

Freedom “for” Religion:
(Yet) Another View of the Cathedral

Richard W. Garnett¹

In the early 1890s, the French Impressionist Claude Monet composed a series of more than 30 paintings of the towering Gothic Rouen Cathedral in Normandy, France. I imagine that many of you have seen at least some of them; perhaps some of you have been lucky enough to see the cathedral itself. The artist had rented rooms and set up a studio across the street, with the aim of capturing – over many months -- how the fog, rain, dust, and especially – as always, for Monet – the light both affected and carried the appearance, and especially the colors, of the structure’s windows, statues, portals, and arches. As one critic has noted, “By focusing on the same subject through a whole series of paintings, Monet was able to concentrate on recording visual sensations themselves. The subjects did not change, but the visual sensations – due to changing conditions of light – changed constantly.”

I imagine him waking up, each morning, and – as he throws open the window-shutters, wondering, “what will I see today?”

¹ Paul J. Schierl / Fort Howard Corporation Professor of Law and Concurrent Professor of Political Science, University of Notre Dame.

About 80 years later, in one of the most cited American law-review articles ever, *One View of the Cathedral*, my torts teacher Guido Calabresi and his co-author Douglas Melamed borrowed the inspiration behind Monet's Cathedral Series in an effort to provide a unified theory of rights, or "entitlements", and how they are protected by legal rules. (I would describe the theory here, but I'm afraid I would get it wrong.) They noted, among other things that some phenomena, like "legal relationships," are "too complex to be painted in any one picture."

The theme of this conference, and the many papers that have been presented so far, suggest to me that much the same thing can be said about "religious freedom." Indeed, while Monet initially composed around thirty "views" of *his* cathedral, we at this gathering will present (by my count) one hundred of *ours*. And while he took advantage of changing seasons, weather, air, and light to emphasize and illuminate the many features and facets of *his* subject, we have used four prepositions – "of, for, from, and within" -- to engage and unpack the "different dimensions" of ours. Our subject, it seems to me, is the moral, human, and legal right to "religious freedom." And, thanks to our conference hosts' inspired idea, these four everyday, unremarkable words have provided – like four different window or, perhaps, four different tables at an outdoor café across the street from the Cathedral – different vantage points, from which we can see shades and details that, depending on the light, might be less visible to a colleague at

another window, or at another table. Through our conversations at this gathering, by “comparing notes” on what we see, there is the possibility of a richer, more complete picture of the whole.

What’s more, I think we have seen these four unassuming connection-words have provided us with many more than just *four* views of our Cathedral. When English speakers like me learn Spanish, one of the challenges is to appreciate the fact that our word, “for”, is translated as both “*por*” and “*para*.” In turn, each of those Spanish words can mean a variety of different English prepositions and phrases. Similarly, it has been interesting to notice, these past two days, that we do not all understand in the same way either the perspective that each of our conference theme’s four words provides on “religious freedom” or the relationship that each suggests between “religion” and “freedom.”

Take, “from”, for example: Given my own experiences, as a lawyer in the United States, I tend associate “freedom from religion” with the aggressive and exaggerated anti-religious stance of activist groups like the “Freedom from Religion Foundation” and with the view argument that one has a right – or the “freedom” – to not be offended by, or even to encounter, unwelcome religious arguments, believers, and symbols in the public square. However, as we have seen at this gathering, someone from another environment might well understand it as the freedom of religious dissenters and minorities not to be coerced or persecuted

by the state in the name of official religious orthodoxy or the demands of political unity. This person's view of the cathedral from the "freedom from" window might well, and understandably, be different from mine.

Similarly, there are lawyers and scholars for whom "freedom *within* religion" has to do with the authority, and perhaps even the obligation, of the state to regulate the internal goings-on of more traditional religious institutions and communities, so as to bring their practices and rules more in line with those of the liberal state, and to guarantee the "freedoms" of those who, the fear is, are trapped in or oppressed by and "within" those communities. For me, though, the "freedom within" table at the café affords a direct view – and, in a way, the opposite view -- of the crucial right of church autonomy, of the ancient idea of the "freedom of the church", and of one of the topics for the next session, that is, the ministerial exception. For me, in other words, to consider "religious freedom" through the lens of "within" is to see the incompetence, and the lack of jurisdiction, on the part of the state when it comes to church polity and religious affairs. From here, the light does not reveal, to me, a warrant for a progressive rescue mission or for an ambitious state-sponsored renovation scheme of traditional teachings and practices.

And even as I consider my own assigned position at the "freedom for" table – and I promise to leave behind soon this "café across from the cathedral" device – it seems to me that I could ask at least three different questions about our subject:

The first is, “What is religious freedom *for*?” Is the *purpose* of our legal religious-freedom regimes to, say, advance the very practical goal of promoting civil peace – perhaps even civic virtue. Is it to dampen and mute religious strife and division? Or, as my friend and mentor John Garvey contended, 20 years ago in his book, *What Are Freedoms For?*, is its purpose to promote real human flourishing and to make it easier to pursue what is, in fact, a “good thing” for human persons, namely, the search for transcendence?

A second possibility: Maybe the benefit of the “freedom for” perspective is that it reminds us that it is “*freedom*” we should aim to provide for religious actors – not merely toleration, for example, or a safe haven at the margins, and in private. In other words, we might come to see that to pursue “freedom for” religion is to refuse to settle for privatization, for *laicite*, for conditional access to civic life or political participation, or for a “naked public square.”

Or, finally, a third line of inquiry, which – after this probably too-long set up! – is what I want to propose briefly to you this afternoon. As I see it, the invitation to consider “freedom *for* religion”, as one “dimension” of the right to religious freedom, is an invitation to ask, “what are the necessary or helpful *conditions* that help make religious freedom a healthy reality? What does religious freedom *need* to function and thrive?”

* * * * *

To develop this proposal, I would like to begin with a few passages from the *Declaration on Religious Freedom*, which was issued 50 years ago at the close of the Second Vatican Council. Taking what was seen by many at the time as a major step, the Declaration affirmed that “the human person has a right to religious freedom” and that this right “has its foundation in the very dignity of the human person as this dignity is known through the revealed word of God and by reason itself.”² That is, the Council fathers insisted, the “right to religious freedom has its foundation not in the subjective disposition of the person, but in his very nature.”³ The freedom of religion, then, is justified in terms of *moral anthropology*—in terms of an account of who we really are, and what we’re really for—and not in terms of political convenience, benefit, or necessity. It is a pre-political possession, and not a state-granted concession.

This idea that religious freedom is a fundamental human right, one that every person, precisely because he or she is a person, enjoys—like the idea that human rights are not mere conventions but are instead implications of the truth about what human persons really are—is now a familiar and perhaps even an uncontroversial one. After all, for many today, what Michael Perry has called “the morality of human rights” *is* morality. On this point, the Declaration could be read

² DH 2.

³ DH 2.

as simply echoing the 1948 Universal Declaration of Human Rights (1948), which proclaimed, among other things, that “[a]ll human beings are born free and equal in dignity and rights” and that “[e]veryone has the right to freedom of thought, conscience and religion.”⁴

Some *other* passages in the Declaration, however, are – in the United States, anyway – less familiar and, perhaps, more controversial. At first, these passages might not seem to “fit” well with North American traditions of “church-state separation” and official “neutrality.” In my view, though, they are intriguing, and could help us understand what it means to say, or to embrace, “freedom *for* religion.” Of course, at this gathering, I offer them not as authoritative religious texts but as arguments, offered to “all people of good will,” about the entailments of the human right to religious freedom.

* * * * *

Consider, first, this passage:

Since the common welfare [or, the “common good”] of society consists in the entirety of those conditions of social life under which men and women enjoy the possibility of achieving their own perfection in a certain fullness of

⁴ Universal Declaration, Arts. 1, 18.

measure, and also with some relative ease, it chiefly consists in the protection of the rights . . . of the human person.⁵

This passage, in turn, is complemented by another:

The protection and promotion of the inviolable rights of the person ranks among the essential duties of government. Therefore, government is to assume the safeguard of the religious freedom of all its citizens, in an effective manner, by just laws and by other appropriate means.

Government is also *to help create conditions favorable to the fostering of religious life*, in order that the people may be truly enabled to exercise their religious rights and to fulfill their religious duties”⁶

And, finally, consider one more, which sounds a similar note:

Government therefore ought indeed to take account of the religious life of the citizenry *and show it favor*, since the function of government is to make provision for the [“common good”].”⁷

* * * * *

Taken together, these passages make a claim that is -- particularly for someone engaged in the law-and-religion enterprise in the United States -- an intriguing and maybe unsettling one, namely, that it is the business and duty of

⁵ DH 6 (citation omitted).

⁶ DH 6 (citation omitted) (emphasis added).

⁷ DH 3

government to promote and secure the “common good” of society, and this task includes not only preventing violations of persons’ rights but also helping to *create conditions in society* that are “favorable to the fostering of religious life.” A government that is doing its job, in other words, is not blind or indifferent to the existence and the flourishing of the “religious life of the citizenry.” Instead, such a government will, again, “take account of the religious life of the citizenry *and show it favor*[.]”

Constitutional law in the United States can take on board pretty easily the Declaration’s statements about the foundations of religious freedom in the objective dignity of the human person. But what about this latter claim, about “creating conditions” and “showing favor”? Is this an atavistic or reactionary call for throne-and-altar arrangements, or an anachronistic embrace of the old notion of *cura religionis*, that is, that it is the business, and indeed the duty, of civil authorities to look after the true faith?

I don’t think so.

Still, there does seem to be a disconnect, and perhaps some dissonance, between this claim and the various pronouncements over the years by the U.S. Supreme Court regarding the First Amendment to our Constitution. Didn’t James Madison – “the father of the Constitution” – famously insist that religion is “wholly exempt from [the] cognizance” of government and that government

attempts to support it could only result in perversion and corruption? What about the black-letter requirements of the Court's so-called "*Lemon* test" that all state actions have a "secular purpose," that public policies not "advance" or "support" religion, and that laws and regulations not excessively "entangle" government and religion (or, we might add, the "religious life of the citizenry")? What about the "wholesome," but still "strict neutrality" that, according to Justice Clark in his school-prayer opinion, the First Amendment commands?

In his recent, important book, "Defending American Religious Neutrality," my friend Prof. Andrew Koppelman – as the title suggests -- "defends American Religious Neutrality" as "coherent and attractive" (p. 1). It turns out, though, that the coherence and attractiveness of the regime Koppelman defends depends substantially on its *not* being entirely "neutral." The government is not required, by Koppelman's understanding of neutrality, to be religion-blind or indifferent to religion, and it is certainly not required to be leery of or hostile to it. Instead, "American religious neutrality" permits governments and officials to regard religion – at a high level of generality – as a good thing, and to act accordingly (p. 19).⁸ In his account, the state is to be "silent about religious truth" (p. 25) but this silence may be accompanied or complemented by policies – like religion-based

⁸ See John H. Garvey, *An Anti-Liberal Argument for Religious Freedom*, 7 J. CONTEMP. LEGAL ISSUES 275, 283 (1996).

accommodations from generally applicable laws – that both reflect and communicate the view that “religion as such . . . [is] valuable” (p. 7).

Maybe one way to put the matter is to say that the religious-liberty regime in the United States aims to be “neutral” with respect to the truth of (most) religious claims precisely because it is *not* “neutral” – it does not aim to be neutral, it should not be neutral – regarding the good of *religious freedom*. Religious freedom is not what results from the operationalization in law of hostility toward religion. It is not simply a mechanism for conflict-avoidance or division-dampening. It is, instead, a valuable and necessary feature of any attractive legal regime, because it reflects, promotes, and helps to constitute human flourishing. So yes, the state should remain “neutral” with respect to most religious questions – primarily because the resolution of such questions is outside the jurisdiction of civil authorities – but it may and should affirm enthusiastically that *religious freedom* is a good thing and that it should be not only protected, but also nurtured, by law and policy.

Again, it was for centuries widely thought that the “secular” authority was charged by God with the direct care of true religion itself.⁹ On this view, it was not the obligation of such a “secular” authority, because it was “secular,” to keep

⁹ John Courtney Murray, S.J., *The Declaration on Religious Freedom*, in *WAR, POVERTY, FREEDOM: THE CHRISTIAN RESPONSE* (1966).

itself somehow “separate” from “religion.” It was, instead, the sacred obligation of the political authority to “defend the faith,” even as it respected the appropriate (but usually contested) domain and independence of religious authorities.

This way of thinking has, of course, been abandoned in the West, including in those nations that retain what John Adams might have called “mild and equitable” religious establishments. It has also been abandoned by most religious communities and authorities, and it seems to have been abandoned in the *Declaration on Religious Freedom*. As I understand the *Declaration*, the government’s function with respect to religion is “secular”, as that word was helpfully clarified this morning by Professor Calo. Its task is not to care directly for the true religion, but is, instead – in John Courtney Murray’s words – “confined to a care of the free exercise of religion within society – a care therefore of the freedom of the Church and of the freedom of the person in religious affairs.”¹⁰ This task is, again, “secular,” because – again, quoting Murray -- “freedom in society [is] a secular value – the sort of value that government can protect and foster by the instrument of law.”¹¹

Again, the *Declaration* affirms that governments should “help create *conditions* favorable to the fostering of religious life” and “take account of the

¹⁰ *Id.*

¹¹ *Id.*

religious life of the citizenry and show it favor.”¹² This stance is not “neutral” toward religious freedom. It is, however, consistent with an attractive and “healthy secularity.”

So, how might this work in practice? How might secular, political authorities “care” for “the freedom of the person in religious affairs”; “create conditions favorable to the fostering of religious life”; and “take account of the religious life of the citizenry and show it favor”? Part of the answer is easy: governments “foster[] . . . religious life” by not obstructing or unduly limiting it, and – in the United States, anyway -- by enforcing (legislatively, judicially, and in the course of administration and regulation) the Constitution’s no-establishment rule and antidiscrimination norm. I am interested, though, in something more, in “freedom for” as well as “freedom of” and “freedom from.”

Another part of the answer is, admittedly, more controversial today: governments should broadly and generously accommodate religiously motivated activity, through exemptions and otherwise, even when it does not have to, consistent with the requirements of justice and public order and with the rights of others.

¹² *Id.* at par. 6.

Again, however, I wonder if there is anything more. What other “conditions” are favorable to religious freedom, and in what other ways (if any) may governments “show . . . favor” to “the religious life of the citizenry”? Remember, the question is not whether governments like ours are still charged with the *cura religionis* – the care of the true religion. They are not. But they could be – I think they are – charged with the care of *religious freedom*. How might they fulfill this charge?

I have proposed elsewhere that governments should build, maintain, and nurture the “infrastructure” of religious freedom. In so doing, I am borrowing from Jack Balkin, who argues, with respect to the freedom of speech, that it requires “more than mere absence of government censorship or prohibition to thrive; [it] also require[s] institutions, practices and technological structures that foster and promote [it].” That is, and as Paul Horwitz has thoughtfully shown, certain institutions – newspapers, political parties, interest groups, libraries, universities and so on – play an important structural, or “infrastructural,” role in clearing out and protecting the civil-society space within which the freedom of speech can be well exercised. The same thing can be said, I think, about religious freedom. Just as the “[f]reedom of speech . . . depends on an infrastructure of free expression,” the freedom of religion depends on an infrastructure of, well, religious freedom. Part of this infrastructure – in addition to its more obvious components,

like open and functioning courts, legal accommodations, thriving communications networks, etc. – is a web of independent, thriving, distinctive, self-governing (in their appropriate spheres) institutions. Thus, the recent *Hosanna-Tabor* decision can be seen as a welcome judicial reinforcement of religious freedom’s infrastructure, of the conditions that are useful, or even necessary, for its health. The political community can protect religious freedom appropriately only if there are at work in society free associations and authorities that are not merely political.

* * * * *

What else?

In a recent essay, my colleague Gerard Bradley—echoing Pope Emeritus Benedict XVI—reminds us that “religious freedom is . . . an achievement of a sound political and juridical *culture*.” To rephrase, “religious liberty is a cultural achievement.” And, he suggests, it is one that “history and current events show to be uncommon, and fragile.” Without the “right cultural stuff,” he warns, “a scheme overridingly committed to each one’s free quest for religious truth is likely to derail into an enabler of individual self-invention, individuality for its own sake, subjectivity, or identity.” Far from providing a strong and necessary *infrastructure* for religious freedom, this sort of subjectivity “corrodes the undercarriage of religious liberty[.]”

The Declaration speaks of the “conditions” in which religious freedom thrives, but it has little to say about what those conditions are, beyond—again—a legal regime that protects the rights of persons, families, and communities. However, and as Bradley notes, other documents of the Second Vatican Council brimmed with references to the importance of culture. Can we say anything about what a well-functioning cultural infrastructure would look like?

For starters, and obviously, it is necessary that citizens be informed, and formed to appreciate, not only that religious freedom is a fundamental human right but also that respecting that right sometimes – not always, but sometimes – requires creating exemptions for religiously motivated conduct from well-intended and otherwise valid laws and regulations. This appreciation, and a willingness to act in accord with it, cannot be taken for granted, and should not be assumed to arise and thrive unaided or unencouraged. “Liberty,” as Learned Hand reminded us, “lies in the hearts of men and women; when it dies there, no law, no court can save it[.]”¹³ A culture that has uncritically absorbed, and that too enthusiastically promotes, the view that respect for religious freedom consists only of those concessions that cause no inconvenience, and is not, instead, what is owed by a

¹³ LEARNED HAND, *THE SPIRIT OF LIBERTY* 144 (1952).

political community to human dignity, is probably not one in which the “conditions” are “favorable” for religious life.

More specifically, such a culture should cultivate and act in accord with an attitude that is not merely reactive. It should not settle for identifying and lifting, to the extent possible, the burdens that, given our relative religious diversity, will inevitably be imposed even by conscientious legislators. It should, instead, resolve to proactively create and care for “conditions for the fostering of religious life,” the conditions within which “people may be truly enabled to exercise their religious rights and to fulfill their religious duties.” To be clear: such a resolution, and such attention, need not involve abandoning the well-established rule in American constitutional law that civil governments’ legislation should have a “secular purpose”¹⁴; it simply recognizes that non-coercive support for the conditions – again, the infrastructure – that make it possible for people to pursue a human good and enjoy a human right *does* have an appropriately, and healthily, “secular” purpose.

In any event, that’s how the Cathedral looks, in this light, from my window.

Thank you very much.

¹⁴ See generally, Andrew Koppelman, *Secular Purpose*, 88 VA. L. REV. 87 (2002).