Conscience v. The State

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The First and the Fourteenth Amendments to the Federal Constitution have undergone many tests in the course of the history of the United States, and many more are certain to arise. The freedom of religion there guaranteed and now accepted as one major aim of the Allies in the present war seems at times most embarrassing, not to say dangerous, for both religion and the state demand wholehearted loyalty, each within its own sphere, and their spheres cannot be easily delimited, but inevitably and indefinitely intersect, and that in crucial areas. The rise of nationalism to the status of a religious cult and the contemporary sharpening of the Christian conscience have revitalized and realigned issues that were supposedly settled. As to the relationship of church and state, the present generation is making history as few in the past have done. Here an attempt is made to summarize the present status of this issue as one who is not a lawyer sees it, first in its legal and then in its religious aspects.

THE ISSUES

Because of the earnestness, persistence, and truculence of their propaganda, the so-called “Jehovah’s Witnesses” have recently brought the problem of religious liberty into American courts on various counts, and they provide case studies which place the issues in sharpened focus. The decisions of our courts, to be discussed below, stand in high relief against contemporary treatment of the same group in Germany. Despatches from Switzerland a few months ago told of the execution of some and the arrest of many more of these sectaries. They were accused of teaching children to pray for peace and for the return of their fathers and brothers from the battle front; of putting Germans in the dilemma of choosing between the Fuehrer

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and a heavenly leader; of interpreting their visions as warnings of impending doom upon the German people. These “false rogues, bor-
ing from within,” who were chiefly working people, exhibited admir-
able courage and tenacity of faith. When, recently, seven were exe-
cuted, their wives begged them not to sign a recantation in order to obtain a possible pardon. Repression seems to have had no deterrent effect upon the spread of the movement.

Early Christian martyrdoms immediately come to mind. Often a slight gesture, little more than a flag salute, would have saved the martyrs, for their execution apparently was distasteful to Roman procurators and proconsuls. Polycarp of Smyrna was asked only to “swear by the Good Fortune of Caesar.” Speratus, Donata, and the other Scillitan martyrs likewise were asked merely to swear by the genius of their lord, the emperor, and to pray for his safety. Speratus answered in words which Jehovah’s Witnesses echo: “I know no empire of this age, but rather I serve the God whom no one sees or can see. I have committed no crime; but, if I earn anything, I pay taxes, for I know my Lord, the King of kings and Emperor of all nations.” Donata declared that one should give “honor to Caesar as Caesar, but fear to God.”

The issue raised by conflicting loyalties to church and state is ancient, but also very modern. The churches in Germany, Norway, and other German-occupied countries, and in Japan have been re-
quired to submit to a high degree of government regulation. Japanese Christians accepted regulation and convinced themselves that the rites demanded of them at Shinto shrines did not constitute worship. In every other country, large numbers of church members and of leading ecclesiastics refused submission when they were required to abandon their ecclesiastical autonomy and to take actions and adopt views which they regarded as unchristian. They have suffered most seriously of all from interference with their educational and promo-
tional activities, for totalitarianism can brook no dissemination of independent opinion. In Russia the same issues arose in a different form because the church was completely under the control of the despotic Czarist regime, and the revolutionists, therefore, regarded Christianity as an instrument of oppression. With the recent change

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1 From one of the earliest and most trustworthy martyrlogies; see Robinson, TEXTS AND STUDIES (1891) 112, 113. Apparently the words of both Speratus and Donata reflect Jesus' saying with reference to taxation: “Give unto Caesar what belongs to Caesar and to God what belongs to God” (Mark 12: 17).
of Soviet and church policy, it would appear that freedom of religion can return.

In sharp contrast, the Supreme Court's interpretations of the liberties guaranteed by the Constitution illustrate the progress which democracy has made in one great area of life. A summary of the pertinent decisions may serve to indicate where religion and American democracy now stand in agreement and also where new conflicts may possibly arise. The cases may be classified as covering three affirmed rights of the individual conscience, with a questionable fourth: (1) the right to "communicate opinion and information," that is, to propagate religious (and other) ideas which are contrary to the beliefs of the majority, (a) by word of mouth, and (b) by pamphlets and other printed matter; (2) the right to solicit funds for the propagation of unpopular ideas; (3) the right to refrain on conscientious grounds from expressing or even assenting to the opinions of the majority; and (4) the statutory, but revocable, right to refrain on conscientious grounds from fighting in defense of the country, a right partially recognized in the Selective Service Act, but not constitutionally guaranteed, although refusal is not classed as treasonable.

THE RIGHT TO COMMUNICATE OPINION

The right of a minority to express and urge opinions which are distasteful, or even abhorrent, to the majority of the population has been affirmed by the Supreme Court in a variety of cases touching labor unions, socialists, communists, and religious dissenters. Five such cases were before the Court and two significant opinions were delivered in the October, 1939, term. Three of the four cases considered in the first opinion arose from anti-litter ordinances, which prohibited the passing out of handbills on the street. In one case (No. 13), notices were distributed of a meeting to discuss the war in Spain; in another (No. 18), a printed discussion of a labor dispute was handed out by a picket; and, in the third (No. 29), notices of a meeting to protest the administration of state unemployment funds were distributed. In *Schneider v. State* (No. 11), a woman certified a minister of Jehovah's Witnesses had been convicted of violating an ordinance which prohibited distributing circulars, canvassing, and soliciting funds from house to house without a permit which depended

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upon the discretion of the chief of police. The opinion, delivered by Mr. Justice Roberts (Justice McReynolds dissenting), reversed the convictions obtained in the lower courts, holding that the municipal ordinances in question "abridge the freedom of speech and the press secured against invasion by the Fourteenth Amendment." Handbills have "become historic weapons in the defense of liberty. . . . The streets are a proper place for the exchange of opinion." In *Jamison v. The State of Texas*, a further step was taken. It was held unconstitutional to prohibit the distribution of handbills even though they contained advertisements of religious books for sale, sought to raise funds for religious purposes, and contained an invitation to a religious meeting at which admission was charged.

**CANVASSING AND SOLICITING FUNDS**

In *Schneider v. State* the appellant had been convicted also for canvassing and soliciting funds from house to house without a permit which was to be given at the discretion of a city official. The same question arose in *Cantwell v. Connecticut*, in which Mr. Justice Roberts also delivered the opinion. In both cases the convictions were reversed. The opinion held that a general reasonable and non-discriminatory regulation of the solicitation of funds was not objectionable, but "to condition solicitation of aid for the perpetuation of religious views and systems upon a license, the grant of which rests upon the exercise of a determination by state authority as to what a religious cause is, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution." In other words, the right to propagate opinion carries with it the right to canvass private houses and solicit funds for such propaganda.

This position has been reaffirmed and developed in a series of recent cases. In *Martin v. City of Struthers*, an ordinance which, in the interest of factory workers on night shifts, prohibited knocking at doors and ringing doorbells by canvassers was declared unconstitutional. The opinion, delivered by Mr. Justice Black, noted that it had long been the general practice for each individual to determine
whether uninvited persons may knock at his door, and to give suitable warning against trespass. The municipality, consistently with the Constitution, does not possess the power to make the decision for all of its inhabitants in the case of persons distributing advertisements of religious meetings. Such an ordinance would seriously interfere with the activities of organizations such as the American Tract Society and the American Bible Society, of labor groups, of salesman of government bonds, and many more. In particular, "door to door distribution of circulars is essential to the poorly financed causes of little people." Three justices (Murphy, Douglas, and Rutledge) concurred in an additional strongly worded opinion stressing the value of regulation as against prohibition. Four justices dissented (Frankfurter, Reed, Roberts, and Jackson) on the ground that the need for the protection of privacy outweighed the possible danger to liberty. "Such assurance of privacy [as was here attempted] falls far short of an abridgement of freedom of the press."9

LICENSE FEES

Numerous cases have arisen from municipal ordinances requiring a license fee for permission to peddle objects for sale, including books and other literature. Jehovah's Witnesses have insisted that they were not engaged in commercial activity when they went from house to house or about the streets distributing literature and asking for contributions to aid in further distribution, the more so as they usually gave some of their publications even to those who refused any contribution. The Supreme Court has upheld their contention and reversed the convictions based upon such laws. Jones v. City of Opelika is one of the most celebrated of these cases and one of the most notable in the history of the Supreme Court, partly because of the interest and vigor of both majority and dissenting opinions, partly because of its effect upon the flag-salute issue, and partly because the decision was vacated and the convictions reversed within a year.10

At the first hearing, Mr. Justice Reed delivered the opinion of the Court, affirming the convictions on the ground that censorship and prohibition were one thing, regulation quite another. Religious propaganda may be subjected to taxation when it uses commercial

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9 Ibid. at 157.

10 (1942) 316 U.S. 584; (1943) 319 U.S. 103; see infra note 14. With it are combined two similar cases, one from Arkansas and one from Oklahoma.
methods. The fees levied were not shown to be unreasonable or discriminatory.

Of the four dissenting justices (Stone, Black, Douglas, Murphy), two objected so vigorously that each of them wrote an opinion in which the other three concurred. Mr. Chief Justice Stone objected that the appellants were not engaged in ordinary business. The First and Fourteenth Amendments put freedom of speech and of religion in a preferred position. Actually flat fees, even though not oppressive to those engaged in business, constituted, when “laid in small communities upon peripatetic religious propagandists,” a means for “the effective suppression of speech and press and religion despite constitutional guarantees.” They were more effective even than were the taxes “which were a moving cause of the American revolution. . . . The more humble and needy the cause, the more effective the suppression.”

Mr. Justice Murphy wrote with even more vigor and in more detail. He emphasized the fact that the accused were ordained ministers preaching the gospel. At Opelika ten clergymen testified that they distributed literature in their churches and asked for voluntary contributions. Jehovah’s Witnesses testified that “they do not engage in this work for any selfish reason but because they feel called upon to publish the news and preach the gospel of the Kingdom.” Both dissenting opinions are valuable for their numerous citations of cases and references to historical incidents in which parallel invasions of rights occurred.

A rehearing was granted February 15, 1943, and a new decision rendered on May 3, 1943, in connection with eight cases of the same nature involving the city of Jeannette, Pennsylvania. In brief the grounds for vacating the former decision and reversing the convictions obtained in the lower courts were that a flat license fee restrains in advance. Whether the religious literature purveyed was “sold” or “donated” is immaterial when the purpose is to raise funds for religious propaganda. Such transactions are not commercial. Even though the ordinance might be “nondiscriminatory,” it restrains liberties which, under the First Amendment, are in a preferred position. The community may not suppress views because they are distasteful.

11 Ibid. at 610.
12 Ibid.
13 Ibid. at 613.
14 Murdock v. Pennsylvania (City of Jeannette) (1943) 319 U.S. 105, with seven similar cases all arising on the same day. See also infra Douglas v. Jeannette, note 40.
At the conclusion of the dissenting opinions at the first hearing of *Jones v. Opelika*, a final paragraph appeared which is, I believe, unprecedented in American law. Justices Black, Douglas, and Murphy characterized the opinion of the majority as sanctioning "a device which... suppresses or tends to suppress the free exercise of religion by a minority group,"15 similar to the decision in the *Gobitis* case concerning the flag salute. Since they had concurred in that opinion, they now wished to state that they believed the case to have been wrongly decided.

**THE FLAG SALUTE**

After such a statement by three justices, when a fourth, now Chief Justice, had at the time expressed his dissent, it was inevitable that the flag-salute issue should be raised again. In *Minersville School District v. Gobitis*,16 the opinion, delivered by Mr. Justice Frankfurter, which legalized the order expelling students who refused to give the salute, presents an excellent statement of the delicate problem of the clash between conscience and the state, when "the manifold character of man's relations may bring his conception of religious duty into conflict with the secular interests of his fellowmen."17 The opinion recognizes the grave responsibilities confronting the Court when "it must reconcile the conflicting claims of liberty and authority."18 The issues are thus clearly stated. But the opinion holds that religious convictions do not relieve the individual from obedience to an otherwise-valid law not aimed at the promotion or restriction of religious beliefs. The flag-salute order was held to be such a valid law. Legislation intended to promote national unity was within the province of state legislatures and school boards, and the Court could not exercise censorship over their convictions as to the best means to attain that end.

Justice Stone, dissenting, argued that the beliefs of Jehovah's Witnesses are religious and genuine and exhibit no disloyalty to the United States.19 The law sustained by the majority opinion does more than suppress freedom of speech and more than prohibit the free exercise of religion. It seeks to coerce children to express a sentiment which, as they interpret it, they do not entertain and which

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15 *Supra* note 10, 316 U. S., at 623.
16 (1940) 310 U. S. 586.
17 *Ibid.* at 593.
19 On this point see *infra* note 75.
violates their deepest religious convictions. It is the duty of the courts to protect small minorities from the invasion of their rights by majorities, and, therefore, to scrutinize legislative efforts "to secure conformity of belief and opinion" by compulsion. Enforced compliance would tend to disrupt, not to promote, unity.  

The importance of the issue raised by flag-salute laws, as viewed by the justices of the Supreme Court, is shown by their extensive treatment of it when it appeared again in *West Virginia v. Barnette*, decided June 14, 1943.  

An injunction against the enforcement of a flag-salute law was sustained, and the *Gobitis* decision thus reversed, by a vote of six to three (Roberts, Reed, and Frankfurter dissenting). Mr. Justice Jackson delivered the majority opinion and one concurring opinion was signed by Justices Black and Douglas, another by Justice Murphy. To the arguments in the lone minority opinion in the *Gobitis* case, others were added. The Fourteenth Amendment aimed to protect citizens against the state itself. Its purpose was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the courts.  

Rights to life, liberty, and property and to free speech, worship, and assembly may not be submitted to vote or restricted, except "... to prevent grave and immediate danger to interests which the state may lawfully protect." Those in power may not coerce consent. National unity is to be fostered "by persuasion and example." "Freedom to differ is not limited, under the Constitution, to things which do not matter much, but the test of its substance is the right to differ as to things which touch the heart of the existing order... If there is any fixed star in our Constitutional constellation it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion and force citizens to confess by word or action their faith therein... Those who begin...
by coercive elimination of dissent soon find themselves exterminating dissenters.”

Mr. Justice Frankfurter presented a long and vigorous dissenting opinion. On the legal side he argued that the majority opinion was inconsistent with the decision regarding compulsory military training in *Hamilton v. Regents of the University of California,* for in both cases attendance upon the schools was not compulsory. The Supreme Court was interfering in matters which should be left to the various states. “The uncontrollable power wielded by this Court brings it very close to the most sensitive area of public affairs.” The variety of laws and opinions on parochial schools and on Bible reading in the public schools as well as the innumerable scruples of the two hundred and fifty religious denominations in the United States were beyond the cognizance of the Court. He denied that the flag salute had any resemblance to “the oath test so odious in history.”

**UNPOPULAR OPINIONS.**

On the same day an equally important, but much less widely discussed, opinion was delivered by Mr. Justice Roberts in *Taylor v. State of Mississippi,* joined with two other identical cases, all involving Jehovah’s Witnesses. The appellants had been convicted of violating a Mississippi war-time statute by arguing against the salute to the flag, by making statements to civilians deprecating the war effort, and by distributing pamphlets explaining the religious basis for their refusal to support the war and to salute the flag. Their conviction was reversed on the grounds that, if the state cannot constrain a person to salute the flag, it cannot punish him for imparting his views on that subject to others, and that criminal sanctions cannot be imposed for the communication of ideas concerning domestic issues and trends in national and world affairs when no evil or sinister purpose and no incitement to or threat of subversive action were proved.

If such freedom of speech on social and political questions is al-

25 (1934) 293 U. S. 245.
26 *Supra* note 21, at 666.
27 (1943) 319 U. S. 583.
28 The substitute which, in West Virginia v. Barnette, Jehovah’s Witnesses proposed for the flag salute and statement of allegiance probably weighed heavily in this case as well as in the other. See *infra* p. 27.
owed, how far may it extend as to religious subjects? In *Cantwell v. Connecticut* the appellant was convicted of inciting a breach of the peace by playing a record in the street, by permission, to two Catholic men, who were greatly incensed by its vicious attack upon their religion. When they vigorously dissented and threatened him, he went quietly away. The Court held that he had done nothing to cause a breach of the peace. He had merely expressed his opinions. In spite of excesses, liberty of expression must be preserved. It may not be restrained merely because the opinion is distasteful to the majority. Thus the Court has affirmed the right of Jehovah's Witnesses and any other group (Communists one may suppose, for example) to play records, argue their opinions, distribute literature, and collect funds for propaganda purposes. The liberties allowed seem extremely broad.

In *Douglas v. Jeannette* an application from a Jehovah's Witness seeking an injunction to restrain the city from interfering with the propaganda of the sect by arresting its missionaries was before the Court. The decision turned in part on the legal aspects of the application and the injunction, with which this paper is not concerned; but it also referred to *Murdock v. Pennsylvania*, as disposing of the issue. In a dissenting opinion, Mr. Justice Jackson urged that the grievance of the citizens might have been considered and the issue settled on its merits instead of leaving it as decided in *Murdock v. Pennsylvania*, where the legality of the licensing law under which the arrests were made was denied. He describes what can be called an invasion of the rights of the majority by a minority group which has taken refuge under the protecting wings of the Constitution while attacking all government as essentially Satanic. The citizens of Jeannette had been greatly annoyed by visits from Jehovah's Witnesses and were besieging the mayor and police for protection. When they were threatened with a mass invasion, the mayor asked the "zone servant" in charge of the activities of the group in that region to await a decision of the courts. He refused, and, on Palm Sunday, 1939, sent one hundred Witnesses to visit every house in the little city. They actually visited some houses several times during the day. Only about eighteen, who could be proved to have sold literature,

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20 *Supra* note 6.
31 *Supra* note 14.
32 See the discussion of the tenets of Jehovah's Witnesses below.
were convicted. Mr. Justice Jackson points out that, by the reversal of the convictions in these and other cases, citizens are left without any protection against such annoyance. He insists that the language used by Jehovah's Witnesses constitutes "fighting words" as recognized in *Chaplinsky v. New Hampshire* and that the home should be protected.

**MINOR LIMITATIONS**

However, there are limitations to such rights, some of minor, others of major, importance. As to acts allegedly sanctioned by religion which may be prohibited by the state, opinions, both public and judicial, differ enormously. In several of the actions cited, decisions were reached by a vote of five to four. The reversals of opinion in the cases touching license fees (*Jones v. City of Opelika*) and the flag salute (*Minersville School District v. Gobitis*) show how delicate the balance is. Commentators have pointed out that, if the judges of the circuit courts were given equal weight with the justices of the Supreme Court, the balance would sometimes fall the other way.

Regulation of certain activities excites no dissent. A group of Jehovah's Witnesses staged what they called an "information parade" in Manchester, New Hampshire, without attempting to secure the license required by state law. They were held to have violated a reasonable and nondiscriminatory statute regulating traffic and constituting no interference with religious worship or the practice of religion in any proper sense. The right of the state and its agencies to regulate actions which affect public welfare and even convenience has been repeatedly affirmed. The question then arises as to how far a belligerent minority may go in annoying, inconveniencing, and even thwarting the wishes of their fellow citizens.

A member of Jehovah's Witnesses who caused a riot in Rochester, New Hampshire, by distributing his literature, and who, when interrogated by the chief of police, called him a racketeer and a Fascist and said that all the municipal officers were racketeers and Fascists, was held to have used "libelous, insulting, and 'fighting' words," which are "no essential part of any exposition of ideas." The difference between the *Chaplinsky* and *Cantwell* cases seems to lie in

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33 *Infra* note 35.
34 *Cox et al. v. New Hampshire* (1941) 312 U.S. 569.
35 *Chaplinsky v. New Hampshire* (1942) 315 U.S. 568, opinion rendered by Mr. Justice Murphy.
the individual's words and actions; there was no difference in the religious opinions expressed, although the latter were the cause of the riot.

However, in contrast to the decision in *Cantwell v. Connecticut*, Judge Julius H. Miner, in the Criminal Court of Cook County, Illinois, "after careful study" of the publications called *Consolation* and the *Watch Tower* distributed by a member of Jehovah's Witnesses, held that their contents went "beyond the pale of religion" and violated a section of the State constitution which specified that "liberty of conscience . . . shall not . . . justify practices inconsistent with the peace and safety of the state." Their distribution constituted an abuse of liberty. There is no freedom to libel and slander. The language and sketches in the publication were offensive and provocative.36

In a long and thoughtful article, which evidently grew out of the case just cited, Judge Minor summarizes the restraints which have been legally imposed, by statute and precedent, upon the freedom of the press and religion and upon the distribution of religious literature. "Previous restraint" is not allowable. Like others he regretted the original decision in *Jones v. Opelika* (not then reversed), and pointed out the dangers of the licensing device. But he insists on the value of statutes which prohibit obscene, vulgar, and indecent language, libelous or defamatory words, whether spoken or printed, and acts or words which tend to incite a breach of the peace or to threaten the public safety. In some instances, "the truth of the charge, when published with a good motive and for justifiable ends, is a good defense," but self-professed good motives cannot give any and all acts religious sanctity. It is for the courts to decide whether freedom has been abused.37

Judge Miner instances numerous examples of limitations on religious activities. A preacher may not use obscene language under the guise of "rebuking the sin of impurity." Indeed, the shouting of a minister in his church and the beating of drums on the street as a part of a religious service may be restrained. The practice of astrology and of polygamy, refusal to obey general health measures and laws regarding vaccination and contagious diseases, objections to military draft laws, to labor laws, to the Eighteenth Amendment, to

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pure food laws, and to the censorship of films and books, all of these, even though claimed as religious beliefs or rites, have been refused shelter under the Bill of Rights. The individual and the group may not decide for themselves what may be regarded as the legal exercise of the rights guaranteed under the Constitution. That is for the courts to determine.

The right of a minority group to make themselves thoroughly obnoxious to their fellow citizens seems to have been upheld, but by a narrow margin, in the Struthers and Jeannette decisions, for four justices dissented in each of these cases in which, it will be remembered, city officials attempted to prevent the ringing of door bells and the disturbance of unwilling citizens by zealous Jehovah's Witnesses. In the Struthers opinion it was suggested that there were other means, besides a too-general city ordinance, by which citizens could protect themselves. What means was not indicated.

The most recent case to come before the Supreme Court touches the rights of children to engage in the evangelistic activities of Jehovah's Witnesses on the streets. By another five-to-four decision the Supreme Court upheld the conviction of the guardian of a nine-year-old girl for allowing her to distribute literature on the street contrary to a Massachusetts statute. The majority opinion delivered by Mr. Justice Rutledge pointed out that the state has a right superior to that of the parent in matters touching a child's welfare, that there was "clear and present danger" to the child in such activities as were here involved, and that no undue restriction of religious liberty could result from the enforcement of the statute.

Mr. Justice Murphy, dissenting, argued that the state of Massachusetts had not proved any grave or immediate danger such as justified a limitation of the liberties protected by the Constitution. Mr. Justice Jackson also dissenting (joined by Mr. Justice Roberts and Mr. Justice Frankfurter) held that the action in this case was inconsistent with that in Murdock v. Pennsylvania, which gave pref-

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39 Supra note 8.
40 Supra note 14.
41 Supra notes 8 and 14.
43 Supra note 14, at 109, 111.
ference to religious activities. The difficulty of deciding these issues is again clear.

THE CONTRIBUTION OF THE SUPREME COURT

At a time when the currents of thought in the world are against democracy and toleration, the Supreme Court has made a substantial contribution to the defense of the liberties guaranteed by the Constitution. Few would criticize the progress which has been made in defining freedom of speech and of religion and in extending the benefits of these freedoms to small and even belligerent groups which have neither economic nor political influence. The emphasis, in several of the opinions cited, upon the rights of "little people," of causes that are humble, needy, and without financial resources, is particularly notable. The justices of the Supreme Court echo the language of social and religious protest from almost the beginning of history (2500 B.C.) in Mesopotamia, Egypt, and later in Palestine, down to the present day. Such language is familiar in the Hebrew prophets, the Psalms, and the Gospels. The obligation of government to protect the rights of the weak against those who possess political and economic power has been repeatedly proclaimed by prophets, but all too seldom recognized by the powers that be. Both democracy and religion demand the protection of the advocate of unpopular causes, for practically every reform, whether political, social, or religious, begins as a protest against vested interests and majority opinions. Progress in the church and the state, in politics and economics, in ethics and religion, depends upon freedom of discussion.

It can hardly be denied that the "reconstructed Court" has a remarkable record for the recognition of the dangers threatened by narrow nationalism, totalitarianism, and religious intolerance, and for sane and unbiased judgment in handling the delicate issues brought before it. It has been suggested that the earlier decisions in Minersville School District v. Gobitis and Jones v. Opelika were made under the influence of an upsurge of popular patriotism. It may be equally true that a reaction in view of the too-evident dangers of totalitarian intolerance resulted in the reversal of those verdicts. While the courts should never be expected to yield to popular pressure and hysteria, the interpretation of the Constitution should take account of new problems and conditions and keep pace with the

growth of the public conscience. For the enlargement and sharpening of ethical concepts the church surely has been and should be in part responsible.

Genuine moral progress, in the individual and the social group, is achieved only with the voluntary cooperation of those concerned. Lawful force, either police or military, is necessary to prevent lawless force from interfering with free discussion. The majority like the minority, and the minority like the majority must depend upon the free exchange of opinion. The truth has no magical power to defend itself against physical force. It is the duty of government to see that the liberties of all citizens are preserved, in order that neither minority nor majority shall interfere with the rights, each of the other. How far may political, social, and religious dissent be allowed to go? The issues raised by the "invasion" of Jeannette are by no means resolved. Further attempts at legislation may succeed in more clearly defining and in guarding the rights of both majority and minority. But in a democracy much must be left to the good will of the citizens. Where earnestness or fanaticism override good will and the Golden Rule, police power may intervene and the courts must decide the extent of the trespass.

The advocacy of the overthrow of government is generally regarded as beyond the pale. In Gitlow v. New York, the Supreme Court so decided in the case of a revolutionary-socialist publication urging mass action such as amounted to criminal anarchy.45 Yet Mr. Justice Holmes and Mr. Justice Brandeis dissented on the ground that there was no "clear and present danger." Many would argue that it is better to allow such opinions to be expressed openly, when such "revolutionists" are too few to constitute a menace, rather than to drive them underground and likewise to establish precedents which may be misused. The Supreme Court decision in Taylor v. Mississippi46 would seem to render void the antisedition laws of many state legislatures; it certainly does so as regards Jehovah's Witnesses.

Presumably the attempt to propagate the opinions of revolutionary socialism or communism or even the doctrines of Jehovah's Witnesses among members of the armed forces would be viewed differently. In such a case the legal doctrine of "grave and immediate danger" would certainly be invoked. The attempt to convert either possible recruits or military personnel to the doctrine of Jehovah's

45 (1925) 268 U.S. 652.
46 Supra note 27.
Witnesses would be an effort to dissuade them from fighting, since the group has reasons of its own for refusing military service. Any such propaganda would be a violation of the Espionage Act.\(^4\)

However delicate the problems and fundamental the issues raised in the limitations discussed above, they are minor examples of the liberties which are at stake when compared with refusal to accept military service. The Selective Service Act of 1940 and the resistance to it of pacifists and religionists of various colors raises in its most acute form the fundamental issue, latent in the cases heretofore discussed, of man's relative obligation to Caesar and to God, to the state and to conscience. As Judge Evan A. Evans remarked in an opinion, "We cannot ignore the seriousness of the issues which the defendant presents. His challenge, if successful, would jeopardize the country's defense in time of war."\(^5\) If there were 450,000 male Jehovah's Witnesses or 450,000 pacifists to refuse military service as the United Mine Workers refused to dig coal, what would the nation do?

**SELECTIVE SERVICE CLASSIFICATION**

The problem of the classification of religious workers as ministers and their consequent exemption from military service cuts close to the heart of the conflict between conscience and society. Many of Jehovah's Witnesses have refused classification in IV-E, as conscientious objectors, and have insisted instead upon being placed in IV-D, as "ministers of the gospel." A score or more are serving sentences in prison for refusing to report for induction.

A typical case, *Rase v. United States*, may be cited.\(^6\) Mr. Kenneth G. Rase had full-time employment with a commercial firm in Detroit. He gave three evenings a week and Sundays, without compensation, to activities as a propagandist for Jehovah's Witnesses and was certified as one of their ministers. But he was not named in an official list submitted, at the request of the National Director of the Selective Service System, by the general counsel of Jehovah's Witnesses in Brooklyn, New York. His appeal was based upon the claim that his propagandist duties were an obligatory part of his religious activities, that he was, therefore, a minister, and that to confine him in a camp for conscientious objectors was an unwarrantable

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\(^2\) United States v. Mroz (C.C.A. 7th, 1943) 136 F. (2d) 221 at 225.

\(^3\) (C.C.A. 6th, 1942) 129 F. (2d) 204.
interference with the exercise of his religion. In an opinion delivered by Judge C. C. Simons, the court held that confinement in a conscientious objectors' camp was not an unconstitutional limitation of the exercise of religion. Otherwise immunity from the criminal code might be claimed, since incarceration would restrict the exercise of religion. The plea that the appellant's propagandist duties were obligatory "would mean that all members of any religious group which imposes upon its adherents an obligation to teach and preach its beliefs or to make converts are exempted under the Selective Service Act." The status of each individual must be determined by the local draft board by discovering (1) whether the individual devotes his life to his religious duties, (2) whether he performs the usual functions of an ordained minister, and (3) whether he is regarded by other Jehovah's Witnesses as are the ordained ministers in other religious societies. On the evidence submitted, the court concluded that Mr. Rase was not a minister according to the intention of Congress. The latter, and not the meaning attached to the term by any religious group, was decisive. "The Constitution grants no immunity from military service because of religious convictions and activities. . . . No question of religious liberty, in any true sense, is here involved, and the zealous and ill-advised pursuit of a martyr role is not, by sanction of the Constitution, permitted to imperil national safety without the preservation of which, liberty of conscience and religion will everywhere disappear."

In this case, appeals had been made to the district draft board, and to the President of the United States. In other cases, where the appeal to the President had not been made, the courts pointed out that the local draft board had the task of determining the question of fact, as to whether the registrant was a minister of religion or not. The courts could only consider the question as to whether he had had a full and fair hearing and whether the board had acted in an arbitrary and capricious manner. The registrant may not disobey the draft board's orders but may secure a judicial determination as to the fairness of his hearing by writ of habeas corpus.

60 Ibid. at 209.
61 It has been found that the official list from the sect's headquarters in Brooklyn can be regarded only as evidence on the last point.
62 Supra note 49, at 210.
63 United States v. Grieme (C.C.A. 3d, 1942) 128 F. (2d) 811, convicted of violating section 11, 50 U.S.C.A. Appendix §311; June 9, 1942. United States v. Grieme has been taken in several subsequent cases as settling the basic problems as to when a writ
Other sects also have no paid ministry, but are served by designated members who support themselves otherwise. Jehovah's Witnesses are different in this as in nearly everything they profess. They take seriously the excellent Protestant doctrine of the priesthood and equal obligation of all believers. According to their theory every loyal member is a minister, even if only ten years of age. Although many also fill out the form for conscientious objectors, they refuse classification as such, while others deny that they are conscientious objectors to all wars, since they are ready to fight for the kingdom of God. Until the Supreme Court has passed, not only upon the technical question of their submission to induction, but also upon their claim to be ministers in the full legal sense, their status remains uncertain. More than that, the fundamental question as to how far a religious group may go in exempting itself from the obligations of citizenship also remains undetermined.  

Two recent California cases emphasize the need for decisions by the Supreme Court which will clarify draft board and court procedures in such cases and also determine what kind of evidence will settle the question of fact; that is, determine under what conditions a Jehovah's Witness is entitled to ministerial exemption. Judge Denman, in dissenting opinions, called attention to the vigorous antiwar propaganda which had conditioned adolescents during the prewar period, since, as he believed, the prevalence of that propaganda tended to establish the bona fides of a young man's claim to a conscientious objector's status. The decision in one case had hinged partly upon, possibly unjustified, doubts. Apparently no consideration was given to the difference of the ministerial status of the appellants. One, Mr. Hopper, seems to have been simply a member; the other, Mr. Crutchfield, was eventually proved to be a "pioneer," a much higher position in the unusual hierarchy of the group.

of habeas corpus may be invoked. See Bronemann v. United States (1943) 138 F. (2d) 333, at 335, for citations of similar cases.

54 In the case of Ex parte Catanzaro (C.C.A. 3d, 1943) 138 F. (2d) 100, Judges Biggs and Maris recorded a dissenting opinion holding that when the registrant was arrested for failure to report for induction, he was already deprived of his liberty, and the restraint was wrongful if the draft board's order was invalid. Therefore, the person thus detained has the right of appeal and a judgment on the merits of his case.

55 Hopper v. United States, No. 10, 110, decided Dec. 6, 1943; Crutchfield v. United States, No. 10, 200, decided Apr. 2, 1943; advance sheets kindly supplied by Mr. John L. Rockwell, secretary to Judge William Denman. The decisions turned largely upon technical questions of court procedure and the process of appeal from the classifications of draft boards.
The importance of these cases is witnessed by Judge Denman's statement that there have been 100 convictions in similar cases in the Ninth Circuit.

Up to this time only one case of a Jehovah's Witness convicted for disobeying the order of a draft board to report for induction in a conscientious objectors' camp has come before the Supreme Court. The case of Nick Falbo v. United States[^56] was decided against the petitioner in an opinion delivered by Mr. Justice Black. The Court held that the only question before it was whether Congress had authorized in such a case a judicial review of the propriety of a board's classification and, having answered that question in the negative, it necessarily denied the appeal.

Mr. Justice Rutledge concurred in the result but noted that some evidence tending to show prejudice on the part of the draft board was excluded in the trial court. However, the petitioner made no such charge concerning the appeal board.

Mr. Justice Murphy, dissenting, argued that the Supreme Court had the same duty as in a habeas corpus proceeding to review the action of the local draft board, for "criminal punishment for disobedience of an arbitrary and invalid order is objectionable"[^57] under any circumstances. He referred to two cases decided by Judges Parker, Soper, and Dobie in the Circuit Court of Appeals, Fourth Circuit, which hold that "the total invalidity of an order which would be necessary to justify release on habeas corpus would constitute a defense to a criminal action based on disobedience of that order."[^58] Such a review is not allowable "so long as the board's jurisdiction is not transcended and its action is not so arbitrary and unreasonable as to amount to a denial of constitutional right."[^59] However, in neither of these cases was such arbitrary and unreasonable action discovered in the decision of the draft board.

The decision of the Supreme Court, therefore, confirms that of the circuit court in United States v. Grieme.[^60] The conscientious objector who refuses to go to a Civilian Public Service camp must first present himself for transportation to camp before the courts can intervene on a petition for a writ of habeas corpus.

[^56]: (1944) 64 Sup. Ct. 346.
[^57]: Ibid.
[^58]: Ibid.
[^59]: Goff v. United States (1943) 135 F. (2d) 610 at 613; Baxley v. United States (1943) 134 F. (2d) 998.
[^60]: Supra note 53.
CONSCIENTIOUS OBJECTORS

As to conscientious objectors to war, who are now found in many churches and also outside the churches, the rulings of the courts and of the Supreme Court have been fairly consistent. The principle followed is that enunciated in the much-debated case of Professor Douglas C. Macintosh, of Yale University, who was denied naturalization because he would agree to fight only in a war which he thought morally justified. The majority opinion in that case, delivered by Mr. Justice Sutherland, held that while we are a Christian nation believing in religious freedom and "the duty of obedience to the will of God, . . . we are a Nation with the duty to survive; . . . unqualified allegiance to the Nation and submission and obedience to the laws of the land . . . is not inconsistent with the will of God."61

Chief Justice Hughes wrote a dissenting opinion with which Justices Holmes, Brandeis, and Stone concurred. They agreed that "the privilege . . . to avoid bearing arms comes not from the Constitution but from Acts of Congress,"62 but denied that Congress had intended the oath required of candidates for naturalization, and the substantially similar one taken by civil officials, to subordinate their consciences to the will of the state. The majority opinion, based on a vote of five to four, if taken literally, sets a very definite and all-embracing limit to the autonomy of conscience, a limit by the side of which all the liberties granted by the Constitution and defended by the Supreme Court seem meager, if not meaningless.63 Since the days of the early martyrs, many a Christian has denied that in certain contingencies "submission and obedience to the laws of the land . . . is not inconsistent with the will of God."64

Certain immunities have, indeed, long been granted to conscientious objectors and are affirmed by the Selective Service and Training Act of 1940. But these exemptions, which provide for noncombatant service under military command or for "service of national importance" under civilian control in "Citizen Public Service Camps," do not solve the fundamental problem. There is no immediate reason to fear a change in national policy in the matter, or a mass disaffection of Christians. Yet, at bottom, the question is

61 Infra note 63.
62 See note 63.
63 United States v. Macintosh (1931) 283 U.S. 605. It has been vigorously discussed. See Professor Macintosh's own account, with references to pertinent literature, Social Religion (1939) 280-296.
64 Ibid.
allowed to remain open only by the will of the majority, since there is no constitutional immunity. Here is an example of those conflicts of rights and obligations, of liberties and responsibilities, and of rights with rights and liberty with liberty which inevitably arise in highly developed social groups.

From this brief survey of typical cases it is clear that jurists have been far from unanimous in their definition of religious liberty and far from consistent in their interpretations of the Bill of Rights. As to the rights of conscience in the sense of belief, or opinion, there is no dispute on either the legal or the ecclesiastical side. Even the Roman Catholic church now agrees on this. The law takes cognizance of acts. What of the duty of the citizen when his beliefs lead to acts which jeopardize the existence of the state? What obligation has the democratic state as between its respect for religious liberty and the preservation of its existence?

CAUSES OF THE VARIANT ATTITUDES OF THE CHURCHES

The attitudes of the churches and of Christian people on the conflict between conscience and the state are more difficult to define and even more subject to revision than those of the legislatures and the courts. The resolutions and practices of ecclesiastical bodies and the opinions of individuals on many details are as confused and contradictory as state and ecclesiastical law and private opinion are in the matter of marriage and divorce. Almost none would agree with Jehovah's Witnesses. Mr. Justice Frankfurter might well refer to conflicting religious scruples in his dissenting opinion in West Virginia v. Barnette. Two general considerations explain this inevitable confusion, although they do not mitigate its evil effects.

The first of these considerations is practical. It arises from the difficulty of understanding the Christian "constitution," the Bible, and from differences of method in interpreting it. Since it was over a thousand years in the making, it cannot be expected to be consistent within itself. Since it was written for social circumstances which were entirely different from ours, its application to present conditions is extremely difficult. The lawyer will fully appreciate such a problem. At one extreme, the orthodox conservative, who believes

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65 An immense literature might be cited. For a fair and comprehensive statement of Protestant opinion see a volume edited by Dr. William Adams Brown for a committee of the Federal Council of the Churches of Christ in America, CHURCH AND STATE IN CONTEMPORARY AMERICA (1936).

66 Supra note 21.
that the Bible should be interpreted literalistically, and, at the other, the devotee of critical, historical methods, such as are used in interpreting other documents of the past, cannot but reach opposite conclusions. The educated or uneducated biblical student who adopts the allegorical or the symbolical method of interpretation, as Jehovah's Witnesses do, can arrive at any desired result.

The second of these considerations is historical. The theologian and the biblical interpreter are sensibly or insensibly under the influence of precedent and tradition, just as the jurist is. To understand the confusion of political views among Christians, it is necessary to remember the long and complicated history back of them. As already intimated, this is one factor in the difficulty of interpreting the Bible. According to the ideals of the ancients, the Babylonians, the Assyrians, and the Egyptians, as well as the Hebrews, the king as well as the priest derived his authority from the gods and it was the duty of the king, his court, and the priests to see that the divine laws of social and economic justice were enforced. Here was a possible basis for the later doctrine of the divine right of kings. The king was often the religious, as well as the political, head of the nation. The prophet, therefore, was in a serious dilemma when he believed that the king was disobedient to the laws of God. Another ancient theory, reflected especially in postexilic Jewish history, is that of theocratic rule, which, in practice, means a sacerdotal autocracy.

In Jesus' day there was neither king nor priest to whom the oppressed and exploited common people or the prophetic reformer could appeal. The aristocratic priesthood and the Sanhedrin were as little interested as were the Roman procurators. Jesus' teaching, which was essentially Jewish, required that a good man should actually order his conduct according to the principles of Hebrew law, as summarized in the two commands to love God and his neighbor whole-heartedly. This need not interfere with rendering Caesar his due, for, except to a minority who were militant revolutionaries, government was unimportant. In God's own good time, which some believed to be just at hand, others to belong to the distant future, he would miraculously alter the conditions of existence so that his will would be done on earth as it was in heaven. Nothing was to be expected from earthly rulers, nor could the little minority of the faithful, by "social action," direct or indirect, hasten the desired

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change. Jesus called upon men to live together in peace and good will in the midst of a society over which they had no control and in which they had little interest, either legal, economic, or psychological.

Paul and probably all of the early Christians harbored the same hope of a speedy end to the evils of their earthly lot, and accepted the same ethical standards, with an even stronger individualistic and otherworldly emphasis than Jesus had given. In the earliest stage of Christian history, the Roman authorities, the "powers that be" in Paul's language, were ordained by God for the suppression of social disorder and the protection of law-abiding citizens, until the gospel should be preached to all. But no reform or redress of social wrongs was to be expected of them or attempted by Christians. Each Christian was to remain in his appointed place in the social order until, at the imminent appearance of Christ on the clouds, God should transform the physical earth, human beings, and human society and introduce a heavenly, incorruptible existence.

When, after perhaps two generations, this vivid, spectacular hope of necessity faded away, a belief in the mystical presence of Christ and a future heavenly home for the righteous (Gospel of John) produced even greater indifference to mundane affairs. The persecutions which the early Christians suffered led many of them to regard the Roman Empire as the enemy of all good and Rome itself as the embodiment of all evil (Book of Revelation). State and church were in the bitterest conflict. The believer's citizenship was in heaven. The Christians were usually poor, inconspicuous people. Without earthly prospects as they were, a contagious enthusiasm, enflamed by their otherworldly hopes, produced a widespread martyr complex, which resulted in romantic and dramatic displays, but in questionable advantage to the Christian cause. The church's arch-enemy was the state, which, especially during times of persecution, was regarded as an incarnation of Satan. Even the better and more conscientious emperors, such as Marcus Aurelius, regarded Christianity as inimical to the state, because Christians insisted that they obey God rather than man. All of this leaves the modern Christian, who lives under totally different conditions, without any laws or precedents which can be directly applied to modern problems.

When Christianity was recognized by Constantine and became

68 Jehovah's Witnesses reproduce these now antiquated attitudes and opinions.
the nominal religion of the state, this overt hostility was succeeded by an equally real and far from covert conflict, now within what was theoretically one Christian body, between its political and ecclesiastical heads, the same conflict which had arisen again and again in the long history of the Near East. Catholicism still maintains its claim that the Roman church, as representing divine authority, is to be recognized as teaching the only true religion. The authoritative discussion by Mgr. John A. Ryan and Father Francis J. Boland puts the Roman Catholic doctrine clearly: "All public power must proceed from God." Since the Church is the sole interpreter of God's will, the state must recognize, profess, and promote the true religion as found in the Roman Catholic church. Even so liberal a pope as Leo XIII insisted that the American principle of the separation of church and state is wrong. This suggests some of the delicate problems to be faced in the course of postwar rehabilitation. However, Catholics recognize realistically the accomplished facts of history and contemplate no attempt to introduce religious intolerance into the United States. Mr. Justice Murphy, a Catholic, dissenting in Jones v. Opelika, defended the right, as one of those dearest to many individuals, "to carry their message or their gospel to every living creature."

The inevitable result of the Protestant doctrine of individual freedom of belief and of biblical interpretation has been that Protestant countries exhibit far less uniformity than do Catholic lands. There is no need to rehearse the long story of the struggle of dissenting groups for religious freedom in Continental countries, Great Britain, and the United States. The point of present importance is its outcome in the widest possible variety of legal status and ecclesiastical practice and opinion in all lands where Christianity has gone. Many British and European Protestants are not yet ready for a separation of church and state. Varying factors, political, social, and theological, have resulted in widely differing situations, even in countries with established churches supported by taxes. Generalizations are dangerous and detail impossible here. But it must not be overlooked that the "fourth freedom" and the relationship of church and state

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69 Catholic Principles of Politics (1940) 284, 314-320; cf. Paton, The Church and the New Order (1941) 139 ff. The broadminded Makin, Freedom in the Modern World (1935) 65, note 1, cautiously repudiates the doctrine of a double morality, one for Catholics, the other for Protestants.

will play their part also in the problem of rehabilitation in the countries of Europe and should be carefully considered by the American and British public and their representatives.  

**EFFECTS OF VARIANT ATTITUDES**

The varying views of Catholics and Protestants complicate international relations in another way. In view of the world-wide entanglements of the political relations of the United States, the international character of church organizations assumes political as well as religious significance. The Catholic church and many of the Protestant denominations of Europe, Great Britain, Canada, and the United States including Jehovah’s Witnesses are scattered all over the world. They are thoroughly international. The problems of adjustment between differing types of Protestant organization, theology, and ethical outlook have been brought into the open and peaceably discussed in a series of conferences. The most recent, held in Oxford, Edinburgh, and Madras in 1937 and 1938, included also representatives of Eastern Orthodox Christianity. The result has been a World Council of Churches and a new consciousness on the part of churchmen in this country of their responsibilities abroad. Protestant missionaries have ceased seeking or accepting consular or diplomatic pressure to aid them. In postwar settlements Protestants will not wish their governments to use pressure to promote any particular form of religion, but they will be inclined to demand that the fourth freedom be on a par with the other three. In a recent article Governor Thomas Dewey of New York has said, “As Americans, we must be prepared to insist that any organization for peace shall fully, frankly and boldly require of all participants a declaration establishing ‘in principle the right of individuals everywhere to religious and intellectual liberty’.” In both theory and practice, Christianity, in all its indescribable variety, transcends all racial and national boundaries.

**AS TO WAR**

In English speaking countries, the conflict between conscience and the state centers at the moment around the problem of war. The

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71 For a survey see Keller, Church and State on the European Continent (1936).
72 See the preparatory volumes, too numerous to list, and the final reports: Oldham, The Oxford Conference (Official Report 1937); The World Mission of the Church (1939).
73 The Sixth Pillar, Christianity and Crisis, July 12, 1943, at 6.
enthusiasm with which church leaders and church bodies blessed the effort to make the world safe for democracy, and so for Christianity, in the first World War has notoriously burned out into the cold ashes of disillusion and reaction. Three types of opinion prevalent among Christians were listed in the Oxford Conference report: (1) “War, especially in its modern form, is always sin, . . . is ultimately destructive in its effects, . . . and ends in futility.” It must be instantly and totally renounced. (2) There may be necessary wars, for instance those waged “to defend victims of wanton aggression and to secure freedom for the oppressed.” But war is an evil and must be overcome. (3) The world being evil, no effort can end wars, and it is the duty of Christians to support, by force of arms when necessary, the efforts of the state to curb crime and preserve order.7

The last view, it may be fairly said, is more common in the churches which believe in a visible second coming of Christ and in those which do not accept the “social gospel,” the obligation of Christians to attempt social reform. It is a not-uncommon attitude in the Continental churches and American churches with recent European background. It conflicts only with a Hitlerist or Leninist theory of the state. Probably a considerable majority of American Protestants and Catholics belong to the second group. They deplore the present war as an evil necessity but do not believe that wars are eternally inevitable, and hope for a world organization which will insure peace.

JEHOVAH’S WITNESSES

Of the first type, the pacifists, there are many varieties. Numerically they are hardly so influential as their propaganda seems to indicate. No large denomination, not even the Friends, has insisted that every member must be a pacifist. Jehovah’s Witnesses, though not all of them radical pacifists, are organized and zealous propagandists. Their history explains their peculiarities. Their “gospel” originated as a hostile reaction against extreme, “hell-fire” revivalism, against the dominant religious denominations, and against the more prosperous classes of society. Their founder, “Pastor” (Charles Taze) Russell, was an independent minister of very little education who adopted indescribably weird and willful, allegorical and symbolical interpretations of the Bible, including a repudiation of any belief in hell and punishment after death and a proclamation of the imminence of a new age in which all believers should shortly enjoy mil-

74 Oldham, op. cit. supra note 72, at 162-167.
lennial happiness. Russell proclaimed that the millennium began in 1874, that millions now living would never die, and that a new age would begin in 1914. He succeeded in gathering a remarkable following among the poor and the economically and religiously disaffected. His successor, the astute lawyer, Joseph F. Rutherford, was equally effective.

In theory Jehovah's Witnesses insist categorically that all governments and all religions—except their "gospel"—are the work of Satan and his demons. God is the only legitimate ruler. During the last war the group was militantly pacifist and against the government. However, they now agree that great blessings have resulted from the freedom which has been granted in democratic America. They have offered as a substitute for the flag salute a statement that they "respect the flag of the United States and acknowledge it as a symbol of freedom and justice to all," with a pledge of "unqualified allegiance and devotion to Jehovah, the Almighty God" and of "allegiance and obedience to all the laws of the United States that are consistent with God's laws, as set forth in the Bible." 75

PROTESTANT ATTITUDES

The pledge of allegiance just quoted is in theory the only kind of "test oath" to which a very large number of the members of the Protestant denominations could subscribe. They believe that they "must obey God rather than man." If a national majority should decide upon policies which they thought wrong and they should be ordered to take part in the resulting actions, many would refuse to comply, accepting without resistance whatever punishment resulted. Some would follow Gandhi's policy and adopt passive resistance. Others might resist militantly. In view of the fact that modern society cannot, by the wildest stretch of the imagination, be said to be governed by Christian principles, it would be expected that, not only on the war issue, but on many others, Christians would find themselves so at variance with majority opinion and practice that they would be constantly in conflict with the state.

There are at least three reasons why this does not happen. One, which is not to the credit of the Christian profession, is that ethical

75 West Virginia State Board of Education v. Barnette, supra note 21, at 628, note 4; The New World (1942) 71 f.; also a pamphlet by "Judge" Rutherford, God and the State (1941). "Pastor" Russell seems to have been intransigent; see his posthumous Finished Mystery (1918), which was suppressed by the government as treasonable. "Judge" Rutherford was much more politic; see his volume Government (1928).
inertia and the natural coercion of public opinion lead to conformity to fashion in both thought and action. Another reason is the recognition by the thoughtful Christian of the fact that social change and ethical progress are inevitably slow. The third reason, closely related to the last, is a sense of social solidarity which leads the Christian to accept partial responsibility for evils which he cannot correct at once rather than to evade his obligation for their improvement.

Ku Klux Klans and similar organizations are quite willing to work quick reforms by despotic methods. But the idea is abhorrent to the essential nature of both democracy and Protestantism, for the fundamental principle of both is that truth and right are to be progressively discovered by investigation and discussion. Not even Plato's wise men may be trusted with uncontrolled power. History, early Massachusetts being one witness out of many, does not suggest that ecclesiastical authority is necessarily either wise or benevolent. The more conscientious the dogmatist, the more dangerous. The possibilities of terrible mistakes, no matter how well intended and high-minded men may be, forbid recourse to undemocratic methods. Moreover, the coercion of conscience and the will does not promote morality. Mr. Justice Murphy, concurring in the Barnette decision, quotes from the preamble to the Virginia Statute of Religious Freedom: "... all attempts to influence [the mind] by temporal punishments, or burthens, or by civil incapacitations tend only to habits of hypocrisy and meanness." It may be added that the tyranny of governmental prestige and social pressure is equally effective and more subtly dangerous.77

The perennial question of compromise is involved. Shall the idealist make a frontal attack upon evil, or will milder and more reasonable methods, a slower but subtler psychological approach, be more effective? Shall he, hermit-like, shake off the dust of his feet against a society which he regards as evil? Was the blood of the martyrs the seed of the church, and does the present prevalence of evil call for new martyrs? Or were other, less dramatic factors actually more effective then, and are less heroic measures now demanded?

A weighing of the "radical demands" of Jesus is necessary. Jehovah's Witnesses and many other pacifists have decided to attempt to live according to one section only of his teachings, just as an occasional Christian, besides the mendicant monks, has given away all

70 Supra note 21, at 646.
77 Cf. McConnell, Christianity and Coercion (1933) c. 5, Social Pressure.
that he had as Jesus demanded of the "rich young ruler." The majority of Christians, even the most conscientious, believe that it is contrary to Jesus' own teachings to take any of his teachings literally, as Jehovah's Witnesses, among others, attempt to do. They take into consideration the necessarily unqualified and summarily reported language of the popular preacher, the difference of historical and social conditions, and the vivid expectations of an imminent coming of the divine reign to earth, all of which contributed to the radical form of Jesus' utterances.

The churches, therefore, adopt a policy of "gradualness," which is anathema to the fanatic. They know that men cannot suddenly be made morally mature, even by the might of God, and that the only way to bring about lasting social change is by persuasion and education. The democratic process is the Christian process. In any social group compromise is necessary. Were not uncompromising Christian abolitionists in part responsible for the American Civil War? The uncompromising pacifist, or prohibitionist, or socialist may do more harm than good. As Bishop McConnell has said, "Compromise, as a surrender of moral principle, is reprehensible enough; but compromise, as an attempt to get at all the moral principles available on both sides, is thoroughly commendable."78

Under a totalitarian government, Christians are almost certain to be a persecuted minority. When they become a majority, as they practically are in the English-speaking countries, they must accept their responsibility for the enforcement of order. That now means, not national, but international order. As the Quaker, Professor Brand Blanshard, has written, William Penn, John Bright, and Herbert Hoover all found, when they began to be "active in the performance of all the duties of good citizenship," as the Quaker Discipline requires, that they could not maintain the "pacifist dogma."79 Responsibility to society involves the use of force, purely negative though it is, as a means of controlling a minority which breaks reasonable laws intended to insure equal liberties for all, in all lands. But the future depends upon the preservation of the slow, but positive, methods of democracy.

As to the type of minority dissent represented by Jehovah's Witnesses, democracy can only be patient, believing that a too-ardent fanaticism will burn itself out. Riotous attacks upon them, whether

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78 McConnell, ibid. at 111.
in New Hampshire, Texas, or California, are a blatant repudiation of both democracy and Christianity. Pacifism is a national menace only as allied with isolationism. As the issues of the present conflict became clearer, a great number of those who had sincerely hoped never again to be involved in war came to feel that, in this case, war was the lesser of two evils, and that a choice between the two was inescapable. To be neutral meant complicity in crime. To sell to both sides was to compound a felony. One can believe that, if the Christian conscience is on the alert, no circumstances will ever arise to plunge this nation into another war even as mildly aggressive as that against Spain, and that no antidemocratic movement can usurp authority to such an extent that the conflict between conscience and the state shall ever rise to the pitch which it has reached in Germany. The Christian conscience should be critical of society; it may never be satisfied with the state; but history seems to prove that revolt is never necessary where there is sane, progressive, and farsighted leadership. Upon that the future depends. In dealing with Jehovah's Witnesses the Supreme Court has shown a sanity and a consideration for the ultimate issues involved which cannot but have some effect upon the cowardice of politicians and the impatience of crowds.