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Winnifred Fallers Sullivan: The Impossibility of Religious Freedom

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Introduction

This book is about the impossibility of religious freedom. Many laws, constitutions, and international treaties today grant legally enforceable rights to those whose religious freedom is infringed. Stories of the conflict between the demands of religion and the demands of law are daily news items all over the world, and take a familiar patterned form. Schoolgirls in France seek permission to wear the *hijab* to school. Sikhs in Britain seek exemption from motorcycle helmet laws. Muslim women seek civil divorces in India on the same ground as their Hindu and Christian neighbors. The Jehovah's Witnesses seek the right to be a recognized religious organization in Russia and to be exempt from patriotic exercises in Greece. Native Americans seek repatriation of religious items in the cases of U.S. museums. In each of these cases a court or a legislature or an administrative official must make a determination as to whether the religious practice in question is legally religious. In other words, in order to enforce laws guaranteeing religious freedom you must first have religion.

The impossibility of religious freedom is not obvious, nor is the advocacy of such a position popular. A commitment to religious freedom is a taken-for-granted part of modern political identity in much of the world. Certainly this is so in the United States. Even most of those whose own personal stance is fiercely secular would include the right to religious freedom among those rights fundamental to a free democratic society. Indeed, Americans who may be able to agree on little else agree that religious freedom is one of the shining achievements of the United States, one that they are often anxious to export around the world.¹ Nowhere, as Americans understand it, is religion so strong and so free. Not in Europe, which is believed to be pervasively and irredeemably atheistic, and where new religious movements are persecuted. Not in the Muslim world, where it is believed that adherence to Islam is enforced by authoritarian regimes and non-Muslims are discriminated against. Not in China, where it is believed that all religion is suspect. But there is a very real sense in which religious freedom is turning out to be impossible to realize, even in the United States. Drawing a line around what counts as religion and what does not is not as easy as periodically recommitting ourselves politically to religious freedom. Defining religion is very difficult, particularly at the beginning of the

twenty-first century. Who is to say what is the authentic way for an American to be Christian or Jewish or Muslim or Inuit or Daoist or . . . ?

This book tells two stories. First, it tells the story of how a motley group of ordinary Americans buried their dead in one cemetery in a small Florida city in the 1980s and 1990s, in defiance of local regulation, and then challenged the federal courts to enforce their right to the free exercise of their religion. Second, in light of the sometimes heroic effort of this group of ordinary American Protestants, Catholics, and Jews to explain what they did and why they did it to a group of ordinary American lawyers and judges and city officials, it tells the story of the impossibility of religious freedom today. The story of the trial itself is a small but moving local tale of a dispute that is now in its second decade. The implications of these local events are, however, arguably of wider significance.

Warner v. Boca Raton (hereinafter the *Warner* case)² was brought on behalf of a group of Florida residents who sought to prevent the forced removal of the numerous statues, plantings, crosses, Stars of David, and other individually crafted installations that, with the tacit permission of city officials, they had placed on the individual graves of their deceased relatives over the course of ten to fifteen years (see photographs between pp. 31 and 32). The suit sought a statutory and constitutional free-exercise-of-religion exemption from local cemetery regulations that limit the size and placement of memorials to small flat metal plaques, flush with the ground, giving only names and dates, and that can be easily mowed over. The principal issue at trial was whether the nonconforming memorial arrangements assembled by plaintiffs were an “exercise of religion,” and therefore protected by the relevant statutes and constitutional provisions.

The burial practices of the *Warner* plaintiffs belong to a grouping of religious beliefs and practices that one might call “lived religion,” or “folk religion,” that is, religion that takes place beneath the radar of religious officials and institutions. These practices, as with the familiar impromptu memorials constructed at the side of the road at the site of automobile accidents or at places of national tragedy such as that of the Oklahoma City bombing, reflect U.S. religious diversity, immigrant piety, political idealism, and a do-it-yourself style of religious ritual and iconography. This kind of religion is, for the most part, local and family-centered—but it is also linked in important ways to international and transnational religious communities and traditions.

The lived religion of the *Warner* plaintiffs, as represented by the Boca Raton cemetery memorials, will be seen in the context of this trial as resistant to, and yet shaped in fundamental ways by the larger U.S. religious

and legal history and landscape of which they are a part. But the religious practices described in this book and the conditions set by the legal context in which they find themselves are not exclusive to the U.S. context; with some local shading, they are common throughout the world. We live increasingly in a world of diaspora religious communities in which all religions are everywhere, in which all religions everywhere are governed by secular legal regimes, and in which all religions everywhere are being reinvented by their adherents to suit new circumstances. The *Warner* trial provides a case study for how and whether, given these conditions, law anywhere today can do what it is being asked to do: guarantee freedom of religion. Courts need some way of deciding what counts as religion if they are to enforce these laws. Is it possible to do this without setting up a legal hierarchy of religious orthodoxy? And who is legally and constitutionally qualified to make such judgments? Can “lived religion” ever be protected by laws guaranteeing religious freedom?

Religion and law today speak in languages largely opaque to each other. When they intersect, whether in the work of academics or in the public square, it is usually in one of several familiar ways: in debates concerning certain issues of public policy—such as abortion, homosexuality, cloning, and euthanasia—or in the high-profile stories of the asserted denial of religious freedom mentioned above, such as prohibitions against Islamic veiling in France and Turkey, or of government funding of faith-based initiatives in the United States. These debates and these stories, for the most part, focus on the political questions and assume an unproblematic understanding of secular law, its history, and how it works today. They assume that, given the political will, laws—and courts—can do the work of enforcing the rights of religion. Less attention is given to how and whether law affects religion in these cases—to the actual encounter in courtrooms today between the religious lives of ordinary people and secular legal regimes. How can courts fairly assess evidence about religious practice? How can courts determine what counts as religious for the many laws all over the world that give persons whose actions are religiously motivated special privileges in law?³

This book is, then, on the smallest scale, about what counts as religion, legally, in Boca Raton, Florida, at the beginning of the twenty-first century. The book will consider the *Warner* case itself in some detail, but I will first put the case, and my own involvement in it, in a somewhat larger legal context.

On the fifth and final day of the trial, in March 1999, just before giving his ruling from the bench, the Honorable Kenneth L. Ryskamp, U.S. district

judge for the Southern District of Florida, announced: “I must admit that I enjoyed the four days immensely. I mean it’s not very often where you can spent [*sic*] four days in court and talk theology all day. And I happen to enjoy that. And I thought it was interesting. It’s an experience unlike anything I’ve had in 13 years on the bench.”⁴ It should come as a surprise—to Americans at least—that a federal judge would describe a four-day trial as “talking theology all day.” “Talking theology,” we might think, is something that properly happens in churches and seminaries, or—at the very least—among private citizens. It is certainly not something that a federal judge should be doing while on the bench. It is not something that the government should be doing at all—if, by “talking theology,” we mean talking about God.⁵

Characterizing all Americans is certainly almost as difficult as defining religion; but American attitudes toward religion are the product of a distinctive history, and Americans, on the whole, tend to be quite fastidious about the line between religion and government. Europeans, while often more secular in their personal orientations, are much more used to living with a lingering religious “establishment” of sorts and consequently less squeamish about public displays of religion and public involvement of religion in the life of the community and governmental involvement in the operations of religious communities. Religious freedom is often understood in Europe not to be incompatible with public funding of religion, for example.⁶ Some Americans might be more tolerant of generalized religious references and more comfortable with ceremonial religiosity than others; but most would recoil at the idea that a federal judge should be deciding in a federal court, for the purposes of secular law, what does and what does not count as real religion—what counts as what we might call “legal” religion. When Judge Ryskamp speaks of “talking theology” he is referring to his efforts to determine exactly what counts as religion for the purposes of law.

The *Warner* case does not seem at first blush to have the marks usually associated with important legal cases in this country. It is not yet a Supreme Court case. It is not regarded as a landmark case in the legal literature. It seems now unlikely to be widely cited or discussed in legal circles. Furthermore, protection of the practices at issue in this case were not necessary for the survival, or even central to the identity, of a religious community, as was the case in many of the well-known American judicial decisions about religion: cases concerning Jehovah’s Witnesses proselytizing, Mormon polygamy, Amish educational practices, or Native American sacred lands, to mention just a few.⁷

INTRODUCTION

The practices for which protection was sought in the *Warner* case are more modest and more typically mainstream American. The *Warner* plaintiffs are not members of a religious elite. They are ordinary Americans attending to the most critical events of their lives—the deaths of their children, spouses, and parents. They are ordinary Americans seeking to create a place for mourning within the spaces set out by city, state, and federal laws, and by the cemetery industry. But if the religious activities at these graves are seen as unimportant and as not deserving of protection, legally speaking, then statutes guaranteeing religious freedom may be accomplishing just the reverse of their stated intent. These laws may be harming rather than fostering freedom of religion. In the important area of defining legal religion and legally protecting religious freedom, the *Warner* case provides, I believe, a valuable example.

Those “talking theology” in federal court with Judge Ryskamp in this trial in March 1999 included the plaintiffs (relatives of those whose remains were buried in the cemetery), city officials and managers of the cemetery, a financial analyst, two experts on the cemetery industry, five experts on religion, the lawyers, and the judge. I was the third of the three religion experts hired by the plaintiffs’ lawyers. The other two expert witnesses for the plaintiffs were a priest and a rabbi, both also academics. The City hired two religion scholars as experts. The testimony of all of those testifying at this trial was often at cross-purposes. As with many religion cases in the American courts, to read the testimony and the legal arguments in the *Warner v. Boca Raton* case with the eye of a scholar of religion is to wade into a murky mixture of half-remembered childhood teachings (whether at the knee of one’s grandmother or in formal religious instruction), ideas promoted in the popular literature of spirituality, fragments of Supreme Court opinions, the demands of the politics of identity, academic theories and opinions, and genuine, if often uninformed, fascination and concern. Indeed, one could say that the process of the trial itself, not just the ultimate decision, was somehow at times indecent, however unintentionally, in its ignorance about religion and in the resulting harassment of the plaintiffs. Certainly by bringing suit the plaintiffs consented, in some sense, to intrusive questioning—but did they consent to ill-informed and sometimes humiliating badgering about their religious beliefs and practices? And to what purpose?

The *Warner* case, in its very modesty, nicely illustrates the modern legal conditioning and predicament of religion. And it does so in the context of the peculiarly American conjunction between a strict separationist political ideology and a widespread evangelical style of religiosity, a conjunction

further distinguished by the very American sense that everyone is an expert when it comes to religion. The United States is, as many have observed, at once a profoundly secular and a profoundly religious society. “Separation of church and state” means that there is no established authority. A reformed evangelical piety means that each person is enthusiastically open to new religious experience, his or her own and everyone else’s. Together, these conditions produce a religious field both diverse and uniform. Throughout the *Warner* trial Judge Ryskamp inhabited this American double consciousness, at once separationist and evangelical, uneasily, I think, not sure how to resolve it. He confidently asserted the entire and complete right of every American to believe as she or he chooses while at the same time thoroughly enjoying arbitrating among competing views. This practice of his, his arbitration among views, was what he called “talking theology.” Biblically literate in a lay sense, Ryskamp felt no hesitation in openly preferring his own reading of the Hebrew Bible to that of the rabbi. He also felt no compunction about preferring his own version of church history to that of the church historian. Religion appeared to be judged in his courtroom according to the fabled “I know it when I see it” standard.⁸

Judge Ryskamp is like many Americans, I think, both in his obvious pleasure in “talking theology” and in his self-confident evaluation of the available evidence about religion. He *was* interested in religion and he was entirely democratic, if often uninformed, when debating authoritative sources. Religious authority was located for him in the individual, not in the religious community. Summarizing his reaction to the plaintiffs’ testimony in the *Warner* case, he revealed his own very American brand of broadmindedness when it comes to religion:

I would say at the outset, of all the plaintiffs who testified and the depositions that I’ve read, I believe that all of them have sincere religious beliefs. This does not require any testimony of orthodoxy, because orthodoxy is not an issue. . . . In listening to the testimony, the views expressed weren’t necessarily my views but I recognize them as all valid religious beliefs that are entitled to protection under the law. I’m sure that if I express my religious views some people would say that’s very weird and that’s very strange, you know, I can’t agree with that. That’s unorthodox. And that’s what makes up religion, is that we all have the right in this country to have whatever religious views we choose to have. So I would say as a blanket matter at the beginning that I recognize all of these views that have been expressed as sincerely held religious views.⁹

“Sincerity” is the only standard, he says here.¹⁰ Each person is entitled to his or her own beliefs. Yet, legally defined orthodoxy, not sincerity, was the final standard used in the *Warner* trial.

The case before him demanded that Judge Ryskamp make a decision about what counts as religion. Where else was he to look for authority, other than his own judgment? The five expert witnesses on religion in the *Warner* case, of which I was one, did not have an obvious place in the conversation. We did not speak out of his largely individualistic and self-taught evangelical epistemology. We spoke of history and culture and tradition. Ryskamp was suspicious about our claims to authority and reluctant to credit our testimony. Our claims of authority, whether scholarly in a religious or in a secular sense, were un-American. A federal judge has a great deal of power. Academic expertise can be impotent in such a place, particularly, perhaps, if the expertise is about religion. In the end Ryskamp drew back from the implications of the embracing antiauthoritarianism expressed above, falling back on his own authority as a federal judge and as a religious American.

Religious freedom and the legal disestablishment of religion, as political ideas, find their origin in the early modern period in Europe.¹¹ With other markers of modernity identified by scholars—the rise of the nation state, the maturing of an international market, the invention of modern warfare, the advent of printing and literacy, the emergence of a middle class, among others—a new relationship of religion to political governance was created with the breakup of the monopoly of the Roman Church.¹² For perhaps the first time since Constantine, religious affiliation in Europe began to be detached again from political identity. National and religious identity no longer necessarily went hand in hand. To be sure, at first, new national religious establishments were created to take the place of the continental monopoly of the Roman Catholic Church, but over the centuries religion was both consciously and unconsciously remodeled to accommodate the new secular political order and new ideas of citizenship. Religion was thereby politically and legally divided into modern and antimodern, long before the reappearance of “fundamentalism” in the 1970s.¹³ The precondition for political participation by religion increasingly became cooperation with liberal theories and forms of governance.¹⁴

As a result, the modern religio-political arrangement has been largely, although not exclusively, indebted, theologically and phenomenologically, to protestant reflection and culture.¹⁵ Particularly in its American manifestation. “Protestant” is here spelled with a small “p.” I use “protestant” not in a

narrow churchy sense, but rather loosely to describe a set of political ideas and cultural practices that emerged in early modern Europe in and after the Reformation; that is, I refer to “protestant,” as opposed to “catholic,” models of church/state relations. (According to this use, Protestants can be “catholic” and Catholics can be “protestant.”) Religion—“true” religion some would say—on this modern protestant reading, came to be understood as being private, voluntary, individual, textual, and believed. Public, coercive, communal, oral, and enacted religion, on the other hand, was seen to be “false.” The second kind of religion, iconically represented historically in the United States, for the most part by the Roman Catholic Church (and by Islam today), was, and perhaps still is, the religion of most of the world. Indeed, from a contemporary academic perspective, that religion with which many religion scholars are most concerned has been carefully and systematically excluded, both rhetorically and legally, from modern public space. Crudely speaking, it is the first kind—the modern protestant kind—that is “free.” The other kind is closely regulated by law. It is not incidental that most of the plaintiffs in the *Warner* case, the case considered in this book, are Catholic.

This book, to reiterate, is about the impossibility of religious freedom. Not the impossibility of societies in which persons are free to believe what they want and to associate themselves freely with others who believe in similar ways. Or in which persons are free to speak of religious matters openly and freely. Or in which government is prohibited from disfavoring one group of citizens for invidious reasons. These are rights that belong to all peoples. What is arguably impossible is justly enforcing laws granting persons rights that are defined with respect to their religious beliefs or practices. Forsaking religious freedom as a legally enforced right might enable greater equality among persons and greater clarity and self-determination for religious individuals and communities. Such a change would end discrimination against those who do not self-identify as religious or whose religion is disfavored. It might also force religious groups to fend for themselves politically, economically, and philosophically in a new world of radical normative pluralism.¹⁶

In this book I will, as I have said, describe one trial in detail. I intend by so doing to provide “ethnographic”¹⁷ evidence from which to question the received wisdom that legal guarantees of religious freedom are logically, or even morally, necessary elements of the emerging international legal order. A detailed look at one trial permits the fine-grained texture of this problem to emerge—in a way impossible, I would argue, in larger-scale studies of modern religion and law or politics, whether historical, sociological, or

philosophical. The *Warner* case is not unusual. I see it as typical. Philosophers may consider the metaphysical underpinnings of human rights from above.¹⁸ Here I intend a bottom-up look at the problem. A careful reading of the words and actions of the participants in the *Warner* trial—the witnesses, the lawyers, and the judge—shows a fragile and complex religious life unreachable by legal enforcement of the rights of religion.

The religious practices at issue in this case concern death. They are burial and mourning practices. If religion is anything, it could be said to be about what human beings do in relation to their mortality. Indeed prehistoric peoples are understood to be religious on the basis of the evidence of their burial practices. If these practices do not fall within the scope of protected religion under the most recent American statutes designed to protect religion from government burdens, how can such laws be rationally defended?

In October 1998, about six months before the *Warner* trial, I received a telephone call from Jim Green, one of the lawyers for the plaintiffs in the *Warner* case, a call in which he asked me to serve as an expert witness in the case. Jim found me because I had served as an expert witness in an earlier religion case concerning the impact of Wisconsin state-prison regulations on the prisoners' exercise of religion.¹⁹ Our telephone conversation followed what I have since come to see, after a number of such conversations, as a fairly typical pattern. I am sitting in my office. Out of the blue, a lawyer calls me, asking me to testify at a trial. He wants me to testify that a certain religious group believes certain things, or does certain things. I am usually asked to testify in one of two ways, depending on whether the case is a "free exercise" or an "establishment"-clause case, in American constitutional parlance:²⁰ In the first kind of case, a "free exercise" case, I am asked to testify that, if required to conform to laws that impinge on or prohibit a particular religious practice, the religious lives of the members of the group performing such a practice will, in some sense, be "substantially burdened"; in the second kind, an "establishment" case, I am asked to testify that if a particular law were to continue to be enforced, the government, through the legal favor shown to a particular religious group, would be "endorsing" one religion while discriminating against other religious groups, as well as against individual believers and nonbelievers with different religious commitments or orientations. Other scholars of religion also receive these calls with some frequency. Lawsuits in which religion is at issue occur with regularity in state and federal courts all over the United States, either because an individual's religious practice conflicts with the requirements of law or because government is seen, in some sense, to be unconstitutionally benefiting

a particular religious point of view or religious practice. Religion scholars and anthropologists regularly testify as to the authenticity of the religious views and practices in question in these cases.

I am almost always uncomfortable with the way the lawyer poses the question to me in these telephone calls (as are other experts, I am sure). I find myself explaining to him that religion does not work that way. I say that religion, particularly American religion, fits uneasily into a legal scheme that demands such categories and such expert certainty. Rationalizing religion in the ways proposed by courts and legislatures in this country fails to capture the nature of people's religious lives at the beginning of the twenty-first century, maybe of any century. Such rationalization also asks the government to be the arbiter of religious orthodoxy. My instinct in these phone calls is to say that these issues do not belong in courts—that “law” in a modern secular society ought not to be occupied with “religion” in any way, but certainly not in such a way as to put courts in the position of defining which religious belief or practice is authentic, and therefore legally significant. And yet these cases are often poignant: cases of ordinary Americans going about their lives, often in very modest ways, and coming up against legal regulation and legal ignorance of various sorts. I have served, and am serving, as an expert in several cases, including the case considered in this book. In each case I have, perhaps arrogantly, perhaps naively, thought that I could be helpful in educating the court about religion, helping to put the parties' actions into contexts in which they might be understood as religious, or not. I am concerned about the way the line between religion and not-religion is being drawn in this country and elsewhere.

Courts, legislatures, and other government agencies judge the activities of persons as religious or not, as protected or not, based on models of religion that often make a poor fit with religion as it is lived. In the phone calls I have with lawyers, I tell them what I think I can say that might be helpful, and I conclude with a warning that I have written academic articles—and now this book—suggesting that legal protection for religion is certainly theoretically incoherent and possibly unconstitutional. But—I think to myself—cases continue to be brought, and surely education is better than ignorance.

This book is about one particular case in which I happened to be involved, but there is a sense in which it could be about almost any case regarding religion in a country in which a secular state polices religion. In the United States recent cases have included the following occasions in which religion and law have come in conflict: An inmate in a Wisconsin prison wants, contrary to prison regulations, to wear a cross; Indians want,

contrary to the regulations of the National Park Service and in competition with park visitors, to use land sacred to their ancestors; evangelical chaplains in the navy want equal opportunity to promotion with chaplains of other Christian denominations; a county in Georgia, in a gesture arguably favoring Christianity and Judaism, depicts the Ten Commandments on its seal; a prison, also arguably favoring Christianity, funds an Evangelical Christian prison fellowship administering a program in an Iowa prison.²¹ There are hundreds, perhaps thousands, of such cases, here and in other secular jurisdictions. The word “religion” or “religious” appears over 14,000 times in state and federal statutes and regulations in the United States alone.²² What can these words mean, in law?

I did not choose this case. It chose me. I was asked, as I have said, to serve as an expert witness for the plaintiffs in this case. I agreed, with some uncertainty about the extent of my expertise on the matter in question and with some concerns about the effect on the plaintiffs’ case of my published skepticism concerning the kinds of legal claims being made. I first made a rather limited commitment, carefully circumscribing what I believed I could do to be of use to the plaintiffs and what I believed I could do with integrity, given my views. The City, the defendant in the *Warner* case, had argued that what the plaintiffs had done was not an “exercise of religion.” I thought that I could comfortably testify that what the plaintiffs had done would be considered religion by most religion scholars. What people do with respect to death is at the heart of religion, I thought. I wrote a short report summarizing my opinion and was scheduled to fly in for a short appearance at the trial.

Expert witnessing takes a peculiar form in U.S. courts. Expert witnesses are hired by the parties and are examined and cross-examined in an adversary context, both in depositions and at trial.²³ There are studies that show that in the United States, juries certainly, and perhaps judges as well, regard expert witnesses, whatever their expertise, with a somewhat jaundiced eye and tend to discount their testimony, viewing it as bought and paid for.²⁴ The dubious evidentiary value of such witnessing is compounded by the professional and ethical challenges faced by the experts themselves, some peculiar to religious studies, but many shared by all academic experts. The legal process demands a level of certainty with which most academics are justifiably very uncomfortable. A number of academics who have served as expert witnesses have written about the moral and professional ambiguities raised by serving as an expert.²⁵ These are unquestionably serious issues, and I acknowledge and honor those who have written eloquently about the impossibilities of achieving the kind of scholarly objectivity and certainty demanded by the courts.²⁶

I do think, however, that scholars have a public-service obligation to offer their expertise, when it can be helpful, conscious of the dangers of making the situation worse, and that the experience can have a kind of bracing honesty about it, one that challenges academics to come to terms with how the words they use may have direct effect on people's lives.²⁷

Over the course of the time of trial preparation during which I had periodic telephone conversations with the plaintiffs' lawyers, I was gradually drawn in and came to think that I could be of some real help in a case I consider a valuable exemplar for those promoting religious freedom in this country and elsewhere. I came to believe that there were discrimination issues—that there were issues of justice and fairness. I was pressed into service as consultant to the plaintiffs' lawyers for the whole trial,²⁸ an exhilarating experience for a former litigator. I found that questions I had been thinking about for years gained a certain urgency and clarity when considered in connection with the very real lives of people accidentally made visible by the legal system.

I will not use my own participation in this trial as a central organizing principle for this book. In a real sense I was a bystander. I hope that the fact of my presence does not distract from the argument here. I did not personally interview any of the participants. Everything here described and interpreted, with the exception of my own experience of being there, is a part of the public record in the case. I have not sought the permission of either the plaintiffs or the plaintiffs' lawyers in the publication of this book, but have tried faithfully to represent their public actions and words as I experienced them. These are my reflections on this case, and not a brief on their behalf. I will try to describe my own role accurately, as I will the other expert witnesses' at trial, but this book is not about me . . . and other stories could be told about these events.