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The Protection of Holy Places

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Abstract: Holy places are protected by the law, but the rationale for this protection has received little attention. The purpose of our paper is to fill this gap. The natural explanation for this protection lies in terms of religious freedom. However, since this freedom is violated only when believers are required to actively act against the dictates of their religion, this notion is of no help in the present context. Even when holy places serve as sites for worship, there is usually no religious duty to carry out worship there. Another explanation would base the protection of holy places on the prohibition against hurting religious feelings. But while this looks promising when the desecration is intentional, it is less so when the desecration or the hurt are incidental. Finally, the protection of holy places is sometimes understood as a way of preserving “cultural heritage.” But many holy sites do not fall under this definition and still enjoy protection. Our tentative conclusion is that holy places do not enjoy automatic protection just because they are perceived as such by some religious group. This protection must be earned by arguments that would establish the (“objective”) holiness of the relevant site within some religious tradition, explain the exact nature of the harm or offense that is the matter of concern, and demonstrate why the believers’ interests regarding the perceived holy place override those of the public.

Keywords: religious freedom, holy places, hurting feelings, state and religion, conscience

Introduction

Almost all countries, even non-liberal ones, officially grant special protection to religion under the title of (the right to) religious freedom.¹ The right to this freedom is also inscribed in the UN Declaration of Human Rights, famously

¹ See, for example, the following constitutions: TÜRKİYE CUMHURİYETİ ANAYASASI, 1982, art. 24. (Turkey): Everyone has the right to freedom of conscience, religious belief and conviction;

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affirming that everyone has the right to freedom of thought, conscience, and religion, a maxim that entails the right of every individual “to manifest his religion or belief in teaching, practice, worship and observance.”² Some countries recognize another form of protection as well, namely, a protection of religious feelings or sensibilities.³ Taken together, these two forms of protection seem to grant privileged status to members of religious groups as far as the protection of their interests is concerned.

One of the major questions that any theory in the field of state and religion must answer is whether and in what sense this protection granted to religion is special, and what its justification might be; why should the exercise of religion enjoy what on the face of it seems to be stronger protection than the exercise of any other ideology or way of life, and why should religious feelings be thought to deserve stronger protection than non-religious ones? These questions are particularly troubling for liberal countries with their strong commitment to equality. If all individuals and all groups are to be treated equally, we would ask, what could justify granting this apparently unique status to religion? These

CONSTITUCIÓN DE LA NACIÓN ARGENTINA, 1994, sect. 14 (Argentina): All the inhabitants of the Nation are entitled to the following rights, in accordance with the laws that regulate their exercise, namely:... to profess freely their religion; 中華人民共和國憲法, 1982, art. 36. (China): Citizens of the People’s Republic of China enjoy freedom of religious belief. No state organ, public organization or individual may compel citizens to believe in, or not to believe in, any religion; nor may they discriminate against citizens who believe in, or do not believe in, any religion; CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA, 1999, art. 38 (Nigeria): (1) Every person shall be entitled to freedom of thought, conscience and religion, including freedom to change his religion or belief, and freedom (either alone or in community with others, and in public or in private) to manifest and propagate his religion or belief in worship, teaching, practice and observance; КОНСТИТУЦИЯ РОССИЙСКОЙ ФЕДЕРАЦИИ, 1993, art. 28 (Russia): Everyone shall be guaranteed the freedom of conscience, the freedom of religion, including the right to profess individually or together with other any religion or to profess no religion at all, to freely choose, possess and disseminate religious and other views and act according to them.

2 G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

3 For example, according to article 148 of the Russian Criminal Code, “public acts expressing manifest disrespect for society and carried out with the goal of insulting the feelings of religious believers could bring fines of up to 300,000 rubles or up to a year of imprisonment, or fines of up to 500,000 rubles (over \$15,000) – or up to three years in prison if the act is carried out in a place of worship or a place otherwise set aside for religious rituals or ceremonies.” Prohibitions on blasphemy, offense of religious believers’ feelings, and/or the defamation of religion can be found in other countries’ criminal or penal codes: such as CÓDIGO PENAL MILITAR, art. 208 (Brazil); Israel Penal Law, 5737–1977, arts. 170 & 173, 42 LSI 57, p. 226 (Isr.), Finland Criminal Code, sect. 10, ch. 17) and Strafgesetzbuch (StGB), art. 166, (Ger.).

questions regarding the apparent “uniqueness” or “specialness” of religion have attracted quite a lot of attention in recent years.⁴

Obviously, the answer to the question regarding the apparently special status of religion cannot be based on the assumption that religion got it right, so to say, namely, that, since it holds the key to the true perception of reality, it merits special protection. First, even if the majority of citizens happen to believe that they hold such a key by virtue of their religious belief, qua liberal state, the state itself is not committed to such a position. Second, the special protections that are granted to religion are afforded to *all* religions within the jurisdiction of the state – or all religions in the world – and since these religions may express opposing views about the nature of reality, the grounds for protecting them cannot be that they all grasp the true picture of reality. Some countries “establish” religion and grant their established religion special privileges. For instance, in the UK, blasphemy applies only to sacrilegious comments against Christianity. But even in these countries most forms of protection are granted equally to all religions under their jurisdiction, including those perceived as misguided, sinful or heretical by the established religion. What follows is that the protection of religion – whether perceived as “unique” or not – must be based on non-religious premises, on values that liberalism holds dear.

In the present paper, we explore the role that such premises might play in justifying the special protection granted to holy places in both domestic and international law.⁵ While the importance of such protection is almost uncontroversial, at least among decent states, its basis is less clear than often assumed. Or so we shall argue.

⁴ See in particular, the debate between Andrew Koppelman and Micah Schwartzman; Andrew Koppelman, *Religion's Specialized Specialness*, U. CHICAGO L. REV. DIALOGUE 71, 78, <https://lawreview.uchicago.edu/sites/lawreview.uchicago.edu/files/uploads/Dialogue/Koppelman%20Online.pdf>; Andrew Koppelman, *Neutrality and the Religion Analogy* (APSA 2014 Annual Meeting Paper; Northwestern Public Law Research Paper No. 14–44, July 30, 2014), available at SSRN <http://ssrn.cpm/abstract=2454399>; Micah Schwartzman, *What If Religion Is Not Special?*, 79 U. CHICAGO L. REV. 1351 (2012); Micah Schwartzman, *Religion as a Legal Proxy*, 51 SAN DIEGO L. REV. 1085 (2014); Andrew Koppelman, *Religions as a Bundle of Legal Proxies. Response to Micah Schwartzman*, 51 SAN DIEGO L. REV. 1079 (2014); See also Steven D. Smith, *The Last Chapter?* 41 PEPP. L. REV. 903 (2013).

⁵ See, e.g., The Protection of Holy Places Law, 5727–1967, § 1, 21 LSI 76 (1966–67) (Isr.); Basic-Law: Jerusalem, the Capital of Israel, 5740-1980§ 3, SH No. 980 p. 186 (Isr.); American Indian Religious Freedom Act, 42 U.S.C. (U.S); 106 P.L. 65 (US); 113 P.L. 154 (US); 2014 Cal. ALS 532 (Cal.); Cal Pub Resources Code § 2773.3, 5097.9 (2014) (Cal.); Conn. Gen. Stat. § 10–381, 386 (Conn.); 29 V.I.C. § 952 (2014) (Cal.); R.S.O. 1990, c. H.19, s. 18.1 (Ont. Canada); S.B.C. 1999, c. 2, Sch. (B.C. British Columbia, Canada); LNZ Resource Management 22 (N.Z); LNZ Maori land 110 (N.Z).

Holiness in the Eyes of the Liberal State

For the sake of the present inquiry we can put aside the intriguing question of what holiness means. Instead, we start with a more manageable question, namely, what the liberal state has in mind when, in its legislation or court decisions, it talks about holy places. In particular, we ask whether, when the state does so, it assumes that some sites *are* sacred (whatever exactly this means), or only that they are *perceived* as such by some group of believers.

The answer is complex because the notion of holiness whose natural home is in the realm of religion has been secularized together with many other religious terms, and is now used in non-religious contexts too. The result is that, in some contexts, when the state refers to the holiness of sites it really means it, so to say, namely, it attributes some kind of inherently high value to them, while, in other contexts, it merely means to refer to the fact that a site is believed by some people to have this special value.

Examples of the former – of holy sites whose holiness is unrelated to religion – are sites or monuments with great national significance, like military cemeteries. For instance, the Supreme Court of Israel has stated that while “a civil cemetery is a holy place for the families of the deceased, a military cemetery is much more than that. It is a holy place *for the nation and the state.*”⁶ In the eyes of the court, then, when the law refers to military cemeteries as holy, it does not mean to merely report on how they are perceived by some people, but to point out some kind of objective property that these sites have, in a way that is not that far from the way in which believers refer to the holiness of certain sites.

However, in most cases, when the law talks about the protection of holy places, it makes no commitment to the inherent value of such places, but only recognizes the fact that they are perceived as such by some group of believers. So, for instance, when Israeli law says that it is a criminal offense “to desecrate a holy place or harm it in any other way,”⁷ it need not be assuming that this place has inherent value. The law need not accept the religious point of view with respect to some site before it can grant it protection from harm or desecration.

Moreover, the secularized use of holiness by the liberal state would most probably be committed to a weaker metaphysical understanding of holiness than that assumed by religion. While religion typically regards holiness as some kind of objective property with real implications, such as danger to

⁶ HCJ 5688/92 Vichselbaum v. Minister of Defense 47(2) PD 812 (1993) (Isr.).

⁷ The Protection of Holy Places Law, 5727–1967, § 2(a) 21 LSI 76 (1966–67) (Isr.); Conn. Gen. Stat. § 10–390 (Conn.); Cal Pub Resources Code § 5097.993, 5097.99 + Cal Pen Code § 1170 (Cal.)

those who approach a holy site when they ought not to,⁸ or approach it in the wrong manner,⁹ the liberal state uses the term under discussion in a more metaphorical way. Respect for the “holiness” of a site is mainly a way of respecting what the site represents, be it nationhood, sacrifice for the sake of one’s country, and so on. Hence we presume that the state would be more willing to compromise the integrity of such sites in cases of conflict between this integrity and significant public interests than religion would be. To illustrate in the case of graveyards: The state would be more willing to consider the relocation of graves or monuments in the face of some pressing public interest than would be most religious groups.

These two different notions of holiness, the religious and the non-religious, might come into conflict when they concern the same site. Thus, the Western Wall in Jerusalem is conceived both as a religious site, one that preserves some of the holiness of the Second Temple, as well as a national site, symbolizing the long attachment of the Jews to Jerusalem in particular, and to the Land of Israel in general. In the former, it is a holy (religious) site; in the latter, a national monument. These two perspectives entail different rules regarding appropriate conduct at the site. If the Wall is a religious site, the dress code that is expected there, for instance, is different than that expected at a national site. In his decision on the case of “The Women of the Wall,” Supreme Court Justice, Shlomo Levin, explains this point well:

No doubt the Western Wall and the open place attached to it has for ages been a religious site and site of prayer for the people of Israel. But at the same time it also acquired symbolic national meaning, as a unique historical remainder of the walls of the Temple; a symbol for [the renewal of] the Kingdom of Israel for which so many Jews have yearned for generations.¹⁰

Anyhow, our main interest here is not with the secularized notion of holy places, but with the religious one. We are interested in those cases in which the state itself is not committed to the belief that some site is (“truly”) holy, though it acknowledges the fact that some of its citizens, or some people outside its borders, do believe so. This sets the scene for the main question that will occupy

⁸ See, e.g., *Exodus* 19:12–13: “And thou shalt set bounds unto the people round about, saying, Take heed to yourselves, *that ye go not* up into the mount, or touch the border of it: whosoever toucheth the mount shall be surely put to death: There shall not an hand touch it, but he shall surely be stoned, or shot through; whether *it be* beast or man, it shall not live: when the trumpet soundeth long, they shall come up to the mount.”

⁹ See *Leviticus* 10:1–2.

¹⁰ HCJ 257/89 Anat Hoffman v. Western Wall Commissioner 48(2) PD 265 (Isr.) (Shlomo Levin, J., para. 2).

us in what follows: Why should the state grant special protection to some sites although it does *not* accept their holiness, just because some citizens regard these sites as holy?

Religious Freedom, Conscience, and Holy Places

Back, then, to our main task which is to explain the basis for the requirement to grant special protection to holy places. The natural answer that comes to mind is that the protection is grounded in the right to religious freedom. Arguably, when holy places are treated with disrespect, the freedom of the relevant believers to exercise their religion is violated. Whether or not this explanation works, however, depends on how the right to religious freedom is understood. Elsewhere we defended a limited interpretation of it,¹¹ one that has direct bearing on the issue at hand. Let us present this interpretation briefly and then see what follows with regard to the protection of holy places.

We begin by noting the obvious. Living together in an organized society necessitates compromises on the part of all members of society whose interests and conceptions of the good often conflict. In the words of Noam Zohar, compromise is “analytical” to the concept of the political.¹² This means that, in ordinary circumstances, citizens have no special claim against the state not to act in a way that prevents them from satisfying some interest that, in pre-organized society, they would be able to satisfy freely. In other words, in ordinary circumstances, citizens don’t have a special right to the protection of their interests or preferences against otherwise legitimate government acts. If they have such a right, it exists in *non*-ordinary circumstances, when the threat is especially troubling, for instance, when citizens are expected to act against their conscience. What we mean by this notion is a person’s innermost normative beliefs, those that constitute his or her personal identity. Coercing people to act against their deepest normative beliefs presents a severe threat to their integrity and makes them experience strong feelings of self-alienation; therefore, liberal countries that are committed to the idea of respect for the individual try to avoid such coercion as much as possible. It is this sort of argument that underlies the liberal requirement to show tolerance for certain dissenters,

11 Daniel Statman, *Hurting Religious Feelings*, 3 DEMOCRATIC CULTURE 114 (2000); DANIEL STATMAN & GIDEON SAPIR, STATE AND RELIGION IN ISRAEL: A PHILOSOPHICAL-LEGAL INQUIRY ch. 6 (2014).

12 Noam Zohar, *Co-operation Despite Disagreement: From Politics to Healthcare*, 17 BIOETHICS 121 (2003).

especially those whose conscience prevents them from serving in the armed forces. The assumption is that forcing pacifists to serve in the army constitutes an attack on their integrity which regular coercions by the law do not.

Thus, a natural way of understanding the special protection granted to the exercise of religion is by grounding it in the protection of conscience.¹³ Since religious beliefs belong to the category of fundamental convictions, convictions whose observance enables believers to retain a sense of their moral integrity as individuals, forcing believers to act contrary to their beliefs means forcing them to act contrary to their consciences, therefore freedom of religion deserves special protection (in comparison to freedom to act in ways that do not touch upon issues of conscience). However, this grounding also means that religious freedom is violated only in cases of direct conflict between the dictates of one's religion and some requirement on the part of the state. When no such direct conflict is involved then the religious expectation is downgraded, so to say, to a regular interest, which enjoys no special protection.

This argument does not, of course, assume that only religiously-based convictions merit special protection. To the contrary, protection of religious conscience is seen as deriving from a principle that applies to all cases in which an individual's conscience is threatened by the state. But since threats to religious conscience are paradigmatic illustrations of such a state of affairs, and since they seem more common than threats to secular conscience, it makes sense to talk about a separate right to *religious* freedom.

As you can see, the notion of religious freedom that emerges from this analysis is quite limited. Here's one example. In the Canadian *Amselem* case,¹⁴ a group of Jews claimed that preventing them from building a sukkah on their balcony in celebration of the Jewish holiday of Sukkot (the Feast of Tabernacles) constitutes a violation of their religious freedom. The owners of their building complex suggested solving the problem by building a large sukkah in the yard that would serve all the Jewish tenants, but Mr. Amselem and his friends found this unsatisfactory. We grant that the prevailing custom among Jews is for every family to build its own sukkah, decorate it and then have meals there during the festival. But – contrary to the argument made by the appellants – there is no obligation in Jewish law (*halakha*) to build a sukkah of one's own, nor to eat in one's own sukkah. Hence, in our view, Amselem did not deserve special protection under the right to religious freedom. His desire to build a sukkah of his own

¹³ The question of why exactly conscience merits special protection requires more elaboration than we can offer here. To get a taste of the problematic involved, see Sonu Bedi, *What is so Special About Religion? The Dilemma of the Religious Exemption*, 15 J. POL. PHIL. 237 (2007).

¹⁴ *Syndicat Northcrest v. Amselem* (2004), 2 S.C.R. 551 (Can.).

should have been treated as a mere preference, which, as such, should have given way to the public interest.

Let us return to the protection of holy places. We asked earlier why the state should grant special protection to sites whose holiness the state itself does not assume (in comparison to other sites which, for various reasons, are dear to some citizens but not to others). Respect for religious freedom seems to help here because obviously the religious practices that the state is required to respect under this right are not necessarily practices whose religious value is recognized by the state. The problem, however, is that, in many cases, the freedom of believers to fulfill the dictates of their religion (in the interpretation just proposed) is not violated when their holy places are harmed or desecrated. Why is this so?

First, it is not the case that all holy places involve a religious obligation to visit them, namely, an obligation of pilgrimage, or an obligation to worship in, on, or near them. Take, for example, the debate in India about what is known as the Sethusamudram project. For many years, proposals were made to create a canal through the Palk Strait separating India and Sri Lanka. Currently, commercial ships traveling around India must navigate around the island of Sri Lanka because the strait is too shallow. Finally, some ten years ago, the Indian government decided to undertake this project – “the Suez of the East” – which was expected to lead to significant economic and other benefits. The Indian Prime Minister announced that “the lives of the people will be transformed with the implementation of this project.” However, shortly after it was announced, the project started to face objection from religious circles who also petitioned the court in a demand to stop the project. The religious opposition was based on the ancient Hindu text of the Ramayana which describes a bridge across the ocean built by Rama’s army of monkeys. It is believed that this bridge, known as the Ram Setthu, was built from the southeast coast of India across the Palk Strait to the island of Sri Lanka, hence it would be destroyed by the proposed project.¹⁵

Our point is that whatever one thinks of this case, the issue it raises has nothing to do with respect for *religious practices* perceived as inescapably compelling by the believers. Those who object to the construction of the canal do not claim that they would be barred from fulfilling any religious duties, particularly any duty of pilgrimage or of worship. Their opposition is based on their belief in the harm – the *metaphysical* harm? – that would be caused to this mythical bridge, a belief which, of course, was not shared by the government.

¹⁵ We learned the details of this case from Christian H. Brill, *Holy Places in an Unholy World: Will Religious Beliefs Halt India’s ‘Suez of the East’?*, 35 N.C. J. INT’L L. & COM. REG. 447, sec. IV (2010).

The point can also be illustrated by the famous *Lyng* case. The question in this case was whether the U.S. government would be violating the free exercise clause if it constructed a new road through an area in California which was perceived by Indian Americans as sacred. Here too there was arguably no issue of pilgrimage or of worship; it was just believed by the Indian Americans that such a road would harm or desecrate this sacred territory. This, at any rate, was the view of the U.S. Supreme Court that decided to reject this claim by a 5–3 majority. The explanation it offered was like the one proposed here, namely, that the government program under discussion had “no tendency to coerce individuals into acting contrary to their religious beliefs.”¹⁶

The second reason that the right to religious freedom falls short of substantiating a special protection of holy places is that the possibility of accessing a holy site, praying there, or carrying out other forms of worship is not necessarily restricted by the fact that it is slightly damaged, all the more so when it suffers no real damage but just non-violent acts of disrespect.

To sum up these two points: Not all holy places involve a duty of visit or worship and even when they do, it is often the case that these religious duties can be carried out even if the holy place is harmed or desecrated. The concern about refraining from forcing believers to act against their deep normative commitments thus falls short of providing the required support for the requirement to grant special protection to holy places.

There is another question concerning the argument from religious conscience that is worth considering before we move to other rationales, namely, who determines which sites are holy and thus deserve special protection and which are not. The next section will take a detour to explore this question before we get back to the main track of our argument.

“Official” vs. “Non-Official” Holiness

According to the Torah, the dead are the main source of impurity, “the father of fathers of impurity.”¹⁷ Whoever touches a dead person or is present in a building in which there is a dead person, becomes impure for seven days and needs to undergo a whole ritual procedure in order to be pure again.¹⁸ This would seem to imply a clear distinction between anything connected to the dead – the

¹⁶ *Lyng v. Northwest Indian Cemetery Prot. Assn.*, 485 U.S. 439, 450 (1988).

¹⁷ See Rashi, Commentary on the Torah, Commentary on Exodus 19:22.

¹⁸ *Id.* 19: 11, 14–16.

preparation of the body for burial, the funeral, the grave and the cemetery – and the world of holiness. Getting close to the dead, or being in a cemetery, is being in touch with the world of impurity; praying or studying Torah connects the believer with the realm of the sacred.

With this brief introduction in mind, we can now understand Rabbi Soloveichik's observation on the Jewish attitude to the dead:

Judaism has a negative attitude toward death: a corpse defiles; a grave defiles; a person who has been defiled by a corpse is defiled for seven days and is forbidden to eat any sacred offerings or enter the temple [...] Judaism proclaims that coming into contact with the dead precipitates defilement. Judaism abhors death, organic decay, and dissolution. It bids one to choose life and sanctify that. Authentic Judaism as reflected in halakhic thought sees in death a terrifying contradiction to the whole of religious life. Death negates the entire magnificent experience of halakhic man.¹⁹

However, as shown in detail by Yechezkel Lichtenstein,²⁰ this approach underwent a significant change during Jewish history, and nowadays cemeteries are regarded by almost all Jews as holy sites in which prayers are recited and requests are made, especially around the graves of leading Rabbis which, in some cases, have become popular places for pilgrimage and worship. The rabbinical authorities have often been concerned by this new attitude to the dead, though in most cases they have given their post factum approval to it. Most Jews today believe that there is a strong obligation to respect the dead by visiting the grave sites, carrying out various rituals and reciting prayers in the cemetery, and they have no idea that many of the practices currently carried out in Jewish cemeteries are, at least, questionable according to the classic sources.

Assume now that some public interest necessitates the imposing of limitations on visiting Jewish cemeteries, or constraints on the rituals carried out around the grave of some famous Rabbi. Or assume that a Jew is not granted leave from work to go to his father's grave on the anniversary of the father's death (the *yahrzeit*) and say the *kaddish* prayer, conceived by many as a prayer *for the dead*. Would these be instances of violating religious freedom? The answer seems to depend on whether one takes an objective or a subjective view of (what is protected by) religious freedom. According to the objective view, religious freedom is violated only when believers are required to violate what the official texts, or the accepted authorities of their religion, see as religious obligations. According to the subjective view, what is crucial for

¹⁹ JOSEPH B. SOLOVEITCHIK, HALAKHIC MAN 31 (1983).

²⁰ YECHESKEL LICHTENSTEIN, CONSECRATING THE PROFANE: RITUALS PERFORMED AND PRAYERS RECITED AS CEMETERIES AND BURIAL SITES OF THE PIOUS (2007) [in Hebrew].

determining whether religious freedom is threatened is not the official position of the relevant religion, but the subjective manner in which believers regard their religious obligations. If they sincerely believe that they are under a religious obligation to do X, then preventing them from doing X would violate their religious freedom even if, as a matter of fact, X is not required by the official texts of their religion at all. The objectivist view would thus entail that, in the examples just mentioned, Jews would not enjoy special protection under the right to religious freedom, while the subjectivist view would say that they do; that if a Jew believes that he must visit his father's grave on the anniversary of his father's death, then he has a strong claim against his employer to make this possible for him, even if from a strictly halakhic perspective it is at best a rather weak obligation.

Thus, with respect to both the definition of a site as holy and the obligations incumbent upon the believers in this regard, there might be a disagreement between the official position of some religious tradition and the actual view of many believers. When such a disagreement exists, the question of whether the site should enjoy special protection (as well as the rituals that take place there) depends on whether one assumes an objectivist or a subjectivist view of religious freedom in general and of holiness in particular. On the objectivist view, a site might enjoy special protection qua holy site only if it is conceived as such by the official sources or authorities of some religious tradition, while on the subjectivist view it is sufficient that such a belief with regard to some site is held by some believer or believers.

It is not easy to decide between these two views regarding religious freedom in general, and the protection of holy places in particular. Nonetheless, we tend toward the objectivist position for the following reasons:

1. The requirement not to coerce individuals to act against their conscience derives part of its force from the thought that, in a sense, they feel they simply "cannot" do what some law demands of them. This is often how believers conceptualize their opposition to demands that contradict their religious commitment; the Jew says that she cannot do such and such because that would constitute a desecration of the Sabbath, the Muslim says that he cannot eat such and such because it violates his dietary laws. They do not say that doing such and such would violate their conscience as individuals, but as members of a specific religious tradition; as Jews, as Muslims, and so forth. However, when the religious tradition they uphold does *not* actually forbid the actions in question, the believers *can* do them, namely, can do them without suffering an unbearable blow to their integrity. In other words, to the extent that a religious tradition permits some action and insofar as the believers are made aware of this fact, their claim

for a special protection under the right to religious freedom – understood in terms of freedom of conscience – is weakened. It becomes more a matter of *preference* than of *conscience*.

2. On the subjectivist view, to determine whether some individual deserves special protection requires an exploration into the depths of her soul, so to say, in order to establish that there is indeed a serious conflict between the principles that constitute her personal identity and some public law or act. Practically, this is a challenging requirement. It is somewhat eased in the case of individuals who belong to known religious communities because, in such cases, the fact that this community clearly forbids X can be taken as sufficient evidence that all its individual members are committed to not X-ing. It is this kind of presumption that explains the policy of many countries regarding exemptions from military service on the basis of conscientious objection. Those requesting such an exemption are not asked to present evidence for their subjective “inability” to serve in the army, they are only asked to prove their allegiance to some religious community that is committed to pacifism. This objectivist attitude to cases of assumed threat to conscience seems more practical and hence by and large should be preferred. (This does not, of course, mean that secular pacifists would necessarily be denied exemption.)
3. The subjectivist view seems more vulnerable to manipulation, by which we mean attempts by believers to inflate the religious value of some site beyond what is reasonable, often on the basis of considerations that have nothing to do with the religious view of the site. What we have in mind in particular is the way that *political* considerations affect the perceived religious significance of holy sites. This is a central thesis in Ron Hassner’s book *War on Sacred Grounds*, in which he argues that “actors may wish to enhance the salience of sacred sites in order to fulfill political aspirations, mobilize followers, or subvert the secular foundations of a state.”²¹ Thus, by granting protection to sites beyond those entailed by the official texts of the tradition, the state might thereby be contributing to some political agenda which would then promote the perceived religious value of these sites, which, in turn, would attract further political manipulation, and so on.

²¹ RON E. HASSNER, *WAR ON SACRED GROUNDS* 33 (2009) (referring to Roger Friedland & Richard Hecht, *The Bodies of Nations: A Comparative Study of Religious Violence in Jerusalem and Ayodha*, 38 *HIST. RELIGIONS* 101 (1998)).

The criteria for determining what would be objectively forbidden within some religious tradition are complex and controversial. We can bracket this issue for the sake of the present concern. Our point here is that even if an individual feels subjectively that by doing X she would be gravely violating the dictates of her religion, this feeling is not sufficient to grant her an exemption from X-ing. She must show that X-ing *does* indeed violate the requirements of the religion on whose behalf she seems to be speaking.

Finally, we apply this more objectivist view of religious freedom to non-religious claims regarding freedom of conscience as well. For example, Israeli pacifists – all of whom are secular – argue that as pacifists they cannot undertake any national service in an army framework, even if such service involves no military training, no carrying of weapons, no wearing of uniform etc. They say that as pacifists their conscience would be attacked if the army placed them as paramedics in civil or in military clinics, or as teachers in less privileged schools. But, in our view, the army need not accept these subjective claims. It may argue that, objectively speaking, there is no clash between (a reasonable understanding of) pacifism and various forms of service to one's country in, or through the army.²² On the basis of this approach it has been suggested elsewhere that, in the current legal regime, the IDF should cease to grant pacifists full exemption from military service.²³

Right to Culture

We turn now to the second attempt to explain the special protection granted to holy places. As suggested elsewhere,²⁴ religious freedom can be based not only on the importance of protecting individual conscience, but also on the importance of protecting culture. According to this rationale, religion is an example of an all-encompassing culture, whose protection is of great value for the members

²² By “through the army” we refer to an existing arrangement by which every year the army transfers candidates for military service to other organizations, such as the police. Pacifists say that even this arrangement constitutes an attack on their conscience because it would be the army that would arrange the transfer so in some sense they would still be affiliated with an organization – the army – which they strongly oppose.

²³ Daniel Statman, *Critical Reflections on the Exemption from Military Service on Conscientious Objection Grounds*, 31 IYUNEI MISHPAT 669 (2009) [in Hebrew].

²⁴ Gideon Sapir, *Religion and State: A Fresh Theoretical Start*, 75 NOTRE DAME L. REV. 579 (1999).

of the relevant cultural groups, either because of the connection between culture and autonomy,²⁵ or – more plausibly – because of its connection to identity.²⁶ It might be argued, then, that when the holy sites of some religious group are harmed or desecrated, or when believers are barred from visiting such sites or worshipping at them, that constitutes a violation of the right to culture, hence must be avoided to the extent possible. Holy places merit special protection because culture merits special protection and because such places play a crucial role in the life of religious cultures.

A notable advantage of this rationale is that it does not make the special protection of holy sites dependent on the connection between such protection and the existence of a threat to religious practices such as pilgrimage or prayer. Assumingly holy places play a central role in the culture of religious groups even if they do not involve such practices. In this vein, and assuming that the road planned in the case of *Lyng* would not have interfered with any religious practices,²⁷ it might have been more convincing to formulate the Indian concern as a concern about their culture rather than a concern about the conscience of individual members.²⁸

Can the right to culture explain the special protection granted to holy places? We see two main problems in this proposal. First, the right to culture is extended only to minorities and not to members of the majority culture, because the latter need no special assistance to preserve their culture and to pass it on to future generations. “The state,” as Halbertal and Margalit put it, “is meant to be neutral towards the majority culture,” for this culture can “by its very essence maintain a more or less homogenous environment, even without enjoying special rights.”²⁹ This implies that insofar as religious freedom is cashed out in terms of the protection of culture, it applies only to religious groups that are minorities; “freedom of religion is understood in this setting as a measure aimed to guarantee the survival of minority cultures that have lost in the majority cultural battlefield.”³⁰ But this would imply that while the holy sites of minority religions enjoy special

25 WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* (1995); WILL KYMLICKA *LIBERALISM, COMMUNITY AND CULTURE* (1989).

26 See, e.g., Avishai Margalit & Moshe Halbertal, *Liberalism and the Right to Culture*, 61 *SOC. RES.* 491 (1994).

27 See *Lyng v. Northwest Indian Cemetery Prot. Assn.*, 485 U.S. (1988).

28 For such an account of the Indians’ claim in this case, based on their right to culture, see Sapir, *supra* note 24, at 639–41.

29 Margalit & Halbertal, *supra* note 26, at 509.

30 Sapir, *supra* note 24, at 634; the idea that group rights aim at rectifying the unfairness that results from the disadvantaged status of minorities in the cultural market-place is central to Kymlicka’s view. See, e.g., Kymlicka, *supra* note 25, at 107–09.

protection, this would not be the case with the sites which are sacred to majority religions, a conclusion which is hard to accept.

This argument applies both to religions that form the majority within some country, say Catholicism in Spain, as well as to the status of religions worldwide. With more than a billion believers worldwide in Islam and in Christianity, neither of these religions seems to qualify as a minority group that needs special protection for its practices or its perceived holy sites – but surely their sites *are* granted special protection, wherever they are, from being damaged or desecrated and from interference in access or worship.³¹

Saying that the holy sites of the majority do not enjoy special protection under the right to culture is of course not like saying that they enjoy no protection at all. Members of majority religions would still be able to use all the regular legal and political tools to defend their interests vis-à-vis these sites. The point is just that, qua members of majority groups, their religious interests in general, and their interests in some sites in particular, do not enjoy *extra* protection when they come into conflict with other public interests. The fate of their holy places would be decided by a regular weighing of the conflicting interests; if the interests in favor of, say, a new highway, are weightier than those against it, the new highway may be constructed via a territory which is sacred to some religion, while if they are less weighty it may not. But again, this sounds highly counter-intuitive; the fate of holy places – even those belonging to majority and very powerful religions – should not be vulnerable to regular utilitarian calculation.

The second problem with grounding the protection of holy places in the right to culture has to do with a well-known ambiguity in the assumed threat to minority cultures from the majority culture. It might be understood as a threat to the very existence of some culture, or a threat to the specific version of this culture at a given point in time. The former is concerned with the possible *disintegration* of the minority culture.³² The latter is concerned with the culture undergoing *changes*. The arguments for preserving culture definitely do not cover the latter. Individuals constantly change, as do cultures, and there is no reason to grant the members of cultural groups a right to preserve the specific form of culture to which they happen to feel attached.

³¹ There might be cases of Muslim or Christian minorities with their own holy places whose religious culture *would* be seriously threatened by damage to these sites. Our point is that even when this is not the case, the holy sites of Christianity, Islam and Buddhism still seem to merit special protection.

³² Kymlicka, *supra* note 25, at 84.

Thus, regarding holy places, one must ask whether damage done to them, or limitations on pilgrimage or worship, threaten the very existence of the relevant culture, placing it on a path, so to say, to disintegration, or is merely expected to lead to a modification of the culture (maybe to the good). We do not deny that in some cases the damage would be devastating to the culture, but in many cases – probably in most cases – it would not, hence we doubt whether the special protection of holy sites can be anchored in the right to culture.

Religious Feelings

Given that the material or symbolic damage to holy places need not interfere with the believers' ability to visit them or worship in them, maybe the basis to claim that the special protection granted to them lies elsewhere, perhaps in the requirement not to hurt religious feelings or sensibilities. This is a moral requirement and in some countries a legal one too. In Israel, for instance, it is a criminal offense to publish a publication "that is liable crudely to offend the religious faith or sentiment of others, or to voice in a public place and in the hearing of another person any word or sound that is liable crudely to offend the religious faith or sentiment of others."³³ Since harming a holy place or treating it disrespectfully tends to constitute a serious offense to religious feelings, the state should guarantee special protection from such harm or disrespectful behavior. What could be more obvious?

The argument indeed seems convincing insofar as *intentional* harm to holy sites is concerned. When the wish to offend some religious group by desecrating one of its sacred sites is the motivating force behind some act, there is no interest worthy of protection on the side of the potential offenders, while the potential victims have a legitimate and strong interest in not being offended and in not being treated with disrespect. Hence, in such cases, it is easy to see why the state should grant holy sites special protection.

The problem is that, in many cases, the offense to religious sensibilities is only incidental, and forms no part of the offender's motivation. Think of the Sethusamudram project mentioned earlier concerning the planned canal between India and Sri Lanka; the *Lyng* case concerning the construction of a new road; or the Israeli *Mamilla* case in which the municipality of Jerusalem wanted to build a museum of tolerance on what was once part of a Muslim

³³ Israel Penal Law, *supra* note 3.

cemetery.³⁴ In all of these cases, the interest underlying the proposed public action was legitimate and weighty. The question was whether it should have been overridden by the opposing consideration, namely, the emotional pain caused to the relevant religious group.

As argued at length elsewhere,³⁵ only rarely would such emotional pain justify the imposition of restrictions on the liberty of individuals or of government bodies. The reason is that if the very fact that a certain behavior on the part of one individual upset another was sufficient to rule it out, even when there was no intention of offence, our freedom would be unreasonably limited. A necessary condition for the existence of a free and decent society is that its members tolerate behaviors to which they strongly oppose and which deeply annoy them.

The point, however, goes beyond that of the problematic effects of prohibiting incidental offenses to feelings in a free society. Suppose that somebody hates vegetarians and intentionally eats meat near them just in order to offend them. As indicated above, the vegetarians would have a strong case for protection from such an offense to their feelings. But now suppose that some vegetarian is waiting for her train in a railway station while some passengers are sitting on a bench nearby eating their salami sandwich. It would surely be bizarre if she went over to them to complain that they were “hurting her feelings.” Even the *thought*, on her part, that they were doing so would be completely misguided. Her painful feelings could substantiate no claim to restrict the behavior of the salami-eaters.

The same goes for religious feelings. Replace the vegetarian in the previous example with a Muslim and assume that her neighbors on the bench are eating pork. She might be upset and even disgusted by their behavior,³⁶ but, again, she would have no basis to complain about them hurting her feelings, and definitely no basis for demanding that they refrain from eating pork in the railroad station. To the extent that she feels offended, her feeling would be irrational. Nobody tried to offend her; nobody sought to express any kind of disrespect toward her.

³⁴ HCJ 52/06 Al Aqsa Association for the Development of the Assets of the Muslim Waqf in the land of Israel Ltd. v. Simon Wiesenthal Ctr. Museum Corp. (Oct. 29, 2008), Nevo Legal Database (by subscription) (Isr.).

³⁵ Statman, *supra* note 11; Statman & Sapir, *supra* note 11, ch. 7.

³⁶ See J.S. MILL, ON LIBERTY ch. 4, para. 3 (1869): “To cite a rather trivial example, nothing in the creed or practice of Christians does more to envenom the hatred of Mahomedans against them, than the fact of their eating pork. There are few acts which Christians and Europeans regard with more unaffected disgust, than Mussulmans regard this particular mode of satisfying hunger.”

In response, one might argue that even when a person does something with no explicit *intention* of offending another, if it can be reasonably expected that doing so would cause such an offense, he must refrain from doing so. To put the point from the perspective of the offended person: Insofar as she has a reasonable expectation that people do not do X to her (or near her, or with regard to her) then she is not behaving irrationally when she feels offended as a result of the fact that this expectation is frustrated. That would mean that the rationality of the hurt feelings depends on the rationality of the victim's expectations vis-à-vis the offender. But if that's the case, then the real normative work is done by the justification of the relevant *expectations*, which of course cannot itself be grounded in the protection of *feelings*.

We do not want to sound – or to *be* – too harsh with believers whose feelings are hurt because of the behavior, or the planned behavior of others. When the public interest in this behavior is minor while the emotional pain is intense, it might be morally appropriate to refrain from the seemingly offensive behavior. And certainly when the offense is intentional such restraint would be called for. But in many cases, (a) the offense is not intentional and (b) the contested behavior serves a legitimate and significant interest. To the extent that this is the case, the normative force of the victim's claim that her feelings are hurt is pretty low.

Back, then, to holy places. Think again of cases like *Lyng* or like the planned canal between India and Sri Lanka. In neither case was there any intention to express disrespect to religious beliefs or sensibilities. In both cases the public interest was significant. With both projects it could have been foreseen that they would upset the members of the respective religious groups, but then many projects in free and well-ordered societies can be known to upset some members of society – those who strongly oppose them for whatever reason. The argument from hurt feelings fails to show why emotional pain that has to do with harm to or desecration of perceived holy places is worthy of special protection and should be assigned more weight than that assigned to the public interest.

Other Rationales

There are other possible justifications for the special protection granted to holy place, but these seem even less promising. One such justification is based on the fact that holy places are the private property of religious groups, hence these groups have the normative power to determine how the sites shall be treated. The duty to respect holy places is just a corollary of the general obligation to respect the property rights of owners.

While this argument might offer some help, its scope is too limited. First, many holy places cannot plausibly be said to be the private property, in the legal sense of the term, of any religious group. In most cases, it would be hard to understand what such a claim would even mean, for instance, the claim that the Western Wall is the private property of “the Jews,” or that the Via Dolorosa belongs to “the Christians.” The source of confusion here might be the ambiguity of terms like “my,” “theirs,” etc. which are usually taken to express ownership while they often do not. Yesterday I walked through the library, and I saw a copy of *my* book on the shelf. But of course the book is the library’s property, not mine. And the same applies to “my office,” which unfortunately is not *mine*, “my flight,” “my dentist,” and numerous other examples. Thus, a Jew might say wholeheartedly that the Western Wall is hers, or is the Jewish people’s, or say that it is a “Jewish site,” without implying anything concerning literal *ownership*.

Second, while the right to one’s private property entails a right of protection from damage that may be done to it, it does not include a right of protection from forms of behavior that express disrespect toward it or toward its owner. If A spits on the pavement outside B’s house in order to express hatred and contempt toward B, it would not be B’s right to his *property* that would be impugned. But if this building happened to be a mosque, such spitting would be considered a clear case of desecration against which holy sites are protected.

The second justification we’d like to mention is based on the need to preserve sites that fall under the category of “cultural heritage.” One naturally thinks of the monumental Buddhas of Bamiyan destroyed by the Taliban in 2001, the mosques on the Temple Mount in Jerusalem, and so on. But again this rationale would offer only a limited justification for the demand to protect holy places. Most holy sites are not like the Buddhas of Bamiyan and only a selected number of them would fit the definition of cultural heritage.

Concluding Thoughts

If the arguments developed above are sound, then the theoretical basis for the special protection granted to holy places is not entirely clear and is rather unstable. We might have missed other possible rationales, or might have been unfair in our criticism of the prevalent ones, and we invite readers to correct our mistakes in these regards. But if we turn out to be right, then the explanation for the special protection granted to holy places and to the autonomy granted to believers to regulate the behavior in and around them, might have to do with a consideration that we ignored until now, namely, the fear of violence and public

disorder. In Israel, this has been the official reason for preventing Jews from praying at the Temple Mount, namely, the fear that the Muslims would regard this as offensive and would express their anger in violent ways. The Supreme Court of Israel accepted this rationale, thereby providing extra protection to the Muslims from what *they* – but not the court – perceive as offensive behavior. In the eyes of the Supreme Court, the Muslims have no right to prevent Jews from praying on the Mount, but, because of the fear of violence, the court de facto approved of a wide Muslim right to regulate the religious behavior in Haram Al-Sharif.³⁷ We do not belittle these considerations (though it is still an open question whether they justify a sweeping prohibition on Jews praying on the Temple Mount), but it is rather upsetting to be reminded that social and legal arrangements are often much more a result of power relations than of moral principles.

That as it may be, on a more principled level, our tentative conclusion is that holy places do not enjoy automatic (“special”) protection just because they are perceived as such by some religious group. This protection must be earned by arguments that would establish the (“objective”) holiness of the site within some religious tradition that would explain the nature of the harm or offense that is the matter of concern, and that would demonstrate why the believers’ interests regarding the perceived holy place override those of the public. In most cases the onus can be lifted, but probably not in every case. Moreover, like with so many other things, the protection of holy places is not a matter of all or nothing. It can come in many shapes and forms and – most importantly – in different degrees.

Finally, this proposal for a less generous policy regarding the protection of holy sites might contribute – if accepted – to easing some of the inter-religious tensions and conflicts around holy sites, together with the political conflicts that go with them. If members of religious groups realize that they don’t have an automatic right to full control over what they perceive as holy places, that they must reach some compromise between their own interests in these places and the interests of others (the majority of citizens, or other religious groups), then we are on a route to more stable and fair arrangements concerning the management of holy places. To be sure, some forms of compromise would be unthinkable for believers,³⁸ but there are still wide areas in which negotiation and

³⁷ See HCJ 4044/93 Gershon Solomon v. the Commander of Jerusalem Police 49(5) PD 617 (1996) (Isr.); see HCJ 2955/07 The Temple Mount Faithful v. the Government of Israel (Apr. 01, 2007), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

³⁸ See AVISHAI MARGALIT, ON COMPROMISE AND ROTTEN COMPROMISES 24 (2010): “The religious picture is in the grip of the idea of the holy. The holy is not negotiable, let alone subject to compromise.”

compromise are possible, even with regard to holy places.³⁹ Let us hope that one day holy places will serve to unite humanity rather than be a tool for division, and be places of peace and harmony rather than sources of conflict and violence.

39 A helpful way for religious groups to see that compromise is possible in some area is to note how concessions were made in the past, yet the skies did not fall. Consider the following example: Burial sites of leading rabbis, especially from ancient times, are usually seen in Israel as holy places, and often serve as sites of pilgrimage and ritual. Many of them are explicitly mentioned as meeting protection under Protection of Holy Places to Jews Regulations, 5741–1981. KT No. 4252, p. 1212 (Isr.). One would thus expect that the burial site of R. Judah the Prince, the compiler of the Mishna, would also enjoy this status. But it does not. His burial place was identified in archeological excavations in Bet-Shearim in the early 1950s, and in spite of some protest by religious circles, it was never turned into a “holy place,” but was placed under the governance of the Israel Nature Parks Authority. It has since been a non-issue in the rather tense relations between state and religion in Israel. See Doron Barr, *Bet-Shearim: An Archeological Site and National Park, or a Holy Place?*, 17 ARCHIVE 41 (2013) [in Hebrew].