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LOSING JERUSALEM—RFRA AND THE VOCATION OF LEGAL CRUSADER

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Even the mere sound of the name Jerusalem must have had a glittering and magical splendour for the men of the eleventh century which we are no longer capable of feeling. It was a keyword which produced particular psychological reactions and conjured up particular eschatological notions. Men thought, of course, of the town in Palestine where Jesus Christ had suffered, died, been buried, and then had risen again. But, more than this, they saw in their minds' eye the heavenly city of Jerusalem with its gates of sapphire, its walls and squares bright with precious stones . . . . It was the centre of a spiritual world . . . . It was a meeting place for those who had been scattered, the goal of the great pilgrimage of peoples, where God resides among his people; the place at the end of time to which the elect ascend; the resting place of the righteous; city of paradise and of the tree of life which heals all men.¹

As a first-year law student, I quickly noticed that the third-year students spent most of their spare conversational time talking about jobs. The late 1970s were relatively prosperous times for legal employment, and most graduates of Yale Law School had the luxury of choosing among an assortment of employers in a variety of places. The recruitment efforts of these employers were calculated, naturally, to make the soon-to-be lawyers feel like honored dignitaries (although of course, their status would change radically immediately upon commencing permanent, as

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opposed to summer, employment). So the third-years whiled away many pleasant or sometimes anxious hours reflecting on whether to confer their valuable services on Sullivan & Cromwell in New York, or Gibson, Dunn in L.A., or perhaps an appeals court judge in Dallas.

Not everyone was content with this mundane prosperity, though. I recall overhearing a conversation between two third-years who were having lunch at a nearby table. One—I didn’t know him, but we can call him Miniver—was complaining that he had not been born a generation earlier. “I decided to go into law because I wanted to fight injustice,” Miniver said. (Of course I can’t remember his precise words, especially after two decades, but as Dave Barry says, I am not making this up). “Back in the ‘60s there were jobs where you could do that. But there just isn’t much injustice left to fight.”

Miniver’s comment was foolish on more than one level, no doubt, but I think it was also natural, understandable, laudable in a way, maybe even inadvertently profound. Natural, in that Miniver’s comment reflected a common desire, as the judge I later clerked for liked to put it, to “do well while doing good.” Understandable, given the contrast between the generally unromantic ethos of the 1970s—quite a letdown from the revolutionary ‘60s—and the more idealistic spirit that still prevailed within the law school. (The contrast was most clearly manifest, I think, in the fact that Professor Owen Fiss and a few of his proteges managed to devote literally weeks of the class in Injunctions to what I could only understand as a sort of reverential collective meditation on the meaning of the events from days of yore memorialized in the casebook under the heading of Walker v. City of Birmingham.2) Laudable, in that the comment revealed an aspiration for a life devoted to something beyond mere survival and self-gratification: As Geoffrey Hazard, another of my first-year professors, told us (only in part ironically, I think): “You all have a conscience. That’s why you’re here, and not in business school.” And profound, because... but this is not the place to investigate whether evil is a necessary condition for the existence of good, so that the eradication of evil would actually be a grave misfortune.

In any event, Hazard was right: Most of us did have a conscience (if that is the right word for what we had), and we hoped to use law to improve the world. And not all of us were as despondently sanguine about the world's achieved goodness as Miniver. The causes that might attract our reforming zeal differed, of course. For some, the cause might be civil rights or gender equality; for others it was ending the death penalty, which our constitutional law professor Charles Black thunderously denounced with a crusading eloquence worthy of Peter the Hermit. Environmentalism, though not as popular at Yale as it is at Colorado where I work now, was a possible commitment. Discussions of animal rights were beginning, though they still had an air of novelty. And for a few of us, something we might generically and amorphously call "religion" was the cause of choice (although our commitment was pretty much invisible, because the law curriculum at Yale paid no attention whatsoever to this particular concern).

For many graduates, of course, the zeal for justice would soon be snuffed out by the mercenary rigors of the corporate law firm. But not everyone gave up the faith. And I suspect that the reforming impulse survived in greater purity in those who chose to leave behind the lucrative rewards of law practice for the—let us be honest, still far from ascetic—life of teaching and scholarship.

Indeed, without appreciating this common motivation, I think, you cannot really understand the work that over the last generation or so has been offered under the description of "legal scholarship," either in general or with specific reference to the religion clauses. A good deal of that scholarship, I believe, can only be viewed as the work of what we might call "legal crusaders." In particular, you cannot otherwise understand the indignant scholarly reaction to Employment Division v. Smith, or the fer-

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3. Peter came from Picardy and before the crusade he had probably been active as a preacher in Central France. He did not look very attractive, usually being caked with mud and dirt, as he rode about the countryside on a donkey. Yet he was a man of electrifying eloquence who radiated an unusual power. Mayer, supra note 1, at 39.

vor of support for the Religious Freedom Restoration Act (RFRA),\textsuperscript{5} or the likely reaction to \textit{City of Boerne v. Flores}.\textsuperscript{6}

I. LAW AS CRUSADE

The allusion to crusaders is meant to be more than a passing flourish; I believe the analogy is more fruitful than that. The original crusader, after all, was typically a man whose principal talents were not of a particularly spiritual nature, and the crusade was a way of turning these dubious skills to a higher purpose. Someone who might otherwise have been little more than a hired sword, or perhaps even a petty cutthroat, was thereby promoted to a sort of holy warrior.

In the same way, the litigator or legal scholar is a person trained mostly in the skills of arguing, framing issues in a tendentious way, and making verbal distinctions and deductions within a highly abstract and artificial conceptual system. It is a necessary kind of work, probably, perhaps even a socially valuable work; but it is not an especially ennobling one. Most of the people engaged in this sort of work are probably dedicated to nothing more lofty than, as a disapproving relative once put it to me while I was still in a business litigation practice, fighting over "who gets the money?" But in the legal crusade these argumentative or rhetorical talents are redeemed by being devoted to advancing righteous causes.

Other parallels are less pleasant to contemplate. Although the medieval crusader thought to elevate what otherwise would be at best practical and at worst vicious pursuits, there was also something incongruous in his calling. In the first place, the gains for which the crusader traveled, bled, and killed were mostly symbolic. Jerusalem itself was not so much a place as a symbol.\textsuperscript{7} Indeed, the situation could hardly have been otherwise, because the crusader's means were wholly out of line with his ostensible ends: You just cannot save souls by bashing in heads.

\footnotesize{(1995) (collecting scholarly criticisms of Smith).}

\textsuperscript{5} 42 U.S.C. §§ 2000bb to 2000bb-4 (1994); \textit{see} Lupu, \textit{supra} note 4, at 187 (discussing the support for RFRA).

\textsuperscript{6} 117 S. Ct. 2157 (1997).

\textsuperscript{7} \textit{See supra} text accompanying note 1.
with a mace, or by plundering the capital of a rival Christian tradition, or by making Jerusalem flow with the infidels' blood.\textsuperscript{8} And symbolic victories may well have been accompanied by real losses: The exhilaration of the crusade may have caused people to overlook the grotesque incommensurability between means and ends, and hence to neglect the sorts of more quiet, patient efforts that could produce real spiritual gains.

So if there was something daunting or inspiring in the image of the knight on horseback and in polished armor with the sign of the cross emblazoned on his shield, there is also, from our perspective at least, something absurd and even contemptible in the spectacle. How in heaven's name, we may wonder in retrospect, could so many people have been so deluded? How could they have believed that they were actually serving God? Why couldn't they understand that if they were really determined to follow Christ, the way to do so was to devote themselves to understanding his teachings and cultivating the virtues he taught—such as turning the other cheek\textsuperscript{9} or loving one's enemies,\textsuperscript{10} not killing them?

Less dramatic but still similar questions might be raised about the legal crusader, especially the crusader who fights for justice in the guise of legal scholar. Realistically, the legal scholar, like the medieval holy warrior, must be viewed as someone who fights mostly for symbolic victories. That is because the causal connection between scholarly articles and real world conditions is interrupted by two large gaps, which taken together make the scholar's means—writing law review articles, principally—an especially problematic way of achieving her ostensible ends.\textsuperscript{11}

\textsuperscript{8} The intoxication of victory, religious fanaticism, and the memory of hardships bottled up for three years exploded in a horrifying bloodbath in which the crusaders hacked down everyone, irrespective of race or religion, who was unfortunate enough to come within reach of their swords. They waded, ankle-deep in blood, through streets covered with bodies.

\textsuperscript{9} See Matthew 5:39.

\textsuperscript{10} See Matthew 5:44.

\textsuperscript{11} Pierre Schlag has developed extensively the observations that follow. See, e.g., Pierre Schlag, Normativity and the Politics of Form, in PAUL F. CAMPOS ET AL., AGAINST THE LAW 29 (1996) [hereinafter Schlag, Normativity]; Pierre Schlag, Writing for Judges, 63 U. COLO. L. REV. 419 (1992) [hereinafter Schlag, Writing].
One gap separates the scholar and her writings from the judge. Considerable evidence suggests, I think, that judges rarely read legal scholarship, or that they are not much influenced by it even if they do occasionally read it. To be sure, prescriptive scholarship may have more gradual and indirect effects—for example, by educating or conditioning the next generation of lawyers, judges, and professors. But there is little reason to suppose that these more indirect effects will correspond closely to the scholar's specific recommendations. A generation's worth of justifications for judicial activism developed by admirers of the Warren Court might take effect just in time for a more conservative judiciary to put down "progressive" measures, such as affirmative action. Realistically, it seems, prescriptive legal scholarship more often serves to rationalize what was done in the past than to direct what will be done in the future.

The second gap divides what the judge says or commands from what actually happens in the world. There is reason to believe that the cause-effect relationship here is at best very complicated: The judge's injunction sallies forth into the world and promptly mixes with a whole company of other unfathomable factors and characters to produce an end result that may be utterly different than anything the judge, or anyone else, would have contemplated.

It doesn't follow, I think, that law professors should simply abandon normative scholarship. And indeed, at some level all legal scholarship is probably normative in some sense. Still, given the complications and dilutions and unanticipated redirections noticed above, the legal scholar who spends his days piously issuing prescriptions to the world may begin to seem a bit silly. His rectitude is largely spent, a cynic might conclude,

16. See generally Schlag, Normativity, supra note 11, at 33 (discussing the pervasiveness of normativity in legal thought).
in a sort of self-righteous posturing—in ostentatiously holding the right opinions on a variety of fashionable issues. What exactly does he think he is accomplishing, we might well ask. Why would intelligent people have supposed that we could truly reform society by passing laws, or by issuing injunctions commanding the world to be virtuous and just, much less by publishing articles to that effect in little-read law reviews? Does the legal scholar really care about social improvement at all, or only about his own status and reputation? And if he does care, why doesn’t he devote himself to doing something that might actually help—getting more directly involved in politics or general public education, perhaps, or even cultivating his own soul or attending to his family so that in Confucian fashion the world might actually, gradually, be made better?

To be sure, Confucius also emphasized the value of scholarly learning. But that observation points to another problem with the legal crusader: Her vocation mixes the roles of scholar and

17. Gerald Rosenberg has observed that:
A further danger of litigation as a strategy for significant social reform is that symbolic victories may be mistaken for substantive ones, covering a reality that is distasteful. Rather than working to change that reality, reformers relying on a litigation strategy may be misled (or content?) to celebrate the illusion of change.
ROSENBERG, supra note 15, at 340.
18. The Confucian classic The Great Learning explains:
The ancients who wished clearly to exemplify illustrious virtue throughout the world would first set up good government in their states. Wishing to govern well their states, they would first regulate their families. Wishing to regulate their families, they would first cultivate their persons. Wishing to cultivate their persons, they would first rectify their minds. Wishing to rectify their minds, they would first seek sincerity in their thoughts. Wishing for sincerity in their thoughts, they would first extend their knowledge.
Confucius said: “Lead the people by laws and regulate them by penalties, and the people will try to keep out of jail, but will have no sense of shame. Lead the people by virtue and restrain them by the rules of decorum, and the people will have a sense of shame, and moreover will become good.”
SOURCES OF CHINESE TRADITION, supra, at 34 (quoting Analects II:3 (n.d.)).
advocate in a way that can easily end up doing violence to both.\(^2^0\) Typically she will not feel free simply to pursue truth wherever the search may lead. Her "truths" must be ones that speak to current controversies as currently formulated—otherwise she will not be participating in the legal conversation—and they will need to end up favoring the righteous side of those controversies. Uncooperative truths will be of little value, or even of negative value.

Moreover, as other professors and lawyers come to understand the tilted and tendentious nature of legal scholarship, that scholarship loses its authority as "scholarship"—and, hence, its ability to persuade.\(^2^1\) The reforming law professor busily turning out advocacy scholarship may come to resemble the obsessive, self-appointed soap box orator: At first people may be slightly interested, but interest turns to amusement, and then to annoyance, until gradually people learn to pay no attention.

II. THE CRUSADING VOCATION AND THE SCHOLARSHIP OF RELIGIOUS FREEDOM

These doubts apply in force, I think, to those of us who may have thought to advance righteousness by using legal scholar-

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\(^2^0\) See generally Paul F. Campos, Advocacy and Scholarship, 81 CAL. L. REV. 817 (1993) (arguing that most modern constitutional scholarship is really advocacy in the guise of scholarship—an approach that has little value because scholarship's goal is to seek truth). Learned Hand echoed similar sentiments over 50 years ago:

You may take Martin Luther or Erasmus for your model, but you cannot play both roles at once; you may not carry a sword beneath a scholar's gown, or lead flaming causes from a cloister. Luther cannot be domesticated in a university. You cannot raise the standard against oppression, or leap into the breach to relieve injustice, and still keep an open mind to every disconcerting fact, or an open ear to the cold voice of doubt. I am satisfied that a scholar who tries to combine these parts sells his birthright for a mess of pottage; that, when the final count is made, it will be found that the impairment of his powers far outweighs any possible contribution to the causes he has espoused. If he is fit to serve in his calling at all, it is only because he has learned not to serve in any other, for his singleness of mind quickly evaporates in the fires of passion, however holy.


\(^2^1\) See SMITH, supra note 14, at ch. 6.
ship to advocate various positions or principles for protecting "religious freedom." To begin with, there is reason to doubt, here as elsewhere, that the vast bulk of scholarly writing is ever read by judges, or that judges are persuaded to change their minds by the rare scholarly article that they do occasionally read.\textsuperscript{22} Although \textit{Flores} might seem to provide contrary evidence, I think it in fact supports this observation. The case produced opinions by Justices Scalia and O'Connor arguing about the "original meaning" of the Free Exercise Clause,\textsuperscript{23} and the opinions dealt at length with an article on the subject by Michael McConnell.\textsuperscript{24} Perhaps never in this field has a law review article received as much explicit, official attention in a Supreme Court decision. So if there was ever a chance for a legal scholar to influence the Court directly in shaping a key religion clause doctrine, one might guess, it was in this case. Professor McConnell was probably flattered—at least, I would have been—but it also needs to be noted that neither Scalia nor O'Connor budged at all from the positions they had held on the Free Exercise Clause \textit{before} the article was published.\textsuperscript{25}

Even more importantly, there is at best a complicated, unpredictable, sometimes perverse correlation between what the judges command and what happens to religion, or religious freedom, in the world. Most of the interactions between religion and politics still have not been brought within the courts' conscious cognizance.\textsuperscript{26} And when the courts do address an issue, their commands are subject to construal and misconstrual, underenforcement and overapplication. Hence we hear of school districts where scripture reading and class prayers persist,\textsuperscript{27} but also of school administrators who forbid students to bow their

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\item \textsuperscript{22} \textit{See supra} notes 12-13 and accompanying text.
\item \textsuperscript{23} \textit{See City of Boerne v. Flores}, 117 S. Ct. 2157, 2172-76 (Scalia, J., concurring in part); \textit{id.} at 2176-85 (O'Connor, J., dissenting).
\item \textsuperscript{24} \textit{See Michael W. McConnell, The Origins and Historical Understanding of Free Exercise of Religion}, 103 HARV. L. REV. 1409 (1990).
\item \textsuperscript{25} \textit{See Employment Div. v. Smith}, 494 U.S. 872, 874-90 (1990); \textit{id.} at 891-907 (O'Connor, J., concurring).
\item \textsuperscript{26} \textit{See Steven D. Smith, Legal Discourse and the De Facto Disestablishment}, 81 MARQ. L. REV. (forthcoming 1998).
\item \textsuperscript{27} \textit{See, e.g., Jay Reeves, Schools Targeted Jewish Family, Suit Says Religion, L.A. TIMES, Sept. 14, 1997, at A4, available in 1997 WL 13979789.}
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heads in a silent grace over lunch.\textsuperscript{28} We observe the courts ordering the removal of public religious symbols in order to reduce alienation,\textsuperscript{29} but for all we know the net result may be an overall increase in aggregate alienation, and in subtle but powerful religious hostility.\textsuperscript{30} We note that decisions calculated to make public life more secular are followed by—quite likely as a natural but unanticipated reaction—the rise of a more aggressive "religious right."\textsuperscript{31} The Supreme Court holds that the very possibility of religious indoctrination precludes public school teachers from offering remedial math and reading classes in parochial schools.\textsuperscript{32} The consequence is that students march through rain and snow to receive the classes in vans across the street or down the block; millions of dollars and lost school hours later, the Court concedes that it made a mistake.\textsuperscript{33}

But the problem with using religion law scholarship primarily as advocacy is not just that such advocacy is inefficacious, or unevenly and sometimes perversely efficacious. The advocacy orientation also undermines the value of such scholarship as scholarship. For example, legal scholars have done a good deal of historical work, some of it quite impressive. But insofar as they are engaged in a crusade of one kind or another, they must use history tactically to provide answers to our questions. So if it turns out, as not surprisingly it often does, that historical actors were not addressing our questions at all—that they were addressing their own questions, which were quite different—the legal scholar is likely to find this situation unacceptable. Like a lawyer cross-examining a witness, the legal scholar will insist that his historical predecessors answer the questions put to them; and being long since dead, how can they protest? Not surprisingly,


\textsuperscript{31} See id. at 115-17.


the resulting "history" will be distorted and unreal. So it is

that the "history" relied upon by religion law scholars, as well as by Supreme Court justices, is so often a sort of stylized mythology, loosely grounded in the past but remade for modern uses.

In these respects, one might say, religion law scholars have merely succumbed to the temptations that afflict legal scholars generally. But it seems to me (and I say this with a twinge of embarrassment) that professors whose commitment is to "religion" ought to have been more perceptive, and hence more immune to the common mistakes, than other law professors. Religious believers have been alerted, after all, to the danger of supposing that one can be virtuous by making public professions or gestures on behalf of righteous causes. In addition, religious believers are heirs to a long tradition that should have educated them in the difficulties and complications of using "law" as an instrument for protecting and advancing the cause of God.

More specifically, believers are the beneficiaries of ample historical examples of the potentially corrupting effects for religion of striking up a cozy partnership with earthly government. (And the judiciary is after all merely one branch of the government, even though law professors often display an uncanny ability to forget the fact). Believers also ought to know that religion does not need to curry the favor of earthly government—that "[a]ll nations before [God] are as nothing" and that God "bringeth the princes to nothing; he maketh the judges of the earth as vanity." To be sure, religious believers have often been the

34. For an elaboration of this point, see SMITH, supra note 14, at chs. 1-4.
35. In the New Testament, this sort of behavior was condemned as hypocrisy. See, e.g., Matthew 6:1-5.
38. Id. 40:23. The fact that religions sometimes change or give way before governmental pressure, as with the Mormon abandonment of polygamy, is not incompatible with this belief. Indeed, if the believer truly holds that God lives, that He governs all things, and that He "works in mysterious ways," then it becomes difficult to say peremptorily that changes brought about through outside pressure are necessarily contrary to God's will. In fact, scripture plainly indicates that God sometimes uses even those in rebellion against Him to bring about His purposes. See, e.g., Genesis 45:4-8 (relating how God worked through Joseph's brothers, who sold him into
victims of official persecution; but their faith tells them that they will be blessed for this and will be rewarded with the kingdom of heaven.\(^3\) So it is at least curious to observe the zeal with which law professors, among others, construct legal barriers calculated to ensure that the faithful will not experience this sort of blessedness.

I don't want to be understood as suggesting that religious believers ought to cultivate persecution, or that they should be oblivious to legal aspects of religious freedom. In fact, I don't mean to draw any specific conclusions here about the proper relationship between religion and government. That relationship is extremely complicated, and perhaps ultimately unfathomable. "In the world but not of the world" has always been, for the religious, a necessary but also confounding concept.\(^4\) Indeed, that is the whole point of these observations: Religious believers even more than others ought to be able to appreciate that the connections between "law" and various goods, especially those associated with "religion," are highly problematic. That appreciation ought to alert them to the complexities, and the perils, of legal crusading on behalf of religion. And it ought to prepare them to resist the passing satisfactions of symbolic victories—and the thin disappointments of symbolic defeats.

### III. THE FALL OF RFRA AND THE LEGAL CRUSADER

All of this is prelude to a comment on *City of Boerne v. Flores*.\(^4^1\) What is the meaning of *Flores*? What are its implications? My guess is that the decision will provoke stern denunciations from the spectrum of groups that supported the Religious Freedom Restoration Act; there will be talk of all the damage that the decision will inflict on religion.\(^4^2\) But my answer is that I don't know what effects the decision will have on religion, or whether

\(^3\) See Matthew 5:10-11; 2 Maccabees 7:7-14, 7:20-41, 12:42-45.

\(^4\) This phrase emanates from John 17:14-16.

\(^4^1\) 117 S. Ct. 2157 (1997).

the decision is ultimately good or bad for religion, and I don't think any other human knows either. "The information's unavailable," as someone said, "to the mortal man." 43

Purely as a symbolic matter, the decision probably represents a defeat for "religious freedom." Even that observation must be qualified: Flores's focus on limitations on congressional power 44 makes its symbolic significance for religious freedom even more ambiguous than was the case with Employment Division v. Smith. 45 Still, Flores in effect reaffirms Smith, 46 and as we know, Smith provoked an outpouring of condemnation (from, among others, myself) 47 claiming that the Court had betrayed religion or religious freedom. 48

In retrospect, it seems that the Sherbert v. Verner 49 "compelling state interest" doctrine 50 was for many religious believers a prize to be fought for and defended. So Smith represented, in effect, the loss of Jerusalem, to be retaken (temporarily as it turned out) by the enactment of RFRA. And because nearly everyone also agreed that the compelling interest test overruled in Smith—or, rather, declared never to have existed 51—had carried little force in actual practice, 52 the outcry seemingly reflected a perception that religion had lost its symbolic place of preference in the constitutional scheme. Flores helps to confirm this perception.

43. I believe one can say with confidence that the claim that Flores is the "most important church-state decision . . . in fifty years," see Jed Rubenfeld, Antidisestablishmentarianism: Why RFRA Really Was Unconstitutional, 95 MICH. L. REV. 2347, 2347 (1997), is, shall we say, exaggerated. That claim is best understood as an effort to enhance the significance of law review articles discussing the decision.

44. See Flores, 117 S. Ct. at 2162-72.

45. 494 U.S. 872 (1990) (holding that neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest).

46. Cf. Flores, 117 S. Ct. at 2160 (explaining that "Congress enacted RFRA in direct response to" Smith); id. at 2172 (declaring RFRA unconstitutional).


48. See id.; supra note 4 and accompanying text.


50. See id. at 403.


But what effect will this symbolic defeat have on the actual exercise of religion in the country? This, I think, is what no one knows. At least in the short-run, a few religious claimants who might have been relieved of legal burdens likely will have to bear them, for better or worse. Beyond this, I think, it is hard to predict. The difficulty in part reflects the usual empirical problems that afflict prophecy. It may be, for example, that Congress or the states will enact new general laws like RFRA but designed to avoid the limitations discussed in *Flores*.\(^53\) Or they might enact a variety of more specific exemptions for religion. If they do, then *Flores* may have almost no practical effect at all.

Suppose such legislation is *not* enacted. In that case, our assessment of the value and implications of *Flores* is still impeded by a variety of limitations in our understanding. I will mention three.

First, we do not have any good theory of religious freedom against which to measure even known consequences of this or related decisions. Let me explain the difficulty in this way: Even if "religious freedom" were a sort of quantifiable commodity subject to linear measurement—which it surely is not—almost no one believes simply that "more is better." No one thinks, that is, that any citizen's claim to anything should be granted so long as it is sincerely based in religion, so that denying the claim would burden that citizen's religious exercise or fulfillment. If Cheevy sincerely reports that he believes God has appointed him to be President, no legal scholar is going to argue that Cheevy has a constitutional right to the office. So the real questions are always about *how much* and *what kind of* freedom to practice religion ought to be maintained. And we have no convincing theory or measure for answering those questions. Consequently, even if *Flores* will in some sense reduce religious freedom, that alone does not show the decision to be either good or bad.\(^54\)

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Second, we do not have any good understanding of the relation between “law” and “religion,” or between different kinds of laws or legal regimes and different kinds of religions sociologically understood. Sometimes official persecution or, what is more likely in this country today, insensitivity may inhibit or weaken some religions. At other times these policies seem to stimulate or strengthen religion. “The blood of the martyrs is the seed of the church.”

Finally, we do not have any good understanding of what for the religious believer ought to be the most important issue—that is, the relation between “law” and “religion” religiously understood. For example, it is often said that the scheme of religious voluntarism adopted in this country in the late eighteenth and early nineteenth centuries, though depriving the churches of governmental support, actually had the effect of strengthening religion. Though causal connections are difficult to draw with confidence, relatively high levels of religiosity in this country compared with those in some European countries that maintained established churches for a longer time seem consistent with this view. But religious voluntarism also led to dramatic changes in the nature of religious worship and practice. The rise of revivalism as a way of enlisting popular participation and the decline in the intellectual requirements for the ministry were among the natural products of religious voluntarism.

55. See, e.g., EARL E. Cairns, CHRISTIANITY THROUGH THE CENTURIES 95, 101 (rev. ed. 1967) (“The [early Christian] Church continued to develop in spite of or, perhaps, partly because of persecution . . . . The rapid spread of Christianity [in the first century], even during the periods of heaviest persecution, proved that indeed the blood of the martyrs was the seed of the Church.”).

56. Alexis de Tocqueville was an early proponent of this view. See 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 308-12 (Francis Bowen trans., Phillips Bradley ed., Alfred A. Knopf 1956) (1835).


58. See generally NATHAN O. HATCH, THE DEMOCRATIZATION OF AMERICAN CHRISTIANITY (1989) (explaining how the democratization of Christianity in this country undermined Calvinist orthodoxy, and theology in general, and led to a greater emphasis on emotion and individual autonomy); SIDNEY E. MEAD, THE LIVELY EXPERIMENT: THE SHAPING OF CHRISTIANITY IN AMERICA 123 (1963) (arguing that the separation of church and state stimulated revivalism; in turn, revivalism “tends to produce an oversimplification of all problems” and also “tends to lean theologically in an Armenian or even Pelagian direction with the implicit suggestion that man saves
Let us grant that these developments led to a broader participation of the population in religious activities: Is it clear that "religion" was thereby strengthened? Proponents of more pietistic or evangelistic or pentecostal versions of religion might say "yes"; indeed, they might contend that these changes in the character of religion were desirable in themselves, even apart from their function in making religion more accessible to some parts of the population. But of course, more traditional religionists like Timothy Dwight or Lyman Beecher, as well as European visitors like Frances Trollope, took a very different view. And although Beecher's and Trollope's general attitudes toward democratic developments may seem intolerably stuffy, still, watching some of the religious programs on television or listening to contemporary religious popular music, one can perhaps sympathize with their perspective.

Or, to return to the case at hand, suppose that a decision like Flores leads to a higher incidence of official religious intolerance, himself through choice”).

59. See HATCH, supra note 58, at 18-19. Beecher spoke out against the newly dominant, untrained clergy:

There may be, perhaps, 1500 besides who are nominally ministers of the Gospel. But they are generally illiterate men, often not possessed of a good English education, and in some instances unable to read or write. By them, as a body, learning is despised. With few exceptions they are utterly unacquainted with theology and like other men are devoted through the week to secular employment, and preach on the Sabbath, with such preparation as such an education and such avocations allow.

Id. at 18 (quoting Lyman Beecher, An Address to the Charitable Society for the Education of Indigent Pious Young Men for the Ministry of the Gospel (1814)).

Hatch quotes a popular preacher, who expressed the opposing view:

What I insist, upon my brethren and sisters, is this: larnin isn't religion, and eddication don't give a man the power of the Spirit . . . . And so, when [the Lord] wants to blow down the walls of the spiritual Jericho, my beloved brethren and sisters, he don't take one of your smooth, polite, college larnt gentlemen, but a plain, natural ram's-horn sort of man like me.

Id. at 20 (quoting 1 SAMUEL GOODRICH, RECOLLECTIONS OF A LIFETIME 196-97 (1856)).

60. See MARK A. NOLL, A HISTORY OF CHRISTIANITY IN THE UNITED STATES AND CANADA 221 (1992) (quoting Trollope as describing the revival meeting as a “most terrific saturnalia”). More generally, Trollope reported that in the United States “[t]he whole people appear to be divided into an almost endless variety of religious factions,” and “[t]he vehement expressions of insane or hypocritical zeal, such as were exhibited during ‘the Revival,’ can but ill atone for the want of village worship.” Id. at 221.
and that one result of this change is that the more noncommittal members of some religions are induced to abandon their lukewarm faith while other adherents develop a more intense commitment. Numerically, the religion may appear weaker than before. But from a religious standpoint the change might represent a definite gain.\textsuperscript{61} To be sure, the believer cannot accommodate herself to the world as easily or as comfortably as before. But then, didn't her faith warn her all along that accommodating herself to the world was a temptation to be fervently resisted?\textsuperscript{62}

IV. CONCLUSION: CALLING OFF THE CRUSADE

The preceding discussion suggests that for a variety of reasons we do not—and we probably never will—know what the impact of Flores will be, either on "religious freedom" or on religion. So we should be, if not approving, at least temperate in our criticisms of Flores: The "compelling state interest" test was not Jerusalem, and in any case Jerusalem will not be won by litigation, much less by writing law review articles.

Of course, most of the points made here could be generalized to other religion clause decisions, and to other legal decisions in general. So legal crusaders of all types will often be charging and thrashing about in the dark. Is this conclusion discouraging for the legal scholar—perhaps even nihilistic? I don't think so. In other disciplines it is not taken for granted that the point of scholarship is to prescribe decisions to some authoritative body or institution. Why must legal scholarship be bound by that assumption?

To put the point more positively: Recognizing the futility of crusading should free legal scholars to be more curious, and more honest. We can investigate questions that have no obvious "advocacy" payoff. We can stop forcing historical figures to answer our questions: It might turn out that they (even those whose positions we have been brought up to deplore) actually

\textsuperscript{61}. Cf. Revelation 3:15-16 ("I know thy works, that thou art neither cold nor hot: I would thou wert cold or hot. So then because thou art lukewarm, and neither cold nor hot, I will spue thee out of my mouth.").

\textsuperscript{62}. See James 4:4 ("[K]now ye not that the friendship of the world is enmity with God? Whosoever therefore will be a friend of the world is the enemy of God.").
have something to teach us, instead of just providing authority for views we already hold. Or, insofar as our scholarship continues to be normative in character, it might be normative in a less tendentious, less specifically result-oriented, and hence perhaps ultimately more helpful way.

More generally, we can draw the conclusions that seem to be indicated without constantly worrying about whether we are coming down on the side of justice and virtue. Just as the eventual recognition that Jerusalem was not to be won for Christ by the sword freed erstwhile crusaders to pursue a life more truly Christian, so also the realization that legal scholarship is not well suited to reforming the world in any direct and immediate way might liberate the religious believer/law professor to practice both a more uncompromised faith and a more uncorrupted scholarship.