Maine Law Review

Volume 65 | Number 2 Article 19

January 2013

Introduction: Symposium: Law, Religion, and Lautsi v. Italy

Malick W. Ghachem
University of Maine School of Law

INTRODUCTION

Malick W. Ghachem[*]

This symposium offers a rare opportunity to see three of the finest minds in Law and Religion scholarship from both sides of the North Atlantic at work. Held at the University of Maine on March 23, 2012, the symposium featured a keynote address by Professor Joseph Weiler of New York University Law School.[1] Professor Weiler's remarks were occasioned by a 2011 decision of the European Court of Human Rights ("ECHR") in Strasbourg, *Lautsi v. Italy*, upholding the constitutionality of the display of the crucifix in Italian public school classrooms under the European Convention of Human Rights ("the Convention").[2] The principal respondents were Pierre-Henri Prélot of the University of Cergy-Pontoise in France and William Marshall of the University of North Carolina School of Law. The dialogue between these three great students of European and American constitutional law taps into some of the most urgent and controversial issues on the church/state horizon.

In his 2005 book *A Christian Europe?* (published in French and Italian editions, among others, but not yet in English), Weiler argued that Europe should be able to freely embrace its Christian heritage.[3] As Prélot reminds us, this argument was first made in connection with the 2004-2005 debates over whether to include a clause acknowledging the relationship between Europe and Christian values in the preamble of the proposed constitutional treaty of the European Union. That treaty was rejected by French (and later also by Dutch) voters in a May 2005 referendum and so never came into effect. Although keyed to that debate, Weiler's book also developed a more general set of arguments about the implications for European identity of acknowledging or denying Europe's Christian traditions.

Around this same time period, the *Lautsi* case began winding its way up through the Italian court system and, eventually, towards the ECHR. The display of the crucifix in Italian public schools dates back to a pair of royal decrees from the 1920s, and even further back to an 1859 law of the Kingdom of Piedmont-Sardinia requiring such display. (Piedmont-Sardinia was soon to be united into the new Kingdom of Italy during the Risorgimento of the 1860s that created the modern Italian nation.) After the Italian Council of State sustained the constitutionality of this practice as a matter of Italian constitutional law in 2006, Lautsi, the parent of an Italian public school pupil, brought a challenge before the ECHR. The ECHR Second Chamber – which we can roughly analogize to a three-

---

* Associate Professor of Law, University of Maine School of Law.

1. The lead organizer of the symposium was Francesca Vassallo of the University of Southern Maine's History and Political Science Department. Martin Rogoff of the University of Maine School of Law and myself were co-organizers. Maine Law's Franco-American Law Seminar, founded and directed by Professor Rogoff, made possible the participation of colleagues and students from the law schools in Le Mans and Rennes, France. The conference benefitted from the support of the Florence Gould Foundation, among other sponsors.

2. Lautsi v. Italy, 54 Eur. Ct. H.R. 3 (2011).

3. For the French edition, see JOSEPH H.H. WEILER, L'EUROPE CHRÉTIENNE? UNE EXCURSION (2007).

member federal appellate panel in the American system – found the display of the crucifix to be in violation of the Convention. That ruling was then appealed to the full court of the ECHR, which reversed the Second Chamber. Weiler argued the case before the *en banc* court on behalf of a number of third-party EU-member states (Italy was represented by separate counsel).[4]

Weiler's basic impulse is to raise questions about two understandings of the law of church and state: American neutrality and French *laïcité*, those distinctive products of the American and French revolutions, respectively. He writes that the idea of "neutrality," a longtime (if increasingly on-the defensive) backbone of American religious liberty law,[5] is often anything but, for it tends to privilege secular over religious positions whenever the issue of religion's place in the public square arises. The French tradition of *laïcité*, in his view, has much the same effect, though Marshall's point that American church-state law often struggles to reconcile neutrality with competing free exercise and other values suggests a less cozy relationship between these two traditions.

But if not neutrality or *laïcité*, then what? Mistakenly held out as a right-wing spokesperson for a theocratic state in some quarters, Weiler embraces the old ideal of toleration. Toleration, he suggests, has come upon hard times at the hands of those purporting to act in its name: the inheritors of the Lockean, Madisonian, and Jeffersonian commitment to freedom of conscience. Not for Weiler, the late eighteenth-century skepticism of George Washington that toleration as an ideal is sufficiently robust to protect liberty of conscience. In a 1790 letter to the Hebrew Congregation of Newport, Rhode Island, Washington famously dismissed the concept of toleration for presuming that it was only "by the indulgence of one class of people, that another enjoyed the exercise of their inherent natural rights."[6] The First Amendment religion clauses, in other words, embodied a regime of right rather than toleration: their operation did not depend on whether despised minorities of the day happened to find favor with those (temporarily) in power.

Weiler's most profound contribution to this debate is to encourage us to think about liberty of conscience not as a narrow function of the rights-bearing individual but rather in the broader political sense of compromise between those of religious and non-religious sensibilities. The *Lautsi* case matters because it permits a reasonable constitutional reconciliation between the *laïque* and non-*laïque* states of Europe and so gives to the rest of the world an example of how liberal democracy and religious sensibilities can coexist. He implies that this compromise will also protect and even advance the interests of European citizens who do not share the "official religions" of their states: states, that is, with modern establishment traditions such as Italy, Britain, and Denmark.

On that last point much depends. What kind of a claim is Weiler making here? Is it a normative thesis about the proper relationship between a national state and its citizens at the substantive level of religious liberty law? When Weiler speaks of

4. Professor Weiler's oral argument can be seen and heard online at http://dotsub.com/view/65bc5332-aa10-4b8c-bc50-d051e8f4fcc7 (last visited Mar. 17, 2013).

5. For a recent defense of the neutrality tradition, see ANDREW KOPPELMAN, DEFENDING AMERICAN RELIGIOUS NEUTRALITY (2013).

6. George Washington's Reply to the Hebrew Congregation in Newport, Rhode Island (Aug. 18, 1790), http://gwpapers.virginia.edu/documents/hebrew/reply.html.

religious liberty as a communitarian rather than individual right, he engages us at this level of analysis. In other respects, however, he seems to have in mind a primarily structural thesis about how best to preserve state-to-state "toleration" in a non-federal union such as Europe's (one that for financial reasons has seemed conspicuously fragile in recent times). Prélot's critique turns on this distinction. Like Marshall, he questions whether it is true that the French and American models of democracy entail consigning religion to the private sphere in the same way. In his oral argument before the ECHR, Weiler pointedly warned the judges of the harms that would flow from Europe's drift towards an American non-establishment pole. Prélot's analysis suggests that the harms at issue here are those of American-style unitary constitutional law (one rule for all fifty states), not those of substantive American religious liberty law. He concludes, regretfully, that *Lautsi* represents the end of a certain modern European tradition of separating religion from politics: Christianity is now a *de facto* part of substantive European constitutional law.[7]

Marshall shares Prélot's anxiety that Weiler has won the war over religion after losing the 2004 battle over the (failed) EU Treaty. He is sympathetic to Weiler's critique of neutrality as a misleading abstraction, but finally speaks from the eighteenth-century voice of Madison and Jefferson: non-establishment prevents the corruption of religion by governmental oversight and the division of society into warring religious factions, each competing with the others for public recognition. Marshall associates the first of these dynamics with a revolutionary-era, evangelical understanding of separation that is only partly captured in Weiler's concept of "freedom from religion." The paradox of this evangelical version of separation is that it conceives of the secular state as an instrument for the protection and promotion of faith. Locke walks hand in hand with a robust church; in this way the American experiment still lives as a model for getting beyond the Old World's history of religious strife.

But do free exercise and non-establishment introduce their own kind of competitiveness between religions? A recent study shows that Muslim Americans are significantly less likely to prevail on free exercise claims in federal court than followers of other religions.[8] Do we have a culture of "comparative free exercise success" in the making? Do secularism and non-establishment really remove the jousting between religions for the approval of the state, where that approval is framed as a matter of judicial acceptance of religious liberty claims rather than

---

7. On the distinction between American-style separation of church and state and the European separation of religion and politics, see James Q. Whitman, *Separating Church and State: The Atlantic Divide*, *in* LAW, SOCIETY, AND HISTORY: THEMES IN THE LEGAL SOCIOLOGY AND LEGAL HISTORY OF LAWRENCE M. FRIEDMAN 233, 233-37 (Robert Gordon & Morton Horwitz eds., 2011).

8. *See* Gregory C. Sisk and Michael Heise, *Muslims and Religious Liberty in the Era of 9/11: Empirical Evidence from the Federal Courts*, 98 IOWA L. REV. 231 (2012) (finding that Muslim Americans are slightly more than half as successful as other religious liberty claimants in the federal courts, and concluding that this discrepancy is most likely due to judicial internalization of popular associations of Muslims with terrorism). The evidence that Sisk and Heise adduce is significant, but the methods they bring to bear on that evidence are unsatisfactory. Statistical analysis and inferences based on social and cognitive psychology, by themselves, cannot substitute for an analysis of what judges actually say. *See* Malick W. Ghachem, *Religious Liberty and the Financial War on Terror*, 12 FIRST AMEND. L. REV. (forthcoming Fall 2013).

theocratic endorsement of particular faiths? Europe's continuing difficulties in integrating Muslim communities makes the American experience in this respect seem like a success story, but Weiler's intervention suggests that there may be hidden, or at least less visible, costs to that success.

The rich and lively symposium that follows encourages us to think hard about this and other questions. I want to conclude by thanking the editors of the Maine Law Review for their work on this dialogue, and Professors Weiler, Prélot, and Marshall for revealing to us so powerfully the lingering presence of the Atlantic revolutionary past in the law of religious liberty.