

1-30-2015

## Faith-Based Private Arbitration as a Model for Preserving Rights and Values in a Pluralistic Society

Michael J. Broyde  
*Emory University School of Law*

Follow this and additional works at: <https://scholarship.kentlaw.iit.edu/cklawreview>



Part of the [Dispute Resolution and Arbitration Commons](#), and the [Religion Law Commons](#)

---

### Recommended Citation

Michael J. Broyde, *Faith-Based Private Arbitration as a Model for Preserving Rights and Values in a Pluralistic Society*, 90 Chi.-Kent L. Rev. 111 (2015).

Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol90/iss1/6>

This Article is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Law Review by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact [jwenger@kentlaw.iit.edu](mailto:jwenger@kentlaw.iit.edu), [ebarney@kentlaw.iit.edu](mailto:ebarney@kentlaw.iit.edu).

# FAITH-BASED PRIVATE ARBITRATION AS A MODEL FOR PRESERVING RIGHTS AND VALUES IN A PLURALISTIC SOCIETY

MICHAEL J. BROYDE\*

## INTRODUCTION

The original title of the address that formed the basis for this paper, “Suggestions for Shari’a Courts based on the Precedent of the Beth Din of America,” was something of a misnomer.<sup>1</sup> I have already written at some length about Jewish law courts successfully creating a model of binding private arbitration that helps insure that arbitral decisions are routinely upheld in U.S. courts.<sup>2</sup> I have also explored the possibility of developing effective religious arbitration according to Islamic law in the United States based on the precedent of the Beth Din of America (BDA) and the Muslim Arbitration Tribunal (MAT) in the United Kingdom.<sup>3</sup> Now I would like to step back and take a broader view. In this paper I suggest that the kind of religiously-oriented private dispute resolution associated with the Jewish and Muslim communities can be broadly applicable to a whole host of other religious and values-oriented communities, and that this trend will serve to fill the lacuna created by the movement of American secular law away from traditional values, particularly—but not exclusively—in family law.

\* Michael J. Broyde is a Professor of Law at Emory University School of Law and a Senior Fellow at the Emory University Center for the Study of Law and Religion. Professor Broyde is also an ordained rabbi, an ordained rabbinical court judge and has served as a rabbinical judge. He served as a member (*dayan*) in the Beth Din of America and was the director of that rabbinical court as well. The author would like to thank the three conveners of the Sharia and Halakha conference, Professors Samuel Fleischacker, Junaid Quadri, and Mark D. Rosen, for including him. He would also like to thank Jacquelyn J. Linzer and Michael Ausubel for their assistance in preparing the manuscript. Since this paper originated as a keynote address in the conference, this paper still has some of the feel of a lecture.

1. See Chicago-Kent College of Law, *Suggestions for Shari’a Courts Based on the Precedent of the Beth Din of America*, YOUTUBE (May 14, 2013), [www.youtube.com/watch?v=enqjJBaNuBw&list=PLYw2Vm1u7D168d9Kk05t0TdOCld5m8CN&index=4](http://www.youtube.com/watch?v=enqjJBaNuBw&list=PLYw2Vm1u7D168d9Kk05t0TdOCld5m8CN&index=4).

2. See Michael J. Broyde, *Jewish Law Courts in America: Lessons Offered to Sharia Courts by the Beth Din of America Precedent*, 57 N.Y.L. SCH. L. REV. 287 (2012–2013).

3. See 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 HARV. J. ON RACIAL & ETHNIC JUST. 33–76 (2014). I would like to express my appreciation to Emory University for supporting two exceptional graduate students, Ira Bedzow (who received his Ph.D. this past year) and Shlomo Pill (who is completing his S.J.D. shortly).

The modern legal trend, certainly in America, is toward increased validation of private arbitration courts and the relationship-governing rule created through contract.<sup>4</sup> Courts grant parties wide latitude to craft agreements that specify private arrangements to resolve future disputes. This is certainly true in commercial law and is even true in family law, which is typically more value-driven. With slightly varying degrees of scrutiny, American law generally upholds the ability of individuals, couples, and corporations to privately order their own relationships in accordance with a broad range of contractual agreements.

The Federal Arbitration Act<sup>5</sup> (FAA) in particular represents a high-water mark for the contractual approach: courts defer to binding arbitration agreements and subject them only to procedural review for matters like voluntariness and procedural fairness. Arbitration clauses that include both choice-of-law and choice-of-forum provisions are an especially powerful means of adopting alternative legal models, even when the chosen forum is an arbitration court and the chosen law is religious. Indeed, courts will even defer to decisions of panels that operate under principles that are dramatically different from the existing laws of any state—such as Jewish law, Islamic law, or even a non-law structure such as Christian conciliation—provided parties' selection of the forum and decisional norms is voluntary and the arbitration procedures used are clear and reasonably fair. Done right, private arbitration can thus be a viable option for a wide variety of religious communities who wish to conduct themselves in accordance with privately held religious values that are not reflected in secular state law.<sup>6</sup>

That religious communities are coming around to embrace this view is the culmination of another trend in American society. Over the last sixty years, the substance of American law has increasingly come to reflect secular principles rather than the religious values upon which it was historically based. The law has grown increasingly secular, with an increased focus on religiously neutral principles of equality and fairness, rather than the histor-

4. See *infra* notes 5–6.

5. 9 U.S.C. §§ 1–16 (1947). Before Congress enacted the FAA, courts were often hostile to alternative dispute resolution, including arbitration. See *Meacham v. Jamestown, F. & C. R. Co.*, 105 N.E. 653, 655 (N.Y. 1914).

6. Indeed, in recent years there has been a considerable increase in articles addressing religious arbitration. See, e.g., Farrah Ahmed & Senwung Luk, *How Religious Arbitration Could Enhance Personal Autonomy*, 1 OXFORD J. L. & RELIGION 424 (2012); Amanda M. Baker, *A Higher Authority: Judicial Review of Religious Arbitration*, 37 VT. L. REV. 157 (2012); Michael A. Helfand, *Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders*, 86 N.Y.U. L. REV. 1231 (2011); Nicholas Walter, *Religious Arbitration in the United States and Canada*, 52 SANTA CLARA L. REV. 501 (2012).

ical commitment to traditional values.<sup>7</sup> Not coincidentally, this development coincides with significant demographic changes: there is no longer a majority religion in the United States. While most Americans still identify as Christians, no denomination or sect predominates, and most Christians or Jews no longer look to their faith for their basic values.<sup>8</sup> Moreover, since the mid-twentieth century, the United States has become more of a multi-cultural society. It is increasingly comfortable with multiple expressions of individual and sub-group identity coexisting in the public sphere. In sociological terms, the metaphor of the melting pot has been replaced by a salad bowl.<sup>9</sup>

So while the culture wars still flare, religious communities have begun to realize that they are all minority groups, and secular law is no longer broadly reflective of traditional values nor will this change in the foreseeable future. Whether this has become apparent to everyone or not, it is motivating religious communities to step outside the framework of secular law into the realm of private dispute resolution in order to preserve their communities.<sup>10</sup> Even more importantly, the common social fabric has shifted to a secular model—gay marriage is just the most public crier of this change—which predominates in every value-driven public discussion, leaving traditional religious communities feeling less and less comfortable with general social mores and at the same time increasingly disconnected from common public discourse or law.<sup>11</sup>

7. See, e.g., David Aikman, *America's Religious Past Fades in a Secular Age*, WALL ST. J., Oct. 25, 2012,

<http://online.wsj.com/news/articles/SB10001424052970203630604578073171838000416>.

8. Pew Research Center data from 2007 indicated “that the United States is on the verge of becoming a minority Protestant country; the number of Americans who report that they are members of Protestant denominations now stands at barely 51%.” PEW FORUM ON RELIGION & PUB. LIFE, U.S. RELIGIOUS LANDSCAPE SURVEY 5 (Feb. 2008), available at <http://religions.pewforum.org/pdf/report-religious-landscape-study-full.pdf>. By 2012, the prediction had come true. PEW FORUM ON RELIGION & PUB. LIFE, “NONES” ON THE RISE: ONE-IN-FIVE ADULTS HAVE NO RELIGIOUS AFFILIATION 13 (Oct. 9, 2012), available at <http://www.pewforum.org/2012/10/09/nones-on-the-rise/> (“In surveys conducted in the first half of 2012, fewer than half of American adults say they are Protestant (48%). This marks the first time in Pew Research Center surveys that the Protestant share of the population has dipped significantly below 50%.”).

9. 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.”).

10. Some religious communities even welcome this, as they see greater threat from alternative religious values than secular ones. See Michael J. Broyde, *Jewish Law and American Public Policy: A Principled Jewish Law View and Some Practical Jewish Observations*, in *RELIGION AS A PUBLIC GOOD: JEWS AND OTHER AMERICANS ON RELIGION IN THE PUBLIC SQUARE* 161 (Alan Mittleman ed., 2003).

11. For just the most recent example of this, see Michael Paulson, *Colleges and Evangelicals Collide on Bias Policy*, N.Y. TIMES, June 9, 2014, <http://www.nytimes.com/2014/06/10/us/colleges->

The Orthodox Jewish community has struggled with this problem for decades—preserving religious community while integrating economically and socially into secular society to varying degrees.<sup>12</sup> Its rabbinical courts have developed well-crafted models for enforceable arbitration agreements that can be adapted by any interested religious community. The American Orthodox Jewish community has had experiences other faiths have not in this area, not because it was chosen as a people for this role, but because the Christian community was majoritarian and actually sought to shape the secular law for many years in this Republic, and the Muslim community was absent for the first two centuries of the Republic.<sup>13</sup> That peculiar Jewish experience is now becoming the norm for every American religion.

### I. CRAFTING A FRAMEWORK FOR ENFORCEABLE ARBITRATION DECISIONS

As I have discussed elsewhere,<sup>14</sup> when one looks at the “best practices” of the rabbinical courts in America, one can see six principles underpinning the system that allows for binding arbitration decisions that the secular government is then obliged to enforce.<sup>15</sup> Islamic tribunals have done much the same in the United Kingdom and will certainly move in that direction in the United States.<sup>16</sup> But these six principles are not unique to Jewish or Islamic law—they are readily transferrable to any minority community that wishes to govern itself by common rules or shared values that differ substantively from the statutory scheme promulgated by the state.

Extrapolating and summarizing from my prior articles,<sup>17</sup> the six principles for long-term success are as follows: First, the arbitration panel must develop and promulgate standardized, detailed rules of procedure. Uniform rules and procedures set clear expectations for the proceedings and protect vulnerable parties. More importantly, procedural safeguards are crucial to the viability of private arbitration, as courts generally review arbitration

and-evangelicals-collide-on-bias-policy.html, which discusses how many institutions are forcing religious student organizations whose values discriminate against homosexual conduct off campus.

12. See Broyde, *supra* note 2, at 288.

13. See Broyde et al., *supra* note 3.

14. See Broyde, *supra* note 2, at 288–89.

15. Of course, I recognize that rabbinical courts do not in every instance and in every location follow the best practices consistently. Some have weaker appeals processes or less formal rules. But the articulation of consensus best practices serves as a model for how things ought to be done without asserting that all practices below the “best” are not legally satisfactory.

16. See Broyde et al., *supra* note 3, at 36–37.

17. See Broyde, *supra* note 2; see also Broyde et al., *supra* note 3.

decisions for procedural, rather than substantive fairness. Second, any organization providing arbitration services should also develop an internal appellate process. This reduces the likelihood of errors, increases trust, and helps prevent decisions from being routinely overturned by courts. Third, the governing rules should spell out choice-of-law provisions to facilitate the accommodation of religious traditions and principles as well as secular law where possible.

Fourth, in addition to religious authorities, the arbitration panel should employ skilled lawyers and professionals from the panel's constituent religious community who can provide expertise in secular law and contemporary commercial practices. Fifth, to ensure the effective resolution of commercial arbitrations, the organization should recognize, and to the greatest extent possible incorporate into its rulings, the realities of conduct in the public arena—even in family law. This is crucial to understanding the actions and intent of the parties in common transactions, but perhaps more importantly it will instill confidence in potential disputants. After all, a dispute resolution system that reflects grand abstract ideals but has little notion of business realities is unlikely to attract willing participants. Finally, the tribunal should recognize that an aggregate of individual arbitrations will likely give rise to an active role in communal leadership. This is particularly true among adherents, but it is to be more broadly expected as well.

## II. PROCEDURAL REQUIREMENTS

First and foremost, other than in child custody disputes,<sup>18</sup> American law of arbitration pays little attention to notions of substantive due process. Neither the government nor the courts have a preconceived notion of the

18. Child custody is the exception that proves the rule. In child custody matters, exactly because children are not assets and may not be contractually divided, binding arbitration is limited: judges cannot fundamentally engage in only a procedural review; they must engage in substantive review to determine the best interests of the child. They have no choice but to ask whether the arbitration panel reached the right, or a plausibly right, answer. Whether the arbitration panel is reviewed *de novo* or for harm or some other standard, the predicate of child custody analysis is not procedural due process but some form of substantive due process. *See, e.g.,* Glauber v. Glauber, 192 A.D.2d 94, 97 (N.Y. App. Div. 1993) (finding that “[t]he court must always make its own independent review and findings” in child custody cases, despite an arbitration award addressing the issue); *see also* Fawzy v. Fawzy, 973 A.2d 347, 350 (N.J. 2009) (finding a N.J. constitutional right to child custody arbitration albeit with *de novo* review). Furthermore, I have noted, “[E]ven in the universe of child custody cases, which are reviewed *de novo* by secular courts in many states, but not allowed in many others, no BDA decision has ever been overturned.” Broyde, *supra* note 2, at 300. As I have shown elsewhere, it is the majority view in the Jewish tradition as well that the best interest of the child analysis should be used. *See* Michael J. Broyde, *Child Custody in Jewish Law: A Conceptual Analysis*, 37 J. HALACHA & CONTEMP. SOC. 21 (1999).

“right” substantive resolution of most any dispute if the parties contractually choose to opt for a different resolution or a process that produces a different resolution from what state or federal law might offer.<sup>19</sup> Rather, the FAA and the myriad state laws that derive from it have a strong notion of procedural due process.<sup>20</sup> These statutes provide that there are certain things arbitration panels may and may not do in the course of decision making: they may not call a hearing at 4:00 a.m. on a federal holiday, they must provide litigants with a reasonable amount of notice,<sup>21</sup> they must conduct hearings in a language that the parties understand, arbitrators may not have a financial interest in the resolution of the case or financial involvement with the parties, as well as other basic ideas of procedural fair play.<sup>22</sup>

Within these procedural confines, there is still much room for flexibility, creativity and alternative solutions. The proceedings can be adversarial, inquisitorial, or conciliatory. They can be sealed or open. They can be closed to outsiders or broadcasted on television. They can be rather informal, or the arbitrator can sit on a raised bench in robes and insist that the parties address him or her as “Judge” or “Your Honor.”<sup>23</sup> They can be based on French law, commercial custom, or religious law.

Religious tribunals recognize that in order for secular courts to honor their decisions, they must follow only procedural (rather than substantive) due process. The Beth Din of America has promulgated legally sophisticat-

19. See Helfand, *supra* note 6, at 1256.

20. See Michael A. Helfand & Barak Richman, *The Challenge of Co-Religionist Commerce*, 64 DUKE L. REV. (forthcoming 2014), available at [http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5926&context=faculty\\_scholarship](http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5926&context=faculty_scholarship).

21. See, e.g., JAMS, JAMS POLICY ON EMPLOYMENT ARBITRATION: MINIMUM STANDARDS OF PROCEDURAL FAIRNESS (July 15, 2009), available at [http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS\\_Employment\\_Min\\_Std-2009.pdf](http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Employment_Min_Std-2009.pdf). Of course, the JAMS policy is only binding when it is incorporated by contract and the minimal obligations of the arbitrator under state law are considerably lower.

22. For a reexamination of the basic issues of due process and fairness in this context, see Bradley Dillon-Coffman, Comment, *Revising the Revision: Procedural Alternatives to the Arbitration Fairness Act*, 57 UCLA L. REV. 1095 (2010).

23. Two New York City Civil Court rulings have reached opposite conclusions as to whether what happens on “The People’s Court” is arbitration or some other contractually agreed-to form of ADR. Compare *Kabia v. Koch*, 713 N.Y.S.2d 250, 251 (N.Y. Civ. Ct. 2000) (holding that submission of a claim to television court qualifies as arbitration), with *Doo Wop Shoppe Ltd. v. Ralph Edwards Prods.*, 691 N.Y.S.2d 253, 253 (N.Y. Civ. Ct. 1998) (holding that submitting a claim to television court did not qualify as arbitration). See Philip Z. Kimball, *Syndi-Court Justice: Judge Judy and Exploitation of Arbitration*, 4 J. AM. ARB. 145, 147, 158 (2005) (describing how syndi-court arbitration distorts the public’s conception of what the judicial process is in America); see also Kimberlianne Podlas, *Blame Judge Judy: The Effects of Syndicated Television Courtrooms on Jurors*, 25 AM. J. TRIAL ADVOC. 557, 586 (2002) (demonstrating that television courtroom programs have an educating but distorting effect on potential jurors); Kimberlianne Podlas, *Please Adjust Your Signal: How Television’s Syndicated Courtrooms Bias our Juror Citizenry*, 39 AM. BUS. L.J. 1, 24 (2001) (showing that television courtroom programming may bias jurors in troubling ways).

ed rules and procedures that are published on the organization's website.<sup>24</sup> The ICC<sup>25</sup> and the MAT have done likewise.<sup>26</sup> These rules set out requirements such as the number of days between filing and response. They describe matters like discovery, motion practice, transcription, and the appropriate place to file items. They also establish the proper language for hearings, the procedure for compiling a record, waiver doctrines, notice provisions, and other rules of procedure.<sup>27</sup>

These rules help a layperson understand what to expect procedurally during the process of religious arbitration; to a lawyer, they look a lot like the Federal Rules of Civil Procedure. But they speak not at all about substance. One reading these rules would learn nothing about the content of Jewish law, Islamic law or Christian jurisprudence. Indeed, the ICC makes this clear in its rules, which state directly and simply:

[Rule] 4. Application of Law

Conciliators shall take into consideration any state, federal, or local laws that the parties bring to their attention, but the Holy Scriptures (the Bible) shall be the supreme authority governing every aspect of the conciliation process.<sup>28</sup>

Which version of the Bible? Are commentaries or interpretations binding? Which ones? The ICC provides no guidance as to the substance of the law. Rather, the conciliators have broad authority to determine the substantive rules or principles that are applicable to the matter before them.

The rules of the BDA are even less clear as to the substantive law. Rule 3c states simply that “[t]he Beth Din of America accepts that Jewish law as understood by the Beth Din will provide the rules of decision . . . .”<sup>29</sup> Not only is there no definition of the substance of Jewish law, but by insisting that Jewish law *as understood by the Beth Din* is the law, substantive

24. BETH DIN OF AMERICA, RULES AND PROCEDURES (2013), available at [http://bethdin.org/docs/PDF2-Rules\\_and\\_Procedures.pdf](http://bethdin.org/docs/PDF2-Rules_and_Procedures.pdf) [hereinafter BDA RULES].

25. THE INSTITUTE FOR CHRISTIAN CONCILIATION, RULES OF PROCEDURE FOR CHRISTIAN CONCILIATION, available at [http://www.peacemaker.net/site/c.nuIWL7MOJtE/b.5335917/k.D8A2/Rules\\_of\\_Procedure.htm](http://www.peacemaker.net/site/c.nuIWL7MOJtE/b.5335917/k.D8A2/Rules_of_Procedure.htm) (last visited Nov. 25, 2014) [hereinafter ICC RULES].

26. MUSLIM ARBITRATION TRIBUNAL, PROCEDURAL RULES OF MUSLIM ARBITRATION TRIBUNAL (2010), available at [http://www.matribunal.com/procedure\\_rules.html](http://www.matribunal.com/procedure_rules.html) [hereinafter MAT RULES].

27. Perhaps the most startling thing one might encounter in a comparative study of the rules of the BDA, ICC, and MAT is how similar they are. With but a few differences, they essentially address the same set of issues, namely the procedural rights of the parties in arbitration. Indeed, with but a few word changes, the rules of any one of them could serve as rules of each of them. While this might incline one to think that they had a common author (which assuredly they did not, as I drafted the BDA rules myself many years ago, but I did not write the ICC or MAT rules), the truth is that they are simply co-evolutionary identical responses to the pressures of the secular Federal Arbitration Act.

28. ICC RULES, *supra* note 25, § 4.

29. See *supra* note 24.



review becomes impossible, since whatever decision of Jewish law the BDA determines to be correct is by definition the Jewish law *as understood by the Beth Din*.

Similar to this, the MAT rule states:

[Rule 8] Giving of determination

[(1) In arriving at its decision, the Tribunal may consider but not be bound by any previous decision of the Tribunal.

(2) In arriving at its decision, the Tribunal shall take into account the Laws of England and Wales and the recognized Schools of Islamic Sacred Law.<sup>30</sup>

There are no clear rules of decision in any of these three arbitration tribunals that any court can review for consistency and proper application. Consider a simple hypothetical example concerning a commercial dispute between a kosher food provider and a customer about whether Jewish law considers pigs' feet to be kosher.<sup>31</sup> If the BDA were to determine that they were kosher, a secular court could not review that determination to see if it was consistent with Jewish law, as it is "Jewish law as understood by the Beth Din."<sup>32</sup> The decisions of arbitrators are not subject to review by secular courts for errors of law.

This fits well with our understanding of the role of secular courts in reviewing religious arbitration: they are limited to procedural review. Secular courts can and do evaluate whether secular procedural due process was complied with, and whether general notions of fair play were observed, but they cannot tell you what the substantive rules of Jewish, Islamic or Christian law are.<sup>33</sup> Even if they could, religious arbitration organizations write their rules to prevent that review.<sup>34</sup> Arbitration law mandates that arbitration organizations have rules that protect basic procedural rights (and not basic substantive rights), and they do: no other review is needed.

30. MAT RULES, *supra* note 26, § 8.

31. There is no view in Jewish law that considers them kosher, as the Bible explicitly states that pork is not kosher. See *Leviticus* 11:7.

32. See *supra* note 24, § 3(c).

33. While in theory disputants could have a choice of forum provision that selects a state court and a choice of law provision that specifies Jewish law, in which case the state court might very well make a determination of what Jewish law is in the first instance, that is much different from a secular court being asked to review someone else's determination of Jewish law. For examples of this first phenomena, see Daniel Ashburn, *Appealing to a Higher Authority? Jewish Law in American Judicial Opinions*, 71 U. DET. MERCY L. REV. 295 (1994).

34. By defining, for example, Jewish law not in reference to its historical meaning, but in reference to how this court understands it.

### III. APPEALS PROCESS

It is important that religious arbitration panels develop internal review processes. To err is human, and all arbitration panels sometimes err. Sometimes they err in judgment, sometimes in fact. Sometimes the errors are painfully obvious or even laughable, as even great people sometimes make simple mistakes. Sometimes there are errors in transcription. Many of these procedural errors can result in a court overturning an arbitration award. An appellate process is thus an important safeguard that allows an arbitral organization to correct its mistakes internally before those mistakes are brought to the attention of a reviewing court that may well vacate the tribunal's decision entirely.

Without an internal appellate process to correct one's own procedural mistakes, a court will step in and do it, pointing to the provisions of the FAA or state law.<sup>35</sup> An internal appellate procedure allows for a basic error correction process that produces regularly valid decisions, as it forces the litigants to share with the arbitral organization their claims of error and allows the private arbitrator to correct its own error before the litigants do so in court. Good arbitration rules, then, spell out the grounds for error and procedures to initiate an appeal.

Consider, as a starting point, Jewish law, which does not intrinsically have an appellate process, but permits one by contract.<sup>36</sup> Based on this, the Rules of the Beth Din of America state simply and directly that:

[Rule] 31 Modification of Award

On written application of a party to the Beth Din within twenty (20) days after delivery of the award to the applicant, the Beth Din may modify the award if (a) there was a mathematical miscalculation; or (b) there was a mistake in the description of any person, thing or property referred to in the award; or (c) the award is based upon an issue not submitted to the Beth Din and the award may be corrected without affecting the merits of the decision upon the issues submitted; or (d) the award is imperfect in a matter of form not affecting the merits of the controversy; or (e) the Av

35. Consider the following example: The parties agree to a submission deadline of March 25. The arbitrator hearing the matter hastily jots down a squiggly five, which is later transcribed to the file as a three. The arbitrator then closes the matter on March 23, and, finding that one party failed to make a timely submission, issues an award on March 24, in favor of the other party. The arbitrator has committed a procedural error. A secular court judge presented with this case will find the award unenforceable, as the record should have remained open for another two days. For a rabbinical court appeal with this fact pattern, see Broyde, *supra* note 2, at 310–11 (in *Anonymous v. Anonymous*, the court vacated the original decision for procedural error and remanded it with order to reopen the record and allow Defendant's submission as timely).

36. See J. DAVID BLEICH, CONTEMPORARY HALAKHIC PROBLEMS 17–45 (1995); J. David Bleich, *The Appeal Process in the Jewish Legal System*, 28 TRADITION 94 (1993).

Beth Din determines that a provision of the award is contrary to Jewish Law.<sup>37</sup>

This type of rule can be found just as clearly in the rules and procedures of the Institute for Christian Conciliation:

[Rule] 41. Request for Reconsideration

A. A party may submit a request to the Administrator for reconsideration of a decision within twenty (20) calendar days after the day the decision was received by the parties.

B. A request for reconsideration will not be considered if it simply asks the arbitrators to review the evidence and change their decision.

C. A request for reconsideration is appropriate only when the arbitrators (1) have deviated from these rules or from the arbitration agreement; (2) have patently misunderstood a party; (3) have failed to address an issue or have made a decision outside the issues presented to the arbitrators by the parties; or (4) have made a miscalculation or a mistake of identification.<sup>38</sup>

Unlike the BDA, the ICC rules seem to allow reconsideration by the same arbitrators or alternatively by an Administrator. But its purpose is to correct error.

Because decentralization is an internally important feature of Islamic law,<sup>39</sup> the traditional Islamic adjudication process also did not include a formal right of appeal or reconsideration. Traditionally, the Islamic judicial system was not formally hierarchical,<sup>40</sup> and the decision of any panel was considered final and binding. Thus, Islamic courts do not provide an internal appellate procedure. Nevertheless, acknowledging that its arbitration process operates within the legal framework created by British law, MAT rules expressly acknowledge that a party may apply for judicial review of its arbitral awards, creating a quasi-appeal process.<sup>41</sup> But, in truth, a close read of the MAT rules reveals a reconsideration process that serves much the same role as an appellate process. Consider the following three rules:

[Rule 23] Appeals

□ No appeal shall be made against any decisions of the Tribunal. This rule shall not prevent any party applying for Judicial Review with permission of the High Court.<sup>42</sup>

37. BDA RULES, *supra* note 24, § 31a.

38. ICC RULES, *supra* note 25, § 41.

39. See MOHAMMAD HASHIM KAMALI, PRINCIPLES OF ISLAMIC JURISPRUDENCE 257 (3d ed. 2003).

40. See TAHA JABIR AL-ALWANI, TOWARDS A FIQH FOR MINORITIES: SOME BASIC REFLECTIONS xiii–xiv (Arthur A. Shamis trans., 2003).

41. See MAT RULES, *supra* note 26, § 23.

42. *Id.*

This rule, if taken alone, would seem clear and directly counter my hypothesis that an internal appeals process is needed. But if one examines the rules of the MAT in total, one sees that there is an error correcting process in place that goes by a term other than “appeals.” Rule 21 states directly:

[Rule 21] Errors of procedure

□ (1) Where, before the Tribunal has determined a case or application, there has been an error of procedure such as a failure to comply with a rule—

subject to these Rules, the error does not invalidate any step taken in the proceedings, unless the Tribunal so orders; and

the Tribunal may make any order, or take any other step, that it considers appropriate to remedy the error.

□ (2) In particular, any determination made in a case or application under these Rules shall be valid notwithstanding that the determination was not made or served, within the time period specified in these Rules.<sup>43</sup>

And Rule 22 makes this even clearer:

[Rule 22] Correction of orders and determinations

□ (1) The Tribunal may at any time amend an order, notice of decision or determination to correct a clerical error or other accidental slip or omission.

(2) Where an order, notice of decision or determination is amended under this rule, the Tribunal must serve an amended version on the party or parties on whom it served the original.<sup>44</sup>

What we have here is not a process of appeal to a higher authority, but an elaborate procedure akin to a motion for reconsideration in which a litigant who sees error in a decision can point out the error to the original panel, which may then correct itself. Although in this author’s view, there is a weakness in the MAT rules in that the process is not well described, the result is the same: an internal procedure to correct error.<sup>45</sup>

43. *Id.* § 21.

44. *Id.* § 22.

45. Nor is the process of appeal unique to religious arbitration. Part of a recent JAMS advertising campaign was aimed at dispelling “one of the biggest myths about arbitration,” namely, “that there is no avenue to appeal.” See JAMS, *Five Things You Didn’t Know about Arbitration*, A.B.A. J. (Apr. 29, 2014, 5:04 PM),

[http://www.abajournal.com/advertising/article/five\\_things\\_you\\_didnt\\_know\\_about\\_arbitration/](http://www.abajournal.com/advertising/article/five_things_you_didnt_know_about_arbitration/).

The advertisement explains that:

Perhaps one of the biggest myths about arbitration is that there is no avenue to appeal. This is not the case, and hasn’t been for many years. The International Institute for Conflict Prevention and Resolution (CPR) and JAMS have, for many years, offered appellate procedures that provide a formal structure for appeal to either a single arbitrator or tripartite panel. The American Arbitration Association has recently issued its own Optional Appellate Arbitration Rules. Keep in mind that not every arbitration is well suited to an appeal, but incorporation of an appellate process can lessen the risks and provide some peace of mind.

*Id.*; see AMERICAN ARBITRATION ASSOCIATION, OPTIONAL APPELLATE ARBITRATION RULES (2013), available at <http://images.go.adr.org/Web/AmericanArbitrationAssociation/%7B9e172798-c60f-4de0->

Not surprisingly, the grounds used by all three of these tribunals are essentially the grounds that would cause a reversal under the secular law of the land, with the exception of provision (e) of the rules of the BDA, a distinctive feature of the BDA, modeled on the rules of the Rabbinical Courts of Israel, who also have this form of review, and which will be explained below.

One could easily advance a further point: a litigant who chooses not to use the error correcting process provided by the arbitration panel and its rules could be said to have waived her right to allege that error in secular court under the well-known doctrine of exhaustion of administrative review. Although I am aware of no case law to make this point, it seems logical that just as one cannot appeal the decision of an administrative agency to court without first exhausting the review process internal to the agency, the same ought to be true of the appellate panel of an arbitration organization. As the classical law review article on this topic by Professor Raoul Berger noted in its opening sentences in 1939, “Administrative remedies must be exhausted before resort is had to the federal courts. The doctrine is as old as federal administrative law, and in the fifty years that have elapsed since the early decisions it has been expounded in a formidable mass of case law.”<sup>46</sup>

It is reasonable to rule that an arbitration agreement (contract) that directs the parties to obey the process of arbitration should function like an administrative agency: before running to court, an unhappy disputant must exhaust the internal process. Indian tribes (whose resemblance to insular religious communities requires much further examination) already do so in their arbitration agreements.<sup>47</sup> Indeed, it would be wise if religious arbitration panels were to make this clear by inserting the following additional sub-rule (as a new section 31c of the BDA rules and 41d of the ICC rules):

Exhaustion of Modification of Award Process under this Rule: Litigants must first exhaust the Modification of Award process found in this rule before contesting the confirmation of any award issued by this tribunal in

9ebc-438e54e78af8%7D\_AAA\_ICDR\_Optional\_Appellate\_Arbitration\_Rules.pdf. In fact, CPR first published an arbitration appeals procedure in 1999. See INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION, CPR ARBITRATION APPEAL PROCEDURE AND COMMENTARY 1, available at <http://www.cpradr.org/Portals/0/Resources/ADR%20Tools/Clauses%20&%20Rules/CPR%20Arbitration%20Appeal%20Procedure.pdf> (last visited Nov. 25, 2014).

46. Raoul Berger, *Exhaustion of Administrative Remedies*, 48 YALE L. J. 981, 981 (1939).

47. See, e.g., VIEJAS BAND OF KUMEYAAY INDIANS TRIBAL CODE, TORT LIABILITY ORDINANCE § 6.01 (Nov. 20, 2013), available at [http://viejas.com/sites/default/files/Tort\\_Liability.pdf](http://viejas.com/sites/default/files/Tort_Liability.pdf) (“Exhaustion of Tribal Dispute Process. Claimant must first exhaust the Viejas Band’s Tribal Dispute Process for resolving a Claim as provided in Sections 6 and 7. Claimant’s failure to do so or to strictly comply with any aspect of the Tribal Dispute Process shall result in Claimant’s loss of any right to pursue a Claim against the Viejas Band by arbitration or any other legal action.”).

any other forum or court. Either party's failure to do shall be deemed a waiver of the underlying claim that could have been the subject of a Modification of Award motion.

#### IV. THE IMPORTANCE OF LAW TO VARIOUS RELIGIOUS FAITHS

Why does only the BDA have an appeals ground that allows reversal based on a determination by the lead jurist that a panel's decision is contrary to religious law?<sup>48</sup> This indicates a desire of a religious arbitration organization to build an internally coherent legal system of its own by reversing decisions of panels that adjudicated its own religious law incorrectly,<sup>49</sup> and is reflective of different religious views to law. The Orthodox Jewish tradition is very, very (maybe another "very" is actually needed!) law driven and considers its court systems to be fundamentally governed by a set of rules that are part of the Jewish tradition, albeit sometimes tempered by doctrines of equity or even compassion, perhaps no different from any legal system.<sup>50</sup> Decisions can then be "wrong" in the sense that the chief judge or his designee determines that they are contrary to one provision or another of Jewish law.<sup>51</sup> Islamic law is similar to Jewish law in its law focus, but distinctly different in its approach to panel adjudication<sup>52</sup> in that the Islamic tradition is extremely case and controversy driven in its adjudication and favors allowing the individual decisor or decisors full autonomy to determine the law and equities of any given case, without any possible appeal.<sup>53</sup>

The contemporary Protestant Christian tradition does not see itself in that model. Law is not the central feature of their religious life and there is no independent legal code of Protestant Christian law, creating little precedent and thus no possibility of reversal on the grounds of Christian legal error.<sup>54</sup> Computational or descriptive error of course is possible, but since there is no legal code beyond that of secular law, there is no legal error either.

It is for this reason that factual or procedural error is the universal grounds for appeal in each of these organizations, but substantive error of

48. See BDA RULES, *supra* note 24, § 31a(e).

49. For a discussion of why such an appellate process is valid as a matter of secular law, see Lang v. Levi, 16 A.3d 980 (Md. Ct. Spec. App. 2011), where an appellate decision of the Beth Din of America that reversed the decision of the arbitrators as a matter of Jewish law is discussed.

50. See MENACHEM ELON, JEWISH LAW: HISTORY, SOURCES, PRINCIPLES 46–74 (Bernard Auerbach & Melvin J. Sykes trans., Jewish Publication Society 1994).

51. *Id.*

52. See *supra* text accompanying notes 39–40.

53. See Brody et al., *supra* note 3, at 51.

54. See generally 2 THE TEACHINGS OF MODERN CHRISTIANITY ON LAW, POLITICS & HUMAN NATURE (John Witte Jr. & Frank S. Alexander eds., 2006).

one's own religious law is present only in the Jewish tradition. What accounts for these different attitudes to systemic law between the Jewish, Christian, and Islamic traditions involves theology almost as much as anything else. More than twenty-five years ago, the late professor Robert Cover of Yale Law School noted a crucial difference between the rights-based approach of common law countries and the duties-based approach of Jewish law. He remarked:

Social movements in the United States organize around rights. When there is some urgently felt need to change the law or keep it in one way or another a "Rights" movement is started. Civil Rights, the right to life, welfare rights, etc. The premium that is to be put upon an entitlement is so coded. When we "take rights seriously" we understand them to be trumps in the legal game. In Jewish law, an entitlement without an obligation is a sad, almost pathetic thing.<sup>55</sup>

I suspect that while Professor Cover is speaking about "social movements," what he really means is contemporary Christian ethics with its emphasis on many values other than law. This is part of the contrast between the Jewish mindset of obligation and duty and the Christian mindset of rights and needs. The Christian (and particularly Protestant) approach simply does not view "laws," "rules," or "obligations" as the central framework upon which to consider complex issues of society. Many other virtues, including "love" and "mercy," successfully compete with "rules" and "law" for the heart and soul of society in a Christian community and serve as the central features of Christian jurisprudence.<sup>56</sup>

Indeed, many religious movements in the United States identify love as an overarching guiding principle. When there is some urgently felt need to change a doctrine or keep it in one way or another, the principle of "love" is frequently invoked to justify the modification of the law. When Christianity takes love seriously, love supersedes other values and creates some sort of entitlement to be whom one wants, as God's love will end in an accepting embrace.<sup>57</sup> But Jewish law embodies an approach where "an

55. Robert M. Cover, *Obligation: A Jewish Jurisprudence of the Social Order*, 5 J.L. & RELIGION 65, 67 (1987).

56. Professor Chaim Saiman of Villanova University School of Law has written insightfully about the sources of these fundamental differences and how they still resonate today in a number of ways. See Chaim Saiman, *Jesus' Legal Theory—A Rabbinic Reading*, 23 J.L. & RELIGION 97, 100–01 (2007–2008) (arguing that the polarized positions in many contemporary debates within American law—law versus equity, procedural versus substantive justice, rules versus standards, formalism versus instrumentalism, and textualism versus contextualism—can be seen as manifestations of a fundamental disagreement between the rabbinic Jewish understanding of law and Christian jurisprudence as represented in the Gospels).

57. Insofar as "love" is a term that implies unconditional acceptance, Christianity's belief in God's love for humanity leads to a sense of Christian entitlement. Because of his belief in God's "love,"

entitlement without an obligation is a sad, almost pathetic thing” as Professor Cover notes.<sup>58</sup> Law, and not love, remains the trump card in classical Jewish discourse about Jewish values.<sup>59</sup>

### V. DUAL-SYSTEM FLUENCY

The religious courts (of any flavor) functioning as arbitration panels that wish to take advantage of secular law’s endorsement and enforcement of private arbitration have to be sensitive to both religious and secular norms in order to get the cases right. More particularly, religious arbitration panels have to be right in three senses: religiously, legally, and culturally.<sup>60</sup> Being right religiously means that the panel is correctly applying the technical rules of the faith to the problem at hand. Being right legally means that the panel is producing a decision that the secular legal system will enforce.

Being right culturally is the hardest to understand, but just as important. When an arbitration panel loses—within its own religious community—the appearance of religious legitimacy (that deep sense of the community of the faithful that this religious court is part of that community), community members will refuse to participate in the workings of this panel. On the other hand, and equally so, if the secular legal community (which ultimately is the source of the religious panel’s coercive authority, through contract enforcement) senses that the religious tribunal cannot be

the Christian feels entitled to be what he wants to be and do what he wants to do, knowing all the while that in the end, God’s love for him will end in an accepting embrace.

58. Cover, *supra* note 55, at 67.

59. See, e.g., 1 SAMSON RAPHAEL HIRSCH, HOREB: A PHILOSOPHY OF JEWISH LAWS AND OBSERVANCES xxxvii (Dayan Dr I. Grunfeld trans., The Soncino Press 1962) (“[T]he operative word in Judaism is not ‘faith’ but ‘law’ . . . . The chief purpose of man on earth from the point of view of the Torah is not metaphysical speculation or abstract thought, but moral action.”).

60. The virtues of dual system fluency are not merely in adjudication, of course. In my conversation with Justice Menachem Elon of the Israeli Supreme Court, he observed many times that when he would lecture on Jewish law in medieval Europe he would explain that, centuries ago, Jews could engage in international commerce when no one else could, as they were dual system fluent. He would observe that a Polish Catholic who wanted to sell a product in Protestant Germany was not able to, because the seller and the buyer could not agree on a law, a language, or a court to resolve disputes should they arise. But the Jews, with their cross-border commonalities of a language (*Yiddish*), a law (Jewish law), and a legal system (the rabbinical courts), could serve as such middle men. Thus, a Polish Catholic could sell merchandise to a Polish Jew in accordance with Polish law, and the Jew could take the product to Germany and sell it to a German Jew in their shared language of *Yiddish*, in accordance with Jewish law and subject to adjudication in the shared legal system they both honor. The German Jew would then sell it to a Protestant German merchant in accordance with German law. Having a common language, legal system, and religious tribunals allows for the resolution of common disputes and builds community. Of course, the existence of a formal transnational mercantile law in pre-modern times is a subject of great historical dispute, but Justice Elon’s point reflects at least one of the perceived strengths of Jewish law in pre-modern times.



trusted to genuinely adhere to the procedural norms needed to guarantee enforcement,<sup>61</sup> then the secular courts will remove this arbitration panel from access to the commonwealth of justice, either on a case-by-case or wholesale basis.

But, in truth, there is a deeper problem present that is part of the dual system issue: it is quite possible that religious tribunals lose track of what is actually occurring on a commercial level. Sometimes in the Jewish law world, rabbinical courts are applying Jewish law faithfully *but the community is not*: they have already adopted the commercial law norms of the general society in which they live and work and have fully integrated secular law norms within the Jewish law. Thus, the religious arbitrators ought to be people who are comfortably enmeshed in the community and also follow the details of what is actually occurring commercially.<sup>62</sup>

The Jewish law story is probably typical of many faiths. In Jewish law: (1) any condition that is agreed upon with respect to monetary matters is valid under Jewish law;<sup>63</sup> and (2) customs established among merchants acquire Jewish law validity,<sup>64</sup> provided that the practices stipulated or commonly undertaken are not otherwise ritually prohibited by Jewish law.<sup>65</sup> These two principles are arguably interrelated; commercial customs are sometimes said to be binding because business people implicitly agree to abide by them.<sup>66</sup> The Code of Jewish Law (*Shulchan Aruch*) makes it clear that common commercial practices override many default Jewish law rules that would otherwise govern a transaction.<sup>67</sup> Moreover, these customs

61. Because they do not know how to conform to basic secular standards or because they choose not to for either religious reasons or, most commonly, they have no one who can explain to them how to conform to secular norms, since they do not think those norms are valuable religiously.

62. The Jewish tradition has a long and storied interaction with secular law and elaborate doctrines of incorporation, as this article notes. Islamic law is beginning that process, as its history is not as a diaspora religion residing in a secular environment. For more on this, see KATHLEEN M. MOORE, *THE UNFAMILIAR ABODE: ISLAMIC LAW IN THE UNITED STATES AND BRITAIN* (2010).

63. See generally ENCYCLOPAEDIA JUDAICA, *THE PRINCIPLES OF JEWISH LAW* 880–87 (Menachem Elon ed., 1975).

64. *Id.*

65. For example, Jewish law prohibits a debtor from offering a “pound of flesh” as collateral for a loan, and even if the borrower, the lender, and the general community of merchants accept such a practice, Jewish law would nonetheless reject such practice as invalid. See RABBI SHELOMOH YOSEF ZEVIN, *Mishpat Shylock Left Ha-Halakhah* [Shylock in Jewish Law], in LE-OR HA-HALAKHAH: BE’AYOT U-VERURIM 310 (2d ed. 1957) (Isr.).

66. The *Mishnah* pronounces the validity of commercial customs. It states:

What is the rule concerning one who hires workers and orders them to arrive at work early or to stay late? In a location where the custom is to not come early or stay late, the employer is not allowed to compel them [to do so] . . . . All such terms are governed by local custom.

THE OXFORD HANDBOOK OF JUDAISM AND ECONOMICS 373 (Adam Levine ed., Oxford Univ. Press 2010) (quoting BABYLONIAN TALMUD, *Bava Metzia* 83a).

67. RABBI YOSEF KARO, *Choshen Mispat* 331:1, in SHULCHAN ARUCH (Ketuvim ed. 1992) (Isr.). See also TALMUD YERUSHALMI: *Bava Metzia* 7:1(11b) (statement of Rav Hoshaya, *ha-minhag mevateil*

are valid even if the majority of the business people establishing them are not Jewish, simply because they are the norm. As Rabbi Moses Feinstein explains:

It is clear that these rules which depend on custom . . . need not be customs . . . established by Torah scholars or even by Jews. Even if these customs . . . were established by non-Jews, if the non-Jews are a majority of the inhabitants of the city, Jewish law incorporates the custom. It is as if the parties conditioned their agreement in accordance with the custom of the city.<sup>68</sup>

Most authorities rule that such customs are legally valid according to Jewish law even if they were established *because* secular law required the particular conduct.<sup>69</sup>

## VI. RESPECT FOR BOTH RELIGIOUS AND SECULAR LEGAL NORMS

A religious tribunal not only has to know the religious law and secular law, it has to be familiar with the street law, so as to know which legal code—or some hybrid—is actually being followed by people. Sometimes, truth be told, no legal code is being followed at all, just a commercial custom.

Allow two illustrative examples: Jewish law rules that when one steps into a supermarket and picks up a jar of spaghetti sauce to put it in one's cart and the jar slips and breaks, the one who broke it purchased it and has to pay for it.<sup>70</sup> On the other hand, the accepted practice in American law is clear that such is not the case and the customer has not yet purchased the

*et ha-halakhah* [Custom supersedes *halakhah*]); RABBI JOSEPH COLON, RESPONSA OF MAHARIK no. 102; RABBI SAMUEL DI MEDINA, RESPONSA OF MAHARASHDAM no. 108.

68. RABBI MOSES FEINSTEIN, *Hoshen Mishpat* 1:72, in IGGEROT MOSHE; see also RABBI YEHIEL MICHEL EPSTEIN, *Hoshen Mishpat* 73:20, in ARUKH HA-SHULHAN; see generally Rabbi Steven H. Resnick, *Bankruptcy: A Viable Halachic Option?*, 24 J. HALACHA & CONTEMP. SOC'Y 5, 10–14 (1992) (who discusses this issue at great length).

69. See, e.g., FEINSTEIN, *supra* note 68; RABBI ISAAC BLAU, PITHEI HOSHEN, DINEI HALVA'AH, ch. 2, ¶ 29 n.82; RABBI ISAAC AARON ETTINGER, MAHARYAH HA-LEVI 2:111; RABBI DAVID HAZZAN, NEDIV LEV no. 12; RABBI ELIYAHU HAZZAN, NEDIV LEV no. 13; RABBI ABRAHAM KAHANA-SHAPIRO, DVAR AVRAHAM 1:1; RABBI ISRAEL LANDAU, BEIT YISRAEL no. 172. For example, RABBI JOSEPH IGGERET, DIVREI YOSEF no. 21, states:

One cannot cast doubt upon the validity of this custom on the basis that it became established through a decree of the King that required people to so act. Since people always act this way, even though they do so only because of the King's decree, we still properly say that everyone who does business without specifying otherwise does business according to the custom.

There is no reason to assume that these customs would not be valid if international law gave rise to such practices. See Michael J. Broyde, *Public and Private International Law from the Perspective of Jewish Law*, in THE OXFORD HANDBOOK OF JUDAISM AND ECONOMICS 373 (Aaron Levine ed., Oxford Univ. Press 2010).

70. This is called *kinyan mishicha*. See KARO, *supra* note 67, at 198:1. It is possible that there is also an action here in tort for damages, but more importantly, a sale has occurred.

item.<sup>71</sup> In theory, were one to run a supermarket according to Jewish law, one could hang a sign that said, “If you’re Jewish and you break an item, you bought it as per Jewish law; if you’re a Gentile, the U.C.C. governs and it’s on the house.” But Jewish tradition recognized centuries ago that shopkeepers were not in fact acting this way: the common commercial practice was to defer to secular law norms on many matters of sale law, because Jews participated in an integrated economy and it was easier to adopt those secular norms.<sup>72</sup> Though there are occasional exceptions,<sup>73</sup> the Jewish tradition generally is to buy, sell, and otherwise conduct business according to the norms and practices of the secular marketplace.<sup>74</sup> If rabbinical courts of arbitration do not understand these street norms, decisions are not resolved “correctly.”

The real world contains even more complex cases, where determining what really is the law and the custom is far from clear. Consider for example the sale of marijuana in the United States. It is a federal crime to sell marijuana, medical or otherwise.<sup>75</sup> Per the Supremacy Clause of the U.S. Constitution, federal law supersedes state statutes, and states cannot abrogate federal law.<sup>76</sup> Yet, in several states, there are in fact medical marijuana dispensaries in which bona fide commercial transactions take place; in some states, such sales are “legal” even outside a pharmacy.<sup>77</sup> Are these sales actually legal or illegal as a matter of Jewish law? How should a rabbinic court consider a debt collection action for merchant credit extended to purchase marijuana? Is it a valid debt because Jewish law does enforce a contract of payment for an illegal action?<sup>78</sup> Is it invalid because secular law prohibits, through the clean hands doctrine, lawsuits for relief in illegal

71. See U.C.C. § 2-204 (1977), for an indication as to why this might be the case.

72. See *supra* notes 66 and 67.

73. For example, a rabbi’s contract of employment might be adjudicated purely in accordance with Jewish law.

74. This tradition is very old, and traces itself back to the Talmudic attempt to harmonize itself with Roman law on the issue of market overt. See BABYLONIAN TALMUD, *Bava Kama* 115a (E. W. Kirzner trans.), available at [http://halakhah.com/pdf/nezikin/Bava\\_Kama.pdf](http://halakhah.com/pdf/nezikin/Bava_Kama.pdf) (last visited Nov. 25, 2014); Michael Broyde & Stephen Resnicoff, *Jewish Law and Modern Business Structures: The Corporate Paradigm*, 43 WAYNE L. REV. 1685 (1997).

75. See Controlled Substance Act, 21 U.S.C. § 801–904 (1970).

76. U.S. CONST., art. VI, § 2 (“[T]he Laws of the United States . . . shall be the supreme Law of the Land . . .”).

77. See *Medical Cannabis in the United States*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Medical\\_cannabis\\_in\\_the\\_United\\_States](http://en.wikipedia.org/wiki/Medical_cannabis_in_the_United_States) (last modified Sept. 25, 2014, 7:57 PM) (particularly the entry under Colorado which notes that all recreational sales are legal in that state).

78. See KARO, *supra* note 67, at 225:5.

transactions?<sup>79</sup> Is it valid because state law validates the sale,<sup>80</sup> or valid because people on the street are actually doing this?<sup>81</sup> Or is it an illegal transaction since it violates federal law and the Jewish tradition validates such illegality through the “law of the land” doctrines that would point to federal law?<sup>82</sup> Is the Jewish law in Georgia then different from that in Colorado? One cannot answer these questions in the abstract.<sup>83</sup> The point of this example is not to discuss marijuana sales and Jewish law but to emphasize that to successfully arbitrate, one needs to know not only one’s own religious tradition and law, and secular law, but the facts on the ground that craft the commercial question that people are actually confronting.

Furthermore, arbitrators might make a decision that is not a completely wrong decision, but merely a decision that is “no longer correct,” if it was the right decision at a different time and place. Consider the *ketubah*—the premarital document traditional Jews sign prior to a wedding.<sup>84</sup> The Jewish tradition has required since time immemorial that couples marry with a prenuptial agreement called a *ketubah* whose text mandates how much the husband should pay the wife if he divorces her without cause.<sup>85</sup> Among European Jews, this contractual tradition did not continue much beyond the end of the first millennium of the Common Era. Through the efforts of the luminous leader of tenth-century European Jewry, Rabbenu Gershom, a decree<sup>86</sup> was enacted that moved Jewish law toward a covenantal model of

79. See *Gonzales v. Raich*, 545 U.S. 1, 29–33 (2005), which notes that such laws are void under the Supremacy Clause.

80. See, e.g., Vivian Cheng, Comment, *Medical Marijuana Dispensaries in Chapter 11 Bankruptcy*, 30 EMORY BANKR. DEV. J. 105 (2013) (arguing that state law legality is enough).

81. *Id.* at 128 (noting that Colorado “has more medical marijuana dispensaries than McDonalds [sic] and Starbucks combined” (footnote omitted)).

82. Since the Jewish law doctrine of “the law of the land” might mandate that Federal law be followed per the Supremacy Clause. Or maybe not, and the law of the land doctrine mandates that one follow the law of one’s home state only.

83. I, for example, think that Jewish law would enforce a merchant debt entered for the purchase of marijuana in a state where such a sale is legal, even as it violates Federal law, and hope to write a future article explaining the issues in such a case. This is grounded in the two-sided idea that Jewish law expects people to obey the law of the land as enforced and that the common commercial custom is to consider such transactions as valid in those states which permit it, notwithstanding the Supreme Court’s clear rule to the contrary in *Gonzales*, 545 U.S. at 29–33. Needless to say, the religious obligation to obey the law of the land is made much more complex when various portions of the law are intentionally left unenforced by secular authorities.

84. See Michael Broyde & Jonathan Reiss, *The Ketubah in America: Its Value in Dollars, its Significance in Halacha and its Enforceability in American Law*, 47 J. HALACHA AND CONTEMP. SOC. 101, 101 (2004).

85. As well as other things.

86. “The decree of Rabbenu Gershom was enacted under penalty of ban of excommunication (*herem*). The collective decrees of Rabbenu Gershom are thus known as *Herem deRabbenu Gershom*.” Michael J. Broyde, *New York’s Regulation of Jewish Marriage: Covenant, Contract or Statute?*, in MARRIAGE AND DIVORCE IN A MULTICULTURAL CONTEXT: MULTI-TIERED MARRIAGE AND THE BOUNDARIES OF CIVIL LAW AND RELIGION 142 n.16 (Joel A. Nichols ed., Cambridge Univ. Press 2012) (citation omitted).

marriage and away from a contract model.<sup>87</sup> Rabbenu Gershom's view was that it was necessary to restrict the rights of the husband and prohibit unilateral no-fault divorce by the husband.<sup>88</sup> Divorce was limited to cases of provable fault or mutual consent.<sup>89</sup> In only a few cases could the husband actually be forced to divorce his wife or the reverse, and in such cases, the *ketubah* did not govern, since its provisions do not apply to faulted divorce.<sup>90</sup>

In those places where the decrees of Rabbenu Gershom were implemented, the basis for Jewish marriage changed. While in Talmudic and Gaonic times, the parties pre-negotiated the amount the husband would have to pay his wife if he divorced her against her will—she could not prevent her husband from divorcing her, except by setting the payment level high enough that the husband was deterred from divorce by dint of its cost.<sup>91</sup> All this changed in light of the decrees of Rabbenu Gershom.<sup>92</sup> Couples would have to negotiate payments to facilitate divorce that one wanted more than the other, and the *ketubah* stopped being a contract.<sup>93</sup> Rabbenu Gershom's ban against divorcing a woman without her consent or without a showing of hard fault<sup>94</sup> called into question the value of the marriage contract itself. Simply put, the Talmudic rabbis instituted the *ketubah* payments to deter the husband from rashly divorcing a wife. But now, since the husband could not divorce his wife without her consent, there seemed to be no further need for the *ketubah*.<sup>95</sup> As Rabbi Moses Isserles (Rama), the leading codifier of European Jewry, wrote at the beginning of his discussion of the laws of the *ketubah*

87. MICHAEL J. BROYDE, MARRIAGE, DIVORCE, AND THE ABANDONED WIFE IN JEWISH LAW: A CONCEPTUAL UNDERSTANDING OF THE AGUNAH PROBLEMS IN AMERICA 21 (2001).

88. *Id.*

89. *Id.*

90. *Id.*

91. *See supra* note 84.

92. This insight is generally ascribed to the 12th century Tosafist Rabbenu Tam in his view of the repugnancy claim (Heb.: *mais alay*). *Id.* In fact, it flows logically from the view of Rabbenu Gershom, who not only had to prohibit polygamy in order to end coerced divorce, but even divorce for soft fault. *Id.*

93. Absent the prohibition on polygamy, the decree restricting the right to divorce would not work, as the husband who could not divorce would simply remarry and abandon his first wife. This prevented that conduct.

94. In which case, the value of the *ketubah* need not be paid as a penalty for misconduct imposed on the woman. What exactly is hard fault remains a matter of dispute, but it generally includes adultery, spouse beating, insanity, and frigidity. *See* RABBI YOSEF KARO, EVEN HAEZER 154, *in* SHULCHAN ARUCH (Version 22, Bar Ilan Responsa Project ed., 2013).

95. Thus, for example, *Shulchan Aruch (Even HaEzer)* states that “a man who rapes a woman . . . is obligated to marry her, so long as she . . . wish[es] to marry him, even if she is crippled or blind, and he is not permitted to divorce her forever, except with her consent, and thus he does not have to write her a *ketubah*.” *Id.* at 177:3. The logic seems clear. Since he cannot divorce her under any circumstances without her consent, the presence or absence of a *ketubah* seems to make no difference to her economic status or marital security. When they both want to get divorced, they will agree on financial terms independent of the *ketubah*, and until then, the *ketubah* sets no payment schedule. Should she insist that she only will consent to be divorced if he gives her \$1,000,000 in buffalo nickels, they either reach an agreement or stay married.

nearly 500 years ago: “Thus, nowadays, in our countries, where we do not divorce against the will of the wife because of the ban of Rabbenu Gershom . . . it is possible to be lenient and not write a *ketubah* at all [when getting married] . . . .”<sup>96</sup>

Of course, the *ketubah* did remain a fixture of Jewish weddings after the tenth century,<sup>97</sup> but it was transformed from a marriage contract that governed a contractual marriage to a ritual document whose transfer initiated a covenantal marriage. The *ketubah* held no economic or other value as a contract. Indeed, the contractual model of marriage ended for those Jews—all European Jews—who accepted the refinements of Rabbenu Gershom. Consider the observation of Rabbi Moses Feinstein, the leading American Jewish law authority of the last century, on this matter:

The value of the *ketubah* is not known to rabbis and decisors of Jewish law, or rabbinical court judges; indeed we have not examined this matter intensely as for all matters of divorce it has no practical ramifications, since it is impossible for the man to divorce against the will of the woman, [the economics of] divorce are dependent on who desires to be divorced . . . .<sup>98</sup>

Notwithstanding this fact, one still occasionally sees American courts actually looking at the *ketubah* as a valid Jewish marriage “contract” between the husband and wife and seeking to enforce its provisions.<sup>99</sup> To make this matter even more complex, the trend in modern rabbinical courts in Israel is that the *ketubah* is the basis for divorce settlements and is in fact enforced, in accordance with the older Talmudic custom and the prevailing norm of Sephardic Jews,<sup>100</sup> which is distinctly different from the modern American practice (which is frequently to use secular law concepts such as equitable distribution to reflect the actual intent of the parties as to how

96. *Id.* at 66:3.

97. Broyde & Reiss, *supra* note 84, at 118–19.

98. MOSES FEINSTEIN, IGGROT MOSHE, EVEN HAEZER 4:91. This *responsum* was written in 1980.

99. *See, e.g.*, *Victor v. Victor*, 866 P.2d 899, 901–02 (Ariz. 1993); *In Re Marriage of Goldman*, 554 N.E.2d 1016, 1021–23 (Ill. App. Ct. 1990) (holding that the words “in accordance with the law of Moses and Israel” appearing in the *ketubah* created a contractual obligation to give a Get); *Avitzur v. Avitzur*, 446 N.E.2d 136 (N.Y. 1983); *Hurwitz v. Hurwitz*, 216 A.D. 362, 364 (N.Y. App. Div. 1928); *In re Estate of White*, 356 N.Y.S.2d 208, 210 (N.Y. Sur. Ct., 1974). *But see* *Aflalo v. Aflalo*, 685 A.2d 523, 531 (N.J. Super. Ct. Ch. Div. 1996) (rejecting a similar argument); *Morris v. Morris* (1973), 42 D.L.R. 3d 550 (Can. Man. C.A.). For more on this, see RABBI YITZCHAK BREITOWITZ, BETWEEN CIVIL AND RELIGIOUS LAW: THE PLIGHT OF THE AGUNAH IN AMERICAN SOCIETY 50–55 (1993), and Helfand & Richman, *supra* note 20, which calls for courts to distinguish between contract and ceremony, a very astute observation.

100. *See* Michael Broyde & Jonathan Reiss, *Erkah shel Ha-Ketubah [The Value of the Ketubah]*, 25 TEHUMIN 180 (2005) (Isr.) (the editor of the journal noting the contrary practice in Israel in footnotes).

they wish to govern their divorce).<sup>101</sup> The complexity is clear: Jewish law courts sometimes point to secular law as the basis for Jewish divorce law, and secular courts sometimes point to Jewish law. Religious arbitration tribunals that are not sufficiently in tune with how religious law, secular law, and common custom actually work on the street can thus easily reach wrong decisions, undermining confidence in such tribunals' professionalism in the eyes of secular courts and their constituent religious communities.

But, you might ask—reasonably so—what is so bad about wrong decisions? They are nonetheless legally binding through secular arbitration law, so how do even “wrong” decisions detract from the legitimacy of religious arbitration? The answer is clear: a pattern of “wrong” outcomes undermines legitimacy because litigants simply will not repeatedly use any process that produces binding but wrong results, even if they sometimes win unjustly: When a businesswoman wins a case that she knows she should have lost, she says to herself, “Wow, thank goodness I won this time. But, I’m never going back to this panel, because in the next case that I should win, I very well might lose.” Arbitral decisions that are enforced, but thought of as wrong by the community, undermine the community’s sense that its judicial process is fair, reasonable, and useful—whether or not it is binding. Community members simply will not consistently use a process that is binding, but irrational.

#### VII. RELIANCE ON ARBITRATORS WITH BROAD DUAL-SYSTEM EXPERTISE

Partially to address these complexities, successful religious arbitral panels not only pick people who are experts in their own religious law and secular law, but experts in the particular matter at hand. Thus when dealing with building construction matters, they employ an expert in construction matters. And for dental malpractice, dentistry. Similarly, if a religious tribunal expects to hear matters of child custody, having a child psychologist present (either with the panel or on the panel) would seem helpful and increases the likelihood of secular affirmance.<sup>102</sup>

101. See, for example, the standard prenuptial agreement used in the Orthodox Jewish community, which gives two choices for how to divide assets in the case of divorce, each grounded in secular law. THE PRENUP, <http://theprenup.org> (last visited Nov. 25, 2014); see also BROYDE, *supra* note 87, at 127–36.

102. See, e.g., Michael J. Broyde, *What’s Love Got to Do with It?(Part I): Loving Children in Cases of Divorce or Death in the Jewish Tradition*, in THE BEST LOVE OF THE CHILD: BEING LOVED AND BEING TAUGHT TO LOVE AS THE FIRST HUMAN RIGHT 253, 261 (Timothy P. Jackson ed., 2011).

In recognition of this, Jewish law does not strictly require that arbitrators be rabbis but allows the parties to accept panel members who are qualified in other ways.<sup>103</sup> Because of this, and given that the Jewish tradition allows panels of three, one does not have to find a single individual who is a Jewish law scholar, an American law scholar, and a skilled dentist (though such experts undoubtedly exist); rather, the arbitration panel can be comprised of various subject-matter experts, and the three put together reach a resolution.

This complexity is part and parcel of the problem of religious arbitration of both commercial and family law matters: by default, the arbitration panel must include people who are fluent in more than one legal system and more than one cultural reality. American law does not require this level of expertise and does not have to. Because the dominant legal culture reasonably assumes that all adhere to its social cultural and legal norms, judges need not wonder if the parties actually intend to follow the common law of the land. Furthermore, consistent with its contractarian model, the FAA does not restrict arbitrators to experts and allows parties to pick three blind mice, more or less.<sup>104</sup>

But litigants who live in more than one cultural norm will not use a service that selects single system experts; only multi-system experts will succeed and only those able to determine which system provides the proper rules for the case at hand will actually be successful. So this is a balance not just of what arbitration law allows, but the reality of what sophisticated consumers in a narrow religious community will insist, which is that you need to appoint arbitrators who understand the very complex legal, social, and cultural mores of religious communities in America. Although some religious communities are totally separatist and look to secular law and culture for virtually nothing, most religious communities are not in that model. These communities are in a perpetually dynamic relationship with secular law and secular society, incorporating secular legal rules and ideas into their commercial and family law—and to do justice, the arbitrators chosen by this community ought to be engaged themselves with that dynamic interaction.<sup>105</sup>

103. See KARO, *supra* note 67, at 7:1–2.

104. Of course, neither the American nor the Jewish tradition actually allows mice to serve as arbitrators. See KARO, *supra* note 67, at 7, for a list of the minimal qualifications to be arbitrators.

105. Let me add that within the traditional Jewish community that I am part of, secular law norms have made greater inroads in the area of commercial law than in the area of family law. This is, I suspect, typically true of conservative religious faiths, but is not axiomatically correct. One could construct a sexually progressive but economically conservative religion as well. See, e.g., HERESY AND AUTHORITY IN MEDIEVAL EUROPE (Edward Peters ed., 1980) (this is a collection of primary sources, some on Catharism, arguing that this Christian sect was such a faith). This point is worthy of emphasis:



## VIII. COMMUNAL BENEFITS

Although this phenomenon is worthy of a paper of its own, religious leadership that resolves disputes between parties ultimately serves a role in shaping the community, no differently than judges in any society. What flows from this observation is less of a requirement than a consequence, but any discussion of what happens when judicial structure is introduced into religious community would be incomplete without it. Religious tribunals, once up and running, begin to assume roles in communal governance: this should seem clear to any who look at a history of the Catholic religious tribunals in the United States.<sup>106</sup> It is not enough for a faith—or even a legal system—to have rules; it has to have a judicial process (we call them arbitration panels in this article) that applies those rules to the reality it confronts.

When this system is respected by peer religious organizations within the same faith as producing religiously reliable and functionally realistic answers to the pressing questions they have, this adjudicative body becomes the location members of the religious communities go to when they have disputes, not just about buying and selling houses or marriage and divorce, but about territorial, jurisprudential, and even theological matters that coreligionists sometimes disagree about. Without this, even members of the same faith, who share an identical vision of the grander questions of community, life, and God, will sometimes fight about the mundanely parochial and sometimes even more important issues that can generate institutional conflict.

Dispute resolution for the faithful will resolve not only mundane disputes but also communal disputes. Within the Jewish tradition, this has clearly happened, and it is a consequence of building structure: religious institutions prefer law to politics as a method of dispute resolution, and if there is a court that shares their religious values, they will use it. This will build a tighter cooperation among the community of the faithful, as the organs of justice will share their religious values. Over time, this gives the community increased structure, stability, and cohesiveness. And I expect this to be true not only of particular Jewish law courts, but of a wide variety

the ideas presented in this essay are useful not only for conservative religions but liberal ones. The question of how to structure one's community when secular law is not to the liking of one's faith is a universal one. See, e.g., *Posik v. Layton*, 695 So. 2d 759 (Fla. Dist. Ct. App. 1997), *reh'g denied*, 699 So. 2d 1374 (Fla. 1997).

106. Indeed, this is much more part of the mission of the canon law courts than any other mission. See, e.g., *Code of Canon Law*, VATICAN, [http://www.vatican.va/archive/ENG1104/\\_INDEX.HTM](http://www.vatican.va/archive/ENG1104/_INDEX.HTM) (last visited Nov. 25, 2014).

of religious and values-oriented forums for dispute resolution. The Catholic model in America—which is uniquely hierarchical and thus does not serve as a general precedent for most American faiths—can be built by this process but most likely will not.<sup>107</sup>

### IX. LONG TERM CONSEQUENCES

The formation of religious communities in America is, I would propose, dramatically assisted by the modern rise of contract law as the central touchstone of dispute resolution. A secular legal system that functions based on its sacrament—not only marriage sacrament, but sacrament in all areas of the law—looks at people and communities with alternative legal rules and denies them the right to be adjudicated by any legal rules other than the law of the state, because its legal rules are sacred, so that even if the parties wish to apply them, the legal system refuses to do so.<sup>108</sup>

Consider for example the view endorsed by Justice Benjamin Cardozo a century ago while he was a member of the New York Court of Appeals. Cardozo noted:

In each case, however, the fundamental purpose of the contract [of arbitration] is the same—to submit the rights and wrongs of litigants to the arbitrament of foreign judges to the exclusion of our own. Whether such a contract is always invalid where the tribunal is a foreign court we do not need to determine. There may conceivably be exceptional circumstances where resort to be courts of another state is so obviously convenient and reasonable as to justify our own courts in yielding to the agreement of the parties and declining jurisdiction. . . . If jurisdiction is to be ousted by contract, we must submit to the failure of justice that may result from these and like causes. It is true that some judges have expressed the belief that parties ought to be free to contract about such

107. Since the Catholic model has but one mother church and expects full obedience to it by all of its subsidiaries. This model does not fit the religious ideology of most American faiths, in that the Catholic Church is so broadly interconnected as a single whole church, whereas almost all other American faith groups expect and grant their local communities much more religious, legal, and ideological autonomy.

108. 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 not proper to discriminate. 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 construct 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 HARV. L. REV. 877 (1994) (discussing societal tolerance for racial steering in personal ads).

matters as they please. In this state the law has long been settled to the contrary. *The jurisdiction of our courts is established by law, and is not to be diminished, any more than it is to be increased, by the convention of the parties.*<sup>109</sup>

The facts of the case involved a contract with both a choice of law to an alternative legal system and a choice of forum to private arbitration.<sup>110</sup> Neither choice of law nor choice of forum arbitration is permitted in this view.

Notwithstanding Cardozo's venerable view, this is not the trend in modern American society or law, where both choice of law and choice of forum (including private arbitration) are all considered proper. For example, if there is one characteristic of the Uniform Commercial Code that is central, it is that almost any of its provisions may be modified by agreement of the parties.<sup>111</sup> Our American legal system is moving faster and faster into contract as the foundational doctrine.

Under a system that takes contract as a foundational doctrine, religious communities with well-written contracts will grow, thrive, and prosper precisely because as a society we can no longer agree on a single definition for what were once commonly held legal sacraments. For example, if traditionalists and progressives are to reach a workable détente 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

109. *Meacham v. Jamestown, J. & C. R. Co.*, 105 N.E. 653, 655 (N.Y. 1914) (Cardozo, J., concurring) (emphasis added) (internal citation omitted).

110. The contract stated:

In order to prevent all disputes and misunderstandings between them in relation to any of the stipulations contained in this agreement, or their performance by either of said parties, it is mutually understood and agreed that the said chief engineer shall be and hereby is made arbitrator to decide all matters in dispute arising or growing out of this contract between them, and the decision of said chief engineer on any point or matter touching this contract shall be final and conclusive between the parties hereto, and each and every of said parties hereby waives all right of action, suit or suits or other remedy in law or otherwise under this contract or arising out of the same to enforce any claim except as the same shall have been determined by said arbitrator.

*Id.* at 347.

111. 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 (1977).

model is merely the default model.<sup>112</sup> 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.<sup>113</sup> 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 than 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 has to be limitations: operating within the context of a secular legal system means that arbitration panels that enforce religious-legal norms must accept that religious principles will not excuse religious parties from criminal and other forms of liability under the relevant secular legal system.<sup>114</sup> As the wise Professor John Witte, Jr. notes, "Even the most devout religious believer has no claim to exemptions from criminal laws against activities like polygamy, child marriage, female genital mutilation, or corporal discipline of wives, even if their . . . particular religious community commands it."<sup>115</sup> In order to garner the respect of the secular justice system by genuinely respecting secular

112. 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." MARION BOYD, DISPUTE RESOLUTION IN FAMILY LAW: PROTECTING CHOICE, PROMOTING INCLUSION 133–42 (2004), available at

<http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/fullreport.pdf>. 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).

113. 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 86, at 138.

114. 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 nation-wide 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.

115. John Witte, Jr., *The Future of Muslim Family Law in Western Democracies*, in *SHARIA IN THE WEST?* 279, 286 (Rex Ahdar & Nicholas Aroney eds., 2011), available at <https://divinity.uchicago.edu/sites/default/files/imce/pdfs/webforum/102011/Witte%20Final.pdf>.

law, arbitration institutions must educate their communities on the necessity of adhering to general legal norms.<sup>116</sup>

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, as well. 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.<sup>117</sup> Private arbitration panels are bound by this limitation, and rulings that violate the automatic stay will simply be disregarded.<sup>118</sup>

But this will be the exception and not the rule. 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.

One final observation is worth noting. All of this need not be so: the law need not be this friendly to religious groups. Some secular legal regimes leave no breathing room for crafting private agreements that go against secular norms. One province in Canada has already legislatively prohibited private adjudication in family law matters<sup>119</sup> and France, following the principles of *laïcité* (the secular legal norms in France) is throttling communal religious values.<sup>120</sup> It is worth recognizing that it is possible to suffocate communal religious liberty without denying personal religious freedom (which no democracy can do). 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

116. 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.

117. See 11 U.S.C. § 362 (2010).

118. See Michael A Helfand, *Fighting for the Debtor's Soul: Regulating Religious Commercial Conduct*, 19 GEO. MASON L. REV. 157, 187–88 (2011).

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

120. See *generally Knowledge Resources*, GEORGETOWN UNIV.: BERKELEY CTR. FOR RELIGION, PEACE & WORLD AFFAIRS, <http://berkeleycenter.georgetown.edu/resources/countries/france> (last visited Nov. 25, 2014).

longer function. Of course, France does not suffocate individual religious liberty, but in insisting that every dispute between two or more people be resolved without reference to the religious rules that the parties wished to govern them, this religious community is vastly diminished.

On the other hand, one can have a very secular state with very vibrant religious communities existing side by side, 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 such an example.<sup>121</sup> Liberal and secular western democracy is compatible with religious community.

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, and 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 is increasingly open to the idea that people can structure their relationships around a contract, rather than around sacrament. And the default model doesn't need to be the only model—customization can be allowed and even expected.

## CONCLUSION

It is very important to appreciate the unique benefits conferred to religious freedoms in America through the Federal Arbitration Act, which provides protection of private dispute resolution through arbitration by religious communities. This protection provides a viable option for maintaining religious communities that wish to organize themselves around values they no longer share with an increasingly tolerant and neutral secular law.<sup>122</sup>

121. In that, for example, New York has same sex marriage and is widely considered one of the most liberal states of the union, and yet has the most vibrant Orthodox Jewish and Catholic communities. Furthermore, as noted in Broyde, *supra* note 86, at 161–62, New York uniquely accommodates Jewish and Islamic marriage law with special statutory provisions.

122. Although beyond the scope of this article, there is good reason to suspect that a state that sought to prohibit religious arbitration, but would permit that same arbitration by any non-state law so long as such law is not religious, would violate the core holding of *Good News Club v. Milford Central School*, 533 U.S. 98, 109 (2001). The question of whether religious arbitration of secular matters could and should be prohibited by statute is discussed in Walter, *supra* note 6, at 557, and he concludes that such arbitration should be prohibited. Putting aside the religious discrimination problem of the government allowing all arbitration other than religious arbitration, I think the policy concerns that he worries about—that religious arbitration curtails the right of people to change their faith (the “exit” problem)—strikes me as not important when religious arbitration is viewed as just another form of contract. Of course, by contract, one can and does abandon deeply held constitutional rights and loses one's right to change one's mind. A person by contract can forsake his right to work as a journalist (a First Amendment right), to bear arms (a Second Amendment right), the right to jury trial (a Seventh Amendment

Traditional communities ought to recognize that in matters on which they hold cultural values that are different from the majority of the polity, they can—and if they are to stay viable, sometimes must—opt out of society’s legal structure to avoid being suffocated. Private arrangement of family matters can be a viable option for those who, for example, do not believe in unilateral no-fault divorce, do not believe in divorce, or do not believe in marriage. This is true whether we are talking about Jewish courts, Sharia courts, Evangelical Christian courts, Canon law courts, or Hindu tribunals. Whatever the differences, if religious communities are to avoid suffocating in this secular atmosphere, it is because the secular society recognizes the right of parties to contract out of the general law. Those communities wise enough to take advantage of the six principles necessary to successfully opt out, implement them, and build religious arbitration tribunals, will flourish. These communities will be gloriously different, each in its own way, each sharing its religious values in a grand whole, and each exercising the freedom to maintain its own set of beliefs and practices within the majestic mosaic of diverse communities that make up our United States.

right), and many other rights. Free exercise rights are no more jeopardized by enforcing contracts for religious arbitration than contractual waiver of a right to trial by jury endangers jury trial rights.