
A RESPONSE TO PROFESSOR GREENAWALT

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Professor Greenawalt raises important and interesting questions about my thesis in *God vs. the Gavel: Religion and the Rule of Law* that legislators are in a better position to grant religious accommodation than are courts.¹ His analysis rests largely at a theoretical level, which, I think, leads him to fail to take into account the crucial empirical claims that serve as the foundation to *God vs. the Gavel*.

My position is that as a society Americans have ignored the likely harms that can result from religious accommodation. To that end, I document at some length the many instances in which religious entities either receive or demand permission to avoid the laws that govern everyone else. The point is to force the discourse of religious liberty onto a factual base.

Harm arising from religious entities was unacknowledged, and even taboo, before the publication of *God vs. the Gavel*. There was a moral imperative in the culture that forbade negative talk about religion. If an accommodation was for religion, it was presumed to be good for society as a whole.

Parsing a single sentence, Professor Greenawalt characterizes my position as “suggest[ing] that an exemption automatically departs from the rule of law.”² He is speaking against the backdrop of scholarship dissecting “rule of law.” My point is actually more subtle, though: the “rule of law” in the United States contains within it the requirement of keeping harm to a minimum. Military and autocratic regimes can follow a rule of law that is nothing but the same rule applied to everyone doing the same thing. My point is that the rule of law in the United States requires consideration not only of consistency but also of substantive harm. Thus, a rule that is being applied unevenly to those engaging in the same actions is problematic to be sure, though that is not my focus. A law that is being applied unevenly without reference to the harm engendered by the action is a separate, more disturbing violation of the fullness of the rule of law in a republican democracy

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¹ MARCI A. HAMILTON, *GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW* (2005).

² Kent Greenawalt, *The Rule of Law and the Exemption Strategy*, 30 *CARDOZO L. REV.* 1513, 1518 (2009).

that recognizes individual rights.

A presupposition of goodness on the part of religious actors was necessary for religious exemptions to be granted in a number of instances. In fact, the harms caused by religious entities and individuals frequently have been beyond the view of the public. *God vs. the Gavel* brought to light many instances in which religious entities received preferential treatment and in turn harmed others. It also described how religious entities fight for such treatment in the political sphere, even when the results are at odds with the larger public good. Placing religious entities foursquare in the political maelstrom is crucial to understanding how they have come to possess such expansive privileges and recasts them in a more accurate light.

These factual premises lead me to demand more factual investigation into the impact of religious accommodation on others, by society as a whole and by elected representatives.

Then I ask whether the courts or the legislatures are in a better position to engage in this factual inquiry. It seems quite clear to me at least that legislatures are in a far better position to ferret out otherwise hidden victims than are courts. Courts are constrained to address the parties before them,³ and, therefore, rarely have the information needed to investigate whether there are third parties—not part of the lawsuit or prosecution—whose needs ought to be taken into account before crafting an accommodation. In contrast, legislatures can engage in the sort of wide-ranging investigation that can unearth potential victims.⁴ Moreover, as a matter of the republican form of government in place, legislatures are supposed to engage in decisionmaking that includes consideration of the larger public good, an inquiry typically forbidden to judges, whose judgment is supposed to be more constrained. This is a matter of institutional competence.

I further make the point, though, that legislators, like most other Americans, have shared the view that religiously motivated conduct is almost always good and, therefore, worthy of whatever accommodation religious entities request. Therefore, to date, even legislators have not shouldered the responsibility to make sure that religious accommodation does not harm others. The empirical result has been a tremendous amount of legislation that blindly hands religious entities the power to act in ways that can harm others, for example, medical neglect exemptions for faith-healing parents and a lack of regulation for summer religious camps. Thus, not only do I call for legislative, rather

³ Courts are constrained from issuing advisory opinions on any issue beyond the dispute of the parties. *See* U.S. CONST. art. III, § 2 (limiting jurisdiction to “cases” and “controversies”).

⁴ There is also a cost factor, because it costs far less for a victim to alert a legislator to harm than it does to become a litigant in a lawsuit. Moreover, in many lawsuits, the victims’ concerns about accommodation would be insufficiently concrete to permit them to assert standing.

than judicial accommodation, but also for more rigorous legislative investigation before any accommodation is provided.

A good example of the different dynamic within court and legislature can be seen underlying the Supreme Court's recent decision in *Gonzalez v. O Centro Espirita Beneficente Uniao Do Vegetal*.⁵ In that case, members of the O Centro Espirita Beneficente Uniao Do Vegetal (UDV), a Christian Spiritist sect based in Brazil, demanded the right to use an illegal substance, dimethyltryptamine (DMT), which is brewed in a tea called *hoasca*, as part of their religious observance. They derived their legal theory from the Religious Freedom Restoration Act⁶ (RFRA), arguing, among other things, that RFRA imposed strict scrutiny on the federal drug laws, and that there was no compelling interest to justify denying the group the use of the drug. In other words, RFRA mandated judicial accommodation. The procedural posture of the case meant that the Court did not decide the issue on the merits, but rather only whether the members were likely to succeed on the theory, and the Court found that they were likely to succeed on the merits.⁷

RFRA provides that no federal law may substantially burden religious expression unless the law serves a compelling interest and is the least restrictive means of furthering that interest.⁸ This statutory incorporation of constitutional strict scrutiny makes it exceedingly difficult for federal law to govern religious conduct. *O Centro* shows that courts will even allow the use of the most dangerous illegal drugs—as classified by Congress⁹—if the reason for the use is religious.

This is an excellent case to show the inadequacies of the judicial system in assessing and granting religious accommodation. The Court had little before it: no trial and no decision on the merits below, just its free exercise jurisprudence and the parties to the case: the UDV believers and the federal government. Although the Court reaffirmed its holding in *Employment Division v. Smith*,¹⁰ that neutral, generally applicable laws are constitutional, it followed Congress's mandate to apply a different standard—strict scrutiny—to such laws, including the federal drug laws.¹¹ Given the case's universe—both procedural and substantive—the Court had no opportunity to inquire into whether

⁵ 546 U.S. 418 (2006).

⁶ 42 U.S.C. § 2000bb (2006).

⁷ *O Centro*, 546 U.S. at 438-39.

⁸ 42 U.S.C. § 2000bb(b) (2006). RFRA was held unconstitutional, at least as applied to state and local law, in *Boerne v. Flores*, 521 U.S. 507 (1997).

⁹ DMT, the active drug in *hoasca*, is listed in Schedule I of the Controlled Substances Act. See 21 U.S.C. § 812(b) (2006). Schedule I drugs are subject to the most comprehensive set of restrictions, including an outright ban on all importation and use (except for strictly regulated research projects, see 21 U.S.C. §§ 823, 960(a)(1) (2006)), and criminal liability for simple possession. See 21 U.S.C. § 844(a) (2006).

¹⁰ 494 U.S. 872 (1990).

¹¹ *O Centro*, 546 U.S. at 424.

granting such an accommodation might create third-party harm. Rather, the Court dwelled on what is most familiar to it. It reasoned that the federal government had provided an exemption for the use of peyote for Native American Church members (whose practices were the subject of its *Smith* decision), and, therefore, it should have been open to an exemption for *hoasca* for UDV members.¹² The Court further rejected the government's claims that (1) inclusion of DMT within the category of highly dangerous drugs precluded the Court from crafting an exemption,¹³ and (2) that the Controlled Substances Act precluded exceptions.¹⁴

There was simply no opening in the case to introduce the issue of harm to third parties, whose identities extended beyond the named parties before the Court. The UDV is a relatively new religion in the United States, and, therefore, the American system (which includes press and all levels of government) had not had an opportunity to learn the parameters of its drug usage. Because Congress had never considered whether to make use of DMT an exception to the Controlled Substances Act for religious purposes, the federal government had no studies or other sources of information regarding this particular drug. In contrast, when the federal government and numerous states granted religious exemptions for the use of peyote, at least there was significant experience with that use here in the United States, which could have informed lawmakers about the larger social effects of granting the exemption.

Judicial accommodation in this scenario creates a further barrier to ever discovering whether a religious practice may harm others. By holding that UDV members proved a likelihood of success, and, therefore, that the courts would likely carve an exemption for them from the drug laws, the Court, in effect, shut down any likely inquiry into third-party harm, because the impetus to request the exemption has been abated.¹⁵ When the courts consider accommodation, there is limited information at best, and, if the exemption is granted, there is no need for the legislature to engage in any open-ended inquiry that might yield more accurate answers about the actual impact of the accommodation. This is the cycle that I criticize in *God vs. the Gavel*.

An opposite conclusion (or the repeal or invalidation of RFRA) would have led the UDV believers to lobby for an exemption from Congress, which would not have been prohibited from investigating the

¹² *Id.* at 433.

¹³ *Id.* at 432-33.

¹⁴ *Id.* at 434-35.

¹⁵ Of course, this is not the Court's fault, given that it was acting pursuant to Congress's mandate in RFRA to engage in mandatory judicial accommodation. Under its decision in *Smith*, the UDV likely would not have prevailed and would have had to seek exemption from Congress.

factual impact of creating an exemption for *hoasca*. If Congress were to ask the big-picture question about the larger public good, it would not be constrained in any way from investigating how the public good would be affected by an exemption. Such an inquiry, one would hope, would include investigation into UDV's practices and the question of whether children are exposed to the drug. It is one thing to create an exemption for adults, who are presumably exercising free will, to use mind-altering drugs for religious services, but quite another if those same adults give the drugs to children.¹⁶ The Court was in no position to answer or ask this question, and, therefore, it reached conclusions about the government's interest before the government could even investigate what interests are at stake in light of this newly discovered religious practice. If children are being given illegal drugs, then the Court's conclusion perpetuated the harm. This example should illuminate my responses to Professor Greenawalt's main points below.

Professor Greenawalt raises three primary points. First, he implicitly criticizes my approach for not taking into account how different mens rea can alter how we punish particular actors.¹⁷ He has a point, but he also misses the point. My position is that harm is a necessary element to the rule of law and that actions engendering harm should be treated the same by government, whether committed by religious or non-religious entities. He rightly points out that in many circumstances, different punishments are meted out according to the intent of the actor, so mere action cannot be the touchstone for punishment.¹⁸ Therefore, the action of killing another does not by itself determine punishment—the system must also consider the killer's intent to choose between involuntary manslaughter, murder, etc. The question, then, is how to categorize religious intent. He seems to be ambivalent on this issue.

While he does not go this far, he edges toward an argument that faith-healing parents whose child dies following a treatable illness did not *want* the child to die, and, therefore, charging them with murder is not fair. Rather, they should only be guilty of negligent homicide, or manslaughter.¹⁹

My first response to this argument is that this partakes of the larger culture's optimistic thinking about religion that has infected current investigation of accommodation. While some faith-healing parents do not want the likely consequences of their decision to forego medical

¹⁶ This line of reasoning occurred to me as a result of e-mails received from UDV believers, which led me to understand that adolescents do, in fact, frequently partake in DMT (and other drugs) within the UDV religion.

¹⁷ Greenawalt, *supra* note 2, at 1522-24.

¹⁸ *Id.*

¹⁹ *Id.* at 1528-30.

treatment for their child to occur, that is certainly not true of all. If one refuses to assume that all religious actions have proper intentions, it is not hard to imagine that some religious parents actually believe that heaven is a better place for their child, and, therefore, denial of treatment is actually intended to facilitate death. In fact, this is the most plausible way to explain those believers who refuse to feed infants in order to keep the infants pure. Thus, no situation involving the death of another should be presumed to be against the will of the believer.

Second, this analysis does not fit into standard mens rea analysis. Intent is not normally determined simply by what the actor ultimately wanted; more important is the question of whether the actor possesses the requisite state of mind with regard to each material element of an offense.²⁰ Moreover, many crimes do not require the same mental state for each element; where the conduct mens rea may require purpose or knowledge, mere recklessness may suffice as to the result element.²¹ Religious parents may believe that they should not act to save the child, because God must determine life and death, but that does not mean they do not understand or know the law. Rather, they are motivated by their religious beliefs to disregard the law, and this does not necessarily negate their mens rea regarding the elements of the crime.²²

Of course, if they are not capable of distinguishing right from wrong under the law, they are clinically insane, and that does create a defense, which can alter punishment.²³ Yet, those defending different treatment for faith-healing parents do not mean to imply that all religious actors are mentally incompetent. For the vast majority of religious actors, their actions, when in conflict with the law, are the result of free will, not mental deficiency. Thus, in circumstances when a parent knowingly permits a child to die of a treatable ailment, there is

²⁰ MODEL PENAL CODE § 2.02 (Official Draft and Revised Comments 1962); see also MARTIN GARDNER, *The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and Present*, 1993 UTAH L. REV. 635 (1993). While the actor may not have purposefully intended that the withholding of medical treatment would cause a child to die, he was at least reckless as to that result.

²¹ MODEL PENAL CODE § 2.02(3).

²² While the parents may have believed that withholding treatment would ultimately lead to the recovery of the child, motive is, in most instances, considered only in sentencing once criminal liability has already been established.

A defendant may have had a good reason for acting in violation of the criminal laws, but the prosecution can still prove he or she had the requisite *mens rea*—even knowledge or purpose—by showing that defendant knew what he or she was doing or that it was defendant's purpose to act in a specific fashion. . . . [G]ood motive does not normally negate *mens rea*.

STEVEN A. SALTZBURG, JOHN L. DIAMOND, KIT KINPORTS & THOMAS H. MORAWETZ, *CRIMINAL LAW* 199-200 (2000).

²³ A very insightful review of *God vs. the Gavel* makes the valuable point that there has been inadequate investigation into where to draw the line between religious fervor and insanity. See Caleb E. Mason, *Faith, Harm, and Neutrality: Some Complexities of Free Exercise Law*, 44 DUQ. L. REV. 225, 227 (2006).

little reason to treat the actor differently based on religious status. Parents are thus put to a choice: obey the law or obey their religious mandates, but know that the failure to obey the law has consequences within the civil sphere.

Professor Greenawalt's second point is that courts (and administrative agencies) engage in benefit/harm analysis on a regular basis, so there should be nothing wrong with judicial accommodation.²⁴ My view is that he is confusing apples with oranges. Benefit/harm analysis in the courts is not the same as public good investigation in the legislatures.

The sorts of cases he seems to be imagining show courts engaging in benefit/harm analysis narrowly with respect to the particular parties before them. While he does not cite particular cases for this proposition, he seems to be adverting to judicial consideration of the "justification defense," where the defendant admits he committed the crime, but claims it was the right thing to do.²⁵ This inquiry, though more open-ended than much judicial decisionmaking, is still tied to particular parties, facts and circumstances. It does not afford the opportunity, only enjoyed by the legislature, to follow whatever public policy evidence or arguments it would like. There are instances where legislative investigation takes what appears to be a tangential path, which then turns out to be crucial in the final analysis. Those tangential paths to theories, individuals, and circumstances irrelevant to the case are foreclosed to the judge.

My point is not that courts cannot apply reason to complex social facts. Of course they can do that. They are certainly as good or better than legislatures in logical and careful analysis of the facts before them. The problem is that they cannot gather all the facts they need in order to then analyze third-party harm.²⁶ Courts are constitutionally prohibited from engaging on any regular basis in benefit/harm analysis of the legislative scope I described above; they cannot fund large studies, take all the time they need to investigate, or permit their inquiry to stray beyond the narrow confines of the legal question and particular parties brought before them. Courts surely weigh various interests in particular cases, but the broad-ranging and open-ended inquiry that ferrets out unidentified victims of religious conduct is not a part of their universe. That is why the Supreme Court could rule in *Wisconsin v. Yoder*²⁷ that the Amish could withdraw their children from public school following

²⁴ Greenawalt, *supra* note 2, at 1523-24.

²⁵ Greenawalt, *supra* note 2, at 1524.

²⁶ In many instances, judges are also disabled from these sorts of inquiries because they are working alone. Trial judges especially do not have the benefit of the accidental insight gained from the deliberation and open discussion that characterizes the legislative process.

²⁷ 406 U.S. 205 (1972).

eighth grade, despite the state's compulsory education laws, with the primary opinion not even adverting to the needs of the children at that point in their lives or later.

Finally, we disagree over what the Supreme Court's standard has been over the years—and, therefore, the doctrinal backdrop to accommodation. Professor Greenawalt rightly rejects the popular but misguided notion that the Court routinely engaged in strict scrutiny, as that term is understood in other constitutional arenas like equal protection or freedom of speech, between 1963 and 1990. Rather, in his view, the Court was applying some form of intermediate review.²⁸

As I explain in *God vs. the Gavel*, it is impossible to categorize all of the free exercise cases under any one level of review. The Court engaged in context-dependent analysis between 1963 and 1990, but overall, the Court deferred to legislative judgment in the vast majority of cases, as the Court pointed out in *Smith*.²⁹ No religious claimant after the *Wisconsin v. Yoder* decision won a religious accommodation claim outside the unemployment benefits context.³⁰ Thus, any argument about a “right” to strict scrutiny in free exercise cases before 1990 is a misstatement and exaggeration.³¹

If the Court had been applying a higher level of scrutiny across the board, religious entities would have prevailed more often, but, more importantly, they would have focused their efforts for accommodation on the courts. At the very least, though, *God vs. the Gavel* establishes that religious entities have been looking to legislative accommodation for decades, and quite successfully. Had the courts been more hospitable, it is likely the demand for legislative accommodation would not have been as intense as it has been.

A cornerstone of the rule of law is that citizens who engage in the same behavior (which is a combination of action, intent, and knowledge of the law) receive the same legal treatment. From another perspective, the rule of law is also an important means of protecting the vulnerable from harm, because it prevents distinctions between bad actions based on status. The rule of law is not without substantive content on this account. I stand by my position that rule of law principles require that neutral, generally applicable laws should apply to religious entities, even when they incidentally burden religious conduct—and that

²⁸ Greenawalt, *supra* note 2, at 1532.

²⁹ *Employment Div. v. Smith*, 494 U.S. 872, 884-85 (1990).

³⁰ “Since 1972, the Court has rejected every claim for a free exercise exemption to come before it, outside the narrow context of unemployment benefits governed strictly by *Sherbert v. Verner*, 374 U.S. 398 (1963).” MICHAEL W. MCCONNELL, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1417 (1990).

³¹ See Marci A. Hamilton, *An Imperfect Vocabulary of Religious Liberty*, J.L. & RELIGION (forthcoming 2009) (reviewing MARTHA C. NUSSBAUM, *LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY* (2008)).

legislative accommodation is only consistent with rule of law principles if the accommodation does not result in harm to others.

To be sure, the conflict between law and religious conduct can be most acute when the believer takes a literal, or fundamentalist, reading of the religious text, which leaves less room for the believer to adjust his or her conduct. But I would not single out fundamentalists from other believers for or against accommodation because the focus rightly belongs on the larger public good, and not on the needs of any one believer or faith. If believers can prove that protecting their religious conduct does not harm others, then, on my reasoning, an exemption is warranted. But where the demand for accommodation results in harm to others, or society as a whole, the argument for religious liberty from generally applicable rules falters.