Favoring And Disfavoring Religion In Law

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I. INTRODUCTION

I would like to start this essay with a simple question: "Should we treat religion differently?" Many of us have experienced variations of this question in our daily life. For example, think of a local supermarket that wants to open on Sunday but cannot either because the law prohibits shops to open on Sunday,[1] or because people who work there consider Sunday a rest day on religious grounds.[2] Another example is that of a photographer or a cake baker who denies services to same-sex couples on the basis of his or her religious commitments.[3] Finally, think of a hospital or a detention center setting where some people refuse to eat pork on religious grounds and some others refuse to eat any meat because they are vegetarians.[4]

How should we deal in these cases? Should we, for example, accommodate both religion and non-religion in the same way? Or should we make exemptions only for religion? If we single out religion for special protection, what reasons do we have to do so? Does the special protection of religion mean that people can use religion to do whatever they want to do, even if their practices harm others? Does the risk that people could abuse religion justify singling out religion for restrictions?[5]

In essence, the question is whether the *law* should treat religion in a special way *because* it is religion, either for the purposes of favoring or disfavoring religion in law.[6] This is a particular point of concern for the laws of liberal democracies, meaning countries that to one or another extent guarantee basic liberties, as opposed to the laws of religious theocracies or

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1. Michael A. Helfand, *Identifying Substantial Burdens*, 2016 U. ILL. L. REV. 1771, 1775 (2016) (on the litigation journey of Orthodox Jewish businessmen who argued that Sunday-closing law in the state of Pennsylvania violated their free exercise).

2. *Cf.* Sherbert v. Verner, 374 U.S. 398 (1963) (a classic example of what "government may not do to an individual in violation of his religious scruples."). *See also* Frazee v. Illinois Dept. of Emp. Security, 489 U.S. 829 (1989) ("Denial of unemployment compensation benefits to appellant on the ground that his refusal to work was not based on tenets or dogma of an established religious sect violated the Free Exercise Clause of the First Amendment.").

3. *Cf.* Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Com'n, 138 S. Ct. 1719 (2018) (on neutrality toward religion, the underlying issue was refusal of public services to a same-sex couple); Elane Photography v. Willock, 309 P.3d 53 (N.M. 2013) (denying photography services to a same-sex couple).

4. JOCELYN MACLURE & CHARLES TAYLOR, SECULARISM AND FREEDOM OF CONSCIENCE 77 (2011).

5. Sohail Wahedi, *Freedom of Religion and Living Together*, 49 CAL. W. INT'L. L. J. 213 (2019).

6. Micah Schwartzman, *What if Religion Is Not Special?*, 79 U. CHI. L. REV. 1351, 1357 (2012).

atheist countries.[7] Over the recent years, the "specialness" of religion has been a significant topic in law and religion debates for two reasons. First, there are academic conversations about why religion has been singled out for favored treatment in law.[8] Second, liberal democracies have in some cases enacted politics of exclusion and religious intolerance that clearly disfavor religion.[9]

II. FAVORING RELIGION IN LAW

In the academic conversation on singling out religion for favored treatment, legal scholars have defended for a long time the argument that we have the right to free exercise, simply because of the specialness of the metaphysics of religion.[10] Probably the most outspoken and well-known position advocating this argument is that of Professor Michael McConnell, who maintained that the liberal state is not able to exclude ultimately the possibility that religious claims might be true. In Professor McConnell's analysis, this means that the transcendental authority of such claims has more value than the claims of the liberal state.[11]

However, in recent years, an increasing number of scholars, such as Martha Nussbaum,[12] Brian Leiter,[13] Ronald Dworkin, and Cécile Laborde,[14] have challenged the idea that the law should single out religion because it is religion for favored treatment. In other words, there has been a shift in theories of religious freedom from considering religion *per se* as something special in law toward understanding the specialness of religion in law in terms of non-religious values, such as, for example conscience.[15]

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7. W. COLE DURHAM, JR. & BRETT G. SCHARFFS, LAW AND RELIGION: NATIONAL, INTERNATIONAL, AND COMPARATIVE PERSPECTIVES (2010).

8. *See generally* CÉCILE LABORDE & AURÉLIA BARDON, RELIGION IN LIBERAL POLITICAL PHILOSOPHY (2017).

9. *See generally* KHALED A. BEYDOUN, AMERICAN ISLAMOPHOBIA (2019); ASMA T. UDDIN, WHEN ISLAM IS NOT A RELIGION (2019); MARTHA C. NUSSBAUM, THE NEW RELIGIOUS INTOLERANCE: OVERCOMING THE POLITICS OF FEAR IN AN ANXIOUS AGE (2012) (discussing the contemporary fear toward religious minorities, particularly the Muslim minority, in the Western world).

10. RAFAEL DOMINGO, GOD AND THE SECULAR LEGAL SYSTEM 79, 80–82 (2016); Michael Stokes Paulsen, *The Priority of God: A Theory of Religious Liberty*, 39 PEPP. L. REV. 1159, 1183 (2013); DAVID NOVAK, IN DEFENSE OF RELIGIOUS LIBERTY 116, 117 (2009); JOHN H. GARVEY, WHAT ARE FREEDOMS FOR? 57 (1996) (using a transcendental argument to justify the special legal protection of religion).

11. Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 15–16 (1985).

12. MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE (2008).

13. BRIAN LEITER, WHY TOLERATE RELIGION? (2013).

14. RONALD DWORKIN, RELIGION WITHOUT GOD (2013); CÉCILE LABORDE, LIBERALISM'S RELIGION (2017).

15. *See generally* Sohail Wahedi, *Abstraction from the Religious Dimension*, 24 BUFF. HUM. RTS. L. REV. 1, 35 (2018) (pointing out that liberal theories of religious freedom reject any sectarian justification of this fundamental right).

What these theories have in common is that they reject the idea that religion should be singled out for a favored treatment in law *qua* religion. This rejection challenges the argument that religion is special for purposes of religious freedom, religious accommodation, and people's relationship with religion, in general. It makes a conceptual argument that despite people's relationship with religion, for example, there is no reason to single out religion *qua* religion for favored treatment in law. These skeptical theories, rejecting the special protection of religion in law, not only reject the idea that religion may have some distinctive characteristics, but also re-describe religion as a non-theistic concept.[16]

This approach is often grounded in the idea that the state should be neutral and should treat human beings equally and appraise their deep commitments about who they are and how they want to live their lives in a neutral way. This results in something like "abstraction from the religious dimension" in the academic discussions on the specialness of religion.[17] Religion is not considered a protection-worthy category in law because of the metaphysics of religion, but rather because of values and virtues that are not necessarily religious of nature, such as human conscience.[18]

III. DISFAVORING RELIGION IN LAW

Now, how different the situation is regarding the other angle of law and religion: singling out religion for disfavored treatment in law, where we also see abstraction from the religious dimension. Here, abstraction is not used as a concept that informs us as to how normative theories of religious freedom think about the specialness of religion, but rather to reveal how religious practices have been repackaged and re-described in non-religious terms in order to justify far-reaching restrictions upon religion under the guise of security, state neutrality and societal harmony.[19]

It is in light of this "repackaging" through abstraction and the way that it comes ultimately to be used against religion, that I claim that the rise of measures singling out religion *qua* religion for disfavored treatment is perplexing.[20] The failure of the judiciary across liberal democracies to

16. *Id.*

17. *Id*. at 37.

18. *Id.*

19. *See,* e.g. Sohail Wahedi, *Muslims and the Myths in the Immigration Politics of the United States*, 56 CAL. W. L. REV. 135 (2020); Khaled A. Beydoun, *9/11 and 11/9: The Law, Lives and Lies That Bind*, 20 CUNY L. REV. 455 (2017); Asma T. Uddin & Dave Pantzer, *A First Amendment Analysis of Anti-Sharia Initiatives*, 10 FIRST AMEND. L. REV. 363 (2012).

20. *See generally* Sohail Wahedi, *Freedom of Religion and Living Together*, 49 CAL. W. INT'L. L. J. 213 (2019) (discussing facades behind singling out religion *qua* religion for disfavored treatment). *Cf.* also Sofie G. Syed, *Liberte, Egalite, Vie Privee: The Implications of France's Anti-Veil Laws for Privacy and Autonomy*, 40 HARV. WOMEN'S L.J. 301, 320 (2017) (discussing pretexts used to justify the ban on face-covering veil in France); Sital Kalantry, *The French Veil Ban: A Transnational Legal Feminist Approach*, 46 U. BALT. L. REV. 201, 217 (2017) (critical of the pretext-argument).

protect our most sacred freedoms is regrettable, and what is all the more grievous is that the legislative and executive branches of power tasked with implementing human rights, including religious human rights, seem to be quite insensitive toward the promises of "never again."[21]

After all, our history is full of examples of harmful acts against "unpopular" religious groups, with the systematic extermination of Jews by the Nazi regime during the Second World War as an indelible blemish in our recent history.[22] It was exactly this evil experience that resulted in the first big promise of no more religious animus and never again religious genocide.[23] More recently, the experiences of apartheid resulted in a new ambitious promise: no more racial discrimination.[24] But despite the clear and unambiguous goal behind these promises, reality suggests something else. It is not only the revival of religious intolerance that has become an undeniable fact over the recent years—it is the emergence of politics of exclusion and racial segregation that divides the society into "us" and "them."[25]

This unfortunate development is all the more shocking because Western democracies have for a long time aimed at exporting their achievements in the area of religious liberty and societal tolerance to other destinations.[26] However, yesterday's religious tolerance has been replaced by religious animus and racial discrimination.[27] We see this in the infamous travel ban

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21. *See* Khaled A. Beydoun, *Why Ferguson Is Our Issue: A Letter to Muslim America*, 31 HARV. J. RACIAL & ETHNIC JUST. 1 (2015) (on the role of private parties in fighting inequality, racial violence and discrimination).

22. Any reference at this point would be somehow insufficient to describe the immense injustice during the Nazi regime, but *cf*. Makau Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARV. INT'L L. J. 201, 211 (2001) (rightly pointing out the Nazi regime was the incarnation of "barbarism"); *See also* M. Cherif Bassiouni, *International Law and the Holocaust*, 9 CAL. W. INT'L L.J. 201 (1979).

23. *See generally* Matthew Lippman, *The 1948 Convention on the Prevention and Punishment of the Crime of Genocide: Forty-Five Years Later*, 8 TEMP. INT'L & COMP. L.J. 1 (1994) (linking the enactment of the Convention to the experiences under the Nazi regime); *See* for a recent case of breaking the promise of never again religious genocides: EWELINA U. OCHAB, NEVER AGAIN: LEGAL RESPONSES TO A BROKEN PROMISE IN THE MIDDLE EAST (2016) (on the systematic extermination of religious minorities by members of Daesh in Iraq and Syria).

24. *Cf*. Johan D. van der Vyver, *Constitutional Options for Post-Apartheid South Africa*, 40 EMORY L. J. 745 (1991) (providing some insights in the institutionalization of racial discrimination in South Africa).

25. MARTHA C. NUSSBAUM, THE NEW RELIGIOUS INTOLERANCE: OVERCOMING THE POLITICS OF FEAR IN AN ANXIOUS AGE (2012).

26. George Bush, *Exporting the American Dream*, 17 HUM. RTS. 18, 19 (1990) (defending the export of the "American Dream" to new democracies).

27. What we hear today about religious diversity, tolerance and pluralism is nothing more than providing lip-service to minority groups and the outward world. *Cf*. Edel Hughes, *Promoting Peace, Enforcing Democracy? The European Court of Human Rights' Treatment of Islam*, 11 HUM. RTS. 129 (2017) (discussing the problematic religious freedom jurisprudence of the European Court of Human Rights (ECtHR), which is intolerant toward

ordered by President Trump,[28] Oklahoma's Save our State Amendment,[29] the French ban on face-covering veils in public,[30] and other restrictions that have effectively singled out religion for disfavored treatment.

IV. CONCLUSION

Although abstraction may help to sever religious practices from their religious dimension in ways that may be politically palatable in liberal democracies, there is no justification for strategies that disfavor religious groups. My main conclusion is that religion should not be singled out for special treatment *qua* religion. There should be neither special protection of religion nor special restrictions on religion in law simply because of religion. We should protect the liberal tradition of freedom, neutrality and justice for all.

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the presence of the Islamic religion in the public sphere); *see also* Peter G. Danchin, *Of Prophets and Proselytes: Freedom of Religion and the Conflict of Rights in International Law*, 49 HARV. INT'L L.J. 249, 275 (2008) (claiming there is "a bias in the [religious freedom] jurisprudence of the Court . . . protecting traditional and established religions and a corresponding insensitivity toward the rights of minority, nontraditional, or unpopular religious groups.").

28. *See* Khaled A. Beydoun, *Muslim Bans and the (Re)Making of Political Islamophobia*, 2017 U. ILL. L. REV. 1733, 1735 (2017) (arguing the Muslim ban fits a long tradition of Islamophobia that has been institutionalized in the United States).

29. Amara S. Chaudhry-Kravitz, *The New Facially Neutral Anti-Shariah Bills: A Constitutional Analysis*, 20 WASH. & LEE J. CIV. RTS. & SOC. JUST. 25, 31 (2013); Yaser Ali, *Shariah and Citizenship—How Islamophobia is Creating a Second-Class Citizenry in America*, 100 CALIF. L. REV. 1027, 1065 (2012); Lee Tankle, *The Only Thing We Have to Fear Is Fear Itself: Islamophobia and the Recently Proposed Unconstitutional and Unnecessary Anti-Religion Laws*, 21 WM. & MARY BILL RTS. J. 273, 284 (2012) (exploring the roots of anti-Islamic legislation in the United States).

30. *See generally* Shelby L. Wade, *Living Together or Living Apart from Religious Freedoms: The European Court of Human Right's Concept of Living Together and Its Impact on Religious Freedom*, 50 CASE W. RES. J. INT'L L. 411 (2018); Sarah Trotter, *Living Together, Learning Together, and Swimming Together: Osmanoglu and Kocabas v Switzerland (2017) and the Construction of Collective Life*, 18 HUM. RTS. L. REV. 157, 169 (2018) (discussing the emergence of the "living together" doctrine in the case law of the ECtHR, which has been used as a pretext to justify far-reaching restrictions upon free exercise).