

Sullivan, “Cemetery Anarchy”

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“Cemetery Anarchy: Religion, Religious Freedom, and the Rule of Law”

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Introduction

The absolute need for legal protection for religious freedom has never had more currency than it does today, in the U.S. . . . and around the world . . . in the media, in international politics, in religious communities . . . Even people who have little or no use for religion reflexively bow to the need for legal protection for *religious* freedom. Yet one does not have to know much about the deeply ambiguous and constantly changing nature of religion in human history to be surprised that it should deserve such special privileging in law.

Today, rather than engaging the philosophical debate about the importance of religious freedom or attempting a re-telling of the narrative of how we arrived at a point of such rhetorical consensus, although these are both worthy endeavors, I will take a close look at one recent U.S. religious freedom trial, with a view to trying to persuade you that taking *religion* seriously can illuminate law. What I mean by “taking religion seriously” is not valorizing it, but I mean taking seriously the rapidly transforming modern social and cultural phenomenon of religion and how it is shaped by and, in turn, shapes modern “secular” law.

What is valuable for law about a religious studies approach to the study of religion is that any answer to the question “What is religion?” is provisional. One tacks back and forth, in Larry Rosen’s sense, between historical and anthropological work that

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tries to refine a description of those activities that look like religion—or that people have called religious—and a genealogical and structural concern with how the idea has developed and is used today in different contexts. What one finds is that “religion” is a tremendously unstable concept, too unstable, perhaps, to bear the weight of constitutional or human rights status. As historian of religion Jonathan Z. Smith insists, “religion” is a second order category invented by scholars in the early modern period to explain the European encounter with other religions. And, as Talal Asad adds in his call for an anthropology of the secular, the goal of the modern state in promoting tolerance and the privatization of religion as well—as in negotiating the line between the secular and the religious and the moral—is *not* freedom, but control.

Religion presents a particularly difficult question for law. While in some ways the problem presented is similar structurally to other kinds of difference—to the general problem of accommodating pluralism of various kinds. Religion presents a special problem—because it makes normative claims, normative claims often embodied in institutions and texts, of its own. It is both a rival to and a subject of law—the rule of law . . . but you already know all of this because this is one place where a serious conversation about the intersection of religion and law is happening.

Warner v. Boca Raton

Today I am going to talk about a religious freedom trial in Florida at which I was an expert witness and about which I wrote my second book. Because I find that one antidote to mindless cheerleading for religious freedom is to get down to the level of real people and the daily-ness of the legal encounter with religious practice—the religious

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practice of ordinary American Protestants, Catholics and Jews, not the practice of exotic religionists.

Warner v. Boca Raton was the first case brought under the Florida Religious Freedom Act (RFRA) and was tried in federal district court in the Southern District of Florida in March 1999 before Judge Kenneth Ryskamp. There is much to say about this trial but, in essence, this book asks what happens if you take *them* at their word—those who say they want to protect *everyone’s* religious freedom . . . and that is what most religious freedom advocates today say that they want. Even the advocates of a Christian America have learned the language of inclusion. In the state’s brief on appeal in defense of the Florida RFRA act, Governor Jeb Bush made clear that virtually anything that anyone sincerely claims as a religious belief counts. Anything. The only conduct that is excluded is that “motivated by a secular belief or philosophy.” “Simply because some individuals may not hold beliefs of ancient origin does not mean that these beliefs are not religious.” According to the Governor, *all* of it is protected by the Florida RFRA law from being “substantial burden[ed]” by the state—unless the state can show a compelling interest and the least restrictive means.

In other words, the Florida law, like its federal predecessor, attempts to reverse the *Smith* decision and provide its adherents with religious exemptions from neutral laws of general application. Taken at face value, the law is a breathtaking grant of privilege and astonishing in its epistemological naiveté. The result of such inclusive impulses has been, for the most part, in my view, judicial nonsense and judicial nullification. Just read the opinions in *Yoder* . . . But let me tell you about the trial.

The trial concerned the Boca Raton City Cemetery. The Boca Raton Cemetery is a municipal cemetery in the style of a memorial garden. Cemetery regulations provide that the only memorials that can be placed on graves are small flat markers that are flush with the grass. The City's cemetery expert testified that a garden style cemetery "diminish[es] the starkness of death," is easier to maintain, and is "easier from a marketing and sales perspective because memorials are standardized and products and services can be packaged into a combination sale." As a current advertisement for hospice services on the sides of some buses in the city of Chicago announces: "Make death comfortable."

Over the years in the Boca Raton Cemetery, however, beginning in the mid 1980's, city workers allowed people to do more than was permitted. Over 400 Protestant, Catholic and Jewish families built homemade, above the ground, memorials—or shrines—on the graves of their deceased relatives . . . For example,

--A Lebanese immigrant who calls himself a born-again Christian made a four-foot high wooden cross, covered with silk lilies, to place on his wife's grave—as a witness, he said to their faith in the resurrection.

--A Jewish couple from England whose son had died young in a car crash, put a stone Star of David on his grave and surrounded it with a fence and plantings to prevent people from walking on it, as they said they had been taught Jewish law required.

--Two Cuban sisters whose brother had committed suicide placed a large statue of the Sacred Heart and planters with "offerings" of flowers on their brother's grave. They visited and prayed for his salvation daily, because they believed that suicide was an unforgivable sin.

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. . . and there were many more—carefully assembled but modest collections of statues, flowers, vases, inscriptions, crosses, stars of David. The aesthetic reminds one of roadside memorials at the scene of car accidents or the impromptu shrines built at the scenes of terrorist attacks. All of these assemblages were in violation of the regulations but were tolerated, even at times encouraged by, the cemetery management who openly admired the care and piety of the plaintiffs.

After about fifteen years—beginning in the late 90’s—the City decided to start enforcing the regulations and announced that everything on the graves that did not conform to the regulations would be removed. The City gave as reasons safety and economic considerations. Some suspected that there were also class considerations—that the little home-made installations were considered tacky and “not Boca.” After an attempt to settle the matter through the City Council, the local ACLU brought a lawsuit on behalf of those who had placed the nonconforming memorials on the graves. I was asked to be an expert witness on behalf of the plaintiffs. I ended up staying for the entire week of the trial to serve as a consultant to the plaintiffs’ lawyers—which was a lot of fun for a former litigator.

The Boca Raton plaintiffs claimed that enforcement of the cemetery regulations “substantially burden[ed]” their “exercise of religion”. The City responded that what the plaintiffs had done was not *mandated* or *required* by their religions so that what they had done was not really an “exercise of religion,” in the words of the statute. What they had done amounted to nothing more than what the City repeatedly called “purely personal preference.” Allowing people to do what the plaintiffs had done would lead, they repeatedly said, to “cemetery anarchy.”

The City insisted on this showing of compulsion although the Florida statute had deliberately and specifically attempted to cure a frequently criticized aspect of federal RFRA jurisprudence in its definitions section. Federal judicial interpretation of RFRA in some circuits had limited RFRA protection to practices central to or mandated by a particular religion. The Florida Act, unlike the federal RFRA, contains in its definitions section the explanation that an “exercise of religion” is “an act or refusal to act that is substantially motivated by a religious belief, *whether or not* the religious exercise is compulsory or central to a larger system of religious belief.” But, as you will see, that effort was defeated by the fear of anarchy.

The testimony of the plaintiffs was very moving. Eleven plaintiffs testified concerning their actions in the cemetery. They said that they had chosen the cemetery because they had admired the many personalized memorials already there, because it was close to their house or to their place of worship, and because they liked the religious pluralism of the cemetery. The immigrant plaintiffs talked about the lack of religious freedom in their home countries, fusing religious and political sensibilities. Each told how and why they had selected the items—items that made the small spaces holy and reminded them of the relatives who were buried there—mostly they referred to family tradition and religious upbringing to explain their choices. They all talked about their frequent visits to the graves.

The City insisted that the plaintiffs’ religions had not *required* them to build “vertical” memorials—that in each relevant religious tradition it was permissible to use flat memorialization. The City seemed to imply that religion is the kind of thing that if you look in one of the books belonging to a religion you will find a lot of rules about

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what you are supposed to do—including very specific rules about what to do on a grave—a kind of guide to proper use. If you are doing something that is not written down somewhere authoritative, the City further implied, then what you are doing is not religious. The religious person was, for the City, someone who follows rules.

The plaintiffs and the religion scholars who testified for the plaintiffs described religious practices that were to some extent improvised—within certain parameters, to be sure—but the religious people they talked about were creative interpreters of their received traditions—people who riffed—if you like—on what they had been taught by their families, in religious education classes, or even on TV. Such improvisation did not make what they did any less religious.

Three religion scholars testified for the plaintiffs and two for the city. The expert testimony about religion in this case is a story unto itself—who was chosen to testify, what they were asked, etc. Its value shares much with social scientific expert testimony generally. While we could attempt to educate the court about religion and religious history, none of us had interviewed the plaintiffs or done studies of the effects of the enforcement of the regulations in their lives. There was apparently little thought given by the lawyers to the disciplinary coherence of this testimony—and one could well ask what the evidentiary basis for our testimony was—but there we were—displaying religious studies in all its anarchic creativity—because the nature of religion was almost totally up for grabs in this trial and, more importantly, because courts in a deregulated religious context have no authoritative way to structure religious knowledge. As became more and more evident as the trial progressed, everyone is an expert on religion in the U.S. Specialized knowledge about religion is suspect.

The expert in Jewish law, Michael Broyde, an orthodox rabbi who teaches at Emory Law School, gave the judge an eloquent introduction to a certain style of Jewish legal reasoning. He testified that Jewish law is found in a number of places, in the Bible, in the writings of the rabbis, and in the customs of the people. He said that the things that the Jewish plaintiffs did to protect the grave, while not explicitly required by Jewish legal texts, were consistent with a tradition of Jewish burial practice that could be traced back to Jacob’s raising a monument to Rachel, as recorded in the book of Genesis. He talked of differences in the Ashkenazic and Sephardic traditions. But Broyde focused particularly on the concern expressed in Jewish law from the beginning of rabbinic Judaism about the removal of items that are already on a grave. The Emory rabbi readily agreed with the City’s lawyer that it would be legally permissible to have a Jewish grave without a raised memorial, but he was also emphatic that the writings of the sages are very clear that an existing burial site must not be disturbed or altered—because of the honor due that holy place.

The second expert who testified for the plaintiffs, John McGuckin, was an early church historian. Professor McGuckin teaches at Union Theological Seminary in New York. He is Irish—but born in England—and has since become a Serbian Orthodox priest. His shoulder length hair, and large pectoral cross, made quite a stir in the South Florida courtroom. One of the plaintiffs leaned over to me and said “It’s like having Jesus in the courtroom.” McGuckin testified that what the Christian plaintiffs, Catholic and Protestant, had done was very typical of what he called Latin piety—that is, the religious practices of Roman Catholics in southern Europe. He also talked about the importance of gravesites to Christians since earliest times.

One might well ask why an Orthodox priest was representing Christianity in a U.S. courtroom and why early Christian history was relevant in explaining the burial practices of contemporary Christians in southern Florida. As for the first, I think there was little understanding in the courtroom of the differences among Christian churches. As for the second, McGuckin's testimony was offered to rebut the testimony of one of the City's expert, who had written in his report that Christians were really not very interested in burial because they were focused on the next life: "What will happen to the body on the day of Resurrection is momentarily important," he said, "how it is cared for or memorialized between the present moment and that day is not a serious or enduring concern."

I testified about U.S. religion—about the fact that without an established church, Americans are very much on their own in determining what religious practices they deem important so that it is not necessarily appropriate to look to textual or institutional authorities for a ruling on what religious practices are important in a particular person's religious life. In closing the lawyer for the City recalled my testimony:

At the end of the trial the last question that I asked of Winnifred Sullivan, I think, takes us to a very helpful point. I asked her what would the Boca Raton cemetery be like if we adopted your approach, which is that any religious shrine or any shrine that is put on these graves by people, and they say that they are motivated by their religious beliefs, what would the Boca Raton cemetery look like? And she said that it would celebrate, maybe these are not the exact words, but it would celebrate the diversity of the religious beliefs in Boca Raton. And really what that told me was that the position that the plaintiffs are taking, and that their experts are taking, is to create a situation where basically you would have cemetery anarchy (Quoted in Sullivan 2005, 89).

The City's lawyers also called two scholars of religion. They testified not as experts in particular religious traditions but as experts on religion in general and were each asked

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to devise tests that would tell a court when a particular religious practice was protected by the act.

The first of the city’s religion experts testified that religion can be divided into two types, “high” religion and “low” religion. “High” religion, he said, is textual, institutional, and male. “Low” religion, he said, is oral, home-based, and female. I am not making this up! Plaintiffs’ practices at these graves, he said, were “low” because Protestantism, Catholicism and Judaism (his words) do not, he said, have text-based rules requiring their adherents to place *vertical* memorials on graves. The first kind, “high” religion, should be legally protected, he said. The second could not be.

The second of the city’s experts in religion, the expert mentioned earlier in connection with Christian attitudes toward burial, described religious practices as falling either near the center or near the periphery of a particular religious tradition. What the plaintiffs had done, he said, fell near the periphery. Those near the center should be protected while those at the edge should not be.

While the testimony of and about the plaintiffs focused on the subjective experience of the individual, contextualizing plaintiffs activities in the graves within long, complex, and changing histories, as apparently required by the statute, the city’s lawyers and experts focused on whole religious traditions. This difference meant that the plaintiffs were asked in some sense to be orthodox representatives of religious communities.

One of the most disturbing periods of the trial was the cross-examination of the plaintiffs by the city’s lawyers. If you claim that your religious freedom has been infringed, you must, of course, prove that you are religious. So . . . the plaintiffs were asked whether and how often they prayed and went to church or synagogue—and they

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were catechized concerning their knowledge of scripture and religious law—and whether they had consulted with religious authorities before decorating the graves. Mostly the plaintiffs were puzzled by these questions. Sometimes they clearly felt harassed. They did not need to look in books or talk to priests or ministers or rabbis to know how to bury their relatives in a holy way—they learned that from their families. When one of the Jewish plaintiffs said that he did not belong to a synagogue, the city’s lawyer implied that he was not a good Jew—and by implication, then, not entitled to the law’s protection. Let me read an excerpt from the trial:

On cross-examination, Bruce Rogow asked Ms. Monier about her choices regarding the protection of her brother’s grave, mentioning each item, and concluding with these questions:

Q: But you chose the method of denoting the perimeter of your brother’s grave, did you not?

A: Yes.

Q: That was your choice?

A: (No verbal response, nodding head).

Q: There was nothing in your Catholic teachings that said to you this is the manner, the manner that you have used to denote the perimeter of your brother’s grave?

A. No.

During his cross examination of each plaintiff, Rogow emphasized the personal nature of the particular choices that were made about the decoration of the graves,

apparently seeking to prove that the plaintiffs were monadic creators of unsanctioned and idiosyncratic new religious forms. (Sullivan 2005, 39).

Law demands an essentialized religious field. The odd thing about these cases to me—and this case is by no means unique—is that although the constitution purportedly guarantees religious freedom in this country you cannot avail yourself of the protection of these laws unless you conform to the court's idea of what being religious is.

Judge Ryskamp was faced with the task of being the first interpreter of a state statute. Rather than exegeting the language of the statute in a straightforward manner, he reviewed the evidence of the experts and the history of the RFRA statutes, state and federal, and then added to the confusion by devising his own test. In order for a religious practice to qualify for protection under the Florida RFRA, he said, an "exercise of religion" must "reflect some tenet, practice, or custom of a larger system of religious beliefs." Like the definition in the Florida RFRA, his does not sound like a particularly onerous test. Indeed, one could argue that virtually anything a person claimed to be doing for a religious reason could be understood to "reflect some tenet, practice, or custom of a larger system of religious beliefs." That would seem to be the minimal requirement for inclusion in the category. Certainly, everything that the plaintiffs had done would seem to fit within that test. But . . . all of this discussion of tests turned out to be window-dressing. Judge Ryskamp agreed with the City that what the plaintiffs had done was the product of "purely personal preference." He said that he believed that they were sincere but that what they had done was something like a decorating choice.

There is a theatre of the absurd quality to all of this—appropriate perhaps in this week in which Harold Pinter was awarded the Nobel Prize. One result of the application

of this kind of process in determining whether a person's actions are religious is to suggest that people do not really understand their own religion—and that the courts do. I think that such a result would sound a lot like established religion to the founders. In the end, then, in this case, although Judge Ryskamp said often during the trial that Americans were completely free to believe whatever they liked, the federal court set itself up as a court of heresy, ruling eventually that plaintiffs' practices were not sufficiently orthodox to deserve protection. Ironically, law seems to be most comfortable when religion looks like law—when it has clearly defined rules and ways of enforcing them—like recognizes like.

Two modernist versions of the relationship of religion and law—one in which religion is about rules, like modern positivist law—like recognizes like—the other in which the individual is privileged over the religion and law protects the individual. I cannot see how we in the U.S. have a choice but it will be interesting to see whether modernizing Islams will invent new ways to negotiate the modern sacred/secular divide and whether they can build on the differences already noticed by anthropologists of modern Islam like Rosen, Bowen and Asad.

Conclusion

What cases like the *Warner* case remind us—as well as the much good scholarship expanding our notions of what law and religion are—is that religion is not a natural category. "Religion" has a history—a modern history. As Talal Asad, Tomoko Masuzawa, and Jonathan Z. Smith have taught us, the sacred and the secular, and their division is highly dependent on time and space. Its use as a category for law is, as a result, extremely problematic. Numerous models of religion circulated in the courtroom,

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models based on internal psychologies, on invented traditions, on structures of hierarchy, on aesthetic interpretation of the material record, on political theory, among others. The testimony of the experts was, in some ways, a parody of religious studies, a parody of the social sciences generally--while the testimony of plaintiffs' and defendants' experts spoke to different modernist conceptions of law, one naively open-textured and affirming, the other closed and controlling.

The problematic nature of religion as a category for law does not end the conversation. It merely says that to name something as "religious" or not does not address what is at stake. One of the most interesting aspects of David Engel's new article on the decline of legal consciousness was his description of the increasing adoption by some Thais of a new transnational Buddhism, a Buddhism that is more mobile and focused on self discipline. This is the kind of religion that best fits with modern liberal political theory. One can see similar developments in Islam (Charles Hirschkind's work on the use of cassette sermons in Egypt). Local religion that is focused on things and places and folk practices—and graves are quintessentially local and placed—is problematic for the rule of law.

All law is also about religion. Because that is so—thinking about religion can give us an angle from which to view law. One way to resist the assumptions of autonomy, neutrality, secularity and universality, made by modern legal positivism. In other words, religion is good to think about law. I thought I might end with some of the current options:

1. Most common in this country is the notion that relating religion to law means thinking constitutionally. It means interpreting the religion clauses of the first amendment. The

assumption is that while law and politics should be secular—or at least neutral—religion should be free. This only works if you have a very particular notion of what religion is and are willing to enforce it and you are willing to defend the privileging of religion and discrimination against the non-religious. The question is: what words does one use to be fair about religion, legally speaking, in a pluralistic liberal democracy? If that is impossible, as I argue here, then religion must be defined universally—such as being equated with “conscience”—and the question of regulating difference is about equal protection.

2. Religion can be thought of as social, cultural, and institutional—which is more common in Europe. That allows the state to do certain things.
3. Religion is about anthropology—about understandings of the human person—marriage law—reproductive technology—and epistemology—in education—in the delivery of transformation social services like prison rehabilitation and substance abuse counseling.
4. Religion is an aspect of globalization—religion as a transnational field—linking local groups—largely unregulated—about transnationalism, the global and the local.
5. Religion makes rival normative claims—usually religion appears in an antinomian guise in the U.S. context—normative pluralism—Personal law jurisdictions (John Bowen)
6. Religion is about post-colonialism, genealogy of modernity, secularism (Talal Asad, Sally Merry).