

**B**arry Lynn has been the legislative counsel to the Washington, D.C., office of the American Civil Liberties Union since 1984. During that time he has worked on numerous church-state issues in Congress, playing a key role in efforts to defeat school prayer amendments and various parochial proposals, as well as working on legislation affecting the free exercise of religion and countless other civil liberties issues.

Lynn holds a law degree from Georgetown University Law Center and a theology degree from Boston University School of Theology. An ordained minister in the United Church of Christ, he taught in the religious studies department of a Boston Catholic school in the early 1970s. He has been widely published on church-state and other civil liberties issues and is a frequent media commentator on First Amendment concerns.

Lynn left the ACLU July 1 to pursue a full-time career in broadcasting as cohost of the nationally syndicated daily radio talk show program "Battleline."

Last June, *Church & State* Assistant Editor Rob Boston interviewed Lynn at the Washington offices of the ACLU about a variety of church-state issues.

**C&S:** *It's 1991, the bicentennial of the Bill of Rights and the First Amendment's church-state provisions. Give me an overall assessment of where religious liberty and church-state separation are today.*

**Lynn:** I think both religion clauses of the First Amendment are in trouble in America today, both the free exercise concept as well as the concept of the non-establishment of religion.

When it comes to free exercise, I don't think that the courts have been very sensitive to non-traditional religions. As a consequence judges have been willing to find a legal justification—almost any justification—for state or municipal governments when they come up with an excuse for inhibiting if not completely eliminating particular religious practices. The free exercise of religion is almost a meaningless phrase at this point. Courts don't seem to appreciate the sincerity and the intensity of religious belief and how it requires people to act in ways that are somewhat different from the ways that the majority of Americans act.

On the other side—on the establishment side—I think we're in at least as much trouble. A consistent trend that I see, both in the case law and in the acts of Congress and state legislatures, is the trend to directly and indirectly fund religious activities. The Establishment Clause ought to mean that neither directly nor

# DEFENDER OF THE WALL

## An Interview With The ACLU's Barry Lynn

indirectly should government be in the business of supporting religious activities.

It is in the best interests of all for separation to continue, for there to be a decent distance between church and state in America, because if there is not it hurts the state and it also hurts the church. It denigrates both to have them dependent on one another, and unfortunately that is the clear trend that I see both in the courts and in the legislatures and in the thoughts of many Americans.

**C&S:** *We're seeing new trends at the Supreme Court (right across the street from us today). Some are predicting the demise of what Thomas Jefferson called the "wall of separation between church and state." Assess that situation.*

**Lynn:** I think the problem is even worse than simply the problem of

the Supreme Court not understanding the proper view of the First Amendment. We're starting to see the legacy of 60 percent of the federal court judges at the district and appeals court levels being the appointments of Ronald Reagan and George Bush. These are people who in the main—there are some exceptions—do not understand church-state separation. This is a profound change and it's going to have a dramatic effect on the way that Americans are able to practice their religion and to avoid supporting the religions of others with federal, state or local tax dollars. We separationists are losing many cases, and the trend simply is not healthy at any level of the federal judiciary.

**C&S:** *What can be done now that the federal courts are not as willing to uphold separation? Are there strategies that separationist groups can pursue?*

**Lynn:** One way is a better educated electorate, and that is something that can be done through the kind of public education programs that separationist groups—Americans United and the ACLU, People for the American Way and others—are engaged in. It's also necessary though to shift resources, I would say dramatically, out of the courts and out of litigation and into the hard work of making sure that bad laws never get enacted in the first place.

**C&S:** *Assess the Congress. What are the members' views on church-state separation?*

**Lynn:** I'm afraid most members of Congress, if they studied the Constitution, never made it to the Bill of Rights. You learn about church-state separation in the very first amendment, and they don't seem to have noticed it. There are very few members of the House or the Senate today who could get up and instinctively understand that something that was being done on the floor was a violation of the First Amendment. We used to have people like

Senator (now governor) Lowell Weicker of Connecticut who understood it instinctively. He realized that it was very easy to slip by, particularly in the middle of the night, provisions that were going to do injustice to the First Amendment. We don't have many people like that. I would say that as a matter of church-state sensitivity, this current Congress is about as bad as I've seen.

**C&S:** *A few years ago the Williamsburg Charter group released a survey that showed that a full quarter of the American population doesn't think separation of church and state is a good idea at all. And when pollsters got into specific issues they found even more disturbing news. Why isn't there more support for church-state separation?*

**Lynn:** I think it's because it's very easy for Americans to think that the problems of the Ayatollah Khomeini, for example, are not problems that will ever be replicated here in the United States. They think this country somehow at some point down the road won't let things get out of hand. I think that's a very dangerous and false idea. All you need to do is to read the books and the writings of people like Randall Terry, head of Operation Rescue. He's a man who radically wants to transform America on the basis of the biblical understanding that he and many people share. He's not going to be satisfied by outlawing abortion because he will admit to an agenda that's far more far-reaching than that.

It's incumbent on separationist groups to go back to basics, to talk about defining principles, about why it is valuable for religious institutions as well as for government to keep separation as complete as possible. We should not be working to take a few more stones out of the wall of separation. We ought to be working to put some of the stones back.

There's also a tendency in America to look for easy solutions. In theological terms this is the worst kind of "cheap grace." If you can't get your own kids to pray then maybe if the school tells them they have to pray for two minutes a day it will teach them something. Well, I don't believe government institutions ought to take the place of either parents or religious institutions in the promulgation of their faith. You should not be asking the institutions of government to do

what you failed to do. It is an easy way out, and I'm afraid a lot of people these days are looking for easy ways out.

**C&S:** *Religious Right groups are fond of saying that separation of church and state is inherently hostile to religion. This view has even gained some support on the Supreme Court. I know you have a background in law and in theology. How do you respond to this charge?*

**Lynn:** I think it's dangerous, foolish and completely wrong-headed to believe that government neutrality toward religion means hostility. It clearly does not. To not have prayer in public schools simply sends the message that government sponsorship of religious activity is inappropriate. It doesn't say there's anything wrong with religion. I blame the Religious Right for managing to confuse the issue so much.

Individual expression of belief is not forbidden. The ACLU has defended the right of individual school children to wear T-shirts that have religious messages on them, to distribute religious newspapers, to read Bibles on their own. Where we draw

the line, but where the Religious Right wants to muddy the line, is the distinction between *government* efforts that support or encourage religious activity and a neutrality that simply permits some of these things to occur when it is truly the choice of the student.

If a student wants to pray before meals in a public cafeteria, no problem. When the state says, "We will set aside a time for you to pray before you eat your hot dogs," then you have a legitimate constitutional problem. I think the Religious Right, more than anybody else, is to blame for the total confusion here.

**C&S:** *Religious Right groups often claim that separation of church and state is a recent development. We know that Thomas Jefferson coined the "wall of separation" metaphor in 1802. How far back do the roots of separation go in the United States?*

**Lynn:** I think they go back prior to the Jeffersonian construct. I think in some of the colonies there was a clear understanding about the need to keep church and state separated. But you know, people and countries develop an understanding over the course of their lives.

When you have as many religious traditions and religious be-



Barry Lynn: Church-state separationist

lief systems as this country has, you have to be *more* sensitive, not less sensitive, to the fact that majority rule is dangerous to minority practitioners as well as to those who have no religious beliefs at all. You need to assess just what the danger is in America today. The danger is not that the government is going to come and shut down the religious activities of majoritarian religious practitioners. The danger is that they will have so much of the "ear time" of the leaders of the country that they will end up imposing their religious systems on everyone. If there is a need to err on one side of the religion clauses instead of the other (and there sometimes may be), it's important that we err on the non-establishment side. Because that's where the danger is.

We now have a president of the United States who thinks nothing of issuing victory proclamations in the Persian Gulf that are based on biblical understandings. We elected him president, not chief theologian, and I'm sorry that he's chosen to adopt that role along with all of his others. If he didn't do this, he'd have more time to think about the savings and loan crisis.

**C&S:** *Religious Right activists also argue for a narrow interpretation of the First Amendment. They say it only bars establishment of a national church. Is this view misguided?*

**Lynn:** The Framers intended the Bill of Rights to be a framework in which to operate. It was not intended to be like a statute—read forever the same way—but a living document that was going to be interpreted as the country grew. That's the understanding that they had when they adopted these rather vague, very broad First Amendment religion clauses. If they had wanted to say, "There shall be no national church" and leave it at that, they were more than capable of saying that. When they decided who could be a president they were very specific in saying you had to be 35 years of age, they didn't say a mature individual must be elected. In the Bill of Rights they meant to create a framework that was going to guarantee freedom for Americans and also to guarantee that support of religion would not come from the government itself. The details were to be filled in as the country grew.

**C&S:** *I was at a Philadelphia conference recently that dealt with the religion clauses. There was a lot of discussion about the Employment Division v. Smith decision, last year's Supreme Court ruling that allowed greater government infringement on religion. Isn't it true that most people on the street have no idea that this decision even came down?*

**Lynn:** Yes. You almost have to say to them, and I think that it is not rhetorical to do so, that under the *Smith* decision, if you serve wine at communion and the state says you can't anymore, you don't have a serious religious liberty claim. In other words, if there is some rational, arguable state interest that can be articulated, the government wins and religion loses. For example, the state could say, "If you're 14 you shouldn't have a drop of wine

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or any alcoholic beverage—including communion wine,” and that would be the law. That tends to get people's attention.

**C&S:** *Let's talk about some other specific issues. We know about this big drive for parochial school aid under the guise of vouchers or "parental choice." Is school choice that involves private schools inevitable?*

**Lynn:** I think as we begin to see the results we are going to realize that school choice is a false promise. The question is whether we are going to see any of those results early enough to stop the political momentum toward this phrase "choice" that the Right has now attached itself to and which the Bush Administration is pushing. If you starve a public school system to death, whether there's choice in the sys-

tem or not, you're not going to get the education that you have if it was a system that could be satiated with some combination of money. School choice doesn't help public schools get more money, it just drains the political base for public schools and it creates a problem with church-state separation because the majority of private schools are church schools dedicated to the proposition that education is done right only when it's done in the context of religion.

I encourage people to set up schools. If they want to set up a school that teaches about religion and that has religion imbuing the entire curriculum from geometry to history, that's wonderful. Simply, I ask, do not ask me to pay for that.

A lot of Americans seem to think that there's a kind of cost benefit analysis in the Constitution that says if you save a little money somehow the principles don't matter. The principles matter a great deal. And the principle of taxpayers supporting religious institutions' educational programs ought to be a horrendous thought for Americans. Our tax dollars are not to be used for sectarian purposes. Yet that's exactly what happens in so-called "school choice" programs.

**C&S:** *Most private religious schools are affiliated with the Catholic Church. Yet when the question of parochial school aid is discussed a lot of people don't really realize that parochial schools have a strong political as well as religious agenda. For instance, they very forcefully indoctrinate kids on the abortion issue. Is this relevant to the "choice" debate?*

**Lynn:** I think that there is an argument to be made that the political agenda that flows from many of these religious schools is one that would disturb many Americans. That is a point worth making, whether we're talking about the conservative Baptist schools, Roman Catholic schools or the schools of the Unification Church. Whatever political line you don't like, it's likely to be taught with your money at one of these schools if vouchers become available to private and religious educational institutions.

**C&S:** *Many of the fundamentalist parochial schools are drop-*

ping their fear of government regulation and joining the move to support vouchers. It's a reversal for them. How can we make these schools understand that they are going to be regulated?

**Lynn:** They want to have it both ways. They want to take the tax money and have no strings attached. It is the ultimate kind of hypocrisy. They fight every regulation possible no matter how relatively harmless it is, in an effort to gain the funding they want without playing by any rules to be set up.

I think the reason they're not more worried about it is they assume they are always going to be writing the regulations. But if you believe in the pendulum approach to history—that things go to the right and then go back to the left—eventually that pendulum is going to swing back. People are going to be writing regulations that they don't like. For instance, a regulation might say, "If you take federal money, you have to discuss all sides of the abortion question." Then how many of the schools now supported by Jerry Falwell, Pat Robertson and the Roman Catholic Church are going to want to take the federal money. But they don't think that far ahead. They just are sure that they're on the winning side at the moment. And they apparently don't want to think about what the moments are going to look like ten years down the road.

**C&S:** Another big issue is religion in the schools. *Lee v. Weisman*, an ACLU-sponsored case, is coming up at the Supreme Court next year, and it deals with graduation prayers. We had the school prayer decisions in the '60s that struck down state-sponsored prayers and Bible reading. Could we see all that done away with and local option coming back in?

**Lynn:** I don't think we're going to see that in the near future, and I don't think we're going to see it because of the *Weisman* case. It is said that only fools make predictions about what the Supreme Court will do. Here's my prediction: They will have a narrow decision that simply says that as a matter of government advancement of religion, a one-time expression of religion at a graduation ceremony simply does not rise to the level of an activity which in fact advances religion. And they're probably going to throw something in about history, (although, ironically, in Rhode Island a large number of the schools at their graduation never had religious activities. Some did and some didn't.) The justices are going to say, "If it's a tradition, and if it's only once a year, it doesn't matter."

That's ironic too because it's another mistreatment of the significance of religion itself. The truth of the matter is the history of religion is replete with a single prayer, a single religious experience, having a dramatic effect, literally transforming someone's life. But here, as happens in Rhode Island, they tell the person giving the prayer what not to say so he or she doesn't offend too many people. School officials give the clergy a little book about how to pray to religiously mixed audiences and hope they use it. I cannot think of a more offensive entanglement than having a bunch of school bureaucrats explain to a member of the clergy how he or she ought to craft a prayer to have limited annoyance value for the public.

**C&S:** Let's discuss the Religious Right. When the TV preacher scandals occurred there was a feeling that they were on the

ropes. But they're not dead. What are some of the things they're doing to get their views across?

**Lynn:** They may not view themselves as needing to be so visible because they are successful even when largely invisible to the general public. For example, very few people in the country know who James Dobson is, the head of Focus on the Family. Yet because of the miracle of electronic communications over the radio, he is available to his followers and believers in virtually every radio market in the United States on a daily basis. This gives him a tremendous capacity to deliver messages to Congress on specific issues. He can literally launch mailbags of letters to the Congress simply by talking about a piece of legislation on his daily radio program. Those on the other side of these issues rarely have that kind of access to every major market. Perhaps we should be able to find a way to do that kind of mass communication. I think we should, but at the moment we don't have it and we are the poorer because of it and I think we are losing issues in votes in the Congress because of it. The Religious Right has not gone away. The scandals did not stop televangelism. It's just filtered a few individuals out of the market, and their places have been taken up by others.

**C&S:** Thinking back on the years you've put in at the ACLU, what have you learned about the way Americans perceive their freedom?

**Lynn:** The bad news is that Americans don't perceive their freedom as being "at risk" as they in fact are. Too many people are too willing to trade off important civil liberties interests when a state comes up with some arguable reason to do so, whether it's the war on crime or the need to craft children with better values.

On the more positive side, it is in the area of explaining the Constitution that I think we can have the most success as educators, broadly speaking, whether we are educating through an op-ed piece, or teaching a class or talking in your local church. I think if we work hard enough we can change peoples' minds.

**C&S:** Someday if we are lucky we may have a tricentennial of the Bill of Rights. Thinking along those lines, do separationists have any cause for optimism?

**Lynn:** I think if we have a cause for optimism, it is that the educational process on these issues may indeed work. It will require the organizations dedicated to separation to be more effective, frankly, than we've been so far in the public education arena. We have to be able to combat on a regular basis the misinformation, the hypocrisy and the outright falsehoods that are being disseminated about these issues by many people on the so-called Far Right or Religious Right.

We have the truth of history on our side. I think we have the best public policy arguments on our side. And I think, fundamentally, we also have on our side the deepest respect for individual freedom. And that's a pretty appealing combination. I think that if we work at it we can make sure that a hundred years from now the First Amendment's religion clauses have not been erased by the actions of courts and legislatures. But it is an uphill battle that we face and one that we could lose a lot more of in the near future unless we get more creative about—and dedicate more resources to—explaining our side of the equation. □