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THE PAST, PRESENT, AND FUTURE OF CHRISTIAN ADR

Ronald J. Colombo*

ABSTRACT

Many religious traditions recommend (if not require) that their adherents bring some if not all of their disputes with co-adherents before a religious tribunal for resolution. The Christian religious tradition is no exception. That said, the dramatic history of the Church in the West, from that of a persecuted Jewish sect, to the official state religion of Imperial Rome, to an international authority competing with that of local monarchs, to its modern status of merely tolerated, has yielded a variety of evolving perspectives on the question of intra-faith dispute resolution within Christianity. This article examines that question and the historical answers given thereto by Christian theologians over the past two millennia. In its final sections, this article explores the constitutional parameters circumscribing the modern practice of religious ADR and engages in some prognostication about the future of religious ADR.

I. INTRODUCTION

Alternative Dispute Resolution (“ADR”), according to Black’s Law Dictionary, refers to “procedures for settling disputes by means other than litigation; e.g., by arbitration, mediation, mini-trials.”¹ The dictionary’s entry continues as follows: “Such procedures, which are usually less costly and more expeditious, are increasingly being used in commercial and labor disputes, divorce actions, in resolving motor vehicle and medical malpractice tort claims, and in other disputes that would likely otherwise involve

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¹ *Alternative dispute resolution*, BLACK’S LAW DICTIONARY (6th ed. 1990).

court litigation.”² Absent from this definition is any mention of alternative dispute resolution’s utilization to resolve quarrels between co-religionists. Yet religiously motivated and religiously based methods of alternative dispute resolution represent a significant and growing segment of ADR.³ This paper will examine that phenomenon within the Christian tradition.

This paper’s examination of Christian-based ADR will proceed in four parts, following this introduction (Part I). Part II will identify the scriptural basis for ADR within the Christian tradition; Part III will explore the history of ADR within the Christian tradition; Part IV will discuss the modern practice of religiously based ADR among Christians; and Part V will offer some thoughts on the future of Christian-based ADR. It is my hope that this paper will be of interest and use to both legal scholars and practitioners, by introducing each to the history, development, and modern manifestations of religiously based ADR within the Christian tradition.

II. SCRIPTURAL BASIS OF CHRISTIAN ADR

A large number of scriptural passages appear to bear upon the propriety of, and indeed the preference for, alternative dispute resolution between Christians. Although there are undoubtedly relevant passages in the Old Testament⁴ (which, of course, Christians revere), I have limited myself to those contained in the New Testament for purposes of this paper. In the chart set forth below, I reprint the most relevant.

² *Id.*

³ See Michael Broyde, *The Rise and Rise of Religious Arbitration*, WASH. POST (June 26, 2017), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/06/26/the-rise-and-rise-of-religious-arbitration/>.

⁴ See, e.g., *Psalms* 132:1 (Douay-Rheims) (“Behold how good and how pleasant it is for brethren to dwell in unity.”).

A. Scriptural Text and Commentary

Text ⁵	Citation
Blessed are the peacemakers: for they shall be called children of God.	Matthew 5:9
Be at agreement with thy adversary betimes, whilst thou art in the way with him: lest perhaps the adversary deliver thee to the judge, and the judge deliver thee to the officer, and thou be cast into prison.	Matthew 5:25
You have heard that it hath been said, An eye for an eye, and a tooth for a tooth. But I say to you not to resist evil: but if one strike thee on thy right cheek, turn to him also the other: And if a man will contend with thee in judgment, and take away thy coat, let go thy cloak also unto him. And whosoever will force thee one mile go with him other two.	Matthew 5:38–41
But I say to you, Love your enemies: do good to them that hate you: and pray for them that persecute and calumniate you.	Matthew 5:44
And forgive us our debts, as we also forgive our debtors. . . .For if you will forgive men their offences, your heavenly Father will forgive you also your offences. But if you will not forgive men, neither will your Father forgive you your offences.	Matthew 6:12, 14–15
But if thy brother shall offend against thee, go, and rebuke him between thee and him alone. If he shall hear thee, thou shalt gain thy brother. And if he will not hear thee, take with thee one or two more: that in the mouth of two or three witnesses every word may stand. And if he will not hear them: tell the church. And if he will not hear the church, let him be to thee as the heathen and publican.	Matthew 18:15–18
Then came Peter unto him and said: Lord, how often shall my brother offend against me, and I forgive him? Till seven times? Jesus saith to him: I say not to thee, till seven times; but till seventy times seven times.	Matthew 18:21–22

⁵ The text set forth below is drawn from the Douay-Rheims Bible. It hews extremely close to the authoritative Latin Vulgate of St. Jerome. *Douay Bible*, CATHOLIC ENCYCLOPEDIA (1909).

Text	Citation
<p>And there came one of the scribes that had heard them reasoning together, and seeing that he had answered them well, asked him which was the first commandment of all. And Jesus answered him: The first commandment of all is, Hear, O Israel: the Lord thy God is one God. And thou shalt love the Lord thy God, with thy whole heart, and with thy whole soul, and with thy whole mind, and with thy whole strength. This is the first commandment. And the second is like to it: Thou shalt love thy neighbour as thyself. There is no other commandment greater than these. And the scribe said to him: Well, Master, thou hast said in truth, that there is one God, and there is no other besides him. And that he should be loved with the whole heart, and with the whole understanding, and with the whole soul, and with the whole strength; and to love one's neighbour as one's self, is a greater thing than all holocausts and sacrifices.</p>	<p>Mark 12:28–33</p>
<p>And when thou goest with thy adversary to the prince, whilst thou art in the way, endeavour to be delivered from him: lest perhaps he draw thee to the judge, and the judge deliver thee to the exacter, and the exacter cast thee into prison. I say to thee, thou shalt not go out thence, until thou pay the very last mite.</p>	<p>Luke 12:58–59</p>
<p>Dare any of you, having a matter against another, go to be judged before the unjust, and not before the saints? Know you not that the saints shall judge this world? And if the world shall be judged by you, are you unworthy to judge the smallest matters? Know you not that we shall judge angels? How much more things of this world? If therefore you have judgments of things pertaining to this world, set them to judge, who are the most despised in the church. I speak to your shame. Is it so that there is not among you any one wise man, that is able to judge between his brethren? But brother goeth to law with brother, and that before unbelievers. Already indeed there is plainly a fault among you, that you have lawsuits one with another. Why do you not rather take wrong? Why do you not rather suffer yourselves to be defrauded? But you do wrong and defraud, and that to your brethren.</p>	<p>1 Corinthians 6:1–8</p>

Most of the verses reprinted above set forth or expand upon Christ’s fundamental message of mercy and forgiveness. Indeed, the centrality of this message is such that it appears in the most famous Christian prayer of all, the “Pater Noster” or “Our Father” or “Lord’s Prayer,” issuing from Christ’s own lips. In the Vulgate as per St. Jerome, it reads “*et dimitte nobis debita nostra sicut et nos dimittimus debitoribus nostris*,”⁶ translated most literally as “[a]nd forgive us our debts, as we also forgive our debtors,”⁷ but perhaps more familiarly as “[a]nd forgive us our trespasses, as we forgive those who trespass against us.”⁸ That verse is set forth in the chart provided under Matthew 6:12, 14–15. But of course, Christ calls upon his followers to do far more than to forgive those who would wrong them. When asked to identify the greatest of the commandments, He responds with the famous twofold answer:

And thou shalt love the Lord thy God, with thy whole heart, and with thy whole soul, and with thy whole mind, and with thy whole strength. This is the first commandment. And the second is like to it: Thou shalt love thy neighbour as thyself. There is no other commandment greater than these.⁹

And “neighbor,” as Christ defines the term, includes everybody—even one’s enemies. “But I say to you, [l]ove your enemies: do good to them that hate you: and pray for them that persecute and calumniate you.”¹⁰ But of all the verses in the New Testament bearing upon the issue of alternative dispute resolution, the most on point would be Matthew 18:15–18 and 1 Corinthians 6:1–8. For the sake of convenience, these passages have been printed in bold on the chart above.

In 1 Corinthians 6:1–8, St. Paul excoriates the Christians of Corinth for their litigiousness—and especially for hauling one another before heathen tribunals.¹¹ In Matthew 18:15–18, St. Matthew records Christ’s words regarding how Christians are to resolve disputes between one another. Taken together, 1 Corinthians and Matthew 18 appear to prohibit Christians from having recourse to the courts. In light of the two-thousand year history of Christianity, however, including practices in our own day among

⁶ *Matthew* 6:12 (Vulgate). See also *Luke* 11:4 (Douay-Rheims).

⁷ *Matthew* 6:12 (Douay-Rheims).

⁸ *The Our Father*, EWTN, <https://www.ewtn.com/catholicism/devotions/our-father-395> (last visited Sept. 13, 2020).

⁹ *Mark* 12:28–33 (Douay-Rheims).

¹⁰ *Matthew* 5:44 (Douay-Rheims).

¹¹ See Mark Dunagan, *Commentary on the Bible: 1 Corinthians 6*, STUDYLIGHT.ORG, <https://www.studylight.org/commentaries/dun/1-corinthians-6.html> (last visited Sept. 13, 2020).

practicing Christians, either (1) an interpretation of the text as giving rise to a blanket prohibition on litigation is mistaken or (2) there are far, far fewer faithful Christians than we commonly surmise—even among those who profess to be.

The faithlessness of those who call themselves “Christian” is well documented.¹² That lends support to the second explanation I posited behind the disconnect between the Bible’s text and the practices of Christians: That is, maybe most Christians are simply disregarding the demands of their faith. Even though this is probably true, I suggest that such faithlessness is not necessarily tied to the disregard of 1 Corinthians or Matthew 18 because a closer review of these texts—especially in the context of their times—yields alternative, less stringent interpretations.

With regard to Matthew 18, it is not entirely clear that Christ is addressing the vindication of legal rights *per se*. Rather, Christ may be addressing a different sort of harm:

But if thy brother shall offend against thee, go, and rebuke him between thee and him alone. If he shall hear thee, thou shalt gain thy brother. And if he will not hear thee, take with thee one or two more: that in the mouth of two or three witnesses every word may stand. And if he will not hear them: tell the church. And if he will not hear the church, let him be to thee as the heathen and publican.¹³

In the Vulgate, the word from which “offend” in “[b]ut if thy brother shall offend against thee” is rendered as “*peccaverit*.”¹⁴ That’s a form of the verb “*pecco*,” which means “to make a mistake, go wrong, err or sin.”¹⁵ This suggests something personal in nature, such as a grievance arising from an insult or indignity. It doesn’t suggest something rising to the level of an infraction of the law.

This reading appears consistent with that of most commentators, who interpret Matthew 18:15-18 as a lesson in fraternal correction (both the importance thereof, and how to engage therein).¹⁶ Indeed, in his commentaries on the Bible, Calvin¹⁷

¹² See e.g., Elisabetta Poveledo & Sharon Otterman, *Cardinal Theodore McCarrick Resigns Amid Sexual Abuse Scandal*, N.Y. TIMES (July 28, 2018), <https://www.nytimes.com/2018/07/28/world/europe/cardinal-theodore-mccarrick-resigns.htm>.

¹³ *Matthew* 18:15–18 (Douay-Rheims).

¹⁴ *Matthew* 18:15 (Vulgate).

¹⁵ *Pecco*, CASSELL’S LATIN DICTIONARY (1968).

¹⁶ Charles John Ellicott, *Ellicott’s Commentary for English Readers, Matthew 18*, STUDYLIGHT.ORG, <https://www.studylight.org/commentaries/ebc/matthew-18.html> (last visited

stresses the “private” nature of the harm to which Matthew 18:15 refers, as opposed to a “public offense.”¹⁸

In any event, to the extent that Matthew 18 refers to something more than merely private sin, but to legal wrongs as well, its inclusion of legal wrongdoing would appear to be subsumed by 1 Corinthians. For, consistent with 1 Corinthians, Matthew 18 ultimately commands that the faithful take their unresolved disputes to “the church” for formal resolution. St. Paul addresses the same issue, but more emphatically, as follows in his first letter to the Corinthians:

Dare any of you, having a matter against another, go to be judged before the unjust, and not before the saints? . . . Is it so that there is not among you any one wise man, that is able to judge between his brethren? But brother goeth to law with brother, and that before unbelievers. Already indeed there is plainly a fault among you, that you have lawsuits one with another. Why do you not rather take wrong? Why do you not rather suffer yourselves to be defrauded?¹⁹

There can be little doubt that St. Paul is condemning those Christians who would haul a fellow Christian, “a brother” before a court of “the unjust”; before “unbelievers.” Rather, disputes between Christians ought to be resolved among Christians, before a court of “saints”; before a judge hailing from one of the “brethren.”

Although St. Paul’s rebuke may have caught the Corinthians somewhat by surprise (a Gentile, Greek people)²⁰, it would not have rung particularly odd to his fellow Jews of the time. For “[t]he Jews did not ordinarily go to law in the public law-courts at all; they settled things before the elders of the village or the elders of the Synagogue; to them justice was far more a thing to be settled in a family spirit than in a legal spirit.” Indeed, “Roman laws allowed the Jews to settle their disputes about property by arbitra-

Sept. 13, 2020); John Calvin, *Calvin’s Commentary on the Bible, Matthew 18*, STUDYLIGHT.ORG, <https://www.studydrive.org/commentaries/cal/matthew-18.html> (last visited Sept. 13, 2020).

¹⁷ John Calvin “was an influential French theologian and pastor during the Protestant Reformation. He was a principal figure in the development of the system of Christian theology later called Calvinism.” See Calvin, *supra* note 16.

¹⁸ Calvin, *supra* note 16. See also James Burton Coffman, *Coffman’s Commentaries on the Bible, Matthew 18*, STUDYLIGHT.ORG, <https://www.studydrive.org/commentaries/bcc/matthew-18.html> (last visited Sept. 13, 2020).

¹⁹ 1 Corinthians 1–8 (Douay-Rheims).

²⁰ Dunagan, *supra* note 11.

tion among themselves.”²¹ The Christians, viewed at the time as a mere Jewish sect, would have enjoyed the same privilege.²² Thus, there was no need for Christian to litigate against Christian before a pagan tribunal. Alternative dispute mechanisms were legitimate options for them to pursue. In foregoing this right, and in litigating their disputes in Roman courts, the Corinthians not only ran afoul the spirit and sensibilities of Christianity, but with that of Judaism as well.²³ There were many good reasons why the Jews of the time preferred to resolve disputes among their own internally, within their own rabbinical courts.²⁴ These and additional reasons fueled St. Paul’s umbrage toward the Corinthians’ litigiousness.

At the forefront of St. Paul’s umbrage was the ‘scandalousness’ of the practice.²⁵ For a faith predicated upon love of neighbor, the spectacle of Christian suing Christian was a disgraceful one.²⁶ As one commentator explained: “The shame of people who professed to love one another and put the welfare of others before their own suing each other was a defeat in itself. This defeat was far more serious than any damages they may have had to pay. It would be better to suffer the wrong or the cheating than to fight back in such an unchristian way”²⁷

Litigation between Christians also belied the professed disdain for things of this world, and revealed “covetousness, ambition, and

²¹ Charles Hodge, *Hodge’s Commentary on Romans, Ephesians and First Corinthians, 1 Corinthians 6*, STUDYLIGHT.ORG, <https://www.studylight.org/commentaries/hdg/1-corinthians-6.html> (last visited Sept. 13, 2020). See also Robert Jamieson A.R. Faussett & David Brown, *Commentary Critical and Explanatory on the Whole Bible, 1 Corinthians 6*, STUDYLIGHT.ORG, <https://www.studylight.org/commentaries/jfb/1-corinthians-6.html> (last visited Sept. 13, 2020).

²² Hodge, *supra* note 21.

²³ Charles John Ellicott, *Ellicott’s Commentary for English Readers, 1 Corinthians 6*, STUDYLIGHT.ORG, <https://www.studylight.org/commentaries/ebc/1-corinthians-6.html> (last visited Sept. 13, 2020).

²⁴ Known as “batei din” (or “beth din” in the singular). See Ginnine Fried, *The Collision of Church and State: A Primer to Beth Din Arbitration and the New York Secular Courts*, 31 FORDHAM URB. L.J. 633, 634 (2004). See also Albert Barnes, *Notes on the Whole Bible, 1 Corinthians 6*, STUDYLIGHT.ORG, <https://www.studylight.org/commentaries/bnb/1-corinthians-6.html> (last visited Sept. 13, 2020). “The Jews would not allow any of their causes to be brought before the Gentile courts. Their rule was this, [H]e that tries a cause before the judges of the Gentiles, and before their tribunals, although their judgments are as the judgments of the Israelites, so this is an ungodly man,” etc. Maimon, Hilch, Sanhedrin, chapter 26 section 7. They even looked upon such an action as bad as profaning the name of God.” *Id.*

²⁵ See Adam Clarke, *The Adam Clarke Commentary, 1 Corinthians 6*, STUDYLIGHT.ORG, <https://www.studylight.org/commentaries/acc/1-corinthians-6.html> (last visited Sept. 13, 2020).

²⁶ Hodge, *supra* note 21.

²⁷ Thomas Constable, *Expository Notes of Dr. Thomas Constable, 1 Corinthians 6*, STUDYLIGHT.ORG, <https://www.studylight.org/commentaries/dcc/1-corinthians-6.html> (last visited Sept. 13, 2020).

revenge” among the faithful—all “to the dishonor of God, and to the discredit of the gospel.”²⁸ It reflected avarice, not the preaching of Christ.²⁹ For Christ had exhorted his followers to suffer wrongs patiently—not to scrupulously assert their rights against others.³⁰ How much more scandalous is such litigation before a “heathen magistrate” when over “mere trifles and small matters”?³¹

Litigation itself could be considered a “near occasion of sin,”³² as it often brings out the worst in people, tempting litigants to behave unscrupulously for an advantage in court.³³ Resorting to heathen tribunals revealed a shocking lack of trust and faith in the church’s own leaders, and of one another.³⁴ On a related note, it revealed a certain slothfulness on the part of the church to develop, within its own ranks, the necessary learning, wisdom, and expertise needed to resolve disputes.³⁵ In short, “how credible and relevant does Christianity look, when members of the church must continually run to the world for the answers to their personal problems?”³⁶ Sometimes the formalities of pagan tribunals, such as “adjurations by heathen deities” would involve the litigants in “idolatrous practices”—something strictly forbidden to Christians.³⁷

As one commentator has summarized:

To call in the unbelievers to settle the disputes of Christian brethren was an act of audacity almost beyond the belief of the Apostle (1 Corinthians 6:1), and in marked contrast to the feeling prevalent in the Christian Church at its first foundation (Acts 4:32). It were far better for a Christian to suffer the ut-

²⁸ William Burkitt, *Expository Notes with Practical Observations on the New Testament, 1 Corinthians 6*, STUDYLIGHT.ORG, <https://www.studylight.org/commentaries/wbc/1-corinthians-6.html> (last visited Sept. 13, 2020).

²⁹ See John Calvin, *Calvin’s Commentary on the Bible, 1 Corinthians 6*, STUDYLIGHT.ORG, <https://www.studylight.org/commentaries/cal/1-corinthians-6.html> (last visited Sept. 13, 2020).

³⁰ See Matthew Poole, *Matthew Poole’s English Annotations on the Holy Bible, 1 Corinthians 6*, STUDYLIGHT.ORG, <https://www.studylight.org/commentaries/mpc/1-corinthians-6.html> (last visited Sept. 13, 2020).

³¹ Burkitt, *supra* note 28.

³² “Near occasions of sin,” as per Catholic moral theology, are “persons, places, and things that may easily lead [individuals] into sin.” BALTIMORE CATECHISM, 46 (1891), http://www.boston-catholic-journal.com/baltimore_catechism.pdf.

³³ Burkitt, *supra* note 28.

³⁴ *Id.*

³⁵ *Id.*

³⁶ Dunagan, *supra* note 11.

³⁷ *Cambridge Greek Testament for Schools and Colleges, 1 Corinthians 6*, STUDYLIGHT.ORG, <https://www.studylight.org/commentaries/cgt/1-corinthians-6.html> (last visited Sept. 13, 2020).

most wrong, than to bring such a reproach upon the name of Christ (1 Corinthians 6:7).³⁸

As another commentator put it:

Christians should be willing to give to one another rather than trying to get from one another. In other words, there should be no going to court with one another at all. Nevertheless, if the Corinthians insisted on going to court, it should be a court of believers in the church, not unbelievers outside the church.³⁹

B. *Limiting Principles*

Despite the fierceness of St. Paul's condemnation of litigation in 1 Corinthians, his letter to the Corinthians has never been understood as setting forth a complete bar upon the use of courts to resolve disputes. Not even pagan courts.

First, as referenced previously, the text itself contemplates some form of formal dispute mechanism. For a careful reading of St. Paul reveals that he does not issue a blanket, unequivocal condemnation of litigation generally, but rather the use of pagan, heathen tribunals in disputes between Christians.⁴⁰ Indeed, St. Paul contemplates a formal mechanism for resolving disputes between Christians, within the church. The critical factor, therefore, appears to be the nature of the tribunal; the character of the judge.

Moreover, the text of 1 Corinthians does not address the situation of a Christian suing a non-Christian. Its focus is entirely on Christian suing Christian. This suggests the appropriateness of a Christian using the civil courts to vindicate his or her rights against a non-Christian.⁴¹ Yes, Christians are urged to love their neighbor, including their non-Christian neighbors, including their enemies even. And so, in many circumstances, the Christian obligation may very well be to "turn the other cheek" rather than to press a legitimate claim in court.⁴² But competing obligations to one's loved

³⁸ *Id.*

³⁹ Constable, *supra* note 27.

⁴⁰ Barnes, *supra* note 24.

⁴¹ Burkitt, *supra* note 28. *But see* Aaron T. Hubbard, *Mediation and Religion: General Attitudes of Three Major Religions in the United States*, 63 L.A. B.J. 196, 197 (2015) ("Th[e] principle of encouraging mediation applies in disputes between two Christians, a Christian and a non-Christian, or two non-Christians (if the third party is a Christian)").

⁴² *See* Luke 6:29 (Douay-Rheims) ("And to him that striketh thee on the one cheek, offer also the other. And him that taketh away from thee thy cloak, forbid not to take thy coat also.").

ones, or others in one's care, may suggest a different approach.⁴³ Thus, St. Paul's letter should not be read as proclaiming that recourse to civil courts is *per se* inconsistent with one's obligations as a Christian. For such recourse, if undertaken in order to defend one's self, or vindicate one's rights, if absolutely necessary, would appear justifiable—especially if the dispute in question does not involve a fellow Christian.⁴⁴

Thus, as one commentator explains, “[t]he Christian rule . . . did not forbid the prosecuting of a heathen by a Christian before a heathen tribunal. A narrative is related of St. Julitta, who . . . prosecuted a pagan for theft.”⁴⁵ Notably, she subsequently “withdrew her suit when required by the court, as a condition of a verdict, to renounce her Christian faith.”⁴⁶

Indeed, as a Roman citizen, “Paul himself appealed to Caesar,” when he found it necessary to defend himself from the ruling authorities.⁴⁷ Thus, as one commentator observed: “It was, therefore, no sin in his eyes to seek justice from a heathen judge, when it could not otherwise be obtained. But it was a sin and a disgrace in his estimation for Christians to appeal to heathen magistrates to settle disputes among themselves.”⁴⁸

Calvin goes a bit further, and appears to acknowledge recourse to civil litigation, even between Christians, as justifiable in situations of necessity and as a last resort. As per Calvin: “I answer, that Paul does not here condemn those who from necessity have a cause before unbelieving judges, as when a person is summoned to a court; but those who, of their own accord, bring their brethren into this situation, and harass them, as it were, through means of unbelievers, while it is in their power to employ another remedy.”⁴⁹ He adds: “For my own part, my answer is simply this—

⁴³ This supplies one of the many reasons why self-defense has been traditionally justifiable from the Christian perspective. An individual without a responsibility to others may choose to sacrifice his or her life to a band of brigands, rather than to put up a fight. But a parent with a family relying upon him or her is arguably called to use even lethal force, if necessary, to preserve his or her life. See *Self Defense*, CATHOLIC ENCYCLOPEDIA (1912); cf. WILLIAM A. JURGENS, 2 THE FAITH OF THE EARLY FATHERS, 7 (1979) (“Our Fathers did not reckon killings in war as murders, but granted pardon . . .”) (quoting St. Basil the Great).

⁴⁴ For if the matter involved a fellow Christian, the dispute should be settled or otherwise resolved within the Church (It is unlikely that a non-Christian would accede to such a forum.).

⁴⁵ See Daniel Whedon, *Whedon's Commentary on the Bible, 1 Corinthians 6*, STUDYLIGHT.ORG <https://www.studylight.org/commentaries/whe/1-corinthians-6.html>.

⁴⁶ *Id.*

⁴⁷ Hodge, *supra* note 21.

⁴⁸ *Id.*

⁴⁹ Calvin, *supra* note 16.

having a little before given permission to have recourse to arbiters, he has in this shown, with sufficient clearness, that, Christians are not prohibited from prosecuting their rights moderately, and without any breach of love.”⁵⁰

All that said, more exegesis on this subject would be helpful—especially from the Church Fathers. As Calvin lamented, “it is surprising that this question has not been more carefully handled by ecclesiastical writers.”⁵¹

III. ADR WITHIN THE CHRISTIAN TRADITION

The early Christian community was both fervent and cohesive.⁵² In Jerusalem, it was described as being of “one heart and one soul.”⁵³ To the extent that disputes arose between Christians, “it was customary . . . to appear before the bishop and accept his decision . . . in accordance with the grave admonition of St. Paul.”⁵⁴ Although in such cases “the bishops often assumed the role of friendly arbiters rather than strict judges, we should not infer that they never conducted a strict trial.”⁵⁵ In other words, early Christian ADR was not necessarily a mere, informal attempt to forge compromise. Actual rules of procedure and practice began to develop—most likely mirroring those of the Jewish communities from which many Christians sprouted.⁵⁶

Indeed, a document known as the “Apostolic Constitutions,”⁵⁷ dated from the Fourth Century A.D., sets forth a rather detailed explanation of how the Church is to conduct its trials. The Apostolic Constitutions addresses everything from when court ought to be held,⁵⁸ to punishments that should be inflicted,⁵⁹ to qualifica-

⁵⁰ *Id.* See also Joseph Allegretti, *Dialogue on the Practice of Law and Spiritual Values*, 28 *FORDHAM URB. L.J.* 997, 1000–01 (2001) (“John Calvin argues that Christians should view litigation as a last resort.”).

⁵¹ Calvin, *supra* note 16.

⁵² See H. DANIEL-ROPS, *THE CHURCH OF APOSTLES & MARTYRS 15–18* (1960); JOHN LAUX, *CHURCH HISTORY* 9 (1930).

⁵³ *Ecclesiastical Courts*, *CATHOLIC ENCYCLOPEDIA* (1908).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ See generally Fried, *supra* note 24. See also Barnes, *supra* note 24.

⁵⁷ *Ecclesiastical Courts*, *supra* note 53.

⁵⁸ See *Apostolic Constitutions*, *NAZARENE WAY OF ESSENIC STUD.*, at XLVII http://thenazareneway.com/apostolic_constitutions/book_1-VI.htm (last visited Sept. 13, 2020).

⁵⁹ *Id.* at XLVIII.

tions of witnesses and accusers,⁶⁰ to the impact of former offences upon credibility,⁶¹ to the importance of hearing from all parties.⁶² As might be expected, the section of the Apostolic Constitutions contending with these matters both begins, and ends, with exhortations that Christians “have no contest with anyone.”⁶³ And it reiterates St. Paul’s command that “believers ought not to go to law before unbelievers.”⁶⁴ Nevertheless, for those situations where a formal means of dispute resolution is necessary, the Apostolic Constitutions set forth the means and guidelines by which it is to be administered *within* the Church. This is in keeping with the biblical texts reviewed previously.

Over the course of that same Fourth Century, however, two events occurred that would dramatically change the course of history. In 313 A.D., Emperor Constantine promulgated the Edict of Milan, officially granting freedom to Christians to practice their religion throughout the Roman Empire.⁶⁵ This was followed up in 380 A.D. by Emperor Theodosius’s edict embracing Christianity as the official State religion of Rome.⁶⁶

With Rome officially Christian, and with many of her magistrates themselves practicing Christians, the applicability of 1 Corinthians was cast into doubt. For now, arguably, “the reasons that moved St. Paul to persuade or command the faithful to avoid the civil tribunals were no longer pertinent.”⁶⁷ As such, “[g]radually the Church allowed the faithful to submit their differences to either the ecclesiastical or civil tribunals.”⁶⁸ This kicked off an era of co-jurisdiction, when “the bishops shared with the secular magistrates the power of settling the disputes of the faithful.”⁶⁹ For among his other enactments, Emperor Constantine decreed that all cases settled before episcopal courts “be considered as finally adjudicated” by civil authorities.⁷⁰

⁶⁰ *Id.* at XLIX.

⁶¹ *Id.* at L.

⁶² *Id.* at LI.

⁶³ *Id.* at XLV, LIII.

⁶⁴ *Apostolic Constitutions*, *supra* note 58, at XLVI (“Let not the heathen therefore know of your differences among One another . . .”).

⁶⁵ See DANIEL-ROPS, *supra* note 52, at 426–27.

⁶⁶ See *id.* at 590; see also WARREN H. CARROLL, *THE BUILDING OF CHRISTENDOM* 61 (1987).

⁶⁷ *Ecclesiastical Courts*, *supra* note 53.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

As Charles John Ellicott, a Nineteenth Century Anglican priest and renowned Bible scholar explained:⁷¹

Unjust . . . saints. These words convey here no essentially moral ideas. They merely signify respectively “heathen” and “members of the Christian Church.” These phrases remind us that the state of things when St. Paul wrote this was entirely different from what exists in any Christian country now. The teaching has nothing whatever to do with the adjudication of the courts of a Christian country. The cases to which St. Paul’s injunctions would be applicable in the present day would be possible only in a heathen country. If, for example, in India there existed heathen tribunals, it would certainly be wrong, and a source of grave scandal, for native Christians to submit questions between themselves for decision to such courts, instead of bringing them before the legal tribunals established by Christian England. It is not probable that at so early a period there were any regular and recognised tribunals amongst the Christians, and certainly their decisions could scarcely have had any legal force. There is, however, historical evidence of the existence of such in the middle of the second century. The principles here laid down would naturally have led to their establishment. (See 1 Corinthians 5:4).⁷²

As one might imagine, the overlapping jurisdiction of both the Church and the State over civil cases and controversies eventually led to friction.⁷³ That tale is itself a fascinating one,⁷⁴ including, among its episodes, the infamous murder of St. Thomas Becket⁷⁵ by the knights of Henry II (and it is, of course, to St. Thomas’s shrine that the pilgrims of Chaucer’s *Canterbury Tales* are headed).⁷⁶

Suffice it to say, that over the course of the middle ages, the jurisdiction of the Church over civil disputes was gradually diminished.⁷⁷ It should be noted, however, that the Church “never claimed an essential right to the exclusion of civil power” over such purely temporal disputes, but rather agreed to hear them largely out of the “peculiar necessities of the age,” including the “deficient

⁷¹ See Ellicott, *supra* note 16; see also Calvin, *supra* note 16.

⁷² Hodge, *supra* note 21.

⁷³ *Ecclesiastical Courts*, *supra* note 53.

⁷⁴ See *Ecclesiastical Jurisdiction*, CATHOLIC ENCYCLOPEDIA (1910).

⁷⁵ See Michael David Knowles, *St. Thomas Becket*, ENCYC. BRITANNICA (Apr. 27, 2020) www.britannica.com/print/article/57948.

⁷⁶ Cf. GEOFFREY CHAUCER, *THE CANTERBURY TALES: DOVER THRIFT EDITIONS* (Dover 2004).

⁷⁷ *Ecclesiastical Courts*, *supra* note 53.

administration of justice.”⁷⁸ Indeed, in theory, the Church “recognize[d] the full competence of the state” in purely civil matters.⁷⁹ But the Church was particularly concerned with safeguarding the rights of the poor, widows, orphans, and her own clergy: on account of these concerns the Church resisted attempts on the part of the state to encroach upon its jurisdictional authority over civil matters.⁸⁰ Yet gradually such jurisdictional authority was indeed stripped from the Church.⁸¹ Confusing affairs along the way, was the fact that many civil magistrates were themselves clerics, operating in a dual capacity.⁸² Today, the only objects of jurisdiction over which the Church *per se* has authority recognized by the state is that pertaining to ecclesiastical and spiritual matters.⁸³

IV. CHRISTIAN ADR TODAY

The Church enters the first half of the Twenty-First Century stripped of its authority to exercise jurisdiction over disputes between Christians.⁸⁴ The Church lacks the power to summon individuals before it,⁸⁵ and the State will not accord the Church’s judgments the authority of law as a matter of course.⁸⁶ In light of this, to what extent should and/or do Christians seek out fora to resolve their disputes beyond those of the secular world? And how is this accomplished?

A. *The Case for Christian ADR*

For the practicing Christian, as per reasons articulated previously, the need to utilize Christian ADR mechanisms today in lieu of the secular courts is not entirely clear. Although the government of the United States is not, nor has ever been, officially Christian (as was that of the Roman Empire in the Fourth Century and

⁷⁸ *Id.*

⁷⁹ *Ecclesiastical Forum*, CATHOLIC ENCYCLOPEDIA (1909).

⁸⁰ See *Ecclesiastical Jurisdiction*, *supra* note 74.

⁸¹ See *id.*

⁸² *Ecclesiastical Courts*, *supra* note 53.

⁸³ See *Ecclesiastical Jurisdiction*, *supra* note 74.

⁸⁴ *Id.*

⁸⁵ *Ecclesiastical Courts*, *supra* note 53.

⁸⁶ See THOMAS J. PAPROCKI, *NEW COMMENTARY ON THE CODE OF CANON LAW 1803* (John P. Beal, James A. Coriden, & Thomas J. Green, eds. 2000).

thereafter), its legal system (indeed, the legal system of pretty much the entire Western world) is largely, in both substance and procedure, a product of the Church.⁸⁷ Additionally, in the United States, the “personnel of civil courts often are now themselves believers, acting out of a Judeo-Christian belief system and seeking to imbue the secular order with their religious values.”⁸⁸ In short, “the legal concerns of Christians and the institutions of civil courts today are not necessarily incompatible.”⁸⁹

Apparently, most Christians agree with that sentiment. I have not come across statistics shedding much light on the degree to which Christians opt to pursue religiously based ADR over recourse to the courts. Anecdotally, however, it appears as though a very small percentage of Christians make this choice. That said, a review of both the biblical texts and Church tradition suggests that most Christians may be out of touch with the faith of their forbearers. For it seems that, regardless of how “Christianized” the West’s legal system has become, recourse to civil litigation ought to remain permissible only as a last resort pursuant to the Christian tradition.

In a perfect world, there’d be no disputes, between Christians or anyone for that matter. And if a dispute were to arise, it should be resolved charitably, and in good faith. The model would be how individuals resolve disputes among loved ones within a functional family. Fairness and compromise reign supreme—not revenge and punishment. If that is not possible—if the feelings involved are too raw, or the level of trust is insufficient—then, ideally, Christian disputants should bring their problem to the Church for resolution therein as per Church tradition.

Of course, such resolution might not be possible. One’s counterparty, whether a co-religionist or not, might simply not ac-

⁸⁷ See generally HAROLD BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* (1983); see also PAPROCKI, *supra* note 86, at 1803. Indeed, some of the foundational elements of due process found their origins in the courts of the Inquisition. See Mirjan Damaska, *The Quest for Due Process in the Age of Inquisition*, 60 AM. J. COMP. L. 919, 953 (2012). As an aside, recent scholarship over the past few decades, based upon previously unexamined primary sources, has painted a picture of the Inquisition far different than that of the “black legend” with which most are familiar. See, e.g., *Timewatch – The Myth of the Spanish Inquisition* (BBC television broadcast, Nov. 6th, 1994); Robert P. Lockwood, *History and the Myth: The Inquisition*, CATH. LEAGUE FOR RELIGIOUS CIV. RTS. (Aug. 2000), <https://www.catholicleague.org/history-and-myth-the-inquisition/>; EDWARD PETERS, *INQUISITION* (1989). Individuals genuinely interested in legal history would do well to acquaint themselves with this growing body of literature.

⁸⁸ PAPROCKI, *supra* note 86, at 12.

⁸⁹ *Id.*

cede to such a course of action. In such a case, certainly a Christian may defend himself or herself in a secular court, if so hauled, by whatever means legally, ethically, and morally available.⁹⁰ But beyond that, a Christian would seem to have a moral right to justice as per the terms of the social contract he or she has with the secular world he inhabits.⁹¹ Yes, it may be better to let the matter slide, as discussed previously. But one may very well have a responsibility to others, wupon which the just resolution of the dispute in question impacts. Under such circumstances, vindication of one's rights would appear to be morally appropriate within the Christian tradition.⁹²

Finally, at the risk of engaging in the “No True Scotsman” fallacy,⁹³ if a Christian is unwilling to engage in dispute resolution outside of the secular courts with a fellow Christian, is he or she properly a Christian? If the suggestion for Christian ADR is proffered but rebuffed, one might be justified in concluding that the “rebuffer” is not authentically Christian, thereby removing the dispute from the purview of St. Paul's wrathful screed.

I found the following exegesis of Albert Barnes, an American theologian and a Nineteenth Century Presbyterian minister, to capture quite well my reading of the scriptural text and history of the church:

It may be asked then whether lawsuits are never proper; or whether courts of justice are never to be resorted to by Christians to secure their rights? To this question we may reply, that the discussion of Paul relates only to Christians, when both parties are Christians, and that it is designed to prohibit such an appeal to courts by them. If ever lawful for Christians to depart from this rule, or for Christians to appear before a civil tribunal, it is conceived that it can be only in circumstances like the following:

- (1) Where two or more Christians may have a difference, and where they know not what is right, and what the law is

⁹⁰ See generally *Self Defense*, *supra* note 43 (addressing Christian teaching on self-defense).

⁹¹ For example, I would not consider the declaration of bankruptcy as immoral—as a form of theft. Some would, however, and bankruptcy has long been subject to moral opprobrium. See Todd J. Zywicki, *Bankruptcy Law as Social Legislation*, 5 TEX. REV. L. & POL. 393, 395 (2001). Rather, it's part of the rules of the game. So long as said rules are not intrinsically evil, it should not be deemed wrongful to take advantage of them. Similarly, recourse to the secular courts should not be deemed verboten to the Christian should he or she have absolutely no other way of vindicating his or her rights.

⁹² See *Self Defense*, *supra* note 43.

⁹³ See *No True Scotsman Fallacy*, ELUCIDATIONS U. OF CHI. PHI. PODCAST (May 8, 2013), <https://lucian.uchicago.edu/blogs/elucidations/2013/05/08/no-true-scotsman-fallacy/>.

in a case. In such instances there may be a reference to a civil court to determine it - to have what is called "an amicable suit," to ascertain from the proper authority what the law is, and what is justice in the case.

(2) When there are causes of difference between Christians and the people of the world. . . . As the people of the world do not acknowledge the propriety of submitting the matter to the church, it may be proper for a Christian to carry the matter before a civil tribunal. Evidently, there is no other way, in such cases, of settling a cause; and this mode may be resorted to not with a spirit of revenge, but with a spirit of love and kindness. Courts are instituted for the settlement of the rights of citizens, and people by becoming Christians do not alienate their rights as citizens. Even these cases, however, might commonly be adjusted by a reference to impartial people better than by the slow, and expensive, and tedious, and often irritating process of carrying a cause through the courts.

(3) Where a Christian is injured in his person, character, or property, he has a right to seek redress. Courts are instituted for the protection and defense of the innocent and the peaceable against the fraudulent, the wicked, and the violent. And a Christian owes it to his country, to his family, and to himself, that the man who has injured him should receive the proper punishment. The peace and welfare of the community demand it. If a man murders my wife or child, I owe it to the laws and to my country, to justice and to God, to endeavor to have the law enforced. So if a man robs my property, or injures my character, I may owe it to others as well as to myself that the law in such a case should be executed, and the rights of others also be secured. But in all these cases, a Christian should engage in such prosecutions not with a desire of revenge, not with the love of litigation, but with the love of justice, and of God, and with a mild, tender, candid and forgiving temper, with a real desire that the opponent may be benefited, and that all his rights also should be secured⁹⁴

B. *Christian ADR in Practice*

As a result of the preceding, the Canon Law of the Catholic Church, which had previously addressed itself to several matters

⁹⁴ Barnes, *supra* note 24.

commonly understood to be primarily secular in nature,⁹⁵ today “defers to civil laws . . . as long as civil laws are not contrary to divine law or unless canon law provides otherwise.”⁹⁶ This is explicit with regard to disputes concerning contracts, labor, prescription, wills and inheritance, and tort law.⁹⁷ Consequently “Church tribunals “are generally neither prepared to hear such matters nor to enforce injunctions or execute judgements for damages.”⁹⁸ Although the Code of Canon law “repeatedly” urges Catholics to resolve their controversies via “some alternative form of dispute resolution,”⁹⁹ and bring their disputes before the Church itself for resolution, few diocesan bishops have established offices capable of handling such matters.¹⁰⁰ In practice, the ecclesiastical courts of the Catholic Church “are used today almost exclusively for marriage annulment cases.”¹⁰¹ This transformation is not necessarily a bad one for the Church, institutionally, as it frees the Church to focus its attention on the spiritual sphere.¹⁰²

But not all Christian denominations agree with the Catholic perspective. Many take more seriously the Gospel’s requirement to provide an alternative dispute mechanism to their members.¹⁰³ They find themselves obligated to resolve their disputes with fellow Christians either amicably or via “biblically-based mediation.”¹⁰⁴

As mentioned, the state does not recognize the jurisdiction of religious tribunals *per se* over secular matters.¹⁰⁵ Accordingly, it will not, ordinarily, give effect to the judgments of such tribunals.¹⁰⁶ The state does, however, recognize the right of individuals to have their private disputes resolved conclusively outside of court, via mediation or binding arbitration.¹⁰⁷ And thus, to the extent that Christians, or any individuals, wish to have their disputes

⁹⁵ PAPROCKI, *supra* note 86.

⁹⁶ *Id.* at 877.

⁹⁷ *Id.* at 873.

⁹⁸ *Id.* at 864.

⁹⁹ *Id.* at 1826.

¹⁰⁰ *Id.* at 1826–27.

¹⁰¹ PAPROCKI, *supra* note 86, at 1803.

¹⁰² *Id.*

¹⁰³ See Steven R. Hadley, *Handbook of American Church Courts*, 22 WHITTIER L. REV. 251, 261–64 (2000) (setting forth practice of Seventh Day Adventists).

¹⁰⁴ See *Petty v. Share*, No. 2:19-CV-59-KS-JCG, 2019 WL 4855165, at *2 (S.D. Miss. Oct. 1, 2019).

¹⁰⁵ See *Ecclesiastical Jurisdiction*, *supra* note 74 and accompanying text. See also *Ecclesiastical Courts*, *supra* note 53.

¹⁰⁶ *Id.*

¹⁰⁷ See Kenneth A. Vogel, *Religious Options for Conflict Resolution*, 51 MD. B.J. 14, 15–16 (Sept./Oct. 2018).

settled within their own faith communities, they can do so if they enter into a valid arbitration agreement between them, and conduct themselves appropriately in its execution. It is important, however, to note some important parameters with regard to this possibility.

On one end of the spectrum, individuals cannot elect to have criminal matters resolved via a religious tribunal.¹⁰⁸ The days when clergy, for example, were exempt from civil jurisdiction are long past.¹⁰⁹ On the other end of the spectrum is the incompetence of the state to “decide religious questions when resolving disputes within religious organizations,” including the hiring and firing of its ministers.¹¹⁰ These limits on secular authority are known as the “ecclesiastical abstention doctrine”¹¹¹ and the “ministerial exemption,”¹¹² respectively. Although the precise lines of what constitutes an impermissible religious question is not altogether clear,¹¹³ the fundamental incompetence of the courts to decide such questions has been made resoundingly clear by the Supreme Court as recently as 2012 in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*.¹¹⁴ In *Hosanna-Tabor*, the Supreme Court unanimously rejected an attempt by the EEOC to subject a Lutheran school’s employment determinations to the Americans with Disabilities Act.¹¹⁵ As Chief Justice Roberts explained, despite the importance of our nation’s antidiscrimination laws, “[t]he church must be free to choose those who will guide it on its way.”¹¹⁶

For cases not running afoul to these parameters, resort to religiously based mediation or arbitration can be viable options. So long as no statute or policy renders the claim non-arbitrable, all that matters is whether the parties entered into a valid, binding arbitration agreement.¹¹⁷ In answering that question, courts apply state-law rules governing the formation of contracts.¹¹⁸ This is echoed by the Federal Arbitration Act:

¹⁰⁸ See *id.* at 16.

¹⁰⁹ *Ecclesiastical Courts*, *supra* note 53.

¹¹⁰ See Vogel, *supra* note 107, at 16.

¹¹¹ *Harrison v. Bishop*, 44 N.E.3d 350, 354 (Ohio Ct. App. 2015); *Hamashiach v. Adan*, No. 14-13-00491-CV, 2015 WL 971217, at *4 (Tex. Ct. App. Mar. 3, 2015).

¹¹² *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 173 (2012).

¹¹³ See Mark A. Hicks, *The Art of Ecclesiastical War: Using the Legal System to Resolve Church Disputes*, 6 LIBERTY U. L. REV. 531, 541–60 (2012).

¹¹⁴ *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. at 173 (2012).

¹¹⁵ *Id.* at 196.

¹¹⁶ *Id.*

¹¹⁷ See *Share*, 2019 WL 4855165, at *2.

¹¹⁸ *Id.*

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.¹¹⁹

Thus, mere reference to the importance of biblical principles, including, perhaps, even including a citation to 1 Corinthians, will not typically give rise to a binding arbitration agreement,¹²⁰ for such would not be sufficient to establish the existence of a contractual obligation under the law of contracts.¹²¹ And an agreement found to be unconscionable, via the traditional test for contractual unconscionability, will likewise be unenforceable.¹²² But a contractually sound arbitration agreement will be enforced by state and federal courts.¹²³

Significantly, it should be noted that an enforceable arbitration *agreement* is not the same thing as an enforceable arbitration *award*. An arbitration process that has been marred by corruption, fraud, partiality among the arbitrators, or other significant defects is subject to being vacated in a United States district court.¹²⁴ Thus, not only must one's arbitration agreement measure up to the standards necessary for finding a binding contract, but the conduct of the arbitration itself must comport with general standards of order and fairness in order. Otherwise, the result reached in a Christian ADR forum may, ultimately, not be binding upon its parties.

Stephen Hadley has compiled a valuable (albeit now somewhat dated) compilation of ADR resources made available by fifteen major groupings of churches in the United States.¹²⁵ In it he sets forth “the adjudicatory structures and processes” of each ma-

¹¹⁹ 9 U.S.C. § 2.

¹²⁰ See *Branyon v. Phoenix Business Consulting, Inc.*, No. 1:16CV673, 2016 WL 7264873, at *2–3 (M.D.N.C. Dec. 15, 2016).

¹²¹ *Id.*

¹²² See *Higher Ground Worship Center, Inc. v. Arks, Inc.*, No. 1:11-cv-00077-BLW, 2011 WL 4738651, at *2–4 (D. Idaho Oct. 6, 2011).

¹²³ See Vogel, *supra* note 107, at 17–18; MARTIN DOMKE, GABRIEL M WILNER, & LARRY E. EDMONSON, *DOMKE ON COMMERCIAL ARBITRATION* § 54:8 (2d ed. 2019); see, e.g., *Maynard v. Valley Christian Academy*, No. 5:16-CV-01889, 2017 WL 3594670 (N.D. Ohio Aug. 21, 2017).

¹²⁴ 9 U.S.C. § 10.

¹²⁵ See Hadley, *supra* note 103, at 253.

grouping.¹²⁶ In addition to these church-based resources, other resources exist for the Christian wishing to pursue religiously based ADR outside the formal mechanisms established by any particular denomination. A leading example of this would be Peacemaker Ministries Institute for Christian Conciliation.¹²⁷ Thus, to a greater or lesser degree, Christians in America do indeed have religiously based ADR options available to them should they wish to eschew state courts.

An interesting question would be the degree to which a particular denomination could require its members to submit their disputes to binding, religious mediation or arbitration as a condition of membership. A recent case hailing from California, and involving the Church of Scientology, may shed some light on this question.¹²⁸ The case was brought by four women who accused actor Danny Masterson of stalking, harassment, and the intentional infliction of emotional distress, naming the Church of Scientology as a co-defendant.¹²⁹ The women, along with Danny Masterson, were all members of the Church of Scientology at the time of the alleged wrongdoing, pursuant to which they executed agreements stipulating to binding arbitration within the Church of Scientology with regard to “any dispute, claim or controversy against the Church.”¹³⁰ Participation in the Church was conditioned upon execution of these agreements.¹³¹ Complicating matters is the fact that the four women are no longer members of the Church of Scientology. As discussed previously, ordinary principles of contract law ought to apply here, and to the extent that the agreement purports to bind the women in perpetuity to their promise to arbitrate all matters against the Church, the agreement may be struck down as unconscionable. To the extent that the agreement is upheld but any ensuing arbitration proceeding is marred by bias or some other serious defect, its determination might not be binding upon the parties.

¹²⁶ *Id.*

¹²⁷ See DOMKE ET AL., *supra* note 123, at § 54.8; see PEACEMAKER MINISTRIES (2020), <https://www.peacemakerministries.org/> (last visited Sept. 13, 2020).

¹²⁸ See Eriq Gardner, *The Church of Scientology Says Danny Masterson Stalking Suit Must Go to “Religious Arbitration”*, HOLLYWOOD REP. (Jan. 8, 2020), www.hollywoodreporter.com/thr-esq/church-scientology.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

V. CHRISTIAN ADR TOMORROW

What does the future hold for Christian alternative dispute resolution? The question is a fascinating one as it taps into some powerful cultural cross currents and demographic trends. The main religious headline of the past few decades has been the rise of the “nones”: those Americans who self-identify as not belonging to any particular religion. Their rise has been dramatic, in both real numbers and percentage terms. According to the Pew Research Center, simply between the years 2007 and 2015, their ranks have grown from 16% of all Americans to 23% of all Americans.¹³² And if one looks deeper, it’s not merely that this rising cohort of Americans rejects organized religion. Rather, it’s that they reject God.¹³³ Their ranks are populated by atheists and agnostics in unprecedented numbers.¹³⁴

Finally, the ferocity of their rejection of God and religion is also noteworthy. One cannot have missed the “New Atheism” movement in America.¹³⁵ This threatens the imposition of a secularist culture in the United States akin to that which we’ve seen in Western Europe.¹³⁶ Most Americans are probably aghast at France’s practice of banning religious jewelry or garments in public school,¹³⁷ or of essentially forcing Muslim women to strip into swimwear with which they are religiously uncomfortable should they desire to enjoy the beach.¹³⁸ Yet in America today the government has effectively shuttered successful adoption agencies for staying true to their religious beliefs.¹³⁹ An order of nuns, the Little Sisters of the Poor, have spent the last several years fighting off government efforts to impose upon them a requirement to subsi-

¹³² See Michael Lipka, *A Closer Look at America’s Rapidly Growing Religious ‘Nones’*, PEW RSCH. CTR. (May 13, 2015), <https://www.pewresearch.org/fact-tank/2015/05/13/a-closer-look-at-americas-rapidly-growing-religious-nones/>.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ See, e.g., CHRISTOPHER HITCHENS ET AL., *THE FOUR HORSEMEN* (2019).

¹³⁶ See Antony Barone Kolenc, *Religion Lessons from Europe: Intolerant Secularism, Pluralistic Neutrality, and the U.S. Supreme Court*, 30 PACE INT’L L. REV. 43 (2017).

¹³⁷ See Elaine Sciolino, *France Assembly Votes to Ban Religious Symbols in Schools*, N.Y. TIMES (Feb. 11, 2004), <https://www.nytimes.com/2004/02/11/world/french-assembly-votes-to-ban-religious-symbols-in-schools.html>.

¹³⁸ See Mohamed Abdelaal, *Extreme Secularism vs. Religious Radicalism: The Case of the French Burkini*, 23 ILSA J. INT’L & COMP. L. 443 (2017).

¹³⁹ See Matthew W. Clark, *The Gospel According to the State: An Analysis of Massachusetts Adoption Laws and the Closing of Catholic Charities Adoption Services*, 41 SUFFOLK U. L. REV. 871, 872 (2008).

dize birth control for their workers, in contravention of their values.¹⁴⁰ We've moved beyond yesterday's "live and let live" approach to religious tolerance. As per the title of a recent book, "Why Tolerate Religion?" seems to be growing sentiment.¹⁴¹

But largely overlooked, I suggest, has been the concomitant rise of intensity among those who remain religiously active. I refer here to the increased orthodoxy and more scrupulous practice of the faith among those who continue to adhere to it. Whereas the lukewarm are falling away, those who are hot with religion appear to be burning hotter still.

Although quality statistical evidence is hard to come by, there is some.¹⁴² And the anecdotal evidence appears overwhelming. Among Jews, the fastest growing communities are those which are orthodox,¹⁴³ among Protestants, the fastest growing communities are among the Evangelicals;¹⁴⁴ among Catholics, the fastest growing communities are those which embrace traditional practices and beliefs.¹⁴⁵ For example, the religious orders of sisters and nuns, who largely shed their habits and many of their distinctively Catholic features a few generations ago, are now pretty much entirely extinct.¹⁴⁶ But newer orders, featuring stunningly traditional habits and austere, medieval lifestyles, are flourishing.¹⁴⁷ While "main-

¹⁴⁰ *Little Sisters of the Poor Appeal to the Supreme Court, Again*, CATH. WORLD REP. (Oct. 9, 2019), <https://www.catholicworldreport.com/2019/10/09/little-sisters-of-the-poor-appeal-to-the-supreme-court-again/>. In the interest of full disclosure, I have signed two amicus briefs on behalf of the Little Sisters of the Poor in connection with this litigation. See Brief for Constitutional Law Scholars as Amici Curiae Supporting Petitioners, *Little Sisters of the Poor v. Burell*, 136 S. Ct. 1557 (2016) (No. 15-105), 2016 WL 183794; see also Brief for Constitutional Law Scholars as Amici Curiae Supporting Petitioners, *Little Sisters of the Poor v. Pennsylvania*, 140 S. Ct. 2367 (Nos. 19-431, 14-454), 2020 WL 1391893.

¹⁴¹ BRIAN LEITER, *WHY TOLERATE RELIGION?* (2012).

¹⁴² See RONALD J. COLOMBO, *THE FIRST AMENDMENT AND THE BUSINESS CORPORATION* 65 (2014).

¹⁴³ See *A Portrait of Jewish America*, PEW RSCH. CTR. (Oct. 1, 2013), <https://www.pewforum.org/2013/10/01/jewish-american-beliefs-attitudes-culture-survey/>); see also Laura E. Adkins, *Orthodox to Dominate American Jewry in Coming Decades as Population Booms*, FORWARD (Jun. 12, 2018), <https://forward.com/news/402663/orthodox-will-dominate-american-jewry-in-coming-decades-as-population/>.

¹⁴⁴ See *America's Changing Religious Landscape*, PEW RSCH. CTR. (May 12, 2015), <https://www.pewforum.org/2015/05/12/chapter-1-the-changing-religious-composition-of-the-u-s/>.

¹⁴⁵ See Stephen Beale, *FSSP Sees Growth 10 Years After Summorum Pontificum*, THE CATH. REG. (Nov. 7, 2018), <https://www.ncregister.com/daily-news/fssp-sees-growth-10-years-after-summorum-pontificum>.

¹⁴⁶ See Russell Shaw, *Where Have All the Sisters Gone?*, CATH. ANSWERS (Dec. 1, 2006), [//www.catholic.com/magazine/print-edition/where-have-all-the-sisters-gone](http://www.catholic.com/magazine/print-edition/where-have-all-the-sisters-gone).

¹⁴⁷ See Mark Oppenheimer, *Nuns of a New Generation Forge Their Own Path*, N.Y. TIMES (Aug. 7, 2015), <https://www.nytimes.com/2015/08/08/us/nuns-of-a-new-generation-forge-their->

stream” Catholic parishes and seminaries are closing across the United States, traditionalist Catholic parishes are filled with large families and traditionalist religious orders (featuring priests who don cassocks and chant the Mass in Latin) have opened new seminaries—which are bursting at the seams.¹⁴⁸

All this suggests a widening gulf in America between the religious and the nonreligious. Moreover, with increased overall societal secularization, I see a further estrangement between citizens of faith and American governmental institutions. Indeed, the state’s attitude toward Christianity in particular has evolved fairly quickly from the tacit embrace at its founding,¹⁴⁹ to a warm and benign tolerance near the latter half of the twentieth century, to, in many quarters today, outright hostility (as referenced above).¹⁵⁰ Long gone, I fear, will be those days of yesteryear where being a faithful Christian and a patriotic American citizen were seen as co-terminus.¹⁵¹

Consequently, this might breathe new life into St. Paul’s exhortation to the Corinthians. For Christians may no longer view state courts as fundamentally or foundationally Judeo-Christian. Christians may no longer see, in judges, juries, and magistrates, fellow believers. They increasingly see non-Christians today, but may come to see, increasingly, enemies tomorrow. In short, as American society and government more slowly comes to resemble that of Corinth in the first century,¹⁵² it will become increasingly difficult for practicing Christians to disregard so blithely the injunction against recourse to secular courts.

own-path.html); Joanna Bogle, *The New Sisterhood: traditional orders are booming*, CATH. HERALD (Jan. 17, 2019), <https://catholicherald.co.uk/magazine/the-new-sisterhood-traditional-orders-are-booming/>.

¹⁴⁸ See *Annual Census Shows Prolific Growth at FSSP Parishes*, MISSIVE (Oct. 17, 2019), <https://fssp.com/annual-census-shows-prolific-growth-at-fssp-parishes/>; Jeffrey Cimmino, *Traditional Catholic Parishes Grow Even as US Catholicism Declines*, WASH. EXAMINER (Nov. 2, 2019), <https://www.washingtonexaminer.com/news/traditional-catholic-parishes-grow-even-as-us-catholicism-declines>).

¹⁴⁹ “These, and many other matters which might be noticed, add a volume of unofficial declarations to the mass of organic utterances that this is a Christian nation.” *Holy Trinity Church v. United States*, 143 U.S. 457, 471 (1892).

¹⁵⁰ See Clark, *supra* note 139 and accompanying text.

¹⁵¹ Cf. PATRICK MCKINLEY BRENNAN & CHRISTOPHER A. FERRARA, *LIBERTY, THE GOD THAT FAILED* vi–vii (2012).

¹⁵² Thor Masden, *The Ethical Similarities Between Corinth and Today*, ERLC (Apr. 1, 2015), <https://erlc.com/resource-library/articles/the-ethical-similarities-between-corinth-and-today>; Julian Spriggs, *Corinth: The City and the Church*, BRINGING GOD’S WORD TO THE NATIONS, <http://www.julianspriggs.co.uk/Pages/Corinth> (last visited Sept. 13, 2020).

