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# CHRISTIAN SCIENCE: RELIGIOUS FREEDOM AND STATE CONTROL

IRVING STEINHARDT\*

## INTRODUCTION

Christian Science was "discovered" by Mary Baker Eddy in 1866.<sup>1</sup> The movement had its nucleus in Massachusetts and from there it spread to all the states in the Union, and ultimately to all corners of the world. A recent tabulation indicates that there are approximately 2400 Christian Science Churches and Societies in the United States.<sup>2</sup>

The tenets of the religion are found solely in the writings of Mrs. Eddy, particularly in the book entitled *Science and Health, with the Key to the Scriptures*.<sup>3</sup> This work, the cornerstone of the Christian Science faith, is both an exposition of the theology of Christian Science<sup>4</sup> and a textbook for practitioners and teachers.<sup>5</sup> "The Key to the Scriptures" is Mrs. Eddy's interpretation of certain portions of the Bible.<sup>6</sup>

The philosophy of Mrs. Eddy is based on a simple idealism: nothing exists but the spirit of God. This sole reality is also synonymous with "Life," "Mind," "Soul," "Good," "Truth," and "Love." Material substance and the things known as sin, death, disease, suffering, and pain are not real. They are merely delusions of mortal material mind and, contrary to ordinary human belief, they do not exist. These errors can be rooted out and destroyed by Truth, spiritually discerned.

The Christian Science practitioners are specially trained church members who apply this Christian Science doctrine by means of audible and silent "argument" to aid those who are afflicted with some supposed mental or physical ailment, injury or disease. The practitioners must fulfill the requirements set by the Mother Church, The First Church of Christ, Scientist, in Boston. Their names, addresses, and telephone numbers are

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1. The published biographies on Mrs. Eddy are numerous. Works such as SELLERS, *PRIVATE LIFE OF MARY BAKER EDDY* (1935), are extremely unfavorable, even to the point of scurrilousness. On the other hand, the official and Church-approved books such as POWELL, *MARY BAKER EDDY* (1931), and BATES and DITTEMORE, *MARY BAKER EDDY* (1932), are overly sympathetic. For a comparatively objective account see DAKIN, *MRS. EDDY* (1932).

2. The Christian Science Journal, Feb., 1953.

3. Published by the Christian Science Publishing Society, Boston, Mass.

4. *Id.*, cc. I-IX, pp. 1-341.

5. *Id.*, c. XII, pp. 362-442.

6. *Id.*, p. 501.

listed in the Christian Science Journal, a monthly publication; and they may charge a fee for their services.<sup>7</sup>

Thus, with Christian Science, belief takes on the form of action, and in a field which is generally considered to be outside the sphere of spiritual activity. ("The ordinary church merely attempts to preach the gospel. The Christian Science Church preaches the gospel and heals the sick."<sup>8</sup>) It is this application of doctrine in a field which is usually considered to be beyond the scope of religious activity, and particularly in an area where the state exercises regulatory police powers, which gives rise to most of the legal problems of the church and its members.

However, this should not obscure the very important fact that Christian Science is not just a school of medicine, but primarily a faith whose members number thousands of devout worshippers, sincerely and firmly believing in Christian Science, not merely as a method of healing, but as a moral guide and a divine faith. It is also obvious that the practice of Christian Science is so inextricably connected with religious doctrine and dogma and so distinctly remote from any secular theory or school that it is a fallacy of definition not to consider it a form of religious practice.<sup>9</sup> Unfortunately, some courts have failed to recognize this.

#### CHRISTIAN SCIENCE AND THE PRACTICE OF MEDICINE ACTS

The medical practice acts of the various states presented a serious impediment to the growth of Christian Science practice. Every state has such an act and all the acts are similar. They usually state what constitutes the practice of medicine; they set out the educational, training, and other requirements necessary for a license to practice medicine; and they also contain penal provisions for failing to comply with the act.<sup>10</sup>

The numerous indictments of Christian Scientists and others under these acts around the turn of the century and in the early 1900's gave rise to a rash of decisions in which the courts attempted to define the position of Christian Scientists under the various acts.

Presently the statutes of every state in the Union, with the exception of Alabama, Iowa, Mississippi, and Montana have specific provisions, directly or indirectly, exempting Christian Scientists from the provisions of the medical practice acts;<sup>11</sup> so a study of these early cases would seem academic. However, since most of the cases either directly or indirectly

7. The Christian Science Journal, Feb. 1953, lists approximately 8,500 Christian Science practitioners in the United States.

8. *In re* First Church of Christ, Scientist, 205 Pa. 543, 544, 55 Atl. 536, 537 (1903).

9. Whenever the phrase "Christian Science practice" or "practice of Christian Science" is used, it means the mind healing activities of the practitioners as distinguished from the passive religious worship of the ordinary members of the Church.

10. For typical statutory provisions see FLA. STAT. § 458.01 *et seq.* (1951).

11. A compilation of these provisions is to be found in *Table of Legal Provisions Upholding Freedom in Religion, Health, Education*. (Christian Science Publishing Society) pp. 12-27.

were concerned with constitutional guarantees of religious freedom, the principles involved are pertinent to contemporary problems of the rights of Christian Scientists under the Constitution of the United States,<sup>12</sup> and particularly under the various state constitutions.

Faced with the same problem, the highest state courts of both Nebraska and Ohio decided that the practice of Christian Science was within the comprehension of the medical practice act of their respective states. However, the approach used by each court was widely divergent, and the two cases illustrate a fundamental difference in judicial attitude toward the functions of a civil court in making ecclesiastical adjudications.

In *State v. Buswell*<sup>13</sup> the defendant, a Christian Science practitioner, was indicted for practicing medicine without a license. He was acquitted after the judge charged the jury that the defendant "could only be found guilty if he practiced medicine, surgery, and obstetrics as these terms are usually and generally understood."

The state took exception to the charge and appealed. The defendant contended that any other construction of the statute would violate his constitutional right to freedom of conscience,<sup>14</sup> and also the provisions of the enabling act which provides that "perfect toleration of religious sentiment shall be secured and no inhabitant of said state shall be molested in person or property on account of his or her mode of religious worship."<sup>15</sup>

The Nebraska Supreme Court rejected this contention by deciding that Christian Science practice involves no question of religious worship or duty. Chief Justice Ryan cited no legal authority but used the Bible itself. Noting that the defendant relied upon the Bible as his authority, the court stated: "It will not therefore be amiss to refer to it for authorities applicable in his case."<sup>16</sup> Pointing out that Christian Science practitioners accepted compensation for their ministrations, the court then cited the examples of Simon Magus<sup>17</sup> and Gehazi, servant of Elisha,<sup>18</sup> as authority for the proposi-

12. U. S. CONST. AMEND. I: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . ."; U. S. CONST. AMEND. XIV, § 1: "Nor shall any state deprive any person of life, liberty or property without due process of law. . . ." Since the cases under discussion arose before the Supreme Court decided that the Fourteenth Amendment prohibited the states from abridging religious freedom, *Meyer v. Nebraska*, 262 U.S. 390 (1923), or from establishing religion, *McCullum v. Board of Education*, 330 U.S. 1 (1948); *Everson v. Board of Education*, 330 U.S. 1 (1948), they did not present any issues of religious freedom or establishment under the Fourteenth Amendment. However, they do represent judicial opinion on the general constitutional problems involved and are therefore germane.

13. 40 Neb. 158, 58 N.W. 728 (1894).

14. NEB. CONST. § 4, Art. 1: "All persons have a natural and indefensible right to worship Almighty God according to the dictates of their own conscience."

15. Neb. Enabling Act, sec. 4, 13 Stat. 47 (1864).

16. *State v. Buswell*, 40 Neb. 158, 166, 58 N.W. 728, 731 (1894).

17. Simon Magus, after being converted to Christianity, offered money to the apostles in return for the gift of the giving of the Holy Ghost by the laying on of hands, to which request Peter replied, "Thy money perish with thee, for thou has thought that the gift of God may be purchased with money." *Apostles*, c. VIII.

18. Gehazi, servant of Elisha, took talents of silver and changes of raiments which his master had refused for curing Naaman's leprosy. For this Gehazi suffered his

tion that "the exercise of the art of healing for compensation whether exacted as a fee or expected as a gratuity cannot be classed as an act of worship. Neither is it the performance of a religious duty. . . . The indictment involved no question of sentiment nor of religious practice or duty."<sup>19</sup>

The court concluded that the instruction given was erroneous and that the defendant was engaged in the treating of physical ailments for compensation.<sup>20</sup>

Although the Nebraska court probably reached a correct result, the technique employed was unsound in its reasoning, unwarranted by sound authority, and in the light of the *Everson* and *McCullum* cases<sup>21</sup> may possibly be thought of as an establishment of religion prohibited by the Fourteenth Amendment.

First, the court's reasoning implies that whatever actions or beliefs the Bible forbids, either directly or by interpretation, are not religious. If this is correct, a belief in or practice of Mohammedanism or Buddhism is not a religious belief or practice. According to the commonly accepted definitions of religion this proposition is absurd. Even if the express language of the court is disregarded and the opinion is read as defining Christian Science practice merely as an un-Christian activity, this conclusion too is debatable.<sup>22</sup>

However, any discussion of theological theory or argument should have been bypassed by the court in view of the traditional hesitancy of most American civil courts to make ecclesiastical adjudications.<sup>23</sup> Although there were cases to the contrary,<sup>24</sup> sound contemporary authority indicated that civil courts were prohibited from deciding questions of religious doctrine and dogma.<sup>25</sup>

Finally, if this case were decided the same way at the present time it would present the serious question, in the light of *Everson* and *McCullum*, of whether such a determination by a state court was prohibited by the Fourteenth Amendment. It is not inconceivable that the Supreme Court may be moved by the bizarre spectacle of a civil court interpreting the Bible so as to hold that such adjudication by a civil court defining what is religious or Christian is *pro tanto* an establishment of religion, and hence invalid under the Fourteenth Amendment.

Faced with the same problem as Nebraska, the Supreme Court of Ohio reached the same result in *State v. Marble*.<sup>26</sup> In that case also, the defend-

master's curse and "went out from his presence a leper as white as snow." *II Kings*, c. 5.

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

20. *Cf. Smith v. People*, 51 Colo. 270, 117 Pac. 612 (1911).

21. Note 12, *supra*.

22. It is certainly not fanciful to categorize Christian Science practitioners as agents of the church performing religious duties just as priests, ministers and pastors are. Hardly anyone would characterize the rendering of the services by the latter for compensation as un-Christian.

23. See *Partin v. Tucker*, 126 Fla. 817, 172 So. 891 (1937).

24. *Watson v. Garvin*, 54 Mo. 353 (1871).

25. *Watson v. Jones*, 13 Wall. 679 (U. S. 1871).

26. 72 Ohio St. 21, 73 N.E. 1063 (1905).

ant, a Christian Science practitioner, was convicted of practicing medicine without a license in violation of the statute.<sup>27</sup> His conviction was affirmed by the court. The defendant made the same arguments that were urged in the *Buswell* case: (1) his practice was not within the statute, and (2) the statute as applied to him was an abridgement of his right of worship under the Ohio Constitution.<sup>28</sup>

The court construed the statute as embracing Christian Science practitioners within its terms.<sup>29</sup> The constitutional objections were met, not by rejecting Christian Science practice as a valid form of religious activity, but by deciding that Christian Science practice was a proper subject for regulation pursuant to the police power of the state. The court recognized that a delicate balance exists between the exercise of the police power of the state and the constitutional guaranties of individual liberties: "The power is subject to the express state constitutional limitations and to the inhibitions of the Fourteenth Amendment to the Constitution of the United States . . . and the implied limitation that every exercise of the police power must be reasonable."<sup>30</sup>

The court recognized that the state has a legitimate interest in the preservation of the life of the individual who is sick and needs the services of a physician; furthermore, the state has an interest in safeguarding the public against the spread of contagious diseases; and those objectives can best be obtained by such regulatory legislation as was in issue. To the objection that a person should have the right to choose his own type of treatment the court replied:

While the state may not deem it wise to go the extent of requiring the individual to avail himself of the services of a physician, yet it may not wish to hasten his death and so to transfer to itself the burden of supplanting those dependent upon him by making it possible for him to employ an empiric.<sup>31</sup>

The court concluded that the practice of Christian Science, though it be a religious act, may be regulated because it is inimical to the public welfare.<sup>32</sup>

27. Ohio General Code, § 1286: "A person is practicing medicine . . . who shall prescribe or shall recommend for a fee for like use any drug or medicine or application or application or operation or treatment of whatever nature for the care or relief of any wound, fracture, or bodily injury, infirmity or disease."

28. OHIO CONST., § 7: "All men have a natural and indefeasible right to worship Almighty God according to the dictates of his own conscience, nor shall any interference with the rights of conscience be permitted."

29. Under a previous statute enacted in 1896 which was less sweeping in its terms ("who shall prescribe . . . any drug or medicine or other agency. . . ." 92 Ohio Laws 47), the statute was held not to apply to osteopaths, *State v. Liffing*, 61 Ohio St. 39, 55 N.E. 168 (1899), or to Christian Scientists, *Evans v. State*, 9 Ohio Dec. 222 (1889). It seems that the court in *Marble* was sound in holding that the broadening of the statute by the addition of the words "treatment of whatever nature whatsoever." Note 27 *supra*, was intended to embrace the practice of Christian Science.

30. *State v. Marble*, 72 Ohio St. 21, 33, 73 N.E. 1063, 1065 (1905).

31. *State v. Marble*, 72 Ohio St. 21, 36, 73 N.E. 1063, 1067 (1905).

32. Cf. *Reynolds v. United States*, 98 U.S. 145 (1878).

In contrast to the *Buswell* decision there can be no serious objections raised to the judicial technique used in the *Marble* case, and on a comparative basis the latter is the best reasoned and most lucid of all the decisions on the subject.

The remaining cases were decided simply by holding that Christian Scientists and others who healed without the use of drugs were not practicing medicine within the meaning of the particular statute involved.<sup>33</sup>

#### PARENTAL AUTHORITY VERSUS THE STATE

##### *Child Welfare*

It has generally been established that the state, as *parens patriae*, may legislate for the protection of children.<sup>34</sup> When state regulation takes on the form of requiring medical attention to be furnished to an infant, or establishing a physical examination or vaccination as a prerequisite to school attendance, the objections of parents who are Christian Scientists are obvious.

The courts have generally sustained such legislation despite the argument that it abrogates religious liberties of parents and children.

The Supreme Court of the United States in *Jacobson v. Massachusetts*<sup>35</sup> held that the Fourteenth Amendment did not prohibit a state from compelling its citizens to submit to vaccination. The decision did not expressly decide that the state could exercise its power when the objection to vaccination was based on religious belief. However, the state courts, when confronted with the issue, have usually sustained the state's action under the particular state constitution involved and under the Fourteenth Amendment, citing the *Jacobson* case.<sup>36</sup> In *Anderson v. State*<sup>37</sup> the major ground for these decisions was cogently expressed by Justice Townsend:

The ill effects of contagious disease and its power to wipe out entire populations is a matter of history. Many of these scourges of the past have been completely dissipated by the preventive methods of medical science. The purpose of the legislature in passing Code Supp. Sec. 32-94 was to prevent the spread of these

33. *State v. Miller*, 216 Iowa 806, 249 N.W.141 (1933); *Bennett v. Ware*, 4 Ga. App. 293 (1908); *State v. Mylod*, 20 R.I. 632, 40 Atl. 753 (1898).

34. *State v. Bailey*, 157 Ind. 324, 61 N.E. 730 (1901); *People v. Ewer*, 141 N.Y. 129, 36 N.E. 4 (1894).

35. 197 U.S. 11 (1905).

36. *Anderson v. State*, 84 Ga. App. 255, 65 S.E.2d 848 (1951); *Dunham v. Board of Education*, 154 Ohio St. 469, 96 N.E.2d 413 (1951); *Mosier v. Barren County Board*, 308 Ky. 829, 215 S.W.2d 967 (1948); *Sadlock v. Board of Education*, 137 N.J.L. 85, 58 A.2d 218 (1948). See *In re Whitmore*, 47 N.Y.S.2d 143, 146 (1944); *State v. Drew*, 89 N.H. 54, 57; 192 Atl. 629, 632 (1937). In several of the above cases the vaccination requirement took on the form of a regulation promulgated by the Board of Education. In some of the cases it was argued that a statute giving the board the power to issue the regulation was either an unconstitutional delegation of legislative power to an administrative board; or else an unconstitutional assumption of such power in the absence of any statute. This argument was rejected in every instance. However, in *State v. Burdage*, 95 Wis. 390, 70 N.W. 347 (1897), the objecting parent prevailed on the ground the promulgation of the regulation was an invalid assumption of legislative power by the board. No issue of religious liberty was raised in that case.

37. 84 Ga. App. 259, 65 S.E.2d 848 (1951).

diseases not only for the protection of those actually immunized but for the protection of those with whom they might come in contact. The refusal of the defendants then to have their children vaccinated here amounted to a transgression of the rights of others . . . . A person's rights to exercise religious freedom which may be manifested by acts ceases when it overlaps and transgresses the rights of the others. Every one's rights must be exercised with due regard to the rights of others. . . . Liberty of conscience is one thing. License to endanger the lives of others by practices contrary to statutes passed for public safety and in reliance upon modern medical knowledge is another. The validity of the statute is not questioned, and the wisdom of the legislative enactment is not a matter for the decision of either this court or any individual citizen.<sup>38</sup>

The court was unclear when it talked in terms of the rights of the majority being transgressed by the rights of a minority, for it is difficult to perceive precisely what rights are being transgressed. Surely the public has not absolute right to protection from the spread of disease. However, the general import of the opinion is clear: whenever the state enacts legislation that is reasonably designed to secure the health of its citizens, the religious practices of a minority must yield if those practices tend to negative the efficacy of the legislation.<sup>39</sup>

The vaccination requirements have been justified because they not only protect the person being vaccinated but the general public as well. When the sole risk involved is the health or lives of children, most states have gone even further and imposed upon parents the statutory duty of providing medical attendance for their children.

The constitutionality of such legislation was in issue in *People v. Pierson*.<sup>40</sup> In that case the defendant refused to allow his child to be treated by a physician because his religious faith led him to believe that the child would get well by prayer. He was indicted and convicted for violation of the statute which made it a misdemeanor to wilfully omit or fail to furnish a minor with "food, clothing, shelter, or medical attendance."<sup>41</sup> At the trial the judge charged that no man can be permitted to set up his religious belief as a defense to the commission of an act which is in plain violation of the statute. The defendant took exception to the charge and appealed.

The New York Court of Appeals construed the words "medical attend-

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38. *Anderson v. State*, 84 Ga. App. 259, 264, 65 S.E.2d 848, 851 (1951).

39. The Supreme Court has indicated that in some instances a state may not transgress the right to religious worship unless the worship present a clear and present danger to the interests of the state. See the discussion of the *Barnette* case *infra*. There is doubt, however, that that standard will be applied in its literal sense to the vaccination issue. The efficacy of vaccination lies in the fact that it is preventive. To force a state to wait until a communicable disease has reached the stage when the danger to the lives of its citizens is imminent would in effect prevent the state from protecting the lives of its citizens. See *State v. Armstrong*, 39 Wash.2d 860, 239 P.2d 545 (1952).

40. 176 N.Y. 201, 68 N.E. 243 (1903).

41. N. Y. PENAL CODE § 288.

ance" as meaning that furnished by a regularly qualified physician, and then discussed the constitutional objections as follows:

The peace and safety of the state involve the protection of the lives and health of its children. Full and free enjoyment of religious worship is guaranteed,<sup>42</sup> but acts which are not worship are not. A person cannot under the guise of religious belief practice polygamy and still be protected from our statutes constituting the crime of bigamy. He cannot, under the belief or profession of belief that he should be relieved from the care of children, be excused from punishment for slaying those who have been born to him. Children when born into this world are utterly helpless, having neither the power to care for and protect themselves. They are exposed to all the ills to which flesh is heir and require careful nursing, and at times, when danger is present, the help of an experienced physician. But the law of nature, as well as the common law, devolves upon the parents the duty of caring for the young in sickness and health, and of doing whatever may be necessary for their care, maintenance, and preservation, including medical attendance if necessary, and an omission to do this is a public wrong which the state under its police powers may prevent . . . We are aware that there are people who believe that the Divine power may be invoked to heal the sick, and that faith is all that is required. . . . But sitting as a court of law for the purpose of construing and determining the meaning of the statute, we have nothing to do with the variances in religious beliefs and have no power to determine which is correct.<sup>43</sup> We place no limitations upon the power of the mind over the body, the power of faith to dispel diseases or the power of the Supreme Being to heal the sick. We merely declare the law as given us by the legislature.<sup>44</sup>

Similar considerations led the Supreme Court of South Dakota, in *Streich v. Board of Education*,<sup>45</sup> to uphold a physical examination regulation promulgated by a local board of education. The plaintiff had brought a petition for a writ of mandamus to compel the board to admit his children to the public school after he had refused to allow them to submit to a physical examination and questionnaire. The upper court affirmed the action of the trial court in denying the plaintiff's petition for mandamus.

On appeal the plaintiff contended in his brief that the board was exceeding its power and that the regulation as applied to himself denied him liberty of religious worship.

The court met the first contention by stating that an administrative body has all the implied police powers necessary to fulfill its function. The plaintiff abandoned his religious freedom argument on the oral argument

42. N. Y. Consr., Art. I, § 3: "The free exercise and enjoyment of religious profession and worship without discrimination or preference shall forever be allowed in this state to all mankind . . . but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practice inconsistent with the peace and safety of this state."

43. *Contra* attitude in *State v. Buswell*, 40 Neb. 158, 58 N.W. 728 (1894).

44. *People v. Pierson*, 176 N.Y. 201, 212, 68 N.E. 243, 246 (1903).

45. 34 S.D. 169, 147 N.W. 779 (1914).

but there was no doubt that the court rejected it. Justice Whiting noted that plaintiff's counsel "upon the oral argument of this cause repeatedly assured this court that the question before us was in no sense a religious question but is entirely separate and distinct from anyone's religious belief. We agree fully with counsel as certainly the school boards of our land should not base the same upon the tenets of any particular religious sect or sects."<sup>46</sup>

In *Prince v. Commonwealth*<sup>47</sup> the Supreme Court of the United States affirmed the power of the state to exert its authority over the activities of children despite the fact that state regulation in that area hampered the religious activities of both the parent and the child. The Court sustained a state child-labor law prohibiting selling by children on the public streets. The appellant's ward, a child of nine, had been helping appellant distribute religious literature on the streets. The Court held that the statute as applied to appellant was not violative of freedom of religion nor a denial of the equal protection of the laws under the Fourteenth Amendment. Writing for the majority, Mr. Justice Rutledge noted that "the family itself is not beyond regulation in the public interest"<sup>48</sup> and cited with approval *People v. Pierson*.<sup>49</sup> He reiterated the principle illustrated by the *Pierson* and *Streich* cases when he stated: "The state's authority over children's activities is broader than over like actions of adults."<sup>50</sup>

Thus, when the welfare of their children is the interest that is in issue, Christian Scientists may generally expect the courts to deny relief from the application of legislative or state action despite the fact that such regulation is offensive to the religious beliefs of both parent and child.

#### *Education of Children*

It would seem that the teaching of compulsory hygiene and health courses in public schools would be so repugnant to the religious beliefs of Christian Scientists that the clash would result in a fair amount of litigation. Surprisingly, there is not a single instance of persuasive authority which deals precisely with the problem. No doubt one of the major reasons for the lack of cases on the subject is the general preference of the Christian Scientists to secure their rights through legislation rather than resort to the courts. Twelve states have provided for students' statutory exemptions from health or hygiene courses if such courses conflict with their religious beliefs.<sup>51</sup>

The only authorities that bear any relation to the problem are the

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46. *Streich v. Board of Education*, 34 S.D. 169, 182, 147 N.W. 779, 783 (1914).

47. 321 U.S. 158 (1943).

48. *Prince v. Commonwealth*, 321 U.S. 158, 166 (1943).

49. Note 40, *supra*.

50. *Prince v. Commonwealth*, 322 U.S. 158, 168 (1943).

51. Cal., Conn., Ind., Iowa, Mich., Miss., N. Y., Okla., Ore., R. I., Utah, Wash., Wis. The complete texts of the statutory provisions are found in *The Table of Legal Provisions*, note 14 *supra*, pp. 69-102.

*McCollum* case,<sup>52</sup> the *Barnette* case,<sup>53</sup> and the conflicting state decisions directed to the issue of whether Bible reading in public schools violated constitutional prohibitions against establishment of religion and sectarian instruction in public school and infringed upon constitutional guarantees of religious freedom.<sup>54</sup>

The Bible-reading cases have only slight relevance to the issue and are not conclusive in any sense. There are several important distinctions. First, in most of the Bible-reading cases there was no active religious instruction; and the practice usually involved was a reading of a portion of the Bible as an opening exercise. The problem under discussion is one of active instruction. Second, the reading of the Bible obviously involves a religious subject; the teaching of health and hygiene courses is normally thought of as secular instruction. Finally, requiring Bible reading in public schools is not an exercise of the police power of the state; requiring instruction in health and hygiene is more nearly within the police power. These are the factors that may influence a court to hold that any prohibition of, or exemption from Bible-reading, does not extend to health or hygiene courses.

In the *McCollum* case the Supreme Court of the United States held that the Fourteenth Amendment prohibited the use of state buildings for religious instruction in the three major faiths. This was held to be, among other things, an establishment of religion now forbidden by the Fourteenth Amendment. If the fight for exemption from health courses is carried to the Supreme Court, how far will *McCollum* control the question? The major distinction in the two situations is the type of instruction involved. Mr. Justice Jackson's concurring opinion in *McCollum* is anticipatory of this problem. He agreed with the majority that formal and explicit instruction in "creed and catechism and ceremonial" should be prohibited as an establishment of religion, but he doubts the wisdom of enunciating a general rule forbidding religious instruction in public schools because of the highly difficult job in many instances of separating the secular from the religious. Mr. Justice Frankfurter's dissent in *Barnette* also raised the problem: "Or is the court to enter the old controversy between science and religion by unduly defining the limits within which a state may experiment with its school curricula?"<sup>55</sup>

However, should the health and hygiene issue ever arise, it is almost impossible to conceive that any member of the court would accept any characterization of the teaching of the ordinary health course as a species of religious instruction and thus condemn it as an establishment of

52. *McCollum v. Board of Education*, 330 U.S. 1 (1948).

53. *Board of Education v. Barnette*, 319 U.S. 624 (1943).

54. For a complete discussion of the litigation involving Bible reading in public schools see JOHNSON AND YOST, *SEPARATION OF CHURCH AND STATE*, c. IV (1948). The most recent case involving this issue is *Doremus v. Board of Education*, 5 N.J. 435, 75 A.2d 880 (1950), 342 U.S. 429 (1952) (appeal dismissed—no case or controversy).

55. *Board of Education v. Barnette*, 310 U.S. 624, 659 (1943).

religion.<sup>56</sup> Aside from this, the instruction may be sustained on the ground that to require it is a valid exercise of the power of the state reasonably designed to safeguard the health of its citizens.

Most probably the issue, if presented at all, will not be in the form of a demand for total prohibition, but rather as a request for exemption from such courses. The *Barnette* case indicates that Christian Scientists may have a valid constitutional objection to the teaching of health courses to their children. In that case the Supreme Court of the United States upheld the right of children of Jehovah's Witnesses to refuse to salute the American flag even though it was required by a local school board. The court indicated in *Barnette* that no state could compel an individual to participate in a ceremony that was odious to his religious belief. In the course of the majority opinion, Mr. Justice Jackson intimated that the "clear and present danger" standard as first enunciated in respect to freedom of speech was also applicable in respect to religious liberty and that a state could not infringe upon rights of religious worship unless the worship presented "grave and immediate danger" to interests which the state may lawfully protect. If the present court can be convinced that lack of health training to a minority presents no such danger to the preservation of the health of the community, the Christian Scientists may very well score a victory.

At the beginning of this section it was stated that no persuasive authority could be found dealing directly with the problem. Yet the Committee on Publication of the Mother Church<sup>57</sup> and others<sup>58</sup> seem to cite the case of *Hardwick v. Board of School Trustees*<sup>59</sup> as declaratory of the proposition that a parent may refuse to allow his children to be taught secular subjects if they interfere with the parents' or the child's religious beliefs. Because of the remarkable language and judicial method employed by Justice Hart, the case probably is not authoritative to any great degree, and in the last analysis is probably an aberration in the field of case law.

The litigation revolved about the expulsion of the plaintiff's children from a public school when they refused to participate in ballroom dancing classes which were prescribed for the course in physical education. The plaintiff thereupon brought a petition for a writ of mandamus directed to the school board to compel reinstatement of the plaintiff's children. The school board demurred generally and specially to the petition. The demurrer was sustained and judgment entered against the plaintiff who appealed to the District Court of Appeals. Justice Hart reversed the judgment of the lower court.

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56. If the health instruction shades off into the area of biology which may in turn involve instruction in such controversial matters as the theory of evolution, then, of course, the difficulty foreseen by Jackson and Frankfurter will exist. However, a pure hygiene course would seem clearly secular.

57. See *The Table of Legal Provisions*, note 14 *supra*, at 119.

58. See JOHNSON AND YOST, *SEPARATION OF CHURCH AND STATE*, 61 (1948).

59. 54 Cal. App. 696, 205 Pac. 49 (1921).

One of the grounds for the demurrer was that the complaint was “. . . uncertain in that it does not appear to what church discipline the plaintiff submits nor in what way the matter of said children so dancing conflicts with said conscientious scruples and religious beliefs and principles either of said plaintiff or of said children of said plaintiff.”<sup>60</sup>

The Board's argument for requiring an allegation of membership in an organized religion was as follows:

At the trial of such a case all the plaintiff would have to do would be to prove that certain things were done or taught in the schools and then testify arbitrarily that such things were against his conscience or religion and he could have them prohibited. . . . How could the people or school authorities disprove the testimony of a man who stated that anything done in the schools was offensive or contrary to his religion? If this complaint is good, another stating that mathematics or chemistry or the letters or history taught was contrary to anyone's religious beliefs would be equally good.<sup>61</sup>

Justice Hart failed to discuss the issues thus raised—of difficulty of proof of religious belief and its hampering effect upon school administration—but simply decided that the guaranties of the constitutions of California<sup>62</sup> and the United States are not only applicable to religious organizations or to persons actually affiliated with such organizations, but also apply to any person having religious convictions, irrespective of whether he is a member of any church or any religious society.

After asserting this flat and sweeping proposition the judge immediately shifted the issue to another ground:

The question involved in the controversy, however, is not necessarily one of religion, or whether the dances mentioned in the complaint and to which the plaintiff is opposed are disapproved of by the religious organization to which he belongs, if indeed he is a member of any such organization. It is as much a question of morals.<sup>63</sup>

Then in a long and eloquent discourse, more befitting a seventeenth-century pulpit than a twentieth-century bench, Justice Hart stated that the teaching of the dances in question—the waltz, the two-step and the polka—is regarded by many “as tending in no small degree to develop in the young thoughts of propensities incompatible with that higher concept of morality which is a prime desideratum of life” or, if it is not regarded as wrong *per se*, many perceive in the exercise “an element of infatuation so overwhelming in its

60. *Hardwick v. Board of School Trustees*, 54 Cal. App. 696, 205 Pac. 49 (1920).

61. *Hardwick v. Board of School Trustees*, 54 Cal. App. 696, 700, 205 Pac. 49, 50 (1921). Aside from the difficulty of proof, school administration in this area may further be hampered if a court is constitutionally prohibited from inquiring whether an alleged religious belief actually exists. See *United States v. Ballard*, 322 U.S. 78 (1944).

62. CAL. CONST., Art. I, § 4. The provisions are exactly the same as those in the N. Y. Constitution, note 4 *supra*.

63. *Hardwick v. Board of School Trustees*, 54 Cal. App. 696, 708, 205 Pac. 49, 54 (1921).

effect upon the undeveloped judgment of minors as to distract their minds, to their irremediable detriment from the more important and serious matters of both spiritual and temporal concern."<sup>64</sup>

The judge concludes that these views may be held by anyone:

Indeed there may be persons (and undoubtedly there are many who have absolutely no religious conviction based upon the teachings of the Good Book—in fact, even atheists and agnostics, who are conscientiously opposed to their children engaging in dancing in any form or under any circumstances upon the honest belief that such performances are not conducive to the moral uplift of the young.

The judge stated:

Thus it will be readily understood that, as before declared, the important proposition involved in the controversy is no more a question of religious liberty than it is a question of morals.<sup>65</sup>

In view of the quoted language, the main ground of decision seems to be that a secular subject may be objectionable if it offends the moral sense of some of the community. Although conceivably the opinion may be read as containing an alternative ground that the instruction infringed upon religious liberty, the bypassing of the issues raised by the demurrer and the shift into, and heavy emphasis upon, questions of morals and morality so far qualified the religious liberty issue that it would be difficult to contend that this case is strong authority for the proposition that a parent may demand exemption of his child from secular instruction if it offends both his and his child's beliefs.

Considering the lack of direct authority cited in the opinion and the strong condemnatory language used, the *Hardwick* decision seems to be a case of a judge's personal moral indignation transformed into case law; and the case is probably not authoritative precedent for any principle. Thus, if the issue of exemption from hygiene courses arises in the courts, the field may be considered relatively unblemished by any direct prior persuasive authority.

#### STATE CONTROL OF CHURCH AFFAIRS

Despite the general reluctance of Christian Scientists to participate in litigation, a bitter controversy in the 1920's, concerning the scope of the power that the directors of the Mother Church retained over the trustees of the Christian Science Publishing Society, sent several of the parties scurrying into court to vindicate their rights. The litigation resulted in two decisions that firmly established the authority of the board of directors.

The dissension centered about the meaning of certain sections of the Church Manual<sup>66</sup> and the extent to which its provisions authorized the

64. *Hardwick v. Board of School Trustees*, 54 Cal. App. 696, 707, 205 Pac. 49, 55 (1921).

65. *Hardwick v. Board of School Trustees*, 54 Cal. App. 696, 706, 205 Pac. 49, 53, 54 (1921).

66. This work, authored by Mrs. Eddy, contains the church by-laws.

directors to supervise the matter to be printed and sent out by the trustees. During the conflict the directors singled out one of the rebellious trustees, Rowlands, for removal, and also purported to remove Dittmore, a fellow-member of the board of directors. The trustees filed a bill in equity in the Supreme Judicial Court of Massachusetts demanding that the resolution removing Rowlands be adjudged void.

The case was referred to a master who found that the directors acted pursuant to the following power contained in the deed of trust establishing the Publishing Society:

The First Members, together with the directors of said church shall have power to declare vacancies in said trusteeship for such reasons as to them shall seem expedient.

The master's findings of law were that the power of removal was not vested in the board of directors: the resolution was ineffectual to remove Rowlands; and he was still a trustee. The case went up on appeal.<sup>67</sup>

By the express terms of the trust, the power was vested in both the First Members and the board of directors. By the time of Rowlands' removal the First Members had ceased to function as an ecclesiastical body in the church and actually were no longer in existence. The first question facing the court then was: Did the power of removal survive solely in the directors? After an exhaustive examination and construction of the deeds of trust establishing the Mother Church and the Publishing Society, Chief Justice Rugg reached an affirmative conclusion. He then went on to decide that the adoption of the resolution removing Rowlands was a valid exercise of the power.

In respect to the dispute concerning the directors' right of censorship or review over published material, the master was unable to find that the directors had the authority that they claimed. The master stated, "It was by no means a question regarding which no honest difference of opinion was possible."

The court decided that it could not pass on the merits of the controversy because the directors honestly believed that the removal of the defendant was necessary to the welfare of the trust:

The discretion of those possessing the power of removal when applied in good faith is not subject to reexamination in respect to its wisdom. The judgment of the court cannot be substituted for the constituted authorities when fairly exercised.<sup>68</sup>

The court adds the following qualifications:

The power cannot be put forth maliciously, whimsically, or capriciously. The function of the court is to determine whether the terms of the trust have been observed, whether the proceedings have been regular, whether the cause assigned is sufficient to warrant removal, whether fair opportunity has been accorded the

67. *Eustace v. Dickey*, 240 Mass. 55, 132 N.E. 852 (1921).

68. *Eustace v. Dickey*, 240 Mass. 55, 83, 132 N.E. 852, 862 (1921).

trustee to present his side of the matter so as to satisfy the requirements of natural justice.<sup>69</sup> After thus enunciating what seem to be due process standards, the court proceeded to apply those standards to the facts.

The master found that the directors assigned as one of the reasons for the removal of Rowlands: He ". . . evidently has other interests which prevent him from giving sufficient time or attention to the business of the Christian Science Publishing Society." The master found that the reason assigned was a false one and not made in good faith. The master also found that, even though all the trustees were equally disputing the directors' authority, only Rowlands was singled out for removal; and he further found that there was no opportunity for a formal hearing before removal.

Chief Justice Rugg decided that the first two factors did not void the action of the directors because they were exercising their honest judgment on the question of expediency. As to the requirement of a hearing, the court added that ordinarily one whose conduct is called into question ought to be given an opportunity to be heard in his own defense, but that the long controversy between the directors and the trustees had brought out clearly the points of difference between them so that a hearing was unnecessary. In the end, therefore, the court seems to be merely paying lip service to standards of due process; and the case in its result is another instance of the reluctance of most American courts to apply those standards when the powers of an autocratic form of church government are called into question.<sup>70</sup>

That this is so seems to be affirmed by the subsequent case of the deposed director, Dittmore.<sup>71</sup> He was dismissed pursuant to Art. 1, § 5 of the Church Manual: "The Christian Science Board of Directors shall consist of five members. . . . A majority vote or the request of Mrs. Eddy shall dismiss a member." In his opinion, Chief Justice Rugg stated:

The plaintiff became a member of the board of directors in 1909. The manual with its provisions respecting removal of directors was as much a part of the governing policy of the church then as now. He is bound by it. By accepting the office of director he consented to removal, provided only that it was accomplished in the manner pointed out in the Church Manual. When the validity of an order of removal under these circumstances is challenged in the courts the wisdom or the expediency of the removal is not reviewed. The decision of the society or its officers acting in good faith rendered according to their own rules is final. There is no general right of appeal to the courts.<sup>72</sup>

The court decided that no hearing was required and that Dittmore's removal was legally effectuated.

69. *Ibid.*

70. See *Carter v. Papineau*, 222 Mass. 464, 111 N.E. 358 (1916); *Bonacum v. Harrington*, 65 Neb. 832, 91 N.W. 886 (1902).

71. *Dittmore v. Dickey*, 249 Mass. 95, 144 N.E. 57 (1924).

72. *Dittmore v. Dickey*, 249 Mass. 95, 107, 144 N.E. 57, 62 (1924).

These cases, representing as they do the "hands-off" attitude of the Massachusetts court toward internal dissension in the management of the Mother Church and its associated bodies, are solid assurance to the directors that their administration will not be hampered by recourse of aggrieved church members to the civil tribunals.

#### CONCLUSION AND FORECAST

The litigation arising from the clash of the religious beliefs of Christian Scientists and the exercise of the police power of the state has generally resulted in defeat for the Christian Scientists. Quite understandably they have then resorted to legislation to secure their rights.<sup>73</sup> Because of this, and because the internal authority of the church has been resoundingly established, the amount of future litigation involving the church and its members will probably be negligible.

In the limited area of exemption from hygiene courses, however, the possibility of litigation seems substantial. It is rather significant to note that the recent passage in New York of the Morgan-Hammond Act,<sup>74</sup> which exempted pupils from hygiene courses, brought forth a wave of protest from parent organizations, medical groups,<sup>75</sup> and from the pulpit.<sup>76</sup> Carl E. Willgoose of Syracuse University in a recent article thoroughly and eloquently condemned the passage of the Act.<sup>77</sup>

It must be remembered that legislatures respond to public opinion. If the controversy in New York is indicative of a trend of public opinion, it may follow that other legislatures will hesitate in granting statutory exemptions in this field. In such an event, a recourse to the courts may become imperative. In the light of the recent solicitous attitude taken by the Supreme Court of the United States with respect to religious liberties, the course of future litigation in this area by Christian Scientists may prove rewarding.

Finally, it should be noted that, although the state in the past has generally been content to regulate the practice of medicine, there seems to be a growing movement toward active participation in the medical field on the part of municipal, state, and federal governments. Examples of this trend are fluorination of water supplies and the proposed federal socialized medicine program. As this new development grows it will engender increasing friction between the powers of the state and the religious beliefs of Christian Scientists. Out of the clash may emerge novel legal problems to which the cases and issues discussed here may prove a guide.

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73. A testimonial to their efforts is *The Table of Legal Provisions*, note 11 *supra*, containing hundreds of statutory provisions recognizing the rights of Christian Scientists.

74. N. Y. EDUCATION LAW, § 3204(5).

75. N. Y. Times, Dec. 12, 1951, p. 39, col. 5.

76. N. Y. Times, Dec. 13, 1951, p. 68, col. 3.

77. "Health, Welfare and Religious Freedom," 73 SCHOOL AND SOCIETY 196, (March 31, 1951).