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IN GOD WE TRUST (UNLESS WE CHANGE OUR MIND): HOW STATE OF MIND RELATES TO RELIGIOUS ARBITRATION

Skylar Reese Croy

ABSTRACT

Arguably, binding religious arbitration agreements are constitutionally problematic because they hinder freedom of religion: They inhibit parties' ability to change their beliefs. However, religious arbitration agreements also offer an outlet for the religiously inclined to further practice their beliefs.

This Article offers a middle ground: If a party to a religious arbitration agreement changes religion, he or she can claim a "conscientious objector" status if he or she can prove the agreement violates his or her sincerely held religious beliefs. Courts are allowed to inquire into the sincerity of a person's religious beliefs. The religious question doctrine—which restricts courts ability to decide questions of religion—does not apply to sincerity determinations. Courts should view conscientious objectors with skepticism in order to promote the national policies in favor of arbitration, freedom of contract, and the prevention of fraud. Courts can strike the proper balance between these policies and freedom of religion by using similar standards to those found in military regulations regarding conscientious objectors.

This Article's primary focus is on how courts can use religious sincerity. However, it ends by noting a second example of how state of mind can help avoid tricky religious questions. Recently, a former member of the Church of Scientology tried to escape a religious arbitration agreement by arguing it was unconscionable because the arbitrators were scientologists and the church teaches that members should shun those that leave. The court refused to look at whether the church actually taught this. The former member should have argued the individual arbitrators were biased, instead of focusing on church teachings. This Article concludes that the distinction between what parties or arbitrators believe—i.e., their state of mind—and what churches teach is a powerful tool.

I. INTRODUCTION

Susan and Boaz Avitzur “were married on May 22, 1966, in a ceremony conducted in accordance with Jewish tradition.”¹ In keeping with Jewish custom, the couple signed a marriage contract known as a *ketubah*.² The couple declared in the *ketubah* their “desire to . . . live in accordance with the Jewish law of marriage throughout [their] lifetime.”³ Importantly, this *ketubah* included a religious arbitration clause, which stated:

[We], the bride and bridegroom . . . hereby agree to recognize the Beth Din of the Rabbinical Assembly and the Jewish Theological Seminary of America or its duly appointed representatives, as having authority to counsel us in the light of Jewish tradition which requires husband and wife to give each other complete love and devotion, and to summon either party at the request of the other, in order to enable the party so requesting to live in accordance with the standards of the Jewish law of marriage throughout his or her lifetime. We authorize the Beth Din to impose such terms of compensation as it may see fit for failure to respond to its summons or to carry out its decisions.⁴

The New York Court of Appeals enforced the arbitration clause.⁵ It found that the arbitration clause merely imposed a secular contract obligation.⁶ Religious arbitration agreements, such as the Avitzurs’s, have grown in popularity.⁷ This rise is primarily due to two factors: (1) the legal community’s acceptance of arbitration more generally,⁸ and (2) the thinning of Judeo-Christian values from secular law,

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

² *Id.* See generally MICHAEL J. BROYDE, SHARIA TRIBUNALS, RABBINICAL COURTS, AND CHRISTIAN PANELS 51–56 (2017) (describing the complex nature of Jewish marriage contracts).

³ Avitzur, 446 N.E.2d at 137.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ BROYDE, *supra* note 2, at 3 (“Although controversial, religious arbitration has grown immensely since its inception. In fact, almost every religion in the United States has its own system for settling disputes, each of which function as an alternative to the civil courts.”).

⁸ *Id.* at 5–6 (“Judges shunned arbitration for a number of reasons. The most often cited factors were that arbitrators lack as robust an understanding of the law as judges, the lack of adequate judicial oversight of the arbitration process, and the lack of a binding effect. As time went on, however, and the body American contract law developed, courts became satisfied that individuals could contract with one another to make their future disputes subject to arbitration. Labor unions were one of the first groups to move in, quickly embracing it and testing its structural soundness. . . . Other groups then started occupying other

which has caused Christian communities to seek their own dispute resolution systems.⁹ U.S. Courts have generally enforced these arbitration agreements by reasoning that religious arbitration agreements impose mere secular contract obligations, just like the New York Court of Appeals did.¹⁰

Nevertheless, civil court enforcement of religious arbitration agreements and awards is particularly controversial.¹¹ Opponents' usual argument is that religious arbitration relies on religious law that generally disadvantages women.¹² Furthermore, they fear women may feel pressure from their religious communities to submit to arbitration.¹³ Indeed, Ontario banned religious arbitration for family disputes in 2006 following a quote from a Muslim leader that "good Muslims" would be expected to subject their family law disputes to resolution by the Sharia arbitration mechanism, rather than the state's civil court system and its secular family laws."¹⁴ Of course, whether these arguments pass muster is questionable.¹⁵

parts of the house . . . [A]s arbitrators specialized, groups of prospective arbitral parties were able to build de facto court systems within which to settle their disputes . . . As the class of arbitrable disputes grew, so did the groups who embraced the practice. Merchants, employers, and banks all began implementing it in some form or another.”)

⁹ *Id.* at 9 (“For some time, law in the United States was in very close alignment with Judeo-Christian values on many issues (race being the huge area of tension). . . . As the laws and principles of Americans have continued to develop in a more secular direction, these religious groups—especially Evangelical and mainline Protestant communities— whose religious beliefs were once perfectly reflected in the law—have realized they are now falling into the minority. . . . As secular law loses its Judeo-Christian roots, a trend that is likely to continue in the coming years, the people still rooted in Judeo-Christian values and traditions will continue to find other means for settling their disputes outside the court system . . .”).

¹⁰ *E.g.*, Nicholas Walter, *Religious Arbitration in the United States and Canada*, 52 SANTA CLARA L. REV. 501, 550 (2012) (citing *Encore Prod. V. Promise Keepers*, 53 F. Supp. 2d 1101 (D. Colo. 1999)) (“The court took the view that the agreement to undergo religious arbitration was a question of civil contract law, so a court could enforce it.”).

¹¹ *See generally id.*

¹² *E.g.*, *id.* at 542; Lee Ann Bambach, *The Enforceability of Arbitration Decisions Made by Muslim Religious Tribunals: Examining the Beth Din Precedent*, 25 J. L. & REL. 379, 413 (2009) (“Another serious criticism that is likely to be leveled at the use of Muslim religious tribunals in the United States is a concern over women’s rights, especially women who are seen as particularly vulnerable, such as recent immigrants or those in abusive relationships.”).

¹³ *E.g.*, Ori Aronson, *Out of Many: Military Commissions, Religious Tribunals, and the Democratic Virtues of Court Specialization*, 51 VA. J. INT’L L. 231, 241 (2011).

¹⁴ *Id.* at 241; *see also* Tabassum Fahim Ruby, *The Question of Muslim Women’s Rights and the Ontario Shari’ah Tribunals*, 34 FRONTIERS 134, 142–43 (2013) (discussing the perception of many Canadians that Muslim women were victims).

¹⁵ “Public outcry against religious arbitration has, thus far, been confined to ‘Islamophobia’ as there has not been an equivalent public reaction to more well-established Jewish or Christian versions of religious arbitration.” Aric Birdsell, Note, *Hosanna-Tabor and Culture Gap: A Case for Settling Church & Minister Employment Disputes Through Religious Arbitration*, 28 OHIO ST. J. ON DISP. RESOL. 519, 545 (2013) (citing Harvey Simmons, *One Law for All Ontarians*, TORONTO STAR, Sept. 14, 2010, <http://www.thestar.com/opinion/editorialopinion/article/860513--one-law-for-all-ontarians>); *see also* Bambach, *supra* note 12, at 413. Furthermore, one scholar has questioned whether civil courts are “better” for so-called “vulnerable” Muslim women. Ruby, *supra* note 14, at 149 (“Through the notion of gender equality opponents reproduced the notion of the ‘vulnerable’ Muslim woman who was a victim of her religion and in need of the

However, this Article focuses on a newer, less addressed argument.

Nicholas Walter, in an article published by the *Santa Clara Law Review*, has argued that religious arbitration infringes religious freedom.¹⁶ Specifically, Mr. Walter has argued that people have a constitutional right to change their religious beliefs.¹⁷ If a court requires someone who has changed his or her beliefs to undergo religious arbitration, the court subjects that person to a religious proceeding, arguably violating the Free Exercise Clause.¹⁸ Mr. Walter has taken this argument so far as to suggest “religious arbitrations have a deterrent effect on people changing faith” and thus, that religious arbitration agreements should not be enforced even if no party is claiming to have changed religions.¹⁹

Ultimately, this Article concludes that courts must allow some exception to otherwise binding religious arbitration agreements and awards for conscientious objectors thus addressing Mr. Walter’s concern.²⁰ This Article borrows the term “conscientious objector” from military regulations, which allow servicemembers to receive discharges—and thus escape contractual obligations—for religious beliefs. In the military realm, proving conscientious objector status is no easy task.²¹ This Article argues that courts should have a similar skepticism for conscientious objectors to religious arbitration. Because parties need some predictability in order to manage their expectations and contract accordingly, courts should generally enforce religious arbitration agreements. Other policies, such as the policies in favor of arbitration and the prevention of fraud, can also be encouraged by such skepticism.

protection offered by the tropes of liberal sensibilities. This position veiled the reality that the alternative offered to faith-based arbitration was a family court system that was already difficult to access for many women, particularly those with fewer economic resources. Critics overlooked the social realities of Muslim women (and men) and argued that state laws were the best mode available to protect the rights of Muslim women. This claim characterized the tropes of liberal sensibilities as neutral, as if such techniques would shield Muslim women from racism and sexism and as if Muslim women would automatically embrace civil laws over religious laws upon immigrating to Canada.”)

¹⁶ Walter, *supra* note 10, at 547–52.

¹⁷ *Id.*

¹⁸ *Id.* Some commentators have discussed possible Establishment Clause concerns as well. *See, e.g.,* Birdsell, *supra* note 15, at 546. However, “[c]ourts have consistently held that the enforcement of religious arbitration awards by secular courts poses no Establishment Clause concerns. Mandatory arbitration agreements have been consistently upheld as well.” *Id. Contra* Brian Hutler, *Religious Arbitration and the Establishment Clause*, 33 OHIO ST. J. DISP. RESOL. 337, 338 (2018) (“[T]he enforcement of religious arbitration agreements may constitute a delegation to religious institutions of a core governmental function, namely, the adjudication and enforcement of the private law.”).

¹⁹ Walter, *supra* note 10, at 551. Mr. Walter does allow for religious arbitration of questions that courts would be prohibited from answering under the religious question doctrine. *Id.* at 553–54. He finds this exception acceptable because of necessity: Someone has to resolve the dispute. *Id.* Problematically for his exception, its constitutionality probably cannot turn on mere necessity.

²⁰ *Id.* at 551.

²¹ John H. Matheson, *Conscientious Objection to Military Service*, THE FIRST AMENDMENT ENCYCLOPEDIA, <https://www.mtsu.edu/first-amendment/article/912/conscientious-objection-to-military-service>.

This Article proceeds in four parts. Part I surveys responses to Mr. Walter's argument in the scholarly literature. Part II explains a novel counterargument: Courts can determine religious sincerity. The religious question doctrine—which limits courts' ability to decide religious questions—does not apply.²² Part III explains how a court could perform a conscientious objector analysis in the context of religious arbitration. Part IV addresses two counterarguments. First, it explains why allowing religious sincerity determinations in the context of religious arbitration will not create a flood of people hoping to escape. Second, it explains why the religious question doctrine does not apply to religious sincerity determinations.

This Article concludes that state of mind determinations—such as determining sincerity—do not invoke the religious question doctrine and have a place in religious arbitration literature. This Article's conclusion briefly describes another state of mind determination—bias. Courts can determine whether a religious arbitrator is biased because a party has left the arbitrator's faith without invoking the religious question doctrine.²³ In summary, mental state is a powerful and unexplored tool in the world of religious arbitration.

II. FREEDOM OF RELIGION MEETS RELIGIOUS ARBITRATION

This part explains how scholars and litigants have reacted to Mr. Walter's argument. His argument has gone mostly unaddressed, despite being noted, with the exception of one article discussed below.²⁴ Indeed, the weight of scholarly literature argues that freedom of religion is promoted by enforcing religious arbitration agreements, yet his argument stands without a proper counter.

A. *Mixed Messages from Professor Broyde*

Professor and Rabbi Michael J. Broyde's acclaimed book, *Sharia Tribunals, Rabbinical Court, and Christian Panels*, has an entire chapter that is nothing but a summary of the background section of Mr. Walter's article.²⁵ The chapter contains sixty-eight citations, all to Mr. Walter's article.²⁶ Later in the book, without acknowledging Mr. Walter as the source, he stated Mr. Walter's argument "raises serious questions about whether and to what extent secular enforcement of religious arbitration can be achieved without seriously abridging individuals' rights to freely

²² See generally Nathan S. Chapman, *Adjudicating Religious Sincerity*, 92 WASH. L. REV. 1185 (2017).

²³ Jeff Dasteel, *Religious Arbitration Agreements in Contracts of Adhesion*, 8 Y.B. ON ARB. & MEDIATION 45, 63–64 (2016).

²⁴ Broyde, *infra* note 31.

²⁵ BROYDE, *supra* note 2, at 71–82.

²⁶ *Id.*

choose, change, and practice religion as their own consciences dictate.”²⁷ He acknowledged the force of an argument analogous to Mr. Walter’s by scholar Ayelet Shachar that ordering a Jewish husband “to appear before a rabbinical court . . . would have been ‘an impermissible breach of the husband’s constitutionally protected freedom of religion.’”²⁸ The book, unfortunately, did little more than acknowledge the argument.²⁹ In one recent article authored by Professor Broyde, he walked through various arguments against religious arbitration, and even though Professor Broyde again cited Mr. Walter’s article, he did not address its underlying argument.³⁰ One of the few responses to Mr. Walter’s argument occurs in a mere footnote toward the end of another article by Professor Broyde:

The question of whether religious arbitration of secular matters could and should be prohibited by statute is discussed . . . [by Mr.] Walter . . . and he concludes that such arbitration should be prohibited. Putting aside the religious discrimination problem of the government allowing all arbitration other than religious arbitration, I think the policy concerns that he worries about—that religious arbitration curtails the right of people to change their faith (the “exit” problem)—strikes me as not important when religious arbitration is viewed as just another form of contract. Of course, by contract, one can and does abandon deeply held constitutional rights and loses one’s right to change one’s mind. A person by contract can forsake his right to work as a journalist (a First Amendment right), to bear arms (a Second Amendment right), the right to a jury trial (a Seventh Amendment right), and many other rights. Free exercise rights are no more jeopardized by enforcing contracts for religious arbitration than contractual waiver of a right to trial by jury endangers jury trial rights.³¹

Notably, this footnote is at odds with Professor Broyde’s book. More importantly for this Article, Professor Broyde’s footnote does not engage with Mr. Walter’s argument that freedom of religion is different from other rights because it is

²⁷ *Id.* at 233; accord Walter, *supra* note 10.

²⁸ BROYDE, *supra* note 2, at 233 (quoting Ayelet Shachar, *Privatizing Diversity: A Cautionary Tale from Religious Arbitration in Family Law*, 9 THEORETICAL INQ. L. 573, 595 n.52 (2008)).

²⁹ *Id.*

³⁰ Michael J. Broyde, *Playground Resurfacing and Religious Arbitration Are Very Similar Activities: Trinity Lutheran Church as Applied to Religious Arbitration*, 18 RUTGERS J. L. & REL. 298 (2017).

³¹ Michael J. Broyde, *Faith-Based Private Arbitration as a Model for Preserving Rights and Values in a Pluralistic Society*, 90 CHI.-KENT L. REV. 111, 139 n.122 (2015).

inalienable.³² Mr. Walter pointed out that James Madison painstakingly:

explain[ed] why the right to religion was inalienable. It was inalienable both because “the opinions of men, depending only on the evidence contemplated by their own minds, cannot follow the dictates of other men;” and because it is the “duty of every man to render to the Creator such homage, *and such only*, as he believes to be acceptable to him.”³³

As Mr. Walter’s explained, the U.S. Supreme Court has often used James Madison’s language—that freedom of religion “is in its nature an unalienable right.”³⁴

B. The Religious Freedom Restoration Act (RFRA) Solution

Professor Jeff Dasteel proposed a solution, similar to this Article’s, in order to address Mr. Walter’s argument: Use the RFRA.³⁵ The RFRA, in relevant part, states:

(a) In General Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

(b) Exception Government may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means for furthering that compelling governmental interest.³⁶

³² Walter, *supra* note 10, at 548–49.

³³ *Id.* (quoting James Madison, *Memorial and Remonstrance Against Religious Assessments*, in CONSTITUTIONAL DEBATES ON FREEDOM OF RELIGION: A DOCUMENTARY HISTORY 48, 50 (John J. Patrick & Gerald P. Long eds., 1999)) (emphasis added).

³⁴ *Id.* at 548 & n.319 (citing *Wallace v. Jaffree*, 472 U.S. 38, 53 n.38 (1985); *Everson v. Bd. of Educ.*, 330 U.S. 1, 12 (1947); *id.* at 37 & App. (Rutledge, J., dissenting); *Walz v. Comm’n*, 397 U.S. 705 & App. II (1970) (Douglas, J., dissenting)).

³⁵ Jeff Dasteel, *supra* note 23, at 45. However, he does not cite Mr. Walter. *Id.*

³⁶ 42 U.S.C. § 2000bb–1 (2018).

In addition to the RFRA, he argued, “where there is a sincere religious objection to religious arbitration in a contract of adhesion and the court is prevented from ruling on that objection due to the non-interference doctrine, the court should abstain from ruling on the application to compel arbitration.”³⁷ For example, Professor Dasteel considered the *Garcia* case, discussed below.³⁸ In this case, one of the major issues was whether the arbitrators were biased given that the plaintiff had left the church of Scientology and that the arbitrators were scientologists.³⁹ The plaintiff, unwisely, framed his argument in terms of church doctrine: that scientologists were taught to be biased against him for leaving.⁴⁰ Instead of deciding whether the arbitrators were biased, Professor Dasteel would have had the judge abstain from deciding the case at all, out of fear that the inquiry would necessarily entail looking at church teachings.⁴¹ This Article argues that bias is a state of mind, and thus a court does not have to look into religious teachings.

On a final note, Professor Dasteel, while discussing some cases, made very little effort, unlike this Article, to discuss what a sincerely held belief looked like.⁴² He does say those wishing to escape must have a “good faith belief.”⁴³ After discussing some cases, he merely states, “a court can assess whether a party asserts the RFRA as a defense to compelling religious arbitration based on that party’s sincere religious beliefs as a matter of factual inquiry, something courts are able to do and have done with some frequency in the past.”⁴⁴

C. *The “Court” of Scientology*

In addition to scholars, litigants have also jumped on Mr. Walter’s argument.⁴⁵ Parties hoping to escape religious arbitration agreements have recently started to use it—at least when talking to the media.⁴⁶ For example, Luis Garcia, a

³⁷ Dasteel, *supra* note 23, at 60.

³⁸ *Id.* at 56-60.

³⁹ See Part VI for a more detailed discussion.

⁴⁰ See *infra* Part VI.

⁴¹ Dasteel, *supra* note 23, at 65 (“If a party to a contract of adhesion contends that the arbitration agreement is unconscionable on religious grounds, the court cannot make a ruling on unconscionability. Thus, in *Garcia*, if the determination of whether to grant Scientology’s application to compel arbitration turned on whether the religious arbitration agreement was substantively unconscionability [sic], and that determination required determination of an ecclesiastical issue, then the court should refrain from both making the determination of substantive unconscionability and abstain from deciding the motion to compel arbitration.”).

⁴² *Id.* at 63–65.

⁴³ *Id.* at 66.

⁴⁴ *Id.* at 64.

⁴⁵ See generally Michael Corkery & Jessica Silver-Greenberg, *In Religious Arbitration, Scripture Is the Rule of Law*, N.Y. TIMES (Nov. 2, 2015), <https://www.nytimes.com/2015/11/03/business/dealbook/in-religious-arbitration-scripture-is-the-rule-of-law.html>.

⁴⁶ *Id.* (“Some plaintiffs counter that it is their First Amendment rights being infringed because they must

former member of the Church of Scientology, sued the church for fraud, demanding it return “roughly \$68,000 he had paid the church for training courses he never took and other expenses . . . [and] also demanding that the church return \$340,000 he said his family had given for the construction of a ‘Super Power’ building in Clearwater, Fla.”⁴⁷ The church moved, successfully, to enforce a religious arbitration clause.⁴⁸ Mr. Garcia complained to the *New York Times*, “I am being forced to go before a court run by a religion I no longer believe in How could that happen?”⁴⁹ Mr. Garcia’s complaint was essentially the same argument that Mr. Walter’s presented in his article: parties have a right to change their religions and courts should not interfere.⁵⁰

D. *The Need for Balance*

Mr. Walter’s argument needs to be addressed head-on. Problematically, it has been either accepted or rejected in its totality.⁵¹ Such is often and unfortunately the case with religious accommodations in general.⁵² As Professor Shachar explained in the 1990s, multiculturalist literature generally argued either for or against accommodations.⁵³ She argued nations must move away from “all-or-nothing” approaches to accommodations and recognize that some accommodations have significant value to society while at the same time realizing accommodations can hurt individuals.⁵⁴ The proper balance must be struck.⁵⁵ This Article is a step in that direction. The United States can support religious arbitration generally and at the same time have an escape mechanism for those with legitimate religious objections.

unwillingly participate in what amounts to religious activity.”).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *See generally id.*

⁵¹ *See* AYELET SHACHAR, MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN’S RIGHTS (2001).

⁵² *See id.* at 85.

⁵³ *See id.*

⁵⁴ *Id.* (“This chapter has sought to expose the fundamental problems underlying current theoretical and legal paradigms for dividing jurisdiction over individuals with multiple affiliations. They share one basic misguided assumption: that group members cannot be *simultaneously* subject to more than one source of legitimate legal authority. Whether explicitly or implicitly, current legal and theoretical thinking tends to assume that *either* the state *or* the group should exclusively govern group members’ affairs.”). *Id.* Notably for this Article’s purpose, Professor Shachar noted the need for what she called “reversal points.” *Id.* at 122. In other words, she believed there needed to be certain ways by which a member of a group could “opt out.” *Id.* at 122–23.

⁵⁵ *Id.*

III. UNCLE SAM AS THE JUDGE OF RELIGIOUS SINCERITY

Courts can achieve a middle ground by using religious sincerity.⁵⁶ Mr. Walter stated, “[A] court would not seek proof that someone who had agreed to enter into Christian arbitration, was in fact, a Christian. In any case, such an inquiry—determining the status of a party’s religion—would likely contravene the religious question doctrine.”⁵⁷ Mr. Walter is wrong, and this part of the Article lays the groundwork for understanding why. It begins with an overview of military conscientious objectors. Next, it discusses other kinds of religious sincerity inquiries in order to show such inquiries are quite common.

A. *Military Conscientious Objectors*

Military conscientious objector status represents, perhaps, the ultimate religious accommodation.⁵⁸ Before conscientious objector status, government overreach in the name of war was substantial.⁵⁹ Conscientious objector status, as it is understood today, has its origins in the 1917 Draft Act.⁶⁰ Prior to this point in history, those with religious objections to military service had little recourse.⁶¹ During the Civil War, “the Enrollment Act of 1863 allow[ed] draftees to pay \$300 to a substitute who served for them.”⁶² The Enrollment Act did little good for the common man, and in reality, it was mostly just a way for the rich to dodge military service.⁶³ Prominent men, such as Grover Cleveland, the future President, and John D. Rockefeller, took advantage of the Enrollment Act.⁶⁴ The 1917 Draft Act did a similarly poor job of helping the common man with religious objections.⁶⁵ “In effect, . . . [its] exemption was limited to members of the historic peace churches.”⁶⁶ Members of the Mennonite faith who refused to serve were often sent to hard labor camps.⁶⁷ In a letter, one Mennonite wrote:

⁵⁶ See generally Walter, *supra* note 10, at 549.

⁵⁷ *Id.*

⁵⁸ Matheson, *supra* note 21.

⁵⁹ Timothy G. Todd, Note, *Religious and Conscientious Objection*, 21 STAN. L. REV. 1734, 1734 (1969).

⁶⁰ See *id.*

⁶¹ Michael T. Meier, *Civil War Draft Records: Exemptions and Enrollments*, GENEALOGY NOTES, Winter 1994, <https://www.archives.gov/publications/prologue/1994/winter/civil-war-draft-records.html>.

⁶² *Id.*

⁶³ Matheson, *supra* note 21.

⁶⁴ Meier, *supra* note 61.

⁶⁵ Donald Eberle, *The Plain Mennonite Face of the World War One Conscientious Objector*, 3 J. AMISH & PLAIN ANABAPTIST STUD. 175, 178 (2015).

⁶⁶ Todd, *supra* note 59, at 1734.

⁶⁷ As one scholar noted:

A total of 20,873 men made conscientious objector claims to their local boards, and were subsequently inducted into the army. Just 3,989 of these men actually

Today some of us had the hardest experience that we have had since we came to camp. We were cursed, beaten, kicked, and compelled to go through exercises to the extent that a few were unconscious for some minutes. They kept it up the greater part of the afternoon, and then those who could possibly stand on their feet were compelled to take cold shower baths. One of the boys was scrubbed with a scrubbing brush, using lye on him. They drew blood in several places.⁶⁸

Before the United States entered World War II, Congress passed the Selective Service Act of 1940, which “broadened the conscientious objection exemption.”⁶⁹ Today, individuals may not only escape military service by gaining conscientious objector status but may also sign away their souls to Uncle Sam and then change their minds.⁷⁰ Department of Defense Directive (“DoDD”) 1300.06 explains:

a. Service member may be granted an administrative separation, or restriction of military duties, due to conscientious objection before completing his or her obligated term of service based on the Service member’s respective Military Department’s judgment of the facts and circumstances in the case.

* * *

d. Due to the personal and subjective nature of conscientious objection, the existence, honesty, and sincerity of asserted conscientious objections cannot be determined by applying inflexible objective stands and measurements on an “across-the-board” basis.

* * *

b. A primary factor to be considered is the sincerity with which the religious, moral, or ethical belief is held. Great care

claimed conscientious objector status in camp. Certainly, the physical and mental duress and “inhuman treatment” designed to test the “genuineness” of their convictions convinced many to drop their claim.

Eberle, *supra* note 65.

⁶⁸ Letter reprinted in JONAS SMUCKER HARTZLER, *MENNONITES IN THE WORD WAR: OR, NONRESISTANCE UNDER TEST* 123 (1921).

⁶⁹ Todd, *supra* note 59, at 1734–35.

⁷⁰ U.S. DEP’T OF DEF., *DoD INSTRUCTION 1300.06 CONSCIENTIOUS OBJECTORS* (2017) (emphasis added).

must be exercised in seeking to determine whether asserted beliefs are honestly and genuinely held.

- (1) Sincerity is determined by an impartial evaluation of the applicant's thinking and living in its totality, past and present.⁷¹

Such an out for conscientious objectors is necessary in order to prevent the substantial government overreach of the past from reoccurring.⁷² However, it also presents the kind of accommodation that is most problematic: one with substantial externalities.⁷³ Indeed, it is hard to think of a public policy more important than having sufficient soldiers during wartime. Furthermore, it may be unfair to let some people avoid the draft merely on religious grounds, requiring others to fight in their place.⁷⁴ “Both advocates and critics of multiculturalism have given much attention to the potential for accommodation to erode the social unity of already diverse polities. They are quite reasonably concerned that such societies will lose whatever ‘social glue’ holds their citizens together.”⁷⁵

Nevertheless, the current regulation is quite clear: A service member can receive a discharge for a change in religious beliefs but only after a substantial inquiry into the sincerity of the beliefs.⁷⁶ The fact that society is willing to bear this cost has two implications for this Article. First, religious arbitration, in general, seems like a minor accommodation. Second, someone with a legitimate objection to religious arbitration should seemingly be able to change his or her mind.

B. *United States v. Seeger*

Various religious accommodation cases trace their origin back to a case interpreting the Universal Military Training and Service Act, called *United States v. Seeger*.⁷⁷ During the Vietnam War, Daniel Andrew Seeger had been convicted of “refus[ing] to submit to induction in the armed forces.”⁷⁸ The case was one of statutory, and not constitutional, interpretation.⁷⁹ The Court had to interpret, *inter*

⁷¹ See DoDD 1300.06 (2017).

⁷² See *id.*

⁷³ See *id.*

⁷⁴ Matheson, *supra* note 21.

⁷⁵ SHACHAR, *supra* note 51, at 1.

⁷⁶ See DoDD 1300.06 (2017).

⁷⁷ See generally *United States v. Seeger*, 380 U.S. 163 (1965). For example, the case discussed *infra*, *Kay v. Bemis*, cites *Snyder v. Murray City Corp.*, which in turn cites *Seeger*.

⁷⁸ *Id.* at 166.

⁷⁹ *Id.* at 176. However, the Second Circuit decided a section of the law in question was unconstitutional because it “discriminate[d] against those whose sincere objection to war [wa]s founded upon grounds

alia, the phrase “religious training and belief.”⁸⁰ The majority explained, as a threshold matter, a religious belief had to be “sincere.”⁸¹ The Court emphasized the subjective nature of sincerity and how it is different from whether a person’s beliefs are correct:

The validity of what . . . [the objector] believes cannot be questioned. Some theologians, and indeed some examiners, might be tempted to question the existence of the registrant’s “Supreme Being” or the truth of his concepts. But these are inquiries foreclosed to Government. “Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others.” Local [draft] boards and courts in this sense are not free to reject beliefs because they consider them “incomprehensible.” Their task is to decide whether the beliefs professed by a registrant are sincerely held and whether they are, in his own scheme of things, religious.⁸²

The takeaway from *Seeger* is that sincerity cannot be based on the correctness or perceived validity of one’s beliefs.⁸³ Furthermore, as Justice William Douglas explained in his concurrence, questions and doubts are natural and thus not alone sufficient to find a lack of sincerity.⁸⁴

C. Other Areas Where Courts Inquire into Religious Sincerity

Notably, *Seeger* was a statutory interpretation case.⁸⁵ However, constitutional claims often have a religious sincerity inquiry as well. Inquiries into religious sincerity are common in various areas of law.⁸⁶ In addition to conscientious objection status, other areas of law where religious sincerity is judged include:

other than belief in a Supreme Being.” Todd, *supra* note 59, at 1738 (citing *United States v. Seeger*, 326 F.2d 846, 854 (2d Cir. 1964)). “The Supreme Court refused to rule on the constitutional issues raised by *Seeger*.” *Id.*

⁸⁰ *Seeger*, 380 U.S. 163 at 176.

⁸¹ *Id.*

⁸² *Id.* at 184–85 (internal citations omitted).

⁸³ *Id.* at 176.

⁸⁴ *Id.* at 193. (Douglas, J., concurring) (“His questions and doubts on theological issues, and his wonder, are no more alien to the statutory standard than are the awe-inspired questions of a devout Buddhist.”).

⁸⁵ *Id.* at 163.

⁸⁶ See *Generally* Chapman, *supra* note 22, at 1188.

“fraud; immigration; employment discrimination; [and] prisoner religious accommodations.”⁸⁷

The prisoner accommodation cases are particularly intriguing. For example, Karl Dee Kay was a prisoner at the Bonneville Community Correctional Facility in Utah.⁸⁸ He filed a lawsuit alleging, *inter alia*, First Amendment violations under 42 U.S.C. § 1983.⁸⁹ He made three allegations relevant to this Article: First, he claimed that corrections “officials not only denied his requests for tarot cards but also confiscated them from him on two occasions when he brought them into [the correctional facility] ‘without permission.’”⁹⁰ Second, Mr. Kay claimed corrections officials disciplined him for these incidents.⁹¹ Third, Mr. Kay alleged that corrections officials “prohibited him from purchasing incense, and books with references to magic or witchcraft on the cover.”⁹²

As the district court judge explained, “[t]he first questions in any free exercise claim are whether a plaintiff’s beliefs are religious in nature, and whether those religious beliefs are sincerely held.”⁹³ In other words, a threshold question in the case was determining what Mr. Kay actually believed.⁹⁴ The court held the complaint did “not allege facts showing that he was denied a reasonable opportunity to exercise his sincerely held religious beliefs.”⁹⁵

The district court erred by concluding the complaint failed to state a claim.⁹⁶ It based its holding on the fact that the complaint did not identify Mr. Kay’s religious affiliation.⁹⁷ It also noted that the complaint did “not allege any facts from which one could conclude that his beliefs are sincerely held,” nor did the complaint allege “any facts showing that the items allegedly denied to him—tarot cards, incense, and books about magic or witchcraft—are necessary to the practice his religion.”⁹⁸

The Tenth Circuit noted on appeal that, as a preliminary matter, the trial judge was simply wrong—the complaint clearly stated Mr. Kay identified as a Wiccan.⁹⁹ More importantly, however, the court took issue with how the district court reached its religious sincerity determination given the case’s procedural posture:

⁸⁷ *Id.*

⁸⁸ *Kay v. Bemis*, 2007 U.S. Dist. LEXIS 6392 (D. Utah 2007), *aff’d in part and rev’d in part*, 500 F.3d 1214.

⁸⁹ *Id.* at *1.

⁹⁰ *Id.* at *3.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at *7 (quoting *Snyder v. Murray City Corp.*, 124 F.3d 1349, 1352 (10th Cir. 1997), *vacated in part by* 159 F.3d 1227 (1998)) (emphasis added).

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at *7.

⁹⁸ *Id.* at *8.

⁹⁹ *Kay*, 500 F.3d at 1219.

The inquiry into the sincerity of a free-exercise plaintiff's religious beliefs is almost exclusively a credibility assessment, . . . and therefore the issue of sincerity can rarely be determined on summary judgment," let alone a motion to dismiss We have said that summary dismissal on the sincerity prong is appropriate only in the "very rare case[]" in which the plaintiff's beliefs are "so bizarre, so clearly nonreligious in motivation that they are not entitled to First Amendment protection." . . .

[I]t is unnecessary for [Mr.] Kay to show that the use of tarot cards and the other items were "necessary" to the practice of his religion if his belief in their use was sincerely held.¹⁰⁰

Other cases have sanctioned similar inquiries.¹⁰¹ Of note, these cases often cite *Seeger*, discussed above.¹⁰²

The Tenth Circuit did note a circuit split relevant to this Article: Other circuits have considered the necessity or centrality of an accommodation to a sincere belief.¹⁰³ The problem with determining necessity, however, is that it borders along the edge of the religious question doctrine.¹⁰⁴ As the Tenth Circuit noted, "courts have rightly shied away from attempting to gauge how central a sincerely held belief is to the believer's religion."¹⁰⁵

IV. UNCLE SAM CAN SOLVE MR. WALTER'S CONCERN

Recall that Mr. Walter's primary concern with religious arbitration was that it limited religious freedom by constraining parties' ability to change or abandon their religious beliefs.¹⁰⁶ However, because courts can inquire into the sincerity of religious beliefs, Mr. Walter's concern is of limited significance. This Part draws on military regulations for determining conscientious objector status ultimately arguing courts could make a similar inquiry in order to determine whether someone should

¹⁰⁰ *Id.* at 1219–20 (quoting *Snyder*, 124 F.3d at 1352–53).

¹⁰¹ *E.g.*, *Salahuddin v. Goord*, 467 F.3d 263, 274–75 (2d Cir. 2006) ("The prisoner must show at the threshold that the disputed conduct substantially burdens his sincerely held religious beliefs."); *Ford v. McGinnis*, 352 F.3d 582, 588–91 (2d Cir. 2003).

¹⁰² *Ford*, 352 F.3d at 588 (quoting *United States v. Seeger*, 380 U.S. 163, 185 (1965)).

¹⁰³ *Kay*, 500 F.3d at 1220 (citing *Freeman v. Arpaio*, 125 F.3d 732, 737 (9th Cir. 1997)).

¹⁰⁴ *See generally* *Walter*, *supra* note 10, at 523.

¹⁰⁵ *Kay*, 500 F.3d at 1220 (quoting *Watts v. Fla. Int'l Univ.*, 495 F.3d 1289 (11th Cir. 2007)).

¹⁰⁶ *See generally* *Walter*, *supra* note 10, at 549–52.

be released from a religious arbitration agreement. The burden on a party seeking to exit a religious arbitration agreement ought to be high in order to further three policies: (1) the national policy in favor of enforcing arbitration agreements; (2) freedom of contract; and (3) the prevention of fraud.¹⁰⁷ Thankfully, as this part shows, the standard relied on by the military is quite difficult to meet.

A. The Military's Eight Step Process

The military uses an eight-step process:

[1.] The service member submits an application for conscientious objector status [to the commanding officer.]

[2.] The commanding officer . . . assigns a military chaplain and a psychiatrist to conduct required interviews.

[3.] The applicant's commanding officer appoints an investigating officer.

[4.] The investigating officer holds an informal hearing.

[5.] The investigating officer prepares a report, including a recommendation to approve or deny the application.

[6.] The commanding officer reviews the record and makes a recommendation to approve or deny the application.

[7.] [The] authorized official or board [reviews the record and] makes the final decision [to either approve or deny the application] and informs the commanding officer.

[8.] The commanding officer . . . informs the applicant of the final decision.¹⁰⁸

A few takeaways are important from this process. First, note that the process involves a religious expert, the chaplain, and a mental health professional,

¹⁰⁷ Hall St. Assocs., LLC v. Mattel, Inc., 552 U.S. 576, 588 (2008) (stating that §§ 9–11 of the Federal Arbitration Act should be read as substantiating a national policy favoring arbitration with limited review needed to maintain arbitration's essential function of resolving disputes).

¹⁰⁸ GOV'T ACCOUNTABILITY OFFICE, MILITARY PERSONNEL: NUMBER OF FORMALLY REPORTED APPLICATIONS FOR CONSCIENTIOUS OBJECTORS IS SMALL RELATIVE TO THE TOTAL SIZE OF THE ARMED FORCES12–13 (2007), <https://www.gao.gov/assets/270/267693.pdf>.

the psychiatrist, who makes reports that are a part of the official record.¹⁰⁹ The use of these professionals must be with great care: religious sincerity determinations are not to reference accuracy or implausibility.¹¹⁰ The experts are there to help determine the credibility of the purported beliefs, but they have to understand what they are allowed to consider in their roles.¹¹¹ The chaplain's report is merely an "opinion on the sincerity and depth of the applicant's conviction . . ."¹¹² Similarly, the psychiatrist's report is a medical evaluation.¹¹³

Second, "[t]he applicant must present clear and convincing evidence of meeting *all* of the criteria for conscientious objector status."¹¹⁴ They must meet this burden on three separate elements: "(1) they are opposed to participation in any form of war; (2) their opposition is based on religious ethical, or moral beliefs; and (3) their beliefs are sincere and deeply held."¹¹⁵

The first element means that a servicemember cannot be a "selective conscientious objector."¹¹⁶ In other words, the applicant must oppose *all* war.¹¹⁷ For example, a Muslim could not object to war with a primarily Muslim nation on the ground that Muslims believe it is wrong to kill other Muslims.¹¹⁸ The other two elements relate to the nature and significance of the belief.¹¹⁹ Likely, any successful applicant will have to show these two elements by evidence of change in his or her life.¹²⁰ Recall Department of Defense Instruction 1300.06 states that "[s]incerity is determined by an impartial evaluation of the applicant's thinking and living in its totality, past and present."¹²¹ This statement suggests that how the applicant's life has changed is critical.¹²² What triggered the change? Did the applicant start attending religious ceremonies? Did the applicant begin going to Bible study? How significant was this life event? Are there witnesses that can attest the applicant has been reading a holy book for a significant period? Has the applicant voiced concern to witnesses over a prolonged period?

¹⁰⁹ *Id.*

¹¹⁰ See generally Chapman, *supra* note 22, at 1185.

¹¹¹ See generally GOV'T ACCOUNTABILITY OFFICE, *supra* note 108, at 12.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at 13.

¹¹⁵ *Id.* at 6.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ See Liz Halloran, *Will Hassan Case Prompt New Look at Objector Rules?*, NPR (Nov. 13, 2009, 8:05 AM), <https://www.npr.org/templates/story/story.php?storyId=120354216>.

¹¹⁹ GOV'T ACCOUNTABILITY OFFICE, *supra* note 108, at 1–2.

¹²⁰ *Id.* For example, a servicemember might point to a conversion to a different religion.

¹²¹ U.S. DEP'T OF DEF., DOD INSTRUCTION 1300.06 CONSCIENTIOUS OBJECTORS (2017) (emphasis added).

¹²² DoDD 1300.06 at 7 (when outlining what the application must include, the instruction states "(2) How the applicant's beliefs changed or developed to include an explanation as to what factors (how, when, and from whom or from what source training was received or belief acquired) caused the change in or development of conscientious objector beliefs.").

Perhaps one of the more telling examples of a change is the story of Joshua Casteel, who the Smithsonian has labeled, “The Priest of Abu Ghraib.”¹²³ Mr. Casteel was a young 24-year-old interrogator in a military intelligence unit.¹²⁴ Mr. Casteel deployed to Abu Ghraib a mere “six weeks after the revelation[s] of prisoner torture and abuse . . . shocked the world.”¹²⁵ Notably, shortly before the deployment, Mr. Casteel had been accepted to the seminary.¹²⁶ He already had doubts about war at this point, but he figured he could do it nonetheless.¹²⁷ In an email, he explained he felt he could bring a sense of “moral order to the interrogation room.”¹²⁸

Mr. Casteel soon realized how naïve he had been.¹²⁹ He began to feel “an overwhelming burden to atone for what . . . [he] considered the sin of reducing individuals to strategic ‘objects of exploitation.’”¹³⁰ He began seeking out a chaplain after each and every interrogation to hear his confession.¹³¹ He stopped eating lunch with his compatriots, choosing instead to eat with locals.¹³² He yo-yoed in weight, he smoked, and he drank “excessive amounts of coffee,” in an attempt to relieve his stress.¹³³ “He stayed up late reading because he didn’t want the next day to come.”¹³⁴ Reportedly, “[h]e read so much that even during mortar attacks he shopped for new books on Amazon.”¹³⁵ Typically, the books Mr. Casteel was reading had to do with “Christian pacifism.”¹³⁶ Mr. Casteel was able to identify a specific moment his worldview, which permitted war, came crashing down: he asked a prisoner, “[w]hy did you come to Iraq to kill,” and the prisoner rhetorically asked him the same question.¹³⁷ Mr. Casteel continued the interrogation, but had to stop shortly after and tell his superiors someone else needed to take over.¹³⁸ He later applied for conscientious objector status.¹³⁹

Mr. Casteel was able to point to a specific trigger: being an interrogator at Abu Ghraib.¹⁴⁰ Indeed, he could pinpoint the exact moment his worldview changed:

¹²³ Jennifer Percy, *The Priest of Abu Ghraib*, SMITHSONIAN.COM: AM. AT WAR (Jan. 2019), <https://www.smithsonianmag.com/history/priest-abu-grahib-180971013/#ErrwxF8uUuvkFxfU.99>.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

the prisoner's rhetorical question.¹⁴¹ Furthermore, his high stress level was evident from his yo-yoing weight fluctuations and cigarette use.¹⁴² Mr. Casteel could further show this stress was caused by his conflicted morality, as shown by him starting to go to a chaplain after each and every interrogation.¹⁴³ He also started to read books about Christian pacifism.¹⁴⁴ These are the kinds of life events that suggest a sincere change (or perhaps in Mr. Casteel's case, realization) of beliefs.¹⁴⁵

B. The Analogous Procedures for Religious Arbitration

These procedures can be paralleled with religious arbitration.¹⁴⁶ First, the burden of proof should be on the party seeking to escape enforcement.¹⁴⁷ Like in the military, the standard of proof should be clear and convincing evidence.¹⁴⁸ The party will have to show a change in his or her lifestyle that corresponds with the change in beliefs, similar to Mr. Casteel's story.¹⁴⁹

Parties should identify triggering life events of such significance that they reasonably may result in a change of beliefs.¹⁵⁰ Mr. Garcia, the former Scientologist discussed above, explained that he became skeptical once he "reached the highest level in Scientology, where he said all of one's past lives are supposed to be easily recalled."¹⁵¹ He was unable to recall his past lives.¹⁵² He also learned money he donated had been misappropriated, which led him to believe the church was a scam.¹⁵³

The party may also have to call expert witnesses.¹⁵⁴ In particular, religious experts and mental health professionals would be useful.¹⁵⁵ The experts would testify to their opinions about the nature and sincerity of the beliefs; they would not testify or even base their opinions on accuracy or implausibility.¹⁵⁶

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ See Michael Broyde, *The Rise and Rise of Religious Arbitration*, WASH. POST (June 26, 2017), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/06/26/the-rise-and-rise-of-religious-arbitration/?noredirect=on> (discussing the rise of religious arbitration).

¹⁴⁷ See Bill Galvin, *The Guide for COs in the Military*, CTR. ON CONSCIENCE & WAR (Aug. 2019), http://www.centeronconscience.org/images/stories/pdf/The_Guide_for_COs_in_the_Military.pdf.

¹⁴⁸ *See id.*

¹⁴⁹ Percy, *supra* note 123 (discussing Mr. Casteel's story).

¹⁵⁰ *Id.*

¹⁵¹ Corkery & Silver-Greenberg, *supra* note 45.

¹⁵² *Id.*

¹⁵³ *Scientologists Sue Church for Fraud*, YOUTUBE: ACTION NEWS (Jan. 23, 2013), <https://www.youtube.com/watch?v=g2nZ9nJQqGU>.

¹⁵⁴ *See Galvin, supra* note 147.

¹⁵⁵ *See id.* (discussing other elements of the process).

¹⁵⁶ *See id.*

The religious arbitration literature already contains one idea that might be helpful in this inquiry. Ontario Attorney General Marion Boyd noted when Ontario was considering a ban on religious arbitration, “Part IV of the Family Law Act should be amended so that if a co-habitation agreement or marriage contract contains an arbitration agreement, that arbitration agreement is not binding unless it is reconfirmed in writing at the time of the dispute and before arbitration occurs.”¹⁵⁷ A pre- versus post-dispute distinction is one factor to consider in a religious sincerity determination because the amount of time between the agreement’s origin and the dispute correlates with the probability of a change of belief.¹⁵⁸ Furthermore, a party would probably have to raise the argument before arbitration. A mere challenge to an arbitration award, after one has lost, seems much less sincere.

The exact nature these inquiries could take is hard to pin down. As the military regulations acknowledge, religious sincerity determinations do not lend well to any particular criteria.¹⁵⁹ Although the lack of objective criteria is problematic, it is no more problematic in the context of religious arbitration than in the context of the military.

V. SOME ELEPHANTS IN THE ROOM: OPENING A FLOODGATE AND THE RELIGIOUS QUESTION DOCTRINE

This Part addresses two counterarguments. First, will permitting some parties to escape religious arbitration on the ground that they changed beliefs open a floodgate? Second, why does the religious question doctrine not apply?

A. *Empirical Data on Conscientious Objectors*

One of the primary objections to using religious sincerity as an escape from religious arbitration agreements might be that it would be too easy for parties to disregard their obligations.¹⁶⁰ However, the empirical data for military conscientious objectors suggests this argument does not hold water.¹⁶¹

The Government Accountability Office created a report in 2007 on the

¹⁵⁷ MARION BOYD, DISPUTE RESOLUTION IN FAMILY LAW: PROTECTING CHOICE, PROMOTING INCLUSION (2004), <https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/executivesummary.html>; see also Birdsell, *supra* note 14, at 542 (noting a “traditional objection[] to religious arbitration . . . [is] pre-dispute pressure to choose religious arbitration”).

¹⁵⁸ *Id.* (discussing examples of religious arbitration techniques in other contexts that can be used in the military context).

¹⁵⁹ See *Question 5: Assessing Sincerity*, GEORGETOWN UNIVERSITY (last visited Sept. 12, 2019), <https://berkeleycenter.georgetown.edu/essays/question-5-assessing-sincerity> (discussing the difficulty of assessing sincerity).

¹⁶⁰ GOV’T ACCOUNTABILITY OFFICE, *supra* note 108.

¹⁶¹ *Id.*

number of conscientious objectors in the military.¹⁶² As a preliminary matter, the
number of people who applied was quite small.¹⁶³ The report summarized these
numbers in a table reproduced below.¹⁶⁴

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

Table 1: Number of Conscientious Objector Applications Reported, Calendar Year 2002—2006 (Reproduced from the Report)¹⁶⁵

Component	2002	2003	2004	2005	2006	Total
Army	25	47	53	33	23	181
Army Reserve	2	8	14	9	3	36
Army National Guard	1	7	11	7	0	26
Navy	8	2	3	9	9	31
Navy Reserve	0	0	0	0	0	0
Air Force	2	15	10	12	6	45
Air Force Reserves	1	2	1	0	0	4
Air National Guard	1	1	0	1	2	5
Marine Corps	8	8	11	6	10	43
Marine Corps Reserve	7	21	14	5	3	50
Coast Guard	1	1	1	0	0	3
Coast Guard Reserve	0	1	0	0	0	1
Total	56	113	118	82	56	425

¹⁶⁵ *Id.* at 9.

As Table 1 shows, the number of people making arguments that a change in religious belief should relieve them from their contractual military obligations is low.¹⁶⁶

Furthermore, the threshold is high for servicemembers to receive discharges.¹⁶⁷ “[I]n order to be granted conscientious objector status, servicemembers must submit *clear and convincing* evidence that (1) they are opposed to participation in any form of war; (2) their opposition is based on religious, ethical, or moral beliefs; (3) their beliefs are sincere and deeply held.”¹⁶⁸ According to the report, the military branches took their obligation to investigate seriously, with many investigations lasting close to a year.¹⁶⁹ The approval rate varied substantially from branch to branch: The Navy granted 84% of applications while the Marine Corps and Coast Guard granted 33%.¹⁷⁰ Across all branches, applicants had about a 53% chance of their application being approved.¹⁷¹ These percentages might seem high, but they must be considered in context: Few people asked for them, and the military seriously investigated each time.¹⁷² From this point-of-view, the percentages seem low. In total, a mere 224 applications were approved from 2002 through 2006.¹⁷³ That means about forty-four applications were granted each year. Keep in mind this was during wartime when, presumably, the number of people seeking to leave the military each year should be high.¹⁷⁴

To understand just how small these numbers are, the report noted there were about 2.3 million members of the armed forces.¹⁷⁵ This means about 0.00191% of servicemembers actually seek and obtain conscientious objector status in any given year.¹⁷⁶ The report even stated the “number is small relative to the [size of the] Armed Forces’ total force”¹⁷⁷ “Since 2003, enlisted service members have been leaving the military at a rate of roughly 250,000 each year”¹⁷⁸ Thus, there is no

¹⁶⁶ *Id.* at 6.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* (emphasis added).

¹⁶⁹ *Id.* at 4 (“On average, the components took about 7 months to process an application for a servicemember requesting conscientious objector status. The Air Force Reserve’s process typically took the longest, at an average of nearly a full year (357 days), while the Navy’s processing time averaged about 5 months (160 days).”).

¹⁷⁰ *Id.* at 9.

¹⁷¹ *Id.* at 4.

¹⁷² *Id.*

¹⁷³ *Id.* at 5.

¹⁷⁴ See generally History.com Editors, *Conscription*, HISTORY (Oct. 13, 2017), <https://www.history.com/topics/us-government/conscription> (discussing the history of draft evasion and conscientious objectors).

¹⁷⁵ GOV’T ACCOUNTABILITY OFFICE, *supra* note 108, at 1.

¹⁷⁶ See *id.*

¹⁷⁷ *Id.* at 3–4.

¹⁷⁸ Anna Zogas, *US Military Veterans’ Difficult Transition Back to Civilian Life and the VA’s Response*, 2–3 (Brown Univ., 2017), <https://watson.brown.edu/costsofwar/papers/2017/us-military-veterans-difficult-transitions-back-civilian-life-and-va-s-response>.

small number of people seeking to exit the armed forces.¹⁷⁹ In summary, the military has not opened the floodgates by allowing conscientious objectors to leave.

While analogies are never perfect and should be taken with a grain of salt, it seems procedures could be put in place, if found desirable, to allow those with legitimate religious objections to religious arbitration to escape their contract without causing a substantial impact on religious arbitration generally.¹⁸⁰ Intuitively, people's motivation to lie about a change of beliefs is probably higher in the military than in religious arbitration because servicemembers can potentially escape death with such a claim. Non-legal pressures often make people submit to arbitration agreements.¹⁸¹ Indeed, even before arbitration was mainstream, merchants would submit to it out of fear that if they did not, it would hurt their reputation.¹⁸² As discussed in the Introduction of this Article, one of the traditional objections to religious arbitration is that it is too coercive—i.e., too many people submit to it, sometimes even if they do not want to.¹⁸³ Thus, it is unlikely that a flood of people hoping to escape an arbitration agreement will arise.¹⁸⁴

B. *The Religious Question Doctrine*

The second elephant in the room for sincerity determinations is the religious question doctrine. Those familiar with the religious question doctrine should feel on edge after reading DoDD 1300.06.¹⁸⁵ However, courts have, subject to much criticism,¹⁸⁶ distinguished between adjudicating a party's religious sincerity and deciding a religious question. Indeed, this Article has already explained multiple examples of times where courts judged religious sincerity without even hinting at the religious question doctrine. This Part does not argue that the distinction between determining a religious question and determining religious sincerity is well-founded. This Part merely explains the distinction to address plausible religious question

¹⁷⁹ *Id.*

¹⁸⁰ *See id.* (concluding this because of the small amount of servicemembers who seek to obtain conscientious objector status).

¹⁸¹ *See* BROYDE, *supra* note 2, at 89 (showing an example of a non-legal pressure).

¹⁸² *See id.* (“Following merchant agreements, enforcement proved relatively simple, as ‘[p]ractices developed among merchants to enforce arbitration awards; the failure to comply with an arbitrator’s decision resulted in threats to a merchant’s reciprocal arrangements or to his reputation.’” (modifications in the original) (quoting Bruce L. Benson, *An Exploration of the Impact of Modern Arbitration Statutes on the Development of Arbitration in the United States*, 11 J.L. ECON. & ORG. 479, 484 (1995))).

¹⁸³ *See id.* at 233.

¹⁸⁴ Indeed, one student note has suggested Mr. Walter’s argument is overstated in the context of disputes involving ministerial employees because a legitimate and significant change of beliefs is unlikely. Birdsell, *supra* note 15, at 544.

¹⁸⁵ *See* DoDD 1300.06 (2017) (emphasis added).

¹⁸⁶ *See generally* Chapman, *supra* note 22 (discussing the court and its role in adjudicating religious sincerity).

doctrine counterarguments to this Article's thesis: that courts can inquire into whether a party to a religious arbitration agreement has a sincere religious belief that prevents them from participating.¹⁸⁷

Professor Nathan S. Chapman recently published an article in the *Washington Law Review* that “defend[ed] and clarif[ied] the sincerity requirement.”¹⁸⁸ Professor Chapman illustrated the religious sincerity confusion with reference to the actions of comedian John Oliver.¹⁸⁹ In 2015, Mr. Oliver started a “church” called “Our Lady of Perpetual Exemption” to poke fun at how easily televangelists could “receive unlimited donations tax-free.”¹⁹⁰ Perhaps to Mr. Oliver's surprise, people donated thousands of dollars to Our Lady.¹⁹¹

“[Mr.] Oliver claimed the stunt was entirely legal”¹⁹² As Professor Chapman explained,

[i]t wasn't. Even considering the IRS's fuzzy conception of “church,” “Our Lady” was missing a crucial component of a religious accommodation claim: sincerity. The scheme was, of course, a parody. By attempting to expose fraud, [Mr.] Oliver may have committed it.

[Mr.] Oliver is not alone in his confusion about the legal relevance of a religious accommodation claimant's sincerity. The black-letter law is pretty clear, but scholars question it and judges—including Supreme Court justices—misunderstand it. The rule is simple: to qualify for a religious accommodation, a claimant must demonstrate sincerity.¹⁹³

As Professor Chapman argued, religious sincerity is a question of mental state and courts may inquire into that mental state “with one caveat: the Constitution prohibits courts from inferring *insincerity* from a religious belief's *inaccuracy* or *implausibility*.”¹⁹⁴

¹⁸⁷ See *Question 5: Assessing Sincerity*, GEO. U. (last visited Sept. 12, 2019), <https://berkeleycenter.georgetown.edu/essays/question-5-assessing-sincerity> (discussing the difficulty of assessing sincerity).

¹⁸⁸ Chapman, *supra* note 22, at 1187.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 1191.

VI. CONCLUSION

The state of mind of religious people has been conflated with religion itself.¹⁹⁵ This fallacy has allowed those opposed to religious arbitration to argue for substantial restrictions on it.¹⁹⁶ This Article is not intended to argue the pros of religious arbitration. Religious arbitration has various merits, which have been discussed comprehensively in other works.¹⁹⁷ Professor Broyde's book, for example, has discussed these merits in detail.¹⁹⁸ Chief among them is that parties to a contract may have religious law in mind and part of contract law's purpose is to enforce those expectations, yet, civil courts are ill-equipped to determine religious law.¹⁹⁹ Furthermore, religious arbitration is an aspect of some people's faith.²⁰⁰ For example, Jewish law emphasizes a duty to resolve disputes outside of secular court.²⁰¹ One Jewish religious-legal text explains,

In any place where you find gentile courts, even though their law is the same as the Israelite law, you must not resort to them since it says, 'These are the judgments which thou shall set before them.' (Ex. 21:1) this is to say, 'before them' and not before gentiles.²⁰²

By not enforcing a religious arbitration agreement, a sincere religious believer may have to jump through additional hoops.²⁰³ In a sense, this harms that person's ability to practice his or her faith.²⁰⁴ A court considering a challenge to a religious arbitration clause on the ground of a change in religion is faced with a lose-lose situation.²⁰⁵ Assuming the change in belief is sincere, one party's freedom

¹⁹⁵ See BROYDE, *supra* note 2, at 233.

¹⁹⁶ See Broyde, *supra* note 146.

¹⁹⁷ E.g., Robert L. McFarland, *Are Religious Arbitration Panels Incompatible with Law? Examining "Overlapping Jurisdictions" in Private Law*, 4 FAULKNER L. REV. 367, 372 (2013) ("Private agreements to arbitrate family disputes before religious tribunals should be enforced (so long as such agreements are voluntary) for several secular reasons. First, enforcing such agreements advances legitimate state interests. Second, enforcement of such agreements promotes freedom (of religion, speech, association, and contract), and freedom is of fundamental importance to our constitutional democracy.").

¹⁹⁸ See BROYDE, *supra* note 2.

¹⁹⁹ See *id.*

²⁰⁰ For a detailed discussion of Jewish people's belief that they should use a *beth din* for dispute resolution, see Ginnine Fried, Comment, *The Collision of Church and State: A Primer to Beth Din Arbitration and the New York Secular Courts*, 31 FORDHAM URB. L.J. 633 (2004) (quoting a translation of TALMUD BAVLI, TRACTATE GITTIN 88b).

²⁰¹ *Id.* at 636 (quoting a translation of TALMUD BAVLI, TRACTATE GITTIN 88b).

²⁰² *Id.* (quoting a translation of TALMUD BAVLI, TRACTATE GITTIN 88b).

²⁰³ See *id.*

²⁰⁴ *Id.*

²⁰⁵ See *id.* at 647-50.

comes at the expense of another, regardless of how the court rules.²⁰⁶ Only upon a substantial showing, as discussed in this Article, should a court allow freedom of religion to trump freedom of contract.

It is worth briefly noting another relevant state of mind—bias. Recall Mr. Garcia’s fight with the Church of Scientology discussed above.²⁰⁷ “The church declared the Garcias ‘suppressives’ and excommunicated them, according to a legal brief submitted by his lawyer.”²⁰⁸ Mr. Garcia pointed to a church doctrine known as “disconnection,” which essentially required Scientologists to shun him.²⁰⁹ He argued, because of the doctrine, the religious arbitration clauses were substantively unconscionable given that he could not receive a “fair and neutral arbitration.”²¹⁰ The court rejected this argument, stating,

[a]s compelling as Plaintiff’s argument might otherwise be, the First Amendment prohibits consideration of this contention, since it necessarily would require an analysis and interpretation of Scientology doctrine. That would constitute a prohibited intrusion into religious doctrine, discipline, faith, and ecclesiastical rule, custom, or law by the court. *Kedroff*, 344 U.S. at 115. Indeed, Plaintiffs earlier acknowledged that “[t]he hostility of any Scientologists on [the arbitration panel] . . . is church doctrine.” . . . Accordingly, the court has no jurisdiction to consider argument.²¹¹

Mr. Garcia’s attorney made a fatal error: framing the argument about bias in terms of church doctrine.²¹² Instead, the argument should have been framed as whether the particular arbitrators were biased. The court could have inquired into the state of mind of the arbitrators without per se questioning religious doctrine.²¹³ It

²⁰⁶ Notably, this argument is merely a form of one argument made by many others: Religious arbitration promotes freedom of religion. *See, e.g., id.*

²⁰⁷ *Supra* Section II.B.

²⁰⁸ Corkery & Silver-Greenberg, *supra* note 45.

²⁰⁹ *Garcia v. Church of Scientology Flag Serv. Org., Inc.*, No. 8:13-CV-220-T-27TBM, slip op. at 19 (M.D. Fla. Mar. 13, 2015).

²¹⁰ *Id.* at 19–20.

²¹¹ *Id.* at 20.

²¹² *See id.*

²¹³ *Contra* Dasteel, *supra* note 23, at 57–58 (“Even if an arbitrator who is a member of the Church of Scientology in good standing is required by church doctrine to have an adjudicatory bias against former church members, there is nothing a court could do about it when the facially neutral Federal Arbitration Act encounters religious doctrine. Indeed, even after arbitration, a litigant would have considerable difficulty challenging an award based on bias because any such finding would require the court to investigate the Church of Scientology’s doctrine concerning adjudication of claims with ‘suppressives.’ . . . [U]nless the Scientologist-arbitrator makes some demonstrated outward display of bias, the Garcias probably could not show actual bias. . . . If this had been a secular arbitration where the arbitrator was

would have been similar to a religious sincerity determination.

For whatever reason, religious arbitration literature has not yet discussed the powerful distinction between state of mind and religious questions. This distinction, while a fine line, is seen prominently in other areas of law. State of mind, whether sincerity or bias, should be considered more seriously going forward.

required to be a member of a secular organization and the rules of that organization required the arbitrator to consider the parties to be 'suppressive,' the court would have little trouble in at least considering substantive unconscionability. However, in the context of religious arbitration, it cannot do so on the grounds of non-interference with religion.”).