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# THE LIMITATION OF RELIGIOUS LIBERTY

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IN THE United States the societal and individual interest in religious liberty has been deliberately enshrined in the First Amendment to the Federal Constitution,<sup>1</sup> as well as in state constitutions. Freedom of religion, like its companion freedoms, occupies a "preferred position" in our hierarchy of socio-legal values,<sup>2</sup> but it is not an absolute.<sup>3</sup> Mr. Justice Black has said: "No well-ordered society can leave to the individuals an absolute right to make final decisions, unassailable by the State, as to everything they will or will not do. The First Amendment does not go so far. Religious faiths, honestly held, do not free individuals from responsibility to conduct themselves obediently to laws which are . . . imperatively necessary to protect society as a whole from grave and pressing imminent dangers. . . ." <sup>4</sup> Clearly the existence of one man's freedom must be tempered if freedom is to exist in others. The totality of religious liberty is reduced by indulging a religious zealot to play a recording outside a church making impossible the worship of many others within.

In politically organized societies such as the United States, characterized by vigilant judicial review, the task of delimiting the "fundamental freedoms"<sup>5</sup> is essentially the function of the judiciary.<sup>6</sup> We are here

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1. U. S. CONST. AMEND. I. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." These prohibitions are applicable to the states under the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U. S. 296 (1940).

2. See *Marsh v. Alabama*, 326 U. S. 501, 509 (1946); *United States v. Ballard*, 322 U. S. 78, 86 (1944); *Follett v. McCormick*, 321 U. S. 573, 577 (1944); *Prince v. Massachusetts*, 321 U. S. 158, 164 (1944); *Jones v. Opelika*, 316 U. S. 584, 603 (1942).

3. ". . . the rights with which we are dealing are not absolutes." *Murdock v. Pennsylvania*, 319 U. S. 105, 110 (1943). "The basic validity of the State's claim to protect the individual and general welfare against crime, trespass, libel, injury of all sorts to health and morals, as defined by the community, forbids the easy assumption that there is an unqualified right of religious liberty against the Community and the State." *BATES, RELIGIOUS LIBERTY* 301 (1946). Nevertheless, it is worth recalling Blackstone: "The first and primary ends of the State are to maintain the personal and civil rights of men." 1 *BL. COMM.* 724.

4. *West Va. Bd. of Educ. v. Barnette*, 319 U. S. 624, 643 (1943) (concurring opinion of Justices Black and Douglas).

5. "This court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. This phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men. It stresses, as do many opinions of this court, the importance of preventing the restriction of enjoyment of these liberties." *Schneider v. New Jersey*, 308 U. S. 147, 161 (1939). See also *Craig v. Harney*, 331

concerned, then, with the judicial function in a particular area; techniques, tests, and decisions.

On occasion the limits of religious liberty have been determined by the techniques of historical jurisprudence. When an accused claimed that freedom of religion exempted him from a statute forbidding polygamy, the United States Supreme Court interpreted our constitutional safeguards solely by eighteenth century norms. Chief Justice Waite, speaking for the Court, said: "The word 'religion' is not defined in the Constitution. We must go elsewhere, therefore, to ascertain its meaning, and nowhere more appropriately, we think, than to the history of the times in the midst of which the provision was adopted."<sup>7</sup> Mr. Justice Cardozo would have utilized an historical approach to freedom of religion in *Hamilton v. Regents of the University of California*,<sup>8</sup> where in his concurring opinion he wrote: "Instruction in military science, unaccompanied here by any pledge of military service, is not an interference by the state with the free exercise of religion when the liberties of the Constitution are read in the light of a century and a half of history during days of peace and war."<sup>9</sup> Even the Blackstonian notion that freedom meant exemption from prior restraint and was no bar to *subsequent* punishment<sup>10</sup> has been indulged in by American jurists<sup>11</sup> who failed to

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U. S. 367, 373 (1947); *Chaplinsky v. New Hampshire*, 315 U. S. 568, 570 (1942); *Cantwell v. Connecticut*, 310 U. S. 296, 303 (1940); *Thornhill v. Alabama*, 310 U. S. 88, 95 (1940); *Lovell v. City of Griffin*, 303 U. S. 444, 450 (1938); *De Jonge v. Oregon*, 299 U. S. 353, 364 (1937); *Grosjean v. American Press*, 297 U. S. 233, 244 (1936); *Whitney v. California*, 274 U. S. 357, 373 (1927) (concurring opinion of Justice Brandeis). Note also the language of the U. N. CHARTER, Art. 1, ¶ 3.

6. "We are under a Constitution, but the Constitution is what the judges say it is, and the judiciary is the safeguard of our liberty." CHARLES EVANS HUGHES, *ADDRESSES AND PAPERS* 139 (1908). "The Supreme Court *is* the Constitution." Felix Frankfurter, quoted in Cushman, *Some Constitutional Problems in Civil Liberty*, 23 B. U. L. REV. 335, 336 (1943). "But we act in these matters not by authority of our competence but by force of our commissions. We cannot, because of modest estimates of our competence in such specialties as public education, withhold the judgment that history authenticates as the function of this Court when liberty is infringed." *West Va. Bd. of Educ. v. Barnette*, 319 U. S. 624, 640 (1943).

7. *Reynolds v. United States*, 98 U. S. 145, 162 (1878).

8. 293 U. S. 245 (1934).

9. *Id.* at 265. Note also the language of Justice Frankfurter in *Minersville School District v. Gobitis*, 310 U. S. 586, 594 (1940).

10. 4 B.L. COMM. \*150.

11. Even Justice Holmes subscribed to that principle in *Patterson v. Colorado*, 205 U. S. 454 (1907). "But even if we were to assume that freedom of speech and freedom of the press were protected from abridgment on the part not only of the United States but also of the States, still we should be far from the conclusion that the plaintiff in error would have us reach. In the first place, the main purpose of such constitutional provisions is 'to prevent all such *previous restraints* upon publications as had been practiced by other

appreciate that Blackstone was not interpreting constitutionally enshrined freedoms, but commenting on an immature common law. It is unthinkable to measure freedom of religion in contemporary America by the conditions of pre-Revolutionary England. Neither the religious test oath nor the star chamber furnish guidance or inspiration to the American judiciary of the twentieth century. The United States Supreme Court has cogently remarked that "No purpose in ratifying the Bill of Rights was clearer than that of securing for the people of the United States much greater freedom of religion, expression, assembly and petition than the people of Great Britain had ever enjoyed."<sup>12</sup>

Colonial bigotries and intolerances<sup>13</sup> are no more desirable charts to the contemporary area of constitutionally protected religious liberty. The constitutional debates and utterances of the Founding Fathers have been cited with equal facility for opposed interpretations of the First Amendment,<sup>14</sup> and they afford little judicial guidance. Logically, there is no more justification for interpreting freedom of religion by 1791 norms than in limiting "commerce" to the media of transportation known in 1787.<sup>15</sup>

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governments,' and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare. *Commonwealth v. Blanding*, 3 Pick. 304, 313, 314; *Respublica v. Oswald*, 1 Dallas, 319, 325. The preliminary freedom extends as well to the false as to the true; the subsequent punishment may extend as well to the true as to the false. This was the law of criminal libel apart from statute in most cases, if not in all. *Commonwealth v. Blanding*, *ubi sup.*; 4 BL. COMM. 150." *Id.* at 462. Justice Holmes, of course, repudiated this view in later years. See *Gitlow v. New York*, 268 U. S. 652, 672 (1925) (dissenting opinion of Justice Holmes), *Abrams v. United States*, 250 U. S. 616, 624-631 (1919) (dissenting opinion of Justice Holmes).

12. *Bridges v. California*, 314 U. S. 252, 265 (1941).

13. "Religious tolerance was not common in the American colonies." FRAENKEL, *OUR CIVIL LIBERTIES* 51 (1944); See also MYERS, *HISTORY OF BIGOTRY IN THE UNITED STATES* (1943); WHIPPLE, *OUR ANCIENT LIBERTIES* (1927); PATTERSON, *FREE SPEECH AND A FREE PRESS* 104 (1939); and COOLEY, *CONSTITUTIONAL LIMITATIONS* 418 (1868).

14. "The inconclusiveness of the historical argument is apparent from the cases. In five of the recent major cases involving interpretation of the First Amendment, the writers of the majority and minority cases [*sic* opinions?] have both used the historical argument to prove their point. In each of those cases the argument seemed almost equally adaptable to the disagreeing judges who arrived at contradictory conclusions. It is submitted that any argument which is so pliable is of strictly limited utility in deciding cases." Summers, *The Sources and Limits of Religious Freedom*, 41 ILL. L. REV. 53, 57 (1946).

15. "But that the First Amendment limited its protection of speech to the natural range of the human voice as it existed in 1790 would be, for me, like saying that the commerce power remains limited to navigation by sail and travel by the use of horses and oxen in accordance with the principal modes of carrying on commerce in 1789. The Constitution was not drawn with such limited vision of time, space and mechanics." *Kovacs v. Cooper*, 336 U. S. 77, 105 (1949) (dissenting opinion of Justice Rutledge). And see CHAFFEE, *FREE SPEECH IN THE UNITED STATES* 29 (1941).

More frequently than historical techniques has the influence of Jhering's judicial utilitarianism<sup>16</sup> and Pound's pragmatism<sup>17</sup> directed the American judiciary in delimiting religious liberty. Characteristically, courts weigh societal utilities and interests when, on occasion, the social and individual interest in freedom of religion clashes with some other social interest and the need of reconciliation or delimitation arises. In the heritage of Justices Holmes<sup>18</sup> and Cardozo,<sup>19</sup> Justice Stone saw that the judicial function here was a balancing and reconciliation of interests. In a religious liberty controversy he wrote: ". . . where there are competing demands of the interests of government and of liberty under the Constitution, and where the performance of governmental functions is brought into conflict with specific constitutional restrictions, there must, when that is possible, be reasonable accommodation between them so as to preserve the essentials of both and . . . it is the function of the courts to determine whether such accommodation is reasonably possible."<sup>20</sup> Justice Rutledge has given a clear picture of the present Court's concept of the judicial function in freedom controversies. He writes: "Where the line shall be placed in a particular application rests . . . on the concrete clash of particular interests and the community's relative evaluation both of them and how the one will be affected by the specific restriction, the other by its absence. That judgment in the first instance is for the legislative body. But in our system, where the line can constitutionally be placed presents a question this Court cannot escape answering independently, whatever the legislative judgment, in the light of our constitutional tradition."<sup>21</sup> There are sufficient expressions by other Justices of the Supreme Court<sup>22</sup> to affirm that this tribunal is regularly

16. Primarily *DER KAMPF UMS RECHT* (1872) and *DER ZWECK IN RECHT* (1877). The former is available in an English translation by Lalov with an introduction by Kocourek (Callaghan, 1915), while the latter is available in English under the title, *LAW AS MEANS TO AN END*, number five in the Modern Legal Philosophy Series. The translation is by Husik (Macmillan, 1921).

17. Especially Pound, *Interests of Personality*, 28 *HARV. L. REV.* 445, 453 (1915); Pound, *A Theory of Social Interests*, 15 *PROC. AM. SOC. SOC'Y* 16 (1921); and Pound, *A Survey of Social Interests*, 57 *HARV. L. REV.* 1 (1943).

18. "I think that the judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage. The duty is inevitable, and the result of the often proclaimed judicial aversion to deal with such considerations is simply to leave the very ground and foundation of judgments inarticulate, and often unconscious. . . ." Holmes, *The Path of the Law*, 10 *HARV. L. REV.* 457, 467 (1897).

19. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 102, 112 (1922); CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* 72 (1928).

20. *Minersville School District v. Gobitis*, 310 U. S. 586, 603 (1940) (dissenting opinion of Justice Stone).

21. *Thomas v. Collins*, 323 U. S. 516, 531 (1945).

22. *Saia v. New York*, 334 U. S. 558, 562 (1948); *United Public Workers v. Mitchell*,

weighing societal utilities in the delimitation of the First Amendment freedoms.

Supposedly, as Justice Black intimated, the United States Supreme Court recognizes the clear and present danger test as the proper criterion to be used in the delimitation of religious liberty. In *Cantwell v. Connecticut*,<sup>23</sup> the first Supreme Court decision squarely holding that freedom of religion is protected against state infringement by the Fourteenth Amendment, the Court stated: ". . . in the absence of a statute narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the state, the petitioner's communication, [playing a victrola record critical of another faith] considered in the light of the constitutional guaranties, raised no such clear and present menace to public peace and order as to render him liable to conviction of the common law offense [inciting breach of the peace] in question."<sup>24</sup> Three years later the same test was applied to enjoin the enforcement of a public school flag salute requirement of one whose religious beliefs were opposed thereto.<sup>25</sup> The Court, in what is Justice Jackson's greatest opinion in this area, found not even an "allegation that remaining passive during a flag salute ritual creates a clear and present danger. . . ."<sup>26</sup> He added that "It is now a commonplace that censorship or suppression of expression of opinion is tolerated by our Constitution only when the expression presents a clear and present danger. . . ."<sup>27</sup> The clear and present danger criterion was also applied in a companion case upholding the right to teach the impropriety of a flag salute.<sup>28</sup> The following year, however, although it was forcefully argued

330 U.S. 75, 96 (1947); *Pennekamp v. Florida*, 328 U.S. 331, 336 (1946); *Marsh v. Alabama*, 326 U.S. 501, 509 (1946); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942); *Bridges v. California*, 314 U.S. 252, 282 (1941); *Cantwell v. Connecticut*, 310 U.S. 296, 307 (1940); *Thornhill v. Alabama*, 310 U.S. 88, 105 (1940); *Hague, Mayor v. Committee for Industrial Organization*, 307 U.S. 496 (1939). However, Justice Jackson felt compelled recently to "disagree entirely with the idea that 'Courts must balance the various community interests in passing on the constitutionality of local regulations'" of freedom. *Saia v. New York*, 334 U.S. 558, 571 (1948) (dissenting opinion of Justice Jackson).

23. 310 U.S. 296 (1940).

24. *Id.* at 311. 1 BILL OF RIGHTS REV. 134 (1941), 15 CALIF. B. J. 161 (1940); 40 COL. L. REV. 1067 (1940); 3 GA. B. J. 68 (1940); 26 IOWA L. REV. 126 (1940); 15 ST. JOHN'S L. REV. 93 (1940); 14 SO. CALIF. L. REV. 56 (1940); and 89 U. OF PA. L. REV. 515 (1941).

25. *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). Note, *Constitutional Implications of Compulsory Flag Salute Statutes*, 12 GEO. WASH. L. REV. 70 (1943); 32 GEO. L. J. 93 (1943); 6 GA. B. J. 249 (1944); 42 MICH. L. REV. 186, 319 (1943); 28 MINN. L. REV. 133 (1944); 17 TEMP. L. Q. 465 (1943); 92 U. OF PA. L. REV. 103 (1943).

26. *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

27. *Id.* at 633.

28. *Taylor v. Mississippi*, 319 U.S. 583 (1943).

to the Court that "when state action impinges upon a claimed religious freedom, it must fall unless shown to be necessary for or conducive to the child's protection against some clear and present danger,"<sup>29</sup> the high court nevertheless blithely disregarded the test with no effort to satisfy itself that a child selling religious literature on the streets was a clear and present danger to government or to anyone. The United States Supreme Court has overlooked the test in a number of other highly important freedom of religion controversies,<sup>30</sup> and inevitably this has cast doubt upon the tribunal's recognition of clear and present danger as "the proper criterion."

Various other tests have been suggested and utilized in the delimitation

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29. *Prince v. Massachusetts*, 321 U.S. 158, 167 (1944), 32 GEO. L. J. 309 (1944), 17 SO. CALIF. L. REV. 310 (1944).

30. *Marsh v. Alabama*, 326 U.S. 501 (1946) (reversed a conviction under a statute making it a crime to enter or remain on the premises of another after warning not to do so on the grounds that punishing a person for distributing religious literature on the streets of a company-owned town was a violation of the constitutional guaranty of freedom of religion); *In re Summers*, 325 U.S. 561 (1945) (held not unconstitutional to refuse an applicant admission to the practice of law on the ground that he could not in good faith take the required oath to support the state constitution because conscientious scruples would prevent his serving in the state militia in time of war); *United States v. Ballard*, 322 U.S. 78 (1944) (it was error for the Circuit Court to order a new trial because the trial court refused to submit to the jury the question of whether the defendants actually believed the religious views they professed to believe where the defendants were charged with using the mail to defraud); *Douglas v. City of Jeanette*, 319 U.S. 157 (1943) (religious sect, claiming abridgment of freedom of speech, press and religion, denied an injunction against a municipality to restrain the city and the mayor from enforcing an ordinance prohibiting the soliciting of orders for merchandise without securing a license on the grounds that it could receive adequate protection by prompt trial in the state court and appeal to the Supreme Court, and since "No person is immune from prosecution in good faith for his alleged criminal acts." *Id.* at 163); *Martin v. City of Struthers*, 319 U.S. 141 (1943) (an ordinance prohibiting a person from knocking on a door or ringing a doorbell in order to distribute a handbill is a denial of freedom of speech and press to a person distributing advertisements for a religious meeting); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (ordinance requiring one who sells religious literature on the street to pay a license tax is a denial of freedom of speech and freedom of religion); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (conviction under a state law prohibiting the addressing of offensive words to another in a public place is not a denial of freedom of speech since the statute was strictly limited to prevent acts of violence and breach of the peace); *Cox v. New Hampshire*, 312 U.S. 569 (1941) (state law prohibiting parades without paying a license tax held constitutional in view of its construction by the state supreme court as applied to a religious sect marching in close single file in a business district carrying signs); *Schneider v. New Jersey*, 308 U.S. 147 (1939) (an ordinance prohibiting door to door canvassing without a license requiring a police investigation amounting to censorship is void as applied to one delivering religious literature and soliciting donations for the religious sect); *Lovell v. City of Griffin*, 303 U.S. 444 (1938) (as applied to religious magazines and pamphlets a city ordinance prohibiting distribution of any kind without a permit violates the constitutional guaranty of freedom of the press).

of freedom of religion but they are not today influential. Courts occasionally have thought that religious liberty does not excuse "criminal" activity. An Indiana court has stated: "The religious doctrine or belief of a person cannot be recognized or accepted as a justification or excuse for his committing an act which is a criminal offense under the law of the land."<sup>31</sup> This notion goes back to Blackstone<sup>32</sup> and is ridiculous. For an American court to imagine that constitutional freedoms are to be measured by legislative expressions is an utter misconception of a constitutional society and the judicial function.

Frequently courts have asserted that religious liberty protects belief but not activity.<sup>33</sup> An abundance of United States Supreme Court decisions afford proof that activity is within the protection of the First Amendment,<sup>34</sup> and it is unthinkable that the framers of the Amendment intended to safeguard only cloistered contemplatives.

Probably the most disreputable test is indulged in by judges who place beyond the pale activities of religious sects or ministers because it is not *really* religious in any proper sense. In 1890 Justice Field said of a religious faith honestly and devoutly believing in multiple marriages: "To call their advocacy a tenet of religion is to offend the common sense of mankind."<sup>35</sup> Fifty-one years later Chief Justice Hughes pontifically dismissed a claim of religion with the sentence: "No interference with religious worship or the practice of religion in any proper sense is shown. . . ."<sup>36</sup> When a minister refused to fight because of his religious belief in non-violence, a lower federal court disposed of his claim of religious liberty in these words: "No question of religious liberty, in any true sense, is here involved. . . ."<sup>37</sup> Whether or not the results of the

31. *State v. Chenoweth*, 163 Ind. 94, 99, 71 N.E. 197, 199 (1904).

32. 4 BL. COMM. \*150.

33. See *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940); *Reynolds v. United States*, 98 U.S. 145, 163 (1878); *Baxley v. United States*, 134 F.2d 937, 938 (4th Cir. 1943); *Toncray v. Budge*, 14 Idaho 621, 655, 95 Pac. 26, 38 (1908); *Mosier v. Barren County Bd. of Health*, 308 Ky. 829, 215 S.W.2d 967 (1948); *State v. White*, 64 N.H. 48, 5 Atl. 828 (1886); *People v. Dale*, 47 N.Y.S.2d 702, 707 (City Ct. 1944); *McMasters v. State*, 21 Okla. Crim. 318, 207 Pac. 566 (1922); *State v. Kramer*, 49 S.D. 56, 206, N.W. 468 (1925); *Harlen v. State*, 216 S.W.2d 708 (Tenn. 1948); *Kirk v. Commonwealth*, 186 Va. 839, 44 S.E.2d 409 (1947); *State v. Neitzel*, 69 Wash. 567, 569, 125 Pac. 939, 940 (1912).

34. *Tucker v. Texas*, 326 U.S. 517 (1946); *Marsh v. Alabama*, 326 U.S. 501 (1946); *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Taylor v. Mississippi*, 319 U.S. 583 (1943); *Martin v. City of Struthers*, 319 U.S. 141 (1943); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Schneider v. New Jersey*, 308 U.S. 147 (1939); *Lovell v. City of Griffin*, 303 U.S. 444 (1938).

35. *Davis v. Beason*, 133 U.S. 333, 341 (1890).

36. *Cox v. New Hampshire*, 312 U.S. 569, 578 (1941).

37. *Rase v. United States*, 129 F.2d 204, 210 (6th Cir. 1942). Note also the language of Chief Justice Stone in *United States v. Ballard*, 322 U.S. 78, 88 (1944); and the New Hampshire court in *State v. Drew*, 89 N.H. 54, 57, 192 Atl. 629, 631 (1937).



particular cases are justified, the possibilities of this verbal avoidance are both considerable and ominous.<sup>38</sup>

"Commercial" or "profitable" activities have been denied the constitutional protection accorded religious liberty. "Religion cannot be used as a shield to cover a business undertaking," one court has said.<sup>39</sup> Another court has similarly stated: "A person should not be allowed to practice the tenets of . . . any church as a shield to cover a business undertaking."<sup>40</sup> Under this test fortune-telling<sup>41</sup> and faith healing<sup>42</sup> have been particularly subjected to regulation notwithstanding claims of religious liberty. That there are limitations upon the labeling proclivities of the courts under the Constitution is quite evident from the dissenting opinion of Chief Justice Stone in the first *Opelika*<sup>43</sup> case which has now become the position of the United States Supreme Court.<sup>44</sup> And this is necessarily so for experience with the related freedoms clearly demonstrates the readiness of some judges to deny the expressions of political and economic views under the pretext that they are "commercial".<sup>45</sup>

Courts have suppressed freedom of religion when they felt it had a "tendency" to breach of the peace or other public evil.<sup>46</sup> Other judges have denied constitutional protection to religious activity because they

38. Note, for instance, the Government's amazing argument in the Brief for Appellees, pp. 47-49, *Trinity Methodist Church, South v. Federal Radio Comm'n*, 62 F.2d 850 (D. C. Cir. 1932), that radio speech is not really "speech" within the meaning of the First Amendment.

39. *Smith v. People*, 51 Colo. 270, 277, 117 Pac. 612, 615 (1911).

40. *People v. Cole*, 210 N. Y. 98, 111, 113 N. E. 790, 794 (1916).

41. *Dill v. Hamilton*, 137 Neb. 723, 728, 291 N. W. 62, 65 (1940).

42. *Smith v. People*, 51 Colo. 270, 117 Pac. 612 (1911); *People v. Cole*, 219 N. Y. 98, 113 N. E. 790 (1916).

43. *Jones v. Opelika*, 316 U. S. 584 (1942).

44. *Jones v. Opelika*, 319 U. S. 103 (1943).

45. See, for example, *Conflicting Decisions on Commercial Character of Union Leaflets*, 6 INT'L JURID. ASS'N. BULL. 102 (1938); *Commonwealth v. Kimball*, 299 Mass. 353, 13 N. E. 2d 18 (1938); *Almassi v. Newark*, 8 N. J. Misc. 420, 150 Atl. 217 (1930).

46. *Lawson v. Commonwealth*, 291 Ky. 437, 164 S. W. 2d 972 (1942); *Delk v. Commonwealth*, 166 Ky. 391, 178 S. W. 1129 (1915); *State v. White*, 64 N. H. 48, 5 Atl. 828 (1886). And note the amazing language of the United States Supreme Court in the unfortunate decision in *Chaplinsky v. New Hampshire*, 315 U. S. 568, 573 (1942). The evils of the tendency test were apparent to the founders of the republic. Thomas Jefferson wrote in 1789 in his preamble to a draft of A BILL FOR ESTABLISHING RELIGIOUS FREEDOM in Virginia: "To suffer the civil magistrate to intrude his power into the field of opinion or to restrain the profession or propagation of principles on supposition of their ill-tendency, is a dangerous fallacy, which at once destroys all liberty, because he, being of course judge of that tendency, will make his opinions the rule of judgment, and approve or condemn the sentiments of others only as they shall square with or differ from his own." See also CHAFEE, *THE INQUIRING MIND* 104 (1928).

considered it an "abuse" of freedom;<sup>47</sup> or because they labeled it "license" rather than liberty.<sup>48</sup> And some have announced that "harmful" and "evil" activity is beyond the pale.<sup>49</sup> A momentary reflection should convince that these "tests" are without guidance to one who would be law-abiding, or to the judiciary charged with the responsibility of delimiting religious freedom. Customarily they have afforded only rationalization to a judge who was unsympathetic to the particular religious deed. All of them tempt the courts away from their responsibility to a constitutional society that has deliberately enshrined freedom of religion, and, though they survive, without exception they should be condemned.

Probably the most amazing "test" is one uttered by Justice Jackson. In writing of the United States Supreme Court he has said: "Our basic difference seems to be as to the method of establishing limitations which of necessity bound religious freedom." He then continued, "My own view may be shortly put: 'I think the limits begin to operate whenever activities begin to affect or collide with liberties of others or of the public.'"<sup>50</sup> In an intensely inter-related culture, activities "begin to affect" others early in their existence. Not only is this "test" incapable of intelligent application, but since 1919 the record attests the antipathy of our people to phrases that would so readily permit suppressions of freedom. It is somewhat perplexing that a Justice can subscribe to the clear and present danger concept and yet condone limitations of the First Amendment freedoms "whenever activities begin to affect" others. Certainly this is not the Justice Jackson of the *Barnette*<sup>51</sup> and

47. The "abuse" test derives primarily from the language of the state constitutions all of which, excepting Massachusetts, New Hampshire, South Carolina, Vermont and West Virginia, in protecting freedom provide for responsibility for its abuse. *Pennekamp v. Florida*, 328 U.S. 331, 356 n. 5 (1946). Note the example, too, of the United States Supreme Court in related freedom controversies: *Near v. Minnesota*, 283 U.S. 697, 703 (1931); *Stromberg v. California*, 283 U.S. 359, 368 (1931); and *Whitney v. California*, 274 U.S. 357, 371 (1927). For early origins of the abuse test, see 2 *KENT'S COMMENTARIES*, Lecture 24.

48. *Davis v. State*, 118 Ohio St. 25, 31, 160 N. E. 473, 475 (1928); *People v. Pierson*, 176 N. Y. 201, 211, 68 N. E. 243, 246 (1903); *People v. Dale*, 47 N. Y. S.2d 702, 707 (City Ct. 1944).

49. *People v. Cole*, 219 N. Y. 98, 111, 113 N. E. 790, 794 (1916); *State v. Marble*, 72 Ohio St. 21, 31, 73 N. E. 1063, 1066 (1905); *Bolling v. Superior Court*, 16 Wash. 2d 373, 133 Pac. 2d 803 (1943); *State v. Neitzel*, 69 Wash. 567, 125 Pac. 939 (1912). This unwise approach has its origin in Blackstone who said "if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity." 4 *BL. COMMENTARIES*\* 152. It was unfortunately encouraged by language of *Cooley*. *COOLEY, CONSTITUTIONAL LIMITATIONS* 422 (1st ed. 1868).

50. *Prince v. Massachusetts*, 321 U.S. 158, 177 (1944).

51. *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

*Ballard*<sup>52</sup> cases. Fortunately, there is little likelihood that the "begin to affect" criterion will ever secure judicial or popular acceptance.

Usually claims of religious liberty are denied with some general statement to the effect that the constitutional guaranty of religious freedom "does not deprive the state of its police power to enact laws for the protection of the public safety and morals and the protection of the general welfare."<sup>53</sup> Even if the statements were correct they would afford no standard and, at best, they are an inadequate statement of principle.

Since the record of the United States Supreme Court in its application of the clear and present danger test to religious liberty controversies is erratic, and because the decisions of lower federal and state courts are typically without reference to test or principle,<sup>54</sup> inquiry into the judicially determined limits of freedom of religion must turn to an investigation of case authority. An appreciation of case authority will be facilitated by an awareness that the societal and individual interest in freedom of religion clashes on occasion with social interests in health, safety, order and morality.

#### THE SOCIETAL INTEREST IN THE PUBLIC HEALTH AND ITS LIMITATION OF RELIGIOUS LIBERTY

The claim of religious liberty has been no defense to one who, in violation of statute, failed to provide medical attention for a child.<sup>55</sup> And in *Prince v. Massachusetts*<sup>56</sup> the Supreme Court considered the health and welfare of a child paramount to the asserted freedom of religion of the child and her guardian in distributing religious literature on the streets. The Supreme Court stated: "The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death."<sup>57</sup> One may agree with this statement of principle and still insist that any possibility of harm to the child in the *Prince* case was, on the facts, very remote. Application of the clear and present danger test should have resulted in a

52. *United States v. Ballard*, 322 U.S. 78 (1944).

53. *Davis v. State*, 118 Ohio St. 25, 31, 160 N.E. 473, 475 (1928). See *McMasters v. State*, 21 Okla. Crim. 318, 207 Pac. 566 (1922); *St. Louis v. Hellscher*, 295 Mo. 293, 242 S.W. 652 (1922).

54. The very rare lower federal and state court cases applying the clear and present danger test to freedom of religion situations are these: *Baxley v. United States*, 134 F.2d 937 (4th Cir. 1943); *United States v. Hillyard*, 52 F. Supp. 612 (E.D. Wash. 1943); *Gospel Army v. Los Angeles*, 27 Cal. 2d 232, 163 P.2d 704 (1945); and *Morgan v. Civil Service Comm'n*, 131 N.J.L. 410, 36 A.2d 898 (1944).

55. *State v. Chenoweth*, 163 Ind. 94, 71 N.E. 197 (1904); *People v. Pierson*, 176 N.Y. 201, 68 N.E. 243 (1903); *Owens v. State*, 60 Okla. 110, 116 Pac. 345 (1911).

56. 321 U.S. 158 (1944).

57. *Id.* at 166.

reversal of the conviction. The *Prince* decision has been aptly described as "a curious authoritarian island" in the generally liberal record of the present Court.<sup>58</sup>

Compulsory vaccination statutes have been upheld against claims that they violated freedom of religion and the liberty of the individual.<sup>59</sup> And, just as religious liberty has afforded no immunity to one who violated a compulsory education law,<sup>60</sup> so it is no defense for failure to abide by a statute requiring school attendance even of children whose parents entertained religious beliefs against vaccination.<sup>61</sup> Similarly, it has been held that excluding unvaccinated children from the public schools is not an unconstitutional abridgment of either the child's or the parent's religious freedom.<sup>62</sup> Nor does a requirement that public school pupils submit to a physical examination violate religious liberty.<sup>63</sup>

In holding that freedom of religion does not exempt one from statutory requirement of a health certificate before marriage, the court remarked that it knew "of no church which desires its ministers to profane the marriage tie by uniting a man afflicted with a loathsome disease to an innocent woman."<sup>64</sup>

To the crime of practicing medicine without license, the claim of religious liberty has regularly failed as a defense.<sup>65</sup> One court simply concluded: "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. . . ."<sup>66</sup> Another is more emphatic: "If such teacher or minister administer a medicine or prescribe a medicine or assume the

58. Green, *The Supreme Court, the Bill of Rights and the States*, 97 U. OF PA. L. REV. 608, 637 (1949). The case has also been criticized in Summers, *The Sources and Limits of Religious Freedom*, 41 ILL. L. REV. 53, 78 (1946), and in 32 GEO. L. J. 309 (1944).

59. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905); *Cram v. School Bd. of Manchester*, 82 N.H. 495, 136 Atl. 263 (1927).

60. *Mosier v. Barren County Bd. of Health*, 308 Ky. 829, 215 S.W.2d 967 (1948); *State v. Drew*, 89 N.H. 54, 192 Atl. 629 (1937); *Sadlock v. Bd. of Educ.*, 58 A.2d 218 (N.J. 1948); *Rice v. Commonwealth*, 188 Va. 224, 49 S.E.2d 342 (1948).

61. *In re Whitmore*, 47 N.Y.S.2d 143 (Dom. Rel. Ct. 1944).

62. *Zucht v. King*, 260 U.S. 174 (1922); *Vonnegut v. Baun*, 206 Ind. 172, 188 N.E. 677 (1934); *In re Viemeister v. White*, 179 N.Y. 235, 72 N.E. 97 (1904); *City of New Braunfels v. Waldschmidt*, 109 Tex. 302, 207 S.W. 303 (1918). See *Jacobson v. Massachusetts*, 197 U.S. 11, 32 (1905).

63. *Streich v. Board of Educ.*, 34 S.D. 169, 147 N.W. 779 (1914).

64. *Peterson v. Widule*, 157 Wis. 641, 656, 147 N.W. 966, 971 (1914).

65. *Fealy v. City of Birmingham*, 15 Ala. App. 367, 73 So. 296 (1916); *Smith v. People*, 51 Colo. 270, 117 Pac. 612 (1911); *State v. Buswell*, 40 Neb. 158, 58 N.W. 728 (1894); *People v. Cole*, 219 N.Y. 98, 113 N.E. 790 (1916); *State v. Miller*, 59 N.D. 286, 229 N.W. 569 (1930); *State v. Marble*, 72 Ohio St. 21, 73 N.E. 1063 (1905); *State v. Verbon*, 167 Wash. 140, 8 P.2d 1083 (1932).

66. *Fealy v. City of Birmingham*, 15 Ala. App. 367, 372, 73 So. 296, 299 (1916).

title of physician, then it is immaterial whether he claim or even prove that it is a tenet of some religious organization."<sup>67</sup> Constitutional protection is at times denied here because "the exercise of the art of healing for compensation . . . cannot be classed as an act of worship."<sup>68</sup> Finally, freedom of religion immunizes no one from punishment for violating a statute making criminal the use of poisonous snakes as part of a religious service.<sup>69</sup>

Generally, claims to religious liberty are not saved from punishment under reasonable regulations reasonably calculated to protect the public health.<sup>70</sup> The decisions so determinative have not been characterized by statement of controlling test or principle, but even the clear and present danger test would usually be satisfied, as by the uncontrolled use of poisonous snakes in a public assembly,<sup>71</sup> and it is doubtful if any verbalization of rule or standard will produce results greatly divergent from the foregoing statement of the law when society's interest in the public health is opposed to its interest in religious expression.

#### THE SOCIETAL INTEREST IN THE SAFETY OF THE STATE AND ITS LIMITATION OF RELIGIOUS LIBERTY

In 1918 the United States Supreme Court passed "without anything but statement the proposition that an establishment of a religion or an interference with the free exercise thereof repugnant to the First Amendment resulted from the exemption clauses of the [selective service] act . . . because we think its unsoundness is too apparent to require us to do more."<sup>72</sup> This somewhat meager appraisal of societal interests has been the authority for a host of lower federal court cases holding that religious liberty is no defense for violating selective service acts.<sup>73</sup> By

67. *State v. Miller*, 59 N.D. 286, 293, 229 N.W. 569, 572 (1930).

68. *State v. Buswell*, 40 Neb. 158, 169, 58 N.W. 728, 732 (1894).

69. *Larson v. Commonwealth*, 291 Ky. 437, 164 S.W.2d 972 (1942); *State v. Massey*, 229 N.C. 734, 51 S.E.2d 179 (1949); *Harden v. State*, 216 S.W.2d 708 (Tenn. 1948); *Kirk v. Commonwealth*, 186 Va. 839, 44 S.E.2d 409 (1947).

70. "Counsel has emphasized the religious aspect presented by these cases. . . . The argument from religious motivation has been foreclosed, so far as legislative power is concerned, since *Reynolds v. United States*. . . ." *Cleveland v. United States*, 329 U.S. 14, 21 n. 1 (1946) (concurring opinion of Justice Rutledge).

71. ". . . this danger is grave and immediate when and wherever the practice is being indulged." *Harden v. State*, 216 S.W.2d 708, 711 (Tenn. 1948).

72. *Arver v. United States*, 245 U.S. 366, 389 (1918).

73. *Van Bibber v. United States*, 151 F.2d 444 (8th Cir. 1945); *Roodenko v. United States*, 147 F.2d 752 (10th Cir. 1945), cert. denied, 324 U.S. 860 (1945); *Hopper v. United States*, 142 F.2d 181 (9th Cir. 1943); *Checinski v. United States*, 129 F.2d 461 (6th Cir. 1942); *Rase v. United States*, 129 F.2d 204 (6th Cir. 1942); *United States v. Brooks*, 54 F. Supp. 995 (S. D. N. Y. 1944); *United States ex rel. Zucker v. Osborne*, 54 F. Supp. 984 (W. D. N. Y. 1944).

1942 a court could say with little possibility of reversal that "The Constitution grants no immunity from military service because of religious convictions or activities."<sup>74</sup> The following year Judge Dobie held it "well settled that though one is not punished in these United States for his religious views and beliefs, yet one may be punished when through external conduct these views are put into practice, if such practice is fraught with clear and present danger to the safety, morals, health or general welfare of the community, and is violative of laws enacted for their protection", and thereupon sustained a conviction for violation of the draft law.<sup>75</sup> Judge Dobie's decision is a valuable illustration that the clear and present danger test can be applied in religious liberty controversies with ample protection to the state.

Claims of religious liberty were in 1934 subordinated by the Supreme Court to the societal interest in the safety of the state. In *Hamilton v. Regents of the University of California*,<sup>76</sup> the Court ruled that one opposed to military training because of his religious beliefs could not refuse such training and still avail himself of the benefits of an education at a public university. Justice Butler, speaking for the Court, stated: "Government, federal and state, each in its own sphere owes a duty to the people within its jurisdiction to preserve itself in adequate strength to maintain peace and order and to assure the just enforcement of law. And every citizen owes the reciprocal duty, according to his capacity, to support and defend government against all enemies."<sup>77</sup> Then, in 1945, in an equally unfortunate decision, the Supreme Court held, in effect, that the safety of the state was so jeopardized by admission to the bar of one whose religious beliefs did not permit bearing arms that conscientious objectors cannot imperil the state by the practice of law.<sup>78</sup> The case is, fortunately, of dubious validity today inasmuch as the cases principally relied upon by the Court in defense of its decision<sup>79</sup> have been overruled.<sup>80</sup>

As early as 1941 a lower federal court had held that freedom of religion was violated by requiring a flag salute as a condition of a permit for the distribution of religious literature.<sup>81</sup> Then, in 1943, *West Virginia*

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74. *Rase v. United States*, 129 F.2d 204, 210 (6th Cir. 1942).

75. *Baxley v. United States*, 134 F.2d 937, 938 (4th Cir. 1943).

76. 293 U.S. 245 (1934).

77. *Id.* at 262.

78. *In re Summers*, 325 U.S. 561 (1945).

79. *United States v. Macintosh*, 283 U.S. 605 (1931); *United States v. Schwimmer*, 279 U.S. 644 (1929).

80. *Girouard v. United States*, 328 U.S. 61 (1946).

81. *Kennedy v. City of Moscow*, 39 F. Supp. 26 (D. Idaho 1941).

*State Board of Education v. Barnette*<sup>82</sup> overruled the ill-starred *Gobitis* decision<sup>83</sup> and held that a flag salute could not be compelled of a public school pupil whose religious principles were opposed thereto. Obviously there was no clear and present danger to the safety of the nation from the reluctance of a school child to engage in the mockery of a symbolism antipathetic to its deepest beliefs. In a companion case the Court properly found no clear and present danger sufficient to support conviction of a teacher who advised the desirability of refraining from flag salutes.<sup>84</sup> The following year a New Jersey court held, in an interesting application of the clear and present danger test, that freedom of religion was violated by denying a civil service position to the best qualified applicant simply because he did not believe in taking the flag salute.<sup>85</sup>

Application of the clear and present danger test—or any other—will probably not prevent convictions for refusing to fight when the nation is struggling for survival. But proper utilization of the test can not conceivably justify the *Hamilton* and *Summers*<sup>86</sup> decisions, for under no test is society's interest in the safety of its political institutions even remotely endangered by the beliefs of the individuals concerned.<sup>87</sup>

#### THE SOCIETAL INTEREST IN PEACE AND GOOD ORDER AND ITS LIMITATION OF RELIGIOUS LIBERTY

As early as 1890 the United States Supreme Court asserted that "It was never intended or supposed that the [First] amendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society."<sup>88</sup> Fifty years later, Justice Roberts, speaking for the Court in the *Cantwell* case, said, in dicta, that "a state may by general and non-discriminatory legislation regulate the times, the places, and the manner of soliciting upon its streets, and of holding meetings thereon; and may in other respects safeguard the peace, good order and comfort of the community, without unconstitutionally invading the liberties protected by the Fourteenth Amendment."<sup>89</sup> He further reflected: "No one would have the hardihood to suggest that . . . religious liberty connotes the privilege to exhort others

82. 319 U.S. 624 (1943).

83. *Minersville School District v. Gobitis*, 310 U.S. 586 (1940).

84. *Taylor v. Mississippi*, 319 U.S. 583 (1943).

85. *Morgan v. Civil Service Commission*, 131 N.J.L. 410, 36 A.2d 898 (1944).

86. *In re Summers*, 325 U.S. 561 (1945).

87. "There was obviously no clear and present danger for the state's action was not based on any of his conduct but purely upon his confessed beliefs." *Summers*, *The Sources and Limits of Religious Freedom*, 41 ILL. L. REV. 53, 78 (1946).

88. *Davis v. Beason*, 133 U.S. 333, 342 (1890).

89. *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940).

to physical attack upon those belonging to another sect. When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the State to prevent or punish is obvious."<sup>90</sup> The Court took pains to point out, however, that it will take something more than the generalized and indefinite concept of the common law breach of peace to outweigh the societal interest in freedom of religion under the Fourteenth Amendment. The state must, according to the Court, employ "a statute narrowly drawn to define and punish specific conduct as constituting a clear and present danger. . . ."<sup>91</sup>

Within the year the same Court concluded that religious liberty was not unconstitutionally abridged by a statute requiring members of a religious group to make application for a permit before publicly parading, when such permit could be denied only because of public inconvenience in the use of the streets.<sup>92</sup> Chief Justice Hughes thought he saw an analogy to the common traffic signal. "One would not be justified", he said, "in ignoring the familiar red traffic light because he thought it his religious duty to disobey the municipal command or sought by that means to direct public attention to an announcement of his opinions."<sup>93</sup> The claim of religious freedom was dismissed summarily. "The argument as to freedom of worship is also beside the point," the Chief Justice pontificated, "No interference with religious worship or the practice of religion in any proper sense is shown. . . ."<sup>94</sup> As has been earlier noted, the "in any proper sense" language is only an example of the sophistry of definition, not at all new and not at all reputable.

In *Chaplinsky v. New Hampshire*,<sup>95</sup> the Supreme Court sustained the conviction of a minister who called a police officer an "offensive or de-

90. *Id.* at 308.

91. *Id.* at 311.

92. *Cox v. New Hampshire*, 312 U.S. 569 (1941), 21 B. U. L. REV. 540, 9 DUKE B. A. J. 151.

93. *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941).

94. *Id.* at 578. Note also *Bennett v. City of Dalton*, 69 Ga. App. 438, 25 S.E.2d 726, *aff'd per curiam*, 320 U.S. 712 (1943), holding freedom of religion not violated by conviction of Jehovah's Witnesses who refused to move on when requested by an officer attempting to break up a crowd after a disturbance, and *New York v. Hussock*, 23 N.Y.S.2d 520 (Spec. Sess. 1940), *cert. denied*, 312 U.S. 659 (1941), similarly affirming conviction of one who refused to move on when ordered by police breaking up a crowd because of traffic peril. See also the following state court cases wherein control of street demonstrations was upheld in spite of claimed denials of religious liberty: *Mashburn v. City of Bloomington*, 32 Ill. App. 243 (1889); *Commonwealth v. Plaisted*, 148 Mass. 375, 19 N.E. 224 (1889); *In re Frazee*, 63 Mich. 396, 30 N.W. 72 (1886); and *State v. White*, 68 N.H. 48, 5 Atl. 828 (1886).

95. 315 U.S. 568 (1942).



risive name" interdicted by statute, Justice Murphy observing that he could not "conceive that cursing a public officer is the exercise of religion in any sense of the term."<sup>96</sup> The decision marks an unfortunate abridgment in, if not freedom of religion, freedom of speech. Supposedly the societal interest in peace and good order is involved here. Even though another addressee might breach the peace under such circumstances, can it be assumed that a *peace officer* would breach the peace upon hearing annoying or derisive words? It is unfortunate that the attention of the Supreme Court was not called to the far better language of a New York court in the identical situation. The New York judge said: "I do not think that any remark, however insulting, addressed while under lawful arrest, to the police officer making the arrest (there being no evidence that the remark was made in a loud voice or public manner), can be deemed disorderly conduct tending to, or intended to provoke, a breach of the peace. The law does not contemplate that the officer would assault a person in his custody by reason of a remark addressed to him, yet in no other way could the remark tend to provoke a breach of the peace."<sup>97</sup> Surely there was not even a remote possibility of *substantive* evil, let alone a clear and present danger, from the words of the arrested minister. Furthermore, as the recent *Terminiello* case<sup>98</sup> well illustrates, the fact that the exercise of a First Amendment freedom results in *some* disturbance does not justify its suppression or punishment . . . there must be grave, substantial evil. Can one imagine that the foundations of society were imperiled by the police officer being called a "racketeer"?

On the relationship between the liberty of a religious group and the possibility of disorder Judge Sanborn has made a magnificent contribution in his opinion for the Court of Appeals for the Eighth Circuit in *Sellers v. Johnson*.<sup>99</sup> He there wrote: "The theory that a group of individuals may be deprived of their constitutional rights of assembly, speech and worship if they have become so unpopular with, or offensive to, the people of a community that their presence in a public park to deliver a Bible lecture is likely to result in riot and bloodshed, is interesting but somewhat difficult to accept. Under such a doctrine, unpopular political, racial and religious groups might find themselves virtually inarticulate. Certainly the fundamental rights to assemble, to speak,

96. *Id.* at 571.

97. *People v. Lukowsky*, 94 Misc. 500, 501, 159 N. Y. Supp. 599, 600 (Gen. Sess. 1916). Compare *State v. Moore*, 166 N. C. 371, 81 S. E. 693 (1914) where conviction was reversed though a "fighting" word was used to a police officer, *with State v. Maggard*, 80 Mo. App. 286 (1899) where a police officer was held not a "person" within the meaning of an ordinance prohibiting the use thereto of words tending to disturb the peace.

98. *Terminiello v. City of Chicago*, 337 U. S. 1, *rehearing denied*, 337 U. S. 934 (1949).

99. 163 F. 2d 877 (8th Cir. 1947).

and to worship cannot be abridged merely because persons threaten to stage a riot or because peace officers believe or are afraid that breaches of the peace will occur if the rights are exercised."<sup>100</sup> The Court granted an injunction to the religious group restraining public officers from interfering with the group's use of a public park in their religious worship.

It has been held that freedom of religion does not justify disturbing the neighborhood by excessive noise.<sup>101</sup> Nor is this freedom denied by declaring an edifice used for noisy religious services a public nuisance.<sup>102</sup>

Furthermore, religious freedom affords no justification for the unpermitted invasion of a private home,<sup>103</sup> a housing project,<sup>104</sup> or a hotel<sup>105</sup> in search of converts. Where, however, it is a public community or even a company town there can be no complete restraint on evangelizing activities or censorship thereof.<sup>106</sup>

In 1940 the United States Supreme Court emphasized that "Nothing we have said is intended even remotely to imply that, under the cloak of religion, persons may, with impunity, commit frauds upon the public."<sup>107</sup> By that time it was well-established in the state courts that religious liberty did not protect fortune-telling in violation of the criminal law.<sup>108</sup> ". . . religious liberty does not include the right", states a typical court, "to introduce and carry out every scheme or purpose which persons see fit to claim as part of their religious system."<sup>109</sup> Since 1917 it should have been evident that claims of religious liberty would not prevent punishment for using the mails to defraud, where the obtaining

100. *Id.* at 881.

101. *City of Louisiana v. Bottoms*, 300 S.W. 316 (Mo. 1927).

102. *Morison v. Rawlinson*, 193 S.C. 25, 7 S.E.2d 635 (1940).

103. *State v. Martin*, 199 La. 39, 5 So.2d 377 (1941); *People v. Bohnke*, 287 N.Y. 154, 38 N.E.2d 478 (1941); *People v. Dale*, 47 N.Y.S.2d 702 (City Ct. 1944). *But cf.* *Commonwealth v. Richardson*, 313 Mass. 632, 48 N.E.2d 678 (1943).

104. *Watchtower Bible and Tract Soc., Inc. v. Metropolitan Life Ins. Co.*, 297 N.Y. 339, 79 N.E.2d 433, *cert. denied*, 335 U.S. 886 (1948), 48 Col. L. Rev. 1105.

105. *People v. Vaughan*, 64 Cal. App. 2d 282, 150 P. 2d 964 (1944).

106. *Tucker v. Texas*, 326 U.S. 517 (1946); *Marsh v. Alabama*, 326 U.S. 501 (1946); *Follett v. Town of McCormick*, 321 U.S. 573 (1944); *Martin v. City of Struthers*, 319 U.S. 141 (1943); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Jones v. Opelika*, 319 U.S. 103 (1943); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Schneider v. New Jersey*, 308 U.S. 147 (1939); *Lovell v. City of Griffin*, 303 U.S. 444 (1938).

107. *Cantwell v. Connecticut*, 310 U.S. 296, 306 (1940).

108. *In re Wedderburn*, 66 Cal. App. 2d 70, 151 P.2d 889 (1944); *City of St. Louis v. Hellscher*, 295 Mo. 293, 242 S.W. 652 (1922); *Dill v. Hamilton*, 137 Neb. 722, 291 N.W. 62 (1940); *People v. Ashley*, 184 App. Div. 520, 172 N.Y. Supp. 282 (2d Dep't 1918). *Davis v. State*, 118 Ohio St. 25, 160 N.E. 473 (1928); *McMasters v. State*, 21 Okla. Crim. 318, 207 Pac. 566 (1922); *State v. Neitzel*, 69 Wash. 567, 125 Pac. 939 (1912). *But see State v. DeLaney*, 1 N. J. Misc. 619, 621, 122 Atl. 890, 891 (1923).

109. *McMasters v. State*, 21 Okla. Crim. 318, 323, 207 Pac. 566, 568 (1922).

of money was with fraudulent intent.<sup>110</sup> Then, in 1944, the Supreme Court held that where the defendants did not "honestly and in good faith believe" their representations, freedom of religion was no bar to punishment under the mail fraud statute.<sup>111</sup> Justice Stone remarked: "I am not prepared to say that the constitutional guaranty of freedom of religion affords immunity from criminal prosecution for the fraudulent procurement of money by false statements as to one's religious experiences, more than it renders polygamy or libel immune from criminal prosecution. [Cases omitted.] I cannot say that freedom of thought and worship includes freedom to procure money by making knowingly false statements about one's religious experiences."<sup>112</sup> Although this statement was made in a dissenting opinion (joined in by Justices Roberts and Frankfurter), it is suggested that the members of the majority would not dispute it. In an unaccompanied dissent Justice Jackson avers that any investigation into the disbelief of religious representation violates the constitutional freedom of religion, and he "would have done with this business of judicially examining other people's faiths."<sup>113</sup>

Society's interest in safeguarding the purse of the citizenry justifies some regulation of solicitors, including those for religious causes and periodicals. The extent of permissible registration statements, badges, bonds and reports has not yet been clearly defined by the courts.<sup>114</sup>

Since 1923 it has been clear that freedom of religion permits the teaching of a foreign language in a parochial school.<sup>115</sup> And, since 1925, it has been established that there is no interest in the state that can require a parent to send his child to a public school.<sup>116</sup> It has also been held that

110. *New v. United States*, 245 Fed. 710 (9th Cir. 1917), *cert. denied*, 246 U.S. 665 (1918).

111. *United States v. Ballard*, 322 U.S. 78 (1944).

112. *Id.* at 88 (dissenting opinion of Justice Stone).

113. *Id.* at 95 (dissenting opinion of Justice Jackson). Following the principle of the *Ballard* case is *United States v. Carruthers*, 152 F.2d 512 (7th Cir. 1945), *cert. denied*, 327 U.S. 787 (1946).

114. Compare *City of Manchester v. Leiby*, 117 F.2d 661 (1st Cir. 1941), *cert. denied*, 313 U.S. 562 (1941), upholding an identification badge requirement of distributors of religious literature; and dictum in *Cantwell v. Connecticut*, 310 U.S. 296 (1940) that "Without doubt a State may protect its citizens from fraudulent solicitation by requiring a stranger in the community, before permitting him publicly to solicit funds for any purpose, to establish his identity and his authority to act for the cause which he purports to represent." *Id.* at 306, with the language of the Court in *Thomas v. Collins*, 323 U.S. 516, 538 (1945), especially: "As a matter of principle a requirement of registration in order to make a public speech would seem generally incompatible with an exercise of the rights of free speech and free assembly." *Id.* at 539. And see the language of the Court in the inconclusive cases *Gospel Army v. Los Angeles*, 331 U.S. 543 (1947) and *Rescue Army v. Los Angeles*, 331 U.S. 549 (1947), especially the latter at 575.

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

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

if a child attends a public school it cannot be forced to participate in dancing against the religious beliefs of the parents.<sup>117</sup>

THE SOCIETAL INTEREST IN MORALITY AND ITS LIMITATION OF  
RELIGIOUS LIBERTY

Somewhat incongruously, the societal interest in religious liberty clashes intermittently with the interest in morality. ". . . it has long been held that the fact that polygamy is supported by a religious creed affords no defense in a prosecution for bigamy."<sup>118</sup> Nor will the fact that the defendant's multiple wives are proper according to his religious belief prevent punishment for violation of the Mann Act.<sup>119</sup> Claims of religious freedom did not prevent enforcement of prohibition laws supposedly expressive of society's interest in morality.<sup>120</sup> Religious liberty, it has been held, is no excuse for a minister's use of obscene language in a sermon.<sup>121</sup> And, similarly, a punishment for blasphemy has been sustained over claims that the speaker's religious liberty was denied.<sup>122</sup>

CONCLUSION

The societal and individual interest in religious liberty will on occasion clash with other social interests. In the weighing of these interests, the judiciary will be tempted merely to mirror the attitudes and passions of the temporary majority unless they are ever cognizant that the deliberate constitutional enshrinement of freedom of religion requires that attempted legislative denials thereof be condemned unless they can be proven imperatively necessary for the protection of a fundamental societal interest. Apparent to all must be the very important interest, not only individual but societal,<sup>123</sup> in dignifying the individual through the full development of his spiritual powers. The perceptive jurist is also well aware of the social utility resulting from sanctions the law can never provide.

Perhaps no test, no verbalized phrase, can keep the judiciary to its constitutional responsibility.<sup>124</sup> But to the extent that words can hold

117. *Hardwick v. Board of School Trustees*, 54 Cal. App. 696, 205 Pac. 49 (1921).

118. *Cleveland v. United States*, 329 U.S. 14, 20 (1946). *Church of Latter Day Saints v. United States*, 136 U.S. 1 (1890); *Davis v. Beason*, 133 U.S. 333 (1890); *Reynolds v. United States*, 98 U.S. 145 (1878); *Toncray v. Budge*, 14 Idaho 621, 95 Pac. 26 (1903); *State v. Barlow*, 107 Utah 292, 153 P.2d 647 (1944), *aff'd per curiam*, 324 U.S. 829 (1945).

119. *Cleveland v. United States*, 329 U.S. 14 (1946).

120. *Ruppert Corp. v. Caffey*, 251 U.S. 264 (1920); *Shapiro v. Lyle*, 30 F. 2d 971 (W.D. Wash. 1929), *aff'd mem.*, 36 F. 2d 1021; *State v. Kramer*, 49 S.D. 56, 206 N.W. 468 (1925).

121. *Delk v. Commonwealth*, 166 Ky. 39, 178 S.W. 1129 (1915).

122. *State v. Mockus*, 120 Me. 84, 113 Atl. 39 (1921).

123. See Pound, *Interests of Personality*, 28 HARV. L. REV. 445, 453 (1915).

124. "The great ideals of liberty and equality are preserved against the assaults of

judges and juries to their duty, the clear and present danger test will—better than any of its competitors—encourage those charged with the delimitation of religious liberty to pause and reflect<sup>125</sup> upon the primacy of the enshrined socio-legal values in religious liberty, and to investigate fully the purported need for its denial.

Today no presumption of constitutionality abets legislation abridging freedom of religion.<sup>126</sup> In fact, there is some recognition that a presumption of *unconstitutionality* burdens all legislative denials of the First Amendment freedoms.<sup>127</sup> This is a concept of legal significance, derivative from the specific embodiment of the fundamental freedoms in the First Amendment, that should affectuate the constitutional purpose and more adequately safeguard religious liberty and the companion freedoms than pious, but legally insignificant, incantations.<sup>128</sup> It is rather doubtful that the presumption of unconstitutionality is presently recognized by a majority of the Court,<sup>129</sup> although some competent observers have so

opportunism, the expediency of the passing hour, the erosion of small encroachments, the scorn and derision of those who have no patience with general principles, by enshrining them in constitutions, and consecrating to the task of their protection a body of defenders." CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 92 (1921). "Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed." *Whitney v. California*, 274 U.S. 357, 376 (1927) (concurring opinion of Justice Brandeis). See also BECKER, *FREEDOM AND RESPONSIBILITY IN THE AMERICAN WAY OF LIFE* 26 (1945); CUSHMAN, *SAFEGUARDING CIVIL LIBERTY TODAY* 84 (1945); HINES, *THE REVIVAL OF NATURAL LAW CONCEPTS* 82 (1930); ADAMS, *A DEFENSE OF THE CONSTITUTIONAL GOVERNMENT OF THE UNITED STATES IV* (1787); PATERSON, *FREE SPEECH AND A FREE PRESS* 3 (1939); and Pound, *The Development of Constitutional Guarantees of Liberty*, 20 *NOTRE DAME LAW.* 347, 395 (1945).

125. Biddle feels this is the real value of the clear and present danger test. BIDDLE, *MR. JUSTICE HOLMES* 156 (1946).

126. *Thomas v. Collins*, 323 U.S. 516, 530 (1945); *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Schneider v. New Jersey*, 308 U.S. 147, 161 (1939); *United States v. Carolene Products*, 304 U.S. 144, 152 n. 4 (1938); *Hernodon v. Lowry*, 301 U.S. 242, 258 (1937). "This presumption in favor of state legislation . . . does not extend . . . to legislation which is challenged as restricting civil liberties." Barnett, *Mr. Justice Black, And the Supreme Court*, 8 *U. OF CHI. L. REV.* 20, 27 (1940).

127. "The presumption rather is against the legislative intrusion into these domains." *United States v. Congress of Industrial Organizations*, 335 U.S. 106, 140 (1948) (concurring opinion of Justice Rutledge joined in by Justices Black, Douglas and Murphy). "... the human freedoms enumerated in the First Amendment and carried over into the Fourteenth Amendment are to be presumed to be invulnerable and any attempt to sweep away those freedoms is prima facie invalid." *Prince v. Massachusetts*, 321 U.S. 158, 173 (1944) (dissenting opinion of Justice Murphy). See also *Bridges v. Wixon*, 326 U.S. 135, 165 (1945) (concurring opinion of Justice Murphy).

128. The courts refer to freedom of religion as having a "preferred place" and "preferred position."

129. Note Justice Frankfurter's insistence that "the claim that any legislation is presumptively unconstitutional which touches the field of the First Amendment and the

concluded.<sup>130</sup> It is to be hoped that the Court will soon give recognition and application to such a presumption.

Worth remembering are the words of a recently departed member of the United States Supreme Court: "Freedom of religion has a higher dignity under the Constitution than municipal or personal convenience. In these days, free men have no loftier responsibility than the preservation of that freedom. A nation dedicated to that ideal will not suffer but will prosper in its observance."<sup>131</sup>

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Fourteenth Amendment, insofar as the latter's concept of 'liberty' contains what is specifically protected by the First, has never commended itself to a majority of this Court." *Kovacs v. Cooper*, 336 U. S. 77, 94 (1949) (concurring opinion of Justice Frankfurter). Green feels the presumption of unconstitutionality "cannot yet be taken as established." Green, *The Supreme Court, the Bill of Rights and the States*, 97 U. OF PA. L. REV. 608, 635 (1949).

130. Hamilton and Braden, *The Special Competence of the Supreme Court*, 50 YALE L. J. 1319 (1941); Cushman, *Keep Our Press Free*, PUBLIC AFFAIRS PAMPHLET No. 123, 23 (1946); 40 COL. L. REV. 531 (1940); 49 COL. L. REV. 363, 369 (1949).

131. *Martin v. City of Struthers*, 319 U.S. 141, 151 (1943) (concurring opinion of Justice Murphy).