
WHEN GOD ISN'T GREEN: SOME THOUGHTS ON THE THOUGHTS OF NAGLE AND SCHINDLER

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What a pleasure it is to discuss my book with two such talented and creative scholars as John Nagle and Sarah Schindler, first at a live mini-symposium and now online.¹ Even in the few short pages allotted here, Nagle and Schindler have raised so many interesting points that I couldn't possibly address them all. In particular, Nagle's suggestion that allowing wind farms to kill bald eagles but not allowing Native Americans to do the same "deserves a better explanation" and Schindler's query about the relative ranking of religious practice and food consumption are so challenging and complex that I think it's better to let them stand as is rather than hazard some half-baked theories of my own. Instead, I will focus my comments on three sets of issues that find their way into both Nagle and Schindler's comments—namely (1) the cumulative nature of environmental harms; (2) the choice of regulatory and other options that government might choose from when dealing with religious practices that harm the environment; and (3) the worth of travel scholarship generally.

First, then, let me say a few words about the book in connection to the issue of cumulative harms. I appreciate both Nagle and Schindler's observations that although the contribution of religious practices to environmental degradation may be relatively small compared to other sources of contamination, such as manufacturing and transportation, the contribution may nonetheless be more important than it would otherwise seem because of the cumulative nature of environmental harms—harms that might not be particularly significant in themselves can become significant when combined with already existing harms from other sources. I am particularly excited to have learned from Professor Schindler that my book "fall[s] within the literature addressing what are known as 'environmentally significant individual behaviors.'" Who knew? It's great to find out that your work falls within a literature, especially when you didn't even know that such a literature existed.

I do want to quibble a bit with Schindler's suggestion that without the cumulative aspect of these environmental harms "there likely wouldn't be a problem (or a book)." My response to this also starts to get at Schindler's second point in her essay regarding how we might know whether a given harm is significant enough for the government to address, given all of the other sources

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¹ Paul Horwitz was also present at the live symposium; for the record, he is also talented and creative.

of environmental harm that exist, although my response hardly answers that difficult question. My only point here is that even if the environmental harms stemming from religious practice do not contribute significantly to the overall degradation of the environment, there would still be a problem (and a book) because many of the environmental harms that come from religious practice have substantial local and immediate impacts on the people and communities located in the specific area where the practice occurs.

Take for instance the burning of joss paper in Singapore. Compared, for example, to the impact on air quality in that tiny island nation caused by the burning of forests in Indonesia, the impact on air quality from joss burning is concededly minor as an overall matter. For specific individuals, however, who live near a temple where burning takes place or in an apartment building where someone is burning joss on the next patio over, the minor contribution of joss burning on air quality in Singapore will be cold comfort, especially if those people happen to have asthma or some other respiratory illness. Similarly, for those specific people who would like to enjoy a particular small river in India that has been destroyed by idol immersion or a lake in Taiwan whose ecosystem has been ruined by mercy release, the percentage of aggregate environmental harm contributed by those practices is likely irrelevant—what matters is that they cannot use the lake anymore, or that their enjoyment of the lake has diminished. And so, even in the absence of the cumulative harm phenomenon, the government would still need to make choices about how to balance religious freedom and the environment, and those choices would still be difficult and interesting enough, I believe, to warrant a book.

Second, on the question of how government ought to approach these religious practices that harm the environment, I am heartened to learn that both Nagle and Schindler appear to agree that top-down regulation is not the best answer. Rather, some combination of education, collaboration, and what Schindler, citing Lessig, calls “architectural solutions” would appear to be better choices, at least in the first instance. In my view, government-private collaboration, which is a staple of environmental policy in many other contexts,² would seem ideally suited for the context of religious practice. Schindler’s question—“I would like to ask Jay whether the religious practices that he describes in the book are more akin to norms or laws”—is a really interesting one, and it is not particularly easy to answer. I think I’d suggest that it depends on the practice and perhaps even the person engaging in the practice. Surely, many religious believers view at least some of their obligations as akin to laws, and in those

² See generally, Antony Cheng, *Build it and They Will Come? Mandating Collaboration in Public Lands Planning and Management*, 46 NAT. RES. J. 841 (2006); Daniel Kemmis & Matthew McKinney, *Collaboration and the Ecology of Democracy*, 12 SUSTAINABLE DEV. L. & POL’Y 46 (2001); David J. Sousa & Christopher McGrory Klyza, *New Directions in Environmental Policy Making: An Emerging Collaborative Regime or Reinventing Interest Group Liberalism*, 47 NAT. RES. J. 377 (2007); Francisco Zamora-Arroyo, et al., *Collaboration in Mexico: Renewed Hope for the Colorado River Delta*, 8 NEV. L.J. 871 (2008).

situations, it will likely be quite difficult for the government to stop them from engaging in those obligations without employing the force of its own laws. On the other hand, not everything a religious believer does in furtherance of his or her beliefs necessarily carries such weight; to the extent the practice is less central, perhaps it can be better characterized as a norm and thus more amenable to softer types of government influence.

At least for some of the religious practices that I examined in my book, it would appear that the core of the practice might be better described as a law, while some of the details surrounding that core might be better described as norms. For instance, the notion that the government of India would ever be successful (assuming this is what it wanted) in convincing Hindus to stop immersing Ganesh idols seems almost impossible to imagine. We might then refer to the practice of immersing idols as a true religious obligation akin to a law. On the other hand, some of the details of that practice which contribute to its negative environmental impact—the size of the idols, painting the idols with lead paint, festooning the idols with jewelry, etc. etc.—might be more peripheral than the immersion itself and thus more akin to a norm rather than a law and thus susceptible to government-influenced change. Likewise with joss burning in Singapore. As I describe in the book, when a locality attempted to ban the practice altogether, the Prime Minister had to get involved to ensure that the practice could continue. On the other hand, Singapore has successfully regulated the size of joss sticks, and one can probably assume that at least some other aspects of the practice (how much joss paper is burnt, where it is burnt, whether it would be acceptable to temples to implement “best available technology” to reduce emissions as is the case in Hong Kong) are similarly peripheral enough to be viewed as norms rather than laws.

Finally, I am delighted that both Nagle and Schindler appreciate the travel aspect of the book. Most research that goes into legal scholarship, of course, is carried out in offices, libraries, and archives, and not on beaches or in jungles. Nagle and I have been competing for a while now to come up with projects that will take us to better and better locales. The book he is working on now that has taken him to nearly forty U.S. national parks thus far may be the best idea yet, although I am currently writing up a proposal for a book that will take me to the moon and at least a couple of the more nearby planets.³ I am far from convinced that I have “outdone” him yet, although I am also not even close to being convinced that a tarantula would be tastier than the muktuk I enjoyed in Alaska (indeed, just thinking about eating a tarantula makes me want to skip lunch). Nagle is certainly correct to sense my wistfulness about not making it to Africa for the book; despite looking for over a year for a religious practice to investigate there, I didn’t come up with anything, and I only encountered the Shembe practice of donning leopard pelts during religious ceremonies after my money for trips had already run out.

³ Not really.

In all seriousness, though, I think there is an enormous amount of value in getting out of the office and visiting places where important legal cases and controversies originated or are currently occurring. My understanding and appreciation of the cases I teach in my Law & Religion class, for instance, have been increased dramatically by the trips I took for Holy Hullabaloo. Now when I write or lecture about *Kiryas Joel*,⁴ for example, or *Lukumi Babalu Aye v. Hialeah*,⁵ I can talk not just about what is on the page of the U.S Reports but also what the village of Kiryas Joel looks like and how fervently the Santeria of Hialeah believe in their faith. I can do this because I have seen those things in person. When I talk about the importance of religious practice to a community and want to use the Ganesh festival in Mumbai as an example, I don't have to rely on pictures and secondhand accounts; I can relate my experience standing on a beach with a million other people watching devoted believers participate in the practice, with all of the sights and sounds and smells that go with it. This depth of feeling and understanding, I can't help but think, must make for better reading and, most importantly, a better classroom experience for my students.

If you would like to know more about how I drank with a cat, however, you'll need to read the book.

⁴ Bd. Educ. Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687 (1994).

⁵ Church of the Lukumi Babalu Aye v. Hialeah, 508 U.S. 520 (1993).