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Cover Page Footnote

J.D. Candidate, 2007, Fordham University School of Law.

FAITH-BASED ARBITRATION: FRIEND OR FOE? AN EVALUATION OF RELIGIOUS ARBITRATION SYSTEMS AND THEIR INTERACTION WITH SECULAR COURTS

Caryn Litt Wolfe*

INTRODUCTION

Susan and Boaz Avitzur were married in a traditional Jewish ceremony in 1966.¹ As part of the ceremony, the couple signed a *ketubah*, or marriage contract.² The contract provided in part that they would recognize a particular *beth din*, or Jewish court, as having the power to resolve any disputes that might arise between the couple in the future.³

Susan and Boaz's marriage ended in civil divorce in 1978.⁴ Boaz, however, refused to appear before the *beth din*, and Susan was therefore unable to receive a Jewish divorce.⁵ Susan brought Boaz to court, hoping to have the court compel him to submit to Jewish arbitration, as he had agreed to in their marriage contract.⁶ The New York Court of Appeals ruled that their agreement to arbitrate any future disputes was valid and ordered Boaz to appear before the *beth din*.⁷

Over the past half century, those facing legal conflicts have increasingly turned to private arbitration to resolve their disputes rather than resolving them through litigation.⁸ Parties have recognized the significant advantages of arbitration, and United States courts have been very willing to unburden their caseloads onto private arbitration and other methods of dispute resolution.⁹ Along with general arbitration, faith-based arbitration—a process in which arbitrators apply religious principles to resolve disputes—

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1. *Avitzur v. Avitzur*, 446 N.E.2d 136, 137 (N.Y. 1983).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.* In Judaism, the attainment of a Jewish divorce is extremely significant, especially for the woman. *See infra* notes 195-98 and accompanying text.

6. *Avitzur*, 446 N.E.2d at 137.

7. *Id.* at 139.

8. *See infra* notes 56-81 and accompanying text.

9. *See infra* notes 41-49 and accompanying text.

is common today, as well.¹⁰ As with ordinary arbitration, the courts have generally been accepting of faith-based arbitration.¹¹

While faith-based arbitration is utilized in multiple areas of law,¹² its use in the context of family law deserves special attention because family law often involves more vulnerable members of society, and religious doctrines used in deciding family law issues may present human rights concerns.¹³ Indeed, in September 2005, the premier of Ontario, Canada rejected a proposal to establish Islamic arbitration panels, putting its other already existing faith-based arbitration systems at risk.¹⁴ The popular uproar and severe government response to the use of religious arbitration in Ontario provides an interesting contrast to the attitude of the United States toward faith-based arbitration and prompts an evaluation of the system as it currently exists.¹⁵

Part I of this Note provides an overview of faith-based arbitration in the United States, placed in the context of regular arbitration as a whole, focusing on arbitration in the family law context and the relationship between arbitration and secular courts. Part II examines in detail the reasons that faith-based arbitration is necessary and beneficial, and, alternatively, the disadvantages to such a system. Part III suggests that, in light of both the compelling justifications for it as well as the intense criticism hurled against it, religious arbitration systems should be maintained, although with more oversight.

I. THE USE OF FAITH-BASED ARBITRATION IN FAMILY LAW

While the United States accepts systems of religious arbitration, it is by no means obvious that its current approach to faith-based arbitration is the most appropriate. The arguments for and against faith-based arbitration can best be evaluated after considering its background. First, this part provides an overview of arbitration and its benefits in general in the context of other types of alternative dispute resolution (“ADR”).¹⁶ Next, it presents a brief history of the growth and discusses the many current uses of arbitration in the United States.¹⁷ It then turns to an overview of the development and state of existence of faith-based arbitration in particular.¹⁸ This part also discusses the interaction of faith-based arbitration with secular courts.¹⁹ Finally, this part highlights the special human rights dangers involved in

10. *See infra* notes 97-126 and accompanying text.

11. *See infra* notes 61-65, 185-89 and accompanying text.

12. *See infra* note 105 and accompanying text.

13. *See infra* Part I.E.

14. *See infra* Part I.F.

15. *See infra* Part I.F.

16. *See infra* Part I.A.

17. *See infra* Part I.B.

18. *See infra* Part I.C.

19. *See infra* Part I.D.

using religious arbitration in the family law context,²⁰ contrasting the Canadian reaction to the growth of faith-based arbitration with that of the United States.²¹

A. General Discussion of ADR and Arbitration

It is important to understand arbitration in the context of ADR. ADR refers to all methods of resolving a dispute other than litigation.²² While ADR can take almost any form, the most common types are negotiation, mediation, collaborative law, and arbitration.²³ In negotiation, the most informal type of ADR, the two opposing parties work together in a conciliatory manner in order to reach a compromise.²⁴ Attorneys are allowed to participate but their presence is not required.²⁵ Mediation is similar to negotiation, but it involves a third party whose role is to facilitate communication between the two parties and help them reach an acceptable resolution to their dispute.²⁶ The mediator listens to the parties, either together or separately, and sometimes collects documents and interviews witnesses in an effort to identify the strengths and weaknesses of each party's argument so that they can rationally reach an agreement.²⁷ The mediator helps the parties understand the underlying problems and interests and makes them aware of the options that will help them resolve the dispute.²⁸ Although the parties agree to mediation through contract,²⁹ the mediator's suggestions are not binding.³⁰ Collaborative law is largely distinguished from negotiation and mediation by the required inclusion of attorneys and any other professionals necessary to resolve the dispute.³¹ In collaborative law, the parties sign a contract to work exclusively toward the

20. See *infra* Part I.E.

21. See *infra* Part I.F.

22. Abraham P. Ordover & Andrea Doneff, *Alternatives to Litigation: Mediation, Arbitration, and the Art of Dispute Resolution* 5 (2d ed. 2002).

23. See *id.* at 7-10; see also Sheila M. Gutterman, *Collaborative Law: A New Model for Dispute Resolution* 14-17 (2004). For a summary of other, less common forms of alternative dispute resolution ("ADR"), see Ordover & Doneff, *supra* note 22, at 11-12 (discussing types of ADR such as settlement week, summary jury trials, mini trials, and rent-a-judge).

24. Ordover & Doneff, *supra* note 22, at 7. While negotiation occurs often in everyday life, in the legal context negotiation most commonly serves as the basis for other types of ADR, as most disputes involve more people than just the two disputing parties. See *id.* at 7-8.

25. *Id.* at 7.

26. Gutterman, *supra* note 23, at 15-16. Mediation has been used, for instance, to resolve environmental disputes. See Matthew Patrick Clagett, *Environmental ADR and Negotiated Rule and Policy Making: Criticisms of the Institute for Environmental Conflict Resolution and the Environmental Protection Agency*, 15 Tul. Envtl. L.J. 409, 411-14 (2002).

27. Steven C. Bennett, *Arbitration: Essential Concepts* 4 (2002).

28. Ordover & Doneff, *supra* note 22, at 8. The authors emphasize that in mediation the two parties must feel that the resolution is fair. *Id.*

29. Bennett, *supra* note 27, at 48.

30. *Id.* (noting that mediators cannot impose a settlement).

31. See Gutterman, *supra* note 23, at 16.

goal of settlement, and if the dispute does not settle, everyone involved must withdraw from the case.³² This form of ADR still focuses on the needs and interests of the parties, and the goal remains to reach an agreement which satisfies both parties.³³

The most traditional form of ADR, arbitration, differs from the other modes of ADR in that an arbitrator or panel of arbitrators gathers information, including documents, briefings, and witness testimony, and makes a decision that is binding on the parties.³⁴ The parties can contract privately regarding the range of issues to be addressed, the scope of relief to be awarded, and any procedural aspects of the arbitration.³⁵ Of all of the methods of ADR, arbitration is most like litigation in that it is adjudicatory and binding.³⁶ While arbitration is most often a result of private contractual agreement, where two parties agree to use the method and be bound by the arbitrator's decision,³⁷ nonconsensual ADR does exist, in the form of mandatory, or court-ordered, arbitration.³⁸ The arbitrator's decision is "subject to limited review by a court on motion to confirm or vacate the arbitration award."³⁹

Aside from classic arbitration, there are several subtypes of arbitration, the most common of which is mediation-arbitration ("med-arb"). Med-arb combines the elements of mediation and arbitration, such that a neutral and impartial third party serves as a mediator, but if the parties are unable to agree to a settlement, the third party takes on the arbitrator role.⁴⁰

There are many benefits to using arbitration. The primary reasons parties would choose arbitration over litigation to resolve their disputes are time

32. *Id.* Collaborative law is commonly used in cases of divorce and other family law disputes. See generally Gay G. Cox & Robert J. Matlock, *The Case for Collaborative Law*, 11 Tex. Wesleyan L. Rev. 45 (2004).

33. Gutterman, *supra* note 23, at 17.

34. See Bennett, *supra* note 27, at 4-5; Judicial Arbitration & Mediation Servs. (JAMS), Arbitration Defined, <http://www.jams-endispute.com/arbitration/defined.asp> (last visited Aug. 12, 2006). Arbitration is used in a wide variety of contexts. See *infra* notes 66-78 and accompanying text.

35. See, e.g., Carl H. Johnson & Pete D.A. Petersen, *Is the Revised Uniform Arbitration Act a Good Fit for Alaska?*, 19 Alaska L. Rev. 339, 376-78 (2002) (noting that parties can determine, independent of any court's conclusion, to prevent consolidation with any other arbitration proceedings); Bradley T. King, Note, "Through Fault of Their Own"—Applying Bonner Mall's *Extraordinary Circumstances Test to Heightened Standard of Review Clauses*, 45 B.C. L. Rev. 943, 957-58 (2004) (stating that parties can determine to arbitrate according to a particular state's laws).

36. See JAMS, *supra* note 34.

37. Ordovery & Doneff, *supra* note 22, at 9.

38. See JAMS, *supra* note 34.

39. Bennett, *supra* note 27, at 5. A more detailed analysis of court intervention in arbitration awards follows below at Part I.D. For a review of the stages of the arbitration process, from initiation to award, see John W. Cooley, *The Arbitrator's Handbook* 2-5 (2d ed. 2005).

40. See Gutterman, *supra* note 23, at 16. For the difficulties inherent in this form of ADR, see Alan Scott Rau et al., *Arbitration* 298-303 (2d ed. 2002). For a summary of other types of arbitration, such as high-low arbitration, baseball arbitration, arbitration-mediation, co-arbitration-mediation, see Cooley, *supra* note 39, at 9-12.

and money. The process of arbitration is much faster and cheaper than litigation.⁴¹ Many people also prefer arbitration because it allows them to retain some control over their dispute, including the identity of the decision-maker, and when and how the decision is made.⁴² This type of control adds convenience that is absent in litigation—instead of having to be on alert for trial call and not knowing until the last minute which courtroom has become available, the parties can fix their own date.⁴³ Another key benefit to arbitration is that it can be a less hostile and adversarial process than litigation, allowing the parties to continue their business relationship afterwards.⁴⁴ Other reasons why the parties may choose arbitration are as follows: (1) arbitration affords privacy because sessions are not open like litigation, pleadings are not filed publicly, and no one but the parties has access to the decision; (2) the arbitration process employs more flexible rules in that it allows the parties to choose the rules and procedures; (3) the process is more businesslike and less lawyer-like, as the sessions often take place in private conference rooms; (4) because its appeals process is limited, arbitration affords more finality than litigation; (5) arbitration allows the opportunity for both sides to present their arguments in a neutral forum;⁴⁵ (6) in arbitration the parties have the ability to choose a decision-maker with special expertise in the area being arbitrated; (7) the arbitrator is able to tailor the remedy to the situation;⁴⁶ (8) there is a greater chance of settling when arbitration is used; (9) arbitration provides insight into the plaintiff's case; and (10) arbitration is useful for narrowing the issues involved, which can greatly help in preventing future disputes.⁴⁷ Arbitration is also beneficial for the judicial system—it eases the pressure of mounting dockets and reduces the administrative costs of discovery and trials.⁴⁸ The process also tends to deter the filing of frivolous claims.⁴⁹

41. Ordovery & Doneff, *supra* note 22, at 6. Aside from obvious costs like attorneys' fees and general litigation-related expenses, additional costs, especially in the commercial and employment arbitration contexts, can include loss of employee time, loss of employee concentration, and loss of company good will. *Id.* Fees and costs associated with ADR are normally much lower than the fees and costs of litigation. Cooley, *supra* note 39, at 6. *But see* Bennett, *supra* note 27, at 7 (suggesting that there is little real evidence that arbitration saves money or time; rather people merely perceive the process as cheaper and faster); Rau et al., *supra* note 40, at 24-25 (suggesting that arbitration was never considered as a cheaper or faster substitute for adjudication, but rather as a means to provide merchants with an internal community method of dispute resolution).

42. Ordovery & Doneff, *supra* note 22, at 6.

43. Randy Linda Sturman, *House of Judgment: Alternate Dispute Resolution in the Orthodox Jewish Community*, 36 Cal. W. L. Rev. 417, 417 (2000).

44. American Arbitration Association (AAA), Focus Areas, Resolving Professional Accounting and Related Services Disputes: A Guide to Alternative Dispute Resolution, <http://www.adr.org/sp.asp?id=22021> (last visited Aug. 12, 2006).

45. Bennett, *supra* note 27, at 6-8.

46. Cooley, *supra* note 39, at 6.

47. Ordovery & Doneff, *supra* note 22, at 6. A study of ADR use by the Assistant United State Attorneys (AUSA) organization over a five-year period revealed that sixty-three percent of the cases that employed ADR settled. *Id.*

48. *See* Diane P. Wood, *The Brave New World of Arbitration*, 31 Cap. U. L. Rev. 383, 383 (2003).

While there are many benefits to arbitration, there are also some drawbacks. Disputing parties may decline to use arbitration because, put simply, arbitration lacks the protections of the court system. In arbitration, there are limitations on discovery, acquiring preliminary relief is difficult, arbitrators make decisions using relaxed standards, and there is limited review of arbitration awards.⁵⁰ Furthermore, there is a lack of quality control in arbitration proceedings, the arbitrators are not held accountable by any supervising authority, there are often relaxed rules of evidence, there is limited subpoena power, arbitrators are not required to rely on precedent, there is often no uniformity of decisions, and the arbitrator rarely writes a reason for his decision.⁵¹

B. *A Brief History of the Growth of Arbitration*

Arbitration in the United States has a long history, although the process has been legitimized by the courts only relatively recently. The first permanent arbitration board was established by the New York Chamber of Commerce in 1768, and the securities industry had included an arbitration clause in its constitution by 1817.⁵² The courts, however, viewed the arbitration method “with skepticism.”⁵³ Showing little respect for arbitration, one nineteenth century judge wrote,

49. See, e.g., Andrea Catania, *State Employment Discrimination Remedies and Pendent Jurisdiction Under Title VII: Access to Federal Courts*, 32 Am. U. L. Rev. 777, 827 n.234 (1983) (explaining that the medical profession’s use of arbitration to settle malpractice claims can deter frivolous claims because those on the arbitration panel are medical professionals likely to rule for defendants, which discourages those without strong cases from going to court with their claims).

50. Bennett, *supra* note 27, at 8. For instance, arbitration will require a limited schedule of discovery, often as a cost- and time-saving measure. See Jeff A. Ronspies, *Does David Need a New Sling? Small Entities Face a Costly Barrier to Patent Protection*, 4 J. Marshall Rev. Intell. Prop. L. 184, 210 (2004). Acquiring preliminary relief is difficult because, although arbitration rules allow it, the arbitration clause usually must provide for such relief. See Melissa Devack, Note, *Intellectual Property as an Investment: A Look at How ADR Relates to the European Union’s Proposal for Electronic Commerce in the Single Market*, 2 Cardozo Online J. Conflict Resol. 57, 74 n.296 (2001). Furthermore, even if the arbitrator does grant preliminary relief, the only way to force a party to comply is by going to court. See Christopher R. Drahozal, *Privatizing Civil Justice: Commercial Arbitration and the Civil Justice System*, 9 Kan. J.L. & Pub. Pol’y 578, 586 (2000).

51. Cooley, *supra* note 39, at 6. The author indicates a number of factors that the parties should consider in order to determine if arbitration is the proper method to employ. *Id.* at 7-8. The fact that legal issues predominate over factual issues, that the parties wish to lower costs, settle the matter confidentially and receive a quick decision, and that a power imbalance between the parties exists that would make mediation a poor choice to resolve the conflict are among the favorable indicators for arbitration. *Id.* at 7. If a party seeks an unusual remedy not provided by arbitration, the resolution reached would require monitoring, the conflict involves major constitutional issues, the facts of the case suggest a jury would be appropriate, or the parties fear a binding, unappealable award, then arbitration may not be the optimal method of resolution. *Id.* at 7-8.

52. Bennett, *supra* note 27, at 9.

53. Wood, *supra* note 48, at 383. A mid-nineteenth century case, *Tobey v. County of Bristol*, 23 F. Cas. 1313 (C.C.D. Mass. 1845) (No. 14,065), exemplifies the judicial attitude toward arbitration at that time. The case involved a claim against the county arising out of a

[A]rbitrators, at the common law, possess no authority whatsoever, even to administer an oath, or to compel the attendance of witnesses. They cannot compel the production of documents, and papers and books of account, or insist upon a discovery of facts from the parties under oath. They are not ordinarily well enough acquainted with the principles of law or equity, to administer either effectually, in complicated cases; and hence it has often been said, that the judgment of arbitrators is but *rusticum judicium*.⁵⁴

This reluctance of courts to enforce arbitration decrees made arbitration less appealing to disputing parties.⁵⁵

However, as new economic and political developments arose in the twentieth century, such as the rise of the organized labor movement and the expansion of social welfare regulation and administrative power, the need for arbitration grew.⁵⁶ Recognizing the usefulness of arbitration, Congress in 1925 passed the Federal Arbitration Act (FAA).⁵⁷ Essentially, the FAA established that a written agreement of arbitration “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”⁵⁸ In 1955, the National Conference of Commissioners on Uniform State Laws drafted the Uniform

road the plaintiff was constructing for it. *Id.* at 1318. The parties had agreed to submit any disputes to arbitration, with the parties mutually consenting to the arbitrators. *Id.* at 1319. The county chose arbitrators on its own, and when the plaintiff sought to have arbitrators chosen from among his picks, the county refused, and the plaintiff brought suit in court to compel the county to pick new arbitrators. *Id.* The court denied the plaintiff any relief, holding that the court had no power to order the defendants to fulfill their arbitration agreement. *Id.* at 1320. The court wrote, “[A] court of equity ought not to compel a party to submit the decision of his rights to a tribunal, which confessedly, does not possess full, adequate, and complete means . . . to administer justice. . . . [A]lthough a party may have entered into an agreement to submit his rights to arbitration, this furnishes no reason for a court of equity to deprive him of the right to withdraw from such agreement *Id.*”

54. *Tobey*, 23 F. Cas. at 1321. “*Rusticum judicium*” is Latin for rustic or simple justice. Citizen Legal Reference Materials, Legal Dictionary, <http://www.citizenlaw.com/pdf/r.pdf> (last visited Aug. 9, 2006).

55. See Bennett, *supra* note 27, at 10.

56. *Id.* The numerous disputes arising from modern industrial operations convinced both unions and management that a fast and inexpensive way to solve disputes was preferable to litigation, and quasi-judicial administrative law proceedings, which resembled arbitration, were seen as necessary in a new administrative age. *Id.*

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

58. *Id.* § 2. For a summary of the Federal Arbitration Act (FAA) provisions, see Bennett, *supra* note 27, at 17-29.

Arbitration Act (UAA),⁵⁹ and, as a response to gaps and ambiguities in the UAA, the Revised Uniform Arbitration Act (RUAA) was drafted in 2000.⁶⁰

Throughout the first half of the twentieth century, the Supreme Court remained ambivalent toward arbitration.⁶¹ The judicial system did not become regularly receptive to enforcing arbitration agreements until the 1960s.⁶² Through a number of cases that arose in the second half of the twentieth century, the Supreme Court established its approval of the arbitration method.⁶³ The Court began to see arbitration as an equally

59. Unif. Arbitration Act (UAA) §§1-25, 7 U.L.A. 102-768 (1956), available at http://www.law.upenn.edu/blil/ulc/fnact99/1920_69/uaa55.htm (last visited Aug. 13, 2006). For a summary of the UAA provisions, see Bennett, *supra* note 27, at 29-31. In 1920, New York was the first state to enact a statute recognizing the validity and enforceability of arbitration agreements. *Id.* at 10. Most states today have arbitration statutes based on the Uniform Arbitration Act. *Id.*; see also George K. Walker, *Arbitrating Family Law Cases by Agreement*, 18 J. Am. Acad. Matrimonial Law 429, 435 & n.22 (2003).

60. Unif. Arbitration Act (RUAA) §§1-33, 7 U.L.A. 10-94 (2000), available at <http://www.law.upenn.edu/blil/ulc/uarba/arbitrat1213.htm> (last visited Aug. 13, 2006); see also Walker, *supra* note 59, at 436. For a summary of the RUAA provisions, see Bennett, *supra* note 27, at 32-39 (summarizing the waivable and non-waivable rights involved in arbitration; the principles regarding the validity of agreements to arbitrate; provisional remedies a court can grant; provisions for consolidation of separate arbitration proceedings; arbitrator bias; arbitrator immunity; the process of conducting an arbitration; the arbitration award; confirming or vacating an award; and the scope of the RUAA); see also *infra* notes 147-68 and accompanying text. As of 2003, eight states had enacted the RUAA, and fifteen states were considering it. Walker, *supra* note 59, at 436-37. It is predicted that more jurisdictions will follow. *Id.* at 437-38. In addition to state statutes, common law arbitration still exists, whereby even when there has been no agreement to arbitrate or some other statutorily necessary component is missing, the arbitrator's decision may still be binding as long as neither party had objected to the award or revoked his or her consent to the arbitrator. Rau et al., *supra* note 40, at 57-58.

61. See Wood, *supra* note 48, at 383. In 1931, the Court ruled that a Minnesota statute requiring arbitration for insurance disputes was constitutional. *Hardware Dealers Mut. Fire Ins. Co. v. Glidden Co.*, 284 U.S. 151 (1931). The Court called the method of arbitration "substantial and efficient." *Id.* at 159. However, as late as 1953, the Supreme Court ruled that a claim for damages for lack of disclosure in a securities sale could not be arbitrated, even though there had been a previous agreement to arbitrate, because arbitration would violate section 14 of the Securities Act of 1933, which says that any condition or stipulation that causes a buyer of securities to waive compliance with any provisions of the Act is void. *Wilko v. Swan*, 346 U.S. 427, 430, 434-35 (1953). The Court felt that the protections afforded by the Securities Act would be weakened if applied in arbitration rather than in a judicial proceeding, *id.* at 435-37, and that with arbitration came "less certainty of legally correct adjustment." *Id.* at 438.

62. See, e.g., *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403 (1967) (holding that the FAA required a court to order arbitration to proceed once it was clear that the agreement to arbitrate was not at issue).

63. See, e.g., *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001) (holding that the FAA exclusion of employment contracts of workers engaged in interstate commerce should be interpreted narrowly to refer to transportation workers only); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995) (holding that the FAA preempted an Alabama statute making pre-dispute arbitration agreements invalid and unenforceable); *Rodriguez de Quijas v. Shearson/Am. Express*, 490 U.S. 477 (1989) (overruling *Wilko*, 346 U.S. 427); *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984) (holding that the FAA overrides state laws regarding enforceability of arbitration agreements); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974) (holding that an arbitration clause in a securities context

viable method of dispute resolution as litigation.⁶⁴ The Court also noted, in several cases, that Congress's purpose in enacting the FAA was to reverse the hostility of American courts toward enforcement of arbitration agreements.⁶⁵

Today, arbitration is a common method of resolving disputes. Tens of thousands of arbitration cases are conducted every year.⁶⁶ Arbitration is employed in a number of contexts. The majority of arbitrated cases are insurance disputes.⁶⁷ These disputes can be between insurance providers and policyholders, between two insurance companies, or between a third-party claimant and an insurance company regarding the third party's right to be reimbursed under another's policy, and they can arise in personal injury, medical malpractice, legal malpractice, and property damage claims, among others.⁶⁸ Arbitration is also commonly used in the commercial context.⁶⁹ Increasingly, arbitration clauses are included in business contracts and agreements, used in such areas as consumer disputes, like those fielded through the Better Business Bureau,⁷⁰ and construction disputes.⁷¹ Labor and employment arbitration is another large area of arbitrated disputes.⁷² Most collective bargaining agreements between unions and management provide for arbitration of disputes.⁷³ For nonunion employees, disputes arising from discrimination based on race, sex, religion, sexual orientation, and disabilities, as well as terms and conditions of employment, are often resolved through arbitration.⁷⁴ International disputes are also often resolved through arbitration.⁷⁵ The potential involvement of multiple bodies of law and court systems, as well as unpredictability regarding the

was enforceable). For a more complete history of arbitration cases, see Wood, *supra* note 48, at 384-91.

64. Wood, *supra* note 48, at 387.

65. See, e.g., *Circuit City Stores*, 532 U.S. at 111; *Southland Corp.*, 465 U.S. at 10.

66. Rau et al., *supra* note 40, at 28. In 2000, over 190,000 cases were filed with the American Arbitration Association (AAA), a private, nonprofit organization founded in 1926 that facilitates arbitration. *Id.*

67. *Id.* at 28-29.

68. Cooley, *supra* note 39, at 14.

69. Rau et al., *supra* note 40, at 24. Of the cases filed with the AAA in 2000, 17,791 of them were commercial cases. *Id.* at 28.

70. Cooley, *supra* note 39, at 13. See Rau et al., *supra* note 40 at 46-48 (discussing consumer disputes).

71. Cooley, *supra* note 39, at 13. Construction disputes lend themselves to arbitration because they are complex, require many experts, and concern many documents, and discovery can be done more quickly and flexibly in arbitration. *Id.* Of the cases filed with the AAA in 2000, 4677 were construction cases. Rau et al., *supra* note 40, at 28.

72. Cooley, *supra* note 39, at 14.

73. Rau et al., *supra* note 40, at 37-38. Of the cases filed with the AAA in 2000, 13,680 were labor cases. *Id.* at 28.

74. Cooley, *supra* note 39, at 14. Of the cases filed with the AAA in 2000, 2049 were individual employment cases. Rau et al., *supra* note 40, at 28.

75. Cooley, *supra* note 39, at 16. A variety of organizations administer international arbitration, such as the International Chamber of Commerce (ICC), the International Bar Association, and the United Nations Commission on International Trade Relations and Law (UNCITRAL). *Id.*

rules of decision and judgment enforcement, make arbitration especially compelling for international disputes.⁷⁶ Other contexts in which arbitration is useful are securities disputes, real estate disputes, health care disputes, and government disputes.⁷⁷

Finally, arbitration is used to resolve family disputes, such as divorce.⁷⁸ Although some parties prefer mediation as a dispute resolution method, especially to resolve such issues as custody and visitation, arbitration is useful for property division, and for issues that the parties failed at mediating.⁷⁹ Often, divorce settlements will contain arbitration clauses that require arbitration of any disputes arising after the divorce.⁸⁰ Furthermore, many people prefer to resolve family law issues privately, using a forum in which an arbitrator might share their values and be better able to understand their unique concerns.⁸¹

C. Faith-Based Arbitration

Arbitration, regardless of the specific context, is conducted under the auspices of different umbrella organizations, whether arbitration associations in general, industry arbitration boards, or religious organizations. The American Arbitration Association (AAA) administers much of the arbitration that takes place in the United States.⁸² In addition to promoting the study of arbitration,⁸³ the AAA provides procedures for arbitration.⁸⁴ The AAA offers rules for commercial arbitration, as well as labor disputes and arbitration of disputes in particular industries.⁸⁵ Disputants can choose from among thousands of arbitrators the organization retains, and the organization provides such services as giving notice to the parties, arranging pre-hearing conferences, and arranging the scheduling and the location of the hearing.⁸⁶ Another organization, Judicial Arbitration

76. Rau et al., *supra* note 40, at 30. Arbitration clauses are “taken for granted” in international commercial contracts. *Id.* at 31 (internal quotations omitted). The Supreme Court noted that arbitration clauses, especially ones that specify forum and choice of law, can bring “orderliness and predictability” to international commercial disputes. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516 (1974).

77. Cooley, *supra* note 39, at 14-16.

78. *Id.* at 15.

79. *Id.*

80. *Id.*

81. See *infra* notes 137-39 and accompanying text.

82. Rau et al., *supra* note 40, at 28; see also *supra* note 66.

83. Rau et al., *supra* note 40, at 28.

84. Bennett, *supra* note 27, at 43. The rules can be found at AAA, Rules and Procedures, <http://www.adr.org/RulesProcedures> (last visited Aug. 9, 2006).

85. Bennett, *supra* note 27, at 44.

86. Rau et al., *supra* note 40, at 29. The organization bills itself as offering a wide range of services, including education and training, publications, and the resolution of a wide range of disputes through mediation, arbitration, elections and other out-of-court settlement techniques. The AAA—with thirty-four offices in the United States and Europe and 59 cooperative agreements with arbitral institutions in forty-one countries—provides a forum for the hearing of disputes, case administration, tested rules and procedures, and a roster of

& Mediation Services (JAMS), functions similarly to the AAA. Founded in 1979, JAMS provides dispute resolution services, offering full-time retired judges and attorneys to serve as neutral arbitrators.⁸⁷ Like the AAA, JAMS offers rules for arbitration.⁸⁸ Other arbitration forums include the National Arbitration Forum (NAF), founded in 1986,⁸⁹ Arbitration Forums, Inc. (AF),⁹⁰ the National Arbitration Association (NAA),⁹¹ and the National Academy of Arbitrators.⁹²

Aside from these overarching arbitration forums, there are also quite a few industries that maintain their own arbitration boards. For example, the film industry's American Film Marketing Association has an International Arbitration Tribunal, founded in 1983, to arbitrate employment disputes.⁹³ The arbitration agreements are typically between producers and distributors or between distributors and foreign sub-distributors.⁹⁴ For the securities market, the National Association of Securities Dealers (NASD) conducts thousands of arbitrations each year.⁹⁵ The diamond industry, too, has for years resolved its disputes out of court with its own private arbitration boards.⁹⁶

Private arbitration forums are also common among religious communities. Judaism, Christianity, and Islam all offer some form of internal dispute resolution.⁹⁷ Judaism, for instance, has had its own system of self-government for thousands of years, across many geographic

impartial experts to hear and resolve cases. AAA, About Us, <http://www.adr.org/About> (last visited Aug. 13, 2006).

87. JAMS, Partners in Resolution, at ii-iii, available at <http://www.jams-endispute.com/images/PDF/Partners-in-Resolution-Brochure.pdf>.

88. See JAMS, Rules and Procedures, <http://www.jams-endispute.com/rules/rules.asp> (last visited Aug. 13, 2006).

89. See National Arbitration Forum, About Us, <http://www.arbforum.com/main.aspx?itemID=249&hideBar=False&navID=1&news=3> (last visited Aug. 13, 2006).

90. See Arbitration Forums, Inc., <http://www.arbfile.org> (last visited Aug. 13, 2006).

91. See National Arbitration Association, <http://www.natarb.com/> (last visited Aug. 13, 2006).

92. See National Academy of Arbitrators (NAA), <http://www.naarb.org/> (last visited Aug. 13, 2006). NAA focuses on labor-management arbitration. See *id.*

93. See Paul D. Supnik, *Arbitration of Entertainment Industry Contingent Compensation Claims*, <http://www.supnik.com/arb-ent.htm> (last visited Aug. 13, 2006).

94. *Id.*

95. National Association of Securities Dealers (NASD), About NASD, <http://www.nasd.com/AboutNASD/index.htm> (last visited Aug. 13, 2006). But see Justin Kelly, *Mandatory Securities Arbitration Under Review After Hearings, Give me Back my Rights!*, March 23, 2005, <http://www.givemebackmyrights.com/bma-report-ADR.htm> (last visited Aug. 13, 2006) (reporting that criticism of the NASD system has prompted a closer look at securities arbitration).

96. See generally, Lisa Bernstein, *Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. Legal Stud. 115 (1992).

97. See *infra* notes 98-126 and accompanying text. Native Americans also have private tribunals through which to resolve their disputes. See, e.g., Scott A. Taylor, *Enforcement of Tribal Court Tax Judgments Outside of Indian Country: The Ways and Means*, 34 N.M. L. Rev. 339 (2004).

locales.⁹⁸ Jews always had an adjudication system, based on the Bible and the Talmud,⁹⁹ and, from the time Jews were under the control of foreign, secular leadership, they conducted their own courts.¹⁰⁰ Today, the form that Jewish arbitration typically takes is the *beth din* (also appearing as *bet din*, *beit din* or *beis din*; with the plural as *battei din*), literally the “House of Judgment,” which usually either consists of a single rabbi or, more commonly, a panel of three rabbis.¹⁰¹ In the United States, the Jewish arbitration system is well organized, with branches of standing *battei din* all over the country.¹⁰² Headquartered in New York and founded in 1960, the Beth Din of America is the most prominent *beth din* and is affiliated with the Rabbinical Council of America (RCA).¹⁰³ In cities with too small a Jewish population to support a standing *beth din*, ad hoc *battei din* are formed as necessary.¹⁰⁴ *Battei din* preside over such religious matters as divorce and conversion, but they also offer arbitration services for commercial or business matters involving Jews,¹⁰⁵ using principles of *halakhah*, Jewish law, to settle disputes.¹⁰⁶ Turning to a *beth din* for commercial arbitration is purely voluntary, initiated by agreement of the disputing parties.¹⁰⁷ Among the faith-based arbitration systems, Judaism’s is the most formal and trial-like.¹⁰⁸ Because *battei din* generally conduct

98. Ginnine Fried, Comment, *The Collision of Church and State: A Primer to Beth Din Arbitration and the New York Secular Courts*, 31 Fordham Urb. L.J. 633, 635 (2004).

99. See *Deuteronomy* 16:18; see generally, Tractate Sanhedrin, Babylonian Talmud, (Schottenstein Edition, 1993) (dealing with the laws of Jewish courts).

100. Fried, *supra* note 98, at 635.

101. Sturman, *supra* note 43, at 418.

102. See, e.g., Chicago Rabbinical Council (CRC), CRC Beth Din, <http://www.crcweb.org/bethDin/index.html> (last visited Aug. 13, 2006) (describing Chicago’s *beth din* services); Synagogue Council of Massachusetts, Rabbinic Court of Justice, http://www.synagoguecouncil.org/beit_din.htm (last visited Aug. 13, 2006) (providing contact information for *beth din* services in Massachusetts); The Rabbinical Council of Greater Washington, <http://www.capitolk.org/> (last visited Aug. 13, 2006) (offering arbitration services in the Washington, D.C., area).

103. June D. Bell, *Jewish Justice*, Atlanta Jewish Times, July 30, 1999, available at <http://atlanta.jewish.com/archives/1999/073099cs.htm> (last visited Aug. 13, 2006); Beth Din of America, Background and Affiliations, <http://bethdin.org/mission.htm> (last visited Aug. 13, 2006). Many of the *battei din* are affiliated with the Rabbinical Council of America (RCA). R. Seth Shippee, Note, “*Blessed Are the Peacemakers*”: Faith-Based Approaches to Dispute Resolution, 9 ILSA J. Int’l & Comp. L. 237, 253 (2002). For more on the development of a *beth din* system in America, see Jerold S. Auerbach, *Justice Without Law? Resolving Disputes Without Lawyers* (1983), and Israel Goldstein, *Jewish Justice and Conciliation: History of the Jewish Conciliation Board of America, 1930-1968*, and a Review of Jewish Juridical Autonomy (1981).

104. See Bell, *supra* note 103. Any Jewish male can be a member of a *beth din*. See *id.*

105. Sturman, *supra* note 43, at 418.

106. See Beth Din of America, Our Services, <http://bethdin.org/services.htm> (last visited Aug. 13, 2006); Beth Din of America, Our Mission, <http://bethdin.org/mission.htm> (last visited Aug. 13, 2006). A case brought to a *beth din* for arbitration is called a “Din Torah.” See, e.g., CRC, Din Torah—Halachic Arbitration, <http://www.crcweb.org/bethDin/dinTorah.html> (last visited Aug. 13, 2006).

107. See Beth Din of America, The Beth Din of America Guide to Rules and Procedures § 1(a), <http://bethdin.org/rules.htm> (last visited Aug. 13, 2006).

108. Shippee, *supra* note 103, at 249.

their arbitration following secular arbitration law, their awards are usually binding and courts will usually enforce them.¹⁰⁹

Those of the Christian faith also have private arbitration procedures. Hundreds of Christian denominations and organizations offer dispute resolution services.¹¹⁰ Peacemaker Ministries, founded in 1982, is the “largest, multi-denominational Christian dispute resolution service in the country,” having merged several hundred churches and organizations under its auspices.¹¹¹ Under Peacemaker Ministries, Christian ADR, known as Christian conciliation, offers disputing parties a process to resolve their disputes out of court following biblical principles.¹¹² Christian conciliation focuses on both a substantive resolution and personal reconciliation, emphasizing Christian principles found in the Bible.¹¹³ Christian conciliation resembles negotiation and med-arb in that it generally involves three stages: (1) the parties undergo individual counseling to resolve the issues themselves; (2) if individual counseling fails, the parties submit their dispute to mediation; (3) if mediation fails, the parties proceed to arbitration.¹¹⁴ Individual volunteers, professional mediators, Certified Christian Conciliators, and local churches can all provide Christian conciliation services.¹¹⁵ Christian conciliation can be used to resolve any manner of conflict, even those involving millions of dollars.¹¹⁶ Arbitration following Christian conciliation principles cannot be used to resolve issues that are solely under the jurisdiction of civil courts, the family, or the church.¹¹⁷

109. *Id.* at 254.

110. *Id.* at 242.

111. *Id.* at 242-43. Another large Christian dispute resolution service is Christian Dispute Resolution Professionals, Inc., a for-profit organization. *Id.* at 244. For more on the development of Christian Conciliation, see Glenn G. Waddell & Judith M. Keegan, *Christian Conciliation: An Alternative to “Ordinary” ADR*, 29 *Cumb. L. Rev.* 583, 585-89 (1998-99).

112. See Waddell & Keegan, *supra* note 111, at 584; Peacemaker Ministries, An Introduction to Christian Conciliation, http://www.peacemaker.net/site/c.aqKFLTOBIpH/b.931479/k.8151/FAQs_Regarding_Christian_Conciliation.htm (last visited Aug. 13, 2006).

113. Wallace, Jordan, Ratliff, & Brandt, LLC, Christian Conciliation, http://www.wallacejordan.com/practiceareas/page_conciliation.html (last visited July 30, 2006) [hereinafter Wallace]; see also Peacemaker Ministries, Introduction, *supra* note 112. In fact, the primary distinction between Christian conciliation and ordinary ADR is that in Christian conciliation the Bible is preeminent as the standard of conduct for both the participants and the conciliators. Waddell & Keegan, *supra* note 111, at 591.

114. Peacemaker Ministries, *supra* note 112.

115. *Id.* A formally established conciliation ministry, the Institute for Christian Conciliation, which is a division of Peacemaker Ministries, also exists. *Id.*

116. *Id.* This ADR method has been used to settle contract, employment, family, personal injury, church, landlord-tenant, real estate, and creditor-debtor disputes. *Id.* Christian conciliation can also be used in embezzlement cases, construction disputes, professional malpractice cases, divorce mediation, church and denominational splits or disputes, intellectual property issues, and allegations of sexual harassment or abuse. Wallace, *supra* note 113.

117. Peacemaker Ministries, *supra* note 112. Issues solely under the jurisdiction of the civil courts may include child custody and visitation; issues within the jurisdiction of the

Although less organized and widespread than Jewish and Christian dispute resolution services, Islamic organizations also offer mediation and arbitration services.¹¹⁸ While Islamic arbitration is still in its incipient stages in America, Islam has a tradition of encouraging peaceful resolution of conflicts, finding support in religious doctrine.¹¹⁹ Specialized intermediaries, known as *quadis*, interpret and apply Islamic law, or *shari'a* (also appearing as *sharia* or *shariah*).¹²⁰

Muslim communities in the United States seem to prefer mediation and conciliation to arbitration.¹²¹ In Islamic mediation, the two disputing parties will either each choose someone he or she is comfortable with or they will choose one person acceptable to both to be the sole mediator.¹²² Mediation is used most often in the marital dispute context.¹²³ Although favoring it less, Muslims will also turn to arbitration to resolve family disputes such as property division and child custody in the event of divorce.¹²⁴ The Islamic community in Canada seems more inclined to use arbitration,¹²⁵ although scholars have urged the expansion of arbitration in the United States.¹²⁶

In addition to the reasons disputing parties would turn to arbitration in general, there are many benefits specific to faith-based arbitration and other forms of dispute resolution. First, members of a religious community may feel obligated to turn to religious arbitration out of religious conviction.¹²⁷ Followers of Judaism believe, for instance, that, according to *halakhah*, Jews are not allowed to bring their cases to secular courts.¹²⁸ Other faiths are simply wary of litigating cases in a court environment. The Qur'an, for

family include teaching and disciplining children; issues within the jurisdiction of the church include determining doctrine, dismissing a pastor, or exercising church discipline. *Id.*; see also *infra* note 192 and accompanying text.

118. See Shippee, *supra* note 103, at 245-48.

119. *Id.*

120. *Id.* at 246.

121. *Id.* at 246, 248. The reason for the preference seems to be that the parties generally turn to arbitration as a last resort, when the parties' relationship may already be irreparably broken. See *id.* at 248. Additionally, the arbitration process is less conciliatory than mediation, which often causes the parties to be dissatisfied with the results of arbitration and therefore more likely to challenge the agreement in court. *Id.*

122. *Id.* at 247. If two people are chosen, they are likely to be older family members; if one person is chosen, he is likely to be the local *imam*. *Id.*

123. *Id.* at 246-47.

124. Shippee, *supra* note 103, at 248.

125. See *infra* note 202 and accompanying text.

126. See generally Irshad Abdal-Haqq & Qadir Abdal-Haqq, *Community-Based Arbitration as a Vehicle for Implementing Islamic Law in the United States*, 1 J. Islamic L. 61 (1996).

127. Sturman, *supra* note 43, at 418.

128. Fried, *supra* note 98, at 635-36. The prohibition against utilizing secular courts, and the related obligation to use Jewish courts, is found in the Talmud. *Id.* at 636. In addition to this Biblical mandate, another rabbinically suggested reason for not going to secular court is to avoid shaming the Jews by calling attention to their misdeeds. *Id.* at 636-37. Furthermore, certain religious issues, such as divorce, can only be settled by a *beth din*. *Id.* at 640.

instance, urges mediation or arbitration rather than litigation.¹²⁹ The Christian faith, too, discourages the use of secular courts, urging instead the private resolution of conflicts.¹³⁰ A related, although very different, motivator may be social pressure.¹³¹ For example, in the Jewish faith, if a party tries to gain relief in a secular court, a *beth din* may issue a *seruv*, a document noting that a party has chosen to pursue his or her case in a secular court.¹³² The *seruv* can result in the party's community socially ostracizing him or her.¹³³ Additionally, sometimes those of a minority religious faith mistrust secular courts, fearing discrimination, and prefer to have their disputes settled internally.¹³⁴ Another reason parties may choose religious arbitration is that it is generally more conciliatory in nature than ordinary arbitration.¹³⁵ Similarly, many people feel that a faith-based arbitrator will judge the case more on equity and morals than following a precise legal issue.¹³⁶

A significant motivation for many people to turn to faith-based arbitration is that they feel more comfortable presenting their arguments before arbitrators who share their value system.¹³⁷ Similarly, just as people prefer bringing commercial disputes to arbitration because the arbitrator will have specific knowledge of the area,¹³⁸ parties utilize religious arbitration because the arbitrator is better equipped to deal with religious issues.¹³⁹ Furthermore, for nonreligious disputes, because the forum is religious, less attention may be paid to the parties' religion.¹⁴⁰

Finally, an important reason for turning to religious arbitration is that an internal system of governance helps preserve minority cultures and community values.¹⁴¹ Regarding family law issues, for instance, the intertwining of religious belief, legal principles, and family relations that is common among religions leads to a protectiveness regarding the religion's

129. Abdal-Haqq & Abdal-Haqq, *supra* note 126, at 75.

130. Shippee, *supra* note 103, at 241-42.

131. Sturman, *supra* note 43, at 418.

132. Fried, *supra* note 98, at 651.

133. *Id.* The *seruv* poses more of a threat in small, insulated Jewish communities. *Id.*

134. *See id.* at 639.

135. *See, e.g., supra* notes 112-14 and accompanying text.

136. *See Kozlowski v. Seville Syndicate, Inc.*, 314 N.Y.S.2d 439, 445 (Sup. Ct. 1970) (writing that a Jewish arbitration tribunal "may seek to compromise the parties' claims, and is not bound to decide strictly in accordance with the governing rules of Jewish law, but may more carefully weigh the equities of the situation"). *But see* Sturman, *supra* note 43, at 429 (Jewish arbitrators base their decisions on "strict interpretation[s] of the law").

137. Sturman, *supra* note 43, at 418.

138. *See* Bennett, *supra* note 27, at 6 (the decision maker in arbitration will often have more expertise in complex and technical matters than a judge or jury); Cooley, *supra* note 39, at 13 (arbitrators have knowledge regarding specific industries and understand technical terms).

139. Fried, *supra* note 98, at 639.

140. *See* Sturman, *supra* note 43, at 427.

141. *See infra* Part II.A.2.

laws and culture.¹⁴² Furthermore, those practicing a religious faith see the “importance of maintaining a sense of community [and] of viewing each other as an extended family.”¹⁴³ Relying on an internal arbitration system can provide a “sense of togetherness and unity in the community.”¹⁴⁴ Finally, utilizing such a system and applying religious principles in practice will clarify the religion’s values.¹⁴⁵

D. *The Relationship of Faith-Based Arbitration to Secular Courts*

Arbitration has had somewhat of a rocky relationship with the courts.¹⁴⁶ Today, the relationship is determined largely by the FAA and state arbitration statutes, many of which follow the RUAA.¹⁴⁷ As faith-based arbitration is merely a sub-category of arbitration in general, the intervention of the secular courts into faith-based arbitration is to a certain extent limited by the statutes governing arbitration.¹⁴⁸ Essentially, there are two circumstances that may arise in the arbitration process that might require court intervention—disputes regarding whether the agreement to arbitrate was actually valid,¹⁴⁹ and disputes regarding whether the arbitration award should stand.¹⁵⁰

Under the FAA, written agreements to arbitrate are treated like any contract.¹⁵¹ If one of the parties refuses to abide by an arbitration agreement, the other party can petition the court to order that the dispute be arbitrated.¹⁵² If the court is satisfied there is a valid contract to arbitrate and that the issue is not disputed, it will order the arbitration; if it is unclear and disputed whether there is an agreement to arbitrate, the court will hold a trial to determine whether the contract exists and will order the arbitration if the trial finds that there is in fact a valid contract to arbitrate.¹⁵³ Similarly, if a case comes before the court in which one party claims that arbitration was agreed to and the court agrees to the validity, the court may issue a stay

142. Sebastian Poulter, *The Claim to a Separate Islamic System of Personal Law for British Muslims*, in *Islamic Family Law* 147, 147 (Chibli Mallat & Jane Connors eds., 1990); see Shippee, *supra* note 103, at 249.

143. Sturman, *supra* note 43, at 435.

144. Abdal-Haqq & Abdal-Haqq, *supra* note 126, at 74.

145. *Id.* at 73.

146. See *supra* notes 53-55 and accompanying text.

147. See *supra* notes 57-60 and accompanying text.

148. See FAA, 9 U.S.C. § 2 (2000); RUAA § 6, 7 U.L.A. 22 (2000) (not distinguishing among different kinds of arbitration). *But see* Larry J. Pittman, *The Federal Arbitration Act: The Supreme Court’s Erroneous Statutory Interpretation, Stare Decisis, and a Proposal for Change*, 53 Ala. L. Rev. 789, 825 (2002) (suggesting that the FAA should apply only in commercial contexts).

149. See *infra* notes 151-58 and accompanying text.

150. See *infra* notes 158-63 and accompanying text.

151. 9 U.S.C. § 2 (“[A]n agreement in writing to submit to arbitration . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”).

152. *Id.* § 4.

153. *Id.*

of the trial until arbitration is completed.¹⁵⁴ The RUA includes similar provisions.¹⁵⁵ Furthermore, because an arbitration agreement is treated like any contract, courts can refuse to enforce the agreement based on contract principles, such as adhesion or unconscionability.¹⁵⁶ Under the FAA, appeals are allowed for decisions regarding confirming awards but not for compelling arbitration.¹⁵⁷ The RUA, however, does allow for appeals of orders denying a motion to compel arbitration and orders granting a stay of arbitration.¹⁵⁸

The second circumstance that might require court intervention regards confirming or vacating the arbitration award. Under the FAA, if the parties had agreed to have a judgment of the court entered pursuant to the arbitration, either party can petition the court, within one year of the arbitration, to confirm the award.¹⁵⁹ The court will confirm the award unless there is reason to vacate or modify the award.¹⁶⁰ The reasons to vacate an award include the following: The award was procured by corruption, fraud, or undue means; the arbitrator or arbitrators were evidently partial or corrupt; the arbitrators were guilty of misconduct (for example, by refusing to postpone a hearing after sufficient cause was shown, or by refusing to hear pertinent evidence); or the arbitrators exceeded or imperfectly executed their powers.¹⁶¹ A court can modify or correct an award, on application of one of the parties under the following circumstances: There was a material miscalculation of figures or a material mistake in the description of anything referred to in the award; the arbitrators made a decision on a matter not submitted to them; or the award "is imperfect in matter of form not affecting the merits of the controversy."¹⁶² The RUA includes similar provisions.¹⁶³ Appeals of these types of decisions are generally allowed.¹⁶⁴

154. *Id.* § 3.

155. RUA § 7, 7 U.L.A. 29 (2000).

156. *See, e.g.*, *Broemmer v. Abortion Servs. of Phoenix, Ltd.*, 840 P.2d 1013, 1015-16 (Ariz. 1992) (holding that a signed agreement between a young female patient and an abortion clinic to arbitrate all legal issues was unenforceable). An adhesion contract is usually a standardized form signed by someone who, because of time constraints or other circumstances, essentially has no choice but to sign it. *Id.*; *see also Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 689-94 (Cal. 2000) (holding that an arbitration agreement in the context of an employment agreement that required arbitration of wrongful termination of employee disputes but did not require arbitration of employer claims against employees was unenforceable because of adhesion and unconscionability).

157. 9 U.S.C. § 16.

158. RUA § 28, 7 U.L.A. 89-90.

159. 9 U.S.C. § 9.

160. *Id.* § 10.

161. *Id.*

162. *Id.* § 11.

163. RUA § 22-24, 7 U.L.A. 72-84. The RUA includes additional reasons for vacating the award: there was no agreement to arbitrate and an objection had been made to the proceeding; the arbitration was conducted without proper notice of the initiation of arbitration. *Id.* § 23.

164. 9 U.S.C. § 16; RUA § 28, 7 U.L.A. 89-90.

The grounds to intervene in arbitration cases, therefore, are quite limited, and even those limited provisions have been interpreted narrowly by the courts.¹⁶⁵ The FAA and RUAAs do not provide for vacatur on grounds of mistake of fact, mistake of law, or abuse of discretion.¹⁶⁶ Partiality, for which vacation of an award is permitted, has been understood as something much worse than mere impropriety, and only actual misconduct, and not mistake, will allow for court intervention.¹⁶⁷ In general, courts are reluctant to review arbitration awards for fear of disrupting the goals of arbitration—resolving disputes efficiently and reducing litigation.¹⁶⁸

While the courts will not review arbitration awards for ordinary mistake of law, the case law has broadened the vacating power of courts under the FAA with two principles: courts can vacate an arbitration award if the arbitrator has shown “manifest disregard” for legal rules or if the enforcement of the award would violate public policy.¹⁶⁹ Essentially, manifest disregard for the law means something more than an error or misunderstanding of the law.¹⁷⁰ Manifest disregard requires gross error—for instance, if the arbitrator actually knew the law and consciously disregarded it.¹⁷¹ While all courts seem to agree that manifest disregard is something extreme and difficult to prove, courts have differed over the parameters of manifest disregard, with some courts interpreting it more broadly than others. For instance, one court determined that, in order to vacate an award, the court must find “both that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case.”¹⁷² In other words, manifest disregard means the arbitrator ignores an obvious legal principle that should apply to the case. Another court held, however, that manifest disregard refers to either an

165. Wood, *supra* note 48, at 400.

166. *Id.*

167. *Id.* (citing *Sphere Drake Ins. Ltd. v. All Am. Life Ins. Co.*, 307 F.3d 617 (7th Cir. 2002)). Courts review the partiality of arbitrators similarly to their review of the partiality of lower court judges. *See id.* at 400 n.72.

168. *See* *Willemijn Houdstermaatschappij, BV v. Standard Microsystems Corp.*, 103 F.3d 9, 12 (2d Cir. 1997) (citing *Folkways Music Publishers v. Weiss*, 989 F.2d 108, 111 (2d Cir. 1993)).

169. *See* RUAAs §23, cmt. C, 7 U.L.A. 79-81. The drafters of the RUAAs considered including manifest disregard and public policy as reasons to vacate an award, but decided against it for two reasons. First, the FAA omitted these provisions, so the drafters of the RUAAs feared the FAA would preempt these provisions if the Supreme Court or Congress ever confirmed that the reasons for vacatur set forth in the FAA were exclusive grounds. *Id.* ¶ 5. Second, the drafters saw difficulty in creating clear tests for the two standards, especially given the unsettled case law in the area. *Id.*

170. *Id.* ¶ 2.

171. *Id.*

172. *Greenberg v. Bear, Stearns & Co.*, 220 F.3d 22, 28 (2d Cir. 2000) (internal quotations omitted) (holding that an arbitration award dismissing a securities fraud claim should be upheld because the petitioner failed to demonstrate that the arbitrator showed manifest disregard for federal law). The *Greenberg* court noted that there is a “very stringent burden” involved in demonstrating the manifest disregard required for vacating an arbitration award. *Id.* at 24.

arbitration award that requires the parties to violate the law or an award that does not adhere to the legal principles specified by contract.¹⁷³ This court considered manifest disregard as applying to the arbitration award but not to the arbitrator's ignorance or misapplication of a legal principle.¹⁷⁴

The other judicially created reason to vacate an award is on grounds of public policy. As with the manifest disregard standard, the public policy grounds for vacatur are rather narrow. The threatened public policy must be a "clearly defined, dominant, undisputed rule of law."¹⁷⁵ Here too, courts disagree over how to apply this standard. Some courts, for instance, understand "conflicting with public policy" to mean that the arbitrator's analysis of the parties' contract or relevant law cannot violate public policy, or, in other words, the terms of the arbitration agreement as understood by the arbitrator cannot conflict with public policy.¹⁷⁶ Other courts have understood the public policy standard to mean that to vacate an award a court must find that implementation of the arbitration award would force one of the parties to violate dominant public policy.¹⁷⁷ Two contexts in which vacatur on grounds of public policy often occur are the enforcement of international arbitration awards, when determined in a foreign country using different rules,¹⁷⁸ and family law, such as arbitration decisions regarding child custody.¹⁷⁹

These reasons for a court to intervene in arbitration—those enumerated in the FAA and RUAA, as well as those articulated in case law—theoretically apply equally to all kinds of arbitration, including faith-based arbitration.¹⁸⁰ However, in the realm of faith-based arbitration, courts often cannot even utilize their limited means to intervene because of additional constitutional restrictions. Courts cannot interfere with religion if doing so would violate the Establishment Clause or the Free Exercise Clause of the First

173. *George Watts & Son, Inc. v. Tiffany & Co.*, 248 F.3d 577, 580-81 (7th Cir. 2001) (upholding an arbitration award because it did not show a manifest disregard for the law).

174. *Id.*

175. RUAA §23, cmt. C ¶ 3, 7 U.L.A. 80 (2000).

176. *See Seymour v. Blue Cross/Blue Shield*, 988 F.2d 1020, 1024-25 (10th Cir. 1993) (denying an insured's request to vacate an arbitration award because the insurer's unilateral modification of the policy was not a sufficient violation of public policy); *PaineWebber, Inc. v. Agron*, 49 F.3d 347, 351 (8th Cir. 1995) (denying an employee's request to vacate an arbitration award because it did not violate a well-defined and dominant public policy).

177. *See Brown v. Rauscher Pierce Refsnes, Inc.*, 994 F.2d 775, 782 (11th Cir. 1993) (refusing to vacate an award based on a claim of a violation of public policy and writing that "the public policy exception is implicated when enforcement of the award compels one of the parties to take action which directly conflicts with public policy"); *Diapulse Corp. of Am. v. Carba, Ltd.*, 626 F.2d 1108, 1110 (2d Cir. 1980) (writing that an "award may be set aside if it compels the violation of law or is contrary to a well accepted and deep rooted public policy").

178. *See Wood*, *supra* note 48, at 402-04.

179. RUAA §23, cmt. C ¶ 4, 7 U.L.A. 81. *See, e.g., infra* note 192 and accompanying text.

180. *See supra* note 148 and accompanying text.

Amendment.¹⁸¹ Of the several tests the U.S. Supreme Court has set forth for determining whether state actions, including judicial actions, violate the Establishment Clause, two are the most widely accepted. First, the excessive entanglement test asks if the purpose and effect of the state action is secular and if the state action will require excessive monitoring or interference with religion.¹⁸² Second, the endorsement test asks whether the government act at issue conveys endorsement or disapproval of religion.¹⁸³ The government is also confined by the Free Exercise Clause. As set out by the Supreme Court, when the government seeks to interfere with a sincere religious belief, the government must show a compelling interest.¹⁸⁴

Judicial intervention into faith-based arbitration, even when allowed by statute, can implicate these First Amendment principles. To deal with constitutional difficulties, some jurisdictions have established the general rule that civil courts can interfere with religious disputes and arbitration panels to the extent that they exercise neutral principles of contract law.¹⁸⁵ For instance, courts are generally comfortable enforcing private agreements to arbitrate before a religious arbitration panel because they involve, simply, contract laws.¹⁸⁶ Similarly, some courts have directed religiously oriented acts, such as paying a religiously ordained dowry, if it would simply fulfill

181. U.S. Const. amend. I. The First Amendment applies to the states through the Fourteenth Amendment. See *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

182. See *Lemon v. Kurtzman*, 403 U.S. 602, 612-15 (1971).

183. See *Lynch v. Donnelly*, 465 U.S. 668, 688-94 (1984) (O'Connor, J., concurring).

184. See *Sherbert v. Verner*, 374 U.S. 398, 406 (1963). To determine whether the belief is sincerely held, the court considers the length of time the belief has been held; the importance of the belief to everyday practice; the nature of the belief; and the origins of belief. See *Wisconsin v. Yoder*, 406 U.S. 205, 215-17, 235-36 (1972).

185. See, e.g., *Meshel v. Ohev Sholom Talmud Torah*, 869 A.2d 343, 354 (D.C. 2005) (holding that the court did not lack subject matter jurisdiction to compel a Jewish congregation and its members to submit to religious arbitration). The court wrote that there was no First Amendment issue because "well-established, neutral principles of contract law can be used to determine whether the Beth Din provision in the bylaws is an enforceable arbitration agreement and, if so, whether the parties' dispute falls within its scope." *Id.* at 346. Courts will therefore not interfere in religiously oriented disputes when more than just neutral principles of law are at stake. See, e.g., *Smith v. Clark*, 709 N.Y.S.2d 354 (Sup. Ct. 2000) (dismissing a breach of employment contract case involving ministers because it failed the neutral principles of law test by involving religious doctrine); *McEnroy v. St. Meinrad Sch. of Theology*, 713 N.E.2d 334, 336-37 (Ind. Ct. App. 1999) (holding that the court could not interfere in a professor's breach of employment suit against a Catholic school because it would require too much inquiry into religious law), *cert. denied*, 529 U.S. 1068 (2000). See *Jones v. Wolf*, 443 U.S. 595, 602-04 (1979), for a discussion of the advantages and disadvantages to the neutral principles of law approach.

186. See, e.g., *Avitzur v. Avitzur*, 459 N.Y.S.2d 572, 574-75 (1983) (holding that the court can compel a husband and wife to go to a *beth din* to resolve their divorce, pursuant to their agreement in their marriage contract); see also Michelle Greenberg-Kobrin, *Civil Enforceability of Religious Prenuptial Agreements*, 32 Colum. J.L. & Soc. Probs. 359, 382 (1999). However, whether a court will compel parties to go before a religious arbitration panel may depend on whether the parties had stipulated a standing arbitration board or whether the court would have to select a religious tribunal. Greenberg-Kobrin, *supra*, at 382.

a legally binding contract.¹⁸⁷ Restricted by the Free Exercise Clause, courts must allow the use of religious arbitration tribunals but may refuse to grant injunctions against arbitration proceedings.¹⁸⁸ In general, constitutional concerns have produced inconsistent results among different courts regarding treatment of religious issues and religious arbitration tribunals.¹⁸⁹

E. *Special Dangers of Faith-Based Arbitration in the Family Law Context*

There are certain dangers of arbitration that are unique to family law contexts. In commercial contexts, the two parties are likely to be on relatively equal footing, with relatively equal bargaining power. Some have argued, in fact, that the FAA should apply only to commercial contracts.¹⁹⁰ Conversely, family law issues, such as divorce, child custody, and support, involve the traditionally more vulnerable members of society—women and children.¹⁹¹ The judicial system has responded to this problem in some sense by applying the public policy grounds to limit arbitrability of certain issues, like child custody.¹⁹²

Islamic and Jewish tribunals are of special concern because issues of marriage and divorce are likely to come within their ambit,¹⁹³ yet the religious doctrines used to resolve these issues are viewed by some as antiquated and prejudiced against women.¹⁹⁴ For instance, in Judaism, only a man can grant a divorce, called a *get*, and he must grant it willingly.¹⁹⁵ If the husband refuses to give his consent to a divorce, the *beth din* cannot terminate the marriage and the wife is unable to remarry.¹⁹⁶ Furthermore, if the woman does remarry, the relationship is considered adulterous and any offspring born of the marriage are considered illegitimate under Jewish law, prohibiting them from marrying into the Jewish faith.¹⁹⁷ These laws give

187. See, e.g., *Aziz v. Aziz*, 488 N.Y.S.2d 123, 124 (1985) (holding that a wife was entitled to her *mahr* (Islamic dowry), regardless of the fact that it was contracted for as part of a religious marriage ceremony).

188. See *Fried*, *supra* note 98, at 654.

189. See *infra* Part II.A.

190. See *supra* note 148.

191. See *Perl v. Perl*, 512 N.Y.S.2d 372, 375 (App. Div. 1987) (noting the “unequal allocation of power between spouses to terminate a religious marriage—particularly where the partners are of the Jewish faith”).

192. See, e.g., *Rakoszynski v. Rakoszynski*, 663 N.Y.S.2d 957, 958 (Sup. Ct. 1997) (holding that child custody is not subject to arbitration). Courts that would ordinarily require a best interests standard for child custody still require that standard when issues are otherwise being resolved through arbitration, so that the courts are not bound to arbitration decisions regarding child support. See, e.g., *Miller v. Miller*, 620 A.2d 1161 (Pa. Super. Ct. 1993).

193. See *supra* notes 106, 123-24 and accompanying text.

194. See *infra* note 205 and accompanying text.

195. Jodi M. Solovy, *Civil Enforcement of Jewish Marriage and Divorce: Constitutional Accommodation of a Religious Mandate*, 45 DePaul L. Rev. 493, 500 (1996).

196. *Id.* at 500-01. The woman is referred to as an *agunah*, or chained woman. *Id.* at 502.

197. *Id.* at 502 n.64. The recalcitrant husbands do not suffer the same fate—because polygamy is biblically allowed, a husband’s remarriage is not adulterous and the children born to such a marriage are not illegitimate. *Id.* at 503.

the husband tremendous bargaining power in obtaining a favorable divorce settlement with regard to property division and child custody and often leave the wife with an inequitable divorce contract.¹⁹⁸ Similarly, Islamic law has been criticized for being patriarchal and for disadvantaging women.¹⁹⁹ For instance, the Qur'an allows "physical correction" by a husband against his wife, and the strong presumption is that the husband will get custody of the children in the event of a divorce.²⁰⁰

F. Faith-Based Arbitration in Canada: A Contrast

Despite all of the advantages of faith-based arbitration and its widespread use in the United States, it cannot be taken for granted that faith-based arbitration is a proper alternative to litigation in secular court. Nothing demonstrates this more clearly than the approach Canada has taken toward faith-based arbitration.

While Jewish, Christian, and Catholic arbitration had existed in Canada for many years,²⁰¹ faith-based arbitration became a major issue in Canada only recently, after Canadian Muslims determined to establish an Islamic arbitration system in Ontario.²⁰² Ontario had an existing Arbitration Act, enacted in 1991, that did not preclude the existence of private, religious arbitration tribunals, provided they did not contradict Canadian secular law.²⁰³ However, when the Canadian Society of Muslims founded the Islamic Institute of Civil Justice in 2003 to serve as an official arbitration body for Muslims that would rule on issues of family law and inheritance,²⁰⁴ there was immediate and strong backlash. The National

198. *Id.* at 502 & n.66.

199. Najla Hamadeh, *Islamic Family Legislation: The Authoritarian Discourse of Silence, in Feminism and Islam: Legal Studies and Literary Perspectives* 331, 334 (Mai Yamani ed., 1996) (writing that "Islamic family law treats the wife as a creature of undiscerning needs, whose feelings and preference can be totally ignored, and whose judgment is, in many ways, suspended or disregarded"); Ghada Karmi, *Women, Islam, and Patriarchalism*, in *Women in Islamic Law* 69, 79 (Mai Yamani ed., 1996) ("A much better description [than misogyny] would be to suggest that women are infantilised in the Qur'an. They are to be protected and economically provided for by men, but admonished and punished if they are disobedient.").

200. Kathleen A. Portuán Miller, *The Other Side of the Coin: A Look at Islamic Law as Compared to Anglo-American Law—Do Muslim Women Really Have Fewer Rights than American Women?*, 16 N.Y. Int'l L. Rev. 65, summer 2003, at 89-90, 116. For more on the inferior social and legal position of women in Jewish and Islamic communities, see *infra* notes 312-26 and accompanying text.

201. Nicholas Pengelley, *Faith-Based Arbitration in Ontario*, 9 Vindobona J. Int'l Com. L. & Arb. 111, 113-14 (2005).

202. *Id.* at 111-12.

203. *The Religion Report: Sharia for Canada?* (Australian Broadcasting Corporation radio broadcast Feb. 2, 2005) [hereinafter *Sharia for Canada?*], available at <http://www.abc.net.au/rn/talks/8.30/re/rpt/stories/s1334120.htm> (last visited Aug. 13, 2006) (posting a transcript).

204. *Id.* The Muslim community is the largest religious minority in Canada, with over 1,000,000 members, 400,000 of them living in Ontario. Judy Van Rhijn, *First Steps Taken for Islamic Arbitration Board (Canada)*, Law Times News, Nov. 25, 2003, available at <http://www.freerepublic.com/focus/f-news/1028843/posts> (last visited Aug. 13, 2006); *The*

Association of Women and the Law, the Canadian Council of Muslim Women, and the National Organization of Immigrant and Visible Minority Women of Canada argued that *shari'a* law was inherently unfair to women, favoring men in areas of divorce, child custody, and inheritance.²⁰⁵ The Muslim Canadian Congress decried the use of *shari'a* arbitration as “racist and unconstitutional” and expressed concern that the Muslim population in Canada would be further alienated.²⁰⁶ There were also fears that, although arbitration is consensual, vulnerable women would be pressured into participation, thereby foregoing more equitable treatment they would have received had they gone to secular courts.²⁰⁷ Additionally, there was concern that allowing *shari'a* arbitration would subvert Canadian law by allowing the resolution of disputes in ways not in accordance with Canadian secular law or standards.²⁰⁸

In June 2004, the Ontario government asked former Attorney General Marion Boyd to review the existing Arbitration Act to determine if *shari'a* arbitration was consistent with it.²⁰⁹ Ms. Boyd submitted her report in December 2004, in which she supported the continuing of religious arbitration, including the establishment of *shari'a* arbitration, in accordance with the Arbitration Act of 1991, along with forty-six additional recommendations and procedural safeguards.²¹⁰ After the Boyd report was released, opponents of *shari'a* arbitration again voiced their concerns, and the report sparked protests in cities around the world.²¹¹ After months of nonaction during which the public assumed the government would follow Ms. Boyd's recommendations, Dalton McGuinty, the premier of Ontario, announced in September 2005 that Ontario would not allow the use of *shari'a* arbitration.²¹² At that time, Mr. McGuinty also announced that all religious arbitration would be outlawed, and “one law for all Ontarians” would exist.²¹³ Indeed, in November 2005, the Ontario government proposed legislation that would require all family law arbitrations in

Religion Report: Religious Law in Canada (Australian Broadcasting Company radio broadcast Sept. 21, 2005) [hereinafter *Religious Law in Canada*], available at <http://www.abc.net.au/rn/talks/8.30/relrpt/stories/s1464101.htm> (last visited Aug. 13, 2006) (posting a transcript).

205. CBC News, Shariah law: FAQs, <http://www.cbc.ca/news/background/islam/shariah-law.html> (last visited Aug. 7, 2006).

206. International Humanist and Ethical Union, Canada: Shariah Based Arbitration Racist and Unconstitutional, <http://www.iheu.org/node/134> (last visited Aug. 13, 2006).

207. Pengelley, *supra* note 201, at 112.

208. *Id.*

209. *Sharia for Canada?*, *supra* note 203.

210. See generally Marion Boyd, Ontario Ministry of the Attorney General, Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion (2004), available at <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/fullreport.pdf>.

211. *Ontario Report Criticized by Shariah Opponents*, CBC News, Dec. 20, 2004, <http://www.cbc.ca/story/canada/national/2004/12/20/sharia-boyd041220.html>; *Religious Law in Canada*, *supra* note 204.

212. *Religious Law in Canada*, *supra* note 204; see also *Ontario Will Ban Shariah Arbitrations*, N.Y. Times, Sept. 12, 2005, at A6.

213. *Ontario Will Ban Shariah Arbitrations*, *supra* note 212.

Ontario to be conducted using only Canadian law; ensuring that arbitration based on religious principles would have no legal effect.²¹⁴ It seems that religious arbitration tribunals will be available just for advice, and Canadian courts will not be obliged to enforce any religious arbitration awards.²¹⁵ The complete implications of this new government approach to religious arbitration are still not entirely clear, and religious groups that had previously utilized religious arbitration have expressed concern.²¹⁶

The Canadian approach to faith-based arbitration offers an interesting contrast to the one taken by the United States. In the United States, faith-based arbitration has been accepted by courts as a generally positive way to resolve disputes. Rather than concerning themselves too much with potential human rights issues in the family law context, United States courts have more typically distanced themselves from faith-based arbitration and let it function quite independently in order to avoid constitutional pitfalls.²¹⁷ However, the concerns of the Canadian opponents of *shari'a* arbitration in Ontario are real, and the political philosophy that all citizens should share the same law is certainly legitimate.²¹⁸ As in Canada, Jewish and Christian arbitration tribunals have existed for years in the United States while arbitration based on Islamic law has not yet been established in any organized way.²¹⁹ As the Muslim population in the United States grows, however, and interest in applying *shari'a* law spreads, the United States may be forced to confront the same issues Ontario did regarding the advisability of relying on faith-based arbitration to resolve family law disputes.²²⁰ Part II of this Note addresses the arguments both for the use of faith-based arbitration in the family law context and those against it.

II. USING FAITH-BASED ARBITRATION IN FAMILY LAW

As the response to faith-based arbitration in Ontario highlights, it is in no way obvious that accepting a system of faith-based arbitration is the proper approach.²²¹ There is, in fact, much debate regarding the efficacy and fairness of faith-based arbitration systems. This part presents the arguments

214. News Release, Ontario Ministry of the Attorney General, McGuinty Government Declares One Law for All Ontarians: Only Canadian Law to Apply to Family Law Arbitrations, (Nov. 15, 2005), available at <http://www.attorneygeneral.jus.gov.on.ca/english/news/2005/20051115-arbitration.asp> [hereinafter One Law for All Ontarians]. The Attorney General Michael Bryant stated, "There is one family law for all Ontarians and that is Canadian law." *Id.*

215. *One Law for All Ontarians*, *supra* note 214; *Religious Law in Canada*, *supra* note 204.

216. *See Religious Law in Canada*, *supra* note 204.

217. *See supra* notes 181-89 and accompanying text.

218. *See infra* Part II.B.2.

219. *See supra* notes 97-126 and accompanying text.

220. Estimates of the Muslim population in the United States, as of 2000, have ranged from 1.1 million to seven million. The Islam Project, United States: Muslim Population Circa 2000, http://www.theislamproject.org/education/United_States.html (last visited Aug. 15, 2006); *see also* Abdal-Haqq & Abdal-Haqq, *supra* note 126.

221. *See supra* Part I.F.

in favor of faith-based arbitration in the family law context²²² as well as the arguments against it.²²³

A. Arguments for Using Faith-Based Arbitration in a Family Law Context

There are many reasons why disputants and the courts would be in favor of arbitration. As mentioned above, arbitration in general provides many benefits,²²⁴ and faith-based arbitration in particular offers its own unique benefits.²²⁵ This section sets forth other compelling arguments for using faith-based arbitration in the family law context, namely, the courts' mishandling of religiously-oriented conflicts, the procedural protections and safeguards in place to adequately protect vulnerable parties, and the importance of faith-based arbitration in furthering multiculturalism.

1. Courts Are Unhelpful in Dealing with Religious Issues

From a legal perspective, it could be argued that religious arbitration systems are actually necessary to deal with religious disputes because resolving religious conflicts through secular courts leads to inconsistent results and limited relief for religious people. The inconsistencies can be seen clearly in the way courts treat the enforcement of religious documents, like the *ketubah*, *mahr* agreements, and Jewish prenuptial agreements, and the response of courts to Jewish men who refuse to grant their wives religious divorces.²²⁶ While lower courts have adhered to the Supreme Court's neutral principles of law standard,²²⁷ the courts have applied the rule differently, resulting in inconsistencies and uncertainties regarding disputes spanning all religious faiths.

Courts have differed, for instance, over whether to enforce a *ketubah*, or Jewish marriage contract, and, related to the *ketubah* issue, whether to order a recalcitrant husband to grant his wife a *get*. In *Avitzur v. Avitzur*, for instance, a New York court upheld the *ketubah* as a valid contract and essentially compelled the husband to appear before a *beth din*.²²⁸ The *ketubah*, entered into and signed as part of the religious marriage ceremony,²²⁹ included a provision that the bride and groom would recognize the *beth din* as having authority "to counsel us in the light of Jewish tradition . . . and to summon either party at the request of the other, in order to enable the party so requesting to live in accordance with the

222. See *infra* Part II.A.

223. See *infra* Part II.B.

224. See *supra* notes 41-49 and accompanying text.

225. See *supra* notes 127-45 and accompanying text.

226. There is also much inconsistency with regard to the courts' handling of religious issues of child custody. See Jeff Atkinson, *Family Law Practice Guide: Handling Religious Issues in Custody and Visitation Disputes* 1-13 (A.B.A. 1992).

227. See *supra* notes 185-89 and accompanying text.

228. *Avitzur v. Avitzur*, 446 N.E.2d 136 (N.Y. 1983).

229. *Id.* at 136.

standards of the Jewish law of marriage throughout his or her lifetime."²³⁰ When the husband refused to grant his wife a religious divorce or appear before a *beth din*, the wife sought specific performance of the *ketubah* in court.²³¹ The court viewed the *ketubah* as "nothing more than an agreement to refer the matter of a religious divorce to a nonjudicial forum,"²³² and, applying the neutral principles of law standard, found that the case could in fact be decided on neutral principles of contract law.²³³ The court specifically noted that the agreement was not unenforceable simply because it had been entered into as part of a religious ceremony.²³⁴ Similarly, in *In re Scholl*,²³⁵ a Delaware court enforced a provision in a couple's Stipulation of Settlement that called on the husband to "cooperate with Wife in allowing her to obtain a Jewish Divorce."²³⁶ The husband had given a Conservative *get* rather than an Orthodox one, so the wife, who was Orthodox, could not remarry under Orthodox Judaism.²³⁷ Looking to New York cases as persuasive authority, the court ruled that ordering the husband to give his wife a *get* would not violate the Constitution.²³⁸ As the husband had not fulfilled the provision to cooperate in granting his wife a *get*, the Conservative *get* was insufficient and the husband was required to provide an Orthodox *get*.²³⁹

Avitzur and *In re Scholl* were perhaps easier cases for the courts to enforce the granting of a *get* or appearing before a *beth din* because the contractual provisions at issue were very specific, so there was no interpretation involved but merely implementation of agreed upon terms. Yet, there have been cases where courts compelled husbands to grant religious divorces under much more general agreements. In *In re Marriage of Goldman*,²⁴⁰ for instance, the court read the general language of a *ketubah* in which the husband promised "be thou my wife according to the law of Moses and Israel" as requiring the husband to grant his wife a *get*.²⁴¹ The court held that there was sufficient evidence to conclude that the parties intended the *ketubah* to be a valid contract.²⁴² Furthermore, while the husband claimed that the *ketubah* language was too vague, the court applied contract principles, relying on expert testimony of rabbis to interpret the contract terms, and determined that the parties did intend that the *ketubah* would bind them to using Orthodox Jewish law in their marital disputes.²⁴³

230. *Id.* at 137.

231. *Id.*; see also *supra* notes 195-98.

232. *Avitzur*, 446 N.E.2d at 138.

233. *Id.*

234. *Id.* at 139.

235. 621 A.2d 808 (Del. Fam. Ct. 1992).

236. *Id.* at 809.

237. *Id.*

238. *Id.* at 811-13.

239. *Id.*

240. 554 N.E.2d 1016 (Ill. 1990).

241. *Id.* at 1018.

242. *Id.* at 1021.

243. *Id.* at 1022.

Finally, the court found that enforcing the *ketubah* terms would not violate the Constitution. It would not violate the Establishment Clause because the court was merely involved in the secular purpose of enforcing contracts, the granting of a *get* was secular so that there was no religious effect, and the court was able to apply neutral principles of law thereby avoiding excessive entanglement with religion.²⁴⁴ It would not violate the Free Exercise Clause because the husband would only be required to do what he promised to do, and, because granting a *get* was secular in nature, the husband would not have to “engage in any act of worship or to express any religious belief.”²⁴⁵

Courts have enforced arbitration agreements reached through Islamic arbitration, as well. A common dispute among Muslims is the enforcement of the *mahr*, or dower, which is an amount of money a husband is obligated to pay his wife immediately on divorce, death, or other stipulated event.²⁴⁶ The *mahr* is included in religious marriage contracts, and its enforcement is often analyzed similarly to that of the *ketubah*.²⁴⁷ Some courts, following an *Avitzur*-like approach, have enforced the *mahr*. In *Aziz v. Aziz*,²⁴⁸ the court ruled that the husband was required to pay the wife \$5,000 in fulfillment of the *mahr* because the contract was essentially secular, even though it was entered into as part of a religious ceremony.²⁴⁹

While in some cases, then, courts have been willing to help a woman receive a Jewish divorce from a recalcitrant husband or a Muslim woman receive her *mahr* by enforcing religiously oriented antenuptial agreements and divorce settlements, other courts have refused to do so. For instance, in the New Jersey case *Aflalo v. Aflalo*, the court held that it could not order the husband to give his wife a *get* because it violated his First Amendment rights and was an excessive entanglement with religion.²⁵⁰ The court disagreed with earlier cases that had concluded that a *ketubah* could be considered a secular contract and that granting a *get* was a civil matter.²⁵¹

244. *Id.* at 1023.

245. *Id.* at 1024; *see also* *Koeppel v. Koeppel*, 138 N.Y.S.2d 366, 373 (Sup. Ct. 1954) (holding that specific performance of an agreement to give a *get* could be ordered because it “would merely require the defendant to do what he voluntarily agreed to do”). Rabbis have testified that the granting of a *get* is part of the civil code of Judaism, unconnected to the religious code. *Minkin v. Minkin*, 434 A.2d 665, 667-68 (N.J. Super. Ct. Ch. Div. 1981).

246. Ghada G. Qaisi, Note, *Religious Marriage Contracts: Judicial Enforcement of Mahr Agreements in American Courts*, 15 J.L. & Religion 67, 70-71 (2000-01).

247. *Id.* at 72.

248. 488 N.Y.S.2d 123 (Sup. Ct. 1985).

249. *Id.* at 124.

250. *Aflalo v. Aflalo*, 685 A.2d 523 (N.J. Super. Ct. Ch. Div. 1996).

251. *Id.* at 528-29. While not explicitly overruling *Minkin*, the *Aflalo* court was highly critical of that earlier New Jersey case, noting that *Minkin* did not analyze the situation under the Free Exercise clause, as it should have. *Id.* at 528. Moreover, the court found that simply hearing conflicting testimony regarding the nature of the *get* and choosing one interpretation over another amounted to excessive entanglement. *Id.* at 528-29. The court similarly found that an order to give a religious divorce did directly affect the parties’ religious beliefs. *Id.* at 529. The court also noted that ordering the husband to grant a *get* would not have any effect because under Jewish law the husband must willingly agree to grant the *get*. *Id.* at 529-30.

While claiming to be “not unsympathetic” to the wife’s desire to obtain a *get*, the court ultimately found that the husband’s refusal to grant the *get* was not really “unfair” because the wife’s inability to remarry came from her own choices and her “own sincerely-held religious beliefs.”²⁵² In *Victor v. Victor*,²⁵³ an Arizona court found other grounds on which to refuse to order a husband to give his wife a *get*. In contrast to *In re Marriage of Goldman*, the court here found that the *ketubah* was not specific enough and therefore could not be enforced for vagueness.²⁵⁴ The court concluded that interpreting the *ketubah* to determine if it included a promise by the husband to give the wife a *get* in the event of a separation would require it to act as a religious court, which would be overstepping its authority.²⁵⁵ Similarly, in *Habibi-Fahnrich v. Fahnrich*,²⁵⁶ the court did not enforce a *mahr* agreement. Although the court agreed with *Aziz* in principle that a *mahr* agreement can be enforceable, similar to *Victor*, the court held that the agreement was too vague to be enforceable.²⁵⁷ The agreement called for “a ring advanced and half of husband’s possessions postponed,”²⁵⁸ which the court found suffered from a lack of mutual understanding, lack of specificity, and lack of clear terms.²⁵⁹ Courts have refused to enforce *mahr* agreements on public policy grounds, as well. In *In re Marriage of Dajani*,²⁶⁰ the court concluded that the *mahr* facilitated and encouraged divorce by providing for a settlement only in case of a divorce and was therefore void for public policy reasons.²⁶¹

The responses of courts to these types of religious conflicts generally fit within two basic molds. Some of the courts choose a universalist method, attempting to fit the religious issues into existing legal categories.²⁶² For instance, *Avitzur* and *Aziz* both gave effect to the religious agreements because they comported with neutral principles of contract law, and *Dajani* did not enforce the *mahr* because the court fit it into the legal category of

The “*get me’useh*,” or forced *get*, is a serious problem, and ways around it have been studied by rabbinic and academic scholars. See Greenberg-Kobrin, *supra* note 186, at 370-73.

252. *Aflalo*, 685 A.2d at 527, 531. For another case in which the court refused to order a husband to grant a *get* because of First Amendment concerns, see *Seindel v. Steinberg*, No. 44125, 1982 WL 2446 (Ohio Ct. App. June 24, 1982).

253. 866 P.2d 899 (Ariz. Ct. App. 1993).

254. *Id.* at 901-02.

255. *Id.* at 902.

256. No. 46186/93, 1995 WL 507388 (N.Y. Sup. Ct. July 10, 1995).

257. *Id.* at *3.

258. *Id.* at *1.

259. *Id.* at *2.

260. 129 Cal. App. 3d 1387 (Ct. App. 1988).

261. *Id.* at 1389. A later case, *In re Marriage of Bellio*, 129 Cal. Rptr. 2d 556 (Ct. App. 2003), disapproved of the result in *Dajani*, claiming that the amount of the *mahr* in question—\$1,700—was too small an amount to have encouraged divorce. *Id.* at 558-59. *Bellio* did, however, uphold the principle that agreements that encouraged divorce and “profiteering by divorce” were against public policy and unenforceable. *Id.* at 559 (internal quotations omitted).

262. See Pascale Fournier, *The Erasure of Islamic Difference in Canadian and American Family Law Adjudication*, 10 J.L. & Pol’y 51, 61-64 (2001).

prenuptial agreements.²⁶³ Other courts have relied on a cultural relativist method, assuming that there is a single truth in religious law that they can simply apply.²⁶⁴ Cases like *In re Marriage of Goldman* and *Minkin* might be categorized under this approach because they relied on expert testimony and came to a determination regarding the absolute truth of one side over the other. Scholars have criticized both of these approaches. A universalist approach is majoritarian, with the courts imposing values of the majority and essentially enforcing homogeneity²⁶⁵ while restricting themselves to “familiar legal categories of contract or divorce law.”²⁶⁶ Additionally, universalism prevents the state from accommodating the unique needs of religious group members.²⁶⁷ The relativist approach is overly simplistic, assuming a single perspective is correct, not recognizing the enormous diversity of opinion within religions, and not distinguishing between reliable and unreliable sources of information.²⁶⁸ Furthermore, some scholars have noted that denials for enforcement of religious agreements often represent misunderstandings of religious law.²⁶⁹

In addition to the inadequacies of the approaches courts follow, a major problem with turning to the courts to settle religious disputes is simply the unpredictability and uncertainty that results from the disparity with which courts view them. Indeed, religious leaders have begun advising couples to include arbitration clauses in their religious agreements.²⁷⁰

2. Religious Arbitration Is Important to Effectuate a Multicultural Society

The interference of secular courts in religious issues, and their tendency to substitute judgment for religious authorities, can threaten the preservation of cultural and religious groups and their traditions. Indeed, some have argued that, in order to promote group survival, either family law in the United States should be more multicultural, or particular cultural/religious groups should have their own system of self-governance, free from state interference.²⁷¹ Principles of neutrality and the limits of the Establishment Clause and the Free Exercise Clause serve to create a

263. *Id.* at 63-64.

264. *Id.* at 64-65.

265. Fournier, *supra* note 262, at 62.

266. *Id.* at 68.

267. Suzanne Last Stone, *The Intervention of American Law in Jewish Divorce: A Pluralist Analysis*, 34 *Isr. L. Rev.* 170, 179 (2000).

268. Fournier, *supra* note 262, at 67-68. In Islam, there are several schools of interpretation of Islamic law. *Id.* at 67. Similarly, in Judaism there are several denominations, and even within denominations there is much difference in opinion. *See, e.g., In re Scholl*, 621 A.2d 808, 812-13 (Del. Fam. Ct. 1992) (involving a husband who felt he had complied with the granting of a *get* by following Conservative Judaism principles while the wife demanded an Orthodox *get*). One scholar has suggested a functional approach, which would demand that courts recognize and understand the social and cultural context in which these religious principles lie. Fournier, *supra* note 262, at 68-70.

269. Qaisi, *supra* note 246, at 78.

270. *Id.* at 81.

271. *See* Stone, *supra* note 267, at 171-72; *supra* notes 142-45 and accompanying text.

homogeneous common culture.²⁷² However, many cultural groups wish to preserve their distinctive cultures and resist “state-promoted assimilation.”²⁷³

There are two main types of pluralists—the cultural pluralists and the legal pluralists. Cultural pluralists simply want greater accommodation within the legal system, namely the “adoption of non-neutral state rules tailored to the needs of members of different cultural, ethnic or religious groups.”²⁷⁴ The goal would be to establish broader legal rules that would allow individuals to express their religious identities.²⁷⁵ Legal pluralists believe that cultural and religious groups have a right to noninterference and that the state should defer to other non-state legal entities with their own sovereignty.²⁷⁶

In some ways, states have acceded to the accommodation principles of the cultural pluralists. For instance, states generally recognize the validity of marriages established through religious ceremonies even if the parties have not complied with licensing requirements.²⁷⁷ However, courts face a daunting challenge to truly accommodate minority cultures, and they are not always successful. A court would be required to first understand the underlying cultural and religious practices of the dispute, and then try to determine if any existing legal principles can be harmonized with a different tradition. If the court is unable to apply existing legal principles, it must find a solution that allows both the legal system and the minority cultural or religious system to exist.²⁷⁸ Courts have failed to accommodate members of religious groups in such cases, for instance, in enforcing *mahr* agreements.²⁷⁹ While courts may have begun to see the value in accommodating minority groups, there is still much work to be done in this area.²⁸⁰

272. See Stone, *supra* note 267, at 179-82.

273. *Id.* at 184. The author notes that multiculturalism has become a political ideal in the liberal societies of the West, and that recognition of the distinctiveness of individuals and the groups to which they belong is seen as valuable. *Id.* at 184-85. A related concept to multiculturalism is cultural relativism, the idea that there are no universal standards by which to judge religions and cultures. See Courtney W. Howland, *Introduction to Religious Fundamentalisms and the Human Rights of Women* xi, xiv (Courtney W. Howland ed. 1999).

274. Stone, *supra* note 267, at 186.

275. Ann Laquer Estin, *Embracing Tradition: Pluralism in American Family Law*, 63 Md. L. Rev. 540, 542 (2004).

276. Stone, *supra* note 267, at 187.

277. Estin, *supra* note 275, at 559-62. Such decisions reflect a general public policy towards favoring validating marriages. *Id.* at 561-62. A separate, general principle of religious accommodation exists under the law by which the government can make exceptions for those whose religious beliefs would be violated by a government action. See Greenberg-Kobrin, *supra* note 186, at 387-89; see also generally Clare Zerangue, *Sabbath Observance and the Workplace: Religion Clause Analysis and Title VII's Reasonable Accommodation Rule*, 46 La. L. Rev. 1265 (1986).

278. See Estin, *supra* note 275, at 558-59.

279. See *supra* notes 246-61 and accompanying text.

280. See Estin, *supra* note 275, at 603-04.

The legal pluralists' vision of nonintervention of secular courts in religious disputes has not been as well accepted. Outside the United States, separate legal systems for separate ethnic and religious groups are not so uncommon.²⁸¹ However, the idea of a separate religious system with its own sovereignty operating alongside a secular system has for the most part not caught on in this country.²⁸² The concept, though, is not completely foreign—Native American tribes, for example, retain certain powers of self-government concerning family law issues.²⁸³ A separate religious legal system may be necessary because there are certain issues that can be dealt with only within the religious tradition and not in secular courts.²⁸⁴ More importantly, from a pluralist perspective, letting a religious group function on its own with its own internal methods of dispute resolution could be very important in preserving the culture and values of the religious group. For instance, in *Golding v. Golding*,²⁸⁵ a woman signed a separation agreement with her husband after going to a *beth din*, and, in exchange for signing the agreement, her husband gave her a *get*.²⁸⁶ The court ruled the agreement invalid because it considered the agreement a product of duress and coercion.²⁸⁷ The husband, denying any coercion or duress, argued that the agreement was reached through the process of rabbinic arbitration, and should therefore be binding.²⁸⁸ This case illustrates the plight Jewish women can suffer when their husbands refuse to grant them religious divorces, and the court was trying, some might say admirably, to correct for the unequal bargaining power between the husband and wife.²⁸⁹ However, whether the result was morally correct or not, there is always the possibility that courts, while trying to amend some flaws they see in religious laws, will misunderstand the nature of those laws and the role of religious arbitration.²⁹⁰ As one scholar notes, “interferences with the indigenous system of *halakha*, and especially the system of rabbinical dispute resolution—which historically has played a central role in Jewish life and to

281. *Id.* at 548-49. For instance, Israel and several African countries that had previously been British colonies have separate religious legal systems. See generally Abdulmumini Adebayo Oba, *The Sharia Court of Appeal in Northern Nigeria: The Continuing Crises of Jurisdiction*, 52 Am. J. Comp. L. 859 (2004).

282. Estin, *supra* note 275, at 550.

283. *Id.*

284. *Id.* at 586. For instance, “exit” problems, when one member of a couple wishes to leave a religion but the other one still adheres to its laws, present difficulties for secular courts because they face constitutional constraints in forcing someone to participate in a religion. *Id.*

285. 581 N.Y.S.2d 4 (App. Div. 1992).

286. *Id.* at 5-6.

287. *Id.* at 6.

288. *Id.*

289. See *id.* at 6-7.

290. Stone, *supra* note 267, at 197. In *Golding v. Golding*, the court viewed the rabbis involved in the arbitration process as intermediaries, rather than as authoritative arbitrators. See *Golding*, 581 N.Y.S.2d at 5.

which the parties first turned—has the capacity to narrow a significant feature of Jewish identity and of Jewish communal existence.”²⁹¹

3. Procedures and Safeguards Adequately Protect the Vulnerable Parties

While some have argued that a developed and independent religious arbitration system would be harmful to vulnerable parties,²⁹² arbitration does have certain safeguards that may be adequate to protect those parties. Faith-based arbitration is limited by both contract law and rules of arbitration.²⁹³

One common way that contract law protects potentially vulnerable parties is the requirement that an agreement be free from duress in order to be valid.²⁹⁴ Courts have refused to enforce agreements that were the product of duress. In *Segal v. Segal*,²⁹⁵ for instance, the court invalidated a separation agreement reached through a *beth din* arbitration because it found that the husband had pressured his wife to sign it by threatening to withhold a *get* from her and by physically intimidating her.²⁹⁶

Procedural rules of arbitration protect vulnerable parties, as well. Parties to arbitration are entitled to notice²⁹⁷ and to attorney participation.²⁹⁸ Arbitrators are required to disclose any information that may affect their impartiality, such as a financial interest in the outcome of the proceeding or a prior relationship with one of the parties.²⁹⁹ Furthermore, a party to arbitration is not allowed to agree to unreasonably restrict the rights of notice and arbitrator disclosure and is not allowed to waive the right to attorney representation.³⁰⁰ These provisions are in place to correct for unequal bargaining power between the parties.³⁰¹ It is not so difficult for religious arbitration tribunals to conform to these rules,³⁰² and they have an

291. Stone, *supra* note 267, at 197.

292. See *supra* notes 193-200, 205-07 and accompanying text; *infra* notes 311-30 and accompanying text.

293. See *supra* notes 151-79 and accompanying text.

294. See Restatement (Second) of Contracts §§ 174-77 (1981). Agreement has been given as a result of duress if it was “induced by an improper threat by the other party that leaves the victim no reasonable alternative.” *Id.* § 175.

295. 650 A.2d 996 (N.J. Super. Ct. Ch. Div. 1994).

296. *Id.* at 997-1000; see also *Burns v. Burns*, 538 A.2d 438 (N.J. Super. Ct. Ch. Div. 1987) (refusing to enforce an agreement whereby the wife would pay thousands of dollars in exchange for a *get* because it was considered to be extortion); *Perl v. Perl*, 512 N.Y.S.2d 372 (App. Div. 1987) (invalidating an agreement in which the wife agreed to pay a large sum of money and give the husband the marital home, the car, and her personal jewelry on grounds of duress because the husband had threatened to withhold a *get*).

297. RUAA § 9, 7 U.L.A. 35 (2000). States have followed the RUAA and adopted similar, and sometimes more stringent procedures. New York, for instance, requires that notice be given at least eight days prior to the arbitration date. N.Y. C.P.L.R. 7506(b) (McKinney 2003).

298. RUAA § 16, 7 U.L.A. 56.

299. *Id.* § 12.

300. *Id.* § 4.

301. See *id.* § 4, cmt. 4(c).

302. Fried, *supra* note 98, at 644.

incentive to implement the rules so that their rulings will be binding.³⁰³ In the event the procedural safeguards are not met, courts will invalidate the agreements or awards. For instance, in *Stein v. Stein*,³⁰⁴ the court invalidated a *beth din* award that gave the husband custody of the couple's children and all of the marital assets because the agreement to submit to arbitration and the commencement of the arbitration occurred on the same day, thereby failing to comply with the state's notice requirements.³⁰⁵

Arbitration vacatur rules also help to protect the weaker parties. Grounds of public policy, in particular, serve to invalidate questionable agreements. For instance, courts generally consider child custody as non-arbitrable and will not enforce agreements that determine child custody.³⁰⁶ Their concern is that the state's standard for custody, often the "best interests of the child" standard, will not be utilized.³⁰⁷ As one court wrote, "The court's traditional power to protect the interests of children cannot yield to the expectation of finality of arbitration awards."³⁰⁸ Another situation in which arbitration decisions have been vacated on public policy grounds is when the arbitration tribunal assumes for itself universal jurisdiction. For instance, in *Rakoszynski v. Rakoszynski*,³⁰⁹ the court refused to confirm a *beth din* divorce settlement because the *beth din* had limited the parties' access to civil courts, thereby depriving them of their constitutional rights.³¹⁰ All of these procedural safeguards certainly would help to counteract many of the concerns people have regarding the vulnerability of weaker parties in arbitration contexts.

B. Arguments Against Using Faith-Based Arbitration in a Family Law Context

There are several reasons why people oppose faith-based arbitration. This section will address those reasons. First, there is much concern regarding the substantive law on which religious arbitrators base their decisions, with some considering religious law to be prejudicial against women in a way that presents human rights concerns. Second, multiculturalism is not necessarily a positive concept, especially in light of the subordinated position of women in many cultures. Finally, arbitration is susceptible to abuse, and safeguards, while in place, do not always work as they should to protect vulnerable parties.

303. Pengelley, *supra* note 201, at 118.

304. 707 N.Y.S.2d 754 (Sup. Ct. 1999).

305. *Id.* at 759.

306. *See, e.g.*, *Glauber v. Glauber*, 600 N.Y.S.2d 740 (App. Div. 1993) (refusing to uphold the child custody arrangement reached in a *beth din* proceeding).

307. *Id.* at 742.

308. *Id.* at 743.

309. 663 N.Y.S.2d 957 (Sup. Ct. 1997).

310. *Id.* at 961. Also at issue in this case was the arbitrability of child support. While child support awards are arbitrable, the court here invalidated the child support clauses because in this instance it was unclear how the amounts were determined, so it violated public policy. *Id.* at 960-61.

1. Faith-Based Arbitration Presents Human Rights Concerns

The prejudice of traditional religions against women and other minority subgroups has led some to believe that independent, separate systems of religious arbitration can be harmful.³¹¹ Women, for instance, are disadvantaged by both religious laws and the cultural views of male-female relationships within the religions. Some argue that legal systems that perpetuate this kind of inequality should not be allowed.³¹²

There are several Islamic and Jewish laws that are facially prejudicial against women and children. For example, Muslim women are prohibited from marrying non-Muslims, even though Muslim men can marry non-Muslim women.³¹³ Islam also allows polygamy for men, but not for women, thus discriminating against women.³¹⁴ Furthermore, under Islamic law, husbands are allowed to unilaterally divorce their wives, without having to show cause or give notice.³¹⁵ Women are vulnerable in divorce also at instances when the *mahr* and other marital agreements are not enforced by the courts.³¹⁶ Minors, mainly prepubescent females, are oppressed by culturally acceptable forced marriages.³¹⁷ In the Jewish religion, women are disadvantaged by the divorce laws under which only men can grant divorces.³¹⁸ Indeed, scholars have noted the vulnerability of women within traditional family law systems because they “face greater restrictions on their rights to marry, their rights to pass on their nationality or membership to their children, their options and access to divorce, their financial circumstances and their opportunities to be awarded custody.”³¹⁹ There is concern that substantive equality for women will be lacking, especially if the arbitration systems employ the more rigid and conservative interpretation of the religious laws.³²⁰

311. See *supra* notes 193-200, 205-07 and accompanying text; *infra* notes 312-30 and accompanying text. But see generally Miller, *supra* note 200 (arguing that Muslim women are really not that disadvantaged, even compared with the rights of women in the West).

³¹² See, e.g., Ayelet Shachar, *Religion, State, and the Problem of Gender: New Modes of Citizenship and Governance in Diverse Societies*, 50 McGill L.J. 49 (2005).

313. Poulter, *supra* note 142, at 160. The purpose of this differential treatment is to keep children within the Muslim faith, and children are assumed to follow the religion of their fathers. *Id.* The author writes that, although this aim is legitimate, the method of achieving it is “unreasonable and disproportionate.” *Id.*

314. *Id.* at 160-61.

315. *Id.* at 161. This form of divorce is known as *talaq*. *Id.* For more on *talaq* and Islamic divorce law, see Dawoud El Alami & Doreen Hinchcliffe, *Islamic Marriage and Divorce Laws of the Arab World* (Eugene Cotran & Chibli Mallat eds., 1996).

316. Estin, *supra* note 275, at 576; see *supra* notes 251-56, 257-62 and accompanying text.

317. Poulter, *supra* note 142, at 161.

318. See *supra* notes 193-98 and accompanying text. In general, Jewish laws are viewed as less draconian than Muslim laws, which may explain the greater fear in establishing *shari'a* arbitration than Jewish *battei din*. See *supra* notes 201-02 and accompanying text.

319. Estin, *supra* note 275, at 600 (citing Ayelet Shachar, *Multicultural Jurisdictions* 36, 55-56 (2002)).

320. See Shachar, *supra* note 312, at 64.

In addition to these actual laws, and perhaps engendered by them, are the cultural limitations put on women. First, religious cultures often perpetuate the idea that women are subordinate and inferior creatures.³²¹ In addition, the viewpoint, common among traditional cultures, that women are somehow more responsible in transmitting and preserving the culture often works against them—they can be “subject to heightened control, constrained by rules that entrench their dependence and inequality within the community.”³²² Similarly, women also often have a harder time exiting their religious communities.³²³ These types of cultural attitudes can isolate women further.³²⁴ They can also make women even more vulnerable by turning them into unequal bargaining partners in family law issues. For example, in the case of Islamic unilateral divorces, Muslim women can reserve the same right in their marriage contracts, but, in practice, Muslim women have insufficient bargaining power to insert the clauses into the contract.³²⁵ This subordination of women within traditional religions is, in fact, one of the reasons that some people oppose the concept of multiculturalism in general.³²⁶

2. Multiculturalism Should Not Be Advanced

One large reason to oppose a separate arbitration system is that, contrary to the arguments supporting it, multiculturalism is actually not a positive goal to work towards. Considering the subordinate position of women in the cultural and religious groups that most want autonomy, some argue that multiculturalism will only put already vulnerable parties at a greater disadvantage.³²⁷ Left to their own independent systems, there will be a “solidification of existing power inequalities within minority groups.”³²⁸ Even though the minority group as a whole may be able to preserve its culture and heritage, the feminist critique of multiculturalism finds women bearing “disproportionate costs.”³²⁹ Furthermore, because there is often pressure within insular minorities to conform, vulnerable members are even more at risk because they will not seek relief outside of their own arbitration system, and they are likely to not even be aware of possible modes of relief.³³⁰

321. See *supra* note 199.

322. Estin, *supra* note 275, at 551 (citing Shachar, *supra* note 312, at 54-55).

323. *Id.* at 600 (citing Shachar, *supra* note 312, at 59-60).

324. See Shahnaz Kahn, *Canadian Muslim Women and Shari'a Law: A Feminist Response to "Oh! Canada!"*, 6 Can. J. Women & L. 52, 59 (1993).

325. Poulter, *supra* note 142, at 161.

326. See *infra* notes 327-30 and accompanying text.

327. See Estin, *supra* note 275, at 551-52; Stone, *supra* 268, at 201-02.

328. Shachar, *supra* note 312, at 58.

329. *Id.*

330. See *infra* notes 343-59 and accompanying text; see also Shachar, *supra* note 312, at 64, 74. Shachar proposes using a joint governance approach, which calls for shared and overlapping jurisdictions of the state and the group. *Id.* at 71-72. The approach consists of three principles: (1) the submatter allocation of authority, identifying the interrelated

Aside from the feminist criticism of multiculturalism, there are other, more universal criticisms, as well. First, there are those who see a multicultural approach as reducing assimilation, and therefore serving to only further highlight the gaps between the majority and minority population.³³¹ In societies where minority groups are already discriminated against, the goal should be to include outsider minorities, not to exclude them.³³² Indeed, liberal scholars see it as an ideal to promote communication and trust among all citizens.³³³ A state's public recognition and deferral to religious and cultural authorities or accommodation of specific religious laws would be antithetical to democratic ideals.³³⁴

Second, a multicultural approach presents practical problems. For example, assuming a minority religion is granted the right to state noninterference, who would decide how their independent arbitration panels should run and on which interpretations of their religious laws their decisions would be based?³³⁵ Within religions there are multiple strands of thought and many versions of religious laws.³³⁶ It is unclear who would speak for the group when there is internal conflict and if minority dissenters would ever be given an opportunity to have their voices heard.³³⁷

Finally, following a multicultural approach may ultimately disadvantage the very minority groups attempting to preserve their culture. Some scholars have suggested that state oversight and interaction with religious systems would result in positive innovation and change within the minority group.³³⁸ Often state disapproval of a particular religious practice can lead to introspection and eventually encourage the members of the group to act to correct the injustice.³³⁹ For example, modern conceptions of equality within the family and between men and women have prompted a reanalysis of the Jewish divorce laws and creative solutions to correct for the

functions in the specific area in which the minority group seeks accommodation; (2) the non-monopoly rule, establishing that neither the group nor the state has exclusive control over a social area that affects people as members of a group; and (3) the establishment of clearly delineated reversal points, allowing the individual group member to turn to a competing jurisdiction for an alternative, adequate remedy. *Id.* at 72. Shachar also suggested several additional procedural requirements that would facilitate these goals, such as the administering of mandatory legal advice before the parties agree to arbitration and allowing a nongovernmental organization to assist women in the process. *Id.* at 75-76. In a similar vein, Fried suggests that secular courts must be more comfortable interacting with religious arbitration tribunals, even "broaching the barrier separating Church and State." Fried, *supra* note 98, at 655.

331. Kahn, *supra* note 324, at 62-63.

332. *Id.* at 63. The author is herself a Canadian Muslim who resents the idea that her national and religious identities might be mutually exclusive. *Id.* at 62.

333. Shachar, *supra* note 312, at 78-79.

334. *Id.* at 79.

335. Stone, *supra* note 267, at 189.

336. Poulter, *supra* note 142, at 158; *see supra* note 269.

337. Stone, *supra* note 267, at 189.

338. *Id.* at 190.

339. *Id.*

imbalances.³⁴⁰ These solutions remain true to *halakhah* while still advancing more modern notions of equality.³⁴¹ Utilizing and relying on secular courts will help in internally reforming religious laws seen by many as immoral, while an approach of multiculturalist noninterference will force the religion to remain static.³⁴²

3. The Procedural Safeguards Are Not Adequate

The procedures and rules of arbitration, while offering some protection to vulnerable parties, are not sufficient to protect those parties fully. A potent example is that of duress. While courts will rule a contract invalid if it was agreed to under duress,³⁴³ courts do not recognize internal pressure as duress.³⁴⁴ This failure is especially important in the context of religious arbitration agreements, where there is much community pressure to submit disputes to religious arbitration.³⁴⁵ In the Jewish community, for example, a *beth din* may issue a *seruv* to compel parties to appear before it.³⁴⁶ In *Greenberg v. Greenberg*,³⁴⁷ a wife had agreed to resolve all of the divorce disputes, including the financial issues, in a *beth din* because she feared the threat of a *seruv*.³⁴⁸ The court refused to invalidate the agreement on grounds of duress.³⁴⁹ The court wrote,

We find that the wife freely submitted herself to the jurisdiction of the Bais Din and that this was a manifestation of her having voluntarily undertaken obedience to the religious law which such tribunals interpret and enforce. The "threat" of a *seruv* . . . cannot be deemed duress. The record in the present case does not support a finding that the wife was subjected to any particular coercion greater than that which is intrinsic in the case of any member of a religious community who, as a matter of conscience, feels obligated to obey the laws of his or her religious organization, or to follow the decrees of a religious court, and who consequently exposes himself or herself to the ecclesiastical sanctions available for the enforcement of such decrees or such law. In sum, the release signed by the wife was, as a matter of law and fact, voluntary.³⁵⁰

340. See, e.g., *Greenberg-Kobrin*, *supra* note 186.

341. See *id.*

342. Stone, *supra* note 267, at 202-05.

343. See *supra* notes 295-97 and accompanying text.

344. Fried, *supra* note 98, at 651.

345. See *id.*

346. See *supra* notes 132-33 and accompanying text. Courts generally do not interfere with a *beth din*'s issuance of a *seruv* at all. See, e.g., *Neiman Ginsburg & Mairanz, P.C. v. Goldburd*, 684 N.Y.S.2d 405 (Sup. Ct. 1998) (refusing to review a *beth din*'s decision to issue a *seruv* and rejecting a claim for libel because of the *seruv*).

347. 656 N.Y.S.2d 369 (App. Div. 1997).

348. *Id.* at 369-70.

349. *Id.* at 370.

350. *Id.* (internal citations omitted). But see *Perl v. Perl*, 512 N.Y.S.2d 372 (App. Div. 1987) (holding that the unequal balance of power within a Jewish marriage could be considered duress).

The court's refusal to consider a *seruv* duress suggests a misunderstanding of the power of the *seruv* and what it means to be devoted to a religion.³⁵¹ Even if a particular religion has no explicit threatening mechanism through which to compel compliance, simply being a member of that religious community can exert a tremendous amount of internal pressure.³⁵² Group members may look on the nonconforming group members as disloyal if they choose to resolve disputes in a secular court rather in a religious arbitration setting.³⁵³ Those who do not conform may face ostracism by their families and their communities.³⁵⁴ Such an accusation of disloyalty may be enough in some cultures to force someone to turn to the religious arbitration system in place.³⁵⁵ Until courts recognize that internal community pressure functions as duress, vulnerable parties will be held at the mercy of possibly immoral and discriminatory rules that may lead to harmful results.

Furthermore, in many cases, communities are so insular and self-sufficient that members may not even be aware of all of their rights, rendering any procedural safeguards in place irrelevant. For example, even though parties to arbitration are entitled to attorney representation,³⁵⁶ many of those turning to religious arbitration are unaware of this right.³⁵⁷ The *beth din* does not even have to confirm that the parties have waived their rights.³⁵⁸ In traditional Islamic communities, women may be so isolated as to be unaware of the help available to them.³⁵⁹

It is interesting to note that when Ontario was considering the establishment of a *shari'a* arbitration system, Ms. Boyd gave her approval of the plan, assuming her recommendations—numbering forty-six—were implemented.³⁶⁰ Ontario already had an Arbitration Act in place that provided similar safeguards as the ones in place in the United States, such as notice requirements and reasons for vacatur.³⁶¹ The Boyd review, however, called for additional measures that would further protect vulnerable parties from the type of internal pressure and inaccessibility to rights and knowledge that critics envisioned. For example, Ms. Boyd recommended that arbitrators be required to develop and distribute to the parties a statement of principles that explains the parties' rights and

351. Fried, *supra* note 98, at 652.

352. See Khan, *supra* note 324, at 60.

353. Shachar, *supra* note 312, at 64.

354. Kahn, *supra* note 324, at 60.

355. See *id.*

356. See *supra* note 299 and accompanying text.

357. See Fried, *supra* note 98, at 646-47.

358. *Id.* at 646. The author writes, "One can merely guess the countless number of people who might have simply obeyed the decision of the *beth din*, unknowingly deprived of their rights or unwilling to go through the costly and time-consuming procedure of vacating the resulting award." *Id.* at 646-47.

359. Pengelley, *supra* note 201, at 122.

360. See *supra* notes 209-12 and accompanying text.

361. See Pengelley, *supra* note 201, at 118-20.

obligations and available processes under that form of religious law.³⁶² Ms. Boyd also recommended that a statement that the parties have received advice regarding Ontario and Canadian law, the law of arbitration, and the remedies available should be included in the certificate of Independent Legal Advice.³⁶³ Several of the recommendations pertained to the government's responsibility for developing public legal education programs to make all citizens aware of the legal system and their rights.³⁶⁴ Ms. Boyd also recommended increased oversight, in the form of screening processes, task forces, and reporting procedures, of family law arbitration, of the situations of the parties involved, and of the arbitrators themselves.³⁶⁵ These possibly helpful recommendations are currently lacking not just in Canada, but in the United States, as well.

Faith-based arbitration has provoked vehement arguments both for and against its establishment and use. The courts' inability to deal consistently and favorably with religious issues, the importance of a multicultural society, and the number of safeguards already in place are certainly legitimate reasons to support faith-based arbitration. Equally valid counterarguments, however, are the fear that the arbitration systems will discriminate against women and other vulnerable parties, the potential harms of multiculturalism, and the inadequacy of the safeguards. Part III of this note suggests an approach to faith-based arbitration that takes all of these arguments into consideration.

III. AN APPROACH TO FAITH-BASED ARBITRATION

In light of the compelling reasons to have faith-based arbitration systems as well as the legitimate criticisms of such systems, this part suggests that some middle ground ought to be reached. The tremendous benefits to private arbitration, constitutional issues involved in banning religious arbitration, the positive aspects of multiculturalism, and the inability of the secular court system to adequately deal with religious issues all suggest that faith-based arbitration is a good idea. However, the inadequacy of the procedures in place to sufficiently protect vulnerable parties indicates that more oversight is necessary and that cultural pluralism, rather than legal pluralism, may be most appropriate.

The many benefits of private arbitration, and religious arbitration in particular, are reason enough to rethink an abandonment of faith-based arbitration. Arbitration in general offers a faster and cheaper alternative to litigation, and it affords the participants greater control, privacy, flexibility, chance of settlement, and a decisionmaker with specific expertise in the area of dispute.³⁶⁶ Courts, too, appreciate arbitration because it eases their

362. Boyd, *supra* note 210, at 136 (recommendations 16-17).

363. *Id.* at 137 (recommendation 21).

364. *Id.* at 138 (recommendations 25-30).

365. *Id.* at 139-49 (recommendations 31-42).

366. *See supra* notes 41-47 and accompanying text.

burden, lowers administrative costs, and deters frivolous claims.³⁶⁷ There are even more benefits to religious arbitration. Faith-based arbitration often offers a more conciliatory setting and an atmosphere of shared values. Furthermore, the arbitrator is more likely to judge using principles of equity and morals and be better equipped to deal with religious issues.³⁶⁸

Aside from the benefits of faith-based arbitration, there are constitutional reasons to uphold the use of religious arbitration systems. There are certain religious issues, like divorce, that require the aid of a *beth din* or an Islamic authority.³⁶⁹ Limited by the Free Exercise Clause of the Constitution, the courts must allow these religious systems to function, and they may even be prohibited from granting injunctions against the use of faith-based arbitration.³⁷⁰ Allowing the religious arbitration tribunals to exist, however, is not the same as deferring to their judgment and enforcing their awards. In Ontario, for instance, the government suggested it would allow the religious arbitration tribunals to exist and function in the role of an advisory body, without enforcing their judgments.³⁷¹ However, refusing to enforce arbitration awards would seriously weaken the power of the arbitration tribunals, to the extent that some people may stop turning to them for judgment. Furthermore, religious arbitration tribunals can, with little difficulty, conform to arbitration procedures.³⁷² It would be hard to justify banning the use of perfectly compliant religious arbitration tribunals while allowing other types of arbitration to continue.

Religious arbitration should also continue and, in the case of Islamic law, expand because the arguments in favor of a multicultural society are more persuasive than the ones against it. Enhancing the appreciation of the diversity of cultures is a positive goal, and the recognition of minority groups' distinctiveness does not contradict democratic ideals.³⁷³ While those opposed to multiculturalism may fear democracy will somehow be weakened by allowing minority groups to function with some independence,³⁷⁴ a clear separation between the private and religious realms and the public and neutral realms may actually further liberal democratic ideals.³⁷⁵ In response to the serious charge that religious arbitration can have the harmful result of disadvantaging vulnerable members of minorities even more,³⁷⁶ one need only emphasize the extreme importance of allowing

367. See *supra* notes 48-49 and accompanying text.

368. See *supra* notes 134-39 and accompanying text.

369. See *supra* note 106 and accompanying text.

370. See *supra* notes 184, 188-89 and accompanying text.

371. See *supra* notes 214-16 and accompanying text.

372. See *supra* note 109 and accompanying text.

373. See *supra* note 274.

374. See *supra* notes 333-34 and accompanying text.

375. While the current jurisprudence carefully limits judicial involvement in religious matters through principles of excessive entanglement and the neutral principles of contract law approach, the abundance of religiously themed cases that end up in secular courts suggests the high degree of interaction between the civil and the religious.

376. See *supra* notes 327-30 and accompanying text.

members of a minority religious or cultural group to preserve their heritage and values.³⁷⁷ Assuming that sufficient procedures are in place to protect the vulnerable parties, banning religious arbitration altogether would be a much too severe response.

The inability of secular courts to deal in a consistent and meaningful way has also demonstrated the need for some kind of religious arbitration system. While some courts and jurisdictions have accommodated the needs of the religiously observant, other courts have remained insensitive to particular problems that can arise in religious communities.³⁷⁸ For example, in some jurisdictions, courts will order a recalcitrant husband to give his wife a *get* and will order the payment of the *mahr*, while other courts will refuse to enforce these agreements. Given the uncertainty of the results, people may be hesitant to bring such disputes to court. In addition, courts have refused to consider the impact of internal community pressure, demonstrating a deep misunderstanding of religious belief.³⁷⁹ The approaches taken by the courts, whether universalist or relativist, seem unworkable.³⁸⁰ While some have suggested a more functional approach,³⁸¹ requiring courts to study and gain a deeper understanding of religions and cultures would most likely face excessive entanglement obstacles. That courts are not equipped with the knowledge, sensitivity, and patience to fully resolve religious disputes suggests that religious issues would best be resolved using internal community solutions and systems.³⁸²

The criticisms of religious arbitration tribunals, however, leads one to conclude that religious arbitration systems cannot function completely free from any state interference or intervention. Traditional religions have laws that discriminate against women and other vulnerable parties, such as the acceptance of polygamy for men and forced marriages for minor females.³⁸³ Women are particularly disadvantaged in cases of divorce.³⁸⁴ Furthermore, traditional religious cultures perpetuate conceptions of inequality between men and women and subordinate women, making their bargaining power even more unequal.³⁸⁵ The fear that faith-based arbitration will be responsible for immoral or unjust treatment of citizens is not great enough to justify banning arbitration altogether, but it is enough to demand oversight. While legal pluralists may argue for complete non-intervention, the state has too great an interest in protecting its citizens to completely turn a blind eye to injustices that may be carried out through religious arbitration.

377. See *supra* notes 272-74 and accompanying text.

378. See *supra* notes 251-56, 257-62 and accompanying text.

379. See *supra* notes 343-55 and accompanying text.

380. See *supra* notes 263-70 and accompanying text.

381. See *supra* note 269.

382. See *supra* Part II.A.1.

383. See *supra* notes 313-18 and accompanying text.

384. See *supra* note 316 and accompanying text.

385. See *supra* notes 321-25 and accompanying text.

The procedures currently in place are not sufficient to adequately protect vulnerable parties. While contract laws like invalidating agreements reached as a result of duress certainly help,³⁸⁶ they do not reach all cases.³⁸⁷ Similarly, arbitration rules, such as vacating awards on grounds of public policy and requiring attorney representation, can alleviate some problems,³⁸⁸ but they do not always work fully.³⁸⁹ Furthermore, relying on ex post solutions may not be enough to protect parties, as they may not be aware of their rights, or, even if they are, they may find litigation too costly or time-consuming.³⁹⁰

What is required, then, is more oversight and regulation along the lines of what Ms. Boyd recommended for Ontario.³⁹¹ It is important that before the parties even agree to arbitration they be made aware of all of their legal rights and options. To that end, requiring faith-based arbitration systems to inform parties of their rights, such as a right to attorney representation and possible legal remedies through the court system, is a good idea.³⁹² The government should also accept greater responsibility for legal education, reaching out to insular communities to educate the members of their legal rights.³⁹³ Better and more comprehensive screening of the specific arbitration tribunals would be helpful, as well, to make sure that procedures are complied with and that the parties are not being taken advantage of. The arbitrators, too, should be screened, and perhaps even required to be licensed, in order to weed out extremists.³⁹⁴

While governments may not feel comfortable with such intense interaction with religious bodies, they must overcome their discomfort.³⁹⁵ They would not have to go so far as a joint governance approach.³⁹⁶ Overseeing adjudication systems and ensuring that they comply with procedures, as well as educating the public regarding their full legal rights, is merely a neutral function of government.

CONCLUSION

Private arbitration has a long history in the United States. Faith-based arbitration, too, especially Christian arbitration and Jewish *battei din*, have existed harmoniously with the secular courts. However, the uproar in Canada over the establishment of *shari'a* arbitration tribunals has brought to light criticism of faith-based arbitration in general. Legitimate fears that

386. See *supra* notes 295-97 and accompanying text.

387. See *supra* notes 343-55 and accompanying text.

388. See *supra* notes 298-306 and accompanying text.

389. See *supra* notes 356-59 and accompanying text.

390. See *supra* note 358.

391. See *supra* notes 360-65 and accompanying text.

392. See *supra* notes 362-63 and accompanying text.

393. See *supra* note 364 and accompanying text.

394. See *supra* note 365 and accompanying text.

395. See *supra* note 330.

extremist Islamic laws and cultural attitudes would overtake any type of independent faith-based arbitration system drove some to believe that an arbitration regime would be harmful to vulnerable parties. While *battei din* have existed for years in both the United States and Canada, it is clear that traditional Judaism presents some human rights concerns, as well, in the form of community pressure to conform and inequality between men and women. As the Islamic community in the United States grows, and as other countries take positions on the use, or nonuse, of faith-based arbitration, the United States may be prompted to reevaluate its own attitude toward faith-based arbitration. The proper response to the criticism of religious arbitration is not to ban it entirely, but to implement greater oversight procedures. Through heightened oversight, religious communities will be able to preserve their culture and heritage while the state will be able to fulfill its duties of protecting its citizens.

Notes & Observations