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Mark L. Movsesian

St. John's University - New York

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STATE-SPONSORED RELIGIOUS DISPLAYS IN THE U.S. AND EUROPE INTRODUCTION

MARK L. MOVSESIAN[†]

On June 22, 2012, the Center for Law and Religion proudly hosted, together with the Department of Law at Libera Università Maria SS. Assunta (LUMSA), an international conference, *State-Sponsored Religious Displays in the U.S. and Europe*. Held at LUMSA's campus in Rome, Italy, the conference brought together leading American and European scholars, judges, and government officials to address the legality of public religious displays in different nations. Professor Silvio Ferrari of the University of Milan delivered the Conference Introduction. Panels included *Cultural or Religious? Understanding Symbols in Public Places*; *The Lautsi Case and the Margin of Appreciation*; and *State-Sponsored Religious Displays in Comparative Perspective*.

Questions about the public display of religious symbols are very much in the air. In both the United States and Europe, recent cases have addressed the permissibility of such displays. In the United States, a fractured Supreme Court in 2010 allowed display of a Latin cross as a war memorial in the Mojave Desert. The Court decided the case, *Salazar v. Buono*,¹ on a procedural point, but observers generally understood that the real issue in the case was the constitutionality of the cross itself.² Across the Atlantic Ocean, the European Court of Human Rights in 2011 decided *Lautsi v. Italy*,³ a challenge to Italy's practice of placing

[†] Frederick A. Whitney Professor and Director, Center for Law and Religion, St. John's University School of Law. I thank my colleague Marc DeGirolami for helpful comments.

¹ 559 U.S. 700 (2010).

² Christopher C. Lund, *Salazar v. Buono and the Future of the Establishment Clause*, 105 NW. U. L. REV. 1387, 1390 (2011) ("The antecedent question behind everything in *Salazar* is the constitutionality of the cross itself.").

³ *Lautsi v. Italy*, No. 30814/06 (Eur. Ct. H.R. Mar. 18, 2011), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-104040>.

crucifixes in public school classrooms. In a decision that surprised many observers, the Grand Chamber held that display of the crucifix was consistent with Italy's duty of religious neutrality under the European Convention on Human Rights.

Salazar and *Lautsi* are two prominent examples of litigation involving public religious displays, but similar cases recur all the time. Public religious displays cause neuralgic controversies in America and Europe, and, indeed, around the world. As Ferrari writes in his contribution to this symposium, "conflicts around religious symbols have acquired a global dimension and occur with equal intensity in countries with profoundly different cultural backgrounds, religious traditions, and political institutions."⁴ Millions of people see such displays as vital to a sense of national identity—or, at worst, innocuous. For millions of other people, however, state-sponsored religious symbols send a message of exclusion and intolerance. The debate seems unlikely to end anytime soon.

From among the many fine papers presented at the Conference, the editors of the *Journal of Catholic Legal Studies* have selected four for publication. Ferrari's Conference Introduction, *State-Supported Display of Religious Symbols in the Public Space*, explores the complexity of the issue. Religious symbols, like other symbols, may have multiple, even conflicting meanings. For example, observers could reasonably understand a woman's veil to be a symbol of piety, or oppression, or even a fashion statement. And the woman herself might intend the veil to mean something else entirely. Should we therefore give up on legal solutions and leave the matter to politics? No, Ferrari responds: We should undertake a careful analysis of the setting where the symbol is displayed. Relying on Jürgen Habermas's distinction between "political" and "institutional public sphere[s],"⁵ Ferrari argues that religious symbols should be allowed in a public space that is open for debate—what we in America would call a public forum—but not one where coercive deliberations take place, like a courtroom.

Ferrari concedes that it will sometimes be difficult to distinguish clearly between political and institutional public spheres, and that, even within a clearly defined space, people act

⁴ Silvio Ferrari, *State-Supported Display of Religious Symbols in the Public Space*, 52 J. CATH. LEGAL STUD. 7, 9 (2013).

⁵ *Id.* at 17.

in different capacities. In a public school, for example, we may wish to allow greater freedom for students to display religious symbols than for teachers. Everything, he argues, depends on context: “[I]n some cases the neutrality that must characterize the institutional public space requires the exclusion of religious symbols, but . . . in other cases the same neutrality can be ensured by the inclusion of a number of different religious symbols in that space.”⁶ Crucially, all “stakeholders” should be consulted. Even on those occasions when people cannot agree on whether a symbol should be allowed, the very act of consultation will prove beneficial.

In his contribution, *Can State-Sponsored Religious Symbols Promote Religious Liberty?*, Professor Thomas Berg of the University of St. Thomas School of Law challenges the conventional wisdom that public religious symbols are, at best, merely consistent with religious liberty. On the contrary, he says, state-sponsored displays “can actually support a vigorous conception of religious liberty.”⁷ By suggesting a transcendent authority higher than the state, such displays may remind citizens that government, however powerful, has limits. The sense of limitation and respect for a higher authority may benefit not only members of the majority religion, he maintains, but members of minority religions as well. Moreover, “official religious expression may bolster religious freedom by affirming, if only symbolically, that religious beliefs [including minority beliefs] are relevant to public life.”⁸

Berg recognizes that public religious displays have costs, however. Such displays can trivialize piety, thus injuring the very religious communities whose symbols are being displayed. In addition, religious symbols may alienate citizens with different religious commitments or none at all. In the end, he argues, “[e]ven granting that officially endorsed religious symbols can support a wholesome attitude toward religious liberty . . . the government may be wise to forego displaying such symbols unless the potential benefits in religious freedom are quite certain and cannot be achieved by other means.”⁹

⁶ *Id.* at 20.

⁷ Thomas Berg, *Can State-Sponsored Religious Symbols Promote Religious Liberty?*, 52 J. CATH. LEGAL STUD. 23, 24 (2013).

⁸ *Id.* at 35.

⁹ *Id.* at 46.

Professor Monica Lugato of LUMSA approaches the subject from an interesting perspective that one does not typically encounter in the law and religion literature. Her contribution, *The “Margin of Appreciation” and Freedom of Religion: Between Treaty Interpretation and Subsidiarity*, situates *Lautsi* in the context of debates about international law, specifically, treaty interpretation. In allowing display of the crucifix in *Lautsi*, the Grand Chamber relied heavily on the so-called margin of appreciation doctrine, which gives state parties a certain degree of discretion in adapting the requirements of the European Convention to local conditions. In *Lautsi*, for example, Italy had discretion in determining how best to fulfill its duty of religious neutrality in light of the enduring place of Catholicism in Italian society.

The Grand Chamber’s employment of the doctrine, in *Lautsi* and elsewhere, has drawn much criticism. Many scholars view the margin of appreciation concept as irredeemably vague, a handy device for the Grand Chamber when it wishes to avoid ruling against a state party. For her part, however, Lugato defends the Grand Chamber’s reliance on the doctrine. The margin of appreciation, she maintains, “is inherent in international human rights obligations”—like those contained in the European Convention—for two reasons.¹⁰ First, the doctrine follows from the standard international law rules on treaty interpretation contained in the 1969 Vienna Convention on the Law of Treaties. Second, the doctrine represents a “logical consequence[]”¹¹ of the principle of subsidiarity, which permits regional solutions to human rights problems only where local authorities prove incapable of addressing them. With respect to classroom religious displays, she believes, “the ‘margin of appreciation’ and subsidiarity represent important tools to accommodate effective protection of the right to religious freedom and the right to education with due consideration of the place of religion in any given society.”¹²

¹⁰ Monica Lugato, *The “Margin of Appreciation” and Freedom of Religion: Between Treaty Interpretation and Subsidiarity*, 52 J. CATH. LEGAL STUD. 49, 53 (2013).

¹¹ *Id.* at 67.

¹² *Id.* at 70.

The final contribution comes from Judge Diarmuid F. O'Scannlain of the United States Court of Appeals for the Ninth Circuit. He helpfully rounds out the symposium by providing the perspective of a jurist who must decide cases on the legality of public religious displays. In his paper, *Religious Symbols and the Law*, he surveys important decisions from his own court, including one, like *Lautsi*, concerning public display of a Latin cross.¹³ In that case, *Separation of Church and State Committee v. City of Eugene*, the Ninth Circuit held that display of a Latin cross in a public park was unconstitutional under the Supreme Court's "endorsement test," which forbids a state from acting in a way that would suggest the state had endorsed religion.¹⁴ Judge O'Scannlain concurred in the result, but argued that his colleagues' reasoning was too sweeping. Judge O'Scannlain insists that courts must pay close attention to context and avoid categorical rules about public religious displays.

After discussing the American cases, Judge O'Scannlain addresses the caselaw of the European Court, in particular, the *Lautsi* decision. He undertakes a comparison of the approach of these two jurisdictions to the problem of religious displays. Some similarities exist: Just as the United States has moved away from the original meaning of the Establishment Clause, which would allow much more in the way of public religious displays than the endorsement test, Europe, too, might be moving away from the original understanding of the European Convention. But he cautions against "drawing too close a connection" between the American and European jurisprudence.¹⁵ American and European courts work with different authoritative texts—the European Convention does not have an Establishment Clause, after all—and there are very different religious histories involved.

Judge O'Scannlain's paper thus echoes a powerful point that Ferrari, Berg, and Lugato make as well. When it comes to public religious symbols, careful analysis of context is crucial. Different legal regimes, the products of different cultures and histories,

¹³ Diarmuid F. O'Scannlain, *Religious Symbols and the Law*, 52 J. CATH. LEGAL STUD. 71, 71–72 (2013).

¹⁴ 93 F.3d 617, 619–20 (9th Cir. 1996) (per curiam).

¹⁵ O'Scannlain, *supra* note 13, at 91.

will naturally adopt different approaches to religious symbols.¹⁶ Even within a single regime, a variety of responses may be appropriate, depending on place, speaker, and other circumstances. In this area, as in so many others in law and religion, a rigid, categorical approach seems unwise.¹⁷ In highlighting the essentially contextual nature of the inquiry—and in many other ways too—these very fine essays make an important contribution to the literature.

¹⁶ See generally Mark L. Movsesian, *Crosses and Culture: State-Sponsored Religious Displays in the U.S. and Europe*, 1 OXFORD J. L. & RELIGION 338 (2012).

¹⁷ See generally Marc O. DeGirolami, *THE TRAGEDY OF RELIGIOUS FREEDOM* (2013).