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Book Review

DEMYTHOLOGIZING THE LEGAL HISTORY OF THE JEHOVAH'S WITNESSES AND THE FIRST AMENDMENT

JUDGING JEHOVAH'S WITNESSES: RELIGIOUS
PERSECUTION AND THE DAWN OF THE RIGHTS
REVOLUTION. BY SHAWN FRANCIS PETERS. 2000.
UNIVERSITY PRESS OF KANSAS.

*Reviewed by Allen Rostron**

The Supreme Court of the United States recently decided a case involving the First Amendment rights of Jehovah's Witnesses for the first time in more than twenty years.¹ In *Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton*,² the Court ruled that Witnesses cannot be required to give their names to local government authorities in order to obtain permits before going door-to-door to distribute their publications and preach their religious message.³

The disappearance of the Witnesses from the Court's docket for two decades is a remarkable change from earlier times in which the Witnesses were among the groups most frequently before the Court. Between 1938 and 1958, the Supreme Court heard more than fifty cases involving Jehovah's Witnesses, deciding the vast majority of them in the Witnesses' favor.⁴ The cases included landmark decisions on the First

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1. The last case involving a Jehovah's Witness to come before the Court was *Thomas v. Review Bd.*, 450 U.S. 707 (1981).

2. 536 U.S. 150 (2002).

3. *Id.*

4. See Clement E. Vose, *Litigation as a Form of Pressure Group Activity*, 319

Amendment freedoms of religion, speech, and the press.

While the amount of new law being generated by the religion's followers has slowed, scholars have finally begun in recent years to give significant attention to the legal history of the Jehovah's Witnesses, and, in particular, to their phenomenal wave of constitutional litigation. Shawn Francis Peters' *Judging Jehovah's Witnesses* is the most recent, and broadest, historical account of the Witnesses' legal activities.⁵ Peters focuses on the period of the late 1930s through the mid-1940s, a time when persecution of the Witnesses was at its peak and the Supreme Court decided a flurry of major First Amendment cases involving the Witnesses.

Peters' book shares a fundamental flaw with previous accounts of the legal history of the Jehovah's Witnesses. He has chosen to passionately and unequivocally support the Witnesses' side of each and every one of the legal battles he describes. In Peters' hands, every episode in the Witnesses' legal struggles becomes a story about how an extraordinarily brave and dedicated Witness challenged an indefensible rule of law, and how every case ultimately resulted in either a watershed victory for liberty, or a disheartening judicial failure to protect our freedom. This Review considers the problems that arise in trying to force the history of the Jehovah's Witnesses into a uniform narrative of courageous opposition to unjust legal restrictions and prejudice. This form of legal history idealizes and oversimplifies the events underlying the cases and the issues they raise.

Part I of this Review describes Peters' approach, and how he consistently frames the legal history of the Witnesses as a confrontation between righteous dedication and legal harassment. Part II suggests that Peters and other historians have been so determined to applaud the Witnesses' effect on the law that they have overlooked the equally significant question of how participating in these legal activities affected the Witnesses. Part III closely examines one particular case, *Cantwell v.*

ANNALS AM. ACAD. POL. & SOC. SCI. 20, 22 (1958) (ranking Jehovah's Witnesses with the NAACP as one of the most effective and frequent of organizations involved in constitutional litigation); see also DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1888-1986 261-68, 313-20 (1990) (compiling cases involving Jehovah's Witnesses); Joseph F. Zygmunt, *Jehovah's Witnesses in the U.S.A.*, 24 SOC. COMPASS 45, 47 (1977) (reporting 3500 cases tried in state courts and 200 appealed to higher courts by Witnesses by 1946).

5. SHAWN FRANCIS PETERS, *JUDGING JEHOVAH'S WITNESSES: RELIGIOUS PERSECUTION AND THE DAWN OF THE RIGHTS REVOLUTION* (2000).

Connecticut,⁶ in which the Supreme Court considered the First Amendment rights of Jehovah's Witnesses, in order to suggest how Peters' approach to the legal history of the Witnesses can distort representation of the facts underlying cases as well as analysis of the meaning and significance of the cases as legal precedent. Finally, Part IV suggests that Peters, like others, has also neglected the opportunity to gain a deeper understanding of the Witnesses' legal history through comparison of the Witnesses to other religious groups.

I. HISTORY AS INSPIRING TALES OF COWARDICE AND COURAGE

Peters recounts the tremendous persecution suffered by the Witnesses in the early 1940s and the major cases involving Witnesses' First Amendment rights that went to the U.S. Supreme Court in that era. He describes the events underlying the cases from the point of view of the Witnesses involved, often relying on interviews with the participants, personal accounts they wrote for Watchtower Society publications, or other statements they gave to attorneys or researchers.

While revealing much about these cases, Peters essentially takes a single narrative formula and plugs each episode and aspect of the Witnesses' legal history into it. By his account, each of the Jehovah's Witnesses involved in litigation possessed extraordinary courage and perseverance. They were solemn, extraordinarily devoted to their faith, boundlessly enthusiastic, amazingly resilient, remarkably uncompromising, and unrelenting, with inexhaustible reservoirs of righteous determination. Their attorneys were tireless. On the other hand, the police, judges, and private citizens with whom they crossed paths generally were irate, hostile, brutal, boisterous, and insulting. The laws the Witnesses challenged were invariably unjust restraints on their activities. With each case presented as a simple dichotomy between good and evil, these stories lead to the inexorable conclusion that the Witnesses deserved to win every case, and the only question was whether the Supreme Court would have the courage and sense to rule in favor of the Witnesses and freedom. Victories for the Witnesses were "vital and enduring developments in constitutional jurisprudence."⁷ Defeats were "heartrending setbacks" and "dark moment[s] for the First Amendment."⁸ As Peters himself puts it, these are stories about "the

6. 310 U.S. 296 (1940).

7. PETERS, *supra* note 5, at 185.

8. *Id.* at 201, 206.

extremes of cowardice and courage.”⁹

Peters’ book is not the first historical work on the Witnesses’ legal efforts to follow this same basic pattern. Victor Blackwell wrote the first book dedicated to recounting the Witnesses’ legal history.¹⁰ Since he was a Jehovah’s Witness who worked as an attorney on behalf of the church and its members for many years, it is not surprising that he would consistently portray the Witnesses as underdogs persecuted and harassed by unjust legal restraints, fighting valiantly in the courts to vindicate their rights, and winning heroic victories that advanced the freedoms we enjoy today.

Merlin Newton took the same basic approach in *Armed with the Constitution*,¹¹ a history focused on two cases that arose in Alabama and in which the Witnesses eventually prevailed in the Supreme Court.¹² Newton’s research into the facts underlying these cases was extraordinarily detailed, but her account was ultimately a tale of “fortitude, dedication, and courage,” with the same standard components—extraordinarily heroic Witnesses facing discriminatory application of unjust laws by small-minded local police and courts.¹³ Newton repeatedly extols the Witnesses’ miraculous “courage, discipline, and utter dedication.”¹⁴ A Witness “won by believing in the righteousness of his cause and standing with the courage of a Daniel.”¹⁵ For Newton, the Witnesses’ cases were stories of “heroic deeds” and “dedication, perseverance, and personal bravery” and were all “fearless crusade[s].”¹⁶

9. *Id.* at 18; see also Neil M. Richards, *The “Good War,” the Jehovah’s Witnesses, and the First Amendment*, 87 VA. L. REV. 781, 797 (2001) (describing how Peters portrays the Witnesses as “the heroic protagonists in a constitutional morality play, protagonists whose noble suffering and dogged determination helped to create the legal doctrine that ushered in a modern world of comprehensive judicial protection for minority rights”).

10. VICTOR V. BLACKWELL, *O’ER THE RAMPARTS THEY WATCHED* (1976). Though Blackwell had devoted years to defending Witness cases, the publication of this book brought him to the brink of expulsion from the church because some felt the book was a sign of excessive self-pride. See M. JAMES PENTON, *APOCALYPSE DELAYED: THE STORY OF THE JEHOVAH’S WITNESSES* 105 (1985) [hereinafter PENTON, *APOCALYPSE DELAYED*].

11. MERLIN OWEN NEWTON, *ARMED WITH THE CONSTITUTION: JEHOVAH’S WITNESSES IN ALABAMA AND THE U.S. SUPREME COURT, 1939-1946* (1995).

12. *Marsh v. Alabama*, 326 U.S. 501 (1946); *Jones v. Opelika*, 319 U.S. 103 (1943).

13. NEWTON, *supra* note 11, at 1.

14. *Id.* at 4; see also *id.* at 24 (“With Jehovah their comfort and their advocate, they would fear no evil.”).

15. *Id.* at 144.

16. NEWTON, *supra* note 11, at 151.

Peters' book follows in the footsteps of those earlier works, telling a partisan history of the Witnesses' legal battles.¹⁷ Of course, this is not to deny in any way that there were Jehovah's Witnesses who showed courage and dedication, or who suffered inexcusable persecution, intolerance, and interference with their religious beliefs and actions. The point is not that the standard story that recurs throughout these legal histories of the Witnesses is invariably untrue, but instead that it oversimplifies and misses a tremendous amount of variety and complexity in the people, events, and issues examined.¹⁸ Peters sacrifices the subtleties, contradictions, and uncertainties of history in his determination to turn these cases into uniformly inspirational stories.

II. THE OVERLOOKED QUESTION OF HOW LITIGATION AFFECTED THE WITNESSES

Peters' approach to the legal history of the Witnesses leads him to focus exclusively on how the Witnesses affected the development of constitutional law, ignoring significant questions about what motivated the Witnesses to fight these legal battles and how participation in them affected the Witnesses. Peters acknowledges at the outset that he seeks only to describe the Witnesses' "formidable impact on American law."¹⁹ He makes only a fleeting effort to consider what motivated the Witnesses, speculating that they may have viewed fighting for the First Amendment as a way to counter the perception that they were un-American or may have seen testifying in court as another opportunity to

17. While Peters focuses on the Witnesses' activities within the American legal system, there have also been two studies of the legal history of Jehovah's Witnesses in Canada, who experienced problems during World War II similar to their counterparts in the United States. After the war, the Witnesses were instrumental in securing the eventual passage of the Charter of Rights and Freedoms in 1960, the first Canadian bill of rights. See M. JAMES PENTON, *JEHOVAH'S WITNESSES IN CANADA: CHAMPIONS OF FREEDOM OF SPEECH AND WORSHIP* (1976) [hereinafter PENTON, *JEHOVAH'S WITNESSES IN CANADA*]; WILLIAM KAPLAN, *STATE AND SALVATION: THE JEHOVAH'S WITNESSES AND THEIR FIGHT FOR CIVIL RIGHTS* (1989).

18. There have been several articles about the Supreme Court decisions involving the Witnesses that have taken a more even-handed approach. Most recently, an article by Professor William McAninch provided a balanced overview of the cases litigated by the Witnesses that reached the Supreme Court, although he relied exclusively on the published judicial opinions and did not do original historical research into the facts underlying the cases. See William S. McAninch, *A Catalyst for the Evolution of Constitutional Law: Jehovah's Witnesses in the Supreme Court*, 55 U. CIN. L. REV. 997 (1987).

19. PETERS, *supra* note 5, at 18.

proselytize.²⁰ Peters does not pursue any of those intriguing possibilities, and instead immediately turns his focus back to how the Witnesses affected the development of the law “[w]hatever their intentions” may have been.²¹

In undertaking his extensive examination of the Witnesses’ legal activities, Peters foregoes a valuable opportunity to shed light on what drove the Witnesses and what they got out of their unique involvement in constitutional litigation. An examination of the history, beliefs, and practices of the Jehovah’s Witnesses suggests that the legal activity was important to them on several levels. Litigation, obviously, was a means to remove legal obstacles to the Witnesses’ exercise of their religion. However, the legal struggles served even more fundamental needs of the Witnesses, setting them apart from others, indulging their need for opposition and adversity, and reassuring them that they were indeed a special people to God.

Peters describes briefly the origins of the Jehovah’s Witness movement and the changes instituted after the leadership of the Society passed to “Judge” Joseph Rutherford in 1916.²² He notes the significant changes in doctrines and practices instituted by Rutherford that would be the key factors which influenced the Witnesses in later legal endeavors. In particular, Rutherford made public proselytizing a crucial duty of every Witness. He announced that Witnesses should be wholly apolitical because secular nations and governments are tools of Satan. He increased the harshness of the Society’s attacks on other religions, especially Roman Catholicism.²³

While noting those changes, Peters does not explore further why courts were the only institution of secular government that the Witnesses did not thoroughly condemn. The reasons for that were more complicated than the simple fact that courts could remove legal barriers to the Witnesses’ exercise of their religion. The religion itself was extraordinarily legalistic in nature. The Witnesses worshipped a God of law and order, not of mystery or caprice. They were not simply a religion that happened to need the legal system’s help, but one that shared an underlying harmony with the nature of that system.

This trait is attributable in large part to the pervasive influence of Judge Rutherford over all aspects of the church. Rutherford began as a

20. *Id.* at 14.

21. *Id.* at 14.

22. *Id.* at 28-35.

23. PETERS, *supra* note 5, at 24-35.

court reporter in Missouri, studied law under the apprentice system, and became a litigator, assuming the title of “Judge” after serving as a substitute judge in the local court.²⁴ In 1906, he joined the Society and, within a few years, moved to the Society’s headquarters in Brooklyn and became its head counsel.²⁵

The legal flavor of the religion manifested itself in the Witnesses’ consuming obsession with the printed word. At Rutherford’s direction, the distribution of literature became the Society’s central and fundamental concern. Within the church, the active members became known as “publishers.” Each one preached publicly, on street corners or from house to house, and reported back regularly on the number of hours spent witnessing, and the number of books and pamphlets distributed. In this, as in other areas, the church maintained a strong penchant for statistical calculations and their certainty. “For the Witnesses there is salvation, and comfort, in numbers.”²⁶

Judge Rutherford authored most of the Society’s literature during his term of leadership, and he had complete editorial discretion over the rest. His legal background deeply influenced the style of the Watch Tower Society’s publications. In his writing, he “always used a pseudo-technical style overburdened with legal phrases,” such as “to wit” and “whereas.”²⁷

At an even deeper level, Judge Rutherford’s thinking shaped the entire mindset of the religion. The Witnesses feared passion. The religion was contractual, bloodless, and legalistic, rather than ecstatic. The Witnesses believed that their religion was a comprehensive theological system, with an answer for every conceivable question.²⁸ A central theme of the religion was its attempt to make the world reassuringly understandable, rather than great, mysterious, and frightening. As a sociologist studying them observed, the Witnesses “are generally people who want a religion which will help them with their problems in a mundane way,” not in a magical one.²⁹

The Witnesses embraced a form of Gnosticism, or belief that they can obtain special and complete knowledge. The typical Witness pictured “‘truth’ as a sugar cube which he could put into his drink—

24. KAPLAN, *supra* note 17, at 4.

25. BARBARA G. HARRISON, *VISIONS OF GLORY: A HISTORY AND A MEMORY OF JEHOVAH’S WITNESSES 172-73* (1978).

26. *Id.* at 23.

27. HERBERT H. STROUP, *THE JEHOVAH’S WITNESSES* 18, 50 (1945).

28. *Id.* at 96, 124.

29. *Id.* at 94.

single, dispersible.”³⁰ In the Witnesses’ view, God’s plan for the world could be understood readily by our minds, and much of it turned out to be a matter of legal analysis. For example, one Witness leader described the origins of the world in the Garden of Eden this way: “It was a legal matter. The [forbidden] tree served as a legal sign, a guidepost between the God-King and man in their governmental dealings with each other. Adam and Eve failed to fulfill their contract.”³¹ Similarly, the Witnesses conceptualized the problem of theodicy, the existence of evil in God’s world, as an issue of the legitimacy of God’s sovereignty as opposed to Satan’s.³²

The Witnesses believed that, with enough determination, they could bring everything in life within their control.³³ Reflecting this tremendous lust for certainty, the Witnesses approached the entire Bible, from the poetic to the historical portions, with the same unblinking literal-mindedness. It was a treatise to them, not an arcane, mystical volume. It contained precedent that they thought could prove the validity of their religious beliefs to anyone willing to apply cold, analytical reasoning to the issues. Indeed, the Society’s lawyers freely mixed citations to the Bible and case law throughout the briefs they filed in courts.³⁴

The Witnesses were also remarkable for the stunning sincerity of their beliefs.³⁵ Many had a total faith that the end of our world was almost here. Belief was not just a mental abstraction, but was something that affected their everyday lives.³⁶

30. *Id.* at 127-28.

31. HARRISON, *supra* note 25, at 17 (quoting Hayden C. Covington).

32. WATCH TOWER BIBLE AND TRACT SOC’Y OF PA., ALL SCRIPTURE IS INSPIRED OF GOD AND BENEFICIAL 7-8 (1963).

33. Watchtower publications have suggested that all problems, from mental illness to violent crime, can be overcome by sufficient self-control. *See* HARRISON, *supra* note 25, at 248; AWAKE!, Apr. 22, 1975, at 15 (“[B]asically the mentally ill person needs help in getting control of his or her thinking.”); *How Can You Protect Yourself?*, AWAKE!, Nov. 22, 1975, at 12 (“The self-control that can protect you from such violence is a product of God’s spirit . . .”).

34. *See, e.g.*, Appellants’ and Petitioner’s Brief, at 18-32, *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (No. 632) (citing as many passages from the Bible as court cases).

35. STROUP, *supra* note 27, at 63 (quoting an ACLU attorney who worked with the Witnesses as saying that “we moderns think that there is nothing for which a man should give his life. But when you meet the Witnesses, you will be meeting, probably for the first time, people who are willing to be persecuted, even slain, for the sake of their religious faith.”).

36. HARRISON, *supra* note 25, at 77 (describing how many Witnesses frowned on those who chose to have children, considering it wrong to bring children into a world so near its end); *id.* at 16 (describing how some faithful members declined dental treatment

Despite the extraordinary tenacity of their beliefs, the Jehovah's Witnesses suffered under one great anomaly, and their legal activities became an important means of resolving it. The Witnesses conceived of themselves as God's one and only chosen people, the only people who knew the greatest truths. Yet, while they knew how special they were, outsiders would be hard-pressed to recognize it. The church did not have grand cathedrals, raucous meetings, or ancient rituals. The members themselves were a rather homogeneous and unremarkable group. As one observer of their conventions described it:

They do all [look] alike; they all look Midwestern. Even when they are clad in saris and loincloths, muu-muus and kimonos, there is something ineffably missionary-Midwestern about the aura they project. And Paradise restored, if the illustrations in Watchtower publications are to be taken literally, will look exactly like an endless Kansas picnic The Witness dream of Eden is a dream of American suburbia³⁷

The Witnesses desperately needed to conceive of themselves as being anything but ordinary. Being ordinary did not sit well with their belief that all of the world's history centered around them.³⁸ The worst thing for the Witnesses was to be ignored:

They are always having to prove themselves, set themselves tests, always investing events with enormous significance; they are naked and afraid in the face of ordinary life and must substitute for the excitement of an inner life the scent of danger To be buffeted and racked by worldly forces, to choose martyrdom, to excite the animosity of a crowd satisfied some hunger in them, gave them rest of a kind, rest from self-doubt. What was important was that something should always be happening In their persecution, they found a kind of peace.³⁹

As an observer in the 1940s noted of the Witnesses:

The psychological nub of their appeal, I believe, is their conviction that all members of the sect must constantly and fully participate in spreading the

in anticipation of restoration of perfect teeth in the "New World").

37. *Id.* at 50.

38. *Id.* at 21 ("All history, as seen by the Witnesses, revolves around them. They are guilty of what theologian Charles Davis calls 'pride of history': they 'reject temporality as man's mode of existence or else close that temporality against the transcendent; either history has no meaning at all or it means everything.'"); PENTON, *JEHOVAH'S WITNESSES IN CANADA*, *supra* note 17, at 17 ("Probably not even Marxists believe that history is on their side to the extent that the Witnesses of Jehovah do.").

39. HARRISON, *supra* note 25, at 183-84.

gospel of the sect, thus supplying to drab and commonplace lives a wonderfully consoling unity of action and purpose We constantly forget how deep is the appeal of a communal life lived for a higher purpose and involving sacrifice and even martyrdom Especially is it strong when it combines with its own intrinsic purposes a sanction for rebellion against constituted authority, moral and civil.⁴⁰

In the church's *Yearbook* for 1945, the Witnesses themselves recognized: "Why is it . . . that Jehovah's witnesses are so different from everybody else? It is not because of the way they walk or talk or how they dress or how they act in general. The only thing that makes them different is the way they worship."⁴¹

Persecution itself set the Witnesses apart from everyone else, bestowing on them the specialness they otherwise lacked. The Witnesses were obsessed with their enemies. They believed the world was aligned against them and saw evidence of this in almost anything that happened.⁴² Researchers trying to study the church constantly ran up against this pervasive distrust.⁴³ Even within the church, the Witnesses initially, but temporarily, treated their new converts as "spies."⁴⁴ The Witnesses' paranoia seemed to reach a fever pitch at their annual conventions. These conventions were occasions when the Witnesses' delight in persecution was most in evidence: "During the late 1930s and early '40s, when the Witnesses were undergoing legal trials, the conventions were suffused with special joy. The Witnesses huddled together for warmth; infatuated with their pain, they took violent satisfaction in their suffering."⁴⁵ The Society's paranoid fears seemed to go hand-in-hand with those feelings at the conventions. Judge

40. Harry L. Binsse, *Religion and a Liquor License*, 46 COMMONWEAL 317, 318 (Jan. 10, 1947).

41. HARRISON, *supra* note 25, at 22-23 (citing 1945 Yearbook).

42. The Witnesses displayed the characteristics of what Richard Hofstadter called: the paranoid style—suspiciousness; conspiracy thinking—the Witnesses believe the primary objective of the world's religious, political, and commercial triad is to destroy the Society; imitation of the enemy—during the period when the Witnesses were most hostile to the Roman Catholic Church, they became more and more like it through Rutherford's institution of the 'Theocracy' form of organization; and reduction of everything to a simple schism of good versus evil.

PENTON, *APOCALYPSE DELAYED*, *supra* note 10, at 214, 304 (citing RICHARD HOFSTADTER, *THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS* 33-39 (1965)).

43. STROUP, *supra* note 27, at 35 (describing author's difficulty studying the Witnesses during World War II because of their extreme suspiciousness).

44. *Id.* at 104.

45. HARRISON, *supra* note 25, at 270.

Rutherford, and all of the ushers, always carried canes at these meetings for defensive purposes. At one convention, Rutherford had the stage surrounded by machine guns in order to protect himself from the “Catholic hierarchy.” At another, he had special lookouts on the roof watching out for airplanes sent by the Witnesses’ enemies to bomb the building.⁴⁶

This paranoid thinking extended to the legal dimension of the Witnesses’ experience. It did not occur to the Witnesses that their legal difficulties were due to the public’s fear of those who disregard social norms, or any other abstract or benign explanation.⁴⁷ Hayden Covington, the Society’s chief legal counsel after 1939, claimed that legislators “deliberately laid every legal snare they could think of to foil” the Witnesses.⁴⁸ Every legal clash was just a small part of the effort of Satan, and his earthly servants, to thwart the Jehovah’s Witnesses.

The Witnesses regarded persecution as a privilege and an honor.⁴⁹ They relished the role of the outcast. Paradoxically, the Witnesses took both suffering and escaping from persecution to be signs of God’s blessing. On the one hand, the Witnesses “court persecution as proof that they are God’s chosen,” and on the other, they “expound upon their ‘marvelous escapes’ [from such persecution] as proof that they are God’s chosen.”⁵⁰ As the Society proudly observed in 1976 in looking back on its history, “[t]he world already hates us, but Jehovah God and Jesus Christ do not.”⁵¹ The Society’s leaders affirmatively worked to instill that attitude among the Witnesses. Judge Rutherford, upon his arrest in 1918 under the Espionage Act for encouraging draft resistance,

46. STROUP, *supra* note 27, at 29.

47. Examining conflicts between marginal religious movements and mainstream America, one study found that “in every case the tension is a function not of the group’s theological beliefs, no matter how alien they might appear to be, but of positions or practices which threaten or trench upon strongly held national secular values.” Leo Pfeffer, *The Limitation of Marginal Religions in the United States*, in RELIGIOUS MOVEMENTS IN CONTEMPORARY AMERICA 9, 14 (Irving I. Zaretsky & Mark P. Leone eds., 1974).

48. HARRISON, *supra* note 25, at 189.

49. PENTON, JEHOVAH’S WITNESSES IN CANADA, *supra* note 17, at 120-28; STROUP, *supra* note 27, at 65 (detailing the Witnesses’ almost “masochistic tendency” to take satisfaction in their sufferings); *see also* HARRISON, *supra* note 25, at 91 (suggesting that persecution of the Witnesses assisted their efforts to gather new converts by increasing their sympathy).

50. HARRISON, *supra* note 25, at 22.

51. *The Coming Deliverance from the Anti-Religious “Ax,”* THE WATCHTOWER, Jan. 15, 1976, at 55.

told his followers that persecution was a glorious thing: “This is the happiest day of my life. To serve earthly punishment for the sake of one’s religious belief is one of the greatest privileges a man could have.”⁵²

The Witnesses did not hide the satisfaction they took in their suffering. Their publications, not to mention their meetings and conversations, devoted much time to recounting and celebrating their hardships. Their joy was remarkable. As one Witness who grew up in the 1940s put it, “[i]t was even jolly to think how, soon, we were all going to be persecuted. Jolly, perhaps, isn’t the word: It was thrilling. It made us glad.”⁵³ Another young Witness similarly stated: “I fantasized about being thrown into prison camps. I loved the idea of going to prison, suffering for—maybe dying for—Jehovah.”⁵⁴ The Witnesses regarded persecution as “a divinely permitted test of their faith” which they were happy and willing to undergo.⁵⁵

The Society made the most of its opportunities to fight in the courts. Witnesses throughout the country learned and practiced how to deal with arresting officers and in trials, in anticipation of the legal encounters to come. The Society printed a pamphlet entitled *Order of Trial*, one intended for its members to read rather than distribute. The pamphlet explained how to assert a defense based on free exercise of religion.⁵⁶ The Witnesses had plenty of opportunities to apply their training. Between 1933 and 1951, there were 18,866 arrests of Witnesses for religious-related activity in the U.S.⁵⁷ In some areas, the Witnesses responded to arrests of their members by sending in reinforcements from other areas. Once the local jails were full, the Witnesses could continue to preach without fear of arrest. The Witnesses had 12,600 special volunteers trained and on call for this strategy.⁵⁸ The Society also made it a policy to appeal every case it lost.⁵⁹ In addition, the Witnesses were commanded not to pay any fines after exhausting their appeals. To do so would be an admission of having done

52. HARRISON, *supra* note 25, at 175 (quoting *New York Tribune*, June 22, 1918).

53. HARRISON, *supra* note 25, at 36.

54. *Id.* at 237.

55. DAVID R. MANWARING, *RENDER UNTO CAESAR: THE FLAG-SALUTE CONTROVERSY* 21 (1962).

56. McAninch, *supra* note 18, at 1013.

57. PENTON, *APOCALYPSE DELAYED*, *supra* note 10, at 88.

58. MANWARING, *supra* note 55, at 28.

59. *Id.* at 27.

something wrong. Instead, the Witnesses would serve time in jail.⁶⁰

Far more than merely a means to an end, the legal fighting became a badge of distinction for the Witnesses regardless of the ultimate legal outcome. As one of the Society's lawyers described it, the Witnesses' legal activities became an integral part of their battle for God and against the world. The Witnesses fought with "[n]ot metallic weapons of carnal conflict to draw the blood of men, but Scriptural, Legal and Constitutional armaments Theirs was a legal and righteous warfare."⁶¹ One of the members similarly observed that the Witnesses' legal struggles "served to create a real sense of *esprit de corps* among them" and "were perhaps more important to the Witness communities as morale builders than they were in gaining legal acceptance and a degree of good will."⁶²

Peters does not pursue these intriguing issues. Focused exclusively on how the Witnesses affected constitutional law, his approach to the legal history of the Witnesses sacrifices tremendous opportunities to explore why the Witnesses had such a unique experience with the legal system and what their extensive participation in constitutional litigation meant for them, both as individuals and as an organization.

III. MAKING EVERY CASE TELL THE SAME STORY

Peters' approach to the Witnesses' history also sacrifices factual and legal complexity in order to turn cases into uniformly inspiring stories. The cases involving the constitutional rights of the Witnesses arose in many different circumstances. Each case involved unique people and events, different times, and a variety of places. To impose the same basic story formula on every episode involving the Witnesses requires shaping, stretching, and trimming the facts to fit the standard narrative, themes, and characterizations. As an example, this section examines, in close detail, the events underlying the case of *Cantwell v. Connecticut*,⁶³ in which the Supreme Court unanimously overturned the conviction of Jehovah's Witnesses arrested while going from door to door preaching and distributing literature in New Haven, Connecticut, in

60. See *47 Witnesses Arrested in New Britain*, HARTFORD DAILY COURANT, Mar. 28, 1938, at 1.

61. BLACKWELL, *supra* note 10, at 30; see also STROUP, *supra* note 27, at 151 (describing the war imagery with which Witnesses often depicted their struggles against nonbelievers).

62. PENTON, APOCALYPSE DELAYED, *supra* note 10, at 88.

63. 310 U.S. 296 (1940).

1938.

In Peters' hands, the *Cantwell* case is another story of "boundless courage and unending perseverance," in which Witnesses imbued with extraordinary determination and resolve fought against religious prejudice and opposition to their preaching activities.⁶⁴ According to Peters' account, the Cantwells were devout, courageous Witnesses, who happened to face a climate of severe hostility in New Haven.⁶⁵ The city's police were "particularly antagonistic."⁶⁶ According to Peters, police arrested the Cantwells after several individuals became so incensed by the Witnesses' message that they nearly assaulted them.⁶⁷

A closer look at the original historical record reveals a number of respects in which that story is misleading or incomplete. Peters frames the facts to fit the standard story he tells throughout his book, and does not consult sources, such as contemporary local news accounts, that could shed a different light on the events. The only sources he cites for the facts underlying the case are the opinions of the Connecticut Supreme Court and the U.S. Supreme Court, and two articles written more than thirty years later by the Witnesses involved in the case for the Society's *The Watchtower* magazine.⁶⁸ The history of the *Cantwell* case can be told in a different way, as suggested in what follows here, that is less inspiring as a story of righteous triumph over injustice, but reflects more fairly the complexity of the people, events, and issues.

Newton and Esther Cantwell worked as full-time proselytizers for the Watchtower Society, which assigned them to move to Connecticut in 1937.⁶⁹ They established a home in Woodbridge, just outside New Haven. The arrests that would ultimately lead them to the U.S. Supreme Court occurred in New Haven on April 26, 1938. Neither Peters' book, nor any other previous historical account of the case, mentions that those arrests came at the end of a period of controversy for the Witnesses further north in the state of Connecticut. In March of 1938, police in Bristol, Connecticut, arrested sixty-seven Witnesses on charges

64. PETERS, *supra* note 5, at 178-81; *see also* NEWTON, *supra* note 11, at 5-6.

65. PETERS, *supra* note 5, at 180.

66. *Id.*

67. *Id.* at 180-81; *see also* NEWTON, *supra* note 11, at 5-6.

68. *See* PETERS, *supra* note 5, at 178-81 and nn.1-9 (citing Newton Cantwell, *Jehovah Provides*, THE WATCHTOWER, July 1, 1970, at 410 [hereinafter Cantwell, *Jehovah Provides*], and Russell Cantwell, *We Were Given a Goal in Life*, THE WATCHTOWER, Mar. 15, 1977, at 168).

69. Cantwell, *Jehovah Provides*, *supra* note 68, at 412.

of breaching the peace.⁷⁰ According to the press, none of those arrested were actually from Bristol. In the weeks before the arrests, as many as five hundred Witnesses had flooded the town for a massive distribution of aggressively anti-Catholic literature. At that time, the police warned the Witnesses, but did not make arrests. The next Sunday, a local Catholic priest made the Witnesses the subject of his sermon. Soon after, hundreds of the Witnesses arrived, and the police went ahead with arrests. A pamphlet entitled *Shall the Priests Rule Connecticut* was among the literature distributed by the Witnesses in Bristol.⁷¹ It claimed that Catholic priests in Connecticut had zealously attacked the Witnesses and caused them to be arrested for practicing their religion. The pamphlet singled out one priest for particular criticism:

[T]he Reverend (self-designated) T.F. Lawlor of St. Mary's Catholic Church, New Britain, praised the police greatly for their brave activities in the suppression of religious freedom. Mr. Lawlor says he believes in religious freedom, except when the Catholic Church is attacked and he would like to have removed from office all officials who do not conform to his special interpretation of freedom of worship and conscience.⁷²

Among those arrested were "N.D. Cantwell" and "Mrs. N.D. Cantwell" of New Haven.⁷³

As soon as those arrested were freed on bond, they threatened the Bristol authorities that they would be returning the next day to continue their preaching work. The next day, however, the Witnesses went to nearby New Britain instead, and forty-seven were arrested there.⁷⁴ Again, the charge was breach of the peace. At the center of the activities, and resulting arrests, was the pamphlet attacking Reverend Lawlor. There was no violence against the Witnesses during this period of arrests, with the exception of one who was punched in the nose and another who was hit over the head with a mop.⁷⁵

Olin R. Moyle, the Watchtower Society's head counsel at that time, represented the Witnesses in court in Bristol and in New Britain. The

70. *Bristol Seizes 67 Witnesses for Jehovah*, HARTFORD DAILY COURANT, Mar. 27, 1938, at 1.

71. *Id.*

72. *Id.*

73. *Id.*

74. *47 Witnesses Arrested in New Britain*, HARTFORD DAILY COURANT, Mar. 28, 1938, at 1.

75. *Id.*

court in Bristol sentenced each of the accused to a ten dollar fine.⁷⁶ The next day in New Britain, the court sentenced the head of the Society's Southwestern New England division to a thirty-day jail sentence. The court sentenced those Witnesses who had been previously warned to a fine of \$100, and the rest to a fine of \$25 each.⁷⁷ The judges declined to consider Moyle's constitutional arguments, as the local courts were under instructions from the state supreme court to leave constitutional issues for appellate resolution.⁷⁸ In the midst of the controversy, the U.S. Supreme Court issued a ruling in favor of a Jehovah's Witness in *Lovell v. City of Griffin*,⁷⁹ a First Amendment challenge to a Georgia city's ordinance requiring a permit for distribution of literature. The Bristol city attorney explained to reporters why he believed the charges being prosecuted in Bristol were distinguishable from those considered by the Court.⁸⁰ Sporadic arrests of small numbers of Witnesses continued throughout the month.⁸¹

The prosecutors in New Britain chose to nullify the convictions of the forty-seven Witnesses convicted there prior to their appeal to the Superior Court.⁸² The Witnesses filed suit seeking an injunction against further arrests by the city of Bristol.⁸³ The case was heard by a special three-member federal constitutional court, which denied the injunction because there were no actual prosecutions pending, and, even if there

76. *67 Religious Sect Members Fined in Bristol*, NEW HAVEN JOURNAL-COURIER, Mar. 29, 1938, at 8; *Court Ruling Cheered by "Witnesses,"* HARTFORD DAILY COURANT, Mar. 29, 1938, at 1.

77. *Religious Sect Members Fined in New Britain*, NEW HAVEN JOURNAL-COURIER, Mar. 30, 1938, at 5; *Sect Leader Sentenced in New Britain*, HARTFORD DAILY COURANT, Mar. 30, 1938, at 1.

78. *Jehovah Witness Fined in Local Police Court*, HARTFORD DAILY COURANT, Apr. 1, 1938, at 20.

79. 303 U.S. 444 (1938).

80. *Bristol Holds 66 of Sect Despite Court's Decision*, NEW HAVEN REGISTER, Mar. 29, 1938, at 6.

81. *Jehovah's Witness Held Here on Two Charges*, HARTFORD DAILY COURANT, Mar. 31, 1938, at 16; *Pamphlet Distributors Arrested in Stratford*, NEW HAVEN JOURNAL-COURIER, Apr. 16, 1938, at 1; *Week-End Rush at Police Station Gives Blotter Pen No Time To Dry*, HARTFORD DAILY COURANT, May 2, 1938, at 16.

82. *Nolles Granted in 47 Jehovah's Witnesses Cases*, HARTFORD DAILY COURANT, May 3, 1938, at 4.

83. *Jehovah Witness Activity Strikes Lull in Bristol*, NEW HAVEN REGISTER, Apr. 24, 1938, § 2, at 8; *Jehovah's Witnesses Seek Injunction to Stop Bristol Arrests*, HARTFORD DAILY COURANT, May 10, 1938, at 9; *Constitution Court Will Hear Suit of Religious Sect*, HARTFORD DAILY COURANT, May 12, 1938, at 11; *State Statute Challenged by Religious Sect*, NEW HAVEN JOURNAL-COURIER, May 12, 1938, at 7; *Religious Sect Case Heard by Special Court*, NEW HAVEN JOURNAL-COURIER, May 27, 1938, at 9.

were, the Witnesses would have the opportunity to present their constitutional arguments in their criminal trials in the state courts.⁸⁴

Despite the recent controversy in northern Connecticut, the Jehovah's Witnesses were not a subject of significant interest or attention down in New Haven. The arrests in Bristol and New Britain received only brief, occasional mentions on the back pages of the New Haven newspapers. In early April of 1938, the *New Haven Register* devoted an editorial to the Supreme Court's recent decision in *Lovell*.⁸⁵ The *Register* editorial did not mention the fact that the case involved Jehovah's Witnesses, but it expressed concern nonetheless that:

As in most cases when the high court rules upon legality, it did not rule on wisdom Distributors may, for instance, be within their constitutional rights in throwing a handful of circulars into the householder's vestibule. But that there is any profit in it, or in scattering them on porches so as to be blown off and to strew a lawn and to collect in shrubbery, is more than doubtful.⁸⁶

There was no sign of hostility to the Jehovah's Witnesses, only an aversion to litter. The *New Haven Journal-Courier* also ran an editorial supporting the Supreme Court's decision in favor of the Witnesses.⁸⁷

On Tuesday morning, April 26, 1938, the Cantwells packed a lunch and loaded up their car.⁸⁸ They had with them their two sons, Jesse, who was sixteen years old at the time, and Russell, who was eighteen. They brought with them an assortment of books and pamphlets, in a variety of languages including Italian, Polish, German, Russian, Swedish, Greek, Armenian, and Ukrainian.⁸⁹ This literature contained a great deal of invective against the Roman Catholic Church. For example, one pamphlet read in part:

84. *Watch Tower Bible & Tract Soc'y v. City of Bristol*, 24 F. Supp. 57, 59 (D. Conn. 1938).

85. 303 U.S. 444 (1938).

86. *Constitutional, But . . .*, NEW HAVEN REGISTER, Apr. 3, 1938, § 4, at 2.

87. "[N]o one is obliged to read a pamphlet that has been thrust into his hand or under his door. If he does not like it, he can always drop it quickly into the incinerator or the wastebasket, where many of them, such as the ones assiduously distributed in the vicinity of Hartford in recent weeks, properly belong." *Pamphlets Under the Constitution*, NEW HAVEN JOURNAL-COURIER, Apr. 1, 1938, at 6 (reprint from HARTFORD COURANT, March 30, 1938, at 10).

88. Newton erroneously indicates that the incident at issue in the *Cantwell* case occurred on Palm Sunday. See NEWTON, *supra* note 11, at 5-6.

89. Testimony of Officer Henry Carignan at 39-41, *State v. Cantwell*, Court of Common Pleas, Criminal Side, New Haven County (1938) [hereinafter "Trial Record"] (on file with author).

The record of that religious organization is written in human blood and tears of bitterness The cruel Inquisition of that religious organization has left its slimy trail in almost every land on earth. It has ever been known as an unclean thing, for the reason that many of its leaders and priests have been and are morally putrid.⁹⁰

Some contained illustrations, including one of a serpent crowned with a papal tiara. In addition, Newton Cantwell and his sons each carried a portable phonograph player and three records. The records contained brief messages spoken by Judge Rutherford, the leader of the Cantwell's church, which explained the content and importance of the books offered by the Witnesses.⁹¹ At each house, the Cantwells would ask permission to play one of the records and then offer a book for sale. If the resident was unable to purchase the book, the Cantwells would accept whatever contribution the resident could make, and if still unsuccessful, they would offer a pamphlet for free on the condition that it be read.⁹²

About four o'clock that afternoon, the Cantwells reached the neighborhood around Cassius Street, located about a mile southwest of the New Haven green, past the railroad station. The neighborhood was at least ninety-percent Catholic.⁹³ Most of the residents of the neighborhood attended church nearby at St. Peter's on Kimberly Avenue. Mrs. Cantwell waited in the car while her husband and sons split up to canvass the neighborhood.

Russell Cantwell rang the bell at the home of Anna Rigby. Rigby had been visited by the Jehovah's Witnesses in the past, and had purchased one of their books, so she knew right away what Russell was doing at her door.⁹⁴ Rigby accepted a small pamphlet from Russell,

90. *Id.* at 46 (from the pamphlet entitled *Cure*, as entered into record by the prosecutor).

91. The Society instituted the use of the records in 1937 as a means of controlling the content of the information spread through the door-to-door preaching. STROUP, *supra* note 27, at 57.

92. Testimony of Officer Felix Gilroy at 58, Trial Record, *supra* note 89; Finding No. 9 at 23, Trial Record, *supra* note 89.

93. Finding No. 11 at 23, Trial Record, *supra* note 89. The police officers and witnesses who would later testify against the Cantwells were all Catholic. Testimony of Officer Henry Carignan at 39, Trial Record, *supra* note 89; Testimony of Officer Felix Gilroy at 58, Trial Record, *supra* note 89; Testimony of John Ganley at 66, Trial Record, *supra* note 89; Testimony of John Cafferty at 73, Trial Record, *supra* note 89; Testimony of Anna Rigby at 77, Trial Record, *supra* note 89; Testimony of Gladys Berry at 83, Trial Record, *supra* note 89; Testimony of Alice Hickey at 86, Trial Record, *supra* note 89.

94. Testimony of Anna Rigby at 78, Trial Record, *supra* note 89.

which she tore up as soon as he left. Rigby then called the police to complain, as she felt that this was “a pretty strong book against my religion,”⁹⁵ and that the Witnesses “should be taken off the street.”⁹⁶

Meanwhile, Russell continued his way down the street. The first police officer to respond to Anna Rigby’s complaint, Officer Leslie Leigh, arrived and found Russell. Questioned by Officer Leigh, Russell explained that he was preaching and offering the books at the houses. Officers Edward Wendland⁹⁷ and Henry Carignan soon arrived with a squad car and took Russell down to the station house for more questioning.

From her porch on the other side of Cassius Street, Gladys Barry watched the police take away Russell. Soon after, when Jesse Cantwell reached her home and offered his books for sale, she told him: “One of your buddies just got arrested across the street; you had better scram. I don’t want any publicity in front of my house.”⁹⁸ Jesse continued along.

Down the street, a small group of men had gathered. One of them, John Ganley, had just finished his shift at work in the nearby railroad yard, and had walked over to visit his mother who lived on Cassius Street. He approached the two men who were standing along the street in order to find out why the police were about on Cassius Street that day. One was Ganley’s friend, John Cafferty, a shop hand at the Eastern Screw Machine Company in New Haven and a resident of Cassius Street. The other was Mentor Canelli, a local insurance salesman who visited Ganley’s mother. Cafferty explained what was going on, for he had watched the police arrest Russell earlier, and knew that Russell had been picked up for making attacks on the Catholic religion.⁹⁹ Ganley was not familiar with the Jehovah’s Witnesses.¹⁰⁰ As the three men were talking, Jesse Cantwell approached them and began the customary pitch. The men agreed to listen to one of the recordings, although they were already aware that the records attacked the Catholic church and that the police were investigating complaints about the Cantwells.¹⁰¹ Cafferty later explained that even though he knew fairly well what the record

95. *Id.* at 81.

96. *Id.* at 79.

97. Officer Wendland was killed in the line of duty less than a month after the Cantwells’ arrests. See *Officer E.H. Wendland Shot Dead Investigating Automobile Theft Case*, NEW HAVEN REGISTER, May 21, 1938, at 1.

98. Testimony of Gladys Berry at 86, Trial Record, *supra* note 89.

99. Testimony of John Cafferty at 76, Trial Record, *supra* note 89.

100. Testimony of John Ganley at 69-70, Trial Record, *supra* note 89.

101. Draft Finding No. 27 at 21, Trial Record, *supra* note 89.

contained, "I wanted to find out for myself."¹⁰² The record Jesse played was the sales presentation for the book *Enemies*. It pronounced that:

The most seductive and subtle instrument employed to deceive man is religion, because religion has the appearance of doing good, whereas it brings upon the people great evil. There are many different religions, all of which are deceptive, are the instruments of the enemy Satan, and all work to the injury of men. This book submits the conclusive proof that for more than fifteen hundred years a great religious system, operating out of Rome, has by means of fraud and deception brought untold sorrow and suffering upon the people. It operates the greatest racket ever employed amongst men and robs the people of their money and destroys their peace of mind and freedom of action. That religious system is vigorously pushing its political schemes amongst all the nations of earth, with the avowed purpose of seizing control of the nations and ruling the people by cruel dictators.¹⁰³

The message was certainly unflattering to Catholics, but it contained none of the truly distasteful language of the Cantwell's books, such as the allusions to the Roman Catholic Church as an old drunken harlot fornicating with Hitler and the other servants of Satan.¹⁰⁴

Cafferty and Ganley were mildly surprised by what they heard on the record. They "never thought that they would have such a record"¹⁰⁵ containing a "pretty rotten attack on [our] religion."¹⁰⁶ Ganley later testified that they were "stung about it to think that our religion, which all our lives we believed in, would be run down like that."¹⁰⁷ The men told Jesse that he had better keep moving, and Jesse did so.

As Jesse headed for the next house, Officer Leigh called him over. In response to Officer Leigh's questioning, Jesse explained that he was busy preaching the word of God. Officer Leigh radioed for another squad car. As that car left with Jesse for the police station, and Officer Leigh prepared to leave as well, a woman approached him and pointed out that there was a woman, Mrs. Cantwell, involved with the men the police were after. Officer Leigh found Mrs. Cantwell sitting in the family car parked on Cedar Street, and he again called for officers to escort her to the police station. Returning to Cassius Street, Officer

102. Testimony of John Cafferty at 77, Trial Record, *supra* note 89.

103. Testimony of Officer Henry Carignan at 44, Trial Record, *supra* note 89 (transcript of *Enemies* record played by prosecutor).

104. More Specific Statement as to Paragraphs 1, 2, 3, and 4 of the Complaint at 7-12, Trial Record, *supra* note 89 (quoting from *Riches* and *Enemies*).

105. Testimony of John Ganley at 67, Trial Record, *supra* note 89.

106. Testimony of John Cafferty at 75, Trial Record, *supra* note 89.

107. Testimony of John Ganley at 70, Trial Record, *supra* note 89.

Leigh spotted his last suspect, Newton Cantwell. Like his sons, Newton explained that he was preaching the gospel at the houses, and Officer Leigh sent him off to join the others at the Howard Avenue station.

At the station, a police officer and a sergeant began to look over the books and pamphlets carried by the Cantwells, and to mark particular paragraphs of note.¹⁰⁸ The police took the Cantwells over to the City Attorney's office. After consulting his code books, the attorney there asked the Cantwells if they had secured a permit to solicit for a religious cause from the Public Welfare Council. They had not.¹⁰⁹ The police charged the Cantwells with breaching the peace, violating the statute requiring a permit for solicitation, and several other minor offenses.

The arrest of the Cantwells barely made the local newspapers. The *New Haven Register* and the *New Haven Journal-Courier* each devoted two small paragraphs to the story.¹¹⁰ The relative inattention to the Cantwells' story is all the more striking in comparison to the things these newspapers were reporting. There was hardly a crime too trivial to make the newspapers.¹¹¹ About the same time the Cantwells were arrested, New Haven's attention was riveted to a different but similar story in town, the "great pushcart controversy." Local businesses complained to city officials that pushcart vendors of candy and ice cream were intercepting all of the business of the local school children by parking their carts just outside the school at recess and after the final bell of the school day. The episode captured the city's attention for weeks, as the mayor, prosecutors, and judges squabbled, and citizens weighed in on both sides of the dispute.¹¹²

108. Testimony of Officer Henry Carignan at 37, Trial Record, *supra* note 89.

109. *Id.* at 39.

110. *Jehovah's Witnesses Given Delay by Court*, NEW HAVEN EVENING REGISTER, Apr. 27, 1938, at 10; *Three Under Arrest on Statute Violation*, NEW HAVEN JOURNAL-COURIER, Apr. 27, 1938, at 3.

111. *See, e.g., North Branford Man Loses \$3 to Pickpocket*, NEW HAVEN REGISTER, Apr. 17, 1938, at 2; *3 Boys Held for Throwing Fruit, Eggs*, NEW HAVEN REGISTER, May 2, 1938, at 6.

112. *See, e.g., 4 Peddlers Seized Near High School—Freed by Court*, NEW HAVEN REGISTER, Apr. 12, 1938, at 6; *Judge and Mayor at Odds over Pushcart Vendors*, NEW HAVEN REGISTER, Apr. 14, 1938, at 1; *Three Vendors Again Land in Police Toils*, NEW HAVEN JOURNAL-COURIER, Apr. 14, 1938, at 7; *Mayor Claims Court Should Back Officers*, NEW HAVEN JOURNAL-COURIER, Apr. 15, 1938, at 1; *Hot Dogs in the Street*, NEW HAVEN REGISTER, Apr. 15, 1938 (editorial), at 26; *Pushcart Controversy*, NEW HAVEN JOURNAL-COURIER, Apr. 16, 1938 (editorial), at 6; *The School Vendors*, NEW HAVEN JOURNAL-COURIER, Apr. 19, 1938 (letters to the editor), at 6; *Vendors Freed Again as Court Raps School*, New Haven Register, Apr. 21, 1938, at 1; *More on Pushcarts*, NEW HAVEN JOURNAL-COURIER, May 4, 1938 (editorial), at 6; *Vendors' Ordinance*, NEW HAVEN JOURNAL-COURIER, May 20, 1938 (letters to the editor), at 6;

The prosecutor brought five charges against Newton Cantwell and each of his sons. The charges were publicly exhibiting offensive and indecent matter, possessing and intending to sell indecent materials, ridiculing persons on account of their religion, soliciting money for a religious cause without securing a certificate of approval from Connecticut's Public Welfare Council,¹¹³ and breaching the public peace.

In their demurrer to the information, the Cantwells pointed out that the prosecutor's information made it difficult to tell exactly what statutes the prosecutor relied upon as creating the offenses listed. Further, the Cantwells contended that the statutes they presumed to be involved were each unconstitutional as applied in the case, because each infringed on the freedom of speech, freedom of press, freedom of religion, and right of assembly.

The Cantwell's demurrer was well-received by the Court. Judge Joseph Pickett sustained the demurrer as to the first three of the five charges, leaving only the charges for unauthorized solicitation and breach of the peace. Though Judge Pickett did not find any of the statutes to be unconstitutional, he took a highly libertarian view of the matter:

Much that appears in these publications would give offense to devout persons of [Catholic, Protestant, or Jewish] religious persuasions, if forced upon their attention. Most persons would ignore such emanations as unworthy of serious attention I can comprehend no useful purpose for this writing or publication of such matter, but I am as little willing to declare them unlawful per se as I would be to declare that a Christian may not argue the Divinity of Christ, a Jew deny it and a Confucianist ignore it as a legend I can see little danger to either government or any substantial religion resulting from stupid, bigoted or fanatical attack.¹¹⁴

The judge concluded that the prosecutor could prove that the Cantwells committed a common-law offense only if they forced their

Pushcart Rule, NEW HAVEN JOURNAL-COURIER, May 26, 1938 (editorial), at 6.

113. CONN. GEN. STAT. § 6294 (1930), amended by 1937 Conn. Pub. Acts § 1451E. The statute provided:

No person shall solicit money, services, subscriptions or any valuable thing for any alleged religious, charitable or philanthropic cause, from other than a member of the organization for whose benefit such person is soliciting or within the county in which such person or organization is located unless such cause shall have been approved by the secretary of the public welfare council.

Id.

114. Memorandum on Demurrer at 15-16, Trial Record, *supra* note 89.

materials “upon the unwilling attention” of persons who would then be stirred to breach the peace.¹¹⁵

When the case went to trial on September 23, 1938, the prosecutor had a tricky time establishing the necessary elements of his case, precisely because his witnesses were too indifferent about the Witnesses. In particular, the Cantwells were charged with breaching the peace by conduct tending to incite others to breach the peace. The prosecutor needed to show that the Cantwells had provoked someone to the brink of violence or some other disruption. No one seemed to care that much about the Cantwells. For example, Anna Rigby, the woman who first complained to the police about her visit from Russell Cantwell, testified that the visit made her angry, but she did not seem to realize what more the prosecutor wanted her to say. The prosecutor’s questions became more and more leading until the defense finally objected, at which point the prosecutor seized the opportunity to clue Rigby in through his argument to the judge:

I claim that I haven’t elicited everything as to the woman’s feeling that she wanted to take, perhaps, an active step in doing something to this fellow or something in the form of physical violence to him. I claim that I have a right to go into the workings of her mind under common law breach of the peace—that having met with this situation and having her religion attacked as it is in these pamphlets, she felt like, as we put it vulgarly, perhaps, doing something to inflict violence on him, although she is a woman. She was so worked up that she wanted, perhaps, to resort to violence and hit or strike him, in addition to what she has already said.¹¹⁶

Defense counsel pointed out the obvious fact that the prosecutor was putting the words he wanted to hear into the witness’s mouth. Rigby finally took the hint and testified that she “really was mad enough, I suppose, to hit him if he wouldn’t get away.”¹¹⁷

The prosecutor had to use a similar technique with John Ganley, one of the men who listened to the *Enemies* record played by Jesse Cantwell on Cassius Street:

Q: I will put it again. After hearing this record

A: Yes, sir.

Q: What was your reaction? Did you want to do something or nothing about it? Did you want to do something?

115. *Id.* at 16.

116. Testimony of Anna Rigby at 79-80, Trial Record, *supra* note 89.

117. *Id.* at 80.

A: Yes, sir.

Q: What did you want to do?

A: I just wanted him to take that victrola and get out of there.

Q: Did you want to beat him up or do anything like that?¹¹⁸

It was only through that kind of repetitious and highly suggestive leading questions that the prosecutor could get any witness to say that he or she felt any violent impulse toward the Witnesses.

The Cantwells did not put on a defense. At the close of the case, the judge sentenced Newton Cantwell and his two sons to pay a fine of five dollars per count, plus the costs of the prosecution. The judgment against the Cantwell family came to a total of \$145.94. The judge also enjoined the Cantwells from further preaching within the county until their appeal was heard.

The Cantwells appealed to the Supreme Court of Errors of Connecticut.¹¹⁹ The court held that the certificate statute was not unconstitutional since it regulated solicitation, not religion. The Witnesses could preach and distribute free literature without a license. The state's interest in protecting its citizens from fraud justified the restriction on solicitation.¹²⁰ However, the court did find that there was not enough evidence to convict Russell or Newton Cantwell for breach of the peace.¹²¹ The only act committed by the Cantwells that could even conceivably have been an incitement to violence was the playing of the *Enemies* record, and only Jesse Cantwell had done that.

Close examination of the facts underlying the *Cantwell* case thus reveals more than a simple story of heroic individual resistance to widespread public hostility, violent treatment, antagonistic police, and repressive local courts. In the months before their arrest in New Haven, the Cantwells participated in an orchestrated campaign of provocation in northern Connecticut. Despite that, there was little controversy or interest surrounding the Witnesses' activities in New Haven. Far from having their minds made up against the Witnesses, the local judges took a libertarian view of the Cantwell's activities and threw out most of the charges. Despite the aggressively anti-Catholic content of Witnesses' message, the individuals that the Cantwells approached in New Haven were no more than mildly annoyed, and it took considerable effort on

118. Testimony of John Ganley at 69, Trial Record, *supra* note 89.

119. *Religious Sect Appeal Before Highest Court*, NEW HAVEN JOURNAL-COURIER, May 2, 1939, at 18.

120. *State v. Cantwell*, 126 Conn. 1, 4-5, 8 A.2d 533, 536 (1939).

121. *Id.* at 5-8.

the prosecutor's part to elicit any testimony suggesting the Cantwell's conduct could have provoked a violent response.

Trying to fit each of the Witnesses' cases to a standard story pattern also risks oversimplification of the legal meaning and significance of the courts' decisions. Subtleties are lost when historians frame each case as a contest between freedom and repression, and reflexively treat each ruling in the Witnesses' favor as an unmitigated victory for civil liberties. Justice Owen Roberts' unanimous opinion in *Cantwell* overturned all of the convictions, and consequently it has been treated as a crucial victory for individual religious freedom by the legal histories of the Witnesses.¹²² The reality of the decision is more complicated.¹²³

Cantwell was the first case in which the Court held that the First Amendment right to free exercise of religion provides protection against the actions of state and local governments, not just the federal government.¹²⁴ However, the Court offered an extremely weak form of protection to free exercise of religion, indicating that the Cantwells were not entitled to any special exemptions from the application of general laws that conflicted with their religious beliefs or practices. The Cantwells prevailed only because the Court concluded that the laws under which they were convicted were unconstitutional *as a general matter*. The Cantwells' special religious needs did not compel any special treatment or scrutiny of the law.

The principal constitutional vice of the Connecticut statute requiring a license to engage in religious solicitation was the excessive discretion it gave to government officials to determine what constituted a religious cause.¹²⁵ Roberts described an alternative law that he would find to be constitutional: "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

122. See PETERS, *supra* note 5, at 184-85; NEWTON, *supra* note 11, at 6; McAninch, *supra* note 18, at 1030-31.

123. The *Cantwell* decision received only moderate and quiet attention at the time it was announced. There was little reaction to the decision in the New Haven newspapers. The editors of the *Journal-Courier* opined that the Court's decision in favor of the Witnesses was the right one, but that the issue of how to prevent nuisances and frauds without infringing religious freedom remained unanswered. *The Cantwell Case*, NEW HAVEN JOURNAL-COURIER, May 22, 1940, at 6. Similarly, the paper mildly criticized the Court's decision two weeks later in the case concerning the Witnesses' refusal to salute the flag. *Flag Salute Decision*, NEW HAVEN JOURNAL-COURIER, June 6, 1940, at 6.

124. *State v. Cantwell*, 310 U.S. 296, 305 (1940).

125. *Id.* at 307.

purports to represent.”¹²⁶

The Cantwells would not have been able to comply with that law. The Jehovah’s Witnesses believed it would insult God to seek approval of any sort from secular officials to engage in their most important religious work, preaching to the public. The Cantwells, after all, were not in trouble because the state refused to issue them a certificate. They, like other Witnesses, had never applied for one.¹²⁷

Likewise, Roberts overturned the Cantwells’ conviction for breach of the peace because it was unconstitutional as a general matter, not because it was subject to heightened scrutiny in a case where it interfered with particular religious beliefs or practices. Roberts noted that the breach of peace offense was “based on a common law concept of the most general and undefined nature.”¹²⁸ Though such a flexible offense may have many constitutional uses, the state still “may not unduly suppress free communication of views, religious *or other*, under the guise of conserving desirable conditions.”¹²⁹ The fact that the Cantwells were Jehovah’s Witnesses, or even that they were religiously motivated at all, was not essential to Roberts’ decision. As with the licensing statute, the problem was excessive discretion: “Here we have a situation analogous to a conviction under a statute sweeping in a great variety of conduct under a general and indefinite characterization, and leaving to the executive and judicial branches too wide a discretion in its application.”¹³⁰

Rather than giving special leeway to the Cantwells because of their religious motives, Roberts found that they simply did not commit the offense in question, once that offense was narrowed to its constitutional limits. Their conduct “did not amount to a breach of the peace.”¹³¹ Again, Roberts went out of his way to emphasize that he was not asking the state to tread especially lightly around the religious needs of the Witnesses:

126. *Id.* at 306.

127. The Associated Press story on the announcement of the decision would even note this fact. *Supreme Court Reverses Conviction of Cantwells*, NEW HAVEN JOURNAL-COURIER, May 21, 1940, at 5 (noting that the Cantwells “had refused to apply for a permit . . . [because] to do so would be an ‘insult to Almighty God and result in their eternal destruction’”).

128. *Cantwell*, 310 U.S. at 308.

129. *Id.* (emphasis added).

130. *Id.*

131. *Id.* at 309.

Conviction . . . was not pursuant to a statute evincing a legislative judgment that *street discussion of religious affairs*, because of its tendency to provoke disorder, should be regulated, or a judgment that the *playing of a phonograph* on the streets should in the interest of comfort or privacy be limited or prevented. Violation of an Act exhibiting such a legislative judgment and narrowly drawn to prevent the supposed evil, would pose a question differing from that we must here answer. Such a declaration of the State's policy would weigh heavily in any challenge of the law as infringing constitutional limitations.¹³²

In essence, Roberts provided the Connecticut legislature with a convenient recipe for enacting a statute that would be constitutional and could still accomplish the same thing as the offense with which the Cantwells were charged. The problem Roberts saw was a general one, an excessively broad interpretation of the offense. The *Cantwell* decision did not hinge on any determination that the burden on the practices of the Cantwells or the Witnesses justified any special treatment for them.

Indeed, one significant hint that should have alerted historians like Peters to the fact that *Cantwell* is not an unqualified affirmation of libertarian free exercise doctrine is the opinion's author. Justice Roberts voted against the Witnesses in both of the cases concerning their refusal to participate in flag salutes. The first of those decisions, *Minersville School District v. Gobitis*,¹³³ came down just two weeks after *Cantwell*. Even when the majority of the Supreme Court had a change of heart and ruled in the Witnesses' favor a few years later in *West Virginia State Board of Education v. Barnette*,¹³⁴ Justice Roberts signed on to Justice Frankfurter's dissent.

Cantwell is not the unequivocal triumph for religious liberty suggested by Peters and other historians recounting the Witnesses' legal efforts. In recent years, it has been cited as support by both sides in the Supreme Court's heated controversy over the Free Exercise Clause.¹³⁵

132. *Cantwell*, 310 U.S. at 307-08 (footnote omitted) (emphasis added).

133. 310 U.S. 586 (1940).

134. 319 U.S. 624 (1943).

135. The majority, led by Justice Scalia, has cited it as supporting their view that generally applicable laws are not subject to strict scrutiny unless they specifically aim at or discriminate against religious exercise. See *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 881 (1990). The minority that would apply stricter scrutiny to general laws burdening religious practices also turns to *Cantwell* for support. *Id.* at 895 (O'Connor, J., concurring in judgment); *id.* at 908 (Blackmun, J., dissenting); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 566 (1993) (Souter, J., concurring).

In the latest case involving Jehovah's Witnesses to make its way to the Supreme Court, *Cantwell* emerged as a crucial precedent *against* the Witnesses' position, because Justice Roberts' opinion endorses the constitutionality of the very sort of solicitation registration requirement that the Witnesses now seek to invalidate.¹³⁶ The significance of the decision as legal precedent is far more complicated and less favorable to the Witnesses than historical accounts like Peters' book suggest, as they seek to force each case to fit the standard story which only has two endings—a heartbreaking defeat or a ringing triumph for liberty. The legal reality is not that simple.

IV. COMPARISONS AMONG RELIGIONS

Peters' approach to the legal history of the Witnesses also neglects the opportunity for instructive comparison of the Witnesses to other religious groups whose beliefs and practices have come into conflict with mainstream society and many of its laws.¹³⁷ Focusing exclusively on how the Witnesses' cases advanced civil liberties, Peters does not consider how the Witnesses' use of law, and the effect it had on them, was similar or different to the experiences of other religious organizations.

For example, the ACLU attorneys who represented the Witnesses in the late 1930s and 1940s often drew comparisons to the persecution suffered by members of the Church of Jesus Christ of Latter-Day Saints, or Mormons, in the previous century.¹³⁸ While the Mormons faced hatred and violence just as the Witnesses later would, their response did not resemble that of the Witnesses. The Mormons' response minimized legal conflict to the extent that they could, first by isolating themselves geographically, and ultimately by disavowing polygamy, the element of their religious doctrine that engendered the most hostility toward them. When the Witnesses were in the midst of their most intense period of persecution and legal conflict in the 1930s and 1940s, the Mormons had achieved a relative degree of accommodation between themselves and the rest of society. While cases involving the Witnesses filled the courts, the Mormons' activities did not generate any cases, even though Mormon missionaries were engaged full-time in proselytization

136. *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 240 F.3d 553, 562 (6th Cir. 2001), *rev'd*, 536 U.S. 150 (2002).

137. *See, e.g., THE AMISH AND THE STATE* (Donald B. Kraybill ed., 1993)

138. *PETERS*, *supra* note 5, at 100.

throughout the country.

The Amish may have done more to advance civil liberties than any religious group other than the Jehovah's Witnesses, but the differences between them again underscore how the Witnesses shaped themselves to be uniquely potent agents of legal reform. Like the Witnesses, the Amish are intensely devoted to their faith, which includes beliefs and practices that frequently run afoul of the law.¹³⁹ However, the essence of the Amish religion literally separates its followers from the rest of the world,¹⁴⁰ and, in part for that reason, the Amish have never been the subject of public hatred.¹⁴¹ The Amish generally violated the law only in passive ways, neglecting to comply with affirmative requirements that the regulatory state requires: sending their children to school, paying Social Security taxes, wearing hardhats at construction sites, and so on.

The Witnesses, on the other hand, sought only a partial form of isolation. They alienated themselves from the world around them while remaining fully ensconced within it. Through their public preaching, they actually attempted to maximize their contact with the world they disdain, and, by doing so, increased the likelihood of crossing the secular authorities.

In addition, when conflicts with governmental authorities arose, the Amish preferred to avoid litigation, considering involvement in legal activities to be a breach of their separation from the world.¹⁴² In addition, the Amish regard filing a lawsuit as a form of retaliation or revenge, an unacceptable and un-Christian behavior.¹⁴³ This bias against litigation is one manifestation of the overall attitude of the Amish toward the state. *Gelassenheit*, or "submission," is their fundamental value, and it requires a "posture of subjection" toward the state, though never at the expense of obedience to God.¹⁴⁴ The Amish attitude toward the state is paradoxical, but not completely negative: government is inspired by God, but is worldly and, at bottom,

139. Donald B. Kraybill, *Preface to THE AMISH AND THE STATE*, *supra* note 137, at ix-x.

140. Donald B. Kraybill, *Negotiating with Caesar*, in *THE AMISH AND THE STATE*, *supra* note 137, at 3.

141. Kraybill, *supra* note 139, at x (describing how America was "rather benevolent and hospitable to these stubborn folks").

142. Kraybill, *supra* note 140, at 12; Paton Yoder, *The Amish View of the State*, in *THE AMISH AND THE STATE*, *supra* note 137, at 23, 37.

143. Yoder, *supra* note 142, at 36; see also *Matthew 5:40* ("If any man will sue you at the law, and take away thy coat, let him have thy cloak also.").

144. Kraybill, *supra* note 140, at 14; Yoder, *supra* note 142, at 31.

incompatible with the Amish ways.¹⁴⁵ Amish relations with government have thus often been characterized by negotiation.¹⁴⁶ The Amish first and foremost want to practice their religion, but they clearly prefer to be able to do so in conformity with the secular laws. They will not compromise their beliefs, but do hope that the law would reconcile itself with their beliefs.¹⁴⁷

The Witnesses differed sharply. They did not have the “quiet and reserved personality” of the Amish.¹⁴⁸ In addition, the Witnesses’ attitude toward the state was unequivocally hostile. For them, the secular nations were instruments of Satan, undeserving of any form of submission, and to be tolerated with loathing only when absolutely necessary. The Witnesses were determined to worship God as they believed they should, and even gained special satisfaction from doing so in defiance of the law. Negotiation and compromise were tactics of last resort. Compromising would merely have deprived them of the opportunity to wage a good fight for Jehovah. Peters does not pursue any of these intriguing lines of inquiry, sacrificing the opportunity to shed further light on his subject by considering how the Witnesses’ experience compared and contrasted to that of other religious groups.

V. CONCLUSION

Peters’ book provides inspiring and detailed accounts of many of the major cases in which courts considered the First Amendment rights of Jehovah’s Witnesses. Examination of this unique chapter in American legal history is long overdue, and Peters’ work does much to fill the void. At the same time, his approach has a number of significant shortcomings. Many significant issues remain to be addressed fully in this fascinating realm at the intersection of legal history, constitutional law, and the study of religion in America.

145. Yoder, *supra* note 142, at 39.

146. Kraybill, *supra* note 140, at 18-20; *see also* Robert L. Kidder, *The Role of Outsiders, in THE AMISH AND THE STATE, supra* note 137, at 213, 224-28.

147. Kraybill, *supra* note 140, at 3.

148. *Id.* at 12-14.