Judging Religion

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I teach in a department of religion at a small liberal arts college. A couple of years ago, my department had a meeting with the graduating senior majors in which they were asked a series of questions evaluating their experiences as majors. After a long and mostly positive assessment of their experience, the head of the department asked the seniors what the department’s reputation was among students at the college outside the department. The student response was immediate and emphatic. One student announced that the department was perceived as a place for Christian proselytizing. Another announced—equally emphatically—that the department was perceived as a place where religion was debunked.

One of the difficulties with the contemporary public conversation about religion, in religious studies and legal circles, is that these two options are viewed by many people as being the only possible scenarios. Is this the choice? Is the choice between trying to sell religion or trying to sell out religion? Or are there other options? Many of us in religious studies are trying to do a third thing which

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* This article discusses proceedings in a case brought under the Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000 bb et seq. (1993), which has subsequently been held to be unconstitutional in *Boerne v. Flores*, 117 S. Ct. 2157 (1997). While I would argue that the opinion for the Court and the concurring opinions by Justices Stevens and Scalia support to some extent the argument of this article, the issues raised by it are no means wholly disposed of by that decision. This is so in part because of widespread opposition to the decision, but also because of related questions in the interpretation of the First Amendment and the free exercise provisions of state constitutions. Further, there are those who argue that the standard in RFRA was simply a legislative enactment of the appropriate standard under the religion clauses of the First Amendment. See, e.g., id. at 2157 (O'Connor, J. dissenting).

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neither promotes religion in general—or any specific religion, in particular—nor attempts to dismiss religion as either irrelevant or evil or as reducible to other human social or cultural phenomena. This third thing talks about religion as a distinctive but varied and shifting human social and cultural product. It strives to avoid privileging certain religious traditions. It respects the integrity of the material while maintaining enough critical distance to advance human understanding of religion and its relationship to other cultural and social events. This third thing is an interdisciplinary and global comparative academic project that is in conversation with anthropology, sociology, history, and theology.

I am trained both in law and in religious studies. In this paper I am going to use religious studies to criticize the legal discourse about religion in American courts. I will then propose that religious studies can help lawyers and judges to acknowledge the religiousness of Americans without establishing it—by recognizing the instability of religion as a category for American law.

I. LAW AND RELIGIOUS STUDIES

Law and religious studies speak different languages about religion. To some extent, this difference accounts for the confusion in law about religious freedom.

Indiscriminate use of the word “religion,” as well as other reifying categories describing religious cultural phenomena—including Christianity, Hinduism, and Buddhism—have been widely and thoroughly criticized in religious studies because their use makes indefensible claims about the existence of referents for those labels. The use of these categories fails to acknowledge the historical, cultural and geographic locatedness of religious experience as well as the vast differences among and within religious traditions. The term “Christianity,” for example, is only useful as an extremely general umbrella term with highly indistinct edges. There are and have been a wide variety of churches. There are people calling themselves Christians who share little. There are cultural events that are distinguishable as having Christian attributes only when compared to the cultural events of other religions. But, there is no “Christianity” out

there. Furthermore, these categories are regarded by scholars of religion as being the product of the history of modernity. They are seen as dependent on academic theories produced in those contexts, and therefore of limited use outside them.\(^3\)

Proposals for remedying this situation include using religion only in the plural, or only as an adjective: Thus, identifying the area of study as "history of religions" or "religious studies," rather than "comparative religion" or, even, simply, "religion." College courses surveying "World Religions" are out of favor, replaced with courses on approaches to the study of religion. The research emphasis among scholars of religion in the last couple of decades entails getting the parts right and examining the borders rather than finding or constructing new wholes—whether of religion-in-general or of particular traditions.\(^4\)

While "religion" and the various religions, as categories, are being seriously reevaluated in religious studies circles, they are alive and well—flourishing even—in legal and political contexts. In fact, "religion" seems to be staging a real comeback in the public realm. New constitutions are being written guaranteeing or extending religious rights. Political demands for religious freedom are ubiquitous. The Prince of Wales is advocating that the English monarchy move from being Defender of the Faith to Defender of All Faiths.\(^5\) In the United States, efforts continue in Congress to amend the Constitution to include more religion.\(^6\) The word "religion" is being written into statutes and used by litigants all over the world. Even law schools have discovered religion.\(^7\)

Why is there this imbalance? Why does "religion" and


7. In the last twenty years courses in law schools and law review articles about religion have increased exponentially.
“Christianity” and “Buddhism” mean less and less in academic circles—even religious academic circles—and more and more in legal and political ones? In the American context certainly, but also elsewhere, use of the word “religion” in public discourse—while always important—has come to have strident political and legal implications. To the extent that this political discourse relies on the word “religion” to carry a useful referent, there is a real question, based on the experience of the modern study of religion, as to whether the word can bear the weight that the legal and political context seems to demand of it.

II. SASNETT V. SULLIVAN

Recently I was asked to serve as an expert witness in a prisoners’ religious rights case—Sasnett v. Sullivan. I will use my experience in that case to illustrate the points I wish to make about religion and law in the United States, and elsewhere.

The action in Sasnett was brought in federal district court in 1994 on behalf of all of the prisoners in the Wisconsin state correctional system under the Religious Freedom Restoration Act (RFRA). The complaint challenged new regulations limiting both the wearing of religious jewelry and the number of publications that a prisoner could keep in his or her cell. The new rules limited publications that could be kept in a cell to twenty-five, regardless of size or length or content, and


(a) In general
   Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.
(b) Exception
   Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—
   (1) is in furtherance of a compelling governmental interest; and
   (2) is the least restrictive means of furthering that compelling governmental interest.

RFRA was held to be unconstitutional in City of Boerne v. Flores, 117 S. Ct. 2157. One point made by the majority in Boerne is that RFRA had generated a huge number of cases at the state and local level. Id. at 217. The Brief for Amici States of Ohio, Arizona, Colorado, Delaware, Florida, Hawaii, Idaho, Mississippi, Nevada, New Hampshire, North Carolina, Oklahoma, The Commonwealth of Pennsylvania, and the Territories of American Samoa, Guam and the Virgin Islands in support of petitioner in Boerne, declared that RFRA spawned a huge number of prisoner rights cases.
prohibited the wearing of all religious jewelry except wedding bands conforming to a particular description. In practice, these new regulations resulted in the confiscation of some religious publications—mostly Bible commentaries—and of all crosses or crucifixes on chains. The stated justification given for the limit on publications was a need to control clutter and conform to fire codes. Three justifications were offered for the jewelry prohibition: that religious jewelry could be used as a weapon; that it invited theft; and that it was used as gang identification. It was the last that was given most attention at trial. The trial court held that the jewelry regulation violated RFRA because it substantially burdened plaintiffs’ religious exercise without a compelling state interest but that the publications limitation did not; the Court of Appeals for the Seventh Circuit agreed.\(^\text{10}\)

III. WHAT IS A SUBSTANTIAL BURDEN TO RELIGION?

As a preliminary matter, RFRA required a finding that there be a “substantial burden” to “a person’s exercise of religion.”\(^\text{11}\) What qualified as “an exercise of religion?” When was a burden “substantial?” In Employment Division v. Smith,\(^\text{12}\) the Supreme Court decision that precipitated the passage of RFRA, petitioners claimed that the challenged statute effectively outlawing the sacramental use of peyote struck right at the heart of their religious exercise and threatened the continued existence of the Native American Church in Oregon. Did the burdened practice, under RFRA, have to be as “central” to the religious tradition in question as the use of peyote arguably is to the Native American Church in order for the burden to have been substantial? Did RFRA require such a high standard?

Judge Crabb, the trial court judge in Sasnett, discussed two possible tests for determining whether the prison regulations substantially burdened prisoner plaintiffs.\(^\text{13}\) Defendant prison officials had argued that the exercise of a prisoner’s religion was substantially burdened only


On May 5, 1997, the Seventh Circuit Court of Appeals held, in a similar Indiana case, that defendant Department of Corrections could not prohibit plaintiff, a Native American, from wearing a medicine bag. Craddick v. Duckworth, 113 F.3d 83 (7th Cir. 1997).


if the prohibited practice was "required by their religion." Because Christianity did not "require" the wearing of crosses or crucifixes, the argument went, prohibition of such a practice could not substantially burden plaintiffs' religious rights. In other words, you could still be a Christian without wearing one. The attraction of this test was that it would be an "objective" one—clear and easily applicable. Just find out what the requirements of the religion are and then you know the range of permissible regulation.

Plaintiffs argued, on the other hand, that the appropriate test should be a subjective one—whether the practices are central to, and sincerely and religiously motivated in terms of, the individual's religious exercise. The test would be whether particular individuals are substantially burdened in the exercise of their religion, from their own viewpoint, not whether a particular practice is central to and mandated by a particular religion.

These two tests are founded in very different understandings of what religion is. For the defendant prison officials in Sasnett, religion is imagined as doctrinally definite and authoritatively determined by an institutional church. Being religious—exercising religion—is being obedient to the legal prescriptions of that religion. For the plaintiffs, on the other hand, religion is imagined as personally determined—a matter of individual choice. Being religious—exercising religion—is about being faithful to one's own religious understanding.

The two tests invite very different kinds of evidence. A test which focuses on the mandates of a particular religion depends on expert testimony to establish the requirements of that religion with respect to a particular practice. The religious practitioner need only testify convincingly to membership in a religious community. The expert does the rest. In Sasnett the expert for defendants offered the following opinions in her affidavit about what Christianity "required":

Although the term "Christianity" covers a large number of churches and individual sects, all Christian churches and sects share certain fundamental characteristics, including the central principle that salvation, or reparation of the separation of God

14. Id.
15. Id. (emphasis added).
16. There are other ways of delineating the possible tests under either RFRA or the Free Exercise Clause of the First Amendment, as Professor Greenawalt points out in his comments. See Kent Greenawalt, Judicial Resolution of Issues About Religious Conviction, 81 MARQ. L. REV. 461 (1998). These are the two considered by the court in Sasnett v. Sullivan, 908 F. Supp. at 1440-44.
and human beings, is a spiritual gift of God given through Jesus Christ.

I am not aware of any Christian churches or sects that hold that the wearing or use of a particular artifact is a necessary condition for salvation. In fact such a claim would be theologically problematic within the Christian framework, since it would invite, if not entail, a preoccupation with the artifacts that would distort or reduce the primary focus on God's saving activity...

In my opinion, to a reasonable degree of professional certainty, the policy prohibiting the wearing of jewelry in prison does not inhibit conduct that manifests a central tenet of the plaintiffs' religions, as referenced above; nor does it prevent plaintiffs from engaging in conduct mandated by their religion.\(^\text{17}\)

With respect to the limitation on the number of publications, defendants' expert testified that she knew "of no Christian sect for which any religious text other than the Holy Bible is central to the practice of the religion."\(^\text{18}\)

For defendants' expert, "Christianity" is about the "spiritual" gift of salvation and does not involve "artifacts." "Christianity" is about a "focus on God's saving activity." It is about belief—belief in a particular religious understanding of salvation.\(^\text{19}\) And the tenets of "Christianity" can be definitively stated. Nowhere in her affidavit did defendants' expert reveal any uncertainty about the possibility of defining the "fundamental characteristics" of "Christianity" or about the appropriate authority to look to in determining such questions. She seemed unselfconscious about the mainstream Protestant bias and iconoclasm evident in her opinion—a bias which favors a concern with a particular understanding of the nature of salvation—based in faith and word. She also seems apparently unaware of the many Christian theologies which have existed across space and time and which continue to be created which diverge from hers. An objective test demands such doctrinally certain and inevitably sectarian evidence.

A subjective test, on the other hand, relies primarily on the


\(^\text{18. Id.}\)

\(^\text{19. Interestingly, this dichotomy between belief and practice set up by the defendants' expert is exactly parallel to the dichotomy in Justice Scalia's opinion in Employment Division v. Smith, 494 U.S. 872 (1990), which he used to deny protection to peyote use. Id. at 874-90. This dichotomy which is, in turn, taken from Reynolds v. U.S., 98 U.S. 145 (1879).}\)
testimony of the lay religious practitioner. She is, in a sense, the expert on her own religious life. My expert testimony for the Sasnett plaintiffs challenged the implication in defendants' argument that religious jewelry could never be central to a person's religious practice. I testified that, on the contrary, religion scholars generally were of the opinion that material objects could be central to a person's practice of his religion and that a person could be substantially burdened in the practice of his religion if religious objects were denied him.20 I also testified that it was not possible to identify fundamental characteristics that were common to all Christians.21

Both the trial court and appellate judges looked to the testimony of the prisoners themselves to determine the effect on religion of the new regulations under RFRA. Judge Crabb held, and Judge Posner, writing for the Seventh Circuit panel, concurred, that the appropriate test was whether the burdened practice was motivated by sincere religious belief on the part of the individual, not whether or not it was ecclesially mandated.22 Both courts held that prohibiting the wearing of crosses substantially burdened plaintiffs' exercise of religion.

For religion scholars, both tests raise a host of troublesome issues of definition. The judges and lawyers, and even some of the scholarly experts in Sasnett, seem oblivious to the difficulties of defining religious orthodoxy and to the theological implications inherent in such questions as the centrality of a particular religious practice or whether an individual or some religious institution should be the location of religious authority. For example, Judge Crabb commented that her choice of an individual motivation test allowed her to "avoid becoming embroiled in questions of theology."23 In fact, theological questions are begged throughout the testimony and opinions in Sasnett.

The decision by both courts does seem ultimately a culturally


22. Sasnett, 908 F. Supp. at 1444; see also Sasnett, 91 F. 3d at 1022.

23. Id. at 1444.
coherent one in terms of American religious history. While both tests, as presented in this case, have a Protestant bias—the objective test because of its focus on belief and the subjective test because of its focus on the individual—neither test is surprising given American religious history. The central role of individual belief is, both in constitutional and religious terms, very American. The right to religious freedom is viewed as belonging to the individual and the religious object is viewed only in the primary context of the individual’s relationship to God. Judge Crabb concluded that “[t]he undisputed facts show that wearing a cross played an important role in the individual faiths of plaintiffs.” While the court claims that there are religious practices that would not meet the subjective test, it is hard to see how the line could be drawn as long as the witness seemed sincerely motivated in his practice.

But this focus on individual belief is not the only way to understand religion, faith or religious freedom. In many religious traditions, the needs and identity of the community would take precedence and religious practice would play a bigger role. Religious communities with tightly formed authority and creeds may place a lower valence on individual conscience and belief. Salvation may be understood in material or communal terms. Religious communities and institutions do not play an important role in the courts’ determinations in Sasnett. There is a hint of anti-Catholicism and Protestant establishment both in plaintiffs’ expert’s iconoclastic rejection of the importance of religious objects as well as in her failure to acknowledge as essential for Christians any religious texts beyond the Bible; the Book of Mormon and Mary Baker Eddy’s Science and Health are two obvious examples.

Is it possible to articulate a test under RFRA that is not either suspect as a religious establishment or so hopelessly subjective as to be meaningless? What role can/should religious studies play in all of this? While religious studies can inform courts about the range of religious practice, it is less suited to providing the kind of stable definitions laws like RFRA seem to demand. The pitfalls of any expert testimony are legion and well documented. They are increased when dealing with people as tangentially related to community of any kind as are the plaintiffs in Sasnett. Let us now turn to those witnesses and their testimony about religion.

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24. *Id.* at 1445.

IV. IS THIS RELIGION AT ALL?

One value of studying religion in a prison is that it is not possible to pick one's informants and the informants you get are not, by and large, like St. Paul or Malcolm X, religious virtuosos. They are people who are marginally competent at everything in their lives—that is why they are there—but whose witness is often affecting and poignant. Listen to some of the plaintiffs in this case:

Sylvester Sasnett:
I belong to a nondenominational church in Waukesha, Wisconsin, Truth Bible Church .... Truth Bible Church is a church that is a nondenominational church that has—it believes in the truth. It believes in the word of God as being the sole counsel, the sole means and direction for a man to live. They are not organized with any established religion. They are not controlled by any established, organized religion .... The cross had an importance because it represented whom I believe in, who I trust in, who I want my life to be patterned by .... The crucifix that I sent out was one that I wore around my neck, to always hold close to my heart and identify with the church and society, and I held that close to me. It was always a reminder of who I am and Christ .... I'm not a Catholic and the rules of my church do not allow [a rosary] .... Because we don't associate with other religious paraphernalia ... no one knows what Christ looked like. So to have a picture of it would be kind of really ridiculous. However, a cross with the image of Christ on it represents that Christ died on Calvary for our sins. I wear it close to my bosom because I identify with it. Its a reminder. It helps to keep in check my character, the way I act around prison staff, the way I act around other inmates ... what it does is it's a point of reference for me. It is something that was not only given to me as a gift from my mother, but always having something around my neck and seeing it as I undressed and went to bed with it on at night always caused me to be thankful to God that I didn't die from my cancer, that I was safe in prison, that I had a new life and it was not wasted as it was before .... I'm not Baptist. I'm not Lutheran. I'm not Presbyterian. I'm a child of God. I'm a Christian.

Lonnie Smith:
[I]t was a gift to me because my friend knew that I was a Christian, and she gave it to me as a gift. When she gave it to me, it meant the world to me. Once I put it on, I said I wasn't going to never take it off. I had it blessed and everything ....
write songs for the church. I have played in the band. I go to bible studies and stuff like that. My family, some was— they had all different religions. I got brothers that go under Muslims. I got sisters that are Christians, some that are—they got their own different style .... I don’t look at Lutheran, Christians, all these other names. I don’t even look at that as being different. I just believe in God and go to church. I don’t really go by names ... [my religion] requires me to wear it because it’s a big part of— it’s a big part of my religion, because when I wear this, it’s like I have God like right here with me, you know. It’s like I’m carrying him around everywhere I go. And when they took it away from me, it was like taking everything away from me, my whole life basically. It’s very important to me because that’s the only thing I have in here.

James Lowery:
Several doctors have diagnosed me as suffering from multiple personality disorder. Several of the different personalities have different religious beliefs. The primary belief is Christian ... there is a Catholic American Indian one, Baptist, Pentecostal, American Indian. One is satanic. There’s agnostics, different beliefs.

Barbara Miller:
I have been a Wells Synod Lutheran my whole life. There’s nothing saying you have to wear the cross, but it brings a person closer to God ... having a cross around your neck— when you are someplace during the day and you want to pray, you pick up that cross and hold it in your hand .... You don’t define a Christian. I wouldn’t think you would. You can pretty well tell by their actions if they are a Christian, and in their behavior.26

“It’s a point of reference for me.” “It’s like I have God right here with me.” “It brings a person closer to God.” For these prisoners, religious jewelry seems to provide an anchor. It locates their religious life. It is part of what might be called the “folk practice” of religion. But is it, or should it be, constitutionally or legislatively protected?

How do you go about deciding whether the religious practice of these people is “substantially burdened” by having the crosses taken away from them? If we disallow defendants’ expert’s definition of Christianity as hopelessly parochial and elitist, where do we begin to

find another? Are these people Christians just because they say they are? Are their practices important to their religion just because they say they are? How borderline would a practice have to be before it would stop being Christian? Or stop being religious? One advantage of a religious establishment is that you can ask the authorities. Without a religious establishment there is no way of making these determinations. All we have is a set of divergent opinions about religion and religious practice and no way of adjudicating among them. Justice Jackson summed up the American attitude in *Barnette*: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein." It is not only ideologically prohibited. It is also practically messy and difficult, even for religious establishments, as years of heresy trials attest to.

Defendants' lawyer pressed each prisoner to identify herself denominationally. He also pressed plaintiffs' expert on prison administration to agree that the best regulatory approach would be to make a list of religious groups and their requirements that could be used by prison officials. Plaintiffs' expert on prisons, Walter Dickey, a law professor at the University of Wisconsin, formerly a prison administrator, resisted the ideas that better categories and clearer rules were the solution:

I think gangs are a legitimate concern ... although one has to, you know, define what one's talking about, because a religious group can be a gang without any illegal purpose, in fact, with the best possible purposes in the world ... I think there are some legitimate interests advanced by religion. Part of the prisons have long, long histories of trying to promote religion, probably in violation of the First Amendment. And I think religion does a lot of good things for prisoners and a lot of good things for institutions. And I think you really want to be very careful in limiting religious activities, religious symbols, when there are so many benefits to them and their return, in terms of control of illegal activity, is so slight, if there's any return at all ... It seems to me people, in the exercise, of their religion, have the right to have objects, medals and rosaries and things that Indian people have. I don't know enough about all the variety of religions to

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27. In the United Kingdom, for example, bishops sit on ecclesiastical cases in the high court just for that purpose.
say what all of those things would be ... I think that people, whether they are in prison or not in prison, have the right to exercise and practice their religion. And if that means for them the having of some religious symbols and the wearing of them, it seems to me, within appropriate kinds of limits, not only should we permit it, but maybe we should encourage it. And we encourage all kinds of other religious stuff. I mean, we are promoting it all the time, spending a lot of the state's money on it, frankly. That's who pays the chaplains and all the other religious leaders ... I remember one [religious claim] ... a guy from Sheboygan who said he was Jewish and he wanted to have a Jewish dinner at Christmastime, or not Christmastime, at Rosh Hashanah or whatever it was. And he invited Linda Rivas, who happens to be Jewish, to it and they had a dinner for two people because he was the only Jewish inmate in the system. And I had to decide whether he was really Jewish, and I decided he was ... I figured the guy had five life sentences, we could cut him a little slack, since he obviously wasn’t Jewish or if he was, he was a very recent convert. He just wanted to have his own dinner.29

Asked whether it would be a good idea if the prison chaplains sat down and listed the essential elements of each religion, Dickey said: “I wouldn’t trust the prison chaplains ... First of all, they’re very much tied into just traditional religion. They view a lot of nontraditional religion as competition. We fought about this all the time. They basically want everybody to be a Catholic, Jew or Protestant.”30 Defendants’ lawyer conducting this deposition became more and more confused. He could not see how you could make rules if everyone got to make up his own religion.

The difficulties of tightly defining the borders of religion and religious practice are familiar to religion scholars. Religions have a way of blending into one another and religion has a way of blending into other categories. Given the inarticulate neediness and shifting religious identities of the prisoners in this case—or of anyone—how are their religious lives given the stable identities that experts and lawyers want? Dickey has a different approach. He seems comfortable with fewer hard borders. For him, based on considerable experience, religion in prison is generally a good thing in almost whatever form it takes. It should be encouraged and the definition should be broad. Limitations should be based on genuine security considerations and fairness.

30. Id.
Lawyers and many current prison administrators, on the other hand, keep pressing for tests and definitions so that rights can be definitively and appropriately allocated.

V. INDETERMINACY

The amorphous quality of the religious lives of the witnesses in Sasnett is not easily susceptible to categorical definition. The witnesses are sincere (no one is arguing otherwise) but it is hard to give content to what they are sincere about. They present the extreme case. However, to a lesser extent the religious lives of most Americans—maybe most people—could be seen to have similar qualities. Most people have a complex and changing relationship to one or more religious traditions. They simply do not fit neatly into a model which could be labeled "Presbyterian" or "Buddhist" or "Black Muslim." Anyone who has been a member of a religious community recognizes this problem. One sometimes has less in common with those one sits next to at a worship service than those one encounters in other parts of one's life. Even the tightest religious communities are riven with profound theological differences. What is needed is a theory of religion that can take account of these difficulties and provide a language about religion that will serve lawyers and judges.

Lawrence Rosen, the legal anthropologist, has made the case in two recent articles in a different context that, rather than trying to pin cultural forms like religion into brittle crystalline structures—structures that do not correspond to the experience of real people—we should acknowledge cultural indeterminacy and focus our attention rather on how to deal with that indeterminacy. In other words, rather than trying to fit people and their religious lives into hard-edged categories, courts should affirm and give value to an American style of engagement with cultural difference.

In an article on Edwards v. Aguillard, Rosen has proposed that the majority opinion striking down a Louisiana creationism law is best understood as one that furthers the very American goal of "continuing the conversation." Plaintiffs in Edwards challenged a statute requiring

that high school biology courses that teach evolution give equal time to creation science. The defenders of the statute argued that creationism is a scientific theory, not religious doctrine, that it is entitled to the same respect as other scientific theories, and that academic freedom inheres in students, not teachers. Those challenging the statute argued that creation science was religion, not science. Justice Brennan’s majority opinion striking down the statute as an establishment of religion is founded, as Rosen sees it, in its understanding of science as provisional and falsifiable. The problem with teaching creationism—the problem with teaching religious doctrine—is not that it is religious but that it is closed and not open to discussion. The best approach, that of the Majority, as Rosen sees it, is to view the appropriate relationship of knowledge to power in such a case as being one of dialogue and process, rather than understanding the choice as being between national or local control of the curriculum. By imagining science as neutral, the majority’s decision encourages continued conversation: “The assessment of harm turns in no small part in these cases, then, on an assessment of whether a given practice will join people in common experiences through which a shared set of orientations can be engendered or whether it further separates people into their respective enclaves.”

Without being naive or overly idealistic about the openness of the scientific process, one can see the Court’s decision, Rosen argues, in the context of a larger cultural commitment to democratic values:

The Court is, in essence, setting the terms of the conversation. It does so when it supports the image of science as neutral and the exchange of ideas as necessitating a willingness to give and take. It does so, too, when it supports the idea that the centers of power in American life are multiple and dispersed. The harm the courts seek to protect against is harm to the process by which differences can be stated without the legitimacy of the state being placed at risk. It may do no harm to such a goal, however, for the courts to acknowledge that science is a domain the courts should leave undefined or to acknowledge that while the forum is indeed one in which others must accept the courts’ idea of

34. Id.
35. Id.
36. See Rosen, supra note 32, at 82-83.
37. Id at 78-79.
38. Id.
what makes for a conversation, the nature of that conversation will itself not be subject to a fixed definition.\textsuperscript{39}

In cases of cultural conflict, attention to key American themes such as the marketplace of ideas and a notion of give-and-take come closer to some sort of cultural justice, in Rosen's view, than would a push for doctrinal rules based in hard ideological positions for or against particular curricular content.\textsuperscript{40}

The best in judicial opinion writing in cases involving cultural conflict engages in what Rosen calls a kind of "socio-logic".\textsuperscript{41}

If ... one thinks of a principle, in the context of the jurisprudence of religion, as the articulation of standards of legitimate conduct as evinced in a number of cultural domains, one can see that it is a socio-logic that is involved here—an attempt in a heterogeneous society to maintain concurrence among concepts whose very power lies in their inherent, indeed necessary openendedness .... [C]ultural forms possess an inherent indeterminacy, a capacity for creating bonds of relationship through passing acquaintance, an ability to hold diverse groups together by means of common symbols imprecisely fixed ... and the sense that one makes of a body of decisions will be seriously truncated if the localized form of cultural knowledge is measured against the inappropriate standard of philosophic logic alone.\textsuperscript{42}

The inherent indeterminacy of cultural forms, such as the religious identities in \textit{Sasnett}, only reinforces the wisdom of this position.

In a subsequent article\textsuperscript{43} Rosen further demonstrates this socio-logic and elaborates on the notion of the indeterminacy of culture by suggesting that instead of using metaphors for culture that suggest order and regularity, it might be more accurate and more fruitful to borrow metaphors that attempt to account for ambiguity, indeterminacy and uncertainty. He mentions scientific models such as chaos theory,

\begin{itemize}
  \item \textsuperscript{39} Id. at 82-83 (emphasis added).
  \item \textsuperscript{40} Id.
  \item \textsuperscript{41} Id. James Boyd White has also proposed that legal reform be focused on the quality of legal discourse, rather than on the formulation of better rules—rules that today are often based on economic analysis and the rigid anthropology often implied thereby. \textit{See, e.g.}, \textit{THE LEGAL IMAGINATION: STUDIES IN THE NATURE OF LEGAL THOUGHT AND EXPRESSION} (1973) and \textit{JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM} (1990).
  \item \textsuperscript{42} Rosen, \textit{supra} note 32, at 82-83.
  \item \textsuperscript{43} Lawrence Rosen, \textit{The Integrity of Cultures}, \textit{34 AM. BEHAVIORAL SCIENTIST} 594, 594-617 (1991).
\end{itemize}
amorphous solids, or fuzzy logic." He then draws from his own study of Morocco to suggest that what most characterizes Moroccan society is a cultural style of negotiability, a style which embodies a certain ambiguity and allows for a necessary flexibility.  

While it is necessary to understanding Moroccan culture to understand such indigenous legal concepts as nafs, 'aqel and haqq, among others, it is in the use of these concepts in the context of establishing and reestablishing a network of relations with others that most typifies Moroccan society:

What results, then, is a view of Moroccans as constantly engaged in bargaining out their relationships with one another, using as much information as they can to assess the way another is most likely to be attached to others and most likely to affect oneself ...

It is small wonder, in so personalistic a universe, that, as T. E. Lawrence put it generally, "Arabs believe in individuals, not institutions."

What Rosen understands Moroccans to share is not simply a set of structured symbols such as the legal concepts listed above, but, more importantly, a common orientation to a shifting set of symbols. Rosen's work implies that it is not just Moroccans that are best understood through attention to cultural style. We also are best understood that way. What makes America work is the democratic conversation, not a uniform commitment to shared symbols and values. For Rosen, the Court is at its best when it facilitates that conversation.

Rosen's focus on cultural style is something like what Walter Dickey, the prison expert in Sasnett, was advocating for prisons. In his testimony the common ground is not rules that are uniformly applied but a process which can make a prison work, a process of negotiation and adaptability which understands the need for security, but which also attempts both to treat prisoners fairly and equally and yet has room for the occasional lifer who needs to have a Seder. This flexibility is not cynical but comes out of a real respect for the individual and for cultural difference: An acknowledgment of an American cultural style in the case of cultural conflict. By stepping one step back from the project of

44. Id.
47. Rosen acknowledges a strong debt to an influential theory of practice in PIERRE BOURDIEU, OUTLINE OF A THEORY OF PRACTICE (Richard Nice trans., 1977).
writing rules to define cultural norms, courts (and maybe prison officials) can do what they do best—insist on procedural fairness and enforce constitutional commitments to a government of the people.

VI. LAW AND RELIGION

We have moved in the last six years from the apparent absurdity of Smith in which constitutional protection for the free exercise of religion did not extend to the sacramental core of an historically oppressed people's religious life to the apparent absurdity of giving a legislative veto to any who claims a religious motive. It is not clear that this is progress. If we are to "continue the conversation" we need a better language about religion and religious difference.

Focusing on legal and political settings in studying religion has a democratizing effect. The collaborative process of constitution making, of legislation, and of courtroom procedure presents cases about religion in the lives of ordinary Americans and permits the supposed objects of our study to be part of the scholarly project. Instead of a language about religion and religious practice based only on the lives and mostly theoretical writing of religious professionals, there can be a give and take between the actual religious lives of ordinary people and the language of legal and religious studies. And our focus can be on the justice of the process rather than on control of the categories.

Focusing on process will not solve the problem of defining religion. In fact, labeling religion as indeterminate might properly be understood in itself as a theological statement. Any sustained treatment of religion implies a theology. Because the language of religious studies is largely inherited from the Reformation and the Enlightenment, and is implicated thereby in the central theological questions and positions of that time, it is in some ways suited to conversation with contemporary law, which finds many of its antecedents in that period and that conversation as well. Focusing on process may allow a respect—on the part of law—for the individual and for cultural difference rather than for religion.

The democratic give and take of political debate about the role of religion in a free pluralistic society can be seen in constitutional debates around the world, a debate which continually subverts the boundaries of legislatively and judicially created categories. In the new South Africa the religion provisions of the new constitution have been debated on
the Internet by all interested comers. Religion has been both oppressor and liberator so passions run high. In Chiapas, in Southern Mexico, debate occurs in modern Mayan communities seeking to preserve their traditions as to whether they are better served by demanding the right to cultural independence or the right to religious freedom. Understanding themselves as dedicated to preserving a culture allows Mayans certain rights as a community over dissenting individuals which the language of religious freedom does not permit, because religious freedom in Mexico is a right that belongs to an individual. Indian communities, like other small insular religious communities, like Hasidic communities, wish to be able to discipline their members for heterodoxy. They cannot do that if a member can assert an individual right to religious liberty.

The goal of religious studies in the academic, legal, and political context, as well as in a scholarly setting, is to develop a common discourse about religion and religious difference. A discourse that makes careful distinctions but that does not pull rank when confronted with evidence such as that which was offered in the Sasnett case—one that allows for the inherent indeterminacy of culture. This project is an urgent contemporary global task, one that requires a thorough understanding of religious history—perhaps in this country most urgently of the Reformation—but one that also sees its job in the context of wider contemporary debates about constructing a just society. To return to our two students and their reporting of the reputation of our department. Religious pluralism should not mean that either colleges or courts must choose between promoting religion or suppressing it, but should be seen as an opportunity to “continue the conversation.” Legislative and constitutional provisions guaranteeing the free exercise of religion may not be the best way of furthering democratic goals in a pluralistic society.

49. Personal conversations with author in August 1995 during a visit to Chiapas. Susan Staiger Gooding has studied the ways in which Indian communities in the Northwest have used the courtroom as a location for exploring and creating identity. Susan Staiger Gooding, Place, Race, and Names: Layered Identities, in UNITED STATES V. OREGON, CONFEDERATED TRIBES OF THE COLVILLE RESERVATION, PLAINTIFF-INTERVENOR, 28 L. & SOC'Y REV. 1181 (1994).
50. For discussion of a recent United States Supreme Court case about a Hasidic community see Winnifred Fallers Sullivan, Competing Theories of Religion and Law in the Supreme Court of the United States: An Hasidic Case, 43 NUMEN 184, 184-212 (1996).
51. At the end of his comments on this paper, Professor Greenawalt concluded that the
troublesome situation of judicial definition of religion is preferable to no free exercise rights. Greenawalt, supra note 16, at 472. I am not so convinced.

Professor Smith has substantially revised his response to my paper since the conference so I have not had time to fully respond to his many thoughtful points. See Rodney K. Smith, Responding to the Supreme Court's Effort to End the Conversation About Religious Exemptions and Welcoming Professor Sullivan into the Conversation, 81 MARQ. L. REV. 487 (1998). I do want to emphasize several differences that we seem to have. Professor Smith assumes that I am of the opinion that religious behavior, whether institutionally compelled or privately motivated, should be constitutionally or legislatively protected. Id. at 503. I am highly skeptical that that can be fairly done because of the instability of the category of religion, as I have tried to demonstrate in my paper.

I am also skeptical of its desirability. In defending the need for legislative protection for religious behavior, Professor Smith argues that the good that religion does outweighs the bad. Id. at 495-501. I would find the balance between the light and dark sides of religion to be closer than Professor Smith suggests, in terms of the historical record, and the possibility of disentangling them more problematic.

The political concern to promote religion as a good is in large part the fruit of the history of disestablishment in the West. It is only when there is a separation of church and state and of religion and culture that religion becomes a thing which can be considered good or bad. Such an instrumental view of religion—one that emerged in the Enlightenment—is highly specific to that religious and political context and fails to accurately represent religion in a radically pluralistic society. (It is also one which I think people who identify themselves as religious should be wary of because it subordinates religion to the needs of the state) Professor Smith, in section V of his article, attempts to distinguish between religion which is enculturated and religion that is not. Id. at 505-07. I do not believe that that distinction can be fairly or accurately maintained. All religion is enculturated.