

# The Ethics of Religious Arbitration

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## INTRODUCTION

Arbitration has shifted the American legal system, particularly in consumer and employment contexts.<sup>1</sup> The uptick in arbitration has caused individuals to resolve disputes in private arbitration tribunals rather than public court systems.<sup>2</sup> As a result, attorneys play a larger role throughout arbitration when drafting mandatory arbitration provisions.<sup>3</sup> Attorneys not only participate in arbitration proceedings but also have the power to create arbitration tribunals and dictate their procedures.<sup>4</sup> And although the *Model Rules of Professional Conduct* regulates attorney conduct in arbitration proceedings, only general ethics principles currently address the regulation of an attorney's conduct in *drafting* arbitration provisions.<sup>5</sup>

Moreover, religious arbitration is on the rise in the United States.<sup>6</sup> Major religions such as Judaism, Christianity, and Islam have established religious arbitration tribunals that adjudicate both secular and non-secular matters.<sup>7</sup> However, its use in the employment context deserves special attention because employment law often involves uneven bargaining power that could be exacerbated when religious doctrine becomes involved. Procedural safeguards afforded in public court systems have become expected in non-religious arbitration.<sup>8</sup> Yet, this Note explains how certain characteristics embedded in religion and employment can exploit employees. With this, attorneys who draft strict religious arbitration provisions may be misleading potential and current employees into thinking their disputes will be resolved through a process that promotes fairness and integrity. If so, those attorneys should be subject to discipline because such conduct

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1. Imre S. Szalai, *The Failure of Legal Ethics to Address the Abuses of Forced Arbitration*, 24 HARV. NEGOT. L. REV. 127, 128–30 (2018).

2. *Id.* at 129–30.

3. *Id.* at 161–62. Szalai's article is based on forced arbitration, rather than general arbitration. For a good background on employment arbitration, see generally TIM BORNSTEIN ET AL., LABOR AND EMPLOYMENT ARBITRATION (2nd ed. 1978).

4. Szalai, *supra* note 1, at 162.

5. MODEL RULES OF PROF'L CONDUCT R. 1.0(m) (2016) [hereinafter MODEL RULES]; see Szalai, *supra* note 1, at 162.

6. MICHAEL J. BROYDE, SHARIA TRIBUNALS, RABBINICAL COURTS, AND CHRISTIAN PANELS: RELIGIOUS ARBITRATION IN AMERICA AND THE WEST 3 (2017).

7. Caryn Litt Wolfe, *Faith-Based Arbitration: Friend or Foe? An Evaluation of Religious Arbitration Systems and Their Interaction with Secular Courts*, 75 FORDHAM L. REV. 427, 437 (2006).

8. Szalai, *supra* note 1, at 162.

undermines “the public’s understanding of and confidence in the rule of law and the justice system.”<sup>9</sup>

The reasons for limiting religious employment arbitration recently have been upheld in analogous arbitration situations, such as forced arbitration. For example, California recently passed A.B. 51, which bans employers from using forced arbitration provisions to settle sexual harassment claims “to ensure that individuals are not retaliated against for refusing to consent to the waiver of those rights and procedures and to ensure that any contract relating to those rights and procedures be entered into as a matter of voluntary consent, not coercion.”<sup>10</sup> And although California’s law was based on forced arbitration, the principles of categorically banning certain claims should be extended to the religious arbitration context. Legal ethics bodies seem to be open to this categorical approach in disciplining attorneys. In fact, the American Bar Association House adopted Resolution 300, which “urges legal employers not to require mandatory arbitration of claims of sexual harassment.”<sup>11</sup>

This Note takes a normative approach and argues that in order to limit the unfair effects of religious arbitration, scholar Imre Szalai’s theoretical framework of using legal ethics principles to regulate attorneys when drafting arbitration agreements should be extended in certain religious arbitration contexts. Part I will discuss the religious arbitration landscape in the United States. Part II will discuss Szalai’s theoretical framework and how it could limit the potential abuses of religious arbitration. Finally, Part III will illuminate the barriers employees face when they are subject to religious arbitration: the legal system’s high deference towards arbitration, the religious question doctrine roadblocking judicial review, and unequal bargaining power between an employee and an employer.

## I. RELIGIOUS ARBITRATION BACKGROUND IN THE UNITED STATES

Today, religious arbitration is on the rise in the United States.<sup>12</sup> Nearly all religions have developed their own systems to settle disputes largely outside of the secular court system.<sup>13</sup> Religious groups were attracted to arbitration as an alternative dispute resolution mechanism because they believed the American legal system no longer preserved the values or interests ingrained in their respective religions.<sup>14</sup> This was due in large part to the fact that most Americans identified as Jewish or Christian.<sup>15</sup> This religious landscape, however, has shifted. From 2007 to 2014, non-religious populations increased by 6.7 percent while the

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9. MODEL RULES pmbl.

10. 2019 Cal. Legis. Serv. Ch. 711 (A.B. 51) (West).

11. See AM. BAR ASS’N, H.D. RESOL. 300 (Aug. 2018), <https://www.americanbar.org/content/dam/aba/images/abanews/2018-AM-Resolutions/300.pdf> [<https://perma.cc/9F4R-X3U8>].

12. BROYDE, *supra* note 6, at 3.

13. Wolfe, *supra* note 7, at 437.

14. BROYDE, *supra* note 6, at 7.

15. *Id.* at 9.

Judeo-Christian population fell 7.8 percent.<sup>16</sup> These dominant religious groups who once saw their respective values “perfectly reflected in the law” have since lost that control.<sup>17</sup> Thus, seemingly new minority religious groups see arbitration as a tool to fight against the loss of dictating the American legal system and maintaining their cultural values and traditions.<sup>18</sup> Although there has been a recent growth in formally participating in U.S. arbitration, religious communities have settled disputes with arbitration-like systems for a while.<sup>19</sup>

#### A. JEWISH ARBITRATION

Jewish arbitration has become the most developed and sophisticated system of religious arbitration in the United States.<sup>20</sup> It is highly-specialized in Judaism and Jewish law and takes a quasi-litigation approach, making it the most similar to secular courts.<sup>21</sup> Jewish courts incorporate the underlying values of Judaism in its system to protect Jewish traditions and laws.<sup>22</sup> The Jewish dispute resolution system provides a range of conciliatory methods, from mediation to arbitration.<sup>23</sup>

Generally, Jewish arbitration is structurally and substantively similar to non-religious arbitration. Parties who choose to arbitrate may bring both secular and Jewish-related issues before a Jewish tribunal.<sup>24</sup> Structurally, a panel of one to three rabbis oversees the dispute and issues an award based on Jewish law.<sup>25</sup> Parties present their arguments, and the panel renders a non-binding or binding decision.<sup>26</sup> If the panel renders a non-binding decision that fails to resolve the dispute, parties may submit the matter to rabbinical courts referred to as a *beth din*.<sup>27</sup> *Beth dins* primarily rely on Jewish law to resolve non-secular and secular issues.<sup>28</sup> In most circumstances, however, *beth dins* recognize secular law based on Samuel of Nehardea’s statement, “*dina d’malchuta dina*,” meaning “the law of the state is the law.”<sup>29</sup> The Beth Din of America, which characterizes itself as

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16. *America’s Changing Religious Landscape*, PEW RES. CTR. (May 12, 2015), <https://www.pewforum.org/2015/05/12/americas-changing-religious-landscape/> [<https://perma.cc/F67L-G52W>].

17. BROYDE, *supra* note 6, at 9. For example, Broyde explains some Christian and Jewish members believe the passage of marriage equality exemplifies the loss of control. *Id.*

18. Wolfe, *supra* note 7, at 455–56.

19. *Id.* at 438–440.

20. BROYDE, *supra* note 6, at 14.

21. *Id.*

22. R. Seth Shippee, Note & Comment, “*Blessed are the Peacemakers*”: Faith-Based Approaches to Dispute Resolution, 9 ILSA J. INT’L & COMP. L. 237, 249 (2002).

23. *Id.* at 251.

24. See Randy Linda Sturman, *House of Judgment: Alternate Dispute Resolution in the Orthodox Jewish Community*, 36 CAL. W. L. REV. 417, 418 (2000).

25. *Id.*; see also Shippee, *supra* note 22, at 252–53.

26. Shippee, *supra* note 22, at 252.

27. BROYDE, *supra* note 6, at 15.

28. *Id.*

29. Samuel Atlas, *Dina d’Malchuta Delimited*, 46 HEBREW UNION C. ANN. 269, 270 (1975).

“one of the nation’s pre-eminent rabbinic courts,”<sup>30</sup> provides a forum to arbitrate disputes through a *din torah*<sup>31</sup> process before a *beth din*. A ruling promulgated by a *beth din* is often binding and enforceable in secular courts because of rabbinical courts’ sophistication and the *dina d’ malchuta dina* principle.<sup>32</sup>

## B. CHRISTIAN ARBITRATION

Like the Jewish community, some Christian denominations have opted to move their disputes from secular courts to religion-based arbitration. Some Christians believe the practice of religious arbitration is sanctioned by biblical teachings of peaceful dispute resolution.<sup>33</sup> The Catholic Church has used Christian-centered dispute resolution methods for some time.<sup>34</sup> The Catholic Church, unlike the Jewish community, limited the scope of review to church-related disputes and used Catholic doctrine embodied in the canon law as its choice of law.<sup>35</sup> Today, some Christian sects have broadened that scope. For example, some other Christian denominations use the Bible and Christian values to resolve both church-related and substantive secular matters.<sup>36</sup> Among others, these issues include employment, marital, and business disputes.<sup>37</sup> This has spurred the growth of Christian dispute resolution organizations.

Peacemaker Ministries is a Bible-based dispute resolution business that offers parties a broad range of services from mediation to the facilitation of arbitration proceedings.<sup>38</sup> Additionally, Peacemaker Ministries’ webpage states that the organization “provide[s] conflict coaching, mediation, and arbitration services.”<sup>39</sup> Peacemaker Ministries provides these services “to train and equip all Christians (2.2 billion) in the world to respond to conflict biblically in their churches, marriages, workplaces, and communities.”<sup>40</sup> It also authorizes parties, like employers, to incorporate its Christian-based guidelines to resolve all disputes.<sup>41</sup> The

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30. *About Us*, BETH DIN OF AM., <https://bethdin.org/about/> [https://perma.cc/6CGZ-AH4E] (last visited Apr. 21, 2020).

31. *Din Torah*, THE CONCISE OXFORD DICTIONARY OF WORLD RELIGIONS, ENCYCLOPEDIA.COM, <https://www.encyclopedia.com/religion/dictionaries-thesauruses-pictures-and-press-releases/din-torah> (last visited Apr. 22, 2020).

32. See Shippee, *supra* note 22, at 245.

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

34. BROYDE, *supra* note 6, at 7–8.

35. *Id.* at 7.

36. Shippee, *supra* note 22, at 244.

37. *Id.*

38. *About: Our Beliefs*, PEACEMAKER MINISTRIES, <https://peacemaker.training/beliefs/> [https://perma.cc/H3K3-STG3] (last visited Apr. 21, 2020).

39. *Id.*

40. *About Peacemaker Ministries*, PEACEMAKER MINISTRIES, <https://peacemaker.training/about/> [https://perma.cc/BR3X-NCVU] (last visited Apr. 20, 2020).

41. The Institute for Christian Conciliation created The Guidelines used by Peacemaker Ministries. See *Guidelines for Christian Conciliation*, INSTITUTE FOR CHRISTIAN CONCILIATION, <https://peacemaker.training/guidelinesforchristianconciliation/> [https://perma.cc/2F8B-6WWD].

Guidelines establish procedural and substantive rules, how arbitrators are to be picked, and how awards are to be appealed.<sup>42</sup> Peacemaker Ministries asserts its authority from the Bible to make binding decisions.<sup>43</sup> For example, the Guidelines provides in relevant part:

Jesus has given the church primary responsibility and authority for resolving conflict and alienation among Christians. In Matthew 18:15–20, Jesus sets forth a process that involves private discussions, mediation, and authority to make a binding decision:

*If your brother sins against you, go and tell him his fault, between you and him alone. If he listens to you, you have gained your brother. But if he does not listen, take one or two others along with you, that every charge may be established by the evidence of two or three witnesses. If he refuses to listen to them, tell it to the church. And if he refuses to listen even to the church, let him be to you as a Gentile and a tax collector. Truly, I say to you, whatever you bind on earth shall be bound in heaven . . .*<sup>44</sup>

Notably, Peacemaker Ministries also provides a choice of law provision, which asserts the Guidelines are controlling unless there are state or federal laws that address the contested issue.<sup>45</sup> But interestingly, even in those instances, the Guidelines prevail unless state or federal law explicitly preempts the issue.<sup>46</sup>

### C. ISLAMIC ARBITRATION

Similar to Jewish and Christian communities, some Islamic communities are opting out of initially resolving disputes in the secular court system.<sup>47</sup> In the United States, however, Muslims rarely use arbitration.<sup>48</sup> But this may change as some legal scholars have encouraged the use of *shari' a*-based arbitration to enjoy the benefits of finality and cultural preservation.<sup>49</sup> Muslims who have turned to *shari' a*-based arbitration adhere to Islamic principles of law to resolve matters.<sup>50</sup> Islamic arbitration is rooted in the Qur'anic principles of the peaceful settlement of disputes.<sup>51</sup> Recently, there has been a growth in the United States of *qadis* whose role is to facilitate settlement by applying *shari' a* law.<sup>52</sup> Despite the benefits and communal interests, some suggest *shari' a*-based arbitration may not find

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42. *Id.*

43. *Id.*

44. *Id.* (quoting *Matthew* 18:15–20).

45. *Id.*

46. *Id.*

47. BROYDE, *supra* note 6, at 19.

48. Shippee, *supra* note 22, at 248.

49. *See id.* at 245, 248.

50. BROYDE, *supra* note 6, at 19.

51. *Id.*

52. *Id.*

as much success as its Jewish or Christian arbitration counterparts because it purportedly lacks deference to secular law.<sup>53</sup>

With religious arbitration's historic practice and emerging legal sophistication, it seems to suggest religious arbitration will expand within the "mainstream" field of American arbitration. This should put attorneys on notice when drafting religious arbitration agreements and procedures because they should be subject to discipline.

## II. LEGAL ETHICS USED TO LIMIT UNFAIR RELIGIOUS ARBITRATION PROCEEDINGS

There exists a tension in arbitration proceedings as to whether due process is applied and, if so, to what extent.<sup>54</sup> Often it is viewed that due process concerns are not triggered if arbitration is viewed as a private process between consenting parties.<sup>55</sup> Yet, some courts have viewed arbitration as a government-sanctioned activity where due process principles should sometimes apply.<sup>56</sup> Despite this ambiguity, scholar Imre Szalai states in his recent article that when the American Bar Association passed the Ethics 2000 amendments, the ABA "recognize[d] that both court and arbitration proceedings operate as components of the same justice system and can impact the rights of individuals. Attorneys now owe the same ethical duties in connection with both litigation and arbitration."<sup>57</sup> For example, the Ethics 2000 amendments added Model Rule 1.0(m), which provides that a "'Tribunal' denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity."<sup>58</sup> Additionally, Model Rule 2.4 comment 5 states that "Lawyers who represent clients in alternative dispute-resolution processes are governed by the Rules of Professional Conduct."<sup>59</sup>

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53. *Id.* at 20–21.

54. Szalai, *supra* note 1, at 161.

55. *Id. See, e.g.,* Everett v. Paul Davis Restoration, Inc., 771 F.3d 380, 386 (7th Cir. 2014) (compelling arbitration because plaintiff's due process rights "argument fails at the most basic level—none of the parties involved are state actors"); Davis v. Prudential Sec., Inc., 59 F.3d 1186, 1191 (11th Cir. 1995) ("[W]e agree with the numerous courts that have held that the state action element of a due process claim is absent in private arbitration cases.").

56. *See, e.g., In re Wal-Mart Wage & Hour Emp't Pracs. Litig.*, 737 F.3d 1262, 1268 (9th Cir. 2013) ("Permitting parties to contractually eliminate all judicial review of arbitration awards would not only run counter to the text of the FAA, but would also frustrate Congress's attempt to ensure a minimum level of due process for parties to an arbitration."); Atlanta Flooring Design Ctrs., Inc. v. R.G. Williams Constr., Inc., 773 S. E.2d 868, 870 (Ga. Ct. App. 2015) (finding an arbitration provision void and unenforceable because the provision prevented the plaintiff's statutory right to challenge the arbitration or award).

57. Szalai, *supra* note 1, at 161.

58. *Model Rules of Professional Conduct as Adopted by ABA House of Delegates, February 2002 - Center for Professional Responsibility*, A.B.A. (Apr. 13, 2020), [https://www.americanbar.org/groups/professional\\_responsibility/policy/ethics\\_2000\\_commission/e2k\\_redline/](https://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_redline/) [<https://perma.cc/4TN5-JS6H>]; Szalai, *supra* note 1, at 158.

59. MODEL RULES R. 2.4 cmt. 5. *See* Szalai, *supra* note 1, at 157.

Furthermore, Szalai states that the passage of the ABA Ethics 2000 amendments shows that attorneys now play a larger role throughout the arbitration process because “attorneys are now actively and more directly involved in shaping and creating tribunals”<sup>60</sup> and may create “[their] own tribunals virtually out of thin air and with a broad range of procedural rules through the drafting of an arbitration clause.”<sup>61</sup> Thus, with all this power, attorneys must be held to the same ethical standard when drafting arbitration provisions as they would when acting within a tribunal. And special attention should be paid towards attorneys drafting religious arbitration provisions for employers.

As Szalai points out in his article, a number of existing *Model Rules* embody the principles of protecting procedural integrity and fairness. For example, Szalai specifically states Model Rules 3.3,<sup>62</sup> 3.4,<sup>63</sup> and 3.5<sup>64</sup> promote these underlying principles. Model Rule 3.3 embodies integrity principles by imposing special duties on attorneys to take affirmative, remedial, and corrective action to prevent conduct that “undermines the integrity of the adjudicative process.”<sup>65</sup> Model Rule 3.4 provides that attorneys must adhere to certain rules and procedures to secure “[f]air competition in the adversarial system.”<sup>66</sup> Comment 1 of Model Rule 3.4 emphasizes that in order to promote fairness, attorneys are “prohibit[ed] against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.”<sup>67</sup> Additionally, Model Rule 3.5 was “designed to help promote the ‘[i]mpartiality and decorum’ of a court or arbitral tribunal.”<sup>68</sup> For example, Model Rule 3.5 prohibits unlawful influence on judges and jurors and prohibits most communications with them during and after the proceeding.<sup>69</sup> These ethical duties establish the principle that attorneys must conduct themselves in ways that protect and promote procedural integrity and fairness.<sup>70</sup>

Furthermore, the *Model Rules* recognize duties an attorney owes to her client and third parties.<sup>71</sup> Generally, the *Model Rules* regulate lawyer-client conduct and prohibit fraud in specific contexts, like advertising<sup>72</sup> or making false statements to third parties regarding material fact or law.<sup>73</sup> But Szalai asserts Model

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60. Szalai, *supra* note 1, at 177.

61. *Id.*

62. *Id.* at 175–76, 179.

63. *Id.* at 174.

64. *Id.* at 174–75.

65. MODEL RULES R. 3.3 cmt. 2, *discussed in* Szalai, *supra* note 1, at 175–76, 179.

66. MODEL RULES R. 3.4, *quoted in* Szalai, *supra* note 1, at 174.

67. MODEL RULES R. 3.4 cmt. 1, *quoted in* Szalai, *supra* note 1, at 174.

68. Szalai, *supra* note 1, at 174 (quoting MODEL RULES R. 3.5).

69. MODEL RULES R. 3.5, *discussed in* Szalai, *supra* note 1, at 17–75.

70. Szalai, *supra* note 1, at 176.

71. *See id.* at 164.

72. *See, e.g.*, MODEL RULES R. 7.1, R. 7.2 cmts. 1, 7 (prohibiting lawyer advertising with misleading or false messages), *referenced in* Szalai, *supra* note 1, at 164 n.145.

73. MODEL RULES R. 4.1, *discussed in* Szalai, *supra* note 1, at 165.

Rule 8.4 also creates a broad duty of attorneys to third parties.<sup>74</sup> He asserts Model Rule 8.4 requires attorneys to “avoid *all* ‘conduct involving dishonesty, fraud, deceit, or misrepresentation,’ regardless of the context.”<sup>75</sup> Thus, Model Rule 8.4 would, in effect, create a more general obligation that would regulate attorneys’ conduct that affects third parties, like employees who would work for the attorney’s client.

Interestingly, most attorney obligations promulgated under the ABA rest on the presumption that attorneys are involved in existing tribunals with established procedural rules.<sup>76</sup> Additionally, the *Model Rules* were drafted in the context that state and federal courts had constitutionally-established procedural rules.<sup>77</sup> Yet, attorneys today play a more prominent role in arbitration because attorneys not only are interacting with a tribunal, they are also involved in creating the tribunal and its procedures. Thus, Szalai asserts that attorneys should be regulated in such situations which involve forced arbitration agreements.<sup>78</sup> Szalai’s theory should also extend to circumstances where an attorney drafts a provision that designs a religious arbitration tribunal and/or its procedures.

With the *Model Rules* codifying values of fairness and integrity, a religious arbitration provision that labels its process as “arbitration” may rise to the level of deceit. This can occur if an arbitration provision creates a one-sided process to resolve claims, which contradicts the Federal Arbitration Act’s (“FAA”) general purpose of providing a forum for mutual resolution.<sup>79</sup> “[T]he structure and text of the FAA . . . is designed to facilitate a final award resolving a contractual dispute between the parties through a fair process.”<sup>80</sup> Section 4 of the FAA authorizes both parties to seek a court order to compel arbitration.<sup>81</sup> Arbitrators are vested with subpoena powers, and the issuance of a subpoena is enforceable through the courts.<sup>82</sup> Furthermore, arbitration awards can be entered as a final judgment in court.<sup>83</sup>

Additionally, the American Arbitration Association promotes principles of fair proceedings. The AAA’s Employment Due Process Protocol provides that employment disputes, particularly those involving statutory rights, should be “conducted under proper due process safeguards . . . to provide expeditious, accessible, inexpensive and *fair* private enforcement.”<sup>84</sup> The Employment Due

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74. Szalai, *supra* note 1, at 164.

75. *Id.* (quoting MODEL RULES R. 8.4).

76. *Id.* at 177.

77. *Id.* at 176.

78. *Id.* at 163.

79. *See id.* at 167.

80. *Id.* at 168.

81. 9 U.S.C. § 4 (West), *discussed in* Szalai, *supra* note 1, at 167.

82. 9 U.S.C. § 7 (West).

83. *Id.* § 9.

84. *Employment Due Process Protocol*, AM. ARB. ASS’N, [https://www.adr.org/sites/default/files/document\\_repository/Employment%20Due%20Process%20Protocol\\_0.pdf](https://www.adr.org/sites/default/files/document_repository/Employment%20Due%20Process%20Protocol_0.pdf) [<https://perma.cc/2UQP-7CSG>] (last visited Apr. 21, 2020) (emphasis added).



Process Protocol also encourages the creation of a “roster of arbitrators and mediators” who are trained in “due process and fairness in the conduct and control of arbitration hearings and mediation sessions.”<sup>85</sup> But arbitration provisions that subject employees to religious arbitration may not always lend themselves to producing an award in good faith because certain characteristics of religion and employment, compounded together, prevents this. Part III will outline how unfairness is inherently baked into religious arbitration.

### III. BARRIERS TO FAIRNESS

Generally, civil courts can prevent potential arbitration abuses when evaluating whether the agreement to arbitrate is valid and enforceable. Yet, parties subject to religious arbitration who would benefit from civil court protection must overcome three hurdles: civil courts’ extreme deference to arbitration, the religious question doctrine, and unequal bargaining power in employment contexts. These hurdles eviscerate potential judicial oversight from secular courts of religious arbitration.

#### A. BARRIERS IN CIVIL COURT

Over time, the U.S. legal system has created clear policies favoring private arbitration.<sup>86</sup> This is largely due to judicial efficiency and being viewed as producing outcomes that align with the parties’ interests and promotes their autonomy.<sup>87</sup> “As a result of this broad, overarching public policy favoring arbitration, courts are often hesitant to avoid arbitration agreements or vacate arbitral awards.”<sup>88</sup> That deference towards arbitration chips away at an employee’s expectation of fairness—what would be offered to a similarly-situated employee not subject to a religious arbitration agreement—if they sought judicial review from civil courts.

Additionally, if an employee can overcome a court’s strong presumption favoring arbitration, the employee who is subject to a religious arbitration agreement must then overcome the religious question doctrine. Courts are significantly hesitant to review religious arbitration matters because of First Amendment concerns regarding free exercise and religious establishment.<sup>89</sup> Most notable in the religious arbitration context is the religious question doctrine, which dates back to 1872 in *Watson v. Jones*.<sup>90</sup> There, the United States Supreme Court addressed the issue of whether secular courts had the authority to review matters that involved religious law.<sup>91</sup> The Court held that these questions are effectively

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85. *Id.*

86. BROYDE, *supra* note 6, at 226.

87. *Id.*

88. *Id.*

89. *Id.*

90. 80 U.S. 679 (1871).

91. *Id.* at 702–03.

unreviewable.<sup>92</sup> The Court stated that “whenever the questions of . . . ecclesiastical rule, custom, or law have been decided by the highest of the church judicatories . . . the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them.”<sup>93</sup> The Court acknowledged that religious members are bound by the laws of the United States, but went on to say the following:

[I]t would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for.<sup>94</sup>

Nearly 100 years later, the Court affirmed the religious question doctrine in *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*.<sup>95</sup> There, the Court held states could not weigh in on the validity of religious doctrine.<sup>96</sup> As a consequence, the Court’s precedents suggest employees subject to a religious arbitration agreement are deprived of meaningful judicial review typically found in arbitration.

In addition to a court’s obligation under to the religious question doctrine to show deference towards religious authorities, a court could impermissibly entangle itself in religious interpretation if it refuses to enforce the arbitration agreement. In *Encore Productions, Inc. v. Promise Keepers*, a federal district court compelled arbitration and rejected the plaintiff’s argument that the arbitration agreement was unenforceable because the court must interpret religious doctrine.<sup>97</sup> The district court reasoned a court does not interpret religious doctrine when applying neutral law principles to resolve disputes.<sup>98</sup> Notably, the district court stated, a “refusal to enforce the parties’ arbitration agreement could itself arguably constitute an impermissible entanglement. PK could claim impedance of the practice of religion or creation of an unjust bias against religion, thereby depriving PK of its free exercise rights.”<sup>99</sup> Despite the district court reasoning that it merely applied neutral law principles, its reasoning seems circular because the religious question doctrine prevents courts from scrutinizing religious text, but also compels courts to find an arbitration agreement enforceable because refusing to do so would enmesh the courts in religious entanglement.

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92. *Id.* at 727.

93. *Id.*

94. *Id.* at 729.

95. 393 U.S. 440, 451 (1969).

96. *See id.*

97. 53 F. Supp. 2d 1101, 1111–12 (D. Colo. 1999).

98. *Id.* at 1112.

99. *Id.* at 1113.

Moreover, certain FAA safeguards do not extend to parties who are subject to religious arbitration. For example, under the FAA, courts may vacate an award if an arbitrator goes beyond her authority by granting an award that does not reflect the terms of the contract.<sup>100</sup> This sometimes turns on an arbitrator's interpretation of the contract's choice of law provision.<sup>101</sup> In non-religious arbitration, courts are free to scrutinize the meaning of the parties' choice of law.<sup>102</sup> But when the parties' choice of law is the religious scripture itself, courts refrain from analyzing the award.<sup>103</sup>

This unequal application of FAA safeguards may also arise when a party challenges the arbitrator's qualifications. Under the FAA, an arbitral award can be set aside if the selected arbitrator has not met the qualifications designated by the parties.<sup>104</sup> Similar to the choice of law predicament, a court would impermissibly entangle itself in interpreting religious doctrine if it had to decide whether the arbitrator met religious qualifications. To meddle in such interpretation would, in effect, be establishing religious norms, which courts are prohibited from doing under the religious question doctrine.<sup>105</sup> Thus, parties subjected to religious arbitration must overcome a higher obstacle than their non-religious counterparts when challenging a contract's choice of law provision. Consequently, the religious question doctrine walls off religious arbitration from judicial review almost entirely.

Furthermore, religious arbitration may rise to the level of unfairness because its procedures are rooted in religious values and traditions and some religious procedural rules inherently fail to provide protections most individuals have come to expect or would be afforded in a civil adjudication. For example, some orthodox Jewish and Islamic laws require formal procedural rules between men and women. Some Jewish arbitration panels enforce procedural rules that do not allow women to serve as rabbinic court judges, which also prevents them from serving on an arbitration panel and offering witness testimony.<sup>106</sup> Similarly, some Islamic arbitration panels enforce procedural rules that only allow men to substantiate certain claims.<sup>107</sup> Although not rooted in female/male distinctions, in

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100. See 9 U.S.C. § 10(a)(4); BROYDE, *supra* note 6, at 227.

101. See BROYDE, *supra* note 6, at 227.

102. See *id.*

103. See, e.g., Lang v. Levi, 16 A.3d 980, 989 (Md. Ct. Spec. App. 2011).

104. See, e.g., Savers Prop. & Cas. Ins. Co. v. Nat'l Union Fire Ins. Co. of Pittsburg, 748 F.3d 708, 720 (6th Cir. 2014); Aviall, Inc. v. Ryder Sys., Inc., 110 F.3d 892, 895 (2d Cir. 1997) ("Although the FAA provides that a court can vacate an award '[w]here there was evident partiality or corruption in the arbitrators' . . . it does not provide for pre-award removal of an arbitrator.") (quoting 9 U.S.C. § 10(a)(2)); Gulf Guar. Life Ins. Co. v. Connecticut Gen. Life Ins. Co., 304 F.3d 476, 490–92 (5th Cir. 2002).

105. See Watson v. Jones, 80 U.S. 679, 729 (1871).

106. See I. EMANUEL QUINT, A RESTATEMENT OF RABBINIC CIVIL LAW 163 (1990).

107. See HAUWA IBRAHIM, PRACTICING SHARIAH LAW: SEVEN STRATEGIES FOR ACHIEVING JUSTICE IN SHARIAH COURTS 165 (2012) (explaining although proving an allegation of *zina* is rarely, if at all, achieved through witness testimony, a strict interpretation of proving a *zina* claim imposes a "stringent requirement that these four witnesses be male, Muslim, and of good character").

some extreme instances, entire claims can be sustained or refuted as a matter of law if parties take a ritual oath to their own factual assertions, in contrast to secular due process where objective criteria is used to evaluate the factual assertion.<sup>108</sup> Thus, some religious procedural rules can inherently create an unfair process that purports to serve as arbitration.

Additionally, employees may also face the religious question doctrine roadblock when a reviewing court would evaluate whether evidence was material.<sup>109</sup> Under the FAA, arbitration awards may be vacated if an arbitrator failed to take into consideration material evidence.<sup>110</sup> Yet, religious doctrine dictates procedural rules and what is considered relevant or material evidence. Thus, the religious question doctrine stops a reviewing court from determining whether evidence was in fact material or if a procedure was administered incorrectly. Religious arbitration seems to evade statutory obligations and may subject employees to biased awards.

Religious arbitration does not provide a fair process to resolve disputes because courts fail to recognize communal pressure that permeates within religious communities. At times, the magnitude of communal pressure may coerce religious arbitration participation. An illustrative example is the Jewish community's use of the *seruv*. According to religious scholar Michael Broyde, a *seruv* is a "public declaration that such parties are in contempt of court"<sup>111</sup> and it is issued when parties refuse to resolve their matters in front of a Jewish tribunal.<sup>112</sup> The effect of a *seruv* varies between Jewish communities but can, on the extreme end, ostracize an individual from the community. Broyde goes on to explain that individuals who have refused to resolve their dispute according to Jewish proceedings "have had the full financial and political resources of some Jewish communities brought to bear against them in secular court proceedings."<sup>113</sup> As Broyde puts it, "[d]espite the very real consequences of refusing to arbitrate a dispute in a rabbinic court, American courts have regularly held that a *seruv* does not constitute legal coercion, and that arbitration agreements signed under threat or actual issuance of a *seruv* are not void for duress."<sup>114</sup> For example, in *Lieberman v. Lieberman*, the court failed to invalidate an arbitration agreement on coercive grounds despite the court acknowledging that a *seruv* "is a prohibitory decree that subjects the recipient to shame, scorn, ridicule and public ostracism by other members of the Jewish religious community."<sup>115</sup>

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108. See THE ASHGATE RESEARCH COMPANION TO ISLAMIC LAW 84 (Rudolph Peters & Peri Bearman eds., 2016); THE PRINCIPLES OF JEWISH LAW 615–19 (Menachem Elon ed., 2007).

109. BROYDE, *supra* note 6, at 228.

110. See 9 U.S.C. § 10(a)(3).

111. BOYDE, *supra* note 6, at 222.

112. *Id.*

113. *Id.* at 223.

114. BROYDE, *supra* note 6, at 223 (relying on Ginnine Fried, Comment, *The Collision of Church and State: A Primer to Beth Din Arbitration and the New York Secular Courts*, 31 FORD. URB. L.J. 633, 652–53 (2004)).

115. *Lieberman v. Lieberman*, 566 N.Y.S.2D 490, 494 (Sup. Ct. 1991); Amanda M. Baker, *A Higher Authority: Judicial Review of Religious Arbitration*, 37 VT. L. REV. 157, 178 (2012).

Christian communities do not have a formal analog to a *seruv* but have used “informal communal pressure to compel members of the faith—as well as those who no longer wish to remain members—to resolve litigious matters internally.”<sup>116</sup> Yet, courts rarely recognize this communal pressure to rise to the level of duress. This creates negative and expansive effects because it can create a culture of resolving disputes internally when secular law enforcement would be applicable. This is evident in the wake of the pervasive and systemic sexual abuse in the Catholic Church and how it was hidden for so long.<sup>117</sup> Furthermore, this communal pressure coupled with religious text commanding adherents to resolve their disputes based on unreviewable religious norms and values leaves individuals to believe that there is no other alternative but to conform to proceedings that may lack fairness, professionalism, or objectivity.<sup>118</sup> Put differently, a religious individual is put to the Hobson’s choice of either participating in an unfair proceeding or not participating, which “can often entail serious consequences to one’s standing in the community, and in the mind of the individual adherent, to his or her standing in the eyes of God as well.”<sup>119</sup>

#### B. BARRIERS IN EMPLOYMENT

Another barrier working against a vulnerable litigant is the employer-employee relationship. For the majority of employer-employee contexts, bargaining power weighs heavily in favor of the employer. When signing employment contracts, employees may be subjected to arbitration provisions where employers dictate the choice of forum and choice of law. The employee is then left with a false choice of walking away from a job offer or contracting with an employer who dictates the forum and law of arbitration which largely rests on religious values, tradition, and text. This may seem more predictable when the employer is a religious-based organization, like a religious institution. This, however, becomes surprising when an employer’s business has nothing to do with religion. Non-religious businesses without religious arbitration agreements will remain subject to the review of the secular courts, whereas their counterparts who include religious arbitration clauses are equipped to substantially evade secular review because of the religious question doctrine.

Furthermore, this unequal bargaining power is magnified when employers dictate how a dispute must be resolved, and then if that does not work, the employer may appeal that award to secular courts. Peacemaker Ministries’ affiliate, the Institute for Christian Conciliation, provides employers “copy-and-paste” arbitration provisions, which help employers easily dictate the terms and conditions of

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116. BROYDE, *supra* note 6, at 223.

117. See Sharon Otterman, *Hundreds of Child Sexual Abuse Lawsuits Flood N.Y. Courts*, N.Y. TIMES (Aug. 15, 2019), <https://www.nytimes.com/2019/08/15/nyregion/child-sex-abuse-lawsuits.html> [<https://perma.cc/C3DS-QCZK>].

118. BROYDE, *supra* note 6, at 224.

119. *Id.*

arbitration. For example, the ICC's "Contract Clauses" webpage provides a number of copy-and-paste provisions for employment contracts.<sup>120</sup> A portion of "Employment Conciliation Clause 1" provides:

The parties to this agreement are Christians and believe that the Bible commands them to make every effort to live at peace and to resolve disputes with each other in private or within the Christian community in conformity with the biblical injunctions of 1 Corinthians 6:1-8, Matthew 5:23-24, and Matthew 18:15-20. Therefore, the parties agree that any claim or dispute arising out of or related to this agreement or to any aspect of the employment relationship, including claims under federal, state, and local statutory or common law, the law of contract, and law of tort, shall be settled by biblically based mediation. If the resolution of the dispute and reconciliation do not result from mediation, the matter shall then be submitted to an independent and objective arbitrator for binding arbitration.<sup>121</sup>

Although it is unknown as the extent to which this employment provision has been upheld, the U.S. District Court of the Southern District of Indiana has upheld this ICC employment provision.<sup>122</sup> Additionally, other copy-and-paste ICC provisions have been enforceable, particularly ICC's Rules of Procedure provision.<sup>123</sup> With courts recognizing ICC's copy-and-paste provisions, employers can easily dictate the terms of arbitration at the outset of employment.

Despite this control, employers exploit access to secular courts when they are given an unfavorable arbitration award. In *Prescott v. Northlake Christian School*, a federal district court compelled religious arbitration.<sup>124</sup> During the arbitration proceeding, the arbitrator dismissed plaintiff's claims of harassment and gender discrimination but found the school board violated its own contract because the contract required the school to follow Matthew 18:15, which states, "if your brother sins against you, go and tell him his fault between you and him alone."<sup>125</sup> Despite the school-employer dictating the contract terms to require religious arbitration, the school appealed the award to the federal district court.<sup>126</sup> There, the court affirmed the award for the employee.<sup>127</sup> Although this is a positive outcome for the employee, not many employees may be so lucky. A vulnerable employee must mount a herculean effort to overcome three major burdens: a court's deference towards arbitration, deference to religious officials'

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120. *Contract Clauses: Employment Conciliation Clause 1*, INSTITUTE FOR CHRISTIAN CONCILIATION, <https://www.instituteforchristianconciliation.com/clauses/> [https://perma.cc/B629-AVRZ] (last visited Apr. 20, 2020).

121. *Id.*

122. *See* *Easterly v. Heritage Christian Schs.*, No. 1:08-cv-1714-WTL-TAB, 2009 WL 2750099, at \*1-3 (S.D. Ind. Aug. 26, 2009).

123. *See* *Encore Prods., Inc. v. Promise Keepers*, 53 F. Supp. 2d 1101, 1106, 1111 (D. Colo. 1999).

124. 141 Fed. App'x 263, 274 (5th Cir. 2005).

125. *Id.* at 265; *Matthew* 18:15.

126. *Prescott*, 141 Fed. App'x at 265.

127. *Id.* at 274.

interpretation of religious text, and the imbalance of the employee-employer bargaining power.

Adding to this one-sided unfairness is another barrier that employees already face in secular arbitration. Because employers, particularly corporate parties, routinely arbitrate in the same forums, arbitrators and attorneys are able to build a familiar relationship.<sup>128</sup> This becomes problematic when an arbitrator begins to rely on the corporate attorney's business to return to her forum but is faced with a "single-use" player, like an employee.<sup>129</sup> In this situation, arbitrators may view that there is more to lose if the arbitrator provided a favorable outcome to the "single-use" employee against its repeat client—the employer's attorney. According to Broyde, this is particularly problematic when arbitrators "do not typically consider themselves bound to any particular procedures."<sup>130</sup>

Additionally, the legislative history of the FAA proves the statute was created to promote a fair process that does not excessively disadvantage one party over another. Attorneys drafting religious arbitration clauses and procedures that contradict the statutory purpose should be disciplined. During Congressional hearings, FAA drafters emphasized the good faith principles to ensure parties mutually agree to arbitrate: "[W]e do not permit any abuse by one side or the other. Friendliness is preserved in business. It raises business standards. It maintains business honor . . . ."<sup>131</sup> This demonstrates the FAA worked to promulgate a process where disputes are resolved between co-equal parties, rather than parties with unequal bargaining power, as is routinely found in employment-employee contexts. Thus, attorneys who draft arbitration provisions that create a one-sided process for the sole advantage of the employer and reinforce this unequal bargaining power with religion could be subject to discipline.

Moreover, Szalai points out that during the FAA's formation, Senator Thomas J. Walsh "raised concerns about enforcing arbitration agreements drafted by a stronger party and presented on a take-it-or-leave-it basis."<sup>132</sup> For example, Senator Walsh argued contracts that were drafted by insurance companies and

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128. BROYDE, *supra* note 6, at 221.

129. Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a 'Privatization of the Justice System,'* N.Y. TIMES (Nov. 1, 2015), <https://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html?module=inline> [<https://perma.cc/Z6XX-5JGP>] ("'Private judging is an oxymoron,' Anthony Kline, a California appeals court judge, said in an interview. 'This is a business and arbitrators have an economic reason to decide in favor of the repeat players.'").

130. BROYDE, *supra* note 6, at 221.

131. *Bills to Make Valid and Enforceable Written Provisions or Agreements for Arbitration of Disputes Arising out of Contracts, Maritime Transactions, or Commerce Among the States or Territories or with Foreign Nations: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68TH CONG. 7 (1924), *quoted in* Szalai, *supra* note 1, at 168, 168 n.157.

132. Szalai, *supra* note 1, at 169, 169 n.158 (discussing *A Bill Relating to Sales and Contracts in Interstate and Foreign Commerce*; and a *Bill to Make Valid and Enforceable Written Provisions or Agreements for Arbitration of Disputes Arising out of Contracts, Maritime Transactions, or Commerce Among the States or Territories or With Foreign Nations, Hearings on S. 4213 and S. 4214 before a Subcomm. of the Senate Comm. on the Judiciary*, 67TH CONG. 9 (1923) [hereinafter FAA Hearings] (statement of Sen. Thomas J. Walsh)).

railroad companies lacked consent because these adhesion-based contracts were not entered into willingly.<sup>133</sup> The Senator emphasized that “[t]he trouble about the matter is that a great many of these contracts that are entered into are *really not voluntary* things at all.”<sup>134</sup> Notably, Szalai also points out that an ABA lawyer who was involved in the drafting the FAA testified “that the FAA was not intended to apply to such take-it-or-leave-it documents.”<sup>135</sup> The ABA lawyer testified, “I would not favor any kind of legislation that would permit the forcing a man to sign that kind of a contract . . . . I think that ought to be protested against . . . .”<sup>136</sup> This further illustrates arbitration was designed to facilitate a fair process where even-handedness is applied to mutually resolve a dispute. When attorneys draft arbitration provisions or procedural rules that create a one-sided unfairness for employees, they contradict the purpose of the FAA and are misrepresenting to employees they will arbitrate under a fair process.

This unequal bargaining power is at the forefront of employment contexts. Indeed, employees who ascend to an employment contract have the autonomy not to contract with an employer with unfair employment conditions, but if that choice does exist, it is dwarfed by the employer’s power to dictate the terms of the contract. “[T]he prospective employee may be most concerned about salary and the nature of the employment, but nonetheless must accept all terms that go along with it . . . an employer may impose a standardized, non-negotiable arbitration agreement on its employees as a condition of employment.”<sup>137</sup> This scenario exposes prospective employees to agreeing to arbitrate on a “take-it-or-leave it” basis, which the drafters of the FAA did not envision for arbitration. This continues to become unfair to employees who contract with an employer whose business has nothing to do with religion.<sup>138</sup> This imbalance would be further weighed against an employee when employers use religious arbitration in business industries that are seemingly unrelated to religion because, coupled with the reasoning above, it would be “misleading and unethical for a lawyer to falsely use the term ‘arbitration’ to describe a bundle of oppressive procedures specifically designed to suppress claims in bad faith.”<sup>139</sup>

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133. See FAA Hearings, *supra* note 132, at 9–10, *discussed in* Szalai, *supra* note 1, at 169.

134. FAA Hearings, *supra* note 132, at 9 (emphasis added), *quoted in* Szalai, *supra* note 1, at 169, 169 n.160.

135. Szalai, *supra* note 1, at 169 (citing FAA Hearings, *supra* note 132, at 7, 9–10).

136. FAA Hearings, *supra* note 132, at 7, 10, *quoted in* Szalai, *supra* note 1, at 169, 169 n.161.

137. Jeff Dasteel, *Religious Arbitration Agreements in Contracts of Adhesion*, 8 Y.B. ARB. & MEDIATION 45, 54 (2016).

138. Aobo Dong, *Forced Christian Arbitration Agreements Trivialize Health Care*, BILL OF HEALTH, (Mar. 8, 2018), <https://blog.petrieflom.law.harvard.edu/2018/03/08/forced-christian-arbitration-agreements-trivialize-health-care/> [<https://perma.cc/N69P-82G3>] (referencing a bamboo floor vendor and cabin rental agency as examples of businesses that use religious arbitration clauses despite the fact that those types of business are seemingly unrelated to religion).

139. Szalai, *supra* note 1, at 170.



### CONCLUSION

The obligations imposed by the *Model Rules* should impose disciplinary action on attorneys who draft misleading religious arbitration agreement provisions and procedures. In recent years, the United States has seen a rise in religious arbitration, but employees subject to a religious arbitration clause must overcome three major hurdles: the legal system's high deference towards arbitration, the religious question doctrine blocking meaningful judicial review, and unequal bargaining power between an employee and an employer. The compounding effects of religion and employment inherently put employees at a disadvantage. Ethical obligations should regulate attorneys who draft strict religious arbitration provisions and procedures to limit the unfair effects of religious arbitration.