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Religious Freedom and Legal Education

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For what was obvious yesterday is not necessarily obvious today, i.e., to the present generation of young citizens. In the past, freedom of religion for all has always been an important element of constitutional guarantees, but one wonders whether religious freedom would be defended by the present younger generation. In particular, would the young of Europe defend it? The answer, unfortunately, is most probably in the negative. But maybe the United States is different—is indeed our Euro-Atlantic world divided on the issue of religion and its role in modern societies? Legal history teaches that freedom of religion always comes at a price. The crucial point is who has to pay the price. Freedom cannot defend itself. It needs its own witnesses, martyrs and, above all, guardians and protectors. Recently, that is during the last two terms, the Supreme Court of the United States has sent out a series of instructive and influential signals that protection of religion should be strengthened. The relevant cases are American Legion *v.* American Humanist Association *(2019),* Espinoza *v.* Montana Department of Revenue *(2020),* Little Sisters of the Poor Saints Peter and Paul Home *v.* Pennsylvania *(2020),* Our Lady of Guadalupe *v.* Morrissey-Berru *(2020) and* Fulton *v.* City of Philadelphia *(2021).*

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Whether one personally appreciates it or not, religion brings redeeming values to personal and social life. Therefore, protecting religious freedom as broadly as is practicable is, in fact, despite sundry contemporary protests, protecting humanity. This is not a matter merely of the expression of ideas, as in freedom of speech. Protecting freedom of religion is protecting our personal internal life. It is a matter of personal integrity and the coherence between what we choose and do, on the one hand, and what we ultimately believe and trust in, on the other. What we do and choose is necessarily a manifestation of our internal life, our intentions and decisions, our expectations and aspirations. That is why during political debates we find religion protected as an essential concern. Contradictorily, one cannot truly be even a humanist without protecting religion. But the question we find ourselves having to ask is: is this present generation willing or not to hold onto and protect essential human values?

For what was obvious yesterday is not necessarily obvious today, that is to the present generation of young citizens. In the past, freedom of religion for all has always been an important element of constitutional guarantees, but one wonders whether religious freedom would be defended by the present younger generation. In particular, would the young of *Europe* defend it? The answer, unfortunately, is most probably in the negative. But maybe the United States is different—is indeed our Euro-Atlantic world divided on the issue of religion and its role in modern societies?

But legal history also teaches us that freedom of religion always comes at a price. The crucial point is who has to pay the price.[2] Freedom cannot defend itself. It needs its own witnesses, martyrs and, above all, guardians and protectors. Recently, that is during the last two terms, the Supreme Court of the United States has sent out a series of instructive and influential signals that protection of religion should be strengthened.

This protection comes under the aegis of the celebrated First Amendment to the US Constitution, which belongs to the *topica*—the topics of modern legal cul-

Would religious freedom be defended by the present younger generation?

Legal history, in giving the opportunity to take advantage of the experience of past generations and their systems, can prove itself to be quite practical when applied in the field of legal studies, i.e., for legal research or analyses. Legal history teaches that constitutional orders have been formed for centuries and it seems likely that all were established with the intent of enduring forever; nevertheless, we know that in practice they are always in a continuous process of refinement and development and will change during the life of any particular society or state. Inevitably, then, some systems and epochs will be richer than others in their understanding of ways to put in normative order what is needed for a society in those situations that require regulation. Justice Hugo Black, writing in the United States in 1951, was clearly aware of living in a less than optimal time with regard to particular freedoms but was able to put this in a broader, historical perspective: "There is hope, however, that in calmer times, when present pressures, passions and fears subside, this or some later Court will restore the First Amendment liberties to the high preferred place where they belong in a free society."[1]

ture. The Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." Nevertheless, despite the highlighted position of the protection of religion in the First Amendment, our actual experience in teaching law[3] proves that if two separate university courses are offered today on subjects related to freedoms secured by this Amendment, it is certain that more students will be attracted to freedom of speech than to freedom of religion. This order, we note, is opposite to that declared by the Constitution, and should be the other way round: religion first, then speech, as the First Amendment puts freedom

1 *Dennis* v. *United States*, 341 U.S. 494, 581 (1951) (Black, J., *dissenting*).

2 Franciszek Longchamps de Bérier, "Cena wolności słowa," in *Państwo prawa i prawo karne. Księga Jubileuszowa Profesora Andrzeja Zolla*, ed. Piotr Kardas and Tomasz Sroka and Włodzimierz Wróbel (Warszawa: Wolters Kluwer Polska, 2012) vol. 1, 259–74.

3 Franciszek Longchamps de Bérier, "Roman Law and Legal Knowledge—Law Faculties versus Law Schools," in *Roman Law and Legal Knowledge. Studies in Memory of H. Kupiszewski*, ed. T. Giaro (Warszawa: Stowarzyszenie Absolwentów Wydziału Prawa i Administracji UW, 2011), 15.

of religion in the *first* place—and, as we will see, for various reasons.

1. We note that in civil law countries, the interest of students should *prima facie* be equal for both courses, inasmuch as they both create the opportunity to acquire skills in common law analyses and in the practice of American courts. In the US, these courses are not broad in their scope, as they cover only one chapter of American constitutional law. There are, however, several possible explanations for the fact that classes in religious freedom tend to be only half as numerous as those in freedom of speech. The first explanation could be that our students think they know a lot and have much to say about freedom of speech. On the other hand, they probably do not find religion an important subject or even, in perhaps the majority of cases, a part of personal and social life that is worth protecting. This is not surprising as the general European tendency seems to be to reduce freedom of religion to freedom of expression[4] as if religion had no redeeming value in itself for individuals or communities—that is, as if religion were not anything more than a particular kind of verbalization of ideas. But religion is not just a matter of expressing certain concepts.

We can get a useful perspective on the Gordian knot of these two freedoms from the results of legal analyses, which allow us to trace important crossroads where both these freedoms meet. And in these intersections it is freedom of religion that seems to have priority over freedom of speech—basically because it also saves religious values that exist in the political sphere.[5] As regards the United States, one could in addition argue, formally speaking, that in the order given in the First Amendment religion is protected before speech and expression are. One might ask: but why take this particular *comparative* example into consideration and refer to American legal experience when discussing the urgent need for awareness in religious freedom *over here in Europe*?[6] First, the conclusions of recent comparative report-studies explicate the underlying rationale for and validity of such comparisons.[7] Second,

If one is apprised of the key issues of free speech, one cannot but be aware that it is impossible in practice to reduce freedom of religion to freedom of speech.

4 Cf. Piotr Szymaniec, *Koncepcje wolności religijnej: rozwój historyczny i współczesny stan debaty w zachodniej myśli polityczno-prawnej* (Wrocław: Oficyna Wydawnicza Atut—Wrocławskie Wydawnictwo Oświatowe, 2017).

5 Andrzej Bryk, "Covenant, the Fear of Failure and Revivals as the Contemporary Sources of American Identity," in *Amerykomania. Księga jubileuszowa ofiarowana profesorowi Andrzejowi Mani*, ed. Włodzimierz Bernacki and Adam Walaszek (Kraków: Wydawnictwo Uniwersytetu Jagiellońskiego, 2012), vol. 2, 60–63, 75–78.

6 Grzegorz Blicharz, "Conclusion: A Historical and Comparative Perspective," in *The Battle for Religious Freedom. Jurisprudence and Axiology*, ed. Grzegorz Blicharz and Maria Alejandra Vanney and Piotr Roszak (Warszawa: Wydawnictwo Instytutu Wymiaru Sprawiedliwości, 2020) 421: "The jurisprudence of the courts is highly influenced by the legal tradition of the country meaning that issues of religious freedom are dependent on local circumstances and the history of each society."

7 *Freedom of Religion. A Comparative Law Perspective*, ed. Grzegorz Blicharz (Warszawa: Wydawnictwo Instytutu Wymiaru Sprawiedliwości, 2019), *Freedom of Conscience. A Comparative Law Perspective*, ed. Grzegorz Blicharz (Warszawa: Wydawnictwo Instytutu Wymiaru Sprawiedliwości, 2019).

the fact that in the United States religious freedom is declared as the very first freedom does not mean it is protected well enough even there. The number of cases concerning the First Amendment that come before the Supreme Court of the United States each term is surprisingly high. Each term (i.e., from early October till early July) the Supreme Court of the United States decides upon only a small number of cases, about 70 to 90, and yet every term there is a least one (sometimes two or three) decided on the basis of, or even directly concerning, the religious clauses of the First Amendment. And it is surprising how many cases have arisen even after *Cantwell* v. *Connecticut*[8] was decided in 1940, as it might be assumed that everything had already been settled and said about religious freedom in First Amendment jurisprudence 80 years ago … What might give reason for concern is the fact that recent cases in which the Court has granted *writ of certiorari* are not about mere details or trifles.

Both the factors we noted—that our students think they already know a lot about freedom of speech, and that they probably do not find religion an important subject—might lead to a negative answer to the question as to whether religious freedom could effectively be defended by this generation. If we do not need religion in Europe anymore, then we will probably feel it does not need to be protected. And so it is that we leave constitutional protection clauses as little more than mere ornaments on legal documents, for European practice and governance, and court decisions, too—of both national and international courts—show that they no less than *despise* religion and the need for religious freedom, and, indeed, those citizens who are religious. One recent example is given by works on the process of implementation of the EU directive on whistleblowers. With regard to exceptions, the directive itself accepts only "legal and medical professional privilege"[9], but not religious privilege. This lack poses a threat for instance to the seal of confession—which is fundamental to a Catholic and to his or her whole inner and outer life. This could lead to the paradoxical situation where the seal of confession is respected in criminal and other procedures, but not in whistleblowing legislation. The Legal Affairs Commission of the Commission of the Bishops' Conferences of the European Union (COMECE) noticed that during a meeting with an EU official, he testified that, during negotiations, there had indeed been requests to expand the scope of clauses on confidentiality within the Directive, but that they had been rejected on the grounds that the protection of public interest was considered prevalent. This official confirmed that two Member States had requested the inclusion of a provision quite specifically on confessional secret, but "the point had not been considered as relevant." However, problems caused by recent regulations in Australia[10] suggest that the issue is by no means irrelevant.

2. What might prompt pessimism is a controversy which recently reached the US Supreme Court concerning a cross located only six miles from the very building which houses this court.[11] Federal courts were expected to order the relocation or demolition of this cross or at least the removal of its arms. It is known as the Bladensburg Cross—a Latin cross, about twelve-meters tall, erected 85 years ago at the center of a busy intersection in the suburbs of the nation's Capital. The cross was erected as a tribute to 49 soldiers from the area who gave their lives in the First World War. The erection of such a cross was not surprising since the Latin cross had become a central symbol of the war. The image of row after row of plain white crosses marking the overseas graves of soldiers was emblazoned on the minds of Americans at home. The situation of the twelve-meter cross was challenged in 2014 by those who claimed to be offended by the sight of the memorial on public land and the expenditure of public funds to maintain it. They themselves were apparently not ready to pay the price of freedom for others. They maintained that this situation, long-established and accepted by the community concerned,

8 *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940).

9 Art. 3 § 3 (b) Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law (CELEX 32019L1937).

10 Cf. Brian Lucas, "The seal of the confessional and a conflict of duty," *Church, Communication and Culture* 6 (2021) no. 1, 99–118.

11 *American Legion* v. *American Humanist Association*, 139 S.Ct. 2067 (2019).

violates the Establishment Clause of the First Amendment; the Court of Appeals for the Fourth Circuit agreed with them that the memorial is unconstitutional and remanded for a determination of the proper remedy. The Supreme Court, however, was of the opposite opinion, by a vote of 7:2; therefore, as far as the highest court in the land was concerned, the matter seemed reasonably clear-cut.

For nearly a century, this cross has expressed the community's grief at the loss of the young men who perished, the community's thanks for their sacrifice, and its own dedication to the ideals for which they fought. It has become a prominent community landmark, as since 1925 it has been the site of patriotic events honoring veterans on, for example, Veterans Day, Memorial Day, and Independence Day. Its removal or radical alteration today would be seen by many not as a neutral act—a respect for all religions—but as the manifestation of "a hostility toward religion that has no place in our Establishment Clause traditions."[12] And there was no evidence of discriminatory intent in the selection of the design of the memorial or the decision of a Maryland commission to maintain it. The Supreme Court observed: "[t]he Religion Clauses of the Constitution aim to foster a society in which people of all beliefs can live together harmoniously, and the presence of the Bladensburg Cross on the land where it has stood for so many years is fully consistent with that aim."[13] In terms of European jurisprudence we would say there is the right to the cross on public property. This is the right of citizens who are believers or nonbelievers: the right to the cross's presence on public land or in prominent public buildings.

In Poland, there had been a similar issue during the 2011 controversy concerning the presence of the cross in the chamber of the Polish parliament. The speaker for the Parliament entrusted four experts with presenting written analyses on the issue. The experts were chosen—one would say—on the scheme 2:2—two who could potentially be in favor of keeping the cross in the chamber room, two who *prima facie* would likely argue for its removal. The surprise was that not one of them really argued for the removal.[14]

Both these Polish experts and the US Supreme Court were convinced that there seems to be no logical connection between the presence of the cross in public places and the government's impartiality in religious matters. The cross does not threaten religious impartiality as its function is an essentially *social* one: it calls for a readiness to sacrifice for the sake of the good of other people. The cross cannot, therefore, be understood as erected *against* anybody: the right to the cross becomes an expression of sincere concern for the common good and of true humanism by the readiness for sacrifice for the sake of others. The people's expectation that they have a right to the cross is respected, in particular when the cross had already been present on public land for a significant period of time. But such historical arguments are not the only arguments and not even necessary in the sense that the lack of them would make a display of the cross unconstitutional or the cross would thereby become a sign of intolerance or religious indoctrination. By the very nature of the cross, that could never be.

The case of the Latin cross suggests that retaining established, religiously-expressive monuments, symbols, and practices, is quite different from erecting or adopting new ones. The Court concluded: "The cross is undoubtedly a Christian symbol, but that fact should not blind us to everything else: that […] the monument is a symbolic resting place for ancestors who never returned home[; that…f]or others, it is a place for the community to gather and honor all veterans and their sacrifices for our Nation. For others still, it is a historical landmark. For many of these people, destroying or defacing the Cross that has stood undisturbed for nearly a century would not be neutral and would not further the ideals of respect and tolerance embodied in [the First Amendment…of] the Constitution."[15] No doubt the cross originated as a Christian symbol.

12 *Van Orden* v. *Perry*, 545 U. S. 677, 704 (2005) (Breyer, J., *concurring in judgment*). Cf. Weronika Kudła, *Wrogość wobec religii. Ostrzeżenia ze strony Sądu Najwyższego USA* (Kraków: Księgarnia Akademicka, 2018), 36–37, 300–308.

13 *American Legion*, 2074.

14 Weronika Kudła and Franciszek Longchamps de Bérier, "Prawo do krzyża w przestrzeni publicznej. Odpowiedź stowarzyszeniu humanistów," *Forum Prawnicze* 4 (2019), 19–37.

15 *American Legion*, 2090.

And it always retains its religious meaning, although it can have a variety of other, lay meanings as well. Challenging the cross only for its intrinsic religious meaning or the original purpose of the monument as infused with religion could only be considered an act of hostility towards religion—not the desire to *permit* all religions but rather the desire to *destroy* all religions.

First, tolerating the meaning of this cross does not actually *harm* anybody—it might only *allegedly* hurt. There is no coercion involved in the presence of the cross, yet there might very well be no basis at all for a legal challenge to this public cross.[16] After all, how is it possible to adjudge, for the challenge to be valid, which particular persons would need to feel offended by the sight of the memorial? Must it include everyone? And how do we define the features of these ostensibly 'offended subjects'? And to what degree do they need to be offended, and how empirically measure the offence felt? And what about exceptions—is not the offence felt at its removal to be also taken into account? Certain lower courts did indeed invent a form of 'offended-observer standing' for Establishment Clause cases in response to *Lemon* v. *Kurtzman*[17]—and so, once again, we might argue that we have here yet another call for overturning *Lemon*. Probably the most trenchant expression of this plea is that of Justice Antonin Scalia. "Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District. Its most recent burial, only last Term, was, to be sure, not fully six feet under: our decision in *Lee* v. *Weisman* conspicuously avoided using the supposed 'test' but also declined the invitation to repudiate it. Over the years, however, no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature's heart (the author of today's opinion repeatedly), and a sixth has joined an opinion doing so. The secret of the *Lemon* test's survival, I think, is that it is so easy to kill. It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to the tomb at will. When we wish to strike down a practice it forbids, we invoke it; when we wish to uphold a practice it forbids, we ignore it entirely. Sometimes, we take a middle course, calling its three prongs 'no more than helpful signposts.' Such a docile and useful monster is worth keeping around, at least in a somnolent state; one never knows when one might need him."[18] Justice Scalia's prose is not just eloquent but entirely to the point—pointing out just how difficult and never-ending free-religion jurisprudence is. And finally we note that the US Supreme Court in the *Town of Greece* case reasoned that the historical practice of having, since the First Congress, chaplains in Congress showed "that the Framers considered legislative prayer a benign acknowledgment of religion's role in society."[19]

With regard to religion, it is not assertiveness that is needed but rather religious-freedom awareness.

Second, it is those above all who champion the religious freedom of their co-citizens who are most likely to avoid hostility towards religious groups. Moreover, there is no reason to limit religious speech and display to that which is nonsectarian. In fact, the nonsectarian is often considered, by sincere adherents of a religion, to retain little or nothing of the truly religious—it is no longer religious in any sense. In Poland, such hostility to religion as that shown towards the cross in the suburbs of

16 *American Legion*, 2096 (Thomas, J., *concurring*).

17 *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971).

18 *Lamb's Chapel* v. *Center Moriches Union Free School District*, 508 U.S. 384, 398–399 (1993) (Scalia, J., *concurring in judgment*).

19 *Town of Greece, N.Y.* v. *Galloway*, 572 U. S. 565, 576 (2014).

Washington, D.C. would be considered to be against the common good—*bonum commune*, that is Article 1 of the 1997 Constitution of Poland. This is particularly evident when we consider that quite different in nature was the act of establishing the cross in public space in the first place from subsequently taking down a well-established and generally respected cross or—worse—demolishing the cross by cutting its arms or removing it completely from any public space. Such demolition would be but an act of vandalism, even if legal in some jurisdictions. But, thankfully, both crosses remain where they were originally set: one on the crossroads six miles from the Supreme Court of the United States, and the other in the chamber of the Polish Parliament.

Freedom always comes at a price. Someone has to pay for it.

3. During the US Supreme Court's 2019 term, there were three cases which concerned religious freedom quite specifically. They are quite instructive for understanding the general tendency in jurisprudence to take into consideration and respect the freedom of religion.

In *Espinoza* v. *Montana Department of Revenue*[20] the highest court had to revisit an issue which has been vigorously discussed since the late sixties of the twentieth century: the constitutionality of spending public funds on helping (parents and their) children who attend parochial schools. The occasion was given by the actions of the Montana legislature. It had established a program granting tax credits to those who donate to certain organizations which in turn award scholarships for private school tuition. The point was that the regulation as worded was about financing *private* schools but not *parochial* (i.e. religious) schools, as, in connection with this program, the Montana Department of Revenue had promulgated "Rule 1" prohibiting families from using the scholarships for education at, *specifically*, religious schools. When three mothers sought to use the scholarships at a religious school, the Montana Supreme Court found the program unconstitutional *simpliciter* and without addressing further the objectionable stipulation. The mothers challenged their decision, maintaining that it was specifically the Rule discriminated on the basis of their religious views and the religious nature of the particular school they had chosen. The question was presented in this way: "whether the Free Exercise Clause of the United States Constitution barred that application of the no-aid provision" of the Montana Constitution. The point was, therefore, not to bury the issue by accepting that the program is simply unconstitutional but address quite explicitly the issue concerned. And the US Supreme Court disagreed with the Montana highest court, reversing its decision by a close 5:4 vote.

During the seventies and eighties, the financing of parochial schools was not allowed by the US Supreme Court, but in the mid-90s the Court changed its line of precedence for various practical reasons, including the extremely high costs of complying with previous Court decisions. The Court became more realistic in finding a fine line discriminating between impermissible establishment and permissible accommodation. Finding this line did not mean paying no price for accommodating others' freedom. This time the Court buried major doubts concerning constitutionality and legitimacy of financing educational institutions that are under sectarian control. For that reason, it went as far as to cite the founding case for American constitutional jurisprudence: *Marbury* v. *Madison* that the "*supreme law of the land* condemns discrimination against religious schools and the families whose children attend them."[21]

A shorter but not less polarizing discussion was closed this same term by another decision in a case

20 *Espinoza* v. *Montana Department of Revenue*, 140 S.Ct. 2246 (2020).

21 *Marbury* v. *Madison*, 1 Cranch 137, 180 (1803).

that was quite clearly about the free exercise of religion. In *Little Sisters of the Poor Saints Peter and Paul Home* v. *Pennsylvania*[22], the US Supreme Court held that an administrative health agency is entitled to promulgate religious and moral exemptions. Pennsylvania had objections to the Departments of Health and Human Services, Labor, and the Treasury accommodating in such a way a religious employer which is only a religious *order* and not a church, sect or denomination. The issue was created by the Affordable Care Act of 2010, i.e. by the so-called 'Obamacare' that requires those employers who are covered to provide women with "preventive care and screenings" without "any cost-sharing requirements." Health plans provide coverage for all Food and Drug Administration approved contraceptive methods, including early-abortion drugs. In two previous cases, the Supreme Court had decided to respect the conscientious objections of a family firm, with expectations that church exemptions would be broadened.[23] And this time, the Court decision was decided by a 7:2 vote and confirmed the constitutionality of the actions taken by the administrative agency. It legitimately granted exceptions that accommodate and respect religious objectors who have had to fight for the ability to continue in their worthy charitable work without violating their sincerely-held religious beliefs.

Our Lady of Guadalupe v. *Morrissey-Berru*—a case concerning the so-called 'ministerial exception'—was decided by the very same vote and on the very same day, July 8, 2020.[24] This same issue had appeared before the Supreme Court nine years earlier in *Hosanna-Tabor Evangelical Lutheran Church and School* v. *EEOC*[25] when the court confirmed the freedom of religious entities to hire and fire those whom they consider their ministers, that is to say, persons involved in accomplishing the denominational mission. There was absolutely no doubt that religious institutions are to decide for themselves, free from state interference, not only matters of faith and doctrine but those of church government as well. This right is protected by the First Amendment and for courts it meant that they are barred from entertaining an employment-discrimination claim brought by a teacher of a religious school. The *Our Lady of Guadalupe* case strongly confirmed the ministerial exception, saying that the First Amendment's Religion Clauses foreclose the adjudication on employment-discrimination claims in religious schools. "When a school with a religious mission entrusts a teacher with the responsibility of educating and forming students in the faith, judicial intervention into disputes between the school and the teacher threatens the school's independence in a way that the First Amendment does not allow."[26]

The case was based on proceedings brought by two teachers in the Archdiocese of Los Angeles. Their employments had been terminated, allegedly because one had achieved old age and the other had breast cancer. Neither teacher wanted to pay the price for the ministerial exception granted to their employers, so after their employment was terminated they proceeded to sue their schools. Both were employed under nearly identical agreements that set out the schools' mission to develop and promote a Catholic school faith community; imposed commitments regarding religious instruction, worship, and personal modeling of the faith; and explained that teachers' performance would be reviewed on those bases. Both teachers taught religion in the classroom, worshipped with their students and prayed with them, and had their performance measured on religious bases. The point of this case was not the *adoption* of the privilege as in the *Hosanna-Tabor* case, but rather the elaboration of its correct understanding. Is there any test as to who is a minister? If one works in a religious school but is of a different faith, could one still be considered a minister? How much teaching, how much preaching needs to be exercised to be considered a minister? In the *Our Lady of Guadalupe* case a "function-only" test was argued for by those who

22 *Little Sisters of the Poor Saints Peter and Paul Home* v. *Pennsylvania*, 140 S.Ct. 2367 (2020).

23 *Burwell* v. *Hobby Lobby Stores, Inc.* 573 U. S. 682, 696–697 (2014), *Zubik* v. *Burwell*, 578 U. S. 403 (2016). Franciszek Longchamps de Bérier, "Law and Collective Identity: Religious Freedom in the Public Sphere," *Krakowskie Studia z Historii Państwa i Prawa* 1 (2017), 176–77.

24 *Our Lady of Guadalupe* v. *Morrissey-Berru*, 140 S.Ct. 2049 (2020).

25 *Hosanna-Tabor Evangelical Lutheran Church and School* v. *EEOC*, 565 U. S. 171 (2012).

26 *Our Lady of Guadalupe*, 2069.

expected an overturning of the *Hosanna-Tabor* case. In the same vein, the US Court of Appeals for the Ninth Circuit that covers California by its jurisdiction wanted to limit the scope of the understanding of who can be considered a minister simply in order to avoid chaos. There were various indications that could be taken from *Hosanna-Tabor* to limit the ministerial exception. First, the church itself gave the teacher the title of minister, with a role distinct from that of most of its members. Second, her position "reflected a significant degree of religious training followed by a formal process of commissioning." Third, she "held herself out as a minister of the Church" and claimed certain tax benefits. Fourth, her "job duties reflected a role in conveying the Church's message and carrying out its mission." The Supreme Court decided that the circumstances which the Supreme Court had found relevant in *Hosanna-Tabor* had mistakenly been treated by the Ninth Circuit as a mere checklist of items to be assessed and weighed against each other. But that is insufficient because when it comes down to details we have to enter into churches' internal affairs. No wonder, then, that the Supreme Court stated what in hindsight seems obvious: "Deciding such questions would risk judicial entanglement in religious issues." It is not only much better keeping away, it is in fact the only honest attitude that could be taken by a government with any serious constitutional respect for and declaration of religious freedom.

4. The 2020 term started with only two cases in which there was any religious element, but for both religion was only in the background.[27] In November, however, an important case arose when the US Supreme Court agreed on an executive order establishing occupancy limits in the time of pandemic in order to curb rising infections. A Roman Catholic diocese and two Orthodox Jewish synagogues sued to block enforcement of the executive order as it negatively impacted them when introducing *no* capacity restrictions on certain businesses considered 'essential'. The businesses were in fact only secular. The court granting the injunction against the executive order stated that if the restrictions that were being challenged were in fact enforced they would cause irreparable harm; on the other hand, blocking them would *not* infringe the public interest. The Supreme Court took the occasion, therefore, to reaffirm that freedom of religion is not to be disregarded even in times of crisis. Government officials cannot treat religious activities worse than comparable secular activities, unless they are pursuing a compelling interest and using the least restrictive means available.[28]

We need to think in terms of educating so as to be of help to those who pay the price of religious freedom.

A major contribution to the affirmation of individual religious freedom came with a case decided unanimously in mid-June 2021. In *Fulton* v. *City of Philadelphia*[29], a public entity stopped referring children to a foster-care agency which would not certify same-sex couples as foster parents due to the agency's religious beliefs about marriage. Yet no same-sex couple had ever sought certification from the agency. If one did, the agency "would direct the couple to one of the more than 20 other agencies in the City, all of which currently certify same-sex couples." For over fifty years (up until 2018) the agency had successfully contracted with the City to provide foster-care services while holding to its beliefs. It was plain to the

27 *Tanzin* v. *Tanvir*, 141 S.Ct. 486 (2020) and *Uzuegbunam* v. *Preczewski*, 141 S.Ct. 792 (2021).

28 *Roman Catholic Diocese of Brooklyn* v. *Cuomo*, 141 S.Ct. 63 (2020).

29 *Fulton* v. *City of Philadelphia*, 141 S.Ct. 1868 (2021). See https://www.catholicnewsagency.com/news/249688/city-of-philadelphia-to-pay-2-dollars-million-to-catholic-foster-care-agency-in-settlement., accessed November 26, 2021.

US Supreme Court, in the first place, that the City's actions had burdened the agency's "religious exercise by putting it to the choice of curtailing its mission or approving relationships inconsistent with its beliefs." The task of the Court was to decide whether the burden the City had placed on the agency was constitutionally permissible. And it found that the City had indeed burdened the agency's religious exercise "through policies that do not meet the requirement of being neutral and generally applicable." The Court recalled two important cases[30] as precedent that Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature. The City had transgressed this standard of neutrality, but, even more serious, its regulation was not generally applicable. The regulation did in fact provide a mechanism for individualized exemptions, but the agency had not been offered one. The City invoked, unsuccessfully, its compelling interest in enforcing its non-discrimination policies but offered no compelling reason why it had a particular interest in denying an exception to the Catholic agency while making them available to others. They had, therefore, prohibited religious conduct while at the same time permitting secular conduct. It was clearly a partisan decision and against the Constitution.

nation, a nation which is understood politically as the result of a political covenant. This covenant is realistic when it takes into consideration the fact that the citizens it consists of are also subjects of various religious covenants.[31]

What proposals do we put forward, then, with regard to legal education? The need for religious freedom might be obvious to the US Supreme Court and to older generations, but there is an urgent need to explain convincingly to younger generations the redeeming value of this freedom—and not only the position it happens to have in our countries' constitutions. It is not enough to teach freedom of religion in general courses on human rights or constitutional law as a perfunctory add-on to other freedoms. There is a constant need for specific courses dedicated to religious freedom itself, preferably with this freedom explicitly named in the titles of the courses. It is good and helpful to teach free speech as well, but separately—also in order to present the conflicts and common problems that arise between these two freedoms and the endeavors to protect both. If one is apprised of the key issues of free speech, one cannot but be aware that it is impossible *in practice* to reduce freedom of religion to freedom of speech, unless the intention is in fact to neglect or diminish freedom of

We should take up the challenge of educating our young about religious freedom.

5. The number of cases concerning religious freedom that continue to come up before the Supreme Court of the United States proves that religious freedom and keeping healthy relations between government and religion are essential for the good of American society. This is unsurprising, as religion brings what is redeeming to the common life even of this most modern, diverse or—as we love to say—'pluralistic' religion—which would be an enormous reduction in individual freedom and of a vital aspect of that freedom. It would, of course, be possible to attempt to regulate religion in the same way as speech, i.e. using a top-down approach, but true freedom of religion could not be enjoyed under such regulation, because religious freedom requires respect for ordinary everyday practices. And that is why freedom of religion requires rather a bottom-up analysis.

30 *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520, 531–532 (1993) and *Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rights Commission*, 138 S.Ct. 1719, 1731–1732 (2018).

31 Franciszek Longchamps de Bérier, "Church-State Relations: Separation without the Wall," *Studia Iuridica* 30 (1995), 91.

Legal education about religious freedom could clearly present argumentation in favor of the freedom of religion, but this should not be a mere presentation of certain splendid victories that have occurred in courts. It is important that it is seen that religious freedom is and, indeed, *should be* respected. It might perhaps be a better approach to analyze attacks against this freedom and against religion itself that unfortunately *succeeded*. Studying such defeats for religion could be useful for training our young to be prepared for the situations they might encounter. Note that, with regard to religion, it is not assertiveness that is needed but rather religious-freedom *awareness*.

When addressing a broad audience, Jesus Christ would often talk in parables. Parables are excellent literary style. They are quite safe for the speaker and respectful to the listeners, for parables come to each listener at his or her own level of intelligence and awareness. If those who hear are sufficiently acute they will understand more than the literal, explicit meaning and may even add something from their own experience. If the hearers are very sharp-witted or sagacious, the speaker might be required to explain the parable in plain, explicit terms. Foreign court cases—like those decided by the US Supreme Court or others known from comparative report-studies—are the parables that allow us to see as in a fable our own local issues and guide us as to the measures to be taken.

In our workshops and other educational practices, we should ourselves remember, as well as reminding others, that freedom always comes at a price. Someone has to pay for it. This observation of a simple fact needs to be combined with the following simple and evident but nevertheless powerful message: "freedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way."[32] Constitutionally-guaranteed protection has to be ensured to everyone, not just to those who can afford it. We need to think, therefore, in terms of educating so as to be of help to those who pay the price of religious freedom.

The decisions of courts often seem obvious in hindsight and we might wonder how anyone could have thought of challenging a certain monument or ministerial exception or failed to take into consideration the educational needs of mothers or the conscientious objections of foster agencies or of nuns who did not want to sponsor early-abortion drugs. Nevertheless, these things did happen and we need to be constantly prepared for challenges to religious freedom. We should take up the challenge of educating our young about religious freedom, and that includes being ready to confront challenges to that freedom. We should have good and inclusive and tolerant answers ready to hand so we can protect and defend the freedom of religion opportunely and staunchly. So help us God.

32 *Murdock* v. *Pennsylvania*, 319 U.S. 105, 111 (1943).

Bibliography

Blicharz, Grzegorz. "Conclusion: A Historical and Comparative Perspective," in *The Battle for Religious Freedom. Jurisprudence and Axiology*, edited by Grzegorz Blicharz and Maria Alejandra Vanney and Piotr Roszak, Warszawa: Wydawnictwo Instytutu Wymiaru Sprawiedliwości, 2020, 409–421.

Blicharz, Grzegorz. edited, *Freedom of Conscience. A Comparative Law Perspective*, Warszawa: Wydawnictwo Instytutu Wymiaru Sprawiedliwości, 2019.

Blicharz, Grzegorz. edited, *Freedom of Religion. A Comparative Law Perspective*, Warszawa: Wydawnictwo Instytutu Wymiaru Sprawiedliwości, 2019.

Bryk, Andrzej. "Covenant, the Fear of Failure and Revivals as the Contemporary Sources of American Identity," in *Amerykomania. Księga jubileuszowa ofiarowana profesorowi Andrzejowi Mani*, edited by *Włodzimierz Bernacki and Adam Walaszek*, vol. 2, Kraków: Wydawnictwo Uniwersytetu Jagiellońskiego, 2012.

Kudła, Weronika. *Wrogość wobec religii. Ostrzeżenia ze strony Sądu Najwyższego USA*, Kraków: Księgarnia Akademicka, 2018.

Kudła, Weronika, and Franciszek Longchamps de Bérier. "Prawo do krzyża w przestrzeni publicznej. Odpowiedź stowarzyszeniu humanistów," *Forum Prawnicze* 4 (2019), 19–37.

Longchamps de Bérier, Franciszek. "Cena wolności słowa," in *Państwo prawa i prawo karne. Księga Jubileuszowa Profesora Andrzeja Zolla*, edited by Piotr Kardas and Tomasz Sroka and Włodzimierz Wróbel, Warszawa: Wolters Kluwer Polska, 2012, vol. 1, 259–74.

Longchamps de Bérier, Franciszek. "Church-State Relations: Separation without the Wall," *Studia Iuridica* 30 (1995), 61–92.

Longchamps de Bérier, Franciszek. "Law and Collective Identity: Religious Freedom in the Public Sphere," *Krakowskie Studia z Historii Państwa i Prawa* 1 (2017), 169–80.

Longchamps de Bérier, Franciszek. "Roman Law and Legal Knowledge—Law Faculties versus Law Schools," in *Roman Law and Legal Knowledge. Studies in Memory of H. Kupiszewski*, edited by T. Giaro, Warszawa: Stowarzyszenie Absolwentów Wydziału Prawa i Administracji UW, 2011.

Lucas, Brian. "The seal of the confessional and a conflict of duty," *Church, Communication and Culture* 6 (2021) no. 1, 99–118.

Szymaniec, Piotr. *Koncepcje wolności religijnej: rozwój historyczny i współczesny stan debaty w zachodniej myśli polityczno-prawnej*, Wrocław: Oficyna Wydawnicza Atut—Wrocławskie Wydawnictwo Oświatowe, 2017.