

Michigan Law Review

Volume 97 | Issue 6

1999

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Recommended Citation

Robert F. Drinan S.J., *The Convergence of the First Amendment and Vatican II On Religious Freedom*, 97 MICH. L. REV. 1948 (1999).

Available at: <https://repository.law.umich.edu/mlr/vol97/iss6/32>

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THE CONVERGENCE OF THE FIRST AMENDMENT AND VATICAN II ON RELIGIOUS FREEDOM

*Robert F. Drinan, S.J.**

THE LUSTRE OF OUR COUNTRY: THE AMERICAN EXPERIENCE OF RELIGIOUS FREEDOM. By *John T. Noonan, Jr.* Berkeley: University of California Press. Pp. 436. \$35.

Did the United States radiate the views of James Madison on the free exercise of religion to the world? That, in essence, is the main thrust of this provocative study by John T. Noonan, Jr., Professor Emeritus at the University of California Law School, Berkeley, and a Senior Judge of the U.S. Court of Appeals for the Ninth Circuit.

Noonan is, of course, the author of magisterial books on abortion, birth control, legal ethics, and related issues.¹ He writes as a committed Catholic who takes pride in the religion that he learned as a child in his native Brookline, Massachusetts. In Catholic circles and far beyond he is regarded as a scholar who combines the insight of faith with the voice of reason.

In thirteen closely argued chapters Noonan describes how James Madison was instrumental in securing adoption of the "free exercise" of religion in the First Amendment. This formulation has a very special significance since it was not the idea of a secularist or a deist, but of a person close to and active in the Anglican church. The sixteen words of the First Amendment banning the establishment of religion and guaranteeing its free exercise had a profound effect in guaranteeing that there be no state-sponsored religion and that believers enjoyed, with some exceptions, the right to practice their religious beliefs.

Noonan contends that the separation of government and religion with the guarantee of free exercise has been a success in the United States and that many nations have adopted it as the best way to resolve the problems of church and state in societies that are

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1. See BRIBES (1984); THE CHURCH AND CONTRACEPTION (1967); CONTRACEPTION: A HISTORY OF ITS TREATMENT BY CATHOLIC THEOLOGIAN AND CANONISTS (1965); THE MORALITY OF ABORTION (John T. Noonan, Jr. ed., 1970); A PRIVATE CHOICE: ABORTION IN AMERICA IN THE SEVENTIES (1979).

deeply divided with respect to religion. Indeed, it was our Founding Father James Madison who furnished the title to Noonan's book, expressing his revolutionary belief and hope that "freedom of religion promised a lustre to our country" (p. 4). These notions, however, must cope with active secularism that is negative and even antagonistic to organized religion.

Despite the absence of a national church, the United States has maintained a public piety that almost assumes a nationally accepted belief and faith. Noonan cites and seemingly applauds a famous expression of such piety in the dramatic God-centered prayer spoken by President Roosevelt on D-Day, June 6, 1944. After announcing that the invasion of Europe was successful President Roosevelt said these words: "And so in this poignant hour, I ask you to join me in prayer" (p. 393). Roosevelt did not define what he meant by "prayer," but the prayer was acceptable and welcome to all but some secularists or non-Christians.

In pursuing his thesis Noonan reviews the principal instances in American history when church and state have clashed. They include the struggle over slavery (pp. 114-15), exemptions from the military for conscientious objectors (pp. 219-26), religion in the military service (pp. 84-85), and the famous cases involving excusing the children of Jehovah's Witnesses from saluting the flag (pp. 241-44). The underlying assumption of Noonan is that the American experience has been generally salutary for religion and for a government devoted to the advancement of values and virtues, some of which are derived ultimately from religious sources. These ideas are now transformed into truths that furnish sound ideals for a nation that is neither expressly sacred nor explicitly secular.

Noonan's analysis of religious practice in France (pp. 265-84), Japan (pp. 287-304), and Russia (pp. 307-27) is filled with little known facts that have seldom been pulled together before. Some readers may feel that the author engages in a bit of a stretch, essentially claiming that the United States was instrumental in placing the concept of the free exercise of religion in the legal institutions of the countries he discusses. Nevertheless, it is amazing how frequently the American understanding of the free exercise of religion has been adopted in some form in scores of nations that have emerged in the postcolonial world.

Noonan's final and bold contention is that Madison's concept of the free exercise of religion was in essence adopted by the Second Vatican Council in 1965. In crafting his argument, Noonan traces the dramatic events involved in the book of the Jesuit theologian, Father John Courtney Murray, S.J., who was first silenced by the Holy See but then invited to be an expert at the Second Vatican Council, where he turned out to be one of the major architects of

Vatican II's proclamation on religious freedom.² Noonan also describes at some length the pioneering work of Jacques Maritain, a convert to Catholicism (pp. 335-37). Noonan tries not to oversimplify, but he links together the works of Madison, Maritain, and Murray. The thesis, that the United States created a document exalting the free exercise of religion and that this approach has been adopted by the Catholic Church, is interesting, indeed intriguing. Still, as Noonan would agree, there are many other forces operating in the world since the establishment of the United Nations, and especially since the adoption of the 1948 Universal Declaration of Human Rights.³ It is, however, significant that, despite the clear affirmation of the free exercise of religion in the Universal Declaration of Human Rights, the United Nations has been able to issue a declaration on freedom of religion,⁴ but not a covenant on religious liberty. This is less than the United Nations has done on other major human rights issues such as the covenants on race⁵ and the rights of women⁶ and children.⁷ Those in charge of the refinement and implementation of religious freedom know that at this time there is little chance that a sufficient number of nations would ratify a treaty or covenant on religious freedom that would eventually become customary international law.

Some readers may also feel that Noonan overclaims a bit for the achievement of Vatican II. The idea of the free exercise of religion was prominent in the documents of the World Council of Churches⁸ and in proclamations of Jewish bodies⁹ before the Declaration on Religious Freedom of Vatican II in 1965.¹⁰ It may be that it is accurate to trace the origins of the concept of the free exercise of religion to Madison and the First Amendment. Again, however, intellectual developments related to freedom of worship in England

2. See *Declaration on Religious Freedom*, in THE DOCUMENTS OF VATICAN II 675, 675 (Walter M. Abbott & Joseph Gallagher eds., 1966).

3. See Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948).

4. See United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. Res. 36/55, U.N. GAOR, 36th Sess., Supp. No. 51, U.N. Doc. A/36/51 (1982).

5. See International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195.

6. See Convention on the Political Rights of Women, *opened for signature* Mar. 31, 1953, 27 U.S.T. 1909, 193 U.N.T.S. 135.

7. See Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/736 (1989).

8. See Statement on Religious Liberty, in Minutes and Reports, Central Committee of the World Council of Churches 15 (1949) (issued four months prior to the U.N. Declaration).

9. See, e.g., Declaration on the Establishment of the State of Israel, 1948, 1 L.S.I. 3, 4, (1948) ("[The State] will guarantee freedom of religion, conscience . . .").

10. See *Declaration on Religious Freedom*, *supra* note 2.

and Europe were one of the sources of the thinking about religion done by Jefferson, Madison, and the first Congress.

Noonan, being a careful scholar, does not unduly exaggerate the role of the United States as promoter of the idea of religious freedom when it was a relatively new concept. With all due respect, the framers of the Bill of Rights adopted a formula that would keep peace among the thirteen colonies and prevent a holy war between the followers of the Anglican church and other denominations. Madison and Jefferson were undoubtedly concerned lest the Anglicans in Virginia seek to perpetuate their dominance in that state by enacting a law that would impose a state religion on believers and others in Virginia (pp. 69-75).

But the formula adopted by the first Congress clearly turned out to be more prophetic than its authors dreamed or designed. The separation of church and state, as preached and practiced in the United States, turned out to have an impact clearly never foreseen by its authors. As Father Murray characterized them, the two parts of the First Amendment were "articles of peace."¹¹ The ban of the establishment of religion and the guarantee of its free exercise made the government a protector of religious pluralism but not a supporter of religion as such.

The Vatican statement arguably goes beyond the First Amendment in these strong and indeed amazing words:

[I]n spreading religious faith and in introducing religious practices, everyone ought at all times to refrain from any manner of action which might seem to carry a hint of coercion or of a kind of persuasion that would be dishonorable or unworthy, especially when dealing with poor or uneducated people.¹²

Given this sentiment, should there be a global understanding that the free exercise of religion — arguably guaranteed by international law — be assured? It is hard to affirm such a norm, at least as an enforceable right. The example of the First Amendment and most developments in democracies, however, seem to suggest that the world is moving in that direction.

Still, there is no certainty that the guarantees of the First Amendment will be universally accepted in the near future. For centuries, citizens and governmental officials have maintained, almost by instinct, that the religion of a nation must receive protection from its government and that public morality will erode and decay if the religious traditions of the people are not guaranteed.¹³

11. JOHN C. MURRAY, S.J., *WE HOLD THESE TRUTHS* 56 (1960).

12. *Declaration on Religious Freedom*, *supra* note 2, at 682.

13. Noonan does not get into the vast question of religious freedom in nations in which the population is predominantly Muslim. Some of these nations have a majority or a large minority that desires to have its national government recognize and give preferential status to the Muslim religion.

The interdependence of religion and government continues to be firmly supported by a multitude of people even though they may say that they desire the separation of church and state. Among Americans, even some who are secular, there is a deep desire to have the government promote some morality; for example, many parents want more values taught in the schools.¹⁴ Such desires seem to be more prevalent now than in previous generations. The persistent rate of crime, the dramatic increase in the divorce rate, and the collapse of customary morality in other ways are prompting outcry from vast numbers of citizens.¹⁵ These strident observers do not want the government to endorse and support religious institutions or religious values, but they feel deeply that the government has become too amoral.

Many wonder whether these citizens are, in essence, seeking a change in the meaning of the First Amendment; this inspires fear of demands by the Christian Coalition and similar groups. These entities, which have gained prominence in the last generation, sincerely feel that the government has to curb abortion, strengthen the institution of marriage, and reintroduce religion in some form in the public schools.¹⁶ They do not necessarily state that the country has to revisit or change the First Amendment, but they do want their government to help them more directly and more generously.

It is easy to respond to these ardent followers of their religion that they have no right to have their government advance or enhance their religious beliefs and institutions. The evils that result when the state and the church get too intertwined are legendary. The fact remains, however, that there is a widespread and profound apprehension by believers that a state neutral to religion subtly undermines the value of faith. Madison probably sensed that and, along with the first Congress, created chaplains in the Congress and the military, carried over the English tradition of extensive tax exemption for churches, and initiated presidential proclamations for sacred events (pp. 84-85). The nation was also deemed to be "under God." A pervasive civil religion was built into the culture. It will go on and may even be increased by politicians who think they gain approval if they refer to God and imply that they want more governmental support for religion.

What will happen if or when the 100 million Americans not affiliated with any religious body become more insistent that their free

14. See Cheryl Wetzstein, *American See Crisis of Morals Among Teens*, WASH. TIMES, June 26, 1997, at A1.

15. See John Dillin, *Is Morality in Decline?*, CHRISTIAN SCI. MONITOR, Dec. 16, 1998, at 1; Richard Morin & David S. Broder, *Worries About Nation's Morals Test a Reluctance to Judge*, WASH. POST, Sept. 11, 1998, at A1.

16. See Ronald Brownstein, *GOP Leaders Embrace Christian Coalition Plan*, L.A. TIMES, May 18, 1995, at A10.

exercise of religion means that they have a right to see diminished governmental endorsement of and support for religion? This possibility raises the intractable question of how neutral a government should be in its approach to religion. Can any formulation be devised such as “friendly neutrality,” “benign neglect,” or “symbiosis”?

John Noonan’s essays on the acceptance of the concept of religious freedom by the United States, France, and the Catholic Church synthesize and rationalize the emergence of religious freedom as one of the almost universally accepted doctrines in the Western world. It seems clear that the concept of a church superior to the state in some ways will not be accepted again. The symbols of a preeminent church found in Scandinavia, England, and Germany, for example, may continue.¹⁷ It should be noted, however, that in these countries religious instruction in the public schools and some government aid for church-related schools are common.

Does this mean that these nations, by aiding the religions of some, deny the religious freedoms of those not associated with any church — and particularly those without faith? That is the question that Noonan does not answer. Particularly, he does not cover funding for church-related schools extensively, although the issue is acutely alive in the United States. It should be noted that the Vatican Council clearly states that parents have a right to some form of subsidy for sending children to schools consistent with their religious convictions and conscience.¹⁸ This, of course, is a claim never recognized in America despite the guarantee of the free exercise of religion. In a long series of decisions beginning in 1947, the United States Supreme Court has been consistent in denying any government grants beyond auxiliary services to sectarian schools of less than collegiate rank.¹⁹ This is contrary to the practice in virtually every democracy in the modern world. Many observers, including the late Father Murray, are convinced that the United States is not being faithful to the Free Exercise Clause in denying benefits to religious parents who feel strongly that the financial burden placed on them by the government is a denial of their constitutionally

17. See Thomas M. Franck, *Is Personal Freedom a Western Value?*, 91 AM. J. INTL. L. 593, 598 (1997); Ingrid Brunk Weurth, *Private Religious Choice in German and American Constitutional Law: Government Funding and Government Religious Speech*, 31 VAND. J. TRANS-NATL. L. 1127, 1144-46 (1998).

18. See *Declaration on Christian Education*, in THE DOCUMENTS OF VATICAN II, *supra* note 2, at 637, 641-42.

19. See pp. 181-88 (giving a discursive discussion); *Everson v. Board of Educ.*, 330 U.S. 1 (1947). While some recent decisions of the Supreme Court may appear to ease the *Everson* rule, those decisions do not rely on the free exercise clause. See, e.g., *Agostini v. Felton*, 521 U.S. 203 (1997).

guaranteed right;²⁰ these parents often feel that their claim for religious freedom should trump the Establishment Clause.

The exaltation of religious freedom in a democratic society as set forth in Noonan's magisterial work demonstrates that the world now has a well-established belief that individuals should not be forbidden from engaging in religious exercises that are meaningful to them. This is above and beyond the abandonment long ago of the practice of coercing people to believe in certain religious dogmas.

But the unsettled question — more in non-Christian countries than in Western nations — is whether those who do not believe the fundamental philosophy of the Islamic or Buddhist religions can obtain some share of the government's resources to operate the religious schools of these dissidents. This question has not really been addressed in those nations where the schools are almost exclusively an agency of the government. Muslim governments, perhaps like governments from the beginning of time, tend to be omniscient and even totalitarian. They know that dissident religions tend to be counter-cultural and sometimes even subversive of the demands of the government. Hence, governments will subscribe to Article XVIII of the Universal Declaration of Human Rights that grants religious freedom, but says nothing about the place, if any, of nonpublic schools.²¹ To be sure, Article XXVI of the Universal Declaration of Human Rights insists that parents have a right to be heard with regard to the education of their child.²² The article says nothing, however, about any role of the government in assisting parents in that regard.

In democracies in which Christians have had a predominant or leading role, the state often assists Christian and other religious groups to finance their schools. England,²³ France,²⁴ Australia,²⁵ and the Netherlands²⁶ are among the best-known examples.

As one views the rapid expansion around the world of the meaning of religious freedom, it is hard to think that governments can solemnly pledge to give their subjects religious freedom as guaranteed in the Constitution and statutory law and still retain a monopoly on the funds for schools. The compromise in American law of allowing parents to establish schools but denying them the

20. See MURRAY, *supra* note 11, at 148.

21. Universal Declaration of Human Rights, *supra* note 3, art. XVIII.

22. *Id.* at art. XXVI.

23. See DEPT. OF STATE, 102ND CONG., 1ST SESS., COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1990, at 1328-29 (Joint Comm. Print 1991).

24. See DEPT. OF STATE, 105TH CONG., 1ST SESS., COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1996, at 939 (Joint Comm. Print 1997).

25. See Donald Hirsch, *Schools: A Matter of Choice*, OECD OBSERVER, Apr. 1994, at 12, 12.

26. See *id.* at 12-13.

funds for school construction or for teachers' salaries hardly seems consonant with a wholehearted acceptance and advancement of religious freedom.²⁷

The free exercise adage seems to be holding, at least for the moment. But will America have to face the awesome question of precisely why government has to give a special preference to religious freedom? After all, that those devoted to religion have a personal belief that the government has no duty to defend. This concept, however, may never win widespread approval. English law and tradition supplemented by the First Amendment have made the right to believe in and practice a religion something very special and precious.

Noonan has written a compelling brief for the proposition that a guarantee of the Free Exercise Clause is all that is needed to have religions flourish. He cannot answer all the difficulties with this thesis. The secularism of the present age so permeates the culture that many will begin to deny that the free exercise of religion is a value that deserves any particular attention. These observers could agree with the conclusions of Emile Durkheim that "each nation has an established religion which is a worship of itself" (p. 241).

Still, this learned and creative treatment of the place of religion in secular society makes a very significant contribution to a topic about which there must be a constant dialogue to avoid tragic consequences. Noonan's related support of the Religious Freedom Restoration Act (pp. 188-91), his unique and informative discussion of Tocqueville (pp. 95-115), and his appealing, autobiographical reflections on childhood (pp. 15-38) are all compelling — the number of issues he treats in some depth is most impressive.

The book's introduction ends with these words: "The American experience has lighted up the skies" (p. 9). The contribution that the United States has made to the implementation of religious freedom could be one of its greatest gifts to world history. Noonan argues this forcefully with the convictions of a believer and the logic of a jurist who treasures religious liberty as the first of all the freedoms of humanity.

27. See SEYMOUR SARASON, *CHARTER SCHOOLS: ANOTHER FLAWED EDUCATION REFORM?* (1998).