

The Effect of Zoning Ordinances on Churches; Examination of Jurors as to Religious Prejudice

Follow this and additional works at: <https://scholarship.law.stjohns.edu/tcl>



Part of the [Catholic Studies Commons](#), and the [Property Law and Real Estate Commons](#)

This Notes and Comments is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in The Catholic Lawyer by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

NOTES AND COMMENTS

The Effect of Zoning Ordinances on Churches

For some time, zoning ordinances have been found necessary in order to relieve the congestion in the nation's cities and suburbs, and to preserve the value and dignity of the private home. Through the medium of the zoning ordinance, business property has been segregated from residential property, and multiple family dwellings from single family dwellings. It is not difficult to agree that such things as stores, gasoline stations and movie theatres are undesirable in a neighborhood consisting of single family dwellings. But difficulty does arise when a municipality decides to restrict the building of churches in a residential neighborhood. This is not an easy problem to resolve, because the advent of a church may cause a certain amount of inconvenience to owners of residential property, by way of noise, increase in traffic congestion, and property devaluation. On the other hand, the church has been traditionally identified with the home, and not with business property. The purpose of this note is to examine the attitudes of the courts towards zoning ordinances as applied to churches and to determine to what degree the courts will allow the building of churches to be regulated. The topic is timely because many of the cases in this area have been decided in very recent years. The following items will be discussed in order: (1) the complete exclusion of churches from residential districts; (2) ordinances qualifiedly permitting churches in residential districts; (3) regulations with which a church must conform

before being admitted into a residential district; (4) what is considered to be within the meaning of the word "church." It is to be noted that while a church has been held to be a building set aside primarily for religious worship,¹ not every place of religious assembly has been considered by the courts to be a church.²

The Complete Exclusion of Churches from Residential Districts

According to the weight of authority, churches cannot be totally excluded by a zoning ordinance from a municipality or any of its residential districts.³ Consequently, ordinances which either by their very terms exclude all churches,⁴ or which

¹ Portage Township v. Full Salvation Union, 318 Mich. 693, —, 29 N.W.2d 297, 300 (1947); Sexton v. Bates, 17 N.J. Super. 246, —, 85 A.2d 833, 836 (L. 1951), *aff'd sub nom.* Sexton v. County Ritualarium, 21 N.J. Super. 329, 91 A.2d 162 (App. Div. 1952).

² Portage Township v. Full Salvation Union, *supra* note 1 (religious camp meetings); Sexton v. Bates, *supra* note 1 (a mikvah, a building used for ritualistic bathing); Coe v. City of Dallas, 266 S.W.2d 181 (Tex. Civ. App. 1953) (property of which 2,400 square feet would be used for healing or prayer rooms, and only 600 square feet for the church proper). Under the facts of the latter case the proposed use would be a nuisance.

³ 2 YOKLEY, ZONING LAW AND PRACTICE § 222 (2d ed. 1953); Crolley, *Regulation Of The Location Of Churches By Municipal Zoning Ordinances*, 23 BROOKLYN L. REV. 185, 186 (1957). See, *e.g.*, North Shore Unitarian Soc'y v. Village of Plandome, 200 Misc. 524, 109 N.Y.S.2d 803 (Sup. Ct. 1951); Young Israel Organization v. Dworkin, 105 Ohio App. 89, 133 N.E.2d 174 (1956).

⁴ North Shore Unitarian Soc'y v. Village of Plan-

by their operation would cause the exclusion of a church,⁵ have been held invalid per se or as applied to the particular church in controversy.

The courts have based their decisions in this regard on various constitutional grounds. One reason why they have declared such ordinances invalid is that they deprive a church of the use of its property without due process of law.⁶ To exclude

dome, *supra* note 3; *Ellsworth v. Gercke*, 62 Ariz. 198, 156 P.2d 242 (1945); *City of Sherman v. Simms*, 143 Tex. 115, 183 S.W.2d 415 (1944). Ordinances exclude churches when they list a number of uses that are permitted in the district without mentioning churches as among these permitted uses. See *Ellsworth v. Gercke, supra*.

⁵ *Board of Zoning Appeals v. Decatur, Indiana Co. of Jehovah's Witnesses*, 233 Ind. 83, 117 N.E.2d 115 (1954); *Congregation Temple Israel v. City of Creve Coeur*, 320 S.W.2d 451 (Mo. 1959); *State ex rel. Roman Catholic Bishop v. Hill*, 59 Nev. 231, 90 P.2d 217 (1939); *Young Israel Organization v. Dworkin*, 105 Ohio App. 89, 133 N.E.2d 174 (1956). In the *Creve Coeur* case there appears one illustration of how an ordinance could cause the exclusion of churches, although by its terms it does not exclude them. There, the ordinance provided that churches, as well as certain other structures, could not be erected in any district without the issuance of a special permit. The Board of Aldermen could grant the permit, provided that ten per cent or more of the owners in the immediate area did not protest against the building of the church. If such a percentage did protest, then three-fourths of the Board would have to approve the application for the permit. The court held that the state by its zoning act had granted no authority to cities to prohibit the building of either churches or schools in residence districts. *Congregation Temple Israel v. City of Creve Coeur, supra* at 456.

⁶ *Mooney v. Village of Orchard Lake*, 333 Mich. 389, 53 N.W.2d 308 (1952); *State ex rel. Roman Catholic Bishop v. Hill*, 59 Nev. 231, 90 P.2d 217 (1939); *Young Israel Organization v. Dworkin*, 105 Ohio App. 89, 133 N.E.2d 174 (1956); *City of Sherman v. Simms*, 143 Tex. 115, 183 S.W.2d 415 (1944). See *North Shore Unitarian Soc'y v. Village of Plandome*, 200 Misc. 524, 109 N.Y.S. 2d 803 (Sup. Ct. 1951).

churches from residential districts does not promote the health, safety, morals and general welfare of the community.⁷ If an ordinance does not promote these ends, it is arbitrary and unreasonable,⁸ and constitutes an unwarranted invasion of one's property rights.⁹ Sometimes, the court's reasoning is impliedly based on the equal protection clause of the fourteenth amendment, if the ordinance permits without objection other structures from which flow the same harms which are sought to be avoided by excluding churches.¹⁰ It has been held, for example, that it is arbitrary and discriminatory to allow municipal buildings, public schools, clubhouses, railroad stations, and post offices and at the same time not allow churches.¹¹ Another basis for objection is that such ordinances violate the mandates of the first amendment as applied to the states through the fourteenth amendment, in that they impose an undue burden on the free exercise of religious worship.¹² In *Board of Zoning Appeals v.*

⁷ *North Shore Unitarian Soc'y v. Village of Plandome*, 200 Misc. 524, 109 N.Y.S.2d 803 (Sup. Ct. 1951).

⁸ *City of Sherman v. Simms*, 143 Tex. 115, 183 S.W.2d 415 (1944).

⁹ See *Mooney v. Village of Orchard Lake*, 333 Mich. 389, 53 N.W.2d 308 (1952).

¹⁰ See *North Shore Unitarian Soc'y v. Village of Plandome*, 200 Misc. 524, 109 N.Y.S.2d 803 (Sup. Ct. 1951); *Ellsworth v. Gercke*, 62 Ariz. 198, 156 P.2d 242 (1945); Note, *Churches and Zoning*, 70 HARV. L. REV. 1428, 1434 (1957).

¹¹ *North Shore Unitarian Soc'y v. Village of Plandome, supra* note 10. *Accord, Ellsworth v. Gercke, supra* note 10, at ____, 156 P.2d at 244, where the zoning ordinance excluding churches was held discriminatory in that under the same ordinance "an owner of property within the district involved may maintain horses, cows and swine on his premises and store fertilizer. . . ."

¹² *Board of Zoning Appeals v. Decatur, Indiana Co. of Jehovah's Witnesses*, 233 Ind. 83, 117 N.E.2d 115 (1954); *City of Sherman v. Simms*,

Decatur Indiana Co. of Jehovah's Witnesses,¹³ the court said:

When, under the facts in this case, the welfare and safety of the people in the neighborhood is placed in the scales of justice on one side, and the right to freedom of worship and assembly is placed on the other, the balance weighs heavily on the side guaranteeing the right to peaceful assembly and to worship God according to the dictates of conscience, regardless of faith or creed.¹⁴

Important public policy considerations underlie the attitude with which the majority of courts view the exclusion of churches from residential districts. The church is the teacher of morals and the strong supporter of family life, so that its place is not in the business districts, but in the places where people live with their families.¹⁵ One court stated its position in this manner:

The place of the church is to be found in that part of the community where the people live. It is to be associated with the home, its influence is concerned with family life. It is an institution to which we look for leadership in furtherance of the brotherhood of man, in molding the moral progress of our children and sustaining and giving strength to purity of our family life. To hold that a church is detrimental to the welfare of the people is in direct contradiction of historical truths and evidences a failure to recognize basic fundamentals of a democratic society.¹⁶

143 Tex. 115, 183 S.W.2d 415 (1944). See *Congregation Temple Israel v. City of Creve Coeur*, 320 S.W.2d 451 (Mo. 1959).

¹³ 233 Ind. 83, 117 N.E.2d 115 (1954).

¹⁴ *Id.* at ____, 117 N.E.2d at 120.

¹⁵ See generally *Ellsworth v. Gercke*, 62 Ariz. 198, ____, 156 P.2d 242, 244 (1945); *State ex rel. Tampa, Florida Co. of Jehovah's Witnesses v. City of Tampa*, 48 So.2d 78, 79 (Fla. 1950); *State ex rel. Synod of Ohio v. Joseph*, 139 Ohio St. 229, ____, 39 N.E.2d 515, 524 (1942); *State ex rel. Anshe Chesed Congregation v. Bruggemeier*, 97 Ohio App. 67, ____, 115 N.E.2d 65, 69-70 (1953).

¹⁶ *State ex rel. Anshe Chesed Congregation v. Bruggemeier*, *supra* note 15.

On the other hand, the minority view as evidenced by a few decisions in California and Florida have upheld the validity of zoning ordinances which would completely exclude churches from residential districts.¹⁷ In *Corporation of Presiding Bishop v. City of Porterville*,¹⁸ an ordinance restricted the district in question to single family residences. To justify its position that the ordinance was valid, the court stated the following:

The provision in the ordinance for a single family residential area affords an opportunity and inducement for the acquisition and occupation of private homes where the owners thereof may live in comparative peace, comfort and quiet. Such a zoning regulation bears a substantial relation to the public health, safety, morals and general welfare because it tends to promote and perpetuate the American home and protect its civic and social values.¹⁹

The court went on to say that religious worship was not being unduly burdened, since the refusal to allow the church involved to build in the district did not pro-

¹⁷ *Minney v. City of Azusa*, 164 Cal. App.2d 12, 330 P.2d 255 (Dist. Ct. App. 1958), *appeal dismissed*, 359 U.S. 436 (1959); *Corporation of Presiding Bishop v. City of Porterville*, 90 Cal. App. 2d 656, 203 P.2d 823 (Dist. Ct. App.), *appeal dismissed*, 338 U.S. 805 (1949); *United Lutheran Church v. City of Miami Beach*, 82 So.2d 880 (Fla. 1955). In *State ex rel. Wenatchee Congregation of Jehovah's Witnesses v. City of Wenatchee*, 50 Wash.2d 378, 312 P.2d 195 (1957), the court by way of dictum voiced some scepticism about the majority rule which forbids the complete exclusion of churches from residential districts as follows: "The viewpoint of the weight of authority may be an extreme one. It ignores the basic premise of modern day zoning legislation which emphasizes the best and most reasonable land utilization possible, considering the best interests of the entire community." *Id.* at ____, 312 P.2d at 197.

¹⁸ 90 Cal. App.2d 656, 203 P.2d 823 (Dist. Ct. App.), *appeal dismissed*, 338 U.S. 805 (1949).

¹⁹ *Id.* at ____, 203 P.2d at 825.

hibit religious worship to anyone, and since there was no indication that the church could not be erected if not built in the restricted area.²⁰ In *Minney v. City of Azusa*,²¹ the court not only followed the *Porterville* case in upholding the validity of an ordinance which excluded churches from a residential district²² but also held that the church failed to prove that the ordinance, in allowing libraries, museums, public schools and municipal buildings at the same time it was excluding churches, was discriminatory on its face.²³

In *United Lutheran Church v. City of Miami Beach*,²⁴ the court, in upholding an ordinance which excluded churches in the residential district while permitting golf-courses, playgrounds and municipal buildings, expressed itself in this way:

It is commonly known that generally the activities of the present-day churches are wide and varied as, indeed, they should be. The use of church buildings and facilities is not confined to worship periods on Sunday and mid-weekly prayer meetings. They are

²⁰ *Id.* at ___, 203 P.2d at 825-26.

²¹ 164 Cal. App.2d 12, 330 P.2d 255 (Dist. Ct. App. 1958), appeal dismissed, 359 U.S. 436 (1959).

²² *Id.* at ___, 330 P.2d at 257.

²³ *Id.* at ___, 330 P.2d at 261-63. The plaintiff-church urged that there was also discrimination in the fact that five other churches had been granted variances permitting them to build in the residential district, and that one of them was actually allowed to locate on the same block on which the plaintiff now wished to build. The court answered this objection by saying that the denial of a variance to some when a variance has been granted to others does not of itself establish discrimination, since otherwise, once one variance was granted, they would always have to be granted, and the ordinance would then lose all its meaning. *Id.* at ___, 330 P.2d at 266-67. See *Milwaukee Co. of Jehovah's Witnesses v. Mullen*, 214 Ore. 281, ___, 330 P.2d 5, 13-15 (1958), cert. denied, 359 U.S. 436 (1959).

²⁴ 82 So.2d 880 (Fla. 1955).

often used as places of instruction and entertainment. We do not frown upon these activities; on the contrary we think they should be promoted and encouraged. But we do not agree that because of the merits of these activities it can be said that an infringement of the constitutional rights of the owner results if it is not allowed use of the property for such purposes in the midst of a section of the city which has been restricted, and which the [church] . . . in this instance knew had been restricted, primarily to homes to be occupied by individual families.²⁵

Ordinances Qualifiedly Permitting Churches in Residential Districts

Another type of zoning ordinance with which churches have come into conflict is the ordinance which qualifiedly permits churches in residential districts.²⁶ Such an ordinance will provide that before the church can be built on a chosen site in a residential district, the church authorities must be granted a permit by the Board of Zoning Appeals. The Board may in its discretion refuse to issue the permit, if the building of a church on the site chosen would be detrimental to the public welfare.²⁷ The church is not being totally excluded from the residential district, but it is only being excluded from a particular site within the residential district. Consequently, an application can be made for a permit to build on other sites within the same district.²⁸ The ordinance, however, must contain reasonably definite and uniform standards which the Board of Zoning

²⁵ *Id.* at 882.

²⁶ See Crolley, *Regulation Of The Location Of Churches By Municipal Zoning Ordinances*, 23 BROOKLYN L. REV. 185, 187-93 (1957).

²⁷ *Id.* at 188.

²⁸ The Board of Zoning Appeals cannot establish a policy of never issuing a permit to a church in a residential district, so that by repeated refusals it

Appeals can use to determine whether the granting of the permit to the church will be detrimental to the general welfare, lest the church be arbitrarily denied the permit.²⁹ When the decision of a Board of Appeals denying a permit is being attacked, the court must decide whether the reason for denying the permit bears a substantial relation to the public welfare. If it does not, the decision of the Board will be struck down as arbitrary and capricious, and the Board will be required by the court to issue the permit.³⁰

One of the principal reasons why a Board

accomplishes the same result as would an ordinance which completely excludes churches. See *Diocese of Rochester v. Planning Board*, 1 N.Y. 2d 508, 523, 136 N.E.2d 827, 835, 154 N.Y.S.2d 849, 860 (1956); *Congregation Committee, Jehovah's Witnesses v. City Council*, 287 S.W.2d 700, 704 (Tex. Civ. App. 1956). Each time a permit is denied it must be shown that to issue the permit would be detrimental to the public welfare. *Congregation Committee, Jehovah's Witnesses v. City Council*, *supra*.

²⁹ *Pentecostal Holiness Church v. Dunn*, 248 Ala. 314, 27 So.2d 561 (1946).

³⁰ There are two points of view as to who has the burden of proof when the decision of the Board denying the permit to the church is being attacked. *Milwaukee Co. of Jehovah's Witnesses v. Mullen*, 214 Ore. 281, —, 330 P.2d 5, 11 (1958), *cert. denied*, 359 U.S. 436 (1959), states that the burden of proof is on the plaintiff to show that the act of an administrative agency is arbitrary and that no different rule applies when the plaintiff happens to be a church. *State ex rel. Synod of Ohio v. Joseph*, 139 Ohio St. 229, —, 39 N.E.2d 515, 523 (1942), on the other hand, represents the point of view "that the usual presumption of the validity of the acts of public boards and officials does not apply to acts involving the forfeiture of an individual's rights or the depriving him of the free use of his property . . . [so] that the board of zoning appeals has the burden of showing reasons sufficient to support its authority in refusing a building permit." *Accord*, *State ex rel. Wenatchee Congregation of Jehovah's Witnesses v. City of Wenatchee*, 50 Wash.2d 378, —, 312 P.2d 195, 198 (1957).

of Zoning Appeals may refuse to issue a permit is that the advent of the church into the neighborhood will increase traffic hazards and traffic congestion. Many courts that have dealt with this matter have held that the traffic problems that might be caused by the advent of a new church into a particular area were an insufficient reason under the circumstances for denying the permit.³¹ It may be implied that the courts in these decisions would not deny that traffic problems could become so severe in a particular area that a Board of Appeals would be justified in excluding a church from that area. One New York decision, however, seems to set forth a policy against ever excluding a church because of traffic congestion.³² The following were among the factors which induced the courts to rule in favor of the churches in the above cases:³³ (1) the size of the congregation was small;³⁴ (2) the streets near the pro-

³¹ *State ex rel. Synod of Ohio v. Joseph*, 139 Ohio St. 229, —, 39 N.E.2d 515, 523-24 (1942); *Young Israel Organization v. Dworkin*, 105 Ohio App. 89, —, 133 N.E.2d 174, 181-82 (1956); *Congregation Committee, Jehovah's Witnesses v. City Council*, 287 S.W.2d 700 (Tex. Civ. App. 1956); *State ex rel. Wenatchee Congregation of Jehovah's Witnesses v. City of Wenatchee*, 50 Wash.2d 378, —, 312 P.2d 195, 198-99, (1957); *State ex rel. Howell v. Meador*, 109 W. Va. 368, 154 S.E. 876 (1930). *Cf. State ex rel. Anshe Chesed Congregation v. Bruggemeier*, 97 Ohio App. 67, —, 115 N.E.2d 65, 69 (1953).

³² *Diocese of Rochester v. Planning Board*, 1 N.Y. 2d 508, 136 N.E.2d 827, 154 N.Y.S.2d 849 (1956). The court, however, went on to say the following: "That is not to say that appropriate restrictions [building restrictions etc.] may never be imposed with respect to a church and school and accessory uses, nor is it to say that under no circumstances may they ever be excluded from designated areas." *Id.* at 526, 136 N.E.2d at 837, 154 N.Y.S.2d at 863.

³³ See note 31 *supra*.

³⁴ *Congregation Committee, Jehovah's Witnesses v. City Council*, 287 S.W.2d 700, 705 (Tex. Civ.

posed site were wide enough to handle the extra traffic brought on by the new church;³⁵ (3) at the time the church held its services traffic was at a low ebb;³⁶ (4) churches and other public buildings were already in the immediate vicinity;³⁷ (5) off-street parking was provided for.³⁸ In some decisions, however, it has been held that under the circumstances the traffic problems were sufficient to warrant the denial of a permit.³⁹ As was said in one of these cases:

[I]f traffic congestion is already a real or threatening problem near the site where the congregation desires to build, and the church would bring to that community enough additional vehicles to definitely establish congestion at that point, then the Council would be reasonably warranted, if not duty-bound, to deny a permit for its erection.⁴⁰

App. 1956); *State ex rel. Howell v. Meador*, 109 W. Va. 368, —, 154 S.E. 876, 877 (1930).

³⁵ *State ex rel. Synod of Ohio v. Joseph*, 139 Ohio St. 229, —, 39 N.E.2d 515, 524 (1942); *Young Israel Organization v. Dworkin*, 105 Ohio App. 89, —, 133 N.E.2d 174, 182 (1956); *State ex rel. Howell v. Meador*, 109 W. Va. 368, —, 154 S.E. 876, 877 (1930).

³⁶ *State ex rel. Synod of Ohio v. Joseph*, 139 Ohio St. 229, —, 39 N.E.2d 515, 524 (1942); *Congregation Committee, Jehovah's Witnesses v. City Council*, 287 S.W.2d 700, 705 (Tex. Civ. App. 1956).

³⁷ *State ex rel. Howell v. Meador*, 109 W. Va. 368, —, 154 S.E. 876, 877 (1930).

³⁸ *State ex rel. Synod of Ohio v. Joseph*, 139 Ohio St. 229, —, 39 N.E.2d 515 (1942); *Young Israel Organization v. Dworkin*, 105 Ohio App. 89, —, 133 N.E.2d 174, 181 (1956).

³⁹ *West Hartford Methodist Church v. Zoning Board of Appeals*, 143 Conn. 263, 121 A.2d 640 (1956); *Galfas v. Ailor*, 81 Ga. App. 13, 57 S.E. 2d 834 (1950); *Milwaukee Co. of Jehovah's Witnesses v. Mullen*, 214 Ore. 281, —, 330 P.2d 5, 18-20 (1958), *cert. denied*, 359 U.S. 436 (1959).

⁴⁰ *Milwaukee Co. of Jehovah's Witnesses v. Mullen*, *supra* note 39, at —, 330 P.2d at 19. In this case, the court rejected arguments that the church was being deprived of equal protection of the laws, due process, and religious freedom.

The following have usually been held insufficient grounds for denying a church a permit to build in residential districts: (1) the church because of its tax-exempt status would cause the community to lose potential tax revenue;⁴¹ (2) with the coming of the church adjoining property would depreciate in value;⁴² (3) noise and other inconveniences would result from the building of the church.⁴³ The basis for this stand is that if such reasons were sustained as sufficient in one case, they would have to be sustained in every case where a church is seeking a permit to build in a residential district, so that, in effect, churches would be excluded from these districts.⁴⁴ In *West Hartford Methodist Church v. Zoning*

⁴¹ *Diocese of Rochester v. Planning Board*, 1 N.Y. 2d 508, 524-25, 136 N.E.2d 827, 836, 154 N.Y.S. 2d 849, 861 (1956); *State ex rel. Anshe Chesed Congregation v. Bruggemeier*, 97 Ohio App. 67, —, 115 N.E.2d 65, 69 (1953).

⁴² *Diocese of Rochester v. Planning Board*, *supra* note 41, at 524, 136 N.E.2d at 835, 154 N.Y.S.2d at 861 (1956); *Garden City Jewish Center v. Incorporated Village*, 2 Misc. 2d 1009, 1014, 155 N.Y.S.2d 523, 528 (Sup. Ct. 1956); *Congregation Committee, Jehovah's Witnesses v. City Council*, 287 S.W.2d 700, 705 (Tex. Civ. App. 1956).

⁴³ *Diocese of Rochester v. Planning Board*, *supra* note 41, at 525, 136 N.E.2d at 836, 154 N.Y.S.2d at 861 (1956); *Garden City Jewish Center v. Incorporated Village*, *supra* note 42; *State ex rel. Roman Catholic Bishop v. Hill*, 59 Nev. 231, —, 90 P.2d 217, 222 (1939). In *State ex rel. Roman Catholic Bishop v. Hill*, *supra*, it was argued that the funerals held at the church would have a depressing effect on the neighbors, and the court said in reply: "[I]t is a matter of common knowledge that funeral services are frequently conducted in the finest as well as the less pretentious private homes in the Residential District of the City of Reno. Death is a part of our existence, and is as natural as life."

⁴⁴ *Diocese of Rochester v. Planning Board*, *supra* note 41, at 524, 136 N.E.2d at 835, 154 N.Y.S.2d at 861 (1956); *Congregation Committee, Jehovah's Witnesses v. City Council*, *supra* note 42, at 704-05.

Board of Appeals,⁴⁵ however, some of the above factors were held to have a substantial relation to the public welfare:

Suffice it to say that these homes will lose much of the peace and quiet now enjoyed by their owners. Values will fall; traffic, with its attendant danger and noise, will increase greatly on Crestwood Road and other side streets; and the privacy of some homes will disappear with the advent of a large parking lot at their very boundary lines.⁴⁶

In *State ex rel. Anshe Chesed Congregation v. Bruggemeier*,⁴⁷ the basic reason for the Board of Appeal's refusal to grant a permit to the church was that most of the members of the congregation would be non-residents and would exceed the population of the village by several times.⁴⁸ The court rejected this reason on the grounds that a village contiguous to a metropolitan area cannot refuse to contribute to the general welfare of the community upon which it depends, that membership in a church is not confined within city boundaries, and that the great majority of the people in the village themselves attended services outside the town.⁴⁹

In summary, it can be said that many courts have not been impressed by the arguments advanced for denying a permit to a church. Of these, however, that of traffic congestion has been more acceptable to the courts, whereas the others have for the most part been absolutely dismissed as insufficient.

⁴⁵ 143 Conn. 263, 121 A.2d 640 (1956).

⁴⁶ *Id.* at ___, 121 A.2d at 643. *Cf.* Milwaukee Co. of Jehovah's Witnesses v. Mullen, 214 Ore. 281, ___, 330 P.2d 5, 18 (1958), *cert. denied*, 359 U.S. 436 (1959).

⁴⁷ 97 Ohio App. 67, 115 N.E.2d 65 (1953).

⁴⁸ *Id.* at ___, 115 N.E.2d at 68-69.

⁴⁹ *Id.* at ___, 115 N.E.2d at 69.

Regulations With Which a Church Must Conform Before Being Admitted into a Residential District

It is often held that the building of a church is subject to such reasonable regulations as will promote the welfare of the community.⁵⁰ Zoning ordinances, therefore, will often contain certain requirements to which a church must conform before it is granted a permit to build in a residential district. Such provisions may require that a church be set back from the street a certain number of feet, or that it provide a certain amount of off-street parking facilities or that it be a certain distance from other buildings. The purpose of such regulations is to prevent traffic congestion and protect the peace, dignity and order of a community. Whether these regulations will be sustained depends upon whether they are reasonably related to the public welfare, and can be reasonably complied with by the church.

In *Portage Township v. Full Salvation Union*,⁵¹ a religious group was enjoined from the use of its premises in violation of a zoning ordinance which required residential dwellings to have running water, adequate sewage facilities, and a substantial foundation of mortar and stone. The group in its regular camp meetings had contravened the ordinance by erecting many tents and temporary buildings. In *Appeal of Jehovah's Witnesses*,⁵² a provision requiring a church to be situated one-fourth of a mile

⁵⁰ *E.g.*, Board of Zoning Appeals v. Decatur, Indiana Co. of Jehovah's Witnesses, 233 Ind. 83, ___, 117 N.E.2d 115, 118 (1954); Appeal of Jehovah's Witnesses, 183 Pa. Super. 219, ___, 130 A.2d 240, 243-44, *appeal dismissed*, 355 U.S. 40 (1957).

⁵¹ 318 Mich. 693, 29 N.W.2d 297 (1947).

⁵² 183 Pa. Super. 219, 130 A.2d 240, *appeal dismissed*, 355 U.S. 40 (1957).

away from the next place of public assembly was held to have a reasonable relation to the public welfare, on the ground that a number of public buildings in a residential district would create traffic hazards in a residential district that is not equipped to handle large concentrations of people.⁵³ The reasonableness of the provision was further sustained by the fact that there were other sites in the district which were available to the church.⁵⁴ In *State ex rel. Presbyterian Church v. Edgcomb*,⁵⁵ on the other hand, no property owners in a certain district could erect any building which would cover more than twenty-five per cent of the area of a lot. The church's request that it be allowed to build on thirty-seven and one-half per cent of the area of its lot was refused by a city building official. The court held that the provision was so restrictive of property rights as to be invalid.⁵⁶

As has been said, some ordinances require a church to provide off-street parking facilities on its premises sufficient for the needs of its congregation. The purpose of such an ordinance is to provide relief against traffic congestion. In a built-up residential district this provision may be difficult to comply with because space may be lacking. Possibly because of this, the decisions that have dealt with this problem have

been favorable to the church. Usually it has been found that under the facts the church substantially complied with the parking requirement.⁵⁷ In *Board of Zoning Appeals v. Decatur, Indiana Co. of Jehovah's Witnesses*,⁵⁸ however, a provision requiring one parking space for each six seats in certain types of buildings was held unconstitutional as applied to the church under the facts of the case.⁵⁹ This was a situation where the church could not comply with the technical requirements of the ordinance. In reaching its decision, the court reasoned in this manner:

It is no doubt true that automobile traffic often chokes the streets and endangers both the general and the travelling public. However, it is rarely, if ever, that people entering or leaving a church cause or contribute to traffic accidents. It would seem reasonable to assume that if regulation is necessary to the interests of the safety, convenience and welfare of the general public, that should be regulated which has a direct effect upon such general welfare. This can be, and is, done generally by traffic police, signs and other reasonable regulations imposed alike upon all persons using the streets in the vicinity of churches, without undue interference with the right of worship and free assembly.⁶⁰

The dissenting members of the court in this

⁵³ *Id.* at ___, 130 A.2d at 243.

⁵⁴ *Id.* at ___, 130 A.2d at 244-45.

⁵⁵ 108 Neb. 859, 189 N.W. 617 (1922).

⁵⁶ *Id.* at ___, 189 N.W. at 619. Compare *Schwartz v. Congregation Powolei Zeduck*, 8 Ill. App.2d 438, 131 N.E.2d 785 (1956) (ordinance permitting church only on a lot adjoining an apartment house); *O'Brien v. City of Chicago*, 347 Ill. App. 45, 105 N.E.2d 917 (1952) (provision allowing the building of churches only on lots entirely surrounded by streets or alleys); *Board of Zoning Appeals v. Decatur, Indiana Co. of Jehovah's Witnesses*, 233 Ind. 83, ___, 117 N.E.2d 115, 118 (1954) (set-back provision held reasonable).

⁵⁷ *Pelham Jewish Center v. Marsh*, 10 App. Div.2d 645, 197 N.Y.S.2d 258 (2d Dep't 1960) (memorandum decision); *Garden City Jewish Center v. Incorporated Village*, 2 Misc.2d 1009, 1013, 155 N.Y.S.2d 523, 527 (Sup. Ct. 1956); *Redwood City Co. of Jehovah's Witnesses v. City of Malo*, 167 Cal. App. 686, 335 P.2d 195 (Dist. Ct. App. 1959); *State ex rel. Tampa, Florida Co. of Jehovah's Witnesses v. City of Tampa*, 48 So.2d 78 (Fla. 1950); *Congregation Committee, Jehovah's Witnesses v. City Council*, 287 S.W.2d 700, 704 (Tex. Civ. App. 1956).

⁵⁸ 233 Ind. 83, 117 N.E.2d 115 (1954).

⁵⁹ *Id.* at ___, 117 N.E.2d at 121.

⁶⁰ *Id.* at ___, 117 N.E.2d at 120.

case said that it was not unconstitutional to require a church to provide a reasonable amount of off-street parking facilities.⁶¹

What Is Considered to Be Within the Meaning of the Word "Church"

The problem to be considered here concerns what accessory uses of church property are included within the word "church." In the cases that have dealt with this problem, the decisions have supported the proposition that a "church" consists of more than a building for public worship. This proposition is directly supported by *Community Synagogue v. Bates*.⁶² There, a permit had been refused by the Board of Appeals to a synagogue on the ground that it would be used for other than strictly religious purposes, since there were contemplated such accessory uses as a Sunday school, a men's club, a women's social group, and youth activities. The court rejected this contention, stating as follows:

Strictly religious uses and activities are more than prayer and sacrifice and all churches recognize that the area of their responsibility is broader than leading the congregation in prayer. The Church has always developed social groups for adults and youth where the fellowship of the congregation is strengthened with the result that the parent church

is strengthened. . . . To limit a church to being merely a house of prayer and sacrifice would, in a large degree, be depriving the church of the opportunity of enlarging, perpetuating, and strengthening itself and the congregation.⁶³

This problem was indirectly touched upon in *Diocese of Central New York v. Schwarzer*,⁶⁴ where the plaintiff was proposing to use a particular site as a place in which a series of programs of religious study and contemplation would be conducted. The court held that since the zoning ordinance in question permitted churches, parish houses, convents and parochial schools in the district, a combination of these uses on the one site would be permissible.⁶⁵

The parochial school, likewise, is considered by some as essentially connected with a church. Frequently the problem in this area arises when a zoning ordinance will allow public schools in a residential district, but not private schools. When a parochial school is involved, a number of courts have taken the position that such an ordinance is unreasonable and discriminatory.⁶⁶ If the erection of a public school in a residential district does not harm the public welfare, neither does the erection of a private school; in fact both contribute greatly to the public welfare.⁶⁷ Moreover,

⁶¹ *Id.* at ___, 117 N.E.2d at 121, 124 (dissenting opinion).

⁶² 1 N.Y.2d 445, 136 N.E.2d 488, 154 N.Y.S.2d 15 (1956).

⁶³ *Id.* at 453, 136 N.E.2d at 493, 154 N.Y.S.2d at 21-22. *Accord*, *Diocese of Rochester v. Planning Board*, 1 N.Y.2d 508, 525-26, 136 N.E.2d 827, 836-37, 154 N.Y.S.2d 849, 862-63 (1956). *Cf.* *Board of Zoning Appeals v. Wheaton*, 118 Ind. App. 38, 76 N.E.2d 597 (1948) (convent held permissible accessory use); *Mahrt v. First Church of Christ, Scientist*, 142 N.E.2d 567, 577-78 (Ohio C.P. 1955), *aff'd*, 142 N.E.2d 678 (Ohio Ct. App. 1956) (parking lot held permissible accessory use).

⁶⁴ 23 Misc.2d 515, 199 N.Y.S.2d 939 (Sup. Ct. 1960).

⁶⁵ *Ibid. Accord*, *Overbrook Farms Club v. Zoning Board of Adjustment*, 351 Pa. 77, 40 A.2d 423 (1945); *Appeal of Floersheim*, 348 Pa. 98, 34 A.2d 62 (1943).

⁶⁶ *Roman Catholic Welfare Corp. v. City of Piedmont*, 45 Cal.2d 325, 289 P.2d 438 (1955); *Catholic Bishop v. Kingery*, 371 Ill. 257, 20 N.E.2d 583 (1939). See *Hoelzer v. Village of New Hyde Park*, 4 Misc.2d 96, 98, 150 N.Y.S.2d 765, 767 (Sup. Ct. 1956).

⁶⁷ *Catholic Bishop v. Kingery*, 371 Ill. 257, 20 N.E.2d 583 (1939). The court said: "We fail to

in *Roman Catholic Welfare Corp. v. City of Piedmont*,⁶⁸ the court set forth the proposition that "parents have the right to send their children to private schools, rather than public ones, which are located in their immediate locality or general neighborhood."⁶⁹ *Tustin Heights Ass'n v. Board of Supervisors*,⁷⁰ on the other hand, stands to some degree opposed to the position taken by the above courts in this matter. There, a conditional permit had to be obtained before any school would be allowed in the district. Since on its face this requirement applied to all schools, both public and private, the ordinance was not apparently discriminatory. It was argued on behalf of the school, however, that by state law no public school could in fact be restricted in any district, so that the ordinance was in practice discriminatory.⁷¹ The court rejected the contention, saying:

Respondent church argues that since the ordinance is ineffective as to public schools it is an unconstitutional denial of equal protection of the law if applied to private schools. The argument is untenable in that it assumes that due process and equal protection of the law are synonymous with equal treatment of private citizens and the

perceive to what degree a Catholic school of this type will be more detrimental or dangerous to the public health than a public school. It is not pointed out to us just how the pupils in attendance at the parochial school are any more likely to jeopardize the public safety than the public school pupils. Nor can we arbitrarily conclude that the prospective students of the new school will seriously undermine the general welfare. As a matter of fact such a school, conducted in accordance with the educational requirements established by State educational authorities, is promotive of the general welfare." *Id.* at ___, 20 N.E.2d at 584.

⁶⁸ 45 Cal.2d 325, 289 P.2d 438 (1955).

⁶⁹ *Id.* at ___, 289 P.2d at 441.

⁷⁰ 170 Cal. App. 619, 339 P.2d 914 (Dist. Ct. App. 1959).

⁷¹ *Id.* at ___, 339 P.2d at 922.

sovereign. Respondent's argument is that since the state may not be regulated in this particular field of activity, neither can the same activity of a private individual or corporation be so regulated. If this theory of equal protection were valid, it would necessarily apply to all activities of the state, not just public schools.⁷²

Conclusion

As regards zoning regulation applied to churches, two attitudes are displayed. Some feel that the strict application of zoning to churches will force them into areas away from the private home, resulting in a weakening of religion's force in society,⁷³ while others, stressing the importance of comprehensive zoning, take the position that churches should not easily be exempted from its reach.⁷⁴ Most courts have taken the first point of view.

It is submitted that if the building of churches in residential neighborhoods is to be restricted or regulated in any way, it should at least be made certain that people in all neighborhoods will be afforded the opportunity of being reasonably close to a church of their own choice. If this principle is not adhered to, it would seem that the

⁷² *Id.* at ___, 339 P.2d at 922-23. *Contra*, *Brandeis School v. Village of Lawrence*, 8 Misc.2d 550, 560-61, 184 N.Y.S.2d 687, 697 (Sup. Ct. 1959). In *Andrews v. Board of Adjustment*, 30 N.J. 245, ___, 152 A.2d 580, 584 (1959), the court by way of dictum said that there might be justification for not putting public and private schools in a single category for zoning purposes. For an article against differentiation between public and private schools in zoning ordinances, see Seitz, *Constitutional and General Welfare Considerations in Efforts to Zone Out Private Schools*, 11 MIAMI L. Q. 68 (1956).

⁷³ See Note, *Zoning Laws And The Church*, 27 ST. JOHN'S L. REV. 93, 103 (1952).

⁷⁴ See *Milwaukee Co. of Jehovah's Witnesses v. Mullen*, 214 Ore. 281, ___, 330 P.2d 5, 21, 27-28, cert. denied, 359 U.S. 436 (1959).

free exercise of religion is being violated, and the work of the church in society is being discouraged. Finally, it should not be forgotten that churches, if gracefully built, add to the beauty of the finest residential neighborhood. As one court so well said:

Over the generations we have seen American churches in the quiet, dignified surroundings of residential districts readily accessible to the members of the congregation. . . . Churches in fitting surroundings are an inspiration to their members and to the general public. If located in the residential district — space, perspective, greenswards and trees aid in setting off the beauty of the building and thereby increasing its inspiration. To require that churches be banished to the business district, crowded alongside filling stations and grocery stores, is clearly not to be justified on the score of promoting the general welfare.⁷⁵

Examination of Jurors as to Religious Prejudice

The right to trial by jury is fundamental. Yet this most cherished of American constitutional rights would be an empty and unavailing one were it not implemented by certain procedural safeguards designed to assure the selection of an impartial jury. Prominent among these is the right of a party to an action — criminal or civil — to examine persons called to serve as jurors so that all who are biased, prejudiced or otherwise unqualified to serve may be excluded. In the conduct of this examination of prospective jurors, inquiry into their religious beliefs or affiliations may well be appropriate in a particular case. It is the purpose of the present discussion to attempt to answer the following general

questions regarding interrogation into the religious beliefs and affiliations of jurors and the effect of exclusion from jury service on account of such beliefs or affiliations. When are questions pertaining to the religious beliefs or the denomination of a prospective juror permissible? What types of questions may be asked of a prospective juror to ascertain whether he will, by reason of his religion, be unduly prejudiced for or against one of the parties to the suit? What is the effect of a systematic exclusion from the jury of members of a particular religious grouping?

The right to challenge prospective jurors on *voir dire* examination has always been regarded as an integral part of the right to trial by jury.¹ In fact, so important is the right to a fair and impartial jury that provision is made not only for the challenge of jurors for cause but also for the added safeguard of the peremptory challenge, *i.e.*, an objection to a juror for which no reason need be assigned, but upon which the court must nevertheless exclude the juror.² Statutes in the various states specify the grounds for which challenge for cause may be made and usually specify the number of peremptory challenges to which the parties are limited.³

Although the grounds for challenge for cause and the number of peremptory challenges to which a party is entitled are statutorily defined, the extent to which counsel

⁷⁵ *State ex rel. Synod of Ohio v. Joseph*, 139 Ohio St. 229, —, 39 N.E.2d 515, 524 (1942).

¹ See *Menefee v. State*, 30 Okla. Crim. 400, 236 Pac. 439 (1925).

² *Swift & Co. v. Platte*, 68 Kan. 1, 72 Pac. 271, *rev'd on other grounds*, 69 Kan. 1, 74 Pac. 635 (1903).

³ See, *e.g.*, MD. ANN. CODE art. 51, §§1, 2, 5, 16, 24 (1957); N. Y. CIV. PRAC. ACT §§450-55; OKLA. STAT. ANN. tit. 12, §§572-74 (1960); OKLA. STAT. ANN. tit. 22, §§654-60 (1937).

may go in examining prospective jurors on *voir dire* is left largely for judicial determination. It is the duty of the trial judge to supervise the selection of an impartial jury.⁴ The trial court has a great deal of discretion concerning what may be asked of prospective jurors on *voir dire* examination.⁵ Appellate courts are generally reluctant to overturn discretionary decisions of the trial judge in reference to the examination of jurors.⁶ Only where the trial court's decision on a question relating to the exclusion of jurors is clearly erroneous will an appellate court consider reversing,⁷ and even then it will reverse only if the error was one which denied the appellant substantial rights.⁸

When Inquiry Proper

The courts have traditionally allowed attorneys a great deal of latitude in their examination of the jury panel.⁹ Although counsel are permitted a wide range within which to conduct their examination of

prospective jurors, inquiry into the religious beliefs or affiliations of a prospective juror may be made only where pertinent to the issues at hand¹⁰ or, according to some courts, when it will enable a party to make more effective use of his right to a peremptory challenge.¹¹

When there are no issues of a religious nature involved or no special circumstances raising the possibility of religious prejudice, some courts hold that counsel may not examine prospective jurors as to their religious beliefs.¹² Thus in *Rose v. Sheedy*,¹³ an action to recover for personal injuries resulting from an alleged assault, the Supreme Court of Missouri held that it was proper for the trial court to prohibit questions as to which church a prospective juror belonged because the attorney asking the question did not show why the question was pertinent. The court indicated that although a prospective juror may be asked any pertinent question tending to show bias or prejudice, questions concerning religious or political affiliations are not always pertinent. It was pointed out that

⁴ *Gregg v. State*, 69 Okla. Crim. 103, 121, 101 P.2d 289, 296 (1940).

⁵ *United States v. Barra*, 149 F.2d 489, 491 (2d Cir. 1945); *United States v. Daily*, 139 F.2d 7, 9 (7th Cir. 1943); *Adams v. State*, 200 Md. 133, 88 A.2d 556 (1952); *Rose v. Sheedy*, 345 Mo. 610, 134 S.W.2d 18 (1939) (per curiam); *Van Skike v. Potter*, 53 Neb. 28, 73 N.W. 295 (1897); *State v. Huff*, 14 N.J. 240, 102 A.2d 8 (1954).

⁶ See *Searle v. Roman Catholic Bishop*, 203 Mass. 493, 89 N.E. 809 (1909).

⁷ *Rose v. Sheedy*, 345 Mo. 610, 134 S.W.2d 18 (1939) (per curiam).

⁸ *Amandes, Jury Challenge in Criminal Cases: When, How, and Group Membership Bias as a Basis Therefor*, 3 WAYNE L. REV. 106, 112-13 (1957).

⁹ *State v. Miller*, 60 Idaho 79, 88 P.2d 526 (1939); *Swift & Co. v. Platte*, 68 Kan. 1, 72 Pac. 271, *rev'd on other grounds*, 69 Kan. 1, 74 Pac. 635 (1903); see *United States v. Daily*, 139 F.2d 7, 9 (7th Cir. 1943).

¹⁰ See, e.g., *Rose v. Sheedy*, *supra* note 7; *Van Skike v. Potter*, 53 Neb. 28, 73 N.W. 295 (1897). "It is the duty of the trial court to see that upon such inquiry [the *voir dire* examination of prospective jurors], no collateral or unrelated issue is brought into the case. . . . The court very properly confined inquiry to the issues to be tried by the jury. . . ." *United States v. Daily*, *supra* note 9.

¹¹ *State v. Miller*, 60 Idaho 79, 88 P.2d 526 (1939); *Wasy v. State*, 234 Ind. 52, 123 N.E.2d 462 (1955); *Young v. State*, 41 Okla. Crim. 226, 271 Pac. 426 (1928).

¹² *Yarborough v. United States*, 230 F.2d 56, 63 (4th Cir.), *cert. denied*, 351 U.S. 969 (1956); *People v. Chambers*, 22 Cal. App. 2d 687, 708-09, 72 P.2d 746, 756 (Dist. Ct. App. 1937); *Rose v. Sheedy*, *supra* note 7; *State v. Huff*, 14 N.J. 240, 102 A.2d 8 (1954).

¹³ 345 Mo. 610, 134 S.W.2d 18 (1939) (per curiam).

whereas some questions are always pertinent, for example, those seeking to establish a relationship of the jurors to the parties to the suit or an interest of the jurors in the outcome of the litigation, questions dealing with the religion of prospective jurors become pertinent only "under peculiar circumstances."¹⁴

Some courts allow interrogation into the religious background of a prospective juror even when no religious issues or special circumstances are present. These courts proceed on the assumption that such inquiry should be allowed to enable a more enlightened exercise of the right to peremptory challenge.¹⁵ This was the view of the court in *Young v. State*.¹⁶ In that case, the trial court had permitted counsel for the state in a prosecution for manslaughter to ask the members of the jury panel whether they were or had been members of any church. On appeal, the defendant contended that it was improper to question a prospective juror concerning his membership in a church or other organization. The Criminal Court of Appeals of Oklahoma held that such questioning was proper provided it was confined within reasonable bounds and limited by a fair discretion of the court. The court's holding was based on the ground that such questioning might give counsel information which would en-

able him to make a more intelligent use of his peremptory challenges. Maryland courts, however, do not permit counsel to "fish" for information from prospective jurors in order to determine how best to exercise peremptory challenges.¹⁷

When the factual situation has religious doctrinal overtones¹⁸ or when special circumstances warrant inquiry into the religion of a prospective juror,¹⁹ the courts permit counsel to make such an inquiry. The defendant in *Miles v. United States*²⁰ was convicted of the crime of bigamy. He appealed to the Supreme Court of the United States where he contended that it was error for the trial court to have permitted interrogation into the religious beliefs of a proposed juror. The Court held that the questions regarding the religion of the prospective jurors were proper and that certain of the jurors were properly found disqualified because they believed that the practice of polygamy was obedience to the will of God. Said the Court:

It needs no argument to show that a jury composed of men entertaining such a belief could not have been free from bias or prejudice on the trial for bigamy, of a per-

¹⁴ *Ibid. Accord*, *Van Skike v. Potter*, 53 Neb. 28, 73 N.W. 295 (1897), which held that the trial court did not err in precluding counsel for plaintiff in a suit for malpractice of medicine from asking whether the prospective jurors belonged to any religious or secret societies. Since no such society was even remotely connected with the case, the court indicated that no useful purpose could be served by allowing such a line of questioning.

¹⁵ See cases cited note 11 *supra*.

¹⁶ 41 Okla. Crim. 226, 271 Pac. 426 (1928).

¹⁷ *Handy v. State*, 101 Md. 39, 60 Atl. 452 (1905); *Emery v. F. P. Asher, Jr. & Sons*, 196 Md. 1, 75 A.2d 333 (1950). The court in the *Handy* case cites several English and American decisions indicative of the view that a party should not be permitted to engage in speculative questioning of prospective jurors.

¹⁸ See *Miles v. United States*, 103 U.S. 304 (1880); *Reynolds v. United States*, 1 Utah 226 (1875), *aff'd*, 98 U.S. 145 (1878). Both the *Reynolds* and *Miles* cases involved prosecutions for polygamy. In both cases questions regarding the religious beliefs of prospective jurors were permitted.

¹⁹ See *People v. Christie*, 2 Abb. Pr. 256 (N.Y. Sup. Ct. 1855); *Potter v. State*, 86 Tex. Crim. 380, 216 S.W. 886 (1919).

²⁰ 103 U.S. 304 (1880).

son who entertained the same belief, and whose offence consisted in the act of living in polygamy.²¹

The Court regarded it as entirely immaterial that the bias was founded on the religious beliefs of the jurors and indicated that it would not be an invasion of the constitutional rights of a juror called to try a party charged with bigamy to ask him whether he himself was living in polygamy or whether he believed it to be divinely ordained.

However, the mere fact that the issue has reference to the tenets of a particular religion does not give counsel the right to inquire into the religion of the prospective jurors.²² In *State v. Weiss*²³ it was held improper in a prosecution for abortion to allow questions as to whether prospective jurors were members of any church whose tenets had reference to birth control. *Adams v. State*²⁴ also involved a prosecution for abortion. In that case the trial court had denied a motion by the defense counsel that the court question each prospective juror concerning his church affiliation. Instead the court asked whether the prospective juror would be unable to give the defendants a fair and impartial trial for any religious or political reason. On appeal, the Court of Appeals of Maryland, in affirming the judgment of conviction, held that the trial court did not err in denying

²¹ *Id.* at 310.

²² *Adams v. State*, 200 Md. 133, 88 A.2d 556 (1952); *State v. Weiss*, 130 N.J.L. 149, 31 A.2d 848 (Sup. Ct. 1943), *aff'd*, 131 N.J.L. 228, 35 A.2d 895 (Ct. Err. & App. 1944) (per curiam). *But see* *Wasy v. State*, 234 Ind. 52, 123 N.E.2d 462 (1955).

²³ 130 N.J.L. 149, 31 A.2d 848 (Sup. Ct. 1943), *aff'd*, 131 N.J.L. 228, 35 A.2d 895 (Ct. Err. & App. 1944) (per curiam).

²⁴ 200 Md. 133, 88 A.2d 556 (1952).

the defense counsel's motion. The court stated:

Religious or ethical beliefs as to the practice of abortion may range from the view that abortion, or even contraception, in any form or under any circumstances is morally wrong, to a view that the prevention of an unwanted child may be morally right, under circumstances not directly related to the mother's physical survival. But unless such beliefs would prevent an impartial consideration of the evidence and a proper application of the existing law, they would not disqualify.²⁵

Both polygamy and abortion are practices fraught with religious implications. Both have given rise to varied but staunchly adhered to religious doctrines. Yet the Court in the *Miles* case permitted questioning of the prospective jurors concerning their religion, whereas in the *Weiss* and *Adams* cases such questioning was precluded. However, the cases may perhaps be more compatible if viewed in the following light. The proper object of all examination into the religious backgrounds of prospective jurors is the elimination of those whose verdicts will be affected by reason of their religion. In *Miles*, sympathetic treatment of the defendant was a very likely possibility since a juror of the Mormon faith at the time might not only believe in polygamy, but might also be engaged in the practice himself. In the *Adams* case, however, any attitudes of the jurors regarding abortion were in all probability confined to intellectual conviction.

In *Potter v. State*²⁶ the issues were devoid of religious doctrinal overtones, but the special circumstances were shown to support inquiry into the religious backgrounds of prospective jurors. The case involved an

²⁵ *Id.* at 141, 88 A.2d at 559-60.

²⁶ 86 Tex. Crim. 380, 216 S.W. 886 (1919).

indictment for criminal libel. The libel was contained in a newspaper article in which the defendant severely criticized the Jewish race. The trial court ruled out a question as to whether Jewish persons or persons affiliated with Jews would be prejudiced against defendant if it developed on the trial that he had printed an article defaming Jews. The Court of Criminal Appeals of Texas, in reversing, held that the question should have been permitted. Apparently the court felt that the jurors questioned might be unduly prejudiced against the defendant if it developed that he was anti-semitic.

Scope of the Inquiry

Although it is generally conceded that a prospective juror may be examined regarding his religious beliefs,²⁷ the range of permissible inquiry varies. The scope of the examination of prospective jurors is regulated by the sound discretion of the trial court and the bounds of reason.²⁸

Questions designed to ascertain whether certain religious beliefs or affiliations of a member of the jury panel will affect his verdict are usually held permissible.²⁹ In

²⁷ *Miles v. United States*, 103 U.S. 304 (1880); *Wasy v. State*, 234 Ind. 52, 123 N.E.2d 462 (1955); *People v. Christie*, 2 Abb. Pr. 256 (N.Y. Sup. Ct. 1855); *Young v. State*, 41 Okla. Crim. 226, 271 Pac. 426 (1928); *Potter v. State*, 86 Tex. Crim. 380, 216 S.W. 886 (1919); *Reynolds v. United States*, 1 Utah 226 (1875), *aff'd*, 98 U.S. 145 (1878).

²⁸ See cases cited note 5 *supra*.

²⁹ *Miles v. United States*, 103 U.S. 304 (1880); *Smith v. Smith*, 7 Cal. App. 2d 271, 46 P.2d 232 (Dist. Ct. App. 1935); *Reynolds v. United States*, 1 Utah 226 (1875), *aff'd*, 98 U.S. 145 (1878). A prospective juror may be questioned in regard to membership in any "political, religious, social, industrial, fraternal, law-enforcement, or other organization whose beliefs or teaching would prejudice him for or against either party to . . .

the *Miles* case, the state court, speaking of the potential impact of a religious belief on a juror's verdict, said:

A religious belief takes strong hold upon the individual. If a person believes it is his religious duty or privilege to do an act, he would not, as a consequence, look upon such act as criminal. . . . [H]e would naturally . . . be averse to inflicting punishment therefor. In such a case he would naturally lean toward an acquittal, and would possess that state of mind which would lead to a just inference that he would not act with entire impartiality in the case.³⁰

In *Smith v. Smith*,³¹ an action by a former wife to recover amounts allegedly due under a property settlement, it was held proper to question prospective jurors on *voir dire* as to what effect their religious beliefs in regard to divorce and remarriage might have on their verdict.

A prospective juror may also be questioned regarding his attitude towards a particular religion adhered to by a party to the suit.³² In *United States v. Daily*³³ the defendant was indicted for violation of the Selective Training and Service Act of 1940³⁴ in failing to report for induction when ordered to do so. He claimed that he had been incorrectly classified by his draft board since he was a minister of the Jeho-

[the] case." *People v. Buyle*, 22 Cal. App. 2d 143, 146, 70 P.2d 955, 957 (Dist. Ct. App. 1937) (emphasis added).

³⁰ *United States v. Miles*, 2 Utah 19, 22, *rev'd on other grounds*, 103 U.S. 304 (1881).

³¹ 7 Cal. App. 2d 271, 46 P.2d 232 (Dist. Ct. App. 1935).

³² *United States v. Daily*, 139 F.2d 7 (7th Cir. 1943); *Casey v. Roman Catholic Archbishop*, 217 Md. 595, 143 A.2d 627 (1958); *People v. Christie*, 2 Abb. Pr. 256 (N.Y. Sup. Ct. 1855); *Horst v. Silverman*, 20 Wash. 233, 55 Pac. 52 (1898) (per curiam).

³³ 139 F.2d 7 (7th Cir. 1943).

³⁴ 54 Stat. 885, ch. 720 (1940).

vah's Witnesses. The Court of Appeals for the Seventh Circuit held that the defendant had the right to inquire of the members of the venire whether any of them entertained any prejudice against members of the Jehovah's Witnesses.

In *People v. Christie*³⁵ members of the Ancient Order of Hibernians, who took part in a parade in New York City, were indicted for a resulting riot. At the time, the court noted, the inhabitants of the city, including the police, were strongly prejudiced against Irish and Roman Catholics. Counsel for the defense asked a prospective juror whether he had any bias or prejudice against Roman Catholics. The prosecution successfully objected on the ground that the juror was not bound to answer if he thought it would disgrace him to do so. In reversing, the appellate court said that the right to be tried by an impartial, unprejudiced jury "is not to be sacrificed to the fear or apprehension of wounding the feelings of others."³⁶

Regarding the specificity of questions concerning the religious prejudice of jurors, some courts hold that such questions should be limited to such general inquiries as whether the prospective juror feels he will be unable to act fairly and impartially as a juror³⁷ for any religious or political reason. *Casey v. Roman Catholic Archbishop*³⁸ required a more specific inquiry. In that case plaintiff brought suit for personal injuries sustained when she fell on a newly waxed aisle of her parish church. On the *voir dire* examination the trial court refused plaintiff's request to question the members of

the jury panel as to whether they might be biased because of the nature of the suit or the fact that the defendant was an ecclesiastical corporation. Instead the court propounded a more general question as to whether the prospective jurors had any reason, such as religious scruples, which would prevent them from acting impartially on the trial. The court made no reference to the fact that defendant was a corporation and not a prelate being sued personally or as a church official. Plaintiff appealed from a verdict in her favor which she claimed to be inadequate. The Maryland Court of Appeals reversed the lower court's judgment and remanded the case for a new trial. Although indicating that the form of the question to be asked was clearly up to the discretion of the trial judge, the court held that the trial court's question had not informed the prospective jurors of the nature of the action and the identity of the defendant with sufficient specification. The court pointed out that it should have been made clear to the jurors that the suit was against a corporation as the holder of the legal title to the church building, and that it was not a suit against the Archbishop of Baltimore personally or as an ecclesiastical official.

Although religious prejudice against a party's principal witness might be detrimental to that party, as would religious prejudice against the party himself, questions designed to determine the attitudes of a prospective juror toward the religious faith of a witness do not seem to be permissible.³⁹ Counsel for the defendant in *State v. Holedger*⁴⁰ asked a prospective juror whether he would give more weight to the

³⁵ 2 Abb. Pr. 256 (N.Y. Sup. Ct. 1855).

³⁶ *Id.* at 258.

³⁷ *State v. Maxwell*, 151 Kan. 951, 102 P.2d 109 (1940); *Adams v. State*, 200 Md. 1, 88 A.2d 556 (1952).

³⁸ 217 Md. 595, 143 A.2d 627 (1958).

³⁹ *State v. Holedger*, 15 Wash. 443, 46 Pac. 652 (1896).

⁴⁰ *Ibid.*

word of a preacher than "any other gentleman," and whether he would attach more credence to the testimony of a particular witness named, who was a minister, than to the testimony of anyone else. The State objected to these questions and the court sustained the objection. On appeal, these questions were dismissed as "so apparently improper and irrelevant" as not to warrant discussion of them.⁴¹

The Religion of the Juror

Generally jurors are not disqualified solely because of their adherence to a particular religion.⁴² Church membership is not a qualification for serving on a jury.⁴³ Thus, the prevailing view is that mere adherence to the same religious denomination as one of the parties to an action will not per se disqualify a juror from serving in the case.⁴⁴

⁴¹ *Ibid. Accord*, Horst v. Silverman, 20 Wash. 233, 55 Pac. 52 (1898) (per curiam). In this case it was held proper to ask whether a prospective juror entertained any prejudice against people of the Jewish faith but that it would be improper, and therefore the trial court properly ruled out a question as to whether as much credence would be given to the testimony of witnesses who professed the Jewish faith as to that of the members of any other faith.

⁴² See Smith v. Smith, 7 Cal. App. 2d 271, 46 P.2d 232 (Dist. Ct. App. 1935); *In re Malvasi's Estate*, 96 Cal. App. 204, 273 Pac. 1097 (Dist. Ct. App. 1929); Rose v. Sheedy, 345 Mo. 610, 134 S.W.2d 18 (1939) (per curiam).

⁴³ See Rose v. Sheedy, *supra* note 42, wherein it is indicated that church membership is neither a qualification for serving on a jury, nor is it a sufficient ground for disqualification from jury service.

⁴⁴ Smith v. Sisters of Good Shepherd, 27 Ky. L. Rep. 1107, 87 S.W. 1083 (Ct. App. 1905); Searle v. Roman Catholic Bishop, 203 Mass. 493, 89 N.E. 809 (1909); American Creosote Works v. Harp, 215 Miss. 5, 60 So. 2d 514 (1952); Barton v. Erickson, 14 Neb. 164, 15 N.W. 206 (1883).

*Smith v. Sisters of Good Shepherd*⁴⁵ is illustrative of the general proposition that a juror may not be excluded solely because he is affiliated with the same church as a party to the suit. In that case the plaintiff, a Protestant who had resided in a Catholic institution for wayward women, brought suit for alleged false imprisonment and cruel treatment by the Sisters of the Good Shepherd who operated the institution. The trial court refused to discharge certain jurors who were Catholics. On appeal, the court held that this was not error since it was not shown that they were placed on the panel because they were Catholics, nor that they had any interest in the litigation. The appellate court felt that practical considerations prohibited such exclusion because in a state in which most of the people were either Catholics or Protestants (as was the case in Kentucky at the time), it would be practically impossible to select a jury in an action in which one of the parties is Catholic and the other Protestant.

*American Creosote Works v. Harp*⁴⁶ was a suit for personal injuries allegedly caused by the defendant's negligence. On appeal, it was contended by the defendant that the trial court had erred in not sustaining a challenge for cause to a proposed juror. The latter, it appeared on *voir dire*, lived in the same community as did the plaintiff and was a member of the same church and lodge. The juror was asked if this would influence his verdict. His response was that he would not be influenced and would try the case as if it were a suit between parties of whom he had never heard. The court was of the opinion that a prospective juror is not rendered unfit to serve merely be-

⁴⁵ 27 Ky. L. Rep. 1107, 87 S.W. 1083 (Ct. App. 1905).

⁴⁶ 215 Miss. 5, 60 So. 2d 514 (1952).

cause he and one of the parties are of the same religious denomination or fraternal order.

*Systematic Exclusion of Members
of a Particular Group*

If an eligible class of persons is excluded from a jury panel, the party whose interests may be affected may challenge the panel.⁴⁷ A panel of jurors may also be challenged when it is formed wholly or partially from jurors whose names were not drawn from a jury box, but were summoned by an officer who was biased or prejudiced.⁴⁸ However, the challenge to the panel or array may be made before accepting the jury drawn and before the trial commences.⁴⁹ Failure to challenge the panel at the time the jury is being selected or before trial may constitute a waiver of objection to the exclusion of a particular group of eligible persons.⁵⁰

Where a particular class of persons is systematically excluded in the selection of persons eligible for jury service, a party adversely affected may have grounds for a reversal.⁵¹ Although a party to an action

cannot insist on a jury composed of members of his own class,⁵² race, sex, or religion, he does have a legal right to have the jury chosen from an unrestricted range of persons eligible for jury service.⁵³ *Searle v. Roman Catholic Bishop*⁵⁴ is precisely in point. In that case the defendant was a Roman Catholic Bishop who held title, as trustee, to the land in controversy. At the request of the plaintiff, the trial court ruled that no person of the Roman Catholic faith should serve on the jury. Under this ruling two prospective jurors whose names were drawn from the jury box were excluded. The ground for the trial court's ruling was that title to the real estate involved in the litigation was held in trust for the Roman Catholic Church and that therefore all persons who were members of that church had a pecuniary interest in the litigation. The Supreme Judicial Court of Massachusetts reversed and held that the ruling was erroneous because it applied to all persons of the Roman Catholic faith without regard to their residence or to any affiliation with the particular local church. The court held that this error was prejudicial and warranted reversal because it rendered the statutory right of the defendant to peremptory challenges materially less valuable.

The exclusion of a competent juror may constitute grounds for reversal even though the jurors who actually served for the case

⁴⁷ See *Strauder v. West Virginia*, 100 U.S. 303, 312 (1879) (negroes excluded from petit and grand juries); *Ware v. State*, 146 Ark. 321, 225 S.W. 626 (1920) (negroes excluded from petit and grand juries); *Tillman v. State*, 121 Ark. 322, 181 S.W. 890 (1915) (negroes excluded from grand jury).

⁴⁸ *Roof v. State*, 34 Okla. Cr. 145, 245 Pac. 666 (1926).

⁴⁹ *Ware v. State*, 146 Ark. 321, 332-33, 225 S.W. 626, 631 (1920).

⁵⁰ *People v. Duncan*, 261 Ill. 339, 343-44, 103 N.E. 1043, 1045-46 (1913).

⁵¹ *Walter v. State*, 208 Ind. 231, 195 N.E. 268 (1935); *Searle v. Roman Catholic Bishop*, 203 Mass. 493, 89 N.E. 809 (1909); *Hildreth v. City of Troy*, 101 N.Y. 234, 4 N.E. 559 (1886); *Juarez v. State*, 102 Tex. Crim. 297, 277 S.W. 1091 (1925) (grand jury).

⁵² See Comment, *Class Discrimination in Selection of Jurors*, 5 CATHOLIC U. L. REV. 157, 161, 162 (1955); *Gregg v. State*, 2 Okla. Crim. 103, 121, 101 P.2d 289, 296 (1940). "The defendant has no vested right to have any particular juror on the panel selected to serve in his case. His right is that of refusal rather than that of selection." *Ibid.*

⁵³ *Walter v. State*, 208 Ind. 231, 195 N.E. 268 (1935); *Hildreth v. City of Troy*, 101 N.Y. 234, 4 N.E. 559 (1886).

⁵⁴ 203 Mass. 493, 89 N.E. 809 (1909).

were qualified. Illustrative of this is the case of *Hildreth v. City of Troy*,⁵⁵ in which persons otherwise qualified to serve as jurors were excluded by the trial court in a suit against the city because they were taxpayers and residents of that city. It was contended on appeal that this was not error warranting reversal because the jurors who tried the case were qualified in all respects. The court, however, rejected this argument, indicating that although no one could say whether or not the result would have been different had the city residents been allowed to sit as jurors, a party to a suit has a legal right to have the jury selected indiscriminately, and not from a class-restricted range.⁵⁶

Another view is that prejudicial error occurs only when a juror is improperly permitted to serve.⁵⁷ According to this view, no reversible error is committed if jurors are excused without sufficient cause; an error constitutes grounds for reversal only when a sufficient challenge for cause has been overruled, the complaining party has exhausted his peremptory challenges, and one or more jurors were thereby improperly allowed to serve.⁵⁸ Under this view, it seems that if a juror is excluded solely be-

⁵⁵ 101 N.Y. 234, 4 N.E. 559 (1886).

⁵⁶ "The law prescribes the qualification of jurors. The court cannot add to or detract from them. It cannot itself select the jury, directly or indirectly. It cannot in its discretion or capriciously set aside jurors as incompetent, whom the law declares are competent, and thus limit the selection of the jury. . . . If this is done, a legal right is violated, for which an appellate court will give redress." *Hildreth v. City of Troy*, 101 N.Y. 234, 239, 4 N.E. 559, 562 (1886).

⁵⁷ See *Amandes, Jury Challenge in Criminal Cases: When, How, and Group Membership Bias as a Basis Therefor*, 3 WAYNE L. REV. 106, 112-13 (1957).

⁵⁸ *Ibid.*

cause of his religion, this would not be ground for reversal.

Conclusion

Courts usually permit inquiry into a juror's religious beliefs or background if the inquiry is relevant. The argument may be advanced that such inquiry is futile because prejudice exists, consciously or subconsciously, in most of us.

The prospective juror ought not be permitted to be the exclusive judge of his own freedom from prejudice. The trial judge should not permit a person whose impartiality is subject to serious doubt to serve unless he is convinced, after questioning such person himself, that he will be able to completely disregard any related religious belief or position of his church. The trial court has both jurors and counsel before it, and is best qualified to determine the extent and nature of the questions directed to the prospective jurors and whether they answer them truthfully.

The form and content of the questions on *voir dire* should be carefully scrutinized by the trial judge. Prolonged questioning on *voir dire* may be resorted to by counsel as a device calculated to predispose the jury in his client's favor.⁵⁹ The court should be on guard against such exploitation of the examination and should prevent questions framed to incite the religious or other prejudices of the members of the panel. However, the questions should not be restricted to general inquiries having reference to prejudices. The court should permit counsel to be sufficiently specific, so that

⁵⁹ See, e.g., *Swift & Co. v. Platte*, 68 Kan. 1, 72 Pac. 271 (1903), wherein it was held error to permit counsel for the plaintiff in a personal injury case to ask questions in the *voir dire* examination of jurors which unnecessarily suggested that the defendant was insured.

the members of the jury panel will be apprised of the kind of bias or prejudice to which counsel is referring.

In connection with the deliberate disqualification from the jury of all members of a particular religious background, it should be noted that serious doubts of constitutionality may be raised if there is no compelling reason for such exclusion.⁶⁰ In

⁶⁰ See *Juarez v. State*, 102 Tex. Crim. 297, 277 S.W. 1091 (1925).

the *Miles* case there was a sound reason for the exclusion of all Mormons from the jury. But ordinarily it is difficult to justify the systematic exclusion of all members of a particular religious persuasion. Equality and due process demand that a defendant be tried without an arbitrary exclusion of members of his class from the jury. Inclusion or exclusion from juries should not be based on such accidents as race or religion.