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Donald A. Giannella Memorial Lecture

WHAT IS RELIGIOUS "PERSECUTION" IN A PLURALIST SOCIETY?

SUSAN J. STABILE*

We hear about religious persecution throughout the [third] world, but the Catholic Church is being persecuted right here in the United States by our own government."

—Rep. Ted Poe, February 1, 2012¹

"I've said a number of times that persecution is on a continuum. . . . I think America today is in the process of moving from level one [Social Persecution on the basis of religion] to level two [Legal Persecution]."

—Rep. Rebecca Hamilton, March 15, 2013²

"The persecution of religion in America has begun, with the Catholic Church a prime target."

—Russell Shaw, author and former communications director for USCCB, November 16, 2011³

"Do I believe Christians will face real persecution, such as loss of livelihood, civil penalties, physical abuse or even jail? Absolutely."

—Matt Barber, VP of Liberty Counsel Action, June 28, 2013⁴

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1. Ted Poe, *Government Persecution of Catholic Christians—in America*, U.S. CONGRESSMAN TED POE (Feb. 1, 2012), <http://poe.house.gov/index.cfm/2012/2/government-persecution-of-catholic-christians-in-america>.

2. Rebecca Hamilton, *Degrees of Christian Persecution: Where Does America Fit?*, PATHEOS (Mar. 15, 2013), <http://www.patheos.com/blogs/publiccatholic/2013/03/degrees-of-christian-persecution-where-does-america-fit/>.

3. Russell Shaw, *The Persecution of Religion Has Begun*, PATHEOS (Nov. 16, 2011), <http://www.patheos.com/Resources/Additional-Resources/Persecution-of-Religion-Has-Begun-Russell-Shaw-11-16-2011.html>.

4. Matt Barber, *Mock 'Marriage' and the Death of Freedom*, WND COMMENTARY (June 28, 2013, 8:27 PM), <http://www.wnd.com/2013/06/mock-marriage-and-the-death-of-freedom/>.

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I. INTRODUCTION

ON a cursory look one afternoon, I found several websites devoted to the subject of religious persecution in the United States. One site, *Christian Persecution in America*, has as its tagline, “Bringing awareness, answers and resources to the question of Christian Persecution in America.” Another, *Persecution.org*, subtitled “Your Bridge to the Persecuted Church,” has 668 entries for the U.S.

Even blogs and websites not fully devoted to the subject contain individual entries discussing religious persecution in the United States with titles like (and again, this was found with a pretty quick search):

- The Beginning of the Anti-Catholic Persecution in America—Again
- The Coming Persecution
- Defending the Persecuted Faith
- Back to the Ghetto
- Confronting Religious Persecution in America
- Persecution and Martyrdom of the Catholic Church in America
- Persecution in America

There is even a “Wiki How” entry for How to Handle Anti-Catholic persecution in the United States. And next month will see the release of a star-studded film titled *Persecution*, about the suppression of Christians in America. A second film of the same name will be released later this year as a short film to submit to the Cannes film festival.

Any number of issues have given rise to the use by various persons of the label “persecution” to describe the treatment of Catholic or other Christians in this country:

- The Health and Human Services mandate that employers (including Catholic universities and hospitals) provide contraceptive coverage for their employees, which the outgoing president of the Ethics and Religious Liberty Commission characterized as “by definition, a form of religious persecution.”⁵
- The lack of satisfactory religious exemptions in state statutes governing same-sex marriage as well as lawsuits against companies who refuse to provide services to gay couples.
- Laws that seek to force Catholic adoption and foster care agencies to allow gays to adopt children (or punish those who do not).
- Restrictions on evangelization in the military.

5. Bob Allen, *SBC Leader Calls HHS Mandate ‘Persecution’*, ABP NEWS (Apr. 10, 2013), <http://www.abpnews.com/culture/politics/item/8391-sbc-leader-calls-health-care-mandate-persecution#.U1mx7-ZdVpE> (quoting Richard Land, outgoing president of Ethics and Religious Liberty Commission).

- The scorning or ostracizing of certain public figures for their religious beliefs—Tim Tebow and sportscaster Chris Broussard are two that come to mind in recent years, as does the temporary suspension of Phil Robertson from A&E over anti-gay and allegedly racist statements (although it is not clear to me the last was anything more than a marketing ploy by A&E).
- Christian students being ridiculed for their beliefs or universities, or the denial of funding to Christian fraternities, sororities, or clubs because they restrict membership to Christians.
- Not being able to put Christian symbols on public buildings, such as the Ten Commandments on school buildings.

Some of the language of persecution has come from individual American religious leaders, some from Catholic or conservative Protestant legislators, some from conservative media, and some from ordinary citizens. While I hope and expect there will be less of that language coming from American bishops, given their shift in focus toward religious persecution abroad—that is, places Cardinal Timothy Dolan referred to in his final presidential address to the USCCB as the “dramatic front lines” of the battle of religious freedom—there is little reason to think the language will disappear in other venues.⁶

What I would like to explore in this talk is how we should think about what we do and do not mean by religious persecution in a pluralist society like the United States and whether we should be concerned with the use of the term “persecution” for the kind of issues that have given rise to that label in the United States. (Spoiler alert: I think we should be concerned).

To be very clear at the outset: I am not saying we do not have what we might term a “religious freedom problem” in the United States (and a fairly large one at that); I think there are numerous examples of things that can fairly be characterized as failures to give sufficient respect for religious freedom. I sadly think it is the case both that some people have too narrow an understanding of what religious freedom should mean, and that there is generally much less tolerance for religious-based claims in the public square than there once was. This translates into a grudging willingness on the part of many to tolerate only a “private, personal freedom that lacks space for public expression,”⁷ essentially equating religious freedom with freedom to unobtrusively worship. I think this is a serious problem

6. Cardinal Timothy M. Dolan, Archbishop of New York, President of the U.S. Conference of Catholic Bishops (USCCB), Presidential Address to the USCCB General Assembly (Nov. 11, 2013), *available at* <http://www.usccb.org/about/leadership/usccb-general-assembly/2013-november-meeting/farewell-presidential-address-cardinal-dolan.cfm>.

7. R.R. Reno, *Our Secular Future: The Redefinition of Religious Liberty in American Society*, AM. MAGAZINE (Feb. 24, 2014), <http://americamagazine.org/issue/our-secular-future>.

and nothing I say here is meant to minimize that. My issue is with characterizing these as instances of religious “persecution.”

II. WHAT DOES PERSECUTION MEAN?

Stepping back from this current use of the term for some of the examples I just mentioned, what do we understand by the word “persecution”?

Black’s Law Dictionary defines “persecution” as “[v]iolent, cruel, and oppressive treatment directed toward a person or group of persons because of their race, religion, sexual orientation, politics, or other beliefs.”⁸ *The American Heritage Dictionary of the English Language* says that “persecute” means “[t]o oppress or harass with ill-treatment, especially because of race, religion, gender, sexual orientation, or beliefs.”⁹ *Random House College Dictionary* says that “persecute” means “to oppress with injury or punishment, for adherence to principles or religious faith.”¹⁰

One of the places we see the term “persecution” used in the American legal system is in the asylum context. An applicant for asylum in this country must demonstrate a well-founded fear of persecution. As anyone who has any familiarity with this system knows, it is not easy to meet this requirement for being granted asylum in the U.S. The Ninth Circuit observed in *Li v. Ashcroft*¹¹ that “caselaw characterizes persecution as an extreme concept, marked by the infliction of suffering or harm . . . in a way regarded as offensive.”¹² To constitute persecution for purposes of asylum, the conduct in question must involve serious physical violence, torture, threat of physical violence or torture, detention and confinement, creating serious emotional or psychological harm (not merely harassment or ostracism) or substantial economic deprivation (not merely economic disadvantage).

In 1998, a bill was introduced in the House—the Freedom from Religious Persecution Act¹³—designed to take action against nations that condone or conduct religious persecution. Under the proposed law, the activities that constituted “persecution” were “abduction, enslavement, killing, imprisonment, forced mass relocation, rape, crucifixion or other forms of torture, or the systematic imposition of fines or penalties which have the purpose and effect of destroying the economic existence of persons on whom they are imposed.”¹⁴

8. BLACK’S LAW DICTIONARY 1257 (9th ed. 2009).

9. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 2013), available at <http://ahdictionary.com/word/search.html?q=persecute&submit.x=0&submit.y=0>.

10. RANDOM HOUSE COLLEGE DICTIONARY 1074 (rev. ed. 1980).

11. 356 F.3d 1153 (9th Cir. 2004) (en banc).

12. *Id.* at 1158 (alteration in original) (internal quotation marks omitted).

13. H.R. 2431, 105th Cong. (1998).

14. H.R. REP. NO. 105-480, pt. 3, at 3 (1998).

Last summer, I spent some time in Amsterdam and Germany. Several experiences from that vacation came to mind as I was thinking about what I would say on this subject.

In Amsterdam, we visited the Church of Our Lord in the Attic. In the late sixteenth century, public celebration of the Catholic Mass was outlawed in Amsterdam when Protestants took over control of the city. Private Catholic worship was tolerated, so long as it was hidden from public view. In 1661, a wealthy Catholic merchant constructed a hidden church that occupied the entire top floor of his house and the two houses behind it. The Church of Our Lord in the Attic was essentially the parish church for Catholics living in Amsterdam for 200 years. A hidden church.

Amsterdam is also home to the Portuguese Synagogue. The Synagogue is the home of the oldest Jewish Community in the Netherlands, a community founded by Jews who had fled the persecutions of the Inquisition in Spain and Portugal. The Synagogue was home to a thriving community until World War II and today tells the story of the Jews who lived there. When Nazi Germany invaded Holland in 1940, there were around 140,000 Jews living there; after the war there were 20,000, most of the rest having perished.

Not being able to worship in public. Facing the Inquisition. Perishing in the Holocaust. These are things I have no difficulty labeling persecution, as we understand that term from dictionary definitions and from the use of the term in U.S. law.

And we see plenty of similar incidents in our world today. The arrest of Christian missionaries in North Korea and the physical assault and killings of people practicing their Christian faith there. (In one reported incident, a woman in North Korea was shot and killed because she kept a Bible in her home). Assyrian Christians have been told, "If you want to come back, convert to Islam, or you will be killed." The kidnapping of a clergyman in Syria. A car-bombing near a church that kills twenty Coptic Christians in Alexandria. These are not isolated instances. The Vatican's UN representative recently told a congressional panel that "flagrant and widespread persecution of Christians rages in the Middle East even as we meet."¹⁵ And "[o]ther speakers at the hearing testified about violence against Christians in Indonesia, Vietnam, Nigeria, Myanmar, Sudan and Eritrea, among other [places]."¹⁶

Understandably, those who experience these kinds of suffering, as well as those who observe them, raise an eyebrow to the characterization of what goes on in the United States as persecution. A cartoon was posted not that long ago on Facebook that involved a conversation between two people.

15. *Persecution of Christians 'Flagrant,' U.N. Nuncio Tells U.S. Congress*, AM. MAGAZINE (Mar. 3, 2014), <http://americamagazine.org/issue/persecution-christians-%E2%80%98flagrant%E2%80%99-un-nuncio-tells-us-congress>.

16. *Id.*

The first person said: I'm a Middle-Eastern Christian. In Egypt, we can't build new churches, and the authorities ignore the frequent violence committed against us. Almost all of us have been pushed out of Iraq. In Saudi Arabia, we have to hide inside to have church services. In some Muslim countries, converts to Christianity are sentenced to prison or death. In Sudan, we are decapitated for our faith by Islamists. We face a lot of religious oppression.

The second responds: Oh, I know about oppression too. I'm an American Christian. In the U.S., we aren't always allowed to put our religious symbols on every single public building. Sometimes bosses aren't allowed to restrict their workers' access to contraception. People sometimes say mean things about us on blogs. And worst of all, during Christmas, some people say, "Happy Holidays" instead of "Merry Christmas." I truly understand what you mean by religious oppression. I sure wish I had religious freedom.

After a pause, the first person replies with an expletive deleted. The cartoon was a caricature, but you get the point.

Another commentator posted a flow chart in November titled: Are you being persecuted? The first question was: "Did someone threaten your life, safety, civil liberties, or right to worship?" If yes—you are being persecuted. If no—the next question was: did someone wish you happy holidays? And for both no and yes, the next line read: You are not being persecuted.

The question here is:

III. WHAT CONSTITUTES RELIGIOUS PERSECUTION IN A PLURALIST SOCIETY?

Let me try to address the question from the opposite direction, by talking about what I do not think can fairly be characterized as religious persecution.

First, failure to respect one's religion is not persecution. A lot of people who have no religious faith lack respect for anyone who is a religious adherent. (That is not always the case: I know many people who have no faith of their own who nonetheless respect the faith of others). And a lot of people who are religious have no respect for faiths other than their own. They see their faith as the one true way and see anything else as deserving of criticism and ridicule. (Listen to how some Christians talk about Buddhism. Or about how some mainline Protestants talk about Mormonism).

I happen to think that is unfortunate: I have written about the value of interfaith dialogue and why I think that we can all, whatever our own faith tradition, learn from people of different faiths. In my own case, I returned to Catholicism after spending twenty years as a Buddhist. Despite the fact that I no longer identify myself a Buddhist, I have enormous

respect for Buddhism and the Buddhist practitioners I know, and my Christian faith is all the stronger for what I learned from Buddhism.

But, while I think criticizing and ridiculing other faith traditions is unwise and unwarranted, that lack of respect is not persecution. No one has an entitlement that others respect their views, whether religiously based or otherwise. Ridicule is not persecution. Someone not wanting to listen to you talk about your religion is not persecution. Yet it is clear that for some people, not being respected or being ridiculed because of their religious faith, or not having their religious views respected, constitutes persecution.

I should add here that it is also not persecution if someone decides he or she does not like you anymore because of your religious views. I have—or had—a friend who no longer talks to me because of my faith. It saddens me deeply; I thought we had a real friendship. But that my former friend will no longer speak to me, while causing me great pain, is not persecution.

Second, giving a group legal rights that another group does not think they should have—that is inconsistent with the religious tenets of the second group's faith—does not constitute persecution against the second group. Granting legal recognition of same-sex marriage, for example, is not itself an act of persecution against those whose religion holds that same-sex marriage is immoral. Nor is legalizing abortion persecution against those whose religion opposes abortion as sinful.

That does not mean people cannot argue on the basis of their religion that the law ought not to do those things. People are free to argue—and should be free to argue—based on their religious beliefs that same-sex parents are harmful for children or that a society that allows abortion is a society that will not take sufficient steps to care for the marginalized and less well-off. Others may or may not find those arguments persuasive. But the fact that they do not is not persecution.

That raises a question of how such laws impact those who have religious opposition to them. We know that a law that, for example, allows same-sex marriage will raise questions about the extent to which others must respect those marriages, or that allowing abortion will raise questions about access. This leads to my next point.

Third, not every failure to give an exemption under the law or to provide a religious accommodation, in the case of a law that places a burden on religion, is persecution. By definition, living in a pluralist society means that not everyone shares the same views. What is sacrosanct to members of one faith may be something viewed as against the social good as defined by others. And by definition, not all freedoms can be absolute, because the exercise of one person's freedom may infringe on the freedom of others.

Conflicts inevitably arise, and take many forms, and have to be resolved.

How do we balance a state's interest in compulsory education of children against the Amish belief their children should not go to public school?¹⁷

How do we resolve a conflict between a state law banning drug use against the religious use of peyote?¹⁸

How do we resolve the conflict between the government's determination that contraception is part of health care and therefore must be provided as part of the provision of preventive services against the religious opposition of employers to the use of birth control?¹⁹

How do we reconcile the desire of Catholic social service organizations not to place children in same-sex households with our nondiscrimination laws?

And you can think of other examples.

In some of these cases, accommodations that protect religious beliefs will be made, sometimes voluntarily and sometimes because a court determines that the Constitution or statutory law requires it. But not always. Sometimes law and society will determine that other protected rights take precedence over religious claims for exemptions.

In my view, it is inappropriate to label such determinations persecution. That is, it is not always persecution to fail to provide special treatment or an exemption from a generally applicable law on the basis of religion, even where the consequence is that a religious adherent may have to pay a price for standing up for his or her religious convictions. The price of living in a society where we do not all share the same views is that not everyone's view can always be accommodated, and some will face some sacrifice as a cost of living consistently with their religious beliefs. So, to use a couple of recent examples:

A federal judge ruled in November that a law that allowed clergy members to avoid paying income taxes on compensation that is designated as a housing allowance is unconstitutional.²⁰ The tax exemption may be a desirable thing for clergy who do not receive very high incomes (although the same could be said for other lower-paying jobs), but that does not mean that the failure to provide it is religious persecution.

Or take the example of the New Jersey town of Ocean Grove.²¹ The town had its origins in a campsite established by some Methodist preachers. Over time, the state of New Jersey granted the "Ocean Grove Camp Meeting Association" a charter, letting them create a police force and es-

17. See generally *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

18. See generally *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990).

19. See generally *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

20. See *Freedom from Religion Found., Inc. v. Lew*, 983 F. Supp. 2d 1051 (W.D. Wis. 2013).

21. See Jonathan V. Last, *The Town FEMA Turned Down: The Tide Goes Out on Religious Liberty*, THE WEEKLY STANDARD (Nov. 25, 2013), http://www.weeklystandard.com/articles/town-fema-turned-down_767137.html.

establish an infrastructure allowing them to set aside the land for "the perpetual worship of Jesus Christ."²² (This was in 1870). Over the years, a town grew up and thrived. Although Ocean Grove later became a part of a larger township, it continued to operate its own services and retain independent authority over its laws.

When a storm destroyed the boardwalk of Ocean Grove in 1992, FEMA provided emergency relief funding. However, after Hurricane Sandy in 2012, FEMA refused to provide assistance, explaining that as a private, nonprofit organization, Ocean Grove was not eligible for federal assistance to repair the boardwalk because the property was owned by the Camp Meeting Association and the property was a "private religious 'recreational facility.'"²³

The issue is not the wisdom of FEMA's actions. In fact, I think FEMA's decision is a bad one. Ocean Grove and the state have managed to reach reasonable accommodation for a very long time. It has functioned as a "town," and the boardwalk is essentially a public place that is one of the main attractions of the town.

But is it persecution to fail to provide federal relief to the town? Is it a violation of free exercise? I think that is a harder question.

I'm not saying that a failure to accommodate should never be labeled as persecution.

A failure to provide a religious exemption with costly consequences, motivated by animus against a particular religion, might properly be characterized as persecution.

A legal requirement that forced someone to violate his or her faith that is accompanied by fines so crushing that the person simply cannot act consistently with his or her faith may perhaps properly be characterized as persecution.

To take a recent example, a German family who had been homeschooling their children fled to the United States to avoid Germany's prohibition against home schooling; Germany requires that all children be sent to public schools to "counteract the development of religious and philosophically motivated parallel societies."²⁴ In 2001, an immigration judge in Memphis granted the family asylum, stating they would face persecution for their faith if they returned to Germany. The Sixth Circuit overturned that decision, saying "[t]here is a difference between the persecution of a discrete group and the prosecution of those who violate a generally applicable law."²⁵ I think one could (and should) come to a

22. *Id.*

23. *See FEMA Backs Down?*, THE WEEKLY STANDARD (Jan. 27, 2014), <https://www.weeklystandard.com/keyword/FEMA>.

24. *Justice Department: Home Schooling Not a 'Right'*, CBN NEWS (Feb. 19, 2013), <https://www.cbn.com/cbnnews/politics/2013/February/Justice-Department-Home-Schooling-not-a-Right/>.

25. *Romeike v. Holder*, 718 F.3d 528, 530 (6th Cir. 2013), *cert. denied*, 134 S. Ct. 1491 (2014).

different conclusion. That family cannot live in Germany and act consistently with their beliefs, any more than the Yoders could, giving rise to our exemption for the Amish from state education requirements. The penalties in Germany included not only crushing fines but criminal charges and the potential that children will be taken away from their parents.

But that is a much more nuanced determination than some of the current claims of religious persecution engage in. Not everything that might be labeled as discrimination (in the sense of burdening religious practice) is persecution.

Fourth, efforts to protect third parties from intrusive and uninvited religious proselytization are not persecution.

Many Christians view evangelization as a foundational part of their discipleship. It is not hard to understand why. “Go therefore and make disciples of all nations,” said Jesus to his disciples before his Ascension.²⁶ In his Apostolic exhortation, *Christifideles Laici*, Pope John Paul II wrote: “The entire mission of the Church, then, is concentrated and manifested in *evangelization*,” quoting Paul VI who wrote that, “[t]o evangelize . . . is the grace and vocation proper to the Church, her most profound identity.”²⁷

Different Christian traditions have different ideas about what evangelization means. And some Christians are fairly aggressive in their efforts to try to bring other people to the Christian faith.

How do we decide when one person’s unwanted efforts to evangelize interfere with another person’s right not to be harassed?

In many circumstances, there is no need for government or any other third party interference to resolve this. If young Mormons ring my doorbell and want to talk to me about how Joseph Smith is the true prophet of God, I can say no thank you and close my door. When I lived in Brooklyn Heights in New York, ten blocks from the Watchtower Building, and was confronted on the street corner on an almost daily basis by Jehovah’s Witnesses who wanted to thrust copies of their literature in my hand, I could say no thanks and be on my way. (Sometimes I had to say it firmly or more than once, but no one forced me to listen).

There clearly are, however, circumstances where the object of the evangelization efforts cannot just say no. Those include situations where the person doing the evangelizing is in a position of authority over another or where the object of the evangelization is a captive audience.

In those circumstances, government and society need to consider how to balance competing interests. It seems to me it is neither illegitimate nor an instance of religious persecution to express concern, for example,

26. *Matthew* 28:19.

27. POPE JOHN PAUL II, *CHRISTIFIDELES LAICI* ¶ 33 (1988), available at http://www.vatican.va/holy_father/john_paul_ii/apost_exhortations/documents/hf_jp-ii_exh_30121988_christifideles-laici_en.html.

at a teacher's aggressive efforts to proselytize his or her students, or superiors in the military using their authority to try to convert subordinates.

The Second Vatican Council, in its Declaration on Religious Freedom, *Dignitatis Humanae*, recognized that "in spreading religious faith and in introducing religious practices everyone ought at all times to refrain from any manner of action which might seem to carry a hint of coercion or of a kind of persuasion that would be dishonorable or unworthy . . ." ²⁸ That same sentiment was expressed by Pope Paul VI in *Evangelii Nuntiandi*, where the Pope distinguished between "propos[ing] . . . the truth of the Gospel and salvation in Jesus Christ, with complete clarity and with a total respect for the free options which it presents" and coercively imposing the Gospel on others. ²⁹ That same language was quoted by Pope Francis in his Message for World Mission Day. ³⁰

To be sure, deciding what is or is not intrusive or coercive is not always easy. Some people will say evangelization is permissible but proselytization is not. (And, indeed, Pope Francis was quoted this past year as saying Catholics should be engaged in evangelization, not proselytization). But that requires a shared definition of what those terms mean, and I think we lack that. (If you go to the dictionary, the two words have the same meaning: to convert or attempt to convert someone.)

What is intrusive? What is unwanted? Can we define these on an ex ante basis, or is it something to be handled on a case-by-case basis, the latter of which would not be very helpful in letting anyone know what is permissible and what is not.

The fact that such determinations are difficult, however, does not mean that all efforts to protect some against unwanted contact by those who would seek others to their faith are instances of religious persecution.

Fifth, mere efforts to limit religion in public schools and universities are not persecution (although Catholic online encyclopedia refers to the exclusion of religion in public schools with precisely that term).

Conflict over religion in public schools has existed for years. Today, we see a conflict between those who are troubled by what they see as an effort by courts and others to exclude God and religion completely from public schools. Others are concerned that conservative Christians are trying to impose their values on students. Both claim the First Amendment is on their side.

Going back to the point I just made about proselytization, it is clear that the Constitution prohibits public schools (as it should) from indoctrin-

28. POPE PAUL VI, DIGNITATIS HUMANAЕ ¶ 4 (1965), available at http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_1965_1207_dignitatis-humanae_en.html.

29. POPE PAUL VI, EVANGELII NUNTIANDI ¶ 80 (1975), available at http://www.vatican.va/holy_father/paul_vi/apost_exhortations/documents/hf_p-vi_exh_19751208_evangelii-nuntiandi_en.html.

30. See Francis' Message for World Mission Day, ZENIT (Aug. 6, 2013), <http://www.zenit.org/en/articles/francis-message-for-world-mission-day>.

nating children in religion. But the range of things short of that, that could and has given rise to conflict, is enormous: student-led prayer, non-sectarian prayer, teaching of creationism as well as evolution, Bible readings in school, Bible study in school, and so-forth.

It may be that in the effort to avoid indoctrination, some courts have gone too far. It may be that those who would prefer to see a country and a world where no one has any religious belief push further than reasonable.

But, again, absent animus toward a particular religious group because of its beliefs, I am troubled by labeling the resolution of these conflicts persecution, even where I might disagree with the conclusion reached.

Finally, even freedom to worship is not absolute. By that I mean simply that there may be limits to the obligation of others to accommodate my worship needs. The most obvious example is the Supreme Court's *Smith* decision, saying that the Free Exercise clause permits the state to prohibit sacramental peyote use.³¹ Sometimes worship needs may interfere with other legitimate interests. Or employers have to try to accommodate an employee's religious practices, but the requirement is a "reasonable" accommodation, not any accommodation an employee asks for.

In connection with some comments he made recently about the fate of Arizona's failed proposed legislation to protect religious freedom (and I recognize different people have different ways of characterizing this legislation), Ross Douthat gave some examples that I think draw helpful distinctions.³²

First, "[i]f the federal government suddenly closed all religious schools in the United States, banned homeschooling, and instituted an anti-religious curriculum in public schools," he would have no hesitation labeling that persecution.³³ In contrast, "denying religious colleges access to public dollars would not rise to the same level."³⁴ While "[i]t would certainly create hardship and disruption, and weaken institutional religion in significant ways," it is not persecution.³⁵ Withholding a subsidy "leave[s] the basic liberty to educate one's children in one's own faith intact . . ."³⁶

Second, a law requiring businesses to fire Christians would deserve the label persecution.³⁷ "But having the rules of a few professions sud-

31. See generally *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990).

32. See Ross Douthat, *On Persecution*, N.Y. TIMES BLOG (Mar. 6, 2014, 12:50 PM), <http://douthat.blogs.nytimes.com/2014/03/06/on-persecution/>.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. See *id.*

denly pose new ethical dilemmas for religious believers" is "a challenge" or "a hardship," but not persecution.³⁸

We can conceive of things that would constitute persecution in the United States, short of rounding up Christians and feeding them to the lions. But I do not see the label appropriately applied to any of the situations in which it is currently used.

IV. USE OF THE WORD "PERSECUTION" IN THIS CONTEXT

Let me now address a different question, that is: Is there a problem with the use of the term "persecution" to describe the way Christianity is viewed or treated societally and politically in the United States today?

I did not major in either government or theology as an undergraduate at Georgetown. I was an English major, which may explain why, when Michael Moreland told me I could speak to you about any subject broadly relating to law and religion, I settled on something having to do with language. I sat in an Honors English class as an undergraduate at Georgetown and happily spent forty-five minutes discussing the significance of the fact that Gerard Manley Hopkins begins the last quatrain of his poem *God's Grandeur* with the word "and" rather than the word "but." Thus, my starting point is that words matter. The language we use to talk about issues has a significant effect.

In this particular case, I worry about the effect of the use of the term "persecution" both on those who utter the words and those who hear them.

Let me start with the effect on those who claim to be persecuted—those who speak in terms of persecution. Once people see themselves as "persecuted," their instinctive reaction is to fight and resist. And the fight becomes fierce because a kind of circle the wagon mentality arises and anyone outside that circle is the enemy. And when we are talking in religious terms, the enemy is evil. If I believe I am persecuted, I must fight to defend myself. It is not just that someone disagrees with me, I am being attacked.

The result of language of persecution is demonization of those who disagree. In *The Myth of Persecution*, Candida Moss writes:

The myth of persecution is theologically grounded in the division of the world into two parties, one backed by God and the other by Satan. And everyone knows that you cannot reason with the devil. Even when the devil is not explicitly invoked, the rhetoric of persecution suggests that the persecutors are irrational and immoral and the persecuted are innocent and brave. In a world filled with persecution, efforts to negotiate or even reason with one's persecutors are interpreted as collaboration and moral compromise. We should not attempt to understand the other

38. *Id.*

party, because to do so would be to cede ground to injustice and hatred.

This, then, is the problem with defining oneself as part of a persecuted group. Persecution is not about disagreement and is not about dialogue. The response to being “under attack” and “persecuted” is to fight and resist. You cannot collaborate with someone who is persecuting you. You have to defend yourself. When modern political and religious debates morph into rhetorical holy war, the same thing happens: we have to fight those who disagree with us. There can be no compromise and no common ground.³⁹

Not surprisingly, this kind of attitude inhibits the ability to find any kind of common ground—indeed, to even acknowledge the possible existence of common ground. It also inhibits the ability of those who would stand fast to their religious beliefs to, in one commentator’s words, prepare “for a future as a (hopefully creative) religious minority, because it conditions them/us to constantly expect some kind of grand tribulation that probably won’t actually emerge.”⁴⁰

There is also an unfortunate effect on those who hear the words. First, the more the language of religious persecution is used for things that are not really persecution, the greater the danger of trivializing the real persecution that exists. There becomes a real credibility problem that makes it much harder for people to take real threats against religion seriously. There is a bit of the “boy who cried wolf” too many times reaction. Moreover, many people feel that calling the kinds of things I have mentioned as examples here “persecution” cheapens and detracts from “real” instances of persecution around the world.

Second, the more the language of persecution is used, the more likely it is that opponents of a broad concept of religious freedom will tend to argue that anything short of persecution ought to be acceptable. It makes persecution that which we seek to avoid, rather than claiming a strong positive space for things that fall short of an accepted definition of persecution.

Third, people accused of persecution are also likely to go into a fight mode, creating the possibility of backlash that results in an even narrower understanding of what constitutes persecution and what kinds of protection ought to be granted on religious grounds.

For both those who claim to be persecuted and those accused of doing the persecution, the language of persecution ratchets up the “crazy” emotion, creating dangerous polarization. Candida Moss calls the language of persecution “discursive napalm” and “dialogue-ending lan-

39. CANDIDA MOSS, *THE MYTH OF PERSECUTION: HOW EARLY CHRISTIANS INVENTED A STORY OF MARTYRDOM* 254 (2013).

40. Douthat, *supra* note 32.

guage"—and I think there is much truth in her conclusion that "[i]n the political and religious arenas, [abandoning the narrative of persecution] would allow us to find common ground in debates that are currently sharply polarized. Rather than demonizing our opponents, we could try to find points of agreement and work together."⁴¹

The failure to do so risks turning some people off to Christianity altogether. That is a sad and unfortunate result—if people view Christians as cry-babies who rant about persecution, our evangelization efforts will falter; people will be much less likely to be able to hear the message of Christ.

In an interview with CNS News not long ago,⁴² Archbishop Chaput was asked whether Christians are being persecuted in the United States. I think his response was a good one: "'Persecuted' is a big word," he said, going on to say, "We're not in Pakistan or North Korea. But it would be very unwise to ignore the implications of government coercion like the HHS mandate, or the misuse of the IRS, or political and judicial attacks on the nature of marriage."⁴³ His language was not incendiary, yet it conveys that we have a real problem to deal with.

And that is what we have to do—to speak truth, but to do so aggressively but peacefully, if that conjunction makes sense. I think that means being willing to speak truth to both sides—being critical both to those who are insufficiently sensitive to religious freedom in the United States and to those who would turn this into a war between good and evil. I say that recognizing that there are some Christians who really believe this is a "war against evil," who believe we are in the final stages of the war prophesied in the Book of Revelation. I think that is neither a correct, nor a particularly helpful way to characterize what is going on in the United States today.

I mentioned before the effect of language of persecution on the ability to find common ground. Much of our debates about issues of law and public policy are anything but meaningful debates. Rather, they are little more than shouting matches between extremely polarized positions—and not even shouting to each other, but shouting past each other. I sometimes wonder if either side is listening to the other.

Almost anytime I suggest criticism of the tactics of the extremists (on either side), I hear the equivalent of "he started it," "she behaved badly first." (I failed to find that excuse acceptable when uttered by my daughter when she was in grade school; it is even less acceptable in this context). I believe we need to get beyond that, to truly seek to find a way to move

41. Moss, *supra* note 39, at 13, 257.

42. See Barbara Hollingsworth, *Archbishop: 'The More That Gov't Mandates Evil Actions, the More Likely Civil Disobedience Becomes'*, CNS NEWS (Feb. 14, 2014, 2:59 PM), <http://cnsnews.com/news/article/barbara-hollingsworth/archbishop-more-govt-mandates-evil-actions-more-likely-civil>.

43. *Id.*

debates forward by finding common ground. Language of persecution does not aid that effort.

V. FINAL POINT: ASSUMING THE LABEL PERSECUTION IS AN ACCURATE ONE, HOW SHOULD WE RESPOND TO THAT?

Let's assume the label persecution is the correct one; that the lack of respect, failure to affirm, failure to sufficiently accommodate, scorning, etc. are worthy of the label persecution. What should be our reaction?

First, should Christians be surprised at this? After all, the Incarnate God, in whose name we call ourselves Christians, was put to death for what he preached. God came into the world and preached a message antithetical to the power structure of his day, upsetting the way things had been done. And when that happens, the existing power structures do not play nice.

This is what we signed up for. It is not as though Jesus did not promise us that following him would lead to some unpopularity:

Remember the word I spoke to you, 'No slave is greater than his master.' If they persecuted me, they will also persecute you.⁴⁴

Behold, I am sending you like sheep in the midst of wolves. . . . You will be hated by all because of my name.⁴⁵

Before [the end], they will seize and persecute you, they will hand you over to the synagogues and to prisons, and they will have you led before kings and governors because of my name. . . . You will even be handed over by parents, brothers, relatives, and friends, and they will put some of you to death. You will be hated by all because of my name.⁴⁶

From the beginning, Jesus was clear that walking with him was not a blissful walk in the park. That it was not going to be all turning water into wine at wedding feasts, healing the sick, and feeding the multitudes. That it was not all going to be pleasant.

David Steindl-Rast, a Benedictine monk, has a wonderful book on the creed, titled *Deeper than Words: Living the Apostles' Creed*. Speaking about the line in the creed in which we say that Jesus suffered under Pontius Pilate, he writes:

All those whose faith in God finds expression in their faith in Jesus Christ who suffered under Pontius Pilate must realize what they are in for. Citizens, for instance, who demonstrate against the use of torture by their government take the kind of stance that Jesus took. They commit themselves to speak up for justice

44. *John* 15:20.

45. *Matthew* 10:16, 22.

46. *Luke* 21:12, 16–17.

and compassion and peace, as the Spirit guides them—like Jesus⁴⁷

There is a cost to Christian discipleship. To be a Christian is to share in the Paschal Mystery. Dietrich Bonhoeffer wrote: "Just as Christ is Christ only in suffering and rejection, so also they are his disciples only in suffering and rejection, in being crucified along with Christ. Discipleship as commitment to the person of Jesus Christ places the disciple under the law of Christ, that is, under the cross."⁴⁸

More recently, Pope Francis preached a homily in March of this year in which he called persecution a "reality of Christian life," saying that the Cross is always present when we follow Christ.⁴⁹

So not being popular, not being respected, not having every accommodation we might like to have—whatever label we give that—is kind of built into our faith.

Second, Jesus is very clear how we are to react to such persecution:

Bless those who persecute you, bless and do not curse them.⁵⁰

But I say to you, love your enemies, and pray for those who persecute you, that you may be children of your heavenly Father⁵¹

And part of how we are to react is to stand firm in the face of any persecution. That is the lesson of the parable of the mustard seed. We are not to be like:

The seed sown on rocky ground[—]the one who hears the word and receives it at once with joy. But he has no root and lasts only for a time. When some tribulation or persecution comes because of the word, he immediately falls away.⁵²

Finally, Jesus reminds us that persecution is not simply some horrible thing we have to suffer, but something we should, if not welcome, at least recognize the blessing in, reminding us that the persecution is not the end of the story:

Blessed are they who are persecuted for the sake of righteousness, for theirs is the kingdom of heaven. Blessed are you when they insult you and persecute you and utter every kind of evil against you [falsely] because of me. Rejoice and be glad, for your

47. DAVID STEINDL-RAST, *DEEPER THAN WORDS: LIVING THE APOSTLES' CREED* 79 (2010).

48. DIETRICH BONHOEFFER, *MEDITATIONS ON THE CROSS* 12 (Douglas W. Stott trans., 1998) (1996).

49. See Elise HARRIS, *Pope: More Martyrs Exist Today than in the Early Church*, CATHOLIC NEWS AGENCY (Mar. 4, 2014, 2:56 PM), <http://www.catholicnewsagency.com/news/pope-more-martyrs-exist-today-than-in-the-early-church/>.

50. *Romans* 12:14.

51. *Matthew* 5:44–45.

52. *Id.* 13:20–21.

reward will be great in heaven. Thus they persecuted the prophets who were before you.⁵³

You will be hated by all because of my name, but not a hair on your head will be destroyed. By your perseverance you will secure your lives.⁵⁴

Now, to be clear, I am not saying Christians should not work to ensure just structures, or that Christians should not take advantage of the protections of our faith afforded by the First Amendment or the Religious Freedom Restoration Act.

But I am suggesting that there is something about the tone with which this issue of “persecution” is often addressed (whether or not that term is used) that seems to me inconsistent with Jesus’s preaching. (For that matter, the same is true even when the language employed is that of lack of religious freedom). Specifically, there is a sense of entitlement—as though we have the one true way and everyone ought to facilitate our living of it and spreading it to others.

As I have said, I do not think the term “persecution” is a good one to be tossing about. But if we as Christians are being persecuted, well, blessed are we.

Most importantly, whatever term we use, our response should be to continue to witness our truths—at whatever cost. If we believe in the power of our truths, we will, no matter how difficult, continue to be, to borrow a phrase, the “counter-cultural salt of the earth.”⁵⁵

Thank you again for allowing me to be with you this afternoon.

53. *Id.* 5:10–12.

54. *Luke* 21:17–19.

55. Andrew Sullivan, *Surrender Douthat!*, THE DISH (Mar. 4, 2014, 1:23 PM), <http://dish.andrewsullivan.com/2014/03/04/surrender-douthat/>.