

ESSAY

MAKING THE CASE FOR RELIGIOUS FREEDOM IN SECULAR SOCIETIES

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This is the text of the opening keynote lecture delivered at the conference, “Is Religious Freedom under Threat?,” Christ Church, Oxford, May 23–25, 2018, convened by Oxford University’s McDonald Centre for Theology, Ethics and Public Life and Emory University’s Center for the Study of Law and Religion.

It is truly an honor to deliver the opening lecture for this McDonald Conference titled “Is Religious Liberty under Threat?” Since it was only four years ago that I had given a talk on that subject for the *Oxford Journal of Law and Religion’s* Summer Academy, which built in turn upon my Harold Berman Lecture at Emory University two years before,¹ I have had to give some serious thought to how I might avoid repeating myself. Yet when I looked back over what I said on those occasions, I wished that I had dwelt less upon the threats and more on the challenge of how to address them. What I would like to do in this lecture, therefore, is to offer some suggestions in the hope of stimulating discussion about how to make the case for religious freedom as a fundamental human right in today’s increasingly secular liberal democracies.

For me, as I imagine for most religious freedom advocates, the title of this McDonald Conference sounds like a rhetorical question on the order of “Does the pope go to Mass?” But there should be no mistake about the fact that for a very large proportion of our political leaders and fellow citizens, the answer is “No.” A poll in the United States tells us that 56 percent of Americans do not believe that religious liberty is being threatened.² Many people, in fact, would say that religious freedom itself is a threat! That seems to be the view of over 60 percent of the people polled in Great Britain, Germany, Australia, Belgium, Spain, and Sweden, who stated that they believe religion does more harm than good.³

Given the 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 would be surprising if concern for freedom of religion had not declined. The more that people come to see religion as a private, solitary activity, or as something like a hobby, the greater the likelihood that their concern about full, robust free exercise as envisioned in Article 18 of the Universal Declaration of

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- 1 Mary Ann Glendon, “Is Religious Freedom an ‘Orphaned Right?’” in *The Changing Nature of Religious Rights under International Law*, ed. Malcolm Evans, Peter Petkoff, and Julian Rivers (Oxford: Oxford University Press, 2015), 1–8; Glendon, “The Harold J. Berman Lecture. Religious Freedom: A Second Class Right?” in “In Memoriam: David J. Bederman,” special issue, *Emory Law Journal* 61 (2012): 971–90.
 - 2 Robert P. Jones and Daniel Cox, “Majority of Americans Do Not Believe Religious Freedom Is under Attack,” Public Religion Research Institute, March 15, 2012, <http://www.prii.org/research/march-rns-2012-research/>.
 - 3 Dyfed Loesche, “Good God?” *Statista*, October 13, 2017, <https://www.statista.com/chart/11473/religion-more-harm-than-good/>.

Human Rights is apt to diminish.⁴ This leads me to believe that one of the greatest threats to religious freedom at home and abroad is the widely held opinion that it is not under threat. If that is so, then one of the most pressing challenges for defenders of religious freedom is to make their case more persuasively and effectively.

Since the challenges for religious freedom advocates are quite different in the international context from those in the liberal democracies, I will begin with some observations based on my experiences on the United States Commission for International Religious Freedom (USCIRF), highlighting the difficulties of getting attention for religious freedom violations in the world's worst trouble spots. Then I will turn briefly to some recent developments in Europe and the United States. And I will conclude with some thoughts about the problem that perplexes me most lately: How do we make the case for the fundamental human right of freedom of religion and belief to different sorts of audiences in a world where that right is little valued—not only by militant secularists and intolerant religious zealots—but by increasing numbers of our friends, colleagues, and fellow citizens?

INTERNATIONAL RELIGIOUS FREEDOM

Given the massive evidence of violent and systematic religious freedom violations in many parts of the world, it is easier in what I hope one may still call the liberal democracies to make the case for protecting the religious liberty of persons in faraway lands than when one is speaking of the types of infringements we see at home. That is not to say it is easy to persuade domestic decision-makers to address atrocities abroad; just that making the case is easier.

USCIRF's annual report for 2017 began with the statement that “[b]latant assaults have become so frightening—attempted genocide, the slaughter of innocents, and wholesale destruction of places of worship—that less egregious abuses go unnoticed or at least unappreciated.”⁵ In its 2018 report, USCIRF warned of an “ongoing downward trend” including “genocide and other mass atrocities, killings, enslavement, rape, imprisonment, forced displacement, forced conversions, intimidation, harassment, property destruction, the marginalization of women, and bans on children participating in religious activities or education.”⁶ Add to this that some of the most populous countries are among the worst violators, which means, according to the Pew Research Center, that almost 80 percent of the world's inhabitants live in countries where there are “high” or “very high” levels

4 Universal Declaration of Human Rights, G.A. Res. 217A, art. 18, U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N. Doc. A/810 (Dec. 12, 1948) (“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 private, to manifest his religion or belief in teaching, practice, worship and observance.”).

5 United States Commission on International Religious Freedom, *2017 Annual Report*, April 2017, 1, <https://www.uscirtf.gov/sites/default/files/2017-USCIRFAnnualReport.pdf>; see also “Global Restrictions on Religion Rise Modestly in 2015, Reversing Downward Trend,” Pew Research Center, April 11, 2017, <http://www.pewforum.org/2017/04/11/global-restrictions-on-religion-rise-modestly-in-2015-reversing-downward-trend/>. Restrictions continued to climb in 2016: “Global Uptick on Government Restrictions on Religion in 2016,” Pew Research Center, June 21, 2018, <http://www.pewforum.org/2018/06/21/global-uptick-in-government-restrictions-on-religion-in-2016/>.

6 United States Commission on International Religious Freedom, *2018 Annual Report*, April 2018, 1, <https://www.uscirtf.gov/sites/default/files/2018USCIRFAR.pdf>.

of governmental and/or societal restrictions on religion.⁷ By all indications, the world is an increasingly hostile place for religious individuals and groups—Christians, Jews, Muslims, Baha'is, Yazidis, Hindus, Sikhs, and many others.

In many cases, it is difficult to discern the extent to which these severe restrictions and hostilities are *driven* by religious, as distinct from the ethnic and political, factors with which they are frequently entangled.⁸ But the *impact* on the religious freedoms of those affected is indisputable.

Among those severely affected, all indications are that Christians are currently the principal targets of religiously motivated violence and oppression, with an estimated 200 to 600 million suffering harsh persecution in Iran, Somalia, Syria, Pakistan, North Korea, and Nigeria.⁹ Obviously, the denial of a fundamental human right is a serious matter no matter who is the victim, but it is notable that the media tends to underreport the degree to which Christians are disproportionately affected.¹⁰

Sad to say, international religious freedom violations of *all* types tend to be underreported, and not only by the media. One of the world's most important human rights organizations, Human Rights Watch, for example, touched on religious persecution in only eight out of its 323 reports over a three-and-a-half-year period.¹¹ This neglect undoubtedly contributes to the widespread belief that religious freedom is not under threat. And that belief, in turn, may help to explain why, in countries that generally pride themselves on their commitment to human rights, it so often proves difficult to get government officials to pay attention to horrifying violations of religious freedom around the world.

Let me give a couple of examples from my service with USCIRF. In 1998, the US Congress by a nearly unanimous vote made it a foreign policy priority for the United States to advocate for religious freedom and for persons who are suffering from religious persecution.¹² Yet until very recently US State Department representatives were slow to embrace that priority. Many of them deliberately avoided the term “religious freedom,” using the narrower term “freedom of worship” instead. That phraseology is strikingly at variance with Universal Declaration of Human Rights Article 18, which guarantees the right to “manifest [one’s] religion or belief in teaching, practice, worship and observance” and to do so “either alone or in community with others and in public or private.”¹³

7 Michael Lipka, “Religious Restrictions Vary Significantly in World’s Most Populous Countries,” *Fact Tank*, Pew Research Center, April 13, 2017, <http://www.pewresearch.org/fact-tank/2017/04/13/religious-restrictions-vary-significantly-in-the-worlds-most-populous-countries/>.

8 Malise Ruthven, “Fundamentalist and Other Obstacles to Religious Toleration,” in *Universal Human Rights in a World of Diversity: The Case of Religious Freedom*, ed. Mary Ann Glendon and Hans E. Zacher, Pontifical Academy of Social Sciences Acta 17 (Vatican City: Pontifical Academy of Social Sciences, 2011), 456–74.

9 According to estimates cited in the 2015–2017 report of Aid to the Church in Need, *Persecuted and Forgotten: A Report on Christians Oppressed for Their Faith* (2017), <https://acnuk.org/persecuted/>. In announcing the report, Aid to the Church in Need stated that “Christians are the victims of at least 75% of all religiously-motivated violence and oppression.” <https://www.acnireland.org/persecuted-and-forgotten-2017/>.

10 John Allen, *The Global War on Christians: Dispatches from the Front Lines of Anti-Christian Persecution* (New York: Image Press, 2013); Jonathan Fox, *The Unfree Exercise of Religion: A World Survey of Discrimination against Religious Minorities* (Cambridge: Cambridge University Press, 2016), 190.

11 Daniel Philpott and Timothy Shah, eds., *Under Caesar’s Sword: How Christians Respond to Persecution* (Cambridge: Cambridge University Press, 2018), 1.

12 International Religious Freedom Act of 1998, Public Law 105–292, 112 Stat. 2787 (as amended by Public Law 106–55, Public Law 106–113, Public Law 107–228, Public Law 108–332, and Public Law 108–458).

13 Universal Declaration of Human Rights, art. 18.

The term “freedom of worship” also sends an unfortunate signal.¹⁴ For that is the very expression favored by officials in countries that are notorious for religious freedom violations. For example, when USCIRF delegations visited Pakistan, Turkey, and Vietnam, we were repeatedly assured by officials in those countries that their citizens enjoy religious freedom because they can believe whatever they like and worship as they see fit. In Pakistan, our first stop was a visit to the US Embassy, where we were blandly assured by an American diplomat that there was “more freedom of worship in Pakistan than anywhere in the Middle East.” Then we met with several Pakistani officials who told us the same thing. But we soon learned that even worship services were heavily monitored, and two days after we left, two Christian churches were bombed in Lahore, with fifteen persons killed and seventy-two wounded.

Similarly, in Vietnam, our delegation was assured by the US ambassador himself that there was great “freedom of worship” in that country. But our meetings with religious leaders and groups told a very different story.¹⁵ A few days after we left Vietnam, several people who had taken great risks to speak with us about governmental restrictions were arrested and jailed.

It is not as though the US government has no means at its disposal for implementing the congressionally established priority for promoting religious freedom in foreign policy. The International Religious Freedom Act specifically mentions a broad range of measures: diplomatic inquiries and protest, condemnation within international organizations, delay or cancellation of cultural exchanges or official visits, reduction or termination of financial assistance, imposition of trade sanctions, withdrawal of the chief of mission, and so on. Even threats of doing these things can sometimes be effective. Often, merely shining the spotlight of publicity on atrocities is helpful.

So how can political decision-makers be persuaded to use these tools? One of the most frustrating obstacles encountered by international religious freedom advocates is the difficulty of convincing governmental actors to pay attention to even the most shocking cases. Moreover, even when political leaders in one country are willing to speak out or act, the fact is that a single country acting alone will always be suspected, rightly or wrongly, of being motivated primarily by its own geopolitical concerns.

Fortunately, however, there is some good news to report. One encouraging development was the decision of the United States State Department to host its first-ever Ministerial to Advance Religious Freedom in July 2018. In his remarks on that occasion, US secretary of state Michael R. Pompeo asserted the United States’ “unwavering commitment to promoting and defending religious freedom.”¹⁶ Another sign of progress is the growth of a religiously diverse group of legislators from a growing number of countries who have banded together to speak with a common voice in support of, and in solidarity with, victims of religious persecution. In 2014, a handful of five parliamentarians from different countries, plus a few delegates from USCIRF, got together in London to discuss possibilities for a coordinated international effort in support of religious freedom.¹⁷ Just a few months later, those discussions led to a joint event in Brussels, co-sponsored by USCIRF and the European Parliament’s Working Group on Freedom of Religion or Belief. At

14 As pointed out by the United States Commission on International Religious Freedom, *2010 Annual Report*, May 2010, 17, <http://www.uscifr.gov/sites/default/files/resources/annual%20report%202010.pdf>.

15 For a detailed account, see Thomas J. Reese and Mary Ann Glendon, “Report from Vietnam,” *America*, February 29, 2016.

16 Michael R. Pompeo, “Remarks at the Ministerial to Advance Religious Freedom,” July 26, 2018, <https://www.state.gov/secretary/remarks/2018/07/284550.htm>.

17 For firsthand accounts, see Knox Thames, “Statement on Denmark’s National Religious Freedom Day 2018,” US Embassy in Denmark, January 16, 2018, <https://dk.usembassy.gov/national-religious-freedom-day-2018/>; Jackie Wolcott and Sandra Jolley, “Legislators Abroad United for Religious Freedom,” *Hill*, November 14, 2016.

the Brussels gathering, a capacity crowd heard presentations by Baroness Elizabeth Berridge, who chairs the British Parliamentary Group on Freedom of Religion and Belief; Heiner Bielefeldt, the UN special rapporteur on freedom of religion or belief; USCIRF's then chair, Katrina Lantos Swett; and others.

By November of that same year, those efforts had awakened enough interest to produce the founding of the International Panel of Parliamentarians for Freedom of Religion or Belief. The launching ceremony was held in the Nobel Peace Centre in Oslo and was attended by over thirty parliamentarians, all of whom signed a charter pledging to advance religious freedom in accordance with UDHR Article 18. All that happened in the space of a year!

By 2018, that network had grown to over a hundred parliamentarians from all over the world. In its short life it has already led to the formation of legislative caucuses in several countries to promote religious freedom, the issuance of several joint letters addressing religious freedom issues with officials in Pakistan, Myanmar, Indonesia, and North Korea, and to the first of what one hopes will be a series of fact-finding visits to countries of particular concern. The rapid growth of this global parliamentary network was cited in USCIRF's 2018 report as a "real reason for optimism" on an otherwise bleak international religious freedom landscape.¹⁸

RELIGIOUS FREEDOM IN THE LIBERAL DEMOCRACIES

Turning now to the state of religious freedom in the liberal democracies, the picture is less dramatic but nevertheless ominous. Few victims of religious discrimination have lost their lives, but many are losing their livelihoods and their ability to participate in public life while being true to their deepest beliefs. Though restrictions, discrimination, and hostilities are less severe in Europe and the United States than in many other parts of the world, they are increasing.¹⁹ Moreover, I would argue, they are increasing in ways that are harmful to the social ecology upon which every democratic polity depends, because inroads on religious freedom undermine many institutions of civil society that foster the qualities of mind and character that a free society requires in its citizens and statespersons.²⁰

Where religious freedom in Europe is concerned, there are, needless to say, significant differences from country to country. But we learn from the Pew Research Center that both government restrictions and social hostilities are on the rise there,²¹ with increases in social hostilities particularly directed at Muslims and Jews in some countries.²²

18 United States Commission on International Religious Freedom, *2018 Annual Report*, 2.

19 See Thomas F. Farr, "The Ministerial Exception: An Inquiry into the Status of Religious Freedom in the United States and Abroad," in *Religious Freedom and the Law: Emerging Contexts in Freedom for and from Religion*, edited by Brett G. Scharffs, Asher Maoz, and Ashley Isaacson Woolley (London: Routledge, 2019), chapter 2.

20 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, at 46.

21 Katayoun Kishi, "Government Harassment, Use of Force against Religious Groups Increased Sharply in Europe in 2015," *Fact Tank*, Pew Research Center, April 11, 2017, <http://www.pewresearch.org/fact-tank/2017/04/11/government-harassment-use-of-force-against-religious-groups-increased-sharply-in-europe-in-2015/>.

22 Katayoun Kishi, "Muslims, Jews Faced Social Hostilities in Seven-in-Ten European Countries in 2015," *Fact Tank*, Pew Research Center, April 12, 2017, <http://www.pewresearch.org/fact-tank/2017/04/12/muslims-jews-faced-social-hostilities-in-seven-in-ten-european-countries-in-2015/>; see also, "Report Finds Dramatic Increase in anti-Semitic Harassment in the West," *Catholic News Agency*, April 28, 2018, <https://www.catholicnews-agency.com/news/report-finds-dramatic-increase-in-anti-semitic-harassment-in-the-west-54602#.Wu3kq8G9vAA.email>.

Fear of religiously motivated violence, together with increasing secularism, greatly complicates the task of defending religious freedom in Europe. I may be mistaken, but it seems to me that there has not been a vigorous push-back against such measures as restrictions on the conscience rights of medical personnel who decline to perform euthanasia or abortions; or against legal prohibitions of kosher and halal slaughter; or against bans on the conspicuous public display of religious symbols by government workers and students in public schools. In some places, there have been incidents in which priests and ministers were investigated simply for expressing traditional beliefs on sexuality while preaching or in newspaper interviews.²³ With the legalization of same-sex marriage, it is only to be expected that conflicts will increase between the rights of individuals to be free of unjust discrimination on account of their sexual orientation and the rights of groups and individuals to be free of unjust discrimination on account of their religious beliefs about sex and marriage.

The situation in the United States is similar in many respects, but some differences are worth noting. As in Europe, there are instances of denial of conscience protection, controversies involving the rights of parents regarding the education of their children, and growing conflict between religious freedom and claims based on nondiscrimination norms, abortion rights, and various sexual liberties.²⁴

And as in Europe, there is a waning consensus on the importance of religious freedom, plus a good deal of open hostility to religion among opinion leaders in the media, the world of entertainment, and the academy. Some legal scholars now maintain that religious freedom is an unnecessary right since everything worth protecting is covered by freedom of speech and association.²⁵ In fact, one constitutional scholar has gone so far as to proclaim that the “culture wars” are over, and that the only question left is how to treat the losers, which he identified as “Christians and conservatives.”²⁶ He recommends “taking a hard line (‘you lost, live with it’)” rather than trying to reach any form of accommodation, remarking that the hard line “seemed to work reasonably well in Germany and Japan after 1945.”

Regrettably, many of the same culture warriors who once called for toleration and for a policy of “live and let live” now want to run their opponents out of their jobs, close down their businesses, and undermine their institutions. A few years ago, the prevalence of such attitudes among academics prompted a writer in *Commentary* magazine to describe America’s college campuses as “little islands of intolerance in a sea of freedom.” But these days, the “sea of freedom” is far from tranquil where religious liberty is concerned. Just how choppy its waters have become is evident from a 2016 statement by the then chairman of the United States Commission on Civil Rights.

23 Paul Coleman, “Europe’s Free Speech Problem: A Cautionary Tale,” *Public Discourse*, July 5, 2016, <http://www.thepublicdiscourse.com/2016/07/171113/>.

24 As Richard Garnett recently noted, “there are more than a few troubling signs that [the traditional American] policy of accommodation and the commitments it reflects are falling out of favor and even being squarely rejected.” Garnett, “Symposium: The Future of Accommodation,” *SCOTUSBlog*, May 17, 2016, <https://www.scotusblog.com/2016/05/symposium-the-future-of-accommodation/>.

25 See, for example, Brian Leiter, *Why Tolerate Religion?* (Princeton: Princeton University Press, 2013); James W. Nickel, “Who Needs Freedom of Religion?” *University of Colorado Law Review* 76, no. 4 (2005): 941–64, at 943; Mark Tushnet, “The Redundant Free Exercise Clause?” *Loyola University of Chicago Law Review* 33, no. 1 (2002): 71–94, at 72.

26 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/>.

Religious freedom and religious liberty, he said, are simply “code words for discrimination, intolerance, racism, sexism homophobia, or any other form of intolerance.”²⁷

On the other hand, it is my impression that there is somewhat more popular resistance in the United States to incursions on religious freedom violations than in most of Europe. If so, that may be explainable by recent studies on American religiosity. According to a 2018 report issued by the Pew Research Center, United States citizens are “far more religious” than are citizens of other affluent nations.²⁸ And while the United States has seen a rise in the “nones” and the unaffiliated, researchers at Harvard and Indiana universities reported in 2017 that the proportion of religiously affiliated persons who are “strongly affiliated” had risen from 39 percent in 1989 to 47 percent in 2017.²⁹ In other words, the proportion of the population that self-identifies as religious has become more intensely so. The researchers concluded that in this respect the United States is growing ever more exceptional in comparison with other western societies.

MAKING THE CASE FOR RELIGIOUS FREEDOM

In sum, it seems to me that there is a rocky road ahead for religious freedom advocates, whether in Europe or the United States, and whether their focus is domestic or international. Recently I was speaking with a colleague who asked me what I was working on. When I said I was preparing to give a talk on religious freedom, he looked at me blankly and said, “I’ve never understood that issue. I just don’t get it.” In our increasingly secular societies, persons who are simply indifferent to religion and religious freedom are far more numerous—and far more influential—than the militant secularists who want to scrub every trace of religion from public life. The less one feels that he or she personally is affected by restrictions on religious liberty, the less interest one is likely to take in its protection.

I have no magic formula to suggest, but I would like to use the occasion of this McDonald Lecture to offer a few ideas that seem to me potentially useful in making the case for protecting religious freedom. 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. USCIRF’s chairman Daniel Mark did that very effectively in the group’s 2018 report:

Though [freedom of religion is] profoundly intertwined with other basic rights such as freedom of expression and association, it stands out as the right for which people are most willing to suffer and die. This is because religious freedom safeguards the rights to recognize what is most sacred and to live one’s life according to one’s sacred obligations. Moreover, religious freedom is the ultimate bulwark against totalitarianism because

27 Joe Davidson, “Civil Rights or Religious Liberty—What’s on Top?” *Washington Post*, September 9, 2016.

28 Dalia Fahmy, “Americans are Much More Religious than Adults in Other Wealthy Nations,” *Fact Tank*, Pew Research Center, July 31, 2018, <http://www.pewresearch.org/fact-tank/2018/07/31/americans-are-far-more-religious-than-adults-in-other-wealthy-nations/>.

29 Landon Schnabel and Sean Bock, “The Persistent and Exceptional Intensity of American Religion: A Response to Recent Research,” *Sociological Science* 4, no. 28 (November 2017): 686–700, at 689.

it stands as a testament to the notion that the human being does not belong to the state and that the person's highest commitments lie beyond the control of government.³⁰

That is a concise and compelling statement. But many people, I believe, are more apt to be swayed by a firsthand experience or a compelling story. Recently I heard of a doctor who had been dreading a visit to a friend in a nursing home because he was well aware of the kinds of problems that are common in nursing homes. But it turned out that the friend was receiving respectful and attentive care in a warm and compassionate setting. The doctor was surprised, he said, until he realized that the home was run by members of a religious order. The difference that faith can make suddenly became palpable to this very secular individual. Once someone personally witnesses the capacity of faith-based institutions to deliver many kinds of much-needed services effectively, efficiently, and humanely, it is only a step to understanding that these groups need the freedom to be true to themselves in order to do what they do best. Much more needs to be done to publicize the impact of institutions like Saint Benedict's preparatory school in Newark, New Jersey, where boys from neighborhoods where they are at high risk of ending up in gangs, in jail, or dead, are prepared for college and beyond. Saint Benedict's sends 95 percent of its graduates to college, including some of the best universities in the United States. Such examples help people to understand Yuval Levin's point that in advocating for religious freedom, "We are defending the very idea that our government exists to protect the space in which various institutions of civil society do the work that enables Americans to thrive, *and* we are defending the proposition that this work involves moral formation and not just liberation from constraint."³¹

In dealing with objections to the grant of religious or conscience-based exemptions to generally applicable rules, it is often possible to show that what seems to be a stumbling block in theory turns out not to be a problem in practice. For example, it is sometimes contended that religious exemptions from generally applicable laws give religious objectors a "license to discriminate." But Mark Rienzi has argued persuasively with many examples that the long American experience with granting reasonable religious exemptions has had the opposite effect.³² He points out that the venerable US tradition of accommodating various sorts of conscientious objectors not only is workable but that it serves two widely shared American 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.

When core freedoms collide, as they increasingly do, the challenge is to preserve as much of each as possible. To achieve that sort of accommodation (what German jurists call *praktische Konkordanz*) is an admirable political and legal accomplishment.³³ In today's society, however, that sensible approach must overcome a number of hurdles. In the first place, our litigation system

30 United States Commission on International Religious Freedom, *2018 Annual Report*, 14.

31 Yuval Levin, "The Perils of Religious Liberty," *First Things*, February 2016, 35.

32 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).

33 "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.

fosters a winner-takes-all attitude. Secondly, many proponents of new rights hold a concept of freedom as liberation from constraint in order to pursue individual self-fulfillment. They have difficulty understanding those who seek religious liberty in order to fulfill sacred obligations—like caring for the least of their brethren—while being true to what it is that inspires them in the first place to serve their fellow human beings. As Yuval Levin has put it, religious liberty “is not a freedom to do what you want, but a freedom to do what you must. It describes a duty of society to retreat and give its members space to act on what they deem essential; an acknowledgment not of a human liberty or right, but of a human obligation that precedes the social obligation and so shapes it.”³⁴

A third obstacle to reasonable accommodations is the view of some in the human rights community that many of the persons and groups who seek protection for religious liberty do not deserve it.³⁵ After achieving pathbreaking victories in the area of political and civil rights, many human rights groups (and their funders) shifted their focus to issues that led them to see some religious individuals and groups as antagonists to their causes and hence unworthy of equal protection of the law.

Those obstacles are formidable. But when those views are held by a well-intentioned, intelligent individual, it is often helpful to appeal to the liberal ideals of tolerance, fairness for all, appreciation of the benefits of pluralism, and the Golden Rule.

An impressive example of that approach in the US context was an op-ed co-authored by Stanford professor Michael McConnell and the then dean of Harvard Law School, Martha Minow, just before the announcement of the Supreme Court’s decision in the same-sex marriage case. With the outcome uncertain and with tensions running high, those two academics (on opposite sides of the issue) joined in deploring the trend toward ill-will and demonization in conflicts over the place of religious views on health care, marriage, and public life.³⁶

No matter “who will ‘win’ and who will ‘lose,’” they wrote, “the biggest losers are the entire nation if we descend into intolerance.” They acknowledged that a decision either way would pose difficult challenges, especially in “find[ing] the line[s] between assured protection for one’s own religious freedom and equality on the one hand and interference with the religious freedom and equality of others.” But they appealed for an approach that preserves what they called “the remarkable American Promise to welcome people of all religions and to be a model on how to be both religiously vibrant and mutually respectful.” To that end, they jointly endorsed the principle that religious and other conscientious dissenters from legal and cultural norms should be accommodated when practical to do so. They also evoked what they called “the admirable American promise of respect for dissent.” The key to this promise, they said, “its secret sauce—is our ability to agree to disagree, even about matters of profound importance, both by accepting legal resolutions of intense disagreements and by preserving avenues for ongoing dissent.”

Justice Anthony Kennedy gave some encouragement to that spirit when he wrote for the 5–4 majority in the same-sex marriage case that, “Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here.”³⁷ Toward the end of his opinion, Justice Kennedy

34 Levin, “The Perils of Religious Liberty,” 32–33.

35 Richard W. Garnett, “Religious Accommodations and—and among—Civil Rights: Separation, Toleration, and Accommodation,” *Southern California Law Review* 88, no. 3 (2015): 493–510, at 501.

36 Martha Minow and Michael McConnell, “Respectfully Resolving Tensions between Religion, Law Is Possible,” *Boston Globe*, May 27, 2015, <https://www.bostonglobe.com/opinion/2015/05/27/respectfully-resolving-tensions-between-religion-law-possible/IRgR3oPYQYSgCDRp2USpBP/story.html>.

37 *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603 (2015)

added that “it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered.”³⁸

In the European context, the best example that I know of taking the liberal high ground is the successful argument made by the great comparatist and international lawyer Joseph Weiler in the 2014 Italian Crucifix case.³⁹ Weiler, an observant Jew, represented several European countries (*amici curiae*) that supported Italy’s position in favor of allowing crosses to remain in state school classrooms. Just as McConnell and Minow drew upon an exalted image of US traditions, Weiler lifted up a high-minded vision of European pluralism. In a press release issued at the time, he said,

Europe is special in that it guarantees at the private level both freedom of religion and freedom from religion, but does not force its various Peoples to disown in its public spaces what for many is an important part of the history and identity of their States, a part recognized even by those who do not share the same religion or any religion at all. It is this special combination of private and public liberties, reflecting a particular spirit of tolerance, which explains how in countries such as, say, Britain or Denmark to give but two examples, where there is an Established State Church no less—Anglican and Lutheran respectively—Catholics, Jews, Muslims, and, of course the many citizens who profess no religious faith, can be entirely ‘at home,’ play a full role in public life, including the holding of the highest office, and feel it is ‘their country’ no less than anyone else. It is an important model for the world of which Europe can be justly proud.⁴⁰

What is important, Weiler emphasized, is not whether a country like Italy permits religious symbols in the classroom or a country like France forbids them. What is important, he said, is that “[t]he prohibition of religious symbols should not be understood as a denigration of religion or religious people and the requirement of a religious symbol such as the cross, should not be understood as denigrating other religions or those who do not profess a religious faith at all.”⁴¹

The weak spot in the arguments of McConnell and Minow and Weiler, of course, is that they presuppose a certain respect for the ideals of fairness, tolerance, and pluralism. In my view, Weiler’s most important point was his acknowledgment that the form of pluralism he praised can work only if supported by a culture of mutual respect and genuine tolerance. So I would like to conclude with a brief elaboration on that thought.

It is only natural for those of us who are lawyers to hope that our legal and political efforts will carry the day, but the fact is that the preservation of religious freedom depends ultimately on building cultural support. Legal frameworks are undoubtedly important, and legal efforts can help to create space or buy time for culture building, but the challenge is cultural before it is legal and political.

I would suggest, therefore, that the fate of religious freedom will depend on what happens in the capillaries of society. Much will depend on whether religious leaders and believers can educate their

38 *Id.*, 2607.

39 *Lautsi and others v. Italy*, 2011-III Eur. Ct. H.R. 1. For a penetrating analysis, see Marta Cartabia, “The Challenges of ‘New Rights’ and Militant Secularism,” in Glendon and Zacher, *Universal Human Rights in a World of Diversity*, 428–55.

40 European Center for Law and Justice, “Crucifix Case: Press Release of Professor Joseph Weiler,” press release, par. 5, <https://eclj.org/crucifix-case-press-release-of-professor-joseph-weiler> (last visited February 17, 2019).

41 European Center for Law and Justice, “Crucifix Case,” para. 6.

coreligionists to the responsible exercise of religious freedom, especially to the rejection of ideologies that manipulate religion for political purposes, or that use religion as a pretext for violence. At the same time, much will depend on whether secularist leaders and their following can free themselves of hostility to religion and accept that human rights, including religious freedom, are indeed, as stated in the Vienna Declaration, “universal, indivisible and interdependent and interrelated.”⁴²

42 World Conference on Human Rights, June 14–25, 1993, *Vienna Declaration and Programme of Action*, ¶ 5, U.N. Doc. A/Conf.157/23 (July 12, 1993).