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Individual, Community, and State: How to Think About Religious Freedom

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The following is adapted from a lecture delivered at Hillsdale College on September 11, 2012, during a conference on "The Supreme Court: History and Current Controversies."

There is a growing awareness among Americans that religious freedom in our country has come under sustained pressures. In the public square where freedom of religion meets public policy, it becomes clearer all the time that there is a high price to be paid for being true to one's conscience. This is no tale of Chicken Little—although a chain of chicken sandwich restaurants based in Atlanta is part of the story. Let me give you a few examples.

In our universities, those citadels of toleration, we find that toleration can be sharply limited. At the Hastings College of Law in San Francisco, the student chapter of the Christian Legal Society was denied any status on the campus because it would not abandon its requirement that members commit themselves to traditional Christian norms regarding sexual morality. The U.S. Supreme Court, in a 5-4 ruling in 2010, held that the student group's rights were not violated by a "take all comers" policy. Following this lead, Vanderbilt University has rewritten its student organizations policy and effectively chased every traditionally Christian student group off campus, denying them regular

access to campus facilities. And at the University of Illinois, an adjunct professor of religion, hired to teach a course on Catholicism, was let go because a student complained about his patient explanation of the Catholic Church's natural law teachings on human sexuality. (He was later restored to his teaching duties, but at the expense of the Newman Center, not on the state payroll.)

In our states and localities, we see other kinds of pressures. Authorities in Washington state and Illinois have attempted to force pharmacists, against their conscience, to dispense "morning after" pills when other pharmacists short distances away make these abortifacients available. New York City has barred church congregations—and them alone—from using public school buildings outside school hours. In New Mexico, a Christian wedding photographer was fined for violation of a state "human rights act" because she refused to take the business of a same-sex couple who claimed to want her services at their civil union ceremony. And in Massachusetts, Illinois, San Francisco, and the District of Columbia, the adoption and fostering agencies of Catholic Charities have been shuttered because they will not place children with same-sex couples, as the local authorities demand.

In our courts, we see the First Amendment turned on its head or simply disregarded, in active hostility to the place of religion in our public life. The U.S. Seventh Circuit Court recently ruled that a Wisconsin public high school could not rent space for its annual graduation exercises in a local church, lest it be seen as "endorsing" religion and "coercing" its students to view Christianity in a positive light. In 2010, Judge Vaughn Walker of the U.S. District Court in San Francisco ruled that Proposition 8, preserving marriage in the California constitution as the union of one man and one woman, was unconstitutional. He held that the affinity between traditional religion and the moral case against same-sex marriage was reason enough to strike down the popular referendum, and went so far as to say that religious doctrines holding homosexual acts to be sinful are *in themselves* a form of "harm" to gays and lesbians. In this he followed the lead of the Iowa Supreme Court, which held in 2009 that the state's law restricting marriage to a man and a woman was an expression of a religious viewpoint, and *for that reason* unconstitutional.

Finally, we have listened to Obama administration officials, including the President and the Secretary of State, speak of "freedom of worship" as though it marked the full extent of freedom of religion. The President famously spoke at the University of Notre Dame's commencement in 2009, but in that speech, he treated religious opinions that disagree with his views on abortion and other social issues as fundamentally irrational, and thus to be relegated to the private sphere and ruled out of order in our public debates. Having succeeded in persuading Congress to repeal the "Don't Ask, Don't Tell" policy for the military, the administration has been strongly opposed to legislation that would protect the conscience

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rights of chaplains and other servicemen and women who continue to hold and to express the view, on religious grounds, that sexual relations are morally permitted only in a marriage between a man and a woman. In the recent term of the Supreme Court, the administration's lawyers took the position that there should be no "ministerial exception" on religious-freedom grounds, for employers such as religious schools, from federal anti-discrimination laws. Church schools and other religious institutions, they argued, have only as much protection as non-religious groups do on "freedom of association" grounds—as though the religion clause of the First Amendment added no ground whatsoever for a unique *religious* freedom claim. In the best religious freedom news of the year, the administration lost this case 9-0 in the Supreme Court, which held that the Obama Justice Department's view was "remarkable," "untenable," and "hard to square with the text of the First Amendment itself."

And of course there is the infamous Health and Human Services "contraception mandate," the cause of the most pointed confrontation in recent memory between a presidential administration and major figures in America's religious communities. Under the HHS mandate, an administrative rule authorized by the 2010 Affordable Care Act, every employer with more than 50 employees must provide group health insurance that includes, in the category of preventive medicine for women, no-cost coverage of sterilization services and FDA-approved prescription contraceptives—including those that are better understood as abortifacients because they can act to destroy embryos rather than merely prevent conception. A narrow exemption was included for religious employers that are non-profit, exist to inculcate "religious values," and primarily employ and serve members of their own religious community. This meant that while churches and other houses of worship would be exempted, countless religious schools, universities, hospitals, and charitable institutions would not. Under pressure, the administration has promised a future "accommodation" for a broader range of religious institutions, with an ill-defined "safe harbor" until the new arrangement becomes effective in August 2013. At that time, these institutions' employees would still be entitled to the same "preventive services," but with insurers rather than employers responsible for the costs. Some religious institutions, such as the University of Notre Dame, are self-insured for their employee health plans, and there is no sign yet regarding how their situation could be addressed. And who can be fooled by the promise that insurance companies rather than employers are paying for the coverage, and that employers will somehow have clean hands in a three-cornered contractual relationship in which these services are guaranteed?

It is no wonder that the U.S. Catholic bishops formed an Ad Hoc Committee for Religious Liberty last year; and that they published a major statement on religious freedom in March; and that they organized a "Fortnight for Freedom" to pray for religious liberty in June and July. Recognizing the threat to themselves as well, particularly in the mandated coverage of abortifacient pharmaceuticals, a number of evangelical Protestant institutions have joined in the litigation against the HHS mandate, while Jewish, Mormon, and Muslim leaders have joined in formal protests. There are, at last count, 28 separate lawsuits pending in federal courts around the country, involving more than 80 separate plaintiffs.

Perhaps the most interesting case involves, not a religious school, hospital, or charity, but Hercules Industries of Colorado, a private company that makes heating and air conditioning equipment. Its sole owners are the Newlands, a family of Catholics who object to providing the mandated coverage to their employees, against the dictates of their conscience as informed by their faith. The argument of

the Obama Justice Department in the case is astonishing. It is that no one can claim, on behalf of an incorporated business he owns, *any* right of religious freedom or conscience that can trump a requirement of the law. Period. The members of the Newland family may have religious scruples, but the business they own cannot be conducted in accord with those scruples. Once individuals opt for incorporation of a business, they lose the freedom of religion so far as the actions of that corporation are concerned. Luckily, a federal judge in Colorado has entered a preliminary injunction barring enforcement of the HHS mandate against Hercules Industries while litigation continues. But the all-out character of the administration's disregard for claims of conscience is a grave portent of things to come.

* * *

What is the cause of these pressures on freedom of religion and conscience? And how can we respond in the spirit of a renewed commitment to principles of religious liberty?

In truth and charity, we must give those responsible for the policies I've described the benefit of the doubt, as acting on some vision of the good. Those in charge of our universities, our state and local governments, our courts, and the Obama administration, seem to be animated by a desire to serve the goal of women's health as they understand it, or to advance a certain view of freedom or equality. They think of electoral and legislative victories as vindicating the rightness of their views. And they often see the push-back that results as a failure to understand something obviously just. Hence the Obama administration's rhetoric about a "war on women" expresses a real opinion on the part of the president and his supporters that the equal position and basic health of women in American society are served by a mandate that burdens all but the smallest employers and the most narrowly defined institutions of worship with the legal obligation to provide free contraceptives, abortifacient drugs, and sterilization services.

But while they may seek a certain good as they understand it, they fail to grasp the perspective of the religious dissent their policies generate. There is a blundering impatience on the part of the secular state, and the secular elites in charge of it, whenever countervailing claims are made in the name of religious conscience, the integrity of religious institutions, or the foundational character of religious communities as part of American civil society. And there is a characteristic failure to perceive the legitimate contribution of religion to public discourse.

Thus our predicament drives us back to first things—to the necessity of thinking through, from the beginning, the ground of religious freedom as an individual right; the relation of the individual believer to his fellows in a naturally formed community; and the way in which these individuals and their organic relationships of family, church, and other spontaneous expressions of civil society, are responsible for creating the state by their mutual consent.

I have twin touchstones for the reflections that follow: the "Memorial and Remonstrance Against Religious Assessments," which was addressed by James Madison to the Virginia General Assembly in 1785 and helped defeat a bill to spend tax dollars on the support of clergy; and *Dignitatis Humanae*, the "Declaration on Religious Freedom" of the Second Vatican Council in 1965. These two brief documents, written under such different circumstances 180 years apart, are not, of course, in perfect accord on every point. But they have something in common in the way they ground religious freedom in axiomatic reflections on the human condition, in the priority they place on religious obligations as making a higher claim on our attention than political obligations, and in the way they elaborate the limits of political authority.

Both Madison and the authors of *Dignitatis Humanae* begin with reflections on the individual human person and his relationship to God. Religious belief and devotion are not anthropological curiosities or historical relics, but are basic to the human experience—natural to us in the exercise of our most human faculties,

those of the mind. And religious belief impresses itself directly on the mind in such a way that we can speak of it as not altogether voluntary—not a matter of willing choice, but of compulsion in light of the evidence that both reason and revelation place before us. Thus Madison speaks of religious conscience as an "unalienable right"—the same expression used for our most basic natural rights in the Declaration of Independence—"because the opinions of men, depending only on the evidence contemplated by their own minds[,] cannot follow the dictates of other men." Likewise, *Dignitatis Humanae*, which grounds religious freedom in "the very dignity of the human person": "The truth cannot impose itself except by virtue of its own truth, as it makes its entrance into the mind at once quietly and with power."

The right of conscience, then, is a right not to be compelled to speak or act as though what one knows to be true is actually false. For one has a duty to truth, and no higher duty than to the truth about the highest thing. As Madison goes on to say,

> It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him. *This duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society.* (emphasis added)

Similarly, *Dignitatis* describes religious freedom as something "men demand as necessary to fulfill their duty to worship God," and this worship is the means by which we "may come to God, the end and purpose of life." This puts before us as our *end* what Madison places before us as our *beginning*: Our freedom to fulfill our duty to God must be untrammeled because that duty is both first and last for us, the alpha and the omega. Fleshing out this common teaching, *Dignitatis* continues: "the exercise of religion, of its very nature, consists above all else in those internal, voluntary, and free acts whereby man sets the course of his life directly toward God. No merely human power can either command or prohibit acts of this kind." As Madison puts it, "Religion is wholly exempt from [the] cognizance" of political authority.

Perhaps not surprisingly, *Dignitatis* had more than Madison to say about the fact that individuals do not practice their religion as a solitary act, but together with one another. *Dignitatis* refers to the "social nature of man," and the natural consequence that "he should profess his

religion in community." It follows that the "immunity from coercion in matters religious" that men enjoy as individuals is "also to be recognized as their right when they act in community." The vitality of faith comes in its communal character, in the individual's fellowship with others whose views support, inform, and refine his own. *Dignitatis* treats at length the freedom of religious communities to meet and to organize, to teach and to witness to their faith, to control their own internal affairs, to undertake "educational, cultural, charitable and social" efforts as they see fit. This receives less attention from the more individualistic Madison, yet he implicitly agrees, assuming the existence of what he later called a "multiplicity of sects" and insisting on a politics of equal freedom for all religious communities, with the state "neither invading the equal rights of any Sect, nor suffering any Sect to invade those of another."

Madison's "Memorial"—again, not surprisingly—contains more of a political science than *Dignitatis*. It carries us back to the principles of the Declaration of Independence, which move from our natural equality as created beings, to our possession of rights inextricably bound up with our nature and bestowed on us by the Creator, to the purpose and foundation of government, made by us to serve rather than frustrate our natural equality and liberty. Madison carefully employs the phrase "Civil Society" to identify the whole community—the community of communities, made up of families, churches, and all sorts of organic human relations—that is responsible for authorizing and limiting political authority. Civil society is the earthly sovereign, the supreme temporal power that delegates the powers of government. But even this is only the *earthly* sovereign. Over all there remains the "Universal Sovereign" to whom all must answer: "Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governour of the Universe." For this reason, Madison says, religion is "exempt from the authority of the Society at large." Much more so must it be exempt from the political authority of the government society creates.

The priority of individual rights and of the claims of organic communities also permeates *Dignitatis*, which describes the "common welfare of society" as consisting "chiefly . . . in the protection of the rights, and in the performance of the duties, of the human person." Those duties are experienced and expressed in "religious communities," so it is "imperative that the right of all citizens and religious communities to religious freedom should be recognized and made effective in practice."

* * *

What are we to take away from these essential reflections on the nature and requirements of religious freedom?

First, human beings are by nature truth-seekers and truth-responders. If we are to live fully integrated lives, making our relationship to the truth a central part of our being and character, then we must respond to the truth as we understand it, and order our lives around it.

Second, thanks to the fallible character of our minds, we grasp the truth in common with some of our fellows and differently from others. But it does not follow from our conviction of the truth, shared with others, that we who agree acquire a right to compel others who disagree. Persuade yes, compel no.

Third, religious communities form an essential element in the civil societies formed by men. They are as natural and as organic as families. Their integrity and freedom come near to being as important as that of the individuals of which they are composed.

Fourth, the power of government, necessary as it is to maintaining a shared moral order, is the creature and not the creator of men's rights, and the servant, not the master of our private relations in our families and religious communities. It has no jurisdiction over belief; it cannot properly legislate or adjudicate questions of religious duty or the validity of requirements of conscience. This is not to say that the government may never inquire into whether a claim of religious conviction is sincere. Nor must the state yield entirely to every sincerely presented

claim. In the words of *Dignitatis*, the "objective moral order" that calls for "good order and . . . true justice" will trump claims that threaten the public peace or the rights of others.

But—fifth—short of such cases, the state should respect, honor, and even foster the role of religious communities and institutions as essential contributors to civil society. In crucial respects they are expressions of something still more basic to the flourishing of the human personality than is the political order itself.

The modern secular state errs in viewing religious communities as subordinate—whether as handmaidens of government, rivals for people's allegiance, or as mere interest groups in elections and public policy debates. Subordination of the religious to the political tends to sever, in the minds of policymakers and judges, the link between *individuals* and the various expressions of religious *community* that enrich their understanding of the truth, animate their peaceful encounters with their fellow citizens who have different understandings, and inform the reasonable basis of our objective moral order.

We can see many of these problems in the HHS contraception mandate. In its administrative rulemaking, the Obama administration presumes to define what forms of religious community are religious *enough* to merit the state's definition of "religious employer," and thus to qualify as a genuine claimant of an institutional conscience. Even its promised "accommodation" would treat religious colleges, hospitals, and charitable ministries as second-class religious institutions. Genuine religion, it seems to say, is mere sabbath-keeping by individuals who attend the church of their choosing. And a family like the Newlands, insofar as it is engaged in a business, is utterly subject to the plenary power of the state. The creative gift of the Newland family—their business enterprise—does not fully belong to them, to be governed by their conscience. Their entrepreneurship must be severed from their faith, as though they can be Catholics only in church on Sunday. And the Obama Justice Department has the nerve to argue that the Newlands are "imposing their religion" on their employees!

Here we see one of the characteristic moves of the modern secular state: the effort to push the vital institutions of civil society aside—in this case, its religious communities and the unique role they play in the lives of citizens. Richard John Neuhaus understood this nearly 30 years ago in *The Naked Public Square*: "Once religion is reduced to nothing more than privatized conscience, the public square has only two actors in it—the state and the individual." And he added that "a perverse notion of the disestablishment of religion leads to the establishment of the state as church."

At one of this summer's national political conventions, we heard the startling statement that "government is the only thing we all belong to." In that understanding, the civil society and the communities to which government is responsible are left out. As a crotchety old Hollywood actor observed at the other convention, "We own this country . . . politicians are employees of ours." He did not have religious freedom in mind, so far as I can tell. But his principle is sound for our purposes. Individuals of faith, joined in communities of faith, forming a civil society imbued with the many faiths of those many communities, own this country. The state's authority comes from us, and its power—the power of our elected employees—cannot be greater than what we can rightfully give it. We cannot give the state power over the conscience of men and women, because we do not ourselves have any right to come between God and our fellow citizens. The sooner our elected employees remember these foundational truths, the sooner we may begin to recover a healthy notion of religious freedom. ■