

**New York
County Lawyers
Association**

**Continuing
Legal Education
Institute**

CHRISTIAN, ISLAMIC, AND JEWISH DISPUTE RESOLUTION IN THE NY/METROPOLITAN AREA

Prepared in connection with a Continuing Legal Education course presented
at New York County Lawyers' Association, 14 Vesey Street, New York, NY
scheduled for February 4, 2020

Program Co-sponsors: NYCLA's ADR Committee; AMAL

Program Chairs: Elan E. Weinreb, Christopher Fladgate and Nelson Timken, NYCLA's ADR
Committee; Ally Hack, AMAL

Faculty: Ronald J. Colombo, *Professor of Law and Associate Dean for Distance
Education Maurice A. Deane School of Law at Hofstra University*; Pastor P. Brian
Noble, *Peacemaker Ministries*; Dr. Mohammad Qatanani, *Imam, the Islamic Center of Passaic
County*; Rabbi Shlomo Weissmann, *Director, Beth Din of America*

This course has been approved in accordance with the requirements of the New York State Continuing Legal Education Board for a maximum of 3 Transitional and Non-Transitional credit hours: 1 Skills; 1 PP; 1 DIEB

This program has been approved by the Board of Continuing Legal Education of the Supreme Court of New Jersey for 3 hours of total CLE credits. Of these, 0 qualifies as an hour of credit for ethics/professionalism, and 0 qualify as hours of credit toward certification in civil trial law, criminal law, workers compensation law and/or matrimonial law.

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Information Regarding CLE Credits

**Christian, Islamic, and Jewish Dispute Resolution in the NY/Metropolitan
Area**

February 4, 2020; 6:00 PM to 9:00 PM

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**New York
County Lawyers
Association**
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Legal Education
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**Christian, Islamic and Jewish Dispute
Resolution in the NY/Metropolitan Area**

Tuesday, February 4, 2020

6:00 PM –9:00 PM

Program Co-sponsors: NYCLA's ADR Committee; AMAL

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AGENDA

5:30 PM – 6:00 PM Registration

6:00 PM – 6:10 PM Introductions and Announcements

6:10 PM -- 6:35 PM Jewish Religion

6:35 PM – 7:00 PM Christian Religion

7:00 PM – 7:10 PM BREAK

7:10 PM – 7:35 PM Peacemaker Ministries

7:35 PM – 8:00 PM Muslim Religion

8:00 PM – 8:10 PM BREAK

8:10 PM – 8:45 PM Panel Discussion:

8:45 PM – 9:00 PM Questions and Answers

NOTE: Downloading the course materials from the NYCLA website

- Go to www.nycla.org
- Rollover **CLE** found in the top toolbar
- Scroll down & click on **CLE COURSE MATERIALS**
- Under the name of the course, click on the Attachment folder
- A pdf file will download to your computer; Be sure to check your Download Folder

Discussion Outline

JEWISH

1. History and Background

- Jewish law, generally, including a robust commercial legal system
- History of Jewish courts
- Contemporary role and function of rabbinical courts

2. Procedural issues in rabbinical court

- The summoning process and venue issues
- Procedural nuts and bolts of a rabbinical court arbitration

3. Substantive law in rabbinical court

- Choice of law issues
- Enforceability issues
- Examples of cases

CHRISTIAN (Professor Colombo)

1. Scriptural basis of ADR

2. History of ADR in Christianity

3. Modern Christian ADR

- Distinction between voluntary versus involuntary ADR
- Enforceability of Christian ADR agreements / determinations
- Christian ADR in practice
- Example / personal experience

PEACEMAKERS

1: Tension: A biblical approach to tension

- Healthy Tension
- Unhealthy Tension

2: Story: Discover your Story and Stretch your perspective

- Storyline Questions

3. Ascend: Go back to your core values

- God's Presence
- God's Character
- Our Identity in Christ
- Our Calling to reconcile

4. Reflect: Take personal responsibility

- The Escape and Attack Responses
- Log and Speck Tool
- The Gospel

5. Connect: Make and Implement a Plan

- Apologize
- Forgive
- Restitution
- Reconciliation

MUSLIM

1. Introduction about "Arbitration in Islam"

- Introduction about Islam, Shareah and Fiqh "Jurisprudence".
- Various ways of settling differences in Islam.
- It is a social duty to settle the differences.
- People must observe peace and reconciliation among themselves.
- The Qur'an urges the Muslims to try to adjust any disputes which may arise between them.
- "Have fear of Allah and resolve your differences" . (Surah al-Anfal, 8:1).
- The holy Prophet is reported to have said: "To settle the differences is more meritorious than prayers and fasting".
- A person who has a legal dispute should try to settle it by negotiation, and if a result is not obtained this way, he should refer it to an arbiter, competent in accordance with Islamic standards.
- Whatever judgement is given by the arbiter, should be accepted unconditionally.

2. Adherence to the Divine law

- In Islam It is considered to be a part of faith to refer a dispute to an Islamic arbitration.
- In this respect the Qur'an says: "By your Lord! (the fact is) that they will not be true believers until they make you judge in what is in dispute between them and then do not find in themselves any dislike of what you decide, and submit (to your judgement) without reservation". (Surah al-Nisa, 4:65).

3. Administration of Justice in Islam

- Arbitration In Qur'an And Sunna
- Arbitration according to the main for Fiqhi Schools.
- It is an obligation on Muslims in the west to go to arbitration as much as they can.
- Why the arbitration?!
- Heavy responsibilities of a judge
- The principles of arbitration in Islam.

Rabbi Shlomo Weissmann Materials

Rules and Procedures



BETH DIN *of* AMERICA

בית דין דאמריקא



BETH DIN *of* AMERICA

בית דין דאמריקא

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Contents

SEC. 1	Designation of <i>Av Beth Din</i> ; Designation of Arbitrators (<i>Dayanim</i>).....	1
SEC. 2	Jurisdiction of the Beth Din to Arbitrate.....	2
SEC. 3	Choice of Law	4
SEC. 4	Initiation Under Submission	5
SEC. 5	Number and Selection of Arbitrators (<i>Dayanim</i>).....	6
SEC. 6	Disclosure and Challenge Procedure	6
SEC. 7	Vacancies	7
SEC. 8	Pre-Hearing Conference	7
SEC. 9	Time and Place.....	7
SEC. 10	Record.....	7
SEC. 11	Interpreter and Other Cases of Need	8
SEC. 12	Representation by Counsel	8
SEC. 13	Attendance at Proceedings	8
SEC. 14	Recess	9
SEC. 15	Oaths	9
SEC. 16	Order of Proceedings	9
SEC. 17	Arbitration in the Absence of a Party.....	9
SEC. 18	Evidence	9
SEC. 19	Evidence by Affidavit and Filing of Documents	10
SEC. 20	Inspection or Investigation.....	10
SEC. 21	Conservation of Property	11
SEC. 22	Closing of Proceedings	11
SEC. 23	Reopening of Proceedings.....	11
SEC. 24	Waiver of Oral Hearings.....	11
SEC. 25	Communication with the Beth Din; Service of Process	12
SEC. 26	Decision and Time of Award	12
SEC. 27	Form of Award	12
SEC. 28	Scope of Award	13
SEC. 29	Award upon Settlement	13
SEC. 30	Delivery of Award to Parties	13
SEC. 31	Modification of Award (Appeal)	13
SEC. 32	Release of Documents for Judicial Proceedings.....	14
SEC. 33	Application to Court.....	14
SEC. 34	Fees	14
SEC. 35	Expenses	15
SEC. 36	Deposits	16
SEC. 37	Waiver of Rules.....	16
SEC. 38	Extension of Time	16
SEC. 39	Interpretation and Application of Rules	16

Rules and Procedures



BETH DIN *of* AMERICA

בית דין דאמריקא

The Beth Din of America provides a forum where adherents of Jewish law can seek to have their disputes resolved in a manner consistent with the rules of Jewish law (*halacha*) and with the recognition that many individuals conduct commercial transactions in accordance with the commercial standards of the secular society.

These Rules and Procedures are designed to provide for a process of dispute resolution in a Beth Din which is in consonance with the demands of Jewish law that one diligently pursue justice, while also recognizing the values of peace and compromise. The Beth Din of America adjudicates disputes in a manner consistent with secular law requirements for binding arbitration so that the resolution will be enforceable in the civil courts of the United States of America, and the various states therein.

Rules and Procedures

SEC. 1

**Designation of *Av Beth Din*;
Designation of Arbitrators (*Dayanim*)**

- a The *Av Beth Din* of the Beth Din of America (Beth Din) shall serve as the supervisor of the Beth Din and all of its functions. When parties initiate arbitration or any other dispute resolution related activities, including mediation or negotiation, in the Beth Din, the parties thereby appoint the *Av Beth Din* or his designee as the administrator in any Beth Din proceeding or hearing.
- b The obligations of the *Av Beth Din* or his designee shall be as prescribed in these Rules. Every obligation of the *Av Beth Din* may be delegated to a designee at the discretion of the *Av Beth Din*. In the absence of the *Av Beth Din* or at his direction, the *Segan* (Assistant) *Av Beth Din* shall function as the *Av Beth Din*. In the absence of the *Segan Av Beth Din*, the *Menahel* (Director) of the Beth Din shall function as the *Av Beth Din*.
- c The *Av Beth Din*, with the assistance of any rabbis he shall designate, shall prepare a list of authorized arbitrators (*dayanim*) eligible to hear cases. Such a list shall be divided into two categories: Those arbitrators (*dayanim*) eligible to serve as arbitrators (*dayanim*) alone (in a panel of one arbitrator), all of whom shall be rabbis, and those who shall be eligible to serve only on panels of three arbitrators (*dayanim*), all of whom need not be rabbis, but rather may include religiously observant individuals involved in the various professions. In every matter heard by a panel of three arbitrators (*dayanim*), one panel member must be a rabbi.
- d These Rules and any amendment thereof shall apply to every matter presented to the Beth Din for resolution and shall be provided to the parties by the Beth Din at the time the arbitration is initiated. A copy of these Rules, or an internet link thereto, shall be furnished to each of the parties seven days before any hearings are initiated.
- e When a matter is brought to the Beth Din for resolution, the arbitrator (*dayan*) or arbitrators (*dayanim*) shall be selected by the *Av Beth Din* or his designee and shall be neutral. Any person serving as an arbitrator (*dayan*) shall be subject to disqualification for the reasons specified in Section 6. The *Av Beth Din* may solicit advice from the parties concerning the selection of arbitrators (*dayanim*), as he feels proper.

SEC. 2 Jurisdiction of the Beth Din to Arbitrate

- a The parties shall be deemed to have made these Rules a part of their agreement to seek arbitration (as defined below) whenever they submit their dispute for resolution by the Beth Din.
- b In the absence of an agreement to arbitrate which is signed by both parties, the Beth Din shall send at the request of the claimant (unless prohibited by the law of the jurisdiction in which the Beth Din is sitting) an invitation (*hazmana*) to participate in the proceedings of the Beth Din to any person, if, in the judgment of the *Av Beth Din*, that person is one who should participate in such a proceeding. Should a person receiving an invitation (*hazmana*) not wish to participate in these proceedings, and wishes to avoid the issuance of a *shtar seruv* (see paragraph [i]) one of three responses must be forthcoming from that party:
 - 1 That party wishes to proceed to arbitration in an alternative bet din recognized by the *Av Beth Din* and this case is not one in which the Beth Din of America was the pre-agreed forum for dispute resolution by the parties;
 - 2 That party wishes to resolve the dispute through the procedure by which each side chooses an arbitrator, and the two chosen arbitrators agree on a third party (referred to as *zebla* in Jewish law), and this case is not one in which the Beth Din of America was the pre-agreed forum for dispute resolution by the parties; or
 - 3 That party otherwise falls outside the jurisdictional mandate of the Beth Din.
- c If the litigant who is sent an invitation (*hazmana*) responds by choosing option one, and a bet din is chosen that is suitable to both sides, the Beth Din will withdraw from this matter.
- d If the litigant who is sent an invitation (*hazmana*) responds by choosing option one, and a bet din is chosen that is unsuitable to the claimant, the Beth Din will note that fact in a letter to defendant, and convert the proceeding to a case in which both parties have chosen option 2.
- e If the litigant who is sent an invitation (*hazmana*) chooses option 2, and they have chosen as their representative a person who — in the opinion of the *Av Beth Din* — is authorized by Jewish law to serve as their arbitrator, the Beth Din will withdraw

from this matter. The Beth Din may permit and encourage any one of its arbitrators (*dayanim*) to accept this case under the *zebla* arrangement, although the arbitrator (*dayan*) in such circumstances will not be functioning as a member of the Beth Din.

- f If a litigant is sent an invitation (*hazmana*) and chooses option 2 and chooses a representative who — in the opinion of the *Av Beth Din* or his designee — is unsuitable to function as an arbitrator (*dayan*) according to Jewish law, the Beth Din shall treat this situation as analogous to one in which no proper response is forthcoming.
- g If the party to whom an invitation (*hazmana*) is sent responds by demonstrating facts that show that this case is outside the jurisdiction of the Beth Din, the *Av Beth Din* shall withdraw the invitation, and so note that fact in the record. In such cases, the proper jurisdiction of the Beth Din of America is determined by Jewish law as well as the discretionary judgment of the *Av Beth Din*.
- h If the party to whom an invitation is sent responds by claiming that this case is outside the jurisdiction of the Beth Din and the *Av Beth Din* determines that such a claim is incorrect, the Beth Din shall treat this matter as one in which no proper response is forthcoming, unless this party chooses options (c) or (e) above, or accepts the jurisdiction of the Beth Din.
- i If no proper response is forthcoming to an invitation (*hazmana*) after proper notification and the passing of 30 calendar days, it is within the discretion of the *Av Beth Din* to authorize the Beth Din to issue a *shtar seruv* (a document noting that this person refuses to participate in the proceedings of the Beth Din, and permitting, according to Jewish law, the claimant to seek relief in secular court), and publicize that fact in any manner the Beth Din sees fit.
- j When there is an agreement to arbitrate which is signed by both parties, the provisions found in this section, in clauses (b) through (i) shall not be applicable, and the Beth Din shall hear the matter. If, after reasonable notice, one party refuses to attend the proceedings of the Beth Din in a case in which there is an agreement to arbitrate in the Beth Din, the matter shall proceed without the participation of that party. However, no financial award may be issued based on a default judgment alone. (See Section 17.)

SEC. 3 Choice of Law

- a In the absence of an agreement by the parties, arbitration by the Beth Din shall take the form of compromise or settlement related to Jewish law (*p'shara krova l'din*), in each case as determined by a majority of the panel designated by the Beth Din, unless the parties in writing select an alternative Jewish law process of resolution.
- b The Beth Din will strive to encourage the parties to resolve disputes according to the compromise or settlement related to Jewish law principles (*p'shara krova l'din*); however, the Beth Din will hear cases either according to Jewish law as it is understood by the arbitrators or compromise (*p'shara*) alone, if that is the mandate of the parties.*

*Compromise or settlement related to Jewish law principles (*p'shara krova l'din*) is a process in which the relative equities of the parties' claims are considered in determining the award. For example, in Jewish law (*din*), the party that proves the "truthfulness" of its case "more likely than not," as well as proving the Jewish law basis for its entitlement, is qualified to recover 100% of the amount sought, whereas in compromise or settlement related to Jewish law principles (*p'shara krova l'din*) such a party would not necessarily recover 100% of the amount sought, depending on that party's conduct throughout the matter under dispute. So too, in a case where neither party proves the "truthfulness" of its case "more likely than not," or does not prove the Jewish law basis for its entitlement, Jewish law (*din*) would not provide for an award, whereas compromise or settlement related to Jewish law principles (*p'shara krova l'din*) could provide for an award in that case.

Remedies also might be different. In a case governed by the principles of compromise or settlement related to Jewish law principles (*p'shara krova l'din*) an award could require a public apology, or other remedies not required in Jewish law (*din*). Even in a case decided under the compromise or settlement related to Jewish law principles (*p'shara krova l'din*), it is quite possible that one litigant will triumph completely and be fully vindicated.

Among the factors **not** considered in compromise or settlement related to Jewish law principles (*p'shara krova l'din*) in a financial dispute are: levels of religiosity, relative wealth of the parties, or gender.

It is the policy of the Beth Din of America to encourage the parties to adjudicate matters in accordance with compromise or settlement related to Jewish law principles (*p'shara krova l'din*).

In those cases in which Jewish law mandates that compromise (*p'shara*) alone provide the basis for the resolution of the dispute, no explicit acceptance of such shall be required.

- c The Beth Din of America accepts that Jewish law as understood by the Beth Din will provide the rules of decision and rules of procedure that govern the functioning of the Beth Din or any of its panels.
- d In situations where the parties to a dispute explicitly adopt a “choice of law” clause, either in the initial contract or in the arbitration agreement, the Beth Din will accept such a choice of law clause as providing the rules of decision governing the decision of the panel to the fullest extent permitted by Jewish Law.
- e In situations where the parties to a dispute explicitly or implicitly accept the common commercial practices of any particular trade, profession, or community — whether it be by explicit incorporation of such standards into the initial contract or arbitration agreement or through the implicit adoption of such common commercial practices in this transaction — the Beth Din will accept such common commercial practices as providing the rules of decision governing the decision of the panel to the fullest extent permitted by Jewish Law.
- f Unless otherwise indicated, all references in these Rules to “arbitration” shall refer to dispute resolution utilizing any of these principles, and the Rules set forth herein shall be applicable equally to any of these modes of resolution.

SEC. 4

Initiation Under Submission

- a Parties to any existing dispute may commence a proceeding under these Rules by filing with the Beth Din two (2) copies of an agreement (which shall be executed by the parties) whereby the parties agree to arbitrate under these Rules (“Submission”). A suggested form of Submission is available at www.bethdin.org/agreement.
- b Such Submission shall contain a statement of the matter in dispute that is to be resolved by the Beth Din. The Beth Din shall be permitted to resolve all disputes between the litigants that in its judgment are related to the dispute contained in the submission agreement, even if particular aspects of a dispute are not explicitly mentioned in the submission agreement; disputes related to the matter submitted may only be removed from the jurisdiction of the Beth Din through the explicit agreement of the parties.
- c The parties shall concurrently submit to the Beth Din the appropriate administrative fee.

SEC. 5

**Number and Selection of Arbitrators
(*Dayanim*)**

- a If the Submission or contractual provision pursuant to which arbitration is initiated does not specify the number of arbitrators (*dayanim*), the dispute shall be heard and determined by one arbitrator (*dayan*) if the amount in controversy is less than \$20,000 unless the parties, by mutual agreement, request that the dispute be heard and determined by a panel of three arbitrators (*dayanim*).
- b If the amount in dispute is equal to or more than \$20,000, the matter shall be heard by three arbitrators (*dayanim*) unless the parties, by mutual agreement request that the matter be heard by a single arbitrator (*dayan*).
- c The *Av Beth Din* may direct that any particular case submitted for resolution to the Beth Din be heard by a panel of three arbitrators (*dayanim*).
- d The Beth Din shall notify the parties upon the selection of arbitrators (*dayanim*) by the *Av Beth Din*, so as to provide the parties with a reasonable time to exercise their right to challenge the neutrality of any arbitrator (*dayan*), in accordance with Section 6 of these rules.

SEC. 6

Disclosure and Challenge Procedure

- a Any party may object to the appointment of any person appointed as an arbitrator (*dayan*) on the grounds that such person is biased or has a financial or personal interest in the result of the arbitration or has any past or present relationship with the parties.
- b A person appointed to be an arbitrator (*dayan*) shall disclose in writing, which shall be confidential, to the *Av Beth Din* any circumstances likely to affect impartiality, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties.
- c Upon receipt of such information from such party or arbitrator (*dayan*) or other source, the *Av Beth Din* shall communicate such information to the parties, and, if the *Av Beth Din* deems it appropriate to do so, to the arbitrator (*dayan*) and others. The *Av Beth Din* shall determine whether the arbitrator (*dayan*) should be disqualified and shall inform the parties of his decision, which shall be conclusive. However, the *Av Beth Din* must disqualify any arbitrator (*dayan*) who has a financial interest in any matter.

SEC. 7 Vacancies

- a If any arbitrator (*dayan*) should resign, die, withdraw, refuse, be disqualified or be unable to perform his duties, the *Av Beth Din* may, on proof sufficient and satisfactory to the *Av Beth Din*, declare the office vacant. Any vacancy that occurs before the proceedings have been closed (Section 22) shall be filled in accordance with Section 1(e) of these Rules, as applicable. In the event of the appointment of a substitute arbitrator, the panel of arbitrators shall determine in its sole discretion whether it is necessary to repeat all or part of any prior hearings.
- b Any vacancy that occurs after the proceedings have been closed shall not be filled and the matter shall not be reheard unless, in each case, the parties otherwise agree.

SEC. 8 Pre-Hearing Conference

- a At the request of all the parties or in the discretion of the *Av Beth Din* a pre-hearing conference of the *Av Beth Din* or his designee and the parties will be scheduled in appropriate cases to arrange for an exchange of information, a stipulation of uncontested facts, relevant documents, witnesses to be called and any other matters which shall expedite the arbitration proceedings.

SEC. 9 Time and Place

- a The Beth Din shall fix the time and place for each hearing. The *Av Beth Din* or his designee shall notify each party thereof in accordance with Section 25(b) of these Rules at least eight days in advance, unless the parties by mutual agreement waive such notice or modify the terms thereof.

SEC. 10 Record

- a The *Av Beth Din* shall arrange for electronic recording of every proceeding, unless all of the parties waive this right. At the request of any party, the *Av Beth Din* shall arrange for a reporting service to prepare an official transcript of such recording. The cost of such transcript shall be prorated among the parties ordering copies unless the parties otherwise agree and shall be paid by the responsible parties directly to the reporting service which provides such transcription services.

SEC. 11 Interpreter and Other Cases of Need

- a All proceedings of the Beth Din shall be in English, unless the *Av Beth Din* directs to the contrary, and all the parties to the proceeding consent to the use of any other language.
- b Upon the request of any party, the *Av Beth Din* shall arrange for an interpreter to be present at the proceeding for the benefit of one or more of the parties. The requesting party or parties shall bear the cost of such service.
- c In situations where one of the litigants is handicapped or in need of other assistance which facilitates the presentation to the Beth Din, the Beth Din shall make such accommodations as needed to allow that person to present their case in a reasonable manner.

SEC. 12 Representation by Counsel

- a Any party shall have the right to be represented by an attorney who must be licensed to practice law in any jurisdiction in the United States and may claim such right at any time as to any part of the arbitration that has not taken place. If a party is represented by an attorney, all papers served on such party shall be served on such attorney.
- b A party that does not attend the proceedings with an attorney shall be deemed to have waived his right to counsel for that proceeding.

SEC. 13 Attendance at Proceedings

- a All proceedings of the Beth Din shall be private unless the law of the jurisdiction provides to the contrary. Any person having a direct interest in the arbitration shall be entitled to attend proceedings of the Beth Din and to be represented by an attorney who may attend and participate in the proceedings in any manner that the principal may participate. Unless the parties otherwise agree, the Beth Din shall decide whether any other person may attend the hearings. The Beth Din shall exclude any witness, other than a party or their representatives, during the testimony of any other witness.

SEC. 14 Recess

- a The Beth Din may recess upon the request of any party or upon its own initiative and shall recess when all the parties agree thereto. The Beth Din shall reconvene upon the direction of the *Av Beth Din*, or when agreed to by the parties or directed by the arbitrators hearing the matter.

SEC. 15 Oaths

- a The arbitrators (*dayanim*) shall not be required to take an oath or to administer an oath to any party or witness.

SEC. 16 Order of Proceedings

- a The Beth Din may, at the beginning of the proceeding, ask for statements clarifying the issues involved. After any such statements, the complaining party shall present its claims, witnesses and proof. Thereafter, the defending party shall present its defenses, witnesses and proof. All witnesses who appear before the Beth Din shall submit to questions or other examination by the Beth Din and by the parties (or their counsel). The Beth Din shall have discretion to vary this procedure, but shall afford full and equal opportunity to all parties for the presentation of any material or relevant proof.
- b Exhibits, when offered by either party, may be received in evidence and appropriately marked by the Beth Din.
- c The names and addresses of all witnesses and a description of exhibits in the order received shall be made a part of the record.

SEC. 17 Arbitration in the Absence of a Party

- a Unless the law of the jurisdiction provides to the contrary, the arbitration may proceed in the absence of any party who, after due notice, fails either to be present or to obtain an adjournment. An award shall not be made solely because of a party's default. Rather, the Beth Din shall require the party who is present to submit such evidence as the Beth Din may require for the making of an award.

SEC. 18 Evidence

- a The parties may offer such evidence as they desire and shall produce such additional evidence as the Beth Din may deem necessary to an understanding

and determination of the dispute. The Beth Din, when authorized by the law of the jurisdiction to subpoena witnesses or documents, may do so upon its own initiative or upon the request of any party. The Beth Din shall be the judge of the relevancy and materiality of the evidence offered and conformity to legal rules of evidence shall not be necessary. All evidence shall be taken in the presence of the entire Beth Din and the parties, except where any party is absent because such party is in default or has waived in writing the right to be present.

- b The Beth Din may, on its own motion, seek testimony or affidavits from any person whom it deems relevant to a matter: provided that such testimony be sought in the presence of the parties, and subject to such rebuttal as the parties deem appropriate and the Beth Din permits.
- c There shall be no *ex parte* communication between the arbitrators (*dayanim*) and the parties, or between the arbitrators (*dayanim*) and any witnesses unless the arbitration contract explicitly permits such activity.

SEC. 19

Evidence by Affidavit and Filing of Documents

- a The Beth Din shall receive the evidence of witnesses contained in affidavits, but such affidavits will receive only such weight as the Beth Din deems appropriate after consideration of any objections thereto.
- b Any documents not filed with the Beth Din at the proceeding, but which the parties agree at the proceeding or subsequently should be submitted to the Beth Din, shall be filed with the *Av Beth Din* (for distribution to the entire Beth Din) and a copy of such documents shall concurrently be delivered to each other party to the dispute. All parties shall be afforded an opportunity to examine and submit written comments with respect to such documents to the *Av Beth Din* prior to submission of such documents to the Beth Din. Such comments shall be distributed to the Beth Din together with such documents.

SEC. 20

Inspection or Investigation

- a Whenever the Beth Din deems it necessary or appropriate to make an inspection or investigation in connection with the arbitration, the Beth Din shall advise the parties of such intention. The Beth Din shall set the time and the *Av Beth Din* or his

designee shall notify the parties thereof. Any party who so desires may be present at such inspection or investigation. If one or both parties are not present at the inspection or investigation, the Beth Din shall make a verbal or written report to the parties and afford them an opportunity to comment.

SEC. 21 Conservation of Property

- a Unless prohibited by the law of the jurisdiction, the Beth Din may issue such orders as it may deem necessary or appropriate to preserve and safeguard any property that is the subject matter of the arbitration without prejudice to the rights of the parties or to the final determination of the dispute.

SEC. 22 Closing of Proceedings

- a After each of the parties has completed presenting its witnesses and proof, the Beth Din shall specifically inquire of all the parties whether they have any further proof to offer or witnesses to be heard. Upon receiving negative replies, the Beth Din shall declare the proceedings closed and shall record the date of such closing.
- b If any documents or other submissions are to be filed with the Beth Din after the taking of all testimony has been completed, the proceedings shall be closed as of the final date set by the Beth Din for the filing of such documents or other submissions. Absent an agreement by the parties to the contrary, the time limit within which the Beth Din is required to make its award (Section 26) shall commence upon the closing of the proceedings.

SEC. 23 Reopening of Proceedings

- a Before any award is made, the Beth Din upon its own motion or upon application of a party, may reopen the proceedings at any time for taking additional evidence or hearing additional testimony.

SEC. 24 Waiver of Oral Hearings

- a The parties may provide, by written agreement and the consent of the Beth Din, for the waiver of oral hearings. If such hearing is waived, the parties shall agree upon an alternative procedure to be followed by the Beth Din for receiving evidence.

SEC. 25**Communication with the Beth Din;
Service of Process**

- a After the proceedings have commenced, the parties and their counsel shall not communicate with the arbitrators (*dayanim*) concerning the arbitration outside of the proceedings. Any other oral or written communications from the parties to the arbitrators (*dayanim*) shall be directed to the *Av Beth Din* for transmittal to the members of the Beth Din. In a case in which the *Av Beth Din* is also an arbitrator (*dayan*), the *Segan Av Beth Din* shall assume the duties normally assigned to the *Av Beth Din* for that case.
- b Each party to an arbitration under these Rules shall be deemed to have consented that any documents, notices, awards or process necessary or appropriate to initiate or continue arbitration under these Rules and any court action in connection therewith or the entry of judgment on any award made thereunder may be served upon such party by mail or overnight delivery at the last known address, or by personal service, facsimile transmission (fax), or e-mail transmission, to the party or its representative.

SEC. 26**Decision and Time of Award**

- a The award must be made by at least a majority of the arbitrators (*dayanim*) unless the concurrence of all the arbitrators (*dayanim*) is expressly required by written agreement of the parties. The Beth Din shall make its award promptly and shall strive to issue every award not later than three months after the date on which the proceedings are closed (Section 22). Extensions of this deadline may be made at the sole discretion of the *Av Beth Din*.

SEC. 27**Form of Award**

- a The award shall be in writing and shall be signed and affirmed by the arbitrators (*dayanim*) and shall be in English. In the discretion of the arbitrators (*dayanim*), a simultaneous translation into other languages can also be issued in writing. The award shall be executed in the manner required by the law of the jurisdiction.

SEC. 28 Scope of Award

- a The Beth Din may grant any remedy or relief that it deems just and equitable, including, without limitation, specific performance of a contract and injunctive relief. The Beth Din may also award attorney's fees and expenses.
- b In addition to any final award, the arbitrators may make other decisions, including interim or partial orders and awards.

SEC. 29 Award upon Settlement

- a If the parties settle their dispute during the course of the arbitration, the Beth Din, at the written request of the parties, may set forth the terms of such settlement in an award, although such a settlement shall not be considered an "award of the Beth Din."

SEC. 30 Delivery of Award to Parties

- a The award shall be delivered to the parties in accordance with Section 25(b) of these Rules, and shall be filed in any manner which may be prescribed or permitted by the law of the jurisdiction.

SEC. 31 Modification of Award (Appeal)

- a On written application of a party to the Beth Din with in twenty (20) days after delivery of the award to the applicant, the Beth Din may modify the award if (a) there was a mathematical miscalculation; or (b) there was a mistake in the description of any person, thing or property referred to in the award; or (c) the award is based upon an issue not submitted to the Beth Din and the award may be corrected without affecting the merits of the decision upon the issues submitted; or (d) the award is imperfect in a matter of form not affecting the merits of the controversy; or (e) the *Av Beth Din* determines that a provision of the Award is contrary to Jewish Law.

- b Copies of such application shall be concurrently served upon all other parties to the arbitration in accordance with Section 25(b) of these Rules. Any party objecting to such modification shall submit written objections to the Beth Din, with copies to all other parties to the arbitration, within 10 days of receipt of such application. The Beth Din shall dispose of any application made under this section in writing. The Av Beth Din shall strive to issue such writing within 40 days after the application for modification. The parties may consent in writing to extend the time for such disposition either before or after its expiration.

SEC. 32**Release of Documents for Judicial Proceedings**

- a The Beth Din shall furnish to any party, at the prior written request and at the expense of such party, certified copies of any papers in the Beth Din's possession that may be required in judicial proceedings relating to the arbitration.

SEC. 33**Application to Court**

- a No judicial proceedings by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party's right to arbitrate, although the Beth Din may consider such conduct in determining its award.
- b No arbitrator (*dayan*) in an arbitration proceeding under these Rules is a necessary party to a judicial proceeding relating to such arbitration.
- c Parties to these Rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any Federal or state court having jurisdiction thereof.
- d Parties to an arbitration under these rules shall be deemed to have consented that neither the Beth Din of America nor any arbitrator shall be liable to any party in any action for damages or injunctive relief for any act or omission in connection with any arbitration under these rules.

SEC. 34 Fees

- a The *Av Beth Din* shall prescribe a fee schedule to compensate the Beth Din for the cost of providing its services. The schedule in effect at the time the arbitration is initiated shall be applicable.
- b Fees for arbitration proceedings shall be advanced prorata by the parties, subject to final apportionment by the Beth Din in the award.
- c When a matter is withdrawn or settled, a refund may be made as determined by the *Av Beth Din*.
- d The Beth Din, in the event of extreme hardship on the part of any party, may defer or reduce applicable fees.
- e If, at any time, any party has failed to pay fees or expenses to the Beth Din in full, the *Av Beth Din* may order the suspension or termination of the proceedings, pending payment in full, and inform the parties in order that one of them may advance the required payment. If one party advances the payment owed by a non-paying party, the *Av Beth Din* or his designee may issue an award, separate from any other award ordered by the Beth Din, ordering the non-paying party to reimburse the other party for advances made on their behalf. The *Av Beth Din* or his designee shall notify each party at least eight days prior to the issuance of any such award of his intent to do so, and he may issue such award without an oral hearing unless either party requests one in writing. Such award shall be subject to the provisions of Section 33(c) of these Rules, although it shall not be subject to the provisions of Sections 26 and 27 of these Rules.

SEC. 35 Expenses

- a Each party shall bear the costs of its own counsel and witnesses (other than witnesses who appear at the direct request of the Beth Din).
- b All other expenses of the arbitration, including the expenses of any witness or the cost of any proof produced at the direct request of the Beth Din, shall be borne equally by the parties.
- c The allocation of expenses under this section may be modified by the agreement of the parties, or by the Beth Din in its award.

SEC. 36**Deposits**

- a The Beth Din may require the parties to deposit in advance such sums of money as the Beth Din deems necessary to defray the expenses of the arbitration, and in such circumstances as the *Av Beth Din* considers appropriate, the Beth Din may require the posting of a performance bond. The Beth Din shall render an accounting to the parties and return any unexpended balance.

SEC. 37**Waiver of Rules**

- a Any party who proceeds with the arbitration after knowledge that any provision or requirement of these Rules has not been complied with and fails to state objection thereto in writing shall be deemed to have waived the right to object unless the law in the jurisdiction or these rules provide to the contrary.

SEC. 38**Extension of Time**

- a The parties may by mutual agreement modify the period of time for any action required to be taken hereunder. The Beth Din for good cause may extend any period of time established by these Rules, except the time for making the award. The *Av Beth Din* or his designee shall notify the parties of any such extension of time and the reason therefor.

SEC. 39**Interpretation and Application of Rules**

- a The *Av Beth Din* shall interpret and apply these Rules insofar as they relate to the powers of the Beth Din or any individual arbitrators (*dayan*).



BETH DIN of AMERICA

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*Affiliated with the Rabbinical
Council of America*



*Sponsored by the Union of Orthodox
Jewish Congregations of America*

AGREEMENT TO ARBITRATE

This Agreement to Arbitrate (“Agreement”) is made and entered into as of the _____ day of _____, 20____, by and between: _____, with an address at _____, and _____, with an address at _____.

There exists between the above named parties certain differences and disputes in reference to _____, with each party having certain claims and counterclaims against each other (the “Disputes”). In consideration of the above recitals, the terms and mutual covenants of this Agreement and other valuable consideration, the receipt of which is acknowledged, and intending to be legally bound, the parties agree as follows:

A. The parties agree to submit the Disputes to arbitration before the Beth Din of America. In addition to the Disputes, the Beth Din of America shall have jurisdiction to decide any disputes relating to the enforceability, formation, conscionability, and validity of this Agreement (including any claims that all or any part of this Agreement is void or voidable) and the arbitrability of any disputes arising hereunder (the “Ancillary Disputes”). The Beth Din of America shall arbitrate this matter in accordance with its rules and procedures (available at www.bethdin.org; the “Rules”), which the parties agree that they have read and accept. The parties agree to accept the ruling of the Beth Din of America as a final, binding and legally enforceable decision.

B. If any arbitrator withdraws, or is disqualified from hearing the case, or is unable to function as an arbitrator, the parties agree to accept any new arbitrator named by the Beth Din of America, in accordance with the Rules.

C. The Beth Din of America may resolve this controversy in accordance with Jewish law (“*din*”) or through court ordered settlement in accordance with Jewish law (“*p’shara krova l’din*”).

D. In addition to any final award, the arbitrators may make other decisions, including interim or partial orders and awards. The Beth Din of America shall retain jurisdiction over this matter for one year after publishing its award, and shall be authorized to modify the award for any reason they deem proper. To the extent provided in Section 34(e) of the Rules, the parties hereby waive any rights to an oral hearing with respect to applications for reallocation of unpaid and advanced arbitration fees.

E. The parties expressly acknowledge that they understand and agree that arbitration before the Beth Din of America shall be the exclusive forum for the adjudication of the Disputes and the Ancillary Disputes and that by agreeing to arbitration they are waiving their rights to other resolution processes, such as court action or other arbitration, and that the parties shall be precluded from bringing suit in court with respect to the Disputes and the Ancillary Disputes. This provision shall be a complete defense to any suit, action or proceeding instituted before any court or other body with respect to the Disputes and the Ancillary Disputes, provided, however, that, notwithstanding this provision, any party may seek interim judicial relief in aid of arbitration, to prevent a violation of this Agreement pending arbitration, or to enforce any arbitration award. If either party violates this provision, the other party shall be entitled to dismissal or injunctive relief regarding such court action or arbitration and recovery of all costs and disbursements, losses, and attorneys’ fees related to such other proceedings, if such claim is dismissed, to the extent permitted by law.

F. The invalidity of any provision of this Agreement shall not affect the validity of any other provision of this Agreement. In the event that a court of competent jurisdiction determines that any provisions of this Agreement fail to comply with the legal requirements for the compulsory arbitration of the Disputes or the Ancillary Disputes, it is the parties’ intention that the court shall equitably reform such provisions to the extent necessary (and only to the extent necessary) to conform the offending provisions to such legal requirements.

G. This Agreement may be executed in separate counterparts which together shall constitute a single document. This is the entire agreement between the parties relating to the subject matter hereof, and shall supersede and be merged with any prior or contemporaneous agreements between them relating to the subject hereof. This Agreement shall not be modified except by a written instrument signed by both parties. In witness whereof, each party to this Agreement has caused it to be executed in as of the date written above.

Name:
Date:

Name:
Date:

Beth Din of America

Sample Arbitration Provision

The following is a sample clause that can be included in a contract between two parties:

“Any controversy or claim arising out of or relating to this contract, or the breach thereof (including, without limitation, any disputes relating to the enforceability, formation, conscionability, and validity of this Agreement, including any claims that all or any part of this Agreement is void or voidable, and the arbitrability of any disputes arising hereunder), shall be settled by arbitration by the Beth Din of America (www.bethdin.org), in accordance with its Rules and Procedures. Judgment upon the award rendered by the Beth Din of America may be entered in any court having jurisdiction thereof.

The parties expressly acknowledge that they understand and agree that arbitration before the Beth Din of America shall be the exclusive forum for the adjudication of the aforementioned disputes and that by agreeing to arbitration they are waiving their rights to other resolution processes, such as court action or other arbitration, and that the parties shall be precluded from bringing suit in court with respect to the aforementioned disputes.”

Jewish Dispute Resolution

Rabbi Shlomo Weissmann
Director, Beth Din of America

Additional Resources from the Beth Din of America

The website of the Beth Din of America (www.bethdin.org) contains many resources for individuals seeking rabbinic dispute resolutions services, attorneys representing clients before rabbinical courts, and others interested in both substantive and procedural aspects of beth din dispute resolution.

Articles published in The Journal of the Beth Din of America can be accessed at www.bethdin.org/journal. Reasoned arbitration decisions issued by the Beth Din (anonymized and published following consent from the parties) are available at www.bethdin.org/decisions. The website also includes various forms relevant to beth din practice at www.bethdin.org/forms.

In the summer of 2019, the Beth Din of America launched a new blog called Jewishprudence (available at www.bethdin.org/jewishprudence), dedicated to exploring issues of Jewish law and beth din jurisprudence. Posts have covered a variety of issues, both substantive and procedural. You can sign up on the blog page to receive future postings by email.



Ronald J. Colombo Materials

22 Whittier L. Rev. 251

Whittier Law Review
2000

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Steven R. Hadley^{al}

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HANDBOOK OF AMERICAN CHURCH COURTS

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22 Whittier L. Rev. 251

Whittier Law Review
2000

Article
Steven R. Hadley^{a1}

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HANDBOOK OF AMERICAN CHURCH COURTS

I. Introduction

This cursory guide to the adjudicatory structures and processes of American churches is designed for the attorney or lay person who is called upon to serve as counsel in an internal church conflict. There are scores of books dealing with questions that arise between a church organization and the state, and there are a few books addressing conflict between non-members and churches regarding claims of tort, property, and contract law. But there are no books outlining in one place, how the multitude of American churches resolve internal disputes, or how counsel from outside the church's membership should approach such situations.¹

David Young and Steven Tigges list church-minister relationships, expulsion of members from religious societies, disputes between competing church factions, and church employment disputes, *252 as the four types of internal church conflicts most familiar to courts.² Their list of types of internal church conflict not only mirrors that of other writers, but covers the conflict anticipated in denominational literature outlining procedures for resolving conflict.

The United States Supreme Court has been very reluctant to hear cases involving internal church disputes, indeed only hearing ten such cases in 210-year history.³ Thus, church judicial structures and processes are important, because there is little recourse outside of a religious organization for those who have a grievance with the organization or with a fellow member of the organization.

More importantly, those who have a dispute with or within a church organization are involved in an all-encompassing community. How and how well a dispute is resolved within a church can affect a member's belonging to a group upon which the member has come to rely for mental and physical help, support, direction, and encouragement. Some of the groups studied herein may allow a person to remain as a member of their congregation, but not vote, speak at meetings, or do ministry in the church after differences are resolved. Other groups simply exclude the member who loses the dispute from the community and services of the church.

It is likely that a person's ability to remain in the local community outside of their church will be affected by the resolution of the concern within the church. An extreme example of community consequences is found in the Amish practice of shunning, "which involves the complete withdrawal of social, spiritual, and economic contact" from a person who meets with the disfavor of their religious community.⁴ A more typical example might be found in the person who lives in a small community where ostracism occurs informally as the result of gossip following the resolution of a dispute within the church, which

dominates local life.

For people who believe that forgiveness, salvation, and life after death are inseparable from the ministration of their church, resolution *253 of internal church disputes has vast spiritual and eternal consequences. For instance, the Catholic Church has long practiced excommunication, which not only encourages members to avoid a person under censure, but also denies that person the right to “receive the sacraments, or Christian burial, until [he or she] repents and is reconciled with the Church.”⁵ Similarly, the church has used the interdict, removing its services from the populace of a region, or even a whole country, until it is reconciled with the church.⁶ The threat and experience of being deprived of the sacraments, Christian burial, and marriage, was usually enough to cause medieval citizens to pressure their sovereign into cooperating with the pope.⁷ This paper looks at the fifteen major groupings of churches that comprise over ninety-five percent of Christendom in the United States.⁸ For each cluster of churches, this study relies on official publications unless otherwise noted, and asks the same set of questions: 1) What is the formal or informal organizational and adjudicatory structure and process of the church? 2) What is the historical or doctrinal rationale for the particular structure and process the church uses? 3) How does the church’s adjudicatory structure and process look when applied to the types of internal church disputes listed above? 4) What is the particular church’s view of the secular courts and attorneys?

Since churches are as different from one another as individuals, it is difficult to predict all of the questions that need to be raised when helping clients from separate congregations within the same denomination. Thus, the remainder of the introduction is intended to help an attorney or lay counsel formulate his or her own questions, and *254 do the requisite further homework when approaching internal church conflict.

First, it helps to be aware of the context of organizational structure (polity) when dealing with a client who is requesting help with an internal church dispute.⁹ There are three general categories of church structure--“the episcopal, presbyterian, and congregational types--[which] can be traced largely to doctrinal differences:”¹⁰

The episcopal form--which emphasizes the role of bishops, other hierarchical personnel, and the clergy as their representatives--rests upon such beliefs as authority through apostolic succession and the supreme importance of the church as God’s representative on earth. The presbyterian form stresses control of the church by a presbytery or equivalent body of clergymen. Exalting the role and often the person of the clergyman, it can be traced back to aristocratic tendencies in the history of presbyterian bodies and to an emphasis upon theological doctrines of the sacred character and educationally developed talents of the clergy. The congregational type places the highest authority in church government in the hands of the local congregation. This democratic type of administration, which has flowered in American society, is based ultimately upon belief in the priesthood of the believer and its attendant doctrines.¹¹

The three types of polity just described obviously present a simplification of what is often a mixture in reality. For instance, a church organization may appear quite hierarchical when the national office is called, but turn out to be very congregational when the local *255 church in question is contacted; or vice versa. It is quite possible to find an informal structure running concurrently with the formally stated structure.¹² It pays to be respectful of the formally stated structure while being sure to work with the structure that actually controls the situation.¹³

Additionally, as Samuel Hill pointed out, “[i]n this later twentieth century, religious activity is not being expressed in denominational formation.”¹⁴ At first glance, some loose knit groups may appear to elude any of the above three structural descriptions, but after further observation they will appear to resemble one type of group more than the other two. It may help to initially relate to a loose knit group based on the appearance of its structure, proceed by asking questions, and then let the members themselves point out the correct structure if the original assessment was mistaken.

Most importantly, when inquiring about structure, it may help to ask: Does the church have an adjudicatory or judicial type branch? If not, who tends to internal conflict? If there is a judicial entity, is there a complete separation of power from the people who make the rules, and the ones administering the rules? Just as an attorney would check proper jurisdiction before filing papers in court, it may be wise to consider the church’s structure, and ascertain the appropriate place to begin any

involvement. Asking questions and starting in the appropriate place may appear respectful, and go a long way toward gaining credibility and cooperation from those within the church. It may be necessary to ask whether there is a provision for appeal or review, because it cannot be presumed.

Second, an acquaintance with the church's process (governance) for dealing with internal conflict is as important as familiarization with the structure.¹⁵ After obtaining a copy of the stated process, it may be *256 helpful to check with someone familiar with the situation in question to make sure that the particular congregation adheres to it. If the congregation does not adhere to the stated process, it is essential to get information regarding its variation from the procedure.

The same questions an attorney would ask in checking the presence of constitutional procedural due process may prove helpful in addressing internal church disputes. The church may or may not adhere to familiar concepts of legal due process, but knowing at the outset what can and what cannot be relied on may serve as useful reference points when becoming involved.

Does the church provide notice of time, place, issues, and manner when addressing disputes?¹⁶ Has the client been informed of what the process is and how it works? Does the process provide that people be given the opportunity to voluntarily and intentionally consent to the expectations and authority of the church? Has the client actually been given the opportunity to consent in such a manner?

Does the church's process include the opportunity for a hearing, before an impartial tribunal?¹⁷ Does the client have the right to appeal a church decision to some higher body? If the client is involved in a matter of church discipline, does he or she have the right and assistance to gather the necessary witnesses or evidence his or her case requires? What kind of witnesses and evidence are allowed? Will the client be given the opportunity to confront and question those with whom he or she differs, and does he or she have the right to speak or remain silent without prejudice?¹⁸

Is the client afforded the right to counsel or someone who occupies a place of knowledge and authority in the church parallel to *257 that filled by a lawyer in society?¹⁹ Under what circumstances, if any, are attorneys allowed to attend church meetings, and what will be the repercussion to the client if the church even knows he or she is talking to an attorney?

Is the church's process used consistently, and if not, why; and what is the possible substitute process? Lastly, are rights provided to each member in-kind? Even when church policy states that a consistent process shall apply to all, it may not hurt to ask if that is what actually happens in practice in the particular situation in question.

Third, it may be helpful to understand that some piece of the church's history or belief system is probably underlying the dispute resolution process. Because church thought and life is so holistic and all encompassing, it will probably be helpful for the attorney or counsel to become familiar with the theological basis for the denomination's adjudicatory processes.²⁰ Understanding the moral, philosophical, and doctrinal reasons why the adjudicatory structure is being engaged the way it is, helps in preparing the responses and arguments necessitated by the faith based (as opposed to strictly rational) discussions typical of churches.

Familiarization with a church's theological thought supporting its adjudicatory process can be gained by simply finding an officially published book that teaches the church's picture of God meting-out judgment on individuals, groups, or the world as a whole. The theory is: If a person's idea of how God judges them or others can be understood, then the process they believe they have permission to use will invariably be the same. For example, if their God gives notice, they may too; and if their God is not subject to review, they probably will not be either.

Lastly, when becoming involved in internal church disputes, remember this is territory where the United States Supreme Court has historically respected church autonomy.²¹ The "wall" of separation is even stronger than the curtilage of privacy one expects in their home. Being genuinely respectful of a church as one would be of another's home is probably the best way to gain welcomed access as an outside counselor. Likewise, if the denomination does not care to share its *258 process, it simply will not be profitable to attempt to force the information out of it.²²

Churches are about relationships, and the discreet exchanges and remedies of the law are generally viewed as foreign, and therefore, are resisted.

Nothing is so incongruous as an attorney representing a church-related organization in litigation who feels he or she must win the case at all costs, and so engages in coercive, oppressive, intimidating and demeaning legal tactics to overwhelm legitimate claims. While a cutthroat standard of adversarial combat may prevail in other areas of legal practice, it is totally unacceptable for attorneys in the service of the churches.²³ Remember, the one who appears to be wronged the most holds the “martyr card,” and historically the martyr always wins in the Christian church setting.

It helps to be reassuring and offer constructive alternative solutions rather than threats when approaching internal church disputes.²⁴ Openness and honesty with church officials, even when disagreeing with them, and even when pursuing a course that is contrary to their wishes, will most likely gain respect and cooperation. The exception to this rule occurs when one is being lied to, in which case one may find it wise to continue to be honest, but simply decline to share information.

One further bit of general information is worth remembering. National or world church offices most likely have in-house attorneys who are capable of getting on a plane and swooping-in to tend to local matters. Regional church offices may have an officer on staff who is also an attorney, but these offices usually retain outside legal counsel. Local churches rarely have an attorney on staff or retained. Instead, a *259 local congregation either relies on the attorneys hired at higher levels of the organization, a member of the congregation who is an attorney, or a non-member hired for a specific case.

II. Adventist

The Seventh-day Adventist Church, with 914,106 members of its almost eleven million worldwide membership in North America, is the largest of several Adventist bodies, which together total 841,122 in the United States.²⁵ The Adventist Church began as a New England millenarian group expecting the imminent return of Christ in the 1840s; it gathered members from local Baptist, Methodist, Congregationalist, and Presbyterian churches.²⁶

Adventists have a very strong doctrine of separation of church and state derived from their study of western Christian church history, and their own experience requiring religious accommodation of such practices as worship on Saturday and conscientious objection.²⁷ The church moved from “shunn[ing] any relation to government, doomed as it was to an imminent end”²⁸ in the 1840s, to marginal political involvement in temperance issues during the late 1800s and early 1900s, and back to strict separationism through most of the twentieth century.²⁹

Adventist polity is officially presbyterial or representative, but may lean more toward hierarchical or congregational depending on the region or leadership.³⁰ For instance, the organization in the southwest tends to be more congregational than one in the midwest, but there are particular congregations in the midwest that have become very congregational.

Adventism is governed by a series of committees, beginning with the local church board comprised of laity and most often chaired by the *260 local pastor.³¹ Recommendations regarding changes in membership or any other decision that may be of concern to the local membership as a whole are referred to a church business meeting, which all members in good-and-regular standing may attend, and at which they are permitted to vote.³² Matters of church membership and discipline are strictly of local concern, and are rarely heard by any organizational entity higher than the business meeting. Business meetings simply require that notice be given “at the regular Sabbath worship service, together with proper announcements as to the time and place of the meeting.”³³

Pastors are encouraged to “at least informally observe the rules of parliamentary procedure”³⁴ when chairing board and business meetings.³⁵ It is generally understood, but not explicitly stated, that church boards and business meetings should follow Robert’s Rules of Order.³⁶

Adventism began as a rural church with an itinerant ministry, and relied on local lay leadership in the form of elders to carry on the work of the church in the minister's absence. The elders may number as few as one or may comprise a board of elders of a dozen or more, depending on the particular congregation. The local church may give its elders authority to make decisions or give advice, or the elders may informally take such authority themselves. When approaching a conflict in the Adventist Church, it is wise to determine what the elders' role is in the matter, to avoid the possibility of being surprised by a parallel structure and process.³⁷

***261** Above the local congregation is the conference organization, with officers and an Executive Committee functionally mirroring the local church's pastor and church board.³⁸ The Executive Committee and conference officers are elected by delegates from the local churches at a regular conference session, much like the local business meeting.³⁹ The conference represents the legal corporation, holds title to all church properties, and is the employer of all of the local church and school employees.⁴⁰ Conferences retain attorneys if they do not have one on staff, and have their own constitution and by-laws addressing parliamentary procedure and notice.⁴¹ Historically, the conference Executive Committee served an appellate function for unresolved disputes arising at the local congregation, but that rarely happens outside questions of property, employment, or other subject matter already belonging to the Committee.⁴² The session has the ultimate authority to approve the organization and disband the whole congregation.⁴³

Above the local conference, is a regional or union conference entity comprised of several conferences, and mirroring the lower levels with an Executive Committee, and quinquennial conference sessions at which officers and committees are elected by delegates from the local conferences.⁴⁴ The union conference, with its own constitution and by-laws, has the united authority of the various local conferences, essentially becoming the corporation for property, such as a church college, that is commonly held by the local conferences within the region.⁴⁵ It is not uncommon for the union conference to retain ***262** attorneys, though the person who oversees the Public Affairs and Religious Liberty Department may be an attorney doubling as general counsel.⁴⁶

The highest level of Adventist organization is the General Conference, overseeing the world work with its continental divisions.⁴⁷ The General Conference and division officers and Executive Committees are elected at quinquennial sessions by delegates from around the world.⁴⁸ The General Conference has in-house counsel, as well as a Public Affairs and Religious Liberty Department.⁴⁹ The constitution and by-laws for the General Conference are located in the General Conference Working Policy, and are the "authoritative voice of the Church."⁵⁰ The North American Division has developed its own working policy, located in the North American Division of the General Conference Working Policy (Working Policy).⁵¹

The Working Policy contains a section on "Conciliation and Dispute Resolution Procedures."⁵² The section was "developed to provide a method whereby the Church may resolve disputes between church members, individual lay members and various church leaders, employees and church employers, church organizations . . . and/or between conferences and institutions."⁵³ Informal negotiation is always encouraged first, with mediation recommended as the second step, and binding arbitration being the last resort.⁵⁴

Examples of cases that are not covered by these procedures may include but are not limited to:

1. Settlement of insurance or self-insurance claims.
2. Issuance of decrees affecting the boundaries and ownership of real property.
3. Marital differences.

- *263 4. Awarding of custody of minor children.

- 5. Deciding matters involving the administration of estates.

- 6. Debt collection matters.

- 7. Individual disputes with any branch of civil government or law enforcement agencies.

- 8. Specific theological questions.

- 9. Questions regarding church discipline and the transfer or reinstatement of membership.

- 10. Church elections.⁵⁵

The question of jurisdiction regarding arbitration is important in this four (and arguably five) layered organization, and is addressed in detail, as is the initiation of the process.⁵⁶ An arbitration panel of three “neutral, impartial, and independent”⁵⁷ people is recommended, with the parties each choosing a member, and mutually agreeing to a moderator.⁵⁸ “Arbitrators must be church members in good and regular standing who are trained and qualified to serve on arbitration panels and who have the potential for bringing about a resolution.”⁵⁹

The Conciliation and Dispute Resolution Procedures are designed to be an alternative process to the court system where legal representatives are present. Since the intent is to engage in a process that is semiformal, flexible, and nonlegalistic, it is therefore recommended that:

- 1. Legal representation be discouraged unless the attorneys are present to provide expert counsel on specific legal matters. All parties must agree on both the attendance and personnel involved.

- 2. Peer representation be permitted if both the attendance and personnel are agreed upon by all parties in the dispute.⁶⁰ The Working Policy concludes by mentioning observers, conflicts of interest, witnesses, transcripts and recordings, duration of hearings, financial arrangements, and follow-up.⁶¹

*264 The Seventh-day Adventist Church Manual (Church Manual), which is designed as a suggested guide for local Seventh-day Adventist congregations, reflects the Working Policy’s encouragement to resolve disputes informally, resorting to courts only when there is clearly a civil matter or the church has no adequate process.⁶²

The Church Manual also addresses the disciplining of church members, noting why such is to be done, under what circumstances, who is to do so, and how.⁶³ A member can only be disciplined upon the recommendation of the church board, by a majority of the congregation, at a duly called business meeting, at which the member has a right to be heard.⁶⁴ Additionally:

[T]he church does not recognize the right of any member to bring a lawyer to represent him or her in any church meeting or council called to administer order or discipline, or for the transaction of any business relating to the church. Therefore, our members should be informed that they will not be given a hearing if they endeavor to bring a lawyer into a meeting for such a purpose.⁶⁵

There is no right of appeal for a member who has been disciplined by a vote of the congregation. There is a right of appeal to the local conference Executive Committee for a disfellowshipped member who is refused reinstatement by a local congregation, but that committee's power is limited to remanding matters to the congregation.⁶⁶

III. Baptist

American Baptists trace their roots from the Protestant Reformation through those who “were concerned to re-establish the rite of baptism [[according] to its [New Testament] meaning, in the interests of a true doctrine of the nature of the Church.”⁶⁷ The Arminian theology of early Baptists spread among many in the Church of *265 England (Anglican/Episcopal) in the early seventeenth century, and found its first home in America with Roger Williams at Providence, Rhode Island, following Williams' ousting from Puritan Massachusetts in 1639.⁶⁸ Williams and Baptists are given much credit for the disestablishment of religion in America, and the First Amendment's “wall” of separation between church and state.⁶⁹

Baptists are separatist, independent, and congregational, and are represented by at least sixteen groups today.⁷⁰ That same diversity was present in colonial America due to the influx of Baptists from Germany, Wales, Ireland, and England.⁷¹ From England alone came variations like the Seventh-day Baptists and Six-Principle Baptists, and in 1654, the Providence, Rhode Island, Baptists themselves split over “the requirement of ‘laying on of hands’ for all baptized members.”⁷² Additionally, black Baptist churches among the slaves began to appear.⁷³

African-Americans are prominent in Baptist and Methodist denominations, and Nathan Hatch explains why the majority of blacks became Christian and joined those groups from the end of the Revolution to the War of 1812.⁷⁴ First, Baptists and Methodists “welcomed African-Americans as full participants in their communions and condemned the institution of slavery.”⁷⁵ Second, those two groups “proclaimed Christianity that was fresh, capable of being readily understood and immediately experienced.”⁷⁶ Third, black preaching, which arose in that period of history, found a home in the

*266 “experimental climate generated by passionate Baptists and Methodists.”⁷⁷

Prior to the Civil War, the major Baptist denomination, the Baptist Missionary Convention, split in 1845, leaving Southern Baptists and American (Northern) Baptists in two separate denominations to this day.⁷⁸ Of course, in the last 155 years, both Southern and American Baptists have produced significant denominations, such as the Conservative Baptist Association of America and the General Association of Regular Baptist Churches.⁷⁹

The congregational structure of Baptists means that each local church is autonomous, though it may allow itself to be interdependent with other congregations.⁸⁰ Each congregation elects a Board of Deacons to govern it, and a Board of Trustees to hold legal title to its property.⁸¹ A local church business session is the forum for final decision in all matters.⁸² The Baptist pastor is hired indefinitely at the will of the congregation, and serves as its leader, and Chair of the Board of Deacons.⁸³ Representatives are selected to attend meetings, where the various congregations come together to voluntarily work jointly for the purposes of operating schools, publishing houses, and mission programs.⁸⁴ In Baptist governance, there is no official process for decision-making or rules of procedure handed down from a hierarchy above.⁸⁵

*267 The Southern Baptist Convention, with 15,691,964 members or forty-three percent of the 36,412,484 Baptists in the United States, has no official church manual or suggested polity and governance.⁸⁶ But the Convention's seminaries currently use three common texts in preparing their pastors to lead congregations.⁸⁷

Robert Young's book, *The Development of a Church Manual of Administrative Policies*, repeatedly sounds a familiar theme in Baptist governance literature-- the importance of working with the members when drawing up governing documents for a local church.⁸⁸ Though Young mentions in suggested by-laws that the deacons should oversee the administration of discipline in the church, he does not suggest how it should be done.⁸⁹ Likewise, Holcomb's *Church Administration From A to Z* suggests management styles, job descriptions for personnel, and policies for finances, but not a procedure for decision-making.⁹⁰

The *Church Administration Handbook* includes four paragraphs on resolving grievances in a chapter on "Legal Matters."⁹¹ It encourages the writing of procedures and the development of a structure in anticipation of handling internal church disputes that cannot be resolved.⁹² More than once in the four paragraphs, the handbook suggests that every effort should be made to settle internal disputes "rather than securing an attorney and going to court."⁹³ The lack of available material on Southern Baptist governance simply means that one has to ask each local congregation for its own information regarding decision-making and discipline.

*268 The National Baptist Convention, U.S.A. (N.B.C.), with 8,200,000 members or twenty-three percent of the Baptist membership in the United States, is the largest African-American Baptist denomination, and the second largest overall.⁹⁴ The N.B.C. encourages the use of *The Baptist Standard Church Directory and Busy Pastor's Guide (Guide)*, which gives a statement of faith, suggested models for various meetings, and practical advice to pastors.⁹⁵

The Guide notes that each local church is self-governing, and following the New Testament example, elects its own officers and receives, disciplines, and excludes its own members.⁹⁶ Careful mention is made of the notice to be given and votes required when the Deacons are elected.⁹⁷ The Guide also limits the authority of the Deacons to making recommendations to a congregational business meeting regarding important matters, and gives a suggested order of service for that meeting.⁹⁸

The N.B.C. provides for a Mutual Council, usually consisting of three impartial parties, to be called to resolve disputes between two churches or individuals of different churches.⁹⁹ "It is customary for both sides to agree to abide by the decision of the council."¹⁰⁰ If a person or group is denied a Mutual Council, they may ask for an Exparte Council and "[t]he findings and recommendations of such a council are not binding upon the church, but if it should render a decision in favor of the parties who called it, they (the parties who called it) will be entitled to the fellowship of other regular Baptist churches."¹⁰¹ Likewise:

In cases where personal difficulties arise between members, the officers and other members are to strive to restore harmony, if possible, without bringing the case publicly before the church. If their efforts fail, the welfare of the church demands that the matter be taken before the church, even if the member who has been mistreated makes no complaint. When a member brings a private *269 grievance or injury to the attention of the church, after he has failed in his attempts to settle it, he must thereafter abide by the disposition which the church makes, not carrying it further and not complaining if their decision does not please him.¹⁰²

The American (Northern) Baptist Churches in the U.S.A. (A.B.C.), with four percent of the membership in the United States,¹⁰³ outlines the following adjudication process in its Standing Rules of the American Baptist Churches in the U.S.A. (Standing Rules):

Whenever two (2) or more of the National Boards, the Regional Boards, and the General Board differ on any matter, one shall send a written statement of the difference to the other(s) and the Boards shall try to resolve the differences among themselves. If they are unable to resolve the difference through discussion, any of the boards may initiate Adjudication by sending a written request thereof to the General Secretary.¹⁰⁴

The Standing Rules continue by describing how an adjudicator would be chosen, the dispute heard, and a final decision made

by the adjudicator.¹⁰⁵ Again, one needs to contact each local A.B.C. congregation to get specific information regarding its governance in matters of decision-making and disciplinary actions.

The Baptist Bible Fellowship International, with 1,500,000 members in the United States, has no material available for its churches to follow as a model, and encourages the use of Biblical principles in resolving internal church disputes.¹⁰⁶ The National Missionary Baptist Convention of America and the Progressive National Baptist Convention, with 2,500,000 members each, did not return calls for material.¹⁰⁷

***270 IV. Churches of Christ**

Coming from the Reformed and Presbyterian traditions, Alexander Campbell and Barton Stone, independent pastors on the frontier of Kentucky in 1832, brought their groups together in what was known, until 1906, as the Christian Church (Disciples of Christ).¹⁰⁸ Campbell and Stone were intent on imitating “as closely as possible the church life described in the Book of Acts.”¹⁰⁹

By 1906, differences over the creation of a missionary society, and rejection of such practices as organ music in worship services, led the Churches of Christ to break away from the Christian Church (Disciples of Christ).¹¹⁰ In the 1920s, a third denomination, the Christian Churches and Churches of Christ, arose from people leaving the Christian Church (Disciples of Christ) due to perceived liberalism.¹¹¹

These three denominations of the Churches of Christ continue to be essentially the same in theology, but different in practice. Congregational in structure, and relying solely on Biblical principles in governance, they are led by elders and deacons like the New Testament Church.¹¹² The Christian Church (Disciples of Christ) has become representative, in order to coordinate the shared work of its congregations, and each congregation is very independent, having its own constitution and by-laws.¹¹³

None of the Churches of Christ headquarters contacted in compiling this Handbook had a list of Biblical principles it could send, because each congregation is free to produce its own list. The local congregations, which were also contacted, did not have a list of Biblical principles printed, because they are found in the Bible and familiar to the membership.

Since no list of Biblical principles for the Churches of Christ could be located for this Handbook, a list of the ones commonly cited *271 by all Christians has been included.¹¹⁴ The principles may be interpreted and applied differently from one Church of Christ’s congregation to the next, just as they are from one Christian denomination to the next.

Underlying all conflict resolution in the Christian community is the need and desire to be reconciled to each other, and enjoy life in community. Christ articulated this priority in His instruction: “So when you are offering your gift at the altar, if you remember that your brother or sister has something against you, leave your gift there before the altar and go; first be reconciled to your brother or sister, and then come and offer your gift.”¹¹⁵

The approach of Christ when addressing potential conflict was: ““Do not judge, so that you may not be judged. For with the judgment you make you will be judged, and the measure you give will be the measure you get. . . .”¹¹⁶ And again: “Peter came and said to him, ‘Lord, if another member of the church sins against me, how often should I forgive? As many as seven times?’ Jesus said to him, ‘Not seven times, but, I tell you, seventy-seven times. . . .’”¹¹⁷

One may find Christians (as a whole, and not simply this group) forget such civility when initially addressing conflict, whether it be over sin in someone’s life, or the color of paint used in remodeling the church foyer. There are stories of Christ driving the money changers from the temple in disgust, sitting just a few chapters from the scene of the Christ who shields the adulterous woman thrown before Him in the early morning hours.¹¹⁸ In other words, there is justification in the Bible for a multitude of approaches to resolving conflict.

At some point in the dispute, some of the parties get hurt, the majority realizes it still has to live with the minority, or the administrators of justice begin to feel guilty for the pain of the accused; and the need to be merciful balances and often

outweighs the holy zeal to win. Attorneys who do not understand the element of mercy *272 underlying Christianity are the ones who hear the cry for litigation, respond with abandon, and then wonder what happened when they stand deserted.

Religious organizations take a very dim view of secular courts, litigation, and the methods of attorneys. Again, Christ's explicit advice factors into this disdain for the legal profession!

“Come to terms quickly with your accuser while you are on the way to court with him, or your accuser may hand you over to the judge, and the judge to the guard, and you will be thrown into prison. Truly I tell you, you will never get out until you have paid the last penny.”¹¹⁹ Further:

“You have heard that it was said, ‘An eye for an eye and a tooth for a tooth.’ But I say to you, Do not resist an evildoer. But if anyone strikes you on the right cheek, turn the other also; and if anyone wants to sue you and take your coat, give your cloak as well; and if anyone forces you to go one mile, go also the second mile. Give to everyone who begs from you, and do not refuse anyone who wants to borrow from you.”¹²⁰ Even stronger is St. Paul's chastisement of the Corinthian Church for resorting to the secular courts.

When any of you has a grievance against another, do you dare to take it to court before the unrighteous, instead of taking it before the saints? Do you not know that the saints will judge the world? And if the world is to be judged by you, are you incompetent to try trivial cases? Do you not know that we are to judge angels--to say nothing of ordinary matters? If you have ordinary cases, then, do you appoint as judges those who have no standing in the church? I say this to your shame. Can it be that there is no one among you wise enough to decide between one believer and another, but a believer goes to court against a believer--and before unbelievers at that? In fact, to have lawsuits at all with one another is already a defeat for you. Why not rather be wronged? *273 Why not rather be defrauded? But you yourselves wrong and defraud--and believers at that.¹²¹ While most denominations have determined that there are times when they must sue other parties, and all denominations have no qualms about defending their organizations in court, the counsel to avoid litigation remains strong on practical if not moral grounds.

Any church's process for resolving internal disputes will be based on the following model taught by Christ.

“If another member of the church sins against you, go and point out the fault when the two of you are alone. If the member listens to you, you have regained that one. But if you are not listened to, take one or two others along with you, so that every word may be confirmed by the evidence of two or three witnesses. If the member refuses to listen to them, tell it to the church; and if the offender refuses to listen even to the church, let such a one be to you as a Gentile and a tax collector. Truly I tell you, whatever you bind on earth will be bound in heaven, and whatever you loose on earth will be loosed in heaven. . . .”¹²²

Though it seems quite straightforward, there is much room for variance in the above model. For instance, the meaning of the phrase “sins against you”¹²³ ranges from “someone has offended you personally” to “you have heard through the grapevine that someone is doing something you personally consider immoral.” The phrase “[i]f the member refuses to listen”¹²⁴ may mean anything from “outright rejects the message” to “agrees, but does not agree on the solution,” or “does not apply the agreed upon solution quickly enough.” It does not hurt to check for the particular interpretation of Christ's process when approaching each dispute. This passage is as specific as due process gets in the text of the Bible.

When Churches of Christ members look for Biblical principles, they may refer to those found in statements Christ made,

such as: “In everything do to others as you would have them do to you; for this is the law and the prophets.”¹²⁵ Some principles are derived from the *274 Biblical stories and parables, some from the lessons learned by the collective experience of the recorded people, and others from lists like the Ten Commandments. The last six of the ten commandments given to Moses on Sinai deal with man’s relationship to man, and are the basis for a lot of personal internal church dispute:

[4] Honor your father and your mother, so that your days may be long in the land that the Lord your God is giving you. [5] You shall not murder. [6] You shall not commit adultery. [7] You shall not steal. [8] You shall not bear false witness against your neighbor. [9, 10] You shall not covet your neighbor’s house; you shall not covet your neighbor’s wife, or male or female slave, or ox, or donkey, or anything that belongs to your neighbor.¹²⁶

The relationship of the church to the state, and thus the courts, is found in stories such as the Pharisees and Herodians, who asked Christ:

“Is it lawful to pay taxes to the emperor, or not?” But Jesus, aware of their malice . . . said to them, “Whose head is this, and whose title?” They answered, “The emperor’s.” Then he said to them, “Give therefore to the emperor the things that are the emperor’s, and to God the things that are God’s.”¹²⁷ Christ’s admonition corresponds with Paul’s in the Book of Romans to “[l]et every person be subject to the governing authorities . . .”¹²⁸ because they are God ordained, and act against evil for God. Such teaching is set against stories of civil disobedience, like the three Hebrew youths refusing to bow down to Nebuchadnezzar’s golden image, and Peter’s counsel, “[w]e must obey God rather than any human authority. . . .”¹²⁹

V. Episcopal

When the first colonists came from England in 1607, they settled by the authority of the crown and brought the Church of England with *275 them.¹³⁰ But, as Gaustad tells it, the Anglican Church was no better off for arriving on American soil before other church groups.¹³¹ The Indians reduced the population of roughly “3,000 to little more than one-half that number”¹³² in 1622, and by the early 1640s, the Massachusetts Congregationalists had invaded Virginia with their own brand of worship.¹³³

The effect of the American Revolution upon the Church of England was harsh. A majority of the clergy was Tory, and virtually all were assumed to be. In Virginia there were, at the beginning of the war, 95 parishes and 9 [sic] clergymen. After the war, over one-third of the parishes were “extinct or forsaken.” Of the 91 clergymen, only 28 remained.¹³⁴

After the Revolution, the disestablishment of religion further jolted what remained of the Church of England, and worse, “in 1802, the ‘legislature passed the law, by virtue of which the glebes [church lands] of Virginia were ordered to be sold for the benefit of the public. . . .’”¹³⁵ In spite of its near demise Anglicanism survived, and in 1783, the Protestant Episcopal Church was formed, and a Bishop was elected.¹³⁶ Unlike the Baptists, Presbyterians, and Methodists, who were torn apart by the Civil War, the Episcopalians, a predominately northern church, suffered no division.¹³⁷

The Episcopal Church, with 2,536,550 members in the United States, remains in fellowship with the Anglican community, and is episcopal in structure.¹³⁸ The local congregation, or parish, is the basic unit of government under a regional Diocese and Bishop, with a national office and Presiding Bishop at the highest level of organization.¹³⁹ “The episcopal form of government closely parallels *276 that of the U.S. federal government. It is a federal union, each diocese autonomous in its own sphere, originally associated with others for the maintenance of a common doctrine, discipline, and worship.”¹⁴⁰

The process for addressing Episcopal internal disputes is found in the Constitution & Canons of the Episcopal Church and the constitution of the particular Diocese in question. Title III, canon 20 of the Constitution & Canons of the Episcopal Church entitled “Of the Reconciliation of Disagreements Affecting the Pastoral Relation” states that:

When the pastoral relationship in a parish between a Rector and the Vestry or Congregation is imperiled by disagreement or dissension, and the issues are deemed serious by a majority vote of the Vestry or the Rector, either party may petition the Ecclesiastical Authority, in writing, to intervene and assist the parties in their efforts to resolve the disagreement.¹⁴¹ The Bishop may “initiate such proceedings as are deemed appropriate,”¹⁴² including calling in a consultant, and the parties are expected to follow the recommendation of the consultant or authority in a good faith effort.¹⁴³

Canon 21 addresses the “Dissolution of the Pastoral Relation,” and in doing so, outlines a more detailed process for dealing with internal church disputes in general:¹⁴⁴

[T]he Bishop, as chief pastor of the Diocese, shall mediate the differences between Rector and Vestry in every informal way which the Bishop deems proper and may appoint a committee of at least one Presbyter and one Lay Person, none of whom may be members of the Parish involved, to make a report to the Bishop.¹⁴⁵ *277 Each Diocese is led by a Bishop and a standing committee consisting of half clergy and half laity, serving staggered three-year terms.¹⁴⁶ If the parties, with the help of the Bishop, are unable to mediate the dispute, the matter is referred to the standing committee for a recommendation back to the Bishop.¹⁴⁷ Once the Bishop has the recommendation from the standing committee, he makes a final decision as arbiter and judge.¹⁴⁸ Though counsel from outside the church is not mentioned, it is stated that “each party shall be entitled to representation and to present its position fully.”¹⁴⁹ Additionally, the Bishop has ecclesiastical power to enforce his decision.

In the event of the failure or refusal of either party to comply with the terms of the judgment, the Bishop may impose such penalties as may be set forth in the Constitution and Canons of the Diocese; and in default of any provisions for such penalties therein, the Bishop may act as follows:

- (a) In the case of a Rector, suspend the Rector from the exercise of the priestly office until the Priest shall comply with the judgment.

- (b) In the case of a Vestry, invoke any available sanctions including recommending to the Convention of the Diocese that the Parish be placed under the supervision of the Bishop as a Mission until it has complied with the judgment.¹⁵⁰

Title IV of the Constitution & Canons of the Episcopal Church concerns the “Ecclesiastical Discipline” of clergy, and consists of a very detailed process resembling that of title III.¹⁵¹ The provisions of title IV are almost never used, because grievances against Bishops, Priests, and Deacons who commit crimes, immorality, teach heresy, or violate the constitution and canons of the Diocese or church as a whole, are usually resolved long before a formal proceeding of such length is required.¹⁵²

*278 VI. Jehovah’s Witnesses

Charles Taze Russell grew up in a Calvinist home in Pittsburgh during the last half of the 1800s, but wrestled with traditional ideas, especially the doctrine of eternal punishment.¹⁵³ He left the family dry goods business after years of independent Bible study, and legally formed the Watch Tower Bible and Tract Society in 1884.¹⁵⁴ What began as a modest Bible study group of friends in 1870, printing and sharing their convictions, has grown to a worldwide church membership of over 4,278,820, with 975,829 members in the United States.¹⁵⁵

It was under the leadership of Russell's successor, Joseph Franklin Rutherford, that the name Jehovah's Witnesses was adopted, and the emphasis shifted from primarily Bible study to include door-to-door literature distribution.¹⁵⁶ Russell called his followers to live separately from the ways of the world, and any estrangement the Witnesses felt from the secular courts was only exacerbated by their experience as pacifists during World War I. Church historian Martin E. Marty relates:

They claimed that the present age, which they called millennial, would end in 1914 and that in a forthcoming battle, called Armageddon in the Bible, Jesus would lead his own army against the armies of Satan. The witnesses dared fight in no war except that one. . . . World War I was the first great test of the believers' willingness to resist churches, business, government, armies, and all the other allies of Satan.

The war gave revengeful churches their chance to get back at Russellites, and they took it. Law enforcement officials and, sometimes, posses of citizens with judicial support hounded the Students. In June of 1918 a Brooklyn magistrate sentenced seven *279 of them, including Russell's successor, Judge Joseph Rutherford, to twenty years in a federal prison.¹⁵⁷ The Witnesses' crime was distributing material stating that the New Testament did not encourage patriotism ("a narrowly minded hatred of other peoples"¹⁵⁸), and denouncing war as murder.¹⁵⁹ Interestingly, none of the American religious press defended the Witnesses' right to religious expression.¹⁶⁰ Marty concludes that the wartime notoriety helped the group grow "more rapidly after the war than before."¹⁶¹ The denomination recalls that "[i]n fact, during this entire 'testing season,' not one issue of The Watch Tower failed to appear in print!"¹⁶²

Ministers in the church are itinerant, and spend about a week with each congregation twice a year.¹⁶³ Elders who are wise, experienced, and faithful oversee the "flock" during the minister's absence.¹⁶⁴ Past persecution is no doubt part of the reason that this hierarchical group is reluctant to share its adjudicatory information. There is a Shepherd's Book that is distributed to the active elders who lead the local congregations, but the book is not available to the general membership or non-members.¹⁶⁵ However, articles from the church's official journal, The Watchtower, describe the work of the elders in resolving internal church disputes.¹⁶⁶

The attitude and approach of God, and thus the elders, in dealing with erring people is very important to Jehovah's Witnesses. Elders are admonished to "imitate the Great Shepherd, Jehovah,"¹⁶⁷ when *280 disciplining members.¹⁶⁸ For instance, if a member (publisher) mentions his error to an elder, "that elder should try to readjust the new one in a merciful way."¹⁶⁹ The elder may also corroborate with the presiding overseer of the congregation to "determine what further assistance should be given."¹⁷⁰

Some sheep are in more trouble than what one elder may be able to rectify on his own, and in a private manner, and the congregation's larger group of elders becomes involved.¹⁷¹

If notoriety, danger to the flock, or other serious problems are involved, the body of elders would assign two elders to investigate the matter. If these elders find that the matter is sufficiently serious that a judicial committee is needed, they should report this to the body of elders. The body of elders would then appoint a judicial committee to assist the erring one. The judicial committee should deal with him in a tender way.¹⁷²

The judicial committee's decision may range from excluding the member from the platform at meetings in the Kingdom Hall and not allowing him to comment at meetings, to expulsion from the congregation.¹⁷³ The elders are encouraged to "arrange to make shepherding calls intended to bolster [the brother's] faith,"¹⁷⁴ and "work with him in the field ministry from time to time"¹⁷⁵ in an effort to be supportive.¹⁷⁶

The elders are given guidance in determining whether an erring member is wicked or weak. "Wicked people have no place in the Christian congregation,"¹⁷⁷ but weak sheep are to be worked for earnestly.¹⁷⁸ The elders are advised to determine: "[1] Is

the individual *281 repentant? [2] What led up to the sin? [3] Was it the result of an isolated moment of weakness? [4] Was it a practice of sin?"¹⁷⁹ An extensive list of questions follow that are useful in determining whether a person accepts responsibility for the error, and whether that person is desirous of change:

Is there a refusal to accept responsibility for the wrong committed? Has the one who sinned brazenly ignored previous counsel on this very matter? Is there an entrenched practice of serious wrongdoing? Does the wrongdoer manifest a blatant disregard for Jehovah's law? Has he made calculating efforts to conceal the wrong, perhaps corrupting others at the same time? (Jude 4) Do such efforts only intensify when the wrong comes to light? Does the wrongdoer show total disregard for the harm he has done to others and to Jehovah's name? What about his attitude? After kindly Scriptural counsel is given, is he haughty or arrogant? Does he lack a heartfelt desire to avoid repeating the wrong?¹⁸⁰ The conclusion is that people who commit adultery and murder, but repent, are weak but salvageable--like King David and Bathsheba. This is contrasted to people like Adam and Eve, who merely lie, but deny their error, and are thus unsalvageable.

The elders are reminded that there is no sin that cannot be forgiven, but "[t]o be forgiven and reinstated, however, [one] must [1] humbly obey God's laws, [2] produce fruits befitting repentance, and [3] apply to the elders for reinstatement."¹⁸¹ Again, "[a]nyone willfully and obstinately continuing to practice sin after he knows the truth is not forgiven. Hence, it is not so much the sin itself as it is the heart condition, the degree of willfulness involved, that affects whether the sin is forgivable or not."¹⁸²

As recently as 1991, the Kingdom Ministry School that is conducted in many countries, focused its training of elders on the proper handling of judicial cases.¹⁸³ The elders were counseled to judge by more than "appearances" and "mere hearsay."¹⁸⁴ *282 "Impartiality" was stressed as a timeless principle, as was the ability to judge with wisdom and righteousness.¹⁸⁵ "Rather than considering themselves to be superior judges meeting to administer punishment, elders serving on a judicial committee should view the hearing as another aspect of their shepherding work."¹⁸⁶ The elders were asked to "keep a positive view toward showing mercy," and be "conscious of any mitigating circumstances" that might exist.¹⁸⁷

The suggested approach in dealing with problems is: (1) "[D]etermine whether those involved have tried to settle the matter privately"; (2) Counsel the person with one or two elders if an agreement has not been reached; and (3) Employ judicial action "only if a gross sin has been committed that could lead to disfellowshipping."¹⁸⁸

The description of a righteous judge concludes with an appeal to select the "best qualified elders" when judicial action is taken.¹⁸⁹ And again, the work of the elders under such circumstances is to discover the facts, and find a balance between the well-being of the church and salvation of the endangered sinner.¹⁹⁰

VII. Latter-Day Saints (Mormon)¹⁹¹

The Church of Jesus Christ of Latter-Day Saints, with 4.8 million members in the United States, is the largest of five Mormon denominations, which have a worldwide membership of approximately 8.6 million.¹⁹²

Due to early persecution, the Saints moved from New York in 1831, to Kirtland, Ohio, then Independence, Missouri, and later Nauvoo, Illinois.¹⁹³ After friction with the Nauvoo community *283 resulted in the murder of Joseph Smith in 1844, Brigham Young assumed leadership, and in 1847, led the remaining majority to what would become Utah.¹⁹⁴ Later that year, Young predicted that Salt Lake City would become "a place of refuge for the oppressed, and one that is calculated to please the eye, to cheer the heart, and fill the hungry soul with food"¹⁹⁵

In 1890, the church discontinued the practice of polygamy, after the federal government disincorporated the church and confiscated its properties in 1887, and the United States Supreme Court ruled it was constitutional to deny Mormons all privileges of citizenship in 1890.¹⁹⁶ Partly because of its troubled history with government, the church adheres to the doctrine

of separation of church and state, even though approximately seventy percent of Utah's population is Mormon.¹⁹⁷

The Latter-Day Saints are a hierarchical organization with no paid clergy, and a Prophet as the highest leader.¹⁹⁸ The Saints believe in progressive revelation, which continues to come through the Prophet.¹⁹⁹ The Prophet is served by two Counselors, and together the three comprise the First Presidency.²⁰⁰ Along with the First Presidency is a Quorum of Twelve directly underneath it, which assists in giving leadership to the church.²⁰¹ All leaders at this highest level of organization are chosen for life.²⁰²

A middle level of leadership, called a Stake, mirrors that at the top.²⁰³ Each Stake has a President, two Counselors, and a High *284 Council of Twelve, and each serves nine years.²⁰⁴ With most of the membership located in Utah, Idaho, Arizona, California, and Washington, a county may make up one Stake, or a metropolitan area may itself necessitate several Stakes.²⁰⁵ The local congregation is called a Ward, and again there is a Bishop and two Counselors who each serve for five years.²⁰⁶ Typically, six to ten Wards constitute a Stake.²⁰⁷

Additionally, between the First Presidency and the Stakes is a Presiding Bishopric of three, that oversees the financial administration of the church, and two Quorums of Seventy that help oversee the operational management of the church for continents or large sections of continents.²⁰⁸ The first Quorum of Seventy is a life appointment, and the second Quorum of Seventy is a five-year term.²⁰⁹

Due to its hierarchical structure, Mormons do not have internal disputes over such things as theology or church remodeling projects.²¹⁰ Theology is passed down to the members from the Prophet via divine revelation.²¹¹ The floor plans for new church buildings, study material on Sunday mornings, methodology for missionaries, worship format and styles are communicated from the top down, and are followed.²¹² Thus, matters that provide the grist for debate and dissension in most denominations are not even a question addressed in Mormonism. The belief in the priesthood enables those in authority to give unquestioned direction to the church. Also, there is no arbitration or mediation process available to members; and if any secular issue arises, it is referred to a civil court.²¹³

If matters of discipline arise, a member may be either disfellowshipped, meaning they are still a member of the church, but they lose their rights to participation; or they may be excommunicated, meaning they lose their priesthood in the eyes of God, their *285 membership, and the benefits and blessings of belonging.²¹⁴ In either case, it is the Stake leadership that acts as the tribunal in determining the appropriate status of one's membership.²¹⁵

When a person is accused of violating their covenant of membership, they are summoned to the Stake's High Council, which meets before the Stake President and Counselors.²¹⁶ The Stake President assigns six members of the High Council to act as the prosecution at the hearing, and the remaining six members of the High Council are assigned to be the accused's defense.²¹⁷ Non-member attorneys are allowed to appear with the accused to help present their case.²¹⁸ After hearing the charges, evidence, witnesses, and the accused, the Stake President delivers judgment.²¹⁹

A member who is disfellowshipped or excommunicated has the right to make a written appeal directly to the First Presidency, where his or her case will be reviewed.²²⁰ If a member who has been excommunicated wishes to be readmitted to the church, he or she needs to direct the request for readmission to the First Presidency, whether an appeal was initially made or not.²²¹

VIII. Lutheran

When Martin Luther posted his famous ninety-five points of theological debate on the door of the castle church in Wittenberg in 1517, he was simply posting an open letter to the Pope on the town bulletin board.²²² For over 100 years, individuals had attempted to reform the Roman Catholic Church, some at the encouragement of the Popes themselves, but to no avail.²²³ In calling the church to debate, *286 Luther naively sought to reform his church, and never dreamed that a movement would gather, and eventually separate from the church.²²⁴

"It was Luther's good fortune to live in Electoral Saxony during his career as a reformer. His ruler, the Elector Frederick the

Wise, protected him when both empire and church had turned against him.”²²⁵ Such protection may have influenced Luther, and eventually Lutheranism, to be less concerned about separation of church and state than other denominations that have experienced persecution instead of protection.²²⁶

Lutheranism came to colonial America from Germany, Scandinavia, and Holland; and settled in New York, Delaware, South Carolina, and Georgia.²²⁷ “The great influx, however, went to Pennsylvania From Philadelphia they swept into New Jersey, Maryland, Virginia, and North Carolina.”²²⁸ Though the Civil War and increased immigration caused fragmentation in the mid-to-late nineteenth century, there has been an “almost constant effort to unify Lutheran churches and agencies” in the twentieth century.²²⁹

At present, the Evangelical Lutheran Church in America (ELCA), with 5,180,910 members, and the Lutheran Church-Missouri Synod (LCMS), with 2,601,144 members, make up ninety-four percent of the 8,319,348 Lutheran membership in the United States.²³⁰ Both denominations are structurally representative, with the local church being the primary unit.²³¹

The ELCA has Synods, which oversee the work of congregations within a region, and a Church Council at the national level of *287 administration, which oversees the work of the Synods.²³² The LCMS has Districts overseeing the local congregations, and the Synod is the national organization overseeing the church as a whole.²³³ Both the ELCA and LCMS have very specifically articulated processes outlined for dispute resolution.²³⁴

The ELCA’s adjudicatory process is found in the ELCA Constitution, chapter 20, entitled “Consultation, Discipline, Appeals, and Adjudications.”²³⁵ The chapter begins with a section entitled “Consultation and Discipline” and states:

[The] process shall assure due process and due protection for the accused, other parties, and this church. Since synods have responsibility for admittance of persons into the ordained ministry of this church or onto other rosters of this church and have oversight of pastoral/congregational relationships, the disciplinary process shall be a responsibility of the synod on behalf of this church and jointly with it.²³⁶ Chapter 20 continues and states:

As used in this constitution and bylaws, due process means the right to be given specific written notice of the charges against any person or entity of this church, the right to testify in person or remain silent (at the election of the accused), the right to call witnesses and introduce documentary evidence concerning the pending charges, the right to confront and cross-examine all witnesses in support of such charges, the right to a hearing before a discipline hearing committee as provided in 20.13., the right to a written decision of the discipline hearing committee as provided in the bylaws, and the right to be treated with fundamental procedural fairness. Any violation of these rights shall be grounds *288 for reversal of an unfavorable finding and the right to a new hearing.²³⁷

The ELCA Constitution addresses ordained ministers and lay rostered ministers, congregations, members of congregations, and the recall or dismissal of a hierarchical official; giving reasons why they might be disciplined, who would hear their case, how the charges would be filed, how the hearing would be conducted, the time-frame for the process, and how appeals would be filed.²³⁸ In practice, the authority immediately above the accused is the level of organization to initially hear a matter, and appeals can be made to the next highest level of the organization.²³⁹ Section 20.60. addresses the make-up and work of the Committee on Appeals, which would rehear the cases of pastors initially heard by the Synod Council, or of Bishops initially heard by the Church Council.²⁴⁰ Cases of members heard initially by the Congregation Council would be appealed to the Synod Council.²⁴¹

The chapter closes with a section on “Adjudication,” making the Presiding Bishop and the Executive Committee of the Church Council “available to give counsel when disputes arise within this church.”²⁴² Section 20.80. concludes by anticipating possible conflicts that could arise between Synods, a Synod and the Churchwide Assembly, or just factions within a local congregation; and offers a scheme to mediate conflicts through a neutral entity of the church in response to

each situation.²⁴³

The Lutheran Church-Missouri Synod's dispute material can be found in chapter VIII of the LCMS Bylaws, and the Lutheran Church-Missouri Synod Synodical Dispute Resolution Rules of Procedure (LCMS Rules of Procedure), further elaborating the LCMS Bylaws. As with the ELCA, the LCMS's "processes for utilizing the Synodical Dispute Resolution system are designed to resolve the dispute at the *289 lowest level possible."²⁴⁴ "If one level does not result in resolution, then the parties may continue the process at the next level."²⁴⁵ The LCMS Bylaws also state:

The congregation's right of self-government shall be recognized. However, when a decision of a congregation is at issue, a Dispute Resolution Panel may review the decision of the congregation according to the Holy Scriptures and shall either uphold the action of the congregation or advise the congregation to review and revise its decision. If the congregation does not revise its decision, the other congregations of the Synod shall not be required to respect this decision, and the District involved shall take action with respect to the congregation as it may deem appropriate.²⁴⁶

The LCMS Rules of Procedure outline a process beginning with informal efforts toward reconciliation that moves on to a formal reconciliation meeting.²⁴⁷ Each District has at least four reconcilers appointed for six-year terms to facilitate the informal and formal reconciliation steps.²⁴⁸ A Dispute Resolution Panel selected by the Secretary of the Synod is the next step, followed by a formal adjudicatory proceeding, and a request for reconsideration.²⁴⁹ If an Appeal Panel determines that there is warrant for an appeal, a Review Panel is formed, the case is actually reheard, and the Review Panel's decision is considered final and binding.²⁵⁰

The LCMS Rules of Procedure also go into considerable detail regarding general rules, such as withdrawal, fees and costs, involvement of insurer, time and place of meetings and hearings, witnesses and evidence, waiver of right to object, and exclusion from liability.²⁵¹ A party has a right to an "advisor," but the advisor is to remain silent and the party must speak for himself or herself at the meetings and hearings.²⁵² A majority of a panel constitutes a quorum *290 and a majority vote of a Dispute Resolution Panel or Review Panel determines the outcome of the matter in question.²⁵³

IX. Methodist

Henry VIII's establishment of the Church of England in 1534, was the result of an organizational break with the Roman Catholic Church more than a theological one, like the break between Lutheranism and Calvinism.²⁵⁴ Aside from "leaving undefined the exact nature of the Communion bread and wine"²⁵⁵ there was, and still is, little noticeable difference between the theology, worship, ministrations of the priests, and sacramental life of the adherents in the Roman Catholic Church and the Church of England.²⁵⁶ It was left to other groups like the Puritans (eventually the United Church of Christ), Separatists (later called Baptists), and Presbyterians to introduce the theology of the Protestant reformation to England in the 1600s that the continent had experienced in the 1500s.²⁵⁷

Following a failed tour as Church of England missionaries to Georgia (America), John and Charles Wesley returned to England in 1738 "disillusioned and discouraged," and were looking for spiritual direction.²⁵⁸ The Moravians at Herrnhut, Germany, and Luther's preface to his commentary on the Book of Romans, convinced John Wesley that salvation comes by faith alone.²⁵⁹ The Wesley's newfound religious fervor and theology of grace "succeeded in leading a lively renewal movement in the Church of England,"²⁶⁰ and swept the colonies between 1817 and 1843 in what is referred to as the "Second Great [Religious] Awakening" in American history.²⁶¹

*291 Sociologists Roger Finke and Rodney Stark maintain that the rise of Methodism was attributable to the group's methodology as well as their religious fervor and theological appeal.²⁶² After the Revolution, most denominations continued to adhere to a colonial practice of state church, meaning the denomination that settled in an area first had a right to provide religion to that population.²⁶³ Much to the dismay and frustration of the established denominations, the Methodists took advantage of the "rise of a free market religious economy,"²⁶⁴ and unleashed itinerant ministers into every part of the country, raising up congregations from among the existing churches.²⁶⁵ In 1776, Methodists made up only 2.5% of all religious

adherents in America.²⁶⁶ Seventy-four years later, in 1850, the Methodists totaled 34.2% of the membership in America, and were by far the largest denomination.²⁶⁷

Though the African-American population found a home in the Methodist denomination following the War of Independence, their experience quickly changed.²⁶⁸

In November, 1787, the colored people belonging to the Methodist Society in Philadelphia convened together in order to take into consideration the evils under which they labored, arising from the unkind treatment of their white brethren, who considered them a nuisance in the house of worship, and even pulled them off their knees while in the act of prayer and ordered them to the back seats. For these and various other acts of unchristian conduct, they considered it their duty to devise a plan in order to build a house of their own in which they could worship God under their own vine and fig tree.²⁶⁹ The groups in Philadelphia and Baltimore formally organized the African Methodist Episcopal Church (AMEC) in 1816, and a group *292 experiencing similar discrimination in New York City held its first annual conference in 1821, as the African Methodist Episcopal Zion Church.²⁷⁰ Following the Civil War, the African-American members of the Methodist Church in the south left in an “amicable agreement” to form the Christian Methodist Episcopal Church.²⁷¹

With 14,185,952 members, Methodism is the third largest Christian group in the United States today.²⁷² The United Methodist Church (U.M.C.), with 8,495,378 members, the African Methodist Episcopal Church, with 3,500,000 members, the African Methodist Episcopal Zion Church, with 1,252,369 members, and the Christian Methodist Episcopal Church, with 800,000 members, make up nearly ninety-nine percent of the total Methodist membership in the United States.²⁷³ Methodists are representative in government with lay and pastoral delegates from local congregations elected to speak for the people at successively higher levels of decision-making.²⁷⁴ Both the AMEC and the U.M.C. have a judicial branch serving their organizations.²⁷⁵

In the U.M.C., the church or churches under a pastor’s leadership are referred to as his or her “Charge.”²⁷⁶ Each local church is led by a governing Charge Conference, and at least once a year a Charge Conference for the pastor’s church or churches meets to review and direct the work at the local congregational level.²⁷⁷ The Charges send lay and pastoral delegates to the Annual Conference, which oversee the church in district areas such as Northwest Texas, Tennessee, Oregon, and Idaho.²⁷⁸ The Annual Conferences send lay and pastoral delegates to the Jurisdictional Conference covering their region of the continent, and a General Conference for the whole church, which meets every four years.²⁷⁹ The General Conference has *293 “full legislative power over all matters distinctively connectional,”²⁸⁰ but cannot “revoke, alter, or change our Articles of Religion”²⁸¹ or Confession of Faith or “do away with the privileges of our clergy of right to trial by a committee and of an appeal; neither shall it do away with the privileges of our members of right to trial before the church, or by a committee, and of an appeal.”²⁸²

Similarly, the AMEC is led by a quadrennial General Conference composed of lay and clergy delegates from the organizational units beneath.²⁸³ The General Conference is divided into Episcopal Districts or regional areas, which are directed by Annual Conferences, and further divided into State Conferences governed by District Conferences.²⁸⁴ Each District Conference consists of delegates from Quarterly Conferences, and finally local Church Conferences, the primary unit of the AMEC.²⁸⁵

The “Judicial Administration” of the AMEC is described in part XI of The Doctrine and Discipline of the African Methodist Episcopal Church, and begins by stating: “[B]efore any charge may be filed, introduced, or conveyed for consideration, all parties to any difference, dispute, claim or controversy shall submit the matters of contention to the [District’s] Conciliation Committee.”²⁸⁶ The section continues by listing ten types of charges, which may be leveled against a bishop or minister in the AMEC, and the procedure for investigation by a Preliminary Inquiry Committee.²⁸⁷ If the case goes to trial, it is heard by a panel of seven elders serving as jurors, and both the church and the accused have the right to counsel from among the AMEC membership.²⁸⁸

Trials of lay members in the AMEC are heard at the local church level by the stewards of the society or a selected committee,

and the accused has “the right to make a statement on his/her own behalf and to interrogate the witness by whom the accusations are expected to be *294 proven.”²⁸⁹ The offenses chargeable to the laity fall under the headings of “Disobedience to the order of The Doctrine and Discipline of the African Methodist Episcopal Church,” “Sowing Dissension,” “Improper Conduct,” “Spirituos Liquors,” “Frauds and Insolvencies,” “Improper Electioneering,” and “Expelled and Withdrawn Members.”²⁹⁰ Two additional sections are included, specifically addressing the arbitration of debts between clergy and lay members, and between two or more lay members of the society.²⁹¹

Laypersons who want to appeal a decision against them can do so to their Quarterly Conference, clergy to their Annual Conference, and bishops to the Judicial Council of the General Assembly.²⁹² The Judicial Council is made up of “nine (9), five (5) of whom shall be laypersons of the Church, at least three (3) of whom shall be lawyers and/or judges with full membership in the A.M.E. Church The other four (4) members shall be elders of the Church.”²⁹³ The Judicial Council not only hears appeals, but it also makes declaratory decisions interpreting General Conference actions for “any member in good and regular standing affected” by the doubtful meaning.²⁹⁴ “The judgment of any matter returned by the Judicial Council can only be stayed as to the execution thereof by a two-thirds (2/3) majority of the Annual Conferences of the A.M.E. Church or the General Conference when in regular or special session.”²⁹⁵

Likewise, the United Methodist Church has a Judicial Council, which has authority to review cases heard by lower tribunals, and “determine the constitutionality of any act of the General Conference upon an appeal of a majority of the Council of Bishops or one fifth of the members of the General Conference”²⁹⁶ The Judicial Council also exercises the same power of final review over the church’s bishops and other conferences in questions of law.²⁹⁷ The Judicial Council is *295 “composed of nine (9) members and should reflect the racial, ethnic, and gender diversity of The United Methodist Church.”²⁹⁸

The Book of Discipline of the United Methodist Church outlines the procedures for investigating complaints against lay members and clergy, and states that “[a]t each step in the proceedings . . . efforts for resolution shall continue, so long as these efforts are not used to hinder fair process.”²⁹⁹ The process guarantees that “the respondent (the person to whom the procedure is being applied) shall have a right to be heard before any final action is taken”³⁰⁰ and “shall have a right to be accompanied by another person to any judicial process hearing to which he or she is subject”³⁰¹ Additionally, “[t]he person accompanying the respondent shall have the right of advocacy.”³⁰²

The section on trying those accused in the U.M.C. begins with the reminder that “[o]nly after every reasonable effort has been made to correct any wrong and adjust any existing difficulty should steps be taken to institute a trial.”³⁰³ Further, “[n]o such trial as herein provided shall be construed to deprive the respondent or the Church of legal civil rights.”³⁰⁴ Clergy and lay members alike are tried by a jury of thirteen people drawn from a larger pool of thirty-five.³⁰⁵ Nine of the thirteen votes are required for a conviction, and fewer than nine votes are considered an acquittal.³⁰⁶

“In all cases, the right to present evidence shall be exhausted when the case has been heard once on its merits in the proper court, but questions of Church law may be carried on appeal, step by step, to the Judicial Council.”³⁰⁷ Appeals from the clergy are initially heard at the jurisdictional level by a committee of four elders, and appeals from lay members begin at the district level with a committee of eleven laypersons.³⁰⁸

*296 X. Nazarene

The 608,008 Nazarenes living in the United States constitute a little under half of the worldwide membership of 1,342,252.³⁰⁹ Nazarenes trace their history through the Anglican, Methodist, Pentecostal, and Holiness movements of the 1800s.³¹⁰ Sydney Ahlstrom records that by 1908:

[T]he Association of Pentecostal Churches, whose center of gravity was New York and New England, and the Church of the Nazarene which stemmed from the work of Phineas F. Bresee in Southern California, joined forces with the Holiness Church of Christ, a consolidation of rural southern congregations stretching from Tennessee to Texas. The components of this new church were rather diverse, for each was itself a federation

with a complex history. . . . [The initial and subsequent mergers] revealed a trend away from interdenominational associations toward a more denominational understanding of the movement, and away from extreme congregationalism toward a connectional conception of the church that owed much to Methodism.³¹¹ Further:

Nearly all of them were in a technical sense Fundamentalists, yet their passions and goals were oriented not so much toward doctrinal purity as toward true Christian experience. Social mobility would affect them as it did all other American groups; and by 1969, when they numbered 350,882 members, their primitive fervor was considerably attenuated and their interest in education much increased.³¹² Ahlstrom's account helps to explain the apparent incongruity in Nazarene life between the spirit-led openness of worship and individual experience, which is found in many congregational bodies, and the highly structured form of governance, which is more common in representative churches.

*297 The Manual/1997-2001: Church of the Nazarene (Manual), is the denomination's official statement regarding its history, constitution, government, and ritual.³¹³ A Judicial Manual of the Church of the Nazarene (Judicial Manual) supplements the Manual's adjudicatory information with rules of procedure.³¹⁴ The form of government is representative with a General Assembly overseeing the world work.³¹⁵ A regional division of management oversight is used by the international General Assembly, and may possibly be emerging as a distinct and separate level of the organization.³¹⁶ Using a regional scheme, the General Assembly directs denominational life and work through districts, which oversee the local congregations.³¹⁷

Local congregations are directed by a Church Board made up of no more than twenty-five regular members including the pastor, and lay people elected by the congregation as stewards, trustees, and other officers.³¹⁸ Local congregations also consider matters in church meetings, which all members are encouraged to attend.³¹⁹

District Assemblies are comprised of representatives from local congregations and assigned church employees.³²⁰ Likewise, General Assemblies consist of an equal number of lay and ministerial representatives from the District Assemblies.³²¹

Part VI of the Manual is entitled "Judicial Administration," and section I addresses the investigation of possible wrongful conduct and church discipline.³²²

The objectives of church discipline are to sustain the integrity of the church, to protect the innocent from harm, to protect the effectiveness of the witness of the church, to warn and correct the careless, to bring the guilty to salvation, to rehabilitate the guilty *298 to restore to effective service those who are rehabilitated, and to protect the reputation and resources of the church.³²³ Section II states that the immediate superior in any given situation has the authority and responsibility to respond by investigating charges of possible misconduct.³²⁴ Section III encourages the settlement of disciplinary matters by agreement, but encourages local church and District Boards to be prepared to respond to crises and emergencies.³²⁵

Sections IV and V deal with contested matters of lay members and clergy, respectively.³²⁶ If a matter regarding a lay member lies beyond the scope of simple agreement, the local board appoints a Local Board of Discipline, consisting of five members to "hear and dispose of the case in a fair and impartial manner."³²⁷ Similarly, if a case involving a member of the clergy needs to be heard and disposed of, the District Board will appoint a five member District Board of Discipline for the matter.³²⁸

The General Assembly elects "five ordained ministers to serve as members of the General Court of Appeals during each ensuing quadrennium"³²⁹ According to section VI, the General Court of Appeals adopts and publishes rules of procedure, which are authoritative and govern all judicial proceedings for the Church of the Nazarene.³³⁰ The Judicial Manual operates

like local rules of court, giving specific instruction on filings, notification, responses, procedures at hearings, decisions, reporting, and appeals.³³¹ The Judicial Manual also contains sample forms for a Bill of Charges against a minister and a lay member.³³²

Sections VII and VIII of part VI in the Manual describe the selection and work of the District Court of Appeals, which would hear the case of a lay *299 member arising from a Local Board of Discipline, and the General Court of Appeals, which would hear the case of a clergy member arising from the District Board of Discipline.³³³ Section IX briefly mentions a Regional Court of Appeals, but does not elaborate on its work.³³⁴

Section X speaks to the guaranty of rights, and notes that the prosecution has the “burden of proving guilt to a moral certainty and beyond a reasonable doubt.”³³⁵ The accused has the right to counsel, but counsel must be a “member in good standing in the Church of the Nazarene.”³³⁶ The statute of limitations is five years, unless the person bringing the charge was incompetent or a minor, in which case the statute tolls until competency is regained or majority is reached.³³⁷ Lastly, a person “shall not be twice placed in jeopardy for the same offense. It shall not be considered, however, that such person was placed in jeopardy at any hearing or proceeding where the court of appeals discovers reversible error committed in the original proceeding before a Board of Discipline.”³³⁸

XI. Orthodox

During the first thousand years after Christ, Christianity spread through the world as one united church. As the church moved into new regions, it not only influenced, but it also assimilated local cultures, acquiring diverse thought and life, but it inevitably fragmented. The East-West schism of 1054 came about in part because:

The East used Greek as its language; the West used Latin Forms of worship differed: the bread used in communion, the date for Lent, and how mass was celebrated. In the East clergy could marry, and they wore beards. Western priests could not marry and were clean shaven.³³⁹ Additionally, “[t]he East felt uncomfortable with the West’s doctrine of purgatory. The West used the Latin word filioque, ‘and from the Son,’ in the Nicene Creed, after the clause about the Holy Spirit, which say *300 the Spirit ‘proceeds from the Father.’ To the East, that addition was heretical.”³⁴⁰

The differences also had to do with geographical and political power struggles.³⁴¹ In 1049 the new pope, Leo IX, attempted to get the new patriarch of Constantinople, Michael Cerularius, to submit to the authority of Rome, and Michael refused.³⁴² Each excommunicated the other, and by 1054, the western part of Christendom was Roman Catholic, and the East considered itself the Orthodox Church.³⁴³ The Orthodox Church has divided into independent national churches, as indicated by the names found in America today: Albanian, Antiochian, Bulgarian, Greek, Romanian, Russian, Serbian, Syrian, and Ukrainian Orthodox churches.³⁴⁴ Though the patriarchate of Constantinople is depleted, “it has retained its primacy among the Orthodox”³⁴⁵

It must be kept clear, however, that other so-called Orthodox churches in the U.S. are not recognized as canonically “Orthodox.” These irregular Eastern churches might be called autogenic, or self-starting, but they cannot properly be called Orthodox, since the churches must be in canonical relationship with the Patriarch of Constantinople and with one another.³⁴⁶ The Orthodox Church in America, with 2,000,000 members, and Greek Orthodox Church, with 1,950,000 members, make up eighty percent of the Eastern Orthodox membership in the United States.³⁴⁷

The Orthodox churches are hierarchical, and the United States Supreme Court has refused to become involved in its internal disputes because of that particular structure. The cases of *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church*³⁴⁸ and *Kreshik v. St. *301 Nicholas Cathedral*³⁴⁹ can be cited by churches with presbyterial and congregational structures, as well as by denominations with hierarchical structures, when judicial intervention is sought in a matter of internal church conflict.

The disciplinary structure and procedure for the Orthodox Church came from the first four ecumenical councils of the Christian Church: Nicea in 325, Constantinople in 381, Ephesus in 431, and Chalcedon in 451.³⁵⁰ “The canons issued by these councils constitute the core of Church Law in the Christian East, even today.”³⁵¹

Most of what has been written about these councils is in Greek and Russian, and some in French and German, but very little is in English.³⁵² The recommended works on Orthodox canon law available in English are *The Rudder*,³⁵³ *The Church of the Ancient Councils*,³⁵⁴ and volume 14 of the second series of the *Nicene and Post-Nicene Fathers*.³⁵⁵ Not only do these works contain the actual canons, but they also give commentary on the law, because terms like “dispute,” “heretic,” and “conformity” can have more than one meaning.

Canon 5, from the earliest council in Nicea, addressed questions of the bishops’ authority and jurisdiction, the accused’s right to and process for appeal, and the church’s desire for judicial fairness:³⁵⁶

Concerning those who have been excommunicated, either among the clergy or the laity, let the sentence that was given by the bishops of each province remain in force; let this be in conformity with the regulation which requires that those so excluded by some bishops must not be received by others. But let each case be ***302** examined to see if those involved were excluded for a cowardly reason, from a quarrelsome spirit, or from some feeling of dislike on the part of the bishop. Therefore, so that a proper inquiry may take place, it seems good and proper that in each province there be a synod two times a year so that all the bishops of the province sitting together may examine such questions and thus those who, according to the general opinion, may have disobeyed their bishop will be properly considered as excommunicate by all until such time as all the bishops see fit to render a more merciful sentence.³⁵⁷

Fifty-six years after Nicea, the Council of Constantinople, in its canon 6, addressed such issues as who can bring accusations, how accusations are to be brought to the bishops, and also set a rather stiff bar for accusers.³⁵⁸ The second council also forbade anyone to seek help from the secular courts in resolving internal church disputes.³⁵⁹

Because many people are seeking to sow trouble and confusion in church ranks, being motivated by a hateful and slanderous spirit, they invent accusations against the orthodox bishops who administer the churches; their only intention is to impugn the reputations of the priests and to provoke troubles among peoples living in peace. It has, therefore, seemed right and proper to the holy council of bishops assembled in Constantinople that accusers no longer be accepted without previous inquiry; neither should just anybody be allowed to present himself as an accuser of those who administer the churches. This ruling does not, however, exclude everyone from making accusations. . . . [I]f some persons who are neither heretics nor excommunicated, who have not received any condemnation and have not been accused in any way, if any of these persons claim to have a complaint against the bishop in a churchly matter, the holy council requires them first to submit their complaint to all the bishops of the province and in their presence to prove their accusations. If, however, the other bishops of the province cannot redress the wrongs imputed to the bishop, let them then appeal to the greater council of bishops of the diocese, convoked just for this reason. These bishops should not, ***303** however, present their complaint until they have agreed in writing to accept for themselves the sentence handed down if it is shown that they have slandered the accused bishop.³⁶⁰ Further:

If anyone, not abiding by these decisions mentioned above, dares to weary the ears of the emperor or to disturb the law courts of the civil authorities or an ecumenical council, thus scorning all the bishops of the diocese, that person should not be allowed to make such an accusation since he disregards the canons and injures the good order of the Church.³⁶¹

The Council of Chalcedon, in 451, 126 years after Nicea, clarifies and reaffirms the work of the earlier councils. In canon 9 of Chalcedon, we find that the problem of lay members taking church matters to secular courts had become the habit of some clergy in spite of the prohibition against such action. Therefore, the use of a third-party mediator is introduced as a dispute resolution step before going to a bishop directly, and the hierarchy is outlined clearly: cleric, bishop, metropolitan, exarch, and patriarch.³⁶² Canon 9 begins:

If a cleric has a dispute with another cleric, let him not bypass his bishop and go to the secular courts, but let him submit the affair first to his own bishop or, of course, on the advice of his bishop, to some agreed-on third party who can judge the case.³⁶³ “If anyone goes against this ruling, let him be subject to canonical penalties.”³⁶⁴ Canon 9 continues:

If, on the other hand, a cleric has a dispute with his own bishop or with another bishop, let him appeal to the synod of the province. Finally if a bishop or a cleric has something against the metropolitan of the province in question, let him appeal either to the exarch of the diocese or to the see of the imperial city of Constantinople, and let him be given justice there.³⁶⁵ *304 Canon 12 of Chalcedon prohibits bishops from “appeal[ing] to public authorities in order to effect the division of a province in two by imperial decree.”³⁶⁶ Canon 13 restricts clerics and readers to their own city, unless they have been given a letter of recommendation from their bishop.³⁶⁷ In the context of some questions about clerics marrying heterodox women, Chalcedonian canon 14 reinforces the authority of the holy councils with the words: “If anyone goes against the decree of the holy council let him be submitted to a canonical sentence.”³⁶⁸

XII. Pentecostal

In the historical life-cycle of all religious organizations, there comes a point where the members sit up, take stock of how far they have come from their beginnings, and some decide to proceed on, while others attempt to return to their earlier ways.³⁶⁹ Sometimes groups attempt to return to their doctrinal or organizational roots, but for many Methodists in the early nineteenth century, there was a need to reemphasize holiness and disciplined Christian living.³⁷⁰ When the camp meeting and revival fervor subsided in the mid-1800s, a few new denominations emphasizing the “baptism of the Holy Spirit” had emerged, like the Church of the Nazarene.³⁷¹ By the late 1800s, other groups continuing their quest for a sanctified life in the Spirit had begun to experience speaking in tongues as evidence of Spirit baptism, and became known as Pentecostal.³⁷²

The Church of God in Christ, with 5,499,875 members, the Assemblies of God, with 2,467,855 members, the Pentecostal Assemblies of the World, with an estimated 1,000,000 members, and the Church of God, Cleveland, Tennessee, with 753,230 members, account for ninety-one percent of Pentecostalism in the United States today.³⁷³ Each of these denominations is a combination of presbyterial and episcopal structures, with their primary authority residing in the *305 local pastor or elders, and the overseeing and appellate authority residing in the hierarchy above.³⁷⁴

For instance, the Pentecostal Assemblies of the World believe in the headship of God in a Christian’s life, and that headship manifests itself in the church through the person of the ordained pastor or the elder in charge.³⁷⁵ When the church has a concern with a member, or one member with another, the pastor takes the matter under advisement, and makes a “decision through God.”³⁷⁶ If the pastor determines that the concerns are valid and should be dealt with, the person may be silenced, the situation may be noted to the congregation, and the congregation may be encouraged to refrain from fellowshiping with the individual in question.³⁷⁷ If the person does not agree with the leadership of God through his or her pastor, he or she may appeal the decision up the structure to the district elder, the bishop of the diocese, and lastly to the Board of Bishops for the whole denomination.³⁷⁸ A repentant attitude is usually the key to the person’s re-admittance as a member in good and regular standing.³⁷⁹

Article X of the General Council of the Assemblies of God Bylaws is entitled “Discipline,” and is intended “to be administered for the restoration of the minister, while fully providing for the protection of the spiritual welfare of our local

assemblies. It is to be redemptive in nature as well as corrective and is to be exercised as under a dispensation of mercy.”³⁸⁰

The Executive Presbytery of the General Council has a subcommittee dealing with credentials, and it is the Credentials Committee that takes the recommendations of the district, and then decides what to do regarding ministerial discipline.³⁸¹ Article X, part *306 A, section 3, lists thirteen different causes for discipline, and “[i]n the event a district fails to take action within 90 days after a matter has been referred to it, it shall be the responsibility of the General Council Credentials Committee to see that action is initiated.”³⁸²

Article X, part A, sections 5 through 7, contain rules for investigation of complaints, preparing and filing charges, and an outline of the procedure for hearing and disciplining a minister.³⁸³ The standard of proof in convicting a minister is “clear and convincing evidence.”³⁸⁴ The District Office Manual for Ministerial Discipline, Rehabilitation, and Restoration contains three pages of comparisons of judicial standards of proof and definitions of proof in an effort to help define what is “clear and convincing.”³⁸⁵

Article X, part A, sections 8 through 12 of the Assemblies of God Bylaws, deal with an elaborate process for rehabilitating and restoring a person to ministry.³⁸⁶ If a minister submits to the authority of those to whom he is accountable, while in rehabilitation, he may eventually be reinstated, but:

The minimal time-lapse required before a minister who has been dismissed is eligible for reinstatement shall be 1 year, except it shall be 2 years for a minister who has been dismissed because of charges as stated in Article X, [[part] A, Section 3, paragraph a [one of the thirteen reasons]. The time-lapse shall be computed from the date of the district presbytery action as it appears on the ministerial status report filed with the General Council Credentials Committee. (See Bylaw Article VII, Section 10, for other renewals and reinstatements.)³⁸⁷

“The General Assembly is the supreme legislative and judicial authority of the Church Of God In Christ.”³⁸⁸ “There can be no appeal *307 from the decisions and determinations of the General Assembly.”³⁸⁹ Each local church has its own constitution, by-laws and board of trustees, who are elected by the congregation as a whole to govern it.³⁹⁰ A section on rules of order for a meeting are given in the Church Of God In Christ Official Manual (Official Manual), because “[e]very club or organization should want to hold democratic meetings. But wanting this doesn’t always bring it about.”³⁹¹

Disciplinary matters regarding individual church members are not addressed in the Official Manual, but such concerns regarding a church are filed with the Ecclesiastical Jurisdiction regional office.³⁹² If the Investigating Committee appointed by the Jurisdictional Bishop finds reasonable grounds to hear the matter, the same Bishop appoints an Ecclesiastical Council to try the case and make a decision by majority vote.³⁹³ “The Parties shall have the right to be represented by Counsel, who shall be members of the Church Of God In Christ, but said Counsel may be advised by non-members of the Church.”³⁹⁴

If a complaint is filed and accepted against a pastor, it is heard by the Elders Council of the Ecclesiastical Jurisdiction, and the pastor has the right to appeal the Council’s decision to the General Council of the General Assembly.³⁹⁵ The same right to counsel from within the church, and right to counsel from outside the church exists for pastors as for churches.³⁹⁶

The Church Of God, Cleveland, Tennessee, is organized by local church, district, state, national, and international levels.³⁹⁷

If a member who is not a minister shall be charged with any offense which makes it necessary to deal with the member, formal charges in writing shall be given to the member not less than three days (when practical) prior to the time and place of the *308 conference. The member shall have a right to be heard and offer corroborating testimony at the conference.³⁹⁸ The member has the right to appeal to the state overseer who will make a final decision in the matter, and there is no appeal beyond that point.³⁹⁹

A section of the Minutes of the 67th General Assembly of the Church Of God discussing disorderly ministers, addresses the reasons why a minister may have his license revoked, and how he may re-obtain it.⁴⁰⁰ The section also states: “Ministers who resign their ministry to evade charges instituted, or being instituted against them as a result of offending conduct, shall be

considered guilty”⁴⁰¹ Further: “Where ministers have had their ministry revoked for any cause and engage in ministerial activities in opposition to the Church of God, our ministers and members shall be considered disloyal in promoting their ministerial activities”⁴⁰²

A section on offending ministers explains that charges against a minister are filed with the state overseer, who investigates or appoints a board of investigation.⁴⁰³ If the matter actually proceeds to trial, the state overseer appoints a trial board to hear the case and make a decision.⁴⁰⁴ The section sets forth in great detail the trial procedures, but the standard of proof and the vote required by the trial board are not discussed.⁴⁰⁵ It is clearly stated that:

Inasmuch as Church of God hearings and/or trials of its ministers or members are ecclesiastical rather than civil in nature, and concern matters within the Christian brotherhood, to be judged by the guidelines of Holy Scripture rather than civil law, the ministers and members of the Church of God do hereby agree that defense attorneys may not attend or participate in those proceedings.⁴⁰⁶ *309 The minister has the right to appeal the state level decision to the general overseer if “[t]he trial was conducted improperly,” “[n]ew evidence which was not available at the time of the trial becomes available,” “[t]here is a conflict of interest in those conducting the trial,” or “[t]he Executive Committee [of the General Assembly] deems such advisable for other reasons.”⁴⁰⁷

XIII. Presbyterian

American Presbyterianism traces its roots to John Calvin’s reformed movement.⁴⁰⁸ Missionaries left Geneva and worked in Switzerland, France, Holland, England, and Scotland.⁴⁰⁹ The Reform influence produced the British and Scotch-Irish Presbyterians, who mostly settled in Pennsylvania and New Jersey, but by 1750, had congregations as far north as Maine and as far south as Georgia.⁴¹⁰ Given their Calvinist background and history of dissent in Scotland and England, the Presbyterians were overwhelmingly patriots to the point that “the War of Independence has sometimes been described as a ‘Presbyterian Rebellion.’”⁴¹¹ It was the Presbyterians who pushed the expansion of the American frontier geographically, spreading, among other ideas, their democratic form of church governance.⁴¹²

The Presbyterian Church (U.S.A.), also known as the P.C.U.S.A., with 3,637,375 of the 4,133,166 total Presbyterian membership in the United States, is the largest of fifteen such denominations.⁴¹³ Since this denomination dominates the group, the next largest one being the Presbyterian Church in America, with 267,764 members,⁴¹⁴ the P.C.U.S.A.’s material is used in this study as representative of Presbyterian polity and governance. Presbyterianism literally means representative, and the church’s polity and governance reflects *310 democracy.⁴¹⁵ The Constitution of the P.C.U.S.A. is divided into two volumes.⁴¹⁶ Part I is the Book of Confessions, containing the historical and theological statements of the church, and part II is the Book of Order, containing the form of government, directory for worship, and rules of discipline.⁴¹⁷

The section of the Book of Order entitled “The Form of Government,” begins with a very helpful subsection explaining preliminary principles, such as: 1) The Head of the Church, 2) The Great Ends of the Church, 3) The Historic Principles of Church Order, 4) The Historic Principles of Church Government, and 5) The Constitution Defined.⁴¹⁸ “The Form of Government” section also clearly outlines the structure of the church, as well as the relationships between members, clergy, and congregations.⁴¹⁹

The basic entity of Presbyterian organization is the local congregation, which is governed by the session.⁴²⁰ “The session of a particular church consists of the pastor or co-pastors, the associate pastors, and the elders in active service. All members of the session, including the pastor, co-pastors, and associate pastors, are entitled to vote.”⁴²¹ The elders of the local congregation are chosen by the people of the local congregation.⁴²² “Together with ministers of the Word and Sacrament, they exercise leadership, government, and discipline and have responsibilities for the life of a particular church as well as the church at large, including ecumenical relationships.”⁴²³

The level of organization above the session is the presbytery, which is a “corporate expression of the church consisting of all the churches and ministers of the Word and Sacrament within a certain district.”⁴²⁴ Each local session sends one elder to represent it on the presbytery, and an additional elder for each additional 500 members or fraction thereof up to 2000.⁴²⁵ At

2001 members, the congregation *311 sends one additional elder to the presbytery for each additional 1000 members or fraction thereof.⁴²⁶ “The presbytery is responsible for the mission and government of the church throughout its geographical district.”⁴²⁷

Next up the structure is the synod, which consists of no fewer than three presbyteries, and is composed of commissioners selected by the presbyteries.⁴²⁸ The synod, which is composed of half elders and half ministers, mirrors the work and responsibility of the presbytery at a regional level.⁴²⁹

“The General Assembly is the highest governing body of this church and is representative of the unity of the synods, presbyteries, sessions, and congregations of the Presbyterian Church (U.S.A.).”⁴³⁰ The General Assembly, which meets at least biennially, consists of equal numbers of elders and ministers from each presbytery.⁴³¹

The forty-eight pages of the “Rules of Discipline” section of the Book of Order literally read like the Federal Rules of Civil Procedure.⁴³² Presbyterian judicial cases are divided into two categories: remedial and disciplinary.⁴³³ Remedial cases are those where an irregularity has occurred due to an erroneous decision or action, or a delinquency has occurred due to an omission.⁴³⁴ Disciplinary cases involve the censure of a church member or officer for an offense.⁴³⁵

Chapter I of the “Rules of Discipline” outlines principles of church discipline.⁴³⁶ Chapter II defines the judicial process and states:

The governing bodies of the church for judicial process are the session, the presbytery, the synod, and the General Assembly. The session itself conducts trials. The presbytery, the synod, and *312 the General Assembly conduct trials and hearings through permanent judicial commissions.⁴³⁷ Chapter III addresses jurisdictional questions stating:

- a. The session of a church has original jurisdiction in disciplinary cases involving members of that church.
- b. The presbytery has original jurisdiction in disciplinary cases involving minister members of that presbytery and commissioned lay pastors serving in congregations in the presbytery. . . .
- c. The presbytery, the synod, and the General Assembly have jurisdiction in remedial cases . . . and in appeals
- d. When a church is dissolved, the presbytery shall determine any case of discipline begun by the session and not concluded.⁴³⁸

Chapter IV outlines the procedure for referring a case to a higher governing body, and chapter V describes the “Permanent Judicial Commissions” for each presbytery and synod, and the General Assembly.⁴³⁹

The commission for a presbytery has no fewer than seven members; a synod no fewer than eleven. The General Assembly has one member for each of its regional synods, and each attempts to have an equal representation of ministers and elders.⁴⁴⁰ The commission members for the presbyteries and synods serve for a term of six years, and in classes that are staggered so that every two years there is an election of no more than one half of the commission.⁴⁴¹ The term of the commission for the General Assembly is six years, and staggering occurs through natural attrition.⁴⁴²

Chapter VI outlines how a remedial complaint is filed, and charts the pre-trial process complete with time limitations.⁴⁴³ Chapter VII describes the trial in a remedial case, and walks one step-by-step through the proceeding.⁴⁴⁴ Counsel who is a member of the Presbyterian Church (U.S.A.), is allowed to represent a party, but non-***313** members may serve as witnesses only.⁴⁴⁵ The standard of proof in remedial cases is a preponderance of the evidence, and a majority vote of the commission appears to be all that is required to make a determination.⁴⁴⁶ Chapter VIII addresses the appeal of remedial cases, and chapter IX describes a request for vindication.⁴⁴⁷

Chapter X outlines pre-trial procedure, and the rights and options of the accused in a disciplinary case.⁴⁴⁸ Chapter XI mirrors chapter VII and walks one through the proceedings for a disciplinary trial.⁴⁴⁹ In a disciplinary case, only members of the Presbyterian Church (U.S.A.) are allowed to be present, and the standard of proof is beyond a reasonable doubt by a two-thirds majority of the session or commission.⁴⁵⁰ Chapter XII deals with censure and restoration, and chapter XIII addresses the process of appeal in a disciplinary case.⁴⁵¹

Chapter XIV is a code of evidence for both remedial and disciplinary cases.⁴⁵² “Evidence, in addition to oral testimony of witnesses, may include records, writings, material objects, or other things presented to prove the existence or nonexistence of a fact.”⁴⁵³ As far as witnesses in general, “[a]ny party may challenge the ability of a witness to testify, and the session or permanent judicial commission shall determine the competence of the witness”⁴⁵⁴ Regarding spousal privilege, “[a] husband or wife . . . may be a witness for or against the other, but neither shall be compelled to testify against the other.”⁴⁵⁵ The testimony at the proceedings is open to questioning,⁴⁵⁶ is “accurately and fully recorded by a qualified reporter or other means,”⁴⁵⁷ and is “admissible in evidence in any proceeding.”⁴⁵⁸

***314** The Book of Order concludes with an appendix containing fifty-one forms, cross-referenced to the section in the Book of Rules to which they apply.⁴⁵⁹ One can find such forms as: Accusation by Individual as Statement of Offense, Answer to Complaint, Certification of Service of Complaint, Citation to a Party in a Remedial Case, Citation to Person Accused, Citation to Witness, Decision of Permanent Judicial Commission on Reference, Dissent, Notice of Appeal, Request for Taking Testimony by Deposition, Request for Vindication, and Stay of Enforcement in the Book of Order appendix.⁴⁶⁰

XIV. Reformed

The Reformed churches trace their beginnings to John Calvin’s Geneva in the days of the Protestant Reformation of the 1500s.⁴⁶¹ Calvin, the son of a lawyer, studied law before experiencing “sudden conversion” and becoming a theologian and church leader.⁴⁶² While staying overnight in Geneva, Calvin was persuaded by his friend and fellow reformer, William Farel, to stay and help the fledgling protestant movement.⁴⁶³ Calvin stayed, quickly rose to a position of religious and civic leader, and transformed the city into what Macaulay called, “the cleanest and most wholesome city in Europe.”⁴⁶⁴ Chief among the numerous changes to life in Geneva was the democratization of both the church and the city.⁴⁶⁵ “In Calvin’s thoughts lay the germ that in time destroyed the divine right of kings. He gave a new dignity to the people and brought representative government to parliaments and church officials. He struck the final blow at feudalism and offered a spiritual and moral tone for dawning capitalism.”⁴⁶⁶

The United Church of Christ (U.C.C.), with 1,452,565 of the 1,983,359 Reformed membership in the United States, is the largest of ***315** seven denominations in the group.⁴⁶⁷ Just as the P.C.U.S.A. dominates the Presbyterian group, so does the U.C.C. in the Reformed Church family, and its material is used as illustrative for all.

The United Church of Christ is a combination of congregational and representative types of structures, with the primary unit being the local congregation.⁴⁶⁸ Several congregations make up an Association, and several Associations comprise a Conference.⁴⁶⁹ At the highest level is the General Synod, which is the “representative body of the United Church of Christ and is composed of delegates chosen by the Conferences,⁴⁷⁰ and ex officio delegates.⁴⁷¹ Article IV of the U.C.C. Constitution states:

The autonomy of the Local Church is inherent and modifiable only by its own action. Nothing in this Constitution and the Bylaws of the United Church of Christ shall destroy or limit the right of each Local

Church to continue to operate in the way customary to it; nor shall be construed as giving to the General Synod, or to any Conference or Association now, or at any future time, the power to abridge or impair the autonomy of any Local Church in the management of its own affairs, which affairs include, but are not limited to, the right to retain or adopt its own methods of organization, worship and education; to retain or secure its own charter and name; to adopt its own constitution and bylaws; to formulate its own covenants and confessions of faith; to admit members in its own way and to provide for their discipline or dismissal; to call or dismiss its pastor or pastors by such procedure as it shall determine; to acquire, own, manage and dispose of property and funds; to control its own benevolences; and to withdraw by its own decision from the United Church of Christ at any time without forfeiture of ownership or control of any real or personal property owned by it.⁴⁷² *316 Thus, one will need to check with the particular local congregation to determine what the decision-making process is when that congregation is confronted with an internal church dispute in the U.C.C.

The United Church of Christ Manual on Ministry (Manual on Ministry) is available for U.C.C. churches, which the editors hope “will contribute to the development of unity within our diversity and will be expressive of the perspectives and procedures commonly affirmed among us.”⁴⁷³ In a congregational situation like the U.C.C., where each church has the autonomy to do as it sees best, material like the Manual on Ministry may either be followed or at least provide clues as to what to expect when becoming involved in an internal church dispute.

The 1991 Manual on Ministry includes a new section entitled “Review and Discipline of Persons Authorized for Ministry.”⁴⁷⁴ The Manual on Ministry recommends that each Association Committee on the Ministry conducts a periodic review of pastors. It also recommends intervention with a special review that is developmental in nature when a crisis arises, and the holding of a disciplinary review when serious charges or allegations warrant an investigation.⁴⁷⁵

The Manual on Ministry insists that parties clearly distinguish between civil or criminal matters and ecclesiastical matters, and states that the Committee on Ministry “addresses itself only to ecclesiastical matters.”⁴⁷⁶ The Manual on Ministry outlines six answers that may be given regarding a person’s fitness for ministry as a result of a disciplinary review.⁴⁷⁷ Further, the Manual on Ministry adds:

All censures, suspensions, and terminations should be reported to the Secretary of the United Church of Christ and to the Office for Church Life and Leadership. The Office for Church Life and Leadership will report these broadly throughout the ecclesiastical system of the United Church of Christ.⁴⁷⁸ *317 The Manual on Ministry continues with a ten-step process describing how the review takes place.⁴⁷⁹ Steps 1 through 3 on “Initiating a Disciplinary Review”⁴⁸⁰ and step 4 on “Preliminary Exploration,”⁴⁸¹ are followed by steps 5 and 6, the “Disciplinary Hearing”⁴⁸² itself. Remember, “[i]f the person refuses to meet with the Committee, the Committee may proceed with the disciplinary hearing after making every effort to notify the person of the time and place of the hearing.”⁴⁸³ The Manual on Ministry also counsels that “[a] Committee on the Ministry or an Association should assess its need for legal counsel when it considers censure, suspension, or involuntary termination of a person’s ordained ministerial standing, commissioning or licensing.”⁴⁸⁴

A fourteen-point walk through the disciplinary hearing allows for presentation by both sides and the questioning of any testimony by the Committee on Ministry.⁴⁸⁵ Steps 7 and 8 discuss the “Decision by the Committee on the Ministry,” and state: “The decision of the Committee on the Ministry may become a recommendation to the Association ecclesiastical council, which determines the final decision.”⁴⁸⁶

Step 9 describes how the Association Council reviews the work of the Committee on Ministry, and how it listens to the accused and asks questions of those present (though not to retry the case). Step 9 also describes how the Association Council accepts or denies the recommendation, and how it remands or appoints a new committee to retry the case.⁴⁸⁷ Step 10 suggests “Pastoral Follow-Up” in an effort to help the accused, and the section concludes with a six-page chart diagramming what the minister in question, the person(s) making the allegations, and the Association should be doing at each point in the ten-step process.⁴⁸⁸

***318 XV. Roman Catholic**

The Roman Catholic Church traces its history and present day authority directly from Jesus Christ through his twelve Apostles to Pope John Paul II.⁴⁸⁹ “Succession means successive consecration by the laying on of hands, performing the functions of the Apostles, receiving their commission in a lineal sequence from the Apostles, succession in episcopal sees traced back to the Apostles, and successive communion with the Apostolic See, i.e., the Bishop of Rome.”⁴⁹⁰

Christ’s twelve Apostles soon found that they were too busy to care for temporal as well as spiritual matters, and, in a move that marked the church’s first delegation of duties and organizational expansion, they appointed seven deacons to care for the physical needs of the church.⁴⁹¹ As seen earlier in the section on the Orthodox Church,⁴⁹² the authority of the bishops over internal disputes was reaffirmed by the first ecumenical council at Nicea in 325.⁴⁹³ Today, nearly 2,000 years later, the church’s vast organization continues to address internal conflict and discipline by a decision of the local bishop or his appointed judicial vicar, vice-officials, and judges.⁴⁹⁴

The Roman Catholic Church, with 61,207,914 members, comprises thirty-eight percent of Christianity in the United States.⁴⁹⁵ It is hierarchical in structure, and has maintained from the beginning that:

The legislators for the entire Church are the Roman Pontiff alone, or the Pope through the Roman Curia, or an ecumenical council together with the Pope; the bishops for their individual dioceses, or conferences of bishops for the territories under their jurisdiction; and the major superiors of institutes of perfection for their members, according to the respective constitutions.⁴⁹⁶

***319 Additionally:**

This right is believed to be of divine origin, since “the Church, our most prudent Mother, by the constitution received from her Founder, Christ, was endowed with all the qualities suitable to a perfect society. So, too, from her very beginning, since she was to obey the Lord’s command to teach and govern all nations, she has undertaken to regulate and protect by the laws the discipline of clergy and laity alike.”⁴⁹⁷ The church has also always professed its right “to pass laws that are binding on the consciences of the faithful.”⁴⁹⁸ “Since the baptismal character is indelible, a person once baptized always remains subject to the Church into which he or she was incorporated by this sacrament of water and the Holy Spirit.”⁴⁹⁹ Further, the code of canon law states that “[i]t is the right of the Roman Pontiff himself alone to judge cases”⁵⁰⁰ The Roman Pontiff is to judge “cases concerning spiritual matters or connected with the spiritual; the violation of ecclesiastical laws and all those cases in which there is a question of sin in respect to the determination of culpability and the imposition of ecclesiastical penalties.”⁵⁰¹ Additionally, “[t]he First See is judged by no one.”⁵⁰²

The body of canon law itself began as a few norms found in the New Testament, and developed in the writings and church regulations of the Apostles’ successors, the early church fathers. It also received church-wide authority in the ecumenical councils.⁵⁰³

The Corpus Iuris Canonici (Collection of canon law) is [the] set of six collections of law that functioned as the primary source of Roman Catholic church law from the Middle Ages until 1918, when it was superseded by the Codex Iuris Canonici [Code of *320 Canon Law]. . . . Along with Roman law, the elements of the Corpus had become a part of European common law.⁵⁰⁴ Part of Pope John XXIII’s vision, in 1959, for the Second Vatican Council was a revision of the 1917 Code of Canon Law.⁵⁰⁵ Twenty-four years later, in early 1983, the completed revision was presented to Pope John Paul II, and was made effective later that year.⁵⁰⁶

The Code of Canon Law is divided into books, the first being “General Norms,” which includes the working definitions one needs to understand the Law.⁵⁰⁷ Book II is entitled “The People of God,” and outlines the role and organization of the clergy

and the Christian societies.⁵⁰⁸ Book III describes the missionary, catechetical instruction, the schools, and the profession of faith of the church, and is entitled, “The Teaching Office of the Church.”⁵⁰⁹ Book IV describes the sacraments, the sacred places and times, and other acts of divine worship, and is entitled, “The Office of Sanctifying in the Church.”⁵¹⁰ Book V is entitled, “The Temporal Goods of the Church,” and addresses the acquisition and management of the church’s goods, contractual arrangements, and pious wills and foundations.⁵¹¹ Book VI lists the “Sanctions in the Church,”⁵¹² and Book VII outlines the church’s “Processes.”⁵¹³

Though trials of first instance are usually before a single judge, “contentious cases: a) concerning the bond of sacred ordination; b) concerning the bond of marriage . . .” and “penal cases: a) concerning offenses which can entail the penalty of dismissal from the clerical state; b) concerning the imposition or declaration of excommunication,” are heard by a collegiate tribunal of three to five judges.⁵¹⁴ The accused has the right to appeal to the next highest level of the church, and by reason “of the primacy of the Roman Pontiff, *321 anyone of the faithful is free to bring to or introduce before the Holy See a case either contentious or penal in any grade of judgment and at any stage of litigation.”⁵¹⁵

Part I of Book VII describes trials in general, and addresses the discipline to be observed in trials. For instance, “only those persons are to be present in court whom the law or the judge decides are necessary to expedite the process.”⁵¹⁶ “With appropriate penalties a judge can demand compliance on the part of all who assist at the trial and who are seriously lacking in the respect and obedience owed the tribunal . . .”⁵¹⁷ The parties to the case are allowed to have counsel present with them, but the procurator and advocate “must be a Catholic unless the diocesan bishop permits otherwise, must have a doctorate in canon law or be otherwise truly expert and must be approved by the same bishop.”⁵¹⁸

Part II of Book VII outlines the ordinary contentious trial, which requires a libellus or written complaint, and the alternative oral contentious process.⁵¹⁹ The ordinary contentious trial progresses from the filing of the libellus to the citation and notification of judicial acts, to the joinder of the issue occurring when the terms of the controversy, derived from the petitions and responses of the parties, are defined through a decree of the judge.⁵²⁰

Farther along in the trial process “[p]roofs of any type whatever which seem useful for deciding the case and which are licit can be adduced.”⁵²¹ “The judge can always interrogate the parties so as to reveal the truth more effectively; in fact the judge must do so at the request of a party or to prove a fact which is to be established beyond doubt for the sake of the public interest.”⁵²² Canons addressing the nature and trustworthiness of documents and how they should be presented are followed by rules regarding lay and expert witnesses and testimonies. “Minors below the fourteenth year of age and those who are feeble-minded are not allowed to give testimony; however, they may *322 be heard by reason of a decree of the judge which declares such a hearing expedient.”⁵²³

[P]riests [are considered incapable] as regards [to] everything which has become known to them by reason of sacramental confession, even if the penitent requests their manifestation; moreover, whatever has been heard by anyone or in any way on the occasion of confession cannot be accepted as even an indication of the truth.⁵²⁴ In general, “questions must not be communicated to the witnesses ahead of time.”⁵²⁵

Part II of Book VII also makes a provision for the management of incidental cases arising from the main complaint.⁵²⁶ Part II concludes with chapters on how sentences are challenged, how appeals are made, and how sentences are executed.⁵²⁷ A judge may grant *restitutio in integrum* (reinstatement) “against a sentence which has become a *res iudicata* provided that there is clear proof of its injustice”⁵²⁸ Additionally, “[t]he bishop whose responsibility it is to supervise the tribunal, is to determine norms regarding . . . the honoraria for procurators, advocates, experts and interpreters and the indemnification of witnesses.”⁵²⁹

Part III of Book VII begins with the special processes reserved for questions regarding marriage, including cases to declare the nullity of marriage and cases of separation of spouses, the process for dispensation of a marriage, and the process in the presumed death of a spouse.⁵³⁰ The discussion begins with the words: “Marriage cases of the baptized belong to the ecclesiastical judge by proper right.”⁵³¹ “Cases involving the merely civil effects of marriage belong to the civil magistrate unless particular law determines that these cases can be tried *323 and decided by the ecclesiastical judge when they arise as

incidental and accessory.”⁵³²

Part III continues with the subject of declaring the nullity of sacred ordination, and concludes with methods for avoiding trials.⁵³³ Canon 1713 provides that in order “[t]o avoid judicial contentions a settlement or reconciliation is usefully employed or the controversy can be entrusted to the judgment of one or more arbiters.”⁵³⁴ Further, “[a] settlement or compromise cannot be made validly concerning matters which pertain to the public good and other matters about which the parties cannot freely dispose.”⁵³⁵

Book VII concludes with part IV, briefly describing the process for penal trials, and part V outlining the method of proceeding in administrative recourse and in the removal or transfer of pastors.⁵³⁶

If the good of souls or the need or advantage of the Church requires that a pastor be transferred from his parish which he is governing usefully to another parish or to another office, the bishop is to propose the transfer to him in writing and persuade him to consent to it for the love of God and of souls.⁵³⁷ If the pastor is not convinced that he should move, he may “explain his reasons in writing,”⁵³⁸ but if after reviewing the response the bishop still determines that the pastor should be moved, the pastor is moved by decree.⁵³⁹

XVI. Salvation Army

The Salvation Army has approximately 1,500,000 members in ninety-three countries, with 453,150 in the United States.⁵⁴⁰ Its founder, William Booth, preached for the Wesleyans, the Wesleyan Reformers, and then the Methodist New Connexion before helping to begin a Christian Mission in a tent in London in 1865.⁵⁴¹ By 1877, *324 Booth had taken complete charge of the Mission, and a “military emphasis was developed, with uniforms, corps and citadels, and the magazine *The War Cry*.”⁵⁴²

While the Army may be best known for its military bands and Christmas donation kettles and bells, its real ministry is an efficient blending of feeding and housing the homeless with the preaching of the gospel.⁵⁴³

At its centenary meeting in London in 1965 General Frederick Coutts outlined its twin aims: “If we refer to our evangelical work and also to our social work, it is not that these are two distinct entities . . . [sic] They are but two activities of the one and the same salvation which is concerned with the total redemption of man.”⁵⁴⁴

To accomplish its mission, the Salvation Army is organized like an army of a country, with its members referred to as soldiers.⁵⁴⁵ It is hierarchical in structure with a General as the highest officer, and colonels, captains, majors and lieutenants underneath.⁵⁴⁶ “The primary unit of the Army is the corps, of which there may be several in a city. . . . A number of corps make up each of the [thirty-eight] divisions in the U.S., with the work of each division under the direct supervision of a divisional commander.”⁵⁴⁷ The divisions report to one of four territorial headquarters (Eastern, Central, Southern, and Western), and a national commander is in charge of the church in the United States, which is located in Alexandria, Virginia.⁵⁴⁸ “Property and revenues are in the custody of a board of trustees, or directors, and the citizens’ advisory boards assist in interpreting the work of the Army to the general public.”⁵⁴⁹

The books *Orders and Regulations for Soldiers* and *Orders and Regulations for Officers* are the Army’s manuals for laity and ministers *325 respectively, but are not available to non-members.⁵⁵⁰ Decisions are made by consensus when a board is involved, and the chain of command is respected, as it would be in a national army.⁵⁵¹ There is no provision for the presence of outside counsel when questions arise regarding the operation of the Army or decisions of its officers.⁵⁵²

XVII. Conclusion

In conclusion, the following three observations arise from this inquiry:

1. Ironically, in spite of their scripturally based attempts to avoid the secular courts, American churches have come to rely heavily on the rules and definitions of those same secular courts to flesh-out their Biblical approach to resolving internal church disputes. There remains an opportunity for attorneys and lay counsel to demonstrate to churches that the people of the American legal system can be just as helpful as the rules and definitions.
2. Each denomination's judicial structure and process is a product of its unique church history, interpretation of the Bible, and theology, as well as its experience with the American legal system. Further, each congregation tends to develop its own version of its denomination's adjudicatory process based on its understanding of that process, and its experience in handling internal disputes. Over a period of time, a congregation may slightly change its adjudicatory process in reaction to its experience, or may change its process simply because of a new leader's understanding. The fact that church adjudicatory processes are varied and dynamic guarantees that there will be endless material for study on the subject of internal church disputes.
3. Though the resolution of internal disputes is varied and dynamic, there are two aspects of due process that church members ought to be able to expect no matter what their denomination. At the very least, prospective church members should be informed regarding the process for addressing internal disputes, and ought to give prior *326 consent to that process before joining the denomination.⁵⁵³ Further, secular courts should be free to hold churches accountable for following their stated process when resolving internal disputes.

Footnotes

- ^{a1} Loma Linda University, B.A. Ministerial Studies 1979; Loma Linda University, M.A. Religion/Church History 1987; California Western School of Law, J.D. 1999. The author is currently a Council Representative for San Diego's City Council District One. Additionally, the author was a pastor and a senior pastor with the Seventh-day Adventist Church for 17 years. The author is grateful to law professor Matthew Ritter of California Western for his encouragement and suggestions, and to Jeff Crowe and the Whittier Law Review staff for their editorial work. Credit is due to church historians Paul J. Landa, Jonathan M. Butler, V. Norskov Olsen, and Edwin Scott Gaustad for the influence of their instruction. And, thank you to the author's pastoral internship supervisor Paul Gibson, who modeled ecclesiastical judicial self-restraint.
- ¹ William W. Bassett, *Religious Organizations and the Law* vol. 1, § 1:12, 1-46 (West Group 1999). Bassett continues in section 1:13 to list academic and church resources for canon law information. *Id.* § 1:13.
- ² David J. Young & Steven W. Tigges, [Into the Religious Thicket-Constitutional Limits on Civil Court Jurisdiction Over Ecclesiastical Disputes](#), 47 *Ohio St. L.J.* 475, 483-90 (1986).
- ³ Ira Mark Ellman, *Driven from the Tribunal: Judicial Resolution of Internal Church Disputes*, 69 *Cal. L. Rev.* 1378, 1385-89 (1981).
- ⁴ Justin K. Miller, [Damned if You Do, Damned if You Don't: Religious Shunning and the Free Exercise Clause](#), 137 *U. Pa. L. Rev.* 271, 272 (1988).
- ⁵ John A. Hardon, *Modern Catholic Dictionary* 200 (Doubleday & Company, Inc. 1980) (discussing excommunication).
- ⁶ See *id.* at 283 (discussing interdict and the effect of a general interdict on a local community).

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HANDBOOK OF AMERICAN CHURCH COURTS, 22 Whittier L. Rev. 251

⁷ Id. at 200. Of course, the most famous story of a monarch capitulating under the pressure of an interdict is that of Henry IV of Germany, who stood barefooted in the alpine snow for three days at Canossa before Pope Gregory VII accepted his penitent act. The rest of the story is not as well known. Three years later, in 1080, Gregory figured Henry was politically vulnerable, sided with Henry's rival in the next German dispute, and excommunicated Henry; but Gregory had to be rescued from Rome when Henry defeated his rival prince and marched to the Holy See with a new pope of Henry's own choosing. Williston Walker et al., *A History of the Christian Church 275-77* (4th ed., Charles Scribner's Sons 1985).

⁸ The New York Times Almanac 407 (John W. Wright et al. eds., Penguin Group 1999) [hereinafter Times Almanac].

⁹ Any of the following books would be a useful addition to an attorney's library. The Handbook of Denominations in the United States gives historical background, a brief mention of distinctive doctrinal tenets, and organizational information for each religious group. Frank S. Mead, *Handbook of Denominations in the United States* (Samuel S. Hill ed., 10th ed., Abingdon Press 1995). Leo Rosten's new guide and almanac, *Religions of America*, provides a brief and easily readable doctrinal description, as well as statistics for each denomination. Leo Rosten, *Religions of America* (Simon & Schuster 1975). The Yearbook of American & Canadian Churches is the latest volume of an annual directory of church headquarters, schools, publishing houses, and resource centers. Yearbook of American & Canadian Churches (Eileen W. Lindner ed., Abingdon Press 1999).

¹⁰ David O. Moberg, *The Church as a Social Institution* 61 (Herbert Blumer ed., Prentice-Hall, Inc. 1962).

¹¹ Id. at 61-62.

¹² For example, the stated structure may refer a matter to a particular committee, but one is likely to discover, as time goes on, that a wealthy or influential person not even on the committee actually determines the outcome.

¹³ One should not be at all surprised if the hierarchy of the church acquiesces to the informal structure at the local level, and should expect the courts to recognize the structure and authority the members have come to follow through the course of practice.

¹⁴ Frank S. Mead, *Handbook of Denominations in the United States* preface (Samuel S. Hill ed., 9th ed., Abingdon Press 1990).

¹⁵ A description of the structure can easily be found in a dictionary of church history or a handbook of church denominations. The process, if any, will usually be found only in the particular denomination's printed material. The most appropriate source for getting information on a church's process is the general secretary or legal counsel at the national level. If the church has a publishing company that includes its processes in one of its printed books or pamphlets, one can easily order a copy from the publisher or one of its bookstores. In fact, some denominational headquarters will refer one directly to its bookstore. Of course, another source of a denomination's processes is a local church library, a church leader, or a friend who is a church member; but the information they have may not be the most current. A church secretary is often a source of information on the procedure and practice for his or her local church. More than any other person, the secretary sits in the hub of church life, and very often performs an administrative as well as archivist function.

¹⁶ Mary Angela Shaughnessy, *Ministry and the Law* 10 (Paulist Press 1998).

¹⁷ U.S. Const. amend. VI.

¹⁸ Id.

¹⁹ Id.

²⁰ Edward McGlynn Gaffney, *Piercing the Veil of Religious Organizations*, JD 90 (1990).

²¹ Ellman, *supra* n. 3, at 1388-89.

²² For example, Jehovah's Witnesses have a Shepherd's Book that is only distributed to Elders, and legal counsel for the church has stated up front that the book is not shared with people other than Elders. A Mormon friend preferred to talk to me about polity and governance in his denomination rather than help produce material. The Salvation Army's Orders and Regulations for Soldiers and Orders and Regulations for Officers are not available to the public.

²³ Bassett, *supra* n. 1, § 1:14, 1-49 to 1-50 (footnote omitted).

²⁴ Countless hours were spent gathering material for this paper from the 31 major American churches. Almost all of the groups were hesitant to share their information until they understood how it would be used, and some remain reluctant.

²⁵ Gen. Conf. of Seventh-day Adventists, *Seventh-day Adventist World Church Statistics-1999* (July 2000); *Times Almanac*, *supra* n. 8, at 407.

²⁶ Malcolm Bull & Keith Lockhart, *Seeking a Sanctuary: Seventh-day Adventism and the American Dream* 33 (Harper & Row 1989); Mead, *supra* n. 9, at 33-34.

²⁷ Bull & Lockhart, *supra* n. 26, at 140-51 (discussing "The Politics of Liberty").

²⁸ Jonathan M. Butler, *Adventism and the American Experience*, in *The Rise of Adventism* 173, 174 (Edwin S. Gaustad ed., Harper & Row 1974).

²⁹ *Id.*

³⁰ *Seventh-day Adventist Church Manual* 23-26 (15th ed., Rev. and Herald Publg. Assn. 1995) [hereinafter *Adventist Church Manual*].

³¹ *Id.* at 79-80. The laity most often sit on the church board by virtue of a church office they hold, such as treasurer, clerk, deacon, elder, etc. *Id.* The head elder usually chairs the board if the pastor elects to have a lay person perform that function. *Id.* at 47, 80, 121.

³² *Id.* at 82-84.

³³ *Id.* at 83.

³⁴ Ministerial Assn. & Gen. Conf. of Seventh-day Adventists, *Seventh-day Adventist Minister's Manual* 109 (Ministerial Assn. & Gen. Conf. of Seventh-day Adventists 1992) [hereinafter *Adventist Minister's Manual*].

³⁵ *Id.*

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- ³⁶ Henry M. Robert, *Robert's Rules of Order* (William J. Evans et al. eds., 10th ed., Perseus Books 2000).
- ³⁷ See Ministerial Assn. & Gen. Conf. of Seventh-day Adventists, *Seventh-day Adventist Elder's Handbook* 23-25, 42-43 (Ministerial Assn. & Gen. Conf. of Seventh-day Adventists 1994) (defining the role of the elders) [[hereinafter *Adventist Elder's Handbook*]].
- ³⁸ *Adventist Church Manual*, supra n. 30, at 132-34; North American Division of the General Conference Working Policy 29, 33-34 (rev. ed., Rev. & Herald Publ. Assn. 1998) [hereinafter *Working Policy*].
- ³⁹ *Adventist Church Manual*, supra n. 30, at 132-34; *Working Policy*, supra n. 38, at 29, 33-34.
- ⁴⁰ *Adventist Church Manual*, supra n. 30, at 195.
- ⁴¹ See *Working Policy*, supra n. 38, at 55, 113-45 (discussing legal representation, model constitutions, and operating policies).
- ⁴² See *Adventist Church Manual*, supra n. 30, at 173 (discussing the conference appellate function).
- ⁴³ *Working Policy*, supra n. 38, at 36-42, 45-48.
- ⁴⁴ *Adventist Church Manual*, supra n. 30, at 132; *Working Policy*, supra n. 38, at 1, 34.
- ⁴⁵ See *Adventist Church Manual*, supra n. 30, at 195 (discussing organizations for holding church property); *Working Policy*, supra n. 38, at 113-26 (discussing model constitutions and operating policies suggested for union conferences).
- ⁴⁶ See *Working Policy*, supra n. 38, at 55, 357-58 (discussing legal counsel used by a union conference, and the Public Affairs and Religious Liberty Department policies and litigation procedures).
- ⁴⁷ *Id.* at 10, 29.
- ⁴⁸ *Id.* at 1-8.
- ⁴⁹ *Id.* at 357-58.
- ⁵⁰ *Id.* at 30.
- ⁵¹ *Id.*
- ⁵² *Id.* at 65-75.
- ⁵³ *Id.* at 65.

⁵⁴ Id. at 65-66.

⁵⁵ Id. at 66-67 (footnote omitted).

⁵⁶ Id. at 67-73.

⁵⁷ Id. at 72.

⁵⁸ Id. at 72-73.

⁵⁹ Id. at 73.

⁶⁰ Id.

⁶¹ Id. at 73-75.

⁶² Adventist Church Manual, *supra* n. 30, at 164-65.

⁶³ Id. at 166-74.

⁶⁴ Id. at 170-71.

⁶⁵ Id. at 171.

⁶⁶ Id. at 173.

⁶⁷ The Oxford Dictionary of the Christian Church 129 (F.L. Cross & E.A. Livingstone eds., 2d ed., Oxford U. Press 1974) (defining Baptists) [[hereinafter Oxford Dictionary].

⁶⁸ Id. Calvinism taught that the grace of God is a common grace given to all, but saving graces are given only to the elect. Robert C. Walton, *Chronological and Background Charts of Church History* 43 (Academic Books 1986). Arminianism taught that God's enabling grace is given to all, that saving grace is given to those who believed, and that persevering grace is given to those who obey. Id.

⁶⁹ Edwin Scott Gaustad, *Historical Atlas of Religion in America* 10-13 (rev. ed., Harper & Row 1976).

⁷⁰ See *id.* (discussing the growth of the Baptist Church).

⁷¹ Id. at 10-11.

72 Id.

73 Nathan O. Hatch, *The Democratization of American Christianity* 102 (Yale U. Press 1989).

74 Id. at 102-06.

75 Id. at 102.

76 Id. at 104.

77 Id. at 105-06.

78 Walton, *supra* n. 68, at 69.

79 Id.

80 See *The Covenant of Relationships and its Agreements Among the General, National, and Regional Boards of the American Baptist Churches* 2-3 (Off. of the Gen. Sec. Am. Baptist Churches in the USA 1984) (discussing denominational relationships).

81 L.G. Jordon et al., *The Baptist Standard Church Directory and Busy Pastor's Guide* 20, 24 (rev. ed., Sun. Sch. Publg. Bd. 1993).

82 Id. at 23.

83 Id. at 19-20, 22.

84 Mead, *supra* n. 9, at 54-55; see *The Covenant of Relationships and its Agreements Among the General, National, and Regional Boards of the American Baptist Churches*, *supra* n. 80, at 26-27 (discussing the Agreement regarding the selection and election of representatives).

85 See Mead, *supra* n. 9, at 54-55 (stating that Baptist state and regional conventions only make recommendations and have no authority to enforce their decisions).

86 *Times Almanac*, *supra* n. 8, at 406.

87 Robert A. Young, *The Development of a Church Manual of Administrative Policies; Church Administration From A to Z* (Tim J. Holcomb ed., Conv. Press 1994); *Church Administration Handbook* (Bruce P. Powers ed., rev. ed., Broadman & Holman Publishers 1997).

88 Young, *supra* n. 87, at 20-21.

89 Id. at 33.

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HANDBOOK OF AMERICAN CHURCH COURTS, 22 Whittier L. Rev. 251

- ⁹⁰ Gary Hardin, Church Personnel Management, in Church Administration From A to Z 27, 33-40 (Tim J. Holcomb ed., Conv. Press 1994) (discussing management styles and providing a succinct outline of federal law affecting churches).
- ⁹¹ William G. Caldwell, Legal Matters, in Church Administration Handbook 205, 207-08 (Bruce P. Powers ed., rev. ed., Broadman & Holman Publishers 1997).
- ⁹² Id.
- ⁹³ Id. at 208.
- ⁹⁴ Times Almanac, supra n. 8, at 406.
- ⁹⁵ Jordan et al., supra n. 81, at 22-23, 31, 71-90.
- ⁹⁶ Id. at 25.
- ⁹⁷ Id. at 21.
- ⁹⁸ Id. at 22-23, 139.
- ⁹⁹ Id. at 26-27.
- ¹⁰⁰ Id. at 26.
- ¹⁰¹ Id. at 27.
- ¹⁰² Id. at 28.
- ¹⁰³ Times Almanac, supra n. 8, at 406.
- ¹⁰⁴ Standing Rules of the American Baptist Churches in the U.S.A. 18-3 (Off. of the Gen. Sec. 1998) (quoting rule 18.11.1).
- ¹⁰⁵ Id. at 18-3 (discussing rules 18.11.2 to 18.11.6).
- ¹⁰⁶ Times Almanac, supra n. 8, at 406; Telephone Interviews with secretaries at the Baptist Bible Fellowship International National Headquarters and Midway Baptist Church in San Diego (Sept. 7, 1999) (when asked for examples of Biblical principles that would guide internal church disputes in her church, the secretary at the Midway Baptist Church volunteered: “Don’t take your brother to court!”).
- ¹⁰⁷ Times Almanac, supra n. 8, at 406.

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HANDBOOK OF AMERICAN CHURCH COURTS, 22 Whittier L. Rev. 251

- ¹⁰⁸ The New International Dictionary of the Christian Church 227 (J.D. Douglas et al. eds., rev. ed., Zondervan Publ. H. 1974) (discussing Churches of Christ (USA)) [hereinafter New Intl. Dictionary].
- ¹⁰⁹ Id.
- ¹¹⁰ Mead, *supra* n. 9, at 96, 98.
- ¹¹¹ Id. at 94-101.
- ¹¹² New Intl. Dictionary, *supra* n. 108, at 227.
- ¹¹³ Mead, *supra* n. 9, at 97.
- ¹¹⁴ This list is drawn from the printed material of other denominations cited in this Handbook.
- ¹¹⁵ Matthew 5:23-24 (New Rev. Stand. Version) (footnotes omitted).
- ¹¹⁶ Id. at 7:1-2. Also: ““Do not judge, and you will not be judged; do not condemn, and you will not be condemned. Forgive, and you will be forgiven; give, and it will be given to you... for the measure you give will be the measure you get back.”” Luke 6:37-38 (New Rev. Stand. Version).
- ¹¹⁷ Matthew 18:21-22 (New Rev. Stand. Version) (footnotes omitted).
- ¹¹⁸ Id. at 21:12-13; John 8:2-11 (New Rev. Stand. Version).
- ¹¹⁹ Matthew 5:25-26 (New Rev. Stand. Version) (footnote omitted).
- ¹²⁰ Id. at 5:38-42.
- ¹²¹ 1 Corinthians 6:1-8 (New Rev. Stand. Version) (footnotes omitted).
- ¹²² Matthew 18:15-18 (New Rev. Stand. Version) (footnotes omitted).
- ¹²³ Id. at 18:15.
- ¹²⁴ Id. at 18:17.
- ¹²⁵ Id. at 7:12.
- ¹²⁶ Exodus 20:12-17 (New Rev. Stand. Version) (footnote omitted). The first four commandments dealing with man’s relationship to God are found in verses 3 through 11 of the same chapter. Id. at 20:3-11.

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HANDBOOK OF AMERICAN CHURCH COURTS, 22 Whittier L. Rev. 251

- ¹²⁷ Matthew 22:17-22 (New Rev. Stand. Version); see Mark 12:13-17 (New Rev. Stand. Version); Luke 20:20-26 (New Rev. Stand. Version).
- ¹²⁸ Romans 13:1 (New Rev. Stand. Version).
- ¹²⁹ Acts 5:29 (New Rev. Stand. Version) (footnote omitted); Daniel 3:1-30 (New Rev. Stand. Version).
- ¹³⁰ Gaustad, *supra* n. 69, at 6.
- ¹³¹ *Id.*
- ¹³² *Id.*
- ¹³³ *Id.*
- ¹³⁴ *Id.* at 9.
- ¹³⁵ *Id.* at 10.
- ¹³⁶ Mead, *supra* n. 9, at 131. The first bishop, Samuel Seabury, was finally consecrated in Scotland after waiting for a year in England and being denied that confirmation by the Church of England. *Id.*
- ¹³⁷ *Id.* at 132.
- ¹³⁸ *Id.* at 129-36; Times Almanac, *supra* n. 8, at 406.
- ¹³⁹ Mead, *supra* n. 9, at 133.
- ¹⁴⁰ *Id.* at 132.
- ¹⁴¹ Const. & Canons of the Protestant Episcopal Church tit. III, canon 20. A Rector is one who has charge of a parish; a Vestry is the governing board of a parish; a Presbyterian is a priest; and the Ecclesiastical Authority is the Bishop. *Id.* tit. IV, canon 15 (defining Ecclesiastical Authority); New Intl. Dictionary, *supra* n. 108, at 799, 828, 1016 (defining Presbyterian, Rector, and Vestry).
- ¹⁴² Const. & Canons of the Protestant Episcopal Church tit. III, canon 20.
- ¹⁴³ *Id.*
- ¹⁴⁴ *Id.* canon 21.

For Educational Use Only

HANDBOOK OF AMERICAN CHURCH COURTS, 22 Whittier L. Rev. 251

- ¹⁴⁵ Id. canon 21, § 3.
- ¹⁴⁶ Interview with the Reverend Canon Henry Mann, Canon to the Ordinary, Episcopal Diocese of San Diego (Aug. 31, 1999).
- ¹⁴⁷ Const. & Canons of the Protestant Episcopal Church tit. III, canon 21, § 4.
- ¹⁴⁸ Id. canon 21, § 4(a), (d).
- ¹⁴⁹ Id. canon 21, § 4(c).
- ¹⁵⁰ Id. canon 21, § 6.
- ¹⁵¹ Id. tit. IV.
- ¹⁵² Interview with the Reverend Canon Henry Mann, *supra* n. 146.
- ¹⁵³ Dictionary of American Religious Biography 385-86 (Henry Warner Bowden & Edwin S. Gaustad eds., Greenwood Press 1977) (discussing Charles Taze Russell).
- ¹⁵⁴ Mead, *supra* n. 9, at 154-55; Dictionary of American Religious Biography, *supra* n. 153, at 385-86.
- ¹⁵⁵ Mead, *supra* n. 9, at 157; Times Almanac, *supra* n. 8, at 407.
- ¹⁵⁶ Mead, *supra* n. 9, at 154-57; see Dictionary of American Religious Biography, *supra* n. 153, at 386-88 (discussing Charles Taze Russell and Joseph Franklin Rutherford).
- ¹⁵⁷ Martin E. Marty, *Pilgrims in Their Own Land: 500 Years of Religion in America* 366 (Little, Brown and Co. 1984).
- ¹⁵⁸ Id.
- ¹⁵⁹ Id.
- ¹⁶⁰ Id.
- ¹⁶¹ Id.
- ¹⁶² Jehovah's Witnesses: Proclaimers of God's Kingdom 71 (Watchtower Bible and Tract Socy. of N.Y., Inc. & Intl. Bible Students Assn. 1993).
- ¹⁶³ Mead, *supra* n. 9, at 155.

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HANDBOOK OF AMERICAN CHURCH COURTS, 22 Whittier L. Rev. 251

- ¹⁶⁴ See Jehovah's Sheep Need Tender Care, Watchtower 15-20 (Jan. 15, 1996) (discussing elder responsibilities).
- ¹⁶⁵ Telephone Interview with Michael E. Lewis, Off. of the Gen. Counsel for the Jehovah's Witnesses (Aug. 13, 1999).
- ¹⁶⁶ See e.g. Jehovah's Sheep Need Tender Care, supra n. 164, at 15-20.
- ¹⁶⁷ Id. P 13.
- ¹⁶⁸ Id.
- ¹⁶⁹ Id. P 14.
- ¹⁷⁰ Id.
- ¹⁷¹ Id. P 15.
- ¹⁷² Id. The judicial committee is most often made up of three elders accordingly.
- ¹⁷³ Jehovah's Sheep Need Tender Care, supra n. 164, at 15-20, PP 15-16.
- ¹⁷⁴ Id. P 16.
- ¹⁷⁵ Id.
- ¹⁷⁶ Id.
- ¹⁷⁷ Determining Weakness, Wickedness, and Repentance, Watchtower 27-31 (Jan. 1, 1995).
- ¹⁷⁸ Id.
- ¹⁷⁹ Id.
- ¹⁸⁰ Id.
- ¹⁸¹ Jehovah Forgives in a Large Way, Watchtower 8-13, P 19 (Sept. 15, 1992).
- ¹⁸² Id. P 6.
- ¹⁸³ Elders, Judge With Righteousness, Watchtower 14-19 (July 1, 1992).

184 Id. P 3.

185 Id. P 11.

186 Id. P 14.

187 Id.

188 Id. P 15.

189 Id.

190 Id. P 16.

191 The label Mormon comes from the Book of Mormon, which was given to founder Joseph Smith by the angel Moroni. Dictionary of American Religious Biography, *supra* n. 153, at 411 (discussing Joseph Smith); New Intl. Dictionary, *supra* n. 108, at 678-79 (discussing Mormonism).

192 Times Almanac, *supra* n. 8, at 406; see Mead, *supra* n. 9, at 169-173 (discussing each the five denominations).

193 Gaustad, *supra* n. 69, at 83-87.

194 Id. at 86-87.

195 Id. at 87.

196 Mead, *supra* n. 9, at 168.

197 Utah's High Court Now All Mormon, Metro Chicago 10 (May 12, 2000) (available in 2000 WL 3664913).[2000 WL 3664913](#)).

198 Mead, *supra* n. 9, at 167; Interview with R. Kris Bailey, Mormon (Nov. 5, 1999). Mr. Bailey is a lifelong Mormon from Utah who served as a missionary in France, and continues to be an active member in his Ward. He is a 2000 graduate of California Western School of Law in San Diego, California.

199 Interview with R. Kris Bailey, *supra* n. 198. For instance, one of the more recent revelations the church received through the Prophet opened the position of Bishop in the church to African-Americans in 1988. Id.

200 Mead, *supra* n. 9, at 168.

201 Id.

202 Interview with R. Kris Bailey, supra n. 198.

203 Id. The term “Stake” comes from the picture of the tent of Zion in Utah being connected to the outlying stakes, which anchor and support it. Id.

204 Id.

205 Id.

206 Mead, supra n. 9, at 168-69; Interview with R. Kris Bailey, supra n. 198.

207 Interview with R. Kris Bailey, supra n. 198.

208 Mead, supra n. 9, at 168-69; Interview with R. Kris Bailey, supra n. 198.

209 Interview with R. Kris Bailey, supra n. 198.

210 Id.

211 Id.

212 Id.

213 Id.

214 Id.

215 Id.

216 Id.

217 Id.

218 Id.

219 Id.

220 Id.

221 Id.

222 Walker, *supra* n. 7, at 425-26.

223 See generally *id.* at 283-405 (discussing attempts at reform in the latter middle ages).

224 *Id.* at 425-26. Walker explains that Luther was questioning the extension of indulgences to purgatory, and thought the Pope would actually thank him for pointing out the abuse of indulgence sales. Of course, as he soon found out, the Pope himself was behind the extension of indulgences to purgatory, and Luther was hitting at the heart of a “lucrative source of church revenue and was also touching upon sensitive questions of papal authority.” *Id.*

225 Charles S. Anderson, *Augsburg Historical Atlas of Christianity in the Middle Ages and Reformation* 42 (Augsburg Publg. H. 1967).

226 Luther’s position regarding Christians and civil magistrates is articulated in his treatise, *Christian Liberty*. Martin Luther, *Christian Liberty* (Harold J. Grimm ed., W.A. Lambert trans., Fortress Press 1957).

227 Mead, *supra* n. 9, at 175.

228 *Id.*

229 *Id.* at 176.

230 *Times Almanac*, *supra* n. 8, at 406.

231 Mead, *supra* n. 9, at 178.

232 *Id.* at 181-82.

233 *Id.* at 183-84; *New Intl. Dictionary*, *supra* n. 108, at 612 (discussing the LCMS); see *The Lutheran Church-Missouri Synod District Web Sites Directory* <<http://www.lcms.org/districts>> (accessed Nov. 25, 2000) (listing LCMS districts).

234 *Evangelical Lutheran Church in Am. Const.* ch. 20 [hereinafter *ELCA Const.*]; *Lutheran Church-Missouri Synod Bylaws* ch. VIII [hereinafter *LCMS Bylaws*]; *Lutheran Church-Missouri Synod Synodical Dispute Res. R. of Proc.* §§ A-C [hereinafter *LCMS R. of Proc.*].

235 *ELCA Const.* ch. 20.

236 *Id.* §§ 20.10.-20.11.

237 *Id.* § 20.12. Section 20.12.01. further elaborates upon the meaning of “fundamental procedural fairness.” For example, “avoidance by committee members of written communications to or from either the accused or accuser(s) without copy to the other....” *Id.* § 20.12.01.

238 Id. §§ 20.20.-20.60.

239 See id. § 20.60. (discussing appeals).

240 Id.

241 Id. § 20.41.04.

242 Id. §§ 20.80.-20.81.

243 Id. §§ 20.80.-20.85.

244 LCMS R. of Proc. § A, no. 7.

245 Id.

246 LCMS Bylaws ch. VIII, § 8.11.

247 LCMS R. of Proc. § A, nos. 8-9.

248 LCMS Bylaws ch. VIII, § 8.13.

249 Id. §§ 8.09, 8.15-8.16; LCMS R. of Proc. § A, nos. 10-11.

250 LCMS Bylaws ch. VIII, § 8.16; LCMS R. of Proc. § A, no. 12.

251 LCMS R. of Proc. § A, nos. 21-31.

252 Id. no. 23.

253 LCMS Bylaws ch. VIII, § 8.19.

254 Oxford Dictionary, *supra* n. 67, at 290-93, 634-35 (discussing the Church of England and Henry VIII). Henry's conflict with Pope Clement VII over his divorce from Catherine of Aragon in order to marry Anne Boleyn was simply the last in an ongoing struggle for authority between the church and state in England. Id.

255 Mead, *supra* n. 9, at 128.

256 Id.

- ²⁵⁷ Walton, *supra* n. 68, at 44, 68-69, 71-72.
- ²⁵⁸ The Book of Discipline of the United Methodist Church 9-10 (Harriet Jane Olson et al. eds., United Methodist Publg. H. 1996) [hereinafter Book of Discipline].
- ²⁵⁹ Oxford Dictionary, *supra* n. 67, at 1467 (discussing John Wesley).
- ²⁶⁰ Book of Discipline, *supra* n. 258, at 10.
- ²⁶¹ *Id.* at 10-13.
- ²⁶² Roger Finke & Rodney Stark, *The Churching of America* 54-63 (Rutgers U. Press 1992).
- ²⁶³ *Id.* at 59-63.
- ²⁶⁴ *Id.* at 59.
- ²⁶⁵ *Id.* at 59-61.
- ²⁶⁶ *Id.* at 55.
- ²⁶⁷ *Id.*
- ²⁶⁸ Hatch, *supra* n. 73, at 102-06.
- ²⁶⁹ The Doctrine and Discipline of the African Methodist Episcopal Church 5 (45th ed., AMEC Publg. H. 1997).
- ²⁷⁰ Mead, *supra* n. 9, at 199-200.
- ²⁷¹ *Id.* at 200-01.
- ²⁷² Times Almanac, *supra* n. 8, at 406.
- ²⁷³ Mead, *supra* n. 9, at 200-01; Times Almanac, *supra* n. 8, at 406.
- ²⁷⁴ Book of Discipline, *supra* n. 258, at 23-24 (discussing organization).
- ²⁷⁵ *Id.* at 37-38; The Doctrine and Discipline of the African Methodist Episcopal Church, *supra* n. 269, at 317-42 (discussing “Judicial Administration”).

- ²⁷⁶ Book of Discipline, *supra* n. 258, at 138.
- ²⁷⁷ *Id.* at 138-42.
- ²⁷⁸ Mead, *supra* n. 9, at 206; Book of Discipline, *supra* n. 258, at 30-32.
- ²⁷⁹ Book of Discipline, *supra* n. 258, at 24-28.
- ²⁸⁰ *Id.* at 25.
- ²⁸¹ *Id.* at 26.
- ²⁸² *Id.* at 27.
- ²⁸³ The Doctrine and Discipline of the African Methodist Episcopal Church, *supra* n. 269, at 138, 233-38.
- ²⁸⁴ *Id.* at 252-62, 267-85.
- ²⁸⁵ *Id.* at 262-66.
- ²⁸⁶ *Id.* at 317.
- ²⁸⁷ *Id.* at 318-22.
- ²⁸⁸ *Id.* at 322-24.
- ²⁸⁹ *Id.* at 329.
- ²⁹⁰ *Id.* at 334-36.
- ²⁹¹ *Id.* at 338-39.
- ²⁹² *Id.* at 330.
- ²⁹³ *Id.* at 342.
- ²⁹⁴ *Id.* at 345.
- ²⁹⁵ *Id.* at 347.

- ²⁹⁶ Book of Discipline, *supra* n. 258, at 37.
- ²⁹⁷ *Id.* A fuller description of the composition and duties of the Judicial Council is found in the chapter on “Judicial Administration” and corresponding paragraphs 2601 to 2622. *Id.* at 647-54.
- ²⁹⁸ *Id.* at 647.
- ²⁹⁹ *Id.* at 654 (footnote omitted).
- ³⁰⁰ *Id.* at 655.
- ³⁰¹ *Id.*
- ³⁰² *Id.*
- ³⁰³ *Id.* at 662.
- ³⁰⁴ *Id.*
- ³⁰⁵ *Id.* at 663.
- ³⁰⁶ *Id.* at 665.
- ³⁰⁷ *Id.* at 673.
- ³⁰⁸ *Id.* at 673, 675.
- ³⁰⁹ Times Almanac, *supra* n. 8, at 407; Church of Nazarene Statistical Comparisons <<http://www.nazarene.org/hoo/stats.html>> (accessed Nov. 25, 2000).
- ³¹⁰ See Sydney E. Ahlstrom, *A Religious History of the American People 818-19* (Yale U. Press 1972) (discussing the Church of Nazarene’s “nearly full sectarian cycle”).
- ³¹¹ *Id.* (footnote omitted).
- ³¹² *Id.* at 819.
- ³¹³ Manual/1997-2001: Church of the Nazarene (John Bowling et al. eds., Nazarene Publg. H. 1997) [hereinafter Church of Nazarene Manual].
- ³¹⁴ Judicial Manual of the Church of the Nazarene (J. David McClung ed., Nazarene Publg. H. 1998) [hereinafter Judicial Manual].

315 Church of Nazarene Manual, *supra* n. 313, at 38.

316 *Id.* at 39-41, 155-57.

317 *Id.* at 39.

318 *Id.* at 75, 80-82.

319 *Id.* at 75.

320 *Id.* at 98.

321 *Id.* at 128-29.

322 *Id.* at 206.

323 *Id.*

324 *Id.* at 206-07.

325 *Id.* at 207-09.

326 *Id.* at 209-14.

327 *Id.* at 209.

328 *Id.* at 212.

329 *Id.* at 215.

330 *Id.* at 214.

331 Judicial Manual, *supra* n. 314, at 3-17.

332 *Id.* at 19-22.

333 Church of Nazarene Manual, *supra* n. 313, at 214-16.

334 Id. at 216.

335 Id.

336 Id. at 217.

337 Id.

338 Id.

339 A. Kenneth Curtis et al., *Dates with Destiny* 70 (Fleming H. Revell 1991).

340 Id.

341 Id. at 70-71; *New Intl. Dictionary*, supra n. 108, at 429 (discussing the “Great Schism”).

342 Curtis, supra n. 339, at 70.

343 Id.; *New Intl. Dictionary*, supra n. 108, at 429.

344 Mead, supra n. 9, at 225.

345 Id.

346 Id. at 227-28.

347 *Times Almanac*, supra n. 8, at 406. “Membership statistics are confusing and often unreliable, inasmuch as membership is based on baptismal records rather than communicant status.” Mead, supra n. 9, at 227.

348  [344 U.S. 94, 101, 106-07 \(1952\)](#).

349  [363 U.S. 190, 190 \(1960\)](#).

350 Peter L’Huillier, *The Church of the Ancient Councils 1* (St. Vladimir’s Seminary Press 1996); *New Intl. Dictionary*, supra n. 108, at 322-23 (discussing the Eastern Orthodox Church).

351 L’Huillier, supra n. 350, at 1.

352 Telephone Interview with the Most Reverend Peter, Archbishop of New York (Sept. 7, 1999). The Most Reverend Peter is a canon law expert for the Orthodox Church in America. His Grace Bishop Dimitrios of Xanthou Archdiocese, New York, Ecumenical

Officer for the Greek Orthodox Church, was not able to provide information for his church by the deadline for this inquiry.

353 Agapius & Nicodemus, *The Rudder* (John Nicolaides ed., D. Cummings trans., Orthodox Christian Educ. Socy. 1957).

354 L'Huillier, *supra* n. 350.

355 Nicene and Post-Nicene Fathers vol. 14 (Philip Schaff & Henry Wace eds., 2d series, Hendrickson Publishers, Inc. 1994).

356 L'Huillier, *supra* n. 350, at 41-45.

357 *Id.* at 41-42 (emphasis omitted).

358 *Id.* at 125-31.

359 *Id.* at 125-26.

360 *Id.* (emphasis omitted).

361 *Id.* at 126 (emphasis omitted).

362 *Id.* at 229-36.

363 *Id.* at 229 (emphasis omitted).

364 *Id.* (emphasis omitted).

365 *Id.* (emphasis omitted).

366 *Id.* at 239 (emphasis omitted).

367 *Id.* at 240-41.

368 *Id.* at 242 (emphasis omitted).

369 See Moberg, *supra* n. 10, at 118-24 (discussing the "Life Cycle of the Church").

370 New Intl. Dictionary, *supra* n. 108, at 474-75 (discussing the American Holiness Movement).

371 *Id.*

- 372 Id. at 763-64 (discussing Pentecostal churches).
- 373 Times Almanac, *supra* n. 8, at 406.
- 374 Telephone Interview with an Undershepherd Administrative Assistant in the Pentecostal Assemblies of the World (Dec. 8, 1999). A promised copy of the minutes from the Presiding Bishop's Office had not arrived, and upon inquiry, it was discovered that information regarding internal dispute resolution is not generally shared with the public.
- 375 Id.
- 376 Id.
- 377 Id.
- 378 Id.
- 379 Id.
- 380 District Office Manual for Ministerial Discipline, Rehabilitation, and Restoration 1 (rev. ed., Gen. Council of the Assemblies of God 1998).
- 381 Id. § 2.
- 382 Id. at 1-2, § 3-4.
- 383 Id. at 2-4, §§ 5-7.
- 384 Id. at 11. A Manual for the Minister in Rehabilitation and The Supervising Pastor's Manual for the Minister in Rehabilitation that correspond to the District Office Manual for Ministerial Discipline, Rehabilitation, and Restoration are also available from the Assemblies of God Church.
- 385 Id. at 11-13.
- 386 Id. at 4-7, §§ 8-12.
- 387 Id. at 7, § 12.
- 388 Church Of God In Christ Official Manual 8 (C. F. Range, Jr. & Clyde Young eds., rev. ed., Roy L. H. Winbush 1973).
- 389 Id. at 12.

390 Id. at 15-16.

391 Id. at 95.

392 Id. at 28-29.

393 Id. at 29-30.

394 Id. at 30.

395 Id. at 31-34.

396 Id. at 33.

397 Minutes of the 67th General Assembly of the Church Of God 110-11 (Pathway Press 1998).

398 Id. at 180-81.

399 Id. at 181.

400 Id. at 215-17.

401 Id. at 217 (citation omitted).

402 Id. (citation omitted). A following section further states: “No defendant can avoid a trial by board by confessing to a lesser charge. Trial by board can be avoided only by confessing to the greater charge.” Id. at 220.

403 Id. 217-18.

404 Id. at 218-19.

405 Id. at 218-21.

406 Id. at 217.

407 Id. at 221-22.

408 Mead, *supra* n. 9, at 246-48; see *infra* pt. XIV (discussing Reformed churches).

409 Mead, *supra* n. 9, at 246-48

- 410 See Gaustad, *supra* n. 69, at 19-21 (figure 16 provides the geographic location of Presbyterian churches in 1750).
- 411 *Id.* at 21. Gaustad also reminds us that Presbyterian minister and Princeton president John Witherspoon was the only clergyman signer of the Declaration of Independence. *Id.*
- 412 *Id.*
- 413 Times Almanac, *supra* n. 8, at 406. Forty percent of the Presbyterian (U.S.A.) membership is in the south. Mead, *supra* n. 9, at 259.
- 414 Times Almanac, *supra* n. 8, at 406.
- 415 Mead, *supra* n. 9, at 246-47.
- 416 Book of Order pt. II, preface (Off. of the Gen. Assembly 1997).
- 417 *Id.*
- 418 *Id.* § G-1.0000-.0502.
- 419 *Id.* §§ G-2.0000-G-18.0401.
- 420 *Id.* § G-10.0000-.0401.
- 421 *Id.* § G-10.0101.
- 422 *Id.* § G-6.0300-.0304.
- 423 *Id.* § G-6.0302.
- 424 *Id.* § G-11.0101.
- 425 *Id.*
- 426 *Id.*
- 427 *Id.* § G-11.0103.
- 428 *Id.* § G-12.0101.

- 429 Id. § G-12.0101-.0102.
- 430 Id. § G-13.0101.
- 431 Id. § G-13.0102, .0104.
- 432 Marilyn Ireland, Prof., Lecture, First Amendment Seminar (Cal. W. Sch. L., San Diego, Cal., Jul. 27, 1999).
- 433 Book of Order, *supra* n. 416, § D-2.0201.
- 434 Id. § D-2.0202. [Id. § D-2.0202.](#)
- 435 Id. § D-2.0203. [Id. § D-2.0203.](#)
- 436 Id. § D-1.0000-.0103. [Id. § D-1.0000-.0103.](#)
- 437 Id. § D-2.0000. [Id. § D-2.0000](#), .0102.
- 438 Id. § D-3.0000. [Id. § D-3.0000](#), .0101 (citations omitted).
- 439 Id. §§ D-4.0000-D-5.0206. [Id. §§ D-4.0000-D-5.0206.](#)
- 440 Id. § D-5.0101. [Id. § D-5.0101.](#)
- 441 Id. § D-5.0102-.0103. [Id. § D-5.0102-.0103.](#)
- 442 Id. § D-5.0102. [Id. § D-5.0102.](#)
- 443 Id. § D-6.0000-.0309. [Id. § D-6.0000-.0309.](#)
- 444 Id. § 7.0000-.0700.
- 445 Id. § D-7.0201. [Id. § D-7.0201](#), .0301.
- 446 Id. § D-7.0402. [Id. § D-7.0402.](#)
- 447 Id. §§ D-8.0000-D-9.0102. [Id. §§ D-8.0000-D-9.0102.](#)
- 448 Id. § D-10.0000-.0406. [Id. § D-10.0000-.0406.](#)

449 Id. § D-11.0000-.0801. [Id. § D-11.0000-.0801.](#)

450 Id. § D-11.0201. [Id. § D-11.0201](#), .0301, .0403.

451 Id. §§ D-12.0000-D-13.0405. [Id. §§ D-12.0000-D-13.0405.](#)

452 Id. § D-14.0000-.0502. [Id. § D-14.0000-.0502.](#)

453 Id. § D-14.0101. [Id. § D-14.0101.](#)

454 Id. § D-14.0201. [Id. § D-14.0201.](#)

455 Id. § D-14.0202. [Id. § D-14.0202.](#)

456 Id. § D-14.0302. [Id. § D-14.0302.](#)

457 Id. § D-14.0303. [Id. § D-14.0303.](#)

458 Id. § D-14.0401. [Id. § D-14.0401.](#)

459 Id. at A-1 to A-28.

460 Id.

461 Elgin Moyer, *Wycliffe Biographical Dictionary of the Church* 73 (Earle E. Cairns ed., rev. ed., Moody Press 1982) (discussing John Calvin).

462 Id.

463 Id.

464 Mead, *supra* n. 9, at 247.

465 Id.

466 Id. at 247-48.

467 *Times Almanac*, *supra* n. 8, at 406.

468 Mead, *supra* n. 9, at 290.

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469 Id.

470 The Constitution and Bylaws: United Church of Christ 9, P 50 (Exec. Council for the United Church of Christ 1997).

471 Id.; Mead, *supra* n. 9, at 290.

472 The Constitution and Bylaws: United Church of Christ, *supra* n. 470, at 4, P 15.

473 United Church of Christ Manual on Ministry preface (Off. for Church Life & Leadership, rev. ed., 1991).

474 Id. at 184-205.

475 Id. at 184-85.

476 Id. at 194.

477 Id. at 195-96.

478 Id. at 196.

479 Id. at 196-201.

480 Id. at 196-97.

481 Id. at 197-98.

482 Id. at 198-200.

483 Id. at 197.

484 Id. at 198.

485 Id. at 199-200.

486 Id. at 200.

487 Id. at 200-01.

488 Id. at 201-05.

489 See Hardon, *supra* n. 5, at 37 (discussing Apostolic Succession).

490 Id.

491 See Acts 6:1-7 (New Rev. Stand. Version) (discussing the need for assistants).

492 *Supra* pt. XI (discussing the Orthodox denomination).

493 New Intl. Dictionary, *supra* n. 108, at 323.

494 See Canon Law Socy. of Am., *The Code of Canon Law 954-55* (James A. Coriden et al. eds., Paulist Press 1985) (discussing canons 1419 to 1422).

495 Times Almanac, *supra* n. 8, at 406.

496 Hardon, *supra* n. 5, at 176 (discussing Ecclesiastical Law).

497 Id. at 177 (quoting Benedict XV, *Providentissima Mater Ecclesia*, May 27, 1917).

498 Id.

499 Id.

500 Canon Law Socy. of Am., *supra* n. 494, at 951 (quoting canon 1405) (emphasis omitted).

501 Id. at 950 (quoting canon 1401) (emphasis omitted).

502 Id. at 951 (quoting canon 1404) (emphasis omitted).

503 See *The Encyclopedia of Christianity* vol. 1, 345 (Erwin Fahlbusch et al. eds., William B. Eerdmans Publg. Co. 1997) (discussing Canon Law).

504 Id. at 692 (discussing *Corpus Iuris Canonici*).

505 Canon Law Socy. of Am., *supra* n. 494, at xv.

506 Id.

- 507 Id. at 23-114.
- 508 Id. at 115-542.
- 509 Id. at 543-90.
- 510 Id. at 591-856.
- 511 Id. at 857-90.
- 512 Id. at 891-941.
- 513 Id. at 943-1046.
- 514 Id. at 955 (quoting canon 1425) (emphasis omitted).
- 515 Id. at 954 (quoting canon 1417) (emphasis omitted).
- 516 Id. at 964 (quoting canon 1470, section 1) (emphasis omitted).
- 517 Id. at 965 (quoting canon 1470, section 2) (emphasis omitted).
- 518 Id. at 967-68 (quoting canon 1483) (emphasis omitted).
- 519 Id. at 971, 1007 (discussing canons 1501 and 1656).
- 520 Id. at 972, 978 (discussing canons 1507 and 1531).
- 521 Id. at 977 (quoting canon 1527) (emphasis omitted).
- 522 Id. at 978 (quoting canon 1530) (emphasis omitted).
- 523 Id. at 982 (quoting canon 1550) (emphasis omitted).
- 524 Id. (quoting canon 1550) (emphasis omitted).
- 525 Id. at 984 (quoting canon 1565) (emphasis omitted).
- 526 Id. at 989 (discussing canon 1587).

- ⁵²⁷ Id. at 998, 1000, 1005 (discussing canons 1619, 1628, and 1650).
- ⁵²⁸ Id. at 1004 (quoting canon 1645) (emphasis omitted).
- ⁵²⁹ Id. at 1005 (quoting canon 1649) (emphasis omitted).
- ⁵³⁰ Id. at 1011, 1016, 1019 (discussing canons 1671, 1692, 1697, and 1707).
- ⁵³¹ Id. at 1011 (quoting canon 1671) (emphasis omitted).
- ⁵³² Id. (quoting canon 1672) (emphasis omitted).
- ⁵³³ Id. at 1019-20 (discussing canons 1708 and 1713).
- ⁵³⁴ Id. at 1020 (quoting canon 1713) (emphasis omitted).
- ⁵³⁵ Id. (quoting canon 1715) (emphasis omitted).
- ⁵³⁶ Id. at 1023-45.
- ⁵³⁷ Id. at 1043 (quoting canon 1748) (emphasis omitted).
- ⁵³⁸ Id. (quoting canon 1749) (emphasis omitted).
- ⁵³⁹ Id. at 1044 (discussing canon 1751).
- ⁵⁴⁰ Mead, *supra* n. 9, at 275-76; Times Almanac, *supra* n. 8, at 407.
- ⁵⁴¹ Eerdmans' Handbook to the History of Christianity 516 (Tim Dowley et al. eds., William B. Eerdmans Publg. Co. 1977) [hereinafter Eerdmans' Handbook].
- ⁵⁴² Id. at 517.
- ⁵⁴³ See Mead, *supra* n. 9, at 276-77 (discussing the Salvation Army's function as a social and church agency).
- ⁵⁴⁴ Eerdmans' Handbook, *supra* n. 541, at 517.
- ⁵⁴⁵ Mead, *supra* n. 9, at 275.
- ⁵⁴⁶ See generally *id.* (stating that William Booth was designated as General).

547 Id. at 276.

548 Id.

549 Id.

550 Telephone Interview with Colonel Robertson, Western Territory of the Salvation Army (Nov. 8, 1999). Colonel Robertson was not able to provide excerpts from the Orders by the deadline for this inquiry.

551 Telephone Interview with Colonel Donald MacDougall, Eastern Territory of the Salvation Army (Oct. 29, 1999).

552 Id.

553 See H. Wayne House, *Christian Ministries and the Law* 65-78 (Baker Book H. 1992) (discussing church discipline and the right of privacy).

22 WTLR 251

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Scriptural Texts Regarding Alternative Dispute Resolution

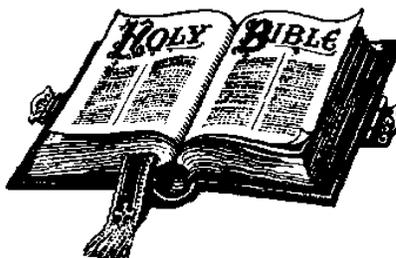
Drawn from the New Testament

Compiled by Ronald J. Colombo

Text ¹ (primary texts)	Citation
<p>But if thy brother shall offend against thee, go, and rebuke him between thee and him alone. If he shall hear thee, thou shalt gain thy brother. And if he will not hear thee, take with thee one or two more: that in the mouth of two or three witnesses every word may stand. And if he will not hear them: tell the church. And if he will not hear the church, let him be to thee as the heathen and publican</p>	Matthew 18:15-17
<p>Dare any of you, having a matter against another, go to be judged before the unjust, and not before the saints? Know you not that the saints shall judge this world? And if the world shall be judged by you, are you unworthy to judge the smallest matters? Know you not that we shall judge angels? how much more things of this world? If therefore you have judgments of things pertaining to this world, set them to judge, who are the most despised in the church. I speak to your shame. Is it so that there is not among you any one wise man, that is able to judge between his brethren? But brother goeth to law with brother, and that before unbelievers. Already indeed there is plainly a fault among you, that you have lawsuits one with another. Why do you not rather take wrong? Why do you not rather suffer yourselves to be defrauded? But you do wrong and defraud, and that to your brethren.</p>	1 Corinthians 6:1-8

¹ The text set forth is drawn from the Douay-Rheims translation of the Bible.

Text (secondary texts)	Citation
Blessed are the peacemakers: for they shall be called children of God.	Matthew 5:9
Be at agreement with thy adversary betimes, whilst thou art in the way with him: lest perhaps the adversary deliver thee to the judge, and the judge deliver thee to the officer, and thou be cast into prison.	Matthew 5:25
You have heard that it hath been said, An eye for an eye, and a tooth for a tooth. But I say to you not to resist evil: but if one strike thee on thy right cheek, turn to him also the other: And if a man will contend with thee in judgment, and take away thy coat, let go thy cloak also unto him. And whosoever will force thee one mile, go with him other two,	Matthew 5:38-41
But I say to you, Love your enemies: do good to them that hate you: and pray for them that persecute and calumniate you	Matthew 5:43
And forgive us our debts, as we also forgive our debtors... For if you will forgive men their offences, your heavenly Father will forgive you also your offences. But if you will not forgive men, neither will your Father forgive you your offences.	Matthew 6:12, 14-15
Then came Peter unto him and said: Lord, how often shall my brother offend against me, and I forgive him? till seven times? Jesus saith to him: I say not to thee, till seven times; but till seventy times seven times.	Matthew 18:21-22
And there came one of the scribes that had heard them reasoning together, and seeing that he had answered them well, asked him which was the first commandment of all. And Jesus answered him: The first commandment of all is, Hear, O Israel: the Lord thy God is one God. And thou shalt love the Lord thy God, with thy whole heart, and with thy whole soul, and with thy whole mind, and with thy whole strength. This is the first commandment. And the second is like to it: Thou shalt love thy neighbour as thyself. There is no other commandment greater than these. And the scribe said to him: Well, Master, thou hast said in truth, that there is one God, and there is no other besides him. And that he should be loved with the whole heart, and with the whole understanding, and with the whole soul, and with the whole strength; and to love one's neighbour as one's self, is a greater thing than all holocausts and sacrifices.	Mark 12:28-33



Pastor P. Brian Noble Materials

About Peacemaker Ministries

Who are we?

Equipping and assisting every Christian and every church in the world to respond to conflict biblically.

Peacemaker Ministries is a non-profit, nondenominational ministry whose mission is to equip and assist Christians and their churches to respond to conflict biblically. Peacemaker Ministries is fervently working to train and equip all Christians (2.2 billion) in the world to respond to conflict biblically in their churches, marriages, workplaces, and communities.

Welcome to Peacemaker Ministries! Let's walk the path of a peacemaker together. Our relationships with God and each other are key to building healthy marriages, families, churches, workplaces, and communities. My hope is that you will experience the Gospel in such a deep and profound way, that you will never be the same. If the Gospel is lived out daily, our lives and our relationships will be transformed into the likeness of Jesus Christ. If there is any way we can serve you, please don't hesitate to

History of Peacemaker Ministries

Peacemaker Ministries was founded in 1982 by Ken Sande, originally under another name. In the 1990's the ministry merged with the Association of Christian Conciliation Services and was renamed Peacemaker Ministries. The ministry flourished under Ken's leadership, developing resources, training hundreds of Christians in conflict coaching and mediation, and assisting countless people to respond to conflict biblically. In 2012 Ken stepped down from leadership and Dale Pyne became the new CEO. He moved Peacemaker Ministries from Montana to Colorado Springs and, over the next few years, strategically aligned it and positioned it for the future.

In March of 2017, Dale stepped down and the Board of Directors appointed P. Brian Noble as the CEO. Brian moved the headquarters of Peacemaker Ministries to Spokane Valley, Washington, where he and a creative staff are developing new resources for churches, marriages, and the workplace. He has written a *Path of a Peacemaker* book, which will be published in 2019. Brian loves to teach, and travels around the country presenting *The Path of a Peacemaker* in a wide variety of settings.

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1. that the Holy Bible, consisting of the Old and New Testaments, is the only inspired, infallible, inerrant and authoritative written Word of God;
2. that there is one God, eternally existent in three persons: Father, Son, and Holy Spirit;
3. in the deity of our Lord Jesus Christ, his virgin birth, his sinless life, his miracles, his vicarious and atoning death through his shed blood, his bodily resurrection, his ascension to the right hand of the Father, and his personal return in power and glory;
4. that for the salvation of lost and sinful people, regeneration by the Holy Spirit is absolutely necessary;

5. that a person is justified by grace alone, through faith alone in the Lord Jesus Christ alone;
6. in the present ministry of the Holy Spirit by whose indwelling the Christian is enabled to live a godly life;
7. in the resurrection of both the saved and the lost — those who are saved, unto the resurrection of life, and those who are lost, unto the resurrection of damnation;
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Muslim/Christian Materials

*Holy Verses Regarding Alternative Dispute Resolution and Justice
From the Holy Quran
And the Tradition of the prophet Mohammad
Selected By. Dr. Mohammad Qatanani*

<i>Verses from the Quran</i>	<i>Citation</i>
<i>“If two groups of believers fight each other, reconcile between them. But if one group aggresses against the other, fight the aggressing group until it complies with God’s command. Once it has complied, reconcile between them with justice, and be equitable. God loves the equitable. The believers are nothing else than brothers. Therefore make peace between your brethren and observe your duty to Allah that you may obtain mercy.”</i>	<i>(Quran 49:9-10)</i>
<i>"O you who have believed, be persistently standing firm in justice, witnesses for Allah, even if it be against yourselves or parents and relatives. Whether one is rich or poor, Allah is more worthy of both. So follow not [personal] inclination, lest you not be just. And if you distort [your testimony] or refuse [to give it], then indeed Allah is ever, with what you do, Acquainted."</i>	<i>(Quran 4:135)</i>
<i>“We sent Our Messengers with clear signs and sent down with them the Book and the Measure in order to establish justice among the people...”</i>	<i>(Quran 57:25)</i>
<i>“Verily, Allah orders justice and good conduct and giving to relatives and He forbids immorality and bad conduct and oppression. He admonishes you that perhaps you will be reminded.”</i>	<i>(Quran 16:90)</i>
<i>“And approach not the property of the orphan except in the fairest way, until he [or she] attains the age of full strength, and give measurement and weight with justice...”</i>	<i>(Quran 6:152)</i>
<i>“O you who believe, be persistently standing firm for Allah as witnesses in justice, and do not let the hatred of a people prevent you from being just. Be just, for that is nearer to righteousness. Fear Allah, for verily, Allah is aware of what you do.”</i>	<i>(Quran 5:8)</i>
<i>Verily, Allah commands you to render trusts to whom they are due and when you judge between people to judge</i>	<i>(Quran 4:58)</i>

<i>with justice. Excellent is that which Allah instructs you. Verily, Allah is ever Hearing and Seeing.”</i>	
<i>“God commands justice and fair dealing...”</i>	<i>(Quran 16:90)</i>
<i>“...If you judge, judge between them with justice...”</i>	<i>(Quran 5:42)</i>
<i>“...Say: I believe in the Scripture, which God has sent down, and I am commanded to judge justly between you...”</i>	<i>(Quran 42:15)</i>
<i>“And the Word of your Lord has been fulfilled in truth and in justice. None can change His Words.”</i>	<i>(Quran 6:115)</i>

From the hadiths of the prophet Mohammad (pbuh)

<i>The hadith</i>	<i>Reference</i>
<i>“There are seven categories of people whom God will shelter under His shade on the Day when there will be no shade except His. [One is] the just leader.”</i>	<i>(Saheeh Muslim)</i>
<i>“Allah has said; O My slaves, I have forbidden injustice for Myself and forbade it also for you. So avoid being unjust to one another.”</i>	<i>(Saheeh Muslim)</i>
<i>“Many communities ruined themselves in the past as they only punished the poor and ignored the offenses of the exalted. By Allah, if Muhammad’s (My) daughter Fatimah would have committed theft, she will be punished.”</i>	<i>(Sahih Bukhari)</i>
<i>“People, beware of injustice, for injustice shall be darkness on the Day of Judgment.”</i>	<i>(Musnad Ahmed)</i>
<i>Verily, those who were fair will be in the presence of Allah upon pulpits of light, near the right hand of the Merciful, the Exalted, and both of His sides are equally honorable. They are those who practiced justice in their rulings and with their families and in all that they did.”</i>	<i>(Sahih Muslim)</i>
<i>“The rights of every people will be restored on the Day of Resurrection until even the hornless sheep will settle the score with the horned sheep”.</i>	<i>Sahih Muslim)</i>
<i>“Guard yourself from oppression, for oppression will</i>	<i>(Sahih Muslim)</i>

<i>be darkness on the Day of Resurrection. Guard yourself from greed, for greed destroyed those before you. It caused them to shed blood and to make lawful what was unlawful.”</i>	
<i>“Verily, the most beloved of people to Allah on the Day of Resurrection and the nearest to Him will be the just leader. The most hated of people to Allah and the furthest from Him will be the tyrannical leader.”</i>	(Sunan Attirmidhi)
<i>“By Allah, you must enjoin good and forbid evil and seize the hand of the oppressor and make him follow the truth and restrict him to what is just.”</i>	(Sunan Abu Dawud)
<i>Allah's Apostle said, "I am only a human being, and you people (opponents) come to me with your cases; and it may be that one of you can present his case eloquently in a more convincing way than the other, and I give my verdict according to what I hear. So if ever I judge (by error) and give the right of a brother to his other (brother) then he (the latter) should not take it, for I am giving him only a piece of Fire."</i>	(Sahih Bukhari)

Ibn Al-Qayyim said:

“قَدْ بَيَّنَّ سُبْحَانَهُ بِمَا شَرَعَهُ مِنَ الطَّرِيقِ أَنَّ مَقْصُودَهُ إِقَامَةُ الْعَدْلِ بَيْنَ عِبَادِهِ وَقِيَامَ النَّاسِ بِالْقِسْطِ فَأَيُّ طَرِيقٍ اسْتُخْرِجَ بِهَا الْعَدْلُ وَالْقِسْطُ فَهِيَ مِنَ الدِّينِ وَأَيُّسَتْ مُخَالَفَةٌ لَهُ” .

“Allah the Exalted has made clear in his law (sharia) that the objective is the establishment of justice between His servants and fairness among the people, so whichever path leads to justice and fairness is part of the religion and can never oppose it.” Source: Turuq Al-Hukmiyyah 13

2010

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***Fiqh* and Canons: Reflections on Islamic and Christian Jurisprudence**

*Mark L. Mousesian**

As this very fine conference demonstrates, American law-and-religion scholarship has begun to expand its focus beyond the traditional study of church-state relations to an examination of religious law itself. Much of the new scholarship is comparative, addressing law's place in different religious traditions.¹ Yet scholars have neglected one important topic. Although American scholarship has begun to address both Christian and Islamic jurisprudence in a serious way,² virtually none of the literature attempts to compare the place of law in these two world religions.

* Frederick A. Whitney Professor of Contract Law, St. John's University School of Law. For helpful comments, I thank Abduh An-Na'im, Robin Charlow, John Coughlin, Marc DeGirolami, Robert Delahunty, Haider Hamoudi, Larry Joseph, John McGinnis, and the participants in this conference. For research assistance, I thank Arundhati Satkalmi of the St. John's Law Library and St. John's students Amanda Goun, Jennifer Ismat, and George Tsiatis.

¹ See, e.g., RELIGION, LAW AND TRADITION: COMPARATIVE STUDIES IN RELIGIOUS LAW (Andrew Huxley ed., 2002); Harold J. Berman, *Comparative Law and Religion*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 739 (Mathias Reimann & Reinhard Zimmermann eds., 2006); Chaim Saiman, *Jesus' Legal Theory—A Rabbinic Reading*, 23 J.L. & RELIGION 97 (2007); Symposium, *Text, Tradition, and Reason in Comparative Perspective*, 28 CARDOZO L. REV. 1 (2006).

² On Christian jurisprudence, see, for example, CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT (Michael W. McConnell et al. eds., 2001); CHRISTIANITY AND LAW: AN INTRODUCTION (John Witte, Jr. & Frank S. Alexander eds., 2008); THE TEACHINGS OF MODERN CHRISTIANITY ON LAW, POLITICS, AND HUMAN NATURE (John Witte Jr. & Frank S. Alexander eds., 2006). On Islamic jurisprudence, see, for example, ABDULLAHI AHMED AN-NA'IM, ISLAM AND THE SECULAR STATE (2008); Lama Abu-Odeh, *The Politics of (Mis)recognition: Islamic Law Pedagogy in American Academia*, 52 AM. J. COMP. L. 789 (2004); Khaled Abou El Fadl, *Muslim Minorities and Self-Restraint in Liberal Democracies*, 29 LOY. L.A. L. REV. 1525 (1996); Haider Ala Hamoudi, *Baghdad Booksellers, Basra Carpet Merchants, and the Law of God and Man: Legal Pluralism and the Contemporary Muslim Experience*, 1 BERKELEY J. MIDDLE E. & ISLAMIC L. 83 (2008); Ali Khan, *The Reopening of the Islamic Code: The Second Era of Ijtihad*, 1 U. ST. THOMAS L.J. 341 (2003); Asifa Quraishi, *Interpreting the Qur'an and the Constitution: Similarities in the Use of Text, Tradition, and Reason in Islamic and American Jurisprudence*, 28 CARDOZO L. REV. 67 (2006); Kristen A. Stilt, *Islamic Law and the Making and Remaking of the Iraqi Legal System*, 36 GEO. WASH. INT'L L. REV. 695 (2004).

This Essay begins to compare Islamic and Christian conceptions of law and suggests some implications for contemporary debates about religious dispute settlement. One must approach this project with humility, especially in a short piece. Islam and Christianity are subtle and complex religions. Each has competing strands; each has evolved over millennia and expressed itself differently over time. Moreover, although systematic treatments of Islamic law are beginning to appear in English,³ much remains available only in languages, like Arabic, that are unfortunately inaccessible to most American scholars.

Notwithstanding these complexities, some generalizations are possible. Both Islam and Christianity spring from faith, but the two religions express faith differently—and the difference relates to law. In Islam, a comprehensive body of law sacralizes daily life and connects believers to God.⁴ Islam's primary discourse, *fiqh*, or "jurisprudence," attempts to derive that law from scriptural sources.⁵ Islam's clergy, the *ulama*, or "learned"—often translated as "jurists"—are experts in that law.⁶ In fact, many scholars maintain that nothing exceeds law's importance in the life of Islam. A generation ago, the Orientalist Joseph Schacht famously asserted that law constitutes Islam's "core and kernel";⁷ more recently, Wael Hallaq has written that "law has been so successfully developed in Islam that it would not be an exaggeration to characterize Islamic culture as a legal culture."⁸ One should not "overlegalize" Islam,⁹ which values commitment to God rather than routine rule following.¹⁰ Nonetheless, a comprehensive religious law system, one that guides believers in their daily activities, has been a crucial part of the Muslim experience.

By contrast, Christianity does not express its faith through a body of law. Christianity's traditional discourse is theology, a reflec-

³ See, e.g., MOHAMMAD HASHIM KAMALI, *PRINCIPLES OF ISLAMIC JURISPRUDENCE* (3d ed. 2003).

⁴ See MALISE RUTHVEN, *ISLAM IN THE WORLD* 181 (3d ed. 2006) (discussing Sunni Islam).

⁵ See F.E. PETERS, *ISLAM: A GUIDE FOR JEWS AND CHRISTIANS* 174 (2003) (defining *fiqh*).

⁶ *Id.*; see also RUTHVEN, *supra* note 4, at 129 ("scholar-jurists").

⁷ JOSEPH SCHACHT, *AN INTRODUCTION TO ISLAMIC LAW* 1 (1964).

⁸ WAEL B. HALLAQ, *A HISTORY OF ISLAMIC LEGAL THEORIES* 209 (1997).

⁹ MOHAMMAD HASHIM KAMALI, *SHARI'AH LAW* 1 (2008).

¹⁰ See DANIEL BROWN, *A NEW INTRODUCTION TO ISLAM* 127 (2004); JOHN L. ESPOSITO, *ISLAM: THE STRAIGHT PATH* 68 (3d ed. 1998).

tion on God's nature, not His will.¹¹ Its clergy are sacramental ministers, not legal scholars.¹² This is not to say that Christianity embraces antinomianism or lacks interest in ethical behavior. On the contrary, most contemporary churches have some form of canon law,¹³ and Christian jurisprudence exists.¹⁴ But law lacks the significance in Christianity that it has in Islam. Unlike *fiqh*, canon law serves an auxiliary function in the life of Christianity; it is facilitative, not constitutive, of the believer's relationship with God.¹⁵ Unlike *fiqh*, it has a fairly limited scope. And, unlike *fiqh*, Christian jurisprudence is not exegetical. Compared with Islam, as many scholars note, Christianity focuses more on orthodoxy than orthopraxy, on correct doctrine rather than correct practice.¹⁶

The different emphasis that Islam and Christianity place on religious law is reflected in contemporary attitudes toward religious tribunals. In some Western societies, Muslim organizations have called for Islamic tribunals to resolve family and commercial disputes among consenting Muslims. According to proponents, such tribunals are necessary for Muslims in Western societies—so-called “minority” Muslims¹⁷—to “live our faith to the best of our ability.”¹⁸ Not all “minority” Muslims agree; the proposals have created tensions within Muslim communities as well as with non-Muslims.¹⁹ The fact that many Muslims believe that their faith requires them to resolve family

¹¹ See ESPOSITO, *supra* note 10, at 68.

¹² See PETERS, *supra* note 5, at 176.

¹³ For an introduction to contemporary canon law, see Norman Doe, *Modern Church Law*, in CHRISTIANITY AND LAW: AN INTRODUCTION, *supra* note 2, at 271.

¹⁴ For a sourcebook on Christian jurisprudence, see FROM IRENAEUS TO GROTIUS: A SOURCEBOOK IN CHRISTIAN POLITICAL THOUGHT (Oliver O'Donovan & Joan Lockwood O'Donovan eds., 1999).

¹⁵ See *infra* text accompanying notes 145-51.

¹⁶ ESPOSITO, *supra* note 10, at 68; RUTHVEN, *supra* note 4, at 354.

¹⁷ Cf. TARIQ RAMADAN, RADICAL REFORM 31 (2009) (discussing the “minority *fiqh*” that some scholars have formulated for “Muslims living in a ‘minority situation,’ particularly in the West”).

¹⁸ Ayelet Shachar, *Privatizing Diversity: A Cautionary Tale from Religious Arbitration in Family Law*, 9 THEORETICAL INQUIRIES L. 573, 585 (2008) (quoting Interview by Rabia Mills with Syed Mumtaz Ali, President, Can. Soc'y of Muslims (Aug. 1995), available at <http://muslim-canada.org/pfl.htm>).

¹⁹ See, e.g., Abdullahi Ahmed An-Na'im, *The Compatibility Dialectic: Mediating the Legitimate Coexistence of Islamic Law and State Law*, 73 MOD. L. REV. 1, 27-28 (2010) (arguing against Islamic arbitration). For more on some Muslims' objections to Islamic arbitration, see *infra* note 186 and accompanying text.

and commercial disputes in Islamic tribunals, however, demonstrates the importance that religious law has in contemporary Muslim life.

By contrast, a desire for religious tribunals does not loom large for contemporary Christians. True, some Christian organizations offer "Christian arbitration" services, and church tribunals resolve disputes about church structure and discipline.²⁰ But these phenomena differ from their Islamic counterparts. Although hard statistics are unavailable, it does not appear that many Christians wish to resolve legal questions in religious tribunals; most see civil litigation as an acceptable dispute settlement mechanism.²¹ Moreover, even if Christians wished to settle their disputes under religious law, contemporary Christianity does not provide one for them to use. For example, the current Code of Canon Law of the Catholic Church belies any notion of a general Christian substantive law. "In respect to most legal matters regulated by civil law," the Code "says nothing."²² Similarly, "Christian arbitration" tends to involve general ethical principles rather than legal doctrine.²³

To be sure, factors beyond internal religious dynamics also help explain why contemporary Muslims and Christians value religious law differently. The Enlightenment has had a secularizing effect on Western society and made Christianity a more private phenomenon than it once was.²⁴ Islam may similarly evolve; indeed, some argue that the transformation already has begun. And the desire of some Western Muslims for Islamic tribunals may reflect an assertion of community identity more than religious commitment. I discuss these factors below. One should not dismiss internal religious dynamics, however. Comparatively speaking, law figures more prominently in the life of Islam than Christianity, and this difference surely influences how Muslims and Christians view religious tribunals today.

Before going further, I should clarify the way I use three important terms. By "Islam," I mean the classical Sunni tradition. Some

²⁰ On Christian arbitration, see Michael C. Grossman, Note, *Is This Arbitration?: Religious Tribunals, Judicial Review, and Due Process*, 107 COLUM. L. REV. 169, 177-78 (2007). For a recent case enforcing a Christian arbitration agreement, see *Easterly v. Heritage Christian Sch.*, No. 1:08-CV-1714-WTL-TAB, 2009 WL 2750099 (S.D. Ind. Aug. 26, 2009).

²¹ See Thomas J. Paprocki, *Methods of Avoiding Trials*, in NEW COMMENTARY ON THE CODE OF CANON LAW 1803, 1803-04 (John P. Beal et al. eds., 2000).

²² John M. Huels, *Introduction*, in NEW COMMENTARY ON THE CODE OF CANON LAW, *supra* note 21, at 47, 85.

²³ See *infra* text accompanying notes 189-94.

²⁴ See MARK LILLA, *THE STILLBORN GOD* 57-58 (2007).

may quarrel with this decision. To focus on classical Sunni Islam is to exclude other important currents like Shia Islam and Sufi mysticism. Moreover, some commentators maintain that the classical model is “too theoretical” to justify scholarly emphasis.²⁵ For example, Haider Hamoudi cautions that, by focusing on classical Islam, one risks becoming an expert in an abstraction that has little to do with how law actually operates in Muslim countries.²⁶ And some contemporary Muslims are rethinking the classical model and developing new ways of following Islam in the Western world.²⁷

Notwithstanding these criticisms, a focus on classical Sunni Islam seems justified. Roughly ninety percent of contemporary Muslims are Sunni,²⁸ and classical Sunni Islam remains the overwhelming focus of mainstream Islamic law scholarship.²⁹ Scholars like Hamoudi may be correct when they advocate change in Islamic legal scholarship, but, for an outsider seeking to engage the material, the mainstream position seems a safe place to begin. Moreover, “a substantial number of Muslims derive, and for the foreseeable future will continue to derive, their normative understandings of Islam from historical conceptions of Islamic orthodoxy.”³⁰ Classical Islam thus represents an important empirical phenomenon that scholars must engage if they wish to understand the background for contemporary Muslim thought.

Like Islam, “Christianity” encompasses different traditions. The Catholic view of law differs from the Protestant and the Orthodox. Moreover, Christian traditions have adopted different positions at different times; one cannot reduce millennia of reflection to a single formula. One must start somewhere, though. When I discuss Christianity, I mean what some scholars call the “great tradition,” defined by the Bible, the apostolic tradition, and the first ecumenical councils.³¹ Most mainstream Christians accept the legitimacy of these

²⁵ Mohammad Fadel, *Islamic Politics and Secular Politics: Can They Co-Exist?*, 25 J.L. & RELIGION 187, 190 (2009) (discussing this criticism).

²⁶ See Hamoudi, *supra* note 2, at 83–84.

²⁷ See *infra* text accompanying notes 198–212.

²⁸ See PEW FORUM ON RELIGION & PUBLIC LIFE, MAPPING THE GLOBAL MUSLIM POPULATION: A REPORT ON THE SIZE AND DISTRIBUTION OF THE WORLD'S MUSLIM POPULATION 1 (2009), available at http://www.pewforum.org/uploadedfiles/Orphan_Migrated_Content/Muslimpopulation.pdf.

²⁹ See Hamoudi, *supra* note 2, at 83–84.

³⁰ Fadel, *supra* note 25, at 190 (stating author's assumption).

³¹ See James S. Cutsinger, *Introduction: Finding the Center*, in RECLAIMING THE GREAT TRADITION: EVANGELICALS, CATHOLICS & ORTHODOX IN DIALOGUE 7, 7–10 (James S. Cutsinger ed., 1997); see also J.I. Packer, *On from Orr: Cultural Crisis, Rational Realism*

sources, even if they disagree about particulars. As Witte and Alexander observe, “there is more confluence than conflict in Catholic, Protestant, and Orthodox understandings of law,” particularly if one takes the “long and responsible historical perspective.”³²

“Law,” too, is a vague term that covers many discrete concepts relevant here, including canon, divine, Islamic, Jewish, and natural law. I cannot treat these categories in detail, nor, I think, is it necessary to do so. I will distinguish among them where important to avoid confusion. The key point is this: When I say that Islam values law in a way Christianity does not, I mean that Islam has thought it vital to develop a comprehensive legal system to guide believers’ daily lives. Classical *fiqh* covers topics most readers would think of as spiritual, like prayer and fasting, as well as those most readers would think of as temporal, like commerce and inheritance.³³ Apart from medieval Catholicism, perhaps, Christianity has never had such a system, and no Christian tradition has one today.

One sort of law that I will not discuss much here is state law. Islam and Christianity both have reflected on state law and the stance that believers should take toward it. I leave that important and complicated subject for another occasion. My interest here is law in religion, not religion in law. I address how law figures in the relationship between believers and God, not between believers and the political authorities.

Finally, I should note that my interest relates to Islam and Christianity as empirical phenomena. They also represent much more than that. I do not, however, address the religions’ truth claims here, nor do I attempt to evaluate their respective approaches to law. I attempt instead to offer tentative views on a difference that lurks in the background of Muslim-Christian interactions, one that already has contributed to controversy in two Western democracies. Before Muslims and Christians can negotiate this difference, they must understand it. I hope this Essay contributes to that important endeavor and to the growing body of work in comparative religious law.

§ *Incarnational Ontology*, in RECLAIMING THE GREAT TRADITION: EVANGELICALS, CATHOLICS & ORTHODOX IN DIALOGUE, *supra*, at 154, 156–57 (describing content of “the great tradition of Christian faith and life”).

³² John Witte Jr. & Frank S. Alexander, *Introduction* to 1 THE TEACHINGS OF MODERN CHRISTIANITY ON LAW, POLITICS, AND HUMAN NATURE, *supra* note 2, at xxi, xxxv.

³³ See KAMALI, *supra* note 9, at 42.

* * *

As Tariq Ramadan observes, “[t]he first and most important element of Muslim identity is faith.”³⁴ The Muslim is one who believes and puts his trust in God, who submits to God’s will, as God has revealed that will in the witness of the Prophet Muhammad.³⁵ Unlike Christianity, however, Islam has not attempted to express its faith by reflecting systematically on God’s nature.³⁶ Islam has focused most of its intellectual energy on jurisprudence, an attempt to understand God’s will, not His nature, and to actualize that will in a system of law.³⁷

Islam teaches that God revealed His final law for humanity—the Sharia, a word which in Arabic means “way to the watering-place”³⁸—in two sources. The Quran, or “Recitation,” is a collection of roughly 6200 verses (*ayat*) that Muslims believe God communicated to Muhammad, through the intercession of the angel Gabriel, over a span of roughly two decades beginning in the year 610.³⁹ The revelations came during two discrete periods in Muhammad’s life, the first in Mecca, where he struggled against a largely hostile political and religious establishment, and then in Medina, where he emigrated to form the new Muslim community, or *umma*.⁴⁰ The verses appear in more than 100 chapters (*suras*), arranged in terms of length, from longest to shortest.⁴¹ In contrast to Christians, who see the Bible as divinely inspired, Muslims believe that the Quran is literally the word of God, an inimitable miracle, “perfect, eternal, and unchangeable.”⁴²

Less than ten percent of the Quran concerns law.⁴³ Yet, as Hal-laq observes, the legal *ayat* “represent a larger weight than [their]

³⁴ TARIQ RAMADAN, *WESTERN MUSLIMS AND THE FUTURE OF ISLAM* 79 (2004) (emphasis omitted); see also KAMALI, *supra* note 9, at 5 (“Islam is a faith and a moral code first and foremost; it stands on its own five pillars, and following a legal code is relative and subsidiary to the original call and message of Islam.”).

³⁵ See RUTHVEN, *supra* note 4, at 108.

³⁶ See RAMADAN, *supra* note 34, at 11–12 (arguing that Islam does not have a “theology,” in Christian terms).

³⁷ See ESPOSITO, *supra* note 10, at 68–69.

³⁸ KAMALI, *supra* note 9, at 2.

³⁹ See KAMALI, *supra* note 3, at 16–17; PETERS, *supra* note 5, at 99, 101.

⁴⁰ On Meccan and Medinan *suras*, see PETERS, *supra* note 5, at 99. On the founding of the *umma* in Medina, see *id.* at 128.

⁴¹ KAMALI, *supra* note 3, at 17.

⁴² ESPOSITO, *supra* note 10, at 19.

⁴³ KAMALI, *supra* note 3, at 25.

number may indicate.”⁴⁴ Unlike the nonlegal verses, the legal verses tend not to repeat, and their average length is two or three times that of the nonlegal verses.⁴⁵ Thus, while one should not perceive the Quran as a code, its legal elements are quite important. The Quran prescribes rules regarding both worship (*ibadat*) and “civil transactions” (*mu’amalat*).⁴⁶ The latter category covers many subjects that contemporary Western readers would think of as secular, like family law, including “marriage, divorce, paternity, custody of children, maintenance, inheritance and bequests”; “commercial transactions, such as sale, lease, loan, and mortgage”; and “crimes . . . such as murder, highway robbery, theft, adultery, and slanderous accusation.”⁴⁷

The Sharia’s second source is the Sunna, or practices of the Prophet—his words and deeds, the judgments he rendered, the conduct he allowed and the conduct he forbade.⁴⁸ The Sunna appears in “tradition reports,” or *hadiths*, that recount episodes in the Prophet’s life.⁴⁹ Many such reports circulated after Muhammad’s death in 632; in the ninth and tenth centuries, Muslim scholars sifted and compiled them into authoritative versions.⁵⁰ Unlike in the Quran, legal materials predominate.⁵¹ Although it binds believers, the Sunna must be read consistently with the Quran, and, in case of clear conflict, the latter controls.⁵²

Because it often speaks in general terms, especially with respect to *mu’amalat*, the Sharia does not always provide believers clear guidance.⁵³ *Fiqh* evolved as a way to make the Sharia operational. The systematization “took place in the second and third centuries of Islam,” starting around 750.⁵⁴ The *ulama* derived *fiqh* through an exegetical

⁴⁴ WAEL B. HALLAQ, *THE ORIGINS AND EVOLUTION OF ISLAMIC LAW* 21 (2005).

⁴⁵ *Id.*

⁴⁶ See KAMALI, *supra* note 3, at 26 (discussing Quranic rules); KAMALI, *supra* note 9, at 17 (defining these terms).

⁴⁷ KAMALI, *supra* note 9, at 19.

⁴⁸ See ESPOSITO, *supra* note 10, at 80.

⁴⁹ See *id.* Scholars often use the terms Sunna and *hadith* interchangeably. See KAMALI, *supra* note 3, at 61–62.

⁵⁰ ESPOSITO, *supra* note 10, at 80–81.

⁵¹ See KNUT VIKØR, *BETWEEN GOD AND THE SULTAN: A HISTORY OF ISLAMIC LAW* 45 (2005).

⁵² KAMALI, *supra* note 3, at 79.

⁵³ See KAMALI, *supra* note 9, at 50.

⁵⁴ AN-NA’IM, *supra* note 2, at 14.

process called *ijtihad*, a word that means “striving or exertion.”⁵⁵ Faced with a situation the Sharia did not expressly cover, the jurists would search for a similar case and determine its “cause,” or *‘illa*.⁵⁶ Having done so, they would see whether the *‘illa* could extend by analogy—*qiyas*—to the new case.⁵⁷ For someone trained in common law reasoning, this process is very familiar: one discovers the *ratio decidendi* of a case and determines whether it applies in new circumstances.⁵⁸

Ijtihad is quintessentially a religious exercise, a way of relating to the divine.⁵⁹ The Legislator, in Islamic legal theory, is God; the jurist simply seeks, as best he can, to infer God’s will from revelation.⁶⁰ Islam does not admit the concept of natural law in the Christian sense.⁶¹ Early on, the *ulama* rejected the idea that human beings could discern good and evil, and thus the requirements of God’s law, through speculative reason.⁶² That view, associated with a ninth-century school known as the Mutazalites, seemed to impinge on God’s sovereignty.⁶³ Mainstream *fiqh* adopted the position of the Mutazalites’ opponents, the Asharites, who argued that God’s will, not human reason, determines what is good or bad, lawful or unlawful.⁶⁴ Thus, while reason plays an important role in Islamic law, its purpose remains circumscribed. The jurist who engages in *ijtihad* does not seek principally the rule that seems to him most beneficial or just.⁶⁵ He does not even attempt to understand the ultimate intent of God,

⁵⁵ KAMALI, *supra* note 9, at 162; *see also* PETERS, *supra* note 5, at 180–81 (“personal initiative”).

⁵⁶ BERNARD G. WEISS, *THE SPIRIT OF ISLAMIC LAW* 67 (1998).

⁵⁷ For an excellent discussion of this process, *see* KAMALI, *supra* note 3, at 264–305.

⁵⁸ *See* Wael B. Hallaq, *Legal Reasoning in Islamic Law and the Common Law: Logic and Method*, 34 CLEV. ST. L. REV. 79, 86 (1985–86).

⁵⁹ *Cf.* AN-NA’IM, *supra* note 2, at 15 (“The essentially religious nature of Shari’a and its focus on regulating the relationship between God and human believers mean that believers can neither abdicate nor delegate their responsibility [for *ijtihad*].”).

⁶⁰ *See* KAMALI, *supra* note 3, at 440–41.

⁶¹ *See* RÉMI BRAGUE, *THE LAW OF GOD* 160 (Lydia G. Cochrane trans., 2007); RUTHVEN, *supra* note 4, at 149–51.

⁶² This is not to say that Islam rejects speculative reason entirely. *See infra* text accompanying note 158.

⁶³ *See* RUTHVEN, *supra* note 4, at 149.

⁶⁴ *See id.*; BRAGUE, *supra* note 61, at 165–67. *See generally* KAMALI, *supra* note 3, at 441–45 (discussing three different views that *ulama* have held regarding reason and revelation).

⁶⁵ *See* WEISS, *supra* note 56, at 37.

which remains unknowable.⁶⁶ Rather, he seeks to discover, through reason, the rule that the Lawgiver has commanded.⁶⁷

The *ulama* recognized that jurists conducting *ijtihad* could reach different conclusions. Over time, though, jurists might be able to reach consensus, or *ijma*, on a point of *fiqh*.⁶⁸ Once formed, consensus precluded further *ijtihad*.⁶⁹ Indeed, “[b]y the beginning of the tenth century,” the *ulama* had concluded that *ijma* had been reached on all the essential points of *fiqh*.⁷⁰ The “door of *ijtihad*” had closed; from then on, jurists were not to derive new rules, but simply “study the established legal manuals and write their commentaries.”⁷¹ To do otherwise would be to engage in unjustified innovation (*bida*), an accusation “equivalent to the charge of heresy in Christianity.”⁷² Not all *ulama* have agreed, then or now, but “the closing of the door” remains a powerful concept in mainstream Islam.⁷³

One should not see *fiqh* as “monolithic,” however.⁷⁴ Islam has had various schools of jurisprudence (*madhabs*) over the course of its history, four of which remain today in Sunni Islam: the Hanafi, Shafi’i, Maliki, and Hanbali *madhabs*, all named for the jurists who founded them.⁷⁵ Traditionally, they have dominated in different geographical regions.⁷⁶ The *madhabs* disagree on some substantive and methodological questions, including the correct interpretation of parts of the Sharia and the proper role of reason, judicial preference (*istihsan*), and public interest (*istislah*) in legal analysis.⁷⁷ In

⁶⁶ See BRAGUE, *supra* note 61, at 183-84 (discussing work of Ghazali).

⁶⁷ See KAMALI, *supra* note 3, at 440-41.

⁶⁸ See ESPOSITO, *supra* note 10, at 82-83.

⁶⁹ See DAVID WAINES, AN INTRODUCTION TO ISLAM 83 (2d ed. 2003).

⁷⁰ KAMALI, *supra* note 9, at 94.

⁷¹ ESPOSITO, *supra* note 10, at 84; see also RUTHVEN, *supra* note 4, at 142-44.

⁷² ESPOSITO, *supra* note 10, at 84; see also JONATHAN P. BERKEY, THE FORMATION OF ISLAM: RELIGION AND SOCIETY IN THE NEAR EAST, 600-1800, at 147 (2003) (“To go against the consensus was, in a very real sense, to step outside the tradition, to become in fact a heretic.”).

⁷³ See ESPOSITO, *supra* note 10, at 226-29 (discussing Muslim traditionalism); KAMALI, *supra* note 3, at 490 (“With the exception of the Hanbalis, who maintain that *ijtihad* in all of its forms remains open, the *ulama* of the other three schools have on the whole acceded to the view that independent *ijtihad* has discontinued.”). For a recent call for “a second era of *ijtihad*,” see Khan, *supra* note 2.

⁷⁴ KAMALI, *supra* note 9, at 92.

⁷⁵ See WAINES, *supra* note 69, at 65-71; Stilt, *supra* note 2, at 721.

⁷⁶ KAMALI, *supra* note 9, at 73 (contrasting regional distribution of Hanafi and Maliki *madhabs*).

⁷⁷ *Id.* at 93-94.

principle, though, each Sunni school accepts the others as legitimate, and Muslims need not adhere exclusively to any *madhab*. Nowadays, “[a] Muslim may join any orthodox school he or she wishes, or change from one school to another, without formalities.”⁷⁸

Law has had a more ambivalent place in Christianity. Christianity started as a movement within Judaism; the Gospels record that Jesus was a rabbi, a teacher of Jewish law, or Torah.⁷⁹ Very early, though, in apostolic times, Christianity rejected what it saw as Judaism’s legalism, especially the style of close legal reasoning that characterized the Pharisaic tradition that was becoming Judaism’s dominant expression.⁸⁰ The Gospels portray Jesus as denouncing religious lawyers for focusing on technicalities and neglecting “the weightier matters of the law: justice and mercy and faith.”⁸¹ In particular, Christians rejected what they characterized as ceremonial practices, such as dietary rules and circumcision.⁸² The Pauline epistles portray such rules as distracting from the more spiritual worship God desires.⁸³

Christianity did not reject law entirely, though. The early Christians drew a distinction between the ceremonial aspects of Torah and what they perceived as its moral content—the Ten Commandments, for example.⁸⁴ The moral law survived; in fact, Paul argued, it was accessible to human reason as a kind of natural law.⁸⁵ Christians taught that the moral law had achieved perfection in Christ’s example of piety and sacrifice, in the values He had proclaimed in the Sermon on the Mount, particularly the Beatitudes (“Blessed are those who hunger and thirst for righteousness, for they will be filled. Blessed are the merciful, for they will receive mercy.”).⁸⁶ This is what the ear-

⁷⁸ *Id.* at 94; Stilt, *supra* note 2, at 721 (“Historically, school affiliation among Sunnis was more important than it tends to be today.”).

⁷⁹ See, e.g., *John* 1:38; see also Luke Timothy Johnson, *Law in Early Christianity*, in *CHRISTIANITY AND LAW: AN INTRODUCTION*, *supra* note 2, at 53, 57.

⁸⁰ See Johnson, *supra* note 79, at 56 (discussing ascendance of Pharisaic Judaism after 70 A.D.).

⁸¹ *Matthew* 23:23.

⁸² See Johnson, *supra* note 79, at 63.

⁸³ See, e.g., *Galatians* 5:6; *Romans* 14:1–6.

⁸⁴ See Johnson, *supra* note 79, at 63.

⁸⁵ See Brian Tierney, *Natural Law and Natural Rights*, in *CHRISTIANITY AND LAW: AN INTRODUCTION*, *supra* note 2, at 89, 91 (discussing *Romans* 2).

⁸⁶ *Matthew* 5:6–7; see also *CATECHISM OF THE CATHOLIC CHURCH* § 1965, at 477 (1994) (“The New Law or the Law of the Gospel is the perfection here on earth of the divine law, natural and revealed. It is the work of Christ and is expressed particularly in the Sermon on the Mount.”).

ly Christians meant when they said that Christ had come to fulfill the law,⁸⁷ that Christ constituted the law's end, or *telos*.⁸⁸ Christ had revealed Torah's inner dimension; if they believed in Him, Christ would give his followers grace to follow His "new commandment" to "love one another."⁸⁹ "[T]he one who loves another," Paul wrote, "has fulfilled the law."⁹⁰

Now, "love one another" does not provide much practical legal guidance.⁹¹ The early Christians recognized this fact but apparently did not think such guidance important. They believed that the temporal world was quickly passing away; the point was not to achieve justice on earth but to prepare for eternity, which would arrive very soon.⁹² Thus, where the Quran announces detailed rules about inheritance,⁹³ the Gospels recount that Jesus declined to resolve an inheritance dispute for one of his followers.⁹⁴ Dividing an estate correctly was not important, but the condition of one's soul, which God would soon judge. Paul reprimanded early Christians for bringing lawsuits against one another, particularly in Roman courts where pagan judges presided. Christians should resolve disputes among themselves. Indeed, why were Christians demanding their legal rights at all? "Why not rather be wronged?" Paul asked.⁹⁵ "Why not rather be defrauded?"⁹⁶

As the apostolic age ended, and Christians realized that they were not living in the last generation but would need some sort of temporal arrangements, they started to engage law in a more serious way.⁹⁷ Practically, they began to formulate canons—the word comes

⁸⁷ See Matthew 5:17.

⁸⁸ Romans 10:4; see also Johnson, *supra* note 79, at 63.

⁸⁹ John 13:34.

⁹⁰ Romans 13:8.

⁹¹ See Johnson, *supra* note 79, at 63–64.

⁹² Cf. HANS KÜNG, ISLAM: PAST, PRESENT & FUTURE 581–83 (John Bowden trans., 2007) ("The original Christian community . . . lived in expectation of the imminent return of the Lord . . . and consequently were uninterested in establishing structures of worldly power.").

⁹³ THE MEANING OF THE HOLY QUR'AN 4:11-14, at 186-88 ('Abdullah Yusuf 'Ali trans., 11th ed. 2004).

⁹⁴ Luke 12:13–15.

⁹⁵ 1 Corinthians 6:7.

⁹⁶ *Id.*

⁹⁷ See Ladislav M. Örsy, *Theology and Canon Law*, in NEW COMMENTARY ON THE CODE OF CANON LAW, *supra* note 21, at 1, 7 (noting that early Christian assemblies realized that "they had to create ordered structures and converging operations if they wanted to exist at all").

from the Greek for “straight rod” or “measuring stick”—regarding church structure and discipline.⁹⁸ The canons developed episodically; they tended to be brief and ad hoc.⁹⁹ Christians collected them in informal handbooks like the first century *Didache*, “which established rules governing the liturgy, the sacraments and lay practices such as fasting.”¹⁰⁰ For centuries, various unofficial collections circulated throughout the Christian world.¹⁰¹ Christians did not regard any of these collections as complete or universally applicable; Christians evidently did not think they required such a collection.¹⁰² Indeed, the first serious attempt to systematize the canons occurred relatively late, during the so-called Papal Revolution (1050–1200), roughly one thousand years after Christianity’s founding.¹⁰³

Virtually all Christian traditions have some form of canon law, but they value it differently.¹⁰⁴ Catholicism has been most enthusiastic. Medieval Catholicism, in particular, developed a reticulated canon law system that extended beyond worship and church discipline to cover social relations. So, for example, there was a medieval canon law of crimes, contracts, inheritance, property, and torts, all of which derived, in theory, from the church’s authority over the sacraments.¹⁰⁵ Medieval Catholicism also professionalized the ecclesiastical courts. These courts had existed since late antiquity; in the fifth century, Augustine had bemoaned the time his judicial tasks took away from his other episcopal responsibilities.¹⁰⁶ But ecclesiastical courts always had been somewhat informal.¹⁰⁷ The medieval Papacy regularized their

⁹⁸ HAROLD J. BERMAN, *LAW AND REVOLUTION* 199 (1983) (“measuring stick”); Kenneth Pennington, *The Growth of Church Law*, in 2 *THE CAMBRIDGE HISTORY OF CHRISTIANITY* 386, 390 (Augustine Casiday & Frederick W. Norris eds., 2007) (“straight rod”).

⁹⁹ See R.H. Helmholz, *Western Canon Law*, in *CHRISTIANITY AND LAW: AN INTRODUCTION*, *supra* note 2, at 71, 72–73; Johnson, *supra* note 79, at 64.

¹⁰⁰ Pennington, *supra* note 98, at 387.

¹⁰¹ See R.C. MORTIMER, *WESTERN CANON LAW* 12–15 (1953).

¹⁰² See BERMAN, *supra* note 98, at 199–200; Helmholz, *supra* note 99, at 73–74.

¹⁰³ See BERMAN, *supra* note 98, at 115–19, 202.

¹⁰⁴ See Helmholz, *supra* note 99, at 72.

¹⁰⁵ BERMAN, *supra* note 98, at 225; John Witte, Jr., *Introduction to CHRISTIANITY AND LAW: AN INTRODUCTION*, *supra* note 2, at 1, 10–11.

¹⁰⁶ See John C. Lamoreaux, *Episcopal Courts in Late Antiquity*, 3 *J. EARLY CHRISTIAN STUD.* 143, 144–46 (1995); Noel E. Lenski, *Evidence for the Audientia episcopalis in the New Letters of Augustine*, in *LAW, SOCIETY, AND AUTHORITY IN LATE ANTIQUITY* 83, 93 (Ralph W. Mathisen ed., 2001).

¹⁰⁷ See Helmholz, *supra* note 99, at 74.

operation and theorized their jurisdiction as part of a new “constitutional” order of the church.¹⁰⁸

Other Christian traditions have been less positive about canon law. Protestants have been the most suspicious. As Witte explains, the Reformers believed that “medieval Catholic canon law obstructed the individual’s relationship with God and obscured simple biblical norms for right living.”¹⁰⁹ Luther burned canon law books,¹¹⁰ and Protestant countries gradually transferred the jurisdiction of ecclesiastical authorities to state officials.¹¹¹ Protestants did not abolish canon law entirely, however, and most denominations continue to employ some form today.¹¹² Orthodoxy has canons, but it views them more as “pastoral texts” than “juridical norms,” guides to handling specific spiritual problems, not prescriptions for conduct.¹¹³ It allows “ample scope” for “economy,” the relaxing of canons in particular cases in order to further a person’s spiritual development.¹¹⁴ Orthodoxy has never produced a universal code of canons.¹¹⁵ While some contemporary Orthodox writers favor codification, others argue that it would contradict Orthodoxy’s mystical essence.¹¹⁶

Christianity also has engaged law philosophically, as a matter of jurisprudence. Over centuries, it has developed subtle and varied typologies of law. The Church Fathers taught that there were three kinds of law: natural law, accessible to human reason; Mosaic Law, contained in the Old Testament; and the law of Christ, revealed in the Gospels.¹¹⁷ In the ninth century, Nestorian Christians came up with a slightly different taxonomy: the divine law of Christ, “beyond reason and nature”; the “law of nature, based on reason, innate in man’s mind”; and the satanic “law of violence,” which opposed both

¹⁰⁸ See BERMAN, *supra* note 98, at 221–24, 530.

¹⁰⁹ Witte, *supra* note 105, at 16.

¹¹⁰ *Id.*; see Helmholz, *supra* note 99, at 83.

¹¹¹ See HAROLD J. BERMAN, *LAW AND REVOLUTION*, II, at 6 (2003); Witte, *supra* note 105, at 16.

¹¹² *Cf.* Doe, *supra* note 13, at 271 (mentioning Protestant churches that have canon law).

¹¹³ LEWIS J. PATSAVOS, *SPIRITUAL DIMENSIONS OF THE HOLY CANONS* 21–22 (2003).

¹¹⁴ Doe, *supra* note 13, at 285; see PATSAVOS, *supra* note 113, at 12–13.

¹¹⁵ See Paul Valliere, *Introduction to the Modern Orthodox Tradition*, in 1 *THE TEACHINGS OF MODERN CHRISTIANITY ON LAW, POLITICS, AND HUMAN NATURE*, *supra* note 2, at 503, 518.

¹¹⁶ See PATSAVOS, *supra* note 113, at 8–9.

¹¹⁷ See BRAGUE, *supra* note 61, at 212.

God and nature.¹¹⁸ Christian legal theorists have argued for centuries about the overlap among the different categories as well as the respective roles of reason and revelation in discovering them.¹¹⁹

As with canon law, Christian traditions have valued jurisprudence differently. Western Christianity has been more enthusiastic, with Catholicism showing the most interest in systematic legal philosophy.¹²⁰ Aquinas provides the best example; with the rise of neo-Thomism since the nineteenth century, systematic legal thought has experienced a renaissance in Catholic circles.¹²¹ Protestantism has viewed jurisprudence somewhat more skeptically, but it has made important contributions too.¹²² For example, Melancthon developed an influential theory of law's "three uses"—promoting "external . . . morality," revealing God's wrath against sin and sinner, and educating the faithful¹²³—which his contemporary, Calvin, adopted in his own *Institutes*.¹²⁴ More recent Protestant jurisprudential thinkers include Barth, Kuyper, and Niebuhr.¹²⁵ Of the three main traditions, Orthodoxy has had the least interest in systematic jurisprudence, reflecting, perhaps, its suspicion of scholasticism and greater stress on mystical apprehension of divine reality.¹²⁶

Fiqh and canon law are subtle and complex subjects, and space has allowed only a brief discussion here. This overview, however, allows one to make some observations about the place law has in Islam

¹¹⁸ See Anton Tien, *The Apology of Al-Kindi*, in THE EARLY CHRISTIAN-MUSLIM DIALOGUE 381, 449 (N.A. Newman ed., 1993). For more on Nestorian jurisprudence, see BRAGUE, *supra* note 61, at 214.

¹¹⁹ See, e.g., Angela C. Carmella, *A Catholic View of Law and Justice*, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT, *supra* note 2, at 255, 261–62 (contrasting Catholic and Protestant thought); Tierney, *supra* note 85, at 91 (noting tensions in Christian conceptions of natural law).

¹²⁰ See, e.g., CATECHISM OF THE CATHOLIC CHURCH, *supra* note 86, §§ 1949–1986, at 473–81.

¹²¹ For a good introduction to Aquinas, see ST. THOMAS AQUINAS: THE TREATISE ON LAW (R.J. Henle ed. & trans., 1993). For a good introduction to neo-Thomism, see Russell Hittinger, *Introduction to Modern Catholicism*, in 1 THE TEACHINGS OF MODERN CHRISTIANITY ON LAW, POLITICS, AND HUMAN NATURE, *supra* note 2, at 3.

¹²² See, e.g., BERMAN, *supra* note 111, at 6–10 (discussing Lutheran and Calvinist jurisprudence).

¹²³ FROM IRENAEUS TO GROTIUS: A SOURCEBOOK IN CHRISTIAN POLITICAL THOUGHT, *supra* note 14, at 651.

¹²⁴ See *id.* at 664.

¹²⁵ See Mark A. Noll, *Introduction to Modern Protestantism*, in 1 THE TEACHINGS OF MODERN CHRISTIANITY ON LAW, POLITICS, AND HUMAN NATURE, *supra* note 2, at 261, 282.

¹²⁶ See Valliere, *supra* note 115, at 506 (discussing but qualifying this observation).

and Christianity. First, the historical development of Islamic law differs greatly from the analogous process in Christianity. Recall that the *ulama* began to systematize *fiqh* quite early; the process was basically complete within two or three centuries of the Prophet, when the *ulama* decided that the “door of *ijtihad*” had closed.¹²⁷ By contrast, Christianity existed for one thousand years before any Christians—and only Christians in the West—thought to assemble the canons into a comprehensive and universally applicable collection.¹²⁸ This difference alone suggests how much more important legal system building has been to the Muslim, as opposed to the Christian, religious experience.

Second, *fiqh* and canon law have dramatically different scopes. Classical *fiqh* covers “almost every conceivable arena of social life,”¹²⁹ including how to comport and groom oneself, how to pray, what to eat, how to conduct business and make contracts, how to buy and sell real property, whom to marry, how to divorce, and how to divide one’s estate.¹³⁰ Indeed, because *fiqh*’s scope is so extensive, in the classical conception, “all” practicing “Muslims need[] . . . at least some rudimentary understanding of it.”¹³¹ Muslims can gain this understanding on their own, but the more typical method is to consult a member of the *ulama* for a legal opinion, or *fatwa*. A *fatwa* does not bind (or excuse) a believer,¹³² but it can be influential, particularly if the issuing jurist has a reputation for insight and integrity. The *ulama* thus function as Islam’s clergy; as in Judaism, religious lawyers are the authorities to whom the community turns for guidance in daily life.¹³³

Canon law, by contrast, has a much more limited compass.¹³⁴ It deals overwhelmingly with matters of church administration rather than personal behavior and moral judgment.¹³⁵ As a result, most Christians have comparatively little contact with it in their daily lives.

¹²⁷ See *supra* text accompanying notes 70–73.

¹²⁸ See *supra* text accompanying note 103.

¹²⁹ BERKEY, *supra* note 72, at 143.

¹³⁰ See, e.g., *id.* (discussing topics covered by classical *fiqh*); KAMALI, *supra* note 9 (same).

¹³¹ BERKEY, *supra* note 72, at 143. Some contemporary Muslim scholars argue that much of classical *fiqh* should be rethought. See *infra* text accompanying notes 198–212.

¹³² See AN-NA’IM, *supra* note 2, at 16.

¹³³ See PETERS, *supra* note 5, at 176–77.

¹³⁴ See BRAGUE, *supra* note 61, at 145.

¹³⁵ See JAMES A. CORIDEN, AN INTRODUCTION TO CANON LAW 4 (rev. ed. 2004).

As I have explained, medieval Catholicism apparently *did* have a comprehensive body of canon law.¹³⁶ One should not exaggerate, however, the degree to which medieval system building represents something central in Christian thought.¹³⁷ Even at the time, important voices protested. Around 1150, for example, Bernard of Clairvaux warned Pope Eugenius not to pay attention to the lawsuits clogging the papal courts.¹³⁸ “[I]t is unworthy for you to be involved in such affairs,” he wrote, “since you are occupied by more important”—that is, spiritual—“matters.”¹³⁹ And, as I have explained, Protestant and Orthodox Christians never shared medieval Catholicism’s enthusiasm for canon law.

Moreover, notwithstanding the medieval situation, contemporary Catholicism shows little interest in legal system building. The current Code of Canon Law, adopted in 1983, eschews any notion of a general Christian substantive law. The largest sections deal with questions of worship and discipline, such as the ordination and rank of clergy and the reception of sacraments.¹⁴⁰ “In respect to most legal matters regulated by civil law,” the current Code “says nothing.”¹⁴¹ Indeed, the Code frequently adopts civil law by reference in a process called canonization.¹⁴² As long as civil law doctrines do not violate principles of “divine law”—the law drawn directly from revelation or natural law—the Code typically defers to them in areas like contracts, employment, inheritance, and torts.¹⁴³ Augustine would be pleased: Church trials nowadays are reserved “almost exclusively for marriage annulment cases,” Christians having decided that Paul’s admonition against secular litigation no longer applies.¹⁴⁴

Third, the functions of classical *fiqh* and canon law differ greatly. *Fiqh* operates as a crucial link between Muslims and God. Recall that

¹³⁶ See *supra* text accompanying notes 105–108.

¹³⁷ Cf. Helmholz, *supra* note 99, at 71–72 (discussing continuing controversy over canon law in Christian history).

¹³⁸ FROM IRENAEUS TO GROTIUS: A SOURCEBOOK IN CHRISTIAN POLITICAL THOUGHT, *supra* note 14, at 269.

¹³⁹ *Id.* at 270–71; see also BERMAN, *supra* note 98, at 196 (discussing Bernard’s views regarding the papal courts).

¹⁴⁰ CORIDEN, *supra* note 135, at 42.

¹⁴¹ Huels, *supra* note 22, at 85.

¹⁴² See 1983 CODE c.22 (Canon Law) (“Civil laws to which the law of the Church defers should be observed in canon law with the same effects, insofar as they are not contrary to divine law and unless it is provided otherwise in canon law.”).

¹⁴³ On the definition of “divine law,” see CORIDEN, *supra* note 135, at 36.

¹⁴⁴ Paprocki, *supra* note 21, at 1803; see CORIDEN, *supra* note 135, at 194.

the goal of classical *ijtihad* is to ascertain the will of the Legislator, that is, God.¹⁴⁵ The *ulama* reason out what God has ordained; in the final analysis, believers comply because God commands it.¹⁴⁶ Canon law, by contrast, has an auxiliary function. In John Coughlin's phrase, canon law "point[s] beyond itself";¹⁴⁷ it works indirectly, by supporting other aspects of Christian life.¹⁴⁸ For example, by creating an orderly internal structure, canon law allows the church to administer the sacraments and accomplish its evangelical mission.¹⁴⁹ Similarly, canon law educates believers and aids their spiritual growth.¹⁵⁰ In short, canon law is facilitative, not constitutive, of the believer's relationship with God. Canon law honors God,¹⁵¹ but it does not respond, the way *fiqh* does, to a divine command.

Fourth, canon law has a contingent quality that classical *fiqh* lacks. Because canon law exists to help the church on earth to achieve its mission, and because the church on earth remains subject to time and circumstance, canon law must have the capacity to adapt.¹⁵² This does not mean that canon law is entirely malleable; the belief that divine law does not change places a limit on canon law's elasticity.¹⁵³ "The vast majority of canons" do not embody divine law, however, and can evolve.¹⁵⁴ For example, rules on clerical celibacy in the Catholic Church have varied from time to time and place to place. Before the medieval Papal Revolution, parish priests in the Latin rite could marry; afterwards, they could not.¹⁵⁵ In Eastern rites, parish priests may still marry.¹⁵⁶ This capacity for change distinguish-

¹⁴⁵ See *supra* text accompanying notes 59–60.

¹⁴⁶ See *supra* text accompanying notes 59–67.

¹⁴⁷ John J. Coughlin, *Canon Law and the Human Person*, 19 J.L. & RELIGION 1, 47 (2003).

¹⁴⁸ See CORIDEN, *supra* note 135, at 5–6 (describing functions of canon law).

¹⁴⁹ See Örsy, *supra* note 97, at 2–3.

¹⁵⁰ See PATSAVOS, *supra* note 113, at 4–5, 21; Doe, *supra* note 13, at 281.

¹⁵¹ See Örsy, *supra* note 97, at 3 ("When the people intelligently and freely give themselves to [Christ's] Church and observe its laws, they honor him.").

¹⁵² See *id.* at 2; cf. BERMAN, *supra* note 98, at 202–03 (discussing Western canon law's understanding of law as evolving).

¹⁵³ See Huels, *supra* note 22, at 56 ("Divine laws, given by God, are unchangeable by human beings."). Canons that seek to embody divine law may be somewhat contingent, however. Örsy, *supra* note 97, at 2.

¹⁵⁴ CORIDEN, *supra* note 135, at 36.

¹⁵⁵ See BERMAN, *supra* note 98, at 95. For the current rule on clerical celibacy, see 1983 CODE c.277 § 1 (Canon Law).

¹⁵⁶ See John E. Lynch, *The Obligations and Rights of Clerics*, in NEW COMMENTARY ON THE CODE OF CANON LAW, *supra* note 21, at 343, 356 n.68.

es canon law from *fiqh*, which—in the classical conception, at least—achieved perfection many centuries ago and cannot develop further.

Finally, Islamic and Christian jurisprudence differ in basic orientation. *Fiqh* is an exegetical exercise, an attempt to deduce concrete rules from scriptural sources.¹⁵⁷ It generally does not concern itself with defining the nature of justice or the human responsibility for moral reasoning. Islam does not lack interest in such questions, but it has tended to channel them to a different discipline called *kalam*, or “discourse,” a fascinating subject I lack space to address.¹⁵⁸ Christian jurisprudence, by contrast, is not exegetical. It is a kind of speculative legal philosophy, addressing the interplay between reason and faith and the capacity to apprehend the moral law without special revelation.¹⁵⁹ Christianity’s interest in speculative legal reasoning dates from the religion’s formative period.¹⁶⁰ The Pauline epistles, the earliest Christian scriptures, themselves speak of natural law, a set of moral principles “written on [the] hearts” of all people, even “Gentiles.”¹⁶¹ Historian Patricia Crone nicely captures the distinction between the Islamic and Christian approaches in discussing how the two religions would address the use of religious images, or icons. “[I]n the legal culture of Islam,” she writes, the question would be, “when precisely are images permitted?”¹⁶² In the more “philosophical culture of Christianity,” by contrast, the question would be, “what precisely is the nature of an image?”¹⁶³

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The different emphasis on religious law is reflected in contemporary Muslim and Christian attitudes toward religious tribunals. In countries where they constitute minority communities, some influential Muslim organizations have sought to establish Islamic law tribunals to resolve family and commercial disputes among consenting Mus-

¹⁵⁷ Cf. BRAGUE, *supra* note 61, at 145 (noting that canon law “does not put into operation an exegetical method comparable to” Islamic law).

¹⁵⁸ See ESPOSITO, *supra* note 10, at 69; WEISS, *supra* note 56, at 25–30. For an argument that *kalam* represents the most important discipline in Islam, see Mohammad Fadel, *The True, the Good and the Reasonable: The Theological and Ethical Roots of Public Reason in Islamic Law*, 21 CAN. J.L. & JURISPRUDENCE 5, 31 (2008).

¹⁵⁹ See, e.g., Carmella, *supra* note 119, at 261–62.

¹⁶⁰ See Tierney, *supra* note 85, at 89–91.

¹⁶¹ *Romans* 2:14–15.

¹⁶² Patricia Crone, *Islam, Judeo-Christianity and Byzantine Iconoclasm*, 2 JERUSALEM STUDIES IN ARABIC AND ISLAM 59, 83 (1980).

¹⁶³ *Id.*

lims. These organizations contend that Muslims require such tribunals, whose rulings would bind parties in civil courts, in order to practice their faith. Two recent controversies, one in Canada and the other in Great Britain, illustrate the phenomenon.

In 2003, the Canadian Society of Muslims announced its intention to establish a Muslim Court of Arbitration in Ontario to resolve family disputes.¹⁶⁴ The Society planned to operate the tribunal under Ontario's Arbitration Act, which allows binding family-law arbitration.¹⁶⁵ The tribunal was to resolve only those disputes that Muslims voluntarily referred to it and decide cases according to "Muslim Personal/Family Law."¹⁶⁶ Such a tribunal was necessary, the Society explained, because Canadian Muslims "live in a non-Muslim country which subjects us to laws which, for the most part, do not allow us to live our faith to the best of our ability."¹⁶⁷

News of the tribunal sparked immediate resistance, with most opponents expressing concern about the potential oppression of women.¹⁶⁸ The outcry did not diminish when a government report recommended allowing Islamic family law arbitration, with some safeguards.¹⁶⁹ The report explained that religious organizations, including at least one Muslim group, had been conducting dispute settlement in Canada for years,¹⁷⁰ thereby helping "people of faith . . . to live . . . according to their beliefs."¹⁷¹ In response to the outcry, Ontario's Premier announced a ban on all religious arbitration,¹⁷² but the province eventually took a more nuanced position. As of 2007,

¹⁶⁴ See Caryn Litt Wolfe, Note, *Faith-Based Arbitration: Friend or Foe? An Evaluation of Religious Arbitration Systems and Their Interaction with Secular Courts*, 75 *FORDHAM L. REV.* 427, 448 (2006). For the Institute's Web site, see The Islamic Institute of Civil Justice—the Muslim Court of Arbitration, <http://muslim-canada.org/DARLQADAMSHAH1.html> (last visited May 19, 2010).

¹⁶⁵ See Shachar, *supra* note 18, at 577.

¹⁶⁶ See Interview by Rabia Mills with Syed Mumtaz Ali, President, Can. Soc'y of Muslims (Aug. 1995), *available at* <http://muslim-canada.org/pfl.htm>.

¹⁶⁷ *Id.*

¹⁶⁸ See MARION BOYD, *DISPUTE RESOLUTION IN FAMILY LAW: PROTECTING CHOICE, PROMOTING INCLUSION* 48, 52 (2004), *available at* <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/fullreport.pdf>; *see also* Wolfe, *supra* note 164, at 448–49 (discussing this concern).

¹⁶⁹ BOYD, *supra* note 168, at 133. For example, the report recommended numerous steps to ensure that people's consent to religious arbitration was informed and voluntary. *Id.* at 133–42.

¹⁷⁰ *Id.* at 55–60.

¹⁷¹ *Id.* at 63 (discussing submissions from advocates of religious arbitration).

¹⁷² Wolfe, *supra* note 164, at 449.

Ontario had decided to allow religious organizations to arbitrate family disputes, but only under secular law.¹⁷³

The British controversy began in 2008, when the Archbishop of Canterbury, Rowan Williams, gave an address in which he advocated a formal role for Islamic tribunals.¹⁷⁴ In a pluralistic society, Williams argued, a supplementary role for voluntary Islamic arbitration, particularly in family and commercial disputes, seemed unavoidable.¹⁷⁵ Otherwise, a “secular legal monopoly” would overwhelm citizens’ religious commitments.¹⁷⁶ Williams emphasized that Islamic tribunals could not be allowed to deny Muslim citizens their civil rights and pointed out that Christian and Jewish tribunals traditionally had shared jurisdiction with civil courts in Britain without creating dire consequences.¹⁷⁷ Critics excoriated Williams,¹⁷⁸ but the Lord Chief Justice endorsed his position.¹⁷⁹ By autumn 2008, reports surfaced that the government was advising Muslim groups that civil courts could enforce Islamic arbitration awards under the English Arbitration Act.¹⁸⁰

One such organization, the Muslim Arbitration Tribunal (MAT), would like to test the government’s theory. MAT runs Islamic tribun-

¹⁷³ Ann Laquer Estin, *Unofficial Family Law*, 94 IOWA L. REV. 449, 469 & n.91 (2009).

¹⁷⁴ Rowan Williams, Archbishop of Canterbury, Foundation Lecture at the Royal Courts of Justice: Civil and Religious Law in England: A Religious Perspective (Feb. 7, 2008) (transcript available at <http://www.archbishopofcanterbury.org/1575>).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ See *id.*; see also Interview by Christopher Landau, BBC World at One, with Rowan Williams, Archbishop of Canterbury (Feb. 7, 2008), available at <http://www.archbishopofcanterbury.org/1573> (discussing Orthodox Jewish tribunals).

¹⁷⁸ One newspaper characterized the reaction to Williams’s speech as “the most serious threat to the authority of his office since he became Archbishop.” Ruth Gledhill & Joanna Sugden, *Archbishop of Canterbury ‘Should Resign’ over Sharia Row*, TIMES ONLINE (London), Feb. 8, 2008, <http://www.timesonline.co.uk/tol/news/uk/article3335026.ece>.

¹⁷⁹ Lord Phillips, Lord Chief Justice of Eng. & Wales, Equality Before the Law 8–9 (July 3, 2008) (transcript available at http://www.matribunal.com/downloads/LCJ_speech.pdf).

¹⁸⁰ See Abul Taher, *Revealed: UK’s First Official Sharia Courts*, SUNDAY TIMES (London), Sept. 14, 2008, at 2, available at <http://www.timesonline.co.uk/tol/news/uk/crime/article4749183.ece>; cf. David G. Green, *Introduction to DENIS MACEOIN, SHARIA LAW OR ‘ONE LAW FOR ALL?’* 1, 3–4 (2009) (discussing assertion by British Government minister that “sharia rulings on family matters . . . could be given the authority of a British court”).

als in London, Birmingham, and Manchester.¹⁸¹ Although informal Islamic arbitration has existed in Britain for decades, the organization's Web site proclaims that it "will . . . for the first time, offer the Muslim community a real and true opportunity to settle disputes in accordance with Islamic Sacred Law with the knowledge that the outcome as determined by MAT will be binding and enforceable."¹⁸² MAT advertises its services primarily in family disputes, but it also handles commercial, debt, inheritance, and mosque disputes.¹⁸³ MAT acknowledges that civil law binds citizens but states that Islamic law also "[has] its place in this society" as "our personal and religious law."¹⁸⁴ "What a great achievement it will be," its Web site proclaims, "if we can produce a result to the satisfaction of both English and Islamic law!"¹⁸⁵

Some Canadian and British Muslims have vociferously opposed the creation of these Islamic arbitration regimes.¹⁸⁶ And it is true that the tribunals would cover only certain aspects of *fiqh*—primarily family and commercial law—not its entirety. Still, the apparent level of support for Islamic arbitration contrasts dramatically with the lack of interest contemporary Christianity shows in religious law and tribunals. Recall that ecclesiastical courts tend to be reserved nowadays for internal church matters and, in some cases, marriage annulments.¹⁸⁷ The vast majority of Christians would never think to use them for lay legal disputes.¹⁸⁸ Moreover, although some Christian organizations

¹⁸¹ See Green, *supra* note 180, at 2–3. For the organization's Web site, see Muslim Arbitration Tribunal, <http://www.matribunal.com/> (last visited May 19, 2010).

¹⁸² Muslim Arbitration Tribunal, *supra* note 181.

¹⁸³ Muslim Arbitration Tribunal, Our Cases, <http://www.matribunal.com/cases.html>.

¹⁸⁴ Muslim Arbitration Tribunal, Values and Equalities of MAT, <http://www.matribunal.com/values.html>.

¹⁸⁵ *Id.*

¹⁸⁶ On Canadian Muslim opposition, see Jehan Aslam, Note, *Judicial Oversight of Islamic Family Law Arbitration in Ontario: Ensuring Meaningful Consent and Promoting Multicultural Citizenship*, 38 N.Y.U. J. INT'L L. & POL. 841, 842 (2006); Wolfe, *supra* note 164, at 449. On British Muslim opposition, see Sameer Ahmed, *Recent Developments: Pluralism in British Islamic Reasoning: The Problem with Recognizing Islamic Law in the United Kingdom*, 33 YALE J. INT'L L. 491, 491, 495–96 (2008). For a recent critique of Islamic arbitration from a Muslim perspective, see An-Na'im, *supra* note 19, at 27–28.

¹⁸⁷ See *supra* text accompanying note 144.

¹⁸⁸ Cf. Paprocki, *supra* note 21, at 1804 (explaining that "most Christians today are more likely to sue a fellow Christian in civil court . . . than to bring an action . . . in a [church] tribunal").

do offer arbitration services, “Christian arbitration” entails a search for ethical resolutions to legal disputes, not an application of Christian law.

Peacemaker Ministries, a prominent Christian dispute-settlement organization, offers a good illustration.¹⁸⁹ The group was established “in 1982 by a group of pastors, lawyers, and business people who wanted to encourage and assist Christians to respond to conflict biblically.”¹⁹⁰ In addition to informal dispute-settlement mechanisms like mediation, the group offers arbitration through its “Institute for Christian Conciliation.”¹⁹¹ The Institute’s rules make clear that arbitrators do not resolve disputes according to some sort of Christian law. Rather, arbitrators apply secular law, subject to broad biblical principles like keeping one’s word and acting justly and mercifully.¹⁹² The rules also state that “arbitrators may grant any remedy or relief that they deem scriptural, just and equitable, and within the scope of the agreement of the parties.”¹⁹³ In essence, the service that Peacemaker Ministries provides resembles what commercial arbitrators know as “ex aequo et bono” decision making—the resolution of legal disputes according to the broad equitable discretion of the arbitrator rather than formal legal analysis.¹⁹⁴

I recognize that factors beyond internal religious dynamics may help explain why contemporary Muslims and Christians place a different value on religious tribunals. For decades, sociologists have discussed the “secularization theory,” which holds that modernity leads inexorably to a decrease in religious commitment.¹⁹⁵ Perhaps this theory explains the contemporary lack of interest in Christian law.

¹⁸⁹ See Grossman, *supra* note 20, at 177–78 (describing Peacemaker Ministries).

¹⁹⁰ Peacemaker Ministries, First Visit? Please Read This, http://www.peacemaker.net/site/c.aqKFLTOBIPH/b.937085/k.A1EB/First_Visit_Please_Read_This.htm (last visited May 19, 2010).

¹⁹¹ Grossman, *supra* note 20, at 178.

¹⁹² See Peacemaker Ministries, FAQ’s Regarding Christian Conciliation: An Introduction to Christian Conciliation, http://www.peacemaker.net/site/c.aqKFLTOBIPH/b.3910013/k.93FC/FAQs_Regarding_Christian_Conciliation.htm (last visited May 19, 2010).

¹⁹³ See The Inst. for Christian Conciliation, Rules of Procedure, http://www.peacemaker.net/site/c.nuIWL7MOJtE/b.5378801/k.D71A/Rules_of_Procedure.htm (Rule 40(B)) (last visited June 21, 2010).

¹⁹⁴ See ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 43, 127–28 (3d ed. 1999) (discussing equitable arbitration).

¹⁹⁵ See Mark C. Modak-Truran, *Secularization, Legal Indeterminacy, and Habermas’s Discourse Theory of Law*, 35 FLA. ST. U. L. REV. 73, 79–80 (2007).

That Christians today do not wish to settle disputes according to religious law may reflect more a decline in religious intensity than law's place in Christianity.¹⁹⁶ Islam today is approximately the same age Christianity was at the time of the Renaissance. Perhaps Muslims' religious intensity will also decrease over time, and Muslims come to see *fiqh* as less important to their daily lives. Indeed, advances in scientific knowledge and technology since the Western Enlightenment might accelerate the secularization process.¹⁹⁷ Voltaire had to rely on the printing press; his successors can use the Internet.

Secularization may already have begun. The fact that proposals for religious tribunals relate only to some areas, not the whole of *fiqh*, suggests that even those Muslims who desire Islamic law do not desire it in its entirety. Moreover, some contemporary Muslim thinkers question the relevance of the classical, law-based model for Western Muslims. Many of these thinkers reject the "closing of the door" and seek to open a new era of *ijtihad*.¹⁹⁸ For example, Tariq Ramadan argues that Islam represents a faith, not a culture or civilization.¹⁹⁹ He maintains that Islam requires Western Muslims to participate wholeheartedly in the social and political life of their countries, to be good citizens who "submit to the body of positive law,"²⁰⁰ as long as that law does not violate Islamic conscience.²⁰¹ Ramadan thinks that conflicts will be "limited."²⁰² On a true interpretation of Islam, he argues, one that avoids the "distorting prism" of the conventional model, Western laws should not pose major barriers to Muslim life.²⁰³ In most situations, jurists should be able to find solutions to allow Muslims to practice their faith and abide by secular law.²⁰⁴

Khaled Abou El Fadl likewise rejects as "Orientalist" and "essentialist" the notion that Islam and Islamic law are "one and the

¹⁹⁶ Cf. Witte & Alexander, *supra* note 32, at xxxiv (observing that "the legal structure and sophistication of the modern Christian church as a whole is a pale shadow of what went on before").

¹⁹⁷ See John O. McGinnis, *The Symbiosis of Constitutionalism and Technology*, 25 HARV. J.L. & PUB. POL'Y 3, 12 (2001) (observing that "[s]cientific discovery and technological progress seem to have been generally correlated with a decline in religious faith").

¹⁹⁸ See, e.g., AN-NA'IM, *supra* note 2, at 15; Khan, *supra* note 2, at 343.

¹⁹⁹ See RAMADAN, *supra* note 34, at 79, 214.

²⁰⁰ *Id.* at 95.

²⁰¹ *Id.*

²⁰² *Id.* at 100; see also *id.* at 95 ("very rare").

²⁰³ *Id.* at 100.

²⁰⁴ See *id.* at 100-01.

same.”²⁰⁵ Although many observers believe that Muslims must comply with the totality of Islamic law wherever they are—a belief that would make life in a non-Muslim country practically impossible—not all Muslim jurists agree.²⁰⁶ Muslims must have the ability to practice Islam, but that does not necessarily mean following classical *fiqh* in every context. For example, Abou El Fadl points out, the twentieth-century Egyptian jurist Rashid Rida maintained that Muslims in a non-Muslim country need follow “only . . . the laws pertaining to acts of worship (*‘ibadat*) such as fasting, almsgiving, and praying.”²⁰⁷ In other areas, like commercial and criminal law, Muslims could follow the secular laws of the host country.²⁰⁸

Finally, Abdullahi An-Na‘im argues that Islamic law should never be enforced by the state, either in those countries where Muslims make up a majority of the population or in those countries where Muslims form minority communities.²⁰⁹ For him, Islamic law must be a matter of voluntary compliance on the part of the believer. “Islamic law is always relevant and binding on Muslims,” he writes, “but only as each Muslim believes it to be and not as declared and coercively enforced by the state.”²¹⁰ In the minority-Muslim context, this means that Muslims must avoid involving the state in Islamic arbitration.²¹¹ If the state enforces Islamic arbitral awards, he believes, that will inevitably corrupt *fiqh*; “the outcome will always be state law on its own terms.”²¹² State enforcement creates the risk that Muslims will comply with rulings, not out of honest religious conviction, but because civil courts have ordered them to do so.

It is hard for an outsider to evaluate this debate within Islam. Notwithstanding some signs of an “Islamic Reformation,”²¹³ though,

²⁰⁵ Khaled Abou El Fadl, *Striking a Balance: Islamic Legal Discourse on Muslim Minorities*, in *MUSLIMS ON THE AMERICANIZATION PATH?* 47, 60–61 (Yvonne Yazbeck Haddad & John L. Esposito eds., 2000).

²⁰⁶ See *id.* at 57; Khaled Abou El Fadl, *Legal Debates on Muslim Minorities: Between Rejection and Accommodation*, 22 *J. RELIGIOUS ETHICS* 127, 151–53 (1994) (discussing diversity of opinion among pre-modern and contemporary jurists).

²⁰⁷ Abou El Fadl, *supra* note 205, at 54.

²⁰⁸ *Id.*

²⁰⁹ An-Na‘im, *supra* note 19, at 2. For An-Na‘im’s more extensive development of his position, see AN-NA‘IM, *supra* note 2.

²¹⁰ An-Na‘im, *supra* note 19, at 3.

²¹¹ See *id.* at 26–28.

²¹² *Id.* at 27.

²¹³ The phrase is An-Na‘im’s. ABDULLAHI AHMED AN- NA‘IM, *TOWARD AN ISLAMIC REFORMATION* (1990).

one should resist assuming that modernity will inevitably change Islam. Observers have begun to question the power of the secularization theory generally; despite the confident forecasts of a generation or two ago, religion does not seem to be in terminal, global decline.²¹⁴ With respect to minority-Muslim communities, specifically, traditional expressions disproportionately attract younger, Western-born Muslims with university degrees and a familiarity with contemporary culture—the very people to whom, presumably, secularism would appeal most.²¹⁵ Although progressive Islamic scholarship is important, it often encounters resistance in Muslim communities. Ramadan, for example, concedes that his ideas “are frightening and . . . appear new and ‘offensive’” to many Muslims;²¹⁶ the title of his most recent work, *Radical Reform*, suggests the degree of change he believes necessary.²¹⁷ An-Na’im writes that his views “are not only controversial, but also psychologically and intellectually difficult for the vast majority of Muslims to accept today.”²¹⁸

Another factor that may explain Western Muslims’ interest in religious tribunals is Muslims’ status as a minority community. Muslims have only recently begun to arrive in significant numbers;²¹⁹ like most immigrants, many of them find comfort in traditional ways.²²⁰ Moreover, Muslims may find aspects of Western law and courts to be alien and unfamiliar, the reflections of a different religious history and sensibility.²²¹ As the dominant religious group in Western society, Christians fail to perceive the ways in which their worldview pervades the judicial system; values that appear neutral and unremarkable to Christians may not seem so to Muslims.²²² Finally, Western Muslims

²¹⁴ See, e.g., Thomas F. Fart & William L. Saunders, Jr., *The Bush Administration and America’s International Religious Freedom Policy*, 32 HARV. J.L. & PUB. POL’Y 949, 967–68 (2009).

²¹⁵ See CHRISTOPHER CALDWELL, REFLECTIONS ON THE REVOLUTION IN EUROPE: IMMIGRATION, ISLAM, AND THE WEST 156–58, 234 (2009).

²¹⁶ RAMADAN, *supra* note 34, at 5.

²¹⁷ RAMADAN, *supra* note 17.

²¹⁸ Abdullahi Ahmed An-Na’im, *Religion, the State, and Constitutionalism in Islamic and Comparative Perspectives*, 57 DRAKE L. REV. 829, 843 (2009).

²¹⁹ See RUTHVEN, *supra* note 4, at 353 (discussing Muslim migration to the West in recent decades).

²²⁰ See BOYD, *supra* note 168, at 46.

²²¹ Cf. RAMADAN, *supra* note 34, at 99 (noting that “[t]he laws of Western countries have been thought out and elaborated for a society from which Muslims were absent”).

²²² See BOYD, *supra* note 168, at 46.

who experience social prejudice may seek solidarity in an expression of group difference.²²³ In short, the fact that many Western Muslims propose Islamic tribunals may reflect an assertion of communal identity more than the centrality of law in the Islamic tradition.

Christians often do fail to perceive the ways in which their values continue to influence Western law, even considering the major secularizing impact of the Enlightenment.²²⁴ Even so, the argument that one should see proposals for Islamic tribunals as reflecting communal identity rather than religious conviction misses the point. Of course Muslims who advocate Islamic tribunals are asserting their identity. Religious conviction and communal identity often intertwine; identity is how religious conviction expresses itself in human communities. The key point is that many Muslims express their identity through a demand for law. Other similarly situated groups do not. Increasing numbers of Buddhists, Hindus, and Sikhs also have immigrated to Western countries in recent decades, yet no comparable movement for Buddhist, Hindu, or Sikh tribunals has emerged.²²⁵ So far, these communities have been content to rely on Western legal institutions even though those institutions have Christian antecedents, and presumably express some Christian values, that the communities do not share.

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This Essay represents a beginning. Much comparative work on Islamic and Christian jurisprudence remains to be done. For example, what impact, if any, has each religion had on the other's understanding of law? How have Islamic and Christian jurisprudence influenced the ways that Muslims and Christians conceive the state and its proper relationship to believers? What implications do Muslim and Christian theories have for contemporary concepts of religious freedom and other human rights? These questions will have to await another day. For now, I hope that I have shed some light on the complex and different ways that Muslims and Christians understand

²²³ Cf. RAMADAN, *supra* note 34, at 6–7 (alleging that Western Muslims live with social “Islamophobia” on a daily basis).

²²⁴ See Witte, *supra* note 105, at 28–30 (discussing Christianity's impact on current law).

²²⁵ *But cf.* John Witte, Jr., *Exploring the Frontiers of Law, Religion, and Family Life*, 58 EMORY L.J. 87, 93 (2008) (observing that “Muslims, Hindus, and other religious minorities are now pressing for equal treatment for their systems of religious arbitration of marriage and family disputes”).

law, and how these complexities and differences inform an important contemporary debate.

Faculty Biographies

Professor Ronald Colombo teaches Business Organizations, Securities Regulation, Contracts, and a seminar in corporate and securities law at Hofstra University's Maurice A. Deane School of Law. His scholarship has focused largely on issues of securities fraud, corporate law, and financial regulation, and has done so via the application of natural law theory, economic theory, moral philosophy, and neuroscience. More recently, his scholarship has addressed the constitutional rights of business entities. In 2015 he authored a book on the subject, entitled "The First Amendment and the Business Corporation," published by Oxford University Press. Professor Colombo has earned the Stessin Prize for Outstanding Scholarly Publication, and has addressed academic and professional associations around the country, including the Gruter Institute for Law and Behavioral Research, the Federal Bar Council, and a number of law schools and business schools. He has been quoted in the *New York Times*, *Wall Street Journal*, *Dallas Morning News*, *Newsday*, *Bloomberg*, and *The Daily Beast*, and his op-eds / letters have been published in *The Washington Times*, *The Christian Science Monitor*, *The Financial Times*, and *The Huffington Post*. He has also appeared on "Brad and Britt in the Morning" (FM Talk 101.1 WZTK Radio), "The John Williams Show" (830 AM WCCO [CBS] Radio), and Hofstra's Ed Ingles' Show "Newline" (88.7 FM WRHU). Professor Colombo serves on the editorial review board of the *Review of Business*, and as an arbitrator for the Financial Industry Regulatory Authority (FINRA). From 2013-2015, Professor Colombo served as the Associate Dean for Academic Affairs of Hofstra Law School.

Before joining the Hofstra faculty in 2006, Professor Colombo served in the Complex Global Litigation Group of Morgan Stanley & Co., Inc., as vice president and counsel. In this position, Professor Colombo supervised investigations, litigations, and regulatory inquiries affecting Morgan Stanley's investment banking franchise. Prior to that, Professor Colombo practiced as a litigation associate at the New York office of Sullivan & Cromwell, where, among other things, he represented corporate and banking clients in civil and criminal investigations conducted by the S.E.C., the U.S. Attorney's Office, and the Federal Reserve Bank; in matters before state courts, federal courts, and arbitration panels; and in appeals before the Third Circuit, the D.C. Circuit, and the U.S. Supreme Court. From 2000-2003, Professor Colombo also served on the Committee on Professional and Judicial Ethics of the Association of the Bar of the City of NY..

Professor Colombo received a B.S. from Cornell University, graduated, magna cum laude, from NYU School of Law. At NYU, Professor Colombo served as a note and development editor of the NYU Law Review, published a note on the clergy-penitent evidentiary privilege, interned at the Federal Defender Division of the Legal Aid Society in Brooklyn, NY, and was elected to the Order of the Coif. Immediately following graduation, Professor Colombo clerked for Judge Jerry E. Smith of the U.S. Court of Appeals for the Fifth Circuit.

Professor Colombo serves as Associate Dean for Distance Education where he oversees the Law School's [online degree programs](#). From 2013-2015, he served as Associate Dean for Academic Affairs of the Law School.

Brian Noble is Executive Pastor at Valley Assembly and Executive Director of Peacemaker Ministries. Pastor P. Brian Noble is an everyday guy who loves Jesus. He has a wife and four children; they currently reside in eastern Washington. Brian has a masters of arts in missional leadership from Northwest University. An ordained minister with the Assemblies of God for the past 18+ years (3 years as a youth pastor, 14 years as a senior pastor, and 1 year as an

executive pastor), he proclaims hope through the gospel message as the Holy Spirit empowers believers in their daily walk. He believes in the power of the word of God to transform lives. He has been a Certified Christian Conciliator since 2008, with 1000+ hours conflict coaching and mediation experience. His caseload has ranged from husband and wife cases, to family farm, to public schools, and even county government. Brian has taught peacemaking in local jails to internationally in Uganda. He is also trained secularly through Fulcrum Dispute Resolution Clinic, handling small claims court cases and parenting plan cases for the state of Idaho and Washington. At the beginning of 2010 Brian started a private dispute resolution business to meet the ADR needs of his community.

Dr. Mohammad Qatanani has been the Imam of the Islamic Center of Passaic County since 1996. Dr. Qatanani received a bachelor's degree in Islamic Legislation and Jurisprudence in 1985 from the University of Jordan as well a master's degree in Islamic Jurisprudence in 1989. He also received a Ph.D. in Islamic Jurisprudence from the University of Jordan in 1996. Dr. Qatanani has completed numerous researches and studies and published several books in the fields of Jurisprudence of Minorities, Outreach, Interfaith, Marriage, Family, Muslim Character and Quranic Tajweed. Dr. Qatanani is a member of the Fiqh Council of North America and a founding member of the Imams Council of Tri-State Area and WAFAA house (Women Against Family Abuse). He holds appointments as Professor of Islamic Studies at the Graduate Theological Seminary, Professor at the Islamic American University, and Professor of Arabic and Islamic Studies at Montclair State University where he has been recognized as one of the top teachers in America by "Who's Who Among America's Teachers." Dr. Qatanani has received many awards and recognitions, including the "Ambassador for Peace" award by The Inter-religious and International Federation for World Peace and a Special Commendation from the City of Paterson and County of Passaic, New Jersey. He is a member of several interfaith outreach and dialogue organizations and founder of "Muslim-Christian Dialogue of New Jersey." His general areas of interest include: Interfaith issues and Islamic jurisprudence. His specialized areas include: Jurisprudence of minorities; Marriage and family; Muslim-Christian dialogue; and Quranic Tajweed. Selected publications include:

- "The Effect of Differences Throughout Time on the Change of Rulings." Masters thesis submitted to University of Jordan
- "Justice and its implementation in Islamic Jurisprudence." Doctoral thesis submitted to University of Jordan

Rabbi Shlomo Weissmann is the Menahel (Director) of Beth Din of America. Rabbi Weissmann received rabbinical ordination from RIETS in 2001 and advanced rabbinical ordination (Yadin Yadin) in 2014. He is a graduate of Columbia Law School, where he was a Harlan Fiske Stone Scholar. Prior to his association with the Beth Din of America, Rabbi Weissmann worked as an attorney at several prominent law firms, including Debevoise and Plimpton LLP.