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Religion and Religious Freedom in the COVID-19 Era: Finding Community and Hope

“Religious Freedom in the Age of Coronavirus:  
Legal and Non-Legal Strategies for Finding Community and Hope”

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I. Introduction

[Thank you Governor Leavitt and Professor Clark. We appreciate your messages.]

As I’ve noted elsewhere, I’ve been thinking of the current coronavirus pandemic as presenting a kind of stress test upon us and upon the institutions to which we belong.

Perhaps you remember an engineering contest common in high school, when you were tasked with making a bridge out of balsa wood and glue. With a few basic parameters, we built our bridges, which were then tested to see how much weight they could bear before breaking under the strain. My bridge, as I recall, was neither particularly beautiful nor particularly robust.

Another form of stress test measures how well our hearts work during physical exercise, which becomes increasingly strenuous.

As we strive to practice responsible physical distancing, this is surely a time that is testing the strength and resilience of the bridges that connect us one with another, a time that is trying our hearts.

To shift metaphors, in recent weeks, I have felt as if we find ourselves balanced on a razor's edge, with despair lying on one side and rage on the other. We are already seeing evidence that the toll on mental and emotional health, as well as the economic toll that this crisis is exacting, will be significant, alongside the more obvious public health toll, not to mention the terrible price the coronavirus has exacted on more than 100,000 individuals (and their families) here in the United States, and many multiples of that number around the world. As the health and economic crisis is compounded with racial tension we have a sense that today we are facing three generational challenges all at once.

Today I'd like to discuss several strategies – some legal, some not – that may help us withstand the stresses we are currently experiencing. I'll begin with one preliminary observation, followed by three legal strategies and three non-legal strategies for responding to the Covid crisis.

## II. Preliminary Point

First the preliminary point. Religion and religious exercise are not beyond or outside the law. We must not imagine ourselves to be, or to act as, "outlaws." There is no blanket exemption from legal oversight for religious exercise, no sweeping immunity from state authority. When we speak of freedom of thought, conscience, and religion, we are not talking about absolute rights. Fundamental, yes; absolute, no. More than a century ago, in a 1905 case, the US Supreme Court rejected the argument of a pastor from Massachusetts who objected on religious grounds from compulsory vaccination against smallpox. As the Supreme Court recently reminded us in a case involving a church in California, today, too, religious organizations and religious individuals will be subject to emergency measures that place significant limits on religious exercise.

### III. Three Legal Strategies

At times of crisis, it is perhaps natural to look for new and innovative ways of responding. And in finding solutions to COVID-19, we do need innovation, including in finding treatments and ultimately a vaccination to prevent infections.

But in the case of freedom of religion in the COVID-19 era, what is remarkable is how ready, responsive and resilient are the legal tools in our existing toolkit. We've dealt with crises before (including pandemics), and we have the legal tools needed to address the challenges we are facing now. We need to remember what those tools are and how to use them. These are important not just for judges, but for everyone who executes and enforces the law, as well as for us as citizens.

I will mention three.

#### A. Baseline principles: Rule of law and non-discrimination

First, the basic baseline principles are the rule of law and non-discrimination.

Religious activity cannot simply be completely banned. Governors who have taken the view that religious activity is not "essential," and can simply be prohibited, are mistaken and courts will strike down comprehensive measures that prohibit all religious activity. Religious freedom, including religious worship and the right to gather, are among our most precious, and protected, constitutional rights.

The rule of law includes the requirement that the coercive legal power of the state be enacted and exercised in accordance with the rules stipulated for lawmaking and the exercise of executive and police authority. In an emergency, it is easy for government officials to overstep the bounds of their authority, and to issue sweeping proclamations that may not satisfy minimal rule of law requirements. More

problematic, measures that are implemented at times of emergency too easily become permanent limitations on freedom that outlast the emergency.

The principle of non-discrimination is a basic baseline requirement that the free exercise of religion, including activities and manifestations of religion, not be treated less favorably than similarly-situated activities. To my mind, a close comparison is how states regulate health clubs and fitness centers. Like churches, these are places where people gather in close proximity, touch shared equipment and devices, and where the prospect of particles of saliva in the air is not only possible but probable. Another close analogy is the treatment of gatherings for concerts or the theater. Given the Free Exercise Clause, there may be good constitutional reasons for allowing religious gatherings to happen before health clubs or movie theaters are permitted to reopen, but it is difficult to imagine legitimate reasons for allowing these gatherings while prohibiting religious services of a similar size.

It is also interesting to compare media, social media, and public responses to contagion clusters or hot spots that emerge in these different settings. Too often, both in the US and beyond, a cluster linked to a religious community – especially if it is a minority group, such as orthodox Jews in New York, or a small new religious movement in South Korea – are treated as especially dangerous and even pathological, but similar clusters that emerge from a health club, a bar, or a nightclub are treated as unfortunate and ordinary public health events to be managed sensibly.

#### B. Intermediate principles: Reasonable accommodation

A second important legal principle, which we might think of as an intermediate strategy, is the concept of “reasonable accommodation.” In many areas of the law, including the free exercise of religion, legislation often mandates that reasonable accommodations be made for special needs of groups or

individuals. Examples here might include special needs relating to diet, religious attire, or religious holidays or rituals. As we emerge from this crisis, there will be a number of situations that call out for reasonable accommodation, such as access of patients in hospitals to religious leaders including chaplains, or the performance of rituals that require proximity and touching (think here of “last rites” for a Catholic who is dying, or a baptism, or an ordinance that requires the laying on of hands). It will be reasonable to require those participating in such activities to observe certain restraints (often in the form of guidelines), and a measure of trust between religious and government officials will be necessary, much as it is in the case of other essential activities that are permitted.

I’ve written about three different attitudes that we sometimes take to the concept of reasonable accommodation. The first is to treat special needs as unfortunate exceptions to general and neutral rules that should be granted, at best, reluctantly, ostensibly because they violate the principle of equal treatment. The second is to view reasonable accommodations as modifications or adjustments that must be made by those who would prefer to observe religious precepts or follow the dictates of their conscience. Here the party that must make the accommodation is the person who is required to depart from their convictions. But there is a third, and to my mind, much more attractive way of thinking about accommodations, and it is based on the idea of a hotel or guest house that is provided as a place of sanctuary and abode for the weary traveler. When a stranger arrives, it is possible to turn them away on the grounds that there is no room for them in the inn, but it is also possible to give them a place where they can safely rest their head. We can provide them an accommodation. This attitude towards accommodation reflects what we might call an ethic of hospitality, rather than an ethic of right.

As we emerge from the Covid crisis, it will be interesting to see which of these three attitudes prevails: will we look at religious needs as “unfortunate exceptions” as “sacrifices that must be made by the observant,” or as opportunities to accommodate, to provide an accommodation for, others, including those who may be different or even seem alien?

### C. Higher principles: Compelling state interest and least restrictive means

A third legal principle that is an important part of our legal toolkit for responding to the Covid crisis is the compelling state interest test, which requires that governments use the least restrictive means when limiting religious freedom. The basic idea is that restrictions or limitations on religious activities or manifestations should be no greater than what is really necessary. This will require careful balancing that takes account of actual circumstances, which may change quickly.

In compelling state interest cases, most of the action takes place in the second phase of the analysis. There are two things worth emphasizing. First, it is the government that bears the burden both of establishing that there is a compelling state interest that justifies the limitation, and more importantly, it is the government that bears the burden of proving that there is no less restrictive way of protecting that interest. What we find is that governments are good at identifying compelling reasons to limit freedom, but they are less adept at ensuring that their methods are narrowly tailored to vindicate those compelling interests.

### IV. Non-Legal Strategies

Now for the non-legal strategies.

As a law professor, it is easy for me to make the mistake of focusing exclusively on legal responses to social problems, including the Covid crisis, and as I've suggested, we have powerful and useful tools in our legal toolkit for addressing the challenges at hand. But I've come to believe that as important as juriscentric approaches are, usually more important are non-juriscentric approaches.

Let me mention three non-legal strategies that may be especially apropos at this time.

#### A. Patience, forbearance and restraint

The first is remembering to exercise patience, forbearance and restraint, both with ourselves, and with each other. Speaking personally, I have found my nerves frayed and my emotions heightened over the past several months. I find especially that I am less tolerant of the behavior of others that is full of regard for self and deficient in regard for others.

As a boy, I had a neighbor my age named Mark McKinney who grew up to be a high school football coach. He died tragically from a congenital condition when he was still in his thirties. But before that, he invited me to attend a football game with his team, which as I recall had not won a game all year. I remember vividly the locker room speech he gave to those young men before the game. He emphasized good sportsmanship, and the importance of being “classy.” He used that word with variations over and over – have class, be classy, let’s be known for sportsmanship and class. What I realized then, and what I’ve been reminded of recently, is that he was teaching those boys something much more important than how to behave during a football game. This is a lesson I need to remember as well.

#### B. Be a light, reflect light, seek light

Second is striving to be a light at times of darkness. I’ve been impressed with how often in scripture we are admonished to be a light. For example, in the Sermon on the Mount, Jesus declares, “Ye are the light of the world.” He urges us to not hide our light under a bushel, and to let our light shine. (See Matthew 5:14-16)

We are also taught to recognize Jesus Christ as the light of the world. When we find ourselves incapable of being a light, perhaps we can strive to reflect His light. In John 8:12, Jesus says, “I am the light of the world; he that followeth me shall not walk in darkness, but shall have the light of life.”

Finally, if we are so tired or worn down that we cannot be a light, or even effectively reflect light, when we find ourselves in darkness, let us be seekers after and believers in the reality of light. As the great Bono of U2 has reminded us, “darkness always gathers around the light.” But the New Testament prophet John reminds us, “The light shines in the darkness, and the darkness has not overcome it.” (John 1:5)

In that song, called 13 (There is a Light), Bono reminds us that just as we know the world exists even if we are no longer living, we should not doubt that light exists just because it is dark.

“If there is a light, we can’t always see,  
If there is a world, we can’t always be.  
If there is a dark, now we shouldn’t doubt,  
There is a light, don’t let it go out.”

### C. Human Dignity for everyone everywhere

Third and finally, for the past several years we at the International Center for Law and Religion Studies have been participating in a major global initiative focusing on the idea of human dignity for everyone everywhere. Human dignity is an important legal principle, and it is the foundational idea upon which human rights are based. But recognizing, regarding, and respecting the dignity of all people in all places is also an important strategy for responding, collectively and individually, to the Covid crisis.

Elder Jeffrey R. Holland in his April 2020 General Conference address, A Perfect Brightness of Hope, spoke of the “all hands on deck” war with COVID-19, “a solemn reminder that a virus 1,000 times smaller than a grain of sand can bring entire populations and global economies to their knees.”



Elder Holland goes on to speak of the hopes we have as we emerge from this crisis, including the hope

“for the gift of personal dignity for every child of God, unmarred by *any* form of racial, ethnic, or religious prejudice.

I might add that in the aftermath of the George Floyd death, this emphasis on overcoming all forms of prejudice resonates especially strongly.

Elder Holland goes on to say,

“Undergirding all of this is our relentless hope for greater devotion to the two greatest of all commandments: to love God by keeping His counsel and to love our neighbors by showing kindness and compassion, patience and forgiveness. These two divine directives are still – and forever will be – the only real hope we have for giving our children a better world than the one they now know.”

Focusing on human dignity for everyone everywhere is a useful antidote for the tendency to over politicize the moment in which we find ourselves. In the two years I have spent working on the human dignity project, there are two things that stand out most clearly in my mind.

The first is the generative character of human dignity: Almost everyone has something interesting and insightful to add to our understanding of this concept, which is at once simple and clear, but which is also rich and thick.

Second, human dignity tends to elevate rather than degrade conversations. Most political concepts become divisive quickly. It is possible that human dignity becomes divisive as well, but this idea – human dignity for everyone everywhere – I believe has a greater prospect for elevating our discourse and providing light in a time of darkness than any other comparable concept. This is especially important as

we face these three generational crises--the health crisis, the economic crisis, and the crisis of racism and division.

## V. Conclusion

In conclusion, as we face the stress test of the Covid crisis, I hope we will remember, we are not beyond the law. I also hope we will remember, and use in appropriate and perhaps even skillful ways, the tools in our legal toolkit – observing the rule of law; following the principles of non-discrimination and reasonable accommodation; and ensuring the limitations on our freedoms, including religious freedom, last no longer and are no greater than necessary, that the restraints are narrowly tailored and represent the least restrictive means of protecting public health and safety.

As we think about non-legal responses, I hope we will try to be patient and exercise forbearance and restraint, with ourselves and each other. Let us strive to be a light, to reflect and follow our Savior's light, and to seek and believe in the reality of light at times of darkness. May we remember that we are each children of God, created in His image, with all the dignity, value and status that implies.

Finally, please stay safe and well. Thank you for joining us over the past three days for these online discussions of ways of finding community and hope during the Covid era and beyond. I look forward to seeing you next year – in person.

God bless us every one.