

Brooklyn Law Review

Volume 79

Issue 2

SYMPOSIUM:

Restatement Of...

Article 8

2014

Religion and the Restatements

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Recommended Citation

Ian Bartrum, *Religion and the Restatements*, 79 Brook. L. Rev. (2014).

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Religion and the Restatements

Ian Bartrum[†]

INTRODUCTION

As Western democracies go, we are an unusually religious people. A recent Gallup International study on comparative religiosity found that 60% of Americans described themselves as “religious,” while the percentages were generally much lower in Canada, Australia, and Western Europe.¹ Conversely, only five percent of Americans identified themselves as “atheists,” which places the United States among the world’s least atheistic nations, and on a par with Saudi Arabia.² The underlying causes of our national religiosity are undoubtedly complex—and they are decidedly not the subjects of this paper—but it seems likely that our distinctive legal traditions surrounding religious freedom have played a significant role in shaping our cultural norms.³ France and Turkey, perhaps our most notable peers in the formal separation of church and state, rank well below the United States in religiosity at 37% and 23% respectively.⁴ This may be a result of French and Turkish legal traditions that are openly suspicious—perhaps even hostile—toward organized religion, and which have in large part sought to insulate the state from undue clerical influence.⁵ In stark contrast, an important strain of the American

[†] Associate Professor of Law, William S. Boyd School of Law, UNLV. Many thanks to Anita Bernstein for organizing this symposium and asking me to take part. Thanks also to Marc DeGirolami, Rick Garnett, Leslie Griffin, Marci Hamilton, Michael Helfand, Paul Horwitz, Chris Lund, my fellow symposium participants, and the *Brooklyn Law Review* editors for their valuable comments and insight.

¹ *Global Index of Religion and Atheism*, Winn-Gallup International (July 25, 2012) available at <http://redcresearch.ie/wp-content/uploads/2012/08/RED-C-press-release-Religion-and-Atheism-25-7-12.pdf>. Notable exceptions included Italy (73%) and Poland (81%).

² *Id.*

³ See, e.g., DENIS LACORNE, *RELIGION IN AMERICA: A POLITICAL HISTORY* (Columbia Univ. Press, 2011) (surveying various theories of American religiosity).

⁴ *Global Index of Religion and Atheism*, *supra* note 1.

⁵ See, e.g., T. Jeremy Gunn, *Religious Freedom and Laicite: A Comparison of the United States and France*, 2004 BYU L. REV. 419 (2004); Ahmet T. Kuru & Alfred Stepan, *Laïcité as an “Ideal Type” and a Continuum Comparing Turkey, France, and Senegal*, in *DEMOCRACY, ISLAM, AND SECULARISM IN TURKEY* (Ahmet T. Kuru & Alfred Stepan, eds. 2012).

constitutional tradition has embraced institutional religion, and has endeavored to protect the church and religious prerogatives from the potentially tyrannical reach of civil government.⁶

I open this discussion of religion and the Restatements with these somewhat generalized cultural observations because it is important to keep this uniquely American brand of religious liberty—what Mark DeWolfe Howe has called the “evangelistic” conception—firmly in mind as we think about first constitutional principles and the development of the common law.⁷ It is very different, in other words, to approach the relationship between the common law and religion from the perspective of the secular skeptic than it is to understand the civil law, generally, as incompetent or inapposite in matters of faith. The former approach might, for example, tend to understand doctrinal developments as part of a generalized effort to exclude religion and religious ideas from judicial reasoning, while the latter might emphasize the ways that the common law helps to create legal space for both individual conscience and church autonomy. Indeed, it is the coexistence of—and occasionally the tension between—these different visions that makes the American experience especially complex and fascinating. And, in practice, both of these theoretical motivations animate the development of our common law, sometimes even within the same opinion, and so it may be that a systematic effort to account for judicial decision-making in these terms would be both useful and timely.

That, however, is not this article. While I have said it is important to keep the American evangelistic tradition in mind, I do not intend here to provide the blueprint for a future *Restatement of Religious Liberty* organized around competing first principles. In truth, as creatures of constitutional law, religious freedom and disestablishment are probably not the appropriate focus of the Restatement project. Rather, I hope here only to identify and clarify those instances when the existing Restatements already take—or I think should take—our particular traditions of religious freedom into account: a map, perhaps, of the places where the common law river sweeps around the constitutional bedrock of religious liberty. With this in mind, my approach in this article is threefold. The first part identifies where religious freedom considerations

⁶ See, e.g., MARK DEWOLFE HOWE, *THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY* (1967).

⁷ *Id.* at 7.

arise in the existing Restatements. The second draws attention to potential conflicts within and across the Restatements on religious freedom issues. The final part offers a few thoughts on places where the Restatements could, but currently do not, take religious freedom into detailed account.

I. RELIGION IN THE EXISTING RESTATEMENTS

Given the importance of religion in American life and the regular political controversies that arise over questions of religious freedom, it is perhaps surprising to discover that the Restatements address the topic relatively infrequently. One likely explanation for this circumstance is that our particular religious liberty presents questions of an expressly constitutional dimension. Thus, to the extent that the relevant principles tend to develop through something like common law adjudication, that process occurs largely in the Supreme Court—and decisions issuing from a single source do not cry out for the kind of detailed compilation and codification the American Law Institute (ALI) provides in other contexts. Still, this is not the entire story, because there are certainly complex, jurisdiction-specific interactions between constitutional jurisprudence and traditional areas of private law,⁸ and in these fields some organizing guidance is certainly welcome. It is thus hardly a surprise that it is at some of these intersections that religion makes its limited appearances in the current Restatements. Although there is enough extant discussion of religion to allow for an exhaustive accounting, I will instead attempt to make some rough generalizations about the common approaches the Restatements take to religious freedom in a variety of contexts.

At present, the Restatements generally approach issues of religious freedom in one of two ways, which may roughly correspond with the twin constitutional guarantees of free exercise and disestablishment. First, in keeping with the free exercise clause, there are provisions that approach religious liberty as a matter of fundamental right, either “natural” or “constitutional” in nature. Second, the enigmatic promise of the establishment clause prompted the Restatement Reporters to express worry in some sections and commentary about the

⁸ See, e.g., *Hosanna-Tabor v. EEOC*, 132 S. Ct. 694 (2012) (employment discrimination); *Jones v. Wolf*, 443 U.S. 595 (1979) (property); *Dausch v. Rykse*, 52 F.3d 1425 (7th Cir. 1994) (tort); *In re Marriage of McSoud*, 131 P.3d 1208 (Colo. 2006) (family law).

various entanglements that may ensnare those courts that attempt to adjudicate religious questions.

A. *Rights*

The *Restatement of Foreign Relations* provides a paradigmatic example of the “natural” rights approach. Section 701 of the third edition declares that all states are “obligated to respect the human rights of persons subject to [their] jurisdiction,” including those recognized by the “general principles of law common to the major legal systems of the world.”⁹ In explaining the section, the Reporters’ Notes expressly refer to portions of the Universal Declaration of Human Rights, including the recognized rights to “freedom of thought, conscience, and religion.”¹⁰ This effort to embed religious freedom in conceptions of “natural” or “human” rights is certainly understandable in the context of international law, where positive enactments are relatively rare and inconsistently respected. Indeed, the commentary explicitly attempts to link the concepts of “natural” and “constitutional” rights: “The international law of human rights has strong antecedents in natural law, in contemporary moral values, and in the constitutional law of the states.”¹¹ While this approach to questions of religious freedom is certainly in line with the constitutional promise of free exercise, it self-consciously reaches beyond the constitutional text and doctrine to preexisting moral and jurisprudential traditions. This may be a unique move among Restatement provisions, and it certainly reflects some of the difficulties that constitutional and superconstitutional norms may present for the Restatement project.

The *Restatement of Servitudes* illustrates the fundamental rights approach applied, perhaps more comfortably, in the name of express constitutional rights. Section 3.1(2) of the third edition declares invalid any “servitude that unreasonably burdens a fundamental constitutional right.”¹² The Comments identify the “free exercise of religion” as one of the constitutional rights that is sometimes claimed against servitudes, but goes on to acknowledge that “[c]laims that servitudes are unconstitutional have rarely been successful.”¹³ This is almost certainly because, as the Comments explain, the “Constitution does not ordinarily

⁹ RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 701(c) (1987).

¹⁰ *Id.* rep. note 6.

¹¹ *Id.* cmt. b.

¹² RESTATEMENT (THIRD) OF PROPERTY – SERVITUDES § 3.1 (2000).

¹³ *Id.* cmt. d.

affect the validity of private contracts or conveyances.”¹⁴ Nonetheless, the commentary also points out that the Supreme Court has recognized two circumstances in which private actions may be subject to constitutional limitations.¹⁵ These are the “traditional government function” cases derived from *Marsh v. Alabama*, and the “state entanglement” cases that flow from *Shelley v. Kraemer*.¹⁶ The former doctrine applies constitutional limits to private organizations that exercise authority and functions similar to the government, while the latter proscribes private agreements that rely on government enforcement mechanisms.¹⁷ These two exceptions to the Fourteenth Amendment “state action” doctrine raise at least the theoretical possibility that a servitude placing restrictions on religious practice might be found unconstitutional. In practice, however, such cases are more regularly (and successfully) brought under the Fair Housing Act, which prohibits religiously discriminatory servitudes.¹⁸ Still, Section 3.1 well illustrates the Restatement’s general approach to religion as a matter of constitutional right: it is a public policy issue of the highest order, which the private law should bend to accommodate.¹⁹

B. *Entanglements*

The second broad category of Restatement provisions dealing with religion seeks to avoid undue judicial entanglement in matters of personal or institutional religious autonomy. This undoubtedly arises out of an establishment clause concern that the adjudication of religious disputes may work to establish particular beliefs or institutions to the detriment of all others.²⁰ A nice example of this approach appears in the *Principles of the Law of Family Dissolution*, Section 2.12, which declares that courts fashioning custodial parenting plans should *not* consider the “religious practices of a parent or the child, except to prevent

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* (citing *Marsh v. Alabama*, 326 U.S. 501 (1946)); *Shelley v. Kraemer*, 334 U.S. 1 (1948). In truth, the Court has been understandably reluctant to extend the *Shelley* rationale. *But see*, *Barrows v. Jackson*, 346 U.S. 249 (1953) (finding no cause of action against seller who violated racially restrictive covenant).

¹⁷ RESTATEMENT (THIRD) OF PROPERTY – SERVITUDES § 3.1.

¹⁸ 42 U.S.C. §§ 3601–3619, 3631 (1988).

¹⁹ RESTATEMENT (THIRD) OF PROPERTY – SERVITUDES § 3.1, cmt. d.

²⁰ This approach is, of course, consistent with the Court’s larger establishment clause jurisprudence. *See Lemon v. Kurtzman*, 403 U.S. 602, 603 (1971) (holding that the establishment clause forbids “excessive entanglement[s]” between church and state institutions).

the child from severe and almost certain harm.”²¹ The Comments explain that:

The issue of harm can arise when each parent wishes to expose the child to a different, conflicting religion. One parent may wish to limit the religious practices of the other parent when that parent is with the child, out of concern that those practices are distressing to the child, perhaps even inhibiting the child’s ability to develop a coherent religious perspective. . . . The confusion that exposure to different, even conflicting, religions can be expected to cause in some children is a harm, like many others (including any harm to children when married parents attempt to raise their children in two different religions), as to which the law is ill-equipped to save children. Taking this confusion into account would require courts to make comparative judgments between religions, which the U.S. Constitution prohibits. . . . The approach taken [here] reflects a realism about what courts can be expected to accomplish with respect to the spiritual health of children when the parents disagree about a child’s religious upbringing.²²

This comment captures two of the fundamental issues that complicate the relationship between courts and religious practice in a disestablished polity. First, we are concerned about the competence of law—and courts, particularly—to solve particular kinds of problems, and, second, we recognize that these same concerns, among others, undergird the constitutional separation of church from state. Indeed, a different illustration makes these kinds of entanglement concerns even clearer: in a situation where parents’ differing religious views might affect child health care decisions, the court should not adjudicate individual disputes, but rather should award sole health discretion to one parent or another—basically punt—to avoid intractable future conflicts.²³

In truth, of course, not every treatment of religion and religious freedom that appears in the existing Restatements fits neatly within the two approaches I have described. The *Restatement of Unfair Competition*, for example, reveals that some courts have contemplated whether the Church of Scientology can claim parts of its doctrine as a trade secret.²⁴ But this odd intersection of intellectual property and religious freedom is undoubtedly the exception and not the rule. Generally, the Restatements have attempted to flesh out the

²¹ PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 2.12(1)(c) (2000). While not technically titled a “Restatement,” the ALI publishes PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION for the same purposes it does the Restatements.

²² *Id.* cmt. d.

²³ *Id.* § 2.09 cmt. b, ill. 1.

²⁴ RESTATEMENT (THIRD) OF UNFAIR COMPETITION, § 39 (1993) (citing *Religious Technology Ctr. v. Netcom On-Lone Com.*, 923 F. Supp. 1231, 1234, 1235, 1250-53 (N.D. Cal., 1995)).

constitutional protection of free exercise and disestablishment by treating religion either as a matter of fundamental right, or as presenting questions of dubious civil competence with which courts should avoid unnecessary entanglement. It is in organizing and codifying the applications of these principles in varied contexts that the ALI has made a valuable contribution to the law, and, one hopes, where its continued diligence will help guide us through future controversies.

II. POTENTIAL CONFLICT ACROSS THE RESTATEMENTS

Issues of religion and religious liberty make their most frequent appearances in the *Restatement of Donative Transfers* and its cousin the *Restatement of Trusts*. The principal reason for this seems to be that Americans are wont to condition trusts and gifts on their beneficiaries' willingness to adhere to, or abstain from, certain religious principles or practices. What this says about the particular character of our national religiosity and faith is an interesting question in its own right, but one that is certainly beyond this article's scope. What matters here is that the enforceability of such terms and conditions is a matter of some delicacy and increasing controversy as the Restatements (and the society they reflect) continue to evolve and become more diverse.

In keeping with the fundamental rights approach discussed above, both the *Restatement of Donative Transfers* and *Restatement of Trusts* include provisions that place public policy limits on the kinds of restraints that donors may impose on beneficiaries.²⁵ Recall that this resort to public policy concerns is the ALI's sensible compromise on matters affecting the free exercise of religion, a settlement that acknowledges the central place of religious freedom in our national ethos, but concedes that constitutional rights do not (quite) constrain private conveyances and contracts.²⁶ As with virtually all questions of public policy, however, the degree to which the state should act to enforce private religious conditions and restraints is open to reasonable disagreement. Indeed, the resolution of this particular question is a sort of zero-sum game—increased enforcement of a donor's right to impose religious conditions often causes a corresponding decrease in the donee's rights of free exercise. It is perhaps not

²⁵ RESTATEMENT (THIRD) OF TRUSTS, § 29 (2003); RESTATEMENT (SECOND) OF DONATIVE TRANSFERS, § 5.1 (1983).

²⁶ See *supra*, note 16 and accompanying text.

surprising, then, that the ALI has struggled to identify a consistent common law principle governing such situations.

The *Restatement of Donative Transfers* addresses religious restraints specifically. Section 8.1 states: “An otherwise effective provision . . . which is designed to prevent the acquisition . . . of property on account of adherence to . . . certain religious beliefs or practices on the part of the transferee *is valid*.”²⁷ Thus, in the context of donations or gifts, religious restraints are acceptable as a matter of public policy. The rationale offered in the Comment reveals the particular policy choices made, and demonstrates a decided preference for the religious freedom of the donor and a general disregard for the rights of the donee:

Generally, society is not concerned with either the particular religious creed of the individual or the sincerity of his beliefs. The individual is normally free, not only to believe as he chooses, but to promote his theological views among others. The rule stated in this section validates such an attempted promotion of religious views where that promotion takes the form of a religious restraint annexed to a gift of property.²⁸

The Comment goes on to specify four particular examples of restraints that are generally valid:

First, the testator may seek to enjoin his devisee from joining a particular order, or from entering into the ministry of a certain faith, without any desire to alter the adherence of that devisee to the faith itself. Second, and for various reasons, he may proscribe marriage outside the faith of the devisee. Third, the testator, having strong views about a particular religion, may endeavor to influence his devisee either to adopt or abandon that faith entirely. Fourth, the testator, opposed to all deistic religion, may seek to convert the devisee to atheism.²⁹

These examples make it clear that the law of donative transfers is not overly concerned with the religious freedom of donees. Indeed, we might think that the kind of restraints contemplated here would run afoul of the fundamental rights and public policy concerns expressed in several other fields that the Restatements cover, including private servitudes.

Changes seem to be afoot, however. The more recent *Restatement of Trusts* reflects, perhaps, an evolving understanding of the potential harms the traditional approach may visit upon beneficiaries’ rights.³⁰ As with *Donative Transfers*, Section 29 of *Trusts* declares invalid any provision that “is

²⁷ RESTATEMENT (SECOND) OF DONATIVE TRANSFERS, § 8.1 (emphasis added).

²⁸ *Id.* cmt. a.

²⁹ *Id.* cmt. c.

³⁰ RESTATEMENT (THIRD) OF TRUSTS, § 29 (2003).

contrary to public policy.”³¹ The explanatory comments go on to single out religious restraints as exactly this sort of invalid provision. Comment K thus provides:

Individuals are normally free during life to promote their theological views among others, and to create charitable trusts during life or at death to support or advance a chosen religion. But the use of private trusts that create financial pressure regarding the future religious choices of beneficiaries is a different matter. A trust provision is ordinarily invalid if its enforcement would tend to restrain the religious freedom of the beneficiary by offering a financial inducement to embrace or reject a particular faith or set of beliefs concerning religion.³²

This approach, of course, runs counter to the earlier Section 8.1 of *Donative Transfers*—and probably to many of the public policy explanations expressed in other Restatements—and thus represents, an emerging conflict across the Restatement project.

It may be that this conflict reflects a desire to move beyond the traditionally separate categories of free exercise and disestablishment, with the older fundamental rights and entanglement approaches giving way to a newer distinction between generic and particularized conceptions of religion. Thus, a Reporter’s Note in the *Restatement of Trusts* acknowledges that its approach conflicts squarely with both an earlier *Donative Transfers* provision and “[m]ost of the modest number of American decision[s]” on point,³³ but justifies this change as “reflect[ing] in a general way” both free exercise *and* disestablishment principles.³⁴ In other words, the new approach works to protect beneficiaries’ free exercise rights, and also allays concerns that state enforcement of a settlor’s particular religious desires might violate the establishment clause. Indeed, read in a slightly broader context—within which *Trusts* disfavors particularized religious restraints on marriage,³⁵ but would enforce charitable trusts designed to “advance religion generally”³⁶—the newer approach may align with so-called “noncoercion” theories of disestablishment, some of which seem to view the establishment clause as merely proscribing a particularly problematic species of free exercise violation.³⁷ That is to say, the newer approach attempts to protect the free

³¹ *Id.*

³² *Id.* cmt. k (citations omitted).

³³ *See id.*

³⁴ *Id.*

³⁵ *Id.* cmt. j, Ill. 3.

³⁶ RESTATEMENT (THIRD) OF TRUSTS § 28(c) (2003).

³⁷ Ian Bartrum, *Salazar v. Buono: Sacred Symbolism and the Secular State*, 104 NW. U. L. REV. 1653, 1657 (2010).

exercise interests of *both* settlor and beneficiary by enforcing only those trust conditions that do not coerce an individual beneficiary into any particularized religious belief or practice.

These last observations are just speculative, of course, but the underlying conflict in the ALI's positions on donative transfers and trusts is quite real. This divergence is all the more interesting because it does not seem to be motivated by a split in the existing case law. Rather, the most recent edition of the *Restatement of Trusts* has taken it upon itself to revisit the traditional approach to trust and gift conditions, and this may mark the start of a larger change in philosophy about the principles governing a number of other areas of private law. If so, the shift probably embodies a more sophisticated and more comprehensive approach to protecting religious liberty in the context of private agreements, and we should welcome the ALI's thoughtful efforts.

III. FUTURE CONSIDERATIONS

This final part suggests a few places where the ALI might consider adding to its discussion of religion or religious liberty in future editions. In general, I do not mean to argue on behalf of a particular doctrinal stance or theory of church-state relations, but only to indicate some areas where the practice might benefit from some well-reasoned organization and guidance. I am agnostic, in other words, on the normative substance of the ALI's position on various legal controversies, but would welcome more thorough and thoughtful descriptive efforts to guide practitioners in certain evolving or nuanced areas. I am aware, of course, that such descriptive efforts usually require substantive kinds of choices, and that, once published, the Restatements exert a significant normative force of their own. I will leave those choices to the ALI and its future Reporters, however, and simply point out a few areas that might deserve some attention.

The first such area includes various issues perhaps best understood through the lens of the so-called "ministerial exception," which has been in the news over the last two years.³⁸ The exception, which some Circuit Courts have recognized for nearly 40 years,³⁹ shields religious organizations from employment discrimination laws in the context of "ministerial" hiring

³⁸ *E.g.*, Adam Liptak, *Religious Groups Given Exception to Work Bias Law*, N.Y. TIMES, at A1 (Jan. 12, 2012).

³⁹ The seminal case is *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972).

decisions.⁴⁰ Thus, such organizations are free to discriminate against ministerial employees not only on the basis of religion—which various statutory exemptions already permit⁴¹—but also on the basis of race, gender, and disability.⁴² In January 2012, the Supreme Court unanimously endorsed the exception in a suit brought by a Lutheran schoolteacher under the Americans with Disabilities Act.⁴³ That case has provoked intense scholarly debate—some commentators suggest that it places religious groups “above the law,”⁴⁴ while others claim it is a necessary safeguard for “church autonomy”⁴⁵—in part because it pits fundamental conceptions of equal protection and religious liberty against one another.⁴⁶ As such, the ministerial exception per se is now largely a creature of constitutional law—again, probably not apt subject matter for the Restatements—but the underlying concerns resonate in a number of other private tort contexts.

Some examples we might consider are the problems that can arise out of tortious conduct on the part of church leadership or clergy members. On the one hand, principles of “ecclesiastical” or “charitable” immunity generally no longer shield church leadership or hierarchy from liability for the negligent hiring, supervision, or retention of malfeasant clergy.⁴⁷ On the other hand, there is some ambiguity when it comes to “clergy malpractice”—essentially negligent counseling—a claim that first appeared in California in the late 1980s.⁴⁸ Citing First Amendment concerns, courts have traditionally refused to impose liability under this theory, inasmuch as the underlying question is the substantive propriety of clerical counseling or guidance.⁴⁹ When the alleged harm is not the substance or content of the advice given, however, but rather some nonreligious

⁴⁰ *Id.* at 560-61.

⁴¹ *See, e.g.*, Civil Rights Act of 1964, 42 U.S.C. § 2000e-1(a) (2011).

⁴² *See* *Hosanna-Tabor v. EEOC*, 132 S. Ct. 694, 699-701 (2012).

⁴³ *Id.* at 706.

⁴⁴ *See, e.g.*, Caroline Mala Corbin, *Above the Law? The Constitutionality of the Ministerial Exception from Antidiscrimination Law*, 75 *FORDHAM L. REV.* 1968 (2007); Leslie C. Griffin, *The Sins of Hosanna-Tabor*, 88 *IND. L. J.* 981, 1016 (2013).

⁴⁵ *See, e.g.*, Thomas C. Berg et al., *Religious Freedom, Church-State Separation, and the Ministerial Exception*, 106 *NW. U. L. REV. COLLOQUY* 175 (2011); Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 *N.C. L. REV.* 1, 46-48 (2011).

⁴⁶ *See* Ian Bartrum, *Religion and Race: The Ministerial Exception Reexamined*, 106 *NW. U. L. REV. COLLOQUY* 191 (2011).

⁴⁷ *See* Ira C. Lupu & Robert W. Tuttle, *Sexual Misconduct and Ecclesiastical Immunity*, 2004 *BYU L. REV.* 1789, 1798-99 (2004) (compiling cases).

⁴⁸ *Nally v. Grace Cmty. Church of the Valley*, 763 P.2d 948, 949-64 (Cal. 1988) (finding no liability in pastor’s failure to advise parents of child’s suicidal intentions).

⁴⁹ John F. Wagner Jr., *Cause of Action for Clergy Malpractice*, 75 *A.L.R.* 4th 750 §§ 2, 3, 4 (1990) (compiling cases).

conduct undertaken in the context of the counseling relationship—most typically some kind of sexual abuse or misconduct—courts have been increasingly willing to entertain tort suits,⁵⁰ and several states have created statutory causes of action.⁵¹ This distinction has emerged at least in part from popular pressures following the scandals in the Roman Catholic Church and from the Supreme Court's decisions in *Employment Division v. Smith* and *Jones v. Wolf*, which have created the doctrinal space for courts to adjudicate neutral legal principle—while still abstaining from disputes over the content of religious doctrine.⁵² Despite these emerging complexities, the *Restatement of Torts* gives almost no attention to “clergy malpractice”—it appears only in a few case notes as a non-actionable sort of claim.⁵³ Some attention to the more recent distinctions and nuance would be welcome in future editions.

A second area that might benefit from more discussion of religion and religious freedom is the emerging institution of same-sex marriage, which may cut across several Restatement contexts.⁵⁴ For example, formal state recognition of same-sex marriage has given rise to a number of questions surrounding religious exemptions to state anti-discrimination laws.⁵⁵ In contemplating these issues several years ago, I wrongly predicted that we would see very few suits against private

⁵⁰ See *id.* § 4; accord Scott C. Idelman, *Tort Liability, Religious Entities, and the Decline of Constitutional Protection*, 75 IND. L. J. 219, 240, 261-62 (2000) (offering theoretical and institutional reasons for declining recognition of clergy immunity).

⁵¹ Janice D. Villiers, *Clergy Malpractice Revisited: Liability for Sexual Misconduct in the Counseling Relationship*, 74 DENV. U. L. REV. 1, 34-35 (1996).

⁵² See *Emp't Div. Dep't of Human Res. v. Smith*, 494 U.S. 872, 879 (1990) (finding that the free exercise clause does not shield religious actors from neutral, generally applicable laws); *Jones v. Wolf*, 443 U.S. 595, 602-3, 608 (1979) (holding courts may apply neutral principles of law to resolve disputes within or between churches, so long as they do not adjudicate matters of religious doctrine). On the Roman Catholic Church scandal, see Lupu & Tuttle, *supra* note 47, at 1818.

⁵³ RESTATEMENT (SECOND) OF TORTS §§ 16, 299A (1965); RESTATEMENT (SECOND) OF TORTS § 874 (1979).

⁵⁴ See generally SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS (Douglas Laycock, Anthony R. Picarello & Robin Fretwell Wilson eds., 2008). An area I do not discuss that certainly merits attention is the context of family dissolution, in which, as seen above, religious conflicts may present real problems.

⁵⁵ See Michael Kent Curtis, *A Unique Religious Exemption From Antidiscrimination Laws in the Case of Gays? Putting the Call for Exemptions for Those Who Discriminate Against Married or Marrying Gays in Context*, 47 WAKE FOREST L. REV. 173, 173 (2012). Most states that recognize same-sex marriage provide statutory exemptions to anti-discrimination law for religious organizations (religious schools, for example, that do not want to provide married housing to same-sex couples). Most states, however, do not exempt private service providers. *E.g.*, VT. STAT. ANN. tit. 9, § 4502(l) (2009) (exempting religious organizations, but not others, from nondiscrimination law governing public accommodations).

business owners that refused to provide services to gay couples on religious grounds, but rightly (I hope) suggested that the common law could competently address such conflicts if they do arise.⁵⁶ Since that time such lawsuits have been filed in several states, with perhaps the most notable case arising out of a New Mexico photographer's refusal to document a same-sex ceremony.⁵⁷ Both the trial and appeals courts rejected the photographer's claims of First Amendment immunity, but a final resolution awaits in the state Supreme Court.⁵⁸ Other notable cases have arisen in New Jersey, where a church lost its tax-exempt status for refusing to allow same-sex weddings on a boardwalk open to heterosexual couples,⁵⁹ and in Vermont, where a same-sex couple filed suit against an inn that refused to host their wedding.⁶⁰ There is a potentially important distinction, however, between the New Mexico case and the others, in that the photographer has claimed not only a religious exemption to anti-discrimination law, but has also invoked free expression protection for the "artistic skills and creative processes" involved in creating wedding photographs.⁶¹ Such an expressive defense might also be available to florists, caterers, and other creative service providers, but would not seem open to businesses and organizations that simply provide the space or accommodations for couples. In any case, because I continue to believe that the common law is capable of handling such nuances, I think some effort to organize and codify the relevant principles would be a welcome addition to the Restatement project.

There are, of course, several other areas that might deserve the ALI's attention regarding issues of religious liberty. Some that have been brought to my attention include questions about the enforceability of arbitration decisions in religious conflicts,⁶² the application of unconscionability doctrine to

⁵⁶ Ian C. Bartrum, *Same-Sex Marriage in the Heartland: The Case for Legislative Minimalism in Crafting Religious Exemptions*, 108 MICH. L. REV. FIRST IMPRESSIONS 8 (2009).

⁵⁷ *Elane Photography, LLC v. Willock*, 284 P.3d 428 (N.M. Ct. App. 2012).

⁵⁸ *Id.* at 433, 445; *Elane Photography, LLC v. Willock*, 296 P.3d 491 (N.M. 2012) (granting certiorari).

⁵⁹ *Ocean Grove Camp Meeting Ass'n of United Methodist Church v. Vespa-Papaleo*, 339 F. App'x. 232, 235 (3d Cir. 2009).

⁶⁰ Kate Zezima, *Couple Sues Vermont Inn for Rejecting Gay Wedding*, N.Y. TIMES, July 20, 2012, at A19, available at http://www.nytimes.com/2011/07/20/us/20vermont.html?_r=1&.

⁶¹ *Willock*, 284 P.3d at 438, 440.

⁶² On this topic, I particularly recommend, Michael A. Helfand, *Religious Arbitration and the New Multiculturalism*, 86 N.Y.U. L. REV. 1231, 1241-42 (2011).

contracts signed under religious duress,⁶³ the interpretation of binding religious documents (perhaps as contracts), and some explication or codification of the kinds of “religious harms” that might count as damages in a variety of common law contexts. I will leave those discussions for other, more able, commentators, however, and would note only that each of these areas shares in at least some of the same fundamental conflicts between free exercise and disestablishment principles, and between communal and individual religious liberty. Again, this is hardly a surprise as these enduring contests lie at the very heart of what Marc DeGirolami has aptly called the “tragedy” of religious freedom.⁶⁴

CONCLUSION

American religious liberty—with its twin promises of free exercise and disestablishment—is perhaps a more complex creature in both theory and practice than that recognized in any other nation. We have instituted formal legal mechanisms aimed at protecting both individual and group religious practice against state interference, and have sought also to protect the state itself against incursions by those groups or individuals who would bend its coercive power to their religious ends. These first principles are sometimes in tension, and there are certainly circumstances when judicial efforts to further one goal can actually undercut the other. It is precisely in these circumstances that the common law surrounding religious freedom becomes most complex and controverted, and it is thus in these areas that guidance from the Restatements is most welcome.

I have attempted here to identify the current Restatements’ basic approaches to questions of religious freedom, and have suggested that—not surprisingly—those approaches seem to reflect our underlying first principles. The Restatements generally treat religion either as a matter of fundamental right, or as a subject matter from which courts should seek to disentangle themselves. I have also identified one place—the treatment of religious conditions in trusts as opposed to donative transfers—where the tension between these principles and approaches has manifested itself in expressly conflicting provisions. Here it seems that the more recent approach attempts to reconcile the religious rights of both parties to such transactions. Finally, I have made a few

⁶³ Religious duress might occur when a religious organization pressures an individual to enter into an agreement based on the fear of God, damnation, excommunication, or some other form or religious consequence or punishment.

⁶⁴ MARC O. DEGIROLAMI, *THE TRAGEDY OF RELIGIOUS FREEDOM* 55 (2013).

suggestions for places that future Restatements might consider adding some discussion of religious liberty. In particular, the common law surrounding clergy liability and same-sex marriage seems in need of clarification.

Finally, I want to make it clear that my comments and suggested additions to the Restatement are in no way meant as a criticism of the ALI's efforts to date. Indeed, it is the very insight and clarity that the Restatements have brought to so many topics within the common law that makes the idea of future efforts in these areas so appealing. Thus, in the end these suggestions might be just one more of those burdens that are so often thrust upon those who do their jobs just a little too well.