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COMMENTS ON *WHEN GOD ISN'T GREEN*

SARAH SCHINDLER[*]

Thank you for the opportunity to participate in the symposium and provide comments about Jay Wexler's great new book, *When God Isn't Green*. Given that Jay is both a humorist and a serious legal scholar with a penchant for taking trips, it should come as no surprise that this book reads like a mix between a travel guide, a humorous ethnography, and an adventure memoir. In addition to raising important questions about conflicts between two important, competing issues, Jay provides vivid imagery of his trips overseas. I especially appreciated the image of Jay sitting at a bar drinking with a cat.

In this essay, I'd like to make three small points that struck me as I was reading the book. First, I'd like to situate the book within a larger body of scholarship about the cumulative impact of small harms. I'd then like to talk about how big (or small) the cumulative harms that he's addressing in the book really are. I'll conclude with a brief word on animal welfare.

First, with respect to cumulative harms, a number of legal scholars have written about the fact that individuals, and their actions, cumulatively contribute to significant environmental harms.[1] In the book, Jay provides many examples of religious practices that have negative effects on the environment. I view this book as falling within the literature addressing what are known as "environmentally significant individual behaviors."[2] The book fits well within the works of Katy Kuh, Jason Czarnezki, Jim Salzman, Mike Vandenbergh, Thaler & Sunstein and others on this point.

The idea is that, if a single person is releasing a turtle into the wild, or lighting a bonfire, or cutting palm fronds, there likely wouldn't be a problem (or a book), because any harm to the environment would be de minimis. The problem comes from the fact that large numbers of religious adherents engage in these practices. Thus, we can't look at these actions individually. Rather, we have to look at them cumulatively, and when we do so, we might find that they impose harms that have a substantial negative impact on the environment. Although we historically have focused on large, industrial, point-source type polluters and pollutants, some scholars have begun to acknowledge that we must also focus on the actions of individuals that, when taken together, cause harm to the environment.

[1] *See, e.g.*, Katrina Fischer Kuh, *Environmental Privacy*, 1 UTAH L. REV. 1, n.1 (2015).

[2] *Id.* at 1.

One important question that many of these scholars tackle is how to best regulate these individual actions in order to reduce the overall harm. My preferred framework for matching regulatory tool to harmful action is that set forth by Lawrence Lessig, wherein he discusses four forms of regulation, or constraints on behavior.[3] These are laws or mandates, social norms, markets, and architecture. In the book, Jay touches on some of these regulatory options by referencing a variety of educational campaigns, bans on engaging in certain activities, and a number of architectural, or technical, solutions. I'll discuss these shortly, but I want to first address the importance of the religious focus in Jay's book.

Here, I would like to ask Jay whether the religious practices that he describes in the book are more akin to norms or laws. Obviously, the answer to this question depends on the religion we are talking about, as well as the specific religious practice at issue and the beliefs of the adherents. But the answer to that question might help to inform the potential "solutions" to the problems that Jay raises in the book. This is because if a given practice is more like a norm, then an educational campaign—even one established by the government as opposed to the religion itself—might be successfully used to change it (although, religious norms are often sticky norms, and thus harder to change). But to the extent a practice is more akin to a law, it would likely need to be changed from inside the religion itself.

In the book, Jay talks about some countries' attempts at using laws or mandates to regulate harmful religious practices. But Jay recognizes that this probably isn't the best approach, and I agree. He points out that laws often have unequal impacts. They might affect poor people more than wealthy ones, and thus might hinder the ability of poor people to express their religious beliefs more than rich.[4] I would also add that using laws and mandates to control individual behavior is hard because they are difficult to enforce. Jay also notes that mandates tend to force practices underground. It is difficult to know what people are doing inside their homes, or in small groups, and thus it's hard to stop them. It seems to me that, though acknowledging that no solution will be perfect, Jay is suggesting that architectural solutions might be the best approach for regulating environmentally harmful religious practices. He says, "finding a technology-based approach will usually be preferable to outright bans."[5] Technology-based approaches are akin to what Lessig refers to as regulation through architecture. When Lessig talks about architecture as a form of

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[3] Lawrence Lessig, *The New Chicago School*, 27 J. LEGAL STUD. 661, 662-63 (1998).

[4] "[T]he government should be very wary of implementing any regulation meant to protect the environment that will allow some believers to practice their religion but not others." JAY WEXLER, WHEN GOD ISN'T GREEN 102 (2016). Of course, some might argue that this is true of any neutral law that prohibits certain conduct, and if society has determined that the conduct is harmful enough to prohibit it, perhaps it shouldn't matter that some people are affected more than others.

[5] *Id.* at 139.

regulation, he uses the word quite broadly in reference to "the physical world as we find it, even if 'as we find it' is simply how it has already been made."[6] The idea is that that physical features of the built environment constrain our behavior.

Jay's book provides a number of examples of architectural solutions to the harmful religious practices that are discussed. These include:

- Building eco-friendly artificial pools in which to immerse Ganesha idols as a substitute for submerging them in the ocean;
- Promoting the use of natural dyes for use during Holi festival in India instead of chemical ones;
- Developing green, environmentally-friendly temples and smoke-free furnaces for burning joss paper in Asia.

While these ideas can help to reduce some of the environmental harms associated with certain religious practices, there are concerns with these types of architectural solutions as well. First, do they result in religious practices that are too sterile, stripped of their vibrancy? And if so, is there a risk that people will feel like they can't effectively practice their religion? Or perhaps they will seek ways to get around the architectural constraints instead.

Second, architectural regulation typically modifies the built environment, and once constructed, features of the built environment are enduring and hard to change. Therefore, if a number of green temples,[7] artificial pools, and smoke-free furnaces are built, but no one is using them, we're stuck with them until we tear them down. This, of course, is costly, and results in waste that has to be disposed of.

And finally, perhaps the greatest concern with architectural forms of regulation is that, when we seek to change behavior through architecture, it can backfire. This is because an individual's behavior can change in ways that we don't necessarily expect. This phenomenon is sometimes described as the "rebound effect."[8] For example, a landlord may install low-flow showerheads to reduce water usage, but her tenants might just take longer showers.[9] Thus, behavior can counteract the environmental benefits of the architectural solution. So, we should consider how behaviors might change in the context of religious practices before installing permanent, expensive architectural fixes to address these harms.

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[6] Lawrence Lessig, Commentary, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501, 507 (1999).

[7] Jay noted that one of the green temples he visited seemed to be underused.

[8] *See, e.g.*, Daniel A. Farber, *Sustainable Consumption, Energy Policy, and Individual Well-Being*, 65 VAND. L. REV. 1479, 1521 (2012) ("[W]hen energy use is more efficient, consumers may increase some of their energy-using activities. For instance, if lighting is very energy efficient, consumers may be less careful about turning off lights in vacant rooms. Or they may simply use more lights in order to have a brighter room, negating the energy savings from the more efficient lighting.").

[9] P.W. Mayer, et al., Residential End Uses of Water, American Waterworks Association Research Foundation, Denver, CO (1998).

The second broad issue I want to raise is really a question, which is: cumulatively, how significant of a contributor to environmental harms are these religious practices? In the book, Jay states, "when faced with a *substantial risk* to the environment and human health, the government has an obligation to regulate activities to protect its citizens, regardless of the religious motivation of the activity."[10] So, are the risks that he addresses in the book in fact "substantial," and how do we make that determination?

For example, Jay addresses the fact that mercury is used in religious ceremonies inside some homes. However, "common household products and toiletries make up approximately 15 percent of the total mercury found in domestic wastewater."[11] Does the mercury used in religious rituals make up a greater or smaller percentage? Similarly, I was interested to read about the palms used in Palm Sunday, but what about palm trees that are destroyed for non-religious uses, such as oil, and for hearts of palm? Perhaps those activities are contributing more to the destruction of palm trees and habitats than the religious practice—and isn't that relevant when we're talking about where to focus our regulatory power?

This doesn't mean that the religious practices are necessarily insignificant or unsubstantial, but it does raise questions, including how significant or substantial they are, how we determine what constitutes a "significant" impact on the environment, and how we determine where to target our limited regulatory resources. It seems to me that we must be concerned not only with determining the most appropriate regulatory tool to control harmful practices, but also with targeting the most significant behaviors. With respect to the burning of Joss paper, Jay says that it is "hardly the biggest contributor to air pollution in the region, but this detail is beside the point."[12] Perhaps it need not be the *biggest* contributor, but surely at some point the impact—even the cumulative impact—is so small as to make it de minimus. So where is that line? And do we need that type of empirical research before we decide whether and how to regulate these practices?

The final point I want to mention, briefly, concerns the animal-related practices that Jay describes in the book. As a professor of animal law and a long-time vegan, I have some concluding thoughts here. There are many examples in our laws where necessity justifies an action that would otherwise be impermissible. Similarly, the exact same act could be legal if done for purposes of ritual slaughter or for food consumption, but illegal if done for fun. This focus

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[10] WEXLER, *supra* note 4, at 139 (emphasis added).

[11] Michael P. Vandenbergh, From Smokestack to SUV: The Individual as Regulated Entity in the New Era of Environmental Law, 57 VAND. L. REV. 515, 563 (2004) ("Other contributions identified in the AMSA study include infiltration and inflow into the sewer system, mercury used in religious rituals and folk medicine, and the use of thimerisol, a preservative, in some vaccines.") (emphasis added).

[12] WEXLER, *supra* note 4, at 139.

on the justification rather than the act itself is also something to consider in the context of Jay's book.

The book details the practice of mercy release, where people will gather or purchase large numbers of animals and then release them into the wild, sometimes into inappropriate habitats. The book also notes that many of the mercy release animals die in transport. It details the way that birds are kept in tiny cages, and the way that these releases often harm existing ecosystems. We come away with the sense that this is a very bad practice, especially when undertaken on a large scale. Let's assume that, on a large scale, these harms are significant. Some might suggest that the practice should be regulated, despite the fact that we view religion as a core fundamental liberty.[13] Is that because those people devalue religion? Or because the harm to the animals and the environment outweighs the importance of religion?

Here, I would like to analogize to animals that are raised for food in the United States. They too are regularly kept in too-small enclosures in facilities that harm the environment. And yet these practices are allowed to continue. Even if a religious practice and a food-production practice result in precisely the same significant harm to the environment, people will likely consider those practices differently depending on the justification, as well as their own worldview. Although the use of animals for food goes beyond the scope of Jay's book, I believe this comparison gets at a fundamental question the book wants us to consider: how does a person "rank" these justifications? Why might a person believe that religion doesn't justify a certain harm to an animal, but consumption for food does? Is eating animals more or less of a necessity than using them for religious practices? And, should we care at all about the reason for the harm, or should we just look at the harm itself? These are big questions, and I'm glad that Jay's book provides us with a vehicle to foster these discussions.

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[13] There is obviously a tension in the law between the importance of religious liberty (indeed, we sometimes give exemptions to religious groups for what society has deemed to be harmful conduct) and the importance of the government remaining neutral on religion when protecting society from harm (*see, e.g.*, Emp't Div. v. Smith, 494 U.S. 872 (1990)).