

Probably less useful for an overseas reader is Part Two, 'The American Experience', which brings historical writings from figures such as Madison and Jefferson, with extracts from church-state cases from 1790 to 1940. This collection is unlikely to have direct appeal to law teachers in Britain or Europe as a teaching aid, especially since five-sixths of the materials are exclusively American. Rather, its usefulness lies in bringing together in a convenient form a range of historical material on conflicts of conscience with the state and as a handy collection of primary sources for anyone researching the Free Exercise and Establishment clauses.

Ian Leigh, Professor of Law, University of Durham.

*REGULATING RELIGION: THE COURTS AND THE FREE EXERCISE CLAUSE* by CATHERINE COOKSON, Oxford University Press, 2001, 304 pp. (Hardback £35.00) ISBN 0-19-512944-X

Religious liberty has long since outgrown its roots in seventeenth and eighteenth century battles over tolerating religious (generally, Christian, non-conformist) diversity. However, in its post-Enlightenment form the problem remains of where law should draw the boundary between the competing demands that religious believers encounter between acting in conformity to their beliefs and obeying laws framed by the state in general terms for the population at large. Historically, conflict raged over issues such as polygamy. Today it is more likely to be over the freedom to use prohibited drugs for religious purposes, the administering of parental discipline to children, or whether exemption should be granted to religious organisations from non-discrimination legislation. Nowhere have these issues been discussed with greater sophistication than in the jurisprudence and scholarly commentary of the 'free exercise' clause (the First Amendment to the United States Constitution: 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof'). Catherine Cookson's study *Regulating Religion* is a fine and richly argued addition to this literature, which contains many lessons for readers outside the United States.

In view of the fact that several powerfully argued critiques of the free exercise clause have been produced by other writers in the last two decades (notably Michael McConnell, Steven D Smith, Kent Greenawalt and Douglas Laycock), what does this book add?

First, Cookson attempts (reasonably successfully in my view) to demonstrate the value of a different type of analysis—the process of casuistry. She quotes (at page 41) Johnson and Toulmin:

[casuistry is] the analysis of moral issues, using procedures of reasoning based on paradigms and analogies, leading to the formulation of expert opinion about the existence and stringency of particular moral obliga-

tions, framed in terms of rules or maxims that are general but not universal or invariable, since they hold good with certainty only in the typical conditions of the agent and the circumstances of action.

Its principal tools are paradigms, analogies, rules, attention to the condition of the agent and the circumstances of action. Casuistry is, she suggests in Chapter 1, already to be found in a number of the prominent historical judgments on the Free Exercise clause. In chapters 6 and 7 she further demonstrates its advantages through two extended case studies, on government intervention in the reliance by parents on spiritual healing for their children and on the well-known decision in *Employment Division v Smith* (in which the Supreme Court held that there was no violation of the First Amendment when the State of Oregon withheld unemployment benefits from a claimant dismissed from employment because of religiously inspired use of the drug peyote).

The discussion of the Christian Science position on spiritual healing is particularly insightful in explaining the framework of beliefs and revealing a number of pre-conceptions and assumptions that operate to privilege modern medicine and science both in popular thought and before the courts; interestingly as a more nuanced example of judicial reasoning on spiritual healing Cookson holds up the nineteenth-century English decision of *R v Wagstaffe* (1868) 10 Cox C C 534, in which the parents of a fourteen-year-old girl who had died, who were members of the Peculiar People, were acquitted of manslaughter for failing to provide proper medical care for her. Throughout the whole discussion of spiritual healing some powerful points emerge: especially, the extent to which punishment for reliance on healing equates in some belief systems with punishment for holding a religion *per se* and the deep-rooted failure to comprehend a religious perspective—as illustrated for example in the difference in treatment of children (and their parents) who are single-minded in their pursuit of sporting, as opposed to religious, excellence.

The second strength of the book is the rich connections that it makes (especially in chapter 3) between philosophical arguments about the nature of religious liberty and the historical context which gave birth to the First Amendment. The argument here is not an easy read (as Cookson acknowledges at page 50) but she uses to good effect throughout the book the four typologies of approaches to questions of conscience that she develops in Chapter 3: duly ordered relationships, two kingdoms, levitical and enlightenment.

Some features of the discussion are perhaps more specific to American experience, for example the use of the idea of the Wilderness as an explicatory tool to bridge Liberal understandings of religious liberty and religious beliefs systems in chapter 1. Nevertheless, the underlying points are well made: that for many religious people conscience is a matter of duty and not (as Liberals would argue) an autonomous choice and that faced with claims to religious 'exemption' from 'facially neutral' laws the spectre of anarchy is too easily invoked to defeat such claims.

The book will be of primary interest to readers whose concern is freedom of religion under the United States Constitution. However, the casuistical approach that Cookson illustrates and the broader historical and philosophical grounding to religious liberty will be a valuable reference tool in any discussion of religious liberty. Judges, lawyers, and scholars working on Article 9 of the European Convention on Human Rights in particular might learn a great deal from its insights.

Ian Leigh, Professor of Law, University of Durham.