E. CHURCH RESOURCES

How the religious body chooses to deploy its resources is an important element in collective religious liberty, and a large degree of autonomy should be accorded religious bodies in making such determinations without outside interference, particularly by government or the courts. Yet it is in precisely such matters that some of the most egregious interventions have occurred. Although religious bodies' utilization of deployable resources is a kind of subtopic to church property law, it has its own unique collection of case law, since "real" property is treated somewhat differently from "personal" property (furnishings, vehicles, securities, and—most controversial of all—money).

As was observed above, material resources are important for the enabling and embodiment of religious visions and commitments. Yet they are subject to two opposite distortions: disparagement and preoccupation. Both religious leaders and civil magistrates tend—each in their own way—to belittle the religious significance of such objects and at the same time to focus excessive attention upon them. The former can preach sermons against obsession with "mere" material goods but be intensely attentive to prudent investment of surplus church funds (if any). The latter can glibly offer reassurance that "denial of tax benefits... will not prevent [them] from observing their religious tenets,"[1] but then undertake to examine in minutest detail how a religious body allocates its resources, as being presumably far more tangible and "real" than mere spiritual matters. Neither of these extremes is appropriate.

Material objects can be useful, valuable, significant, even evocative of spiritual commitments, but they are not ultimate, divine or indispensable. Of course, some are invested with special sanctity that entitles them to be called "sacred" or "holy," but Christians believe that salvation is in a Savior and not in material objects, however holy; that persons are of greater worth than any material objects; that material objects can be instrumental to salvation and to service, but are not themselves the service or salvation. Other religions may hold similar views. Nevertheless, material resources can and do serve important spiritual purposes. They cannot properly be viewed as mere mundane "temporalities" divorced from the function they fulfill in the religious enterprise. Yet that is what sometimes happens at the hands of the civil authorities.

1. *Bob Jones Univ. v. U.S.*, 461 U.S. 574 (1983), discussed at VC6c(4)ff.

1. The State Takes Over a Church

> On January 3, 1989, the State of California took over a church. It was not done quietly, but it was done very suddenly. A retired judge, officials from the State Attorney General's office, and private attorneys entered the Worldwide Church of God headquarters in Pasadena. They strode to the executive suite. Church employees, taken totally by surprise, resisted. State officials threatened arrests. They banged glass doors with night sticks. When the judge had entered the suite, he almost immediately fired a church secretary. Cartons of documents were seized by state officials and carried off, with no record left for the church.
>
> The judge and his staff moved into the top floor of the Church Administration building. They stopped payment on all the Church's outstanding checks, including paychecks and checks to television and radio stations. The judge...had been made the court-appointed receiver of the Church. As such, he became master of all the Church's financial operations.[2]

What had happened? Six disaffected members of the Worldwide Church of God had complained to an attorney, Hillel Chodos (who relayed their complaint to Lawrence R. Tapper, a deputy attorney general of the state of California), that the leaders of the church were "siphoning off" church assets for their "own personal use and benefit," liquidating the properties of the church "on a massive scale" at prices far below fair market value, and destroying church records to "frustrate discovery of their wrongdoing."[3] Tapper and Chodos had gone into court with an *ex parte* motion[4] to place the church in receivership so that its assets could be safeguarded. Judge Jerry Pacht granted the motion and appointed Judge Steven Weisman as temporary receiver, with vast powers:

> to take possession and control of the Church..., to supervise and monitor all of the business and financial operations and activities of the Church..., to hire, employ and retain lawyers, accountants, appraisers, business consultants, computer experts, security guards, secretarial and clerical help, and employees of all sorts to assist him... and he is authorized to pay reasonable compensation to all his assistants out of the funds and assets of the Church..., to take immediate possession of all books and records of the Church..., to supervise and control all the business and financial operations of the Church..., to suspend or terminate, as he in the sound exercise of his sole discretion determines is necessary, any employee, officer or agent of the Church [except its two top leaders]....[5]

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2. Worthing, Sharon, "The State Takes Over a Church," in Kelley, D.M., ed., *Annals of the American Academy of Political and Social Science*, 446:137 (Nov., 1979).

3. Rader, Stanley R., *Against the Gates of Hell* (New York: Everest House, 1980), p. 80.

4. Meaning unilateral—without notice to the other side—which is usually contrary to the rules of the court. See ibid., p. 78.

5. Ibid., pp. 81-82.

When Judge Weisman stopped payment on all of the church's checks, an excellent credit rating was destroyed overnight. The church's operations ground to a halt. A special appeal to its members for funds to be sent directly to its head and founder, Herbert W. Armstrong, at his home in Tucson, Arizona, was composed, and sixty thousand letters containing the appeal were prepared at the Pasadena headquarters and deposited at the post office. Judge Weisman ordered the post office to hold all mail from the church, and he sent out telegrams to all the church's ministers ordering them to forward all contributions directly to him.

All of this was at the church's expense. From the assets he was appointed to protect, the receiver paid himself $51,000 (at $150 per hour). Chodos and his associates put in a bill for over $100,000 (at $200 per hour—of which, more later). Two other sets of attorneys retained by the receiver requested $31,200. Guard services came to $60,000. Peat, Marwick & Mitchell billed $32,300 for auditing services, and two "operating officers" from San Francisco ran up charges of $15,000 and $19,000 plus travel expenses commuting to and from Pasadena.[6]

The receiver remained in possession for seven weeks, until loyal members of the church put up a stay bond of $3.4 million (some of them mortgaging their homes to make up the surety). In July 1979 the attorney general filed an amended complaint, still only on "information and belief." Despite seven weeks' access to the church's records and accounts, he offered no proof of his sweeping charges. In fact, the judge who had authorized the receivership said on January 12, 1979,

> I don't believe from the state of the evidence that the plaintiff [the attorney general] has made any real showing of any substance that properties have been sold below market value. The declarations that were filed by the plaintiff in this regard have indulged in sheer speculation, conclusion and hearsay regarding the sales....[7]

Nevertheless, the court allowed the occupation to continue because

> I believe it is not the duty of this court to finally determine [the charges], but only to determine whether or not there is any reasonable likelihood that perhaps a trier of fact in the future in this, when this action is heard, will determine that there is some possibility of truth to these charges, probability of truth.[8]

The church appealed the court orders, but the California Court of Appeals upheld them, and the State Supreme Court declined to hear the case. The church retained Professor Laurence Tribe of the Harvard Law School, one of the nation's leading

6. Ibid., pp. 117-119.

7. Quotations are from transcripts of the court's proceedings recorded by court reporters, quoted in Worthing, *supra*, p. 139.

8. Ibid., p. 140.

authorities on constitutional law, to petition the U.S. Supreme Court to deliver it from the grasp of the State of California. The petition was supported by briefs *amicus curiae* filed by the National Council of Churches, the National Association of Evangelicals, the Synagogue Council of America, the Christian Legal Society and the American Civil Liberties Union, as well as a number of denominations, who were appalled at the developments in California.[9]

The Supreme Court declined to hear the case, as often happens with appeals of "procedural" matters, since it usually prefers to wait until lower courts have completed their work and the case can be seen in its entirety. However, sometimes it is the "procedure" itself that may extinguish the rights sought to be protected, in this instance the right of a church not to be ransacked by the state. Each court to which the church appealed apparently felt that the matter could be rectified in due course—*after* the receiver had occupied the church, *after* the attorney general had gone through its records, *after* the allegations of wrongdoing had been spread far and wide by the press, *after* the church's credit and credibility had been ravaged, *after* its work had been disrupted and its assets squandered by the *state*. Then—*if* the attorney general ever brought anyone to trial (which he never did)—*then* the church *might* have its "day in court" to try to vindicate itself. That day never came, at least not in any conclusive fashion.

The attorney general dropped the investigation of the Worldwide Church of God in October 1980 (along with several similar investigations of religious groups) when the California legislature—at the urgent behest of a broad coalition that included not only the California Church Council but the American Council of Christian Churches on one end of the spectrum and the American Civil Liberties Union on the other—revised a section of the state's Nonprofit Religious Corporation Law to make clear to the attorney general that

> government action regarding religious bodies must be narrow and minimal. The Legislature hereby declares that the power of the State of California with respect to the formation, existence, and operation of religious corporations shall be limited to those expressly provided in statutes duly enacted by the Legislature.[10]

This case is described at this point because of its remarkable supposition that the resources of a religious body can be controlled by the state without affecting its free exercise of religion. The court directed that the receiver would have no authority "to

9. See Kelley, D.M., "A Church in Receivership: California's Unique Theory of Church and State," *The Christian Century*, June 18-25, 1980, p. 669.

10. S.B. 1493 (known as the Petris bill after the state senator who sponsored it and secured its enactment), 1980 Cal. Stats. ch. 1324, Section 1, quoted in Dallin H. Oaks, "Trust Doctrines in Church Controversies," 1981 *BYU L. Rev.* 805 (1981). Oaks described the narrow limits placed on the attorney general by the revised statute, p. 884-5.

interfere in any way with the ecclesiastical functions of the church... and [he] is ordered not to do so." The judge further opined:

> I just don't think ecclesiastical matters have anything to do with the financial aspects of the operation out there. I can see a clear delineation between what is ecclesiastical and what is not, but it has no reference whatsoever to financial matters.[11]

Yet what the receiver did—with the court's approval—was to interfere devastatingly with virtually every aspect of the operations of the Worldwide Church of God:

1. Occupying its administrative headquarters;
2. Firing employees;
3. Turning over multitudinous cartons of church files seized virtually at random—which may have contained documents pertaining to any and all aspects of the church's work—to the attorney general to scour for whatever purposes;
4. Interdicting all mail communications from the church to its members;
5. Directing all ministers of the church to send all contributions directly to him, and only to him, for impounding.
6. Stopping payment on all of the church's outstanding checks, thus not only destroying its credit rating but halting its extensive and significant radio and television programming—a central part of its outreach ministry.

The very appointment of the receiver and the ostensible reasons for it—allegations of financial mismanagement and malfeasance—provided a sensational news story that the press and the media played to the hilt, and it sent shock waves throughout the church. It is hard to imagine what "ecclesiastical" aspects of the church were *not* utterly convulsed by this invasion.

On top of this, the attorney general asked the court to remove the leaders of the church and its board of directors and to disqualify them from ever serving as directors of that church or of any other charitable entity in the state! Although no members of the church (other than the six excommunicated dissidents) had ever complained about the uses made by the leadership of their contributions, and although over 3,500 of them rallied to the church's defense by coming *in person* to Pasadena on January 14, 1979, and packing the ground floor of the Administration Building round the clock with their bodies to bar the entry of the receiver and his henchman,[12] and although the members put up $3.4 million as a stay bond to secure the removal of the receiver, the court recognized in them no right to govern the activities of their church. When an attorney for the church attempted to explain that the members were satisfied with

11. Excerpt from Reporter's Transcript of Proceedings in Superior Court of California, Los Angeles County, in *People v. Worldwide Church of God*, Feb. 21, 1979.

12. Rader, *supra*, pp. 132 ff.; as a result of this outpouring, an agreement was worked out whereby the receiver was relocated to another part of the headquarters campus, p. 142.

the existing leadership and the way it operated, the judge replied, "Counsel, their wishes are immaterial."[13]

How could things ever have reached this incredible condition in a nation that professes to respect religious liberty, whose Supreme Court has said that "excessive entanglement" between religion and government is a forbidden "establishment" of religion?[14] Two factors contributed to this development. One was the church; the other was the state.

a. The Worldwide Church of God. The Worldwide Church of God was founded in 1933 by Herbert W. Armstrong and was known as the "Radio Church of God" for many years. It was a very strict Sabbatarian millenialist sect, whose members supported it by generous tithing. It did not proselytize, and those wishing to join had to undergo several years of rigorous training. It did not solicit money from the public and gave away its publications, such as *Plain Truth*. It defined its "work" or mission as "announcing the news of the coming Kingdom of God through all means and media of communication that are available."[15] It did not favor building local church edifices but rented space in various localities to accommodate its congregations.

Mr. Armstrong had the engaging belief that nothing was too good for God or God's ambassadors. He traveled First Class, and so did his assistants. He built a splendid campus in Pasadena for Ambassador College, which he founded, and on that campus were located Ambassador Auditorium ("one of the most beautiful and acoustically perfect concert halls in the world,"[16] where the world's leading musicians presented concerts) and the Administration Building referred to above, facing each other across reflecting pools and fountains. The furnishings of these buildings (and of all others on campus) were of the finest quality. Mr. Armstrong wanted the students to learn to appreciate and care for nice things, and he spared no expense to provide them. It was rather like Taj Mahal West, and stood as the epitome of the upscale style in which that church gratefully savored God's gifts.

Stanley Rader, an attorney and accountant among whose clients was the church, was elevated to become Treasurer and General Counsel of the Church, Mr. Armstrong's right-hand man, who accompanied him on his ambassadorial missions and "ran" the church from an opulent office (about the size of a basketball court) in Pasadena on the top floor of the Administrative Building. Mr. Rader's style was neither shy nor self-effacing. When a reporter asked him if he didn't live in a million-dollar home, he replied, "No, not at all. It was a two-million dollar home, actually, the finest dwelling in Beverly Hills."[17] On the Sixty Minutes program on CBS-TV on April 15, 1979, moderator Mike Wallace tried to embarrass Rader by

13. Ibid., p. 247.
14. *Lemon v .Kurtzman*, 403 U.S. 602 (1971).
15. Rader, *supra*, p. 15.
16. Ibid., 11th p. of photographs between pp. 256 and 257.
17. Ibid., p. 206.

asking about lavish expenditures by church officials. One Prof. Osamu Gotoh, an overseas emissary of the church, ran up a tab in a 10-month period, said Wallace, of $358,000 in credit-card charges. Rader: "That must have been a slow period." At another point, Rader explained that his salary and employee benefit package from the church came close to $300,000 a year, and Wallace remarked, "You're a rich man." Rader: "That makes me well paid, doesn't necessarily make me rich."[18] He insisted it was commensurate with what he was earning in private practice.

One can see that to people making not one-tenth of that amount, Rader's level of remuneration and style of life might inspire a train of thought that would engender or resonate with charges of "siphoning off millions of dollars" from the church. Yet the members of the church were regularly informed of the comings and goings of their leaders; annual audits were made of the finances of the church; every penny was accounted for. Mr. Rader's emoluments were stipulated in his contract, and he paid income tax on everything he got from the church.[19] The Internal Revenue Service had audited the finances of the church eight times, the most recent being an eighteen-month examination, and the church had received a "clean bill of health" each time.[20] So the charges against the church seemed implausible to begin with, and none was ever proved.[21] But many people seemed unable or unwilling to believe that a church could or would choose to deploy its resources in that way.

How did it so choose? Who makes such decisions in the Worldwide Church of God? Mr. Rader made no bones about it.

> The Church's internal organization is hierarchical rather than congregational.... Authority proceeds from the top down in temporal as well as ecclesiastical matters. Herbert Armstrong appoints the members of the board of directors and is the temporal and pastoral head of Church affairs. His position and authority are comparable to those of his holiness, the pope....[22]

Mike Wallace seemed incredulous at such an arrangement:

> Wallace: Herbert Armstrong, in effect, has the right to do with the Church what he wants.
> Rader: You bet your life... because he is responsible and accountable to God.
> Wallace: Therefore that makes it a cult.... [A] cult is led by one man. There aren't by-laws, there aren't rules, there aren't boards, there aren't....
> Rader: Mike, Mike, I'm surprised at you. You are a very informed man.... Would you say that of the Pope?

18. Ibid., pp. 215, 218, 223.
19. Ibid., pp. 88, 225.
20. Ibid., p. 210-211.
21. Rader offered detailed refutation of the charges on pp. 88-93.
22. Ibid., p. 283.

> Wallace: But there are bishops and there are cardinals....
> Rader: Ask them the last time they opposed the pope?
> Wallace: But they elected the pope. The pope did not elect himself.
> Rader: Fine, fine. But who elected the first pope?
> Wallace: Who elected Herbert Armstrong?
> Rader: Mr. Armstrong has served as Christ's apostle for forty-six years. By the constant approval of his members, day by day, week by week, year by year, he has proved that he is the only person worthy of that office. And there is no person within this church who would ever for a moment think otherwise.[23]

In such a way do most religious movements begin, as seen in the case of Methodism, whose first leader, John Wesley, was not "elected" by anyone. He offered his leadership, and many followed. As time goes on, the pattern of decision-making may be regularized within a religious movement in hierarchical or other forms, with greater or lesser degrees of democratic participation by the adherents. But whatever pattern of decision-making a religious body has chosen, it should be permitted to follow without outside interference, particularly by the state.

But sometimes the state feels obliged to enforce some degree of "accountability" on religious bodies, especially when impelled by complaining dissidents or other outside critics of the religious body. In the aftermath of the Jonestown "meltdown" in November 1978, public officials seemed to feel an especially acute urge to "ride herd" on odd-ball religious groups, particularly in California, which has more than its share of them.

b. The State's "Public Trust" Theory. The State of California and its remarkable "public trust" theory deserve a place of special attention in any treatment of the law of church and state, if only for its sheer effrontery. The attorney general (or rather several of his career staff) spun out a concept that they claimed was derived from the ancient common law, to the effect that whenever people give money for a charitable purpose (including a religious purpose), they create a *trust*, the beneficiary of which is the public. And as the servant of the public, the attorney general has the responsibility of safeguarding that trust to make sure that it actually benefits the public and is not diverted to private gain. (Conveniently overlooked was the fact that the common law developed in England, where the monarch is head of the Established Church, and where the powers claimed by the attorney general as descended from the chancellor are primarily derived from the royal prerogative, which does not apply in this country.[24])

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23. Ibid., p. 213.

24. See Oaks, *supra*, pp. 816-822: "The American cases that rely on English common law as the precedent for allowing the attorney general to enforce and supervise charities are erroneous. Acting under its general sovereignty... a state legislature may of course enact statutes conferring such broad... authority on the... attorney general, but such authority does not come from the common law."

The full flavor of this claim can be appreciated only by savoring the inimitable words of Hillel Chodos, addressing the court on behalf of the attorney general:

> The Attorney General of the State of California, and his deputies, have not only the power, but the duty, at any time to investigate all the books and records... of any charitable, religious or educational organization because... [it] derives its position, its existence, from the State of California.
>
> Now those records do not belong... to Mr. Armstrong. There are no privileges, constitutional or otherwise, of a charitable foundation against investigation by the Attorney General....
>
> [F]or 700 years, Your Honor, it has been the law of England and America that charitable funds are public funds. They are perpetually in the custody of the court. The court is the ultimate custodian of all church funds....
>
> Your Honor has the power and the discretion to safeguard and preserve those assets and the duty to do so. But the church, as a charitable trust, has no interest to protect here. It has no client. It is the court's funds, and the court may remove and replace and substitute trustees at its pleasure.[25]

It was this line of reasoning that led the court to remark that the wishes of the members of the church were immaterial, and to look with suspicion upon efforts by the church to defend itself against the solicitous attentions of the attorney general.

This rather sweeping view of the court's power proved to have several remarkable corollaries that were explicit or implicit in the court order empowering the receiver:

> 1. The state controls and supervises the use of all church assets and may punish those who attempt to evade state-mandated restrictions;
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> 2. The state can appropriate church funds to pay the salaries and expenses of the state's supervisors and investigators;
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> 3. The state may remove church leaders if it has the slightest suspicion that they are not following state dictates and bar them from serving in any capacity in any other charitable entity in the state;
>
> 4. Churches have no right to the due process of law guaranteed by the United States Constitution;
>
> 5. Churches have no right to defend themselves against the state, nor to retain counsel of their own choosing;
>
> 6. The state determines how churches are to be governed;
>
> 7. The state can examine and physically take all church records regardless of the chilling effect this might have on membership and participation;
>
> 8. Church members have no right to protect their church or direct how their contributions should be spent;

25. Appendix, Petition for Certiorari at 170b-172b, *Worldwide Church of God, Inc. v. California*, 449 U.S. 900 (1980) (denying *cert.*).

> 9. The People of the State of California own and control all property of churches incorporated in California, even if no California citizen has ever contributed to the church.[26]

c. Some Commentators. These remarkable assertions did not go without evaluation by several legal scholars.

(1) Dallin H. Oaks, formerly president of Brigham Young University, then a justice of the Supreme Court of Utah, and more recently a member of the Council of Twelve of the Mormon Church, has written what may well be the definitive commentary on this issue: "Trust Doctrines in Church Controversies."[27] After first demonstrating that neither the attorney general nor the court of equity can claim the power to supervise churches under the common law, and that they have not been given such powers by the legislature in any state but California, Oaks concluded:

> Despite a search covering hundreds of trust opinions, including a fifty-state lexis search..., the author of this article has not found a single case outside of California in which the "trust" nature of a religious charitable corporation's relationship to its property or its charitable purpose was the basis for any regulatory or supervisory action against the corporation by the attorney general. In short, as to religious charitable corporations the attorney general's so-called common-law powers of enforcement or supervision are non-existent except for the conventional quo warranto power to limit a corporation to activities within its charter powers. This common-law position is in force in all American states except where modified by statute.... As to this subject, the statutes have made few modifications.[28]
>
> * * *
>
> The one type of charity that is universally excluded from the coverage of charitable enforcement or supervision legislation is the church or the trust, corporation or other organization formed for religious purposes.[29]

And in California, as mentioned earlier, that power has been sharply curtailed by the "Petris bill" enacted by the legislature in October 1980, "rescinding the legislative basis for the public trust doctrine."[30]

Oaks assessed the constitutionality of the powers claimed and exercised by the attorney general in the Worldwide Church of God situation.

> Because an assertion of judicial and attorney general supervisory jurisdiction over religious charitable trusts and corporations provides a

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26. These corollaries are taken from Jackson, Morton B., "Socialized Religion: California's Public Trust Theory," *Valparaiso Univ. L. Rev.*, 16:185 (1981), in which each corollary was documented from court records in this or contemporary California cases.

27. *BYU L. Rev.* 805-907 (1981) republished by Mercer Univ. Press, 1984.

28. Ibid., p. 864.

29. Ibid., p. 868.

30. Ibid., p. 887.

> means of state surveillance, regulation and control over the exercise of religious privileges, it is at least a presumptive violation of the guarantee of free exercise of religion....
>
> [T]his supervision inevitably involves official authorities in monitoring and ruling upon religious doctrine and practice, since the purposes of a religious organization are, by definition, overtly religious in nature. Surveillance of churches and official consideration of religious matters are clearly forbidden by the first amendment.[31]
>
> * * *
>
> A systematic monitoring of the financial affairs of churches almost certainly infringes the free exercise of religion. The more intrusive official interventions, such as the appointment of a receiver or the replacement of church officers, are even more obvious infringements of free exercise.[32]

He also concluded that such interventions violated the no-establishment clause because they are the epitome of excessive entanglement.[33]

(2) Charles M. Whelan, S.J., in a brief paper entitled "Who Owns the Churches?" presented at a 1981 Conference on Government Intervention in Religious Affairs, addressed the Worldwide Church of God case with wit and insight. As Professor of Constitutional Law at Fordham Law School, he was one of the few experts on the law of church and state who was also fully conversant with the needs and interests of religious bodies.

> The question ["Who Owns the Churches?"] is perfect for headlines: it is brief, uses only familiar words, and raises a very interesting point.
>
> Unfortunately, all the correct answers to this admirably short and brisk question are lengthy, complex, tedious, and dull.[34]

What posed this question?

> It was the assertion by the Attorney General of California that "the public owns the churches"—a five-word answer to a four-word question.
>
> * * *
>
> I think it clear that the Supreme Court would have rejected the Attorney General's assertion out of hand. Certainly, the court would have rejected the Attorney General's assertion that he has the same supervisory authority over the administration and expenditure of church funds that he has over the administration and expenditure of the funds of other types of charitable trusts and charitable corporations. The Attorney General's fundamental mistake—a mistake shared by the lower courts in California—was that the status of a church *as a charitable trust or corporation*

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31. Ibid., p. 887, citing *Presb. Ch. v. Hull Church*, 393 U.S. 440 (1969), discussed at § B5 above.

32. Ibid., p. 889.

33. Ibid., pp. 889-892.

34. Whelan, Charles M., "Who Owns the Churches?" in Kelley, D.M., ed., *Government Intervention in Religious Affairs* (New York: Pilgrim Press, 1982), p. 57.

> gave him special powers over church finances. The truth is that the special status of a charitable trust or corporation *as Church* severely limits and curtails those powers.
>
> Without doubt, the Attorneys General have *some* supervisory authority over the administration and expenditure of church funds. Otherwise, there is no protection for church members against gross financial abuses by church leaders. But the supervisory power must be exercised with at least as much caution and restraint, and with at least as many procedural safeguards, as in the case of business corporations, labor unions, or nonreligious charitable trusts and corporations. How much *more* protection the First Amendment gives churches, the Supreme Court will have to tell us on another day.[35]

(3) Morton Jackson, an attorney in private practice in Los Angeles, who was active in seeking repeal by the legislature of the powers claimed by the attorney general, directed a critique at the unique California idea that he termed "Socialized Religion," in which the state asserts ownership and control of the means, not of production, but of worship. That such an idea should be not only seriously advanced in the United States of America in 1979, but actually put into effect, with the full machinery of the California executive authorities behind it and the apparent acquiescence of all courts, state and federal, to which it was taken prior to the legislature's repeal, boggles the mind. As Jackson wrote in 1981:

> [N]o case has ever held a church to be a public trust in the sense that the attorney general asserts, that is, with assets held in public trust and officers considered public trustees. Nor has any court either in the United States or in England specifically ruled that a church is subject to attorney general supervision or that a church is subject to the entire body of public trust law.[36]

Although churches are generally "deemed to be of a worthy nature," that does not make them "charities" in a legal sense, and certainly does not make them "public." "[N]o amount of evidence that churches are trusts benefiting the public-at-large incidentally can show that churches are trusts exclusively *for* the public benefit."[37] On the contrary, a primary purpose of any church is to minister to the spiritual and social needs of its congregants and adherents, who constitute a body of specific and identifiable persons, therefore, *not* the "public."

> To be deemed charitable for the purpose of the law of public trusts, the organization must have... *exclusively public* purposes. An organization that has mixed public and private purposes or any substantial private purpose is not considered a charity.... Unless an organization is *obligated* by law or

35. Ibid., p. 63.
36. Jackson, "Socialized Religion," *supra*, p. 204.
37. Ibid., p. 206.

> its own charter to benefit only the public, instead of being able to choose among its various corporate purposes, then no court of equity can enforce a trust for the benefit of the public because there is *none* to enforce. The fact is that the assets of a church are held beneficially by the corporation to do with as it pleases consistent with its corporate purposes. The church may legally limit its activities and the use of its assets to the private religious purposes of its members....
>
> Thus churches are always "charitable" in that they are benevolent but never "charitable" in that they always have a substantial private aspect.[38]

d. A Court Speaks—Belatedly. After the attorney general had dropped the Worldwide Church of God investigation, an appellate court finally got around to assessing the merits of his actions. It did so indirectly, in an action rejecting the application of Hillel Chodos and associates for $100,000 in attorney's fees for their part in the receivership, sought to be collected from the assets of the Worldwide Church of God. In a unanimous opinion, a three-judge panel of the Court of Appeal of the State of California, Division Two of the Second Appellate District, reviewed Chodos' claim and rejected it with a few devastating comments. The court credited Chodos with the initiative that resulted in the receivership.

> Deputy Attorney General Tapper, apparently believing that his authority in supervising the administration of charitable trusts in California included the authority to take the rather drastic action suggested, even in a case of an admittedly hierarchical church organization... asserted that the Church's property, assets and records were "public" and that they were always and ultimately in the custody of and subject to the supervision of the courts upon application of the Attorney General.
>
> To state the proposition is to expose its conflict with the constitutional prohibition against the governmental establishment or interference with the free exercise of religion. How the State, whether acting through the Attorney General or the courts, can control church property and the receipt and expenditure of church funds without necessarily becoming involved in the ecclesiastical functions of the church is difficult to conceive.[39]

The court concluded that "In summary, the Church was severely damaged by the receivership," while "the underlying action has been dismissed without any determination that respondents [the church] were guilty of any wrong doing." And now Mr. Chodos wanted to be paid $100,000 out of the damaged, though unguilty, church's assets that he had been so solicitous to safeguard! The court disposed of each of Chodos' arguments as to why he should be reimbursed by the defendant rather than by his client, the state, and then summed up.

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38. Ibid., p. 209 (emphasis in original).
39. *People v. Worldwide Church of God*, 178 Cal. Rptr. 913, 915 (Cal. Ct. App. 1981).

> In the case at bench, the trial court realistically assessed the litigation and terminated the receivership. It implicitly failed to find that any public right had been vindicated. We agree.... And to find benefit to the public in the events taking place under the receivership... would be difficult indeed in the face of the Church's uncontroverted evidence of adverse financial and organizational impact brought on by the receivership.
>
> We are of the opinion that the underlying action and its attendant provisional remedy of receivership were from the inception constitutionally infirm and predestined to failure. It follows that the burden of the ill-conceived litigation, including the expenses of the receivership and Chodos' fees for procuring the receivership should not be borne by the prevailing party—the Church.

In the light of this tardy vindication, the church might well have sought to recover the "expenses of the receivership" plus compensatory and punitive damages from the state, but the church may have wanted to forgive and forget. Forgiveness, however, is only appropriate after repentance, and there was no indication that the persons responsible for this incredible assault on a church—or the theory underlying it—were repentant. And the theory has not been rejected by any top appellate court, and may be resurrected by any adventurous attorney general in future.

During its brief heyday in California, the attorney general's unique "public trust" theory produced at least one chilling episode that suggested what could happen elsewhere if that theory became generally accepted. On June 8, 1980, law enforcement officers entered upon the premises of Faith Center Church in Glendale, California, and seized files wanted by the attorney general in his investigation of that church and its minister, the Rev. Eugene Scott. When asked to produce a warrant authorizing such an invasion, the officers replied, "We don't need a warrant. A church is a public place!"[40]

Whether churches are "public" or "private," and in what senses and which contexts, is a question that will be discussed further.[41] Suffice it to say at this point that if churches are "public" in the sense suggested by this incident, they will enjoy the *lowest* level of protection against intrusion of any class of entities in the land rather than the *highest*, to which they should be entitled under the First Amendment.

2. The State Voids an Ecclesiastical Trust

In the prosecution and conviction of the Rev. Sun Myung Moon, the U.S. government and the federal courts sent to prison a religious leader for the way in which he used—or misused—the material resources of the Unification Church, which he founded and headed. His conviction turned on the ownership of $1,600,000 that was openly held in his name in time deposits at the Chase Manhattan bank during

40. *Los Angeles Herald-Examiner*, June 9, 1980, p. A10.

41. See § G below.

1973-75. He claimed that this was money he was holding for the church; the government claimed it was his personally. If it was church money, it was not taxable, and he had committed no offense; if it was his, it was, and he had.

Although there is a presumption in common law running back to the mortmain statutes of Henry VIII that "gifts" from church sources to a church leader for church purposes are *presumed* to be church property, though held in his personal name and though absent any explicit trust instrument, and though that presumption was reflected in New York trust law (which should have governed cases arising in that venue),[42] the government simply asserted that the gifts were for Moon personally, not for the church, because they were held in his name, and he spent them as he saw fit. (Of course, that is perfectly consonant with trusteeship: a trustee holds legal title to assets for the benefit of another, in this case the church, and exercises complete dominion and control over them, even using portions for his own expenses, without making the entire corpus his property.) Thus the government by *fiat* converted $1.6 million from church property to property of Moon and his heirs, and then convicted him for not paying income tax on the interest it earned!

In the course of trial, the judge submitted to the jury the question whether the uses to which the money in question was put were (in its lay view) "religious." (Most of it—during the years in question—was invested in time deposits or other income-producing investments, which is a practice not unknown in other, older religious bodies.) The jury was not asked—nor allowed, since no evidence was admitted on this issue—to consider whether the *church* viewed the uses to which the money was put as religious, and indeed no member of the church was complaining that Moon was using the money for improper purposes. (Nor did the government charge him with diversion of a trust; it simply claimed there *was* no trust, and the jury agreed.)

The effect of this proceeding was that the state defined the nature of the funds in question in contradiction to the religious body's definition, and then convicted the group's leader, not just of a civil offense of failing to pay taxes on them, but of the criminal offense of tax *fraud* for "willfully" filing false income tax reports that did not declare the interest on those monies as his personal income.[43] (This case will be treated also in the next section, but is mentioned here because one of its central elements was the government's imposing *its* definition of how a religious body's

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42. See discussion in brief *amicus curiae* of the States of Hawaii, Oregon and Rhode Island in *U.S. v. Moon*, summarized in Sciarrino, J.J., "*United States v. Sun Myung Moon*: Precedent for Tax Fraud Prosecution of Local Pastors?" *S. Ill. Univ. Law. J.*, 1984, No. 2, pp. 255ff.

43. *U.S. v. Sun Myung Moon*, 718 F.2d 1210 (CA2 1983), cert. denied, 104 S. Ct. 2344 (1984). An extensive review of this case is found in the work of a Pulitzer Prize-winning reporter, who has investigated and written exposés of ecclesiastical frauds, and who thought the Moon case another promising scandal, but came to the opposite conclusion, declaring that Moon had been victimized. See Carlton Sherwood, *Inquisition: The Persecution and Prosecution of the Reverend Sun Myung Moon* (Washington, D.C.: Regnery Gateway, 1991), 700 pp.

resources should be used upon that body and then convicting its leader of a crime because his conduct did not fit that definition—a truly alarming instance of the state overriding a religious group's self-understanding!).

It is not the state's responsibility to ride herd on religious organizations with respect to their use of their devotees' benefactions, as by compelled financial disclosure. If adherents do not like the way the religious organization uses their gifts, they can cease to give them. If someone makes a large gift or a bequest, and it is misused, the giver or his or her estate has a civil remedy for violation of trust or contract. There are criminal penalties as well—when justly exacted—that can ground high-flying gurus who promise more than they can deliver (as in the Bakker case?). The best guidance in this minefield is that of Justice Robert Jackson:

> The chief wrong which false prophets do their following is not financial. The collections aggregate a tempting total, but individual payments are not ruinous. *I doubt if the vigilance of the law is equal to making money stick by overcredulous people.* But the real harm is on the mental and spiritual plane.... The wrong of these things, as I see it, is not in the money the victims part with half so much as in the mental and spiritual poison they get. *But that is precisely the thing the Constitution put beyond the reach of the prosecutor, for the price of freedom of religion or of speech or of the press is that we must put up with, and even pay for, a good deal of rubbish....* I do not doubt that religious leaders may be convicted of fraud for making false representations on matters other than faith or experience, as for example if one represents that funds are being used to construct a church when in fact they are being used for personal purposes.[44]

The reason the Constitution places such matters "beyond the reach of the prosecutor" is that one person's "poison" or "rubbish" may be another person's saving faith or guiding light. One person cannot make such judgments for or about another, and the government least of all can make them about anyone.

44. *U.S. v. Ballard*, 322 U.S. 78, 94-95, Jackson, J., dissenting (emphasis added), discussed at IIB6a.