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DISCRIMINATION BY AND AGAINST RELIGION

MARTIN E. MARTY*

Former President George H. W. Bush was applauded by a few but derided by many for a reminiscence he discussed during his 1988 presidential campaign. After surviving on a life raft in the Pacific after his plane crashed in World War II,¹ he reported: "I thought about Mother and Dad and the strength I got from them- and God and faith."² He seemed to have second thoughts as he went on. Eons ago, back in 1988, presidential candidates were often diffident about discussing God and faith, so, in order to bring his salt-watery musings to earth, he added that he had also thought about "the separation of church and state."³

The Priority of Church and State Issues

There are reasons to withhold sneers and show some empathy for the future president. Physically, his circumstances in the little raft on the great Pacific were appalling, so it had to be a challenge for him to keep perspective.⁴ The little company of his raft-riders existed on hand-caught fish and rain-water, while being tossed on the waves.⁵ At such a time one is given license to think and later to report on what comes to mind

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1. JOE HYAMS, *FLIGHT OF THE AVENGER: GEORGE BUSH AT WAR 108-09* (Harcourt Brace Jovanovich 1991).

2. Cullen Murphy, *War Is Heck*, WASH. POST, Apr. 8, 1988, at A21.

3. *Id.*

4. *See* HYAMS, *supra* note 1, at 108-10.

5. *Cf.* HERBERT S. PARMET, *GEORGE BUSH: THE LIFE OF A LONE STAR YANKEE 56-58* (Scribner 1997) (providing a description of President Bush and his crew following their plane crash).

unbidden. “Mother and Dad” belong in such a dire situation. As for the next topics, God and faith: just as it is said to be with soldiers in fox-holes, where, it is said, “there are no atheists,” they would be scarce on life-rafts, so “God and faith” would be called on. But “separation of church and state?” Let us for a moment trust Mr. Bush’s memory and the authenticity of his expression. Then we can ask why “separation of church and state” was more pressing or more comforting than were thoughts of a sweetheart or, say, good hamburgers back home. However the idea of the separation of church and state arrived in his mind, its substance is often seen as “the first freedom,” and it merits a privileged location in the mind.

The Complexity of “Church and State” Issues

Relations of all sorts between “church” and “state” and their analogs may well be one of those features of national life which is so taken for granted that discussion of them are left to attorneys, judges, and interest groups. When disruption on the serene scene occurs because of controversies and contentions, perspective and priorities change and conflict tears at the civil fabric. I recall an incident from the 1980s, during my fifteen minutes of fame on a televised program during the Reagan administration, when there were debates over the President’s naming of 1983 as “The Year of the Bible.”⁶ Almost two centuries had gone by without America having a designated “year of the Bible,” but once a year was appointed and anointed, the citizenry was divided. Our studio audience, made up of people who had ordered tickets two years earlier and having no idea what the topic would be on the day of their presence, upon hearing the issues up for debate, was immediately up in arms. The host kept stirring up the audience during commercial breaks. Right off, some front-row people got the ears of us front-row stage people. One agitated member hissed, “You know, I’ve never given ‘church and state’ a second’s thought, and now after fifteen minutes I’m so G-d mad I can hardly sit still.”

6. See Steven Waldman, *National Year of the Bible- The 2010 and 1983 Versions* (May 22, 2009), available at <http://blog.beliefnet.com/stevenwaldman/2009/05/year-of-the-bible.html>.

I do not know what “side” she was on, but it was obvious that at once all had found themselves on a side. They had to wrestle with a topic that they felt they could neglect no longer. “Church and state” is a theme that does agitate citizens. It is one of the still unsettled and probably never settle-able topics in national life. In most places in the West, and no doubt everywhere else, church and state questions had been settled or suppressed by authorities: emperors, popes, magistrates, priests in such eras gave no ear to discussion of alternatives to the dominant imposed pattern. Certainly, one would think, among the American founders, whose new national seal told of a “new order of ages”—*Novus Ordo Seclorum*, there would have been a chance to establish a new way of dealing with the topic. Yet, constitutional scholar Walter Berns argued convincingly at book length that the founders solved the problem of church and state by not solving the problem of church and state to the satisfaction of many in the religious communities.⁷ They had to accept what amounted to the “subordination” of religion. Every new debate about issues great or small awakened issues that they could not “solve” legally, and each instance brought in new factors, inspired new arguments, upset the civil order, and led to new if temporary resolutions.

I bring up issues like this in a keynote to celebrate the planners of the conference, which stirred the scene and promises to do more by raising questions which can be creatively addressed but never settled.

One feature which struck me as I read proposals and then advance copies of the articles submitted for the symposium was this: the cases and thus the article topics varied widely. How does one bring coherence to such a collection? How does one shuttle mentally from discriminators or the discriminated against when instances as diverse as these bid for attention: *sharia law*, *who is to pray where and when*, “*ministerial exemptions*,” “*arbitration*”.... Yet they are connected

7. See WALTER BERNS, *THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY* 2–32 (Basic Books 1976). Berns notes that the constitutional founders succeeded by “subordinating” religion in civil matters, while thus helping assure personal religious freedom. See *id.* at 25–26. Thus “the church” asks for and may get tax-exemption from the state, while “the state” does not ask for or get exemption from religious fund-raising efforts. “The church” asks for and may be exempted from military service for some members, while “the state” does not ask for, need, or get exemption for its members from endeavors in the voluntary efforts of “the church.”

through correlation in a constitutional system and the needs, interests, and hopes of people and groups who make up the republic. The connections will often cause upset.

The upsets occurring on the not well-named “church-state” front occur, as already mentioned, on issues great and small, national and local. The same intensity greets meetings of local school boards or zoning issues as it does those which engross the attention of citizens as they engage in global and national controversy. Controversy is most heated when one or more parties feels aggrieved, usually by perceived injustice. For example, a religious practice is forbidden for any number of reasons. A policy cherished by a religious group is limited by law for the sake of justice and the common good in a way that suggests discrimination and a limiting of practices and the exercise of religious liberty. One religious community finds a particular expression to represent discrimination against it. Or another is frustrated because it seeks privilege or resents limitations. Mere change can be upsetting to individuals or groups whose practices had once seemed or been licit, but cannot be so in the face of population shifts and the privileging of formerly remote citizen cohorts. Many of these changes end up being enhancements and enlargements of some activities of the group which feels discriminated against, and is eventually welcomed. Still, at the start, in an observation of Anglican divine Richard Hooker, all change is inconveniencing, including “from worse to better.”⁸

The reference to the implicit bargain which “subordinates” religion in the civil order as helping assure individual and personal freedom does not “settle” affairs involving religious communities. Among the most controversial conflicts in this field in our time occur when a legislated civil policy, for example in the matter of controversial medical-ethical practices, such as governmental support of abortion or “gay marriage,” clashes with profoundly committed religious groups whose members cannot in conscience adapt to such imposed policies. Similarly, spokespersons for religious groups feel discriminated against when governmentally approved and imposed hiring policies conflict with particular group norms. Thus Catholic and other groups in some

8. See 4 RICHARD HOOKER, OF THE LAWS OF ECCLESIASTICAL POLITY (1593), reprinted in 1 RICHARD HOOKER, THE WORKS OF THAT LEARNED AND JUDICIOUS DIVINE, MR. RICHARD HOOKER 407 (Isaac Walton ed., 1875).

jurisdictions have to abandon the practice of placing children into foster care homes where parents are gay couples. Church authorities certainly see “their” religion as discriminated against.

Champions of new social policies such as acknowledging gay partnering or marriage celebrate the changes just mentioned, and see suppression of the new policies in many jurisdictions as prejudicial to citizens who are denied “rights” that come with the new social provisions. Thus both “pro” and “con” forces may well be aggrieved by court decisions or legislated policies. The result in most cases is that the charge of “discrimination” will continue. Of course, losers in legislative or judicial controversy will make that charge no matter what; in free societies, as in all others, there will be winners and losers. The United States Constitution and constitutional tradition can affect social policy but cannot determine satisfying outcomes for all religious groups or situations.

Why Religion Is Most Problematic in the Civil Mix.

Most legal changes of the sort just noted may be what Hooker called “from worse to better,” but that “better” will still be unsettling to many.⁹ Change that would be controversial on its own terms, whether it deals with licenses, boundaries, ordinary “secular” doings, and cultural nuances or deeply troubling civil matters, is exaggerated when “religion” enters the mix. Theologian Paul Tillich spoke to this feature of civil life when, discussing the pervasiveness of “religion,” however defined. He contended that “religion is the substance of culture” and “culture is the form of religion.”¹⁰ There are many reasons for this. One notes that in the civil order many religious references are not or at least are not easily addressed in the empirical world. God and the gods are invisible. The sacred texts deal with the mysteries of life. They evoke communities and often give expression to what Tillich called “matters of ultimate concern.”¹¹

9. *See id.*

10. PAUL TILlich, *Our Ultimate Concern*, in *THE ESSENTIAL TILlich* 103 (F. Forrester Church ed., 1987).

11. 1 PAUL TILlich, *SYSTEMATIC THEOLOGY* 11 (Univ. of Chicago Press 1951).

Why the Constitution Is So Determinative on this Scene

The First Amendment to the United States Constitution is the most profound and authoritative element that can be convoked by citizens to deal with claims of legal discrimination against a religious community and its practices. These often deal with behaviors and practices cherished by one community but abhorrent to others. The ceremonies and rituals of some religious communities encourage and even command practices which include legally forbidden elements, often drugs. So members of a group will feel discriminated against if these cannot be used in “sacramental” life and ritual. Not only members of such groups speak up in civil society. Fighting against legal discrimination often elicits passions from leaders not always perceived as passionate. James Madison, who made many of the most decisive moves against legal discrimination, recognized this. Usually seen as a calm and steady leader, he could also summon resolve to speak up for liberties for others. As a young Virginian, he wrote to a Pennsylvania friend about a “diabolical, hell-conceived principle” by which ministers of the gospel were in prison in Virginia for preaching the Gospel,¹² in violation of laws pursued by authorities who represented historic oppressive powers and insisted on licensing preachers and imprisoning those who violated a colony’s legal norms by choosing times and places of worship which nettled authorities.¹³

Those Virginian ministers of the gospel, majorities in later generations would judge, contributed to religious freedom and “separation of church and state”—the favored codeword in Virginia and eventually throughout the republic. These changed policies had to come from somewhere: often it was sets of people whom philosopher George Santayana called “pensive or rabid apostles” of their own liberty who, in fighting against absence of their freedom won freedom of religion for others.¹⁴ It would be an unfair reading, however, to suggest that religious groups were always and only the victims of discrimination. They often

12. Letter from James Madison to William Bradford, Jr., *in* THE WRITINGS OF JAMES MADISON 21 (Gaillard Hunt, ed., 1900).

13. *See id.*

14. GEORGE SANTAYANA, CHARACTER AND OPINION IN THE UNITED STATES 217–18 (Scribner 1920).

discriminated and sought the force of law to make their way. Thus it was religious powers that passed legislation which minorities experienced as discriminating. To cite a few instances: Christian Scientists opposed the fluoridation of drinking water, which they regarded as a medical violation of their religion, just as some Jehovah's Witnesses oppose "forced" blood transfusions to save their children's life. "Sunday closing" of business or "prohibition" of alcoholic beverages or compulsory military involvement impinged on the religious beliefs and practices of numerous religious groups. They pleaded that they were discriminated against.

The Irritant or Opportunity: The Stranger

In most cases the discriminated-against come onto the scene as strangers. Those who put "oppressive" laws on the books and enforced them took advantage of their priority—"we were here first"—or their numbers—"there are enough of us to pass and enforce the laws." The stranger, as German sociologist Georg Simmel defined his or her situation, is always unsettling to the neighbors and "settled" fellow citizens.¹⁵ They do so because they bring values that are not native or familiar to the larger group.

In many cases, even if only grudgingly or with abrasion, religious groups which were long on a particular scene before the stranger comes, adapt, give way, and merge some features of their life with the stranger. The beliefs and practices of the "belonger" and "stranger" find ways to live together, even to the point that they lose much of their distinguishing features within the pluralistic mix. Meanwhile, there are also periods when the stranger persistently upsets the larger community, whose members through it all figured out ways to retain advantage. So it is that the Christian near-majority and longest at-home religious groups often comes to denominate the republic "a Christian nation." They do so without warrant in the original constitutional charter. When minorities successfully press against laws which they experience as discriminating them, it is argued by many that the United States is turning or has turned simply secular, leaving public

15. See GEORG SIMMEL, *The Stranger*, in *THE SOCIOLOGY OF GEORG SIMMEL* 402–08 (Kurt H. Wolff, trans. 1950).

places and events devoid of sacred symbols and overt signals of meaning. At some stages during change both the stranger and the old dominant citizen both testify that they are discriminated against.

Problems with "Religion" Itself

Many groups protesting that they are discriminated against by religious groups suffer from confusion over definitions: what is this "religion" that causes them suffer? Just as the implicit counsel among speakers at the symposium or I in this summary are grounded in an awareness that there cannot be a complete leveling consensus in an ever-involving free society, so it is noted that there is not likely to evolve a definition of religion which will be satisfying across the board. Indeed, the definition in practice of religion and its scope is likely to be as contentious as are the positions appraised or supported in the area of contention. At book length, scholars—one thinks of Winifred Sullivan—argue that the Supreme Court and other courts make judgments about religion without being able to see one definition clearly set forth and seldom and prevailing so it can be used as a norm. Yet judgments must be made. And when one is made which a group finds problematic for those who hold a definition other than the ones the Court uses, the citizenry at large again hears the charge "discrimination."

On an occasion when I was asked to make a deposition in the case of a group which was seeking tax exemption as a 501(c)(3)¹⁶ organization on grounds that it was a religious organization, the issue quickly became: is it religious? In my part of the testimony I admitted that I did not have or would not recognize an all-purpose dictionary level definition. What followed was a virtual Ph.D. oral examination. I mentioned that I was neither a lawyer nor a philosopher, but could describe how I make rudimentary judgments as to what goes into a definition of religion. On phenomenological and linguistic grounds, I paid attention when a wide spectrum of observers found it useful and appropriate to call something "religious" or a "religion." Here were some:

16. See 26 U.S.C. § 501(c)(3) (2006).

Most such groups make reference to what Tillich called “ultimate concern.”¹⁷ Usually “community” played a part, though in our age of hyper-individualism, some expressions were called “religious” even if they were made up of a “community of one.” Add to that a preference, third and fourth, for mytho-symbolic language and ritual-ceremonial reinforcement of what usually are metaphysical or quasi-metaphysical rationales. Add to this some sense of mission. There are also behavioral patterns and expectations. I added two or three more. The judge took me back into his chambers and said the testimony was more or less helpful, and he was like to have to grant exemption on religious grounds. Then, a bit puckishly and provocatively, he asked whether I’d be willing to testify when a Korean martial arts movement was seeking such definition and exemption. “Because every thing you included under the religious tent is a feature of the Korean martial arts.” We talked about how “if everything is ‘religious’ then nothing is religious”—yet the terms remain valuable and can be of some aid.

Living with “Creative Messiness”

I learned much from the case studies in the present setting and set of essays, and am aware of the need in the judicial setting for precision, but I could not foresee the time when everything is settled. Sometimes an historian on this scene is called a relativist who settles for messy realities. If I am to bring out some counsel from what we heard and read here, I would say: If definitions are imprecise and fluid, don’t despair. Listen to all the charges and cases where discrimination against or by religious groups are voiced, get used to it, “get over it,” and enjoy the signs of religious vitality, relativity, and diversity along with coherences, asserting how a republic has functioned for much more than two centuries, often in spite of and sometimes because of charges of discrimination in some groups and because of discrimination against others. In the decades ahead the nation is likely to see more, not fewer, recognitions of what *e pluribus unum* can mean. And consider the alternatives.

17. TILLICH, *supra* note 10, at 103.