

# ARBITRATING GOD

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*When should secular courts enforce religious decisionmaking by faith-based tribunals? This question has become increasingly important as tensions over the accommodation of religious minorities have recently intensified. Over the past four years, more than thirty state legislatures in the United States have moved to ban the use of Sharia and foreign law in state courts turning the spotlight on faith-based adjudication by religious communities. Secular courts meanwhile are highly deferential in enforcing religious arbitration, granting wide autonomy to faith-based tribunals.*

*This Article offers a framework for determining when there should be secular enforcement of faith and identifies two flawed premises that frame the civil courts' existing highly deferential approach toward religious arbitration. The first premise is driven by a public law concern with infringing First Amendment doctrine prohibiting courts from adjudicating religious questions. The second flawed premise is based on private law freedom of contract assumptions that characterize the courts' dominant approach to arbitration. Combined, these conventional public and private law premises effectively insulate religious tribunal decisions from judicial review, giving rise to potential infringements of individual rights.*

*Instead of this hands-off, deferential approach to religious arbitration, this Article proposes that secular courts should enforce religious arbitration when there is clear consent by the parties and continuity of conscience. In addition to determining that the parties consent to the choice of arbitral forum and religious law, an element of conscience is needed to capture the constitutive role of religion for those who regard membership in their religious community as intimately connected to their identity. To determine when there should be secular enforcement of faith, I propose a framework hinging on inquiries of consent and conscience for assessing when courts should review religious arbitration.*

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## PROJECT OUTLINE

Across the United States, bodies of religious decisionmaking by faith-based tribunals are regularly enforced by secular courts. This phenomenon is not new—and it is growing.<sup>1</sup> For the past half-century, Jewish rabbinical courts and Christian mediation bodies have privately adjudicated legal disputes between their community members.<sup>2</sup> Tensions have recently begun to emerge. Bans on the use of Sharia and foreign law in several states have turned the spotlight on religious adjudication by minority groups. In November 2010, the Oklahoma electorate passed a constitutional amendment to ban Sharia law from state courts,<sup>3</sup> sparking a national movement that has led to more than thirty state legislatures introducing legislation to prohibit courts from considering foreign or Sharia law.<sup>4</sup> Questions regarding the accommodation of religious minority groups seem set to grow in importance.<sup>5</sup>

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<sup>1</sup> The Orthodox Jewish Beth Din of America has operated in New York for half a century and the number of cases submitted to this rabbinical court has doubled over the last ten years. Michael A. Helfand, *Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders*, 86 N.Y.U. L. REV. 1231, 1248–49 (2011) (noting that the respective number of civil cases filed for the past seven years has grown from 56 in 2002 to 107 in 2010, citing Interview with Shlomo Weismann, Dir., Beth Din of Am., in New York, N.Y. (Feb. 11, 2011)).

<sup>2</sup> See, e.g., BETH DIN OF AMERICA, *About Us*, <http://www.bethdin.org>. (“The Beth Din of America was founded in 1960 by the Rabbinical Council of America.”); *Mission, History, and Organizational Structure*, PEACEMAKERS MINISTRIES, [http://www.peacemaker.net/site/c.aqKFLTOBIpH/b.958339/k.4C8D/Mission\\_History\\_and\\_Organizational\\_Structure.htm](http://www.peacemaker.net/site/c.aqKFLTOBIpH/b.958339/k.4C8D/Mission_History_and_Organizational_Structure.htm) (“Peacemaker Ministries was founded in 1982 under the auspices of the Christian Legal Society, which helped to establish many similar ministries throughout the United States.”).

<sup>3</sup> H.R.J. Res. 1056, 52d Leg., 2d Reg. Sess. (Okla. 2010) (prohibiting state courts from “look[ing] to the legal precepts of other nations or cultures” and specifically noting that “the courts shall not consider Sharia Law”).

<sup>4</sup> See FAIZA PATEL, MATTHEW DUSS, & AMOS TOH, BRENNAN CENTER FOR JUSTICE, *FOREIGN LAW BANS* 49 (2013) [hereinafter “FOREIGN LAW BANS”] (“Foreign law bans have been introduced in Oklahoma, Kansas, Arizona, Louisiana, Tennessee, South Dakota, Missouri, Florida, Texas, Alabama, Iowa, Indiana, South Carolina, Wyoming, Idaho, Michigan, Pennsylvania, New Hampshire, Nebraska, Georgia, Kentucky, West Virginia, North Carolina, Alaska, Arkansas, Maine, Minnesota, Mississippi, New Jersey, New Mexico, Utah and Virginia.”).

<sup>5</sup> These issues are likely to become increasingly salient with the growth of religious minority groups in America today. The Pew Research Center’s Religion & Public Life Project estimates that “the Muslim population in the United States is projected to more than double in the next 20 years, from 2.6 million in 2010 to 6.2 million in 2030.” *The Global Muslim Population*, PEW RESEARCH CENTER’S RELIGION & PUBLIC LIFE PROJECT, <http://www.pewforum.org/2011/01/27/the-future-of-the-global-muslim-population?>. See John Witte, Jr., *Shari’ah’s Uphill Climb: Does Muslim law have a place in the American landscape?*, CHRISTIANITY TODAY, November 2012, at 31 (“[D]eft legal drafting will not end the matter. As American Muslims grow stronger and anti-Muslim sentiment in

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Can—and should—secular courts operating within the United States’ liberal democratic framework enforce faith-based decisions by religious tribunals? This question is increasingly pressing for America’s contemporary multicultural society. This Article sets out to answer it. Religious arbitration lies at the heart of this issue. By using private arbitration, religious communities use faith-based tribunals to regulate legal disputes between their group members through binding agreements. *Privatizing* religion through the preexisting arbitration framework allows individuals effectively to contract out of the *public* law norms of a secular regime. In this Article, I offer a framework for determining when there should be secular enforcement of faith grounded in principles of consent and conscience and argue that the secular courts’ current deferential approach toward religious arbitration lies on flawed premises.

Western liberal democracies across North America and Europe grapple with the challenges of responding to religious communities seeking to self-govern through religious tribunals. Following public outcry over a proposal to establish an Islamic tribunal in Canada, the Ontario government decided to ban any faith-based family arbitration.<sup>6</sup> In England, the Archbishop of Canterbury’s speech in 2008 suggesting that some aspects of Sharia law could be incorporated into the British legal system sparked heated controversy.<sup>7</sup> The backlash against Islamic tribunals in Canada and England demonstrate the potential impact of the Sharia law controversy for the adjudication of religious disputes in the United States.<sup>8</sup>

Part I of this Article opens by examining the current operation of faith-based tribunals in the United States. I outline the basic features of the United States’ existing jurisprudence on religious arbitration to set the stage for evaluating its approach. Secular courts have routinely enforced decisions by religious tribunals—such as the Jewish Beth Din and Christian arbitration—for several decades. The United States legal sys-

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America goes deeper, constitutional and cultural battles over Muslim laws and tribunals will likely escalate.”).

<sup>6</sup> See *Ontario Will Ban Shariah Arbitrations*, N. Y. TIMES, Sept. 12, 2005, <http://www.nytimes.com/2005/09/12/international/americas/12canada.html>.

<sup>7</sup> See Robin Griffith-Jones, *The “unavoidable” adoption of Sharia law - the generation of a media storm*, in ISLAM AND ENGLISH LAW: RIGHTS, RESPONSIBILITIES, AND THE PLACE OF SHARI’A 9, 14 (Robin Griffith-Jones ed., 2013).

<sup>8</sup> The term “sharia” is used in this Article to refer to “the religious law of Islam in general.” ABDULLAH AHMED AN-NA’IM, ISLAM AND THE SECULAR STATE: NEGOTIATING THE FUTURE OF SHARI’A 3 (2008). I appreciate that there is significant diversity and complexity not only between Islamic schools of opinion but within them as well. *Id.* at 19.

tem’s approach has been to regard religious arbitration as generally enforceable and legally binding.<sup>9</sup> Indeed, civil courts are highly deferential to religious tribunals, affording religious tribunals greater insulation from review compared to their secular counterparts.<sup>10</sup> Critics assert that courts essentially “rubber stamp” the decisions of religious tribunals,<sup>11</sup> even when individual liberties and equality norms are potentially compromised.<sup>12</sup>

This Article identifies two flawed premises that frame the courts’ existing approach to religious arbitration. The first is a *public* law premise driven by secular courts concerned with infringing First Amendment doctrine prohibiting civil courts from adjudicating religious questions.<sup>13</sup> The religious question doctrine constrains judicial review of religious arbitral agreements and awards, often narrowing the scope of review over religious arbitration *further* than for other arbitration.<sup>14</sup> Although First Amendment objections to religious arbitration have chiefly focused on whether its enforcement violates the Establishment Clause, I highlight that the free exercise issues at stake deserve more attention. Compelling

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<sup>9</sup> See, e.g., *Meshel v. Ohev Shalom Talmud Torah*, 869 A.2d 343, 364 (D.C. Cir. 2005) (holding that the Beth Din provision constituted an arbitration agreement and compelling arbitration of dispute before a Beth Din); *Prescott v. Northlake Christian School* 141 F. App’x 263 (5<sup>th</sup> Cir. 2005) (upholding Christian arbitration clause and award of damages granted by Christian arbitrator); *Abd Alla v. Mourssi*, 680 N.W.2d 569, 574 (Minn. Ct. App. 2004) (confirming arbitration award granted by an Islamic arbitration panel).

<sup>10</sup> See *infra* Section 1(C)-(D).

<sup>11</sup> Amanda M. Baker, *A Higher Authority: Judicial Review of Religious Arbitration*, 37 VT. L. REV. 157, 2 (2012).

<sup>12</sup> See Michael C. Grossman, *Is This Arbitration: Religious Tribunals, Judicial Review, and Due Process*, 107 COLUM. L. REV. 169, 187–98 (2007); Shiva Falsafi, *Religion, Women, and the Holy Grail of Legal Pluralism*, 35 CARDOZO L. REV. 1881, 1928–29 (2014); 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, 447–50 (2006).

<sup>13</sup> See *infra* Section 1(D)(1). See, e.g., *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 709 (1976) (“[W]here the resolution of the disputes cannot be made without extensive enquiry by civil courts into religious law and polity, the First and Fourteenth Amendments mandate that the civil courts shall not disturb the decisions of the highest ecclesiastical tribunal within a church of hierarchical polity”); *Natal v. Christian & Missionary Alliance*, 878 F.2d 1575, 1576 (1<sup>st</sup> Cir. 1989) (“[C]ivil courts cannot adjudicate disputes turning on church policy and administration or on religious doctrine and practices.”); *Watson v Jones*, 80 U.S. (13 Wall.) 679, 728-31 (1871) (holding that civil courts cannot decide issues of ecclesiastical law).

<sup>14</sup> See, e.g., *Lang v. Levi*, 16 A.3d 980, 989 (Md. App. 2011) (noting that the “religious context” of the rabbinical arbitral award “further narrows the standard” of review so as “to make [the court’s] intervention nearly impossible”).

individuals to engage in faith-based arbitration against their will may present freedom of conscience concerns.

The second premise is based on *private* law freedom of contract assumptions that characterize the civil courts' dominant approach to arbitration generally.<sup>15</sup> But this approach wrongly equates faith-based arbitration with private, commercial arbitration. The religious nature of these faith-based arbitrations often fits uneasily with characterizing them as creatures of contract law. For instance, situations involving individuals who enter into religious arbitration due to strong communal and social pressure poorly reflect contractual assumptions of consent and autonomy.<sup>16</sup> Yet civil courts viewing these agreements through a contractual arbitration lens have dismissed powerful communal pressure as a form of duress,<sup>17</sup> even when it involves the threat of ostracism from the community.<sup>18</sup>

Combined, the conventional public and private law premises effectively insulate religious tribunals from judicial review, going beyond the typical high level of deference afforded to secular arbitration. Under this hands-off approach, civil courts grant wide deference to religious tribunals, largely adopting a non-interventionist stance. Instead of this strict separationist approach between the civil and religious courts, this Article argues that courts should more carefully consider how to engage with faith-based arbitration agreements and awards.

Part II considers the alternatives that have been adopted by two other Western democracies—Canada and England—in responding to the accommodation of religious tribunals. The Ontario province of Canada chose to ban *any* family arbitration by religious tribunals.<sup>19</sup> However, this blunt approach only reaffirms a rigid public-private divide and risks pushing unofficial tribunals underground where no state regulation is

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<sup>15</sup> See *infra* Section 1(D)(2).

<sup>16</sup> See Ayelet Shachar, *Privatizing Diversity: A Cautionary Tale from Religious Arbitration in Family Law*, 9 THEORETICAL INQ. L. 573, 583 (2008).

<sup>17</sup> See, e.g., *Lieberman v. Lieberman*, 566 N.Y.S.2d 490 (Sup. Ct. 1991), *Greenberg v. Greenberg*, 656 N.Y.S.2d 369 (App. Div. 1997).

<sup>18</sup> The Beth Din's power to issue a *siruv*—a public statement of someone's failure to appear before the rabbinical court—is a “formidable threat” in some Orthodox Jewish communities. Ginnine Fried, *The Collision of Church and State: A Primer to Beth Din Arbitration and the New York Secular Courts*, 31 FORDHAM URB. L.J. 633, 651 (2003). See also *Lieberman v. Lieberman*, 566 N.Y.S.2d 490 (Sup. Ct. 1991) (describing a *siruv* as a “prohibitory decree that subjects the recipient to shame, scorn, ridicule and public ostracism by other members of the Jewish religious community”).

<sup>19</sup> See Family Law Amendment Act, S.O. 1991, c. 1, § 1(1) (Can.).

available to individuals most vulnerable to community pressure.<sup>20</sup> In the United Kingdom, where Islamic councils have grown in number in recent years, public debate over the official recognition of Sharia law is ongoing and an Equality Bill that would prohibit gender-discriminatory arbitration agreements and procedures is currently before the British Parliament.<sup>21</sup> The tensions faced by other liberal democracies give rise to the same question: what framework should guide secular enforcement of faith-based decisionmaking by religious arbitral tribunals?

This Article argues that secular courts should enforce religious arbitration only when there is *clear consent* and *continuity of conscience*. In Part III, I develop a framework for conceptualizing a coherent account of when civil courts should enforce religious arbitration based on two central principles: consent and conscience. Religious arbitral tribunals derive their authority from the parties' consent to submit their disputes to an alternative dispute forum and their autonomy to self-govern is justified to the extent that their individual members participate freely in light of their own consciences to order their lives according to shared religious values. On this account, religious tribunals are valuable because they are borne out of their individual members' voluntary acts of conscience. Conscience also provides necessary texture to an unproblematized voluntaristic account of consent by highlighting the degree to which an individual's acts are intimately connected to one's identity and membership in a religious community. Secular courts should enforce religious arbitration only when there is *clear consent* by the parties to submit to religious arbitration and *continuity of conscience* throughout the process.

Approaching the legal accommodation of religious tribunals through the lens of consent and conscience is helpful in two ways. First, focusing on consent and conscience offers a more nuanced way for conceptualizing and treating faith-based arbitration. Conscience provides a normative justification for why a low threshold of consent is sufficient for most religious arbitration cases—we allow religious institutions autonomy to govern individual members who participate freely according to their own consciences—and why more robust scrutiny is needed when the parties' initial consent is suspect or a party withdraws from the religious community.

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<sup>20</sup> Shachar, *Privatizing Diversity*, *supra* note 16, at 579.

<sup>21</sup> See Arbitration and Mediation Services (Equality) Bill, 2010-12, H.L. Bill [72] cl. 1 (Eng. and Wales).

Second, this account provides a framework for a context-sensitive inquiry into when secular courts should enforce faith-based arbitration. It eschews a religious institutionalism approach that insulates religious tribunals on the basis that civil courts have limited authority to intervene in the internal workings of religious institutions. Instead, a focus on voluntary consent and individual conscience entails an approach that balances the competing rights and interests at stake. In this way, this approach focuses our attention on whether the process continues to represent the consent and conscience of the participants, while taking into account the nature of the dispute, the relationship between the parties, and any competing constitutional rights.

Any coherent account of when secular courts should enforce religious arbitration must be based on two central components: *consent* and *conscience*. Relying on consent alone is inadequate to frame civil court scrutiny of religious arbitration. I highlight the unique role of conscience in the context of religious arbitration—as opposed to other arbitrations—which connects why individuals wish to adjudicate their disputes according to shared religious principles to the authority of faith-based tribunals to self-govern. My aim is to suggest that conscience is necessary to add texture to the dominant consent-based private arbitration paradigm in the context of faith-based arbitration.

Consent is fairly straightforward as a basis for arbitration generally:<sup>22</sup> the arbitrator’s authority derives from the parties’ consent to exit the court system and submit their disputes to an alternative dispute resolution forum.<sup>23</sup> But while the parties’ clear consent to the choice of forum and choice of law adopted by the tribunal should be a necessary condition for secular court enforcement of faith-based arbitration, consent alone is inadequate for dealing with the multiple types of religious arbitration.

One difficulty with consent is that an unproblematized concept of voluntariness does not deal adequately with the subtle or indirect pressures in the religious arbitration context. To say that to opt-in to a religious arbitration scheme is voluntary in theory does not mean that it is voluntary in practice.<sup>24</sup> Individuals in a religious community are often subject to social and communal pressures to submit their disputes to a

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<sup>22</sup> See *Volt Info. Scis.* 489 U.S. at 479 (“Arbitration under the Act is a matter of consent, not coercion....”).

<sup>23</sup> See Michael A. Helfand, *Religion’s Footnote Four: Church Autonomy as Arbitration*, 97 MINN. L. REV. 1891, 1931 (2012).

<sup>24</sup> Helfand, *supra* note \_\_, at 1286.

community-based religious institution.<sup>25</sup> Vulnerable members within a group may feel that they have little choice if they wish to remain part of their faith-based community. In particular, women are likely to experience immense pressure to turn to community-based tribunals as an expression of “loyalty” to the minority group.<sup>26</sup> For those who identify closely with their religious and cultural community, leaving the group is not a realistic option.<sup>27</sup> As Ayelet Shachar expresses, the “troubling doctrine of ‘implied consent’” assumes “that those who have not used the exit option have implicitly agreed to their own subordination.”<sup>28</sup> Focusing solely on the consent of the parties misses an important dimension in the context of *religious* arbitration. The missing element is conscience.

This paper argues that a principle of *continuity of conscience* is central to any consideration of enforcing religious arbitration. The justification for permitting faith-based tribunals to self-govern members of their religious community reflects a core principle of religious liberty premised on freedom of conscience. The idea of conscience supplies a central organizing principle to supplement consent for explaining when we should have secular court enforcement of faith. On this account, religious tribunals are viewed as valuable because they promote the voluntary choices of their individual members to resolve their disputes based on shared religious values.<sup>29</sup> Religious arbitration enhances religious liberty by allowing people to order their lives and resolve their disputes according to their own religious beliefs. In this way, as some scholars emphasize, religious institutions play a freedom-expanding role “by serving as part of the infrastructure that makes religious freedom possible.”<sup>30</sup> What follows from this is that the sphere of autonomy granted to religious arbitral tribunals is intrinsically connected to the individual free exercise rights of their members.

Freedom of conscience lies at the core of the justification for religious free exercise and anti-establishment.<sup>31</sup> Conscience, then, forms

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<sup>25</sup> See Shachar, *supra* note \_\_, at 587–92; Falsafi, *supra* note \_\_, at 1936.

<sup>26</sup> Shachar, *supra* note \_\_, at 591. See also Shahnaz Khan, *Canadian Muslim Women and Shari’a Law: A Feminist Response to “Oh! Canada!”*, 6 CAN. J. WOMEN & L. 60 (1993) (“[N]o doubt [Muslim women] would experience a certain amount of pressure to conform. . . . [S]hould they decline to be governed by Muslim Personal Status Laws . . . [they could] find themselves ostracized by their families and communities.”)

<sup>27</sup> See generally Susan Moller Okin, “*Mistresses of Their Own Destiny*”: *Group Rights, Gender, and Realistic Rights of Exit*, 112 ETHICS 205 (2002).

<sup>28</sup> SHACHAR, *supra* note \_\_, at 80.

<sup>29</sup> Helfand, *supra* note \_\_ at 1243–52; Ahmed and Luk, *supra* note \_\_ .

<sup>30</sup> Helfand, *supra* note \_\_ at 1247.

<sup>31</sup> See Feldman, *supra* note \_\_ at 351; Sandel, *supra* note \_\_.

part of the normative justification for *faith*-based arbitral institutions. Religious arbitration plays a unique role in effectively enabling religious communities to contract out of the general secular norms that apply to the rest of society into a legal system based on religious norms. In a liberal democracy, like the United States, the recognition of religious institutions autonomy to self-govern is predicated on the idea that the individual members of the community wish to adjudicate their disputes according to shared values.<sup>32</sup>

The standard justifications of voluntarism and religious liberty for allowing religious communities the space to govern themselves, I argue, makes sense as long as it is connected to individual conscience. I do not seek to base this account on a theory of group rights, such as the moral or legal rights held by religious or ethnic minorities as a group debated in the multiculturalism scholarship.<sup>33</sup> Rather, I locate the value of religious tribunals as derived from the consent and conscience of its individual members. An important consequence of this is that the autonomy granted to religious tribunals is borne out of the individual acts of its members to participate freely in accordance with their own consciences,<sup>34</sup> not the inability of civil courts to intervene in the internal life of religious institutions.<sup>35</sup>

Conscience also adds texture to conceptualizing the relationship between individuals and religious group membership. Several scholars have described how conscience is fundamentally connected to individual

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<sup>32</sup> For more on the link between religious institutions and the voluntary free exercise of their members, see Richard Schragger & Micah Schwartzman, *Against Religious Institutionalism*, 99 VA. L. REV. 917 (2013); Michael A. Helfand, *Religious Institutionalism, Implied Consent and the Value of Voluntarism*, SOUTHERN CAL. L. REV. (2014), <http://papers.ssrn.com/abstract=2477850> (forthcoming).

<sup>33</sup> See, e.g., WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* (1995); Jeremy Waldron, *Taking Group Rights Carefully*, in *LITIGATING RIGHTS: PERSPECTIVES FROM DOMESTIC AND INTERNATIONAL LAW* 203 (Grant Huscroft & Paul Rishworth eds., 2002).

<sup>34</sup> See Schragger and Schwartzman, *supra* note \_\_; Helfand, *supra* note \_\_.

<sup>35</sup> Some scholars argue for a “religious institutionalism” approach that view religious institutions as having jurisdictional sovereignty outside the authority of the state. See generally Richard W. Garnett, *Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses*, 53 VILL. L. REV. 273 (2008); Paul Horwitz, *Churches as First Amendment Institutions: Of Sovereignty and Spheres*, 44 HARV. C.R.-C.L.L. REV. 79 (2009); STEVEN DOUGLAS SMITH, *FREEDOM OF RELIGION OR FREEDOM OF THE CHURCH?* (2011), <http://papers.ssrn.com/abstract=1911412> (last visited Sep 7, 2014).

identity and personhood.<sup>36</sup> The idea of conscience captures the “constitutive” role that religion plays in the lives of those for whom “the observance of religious duties is essential to their good and indispensable to their identity.”<sup>37</sup> In contrast to the voluntaristic model of the autonomous individual, the additional dimension of conscience highlights that for many “religion is not an expression of autonomy but a matter of conviction unrelated to a choice.”<sup>38</sup> Membership in a group is a significant aspect of the construction of one’s identity.<sup>39</sup> Individual members of tight-knit religious communities often regard their affiliation with the group as intimately tied to their personal identity. For these individuals, group membership plays a pivotal role in the development of their personhood and conscience.<sup>40</sup>

Recognizing this conception of conscience helps ground a more nuanced understanding of the intertwined dynamic involved in the religious arbitration context between the group, the state, and the individual who belongs to both.<sup>41</sup> For those who regard membership in a religious community as indispensable to their identity, using standard contractual notions of autonomy and consent to conceive of these individuals’ interaction with religious tribunals misses the complexities involved. Ayelet Shachar rightly points out that a purely public or private model frequently presents religious tribunals as an “either/or” choice for individuals in religious groups, “dividing them between loyalty to the faith and governance by the state.”<sup>42</sup> Individuals are not freely choosing “unencumbered selves,” as Michael Sandel notes.<sup>43</sup> Our identity and selves are defined by ties constructed through our relationships and social contexts.<sup>44</sup> Conscience incorporates these additional layers of group affiliation into a more nuanced conception of personal identity that provides necessary texture to an unproblematic notion of individual autonomy.

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<sup>36</sup> See MICHAEL J. SANDEL, *DEMOCRACY’S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* 65-71 (1996); KWAME A. APPIAH, *THE ETHICS OF IDENTITY* 98 (2005); TIMOTHY MACKLEM, *INDEPENDENCE OF MIND* 68-118 (2007).

<sup>37</sup> SANDEL, *supra* note \_\_, at 67.

<sup>38</sup> Sandel, *supra* note \_\_, at 611.

<sup>39</sup> See generally AMY GUTMANN, *IDENTITY IN DEMOCRACY*, 151-91 (2003).

<sup>40</sup> See James Nelson, *Conscience, Incorporated*, 2013 MICH. ST. L. REV. 1565 (describing the social construction of identity in developing a theory of conscience for evaluating corporate free exercise claims).

<sup>41</sup> For an exploration of the potential conflicts between the group, state, and individual in multicultural accommodation, see SHACHAR, *supra* note \_\_, at 25-28.

<sup>42</sup> Shachar, *supra* note \_\_, at 587.

<sup>43</sup> SANDEL, *supra* note \_\_, at 68.

<sup>44</sup> See CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF MODERN IDENTITY* 185-98 (1989); MICHAEL WALZER, *SPHERES OF JUSTICE* 31-63 (1983); ALASDAIR MACINTYRE, *AFTER VIRTUE* 204-25 (3rd ed. 2007).

Focusing on the core values of conscience as well as consent offers a more nuanced conceptualization of faith-based arbitration. For one, conscience helps explain why a low threshold to determining consent is sufficient for most religious arbitration contexts and when more robust scrutiny is needed. Deference to the decisions of religious tribunals is appropriate when it is clear that the parties involved are members of a religious community who wish to structure their relationships based on shared values. But when a party's initial consent is suspect due to pressure to remain part of the group or an individual member withdraws from the community, freedom of conscience is undermined, necessitating a more searching inquiry over the parties' consent as well.

In addition, this account provides a framework for a context-sensitive inquiry into when secular courts should enforce faith-based arbitration. It rejects an institutional approach that insulates religious tribunals on the basis that civil courts have limited authority to intervene in the internal workings of religious institutions.<sup>45</sup> Instead, focusing on inquiries of consent and conscience entails an approach that balances the competing rights and interests at stake. The next section begins the task of applying this framework to several challenging areas involving religious arbitration.

To determine when there should be secular enforcement of faith, I propose a judicial review scheme hinging on inquiries of consent and conscience with varying levels of scrutiny for different types of religious arbitrations. I outline a context-sensitive inquiry into determining when secular courts should enforce faith-based decisionmaking by religious tribunals. In what follows, I suggest how the principles of consent and conscience would apply in easier and harder cases involving faith-based tribunal decisions. For many religious arbitration agreements, a minimal level of review by courts and low threshold of consent is often sufficient. However, when the parties' consent or individual conscience is implicated, heightened scrutiny over religious arbitration should be employed to ensure that individual liberties are adequately protected.

Approaching the treatment of religious arbitration through the lens of consent and conscience provides a framework for rethinking the current levels of deference for religious arbitration. First, this inquiry emphasizes a renewed focus on the quality of consent by parties to the religious arbitration. Both the choice of forum and choice of law em-

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<sup>45</sup> See *supra* note 35.

ployed by the religious tribunal must be clear and obvious to the parties when entering the arbitration, particularly if the standards of the applicable religious law diverge significantly from general standards of fairness under secular law. Recognizing a dimension of conscience to thicken the concept of consent also offers greater sensitivity to the forms of communal pressure that can undermine clear consent.

Second, this approach evaluates claims of conscience when an individual withdraws from a religious community or changes religious beliefs. It considers that continuity of conscience is an important element in enforcing religious arbitration. At the same time, it recognizes that an assertion of religious conscience does not, on its own, grant immunity from the need to weigh competing values and harms, such as the nature of the dispute and the commensurate harm to the other party's individual rights.<sup>46</sup> For example, disputes that affect core identity or personhood elements—such as family matters involving marriage or children—fall closer to the end of the spectrum engaging individual conscience compared to commercial or business arbitrations.

In sum, under this framework, scenarios involving vulnerable parties who wish to withdraw from religious community that engage faith-based adjudication of core issues related to individual conscience are most likely to trigger civil court scrutiny.

Let's start with the easier cases: that is, when both elements of consent and conscience are present. Religious arbitration scenarios where neither consent nor conscience are lacking should be presumptively enforceable. Take, for instance, commercial arbitration such as Sharia-compliant banking transactions,<sup>47</sup> or agreements between two Jewish business parties to bring any disputes before the rabbinical courts, where consent by the parties to the arbitration is clearly present. Lack of continuity of conscience is unlikely to apply in such scenarios. Commercial

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<sup>46</sup> This multi-factor framework is more complex than a bright-line rule, but balancing a claim to religious freedom against countervailing values is a “complex, nuanced, and fact-specific exercise.” *Bruker v. Marcovitz*, [2007] S.C.C. 54 (Canada), at [2].

<sup>47</sup> See generally Saad U. Rizwan, *Foreseeable Issues and Hard Questions: The Implications of US Courts Recognizing and Enforcing Foreign Arbitral Awards Applying Islamic Law Under the New York Convention*, 98 CORNELL L. REV. 493 (2013); Almas Khan, *The Interaction between Shariah and International Law in Arbitration*, 6 CHI. J. INT'L L. 791 (2005). See Rizwan, *supra* note \_\_, at 502 (“Under Islamic law, financial deals must not involve interest (*riba*), the parties must not undertake “excessive risk-taking” (*gharar*), the parties must not treat money as a commodity (i.e., a commodity cannot be sold before it is delivered, and speculation is discouraged), and the value of money cannot change with the passage of time.”).

arbitrations between businesses typically do not engage the types of core personhood elements associated with individual conscience. Parties enter such commercial relationships expecting reciprocal mutual benefits and legitimate expectations. The current judicial “deference” model toward religious arbitration is most suited to these types of religious arbitration, where neither consent nor conscience is implicated, and there is no reason why it should not apply in these contexts.

At the other extreme, some religious arbitration agreements should simply be presumptively unenforceable. Some courts—though not all<sup>48</sup>—have noted that public policy can be used to vacate arbitration awards involving child custody matters.<sup>49</sup> In these circumstances, public policy protects vulnerable individuals whose interests would be directly impacted by arbitration proceedings to which they are not a party. This presumption against enforcement should cover scenarios in which the party whose interests are implicated by the outcome has neither exhibited consent nor conscience to the arrangement.

Harder cases involve scenarios that implicate either the principle of consent or continuity of conscience. In these situations, courts will need to weigh the degree to which these variables apply in each specific scenario. If there is a lack of conscience or consent, I suggest that this should trigger more robust scrutiny of the religious arbitration agreement or award. My purpose is not to argue for a precise standard of scrutiny, but to suggest that more robust scrutiny is better than the current level of minimal review or no scrutiny at all. This analysis necessarily involves weighing competing rights and interests within an evaluative framework. Factors to consider include the nature of the dispute, the competing individual rights involved, and the relationship between the parties and the religious tribunal.

Consider, for example, an individual who withdraws from a religion and no longer adheres to the religious principles underlying an arbi-

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<sup>48</sup> See *Fawzy v. Fawzy*, 973 A.2d 347, 360 (N.J. 2009) (“[T]he constitutionally protected right to parental autonomy includes the right to submit any family controversy, including one regarding child custody and parenting time, to a decision maker chosen by the parents.”).

<sup>49</sup> See, e.g., *Glauber v. Glauber*, 192 A.D.2d 94, 97 (2d Dep’t 1993) (holding that “contracts entered into by the parents with regard to the fate of their children are not binding on the courts”) (citing *Nahra v. Uhlar*, 43 N.Y.2d 242 (1977)); *In re Susquehanna Valley Cent. Sch. Dist.*, 339 N.E.2d 132, 133 (N.Y. 1975) (noting that public policy may restrict the freedom to arbitrate in child custody matters); *Schneider v. Schneider*, 216 N.E.2d 318, 321 (N.Y. 1966) (holding that an arbitration award in a child custody matter cannot be binding against a child who was not a party to the arbitration).

tration agreement; he or she may have converted to another faith, or simply no longer hold any religious belief. The standard approach would be to focus on whether the parties had consented to submit their dispute to an arbitral tribunal, that is, the party's choice of forum at an earlier point in time.<sup>50</sup> In essence, courts find that initial consent to bring the dispute to religious arbitration is all that matters.<sup>51</sup> But traditional assumptions of consent and voluntariness do not deal adequately with the situation when an individual explicitly withdraws from the religious community at a later point in time and no longer wishes to be bound by the religious tribunal's choice of law. Here, I argue, *continuity* of conscience no longer exists: the parties' initial consent to submit to a religious tribunal is no longer connected to their wish to adjudicate disputes according to shared values as a matter of conscience.

Instead of adopting a highly deferential approach to the religious tribunal that accords religious tribunals automatic deference, I suggest that a conscience claim by one of the parties could trigger heightened scrutiny by the civil courts of the agreement to submit to religious arbitration. A claim that there is no longer continuity of conscience is premised on freedom of religion: it arises when an individual has explicitly withdrawn from the community or shifted in his or her religious beliefs. Courts should consider whether there are serious rights of conscience at stake in compelling individuals to engage in faith-based arbitration against their will where the relationship between the individual and the community has been severed.

One relevant inquiry, the nature of the dispute, explores how closely connected the issues are to core elements of an individual's identity and sense of self. Matters related to the family involve aspects that people perhaps most obviously regard as intimately connected to their identity and sense of self. Issues relating to marriage and children strike closer to core aspects of one's personhood and conscience. By contrast, it would be much harder to raise a conscience claim in commercial disputes that take place in a more impersonal market transaction context. An arbitral clause between two businesses to submit their disputes to a religious court would be less susceptible to religious conscience objections compared to a family law agreement between individuals to submit is-

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<sup>50</sup> See Shachar, *supra* note \_\_, at 589 (distinguishing between "choice of forum" and "choice of law").

<sup>51</sup> *Encore Prods., Inc. v. Promise Keepers*, 53 F. Supp. 2d 1101, 1112 (D. Colo. 1999), at 1112-13 ("Although it may not be proper for a district court to refer civil issues to a religious tribunal in the first instance, if the parties agree to do so, it is proper for a district court to enforce their contract.").

sues relating to their divorce and children to religious arbitration. Imagine a couple that agrees to submit disputes regarding their divorce settlement and child support and custody to Islamic religious arbitration.<sup>52</sup> If one party then explicitly withdraws from the community, courts should be wary about compelling individuals to engage in faith-based adjudication of such family law matters against their will.

The reciprocal benefits or commensurate harm to the other party also factors into the substance of the dispute and its susceptibility to a conscience claim. As an example, an employee who signs an employment contract with an arbitral clause to join a Christian organization receives reciprocal benefits over a period of employment, such as being part of an institution with shared moral convictions and a like-minded community. In return, she accepts the limitation that any dispute will be submitted to religious dispute resolution.<sup>53</sup> If she later wishes to bring an action against her employer, it would be harder to justify a religious conscience objection to comply with a legal obligation she had entered into and of which she took the negotiated benefits.

Commensurate harm to the other party's individual rights matters as well. Consider an Orthodox Jewish man who objects that submitting to a Beth Din or granting a *get* to his wife would be an intrusion on his religious conscience. Under Jewish law, a husband's refusal to grant a religious divorce (a *get*) affects his wife much more severely than him. If a "chained" woman remarries without a *get*, she is considered an adul-

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<sup>52</sup> See, e.g., *Jabri v. Qaddura* 108 S.W.3d 404.

<sup>53</sup> A related scenario arose in the recent case of *Spivey v. Teen Challenge Inc.* (Fla. 1st DCA Oct. 11, 2013), which involved a mother acting as the personal representative of her deceased son in a wrongful death case against a Christian substance abuse facility. Under Florida law, a representative "stands in the shoes" of the decedent, being bound by any arbitration agreements that the decedent had signed. Spivey objected that it would violate *her* free exercise rights to require her to engage in religious arbitration. The Florida appeals court disagreed, holding that personal representatives "serve the estate's interest not vice versa;" accordingly, Spivey must either comply with the arbitration agreement the decedent signed or have a replacement appointed as personal representative.

This decision seems right. The decedent voluntarily entered into a contractual relationship with the substance abuse facility from which he received the negotiated benefits and in turn agreed to submit any disputes to religious arbitration. Spivey's right to sue stem entirely from her role as the decedent's personal representative. If she objects to fulfilling the decedent's obligation to engage in religious arbitration because it offends her own religious sensibilities, she has a clear option of exit by choosing to resign as his personal representative. See Eugene Volokh, *Court Enforces Religious Arbitration Agreement, Over Objection of Plaintiff*, THE VOLOKH CONSPIRACY (2013), <http://www.volokh.com/2013/10/15/court-enforces-religious-arbitration-agreement-objection-plaintiff/> (last visited Sep 1, 2014).

teress and any subsequent children will be stigmatized as illegitimate and may not marry other Jews within the community. A woman's right to marry and to equality in family life in these cases is significantly impacted by a husband's refusal to grant a religious divorce.<sup>54</sup> It also impacts the religious free exercise of observant women for whom marriage and family are central to their religious life.<sup>55</sup>

As a preliminary matter, strategic use of free exercise arguments to exact more advantageous settlements from the other party undermines the genuineness of a freedom of conscience claim. So, objections by husbands that granting a *get* would be against their religious beliefs, unless their wives agree to better divorce settlements or to pay them a sum of money into an irrevocable trust have been—and should be—met with skepticism.<sup>56</sup> A change in a husband's religious beliefs could raise greater concerns with civil courts ordering specific performance of a religious act.<sup>57</sup> Lower courts have been divided on this issue.<sup>58</sup> One approach—

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<sup>54</sup> Cf. Ihsan Yilmaz, *Law as chameleon: the question of incorporation of Muslim personal law into the English Law*, 21 J. MUSLIM MINORITY AFF. 297, 16 (2001). (noting that “if the [Muslim] woman is not religiously divorced from her husband, it does not matter that she is divorced under the civil law, in the eyes of her community her remarriage will be regarded as adulterous and any possible offspring will be illegitimate since it is not allowed under religious law”).

<sup>55</sup> See Tanina Rostain, *Permissible Accommodations of Religion: Reconsidering the New York Get Statute*, 96 YALE L.J. 1147, 1965–66 (1986) (“In Judaism, marriage is central to religious life. Significant religious obligations that are fulfilled within the domestic sphere devolve upon the observant Jewish woman. Because freedom to enter into a Jewish marriage is important to a Jewish woman's religious observance, it falls within the protection of the free exercise clause.”).

<sup>56</sup> See, e.g., *Segal v. Segal*, 650A.2d 996, 997 98(N.J. Super. Ct. App. Div.1994) (involving a husband who refused to grant a *get* unless the wife “waived any claim to child support or alimony, disclaimed any interest in all marital assets including [the husband's] business, and in addition paid him \$25,000”); *Burns v. Burns*, 538 A.2d 438, 439 (N.J. Super. Ct. Ch. Div. 1987) (dismissing religious conscience objections of a husband who stated that he would secure the *get* for the defendant only if she agreed to pay \$25,000 into an irrevocable trust).

<sup>57</sup> KENT GREENAWALT, *RELIGION AND THE CONSTITUTION VOLUME 2* 262 (2006). (noting that “shifts in a husband's religious beliefs could raise a greater concern with specific performance” and that “[w]hether a court should still order him to appear before a *beth din* or grant a *get* is debatable”). *Id.* at 261. (arguing that “the state should not compel intrinsically religious acts, even if people have agreed to perform them.”)

<sup>58</sup> Lower courts have been divided on this issue. Some courts have compelled husbands to submit to the *beth din*. See, e.g., *Avitzur v. Avitzur*, 446 N.E. 2d 136 (N.Y. 1983). See also *Waxstein v. Waxstein*, 395 N.Y.S.2d 877 (Sup. Ct. 1976) (aff'd 394 N.Y.S.2d 253 (App. Div. 1977)); *Rubin v. Rubin*, 348 N.Y.S.2d 61 (Fam. Ct. 1973); *Minkin v. Minkin*, 434 A.2d 665 (N.J. Super. Ct. Ch. Div. 1981). Others have opted for strict abstention from an order of specific performance to grant a *get*. See, e.g., *Aflalo v. Aflalo*, 685 A.2d 523 (N.J. Super. Ct. Ch. Div. 1996).

adopted by the Supreme Court of Canada—is to award damages for breach of a contractual obligation to submit to religious arbitration when failure to do so results in significant harm to the other party and affects the public interest.<sup>59</sup> Enforcing damages for the detriment that the woman had suffered, as the court stressed, helps strike a balance between competing individual rights at stake, and would also discourage recalcitrant husbands from withholding a religious divorce for strategic purposes.<sup>60</sup>

A second area that poses hard cases involves individuals who face powerful communal pressure to submit to the authority of religious tribunals. Secular courts have generally concluded that such pressures are not enough to constitute legal duress,<sup>61</sup> reasoning that the contracting parties have “freely submitted” to these tribunals because they have “voluntarily undertaken obedience to the religious law.”<sup>62</sup> The court in *Greenberg v. Greenberg*, for instance, dismissed the threat of a *siruv* as presenting “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.”<sup>63</sup>

However, such a view presupposes that voluntariness and consent should be simply taken as given because of the individual’s adherence to religious law as a member of a religious community. The difficulty with an unproblematized notion of consent in the religious arbitration context is that group pressures frequently implicate the individual’s very membership in a religious group that the court appears to predicate the party’s consent as a matter of conscience. For those who regard be-

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<sup>59</sup> The Canadian case of *Bruker v. Marcovitz*, [2007] S.C.C. 54 (Canada), offers a useful illustration of this alternative. A Jewish couple’s divorce settlement included a commitment by both parties to appear before a beth din to obtain a religious divorce decree. However, the ex-husband refused to deliver the *get* for fifteen years. The Supreme Court ruled in favor of awarding damages to the wife for the harms caused to her by the husband’s refusal to comply with his contractual agreement to remove her religious barriers to remarriage. The majority held that civil courts could use damages to discourage religious barriers to remarriage to address “the gender discrimination those barriers may represent” and to alleviate “the effects they may have on extracting unfair concessions in a civil divorce.” *Marcovitz*, at para. 3, 92.

<sup>60</sup> Another alternative could be the enactment of legislative protection. See, e.g., New York’s “Get” Statute, Act of Aug. 8, 1983, 1983 N.Y. Laws ch. 979 (codified at N.Y. Dom. Rel. Law § 253 (McKinney Supp. 1983)). This Act determined that a secular court may take into consideration through equitable distribution a barrier to remarriage, to counter the obstacle of the refusal of a husband to deliver a *get*.

<sup>61</sup> See *supra* note \_\_\_\_.

<sup>62</sup> *Greenberg v. Greenberg*, 238 A.D.2d 420 (1997), 421.

<sup>63</sup> *Id.*

longing to a particular community as fundamental to their personal and religious selves, threats to the status of their membership have significant consequences for their lives and strike at the very core of their identity and conscience.<sup>64</sup>

In the family law context, these tensions become even more charged. For many observant women, particularly those in Jewish and Muslim communities, obtaining a religious divorce is considered essential for their ability to remarry and build new families.<sup>65</sup> Familial and societal pressure can have a powerful impact on women submitting to the authority of community-based religious tribunals.<sup>66</sup> There is often also a gendered dimension present in family law disputes. For example, a Jewish man exercises almost exclusive control over the issuing of a *get*.<sup>67</sup> Under Islamic law, men can unilaterally obtain a divorce, or *talaq*, by declaring three times “I divorce thee” without any notice to their wives.<sup>68</sup>

As such, some women may also experience serious pressure to agree to less favorable financial settlements in divorce disputes submitted to arbitration in order to ensure that the religious aspect of their relationship is dissolved. Sometimes the pressure of a woman’s wish to obtain a religious divorce may be combined with the threat of ostracism from the community if she does not submit to religious arbitration. Consider, for example, *D.G. v. J.G.*,<sup>69</sup> which involved an Orthodox Jewish woman who wished only to obtain a *get* from the rabbinical court proceedings initially refused to sign an arbitration agreement submitting her spousal support to the beth din. She received a notice that a *siruv* would be issued against her if she did not withdraw her civil court proceedings to determine spousal support. As a result, she agreed to submit the other aspects of her divorce settlement to the rabbinical court, which later decided that she was not entitled to any spousal support.

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<sup>64</sup> See Fried, *supra* note \_\_\_ at 651–53 (describing “the *siruv*’s potentially tragic effects on a person’s social life, her livelihood, and that of her family”).

<sup>65</sup> Ayelet Shachar, *State, Religion and the Family: The New Dilemmas of Multicultural Accommodation*, in SHARI’A IN THE WEST 115, 120 (Rex J. Ahdar & Nicholas Aroney eds., 2010).

<sup>66</sup> In her study of Sharia councils in England, sociologist Samia Bano observed that, in 24 out of 26 cases at one Sharia council, a family member accompanied the woman seeking a Muslim divorce. SAMIA BANO, MUSLIM WOMEN AND SHARI’AH COUNCILS: TRANSCENDING THE BOUNDARIES OF COMMUNITY AND LAW 124–25 (2012).

<sup>67</sup> See *supra* note \_\_\_.

<sup>68</sup> See Falsafi, *supra* note \_\_\_, at 1922–23.

<sup>69</sup> *D.G. v. J.G.*, N.Y. L.J., Oct. 16, 1995 at 35.

These scenarios demonstrate the need for a more robust enquiry into the voluntariness of consent by the parties. Powerful communal pressure on vulnerable individuals to remain a member of a religious community implicates their conscience by threatening their religious and communal identity, undermining assumptions of free consent to religious arbitration. Civil courts should consider expanding doctrines like duress and unconscionability beyond their strict contractual definition in these situations, particularly in family law matters that fall below secular standards of protection or have a gendered dimension. Paying closer attention to the interaction between conscience and consent provides greater sensitivity to the forms of pressure faced by those with overlapping individual, communal, and religious identities.

A third important area for civil court review of religious arbitral tribunals arises when the procedural rules employed by religious tribunals are unfair or discriminatory. Consider, for example, religious arbitration panels that apply procedural rules that discriminate based on gender or ethnicity.<sup>70</sup> Some Islamic and Orthodox Jewish laws, for example, limit or exclude the testimony of women as witnesses. Recent lawsuits brought against the Church of Scientology by its former members have also raised questions of procedural unfairness caused by enrollment contracts with arbitral clauses that require all disputes between the church and its members to be submitted to an internal panel of three “church members in good standing.”<sup>71</sup>

Should secular courts enforce the award of a religious tribunal if the arbitrators applied discriminatory procedural rules during the proceedings? One court has suggested, in the context of reviewing a secular commercial arbitration award, that “arbitrators . . . are under the same

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<sup>70</sup> See Michael A. Helfand, *Between Law and Religion: Procedural Challenges to Religious Arbitration Awards*, CHICAGO-KENT L. REV., 7–12 (2014), <http://papers.ssrn.com/abstract=2435998>; Eugene Volokh, *Orthodox Jewish Arbitrations, Islamic Arbitrations, and Discrimination Against Witnesses Based on Sex or Religion*, THE VOLOKH CONSPIRACY (2010), <http://www.volokh.com/2010/10/21/orthodox-jewish-arbitrations-and-discrimination-against-witnesses-based-on-sex-or-religion/> (last visited Sep 1, 2014).

<sup>71</sup> See *Schippers v. Church of Scientology Flag Service Organization*, Case No.: 11-11250-CI-21 (6th Judicial Circuit in and for Pinellas County, Florida, Mar. 7, 2012) (Order Granting in Part/Denying in Part “Motion to Compel Submission of Dispute to Internal Religious Dispute Resolution Procedures and Arbitration and Motion to Stay Action, Including All Discovery”). The civil court rejected the plaintiffs’ contention that such procedural rules are inherently biased, rendering the agreement unenforceable. See Judge rules court can’t take on couple’s dispute over Scientology debt, TAMPA BAY TIMES, <http://www.tampabay.com/news/courts/judge-rules-court-cant-take-on-couples-dispute-over-scientology-debt/1219054> (last visited Sep 3, 2014).

duty as judicial officers to render decisions free from any influence or consideration of the race, ethnic origin or gender of the parties.”<sup>72</sup> Other commentators have argued that, under a principle of freedom of contract, parties should be able to contract for religious arbitration under whatever the procedural rules they prefer, including discriminatory ones, as long as the arbitrator does not exercise personal bias.<sup>73</sup>

This type of consent-of-the-parties argument is often problematic in the religious arbitration context due to the difficulties of determining voluntary consent within a context of religious membership and community pressure. In addition, although the parties may have agreed to the choice of *forum* to which to submit their dispute, they may not necessarily have recognized or understood the implication of the choice of *law* that followed, particularly if the procedural rules were not specifically or clearly stated in the agreement.<sup>74</sup> Many religious arbitration agreements contain boilerplate choice-of-law provisions, which simply require that arbitrators resolve the dispute in accordance with Jewish—or Islamic or Christian—law.<sup>75</sup>

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<sup>72</sup> *Betz v. Pankow*, 16 Cal. App. 4th 919 (“All litigants are entitled to a decision free from arbitrary considerations of race, gender, etc., and although arbitrators enjoy considerable latitude in the resolution of both factual and legal issues, they are under the same duty as judicial officers to render decisions free from any influence or consideration of the race, ethnic origin or gender of the parties.”). However, this matter does not seem to be settled under existing case law in the United States. See Eugene Volokh, *Religious Law (Especially Islamic Law) in American Courts*, 66 OKLA. L. REV. 431, 436 (2013).

<sup>73</sup> Volokh, *supra* note 70 (discussing approach by commenter David Schwarz who argues “that discriminatory rules known to the parties may be enforced, and that what is forbidden is the arbitrator’s unforeseeable personal discriminatory preference”).

<sup>74</sup> See GREENAWALT, *supra* note \_\_, at 262–63. For instance, a civil court could find that a general *ketubah* uttered by spouses at an Orthodox wedding ceremony agreeing to submit to the *beth din* “as having the authority to summon either party at the request of the other, in order to enable the party so requesting to live in accordance with the standards of the Jewish marriage throughout his or her lifetime” lacks the specificity for a party to have consented to foregoing procedural or substantive due process rights when she is before the *beth din*.

<sup>75</sup> See *supra* note See, e.g., *Agreement to Arbitrate*, BETH DIN OF AM., [http://www.bethdin.org/docs/PDF3-Binding\\_Arbitration\\_Agreement.pdf](http://www.bethdin.org/docs/PDF3-Binding_Arbitration_Agreement.pdf) (“The parties acknowledge that the arbitrator may resolve this controversy in accordance with Jewish law (‘din’) or through court ordered settlement in accordance with Jewish law (‘p’shara krova l’din’)”); *Rules of Procedure*, THE INST. FOR CHRISTIAN CONCILIATION, [http://www.peacemaker.net/site/c.nuIWL7MOJtE/b.5378801/k.D71A/Rules\\_of\\_Procedure.htm](http://www.peacemaker.net/site/c.nuIWL7MOJtE/b.5378801/k.D71A/Rules_of_Procedure.htm) (“Conciliators shall take into consideration any state, federal, or local laws that the parties bring to their attention, but the Holy Scriptures (the Bible) shall be the supreme authority governing every aspect of the conciliation process.”); *Binding Arbitration Agreement*, DAR UL HIKMAH CONSULTING, <https://docs.google.com/file/d/0B5VIIJxcjxgVMjY2MzdIYjAtOGYzYS00NmEzLWFkZTMtZWZkYzZmM1NzMyNDll/edit?hl=en&pli=1> (“[The arbitrator’s] mediation, coun-  
(continued next page)

In approaching these questions, the inquiry should focus on the quality of consent by the parties and the nature of the divested right.<sup>76</sup> The extent to which the character and implication of the procedural rules was clear and open is relevant to the consent of the parties to the agreement. Civil courts can seek what the parties had agreed to when they submitted a dispute before a religious tribunal in an objective manner without inquiring into the substance of the religious doctrine.<sup>77</sup> If the choice-of-law clause is phrased in a general manner that does not specify the unfair procedural rules, this casts doubt on the quality of the party's consent to granting the tribunal the authority to apply those internal procedural rules in the first place.

If an arbitration proceeding is carried out according to procedural rules that discriminate based on sex or race, however, civil courts should not enforce the outcome of such arbitrations. As a default rule, it should be presumed that individuals consent to adjudication in good conscience in line with baseline constitutional protections of due process and equality. Parties should not be deemed to have waived the protection of procedural safeguards by their agreement to submit to the authority of an arbitral forum. Refusing to review such arbitral outcomes on the basis that contracting parties had freely agreed to procedurally discriminatory rules highlights the rigidity of adopting a dominant consent-based approach to religious arbitration, and risks sanctioning an autonomous system of religious governance with little or no judicial oversight.

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Existing approaches presuming that secular courts should be highly deferential in enforcing religious arbitration are inadequate. Current doctrine on religious arbitration presents a key conundrum: faith-based arbitral decisions are granted the imprimatur of law, yet insulated from being scrutinized like other forms of law.

This Article offers a more robust approach to determining when secular courts should enforce faith-based arbitration grounded on principles of conscience and consent. Freedom of conscience provides necessary texture to normative accounts for permitting members of a religious

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seling, arbitration, adjudication and advice to me are in accordance with Islamic Religious Rules, i.e. (Shari'ah Law).").

<sup>76</sup> See MARGARET RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* 154–86 (2013).

<sup>77</sup> Grossman, *supra* note \_\_, at 207.

community to adjudicate disputes according to their own religious beliefs. It supplements the consent of the parties as a core organizing principle that legitimates secular court enforcement of religious arbitration. Without considering whether continuity of conscience exists throughout the arbitration, secular courts risk sanctioning the operation of a *de facto* dual jurisdictional system with little interaction between the two forums and no option for exit for individuals who wish to leave the autonomous religious system. Approaching the accommodation of religious tribunals through the lens of conscience and consent provides a framework for analyzing cases involving the enforcement of faith-based arbitration.

Debates over faith-based adjudication by private tribunals go to the very heart of deeper questions over whether religious legal systems can be accommodated within the democratic framework of a secular liberal state. Religious tribunals straddle the boundaries between the public and private, and the secular and religious. Conscience and consent provide the tools for developing a more nuanced approach that would better encapsulate the overlapping dimensions involved and offer more sensitive judicial scrutiny of faith-based arbitration.