

BOOK REVIEWS

TREATISE ON CONTEMPORARY RELIGIOUS JURISPRUDENCE. By I. H. Rubenstein. Chicago: The Waldain Press, 1948. Pp. 120. \$2.50.

JUDICIAL DOCTRINES OF RELIGIOUS RIGHTS IN AMERICA. By William George Torpey. Chapel Hill, North Carolina: University of North Carolina Press, 1948. Pp. 276. \$5.00.

Eleven years ago the Supreme Court in *Lovell v. Griffin*¹ upheld the right of Jehovah's Witnesses to distribute their literature without a license. This decision opened the doors of the Court to a flood of cases which tested the power of a state to penalize individuals because of their religious beliefs or to restrain the activities of those who insisted on aggressively preaching or practicing their beliefs. The difficulty of that problem is evidenced by the wreckage of overruled cases which lie in the tortuous path which the Court has followed.

Two years ago in the *Everson*² case the Court upheld the right of a state to use tax money to transport children to parochial schools. Last year in the *McCullum*³ case it denied the right of a state to permit the teaching of religion in public schools by an arrangement with church organizations. These are but the forerunners of a new series of cases which will test the extent to which the First Amendment requires a separation of church and state.

Thus, the Supreme Court has focused widespread attention on the two related problems of religious freedom and separation of church and state. The difficulty of these problems and the prevailing uncertainty as to their answers creates a substantial need for a serious study which will define as accurately as possible the legal limitations on state action. More important, however, is the need to enunciate clearly and evaluate critically the underlying principles and policies on which the decisions are based. The two books reviewed here are both limited to the definition of state power. This definition is done in considerable detail and the conclusions are fully documented by decisions from state courts. The authors, however, seldom attempt to penetrate below the superficial crust of mechanical doctrines expressed by state courts. Because of this, the usefulness of the books is limited, and in some cases the validity of their conclusions is impaired.

I

Contemporary Religious Jurisprudence is narrowly limited to a study of the legal and criminal aspects of "fortune telling, faith healing, and pacifism." The first two problems are treated comprehensively, and a large number of cases from state courts is cited. The material is made interesting and readable by the author's sketch of the historical background and by his review of many of the bizarre cases which are common in these fields. The legal aspects of pacifism have not been discussed with as much thoroughness, for extended quotations from a few opinions have been substituted for careful analysis. Although the book is expressly devoted to a study of the legal restraints on religious practices, the discussions on fortune-telling and faith-healing attempt to state the legal

¹ 303 U. S. 444 (1938).

² *Everson v. Board of Education*, 330 U. S. 1 (1947).

³ *McCullum v. Board of Education*, 333 U. S. 203 (1948).

restraints on those activities without distinguishing those cases in which the activities are based on religious beliefs. The cases are indiscriminately mingled with the result that the extent to which religious practices are restrained or permitted is not made clear.

The author summarily disposes of the constitutional issue involved by arguing that the plea of religious freedom in these cases is irrelevant if the conduct is otherwise a crime. He says, "Although the government may not interfere with mere religious belief and opinions, it can prohibit and punish religious practices which are criminal offenses."⁴ It is obvious that this line of reasoning is question-begging sophistry. If certain conduct is within the protective walls of the First Amendment, it cannot be made a crime. Practically every Jehovah's Witness case from *Lovell v. Griffin* to *West Virginia State Board of Education v. Barnette*⁵ involved a criminal statute which was held to be invalid because it encroached on constitutional rights guaranteed by the First and Fourteenth Amendments.

In his preface, Mr. Rubenstein makes clear his purpose in discussing these particular practices. He states:

The problems which have been engendered by adherents of these tenets, a large proportion of whom are religious zealots, especially during times of war, epidemic and national crisis, is a matter of grave public concern . . . Law, with its consequence in Justice, must act as the bulwark of Society against the onslaughts of those who would use religion as a sword to gain their fanatical desires and ends.⁶

This thesis is consistently followed through the book, and the author supports those decisions which curtail the activities of people who believe in the miracles of prayer or the practicalities of unlimited good will.

Such a thesis, given color of support by numerous court decisions, has such far-reaching implications that it is worthy of more careful examination. It is founded on certain unexpressed premises which should be made clear; first, that these religious beliefs are clearly in error; second, that although they are clearly in error many people will believe them; and third, that the law should protect people from following these erroneous religious beliefs.

The first premise may appear to be well founded to many who pride themselves on being scientific. Many scientists, however, are loud in forecasting the fate of mankind; prophecies are forthcoming from many pulpits; and the obscure spiritualist brings comfort to the meager group of hungry souls who seek his barren room. The "foolishness" of faith-healing, whether in the form of a Catholic's visit to Lourdes or a Christian Scientist's prayer, is not so obvious in the light of many documented case histories which reveal that physical illness is often but the outward symptoms of a sick soul. Certainly the present condition of world peace after two wars does not make an air-tight argument against pacifism. These particular religious tenets may be in error, but it would be near dogmatism to assert that they contain no kernel of truth which may contribute worthwhile values to those who believe in them or to society as a whole.

The second premise strikes close to the roots of our democratic structure, for it is based on a lack of faith in the ability of individuals to distinguish apparent truth from clear error. Such solicitude for the "ignorant, foolish, credulous and superstitious"⁷ in matters such as religious belief is not merely intellectual condescension but is a vote of no confidence in the ability of people to govern themselves.

The third premise is rooted in the assertion that people who follow these tenets constitute a grave public danger. Except in those rare cases in which faith-healing is used

⁴ Pp. 23, 64.

⁵ 319 U. S. 624 (1943).

⁶ Preface.

⁷ P. 7.

exclusively to cure children or to combat contagious diseases, there is no evidence that these people are a menace to anyone other than themselves. It is questionable whether the law should ever attempt to protect a man from his private mistakes, but to use the law to save a man from his mistaken religious beliefs is to reinstate the spirit of the Inquisition with its hypocrisy of punishing a man to save him from himself. It is not accident that the historical antecedents of fortune-telling laws, as pointed out by Mr. Rubenstein, are the medieval witchcraft and heresy statutes.

There is some evidence that many legislatures have recognized that freedom of religion includes the right to engage in these supposedly dangerous practices. The author indicates that some states exempt religious groups from their fortune-telling and faith-healing statutes. Similarly, pacifists have been given increasing exemption from military service, with the present draft law giving them exemption from any military or non-military service whatsoever.

II

Judicial Doctrines and Religious Rights does not attempt to prove a thesis or present a particular point of view. Although recommendations are made in the final chapter, the book is essentially a descriptive study of cases and statutes. Its scope is exceptionally broad, for it discusses almost every conceivable instance in which the activities of government impinge upon religious beliefs or church organization. The chapters on historical development, exemption of church property from taxation, and the religious aspects of marriage and divorce laws are particularly good. The chapter on religion in education is handicapped by the fact that the body of it was apparently written before the *McCullum* case, and the deficiency was met only by inserting one small paragraph concerning that decision. Other chapters include discussions of the legal status of religious societies and judicial interference in their internal affairs, protection of religious meetings from disturbance by individuals, religious factors in determining custody of minors, competency of witnesses and jurors, and validity of charitable bequests.

The most significant contribution of this book is that it emphasizes the fact that the problems of religious freedom and separation of church and state reach into a hundred nooks and crannies of the law. By spotlighting many of these nooks and crannies and by collecting many of the basic decisions and statutes, Mr. Torpey has laid valuable groundwork for a study which will distill from these diverse elements the common principles which are involved, and weld them into a unified body.

Mr. Torpey makes a second valuable contribution when he reminds us that insuring freedom of religion may require not only non-interference from the state, but also a degree of protection from actions of individuals and groups who would use their physical or economic power to impair that freedom.

It is regrettable that the important contributions of this book are clouded by the failure sufficiently to integrate and evaluate related court decisions. All decisions are apparently given equal weight regardless of when or by whom they were decided, and the significance of every decision is limited to the particular type of fact situation out of which it arose. This results in many apparent contradictions which are extremely confusing to the reader, in a failure to distinguish what may be only minority views, and in a failure to recognize the impact of recent decisions of the Supreme Court. For example, in concluding his discussion of blasphemy, the author baldly states, "Incidentally, laws making it a crime to blaspheme do not deny freedom of speech."⁸ A Maine case of 1921 and a Pennsylvania case of 1870 are cited as authority.⁹ There is no indication that

⁸ P. 60.

⁹ *State v. Mockus*, 120 Me. 84, 113 Atl. 39 (1921), and *Zeisweiss v. James*, 63 Pa. 465 (1870).

the extensive protection which the Supreme Court has recently given the scurrilous literature of Jehovah's Witnesses casts the slightest doubt on this conclusion. Similarly, this deification of decisions results in the author's discussing the famous Scopes "monkey trial" case without a word of protest or a hint that other states might hold otherwise or that the Supreme Court might overrule it.¹⁰

A more technical defect of this book is the failure to cite relevant authorities and the tendency to rely on some of the less reliable secondary authorities. In discussing the power of Congress to prohibit the use of the mails for sending obscene literature, *Hannegan v. Esquire, Inc.*¹¹ is not mentioned. *Girouard v. United States*¹² is omitted from the section on the naturalization power. *Jacobson v. Massachusetts*¹³ is omitted from the section on compulsory vaccination. And Professor Chafee's classic article on unincorporated associations¹⁴ was by-passed in discussing judicial intervention in internal affairs of churches. On the other hand, footnotes are well salted with references to *Cyc*, *Corpus Juris*, and *Ruling Case Law*.

III

These two books raise certain questions of religious freedom and separation of church and state which remain unanswered. How much separation does the First Amendment require, and why? Mr. Torpey's book makes clear that the problem extends far beyond the immediate reach of the two recent cases which involved separation in education. Does the doctrine prohibit the state from giving financial aid to churches in the indirect form of tax exemptions? Can the state give special protection against disturbance of religious organizations and meetings or hold bequests for the propagation of atheism invalid without violating this doctrine? To what extent are Sunday laws constitutional? Three years ago these questions might have seemed impertinent to most people. Are they so impertinent today in the light of the *Everson* and *McCollum* decisions?

The limits of religious freedom are much better defined, but these books raise two difficult questions which have received little attention but which are common to many different types of fact situations. First, to what extent are the rules of religious freedom different when the individual whose welfare is involved is a child? The *Barnette* case upheld the right of a child to refuse to salute the flag, and the *Meyer*¹⁵ and *Pierce*¹⁶ cases upheld the right of parents to direct the education and religious training of their children. In *Prince v. Massachusetts*,¹⁷ however, the Court denied that religious freedom included the right of a child to sell pamphlets on the streets even though accompanied by its parent. Can a Christian Scientist's child insist on being healed by faith, and can its parents be punished for not calling a doctor? Can a parent be denied custody of his child because he professes beliefs which the court finds are detrimental to the welfare of the child? Can a court-appointed guardian of an orphan control the religious training of the child? In short, what are the limits of the doctrine of *parens patriae* when religious freedom is involved? The second difficult question is whether a court can inquire into the *bona fides* of a claimed religious belief, and if so, when. In *United States v. Ballard*,¹⁸ the Supreme Court held that in a prosecution for fraud the jury could not determine the truth or falsity of religious beliefs, but could determine whether the defendants in good faith believed their claims. In the light of the vigorous dissent, will this principle be

¹⁰ *Scopes v. State*, 154 Tenn. 105, 289 S. W. 363 (1927), discussed on pages 267-268.

¹¹ 327 U. S. 146 (1946).

¹² 328 U. S. 61 (1946).

¹³ 197 U. S. 11 (1905).

¹⁴ CHAFEE, *The Internal Affairs of Associations Not For Profit*, 43 HARV. L. REV. 993 (1930).

¹⁵ *Meyer v. Nebraska*, 262 U. S. 390 (1923).

¹⁶ *Pierce v. Society of Sisters*, 268 U. S. 510 (1925).

¹⁷ 321 U. S. 158 (1944).

¹⁸ 322 U. S. 78 (1944).

extended to other cases? When a fortune-teller is arrested for false pretenses or a faith-healer for illegal practice of medicine, shall a jury be allowed to determine whether his claim that he is a Spiritualist or a Scientist is made in good faith? If a bequest is conditioned on the beneficiary's "accepting Christ," can a court inquire into the sincerity of his conversion?

Mr. Rubenstein and Mr. Torpey have done the back-breaking job of collecting a mass of case and statutory material, and have put it in an organized form. They have made clear the breadth and complexity of the problem. From this raw material and preliminary work, it is earnestly hoped that they or others building upon what they have done will spell out the broader principles upon which the cases are based and give additional light on some of these difficult problems.

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SEPARATION OF CHURCH AND STATE IN THE UNITED STATES. By Alvin W. Johnson and Frank H. Yost. Minneapolis: The University of Minnesota Press, 1948. Pp. 279. \$4.50.

What emerges from this volume, and is repeated on almost every page, is the authors' firm conviction that "the fundamental principle of separation of Church and State" is a good thing. Most Americans are inclined to give an unthinking assent. The real trouble comes when we try to find out just those words mean. At that point we soon discover, as Alice remarked to Humpty Dumpty, that "the question is whether you can make words mean so many different things." The process of making the same word mean too many different things is going on in all sections of the world under our eyes today. In Soviet Russia, where (unlike the United States) the words "separation of Church and State" appear in the constitution, those words, like "democracy," mean something quite different from what they mean to us or to the authors of this book. Even in our own country, we appear to be witnessing a considerable shift of meaning in certain quarters, with the result that "the principle of separation of Church and State" is today being invoked in a way which would make the Founding Fathers turn over in their graves.

To say that a given practice is or is not consistent with "the principle of separation of Church and State" is apt to be misleading unless we knew just what that "principle" is. A careful study of the material painstakingly collected by the authors, and covering such diverse subjects as Bible reading in the public schools, the right of pacifists to be naturalized, and the propriety of laws which forbid barbers to work on Sunday, leaves us with the uncomfortable feeling that the "principle" may not be a principle after all, but only a rather dangerous catchword. If the authors have been unable to dispel existing confusion on this score, the fault is not theirs alone, but is to be shared with a good many judges, who, like other human beings, are not above the temptation of labeling catchwords as "principles" in order to cover up gaps in logic. The real difficulty in drawing the line of separation between church and state arises from the fact that man is composed of a mortal body and an immortal soul; and you cannot draw a clearly visible line between his body and soul except with the executioner's axe or its equivalent—in which case he ceases to be a complete man. So long as the two parts of him stay together, he will continue to have two allegiances; and those two allegiances will sometimes conflict.

It is out of such conflicts that most of the litigation tabulated in this book has arisen. By far the greater part of that litigation has involved the field of education. As the authors quite rightly point out, education in this country was from the start primarily