

## REQUIEM FOR THE ESTABLISHMENT CLAUSE

*Winnifred Fallers Sullivan\**

In his two volumes, *Religion and the Constitution*, Kent Greenawalt has obligingly laid out for us the fruit of a long career of careful consideration of the significance and practicality of the religion clauses of the First Amendment to the United States Constitution. This second volume, *Religion and the Constitution: Establishment and Fairness*, devoted to the establishment clause, like the first volume, repays careful and repeated reading. Greenawalt is suitably modest about the capacity of law to regulate religion while being quietly ambitious and insistent about the fundamental rightness of the American way of non-establishment. His work is reasoned, prudential and deeply humane. I have learned a great deal from both books.

Greenawalt's work is also very personal. There is a subtle coercion about this book. The accumulated many small judgments of what count as good reasons over bad reasons for a particular course of action underscore a fundamental commitment to the importance of religion in the United States. Above all, perhaps, there is a privileging of free church ecclesiology. Religion is properly, for Greenawalt, and for Americans generally, according to Greenawalt, the voluntary association of individuals with communities of others who are like-minded in their transcendent commitments. Thus, for example, in his discussion of John Locke, Greenawalt comments negatively on the lack of freedom for Anglicans in England under establishment because they lack the capacity to choose their leaders and their form of government (p. 21). To be able to choose one's religious leaders and the form of government of one's religious organization is basic to Greenawalt's understanding of the American way of religious freedom. While he concedes that Englishmen may enjoy a kind of religious freedom, they cannot really know the real thing.

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There are many such moments in this book, with very little acknowledgment that religion is changed by the freedom he celebrates. Those he pities would not be Anglicans if they had the capacity to choose their leaders and form of government. To be Anglican is to believe that apostolic succession is God-given and that its administration is intimately connected with the Crown. Indeed, for most religious people everywhere at most times, religious leadership, and the form of government of one's religious community, is, in some sense, given, not chosen, and related in explicit ways to government. Those are aspects of religion that gives it its authority and its comfort.

The establishment of a state church, as is the case in most of Europe, or the privileging of a religious tradition, as is the case in Israel and elsewhere, does not, according to Greenawalt, entirely disqualify you from membership in the company of liberal democracies or necessarily imply that you do not practice a reasonable degree of toleration and accommodation of religious difference. Professor Greenawalt's view is, however, that, for good reasons, rooted both in history and in contemporary realities, it is the American way to understand disestablishment and separation as necessary for true religious freedom and, by implication, full membership in the universe of liberal democracies. He also seems to believe that disestablishment has largely worked in the United States. It is messy, but it works. This volume demonstrates the workableness of disestablishment in the United States, given a particular understanding of what religion is.

Some contexts are harder than others, though. One of the thornier issues for proponents of non-establishment in the United States is how to manage religion in places in which government has control over its citizens in ways that restrict their access to the free market in religion—in the military and in prisons, principally. Professor Greenawalt discusses these chaplaincies in Chapter 12 and concludes that, while complete disestablishment is in each case impossible because of the need for the government actually to provide occasions for religious exercise, the voluntary model should be replicated as much as possible. Military chaplaincies should be staffed not with military officers as they are now but with clergy paid for by religious organizations and prison chaplaincies ought likewise to consist of the coordination of voluntary religious activity on the part of prisoners served by voluntary clergy. Thus, the free church model would be extended to the military and prison setting. There is minimal acknowledgment of the cost; its management presents serious

establishment clause issues and tends to undermine the implied naturalness of disestablishment generally.

Religion in prisons is an issue of some importance in the world generally today. And particularly in the United States—because of the large and increasing number of prisoners and because of the increased religious diversity of those prisoners. The United States has the higher percentage of its population incarcerated than any other country in the world, by a wide margin. Three times as many, proportionally, as in most of Europe. It is instructive to compare the current United States practice with respect to the management of religion in its prisons with those of Europe.

A prominent British sociologist of religion, James Beckford, and his associates, have recently completed a study comparing the accommodation of Islam in Her Majesty's prisons of England and Wales, on the one hand, with the prisons of France, on the other.<sup>1</sup> There are, of course, many differences between the prisons and the prisoners of the two countries. English prisons have always had a strong presence of the church. Indeed the churches, in a sense, invented prisons. Church of England priests have regularly been assigned to prisons and most older English and Welsh prisons actually have free-standing churches built in their yards. French prisons are almost entirely secular with the occasional presence of a Catholic priest to accommodate Catholic prisoners. The Muslim prisoners in the two countries have different mixes of ethnic composition and national origin. The English prisoners are more likely to come from South Asia while the French prisoners are more likely to come from North Africa and Eastern Europe. Nonetheless it is interesting to compare the way in which Islam is accommodated in the two cases.

The English prisons have in the last ten years or so engaged in a serious effort to provide religious services to Muslim prisoners that are comparable to those offered to Christian prisoners. Muslims make up approximately ten percent of the prison population in England and Wales. Gradually, with the advice and counsel of religious experts, the prisons have increased the number of imams available to serve in the prisons and have evolved practices that make it possible for prisoners to study the Qur'an, attend Friday prayers, limit their diet to that which is halal, and to observe Ramadan. All officers in English prisoners are

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1. JAMES A. BECKFORD ET AL., *MUSLIMS IN PRISON: CHALLENGE AND CHANGE IN BRITAIN AND FRANCE* (2005).

trained in the practices of Islam so that they will be knowledgeable and respectful of Muslim religious practice. According to Beckford, all of the chicken served in English prison cafeterias now satisfies the requirements of halal regulation.

A slightly creaky but broadly tolerant English religious establishment can do these things because religion is on the table. That is the advantage of a religious establishment. There is someone in charge. You know who to go to if you need to deal with religion. From Beckford's perspective, this effort, while far from perfect, has been remarkably successful both in serving prisoners' needs and in minimizing the influence of radical ideology in the prisons of England and Wales.

The French context is quite different. No one officially knows how many French prisoners are Muslim because the French state does not collect such statistics about religious identity, either about the general population or about prisoners, because of the 1905 law guaranteeing the separation of church and state and because of their commitment to *laïcisme*. Sociologists estimate, however, that the percentage of French prisoners who are at least nominally Muslim may be as high as fifty percent. Not only does the French state not officially recognize its citizens or its prisoners as religious, regarding that fact as entirely private, it provides very little in the way of religious services for prisoners, and what it does provide is mostly Catholic. The result is, according to Beckford and his associates, that prisoners supply their own. Self-taught Muslim religious leaders arise from among the prison population—and the many young men in prisons without previous religious training are taught by these often radical prisoner religious leaders.

United States prisons have mostly had a third way of accommodating religion since the middle of the twentieth century. Lacking an established church to structure and institutionalize religion in prison as in England, but also lacking the austere French commitment to secularism, religion in prisons is a hybrid, that is, it is supplied by a largely entrepreneurial group of volunteers who are, in turn, managed by government chaplaincy services. There are many differences across the many correctional departments in the United States, federal and state, some of them regional, but for the most part, the model has been one in which prison chaplains schedule an increasingly diverse array of religious services, conventional ones as well as arrangements for sweat lodges and neo-pagan worship of various kinds, services that are planned by prisoners or offered by outside religious

groups. All must conform to the places and spaces assigned to them by prison authorities.

But faith-based reform is introducing a new model to the United States. Arguing that high rates of recidivism show that secular rehabilitation programs have failed, new residential in-prison rehabilitation programs have been developed that promise personal transformation through intensive Bible-based Christ-centered teaching and communal living. Such programs are being provided both through contracts with private faith-based providers and through state run faith-based prisons. Islam is only minimally accommodated in United States prisons, and, since 9/11, with great reluctance.

Countries with established churches can arguably accommodate religion in a more sophisticated way—if and when they are willing. The government can recognize its citizens as religious and can hire experts to design smart programs. But, as Greenawalt quite rightly insists, that way is not open to the United States for historical and cultural reasons. We would not tolerate the state orthodoxy that necessarily results from government selection and training of religious leaders and development of programs. But we also cannot be French because we are incurably religious, as is evident in Greenawalt's work, publicly as well as in private.

The English program also has its limits. Guards who have been trained in Muslim practice sometimes resent prisoners who are less than observant. Furthermore, Beckford says that when his team went to women's prisons, the Muslim women prisoners said that they did not want visits from imams or arrangements for Friday prayers. They preferred to have female Muslim psychologists or social workers meet with the prisoners on a regular basis.<sup>2</sup> Women's religion is often different from men's religion. Catering to these and other differences is very difficult, even with the best intention in the world.

The most ambitious of the new faith-based programs in the United States is InnerChange Freedom Initiative developed by Prison Fellowship Ministries (PFM). The constitutionality of the InnerChange program, and by extension other such programs, was challenged in *Americans United v. Prison Fellowship Ministries*,<sup>3</sup> an action seeking to enjoin a contract between the State of Iowa and PFM that authorized PFM to administer a wing of

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2. Based on a personal conversation of the author with James Beckford.

3. 432 F. Supp. 2d 862 (2006), *aff'd in part, rev'd in part*, 509 F.3d 406 (2007).

Iowa's Newton Correctional facility.<sup>4</sup> PFM argued at the trial that its program, while faith-based, was not proselytizing and was secular in purpose. InnerChange is designed, PFM claims, to reduce recidivism through the inculcation of universal values. The Bible, they say, is what they use because that is who they are, but it is simply one narrative among many that can be used to teach and internalize values that we hold in common—the values they describe as those of all civilized people. Each person, they say, needs a “paradigm” in order to function. Prisoners are free to translate InnerChange values into the paradigm that works for them, whether religious or secular. The criticism that PFM makes of secular rehabilitation programs is that they cannot work because they are didactic rather than being rooted in a community with a narrative. IFI's is what might be termed a “holistic” approach to prisoner rehabilitation.<sup>5</sup>

While all United States prisoner religion is in some sense “by law established,” in the English sense, the new faith-based programs in the United States re-institute religion as a comprehensive structuring affair intended to coercively re-make individuals into law-abiding citizens. In Greenawalt's sense, they are thus un-American.

Hospital chaplaincies in the United States are also being transformed. A recent challenge to Veterans Administration (VA) chaplaincies by the Freedom From Religion Foundation, *FFRF v. Nicholson*,<sup>6</sup> reveals a change in VA practice such that hospital chaplains, rather than being part of the athletic and recreational department, are now being formally incorporated into the medical team to enable a holistic approach to medical care.<sup>7</sup> All VA patients are given spiritual assessments when they are admitted and recommendations are made as to their need for spiritual care. Spiritual treatment is recommended if patients achieve a low score on spiritual health. The district court in *Nicholson* granted a motion for summary judgment for the VA on the ground that prisoners could formally opt out of such assessments—but the memorandum opinion was replete with generalized approval of the recognition of the spirituality of all hu-

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4. I served as an expert witness on behalf of the complaining prisoners.

5. See WINNIFRED FALLERS SULLIVAN, *PRISON RELIGION: FAITH-BASED REFORM AND THE CONSTITUTION* (2009).

6. 469 F. Supp. 2d 609 (W.D. Wisc. 2007).

7. This section of the essay is adapted, in part, from Winnifred Fallers Sullivan, *Religion Naturalized: The New Establishment*, in *AFTER PLURALISM* (Courtney Bender & Pamela Klassen eds., 2009).

mans. Such views were also expressed by the Seventh Circuit panel in the oral argument.<sup>8</sup> Spiritual assessments are required by most hospital accrediting agencies and the increasing number of studies correlating religious practice with good health suggest that a time could come in which it is more expensive to purchase health insurance if one is an atheist.

Religion is also re-entering other social service domains. In other words, one could argue that we are now a faith-based nation, again. After a period of separationism, being religious is once more understood to be part of being human, not something that sets you apart. American religion is diverse but American religionists increasingly understand themselves to be in the same business, whatever their tradition. Most of them understand themselves to share a role in ministering to a natural and universal aspect of the human, an understanding that that is self-consciously resistant to an imagined secular enlightenment anthropology that is sterile and mechanistic.

The arrangement Greenawalt describes is receding. Disestablishment is coming to mean less privatized pluralism through the separation of religion(s) from public life and more a permeable and inclusive public accommodation of the religiousness of all Americans. Government funding *and* endorsement of religion, heretofore regarded as taboo, are becoming constitutionally plausible. Separationist ideology simply no longer has the purchase it once did in the United States. In part, this is so because it was arguably founded in an anti-Catholic bias that has largely lost its relevance. It is also so because of the political strength of conservative evangelical Christianity in the United States. Yet, something more fundamental is at work, in my view, a shift in the public understanding of what it means to say that humans are religious—a shift in religious anthropology. Religion is being naturalized. As it is being naturalized, it is becoming a part of the domain of government again in new ways.

The descriptive divisions between the church and the state, and between persons “of faith” and persons *not* “of faith,” on which separation law depends, no longer makes sense. Such divisions can only be made on a doctrinal basis by established religious or legal authorities who define insiders and outsiders. Such authorities no longer exist in the United States. Virtually all

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8. On remand, *Nicholson* was subsequently dismissed in compliance with the *Hein* decision limiting taxpayer standing. *Hein v. Freedom From Religion Found. Inc.*, 551 U.S. 587 (2007).

Americans, however orthodox their asserted religious identities, Protestant or Catholic or Jewish or Muslim, or whatever, claim the right to associate themselves with religious communities—and religious ideas and practices—as they see fit, to change their religious identities and associations at will, and to “mix and match” religious traditions. That right is understood to be authorized by political, legal, and theological narratives and texts. In theory, the high value placed today in the United States on choice reflected in this new assumption of religious authority includes the choice to be nonreligious. But, as a political matter, it is not understood as entirely optional simply to exempt oneself from what is seen by many across the ideological spectrum to be a necessary correction to the Enlightenment, a necessary component to being human. Atheists feel threatened. Religion today in the United States is a fragmented, fissiparous affair, highly resistant to fixed identities and associations, but it is also remarkably resilient. To be American is no longer to be Protestant—but hard-edged atheism is not really acceptable—or even believable. You must be religious, but your religion can be “whatever.” *Really* whatever. Not just Protestant, Catholic, or Jewish. As long as you do not espouse terrorism or child abuse. Eisenhower’s famous open embrace of religion as necessary for American national well-being is being reinvented and radicalized.

The new religious phenomenology, part of a worldwide shift away from the secular, secularism and secularization, increasingly, in my view, makes historical curiosities of the free church model and of the careful doctrinal distinctions documented in the Greenawalt volumes.<sup>9</sup>

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9. Among the raft of new works reconsidering the inevitability of secularization, I have found the following particularly helpful: AFTER PLURALISM (Courtney Bender & Pamela Klassen eds., 2009); TALAL ASAD, FORMATIONS OF THE SECULAR: CHRISTIANITY, ISLAM, MODERNITY (2003); JOSÉ CASANOVA, PUBLIC RELIGIONS IN THE MODERN WORLD (1994); GRACE DAVIE, EUROPE: THE EXCEPTIONAL CASE: PARAMETERS OF FAITH IN THE MODERN WORLD (2002); SABA MAHMOOD, POLITICS OF PIETY: THE ISLAMIC REVIVAL AND THE FEMINIST SUBJECT (2005); VINCENT PECORA, SECULARIZATION AND CULTURAL CRITICISM: RELIGION, NATION AND MODERNITY (2006); CHARLES TAYLOR, A SECULAR AGE (2007).