



Mary Ann Glendon

DEFENDING RELIGIOUS FREEDOM IN SECULAR SOCIETIES



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Among the many challenges facing religious freedom advocates in today's increasingly secular societies is to persuade decision-makers and fellow citizens not only that religious freedom is under threat, but that it is worth defending. Not so long ago, when much of economic, social and political life was influenced by religious principles in many parts of the West, the constitutional recognition of religious freedom was recognized as a major political advance. In that era, the importance of religious liberty for the maintenance of a pluralistic democracy seemed obvious even to many who were not religious.

Today, that is no longer the case. With growing numbers of persons in western nations who are not affiliated with any organized religion, or who describe themselves as not religious at all, it is not surprising that concern for freedom of religion has declined. The more that people come to see religion as a private, solitary activity, something like a hobby, the less likely they are to be concerned about religious freedom in the capacious sense of Article 18 of the Universal Declaration of Human Rights, which protects one's freedom to live in accordance with one's religious beliefs, alone or with others, in private or in public (subject of course to due limitations and the rights of others).¹ Few people today are even aware that religious freedom is one of only seven rights that are internationally recognized to be non-derogable in the International Covenant on Civil and Political Rights.

It is vital, therefore, for today's defenders of religious freedom to find better ways to communicate with different sorts of audiences in countries where religious

¹ U. N. Universal Declaration of Human Rights, Article 18: "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or in private, to manifest his religion or belief in teaching, practice, worship and observance." But see UDHR Article. 29 (2): "In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."

freedom and religion itself are less and less valued, not only by militant secularists, but by increasing numbers of our friends, colleagues and fellow citizens.

That challenge, by its very nature, arises mainly in countries that are not among the world's worst rights violators. But the status of religious freedom in the liberal democracies has grave implications for all the men and women around the world who are suffering torture, arbitrary imprisonment and even being killed for their religious beliefs. A country that regularly subordinates religious freedom to other interests at home is not going to prioritize the protection of religious freedom in its foreign policy.

When compared to the gross violations are taking place every day in many parts of the world, the overall picture of religious freedom in the West is less horrifying and violent. But the human consequences of religious discrimination and restrictions in countries that think of themselves as free and democratic can be devastating. As an American folk song puts it,

As around this world I've wandered,
I've seen lots of funny men.
Some rob you with a six-gun,
And some with a fountain pen.²

While you may not be killed for your beliefs in a liberal democracy, you can be run out of your job; your business can be shut down; your most cherished institutions can be undermined, and you may lose the opportunity to participate in public life. The threats to religious freedom in western countries differ from place to place, both in kind and degree, but there are some common features. Among them are infringement of the conscience rights of health care workers and other service providers, interference with parents' rights with respect to the education of their children, and a tendency to subordinate religious freedom when it is in competition or tension with claims based on non-discrimination norms, abortion rights, and various lifestyle liberties.

With regard to these disturbing trends, I hope the reader will indulge me if take my specific examples from the country I know best, the United States.

One matter of particular concern is the effort to reduce the understanding of religious freedom to mere "freedom of worship". That was the expression favored in the U.S. State Department during my two terms as a member of the U.S. Commission on International Religious Freedom. When we Commissioners

² Woody Guthrie, "The Ballad of Pretty Boy Floyd."

visited many of the world's trouble spots, we found that it was also the term favored by major rights violators. Officials in such countries repeatedly assured us that their citizens enjoy religious freedom because they can believe whatever they like and worship as they see fit. To our dismay, American diplomats in those countries often told us the same thing. In Vietnam, for example, the US Ambassador himself assured us that there was great "freedom of worship" in that country. But our meetings with religious leaders and groups told a very different story. The truth was that even worship was heavily monitored. A few days after we left Vietnam, people who had taken great risks to speak with us about governmental restrictions were arrested and jailed.³

The most powerful opposition to religious freedom in the U.S. no longer comes from the ardent secularists whose lawsuits in the 20th century resulted in many judicial limitations on religious freedom. Nor are opponents much influenced by the fear of religiously motivated violence which plays a large role in some European countries. In the U.S., the most influential opposition comes from persons and groups who see religious liberty as threatening their particular agendas, or as offensive to their concept of freedom as liberty to pursue individual self-fulfillment without constraint. They are much more hostile to religion as such than the old secularists. And they are much more prominent among opinion leaders in government, the media, the world of entertainment, and the universities.

Even organizations like the American Civil Liberties Union that were founded to defend all constitutional rights are paying less attention to religious freedom, a shift that seems to be due at least in part to the view that persons with traditional religious opinions about marriage and sexuality are undeserving of protection.⁴

The media is probably the most influential among the proponents of ideas and claims that are in tension with religious freedom, but the brain trust is in the universities. Some American constitutional law experts openly maintain that religious freedom is an unnecessary right, because (they say) everything it covers is already covered by freedom of speech and assembly.⁵ But more prevalent, and more dangerous, is the opposition to the kinds of reasonable accommodations that are nearly always possible in situations where religious freedom is in tension with other goods like non-discrimination. An extreme example is the statement by a Harvard professor that "Christians and conservatives" ought to be treated as

³ See Thomas J. Reese and Mary Ann Glendon, "Report from Vietnam," *America*, February 29, 2016, p. 1.

⁴ Richard Garnett, "Religious Accommodations and—among—Civil Rights: Separation, Toleration, and Accommodation," 88 *Southern California L. Rev.* 493, 501 (2015).

⁵ See, for example, Brian Leiter, *Why Tolerate Religion?* (Princeton: Princeton University Press, 2013); Mark Tushnet, "The Redundant Free Exercise Clause?" *Loyola University of Chicago Law Review* 33, no. 1 (2002): 71–94, at 72.

defeated enemies: “The culture wars are over, and the only question left is how to treat the losers, Christians and conservatives. I recommend taking a hard line (‘you lost, live with it’) rather than trying to reach any form of accommodation. That seemed to work reasonably well in Germany and Japan after 1945.”⁶

The posture of relentless rejection of common-sense ways to protect all the rights involved to the extent possible is of particular concern. For it is precisely the practice of making such accommodations that has enabled the United States to be a pluralistic society where many different religions not only have co-existed in relative peace, but flourished.⁷ Moreover, the fact is that reasonable accommodations are easier than opponents of religious freedom pretend.

For several decades, even the courts in the United States frequently subordinated religious freedom when it came into conflict with other claims and interests.⁸ In recent years, however, the U.S. federal courts have handed down a series of decisions that significantly eased restrictions on religious freedoms. These decisions have increased protection of the conscience rights of religious health service providers,⁹ foster care agencies,¹⁰ and proprietors of family businesses.¹¹ They have allowed religious schools and other groups to require key employees to abide by the group’s teachings.¹² And they have forbidden states to exclude religious schools from benefits that are available to other private schools.¹³ In what may turn out to be the most significant of all those decisions, the Supreme Court took a decisive move in 2022 away from a long line of decisions that had interpreted the Constitution’s First Amendment to preclude almost any government assistance to religion.¹⁴

Those recent cases represent decades of hard work, and impressive inter-faith cooperation, by religious freedom lawyers. But there are a number of reasons to be cautious about exaggerating their importance.

⁶ Bradford Richardson, “Harvard Professor: Start Treating Christian Conservatives Like Nazis,” *Washington Times*, May 10, 2016, <https://www.washingtontimes.com/news/2016/may/10/harvard-professor-start-treating-christians-nazis/>.

⁷ Richard Garnett, “Religious Accommodations and—and among—Civil Rights: Separation, Toleration, and Accommodation,” 88 *Southern California L. Rev.* 493 (2015).

⁸ For a review of the cases, see Mary Ann Glendon and Raul Yanes, *Structural Free Exercise*, 90 *Michigan L. Rev.* 477 (1991).

⁹ *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 591 U.S. ___ (2020).

¹⁰ *Fulton v. City of Philadelphia*, 593 U.S. --- (2021).

¹¹ *Burwell v. Hobby Lobby*, 573 U.S. 682 (2014).

¹² *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. 694 (2012).

¹³ *Carson v. Makin*, 596 U.S. --- (2022).

¹⁴ *Ibid.*

First, those decisions reflect, to some extent, a change in the composition of the U.S. Supreme Court. The increasing number of court decisions on socially contentious issues has caused the process of selecting Supreme Court Justices to become highly politicized, which in turn has led to sharply divided opinions in many, though not all, of the cases involving “hot button” disputes. Deeply split opinions, obviously, are not as stable as those signed by a substantial majority of the Justices.

Second, court decisions on divisive issues as to which there is no clear constitutional mandate represent failures of ordinary democratic political processes. They reflect failures in the sense that most of those cases should never have had to go to court. Most of them had common sense-solutions that could and should have been reached through the processes of bargaining, education, persuasion, and voting in which the people most affected could participate.

Third, the same decisions that are so welcome to religious freedom advocates have intensified opposition to them.

And finally there is the matter of what the recent legal victories did and did not achieve. What they mainly accomplished was to remove barriers and clear space for religious freedom to be exercised. But, the preservation of religious freedom depends ultimately on what religious groups and individuals do in that space. It is of no use to clear space if the people and groups it was cleared for don't use it. Or if they allow themselves to be intimidated into accepting unreasonable limitations on their rights, as all too many religious providers of social services have done.

In short, the main challenge for defenders of religious freedom is cultural before it is legal. On that point, I cannot do better than to quote what a great American judge said in 1944 as he presided over the naturalization of 150,000 new Americans citizens, many of whom were refugees from war-torn Europe. He said: “Liberty lies in the hearts of men and women. When it dies there, no constitution, no law, no court can save it. No constitution, no law, no court can even do much to help it.”¹⁵

I only wish that Judge Learned Hand had added one more line to that famous speech in order to make clear that good laws and constitutions, while not sufficient for the protection of liberty, are necessary. In my view, he should have said that we must never give up on law so long as liberty does live in people's hearts.

Because the battle for religious freedom depends so heavily on reaching hearts and minds, religious liberty advocates must be able to demonstrate convincingly to their fellow citizens that religious freedom is important—not just for religious

¹⁵ Reprinted in Learned Hand, “The Spirit of Liberty” (Chicago: University of Chicago Press, 1977).

individuals and groups, but for the social, political and economic health of the nations that call themselves liberal democracies. Much will also depend on whether religious leaders can motivate their followers to exercise their freedom in ways that actually show the value of religion and religious freedom to their fellow citizens, and on whether secularist leaders and their followers can free themselves of prejudice toward religion and accept that religion has a place in the public life of a pluralistic democracy.

Which brings us back to the challenges I mentioned at the beginning of this essay: How can friends of religious liberty do a better job of making the case for religious freedom in secular societies? In particular, what can they say to skeptics who are inclined to regard religion as a problem rather than as part of a solution?

I have no magic formula to suggest, but only a few ideas that may serve to spark further discussion. The first is familiar to every lawyer: know your audience. What is convincing to one person may be unpersuasive to another, and the justifications for religious liberty that seem obvious to its advocates may not resonate at all with people who have given little thought to the issues.

I do not mean to say that there is no place for rigorous theoretical defense of religious liberty as a right that goes to the very essence of human dignity. Sometimes, when dealing with well-intentioned, intelligent individuals, it is helpful to appeal to the liberal ideals of tolerance, fairness for all, appreciation of the benefits of pluralism, and the Golden Rule.

But many people are more apt to be swayed by a firsthand experience or a compelling story than by a well-constructed argument. For example, some persons, after witnessing the difference between health care provided in non-religious institutions and the care that is offered in settings staffed by religiously motivated caregivers, are moved by the difference that faith can make. From there it is only a step to understanding that the men and women who seek religious liberty in order to fulfill sacred obligations—like caring for the least of their brethren—need the freedom to be true to what inspires them in the first place to serve their fellow human beings.

In speaking with persons who regard the grant of religious or conscience-based exemptions to generally applicable rules as a “license to discriminate”, it is often possible to show that the opposite is true. There is much evidence from the American experience with religious exemptions showing not only that the practice is workable, but that it serves with two widely shared ideals: the conviction that a heterogeneous society is better and richer for its religious and cultural diversity;

and the respect for individual liberty which demands that the state should not force people to violate their most deeply held beliefs without a very good reason.¹⁶

Of course, what some people mean when they say that religious exemptions are a “license to discriminate”, is that it is okay to discriminate against religion rather than search for a way to accommodate tensions between religious freedom and other important rights. But the fact is that when core principles collide, as they increasingly do, it is not as difficult as opponents of religious freedom suggest to preserve as much of each as possible. To achieve that sort of accommodation (what German jurists call *praktische Konkordanz*) is just the sort of thing that good lawyers and statespersons know how to do well.¹⁷

My final suggestion may appear fanciful, but I offer it in the belief that the point is important. It is that religion and religious freedom are essential elements of any strategy to deal with our current environmental crisis. No, I am not referring to the well-known threats to our natural habitat. The crisis to which I refer is equally serious, but far less recognized, and entirely man-made. It is a crisis in our social environments.

The signs are all around us. They are in the fraying of the intricate webs of customs and understandings on which the success of every program, every policy, every law, and every constitution ultimately depends. They are in the deterioration of the multitudinous social structures where those customs and understandings are formed—the seedbeds of the qualities of character and competence that any healthy society requires in its citizens and statespersons.¹⁸ The best economic and social programs the human mind can devise are just words on paper until they are supported by habits and attitudes nurtured in those seedbeds. And it is at that very basic level that the world’s great culture-forming religions have a vital role to play.

¹⁶ Mark L. Rienzi, “The Case for Religious Exemptions—Whether Religion Is Special or Not,” *Harvard Law Review* 127, no. 5 (2014): 1395–1418, at 1396; see also Luke Goodrich and Rachel Busick, “Sex, Drugs, and Eagle Feathers: An Empirical Study of Federal Religious Freedom Cases,” *Seton Hall Law Review* 48, no. 2 (2018): 353–401 (showing that recent Supreme Court decisions in favor of religious liberty claimants did not, as some predicted, give rise to a hose of novel claims).

¹⁷ “According to this principle [*praktische Konkordanz*], constitutionally protected legal values must be harmonized with one another in the event of their conflict. One may not be realized at the total expense of the other. Both are to be preserved in creative tension with one another.” Donald P. Kommers, “German Constitutional Law: A Prologomenon,” *Emory Law Journal* 40, no. 3 (1991): 837–73, at 851.

¹⁸ See Mary Ann Glendon, “The Cultural Underpinnings of America’s Democratic Experiment,” in *Building a Healthy Culture*, ed. Don Eberly (Grand Rapids: Wm. B. Eerdmans, 2001), 41–58.

Many factors, of course, have contributed to the current crisis, but one whose influence on social environments is often under-rated is globalization. One longtime political-economic analyst has written that the more he observed the system of globalization at work, the more he realized that it had unleashed forces that could “uproot cultures at a pace never before seen in human history.”¹⁹ He pointed out that, “you cannot build an emerging society if you are simultaneously destroying the cultural foundations that cement your society and give it the self-confidence and cohesion to interact properly with the world. Without a sustainable culture there is no sustainable community and without a sustainable community there is no sustainable globalization.”²⁰

As far back as 1991, Pope John Paul II warned that threats to the mediating structures of civil society were even more serious than the threats to our natural habitat. He wrote in *Centesimus Annus*:

In addition to the irrational destruction of the natural environment, we must also mention the more serious destruction of the human environment.... Although people are rightly worried — though much less than they should be — about [the former], too little effort is made to safeguard the moral conditions for an authentic “human ecology” (*CA*, 38).

Pope Francis later repeated that call, pointing out that “social environments, like natural environments, need protection.”²¹ He deplored that humanity has been too slow to recognize the risks that now amount in his words to a “human ecological crisis”. “It is essential,” he said, “that we foster a new human ecology and make it move forward.”

Today, the “ecological” argument for religious freedom is bolstered by a growing social science literature that shows a strong correlation in pluralistic societies between religious freedom and religion and a wide range of social goods—political stability, social harmony, economic growth, and the absence of religion related violence.²²

¹⁹ Thomas Friedman, *The Lexus and the Olive Tree* (New York: Farrar Straus Giroux, 2000), 23.

²⁰ *Id.* at 302.

²¹ Pope Francis, Address to the International Colloquium on the Complementarity between Man and Woman https://www.vatican.va/content/francesco/en/speeches/2014/november/documents/papa-francesco_20141117_congregazione-dottrina-fede.html

²² For a country-specific study, see Brian Grim and Melissa Grim, The Socio-economic Contributions of Religion to American Society: an empirical analysis, 12 *Interdisciplinary Journal of Research on Religion* 1-31 (2016).

I am sure that creative jurists like those assembled at the 2022 conference on “Limitations and Violations of Religious Freedom” where this paper was presented can think of many more ideas than the ones I have suggested. I close these reflections, therefore, with profound gratitude to Deputy Minister Dr. Marcin Romanowski and Director Jaroslaw Szymanek of the Center for European Policy Studies for organizing that memorable event.