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CURRENT LITIGATION

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The topic which I am billed to present is one far greater than could adequately be covered were I to devote our full day to it. It seemed to me that I could serve best by confining myself principally to the subject of litigation, or potential litigation, *within* religious bodies, and I say that because those situations are heavily fraught with consequences to religious liberty.

Court cases arising out of disputes within religious bodies are nothing new in the American experience. Dissension and dissidence, differences honest and feigned, have come to a head in suits involving property, discipline, the application of doctrine, and other areas. The Supreme Court has entertained a number of such cases and, in those and other cases under the Religion Clauses, has laid down certain guidelines for resolution of intra-religious disputes—often the bitterest of all disputes. Those guidelines are not in all respects clear; they are sometimes difficult to apply. Guidelines arising out of one set of factual situations are not necessarily applicable to a different set of factual situations.

Three interesting cases presently in the courts serve as useful laboratory examples of intra-church disputes now arising within the Catholic Church. These are *Reardon v. Lemoyne*,[1] the now famous "Nuns sue Bishop" case arising in New Hampshire, *Struemph v. Behan*,[2] Missouri's case involving removal of altars, and *Curry v. Even*, a libel suit by a priest against parishioners, particularly involving subpoena of Church records.

I.

In *Reardon*, four nuns, members of a religious order, were part of the staff of Sacred Heart School, a school of the Diocese of Manchester School System.[4] The sisters had signed contracts of employment for the 1981-1982 school year. The contracts incorporated by reference the Diocese of Manchester School Policy Handbook and, by that fact, each nun

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[1] 122 N.H. 1042, 454 A.2d 428 (1982).

[2] No. 10132 slip op. (Cir. Ct. Osage County Mo. 1982), *rev'd sub nom.* Struemph v. McAuliffe, No. 46061 slip op. (Mo. Ct. App. Sept. 6, 1983).

[4] *Reardon*, 122 N.H. at 1044, 454 A.2d at 429-30.

agreed "to conform and comply with all laws, rules, regulations, and policies"[5] of the Diocese—including policies relating to dismissal. One clause provided for termination at any time—but "by mutual consent."[6] A provision for unilateral termination by the Sacred Heart School Board was, however, included, but was limited to the situation in which the employee's post was eliminated or if the school should be reduced in size or shut down. There were separate provisions relating to dismissal and renewal. As to dismissal, the Sacred Heart School Board was empowered to dismiss a teacher or principal for any one of eight reasons (including professional incompetence, failure to obtain certification, or failure to profess a philosophy of life consistent with Catholic beliefs). There could be no dismissal without a written statement of cause, and the right to a hearing before the Sacred Heart School Board was provided for, with appeal to the Diocesan School Board. If the School Board decided that the contract was not to be renewed, the staff person was to be given notice in writing by March 15, plus well-documented reasons for the non-renewal.

In January, 1982, the Diocesan Superintendent of Schools recommended that the School Board not renew the four sisters' contracts and notified them of this. The Board at once notified the sisters accordingly. The sisters requested a public hearing before the Board. This was denied, and the sisters, on March 1, 1982, arguing that the Board's action be considered a dismissal rather than non-renewal, filed a petition for declaratory judgment in the state court seeking a construction of their contracts. They asked the court to declare: (1) that they had been dismissed and were thus entitled to the appeals processes as given in the contracts, (2) that the Board had violated their constitutional rights related to due process and equal protection, (3) that they could be dismisssed only on the basis of substantial evidence (and that such evidence was lacking), and (4) that if the court found the matter to be not "dismissal" but instead "non-renewal," the reasons given by the Diocesan Superintendent of Schools were insufficient. Named as defendants were the Bishop, the Diocesan Superintendent of Schools, and the members of the Sacred Heart School Board.

A motion to dismiss was granted on the ground that the court's assumption of jurisdiction over the Bishop, the Superintendent, and the Diocesan School Board would violate the first amendment's mandate of church-state separation. The court nevertheless held that it had jurisdiction over the Sacred Heart School Board, but also held that the sisters could not prevail on the merits. The plaintiffs appealed. Quite properly, the Church defendants cross-appealed, since the trial court may have

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[5] *Id.* at 1045, 454 A.2d at 430.
[6] *Id.*

been in error in holding that it had jurisdiction in the premises, over the parish School Board. The Supreme Court of New Hampshire, on December 23d, 1982, handed down the unanimous opinion which I shall now discuss. In sum, the court held that it had jurisdiction in the case, in that solely "non-doctrinal" contractual claims were involved and that civil courts may pass on such claims.[7] Let me now come to the heart of the court's reasoning. Following a recitation based on *Watson v. Jones*,[8] *Jones v. Wolf*,[9] and *Serbian Orthodox*,[10] the court stated:

> Religious entities, however, are not totally immune from responsibility under the civil law. In religious controversies, involving property or contractual rights outside the doctrinal realm, a court may accept jurisdiction and render a decision without violating the first amendment.[11]

Continuing, the court stated:

> The critical question in determining whether the trial court should have accepted jurisdiction is whether the resolution of the dispute would have involved *doctrinal matters* of the Roman Catholic Church.[12]

Having made its own doctrinal determination—on the basis of no recorded evidence—that the matter was "non-doctrinal," and that the sisters were part of[13] the laity of the Roman Catholic Church, the court was then free to proceed to decide this case on the basis of ordinary contract law. The court further saw no reason for the lower court's holding that it had jurisdiction solely over the School Board. Jurisdiction, said the High Court, extended over the Bishop, the Superintendent, and the School Board alike.

Thus, the case was remanded for trial as a simple contract case, and possibly that decision was completely correct. But one would have felt happier with the decision had the court at least paused to note the existence of the three groups of United States Supreme Court decisions: (a) those, such as *Lemon v. Kurtzman*,[14] *Tilton v. Richardson*,[15] and *Meek v. Pittenger*,[16] which hold the Catholic school to be "an integral part of the religious mission of the . . . Church;"[17] (b) those, such as *Catholic Bishop*

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[7] *Id.* at 1047, 454 A.2d at 433.
[8] 80 U.S. (13 Wall) 679, 727 (1871).
[9] 443 U.S. 595, 602 (1979).
[10] 426 U.S. 696, 709 (1976).
[11] *Reardon*, 122 N.H. at 1047, 454 A.2d at 431.
[12] *Id.* at 1048, 454 A.2d at 432 (emphasis supplied).
[13] *Id.* at 1048, 454 A.2d at 429.
[14] 403 U.S. 602, 609 (1971).
[15] 403 U.S. 672, 695 (1971).
[16] 421 U.S. 349, 371 (1975).
[17] Lemon v. Kurtzman, 403 U.S. 602, 609 (1971) (quoting DiCenso v. Robinson, 316 F. Supp. 112, 117 (D.R.I. 1970)).

of Chicago,[18] which stress the unique role of the teacher in such schools; and (c) those, such as *Watson v. Jones,*[19] *Gonzalez v. Roman Catholic Archbishop of Manila,*[20] *Kedroff v. St. Nicholas Cathedral,*[21] *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church,*[22] *Maryland and Virginia Eldership v. Church of God,*[23] *Serbian Eastern Orthodox Diocese for the United States and Canada v. Milivojevich,*[24] *and Jones v. Wolf,*[25] which stress the independence of churches and the extremely limited role of our civil courts in resolving disputes within churches.

Should the trial court, following the April trial, now hold that, under the terms of the contract, the sisters were dismissed rather than non-renewed, then, as the Supreme Court indicated, it must also hold that they are entitled to a hearing before the parish School Board and to appeals therefrom to the Diocesan School Board. That is all the relief presently sought—a mere declaration of a right to procedural due process. But should those bodies maintain the same position with respect to the retention of the sisters, one would not be surprised if the sisters sought court review of that determination. Having laid down the premise that the case is simply one of contract, it would seem that courts might readily also render a decision with respect to whether the substantive provisions had been breached. This would certainly take the court well inside the sacred precincts. Among the eight specific reasons given in the contract to justify a dismissal, one item bears upon doctrine, administration, and polity. That is "failure to profess a philosophy of life consistent with Catholic belief." Certainly Justice Brennan's "no role"[26] stricture in *Blue Hull* should bar the court from making its own judgments on that question. I gather that may well lie at the heart of the *contractual* dispute. Views taken toward the teaching responsibility and the function of a school within a parish, the role of the pastor in relation to his school (or is it "his" school?), those vital intangibles such as "spirit" and "attitude," and cooperation with "the mind of the Church": would not the sisters be inclined to say that these do *not* come within any of the eight contractual justifications for dismissal—asserting, as to this particular justification, that no evidence has proved that they have failed to "profess a philosphy of life consistent with Catholic beliefs"? And would not the Bishop rely,

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[18] 559 F.2d 1112, 1123-24 (7th Cir. 1977), *aff'd,* 440 U.S. 490 (1979).
[19] 80 U.S. (13 Wall) 679, 727 (1871).
[20] 280 U.S. 1, 16 (1929).
[21] 344 U.S. 94, 116 (1952).
[22] 393 U.S. 440, 449 (1969).
[23] 254 Md. 162, 165, 254 A.2d 162, 165 (1969).
[24] 426 U.S. 696, 708-09 (1976).
[25] 443 U.S. 595, 602 (1979).
[26] 393 U.S. 440, 447 (1979).

not only on those vital intangibles (there appearing none other among the eight on which to rely), but also upon one matter *outside* the eight provisions—thus actually within the contract only by implication, or outside the contract entirely; namely, upon the fact of his authority as Bishop over that part of the Church organism which is the Catholic school?

The New Hampshire Supreme Court has carefully laced its opinion with warnings that the trial court, on remand, must hew to secular aspects of the contracts and avoid "matters involving doctrine, faith, or internal organization, which are insulated from judicial inquiry." What should greatly concern us, however, is that the courts do not always find it easy to know when they are in areas of doctrine, faith, or internal church organization. Conspicuous examples are seen in the well known fundamentalist school cases recently decided by the Nebraska, Iowa, North Dakota, and New Jersey Supreme Courts, and the insistence, in recent years, by federal and state administrative bodies that religion is a thing "confined to the sacristy" (to borrow John Courtney Murray's phrase) shows a hard insistence on secularist definition of religion. Church employment contracts which, though aimed at justice, personal liberty, or administrative ease, bifurcate church employments into "secular" and "religious" components, will invite courts to enter and judge religious disputes. I suggest here, by the way, that we should regard the "secular function" phrasing which appears in the textbook loan case, *Board of Education v. Allen*,[27] as implicitly overruled by *Lemon v. Kurtzman*[28] and the related "entanglement" cases which hold the church-school to be an integral religious organism. I realize that the Supreme Court, post *Lemon*, has continued to hang onto that phrasing (just as it has continued to quote its pro-entanglement language in *Pierce v. Society of Sisters*[29] regarding state supervision of religious schools). But that may be said to be due to the fact that the Court has not yet taken up a case squarely presenting the question whether, in fact, a church-school has any "secular function" (and who shall say what is "secular"?).

The case for employment contracts is, of course, a very attractive one. Rights and duties surely ought to be expressly stated and rendered clear, and neither employers nor employees should have to rely upon good humor, personality, flattery, badgering, or cosseting as the necessary paths to justice and fair treatment. Due process is important; rights should not be extinguished by the stiff-arm memorandum and without any forum in which facts can be found. Perhaps, as some opine, the only way to a better Church is through the multiplication of legal security devices which are responsive not only to the constantly invented intrusions

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[27] 392 U.S. 236, 248 (1968).
[28] 411 U.S. 192, 202-03 (1973).
[29] *See* 268 U.S. 510, 534-35 (1925).

by government, but also to protect those in the Body of Christ against one another.

But in taking those steps to which Church lawyers sometimes beckon bishops, pause should be taken to consider well the liberties of the Church itself, of the potential of legal devices for encouraging the divisive spirit, and of the danger of substituting controversy for conciliation, perfectionism for humility, and litigiousness for Christian charity. While we bemoan the militant secularism astride the world today, we must be careful that we do not secularize the household of the Faith.

I conclude this discussion of the *Reardon* case on a note of irony: the constitutional law of this nation, as spoken by the Supreme Court of the United States, abundantly protects the liberties of churches. Recall the statement in the parent case of *Watson v. Jones*:

> All who unite themselves to such a body [the general church] do so with an implied consent to [its] government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provided for.[30]

Justice Reed, commenting in *Kedroff* eighty years later, stated:

> The opinion [in *Watson v. Jones*] radiates . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine. *Freedom to select the clergy, where no improper methods of choice are proven, we think, must now be said to have federal constitutional protection as a part of the free exercise of religion against state interference.*[31]

The irony is, that while the Constitution amply protects the community of faith, it does so only to the extent that the community of faith allows it to do so. Churches may limit their liberties by contracts, and the question which then arises is to what extent have they thus altered their religious character, which ultimately is a thing of the spirit rather than of the letter?

II.

Struemph v. Behan[32] presents a very different set of facts but it too

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[30] 80 U.S. (13 Wall) 679, 729 (1871).

[31] Kedroff v. Saint Nicholas Cathedral, 344 U.S. 94, 116 (1952) (emphasis supplied).

[32] No. 10132, slip op. (Cir. Ct. Osage County Mo. 1982), *rev'd sub nom.*, Struemph v. McAu-

is essentially a case involving church governance.[33] Here parishioners in Freeburg, Missouri sued a pastor and their bishop. The fight is over the right of the pastor (or the bishop) to remove the reredos of the side altars, one of which had been donated to the Church by the ancestor of one of the plaintiffs and had long been in use.[34] The parish council had steadfastly voted against the decision of the pastor to remove the reredos and, in view of the standing of that newly created entity (which, as we know, is constituted as an advisory body), that vote could be taken to be the will of the parishioners. The plaintiffs have now secured a permanent injunction against the pastor and bishop barring removal of the reredos of the side altars and mandating restoration of the reredos of the side altars (which, under the terms of an earlier order, had been allowed to be removed pending the outcome of this action). While the case is now on appeal by Mr. DeFeo, the trial court's opinion is interesting to examine.

As we consider it, I shall pass over here, as I did in discussing the *Reardon* case, the "human element"—there, the conceivable distress of nuns over what they may have felt was arbitrary treatment, here the evident bitter sentiment of faithful parishioners who felt their Church was being Cromwellized. Some years ago we handled the famous (or infamous) "shunning" case in Cumberland County, Pennsylvania, which involved a Mennonite farmer who was the object of Scriptural avoidance by his family in his religious community and his suit against the Reformed Mennonite Church for an injuntion to require their abandoning of the "shunning" practice. The media feasted on the trial, which involved religion, sex, and the dissident farmer—whom the media cast in the heroic martyr's role. But the marrow of the case was not this matter of sentiment but instead the inviolability of the right of a church to have and practice a belief without interference from the organs of government.

In the Missouri case, coming to its conclusion to issue the permanent injunction, the trial court justified its assertion of jurisdiction "because the parties' dispute involves property rights only and may be resolved by application of neutral principals [sic] without consideration of any underlying religious doctrine." The Court felt it could apply the "neutral principles" by reference to the deed awarding title to the Archbishop of St. Louis and his successors. This deed (from parishioners in 1904) the court held to be entrusting. The *cestui que* trust, said the court, was the people of the parish, and the plaintiffs, as members of that beneficiary class, had the right to protect the corpus from arbitrary action of the trustee.

Whereas in *Reardon*, the New Hampshire Supreme Court brought us to the precipice of civil court involvement in ecclesiastical matters, the

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liffe, 661 S.W.2d 559 (Mo. Ct. App. 1983).

[33] 661 S.W.2d at 560.

[34] *Id.* at 560-61.

Missouri trial court in *Struemph* takes us over the cliff. As Mr. DeFeo perceptively remarks in his brief in the Missouri Court of Appeals, here would be the imposition by judicial decree of "a change in the form of government of the Catholic Church from hierarchical to congregational." Certainly, the power to determine what altars a church shall have amounts to a power of governance. If that power resides in the congregation, the Church is then a congregational church. The court never got to a discussion of that question. Possibly it was unaware of the marked differences between congregational and hierarchial churches which the Supreme Court in *Jones v. Wolf*[35] and *Serbian*[36] had stressed. Equally plainly, the court's imposition of congregational structure on a Catholic Church violates both Free Exercise and Establishment Clause principles.

The determination of what altars a Church shall have is also plainly not a property matter, but an ecclesiastical matter. So here, too, the court was plainly in error. But again, it is at this point of error that we should pause and reflect. The Supreme Court has indeed said that property rights in *purely religious* properties—*e.g.*, not merely an altar but the entire Church edifice, altars and all—may be determined by the civil courts where there are secular documents—*e.g.*, deeds—by which the intent of the religious parties may be ascertained. Property rights include use rights. Churches can deed away, or contract away, even rights of use, which uses are acknowledged to be ecclesiastical. But where there is a dispute between the Church and an adverse claimant over the property (or the user), the court may award the property right if it can do so without passing upon doctrinal or Church administrative matters. The point always to be watched for is the court's decision that a particular thing is, or is not, "doctrinal" or a matter of Church administration. I am back to the point I mentioned in *Reardon*: the absolute necessity of proof, in religious liberty cases, of the religious claim. Sometimes attorneys representing religious bodies naively assume that judges will not be naive in their concepts of religion. In the *Struemph* case, the court's view of "doctrinal" can only be described as "home-made" law—a very narrow and subjective presupposition as to what is, or is not, "doctrinal." I have noticed all too often in court, judges who do not appear to believe that a religious claim could exist unless in resistance to a legislative act which would read: "The dogma of the Immaculate Conception is false and shall not be taught." They demand to know just what "tenet" of a faith is said to be violated, and finding no "tenet," they conclude that religious liberty is not violated. Thus, the theological tenderfoot on the bench readily becomes a judicial Big Foot.

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[35] 443 U.S. 595, 608-09 (1979).
[36] 426 U.S. 696, 721-22 (1976).

In *Wisconsin v. Yoder*,[37] the question was raised whether forcing Amish adolescents into high schools violated any stated "doctrine" of the Amish. If by "doctrine" is meant a formally verbalized tenet, canon, or article of faith, then the religious liberty of the Amish was not violated. But as the Supreme Court clearly recognized in that case, "doctrinal" matters may be something far broader and refer to the established ways of a community of faith, or to an ultimate meaning given, in particular circumstances, to such a terse scriptural command as "Be ye separate from the world."

In the *Struemph* case, Mr. DeFeo has well covered, with an excellent evidentiary record, the Church's religious claim.

III.

Lastly, a few words about the problem posed by the case in Arizona known as *Curry v. Even*. Here, one Father Curry, a priest of the Diocese of Tucson, sued a group of parishioners for libel. The parishioners, in the course of their defense, sought diocesan records. The Bishop of Tucson refused to provide the records, and moved to quash a subpoena *duces tecum* in the state court. This motion was denied without opinion. Upon appeal, the Arizona Court of Appeals affirmed without opinion. The Supreme Court of Arizona denied discretionary review. We discussed three possible options with the attorney for the Diocese: (a) the seeking of review by the United States Supreme Court, (b) the requesting from Justice Rehnquist of a stay of the trial court's decision to enforce the subpoena, (c) an action in federal district court under section 1983. While I am not familiar with what the Diocese may now have done, I will utilize the above facts in order to discuss briefly two matters: (a) the substantive question of the right of resistance of the subpoena of the church records, and (b) matters associated with the bringing of a federal court action in such a situation.

As to the first point, the foundation cases may be conveniently grouped under three heads: the church property cases, the entanglement cases, and the free exercise cases. Having already discussed, at least summarily, church property cases, our particular attention should focus on the entanglement cases, with the most meaningful discussions of all to be found in the Seventh Circuit's opinion in *Catholic Bishop*[39] and the First Circuit's opinion in *Surinach v. Pesquera de Busquets*.[40] We need to keep *Surinach* in our hip pockets, ready for instant use in these days of endless information-seeking by governmental bodies. We have observed the

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[37] 406 U.S. 205 (1972).

[39] 559 F.2d 1112 (7th Cir. 1977), *aff'd*, 440 U.S. 490 (1979).

[40] 604 F.2d 73, 76-77 (1st Cir. 1979).

frequent prurience of official information requests, along with benign disclaimers of, any purpose to violate first amendment liberties. But the First Circuit in *Surinach*, in barring Puerto Rico's demands for financial data from Catholic schools, paid no heed to the fact that the Commonwealth had not *yet* made determinations in conflict with religious liberties. Or, as was well stated by the Supreme Court in *Catholic Bishop*:

> It is not only the conclusions that may be reached by the Board [NLRB] which may infringe on rights guaranteed by the Religion Clauses, *but the very process of inquiry leading to findings and conclusions.*[41]

As to the second point, at least four matters are to be considered when seeking federal district court jurisdiction in an action to restrain state governmental actions: (1) the problem of exhaustion of state judicial remedies, (2) the federal Anti-Injunction Act, (3) *Younger* abstention, (4) the need for the best possible record on the nature of the religious claim. This is not the place, nor have we the time to explore these beyond the following brief observations: As to exhaustion of state judicial remedies, *McDaniel v. Paty*[42] indicates that no such exhaustion is required in a section 1983 action. As to the Anti-Injunction Act, *Mitchum v. Foster*[43] holds that a section 1983 action falls within an express exception to the Act. As to *Younger* abstention, the *Steffel v. Thompson*[44] exception should be noted, as well as other possible avenues for avoiding the bar of *Younger* abstention.

It is clear that much intra-Church litigation lies ahead, if only because we are becoming a more and more litigious society. Such litigation has long been seen in the Presbyterian and Episcopalian churches. It is now increasing within the Catholic Church. But the formation of our constitutional law, at the level of the Supreme Court, has thus far been fairly favorable to religious liberty. Let us hope that the cases which ensue will be the subject of further favorable development.

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[41] 440 U.S. 490, 502 (1979).
[42] 435 U.S. 618, 243 (1978).
[43] 407 U.S. 225, 243 (1972).
[44] 415 U.S. 452, 475 (1974).