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Excerpt

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PART ONE

WHY THE LAW MUST GOVERN RELIGIOUS ENTITIES



THE PROBLEM

The United States has a romantic attitude toward religious individuals and institutions, as though they are always doing what is right. As one scholar has quipped: “There is a long history in this country of religion being reduced to Sunday school morality in service of the common good.”¹ Were religious institutions and individuals always beneficial to the public, this book would not need to be written, and they would not need to be deterred from criminal or tortious behavior. Religious liberty could be absolute. The unrealistic belief that religion is always for the good, however, is a hazardous myth. The purpose of this book is to persuade Americans to take off the rose-colored glasses and to come to terms with the necessity of making religious individuals and institutions accountable to the law so that they do not harm others.

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Excerpt

[More information](#)

4 / GOD VS. THE GAVEL

Without a doubt many religious entities provide important benefits to society. Catholic Charities, the United Jewish Communities, and numerous other mission organizations do wonderfully good works. They feed and house the poor, counsel the addicted, minister to the downtrodden, and educate on a large scale. In 2003, religious organizations received nearly 40 percent of all charitable contributions in the United States, which translates into over \$86 billion to spend on good deeds.² In 2005, religious relief organizations have been indispensable in helping the millions of Indonesian tsunami victims. It is nearly impossible to imagine how the United States or the world could function without the services of these groups. There would be a severe deficit in the public's welfare if they were to close their doors.

Religious belief and ritual also can be a powerful source of inspiration, comfort, and healing, as the hard sciences now acknowledge.³ It can ease the suffering caused by disease, death of a loved one, and the other catastrophes of human life. I know this firsthand as I have turned to prayer many times in my life.

Religious beliefs and speech are also a crucial source of critique of the state, and at their best bring the human drive to power into perspective. Religion can be a liberating force. For example, believers challenged slavery in the United States as early as the 18th century, built the slave-liberating Underground Railroad in the late 19th century, and then led the civil rights marches in the 1960s. It is an undeniably powerful force.

No country, of course, can afford to ignore religion's force on the people, as China is learning with its unsuccessful attempts to eliminate Falun Gong and Christianity.⁴ In today's China, burgeoning religious pluralism has translated into increasingly repressive government policies. The 2004 Report of the U.S. Commission on International Religious Freedom explained the problem: "The Chinese government's campaign against evil cults has reportedly expanded beyond the Falun Gong and similar groups to those who are not part of the officially sanctioned religious organizations. This includes both newer and long-established Protestant and Catholic churches and leaders who, for various reasons, refuse to register with the government. Religious leaders have been imprisoned and followers detained and fined for 'cultist activity.'"⁵

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Excerpt

[More information](#)

THE PROBLEM / 5

There could not be a gentler religion than the Falun Gong, but its existence has threatened the governing powers in China. Three values – truth, compassion, and tolerance – form the backbone of Falun Gong’s philosophy. Since July of 1999, communist officials, most notably party head Jiang Zemin, have campaigned to “eradicate” Falun Gong and any support for it among the Chinese people or foreign governments. According to the Falun Dafa Information Center, as of November 2002, over 500 have died from maltreatment in custody. Sources inside China, however, place the number of deaths in the thousands. Hundreds of thousands more suffer relentless abuse in prisons, forced labor camps, and brainwashing facilities.⁶ Chinese authorities have also waged an abolition campaign against Christian organizations such as the Three Class Servants Church, whose members are said to number in the millions. In 2004, a campaign of arrests, beatings, and extortion of family members resulted in the disappearances and deaths of both bishops and laypersons alike.⁷ China’s relentless persecution of believers has led to sanctions from the United States and other countries.⁸

Communism did not survive in Eastern Europe and has not led to true freedom for the people in other countries in part because of its inability to incorporate religious belief into its social structure.⁹ Russia tried to suppress the Orthodox Church under communism, but could not stamp it out. Church members escaped to the catacombs, where they created an underground church and developed an elaborately encrypted method of communication. Despite the imprisonment and execution of church leaders in Soviet Gulags and concentration camps, the secret church survived and was shepherded through the Soviet era by priests and believers who continued to perform consecrations and religious services.¹⁰ Religion simply cannot be denied.

Despite these many virtues, a good deal of religious conduct is not beneficial. Herein lies the problem – some religious conduct deserves freedom and some requires limitation. Ridding society of religion is no answer, and therefore the United States must grapple with religion at its worst as well as its best. *God vs. the Gavel* argues that the right balance is achieved by subjecting entities to the rule of law – unless they can prove that exempting them will cause no harm to others. There is nothing in this book that can take away these virtues, and no intention to do so. There is

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Marci A. Hamilton

Excerpt

[More information](#)

6 / GOD VS. THE GAVEL

another side, though. Religion's force can be just another iteration of the drive to power. As such, it can wreak horrible wrongs on individuals and society. Sometimes the fight goes on for centuries, as it has in Ireland between Catholics and Protestants.¹¹ Christians led the horror-filled years of the Medieval Inquisition and the Spanish Inquisition.¹² Britain's Queen Mary and Queen Elizabeth executed or exiled scores of "infidels" who did not profess to the queen's religion.¹³ The Hindu majority in India and the Muslim majority in Pakistan have been battling over the Kashmir border region since the British partition in 1947.¹⁴ Israel has been in conflict with Palestinians over the West Bank for over 50 years. In the United States, the Salem witches were hung or, in one man's case, crushed to death, for religious reasons.¹⁵ In this era, Islamic radicals, many of whom are part of a fundamentalist movement that was initiated in 1928,¹⁶ are waging a war of terror worldwide. To this day, there are male fundamentalist polygamists in secret enclaves who enslave women and sexually and physically abuse their children.¹⁷ Faith-healing parents let children die of agonizing deaths from easily treated medical conditions like diabetes.¹⁸ Thousands of children have been sexually abused by clergy in many denominations. And this is only a sampling of the numerous religiously motivated actions that harm others.

Despite such facts, there has been a temptation in the United States to treat religion as an unalloyed good. It is a belief one can embrace only at one's peril. There has been an increasingly strident chorus that the United States has been secularized and that religion has lost its force in the culture. Yale Law professor Stephen Carter's widely read book, *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion*,¹⁹ fed into this social drive. The book portrayed religion as a diminishing influence in society. Ironically, the secularization thesis has permitted organized religion to don the garb of the underdog, when in fact its political power has been quite potent, even if usually behind the scenes. Religion's double role of downtrodden and politically powerful was ironically transparent when in 1993 Senator Orrin Hatch justified the Religious Freedom Restoration Act, which put religious individuals and institutions in the position of being able to challenge every neutral, generally applicable law in the country, by saying, "Government too often views religion with deep skepticism and our popular culture too often treats religious belief with contempt."²⁰

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Excerpt

[More information](#)

THE PROBLEM / 7

Indeed, the *Culture of Disbelief* and the viewpoint it fostered aided religions in their lobbying efforts, because few would suspect that such “weak” political actors could be as busy and as successful as they have been in the legislative context. The truth is that the vast majority of Americans are religious believers, church attendance is higher in the United States than anywhere else in the world, higher than at any time in U.S. history, and religious viewpoints fill the public square. While Americans were reading Carter’s book and being convinced that the United States was “trivializing” religion, thousands of children were being sexually abused by clergy, with no one seemingly able to help them – not the press, not the prosecutors, not their parents, and certainly not the churches. As American society has sublimated the potential risks of religious entities, it has sold out its most vulnerable.

The test of religious liberty that would fail to take into account this other side of religion guarantees suffering. Religious entities have the capacity for great good and great evil, and society is not duty bound by any constitutional right to let them avoid duly enacted laws, especially where their actions can harm others. To say that religious liberty must encompass the right to harm others is to turn the First Amendment on its head.

Part One details some of the instances where religious entities have harmed the public good and documents facts about religion that require sunshine and public debate. Some will label it perverse, and others a betrayal, but it is intended to be an education – one that is sorely needed if true liberty for all is ever to be embraced. Nor is Part One intended to be an argument for eradicating religion, as some might try to interpret it. To the contrary, the impetus for this book lies in a belief in the depthless good that religious entities can and do supply. But that belief is tempered by my deep disappointment in learning the truth of what some religious entities actually have done and continue to do. My rose-colored glasses broke years ago.

From the ivory tower, it is easy to spin abstract arguments about the high principle of protecting religious conduct. Read this:

Having engaged in my own weighing of the value of religious diversity against the potential for anarchy and having determined that religious diversity is highly valuable while the fear of anarchy is without basis at this time in history, I would push the line to be drawn in these

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Excerpt

[More information](#)

8 / GOD VS. THE GAVEL

cases to the farthest extreme compatible with the viability of a living democracy, which is to say that the exercise of religion should trump most governmental regulation.²¹

I'm now embarrassed to say that I wrote that. If one's theory of protecting religious conduct is based on hypotheticals, ideals, and Sunday School, as mine was, it is not difficult to concoct a theory of religious liberty that permits religious conduct to sail above the law and the people. My views have changed 180 degrees, because I have been educated and now know the severe harm religious entities can cause. Most laws should govern religious conduct, with the only exception being when the legislature has determined that immunizing religious conduct is consistent with public welfare, health, and safety.

In recent decades, religious entities have worked hard to immunize their actions from the law, either by obtaining legislative exemptions or by forcing the courts to invalidate any law substantially burdening religious conduct that was not absolutely necessary. They have always waved the banner of "religious liberty," and few Americans have thought to question them. What could be more important in a free society than religious liberty? When the question is left in the abstract, it is hard to think of anything more important. But when one operates from the ground and knows the facts, the answer to the question is that there are all sorts of interests that must trump religious conduct in a just and free society – such as the interest in preventing childhood sexual abuse, or in deterring terrorism, or in preserving private property rights. Every citizen has at least as much right to be free from harm as the religious entity has to be free from government regulation.

In effect, though never explicitly, religious entities have been lobbying for the right to hurt others without consequences. That is a severe attack on the rule of law, which is supposed to guarantee that no one becomes a law unto himself. In a republican form of democracy like this one, the laws are enacted to serve the larger public good, and no one should be permitted to harm another person without account. True religious liberty recognizes an absolute right of belief and, at the same time, society's necessary power to regulate religious conduct to serve the public good.

There are two legal tacks religious individuals and institutions (the collective of which I will refer to as "religious entities") have pursued

Cambridge University Press

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Excerpt

[More information](#)

THE PROBLEM / 9

that have led to disastrous results: legislative exemption and/or constitutional – typically First Amendment – interpretation. The first is to put pressure on the legislative process to obtain exemptions from generally applicable laws. Sometimes they are asking for the right to follow their religious beliefs. For example, the Christian Scientists have a longstanding campaign to exempt parents from having to provide their children with medical treatment, which I will address in Chapter 2.

At other times religious entities ask for exemptions that go well beyond their religiously motivated conduct to avoid liability for their misconduct. For example, the Catholic Church worked hard to prevent clergy from having to report child abuse (knowing as it did that many of its priests were in fact abusing children) – even when a report would not violate the confessional. Their religiously motivated conduct did not require the protection, but their project of keeping secret widespread child sexual abuse by its clergy did.

At other times, the exemptions requested are what I refer to as blind exemptions. Groups of religious entities have persuaded legislatures to grant them a presumptive right to trump all laws or an entire category of law, on the theory that religious liberty demands freedom from the law. Examples include the Religious Freedom Restoration Act of 1993, its counterparts in the states, and the Religious Land Use and Institutionalized Persons Act of 2000 each of which will be discussed in more detail in later chapters.

Too often, specific exemptions have been passed without the general public – and sometimes the legislators – having any idea how the exemption would affect others. In a typical scenario, a religious group would quietly approach a legislator (inside or outside the capitol), and the legislator would then slip the exemption into some bill involving a wholly different subject. There would be no hearings, no public debate, and there would be no in-depth reporting to unmask the dangers of freeing religious entities from the law. Everyone who knew about it would go home satisfied – the legislator because he had done a “good deed” that day, and the religious entity, because it would avoid liability for its actions. Yet, the secrecy meant that the entities’ future victims had no idea what was coming, as it permitted legislators to mimic the hear-no-evil, see-no-evil, speak-no-evil monkeys. This was supposedly religious liberty, American style. The results, documented in Part One, are not pretty.

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Excerpt

[More information](#)

10 / GOD VS. THE GAVEL

The blind exemptions tended not to be so secret, because they were cast in general terms. In other words, the laws themselves were banded about for all to see, but their terms were so general, hardly anyone could comprehend how the law would affect anyone other than the religious entity getting the exemption. The Religious Freedom Restoration Act, the grand blind exemption of all time, gave religious entities the right to disobey any law unless the government could prove it was necessary. It was as opaque on its surface as they come. It would take five years for groups like the ACLU, one of its first and most ardent supporters, to discover that it had supported a law that undermined its interests – in its case, the antidiscrimination laws. The legislative history is filled with paeans to religious liberty, but precious little analysis of what was going to happen if religious individuals and institutions had the power to overcome the laws that regulate conduct.

Whether specific or blind, many of these exemptions have meant that the United States has been tolerating harms known only to those inflicting the harm and their victims. Children have been sexually abused by priests in rectories while clergy were exempt from reporting child abuse, homeowners have been told their residential neighborhoods would now host a church that would bring the kind of traffic and strangers that would force them to keep their children at home, and the prisons would become breeding grounds for terrorists.

In addition to seeking legislative exemptions, religious entities have argued vigorously and actively in the courts (and the legislatures) for a presumptive constitutional right to avoid the law pursuant to the federal and state free exercise of religion guarantees. They have foisted a definition of the First Amendment onto the American people that means, in effect, that they are immune to all but the most necessary laws. They have attempted to use the First Amendment as a shield in prosecutions involving child rape and murder. But their efforts have not stopped at the First Amendment. They have also employed due process, ex post facto, and separation of power theories to argue that the law should not apply to them, often because they are religious.

Part One describes six arenas where religious individuals and institutions have insisted on the right to avoid the law as they have harmed others: children, marriage, schools, land use in neighborhoods, the prisons and the military, and civil rights. Sometimes the exemption was consistent

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Excerpt

[More information](#)

THE PROBLEM / 11

with the public good and no harm accrued, but too often, the exemption meant that a victim had no recourse under the law.

Part Two charts the fall of special privileges for religious conduct in Anglo-American history and the rise of the rule that religious entities have no legal right to harm others. After centuries of development, it is quite clear that harm is harm, and whoever causes it must be held to account. I will endorse the Supreme Court's unfairly maligned opinion in *Employment Div. v. Smith*, and I will argue that there is no constitutional right to harm others simply because the conduct is religiously motivated. Therefore the rule of law – which is the collection of legal principles that are duly enacted by legitimate legislatures – must be applied evenhandedly to all religious entities. Legislatures can exempt the religious from some laws, but only where the religious entities have borne the burden of proving that exempting them renders no harm.