MULTICULTURAL ADR AND FAMILY LAW: A BRIEF INTRODUCTION TO THE COMPLEXITIES OF RELIGIOUS ARBITRATION

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I. Introduction: Changing Values and Laws

Recent polls indicate that the U.S. population is getting less religious and more secular.[1] This seems to mirror the nation's—and its laws'—movement away from reflecting certain traditional values. While these movements have left some members of the religious population in a precarious situation, surrounded by a society whose values are changing before their eyes, it has also caused the religious to cling tighter to their respective faiths and become more entrenched in the values they assert.

As the government has, slowly but surely, aligned itself with the popular shift away from traditional religious values, the pleas of the religious to keep their principles interlaced with the laws that govern the country have fallen on deaf ears. Therefore, instead of looking to the government to continue weaving religion into society or proselytizing to recruit external followers, religions and their faithful have begun to look inward for ways to bridge the gap between what they believe and what society believes.

Indeed, over the last sixty years, the substance of American law has come to reflect secular principles, rather than the religious values upon which it was historically based. The law has grown increasingly secular, with a sharper focus on the religiously neutral principles of equality and fairness, rather than the historical commitment to traditional values.[2] This development coincides with

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1 *See, e.g.*, *America's Changing Religious Landscape*, Pew Res. Ctr. (May 12, 2015), http://www.pewforum.org/2015/05/12/americas-changing-religious-landscape/.

2 *See* Michael J. Broyde, Ira Bedzow & Shlomo Pill, *The Pillars of Successful Religious Arbitration: Models for American Islamic Arbitration Based on the Beth Din of America and*

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.[3] Moreover, since the mid-twentieth century, the United States has become more of a multicultural 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.[4]

So while the culture wars still sometimes flare, religious communities have begun to realize that they are all minority groups. 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.[5] 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 dis-

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Muslim Arbitration Tribunal Experience, 30 HARV. J. ON RACIAL & ETHNIC JUST. 33, 33–76 (2014); *see also* David Aikman, *America's Religious Past Fades in a Secular Age*, WALL ST. J. (Oct. 25, 2012), http://online.wsj.com/news/articles/SB10001424052970203630604578073171838000416.

3 *Id.* 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%." *Religious Landscape Study*, PEW RES. CENTER (Feb. 2008), http://religions.pewforum.org/pdf/reportreligious-landscape-study-full.pdf. By 2012, the prediction had come true. *"Nones" on the Rise: One-in-Five Adults Have No Religious Affiliation*, PEW RES. CENTER (Oct. 9, 2012), 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%.").

4 CARL N. DEGLER, OUT OF OUR PAST: THE FORCES THAT SHAPED MODERN AMERICA 296 (1970) ("The 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.").

5 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).

course or law.[6] Although religious groups may not be able to influence secular law as much as they once did, they have changed their approach, focusing on developing their own internal legal bodies. This follows key developments in the U.S. legal system.

II. The Rise of ADR in the United States

The law, generally speaking and in any and every sense, seeks to provide parties with a framework and arena in which to settle their disputes. Traditionally and historically, disputes were almost unequivocally settled in courts through litigation, with the rare exception of the now arcane practice of dueling, and the even rarer trial by ordeal.[7] The combination of the official nature and binding finality of the judgment of courts made utilizing them favorable to disputing parties. As time passed, however, and America grew diverse as a country both in terms of population and culture, so did the number and types of issues that follow a ballooning population. Disputes arose over many of these issues, and as they were settled by the court system and sometimes legislatures, the body of statutory and case law exponentially expanded. With this inflation, courts became less specialized and less effective at settling disputes in a manner satisfactory to many disputing parties. With more cases to hear, court dockets also grew more crowded, rendering courts less efficient in settling disputes.

Even more importantly, as the nation grew and became more socially, culturally and religiously diverse, those areas of law (most importantly, family law) that depended on the many courts' having a crisp understanding of the cultural norms of society, found it impossible to fully reflect the diversity of society. This was particularly the case in situations (such as marriage) where our legal and cultural norms permit the kind of cultural discrimination that is generally prohibited in most commercial settings.[8]

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[6] 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-and-evangelicals-collide-on-bias-policy.html (discussing how many institutions are forcing religious student organizations whose values discriminate against homosexual conduct off campus).

[7] *See generally* Harwell Wells, *The End of the Affair? Anti-Deuling Laws and Social Norms in Antebellum America*, 54 Vand. L. Rev. 1805 (2001); Robert Bartlett, Trial By Fire and Water: The Medieval Judicial Ordeal (1986).

[8] For example, marriage selection remains one of the few areas of life where one can lawfully engage what is otherwise illegal discrimination based on religious, ethnic and other other-

With courts' ineffectiveness and cultural inefficiency, individuals looked to established law to craft new methods of settling disputes. In particular, they looked to contract law. Through contract law, parties developed more innovative ways to settle disputes—alternative means by which they could have their disputes decided more effectively and efficiently than in the comparatively crowded and culturally deaf courts.[9] The idea was novel in the United States, but not entirely new from a historical perspective: parties would agree to settle disputes outside the traditional court system. This alternative method of resolving disputes came to be known, naturally, as Alternative Dispute Resolution ("ADR"). Defined simply as "[a] procedure for settling a dispute by means other than litigation . . . [,]"[10] ADR was embraced by many parties jaded by the courts.

While contract law can be said to have served as the incubator for ADR, a foundational principal of contract law—NEGOTIATION—could rightfully be pointed to as the seed from which the practice of ADR sprouted. Negotiation, a method of dispute resolution in its own right, is "[a] consensual bargaining process in which the parties attempt to reach agreement on a disputed or potentially disputed matter" and "usually involves complete autonomy for the parties involved, without the intervention of third parties."[11] The purpose of negotiation is to bring parties to a mutually agreed upon understanding.[12] The hope is that allowing disputing parties to negotiate with one another will lead them to a mutually satisfactory resolution. Although negotiation plays a large role in ADR, from initially agreeing to settle disputes through ADR to—in some subsets of ADR—settling a dispute through negotiation between the parties, negotiation is neither the beginning nor the end of ADR. What truly makes ADR a viable alternative to litigation are not its foundations in the art of negotiation, but its subset practices.

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wise protected classes. *See* Elizabeth F. Emens, *Intimate Discrimination: The State's Role in the Accidents of Sex and Love*, 122 HARV. L. REV. 1307, 1310 (2009); Elizabeth F. Emens, Note, *Racial Steering in the Romantic Marketplace*, 107 HARV. L. REV. 877, 883–84, 889 (1994).

9 Ori Aronson, *Out of Many: Military Commissions, Religious Tribunals, and the Democratic Virtues of Court Specialization*, 51 VA. J. INT'L L. 231 (2011).

10 BLACK'S LAW DICTIONARY 91 (9th ed. 2009).

11 *Id.* at 1136.

12 *Id.* at 1136–37.

III. The Development and Evolution of ADR in the United States

ADR is ably split into three sub-practices: CONCILIATION, MEDIATION, and ARBITRATION. While strikingly similar, the subsets of ADR do differ in some respects. If taken at face value, these differences seem insignificant, but, in practice, are actually quite important. The most notable differences between the three subsets of ADR are procedural—namely, how they resolve disputes and whether the decisions arising from each are final and binding on their participants. Examining each subset practice of ADR and laying out the definition of each is important to understanding what makes ADR a reasonable—and sometimes favorable—alternative to litigation.

A. *Conciliation*

Conciliation is the closest subset practice of ADR to negotiation. In particular, it is, first and foremost, "[a] process in which a neutral person meets with the parties to a dispute and explores how the dispute might be resolved."[13] On the spectrum of ADR, conciliation is "a relatively unstructured method of dispute resolution in which a third party facilitates communication between parties in an attempt to help them settle their differences."[14] Conciliation, with its lack of structure, does not lend itself to binding decisions and, therefore, is not a binding method of ADR. Instead, the conciliator is charged with helping the disputing parties reach a mutually agreeable resolution to their dispute. If such a resolution is not reached, the disputing parties may utilize other avenues to settle their disputes. Even if a resolution is reached, either party may choose to take the dispute to the traditional court system or, if agreed to by the parties, into a different ADR arena such as mediation or arbitration.

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13 *Id.* at 329.

14 *Id.*

B. *Mediation*

Almost identical in definition to conciliation, mediation is "[a] method of nonbinding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution . . . . "[15] While there is some disagreement among scholars as to the true difference between mediation and conciliation, the easiest distinction to draw is that "conciliation involves a third party's trying to bring together disputing parties to help them reconcile their differences, whereas mediation goes further by allowing the third party to suggest terms on which the dispute might be resolved."[16] Regardless of the distinction between the two practices, mediation has become more popular and, therefore, more visible than conciliation. The mediator's decision is non-binding and, as with conciliation, if a resolution is not reached, the disputing parties may utilize other avenues to settle their disputes. Also identical to conciliation, even if a resolution is reached in mediation, either party may choose to take the dispute into the traditional court system or, if agreed to by the parties, into the third arena of ADR: arbitration.

C. *Arbitration*

Arbitration is "[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."[17] Probably the best developed of the three subsets of ADR, and certainly that which carries the most weight, arbitration is also the most controversial of ADR's subsets. Parties must agree to arbitrate a dispute, and may do so either before or after a dispute arises. It is typical, however, for parties to agree to arbitrate disputes prior to any dispute arising. It has become particularly common for parties to agree to arbitrate disputes through arbitration clauses in contracts, which mandate arbitration and allow the contracting parties to avoid litigation.[18] Arbitration's most notable characteristic—and one that is not shared by other subsets of ADR—is its binding nature. Arbi-

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15 *Id.* at 1070–71.

16 BLACK'S LAW DICTIONARY, *supra* note 10, at 1071 (quoting BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 554 (2d ed. 1995)).

17 BLACK'S LAW DICTIONARY, *supra* note 10, at 119.

18 *Id.* at 120.

tration, in effect, removes the ability of courts to review disputes that have validly been submitted to—and validly decided by—an arbitrator or arbitral body. This, in turn, allows arbitral bodies to serve in place of courts, which, for some time, made courts uneasy. Many in the judiciary remain uncomfortable with the binding nature of the practice even today and the fact that arbitration's binding characteristic, for all intents and purposes, supplants court jurisdiction over certain disputes. Outside of the courts, arbitration has other critics who are concerned that arbitration negatively affects parties of limited means and favors sophisticated parties, making it a game that is rigged to favor repeat players. Even with its detractors, however, arbitration has been embraced by many and, one could say, perfected by the parties to arbitration themselves.

The contract law foundations of arbitration make the practice extremely customizable. Parties can essentially decide on all aspects of how their arbitration will be governed long before any dispute arises. Such customization can include framing rules of procedure, guidelines for the arbitrator—including who the arbitrator will be—and implementing substantive law outside the realm of traditional substantive law. The difficulty of parsing and understanding this customized substantive law gradually led parties to favor selecting arbitrators who were experts in the substantive law governing their dispute. This aspect of arbitration actually gives arbitration a leg-up over litigation, in which generalist judges decide disputes with which they are sometimes unfamiliar.

Some groups went a step further than specialized arbitrators, and actually created their own arbitral bodies, comprised only of arbitrators who were experts in the types of disputes that would come before them. Today, countless such arbitral bodies exist. They have proved particularly useful to various industries like Real Estate and Construction, which have liberally utilized the practice.[19] While the less visible and commercial nature of disputes handled by arbitral bodies developed by these industries has led to little or no critical reception, other groups have not managed to stay under the radar.

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[19] For more on this, see *Areas of Expertise*, AM. ARB. ASS'N, https://www.adr.org/aaa/faces/aoe?_afrLoop=2079901788261273&_afrWindowMode=0&_afrWindowId=19ojm0jhbd_84#%40%3F_afrWindowId%3D19ojm0jhbd_84%26_afrLoop%3D2079901788261273%26_afrWindowMode%3D0%26_adf.ctrl-state%3D19ojm0jhbd_128.

IV. Religious Arbitration in the United States

The movement by religious groups to create their own internal arbitral bodies for settling disputes within their churches proved extremely controversial. Perhaps the skepticism of religious arbitral bodies and 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 are likely here to stay, at least for the foreseeable future.

The advent of religious arbitration comes at an extremely interesting time in the United States. The United States, as a whole, has gotten less religious, especially over the past two-and-a-half decades. As Americans have moved away from religion, so have their values. In turn, the values reflected in the nation's laws and policies reflect secular—not religious—principles. In the meantime, despite being fewer in number, the religious in the United States still exist. Such individuals view the secularization of American laws and policies as repugnant to their own beliefs and principles, and have thus become further entrenched in their traditionalist 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, allowing religious individuals to agree in contracts with others in their religious community to arbitrate any disputes that arise out of that contract in an arbitral body established by their religion and governed by the law of their religion.[20]

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[20] 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); 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); Michael A. Helfand, *Arbitration's Counter-Narrative: The Religious Arbitration Paradigm*, 124 Yale L.J. 2994 (2015).

Understanding why it is important for religious individuals to be governed by the law of their religion can be a bit difficult to understand. To illustrate the *why* in religious arbitration, let us consider, as the focus of this section, a very hard and very recent case of religious arbitration that was enjoined by a bankruptcy court as violative of the automatic stay:[21] *In Re Congregation Birchos Yosef*.[22] 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 validity, perhaps) of the bankruptcy filing as a matter of Jewish law; in the absence of consent for such adjudication, it wished the rabbinical court to issue a writ of contempt against the debtor as one who is in violation of Jewish Law. Debtor filed a motion in bankruptcy court seeking to enjoin the creditor and the rabbinical court in question from considering the questions of 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.

Indeed, the bankruptcy court is explicit that the automatic stay applies to the proceedings of the rabbinical court no different than it applies to any other court. The Bankruptcy Court states 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)[23]

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 that 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 court.

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21 The Bankruptcy Code's automatic stay, 11 U.S.C.A. § 362, prohibits a wide array of actions that attempt to collect prepetition claims or that otherwise interfere with property of the estate.

22 *In re* Congregation Birchos Yosef, 535 B.R. 629 (S.D.N.Y. 2015).

23 *Id.* at 637.

By noting that the automatic stay applies directly to the rabbinical court in question, the bankruptcy court not only precluded the creditors and debtors from submitting to rabbinic court arbitration (which is an easy matter to preclude under bankruptcy law) but the Bankruptcy Court also used its authority to stay the rabbinical court's religious pronouncements concerning the correctness under Jewish law of the debtors decision to file bankruptcy to begin with. The rabbinical court in question might well wish to note that a debtor is in violation of Jewish religious law, and issue a writ of excommunication (*siruv*) which would serve as the basis for others to note that the debtor was a sinner as a matter of Jewish law (in the opinion of this rabbinical court).[24] Indeed, the court is very much aware of the apparent authority of the rabbinical court's pronouncements—even when lacking legal authority, and makes it clear that such religious pronouncements must cease.[25]

Why is this case so important to a discussion of religious ADR? The answer ought to be clear: people in religious communities do not wish to be considered "sinners" by their communities, and allowing a functioning alternative 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, 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 rabbinical court in this case had religious authority, and that is what it was enjoined against exercising.

V. Variants of Religious Arbitration in Practice

Religious arbitration is a "process in which arbitrators apply religious principles to resolve disputes."[26] While generally true,

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[24] 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 35 (Michael J. Broyde & John Witte, Jr. eds., 1998).

[25] The 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." Birchos Yosef, 535 B.R. at 631–32.

[26] Caryn Litt Wolfe, *Faith-Based Arbitration: Friend or Foe? An Evaluation of Religious Arbitration Systems and Their Interaction with Secular Courts*, 75 Fordham L. Rev. 427 (2006).

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.

This section will outline the various arbitral bodies and procedures utilized by three of the different religions of the Abrahamic faith—Judaism, Christianity, and Islam.

A. *Judaism*

Those who identify as Jewish make up about 1.9 percent of the U.S. population.[27] While small in number of adherents—at least relative to other religions—Judaism has been a trailblazer in the area of religious arbitration in the United States.[28] Today, it enjoys the most sophisticated and formal systems of religious arbitration in the country.[29] In this way, it takes a similar approach to settling disputes as the secular court system, and on the spectrum of dispute resolution, its procedure for settling disputes is most similar to litigation or adjudication. 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 *halacha* (Jewish law)—Jewish law courts work to implement these religious principles and to "preserve Jewish culture and religious law through Judaism-based dispute resolution."[30]

Pivoting around the principle of peace, adversarial dispute resolution takes a back seat to conciliatory proceedings in Jewish ADR. 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

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27 PEW RESEARCH CENTER, *supra* note 1.

28 *See generally* 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).

29 *Id.*

30 R. Seth Shippee, *"Blessed are the Peacemakers": Faith-Based Approaches to Dispute Resolution*, 9 ILSA J. INT'L & COMP. L. 237, 249 (2002). *See also* Nicholas Walter, *Religious Arbitration in the United States and Canada*, 52 SANTA CLARA L. REV. 501 (2012); Michael C. Grossman, *Is This Arbitration?: Religious Tribunals, Judicial Review, and Due Process*, 107 COLUM. L. REV. 169 (2007); Michael A. Helfand, *Litigating Religion*, 93 B.U.L. REV. 493 (2013).

other,"[31] while the *Shulchan Aruch*, the authoritative code of Jewish Law, echoes this preference for conciliation over litigation, counseling adherents to work at settling disputes in a mutually beneficial manner as opposed to one in which the winner takes all.[32] 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 non-binding 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*.[33] These proceedings can be presided over by a panel of two-to-three individuals, which can include a rabbi or simply individuals agreed to by the parties and familiar with the law.[34] The panel hears arguments from both sides and renders a decision, which can be either binding or non-binding.[35] If non-binding and unsuccessful at settling a dispute, the parties may submit their dispute to a Jewish court, or *Beth Din*.

The flagship bodies in the Jewish dispute resolution arena are the rabbinical courts—*Beth Dins*. *Beth Dins* are responsible for many things, from constructing rules of procedure to internally govern the method in which they settle disputes, to providing "a forum for arbitrating disputes through the din torah process, obtaining Jewish divorces, and confirming Jewish personal status issues."[36] 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 *halachic* issues in areas of financial and family law through the prism of contemporary commercial practice and secular law."[37] *Beth Dins*' ability to interweave religious and secular law is their

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31 Shippee, *supra* note 30, at 249–50.

32 *Id.*

33 *Id.* at 251.

34 *Id.* at 249–250.

35 *Id.* at 252.

36 *About Us*, BETH DIN OF AMERICA, https://bethdin.org/about/ (last visited Jan. 15, 2016).

37 Shippee, *supra* note 30, at 253. *See also* Ginnine Fried, *The Collision of Church and State: A Primer to Beth Din Arbitration and the New York Secular Courts*, 31 FORDHAM URB. L.J. 633 (2004); Linda S. Kahan, *Jewish Divorce and Secular Courts: The Promise of Avitzur*, 73 GEO. L.J. 193 (1984); Aviva Vogelstein, *Is ADR the Solution? How ADR Gets Around the Get Controversy in Jewish Divorce*, 14 CARDOZO J. CONFLICT RESOL. 999 (2013).

key to success and, perhaps more importantly, why "their rulings are usually binding and enforceable in the secular court system."[38]

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,"[39] but there are no disputes in Jewish law that cannot be resolved in reference to Jewish law exclusively. So, cases like this one are complex—the debtor's assets are finite, and allowing the rabbinical 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 does recognize the validity of secular bankruptcy law remains an open question about which scholars do not agree.[40]

B. *Christianity: Protestant*

Those who identify as Christian make up about seventy percent (70%) of the United States population.[41] Although Judaism may be considered the trailblazer in religious arbitration, Christianity has developed its own, albeit less formal, successful system of settling disputes through ADR. Recognizing that Christianity has almost countless denominations, all of which cannot realistically be discussed in the body of this article alone, 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 than arbitration,[42] and is actually the least formal method of dispute resolution that will be discussed in this article. This less

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38 Shippee, *supra* note 30, at 253.

39 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* THE OXFORD HANDBOOK OF JUDAISM AND ECONOMICS 363 (Aaron Levine ed., 2010).

40 *See, e.g.*, Steven H. Resnicoff, *Bankruptcy: A Viable Halachic Option?*, 24 J. HALACHA & CONTEMP. SOC'Y 5 (1992); Rabbi Yona Riess, *Establishing a Rabbinical Court Hearing in the Case Where the Plaintiff Has Filed for Bankruptcy*, 15 SHARAI TZEDEK 139 (5775/2014).

41 PEW RES. CTR., *supra* note 1.

42 Shippee, *supra* note 30, at 241. *See also* Glenn G. Waddell & Judith M. Keegan, *Christian Conciliation: An Alternative to "Ordinary" ADR*, 29 CUMB. L. REV. 583 (1998/1999); Joseph

formal method of settling disputes has deep roots in the Christian religion.

Christian ADR is based on teachings of the Bible, and particularly the teachings of Jesus Christ from the New Testament.[43] These teachings encourage Christians to settle disputes in a peaceful manner.[44] For this reason, Christian ADR focuses more on negotiation and mediation than arbitration.[45]

While many Christian ADR tribunals exist, the industry's leader is Peacemaker Ministries.[46] Peacemaker Ministries has grown tremendously since its inception in 1982, and now counts as members "over three hundred churches, ministries, and organizations."[47] This makes Peacemaker "the largest, multi-denominational Christian dispute resolution service in the country."[48] 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 for the dispute. 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.[49] 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.[50] If even these individuals fail and the parties fail to reach a mutually agreeable resolution, the disputing parties are able to request that a trained peacemaker from the Institute of Christian Conciliation get involved in settling the dispute.[51] Although peacemakers charge to hear a dispute, they are arguably better trained and equipped to settle the dispute

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Allegretti, *A Christian Perspective on Alternative Dispute Resolution*, 28 FORDHAM URB. L.J. 997 (2001).

43 Shippee, *supra* note 30, at 241.

44 *Id.*

45 *Id.* at 242.

46 *Frequently Asked Questions*, PEACEMAKER MINISTRIES, http://peacemaker.net/icc-frequently-asked-questions/ (last visited Jan. 15, 2016).

47 Shippee, *supra* note 30, at 242.

48 *Id.* at 243.

49 *Id.*

50 *Id.*

51 *Id.* at 244.

and, with the weight of a fee looming over the settlement, 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 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 coreligionists. In simpler terms, in a faith in which there is no substantive religious law governing commercial matters independent of secular law, what Peacemakers serve as is a "choice of forum" selection, rather than a "choice of law" selection. No matter what forum is chosen, secular bankruptcy law will govern—and because secular bankruptcy law does not allow any forum other than bankruptcy court without leave of the court itself, the conflict is greatly diminished.[52]

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

About twenty percent (20%) of Christians in the United States identify as Catholic.[53] 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.[54] Even with its robust ecclesiastical law, however, the Catholic Church has not embraced ADR. While there are likely many reasons for this failure to adopt a system of ADR, 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

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52 *See* Bankruptcy Code, 11 U.S.C. §§ 105(a), 362(d) (1978) (permitting modification of the automatic stay with permission of the court).

53 PEW RES. CTR., *supra* note 1.

54 For the most recent and complete code of Canon Law, see *Code of Canon Law*, THE HOLY SEE, http://www.vatican.va/archive/ENG1104/_INDEX.htm.

bound,"[55] 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" 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 the 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 secular courts.

C. *Islam*

Only about one percent (1%) of the U.S. population identifies as Muslim;[56] however, it has become the fastest growing religious group in the United States.[57] 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 arbitral bodies, finding its footing somewhere in between mediation and arbitration.[58]

The *Quran*, Islam's holiest book, like the Bible and *Talmud*, encourages settling disputes in a peaceful and conciliatory manner. Because of this emphasis on settling disputes peacefully, "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 solu-

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55 Everson v. Bd. of Educ., 330 U.S. 1 (1947).

56 PEW RESEARCH CENTER, *supra* note 1.

57 Shippee, *supra* note 30, at 245.

58 *See generally* Eugene Volokh, *Religious Law (Especially Islamic Law) in American Courts*, 66 OKLA. L. REV. 431 (2014); Mohammad H. Fadel, *Religious Law, Family Law and Arbitration: Shari'a and Halakha in America*, 90 CHI.-KENT L. REV. 163 (2015); Michael J. Broyde, *Shari'a and Halakha in North America: Faith-Based Private Arbitration as a Model for Preserving Rights and Values in a Pluralistic Society*, 90 CHI.-KENT L. REV. 111 (2015); Cristina Puglia, *Will Parties Take to Tahkim?: The Use of Islamic Law and Arbitration in the United States*, 13 CHI.-KENT J. INT'L & COMP. L. 151 (2013).

tion to a dispute."[59] *Quadis* work in the areas of conciliation, mediation, and arbitration, although conciliation and mediation are "the preferred dispute resolution approaches of the Prophet Mohammed."[60]

Disputing couples are the most likely to become involved in Islamic ADR. Typically, a disputing couple will name an older family member or some other individual to mediate their dispute. It is common that one of the parties is the couple's Imam, or religious leader.[61] Following the Quran, 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.[62] Facilitating negotiation between the parties, the mediator's end goal is to help parties 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* law are often incompatible with local laws.[63]

Whether due to the fact that arbitration agreements stemming from *shari'a* law will not be enforced or for some other reason, Muslims in the United States rarely use arbitration, at least currently.[64] 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.[65] 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 dually ensuring that the principles being enforced run parallel to—and do not interfere with—secular laws.[66]

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

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59 Shippee, *supra* note 30, at 246.
60 *Id.*
61 *Id.* at 247.
62 *Id.*
63 *Id.*
64 *Id.* at 248.
65 Shippee, *supra* note 30, at 248.
66 *Id.*

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.[67]

VI. 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—meaning those who want to settle disputes through the lens of their religious beliefs, as opposed to doing so in a secular venue through secular legal principles.

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 end of those parts of a case that they are constitutionally permitted to review, and leave them with no choice but to uphold their awards. Courts allowing such awards to stand, in turn, give parties faith in the religious arbitral process and makes 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 lens of their religious beliefs. This is especially true in light of recent developments in American religious culture, namely in the movement to secular from traditional, conservative values. While a strong system of arbitration may allow a religion to implement its ecclesiastical law in settling family disputes, there are certain steps each successful religious arbitral body has taken in developing viable alternatives to

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67 *See* Resnicoff, *supra* note 40; Michael Broyde, The Pursuit of Justice and Jewish Law chs. 3, 4, 5 (2d ed. 2007).

the secular court system, and in ensuring that their decisions will be enforceable in, and respected by, secular courts.

VII. Crafting a Framework for Enforceable Arbitration Decisions

Of course, the legal system in America will not honor religious arbitration of family matters or any other matters absent a confidence that religious arbitration is just and proper as understood by secular law and society. However, the Federal Arbitration Act[68] ("FAA") is deeply rooted in 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. When boiled down, there are six basic principles of procedural regularity that religious arbitration panels must incorporate to ensure that secular courts honor their decisions.[69]

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.

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[68] Federal Arbitration Act, 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).

[69] *See* Broyde, *supra* note 28.

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 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 participants voluntarily.

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.[70]

These six rules are based on a fundamental reality of religious arbitration: other than in child custody disputes,[71] 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 offer. Rather, the Federal Arbitration Act and the myriad state laws that derive from it have a strong notion of procedural due process.[72]

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70 This basic idea is the focus of three recent articles of mine. *See* Broyde, *supra* note 58; Broyde, et al., *supra* note 2; Broyde, *supra* note 28.

71 *See* Broyde, *supra* note 18.

72 These statutes provide that there are certain things arbitration panels may and may not do in the course of making decisions that represent procedural violations: 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, as well as 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/. 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.

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 the organization's website.[73] The Institute for Christian Conciliation[74] ("ICC") and the Muslim Arbitration Tribunal ("MAT") have done likewise.[75] 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 parishioners have slowly realized that, so long as these foundations are in place, religious arbitration can be used to settle almost any dispute between any group of disputants—whether they be an individual or a business entity. The latter group, namely commercial entities, are the most recent adopters of religious arbitration, and have implemented the practice to settle disputes arising out of what has been dubbed "co-religionist commerce."

VIII. New Frontiers of Religious Arbitration

Returning to our bankruptcy case of *In Re Congregation Birchos Yosef* allows us to reflect on one of the frontiers of religious arbitration: "co-religionist commerce" (hereafter "CRC"), as the phrase is coined in the excellent article by Michael A. Helfand and Barrack Richmond.[76] As they note, CRC is "commerce between co-religionists who intend their transactions to adhere to religious principles or to pursue religious objectives."[77] Those who have stayed religious have become even more entrenched in their religious beliefs, and as Helfand and Richman note in their seminal work on CRC, "[i]n recent years, American religious communities have become increasingly sophisticated players in commercial mar-

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73 *Rules and Procedures*, Beth Din of Am., http://bethdin.org/docs/PDF2-Rules_and_Procedures.pdf (last visited Jan. 15, 2016).

74 Peacemaker Ministries, http://www.peacemaker.net/site/c.nuIWL7MOJtE/b.5394441/k.BD56/Home.htm (last visited Jan. 15, 2016).

75 Muslim Arbitration Tribunal, http://www.matribunal.com/ (last visited Jan. 15, 2016).

76 Michael A. Helfand & Barak D. Richman, *The Challenge of Co-Religionist Commerce*, 64 Duke L.J. 769 (2015).

77 *Id.* at 771.

kets, developing legal instruments that comply with the demands of religious dictates while engineering substantial business transactions."[78] As this group grows and develops, its religious foundations place it in the precarious—yet unavoidable—position of facing major hurdles in the court system. The largest hurdle co-religionists must overcome is that the secular court system is not sufficiently equipped to deal with highly specialized disputes involving co-religionist parties.

Although similar to typical commerce, CRC—like all specialized areas of commerce—has numerous inherent perspectives and flavors. Its ecclesiastical qualities frequently bleed into the general aspects of its culture. This includes remedies varying from tradition to tradition. As Helfand and Richman point out, while seemingly benign from a religious view, the ecclesiastical qualities inherent in co-religionist commerce present a number of problems for courts. As examples, Helfand and Richmond point to the fact that courts often "shy away from adjudicating co-religionist commercial disputes, fearing that intervention would impermissibly contravene prevailing interpretations of the Establishment Clause" due to the fact that settling co-religionist disputes involves "interpret[ing] religious terminology, standards, . . . practices," and common commercial customs.[79]

Even when no formal Establishment Clause issue exists, however, the correct resolution of disputes between co-religionist parties involves interpreting religious terminology and practices. Courts, therefore, are less likely to resolve these disputes correctly. This is due in part to the fact that "Constitutional doctrine . . . has instructed courts, when confronted with disputes that are imbued with ecclesiastical circumstances, to adjudicate on the basis of 'neutral principles of law'—that is, to issue rulings based 'on objective, well-established concepts of law familiar to lawyers and judges.'"[80] While this keeps courts from becoming entangled in religious doctrine and practice, it also takes away the right of parties to settle their disputes through a lens reflective of their religious principles, underlining the religious purpose and significance of agreements between co-religionist parties.

Helfand and Richman point out a number of issues with secular courts interpreting religious doctrine and settling disputes between co-religionist parties, including the fact that the movement

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[78] *Id.* at 771–72.
[79] *Id.* at 773.
[80] *Id.* at 774.

toward favoring textual interpretations of contracts between merchants takes away the option for courts to invoke contextual evidence to interpret religious terminology in co-religionist commercial agreements.[81] This movement, they argue, when coupled with the growing wariness of courts to adjudicate disputes involving ecclesiastical interests—leading to a tendency by courts to interpret the Establishment Clause expansively to preclude adjudication of co-religionist disputes—places coreligionist parties in a position where their agreements will be judged by the explicit language contained therein. However, if such language draws too much on religious doctrine, courts will refuse to adjudicate disputes arising from the agreement.[82] Helfand and Richman suggest courts take a contextualist approach to settling disputes between co-religionists.[83]

The problem with what they propose, however, is that the mode by which they suggest courts adopt this approach is principally an internal process by which judges realize that agreements between coreligionists are no different than agreements between other parties not involving religious underpinnings, and should be viewed no differently. While this is a reasonable solution to the problem of courts settling disputes between coreligionists, it is a slow and ineffective solution, and forces courts to step outside of their areas of expertise, which is certainly not religious law. In stepping outside of their area of expertise and struggling to resolve disputes they are not inherently incapable of solving, but which they are unfamiliar with and which does not share a jurisprudential base, they have no choice but to adjudicate harder disputes with lower degrees of accuracy than an insider could. More notably, it is inferior to establishing a more robust system of private arbitration between coreligionist parties, which provides coreligionists with a better venue for reasonably addressing and resolving their disputes.

In that sense, CRC is an example of the most powerful form of arbitration—where the practice of arbitration is most efficient. This form of arbitration is most efficient because a system of arbitration becomes most efficient when its key players are united by a particular field—in this case religion and business. Being in the same field gives parties the benefit of speaking the distinctive language of their industry. When united by both commercial field and

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81 *Id.* at 776.

82 Helfand & Richman, *supra* note 76, at 776–77.

83 *Id.* at 775.

religion, parties' interests are brought into closer alignment. The rules set out to govern disputes arising between the parties are mutually agreed to by, and beneficial to, all parties involved in the case, giving them an underpinning of mutuality. In addition to utilizing the "lingo" of their industry, coreligionists utilize religious language in their agreements, which courts cannot immediately understand. By creating and encouraging a more robust system of private arbitration, disputes are placed before a decision-maker—or panel of decision-makers—who are experts in the area of the dispute, and understand what the terms utilized by the parties actually mean. It is important to note here that this is not a novel idea—specialized industries have developed very robust arbitral rules and bodies to govern their disputes, including the construction industry,[84] diamond merchants,[85] professional sports leagues,[86] and many other industries and organizations.

These groups developed robust systems of private arbitration because they found that courts had a difficult time providing proper context in settling disputes between them. Co-religionists are no different than these groups, and there should be no barrier holding them back from creating an equally robust system of highly specific coreligionist arbitration panels to govern disputes arising between them. In creating such a system, coreligionists will be able to combine common law and common culture to reach a common, foreseeable, and mutually agreeable resolution.

As mentioned earlier, judges are generalists. Submitting a matter to private arbitration—when there are robust arbitral rules and courts in place—places two sophisticated parties in a position to agree to submit disputes that arise between them to an equally sophisticated arbitral body for resolution. The groups noted above that have already developed robust systems of private arbitration are special in that they have developed—through the course of business—their own language that only members of the groups

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84 *See, e.g.*, *Construction, Real Estate & Environmental*, AM. ARB. ASS'N (last visited Feb. 3, 2016), https://www.adr.org/aaa/faces/aoe/cre/construction ("For nearly half a century, the American Arbitration Association (AAA) has set the standard for alternative dispute resolution (ADR) in the construction industry. As the provider of choice for dispute resolution services, the AAA through its National Construction Dispute Resolution Committee (NCDRC), has worked closely with the industry to develop the Construction Industry Arbitration Rules and Mediation Procedures and other project specific approaches to prevent and manage conflict.").

85 *See* Barak D. Richman, *How Community Institutions Create Economic Advantage: Jewish Diamond Merchants in New York*, 31 L. & SOC. INQUIRY 383 (2006).

86 Darren Heitner, *Understanding Major League Baseball's Salary Arbitration System*, SPORTS AGENT BLOG (Feb. 25, 2010), http://sportsagentblog.com/2010/02/25/understanding-major-league-baseball%E2%80%99s-salary-arbitration-system/.

thoroughly understand. When they reach an agreement on how they will conduct business with one another, they utilize highly specialized language, often only understandable to members of the group. Agreeing to privately arbitrate disputes allows for these highly specialized individuals to submit their highly specialized disputes to a highly specialized court that speaks their language. This specialization is not something secular courts can offer.

When confronted with a dispute, courts apply their own general understanding of the law to settle them with little references to the unique cultural and legal norms underlying the dispute. Unfortunately, this often leaves parties in highly specialized groups feeling as if their dispute has not been fully settled, or has been settled in an unsatisfactory or incorrect manner. This is quite common when highly specialized disputes are submitted to secular or general courts. Fortunately, arbitration provides a better venue for more satisfactorily settling disputes between these highly specialized parties.

As Helfand and Richman note, agreements between coreligionists often have religious objectives.[87] Such objectives, they argue, "cannot be captured in alternative secular terminology . . . and resist translation"[88] by secular courts. Their solution to this problem—courts taking a contextual approach—does not work, or at least is not the most expedient way to solve the problem. Even in taking a contextual approach, judges must develop a robust understanding of the religious principles underpinning an agreement between coreligionists, which is difficult, as such parties often "enter co-religionist commercial arrangements to purchase *religious* goods or secure *religious* performance . . . not susceptible to description in secular terminology."[89]

As examples, Helfand and Richman point to contractual obligations of a minister and religious standards for supervising kosher products. The authors reiterate that, "[i]n drafting such agreements, parties aim to create commercial or financial arrangements that will comport with shared religious rules and values,"[90] and that "[r]eference to specific religious terms is essential to the agreement."[91] While Helfand and Richman argue that disputes arising out of these agreements cannot be satisfactorily settled by resorting

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87 Helfand & Richman, *supra* note 76, at 771.

88 *Id.* at 782.

89 *Id.*

90 *Id.*

91 *Id.*

to secular terminology, we would go a step further and argue that they cannot be satisfactorily settled by secular courts, at least to the same extent they would be if submitted to a highly specialized arbitral panel. Highly specialized arbitrators would not only be able to glean the parties' contractual expectations stemming from highly specific religious language, but could do so in a way that did not require parties to use what the authors refer to as "secular analogs" in place of religious language. Combined with the fact that specific arbitral bodies could more expediently settle disputes arising between coreligionists, this benefit makes private arbitration superior both economically and religiously to settling disputes in secular courts.

Even beyond the fact that some religious language is not susceptible to secular interpretation, as Helfand and Richman point out, "religious traditions and doctrines place formal restrictions on the structure and terms of the relevant documents."[92] Again, the authors' solution is for courts to take a contextualist approach to interpreting agreements between coreligionist parties—looking into what they intended instead of translating their language into secular terminology.

This still comes up short of a more robust private system of religious arbitration, as the true intentions of the parties may be—and often are—deeply rooted in religious traditions or practices. Therefore, for courts to ably settle these disputes, they must develop their own robust understanding of religious underpinnings, principles, and norms. This takes a significant amount of time, which takes away any aspect of efficiency in settling disputes between highly specialized parties. Moreover, it would be difficult to structure a feasible argument that courts would be able to learn all religious traditions and doctrines inherent in agreements between coreligionists. This is where specialized arbitral bodies have the advantage. Such bodies are presided over by arbitrators who are deeply rooted in religious traditions and doctrines—equally or more than the parties to the dispute. This allows for the individual to draw on his or her own understanding and implement the nuances inherent in particular religions sometimes inaccessible to outsiders.

Helfand and Richman are then legally correct: courts *can* satisfactorily solve disputes between coreligionists without running afoul of the Establishment Clause. Moreover, we agree that it is

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92 *Id.* at 783.

not a religious impossibility for judges to settle disputes between coreligionist parties. Judges and courts, as sophisticated parties and bodies themselves, invariably, given sufficient time and experience, will be able to figure out a way to effectively interpret agreements between coreligionists and settle disputes that arise therefrom. The problem, however, is that this is an imperfect method of settling coreligionist disputes. The fact that different courts will develop different levels of experience over different periods of time leads to uncertainty on the part of parties who submit their sophisticated disputes to courts of general jurisdiction.

Individuals recognize that courts have a difficult time interpreting religious doctrine. In fact, one proposed measure for the 2015 ballot in Texas "would have required judiciaries to refrain from involvement in religious doctrinal interpretation or application."[93] This type of measure has arisen from the claim of churches to what has been deemed church autonomy, or "a claim to autonomous management of a religious organization's internal affairs."[94] Because churches and their parishioners are often governed by church doctrine that would be complicated for outsiders to interpret, and that such interpretation by courts may have First Amendment repercussions, proponents of church autonomy believe that courts should stop short of interpreting religious doctrine. While First Amendment issues certainly present a problem for some courts, another issue is that sometimes they interpret religious doctrine incorrectly. When courts get this wrong, parties to the dispute are left feeling as if their dispute has not been satisfactorily settled. On the other hand, as we have sometimes seen in the past, allowing churches to have carte blanche control over settling disputes between their parishioners can take away the right of individuals to settle disputes between themselves. The median between these two extremes is to allow individuals to contract to have their matters arbitrated by someone familiar with church doctrine.

But, even as CRC can be understood as just another example of the virtues of religious arbitration as a vehicle superior to secular courts and law for dispute resolution, there is another important public policy issue present. CRC creates a model in which—as it becomes common—significant portions of commerce could well be undertaken by people who opt out of the secular law norms. Con-

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93 *Texas Judicial Restraint in Religious Doctrine Interpretation Amendment (2015)*, BALLOTPEDIA, http://ballotpedia.org/Texas_Judicial_Restraint_in_Religious_Doctrine_Interpretation_Amendment_(2015) (last visited Feb. 3, 2016).

94 Douglas Laycock, *Church Autonomy Revisited*, 7 GEO. J.L. & PUB. POL'Y 253, 254 (2009).

sider again the problems of *In Re Congregation Birchos Yosef* and consider a society in which twenty percent of the society adheres to and participates in religious arbitration that functionally does not recognize the validity of secular bankruptcy law, and shuns people who exercise their rights under secular law.

This aspect of CRC—particularly in commercial conduct—changes the basic fabric of society. The weakness of CRC as a category is highlighted by cases like *In Re Congregation Birchos Yosef* since, particularly in bankruptcy, but in many cases possibly, the economic relationship between commerce between two co-religionists and commerce between one of those co-religionists and others who are part of secular society is intertwined, and CRC arbitration raises the possibility of multiple legal systems and multiple courts seeking to regulate interrelated commercial activity.

On the other hand, the concerns with CRC are at their weakest in family matters. Marriages and marriage law, because marriage is (still) dyadic and long term, poses much fewer serious challenges to the norms of society when people formulate religious arbitration tribunals to address marriage and divorce issues. There are unlikely to be multiple spouses or parties to most family law claims and problems associated with third party commercial interests are least likely to be present in the family setting.

IX. Conclusion

The brief remarks here are part of a much longer discussion of religious arbitration and the future of both religious life and arbitration law in America. They highlight six changes in American law and culture over the last decades that are worth pondering.

First, a secular vision of culture has finally taken firm control of law. From same-sex marriage to co-religionist commerce, the prism though which our legal institutions view the hard problems of life is much more firmly secular than at any prior time in the American republic. Although this process is incremental and there is no single moment of triumph, the secular "shining city on the hill" is increasing to dominate the cultural norm.

Second, religious communities are beginning to recognize this and are slowly abandoning the ship of secular law. In particular, the evangelical communities in America are recognizing that institutions that previously reflected their values—like marriage, divorce, and even perhaps bankruptcy—no longer do. Furthermore,

religious communities see little chance of reclaiming them in the foreseeable future.

Third, these same religious communities, which have lost control of secular law and culture, are not abandoning faith generally. Instead, they are reformulating their energies to building a more insular religious culture in which people choose to be members of communities of the faithful as a sub-community of secular society, with norms of conduct and culture that are not part of secular society. These arbitration tribunals ought to be more efficient and more just places to resolve disputes than secular courts, since these religious tribunals understand the contractual norms of the parties more readily than the courts will.

Fourth, as these communities of the faithful become more insular and more self-regulating, arbitration law becomes a basic tool they use to function as part of secular society, albeit with their own norms, rules, and law. Religious arbitration allows like-minded people to submit to a religious and legal judicial body in a way that actually binds, and which calls for secular society to respect and validate (through enforcement under the Federal Arbitration Act) their norms.

Fifth, this change in culture and norms calls for secular law and society to consider the limits of religious arbitration as a binding secular process. Should religious arbitration panels be limited to financial remedies exclusively? Should religious arbitration be excluded from certain subject matters in which the state feels private law should have no say since legal uniformity is needed? Finally, should religious arbitration be more tightly regulated to ensure that only those who voluntarily agree are actually subject to such arbitration?

Finally and most importantly, the most basic question is still unanswered: Is having a vibrant network of religious arbitration systems good for both civil society and faith groups? Will it allow minority religious groups to flourish in a way that enhances both the religious and the civil side of a society?

We suspect that the answer to these many, very hard, questions is that vibrant religious arbitration encourages domestic tranquility in religious communities, allows people to organize their consensual affairs as they deem proper, and encourages civil society to see value in minority religious communities governing their own affairs in a fair and efficient way that reduces tension with the rest of society. This arbitration also advances many goals of civil society by allowing religious communities to be moderately self-

governing in those areas of law where secular adjudication of religious values and expectations is very hard for the secular courts. Such arbitration furthers the interest of justice by encouraging such adjudication. This contractual approach allows a better resolution of the exit problems that plague all religious communities (and thus their civil counterparts) by insisting that exit disputes be treated no differently than any other contract dispute.