RELIGIOUS FREEDOM

HISTORY, CASES, AND OTHER MATERIALS ON THE INTERACTION OF RELIGION AND GOVERNMENT

THIRD EDITION

JOHN T. NOONAN, JR.

EDWARD MCGLYNN GAFFNEY, JR.

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In Memory of David Daube (1909–1999)

Student of secular and religious law,
master of both Testaments,
bridger of continents and worlds.

ACKNOWLEDGMENTS TO FIRST EDITION

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We are grateful to the National Council of Churches of Christ in the United States of America, the University of Chicago Press, the University Press of Virginia, the Princeton University Press, Herald Press, and the *American Journal of Comparative Law* for permission to use excerpts from works to which they hold the copyright.

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John T. Noonan, Jr.
Edward McGlynn Gaffney, Jr.

PREFATORY NOTE TO FIRST EDITION

John T. Noonan, Jr.'s book is one of several publications commissioned by a project on church and state funded by the Lilly Endowment through Princeton University and intended both to interest scholars and students in the churchstate issue in American culture and to enlarge general appreciation of this neglected topic. In addition to this casebook, the project has commissioned two volumes of bibliographical essays and listings, nine monographic studies, and a summary volume that will review the issue from the colonial period to the present day. Of the monographic studies, four will analyze important developments in churchstate relations in various periods of United States history and five will address the topic in societies whose experience contrasts sharply with that of the United States, including Western Christendom, modern Europe, India, modern Japan, and contemporary Latin America. We are grateful to Judge Noonan for his work.

JOHN F. WILSON
Project Director
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INTRODUCTION TO FIRST EDITION

Prior to 1940 the Supreme Court of the United States had never upheld a claim of free exercise of religion, had never found any governmental practice to be an establishment of religion, and had never applied the religion clauses of the First Amendment to the states. The religion clauses were part of the American vision; they were not at work in the judicial process. They were alive in the sense that the ideals they embodied were regularly, if vaguely and inconsistently, acknowledged. Their force and power were yet to be realized.

Beginning in 1940 the Court changed all that. It applied the religion clauses to the states. It vindicated a claim of free exercise of religion. In due time it found an unconstitutional establishment of religion. With the sonorous simplicity of John Marshall laying out the foundations, the Court set out basic principles in the new area of law it was creating. The course of development for the next two generations, from 1940 to 1986, has been vigorous. No area of modern law, it may be boldly asserted, has been so marked by sectarian struggle, so strained by fundamental fissures, so reflective of deep American doubts and aspirations.

Cases have been chosen for inclusion here because they are controlling precedents—for example, the great trio of the early 1940s, *Cantwell, Barnette, and Ballard*—because they, as it were, continue the conversation, refining, elaborating, and qualifying—for example, the 1985 cases of *Aguilar, Ball,* and *Jaffree*—or because they are representative of a pattern—for example, the decisions of the Supreme Judicial Court of Massachusetts in the first part of the nineteenth century. Being concrete, the cases exemplify principles, challenge principles, qualify principles, generate principles. Issuing from conflict, they reveal the losing as well as the winning arguments. Being brought by litigants, they reflect the play of persons in the process.

"A page of history is worth a volume of logic." "The life of the law has not been logic but experience." These two axioms of Holmes—always given lip service by law schools but rarely taken seriously in academic milieus where the arts of logic flourish—are here, if anywhere, the keys of understanding. It is not only a matter of grasping the intentions of the Founding Fathers (a necessity if our national notion of a written Constitution as bedrock is to have validity). It is also a matter of empathetically appropriating the experience that undergirds the constitutional principles of free exercise and no establishment. The experience that made the law is capturable only through history. To know the price other systems have exacted, to know the prize we have, we must immerse ourselves in history.

In law school everything gets classified. Religion becomes a category, and categories are easy to manipulate. A sense of the hard, living reality of religion for believers—the sense that they believe that they are responding to a living transcendent intelligent Being—is easy to lose. One function of history is to put its student in the perspective of those for whom the

overriding reality was that God was making demands of them. Without that awareness of a power higher than the physical power of the state there would have been nothing to keep separate from the state; the law would have been the measure of obligation. Judaism, followed by Christianity, brought an obligation to obey God and established criteria for conscience that surpassed the law. Society was split by this spiritual requirement. In theory at any rate, conscience was made supreme because of each person's higher allegiance. From this higher sphere, too, came the paradigms of justice and mercy and constancy that provided guidance as the law was formed. To sense the reality of religion for the believers is to glimpse how the law was modeled.

Interacting, religion and law have affected each other. The history of that interaction is Jewish, Catholic, Protestant. It is scriptural, patristic, scholastic, Reformation, Enlightenment. It is Near Eastern, Roman, European, North American. It consists in theology, philosophy, political science, jurisprudence. It is exemplified in the earliest great treatise on the common law, *The Law and Customs of England.* It is illustrated by the assassination of Thomas Becket at Canterbury, the burning of Joan of Arc at Rouen, the martyrdom of Thomas More at Tyburn and of Hugh Latimer at Oxford. It is contained in the writings of the great Welsh defender of religious freedom, Roger Williams, and the writings and acts of the American fathers of religious freedom, Thomas Jefferson and James Madison. It involves the active persecution in America in the eighteenth century of the Baptists, in the nineteenth century of the Mormons, and in the twentieth century of the Jehovah's Witnesses and the strain throughout American history of hostility to the Catholics. It involves the crusades conducted under religious auspices for the abolition of slavery, the end of polygamy, the prohibition of alcohol, the vindication of civil rights, and the elimination of abortion. The history consists in specific speeches, memorable declarations, public and private letters, concrete deeds. It carries the most precious values and most terrible memories of our culture.

Religious liberty exists more fully today in America than in 1770 when Baptists were flogged in Virginia, or in 1790 when Catholics could not hold office in Massachusetts, or in 1870 when neither a Catholic nor a Jew could be a governor or legislator in New Hampshire, or in 1890 when the Church of LatterDay Saints of Jesus Christ was dissolved by act of Congress, or in 1930 when conscientious pacifists could not become citizens. Absolute religious liberty never existed and still does not exist. It has been approached asymptotically.

Too often the votaries of religion forget the evil that has been done in God's name. Too often the critics of religion forget that the cultural concepts on which they depend are owed to religion. Impartial history—impartial at least in so far as "the lot of humanity allows"—presents the bad and the good that religion has bestowed on our civilization. The religious impulse, like the sexual, is powerful, not easily trammeled and not easily eliminated from any phase of life. A history of mankind might be written in terms of the foolishness and wickedness that sexual desire or

religious aspiration has caused. But it would be incomparably foolish to think humankind could get along without either impulse.

No believer in God need deny that religion has often been the excuse for cruelty and wickedness. In Scripture itself the hypocrites who cry "Lord, Lord" are assured of their condemnation, and our religious traditions from Isaiah onward have rung with denunciations of the folly and the lethargy and the corruption of official leaders of God's flock. No enemy of the exploitation of human beings by religion should deny that the very terms he invokes in judgment—justice and truth and judgment itself—come from religious roots.

Religion is the realm of the spirit. But the good and the bad effected by religion have very often been achieved through the impact of religion on the organs of government. Recurrent problems are these:

1. *Limits.* What is the limit to the logic that the truth is to be brought to everyone? What is the limit to the logic that everyone is entitled to the full free exercise of religion? The first question was once the problem of believers. Underlying the question is the assumption that you have to doubt either your power or your premises if you do not use force in support of the truth. The second question is the more modern problem. The question is faced not only by those who are skeptical about religious truth and by those pragmatically committed to tolerance to secure peace but also by those who from their view of religion or the requirements of human dignity are constrained not to coerce conscience. The problem is most severe when recognition for the rights of conscience endangers the ability of the nation to defend itself by arms. Dependence on nuclear arms has made the dilemma acute.

Separation of sex and state is a popular idea today—to get the government out of the bedroom is axiomatic. It is urged that if we can accept religious pluralism, we can live with a variety of sexual styles, none specially favored or disfavored by the government. The approach converges with religious pluralism as it is seen that the foundation of the laws on sexual conduct is religious. If we proclaim liberty of choice as to the foundations, why not as to the derivative propositions? This extension of religious freedom has yet to be fully tested. The present compromise, not wholly stable, sees marriage as a secular enterprise that can survive separated from religion. The problem of limits recurs.

2. *Neutrality.* Is it possible for a government to govern without taking positions affecting religion? For example, every government must tax. The tax will fall on religious bodies or it will not; there is no third option. Are there neutral rules of law to decide intrachurch disputes and are the neutral state agencies to adjudicate between believers and nonbelievers? Are the judges marvelously above doctrinal prejudice so that they among all Americans are truly neutral or are they selfdeluded in their claim to be enforcing impartial principle?

3. *The Definition and Special Place of Religion.* Is religion one of many expressions of the human mind so that it is best understood and treated legally as a subdivision of speech? What religion does not largely

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consist in the communication of words? Can religion be defined to differentiate it from nonreligious verbal systems? Is religion indeed susceptible of a single definition? Religion was once defined in terms of duty to God. In a society where Buddhism is commonly viewed as a religion this definition no longer works. Is secular humanism, as the Supreme Court has suggested, a religion? Is Marxist communism a religion by metaphor or in reality?

Because of the magnitude of its claims or the intensity of the devotion it inspires, are believers in religion (a) to be peculiarly favored by the law in relation to fraud, medical malpractice, and the use of hallucinogens? (b) to be specially helped or handicapped in relation to the education of their children? (c) to be permitted to participate in the political system only if their ideas meet with the approval of the elite or only if they do not win too often or too much?

This book sets out documents by which these recurrent questions may be explored. But why speak of such abstractions as "religion" and "government?" The existent realities are persons—persons who are religious or not religious, who wield power or do not, but who invariably and necessarily incorporate in their own beings a mixture of beliefs and functions that can be separated only at the level of abstraction. Very few Justices of the United States Supreme Court, for example, have been irreligious men. Justice Holmes is the best known counterinstance, and he had little impact on the law in this area. The Justices who have shaped the law here have been predominantly Christian, mostly Protestant, sometimes the descendants of Protestant ministers—for example, Stephen J. Field, Charles Evans Hughes, and William O. Douglas. The strength of their religious commitment has varied, but no one could fairly charge them with antireligious opinions. They have embodied the state in its most concentrated form—judicial power. They have embodied Christian faith in ways well within the bounds of accepted Christian belief.

Litigants have been identified and lawyers named in many of the cases here collected. The identification of names functions as a reminder that "the law" set out in cases does not fall from heaven and would not be set out at all unless litigants sued and lawyers had experience, skill, persistence. Where would modern case law in this area be without Hayden Covington, Leo Pfeffer, and William Ball? Legal development has been affected by their beliefs.

"Church and State"—the title under which the subject of this book is conventionally classified—is a profoundly misleading rubric. The title triply misleads. It suggests that there is a single church. But in America there are myriad ways in which religious belief is organized. It suggests that there is a single state. But in America there is the federal government, fifty state governments, myriad municipalities, and a division of power among executive, legislative, administrative, and judicial entities, each of whom embodies state power. Worst of all, "Church and State" suggests that there are two distinct bodies set apart from each other in contrast if not in conflict. But everywhere neither churches nor states exist except as they are incorporated in actual individuals. These individuals are believers and unbelievers, citizens and officials. In one aspect of their activities, if they

are religious, they usually form churches. In another aspect they form governments. Religious and governmental bodies not only coexist but overlap. The same persons, much of the time, are both believers and wielders of power.

"The power"—often translated as "the powers that be"—is St. Paul's phrase for the force that resides in governments. It is stunningly impersonal. French employs a similar expression, *le pouvoir,* to designate the locus of authority. "The power" conveys the reality, that the force at the state's disposition is greater than that of any individual. The phrase also misleads if it dehumanizes this force so that one forgets that it is human beings who embody it.

Those human beings wielding power are linked by law, and it is the linkages of law as affected by and affecting religious belief that are the subject of this book. American law, dominated by case law climaxing in decisions of the Supreme Court, is a complex and comprehensive process. By "law" I mean constitutional provisions, statutes, and judicial decisions, but I also include a variety of other phenomena that are part of the legal process—legislative debates, presidential proclamations and addresses, the commentary of legal scholars, and the arguments of lawyers. Too truncated a vision of American law is conveyed if these other lawmaking, lawasserting activities are not noticed.

To capture the legal process relating to religion in time, to push back to the experience at its roots and carry it forward to the present, is the purpose of this book as it sets out salient moments in the articulation of the relationship between religious beliefs and legal power. The presentation is generally chronological (how else is history to be understood?). But there is a large exception. When one goes from Part I, "Roots," and Part II, "The American Experience," to Part III, "Current Controversies," one enters an area where decisions of the Supreme Court shape the problematic. If one is not to be completely a captive of the Court's categories, there is need to create one's own. I contend that the six divisions proposed here—Sacred Duties; Belief and Its Organization; Double Effect; Education; Political Participation; and Sexual Morals—produce more intelligibility than does a tracking of the Court's analysis.

JOHN T. NOONAN, JR.

Berkeley
August 15, 1986

INTRODUCTION TO SECOND EDITION

This casebook is a reworking of Judge Noonan's collection of materials published by Macmillan in 1987 under the title, *The Believer and the Powers That Are: Cases, History and Other Data Bearing on the Relation of Religion and Government*. That edition has not been available for classroom use for a period of over ten years. The frequent requests of teachers for these materials has led to this updated version. I have the responsibility for the changes that were made to Judge Noonan's materials, which I describe below.

One of the greatest strengths of Judge Noonan's materials is that they illustrate the powerful interaction between law and religion over many centuries. Part III describes various approaches to religious freedom that have emerged in contemporary controversies since 1940, when the Supreme Court first applied the Religion Clause of the First Amendment to the states. One might be tempted to leap over the historical materials in Parts I and II, but that would be short-sighted. In our view, one cannot understand, let alone intelligently criticize, the approaches of the courts and the political branches to religious freedom in the recent past, without a deep appreciation of the roots of these controversies in the ancient and medieval world (Part I) and in the American experience (Part II).

For this reason I have not altered the historical materials in Parts I and II significantly. Occasionally I have added a few new texts and bibliographical citations. For example, I added materials to Chapter One illustrating that many of our legal principles (e.g., privileges and immunities, due process of law, and equal protection of the laws) find their roots in the Hebrew Bible and in the New Testament, and that the problem of exemption of religious adherents from generally applicable laws is an ancient one, involving Jews and well as Christians.

Important differences between Jews and Christians are lost when reference is too easily made to "Judeo–Christian values," a term avoided in this book. I have added materials in the first two chapters that expressly describe the Jewish experience. Symbols have meaning too, so this edition adopts the convention of reckoning time under the increasingly common designations "BCE" (before the common era) and "CE" (common era) rather than under the more familiar designation of time referring to Jesus, "BC" (before Christ) and "AD" (anno Domini, in the year of the Lord).

I acknowledge with candor and sadness that religion has too often been used to deny freedom and even to eliminate lives. The deepest tragedy of the past century—the Holocaust—stems in part from the Christian teaching (a heresy in my view) of contempt for Jews. The Holocaust was an atrocity committed by a pagan secular regime that had contempt for Christianity, but many Christians were bystanders at a time of crisis because they and their ancestors had been taught both by church leaders such as Ambrose, John Chrysostom, Aquinas and Luther and by the law

itself to think of Jews as second-class citizens at best. Established religion begets denial of free exercise.

I added notes that address these concerns for two reasons. First, the relation between religion and government has not always been smooth or error-free, and religion has sometimes been the sinner. I illustrate this with a note on the troubled period in European history from the Peace of Augsburg to the Thirty Years' War and the Peace of Westphalia [Chapter Five, section 1]. Second, sins against religious freedom have also been committed by those who do not believe in sin. The greatest outrages in the century just past were committed not by religious communities but by secular totalitarian regimes of the Left and Right. From the Turkish genocide against the Armenians to the Nazi genocide against the Jews, gays, and gypsies; from Stalin's elimination of millions of his adversaries to the killing fields of Cambodia; and from the tribal slaughter in Rwanda to the ethnic cleansing in the former Yugoslavia, the recurrent mega-problem of the past century has been that lawless authority could acknowledge no power greater than itself, no transcendent point of reference to call it to judgment.

I also address the issue of violence as a religious problem. This edition retains the section containing the modern cases on conscientious objection to military service [Chapter Eleven, 4]. I added a note in Chapter Two on "Christians and Military Service in the Early Church: From Pacifism to the Augustinian Tradition on Justifiable War." This note is meant to explain the development of thinking within early Christianity on the deeply problematic character of the relationship between a believer and a governmental authority that commands a believer to kill.

I also added a note in Chapter Two about the critical transition in the fourth century, in which Christianity first became tolerated by Roman law under Emperor Constantine and then became the official established religion of the empire under Emperor Theodosius.

The principal additions to Judge Noonan's materials are edited versions of intervening decisions of the Supreme Court in Part III. I have tried to be generous with the text of decisions to enable students to see how divided the Court is on these matters and to challenge the whole enterprise of its jurisprudence, including evanescent standards for safeguarding free exercise of religion, as well as contrived tests for evaluating when there is a violation of the nonestablishment principle. Not being able to define hard core pornography didn't keep Justice Stewart from knowing it when he saw it. But familiarity with the historical materials in Parts I and II should equip students to recognize an establishment of religion more readily than can the memorization of judicial tests (from stream-lined "endorsement" or "coercion" tests, to the aptly styled *Lemon* test with its famous three parts, or to a recent proposal for an eleven-part "test" that promises more criteria to come!).

In Chapter Eleven, I added materials from the sacred scriptures of Jews, Christians and Muslims to enable readers to understand the source of a sacred duty that conflicts with the law. And I report several instances in

which the political branches have been more vigilant in safeguarding our first liberty than the Court has deemed necessary. I also report the struggle between the Court and Congress over what is "necessary and proper" in these matters. The text just cited—a phrase from Article I of the Constitution echoed in section 5 of the Fourteenth Amendment—refers to congressional power, not to judicial interpretation. In Chapter Fourteen, I report the latest efforts of the Court to eliminate some of the confusion that has come from its decisions on the funding of education in religious schools.

Judge Noonan and I express our gratitude to colleagues who were willing to use the preliminary draft of this second edition, and favor us with comments that were useful in the process of revision. We are especially grateful to the late William Bentley Ball, who used these materials in a course on this subject that he taught regularly at Widener University School of Law. Ball was a champion of religious liberty identified in this book as a frequent litigator in the Supreme Court, notably in *Wisconsin v. Yoder* (1972) [Chapter Eleven, section 7]. Even when the Court was to announce a sea-change in free exercise standards in *Employment Division v. Smith* (1990) [Chapter Eleven, section 10], it did not abandon *Yoder*, which still stands as a valid precedent requiring States and local public school boards to accommodate the religious concerns of parents. Richard John Neuhaus, a distinguished commentator on religion in public life, wrote of Ball: "From the Supreme Court to school board hearings in humble villages, the voice of Bill Ball has championed the cause of 'little people' who have dared to question the authority of their supposed betters. His advocacy joins fortitude to compassion, learning to eloquence, and earnestness to humor." Ball died in January of 1999, and will be sorely missed among those litigate in this field.

I also wish to honor the memory of another giant in our religious community, John Courtney Murray, S.J. (1904–1967). Like Madison, Fr. Murray knew the difference between toleration and free exercise. He once said that intolerance is a terrible vice, but that toleration is not much of a virtue.

He battled mightily against racial injustice in our country because it was a denial of the self-evident truth that all are created equal. Like David Daube, to whom this book is dedicated, Murray fostered civil dialogue between Christians and Jews, between believers and unbelievers. Tocqueville and Murray were Catholics who—over a century apart from one another—offered the world precious reflections on the American experience. Unlike Tocqueville, Murray lived under a cloud of suspicion in his church because of his writings on religious freedom. But he lived to see his thinking affirmed at the highest teaching level of his church in a declaration of an ecumenical council. Vatican II taught: "The right to religious freedom has its foundation" neither in the church nor in the state, but "in the very dignity of the human person." On the day the Council approved the final draft of the Decree on Religious Freedom, I asked Fr. Murray to autograph his book, *We Hold These Truths: Reflections on the American Experience*. He inscribed it: "Now we must hold these truths more than ever." It is a great honor for me to repeat those words to the readers of this

book many years after Murray's death, when religious freedom has become so vulnerable to governmental trivialization and even to judicial assault.

In 1998 the University of California Press published Judge Noonan's book, *The Lustre of Our Country: The American Experience of Religious Freedom*. A paper edition appeared in 1999, making it an affordable companion to this volume. With Judge Noonan's permission I offer here ten commandments on religious freedom in America. They formed the final chapter in *The Lustre of Our Country*, summarizing succinctly the major themes of that volume. I repeat them here because I view them as a disclosure of where we are coming from and as a guide to where you may be willing to go. Perhaps these commandments may seem obscure at first. The structure and content of this book should clarify what these commandments mean as you read on. You might profit by coming back to these commandments at the end of your study of these materials.

First. You shall conclude that the genealogy, the domestic environment, the educational exposure, the intellectual adventures, the friendships, and the professional life of anyone treating this topic influence the treatment; and you shall suspect that the spiritual life of the writer is relevant as well; and you shall know that no person, man or woman, historian or law professor or constitutional commentator or judge, is neutral in this matter.

Second. You shall acknowledge that the foundation of freedom in religion is the concept of the individual conscience; and you shall not worship an empty idol attributing to "the Enlightenment" an insight of deeper and more ancient root.

Third. You shall respect the content and the context of the fifteen words creating religious freedom in the Constitution, and you shall not artfully divide the words from one another, nor omit any of them, nor impose two meanings on a single word.

Fourth. You shall read Tocqueville for his celebration of the holy union of freedom and religion, discount his excesses and omissions as an advocate, and meditate on his conviction that religion is the foremost of our political institutions.

Fifth. You shall observe that the free exercise of religion generated the moral energy and the bitter passions that produced the Civil War and led to the liberation of the millions held in bondage.

Sixth. You shall mark that government when it seeks to adjudicate the truth of a religion falls afoul of the First Amendment and when it attempts to adjudicate the sincerity of a believer enters an enterprise beset by hazards.

Seventh. You shall realize that the words safeguarding religious freedom in the Constitution must be applied in order to achieve that end; that their application invites interpretation; that interpretation breeds disputes; that disputes result in distinctions; and that only over time do the dominant distinctions become palpable, only then does a development of doctrine occur.

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