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Religious Liberty in the American Law

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RELIGIOUS LIBERTY IN THE AMERICAN LAW.

II.

IT remains to examine the application of this principle* to particular offenses. Statutes have been passed against blasphemy and offenders have been prosecuted under them. This, as said in a Massachusetts case, has not been done "to prevent or restrain the formation of any opinions or the profession of any religious sentiments whatever, but to restrain and punish acts which have a tendency to disturb the public peace."¹³⁵ To prohibit the open, public, and explicit denial of the popular religion of a country is a necessary measure to preserve the tranquility of a government. Of this no person in a Christian country can complain; for, admitting him to be an infidel, he must acknowledge that no benefit can be derived from the subversion of a religion which enforces the purest morality.¹³⁶ It follows that the infidel who madly rejects all belief in a Divine Essence may safely do so, in reference to civil punishment, so long as he refrains from the wanton and malicious proclamation of his opinions with intent to outrage the moral and religious convictions of a community, the vast majority of whom are Christians. But beyond this conscientious doctrines and practices can claim no immunity.¹³⁷

No person of discretion in a Mohammedan country would, whatever his convictions might be, indulge in a tirade which Mohammedans would regard as blasphemous. He would know too well what the consequences with the average Mussulman would be. He would know that his life would be endangered by such an indiscretion. And while such danger of bloodshed is far less pronounced in a Christian country, it cannot be said to be entirely absent. Gross acts of blasphemy not only deeply wound the sentiments of Christians, but may in a rash hour lead to a riot or other breach of peace. The law recognizing this fact therefore forbids blasphemy on the ground that it is likely to provoke a breach of the peace. It punishes persons who vilely attack the legitimacy of Christ and the virginity of

* Part I of the article on "Religious Liberty in the American Law" appeared in the March number of Mich. L. Rev.

¹³⁵ 1836, *Commonwealth v. Kneeland*, 37 Mass. 206, 221; affirming Thatcher's Cr. Cas. 346.

¹³⁶ Swift Systems of Laws, Vol. 2, page 825, cited, 1824 *Updegrath v. Commonwealth*, 11 S. & R. 394, 405 (Pa.).

¹³⁷ 1848, *Specht v. Commonwealth*, 8 Pa. 312, 322.

his mother.¹³⁸ To hold that such an attack is protected by the constitutional guarantee of religious liberty would be an enormous perversion of the meaning of the constitution.

Nor is the fact that the blasphemous words were spoken in a debating club a defense. While serious discussion of religious topics is not and cannot be a crime, a malicious and mischievous attack on the principles of Christianity will be duly punished, even if made in a debating club. If the fact that the malicious words were spoken in a debating club were a defense, "impiety and profanity must reach their acme with impunity, and every debating club might dedicate the club room to the worship of the Goddess of Reason and adore the deity in the person of a naked prostitute."¹³⁹

Similarly the dissemination of lewd, obscene and lascivious matter through the mails is an offense which may be made punishable by Congress though the offender claims that his liberty of conscience is thereby violated.¹⁴⁰

But offenders against the policy of the state as shaped by the influence of the Christian religion will be found not only among such individuals as are embittered against that religion but also among the conscientious adherents of certain sects. Acts done with a religious motive may equally fall under the ban of the law. "Acts evil in their nature or dangerous to the public welfare may be forbidden and punished though sanctioned by one religion or prohibited by another."¹⁴¹ Thus our law, in harmony with Christian morality, extols monogamous marriages as the very basis of society and considers polygamy as "contrary to the spirit of Christianity and of the civilization which Christianity has produced in the Western World."¹⁴² The Mormon church in its earlier day publicly advocated polygamy as a religious tenet. It made it the duty of every man of sufficient means to contract more than one marriage. A Mormon who put this doctrine into practice was arrested and prosecuted. He offered his religious belief as a defense. The court held that religious belief cannot be accepted as a justification of an overt act made criminal by the law of the land and upheld the conviction of the polygamist.¹⁴³ When thereafter the Mormon church, despite

¹³⁸ 1811, *People v. Ruggles*, 8 Johns. 290; 1837, *State v. Chandler*, 2 Del. (2 Har.) 553.

¹³⁹ 1824, *Updegrath v. Commonwealth*, 11 S. & R. 394, 404 (Pa.).

¹⁴⁰ 1909, *Knowles v. United States*, 170 Fed. 409; 95 C. C. A. 579.

¹⁴¹ 1853, *Bloom v. Richards*, 2 Ohio St. 387, 391.

¹⁴² 1889, *Mormon Church v. United States*, 136 U. S. 1, 49; 34 L. Ed. 478; 10 Sup. Ct. Rep. 792.

¹⁴³ 1878, *Reynolds v. United States*, 98 U. S. 145; 25 L. Ed. 244.

this decision, continued its teaching and encouragement of polygamy, it was dissolved by the United States, its property forfeited¹⁴⁴ and the suffrage taken away from its adherents.¹⁴⁵

But while the practice of polygamy was thus suppressed and punished, the law is fully indifferent to any theological doctrine of a polygamous marriage "for eternity." It seems that Mormons make a distinction between marriages "for time" and marriages "for eternity." It is obvious that the law has no concern with the latter variety. A marriage for eternity is "something of which the law takes no cognizance and by which neither party was legally bound."¹⁴⁶ It amounts to a mere abstract belief in a form of polygamy with which the civil powers have no concern.¹⁴⁷ Constitutions and statutes care nothing about what men believe with reference to a future existence. Indeed they are intended in the American Union to protect a man in believing anything he wants to believe with reference to the future. They do not deal with *beliefs* but with *acts* and *practices*.¹⁴⁸ It follows that a believer in the Mormon religion can, so far as the government is concerned, by "celestial" marriages or marriages "for eternity" create a harem for the other world, provided he is able to avoid more than one terrestrial marriage at any one time.

A peculiar tenet maintained by the Christian Scientists has received considerable discussion in various journals,¹⁴⁹ has even been treated in a separate monograph,¹⁵⁰ and has come before the courts in a number of cases. It is well known that these religionists believe that all the ills of the body can be cured by prayer. With this belief the law finds no fault. Christian Scientists, like other sectarians, have the full and untrammelled right to believe in such doctrines as they choose and to propagate them even after their death.¹⁵¹ They may form religious corporations even under the very restricted pow-

¹⁴⁴ 1889, *Mormon Church v. United States*, *supra*; 1893, *United States v. Mormon Church*, 150 U. S. 145.

¹⁴⁵ 1892, *United States v. Late Corporation of Latter Day Saints*, 8 Utah 310; 31 Pac. 436; 1889, *Woolley v. Watkins*, 2 Idaho 590; 22 Pac. 102; 1890, *Davis v. Beason*, 133 U. S. 333; 33 L. Ed. 637; 10 Sup. Ct. Rep. 299.

¹⁴⁶ 1902, *Hilton v. Roylance*, 25 Utah 120, 142; 69 Pac. 660; 58 L. R. A. 723.

¹⁴⁷ Zane J. in, 1892, *United States v. Late Corporation of Latter Day Saints*, 8 Utah 310, 348; 31 Pac. 436.

¹⁴⁸ 1908, *Toncray v. Budge*, 14 Idaho 621, 652; 95 Pac. 26.

¹⁴⁹ See 59 Alb. L. J. 305; 62 Alb. L. J. 358; 2 Law Notes 142; 18 Law Notes 81; 17 Med. Leg. Jour. 175, 181, 186, 192, 196; 168 N. Am. Rev. 345; 61 U. of Pa. Rev. 259; 10 Va. L. Reg. 285.

¹⁵⁰ Christian Science, An Exposition, by William A. Purrington, published in 1900.

¹⁵¹ 1912, *Glover v. Baker*, 76 N. H. 393; 83 Atl. 916.

ers conferred by the Missouri constitution.¹⁵² But when they add the unauthorized practice of medicine to their forms of worship and thus come into conflict with the statutes in regard to such practice the courts will frown upon them and refuse them a charter of incorporation.¹⁵³ They will not allow them to set up their religious belief as a defense to a criminal action by the state¹⁵⁴ but will punish them for their infractions of the statutes in such case made and provided.¹⁵⁵ "The regulation of the practice of medicine is a police regulation for the protection of the public; it does not interfere with the exercise of religious liberty; it merely safeguards the lives and health of the public against the use and employment of dangerous agencies in the hands of the unlearned and unpracticed in the science and art of medicine."¹⁵⁶ Similarly a parent who in consequence of his belief in the Christian Science faith cure allows his sick infant child to die without medical attendance will not be allowed to set up his religious belief as a defense for his nonfeasance but will be punished for his infraction of a statute which requires him to furnish proper medical care in such a case.¹⁵⁷

A practice by the salvation army of beating drums or playing musical instruments on the streets and holding meetings there is well known and appears to be, in the opinion of its adherents, a religious duty. In the opinion of other good people, however, it is a nuisance and has been so declared by statutes and ordinances. These have been upheld as police regulations not trenching on religious liberty. It is too clear for argument that such liberty does not spell a license to disturb the public peace under the form of religious worship nor does it include the right to disregard those regulations which the legislature has deemed reasonably necessary for the security of the public order.¹⁵⁸ The essential purpose of a street is for public travel and therefor it "may not be used, in strictness of law, for public speaking, even preaching or public worship."¹⁵⁹ Hence a religious

¹⁵² 1887, *In re St. Louis Institute of Christian Science*, 27 Mo. App. 633.

¹⁵³ 1897, *In re First Church of Christ Scientist*, 20 Pa. Co. Ct. 241; 6 Pa. Dist. Rep. 745; 1903, *In re First Church of Christ Scientist*, 205 Pa. 543; 55 Atl. 536; 63 L. R. A. 411.

¹⁵⁴ 1905, *State v. Marble*, 72 Ohio St. 21; 73 N. E. 1063; 70 L. R. A. 835; 106 Am. St. Rep. 570; 1911, *Smith v. People*, 51 Colo. 270; 117 Pac. 612; 1904, *State v. Chenoweth*, 163 Ind. 94; 71 N. E. 197; 1911, *Owens v. State*, 6 Okl. Cr. 110; 116 Pac. 345; 36 L. R. A. (N. S.) 633. But see 1898, *State v. Mylod*, 20 R. I. 632; 40 Atl. 753; 41 L. R. A. 428; 1889, *Evans v. State*, 9 Ohio Dec. 222; 6 Ohio N. P. 129.

¹⁵⁵ 1894, *State v. Buswell*, 40 Neb. 158; 58 N. W. 728. See notes 2 Ann. Cas. 904; 27 Ann. Cas. 1221; 6 L. R. A. (N. S.) 685; 36 L. R. A. (N. S.) 633.

¹⁵⁶ 1916, *Fealy v. Birmingham*, 73 So. 296, 299 (Ala.).

¹⁵⁷ 1903, *People v. Pierson*, 176 N. Y. 201; 68 N. E. 243; 63 L. R. A. 187.

¹⁵⁸ 1886, *State v. White*, 64 N. H. 48; 5 Atl. 828, 830.

¹⁵⁹ 1872, *Fairbanks v. Kerr*, 70 Pa. 86; 10 Am. Rep. 664, 669.

body, however earnest and sincere it may be, will not be allowed to avail itself of the religious freedom provisions of the various constitutions as an authority to take possession of a street in a city in violation of such reasonable rules for its use as may have been enacted by the proper authorities.¹⁶⁰ The question whether such an ordinance is reasonable or otherwise must be decided on other than religious grounds.¹⁶¹ The offense however will not be of such a major character as to justify arrest without affidavit or warrant where it is committed out of the presence of an officer.¹⁶²

Whatever acts may be regulated the governments will make no attempts to reach or shape religious convictions. "We live in an age three hundred years later than the eve of St. Bartholomew and the fires of Smithfield. The fruits of the age, grown from the rough but kindly soil where our fathers planted good seed, are charity and toleration. They hoped their children might possess, enjoy and practice these virtues, precious in their estimation, because to them their grace and beauty had been denied; and because we have regarded the precepts of our fathers the laws of this generation encompass, encourage and protect all classes alike."¹⁶³ In the very nature of things religious convictions are beyond the powers of any civil government. They cannot be produced or extirpated by fines and penalties, and are a concern between each man and his Maker.¹⁶⁴ Attempts on the part of the state to meddle with them cannot but produce either martyrs or hypocrites. "Of all the tyrannies on human kind the worst is that which persecutes the mind"¹⁶⁵ Religious belief therefore is entirely relegated to the domain of the individual conscience. It is not a question to be determined by a civil court in a country dedicated to religious liberty what religion or what sect is correct in its theological views. "Were the administration of the great variety of religious charities with which our country so happily abounds, to depend upon the opinion of the judges, who from time to time succeed each other in the administration of justice, upon the question whether the doctrines intended to be upheld and inculcated by such charities, were consonant to the doctrines of the Bible;

¹⁶⁰ 1889, *Commonwealth v. Plaisted*, 148 Mass. 375; 19 N. E. 224; 2 L. R. A. 142; 12 Am. St. Rep. 566; 1889, *Mashburn v. Bloomington*, 32 Ill. App. 245; 1899, *Wilkes-Barre v. Garabel*, 11 Pa. Super. Ct. 355.

¹⁶¹ 1886, *In re Frazee*, 63 Mich. 396; 30 N. W. 72; 6 Am. St. Rep. 310. See 1888, *Anderson v. Wellington*, 40 Kans. 173; 19 Pac. 719; 2 L. R. A. 110; 1887, *People v. Rochester*, 44 Hun. 166. See also 47 L. J. 520.

¹⁶² 1899, *Commonwealth v. Krubeck*, 23 Pa. Co. Ct. 35.

¹⁶³ 1876, *Ward v. Manchester*, 56 N. H. 508; 22 Am. Rep. 504.

¹⁶⁴ 1803, *Mussy v. Wilkins*, Smith 1 (N. H.).

¹⁶⁵ 1 Dryden 246, cited in 1803, *Mussy v. Wilkins*, Smith 1, 5 (N. H.).

we should be entirely at sea, without helm or compass, in this land of unlimited religious toleration."¹⁶⁶ The law therefore does not presume "to settle differences of creeds and confessions, or to say that any point of doctrine is too absurd to be believed."¹⁶⁷ It regards the Unitarian religion as a branch of the Christian religion within the meaning of a will.¹⁶⁸ While evidence may be introduced in proper cases as to what a person's religious views are without violating any constitutional guarantees,¹⁶⁹ this will not be done to determine the truth of such tenets but rather to ascertain what they are so that some trust or property right may be properly adjudicated.¹⁷⁰ All religions however orthodox or heterodox,¹⁷¹ Christian or Pagan, Protestant or Catholic,¹⁷² stand equal before the law which regards "the Pagan and the Mormon, the Brahmin and the Jew, the Swedenborgian and the Buddhist, the Catholic and the Quaker as all possessing equal rights."¹⁷³ Because we are a Christian nation and believe in the inherent strength of the Christian religion we do not hesitate to allow other religious systems free scope. Protection is therefore afforded not only "to the different denominations of the Christian religion, but is due to every religious body, organization or society whose members are accustomed to come together for the purpose of worshipping the Supreme Being."¹⁷⁴

The question of the religious convictions of the guardians by nature or nurture of children has come before the courts for adjudication. The decision of this question of course is of the greatest importance in relation to the future faith of such wards. Nevertheless it will not be treated by the courts as the prevailing consideration. The paramount question will simply be the fitness of the proposed guardian, independently of any religious convictions which he may have. The fact that the mother of a child is a member of the "Magdazan" religion and a follower of one Otoman Zar Adusht Hamish who is the author of a book which cannot be recommended for perusal will therefore not be sufficient to render such child subject to dependent guardianship.¹⁷⁵ While it has been held that a father has no right to control the religious convictions of his fifteen

¹⁶⁶ 1844, *Knistern v. Lutheran Churches*, 1 Sandf. Ch. 439, 507 (N. Y.).

¹⁶⁷ 1836, *Schriber v. Rapp*, 5 Watts 351, 363; 30 Am. Dec. 327 (Pa.).

¹⁶⁸ 1859, *Attorney General v. Dublin*, 38 N. H. 459.

¹⁶⁹ 1905, *Long v. State*, 48 Tex. Cr. Rep. 175; 88 S. W. 203.

¹⁷⁰ 1848, *People v. Steele*, 2 Barb. 397; 1 Edmonds Select Cas. 505 (N. Y.).

¹⁷¹ 1871, *Grimes v. Harmon*, 35 Ind. 198, 211; 9 Am. Rep. 690.

¹⁷² 1910, *People v. Board of Education*, 245 Ill. 334, 349; 92 N. E. 251.

¹⁷³ 1854, *Donahue v. Richards*, 38 Me. 379, 409; 61 Am. Dec. 256.

¹⁷⁴ 1902, *State ex rel Freeman v. Scheve*, 65 Neb. 853, 879; 93 N. W. 169.

¹⁷⁵ 1913, *Lindsay v. Lindsay*, 257 Ill. 328; 100 N. E. 892.

year old daughter¹⁷⁶ he may apprentice his son to Shakers and have him brought up in their persuasion.¹⁷⁷ "A man may think as he pleases upon any subject, religious, philosophical or political, and is not for that under any civil or political disability."¹⁷⁸ Hence children have been apprenticed to Quakers and Shakers¹⁷⁹ and Catholic children have even been placed or left in Protestant homes,¹⁸⁰ though everything else being equal, conformity between the religious faith of the guardian and ward will be the deciding factor.¹⁸¹ In charitable, punitive and disciplinary institutions the state may even actually "take the place of the parent and may well act the part of the parent or guardian in directing what religious instructions shall be given."¹⁸²

It must now be clear that the American governmental policy in regard to religious beliefs is one of masterly inactivity, of hands off, of fair play and no favors.¹⁸³ "So far as religion is concerned the *laissez faire* theory of government has been given the widest possible scope."¹⁸⁴ Where two churches are making claims to a plot of ground the state will therefore not intervene in the controversy, being precluded by its constitution from lending any aid to either party.¹⁸⁵ The erection of a church building by a colored congregation will not be enjoined as a nuisance merely because its neighbors fear that the devotees will conduct their services in a disagreeably loud manner.¹⁸⁶ Since charity is a part of religion, the free exercise of it will be protected as against the attempt of a city by the creation of a charity commission to exercise an arbitrary control over it.¹⁸⁷ Neither Shakers¹⁸⁸ nor Universalists¹⁸⁹ will be discriminated against in Ohio in distributing the avails of land granted by Congress in 1778

¹⁷⁶ 1843 *Commonwealth v. Sigman*, 2 Clark 36; 3 Pa. Law J. 252, 259 (Pa.).

¹⁷⁷ 1848, *People v. Pillow*, 3 N. Y. Super. Ct. (1 Sandf.) 672.

¹⁷⁸ 1870, *Masey v. Bell*, 41 Ga. 183, 185; 1904, *Jones v. Bowman*, 13 Wyo. 79; 77 Pac. 439; 67 L. R. A. 860; 1913, *In re Dixon*, 254 Mo. 663; 163 S. W. 827. See notes in 31 Ann. Cas. 752; 37 Ann. Cas. 361; 41 L. R. A. (N. S.) 610 and an article in 29 Har. L. Rev. 497.

¹⁷⁹ 1811, *Matter of McDowle*, 8 Johns. 328; 1870, *People ex rel Barbour v. Gates*, 43 N. Y. 40.

¹⁸⁰ 1891, *Whalen v. Oimstead*, 61 Conn. 263; 23 Atl. 964; 15 L. R. A. 593; 1907, *Purinton v. Jamrock*, 195 Mass. 187; 80 N. E. 802; 1913, *State ex rel Baker v. Bird*, 253 Mo. 569, 583; 162 S. W. 119.

¹⁸¹ 1903, *In re Jacquet*, 82 N. Y. Supp. 986; 40 Misc. Rep. 575.

¹⁸² 1872, *Board of Education v. Minor*, 23 Ohio St. 211; 13 Am. Rep. 233.

¹⁸³ 1848, *People v. Steele*, 2 Barb. 397.

¹⁸⁴ 1902, *State ex rel Freeman v. Scheve*, 65 Neb. 853, 878; 93 N. W. 169.

¹⁸⁵ 1895 *Church of Christ v. Reorganized Church*, 71 Fed. 250; 36 U. S. App. 379.

¹⁸⁶ 1903, *Boyd v. Frankford*, 25 Ky. Law Rep. 1311; 77 S. W. 669.

¹⁸⁷ 1916, *Ex parte Dart*, 172 Cal. 47; 155 Pac. 63, 66.

¹⁸⁸ 1825, *State v. Trustees of Township 4*, 2 Ohio 108.

¹⁸⁹ 1834, *State v. Trustees of Section 29*, Wright 560 (Ohio).

for "religious purposes." Whatever the personal views of a judge may be concerning the principles and ceremonies of the Shaker society, whether their adherents to his mind smatter of fanaticism or not, he has no right to act upon such individual opinion in administering justice.¹⁹⁰

There are certain ceremonies connected with the various religious systems which in the opinion of their adherents are important and which in some cases are regarded as sacraments. It is clear that any restrictive action taken against such ceremonies would be felt as a severe blow to and a serious infraction of the liberty of conscience. Accordingly such ceremonies have been treated with the utmost respect in the few cases in which the question has arisen. While an exception in a prohibition statute in favor of sacramental purposes has been held not to cover a Jewish custom of drinking, on certain religious occasions, wine as a beverage without symbolical, mystical or sacramental meaning,¹⁹¹ it has been strongly intimated that a statute which exempts from taxation property used exclusively for public worship would be construed to cover bathing facilities, provided that they were confined to the members of the church as a religious ceremonial.¹⁹² In a very recent Oklahoma case it has been held that the federal compact imposed on the state by the enabling statute and expressly accepted by it and made a part of its constitution which interdicts the manufacture, giving away, barter or sale of intoxicating liquors within the state and excepts only purchases for medicinal, industrial and scientific purposes, was not intended to prevent religious worship, the very basis of our Christian morality and public safety, by a prohibition of the sacramental use of wine, but was aimed at conserving these fundamental prerequisites of our happiness by a prohibition merely of the convivial use of intoxicants.¹⁹³ Similarly the newly adopted eighteenth amendment of the federal constitution forbids the manufacture, importation, and sale of intoxicating liquors for beverage purposes only leaving sacramental purposes untouched.

Our conception of religious liberty has resulted in a considerable widening of the definition of religious charities. During the refor-

¹⁹⁰ 1848, *People v. Pillow*, 3 N. Y. Super. Ct. (1 Sandf.) 672, 678 (N. Y.); 1844, *Lawrence v. Fletcher*, 49 Mass. 153; 1836, *Scriber v. Rapp*, 5 Watts 351; 30 Am. Dec. 327 (Pa.); 1834 *Gass v. Wilhite*, 32 Ky. (2 Dana) 170; 26 Am. Dec. 446. See notes, 8 L. R. A. (N. S.) 909; 52 L. R. A. (N. S.) 459.

¹⁹¹ 1903, *Sweeney v. Webb*, 33 Tex. Civ. App. 324, 331; 76 S. W. 766. Writ of error denied 97 Tex. 250; 77 S. W. 1135.

¹⁹² 1889, *Congregation Kol Israel Auchi Poland v. New York*, 52 Hun. 507; 5 N. Y. Supp. 608.

¹⁹³ 1918, *De Hasque v. Atchison Railway Co.*, 173 Pac. 73 (Ok.).

mation of the sixteenth century the doctrine of superstitious uses was born in England.¹⁹⁴ This dogma was aimed particularly against the Catholics, though it is applicable also to Jews and others, and rests on the fact that there was a state religion recognized and established whose purposes were deemed to be pious while the purposes of all other religions were deemed to be superstitious. This distinction has been applied with such stringency that a gift for the propagation of the doctrines of the Church of England in *Scotland* has been treated by an English chancellor as superstitious because the Presbyterian church was settled in Scotland by act of parliament.¹⁹⁵ It was this distinction and the persecutions incident to it which induced the pilgrim fathers to come to America. That religious intolerance which infused itself through parliamentary enactments and judicial sentences, and which procured the law to anathematize different creeds as superstitious or heretical according as Catholics or Protestants gained governmental ascendancy was more than anything else what our ancestors fled from.¹⁹⁶ Under our present constitutions an attempt to make a distinction between pious and superstitious uses in its very nature must be futile. "Under a constitution which extends the same protection to every religion and to every form and sect of religion, which establishes none and gives no preference to any, there is no possible standard by which the validity of a use as pious can be determined; there are no possible means by which judges can be enabled to discriminate, between such uses as tend to promote the best interests of society by spreading the knowledge and inculcating the practice of true religion, and those which can have no other effect than to foster the growth of pernicious error, to give a dangerous permanence to the reveries of a wild fanaticism, or encourage and perpetuate the observances of a corrupt and degrading superstition."¹⁹⁷ The doctrine of superstitious uses has therefore been eliminated from the American jurisprudence as opposed to the spirit of our institutions,¹⁹⁸ to "the spirit of religious toleration which has always prevailed in this country,"¹⁹⁹ is not possible in America,²⁰⁰ and can never gain a foothold here so long as the

¹⁹⁴ Statute of 23 Henry 8th, Chapter 10. See 2 Am. Dec. in Equity 21.

¹⁹⁵ 1692, *Attorney General v. Guise*, 2 Vern 266 (England).

¹⁹⁶ 1898, *Harrison v. Brophy*, 59 Kans. 1, 5; 51 Pac. 885; 40 L. R. A. 721.

¹⁹⁷ 1850, *Andrews v. New York Bible and Prayer Book Society*, 6 N. Y. Super. Ct. (4 Sandf.) 156, 181; reversed on a technicality, 8 N. Y. (4 Seld.) 559.

¹⁹⁸ 1883, *In re Hagenmeyer*, 12 Abb. N. C. 432; 2 Dem. Sur. 87, 90 (N. Y.); 1886, *Appeal of Seibert*, 6 Atl. 105 (Pa.).

¹⁹⁹ 1898, *Harrison v. Brophy*, *supra*.

²⁰⁰ 1832, *Methodist Church v. Remington*, 1 Watts 219, 225; 26 Am. Dec. 61 (Pa.); 1910, *In re Kavanaugh*, 143 Wis. 90, 96; 126 N. W. 672.

courts cannot decide that any particular religion is *the* true religion.²⁰¹ "The recognition which religion generally has obtained from common consent and legislative enactments among us, as a valuable portion of the institutions of our society, must prevent the courts from saying that every (any) religious use is a superstitious use, and, by consequence, must compel them, in fulfillment of the spirit of the constitution, to declare every religious use a pious use."²⁰²

With religious opinion every action which does not conflict with the policy of the law or the rights of others, no matter how curious or quixotic it may in the opinion of others be,²⁰³ is fully protected. The American citizen may or may not profess a belief in the pope and the succession of the clergy.²⁰⁴ He may change his religious profession as often as he pleases²⁰⁵ and may worship or may not worship.²⁰⁶ He may worship in his own manner and may give importance to matters of doctrine and require that services and ceremonies be conducted in accordance with certain forms.²⁰⁷ He may entertain extraordinary religious ideas,²⁰⁸ such as a belief in spiritualism,²⁰⁹ or the notion that the souls of men after their death enter into the bodies of animals,²¹⁰ without being for that reason declared insane or incapable of making a will. He may join any church and leave it for any reason whatsoever.²¹¹ He may be unreasonable in religious matters.²¹² He may preach as he pleases²¹³ and may assure his hearers that if they join a certain society their names will be written in the lamb's book of life, otherwise they will go to hell.²¹⁴ He may acquire property though he has taken a vow of poverty.²¹⁵ He may

²⁰¹ 1850, *Andrew v. New York Bible and Prayer Book Society*, 6 N. Y. Super. Ct. (4 Sandf.) 156, 181; reversed on a technicality, 8 N. Y. (4 Seld.) 559; 1842, *Attorney General v. Jolly*, 1 Rich. Eq. 99, 108; 1 Rich. Law 176 note.

²⁰² 1834, *Gass v. Wilhite*, 32 Ky. (2 Dana) 170, 176; 26 Am. Dec. 446, 452.

²⁰³ 1826, *Waite v. Merrill*, 4 Me. (4 Greenl.) 102; 16 Am. Dec. 238, 245.

²⁰⁴ 1822, *Case of St. Mary's Church*, 7 S. & R. 516, 535 (Pa.).

²⁰⁵ 1896, *Smith v. Pedigo*, 145 Ind. 361, 378; 33 N. E. 777; 44 N. E. 363; 19 L. R. A. 433; 32 L. R. A. 838.

²⁰⁶ 1910, *People v. Board of Education*, 245 Ill. 334, 346; 92 N. E. 251.

²⁰⁷ 1915, *Lindstrom v. Tell*, 137 Minn. 203, 206; 154 N. W. 969.

²⁰⁸ See notes 37 L. R. A. 269; 37 L. R. A. (N. S.) 89; L. R. A. 1915 A. 462.

²⁰⁹ See note 37 L. R. A. 270.

²¹⁰ 1872, *In re Bonard*, 16 Abb. Prac. (N. S.) 128, 184 (N. Y.).

²¹¹ 1872, *Feisel v. First German Society*, 9 Kans. 592, 596; 1913, *Barkley v. Hayes*, 208 Fed. 319, 323; 1816, *Riddle v. Stevens*, 2 S. & R. 537, 543 (Pa.).

²¹² 1902, *State ex rel Freeman v. Scheve*, 65 Neb. 853; 91 N. W. 846; 93 N. W. 169; 59 L. R. A. 927.

²¹³ 1893, *Schlichter v. Keiter*, 156 Pa. 119; 27 Atl. 45; 22 L. R. A. 161.

²¹⁴ 1836, *Schriber v. Ropp*, 5 Watts 351; 30 Am. Dec. 327 (Pa.).

²¹⁵ 1886, *Lynch v. Loretta*, 4 Dem. Sur. 312 (N. Y.); 1888, *White v. Price*, 108 N. Y. 661; 15 N. E. 427; affirming 39 Hun. 394; 1912, *Steinhauser v. Order of St. Benedict*,

bury his child with or without religious ceremonies.²¹⁶ The freest possible scope is allowed him in giving outward expression of his inward religious life.

The fact that he is thus free to act does not of course shield him from the legal consequences of his acts where he has entered into a contract, committed a tort, or been guilty of a breach of the peace. He may or may not join a church, but if he does join he becomes subject to its rules, surrenders his religious liberty to that extent²¹⁷ and cannot complain of being forced to contribute to its support,²¹⁸ though his religious convictions may have undergone a change.²¹⁹ Where he is a member he may sever his connection and organize a church on other principles but may not in so doing appropriate in his new capacity property which has been solemnly consecrated to and is held in trust for the church of his old connection.²²⁰ He has the liberty to leave his church but not to steal its property.²²¹ He may interpret the Bible to enjoin communal life as a cardinal doctrine of the Christian faith but if he puts his conception into practice, joins a communistic society and contributes his property to it, he cannot recover such property after it has been consumed by the society.²²² He may accept the provisions in a deed, will or other instrument, which imposes the observance of some religious rite as a condition of enjoyment, and will thereupon enjoy the benefit as long as he bears the burden. But he cannot accept the benefit and evade the burden.²²³ He may join a mutual benefit society which makes the observance of certain religious ceremonies a condition of his membership. But he cannot force such society to carry out its part of the bargain after he has broken his part.²²⁴ He cannot be

194 Fed. 289; 114 C. C. A. 249. See articles in 47 Am. Law Rev. 587; 71 Cent. L. J. 167; 18 Law Notes 81; 19 Va. L. Reg. 949.

²¹⁶ 1912, *Seaton v. Commonwealth*, 149 Ky. 498; 149 S. W. 871.

²¹⁷ 1913, *Barkley v. Hayes*, 208 Fed. 319.

²¹⁸ 1860, *Curry v. First Presbyterian Congregation*, 2 Pitts. Rep. 40.

²¹⁹ 1829, *First Congregational Society v. Swan*, 2 Vt. 222, 230.

²²⁰ 1871, *Roshi's Appeal*, 69 Pa. 462, 469; 8 Am. Rep. 275; 1867, *Venable v. Coffman*, 2 W. Va. 310, 324.

²²¹ 1896, *Smith v. Pedigo*, 145 Ind. 361, 364; 33 N. E. 777; 44 N. E. 363; 19 L. R. A. 433; 32 L. R. A. 838.

²²² 1913, *Ruse v. Williams*, 14 Ariz. 445; 130 Pac. 887, 889.

²²³ 1912, *Case v. Dickey*, 212 Mass. 555; 99 N. E. 410; 1906, *In re Paulson's Will*, 127 Wis. 612; 107 N. W. 484; 5 L. R. A. (N. S.) 804; 1893, *McBride Estate*, 152 Pa. 192; 25 Atl. 513; 1881, *Magee v. O'Neill*, 19 S. C. 170; 45 Am. Rep. 765; 1898, *Board of Church Erection Fund v. First Presbyterian Church*, 19 Wash. 455; 53 Pac. 671. Contra 1854, *Maddox v. Maddox*, 52 Va. (11 Gratt.) 804. See Note 5 L. R. A. (N. S.) 804.

²²⁴ 1883, *Hitler v. German Roman Catholic Society*, 4 Ky. Law Rep. 728, 871; 1903, *Barry v. Order of Catholic Knights*, 119 Wis. 362; 96 N. W. 797; 1826, *Waite v. Merrill*, 4 Me. (4Greenl.) 102; 16 Am. Dec. 238; 1860, *Curry v. First Presbyterian Congregation*,

coerced into observing the sacrament of any church and even if he should enter into a solemn contract to do so, he is free to break the contract and for breaking it he cannot be deprived of any right which he may have independently of it. But if by the contract a special benefit is created for him he cannot break the contract and retain the benefit. The law will not guard a person "in that freedom of conscience which would permit him to enter into a contract and keep it to the extent that it suits him and repudiate it otherwise."²²⁵ He may believe that he is of divine origin and birth, a son of the Holy Ghost, and greater in authority, majesty, and power than was Moses, Elijah and John the Baptist, that he has attained a supernatural state of self-immortality in the body by a course of religious conduct consisting in abstinence from meat, intoxicating liquor, indecent and profane language, lies or adultery committed by acts or desires and that such supernatural power has conquered disease, death, poverty and misery and can be transmitted by him to others who are willing to accept his teachings and may honestly and sincerely endeavor to persuade others, by any legitimate means to embrace the same belief. But he will not be permitted, by pretending to entertain such views, to extract money from others through the use of the mails.²²⁶

There are certain denominations whose peculiar beliefs render the performance of certain public duties on the part of their adherents a most difficult matter. Such situations have been very liberally dealt with by the lawmaking powers. Even before the adoption of the Federal constitution Quakers were allowed by the constitutions of several of the original thirteen states²²⁷ to substitute an affirmation for an oath. The adherents of sects which consider the bearing of arms to be sinful have been exempted from the selective draft law passed by congress in 1917, and this exemption has been upheld by the United States Supreme Court against the contention that it violates the first amendment.²²⁸ Similarly the constitutions of Florida, Kansas, Oregon and Tennessee exempt citizens from military duty on account of religious scruples on such conditions as the legislature may prescribe.²²⁹ All these exemptions are granted as a favor and

² Pitts. 40; 1901, *Mazurkiewitz v. St. Adelbertus Aid Society*, 127 Mich. 145; 86 N. W. 543; 54 L. R. A. 727.

²²⁵ 1901, *Franta v. Bohemian Roman Catholic Union*, 164 Mo. 304, 314; 63 S. W. 1100; 54 L. R. A. 723; 86 Am. St. Rep. 611.

²²⁶ 1917, *New v. United States*, 245 Fed. 710; 158 C. C. A. 112.

²²⁷ Massachusetts Const., 6th amendment; New Hampshire Const. of 1784, under oaths and subscriptions; New York Const. of 1777, Art. 8.

²²⁸ 1918, *Arver v. United States*, 38 Sup. Ct. Rep. 159, 165.

²²⁹ Florida Const. of 1887, Art. 14, Sec. 1; Kansas Const. of 1859, Art. 8, Par. 1; Oregon Const. of 1857, Art. 10, Par. 2; Tennessee Const. of 1870, Art. 8, Sec. 3.

are generally limited to the members of certain definitely ascertained denominations. Any other rule could not but lead to gross abuse. Man has no window in his breast through which his real sentiments can be discovered. If his mere scruples of conscience would afford him a dispensation, the religious and the hypocritical, the candid and the deceitful would be placed upon the same footing. It would be impossible to distinguish between the pious plea of a saint and the black lie of a sinner. The most dogged unwillingness, the most perverse obstinacy and the most unpatriotic selfishness might be the mainspring of a claim for exemption dripping with oily asserations of religious scruples. It has therefore been held that while a jurymen may be excused in a murder case on account of his conscientious scruples against the death penalty,²³⁰ or in a bigamy case on account of his belief in Mormonism,²³¹ he will not be excused from his duty as a grand juror merely because he is a Covenanter and as such believes that it would be a sin for him thus to act.²³² A fixed and scrupulous moral objection to the discharge of a duty required by law which springs conscientiously from the religious tenets of a person does therefore not exempt him from its performance even though such objection but reflects the public teaching of the denomination of which the objector is a member. In the absence of a positive legislative exemption such as has been granted to clergymen and theological students by the selective draft law of 1917 and which has been upheld by the United States Supreme Court²³³ even clergymen have been held not to be exempt from jury²³⁴ and patrol²³⁵ duty. Imperative public needs must take precedence over private conscientious scruples.

One aspect of the subject of this chapter as to which the courts have faltered miserably must be noted. It was decided by the United States Supreme Court in 1871 that the decisions of ecclesiastical courts are binding in all cases of ecclesiastical cognizance even where such tribunals have actually exceeded the jurisdiction conferred upon them by the social compact, the contract between the members by which the church has come into existence.²³⁶ While some courts have sought to distinguish this case, without however being able to point to a real difference, others have blindly followed it even where

²³⁰ 1828, *Commonwealth v. Leshner*, 17 S. & R. 155 (Pa.).

²³¹ 1880, *Miles v. United States*, 103 U. S. 304; 26 L. Ed. 481, reversing 2 Utah 19.

²³² 1823, *State v. Wilson*, 13 S. C. Law (2 McCord) 393.

²³³ 1918, *Arver v. United States*, 38 Sup. Ct. Rep. 159, 165.

²³⁴ 1864, *King v. Daniel*, 11 Fla. 91.

²³⁵ 1834, *Commonwealth v. Bussell*, 33 Mass. 153.

²³⁶ 1871, *Watson v. Jones*, 80 U. S. (13 Wall.) 679; 20 L. Ed. 666.

it led to gross injustice, while only a few have dared to disregard it completely. In consequence this portion of the law has become a perfect jungle, a wilderness of cases, a river of doubt and a despair to all concerned. It will not be attempted in this chapter to discuss the situation that has arisen.²³⁷ Suffice it to say that the decision places in the hands of church judicatories a tyrannical power which is inconsistent with the rights of the parties that come before them and that it destroys religious liberty *pro tanto* instead of protecting it.

The duty of the state to protect religious liberty is positive as well as negative. The government does not merely allow religious organizations to shift for themselves as best they may but acts affirmatively to secure to them the fullest possible freedom. Its policy is to encourage and advance religion.²³⁸ The situation of unincorporated church bodies was at an early date found to be highly unsatisfactory. Churches have therefore been incorporated at first by special acts, later, under general incorporation statutes. The formalities required of them under such statutes have been generally made extremely simple, consisting frequently merely of the filing with some designated officer of some certificate, affidavit or similar paper whose form has even been suggested by the law. In some states separate statutes have been enacted, adapted each to a particular denomination, and their validity has been sustained by the courts.²³⁹ The policy of the states has been to frame this legislation so that each denomination "may have an equal right to exercise religious profession and worship, and to support and maintain its ministers, teachers and institutions in accordance with its own practice, rules and discipline."²⁴⁰

Incorporation therefore does not change the ecclesiastical status of congregations. It merely gives them a more advantageous civil status²⁴¹ and secures to them "that religious freedom which American constitutions guarantee."²⁴² It leaves the subject of religion free from legal restraint and assistance and allows the various churches to pursue their own ways unaided and unrestricted by law,

²³⁷ See the chapter on Church Decisions in the author's book, "American Civil Church Law," in which the matter is discussed in detail.

²³⁸ 1886, *First M. E. Church v. Atlanta*, 76 Ga. 181.

²³⁹ 1851, *Smith v. Bonhoof*, 2 Mich. 115; 1910, *St. Hyacinth Congregation v. Borucki*, 141 Wis. 205; 124 N. W. 284; 1888, *Keith and Perry Coal Company v. Bingham*, 97 Mo. 196; 10 S. W. 32; 1898, *Roberts v. Bradfield*, 12 App. D. C. 453.

²⁴⁰ 1897, *State v. Getty*, 69 Conn. 286; 37 Atl. 687.

²⁴¹ 1862, *Weinbrenner v. Colder*, 43 Pa. 244, 252.

²⁴² 1909, *Klix v. Polish Roman Catholic St. Stanislaus Church*, 137 Mo. App. 347; 118 S. W. 1171.

no one favored and no one discriminated against.²⁴³ It aids "with equal attention the votaries of every sect to perform their own religious duties,"²⁴⁴ extends religious liberty equally to every religious sect, whether Christian or otherwise²⁴⁵ and enables all sects effectually to accomplish "the great objects of religion, by giving them corporate rights for the management of their property and the regulation of their temporal as well as spiritual concerns."²⁴⁶

Unfortunately, however, not all the states have pursued this liberal policy. Though the United States Supreme Court in a case coming up from Virginia has said that neither public nor constitutional principles require the abolition of all religious corporations,²⁴⁷ though congress itself has exercised the power to incorporate church societies in the District of Columbia,²⁴⁸ the states of Virginia and West Virginia have absolutely prohibited in their constitutions the grant of any charter of incorporation "to any church or religious denomination."²⁴⁹ This provision is due to an early prejudice which had lodgment in the minds of our forefathers. "Religious corporations as they were known at common law were not looked upon with favor by the early inhabitants of this country in whose mind they were associated in a great degree with the idea of a union of Church and State, and therefore the disposition was to give them no countenance in law."²⁵⁰ This conception induced President Madison, himself a Virginian, on February 21, 1811, to veto an act of congress incorporating a church in the town of Alexandria on the ground that it violated the first amendment.²⁵¹

The practical effects of these provisions are not at all uncertain. They create a mortmain policy whose reason certainly is "not so apparent now as it was at the time when enacted."²⁵² The mere existence of a multitude of denominations in a state all more or less struggling to meet their obligations none being preferred by the government is a sufficient guaranty against the dangers which the mortmain policy is intended to meet. The Virginia policy therefore denies a substantial right to unoffending citizens because of an academic theory. It forces church associations to hold their prop-

²⁴³ 1903, *State ex rel Morris v. Westminster College*, 175 Mo. 52; 74 S. W. 990.

²⁴⁴ 1815, *Terrett v. Taylor*, 13 U. S. (9 Cranch) 43, 49; 3 L. Ed. 650.

²⁴⁵ 1868, *Hale v. Everett*, 53 N. H. 9; 16 Am. Rep. 82.

²⁴⁶ 1815, *Terrett v. Taylor*, *Supra*.

²⁴⁷ *Ibid*.

²⁴⁸ 1898, *Roberts v. Bradfield*, 12 App. D. C. 453, 471.

²⁴⁹ Virginia Const. of 1902, Sec. 59; West Virginia Const. of 1872, Art. 6, Sec. 47.

²⁵⁰ 1903, *State v. Westminster College*, 175 Mo. 52, 57; 74 S. W. 990.

²⁵¹ 1898, *Roberts v. Bradfield*, 12 App. D. C. 453, 465.

²⁵² 1907, *Miller v. Ahrens*, 150 Fed. 644, 652; affirmed 163 Fed. 870.

erty by trustees with all the vexatious consequences which flow from this relation.²⁵³ Its extent has therefore been somewhat confined by the action of the courts in holding that "agencies" of churches may be incorporated though the churches themselves are incapable of receiving such a boon.²⁵⁴

There is one other state which at one time had been enmeshed in the toils of the Virginia misconception and which has but imperfectly extricated itself. The Missouri constitution of 1820 ordained that "no religious corporation can ever be established in this state."²⁵⁵ A lengthy provision in the constitution of 1865, by which this policy was modified to a certain extent,²⁵⁶ was epitomized by the constitution of 1875, which is now in force, to read as follows: "No religious corporation can be established in this state, except such as may be created under a general law for the purpose only of holding the title to such real estate as may be prescribed by law for church edifices, parsonages, and cemeteries."²⁵⁷ It is clear that this provision severely circumscribes the power of the legislature to pass incorporation statutes. It forces churches which desire to become incorporated to state in their articles of association or charter that the corporation is established for the purpose only of taking title to the property specified in the constitution.²⁵⁸ It prevents a church organization which has incorporated from merging into the corporation²⁵⁹ and enables individual members of it suing for themselves and others similarly situated to enforce its rights to a testamentary gift bestowed on it.²⁶⁰ Its operation is not confined to a church in the ordinary acceptation of the term or even to a religious society as defined by judicial writers, since the provision "plainly intends to forbid the creation of any corporation (other than those which are expressly excepted) whose purposes are directly and manifestly ancillary to divine worship or religious teaching."²⁶¹ While it does not include a catholic colonization company one of whose purpose is the erection of catholic churches,²⁶² it covers an

²⁵³ 1888, *Heiskell v. Trout*, 31 W. Va. 810; 8 S. E. 557.

²⁵⁴ 1889, *General Assembly of the Presbyterian Church v. Guthrie*, 86 Va. 125; 10 S. E. 318; 6 L. R. A. 321; 1885, *Protestant Episcopal Education Society v. Churchman*, 80 Va. 718; 1907, *Jordans v. Richmond Home for Ladies*, 106 Va. 710; 56 S. E. 730; 1886, *Wilson v. Perry*, 29 W. Va. 169; 1 S. E. 302.

²⁵⁵ Missouri Const. of 1820, Art. 13, Sec. 5.

²⁵⁶ Missouri Const. of 1865, Art. 1, Sec. 12.

²⁵⁷ Missouri Const. of 1875, Art. 2, Sec. 8.

²⁵⁸ 1916, *Society of Helpers of Holy Souls v. Law*, 267 Mo. 667; 186 S. W. 718.

²⁵⁹ 1876, *Catholic Church v. Tobbein*, 82 Mo. 418.

²⁶⁰ 1891, *Lilly v. Tobbein*, 103 Mo. 477; 15 S. W. 618.

²⁶¹ 1887, *In re Institute of Christian Science*, 27 Mo. App. 633, 637.

²⁶² 1882, *St. Louis Colonization Ass'n v. Hennessy*, 11 Mo. App. 555.

institute of Christian Science,²⁶³ the trustees of the Methodist Episcopal Church South, and a bible and training school.²⁶⁴ It is to be hoped that it will be eliminated as an anachronism whenever the state shall adopt a new constitution.

Religious liberty would be but a shadow without a substance if religious exercises could be disturbed with impunity. The most effective measures have therefore been adopted to prevent such mischief. Licensed businesses such as saloons, billiard halls and even livery stables have been required to remain beyond a certain distance from any church. Railroads have been enjoined from erecting or continuing engine houses in the immediate vicinity of church property. Individuals who have made it a special business of theirs to disturb the meetings of congregations against whom they had for any reason acquired a grudge have been forced by the strong arm of equity to desist from their lawless course. The criminal law has been used generally and effectively to punish persons who disturb religious meetings and thus deter them and others from further outrages. Statutes accordingly are in force in practically all the states making such disturbance a misdemeanor and punishing it by fine or imprisonment or both and cover pagan as well as Christian worship,²⁶⁵ so that all denominations of worshippers whose doctrine and mode of worship is not subversive of morality are fully protected.²⁶⁶ Under them every congregation assembled for the public worship of God is at least a lawful meeting and as much under the protection of the law as is a political meeting for the exercise of the franchise.²⁶⁷ Says the Oklahoma court: "Every American has the unquestioned and untrammelled right to worship God according to the dictates of his own conscience without let or hindrance from any person or from any source."²⁶⁸ In regard to camp meetings, which, being held in the open air, are peculiarly liable to interruption from petty merchants who seize the opportunity to sell their wares regardless of the disturbance which they may cause, unusual traffic within one, two or even three miles of the meeting been prohibited by statutes whose constitutionality has been upheld by the courts,²⁶⁹ on the ground that their object is the protection of the citizen in the unmolested and undisturbed enjoy-

²⁶³ 1887, *In re Institute of Christian Science*, 27 Mo. App. 633.

²⁶⁴ 1909, *Proctor v. Methodist Episcopal Church South*, 225 Mo. 51, 66; 123 S. W. 862.

²⁶⁵ 1843, *Rogers v. Brown*, 20 N. J. Law 119.

²⁶⁶ 1802, *Commonwealth v. Arndt*, 2 Wheeler Cr. Cas. 236 (N. Y.).

²⁶⁷ 1834, *United States v. Brooks*, Fed. Cas. No. 14, 655; 4 Cranch C. C. 427.

²⁶⁸ 1913, *Cline v. State*, 9 Okl. Cr. Rep. 40, 44; 130 Pac. 510, 512.

²⁶⁹ 1882, *Commonwealth v. Bearse*, 132 Mass. 542; 42 Am. Rep. 450; 1887, *Meyer v. Baker*, 120 Ill. 567; 12 N. E. 79; 60 Am. Rep. 580.

ment of his rights of worship while the restriction of the defendants in their absolute right of property is carried so far only as in the judgment of the legislature is necessary to secure such end.²⁷⁰

Another illustration of the protection afforded to religious bodies is afforded by our Sunday legislation. There is no disharmony in the views taken by the courts on this important subject. Another "such strong concurrence of opinion on one leading question affecting the general community cannot be found in the history of American jurisprudence."²⁷¹ While the cases usually uphold Sunday legislation on the ground that it is promotive of physical and moral health and efficiency,²⁷² and while it has been held that under the first amendment to the federal constitution congress can enforce the observance of Sunday as a civil but not as a religious duty,²⁷³ it should not be forgotten that without such legislation the observance of Sunday would be difficult to all and impossible to some. The din and confusion of secular employments would disturb all in this worship and absolutely prevent the worship of many. While the rich and powerful would not suffer very seriously the man dependent on the labor of his hands would largely be prevented from attending divine service at any time. Sunday laws have thus become auxiliary to the rights of conscience. Christianity being recognized as part and parcel of the law, all the institutions growing out of it or in any way connected with it, in case they do not interfere with the rights of conscience, are entitled to the most profound respect and can rightfully claim the protection of the law making power of the state.²⁷⁴ It could scarcely be asked of a court in what professes to be a Christian country to declare a law unconstitutional because it requires rest from bodily labor on Sunday (except works of necessity and charity) and *thereby* promotes the cause of Christianity. If the Christian religion is, incidentally or otherwise, benefited or fostered by having this day of rest, as it undoubtedly is, there is all the more reason for the enforcement of laws that help to preserve it. Whilst courts have generally sustained Sunday laws as "civil regulations" their decisions will have no less weight

²⁷⁰ 1878, *State v. Cate*, 58 N. H. 240.

²⁷¹ 1861, *Ex parte Andrews*, 18 Cal. 678, 681. The court in this case overrules its former decision, 1858, *Ex parte Newman*, 9 Cal. 502, which was out of line with all the other authorities.

²⁷² 1898, *State v. Petit*, 74 Minn. 376; 77 N. W. 225, affirmed 177 U. S. 164; 44 L. Ed. 716; 20 Sup. Ct. Rep. 606.

²⁷³ 1908, *District of Columbia v. Robinson*, 30 App. D. C. 283.

²⁷⁴ 1850, *Shover v. State*, 10 Ark. 259, 263.

if they are shown to be in accordance with divine law as well as human.²⁷⁵

The constitution of Vermont therefore provides that "every sect or denomination of Christians ought to observe the Sabbath or Lord's day and keep up some sort of religious worship, which to them seem most agreeable to the revealed word of God."²⁷⁶ Without Sunday laws, indeed, Christianity might be exposed "to the danger of being reduced to the condition in which it was before the Roman world was governed by Christian princes. Though it might not be persecuted by the arm of the civil power, it would be driven by the annoyances and interruptions of the world to corners and by-places, in which to find retreat for its undisturbed exercise."²⁷⁷

The inconvenience which some suffer is of course no legitimate argument against these laws. If this argument were to prevail all laws would be abolished and anarchy would rule supreme. Where therefore believers in the Saturday as a day of rest are partly by the law, partly by their own conscience forced to abstain from work on two days of the week their religious freedom is not violated. They are as little compelled to worship on Sunday as is any other citizen. The Sunday is theirs "for social intercourse, for moral culture, and if they choose for divine worship."²⁷⁸ While the conscience of all is preserved as much as possible and while one state in its constitution even provides that "no person shall in time of peace be required to perform any service to the public on any day set apart by his religion as a day of rest,"²⁷⁹ Sunday laws have therefore been upheld against the objections of Jews²⁸⁰ and Seventh Day Adventists.²⁸¹

When churches were established and were public corporations supported by taxation like counties, towns, cities and villages it was but natural that they should be exempt from taxation. This exemption was retained after the reason for it had ceased. A new reason has therefore been sought and has been stated as follows: "The fundamental grounds upon which all such exemptions are based is a benefit conferred on the public by such institutions and

²⁷⁵ 1894, *Judefind v. State*, 78 Md. 510, 515, 516; 28 Atl. 405; 22 L. R. A. 721.

²⁷⁶ Vermont Const. of 1793 and 1913, Art. 3.

²⁷⁷ 1854, *State v. Ambs*, 20 Mo. 214, 219.

²⁷⁸ Field J., in 1858, *Ex parte Newman*, 9 Cal. 502, 520, 521.

²⁷⁹ Tennessee Const. of 1870, Art. 11, Sec. 15.

²⁸⁰ 1817, *Commonwealth v. Wolf*, 3 S. & R. 48 (Pa.); 1867, *Frolichstein v. Mobile*, 40 Ala. 725; 1906, *State v. Weiss*, 97 Minn. 125; 105 N. W. 1127; 1909, *Silverberg Brothers v. Douglas*, 114 N. Y. Supp. 824; 62 Misc. Rep. 340.

²⁸¹ 1877, *Commonwealth v. Has*, 122 Mass. 40; 1848, *Specht v. Commonwealth*, 8 Pa. 312; 1879, *Waldo v. Commonwealth*, 9 Wkly. Notes Cas. 200 (Pa.).

a consequent relief, to some extent, of the burden upon the state to care for and advance the interests of its citizens."²⁸² It has therefore become the policy of the various states by tax exemption statutes to encourage, foster and protect religious institutions "because the religious, moral and intellectual culture afforded by them were deemed, as they are in fact, beneficial to the public necessary to the advancement of civilization, and the promotion of the welfare of society."²⁸³

It will readily be seen that it "is easier to admire the motives for such exemption than to justify it by any sound argument."²⁸⁴ Its constitutionality however is generally foreclosed by provisions contained in the various state constitutions expressly empowering the legislature to exempt church property. One thing should be especially noted. Exemption laws are construed strictly,²⁸⁵ as they are against common right and practically amount to the same thing as levying an assessment for church purposes.²⁸⁶ Where churches are therefore in terms exempted from taxation they will not be exempted from special assessments.²⁸⁷

The discussion of this chapter would not be complete without a reference to the question of the quantum of religious belief required of witnesses in courts of justice and incidentally of the members of a jury²⁸⁸ or grand jury.²⁸⁹ According to the settled rule of the common law a witness in order to be competent to testify must believe in a God and in a future state of rewards and punishments.²⁹⁰ This rule has been strictly followed in numerous cases which in turn have led to constitutional provisions and statutory enactments modifying it or abolishing it altogether.²⁹¹ Since these provisions and enactments have taken various forms²⁹² a great dissimilarity now exists in the law of the various jurisdictions.²⁹³ No attempt will be made to trace these changes and to

²⁸² *Book Agents of M. E. Church v. Hinton*, 92 Tenn. 188, 21 S. W. 321, 19 L. R. A. 289.

²⁸³ 1886, *People v. Barber*, 42 Hun. 27, 30.

²⁸⁴ 1853, *Orr v. Baker*, 86, 88.

²⁸⁵ 1912, *United States National Bank v. Poor Handmaids*, 148 Wis. 613; 135 N. W. 121; 1911, *People v. Deutsche Ev. Luth. Jehovah Gemeinde*, 249 Ill. 132; 94 N. E. 162; 1912, *Gorham v. Trustees of Ministerial Fund in Gorham*, 109 Me. 22; 82 Atl. 290.

²⁸⁶ 1853, *Orr v. Baker*, 4 Ind. 86, 88.

²⁸⁷ 1853, *Lefebvre v. Detroit*, 2 Mich. 586; 1885, *Chicago v. Theological Union*, 115 Ill. 245; 2 N. E. 254; 1856, *Lockwood v. St. Louis*, 24 Mo. 20.

²⁸⁸ 1912, *State v. Jackson*, 156 Iowa 588; 137 N. W. 1034.

²⁸⁹ 1905, *State v. Mercer*, 101 Md. 535; 61 Atl. 220.

²⁹⁰ See note 12 Ann Cas. 155.

²⁹¹ See note 42 L. R. A. 553.

²⁹² See note 12 Ann. Cas. 158.

²⁹³ See note 42 L. R. A. 554.

classify the states into groups. It may however be stated without fear of contradiction that in the majority of the states no religious belief is required and that in some even an atheist is now a competent witness. It should not be overlooked however that in some jurisdictions a belief in Divine punishment is still necessary and that in others evidence concerning the belief or disbelief of the witness may still be used to impair his credibility.²⁹⁴ This is so particularly where a person testifies in his own behalf. It has therefore been held that the right to so testify is a civil right which is protected by a constitutional provision that "no person shall be denied the enjoyment of any civil right, merely on account of his religious principles."²⁹⁵

The same contrariety meets the inquirer regarding the admissibility of dying declarations. It needs no argument to demonstrate that the unsworn declarations of a person whose sworn evidence would have been rejected while he was alive and subject to both cross examination and punishment for perjury would not be received after his death. Conversely, where his living testimony would have been received despite his lack of religious belief his dying declaration should not be rejected merely because he did not believe in a life beyond. The admissibility of dying declarations will therefore depend upon the law in regard to the competency of the person who made them to testify in the first place.²⁹⁶

The fact that most of the original thirteen states in 1787 had some form of a religious test was principally instrumental in bringing into the United States constitution a prohibition against such tests "as a qualification to any office or public trust under the United States." The further fact that a smaller number of such states at that date still retained some form of an established church was largely responsible for the adoption of the first amendment which prohibits congress from making any law "respecting an establishment of religion or prohibiting the free exercise thereof." Both provisions clearly control the action of the national government only and do not in any manner affect state policy. A federal control over such matter limited as to area has, however, been established since the days of the civil war through a compact irrevocable except by the consent of the United States, which compact has been imposed on all states since admitted into the union. This secures perfect toleration of religious sentiment and forbids any

²⁹⁴ See note 23 L. R. A. (N. S.) 1023.

²⁹⁵ 1889, *State v. Powers*, 51 N. J. Law 432; 17 Atl. 969; 1911, *Commonwealth v. Tresca*, 45 Pa. Super. Ct. 619.

²⁹⁶ See note 56 L. R. A. 419.

molestation of any person on account of his or her mode of religious worship. A similar control limited as to scope has been born out of the same conflict and has taken form in the words of the fourteenth amendment which prohibits all states from depriving any person "of life liberty or property without due process of law."

While these provisions are important, the main protection of the American citizen in his religious liberty still has its anchorage in the various state constitutions. These, after very interesting history in the course of which the various established churches were gradually disestablished though traces of the old order of things remain to the present day, now contain three outstanding prohibitions directed against (1) any preference of any church over another, (2) any compulsory attendance on any religious worship, (3) any taxation in support of any religious organization. They break down the distinction between pious and superstitious uses and allow the various churches to adopt such ceremonies as they may please. They do not disqualify a person on account of his religious belief from becoming the guardian of dependent children, and allow the competency of witnesses and jurors to be judged by such religious tests as the constitutions and statutes may have fixed. Where denominations have fixed scruples against the performance of certain duties they permit of their exemption from them through legislative action. In short they leave the field of religious opinion and religious practices free.

One thing however they do not do. They do not allow religious liberty to be so construed as to excuse acts of licentiousness or to justify practices inconsistent with the peace, safety and good order of the state. Neither do they permit the liberty of one person to be so extended as to interfere with that of another. In determining the acts deemed to be detrimental to society the prevailing moral conceptions of the people of the United States which are Christian in character will of course have a most decisive influence. This fact has led to the formation of the maxim that Christianity is a part of the law of the land. Accordingly anti-religionists, on the one hand, and Mormons, Salvation Army adherents and Christian Scientists, on the other, have been punished, the first for blasphemous and lascivious remarks made by them, the others for such acts as contracting polygamous marriages, occupying the public streets for religious services, and practicing medicine without a license.

Religious bodies would be ill protected if the action of the government toward them were negative only. Accordingly the states take positive action to make such liberty effective. With the

exception of Virginia and West Virginia they allow church bodies to incorporate and, with the further exception of Missouri, they are very liberal towards them in this regard. They exempt church property from taxation and thus lighten their financial burdens. Last but not least they protect religious worship by injunctions and verdicts for damages, by the pains and penalties of the criminal law, by requiring certain licensed businesses to remain beyond a certain radius from church buildings and by requiring a cessation from work on Sundays, the day principally given to religious exercises.

One unfortunate exception to the religious liberty enjoyed by the American citizen must be noted. Due probably to the feelings aroused by the civil war the United States Supreme Court in 1871 upheld the loyal action of a church body though such action concededly was beyond its powers. By this decision, which has been blindly followed by many courts, it has given an exaggerated importance to the decisions of church tribunals and has placed in the hands of these judicatories a tyrannical power inconsistent with natural justice, with the very terms of the compact to which they owe their existence and with the religious liberty of those who come before them.

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