legal, and communal implications for both herself and any future children she may have. A woman whose husband refuses to grant her a *get* after the practical dissolution of the marital relationship is called an *agunah*, a "chained woman." She remains metaphorically chained to her husband and a dead marriage, unable to move on with her life within the framework of Jewish religious observance.[144]

Because the *get* must be given willingly, a rabbinic court cannot directly compel a husband to give the *get*, nor can it unilaterally dissolve the marriage. Moreover, because Jewish law places fewer bars and consequences on a man marrying or having a sexual relationship with more than one woman than on a woman marrying or having a sexual relationship with more than one man, husbands have an upper hand in religious divorce proceedings. A husband can withhold a *get* from his religiously observant wife and thereby impose very substantial handicaps on her life without suffering reciprocal harms to himself.[145] Traditionally, rabbinic courts operating in Jewish communities that enjoyed some measure of legal autonomy within their host societies could apply certain kinds of pressure permitted by Jewish law in order to convince the husband to agree to give the *get*. In modern times, however, rabbinic courts in most jurisdictions have no such authority. Indeed, exerting such pressure would violate secular criminal laws, as one recent case in the United States illustrates.[146] This situation has resulted in what is called the "*agunah* problem," the phenomenon of husbands refusing to give their wives a Jewish divorce (*get*), even after the effective dissolution of their marriages and the completion of civil divorce proceedings in order to compel their wives to agree to more favorable property division, custody, and child support settlements.

Jewish communities have attempted to address the *agunah* problem in a variety of different ways. Some have advocated changes to the contemporary practice of Jewish law. According to this approach, the *agunah* problem could be solved by adopting some nonnormative legal opinions that permit rabbinic courts to unilaterally annul marriages in certain cases.[147] Others have proposed doing away with formal marriage entirely, and structuring relationships under Jewish laws of contract rather than the more ritualistic framework of marriage. This would enable contractual "marital" relationships to be dissolved without the need for a *get*, thereby removing husbands' leverage over their wives.[148] Both of these proposals have been widely rejected within observant

143 *See* IRVING BREITOWITZ, BETWEEN CIVIL AND RELIGIOUS LAW: THE PLIGHT OF THE *AGUNAH* IN AMERICAN SOCIETY (1993); BROYDE, *supra*, note 28.

144 *See* BROYDE, *supra* note 1, at chapter 3.D.

145 *See* BROYDE, *supra* note 28.

146 *See* FEDERAL BUREAU OF INVESTIGATION, https://www.fbi.gov/contact-us/field-offices/newark/news/press-releases/orthodox-jewish-rabbi-sentenced-to-more-than-three-years-in-prison-for-role-in-conspiracy-to-violently-extort-divorce-consent-from-reluctant-husband (last visited Feb. 9, 2017). *See generally* AVIAD HACOHEN & BLU GREENBERG, THE TEARS OF THE OPPRESSED: AN EXAMINATION OF THE AGUNAH PROBLEM: BACKGROUND AND HALAKHIC SOURCES 20–22 (2004).

147 *See* BROYDE, *supra* note 28, at 11–12.

148 *Id.*

Jewish communities, in a large part because their adoption would threaten to undermine the sanctity and significance of Jewish marriage and committed Jewish family life as an important religious good.[149]

A third approach has been to encourage states to pass legislation that either bars individuals from preventing their spouses from obtaining a religious divorce, from obtaining a civil divorce, or penalizes spouses who prevent the giving of a *get* as part of civil divorce decrees.[150] The first of these solutions is exemplified by New York State's 1984 *get* law. This law provided that a plaintiff will not be granted a civil divorce until he or she has removed all barriers to the other spouse's ability to remarry. While the law was facially neutral, it was designed to put pressure on Jewish husbands who refused to give their wives *get*s by preventing them from obtaining a civil divorce settlement.[151] In 1992, New York passed another *get* law, which directed courts to consider "the effect of a barrier to marriage" as one of the thirteen factors that must be considered when adjudicating a division of marital assets. In effect, the law permitted courts to award a wife a larger portion of the marital assets than she would otherwise be entitled to if her husband had given her a *get*.[152]

The New York *get* laws attempted to do through legislation what courts had been doing for decades through a variety of other legal theories. In some cases, courts have found legally enforceable agreements between husbands and wives that obligate the giving of a *get*. In most of these cases, the courts have declined to order the specific performance of such promises due to constitutional concerns for religious freedom, but have upheld the imposition of fines and other penalties upon recalcitrant husbands.[153] In one case, a court refused to grant any affirmative legal requests by the recalcitrant spouse—in that instance, the wife—until she fulfilled her contractual obligations to accept the *get*.[154] In *Waxstein v. Waxstein*, a New York court went so far as to directly order specific performance of an agreement in which the husband had promised to give the wife a *get*.[155] Other courts have held that husbands are legally obligated to give their wives *get*s based on an implied contractual promise in the *ketubah*, or Jewish religious marriage contract. The *ketubah* includes language in which the husband promises to take his spouse as a wife "in accordance with the laws of Moses and Israel." At least one court has held that this language implies a contractual promise to grant a *get* in those cases in which Jewish law—the Law of Moses and Israel—requires it.[156] Finally, some courts have attempted to compel recalcitrant Jewish husbands to give their wives *get*s by treating the refusal to give a *get* as a tort, such as fraud or the intentional infliction of emotional distress.[157] Those courts have not directly ordered the giving of a *get*, of course, but they have sustained causes of action by wives seeking financial compensation from their husbands who refuse to give them *get*s. Both legislation and judicial actions on *get* cases evince a societal interest in remedying a serious religious problem through secular legal mechanisms.[158]

149 *See* Hacohen & Greenberg, *supra* note 146, at 21.
150 *See* Broyde, *supra* note 28, at 12–13, 35.
151 *See generally* Lisa Zornberg, *Beyond the Constitution: Is the New York Get Legislation Good Law*, 15 Pace Law Review 703–84, 728–33 (1995).
152 *See* Broyde, *supra* note 28, at 35.
153 *See, e.g.*, Marguiles v. Marguiles, 344 N.Y.S.2d 482 (1973).
154 *See* Rubin v. Rubin, 348 N.Y.S.2d 61 (1973); *see also* Pal v. Pal, 45 A.D.2d 738 (N.Y. App. Div. 1974).
155 *See* Waxstein v. Waxstein, 395 N.Y.S. 2d 877 (1976) (*aff'd* 394 N.Y.S.2d 253 (1977)).
156 *See* Stern v. Stern, 5 Fam. L. Rep. (BNA) 2810 (1979).
157 *See, e.g.*, Weiss v. Goldfeder, N.Y.L.J., Oct. 26, 1990 at 21 (1990).
158 *See generally* Zornberg, *supra* note 151, at 721–27.

These efforts by secular law to remedy the *agunah* problem highlight one of the chief deficiencies inherent in dealing with some kinds of religious problems in secular courts, and with not affirmatively empowering religious arbitrators to address them effectively and decisively. In short, when American courts attempt to administer the *get* giving process or interfere with this tightly regulated religious sacrament, their attempts at helping may actually do more harm than good. The specific problem is that according to traditional Jewish law, a *get* is only valid if given willingly by the husband. The use of coercive measures against a recalcitrant husband, especially by a secular court or legal authority, will typically result in the *get* being considered null and void under traditional rabbinic law. While Jewish law permits rabbinic courts with the authority to do so, to use certain coercive measures against recalcitrant husbands, such measures must be applied only by rabbinic authorities pursuant to a rabbinic court's ruling that the giving of a *get* is legally required in that specific case. According to many contemporary Jewish law authorities, *get*s issued as a result of penalties imposed through secular legislation or by the order of state courts are thus invalid; they do not result in a religiously recognized divorce.[159] Even more bizarrely, a husband's giving such a court-ordered *get* would likely help him avoid further legal penalties or liabilities, despite the fact that from a religious law perspective, his invalidly given *get* has accomplished nothing for his observant and religiously still married wife.

An alternative approach to dealing with the *agunah* problem focuses on utilizing existing secular law arbitration frameworks to put religiously permitted pressure on husbands to give *get*s to their wives. Generally speaking, this approach involves using legally compliant arbitration agreements in which both spouses agree to adjudicate their religious divorce in a *beth din*, a rabbinic court. One early example of this model is the 1954 case of *Koeppel v. Koeppel*, where the parties had signed a prenuptial agreement that required both spouses to appear before a rabbinic court in the event of a dissolution of their marriage.[160] While the court in that case found the agreement enforceable, it also concluded that the *beth din* provision was too vague to warrant a ruling for specific performance of the promise. Several decades later, however, a court upheld the enforceability of an innovative clause inserted into the *ketubah* contracts of some Jewish couples that required both spouses to appear before a *beth din* and abide by its decision subject to financial penalties.[161]

Another arbitration-based solution was developed by the Rabbinical Council of America, a major Orthodox rabbinic association in the United States. This approach (the RCA "Prenup") utilizes a prenuptial agreement in which the husband makes a legally binding promise to fulfill spousal marital support obligations incumbent upon him under traditional Jewish law from the time that the marital relationship effectively ends until the giving of a *get*.[162] Combined with an arbitration agreement that commits both parties to appear before a specific rabbinical court to arbitrate their divorce settlement in accordance with Jewish law, this contractual approach to mitigating the *agunah* problem uses religious arbitration to establish a husband's religious duty to give a *get*, which in turn causes the clock to begin running on a daily spousal support obligation that can be enforced in court.[163] Critically, because this prenuptial agreement only imposes spousal support payments that the husband would otherwise be religiously obligated to provide for the duration of the couple's marriage, these payments do not amount to the kind of coercion that would invalidate the *get*, even when such support duties are enforced by a secular court. In effect, this arbitration-based

159 *See* BROYDE, *supra* note 28, at 103–16.

160 *See* Koeppel v. Koeppel, 138 N.Y.S.2d 366 (1954).

161 *See* Avitzur v. Avitzur, 58 N.Y.2d 108 (1983).

162 *See Prenup Forms*, THE PRENUP, http://theprenup.org/prenupforms.html (last visited Feb. 9, 2018).

163 *See* BROYDE, *supra* note 28, at 66–70.

response to the *agunah* problem—unlike solutions grounded in state legislation or judicial action—checks most of the necessary boxes. It ensures that the giving of a *get* will only be done pursuant to the finding of a competent religious tribunal rather than a secular court. It utilizes secular contract and arbitration law to impose religiously acceptable penalties upon a recalcitrant husband.[164] Most importantly, this solution seems to work. To date, there do not seem to be any cases of long term *get* refusal by husbands who have previously signed this prenuptial arbitration agreement. Indeed, the spousal support provision of the RCA "Prenup" was recently upheld and enforced by a Connecticut state court in *Light v. Light*, leading to the husband giving the wife a *get*.[165]

The religious ineffectiveness of secular court adjudication in Jewish law is indeed far broader than just semi-sacral matters of marriage and divorce. Traditional rabbinic jurisprudence maintains a fairly strict bar on Jewish individuals and institutions litigating disputes with fellow Jews in secular courts. This religious restriction applies even if non-Jewish courts were to resolve such cases in accordance with substantive Jewish law norms and principles. Some Jewish legal sources go so far as to characterize the collection of secular court judgments against fellow Jews as theft.[166] On this view, state court judgments are fundamentally ineffective from a religious perspective; even in "secular" matters, religiously observant Jews can fulfill their religious responsibilities only by abiding by the rulings of rabbinic adjudicators. A system of secular law that does not provide for the effective faith-based resolution of disputes between Jewish individuals through arbitration is thus insufficient from a religious perspective.

This idea is not limited to Jewish law. Similar commitments exist in other religious systems as well. Muslim jurists have long held that Islam strongly encourages, if not requires, that disputes between Muslims that come within the ambit of Islamic religious law be resolved by Muslim judges or arbitrators in accordance with Islamic norms and values.[167] In principle, the religious duties of observant Muslims toward each other and to God can only be fulfilled through the adjudication of those obligations through religious processes. Likewise, for many Christians, there is a strong belief that even basically secular disputes ought to be resolved by religious authorities and in accordance

164 *See* Rachel Levmore, *Rabbinic Responses in Favor of Prenuptial Agreements*, 42 TRADITION 29–48 (2009).

165 *See* Light v. Light, 2012 WL 6743605 (Sup. Ct. Conn., 2012).

166 *See* Yaacov Feit, *The Prohibition against Going to Secular Courts*, 1 JOURNAL OF THE BETH DIN OF AMERICA 30–47 (2012).

167 *See* Khaled Abou el Fadl, *Legal Debates on Muslim Minorities: Between Rejection and Accommodation*, 22 JOURNAL OF RELIGIOUS ETHICS 127, 145–51 (1994). For an important overview of various juristic approaches to the issues of Muslims ordering interpersonal relationships based on normative systems other than the sharia, see generally Andrew F. March, ISLAM AND LIBERAL CITIZENSHIP: THE SEARCH OF AN OVERLAPPING CONSENSUS 97–258 (2009). Many juristic treatments of this issue stem from interpretations of Qur'an 5:44–50, which states,

> and whosoever does not judge by what God has revealed [and instead judges by other laws], such [people] are unbelievers … And We have revealed to you, [Muhammad], the Book in truth, confirming that which preceded it of the Scripture and as a criterion over it. So judge between them by what Allah has revealed and do not follow their inclinations away from what has come to you of the truth.

Some Muslim scholars, such as Abu a-Ala al-Mawdudi and Syed Qutb used these passages to argue that there are only two kinds of normative systems in the world, the sharia, and the law of *jahilliya*, or ignorance, which includes any normative system other than the Islamic sharia. Muslims are obligated to order their affairs using the former, and prohibited from structuring relationships through or obeying the latter. For an overview of Qutb's approach, see Sayed Khatab, *"Hakimiyyah" and "Jahiliyyah" in the Thought of Sayyid Qutb*, 38 MIDDLE EASTERN STUDIES 145 (2002). Many other Muslim scholars rejected this simplistic approach but have nevertheless maintained that, all things being equal, Muslims should strive to resolve disputes through Islamic means rather than in secular courts under secular law. *See generally* el Fadl, *supra*.

with biblical norms and values. Here too, dispute resolution in secular courts is religiously deficient.[168]

Thus, while it is often possible for state courts to resolve many of the conflicts between religious individuals consistent with constitutional norms and religious establishment concerns, the fact that such rulings may be legally valid from the perspective of society does not mean that they will also be regarded as religiously valid for observant litigants. For members of many faith traditions, the only way to effectively resolve disputes consistent with their religious duties is through faith-based arbitration. To the extent that secular society recognizes the value of ensuring that conflicts are resolved in a manner that provides closure and effective, nonviolent social ordering for disputants, it also has an interest in facilitating effective and enforceable religious alternatives to state adjudicatory processes.

Secular Recognition of Religious Arbitration Helps Moderate and Integrate Religion

The foregoing two sections have argued that secular recognition and enforcement of religious arbitration are important to the well-being of religion and religious individuals living in societies in which the general courts do not understand, embrace, or enforce their faith commitments. This section continues that line of argument by suggesting that religious interactions and negotiations with secular norms and values through their participation in alternative dispute resolution frameworks regulated by secular law can help faith traditions evolve and grow in ways that keep them meaningful and relevant in contemporary, nonreligious contexts. But this section also takes the claim one step further. Religious arbitration is not only good for religion, and it is not only a necessary consequence of secular commitments to religious freedom; religious arbitration is also good for secular societies in their own right. This section will contend that secular arbitration frameworks can help promote more complex and moderate modes of religious thought and practice among religious minority groups in secular societies. This, in turn, helps ensure that religious individuals and communities view themselves as partners in a broader societal project that transcends parochial identities, and do not come to view their relationships with general society in oppositional terms. Secular societies ought to facilitate effective faith-based arbitration because by doing so they will encourage their constituent religious communities to become more integrated into society, and more moderate in their ecumenical convictions and practices.[169]

One of the main concerns of liberal, multicultural polities is that various interest and identity groups within those societies will isolate themselves from general society. In doing so, such minority communities may reject the norms and values of the general society, and order their own internal affairs in accordance with their own parochial preferences—often in ways that are deeply antithetical to the behavioral standards and mores that society seeks to uphold.[170] Oftentimes, these groups

168 *See* Judith M. Keegan, *The Peacemakers: Biblical Conflict Resolution and Reconciliation as a Model Alternative to Litigation*, 1987 JOURNAL OF DISPUTE RESOLUTION 11–25, 16–19 (1987).

169 By this, we do not mean "more moderate" in any theological sense, but merely "less at conflict with secular society and its values," and this flows obviously from the basic thrust of this article and the book it is based on. Secular law will refuse to validate those arbitration decisions that are predicated on conduct that is repugnant to the norms of secular society, and the withholding of that validation will make enforcing religious norms so much harder as such faith groups will have to enforce their norms in reference to a legal culture that will not help them through arbitration enforcement.

170 *See* Richard W. Garnett, *Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses*, 53 VILLANOVA LAW REVIEW 273–96, 292–93 (2008) (describing the importance that religious communities place on opportunities for self-governance).

will be puritanically loyal to extreme understandings of their own practices and traditions. Fault lines may develop between isolationist communities and the general society, especially in the realm of individual rights, where the practices of insular groups tend to diverge from societal norms in ways that violate what society has determined to be fundamental individual rights and interests that the government is obligated to protect. Minority communities following their own norms and values may treat people—even if just their own members—in ways that society feels it should not and cannot tolerate, especially in areas such as education, religious freedom, treatment of women and children, bodily integrity, and family matters. When this happens, government must step in to correct what it views as severe injustices perpetrated by such groups against their members or others. Entire internally cohesive communities thus become resentful of what they view as societal oppression and overreaching, and develop antagonistic relations with other citizens, societal institutions, behavioral norms, and values. This, in turn, creates unhealthy, systematic tensions and discord that can undermine the foundations of civil societies from within.

Many scholars have noted that the incidence of religious isolationism and extremism is often related to the quality and quantity of religious freedom and autonomy that societies afford to their various constituent faith communities. There are, in truth, two schools of thought on this issue. According to some, dangerous, nonintegrative expressions of religious thought and practice tend to flourish in the absence of religious freedom.[171] On this view, restrictions on the freedom to observe faith traditions within a given society tend to encourage religious individuals and communities to reject prevailing social norms and values, and to isolate themselves from societal participation. In such contexts, religious practitioners see little value in integrating into a society and culture that views their own deeply cherished commitments with suspicion or derision. This outlook then tends to produce an oppositional attitude toward the broader society, and isolationist religious tendencies. Restrictions on religious freedom signal societal opposition and disregard for religion. This often leads religious groups and individuals to reject prevailing societal norms and values, and to turn inward, isolating themselves from external influences.[172]

Restrictions on religious freedom and the resulting tendency of religious communities to isolate themselves from their host societies can also contribute to the development and adoption of more puritan and extremist approaches to religious thought and practice. In part, this is because when religious communities reject and isolate themselves from society, they avoid engaging with society's mores, values, and behavioral standards as genuine religious concerns. By not engaging with the broader societies in which they are situated—indeed by regarding those societies as at best irrelevant, and at worst dangerous—such isolationist religious cultures tend to cultivate more extreme modes of understanding and practicing the faith, contributing to a cycle of increasing tension between religious communities and individuals and their societies.[173]

Some other scholars maintain that there is a directly inverse relationship between religious freedom on the one hand, and religious isolationism and extremism on the other. On this view, unrestricted freedom of religion actually encourages religious communities to become more isolated

171 *See* Jean Bethke Elshtain, *On Religious Freedom and Religious Extremism* (Sept. 9, 2011), The Religious Freedom Project, The Berkley Center for Religion, Peace, and World Affairs, https://berkleycenter.georgetown.edu/essays/jean-bethke-elshtain-on-religious-freedom-and-religious-extremism.

172 This was the thrust of much of the Fundamentalism Project of the University of Chicago in the late 1990s and early 2000s and the subject of an excellent edited work by the director of that project. Fundamentalism Comprehended (Martin E. Marty and R. Scott Appleby, eds. 1995).

173 *See Islamist Extremism in Europe*: *Hearing 109-818 before the Subcommittee on European Affairs of the Senate Committee on Foreign Relations*, 109th Congress 8–11 (2006) (Statement of Daniel Fried, Assistant Secretary for European and Eurasian Affairs, Department of State).

from general society, and ultimately to become more puritanical and extreme in their religious commitments.[174] Freedom to practice and believe in one's faith as one sees fit without any societal limits or oversight can be, and sometimes is, interpreted as an endorsement of total normative relativism, of "freedom for belief from all external examination and criticism."[175] Such unrestricted freedom permits religious individuals and groups to isolate themselves and avoid engaging with and negotiating with the societies in which they are situated. If active suppression of religious freedom causes faith communities to turn inward and isolate themselves as an expression of affirmative hostility and opposition to society, unrestricted religious freedom can have the same result due to the irrelevance of societal norms and values to religious practitioners.[176]

Isolationism born of pluralistic indifference to religion can result in religious extremism in much the same way as can draconian restrictions on religious freedom. If actively suppressing religious freedom causes faith communities to turn inward and isolate themselves as an expression of affirmative hostility and opposition to society, unrestricted religious freedom can have the same result due to the irrelevance of societal norms and values to religious practitioners that can do as they will within their own communities. When faith traditions are freed from the need to engage society, there is no way for either secular societies or religious communities to seriously examine and evaluate religious expressions or to distinguish between positive and harmful constructions of religious values and practices. In extremely pluralistic environments, society cannot control or critique its own religious communities or cultures for fear of violating secular commitments to religious freedom. Likewise, religious communities themselves, disengaged from dialectical tension with outside norms and values, lack any external yardstick or alternative sources of truths to help guide the development of religious expression. In such a neutral environment, religious practices and cultures that promote extreme, black-and-white visions of the world and human experience can develop easily and uncritically.[177] Especially in the contemporary online world where sensational extremism is popular currency, dangerous, anti-societal religious views and practices can be promoted, spread, and take hold with relative ease. If societies grant too much freedom and autonomy to religious individuals and communities to practice whatever faiths they see fit, these kinds of extreme religious views can take hold and thrive without internal or external checks.

In either case, religious isolationism has deleterious effects on society. When religions turn inward and become at best indifferent and at worst hostile to their host societies, the broader society must contend with constituent individuals and communities that actively oppose its norms, values, and way of life from within. In some cases, extreme and isolationist religious groups who see stark contradictions between societal standards and their own faith-based values may turn to violence in order to express outrage or bring about substantive change to societal norms.

174 *See, e.g.*, Frederick Mark Gedicks, *The Recurring Paradox of Groups in the Liberal State*, 2010 UTAH LAW REVIEW 47–64, 51–55 (2010); Henry J. Steiner, *Ideals and Counter-Ideals in the Struggle over Autonomy Regimes for Minorities*, 66 NOTRE DAME LAW REVIEW 1539–60, 1551–55 (1991).

175 Roger Trigg, *On Religious Freedom and Religious Extremism*, THE RELIGIOUS FREEDOM PROJECT, THE BERKLEY CENTER FOR RELIGION, PEACE, AND WORLD AFFAIRS (Sept. 9, 2011), https://berkleycenter.georgetown.edu/essays/roger-trigg-on-religious-freedom-and-religious-extremism.

176 *See* Gedicks, *supra* note 174, at 51–55 (2010); AYELET SHACHAR, MULTICULTURAL JURISDICTION: CULTURAL DIFFERENCES AND WOMEN'S RIGHTS 81–85 (2001).

177 For more on this from a Jewish view, see Aharon Lichtenstein, *Torah and General Culture: Confluence and Conflict*, *in* JUDAISM'S ENCOUNTER WITH OTHER CULTURES (Jacob J. Schacter, ed., 1997). This work is not the place to review this extensive literature that has been amply shown to be true and has been the focus of much work by the eminent Dr. Martin Marty of the University of Chicago.

In addition to its societal ills, isolationism of this kind is also bad for religion and bad for religious communities and individuals. In basic materialistic terms, this is true of isolationist religious groups. Most often find themselves at the fringes of society, and this socio-economic marginalization is accompanied by crime, poverty, and lack of advancement.[178] Moreover, isolationist extremism is often harmful to more moderate segments of broader faith communities, which are often unfairly identified with more puritan elements by concerned but poorly informed members of society at large. Perhaps most importantly, the kinds of religious extremism and isolationism that tend to result from either severe restriction on religious freedom or unmitigated pluralism have negative impacts on the integrity and viability of religious traditions themselves. To remain meaningful and persuasive, religions must offer their adherents convincing and helpful accounts of real world experiences and needs. Religious teachings must engage the world around them and must appreciate the needs and experiences of their members in order to remain vital. Faith traditions cannot do this, however, from positions of isolation and puritan dogmatism. When religious traditions engage the outside world, they are forced to self-examine, evolve, grow, and respond to real world contexts. These negative processes tend to produce robust, nuanced, and sophisticated religious ideas that help faith traditions remain relevant while also preserving continuity with their origins.

If both extreme suppression of religious freedom and unmitigated multicultural pluralism tend to encourage religious groups to become more isolated and extreme, it appears that a more viable approach to dealing with religious minorities within a broader society should chart a middle path. Societies that seek integrated rather than isolationist religious minorities impose on faith communities some expectations of conformity without severely restricting the ability of religious individuals and groups to maintain their religious convictions and practices. In part, at least, this entails creating a societal environment in which religions have the opportunity and need to actively engage and negotiate with societal norms. Such interactions between the sacred and secular are a key ingredient to promoting the moderation and integration of faith traditions and communities into general society. Religious traditions that engage with and confront external value systems and modes of living as meaningful and productive ways of experiencing the world must often negotiate tensions between abstract religious doctrines and lived experiences. This tends to produce more moderate and complexly nuanced modes of religious being that balance relations between alternative sources of truths about the world, society, norms, values, and the human condition.

Thus, instead of seeking to drive religion underground and out of society, society should create frameworks in which religion can exist, operate, and be practiced within society, albeit with some societal oversight. When society allows religion to function and gives religious communities limited authority over their own religious affairs, and the ability to rely on the coercive arm of the state to actualize that delegated authority, then religion will tend to moderate in order to work within that framework.[179] This allows the state to exert some appropriate oversight and control over religion, and provide an incentive for religious communities to not exert coercion on their own, which would

178 See, for example, Jack Wertheimer, *What You Don't Know about the Ultra-Orthodox*, COMMENTARY MAGAZINE (July 1, 2014), https://www.commentarymagazine.com/articles/what-you-dont-know-about-the-ultra-orthodox/ ("Haredim have made the choice to sustain their lifestyle—and large families—by working the system to obtain government support. Significant percentages of Haredim in the U.S. collect food stamps, and benefit from Section 8 rent assistance, Medicaid, and other subsidies … What seems to set critics off is the life of poverty-by-choice embraced by the Haredim. How dare they have so many children and then rely upon government subsidies to help support their brood?").

179 One merely needs to examine the reported decisions of the Beth Din of America, which are a model for what arbitration decisions ought to look like when they are seeking enforcement. They are reasoned, consistent with the requirements of secular law, and designed to be pleasing to those whose baseline of adjudication is

be destabilizing to society and oppressive to individuals. A moderate approach to facilitating religion encourages religious practitioners and communities to make the trade-off of interpretatively moderating their own practices in order to work within the framework established by secular society. This would not work if the trade-off demanded is too great so as to expect religious communities to fundamentally change their religion or do things that they would themselves regard as compromising on the overall integrity of the faith.

Legal frameworks providing for the practice and judicial enforcement of faith-based dispute resolution offer precisely this kind of environment. Religious arbitration gives religious individuals and communities an opportunity to sustain their religious commitments and practices in an effective way. Without a legally enforceable dispute resolution forum, individuals would be unable to rely on their coreligionists upholding their own religious obligations in cases of conflict arising from coreligionist commerce. Religious individuals and communities would then be compelled to abandon their traditions and instead abide by secular laws enforced by secular courts with enforcement powers. Instead of turning to the courts, however, some deeply committed adherents would simply turn inward to construct their own informally coercive religious communities beyond the reach of state oversight. By providing religious parties with the ability to resolve their disputes according to religious norms in ways that will be legally enforceable, societies provide religious communities with a powerful incentive to remain part of the general society on whose judicial enforcement powers any such religious arbitration scheme would rely.[180]

Religious arbitration regimes do not give religious communities and faith-based dispute resolution tribunals full reign to do as they please. Secular arbitration law sets important procedural and substantive benchmarks that must be met by religious practitioners for the courts to respect and enforce religious arbitration decisions. These requirements enshrine many of the most important societal commitments to procedural justice, while also limiting the extent to which substantive religious norms can be actualized when they depart too sharply from prevailing secular policy commitments.

Most importantly, these requirements induce religious groups interested in developing legally enforceable faith-based arbitration to engage in a conversation with the demands set by societal norms and values. The examples of the Beth Din of America in the United States and the Muslim Arbitration Tribunal in the United Kingdom illustrate how religious communities can adapt and reinterpret their own traditions in order to comply with important societal demands.[181] These Jewish and Muslim dispute resolution tribunals do not punish ritual offenses, do not use coercive methods, and generally afford parity to litigants and witnesses regardless of their gender or faith. Traditionally, Judaism and Islam imposed corporal and other penalties for religious offenses, policed the boundaries of the religious community, and distinguished between men and women, and between members of their own or other faiths in the courtroom. However, the Beth Din of America and Muslim Arbitration Tribunal, as well as other religious arbitration organizations have subtly adapted their religious laws to comply with secular requirements. Arguably, it is precisely because secular societies have given religious communities the opportunity to benefit from judicially enforced arbitration, and because they have done so judiciously—imposing only the most necessary limits on religious practice where it conflicts with societal norms—that many leaders in these faith traditions have been willing to adapt and integrate in order to take advantage of these legal benefits.

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secular, rather than religious. *See* 2 JOURNAL OF THE BETH DIN OF AMERICA, http://s589827416.onlinehome.us/wp-content/uploads/2015/07/JBDAVol2.pdf (last visited Feb. 9, 2018) (Eight reported decisions).

180 This is discussed at great length in BROYDE, *supra* note 1, chapter 6.

181 *See* Broyde, Bedzow & Pill, *supra* note 2.

Ultimately, the prevailing legal scheme that permits religious arbitration within certain necessary limits helps encourage religious minorities to become more integrated into the general society, rather than more isolated. This is good for society, which avoids the problem of separatist religious groups with antagonistic attitudes toward society and the state. This is also good for religious communities, which are afforded the immediate benefit of being able to voluntarily practice their religious norms in a way that will be legally enforced. Religious communities also gain from their interactions with the norms and values of society, with which they must negotiate on religious terms in order to comply with societal demands and enjoy the benefit of judicial respect for their internal dispute resolution mechanisms.

Secular Recognition of Religious Arbitration Promotes Value Sharing that Enriches Public Policy and Discourse

The final section of this article suggests that religious arbitration is important because it helps faith traditions participate in important societal discussions on law, policy, ethics, and other normative concerns. While engagement between religious and secular norms and values through a system of faith-based dispute resolution helps moderate religion by encouraging it to contend with outside norms and values, this engagement is a two-way street. Just as religion stands to learn and grow from its integration with society, secular society can benefit from its interactions with religion. In liberal, pluralistic societies it is important to have numerous voices and traditions as part of any deliberative public discourse.[182] Religious traditions, no more or less than various ideological, philosophical, cultural, ethnic, or political frames of references, are important perspectives that ought to be included in such conversations.

Many scholars have noted the important role that religious beliefs and practices have historically played in shaping legal traditions broadly, as well as specific legal norms and principles. Harold Berman's seminal works, *Law and Revolution* and *Law and Revolution II*, trace such influences in the Western legal tradition from the papal revolution of Gregory VII in the late 1000s, through the Protestant reformation and accompanying upheavals of the sixteenth and seventeenth centuries. In both cases, religious teachings exerted substantial influence on how law was thought about and practiced.[183] Indeed, James Brundage has shown that the legal profession itself, and the formalization of secular legal practice can be traced to the university educated and trained judges and counsel of medieval canon law courts.[184]

These religious influences on the development of law are in many ways just other instances of the phenomenon that Alan Watson describes as "legal transplants."[185] Alan Watson's central claim is that most changes in most legal systems occur through a process of transplantation or borrowing from existing concepts in other legal systems. The norms and principles of a legal system evolve and change, often slowly, in response to the real-world experiences of practitioners and actors within that system. Oftentimes, laws develop through a process of trial and error. Lawmakers pass laws, and judges and other officials interpret and apply laws in ways designed to achieve desired ends under changing social, economic, and political conditions. Sometimes these efforts work

182 *See* Helfand, *supra* note 14, at 1274–75.

183 *See* HAROLD J. BERMAN, LAW AND REVOLUTION II: THE IMPACT OF THE PROTESTANT REFORMATIONS ON THE WESTERN LEGAL TRADITIONS (2006).

184 *See* JAMES A. BRUNDAGE, THE MEDIEVAL ORIGINS OF THE LEGAL PROFESSION: CANONISTS, CIVILIANS, AND COURTS (2008).

185 *See* ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW (1974).

well, but other times they fail to attain the intended results. In the latter case, the law goes through continued development through legislative and judicial processes in order to find the correct normative formula for realizing political ends through legal means. During this process of legal change, rather than trying to develop effective solutions to new problems from the ground up, legal officials often look, explicitly or implicitly, at analogous experiences of other societies and legal systems that use similar policies. Laws and doctrines that work well to address similar problems in other systems may be adapted and adopted to deal with contemporaneous concerns.

Secular legal systems do this with each other, to be sure. But secular law also has and does borrow from religious legal traditions. This is especially the case in those areas of the law that most obviously touch on ethical and moral concerns, such as medical ethics; the law of war, including recently, the treatment of prisoners and terror suspects; proper treatment of criminal defendants and issues related to criminal punishment; and assisted suicide.[186] Powerful streams of Western legal thought, especially in recent centuries, have sought to largely divorce legal jurisprudence from ethical or moral concerns.[187] While there are obvious benefits to this, it does mean that conventional legal tools are often inadequate to deal with many of the knottier issues of contemporary life that we sense must be legally regulated, but which have serious moral and ethical dimensions. Lawmakers and scholars have therefore often drawn on religious traditions—especially religious traditions grounded firmly in religio-legal practice—for insights into how to reasonably address these issues in balanced ways.[188] It is often erroneously thought that religious legal traditions view such issues in stark black-and-white terms unsuited to nuanced modern jurisprudence. However, this is largely untrue. Religions that have religious law in a serious way have been grappling with these kinds of questions for centuries, and it is precisely because they have dealt with these questions flexibly and pragmatically while also hewing closely to the demands of their ecumenical norms and values that these systems have lasted and retained the allegiance of their adherents for as long as they have.

A particularly fine, if mundane, example of how secular law interactions with religious legal traditions can serve as vehicles for legal development is offered by Lynn Stout. Without drawing on specific religious doctrines, Professor Stout argues in part that law can and should be used as a means of encouraging law-abiding citizens to act with conscience.[189] This is an idea found in numerous nomos-centric faith traditions. Chaim Saiman argues that many areas of traditional Jewish law exist in large part in order to teach and inculcate certain values and attitudes that Judaism values.[190] Likewise, important strains of Islamic legal theory maintain that while observing Islamic law is imperative, Muslims lose sight of the ultimate purposes of religious norms if they fail to use the performance of ritual imperatives to impact their characters, attitudes, and ways of interacting with others. Stout incorporates such ideas about using law to affect good human attitudes and actions into proposals for innovative approaches to tort and contracts, as well as criminal law and punishment.

186 *See generally* Boris I. Bittker, Scott C. Idleman & Frank S. Ravitch, Religion and the State in American Law 111–48 (2015).

187 *See* Harry W. Jones, *Law and Morality in the Perspective of Legal Realism*, 61 Columbia Law Review 799–809 (1961).

188 See some of the works of the late Harold Berman as examples of this, in particular Law and Revolution I: The Formation of the Western Legal Tradition (1983) and Berman, *supra* note 183.

189 *See* Lynn Stout, Cultivating Conscience: How Good Laws Make Good People (2011).

190 *See* Chaim N. Saiman, Halakha: The Rabbinic Idea of Law (2018).

Ultimately, reasonable people can differ on the propriety and advisability of using lessons gleaned from religious law traditions to further develop secular legal norms. However, from a liberal perspective, there is another important societal value in encouraging robust interactions between functioning religious law systems and secular jurisprudence. In short, many think that societies work better, progress faster, and innovate more creatively when public discourses on important issues of law and policy are more diverse. This claim was famously made by Scott Paige in his 2008 book, *The Difference: How the Power of Diversity Creates Better Groups, Firms, Schools, and Societies*.[191] Paige's arguments are important for two reasons. First, his methodology is empirical and quantitative; his argument is not that societies should be more diverse for moral or philosophical reasons, but that groups that partake in diversity and reach decisions based on input from multiple perspectives are in fact more successful in the long run.[192] Second, and relatedly, Paige's claims are pragmatic. His study seeks to discover how organizations can be more productive and successful, and his empirical conclusion is that success follows the inclusion of individuals and groups from very different perspectives.[193]

Based on this, it seems advisable for liberal societies to facilitate the kind of diversity that will enable numerous robust and active cultures, traditions, and points of view to put forward their own insights and ways of thinking about societal issues in public conversations.[194] In particular, and based on the history of religious traditions contributing to the development of secular law, societies should enable faith-based communities to practice and develop their religious practices so that these groups can and will seek to weave themselves into a more diverse—and thus more productive—societal tapestry.

A robust secular law framework for the recognition and enforcement of religious arbitration processes helps promote these societal goods. By enabling religious communities to resolve coreligionist disputes through the application of traditional religious laws to contemporary problems, secular law can contribute to the construction of strong religious communities capable of participating in important public discourses. As discussed earlier, this model of dealing with religious minorities can encourage religious individuals and groups to integrate into society.[195] In this integration process, religion will pick up cultural norms and values from the general society and will evolve and adapt in order to strike an acceptable balance between these standards and its own traditions. As religion picks up and synthesizes aspects of general culture, however, it also injects its own perspectives, teachings, and practices on important societal issues into the public discourse. As religion adapts and evolves in order to integrate into society, society also adapts and evolves to integrate with religion.

On a more micro level, a robust practice of faith-based arbitration encourages religious leaders and decision makers to think hard about the best ways to resolve real world problems using traditional religio-legal sources and methods. This not only helps religious traditions develop more nuanced and complex doctrines and practices that are responsive to contemporary issues, but it also empowers religious groups to develop the kinds of creative and innovative ways of

191 *See* Scott E. Paige, The Difference: How the Power of Diversity Creates Better Groups, Firms, Schools, and Societies (2008).

192 *Id.*

193 *Id.*

194 There is little doubt that Grutter v. Bollinger, 539 U.S. 306 (2003), is the seminal case for the idea that such diversity of "underrepresented minority groups" is a compelling interest of any organized society. *See also* David Orentlicher, *Diversity: A Fundamental American Principle*, 70 Missouri Law Review 777–812 (2005).

195 *See* Broyde, *supra* note 1, chapter 10.D.

approaching these problems that can serve as instructive models for secular law and policy. Both of these positive outcomes would likely be retarded if religious communities were not given opportunities to resolve coreligionist disputes through faith-based arbitration. In that scenario, much of religion would remain highly abstract, dogmatic, and removed from providing practical answers to contemporary concerns. By providing a framework for religious groups to address complex problems through a religious lens, however, secular law can encourage faith communities to tackle developing issues head on, thereby strengthening religious groups internally and providing a valuable repository of wisdom and experience on which general society can draw as it works to address similar concerns through law and policy.

CONCLUSION

Precisely because as a society we can no longer agree on a single definition for what were once commonly held legal sacraments—and maybe in a federal system like the United States, we never really had one—religious arbitration is a fundamental tool that allows many different and competing parts of society to flourish. For example, if traditionalists and progressives are to reach a workable detente on divisive questions of marriage equality, it will not be because all agree with a single vision about who should marry, what a civil union looks like, or what "equality" in marriage means. Rather, it will be because the government will increasingly move to the contract model of unions, in which its secular model is merely the default model and people build their own model of marriage with prenuptial agreements.[196] And what will faith-based communities do? They will write their own contracts of marriage, or even appeal to secular authorities to recognize that marriages performed by their own clergy have different rules and ought to have a different secular law.[197] One group's contracts will be different from another's contracts, which will be different still from others'. Indeed, within the Jewish tradition there might be more than one model of contract that people can choose to enter. That is the joy of contracts: they are almost endlessly customizable.

Furthermore, the "Rise of Contract" as a fundamental basis of liberty allows for the proliferation of a wide array of religious arbitration tribunals across the United States. Of course, there have to be limitations: operating within the context of a secular legal system means that arbitration panels that enforce religio-legal norms must accept that religious principles will not excuse religious

196 At least one province in Canada has gone in a different direction, prohibiting the private arbitration of all family law matters according to any substantive law other than that of the Canadian province. A decade ago, Ontario considered the prospect of private arbitration by Islamic tribunals in accordance with religious law under general arbitration statutes. A report produced by the former attorney general recommended authorizing religious arbitration in family and inheritance law, subject to 46 proposed "safeguards." *See* MARION BOYD, DISPUTE RESOLUTION IN FAMILY LAW: PROTECTING CHOICE, PROMOTING INCLUSION 133–42 (2004), http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/fullreport.pdf (last visited Feb. 9, 2018). The report generated significant political backlash; ultimately, Ontario's Arbitration Act, S.O. 1991, c. 17 (Can.), and Family Law Act, R.S.O. 1990, c. F.3 (Can.), were amended to require that family arbitration be "conducted exclusively in accordance with the law of Ontario or of another Canadian jurisdiction." Family Statute Law Amendment Act, S.O. 2006, c. 1 (Can.). "Family arbitration" was defined as "arbitration that . . . deals with matters that could be dealt with in a marriage contract, separation agreement, cohabitation agreement or paternity agreement." *Id.* § 1(a).

197 This is exactly the history of the New York Jewish Divorce Law, where the state of New York enacted a special provision of the law regulating marriages done by clergy who have specific requirements for divorce. For more on this, see BROYDE, *supra* note 28, at 138. This could also lead to the potential legal recognition of polygamous marriages performed under the auspices of religious authorities. For an in depth prospective view on what such a system might look like, see MARK GOLDFEDER, LEGALIZING PLURAL MARRIAGE: THE NEXT FRONTIER IN FAMILY LAW (2017).

parties from criminal and other forms of liability under the relevant secular legal system.[198] Equally importantly, in order to garner the respect of the secular justice system by genuinely respecting secular law, arbitration institutions must educate their communities on the necessity of adhering to general legal norms of the country.[199]

So, too, religious arbitration cannot address matters that are not fundamentally contractual between the parties. Occasionally, such exclusive, binding authority is not limited to criminal matters; it is found in certain civil matters, such as bankruptcy law, where the resolution of one claim has to impact the resolution of other claims. Because of this, according to federal law, after a party has filed for bankruptcy, there is an automatic stay in place, and no one may interfere with or seek to collect a debt without the bankruptcy court's permission.[200] Private arbitration panels are bound by these collective limitations, and rulings that violate the automatic stay will simply be disregarded.[201]

But this will be the exception and not the rule.[202] In most areas, the law should not grant unique and exclusive authority to the state. If anything, the trend is to move further and deeper into contract and less and less into fixed, sacramental models set by the government that one cannot opt out of at all.

All of this need not be so and it is not inevitable in any just society that there be vibrant religious arbitration, even if individual religious freedom is protected. The law need not be protective of religious groups. Some secular legal regimes leave no breathing room for crafting private agreements that go against current secular norms. One province in Canada has already legislatively prohibited private adjudication in family law matters,[203] and France, following the principles of *laïcité* (the secular legal norms in France) is throttling communal religious values even as it recognizes individual religious liberty.[204] It is worth recognizing that it is possible to suffocate communal religious

198 See S.D. v. M.J.R., 2 A.3d 412, 422-23 (N.J. Super. Ct. App. Div. 2010), a recent New Jersey case that evoked nationwide criticism of Islamic law and the relationship between Muslim religious norms and the American justice system. This case illustrates the importance of Islamic arbitral courts' teaching their communities about the importance of following American law, even when it prohibits acts that may be permitted under religious law. It is worth noting that this case was affirmed on appeal.

199 Based on this, one suspects that communities like the Christian Domestic Discipline community will ultimately be subject to significant legal sanction over the use of force. *See Welcome to CDD*, Christian Domestic Discipline, http://christiandomesticdiscipline.com/home.html (last visited Nov. 25, 2014). Indeed, these communities seem aware of this issue and seek to address it through general consent. *See "Nonconsensual" Consent? A Guideline to Consent in CDD*, Christian Domestic Discipline, http://christiandomesticdiscipline.com/nonconsensualconsent.html (last visited Nov. 25, 2014). But, there is ample legal precedent for the idea that the state sanctioned monopoly on force—particularly in the area of domestic violence—will not be set aside without a much more particular and detailed consent by the woman being hit.

200 *See* 11 U.S.C. § 362 (2010).

201 *See* Michael A. Helfand, *Fighting for the Debtor's Soul: Regulating Religious Commercial Conduct*, 19 George Mason Law Review 157–96, 187–88 (2011).

202 Indeed, the more strongly the United States moves toward a contract model of marriage and sexual unions, the more religious arbitration will be used to implicitly validate plural marriage through arbitration. The decision in U.S. v. Windsor 570 U.S. 744 (2013) struck down the Defense of Marriage Act, which prohibited same-sex marriage and polygamy with its definition of a marriage as "a legal union between one man and one woman as husband and wife." This opened up a greater possibility for allowing legal plural marriages. *See* Goldfeder, *supra* note 197, at 6. On the other hand, if the purpose of government regulations that curb religious freedom in a liberal western society is the prevention of harmful vices at a minimal expense to religious freedom, then if marriage is contractual, it follows that the permissibility of plural marriages generally is logical with regulations only seeking to mitigate potential abuses of the institution rather than the institution itself.

203 Family Statute Law Amendment Act, S.O. 2006, c. 1 (Can.).

204 *See generally* T. Jeremy Gunn, *Religious Freedom And Laïcité: A Comparison of the United States and France*, 2004 Brigham Young University Law Review 419–506 (2004); Michel Troper, *French Secularism, Laïcité*, 21 Cardozo Law Review 1267–84 (2000).

liberty without denying personal religious freedom (which no democracy does). When both the substantive law is secular and the arbitration law resists the application of legal rules selected by the parties contractually in private law, religious communities can no longer function. Of course, France does not suffocate individual religious liberty in the private sphere, but by insisting that every dispute between two or more people be resolved without reference to the religious rules that the parties wished to govern them, the religious community is vastly diminished.

So, the thrust of this article is that vibrant religious arbitration is good for secular society. Putting aside religious arbitration of matters that can never be adjudicated by a civil court such as insular church doctrinal disputes, secular society benefits in many ways from allowing religious communities and their members to contractually resolve their commercial and family law disputes. Such religious arbitration is more accurate within its cultural norms, more respective of autonomy rights of individuals, and more sympathetic to the values of a multicultural society. Each of these values represents important American ideals. In addition, of course, this is part of the religious freedom that is fundamental to law and culture, particularly in the United States.

Of course, secular society must regulate such arbitration in three very important ways. First, it must make sure that people are truly voluntarily agreeing to such arbitration in a way that shows genuine consent to religious arbitration. Second, society must make sure that such arbitrations are limited to noncriminal matters and do not tread on the unique police powers of the general society or the truly important (religiously neutral) public policies of society.[205] Third, it must make sure that procedural due process is followed in arbitration hearings. Related to that is that religious arbitrators, to be successful, must integrate well the norms of the secular society that intermingles with their own religious community.

As America transitions from a society in which there is a dominant religion—Christianity—and a dominant cultural norm—commonly called the Judeo-Christian ethic—to something else, the question is what should society do with those groups that still adhere to the old traditions or craft new traditions that are at tension with the cultural norms?[206]

One way to think about the problems of religious arbitration is whether the winners of cultural war in the twenty-first century should vanquish the losers (as winners of cultural wars have historically done) or should our American society seek a different peace to the most recent cultural war? If a different peace is found, maybe the winner-take-all cultural wars of the past will not have to be fought again?

Religious arbitration is part of the answer that avoids cultural wars. It argues that one of the basic ways the Founding Fathers crafted a barrier against imposing imperialism was through divided power, and this approach should be employed again to prevent cultural wars and values imposition. This insight is the idea of federated justice. The United States is almost unique worldwide in that power is very much decentralized. The federal government has three co-equal branches and even when it is united, the fifty states—each with their three branches—have independent power that cannot be usurped by the national government. Liberty is acquired by diffused power. Religious arbitration continues this aspect of diffusion that is common in America.

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205 This proposition hardly needs defending as a general idea: the delegation of "police powers" to a private arbitration tribunal—religious or secular—would be a flagrant violation of the Federal Arbitration Act as well as a deep violation of the historical common law norms concerning the role of arbitration. See BROYDE, *supra* note 1, chapter 1.

206 The most striking example of this is consensual non-monogamy, which is not part of the Judeo-Christian tradition, but is common in modern America. *See* Brenden Shucart, *Polyamory by the Numbers*, ADVOCATE (January 8, 2016), https://www.advocate.com/current-issue/2016/1/08/polyamory-numbers.

As this iteration of the culture war ends, what should our society do with people and religious groups that refuse to surrender? The answer to that question will set the tone for much societal discourse for many decades. This work proposes that allowing such religious communities—made up at this moment of Evangelical Christians, Orthodox Jews, newly immigrant Muslims, traditional Mormons, and many other smaller subgroups scattered nationwide—to form their own communities where they use the limited tools of religious arbitration to adjudicate disputes between members of their community who consented to such adjudication should be encouraged. Of course, such arbitration should be confined to financial matters and maybe child custody. Secular society must maintain a monopoly on its police powers and must take steps to ensure that religious adjudication is limited to people who genuinely consent.

Religious arbitration is an aspect of liberty. Like all sources of power in a balanced system, it has to be subject to checks and balances, but when reasonably checked, the central idea is that robust religious arbitration is a valuable tool that ensures democratic liberty, accurate adjudication, and moderate religions, each of which is needed to craft a viable secular society. People of a common faith or idea are entitled to order their lives as they see fit by crafting a legally binding private religious adjudication process which serves to regulate many aspects of the law governing their family, commercial, and private lives.

The United States now has a wonderful status quo. It is a very secular state with very vibrant religious communities existing side by side in peace, so long as all parties respect the distinction between public and private law and allow contractual arbitration law to operate under any substantive legal rubric the parties agree to. New York State is an excellent example. New York is widely considered one of the most liberal states of the union, and yet has the most vibrant Jewish, Islamic, and Catholic communities with many different religious arbitration tribunals. Furthermore, New York uniquely accommodates Jewish and Islamic marriage law with special statutory provisions.[207] Liberal and secular western democracy is compatible with religious community. Arbitration contracts are an essential part of what makes for compatibility.

In sum, we in America live in a society in which religious traditions—Judeo-Christian or otherwise—have receded to the background of our legal culture. The legal norms that once reflected those values are being replaced by secular principles, the most fundamental of which seems to be contract law. What this means is that our law should be increasingly open to the idea that people can structure their relationships around a contract, rather than around sacrament. And the default model does not need to be the only model; customization can be allowed and even expected. Religious arbitration is a vital part of that multicultural salad.[208]

Allowing this religious arbitration not only serves the best interest of the religious community, but of secular society as well. The United States will be better for it.

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207 As noted in Broyde, *supra* note 28, at 161–62.

208 Carl N. Degler, Out of Our Past: The Forces That Shaped Modern America 296 (1970) ("[T]he metaphor of the melting pot is unfortunate and misleading. A more accurate analogy would be a salad bowl, for, though the salad is an entity, the lettuce can still be distinguished from the chicory, the tomatoes from the cabbage.").