SJHSS 2018 DOI | 10.26613/sjhss/2.1.27

The Rise of Religious Arbitration in America: American Arbitration Law, Jewish *Batai Din*, Protestant Peacemaker Panels, and Islamic Sharia Court Reviewed

Michael J. Broyde

INTRODUCTION

This article hopes to survey the contemporary landscape of religious arbitration in the United States by exploring how different religious communities utilize arbitration; how these processes differ from each other; and where various faith-based dispute resolution models fall on the broader Alternative Dispute Resolution spectrum. In particular, this article will explore developments in Jewish, Christian, and Islamic arbitration in America over the last several decades and discuss what internal concerns and external stimuli have spurred these changes. It will focus more on the Jewish Tradition than any other as such is the focus of the readership. In this context, this article will also reflect on why American Catholics have not moved in the same direction as some other religious groups who have been eager to embrace the use of religious arbitration as a means of enabling their adherents to resolve ordinary secular conflicts in accordance with religious norms and values. Finally, this article will discuss the historical limitations of utilizing religious arbitration in many faiths and how some have evolved to embrace the practice.

Although controversial,[1] religious arbitration has grown immensely since its inception. In fact, almost every religion in the United States has its own system for settling disputes which functions as an alternative to the civil courts. While these vary in detail, with different religious groups utilizing different methods of ADR and some developing more intricate, sophisticated. and successful systems than others, they all share the same goal: creating a system for settling disputes outside the realm of the secular court system.

A. CUSTOMIZING LAW: THE DEVELOPMENT OF RELIGIOUS ARBITRATION

Law is defined by Black's Law Dictionary as "[t]he aggregate of legislation, judicial precedents, and accepted legal principles; the body of authoritative grounds of judicial and administrative action; esp., the body of rules, standards, and principles that the courts of a particular jurisdiction apply in deciding controversies brought before them."[2] This definition, among other things, highlights the importance many practitioners of the law place on the so-called "rule of law," or law as a rules-based system. For some time, law was viewed solely as a vehicle for setting standards of accepted behavior and managing said behavior. However, as the law has developed, it has turned into something different altogether—a structure that allows parties to set and meet their own expectations. These expectations could be those of employment for a certain period of time or for the purchase of a particular piece of property. No matter what the expectation is, however, the law has morphed into a vehicle that enables individuals to drive their dealings.

At one point in US history, the only way parties could settle legal disputes was through the court system. Historically, in the common

law, for various reasons, no arbitration—or anything similar—existed. Courts did not trust arbitrators to handle disputes in a manner consistent with the law. Moreover, they believed that arbitration interfered with the right of individuals to petition the court system for redress of their grievances. In the early twentieth century, however, the courts came to accept the idea of parties' right to agree to settle disputes by arbitration. Arbitration at that point, however, still bore little resemblance to what it has become today. Parties had no ability to add choice-of-law provisions to their arbitration agreements, and were thus governed by federal, state and local rules. Once this changed, however, and choice-of-law provisions were allowed, arbitration became a different tool altogether. Individuals and organizations could craft the rules by which they wanted their disputes to be governed. This led them to further embrace arbitration.

The better developed the system of arbitration became in the United States, the more comfortable judges, practitioners and, most importantly, parties were with utilizing it. While the rise of arbitration in general in the United States is the focus of my recent book,[3] it is helpful to give a short summary here in order to situate the development of religious arbitration in particular.

B. A BRIEF HISTORY OF ARBITRATION'S RISE IN THE UNITED STATES

For a long time, judges and courts in the United States were viewed as experts in everything. Almost any dispute could be settled in a courtroom. In fact, courts were viewed for some time as the only arena where legal disputes between parties *could* be settled. Over time, however, the ability of courts to settle disputes efficiently and effectively came into question. Courts got backed up and volumes of codified law piled up. Litigation progressively became more expensive and draconian. Parties sought viable alternatives. Out of this frustration, ADR—and arbitration in particular—was born.

Arbitration is defined as "[a] method of dispute resolution involving one or more neutral third parties who are usually agreed to by the disputing parties and whose decision is binding."[4] While arbitration is now widely accepted by the US legal system, this was not always the case. In its infancy, arbitration was shunned as an inferior method of settling disputes. Initially, in fact, the practice was entirely banned.

Judges shunned arbitration for a number of reasons. The most often cited factors were that arbitrators lack as robust an understanding of the law as judges, the lack of adequate judicial oversight of the arbitration process, and the lack of a binding effect. As time went on, however, and the body of American contract law developed, courts became satisfied that individuals could contract with one another to make their future disputes subject to arbitration. However, this freedom of contract theory only went so far.

Those who decided on arbitration were forced to remain subject to American law, thus moving the dispute out of the courtroom while maintaining the somewhat fixed variable of the US rule of law. This method of regulating individual agreements, however, came into question as individuals were progressively given more freedom to craft their agreements to meet their individual needs and expectations. Eventually, the rule requiring arbitrations to apply American law gave way to one giving individual contracting parties the ability to choose the applicable law. While there have certainly been bumps on the road to arbitration, it has weathered the storms and gained a significant amount of respect from almost the entire legal community, including judges whose dockets have become quite a bit more manageable because of the practice.

In short, arbitration allows parties to agree to settle disputes which may arise from their dealing outside of the traditional court system and beyond the realm of the traditional rule of law, opting instead for a venue and law they

find mutually agreeable. Therefore, the rule of law, at least in the customizable realm of arbitration, has become less of a fixed structure and more adaptive to individual needs and desires. This development has shifted the law from being viewed as a science from which a singular correct answer can be found to a search for more contextual answers dictated by the parties' agreement to arbitrate. Stemming almost entirely from the contract setting, this newly discovered malleability of the law at most highlighted the fact that courts are not experts in all things and often do a poor job of settling disputes to the satisfaction of either—if any—of the parties, and at least justified allowing another avenue for parties to take in settling their disputes.

By analogy, it is helpful to think of arbitration and litigation as separate houses, with each arbitral specialization to be a separate room within the arbitration house. At first, religious groups stood by and watched the construction of what would become the house of arbitration. Labor unions were one of the first groups to move in, quickly embracing it and testing its structural soundness. They soon found that arbitration was an excellent outlet for resolving disputes governed by collective bargaining agreements. Other groups then started occupying other parts of the house, each decorating its own room. As the number of individuals embracing arbitration increased, so did the number of arbitrators who focused solely on one type of dispute or one type of arbitrating party.

This specialization added new strength and beauty to the house of arbitration and resolved an initial discrepancy between it and the litigation house—the latter of which initially had a vast knowledge and understanding of the law and, in turn, how disputes should be decided. By contrast, arbitrators were at first asked to balance the law on one hand and the wishes of the disputing parties on the other. Early critics of arbitration cited this as one of the reasons litigation was superior. But as arbitrators specialized, groups of prospective arbitral parties were able to build de facto court systems within which to settle their disputes, wherein they could have their legal issues decided, but with a slant toward their own internal policy preferences. As the class of arbitrable disputes grew, so did the groups who embraced the practice. Merchants, employers, and banks all began implementing it in some form or another.

Meanwhile, religious groups saw the litigation house tossing out the furniture of the values and beliefs that have, for a long time, gone hand-in-hand with religion. Too skeptical to move into arbitration at first, religious groups bided their time. In addition to the general concerns about arbitration's durability—especially, its ability to stand up to the wrecking balls of judicial review and expectations for arbitration awards to be consistent with state and federal law—religion was faced with the very real concern that church and state should remain separate. Cohabitation of legal and religious principles in arbitration, in the eyes of many, set up religious arbitration to be judicially walled-off—courts were always wary of quasi-judicial bodies, but were prone to be especially so when religious groups were involved.

C. THE BIRTH OF RELIGIOUS ARBITRATION

While there are arguments for and against arbitration—particularly the fear that certain parties invoke it in a coercive manner—the practice is continuing to grow and will only be hampered inasmuch as certain government regulatory bodies allow it to be. To a great extent, religious groups entered the arbitration universe later than others, mostly due to a lack of comfort with the skills needed to produce binding arbitration. Now, however, religious groups step over the threshold regularly.

The fact that religious groups settle disputes through quasi-arbitral bodies is nothing new. The Catholic Church has long utilized some manner of arbitration to settle matters of canon law. However, this method of dispute resolution has not been a matter of major

concern because Catholic religious courts do not typically come in direct conflict with American law or draw judicial challenges from American courts for one very important reason: While there is a system of Catholic religious law, the Church distinguishes between the canon law and secular law jurisdictions. Canon law never moved into what would now be called arbitration because modern arbitration in the United States handles matters that fall under the scope of ordinary secular law—matters such as private property disputes, employer-employee conflicts, regular commercial and contractual matters, and so on. Canon law, by contrast, was historically concerned with the internal governance of the church and its functionaries, as well as sacerdotal and ritual matters. Ordinary property disputes, employment matters, or other decidedly secular contract disputes between Catholic parishioners simply did not fall within the scope of canon law or church court jurisdictions, and so from a religious perspective there was no need to resolve such issues based on religious principles. With respect to those kinds of secular disputes, at least, good Catholics could litigate cases in state courts without concern, rendering unto Caesar what is Caesars.

Various Protestant groups have until recently also largely avoided the clash between faith-based dispute resolution and secular law. In the case of Protestant denominations, however, the tension was not diffused by the kind of strict jurisdictional separation between ecclesiastical and secular matters and law embraced by Catholicism, but by the confluence of two other factors. First, Protestantism in general lacks the kinds of nomos-centrism characteristic of some other faiths like Judaism, Islam, and to some extent Catholicism. Consequently, the notion that disputes between Protestant practitioners had to be resolved in accordance with religious norms rather than secular laws was not particularly pronounced. Indeed, there was not much "Protestant law" to speak of that might provide an alternative contrasting system of behavioral and relational norms that Protestants might be expected to utilize in structuring their ordinary material relations. Moreover, for much of American history, Protestants have made up a substantial majority of the population, and Protestant values and sensibilities have featured prominently in American law and policy. As a result, even deeply religious Protestant Americans often found little issue in adjudicating their litigious disputes in state and federal courts. There was no relevant body of specific religious precepts that had to be observed, and the American law results issuing from traditional courts largely reflected their religious sensibilities in any case.

But religious arbitration has taken on a much more sweeping public significance recently because of shifts in American social and legal values. The last half of the twentieth century saw the erosion of cultural foundations built on religious values and their progressive replacement with more secular ones. Religious groups were keenly aware of the chasm that had developed between cultural values held by the general US population and those held by them and their parishioners. They began to build on the inroads made by the Catholic Church years earlier, slowly but surely wading deeper into the waters to see what limits courts would place on their use of arbitration. Judaism pioneered and perfected this practice, developing its own intricate system for settling disputes arising between individual members of the religion, even those that went beyond the pale of religious issues and into the realm of contract and family law. This went relatively unnoticed, however, because even though it has the largest number of followers of any non-Christian religion, as of 2007, only 1.9% of the US population identified as Jewish.[5] The attention drawn by religious arbitration as a viable option for settling religious disputes would only increase with time, as the cultural foundations of the country strayed even further from Judeo-Christian values.

For some time, law in the United States was in very close alignment with Judeo-Christian

values on many issues (race being the huge area of tension). The reason for this was obvious: most people in the United States identify themselves as followers of a Judeo-Christian religion. As of 2007, 80.1% of the population identified as such.[6] Although this number fell in 2014 to 72.5%, Judeo-Christians still make up a staggering majority of the population.[7] Even with this majority, however, what is not doubted is that the US population is progressively becoming less religious. Those individuals identifying as "Unaffiliated" with a religion—including Atheists, Agnostics, and those identifying as "Nothing in Particular"—have seen a notable increase in the past decade-and-a-half, going from 16.1% of the population to 22.8%, a 6.7% increase in just seven years.[8] This group, in turn, has had the largest gains over the seven-year period from 2007 to 2014.[9] As the laws and principles of Americans have continued to morph in a more secular direction, these religious groups—especially Evangelical and mainline Protestant communities—whose religious beliefs were once perfectly reflected in the law have realized they are now falling into the minority. They have essentially lost control of the law. This is evident in the decision to legalize same-sex marriage in the United States. Attempting to re-take control of the law, and equipped with the history of Judaism's success with arbitration, newly-minority religious groups started building arbitral bodies of their own. More than anything, these groups have lost the ability to participate in—and in most cases actually dictate—family law, the area of the law where cultural values are manifested most directly.

As secular law loses its Judeo-Christian roots, a trend that is likely to continue in the coming years, the people still rooted in Judeo-Christian values and traditions will continue to find other means for settling their disputes outside of the court system, whose values increasingly differ markedly from their own. Even non-Judeo-Christian religious groups, most notably Muslims, have followed suit in beginning to build their own arbitral bodies. They do so because arbitration gives them an opportunity to decide matters through a lens that considers both the secular and the religious laws to which they are subject.

The movement by religious groups to create their own internal arbitral bodies proved extremely controversial. Perhaps the skepticism toward religious arbitration stems from the secretive nature of certain churches, our own general lack of understanding of different religions, or even the deeply engrained American principle that church and state should remain separate and that allowing "religious courts" to exist pushes parties into an inherently unconstitutional forum. Regardless of why religious arbitration is such a controversial topic, religious groups have become arbitration specialists. In turn, the arbitral bodies developed by religious groups are intricately built and likely here to stay, at least for the foreseeable future.

D. VARIANTS OF RELIGIOUS ARBITRATION IN PRACTICE

Religious arbitration is a "process in which arbitrators apply religious principles to resolve disputes."[10] While generally true, this simplistic definition does not do justice to what has become a widely implemented system of dispute resolution in the United States. In fact, even the definition of arbitration fails to fully summarize religious arbitration. In a sense, religious arbitration can run the gamut of dispute resolution practices. Some religious arbitral bodies utilize relaxed methods of ADR such as negotiation, conciliation, and mediation, while others have implemented very strict, litigation-like courts and procedures.

The advent of religious arbitration comes at an extremely interesting time in the United States. Many religiously observant Americans view the secularization of American laws and policies as repugnant to their own beliefs and principles and have thus become further entrenched in their traditional beliefs. They

also favor having their religious beliefs govern their everyday lives in all respects, including the way in which they settle their disputes. Religious arbitration presents a perfect outlet for this, by allowing religious individuals to agree to arbitrate all manner of basically secular disputes with their co-religionists in arbitral forums established and governed by their religion.[11]

It can be a bit difficult to understand why it is important for religious individuals to be governed by the law of their religion.

To illustrate the *why* of religious arbitration and the problems that why can cause, let us consider a very hard and very recent case of religious arbitration that was enjoined by a bankruptcy court as violative of the automatic stay, a provision designed to force all parties to adhere to bankruptcy rules:[12] *In Re: Congregation Birchos Yosef*.[13] In this case, an Orthodox Jewish creditor sought to have an Orthodox Jewish debtor or his proxy summoned to an Orthodox Jewish religious tribunal to adjudicate the propriety (and even perhaps the validity) of the debtor's bankruptcy filing as a matter of Jewish law. In the absence of the debtor's agreeing to appear before the rabbinical court for such adjudication, the creditor wished the rabbinical court to issue a writ of contempt against the debtor as being in violation of Jewish law. The debtor filed a motion in bankruptcy court seeking to enjoin the creditor and the rabbinical court in question from considering whether bankruptcy is a valid option under Jewish law, whether the creditor owed the debtor money, and whether the rabbinical court may issue a contempt citation under Jewish law.

The bankruptcy court held that the automatic stay applies to the proceedings of the rabbinical court no differently than to any other court. It stated simply:

> The automatic stay is clearly neutral on its face and is also neutral and generally applicable, as far as religious exercise is concerned, in practice. It applies to anyone who falls within the ambit of 11 U.S.C. § 362(a) (here, to anyone who commences a proceeding or takes another action covered by either 11 U.S.C. § 362(a)(1) or (3)). It prohibits the invocation of all covered proceedings, whether in state or federal court, a foreign court, **or a *beis din***. (Bold added for emphasis).[14]

It is worth understanding what was *not* under consideration in this case. All parties agreed to the following:

- The rabbinical court cannot issue a legally binding order, even with an arbitration agreement signed by both parties, if it contradicts the directive of the bankruptcy court.
- The debtor's assets cannot be used to repay the debt upon the directive of the rabbinical court, since the assets are under the control of the bankruptcy court.

By noting that the automatic stay applies directly to the rabbinical court in question, the bankruptcy court not only precluded the creditor and debtor from submitting to rabbinic court arbitration (which is an easy matter to preclude under bankruptcy law) but also used its authority to stay the rabbinical court's religious pronouncements concerning the correctness under Jewish law of the debtor's decision to file bankruptcy to begin with. Even if it could not have reached any meaningful decision on the merits of the case itself, the rabbinical court here may have wished to issue the *seruv*, or writ of contempt, against the debtor in order to signal to both the parties and the wider Jewish community that the debtor had violated Jewish religious law by filing for bankruptcy in order to avoid paying his debts.[15] While such religious pronouncements lack any real legal authority or implications, they are important from a religious perspective. The bankruptcy court, however

made it clear that such religious pronouncements must cease.[16]

This type of case is symptomatic of all four problems that a secular courts and society can encounter by allowing religious arbitration. Sometimes, religious systems impede—from the secular view—the reasonable and orderly operation of the justice system by operating a religious arbitration system that perceives itself as morally and legally free from the constraints of the law. In particular, four problems arise and these types of cases highlight all four of them.

First, a religious system could be attempting to govern disputes between parties that did not actually consent to the religious legal systems authority. This is particularly present sometime in bankruptcy since (when a debtor is insolvent) money to pay creditors is very limited and directions to pay Peter always are about how much is Paul also entitled to. While this is a slippery slope sometimes (and money is frequently limited to some extent), bankruptcy is particularly the case that adjudication of any part of the estate impacts on all of the estate.

Second, a religious system could be attempting to adjudicate a case where the secular legal authorities are expecting exclusive jurisdiction by the secular courts. Criminal law is such a case and so is bankruptcy. In the commercial area, bankruptcy is almost uniquely so. Almost by definition, all attempts at arbitration violate societies' legal sense that certain types of cases can and should only be adjudicated by a court of the government. Of course, religious communities might very well object to that policy, based on their faith's ideas of proper dispute resolution.[17]

Third, a religious legal system could be making an ecclesiastical point—that one party is a sinner—even as the underlining claim is financial and ought to be resolved in secular court. This is a very hard issue to completely wrap one's hand around, but ecclesiastical pronouncements in commercial matters—such as debtor and creditor rights—are easily understood (or misunderstood) by the courts to be attempts to coerce one of the parties out of their rights to use the secular court system and to generate a false consent to arbitration by labeling certain lawful conduct to be sinful.

Finally, a religious legal system could be attempting to impose a choice of law rule on a dispute in which all the parties did not wish or expect religious law to govern. This is related to, but not identical to first objection, since a party does have the secular right to file bankruptcy even if they had a "religious law" choice of law clause even if the religious law has no provisions for bankruptcy. But such a choice of law provision—particularly when used in some commercial contracts and not others—gives rise to the possibility that this adjudication is prejudicial to some of the creditors in a way that is inconsistent with secular law.

On the other hand, this case is so important to religious ADR because people in religious communities do not wish to be considered "sinners" by their communities. Allowing a functioning alternative religious court system creates the distinct possibility that religious communities will seek even greater autonomy from the general norms of secular law and life —in this case, those of bankruptcy law. So, as one considers religious arbitration abstractly, one must consider both its impact in any given case as well as the systemic impact of an alternative legal system—almost a shadow law—on society as a whole. Even when lacking enforceable authority, the rabbinic court in this case had religious authority, and that is what it was enjoined against exercising.

The next section will outline the various arbitral bodies and procedures utilized by three of the different religions of the Abrahamic faith—Judaism, Christianity and Islam—and as a foreshadowing of much to come, explain how likely problems of the type the court encountered in *Birchos Yosef* can be endemic to religious arbitration. The greater the *Birchos Yosef* problem,

the less compatible religious arbitration might be with Western democratic law.

JEWISH ARBITRATION

A. Jewish Law discourages Litigation in Secular Court and sometimes Prohibits It

Those who identify as Jewish make up about 1.9% of the US population, and an even smaller percentage are traditional in values.[18] While small in terms of the number of adherents—at least relative to other religions—Judaism has been a trailblazer in the area of religious arbitration in the United States.[19] Today, it enjoys the most sophisticated and formal systems of religious arbitration in the country.[20] It takes a pseudo-litigation or pseudo-adjudication approach similar to that of the secular court system. Highly specialized by area of law and well-versed in the historical foundations of Judaism and the Jewish people—including the Bible, Talmud, writings of Jewish scholars, and halakha (Jewish law)—Jewish law courts work to implement these religious principles and "preserve Jewish culture and religious law through Judaism-based dispute resolution."[21]

Pivoting around the principle of peace, in Jewish ADR, adversarial dispute resolution takes a back seat to conciliatory proceedings. This preference is a reflection of some of Judaism's holiest books. The Talmud "highlights the advantages of mediation and compromise over a legal decision finding for one party or the other,"[22] while the *Shulchan Aruch*, the authoritative code of Jewish law, counsels adherents to work at settling disputes in a mutually beneficial manner as opposed to one in which the winner takes all.[23] However, realizing that disputes must be settled with some finality, Judaism-based dispute resolution leaves room for parties to move from conciliation to mediation and, if necessary, from mediation to arbitration. Therefore, Jewish ADR runs the gamut of ADR—from informal to formal and nonbinding to binding.

Most commonly, Jewish dispute resolution begins with an informal mediation or arbitration-like process referred to as a *bitzua* or a *p'sharah*.[24] These proceedings can be presided over by a panel of two to three individuals, who can include a rabbi or simply individuals agreed to by the parties and familiar with the law.[25] The panel hears arguments from both sides and renders a decision, which can be either binding or nonbinding, depending on the wishes of the parties.[26] If a nonbinding decision issues and the parties are unsuccessful at settling their dispute, the parties may submit the matter to a Jewish court, or *Beth Din*.

These rabbinic courts are the flagship bodies in the Jewish dispute resolution arena. *Beth Dins* are responsible for many things, from constructing internal rules of procedure to providing "a forum for arbitrating disputes through the *din torah* process, obtaining Jewish divorces, and confirming Jewish personal status issues."[27] Although cases heard by *Beth Dins* often involve issues of secular law, and *Beth Dins* rely primarily on Jewish law in reaching their decisions, their success has depended significantly on their ability to utilize "erudite rabbinic judges… capable of addressing halakhic issues in areas of financial and family law through the prism of contemporary commercial practice and secular law."[28] *Beth Dins*' ability to interweave religious and secular law is their key to success and, perhaps more importantly, why "their rulings are usually binding and enforceable in the secular court system."[29]

It is worth referring back to the case of *In Re: Congregation Birchos Yosef* to understand how common such cases are in the Jewish tradition. Because the Jewish tradition recognizes that Jewish law is a complete legal code, it *does not* recognize that secular law is even needed to resolve any dispute between Jews. Of course, it has a vibrant concept of "the law of the land is the law,"[30] but there are no disputes in Jewish law that cannot be resolved exclusively through reference to Jewish law. So, cases like this one are complex—the debtor's assets

are finite, and allowing the rabbinic court to resolve any disputes related to them removes them from the estate. On the other hand, enjoining a religious tribunal from voicing its religious view on a matter is not a simple issue. Furthermore, the question of whether Jewish law even recognizes the validity of secular bankruptcy law remains an open question about which scholars do not agree.[31] The more "modern" in orientation the rabbinic court is, the more likely it is to work very hard to prevent *Birchos Yosef* problems in its various four forms. For this reason, the rules of the Beth Din of America speak regularly about the civil law of the jurisdiction in which it is conducting arbitrations and seeks mightily to adhere to the law of the land.[32] Other rabbinic courts in the United States are less deferential to secular law and more likely to encounter a *Birchos Yosef* problem.[33]

B. The Jewish Legal Tradition Like Contract Solutions to Problem and Contracts need Jewish Courts

The Jewish tradition is more sophisticated and nuanced—indeed, simply more advanced—in its use of arbitration than either any denomination of Christianity or Islam. Understanding this in native Jewish law terms might be helpful to many readers uniquely interested in Jewish law, tradition, and culture.

The Jewish faith has confronted many deep social, cultural, economic, and ethical challenges in its diasporic faith to its very system of rules in specific concrete areas of Jewish law—such that some people living at those times and places were not sure Judaism could continue to function unless somehow the Jewish tradition as practiced was changed in this area or that area—and it survived that process of legal change without being ripped asunder. How did it do that? There is a basic structural answer that is part of the explanation: by accepting modifications driven by contracts and agreements between parties and having a deep abiding respect for the court system when it adjudicated contractual claims.

Five distinctly different examples from different eras and areas of Jewish legal are quickly provided, outlining this ideal, with the goal of persuading the reader of this point and intuiting why such a system always deeply respects contractual arbitration:[34]

1. Debt forgiveness and *Prosbul*: The biblical system of debt forgiveness (automatic and every seven years) assumed a landed economy and the mercantile economy more than 2,000 years ago was being deeply hindered by the inability to make loans with any assurance that the money would be repaid. Hillel decrees that there is a mechanism to be used to solve this problem called prosbul, which works by contract—since a rabbinic court does not have to discharge debt during sabbatical year, a creditor will sell or give his debt to bet din which will collect on his behalf. How does this work? One has to use the prosbul (a contract) in order for it to be effective. Although many mechanisms are proposed (*hefker bet din* and others) the one that wins out is contract: If one does not actually use the contract – sign it in front of a bet din – it does not work. **No contract, no solution. A rabbinic court is needed to make this work.**[35]
2. Owning Bread on Passover and *Mechirat Chametz*: On Passover, ownership of fermented grain-based items were prohibited. With the popularity of whiskey trade among the Jews, seven hundred years ago, many found themselves in a Passover bind: they had large amounts of valuable but not perishable chametz and the classical idea of discarding all *chametz* for Passover proved very economically challenging. Although many solutions were proposed—including some views that liquid grain was not really prohibited—none of these solutions were accepted. Instead, Jewish law adopts a contract based solution: A person will sell his grain products

to a Gentile by contract, while keeping functional possession so as to make sure that the Gentile does not sell it or drink it. The deal was to be crafted so that the Gentile could not afford to keep the items after Pesach, insuring their return after the holiday. In order for this to work, the Jew has to use the contract of sale before Pesach. **No contract, no solution**. **A rabbinic court is needed to implement this sale.**[36]

3. Levirate Divorce and *Agunah* from *Yibum*: During the early and late medieval period, the Jewish tradition confronted an enormous practical challenge from *yibum,* the Torah directive (Devarim 25:5–6) that if a husband dies childless, his brother may marry his widow (*yibum*), and if he does not then the *chalitza* ceremony should take place. Widows were awaiting *chalitza* from a brother who was far away or an apostate or otherwise unfit or would not appear. Many solutions where proposed (from the idea that the apostate brother was not really a brother to other solutions) but in the end, halakha adopts a contract-based solution: at the time of marriage, husband and wife enter into what we would now call a prenuptial agreement of conditional marriage. Husband and wife agree that if he should die without children, the marriage is void. Again, this solution is not a halachic decree or a rule of law, but an agreement: if they did not actually make such an agreement, then this solution did not work. **No contract, no solution. A rabbinic court is needed to supervise this process.**[37]
4. Charging Interest on Loans and *Heter Iska*: In more modern times and with the rise of the interest-driven economy, the Torah prohibition of interest was proving to be economically impossible to observe. The absence of interest payment was simply making the economic situation impossible. Many solutions were proposed but the solution that is finally adopted and accepted is the contract one. The parties sign an agreement recasting their loan as a business deal and the interest payments as profit payment and this solution becomes universally accepted. To make this work, what do the parties have to do? Make an agreement. **No contract, no solution: a rabbinic court is invoked to resolved disputes and attest to the validity of the agreement.**[38]
5. Not Farming Every Seven Years in Israel and *Heter Mechira* for the Sabbatical Year: The resettlement of Israel had started and it is an agricultural enterprise. Rigorous observance of the prohibition against farming every seven years, it was claimed, might jeopardize the resettlement of the land—what to do? The answer again lies in contract and agreement: sell the land to a Gentile to putatively avoid the prohibited activity, with the understanding that after the sabbatical year, the owner will buy the land back. Although somewhat controversial, it becomes the standard solution in Israel and is widely supported and used. But, what does one have to do to benefit from it? One has to actually sign it and enter the contract. If one does not sign the sale contract for sabbatical year, then it does not work. **No contract, no solution: a rabbinic court is needed.**[39]

One could present many other examples as well.[40] These five were picked because they span the 2,200-year history of the rabbinic tradition and are in a variety of areas (including marriage law).

In sum, the Jewish tradition is wedded to its tribunals and is comfortable with contract-based adjudication of important matters, and contract based "loop-holing" of problems also. This creates a legal tradition that is the first to use secular arbitration to enforce rights and is most comfortable with the framework of contractual adjudication. [41]

C. Application to the Modern *Agunah* Problem: The Prenuptial Agreement

This well explained why contemporary solutions to the modern *agunah* (recalcitrant spouse) problem are contractual: Contemporary American Orthodox Jewry uses a prenuptial agreement rather than any other solution because contracts are so powerful in both the Jewish and the American legal system. Rabbi Saul Lieberman first intuited this decades ago in America and others have followed. The excellent Beth Din of America agreement[42] works very well in nearly all cases, although it does depend on secular law and enforcement (which some do not like) and yet other agreements are around of many different flavors.[43]

Prenuptial agreements have been widely hailed both within the Jewish law community and by popular media outlets as a compelling solution to the modern *agunah* problem of husbands refusing to grant give their wives *get*s even after the functional dissolution of their marriages.[44] These agreements vary widely; some are simple, others more complex; some merely commit both spouses to adjudicating the giving of a *get* in a particular *beit din*, while others go further in providing failsafe mechanisms designed to ensure that the husband gives and that the wife accepts a *get* in a timely manner.[45]

Perhaps the most commonly used document—certainly within the American Modern Orthodox community—is a prenuptial agreement developed by the Beth Din of America in cooperation with the Rabbinical Council of America and in consultation with prominent rabbinic authorities in the United States and Israel.[46] This document (hereinafter: BDA Prenup) attempts to solve the contemporary *agunah* problem by (1) committing both spouses to binding arbitration before the Beth Din of America over the issue of the giving of a *get*, and (2) providing that once the couple separates, the husband will be obligated to pay the wife $150 per day until the giving of a *get* in fulfilment of the husband's Jewish law obligation to support his wife during their marriage.[47] The first mechanism authorizes the Beth Din of America to oversee the divorce process, thereby avoiding the issues of forum shopping and spousal disagreements over which *beit din* to appear in, which lie at the root of many *agunah* cases.[48] The second mechanism creates an incentive for the husband to quickly comply with any order from the Beth Din of America to give his wife a *get*, since delaying the giving of a *get* results in his being liable for the liquidated amount of daily spousal support provided for in the document—an obligation that can if necessary be enforced in state court.[49]

The BDA Prenup is structured this way so as to not directly coerce or even legally pressure a husband to give his wife a *get*, and instead formalizes and enforces the husband's preexisting but civilly unenforceable Jewish law obligation to provide his wife with a reasonable standard of living.[50] This indirect incentive for the husband of a permanently separated couple to formalize their divorce by giving a *get* is important because Jewish law requires that a *get* be given by a husband willingly.[51] Thus, if a state court were to order a husband to give his wife a *get* under threat of sanctions for contempt, a *get* given pursuant to such an order would be invalid under Jewish law.[52] The same is true when a *beit din* improperly applies coercive measures to compel a husband to divorce his wife; the *get* is invalid, and the couple remains married in the eyes of Jewish law.[53] While Jewish law does authorize the use of certain measures to pressure husbands to agree to divorce their wives, these measures can only be utilized in situations where in the eyes of the *beit din* the husband is legally obligated to grant his wife a *get*.[54] There are very many cases, however, in which many rabbinic authorities would agree that it is wise, prudent, and appropriate that a couple be divorced, but where there are not clear adequate grounds for imposing on the husband a halakhic duty to give a *get* or, therefore, for applying direct pressure to convince him to do so.[55] Moreover, it is generally

accepted that a *get* might be considered to have been given under duress even if the husband had previously agreed to subject himself to some kind of coercive penalty for refusing to grant his wife a divorce.[56] Since it is imprudent to utilize a mechanism that could produce *gittin* that might possibly be invalid, the BDA Prenup does not utilize the self-imposed penalty model to help prevent the *agunah* problem.

Instead, the BDA Prenup is carefully structured so as to avoid the critical concern of a coerced *get*. The BDA Prenup memorializes a Jewish husband's halakhic obligation to support his wife. During the course of a couple's peaceful cohabitation as husband and wife, this obligation is fulfilled without notice, as the couple shares finances, pays for their home, groceries, clothing, and other necessities together in a collaborative and cooperative way. The Prenup merely makes clear that if a couple permanently separates and thus concludes their ordinary course of keeping a marital home together, the husband remains obligated to provide a specific amount of daily spousal support to the wife for as long as they remain married in the eyes of Jewish law—that is, until he gives her a *get*. The husband is left technically free to withhold a *get*, but if he chooses to do so, he must bear the burdens and duties of marriage by continuing to support his wife at the agreed-on rate. Since husband's who are not living with or maintaining any actual relationship with their wives are unlikely to want to shoulder the financial responsibility of supporting them in a reasonable standard of living, the BDA Prenup's spousal support provision provides a strong incentive for the giving of a *get* soon after the functional dissolution of a marriage.[57]

When utilized, the BDA Prenup has proven to be a highly effective tool for insuring that timely giving of a *get*.[58] Additionally, it has been upheld as legally binding and enforceable by American courts, reflecting not on Jewish Law's comfort with contract's but American law's comfort with Jewish Law's use of contract.[59]

PROTESTANT CHRISTIAN ARBITRATION

Those who identify as Christian make up about seventy percent of the United States population.[60] Although Judaism may be considered the trailblazer in religious arbitration, Christianity has developed its own successful, albeit less formal, system of settling disputes through ADR. Recognizing that Christianity has almost countless denominations, all of which cannot realistically be discussed here, it will suffice to discuss Christian ADR in a general sense.

Unlike Judaism's more formal, litigation-like arbitral process, Christian ADR looks significantly more like negotiation or mediation,[61] and is the least formal method of dispute resolution that will be discussed here. This less formal method of settling disputes has deep roots in the Christian religion.

Christian ADR is based on teachings of the Bible, and particularly those of Jesus Christ from the New Testament.[62] These encourage Christians to settle disputes in a peaceful manner.[63] For this reason, Christian ADR focuses more on negotiation and mediation than arbitration.[64]

While many Christian ADR tribunals exist, the industry's leader is Peacemaker Ministries.[65] Peacemaker Ministries has grown tremendously since its inception in 1982, and now counts as members "over three hundred churches, ministries, and organizations."[66] This makes Peacemaker "the largest, multidenominational Christian dispute resolution service in the country."[67] Along with growing in size and membership, Peacemaker has grown in regard to experience and sophistication, and has developed a streamlined process for settling disputes efficiently and effectively.

Peacemaker Ministries' method of settling disputes begins with giving the parties an opportunity to reflect on whether they were perhaps partially to blame. If reflection does not settle the dispute, the parties are required to negotiate with one another. In the case that private negotiations are unsuccessful, the parties are

asked to look to a "spiritually mature" person in the church to coach them in their negotiations.[68] If one conciliator is not enough, it is suggested that the parties turn to two respected individuals in the church to assist in settling the dispute through mediation and, if necessary, arbitration.[69] If even these individuals fail and the parties cannot reach a mutually agreeable resolution, the disputants are able to request that a trained peacemaker from the Institute of Christian Conciliation get involved.[70] Although peacemakers charge to hear a dispute, they are arguably better trained and equipped to settle it and, with the weight of a fee looming, the parties are arguably encouraged to settle more quickly.

Christian ADR, like Jewish ADR, touches almost every method of ADR, from conciliation to arbitration, allowing adherents a wide variety of ways in which to settle disputes. When disputants turn to arbitration and work through to an arbitration award, like Jewish arbitration awards, courts uphold them more often than not. However, unlike for Judaism, there seem to be vast areas of secular law that have no direct Christian counterpart, vastly reducing the likelihood of the type of conflict found in *In Re Congregation Birchos Yosef*, where the basic issue is what legal system ought to actually govern a substantive area of commercial law between two co-religionists. In simpler terms, in a faith in which there is no substantive religious law governing commercial matters independently of secular law, what Peacemakers serves as is a "choice of forum," rather than a "choice of law." No matter what forum is chosen, secular bankruptcy law will govern—and since secular bankruptcy law does not allow any forum other than bankruptcy court without leave of the court itself, the conflict is greatly diminished.[71]

CATHOLIC CHRISTIAN ARBITRATION

Outside of Protestant Christianity, which has embraced ADR, there are Christian denominations that have very robust bodies of law yet having distanced themselves from it. The most notable of these is the Catholic Church.

About twenty percent of Americans identify as Catholic.[72] It is worth focusing on the Catholic Church directly, as it is the exception to the rule of religious groups adopting methods for ADR. This is not to say that Catholics do not have laws governing their churches and parishioners. In fact, Canon Law, the body of ecclesiastical laws and regulations created to internally govern the Catholic Church, is one of the most ancient and robust legal systems in the world.[73] Even with its robust ecclesiastical law, however, the Catholic Church has not embraced ADR. While there are likely many reasons for this, it is mainly due to the fact that Canon Law is used mostly for church governance issues. Although Canon Law is "the law of the Catholic church by which all Catholics are bound,"[74] it is not easily accessible to—or often used by—individual members of the Catholic Church. While it also extends to issues of marriage and divorce between Catholics, it does not extend as far as general private disputes between co-religious parties—it neither professes to be a "choice of law" nor a "choice of forum" available for commercial disputes between members of the Catholic Church.

Because Catholic Church ecclesiastical law has no private ADR mechanism to resolve disputes between private parties, cases like *In Re: Congregation Birchos Yosef* cannot appear or be settled under Canon Law. Of course, an exception exists when one of the adjudicants is a Catholic church itself, but even in such a case, Canon Law might simply send the matter to secular court, as it lacks civilly binding force in most such tribunals.

ISLAMIC ARBITRATION

Only about one percent of the US population identifies as Muslim;[75] however, Islam has become the fastest growing religious group in the United States.[76] With this growing population has come an interest, like those that have

developed in Jewish and Christian communities, in preserving Muslim culture. One way Muslims have done this is through settling disputes outside of the secular court system with Islamic principles of law. The procedures used by Muslim arbitral bodies fall somewhere between Christian and Jewish ones—between mediation and arbitration.[77]

The Qur'an, Islam's holiest book, like the Bible and Talmud, encourages settling disputes in a peaceful and conciliatory manner. Because of this emphasis, "the Islamic tradition has developed specialized intermediaries known as *quadis* who interpret and apply Islamic law (*Shari'a*), often in an attempt to preserve social harmony by reaching a negotiated solution to a dispute."[78] *Qadis* work in the areas of conciliation, mediation and arbitration, although conciliation and mediation are "the preferred dispute resolution approaches of the Prophet Mohammed."[79]

Disputing couples are the likeliest parties to become involved in Islamic ADR. Typically, a couple will name an older family member or some other individual to mediate their dispute. It is common that one of the arbitrators is the couple's imam, or religious leader.[80] Following the Qur'an, the mediator's job is to give both parties an opportunity to hear one another's side of the story and identify the underlying issues causing the dispute.[81] Facilitating negotiation between the parties, the mediator's end goal is to help them find a mutually satisfactory resolution to the dispute. Muslim mediation is more often enforced in secular courts than its arbitration counterpart, as arbitration agreements stemming from *Shari'a* are often incompatible with local laws.[82]

Whether due to the fact that arbitration agreements stemming from *Shari'a* will not be enforced or for some other reason, Muslims in the United States rarely use arbitration, at least currently.[83] However, many Islamic legal scholars feel that arbitration needs to be utilized more frequently, as arbitral decisions provide more finality than their less binding ADR counterparts, as they do not need additional court approval, but simply serve as stand-alone judgments.[84] Muslim arbitration can likely find enforceability in the same way Jewish and Christian arbitration have—through the development of a sophisticated arbitration board or multiple boards with specialized experts familiar with both Islamic and secular law. In this way, trained Muslim arbitrators could help Muslims settle their disputes through a religious lens, while ensuring that the principles being enforced run parallel to—and do not interfere with—secular laws.[85]

Much like Jewish and Christian ADR, Islamic dispute resolution has seen significant developments since its inception and looks to continue to evolve by following in the footsteps of its predecessors. However, Muslim arbitration is likely to face many hurdles with which its predecessors were not forced to deal. Unlike Jewish law, Islamic law has very weak doctrines of "the law of the land is the law," and this is likely to create significant ongoing tension between it and secular law over the content of the laws used in adjudication. Cases like *In Re: Congregation Birchos Yosef*, thus, will be much more common in Islamic tribunals because the basic validity of American bankruptcy law can be questioned from the rubric of Islamic law, whereas there is a significant strain of Jewish law that validates secular bankruptcy law.[86]

THE FUTURE OF RELIGIOUS ARBITRATION

Religious arbitration's viability rests on its ability to maintain the respect of secular courts and on the number of participants it can attract.

Religious groups have maintained success in the field of arbitration law particularly by following in the footsteps and procedural methods of their predecessors, building on a foundation of secular contract law and solid procedural foundations commensurate with secular procedural rules. With these foundations in place, religious arbitral bodies take secular courts to the outer limits of constitutionally permitted

review, leaving them no choice but to uphold awards. Courts allowing such awards to stand, in turn, give parties faith in the religious arbitral process and make them more likely to view religious arbitration as a viable alternative to secular methods of dispute resolution.

So long as potential participants in religious arbitration view religious dispute resolution as a method that will be respected and upheld by courts, there is not likely to be a shortage of individuals who wish to settle their disputes through the lenses of their religious beliefs. This is especially true in light of recent developments in American religious culture, namely, the movement of secular Americans away from traditional, conservative values.

History shows that a strong system of arbitration may allow a religion to meet this desire by implementing its own law in settling disputes, but there are certain steps each successful religious arbitral body has taken in developing into a viable alternative to the secular court system, and in ensuring that its decisions will be enforceable in, and respected by, secular courts.

CRAFTING A FRAMEWORK FOR ENFORCEABLE ARBITRATION DECISIONS

Of course, the social reality is that the legal system in America will not honor religious arbitration of family or any other matters unless law makers and judges can be confident that religious arbitration is just and proper as understood by secular law and society. At the same time, however, faith-based arbitration, like any other form of ADR, is built upon the Federal Arbitration Act ("FAA"),[87] which is deeply rooted in the contractual approach to private dispute resolution. Under the FAA, 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, *Shari'a*, or even a nonlaw 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.

As explained in greater detail elsewhere, experience shows that there are six basic principles of procedural regularity that religious arbitration panels must incorporate to ensure that their decisions are honored by secular courts.[88]

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 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 who are also members of the panel's constituent religious community and 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 voluntary participants.

Finally, the tribunal should recognize that an aggregate of individual arbitrations will likely give rise to an active role in communal leadership. By dint of having organizations that particular faith group recognizes as "dispensing justice," boundary line disputes within faith based organizations can be settled judicially, rather than politically. This is particularly true among adherents, but it is to be more broadly expected as well.[89]

These six rules are based on a fundamental reality of religious arbitration: Other than in child custody disputes,[90] American arbitration law pays little attention to notions of substantive due process. Neither the government nor the courts has a preconceived notion of the "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. Rather, the Federal Arbitration Act and the myriad state laws that derive from it have a strong notion of *procedural* due process.[91]

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 sophisticated rules and procedures that are published on its website.[92] The Institute for Christian Conciliation[93] and the Muslim Arbitration Tribunal have done likewise.[94] 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.

Religious groups and their adherents have slowly realized that, so long as these foundations are in place, religious arbitration can be used to settle almost any dispute between any groups of disputants—be they individuals or business entities. The latter group are the most recent adopters of religious arbitration, having implemented the practice to settle disputes arising out of what has been dubbed "co-religionist commerce."

RELIGIOUS ARBITRATION'S BIGGEST CHALLENGES MOVING FORWARD: MOLDING ANCIENT LAWS TO FIT A MODERN PARADIGM AND EQUAL ACCESS OF ALL RELIGIONS TO RELIGIOUS ARBITRATION

Even with its growth, religious arbitration's proliferation still faces difficult issues, especially as new religions embrace the practice. The two biggest are apparent in the fledgling branch of Islamic religious arbitration in the United States. First, Islamic arbitrators, much like those of other religions, must mold ancient laws to fit a modern paradigm. This is indeed a challenge for any nomos-centric faith tradition that wishes to use its religious norms and values to effectively and convincingly resolve modern conflicts. While do so can often be challenging in practice, it is something that religious leaders and scholars of many faiths have done before and have t within their power to do again. The second challenge is more difficult to overcome. Contemporary American Muslims face serious Islamophobia that is specifically directed at concerns over Islamic religious norms and practices—precisely the standards that Islamic arbitration would seek to uphold among Muslim disputants. While this problem is particularly acute for Muslims—thus far, no states have attempted to ban the application of Jewish law or Protestant values—it is in many ways part of a broader tension between contemporary societal values and traditional religious mores and practices.

As with Christian denominations, Islam is composed of numerous sects, some more conservative—strict in their adherence to the laws

of their faith—than others. These subsets also have different interpretations of the Qur'an and its teachings. Different subsets will thus be more readily able to implement religious arbitration acceptable to American secular courts than will others. As with every other branch of dispute resolution, the enforceability of arbitration proceedings applying religious norms is limited by the bounds of public policy. Some groups' interpretations of the Qur'an breach or run contrary to public policy and, thus, will not be enforceable even in consented-to arbitration.

That said, with the growth of Islamic arbitral bodies has come the type of sophistication developed by other religions in their utilization of arbitration. Islamic arbitral bodies have gotten better at ensuring that they keep their decisions, arbitral awards, and arbitral procedures within the bounds of public policy, and they continue to work at perfecting this skill.

But instead of being met with increasing acceptance, Islamic religious arbitration has been framed as a different practice altogether. Muslims' arbitral bodies are often characterized as full-blown courts. This sort of characterization can be found in the following passage:

> An Islamic Tribunal using Sharia law in Texas has been confirmed by *Breitbart Texas*. The tribunal is operating as a non-profit organization in Dallas. One of the attorneys for the tribunal said participation and acceptance of the tribunal's decisions are "voluntary."[95]
>
> *Breitbart Texas* spoke with one of the "judges," Dr. Taher El-badawi. He said the tribunal operates under Sharia law as a form of "non-binding dispute resolution." El-badawi said their organization is "a tribunal, not arbitration." A tribunal is defined by Merriam-Webster's Dictionary as "a court or forum of justice." The four Islamic attorneys call themselves "judges" not "arbitrators."
>
> El-badawi said the tribunal follows Sharia law to resolve civil disputes in family and business matters. He said they also resolve workplace disputes.

Upon review, the tribunal's website indicates a practice directly in line with other religious arbitral bodies.[96] Even if the tribunal were to decide issues not in accordance with the laws of the United States, such decisions could be challenged in the secular court system. Nevertheless, the fear of such tribunals persists. For example, "[i]n 2006, the province of Ontario banned arbitration of family law disputes under any body of laws except Ontario law, in part to prohibit arbitration under religious laws."[97] Moreover, within the United States, seven states have passed their own laws banning courts from considering *Shari'a*.[98] Because bans on consideration of *Shari'a* in particular will likely be found unconstitutional in the United States, states that pass such laws will need to draft them broadly in order for them to pass constitutional muster. The unintended consequences can be significant:

> [T]he bans can have unintended consequences like disrupting marital prenuptial agreements or invalidating court decisions in other states. Especially in divorce and contract law, religious beliefs (like Sharia, orthodox Jewish or Catholic canon) can factor into how judges or arbitrators preside over a dispute. For example, a couple may sign a prenuptial agreement that requires them to go to an imam and that a religious leader must conduct the mediation. Alabama's [ban on consideration of *Shari'a*] nullifies that requirement.[99]

Religious leaders fear such effects—as reflected in their willingness to stand united against such laws.[100] This trend must continue for universal acceptance of religious arbitration to continue. If bans are passed and awards from religious arbitral bodies consistently struck down, the practice will be less likely to be selected as a method for settling disputes between parties. Such nullification is unlikely, however, as it would be disregard for contract law.

CONCLUSION

This article has provided a brief survey of contemporary faith-based dispute resolution in the United States. Religious arbitration serves an important function for religious individuals and communities in the United States the Jewish tradition is particularly predisposed to use such arbitration.

Religious ADR provides a legally recognized mechanism whereby people can choose to bring their ordinary legal disputes over mundane matters like property, employment, and commercial transactions to religious courts, staffed by religious functionaries that will resolve such conflicts in accordance with the parties' religious commitments. While adjudication by religious courts have always existed in this country, it is only in recent decades that the presence and practice of faith-based dispute resolution has become both more urgent for religious individuals and communities, as well as more troublesome for some in the broader American political and legal landscape. In response, different major faith traditions, including Protestant, Jewish, and Muslim communities have developed different models of dispute resolution. As was briefly alluded to above, the rise of various models of religious arbitration in recent decades is in part due to the gradually growing distance between the traditional religious—especially Protestant Cristian bases—for American law and policy, and contemporary societal norms and attitudes that embrace a different set of values. It is to this important catalyst for the development of faith-based arbitration as a serious alterative to American courts and American law.

ENDNOTES

1. See, e.g., Michael Corkery and Jessica Silver-Greenberg, "In Religious Arbitration, Scripture is the Rule of Law," *New York Times,* November 2, 2015.
2. Black's Law Dictionary (9th ed. 2009), 962.
3. Michael. J. Broyde, *Sharia Tribunals, Rabbinical Courts, and Christian Panels: Religious Arbitration in America and the West* (Oxford University Press, 2017).
4. Black's Law Dictionary (9th ed. 2009), 119.
5. *America's Changing Religious Landscape*, Pew Research Center, May 12, 2015, http://www.pewforum.org/2015/05/12/americas-changing-religious-landscape/.
6. Ibid.
7. Ibid.
8. Ibid.
9. Ibid.
10. Caryn Litt Wolfe, "Faith-Based Arbitration: Friend or Foe? An Evaluation of Religious Arbitration Systems and Their Interaction with Secular Courts," *Fordham Law Review* 75 (2006): 427.
11. 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," Oxford Journal of Law and Religion* 1 (2012): 424; Amanda M. Baker, "A Higher Authority: Judicial Review of Religious Arbitration," *Vermont Law Review* 37 (2012): 157; Michael A. Helfand, "Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders," *New York University Law Review* 86 (2011): 1231; Nicholas Walter, "Religious Arbitration in the United States and Canada," *Santa Clara Law Review* 52 (2012): 501; Michael J. Broyde, "Faith-Based Private Arbitration as a Model for Preserving Rights and Values in a Pluralistic Society," *Chicago-Kent Law Review* 90 (2015): 111; Michael A. Helfand, "Arbitration's Counter-Narrative: The Religious Arbitration Paradigm," *The Yale Law Journal* 124 (2015): 2994.
12. The Bankruptcy Code's automatic stay prohibits a wide array of actions that attempt to collect prepetition claims or that otherwise interfere with property of the estate. See The US Code 11: § 362.
13. *In Re: Congregation Birchos Yosef*, 535 B.R. 629 (Bankr. S.D.N.Y. 2015).
14. Ibid., 637.
15. For more on this, see Michael J. Broyde, "Forming Religious Communities and Respecting Dissenters' Rights" in *Human Rights in Judaism: Cultural, Religious, and Political Perspectives* (Michael J. Broyde and John Witte, Jr. eds., 1998, 35.

16. The bankruptcy court states directly: "Based on the record of the hearing, while the full extent of the effect of a *sirov,* if issued, is somewhat unclear, the mere threat of the issuance of a *sirov,* and, in fact, the commencement of the *beis din* proceeding itself, has already adversely affected the Debtor, through its principals, and made it more difficult to conduct this case by exerting significant pressure to cease pursuing the Debtor's claims against those who invoked the *beis din." In Re: Congregation Birchos Yosef*, 535 B.R., 631–32.
17. Such as the Jewish ideal of disputes between Jews being resolved in rabbinic court or the Islamic ideal of the same.
18. *America's Changing Religious Landscape*, Pew Research Center, May 12, 2015, http://www.pewforum.org/2015/05/12/americas-changing-religious-landscape/.
19. See generally Michael J. Broyde, "Jewish law Courts in America: Lessons Offered to Sharia Courts by the Beth Din of America Precedent," *New York Law School Law Review* 57 (2012–2013): 287.
20. Ibid.
21. R. Seth Shippee, "'Blessed are the Peacemakers': Faith-Based Approaches to Dispute Resolution," *ILSA Journal of International and Comparative Law* 9 (2002): 237, 249; see also Nicholas Walter, "Religious Arbitration in the United States and Canada," *Santa Clara Law Review* 52 (2012): 501; Michael C. Grossman, "Is This Arbitration?: Religious Tribunals, Judicial Review, and Due Process," *Columbia Law Review* 107 (2007): 169; Michael A. Helfand, "Litigating Religion," *Boston University Law Review* 93 (2013): 493.
22. Ibid., 249–50.
23. Ibid.
24. Ibid., 251.
25. Ibid., 249, 250.
26. Ibid., 252.
27. *About Us*, Beth Din of America, https://beth*din*.org/about/ (last visited January 15, 2016).
28. Shippee, supra note 31, 253; see also Ginnine Fried, "The Collision of Church and State: A Primer to Beth Din Arbitration and the New York Secular Courts," *Fordham Urban Law Journal* 31 (2004): 633; Linda S. Kahan, "Jewish Divorce and Secular Courts: The Promise of Avitzur," *Georgetown Law Journal* 73 (1984): 193; Aviva Vogelstein, "Is ADR the Solution? How ADR Gets Around the Get Controversy in Jewish Divorce," *Cardozo Journal of Conflict Resolution* 14 (2013): 999.
29. Ibid.
30. For an explanation of the various theories relating to secular and Jewish law, see Michael J. Broyde, "Public and Private International Law from the Perspective of Jewish Law," in *Oxford Handbook of Judaism and Economics* 363 (Aaron Levine ed., 2010).
31. See, e.g., Steven H. Resnicoff, "Bankruptcy—A Viable Halachic Option?," *Journal of Halacha and Contemporary Society* 5 (1992): 5; Rabbi Yona Reiss, "Establishing a Rabbinical Court Hearing in the Case Where the Plaintiff Has Filed for Bankruptcy," *Sharai Tzedek* 15 (5775/2014): 139.
32. See, e.g., Resnicoff, supra note 41; Reiss, supra note 41 (this article is written by a member of the Beth Din of America and seeks exactly the accommodation noted in the text).
33. See, e.g., Michael A. Helfand, "Fighting for the Debtor's Soul: Regulating Religious Commercial Conduct," *George Mason Law Review* 19 (2011): 157 for a discussion of this issue.
34. These are five dramatic examples of Jewish law and society functionally permitting that which was generally thought of as prohibited (rather than prohibiting that which is permitted, a different issue).
35. For more on this, see Shulchan Aruch Choshen Mishpat 67 and Rabbi Yeheil Miheil Epstein, Aruch Hashulchan Choshne Mishpat 67.
36. See Shmuel Eliezer Stern, *Mechirat Chametz K'hilchato* (Bnei Brak, 5749) and Rabbi Steven Gottlieb, "Mechirat Chametz," *Journal of Halacha and Contemporary Society* 21 (5756): 94–116 and Rabbi Shimon D. Eider, *A Summary of Halachos of Pesach* (Lakewood, 1980), 30–35.
37. Shulchan Aruch Even ha-Ezer157:4 and the extensive discussion in Pitchai Teshuva, Even ha-Ezer 157:4.
38. For more on this, see Rabbi J. Stern, "Ribis: A Halachic Anthology," *Journal of Halacha and Contemporary Society* 4:46 (Fall 1982): 66–69. For such a form, see https://www.star-k.org/images/db//hetter-iska.pdf
39. For more on this, see Rabbi Yitzchok Gottlieb, "Understanding the Heter Mechira," *Journal of Halacha and Contemporary Society* (1993): 26.
40. For example: *Chatzi zachor* is a contract to bypass the Jewish Law rules of inheritance, *shtar Shabbos* is a contract to bypass the Jewish law rules of owning a store which is open on the Sabbath, *sechirat reshut* in *eruvin* is a process that ritually purchases public land to enclose with an ritual fence., *ketubah* is a prenuptial agreement to deter divorce, *michirat*

bechor bahaima is a contract for the sale of a first born animal. Literally, the author could provide dozens more.

41. Why this is so in technical Jewish law is worthy of a doctoral dissertation, but only gets a footnote. The basic answer is that Jewish law has much more dynamic contract doctrines with deeper systemic ambiguities or loopholes—even in areas that impact ritual or family law—than it has in other areas. Dramatic changes in the Jewish law on the ground is possible even in many interpersonal areas of Jewish law (even when they directly affect areas of holiness) when the parties agree to rules by contract. Jewish law recognizes that if two people agree to do something that creates a deep sense that the Jewish legal system should try to honor such an agreement, if at all possible. Why exactly this is the case is for a doctoral dissertation and not a short article: but, on one foot, one can point to five Jewish Law ideas: (1) Jewish law's broad and deep acceptance of conditions within contract; (2) Jewish law's general enforcement of agreements that violate Jewish law; (3) Jewish law's emphasis on formalism as an important type of halakhic reasoning; (4) Jewish law's flexible idea of who transactions are implemented (*kinyan*—manner of being bound to a contract) doctrines; (5) Jewish law's admiration of "workaround" solutions to complex problems that avoid direct resolution of disputes. All together these have created a "perfect storm" within Jewish law for contract law to be very powerful. And it is.
42. http://theprenup.org/prenupforms.html
43. This topic has been the subject of countless works and much analysis, but I footnote only my own recent works:
    Michael J. Broyde, "An Unsuccessful Defense of the Beit Din of Rabbi Emanuel Rackman: The Tears of The Oppressed by Aviad Hacohen." *Edah Journal*, 4(2) (2004).
    Michael J. Broyde, "A Proposed Tripartite Agreement to Solve Some of the Agunah Problems: A Solution Without Any Innovation." *Jewish Law Association Studies*, 20 (2010).
44. See, e.g., Rabbi Shlomo Weissmann, "Ending the Agunah Problem as We Know It," August 23, 2012, https://www.ou.org/life/relationships/ending-agunah-problem-as-we-know-it-shlomo-wiess-mann/; "Halakhic Prenuptial Agreements: Agunah Prevention, The Jewish Orthodox Feminist Alliance," https://www.jofa.org/Advocacy/Halakhic_Prenuptial_Agreements_Agunah_Prevention; Shlomo Brody, "Can Prenuptial Agreements Prevent 'Agunot'?," *The Jerusalem Post*, November 15, 2012, http://www.jpost.com/Jewish-World/Judaism/Can-prenuptial-agreements-prevent-agunot; Beverly Siegel, "Sign on the Dotted Line," *Tablet Magazine*, March 6, 2015, http://www.tabletmag.com/jewish-life-and-religion/189149/sign-on-the-dotted-line; Mark Oppenheimer, *Where Divorce Can Be Denied, Orthodox* "Jews Look to Prenuptial Contracts," *The New York Times*, March 16, 2012, http://www.nytimes.com/2012/03/17/us/orthodox-jews-look-to-prenuptial-contracts-to-address-divorce-refusals.html.
45. For examples of some prenuptial agreements designed to address the *agunah* problem, see https://www.jofa.org/Advocacy/Halakhic_Prenuptial_Agreements_Agunah_Prevention;
46. The text of this agreement can be found at http://theprenup.org/pdf/Prenup_Standard.pdf. A list of rabbinic endorsements supporting the viability of this document under Jewish law can be found at http://theprenup.org/rabbinic.html.
47. See http://theprenup.org/pdf/Prenup_Standard.pdf .
48. See Michael J. Broyde, *Marriage, Divorce and the Abandoned Wife in Jewish Law: A Conceptual Understanding of the Agunah Problems in America* n. 24 (2001), 163; Irving Breitowitz, "The Plight of the Agunah: A Study in Halacha, Contract, and the First Amendment," *Maryland Law Review* 51 (1992): 312, 327.
49. The legal enforceability of the BDA Prenup was upheld by a Connecticut court in *Light v. Light*, 2012 WL 6743605 (Conn. Super.).
50. See Maimonides, Mishnah Torah, *Hilchot Ishut* 11:2.
51. See Mishnah, Yevamot 14:1; Maimonides, Mishnah Torah, *Hilchot Gerushin* 1:1–2.
52. See Michael J. *Broyde, Marriage, Divorce and the Abandoned Wife in Jewish Law: A Conceptual Understanding of the Agunah Problems in America* (2001), 69; Chaim Malinowitz, "The New York State Get Bill and its Halachic Ramifications," *Journal of Halacha and Contemporary Society* 27 (1994): 5; Michael J. Broyde, "The 1992 New York State Get Law," *Tradition* 29 (Summer 1995): 5.
53. See Babylonian Talmud, Gittin 88b; Shulchan Aruch: Even ha-Ezer 134:7.
54. See ibid. See also Tzvi Gartner, "Problems of a Forced Get," *Journal of Halacha and Contemporary Society* 9 (1985): 118.
55. See Irving Breitowitz, "The Plight of the Agunah: A

Study in Halacha, Contract, and the First Amendment," *Maryland Law* Review 51 (1992): 312, 332–35.

56. See Shulchan Aruch: Even ha-Ezer 134:4.
57. For a discussion of this mechanism and its historical usage, see 1 J. David Bleich, *Contemporary Halakhic Problems,* 155–59 (1977).
58. See https://www.getora.org/faqs-about-the-prenup.
59. See *Light v. Light*, 2012 WL 6743605 (Conn. Super.).
60. *America's Changing Religious Landscape*, Pew Research Center (May 12, 2015), http://www.pew-forum.org/2015/05/12/americas-changing-religious-landscape/.
61. Shippee, supra note 28, 241; see also Glenn G. Waddell & Judith M. Keegan, "Christian Conciliation: An Alternative to 'Ordinary' ADR," *Cumberland Law Review* 29 (1998/1999): 583; Joseph Allegretti, "Dialogue and the Practice of Law and Spiritual Values: A Christian Perspective on Alternative Dispute Resolution," *Fordham Urban Law Journal* 28 (2001): 997.
62. Ibid.
63. Ibid.
64. Ibid., 242.
65. *Frequently Asked Questions*, Peacemaker Ministries, http://peacemaker.net/icc-frequently-asked-questions/ (last visited January 15, 2016).
66. Shippee, supra note 31, 242.
67. Ibid., 243.
68. Ibid.
69. Ibid.
70. Ibid., 244.
71. See Bankruptcy Code, The US Code 11: §§ 105(a), 362(d) (1978) (permitting modification of the automatic stay with permission of the court).
72. *America's Changing Religious Landscape*, Pew Research Center, May 12, 2015, http://www.pew-forum.org/2015/05/12/americas-changing-religious-landscape/.
73. For the most recent and complete code of Canon Law, see *Code of Canon Law*, Holy See, http://www.vatican.va/archive/ENG1104/_INDEX.HTM.
74. Everson v. Board of Education, US 330 (1947), 1.
75. *America's Changing Religious Landscape*, Pew Research Center, May 12, 2015, http://www.pew-forum.org/2015/05/12/americas-changing-religious-landscape/.
76. Shippee, supra note 31, 245.
77. See generally Eugene Volokh, "Religious Law (Especially Islamic law)," *American Courts, Oklahoma Law Review* 66 (2014): 431; Mohammad H. Fadel, "Shari'a and Halakha in North America: Religious Law, Family Law and Arbitration: Shari'a and Halakha in America," *Chicago-Kent Law Review* 90 (2015): 163; Michael J. Broyde, "Shari'a and Halakha in North America: Faith-Based Private Arbitration as a Model for Preserving Rights and Values in a Pluralistic Society," *Chicago-Kent Law Review* 90 (2015): 111; Cristina Puglia, "Will Parties Take to Tahkim?: The Use of Islamic law and Arbitration in the United States," *Chicago-Kent Law Review of International and Comparative Law* 13 (2013): 151.
78. Shippee, supra note 31, 246.
79. Ibid.
80. Ibid., 247.
81. Ibid.
82. Ibid.
83. Ibid., 248.
84. Ibid.
85. Ibid.
86. See Resnicoff, supra note 41; Michael J. Broyde, *The Pursuit of Justice and Jewish Law*, chap. 3, 4, 5 (2d ed. 2007).
87. Federal Arbitration Act, The US Code 9: §§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).
88. Michael J. Broyde, "Jewish law Courts in America: Lessons Offered to Sharia Courts by the Beth Din of America," *New York Law School Law Review* 57 (2012/2013): 287.
89. This basic idea is the focus of three recent articles of mine. See Michael J. Broyde, "Shari'a and Halakha in North America: Faith-Based Private Arbitration as a Model for Preserving Rights and Values in a Pluralistic Society," *Chicago-Kent Law Review* 90 (2015): 111; 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," *Harvard Journal of Racial and Ethnical Justice* 30 (2014): 33; Michael Broyde, "Jewish law Courts in America: Lessons Offered to Sharia Courts by the Beth Din of America," *New York Law School Law Review* 57 (2012/2013): 287.
90. See Broyde, supra note 22.
91. There are certain things arbitration panels may and may not do in the course of making decisions: They may not call a hearing at 4:00 AM on a federal holiday, they must provide litigants with a reasonable amount

of notice, 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, and they must honor other basic ideas of procedural fair play. See, e.g., "JAMS Policy on Employment Arbitration: Minimum Standards of Procedural Fairness," JAMS, http://www.jamsadr.com/employment-minimum-standards/ (last visited October 1, 2016). 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.)

92. *Rules and Procedures*, Beth Din of America, http://bethdin.org/docs/PDF2-Rules_and_Procedures.pdf (last visited January 15, 2016).
93. Peacemaker Ministries, http://www.peacemaker.net/site/c.nuIWL7MOJtE/b.5394441/k.BD56/Home.htm (last visited January 15, 2016).
94. Muslim Arbitration Tribunal, http://www.matribunal.com/ (last visited January 15, 2016).
95. Bob Price, "Islamic Tribunal Confirmed in Texas; Attorney Claims 'It's Voluntary,'" Breitbart.com, January 27, 2015, http://www.breitbart.com/texas/2015/01/27/hold-islamic-tribunal-confirmed-in-texas-its-voluntary-says-attorney/ (last visited October 1, 2016).
96. *About Us*, Islamic Tribunal, http://www.islamictribunal.org (last visited October 1, 2016).
97. Bilal M. Choksi, Comment, "Religious Arbitration in Ontario—Making the Case Based on the British Example of the Muslim Arbitration Tribunal," *University of Pennsylvania Journal of International Law* 33 (2012): 791.
98. Liz Farmer, "Alabama Joins Wave of States Banning Foreign Laws," *Governing*, November 4, 2014, http://www.governing.com/topics/elections/gov-alabama-foreign-law-courts-amendment.html (last visited August 28, 2016).
99. Ibid.
100. See, e.g., Tara Culp-Ressler, "Christians Blast Ballot Initiative Banning Sharia Law in Alabama," ThinkProgress. November 2, 2014, https://thinkprogress.org/christians-blast-ballot-initiative-banning-sharia-law-in-alabama-7166c97ae507#.qejhnbffj (last visited August 28, 2016).