C. CHURCH MEMBERSHIP

Far more important to religious liberty than the ability to control its "temporalities" is a religious body's ability to determine *who shall be its members* and *on what terms*. The question of temporalities was discussed first because in that area the law is more fully developed and provides a useful paradigm for understanding other questions of a church's authority and its autonomy in exercising it. But the question of control over its membership selection goes to the very heart of the composition of the religious group itself and who it is that will constitute the group and exercise its authority.

1. The "Power of the Gate"

In a free society, religious organizations (and other voluntary associations) cannot resort to force or coercion to achieve their purposes. They have only one means by which to preserve their character and effectuate control of their direction, and that is *the power of the gate*—to determine who may enter the organization and on what conditions they may remain in it and participate in its activities and decision-making processes. And *the gate swings only one way. A religious body cannot compel anyone to enter or to remain a member* for one instant against his or her will.[1] Therefore, this very limited power must be used with great care and conscientiousness if the organization is to preserve its character and quality.

Every effective religious group devotes much attention and energy to defining and preserving its boundaries, though in some groups that vigilance may have become relaxed or vestigial. The early Christian Church characterized itself as *ec-clesia* (the regular Greek word for an assembly), the root meaning of which is "called out" (from the rest of society). It considered itself to be set apart from the unsaved pagan world, called to a different kind of life governed by different standards. Though the early Church decided, after much soul-searching, that Christians might—within certain limits—associate and even eat with non-Christians,[2] its cult-life remained completely exclusive. Christians neither joined in the pervasive religious activities of their non-Christian neighbors—many of whom might indiscriminately observe the rites of several different religions—nor admitted outsiders to their own sacred rites.

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1. But see *Guinn v. Church of Christ*, discussed at § 6c below, for an attempt by a religious group to continue to exercise discipline over a church member after she had resigned.

2. See Acts 10 and 11.

It was not simple nor easy to become a Christian, and those undergoing the long and careful process of preparation for membership (the catechumens) were admitted only to the first part of the Eucharist. It was only after they became full members that they could attend and participate in the latter and more sacred portion. And after they became members, they were expected to live up to the standards of the church. If they failed to do so, they were cast out. The New Testament specified that those who fell short of the expectations of the church were to be admonished and then reproved. If they repented, they were to be restored to full fellowship. If they did not, they were to be ostracized by the faithful.

> If your brother sins against you, go and tell him his fault, between you and him alone. If he listens to you, you have gained your brother. But if he does not listen, take one or two others along with you, that every word may be confirmed by the evidence of two or three witnesses. If he refuses to listen to them, tell it to the church; and if he refuses to listen even to the church, let him be to you as a Gentile and a tax collector.[3]
>
> It is actually reported that there is immorality among you.... Let him who has done this be removed from among you.[4]
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> Now we command you, brethren, in the name of our Lord Jesus Christ, that you keep away from any brother who is living in idleness and not in accord with the tradition that you received from us.... If anyone refuses to obey what we say in this letter, note that man, and have nothing to do with him, that he may be ashamed.[5]
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> As for a man who is factious, after admonishing him once or twice, have nothing more to do with him, knowing that such a person is perverted and sinful; he is self-condemned.[6]
>
> If anyone comes to you and does not bring this doctrine, do not receive him into the house or give him any greeting; for he who greets him shares his wicked work.[7]

During the centuries when the church was closely linked to the temporal powers and could rely upon civil rulers to punish heterodoxy or heteropraxy, erring persons were subject to exile, imprisonment, torture or execution. Crusades, inquisitions, interdicts and pogroms were mounted against heretics. The slaughter of the Cathars, the Massacre of the Huguenots on St. Bartholomew's Night and the execution of Baha'i's in Iran were overzealous efforts at quality control. Since such expedients fortunately are not available to religious bodies in this country, this discussion can be confined to the uses of the power of the gate.

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3. Matthew 18:15-17, RSV.
4. I Cor. 5:1a, 2b, RSV.
5. II Thess. 3:6, 14, RSV.
6. Titus 3:10-11, RSV.
7. II John 10-11, RSV.

The Anabaptists, having no access to the civil power, but being themselves a mercilessly persecuted minority, had only the power of the gate to preserve the purity of their ranks. (Of course, not many were clamoring to be admitted, since entering that group was equivalent to signing one's own death warrant.) Their practice of the "ban" or strict shunning—*Streng Meidung*—is practiced even today among their heirs, the Amish and Mennonites, as related below.[8] In practice, it meant that a person who was found to be unworthy by the church and who refused to repent and reform would be disfellowshiped: the members would refuse to speak to him or her or to recognize him or her as a member of the community. They would feed, clothe and shelter such a person, even as they would a non-Christian in need, but would not carry on any sharing of communications.

A similar tactic was enjoined in the General Rules of the Wesleyan Societies:

> If there be any among us who observes them [the General Rules] not, who habitually breaks any of them, let it be known unto them who watch over that soul as they who must give an account. We will admonish him of the error of his ways. We will bear with him for a season. But, if then he repent not, he hath no more place among us.[9]

The United Methodist Church today still carries these General Rules in its *Book of Discipline* immediately following its Constitution and Articles of Religion. The same volume of church law contains nineteen pages of detailed provisions for ecclesiastical trials to implement the injunction of the General Rules, including provisions for the trial of a bishop, an ordained minister, a lay pastor, a church member, specifying the procedures to be followed in accusations, investigations, trials and appeals, with stipulations about counsel, notice, records, testimony of witnesses, etc.,[10] designed to provide a reasonable equivalent of "due process" within the church—a far cry from John Wesley's sitting as prosecutor, judge and jury in the summary expulsion of the "triflers and disorderly walkers" of Nottinghamtown![11]

Other denominations and religious bodies usually have comparable provisions and procedures for maintaining quality control, some as simple as John Wesley's, some as elaborate as those of his heirs, the United Methodist Church, and everything in between. They are all designed to enable the church to preserve its character, purpose and direction against the danger of diversion, dilution or subversion by persons who may be or seek to become members but who do not share the purposes or meet the standards of the organization. Every organization, whether religious or not, has similar concerns and ways to embody them, and their ability to do so is essential to freedom of association. But in the case of churches, the need to protect their

8. See § 6a *infra*.

9. *The Book of Discipline of the United Methodist Church* (1984), p. 71.

10. Ibid., pp. 639-678.

11. See AUTONOMY § 2 above.

purposes and defend their direction from deterioration is in addition a central element of the free exercise of religion.[12]

The four dissenting justices in *Jones v. Wolf*, in an opinion written by Justice Powell, noted the right of the presbytery in a Presbyterian Church—as stipulated in the denomination's Book of Church Order—"to replace the leadership of the congregation, to *winnow its membership*, and to take control of it."[13] That is an excellent phrase—to "winnow the membership"—to separate the "wheat" from the "chaff"—which is exactly what John Wesley did in Nottingham and what every religious body must be free to do.

2. Some Commentators

Controversies over expulsions from church membership have besieged the state courts since the beginning of the Union, with varying results, which can be reviewed in the literature.[14] The main principle seems to be that expressed in *Watson v. Jones*: "*All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it*."[15] Accordingly, some states refuse to review ecclesiastical determinations on expulsion of members. A majority of states, however, will entertain such suits on varying grounds, such as when expulsion from church membership is claimed to involve civil, contract or property rights, or where the (ecclesiastical) procedure followed is alleged to be in some way irregular.[16]

An Ohio court has held that church membership in itself constitutes a "property right," since the members share the right to use the church property, and therefore the civil courts have jurisdiction to review all such expulsions because they deprive the expelled member of such access.[17] The same court contended that a civil right was involved because of "the humiliation and hurt to personality, the injury to character, reputation, feelings and personal rights and human dignity." A New Jersey court held:

> (1) The expulsion of a member from a church can constitute a serious emotional deprivation which, when compared to some losses of property

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12. A further discussion of the "power of the gate" may be found in the author's *Why Conservative Churches Are Growing* (New York: Harper & Row, 1972, 1976; Macon, Ga.: Mercer Univ. Press, 1986), pp. 121-132, 138-141.

13. *Jones v. Wolf, supra*, Powell dissent, part IV, discussed at § B8 above, emphasis added.

14. Zollman, Carl, *American Church Law* (St. Paul, Minn.: West Pub. Co., 1933) pp. 306-308; Torpey, William G., *Judicial Doctrines of Religious Rights in America* (Chapel Hill, N.C.: Univ. of N. Carolina Press, 1948) pp. 125-133; Hammar, Richard, *Pastor, Church and Law*, (Matthews, N.C.: Christian Ministry Resources, 2d. ed. (1991), pp. 348ff.

15. 13 Wallace 679 (1872), emphasis added.

16. Hammar, *supra*, pp. 353ff.

17. *Randolph v. First Baptist Church*, 120 N.E.2d 485, (Ohio 1954), cited in Hammar, *supra*, p. 358.

> or contract rights, can be far more damaging to an individual; (2) The loss of the opportunity to worship in familiar surroundings is a valuable right that deserves the protection of the law; and (3) except in cases involving religious doctrine, there is no reason for treating religious organizations differently from other nonprofit organizations, whose membership expulsions are routinely reviewed by the courts.[18]

Five states are cited by Torpey as having held church membership to be a relationship of "contract" between the individual and the church, which civil courts can therefore review to enforce the (supposed or implied) "contract."[19] Zollman regretted that only a minority of courts recognized membership in a church as conferring *property rights* that the courts could review.[20]

In most instances in which courts do take jurisdiction on one of these grounds, their scrutiny is limited to determining whether the religious body followed its own procedures, whether the person or group making the decision to expel had authority under the church's own law to do so, whether fraud or collusion was involved, or to resolve disputes over contested (nondoctrinal) terms of the "contract" of membership.[21] But in no case can the civil courts resolve disputes over religious doctrines. The difficulty implicit in this type of adjudication, however, is that judges may treat as civil rights what are essentially religious decisions seeking to enforce quality control by means of the power of the gate.

3. *Bouldin v. Alexander* (1872)

An example of this type of adjudication is found in a little-noticed case of 1872, decided by the Supreme Court of the United States sitting as an appellate court for the District of Columbia—the Supreme Court's only opinion dealing with expulsion from church membership—shortly after it had decided *Watson v. Jones*. The dispute arose in "an unincorporated religious society of colored persons... calling themselves the `Third Baptist Church.'"[22] The group was led by one Rev. Albert Bouldin, who raised money to build a meetinghouse, which he eventually deeded to four persons as trustees, later increased to seven, duly elected at a meeting of the congregation of some 200 members in February 1867. A few months later, dissension arose among the flock, and it divided into two factions, each claiming to be the true "Third Colored Baptist Church."

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18. *Baugh v. Thomas*, 265 A.2d 675 (N.J. 1970), paraphrased by Hammar, *supra*.

19. Torpey, *supra*, p. 125; the states (at the time he wrote—1948) were Kentucky, Missouri, New York, Pennsylvania and Michigan.

20. Zollman, *supra*, p. 306.

21. Hammar, *supra*, p. 359.

22. *Bouldin v. Alexander*, 15 Wall. 131, 132 (1872).

On June 7, 1867, one of these groups, being a very small minority of the original membership, "probably about fifteen in number," said the court, including the Rev. Mr. Bouldin, met and voted to "turn out" four of the seven trustees—but without naming *which* ones—and elected four others to replace them. A few days later, the same small group proceeded to "turn out" forty-one members of the church, again without notice to those persons, citing any charges or holding a trial. The "rump" board of four newly elected trustees changed the locks on the church building and—with Bouldin in their midst—took possession of the premises thereafter.

In September of 1867, the four trustees to whom Bouldin had deeded the property, led by one Alexander, plus the others claiming to have been duly elected in February, took the matter to court. Bouldin responded that there had been no election of trustees in February, that the record in the book of minutes purporting to record the election was a forgery, and that the complainants had withdrawn from the "Third Baptist Church" to form a new congregation, thus relinquishing all rights in the original church. The district court found against Bouldin, and the U.S. Supreme Court affirmed.

The Supreme Court undertook to decide "where was the legal ownership of the property. The question respects temporalities, and temporalities alone." The court held that the original trustees had been duly elected, simply disbelieving Bouldin's claim that the record of the election was a forgery. The "statement of the case" portrays the learned judges poring over the evidence themselves:

> The books were brought into this court, and showed some erasures and the cutting out apparently of some leaves, but little or nothing beyond Bouldin's statement to prove that this particular minute was not entitled to as much respect as others in the book. Minutes following it were made by Bouldin himself.

The court concluded:

> Those who held under the deed were not removable... without cause. And had there been cause, none was shown.... [I]t may not be admitted that a small minority of the church, convened without notice of their intention, in the absence of the trustees, and without any complaint against them, or notice of complaint, could divest them of their legal interest and substitute other persons to the enjoyment of their rights.

With respect to the claim that the plaintiffs had left the church and gone off to start another, relinquishing their rights in the old one, the court opined:

> There is no sufficient evidence that any new congregation was formed, or that there was any withdrawal from the church, or union with any other.... [T]hey were not seceders, and... their rights have not been forfeited.

> This is not a question of membership of the church, nor of the rights of members as such. It may be conceded that we have no power to revise or question ordinary acts of church discipline, or of excision from membership.... [W]e cannot decide who ought to be members of the church, nor whether the excommunicated have been regularly or irregularly cut off....
>
> But we may inquire whether the resolution of expulsion was the act of the church, or of persons who were not the church and who consequently had no right to excommunicate others. And, thus inquiring, we hold that the action of the small minority... was not the action of the church, and that it was wholly inoperative. In a congregational church... an expulsion of the majority by a minority is a void act.

In this venerable minor case, the U.S. Supreme Court, insisting that it was dealing solely with "temporalities" and by no means with church membership, not only reinstated the dispossessed trustees and congregation but un-excommunicated the forty-one "excommunicated" members by (rightly) pointing out that the purported acts of the tiny "rump" group in possession of the property were null acts because done by force but not by law.

4. Should Courts Correct Abuses Within Churches?

There are many such cases involving high-handedness within congregational bodies, in which civil courts have intervened to rectify abuses. *Watson v. Jones* seems to imply that such intervention is permissible in churches of congregational polity, but not in those of hierarchical polity, and commentators have been very critical of this distinction, asking "Why hierarchical churches are treated differently, for constitutional purposes, from congregational churches."[23] One answer might be that the availability of an appeal process (if it is available) within the ecclesiastical structure will rectify errors that a civil court would otherwise have to correct. The appellate levels of the civil courts exist to correct the errors of trial courts, whether those be due to local pressures, ineptitude, inadvertence, prejudice, or whatever. In like fashion, religious bodies that provide one or more levels of review within their structure are able, because of the broader perspective and wider experience usually available at appellate levels, to correct at least some of the errors that may arise in local determinations. Whether that difference is of constitutional dimension is the kind of question on which experts in jurisprudence do not necessarily agree. But the case reports are full of unlovely strategies carried on in congregational churches that would quickly be corrected by any "outside" body looking at the matter

23. Ellman, Ira Mark, "Driven from the Tribunal: Judicial Resolution of Internal Church Disputes," 69 *California Law Rev.*, 1378, 1406 (1981).

dispassionately—whether an ecclesiastical appellate body or a civil one. One commentator characterized the genre as follows:

> The most common cases involve the expulsion of one faction of the church by the other, voted on at a purportedly proper meeting of the congregation. These are churches in which the power to expel undeniably belongs to the congregation's majority, and church rules governing the conduct of such meetings may be sparse, or nonexistent. The expulsions typically take place with no notice or hearing, since they result from political opposition rather than some individual offense, and the courts latch onto these "due process" failings to justify their intervention. In the absence of specific internal authority on the point, the court will extrapolate from the church's concededly democratic polity to find that the expulsion is not authorized.[24]

One example, a New Jersey case of 1947, may suffice as representative. It did not involve expulsion, but the tactics of manipulation of congregational decision-making are instructive.

> In *Randolph v. Mt. Zion Baptist Church*, the congregation was sharply divided over the question of whether to sell their old church building and hold services exclusively in a new building they had recently acquired. The faction favoring sale of the old building included the board of trustees and the pastor and was thus able to control the conduct of church meetings. They issued a meeting notice that included little detail on the offer to purchase the old building. At the meeting itself they allowed no discussion before the vote. Just before the vote was actually taken, the pro-sale group suddenly brought into the meeting the entire junior choir, 50 to 100 strong.... The children voted unanimously in favor of the sale, which was approved by a margin of 152 to 92. However, that approval was upset in court.
>
> All of the circumstances surrounding the vote combined to influence the court, but the pro-sale faction's stratagem with the choir seemed particularly important. Church rules were unclear on whether children could vote. Baptist tradition apparently permits it, although individual Baptist churches vary in their practice, and the issue had not arisen in this church. There was thus no firmly established rule. Nor was there an established practice.... But to the court, the use of their vote here seemed unfair. The pastor had called the choir to a special rehearsal that night, so that they would be on hand to vote, but none of... the children of the anti-sale faction, were called to the rehearsal.[25]

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24. Ibid., p. 1426, citations omitted.

25. Ibid., 1427-8. The citation of the case is 139 N.J. Eq. 605, 53 A.2d 206.

Despite the lack of any explicit rule or practice in the church or its tradition, the court nullified the purported decision to sell the church on the ground that it was "unfair"—that is, contrary to the spirit of majority rule on which congregational bodies presumably operate. The uninformative notice, the denial of opportunity for discussion, and the failure to include the children of the adverse faction all doubtless contributed to and confirmed the court's impression of unfairness. It would be hard to quarrel with the court's decision in this case any more than with the Supreme Court's decision in *Bouldin*. But should the court have taken jurisdiction in either case, or in others arising within congregational polities?

Consider the *Bouldin* case again. The court referred without elaboration to a "dissension" that had arisen within the congregation and led to the struggle that the court adjudicated. If it was a dispute over a minor issue, such as the color of the choir robes (as many intracongregation fusses are), the court would not be seriously distorting the doctrinal development of the religious body or its members. If it was a dispute over the expulsion of one or more members for playing cards or dancing—as has been known to happen—the court would be interceding on one side or the other of an effort by the church to enforce its standards of moral conduct within its membership.

But suppose the dispute was over whether infants could be baptized. Suppose the majority faction had fallen away from the insistence upon *"adult" baptism only*, and the pastor and a handful of the faithful were trying to preserve the essence of the church—the core doctrine without which it would no longer be a *Baptist* church, whatever name was on the door. For all we know, the uncharacterized "dissension" could have been about just such a central doctrine, and the court could have dealt with it in just such a "neutral" way, without deciding on its truth or falsity or whether it was essential to the church or even whether it was believed by all or some or any of the disputants.

The court could simply have avoided taking cognizance of the doctrinal element—if any—altogether, and the decision would have come out just as it did, dispossessing the minority and reinstating the majority. In so doing, the court would thus have upheld the alienation of a church from its founder, pastor and mentor and from the centuries-old tradition he was trying to preserve, the tradition that is essential to the very identity and integrity of anything calling itself a "Baptist" church!

To be fair to the Supreme Court, it had taken judicial cognizance of the fact that both sides of the dispute had been heard by a commission composed of delegates from seventeen contiguous Baptist churches, which unanimously held against Bouldin, and that as a result the anti-Bouldin faction was admitted to the Philadelphia Baptist Association as the rightful representatives of the "Third Colored Baptist Church of Washington"—which would never have happened if the majority faction had opposed adult baptism! One might have thought that that ecclesiastical verdict

would have settled the matter under the doctrine of *Watson v. Jones*, but the Supreme Court explained: "That body, it is true, was not a judicatory. Its action was not conclusive of any rights." But its action favoring the dispossessed majority served to confirm the court's conclusions; it was "persuasive evidence that they were not seceders, and that their rights have not been forfeited" [relinquished, as Bouldin contended].[26]

By agreeing to decide such cases, but addressing only their nondoctrinal aspects, civil courts may sometimes run the risk of seriously distorting the essential nature and development of a religious body. They will also invite litigation by dissident persons and factions who have lost out within the church itself. As *Watson v. Jones* cautioned:

> All who unite themselves to such a body do so with an implied consent to [its] government.... But it would be a vain consent and would lead to the total subversion of such religious bodies, if anyone aggrieved by one of their decisions could appeal to the secular courts and have them reversed.[27]

Therefore, civil courts are wise to refrain from interfering in even the most radical departures that a church may make from its historic traditions, provided the decision is made by the tribunal and by the process that the church itself has chosen as the proper locus in its own body for the making of such decisions. (After all, a number of Congregational churches in New England at the turn of the eighteenth century voted themselves from Trinitarian to Unitarian in doctrine, with none outside to say them nay.)[28]

Another class of disputes can arise over the enforcement of church *discipline* on members, who may go to court because of the sanctions imposed upon them by the church, up to and including expulsion. The Supreme Court of the United States has not yet dealt with any cases directly posing this issue, but a number of lower courts have. A few examples will suffice.

5. Litigation Over Church Discipline

One of the most difficult and demanding tasks of church leadership is "quality control"—striving to keep the standards of the faith in force among the members. It requires immense energy and self-discipline to be fair but firm, principled but patient,

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26. *Bouldin v. Alexander*, at 136-137 and 139.

27. *Watson v. Jones*, at 729. (The court was speaking at this point of churches of hierarchical polity, but the point would seem to apply equally to churches of any polity.)

28. Actually, the vote was carried, not by a majority of the communicants, but by a majority of the inhabitants of the "territorial parish," a result ratified in the Dedham case of 1820, *Baker v. Fales*, 16 Mass. 488. See Ahlstrom, Sydney E., *A Religious History of the American People* (New Haven: Yale Univ. Press, 1972), p. 397.

in this role. When churches undertake to call their members to closer adherence to the requirements of membership, and especially when they seek to enforce those terms upon wayward or "backsliding" members, frictions, tensions and resentments are apt to be generated that may lead to litigation.

a. Shunning. The maximum sanction that the church can exert on such individuals is to deny them the fellowship of the faithful. Such a rejection is commanded of Christians by the text of Scripture: "It is actually reported that there is immorality among you.... Let him who has done this be removed from among you."[29] Yet mild as that rebuke may be, it is sometimes viewed by "victims" and bystanders as dreadfully harsh. Several cases involved this practice of Christian "shunning."

(1) *Bear v. Mennonite Church* (1975). Typical of such cases is one that arose in the Pennsylvania Dutch country when a potato farmer named Robert Bear sued his church for breaking up his home. He had married the sister of a bishop of the Reformed Mennonite Church, and they had had six children. But the father Bear had fallen out with the church and had criticized what he considered "five heresies" of the church. His persistence in expressing this criticism—a practice viewed as "railing" by the church—resulted in a decision by the fifteen members of the ministry of the district to excommunicate Bear, which entailed avoidance or "shunning" by other members of the church, a practice believed by them to be required by Scripture.

Bear then sued the church and two of its bishops (one of them his brother-in-law) for having damaged his business, disrupted his home, alienated his wife's affections and interfered with his free exercise of religion. The Court of Common Pleas of Cumberland County, Pennsylvania, accepted the defendant's contention that the complaint, in averring only an ecclesiastical dispute, had failed to state a cause of action upon which relief could be granted, and dismissed the case.[30] Bear appealed to the Supreme Court of Pennsylvania, which reversed and remanded for trial, concluding that the plaintiff had pleaded sufficient facts and created sufficient doubt to warrant a full hearing on the merits,[31] which was had from November 24 to December 12, 1975, before Judge Weidner, who issued his judgment and opinion June 24, 1976.

The judge continued to entertain misgivings about the justiciability of the case: "There is indeed a serious question as to whether a civil court may properly consider a controversy of this particular nature at all." (On that subject, he was arguably correct, and the Pennsylvania Supreme Court was in error, notwithstanding which its opinion continues to be cited for the teaching that complaints of "shunning" are

29. I Cor. 5:1a, 2b, RSV.

30. *Bear v. Reformed Mennonite Church*, 24 Cumb. L.J. 168 (1974).

31. *Bear v. Reformed Mennonite Church*, 462 Pa. 330, 341 A.2d 105 (1975).

justiciable.)[32] Nevertheless, he acceded to the order of the state supreme court and proceeded to determine whether the plaintiff had proven by a preponderance of the evidence the allegations of his complaint. The court concluded that he had not.

The court observed that Bear did not object to his excommunication as such, but did object to the "shunning" or avoidance that accompanied it as a religious and social practice because of its effect upon his life.

> By requesting injunctive relief [in addition to damages] plaintiff has in effect raised the issue of whether defendant Church and members thereof, including of course plaintiff's wife, may continue to freely exercise a basic precept of their religious faith.... [W]e have concluded that they may.

Bear contended that he had been excommunicated without proper hearing.

> This court can neither seriously consider nor find merit in this contention.... [T]he facts clearly indicate that what doctrinal differences existed between plaintiff and defendant Church were handled pursuant to the normal, well-established procedures of the Church. Only after these efforts at reconciliation had failed was plaintiff expelled. Certainly no challenge is made to the right of defendant Church to excommunicate a dissident member.

The ministry of the church had indeed "labored" with Bear repeatedly prior to his expulsion, and he was "able to maintain a dialogue with church members through numerous post-expulsion meetings."

Bear also contended that as a result of this excommunication, the church and the two bishops "willfully and intentionally caused him to be boycotted and shunned by all members of the church and caused him to be cut off from all social and business relationships with these members."

> It is uncontested that plaintiff has been, and is being, avoided by members of defendant Church, including his wife. The question remains whether such practice is motivated by an intent to harm plaintiff personally and/or economically.... [S]uch is unsubstantiated by any evidence.
>
> On the contrary, there is extensive testimony indicating the practice of avoidance has been and remains an integral part of Church doctrine and teachings.... Its purpose is essentially to maintain doctrinal purity and to remind the excommunicant of his or her deviation therefrom. The motivating force for the practice... is love and concern for the one expelled. While, admittedly, such an expression of love may be somewhat difficult for the non-member of defendant Church to appreciate, this court, in hearing the instant testimony, must respect the obviously deep and sincere religious convictions upon which it is based.

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32. Cf. *Paul v. Watchtower*, immediately following.

Earlier, in its Findings of Fact, the court had described the operation of shunning as between husband and wife:

> 21. Avoidance of an excommunicant by his spouse includes not taking meals together and, by necessary implications, the discontinuance of conjugal relations, but does not include refusal to: prepare meals; care for the house; cohabit with the spouse; cooperate in financial and other support and care of the family and household; or converse with the spouse.

The court was convinced by the wife's testimony that she had indeed pursued this course toward her husband since his excommunication, but that she did so "of her own free will as an expression of her personal religious faith and conviction.... She categorically denied that any member of her Church ever initiated any discussion with her concerning avoidance of her husband, or ordered such avoidance. This testimony stands uncontradicted."

After enumerating a series of harms that he attributed to the allegedly tortious conduct of the church and its bishops, Bear claimed that "the practice of avoidance constitutes an infringement upon his personal and religious freedom under both the Pennsylvania and U.S. Constitutions," and that "this practice exceeds the bounds of social order, morality, and constitutional protection. Again, however, plaintiff's case fails to prove these allegations."

> Plaintiff has been, and remains, completely free to follow the dictates of his religious conscience. He has offered no evidence to suggest defendants have in any way infringed upon this religious freedom. While defendants have exercised their own right to exclude plaintiff from their private, religious entity, such action hardly prevents him from holding or exercising his own independent beliefs. In fact, based on plaintiff's own testimony, his non-membership in defendant Church would seem far more consistent with those beliefs.
>
> Much the same can be said with respect to the practice of avoidance.... [P]laintiff has failed to establish that this basic tenet of defendant Church has, in fact, excessively or wrongfully interfered with areas of paramount state concern....
>
> Simply stated, plaintiff has demonstrated no conduct which would warrant the intervention of this court. Moreover, if equitable relief were granted, it is abundantly apparent that the religious freedom of defendant Church, as well as each individual member thereof, including, of course plaintiff's wife, would be seriously and unconstitutionally impaired.

Thus did the court dispose of the challenge to the right of a church to excommunicate and shun a dissident member. But it added a further consideration.

> Knowing that the defendants and the Reformed Mennonite Church would not come into court to redress the wrongs against them, plaintiff embarked upon a campaign to destroy the Church, his wife, and his brother-in-law.... In this pursuit, plaintiff has used every tactic that could have been used to taunt, defame, embarrass, and destroy, knowing he was safe from requests for redress. Members of defendant Church only utilized avoidance, as any human would have, when they did not desire to retaliate. In this case, plaintiff is entitled to no relief. Defendant Church and members thereof were and are fully warranted in their avoidance rather than submit to destruction or further wrongs by plaintiff.
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> * * *
>
> Plaintiff himself has engaged in wrongful conduct in connection with the claims he has raised and has thus come into this court of equity with unclean hands.[33]

Not surprisingly, plaintiff did not appeal further. This case is interesting because it reveals the nonreligious animus underlying the plaintiff's resort to the courts. If the appellate court had not remanded it for trial, plaintiff's "dirty linen" would not have had to be revealed on the public record, but Bear could not seem to control his self-destructive urges to bring his household down in order to punish his wife. The parallel to the self-destructive obsession of the Nallys in the California "clergy malpractice" case is remarkable.[34] (In 1989, Robert Bear again went to court, attempting to revive his earlier cause of action, but with no greater success.)

But the court in this case did not reach the harder question: What if Bear *had* been harmed as he alleged and had not himself given any offense beyond the "railing" that led to his excommunication; would he then have had a cause of action? A religious body should never be penalized by a civil court for trying to exercise ecclesiastical discipline over its members (so long as that discipline is limited to avoidance or excommunication and no civilly enforceable contracts are broken). Even if the decision to excommunicate may be thought by outsiders to have been determined unjustly, that is not a fault that civil courts should be expected or empowered to remedy since they cannot weigh the merits of the dispute without scrutinizing religious doctrines and norms of conduct and the application thereof by ecclesiastical authorities entrusted with that responsibility.

(2) *Paul v. Watchtower Bible & Tract Society* (1987). A federal circuit court of appeals subsequently dealt with the question whether shunning by a religious group is actionable in tort. The question arose when Janice Paul, a longtime Jehovah's Witness, withdrew from that sect after her parents were "disfellowshiped" by the

33. *Bear v. Reformed Mennonite Church*, (June 24, 1976) (slip op.).

34. See IID4.

same organization. She was in turn disfellowshiped as a result of her withdrawal, in accordance with a directive expressed in *The Watchtower* in 1981:

> THOSE WHO DISSOCIATE THEMSELVES
> ...Persons who make themselves "not of our sort" by deliberately rejecting the faith and beliefs of Jehovah's Witnesses should appropriately be viewed and treated as are those who have been disfellowshiped for wrongdoing.[35]

The consequence of being disfellowshiped was that she was shunned by all members of Jehovah's Witnesses. Since most of her friends and acquaintances since childhood were Witnesses, this made a severe impact upon her, and she brought suit against The Watchtower Bible and Tract Association, "the corporate arm of the Governing Body of Jehovah's Witnesses," alleging common law torts of defamation, invasion of privacy, fraud and outrageous conduct. The district court gave summary judgment in favor of the church, and Paul appealed. The Ninth Circuit of Appeals, Judges Eugene A. Wright, Thomas Tang and William C. Reinhardt, ruled unanimously in an opinion by Judge Reinhardt.

> We note at the outset that in this case the actions of Church officials were clearly taken pursuant to Church policy.... Although shunning is intentional, the activity is not malum in se.[36] The state is legitimately concerned with its regulation only to the extent that individuals are directly harmed.
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> * * *
>
> [T]he defendants... possess an affirmative defense of privilege—a defense that permits them to engage in the practice of shunning pursuant to their religious beliefs without incurring tort liability. Were shunning considered to be tortious conduct, the guarantee of the free exercise of religion would provide that it is, nonetheless, privileged conduct.
>
> * * *
>
> Shunning is a practice engaged in by Jehovah's Witnesses pursuant to their interpretation of canonical text, and we are not free to reinterpret that text.[37] Under both the United States and the Washington Constitutions, the defendants are entitled to the free exercise of their religious beliefs.
>
> * * *
>
> Clearly, the application of tort law to activities of a church or its adherents in their furtherance of their religious belief is an exercise of state power. When the imposition of liability would result in the abridgement of the right to free exercise of religious beliefs, recovery in tort is barred.

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35. *The Watchtower*, Sept. 15, 1981, quoted in *Paul v. Watchtower Bible & Tract Society*, 819 F.2d 875 (CA9 1987).

36. Not "wrong in itself."

37. Reference is to Matt. 18:18, Gal. 6:1, Titus 1:13, etc., quoted earlier in this section at nn. 4-8.

> The Jehovah's Witnesses argue that their right to exercise their religion freely entitles them to engage in the practice of shunning. The Church further claims that assessing damages against them for engaging in that practice would directly burden that right.
>
> We agree that the imposition of damages on the Jehovah's Witnesses for engaging in the religious practice of shunning would constitute a direct burden on religion.
>
> * * *
>
> The harms suffered by Paul as a result of her shunning by the Jehovah's Witnesses are clearly not of the type that would justify the imposition of tort liability for religious conduct. No physical assault or battery occurred. Intangible or emotional harms cannot ordinarily serve as a basis for maintaining a tort cause of action against a church for its practices—or against its members.... Offense to someone's sensibilities resulting from religious conduct is simply not actionable in tort. Without society's tolerance of offenses to sensibility, the protection of religious differences mandated by the first amendment would be meaningless.
>
> A religious organization has a defense of constitutional privilege to claims that it has caused intangible harm—in most, if not all, circumstances....
>
> Providing the Church with a defense to tort is particularly appropriate here because Paul is a former Church member. Courts generally do not scrutinize closely the relationship among members (or former members) of a church. Churches are afforded great latitude when they impose discipline on members or former members.[38] We agree with Justice Jackson's view that "[r]eligious activities which concern only members of the faith are and ought to be free—as nearly absolutely free as anything can be." *Prince v. Massachusetts* (1944) (concurring).
>
> The members of the Church Paul decided to abandon have concluded that they no longer want to associate with her. We hold that they are free to make that choice. The Jehovah's Witnesses' practice of shunning is protected under the first amendment of the United States Constitution and therefore under the provisions of the Washington state constitution.[39]

Indeed, one wonders what a church and its members would be expected to do to rectify a determination of tort derived from shunning. Would they be obliged to bring themselves into association with her—contrary to their inclinations and beliefs? No one should be obliged by law to do that—to associate in personal relations with someone else—for religious reasons or any other.

b. "Squire" v. Elders. Another case arose in a small rural church in Iowa, a congregation of one of the oldest Calvinist communions in the country. The pastor and three lay elders met to consider what to do about the domineering tactics of the

38. But see *Guinn* case at § c below.

39. *Paul v. Watchtower Bible and Tract Assn.*, *supra*.

church's most wealthy member, who tended to treat the church as his family chapel. They decided, in accordance with the law and practice of the denomination, to draw up an ecclesiastical admonition reproving the local squire for "unchristian conduct" and for causing dissension in the church. Two of the lay elders then hand-delivered the written admonition to the squire at his home, taking care that no one knew about it but themselves and the pastor.

The squire and his wife were furious and took the letter around to people in the church to ask if they had had anything to do with it. They then proceeded to sue the lay elders for defamation, though any "publishing" of the offending contents was done by themselves, not by the elders. They also subpoenaed the pastor and the church record books in an effort to discover evidence of malice in the decision to issue the rebuke. The denomination somewhat belatedly sought to assist the local church in defending its right to admonish a member in accordance with church law without opening up the church's internal affairs in court.

The local attorney retained by the defendants, however, had already pled a straight libel defense: the plaintiff had "published" the admonition himself; there was no malice involved, etc., thus opening up the way for discovery in preparation for trial. Church-state experts—when consulted after the fact—felt that the court should have been asked to dismiss the case for lack of jurisdiction over internal church affairs, citing *Serbian Eastern Orthodox Diocese v. Milivojevich* for the principle that "civil courts are bound to accept the decision... of religious organization[s]... on matters of discipline, faith, internal organization or ecclesiastical rule, custom or law."[40] But by the time experts were consulted, the damage had already been done.

The pastor moved to another church before the case came to trial. The lay elders were afraid of losing their farms if the suit should go against them and also were unable to spend much on legal defense. The synod executive was anxious to bring about a reconciliation among the parties. The national headquarters of the denomination sought to intervene as a party defendant to protect their church in the exercise of its ecclesiastical discipline, but their East Coast attorney had trouble communicating their wishes to the local attorney on the scene, and eventually (in 1984) the matter was settled out of court, with an agreement that represented a capitulation to the squire, who remained in undisputed control of his "chapel," with the church members and elders once more suitably subservient.

The case never came to trial and is therefore unreported. The names of the parties are not disclosed here, but the events are recounted as an outstanding example of how *not* to protect the integrity of church membership requirements. The following elements should be noted:

a. Retaining an attorney unfamiliar with church-state law;

40. 426 U.S. 696 at 713 (1976); see § B7 *supra*.

b. Failure to consult experts on that law until after the posture of the case had already been cast;
c. Treating the case as an ordinary libel suit rather than challenging the court's jurisdiction to try it at all—under the principles of autonomy discussed above;
d. Failing to cite *Reutkemeier v. Nolte*, a 1917 decision of the Iowa Supreme Court recognizing the privilege of a presbyterial system of church discipline;[41]
e. Not calling in the regional and national church bodies to intervene in a timely defense of the church's internal procedures and hierarchical polity;
f. Neglecting to insist that the plaintiff exhaust his remedies within the church before resorting to civil courts;
g. Letting the lay elders take the financial risk of carrying out the church's responsibility of membership discipline (or letting them think the burden was entirely theirs);
h. Once having set hand to the plow, turning back to a "reconciliation" that was really a capitulation to the tantrums of a village tyrant.[42]

c. *Guinn v. Church of Christ* (1984). An Oklahoma case revealed another aspect of religious discipline of church members. Marian Guinn, age thirty-six, a registered nurse, divorced mother of four, was a member of the Collinsville (Oklahoma) Church of Christ. She developed a liaison with a man who had been mayor of Collinsville, who was also divorced. In September 1981 the elders of the church threatened to disclose her relationship to the congregation unless she repented of her "sin of fornication." She responded by sending them a letter stating that she did not want "her name mentioned before the church except to tell them that I withdraw my membership immediately!" She was told by an elder, "You cannot withdraw from us. We must withdraw from you."[43]

On October 4, 1981, the elders disclosed to the congregation Marian Guinn's "sin of fornication" and advised members not to associate with her except to encourage her to repent. Copies of the elders' announcement were sent to Church of Christ

41. See Tiemann, W.H., and Bush, J.C., *The Right to Silence* (Nashville: Abingdon, 1983), p. 141, discussed further at § G2 below.

42. See further discussion of this case at § H2 below. In fact, Iowa is one of the few jurisdictions in which a collective privilege is recognized. In *Reutkemeier v. Nolte*, the Supreme Court of that state ruled that communications to and from the ruling elders of a Presbyterian Church were privileged (L.R.A., vol. 1917D, pp. 274-276). A subsequent case involving internal matters of church discipline was dismissed as being outside the purview of civil courts. On appeal the Supreme Court of Iowa ruled (as it ideally would have done if the above case had come before it): "The church's decision to excommunicate [the plaintiff] was purely ecclesiastical in nature, and therefore we will not interfere with the action. Interfering with the decision would contravene both our history of leaving such matters to ecclesiastical officials and the first and fourteenth amendments of the United States Constitution." *John v. Estate of Hartgerink*, 528 N.W.2d 539 (Iowa 1995), citing *Brown v. Mt.Olive Baptist Church*, 124 N.W. 2d 445 (1963).

43. Tulsa *World*, March 18, 1984.

congregations in neighboring towns.[44] She filed suit against the church for invasion of privacy and infliction of emotional distress. After trial in Tulsa County Court in March 1984, Marian Guinn was awarded damages against the church of $390,000. The church took an appeal, and various church leaders of other denominations were approached to support the church's right to discipline its members.

The right of a church to enforce ecclesiastical discipline is vital to its ability to maintain membership standards. Its maximum penalty is excommunication and/or shunning, but even that is too harsh in some people's view. Some of the jurors, when interviewed after the trial, said their verdict was intended to show that there are limits to the length to which churches can go in disciplining their members.[45] One wonders what they would think those limits should be. The elders maintained that they were simply doing their duty as set forth in the Gospel,[46] and they expressed concern, not so much about the possibility of having to pay the damages awarded, but the effect this verdict would have on other churches' trying to follow the Scriptural injunction.

There was one important flaw in their defense, however, which changed the entire status of the case, though it does not seem to have been recognized as dispositive by the jurors quoted above. The person the elders were undertaking to discipline *was no longer a member of the church*, having resigned in writing prior to their public denunciation, and their jurisdiction over her ceased at that instant. Though they may have believed it still their duty to warn the faithful against her, they could have done so by simply stating that she had withdrawn from the church and was therefore no longer a suitable person with whom to associate. To describe her sins to the congregation was gratuitous and properly actionable, as subsequent developments demonstrated. The elders' contention that she could not withdraw from them, they must withdraw from her, is not consonant with the principle of voluntary association that is basic to American law.

Some people have defended the right of a church to enforce discipline upon its members until such time as it consents to their withdrawal on the ground that all members were aware when they joined that that was part of the compact into which they were entering. That may conceivably be some churches' view of the solemnity and bindingness of church membership, and, if so, they should obtain from each member a written consent to that condition prior to any dispute about withdrawal, but it still may not prove to be enforceable in a court of civil law as contrary to public policy.

Several years after the foregoing lines were written, the Supreme Court of Oklahoma reached a similar conclusion in an opinion by Justice Marian P. Opala, delivered January 17, 1989.

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44. *Oklahoman*, March 11, 1984.

45. *New York Times*, March 16, 1984.

46. Cf. Matthew 18:15-17 and other passages cited in nn. 4-8 above.

The proper constitutional inquiry is whether the elders' decision to discipline the parishioner constituted such a threat to the public safety, peace or order that it justified the state trial court's decision to pursue the compelling interest of providing its citizens with the means of vindicating their rights conferred by tort law.

Prior to the parishioner's withdrawal of membership from the church, the elders approached her on three separate occasions to explain the doctrinally mandated consequences confronting a member who has been accused of transgressing church law. Here, the elders' protected conduct clearly did not justify governmental regulation on the ground that it posed a serious threat to public safety or welfare. When people voluntarily join together in pursuit of spiritual fulfillment, the First Amendment requires that the government respect their decision and not impose its own ideas on the religious organization. The parishioner's willing submission to the church shielded the church's pre-withdrawal, religiously motivated discipline from scrutiny through secular judicature.

Just as the freedom to worship is protected by the First Amendment, so also is the liberty to recede from one's religious allegiance. Implicit in the right to choose freely one's own form of worship is the right to unhindered and unimpeded withdrawal from the chosen form of worship. When the parishioner removed herself from membership, she withdrew her consent, thereby depriving the church of the power to actively monitor her spiritual life through overt disciplinary acts.

In *Paul v. Watchtower Bible & Tract Society*,[47] the court held that the Jehovah's Witness Church's practice of "shunning" is protected First Amendment activity. The facts here are clearly distinguishable from those in *Paul*. While both cases address the tort implications of a church's decision to impose disciplinary measures upon a former member, the forms of discipline are notably different. Here, although the parishioner had withdrawn her consent to submit to the church's discipline, the elders continued to actively discipline and punish her. In *Paul*, however, a former member deliberately rejected the faith and was thus shunned. The disassociation from the parishioner through shunning was merely a reiteration of her prior rejection, not an active attempt to involve her in the religious practices of a church whose precepts she no longer followed. For purposes of First Amendment protection, religiously motivated disciplinary measures that merely exclude a person from communion are vastly different from those that are designed to control and involve.

In order to prevail on her claim for invasion of privacy, the parishioner must prove four elements: that the statements by the elders were highly offensive to a reasonable person; that they contained private facts about the parishioner's life; that there was a public disclosure of private facts;

47. 819 F.2d 875 (CA9, 1987), discussed at § 5a(2) above.

> and that the statements were not of legitimate concern to the congregation. The elders contend that the third and fourth elements have not been met.
>
> The elders read scriptures that implicated the parishioner's private life to a church congregation comprising five percent of the parishioner's hometown population. The parishioner proved the third element by showing that the elders' actions amounted to a publication. To satisfy the fourth element, the parishioner had to prove that the publication was not of legitimate concern to the congregation. The elders' testimony indicated that one of the purposes served by the disciplinary proceedings is to keep the accused member's sin from spreading through the entire congregation. However, the parishioner removed herself from membership and thus posed no threat of continued adverse influence on the church congregation.
>
> Because the disciplinary actions taken by the elders after the parishioner's resignation are not deserving of First Amendment protection, they were the proper subject of her claim for intentional infliction of emotional distress, or outrage. The elders knew that the parishioner had withdrawn from the church, and yet they continued to discipline her as though she were a current member. Among the congregation were the parishioner's friends and fellow townspeople. Disciplining the parishioner as if she were still a member by communicating her sin of fornication could be found to be beyond all bounds of decency and supports the jury's finding that the elders intended to inflict emotional harm.[48]

This case, then, stands for the teaching that a church should not undertake to denounce from the pulpit the sins of one who is no longer a member unless it is prepared to answer in tort to the tune of six figures.

6. Can Churches Discriminate?

The foregoing disputes arose with respect to persons already members (or former members) of a religious body. But may a religious body in advance exclude from becoming members certain classes of persons whom it may consider ineligible for doctrinal (or other) reasons? The Black Muslims, for instance, during the lifetime of Elijah Muhammed did not admit whites to membership, though that restriction was rescinded after his death. Is a religious group entitled to select its members solely from one race or nationality, or to exclude a particular race or nationality from membership? Is the Native American Church entitled to limit its adherents to American Indians, a synagogue to Jews, or a Korean Presbyterian Church to Koreans? How about religious orders that admit only men, or only women?

Here an important distinction must be made. As was stated at the outset, the only power that religious bodies possess to protect their purpose, their doctrine, their

48. *Guinn v. Church of Christ of Collinsville*, 57 USLW 2462 (1989).

integrity, is the "power of the gate"—the ability to determine for themselves who can get in and stay in, and on what conditions. The first and most fundamental precept of (collective) religious liberty is that a religious body must be able to admit those who adhere to its tenets and obey its commandments and to exclude those who do not. That principle must never be compromised.

But that principle is distinguishable from the view that only persons of certain races, nationalities or other classifications over which they have no control can be expected to adhere to the tenets and obey the commandments of a religious group. Such a body could demand the most rigid standards of faith and behavior without arbitrarily shutting out in advance some potential members because of accidents of birth. Fortunately, Christianity and most other world religions (in their normative forms, at least) do not attempt to exclude any category of converts on the basis of involuntary traits—those they did not choose and cannot change: race, gender, age, place of birth. (Whether religious bodies legally *can* do so is a different question from whether ideally they *should* do so.)

The difference is this: in the first instance the religious body says to prospective members, "If you will believe our creed and abide by our rules, you may join our fellowship." In the second case, the religious body says, "If you are of the wrong color, gender, or nationality, there is nothing you can say or do that will make you eligible to join our fellowship." If a group believes, as many do, that there is no salvation outside its doors,[49] then in closing its doors on certain (involuntary) classes of people it is denying them the possibility of salvation on grounds of facts they cannot alter. A religious body must be *selective* in the first sense, but need not be *exclusive* in the second. In fact, if it chooses the latter course, it may suffer certain sanctions under the laws of a democratic society, such as loss of tax exemption, a possibility suggested by a recent Supreme Court decision, *Bob Jones Univ. v. U.S.*[50]

The optimum condition for religious liberty would be that in which the government did not attempt to regulate by law, or to impose sanctions under the tax code upon, a religious body's criteria for admission or retention of members. No one has a civil "right" to belong to any religious body, and no one should have a claim under property or contract law (unless a formal, explicit contract has been entered into) not to be expelled from it for violation of the organization's rules. If a group of bald-headed or blue-eyed or left-handed people should wish to organize a religious body for only those persons having the same characteristic, it should be none of the government's business. (It may be everybody's business *but* the government's, since the concept of religious liberty does not mean that religious persons or bodies are to be exempt from all criticism or even private sanctions, which are part of the give-and-take of a free society.)

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49. *Extra ecclesia non salus.*

50. 461 U.S. 574 (1983), discussed at VC6c(4).