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The Impact on "The Vanishing Trial" If People of Faith Were Faithful to Religious Principles of Settling Disputes Without Litigation

Anthony R. Benedetto*

I. INTRODUCTION

Commentators have expressed concern about "the vanishing trial" with respect to the possible loss of precedent and the loss of opportunities for aggrieved persons to have their concerns resolved in the judicial arena.[1] Ignoring the controversy surrounding whether the number of trials is actually decreasing significantly, this paper asks whether the number of trials would be significantly affected if all people of faith resolved their disputes within their religious communities, or at least outside of the secular court setting. The impact on secular case law of the disappearance of such disputes is then estimated. Finally, recommendations are presented for overcoming the consequent loss of trial-based case law.

Section II describes in general terms the "peacemaking" traditions of Christianity, Judaism, and Islam, which are the major religious traditions in the United States today. In all three religions, there is a common thread of resolving disputes between fellow believers using scripture-guided negotiation, mediation, arbitration, and variants of these methods. Section III provides examples of recent court opinions that demonstrate widespread and settled acceptance of faith-guided dispute resolution clauses in secular contracts. Section IV combines demographic statistical data about court

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1. *See* Thomas J. Stipanowich, *ADR and the "Vanishing Trial": The Growth and Impact of "Alternative Dispute Resolution"*, 1 J. EMPIRICAL LEGAL STUDIES 843 (2004).

caseloads and faith communities to obtain an estimate of the number of cases filed each year in the United States by members of those faith communities. Section V uses this estimate to assess the impact on the federal and state courts if these lawsuits were to disappear. Finally, Section VI addresses the concerns of commentators about loss of precedent and loss of forum if secular or faith-guided dispute resolution were to significantly reduce the number of cases entering the litigation system.

II. RELIGIOUS PEACEMAKING TRADITIONS

As shown in Section IV, the major religious traditions in the United States,[2] and their primary holy scriptures, are Christianity (Old and New Testaments of the Bible), Judaism (Torah and Talmud), and Islam (Qur'an and Sunna). Although there are significant differences in how each religion approaches dispute resolution, the similarities are strong and they share a common, core theme of atonement, forgiveness, and reconciliation between the believer and God and also between believers and others (believers and non-believers).[3] All three religions teach that disputes should be resolved privately between the disputants and that only fellow believers should become involved if the disputants require assistance.

The scriptural texts of Christianity, Judaism, and Islam make it clear that the civil court system is a highly undesirable forum for resolving disputes and that a believer should make every effort to avoid litigation, either as a plaintiff or as a defendant. When I made an oral presentation of this material to a law school class, an attendee commented that she had attended Catholic schools for eleven years but had never heard of the proscription against the secular courts. The absence of instruction of secondary school students is not surprising, since minors are not likely to find themselves involved in a lawsuit. The absence of instruction of adult congregants is also not surprising today, since many of the mainstream denominations have been accused of avoiding preaching and teaching about sin.[4] Further, Americans in general, and many church members in particular, dislike being told "thou shalt not . . ." in this modern age of entitlements and of so-called "prosperity theology."[5]

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2. Largest Religious Groups in the United States of America, http://www.adherents.com/rel_USA.html.

3. Rodney A. Max, *A Matter of Principle: The Role of Religious Philosophies in Resolution* (2002) at 27 (available from author at 2000A Southbridge Pkwy, Suite 330, Birmingham, AL 35209).

4. Evangelicalism, http://mb-soft.com/believe/text/evangeli.htm (last visited Mar. 2006).

5. Christian Animal Rights Effort C.A.R.E., http://www.all-creatures.org/care.html (last visited Mar. 2006).

The major religious traditions also teach that when disputes arise, the disputants should devote their attention not primarily to resolution of the dispute, but to reconciliation of the relationship among themselves and with their supreme being (God or Allah).[6] For believers, the adjudicatory function of either secular or faith-guided dispute resolution methodologies should be secondary to the conciliatory function, which is rarely encountered in the secular methods, particularly litigation. As a consequence, the government-provided judicial system should not be nearly as important to believers as the judicial system might think itself to be.[7]

The term "faith-guided dispute resolution" is used in this paper to describe dispute resolution methods that persons of faith should use if they wish to do so consistently with the principles of their religion. Since Christianity, Judaism, and Islam are the predominant religions in the United States, the examples used in this paper focus on these religious traditions. The concept of faith-guided dispute resolution can be adapted to any religion's principles, most suitably by consulting with religious leaders of the particular faith for assistance in identifying scriptural texts and other expressions of that religion's dispute resolution teachings. In general, the core principles of Christianity are shared by all Christian denominations, so there should be little or no need to adapt core Christian conciliation principles when disputants are of different denominations, such as a Methodist and a Baptist. On the other hand, a Christian conciliator, or a secular mediator who is a Christian, might find it desirable to consult with a rabbi or an imam if a disputant involved in a secular mediation or faith-guided dispute resolution proceeding is of the Jewish or Islamic faith, respectively.

The predominant faiths in the United States teach that believers are expected to pay attention to two primary relationships. First and foremost, believers are expected to maintain a proper relationship with God (or Allah). When a believer commits a sin, God expects the believer to acknowledge the sin, to apologize for it, to make reparations if appropriate, and to reconcile with God. The word "reconcile" means "[t]o reestablish a close relationship between."[8] Thus, believers are required to do whatever is necessary to reestablish the close relationship between themselves and God, as taught in their religion's scriptural texts and other statements of the faith.

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6. *See* Andrew W. McThenia & Thomas L. Shaffer, *For Reconciliation*, 94 YALE L.J. 1660, 1666 (1985).

7. *Id.* at 1667.

8. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1461 (4th ed. 2000).

The second important relationship about which believers must be concerned is the relationship between believers (and between believers and non-believers). Although the relationship with God is considered the most important relationship, a proper relationship with other mortals is only minimally less important. For example, Christianity teaches that God does not want to be approached in prayer or in worship if a believer has an active dispute with another believer.[9] In other words, believers are expected to reconcile with each other as a high and sacred duty. When believers are not in a proper relationship with each other, God treats them as not being in a proper relationship with God, as well.

Faith-guided dispute resolution, conciliation or reconciliation thus requires believers to not check their faith at the door when a dispute arises. Rather, believers are expected to remain mindful of religious principles of dispute resolution at all times. Recall that believers must hold reconciliation with God as their primary goal during resolution of any dispute. Inherent in this expectation is that believers must not violate religious principles any further than they might have already done in spawning the dispute in the first place.

Since God's expectations of the behavior of believers can be quite different from behaviors commonly seen in secular dispute resolution (e.g., confrontation, adversarial postures, etc), the mediator who encounters faithful believers attempting to adhere to their religious principles might be taken aback. For example, in most faiths, a person's word is his or her bond, (i.e., a valid covenant or contract is established). A believer commits a serious sin by failing to keep the promise. In contrast, in the secular world some contracts must be put in writing, under the Statute of Frauds, in order to be enforceable. If a believer makes an oral promise that the Statute of Frauds requires to be in writing, secular law would allow the believer to disaffirm the promise, but the believer's faith would require performance of the contract. In such a situation, though, the believer is expected to do the right thing, not to exercise a sinful secular right.[10] To be truly effective for believers, mediators and lawyers must be able to recognize when a disputant is invoking religious principles and should appropriately adapt their methods and expectations about outcomes. Of course, since the believer must live in the secular world and is expected to comply with secular law to the extent it does not conflict with his or her religious beliefs,[11] the believer would be wise to observe secular contract law in order to avoid disputes that are easily prevented by such observance.

9. *Matthew* 5: 23-24.

10. *See* KEN SANDE, THE PEACEMAKER 98 (Baker Books 2d ed. 1997).

11. *See Matthew* 22:21 ("Render unto Caesar what is Caesar's, and unto God what is God's.").

A reviewer of an earlier draft of this article questioned how well faith-guided dispute resolution would work if the believer-disputants place different emphasis on the important core principles of their religion. For example, how would they find common ground? A presumption underlying faith-guided dispute resolution is that the believer either already adheres to the core principles important to faith-guided conciliation or will adhere to these principles upon being educated about them *de novo* or having their importance demonstrated to them. If this condition is not satisfied, a faith-guided conciliator may decline to participate if the condition is noted initially, or the conciliation effort may be more difficult or less productive if the condition remains unrevealed or becomes evident during the conciliation process.

A. Judaism

Judaism is the oldest of the religious traditions discussed in this paper. The treatments of dispute resolution by Christianity and Islam can be viewed as offshoots of dispute resolution traditions from Judaism. Abraham had a son, Ishmael,[12] whose line of descendants included the prophet Muhammad, the founder of Islam. Fourteen years later, Abraham had another son, Isaac,[13] whose line of descendants included Jesus, the founder of Christianity. As a result, many elements of Judaic dispute resolution can be seen in Christian and Islamic dispute resolution schema.

During the forty years the Israelites wandered in the wilderness under the leadership of Moses, the number of Israelites grew considerably. Moses became overwhelmed by the many tasks for which he was responsible, including dispute resolution. God recognized that Moses needed help, so God told Moses to pick "some wise, understanding and respected men" whom God then appointed as military leaders, tribal officials, and "judges."[14] These judges were not trained in the law, but rather were selected from the general Israelite community. A similar approach is seen in the New Testament, where the apostle Paul, writing to the church at Corinth, instructed church leaders "if you have disputes about [the ordinary events of life], appoint as judges even men of little account in the church."[15]

12. *Genesis* 16:1-16.
13. *Genesis* 21:1-5.
14. *Deuteronomy* 1:9-17.
15. 1 *Corinthians* 6:4.

A central tenet of Judaism is *shalom* (peace).[16] "A dry crust eaten in peace is better than a great feast with strife."[17] In ancient Israel, disputes were settled by judges selected from among the common people of the tribe.[18] Over time, the body of Israeli law grew large and complex, to the point where scholars specializing in the law appeared. In modern Judaism, the rabbi is the local specialist in the Judaic law. The rabbi is also responsible for conflict prevention and peacemaking within the Jewish community.[19]

Perhaps illustrated best by the story of King Solomon and the "split the baby in two" episode,[20] Judaic dispute resolution historically has encouraged "creative solutions" through mediation and arbitration.[21] Judaic mediation (*p'sharah*) involves a single mediator, and arbitration (*bitzua*) requires three individuals; both *p'sharah* and *bitzua* follow basically the same procedures as secular mediation and arbitration.[22] In both of these less formal types of dispute resolution, the mediators and arbitrators are selected from the Jewish community generally.[23] Secular courts treat binding decisions from the *bitzua* essentially the same way as the courts would treat any secular arbitration agreement.[24]

Most formal Judaic dispute resolution is conducted by a *Beth Din* (rabbinical court).[25] In ancient times, the Jews were scattered in small groups among nations of non-believers. The Jews developed a strong distrust of the secular courts, labeling them with the "derogatory term *Arkaot Shel Nochrim*," which refers to the "corrupt, partial and slow-moving courts that were not viewed as dispensing justice for Jews."[26] As an alternative, Judaism developed the *Beth Din*, which is essentially a formal arbitration proceeding conducted by a panel of three rabbis who are competent in both secular and Judaic law.[27] The *Beth Dins* in the United States are governed by procedures designed to assure that decisions meet secular arbitration law

16. Seth Shippee, *"Blessed are the Peacemakers": Faith-based Approaches to Dispute Resolution*, 9 ILSA J. INT'L & COMP. LAW 237, 249 (2002).

17. *Proverbs* 17:1.

18. *Deuteronomy* 1:9-17.

19. Shippee, *supra* note 16, at 249.

20. 1 *Kings* 3:16-27.

21. Shippee, *supra* note 16, at 251.

22. *Id.* at 251-52.

23. *Id.* at 252.

24. *Id.* at 254.

25. *See* Kellie Johnston, Gus Camelino & Roger Rizzo, *A Return to 'Traditional' Dispute Resolution*, http://www.cfcj-fcjc.org/full-text/traditional.htm (Section II.A) (last visited Mar. 2006).

26. *Id.* at n.13.

27. *Id.* at Section II.B.

standards and, thus, will be legally binding and enforceable by civil courts.[28] In fact, the *Beth Din* often is conducted in accordance with the procedures of the American Arbitration Association (AAA),[29] since contracts between Jews may specify AAA rules, or some other secular dispute resolution entity.

B. Islam

Islam considers mediation and conciliation to be the preferred approaches to dispute resolution. Arbitration is contemplated but is a secondary method because it involves the imposition of a decision on the disputants rather than a mutually-decided agreement.[30]

Muslims believe the only way to make peace with God is by atonement. Atonement involves reaffirming the basic tenets of the Islamic faith and then leading a virtuous life by adhering to the Qur'an in one's daily life.[31]

The major prophet of Islam, Muhammad, served as a mediator and arbitrator for both believers and non-believers throughout his life.[32] Muhammad lived a virtuous life, which served as a model to how Muslims should live and act toward each other and toward non-believers. Virtuous living is considered important for Muslims, because atonement is not based on faith alone, but on repentance and living a life of peace, justice, and forgiveness.[33]

Western culture focuses on the rights and duties of individuals, but Islamic culture has always emphasized community, with the family being the basic unit of Islamic accountability.[34] The impact on a dispute resolution professional of this focus on community is that Muslims involved in a mediation proceeding should not be presumed to be a collection of individuals who expect that all transactions will be between only the mediator and the parties. Rather, the mediator should expect either the

28. *See id.* at Section II.B. *See also* Elmora Hebrew Ctr., Inc. v. Fishman, 593 A.2d 725, 731 (N.J. 1991) (affirming the validity of *Beth Din* proceeding between rabbi and congregation, including enforceability of judgment).

29. Shippee, *supra* note 16, at 252.

30. Shippee, *supra* note 16, at 247.

31. Max, *supra* note 3, at 22.

32. *Id.*

33. *Id.* at 24-26.

34. Islamic Society of North America, *Principles of Islamic Interpersonal Conflict Intervention*, http://www.crescentlife.com/articles/I/interpersonal_conflict_intervention_islamic_principles.html (last visited Feb. 2005).

immediate or ultimate involvement of others, e.g., family members, eminent members of the community.[35]

As an example of the inclusion of others, Muslim divorce conflicts are frequently mediated by two persons, one named by each spouse, and usually chosen from among older family members. If the spouses employ only one mediator, that person is usually the couple's local religious leader, the imam.[36] As in Jewish *p'sharah*, Christian conciliation, and secular mediation, the Islamic mediator is more of a facilitator than a "judge."[37]

Arbitration was used to settle disputes between Arabs well before the establishment of Islam.[38] Islamic arbitration, like modern secular arbitration, is based on a contractual arrangement between the parties that may be set out prospectively or that may be entered into after a dispute arises.[39] Scriptural texts authorize arbitration but furnish very few specific details about how an arbitration proceeding should be conducted. The parties are free to determine the number of arbitrators, name the arbitrators, and set the administrative rules for the proceeding.[40] The arbitrators must have the same qualifications as an Islamic judge, since arbitration is considered a judicial function.[41] As an example, the arbitration panel in *Jabri* was composed of three imams from the Fort Worth and Arlington area.[42]

Islam provides specific guidance on handling conflict between Muslims and people of other faiths or of no faith.[43] Islam has always contemplated there would be tension between Muslims and others in the world, since Muslims believe God has chosen them as *shahadat*, an Arabic word meaning "witness over other nations."[44] This call to be a "witness over other nations" is interpreted to mean that Muslims should first seek to live at peace and in harmony with each other, and then to spread that peace to other communities in the same measure.[45] But Muslims are permitted to take a dispute with a non-Muslim into the secular legal system so long as the procedural rules do not violate the Qur'an or Sunna.[46]

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35. *See id.* at 4.

36. *See* Shippee, *supra* note 16, at 247.

37. *See id.*

38. *See* Zeyad Alqurashi, *Arbitration Under the Islamic Sharia*, 1 OIL, GAS AND ENERGY LAW INTELLIGENCE, Section 2 (Mar. 2003), www.gasandoil.com/ogel/samples/freearticles/article_63.htm (last visited Mar. 2005).

39. *See id.* at Section 5.1.

40. *See id.* at Section 5.2.

41. *Id.*

42. *See* Jabri v. Qaddura, 108 S.W.3d 404, 408 (Tex. App. 2003).

43. *See* Shippee, *supra* note 16, at 246.

44. *See id.*

45. *Id.*

46. *See* Alqurashi, *supra* note 38, at Section 5.3.

C. Christianity

The Jewish proscription against suing a fellow believer in the secular courts is also a central tenet of Christianity. The apostle Paul wrote:

> If any of you has a dispute with another, dare he take it before the ungodly for judgment instead of before the saints [fellow Christians]? . . . The very fact that you have lawsuits among you means you have been completely defeated already. Why not rather be wronged? Why not rather be cheated?[47]

A primary reason for this proscription is that disputes between Christians almost always involve sin issues. Secular courts have neither jurisdiction nor competence to address sin issues, since sin is a matter of the heart, not of the law, and sin must be resolved between the Christian and God.[48] The Bible is clear that many intra-church remedies are available and that all such remedies must be exhausted before a Christian may resort to the secular courts.[49] As mentioned earlier, a gap may exist between what the Bible says about this topic and what the believer actually knows. The importance of Christians living in harmony with each other is shown by Jesus' admonition that a Christian who has wronged a fellow Christian and not reconciled with that person cannot properly worship God: "If you are offering your gift at the altar and there remember that your brother has something against you, leave your gift there in front of the altar. First go and be reconciled to your brother, then come and offer your gift."[50]

Christian dispute resolution procedures are built upon the teachings of Jesus and of the apostle Paul. Jesus said "Blessed are the peacemakers, for they shall be called the children of God."[51] The apostle Paul, writing to the church in Corinth, instructed them "if you have disputes about [things of this life], appoint as judges even men of little account in the church."[52]

But, importantly, Christian (and Islamic) dispute resolution procedures are also built upon principles of Judaic dispute resolution. In the Judaic tradition, scripture teaches that the transgressor has a duty not only to apologize and make compensation to an aggrieved person, but also to love

47. 1 *Corinthians* 6:1, 7.
48. *See* SANDE, *supra* note 10, at 279-80.
49. *See id.* at 281-83.
50. *Matthew* 5:23-24.
51. *Matthew* 5:9.
52. 1 *Corinthians* 6:4.

them (in the *agape* sense of "love").[53] In fact, "love your neighbor as yourself" is one of the prominent admonitions in all three religious traditions.[54]

1. Private Reconciliation

Jesus described a multi-step process for reconciliation among Christians. The first step involves attempting to achieve reconciliation privately between the two disputants: "If your brother sins against you, go and show him his fault, just between the two of you. If he listens to you, you have won your brother over."[55]

2. Multi-Party Reconciliation/Mediation

Recognizing that human nature makes even Christians reluctant to deal with disputes forthrightly, Jesus went on to provide a second step if the first step is unsuccessful "[b]ut if he will not listen, take one or two others along."[56] This step addresses two possible scenarios that call for opening up the dispute to members of the church. In the first scenario, there may be a power imbalance or physical intimidation that could adversely affect the negotiations. The additional church members can serve as intermediaries or buffers between the two disputants, if necessary.[57] The role played by the non-disputant participants thus is very similar to the role played by the secular mediator, especially where separate caucuses might be needed.

In the second scenario, the two disputants may need the wise counsel and perspective of mature Christians to overcome an impasse caused by lack of creativity or unfamiliarity with scriptural teachings.[58] The role played by the non-disputant participants in this scenario is very similar to the facilitative role of secular mediators in every mediation session.

3. Tell It To The Church/Arbitration

"If he refuses to listen to them, tell it to the church."[59] This admonition can be divided into two sub-steps. First, the church is instructed to assemble a panel of mature Christians to conduct an arbitration proceeding, identical

53. *See* McThenia & Shaffer, *supra* note 6, at 1665.
54. *Leviticus* 19:18.
55. *Matthew* 18:15.
56. *Matthew* 18:16.
57. SANDE, *supra* note 10, at 185.
58. *See id.*
59. *Matthew* 18:17.

in all important ways to secular arbitration, except that the proceeding is conducted according to biblical principles and the outcomes are measured against Scripture.[60] Just as in secular arbitration, the disputants sign an arbitration agreement before the proceeding, and the arbitral decision is legally binding on them, both in church law and in secular law. As will be discussed more fully in Section III, the secular courts have long recognized the authority of people of faith to conduct dispute resolution according to principles of their faith and for the outcomes to be legally enforceable in the secular courts.

The second sub-step involves communication to the entire congregation of a believer's unwillingness to comply with Christian conciliation principles.[61] The fundamental principles invoked here are a combination of peer pressure (to conform to the tenets of the congregation's faith) and persistent love (demonstrate God's love for the disputant so consistently that she eventually faces up to her fault and comes back into the fold).[62]

4. Treat Him as a Non-Believer/Litigation

The final step taught by Jesus is "if he refuses to listen even to the church, treat him as you would a pagan."[63] In all cases, the Christian who is pressing the grievance must decide whether he should file a lawsuit or not. As mentioned previously, the presence of Christians in secular lawsuits is considered a major "black eye" for the church. A Christian should file a lawsuit only when the wrong committed was so significant that justice would be served or the weak would be protected only by the authority of a secular court.[64] If a "Christian" has been brought assiduously and biblically through the multi-step Christian conciliation process and continually has shown disdain for Christian principles of reconciliation and ignored the commands of his local church, the church is told to consider the person to not be a true Christian, i.e., a "pagan" non-believer, against whom it is acceptable to bring suit in extreme circumstances. Thus, litigation is a "last resort" approach to dispute resolution the Bible permits but strongly discourages.

60. SANDE, *supra* note 10, at 273.
61. *See id.* at 281.
62. *See id.* at 291-93.
63. *Matthew* 18:17.
64. *See* SANDE, *supra* note 10, at 283.

D. The Mediator Who Is Not a "Person of Faith" or Who Is of a Different Faith from a Disputant

A mediator need not be of the same religious faith as either or both of the disputants. In fact, the mediator need not be a "person of faith" at all to utilize faith-guided principles in a secular mediation. All that is required is for the mediator to be sensitive to the possible significance of religious principles to a disputant and to have a general understanding about the implications of those principles in dispute resolution.[65]

Rodney Max, who is a Jewish attorney and mediator, gives three beautiful examples of how his recognition of the importance of religious principles in cases involving a Jewish disputant,[66] a Christian disputant,[67] and a Muslim disputant[68] allowed the disputants to overcome stubborn impasses that had appeared insuperable. For example, the health insurance provider of a Muslim wife with breast cancer refused to authorize aggressive chemotherapy and she died after receiving only standard chemotherapy. The husband promised his wife, on her deathbed, that he would "take her case to the highest court in the land to seek 'justice'."[69] After lengthy unproductive mediation between the husband and the insurer, the husband explained privately to Mr. Max the promise he had made to his wife. Fortunately, Mr. Max had sought assistance before the encounter from a Muslim friend, who provided the following verse from the Qur'an: "let not the hatred of others to you make you swerve to wrong and depart from justice. Be just—that is next to piety; and fear God. For God is well-acquainted with all that you do."[70] The case settled shortly afterward.

III. THE SECULAR COURTS AND FAITH-GUIDED DISPUTE RESOLUTION

In *Watson v. Jones*,[71] the United States Supreme Court demonstrated that it would not hesitate to become involved in controversies among church congregants when the controversies involved non-religious issues, such as ownership of church property. (Note that *Watson* was rendered in 1872, prior to adoption of the First Amendment to the United States Constitution.) In a case about a century later, Justice Rehnquist characterized *Watson* as

65. *See* Max, *supra* note 3, at 27.
66. *See id.* at 2-3.
67. *See id.* at 3-5.
68. *See id.* at 5-6.
69. *Id.* at 5.
70. Qur'an, Sura 5, Ayat 8.
71. *See* Watson v. Jones, 20 L.Ed. 666 (1872), *cited in* Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 728 (1976).

representing the Court's recognition that such disputes within churches were not significantly different from intraorganizational disputes that occur within any private voluntary association.[72]

The Supreme Court's view that secular courts can feel comfortable resolving church and religious disputes, so long as the courts don't get entangled in interpreting religious doctrine, was most recently reinforced in a case where an employment contract required Christian conciliation between a Christian school and a teacher in the event of an employment dispute.[73] In *Dayton Christian Schools*, the Court upheld the validity of the contract. The opinion is noteworthy as much for what wasn't said as for what was said. Nowhere in the opinion does the Court express any concerns or reservations about determining whether a Christian conciliation requirement was within the purview of the secular courts. Rather, the opinion appears to make an implied "well-settled law" presumption that such inquiries are proper within bounds and that the only issues that need to be discussed in the opinion are the procedural errors alleged on appeal and the merits of the case, as controlled by contract law or other pertinent secular law.[74]

A recent Fifth Circuit case reflects a similar implied "well-settled law" presumption, in another case involving a Christian school, one of its teachers, and a requirement to deal with disputes using Christian conciliation principles.[75] Nowhere in the opinion does the court mention the need to be circumspect about dealing with matters related to religion. Rather, the court launches directly into evaluation of the contract using ordinary contract law.

The Beaumont Court of Appeals was faced with yet another controversy between a Christian school and one of its teachers.[76] Except for an extended quotation from the employment contract setting forth the dispute resolution mechanism as being Christian conciliation, the opinion reads as an ordinary contract interpretation case. The Minnesota Court of Appeals dealt with a commercial dispute between two Muslims with only a brief mention of the arbitration clause in their partnership agreement requiring Islamic

72. *See* Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 728 (1976) (Rehnquist, J., dissenting).

73. *See* Ohio Civil Rights Comm'n v. Dayton Christian Sch., 477 U.S. 619 (1986).

74. *See id.*

75. *See* Prescott v. Northlake Christian Sch., 369 F.3d 491 (5th Cir. 2004).

76. *See* Woodlands Christian Academy v. Logan, 1998 Tex. App. LEXIS 3185 (1998).

arbitration[77] and no discussion whatsoever about possible entanglement with interpretation of religious doctrine.

The above-cited cases are merely representative of the general trend of modern cases involving Christian conciliation, Judaic arbitration,[78] and Islamic arbitration.[79] The following quote from *Elmore Hebrew Center* is typical of the minimal amount written in court opinions, if anything at all is written:[80]

> courts have the power, and perhaps a duty as well, to enforce secular contract rights, despite the fact that the contracting parties may base their rights on religious affiliations . . . a court may, where appropriate, apply neutral principles of law to determine disputed questions that do not implicate religious doctrine.

Thus, courts today treat faith-guided conciliation and arbitration clauses and agreements no differently than they treat secular mediation and arbitration clauses, after making a minimal inquiry to ensure no entanglement with interpretation of religious doctrine.

IV. INVOLVEMENT OF PEOPLE OF FAITH IN LITIGATION

As shown in Table 1,[81] almost 80% of the people in the United States consider themselves to be a "person of faith." The three predominant religions — Christianity, Judaism, and Islam — account for 98.9% of the five listed religions.[82] Section III demonstrated for all three religions the centrality of private peacemaking among believers, and between believers and non-believers. This section assesses the potential impact on the U.S. federal and state court systems if adherents of these religions were to comply with their religions' teachings that disputes be resolved without resort to the secular courts.

77. *See* Abd Alla v. Mourssi, 680 N.W.2d 569, 570 (Minn. Ct. App. 2004).

78. *See* Elmora Hebrew Ctr., Inc. v. Fishman, 593 A.2d 725 (N.J. 1991).

79. *See* Jabri v. Qaddura, 108 S.W.3d at 404-15.

80. *See* Elmora Hebrew Ctr., Inc. v. Fishman, 593 A.2d at 729-30.

81. Adherents.com, Top Twenty Religions in the United States 2001, http://www.adherents.com/rel_USA.html (last visited Feb. 2005).

82. *Id.*

TABLE 1. MAJOR U.S. RELIGIOUS GROUPS (2001)

Religious Preference	Percentage of U.S. Population
Christian	*76.5%
Nonreligious/secular	13.2%
Judaism	*1.3%
Islam	*0.5%
Buddhism	*0.5%
Agnostic	0.5%
Atheist	0.4%
Hinduism	*0.4%
Total Religious (* entries)	**79.2%**

Statistically strong data regarding the participation of "people of faith" in civil litigation are not gathered by federal or state governmental units. The data presented in this section (except for the caseload data in Table 3) were obtained primarily from a "religious" website and from a lawsuit-reform website. These sources may very well be biased and the data may be less reliable as a result, but for purposes of making the very rough calculations presented in this section they are acceptable.

The non-profit interest group Public Citizen found only four court systems that gathered data identifying whether a lawsuit had been filed by a business or by an individual (Table 2). Fortunately, two of the court systems represent largely rural populations and two represent large urban populations.

TABLE 2. BUSINESS VERSUS NON-BUSINESS LAWSUITS (2002)[83]

Jurisdiction	Business	Non-Business	Ratio
Mississippi	45,891	7,959	5.8
Arkansas	20,868	4,786	4.4
Philadelphia, PA	64,698	19,751	3.3
Cook County, IL	137,890	26,938	5.8
Overall Average			**4.8 ± 1.2**

83. *U.S. Businesses File Four Times More Lawsuits Than Private Citizens and Are Sanctioned Much More Often for Frivolous Lawsuits*, PUBLIC CITIZEN, Oct. 4, 2004, http://www.citizen.org/pressroom/release.cfm?ID=1799 (last visited Feb. 2005).

Business lawsuits outnumbered non-business lawsuits in all four jurisdictions, with an average ratio of 4.8 and a range of 3.3 – 5.8 times more business lawsuits.[84]

TABLE 3. CIVIL TRIAL CASELOADS FOR TRIAL COURTS (2002)

Court System	Civil Cases Filed	Non-Business Civil Cases Filed (4.8:1 ratio)
Federal district courts	274,841[85]	57,258
All state trial courts	22,043,000[86]	4,592,292
Total State and Federal Cases Filed	**22,317,841**	**4,649,550**
Non-business cases filed by persons of faith (assuming 79.2% of population are persons of faith)		3,682,444
Percentage of **Total State and Federal Cases Filed** potentially involving persons of faith		16.5%

Data for federal and state caseloads were available from highly reliable sources. The overwhelming majority of cases are tried in state courts, as evidenced by the 80:1 ratio of state filings to federal filings.[87] The rightmost column of Table 3 first applies the business-to-non-business lawsuit average ratio (of 4.8) from Table 2 to the "Civil Cases Filed" column of Table 3, to obtain an estimate of the number of non-business lawsuits filed each year in the United States (4.6 million non-business lawsuits). Multiplying by the percentage of the population who consider themselves "people of faith" (roughly 80%, from Table 1) gives an estimate of about 3.7 million non-business lawsuits filed each year. Finally, the estimate of 3.7 million non-business lawsuits is divided by the "Total State and Federal Cases Filed" (22.3 million), yielding an estimate of 16.5%. Thus, about one of every six

84. *Id.*

85. JUDICIAL FACTS AND FIGURES, CIVIL CASES FILED BY JURISDICTION, http://www.uscourts.gov/judicialfactsfigures/ contents.html (last visited Feb. 2005).

86. NATIONAL CENTER FOR STATE COURTS, STATE COURT CASELOAD STATISTICS (2003), TABLE 7: REPORTED NATIONAL CIVIL AND CRIMINAL CASELOADS FOR STATE TRIAL COURTS 2002, http://http://www.ncsconline.org/D_Research/csp/2003_Files/2003_SCCS_Tables5-8.pdf (last visited Feb. 2005).

87. Based on dividing numbers found in Table 3.

lawsuits filed in the United States each year may have been filed by a person of faith, and about four of every five non-business lawsuits.

The estimates shown in Table 3 underestimate the number of lawsuit filings involving persons of faith, because the business filings undoubtedly include filings by businesses that cater to people of faith (bookstores that sell religious books, gospel music publishers, etc) and by businesses that are owned or managed by persons of faith. No reliable quantitative data could be found about these types of businesses. Inclusion of data about these businesses would cause a large increase in the percentage of "Total State and Federal Cases Filed" shown in Table 3 since business filings outnumber non-business filings almost 5-to-1. For purposes of this paper, the 16.5% figure from Table 3 will be used, recognizing its rather gross but probably under-inclusive nature.

During an oral presentation of this material, a student suggested that it would be reasonable to think that the 79.2% of American who identify themselves (to pollsters)[88] with a religion are not uniformly educated about and adherent to the principles of their particular religious faith. This suggestion is not at all unreasonable, as shown by research data demonstrating that perhaps only about one-half of persons who identify themselves as church members actually attend religious services regularly.[89] Since these data are not any more definitive than the other data used in this article, no correction factor for the "less than fully adherent" believer is applied in the calculations in the following section.

V. WHAT IF PEOPLE OF FAITH DIDN'T FILE LAWSUITS?

If the gross assumption is made that people of faith are responsible for non-business lawsuits in proportion to their numbers in the U.S. population, about 16.5% of all (business plus non-business) lawsuits filed each year are filed by people of faith.[90] Looking only at the percentage-based impact, the overcrowded federal and state court systems might welcome the reduced caseload. Commentators probably would not be particularly concerned about the loss of case law precedent that would be caused by a 16.5% drop in caseload. Thus, the impact on the "vanishing trial" if all people of faith were to resolve their disputes without filing lawsuits would appear to be

88. *See supra* Table 1.

89. Kirk C. Hadaway and Penny Long Marler, *Did You Really Go to Church This Week? Behind the Poll Data*, THE CHRISTIAN CENTURY, 6 May 1998, at 472.

90. *See supra* Table 3.

relatively minor, if we were to rely on this calculation expressed as a percentage of total caseload (business plus non-business).

A more relevant datum is that almost 80% of all non-business lawsuits would involve people of faith. Conversely, only 20% of the current caseload would remain, i.e., of the estimated 4.6 million non-business lawsuits filed each year, less than one million would remain.[91] Of these roughly one million remaining lawsuits filed, only a very small fraction will actually result in a disposition by trial. In federal district courts, about 2% of cases filed ultimately were resolved by trial.[92] In state courts, jury trials comprised only 0.6% of dispositions, and bench trials comprised an additional 15.2%,[93] for a total of about 16%.

Applying the 2% (federal) and 16% (state) disposition-by-trial estimates to the remaining roughly one million lawsuits filed by non-believers, 20,000 – 160,000 such lawsuits would be resolved by trial each year. When these lawsuits are distributed among all of the pertinent courts nationwide, the actual number of lawsuits resolved by trial would be small in any given court and would be quite small in jurisdictions that serve small populations.

If we now make the assumption that people of faith are involved in the same spectrum of causes of action as non-believers, the effect of the small number of lawsuits estimated in the previous paragraph becomes more worrisome. Any one court or jurisdiction is likely to host only a very few cases of certain causes of actions. In federal courts, this will be less of a problem because most federal district court opinions are published in the *Federal Supplement*. Unfortunately, the overwhelming majority of state trial court opinions are unpublished, and the very small number of trial court-level dispositions result in a correspondingly very small number of appellate opinions, not all of which are published. The overall result of carrying a much smaller number of cases to disposition would be a much slower accretion of case law and precedent compared to today. Thus, when the impact of the disappearance of non-business lawsuits filed by people of faith is assessed in absolute terms, rather than as a percentage of all lawsuits, the impact is much greater.

The calculations presented in this section are based on many gross assumptions and should be used only to take a high-altitude look at the potential impact of people of faith refraining from filing lawsuits. These assumptions probably provide significant overestimates of the impact. Acting in the other direction, though, the missing information about faith-

91. *Id.*

92. Marc Galanter, *The Vanishing Trial: What The Numbers Tell Us, What They Mean*, 10 DISP. RESOL. MAG. 3 (2004).

93. *Id.* at 4.

guided businesses and businesses owned or managed by people of faith would likely offset some of the overestimates in the non-business lawsuit data and calculations.

Is it reasonable to even discuss the possibility that people of faith would turn away from the secular courts in significant numbers? Until the advent of the modern alternative dispute resolution (ADR) movement, the answer confidently would have been "no." Today, though, people of faith are beginning to notice the inroads being made in the secular court system by ADR and are recognizing that faith-guided ADR has been part of their religious tradition all along. Further, organized religions[94] and nondenominational ministries[95] are rediscovering scriptural commands to avoid the secular courts and implement faith-guided ADR/reconciliation programs. Thus, today it is reasonable to discuss the possibility that people of faith might turn away from the secular courts in significant numbers, but concededly over an extended period of time (probably decades).

VI. LESSENING THE IMPACT OF LOSS OF CASE LAW

As shown in Section V, the long-term loss of civil trials caused by faith-guided dispute resolution outside of the secular court system could be significant. Disappearance of such a large number of trials, and follow-on appeals, would lessen the rate at which new case law and precedents are developed.

Commentators have expressed concern that ADR and other trends in judicial procedures are gradually eroding the American judicial system's responsiveness to the system's goals; in one article, the erosion is said to be causing "the end of law" as we know it.[96] In Perschbacher and Bassett's view, "the law" has two primary purposes. First, the judicial system should create statutes, and case law interpreting statutes and constitutions, which establish behavioral norms and precedent to guide the personal and commercial behavior of citizens.[97] This function of the judicial system could be called setting "rules of the game."

94. *See, e.g.*, Presbyterian Peacemaking Program, http://www.pcusa.org/peacemaking (last visited Feb. 2005).

95. *See, e.g.*, Peacemaking Ministries, http://www.peacemaker.net (last visited Feb. 2005).

96. Rex R. Perschbacher & Debra Lyn Bassett, *The End of Law*, 84 B.U.L. REV. 1, 1 (2004).

97. *Id.* at 14-15.

The second purpose of the judicial system, according to Perschbacher and Bassett, is to "provide a public forum to resolve disputes."[98] They consider public adjudication to be important for communicating the "rules of the game" to the public at large and for providing public oversight of the judicial system to prevent corruption and other improprieties that are too easily hidden when dispute resolution occurs behind closed doors.[99]

Perschbacher and Bassett discuss a number of trends that, in their view, are particularly troublesome. They categorize these trends as privatizing law (mediation, arbitration, settlement, etc),[100] avoiding and obscuring law (appellate decisions resting on procedural rather than substantive grounds, unpublished opinions, etc),[101] and eradicating law (vacating of judgments when parties settle after judgment and during appeal, declaring a previously published opinion to be de-published, etc).[102] The underpinnings of their argument about public resolution of disputes are largely philosophical and beyond the scope of this article.

When disputes that previously would have been resolved by litigation are resolved privately, lawyers and parties preparing for trial, and courts in which the trials will take place, will have a more meager body of law upon which to rely. Additionally, efforts to reduce the workload of the courts have been directed to conserving the valuable time of judges by encouraging the non-publication of "run-of-the-mill" cases that "add nothing to the current state of the law."[103] Thus, not only is the addition of new case law diminished, but the case law which is published tends to be only unusual or "anomalous" rather than normative.[104] ""Normal" law springing from "normal" cases is being hidden from public view, leaving the unusual, abnormal, or grotesque cases and procedures to be highlighted."[105]

As a result, the outcome of trials would become more uncertain and unpredictable. Additionally, parties, lawyers, mediators, and arbitrators would have a meager and increasingly unrepresentative body of law to use as a reference to gauge potential settlements or to guide arbitral judgments.

I believe an information system could be developed that would compensate for much of the loss of case law due to faith-guided dispute resolution. Such a system would be based on voluntary or compelled

98. *Id.* at 15.
99. *Id.* at 17-21.
100. Perschbacher & Bassett, *supra* note 96, at 15-32.
101. *Id.* at 32-54.
102. *Id.* at 54-59.
103. *Id.* at 42-43.
104. *Id.* at 2.
105. Perschbacher & Bassett, *supra* note 96, at 60.

submission of selected information from mediations, arbitrations, and similar non-litigation dispute resolution methodologies.

An important condition precedent to the success of such a system is the development of a consensus about the "selected information" that would be submitted. Fortunately, the otherwise daunting process of obtaining agreement about the definition of "selected information" would not start from a clean slate, but should be based on the "selected information" that has been gathered from trial court and appellate opinions and transformed into "case law" for many years. In fact, an argument could be made that the information from unpublished trial and appellate opinions could be gathered in much the same way, thereby collecting data that is currently unavailable and further strengthening the database.

A. What is "Case Law"?

The term "case law" can be understood as the rules applicable to particular causes of action, sometimes in general, but also sometimes in light of particular circumstances. In deriving a rule of law from a case tried by a jury or a court, certain elements are extracted from the fact situation to provide a framework for the analysis. Without attempting to be exhaustive, a list of such elements would include characterization of the plaintiff(s) and the defendant(s) individually (e.g., natural persons, corporations); characterization of the relationship between plaintiff and defendant (e.g., buyer/seller, spouses, lessor/lessee); cause of action (e.g., tort, breach of contract, civil rights); relief sought (e.g., monetary, injunctive); jurisdiction; applicable statutes or administrative agency rules; and, case law used as support by each side.

Combining these elements, the court produces a "rule" that may be simply exact reiteration of an existing rule, modification of an existing rule, or development of a new rule ("case of first impression"). In general terms, the rule will be stated something like this: "In this jurisdiction, when a defendant of this type performs (or fails to perform) acts of the type characterized by this cause of action, a plaintiff of this type is entitled to the relief granted. This entitlement arises from statute (or, alternatively, administrative rules or case law)." As a fictional illustrative example, the rule might be: "In Texas, when an intoxicated driver strikes a pedestrian and causes serious bodily injury, the pedestrian is entitled to receive compensation for actual and consequential damages, based on both the Texas Penal Code and case law."

Implicit within the above description of "case law" is an explanation by the court of its reasoning, i.e., how and why the court reached the decision. Perschbacher and Bassett believe that judicial decisions should be written in a manner similar to the "detailed, step-by-step analysis that law professors expect in strong exam answers."[106]

B. How Would We Derive "Case Law" for ADR Cases?

Recall (from Section VI.A) the non-exhaustive list of elements used to develop a rule of law: (1) characterization of the plaintiff(s) and the defendant(s) individually; (2) characterization of the relationship between plaintiff and defendant; (3) cause of action; (4) relief sought; (5) jurisdiction; (6) applicable statutes or administrative agency rules; and, (7) case law used as support by each side. Each of these elements is also found in a mediation or an arbitration, and each would be equally important in deriving a rule from the outcome of a mediation or arbitration. Additional elements would be needed to fully describe the event (Table 4). A non-exhaustive list would include: (1) type of ADR method (e.g., mediation, arbitration, Christian conciliation, Judaic *Beth Din*); (2) number of third-party neutrals involved (e.g., two co-mediators, panel of three arbitrators); (3) relationship to litigation (e.g., pre-filing of lawsuit, post-discovery but pre-trial); and, (4) rules of procedure (e.g., Better Business Bureau rules, Institute of Christian Conciliation rules).

106. *Id.* at 62.

TABLE 4. INFORMATION NEEDED TO DEVELOP "RULES OF LAW"

Trial and Appellate Cases	ADR "Cases"
Status of parties (individuals, organizations)	Status of parties (individuals, organizations)
Relationship of parties	Relationship of parties
Cause of action	Cause of action
Relief sought	Relief sought
Jurisdiction	Jurisdiction
Applicable statutes or agency rules	Applicable statutes or agency rules, if any
Case law relied upon	Case law relied upon, if any
Analysis and reasoning	Analysis and reasoning
	ADR method(s) used
	Number of third-party neutrals used
	Relationship to litigation (e.g., pre-lawsuit, pre-trial)
	Rules of procedure followed

Given all of these elements, rules for ADR methodologies (mediation, arbitration, Christian conciliation, etc) could be derived using exactly the same logic as is used today for court cases.

C. Where Would We Get the Data?

As mentioned at the beginning of this Section, the data would be submitted voluntarily or by compulsion. In either scenario, the data would be suitably de-identified to protect the anonymity of the parties.

1. Voluntary Submission

Voluntary submission would be relied on when the compulsory reporting methods described later in this subsection are not applicable. As with any voluntary reporting mechanism, there are disadvantages that may be difficult or impossible to overcome. For example, some third-party neutrals may refuse to report any data on any ADR case, and some third-

party neutrals may report less than the full set of elements. But such lack of cooperation seems no more troublesome for the formulation of rules than the existence of unpublished opinions from the vast majority of state trial courts and from many state intermediate appellate courts.

2. Mandatory Submission

Mandatory submission of information about an ADR case probably would need to arise from legislative action, though an argument could be made that the reporting of data from court-annexed ADR "cases" could be required by the courts sending the cases to the ADR arena. As a general rationale, mandatory submission of data could be required whenever the authority of a court is invoked or whenever the subject matter involves constitutionally-guaranteed rights or other matters in which the government can demonstrate a legitimate governmental interest.

Without attempting to be exhaustive, ADR cases from which suitably de-identified ADR data could be required would include: court-annexed cases, where the court required the ADR event and where any settlement is incorporated in the final judgment or settlement order; cases where a court did not require the ADR event but where the parties invoke the authority of the court to issue a court order memorializing the settlement agreement; cases where any party is a governmental unit; cases where any party is a "registered organization" created under the statutory authority of the state, (e.g., corporation, limited liability partnership); cases where the subject matter involves funding provided by a federal or non-federal governmental unit; and, cases where the subject matter touches on civil rights and other areas of public policy concern.

D. How Would We Manage This Information?

As with the development of rules of law, we need not start from scratch on a conceptual design for collection, storage, and analysis of information from ADR procedures, but rather we can base the ADR model on the case law model. Trial and appellate opinions are published in various reporters, both hardcopy and online. The publishers of the reporters, plus other companies, offer search and retrieval software by which anyone wishing to review the state of the law with respect to a particular topic may obtain case law information from any desired jurisdiction.

ADR "reporters" likely would take the form of online-only databases, but hardcopy versions could be published if there was a commercial demand for them. One illustration of this is a single "ADR Reporter" into which all non-trial data are submitted; I also could imagine having a "Mediation

Reporter," an "Arbitration Reporter," and an "Other ADR Reporter." For mandatory submissions, the third-party neutral would be assigned responsibility for organizing and submitting the data; for voluntary submissions, the third-party neutral also would be the obvious person. With careful design, input software could be structured in a way to allow the required elements to be captured with mostly check-boxes and a minimum of "fill in the blank" responses. The third-party neutral herself could enter the data directly online, or commercial services would spring up to whom the information would be submitted.

The software used by commercial services to search and retrieve case opinions would need very little modification to be used with ADR case information. For example, the "names of parties" search function would be replaced by "status of parties" and "relationship of parties" fields. Other than minimal modifications to add a few new search fields, the software for ADR cases would be very familiar to persons already using current software for court cases and would require very little additional training for such persons to become effective users.

E. Summary

In this Section, I have proposed (in broad conceptual terms) a method by which "ADR case law" could be captured and made available for use in litigation and in ADR cases. Selected information would be submitted to an "ADR Reporter" database on a voluntary or mandatory basis. The "ADR Reporter" would be searched and used for retrieval of case information in the same way as the federal and state reporters are currently used for court cases. Thus, a migration of disputes from the secular court system to either secular ADR cases or faith-guided dispute resolution would not necessarily lead to a crippling loss of precedent for the guidance of future cases.

VII. CONCLUSION

In the major religious traditions in the United States (Christianity, Judaism, and Islam), God (Allah) forgives the sins of humans freely, but only when humans atone for the sins they have committed and forgive the sins committed against them by others.[107] Each of these religions commands or strongly urges its members to resolve disputes privately, without resort to the secular courts except in extremely limited circumstances.

Almost 80% of Americans characterize themselves as Christians, Jews, or Muslims.[108] If people of faith are filing lawsuits today in proportion to their numbers in the population, their lawsuits constitute the predominant fraction of all non-business lawsuits. Disappearance of these lawsuits would deliver a potentially crippling blow to the accretion of new case law for causes of action filed by individuals.

The success of the secular ADR movement is spurring efforts among people of faith to employ faith-guided ADR methods in preference to both secular ADR and secular litigation. In the short term, the effects of faith-guided dispute resolution are likely to be minimal. In the long run, the effects on secular ADR and litigation could be substantial, and negatively so.

Information from ADR "cases" could be collected in a manner analogous to that used today to collect trial and appellate opinions, i.e., electronic reporters. Current software would require only minor revision to accommodate ADR information, and users would need very little additional training. Adoption of this suggested "ADR Reporter" scheme would be a major step toward amelioration of the loss of trial and appellate case law by the shifting of disputes among people of faith to faith-guided dispute resolution.

107. *See* Max, *supra* note 3.

108. *See supra* Table 1.